No. __-____

IN THE

Supreme Court of the United States

COREY JOHNSON,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Stay

Execution Date: January 14, 2021 at 6:00 P.M. E.T.

APPENDIX

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PAGE(S)

I. RELEVANT STATUTES

II. RELEVANT PROCEDURAL HISTORY

III. SUPPORTING MATERIALS

Dated: January 14, 2021

Respectfully submitted,

/s/ Shay Dvoretzky

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UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II. CRIMINAL PROCEDURE
CHAPTER 228. DEATH SENTENCE

18 U.S.C. § 3596. Implementation of a sentence of death

* * * * *

(a) In general.--A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

(b) Pregnant woman.--A sentence of death shall not be carried out upon a woman while she is pregnant.

(c) Mental capacity.--A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.

* * * * *

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I. CONTROL AND ENFORCEMENT
PART D. OFFENSES AND PENALTIES

21 U.S.C. § 841 Prohibited acts A

* * * * *

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not

to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a

fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in

accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment

of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18

or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definition

For purposes of this paragraph, the term “without that individual's knowledge” means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not

more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to

remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means—

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally—

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(f) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections 823(f) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to—

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without

attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to—

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

* * * * *

UNITED STATES CODE
TITLE 21. FOOD AND DRUGS

21 U.S.C. § 848 (1988) (repealed 2006) Continuing criminal enterprise

* * * * *

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

> (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and
>
> (2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or
>
> (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203-24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section-

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the

performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g) Hearing required with respect to death penalty

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

(h) Notice by Government in death penalty cases

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice—

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

(i) Hearing before court or jury

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing

to determine the punishment to be imposed. The hearing shall be conducted—

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if—

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

(j) Proof of aggravating and mitigating factors

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors

may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) Return of findings

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of

death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

(l) Imposition of sentence

Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

> (1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or
>
> (2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

> (1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
>
> (2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
>
> (3) The defendant is punishable as a principal (as defined in section 2 of title 18) in the offense, which was committed by another, but the defendant's

participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

(n) Aggravating factors for homicide

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant-

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which—

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this subchapter in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 845 of this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(o) Right of defendant to justice without discrimination

(1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall—

(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.];

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report, death penalty cases involving crimes similar to those covered under this section.

(p) Sentencing in capital cases in which death penalty is not sought or imposed

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

(q) Appeal in capital cases; counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that—

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post-conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available

judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications, for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

(r) Refusal to participate by State and Federal correctional employees

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

* * * * *

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I. CONTROL AND ENFORCEMENT
PART D. OFFENSES AND PENALTIES

21 U.S.C. § 848 Continuing criminal enterprise

* * * * *

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if—

> (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and
>
> (2)(A) the violation referred to in subsection (c)(1) involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or
>
> (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month

period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter or subchapter II the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 - 24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section—

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II who

intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(B), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g) to (p) Repealed. Pub.L. 109-177, Title II, § 221(2), Mar. 9, 2006, 120 Stat. 231

(q) Repealed. Pub.L. 109-177, Title II, §§ 221(4), 222(c), Mar. 9, 2006, 120 Stat. 231, 232

(r) Repealed. Pub.L. 109-177, Title II, § 221(3), Mar. 9, 2006, 120 Stat. 231

(s) Special provision for methamphetamine

For the purposes of subsection (b), in the case of continuing criminal enterprise involving methamphetamine or its salts, isomers, or salts of isomers, paragraph (2)(A) shall be applied by substituting "200" for "300", and paragraph (2)(B) shall be applied by substituting "$5,000,000" for "$10 million dollars".

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

28 U.S.C. § 2255 Federal custody; remedies on motion attacking sentence

* * * * *

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it

also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

* * * * *

FAIR SENTENCING ACT OF 2010
PUBLIC LAW 111-220, 124 STAT. 2372
AUGUST 3, 2010
(21 U.S.C. § 801 note)

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking ‘‘50 grams’’ and inserting ‘‘280 grams’’; and

(2) in subparagraph (B)(iii), by striking ‘‘5 grams’’ and inserting ‘‘28 grams’’.

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking ‘‘50 grams’’ and inserting ‘‘280 grams’’; and

(2) in paragraph (2)(C), by striking ‘‘5 grams’’ and inserting ‘‘28 grams’’.

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning ‘‘Notwithstanding the preceding sentence,’’.

FIRST STEP ACT OF 2018
PUBLIC LAW 115-391, 132 STAT. 5222
DECEMBER 21, 2018
(21 U.S.C. § 841 note)

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term ‘‘covered offense’’ means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

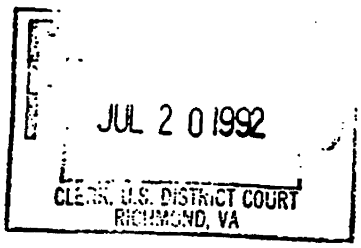
(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

(1)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division



UNITED STATES OF AMERICA	
v.	CRIMINAL NO. 3:92CR68
RICHARD TIPTON aka Whittey (Counts 1-7, 11-30, 32-33)	21 USC § 846 Conspiracy (Count 1)
CORY JOHNSON aka "O" aka "CO" (Counts 1, 2, 8-32)	21 USC § 848 Continuing Criminal Enterprise (Count 2)
JAMES H. ROANE, JR., aka "J.R." (Counts 1, 2, 5-16, 32)	
VERNON LANCE THOMAS aka Anthony Mack aka "V" (Counts 1, 2, 11-16, 24-30, 32)	21 USC § 848(e)(1)(A) & 18 USC § 2 Murder in Furtherance of CCE (Counts 3,5,8,11,17,18,19,24,25)
JERRY R. GAITERS (Counts 1, 17-23, 32)	18 USC § 924(c) Use of Firearm in Relation to Crime of Violence or Drug Trafficking Crime (Counts 6,9,12,15,20,26)
STERLING HARDY (Counts 1, 14-16, 32)	18 USC §§ 1959 & 2 Violent Crimes in Aid of Racketeering (Counts 4,7,10,13,14,16,21-23,27-30)
SANDRA REAVIS (Count 1)	21 USC § 841(a)(1) Distribution of Crack (Count 31)
	21 USC § 841(a)(1) & 18 USC § 2 Possession w/Intent to Distribute Crack (Counts 32-33)

115

SECOND SUPERSEDING INDICTMENT

JULY 1992 TERM - At Richmond

COUNT ONE

THE GRAND JURY CHARGES that from on or about January, 1989, the exact date being unknown to the grand jury, and continuously thereafter up to and including the filing of this indictment, in the Eastern District of Virginia, and elsewhere, the defendants, RICHARD TIPTON, aka Whittey, CORY JOHNSON, aka "O," aka "CO", VERNON LANCE THOMAS, aka Anthony Mack, aka "V", JAMES H. ROANE, JR., aka "J.R.", JERRY GAITERS, STERLING HARDY, and SANDRA REAVIS, did unlawfully, knowingly, and intentionally combine, conspire, confederate, and agree with each other and with other persons, both known and unknown to the grand jury to commit the following offenses against the United States of America:

1. To knowingly, intentionally, and unlawfully possess with the intent to distribute, and to distribute, a Schedule II narcotic controlled substance, that is, at least fifty (50) grams or more of a mixture or substance described in Title 21, United States Code, Section 841(b)(1)(A)(ii), which contains cocaine base, in violation of Title 21, United States Code, Section 841(a)(1).

WAYS, MANNERS, AND MEANS OF THE CONSPIRACY

The ways, manners, and means by which the conspirators carried out the purpose of the conspiracy includes, but are not limited to, the following:

1. It was part of the conspiracy that defendants and co-conspirators would cause cocaine to be purchased in New York City, and elsewhere, and transported to Richmond, Virginia, where the cocaine was to be distributed.

2. It was further part of the conspiracy that once the defendants and co-defendants would receive cocaine in Richmond, Virginia, they would cook the cocaine in such a way to make it cocaine base ("crack" or "cook-em-up"), which cocaine was intended to be distributed on the streets of Richmond, Virginia.

3. It was further part of the conspiracy that the defendants and co-defendants would induce other individuals to work for them selling the crack cocaine on the streets of Richmond, Virginia.

4. It was further part of the conspiracy to engage in a pattern of violent activity, including murder, assaults, and threats of violence to further the goals of the conspiracy. To that end, members of the conspiracy bought, possessed, and transferred firearms, which firearms were used in their violent activities.

OVERT ACTS

In furtherance of this conspiracy, and to bring about the objects and goals of the conspiracy, the defendants, co-conspirators, and unindicted co-conspirators committed overt acts in the Eastern District of Virginia and elsewhere, including, but not limited to, the following:

1. In or about December, 1991, defendants RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "O," aka "CO", assaulted an individual known to the grand jury over a cocaine debt.

2. On or about January 5, 1992, RICHARD TIPTON, aka Whittey, murdered Douglas A. Talley.

3. On or about January 13, 1992, RICHARD TIPTON, aka Whittey, and JAMES H. ROANE, JR., aka "J.R." murdered Douglas Moody.

4. On or about January 13, 1992, an individual known to the grand jury, disposed of the knife used by JAMES ROANE, JR., aka "J.R.", to kill Doug Moody.

5. On or about January 14, 1992, members of the conspiracy caused an individual known to the grand jury to purchase one Glock handgun and two Tech 9mm handguns from Southern Gun World in Richmond, Virginia.

6. On or about January 14, 1992, JAMES ROANE, JR., aka "J.R." and CORY JOHNSON, aka "O," aka "CO", murdered Peyton Maurice Johnson.

7. On or about January 15, 1992, CORY JOHNSON, aka "O," aka "CO", distributed a certain amount of cocaine base ("crack" or "cook em up") in Richmond, Virginia.

8. On or about January 29, 1992, RICHARD TIPTON aka Whittey, JAMES ROANE, JR., aka "J.R.", and CORY JOHNSON, aka "O," aka "CO", VERNON LANCE THOMAS, aka Anthony Mack, aka "V", murdered Louis J. Johnson, Jr., in Richmond, Virginia.

9. On or about January 31, 1992, CORY JOHNSON, aka "O," aka "CO", assaulted an individual known to the grand jury over a drug debt, and solicited that individual to kill Dorothy Armstrong.

10. On or about February 1, 1992, JAMES ROANE, JR., aka "J.R.", RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", VERNON

LANCE THOMAS, aka Anthony Mack, aka "V",and STERLING HARDY murdered Torrick Brown and shot Martha McCoy in Richmond, Virginia.

11. On or about February 1, 1992, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS murdered Bobby Long, Anthony Carter, and Dorothy Mae Armstrong aka Mousey, in Richmond, Virginia.

12. On or about February 2, 1992, defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", STERLING HARDY, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", JAMES H. ROANE, JR., aka "J.R.", and JERRY GAITERS possessed with the intent to distribute crack cocaine.

13. On or about February 13, 1992, STERLING HARDY solicited the murders of certain individuals.

14. On or about February 19, 1992, RICHARD TIPTON, aka Whittey, CORY JOHNSON, aka "O," aka "CO", and VERNON LANCE THOMAS, aka Anthony Mack, aka "V", murdered Curtis Thorne, Linwood Chiles, and shot, seriously wounding, Gwendolyn Green and Priscilla Green, in Richmond, Virginia.

15. On or about April 10, 1992, RICHARD TIPTON, aka Whittey, possessed with the intent to distribute crack cocaine in Richmond, Virginia.

(In violation of Title 21, United States Code, Section 846).

COUNT TWO

THE GRAND JURY FURTHER CHARGES that from at least January, 1991, and continuously thereafter up to and including the date of the filing of this indictment, in the Eastern District of Virginia, and elsewhere, the defendants RICHARD TIPTON,

aka Whittey, CORY JOHNSON, aka "O", aka "CO," JAMES H. ROANE, JR., aka "JR," and VERNON LANCE THOMAS, aka Anthony Mack, aka "V", unlawfully, intentionally, and knowingly, did engage in a Continuing Criminal Enterprise, that is, they did violate Title 21, United States Code, Section 841 and 846, including, but not limited to, those violations alleged in the instant indictment, which are realleged and incorporated by reference herein, and did commit other violations of said statutes, which violations were part of a continuing series of violations of said statutes undertaken by RICHARD TIPTON, aka Whittey, CORY JOHNSON, aka "O", aka "CO," JAMES H. ROANE, JR., aka "JR," and VERNON LANCE THOMAS, aka Anthony Mack, aka "V", in concert with at least five other persons with respect to whom they occupied positions of organizer, supervisor, and manager, and from which continuing series of violations the defendant, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O", aka "CO," JAMES H. ROANE, JR., aka "JR," and VERNON LANCE THOMAS, aka Anthony Mack, aka "V", obtained substantial income and resources.

(In violation of Title 21, United States Code, Section 848.)

COUNT THREE

THE GRAND JURY FURTHER CHARGES that on or about January 5, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendant RICHARD TIPTON aka Whittey, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Douglas A. Talley, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES that on or about January 5, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendant, RICHARD TIPTON aka Whittey, did knowingly, intentionally, and unlawfully cause the murder of Douglas Talley, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES that on or about January 13, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, and JAMES H. ROANE, JR., aka "J.R.", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Douglas Moody, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT SIX

THE GRAND JURY FURTHER CHARGES that on or about January 13, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON, aka Whittey, and JAMES H. ROANE, JR., aka "J.R.", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is, a violation of Title 21, United States Code, Section 846 and 848, and Title 18, United States Code, Section 1959, as set forth in Counts One, Five and Seven of this Indictment. (In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES that on or about January 13, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, and JAMES H. ROANE, JR., aka "J.R.", did knowingly, intentionally, and unlawfully cause the murder of Douglas Moody, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES that on or about January 14, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", and while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Peyton Maurice Johnson, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT NINE

THE GRAND JURY FURTHER CHARGES that on or about January 14, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants JAMES H. ROANE, JR., aka "J.R.", and CORY JOHNSON, aka "O," aka "CO", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Sections 846 and 848, and Title 18, United States Code, Section 1959, as set forth in Counts One, Eight and Ten of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT TEN

THE GRAND JURY FURTHER CHARGES that on or about January 14, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, JAMES H. ROANE, JR., aka "J.R." and CORY JOHNSON, aka "O," aka "CO", did knowingly, intentionally, and unlawfully cause the murder of Peyton Maurice Johnson, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES that on or about January 29, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", and VERNON LANCE THOMAS, aka Anthony Mack, aka "V", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Louis J. Johnson, Jr., and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES that on or about January 29, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", and VERNON LANCE THOMAS, aka Anthony Mack, aka "V", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Sections 846 and 848, and Title 18, United States Code, Section 1959, as set forth in Counts One, Eleven and Thirteen of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES that on or about January 29, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", and VERNON LANCE THOMAS, aka Anthony Mack, aka "V", did knowingly, intentionally, and unlawfully cause the murder of Louis J. Johnson, Jr., as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in

narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and STERLING HARDY, did knowingly, intentionally, and unlawfully cause the murder of Torrick Brown, Jr., as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and STERLING HARDY, did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court

of the United States, that is a violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 1959, as set forth in Counts One, Fourteen and Sixteen of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and STERLING HARDY, did knowingly, intentionally, and unlawfully commit assault resulting in serious bodily injury to Martha McCoy, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21

USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Bobby Long, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Anthony Carter, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded,

induced, procured, and caused the intentional killing of Dorothy Mae Armstrong, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Sections 846 and 848, and Title 18, United States Code, Section 1959, as set forth in Counts One, Seventeen, Eighteen & Nineteen and Twenty-One through Twenty-Three of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT TWENTY-ONE

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, intentionally, and unlawfully cause the murder of Bobby Long, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity,

and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-TWO

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, intentionally, and unlawfully cause the murder of Anthony Carter, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-THREE

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, intentionally, and unlawfully cause the murder of Dorothy Mae Armstrong, as consideration for the receipt of, and as consideration for a promise and

agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-FOUR

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON, aka Whittey, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and CORY JOHNSON, aka "O," aka "CO", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Curtis Thorne, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWENTY-FIVE

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON, aka Whittey, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and CORY JOHNSON, aka "O," aka "CO", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly,

intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Linwood Chiles, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWENTY-SIX

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and CORY JOHNSON, aka "O," aka "CO", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Section 846 and 848, and Title 18, United States Code, Section 1959, as set forth in Counts One, Twenty-Four, Twenty-Five and Twenty-Seven through Thirty of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT TWENTY-SEVEN

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and CORY JOHNSON, aka "O," aka "CO", did knowingly, intentionally, and unlawfully cause the murder of Curtis Thorne, as consideration for the receipt of, and as

consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-EIGHT

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and CORY JOHNSON, aka "O," aka "CO", did knowingly, intentionally, and unlawfully cause the murder of Linwood Chiles, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-NINE

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and CORY JOHNSON, aka "O," aka "CO", did knowingly, intentionally, and

unlawfully cause the maiming of Priscilla Green, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT THIRTY

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", and CORY JOHNSON, aka "O," aka "CO", did knowingly, intentionally, and unlawfully cause the maiming of Gwendolyn Green, as consideration for the receipt of, and as consideration for a promise and agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining and increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT THIRTY-ONE

THE GRAND JURY FURTHER CHARGES that on or about January 15, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendant, CORY

JOHNSON, aka "O," aka "CO", did knowingly and intentionally distribute a Schedule II narcotic controlled substance, that is, a mixture and substance described in Title 21, United States Code, Section 841(b)(1)(A)(ii), which contains cocaine base, commonly known as "crack," or "cook em up."

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT THIRTY-TWO

THE GRAND JURY FURTHER CHARGES that on or about February 2, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", STERLING HARDY, VERNON LANCE THOMAS, aka Anthony Mack, aka "V", JAMES ROANE, JR., aka "J.R.", and JERRY GAITERS, did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, more than fifty (50) grams of a mixture and substance described in Title 21, United States Code, Section 841(b)(1)(A)(ii), which contains cocaine base, commonly known as "crack," or "cook em up."

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT THIRTY-THREE

THE GRAND JURY FURTHER CHARGES that on or about April 10, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD

TIPTON aka Whittey, did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, more than fifty (50) grams of a mixture and substance described in Title 21, United States Code, Section 841(b)(1)(A)(ii), which contains cocaine base, commonly known as "crack," or "cook em up."

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

A TRUE BILL:

/s/ Christopher F. Snead
FOREPERSON

RICHARD CULLEN
UNITED STATES ATTORNEY

By:

Howard C. Vick, Jr.
Assistant United States Attorney

William H. Parcell III
William Parcell
Special Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 3:92CR68
	)	
RICHARD TIPTON a/k/a "WHITEY"	)	
CORY JOHNSON a/k/a "O"	)	
JAMES ROANE. a/k/a "J.R."	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is ordered that:

1. The United States' motion for summary judgment is granted in part and denied in part.

2. Johnson and Tipton's grounds for § 2255 relief are dismissed and their motions pursuant to 28 U.S.C. § 2255 are denied.

3. All of Roane grounds for § 2255 relief will be dismissed except for his claim that he was denied effective assistance of counsel in conjunction with the charges pertaining to the murder of Douglas Moody (Claim IV.B.2) and his claim that he is actually innocent of the murder of Moody (Claim VIII).

4. Tipton's request to conduct additional discovery is denied.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record and counsel for the United States.

It is so ORDERED.

James R. Spencer
United States District Judge

Richmond, Virginia
Date: 5-1-03

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 3:92CR68
	)	
RICHARD TIPTON a/k/a "WHITEY"	)	
CORY JOHNSON a/k/a "O"	)	
JAMES ROANE. a/k/a "J.R."	)	

MEMORANDUM OPINION

The matter is before the Court on the 28 U.S.C. § 2255 motions filed by Tipton, Johnson, and Roane (collectively "the Defendants") and the United States' motions for summary judgment.[1] Tipton, Johnson and Roane's grounds for relief are set forth in appendices A, B, and C respectively. For the reasons set forth below, the Court finds that the United States is entitled to summary judgment on all claims except for a portion of Roane's claim that he was denied effective assistance of counsel in conjunction with the charges pertaining to the murder of Douglas Moody (Claim IV.B.2) and Roane's claim that he is actually innocent of the murder of Moody (Claim VIII).

I. STANDARD FOR SUMMARY JUDGEMENT

It is the responsibility of the party seeking summary judgment to inform the Court of the basis for its motion, and to identify the parts of the record which it believes demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[O]nce the moving party has met its burden under Rule 56(c), the adverse party 'may not rest upon the mere

[1] The general facts that led to the Defendants' convictions and sentences of death are set forth in United States v. Tipton, 90 F.3d 861 (4th Cir. 1996) and will not be repeated here. References to the "record" in this opinion do not include the evidence introduced at the evidentiary hearing conducted on June 21, 2002.

allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" Catawaba Indian Tribe v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992)(quoting Fed. R. Civ. P. 56(e)). In determining whether a particular claim is subject to summary judgment the Court "must view the evidence presented through the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

The Defendants contend that summary judgment is premature because they need to conduct further discovery. The Defendants' unsworn arguments regarding discovery (which already have been rejected by this Court in denying their motions for discovery) do not provide an adequate basis for forestalling a decision on the motion for summary judgment. See Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir. 1996). A demand for additional "discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit . . . and the failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." Id. (quoting Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994)). Because the Defendants have not met the burden of demonstrating that they are entitled to discovery, see Rule 6(a) Governing § 2255 Proceedings, and have not complied with the requirements of Fed. R. Civ. P. 56(f), the Defendants' request to forestall summary judgment until they can conduct additional discovery will be denied.

II. PROCEDURAL STANCE OF THE DEFENDANTS' CLAIMS

Review of many of the Defendants' claims is precluded because the claim was rejected on direct appeal, see Boeckenhaupt v. United States, 537 F.2d 1182 (4th Cir. 1976)(intervening change

in the law is required to relitigate issues in § 2255 motion that were rejected on direct appeal), or the claim could have been raised at trial and direct appeal, but was not. United States v. Frady, 456 U.S. 152, 168-69 (1982). Specifically, the following claims will be dismissed because they were rejected on direct appeal and the Defendants failed to direct the Court to a change in the law that requires the Court to revisit the claim: Tipton Claims V.B.3.b, V.G, V.H; Johnson Claims II.C.2, VIII, IX; and Roane Claim V, and those aspects of the juror misconduct claims relating to mid-trial publicity and juror Cooke, Tipton Claim V.A, Johnson Claim VII, and Roane Claim III.[2] See United States v. Wiley, 245 F.2d 750, 752-53 (8th Cir. 2001)(concluding new facts do not require review of claims rejected on direct appeal), cert. denied, 122 S. Ct. 818 (2002).

The Government correctly notes that the Defendants have defaulted the following claims by failing to raise the claim either at trial or on direct appeal: Tipton Claims V.B.3.a.i, V.B.3.a.ii-iv, V.B.3.c, V.E. 1-15, V.J, V.K, V.L; Johnson Claims II.C.1.a-c, II.C.3.a, II.C.3.b, V.A-V.M, VI, XII, XIII; Roane Claims I.a, I.d, II, VII. Frady, 456 U.S. at 168-69. The Court may grant relief on the foregoing claims only if the Defendant demonstrates that either cause and actual prejudice, or actual innocence excuse his default. See Bousley v. United States, 523 U.S. 614, 622 (1998). Hence, with respect to these defaulted claims, if the Defendant fails to demonstrate that either novelty, or ineffective assistance of counsel, or actual innocence, or some other cause, excuses his default, the claim will be dismissed without further discussion. As discussed below, except for part of Roane's Claim VIII, the Defendants' proffered excuses are unconvincing and are rejected.

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[2] The Government also is correct that the new facet of the Defendants' juror misconduct claim, is defaulted because it could have been raised at trial and on direct appeal but was not. Frady, 456 U.S. at 168-69. The Defendants fail to demonstrate any cause to excuse the new aspect of the juror misconduct claim. See Order entered June 10, 1998 and infra Sec. XII and XIII.

III. RELIEF BASED ON APPRENDI v. NEW JERSEY

Johnson Defaulted Claim XIII
Tipton Defaulted Claim V.L
Roane Defaulted Claim VII

Title 21 U.S.C. § 848(e) provides that any person who, while engaged in or working in furtherance of a continuing criminal enterprise ("CCE"), "intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual" may be sentenced to death or a term of imprisonment from twenty years to life. However, before the death penalty may be imposed, the jury is required to find the presence of certain aggravating factors enumerated in 21 U.S.C. § 848(n). In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Id. at 490. The Court also explained that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." Id. at 489 n. 15 (quoting United States v. Reese, 92 U.S. 214, 232-33 (1875)). Relying on the foregoing statement from Apprendi, the Defendants contend that their convictions and sentences of death are unconstitutional because the indictment failed to charge the aggravating factors that were essential to the imposition of a death sentence.

The United States responds that such a claim is defaulted, barred by the new rule doctrine of Teague v. Lane, 489 U.S. 288 (1989), and lacks merit. See United States v. Sanders, 247 F.3d 139, 144-46 (4th Cir.), cert. denied, 122 S. Ct. 573 (2001). Because the United States' procedural arguments carry the day, it is unnecessary to address the merits of the Defendants' substantive claim.

A. Novelty As Cause

The Defendants assert that their failure to raise the claim on direct appeal should be excused because the legal basis for their claim was not available at the time of direct appeal. In Reed v. Ross, 468 U.S. 1 (1984), the Supreme Court held that a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause to excuse a procedural default. Id. at 16. While novelty continues to be a valid cause for excusing a procedural default, the Supreme Court has narrowed the reach of Reed by expanding the interpretation of when a claim may be reasonably available. See United States v. Bousley, 523 U.S. 614, 622 (1998). In Bousley the Court rejected the petitioner's assertion that a Bailey-type challenge to his § 924(c) conviction prior to the decision in Bailey v. United States, 516 U.S. 137 (1995) was not reasonably available, because the "Federal Reporters were replete with cases involving challenges to the notion that 'use' is not synonymous with mere 'possession'." Id. at 622. The Court then explained that, even if it appears "futile" to attempt a particular legal argument, that perceived futility "cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" Id. at 623 (quoting Engle v. Isaac, 456 U.S. 107, 130 n. 35 (1982)).

Following this refined view of novelty, the Fourth Circuit rejected a defendant's assertion that his Apprendi claim was not reasonably available at the time of his sentencing in 1998. See United States v. Sanders, 247 F.3d 139, 145 (4th Cir.), cert. denied, 122 S. Ct. 573 (2001). The court explained that the Apprendi claim was available in 1998, because

> the germ of Sander's Apprendi claim had sprouted at the time of his conviction and there is no reason why he could not have raised it then. Although the court may not have been likely to accept Sanders' argument, Sanders plainly had at his disposal the essential legal tools with which to construct his claim.

Id. at 146(citing United States v. Smith, 241 F.3d 546, 548 (7th Cir.), cert. denied, 122 S. Ct. 267

(2001)).

The Supreme Court's decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986), provided Tipton, Johnson and Roane with the necessary tools to construct their Apprendi claim. "No one can read McMillan without learning that the Court was open to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime." Almendarez-Torres v. United States, 523 U.S. 224, 256 (1998)(Scallia, J.)(dissenting). Thus, because "the foundation for Apprendi was laid long before 1992," the Defendants cannot assert the claim was not reasonably available at the time of their trial and appeal. Sanders, 247 F.3d at 145(quoting Smith, 241 F.3d at 548). The Defendants' assertion of novelty as cause is rejected.

The Defendants assert that they are actually innocent of all their convictions under 21 U.S.C. § 848 and thus this Court is permitted to review their defaulted claims. As discussed below at SectionVI, such an assertion, with the exception of Roane's claims pertaining to the murder of Douglas Moody, is utterly without merit. Nevertheless, even though Roane's assertion of innocence regarding that murder is meritorious, this Court is still foreclosed from granting Roane, Tipton, or Johnson relief on their Apprendi related claim because of the new rule doctrine.

B. Apprendi Created A New Rule Of Constitutional Procedure That Is Not Retroactive To Cases On Collateral Review

New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. See Teague v. Lane, 489 U.S. 288, 312 (1989). Apprendi's requirement that any fact, (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, constitutes a new rule of criminal procedure that is not retroactive to cases on collateral review. United States

v. Sanders, 247 F.3d 139, 146-48 (4th Cir.), cert. denied, 122 S. Ct. 573 (2001). The Defendants counter that the extension of Apprendi they seek - that all facts necessary to the imposition of a capital sentence must be found by the grand jury and charged in the indictment–is a new rule of substantive, rather than procedural, criminal law. See United States v. Bousely, 523 U.S. 614, 620 (1998)(concluding Teague analysis is not applicable where the Court simply decides the meaning of a criminal statute). The Defendants are wrong. Sanders, 247 F.3d at 147(holding that Apprendi "constitutes a procedural rule because it dictates what fact-finding procedure must be employed to ensure a fair trial" and that it "is certainly a new rule of criminal procedure"); United States v. Sanchez, 269 F.3d 1250, 1268 (11th Cir. 2001), cert. denied, 122 S. Ct. 1327 (2002).

Next, the Defendants assert that the new rule they seek is retroactive because it falls within Teague's second exception to non-retroactivity. In order to qualify under that exception, the new rule must be such that, without it, "'the likelihood of an accurate conviction is seriously diminished'" and the rule must "'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" Sanders, 247 F.3d at 148 (quoting Teague, 489 U.S. at 313 and Sawyer v. Smith, 497 U.S. 227, 242 (1990) respectively)). In Sanders, the Fourth Circuit assumed that a "rule that certain sentencing factors must be proven beyond a reasonable doubt will promote marginally more accurate results." 247 F.3d at 149-50. However, the court then concluded that such a rule lacked the trappings of a truly "watershed" rule because it would not impact all criminal defendants, it would not taint a defendant's entire conviction, and it did not contribute significantly to the core fundamental rights such as the right to counsel, trial by jury, and a finding of guilt beyond a reasonable doubt, but merely answered a subsidiary question about one of those core rights. Id. at 150-51; see O'Dell v. Netherland, 521 U.S. 151, 167 (1997)(noting that qualifying rule should

be a "sweeping" change that applies to a large swath of cases rather than a "narrow right" that applies only to a "limited class" of cases); United States v. Mandanici, 205 F.3d 519, 529 (2d Cir.)(discussing eleven new rules or proposed new rules which the Supreme Court has declined to apply retroactively), cert. denied, 531 U.S. 879 (2000).

It logically follows that, if the necessity of a petit jury finding beyond a reasonable doubt on all factors that increase a defendant's maximum sentencing exposure are not of sufficient primacy and centrality to satisfy Teague's second exception, then the narrower rule that the Defendants demand, which merely requires a grand jury finding by a preponderance of the evidence on the aggravating factors necessary for the imposition of capital sentence factors, is not. See United States v. Cotton, 122 S. Ct. 1781, 1784-86 (2002)(concluding omission from the indictment of certain facts necessary to imposition of a particular sentence did not deprive court of jurisdiction to impose that sentence); Basden v. Lee, 290 F.3d 602, 619 (4th Cir. 2002)(concluding Apprendi based challenges to an indictment are not retroactive to cases on collateral review), cert. denied, 123 S. Ct. 446 (2002). Unlike the straightforward application of Apprendi rejected in Sanders, the extension the Defendants seek would contribute little or nothing toward ensuring an accurate conviction or sentence; the aggravating factors ultimately are found by a jury, beyond a reasonable doubt, before the imposition of a capital sentence. See Jones v. Smith, 231 F.3d 1227, 1238 (9th Cir. 2000)(holding that "the Apprendi rule, at least as applied to the omission of certain necessary elements from the state court information, is neither implicit in the concept of ordered liberty nor an absolute prerequisite to a fair trial"); United States v. Moss, 252 F.3d 993, 998 (11th Cir. 2001)(stating that "we do not believe Apprendi's rule recharacterizing certain facts as offense elements that were previously thought to be sentencing factors resides anywhere near that central core of fundamental rules that are absolutely

necessary to insure a fair trial"), cert. denied 122 S. Ct. 848 (2002). Accordingly, the Defendants' Apprendi based claims are barred by the new rule doctrine and will be dismissed.

IV. ISSUES RELATED TO THE SELECTION OF THE JURY

A. Counsel Failed To Move For A Change of Venue

Johnson Claim IV.A.2
Tipton Claim V.F.1.a
Roane Claim IV.A

The Defendants assert that counsel were deficient for failing to move for a change of venue in light of the pretrial publicity. In order to demonstrate he was denied his right to the effective assistance of counsel, a defendant must show that counsel's representation was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The deficient performance facet of the Strickland test "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To satisfy this facet of Strickland, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. Furthermore, in order to avoid the distorting effects of hindsight, the Court is required to evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

In order to carry a motion for a change of venue prior to trial, counsel is required to demonstrate that the publicity is so inherently prejudicial that trial proceedings must be presumed to be tainted. See United States v. Baker, 925 F.2d 728, 732 (4th Cir. 1991). However, "[o]nly in extreme circumstances may prejudice be presumed from the existence of pretrial publicity itself." Id. (qouting Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987)). Instead, "a trial court customarily

should take the second step of conducting a voir dire of prospective jurors to determine if actual prejudice exists." Baker, 925 F.2d at 732. A defendant would then be entitled to a change of venue if "voir dire reveals that an impartial jury cannot be impaneled." Id.

In assessing whether a change of venue is warranted, not only the volume, but the character and timing of media coverage are critical factors. See Murphy v. Florida, 421 U.S. 794, 801 n. 4 (1975) (important to distinguish between factual and inflammatory publicity); Baker, 925 F.2d 732-33. "The recency of alleged prejudicial publicity is important because '[o]bviously where considerable time has elapsed since publication, the probability or likelihood of impact is appreciably lessened.'" Baker, 925 F.2d 732-33(quoting Wansley v. Slayton, 487 F.2d 90, 93 (4th Cir. 1973)). The Defendants rely on fourteen newspaper articles to support their claim that a motion for change of venue was warranted. Of those articles, eleven were printed at least five months prior to the start of the trial in January of 1993. The twelfth article appeared on January 10, 1993, the day that jury selection began, and was largely factual. The thirteenth article concerned a shot fired at detectives carrying witnesses and was printed on January 23, 1993. The final article was the article that appeared on February 9, 1993. With only a single, largely factual article appearing in the five months preceding their trial, counsel reasonably eschewed pursuing a motion for a change of venue based on pretrial publicity. See Mu'Min v. Pruett, 125 F.3d 192, 199 (4th Cir. 1997)(concluding the 47 articles published over three months prior to defendant's trial did not create a presumption that the court could not select an impartial jury).

Nor did the actual voir dire suggest that it would be necessary to change venue in order to obtain a fair and impartial jury. Of the four jurors, and one alternate juror, who had been exposed to pretrial publicity, each unequivocally stated that nothing in the media coverage would prevent him

or her from being a fair and impartial juror. Additionally, the Court's opening instructions further reassured counsel that a change of venue was not necessary to avoid any inflammatory media coverage. At the beginning of the trial, the Court instructed the jury "not to read or listen to anything touching on this case in any way." Tr. at 762. "Now as I said –and this is very important, so I am going to repeat it . . . .You should be insulated from outside forces. And what happens in this courtroom should be what makes up the body of knowledge that will bring you to your conclusions and determinations." Tr. 766. In light of the foregoing, the Defendants have failed to demonstrate that counsel was constitutionally deficient for not moving for a change of venue or that they were prejudiced by counsel's failure to do so. The above listed claims will be dismissed.

B. The Prosecution's Purported Use of Peremptory Strikes Against Women in Violation of J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1994).[3]

Johnson defaulted Claim V.K, VI
Tipton defaulted Claim V.E.1&12
Roane defaulted Claim II

The prosecution used two peremptory challenges to remove men and eight peremptory challenges to remove women. The Defendants did not raise any objection at trial to the prosecution's purportedly improper use of peremptory challenges. Subsequent to the Defendant's trial, the Supreme Court held that intentional discrimination on the basis of gender by the use of peremptory strikes in jury selection violates the Equal Protection Clause. J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 127 (1994). When the Defendants sought to raise the issue on appeal based on the disproportionate number of challenges the prosecution exercised against women, the Fourth Circuit concluded that, "the bare showing of gender discrimination first attempted on this direct appeal does not suffice either to allow first instance consideration by this court (as appellants concede), nor to warrant a remand for first instance consideration by the district court." United States v. Tipton, 90

F.3d 861, 881 (4th Cir. 1996).

Each of the Defendants asserts that the prosecutor engaged in misconduct by using his peremptory strikes to remove women from the jury. These claims are defaulted because counsel failed to make a contemporaneous objection. The Defendants rely on the constitutionally deficient performance of trial counsel, see Tipton Claim V.F.1.c and Johnson Claim IV.A.4, and novelty to establish cause to excuse their default.

1. Purported Deficient Performance of Counsel for Failing to Raise J.E.B. Or Prosecutorial Misconduct Claim
Tipton Claim V.F.1.c
Johnson Claim IV.A.4

At the time of the Defendants' trial, the Supreme Court had yet to grant certiorari in J.E.B., and the Ninth Circuit was the only Federal Circuit court to extend Batson to strikes based on gender. See United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), and 960 F.2d 1433, 1437-1443 (1992) (en banc) (extending Batson v. Kentucky, 476 U.S. 79 (1986), to prohibit gender-based peremptory challenges in both criminal and civil trials). The Fourth Circuit had explicitly rejected attempts to extend Batson to peremptory challenges based on gender and the language of that decision hardly encouraged counsel to continue to raise the issue. See United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988). "[W]e find no authority to support an extension of Batson to instances other than racial discrimination." Id. (emphasis in original); see also id. at 1042-43; United States v. Mitchell, 886 F.2d 667 (4th Cir. 1989)(rejecting defendants attempt to extend Batson to peremptory challenges based on age).[3] In light of the Fourth Circuit's explicit rejection of attempts to extend

[3] At the time of the Defendants' trial, the Seventh Circuit agreed with the Fourth Circuit. United States v. Nichols, 937 F.2d 1257, 1262-1264 (7th Cir. 1991) (declining to extend Batson to gender), cert. denied, 502 U.S. 1080 (1992); see also United States v. Broussard, 987 F.2d 215, 218-220 (5th Cir. 1993) (same).

Batson to gender, the Defendants cannot demonstrate that the failure of counsel to object to the prosecution's strikes of female jurors fell below the wide range of professionally competent performance. See United States v. McNamara, 74 F.3d 514, 517 (4th Cir. 1996)(concluding counsel is not deficient for following the controlling circuit law at the time of trial); Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995); Honeycutt v. Mahoney, 698 F.2d 213, 216-17 (4th Cir. 1983). Accordingly, the Defendants' claims that they were denied effective assistance by counsel's failure to object at trial to the prosecution's use of peremptory strikes against female jurors will be dismissed.

2. Novelty As Cause For Failure to Raise the J.E.B claims

The Defendants next suggest that, if counsel was not deficient for failing to raise the J.E.B. claim, then surely its novelty must constitute cause excusing their default. This is not so. See Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995)(rejecting a similar argument and concluding that "a necessarily stringent procedural hurdle, coupled with a similarly important deference to attorney performance" precluded petitioner from raising challenge for the first time on habeas).

The Defendants contend that the absence of a contemporaneous objection is excused because the claim was not reasonably available in light of the Fourth Circuit's position in United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988). As discussed in conjunction with the Defendants' Apprendi claim, "a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default." Bousley v. United States, 523 U.S. 614, 622 (1998)(quoting Reed v. Ross, 468 U.S. 1, 16 (1984)). However, novelty or "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." Bousely, 523 U.S. at 623(internal citations and quotations omitted)(rejecting petitioner's assertion

that his Bailey claim was not reasonably available at the time of his trial). Here, the Defendants had at their disposal not only the Batson decision, but also a federal circuit court decision and several state court decisions that had concluded that Batson extended to strikes based on gender.[4] Such authorities provided the Defendants with sufficient tools to challenge any improper gender based exercise of peremptory challenges. See United States v. Sanders, 247 F.3d 139, 145 (4th Cir.), cert. denied, 122 S. Ct. 573 (2001). Hence, the Defendants' assertion that the legal basis for their J.E.B. claim was not reasonably available must fail. The Defendants' assertions of cause are rejected. The substantive prosecutorial misconduct claims are defaulted and will be dismissed.

C. Trial Counsels' Errors Resulted In The Defendants' Exclusion From Voir Dire And The Loss Of The Right To Participate In Jury Selection

Tipton Claim V.F.1.d
Johnson Claim IV.A.5
Roane IV.C.

On direct appeal the Defendants asserted that their absence from portions of voir dire violated their rights under the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and their right to be present under Fed. R. Crim. P. 43(a). Because the Defendants did not raise a contemporaneous objection at trial, the Fourth Circuit reviewed for plain error. The Fourth Circuit concluded that in order to obtain relief on such a claim, the Defendants would be required to demonstrate "'actual prejudice, i.e., that their absences ' affected the outcome of the [trial],' or 'probably influenced the verdict[s]' against them either on the guilt or sentencing phases." United States v. Tipton, 90 F.3d 861, 875 (4th Cir. 1996)(qouting United States v. Olano, 507 U.S. 725, 734-35 (1993)). The court then concluded that the Defendants could not meet this

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[4] Di Donato v. Santini, 283 Cal.Rptr. 751 (1991), review denied (Cal., Oct. 2, 1991); People v. Mitchell, 593 N.E.2d 882 (Ill App. 1992), aff'd in part and vacated in relevant part, 614 N.E.2d 1213 (Ill. 1993); People v. Irizarry, 165 App.Div.2d 715, 560 N.Y.S.2d 279 (1990) .

burden simply by suggesting that if they had been present, the panel would have been composed of different jurors.

> If no more is shown, for example, than that jurors 1, 3, and 5 would have been excluded, this could not suffice to show that their presence caused the finally unfavorable "outcome." Something more, for example, that jurors 1, 3, and 5 in the above hypothetical were demonstrably biased, surely must be shown, and even that might not, under all the circumstances, suffice.

Tipton, 90 F.3d at 876.

Johnson and Tipton assert that had they been present for the entire voir dire, they would have insisted that three of the seated jurors be excused or struck: (1) Frances Hodson, because her husband had killed their son then committed suicide; (2) Bonita Faircloth because her best friend's mother had recently been raped and murdered; and (3) Jerome Harrison, because his brother was a patrolman on the Richmond police force. On direct appeal, Roane suggested that he would have struck these same jurors, to which the Fourth Circuit responded that "even if this were accepted as fact, it would not suffice as a showing of actual prejudice. Nor would the stated bases for his challenges--relationships to law enforcement officers and to the victim of a rape-murder--suffice without more to tip the balance." Id. at 876 n. 7. The Defendants have not supplemented their § 2255 motions with any additional evidence that jurors Harrison, Hodson or Faircloth, or any of the other jurors that sat, had any demonstrable bias. Nor have the Defendants presented any compelling argument as to why the Court should doubt the jurors' sworn assurance that they could render a fair and impartial judgment. Cf. Williams v. Netherland, 181 F. Supp.2d 604, 613-15 (E.D. Va.) (finding juror had implied bias based on her repeated failure to answers questions in an objectively truthful manner), aff'd, 39 Fed.Appx 830 (4th Cir. 2002). Hence, the suggestion that the Defendants

were prejudiced by the presence of above listed jurors is rejected.

Next, the Defendants suggest that the jurors might have drawn negative inferences regarding their absence from particular portions of the voir dire. See United States v. Camacho, 955 F.2d 950, 955-56 (4th Cir. 1992). Here, unlike Camacho, the Defendants were not absent for the entirety of voir dire. Each of the Defendants was personally and immediately present during some portions of the overall voir dire from whom all of the regular and alternate jurors were ultimately selected. Furthermore, since the Defendants were present during some portions of the voir dire, there is no reason the jurors would believe the Defendants absence from certain portions of voir dire was any different from a bench conference. Finally, unlike Camacho the burden is on the Defendants to demonstrate prejudice, which they have not done;[5] the Defendants failed to explain how the result of their trial might have been different if they had been present for all of voir dire. The above described claims will be dismissed.

4. **Defense Counsel Failed To Request Voir Dire Pursuant To Morgan v. Illinois, 504 U.S. 719 (1992).**
Johnson Claim IV.A.3
Tipton Claim V.F.1.b

Capital defendants have a "right to an inquiry sufficient to ensure--within the limits of reason and practicality--a jury none of whose members would 'unwaveringly impose death after a finding of guilt' and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law." United States v. Tipton, 90 F.3d 861, 878 (4th Cir. 1996)(quoting Morgan

[5] Nor can the Defendants satisfy the prejudice component simply by alleging the lack of an objection forced their direct appeal of the issue to be subjected to a more stringent standard of review. See Smith v. Yago, 888 F.2d 399, 405 (6th Cir. 1989)(holding that "the district court applied an improper standard of prejudice by looking only to the outcome of Smith's direct appeal and not to the outcome of the entire criminal proceeding").

v. Illinois, 504 U.S. 719, 733-34 (1992)). Tipton and Johnson contend that counsel were deficient and they were prejudiced because counsel failed to ensure that every juror was specifically asked whether he or she would always impose a sentence of death if they found the defendant guilty of capital murder. As recounted by the Fourth Circuit on direct appeal, the record forecloses Tipton and Johnson's unsupported speculation that omissions by counsel resulted in a jury that might have contained individuals who would have been subject to removal under Morgan. Tipton, 90 F.3d at 878-79. "[T]he district court's inquiry into death penalty attitudes was sufficient to cull out any prospective juror who would always vote for the death penalty." Tipton, 90 F.3d at 879.

Undeterred, Tipton and Johnson argue that prejudice is self-evident because the jury sentenced them to death despite the fact that it found twelve mitigating factors as to Tipton and eighteen mitigating factors as to Johnson. To the contrary, the jury's verdicts demonstrate that its members were not automatically predisposed to impose the death penalty after finding a defendant guilty of a capital crime: the jury failed to recommend the death penalty for three of the six capital counts on which Tipton was convicted and for two of the three capital counts on which Roane was convicted. See Stamper v. Muncie, 944 F.2d 170, 177 (4th Cir. 1991)(concluding jury's verdict refuted suggestion that jury would automatically impose the death penalty). The Defendants cannot demonstrate any prejudice flowing from the purported omissions of counsel, hence their claims will be dismissed.

V. CLAIMS OF ERROR RELATED TO THE CCE CONVICTION

In order to convict a defendant of engaging in a continuing criminal enterprise the government must prove:

> (1)[the] defendant committed a felony violation of the federal drug laws; (2) such violation was part of a continuing series of violations

> of the drug laws; (3) the series of violations were undertaken by defendant in concert with five or more persons; (4) defendant served as an organizer or supervisor, or in another management capacity with respect to these other persons; and (5) defendant derived substantial income or resources from the continuing series of violations.

United States v. Ricks, 882 F.2d 885, 890-91 (4th Cir. 1989). As on appeal, the Defendants' challenges are focused on the second, third, and fourth elements.

A. Counsel Failed To Demand A Unanimity Instruction On The Predicate Acts That Constitute CCE Continuing Series Element

Johnson Claim IV.A.7.a	Defaulted Claim XII
Tipton Claim V.F.1.g.4	Defaulted Claim V.K
Roane	Defaulted Claim VI

After the Defendants were convicted and sentenced, the Supreme Court held in Richardson v. United States, 526 U.S. 813 (1999), that in a prosecution for engaging in a CCE under 21 U.S.C. § 848, the jury "must agree unanimously about which three crimes the defendant committed," to satisfy the statutory requirement that the defendant's behavior is "part of a continuing series of violations" described in 21 U.S.C. § 848(c)(2). Id. at 818-24. Although they had not requested such an instruction at trial, on appeal the Defendants asserted that the failure to give a special unanimity instruction constituted plain error. United States v. Tipton, 90 F.3d 861, 884 (4th Cir. 1996). The claim was rejected:

> the record plainly indicates that appellants could have suffered no actual prejudice from the lack of a special unanimity instruction on the predicate violation element .... By its verdict, it is clear that the jury unanimously found each guilty of at least five predicate violations: the conspiracy charged in Count 1, the drug possession charged in Count 32, and at least three of the § 848(e) murders as variously charged to them. Assuming, without deciding, that unanimity on at least three predicate violations is required to convict, it is clear that unanimity occurred here as to each appellant so that no actual prejudice from the failure so to instruct could be shown. See United States v. Olano, 507 U.S. 725, 734 (1993) (burden is on defendant to show actual prejudice from forfeited error).

Id. at 885.

In their present motions, the Defendants assert that they were deprived of the effective assistance of counsel by counsel's failure to demand a unanimity instruction on the predicate violation element. However, in order to prevail on such a claim, the Defendants must demonstrate that they were prejudiced by that omission. United States v. Stitt, 250 F.3d 878, 883 (4th Cir. 2001)(rejecting assertion that Richardson error is a structural defect), cert. denied,122 S. Ct. 153 (2002). And, as discussed above, the verdict forecloses the Defendants' assertion that they were prejudiced by counsels' omission. Accordingly, because the Defendants have not demonstrated any prejudice their claims will be dismissed.

B. Instructions On The Supervision Element

The Defendants' direct challenges to the jury instructions are defaulted. Therefore, the following discussion is primarily confined to assessing whether the failure to raise a particular challenge constitutes ineffective assistance of counsel sufficient to excuse the default.

1. Counsel Was Deficient For Failing To Demand That The Court Instruct The Jury That The Government Must Prove The Element Of Management As Part Of The Element of Supervision For A CCE Organizer

Johnson Claim II.C.4.e — Defaulted Claim II.C.1.c
Tipton Claim V.B.3.d.iv, V.F.1.g.3 — Defaulted Claim V.B.3.a.iv

The Court instructed the jury that in order to convict the Defendants on the CCE Count, the Government must prove beyond a reasonable doubt that "the defendant was an organizer of these five or more other persons, or occupied a position of management or a supervisory position with respect to these five or more other persons." Tr. at 3209. The Court then explained that:

> The term "organizer" and the term "supervisory position" and "position of management" are to be given their usual and ordinary meanings. These words imply the exercise of power or authority by

> a person who occupies some position of management or supervision.
>
> An organizer can be defined as a person who puts together a number of people engaged in separated activities and arranges them in their activities and in one essentially orderly operation or enterprise.
>
> A supervisory position can be defined as one who manages or directs or oversees the activities of others.

Tr. at 3212.

The Defendants contend that the given instructions were insufficient because under the syntax of the statute, the jury must be instructed that even an organizer must exercise managerial authority over those whom he organizes. See United States v. Lindsey, 123 F.3d 978, 986 (7th Cir. 1997); United States v. Jerome, 942 F.3d 1328, 1332 (9th Cir. 1991)("We read the statutory language 'or any other position of management' to indicate that an 'organizer' must exercise some sort of managerial responsibility."). However, at the time of the Defendants' trial, the Fourth Circuit had concluded that "while proof of a supervisory or managerial relationship requires a showing of some degree of control by the defendant over the other persons, such proof is not required to show that a defendant acted as an organizer." United States v. Butler, 885 F.2d 195, 201 (4th Cir. 1989). Despite this authority, the Defendants were able to obtain the above described instruction which stated that the term organizer "impl[ied] the exercise of power or authority by a person who occupies some position of management or supervision." Tr. at 3212. Counsel was not deficient for obtaining an instruction more favorable than the law in the Fourth Circuit demanded. Accordingly, the above described claims will be dismissed.

2. Counsel Failed To Demand a Buyer-Seller Instruction

Johnson Claim II.C.4.e.	Defaulted II.C.1.a
Tipton Claim V.B.3.d.iv; V.F.1.g.3	Defaulted Claim V.B.3.a.(i)

The "mere showing of a buyer-seller relationship, without more, is not sufficient under 21

U.S.C. § 848" to demonstrate that a Defendant acted as a supervisor, manager, or organizer. United States v. Butler, 885 F.2d 195, 201 (4th Cir. 1988). Thus, Johnson and Tipton fault counsel for not demanding an instruction which stated that individuals who had only buyer-seller relationships with them were not supervised or organized by them.

In United States v. Hall, 93 F.3d 126 (4th Cir. 1996), the court had instructed the jury that "the term organizer and the term supervisory position and position of management are to be given their usual and ordinary meanings. These words imply the exercise of power or authority by a person who occupies some position of management or supervision." Id. at 130. Hall asserted that the jury should have further been told that "individuals who had only buyer-seller relationships with Hall were not supervised or organized by him." Id. In rejecting that assertion the Fourth Circuit concluded,

> [t]he instructions plainly allowed the jury to understand the supervisory requirement. The 'usual and ordinary' meaning of manager or supervisor does not include a mere buyer-seller relationship. Buyer-seller relationships are not characterized by 'the exercise of power or authority.' Jurors are competent to understand and apply ordinary concepts like organizer, supervisor and management.

Id. at 130-31. This Court gave instructions identical to the instructions approved by the Fourth Circuit in Hall. Tr. at 3212. Accordingly, Tipton and Johnson have failed to demonstrate that counsel were deficient or they were prejudiced by the lack of a buyer-seller instruction and their claims suggesting the same will be dismissed.

3. Counsel Was Deficient For Failing To Demand Additional Instructions On the Identity of the Five Supervisees

Johnson Claim II.C.4.g, IV.A.7.b	Defaulted Claim II.C.1.b.(i&ii)
Tipton V.B.3.d.vi; V.F.1.g.1,	Defaulted V.B.3.a.ii,V.B.3.a.iii

Tipton and Johnson assert that the prosecution presented the jury with numerous individuals

who as a matter of law could not count as supervisees. Therefore, Tipton and Johnson contend that counsel were deficient for failing to demand that the Court (1) instruct the jurors that certain of the named individuals could not count as supervisees, see United States v. Barona, 56 F.3d 1087, 1096-7 (9th Cir. 1995), and (2) instruct the jurors that they must unanimously agree on the identities of the five individuals supervised by each defendant, see United States v. Jerome, 942 F.2d 1331 (9th Cir. 1991)[6] . Tipton and Johnson's claims in this regard are meritless because (1) they erroneously assume that the given instructions permitted the jury to select people who could not qualify as supervisees; (2) contrary to Jerome's and Barona's fixation, the supervision element of the CCE statue is concerned with the number of supervisees rather than the identities of those individuals; and (3) they cannot demonstrate a reasonable probability that they each supervised less than five individuals.

First, Tipton and Johnson's demand for additional instructions, particularly the Barona instruction, rests on the flawed assumption that the given instructions would permit the jurors to choose as supervisees individuals who could not be supervisees. The given instructions did not permit the jurors to select as supervisees individuals who could not legally qualify as supervisees. If the evidence was insufficient to prove that any of the alleged individuals was in fact a supervisee, then reasonable counsel would assume that a jury following the Court's instructions would discard

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[6] In Jerome, the government had referred in closing argument to individuals for whom defendant's organization/supervision would have been logically impossible--they were only "the suppliers of his suppliers" in the drug distribution chain. 942 F.2d at 1330. The Ninth Circuit concluded that because the government had presented the jury with a confusing array of individuals, some of whom could be counted as persons managed by a CCE defendant and some of whom, as a matter of law, could not be counted toward the supervision element, "the jurors had to be instructed that they must unanimously agree as to the identity of each of the five people Jerome organized, managed or supervised." Id. at 1331.

that individual from its count. See United States v. Griffin, 502 U.S. 46, 59 (1991)(concluding that lay juries can be presumed to have rejected factually unsupported grounds, but not legally inadequate ones such as, e.g., one that "fails to come within the statutory definition of the crime").[7] Nor can counsel be faulted for not demanding additional instructions on the possibility that the jury would disregard those instructions in favor of the prosecution's argument because the Court repeatedly instructed the jury that "your source as to the law is the Court", not the lawyers. Tr. at 887. See Tr. 3193-95; United States v. Tapia, 738 F.2d 18, 21 (1st Cir. 1984) (prosecutor's rendition of his version of controlling legal principles not prejudicial when "the judge made clear to the jury that it was the judge's description of the law--not that of either counsel--that was to control").

Second, Tipton and Johnson's assertion that counsel were not acting competently because they failed to demand relief pursuant to Barona and Jerome ignores the legal landscape at the time of Defendants' trial in February of 1993. See United States v. McNamara, 74 F.3d 514, 517 (4th Cir. 1996). Although Jerome had been decided by the date of the Defendants' trial, every other Court of Appeals that had addressed the issue had concluded that, "the requirement of action in concert with five or more other persons . . . aims the statute at enterprises of a certain size, so the identity of the individual supervisees is irrelevant."[8] Richardson v. United States, 526 U.S. 813, 829

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[7] Tipton and Johnson contend that the Government presented the jury with individuals, who "could not as a matter of law be supervisees." However, their arguments as to the vast majority of these individuals rest on the premise that the evidence was insufficient to prove that the individual was a supervisee rather than that it was logically/legally impossible for the individual to be a supervisee.

[8] Indeed, the Fourth Circuit affirmed that view in this very case. On direct appeal the Defendants argued that, because the prosecution presented the jury with some individuals who could not be counted as supervisees, it was plain error not to instruct the jurors that they must unanimously agree as to the identity of each of the five people each Defendant organized, managed or supervised. See Roane's Reply Brief at 27(citing United States v. Jerome); see also

(1999)(Kennedy, J., dissenting)(citing cases). See United States v. Cole, 857 F.2d 971, 973 n.1 (4th Cir. 1988)(rejecting defendant's assertion that the jury was required to return a special interrogatory on the CCE count that listed the individuals which he supervised); cf. United States v. Chaklias, 971 F.2d 1206, 1215 (6th Cir. 1992)(concluding it was not plain error for court to fail to instruct jury as to identity of persons whom defendant could not have been considered to have been managing when court gave instructions very similar to those given here). Accordingly, counsel were not deficient for failing to demand the instructions demanded here by Tipton and Johnson.

Tipton and Johnson also assert that the propriety of a unanimity instruction regarding the supervisees must be reevaluated in light of the decision in Richardson v. United States, 526 U.S. 813 (1999), which held that unanimity is required for the three predicate crimes element. They are wrong. United States v. Stitt, 250 F.3d 878, 886 (4th Cir. 2001), cert. denied, 122 S. Ct. 153 (2002). Even after Richardson, the "identity of individual supervisees is irrelevant." Id. Stitt teaches that Tipton and Johnson cannot demonstrate prejudice in conjunction with their challenges to the supervision element simply by suggesting that the jurors were confused about who could be counted as a supervisee.

> Precise details, like the identities of the underlings supervised by the defendant, are not essential elements of the CCE but rather "merely historical facts as to which the jurors could have disagreed without undermining their substantial agreement as to the ultimate and essential fact of whether the requisite size and level of control existed."

Stitt, 250 F.3d at 887(quoting United States v. Jackson, 879 F.2d 85, 89 (3d Cir. 1989)). Rather,

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Roane's Opening Brief at 87(citing Jerome). The Fourth Circuit rejected that claim and concluded that the focus of "this element is on the size of the enterprise . . . rather than the identities of those who make up the requisite number." United States v. Tipton, 90 F.3d 861, 886 (4th Cir. 1996).

it is incumbent upon the Defendants to demonstrate that absent the purportedly improper conduct of counsel or the Government, there is a reasonable probability that the jury would not have concluded that each Defendant supervised or organized the requisite floor of five individuals. This they cannot do. See infra Section V.C. Hence, the above listed claims will be dismissed because the Defendants have demonstrated neither deficiency nor prejudice.

C. Claims Pertaining To Proof Of The Supervision Element

As a prelude to their challenges pertaining to the sufficiency of evidence on the CCE count, the Defendants assert that the prosecution engaged in misconduct in the manner in which it proved the CCE count. The Defendants assert that these defaulted claims of misconduct are excused by the ineffective assistance of counsel. Specifically, the Defendants fault counsel (1) for not objecting to the witnesses' use of the terms "partner" and "worker" as violating Fed. R. Evid. 701 and (2) for not objecting to the testimony by numerous witnesses that was not based on a foundation of personal knowledge.

1. Counsel Failed To Object To Testimony That Purportedly Violated Fed. R. Evid. 602.

Johnson II.C.4.b.	Defaulted	II.C.3.a, V.I
Tipton V.B.3.d.(i)	Defaulted	V.B.3.c.(i), V.E.11

The Federal Rules of Evidence provide that "[a] witness may not testify about a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. However, the "threshold of Rule 602 is low", United States v. Hickey, 917 F.2d 901, 904 (6th Cir. 1990), thus, a Court may accept a witness's unelaborated assertion of personal knowledge "when other evidence indicates that the witness had a personal connection to the subject matter, there is nothing to suggest that the witness likely did not have or could not have had such knowledge, and its probable absence could be easily shown."

United States v. Davis, 792 F.2d 1299, 1304-05 (5th Cir. 1986). Furthermore, "[b]ecause most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences." United States v. Joy, 192 F.3d 761, 767 (7th Cir. 1999), cert. denied, 530 U.S. 1250 (2000).

Johnson and Tipton list numerous instances where they allege the prosecutor elicited or sought to elicit testimony from a witness that violated Fed. R. Evid. 602. The vast majority of these instances simply did not warrant an objection by counsel because there was a foundation for the testimony or the witness could likely provide one. For example, Johnson and Tipton assert that Denise Berkley testified without any basis of personal knowledge that each Defendant supported himself by selling cocaine. Tr. at 1674-75. However, Berkley previously had testified that she saw Johnson and Tipton selling drugs, Tr. at 1667-68, and "every day" for a couple of months the Defendants would give her crack 4 or 5 times for performing chores, Tr. at 1669-70. Additionally, in faulting counsel for failing to object to the admission of testimony, Tipton and Johnson fail to acknowledge that "the personal knowledge requirement of Rule 602 does not apply to statements of a co-conspirator admissible as non-hearsay under Rule 801(d)(2)(E)." United States v. Goins, 11 F.3d 441, 444 (4th Cir. 1993). Thus, Tipton and Johnson unreasonably chide counsel for not objecting each time one of their lackeys testified regarding the position or function of the Defendants and other individuals in their drug enterprise. The witnesses could readily supply the necessary foundation for testimony that the Defendants were "partners," or that certain individuals were "workers" because these witnesses were themselves members of the drug conspiracy and the record reflects that the conspirators regularly referred to each other in such terms. See Goins, 11 F.3d at 444; Davis, 792 F.2d at 1304; see also United States v. Cantu, 167 F.3d 198, 204 (5th Cir.

1999)(permitting witness to testify that individual "worked" for the defendant).

Only in the following few instances does the transcript suggest the propriety of an objection pursuant to Fed. R. Evid. 602 would be well-grounded in law:

> Stanley Smithers' testimony that the Defendants purchased drugs when they were not in his presence and his testimony that Keith Ross and Mousey Armstrong were selling cocaine which they obtained from Johnson; Papoose Davis' testimony that Nat Rozier used to bring people by to purchase crack; Priscilla a/k/a "Pepsi" Greene's testimony that Talley and Chiles used to drive the Defendants to New York to pick up drugs; and Pepsi Greene's testimony regarding the motivation for the Moody murder.

However, with the exception of Pepsi Greene's testimony regarding the Moody murder, the aforedescribed testimony was cumulative of other testimony and was not crucial to the case against the Defendants.

Tipton and Johnson correctly note that Pepsi Greene did not provide a full foundation for her testimony that Little Doug Moody and Peyton Maurice Johnson were killed because Tipton and Johnson "didn't want Maurice and Little Doug to work in that area." Tr. at 2553. However, it is one thing to demonstrate an objection would have been feasible, and quite another to demonstrate the objection would preclude the admission of the testimony which in turn would alter their convictions and sentences. The record reflects that Greene had intimate knowledge of the workings of the CCE and of the events preceding the Moody murder and thus could likely have provided a foundation for her statement. Additionally, as discussed infra at Section VII, there was ample evidence which linked the Moody murder to the plan of Tipton, Johnson and Roane to take over the drug traffic in the Newtowne area. Hence, Tipton and Johnson have not demonstrated that Pepsi Greene could not have supplied a foundation for the testimony described above, much less that if that single remark was excluded there is a reasonable probability their convictions and sentences would have been any

different. In summary, the majority of this ineffective assistance claim will be dismissed because counsel was not deficient and as to remaining instances where counsel failed to object for a lack of demonstrable prejudice.

2. Counsel Failed To Object To Testimony That Purportedly Violated Fed. R. Evid. 701

Johnson II.C.4.b	Defaulted II.C.3.a, V.I
Tipton V.B.3.d.i,	Defaulted V.B.3.c(i), V.E.13

Federal Rule of Evidence 701 limits lay testimony to those opinions or inferences which are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Fed. R. Evid. 701. A witness' testimony that he considered himself or others to work for the Defendants does not run afoul of either of the requirements of Fed. R. Evid. 701. See United States v. Freerman, 619 F.2d 1112, 1120 (6th Cir. 1980)(permitting witnesses to testify as to their perception of the defendants' relationship). The Advisory Committee's Notes explain that natural characteristics of the adversary system, such as cross-examination and closing argument will point up the weakness of empty assertions and exclusion should be reserved for those instances where the opinions constitute "meaningless assertions which amount to little more than choosing up sides." Fed. R. Evid. 701 advisory committee's notes. Here, counsel followed the foregoing admonition and used cross-examination and closing argument to suggest that the terms worker or employee did not imply the exercise of control by the Defendants. See e.g., Tr. at 2378-80, 2405-08; Tipton Closing Tr. at 3035 ("This worker-partner stuff is baloney. He wasn't their boss. He was their supplier."); Tr. at 3053-55; Johnson Closing Tr. at 3063-68. Moreover, counsel reasonably eschewed objecting to the use of the terms "partner" or "worker" because the witnesses were not offering a legal conclusion but were simply using the terms coined/employed by members of the conspiracy to describe the relationships

of different members of the drug conspiracy.[9] Accordingly, counsel were not deficient for failing to object to the use of the term worker or partner by the witnesses. The above described claims will be dismissed.

2(a). The Prosecutors misled the jury by suggesting that they had not influenced witnesses to use terms "partner," "worker," and "employee."
Johnson Defaulted Claim V.J

Charles Townes, Hussone Jones, and Denise Berkley reiterated Antwoine Brooks' testimony that the terms worker and partner originated from the members of the enterprise, not from the prosecution, and swore that they had not been persuaded to use such terms by the prosecution. Despite this explicit testimony, Johnson asserts that counsel should have known that the prosecution encouraged the witnesses to use those terms by inserting the terms into their questioning of Jones and Townes before the grand jury. In light of the trial testimony directly refuting such a claim of misconduct, counsel can hardly be deemed deficient for failing to raise such a claim based on the nebulous evidence offered by Johnson. Accordingly, Johnson's assertions of cause to excuse his default are rejected. Claim V.J is defaulted and will be dismissed.

3. Counsel Were Deficient For Failing To Demonstrate That Each Defendant Supervised Less Than Five Individuals
Johnson II.C.4.c, IV.A.6
Tipton V.B.3.d.(ii), V.F.3.a, V.F.1.f
Roane IV.D

The Defendants contend that the Government's proof of the supervision was based entirely

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[9] Antwoine Brooks, was the first witness to explain what the terms meant in conjunction with the CCE in Richmond. Tipton asked Brooks to be his "partner" in selling crack in Central Gardens. Brooks explained that he and Tipton recruited Maurice Saunders and Hussone Jones as workers. The workers were fronted $300 crack. The workers were responsible for selling the crack and returning $200 to the partners. When asked on cross-examination if someone had suggested that he use the term "worker," Brooks responded, "[w]e just came up with it. It is true. They worked for us at the time." Tr. at 1085.

on misleading testimony. Specifically, the Defendants assert that the term worker simply meant the purchasing of drugs on credit and does not demonstrate a supervisory relationship. The Defendants' argument in this regard ignores the abundance of testimony that indicated that the partners exercised control or supervision over the workers in addition to just providing them drugs on credit. The Defendants' arrangement with their dealers went beyond simple fronting and constituted a consignment or franchise type of operation, with the Defendants retaining ultimate control over the drugs.[10] Brooks explained that people who were simply fronted drugs were not considered workers. Tr. at 1105. And, the workers consistently testified, not that they purchased drugs from the partners, but rather sold drugs "for" the partners. See, e.g., Tr. at. 1542, 1682-83, 2324. Furthermore, Brooks indicated the consignment relationship between partners and workers was an exclusive relationship. Tr. at 1103-4; see United States v. Butler, 885 F.2d 195, 201 (4th Cir. 1989)(concluding the defendant exercised control over purchaser whose relationship was "analogous to an exclusive franchise dealership"). Maurice Saunders, a "worker", explained that he was not permitted to obtain crack from sources other than a partner. Tipton told Saunders, on more than one occasion, "You deal only with me if you value your life." Tr. at 1322. In any event the provision of drugs on consignment to workers was not the only evidence the government adduced to show that each Defendant supervised, organized or managed in excess of five individuals.

> The record reveals--certainly supports findings beyond a reasonable doubt--that these 'retailers,' in more than sufficient numbers as to each of the appellants, acted as 'workers' who were either or both organized, supervised, and managed by appellants while acting as principal 'partners' in a concerted drug trafficking enterprise, and that

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[10] While such a consignment relationship is not sufficient in and of itself to establish supervision, it is probative of that issue. See United States v. Butler, 885 F.2d 195, 201 (4th Cir. 1989)(citing United States v. Possick, 849 F.2d 332 (8th Cir. 1988)).

> some of these people served variously not only as street dealers for the enterprise but as sometime chauffeurs, hideout providers, weapons-keepers, and general underlings for each of the appellants.

United States v. Tipton, 90 F.3d 861, 890 (4th Cir. 1996). No argument by counsel could have overcome the fact that each Defendant personally organized, managed or supervised in excess of five individuals.[11] Accordingly, the Defendants have failed to demonstrate that they were prejudiced by any purportedly deficient effort by counsel to challenge the supervision element. The above described claims will be dismissed.

4. Johnson Contends That Counsel Was Deficient For Failing To Introduce Evidence That Demonstrated That He Was Mentally Incapable Of Acting As An Organizer.
Johnson Claim-II.C.4.a

Johnson asserts that counsel should have adduced evidence of Johnson's low intelligence and learning disabilities to persuade the jury that he was mentally incapable of acting as a CCE organizer. Assuming such evidence would have been admissible in the guilt phase, it would have opened the door to a host of prejudicial evidence and its value to the defense was minimal. Regardless of what any social worker or psychologist may have opined, the record amply demonstrates Johnson was a partner in the CCE and independently directed the activities of his many underlings. Counsel was not deficient for reserving the evidence of Johnson's mental deficiencies, one of the few bolts of

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[11] The transcript is simply littered with testimony supporting the supervision element. See e.g.: Tipton,Tr. at 1061, 1147, 1161, 1165-66, 1173, 1193, 1196-97, 1199, 1200, 1325, 1330, 1542, 1544, 1545-46, 1556, 1565, 1574-78, 1582, 1683-84, 1689-91, 1888, 2330, 2494, 2546-48, 2550, 2703, 2706-8 ; Johnson Tr. at 1162, 1582-83, 1683-84, 1690-92, 1705-8, 1711, 1720, 1888, 1891, 1895,1897, 1899, 1901, 1921, 2321-22, 2340, 2343, 2374, 2546-48, 2550, 2698, 2703, 2706, 2709, 2720; Roane Tr. at 1574, 1682, 1684, 1689, 1705-8, 1888-89, 1895, 1897, 2163, 2172, 2318, 2324, 2337, 2417, 2546, 2550, 2551, 2708. The foregoing evidence also demonstrates that lack of merit of the assertion that the evidence was insufficient to support the supervision element. See Johnson Claim II.C.2, Tipton Claim V.B.3.b.

mitigation, for use to maximum effect at the inevitable sentencing proceeding. Claim II.C.4.a will be dismissed.

D. **Purported Use Of False Testimony To Prove The Existence Of The CCE**

The Defendants assert that the government knowingly elicited false testimony from Gregg Scott, Maurice Saunders, and Priscilla "Pepsi" Greene. If the Defendant shows that: (1) the testimony was false, see Boyd v. French, 147 F.3d 319, 329-30 (4th Cir. 1998); and (2) the prosecutor or other government official knew, or should have known, the testimony was false; see Stockton v. Virginia, 852 F.2d 740, 749 (4th Cir. 1988); Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir. 1975)(noting that "a recantation, particularly by an accomplice should be received skeptically"), then the conviction must be set aside if (3) there "is any reasonable likelihood that false testimony could have affected the judgment of the jury." See United States v. Bagley, 473 U.S. 667, 679 (1985). However, a prosecutor's mere suspicion about testimony is not enough. See, e.g., Hoke v. Netherland, 92 F.3d 1350, 1360 (4th Cir. 1996)(citing Bank of Nova Scotia v. United States, 487 U.S. 250, 261 (1988) ("Although the Government may have doubts about the accuracy of certain aspects of [evidence], this is quite different from having knowledge of falsity.")). And,"[m]ere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." United States v. Grilley, 814 F.2d 967, 971 (4th Cir. 1987). The Defendants have garnered affidavits and other documents which they assert demonstrate that Maurice Saunders, Gregg Scott and Pepsi Greene testified falsely.

1. **Gregg Scott's Testimony Linking Tipton And His Codefendants To The New York Boyz Was False, And The Government Knew Or Should Have Known That It Was False**
   Johnson Claim I.B
   Tipton Claim V.C.1.b
   Roane Claim I.C.1

The Defendants assert that Scott lied when he: (1) stated that he grew up at 155th and Amsterdam in New York; (2) described the New York Boyz as a gang; (3) swore that the New York Boyz met to discuss retaliating against individuals who threatened other members of the gang; and (4) testified falsely when he said he received guns from "Light". The first two statements the Defendants describe as false amount to a difference of opinion, rather than a perjurious statement of a fact. See United States v. Ellis, 121 F.3d 908, 927-8 (4th Cir. 1997). Additionally, the fact that Tipton and Johnson were associated with a gang in New York/New Jersey area that supplied the Defendants with drugs is beyond dispute .[12] See United States v. Smith, 223 F.3d 554, 574 (7th Cir. 2000), cert. denied, 122 S. Ct. 2658 (2002). In short, the Defendants have failed to demonstrate Scott's first two statements were false, much less that the prosecution knew they were false.

The Defendants have submitted evidence that creates a question of fact as to whether Scott testified accurately about the retaliation meetings and receiving guns from "Light"[13]. However, the

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[12] Anthony Howlen testified that both Tipton and Johnson were members of the gang known as the New York Boyz; Anthony Howlen and Richard Brice, a security guard, testified to a retaliatory gang attack over drug matters that involved both Johnson and Tipton; Officer Malone testified that a search of a residence Johnson shared with Scott, Lance Thomas and other purported New York Boyz, turned up guns and a substantial amount of crack; and multiple witnesses testified as to Tipton's comments regarding the New York Boyz , and his ability to call upon them for drugs and assistance. See also Tr. at 1072-73, 1684.

[13] At trial Scott was cross-examined regarding his statement that the New York Boyz would meet to discuss retaliating against any individual who threatened one of the members. Counsel asked Scott to describe those incidents where retaliation had taken place. Scott testified that "Smooth" was cut in a fight, after which Scott, Smooth, "Light," "Law," "L.A.", Lance Thomas, Cory Johnson, "Heavy D" and "Gary William" discussed retaliating against the guys who stabbed "Smooth" (Darryl Williams) and, thereafter, attacked the guys who had stabbed "Smooth." Tr. at 968-69. The Defendants have submitted affidavits, wherein "Light", "Hess", "L.A.", and "Smooth" swear that they were never involved in group discussions of retaliation. Tipton Reply Mem. App. at 1, 4, 5 and 6. "Smooth" further avers that he was never stabbed in his life. Id. at 6. Additionally, in his affidavit, "Light", a/k/a, Rufus Alvarez, a/k/a John Matthews, avers that he did not give any guns to Scott. Id. at 1 ¶ 10.

Defendants have offered no proof which suggests the prosecution knew, or should have known that these aspects of Scott's testimony were false. Cf. United States v. Biberfeld, 957 F.2d 98, 102 (3d Cir. 1992)(concluding petitioner was entitled to hearing where he alleged that prosecution had reviewed files which indicated witness was testifying falsely). Instead, the Defendants speculate that the prosecution knew the testimony was false because it was beneficial to the prosecution. The Defendants then direct the Court to the affidavit of Government witness Sterling Hardy which they suggest demonstrates that the prosecutors pressured witnesses to testify falsely and fed the witnesses the testimony they wanted. The affidavit does not demonstrate that the prosecution knowingly elicited false testimony from Hardy, much less support the claim currently before the Court, that the prosecution knew Gregg Scott testified falsely.[14] Hardy's hopelessly muddy remark that the

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[14] Indeed, Hardy's affidavit, when compared to his trial testimony, belies the suggestion that the prosecutors permitted or encouraged Hardy to testify falsely to any fact. In his affidavit, Hardy swears that,

> The prosecutors wanted me to say that Richard Tipton was present at the Southside shooting when Torrick Brown was killed. I told them Richard was not there, and I did not want to lye[sic]on him. The prosecutors also wanted me to say that Richard Tipton was present when Louis Johnson was killed. I again told them that Richard was not there.
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> I was not clear on many of the particulars, [h]owever after Mr. Vick and Mr. Parcell clarified them I was able to testify the way they wanted me to. They told me to tell the truth and be honest, but if I did, I would not have testified the way they wanted me to.
>
> It was my understanding that Mr. Toby Vick instructed my attorney Mr. Everhart to have me say nine words. I did not know what nine words I needed to say until Mr. Everhart told me. He told me to say "James had problems in the Southside, go get Cory and Lance Thomas."

Johnson Reply Memo Ex. A, Aff. 8.

At trial Hardy did not provide any testimony placing Tipton at the scenes of the Torrick Brown and Johnson murders. Nor did Hardy testify that anyone had instructed him to get Johnson and Lance Thomas to help Roane kill Torrick Brown. Furthermore, at trial, Hardy

prosecutors "told me to tell the truth and be honest, but if I did, I would not have testified the way they wanted me to," does not warrant a different conclusion. Such "[a]iry generalities, conclusory assertions and hearsay statements [do] not suffice" to stave off summary judgment or entitle a habeas petitioner to an evidentiary hearing, because none of these would be admissible evidence at an evidentiary hearing. See United States v. Aiello, 814 F.2d 109, 113-14 (2d Cir. 1987). Simply put, the Defendants have failed to provide any factual anchor for the theory that prosecutors orchestrated false testimony from Scott. See Blackledge v. Allison, 431 U.S. 63, 80 (1976) . The above listed claims will be dismissed.

2. Maurice Saunders' Testimony Linking Tipton to "Light" and Large Sums of Money Was False
Johnson Claim I.C
Tipton ClaimV.C.1.a
Roane Claim I.C.2

The Defendants assert that Saunders testified falsely concerning his two trips to New York where he assisted in the purchase of cocaine and purported to see New York Boy, "Light." This claim flows from an apparent misstatement by the prosecutor in questioning Saunders about the date of the first of these two trips:

Q. I direct your attention to after Christmas of 1991; did you have an occasion to make a trip to New York with "Hess"?
A. Yes, I did.
Q. What was the purpose of that trip?
A. To bring back crack cocaine and some vials.
Q. Who were you getting the crack cocaine for?
A. For Rich[Tipton].

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specifically and repeatedly disavowed that anyone had told him how he should testify. Tr. at 2193, 2202, 2243.

Tr. at 1330.[15] Saunders explained that he and Hess went to an apartment building at 155th and Amsterdam to purchase the crack.

> Q. Who did you see there?
> A. I saw a few other people. Pointed out to me was a guy named "E.B." and pointed out to me was a dude named – he said "Light," I think it was "Light". I'm not sure.

Tr. at 1331. Hess then went into the apartment with $18,000 and emerged with roughly a kilo of crack. Tr. at 1333.

About a month after the first trip, Saunders accompanied Tipton, with $40,000, to New York, back to the same apartment building to buy two and half kilograms of cocaine. Tr. at 1336-37.

> Q. Who did you see up there?
> A. I saw the same faces.
> Q. Did you see "Light" again?
> A. Yes. I did.

Tr. at 1336-37.

The Defendants insist that Saunders testified falsely when he said he observed "Light" on each of these trips. In support of this claim, the Defendants direct the Court to (1) an affidavit from "Light" and criminal records which demonstrate that "Light" was incarcerated from December 3, 1990 to April 2, 1996, the period wherein the drug buying trips purportedly occurred and (2) an affidavit from Hess wherein he swears that he never pointed out "Light" to Saunders and that they

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[15] By his question, the prosecutor suggested to Saunders that the first buying trip took place after Christmas in 1991. However, the whole of Saunders' testimony indicates the trip actually took place in late November or early December of 1990 and the second trip took place in January or February of 1991. Specifically, Saunders stated that he went to New York at about the same time Tipton promoted him and after he moved in with Tipton. Tr. at 1321, 1325. The move and promotion occurred in late November, Tr. at 1324, or early December of 1990. Tr. at 1320-21. Indeed, Hussone Jones, Saunders' brother, swore the first trip took place in the fall of 1990, around Christmas. Tr. at 1550.

merely purchased clothes, rather than crack on their trip. The Defendants have not adduced any evidence that the prosecution was, or should have been aware of "Light's" incarceration[16] at the time of the buying trips. See Horton v. United States, 983 F. Supp. 650, 654-55 (E.D. Va. 1997)(rejecting petitioner's assertion that, for Brady purposes, federal prosecutor is charged with knowledge of state prison records) or had obtained information from "Hess" regarding his version of the first trip to New York. Instead, the Defendants assert that the prosecution knew that Saunders' testimony in this regard was false because it had "orchestrated" Saunders' testimony to corroborate Scott's testimony, i.e., that the prosecution told Saunders to tell the jury that he had seen "Light" on his trips to New York. Neither this palpably incredible allegation nor the inconclusive affidavit from Sterling Hardy substantiate the charge that the prosecutors were aware of any inaccuracies with regard to Saunders' testimony. See McBride v. United States, 446 F.2d 229, 232 (10th Cir. 1971)(summarily dismissing § 2255 motion for failure to specifically advise the district court as to how he intended to factually prove his allegation of a knowing use of perjured testimony). The lack of proof on this score dooms the knowing use of false testimony claims. Accordingly, the above listed claims will be dismissed.

3. Counsel Were Deficient For Failing To Request An Investigator And For Failing To Conduct An Adequate Investigation

Johnson Claim IV.A.1
Tipton Claim V.F.1.e
Roane IV.B.1

Tipton sought and was granted the appointment of an investigator to assist in the Richmond aspects of the case. However, Tipton now contends, along with Johnson and Roane, that counsel

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[16] From December 3, 1990 until April 2, 1996, John Matthews a/k/a "Light" was detained, under the name of Rufus Alvarez, in Mercer County, New Jersey on a variety of drug related charges including conspiracy to distribute cocaine and maintaining a controlled dangerous substance production facility.

should have requested investigative assistance with respect to the New York and New Jersey aspects of the case. The Defendants suggest that had counsel investigated this aspect of the conspiracy they would have discovered evidence to impeach the Government's witnesses. For example, the Defendants note that several of the reputed New York Boyz dispute their membership in an "organized" gang that distributed drugs or engaged in planned retaliatory violence.

The Defendants' assertion that they were prejudiced by the failure to introduce the evidence discovered by habeas counsel disregards the negative repercussions of introducing such evidence and overstates their impeachment value to the case as a whole. First, the suggestion that the Defendants were prejudiced by counsel's failure to locate and call as witnesses, New York Boyz, Lamont Sabb ("L.A."), Larry Williams ("Law"), Darryl Williams ("Smooth"), Jorge Delao ("Hess or James Wilkerson") and John H. Matthews ("Light") ignores the fact that the Strickland prejudice inquiry also accounts for the damaging evidence that could be elicited from each such individual upon cross-examination. See Whitley v. Bair, 802 F.2d 1487, 1494-97 (4th Cir. 1986)(emphasizing court must evaluate the negative aspects of any purportedly omitted mitigating evidence in evaluating prejudice). For example, although some of the above individuals denied being a member of a formal group called the New York Boyz or being involved in group discussions of retaliation, they do not dispute the fact that they hung out with Tipton and Johnson, were involved in the sale of drugs, and pooled their money with Tipton and Johnson to purchase additional drugs. See Tr. 907. Nor does John Matthews a/k/a"Light" deny that, for a time, he was Tipton's regular source of crack. Tr. at 918.

Additional investigation might have yielded the record of "Light's" incarceration, a fact which might have been introduced without additional damage to the defense. However, Saunders

admitted that his identification of "Light" was questionable and impeachment on that matter hardly undermines confidence in their convictions.[17] For example the proffered testimony does not negate: Anthony Howlen's testimony that Johnson and Tipton were part of the New York Boyz and sliced him with razors when he interfered with their attempts to sell drugs in New Jersey; the repeated references to the New York Boyz during the course of the Richmond based activities; Tipton's threats to invoke the assistance of his New York associates if retaliatory actions were required; the appearance of New York Boyz Lance Thomas and Hess in Richmond; and the repeated trips by Tipton and Johnson from Richmond to New York to obtain drugs. Moreover, none of the proffered testimony undermines the voluminous evidence that during 1991 and 1992, the Defendants operated a continuing criminal enterprise in Richmond which distributed drugs through a series of workers and murdered numerous individuals in order to ensure the success of that enterprise. Therefore, the Defendants have failed to demonstrate they were prejudiced by counsel's purported omissions and their claims will be dismissed.[18]

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[17] On direct examination, Saunders acknowledged that his identification was based on the fact that someone "pointed out to me . . . a dude named – he said 'Light,' I think it was 'Light'. I'm not sure." Tr. 1331. On cross-examination, Saunders acknowledged that, on his trips to New York, he heard a lot of names he did not connect with faces. Further, Saunders admitted that it is entirely possible, on the second trip, that Tipton obtained cocaine from someone other than "Light". Tr. 1366-69.

[18] The Defendants assertions of deficiency on the part of trial counsel are equally unconvincing. None of the Defendants couple the deficient investigation claim with evidence that suggested to counsel that an independent investigation into New York/New Jersey aspects would be helpful to the defense. See Smith v. Collins, 977 F.2d 951, 960 (5th Cir. 1992)(noting a reasonable defense does not "contemplate the employment of wholly unlimited time and resources"). While Johnson's trial counsel disparages the quality of his own pretrial preparation, see Johnson Memo Ex. 10, the tenor of the cross-examination reflects that counsel for Tipton and Johnson, whether from information provided by the government or their clients, had detailed knowledge of the activities and events in New York and New Jersey. See e.g. Tr. at 935-40, 967, 975-76. Additionally, Roane's counsel had little reason for allocating resources into

4. **Purported False Testimony By Priscilla "Pepsi" Greene**[19]

a. **The Government allowed Greene to testify falsely regarding her drug dealing activities**

Johnson Claim V.N
Tipton V.C.3
Roane Claim I.C.3.a

The Defendants contend that the purported difference between Greene's testimony regarding her drug dealing activities at their trial and the subsequent trial of their codefendant, Lance Thomas, demonstrate that Greene lied at their trial. At the Defendants' trial, Greene testified as follows:

Q. How long were you involved with "O," "Whitey" and "J.R.," were you involved in the sale of cocaine with them?
A. I never sold cocaine.
Q. Did you help Curt Thorne when he sold cocaine?
A. Yes.

Tr. at 2546. At Lance Thomas' trial, Pepsi Greene, consistent with her prior testimony, explained that she merely helped Curt Thorne to sell drugs.

Q. Do you know how Curt Thorne supported himself?
A. Yes. Curt sold drugs for "Whitey" and "O."
Q. What kind of drugs did he sell for "Whitey" and "O"?
A. Crack, cook'-em-up.
Q. Did you help Curt in any way sell the drugs?
A. Yes.
Q. What did you do for him?
A. Well, people would come to the door, maybe sometimes I would pass the

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investigating the events in New York and New Jersey, because it was undisputed that Roane was not involved with Johnson and Tipton when they were selling drugs in New York/New Jersey. See Strickland v. Washington, 466 U.S. 668, 691 (1984). In short, the Defendants fail to demonstrate that prior to trial facts known to counsel suggested that independent investigation into the New York/New Jersey activities would be beneficial. Hence, the foregoing claim of ineffective assistance cannot succeed because the Defendants have not demonstrated that counsel were deficient.

[19] Roane's contention that Pepsi Greene provided false testimony regarding his role in the murder of Doug Moody is addressed infra at Section VII.B.

cocaine to them and get the money.

Thomas Tr. at 421-22. The Defendants' claim of perjury is based on Greene's initial denial at their trial that she sold cocaine. In Greene's perception she did not sell cocaine, she merely helped her boyfriend, Curt Thorne, sell cocaine. See United States v. Derrick, 163 F.3d 779, 828-29(4th Cir. 1998)(emphasizing that an allegation of perjury as to a matter of perception fails absent conclusive proof that the witness testified falsely as to her belief, rather than that she was merely mistaken in her subjective assessment of the facts). Whatever the distinction in these activities, the claim lacks merit because the prosecution made sure the jury was not misled as to Greene's drug dealing activities. See United States v. Vaziri, 164 F.3d 556, 564 (10th Cir. 1999). Because the prosecution corrected Greene's misleading statements that she was not involved in selling drugs, and Greene did not otherwise testify falsely, the Defendants' claim of prosecutorial misconduct pertaining to this portion of Greene's testimony lacks merit and will be dismissed.

b. The prosecution permitted Greene to testify falsely regarding the primacy of Thomas' role in the enterprise/ the Government engaged in misconduct by presenting two different version's of Tipton's role in the conspiracy at Lance Thomas' trial

Johnson Claim V.O
Tipton Claim V.C.3,V.D.3, V.D.4, V.E.16
Roane Claim I.c.3.b

At their trial, Greene testified that Tipton, Johnson, and Roane were "partners." Tr. at 2547. Additionally, in response to the question if she knew from whom Sandra Reavis received drugs, Greene stated, "'O.' Because 'O' was the head man." Tr. at 2552. Greene was not questioned regarding Thomas' role in the drug enterprise.

At Thomas' trial, Priscilla Greene testified that, around November of 1991, through Curt Thorne's drug selling activities, she met Tipton, Johnson and Roane. Thomas Tr. at 423. About a

month or two after that, Greene met Lance Thomas. Thomas Tr. at 424. Greene then explained that Thorne, "Papoose" Davis and others were merely sellers, while "[t]hey was like the head people." Thomas Tr. at 424. The prosecutor then asked Greene to explain who she meant by they.

> Q. Who were the head people?
> A. "Whitey," "O," – Whitey," "O," "J.R.," "V" because "V" mostly, after he came down he mostly controlled the drugs."

Thomas Tr. at 424-25. She then explained that Thomas "controlled the drugs because he had it bagged up and gave it out to people to sell." Thomas Tr. at 425. Contrary to the Defendants' current suggestion, Greene did not contradict her prior testimony that the Defendants were "partners" nor did she contend that Thomas took over leadership of the organization and managed Tipton, Johnson and Roane. Rather, Greene's later testimony, merely reflects that in January and February of 1992, within the partnership, Thomas was primarily tasked with the duty of distributing the drugs to the workers. Assumption of this task by Thomas, left the other Defendants more time to pursue the other increasing needs of the enterprise such as obtaining cocaine, collecting drug debts, eliminating the competition, and killing suspected snitches.[20] Accordingly, the above listed claims will be dismissed because the Defendants have not demonstrated that the prosecution presented misleading, much less false testimony from Greene.

In his index of claims, Tipton alleged that Greene's purportedly false statements discussed above demonstrated that the Government had violated Brady v. Maryland, 373 U.S. 83 (1963). See Tipton Claims V.D.3, V.D.4. The three components to a Brady claim are (1) the evidence at issue must be favorable to the defendant, whether directly exculpatory or of impeachment value; (2) it

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[20] Nor is there any plausible suggestion that Greene's testimony at Thomas' trial is somehow exculpatory.

must have been suppressed by the government, whether willfully or inadvertently; and (3) it must be material. See Spicer v. Roxbury Correctional Institute, 194 F.3d 547, 555 (4th Cir. 1999). "Suppressed evidence is 'information which had been known to the prosecution but unknown to the defense.'" Id. at 556(quoting United States v. Agurs, 427 U.S. 97, 103 (1976)). Tipton fails to demonstrate that this evidence meets any of the above elements. The respective roles of Greene and Thomas in distributing drugs was common knowledge to the members of the drug conspiracy. Tr. at 1690, 2708; Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002), cert. denied, No. 02-7101, 2003 WL 99455 (U.S. Jan 13, 2003). Moreover, Greene's statements from the Thomas' trial do not diminish Greene's credibility or Tipton's guilt and do not create any possibility of a different result at either the guilt or sentencing phases. Accordingly, Claims V.D.3 and V.D.4 will be dismissed.

VI. ACTUAL INNOCENCE

Tipton Claim V.I
Johnson Claim III
Roane VIII

"Claims of actual innocence, whether presented as freestanding ones, see Herrera v. Collins, 506 U.S. 390, 417, (1993), or merely as gateways to excuse a procedural default, see Schlup v. Delo, 513 U.S. 298, 317 (1995), should not be granted casually." Wilson v. Greene, 155 F.3d 396, 404 (4th Cir. 1998). In Schlup, the Supreme Court held that the proper test for whether a habeas petitioner has established that his case is "extraordinary" enough to fall into that "narrow class of cases," which "implicat[e] a fundamental miscarriage of justice," is whether that petitioner has shown that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schulp, 513 U.S. at 327. Thus, in order to have his procedurally defaulted claims reviewed in these proceedings, the Defendants must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id.; see also O'Dell v.

Netherland, 95 F.3d 1214, 1249-50 (4th Cir. 1996).

This exacting standard requires the petitioner to bring to the federal habeas court probative, reliable, new evidence which establishes the claim of innocence. See Weeks v. Bowersox, 119 F.3d 1342, 1352 (8th Cir. 1997)(en banc). And, as explained by the Supreme Court:

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Schlup, 513 U.S. at 324. And, of course, the new evidence "not presented at trial" must also have been evidence that was excluded or not available at the time of trial. Id. at 327-28. The habeas court then must evaluate "petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" Schlup, 513 U.S. at 328 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)).

The Defendants assert that they are actually innocent of being an organizer of a continuing criminal enterprise violation. Their new reliable evidence of innocence consists of the same frail evidence they offer to prove their claims that Government witnesses perjured themselves. The Defendants' new evidence and the host of arguments presented in the papers does nothing to dispel the overwhelming evidence documentary and testimonial evidence that they are guilty of running a CCE and of the CCE related murders for which they stand convicted. Accordingly, with the exception of Roane's claim that he is actually innocent of the murder of Doug Moody, the

Defendants' claims of actual innocence will be dismissed.

VII. THE MOODY MURDER

A. Evidence Of The Moody Murder At Trial

In early 1992, Ronita Hollman and Doug Moody were selling drugs in the Newtowne area for Peyton Maurice Johnson. Tr. at 1992-93. Tipton, Johnson, and Roane decided to take over the drug trade in Newtowne. Tr. at 1156-58, 2330. As part of this plan, Roane and Tipton approached Hollman to lure her away from her association with Peyton Johnson and to sell drugs for them. Tr. at 1962-63. Tipton told Hollman about his plans for the Newtowne area and informed her that they were willing to kill people to accomplish those plans. Tr. at 1963. Shortly, thereafter Tipton, Johnson, and Roane began to eliminate their competition in the Newtowne area.

On or about January 6, 1992, Cory Johnson and Roane left two handguns with their underling, Robert Papoose Davis. Tr. at 1894. On January 11 or January 12, 1992, Roane retrieved one of the guns from Davis. Tr. at 1895. Douglas Moody was murdered shortly after midnight on January 13, 1992. See Gov't Trial Exhibit 119. Moody had been shot once and stabbed repeatedly.

Shortly after midnight on January 13, 1992, Denise Berkley testified that she was smoking crack at a building on the corner of Clay and Harrison Streets. Tr. at 1694. Berkley heard a shot followed by the breaking of a window from the back of the building. Tr. at 1696. After disposing of her drugs, Berkley went outside and saw Roane repeatedly stabbing Doug Moody while Moody pleaded for Roane to stop. Tr. at 1697-98. Roane then approached Pepsi Greene, gave her the knife and told her to get rid of it. Tr. at 1699. Later that evening, Berkley went to a house on Moore Street, where Tipton was talking excitedly about how he had tried to shoot Moody at the house on Harrison Street.

Pepsi Greene testified that she was on the corner of Clay and Harrison Street when she heard two or three shots. Tr. at 2549. Pepsi then saw Roane and Tipton exit the house from where the shots were fired. Tr. at 2549. After five or ten minutes, Pepsi, accompanied by Roane, went to Curt Thorne's house, where Roane directed Pepsi to get him the big knife he stored there. Tr. at 2550-51, 2572-3. Later that night, Roane returned the knife, now covered with blood, to Pepsi and told her to dispose of it. Tr. at 2551-52.

Papoose Davis also testified that, on January 13, 1992, following the Moody murder, he heard Tipton and Roane conversing as follows, "Yeah, I got him, I got him . . . we can't stay out here this is hot anyway." Tr. at 1896. Davis lived within a block or two of the Moody murder. Tr. at 2560.

The next day, January 14, 1992, Berkley was present while Tipton, Johnson and Roane loaded firearms in a house on Norton Street. Tr. at 1705-6. Later that evening, Roane and Johnson retrieved the guns. Tr. at 1707-08. Roane asked Berkley if she had seen Peyton Maurice Johnson. Tr. at 1708-09. Berkley told him she had just seen him go around the corner. Tr. at 1709. Roane then located Peyton Maurice Johnson in a tavern. Within minutes of Roane departing the tavern, Cory Johnson entered the tavern and fatally shot Peyton Maurice Johnson with an automatic weapon.

B. Purported Perjury By Pepsi Greene
Roane Claim I.c.3.c

Roane contends that Greene's testimony from Lance Thomas' trial demonstrates that she lied at his trial regarding the events of the Moody murder. However, Roane does not direct the Court to any testimony from the Thomas trial that contradicts her earlier testimony. Rather, Roane directs the Court to testimony from Thomas' trial where Greene admits, 15 minutes prior to the shooting of Doug Moody, she was in Curt Thorne's apartment, with Curt. Roane and Doug Moody arrived

and "they excused me out of the house." Thomas Tr. at 426. After the shots were fired, Curt ran out of the house followed by Roane. Thomas Tr. at 426. Roane fails to demonstrate how Greene's subsequent testimony contradicted her testimony at his trial; why Greene was on the corner at the time of the shooting was not explored at Roane's trial.[21] Accordingly, Roane's Claim I.c.3.c will be dismissed because he has failed to demonstrate that Greene testified falsely.

C. Actual Innocence And Ineffective Assistance Of Counsel In Conjunction With The Moody Murder
Roane Claim IV.B.2

Roane contends that his counsel failed to conduct an adequate investigation and defense into the murder of Doug Moody. For ease of analysis, this claim is best divided into three subparts: (a) counsel's failure to adduce available testimonial and documentary evidence to support an alibi; (b) counsel's failure to discover the testimony of an eyewitness who swears that Tipton and Johnson, not Roane, murdered Moody; and (c) general critiques of the quality of counsel's cross-examination and argument. While the trial record largely belies Roane's general critiques of counsel's performance, Roane has tendered evidence which offers substantial support to the first two aspects of this claim and his assertion that he is actually innocent of the murder of Doug Moody.

1. Counsel's Performance At Trial

At trial, David Baugh, one of Roane's attorneys, effectively cross-examined both Berkley and Greene, developing the inconsistencies between their accounts and the accounts of other witnesses. Furthermore, Baugh called Gina Taylor, a neighbor who had attempted to aid the

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[21] Roane suggests that Greene concealed this information at his trial because she wished to prevent the exposure of Thorne's possible role in the murder of Moody. That suggestion is belied by the record; Greene acknowledged that Thorne was present at the site of Moody's murder in her statement to the police and implicitly in her testimony at trial. See Tr. at 2570-80; Clerk's Record # 778 Ex. A & B.

wounded Moody. Taylor testified that she had seen the individual jabbing the prostrate Moody. Taylor testified that the assailant was only about five feet six inches tall and was definitely not Roane. Baugh followed up this description by presenting evidence that two hours before the murder, a person named Keith had come to Moody's mother's house looking for him, and that a week prior, Keith's friends, armed with machine guns, had kicked in the door of Moody's mother's residence while attempting to find Moody. Baugh then called Detective Dalton who stated the foregoing information initially had led the police to suspect Keith Barley, a small featured black juvenile male, as Moody's murderer. Roane's complaints about the quality of Baugh's courtroom performance, with exception of the lack of an objection to Pepsi Greene's statement regarding the motivations for the Moody murder, fail to point up any significant deficiency on the part of counsel.

Pepsi Greene stated Peyton Maurice Johnson and Doug Moody were killed because "O and Whitey and them didn't want Maurice and 'Little Doug' to work that area." Tr. at 2553. Assuming that counsel was deficient for failing to object to this statement on the ground that there was no foundation, Roane fails to demonstrate that an objection might have resulted in the exclusion of Greene's statement, much less altered the outcome of the proceedings. Although Rule 602 provides that a witness' testimony must be based on personal knowledge, it "does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible . . . only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to." M.B.A.F.B. Federal Credit Union v. Cumis Insurance Society, Inc., 681 F.2d 930, 932 (4th Cir. 1982). Roane fails to direct the Court to any evidence that suggests Greene's challenged statement was based on speculation rather than the conversations of her coconspirators. Moreover, even if Roane could have excluded Greene's

statement he cannot demonstrate prejudice. As recited above, there was ample circumstantial evidence, from numerous witnesses which demonstrated that the Doug Moody murder and the Peyton Johnson murder (that occurred the following day) were part of the Defendants' plan to eliminate competition in the Newtowne area. Accordingly, Roane was not prejudiced by counsel's failure to object to the foregoing statement.

2. Failure To Present Alibi Evidence

Roane contends that his counsel was deficient for failing to present evidence that he was at a hotel on the night of Doug Moody's murder. An attorney's failure to present available exculpatory evidence is ordinarily deficient, "unless some cogent tactical or other consideration justified it." Washington v. Murray, 952 F.2d 1472, 1476 (4th Cir. 1991). In his affidavit, Baugh acknowledges that,

> [p]rior to trial, James Roane told me that at the time Douglas Moody was murdered he was at a Richmond motel. I attempted to obtain records from the motel confirming that fact, but was unsuccessful. Mr. Roane identified a witness to that fact, whom I interviewed. She confirmed Mr. Roane's account but stated that she did not want to testify. I do not recall why I did not subpoena her or call her as a witness.

Roane Opening Memo. Ex. H at ¶ 3. Neither Baugh nor the record suggests any tactical reasons for not calling this unnamed woman who would have provided Roane with an alibi for the Moody murder. Additionally, Roane has produced hotel records from the Howard Johnson hotel at 3207 North Boulevard that support his claim that he was at a hotel at the time of the Moody murder. See Roane Reply Memo Ex. A. The records reflect that on January 2, 1992 and January 12, 1992, a Mr.

Chiles[22], rented a room and then checked out the following day. Id. The records are accompanied by a letter from the present management indicating they were readily available in 1992. Id.

Giving Roane the benefit of all favorable inferences, the record before the Court indicates that Roane's counsel performed deficiently when he failed to produce available testimonial and documentary evidence of an alibi. See Bruce v. United States, 256 F.3d 592, 599-600 (7th Cir. 2001); Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992). The Government fails to direct the Court to evidence to counter the suggestion that the failure to produce this evidence was attributable to bad judgment and an inadequate investigation. Furthermore, it is difficult to discount the effect of this alibi evidence in light of the disputed direct eyewitness testimony regarding the description of the individual who stabbed Moody to death. A plausible alibi might sufficiently bolster Gina Taylor's testimony that Roane was not the attacker to create a reasonable probability of a different result. See Bruce , 256 F.3d at 599-600 (remanding for evidentiary hearing to determine whether defendant prejudiced by counsel's failure to call alibi witness); Griffin, 970 F.2d at 1358. Accordingly, the Government's motion for summary judgment on Roane's claim that counsel was deficient in his investigation of the Moody murder will be denied.

3. Demetris Rowe

Roane contends that the inadequacy of counsel's pretrial investigation is further evidenced by counsel's failure to locate and call as a witness Demetris Rowe. Roane has tendered an affidavit from Rowe, who swears that she witnessed the Moody murder from across the street on a porch.

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[22] One of Roane's minions, who acted as a driver, was named Linwood Chiles. The registration card for January 2, 1992 is under the name of Linwood Chiles. The registration card and receipt for January 12, 1992, is under the name Larry Chiles. Both registration cards contain the same address for Mr. Chiles.

Specifically, Rowe avers that,

> At the time of the killing, I had been on the porch for several hours. Earlier, I had seen "Whitey" and "O" enter an apartment at the back of [the] house. A couple of hours later, I saw Doug Moody enter the same apartment. A few minutes later, I heard noises of a fight from the apartment, and saw Doug Moody come out of the apartment. Moody was bloody, and staggering. He was followed closely by "Whitey" and "O." Moody went into the yard, and then, the alley, where "Whitey' and "O" attacked him. A woman came out of the house next door and tried to help Moody.
>
> I did not see James Roane, Sandra Reavis, Pepsi Greene or Denise Berkley at the scene of Douglas Moody's murder.

Roane Third Amend. Memo. Ex. A, Clerk Record #849.

The United States has not specifically addressed counsels' failure to discover Rowe's testimony in its motion for summary judgment. Hence, this Court may only summarily dispose of this claim without an evidentiary hearing only if, "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 Raines v. United States, 423 F.2d 526, 531 (4th Cir. 1970). In this regard, Roane persuasively argues that Rowe's proffered testimony creates a reasonable probability of a different result. Similarly, the record does not conclusively refute Roane's suggestion that the failure to discover Rowe's testimony is attributable to an unreasonable failure[23] by counsel to canvass the vicinity of the Moody murder to locate eyewitnesses to the crime who could exculpate his client.

Roane further contends that Rowe's testimony demonstrates that he is actually innocent of the Moody murder. In order for Roane to have his defaulted claims excused, based on his assertion

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[23] The information known to counsel justified such an investigation. Specifically, prior to trial, counsel had the testimony of an apparently disinterested eyewitness, Gina Taylor, who insisted that Roane did not commit the murder. Second, counsel had the detailed account of the alibi from his client. Third, counsel's initial investigation, corroborated the details of the account provided by Roane.

of actual innocence, Roane must eventually persuade the Court that "it is more likely than not that no reasonable juror would have convicted him" had Rowe testified in accordance with her affidavit. See O'Dell v. Netherland, 95 F.3d 1214, 1249-50 (4th Cir. 1996). However, to survive summary judgment, Roane is required merely to produce evidence, which if credited, creates a material question of fact as to whether no reasonable juror would have convicted him. Certainly Rowe's belated testimony can be viewed with some scepticism and is not entirely supportive of the evidence of his innocence offered at trial.[24] Schulp, 513 U.S. at 332(noting the court may consider "the timing of the submission and the likely credibility of the affiants" in assessing probable reliability of new evidence). However, Roane's conviction turns primarily on a credibility contest between the testimony of Pepsi Greene and Denise Berkley and Gina Taylor. And, in this setting Pepsi Greene's credibility is bolstered by the statement she gave to the police prior to sustaining brain damage. See Schulp, 513 U.S. at 328 (actual innocence review includes evidence tenably claimed to have been wrongly excluded). Nevertheless, in light of the ample, but limited, evidence marshaled against Roane, Rowe's testimony, if credited, constitutes the sort of concrete eyewitness testimony deserving of a hearing. See Armine v. Bowersox, 128 F.3d 1222, 1227-28 (8th Cir. 1997). Accordingly, the foregoing claims will be dismissed in part. Roane is entitled to an evidentiary hearing on his assertions that he is actually innocent of the Moody murder and that he was denied effective assistance of counsel in defense of that crime.

VIII. THE TALLEY MURDER

At approximately 8:00 a.m., on January 5, 1992, the police found Doug Talley stabbed to

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[24] Rowe's proffered testimony is inconsistent with defense witness Gina Taylor's testimony that she saw a single small individual, who she did not recognize, stabbing Moody. Gina Taylor had had a romantic relationship Tipton.

death in his car, on the southside of Richmond. On the floor in the rear of the car, the police found an army field jacket belonging to Johnny Lee Byrd. In the jacket, the police found Byrd's glasses, some pills and a dull, rusty, six inch long knife(hereinafter the "Byrd knife"). The police tested the knife and although the presence of blood was detected, tests to determine the species of origin were inconclusive. Clerk's Record #778, Ex C. Additionally, police were unable to recover any "latent prints of value for identification purposes" from the Byrd knife. Id.

At trial, Johnny Lee Byrd testified he had been selling drugs with Talley for a few days, when on January 3, 1992, Tipton asked to borrow his field jacket. Later that day, Byrd and Talley went to Papoose Davis, on four or five occasions, to obtain drugs to sell. Thereafter, Byrd smoked some of the drugs he obtained and spent the money he had earned from selling the drugs so that he was unable to repay Davis or the Defendants.

On January 4, 1992, Talley accompanied by Tipton, Roane and Johnson came looking for Byrd. Byrd was hiding because he was unable to repay the Defendants for the drugs that had been provided to him. When the Defendants could not find Byrd at his residence, Roane punched Talley in the eye.[25] Then, Tipton, Roane, Johnson, and Talley drove off.

Hussone Jones testified that on January 4, 1992, Tipton told Jones to get in his car and follow Tipton and Roane who were going to ride with Doug Talley. Between 3 a.m. and 5 a.m. on January 5, 1992, Talley stopped on a corner on the southside of Richmond . Jones pulled in behind Talley's car, within a "car or two lengths." Tr. at 1571. Roane and Tipton got out of Talley's car and then got back in. Roane sat behind Talley and Tipton sat in the passenger seat. Roane grabbed Talley around the neck and Tipton started stabbing Talley in the body. "After awhile," Roane released

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[25] A bruise over Talley's eye is clearly visible in the autopsy pictures. Gov't Ex. 4-3.

Talley and got in the car with Jones.

At Roane's direction, Jones pulled up beside Talley's car. By this point, Tipton had gotten out of Talley's car and continued to stab Talley, who "was hanging out of the car." Tr. at 1575. Tipton's final stab stuck in Talley's head, and Tipton had to push his foot against the door to get the knife out. Tipton kicked the car door in an attempt to shut Talley's body in the car, but the door would not shut. Tipton, Roane and Jones, left the scene with Talley's body still hanging out of the door.

Tipton told Jones to take them to "Wildman's" house. After dropping off Roane, Tipton and Jones arrived at Wildman Stevens' house. Jones testified that Tipton gave Stevens the knife to wash off while he took a shower.

Tipton and Roane allege that the prosecution knew or should have known that Jones' description of the Talley murder and the events immediately following it were false. Additionally, Titpon contends that his counsel provided ineffective assistance in defending Tipton on the Talley murder.

A. Purportedly False Description of the Stabbing
Tipton Claim V.C.2,
Roane Claim I.c.4

Tipton and Roane assert the description of the stabbing was false because "the crime scene video and the location where Talley's car and body were discovered would have revealed that the position of the streetlights did not allow a clear view of the events. The most [Jones] could have seen were shadows and silhouettes." Tipton Opening Memo at 70. The record reflects that Jones was within ten to twenty feet of the stabbing. Although the crime scene video does not reveal any streetlights within fifty feet of where Talley's car and body were found, it offers persuasive evidence

that Jones would have been able to clearly witness the stabbing. In the video, filmed about four hours after the murder, the interior car light is on (Talley's head and arm prevented the door from closing). See Gov't'Trial Ex. 119. Thus, Jones would have had an illuminated view of the stabbing, after Roane exited Talley's car and subsequently when Talley or Tipton opened the driver's door.

Next, the Defendants cite Dr. Fierro's testimony for the proposition that Talley was either stabbed from behind by a right-handed assailant or stabbed from the front by a left-handed assailant. Asserting that he is right-handed, Tipton argues that Jones' account of the stabbing must have been false and the prosecutor must have known of its falsity. Contrary to the Defendants' suggestion, Dr. Fierro's testimony does not contradict, Hussone Jones' description of the mode of attack employed by Talley's murderer.

> Q. You keep pointing to the right side of your neck. Were the majority of his injuries received from the right side of his body?
> A. Yes.
> Q. Would that indicate to you that his attacker was to his right, to his left, behind, or in front of him?
> A. It either means that someone is behind him stabbing this way, or in front of him stabbing this way. (Witness indicating.)

Tr. at 2066. Dr. Fierro's testimony did not suggest that Tipton, who was initially sitting on the right of Talley, could not stab Talley on the right side of his body. Additionally, although Talley had 47 stab wounds to his right scalp and neck, the remainder of the wounds were distributed across his body and head.[26] Such a diffusion of wounds is consistent with Jones' description that, by the end of the stabbing, Talley had struggled partly out of the car and Tipton had left the car and continued to stab Talley from outside the vehicle. And, Jones' description of a stab wound penetrating the skull

[26] Talley had 11 stabs wounds on the front of his chest and neck, 14 stab wounds to his his face, 9 to his right upper back, and 3 stabs to his right wrist

was confirmed by the autopsy.

In addition to the autopsy, the minutiae of Jones' account were corroborated by the crime scene and the testimony of Charles Townes. Just as Jones described, Talley's car was parked near a corner, Talley was left hanging out of the door, and the car door bore a dent from where Tipton had attempted to kick the door shut. Furthermore, the police recovered Tipton's blood-smeared finger print from the door of Talley's car. Finally, Jones' account of the stabbing was confirmed by Charles Townes. Tipton told Townes that Jones was present while Tipton stabbed Doug Talley in the head, in Talley's car, on the southside of Richmond. The record conclusively refutes Tipton and Roane's assertions that Jones testified falsely regarding his viewing of the Talley murder or that the prosecution knew Jones testified falsely in that regard.

Next, Roane and Tipton allege that the prosecution knew that Jones testified falsely about Tipton giving the murder weapon to Wildman Stevens' to wash. The only admissible evidence they offer to support this is a vague affidavit wherein Stevens swears that "Richard never gave me a knife to wash. I have never seen Richard with a knife. I recalled Mr. Toby Vick asking a lot of questions." Tipton Reply Memo App. at 8. The United States has responded by submitting the affidavit of Toby Vick and contemporaneous notes of his interview with Stevens. Vick swears that "[t]here was no information other than that contained within my written notes that was given to me by Mr. Stevens which was germane to the issue. There was nothing of an exculpatory nature contained in Mr. Stevens' statement to me." Govt's Resp. Ex. B.[27] Vick's notes do not indicate

[27] It is unclear when Vick interviewed Stevens. Jones initially failed to reveal his role in the Talley murder to the prosecution or the grand jury. Tr. at 1596-97, 1615, 1646. Until Jones revealed his role in the Talley murder, the record does not suggest the prosecution would have a reason to question Stevens about the night of the Talley murder.

Stevens was questioned or provided any information about a knife or the Talley murder. The record does not demonstrate any knowing use of false testimony by the United States. Moreover, in light of the overwhelming evidence that corroborated Jones' account of the Talley murder, there is no "reasonable likelihood" any testimony about events at Wildman's house "could have affected the judgment of the jury," with regard to the conviction of Roane and Tipton for the Talley murder. See United States v. Bagley, 473 U.S. 667, 679 (1985). Tipton's Claim V.C.3 and Roane's Claim I.c.4 will be dismissed.

B. The Prosecution Suppressed "Wildman" Stevens' Statement Regarding The Events At His Home Following The Talley Murder
Tipton Claim V.D.1
Roane Claim I.b.

Roane and Tipton assert that the same facts which demonstrate that the prosecution knew Jones lied about the events at Stevens' house constitute a Brady violation. Specifically, Vick was obliged to inform the defense that Stevens had denied receiving a knife from Tipton. However, as described above, there is no evidence that Stevens actually conveyed such information to Vick. Accordingly the above listed claims will be dismissed because the prosecution had no exculpatory information from Stevens.

C. Counsel Failed To Adequately Defend Tipton On The Charge That He Murdered Talley
Tipton Claims V.F.1.h

In support of this claim, Tipton asserts that counsel (1) should have called Victoria Harris as an alibi witness, (2) should have called Wildman Stevens as a witness to refute Jones' testimony, (3) should have pointed out that it was too dark for Jones to have observed the stabbing, (4) should have performed independent testing on the knife found in Johnny Lee Byrd's jacket to determine whether it was the murder weapon, and (5) should have requested the appointment of a fingerprint

expert.

Conspicuously absent from these criticisms is any evidence from Tipton that he told his counsel that the foregoing avenues of investigation would have been fruitful. See Lackey v. Johnson, 116 F.3d 439, 152 (5th Cir. 1997)(counsel is not ineffective for failing to discover evidence about which the defendant knows but withholds from counsel). For example, there is no evidence that Tipton told counsel that Victoria Harris could provide him with an alibi[28] or that Wildman Stevens would contradict Hussone Jones' description of the events following the Talley murder. Nevertheless, Tipton maintains that counsel's duty to conduct a reasonable investigation required him to seek out and interview Stevens. This is not true. Counsel had no reason to believe that it would be fruitful to interview Stevens when the Government's evidence indicated that Stevens was simply another CCE minion. Tipton has not shown counsel was deficient for failing to interview or call Stevens and Harris as witnesses. Additionally, because Talley's car was illuminated by the interior car light, counsel wisely eschewed contending that Jones' description of the stabbing was a fabrication.

Similarly, counsel had little reason to believe the independent forensic analysis urged here by Tipton would aid Tipton's defense to the Talley murder.[29] For example, Tipton contends counsel

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[28] Tipton has failed to produce an affidavit or any other evidence to support his claim that Victoria Harris could provide an alibi. See Fed. R. Civ. P. 56(e).

[29] At trial, defense counsel suggested through cross-examination and argument that the knife found in the pocket of Byrd's jacket was the murder weapon. Counsel then called Detective Cox who testified that they had questioned Byrd in conjunction with the Talley murder and that Byrd had provided inconsistent statements regarding the identity of the person to whom he had supposedly lent his jacket. And in closing argument, counsel for Roane and Tipton called to the jury's attention the similarity in the width of the knife recovered from Byrd's jacket and the stab wounds described by Dr. Fierro.

should have conducted an independent forensic and fingerprint analysis of the Byrd knife and the blood on that knife. Counsel's decision to forego independent forensic testing was entirely reasonable in light of his knowledge that pretrial testing was unable to ascertain the species of the blood on the knife and indicated that "no latent prints of value for identification purposes are present." Clerk's Record #778, Ex C; see Jones v. Murray, 947 F.2d 1106, 1112 (4th Cir. 1991)(concluding counsel reasonably relied on state experts in foregoing an investigation of mental health defenses).[30] Nevertheless, Tipton argues that even if the latent fingerprints were not sufficient to provide a positive match they might have been sufficient to eliminate him as the subject who left the fingerprints. Counsel reasonably eschewed this investigation -- no one suggested that Tipton had used the Byrd knife to murder Talley.[31] Thus, instead of wasting time and resources on an investigation that was unlikely to provide exculpatory information,[32] counsel chose to exploit the Government's failure to conduct the additional testing to undermine its proofs with respect to the

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[30] Counsel had no reason to suspect the state employees who conducted the tests were incompetent or biased in the performance of their duties. The record indicates the testing was performed at a time when the police were still questioning Byrd as a suspect with regard to the Talley murder.

[31] Nor can Tipton demonstrate any prejudice flowing from the lack of an independent forensic examination of the Byrd knife . On May 3, 2000, the Court granted Tipton's request to have the knife examined by his expert. Thereafter, the Court forwarded the knife and other materials pertaining to the murder of Talley to Tipton's forensic expert, Herbert MacDonnell. MacDonnell's examination of the knife did not produce any new exculpatory information nor did it identify the species of the blood on the knife. See Clerk's Record # 822, Ex. 1. Instead, without explaining what tests he conducted, MacDonnell speculates that, perhaps, DNA testing might reveal the nature of the blood found on the knife blade.

[32] Counsel had good reason to believe that additional expert testimony would constrict the range of available defenses. Specifically, while counsel freely suggested to the jury that Byrd murdered Talley, counsel knew that Byrd had passed a lie detector test with regards to that murder. Tr. at 5. Additionally, the dull rusty knife recovered from Byrd's jacket is not entirely consistent with the "sharp blade" that had been used to kill Talley. Tr. at 2069(Dr. Fierro).

Talley murder. See Smith v. Stewart, 140 F.3d 1263, 1273 (9th Cir. 1998)(in rejecting ineffective assistance claim, court notes that counsel "was happier to have [missing witness] as an empty chair to which he could point, without facing the danger of refutation"). Thus, in his closing argument, counsel employed these omissions to great effect noting the prosecution's failure to tell the jury about the Byrd knife even though it was "obvious[]" from Dr. Fierro's testimony that the knife could have been the murder weapon. Tr. at 3041-42. Counsel then suggested that the prosecution had not performed any tests to determine if the Byrd knife was the murder weapon because such tests might be inconsistent with the prosecution's "Get Whitey" theory. Counsel made a similar inference about the failure of the police to determine whether the substance from which Tipton's fingerprint was lifted was in fact blood.

Undeterred, Tipton contends that counsel should have retained an expert to testify that Tipton's fingerprint recovered from the window of Talley's car could have been made prior to the Talley murder. Counsel was able to elicit testimony on this point from the prosecution's expert who admitted that he could not tell if the fingerprint recovered from Talley's car had been made in December or January. Such a brief jab at the prosecution's evidence was a sounder tact than prolonged expert testimony on the theoretical life span of fingerprints on glass or disputing the prosecution's assertion that the print found was superimposed in blood in light of the crime scene photos. Those photos reflect that Tipton's latent print was found superimposed in a reddish brown substance that looks identical to the blood that was smeared all over the crime scene. See Gov't Ex. 1-1 through 1-7. Tipton has not demonstrated that counsel was deficient in his investigation and presentation of a defense to the Talley murder. For these same reasons, Tipton's request to conduct additional discovery and testing regarding Byrd's jacket and/or Byrd's other personal items obtained

from the Talley car will be denied. See Clerk's Record 822. Moreover, in light of Tipton's bloody fingerprint at the crime scene, Jones' well-corroborated eyewitness account of the murder, and Tipton's confession of the murder to Charles Townes, Tipton has failed to demonstrate a reasonable probability that any further investigation by counsel would have altered the jury's findings. The above described claims will be dismissed.

D. Counsel Was Deficient For Failing To Object To Incorrect Instructions Regarding The Enterprise Element Of the RICO Charges

Tipton Claim V.F.1.g.2

Title 18 U.S.C. § 1959 penalizes certain violent crimes, such as the Talley murder, when they are committed for the purposes of gaining entrance to or maintaining or increasing one's position in "an enterprise engaged in racketeering activity." In order to secure a conviction under § 1959, "the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." United States v. Turkette, 452 U.S. 576, 583 (1981)(explaining the distinction between the two elements). When instructing the jury on the elements of a § 1959 offense, the Court twice misspoke, referring to racketeering activity when it should have said "an enterprise engaged in racketeering activity". Tr. at 3220. However, the instructions as a whole told the jury that it must find both the existence of an enterprise engaged in racketeering activity and the criminal acts that constitute the racketeering activity, see United States v. Tipton, 90 F.3d 861, 888 (4th Cir. 1996). Moreover, in light of the abundance of evidence demonstrating that the racketeering enterprise existed, Tipton has not explained, much less demonstrated, a reasonable probability that more accurate instructions would have resulted in his acquittal on the RICO counts. Accordingly, the above claim will be dismissed.

IX. THE STONEY RUN MURDERS (Curt Thorne and Linwood Chiles)

A. Evidence At Trial

On February 19, 1992, at approximately 10:15 p.m., Curt Thorne, Linwood Chiles, Gwen Greene and Pepsi Greene were shot in Chiles' station wagon, on Stoney Run Road.[33] Pepsi Greene testified that she, Gwen, Thorne, Chiles and Johnson were driving when they pulled in "something like an alley." Tr. at 2558. A gray car pulled in behind them. Johnson told Chiles to place his head on the steering wheel, then Johnson put a gun to Chiles' head and shot him.

Gwen Greene testified that, immediately prior to being shot, Tipton called to her from outside the vehicle, she then saw Tipton wearing blue jeans and a brown jacket with a hood.[34] This description of Johnson's accomplice to the Stoney Run murder was confirmed by Walter Tuck, a passing motorist, who observed a medium complexioned black male, wearing a brown jacket, walking away from the murder scene.

Additionally, the Government's evidence indicated that Tipton's arrival at the murder scene in the gray vehicle was part of a plan he and Johnson had coordinated to provide a getaway car. Specifically, Valerie Butler testified that at 4:00 p.m., on February 19, 1992, Johnson borrowed her gray car and then called Tipton. Johnson then appeared at Nita Bracey's house around 7:30 p.m. with Curt Thorne. At 8:00 p.m., Johnson dropped Butler off at her home and told her he needed to

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[33] Officer Cynthia Riley testified that she received a call to respond to the shooting at 10:36 p.m. Tr. at 2519. Walter Tuck testified that he saw a lady lying in the road with blood around her head and the radio announced the time as 10:17 p.m. Tr. at 2529-31.

[34] Tipton asserts that only a single gun, that was later recovered from Johnson, was used in the Stoney Run murders. Although the portions of the record cited by Tipton attribute some of the recovered bullets to a Glock later retrieved from Johnson, the ballistic evidence does not demonstrate whether all the bullet fragments recovered from the crime scene came from the Glock recovered from Johnson. In contrast, the possibility of a second shooter is suggested by Thorne's autopsy which reflected that he had been hit by bullets fired from two different directions.

keep her car because he wasn't finished with it. Johnson then picked up Curt Thorne and drove to an apartment on the Southside of Richmond where they waited for Chiles and the Greene sisters to arrive. When Chiles and the Greene sisters arrived, Johnson paged Tipton, who was driving around with Charles Townes, John Knight, and Thomas "Stoodie" Green.[35] Tr. at 1188. Upon receiving the page, Tipton called Johnson back and then got in the car and said "'C.O. just got all four of them'. Studie [Stoodie] said, 'Who?' He said, 'Linwood, Curt,' and then he had cut it short." Tr. at 1189. Townes and Knight then dropped Tipton and Stoodie Green off at an apartment in the Southside of Richmond and drove home. Townes and Knight arrived home at 9:45 p.m.[36] Meanwhile, Tipton had left the apartment and was driving to aid Johnson in eliminating Thorne, Chiles, and the Greene sisters.

B. Alleged Brady Violation
Tipton Claim V.D.2

In Claim V.D.2, Tipton contends that the Government suppressed, in violation of Brady, the exculpatory statements of his alibi witnesses to the Stoney Run murders. Specifically, Tipton contends that, when he was paged by Johnson, the Stoney Run murders already had occurred, hence, he went back to the car and told Knight, Stoodie Green, and Townes that Johnson had killed four people. "Knight and Green [in turn] told government agents that Tipton said that Johnson had killed four people." Tipton Reply Memo at 52. This Brady claim is flawed. Here, Tipton obviously knew the identities of the parties who had heard his comments following the page from Johnson and was

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[35] Townes testified that Tipton was wearing blue jeans and a gray hooded sweatshirt. Except for the color of the sweatshirt, the clothing is consistent with what Gwen Greene stated Tipton was wearing on the night of the murder.

[36] Townes was very sure about the time, because Knight had to work the next day.

free to question them. Such facts foreclose any Brady claim because, "where exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine." United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990). "Certainly, then, information that is not merely available to the defendant but is actually known by the defendant would fall outside of the Brady rule." Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002), cert. denied, No. 02-7101, 2003 WL 99455 (U.S. Jan 13, 2003). Additionally, Tipton has not tendered evidence that demonstrates that Stoodie Green provided the police with any statement containing exculpatory information regarding the Stoney Run murders. Moreover, as discussed below in connection with the related ineffective assistance claim, Green and Knight's vague proffers utterly fail to counter the direct and circumstantial evidence that Tipton was an active participant in the Stoney Run murders. Tipton's Claim V.D.2 will be dismissed.

C. Counsels' Failure To Call Knight And Green As Defense Witnesses
Tipton Claim V.F.1.i

In Claim V.F.1.i, Tipton blames his counsel, rather than the Government, for failing to adduce purportedly exculpatory evidence from Knight and Stoodie Green. Conspicuously absent from the record is any evidence from Tipton that he told counsel that Stoodie Green or Knight could exonerate him from involvement in the Stoney Run murders. "In general, counsel is not ineffective for failing to discover evidence about which the defendant knows but withholds from counsel." Lackey v. Johnson, 116 F.3d 439, 152 (5th Cir. 1997). Counsel reasonably concluded from Tipton's silence that neither Green nor Knight could provide exculpatory information. Moreover, as discussed below, Tipton has failed to demonstrate that Green or Knight could counter the compelling

evidence of his involvement in the Stoney Run murders.

Tipton has submitted an affidavit wherein Stoodie Green avers that,

> I was with Richard Tipton, Charles Townes, and John Knight on February 19, 1992, the night Linwood Chiles and Curt Thorne were killed. I remember Richard received a page from someone and using the telephone. Later that evening we hear it on the news.
>
> I know Richard Tipton did not commit that crime . . . .
>
> I never heard Richard Tipton talk about killing people.

Tipton Reply Memo Ex. 10. Strikingly absent from Green's affidavit is an indication that Green could provide Tipton with an alibi for the interval between roughly 9:30 and 10:17 p.m. when the Stoney Run murders occurred. In the absence of that information from Green, Green's general denial of Tipton's guilt has little probative value. See Evans v. Technologies Applications & Service Co., 80 F.3d 954, 960-61 (4th Cir. 1996). Nor does the affidavit of Alfred Brown prove that Green could offer a convincing alibi for Tipton.[37] Tipton Reply Memo Ex. 11. Brown's affidavit consists entirely of inadmissible hearsay. See Greensboro Prof. Firefighters Ass'n v. Greensboro, 64 F.3d 962, 967 (4th Cir. 1995); Maryland Highways Contractors Ass'n v. Maryland, 933 F.2d 1246, 1251-2 (4th Cir. 1991).

Tipton fails to demonstrate that John Knight could have contributed any more to his defense

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[37] In his affidavit Brown states,

> Greene told me that on the afternoon of February 19, 1992, he was riding with Richard Tipton, John Knight and Charles Townes. They were in south Richmond when Richard Tipton received a page from Cory Johnson. After using the telephone, Richard returned to the vehicle and stated "four people just got killed."
>
> He also said that he and Richard remained together, and later that night they watched the report of the murders on the news.

Tipton Reply Memo Ex. 11.

than Stoodie Green. Knight avers that,

> On February 19, 1992, I was in the company of Thomas Green, Charles Townes, [and] Richard Tipton in South Richmond when Richard received a page. I stopped the car to allow him to use the telephone. He returned to my car and said four people had gotten killed.
>
> Shortly after that I drove them to Hillside court where Richard and Stoodie got out at a house.
>
> I returned to Central Gardens with Charles Townes.
>
> I was questioned by police and I gave the above statement to a detective.

Tipton Reply Memo Ex. 9. Conspicuously absent from Knight's proffered testimony is any reference to time. Regardless of what Tipton may have said upon his return to the vehicle, the evidence convincingly demonstrates that the murders did not occur until after Tipton received the page.

Saunders' testimony placed the page at about 9:30 p.m. Tuck, the passing motorist, indicated the murders had taken place just before 10:17 p.m. John Knight has not proffered any testimony that suggests he could have testified to Tipton's whereabouts during the interval of time between 9:30 p.m and 10:17 p.m. Furthermore, the circumstantial evidence, as recounted above, strongly supports the Government's theory that during the interval roughly from 9:30 p.m. to 10:17 p.m., Tipton had retrieved Valerie Butler's gray car and was following Chiles' station wagon, so as to provide Johnson a means to flee the crime scene. The theory that Tipton had planned the Stoney Run murders was further supported by Tipton's comments to Johnson that he "moved too fast; it was not supposed to be done there." Tr. at 1349 (Saunders' Testimony). Sterling Hardy also presented evidence that indicated the murder of Chiles was to be a joint venture planned by Johnson and Tipton. While incarcerated Sterling Hardy told Lance Thomas that he was concerned that Chiles

might testify against them. Tr. 2191. Thomas responded, "not to worry about that, because what he did for Cory and Whitey, that they will take care of that for them." Tr. at 2191. Finally, Gwen Greene's compelling testimony placed Tipton at the scene of the murders. Tipton has demonstrated neither deficiency nor prejudice. Tipton's Claim V.F.1.i will be dismissed.

X. THE PROSECUTION KNOWINGLY PERMITTED JERRY GAITERS TO TESTIFY FALSELY REGARDING THE MURDERS OF LONG, ARMSTRONG, AND CARTER

Johnson Claim V.P
Tipton Claim V.C.4

Jerry Gaiters testified that he aided Johnson in murdering Dorothy Armstrong. Relying on testimony from Lance Thomas' trial, Johnson claims that Gaiters perjured himself regarding when he knew that Johnson intended to kill Armstrong. Thomas Tr. at 569. The facts surrounding this claim are as follows. At Johnson's trial, Gaiters testified that he was talking to Linwood Chiles when Johnson asked him for directions to Armstrong's brother's house, Bobby Long. Gaiters told Johnson that he would take him over there. Tipton then pulled up in a car with a young fellow and Johnson and Gaiters got in the car. They drove to 1212 West Moore Street and retrieved a bag of guns. After dropping off the young fellow, they drove to Bobby Long's house. Johnson sat in the back seat playing with a Glock pistol he had retrieved from 1212 West Moore Street. Gaiters stated that he was kind of nervous because Johnson's manner led him to believe that he might be shot in the head.

When they arrived at Bobby Long's house, Johnson told Gaiters, "I want you to get 'Mousey' to bring out the house[sic]. When I shoot the bitch in the as[s] I want you to run back to the car." Tr. at 2343-44. Gaiters went to the door and induced Bobby Long to open the door. At which point,

Johnson burst into the room and killed Armstrong, Carter and Long using a Glock pistol. [38]

At Lance Thomas' trial, Gaiters testified that he initially believed that Johnson simply wanted to talk to Armstrong. Thomas Tr. at 569. Counsel then asked Gaiters whether "[a]t some point on the way over there [you knew] what 'C.O.' was going to do didn't you?" Thomas Tr. at 569. To which Gaiters responded, "no." Thomas Tr. at 569. Johnson and Tipton contend that Gaiters' denial of foreknowledge of the Armstrong murder demonstrates that Gaiters lied at their trial and requires that their convictions be set aside. They are wrong.

First, at the Defendants' trial, Gaiters testified that during the car ride to Long's home there was no conversation regarding hurting or killing Armstrong. Tr. at 2367. And Gaiters stated that he only realized the purpose of the trip, "when we got over there" and "were near the house" but not beforehand. Tr. at 2415. Thus, Gaiters' testimony at Thomas' trial was consistent with his testimony at Johnson's trial, that he did not grasp that Johnson intended to shoot Armstrong until they approached Long's residence.

Second, even if the testimony could be deemed to be inconsistent, it would still fall short of demonstrating that Gaiters testified falsely, much less that the government knew that Gaiters was testifying falsely. See United States v. Grilley, 814 F.2d 967, 971 (4th Cir. 1987)("Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony.") .

Third, even if Gaiters lied regarding the exact moment he became aware of the plan to murder Armstrong, there is no possibility that exposing such a lie to the jury would have altered

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[38] Denise Berkley testified that Johnson wanted to kill Armstrong because Armstrong had welched on a drug debt.

Tipton's and Johnson's convictions and sentences. Defense counsel fully exposed Gaiters dissembling regarding his culpability for the murder of Dorothy Armstrong. See e.g., Tr. 2363-64, 2373-77, 2380-94. Exposing another misrepresentation of that ilk by Gaiters would not significantly diminish Gaiters' credibility regarding the roles Tipton and Johnson played in the murder of Armstrong, Long, and Carter. Cf. United States v. Hoyte, 51 F.3d 1239, 1243 (4th Cir. 1995)(discussing effect of cumulative impeachment evidence). Gaiters' testimony on that score was thoroughly confirmed by Charles Townes and the ballistics evidence. Charles Townes testified that immediately prior to the murders, Tipton and Johnson told him they were going to Church Hill to murder Armstrong. Subsequent to the murders, Tipton provided Townes with an account of the murders which largely corroborated Gaiters' testimony. And, the ballistics evidence corroborated Gaiters' account of the murder. Gaiters asserted that Johnson used a Glock pistol, retrieved from 1212 West Moore Street, to kill Dorothy Armstrong. The ballistic evidence reflected that the bullets that killed Dorothy Armstrong came from a Glock that was hidden at 1212 West Moore Street. Denise Berkley swore that Johnson was the only person who knew where the Glock was hidden. Claims V.P, and V.C.3 will be dismissed.

XI. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Each Defendant received one or more sentences of death.[39] Johnson, Tipton, and Roane argue

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[39] Ultimately, the jury recommended the death sentence for Johnson on all seven of the § 848(e) capital murders for which he had been convicted, those of Louis Johnson, Long, Carter, Armstrong, Thorne, Chiles, and Peyton Johnson. The jury recommended the death sentence for Tipton on three of the capital murders, those of Talley, Chiles, and Thorne, of the six for which he had been convicted. The jury recommended the death sentence for Roane on one of the capital murders, that of Moody, of the three for which he had been convicted. A full description of the aggravating and mitigating factors found as to each defendant is stated at United States v. Tipton, 90 F.3d 861, 894-95 (4th Cir. 1996).

that if counsel had put forth a reasonable effort the result might have been different. The Court disagrees with the Defendants' critiques of counsel's performance and the suggestion that a different result was obtainable but for counsel errors. Counsel for each Defendant did an excellent job at sentencing. The sentences of death are not attributable to counsel's omissions, but to the absence of evidence or argument that could counter the Government's compelling case that death was the appropriate punishment for the each Defendant's brutal, remorseless behavior.

A. Purported Deficiencies By Roane's Counsel

The jury only sentenced Roane to death for his murder of Doug Moody. As a necessary predicate for that sentence, the Government was required to prove that Roane had committed the murder after substantial planning and premeditation. See 21 U.S.C. § 848(k)&(n)(8). Roane contends, in light of the centrality of this issue, counsel was deficient for failing to challenge the Government's proof of the issue at sentencing and for conceding in his closing arguments that the Government had proved the required aggravating factors.

1. Counsel's Failure To Challenge Substantial Planning Aggravating Factor

Roane Claim IV.E.4

Counsel's concession of this issue was reasonable in light of the ample evidence that demonstrated substantial planning and his sentencing phase strategy of focusing the jury's attention on the humanity of this client rather than the inhumanity of his actions. In rejecting his challenge to the substantial planning factor on appeal, the Fourth Circuit aptly summarized the evidence on this point as follows:

> the jury had before it information that well before Moody's murder, a motive for it, to which Roane was privy with Tipton and Cory Johnson, had developed. Specifically, trial evidence showed that

> Moody and his superior, Peyton Johnson, a rival drug dealer, were thought by Tipton, Cory Johnson, and Roane to be standing in the way of their taking over the Newtowne drug market whose development was Roane's special function. Evidence from the guilt phase revealed . . . that. Tipton and Johnson "and them didn't want Maurice [Peyton Johnson] and 'Little Doug' [Moody] to work in that area ... selling cocaine." From this and other information respecting the details of Moody's murder, the jury properly could find that the visit of Roane and Tipton to [the] apartment on the night of his murder was for the pre-planned, premeditated purpose of murdering him. It showed that they went there armed with the pistol used by Tipton in wounding Moody although members of the enterprise did not as a matter of policy ordinarily carry weapons. It showed that Moody's initial wounding and eventual killing were in the pattern of the comparable enterprise-related, cold-blooded assassinations of Talley some ten days earlier and of Moody's superior, Peyton Johnson, the night after Moody was killed . . . . the issue was whether the murder, not its exact means, was the result of substantial planning and premeditation by Roane. And on that issue the jury had ample information upon which to base its finding beyond a reasonable doubt that Moody's murder was "substantially planned and premeditated" by Roane in concert with Tipton.

United States v. Tipton, 90 F.3d 861, 896 (4th Cir. 1996). Despite this evidence and the jury's prior conclusion that he had murdered Moody as part of their drug dealing enterprise, Roane insists counsel should have argued at sentencing that the evidence did not demonstrate that he murdered Moody as a part of a turf battle. Counsel wisely eschewed such a doomed tact.

The best hope for Roane was to emphasize the evidence in mitigation rather than challenge the prosecution's solid case on the substantial planning aggravating factor. See Carter v. Johnson, 131 F.3d 452, 466 (5th Cir. 1997)(concluding it was reasonable for counsel to concede client's culpability in order to establish credibility with the jury); Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995)(concluding counsel reasonably conceded defendant's guilt on the kidnaping charge to retain credibility during the sentencing phase). Thus, at sentencing when the prosecution emphasized that

death was the appropriate sentence based on the numerous violent acts of the Defendants, counsel conceded the acts of the defendants were bad, but emphasized that during the sentencing the jury was "to determine whether or not there is something about their lives and individuality that should justify not killing them. We are not here to look at the acts again. We are here to look at the people." Tr. 3928. In light of the foregoing, counsel's failure to challenge the substantial planning aggravating factor and focus on the mitigating evidence was neither prejudicial or deficient. See Truesdale v. Moore, 142 F.3d 749, 754 (4th Cir. 1998); Pruett v. Thompson, 996 F.2d 1560, 1571 n. 9 (4th Cir. 1993). Claim IV.E.4 will be dismissed.

2. Purported Deficiencies In Investigating And Presenting Evidence Of Roane's Mental And Emotional Background

Roane Claim IV.E.1-2

Although counsel adduced evidence regarding Roane's severe poverty, organic brain damage, neglect and abuse, humiliation at the hands of his peers, exposure to community and family violence, learning disabilities, self-medication, and the system's failure to respond to these problems, in Claim IV.E.1, Roane vaguely complains counsel's presentation prevented the information from reaching the jury in a cogent form and omitted other critical evidence. Such charges are heavy with adjectives but light on facts and rely primarily on the affidavit of Dr. Lee Norton, who swears that the mitigation case presented by the defense was incomplete and failed to help the jury understand the mitigation evidence presented. Norton fails to support such criticism with the purported omitted mitigating evidence or with any new insights into the relevance of Roanes' experiences and deficits.

For example, Norton criticizes the quality of the investigation into Roane's background. However, the record demonstrates that counsel and his mitigation experts reviewed thousands of

pages of records and interviewed numerous witnesses in preparation for sentencing. At sentencing, Crystal Noakes, a social worker, described Roane's disturbing family background in great detail, including the fact that he had three uncles who were institutionalized, that his mother had been placed in foster care, and that his father left his mother and was convicted of robbery and murder. Despite these efforts, Roane contends that counsel was deficient for not reviewing the medical records, the school records, and the foster care records of Roane's mother; medical records and prison records of Roane's father; and the records documenting the mental illness of Roane's uncles.

The trial record reflects that counsel had uncovered the essential facts regarding these relatives. Additionally, Roane's mother refused to provide any information regarding her time in foster care and the Government has tendered evidence indicating that counsel actively pursued Roane's mother's medical and school records and his father's prison record. See Govt's Response at Ex. C; see also Tr. at 3723. With much on his plate, and his further inquiry into these areas stymied, counsel apparently concluded further investigation into the background of these relatives was not worth the time and effort. That decision appears to be entirely reasonable. "Just as counsel is not obliged to advance every available nonfrivolous argument, so counsel is not necessarily ineffective for failing to investigate every conceivable matter inquiry into which could be classified as nonfrivolous." Smith v. Collins, 977 F.2d 951, 960 (5th Cir. 1992). Roane fails to overcome the "heavy measure of deference" that is accorded counsel's judgment not to pursue further investigations into these tangential matters. See Strickland v. Washington, 466 U.S. 668, 691 (1984). Additionally, Roane fails to demonstrate that the omitted records would have yielded any significant mitigating evidence, much less that counsel should have been aware of that fact.

Next, Roane charges that his counsel failed to elicit expert testimony that explained to the

jury the relevance of his self-medication, his relationship with his codefendants, his sexual abuse and his witnessing violence in his youth. The relevant impact of all these factors was addressed at sentencing. Dr. William Lordi testified that Roane suffered from brain damage and Attention Deficit Disorder which resulted in paranoia and other personality problems.[40] Dr. Lordi explained that people with Attention Deficit Disorder, like Roane, often self-medicate with drugs or alcohol and that Roane's criminal association with Tipton and Johnson was a natural consequence of Roane's mental disorders and his desire to create the family structure he never had.

Additionally, Dr. Lordi and Crystal Noakes documented and explained the high incident of trauma Roane had experienced growing up. Dr. Lordi and Noakes testified that Roane had been sexually abused by a family friend on a continuous basis from age four to six and that Roane's early antisocial behavior of setting fires was the result of such abuse. Noakes testified that Roane was traumatized by the death of 30 friends and relatives. Counsel made the obvious point that persons subjected to such persistent violence become desensitized to it. Roane criticizes counsel for "failing to make reference to the literature regarding the effects of exposure to violence on cognitive and emotional development," Roane Opening Memo. Ex. Aff. of Dr. Norton at ¶ 10, but fails to support that critique with citation to the literature or any specific proffer as to the content of that literature.

Having failed to demonstrate any omissions on the part of counsel's case in mitigation, Roane proceeds to challenge counsel's selection of witnesses. For example, Roane asserts that counsel should have called a more experienced expert than Crystal Noakes. The record does not suggest any reason why counsel's selection of Noakes was deficient. Indeed, counsel used Noakes'

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[40] Dr. Semone confirmed Dr. Lordi's diagnosis and testified that Roane's spiral towards crime was entirely predictable and was not volitional or attributable to any moral weakness on Roane's part or the part of his family.

lack of criminal experience to emphasize Noakes' neutrality, noting that Roane's experts were not simply hired guns who regularly testified for defendants.[41] Roane fails to demonstrate that the selection of Noakes was detrimental, much less that it was deficient.

Finally, in Claim IV.E.2, Roane contends counsel was deficient for failing to present testimony from members of Roane's family. See Bassette v. Thompson, 915 F.2d 932, 940-41 (4th Cir. 1990)(noting that a claim that counsel was deficient for failing to call a witness must be accompanied by a specific proffer of the omitted witnesses' testimony). Roane's proof on this issue is limited to an affidavit from his mother, wherein she swears that she could have,

> described for the jury [Roane's] mental and emotional problems and our attempts to receive help for them. I could have described the circumstances of James' upbringing, as well as his effort to obtain additional education. I also would have told the jury that James is a human being, and that his family cares for him and begged the jury not to sentence him to death.

Roane Opening Memo Ex. Aff. Jeanette Roane at ¶ 4. Counsel was able to elicit this sympathetic information from its expert witnesses, and those experts laid part of the blame for Roane's condition at the feet of his mother who they suggested was too overwhelmed by her seven children to provide adequate care for Roane. Tr. at 3721, 3725, 3743-45, 3789-92. As the deficiencies of Roane's mother played a prominent role in the defense theory of mitigation, it was reasonable for defense counsel to conclude that Jeanette Roane might undermine that theory by casting her actions in a more favorable light. See Beaver v. Thompson, 93 F.3d 1186, 1196 (4th Cir. 1996)(concluding reliance on the credibility of reports and documents from disinterested parties rather than risk that

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[41] Counsel selected Noakes after the mitigation expert originally engaged by the defense, Dr. Lee Norton, withdrew because the Court limited his hours. The record reflects that Crystal Noakes, a specialist in assessing dysfunctional families, was recommended to counsel by the Governor's Commission on Mental Health and Retardation.

defendant's family members might be discredited or testify adversely to defendant's interests on cross-examination was reasonable trial strategy); Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991)(counsel reasonably eschewed calling father for fear he might downplay traumatic childhood of the defendant). Furthermore, counsel was able to convey to the jury that Roane's family loved and supported him without exposing Roane to the risk of placing family members on the witness stand. During her testimony, Crystal Noakes pointed out Roane's mother and other family members who were in the audience. And, Noakes concluded her testimony by telling the jury that Roane has a "very loving family, very loving attitude. They care about James." Tr. at 3796. In short, the record reflects that counsel reasonably eschewed presenting testimony that stood to do more harm than good. Roane's Claims IV.E.1-2 will be dismissed for failure to demonstrate deficiency or prejudice.

B. Counsels' Failure To Introduce Evidence Of The Conditions The Defendants Would Face In Prison
Tipton V.F.2.b
Johnson IV.B.2,
Roane IV.E.3

Each of the Defendants fault counsel for not presenting evidence regarding the conditions they would face in prison. Even if such evidence were admissible, counsel reasonably chose to forego such tepid evidence in light its potential to expose them to damning evidence and argument from the prosecution. Defense attempts to suggest that the Defendants' confinement was sufficient punishment would permit the prosecution to introduce how the Defendants behaved while confined. Specifically, the Government indicated that both Roane and Tipton had a history of assaultive behavior while incarcerated. The Court had precluded the Government from introducing this evidence because the prosecution failed to include future dangerousness as an aggravating factor

in the death notice. Counsel for Roane had further reason to forego such evidence since he had introduced evidence that Roane preferred jail to his home. Additionally, a defense expert on prison conditions would provide the prosecution with another opportunity to remind the jury that Tipton, Johnson and Roane had a proven inclination to engineer murders from behind prison walls. See United State v. Johnson, 223 F.3d 665, 673-78 (7th Cir. 2000)(noting that it is nigh impossible to prevent inmates from transmitting lethal messages to individuals outside the prison), cert. denied, 122 S. Ct. 71 (2001). Finally, any evidence on the harshness of prison conditions would have permitted the prosecution to compare such conditions to the circumstances of the numerous victims of their crimes, particularly the incapacitated Greene sisters. Accordingly, counsel for the Defendants were not deficient for failing to introduce evidence of the Defendants' prison conditions.[42] Additionally, the Defendants cannot demonstrate prejudice because any mitigating benefit from such evidence was far outweighed by the harmful evidence and arguments that would have accompanied its introduction. See Whitley v. Bair, 802 F.2d 1487, 1494-97 (4th Cir. 1986)(emphasizing court must evaluate the negative aspects of any purportedly omitted mitigating evidence in evaluating prejudice). Accordingly, the above described claims will be dismissed.

C. Tipton's Counsel Failed To Present An Adequate Case In Mitigation
Tipton Claim V.F.2.a

Tipton contends that counsel failed to present sufficient evidence of his dysfunctional family life and his tender side. The record refutes such a claim. Mitigation evidence on this score was presented by Tipton's cousin, Tina Wilkinson, Hans Selvog, a clinical psychologist, and Brenda

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[42] The assertion by Johnson's trial counsel that the failure to introduce this evidence was not the result of strategic or tactical decisions does not alter the Court's conclusion that such an omission was not deficient.

Williams, a family friend. Wilkinson testified that Tipton grew up in a home in which his mother was regularly beaten, first by Tipton's father and later by his mother's live-in boyfriend; that Tipton's mother and her boyfriend were addicted to heroin and used the drug on a daily basis; that Tipton was present when his uncle committed suicide with a shotgun; that Tipton's mother used to punch him; and that Tipton learned to take care of himself because of his adverse upbringing.

Wilkinson's testimony of Tipton's disturbing upbringing was reinforced by Selvog, a clinical social worker who had interviewed Tipton and his relatives. Selvog described at length Charlene Tipton's (Tipton's mother) heroin addiction, including instances where she overdosed in front of Tipton and confined Tipton to the closet while she conducted all night drug parties. Selvog also related that Charlene would discipline Tipton by punching him in the face, and that Charlene was not attentive to Tipton's medical needs. Selvog testified that Tipton left his mother, but that his paternal grandmother, Ruby Tipton, refused to take him in. Thereafter, Tipton moved in with his father's girlfriend, Brenda Williams, in Richmond, Virginia. Tipton was happy to live with Williams but, recognizing that his presence was a financial burden to her, he told her he thought it was best if he moved on.

Brenda Williams then testified that while he lived with her, Tipton got a job, helped around the house and played with her children. Williams confirmed that Tipton left her home because he did not want to be a financial burden to her.

Based on the foregoing testimony, defense counsel argued, inter alia, that the following nonstatutory mitigating factors mitigated against a death sentence for Tipton:

> Tipton was subjected to emotional and physical abuse and neglect as a child and was deprived of parental guidance that was needed; Tipton suffers from frontal lobe brain dysfunction that went untreated

> when he was a child; Tipton was introduced to addictive drugs and alcohol while still a child; Tipton grew up in an impoverished, violent and brutal environment, and was exposed to extreme violence as a child and throughout his life.

Tipton Opening Memo Ex. H. The jury agreed; 10 or 12 jury members found each of the foregoing factors mitigated against a sentence of death and refused to impose such a sentence on Tipton for the murders of Long, Armstrong, and Carter.

In his present claim, Tipton contends counsel was deficient for not calling his mother, grandmother and Victoria Harris. Tipton contends that had counsel called his mother and grandmother as witnesses they would have recounted his terrible childhood and begged for his life, while Harris would testify that Tipton lived with her for a time and she once saw him crying while reading a book about self-image. First, the decision not to call Tipton's mother, or maternal grandmother or Harris is reasonable because their testimony would have been cumulative of the evidence regarding Tipton's dysfunctional family and his sensitive side already heard by the jury. See Bacon v. Lee, 225 F.2d 470, 481-82 (4th Cir. 2000), cert. denied 532 U.S. 950 (2001). Second, Tipton has not supported his assertion that the omitted testimony was qualitatively superior to the presented mitigation evidence. See Neal v. Puckett, 239 F.3d 683, 694 (5th Cir. 2001)(noting court should consider "quality and volume" of omitted mitigating evidence)(citing Williams v. Taylor, 520 U.S. 362, 397-99 (2000)). For example, Tipton has not submitted, affidavits from any of these individuals which demonstrate that they were willing to testify consistent with his allegations. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thirdly, the record suggests that the decision not to call Tipton's mother or Tipton's grandmother was reasonable because they may have tempered the description of Tipton's childhood and their absence would enforce the idea that Tipton had been

abandoned by his family. Selvog indicated that Charlene Tipton and Ruby Tipton(the paternal grandmother) were not cooperative in preparing Tipton's defense. And, Tipton's mother requested Wilkerson to "make me look good" when she testified. Tr. at 3445. Hence, the absence of testimony by Tipton's immediate family emphasized that Tipton had been "abandoned" by his family, Tr. at 3909, 3911, and permitted counsel to bring this point home to the jury by asking "[w]here was his mother . . . . When her son is on trial for capital murder, when he is facing the death penalty, his mother is concerned that she look good. Does that tell you why she was not here." Tr. at 3917. In light of the foregoing, counsel was not deficient nor was Tipton prejudiced by the absence of the witnesses he urges here. Tipton's Claim V.F.2.a. will be dismissed.

D. Johnson's Mental Ability Was Not Accurately Reflected By His I.Q. Test, And, In Fact, Was Below 77

Johnson Claim IV.B.1, Claim XI

Federal law provides that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 21 U.S.C. § 848(l); 18 U.S.C. § 3596(c). The Supreme Court has indicated that "[t]o be classified as mentally retarded, a person generally must have an IQ of 70 or below." Penry v. Lynaugh, 492 U.S. 302, 308, n. 1 (1989)(citing American Association on Mental Deficiency (now Retardation) (AAMR), Classification in Mental Retardation at 11 (H. Grossman ed. 1983)). In 1992, the association revised its classification to identify individuals with an IQ of 75 or below as presumptively retarded. See Tr. at 3690; Atkins v. Virginia, 122 S. Ct. 2242, 2245 n. 5 (2002).

In 1982, based on his performance on the WISC-R I.Q. test, Johnson was found to have an IQ of 88. See Exhibit 14, Johnson's Reply Memo. When he was retested in 1985, Johnson was found to have an IQ of 69-74. Id. Counsel recognized the critical import of evidence that would

demonstrate that Johnson was retarded. Therefore, in preparation for trial, on October 10, 1992, a defense expert, Dr. Cornell, administered a Wechsler Adult Intelligence Scale test ("WAIS test") to Johnson. Based on his performance on that test, Johnson was found to have an IQ of 77. Tr. at 3685.

Dr. Cornell was aware that if Johnson was found to have an IQ of 75 or lower, Johnson might be deemed mentally retarded and not eligible for the death penalty. Therefore, Dr. Cornell rechecked Johnson's scores, saw Johnson a second time, and consulted with colleagues in order to assure that Johnson's score of 77 was accurate. These efforts failed to reveal any evidence that undermined his conclusion that Johnson had an IQ of 77 and was not mentally retarded.

In Claim XI, Johnson contends his execution is barred because he is mentally retarded. In support of this claim, Johnson directs the Court to a paper published in 1996, subsequent to his trial, that states,

> Individuals appear to gain approximately 3-5 IQ points over a ten year period. Since the WAIS-R was published in 1981, this inflation factor could mean that the average IQ could be as high as 105-107 points rather than the accepted value of 100.

See Johnson Opening Memo Ex. 7, at 2, The Psychological Corporation, An Introduction to the Wechsler Adult Intelligence Scale, 3ed, (WAIS-III), Tulsksy, Phd.(1996)). In support of the foregoing proposition, the 1996 paper cites to two articles published in 1984 and 1987.[43] However, Dr. Cornell's testimony that he checked his finding and consulted colleagues before concluding that Johnson was not mentally retarded belies the suggestion that Dr. Cornell's analysis did not account

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[43] Flynn, J.R., The Mean IQ of Americans: Massive Gains From 1932-1978, Psychological Bulletin 95, 29-31 (1984); Flynn, J.R., Massive IQ Gain in 14 Nations: What IQ Tests Really Measure, Psychological Bulletin 101, 171-191 (1988).

for possible variations in his testing instrument. Nor has Johnson tendered any testimony from Dr. Cornell expressing doubt about his prior conclusion that Johnson is not mentally retarded. Finally, in preparation for his § 2255 motion, Johnson was granted another full opportunity to demonstrate that he is mentally retarded. See Clerk's Record #700 A & B, 701. Thereafter, Johnson rejected the Court's invitation to submit any new evidence of his mental retardation. See Clerk's Record # 870-874. Hence, the record before the Court demonstrates that Johnson is not mentally retarded. Claim XI will be dismissed.

Undeterred by his own evidence that indicates he is not mentally retarded, in Claim IV.B.1, Johnson contends that counsel was deficient for failing to argue at sentencing that Johnson could not or at least should not be executed because Johnson was mentally retarded. Johnson contends that counsel was deficient for not realizing that Johnson's score on his latest WISC-R IQ test overstated his IQ. In support of this assertion, Johnson tenders an affidavit from trial counsel, who swears that he was not aware of any studies that suggested the IQ tests taken by Johnson may have over estimated Johnson's IQ. Johnson asserts that in light of his 1985 IQ test indicating he had an IQ of 69-74, and the 1992 test that showed Johnson was within a few points of being considered mentally retarded, counsel should not have relied on his expert's conclusion that Johnson was not retarded. Johnson asserts that counsel should have checked behind Dr. Cornell and discovered the studies that suggested the WAIS-R test inflated IQ scores and thereafter argued to the jury and the Court that Johnson was mentally retarded.

With regard to the competency of counsel's performance, the critical question here is whether, in light of the information described above, counsel's reliance on Dr. Cornell's evaluation of Johnson's IQ was reasonable. "[C]ounsel has a duty to make reasonable investigations or to make

a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984). In this regard, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. Hence, where counsel is presented with a mental health report that refutes prior indications that his client had a potential mental health defense, counsel generally is not required to "second guess the contents of [the] report . . . . [and] spend valuable time pursuing what appeared to be an unfruitful line of investigation." See Wilson v. Greene, 155 F.3d 396, 403 (4th Cir. 1998)(rejecting inmate's claim that counsel should have pursued mental health defenses where psychological report indicated inmate was competent to stand trial and not suffering from a significant mental disease or defect at time of the crime). Thus, the courts have consistently upheld as reasonable defense counsel's decision to abandon a particular mental health defense where expert examination determines such a defense is unfeasible. See Pruett v. Thompson, 996 F.2d 1560, 1574 (4th Cir. 1993); Washington v. Murray, 952 F.2d 1472, 1482 (4th Cir. 1992)(concluding counsel was not deficient for failing to suspect that subsequent experts would disagree with the diagnosis provided by the defense expert prior to trial).

Johnson fails to direct the Court to any laxity that should have caused counsel to doubt Dr. Cornell's conclusion that Johnson was not mentally retarded. Indeed, the record demonstrates that Dr. Cornell reached that conclusion after a careful analysis and consultation with colleagues. In light of Dr. Cornell's stated diligence and the standard for competent performance recited above, counsel was not deficient for failing to discover any purported overestimate of Johnson's IQ.

Johnson also suggests that despite Dr. Cornell's conclusion that Johnson was not mentally retarded, counsel should have nevertheless argued to the jury that Johnson was mentally retarded.

Such a tactic fails to account for the loss of credibility that would flow from counsel arguing that his client was mentally retarded when his own expert disputed that conclusion. Instead, at sentencing, counsel conceded that Johnson was not mentally retarded but that the same lack of blameworthiness that had led Congress to preclude the execution of the mentally retarded, warranted a life sentence for Johnson. In this vein, counsel emphasized that Johnson missed the technical definition of mental retardation by a mere two points on his latest IQ evaluation and suffered from severe learning disabilities. Such a tactic was entirely reasonable. Johnson's Claim IV.B.1 will be dismissed.

XII. INEFFECTIVE ASSISTANCE OF COUNSEL AS CAUSE EXCUSING PROCEDURAL DEFAULT OF PROSECUTORIAL MISCONDUCT CLAIMS

Tipton V.B.3.d.v, V.F.1.j
Johnson II.C.4.f, IV.A.8,

In the above listed claims, Tipton and Johnson generally fault counsel for failing to stop the purported onslaught of prosecutorial misconduct. In order to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that: " (1) the prosecutor's remarks and conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial." United States v. Golding 168 F.3d 700, 702 (4th Cir. 1999)(internal quotations omitted). Here, Tipton and Johnson contend that both of the above components were satisfied because during the guilt phase the prosecutors vouched for their witnesses, suggested that a government witness had passed a polygraph test, introduced inadmissible evidence that the Defendants were threats to the lives of witnesses, improperly emphasized that Tipton and the other defendants did not testify, treated Tipton and the other Defendants as a group, and duped the trial court into believing witnesses were in the witness

protection program in order to deny the Defendants access to the witnesses.[44] Of course, the question here is not whether the prosecution engaged in misconduct, but whether that misconduct, either individually or collectively, was so egregious that counsel's failure to challenge the misconduct at trial or on appeal denied Tipton and Johnson the right to effective assistance of counsel. It is to that question that the Court now turns.

A. Counsel Failed To Object To The Testimony Of Several Cooperating Witnesses Whose Testimony Violated 18 U.S.C. § 201(c)(2).

Tipton V.F.1.k.	Defaulted Tipton V.E.15
Johnson	Defaulted Johnson V.M
Roane IV.F	Defaulted Roane I.d.[45]

These claims are grounded in the now vacated panel decision in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), vacated on reh.'g en banc, 165 F.3d 1297, 1299 (10th Cir. 1999). Title 18 U.S.C. Section 201(c)(2) does not prohibit the United States from offering leniency in exchange for testimony, see United States v. Richardson, 195 F.3d 192, 196-97 (4th Cir. 1999), or "from acting in accordance with the long-standing practice and statutory authority to pay fees, expenses, and rewards to informants even when the payment is solely for testimony, so long as the payment is not for or because of any corruption of the truth of testimony." United States v. Anty, 203 F.3d 305, 311 (4th Cir. 2000). None of the Defendants have demonstrated that the United States

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[44] The Defendants' claims that the prosecution engaged in misconduct by introducing testimony without foundation and otherwise engaged in misconduct with regards to the CCE charges were rejected supra at Section V.C and V.D . Tipton and Johnson also assert the prosecution engaged in the following misconduct at sentencing: the prosecution made unsupported argument regarding the conditions Johnson and Tipton would face in prison; the prosecution misled the jury into believing it had a duty to impose the death sentence; the prosecution argued that sentencing should be based on deterrence. The claims that the prosecution engaged in misconduct at sentencing are addressed infra at. XII.C.4.

[45] Roane suggests that novelty rather than ineffective assistance of counsel excused his default.

offered a witness inducements "for or because of any corruption of the truth of [the] testimony." Id. Accordingly, the Defendants cannot demonstrate that counsel were deficient or that they were in any way prejudiced by the failure to raise the claim. The above described claims will be dismissed.

B. Purported Prosecutorial Misconduct With Regards To The Witness List
Tipton Defaulted V.E.5.
Roane Defaulted I.a

Tipton and Roane assert that "the prosecution improperly duped the trial court into permitting it to withhold its witnesses' addresses because they ostensibly had been placed in the federal witness protection program when in fact they had not." Tipton's Index of claims at 15-16. This claim lacks a basis in fact. The record before the Court indicates that the prosecution clearly indicated on the witness list that some witnesses were actually in the "Witness Protection Program" while others were merely "in protective custody" or "in protection." Clerk's Record # 393 at 2; # 416. The Court's Order of January 5, 1993 recognized the distinction between witnesses in protective custody or protection and those formally in the Witness Protection Program. Clerk's Record # 397 at 1. The order did not direct the United States to provide defense counsel with any access to witnesses listed in the "Witness Protection Program" while the United States was required to make arrangements to permit defense counsel to meet with the witnesses "in protection" or "protective custody." Id. Nevertheless, the record indicates that the government provided defense counsel with an opportunity to speak with all witnesses in any protective status prior to trial. However, the majority of witnesses declined to speak with defense counsel. On appeal counsel claimed that the Court erred by failing to provide him with addresses of the witnesses in the Witness Protection Program or some other form of protection. The Fourth Circuit rejected that claim noting that "[a]ccess was ultimately

provided, and though appellants quarrel with its timing and its circumstances, they have offered nothing indicating that they were actually harmed by the delay." United States v. Tipton, 90 F.3d 861, 889 (4th Cir. 1996). Thus, counsel reasonably eschewed pressing the claim urged here by Roane and Tipton because the prosecution did not engage in any misconduct and they cannot demonstrate how they were harmed by the prosecution's conduct. Additionally, Roane and Tipton allege that this claim is not defaulted because the facts supporting this claim were not available at the time of his appeal. They fail to identify any recently discovered facts that support such an allegation of cause. Accordingly, the above described claims are defaulted and will be dismissed.

C. Purportedly Improper Comments By The Prosecution

Even when the prosecution makes inappropriate remarks, a defendant is not entitled to relief unless the offending remarks or conduct "prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial." United States v. Adam, 70 F.3d 776, 780 (4th Cir. 1995). The following factors are relevant to that inquiry:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters . . . .(5) whether the prosecutor's remarks were invited by improper conduct of defense counsel . . . , and (6) whether curative instructions were given to the jury.

See United States v. Wilson, 135 F.3d 291, 299 (4th Cir. 1998)(internal quotations and citations omitted). "These factors are examined in the context of the entire trial, and no one factor is dispositive." Id. However, the prosecutorial misconduct claims are defaulted and Tipton and Johnson must demonstrate cause and prejudice to excuse their default. As the discussion below

reflects, while some of the prosecution's comments were improper, in no single instance (or collectively), do the aforedescribed factors so favor a finding of prejudice that counsel was deficient for failing to pursue the claim of prosecutorial misconduct.

1. The Prosecution Introduced Inadmissible Evidence Through Which They Vouched That The Defendants Were Threats To The Lives Of The Witnesses

Tipton Defaulted V.E.4.
Johnson Defaulted V.B

Johnson and Tipton complain that the Government improperly elicited testimony from Johnny Byrd, Hussone Jones, Denise Berkley, Denis Moody, Valerie Butler, Robert Davis, Stanley Smithers and Montez McCoy regarding their protective custody status to suggest to the jury that the Defendants posed an ongoing threat to the lives of these witnesses. "The Government may appropriately introduce evidence of their witnesses' participation in the Witness Protection Program in order to counter any inference of improper motivation or bias and, under some circumstances, may present this evidence on direct examination in anticipation of a defense attack upon the witnesses' credibility." United States v. Melia, 691 F.2d 672, 675 (4th Cir. 1982). The key question on this score is whether the prosecution was not merely using such testimony to rebut, "the appearance of special treatment and improper motivation" but was unfairly exploiting the inference that fear of a particular defendant caused the witness to seek the state's protection. Id. at 675-6.

In the Defendants' opening statements and questions on cross-examination, defense counsel suggested that the Government's principal witnesses were testifying because they were simply "bounty hunters" seeking financial rewards and personal gain in exchange for their testimony. See, e.g., 837, 849-54. Thereafter, the Court refused the Government's request to allow its witnesses to testify as to their protective custody status, unless and until, the defense opened the door on cross-

examination. Thus, when the defense counsel elicited that the Government was paying Hussone Jones' rent, on redirect Jones explained that he was in danger and had been placed in the Witness Protection Program. Denise Berkley's testimony about which the Defendants currently complain followed a similar sequence of events.[46] Although Berkley and Jones mentioned concerns for their safety, the prosecution did not attempt in either case to capitalize on these comments.

However, with respect to Denis Moody, Valerie Butler, Robert Davis[47], Stanley Smithers, and Montez McCoy, the prosecution jumped the gun and on direct examination elicited testimony about their participation in the Witness Protection Program or about perceived threats to their safety. On direct examination, the prosecution asked Davis why he was testifying, to which he responded, "[m]y brother and sister got killed. And I felt I would be next." Tr. at 1906-7. On direct examination, Stanley Smithers explained that a state court had continued a show cause against him because he was currently in the Witness Protection Program. Tr. at 2099. On direct examination, eight year old Montez McCoy testified that the Marshals had moved his family to New York. Tr. at 2276. On direct examination, Valerie Butler explained that her children were not living with her because she was in the Witness Protection Program. Tr. at 2686. Although the above comments were technically improper and intentionally introduced, its potential for unfair prejudice was partly mitigated by the jury's understanding that the prosecution was countering the defense's repeated

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[46] On cross-examination, the defense elicited from Denise Berkley that the United States had relocated her and paid the majority of her bills. Defense counsel further suggested by the tenor of his questioning that the promise of such support was made as an initial inducement to get Berkley to cooperate. On redirect, Berkley explained that she received support because she feared for her safety and had asked to be placed in the Witness Protection Program.

[47] On cross-examination, defense counsel did attempt to impeach Davis regarding the benefits he had received in exchange for his testimony. Tr. at 1933-34, 1952.

assertion that the witnesses were simply bounty hunters out for personal gain. See United States v. Young, 470 U.S. 1, 12-13, 17 (1985). Moreover, any impression that the Defendants posed a threat to the lives of the witnesses was not the result of the isolated comments cited above but the abundance of properly admitted evidence reflecting that Johnson and Tipton did not want to leave any untrustworthy witnesses to their crimes. For example, Montez McCoy's comment that he had been moved to New York can hardly been deemed to have unfairly prejudiced the defense in light of Butler's testimony regarding a three way phone call between Tipton, Johnson and Roane during which Tipton had told Roane and Johnson that they were dumb for not killing Montez McCoy and the other witnesses to the Torrick Brown murder. Roane then responded that he wanted to kill Martha McCoy and people were trying to locate her for that purpose. Tr. at 2728-29. Butler's testimony in this regard was corroborated by Hussone Jones who testified that he heard Tipton say that Roane "should go back and get the kids" because there "[c]ouldn't be a witness" if there were "[n]o survivors." Tr. at 1580. Similarly, the record reflected that Chiles and Talley were murdered in part to stop them from testifying. Sterling Hardy testified that, while in jail, he told Lance Thomas that he was worried that Linwood Chiles was going to testify "against everybody." Tr. at 2191. Thomas told Hardy not to worry because Tipton and Johnson would "take care of" Chiles. Tr. at 2191. And, Johnson told Charles Townes he killed Chiles because he thought Chiles was talking to the police. Tr. at 1191-92; see Tr. at 2707. The record also suggests that Talley was murdered because Tipton and Roane thought he was involved with the police. Tr. at 1566-67. In summary, it would be nigh impossible to demonstrate unfair prejudice from the brief references to the safety concerns of witnesses because the Defendants were on trial for murdering several potential witnesses. The record was replete with admissible evidence of their efforts to eliminate anyone who

posed a threat to the continued vitality of their drug enterprise and the defense invited many of the prosecution's closing comments by its repeated references to the witnesses as bounty hunters. Tipton and Johnson have not demonstrated that counsel were or that they were prejudiced by the failure to pursue the issue at trial or on appeal. The above listed claims will be dismissed.

2. The Prosecutors Suggested That A Government Witness Had Passed A Polygraph Test

Johnson Defaulted V.F.
Tipton Defaulted V.E.8

On redirect examination of Jerry Gaiters, the prosecutor asked Gaiters if he fully cooperated with the police with respect to the murder of Katrina Rozier and did everything that was requested of him, "including taking a test." Tr. at 2428. Gaiters responded yes to each of these questions. Id. Counsel objected and moved for a mistrial. Id. The Court sustained the objection but denied the motion for a mistrial.

The Government concedes, as it must, that the reference to the polygraph was deliberate and improper. However, counsel reasonably eschewed requesting a specific curative instruction since such an instruction could likely draw more attention to Gaiters' ambiguous remark. Nor does this single reference to a "test," pertaining to the uncharged criminal conduct of the murder of Rozier, provide counsel with a strong claim for relief. See United States v. Tedder, 801 F.2d 1437, 1445 (4th Cir. 1986)(rejecting request for mistrial because brevity of polygraph remark without reference to results of test and witness' lengthy examination mitigated potential for prejudice). Hence, appellate counsel's failure to raise the issue on appeal was not deficient. See Plath v. Moore, 130 F.3d 595, 600-01 (4th Cir. 1997)(concluding petitioner could not demonstrate prejudice flowing from counsel's failure to object to brief reference to polygraph exam where results of exam were not mentioned and jury had ample opportunity to assess the witness' credibility); see also Arnold v. Evatt, 113 F.3d

1352, 1363 (4th Cir. 1997). Accordingly, the above described claims will be dismissed.

3. Purported Improper Remarks By the Prosecution During The Guilt Phase Arguments

a. Counsel were deficient for failing to object to prosecutor's improper closing arguments regarding the supervision element

Johnson II.C.4.d — Defaulted II.C.3.b
Tipton V.B.3.d.(iii) — Defaulted V.B.3.c.(ii)

After recapping the Government's evidence on the continuing series element, the prosecutor went on to the third and fourth elements[48] where he stated:

> The next thing we must have proven to you in order to find them guilty of a CCE is that it was undertaken with five or more people acting in conjunction. And, in deciding this remind yourself of the testimony of Gregg Scott about the New York Boyz. There were 30 or so New York Boyz operating in Trenton, each of whom recruited to themselves workers. In Richmond, when the New York Boyz came south with "Whitey," you had the following people, at least, who were working with them in the sale or distribution of cocaine. You had Denise Berkley, Priscilla Greene, Curt Thorne, Linwood Chiles, Jerry Gaiters, Sterling Hardy, "Papoose" Davis, Hussone Jones, Charles Townes, "Man Man," Maurice Saunders, Antwoine Brooks. You had the people from Charles City that were testified about. You had Pam Williams, Charlotte Moore, Greg Noble, Sam Taylor, and a number of others you have heard testimony

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[48] In order to convict a defendant of engaging in a continuing criminal enterprise the Government must prove:

> (1) defendant committed a felony violation of the federal drug laws; (2) such violation was part of a continuing series of violations of the drug laws; (3) the series of violations were undertaken by defendant in concert with five or more persons; (4) defendant served as an organizer or supervisor, or in another management capacity with respect to these other persons; and (5) defendant derived substantial income or resources from the continuing series of violations.

United States v. Ricks, 882 F.2d 885, 890-91 (4th Cir. 1989).

about.[49]

So that aspect of the CCE is also very clearly proven in this case. That is not an issue.

What is an issue -- let me back up as to the five or more people. You need not find that everyone of these people charged with the CCE, and charged with the CCE are "Whitey," "C.O." and James Roane, you need not find that each and everyone one of these people supervised five or more persons themselves. You need only find as a group, there were five or more people involved in the distribution of cocaine, [hereinafter the **first comment**] just here in the City of Richmond.

But what will be an issue and what you do need to determine in order to determine that indeed a CCE was operated by these people, Continuing Criminal Enterprise was operated by these people, is whether "Whitey," "C.O.," and "J.R." occupied a position of organizer or supervisor. And I suggest to you in that regard, the testimony is also clear and unequivocal. They came down with their source of supply from New York, their source of cocaine, and they orchestrated, organized the people we have already mentioned to you in a distribution outlet, a distribution network. Each and every witness who took that stand testified remarkably consistently concerning the relationship of one with another; that "J.R.," "O," and "Whitey," "V" were partners or bosses; that they were the people who organized the workers, who went out and recruited the workers, who supplied the workers with the cocaine, and that those workers went forth and sold their cocaine on the streets of Richmond. That's all that is required by the law. [the **second comment**] It is not required by the law, as will be argued, I suggest, that they need to provide explicit directions in and orders to each and every one of the people who sold cocaine for them. Although there has been testimony that indeed they supplied directions and orders to each and everyone of these people, that is not necessary for you to find them guilty of operating a Continuing Criminal Enterprise. The language is clear there. All you need to find is that they organized people. And indeed the evidence is clear and unequivocal that they organized a number of people here in the City of Richmond to sell drugs.

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[49] Johnson and Tipton claim that as a matter of law none of the listed individuals were capable of being a CCE supervisee. As discussed in Section V, the Defendants cannot demonstrate any prejudice on this issue because the jury was properly instructed on the supervision element and there was an abundance of evidence supporting the conclusion that Berkley, Thorne, Gaiters, Chiles, Davis, Jones, Townes, Saunders and numerous others were supervisees.

Tr. at 2983-86. The Tipton and Johnson argue that the prosecutor's statements misstated the law and encouraged the jury to convict the Defendants without proof that each Defendant acted as a supervisor or organizer with respect to five or more persons. Additionally, Tipton and Johnson assert that counsel should have objected to the following argument in rebuttal which they contend was inappropriate because the prosecutor sought to avoid the issue of supervision by focusing on inflammatory issues and suggesting that because the case involved drug distribution the jury should convict the Defendants.

> My colleagues have told you and told you and told you how there is no organization here. There is no management. There is no supervision. They say all those things have to be done. It is not true. [the **third comment**] Judge Spencer will tell you what the law is and I will suggest to you the law is that it only requires a person to organize, to supervise or to supervise five or more people in a criminal activity. Mr. Cooley's little cute WonderBread-Safeway joke was interesting yesterday, but it didn't have anything to do with what we are about. Because we are talking about illegal crack cocaine. We are talking about killings. And we are talking about the furtherance of that killing that was done for the furtherance of the conspiracy. The conspiracy to distribute crack cocaine and to make money. [the **fourth comment**] It is not about the legal bread business or Safeway. It is a good analogy, but it does not make any difference. We are talking about apples and oranges. We are talking about a criminal enterprise and a criminal nature. He is talking about a legitimate business. [the **fifth comment**]

Tr. at 3187-88.

Taken in context, the second and third highlighted comments do not mislead the jury as to the supervision element. Rather, these comments simply remind the jury that the supervision element is disjunctive and the Government satisfies the element by demonstrating that the Defendant organized or managed or supervised five or more persons. The fourth and fifth comments were a fair response by the prosecutor to counsel's analogy that there was no supervision because their

relationship to the workers was analogous to the Wonderbread-man who simply delivers his bread to the grocery store. Moreover, "the question we have to ask is not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection." Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). see United States v. Young, 470 U.S. 1, 13 (1985). Here, counsel reasonably eschewed objecting to the second through fifth comments because they were sufficiently within the bounds of fair argument.

Although the first highlighted comment is not an accurate statement of the law, Tipton and Johnson were not prejudiced by the absence of an objection. As noted previously, the Court instructed the jury that the supervision element required the Government to prove that each defendant individually supervised or organized five individuals. Tr. at 3211-12. The Court repeatedly instructed the jury that "your source as to the law is the Court,"not the lawyers. Tr. at 887, see also Tr. 758-59, 972, 3193-95, And, the prosecutor reiterated that instruction.

> The Court will instruct you as to what the law is. What I say is the law, what any one of these counsel says is the law, is not necessarily what the law is. What the Court instructs you that the law is is what the law is. What the Court tells you is the law is the law that you must follow.

Tr. at 2961.[50] The Court's instructions, and the prosecutor's admonitions foreclose any suggestion that the jury applied the prosecution's single inaccurate statement of the law, rather than the appropriate instruction supplied to them by the Court. Accordingly, neither Tipton nor Johnson have demonstrated that they were prejudiced by counsel's failure to take action with respect to the first

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[50] The prosecutor prefaced his CCE argument with a reminder to the jury that "the Court is going to apprize you of what the law is." Tr. at 2982.

comment. The above listed claims will be dismissed.

b. The prosecutors misled the jury by vouching (often in inflammatory terms) to their personal belief in the Defendant's guilt and the veracity of the prosecution witnesses

Johnson Defaulted Claim V.A
Tipton Defaulted Claim V.E.3

It is improper for a prosecutor to vouch for, or bolster the testimony of, its own witnesses. United States v. Lewis, 10 F.3d 1086, 1089 (4th Cir. 1993). "Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury." United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997). In asserting that appellate counsel were deficient for failing to pursue the claim urged here, Tipton and Johnson overstate the occasions the prosecutor engaged in impermissible vouching and ignore the abundance of curative instructions provided by the Court.

During closing argument, the prosecution made the following highlighted comments, which Tipton and Johnson assert were improper vouching.

> Closing statement is . . . to give us an opportunity to argue to you what we believe, what inferences we believe you should draw from the evidence . . .

Tr. at 2956-7.

> There is no 848 murder here, no murder in furtherance of a Continuing Criminal Enterprise charged here, because we know, it was murder over a woman. We know that Robin Cooper was the cause of that murder of Torrick Brown . . . [w]e also know that despite the fact that that murder occurred . . . and was done by James Roane other members of the conspiracy joined him to help that murder.

Tr. at 3003-4. The mere use of the words "we believe" or "we know" does not constitute improper

vouching or bolstering because it was not done to suggest a personal belief in the credibility of a particular witness or imply to the jury that information known to the government but not placed before the jury corroborates the prosecution's version of events. See United States v. Adam, 70 F.3d 776, 780 (4th Cir. 1995) (noting that prosecutor's use of the phrase "I think" in an innocuous, conversational sense "d[id] not suggest an attempt to replace the evidence with the prosecutor's personal judgments"). Indeed, in both of the instances complained of above, the prosecutor's argument in the surrounding text directed the jury to consider the evidence as the barometer for judging what it should know or believe.[51]

The highlighted remark set forth below, though perhaps a misstep by the prosecutor, did not provide Johnson or Tipton with a viable basis for challenging their convictions.

> There is no evidence, ladies and gentleman, with the exception of Hardy, Sterling Hardy and Gaiters, that any of the people brought forth by the government and placed in this witness stand to provide evidence to you knowingly and willingly engaged in a murder . . . .
>
> * * * *
>
> . . . the government has told these people that the words that they give to you from that witness stand will not be used to prosecute them, with the exception of Hardy and Gaiters, who were knowingly involved in murders by their own testimony, who are facing sentencing in this Court, by this Judge, for their involvement in those murders. Ladies and gentlemen, again I remind you, you cannot penetrate a conspiracy without some of the participants in the conspiracy cooperating with you. It is not an exact science. Use-immunity agreements had to be given. We feel like we gave use immunity only to those people who were not the murderers in this case. There has been no evidence that anyone other than Richard Tipton, Cory Johnson, Lance Thomas, Sterling Hardy and Jerry Gaiters were involved in the murders.

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[51] Nor was the prosecution's references to the portions of the witnesses' plea agreements that required them to testify truthfully good fodder for an appeal. Tr. at 2968; see United States v. Henderson, 717 F.2d 135, 137-8 (4th Cir. 1983); Jenner v. Class, 79 F.3d 736, 739 (8th Cir. 1996).

Tr. at 2966-68. While the comment may be read to suggest factors not presented to the jury played a part in the distribution of use immunity, the unfair prejudicial effect was marginal because (1) it was isolated; (2) it did not deflect any plausible suggestion of guilt from one of the witnesses[52] onto the defendants; (3) the evidence of Johnson and Tipton's guilt of the murders was overwhelming; and, (4) the jury was instructed that comments of the attorneys were not evidence and that "the testimony of one who provides evidence against a defendant . . . for immunity from punishment . . . must always be weighed by the jury with greater care and caution than the testimony of an ordinary witness . . . . such testimony is always to be received with caution and weighed with great care." Tr. at 3199-32000.

Indeed, the protective hedge of instructions issued by the Court provided a strong disincentive to appellate counsel hoping to demonstrate prejudice flowing from any improper comments by the prosecution. See Bennet v. Angelone, 92 F.3d 1336, 1346-7 (4th Cir. 1996); United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994). At the outset of the trial, the Court explained that:

> Certain things are not evidence and it is important that you understand what is not evidence . . . . First of all, statements, arguments, questions by lawyers are not evidence. Objections to the questions are not evidence . . . . You should not be influenced by the objection or the Court's ruling on it. If the objection is sustained, ignore the question. If the objection is overruled, treat the answer like any other.

Tr. at 759. After opening statements, the Court admonished the jury that,

> [t]he evidence in this matter is what comes from the witness stand,

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[52] Although the defense counsel tried to implicate Byrd in the Talley death, as reflected supra, Tipton's guilt on that matter was overwhelming.

> the exhibits, and any stipulations. The statements, comments, arguments by lawyers are not evidence and should not be accepted as such. A classic example is that we had a couple of objections.

Tr. at 887-88. Finally, after closing arguments in the penalty phase, the Court instructed the jury:

> it is your duty to determine the facts. And in so doing, you must only consider the evidence that I have admitted in the case. The term 'evidence' includes the sworn testimony of the witnesses and the exhibits admitted into the record, and any stipulations or agreements between the parties.
>
> Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. . . . What the lawyers say is not binding upon you.

Tr. at 3194-95. Given the instructions provided to the jury and the evidence arrayed against their client, counsel wisely refrained from pursuing the claims urged here by Tipton and Johnson.

For example, Tipton and Johnson fault counsel for failing to raise on appeal an exchange where the prosecution purportedly vouched for Gaiters by the manner in which it asked questions.[53] In light of the fact the objection was sustained and that Woody's subsequent proper testimony corroborated Gaiters' account, and the Court's instructions, any unfair prejudice to the defense was unmeasurable.[54] Next, Johnson and Tipton contend that the prosecution engaged in misconduct

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[53] The prosecution asked Detective Woody whether Gaiters "is telling the truth" regarding the Armstrong, Long, and Carter murders. Tr. at 2442-43. Counsel objected and the objection was sustained. Tr. at 2443. Detective Woody then testified that Gaiters had consistently described the motive and the manner in which Johnson had committed the triple murder. Tr. at 2443.

[54] The defense later called Woody as a witness. In response to defense questions, Woody testified that in consideration for information, the police had dropped a number of petty charges against Gaiters. Counsel asked whether a number of more serious charges including a murder charge, a rape charge and a robbery charge against Gaiters also had been dropped. Woody responded affirmatively to this question. On cross-examination, the prosecution asked if the murder, rape and robbery charges were dismissed in consideration for cooperation or because the "investigation revealed that he had not committed" the particular crime. Tr. at 2855. Woody responded that the charges were dismissed based on Gaiters' apparent lack of culpability rather

when it asked Roane's psychiatric expert whether he considered Roane to be "a virtual killing machine." Tr. at 3770. The Court sustained the objection. While the prosecution's question was improper, appellate counsel for Johnson and Tipton were hardly deficient for failing to pursue the issue on appeal; the question was not directed to their client, the objection was sustained, and the Court instructed the jury to ignore a question if any objection is sustained. The Defendants also complain about the manner in which the prosecution twice phrased its objections. Even if such remarks were improper, they were hardly worthy of appellate consideration. See Tr. at 1983, 2053-54.

Finally, Johnson and Tipton complain that the prosecution engaged in misconduct during the sentencing phase when twice during opening argument, and once during closing argument he referred to them as "mass murderers." Counsel reasonably abstained from appealing the issue because that appears to be a fair description of their clients. In light of the instructions provided, the context of the purportedly improper comments and the abundance of evidence, counsel reasonably decided not to appeal the issues urged by Tipton and Johnson in Claims V.E.3 and V.A and such claims will be dismissed.

c. The prosecutors misled the jury by treating the Defendants as a group, rather than as individuals

Tipton Defaulted Claim V.E.9
Johnson Defaulted Claim V.G.

During guilt phase closing arguments, the prosecution told the jury that,

> What happened on January 14? James Roane, Cory Johnson, and Richard Tipton and 'V' Mack get Pam Williams to go buy this Intratec and the AA Arms handguns. What do they do with these guns next? They take them to 'Papoose' Davis' house . . . [Tipton's

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than for any consideration for his cooperation.

> counsel's objection to the use of 'they' overruled] . . . They come up there that day on January 14th, get the guns, and go take a life, that of Peyton Maurice Johnson. They come back and brag about their marksmanship.

Tr. at 3176. Johnson contends that the prosecutor misled the jury because there was no evidence linking him to Williams' purchase of the handguns and Tipton contends there is no evidence that he shot Peyton Johnson. Johnson is simply wrong. Although Roane and Thomas accompanied Williams to the gun shop, Johnson gave Williams crack cocaine in partial payment for her aid in obtaining the guns and told Williams' boyfriend that Williams was required to complete the transaction when she attempted to back out of purchasing the guns.

Although it may be reasonably inferred that Tipton approved of the murder of Peyton Maurice Johnson, it was imprecise and sloppy for the prosecution to suggest, during guilt phase closing argument, that Tipton had actually shot Peyton Johnson.[55] However, in light of the abundance of evidence of guilt, the precise verdict forms, and Court's instructions[56], appellate counsel would have had an impossible task in demonstrating their clients were prejudiced by the

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[55] Tipton and Johnson also restate their complaint, rejected above (see supra first comment and fifth comment Section XII.C.3.a) , that the prosecutor misstated the law when he suggested the supervision element was satisfied if the Defendants had collectively supervised five persons.

[56] At the beginning of the trial, the Court instructed the jury that, "Each defendant's case should be considered independently." Tr. at 35. After opening statements the Court stated, "one final thing before I make the admonishment and let you go: the defendants are charged in a number of Counts, and there are obviously four defendants. Each defendant is entitled to individual consideration. They cannot be grouped. When the time comes for you to decide guilt or innocence, you will consider each defendant individually, as it relates to each count in which that defendant may be charged." Tr. at 888. And the jury was admonished in closing instructions that "the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty should not control your verdict as to any other offense or any other defendant." Tr. at 3231.

prosecutor's occasional collective references to the Defendants. Tipton and Johnson's challenges to the prosecutor's collective references during the sentencing phase are addressed below.

4. Alleged Improper Comments By The Prosecution During The Penalty Phase

a. The prosecutors misled the jury by treating the Defendants as a group, rather than as individuals

Tipton Defaulted Claim V.E.9
Johnson Defaulted Claim V.G.

One of the nonstatutory aggravating factors was that the defendant was a knowing and willing member of a conspiracy which had as one of its goals the murder of individuals other than those for which the defendant was charged.[57] In opening statement at the sentencing phase, the prosecution suggested this factor was satisfied because, "it is clear that each one of them intended to kill other people to hide this conspiracy. They intended to kill Martha McCoy and her children because they survived and were witnesses." Tr. at 2228. "Remember under the law of conspiracy, they are guilty of each and every one of the acts that they did together."Tr. at 3330.[58] Contrary to Tipton and Johnson's suggestion, the underlined comment was permissible because it does not encourage the jury to collectively assign blame based on membership in a conspiracy but based on jointly committed actions.

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[57] To support that factor, the Government reintroduced the guilt phase evidence. The Government also presented further evidence that Johnson, Tipton, and Roane, while incarcerated, had planned to kill several witnesses: Johnson told another inmate he planned to kill Detective Woody; Roane told Douglas Cunningham, Martha McCoy's boyfriend, there was $10,000 "hit" on McCoy's life if she testified, and that McCoy's uncle "was going to be the next one," Tr. 3361; Tipton told Cunningham, "that something was going to happen to me if I was to testify," Tr. at 3359; and Willie Seward overheard Tipton using the phone to tell someone that "he wanted Detective Woody killed . . ." Tr. at 3385.

[58] Shortly thereafter, the prosecutor stressed that each defendant was "due individual consideration in your rendering of your verdict." Tr. 3332.

Next, Johnson and Tipton contend that the prosecutor made a number of collective references in closing argument that were improper. "They deserve the maximum punishment, ladies and gentlemen, because in addition to their drug dealing, they chose to kill ten people." Tr. at 3903; "We have been in trial for five weeks, the same length of time within a week that these three people killed ten –[59]." Tr. at 3945. "They know how to do these crimes." Tr. at 3948. Appellate counsel did not ignore these above comments by the prosecution. Rather, appellate counsel cited these comments to support their primary challenge to the Defendants' sentence; that the failure to conduct separate penalty hearings denied them individualized consideration. See Roane App. Brief at 120. In rejecting that argument the Fourth Circuit concluded that "the court's frequent instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk to acceptable levels." United States v. Tipton, 90 F.3d 861, 892 (4th Cir. 1996)(noting any risk of unfair prejudice was diminished by the separate packets of penalty verdict forms for each Defendant and the Court remonstrances to the Government to "be specific" and to "do it individually" when objections were made). Appellate counsel's use of the prosecution's improper collective references to support his challenge to the joint penalty hearing, rather than in support of a separate claim of prosecutorial misconduct, reflects effective appellate advocacy. Moreover, the Court's repeated instructions foreclose any suggestion of prejudice.[60] Hence, Johnson and Tipton's assertion that ineffective assistance of counsel excuses their default is rejected because they have not demonstrated

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[59] At this point, Tipton's counsel objected to the use of "these" and the amount of murders. The Court sustained the objection.

[60] The Court's closing instructions repeatedly emphasized that each defendant was to be judged individually. Tr. 3985-86, 4002. The Court repeated during closing instructions that the arguments of lawyers were not evidence and it is the juror's recollection of the evidence that controls. Tr. at 3996.

that counsel was deficient or that they were prejudiced. Tipton's Claim V.E.9 and Johnson's claim Claim V.G will be dismissed.

b. The prosecutor misled the jury by improperly emphasizing that the defendants did not testify
Defaulted Tipton V.E.7
Defaulted Johnson V.E

Tipton and Johnson assert that the prosecutor engaged in misconduct when he repeatedly commented upon their silence. The most egregious of these comments occurred during the closing argument. The prosecutor noted that Tipton had told his experts about the deprivation of his youth which his experts had then conveyed to the jury, yet, "[h]ave you once seen from that witness stand this week an iota of remorsefulness from that man?" Tr. at 3897. Counsel objected. The Court sustained the objection and admonished the prosecutor "don't get stupid in the end of this, please." Id. Immediately, upon the conclusion of the prosecutor's argument the Court instructed the jury as follows:

> Mr. Vick, in the zeal of his argument, indicated that Mr. Tipton had spoken many times and openly to the defense expert and they took the stand and discussed that. He then followed that up with "But you haven't seen one iota of remorse from the witness stand."
>
> You cannot, you will not, ever require a defendant to take the stand. The defendant doesn't have to testify. The defendant doesn't have any burden to prove that he should not be put to death. The burden is on the government to prove beyond a reasonable doubt that a defendant should be put to death.
>
> As I will indicate to you in further instructions, as I've said to you earlier in the first part of the trial, the argument on the part of counsel is just that. It is not evidence. And you must consider it in that light. But under no circumstances are you to take that kind of argument as indicating that the defendant has an obligation to take the stand and tell you something, even if to indicate remorse. Do you understand?

Tr. at 3906-7. Later, the Court denied the Defendants' motion for mistrial. Tipton's counsel

appealed that decision and the Fourth Circuit summarily rejected the claim. United States v. Tipton, 90 F.3d 861, 901 n.25 (4th Cir. 1996).

Tipton and Johnson contend that appellate counsel should have shorn up this claim by pointing to other instances where the prosecutor purportedly made improper comments about their silence. The following rule is used to assess whether argument by the prosecution constitutes an improper comment on the defendant's failure to testify, "[w]as the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" United States v. Francis, 82 F.3d 77, 78 (4th Cir. 1996)(quoting United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973)). In answering that question, the Court must look to the context in which the comment was made. See Francais, 82 F.3d at 78. Because, as reflected below, the other remarks, in context, are not indicative of a manifest intent to comment upon the defendants' failure to testify and are more readily understood to comment upon the evidence and defense counsel's arguments, counsel reasonably eschewed pursuing the claims urged here by Johnson and Tipton. See Bates v. Lee, 308 F.3d. 411, 420-22 (4th Cir. 2002).

During the sentencing phase closing arguments, the prosecution summarized Johnson's case in mitigation as follows,

> As to Mr. Cory Johnson, he too says, "I've had a bad youth. I've got a learning disability. I should therefore be excused from blameworthiness for what I have done." You can't do that, ladies and gentleman. The testimony of the doctors who testified for him have made it clear that he knew right from wrong.

Tr. at 3898. The foregoing statement does not seek to impugn Johnson's silence. In fact, its most natural reading is to encourage the jury to give Johnson's statements conveyed though his experts

the same weight as if Johnson had made them directly from the witness stand. Cf. United States v. Walker, 272 F.3d 407, 415 (7th Cir. 2001)(concluding similar attribution of testimonial evidence to defendant during closing argument was not outside the bounds of closing argument), cert. denied, 122 S. Ct. 1456 (2002).

Next, Johnson and Tipton complain that the prosecutor commented upon their silence, when during closing argument at the guilt phase, he argued that

> I suggest to you that the evidence has been clear and unequivocal . . . . That 11 people lie dead in the streets of Richmond, Virginia because those men with others, including "V," wanted to make themselves rich selling drugs, wanted to protect their drug business . . . .I suggest to you that . . . as to Count One of the indictment, the conspiracy count, that those gentlemen haven't truly argued to you, in either opening or in the questions presented to the witnesses during the trial, that they are not guilty of Count One. They have implicitly conceded that indeed that they have sold drugs, that indeed they sold drugs together. Count One in this case has been implicitly conceded by defendants James Roane, Cory Johnson –

Tr. at 2960. At this point the Court overruled an objection by Roane's counsel. The prosecution then continued,

> And I suggest to you through opening and through questioning of the witnesses in this case, there can be no great issue as to the guilt of James Roane, Richard Tipton, and Cory Johnson as to . . . the conspiracy count. Each of them admitted tacitly, if not implicitly, that they sold drugs. Each of them admitted tacitly, if not implicitly, that they were together often. Each of them has admitted tacitly, if not implicitly that they sold drugs together in concert with each other.

Tr. at 2961-62. Placed in context, the remarks are not of such character that the jury would naturally and necessarily take them to be a comment on the failure of the accused to testify; the highlighted remarks direct the jury to consider the evidence adduced and the comments by defense counsel, not the Defendants' silence, in evaluating whether the Defendants were guilty of

conspiracy.[61] Therefore, the comments are not inappropriate. See United States v. Mietus, 237 F.3d. 866, 871-72 (7th Cir. 2001); Oken v. Corcoran, 220 F.3d 259, 270-71 n. 7 (4th Cir. 2000); Francis, 82 F.3d 77, 78 (4th Cir. 1996); see also Tr. at 2976. To the extent the prosecution's comments may have otherwise been improper, counsel reasonably forsook appealing the issue in light of the evidence of guilt on the conspiracy charge and their concessions during their own opening statements and closing arguments that their clients were guilty of conspiracy to distribute drugs, but not of running a CCE.

Finally, Tipton and Johnson complain about an exchange that occurred during guilt phase closing argument. Counsel for Sandra Reavis stated, "But remember, Cory Johnson said that he never gave drugs to Sandra Reavis to sell. So this contradicts what Valerie Butler had to say." Tr. at 3163. The prosecutor objected by stating, "I don't remember Cory Johnson testifying, your Honor." Id. The Court sustained the objection. Defense counsel apologized and corrected his statement by stating, "Cory Johnson told Rodney Tucker, who testified here, that he never gave Sandra Reavis any drugs." Tr. at 3163-64. "No manifest intent exists where there is another, equally plausible explanation for the remark." See United States v. Calderon, 127 F.3d 1314, 1338 (11th Cir. 1997). The prosecutor's attempt to correct a misstatement by defense counsel does not manifest an improper intent to comment on Johnson's failure to testify. See United States v. Smith, 30 F.3d 568, 571 (4th Cir. 1994)(noting context of prosecutor's statement indicated an intent to

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[61] Counsel for each defendant conceded in opening argument that his client sold drugs. During questioning of Government witnesses, defense counsels' questions generally focused on negating the substantial income and supervision element of the CCE count, rather than disputing that the petitioners were engaged in the concerted distribution of cocaine. Tipton also called Gloria Bridges as a witness. Bridges testified on direct examination that she came to know Titpon because he sold drugs.

object to form of the question rather than comment upon the defendant's silence). To the extent, the objection reminded the jury that Johnson had failed to testify, it did not encourage the jury to draw any negative inference from that omission and the Court repeatedly had admonished the jury that it could not draw such an inference. Accordingly, the above claims will be dismissed because Tipton and Johnson cannot demonstrate appellate counsel were deficient for not pursuing the claims.

c. The prosecution improperly made unsupported comments during closing argument regarding the conditions the Defendants would face in prison if given a life sentence.
Johnson Defaulted V.D
Tipton Defaulted V.E.2

During closing argument the prosecutor asked the jury to ponder what the Defendants' conditions would be if they were sentenced to life in prison.

> I'm not telling you incarceration is nice and a lifetime of incarceration is not punishment. But think about each and every day of existence in jail. They will wake up, bathe, be fed. They will be able to watch TV, read books. They will be able to use the telephone to talk to their loved ones.

Tr. at 3904. Defense counsel objected and the Court sustained the objection. Tr. at 3904. While the foregoing comments were improper, it did not provide counsel with a substantial claim for relief on appeal. The Court had made clear to the jury that the verdict was to be based on the evidence, the arguments of the lawyers were not evidence and it was not to consider matters to which objections had been sustained. Accordingly, counsel was not deficient for failing to raise the issue on appeal.

d. The prosecution improperly argued that sentencing should be based on deterrence
Johnson Defaulted V.H
Tipton Defaulted V.E.10

Tipton and Johnson contend that they were denied individualized consideration because the prosecutor twice urged the jury to consider deterrence during closing argument at the sentencing phase. The limited law on the subject indicates that a defendant's right to individualized consideration is not violated when the prosecutor urges the jury to consider whether a sentence of death in this instance would further the specific deterrent purpose of the statute. See Brooks v. Kemp, 762 F.2d 1383, 1407 (11th Cir. 1985)(en banc), cert. granted, Kemp v. Brooks, 478 U.S. 1016 (1986)(vacating Brooks and remanding for further consideration in light of Rose v. Clark, 478 U.S. 570 (1986)), reinstated on remand, Brooks v. Kemp, 809 F.2d 700 (11th Cir. 1987)). Here, when the prosecutor began to make comments that could be construed as a general deterrence argument, he was cut short by an objection. Thereafter, the prosecutor focused his comments on why the deterrence goals of the CCE death penalty statute favored the imposition of a sentence of death for the acts committed by Tipton and Johnson. In light of the single comment about general deterrence, the sustained objection to that comment, and the extensive instructions on the Defendants' entitlement to individualized consideration, appellate counsel reasonably forsook the claims urged here by Johnson and Tipton.

e. The prosecutors misled the jury into believing that it had a duty to convict the Defendants and impose a death sentence

Tipton Defaulted Claim V.E.6
Johnson Defaulted Claim V.C

Tipton and Johnson assert that the prosecution affirmatively misrepresented the law to suggest to the jury that it was legally required to convict the Defendants and impose a sentence of death. See Potts v. Zant, 734 F.2d 526, 535-6 (11th Cir. 1984)(prosecutor engaged in misconduct by suggesting prior state supreme court decisions mandated imposition of death penalty in this case), vacated on other grounds, 478 U.S. 1017 (1986). Tipton and Johnson base these arguments on the prosecutor's

repeated references to "duty."[62] As reflected below, the challenged comments were proper because they emphasized that the jurors' duty to convict and impose the death penalty derived from their sworn obligation to fairly apply the evidence in light of the applicable law. See Davis v. Kemp, 829 F.2d 1522, 1527 (11th Cir. 1988)(concluding defendant not denied individualized consideration by

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[62] The highlighted comments to which Tipton and Johnson object are set forth below.

> You have taken an oath and you can't shirk from that oath. That oath says that you will truly render facts to a verdict. When you do that, you have no choice but to find these defendants guilty of each and every count of the indictment.

Tr. at 3021(guilt phase sentencing).

> Now it is time for you to go back and do your duty.
>
> Each of you during the voir dire . . . stated that in the appropriate case, given the appropriate circumstances, that you could indeed render a verdict of death against a defendant . . . . I submit that based upon the evidence that you have seen from this witness stand over the last five weeks, that this is the appropriate case to render a verdict of death as to each and every defendant.
>
> You took an oath. It is an awesome responsibility. It is an awesome duty. But nonetheless, it is just that a duty. Your duty, ladies and gentleman of the jury, given the argument that you have heard, requires no less verdict than death.

Tr. at 3881-82.

> . . . it is an awesome duty you have undertaken. But the law is clear that in some cases the death penalty should be imposed. It is the will of Congress. It is the law you must follow. What you must determine, is given the evidence that you have heard, is this one those appropriate cases? And I suggest to you, ladies and gentleman, it is the appropriate case . . . .
>
> Ladies and gentleman, it is a strong duty you have. But it is just that. It is a duty. This case warrants the imposition of the maximum punishment possible, the imposition of the death penalty as to each defendant.

Tr. at 3905-6.

prosecutor's argument that jurors had an obligation to impose the death penalty if they believed it was warranted by the defendant's crime and the evidence introduced at sentencing); cf. United States v. Locasio, 6 F.3d 924, 947 (2d Cir. 1993)(concluding it was not inappropriate for prosecutor to remind jurors of their oath to render a verdict without fear or favor).

Moreover, the Court's numerous instructions throughout the trial refuted any suggestion that the law required that the Defendants receive a sentence of death. "I want to emphasize that even if a jury makes such findings, it is never required to impose a sentence of death upon a defendant." Tr. at 36; 496-97. Again, at the beginning of the sentencing phase the Court reminded the jury that, "[i]t is the government that bears the burden of persuading you beyond a reasonable doubt that a sentence of death is justified as to each defendant." Tr. at 3307. "[E]ven if you do make the findings required by law as prerequisites to the imposition of the death penalty, no jury is ever required to impose the death penalty." Tr. at 3309. And, "[i]t is the government that must persuade you that the death penalty is justified as to each individual defendant. In short, a defendant is not required to prove that he should be allowed to live." Tr. at 3313. And, "you cannot return a decision imposing the death penalty absent a unanimous finding of the existence of certain aggravating factors, no jury is ever required to impose the death penalty, even if it does make such findings." Tr. at 3315. Hence, Tipton and Johnson's attempt to excuse their default is rejected because they have not demonstrated counsel were deficient or that they were prejudiced by any omission of counsel.

D. Cumulative Claims of Error With Regards To Prosecutorial Misconduct And CCE Convictions

Tipton Claim V.B.3.d.v. V.F.1.j	Tipton Defaulted V.E.14
Johnson Claim II.C.4.f, IV.A.8, IV.C	Johnson Defaulted V.L

Whether the prosecutor's improper conduct is isolated or extensive is one of the six factors relevant to assessing whether a defendant was prejudiced by improper comments by the prosecution.

See United States v. Wilson, 135 F.3d 291, 298 (4th Cir. 1998). Thus, Tipton and Johnson contend appellate counsel should have exploited this factor and challenged all of the purportedly improper conduct on appeal.[63] In this regard, Tipton and Johnson must demonstrate their present claims of error were clearly more promising than the substantial claims counsel raised on direct appeal. See Bell v. Jarvis, 236 F.3d 139, 164 (4th Cir. 2000)(en banc), cert. denied, 122 S. Ct. 124 (2001); Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989)(counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Neither Tipton nor Johnson meets this burden. The fact that habeas counsel has seen fit to regurgitate many of the same issues pressed by appellate counsel certainly belies the suggestion that appellate counsel made poor choices on appeal. Moreover, the appellate record confirms that counsel pursued the most promising claims for relief on direct appeal. See Smith v. Murray, 477 U.S. 527, 536 (1986)("Winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.") Appellate counsel reasonably chose to pursue promising claims of instructional errors, separation of powers and errors during voir dire that would entitle their clients to relief under a more lenient showing of prejudice than would be required to prevail on a prosecutorial misconduct claim. See, e.g., United States v. Tipton, 90 F.3d 861, 872-882, 895, 897-98 (4th Cir. 1996). Accordingly, the above listed claims will be dismissed because Tipton and Johnson have failed to demonstrate deficiency on the part of counsel.

XIII. CUMULATIVE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Tipton Claims V.B.3.d.vii, V.F.4

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[63] That portion of these claims which challenges counsels' conduct at trial is rejected for the reasons previously stated by the Court.

Johnson IV.D, IV.C

The Defendants contend that the cumulative effect of all counsel's errors prejudiced them. The cumulative analysis the Defendants seek is not permitted for those claims where the Court rejected their assertion that counsel performed deficiently. Fisher v. Angelone, 163 F.3d 835, 852-3 (4th Cir. 1998). "Attorney acts or omissions 'that are not unconstitutional individually cannot be added together to create a constitutional violation.'" Id. (qouting Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996). Having reviewed those relatively few instances where the Court rejected an individual claim solely for a lack of prejudice, the Court finds even when considered collectively there is no reasonable possibility that the result of the Defendants' convictions or sentence would be different.[64] See Huffington v. Nuth, 140 F.3d 572, 583 (4th Cir. 1998). The Defendants' guilt and culpability were confirmed by numerous credible witnesses. The testimony of the witnesses was well corroborated by the physical evidence including forensic testing, receipts for firearms, the video tape of the murder scenes, and the testimony of other witnesses. The above claims will be dismissed.

XIV. THE DEFENDANTS' ADOPTION BY REFERENCE OF CODEFENDANTS' CLAIMS

Tipton V.J
Johnson X
Roane IX

In their initial § 2255 motion, each Defendant asserts that he adopts by reference any claims by his copetitioners to the extent such claims are applicable to him.[65] By Order entered December

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[64] Roane did not list in his index a separate claim of cumulative ineffective assistance. The Court's rejection of Roane's assertion of collective prejudice does not encompass Roane's Claim IV.B.2 pertaining to the murder of Douglas Moody.

[65] United States v. Merlino, 2 F.Supp.2d 647, 669 (E.D. Pa. 1997)(denying as inappropriate defendant's request to join codefendants' § 2255 motions).

11, 2000, the Court directed each Defendant to provide an index of his claims. Clerk's Record # 830. That order further required each Defendant to list each of his grounds for relief including the subparts thereto and to cite to the portions of the record where the claim is raised and discussed.[66] This opinion has addressed every separate ground for relief listed by Tipton, Johnson, and Roane in his respective index. In light of the specific pleading requirements for § 2255 motions and this Court's orders, the oblique references to the unspecified claims of codefendants do not warrant further individual consideration. Cf. Gray v. Netherland, 99 F.3d 158, 165-66 (4th Cir. 1996)(concluding habeas petitioner had not properly raised claim in federal court where he failed to articulate how the fact and law combined to violate his rights). Claims V.J , X and IX will be dismissed for the reasons previously stated in conjunction with each claim specifically raised by Johnson, Tipton and Roane.

Tipton and Johnson's motion for relief pursuant to 28 U.S.C. § 2255 will be denied. Roane's motion for 28 U.S.C. § 2255 relief is denied in part.

An appropriate Order shall issue.

James R. Spencer
United States District Judge

Richmond, Virginia
Date: 5-1-03

[66] The Court warned the parties that review of their claims would be limited to those portions of the record designated in their individual index.

APPENDIX A
RICHARD TIPTON'S GROUNDS FOR RELIEF[1]

V.A JUROR MISCONDUCT VIOLATED TIPTON'S RIGHT TO AN IMPARTIAL JURY AND TO DUE PROCESS OF LAW.

V.B.3.a[2] The Jury Was Not Properly Instructed As To The Supervision Element:

(i) The trial court failed to instruct the jury that a mere buyer/seller of drug relationship is insufficient to establish the "organization, supervision, or management" element under section 848;

(ii) The trial court failed to instruct the jury that some persons alleged to be CCE supervisees were, as a matter of law, incapable of being CCE supervisees;

(iii) The trial court failed to instruct the jury that it must unanimously agree to the identity of each of the five supervisees;

(iv) The trial court failed to instruct the jury that the government must prove "management" to satisfy the organizer/supervisor element of a CCE.

V.B.3.b There Was Insufficient Evidence To Support The Supervision Element Because The Government Failed To Prove Tipton Supervised Five Persons.

V.B.3.c The Prosecutorial Misconduct Relating To The Supervision Element:

(i) The Prosecution used unsupported, ambiguous, and misleading testimony to prove "supervision";

(ii) The Prosecution used improper and prejudicial argument, misleading the jury, about the supervision element.

V.B.3.d Ineffective Assistance of Counsel At Trial and On Appeal:

(i) Counsel failed to object to the repeated use of improper and prejudicial evidence;

(ii) Counsel failed to determine and demonstrate that there were less than five supervisees;

(iii) Counsel failed to object to the prosecutor's closing argument on the supervision element;

(iv) Counsel failed to seek proper jury instructions on the supervision element;

(v) Counsel failed to stop the onslaught of prosecutorial misconduct;

(vi) Counsel failed to seek relief available pursuant to Barona and Jerome;

(vii) Counsel's errors, viewed individuallly or collectively, require the Court to grant relief.

V.C.1 Tipton's Right To Due Process Was Violated Because The Government Knew Or Should Have Known that:

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[1] Tipton's claims are identified by the letters and numerals used by Tipton in his index of claims.

[2] Section V.B. 1 & 2 discuss legal principals and background and do not set forth claims.

a. Maurice Saunder's Testimony Linking Tipton to "Light" and Large Sums of Money Was False;

b. Greg Scott's Testimony Linking Tipton and his Codefendants to the New York Boyz Was False.

C.2 Hussone Jones' Testimony That Tipton Stabbed Douglas Talley Was False.

C.3 Priscilla "Pepsi" Greene Testified Falsely Regarding Her Drug Dealing Activities And The Hierarchy Of The Drug Dealing Enterprise In Richmond.

C.4 Jerry Gaiters Testified Falsely Regarding His Foreknowledge Of The Murder Of Dorothy Armstrong.

V.D. The Government Failed to Turn Over Exculpatory Evidence In Violation of Brady v. Maryland:

1. The Government Withheld Evidence that Tipton Could Have Used To Impeach The Testimony of Hussone Jones About The Murder Of Douglas Talley;
2. The Government Suppressed Evidence that Gave Tipton An Alibi For The Stoney Run Shooting Deaths of Linwood Chiles and Curt Thorne;
3. The Government Suppressed Evidence that Could Have Been Used To Impeach Priscilla GreenE Testimony That She Did Not Sell Drugs;
4. The Government Suppressed Evidence that Pointed to Co-Conspirator Lance Thomas As The Principal Of The Drug Activities Charged In The Indictment;

V.E. Prosecutorial Misconduct

1.&12. The Prosecution Improperly Discriminated Against Women.

2. The Prosecutors Made Inflammatory Arguments To The Jury, Unsupported By The Evidence, Regarding The Conditions Tipton Would Face If Given A Life Sentence.
3. The Prosecutors Misled The Jury By Vouching, In Inflammatory Terms, To Their Personal Belief Regarding Tipton's Guilt And The Veracity Of Witnesses.
4. The Prosecutors Introduced Inadmissible Evidence Through Which They Vouched That Tipton And The Other Defendants Were Threats To The Lives Of Witnesses
5. The Government Committed Misconduct When It Formulated And Produced Its Witness List.
6. The Prosecutors Misled The Jury Into Believing That It Had A Duty To Convict And Impose A Death Sentence.
7. The Prosecutors Misled The Jury By Improperly Emphasizing That Tipton And The Other Defendants Did Not Testify.
8. Prosecutors Suggested That A Government Witness Passed A Polygraph Test.
9. The Prosecutors Misled The Jury By Treating Tipton And The Other Defendants As A Group, Rather Than As Individuals.
10. The Prosecutors Improperly Argued That Sentencing Should Be Based On Deterrence.
11. The Prosecutors Presented Testimony Without Foundation.
13. The Prosecutors Committed Misconduct With Respect To The CCE Supervision

APPENDIX B
JOHNSON'S GROUNDS FOR RELIEF[1]

I. THE GOVERNMENT KNOWINGLY OR NEGLIGENTLY USED FALSE EVIDENCE TO CREATE THE ILLUSION THAT JOHNSON AND HIS CO-DEFENDANTS WERE LEADERS OF HIGHLY ORGANIZED CONTINUING CRIMINAL ENTERPRISE HAVING ITS ROOTS IN NEW YORK AND/OR NEW JERSEY.

B. Greg Scott's Trial Testimony Linking Johnson And His Co-Defendants To The New York Boyz Was False, And The Government Knew or Should Have Known That It Was False.

C. Maurice Saunder's Trial Testimony Linking Tipton to "Light" And To Large Sums Of Money Was False, And The Government Knew Or Should Have Known It Was False.

II. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT JOHNSON AS A SUPERVISOR OF A CONTINUING CRIMINAL ENTERPRISE UNDER 21 U.S.C. SECTION 848.

C.1 The Jury Was Not Properly Instructed As To The Supervision Element

a. The trial court failed to instruct the jury that a Buyer-Seller Relationship is insufficient to establish the organization, supervision, or management element;

b. The trial court failed to instruct the jury:

(i) that some persons alleged to be CCE supervisees were incapable of counting as supervisees as a matter of law;

(ii) failed to instruct the jury that it must unanimously agree to the identity of each of the five supervisees.

c. The trial court failed to instruct the jury that the government must prove the element of management as part of the element of supervision for a CCE organizer;

C.2 There Was Insufficient Evidence To Support the Supervision Element.

C.3 Prosecutorial Misconduct Relating To Supervision Element:

a. Improper use of unsupported ambigous testimony;

b. Improper argument concerning the supervision element;

C.4 Ineffective Assitance of Counsel At Trial and Appeal:

a. Counsel should have shown that Johnson was incapable of being a supervisor or at least not likely to be a supervisor;

b. Counsel failed to object to repeated improper evidence;

c. Counsel failed to demonstrate that the proof against Johnson did not establish five supervisees;

d. Counsel failed to object to the prosecutor's closing argument on the

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[1] Johnson's claims are identified by the letters and numerals used by Johnson in his index of claims.

APPLICABLE TO HIM.

XI. JOHNSON IS EXEMPT FROM EXECUTION UNDER 18 U.S.C. § 3596(C) AND 21 U.S.C. § 848(1) BY VIRTUE OF MENTAL RETARDATION.

XII. THE DISTRICT COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE ESSENTIAL ELEMENTS OF THE CCE STATUTE IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

XIII. JOHNSON IS ENTITLED TO RELIEF BECAUSE THE INDICTMENT FAILED TO CHARGE THE AGGRAVATING FACTORS IN THE INDICTMENT AS REQUIRED BY Apprendi v. New Jersey, 530 U.S. 466 (2000).

APPENDIX C
JAMES ROANE'S GROUNDS FOR RELIEF

To the extent possible, Roane's claims are identified by the letters and numerals used by Roane in his index of claims.

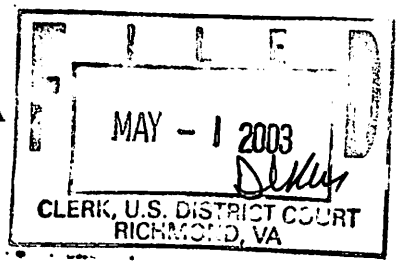
I. PROSECUTORIAL MISCONDUCT
- a. The Prosecution Misled The Court As To Which Witnesses Were In The Witness Protection Program;
- b. The Prosecution Failed To Provide The Defendants With Exculpatory Information In Violation of Brady v. Maryland -The Government Withheld Evidence that Roane Could Have Used To Impeach The Testimony of Hussone Jones About The Murder Of Douglas Talley;
- c. The Prosecution Introduced Evidence That They Knew Or Should Have Known Was False:
  1. Greg Scott's Trial Testimony Linking the Defendants To The New York Boyz Was False, And The Government Knew Or Should Have Known That It Was False.
  2. Maurice Saunders' Trial Testimony Linking Tipton to "Light", And To Large Sums Of Money Was False, And The Government Knew Or Should Have Known It Was False;
  3. Priscilla Greene Testified Falsely Regarding:
     - a. Her innocence in selling drugs;
     - b. Regarding the Primacy of Johnson's role in the enterprise;
     - c. Roane's role in the murdering Doug Moody.
  4. Hussone Jones' Description Of The Talley Murder.
- d. Prosecutors Violated 18 U.S.C. § 201(c)(2) When Obtaining And Presenting the Testimony Of Several Cooperating Witnesses.

II. THE PROSECUTION IMPROPERLY DISCRIMINATED AGAINST WOMEN IN THE SELECTION OF THE JURY

III. THE JURY WAS TAINTED BY OUTSIDE INFLUENCES

IV. INEFFECTIVE ASSISTANCE OF COUNSEL
- A. Trial Counsel Failed To Seek A Change of Venue.
- B. Defense Counsel Failed To Conduct An Adequate Investigation Of:
  1. The Events In New York/New Jersey;
  2. The Moody Murder.
- C. Defense Counsel Waived Roane's Right To Be Present During Voir Dire.
- D. Trial Counsel Failed To Challenge The Government's Evidence That Roane Supervised Or Managed Five Or More Persons.
- E. Trial Counsel Failed To Present An Adequate Penalty Phase Case.
  1. Counsel Failed To Investigate And Present Evidence Of Roane's Mental And Emotional Background.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 3:92CR68
	)	
JAMES ROANE. a/k/a "J.R."	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

Richard Tipton, Cory Johnson, and James Roane were indicted on a series of federal crimes, including multiple capital murders, growing out of their concerted drug-trafficking activities, principally in Richmond, Virginia. Count Five charged that on or about January 13, 1992, Richard Tipton and James Roane while engaged in and working in furtherance of a Continuing Criminal Enterprise caused the intentional killing of Douglas Moody in violation of 21 U.S.C. § 848(e)(1)(a). Count Six charged Tipton and Roane with a violation of 18 U.S.C. § 924(c) in conjunction with the murder of Douglas Moody. Count Seven charged Tipton and Roane with violating 18 U.S.C § 1959 by murdering Douglas Moody. The jury convicted Roane on Counts Five, Six, and Seven, but acquitted Tipton on those same counts. Following a penalty hearing, the jury recommended that Roane be sentenced to death on Court Five, for the murder of Douglas Moody. This Court sentenced Roane to death in accordance with the jury's recommendation.

After filing an unsuccessful appeal, Roane filed a motion for relief pursuant to 28 U.S.C. § 2255 with this Court. The United States moved for summary judgment. Upon review of the record and the parties' submissions, the Court concluded that Roane was entitled to an

898

evidentiary hearing on his claim that he was denied effective assistance of counsel in conjunction with the charges related to the murder of Douglas Moody (Claim IV.B.2) and his claim that he is actually innocent of the charges related to the murder of Moody (Claim VIII). The Court conducted an evidentiary hearing on those claims on June 21, 2002.

B. Roane's Claims

In Claim IV.B.2, Roane asserts that he was denied effective assistance of counsel by counsel's failure to locate a favorable eyewitness to the murder and adduce available testimonial and documentary evidence to support an alibi defense. In Claim VIII, Roane contends that he is actually innocent of the murder of the Douglas Moody. Roane bases this claim of actual innocence on his alibi evidence that counsel failed to introduce and on the testimony of the purported eyewitness who swears that Roane did not murder Moody.[1]

C. Findings Of Fact

1. In early 1992, Ronita Hollman and Doug Moody were selling drugs in the Newtowne area of Richmond, Virginia, for Peyton Maurice Johnson. Tr. at 1992-93; 2553. Richard Tipton, Cory Johnson, and James Roane decided to take over the drug trade in Newtowne. Tr. at 1156-58, 2330.

2. As part of this plan, Roane and Tipton approached Hollman to lure her away from her association with Peyton Johnson and to sell drugs for them. Tr. at 1962-63. Tipton told Hollman about his plans for the Newtowne area and informed her that they were willing to kill people to accomplish those plans. Tr. at 1963.

3. On or about January 6, 1992, Cory Johnson and Roane left two handguns with their underling, Robert Papoose Davis. Tr. at 1894. On January 11 or January 12, 1992, Roane retrieved one of the guns from Davis. Tr. at 1895.

4. Douglas Moody was murdered around 12:00 a.m. on January 13, 1992. See Gov't Trial Exhibit 119.

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[1] Tr. refers to the trial transcript. Hr. Tr. refers to the evidentiary hearing transcript. Hr. Ex. refers to exhibits introduced at the evidentiary hearing.

5. On January 14, 1992, Roane and Cory Johnson retrieved a bag of weapons they had left at the residence of Robert Davis earlier that day. Roane and Cory Johnson then went looking for Peyton Maurice Johnson. Roane located Peyton Maurice Johnson in a tavern.

6. Roane left the tavern and reported what he had seen to Cory Johnson. Within minutes, Cory Johnson entered the tavern and fatally shot Peyton Maurice Johnson with an automatic weapon.

7. In January of 1992, Louis Johnson was acting as bodyguard for a rival drug dealer in the Newtowne area. While acting in this capacity, Louis Johnson threatened Cory Johnson. On January 29, 1992, Roane got out of his car and shot Louis Johnson. Immediately thereafter, Cory Johnson and Lance Thomas exited Roane's car and continued to shoot Louis Johnson until he was dead.

8. The murders of Douglas Moody, Peyton Maurice Johnson, and Louis Johnson were part of the general plan of Roane, Tipton, and Johnson to take over the drug trade in the Newtowne area.

9. At trial, Denise Berkley testified that, shortly before Douglas Moody was murdered, she was smoking crack at a building on the corner of Clay and Harrison Streets. Tr. at 1694. Berkley heard a shot followed by the breaking of a window from the back of the building. Tr. at 1695-96.

10. Berkley further testified that she went outside and saw Roane stab Doug Moody "18 or 19 times" while Moody pleaded for Roane to stop. Tr. at 1697-98. The knife looked like a butcher's knife. Tr. at 1697. Roane then approached Pepsi Greene, gave her the knife and told her to get rid of it. Tr. at 1699.

11. Finally, Berkley testified that Sandra Reavis was present when Moody was killed. Tr. at 1698-99. Berkley testified that she saw Reavis, Roane, Curt Thorne, Linwood Chiles, and Pepsi Greene leave the scene of the murder in Chiles' station wagon. Tr. at 1699.

12. When the police arrived at the scene of the murder, they found a broken window and a bullet hole in the back of the building where Berkley first heard the sounds of a struggle. Tr. at 1824; Gov't Exs. 9-2 through 9-4, 119.

13. The autopsy of Moody's body reflected that he had been shot twice and stabbed 18 times. The stab wounds were inflicted by a single edged blade. Tr. at 2070-74.

14. At trial, Priscilla "Pepsi" Greene testified that she was on the corner of Clay and Harrison Street when she heard two or three shots. Tr. at 2549. Greene then saw Roane and Tipton exit the house from where the shots were fired. Tr. at 2549. After five or ten

minutes, Greene, accompanied by Roane, went to Curt Thorne's house, where Roane directed Pepsi to get him the big knife he stored there. Tr. at 2550-51, 2572-3. Later that night, Roane returned the knife, now covered with blood, to Greene and told her to dispose of it. Tr. at 2551-52. Greene threw the knife over a fence. Tr. at 2551.

15. Greene's physical description of the knife was largely consistent with Berkley's testimony and the medical evidence. Tr. at 2583, Gov't Ex. 146.

16. Greene testified that following the murder, Linwood Chiles drove her, Curt Thorne, Roane, and Reavis to Norton Street. Tr. at 2552, 2576. Thereafter, Greene and Thorne stayed on Norton Street, and Roane, Reavis, and Chiles left that location. Tr. at 2576.

17. Robert Davis lived close to the scene of the Moody murder. Tr. at 1893, 2560. Davis testified that, immediately following the Moody murder, he saw Tipton and Roane by the steps near his house and heard them conversing as follows, "Yeah, I got him, I got him . . . we can't stay out here, man. This is hot anyway." Tr. at 1896.

18. The testimony of Berkley, Davis, and Greene was credible and was corroborated by the physical evidence of murder including the autopsy and the crime scene video. See Gov't Ex. 119. Greene's testimony was and remains particularly compelling.

19. Roane was represented at trial by David Baugh and Arnold Henderson.

20. At trial, Baugh called Gina Taylor, a neighbor who had attempted to aid the wounded Moody.[2] Taylor testified that she had seen an individual jabbing the prostrate Moody. Tr. 2902. Taylor testified that the assailant was only about five feet six inches tall and was definitely not Roane. Tr. 2905-6. However, the exculpatory value of Taylor's testimony was undermined by Taylor's acknowledgment that she could not identify the assailant's gender or see the assailant's face. Tr. 2905-6. Additionally, Taylor's credibility was diminished by her evasive manner on cross-examination and her admission she had "kind of" dated Tipton. Tr. at 2906.

Baugh followed up Taylor's testimony by presenting evidence that two hours before the murder, a person named Keith had come to Moody's mother's house looking for him, and that a week prior, Keith's friends, armed with machine guns, had kicked in the door of Moody's mother's residence while attempting to find Moody. Tr. at 2930-31. Detective Dalton conceded that foregoing information initially had led the police to suspect Keith Barley, a small featured black juvenile male, as Moody's murderer. Tr. at 2928.

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[2] The knife that appears in the crime scene video, Gov't Ex. 119, is not the murder weapon. Taylor brought this knife out of her home to cut Moody's clothes off so that she could administer first aid. Tr. at 1827-28; 2903-4.

21. Prior to trial, Roane told Baugh that he did not participate in the murder of Douglas Moody. Hr. Tr. at 66.

22. Baugh was convinced that Roane did not participate in the Moody murder. Hr. Tr. at 66, 88.

23. Roane told Baugh that on the night of January 12, 1992, he was in a hotel room at the Howard Johnson (hereinafter "the hotel") with codefendant, Sandra Reavis. Hr. Tr. at 66-68, 70-71.

24. The Howard Johnson was located a couple of miles from where Douglas Moody was murdered. The hotel is now a Holiday Inn. Hr. Tr. at 7-8.

25. Roane told Baugh that he and Sandra Reavis were driven to the Howard Johnson hotel by Linwood Chiles. Tr. at 51, 67.

26. Roane told Baugh that Carmella Cooley accompanied them to the hotel. Hr. Tr. at 51, 67.

27. Roane told Baugh that Linwood Chiles registered and paid for the hotel room in cash. Hr. Tr. at 67.

28. In an effort to confirm Roane's alibi, Baugh spoke with Carmella Cooley and attempted to obtain records of Roane's visit to the hotel. Tr. 66-68.

29. Carmella Cooley indicated to Baugh that she had once accompanied Roane and Reavis to the Howard Johnson. Hr. Tr. at 68, 72. However, Cooley could not verify Roane's story that he went to the hotel on January 12, 1992. Hr. Tr. at 68. Baugh concluded that Cooley's ignorance of the date and her apparent hostility made her a bad defense witness. Hr. Tr. at 68.

30. Baugh contacted the Howard Johnson's and asked if the hotel had a record of Linwood Chiles renting a room on January 12, 1992. Hr. Tr. at 66, 71. When Baugh received a negative response from the hotel management, he went to the hotel and attempted to find such a record himself. Hr. Tr. at 66-67.

31. Baugh limited his search to looking for a record of a room rental under the name of Linwood Chiles for the night of January 12, 1992. Hr. Tr. 70-71. Baugh was unsuccessful in finding any such record. Hr. Tr. at 70. Neither Baugh nor the record before the Court suggest that constraints of time or resources played a part in his decision to terminate his search for records corroborative of Roane's alibi.

32. Alfred Brown is an investigator employed by Roane in conjunction with his 28 U.S.C. § 2255 motion. In May of 1998, Brown obtained permission from the hotel management to

review the occupancy records for January of 1992. Brown was pointed to several boxes that contained the relevant records. Hr. Tr. at 5. Within three hours, Brown found two registration cards that had been signed by Linwood Chiles. Hr. Tr. at 11; Pet. Hr. Ex. 3. The first card indicates that "Chiles, Linwood" had checked into a room for the night of January 2, 1992 and checked out on January 3, 1992. Pet. Hr. Ex. 3. The second card indicates that "Chiles, Larry" had checked into a room on January 12, 1992, and checked out on January 13, 1992. Pet. Hr. Ex. 3. Brown also obtained a receipt from the hotel indicating that a "Chiles, Larry" had checked in January 12, 1992, checked out January 13, 1992, and had paid cash for his room. Pet. Hr. Ex. 3. Linwood Chiles' address appears on the face of the receipt and the registration records. Hr. Tr. at 49.

33. In 1992 or 1993, Baugh could have located the same documents discovered by Brown, if he had subpoenaed the records or if he had spent three hours looking through the hotel records.

34. Roane was amenable to testifying in his own defense. Hr. Tr. at 72-73. Baugh advised Roane not to testify unless Baugh could discover some objective confirmation of his alibi for the Moody murder. Hr. Tr. 59; 72-73.

35. If Baugh had discovered the hotel records discussed above, he would have advised Roane to testify. Hr. Tr. at 85-86; 91. Roane would have testified consistent with his testimony at the evidentiary hearing.

36. At the evidentiary hearing, Roane testified that: on the night of January 12, 2002, he, Linwood Chiles, Sandra Reavis, and Carmella Cooley drove to the Howard Johnson in Chiles' station wagon , Hr. Tr. at 45-50; Chiles registered for the room and paid cash, Hr. Tr. at 48; shortly after paying for the room, Chiles and Cooley left, Hr. Tr. 50; Roane and Reavis remained in the room all night and left the next morning, Hr. Tr. at 50

37. Roane further stated that he "didn't have a weapon at all" in the day or two preceding the murder of Douglas Moody. Hr. Tr. at 37. Roane denied that Davis ever kept a gun for him. Hr. Tr. at 58.

38. Based on Roane's demeanor and the details of his account, the Court finds that Roane's testimony that he was at a hotel at the time of the Moody murder, although not compelling, was tenable.

39. At the evidentiary hearing, Sandra Reavis testified that: on the night of January 12, 1992, she, James Roane, Linwood Chiles, and Carmella Cooley drove to the Howard Johnson in Chiles' station wagon, Hr. Tr. at 14-16; she, Roane and Chiles remained in the car while Cooley registered for a room, Hr. Tr. at 16; thereafter Chiles and Cooley left, Hr. Tr. 16-17. Reavis further testified that Roane stayed in the hotel room with her until they left the hotel at around 10:00 a.m. the next morning, January 13, 1992, Hr. Tr. at 17. Reavis'

testimony was flat and unpersuasive.

40. Reavis could not recall when she first told anybody that she was at a hotel with Roane on the night Doug Moody was killed. Hr. Tr. at 24.

41. The Government introduced a letter that Roane had written to Reavis while he was incarcerated awaiting trial. In that letter, Roane indicated that Reavis had requested him to lie and exonerate her by "tak[ing] [the] conspiracy case for [her]". Gov't Hr. Ex. 1 at 2.

42. Prior to the conclusion of her direct appeal, Reavis would not have been willing to waive her Fifth Amendment right to remain silent and provide Roane with an alibi for the Moody murder.

43. At the evidentiary hearing, Demetrius Lavone Rowe testified that at about 8:30 p.m., on January 12, 1992, she had seen Sandra Reavis in the Newtowne area. Hr. Tr. at 97. Rowe testified that Reavis told her she was going to eat with James Roane and then the two of them were going to a hotel. Hr. Tr. at 97. Rowe testified that shortly thereafter she saw Reavis and Roane leave the area. Hr. Tr. at 97. Rowe testified that Reavis and Roane left the area, not in Chiles' station wagon, but in cab. Hr. Tr. 105-107. Rowe did not see Roane again that night. Hr. Tr. at 99-102.

44. Rowe further testified that she had witnessed the murder of Douglas Moody. Hr. Tr. at 92. Rowe testified that she was on a porch drinking when she heard the sounds of fighting from a nearby house. Hr. Tr. at 94-95. Rowe testified that she then witnessed Doug Moody, Pepsi Greene, Curt Thorne, Richard Tipton, Cory Johnson, and a man she did not recognize spill out of the house across the street. Hr. Tr. at 95-99. Rowe testified that as they came out of the house, Johnson was struggling with Moody. Hr. Tr. 95-99. Rowe testified that Johnson continued to attack Moody after Moody had fallen to the ground. Hr. Tr. at 100. Rowe testified that although she did not recognize the unidentified male, she was sure it was not James Roane. Hr. Tr. at 95.

45. Prior to trial, Rowe did not tell the police or anyone associated with Roane's trial defense what she had witnessed. Roane Third Amend. Memo. Ex. A, Clerk Record #849.

46. Roane failed to present any evidence to suggest that a reasonable investigation by trial counsel would have led to the discovery of Rowe as a witness to the murder of Douglas Moody.

47. Rowe's testimony, to the extent it exculpated James Roane for the murder of Doug Moody, was not credible and would carry no weight with a jury. This conclusion is based on Rowe's demeanor, the fact that Rowe's current version of events conflicts with the earlier versions provided to § 2255 counsel and to the Court, wherein she swore that

Pepsi Greene was not at the scene of the murder of Douglas Moody. Roane Third Amend. Memo. Ex. A, Clerk Record #849; Roane Reply Memo. Ex. B.

D. Conclusions of Law

1. Ineffective Assistance of Counsel

a. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that to demonstrate the ineffective assistance of counsel, a defendant first must show that counsel's representation was deficient and, then, must establish that the deficient performance prejudiced the defense. Id. at 687. To satisfy the deficient performance facet of Strickland, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. The prejudice facet of the Strickland test requires the defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

b. Roane contends counsel was deficient for not calling Rowe as witness and for failing to present an alibi defense. Roane has failed to demonstrate that counsel was deficient for failing to discover Rowe was a witness or that he was prejudiced by the failure to present her testimony. See Findings of Fact 43-47. However, Roane has provided substantial proof for his charge that counsels' investigation of, and subsequent failure to present, an alibi were unreasonable. The Supreme Court has provided the following pertinent guidance for such a claim:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. The Court further emphasized what investigation decisions are reasonable depends on the information known to counsel and "critically" on the information supplied to counsel by the defendant. Id. Counsel obviously had a duty to investigate Roane's alibi and counsel did take steps to confirm that alibi. The critical question here is whether counsel's investigation of the hotel records was reasonable in light of the information known to counsel. See id. For the reasons set forth below, the Court concludes that it was not.

Prior to trial, counsel had substantial information that indicated Roane's claim

that he was at a hotel at the time of the Moody murder was credible. First, counsel had the testimony of an apparently disinterested eyewitness, Gina Taylor, who insisted that Roane did not commit the murder. Second, counsel had the detailed account of the alibi from his client. Roane's candor with counsel regarding his other criminal acts assured counsel that the alibi was true. Third, counsel's initial investigation, corroborated the details of the account provided by Roane. Although Carmella Cooley could not provide a specific date, she confirmed to counsel that she had accompanied Roane and Reavis to a hotel. With all this information in hand, counsel had every reason to believe the hotel records would provide objective evidence to corroborate Roane's story. Under such circumstances, counsel was obliged to thoroughly review the hotel's records to determine whether they could yield support for an alibi defense. See Brown v. Sternes, 304 F.3d 677, 694-96 (7th Cir. 2002)(concluding based on facts known to counsel, counsel was required to conduct an "in depth" investigation of mental health defense).

The record indicates that counsel did not follow through and seek the records with the vigor demanded by the situation. See id.; Hoots v. Allsbrook, 785 F.2d 1214, 1219-20 (4th Cir. 1986)(assuming counsel was deficient when he decided not to carry his investigation of possible eyewitnesses past review of police reports where client pressing an alibi defense); Cf. United States v. Russell, 221 F.3d 615, 621 (4th Cir. 2000) (concluding counsel was deficient for relying on the government's representation of defendant's criminal record where his client has informed him that such record was not accurate). The Court does not doubt counsel's testimony that he called the hotel a couple of times and on one occasion he went to the hotel to find the records. However, counsel did not volunteer any details regarding his search and the quantum of evidence presented at the evidentiary hearing indicates the search was very limited in scope and duration. Counsel was looking only for a hotel registration record in the name of Linwood Chiles for January 12, 1992. Hr. Tr. at 70-71. When his search did not readily yield such a record, counsel simply terminated his investigation, discarded the alibi defense and concentrated on the misidentification defense.

Under the circumstances facing trial counsel, reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed. See Nealy v. Cabana, 764 F.2d 1173, 1178-1180 (5th Cir. 1985)(criticizing counsel for not utilizing a subpoena to confirm his client's alibi). Counsel failed to take such actions and that failure was constitutionally deficient. Hooper v. Garraghty, 845 F.2d 471, 474-75 (4th Cir. 1988)(concluding counsel was deficient when he discarded insanity defense after limited exploration of that defense); Proffit v. Waldron, 831 F.2d 1245, 1248-49 (5th Cir. 1987)(concluding counsel was deficient where counsel made some exploration of a defense but failed to take an obvious and readily available investigatory step which would have made the defense viable); Sullivan v. Fairman, 819 F.2d 1382, 1391-92 (7th Cir. 1987)(concluding perfunctory attempts to contact witnesses were not reasonable). The Court finds that counsel's failure to obtain corroborative records of Roane's alibi and the subsequent failure to present an alibi defense at trial is attributable to the unreasonably

limited amount of time and resources counsel devoted to looking for corroborative hotel records. See Brown v. Sternes, 304 F.3d 677, 694-96 (7th Cir. 2002)(concluding counsel was deficient for prematurely abandoning mental health defense); Jennings v. Woodford, 290 F.3d 1006, 1015 (9th Cir. 2002)(counsel was ineffective when he ruled out mental health defense in favor of alibi defense after only preliminary investigation into mental health defense).

c. "[A]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." Id. at 694. In the present case, Roane has met that burden.

Had counsel conducted an adequate investigation, he would have found the records which offered some objective support for Roane's assertion that he was at a hotel when Douglas Moody was murdered. Findings of Fact 32-33. Armed with these records, Roane would have testified that he was at a hotel at the time of the murder of Douglas Moody. Findings of Fact 34-35. The alibi would have been somewhat corroborated by the introduction of the hotel records that indirectly supported that testimony. Of course, the impact of this evidence must be evaluated in light of the strength of the government's case at trial. Strickland, 466 U.S. at 697.[3] As recited above, see Findings of Fact 1-18, although the evidence of Roane's guilt was strong, it was neither undisputed nor overwhelming and hinged primarily on the testimony of Pepsi Greene and Denise Berkley. But for counsel's deficiency, Roane would have presented an alibi defense consisting of Roane's testimony and marginally corroborative hotel records. See Findings of Fact 32, 34-38, 42. Although thin, the foregoing alibi evidence would have bolstered Roane's plausible misidentification defense and is of sufficient credence to create a reasonable probability that Roane would have been acquitted of the charges related to the murder of Douglas Moody. See Griffin v. Warden, 970 F.2d 1355, 1358-60 (4th Cir. 1992) (emphasizing the strength of an alibi to challenge an eyewitness

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[3] In evaluating the potential prejudice of omitted evidence, the Court must also consider any negative aspects that would accompany its introduction. Whitley v. Bair, 802 F.2d 1487, 1494-97 (4th Cir. 1986). Taking the stand was an occasion fraught with peril for Roane. To maintain any semblance of credibility before a jury, if questioned, Roane would have to acknowledge among other things his participation in the plans to take over the drug trade in the Newtowne area and in the murders of Peyton Maurice Johnson and Louis Johnson. However, the Government forsook the opportunity to bolster its theory that Moody's murder was the first in a series of murders related to the plans to take over the drug trade in the Newtowne area. At the evidentiary hearing, the Government did not require Roane to provide details regarding his participation in the plans to take over the drug trade in the Newtowne area and the murders of Peyton and Louis Johnson.

identification); Nichols v. Butler, 953 F.2d 1550, 1553-54 (11th Cir. 1992)(concluding defendant was prejudiced by counsel's actions which prevented defendant from testifying on his own behalf); Sullivan v. Fairman, 819 F.2d 1382, 1392-1393 (7th Cir. 1987). Accordingly, Roane is granted relief on his claim that he was denied effective assistance of counsel with regard to the murder of Douglas Moody.

2. Actual Innocence

a. "Claims of actual innocence, whether presented as freestanding ones, see Herrera v. Collins, 506 U.S. 390, 417, (1993), or merely as gateways to excuse a procedural default, see Schlup v. Delo, 513 U.S. 298, 317 (1995), should not be granted casually." Wilson v. Greene, 155 F.3d 396, 404 (4th Cir. 1998). Here, the Court reviews Roane's claim under the more lenient standard for gateway claims set forth in Schlup v. Delo, 513 U.S. 298 (1995). The proper test for whether a petitioner has established that his case is "extraordinary" enough to fall into that "narrow class of cases," which "implicat[e] a fundamental miscarriage of justice," is whether that petitioner has shown that, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 315, 327; see also O'Dell v. Netherland, 95 F.3d 1214, 1249-50 (4th Cir. 1996)(en banc). It is not, however, this Court's "independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." Schlup, 513 U.S. at 329. This standard is more demanding than the standard for demonstrating prejudice under Strickland v. Washington, 466 U.S. 668, 694 (1984). Schlup, 513 U.S. at 327 n. 45; Sullivan v. Freeman, 819 F.2d 1382, 1392-4 (7th Cir. 1987).

b. The Supreme Court has emphasized that to be credible a claim of actual innocence must be supported with "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." Schlup, 513 U.S. at 324. The Court then must evaluate "petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" Id. at 328 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)).

d. Viewed alongside the other evidence, Roane's new evidence fails to demonstrate that no reasonable juror would have convicted Roane of the offenses related to the murder of Douglas Moody. See Wilson v. Greene, 155 F.3d 396, 404-05 (4th Cir. 1998). Roane's assertion of innocence relies primarily on the testimony of three witnesses, Demetrius Rowe, Sandra Reavis, and James Roane, none of whom are particularly trustworthy. See

Schlup, 513 U.S. at 324. As discussed above, Rowe's testimony appears to be a fabrication and would carry no exculpatory weight with a reasonable juror. See Findings of Fact 43-47. Indeed, the only impact Rowe's testimony would have upon a reasonable juror would be to view with greater skepticism Roane's proffered alibi. Both Roane and Reavis testified that Linwood Chiles drove them to the hotel in his station wagon. Rowe testified that she saw Roane and Reavis leave to go to the hotel, not in Chiles' station wagon, but in a cab. See Finding of Fact 40.

Next, a reasonable juror would have to weigh the testimony of Reavis and Roane. The credibility of their testimony is enhanced by the fact that they both agreed on the basic details of the alibi. For example, both Roane and Reavis testified that they were accompanied to the hotel by Carmella Cooley and Linwood Chiles and that Chiles and Cooley left them alone at the hotel for the night. A juror also would consider significant that hotel records confirmed Roane's statement that Linwood Chiles had paid cash for a room early in the evening on January 12, 1992. However, the value of those records would be diminished by the fact that according to Berkley and Greene, Reavis and Roane continued to employ Chiles as chauffeur after the time of check-in and used his services to depart the scene of the murder. Thus, acceptance of Roane's alibi would turn primarily on whether a juror believed the naked testimony of Reavis and Roane that they did not leave the hotel room until after Moody had been killed.

A reasonable juror would regard with skepticism Reavis' testimony because she was Roane's lover and his lackey in the criminal enterprise and two witnesses had placed her at the murder scene in the company of Roane. Such skepticism would be furthered deepened in light of the late hour of Reavis' testimony and her inability to recall when she first told someone that she was at the hotel with Roane when Doug Moody was murdered. See Finding of Fact 40. Cf. Herrera v. Collins, 506 U.S. 390, 423 (1993)(O'Connor, J.)(concurring)(noting that courts treat last minute affidavits with some skepticism, because "[i]t seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him."). Finally, a juror would be confronted by correspondence between Roane and Reavis which indicated Reavis' desire that Roane tailor his story to exonerate her. See Finding of Fact 41. All these circumstances, along with Reavis' demeanor, would cause a juror to harbor serious doubts about Reavis' veracity.

Roane's self-serving testimony of an alibi unsupported by a credible, unbiased witness or firm objective proof is not the sort of evidence one would deem inherently reliable or trustworthy. See Schlup, 513 U.S. at 324. However, Roane's demeanor at the evidentiary hearing and his ability to recall many of the specific details of the events surrounding the murder of Douglas Moody lent some credence to his testimony. See Finding of Fact 38. Nevertheless, Roane's thin alibi, even when coupled with Gina Taylor's testimony, and the evidence suggesting third parties wished to do Moody harm, is not sufficiently compelling to preclude many a reasonable juror from finding Roane guilty of murdering Moody in light of the formidable direct and circumstantial evidence of Roane's guilt.

Three credible witnesses placed Roane at or around the scene of the murder: Robert Davis testified that he saw Tipton and Roane in the vicinity of the murder shortly

after the murder[4], Finding of Fact 12; Denise Berkley gave a detailed account of the events leading up to the murder and actually saw Roane stab Moody; and Pepsi Greene's compelling testimony largely corroborated the details of Berkley's account and placed the bloody murder weapon in Roane's hand immediately following the slaying. A reasonable juror would tend to credit the foregoing testimony in light of Greene and Berkley's demeanor and because their accounts were largely consistent with each other, the evidence at the crime scene, and the autopsy. Findings of Fact 9-15. Furthermore, Roane's new evidence of innocence does not diminish the substantial evidence that indicated Roane stabbed Moody to death as part of a plan to take over the drug traffic in the Newtowne area. See Findings of Fact 1-8. Specifically, that evidence demonstrated that Roane was involved in the initial planning to take over the drug trade in the Newtowne area. In furtherance of that plan, the day after Moody was killed, Roane participated in executing Moody's superior in the drug trade, Peyton Maurice Johnson. Then, roughly two weeks later, Roane participated in killing another individual who was an obstacle to the plan to take over the drug trade in Newtowne area, Louis Johnson. Roane's assertion that he spent the night of Moody's murder languishing in a hotel room with his girlfriend, does not sit comfortably alongside Roane's proven participation in the other aspects of the plan to take over the drug trade in the Newtowne area. Accordingly, Roane has failed to demonstrate that, in light of all the evidence, no reasonable juror would have found him guilty of the charges related to the murder of Douglas Moody. Claim VIII will be dismissed.

An appropriate Order will issue.

James R. Spencer
United States District Judge

Richmond, Virginia
Date: 5-1-03

[4] Moody was shot and stabbed. Davis testified that Roane had acquired a firearm shortly before Moody was murdered.

378 F.3d 382
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
James H. ROANE, Jr., Defendant-Appellee.
United States of America, Plaintiff-Appellee,
v.
James H. Roane, Jr., Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Cory Johnson, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Richard Tipton, Defendant-Appellant.

Nos. 03-13, 03-25, 03-26, and 03-27.

Argued: May 6, 2004.

Decided: Aug. 9, 2004.

Synopsis

Background: Defendants were convicted of multiple offenses arising from drug trafficking scheme, including capital murders, and were sentenced to death. After convictions and sentences were affirmed on direct appeal, 90 F.3d 861, defendants moved to vacate sentences. The United States District Court for the Eastern District of Virginia, James R. Spencer, J., granted relief to one defendant as to claims arising from one of charged murders, on basis that his counsel was ineffective in investigating alibi defense, and denied other claims. Defendants appealed, and government appealed from grant of relief.

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

[1] counsel was not ineffective in failing to object to allegedly discriminatory use of peremptory challenges against female prospective jurors;

[2] claimed ineffectiveness of counsel in failing to request certain instructions was not prejudicial;

[3] alleged presentation of perjured testimony by prosecution did not provide basis for relief;

[4] prosecution did not violate its duties under *Brady*;

[5] counsel was not ineffective in presenting mitigating evidence at sentencing;

[6] defendant was not mentally retarded, and thus ineligible for execution; and

[7] counsel did not perform deficiently in making investigation into defendant's potential alibi defense.

Affirmed in part and reversed in part.

West Headnotes (48)

[1] **Criminal Law** Review De Novo
Criminal Law Sentencing

In its consideration of district court's rulings on motion to vacate sentence, Court of Appeals reviews its legal conclusions de novo and its findings of fact for clear error. 28 U.S.C.A. § 2255.

16 Cases that cite this headnote

[2] **Criminal Law** Review De Novo

Court of Appeals reviews de novo mixed questions of law and fact addressed by the district court in ruling on motion to vacate sentence, including the issue of whether a lawyer's performance was constitutionally adequate. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2255.

5 Cases that cite this headnote

[3] **Criminal Law** Issues related to jury trial

Court of Appeals reviews for abuse of discretion a district court's decision to deny a post-trial request to interview jurors.

3 Cases that cite this headnote

[4] **Criminal Law** Post-conviction relief

Court of Appeals reviews for abuse of discretion district court's rulings on a discovery request made in connection with motion to vacate sentence. 28 U.S.C.A. § 2255.

2 Cases that cite this headnote

[5] **Criminal Law** Cause

Claims by defendants that had already been addressed and rejected on direct appeal could not be raised in their motions to vacate sentence, where no intervening change in the warranted reconsideration of claims. 28 U.S.C.A. § 2255.

84 Cases that cite this headnote

[6] **Criminal Law** Affirmance of conviction

Claim of impermissible gender discrimination by prosecution in its use of peremptory challenges against female potential jurors, which was addressed on direct appeal, could not be raised by defendants in motion to vacate sentence. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 2255.

6 Cases that cite this headnote

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

Failure of counsel to object to prosecution's allegedly discriminatory use of peremptory challenges against female prospective jurors as resulting in impermissible gender-based discrimination, in violation of equal protection clause, did not constitute ineffective assistance, where at time of trial, Supreme Court had not yet extended rationale of *Batson* to gender-based peremptory challenges, and Court of Appeals for circuit in which trial was held had explicitly rejected attempts to extend *Batson* to gender. U.S.C.A. Const.Amends. 6, 14.

2 Cases that cite this headnote

[8] **Controlled Substances** Continuing criminal enterprise; drug organizations

To convict a defendant of participating in a continuing criminal enterprise (CCE), government is required to prove five elements: (1) defendant committed a felony violation of the federal drug laws, (2) such violation was part of a continuing series of violations of the drug laws, (3) the series of violations were undertaken by defendant in concert with five or more persons, (4) defendant served as an organizer or supervisor, or in another management capacity with respect to those other persons, and (5) defendant derived substantial income or resources from the continuing series of violations. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

1 Cases that cite this headnote

[9] **Criminal Law** Offering instructions

Failure of counsel for defendants convicted of participating in a continuing criminal enterprise (CCE) to request instruction that jury was required to unanimously agree on three predicate violations supporting continuing series element of crime did not result in prejudice, and thus could not support grant of relief based on ineffective assistance of counsel, where reviewing court on direct appeal determined that defendants were not prejudiced by lack of such an instruction. U.S.C.A. Const.Amend. 6; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

1 Cases that cite this headnote

[10] **Criminal Law** Assent of required number of jurors

Jury need not unanimously agree on which five persons were organized, supervised, or managed by the defendant in order to convict defendant of participating in a continuing criminal enterprise (CCE). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

[11] **Criminal Law** Offering instructions

Counsel for defendants charged with participating in a continuing criminal enterprise (CCE) was not ineffective in failing to request special unanimity instruction on the CCE charge regarding the identities of the "five or more persons" that each defendant was alleged to have supervised, as unanimous agreement on the identity of each supervisee is not required to support CCE conviction. U.S.C.A. Const.Amend. 6; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

[12] **Criminal Law** Offering instructions

Failure of counsel for defendants charged with participating in a continuing criminal enterprise (CCE) to request instruction that certain categories of persons, such as drug kingpins, cannot as a matter of law be supervisees, and that certain types of relationships, such as buyer-seller, cannot constitute supervision, for purposes of CCE charge, did not constitute ineffective assistance, where court gave instruction regarding definition of terms "organizer," "supervisory position," and "position of management" as used in CCE statute. U.S.C.A. Const.Amend. 6; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

[13] **Controlled Substances** Continuing criminal enterprise; drug organizations

Proof that a defendant charged with participating in a continuing criminal enterprise (CCE) exercised some degree of control over others is not required to show that he acted as an organizer. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

[14] **Constitutional Law** Use of Perjured or Falsified Evidence

To prevail on claim that prosecution knowingly introduced perjured testimony, in violation of due process clause, defendant is required to demonstrate that (1) the testimony was false, (2) the prosecution knew the testimony was false, and (3) there is a reasonable probability that the false testimony could have affected the verdict. U.S.C.A. Const.Amend. 5.

24 Cases that cite this headnote

[15] **Constitutional Law** Use of Perjured or Falsified Evidence

Criminal Law Use of False or Perjured Testimony

Defendants failed to establish that prosecution knew or should have known that allegedly perjured testimony of prosecution witness during trial on drug and murder charges was false, as required to demonstrate that prosecution had engaged in prosecutorial misconduct in violation of due process clause by presenting such testimony. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[16] **Criminal Law** Perjured testimony and recantation

Conclusory accusations that the government should have known that a statement was false, without more, do not warrant an evidentiary hearing or offer escape from summary judgment, for purposes of motion to vacate sentence in which defendant alleges that government knowingly presented perjured testimony in violation of due process clause. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 2255.

53 Cases that cite this headnote

[17] **Constitutional Law** Use of Perjured or Falsified Evidence

Criminal Law Use of False or Perjured Testimony

No showing was made by defendants who were convicted of murder and drug offenses that allegedly perjured testimony presented by government affected the outcome of their trial, as required to establish due process violation arising from presentation of such testimony, where government presented extensive trial evidence of defendants' gang-related activities and involvement with drugs. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[18] **Criminal Law** Conduct and argument of prosecutor

Defendants charged with murder failed to show that testimony of witness regarding murder was false, as required to prevail on motion to vacate sentence in which they alleged that government had presented perjured testimony in violation of due process clause; witness's testimony was consistent with the facts observed at the crime scene. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 2255.

1 Cases that cite this headnote

[19] **Criminal Law** Information Within Knowledge of Prosecution

Murder defendant failed to show that prosecution was aware that prosecution witness had denied receiving a knife from defendant, as required to establish *Brady* violation based on prosecution's failure to disclose such information. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[20] **Criminal Law** Diligence on part of accused; availability of information

Where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine.

7 Cases that cite this headnote

[21] **Criminal Law** Diligence on part of accused; availability of information

Information actually known by the defendant falls outside the ambit of the *Brady* rule. U.S.C.A. Const.Amend. 5.

14 Cases that cite this headnote

[22] **Criminal Law** Diligence on part of accused; availability of information

Defendant obviously knew who he was with on night of charged murder, so that failure of prosecution to disclose statements by witnesses which allegedly provided defendant with an alibi did not constitute *Brady* violation. U.S.C.A. Const.Amend. 5.

4 Cases that cite this headnote

[23] **Criminal Law** Discovery and disclosure

Good cause for discovery exists in connection with motion to vacate sentence where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. 28 U.S.C.A. § 2255.

50 Cases that cite this headnote

[24] **Criminal Law** Discovery and disclosure

District court did not abuse its discretion by denying defendants' requests for discovery, apart from authorizing forensic testing of knife found at murder scene, in connection with motions to vacate sentence filed by defendants convicted of drug and murder charges, where court carefully considered each claim asserted by the defendants, and assessed whether they had shown good cause for discovery. 28 U.S.C.A. § 2255.

9 Cases that cite this headnote

[25] **Criminal Law** Discovery and disclosure

Defendants who were convicted on drug and murder charges failed to proffer any evidence that jurors engaged in misconduct, or that

they were improperly exposed to outside influences, and thus, district court properly denied defendants' request for leave to interview jurors in connection with their motions to vacate sentence. 28 U.S.C.A. § 2255.

4 Cases that cite this headnote

[26] **Jury** Personal opinions and conscientious scruples

A "*Witherspoon* inquiry" during voir dire seeks to determine whether a potential juror would always refuse to impose the death penalty, while a "reverse-*Witherspoon* inquiry" is utilized to determine the existence of pro-death-penalty bias on the part of a prospective juror.

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

Under deficient performance prong of *Strickland* test for ineffective assistance of counsel claims, court applies a strong presumption that a trial counsel's strategy and tactics fall within the wide range of reasonable professional assistance.

191 Cases that cite this headnote

[28] **Criminal Law** Deficient representation in general

For a lawyer's trial performance to be deficient, and thus to constitute ineffective assistance, his errors must have been so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. U.S.C.A. Const.Amend. 6.

30 Cases that cite this headnote

[29] **Criminal Law** Deficient representation in general

For purposes of ineffective assistance claim, reasonableness of a lawyer's trial performance must be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of reasonableness is highly deferential. U.S.C.A. Const.Amend. 6.

58 Cases that cite this headnote

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

To establish prejudice arising from counsel's deficient performance, defendant must show that there is a "reasonable probability," or a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

47 Cases that cite this headnote

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

Claimed ineffectiveness of counsel for defendants charged with murder and drug offenses in failing to adequately investigate their alleged gang activities in New York and New Jersey, which purportedly would have led to the discovery of impeaching evidence on certain prosecution witnesses, did not result in prejudice, as would support relief based on ineffective assistance, where substantial negative repercussions would have resulted to defendants from introduction of such impeachment evidence. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

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

Claimed ineffectiveness of counsel for capital murder defendants in failing to request a specific "reverse-*Witherspoon*" inquiry of all prospective jurors to determine the existence of pro-death-penalty bias did not result in prejudice, where reviewing court on direct appeal found that trial court's inquiry into death penalty attitudes was sufficient to cull out any prospective juror who would always vote for death penalty. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[33] **Jury** Personal opinions and conscientious scruples

A capital defendant has the right to an voir dire inquiry sufficient to ensure-within the limits of reason and practicality-a jury none of whose members would unwaveringly impose death after a finding of guilt, and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law.

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

Counsel for capital murder defendants were not ineffective in failing to present mitigating evidence at sentencing regarding the prison conditions defendants would face if sentenced to life imprisonment without the possibility of parole, where if such evidence had been introduced prosecution would simply have been afforded another opportunity to remind jurors that defendants had a proven inclination to engineer murders from behind prison walls. U.S.C.A. Const.Amend. 6.

[35] **Criminal Law** Argument and Conduct of Defense Counsel

Attorneys for capital murder defendant were not deficient in failing to urge jury to acquit defendant on basis of testimony of pathologist that defendant, who was right-handed, could not have been victim's murder, based on location of stab wounds, where pathologist's testimony did not suggest that defendant could not have stabbed victim in manner which actually occurred. U.S.C.A. Const.Amend. 6.

[36] **Criminal Law** Investigating, locating, and interviewing witnesses or others

Criminal Law Presentation of witnesses

Counsel for capital murder defendant was not ineffective in failing to interview and call as a witness individual who allegedly would have contradicted prosecution witness who claimed that he had driven defendant and accomplice to individual's house shortly after murder, where there was no evidence that defendant had advised counsel that individual could contradict witness's testimony. U.S.C.A. Const.Amend. 6.

[37] **Criminal Law** Presentation of witnesses

Defendant's failure to inform counsel that prospective witnesses could exonerate him from charges of involvement in murder precluded claim that counsel was ineffective in failing to call witnesses as alibi witnesses. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

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

Counsel was not ineffective in failing to present adequate mitigation evidence regarding defendant's unfortunate childhood during penalty phase of capital murder trial, where counsel did present extensive mitigating evidence, which was sufficiently compelling to convince jury to return non-death verdicts on three of six capital counts against him, despite existence of numerous and weighty aggravating factors. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

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

Counsel for capital murder defendant was not ineffective in failing to contest-and indeed, in effectively conceding-sufficiency of government's proof of the aggravating factor that murder involved substantial planning and premeditation, where evidence of planning and premeditation was ample, and best hope for defendant was to emphasize evidence in mitigation rather than challenge prosecution's solid case on aggravating factor. U.S.C.A. Const.Amend. 6.

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

Capital murder defendant was not prejudiced by claimed ineffectiveness of his trial attorney in waiving defendant's right to be present during portions of jury selection process; defendant made no suggestion of prejudice beyond conclusory assertion of presumptive prejudice. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[41] **Sentencing and Punishment** Mentally retarded persons

Capital murder defendant was not mentally retarded, and thus ineligible for execution; psychologist who examined defendant testified that his IQ was 77, which is above level which places person in mentally retarded category, and that he was aware of significance of score above that level and double-checked his numbers and consulted colleagues before reaching his conclusion. Immigration and Nationality Act, § 408(*l*), 21 U.S.C.A. § 848(*l*).

7 Cases that cite this headnote

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

Counsel for capital murder defendant was not ineffective in failing to assert at sentencing possibility that IQ-score inflation had allowed defendant's IQ to be assessed at just above level which would allow him to be classified as mentally retarded, and thus ineligible for death penalty, where counsel was presented with mental health report, which he had no obligation to second-guess. U.S.C.A. Const.Amend. 6; Immigration and Nationality Act, § 408(*l*), 21 U.S.C.A. § 848(*l*).

6 Cases that cite this headnote

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

To provide effective assistance, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, and a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. U.S.C.A. Const.Amend. 6.

10 Cases that cite this headnote

[44] **Criminal Law** Review De Novo

Criminal Law Sentencing

Court of Appeals reviews de novo district court's conclusion in connection with motion to vacate sentence that defense counsel was constitutionally ineffective, and defers to its findings of fact unless they are clearly erroneous. U.S.C.A. Const.Amend. 6.

8 Cases that cite this headnote

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

Counsel for capital murder defendant did not perform deficiently in making investigation into defendant's potential alibi defense, where upon learning of information that could provide an alibi defense, counsel had interviewed potential alibi witness but determined that her incomplete memory and apparent hostility would make her a poor witness, and went to hotel and performed unsuccessful search for hotel records for single night in question that could provide additional support for alibi. U.S.C.A. Const.Amend. 6.

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

A criminal defense lawyer possesses a duty to conduct a pretrial investigation that is reasonable under prevailing professional norms.

5 Cases that cite this headnote

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

Strategic decision of defense counsel on the extent of his investigation into an alibi defense must be directly assessed for reasonableness in

all the circumstances, applying a heavy measure of deference to counsel's judgments.

12 Cases that cite this headnote

[48] **Criminal Law** Adequacy of Representation

Criminal Law Deficient representation in general

In considering ineffective assistance of counsel claim, court is obligated by law to make every effort to avoid the distorting effects of hindsight, and should evaluate counsel's performance from counsel's perspective at the time of the alleged error and in light of all the circumstances. U.S.C.A. Const.Amend. 6.

43 Cases that cite this headnote

Attorneys and Law Firms

***388** Nos. 03-13 & 03-25. **ARGUED:**Robert John Erickson, Criminal Division, Appellate Section, United States Department of Justice, Washington, D.C., for Appellant/Cross-Appellee. Paul Francis Enzinna, Baker Botts, Washington, D.C., for Appellee/Cross-Appellant. **ON BRIEF:**Paul J. McNulty, United States Attorney, Alexandria, Virginia; G. Wingate Grant, Assistant United States Attorney, Richmond, Virginia, for Appellant/Cross Appellee. Michael J. Barta, Jamie Kilberg, Cheryl Crumpton, Baker Botts, Washington, D.C., for Appellee/Cross-Appellant. No. 03-26. **ARGUED:**Barbara Lynn Hartung, Richmond, Virginia, for Appellant. Robert John Erickson, Criminal Division, Appellate Section, United States Department of Justice, Washington, D.C., for Appellee. **ON BRIEF:**Edward E. Scher, Thorsen & Scher, L.L.P., Richmond, Virginia, for Appellant. Paul J. McNulty, United States Attorney, Alexandria, Virginia; G. Wingate Grant, Assistant United States Attorney, Richmond, Virginia, for Appellee. No. 03-27. **ARGUED:**Stephen Atherton Northup, Troutman Sanders, L.L.P., Richmond, Virginia, for Appellant. Robert John Erickson, Criminal Division, Appellate Section, United States Department of Justice, Washington, D.C., for Appellee. ON BRIEF: **ON BRIEF:**Frederick R. Gerson, Robinson & Gerson, P.C., Richmond, Virginia, for Appellant. Paul J. McNulty, United States Attorney, Alexandria, Virginia; G. Wingate Grant, Assistant United States Attorney, Richmond, Virginia, for Appellee.

Before WILKINSON, KING, and DUNCAN, Circuit Judges.

***389** Affirmed in part and reversed in part by published opinion. Judge KING wrote the opinion, in which Judge WILKINSON and Judge DUNCAN joined.

OPINION

KING, Circuit Judge:

In February 1993, James Roane, Cory Johnson, and Richard Tipton were convicted in the Eastern District of Virginia for an array of criminal activity, including several capital murders, arising out of drug-trafficking operations in and near Richmond. Each received at least one death sentence for his crimes, plus various terms of imprisonment. After unavailing direct appeals to this Court, *United States v. Tipton,* 90 F.3d 861 (4th Cir.1996), Roane, Johnson, and Tipton (the "Defendants") sought habeas corpus relief in the district court. The Government sought summary judgment on their claims, which the district court awarded, except for two claims raised by Roane. *See United States v. Tipton,* No. 3:92CR68 (E.D.Va. May 1, 2003) (the "Opinion"). After discovery proceedings and an evidentiary hearing on Roane's remaining two claims, the court granted relief on his Sixth Amendment claim of ineffective assistance of counsel ("IAC claim"), vacating Roane's convictions and sentences relating to the murder of Douglas Moody. *See United States v. Roane,* No. 3:92CR68 (E.D.Va. May 1, 2003) (the "Roane Opinion"). Finally, the court rejected Roane's claim of actual innocence of the Moody murder. *Id.*

We are now presented with four separate appeals, which we have consolidated. In Appeal No. 03-13, the Government appeals the district court's award of relief to Roane on his Sixth Amendment IAC claim. In No. 03-25, Roane cross-appeals the court's rulings in favor of the Government on certain of his other claims. And in Nos. 03-26 and 03-27, Johnson and Tipton appeal the award of summary judgment to the Government on certain of their claims. As explained below, we affirm the rulings in favor of the Government in Nos. 03-25, 03-26, and 03-27, and we reverse the award of relief to Roane in No. 03-13.

I.

A.

In our comprehensive 1996 opinion rejecting the Defendants' direct appeals, Judge Phillips aptly summarized the relevant facts underlying the prosecution of Johnson, Tipton, and Roane. *See Tipton,* 90 F.3d at 868-70. Because we are unable to improve on that summary, it is set forth *in haec verba:*

> Recounted in summary form and in the light most favorable to the Government, the core evidence revealed the following. Tipton, Roane, and Cory Johnson were principal "partners" in a substantial drug-trafficking conspiracy that lasted from 1989 through July of 1992. The conspiracy's operations began in Trenton, New Jersey where Johnson and Tipton, both from New York City, became members. In August of 1990, the conspiracy expanded its operations to Richmond, Virginia where Roane joined the conspiracy in November of 1991. The Trenton-based operation came to an end on June 4, 1991 when police confiscated a large quantity of crack cocaine and firearms. In late 1991, the conspiracy's operations were expanded from the Central Gardens area of Richmond to a second area in Richmond called Newtowne.
>
> During the period of the conspiracy's operation, its "partners", including appellants, obtained wholesale quantities of powdered cocaine from suppliers in New York City, converted it by "cooking" [it] into crack cocaine, then packaged it, divided ***390** it among themselves, and distributed it through a network of 30-40 street level dealers, "workers." Typically, the appellants and their other partners in the conspiracy's operations took two-thirds of the proceeds realized from street-level sales of their product.
>
> Over a short span of time in early 1992, Tipton, Cory Johnson, and Roane were variously implicated in the murders of ten persons within the Richmond area-all in relation to their drug-trafficking operation and either because their victims were suspected of treachery or other misfeasance, or because they were competitors in the drug trade, or because they had personally offended one of the "partners."
>
> On January 4, 1992, Tipton and Roane drove Douglas Talley, an underling in disfavor for mishandling a drug transaction, to the south side of Richmond. Once there, Roane grabbed Talley from the rear while Tipton stabbed him repeatedly. The attack lasted three to five minutes and involved the infliction of eighty-four stab wounds to Talley's head, neck, and upper body that killed him.
>
> On the evening of January 13, 1992, Tipton and Roane went to the apartment of Douglas Moody, a suspected rival in their drug-trafficking area, where Tipton shot Moody twice in the back. After Moody fled by jumping through a window, both Tipton and Roane pursued. Roane, armed with a military-style knife retrieved from an apartment where the knife was kept for co-conspirator Curtis Thorne, caught up with Moody in the front yard of the apartment where he stabbed him eighteen times, killing him.
>
> On the night of January 14, 1992, Roane, Cory Johnson, and a third person retrieved a bag of guns that they had left at an apartment earlier that day. Roane then located Peyton Johnson, another rival drug dealer, at a tavern. Shortly after Roane left the tavern, Cory Johnson entered with another person and fatally shot Peyton Johnson with a semiautomatic weapon.
>
> On January 29, 1992, Roane pulled his car around the corner of an alley, got out of the vehicle, approached Louis Johnson, whom appellant Johnson thought had threatened him while acting as bodyguard for a rival dealer, and shot him. Cory Johnson and co-conspirator Lance Thomas then got out of Roane's car and began firing at Louis Johnson. As Louis Johnson lay on the ground, either Cory Johnson or Thomas shot him twice at close range. Louis Johnson died from some or all of these gunshot wounds.
>
> On the evening of February 1, 1992, Cory Johnson and Lance Thomas were told that Roane had gone to the apartment of Torrick Brown, with whom Roane had been having trouble. Johnson and Thomas armed themselves with semiautomatic weapons and went to the apartment where they joined appellant Roane outside. The three then knocked on Brown's door and asked his half-sister, Martha McCoy, if Brown was there. She summoned Brown to the door and Cory Johnson, Roane, and Thomas opened fire with semiautomatic weapons, killing Brown and critically wounding McCoy.
>
> In late January, 1992, after being threatened by Cory Johnson for not paying for a supply of crack cocaine, Dorothy Armstrong went to live with her brother, Bobby Long. On February 1, Cory Johnson learned from Jerry Gaiters the location of Long's house. Thereafter, Tipton and an unidentified "young fellow" picked up Gaiters and Cory

Johnson who were then driven by ***391** Tipton to a house where the group obtained a bag of guns. After dropping off the unidentified third party, the group proceeded to Long's house. Upon arriving at Long's house, Cory Johnson and Gaiters got out of the car and approached the house. While Tipton waited in the car, Cory Johnson and Gaiters went to the front door. When Long opened the door, Cory Johnson opened fire, killing both Dorothy Armstrong and one Anthony Carter. Bobby Long fled out the front door, but was fatally shot by Cory Johnson in the front yard.

In early February 1992, Cory Johnson began to suspect that Linwood Chiles was cooperating with the police. On February 19, 1992, Johnson borrowed Valerie Butler's automobile and arranged to meet with Chiles. That night, Chiles, Curtis Thorne, and sisters Priscilla and Gwen Greene met Cory Johnson and drove off together in Chiles's station wagon. Chiles parked the car in an alley, and Tipton soon drove in behind it in another car, got out, and came up alongside the stationwagon. With Tipton standing by, Cory Johnson told Chiles to place his head on the steering wheel and then shot Chiles twice at close range. Additional shots were fired, killing Thorne and critically wounding both of the Greene sisters. The autopsy report indicated that Thorne had been hit by bullets fired from two different directions.

Tipton was charged under 21 U.S.C. § 848(e) and 18 U.S.C. § 2 with capital murder for eight of these killings (Talley, Moody, Louis Johnson, Long, Carter, Armstrong, Thorne, and Chiles); Cory Johnson, with seven (Louis Johnson, Long, Carter, Armstrong, Thorne, Chiles, and Peyton Johnson); and Roane, with three, (Moody, Louis Johnson, and Peyton Johnson).

The jury convicted Tipton of six of the eight capital murders with which he was charged under § 848(e) (Talley, Armstrong, Long, Carter, Chiles, and Thorne). One of the other two § 848(e) charges was dismissed (Louis Johnson) and the other resulted in acquittal (Moody). Tipton was also convicted of conspiracy to possess cocaine base with the intent to distribute (21 U.S.C. § 846), engaging in a [continuing criminal enterprise ("CCE")] (21 U.S.C. § 848(a)), eight counts of committing acts of violence (the eight killings charged under § 848(e)) in the aid of racketeering activity (18 U.S.C. § 1959), two counts of using a firearm in relation to a crime of violence or a drug-trafficking crime (18 U.S.C. § 924(c)), and two counts of possessing cocaine base with intent to distribute (21 U.S.C. § 841(a)(1)).

The jury convicted Cory Johnson of all seven of the capital murders with which he was charged under § 848(e) (Louis Johnson, Long, Carter, Armstrong, Thorne, Chiles, and Peyton Johnson). He was also convicted of conspiracy to possess cocaine base with the intent to distribute (21 U.S.C. § 846), engaging in a CCE (21 U.S.C. § 848(a)), eleven counts of committing acts of violence (including the seven killings charged under § 848(e)) in aid of racketeering activity (18 U.S.C. § 1959), five counts of using a firearm in relation to a crime of violence or drug-trafficking offense (18 U.S.C. § 924(c)), and two counts of possession of cocaine base with the intent to distribute (21 U.S.C. § 841(a)(1)).

The jury convicted Roane of all three of the capital murders with which he was charged under § 848(e) (Moody, Peyton Johnson, and Louis Johnson.) He was also convicted of conspiracy to possess cocaine base with the intent to distribute (21 U.S.C. § 846), engaging in a CCE ***392** (21 U.S.C. § 848(a)), five counts of committing acts of violence (including the three killings charged under § 848(e)) in aid of racketeering activity (18 U.S.C. § 1959), four counts of using a firearm in relation to a crime of violence or a drug trafficking offense (18 U.S.C. § 924(c)), and one count of possession of cocaine base with the intent to distribute (21 U.S.C. § 841(a)(1)).

Following a penalty hearing on the capital murder counts, the jury recommended that Cory Johnson be sentenced to death on all of the seven § 848(e) murders of which he had been convicted; that Tipton be sentenced to death for three of the six § 848(e) murders of which he was convicted (Talley, Chiles, and Thorne); and that Roane be sentenced to death for one of the three of which he was convicted (Moody). The district court sentenced Johnson, Tipton, and Roane to death in accordance with the jury's recommendations pursuant to 21 U.S.C. § 848(*l*), and imposed various sentences of imprisonment upon each of the appellants for the several noncapital counts on which they were convicted and for those capital murder counts on which Tipton and Roane had been convicted but were not given death sentences.

On appellants' motion, the district court refused to order execution of the several death sentences on the grounds that Congress had neither directly authorized the means by which the death sentences imposed under § 848 should be carried out, nor properly delegated to the Attorney General the authority to issue the implementing regulations that

were invoked by the Government. In consequence, the district court stayed execution of the death sentences it had imposed until such time as Congress had authorized the means of execution.

Id.

When the Defendants initially appealed their convictions and sentences to this Court, the Government cross-appealed the district court's stay of their death sentences. In our *Tipton* opinion, we analyzed and disposed of approximately sixty issues, including challenges by the Defendants to aspects of the jury-selection process, the trial's guilt phase, and the trial's penalty phase. *See id.* at 870-901. In rejecting nearly all these challenges, we affirmed the convictions and sentences of the Defendants, except for their convictions for violating 21 U.S.C. § 846 (conspiracy to commit drug offenses), which we vacated on double jeopardy grounds. Finally, on the Government's cross-appeal, we vacated the stay of their death sentences and remanded for the executions to proceed in accordance with regulations promulgated by the Attorney General. *Id.* at 901-03.

B.

Following our decision in *Tipton,* the Defendants persisted in seeking relief from their convictions and sentences. On May 8, 1998, they sought leave to interview jurors, pursuant to Local Rule 83.5 of the district court, which was denied. *Johnson v. Pruett,* No. 3:97CV895 (E.D. Va. June 10, 1998). On June 1, 1998, the Defendants sought relief under 28 U.S.C. § 2255, filing motions to vacate, set aside, or correct their sentences. [1] The Government sought summary judgment on these motions, and the Defendants, in June 1999, requested leave to conduct discovery. The court granted the discovery request in ***393** part, authorizing Tipton to conduct certain forensic testing. *Johnson v. Pruett,* No. 3:97CV895 (E.D.Va. May 3, 2000).

[1] Pursuant to § 2255 of Title 28, a federal prisoner claiming his "sentence was imposed in violation of the Constitution or laws of the United States ... may move the court which imposed the sentence to vacate, set aside or correct the sentence."

In its Opinion disposing of the § 2255 motions, the district court awarded summary judgment to the Government except on Roane's claims that: (1) he was denied effective assistance of counsel in connection with the Moody murder, and (2) he was actually innocent of that murder. *See* Opinion at 114. The Defendants thereafter filed a joint motion to alter the Opinion, which the court denied. *United States v. Tipton,* No. 3:92CR68 (E.D.Va. July 15, 2003). Johnson and Tipton then moved for the issuance of certificates of appealability, which the district court awarded on November 26, 2003, as to all claims raised in their § 2255 motions. *United States v. Tipton,* No. 3:92CR68 (E.D.Va. Nov. 26, 2003). Johnson and Tipton have filed timely appeals, and we possess jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

C.

On June 21, 2002, the district court conducted an evidentiary hearing on Roane's IAC claim and on his claim of actual innocence. In the Roane Opinion of May 1, 2003, the court made findings of fact regarding the representation rendered by Roane's trial attorney. *See* Roane Opinion at 2-8. In so doing, the court first addressed the evidence implicating Roane in the Moody murder, finding as follows:

- Denise Berkley testified that on the night of the Moody murder, she watched Roane stab Moody "18 or 19 times" while Moody pleaded for his life; that she then saw Sandra Reavis, Roane, Curt Thorne, Linwood Chiles, and Priscilla "Pepsi" Greene leave the scene of the murder in Chiles's station wagon; and that Roane took the knife he used to stab Moody and gave it to Pepsi Greene, asking her to get rid of it;

- Pepsi Greene testified that she heard two or three shots and then saw Roane and Tipton exit the house from which the shots were fired; that Roane then directed her to get him a knife; and that later that night, Roane returned the knife, then covered with blood, and told her to get rid of it; and

- Robert Davis testified that, immediately following the Moody murder, he saw Tipton and Roane by the steps near his house and heard them stating, "Yeah, I got him, I got him ... we can't stay out here, man. This is hot anyway."

Id. at 3-4. Importantly, the court found the testimony of these witnesses to be "credible and ... corroborated by the physical evidence of murder including the autopsy and the crime scene video." *Id.* at 4. Indeed, the court found Greene's testimony to be "particularly compelling." *Id.*

The court then focused on the evidence of Gina Taylor, who observed the Moody murder. Taylor had testified at trial that Roane was not involved. *Id.* The court found, however, that the value of Taylor's evidence was undermined by (1) her acknowledgment that she could not identify the assailant's gender and that she did not see his face, (2) the fact that she was evasive on cross-examination, and (3) her acknowledgment that she had "kind of" dated Tipton. *Id.*

The court then made findings regarding Roane's alibi for the Moody murder. According to the court, Roane had advised his lawyer prior to trial of the following: (1) he did not participate in the murder of Moody; (2) on January 12, 1992-the night of the murder-he was in a Howard Johnson hotel room with codefendant Sandra Reavis; (3) he and Reavis were driven to the hotel by Linwood Chiles; (4) Carmella Cooley accompanied them to the hotel; and (5) Chiles had registered and paid ***394** cash for the hotel room. *Id.* at 5. The court found that the lawyer, David Baugh, "was convinced that Roane did not participate in the Moody murder" and that the hotel was a "couple of miles from where Douglas Moody was murdered." *Id.*

In addressing Mr. Baugh's pretrial investigation into Roane's alibi, the court found the following: (1) Mr. Baugh interviewed Cooley, who said that she had once accompanied Roane and Reavis to the Howard Johnson but could not verify the date; (2) Mr. Baugh concluded that Cooley's ignorance of the date and apparent hostility would make her a bad witness; (3) Mr. Baugh contacted the hotel seeking records of Linwood Chiles renting a room on January 12, 1992; (4) when the hotel manager advised that there were no such records, Mr. Baugh went to the hotel and personally sought to locate such records; (5) Mr. Baugh limited his search to the name "Linwood Chiles," and searched only for records of January 12, 1992; and (6) Mr. Baugh found no records of Linwood Chiles being registered at the hotel on January 12, 1992. *Id.*

The court analyzed the sufficiency of Mr. Baugh's pretrial investigation and concluded that it was constitutionally deficient. In so ruling, it found that: (1) an investigator hired by Roane's habeas corpus lawyer went to the Howard Johnson and looked through boxes of occupancy records for three hours; (2) the investigator found a card with the name "Chiles, Linwood" from the night of January 2, 1992, and a card with the name "Chiles, Larry" from the night of January 12, 1992; (3) in his trial preparation, Mr. Baugh could have subpoenaed the Howard Johnson records, or he could have devoted more effort to searching for them; (4) if Mr. Baugh had utilized the subpoena process or searched more diligently, he could have located the records found by the investigator; and (5) Roane was amenable to testifying in his own defense but was advised by Mr. Baugh not to testify unless his alibi defense could be objectively corroborated. *Id.* at 5-6.

Finally, the court made several findings on the evidence presented in the habeas corpus evidentiary hearing, to the following effect: (1) Roane's testimony was "tenable but not compelling"; (2) although Reavis confirmed Roane's alibi, her testimony was "flat and unpersuasive"; (3) because she would not waive her Fifth Amendment rights, Reavis would not have testified at trial; (4) Demetrius Rowe testified that, at about 8:30 p.m. on the night of the Moody murder, Reavis told Rowe that she was going to a hotel with Roane; (5) Rowe saw Reavis and Roane leave the area-not in Chiles's station wagon (as Roane claimed) but in a cab; (6) Rowe witnessed the murder of Moody and was sure Roane was not present; (7) Rowe did not provide anyone with this information before trial; and (8) to the extent it exculpated Roane, Rowe's evidence was "not credible" and "would carry no weight with a jury." *Id.* at 7.

Assessing all these findings in the context of the case, the court concluded that Mr. Baugh was constitutionally ineffective in his investigation of Roane's alibi. It therefore vacated Roane's convictions and sentences on the three counts related to the Moody murder, that is, Counts Five, Six, and Seven.[2] *Id.* at 13. Finally, the ***395** court denied relief on Roane's claim of actual innocence.[3] *Id.*

2 On Count Five, Roane was convicted of killing Moody while engaged in or working in furtherance of a CCE, in violation of 21 U.S.C. § 848(e)(1)(A). On Count Six, Roane was convicted of using a firearm in relation to the killing of Moody, in violation of 18 U.S.C. § 924(c). And on Count Seven, Roane was convicted of killing Moody in order to maintain or increase his position in a racketeering enterprise, in violation of 18 U.S.C. § 1959.

3 Roane does not appeal the court's rejection of his claim of actual innocence.

The Government appealed the court's ruling in favor of Roane on his IAC claim, and Roane sought a certificate of appealability on certain of the claims resolved against him, which the district court issued. *United States v. Tipton,*

No. 3:92CR68 (E.D.Va. Nov. 26, 2003). Roane then cross-appealed, and we possess jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

II.

[1] **[2]** **[3]** **[4]** In our consideration of the district court's rulings, we review its legal conclusions de novo and its findings of fact for clear error. *Monroe v. Angelone,* 323 F.3d 286, 299 (4th Cir.2003); *see also Quesinberry v. Taylor,* 162 F.3d 273, 276 (4th Cir.1998). We review de novo mixed questions of law and fact addressed by the district court-including the issue of whether a lawyer's performance was constitutionally adequate. *Smith v. Angelone,* 111 F.3d 1126, 1131 (4th Cir.1997). We review for abuse of discretion the district court's decision to deny a post-trial request to interview jurors, *United States v. Gravely,* 840 F.2d 1156, 1159 (4th Cir.1988), as well as its rulings on a discovery request. *See Thomas v. Taylor,* 170 F.3d 466, 474 (4th Cir.1999).

III.

The Defendants raise multiple issues on appeal, and the district judge has awarded a certificate of appealability on each of them.[4] Under the applicable statute, an appeal may not be taken from a final order of a district court in a § 2255 proceeding unless a certificate of appealability has been issued. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and the judge must specify the issues on which the certificate has been granted, *id.* § 2253(c)(3). In this instance, the district judge issued certificates of appealability to the Defendants and explained, "[u]pon consideration of the Defendants' claims and the arguments offered in support thereof, the Court concludes that the issues for which the Defendants seek a certificate of appealability are adequate to deserve encouragement to proceed further." *United States v. Tipton,* No. 3:92CR68 (E.D.Va. Nov. 26, 2003).

4 In Part III of this opinion, we spell out and address those issues raised by the Defendants in Nos. 03-25, 03-26, and 03-27. In Part IV, we address the Government's appeal (No. 03-13) from the award of relief to Roane on his IAC claim.

[5] Although some of the issues raised on appeal are common to the Defendants, certain issues pertain to only two of the Defendants or solely to a particular defendant.[5] Each of their contentions, however, falls into one of six categories:

5 When all three Defendants have raised the same issue on appeal, we refer to "the Defendants." Otherwise, we identify by name the defendant raising a particular issue.

(1) claims that the prosecution unconstitutionally discriminated against women in the jury selection process;

(2) challenges to their § 848 CCE convictions-including claims that the trial court erred in failing to instruct and counsel were ineffective in failing to request an instruction that (a) the jury had to unanimously agree on which predicate violations constituted a "continuing series"; (b) the jury had to unanimously agree on the identities of the "five or ***396** more persons" that each Defendant supervised; and (c) certain categories of persons and certain types of relationships cannot constitute supervision;

(3) claims of prosecutorial misconduct during trial-including claims that (a) the prosecution knowingly introduced perjured testimony from witnesses Gregg Scott, Maurice Saunders, and Hussone Jones; and (b) the prosecution improperly withheld exculpatory evidence regarding witnesses "Wildman" Stevens, John Knight, and Stoodie Green;

(4) challenges to the court's conduct of the habeas corpus proceedings-including (a) challenges to the standard employed by the court in assessing the Defendants' discovery requests; (b) the contention that the court abused its discretion in granting summary judgment without allowing further discovery; and (c) Johnson and Tipton's claim that the court erroneously denied their motion for leave to interview jurors;

(5) IAC claims not otherwise addressed-including (a) that their lawyers should have further investigated their alleged gang activities in New York and New Jersey; (b) Johnson and Tipton's claim that their lawyers should have requested a voir dire inquiry on whether prospective jurors had a tendency to favor the death penalty; (c) Johnson and Tipton's claim that their lawyers failed to present mitigating evidence regarding prison conditions; (d) Tipton's claims that his lawyers failed to

present adequate defenses to the Talley and Stoney Run murders;[6] (e) Tipton's claim that his lawyers failed to present an adequate case-in-mitigation; (f) Roane's claim that his lawyers conceded certain aggravating factors; and (g) Roane's claim that his lawyers waived his right to attend the voir dire proceedings; and

6 In the Talley murder, Tipton and Roane had driven Douglas Talley to Richmond's southside in January 1992, where Tipton stabbed Talley eighty-four times in the head, neck, and upper body. In the Stoney Run murders, Cory Johnson and Tipton, in February 1992, shot into Linwood Chiles's stationwagon, killing Chiles and Curtis Thorne, and seriously wounding the Greene sisters, Priscilla ("Pepsi") and Gwen.

(6) Johnson's Eighth Amendment claim that he is mentally retarded and cannot constitutionally be executed, and that his counsel were ineffective in failing to address this issue at sentencing and on direct appeal.[7]

7 The Defendants raise four other claims that were already addressed and rejected on direct appeal. Those claims are: (1) Defendants' contention that they were denied their rights to "justice without discrimination," in violation of 21 U.S.C. § 848(*o*) and the Fifth and Eighth Amendments, *see Tipton,* 90 F.3d at 891 n. 16; (2) Johnson and Tipton's contention that § 848(h) constitutes an unconstitutional delegation of legislative authority to prosecutors by allowing them to allege non-statutory aggravating factors, *see id.* at 895; (3) Johnson and Tipton's claim that the evidence at trial was insufficient to show that they supervised five or more persons, as required by § 848, *see id.* at 890; and (4) Johnson and Tipton's claim of misconduct by juror Cooke due to mid-trial publicity, *id.* at 891 n. 16. Because the Defendants have not pointed to any change in the law that warrants our reconsideration of these claims, we agree with the district court that they cannot relitigate these issues. *See* Opinion at 2-3; *see Boeckenhaupt v. United States,* 537 F.2d 1182, 1183 (4th Cir.1976) (explaining that defendant cannot relitigate issues previously rejected on direct appeal).

We assess these various issues in turn.[8]

8 The Defendants also maintain that, pursuant to *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), their death sentences are constitutionally invalid under the Fifth Amendment because the Indictment failed to allege the statutory aggravating factors under 21 U.S.C. § 848(n)(1)-(12) that define eligibility for the death penalty. *See Ring,* 536 U.S. at 589, 122 S.Ct. 2428 (explaining that a capital defendant is entitled, under the Sixth Amendment, to a jury determination of any fact that increases the maximum penalty from life imprisonment to death); *United States v. Higgs,* 353 F.3d 281, 297 (4th Cir.2003) (explaining that *Ring* dictates that any factor required to be submitted to the jury must be included in the indictment pursuant to the Fifth Amendment Indictment Clause). After oral argument in this case, the Court held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin,* 542 U.S. 348, ----, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004). And although *Schriro* involved the Sixth Amendment aspect of *Ring,* its reasoning-that *Ring* is procedural and does not classify as a rule worthy of retroactive effect-applies equally here.

A.

[6] At trial, the Government utilized two of its peremptory challenges to strike men from the jury panel, and it used eight ***397** peremptory challenges to strike prospective women jurors. The Defendants, however, failed to object at trial to the Government's use of its peremptory challenges. After trial, but before Defendants' direct appeal, the Supreme Court held that intentional gender discrimination by use of peremptory challenges contravenes the Equal Protection Clause. *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (extending its holding in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) from racial discrimination to gender discrimination). The Defendants, in their direct appeal, raised the issue of sex discrimination in jury selection. In rejecting their claim, we explained that they had produced no evidence to support their claim, other than "raw figures" of men versus women stricken by the prosecution, and such raw figures were insufficient to make a prima facie showing of gender discrimination. *Tipton,* 90 F.3d at 881 & n. 11. Because we addressed this issue on direct

appeal in *Tipton,* the Defendants cannot raise their *J.E.B.* claim again in these § 2255 proceedings. [9]

9 Because we have already considered Defendants' *J.E.B.* claim on direct appeal and therefore will not reconsider it, we do not reach the district court's conclusion that the claim was defaulted by Defendants' failure to raise it at trial. *See* Opinion at 12.

[7] The Defendants also maintain that the failure of their counsel to object to the prosecution's use of its peremptory challenges constitutes ineffective assistance of counsel. At the time of their trial, however, the Supreme Court had not granted certiorari in *J.E.B.,* and the Ninth Circuit was the only federal appellate court to extend the *Batson* principle to gender discrimination. *See United States v. De Gross,* 960 F.2d 1433, 1437-43 (9th Cir.1992) (en banc). Indeed, we had explicitly rejected attempts to extend *Batson* to gender. *See United States v. Hamilton,* 850 F.2d 1038, 1042 (4th Cir.1988) ("[W]e reject appellants' suggestion that the Equal Protection Clause compels us to extend *Batson* to apply to peremptory challenges exercised on the basis of gender."). In light of this precedent, the Defendants are unable to demonstrate that their counsel's failure to object to the prosecution's use of peremptory strikes against prospective female jurors fell below the range of professionally competent performance. *See United States v. McNamara,* 74 F.3d 514, 517 (4th Cir.1996) (explaining counsel not deficient for following controlling circuit precedent at time of trial). Accordingly, we must affirm the court's ruling on the IAC claims premised on the lack of an objection at trial to the prosecution's use of its peremptory strikes.

B.

[8] We turn next to the Defendants' multiple claims of error regarding their ***398** convictions on the CCE counts. In order to convict a defendant of a CCE offense, the Government is required to prove five elements:

> (1) [the] defendant committed a felony violation of the federal drug laws; (2) such violation was part of a continuing series of violations of the drug laws; (3) the series of violations were undertaken by defendant in concert with five or more persons; (4) defendant served as an organizer or supervisor, or in another management capacity with respect to those other persons; and (5) defendant derived substantial income or resources from the continuing series of violations.

United States v. Ricks, 882 F.2d 885, 890-91 (4th Cir.1989); *see also* 21 U.S.C. § 848(c). On appeal here, and in their § 2255 proceedings in district court, the Defendants focus on the second, third, and fourth of these elements.

1.

In their direct appeals, the Defendants asserted that the trial court had plainly erred in failing to instruct the jury that it was required to unanimously agree on three predicate violations supporting the "continuing series" element of § 848(c). [10] Assuming that unanimity was required, we rejected this claim and explained that "the record plainly indicates that appellants could have suffered no actual prejudice from the lack of a special unanimity instruction on the predicate violation element" because "[b]y its verdict, it is clear that the jury unanimously found each guilty of at least five predicate violations...." *Tipton,* 90 F.3d at 885.

10 In *Richardson v. United States,* 526 U.S. 813, 818, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), the Court assumed, without deciding, that the necessary number to make up a "continuing series" is three. The parties do not dispute this number here.

After we rendered our *Tipton* decision, the Supreme Court confirmed what we had assumed there. It held that, in a CCE prosecution, the jury must unanimously agree on the specific violations that make up the "continuing series." *Richardson v. United States,* 526 U.S. 813, 816, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). The Defendants now contend that the trial court's failure to give the *Richardson* instruction constitutes a structural defect in their trial and that they are therefore not required to show prejudice. In the alternative, they assert that they have demonstrated prejudice. Johnson and Tipton also maintain that their lawyers were ineffective in failing to object to the lack of a unanimity instruction. As

explained below, we agree with the district court that these claims lack merit.

We have recognized that a trial court's failure to give a *Richardson* instruction is a procedural defect rather than a structural one. *United States v. Stitt,* 250 F.3d 878, 883 (4th Cir.2001) (rejecting assertion that *Richardson* error is structural defect); *United States v. Brown,* 202 F.3d 691, 699 (4th Cir.2000) (same). As explained in *Stitt,* a trial court's failure to give a *Richardson* instruction is subject to harmless error analysis, and a defendant raising such an issue must therefore demonstrate prejudice. *Stitt,* 250 F.3d at 883. We ruled on the Defendants' direct appeal that the trial court's failure to give a *Richardson*-type instruction did not prejudice them, *see Tipton,* 90 F.3d at 885, and we must therefore affirm the district court on this point.

[9] In addition to their substantive *Richardson* claims, Johnson and Tipton maintain that their counsel's failure to request a *Richardson*-type instruction at trial constitutes ineffective assistance, in violation of the Sixth Amendment. Again, ***399** our decision on direct appeal forecloses this contention. In order to prevail on an IAC claim, a defendant must demonstrate that: (1) counsel's performance was deficient; and (2) such deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because we decided in *Tipton* that the Defendants were not prejudiced by the lack of a *Richardson* instruction, Johnson and Tipton are unable to satisfy the second prong of *Strickland.* Accordingly, we affirm the court's ruling on this claim as well.

2.

[10] Relying on *United States v. Jerome,* 942 F.2d 1328, 1330-31 (9th Cir.1991), Johnson and Tipton next contend that they were entitled to a special unanimity instruction on the CCE charge regarding the identities of the "five or more persons" that each of them was alleged to have supervised. *See* 21 U.S.C. § 848(c). Not only has this claim been inexcusably defaulted by Johnson and Tipton's failure to raise it either at trial or on direct appeal, it also fails because, in *Stitt,* we held that *Richardson* did not change the rule "that the jury need not unanimously agree on which five persons were organized, supervised, or managed by the defendant." *Stitt,* 250 F.3d at 886.

[11] Johnson and Tipton nevertheless claim that their attorneys were constitutionally ineffective in failing to raise this unanimity issue at trial. Because *Stitt* stands for the proposition that unanimous agreement on the identity of each supervisee is not required, we agree with the district court that the lawyers were not ineffective in failing to seek such an instruction. *See* Opinion at 21-25.

3.

[12] Johnson and Tipton next contend that the trial court erred in failing to instruct-and counsel were ineffective in failing to request-that certain categories of persons (i.e., drug kingpins) cannot as a matter of law be supervisees, and that certain types of relationships (i.e., buyer-seller) cannot constitute supervision. *See United States v. Barona,* 56 F.3d 1087, 1096-97 (9th Cir.1995) (finding error in failing to instruct that certain individuals who were on list of potential supervisees given to jury were incapable, as a legal matter, of counting as supervisees). This claim has been defaulted by the failure of Johnson and Tipton to raise it either at trial or on direct appeal. *See Bousley v. United States,* 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Like the district court, *see* Opinion at 19, 21-25, however, we will briefly examine this claim in order to assess the contention that counsel's failure to raise it in a timely manner resulted from constitutionally ineffective representation.

[13] The trial court gave the following instruction regarding the supervision element of § 848(c):

> [t]he term "organizer" and the term "supervisory position" and "position of management" are to be given their usual and ordinary meanings. These words imply the exercise of power or authority by a person who occupies some position of management or supervision.

See Opinion at 19-20. We upheld this very instruction in *United States v. Hall,* 93 F.3d 126, 130 (4th Cir.1996), two months after our decision in *Tipton.* In *Hall,* the defendant maintained that the jury should have been instructed that he could have neither supervised nor organized individuals with whom he had only a buyer-seller relationship. *Id.* As we

explained in *Hall,* [j]urors are competent to ***400** understand and apply ordinary concepts like organizer, supervisor and management." *Id.* at 131. This jury, like the one in *Hall,* was fully capable of understanding the term "supervision." Accordingly, Johnson and Tipton were not prejudiced by the lack of such an instruction, and their counsel were not ineffective in failing to request a more detailed instruction regarding these terms. [11]

11 Johnson and Tipton also maintain that the trial court erred in failing to instruct, and that counsel were ineffective in failing to request an instruction, that the Government must prove "management" in order to satisfy the CCE statute's "organizer" or "supervisor" element. This contention ignores our precedent that proof that a CCE defendant exercised some degree of control over others is not required to show that he acted as an organizer. *See Butler,* 885 F.2d at 201. Even if proof of control were required, the trial court properly instructed the jury that supervision constitutes the "exercise of power and authority by a person who occupies some position of management." Accordingly, this contention is without merit.

C.

We turn next to the contentions of Johnson and Tipton that their trial was prejudiced by multiple instances of prosecutorial misconduct. They contend that the prosecution knowingly introduced false testimony at trial, in contravention of their due process rights, from witnesses Gregg Scott, Maurice Saunders, and Hussone Jones. And Tipton asserts that the Government contravened the principles of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding from them exculpatory evidence pertaining to the witnesses "Wildman" Stevens, John Knight, and Stoodie Greene. We assess these claims in turn.

1.

[14] First, Johnson and Tipton contend that the prosecution knowingly introduced perjured testimony from Gregg Scott, Maurice Saunders, and Hussone Jones. In order to prevail on such a claim, Johnson and Tipton are required to demonstrate that: (1) the testimony was false, *see Boyd v. French,* 147 F.3d 319, 329-30 (4th Cir.1998); (2) the Government knew the testimony was false, *see Thompson v. Garrison,* 516 F.2d 986, 988 (4th Cir.1975); and (3) there is a reasonable probability that the false testimony could have affected the verdict, *Boyd,* 147 F.3d at 330. As explained below, we agree with the district court that this claim must be rejected.

A.

[15] In support of this habeas corpus claim, Johnson and Tipton submitted affidavits from various gang members in New York, asserting that Gregg Scott had lied at trial when he: (1) testified that the New York Boyz (a gang of which Johnson and Tipton were allegedly members) met to discuss retaliating against individuals who threatened other members of the gang; and (2) testified that he received guns from a man known as "Light." [12] Although Johnson and Tipton raised a factual issue on the falsity of these statements, they offered no proof that the Government knew or should have known this testimony to be false. Opinion at 33-35. And the fact that the evidence may have benefitted the Government is not enough. Such " '[a]iry generalities, conclusory assertions and hearsay statements [do] not suffice' to ***401** stave off summary judgment or entitle a habeas petitioner to an evidentiary hearing, because none of these would be admissible evidence at an evidentiary hearing." *Id.* at 35 (quoting *United States v. Aiello,* 814 F.2d 109, 113 (2d Cir.1987)). We therefore affirm the district court's ruling on this claim.

12 Johnson and Tipton also submitted affidavits that Greg Scott lied when he: (1) said that he grew up at 155th and Amsterdam in New York; and (2) described the New York Boyz as a gang. The district court found that these statements simply constitute differences of opinion, rather than statements of fact. *See* Opinion at 33. Johnson and Tipton do not contest this finding on appeal.

B.

[16] Johnson and Tipton next assert that the Government knew, or that it should have known, that Maurice Saunders testified falsely at trial when he claimed that he saw Light during two trips to New York, and that Light could not have been in New York because he was in fact incarcerated elsewhere during Saunders's visits. Again, Johnson and Tipton proffer no evidence that the Government, at the time of trial, knew or should have known of Light's incarceration.

See Horton v. United States, 983 F.Supp. 650, 654-55 (E.D.Va.1997) (rejecting assertion that, for *Brady* purposes, federal prosecutor is charged with knowledge of state prison records). And conclusory accusations that the Government should have known that a statement was false, without more, do not warrant an evidentiary hearing or offer escape from summary judgment. *See Aiello,* 814 F.2d at 113-14.

[17] In any event, Johnson and Tipton have made no showing that such testimony about Light's incarceration, even if untrue, could have affected the outcome of their trial. As the district court explained in denying their IAC claim regarding the prosecution's failure to discover Light's incarceration, the Government presented extensive trial evidence of Johnson and Tipton's New York connections and gang-related activities. Opinion at 39 (explaining that the proffered testimony of Light's incarceration does not negate the following: "Anthony Howlen's testimony that Johnson and Tipton were part of the New York Boyz and sliced him with razors when he interfered with their attempts to sell drugs in New Jersey; the repeated references to the New York Boyz during the course of the Richmond based activities; Tipton's threats to invoke the assistance of his New York associates if retaliatory actions were required; the appearance of New York Boyz Lance Thomas and Hess in Richmond; and the repeated trips by Tipton and Johnson from Richmond to New York to obtain drugs"). We therefore affirm the district court on this claim.

C.

[18] Johnson and Tipton also contend that the witness Hussone Jones lied when he testified about the murder of Douglas Talley. Jones testified at trial that he watched from his own car as Tipton stabbed Talley in Talley's car. Johnson and Tipton assume that this testimony was false because there were no street lights in the area of the crime, and they contend it was too dark for Jones to see anything. The district court found, however, that Jones was within ten to twenty feet of Talley's car, and that the car was illuminated by its dome light. The dome light was lit because, after initially being stabbed, Talley's arms and head prevented the car door from closing. Opinion at 54-55. Jones's testimony was consistent with the facts observed at the crime scene, and Johnson and Tipton have failed to make the requisite showing of falsity.

2.

Tipton also asserts that the prosecution improperly withheld exculpatory evidence from his counsel, in violation of due process and *Brady,* regarding the witnesses "Wildman" Stevens, John Knight, and ***402** Stoodie Green. In order to establish a *Brady* violation, Tipton was required to demonstrate that the information at issue was "favorable to the accused"; that it was "suppressed by the [Government], either willfully or inadvertently"; and that prejudice to the defense ensued. *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The district court held that Tipton failed to establish a *Brady* violation, *see* Opinion at 57, 63-64, and we agree.

[19] Tipton contends, first of all, that the prosecutors knew, and yet failed to disclose, that the witness Stevens had denied receiving a knife from Tipton, and that this information would have refuted Jones's testimony that Tipton gave Stevens a bloody knife on the night of the Talley murder. As for this claim, the district court found that there was no evidence that Stevens actually conveyed this information to the prosecution. *Id.* at 57. Accordingly, this contention fails under the second *Brady* prong.

[20] **[21]** **[22]** Second, Tipton asserts that the prosecutors knew of, and yet also failed to disclose, statements by the witnesses John Knight and Stoodie Green providing Tipton an alibi on the night of the Stoney Run murders. Tipton's *Brady* claims must fail, however, because, "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Wilson,* 901 F.2d 378, 381 (4th Cir.1990). We have explained that information actually known by the defendant falls outside the ambit of the *Brady* rule. *Fullwood v. Lee,* 290 F.3d 663, 686 (4th Cir.2002). Obviously, Tipton knew who he was with on the evening of the Talley murder-he had no need for the Government to provide him with such information. Thus, no *Brady* violation has been shown, and we affirm the district court's ruling on the issue.

D.

We turn next to the Defendants' multiple challenges to the district court's conduct of their habeas corpus proceedings.

These contentions include (1) their challenge to the standard utilized by the court in assessing their discovery requests; (2) their contention that the court abused its discretion in awarding summary judgment to the Government without first according them an opportunity to conduct discovery; and (3) their assertion that the denial of their motion for leave to interview jurors was erroneous.

1.

[23] **[24]** Other than authorizing Tipton to conduct forensic testing of a knife found at the Talley murder scene, the court denied the Defendants' broad motions for authority to conduct discovery in their habeas corpus proceedings. *Johnson v. Pruett,* No. 3:97CV895 (E.D.Va. May 3, 2000). Pursuant to Rule 6(a) of the Rules Governing § 2255 Proceedings, a prisoner may engage in discovery only "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants him leave to do so, but not otherwise." The Defendants contend that the district court utilized an incorrect legal standard in assessing their discovery requests. And the Defendants assert that, regardless of the standard employed, such discovery should have been authorized. We are constrained to disagree.

In denying the request for discovery, the court explained the standard it was utilizing:

> The Supreme Court determined in *Harris v. Nelson,* 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), and its ***403** progeny, *Bracy v. Gramley,* 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997), that 'good cause' for discovery exists when a petition for habeas corpus establishes a prima facie case for relief. *See Harris v. Nelson,* 394 U.S. at 290, 89 S.Ct. 1082. Specifically, discovery is warranted, "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief." *Bracy,* 520 U.S. at 908-09, 117 S.Ct. 1793 (citing *Harris,* 394 U.S. at 299-300, 89 S.Ct. 1082).

Johnson v. Pruett, No. 3:97CV895 (E.D.Va. May 3, 2000). The Defendants assert that the court, in ruling against them, improperly applied a stringent "prima facie" standard under *Harris,* instead of a more forgiving "good cause" standard authorized by *Bracy.* This contention is incorrect. In *Bracy,* the Court cited with approval the discovery standard articulated in *Harris,* merely clarifying the definition of "good cause." *See Quesinberry v. Taylor,* 162 F.3d 273, 279 (4th Cir.1998) (observing that *Bracy* approved the *Harris* standard); *see also Murphy v. Johnson,* 205 F.3d 809, 813 (5th Cir.2000) ("[T]he *Bracy* decision does not lower the grade for discovery in habeas cases, but rather it merely reasserts the standards of *Harris v. Nelson* ...."). Here, the district court properly applied the good cause standard outlined in *Harris* and *Bracy,* and it did not abuse its discretion in deciding that the Defendants had not shown good cause for the bulk of their discovery requests. The court carefully considered each claim asserted by the Defendants, and it assessed whether the Defendants had shown good cause for discovery. *See Johnson v. Pruett,* No. 3:97CV895, at 3-12 (E.D.Va. May 3, 2000). Because the court applied the proper standard and did not abuse its discretion, we affirm its rulings on this issue. [13]

13 The district court alternatively held that the Defendants were precluded from further discovery by their failure to comply with Federal Rule of Civil Procedure 56(f), which requires a civil litigant opposing summary judgment to attest in an affidavit that he cannot oppose summary judgment without conducting discovery. We need not reach this basis for denial of discovery because the court did not abuse its discretion in finding that the Defendants had failed to demonstrate good cause.

2.

Johnson and Tipton next contend that the district court abused its discretion in denying their claims of juror misconduct without first granting them leave to interview the jurors. According to Johnson and Tipton, the jurors were exposed to extraneous information during trial, including extensive media coverage, which clouded their judgment.

We have already assessed and disposed of at least one aspect of this claim. During trial, two jurors admitted reading an inflammatory article about the Defendants. One of those jurors was excused by the trial court, but the other, Mr. Cooke, advised the court that the article would not affect his consideration of the case, and he continued to serve. On direct appeal, the Defendants contended that Cooke should have been removed from the jury because he had been exposed to mid-trial adverse publicity. We specifically considered this claim and found no error in the court's decision with regard to Cooke. *Tipton,* 90 F.3d at 891 n. 16. In addition, we agree with the district court that Johnson and Tipton's remaining media-related claims with respect to the jury have been procedurally

defaulted by their failure to raise them either at trial or on direct appeal. *See* Opinion at 3.

***404** **[25]** As to their non-media-related juror misconduct claims, the district court carefully explained that they are so speculative as to be "insufficient to survive summary dismissal, much less summary judgment." *United States v. Tipton,* No. 3:92CR68, at 3 (E.D.Va. July 15, 2003). Throughout the trial, the court gave cautionary instructions to the jury concerning both media coverage and other possible outside influences, repeatedly reminding the jurors to avoid such external sources of information. Johnson and Tipton have provided us with nothing to suggest that the jurors violated these instructions. And as we observed in *Gravely,* "[r]equests to impeach jury verdicts by post-trial contact with jurors are disfavored." 840 F.2d at 1159. Before proceeding down the path of impeaching a jury verdict, a § 2255 movant must make a threshold showing of improper outside influence. *Id.* In this instance, the court did not abuse its discretion in finding that no such showing had been made. *Id.* (explaining that denial of jury investigation is subject to abuse of discretion review). Put simply, Johnson and Tipton have failed to proffer any evidence that the jurors engaged in misconduct or that they were improperly exposed to outside influences. We therefore affirm the court's rulings on the Defendants' request to interview the jurors. *See* Opinion at 3; *United States v. Tip-ton,* No. 3:92CR68, at 3 (E.D.Va. July 15, 2003).

E.

[26] The Defendants also assert multiple other IAC claims, contending that: (1) their lawyers should have further investigated their alleged gang activities in New York and New Jersey; (2) Johnson's and Tipton's lawyers should have requested a "reverse*Witherspoon* " inquiry; [14] (3) Johnson's and Tipton's lawyers failed to present mitigating evidence regarding prison conditions; (4) Tipton's lawyers failed to present adequate defenses to the Talley and Stoney Run murders; (5) Tipton's lawyers failed to make an adequate case-in-mitigation; (6) Roane's lawyers conceded certain aggravating factors; and (7) Roane's lawyers waived his right to voir dire.

[14] *See Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *Witherspoon* authorized a voir dire inquiry to determine whether a potential juror would always refuse to impose the death penalty. Conversely, a "reverse-*Witherspoon* " voir dire inquiry is utilized to determine the existence of pro-death-penalty bias on the part of a prospective juror. *See Morgan v. Illinois,* 504 U.S. 719, 729-34, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

As we have explained, the Court in *Strickland* established that an IAC claim has two prongs: (1) that counsel's performance was deficient; and (2) that such deficient performance prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052. A defendant asserting an IAC claim must therefore satisfy both prongs, and a failure of proof on either prong ends the matter. *See Williams v. Kelly,* 816 F.2d 939, 946-47 (4th Cir.1987).

[27] **[28]** **[29]** Under the first prong of *Strickland,* we apply a "strong presumption" that a trial counsel's strategy and tactics fall "within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. For a lawyer's trial performance to be deficient, his errors must have been so serious that he was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. And the reasonableness of a lawyer's trial performance must be "evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of reasonableness ***405** is highly deferential." *Kimmelman v. Morrison,* 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *see also Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.

[30] In order to establish prejudice under *Strickland* 's second prong, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* As explained below, we agree with the district court that the Defendants' remaining IAC claims lack merit, standing alone or viewed in the aggregate.

1.

[31] First of all, the Defendants maintain that their lawyers should have further investigated their alleged gang activities in New York and New Jersey, and that this failure constitutes constitutionally ineffective assistance. They assert

that such an investigation would have led to the discovery of impeaching evidence on certain prosecution witnesses-i.e., that Light was in jail when Saunders supposedly saw him in New York, and that Scott's testimony about gang-related retaliation was false.

Notwithstanding whether counsel's investigation was reasonable, the Defendants have failed to establish prejudice under *Strickland* 's second prong. As the district court explained, substantial negative repercussions would have resulted to the Defendants from the introduction at trial of such impeachment evidence. Opinion at 38. Many of the purported impeaching witnesses had acknowledged being involved in illegal drug transactions with Johnson and Tipton and in pooling their money with Johnson and Tipton to purchase drugs, and Light did not deny that he was a regular source of Tipton's for crack cocaine. *Id.* In addition, none of this evidence would have undermined the overwhelming evidence before the jury that the Defendants were involved in a CCE in the Richmond area, and that their enterprise had distributed illegal drugs and killed on several occasions in order to ensure its success. Accordingly, the Defendants could not have been prejudiced by any purported omissions of their counsel in this regard, and these claims must be rejected.

2.

[32] **[33]** Johnson and Tipton next contend that, under the principle established in *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), their counsel were constitutionally ineffective in failing to request a specific "reverse-*Witherspoon* " inquiry of all prospective jurors. Under *Morgan,* a capital defendant has the right to an "inquiry sufficient to ensure-within the limits of reason and practicality-a jury none of whose members would 'unwaveringly impose death after a finding of guilt' and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law." *Tipton,* 90 F.3d at 878 (quoting *Morgan,* 504 U.S. at 733, 112 S.Ct. 2222). Johnson and Tipton contend that their lawyers failed to ensure that each prospective trial juror was specifically asked whether he or she would always impose a sentence of death. On direct appeal, however, this Court foreclosed the prejudice prong of this contention when, in considering a separate contention concerning voir dire, we concluded that "the district court's inquiry into death penalty attitudes was sufficient to cull out any prospective juror who would *always* vote for the death penalty." *Id.* at 879. Accordingly, Johnson and Tipton are unable to satisfy *Strickland* 's second prong, and their counsel ***406** were not constitutionally ineffective for failing to request a reverse-*Witherspoon* inquiry.

3.

[34] Johnson and Tipton next contend that their lawyers were constitutionally ineffective for failing to present mitigating evidence regarding the prison conditions they would face if sentenced to life imprisonment without the possibility of parole. This contention is made in response to a point argued by the prosecutor during closing: "Ask yourself, should they be punished beyond incarceration? I'm not telling you incarceration is nice and a lifetime of incarceration is not punishment. But think about each and every day of their existence in jail. They will wake up, bathe, be fed. They will be able to watch TV, read books. They will be able to use the telephone to talk to their loved ones." Essentially, Johnson and Tipton contend that, had their lawyers explained to the jury that actual prison conditions were more difficult than this benign description would suggest, the jury may have seen a life sentence as sufficient punishment and rejected the death penalty.

As the district court correctly explained, if the lawyers had introduced evidence of prison conditions, the prosecution would simply have been afforded another opportunity to remind the jurors that Johnson and Tipton possessed a "proven inclination to engineer murders from behind prison walls." Opinion at 77. And the Government could have drawn the stark contrast between prison life and the living conditions of the incapacitated Greene sisters who were critically wounded during the Stoney Run murders. Accordingly, the lawyers acted reasonably in deciding not to describe prison conditions as mitigating evidence.

4.

Tipton next asserts that his counsel were ineffective in their defense of him on the Talley murder counts (Counts Three and Four), and on the Stoney Run murder counts (Counts Twenty-four and Twenty-five). We reject both of these contentions.

A.

[35] Tipton maintains that, based on pathologist Dr. Fierro's testimony, Tipton, who is right-handed, could not have been Talley's murderer. Accordingly, Tipton contends that Hussone Jones's eyewitness testimony must have been false and that his counsel were ineffective in failing to exploit this fact. We disagree. The district court expressly found that "Dr. Fierro's testimony did not suggest that Tipton, who was initially sitting on the right of Talley, could not stab Talley on the right side of his body.... Such a diffusion of wounds is consistent with Jones' description...." Opinion at 55. In light of this factual finding, counsel were not deficient in failing to urge the jury to absolve Tipton on the basis of Dr. Fierro's testimony.

[36] Tipton also contends that defense counsel were ineffective in failing to interview and call as a witness "Wildman" Stevens, who, according to an affidavit submitted during the § 2255 proceedings, would have contradicted Jones's testimony that Jones drove Tipton and Roane to Stevens's house immediately after Talley's murder. As the district court found, however, there was no evidence that Tipton had advised his counsel that Stevens could contradict Jones's description. *Id.* at 58; *see Lackey v. Johnson,* 116 F.3d 149, 152 (5th Cir. 1997) (explaining lawyer not ineffective for failing to discover evidence that client knew but withheld). And as the court explained, Tipton's counsel had no reason to believe that it would be fruitful ***407** to interview Stevens, considering the fact that the evidence indicated that Stevens was simply another member of the CCE. Opinion at 58. Accordingly, we affirm the court's determination that counsel were not ineffective in defending Tipton on the Talley murder counts.

B.

[37] Tipton also contends that his counsel failed to mount an adequate defense to the Stoney Run murder counts. In particular, Tipton contends that counsel should have called John Knight and Stoodie Green as alibi witnesses. Again, we agree with the district court's denial of this IAC claim. As the court explained, "[c]onspicuously absent from the record is any evidence from Tipton that he told counsel that Stoodie Green or Knight could exonerate him from involvement in the Stoney Run murders." Opinion at 64. We agree with the court that Tipton's counsel was not constitutionally ineffective in his defense of the Stoney Run murders.

5.

[38] Tipton claims that his attorney failed to present an adequate case-in-mitigation at the penalty phase of his trial. In particular, Tipton relies on the absence of evidence from his mother, his paternal grand-mother, and an older woman in whose home he resided in early 1992-specifically contending that these witnesses could have testified to Tipton's unfortunate childhood. Again, we agree with the district court that "[t]he record refutes such a claim," in that counsel presented extensive evidence through both lay and expert witnesses, and succeeded in convincing the jurors to find twelve mitigating factors, a number of which pertained to Tipton's difficult childhood and his mental deficiencies. Opinion at 77-80. Indeed, the mitigating evidence in the trial's penalty phase was sufficiently compelling to convince the jury to return non-death verdicts on three of the six capital counts against Tipton, despite the existence of numerous and weighty aggravating factors. In light of the compelling mitigation case presented by Tipton's counsel in the trial's penalty phase, the court correctly concluded that their performance was not constitutionally deficient and that Tipton was not prejudiced by the absence of additional witnesses.

6.

[39] Roane maintains that his trial counsel rendered ineffective assistance at the trial's penalty phase in failing to contest-and indeed, in effectively conceding-the sufficiency of the Government's proof of the aggravating factor that the murder of Moody involved substantial planning and premeditation. According to Roane, this concession was error because there was no evidence that he manifested a premeditated intent to kill Moody or that there was substantial planning, or any planning at all. The district court disagreed, and we agree with the district court. The court found that the evidence of substantial planning and premeditation was ample and that, in light of that evidence, "[t]he best hope for Roane was to emphasize the evidence in mitigation rather than challenge the prosecution's solid case on the substantial planning aggravating factor." Opinion at 71; *see Carter v. Johnson,* 131 F.3d 452, 466 (5th Cir.1997) (concluding that it was reasonable for counsel to concede client's culpability in order to establish credibility with jury); *Bell v. Evatt,* 72 F.3d 421, 429 (4th Cir.1995) (concluding counsel reasonably conceded defendant's guilt of kidnapping to retain credibility

for penalty phase). Because the performance of Roane's counsel ***408** was not constitutionally deficient, we affirm the district court.

7.

[40] Relying on *Near v. Cunningham,* 313 F.2d 929, 931 (4th Cir.1963), Roane maintains that a capital defendant may not waive his presence at trial and that his trial attorney was necessarily deficient when, after consulting with Roane, he waived Roane's right to be present during portions of the jury selection process. Roane contends that he was prejudiced as a result because, had he been present throughout voir dire, he would have insisted on using peremptory strikes to remove three jurors who ultimately served on the jury. He maintains that, had those strikes been utilized, the outcome of the trial's penalty phase would likely have been different.

Again, our decision on direct review forecloses this contention. In applying plain error review to Roane's waiver-of-presence claim, we observed that Roane did not offer anything to suggest that he was prejudiced by his intermittent absences from jury voir dire beyond the conclusory assertion that he was presumptively prejudiced. *Tipton,* 90 F.3d at 875-76. Accordingly, Roane is unable to satisfy the second prong of *Strickland,* and we need not consider this issue further.

F.

Johnson maintains that he is mentally retarded and that, under federal law, he cannot be executed. He further contends that his counsel were ineffective for failing to argue this point during sentencing. The district court rejected these contentions, *see* Opinion at 80-84, and we agree.

1.

[41] Under federal law, "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 21 U.S.C. § 848(*l*); *see also Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that execution of mentally retarded defendant constitutes cruel and unusual punishment under Eighth Amendment). The district court found, based on data of the American Association on Retardation, that an IQ of 75 or below places a person in the retarded category. *Id.* at 80. At the penalty phase of Johnson's trial, Dr. Dewey Cornell, a psychologist, testified that, on October 10, 1992, he had administered a Wechsler Adult Intelligence Scale Test ("WAIS Test"). Johnson exhibited an IQ of 77, which indicated a "generally impaired intelligence," placing him "just above the level of mental retardation." Importantly, Dr. Cornell testified that he knew the significance of finding Johnson's IQ to be above 75 (i.e., this finding would render Johnson death-eligible), and that he double-checked his numbers and consulted colleagues before reaching this conclusion.

Despite Dr. Cornell's evidence, Johnson asserts that he is in fact mentally retarded. In support of this proposition, Johnson points to evidence offered during the penalty phase that his IQ was somewhere between 69 and 74 in 1985, and he relies on a 1996 publication concluding that the WAIS test tends to inflate IQ scores over the years:

> Individuals appear to gain 3-5 IQ points over a ten year period. Since the WAIS-R was published in 1981, this inflation factor could mean that the average IQ could be as high as 105-107 points rather than the accepted value of 100.

Id. at 81 (quoting The Psychological Corporation, *An Introduction to the Wechsler Adult Intelligence Scale,* (3d ed.1996)). Based on these authorities, Johnson maintains ***409** that his actual IQ is below 75 and that his score of 77 is a product of score inflation. As the district court explained, however, Dr. Cornell's evidence that he double-checked his findings and consulted with colleagues before concluding that Johnson was not mentally retarded "belies the suggestion that Dr. Cornell's analysis did not account for possible variations in his testing instrument." *Id.* at 81-82. Accordingly, Johnson is not barred from execution due to mental retardation.

2.

[42] **[43]** Johnson next contends that his counsel was ineffective for failing to assert possible IQ-score inflation at sentencing. We agree with the district court that Johnson's trial attorney was not ineffective for failing to raise this issue. Under *Strickland,* "counsel has a duty to make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. And "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* In this instance, Johnson's lawyer was presented with a mental health report, and he was under no mandate to second-guess that report. *See Wilson v. Greene,* 155 F.3d 396, 403 (4th Cir.1998) (rejecting inmate's claim that counsel should have pursued mental health defenses where psychological report indicated inmate was competent to stand trial). In these circumstances, Johnson's counsel was not constitutionally ineffective in this respect.

IV.

Finally, we turn to the Government's appeal in No. 03-13, challenging the district court's ruling that Roane's counsel, David Baugh, was constitutionally ineffective for failing to properly investigate Roane's alibi defense for the Moody murder. *See* Roane Opinion at 2-11. The court found that Mr. Baugh's investigation into Roane's potential alibi failed both prongs of *Strickland,* i.e., (1) his performance was deficient, and (2) his deficient performance prejudiced the defense. *See Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. Because the district court erred in concluding that Mr. Baugh's representation of Roane was deficient under the first prong of *Strickland,* we reverse its vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven. [15]

15 Because Mr. Baugh's performance was not deficient under *Strickland*, we need not decide whether his performance prejudiced the defense. *See Williams v. Kelly,* 816 F.2d 939, 946-47 (4th Cir.1987). We express our considerable doubt, however, on whether prejudice could have ensued here. The court found the testimony of all three witnesses who implicated Roane in the Moody murder-Berkley, Davis, and Pepsi Greene-to be credible and corroborated by physical evidence. And Greene's testimony was deemed to be "particularly compelling." Roane Opinion at 4. Conversely, the court found the testimony of the potential alibi witnesses to be much less credible-Reavis's testimony was "flat and unpersuasive," and she would not have testified at trial anyway; Roane's testimony was "tenable" but "not compelling"; Rowe's testimony was "not credible" and "would carry no weight with a jury"; and Cooley could not remember the date on which she went to a hotel with Roane. *Id.* at 5-7. It would be difficult for this testimony (not to mention the fact that Roane would have been subject to cross-examination about the other murders and his extensive criminal record), plus one motel receipt, in someone else's name, placing Roane a mere two miles away from the murder scene, to create a reasonable probability that, but for the lack of such evidence, "the result of the proceeding would have been different." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.

The district court concluded that Mr. Baugh had a duty to investigate Roane's ***410** potential alibi. As the court explained, Mr. Baugh possessed information suggesting that Roane might be telling the truth about staying at the Howard Johnson hotel the night of Moody's murder-(1) Gina Taylor, an eyewitness, claimed that Roane did not commit the murder; (2) Mr. Baugh had received a detailed account of the alibi from Roane, who had been candid about his participation in other crimes; and (3) Carmella Cooley acknowledged that she had visited a hotel with Roane. *See* Roane Opinion at 9. Armed with this information, we agree that Mr. Baugh had reason to believe that the hotel records could generate an alibi for Roane, and Mr. Baugh was therefore obliged to make a reasonable investigation of them. *See Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052 (explaining that attorney has duty to make reasonable investigation or to make reasonable decision not to investigate). We part company with the district court, however, on its conclusion that Mr. Baugh failed to fulfill this duty.

[44] **[45]** We review de novo the district court's conclusion that Mr. Baugh was constitutionally ineffective, *Smith v. Angelone,* 111 F.3d 1126, 1131 (4th Cir.1997), and we defer to its findings of fact unless they are clearly erroneous. As the district court found, Mr. Baugh, in keeping with his obligation to investigate: (1) interviewed Cooley, who stated that she once accompanied Roane and Reavis to the Howard Johnson but could not verify the date; (2) concluded that Cooley's ignorance of the date and apparent hostility would make her a poor witness; (3) thereafter contacted the Howard Johnson and asked for records of Linwood Chiles renting a room on the evening of January 12, 1992; (4) went to the hotel himself and attempted to locate the records; (5) limited his search to the name "Linwood Chiles," and searched only for records from January 12, 1992; and (6) found no record of Linwood Chiles

being registered at the hotel on the evening of January 12, 1992. Roane Opinion at 5. At this point, Mr. Baugh made the strategic choice to focus on Roane's misidentification defense, with Gina Taylor as his lead witness.

The district court concluded that Mr. Baugh's investigation of the alibi was constitutionally insufficient because he "did not follow through and seek the records with the vigor demanded by the situation." *Id.* at 9. According to the court, "reasonably competent counsel would have filed a subpoena demanding all records held by the hotel pertaining to a Mr. Chiles for January of 1992 or spent a few hours going through all the records at the hotel to assure himself that no records corroborative of his client's alibi existed." *Id.* With all respect to the district court, we disagree.

[46] **[47]** **[48]** As the Supreme Court has explained, a criminal defense lawyer possesses a duty to conduct a pretrial investigation that is "reasonable [ ] under prevailing professional norms." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052; *see also Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). And the strategic decision of Roane's lawyer on the extent of his investigation into the alibi defense "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052; *see also Byram v. Ozmint,* 339 F.3d 203, 209 (4th Cir.2003) (same); *Tucker v. Ozmint,* 350 F.3d 433, 441-42 (4th Cir.2003) (same). We are obligated by law to make "every effort to avoid the distorting effects of hindsight," *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, and we should evaluate Mr. Baugh's performance "from counsel's perspective at the time of the alleged error and in light of all the circumstances...." *Kimmelman v. Morrison,* ***411** 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Applying these principles to this situation, Mr. Baugh's performance was constitutionally reasonable and thorough. He interviewed Carmella Cooley, who could not remember when she stayed at a hotel with Roane. He called the hotel and requested records of Linwood Chiles from the *only relevant night*-the night of the murder. And when that search was not fruitful, he went to the hotel and searched for the records himself. Only after this final step in his investigation did Mr. Baugh turn to and focus on Roane's misidentification defense. In these circumstances, we decline to act as a Monday-morning quarterback and second-guess Mr. Baugh's efforts, simply because we are now armed with more information and the benefit of hindsight.

Furthermore, the authorities relied upon by the district court miss the mark, involving situations in which a lawyer has failed to investigate a defense *at all* or has performed an investigation so minimal that no strategic reason could be given for the failure to investigate further. *See, e.g., United States v. Russell,* 221 F.3d 615, 621 (4th Cir.2000) (finding ineffective representation when lawyer failed to investigate defendant's criminal record after defendant advised counsel that his convictions had been overturned); *Hooper v. Garraghty,* 845 F.2d 471, 474-75 (4th Cir.1988) (explaining counsel deficient in failing to investigate insanity defense, after learning from client, client's family, and prison psychologist of client's insanity); *Hoots v. Allsbrook,* 785 F.2d 1214, 1219-20 (4th Cir.1986) (finding lawyer's decision not to interview eyewitnesses unreasonable); *Nealy v. Cabana,* 764 F.2d 1173, 1174 (5th Cir.1985) (finding counsel ineffective in failing to seek evidence from witnesses when client claimed those witnesses committed crime). Unlike the circumstances underlying those decisions, this case does not involve a situation where counsel neglected to investigate, or where his investigation was so cursory that we can now-eleven years on and with the benefit of hindsight-declare it constitutionally unreasonable.

As the Sixth Circuit aptly explained in *Coe v. Bell,* 161 F.3d 320 (6th Cir.1998), what the lawyer did not miss is "just as (or more) important as what the lawyer missed." *Id.* at 342. Here, Mr. Baugh was diligent and highly effective in his representation of Roane during this litigation-he conferred with Roane, he investigated the crime scene, he located an eyewitness to the Moody murder who pro-vided a physical description of a murderer dissimilar to Roane, he learned that Moody's mother had advised the police that another man had been searching for Moody hours before his murder, and he aggressively and professionally cross-examined the Government's witnesses. Mr. Baugh investigated the possible Moody alibi-a weak one at that-but when the investigation proved unfruitful, he put on a strong misidentification defense. According a "heavy measure of deference" to Mr. Baugh, as we must, his representation of Roane was not constitutionally ineffective. We therefore reverse the vacatur of Roane's convictions and sentences on Counts Five, Six, and Seven.

V.

Pursuant to the foregoing, we affirm the award of summary judgment to the Government in Nos. 03-25, 03-26, and 03-27, and we reverse the district court's award of relief to Roane in No. 03-13.

AFFIRMED IN PART AND REVERSED IN PART

All Citations

378 F.3d 382

History (12)

Direct History (4)

1. U.S. v. Roane
378 F.3d 382 , 4th Cir.(Va.) , Aug. 09, 2004

Certiorari Denied by

2. Roane v. U.S.
546 U.S. 810 , U.S. , Oct. 03, 2005

AND Certiorari Denied by

3. Johnson v. U.S.
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4. Tipton v. U.S.
546 U.S. 810 , U.S. , Oct. 03, 2005

Related References (8)

5. U.S. v. Tipton
90 F.3d 861 , 4th Cir.(Va.) , July 08, 1996

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8. Tipton v. U.S.
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AND Post-Conviction Relief Dismissed by

9. UNITED STATES OF AMERICA, v. COREY JOHNSON, Defendant.
2021 WL 17809 , E.D.Va. , Jan. 02, 2021

Appeal Filed by

10. US v. COREY JOHNSON
, 4th Cir. , Jan. 05, 2021

11. United States v. Roane
2020 WL 6370984 , E.D.Va. , Oct. 29, 2020

Appeal Filed by

12. US v. JAMES ROANE, JR.
, 4th Cir. , Nov. 18, 2020

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 22, 2005

No. 03-26
CA-98-895-3
CR-92-68

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CORY JOHNSON

Defendant - Appellant

ORDER

Appellant has filed a motion to recall the mandate and for rehearing or rehearing en banc.

The Court denies the motion to recall the mandate and denies as untimely the petition for rehearing or rehearing en banc.

Entered at the direction of Judge King with the concurrence of Judge Wilkinson and Judge Duncan.

For the Court,

/s/ Patricia S. Connor

CLERK

126 S.Ct. 38
Supreme Court of the United States

Cory JOHNSON, petitioner,
v.
UNITED STATES.

No. 04-8850.
|
Oct. 3, 2005.

Synopsis
Case below, *U.S. v. Roane,* 378 F.3d 382.

Opinion
Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

All Citations

546 U.S. 810, 126 S.Ct. 38 (Mem), 163 L.Ed.2d 43, 74 USLW 3201

End of Document

History (12)

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12. US v. JAMES ROANE, JR.
, 4th Cir. , Nov. 18, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, LEAD CASE: *Roane et al. v. Barr* THIS DOCUMENT RELATES TO: *Bourgeois v. U.S. Dep't of Justice, et al.*, 12-cv-0782 *Lee v. Barr*, 19-cv-2559 *Purkey v. Barr, et al.*, 19-cv-03214	Case No. 19-mc-145 (TSC)

MEMORANDUM OPINION

On July 25th of this year, the U.S. Department of Justice ("DOJ") announced plans to execute five people. *See* Press Release, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse. The DOJ intends to execute Daniel Lewis Lee on December 9, 2019; Lezmond Mitchell on December 11, 2019; Wesley Ira Purkey on December 13, 2019; Alfred Bourgeois on January 13, 2020; and Dustin Lee Honken on January 15, 2020. *Id.* To implement these executions, the Federal Bureau of Prisons ("BOP") adopted a new execution protocol: the "2019 Protocol." *Id;* (ECF No. 39-1 ("Administrative R.") at 1021–1075).

Four of the five individuals with execution dates[1] (collectively, "Plaintiffs"), have filed complaints against the DOJ and BOP (collectively, "Defendants"), alleging that the 2019

[1] Mitchell has not filed a complaint in this court.

Protocol is unlawful and unconstitutional on numerous grounds.[2] *See Purkey v. Barr,* 19-cv-03214 (D.D.C.), Doc. # 1 (Oct. 25, 2019); *Lee v. Barr,* 1:19-cv-02559 (D.D.C.), Doc. #1 (Aug. 23, 2019); *Bourgeois v. U.S. Dep't of Justice, et al.*, 1:12-cv-00782 (D.D.C.), Doc. # 1 (May 5, 2012); ECF. No. 38 ("Honken Compl."). The court consolidated the cases and ordered Plaintiffs to complete the necessary 30(b)(6) depositions on or before February 29, 2020 and to amend their complaints on or before March 31, 2020. (*See* ECF No. 1 ("Consolidation Order"); Min. Entry, Aug. 15, 2019.) Because Plaintiffs are scheduled to be executed before their claims can be fully litigated, they have asked this court, pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, to preliminarily enjoin the DOJ and BOP from executing them while they litigate their claims. (ECF No. 34 ("Purkey Mot. for Prelim. Inj."); ECF No. 29 ("Honken Mot. for Prelim. Inj."); ECF No. 13 ("Lee Mot. for Prelim. Inj."); ECF No. 2 ("Bourgeois Mot. for Prelim. Inj.")) Having reviewed the parties' filings, the record, and the relevant case law, and for the reasons set forth below, the court hereby GRANTS Plaintiffs' Motions for Preliminary Injunction.

I. BACKGROUND

Beginning in 1937, Congress required federal executions to be conducted in the manner prescribed by the state of conviction. *See* 50 Stat. § 304 (former 18 U.S.C. 542 (1937)), recodified as 62 Stat. § 837 (former 18 U.S.C. 3566). After the Supreme Court instituted a *de*

[2] Bourgeois' complaint was filed in 2012 and relates to a separate execution protocol. *See Bourgeois v. U.S. Dep't of Justice, et al.*, 1:12-cv-00782 (D.D.C.), Doc. # 1 (May 5, 2012). In addition, his Motion for Preliminary Injunction (ECF. No. 2 ("Bourgeois Mot. for Prelim. Inj.")) does not articulate his bases for a preliminary injunction, but instead argues that a preliminary injunction is warranted because the plaintiffs in the *Roane* litigation were granted a preliminary injunction. Despite the shortcomings of Bourgeois' briefing, this court has determined that he meets the requirements of a preliminary injunction, as do the three other plaintiffs in the consolidated case, whose motions are fully briefed.

facto moratorium on the death penalty in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972), and then lifted it in *Gregg v. Georgia,* 428 U.S. 153, 187 (1976), Congress reinstated the death penalty for certain federal crimes but did not specify a procedure for implementation. *See* Anti-Drug Abuse Act of 1988, Pub. L. 100–690, § 7001, 102 Stat. 4181 (enacted Nov. 18, 1988). Four years later, under the direction of then-Attorney General William Barr, the DOJ published a proposed rule to establish a procedure for implementing executions. Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56536 (proposed Nov. 30, 1992). The proposed rule noted that the repeal of the 1937 statute "left a need for procedures for obtaining and executing death orders." *Id.* The final rule, issued in 1993, provided a uniform method and place of execution. *See* 58 Fed. Reg. 4898 (1993), *codified at* 28 C.F.R. pt. 26 (setting method of execution as "intravenous injection of a lethal substance.")

But a year later, Congress reinstated the traditional approach of following state practices through passage of the Federal Death Penalty Act ("FDPA"). *See* Pub. L. No. 103–322, 108 Stat. 1796 (1994), *codified at* 18 U.S.C. §§ 3591–3599. The FDPA establishes that the U.S. Marshal "shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." *Id.* § 3596(a). The FDPA provides no exceptions to this rule and does not contemplate the establishment of a separate federal execution procedure. Plaintiffs' cases are governed by the FDPA because when the death penalty portions of the ADAA were repealed in 2006, the FDPA was "effectively render[ed] . . . applicable to all federal death-eligible offenses." *United States v. Barrett*, 496 F.3d 1079, 1106 (10th Cir. 2007).

Given the conflict between the FDPA's state-by-state approach and the uniform federal approach adopted by DOJ's 1993 rule (28 C.F.R. pt. 26), the DOJ and BOP supported proposed legislation to amend the FDPA to allow them to carry out executions under their own procedures.

One bill, for example, would have amended § 3596(a) to provide that the death sentence "shall be implemented pursuant to regulations prescribed by the Attorney General." H.R. 2359, 104th Cong. § 1 (1995). In his written testimony supporting the bill, Assistant Attorney General Andrew Fois wrote that "H.R. 2359 would allow Federal executions to be carried out . . . pursuant to uniform Federal regulations" and that "amending 18 U.S.C. § 3596 [would] allow for the implementation of Federal death sentences pursuant to Federal regulations promulgated by the Attorney General." *Written Testimony on H.R. 2359 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 1 (1995) (Statement of Andrew Fois, Assistant Att'y Gen. of the United States). None of the proposed amendments were enacted, and the FDPA continues to require the federal government to carry out executions in the manner prescribed by the states of conviction.

In 2005, three individuals facing death sentences sued, alleging that their executions were to be administered under an unlawful and unconstitutional execution protocol. *Roane v. Gonzales*, 1:05-cv-02337 (D.D.C.), Doc. #1 ¶ 2. The court preliminarily enjoined their executions. *Roane*, Doc. #5. Three other individuals on death row intervened, and the court enjoined their executions. *See Roane*, Doc. #23, 27, 36, 38, 67, 68. A seventh individual on death row subsequently intervened and had his execution enjoined as well. *See id.* Doc. #333. During this litigation, the government produced a 50-page document ("2004 Main Protocol") outlining BOP execution procedures. *Roane*, Doc. #179–3. The 2004 Main Protocol cites 28 C.F.R. pt. 26 for authority and does not mention the FDPA. *See id.* at 1. The government then produced two three-page addenda to the 2004 Main Protocol. *See Roane*, Doc. #177-1 (Addendum to Protocol, Aug. 1, 2008) (the "2008 Addendum"); *Roane*, Doc. #177-3 (Addendum to Protocol, July 1, 2007) ("2007 Addendum"). In 2011 the DOJ announced that the

BOP did not have the drugs needed to implement the 2008 Addendum. *See* Letter from Office of Attorney General to National Association of Attorneys General, (Mar. 4, 2011), https://files.deathpenaltyinfo.org/legacy/documents/2011.03.04.Holder.Letter.pdf. The government told the court that the BOP "has decided to modify its lethal injection protocol but the protocol revisions have not yet been finalized." *Roane*, Doc. #288 at 2. In response, the court stayed the *Roane* litigation.

No further action was taken in the cases for seven years, until July of this year, when DOJ announced a new addendum to the execution protocol ("2019 Addendum") (Administrative R. at 870–871), that replaces the three-drug protocol of the 2008 Addendum with a single drug: pentobarbital sodium. *See id* at ¶ C. In addition to the 2019 Addendum, the BOP adopted a new protocol to replace the 2004 Main Protocol (the 2019 Main Protocol). (Administrative R. at 1021–1075.)

The court held a status conference in the *Roane* action on August 15, 2019. (*See* Min. Entry, Aug. 15, 2019). In addition to the *Roane* plaintiffs, the court heard from counsel for three other death-row inmates, including Bourgeois, all of whom cited the need for additional discovery on the new protocol. (*See* ECF No. 12 ("Status Hr'g Tr.")). The government indicated that it was unwilling to stay the executions, and the court bifurcated discovery and ordered Plaintiffs to complete 30(b)(6) depositions by February 28, 2020 and to file amended complaints by March 31, 2020. (*See* Min. Entry, Aug. 15, 2019.)

Lee filed a complaint challenging the 2019 Addendum on August 23, 2019 (*see Lee v. Barr*, 1:19-cv-02559 (D.D.C.), Doc. 1), and a motion for a preliminary injunction on September 27, 2019, (Lee Mot. for Prelim. Inj.). On August 29, 2019 Bourgeois moved to preliminarily enjoin his execution. (Bourgeois Mot. for Prelim. Inj.) Honken filed an unopposed motion to

intervene in *Lee v. Barr*, which was granted. (ECF No. 26. ("Honken Mot. to Intervene").) He then filed a motion for a preliminary injunction on November 5, 2019. (Honken Mot. for Prelim. Inj.) Purkey filed a complaint and a motion for preliminary injunction under a separate case number, 1:19-cv-03214, which was consolidated with *Roane*. Thus, the court now has before it four fully briefed motions to preliminarily enjoin the DOJ and BOP from executing Lee, Purkey, Bourgeois, and Honken.

II. ANALYSIS

A preliminary injunction is an "extraordinary remedy" that is "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). Courts consider four factors on a motion for a preliminary injunction: (1) the likelihood of plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff absent an injunction, (3) the balance of equities, and (4) the public interest. *Id.* at 20 (citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau,* 849 F.3d 1129, 1131 (D.C. Cir. 2017). The D.C. Circuit has traditionally evaluated claims for injunctive relief on a sliding scale, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C. Cir. 2011). It has been suggested, however, that a movant's showing regarding success on the merits "is an independent, free-standing requirement for a preliminary injunction." *Id.* at 393 (quoting *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). Here, Plaintiffs' claims independently satisfy the merits requirement.

A. Likelihood of Success on the Merits

Plaintiffs allege, *inter alia*, that the 2019 Protocol exceeds statutory authority and therefore under the Administrative Procedure Act ("APA"), it must be set aside. Under the APA,

a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Plaintiffs argue that the 2019 Protocol exceeds statutory authority by establishing a single procedure for all federal executions rather than using the FDPA's state-prescribed procedure. (Purkey Mot. for Prelim. Inj. at 16; Honken Mot. for Prelim. Inj. at 34–35; Lee Mot. for Prelim. Inj. at 5–6, 17). Given that the FDPA expressly requires the federal government to implement executions in the manner prescribed by the state of conviction, this court finds Plaintiffs have shown a likelihood of success on the merits as to this claim.

Defendants argue that the 2019 Protocol "is not contrary to the FDPA" because the authority given to DOJ and BOP through § 3596(a) of the FDPA "necessarily includes the authority to specify . . . procedures for carrying out the death sentence." (ECF No. 16 ("Defs. Mot. in Opp. To Lee Mot. for Prelim. Inj.") at 34.) Section 3596(a) states:

> When the [death] sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, *who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.* If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

18 U.S.C. § 3596(a) (emphasis added). Because a United States Marshal is to "supervise" the process, it does appear that at least some authority is granted to the Marshal. But it goes too far to say that such authority necessarily includes the authority to decide procedures without reference to state policy. The statute expressly provides that "the implementation of the sentence" shall be done "in the manner" prescribed by state law. *Id.* Thus, as between states and federal agencies, the FDPA gives decision-making authority regarding "implementation" to the

former. Accordingly, the 2019 Protocol's uniform procedure approach very likely exceeds the authority provided by the FDPA.

Defendants contest the meaning of the words "implementation" and "manner." As they interpret § 3596(a), Congress only gave the states the authority to decide the "method" of execution, e.g., whether to use lethal injection or an alternative, not the authority to decide additional procedural details such as the substance to be injected or the safeguards taken during the injection. The court finds this reading implausible. First, the statute does not refer to the "method" of execution, a word with particular meaning in the death penalty context. *See id.* Instead, it requires that the "implementation" of a death sentence be done in the "manner" prescribed by the state of conviction. *Id.* "Manner" means "a mode of procedure or way of acting." *Manner*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 756 (11th ed. 2014.) The statute's use of the word "manner" thus includes not just execution method but also execution *procedure.* To adopt Defendants' interpretation of "manner" would ignore its plain meaning. As one district court concluded, "the implementation of the death sentence [under the FDPA] involves a process which includes more than just the method of execution utilized." *United States v. Hammer*, 121 F. Supp. 2d 794, 798 (M.D. Pa. 2000). [3]

[3] Defendants cite three cases to suggest that "manner" means "method": *Higgs v. United States*, 711 F. Supp. 2d 479, 556 (D. Md. 2010); *United States v. Bourgeois,* 423 F.3d 501 (5th Cir. 2005); and *United States v. Fell*, No. 5:0-cr-12-01, 2018 WL 7270622 (D. Vt. Aug. 7 2018). *Higgs* interpreted the FDPA to require the federal government to follow a state's chosen method of execution but not to follow any other state procedure. 711 F. Supp. 2d at 556. This interpretation, however, was stated in dicta and is not supported by persuasive reasoning. *Id*. *Bourgeois* did not reach the question of what the words "implementation" and "manner" mean in 18 U.S.C. § 3596(a). 423 F.3d 501 (5th Cir. 2005). Instead, it evaluated only whether the sentence violated Texas law. *Id.* at 509. The opinion appeared to assume that § 3596(a) only requires the federal government to follow the state-prescribed method of execution, but it provided no basis for that assumption. *Id.*at 509. In *Fell*, the district court held that the creation of a federal death chamber does not violate the FDPA. *Fell,* slip op., at 4. This holding affirms the notion that the federal government has some authority in execution procedure (such as the

Moreover, legislative efforts to amend the FDPA further support this court's interpretation of the terms "manner" and "implementation." As noted above, in 1995, the year after the FDPA became law, the DOJ supported bills amending the statute to allow the DOJ and BOP to create a uniform method of execution, indicating that the FDPA as drafted did not permit federal authorities to establish a uniform procedure. The amendments were never enacted.

Defendants argue that reading the FDPA as requiring adherence to more than the state's prescribed method of execution leads to absurd results. (*See, e.g.*, Defs. Mot. in Opp. to Purkey Mot. for Prelim. Inj. at 28.) They contend that if the state's choice of drug is to be followed, the federal government would have to "stock all possible lethal agents used by the States." *Id.* But the FDPA contemplates and provides for this very situation: it permits the United States Marshal to allow the assistance of a state or local official and to use state and local facilities. 18 U.S.C. § 3596(a). Moreover, the practice of following state procedure and using state facilities has a long history in the United States. Before the modern death penalty, the relevant statute provided that the:

> manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available State or local facilities and the services of an appropriate State or local official . . .

50 Stat. § 304 (former 18 U.S.C. 542 (1937)), recodified as 62 Stat. § 837 (former 18 U.S.C. 3566) (1948). The federal government carried out executions in accordance with this statute for decades, including those of Julius and Ethel Rosenberg in New York's Sing Sing prison, and Victor Feguer in the Iowa State Penitentiary. *See Feguer v. United States,* 302 F.2d 214, 216

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place of execution), but it does not conflict with the proposition that the FDPA requires the federal government to follow state procedure as to more than simply the method of execution.

(8th Cir. 1962) (noting sentence of death by hanging imposed pursuant to § 3566 and Iowa law); *Rosenberg v. Carroll,* 99 F. Supp. 630, 632 (S.D.N.Y. 1951) (applying § 3566 to uphold state law confinement prior to execution). Thus, far from creating absurd results, requiring the federal government to follow more than just the state's method of execution is consistent with other sections of the statute and with historical practices. For all these reasons, this court finds that the FDPA does not authorize the creation of a single implementation procedure for federal executions.

Defendants argue that the 2019 Protocol derives authority from 28 C.F.R. § 26.3(a), which provides that executions are to be carried out at the time and place designated by the Director of the BOP, at a federal penal or correctional institution, and by injection of a lethal substance or substances under the direction of the U.S. Marshal. (Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj. at 31.) However, this argument is undercut by the fact that, as with the 2019 Protocol itself, 28 C.F.R. Pt. 26 also conflicts with the FDPA. As noted above, 28 C.F.R. Pt. 26 was promulgated in 1993 (before the FDPA was enacted) to implement the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e) (the "ADAA"), which does not specify how federal executions are to be carried out. 28 C.F.R. § 26.3(a) filled that gap by providing an implementation procedure. But when Congress passed its own requirements for the implementation procedure in the FDPA, those requirements conflicted with 28 C.F.R. § 26.3(a).

Defendants concede that "where a regulation contradicts a statute, the latter prevails." (Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj. at 31.) They argue instead that the regulation does not conflict with the FDPA as applied to Plaintiffs because lethal injection (the method required by 28 C.F.R. § 26.3(a)(4)) is either permitted or required in the Plaintiffs' states of

conviction (Texas, Arkansas, Missouri, and Indiana[4]). (ECF No. 37 ("Defs. Mot. in Opp. to Purkey Mot. for Prelim. Inj.") at 26–27; ECF No. 36 ("Defs. Mot. in Opp. to Honken Mot. for Prelim. Inj.") at 19–20; Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj at 31–32.)[5] Two of those states—Texas and Missouri—use a single dose of pentobarbital for executions. (Administrative R. at 99, 104.)

But this overlap does not, in and of itself, reconcile 28 C.F.R. pt. 26 with the FDPA. 28 C.F.R. Pt. 26 remains inconsistent with the FDPA because it establishes a single federal procedure, while the FDPA requires state-prescribed procedures. In addition, 28 C.F.R. § 26.3(a)(2) requires use of a federal facility, while the FDPA permits the use of state facilities. *Compare* 28 C.F.R. § 26.3(a)(2) *with* 18 U.S.C. § 3597. There are also inconsistencies between the FDPA's required state procedures and the 2019 Protocol. For example, states of conviction establish specific and varied safeguards on how the intravenous catheter is to be inserted.[6] The 2019 Protocol, however, provides only that the method for insertion of the IV is to be selected based on the training, experience, or recommendation of execution personnel. (Administrative R. at 872.) Thus, the fact that the states of conviction and 28 C.F.R. § 26.3(a) all prescribe lethal injection as the method of execution is not enough to establish that the regulation is valid as applied to Plaintiffs.

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[4] Honken was convicted in Iowa, which does not have a death penalty. The FDPA requires a court to designate a death penalty state for any individual convicted in a state without the death penalty, and the court designated Indiana. (Honken Mot. for Prelim. Inj. at 37.)

[5] Defendants do not assert this argument as to Bourgeois (likely because he did not raise 28 C.F.R. Part 26 in his motions), but does include Texas' execution protocol—which requires lethal injection—in the Administrative Record. (Administrative R. at 83-91.)

[6] *See, e.g.*, Administrative R. at 90-91 (Texas); Administrative R. at 70-71 (Missouri); Honken Mot. for Prelim. Inj. Ex. 6 at 16–17 (Indiana).

Defendants further argue that even if 28 C.F.R. § 26.3(a) did not conflict with the FDPA by requiring lethal injection, the DOJ would still adopt lethal injection as its method of execution for these Plaintiffs. (*See e.g.,* Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj at 32–33.) On this basis, they ask the court to sever section 26.3(a)(4)—which establishes lethal injection as the federal method—and affirm the rest of 28 C.F.R. § 26.3(a). *Id.* Defendants cite *Am. Petroleum Inst. V. EPA*, 862 F.3d 50 (D.C. Cir. 2017), for the proposition that the court "will sever and affirm a portion of an administrative regulation" if it can say "*without any substantial doubt* that the agency would have adopted the severed portion on its own." *Id.* at 71 (emphasis added). The court declines to take this approach for several reasons. First, it is premised on the strained reading of the FDPA that this court has already rejected. Moreover, the court cannot say "without any substantial doubt" that DOJ "would have adopted the severed portion on its own." *Id.* Even were the court to engage in such speculation, it seems plausible that if 28 C.F.R. § 26.3(a) instructed the BOP to follow state procedure, rather than to implement lethal injection, that BOP would in fact adopt whatever specific procedures were required by each state. Finally, even if the court severed the language in 28 C.F.R. § 26.3(a) that conflicts with the FDPA, another problem would arise: that is the very language that purportedly authorizes the creation of a single federal procedure. If the court severs it, then 28 C.F.R. § 26.3(a) would no longer contain the support for a single federal procedure that Defendants claim it does.

More importantly, Defendants' arguments regarding the regulation's applicability to these Plaintiffs take us far afield from the task at hand. The arguments do not control the court's inquiry of whether the 2019 Protocol exceeds statutory authority. Based on the reasoning set forth above, this court finds that insofar as the 2019 Protocol creates a single implementation procedure it is not authorized by the FDPA. This court further finds that because 28 C.F.R. §

26.3 directly conflicts with the FDPA, it does not provide the necessary authority for the 2019 Protocol's uniform procedure. There is no statute that gives the BOP or DOJ the authority to establish a single implementation procedure for all federal executions. To the contrary, Congress, through the FDPA, expressly reserved those decisions for the states of conviction. Thus, Plaintiffs have established a likelihood of success on the merits of their claim that the 2019 Protocol exceeds statutory authority. Given this finding, the court need not reach Plaintiffs' other claims.

B. Irreparable Harm

To constitute irreparable harm, "the harm must be certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm," and it "must be beyond remediation." *League of Women Voters of U.S. v. Newby,* 838 F. 3d 1, 7–8 (D.C. Cir. 2016) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)) (internal quotation marks and brackets omitted). Here, absent a preliminary injunction, Plaintiffs would be unable to pursue their claims, including the claim that the 2019 Protocol lacks statutory authority, and would therefore be executed under a procedure that may well be unlawful. This harm is manifestly irreparable.

Other courts in this Circuit have found irreparable harm in similar circumstances. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (finding irreparable injury where plaintiffs faced detention under challenged regulations); *Stellar IT Sols., Inc. v. U.S.C.I.S.*, Civ. A. No. 18-2015 (RC), 2018 WL 6047413, at *11 (D.D.C. Nov. 19, 2018) (finding irreparable injury where plaintiff would be forced to leave the country under challenged regulations); *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 126–27 (D.D.C. 2015) (finding irreparable injury where challenged regulations would threaten company's existence); *N. Mariana Islands v. United*

States, 686 F. Supp. 2d 7, 19 (D.D.C. 2009) (finding irreparable injury when challenged regulations would limit guest workers).

Plaintiffs have clearly shown that, absent injunctive relief, they will suffer the irreparable harm of being executed under a potentially unlawful procedure before their claims can be fully adjudicated. Given this showing, the court need not reach the various other irreparable harms that Plaintiffs allege.

C. Balance of Equities

Defendants assert that if the court preliminarily enjoins the 2019 Protocol they will suffer the harm of a delayed execution date. (*See, e.g.*, Def. Mot. in Opp. to Purkey Mot. for Prelim. Inj. at 43.) While the government does have a legitimate interest in the finality of criminal proceedings, the eight years that it waited to establish a new protocol undermines its arguments regarding the urgency and weight of that interest. Other courts have found "little potential for injury" as a result of a delayed execution date. *See, e.g.*, *Harris v. Johnson*, 323 F. Supp. 2d 797, 809 (S.D. Tex. 2004). This court agrees that the potential harm to the government caused by a delayed execution is not substantial.

D. Public Interest

The public interest is not served by executing individuals before they have had the opportunity to avail themselves of legitimate procedures to challenge the legality of their executions. On the other hand, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands,* 686 F. Supp. 2d at 21. Accordingly, this court finds that the public interest is served by preliminarily enjoining the execution of the four Plaintiffs because it will allow them to determine whether administrative agencies acted within their delegated authority, and to ensure that they do so in the future.

III. CONCLUSION

This court finds that at least one of Plaintiffs' claims has a likelihood of success on the merits and that absent a preliminary injunction, they will suffer irreparable harm. It further finds that the likely harm that Plaintiffs would suffer if this court does not grant injunctive relief far outweighs any potential harm to the Defendants. Finally, because the public is not served by short-circuiting legitimate judicial process, and is greatly served by attempting to ensure that the most serious punishment is imposed lawfully, this court finds that it is in the public interest to issue a preliminary injunction. Accordingly, each of Plaintiffs' motions for preliminary injunctions is hereby GRANTED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,

v. Criminal No. 3:92cr68 (DJN)

COREY JOHNSON,
Defendant.

MEMORANDUM ORDER
(Denying First Step Act Motion)

Convicted serial killer Corey Johnson ("Defendant" or "Johnson") comes before the Court with a Motion for a Reconsideration of Sentence Hearing Pursuant to the First Step Act of 2018 (ECF No. 38) in a last-ditch effort to avoid the just punishment imposed on him for his role in killing multiple people in furtherance of his drug enterprise. The Court has already rejected a nearly identical effort from one of Defendant's co-conspirators.[1] Defendant has challenged his convictions and sentences on numerous occasions throughout the years. But each time they survived appellate review. Defendant now seeks to latch onto laws passed to reduce the sentencing disparities between non-violent crack and powder cocaine offenses as a vehicle to reduce his sentences imposed for running a drug enterprise and committing multiple murders in furtherance of the drug enterprise. But that enterprise and those murders, and the statutes under which a jury convicted Defendant for them, have nothing to do with the penalties for drug quantities that the First Step Act addressed.

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[1] The Court hereby expressly incorporates into this Memorandum Order the Memorandum Opinion (the "*Roane* Mem. Op." (ECF No. 67)) denying Roane's First Step Act Motion, entered on October 29, 2020. The instant Memorandum Order supplements the *Roane* Memorandum Opinion to address the new or individualized arguments raised by Defendant.

I. BACKGROUND[2]

A. Factual Background

Defendant, along with Richard Tipton ("Tipton") and James Roane, Jr. ("Roane") (collectively, the "partners"), ran a substantial drug-trafficking conspiracy that lasted from 1989 through July of 1992. *Roane*, 378 F.3d at 389. The partners in the conspiracy obtained wholesale quantities of powder cocaine from suppliers in New York City, converted it into crack cocaine, divided it among themselves and then distributed it through a network of 30-40 street level dealers. *Id.* at 389-90. Typically, the partners took two-thirds of the proceeds realized from the street-level sales of their product. *Id.* at 390.

Over a short time in early 1992, the partners took part, in some form, in the murders of ten persons in the Richmond area. *Id.* These murders occurred "in relation to their drug-trafficking operation and either because their victims were suspected of treachery or other misfeasance, or because they were competitors in the drug trade, or because they had personally offended one of the 'partners.'" *Id.* The murders described below directly implicated Defendant.

On January 14, 1992, Roane and Johnson located Peyton Johnson, another rival drug dealer, at a tavern. *Id.* Shortly after Roane left the tavern, Corey Johnson entered and fatally shot Peyton Johnson with a semiautomatic weapon. *Id.*

On January 29, 1992, Roane pulled his car around the corner of an alley, got out and shot Louis Johnson, who had threatened one of the partners while acting as a bodyguard for a rival drug dealer. *Id.* Corey Johnson and Lance Thomas ("Thomas") then got out of Roane's car and

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[2] The Court takes these background facts from the Fourth Circuit's opinion in *United States v. Roane*, 378 F.3d 382 (4th Cir. 2004), which recited the factual summary *in haec verba* from *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the opinion on the defendants' direct appeal.

began firing at Louis Johnson. *Id.* As Louis Johnson laid on the ground, either Corey Johnson or Thomas shot him twice at close range. *Id.* Louis Johnson died from these gunshot wounds. *Id.*

On February 1, 1992, Roane, Johnson and Thomas went to the apartment of Torrick Brown, who had given Roane trouble. *Id.* After the three men knocked on the apartment door, Brown's half-sister opened the door and summoned Brown. *Id.* The three men opened fire with semiautomatic weapons, killing Brown and critically wounding his half-sister. *Id.*

In late January 1992, after Johnson threatened Dorothy Armstrong for not paying for a supply of crack cocaine, Armstrong went to live with her brother, Bobby Long. *Id.* On February 1, 1992, Johnson, Tipton and Jerry Gaiters ("Gaiters") went to Long's house. *Id.* at 391. While Tipton waited in the car, Johnson and Gaiters approached the front door. *Id.* When Long opened the door, Johnson opened fire, killing Dorothy Armstrong and Anthony Carter. *Id.* As Bobby Long fled out the front door, Johnson shot him dead in the front yard. *Id.*

On February 19, 1992, Johnson arranged to meet with Linwood Chiles, who Johnson suspected of cooperating with the police. *Id.* That night, Chiles and Johnson drove off together in Chile's station wagon, with Curtis Thorne and sisters Priscilla and Gwen Greene also in the car. *Id.* Chiles parked in an alley before Tipton parked behind the station wagon and walked up beside it. *Id.* With Tipton standing by, Johnson told Chiles to place his head on the steering wheel before shooting him twice at close range. *Id.* The partners fired additional shots, killing Thorne and critically wounding the Greene sisters in the station wagon. *Id.*

B. Verdict and Sentencing

In January and February of 1993, United States District Judge James R. Spencer presided

over the trial of Defendant and his co-conspirators. Defendant[3] faced capital murder charges for Murder in Furtherance of a Continuing Criminal Enterprise ("CCE") under 21 U.S.C. § 848(e)(1)(A) for seven of these killings — Peyton Johnson (Count Eight), Louis Johnson (Count Eleven), Armstrong (Count Seventeen), Carter (Count Eighteen), Long (Count Nineteen), Thorne (Count Twenty-Four) and Chiles (Count Twenty-Five) (collectively, the "Capital Murder Counts" or "Capital Murder Convictions"). *Id.* at 391; (Second Superseding Indictment ("Indictment") (Dkt. No. 115) at 7-18). On February 3, 1993, the jury convicted him of all seven Capital Murder Counts. 378 F.3d at 391. The jury also convicted Defendant of one count of participating in a Conspiracy to Possess Cocaine Base with Intent to Distribute, in violation of 21 U.S.C. § 846 (Count One); one count of engaging in a CCE, in violation of 21 U.S.C. § 848(a) (Count Two (the "CCE Count" or "CCE Conviction")); eleven counts of Committing Acts of Violence in Aid of Racketeering ("VICAR"), in violation of 18 U.S.C. § 1959 (Counts Ten, Thirteen, Fourteen, Sixteen, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty); five counts of Use of a Firearm in Relation to a Crime of Violence or Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c) (Counts Nine, Twelve, Fifteen, Twenty, Twenty-Six); and two counts of Distribution of or Possession with Intent to Distribute Crack Cocaine, in violation of § 841(a)(1) (Counts Thirty-One and Thirty-Two (the "Drug Distribution Counts" or the "Drug Distribution Convictions")). 378 F.3d at 392; (Dkt. Nos. 466, 593). Defendant's First Step Act Motion pertains only to the CCE Conviction, the Capital Murder Convictions and the Drug Distribution Convictions.

On February 16, 1993, following a penalty hearing on the Capital Murder Convictions, the jury recommended that Defendant be sentenced to death for all seven of the Capital Murder

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[3] The Court tried Roane, Tipton and Johnson along with four other defendants on a thirty-three-count superseding indictment.

Convictions. 378 F.3d at 392. On June 1, 1993, pursuant to 21 U.S.C. § 848(l), the Court sentenced Johnson to death for Counts Eight, Eleven, Seventeen, Eighteen, Nineteen, Twenty-Four and Twenty-Five. (Dkt. No. 593.) Defendant received a life imprisonment sentence for the CCE Conviction and each of the VICAR convictions. *Id.* Additionally, Defendant received a sentence of forty years' imprisonment for Count Thirty-Two, thirty years' imprisonment for each of Counts Twenty-Nine and Thirty, twenty years' imprisonment for each of Counts Twelve, Fifteen, Sixteen, Twenty, Twenty-Six and Thirty-One and five years' imprisonment for Count Nine. *Id.*

The Court refused to order the execution on the grounds that Congress had neither directly authorized the means to carry out the death sentences, nor properly delegated to the Attorney General the authority to issue the implementing regulations that the Government invoked. 378 F.3d at 392. As a result, the Court stayed the execution of the death sentences until such time as Congress had authorized the means of execution. *Id.*

C. Post-Trial Proceedings

The defendants appealed their convictions and sentences and the Government cross-appealed the stay of the death sentences. *Id.* at 392. In a lengthy opinion, the Fourth Circuit analyzed and disposed of approximately sixty issues, including challenges by the defendants to aspects of the jury-selection process and both the guilt and penalty phases of the trial. *Tipton*, 90 F.3d at 861. The Fourth Circuit rejected nearly all of the claims, affirming the convictions and sentences of all of the defendants, except that it vacated on Double Jeopardy grounds the drug conspiracy convictions under 21 U.S.C. § 846, finding that the CCE convictions in Count Two precluded sentences for the drug conspiracy offenses. *Id.* at 903. Additionally, the Fourth Circuit vacated the stay of the death sentences and remanded for the executions to proceed in

accordance with regulations promulgated by the Attorney General. *Id.* at 901-03.

Defendant continued to press his appeals. On June 1, 1998, Defendant filed a motion under 28 U.S.C. § 2255 to vacate and set aside his sentences. *Roane*, 378 F.3d at 392. The Court granted the Government's summary judgment motion, and Defendant appealed. *Id.* at 393. The Fourth Circuit affirmed, ruling against Defendant on all accounts. *Id.* at 398-406.

In 2016, Defendant filed multiple applications with the Fourth Circuit to file successive § 2255 petitions to invalidate his § 924(c) convictions. The Fourth Circuit denied his requests. *In re Corey Johnson*, No. 16-4 (4th Cir. 2016), ECF Nos. 2, 10; *In re Corey Johnson*, No. 16-13 (4th Cir. 2016), ECF Nos. 2, 8. On May 22, 2020, Defendant filed yet another application with the Fourth Circuit for a successive § 2255 petition pursuant to the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). The Fourth Circuit has placed the case in abeyance pending its decision in *United States v. Dickerson*. *In re Corey Johnson*, No. 20-8 (4th Cir. 2020), ECF Nos. 2, 23.[4]

D. Defendant's First Step Act Motion

On August 19, 2020, Defendant filed the instant motion under § 404 of the First Step Act, asking the Court to reduce his sentences for the CCE counts, the Capital Murder Counts and the Drug Distribution Counts. (Mem. in Supp. of Def.'s Mot. for Reconsideration of Sentence Hearing Pursuant to the First Step Act of 2018 ("Def.'s Mot.") (ECF No. 39).) Defendant argues that these convictions constitute covered offenses under the First Step Act, because the Fair

[4] Johnson's proposed successive § 2255 petition has no impact on his First Step Act motion. In his proposed petition, he attacks his convictions under § 924(c) and does not attack the counts at issue here. *In re Corey Johnson*, No. 20-8 (4th Cir. 2020), ECF No. 2-2 (moving to vacate his convictions under 18 U.S.C. § 924(c) in Counts Nine, Twelve, Fifteen, Twenty and Twenty-Six). Although in his proposed § 2255 petition he argues that his Capital Murder Convictions cannot form the predicates of his § 924(c) convictions, he does not attack the convictions or sentences for the Capital Murder Counts. *Id.*

Sentencing Act modified the statutory penalties for §§ 841 and 848, and the First Step Act allows the Court to retroactively impose those modified statutory penalties. (Def.'s Mot. at 8-10.) Because his resentencing implicates the death penalty, Defendant claims that a jury must resentence him on the Capital Murder Convictions. (Def.'s Mot. at 11.) To that end, Defendant devotes the bulk of his brief to arguing that mitigating factors warrant a reduced sentence. Specifically, Defendant argues that his abusive and neglectful childhood and intellectual disability counsel against imposing the death penalty. (Def.'s Mot. at 16-31.) Further, Defendant argues that his remorse and post-conviction record warrant a reduced sentence. (Def.'s Mot. at 32-35, 40-42.) Finally, Defendant claims that his entire sentencing package contains fatal deficiencies, warranting a sentence reduction. (Def.'s Mot. at 43.) To reach this conclusion, Defendant argues that his § 846, § 924(c) and VICAR convictions are all invalid, despite the Fourth Circuit only invalidating the § 846 conviction to date (on Double Jeopardy grounds) following multiple appeals. (Def.'s Mot. at 43-46.) Accordingly, Defendant requests that the Court grant a full resentencing hearing on the Capital Murder Convictions and a reconsideration of the sentence on the remaining convictions by the Court. (Def.'s Mot. at 47.)

On September 23, 2020, the Government filed its opposition to Defendant's Motion, primarily arguing that his convictions under §848 do not constitute covered offenses and, therefore, the Court may not reduce his sentence. (Govt's Opp. to Def.'s First Step Act Mot. ("Govt's Resp.") (ECF No. 39).) On October 8, 2020, Defendant filed his reply ("Def.'s Reply" (ECF No. 64)), rendering this matter now ripe for review.

II. DISCUSSION

The Court must first address whether Defendant's convictions for which he seeks a reduction constitute covered offenses. *United States v. Gravatt*, 953 F.3d 258, 260 (4th Cir.

2020) ("[T]he existence of a 'covered offense' is a threshold requirement under the [First Step] Act."). Defendant's desire to have his death sentences reduced for his Capital Murder Convictions clearly drives his request, but the Court has recently determined that those convictions do not constitute covered offenses under the First Step Act. Thus, the Court need not engage in that analysis again. The Court will then address whether Defendant's CCE Conviction constitutes a covered offense, because it did not previously have occasion to address that conviction. Finally, the Court must determine whether to reduce Defendant's sentences for the Drug Distribution Counts, which do constitute covered offenses.

A. Defendant's Capital Murder Convictions under § 848(e) Do Not Constitute Covered Offenses.

Defendant argues that his Capital Murder Convictions qualify as covered offenses under the First Step Act. The Court has recently rejected this identical argument as advanced by his co-conspirator, James Roane. On October 29, 2020, the Court denied Roane's First Step Act Motion. (ECF No. 66.) In the accompanying Memorandum Opinion, the Court thoroughly analyzed the question of whether the defendants' murder convictions under § 848(e)(1)(A) constitute covered offenses under the First Step Act. *Roane* Mem. Op. at 15-37. The Court concluded that they do not. *Id.* That analysis applies equally to Defendant's Capital Murder Convictions, and Defendant has offered no compelling arguments to reach a different result. Therefore, the Court hereby incorporates its previous Memorandum Opinion and finds that Defendant's Capital Murder Convictions under Counts Eight, Eleven, Seventeen, Eighteen, Nineteen, Twenty-Four and Twenty-Five do not constitute covered offenses for purposes of the First Step Act.

B. Defendant's CCE Conviction under § 848(a) Does Not Constitute a Covered Offense.

Defendant also argues that his CCE Conviction in Count Two constitutes a covered

offense. (Def.'s Mot. at 8-10.) In the *Roane* Memorandum Opinion, the Court did not analyze whether a conviction under § 848(a) constitutes a covered offense, because Roane did not move to reduce his sentence imposed under Count Two. However, for many of the same reasons that Defendant's Capital Murder Convictions do not constitute covered offenses, his CCE Conviction likewise does not constitute a covered offense.

First, the Fair Sentencing Act did not modify the statutory penalties in § 848(a), demonstrating that the First Step Act does not apply. *See Roane* Mem. Op. at 24-28 (determining that textual analysis of statutes at issue demonstrate that convictions under § 848(e)(1)(A) do not constitute covered offenses). Second, and relatedly, Congress did not intend for the Fair Sentencing Act to reduce the sentences for the drug kingpins that § 848 targets. *See Roane* Mem. Op. at 24-25 (explaining why Congress did not intend the Fair Sentencing Act to apply to § 848(e) convictions). Third, Defendant's CCE Conviction, and the convictions predicating his CCE Conviction, remain valid. That is, the jury found beyond a reasonable doubt that Defendant had committed all of the required elements of a violation of § 848(a), regardless of the statutory penalties that those elements could expose Defendant to when charged as separate offenses. *See id.* at 22-23, 26-28 (explaining why convictions remain valid). Finally, should the Court resentence Defendant under Count Two, his sentencing exposure would remain the same as when the Court originally imposed his sentence — a potential life imprisonment sentence. In short, just as with his Capital Murder Convictions, Defendant comes before the Court with unaltered convictions for statutes that have unaltered statutory penalties and asks the Court to alter his sentence anyway. The First Step Act does not allow for such a result.

C. The Court Will Not Reduce Defendant's Sentences for the Drug Distribution Convictions.

Although the First Step Act does not cover Defendants convictions under § 848(a) or (e), it does cover his Drug Distribution Convictions in Counts Thirty-One and Thirty-Two for violations of § 841(a)(1). However, even if a defendant meets the eligibility requirement for a sentence reduction under the First Step Act, the Court retains discretion over whether to grant the reduction. *United States v. Wirsing*, 943 F.3d 175, 180 (4th Cir. 2019) ("Among other limitations, Congress left the decision as to whether to grant a sentence reduction to the district court's discretion."). The Court imposed a sentence of twenty years' imprisonment for Count Thirty-One and forty years' imprisonment for Count Thirty-Two. (Dkt. No. 593.) Under the current statutory penalties, the Court may impose a sentence up to twenty years' imprisonment for Count Thirty-One and forty years' imprisonment for Count Thirty-Two. Thus, Defendant received sentences in 1993 that remain within the statutory penalties today. However, the Court could still exercise its discretion and reduce Defendant's sentences for the Drug Distribution Convictions.[5]

The Court will not exercise its discretion to reduce Defendant's sentence. In declining to reduce Defendant's sentence, the Court has considered the factors set forth in 18 U.S.C. § 3553(a), which include:

1. the nature and circumstances of the offense and the history and characteristics of the defendant;
2. the need for the sentence imposed –
    a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

[5] As the Court previously decided, the fact that Defendant received sentences for covered offenses does not permit the Court to impose a reduced sentence for his non-covered offenses. *See Roane* Mem. Op. at 37-38.

b. to afford adequate deterrence to criminal conduct;

c. to protect the public from further crimes of the defendant; and

d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

3. the kinds of sentences available;

4. the kinds of sentences and the sentencing range established for [the applicable offense category as set forth in the guidelines];

5. any pertinent policy statement . . . by the Sentencing Commission;

6. the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

7. the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). The applicable factors weigh against granting Defendant's motion.

First, "the nature and circumstances of the offense and the history and characteristics of the defendant" weigh heavily against Defendant. Defendant murdered multiple people on different occasions in cold blood in furtherance of his drug trafficking. Defendant maimed several others in the commission of those murders. Defendant did not limit his violence to others engaged in drug trafficking — innocent bystanders fell victim to Defendant simply as a result of finding themselves in the wrong place at the wrong time. Moreover, even before these convictions, Defendant committed other violent and drug-related crimes, leading to a criminal history category of IV. (PSR ¶ 123-25.) The Court has considered Defendant's good conduct and rehabilitative efforts while in prison, which factor in his favor. Moreover, the Court has considered the evidence of the mitigating factors that Defendant has raised in his Motion, including his neglectful and abusive childhood and his intellectual disability. However, these mitigating factors do not outweigh the heinous nature and circumstances of his offenses.

Next, the Court believes that reducing Defendant's sentence would not reflect the

seriousness of the offense, promote just punishment for the offense, provide respect for the law or afford adequate deterrence to criminal conduct. Indeed, reducing the sentence of a lethal drug dealer would undermine these goals. Defendant has proven himself as the ultimate danger to the community. Defendant led an extremely violent drug enterprise that killed at least ten people, with Defendant personally implicated in at least eight killings. The jury recognized Defendant's status as a highly dangerous individual in sentencing him to the death penalty — a penalty reserved for only the most vicious and dangerous criminals. Defendant's rehabilitative efforts, although substantial and commendable, pale in comparison to the dangers that he poses to society. A reduced sentence would fail to reflect the seriousness of Defendant's crimes. Nor would a reduced sentence provide for a just punishment for Defendant's horrific acts. Likewise, reducing the sentence of a serial killer would undermine respect for the law and detract from adequate deterrence to criminal conduct.

The kinds of sentences and sentencing range weigh in favor of not reducing Defendant's sentence, as he has already received sentences in the applicable Guideline Range for the Drug Distribution Convictions. Likewise, no policy statement from the Sentencing Commission weighs in favor of reducing Defendant's sentences, as the Guidelines for both offenses remain unchanged.

Finally, the Court finds that reducing Defendant's sentence could lead to unwarranted sentence disparities, as defendants with similar records who have been convicted of similar conduct would likely not receive sentences below what Defendant has received here. Defendant argues the opposite, claiming that the life sentences (rather than death) imposed for four murder convictions on his co-conspirator, Thomas, demonstrates that Defendant's sentence "is disproportionate compared to other similarly situated defendants." (Def.'s Mot. at 2; Def.'s

Reply at 11-12.) However, the Court has reviewed and considered Thomas's convictions and sentences and finds that they do not warrant reducing Defendant's sentences. With respect to the murder convictions, Defendant arguably played a larger role in the killings. For instance, although the jury convicted both Thomas and Defendant of the murders of Thorne and Chiles, Defendant pulled the trigger while Thomas sat in jail at the time of the killings. *United States v. Reavis*, 48 F.3d 763, 766 (4th Cir. 1995) (describing respective roles in murders in affirming Thomas's convictions). More importantly, an individualized inquiry into whether the specific defendant deserves the death penalty constitutes the hallmark of the penalty phase in death penalty litigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendment require the sentencer to make an individualized consideration of mitigating factors); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense."). And here, the jury made that individualized determination, finding that Defendant deserved the death penalty after hearing the evidence relating to Defendant's character and record and the circumstances of the murders. Moreover, with respect to the Drug Distribution Convictions that the First Step Act covers, Defendant received the same sentences as his co-conspirators, and those sentences do not diverge from other similarly-situated defendants such that the Court should reduce them.

The applicable § 3553(a) factors, taken as a whole, counsel against reducing Defendant's term of imprisonment for Count Thirty-One below twenty years or Count Thirty-Two below forty years.

III. CONCLUSION

Throughout both the guilt and penalty phases, the jury in this case heard all of the evidence relating to Defendant's role in this drug enterprise and the eight individuals that he killed to protect his enterprise. Beyond evidence of the atrocious crimes for which it convicted Defendant, the jury heard evidence relating to his character. That jury — speaking on behalf of the community — unanimously decided that this heinous serial killer deserved to die for his actions. The Court refuses to overturn the will of the community. It is not the Court's role to revisit the jury's determination, especially when doing so would run contrary to the goals of the First Step Act.

For the reasons stated above and in the Court's *Roane* Memorandum Opinion, the Court finds that Defendant's convictions on Counts Two, Eight, Eleven, Seventeen, Eighteen, Nineteen, Twenty-Four and Twenty-Five do not constitute covered offenses under the First Step Act. Although Defendant's convictions on Counts Thirty-One and Thirty-Two do constitute covered offenses, the Court declines to exercise its discretion to reduce Defendant's sentence. Therefore, Defendant's Motion for a Reconsideration of Sentence Hearing Pursuant to the First Step Act of 2018 (ECF No. 38) will be denied.

Let the Clerk file a copy of this Memorandum Order electronically and notify all counsel of record.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: November 19, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases LEAD CASE: *Roane, et al. v. Barr* THIS DOCUMENT RELATES TO: *Bourgeois v. DOJ*, No. 14-0782 *Roane, et al. v. Barr*, No. 05-2337	Case No. 19-mc-0145 (TSC)

NOTICE OF EXECUTION DATES

The United States hereby notifies the Court that the Director of the Federal Bureau of Prisons, upon the direction of the Attorney General and in accordance with 28 C.F.R. Part 26, has scheduled the executions of Alfred Bourgeois for December 11, 2020; Cory Johnson for January 14, 2021; and Dustin Higgs for January 15, 2021. Bourgeois is the plaintiff in *Bourgeois v. DOJ*, No. 14-0782 (D.D.C.). Higgs and Johnson are plaintiffs in *Roane v. Barr*, No. 05-2337 (D.D.C.). Both cases are part of this consolidated matter.

* * *

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Dated: November 20, 2020

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I hereby certify that on November 20, 2020, I caused a true and correct copy of foregoing to be served on all following counsel of record via the Court's CM/ECF system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 3:92CR68 (DJN)**
	:	**CAPITAL CASE**
COREY JOHNSON,	:	
	:	
Defendant.	:	

NOTICE OF APPEAL

Notice is hereby given that the defendant in the above-captioned case hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Memorandum Order denying Defendant's Motion for a Reconsideration of Sentence Hearing Pursuant to the First Step Act entered in this case on the 19th day of November 2020.

Respectfully submitted,

Dated: November 20, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send notification of such filing to all parties and counsel included on the Court's Electronic Mail notice list.

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,

v. Criminal No. 3:92cr68 (DJN)

COREY JOHNSON,
Defendant.

MEMORANDUM OPINION
(Dismissing § 2255 Petition)

Convicted serial killer Corey Johnson ("Defendant" or "Johnson") comes before the Court with a Motion Pursuant to 28 U.S.C. § 2255 Raising Claim of Ineligibility to Be Executed Under 18 U.S.C. § 3596(c) ((the "Present § 2255 Petition") (ECF No. 86)), attempting to relitigate a question decided long-ago — a question that the Court lacks jurisdiction to decide again. Specifically, the Court and the Fourth Circuit have already rejected Defendant's claim that his intellectual disability[1] precludes the Government from executing him, and only the Fourth Circuit can decide whether to revisit those decisions. Yet Defendant attempts to skirt the rules in hopes of finding a court that will stay his execution, scheduled for January 14, 2021, regardless of whether the Court has the authority to do so. Indeed, district courts generally lack jurisdiction to consider successive § 2255 petitions absent preauthorization from the Court of Appeals. This case presents no exception to that requirement. Accordingly, for the reasons stated below, the Court will dismiss Defendant's Present § 2255 Petition for want of jurisdiction.

[1] The Court uses the term "intellectual disability" rather than "mental retardation" throughout this Opinion. However, in the prior proceedings on this same question and the earlier caselaw, courts use the terms interchangeably.

I. BACKGROUND[2]

A. Factual Background

Defendant, along with Richard Tipton ("Tipton") and James Roane, Jr. ("Roane") (collectively, the "partners"), ran a substantial drug-trafficking conspiracy that lasted from 1989 through July of 1992. *Roane*, 378 F.3d at 389. The partners in the conspiracy obtained wholesale quantities of powder cocaine from suppliers in New York City, converted it into crack cocaine, divided it among themselves and then distributed it through a network of 30-40 street level dealers. *Id.* at 389-90. Typically, the partners took two-thirds of the proceeds realized from the street-level sales of their product. *Id.* at 390.

Over a short time in early 1992, the partners took part, in some form, in the murders of ten persons in the Richmond area. *Id.* These murders occurred "in relation to their drug-trafficking operation and either because their victims were suspected of treachery or other misfeasance, or because they were competitors in the drug trade, or because they had personally offended one of the 'partners.'" *Id.* The murders described below directly implicated Defendant.

On January 14, 1992, Roane and Johnson located Peyton Johnson, another rival drug dealer, at a tavern. *Id.* Shortly after Roane left the tavern, Corey Johnson entered and fatally shot Peyton Johnson with a semiautomatic weapon. *Id.*

On January 29, 1992, Roane pulled his car around the corner of an alley, got out and shot Louis Johnson, who had threatened one of the partners while acting as a bodyguard for a rival

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[2] The Court takes these background facts from the Fourth Circuit's opinion in *United States v. Roane*, 378 F.3d 382 (4th Cir. 2004), which recited the factual summary *in haec verba* from *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the opinion on the defendants' direct appeal. The Court also recited these facts in its Memorandum Order denying Defendant's First Step Act Motion (ECF No. 75).

drug dealer. *Id.* Corey Johnson and Lance Thomas ("Thomas") then got out of Roane's car and began firing at Louis Johnson. *Id.* As Louis Johnson laid on the ground, either Corey Johnson or Thomas shot him twice at close range. *Id.* Louis Johnson died from these gunshot wounds. *Id.*

On February 1, 1992, Roane, Johnson and Thomas went to the apartment of Torrick Brown, who had given Roane trouble. *Id.* After the three men knocked on the apartment door, Brown's half-sister opened the door and summoned Brown. *Id.* The three men opened fire with semiautomatic weapons, killing Brown and critically wounding his half-sister. *Id.*

In late January 1992, after Johnson threatened Dorothy Armstrong for not paying for a supply of crack cocaine, Armstrong went to live with her brother, Bobby Long. *Id.* On February 1, 1992, Johnson, Tipton and Jerry Gaiters ("Gaiters") went to Long's house. *Id.* at 391. While Tipton waited in the car, Johnson and Gaiters approached the front door. *Id.* When Long opened the door, Johnson opened fire, killing Dorothy Armstrong and Anthony Carter. *Id.* As Bobby Long fled out the front door, Johnson shot him dead in the front yard. *Id.*

On February 19, 1992, Johnson arranged to meet with Linwood Chiles, who Johnson suspected of cooperating with the police. *Id.* That night, Chiles and Johnson drove off together in Chile's station wagon, with Curtis Thorne and sisters Priscilla and Gwen Greene also in the car. *Id.* Chiles parked in an alley before Tipton parked behind the station wagon and walked up beside it. *Id.* With Tipton standing by, Johnson told Chiles to place his head on the steering wheel before shooting him twice at close range. *Id.* The partners fired additional shots, killing Thorne and critically wounding the Greene sisters in the station wagon. *Id.*

B. Verdict and Sentencing

In January and February of 1993, then-United States District Judge James R. Spencer

presided over the trial of Defendant and his co-conspirators. Defendant[3] faced capital murder charges for Murder in Furtherance of a Continuing Criminal Enterprise ("CCE") under 21 U.S.C. § 848(e)(1)(A) for seven of these killings — Peyton Johnson (Count Eight), Louis Johnson (Count Eleven), Armstrong (Count Seventeen), Carter (Count Eighteen), Long (Count Nineteen), Thorne (Count Twenty-Four) and Chiles (Count Twenty-Five) (collectively, the "Capital Murder Counts"). *Id.* at 391; (Second Superseding Indictment ("Indictment") (Dkt. No. 115) at 7-18). On February 3, 1993, the jury convicted him of all seven Capital Murder Counts. 378 F.3d at 391.[4]

During the penalty hearing, Defendant's expert psychologist, Dr. Dewey Cornell, testified that Defendant did not qualify as intellectually disabled, but that he tested just above that level. (May 1, 2003 Mem. Op. Denying § 2255 Petition ("First § 2255 Op.") (Dkt. No. 896) at 81.) Dr. Cornell found that Defendant had an IQ of 77. (*Id.*) To ensure the accuracy of his findings, Dr. Cornell rechecked his scores, consulted his colleagues, interviewed Defendant a second time, interviewed individuals involved in Defendant's life and reviewed a substantial amount of background information regarding Defendant. (*Id.*; Tr. of Feb. 10, 1993 Penalty Phase ("Tr.") at 3565-75.) Because Defendant's own expert did not find him intellectually

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[3] The Court tried Roane, Tipton and Johnson along with four other defendants on a thirty-three-count superseding indictment.

[4] The jury also convicted Defendant of one count of participating in a Conspiracy to Possess Cocaine Base with Intent to Distribute, in violation of 21 U.S.C. § 846 (Count One); one count of engaging in a CCE, in violation of 21 U.S.C. § 848(a) (Count Two); eleven counts of Committing Acts of Violence in Aid of Racketeering ("VICAR"), in violation of 18 U.S.C. § 1959 (Counts Ten, Thirteen, Fourteen, Sixteen, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty); five counts of Use of a Firearm in Relation to a Crime of Violence or Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c) (Counts Nine, Twelve, Fifteen, Twenty, Twenty-Six); and two counts of Distribution of or Possession with Intent to Distribute Crack Cocaine, in violation of 21 U.S.C. § 841(a)(1) (Counts Thirty-One and Thirty-Two). *Roane*, 378 F.3d at 392; (Dkt. Nos. 466, 593).

disabled, Defendant's counsel did not argue that Defendant's intellectual disability rendered him ineligible for the death penalty. (First § 2255 Op. at 84.) However, he did argue that the same reasons underlying the prohibition against executing the intellectually disabled mitigated against the imposition of the death penalty on Defendant. (*Id.*)

On February 16, 1993, following the penalty hearing, the jury recommended that the Court sentence Defendant to death for all seven of the Capital Murder Counts. *Roane*, 378 F.3d at 392. On the Special Findings Form, the jury indicated that it had unanimously found that Defendant committed each of the seven murders "after substantial planning and premeditation." (Dkt. No. 508 at 2.) Eight of the jurors found, by a preponderance of the evidence, that Defendant's "full scale I.Q. is 77." (Dkt. No. 508 at 9.) On June 1, 1993, pursuant to 21 U.S.C. § 848(l), the Court sentenced Johnson to death for Counts Eight, Eleven, Seventeen, Eighteen, Nineteen, Twenty-Four and Twenty-Five. (Dkt. No. 593.)

However, the Court refused to order the execution on the grounds that Congress had neither directly authorized the means to carry out the death sentences, nor properly delegated to the Attorney General the authority to issue the implementing regulations that the Government invoked. *Roane*, 378 F.3d at 392. As a result, the Court stayed the execution of the death sentences until such time as Congress had authorized the means of execution. *Id.*

C. Direct Appeal

The defendants appealed their convictions and sentences and the Government cross-appealed the stay of the death sentences. *Id.* at 392. In a lengthy opinion, the Fourth Circuit analyzed and disposed of approximately sixty issues, including challenges by the defendants to aspects of the jury-selection process and both the guilt and penalty phases of the trial. *Tipton*, 90 F.3d at 868. The Fourth Circuit rejected nearly all of the claims, affirming the convictions and

sentences of all of the defendants, except that it vacated on Double Jeopardy grounds the drug conspiracy convictions under 21 U.S.C. § 846. *Id.* at 903. Additionally, the Fourth Circuit vacated the stay of the death sentences and remanded for the executions to proceed in accordance with regulations promulgated by the Attorney General. *Id.* at 901-03.

D. First § 2255 Petition

On June 1, 1998, Defendant filed a petition under 28 U.S.C. § 2255 to vacate or set aside his sentences (the "First § 2255 Petition" (Dkt. No. 714)). Among other challenges to his conviction and sentence, Defendant argued that his intellectual disability precluded the Government from executing him. As part of his intellectual disability challenge, Defendant argued that his counsel had been ineffective in failing to argue at sentencing that Defendant could not be executed due to his intellectual disability. In arguing that "[u]nder federal law, a mentally retarded defendant cannot be executed," Defendant cited both 18 U.S.C. § 3596(c) and 21 U.S.C. § 848(l). (Dkt. No. 719 at 108).

In his First § 2255 Petition, Defendant did not submit any evidence from Dr. Cornell expressing doubt about his conclusions regarding Defendant's lack of intellectual disability. (First § 2255 Op. at 82.) The Court permitted multiple amendments to the First § 2255 Petition and granted Defendant "another full opportunity to demonstrate that he is mentally retarded." (*Id.*) Defendant submitted no new evidence regarding his intellectual disability. (*Id.*)

On May 1, 2003, the Court entered a lengthy opinion denying the First § 2255 Petition. The Court expressly rejected the argument that 18 U.S.C. § 3596(c) precluded the execution of Defendant on the grounds of his mental disability, because "the record before the Court demonstrates that Johnson is not mentally retarded." (First § 2255 Op. at 82.) The Court also rejected Defendant's ineffective assistance of counsel claims, finding that counsel acted

reasonably in not arguing intellectual disability when his own expert disputed that conclusion. (*Id.* at 84.) Consequently, the Court denied Defendant's First § 2255 Petition on the merits.

Defendant appealed the denial of his First § 2255 Petition. (Dkt. No. 908.) In arguing that "Johnson's execution is barred by statute," Defendant cited both 18 U.S.C. § 3596(c) and 21 U.S.C. § 848(l). (Appellants' Br., *United States v. Johnson*, No. 03-13 (4th Cir. Feb. 17, 2004) at 144-45.) On August 9, 2004, the Fourth Circuit affirmed this Court's denial of the First § 2255 Petition. *Roane*, 378 F.3d at 408. The Fourth Circuit noted that federal law prohibits the carrying out of a sentence of death upon a person of intellectual disability. *Id.* However, the Fourth Circuit rejected Defendant's argument that the law barred his execution, stating plainly that "Johnson is not barred from execution due to mental retardation." *Roane*, 378 F.3d at 408-09. The Fourth Circuit also rejected Defendant's argument that his counsel had rendered ineffective assistance by failing to raise additional intellectual disability arguments at sentencing. *Id.* In sum, the Fourth Circuit agreed with this Court on the merits of Defendant's intellectual disability challenge in his First § 2255 Petition.

E. Other Attacks on His Sentence

Defendant has attempted to invalidate his sentences on several other occasions. In 2016, Defendant filed multiple § 2244 applications with the Fourth Circuit for authorization to file successive § 2255 petitions to invalidate his § 924(c) convictions. The Fourth Circuit denied his requests. *In re Corey Johnson*, No. 16-4 (4th Cir. 2016), ECF Nos. 2, 10; *In re Corey Johnson*, No. 16-13 (4th Cir. 2016), ECF Nos. 2, 8. In 2019, the Fourth Circuit again denied Defendant's § 2244 application for authorization to file a successive § 2255 petition. *In re Corey Johnson*, No. 19-1 (4th Cir. 2019), ECF Nos. 1, 13. On May 22, 2020, in the wake of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), Defendant filed yet another § 2244

application with the Fourth Circuit for authorization to file a successive § 2255 petition. The Fourth Circuit has placed the case in abeyance pending its decision in *United States v. Dickerson*. *In re Corey Johnson*, No. 20-8 (4th Cir. 2020), ECF Nos. 2, 23. The proposed petition attached to the § 2244 application does not raise the same issues that Defendant raises in the Present § 2255 Petition.

On August 19, 2020, Defendant filed a motion in this Court under the First Step Act (ECF No. 38), arguing that the Court should reduce his death sentences under the statute enacted to reduce sentences for nonviolent crack offenders. The motion had no merit and amounted to another thinly-veiled attempt by Defendant to relitigate his intellectual disability claim. (ECF No. 39 at 16-31.) Consequently, the Court denied it. (ECF No. 75.) Defendant has appealed that decision to the Fourth Circuit. (ECF No. 77.)

Most recently, on December 23, 2020, Defendant filed a motion in the United States District Court for the District of Columbia, asking that court to enjoin his execution on the basis that he has tested positive for Coronavirus-2019. *In The Matter of The Federal Bureau of Prisons' Execution Protocol Cases*, No. 19mc145 (TSC) (D.D.C.), Dkt. No. 373. That motion remains pending.

F. Defendant's Present § 2255 Petition

On November 20, 2020, the Government informed Defendant that it had scheduled his execution to occur on January 14, 2021. (ECF No. 78.) On December 14, 2020, Defendant filed the Present § 2255 Petition. (ECF No. 86.) Defendant argues that he suffers from an intellectual disability and, therefore, proves ineligible for execution. Defendant asks this Court to issue an order prohibiting his execution on January 14, 2021, and to enjoin his execution until the Court can hold an evidentiary hearing on his intellectual disability. (Present § 2255 Pet. at 3.)

Defendant argues that the Present § 2255 Petition does not constitute a "second or successive" petition, thereby eliminating the requirement to seek authorization to file from the Fourth Circuit, because 18 U.S.C. § 3596(c) provides for review of an intellectual disability claim when the Government sets an execution date. (Present § 2255 Pet. at 43.)

On December 15, 2020, the Court recognized that district courts generally lack jurisdiction to entertain second or successive 28 U.S.C. § 2255 motions without preauthorization from the appropriate Court of Appeals. Therefore, it ordered the parties to brief the limited question of whether Defendant must first seek authorization from the Fourth Circuit and whether the Court has jurisdiction to consider the Present § 2255 Petition. (ECF No. 95.) On December 21, 2020, the Government responded (Govt's Resp. to Court's December 15, 2020 Order ("Govt's Resp.") (ECF No. 96)), arguing that the Court lacks jurisdiction to consider the Present § 2255 Petition. On December 24, 2020, Defendant filed Corey Johnson's Reply Pursuant to December 15, 2020 Order (ECF No. 97), rendering this matter now ripe for review.

II. ANALYSIS

Because the general prohibition on filing second or successive § 2255 petitions calls into question the Court's jurisdiction, the Court must first resolve that issue to determine whether it has jurisdiction to entertain the Present § 2255 Petition. In making this determination, the Court will review the general prohibition against second or successive § 2255 petitions before determining whether the Present § 2255 Petition falls under that prohibition. This analysis involves examining the interplay between habeas law and the Federal Death Penalty Act ("FDPA"), which provides, in relevant part, that "a sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c).[5] Because the Court ultimately

[5] The Court notes that the parties dispute whether Defendant could raise a challenge under

determines that Defendant must obtain authorization from the Fourth Circuit to file the Present § 2255 Petition, it will not reach the merits of the Petition.

A. The Current Statutory Restrictions on Second or Successive § 2255 Petitions

"[I]t is 'particularly egregious' to enter a stay on second or subsequent habeas petitions unless 'there are substantial grounds upon which relief might be granted.'" *Delo v. Blair*, 509 U.S. 823, 823 (1993) (quoting *Herrera v. Collins*, 506 U.S. 390, 425-26 (1993) (O'Connor, J., joined by Kennedy, J., concurring)). Nevertheless, before the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the appellate courts often had "to vacate last minute stays of executions granted by district courts ruling on procedurally defaulted claims in successive petitions." *Stockton v. Angelone*, 70 F.3d 12, 13 (4th Cir. 1995) (citing *Peterson v. Murray*, 949 F.2d 704 (4th Cir. 1991)); *Evans v. Muncy*, 916 F.2d 163 (4th Cir. 1990); *Clanton v. Bair*, 826 F.2d 1354 (4th Cir. 1987)); *see id.* (observing that petitioner's habeas petition "reflects a formula for eleventh-hour relief that is increasingly common in capital cases").

In the wake of these and other practices, the AEDPA restricted the jurisdiction of the district courts to hear second or successive applications for federal habeas corpus relief by prisoners attacking the validity of their convictions and sentences by establishing a "gatekeeping mechanism." *Felker v. Turpin*, 518 U.S. 651, 657 (1996) (internal quotation marks omitted). Specifically, as pertinent here, 28 U.S.C. § 2255(h) states:

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§ 3596(c), given that the Court sentenced him to death under the now-repealed sentencing provisions of 21 U.S.C. § 848, rather than the FDPA. Indeed, the United States District Court for the District of Columbia recently ruled that Defendant lacked standing to challenge his execution under § 3596(a). *In the Matter of Federal Bureau of Prisons' Execution Protocol Cases*, No. 19mc145, ECF No. 378 (D.D.C. Dec. 30, 2020). Nevertheless, § 848(l) and § 3596(c) contain identically worded prohibitions on executing intellectually disabled individuals. Here, the Court need not reach the merits of whether Defendant can raise a challenge under § 3596(c), because Defendant's Present § 2255 Petition qualifies as second and successive even assuming § 3596(c) applies to him.

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255. Section 2244, in turn provides, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). "The core of the AEDPA restrictions on second or successive § 2255 petitions is related to the longstanding judicial and statutory restrictions embodied in the form of res judicata known as the 'abuse of the writ' doctrine." *United States v. Barrett*, 178 F.3d 34, 44 (1st Cir. 1999); *see Felker*, 518 U.S. at 663–64 (citation omitted) (observing that the AEDPA's restrictions on successive petitions "transfers from the district court to the court of appeals [the] screening function" for petitions that constitute an abuse writ). "In the absence of pre-filing authorization, the district court lacks jurisdiction to consider an application containing abusive or repetitive claims." *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003), *abrogated in part on other grounds by United States v. McRae*, 793 F.3d 392 (4th Cir. 2015).

Here, the parties do not dispute that Defendant neither sought nor obtained authorization from the Fourth Circuit to file the Present § 2255 Petition. Nor do they dispute that Defendant previously filed a § 2255 petition. Instead, they dispute whether the requirement to obtain authorization applies to this claim.

B. Defendant's Present § 2255 Petition Constitutes a Second or Successive Petition.

Defendant argues that he did not need to obtain authorization from the Fourth Circuit,

because the Present § 2255 Petition does not constitute a second or successive § 2255 petition within the meaning of § 2255(h). "[I]t is settled law that not every numerically second petition [or motion] is a 'second or successive' petition [or motion] within the meaning of the AEDPA." *United States v. Hairston*, 754 F.3d 258, 262 (4th Cir. 2014) (quoting *In re Williams*, 444 F.3d 233, 235 (4th Cir. 2006)). The Supreme Court has "described the phrase 'second or successive' as a 'term of art.'" *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)). In assessing "what qualifies as second or successive," courts should look for guidance in: (1) "historical habeas doctrine and practice"; and, (2) the "AEDPA's own purposes." *Banister v. Davis*, 140 S. Ct. 1698, 1705–06 (2020). As explained below, both these guides convincingly demonstrate that the Present § 2255 Petition constitutes a second or successive § 2255 petition within the meaning of 28 U.S.C. § 2255(h).

i. Historical Principles Dictate Treating the Present § 2255 Petition as a Second or Successive § 2255 Petition.

Under the historical guide, if the litigant's "later-in-time filing would have "constituted an abuse of the writ, as that concept is explained in . . . [pre-AEDPA] cases . . . it is successive; if not, likely not." *Id.* (alteration in original) (internal quotation marks omitted) (citation omitted). The doctrine of abuse of the writ

> mandates dismissal of claims presented in habeas petitions if the claims were raised, or could have been raised, in an earlier petition. Thus, the doctrine "encourages petitioners to present their claims simultaneously for resolution, rather than fragmenting grounds for collateral relief or advancing endless permutations of the same themes."

Noble v. Barnett, 24 F.3d 582, 585 (4th Cir. 1994) (quoting *Miller v. Bordenkircher*, 764 F.2d 245, 248 (4th Cir. 1985)). Defendant contends that his claim could not have been raised earlier, likening it to the mental competency claims that courts have found unripe. (Present § 2255 Pet. at 45.)

The decision of *Stewart v. Martinez–Villareal*, 523 U.S. 637 (1998), cited by Defendant, illustrates how the historical habeas practice informs AEDPA jurisprudence in determining whether a second in time application for relief constitutes a second or successive application. In *Stewart*, Martinez-Villareal's federal habeas petition, filed in 1993, contained a number of claims for relief, including a claim pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), that his mental incompetence precluded his execution ("*Ford* claim"). *Id.* at 640. The district court dismissed Martinez-Villareal's *Ford* claim as premature and, after remand, denied the remainder of the petition for a writ of habeas corpus. *Id.*

Later, the state set an execution date for the petitioner. *Id.* Martinez-Villareal then sought relief in federal court on his *Ford* claim. *Id.* at 640–41. The state asserted that this subsequent request for federal habeas relief required prefiling authorization from the Court of Appeals pursuant to 28 U.S.C. § 2244(b). *Id.* The Supreme Court rejected the state's position and noted:

> [The most recent petition] may have been the second time that [Martinez-Villareal] had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to [the second or successive petition]. There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. [Martinez-Villareal] was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

Id. at 643–44. The Supreme Court compared Martinez-Villareal's position to "a petitioner who returns to a federal habeas court after exhausting state remedies." *Id.* at 644. And, with a nod to the abuse of the writ doctrine, noted that Martinez-Villareal's "*Ford* claim would not be barred under any form of res judicata. [Martinez-Villareal] brought his claim in a timely fashion, and it has not been ripe for resolution until now." *Id.* at 645; *see also Slack*, 529 U.S. at 478, 487 (declining to apply § 2244(b) to a second application where the district court dismissed the first

application for lack of exhaustion).

Unlike the *Ford* claim in *Stewart v. Martinez–Villareal*, Defendant has already raised his claim that his intellectual disability precludes his execution in his First § 2255 Petition. And, both this Court and the Fourth Circuit rejected it on the merits. *United States v. Roane*, 378 F.3d 382, 409 (4th Cir. 2004) ("Johnson is not barred from execution due to mental retardation."). Thus, res judicata would bar the claim.

Defendant unconvincingly compares his intellectual disability claim to the incompetency claim of Martinez-Villareal and similar litigants whose claims were not ripe or did not arise until after they filed their first request for federal habeas relief. (Present § 2255 Pet. at 44.) Yet, in comparing the two claims, Defendant "confuse[s] intellectual disability with the temporary condition of incompetency, which may come and go." *Bourgeois v. Watson*, 977 F.3d 620, 637 (7th Cir. 2020) (citing *Ford*, 477 U.S. 399; *Williams v. Kelley*, 858 F.3d 464, 472 (8th Cir. 2017); *Busby v. Davis*, 925 F.3d 699, 713 (5th Cir. 2019)), *cert. denied sub nom. Bourgeois v. Watson*, No. 20–6500, 2020 WL 7296816 (U.S. Dec. 11, 2020). Importantly, "[i]ntellectual disability is a permanent condition that must manifest before the age of 18." *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)).

Moreover, the distinct penological purposes behind the respective prohibitions on executing the intellectually disabled and the mentally incompetent underscore the difference in the time at which a defendant may successfully raise each claim. In *Ford*, the Supreme Court indicated that the prohibition on executing the mentally incompetent stemmed from the defendant's lack of comprehension regarding the punishment that he would soon suffer: "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." 477 U.S. at 409-10.

Similarly, Justice Powell wrote in concurrence that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring). Indeed, the *Ford* Court noted the various stages at common law at which a defendant could raise a distinct competency claim, *e.g.*, when pleading an insanity defense, when asserting incompetence to stand trial or before execution. *Id.* at 406-07. Each could require a different competency assessment. *Id.*

Conversely, the prohibition on executing the intellectually disabled stems from the defendant's diminished moral culpability for the crime. As the Supreme Court has stated, "[t]he diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment." *Hall v. Florida*, 572 U.S. 701, 709 (2014). Likewise, the diminished ability to control his conduct through foresight and reason renders a potential death sentence an unlikely deterrent for an intellectually disabled individual. *Id.* Moreover, the prohibition also serves to protect the trial process, as intellectually disabled persons "are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel." *Id.*

Thus, the prohibition on executing the intellectually disabled has a foundation in the mental state of the defendant at the time of the crime and trial. And, this mental state manifests early in life and would not change as a defendant's execution nears. For this reason, courts may consider challenges that a defendant's intellectual disability precludes a death sentence at all phases of the trial and sentence. *See, e.g., United States v. Salad*, 959 F. Supp. 2d 865, 867-68 (E.D. Va. 2013) (considering the defendant's *Atkins* and § 3596(c) challenges before trial); *Ortiz v. United States*, 664 F.3d 1151, 1165-66 (8th Cir. 2011) (considering the defendant's *Atkins* and § 3596(c) challenges at the habeas stage). Conversely, the prohibition on the execution of the

mentally incompetent has a foundation in the mental state of the defendant at the time of his execution. This mental state can change and may not have manifested before the crime or trial. Consequently, an intellectual disability challenge ripens before a defendant files the first petition for federal habeas relief, whereas a competency challenge may not ripen until later.

Here, Defendant's intellectual disability ripened years ago, and the courts rejected it years ago. Indeed, both this Court and the Fourth Circuit ruled on Defendant's intellectual disability claim on the merits, rather than dismissing it as unripe. Therefore, his current attempt to relitigate that claim would be deemed an abuse of the writ. *See Noble*, 24 F.3d at 585 (observing that the abuse of the writ doctrine "mandates dismissal of claims presented in habeas petitions if the claims were raised [and rejected] . . . in an earlier petition."). Accordingly, guidance from historical habeas jurisprudence directs that Defendant's Present § 2255 Petition constitutes a second or successive § 2255 petition within the meaning of 28 U.S.C. § 2255(h).

ii. The Statutory Aims of the AEDPA Indicate that the Present § 2255 Petition is a Second or Successive § 2255 Petition.

The purpose behind the AEDPA's restrictions on multiple requests for federal habeas relief was to "conserve judicial resources, reduc[e] piecemeal litigation," and "lend[ ] finality to . . . judgments within a reasonable time." *Banister*, 140 S. Ct. at 1706 (alterations in original) (ellipses added) (interpreting 28 U.S.C. § 2244(b)) (quoting *Panetti v. Quaterman*, 551 U.S. 930, 945–46 (2007)). As explained below, not treating the Present § 2255 Petition as a second or successive motion would frustrate these statutory aims.

a. Defendant's § 3596(c) challenge does not differ from his previous *Atkins* challenge.

Defendant's argument that the Present § 2255 Petition constitutes a fresh intellectual disability claim, distinct from his previously-failed challenges, contravenes the purposes behind the AEDPA. To succeed on this argument, Defendant argues that an *Atkins* challenge differs

entirely from a challenge under § 3596(c), because "[s]ection 3596(c) provides more specific process for inmates with compelling claims of intellectual disability than is afforded by the Eighth Amendment." (Present § 2255 Pet. at 45-46.) However, the statute does not list the more specific process for intellectually disabled individuals and Defendant offers no authority for this position, or examples of the additional process afforded to intellectually disabled inmates under § 3596(c). Additionally, this argument ignores the fact that courts regularly consider Eighth Amendment and § 3596(c) challenges in tandem, using the same standards. *See, e.g., Bourgeois*, 977 F.3d at 634 (applying analysis equally to both *Atkins* and § 3596(c) claim, because they both provide "the same substantive protection"); *United States v. Cisneros*, 385 F. Supp. 2d 567, 569-70 (E.D. Va. 2005) (analyzing § 3596(c) and *Atkins* claims as one); *United States v. Coonce*, 932 F.3d 623, 632-33 (8th Cir. 2019) (same).

Moreover, Congress could not have sought to include additional protections to the Eighth Amendment, as the passage of the FDPA predated the Supreme Court's holding in *Atkins* that the Eighth Amendment prohibits the execution of the intellectually disabled. Indeed, the Supreme Court heavily relied on the fact that Congress, along with many other states, had passed legislation prohibiting the execution of the intellectually disabled. 536 U.S. at 314. Rather than creating a separate and distinct prohibition from § 3596(c), the Supreme Court in *Atkins* "articulated the constitutional dimension to this prohibition." *Salad*, 959 F. Supp. 2d at 868.

Defendant's argument also ignores the history of *this case*. Defendant previously challenged his death sentence under § 3596(c), citing that provision in his First § 2255 Petition and in his appeal to the Fourth Circuit after the Court's denial of the First § 2255 Petition. Similarly, the Court cited both *Atkins* and § 3596(c) in its Opinion denying the First § 2255 Petition, singularly analyzing the challenges under each, just as Defendant presented them to the

Court. (First § 2255 Op. at 80-84.) Now, despite previously raising a challenge under § 3596(c), Defendant argues for the first time that "adjudication pursuant to § 3596(c) is premature" before the Government has set an execution date. (Present § 2255 Pet. at 45.) But, neither this Court, the Fourth Circuit nor Defendant hinted that Defendant may have prematurely brought his § 3596(c) challenge. Rather than conserving judicial resources and reducing piecemeal litigation — the aims of the AEDPA — splitting the intellectual disability challenge in two would waste judicial resources and encourage piecemeal litigation.

b. Defendant's Textual Argument Lacks Merit.

Defendant argues that the language and structure of the text require the determination of intellectual disability when the Government sets an execution date. (Present § 2255 Pet. at 46.) Defendant correctly points out that the statute does not allow the death penalty "to be carried out" on a person with an intellectual disability. Yet, contrary to Defendant's argument, it does not follow that a determination on a defendant's intellectual disability must occur shortly before execution. A successful challenge under this provision that occurs pretrial, at sentencing or in the time to raise a federal habeas petition will prevent the death sentence from being "carried out" on the defendant. It also makes little sense, given that the prohibition applies to a permanent condition that — by definition — must have manifested before the defendant committed the capital crime. *Compare Atkins*, 536 U.S. at 318 (intellectual disability must manifest before age of eighteen); *with Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting imposition of death penalty on juvenile offenders). For example, here, had Defendant's First § 2255 Petition succeeded in convincing the Court or the Fourth Circuit that he suffered from an intellectual disability, his death sentence would not be carried out.

Likewise, Defendant points out that Congress placed the prohibition on executing the

intellectually disabled between the prohibition on executing pregnant or mentally incompetent individuals, two statuses that must be determined at the time of execution. (Present § 2255 Pet. at 48.) However, this section concerns who the Government may not execute. It does not concern when to determine ineligibility. The fact that eligibility for the other two types of individuals can only be determined on the eve of execution does not mean that the Court must re-review a determination of intellectual disability, particularly when the defendant's ineligibility would stem from a condition that has not developed since the previous determination.

Alternatively, Defendant's argument requires finding that § 3596(c) explicitly allows for two separate challenges — one before the expiration of federal habeas proceedings and another after the Government sets an execution date. Again, this position lacks any support in the caselaw. Moreover, it would require piecemeal litigation, the waste of judicial resources and a lack of finality of the defendant's death sentence, all in contravention to the aims of the AEDPA.

Defendant argues, without support, that when the Government schedules the execution of a person for which evidence of an intellectual disability exists, "§ 3596(c) requires that assessment to be made when the sentence is set to be implemented, even if that issue has been previously litigated." (Present § 2255 Pet. at 46.) This requirement would result in repeated litigation to determine a definitionally permanent condition. The Seventh Circuit recently considered, in the § 2241 context, a similar argument that § 3596(c) entitles the defendant to a new intellectual disability determination before execution. *Bourgeois*, 977 F.3d at 635-39. The court roundly rejected "that end-around § 2255(h)" argument that *Atkins* and § 3596(c) "forbid both the 'imposition' and the 'execution' of death sentences on the intellectually disabled" as follows:

> Intellectual disability is a permanent condition that must manifest before the age of 18. It would be senseless to proscribe the execution of someone who merely "was" intellectually disabled when they were sentenced, or who "will be" intellectually disabled when their sentence is carried out. Bourgeois seems to confuse intellectual disability with the temporary condition of incompetency, which may come and go. . . . And with no textual (or other) support, we are unwilling to accept Bourgeois's sweeping argument that a fresh intellectual-disability claim arises every time the medical community updates its literature.

Id. at 637-38 (internal citations omitted). The Supreme Court denied Bourgeois' petition for a writ of certiorari without explanation. *Bourgeois v. Watson*, 2020 WL 7296816 (U.S. Dec. 11, 2020). Defendant's argument that the Present § 2255 Petition does not constitute a successive petition depends on finding that a new intellectual disability claim has arisen. But, Defendant cannot claim that his intellectual functioning has changed since the previous determinations — only that the methods of assessing a potential intellectual disability have changed. However, the Court agrees with the Seventh Circuit that a fresh intellectual-disability claim does not arise every time the medical community updates its literature.

The Court is mindful of its role in protecting the intellectually disabled from execution. However, if Congress wanted to allow for an extra step in the review process, it could have done so. As it stands now, § 3596(c) neither explicitly nor implicitly states that a new intellectual disability claim arises when the Government schedules an inmate's execution. Because such a claim would frustrate the purposes of the AEDPA, the Court finds that § 3596(c) does not override the ban on successive § 2255 petitions. Accordingly, the Court finds that the Present § 2255 Petition constitutes a successive petition, such that the Fourth Circuit must first authorize Defendant to file it. Determining whether Defendant may pursue this successive petition falls beyond the power of this Court. Until the Fourth Circuit authorizes the filing of the successive petition, the Court lacks jurisdiction to entertain the merits of the petition.

III. CONCLUSION

In passing the AEDPA, Congress sought to put an end to the eleventh-hour relief that capital defendants often sought in district courts. Defendant's litigation tactics highlight the need for a mechanism to stem the filing of last-minute claims. Less than two weeks after asking this Court to enjoin his execution, and before the completion of the expedited limited briefing, Defendant asked the D.C. District Court to do the same. The Court sentenced Defendant to death over twenty-five years ago, yet he now races to different courts looking for one to block his execution. He made no effort to comply with the statutory obligations of the AEDPA, despite the fact that the Court and the Fourth Circuit previously rejected the exact claim that he states now entitles him to relief. And, this case comes on the heels of Defendant filing several unrelated § 2244 applications for authorizations to file successive § 2255 petitions in the Fourth Circuit, along with an appeal of a First Step Act Motion that had no merit.

Because the Fourth Circuit has not authorized this Court to entertain Petitioner's Present § 2255 Petition, Defendant's Motion Pursuant to 28 U.S.C. § 2255 Raising Claim of Ineligibility to Be Executed Under 18 U.S.C. § 3596(c) (ECF No. 86) will be DISMISSED WITHOUT PREJUDICE for want of jurisdiction.

An appeal may not be taken from the final order in a § 2255 proceeding unless a judge issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(B). A COA will not issue unless a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requirement is satisfied only when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4

(1983)). For the reasons stated above, Defendant has not satisfied this standard.

An appropriate Order shall issue.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: January 2, 2021

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,

v. Criminal No. 3:92cr68 (DJN)

COREY JOHNSON,
Defendant.

ORDER
(Dismissing § 2255 Petition)

This matter comes before the Court on Defendant's Motion Pursuant to 28 U.S.C. § 2255 Raising Claim of Ineligibility to Be Executed Under 18 U.S.C. § 3596(c) ((the "Present § 2255 Petition) (ECF No. 86)). In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. The Present § 2255 Petition (ECF No. 86) is hereby DISMISSED WITHOUT PREJUDICE for want of jurisdiction; and

2. A certificate of appealability is hereby DENIED.

Should Petitioner desire to appeal, written notice of appeal must be filed with the Clerk of the Court within sixty (60) days of the date of entry hereof. Failure to file a notice of appeal within that period may result in the loss of the right to appeal.

Let the Clerk file a copy of this Order electronically and notify all counsel of record.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: January 2, 2021

EXECUTION SCHEDULED FOR JANUARY 14, 2021

No. 20-15

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

COREY JOHNSON, A/K/A O, A/K/A CO,

Defendant – Appellant.

CAPITAL CASE

EMERGENCY MOTION OF COREY JOHNSON FOR STAY OF EXECUTION PENDING CONSIDERATION AND DISPOSITION OF APPEAL

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TABLE OF CONTENTS

Appellant, Corey Johnson, respectfully requests a stay of his execution, set for Thursday, January 14, pending this Court's consideration of his appeal of the denial of his claim for relief under Section 404 of the First Step Act.[1] In support of his stay request, he submits the following:

INTRODUCTION

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, passed in late 2018 by a bipartisan Congress, was designed to give retroactive effect to the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, by giving federal prisoners, convicted of crimes stemming from involvement in crack distribution violations, one chance—no more, but also no less—for a new sentencing proceeding at which they can present evidence in support of a reduced sentence.[2] The chance to revisit these penalties was deemed so important by Congress that Section 404 was made available to federal prisoners

[1] Counsel advised the government of its intent to file this Motion, and the government expressed its intention to oppose the Motion. Mr. Johnson did not file for a stay in the district court because the district court's opinion made clear that such an effort would be futile, excusing any obligation.

[2] Section 404 was adopted largely in recognition that the enormous sentencing disparities that had existed for crimes involving crack versus crimes involving powder cocaine were unwarranted and had, in turn, created racial disparities in sentencing that could not be countenanced. *See United States v. Wirsing*, 943 F.3d 175, 177-78 (4th Cir. 2019). Corey Johnson is African American.

as an initial—not a successive—action, even if they had exhausted all other avenues of direct and post-conviction appeal.

Since its passage, thousands of prisoners across the country have sought relief under Section 404 and questions regarding its coverage and interpretation have come before this Court on several occasions. In analyzing applicants' claims, this Court has said they must show only that they committed a "covered offense" —a violation for which the penalties for the "statute of conviction" have been modified even slightly by the Fair Sentencing Act. This Court has emphasized that Congress gave no indication when passing the First Step Act that it "intended a complicated and eligibility-limiting determination at the 'covered offense' stage of the analysis," *Wirsing*, 943 F.3d at 186, nor is it necessary that the Fair Sentencing Act explicitly modified the "statute of conviction." *United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020). If a showing of eligibility is made, the applicant is entitled to have his or her sentence reconsidered, without qualification, and the sentencer must take into account current law and mitigating evidence developed post-conviction. 18 U.S.C. § 3553.

Mr. Johnson is a federal death row prisoner. In 1993, he was convicted of multiple offenses, including murders in the course of a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848, all stemming from crack

distribution activities; he was sentenced to death for all but one of the CCE murders.

On August 19, 2020,[3] like many others before him, Mr. Johnson sought a sentence reduction from death to life without possibility of parole, pursuant to Section 404 of the First Step Act for violations of 21 U.S.C. § 848. He brought this action after other federal courts in Virginia and elsewhere had determined that § 848 CCE crimes were "covered offenses," and some litigants were given sentencing relief.

Mr. Johnson demonstrated to the district court that his crimes were covered offenses and asked that his sentences therefore be reconsidered. Mr. Johnson requested that, consistent with federal law and capital jurisprudence, his sentence reconsideration be conducted by a jury, and he proffered evidence showing that the sentencer would have ample reason to consider a sentence less than death. *See* Memorandum in Support of Motion for Reconsideration of Sentence Hearing Pursuant to the First Step Act of 2018 (the "Motion") at APP.28-58.

In Mr. Johnson's case, the district court, contrary to its sister courts in the Western District of Virginia, held that Mr. Johnson's violations of § 848 were not "covered offenses." The court further held that, because no explicit provision was

[3] This was months before the Department of Justice set his execution date.

made for relief in capital cases, the First Step Act excluded them. The district court also announced that, even if Mr. Johnson's violations had been covered offenses, it

> refuses to overturn the will of the community. It is not the Court's role to revisit the jury's determination, especially when doing so would run contrary to the goals of the First Step Act.

The district court stated it would, therefore, not entertain any such sentence reduction. Memorandum Order (the "*Johnson* Memorandum Order" or "*Johnson* Order") at APP.443.

On November 20, 2020, days after the district court denied his motion and Mr. Johnson had filed a notice to appeal that decision to this Court, the government set an execution date for Mr. Johnson of January 14, 2021.

Mr. Johnson's case is the first to seek relief from the First Step Act for a death-sentenced prisoner for convictions under 21 U.S.C. § 848. Two other such capital cases (those of his codefendants) are also pending before this Court. But the district courts have had occasion to consider whether the Act includes § 848 offenses in the context of non-capital crimes, and contrary to the finding of the district court in Mr. Johnson's case, several held that violations of § 848 do indeed constitute "covered offenses" and have reconsidered the defendants' sentences. Thus, in seeking this relief, Mr. Johnson asks only for the same relief that has been granted others: a determination of eligibility followed by the opportunity to

persuade the appropriate sentencer that, given the evidence he could now present in mitigation of punishment, a sentence of life without possibility of parole is sufficient, and no more than necessary, to adequately punish him and protect the public.

Mr. Johnson is entitled to a stay of execution pending consideration of this claim because he can demonstrate to this Court that he has a "significant possibility of success on the merits," *Hill v. McDonough*, 547 U.S. 573, 584 (2006), that "he is likely to suffer irreparable harm in the absence of [this] preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Glossip v. Gross*, 576 U.S. 862, 876 (2015) (citation omitted).

Mr. Johnson is likely to succeed on the merits of his claim because: (1) others have already won on the question of eligibility that he presents (and it is a categorical determination);[4] (2) the district court erred as a matter of law when announcing it was not the court's role to overturn the 1993 jury sentencing determination, when this Court's holdings mandate the consideration of factors not available at the time the original sentence was imposed; and (3) Mr. Johnson has a

[4] Mr. Johnson is aware of two cases in which § 848(e) offenses were deemed covered offenses, reduced sentences were imposed, and the government has not appealed these outcomes. *See* Order, *United States v. Peterson*, No. 94-CR-46-3H (E.D.N.C. Dec. 17, 2020) (reducing defendant's sentence from life to 384 months); Order, *United States v. Brown*, 03-CR0612 (E.D. Va. Sept. 21, 2020) (reducing defendant's sentence from 30 years to 23 years).

compelling case for sentence reduction, given the strong evidence that he is intellectually disabled; the fact that, despite the government's arguments in 1993 that he would be a "future danger," he has been a model inmate with a practically unblemished record for more than two decades; deep remorse; and other evidence that, despite the severity of his crimes, would support a sentence of life imprisonment rather than death.

Mr. Johnson, therefore, asks only that this Court stay his execution until it has time to deliberate thoughtfully, in the time-honored manner to which every litigant is entitled.

ARGUMENT

Courts in the Fourth Circuit treat a motion to stay an execution as a request for a preliminary injunction. *See, e.g.*, *Prieto v. Clarke*, No. 15CV587, 2015 WL 5793903 (E.D. Va. Oct. 1, 2015). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Glossip*, 576 U.S. at 876 (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)). As to the first of these factors, the Supreme Court has explained that a stay applicant must make "a strong showing that he is likely to succeed on the merits" and that "[t]he first two factors . . . are the most critical." *Nken v. Holder*, 556 U.S. 418,

434 (2009) (citation omitted). In addition to these factors, courts consider "the extent to which the inmate has delayed unnecessarily in bringing the claim" at issue. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

Mr. Johnson is entitled to a stay under these standards.[5]

I. MR. JOHNSON HAS A STRONG LIKELIHOOD OF PREVAILING ON HIS FIRST STEP ACT CLAIM

Mr. Johnson has a significant likelihood of success on the merits of his First Step Act claim. Mr. Johnson is eligible for relief under the First Step Act because, like others with similar claims who have prevailed,[6] he was convicted of offenses

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[5] The First Step Act was meant to provide applicants a discrete opportunity to have their sentences reconsidered without the procedural hurdles applicable to most post-conviction challenges. The government has compromised that opportunity for Mr. Johnson by setting an execution date in the middle of his litigation.

[6] *See, e.g.*, *United States v. Davis*, No. 93-CR-30025, 2020 WL 1131147, at *2 (W.D. Va. Mar. 9, 2020) ("[A] defendant's § 848(e)(1)(A) conviction is a covered offense because it relies on the drug quantity thresholds set by § 841 and, therefore, requires a jury finding that the defendant committed a murder in furtherance of a drug conspiracy to sell 280 or more grams of cocaine base."), *appeal dismissed*, No. 20-6383 (4th Cir. Oct. 20, 2020); Order, *United States v. Fells*, 94-CR-46 (E.D.N.C. Dec. 17, 2020); *United States v. Brown*, No. 08-CR-00011-1, 2020 WL 3106320, at *4 (W.D. Va. 2020); Order at 5, *United States v. Kelly*, No. 94-CR-163 (E.D. Va. June 5, 2020) (sentencing reduction granted; government has not appealed); *Wright v. United States*, 425 F. Supp. 3d 588, 598 (E.D. Va. 2019); Order at 1, *United States v. Groves*, No. 94-CR-97 (E.D.N.C. Nov. 21, 2019); *United States v. Dean*, No. 97-276(3), 2020 WL 2526476, at *3 (D. Minn. May 18, 2020); *United States v. Jimenez*, No. 92-CR-550-01, 2020 WL 2087748, at *2 (S.D.N.Y. Apr. 30, 2020); Mem.-Dec. and Order at 4, *United States v. Hines*, No. 94-CR-150 (N.D.N.Ya. Nov. 8, 2019), ECF No. 607; Mem.-Dec. and

under 21 U.S.C. § 848, and the Fair Sentencing Act modified the penalties of 21 U.S.C. § 848, his "statute of conviction." As a result of his eligibility, and under this Circuit's case law, he should be able to present to a sentencer the extensive evidence he now has, including, *inter alia*, a strong showing of intellectual disability[7] and a virtually unblemished prison record spanning more than two decades, proving that he has adjusted to the strictures of prison without committing any further violence. *United States v. Chambers*, 956 F.3d 667, 675 (4th Cir. 2020).

Mr. Johnson's application for relief does not rest on a blank slate in this Court. To the contrary, this Court has laid out clear standards that fully support both his eligibility to have his sentence reconsidered[8] and the principles that

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Order at 4, *United States v. Walker*, No. 95-CR-101 (N.D.N.Y. Oct. 25, 2019), ECF No. 620; Dec. and Order at 4, *United States v. Robinson*, No. 98-CR-60 (E.D. Wis. Sept. 27, 2019), ECF No. 606.

[7] Mr. Johnson has presented a strong case of intellectual disability, which has never been presented to any court and which should render him ineligible for execution, in other pleadings before this Court. That issue does not need to be reached in this appeal or in this stay motion: if a stay is granted so that he can proceed under the First Step Act, all of that evidence could be considered by the sentencer in determining punishment.

[8] *Wirsing*, 943 F.3d at 186 (Courts should look only to whether penalties were modified for the "statute of conviction," and not engage in "complicated and eligibility-limiting determination[s] at the 'covered offense' stage of the [First Step Act] analysis."); *United States v. Gravatt*, 953 F.3d 258, 264 (4th Cir. 2020) (Had Congress intended for the First Step Act not to apply in certain circumstances, "it could have included that language," and this Court has accordingly "decline[d] to

circumscribe the exercise the sentencer's discretion in deciding whether to reduce his or her sentence. *Chambers*, 956 F.3d at 675.

A. Mr. Johnson Is Eligible for Sentence Reconsideration Because His § 848 Violations Are "Covered Offenses"

When a claim is brought by a defendant for First Step Act relief, the Act requires the court to engage in a two-part process. First, the court is required to determine whether the defendant has committed a "covered offense." Mr. Johnson was convicted of violations of 21 U.S.C. § 841 (Counts 32 and 33) and § 848 (Counts 2, 8, 11, 17-19, 24, and 25). Each of these violations constitutes a "covered offense" under section 404 of the First Step Act because each is a violation of a "Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act."[9]

This Court has held that eligibility turns only on whether the penalties for the "statute of conviction" under which a violation has charged have been modified

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expand the limitations crafted by Congress."); *Woodson*, 962 F.3d at 816 (A modification to a penalty can be slight, does not have to be explicitly mentioned in section 2 or 3 of the Fair Sentencing Act, and the defendant's sentencing range does not have to change in order for him or her to have a "covered offense.").

[9] Mr. Johnson confines his discussion hereafter to the § 848 offenses because the district court has already determined that his § 841 offenses are "covered offenses."

by the First Step Act. *Wirsing*, 943 F.3d at 186.[10] Some of these courts, both in this Circuit and elsewhere, have determined that the statute of conviction for any subsection of § 848 violations is 21 U.S.C. § 848 as a whole. *See, e.g.*, *Brown*, 2020 WL 3106320; *United States v. Moore*, No. 95-CR-509-2, 2020 WL 4748154 (N.D. Ill. Aug. 17, 2020). These analyses are compelling because the term "statute of conviction" has a natural meaning, because § 848 is brief and concise, and because each provision of § 848 is dependent on the central subsection 848(c), which defines a CCE. The other subsections lay out penalties and additional elements, but all revolve around a defendant's participation in a CCE. *Brown*, 2020 WL 3106320, at *4.

These district courts have further determined, and, in some cases, the government has conceded, that the penalties for both subsections 848(b) and 848(e), which predicate violations on underlying § 841(b)(1) violations, have been modified by the Fair Sentencing Act. Accordingly, § 848, the statute of

[10] *See also United States v. Boulding*, 960 F.3d 774, 779 (6th Cir. 2020); *United States v. Shaw*, 957 F.3d 734, 739 (7th Cir. 2020) (holding that "the statute of conviction alone determines eligibility for First Step Act relief"); *United States v. Jackson*, 964 F.3d 197, 206 (3d Cir. 2020) ("[Section] 404 eligibility turns on a defendant's statute of conviction.").

conviction, has been modified by the Fair Sentencing Act, and defendants who violated § 848 are eligible for reconsideration of their sentences.[11]

Even if Mr. Johnson's "statute of conviction" were to be deemed subsection 848(e), as the district court below determined, that subsection was itself modified by the Fair Sentencing Act. *Davis*, 2020 WL 1131147, at *2; *accord Gravatt*, 953 F.3d at 263.

The district court was wrong to parse the statute even further by breaking subsection 848(e) into its component parts. Doing so runs contrary to the language of *Wirsing*, which concluded that Congress did not intend the eligibility determination to be complicated or eligibility-limiting. *Wirsing*, 943 F.3d at 186. Nor, contrary to the opinion of the district court, does the fact that the sentencing range of an individual defendant would not have changed as a result of the Fair Sentencing Act defeat eligibility under this first prong. *Woodson*, 962 F.3d at 816-17.

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[11] *See, e.g.*, Order at 5, *United States v. Kelly*, No. 94-CR-163-4 (E.D. Va. June 5, 2020); *Wright*, 425 F. Supp. 3d at 598; Order at 1, *United States v. Groves*, No. 94-CR-97 (E.D.N.C. Nov. 21, 2019); *Dean*, 2020 WL 2526476, at *3; *Jimenez*, 2020 WL 2087748, at *2; Mem.-Dec. and Order at 4, *United States v. Hines*, No. 94-CR-150 (N.D.N.Y. Nov. 8, 2019), ECF No. 607; Mem.-Dec. and Order at 4, *United States v. Walker*, No. 95-CR-101 (N.D.N.Y. Oct. 25, 2019), ECF No. 620; Dec. and Order at 4, *United States v. Robinson*, No. 98-CR-60 (E.D. Wis. Sept. 27, 2019), ECF No. 606.

For each of these reasons, discussed more thoroughly in Mr. Johnson's Opening Brief dated December 28, 2020 ("Brief") (Brief at 19-44), Mr. Johnson is likely to succeed in demonstrating his entitlement to sentence reconsideration under Section 404.

B. If Mr. Johnson Were Given the Resentencing Hearing to Which He Is Entitled, He Could Make a Strong Showing In Support of a Sentence of Life without Possibility of Parole, rather than Death

In order to prevail on his appeal in this Court, Mr. Johnson need only demonstrate he has committed a "covered offense," a showing that would trigger a remand for reconsideration of his sentence.[12] Thus, in order to show a likelihood of success on the merits warranting a stay, he need not go any further.

It is nevertheless worth noting two important points: First, the district court erred in its discussion of sentence reconsideration, even if it were determined—which it should not be—that the court, rather than a jury, should consider whether to impose a new sentence. The district court treated the extensive evidence Mr. Johnson proffered dismissively and ticked through the sentencing factors listed in

[12] Mr. Johnson has argued in his appeal as he did in the district court that, consistent with 21 U.S.C. § 848(*l*), 18 U.S.C. § 3593, and long-established principles of capital jurisprudence, he must be resentenced by a jury, not by the court. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *United States v. Stitt*, 552 F.3d 345, 354-55 (4th Cir. 2008). The district court erred when it rejected this argument and found that not only should no new jury be imposed, but the court itself did not have the authority to upend the decision made by Mr. Johnson's 1993 jury.

18 U.S.C. § 3553 mechanically at best. Then, ultimately, the district court announced that, in any event, it was not the court's "role" to re-examine the sentences that had been imposed by Mr. Johnson's 1993 jury—despite this Court's previous holdings that evidence of positive prison adjustment, post-conviction mitigation, and current law must be taken into account in a First Step Act sentence reconsideration.

Second, the evidence the district court refused to consider was substantial and was never heard by that 1993 jury. This included:

- Evidence, science, and law demonstrating that Mr. Johnson is a person with intellectual disability. This evidence includes three opinions of nationally renowned experts who specialize in identifying and diagnosing intellectual disability.
- Mr. Johnson suffered horrific abuse, neglect, and abandonment throughout his childhood.
- As is often the case with people with intellectual impairments who lack life skills—particularly those who were physically and emotionally abused as children—Mr. Johnson was a follower, not a leader, who was easily manipulated and would do anything to please others. This element of his character is critical to an understanding of his role in the crimes for which he was convicted.
- Mr. Johnson has an essentially flawless prison record, and a sentence reconsideration would not encourage future crime or endanger the public. Mr. Johnson has been incarcerated for 28 years, and during that time he has been a model federal inmate.
- Mr. Johnson's sentence is disproportionate compared to sentences imposed on his co-defendant Vernon Lance Thomas, who like Mr. Johnson has intellectual disability and was spared the death penalty despite being found guilty of four murders in furtherance of a

CCE, and is disproportionate compared to other similarly situated defendants.

- Mr. Johnson was only 22 at the time of his arrest. Now, Mr. Johnson is 52 years old and poses no threat to the prison population at large.
- Mr. Johnson has demonstrated sincere remorse. Even with his limited ability to express himself, he conveyed his profound regret and accepted responsibility for his crimes at his sentencing hearing.

This Court has held, contrary to the opinion of the district court, that such post-conviction evidence should be considered by the sentencer. *Chambers*, 956 F.3d at 674.[13]

In announcing that it is not the role of the courts to upend the sentencing decision of a jury issued 27 years ago, the district court erred as a matter of law. The entire point of the First Step Act is to provide reconsideration of sentences imposed before passage of the Fair Sentencing Act and a stay is necessary in order for this evidence to be considered. *Chambers*, 956 F.3d at 672, 674.

[13] *See also United States v. White*, No. 19-3058, 2020 WL 7702705, at *1 (D.C. Cir. Dec. 29, 2020) ("[I]t is unclear whether the court properly weighed the factors listed in 18 U.S.C. § 3553(a). And there is nothing to indicate that the District Court weighed the mitigating factors raised by Appellants."); *United States v. Martin*, No. 19-3905, 2020 WL 3251021, at *2 (6th Cir. June 16, 2020) (finding that the "district court erred in limiting what information it could consider for resentencing under the First Step Act").

II. MR. JOHNSON FACES IRREPARABLE HARM ABSENT A STAY

Mr. Johnson will suffer irreparable harm absent a stay because in the absence of immediate relief, no court, could reverse the harm caused by moving forward. *See Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 218 (4th Cir. 2019) ("[I]rreparable harm is often suffered when . . . the district court cannot remedy the injury following a final determination on the merits." (alterations in original) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)). "In cases involving the death penalty when an execution date has been set, as here, it is a certainty that irreparable harm will result if the court of appeals' decision is not stayed." *Beaver v. Netherland*, 101 F.3d 977, 979 (4th Cir. 1996); *see also Oken v. Sizer*, 321 F. Supp. 2d 658, 666 (D. Md. 2004) ("[T]he irreparable harm to one seeking a stay of execution is ordinarily obvious."); *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) ("[I]n a capital case, the possibility of irreparable injury weighs heavily in the movant's favor." (citation omitted)).

Mr. Johnson's execution date has been set and is imminent. Without a stay to allow this Court to consider his arguments, Mr. Johnson will suffer irreparable harm.

III. THE BALANCE OF EQUITIES TIPS IN FAVOR OF A STAY

Here, Mr. Johnson is requesting a stay only long enough to have his First Step Act claim adjudicated by this Court. Although the government normally has a "strong interest" in "proceeding with its judgment," *Nelson,* 541 U.S. at 649-50 (citation omitted), no such interest exists here, where the government itself has caused a decade-long delay in bringing Mr. Johnson's case to this point. The government initially set an execution date for Mr. Johnson in 2006 but was unable to carry the execution out at that time because of flaws in its execution protocol. Tasked by the courts with the job of replacing its flawed protocol, the government passed the next eight years, from 2011 to 2019, without any execution protocol at all. Mem. Op. at 14, *In re the Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (D.D.C. Nov. 20, 2019), ECF No. 50. The Department of Justice then set a new execution date *after* Mr. Johnson had already initiated his First Step Act litigation. The government thus has no basis to argue now that a delay of the several weeks it would take to complete briefing in this case and have this Court resolve Mr. Johnson's claim would infringe its interests.[14]

[14] Under the briefing schedule set by this Court the government's opposition brief is due on January 19, 2021

IV. THE PUBLIC INTEREST FAVORS A STAY

The public interest favors granting a stay. Here Mr. Johnson is asking only for a matter of weeks to have this Court (and, if necessary, the Supreme Court) carefully consider the applicability and implementation of the First Step Act to his case, time that was cut short only by the unilateral setting by the government of this execution date. The public as a whole, as exemplified by a bipartisan Congress and two Presidents, passed the First Step Act 25 years after Mr. Johnson's trial to fix serious flaws in the law under which he was charged and sentenced, and have made Section 404 broadly applicable to correct those flaws. These elected officials represent the whole of the public and have provided a mechanism designed to allow people who committed covered offenses to have their sentences reconsidered. A chief consideration was the disparate treatment on the basis of race that prejudiced those convicted of crack cocaine offenses. These elected officials believed this was such an important interest that they gave every person a way back into court, without an authorization requirement, even if the person had long before exhausted his or her appeals. Thus, it is plainly in the public interest that the government not be permitted to execute Mr. Johnson to deny him the opportunity the law intended to give him to ensure that his sentence was not tainted by racially driven disparate treatment.

V. MR. JOHNSON DID NOT DELAY IN BRINGING THIS ACTION

Mr. Johnson has not been dilatory in his pursuit of a remedy under the First Step Act. In fact, Mr. Johnson filed his claim under it in August, 2020, just weeks after determinations had been made in non-capital cases that 21 U.S.C. § 848 was a covered offense, and after this Court determined that sentence reconsideration included consideration of post-conviction conduct. *Davis*, 2020 WL 1131147, at *2; *Jimenez*, 2020 WL 2087748, at *2; Order, *United States v. Kelly*, No. 94-CR-163-4 (E.D. Va. June 5, 2020). There was no unreasonable delay.

CONCLUSION

For all the foregoing reasons, and to prevent the irredeemable injustice that would occur were Mr. Johnson's execution to go forward before his rights can be adjudicated, he respectfully asks this Court to enter a stay pending consideration and determination of his First Step Act appeal.

Dated: January 7, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion contains 4539 words, excluding the parts of the brief exempted from the word count by Fed. R. App. P. Rule 27(d)(2) and Rule 32(f).

2. This motion complies with the font, spacing, and type size requirements set forth in Fed. R. App. P. Rule 32(a)(5).

/s/ Donald P. Salzman

CERTIFICATE OF SERVICE

I certify that on this 7th day of January 2021, the foregoing document was served on all parties or their counsel of record though the CM/ECF system, which will then send notification of such filing to all parties and counsel included on the Court's Electronic Mail notice list.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,	)	
LEAD CASE: *Roane, et al. v. Barr*	)	Case No. 19-mc-145 (TSC)
THIS DOCUMENT RELATES TO:	)	
Roane v. Barr, 05-cv-2337	)	

MEMORANDUM OPINION

With over 376,000 Americans dead and more than twenty-one million infected, the COVID-19 pandemic "need[s] no elaboration." *Merrill v. People First of Ala.*, 141 S. Ct. 25, 26 (2020) (Sotomayor, J., dissenting). And with each day bringing a new record number of infections, "the COVID-19 pandemic remains extraordinarily serious and deadly." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring).

Among the most susceptible to the spread of COVID-19 is the prison inmate population. As several outbreaks have shown, "COVID-19 can overtake a prison in a matter of weeks." *Valentine v. Collier*, 141 S. Ct. 57, 62 (2020) (Sotomayor, J., dissenting) (discussing one facility which recorded over 200 cases, 5 deaths, and 12 hospitalizations in less than three weeks). This is unsurprising given that most inmates are unable to socially distance, have limited access to adequate testing, and are often housed in buildings with poor circulation.

Despite the pandemic, and the current record high rates of infections and fatalities, Defendants intend to go forward with the scheduled executions of Plaintiffs Cory Johnson and Dustin Higgs on January 14 and 15, 2021, although both men have been diagnosed with COVID-

19. Higgs and Johnson are housed at the Federal Correctional Institution in Terre Haute, Indiana, a facility experiencing its own "massive COVID-19 outbreak." Michael Balsamo & Michael R. Sisak, *Execution staff have COVID-19 after inmate put to death*, AP News (Dec. 8, 2020), https://apnews.com/article/prisons-coronavirus-pandemic-executions-terre-haute-indiana-e80af6a566bbff50ed5e9a097c305dbb.

Defendants intend to carry out the executions according to the procedures set forth in the Federal Bureau of Prisons 2019 Execution Protocol (the 2019 Protocol), which includes a lethal injection of five grams of pentobarbital. Plaintiffs received notice of their diagnoses less than a month before their executions—after Defendants assured the court that "allegations regarding the prevalence of COVID-19 at [] Terre Haute . . . are dated" and that adequate procedures were in place to protect the inmate population. (ECF No. 306-1 at 10 n.3.) Plaintiffs have asked the court to enjoin their executions, arguing that injection of a lethal dose of pentobarbital given their COVID-19 infections will cause them to suffer an excruciating death. Specifically, they argue that damage to their lungs and other organs will cause them to experience the sensation of drowning caused by flash pulmonary edema almost immediately after injection but before they are rendered unconscious.

Defendants argue that Plaintiffs' claims here are the same as those previously rejected by the Supreme Court. (*See* ECF No. 380, Defs. Opp'n at 17.)[1] The court disagrees. Plaintiffs have

[1] Citing Sixth Circuit precedent, Defendants also argue that "even if any of the inmates did briefly experience the effects of 'flash' pulmonary edema prior to becoming insensate, it would not suffice to establish a violation of the Eighth Amendment." (Def. Opp'n at 16 (citing *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 298 (6th Cir. 2019) (holding that pulmonary edema does not "qualify as the type of serious pain prohibited by the Eighth Amendment.")).) This is at odds with D.C. Circuit precedent, which found that flash pulmonary edema could indeed give rise to an Eighth Amendment violation. *See Execution Protocol Cases*, 980 F.3d at 132. Defendants similarly contend that in *Bucklew*, the Supreme Court "rejected an Eighth Amendment challenge to a single-drug pentobarbital protocol "as applied to a prisoner with a

pleaded as-applied Eighth Amendment challenges based on their specific health conditions. Moreover, they allege that their health has been worsened by their infection with COVID-19, an illness which has resulted in a global pandemic for the better part of a year. Given these unique circumstances, the court held an evidentiary hearing to assess the credibility of the parties' expert opinions.

Having heard and reviewed the expert testimony, the court finds that Plaintiffs are likely to succeed on the merits of their as-applied Eighth Amendment challenge. Specifically, they have demonstrated that as a result of their COVID-19 infection, they have suffered significant lung damage such that they will experience the effects of flash pulmonary edema one to two seconds after injection and before the pentobarbital has the opportunity to reach the brain. This will subject Plaintiffs to a sensation of drowning akin to waterboarding, a side effect that could be avoided were Defendants to implement certain precautions, such as administering a pre-dose analgesic or carrying out the execution by firing squad.

For the reasons set forth below, and in light of these unprecedented circumstances, the court will grant a *limited* injunction to allow Plaintiffs the opportunity to adequately recover from COVID-19, at which point it will evaluate whether to extend the injunction in light of any new medical evidence submitted by the parties.

I. BACKGROUND

After a hiatus of more than fifteen years, on July 25, 2019, the Department of Justice announced plans to resume federal executions. *See* Press Release, Dep't of Justice, Federal

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unique medical condition that could only have increased the baseline risk of pain associated with pentobarbital." (Defs. Opp'n at 17 (discussing *Bucklew*, 140 S. Ct. at 2159).) The D.C. Circuit disagrees. "Allegations regarding flash pulmonary edema were not [] before the Supreme Court in *Bucklew*." *Execution Protocol Cases*, 980 F.3d at 131.

Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse. To implement these executions, the Federal Bureau of Prisons (BOP) adopted a new execution protocol: the 2019 Protocol. (ECF No. 39-1, Admin. R. at 1021–75.)

On September 1, 2020, the court granted Higgs' unopposed motion to intervene in *Roane v. Gonzales*, No. 05-2337, a case brought by several death row inmates (including Plaintiff Cory Johnson) challenging the legality of the 2019 Protocol. (ECF Nos. 229, 229-1.)[2] Higgs' claims were largely the same as those asserted by the other Plaintiffs, with one exception: he brought an as-applied challenge under the Eighth Amendment, alleging that because of his asthma and because he believed that had contracted COVID-19 in February 2020, he faced a unique and individualized risk of serious harm if executed using pentobarbital. (ECF No. 229-1 ¶¶ 166–72.)

Defendants moved to dismiss Higgs's as-applied claim, (*see* ECF No. 306), arguing that the claim was speculative because Higgs did not allege that he had tested positive for COVID-19, nor had he actually suffered lung damage from the disease. The court agreed and granted the motion on December 9, 2020. (ECF Nos. 354–55.)

During a status conference on December 17, 2020, Higgs' counsel reported that Higgs had tested positive for COVID-19. Higgs was granted leave to file a Second Amended and Supplemental Complaint, (ECF No. 370), in which he alleges that his heart condition, combined with his asthma, puts him at a greater risk of pulmonary edema, which is further aggravated by

[2] The case originated as a challenge to the federal government's death penalty procedures in 2005 but was subsequently amended to challenge the 2019 Protocol.

his COVID-19 diagnosis.[3] Higgs also filed a second motion for a preliminary injunction. (ECF No. 371, Higgs Mot.)

On December 16, 2020, Johnson also tested positive for COVID-19 and was also permitted to file a supplemental complaint and motion for a preliminary injunction. (*See* ECF No. 372; ECF No. 373.) Johnson's allegations are similar to Higgs' except Johnson does not allege any underlying medical conditions, and he has experienced slightly different symptoms. (*See generally* ECF No. 375, Johnson Mot.)

Defendants argue that Plaintiffs have shown only that there is competing testimony between credible experts, which is insufficient to succeed on a method-of-execution Eighth Amendment claim.

On January 4 and 5, the court held an evidentiary hearing to assess the expert testimony proffered on Plaintiffs' COVID-19 related claims. Drs. Kendall von Crowns and Todd Locher testified for Defendants and Drs. Gail Van Norman and Michael Stephen testified for Plaintiffs.[4]

II. ANALYSIS

A preliminary injunction is an "extraordinary remedy" requiring courts to assess four factors: (1) the likelihood of the plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff absent an injunction, (3) the balance of equities, and (4) the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008) (citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau,* 849 F.3d 1129, 1131 (D.C. Cir. 2017). The D.C. Circuit has traditionally evaluated claims for injunctive relief on a sliding scale, such that "a strong showing

[3] Higgs has another Amended and Supplemental Complaint and accompanying motion for a preliminary injunction pending before the court. (*See* ECF Nos. 343–44.) The court will address that motion for a preliminary injunction in a separate opinion.

[4] The court also briefly heard from Dr. Mitchell Glass, who was slated to testify in favor of Plaintiffs, but his testimony was stricken on Defendants' unopposed motion.

on one factor could make up for a weaker showing on another." *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C. Cir. 2011). It has been suggested, however, that a movant's showing regarding success on the merits "is an independent, free-standing requirement for a preliminary injunction." *Id.* at 393 (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)).

A. Likelihood of Success on the Merits

Plaintiffs bringing an Eighth Amendment challenge to a method of execution face a high bar. They must demonstrate that the 2019 Protocol presents a "substantial risk of serious harm," and they must identify an alternative method of execution that will significantly reduce the risk of serious pain and that is feasible and readily implemented. *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) (confirming that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test."). Indeed, the Supreme Court "has yet to hold that a State's method of execution qualifies as cruel and unusual." *Bucklew*, 139 S. Ct. at 1124.

The court has been down this road before. In July, it enjoined four executions on the basis that the use of pentobarbital would subject Plaintiffs to suffer a cruel and unusual death in violation of the Eighth Amendment. In so ruling, the court found that Plaintiffs had provided scientific evidence that "overwhelmingly" indicated they would suffer the effects of flash pulmonary edema, including a sensation of drowning, while they were still conscious. (ECF No. 135 at 9.) The court weighed the declarations of several experts, including Drs. Gail Van Norman and Joseph Antognini.

On appeal, the Supreme Court vacated this court's injunction, concluding that Plaintiffs were unlikely to succeed on the merits of their Eighth Amendment claim. *See Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). The Court noted that pentobarbital "has become a mainstay of state executions . . . [h]as been used to carry out over 100 executions, without incident," and was upheld "as applied to a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter." *Id.* The Court acknowledged Plaintiffs' expert declarations regarding flash pulmonary edema but noted that "the government has produced competing evidence of its own, indicating that any pulmonary edema occurs only *after* the prisoner had died or been rendered fully insensate." *Id.* In light of the competing evidence—and despite this court's assessment that Plaintiffs' evidence was more credible—the Supreme Court found that Plaintiffs had "not made the showing required to justify last-minute relief." *Id.* It further emphasized that "[l]ast-minute stays" must be "the extreme exception, not the norm." *Id.* (quoting *Bucklew*, 139 S. Ct. at 1134).

Given the Supreme Court's decision in *Lee*, this court subsequently dismissed Plaintiffs' general Eighth Amendment claim, finding that "no amount of new evidence will suffice to prove that the pain pentobarbital causes reaches unconstitutional levels." (ECF No. 193 at 4.) The D.C. Circuit reversed. "By pleading that the federal government's execution protocol involves a 'virtual medical certainty' of severe and torturous pain that is unnecessary to the death process and could readily be avoided by administering a widely available analgesic first, the Plaintiffs' complaint properly and plausibly states an Eighth Amendment claim." *In Re Fed. Bureau of Prisons Execution Protocol Cases*, 980 F.3d 123, 133 (D.C. Cir. 2020). However, the Court of Appeals noted that Plaintiffs had a "difficult task ahead [] on the merits" and that if all they could produce was a "'scientific controvers[y]' between credible experts battling between 'marginally

safer alternative[s],' their claim is likely to fail on the merits." *Id.* at 135 (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008)).

1. Substantial Risk of Serious Harm

In order to succeed on their Eighth Amendment claim, Plaintiffs must show that execution under the 2019 Protocol presents a risk of severe pain that is "sure or very likely to cause serious illness and needless suffering" and gives rise to "sufficiently imminent dangers," such that prison officials cannot later plead "that they were subjectively blameless." *Baze*, 553 U.S. at 49–50 (citations omitted). Although the Supreme Court has cautioned against federal courts becoming "boards of inquiry charged with determining 'best practices' for executions," *id.* at 51, this question necessarily requires some weighing of scientific evidence. *See, e.g.*, *Glossip*, 576 U.S. at 881 (affirming district court's findings that midazolam was "highly likely" to render inmates unable to feel pain during execution).

It is undisputed that both Higgs and Johnson have been diagnosed with COVID-19 and have been exhibiting symptoms consistent with that diagnosis, including shortness of breath, an unproductive cough, headaches, chills, fatigue, etc. To date, neither has been hospitalized or required treatment in an intensive care unit.

It is further undisputed that Plaintiffs will suffer flash pulmonary edema as a result of the 2019 Protocol, "a medical condition in which fluid rapidly accumulates in the lungs causing respiratory distress and sensation of drowning and asphyxiation." *See Execution Protocol Cases*, 980 F.3d at 131. Thus, the question is whether these two Plaintiffs will experience the symptoms of flash pulmonary edema while they are still conscious, an issue that has been the subject of much debate amongst the experts in this case. After the Supreme Court's decision in *Lee*, this court has found that the question of whether an inmate, *absent aggravating factors*, will suffer

flash pulmonary edema while sensate is one on which reasonable minds can differ. (*See* ECF No. 261 at 38.)[5]

But the issue presently before the court is whether Plaintiffs will suffer flash pulmonary edema while sensate given the extensive lung damage they have suffered from COVID-19. The court had not previously received expert testimony on this issue. And having no meaningful way to resolve the dispute on the expert declarations alone, it exercised its discretion and held an evidentiary hearing.

"A preliminary injunction may be granted on less formal procedures and on less extensive evidence than a trial on the merits, but if there are genuine issues of material fact raised . . . an evidentiary hearing is required." *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) (internal citations omitted); *but see* LCvR 65.1(d) ("The practice in this jurisdiction is to decide preliminary injunction motions without live testimony *where possible*." (emphasis supplied)). And where "a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing." *Cobell*, 391 F.3d at 262 (citing *Prakash v. Am. Univ.*, 727 F.2d 1174, 1181 (D.C. Cir. 1984)); *see also* Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed. 1998) (explaining that when a motion for a preliminary injunction "depends on resolving a factual conflict by assessing the

[5] In denying injunctive relief for Plaintiffs' Food, Drug, and Cosmetic Act claim, the court previously found that they had failed to demonstrate that they were sure to suffer flash pulmonary edema while they were sensate. (*See* ECF No. 261 at 40.) But in doing so, the court did not find that Defendants' experts had definitively answered the question. Rather, the court found that given the expert testimony—which did not involve individual medical records—Plaintiffs had failed to meet their burden. Furthermore, that dispute centered on the question of whether *every* plaintiff executed with pentobarbital would suffer flash pulmonary edema before being rendered insensate. The dispute here involves aggravating factors not previously before the court.

credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective plausibility of their affidavits.").

i. COVID-19 Lung Damage – Higgs

Dr. Gail Van Norman, an anesthesiologist and professor in the Department of Anesthesiology and Pain Medicine at the University of Washington in Seattle, opined that "the COVID-19 virus leads to significant lung damage" and that "[f]or prisoners experiencing COVID-related lung damage at the time of their execution, flash pulmonary edema will occur even earlier in the execution process, and before brain levels of pentobarbital have peaked." (ECF No. 374-1, Van Norman Supp. Decl. at 1.) "To a reasonable degree of medical certainty, these prisoners will experience sensations of drowning and suffocation sooner than a person without COVID-related lung damage and, therefore, their conscious experience of the symptoms of pulmonary edema will be prolonged." (*Id.*) She explained that COVID-19 causes "severe damage to many areas in the airways and lungs, but most specifically to the alveolar-capillary membrane, which is also the site of damage of massive barbiturate overdose." (*Id.* at 2.) These effects "can be seen by radiography in . . . at least 79% of patients who have symptomatic COVID-19 infection, even when such infections are mild." (*Id.*) Damage to the lungs may eventually resolve, though studies indicate that "severe pulmonary functional changes have been demonstrated for more than 90 days after infection." (*Id.*; *see also id.* at 5 (listing studies).) She reiterated these points during her direct examination.

The court found Dr. Van Norman highly credible. She testified that she has personally tended to patients hospitalized with COVID-19 who needed airway management, which included administering anesthesia. (*See* ECF No. 389, H'rg Tr. at 145.) She also testified that when

pentobarbital is injected, it flows first to the heart and is then pumped to the lungs before going to the rest of the body. (*Id.* at 147.) Because pentobarbital is caustic, a high concentration dose will burn the alveoli-capillary membrane in the lungs within a second or two of injection. (*Id.* at 192.) A person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain. (*Id.* at 147–48.) Dr. Van Norman also explained that while pentobarbital's anesthetic effect can take anywhere from thirty seconds to two-and-a-half minutes, it takes longer to reach peak effectiveness. (*Id.* at 150.) Thus, Plaintiffs will suffer the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection.

Dr. Van Norman provided credible and persuasive responses to criticism of her opinions. In his fifth amended declaration, Defendants' expert, Dr. Joseph Antognini criticized Dr. Van Norman for not: 1) providing published evidence that asymptomatic or mildly symptomatic patients have increased propensity for pulmonary edema when administered lethal doses of pentobarbital; 2) providing published evidence that pulmonary damage increases the risk of pulmonary edema from pentobarbital; and 3) specifying when the onset of the pulmonary edema might occur in someone who has suffered COVID-19 lung damage. (ECF No. 380-2, Antognini 5th Supp. Decl. ¶¶ 3–5.) As to the first two criticisms, Dr. Van Norman explained that there are no such studies because no physician or scientist has administered massive overdoes of intravenous pentobarbital to COVID-19 patients. (*Id.* at 153.) Dr. Van Norman also stated that, in her opinion, inmates with lung damage from COVID-19 will experience flash pulmonary edema within a second or two after injection, before pentobarbital has reached the brain. (*Id.* at

192 (explaining that pentobarbital is "a caustic chemical" which is "going to attack an already leaky membrane").)[6]

The court found Dr. Antognini's opinions less helpful.[7] Although he faulted Dr. Van Norman for not providing support for her conclusions, Dr. Antognini's opinions regarding the effect of a pentobarbital injection on a person with COVID-19 symptoms were themselves conclusory. In fact, Dr. Antognini cited two studies in his entire declaration, neither of which involved COVID-19. His declaration did not indicate whether he even treats COVID-19 patients. (Antognini Fifth Supp. Decl. ¶ 5.) Relying in large part on his prior testimony, he stated that "unconsciousness occurs when a clinical dose of pentobarbital is administered (around 500 mg—a tenth of the execution dose)." (*Id.*) This statement does not address Dr. Van Norman's explanation that injected pentobarbital will begin to attack damaged lungs before it reaches the brain, and Dr. Antognini did not proffer how long it would take for an inmate to be rendered unconscious. Thus, his declaration did not adequately refute Dr. Van Norman's opinions.

Dr. Michael Stephen corroborated Dr. Van Norman's theory regarding lung damage. During his testimony, Dr. Stephen, an associate professor in the Department of Medicine and Division of Pulmonary and Critical Care at Thomas Jefferson University, who actively treats and reviews x-rays of COVID-19 patients, interpreted x-rays of Higgs' lungs taken in October 2018 and December 2020. Dr. Stephen testified that Higgs' lungs were severely hyperinflated, as

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[6] On cross examination, Dr. Van Norman admitted that she was opposed to the death penalty, but the court has no reason to believe her opposition has biased her scientific assessments, particularly in light of other evidence in the record.

[7] Defendants did not call Dr. Antognini as a witness and Plaintiffs declined to call him for cross-examination.

shown by the fact that on the x-ray, his lungs could not fit on one lung plate. (H'rg Tr. at 99.) Consequently, he explained, the radiologist had to take three views, which in Dr. Stephen's experience was very rare absent a very serious obstructive lung disease such as asthma. (*Id.*) Dr. Stephen also explained that chest x-rays typically only show seven to nine ribs, but Higgs' x-ray films showed eleven ribs, which indicated that Higgs has so much air in his lungs from poorly controlled asthma that his diaphragm is being pushed down, causing the x-ray to capture more ribs than it normally would. (*Id.*) Dr. Stephen also noted evidence of a tabletop (or flat) diaphragm that has become exaggerated between 2018 and 2020, suggesting severely poorly controlled asthma. (*Id.* at 99–100.)

Dr. Stephen's testimony was particularly persuasive and helpful, as he walked the court through a comparison of Higgs' lung images to show the extensive damage caused by COVID-19. As was readily apparent, the right lung exhibited more opacity in certain areas in 2020 than in 2018. (*Id.* at 95.) Dr. Stephen described these opacities as interstitial markings, which are more visible as a result of inflammation caused by "viral pneumonia from COVID-19." (*Id.* at 97.) Because of this inflammation, he concluded that Higgs' alveoli-capillary membrane has already been breached by COVID-19 particles, and white blood cells are flooding into his lungs to combat them. (*Id.* at 97.) Thus, he concluded, Higgs' heart will be pumping very hard to supply blood to the inflamed parts of the lung, a condition that places Higgs at high risk for pulmonary edema. (*Id.* at 98.)

To rebut Drs. Van Norman and Stephen's testimony, Defendants submitted a declaration from Dr. Todd Locher. Interpreting studies relied upon by Drs. Van Norman and Stephen, Dr. Locher opined that "asymptomatic and mildly symptomatic cases [of COVID-19] have a lower percentage of lung involvement." (ECF No. 381-1, Locher Decl. ¶ 11.) After reviewing both

Higgs' and Johnson's medical records, Dr. Locher concluded that both men were experiencing "minimal symptoms." (*Id.* ¶ 12.) With regard to Higgs' x-rays, Dr. Locher agreed with Dr. Justin Yoon, the interpreting radiologist proffered by the government, that there was no "acute cardiopulmonary process" and that Higgs had clear lungs "except for an unchanged right apical reticular nodular density." (*Id.*) He concluded that there was "no evidence [] of lung involvement due to COVID-19." (*Id.*)

Dr. Locher further noted that "there is no evidence in the medical literature suggesting an injection with pentobarbital would somehow exacerbate symptoms or physiologic abnormalities in patients with COVID-19." (*Id.* ¶ 14.) Thus, he concluded, "if pulmonary edema were to occur upon the injection of 5 g of pentobarbital, it is not likely that these inmates would experience pulmonary edema more quickly or severely than inmates who have been diagnosed with COVID-19." (*Id.*)

The court is unpersuaded by this testimony. For one, as Dr. Van Norman explained, there have been no studies involving the injection of large doses of pentobarbital in COVID-19 patients, nor would one expect any. Dr. Locher also stated that a chest x-ray is not as sensitive as a CT scan in detecting lung involvement for COVID-19, but nevertheless concluded that "any findings on a CT scan would likely be minor in view of a normal chest x-ray." (*Id.* ¶ 13.) He appeared to be relying on a less accurate measurement to postulate that a more accurate one would be less useful.

Dr. Locher's live testimony cast further doubt on his credibility. On cross-examination, it was unclear how closely he had reviewed the relevant medical records. For instance, his declaration stated that Higgs was not experiencing any symptoms on December 29, 2020, despite the fact that Higgs' medical records indicates he had a persistent cough. (*Compare* Locher Decl.

¶ 12 ("On 12/29/2020, the medical record reports no shortness of breath, sore throat or other symptoms"), *with* ECF No. 380-4, Smilege Decl. at 58 ("Cough (Duration/Describe: persistent").) Similarly, Dr. Locher's declaration states that Johnson exhibited no symptoms of COVID-19 on December 22 and 23, whereas the records clearly indicate Johnson reported a headache on December 22. (*Compare* Locher Decl. ¶ 12, *with* Smiledge Decl. at 138.) Dr. Locher confirmed during cross-examination that a headache is indeed a common symptom of COVID-19. (H'rg Tr. at 65.) These inaccuracies alone do not cast Dr. Locher's entire testimony in doubt, but they do call into question the amount of time he spent reviewing the evidence, particularly in light of his conclusion that Higgs and Johnson have had mild cases of COVID-19, and the implication that their cases have mostly resolved. (*See* Locher Decl. ¶ 12.) Indeed, Dr. Locher stated that it would not surprise him if either Higgs or Johnson reported persistent shortness of breath into January. (Hr'g Tr. at 72.)

More concerning was Dr. Locher's interpretation of Higgs' x-rays. In his declaration, Dr. Locher agreed with Dr. Yoon, the reviewing radiologist that Higgs' 2020 x-ray indicated a "stable chest examination without acute cardiopulmonary process" and that Higgs has "[c]lear lungs except for unchanged right apical reticular density" when compared to the 2018 x-rays. (Locher Decl. ¶ 12.) He reiterated his opinion that Higgs' 2020 x-ray was "unchanged compared to the previous file dated in October 2018" aside from a small upper right lobe shadow. (H'rg Tr. at 60.) Comparing the two images, one does not have to be an expert to see that this statement is inaccurate. As Dr. Stephen pointed out, the right lung in the 2020 image has more prevalent cloudier streaks when compared to the same lung in 2018. The opacity is present in the left lung, but not to the same extent, which suggests that this is not merely an imaging error. It is troubling that Dr. Locher did not account for these obvious differences between the two

scans, even when asked about Dr. Stephen's assessment by Defendants' counsel during direct examination. Instead, he merely stated his disagreement with Dr. Stephen. (*See id.*)

And while Dr. Locher reached the same conclusion as Dr. Yoon, the court has little information on Yoon, who was not called to testify and who did not submit a declaration in support of his conclusions.[8] The court does not know if Dr. Yoon routinely reviews x-rays of COVID-19 patients.

Based on the declarations and live testimony, the court finds that Higgs has shown that if his execution proceeds as scheduled—less than a month after his COVID-19 diagnosis—he will suffer flash pulmonary edema within one or two seconds of injection but before the pentobarbital reaches the brain and renders him unconscious. Though the Eighth Amendment does not guarantee a painless death, it does prohibit needless suffering. *See Baze*, 553 U.S. at 49–50. The pulmonary edema that Higgs will endure while he is still conscious would not occur were his execution to be delayed. A *brief* injunction will allow Higgs' lungs to sufficiently recover so that he may be executed in a humane manner. Thus, Higgs has successfully demonstrated a substantial risk of serious harm.[9]

ii. COVID-19 Lung Damage – Johnson

Despite the lack of x-ray evidence in Johnson's case, the court reaches the same conclusion for Johnson for several reasons. The assessment of the live testimony above applies

[8] Dr. Yoon's interpretation of Higgs' 2020 x-ray is included in Higgs' BOP medical record. (*See* Smiledge Decl. at 107.)

[9] Higgs also alleges that his COVID-19 diagnosis, given his severe asthma, makes it more likely that he will experience flash pulmonary edema while still conscious. Higgs does not allege that his asthma alone will cause him to suffer these effects. Having already found that Higgs' COVID-19 symptoms will cause him to suffer from flash pulmonary edema while sensate, the court need not determine whether and to what effect asthma has damaged his lungs.

with equal force to Johnson's COVID-19 as-applied claim. It is undisputed that Johnson is suffering from symptoms of COVID-19, which, as Drs. Van Norman and Stephen have shown, means he has suffered damage to his alveoli-capillary membrane. Were he to be injected with pentobarbital in his current state, the drug would travel first to his heart and then to his lungs. As the drug courses through his lungs, it will burn the alveoli-capillary membrane which has already been damaged from COVID-19, triggering flash pulmonary edema, all before the pentobarbital even reaches his brain and begins to have an anesthetizing effect.

And though Johnson's lungs have not been x-rayed (despite a request by Plaintiffs, *see* ECF No. 386), the court can infer from the expert testimony that Johnson has suffered COVID-19 related lung damage. Here again, Dr. Antognini's declaration failed to adequately account for the biological sequence of events that occurs after injection, particularly given COVID-19 symptoms. And Dr. Locher's failure to account for obvious changes in Higgs' x-ray undermines his opinion that patients with mild COVID-19 symptoms are unlikely to suffer extensive lung damage.

The record contains several pulse oximetry readings taken from Johnson over the course of his illness, the interpretation of which was also debated amongst the experts. But the court found this evidence less helpful. As Dr. Van Norman explained in a supplemental declaration she prepared for Johnson, "[a] clear change from 99% to 97%, as Mr. Johnson's pulse oximetry results show, is clinically significant and indicates significant changes have occurred in gas exchange in the lungs, particularly in the setting of early COVID-19 infection." (ECF No. 374-3, Van Norman Decl. Re Johnson ¶ 11.) She explained that "pulse oximetry is both a late and relatively crude method of examining impairments in oxygen exchange in the lungs." (*Id.* ¶ 9.)

Thus, "a person's oxygen level can fall by 80% and still show 100% SaO_2 [(the reading captured by a pulse oximetry test)]." (*Id.* ¶ 10.)

Dr. Antognini disputed this characterization. In his view, "[i]t is misleading to state that going from 99% to 97% is a trend," a change which is "clinically insignificant" because Johnson's pulse oximetry readings have been in the normal range. (Antognini 5th Supp. Decl. ¶ 7.) Dr. Antognini also explained that "[p]ulse oximetry readings are subject to variation and depend considerably on the placement of the probe, the amount of circulation to the finger, motion artifact, etc." (*Id.*)

Dr. Van Norman did not address this critique and did not appear to account for the fact that pulse oximetry readings are subject to variation or that, despite a drop in his pulse oximetry readings, Johnson's oxygen saturation level have remained in the normal range. In fact, even if the court accepts Dr. Van Norman's assertion that a decrease in pulse oximetry *could* signal a steep deprivation of oxygen, it is unclear whether that has occurred in Johnson's case and to what extent. (*See* Van Norman Decl. Re Johnson ¶ 9.) In any event, Dr. Van Norman confirmed that *"[e]ven if [Johnson's] pulse oximetry readings had not decreased* at this point in his infection, the studies I previously cited indicate that he is experiencing ongoing damage to the alveolar capillary membrane that will persist for a prolonged period of time after symptoms resolve." (*Id.* ¶ 12.) The court further notes that Johnson received a 98% reading in a pulse oximetry test performed on January 2, 2021. (*See* ECF No. 387-1 at 3.) Because the interpretation of these results is unclear, the court will accord them minimal weight.

Nevertheless, given the testimony proffered for Higgs and the relative weight the court has afforded the experts, Johnson has demonstrated a substantial risk of serious harm.

iii. Heart Issues – Higgs

Higgs' claim based on his heart conditions was less compelling and, standing alone, would not be enough to show a likelihood of success on an as-applied challenge. Ultimately, Higgs has not convincingly shown that his heart conditions make him more likely to suffer the effects of flash pulmonary edema before he is rendered insensate.

Higgs suffers from various heart conditions, including structural heart disease (by virtue of left atrial enlargement) and mitral valve disease (with moderate mitral valve regurgitation and anterior leaflet dysfunction). (Stephen Decl. ¶ 12.) Dr. Stephen explained that Higgs' enlarged left atrium ineffectively pumps blood to the left ventricle, putting Higgs at risk for fluid backup in his lungs (pulmonary edema). (*Id.* ¶ 13.) An injection of pentobarbital, a cardiac depressant, will induce a sudden onset of congestive heart failure and flash pulmonary edema. (*Id.* ¶ 14.) Dr. Joel Zivot offered similar opinions in his declaration. (*See generally* ECF No. 374-6 ¶¶ 7–9, 19.)

Again, Dr. Locher's declaration was of little value to the court. Dr. Locher confirmed that studies show that "COVID-19 can affect cardiac structure and function which may lead to pulmonary edema." (Locher Decl. ¶ 8.) He qualified his statement by noting that such studies were only performed on symptomatic and hospitalized patients, although he also acknowledges that Higgs is symptomatic. Dr. Locher's other opinions on the issue exhibited the same inconsistencies as his assessment of COVID-19 related lung damage. For instance, Dr. Locher stated that "there is no way for anyone to know if Mr. Higgs has any cardiac decompensation without performing a physical exam, laboratory studies such as serum troponin level . . .[or] a current EKG and echocardiogram." (*Id.* ¶ 8). He then went on to say that such an evaluation would not be helpful for a patient with minimal or no symptoms. (*Id.*) Dr. Locher also

contended that there is no evidence in the medical literature to suggest mitral regurgitation would lead to earlier or more severe pulmonary edema after an injection of five grams of pentobarbital. (*Id.* ¶ 8). The court does not find this argument persuasive—it is not surprising that there is a lack of evidence in the medical literature, given that individuals with mitral regurgitation (or any individuals) are not routinely injected with a lethal dose of pentobarbital.

Dr. Crowns' declaration was more persuasive.[10] He opined that Higgs' mitral valve prolapse/regurgitation is a common condition that presents no symptoms in most people. (ECF No. 380-5, Crowns Decl. ¶ 4.) He further stated that Higgs has not shown signs that he is progressing to heart failure. (*Id.* ¶ 5.) A May 2019 echocardiogram revealed a preserved left ventricular ejection fraction well within a "normal" range. (*Id.*) And during a cardiac consultation in November 2020, Higgs denied any chest pain, palpitations or shortness of breath, and confirmed that he can participate in vigorous exercise. (*Id.*) Thus, Crowns opined that Higgs is not suffering from heart failure and his heart condition would not cause him to experience flash pulmonary edema while sensate. (*Id.* ¶ 6.)[11]

The court has no meaningful way of resolving this dispute. Unlike the expert testimony regarding his lung damage, Higgs' cardiac history indicates that he has a heart abnormality that has not materially impacted his overall health. And despite the abnormality, Higgs' cardiac

[10] Plaintiffs point out that in an earlier evidentiary hearing, Dr. Crowns described "a case report of an individual who developed flash pulmonary edema [upon administration of pentobarbital], but he had underlying heart issues, specifically mitral valve issues . . . So, in his situation, his flash pulmonary edema was the result of a compromised heart." (Higgs Mot. at 9 (quoting ECF No. 271 at 18).) Dr. Crowns asserted that this statement was taken out of context, noting that the study to which he was referring included one patient who had clear symptoms of heart failure. (Crowns Decl. ¶¶ 3–4.)

[11] Though Plaintiffs established that Crowns is not an expert in anesthesiology, the court finds his assessment of Higgs' cardiac health credible.

measurements fall within a normal range. Higgs' experts opine that his heart conditions weaken his heart and are therefore highly likely to cause him to suffer flash pulmonary edema while sensate. But given credible expert testimony on both sides, and absent abnormal measurements showing deteriorating cardiac health, the court cannot find that Higgs has a *substantial* risk of suffering flash pulmonary edema during his execution because of his heart condition.

Higgs also theorizes that his COVID-19 diagnosis will further aggravate his heart condition. However, there is no evidence showing that Higgs has suffered cardiac damage as a result of his COVID-19 diagnosis. Indeed, none of the experts raised any flags about Higgs' cardiac measurements. And while the court accepts the scientific conclusion—proffered by both sides—"that COVID-19 can affect cardiac structure and function which may lead to pulmonary edema" (Locher Decl. ¶ 8), Higgs' own expert testified that COVID-19 impacts patients in different ways, (*see* Stephen Decl. ¶ 11). Based on the evidence before it, the court cannot conclude that Higgs will succeed on this as-applied challenge.

2. Known and Available Alternatives

i. Pre-dose of opioid pain or anti-anxiety medication

Plaintiffs proffer evidence that a pre-dose of certain opioid pain medications, such as morphine or fentanyl, will significantly reduce the risk of severe pain during the execution. (Higgs Mot. at 11–12 (quoting ECF No. 25, Decl. of Craig Stevens, ¶¶ 15–16).) Defendants argue that no state currently uses analgesics in its execution procedures, that pentobarbital alone is sufficiently painless, and that BOP has concluded that a one-drug protocol is preferable, because it will reduce "the risk of errors during administration" and "avoid the complications inherent in obtaining multiple lethal injection drugs and in navigating the expiration dates of multiple drugs." (Defs. Opp'n at 29–30 (citation omitted).)

The court finds Defendants' positions unavailing. While they contend that "no State adds an opioid to an execution protocol using pentobarbital," and the government is therefore not required to do so, (*Id.* at 30 (citing *Bucklew*, 139 S. Ct. at 1130)), this argument misses the mark. As this court has previously noted, Nebraska recently used a pre-dose of fentanyl to reduce the risk of serious pain during an execution (ECF No. 135 at 15), whereas in *Bucklew*, the plaintiff presented only "reports from correctional authorities in other States indicating that additional study [was] needed to develop a protocol" for the proposed execution mechanism. *Bucklew*, 139 S. Ct. at 1129. Even if Defendants were correct, however, the fact that other states do not use pain medication would not be dispositive. *See Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) ("I write to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law. . . . Importantly, all nine Justices today agree on that point.").

Finally, Defendants contend that BOP has "legitimate reasons" for choosing not to use a pre-dose of an opioid because it has concluded that a one-drug protocol will reduce "the risk of errors during administration" and "avoid the complications inherent in obtaining multiple lethal injection drugs and in navigating the expiration dates of multiple drugs." (Defs. Opp'n at 30 (citations to Admin. R. omitted).) The court does not question BOP's conclusions regarding the administrative efficiency of a one-drug protocol. It does, however, question Defendants' conclusion that the administrative ease of administering and procuring a single drug over two drugs—apparently without having made a good faith attempt at the latter, *cf. Glossip*, 576 U.S. at 878–79—is a "legitimate penological reason" to select a particular method of execution despite evidence that the risk of pain associated with that method is "substantial when compared to a known and available alternative." *Bucklew*, 139 S. Ct. at 1125 (quoting *Glossip*, 576 U.S. at

878); *see also Henness v. DeWine*, 141 S. Ct. 7, 9 (2020) (Sotomayor, J., statement on denial of certiorari).

The Supreme Court has previously found a "legitimate penological reason" where a particular drug "hasten[ed] death," *Baze*, 553 U.S. at 57–58 (plurality op.); where a state chose "not to be the first to experiment with a new method of execution" that had "no track record of successful use," *Bucklew*, 139 S. Ct. at 1130 (citation omitted); and where a state was unable to procure particular drugs "despite a good-faith effort to do so," *Glossip*, 576 U.S. at 868–79 (detailing state's efforts and implying without stating that this reason was "legitimate"). Defendants have presented no evidence that they have tried to either procure or administer the two-drug protocol proffered by Plaintiffs, or that any such efforts were unsuccessful. *Cf.* Admin. R. at 869 (asserting that manufacturers would "most likely" resist efforts to use fentanyl in executions); *Execution Protocol Cases*, 980 F.3d at 133 ("The combination of drugs as part of lethal injection protocols has been used by both states and the federal government, and is still used in a number of jurisdictions. The two-drug protocol also fits squarely within the plain text of the federal execution protocol." (citations omitted)). Nor have Defendants provided this court with any authority to support their contention that administrative concerns are a sufficient "legitimate penological reason" under the Supreme Court's Eighth Amendment jurisprudence.

In sum, Plaintiffs have proposed a simple addition to the execution procedure that is likely to be as effective as it is easily and quickly administered. *See Bucklew*, 139 S. Ct. at 1129.

ii. Firing squad.

Alternatively, Plaintiffs proffer execution by firing squad. (Higgs Mot. at 12–13; ECF No. 92 ¶ 114(c).) Because that method of execution is feasible, readily implemented, and would significantly reduce the risk of severe pain, it satisfies the *Blaze*-*Glossip* requirements for

proposed alternatives. Execution by firing squad is currently legal in three states, Utah, Oklahoma, and Mississippi, and can hardly be described as "untried" or "untested" given its historical use as a "traditionally accepted method of execution." *Bucklew*, 139 S. Ct. at 1125, 1130. Moreover, the last execution by firing squad in the United States occurred just over a decade ago, on June 18, 2010, in Utah.

Both the historical use of firing squads in executions and more recent evidence suggest that, in comparison to the 2019 Protocol, execution by firing squad would significantly reduce the risk of severe pain. *See, e.g.*, Deborah Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 688 (1994) ("A competently performed shooting may cause nearly instant death"); Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* app. A at 177 (2014) (calculating that while 7.12% of the 1,054 executions by lethal injection between 1900 and 2010 were "botched," none of the 34 executions by firing squad had been, the lowest rate of any method).[12]

Defendants point to two cases from other Circuits in which courts appeared skeptical of these conclusions. (Defs. Opp'n at 30–31.) But again, they overlook the Supreme Court's

[12] Defendants contend that Sarat "does not discuss execution by firing squad" and that "there is insufficient data in the cited appendix to draw any statistically significant conclusions," given that there "were only two executions by firing squad" since 1980. Setting aside the inconsistency of Defendants' arguments—first claiming that Sarat does not discuss firing squads, and then critiquing the data Sarat provides on that precise subject—Defendants simply misrepresent the facts. Although Sarat's work does not contain a specific chapter devoted to execution by firing squad, it does contain specific mentions of firing squads throughout the main text and associated footnotes, *see* Sarat, *supra* at 4, 10–11, 167, 219 n.131, and the referenced appendix provides data on all executions performed in the United States from 1900 through 2010, including the rate of botched executions separated by execution method. *Id.* app. A at 177. While only two executions by firing squad have been performed since 1980, Defendants inexplicably choose to ignore the first statistics provided in the Appendix, which note that there were 34 executions by firing squad between 1900 and 2010, none of which were botched. *Id.*

guidance in *Bucklew* that a plaintiff's burden in identifying an alternative method of execution "can be overstated" and that there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." 139 S. Ct. at 1128–29. Indeed, members of the Court, including at least one Justice in the *Bucklew* majority, have opined that the firing squad may be an immediate and sufficiently painless method of execution. *See, e.g.*, *id.* at 1136 (Kavanaugh, J., concurring); *Arthur v. Dunn*, 137 S. Ct. 725, 733–34 (2017) (Sotomayor, J., dissenting from denial of cert.) ("In addition to being near instant, death by shooting may also be comparatively painless."). Moreover, given that use of the firing squad is "well established in military practice," *Baze*, 553 U.S. at 102 (Thomas, J., concurring in the judgment), Defendants are, if anything, more capable than state governments of finding "trained marksmen who are willing to participate," and who possess the skill necessary to ensure death is near-instant and comparatively painless. *Cf. McGehee v. Hutchinson*, 854 F.3d 488, 494 (8th Cir. 2017).

Defendants also argue that the court should defer to the government's "legitimate reason[]" for choosing not to adopt the firing squad as a method of execution—that legitimate reason being the government's interest in "preserving the dignity of the procedure" in light of what they deem the "'consensus' among the States that lethal injection is more dignified and humane." (Defs. Opp'n at 32–33 (quoting *Baze*, 553 U.S. at 57, 62 (plurality op.).) Yet in *Baze,* the plurality opinion, joined by three Justices, found that the "consensus" to which Defendants refer went "not just to the method of execution, but also to the specific three-drug combination" at issue in that case. *Baze*, 553 U.S. at 53. The same plurality also found that the state's decision to administer a paralytic agent as part of its execution protocol did not offend the Eighth Amendment where the state's interest in "preserving the dignity of the procedure" by preventing convulsions that "could be misperceived as signs of consciousness or distress" was coupled with

the "the States' legitimate interest in providing for a quick, certain death," and the paralytic had the effect of "hastening death." *Id.* at 57–58.

In his opinion concurring in the judgment in *Baze*, Justice Stevens noted that concern with the "dignity of the procedure" alone constituted a "woefully inadequate justification." "Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable . . . is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain." *Id.* at 73 (Stevens, J., concurring in the judgment); *cf. Bucklew*, 139 S. Ct. at 1130 (finding that "choosing not to be the first to experiment with a new method of execution" that had "no track record of successful use" constituted a "legitimate reason." (citation omitted)). Defendants' argument that the *perception* of a method of execution as less dignified or "more primitive" is a "legitimate penological reason" for declining to adopt a different protocol thus misconstrues the standard set by the Supreme Court's precedent on this issue.

The court does not find that execution by firing squad would be an acceptable alternative in every case. In this case, however, Defendants could readily adopt Plaintiffs' proposal.

Finally, Defendants argue that Plaintiffs' stated preference for execution by firing squad is disingenuous. But Plaintiffs have argued for it at length throughout this litigation, (*see, e.g.*, ECF No. 92), and have shown that it is readily implemented, available, and would significantly reduce the risk of severe pain. *Cf. Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (rejecting possibility of execution by firing squad where the plaintiff had chosen not to plead it as an alternative).

iii. Postponement

Plaintiffs have alternatively proffered the option of delaying their execution until they have recovered from COVID-19. (Higgs Mot. at 13–14.) This is not, as precedent requires, "a known and available alternative method of execution," *see Glossip*, 576 U.S. at 864, but rather an alternative *date* of execution. Even so, the court is likewise unpersuaded by Defendants' contention that postponing the executions "directly contradicts [Plaintiffs'] general Eighth Amendment claim and belies every argument they have made in support of that claim over the last 15 months." (Defs. Opp'n at 34.) If lethal injection of pentobarbital will create a significant risk of suffering even in otherwise healthy persons, as Plaintiffs have long attested, then the risk to an individual with severe respiratory illness, such COVID-19, would only be heightened. This proposal therefore does not contradict Plaintiff's other arguments.

Plaintiffs have identified two available and readily implementable alternative methods of execution that would significantly reduce the risk of serious pain: a pre-dose of opioid pain or anti-anxiety medication, or execution by firing squad. Thus, they have established a likelihood of success on the merits of their claims that the 2019 Protocol's method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment.

B. Irreparable Harm

In order to prevail on a request for preliminary injunction, irreparable harm "must be certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm," and it "must be beyond remediation." *League of Women Voters of U.S. v. Newby,* 838 F.3d 1, 7–8 (D.C. Cir. 2016) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)) (internal quotation marks and brackets omitted). Here, without injunctive relief, Plaintiffs would be subjected to an

excruciating death in a manner that is likely unconstitutional. This harm is manifestly irreparable. *See Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020) (explaining that "prospective violation[s] of . . . constitutional right[s] constitute[] irreparable injury for [equitable-relief] purposes" (internal quotation marks omitted)).

Other courts in this Circuit have found irreparable harm in similar, but less dire circumstances. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (finding irreparable injury where plaintiffs faced detention under challenged regulations); *Stellar IT Sols., Inc. v. USCIS*, No. 18-2015, 2018553 U.S. at 49 WL 6047413, at *11 (D.D.C. Nov. 19, 2018) (finding irreparable injury where plaintiff would be forced to leave the country under challenged regulations); *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 126–27 (D.D.C. 2015) (finding irreparable injury where challenged regulations would threaten company's existence); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 19 (D.D.C. 2009) (finding irreparable injury where challenged regulations would limit guest workers).

Defendants argue that Plaintiffs have failed to demonstrate irreparable harm given "the absence of any evidence that [Plaintiffs], as a result of contracting COVID-19, will experience pulmonary edema prior to falling insensate." (Defs. Opp'n at 36.) But, for the reasons discussed above, the court has found otherwise. Furthermore, Defendants appear to imply that if Plaintiffs experience flash pulmonary edema for thirty seconds, at most, that would not constitute irreparable harm. (*See id.* at 35–36.) The court has already addressed this argument. *See* supra n.1. The Eighth Amendment does not permit "substantial" and "needless" suffering so long as it will only be experienced for a short time. *See Baze*, 553 U.S. at 49–50. Here, the risk of substantial suffering can be avoided by using one of Plaintiffs' proffered alternatives or by waiting several weeks to allow Plaintiffs to recover from a novel disease before executing them.

Thus, Plaintiffs have sufficiently shown they will suffer irreparable harm if their executions proceed as planned.

C. Balance of Equities

The need for closure in this case—particularly for the victims' families—is significant. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998) ("Only with an assurance of real finality can the [government] execute its moral judgment in a case . . . [and] the victims of crime move forward knowing the moral judgment will be carried out."). And this court is mindful of the Supreme Court's caution against last minute stays of execution. *See Bucklew*, 139 S. Ct. at 1134. But the government's ability to enact moral judgment is a great responsibility and, in the case of a death sentence, cannot be reversed. After suspending federal executions for over seventeen years, the government announced a new Execution Protocol and a resumption of executions in July 2019, and since July of this year has executed eleven inmates. Any potential harm to the government caused by a brief stay is not substantial. Indeed, the government has not shown that it would be significantly burdened by staying these two executions for several more weeks until Plaintiffs have recovered from COVID-19. Accordingly, the court sees no reason why this execution *must* proceed this week. Thus, the balance of the equities favors a stay.

D. Public Interest

The court is deeply concerned that the government intends to execute two prisoners who are suffering from COVID-19 infection, particularly given that the disease impacts individuals in drastically different ways and can have particularly devastating long-term effects, even for those with mild symptoms. This is to say nothing of the fact that executing inmates who are positive for COVID-19 in a facility with an active COVID-19 outbreak will endanger the lives of those performing the executions and those witnessing it. This is irresponsible at best, particularly

when a temporary injunction will reduce these risks. The public interest is not served by executing individuals in this manner. *See Harris v. Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004) ("Confidence in the humane application of the governing laws . . . must be in the public's interest.").

Thus, the court finds that all four factors weigh in favor of injunctive relief, and once again finds itself in the unenviable position of having to issue yet another last-minute stay of execution. Nonetheless, this is the nature of death penalty litigation, and this court has had a disproportionate number of such claims given the nature of the case. Moreover, this result could not have been avoided given that Plaintiffs were diagnosed with COVID-19 in late December, at which point Plaintiffs filed amended complaints. The court held an evidentiary hearing to assess the likelihood of success on the merits of these claims and scheduled that hearing at the earliest possible date.

III. CONCLUSION

The court finds that Plaintiffs have demonstrated a likelihood of success on the merits and that absent a preliminary injunction, Plaintiffs will suffer irreparable harm. It further finds that the likely harm that Plaintiffs would suffer if the court does not grant injunctive relief far outweighs any potential harm to Defendants. Finally, because the public is greatly served by attempting to ensure that the most serious punishment is imposed in a manner consistent with our Constitution, the court finds that it is in the public interest to issue a preliminary injunction.

Accordingly, for the reasons set forth above, the court will GRANT Plaintiffs' motions for a preliminary injunction. The injunction will remain in effect until March 16, 2021.[13] A corresponding order will be issued simultaneously.

Date: January 12, 2021

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

[13] The court calculated this date based on Dr. Van Norman's assessment that COVID-19-related lung damage can persist for as long as ninety days after infection. (*See* Van Norman Decl. at 6.) Both Plaintiffs tested positive for COVID-19 on December 16, 2020. The court will not enjoin these executions indefinitely, however. Accordingly, it will consider extending the injunction only if Plaintiffs can provide *demonstrated* evidence of continued lung damage from COVID-19. And the court expects that Defendants will, in good faith, comply with reasonable requests for follow-up medical assessment which, at the bare minimum, should include an x-ray for each Plaintiff in several weeks.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,	)	
LEAD CASE: *Roane, et al. v. Barr*	)	Case No. 19-mc-145 (TSC)
THIS DOCUMENT RELATES TO:	)	
Roane v. Barr, 05-cv-2337	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, (ECF No. 394), the motions for a preliminary injunction filed by Plaintiffs Dustin Higgs and Cory Johnson, (ECF Nos. 371, 375), are hereby GRANTED. The court finds that Plaintiffs have demonstrated a likelihood of success on the merits and that, absent a preliminary injunction, Plaintiffs will suffer irreparable harm. It further finds that the likely harm that Plaintiffs would suffer if the court does not grant injunctive relief far outweighs any potential harm to Defendants. Finally, because the public is greatly served by attempting to ensure that the most serious punishment is imposed in a manner consistent with our Constitution, the court finds that it is in the public interest to issue a preliminary injunction.

It is hereby ORDERED that Defendants (along with their respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them) are enjoined from executing Plaintiffs Dustin Higgs and Cory Johnson until March 16, 2021.

Date: January 12, 2021

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

FILED: January 12, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-15
(3:92-cr-00068-DJN-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

COREY JOHNSON, a/k/a O, a/k/a CO

Defendant - Appellant

No. 21-1
(3:92-cr-00068-DJN-2)
(3:20-cv-00957-DJN)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

COREY JOHNSON, a/k/a O, a/k/a CO

Defendant - Appellant

THE CONSTITUTION PROJECT AT THE PROJECT ON GOVERNMENT OVERSIGHT

Amicus Supporting Appellant

No. 21-2
(3:92-cr-00068-DJN-2)

In re: COREY JOHNSON, a/k/a O, a/k/a CO

Movant

O R D E R

Upon consideration of submissions relative to the motions for stay of execution filed in Case No. 20-15, *United States v. Corey Johnson*, Case No. 21-1, *United States v. Corey Johnson*, and Case No. 21-2, *In re: Corey Johnson*, the court denies the motions for stay of execution.

In No. 20-15, Judge Wilkinson and Judge Floyd voted to deny the motion for stay, and Judge Motz voted to grant the motion.

In Nos. 21-1 and 21-2, Judge Wilkinson, Judge Motz, and Judge Floyd all voted to deny the motions for stay of execution.

Judge Wilkinson wrote a separate opinion. Judge Motz wrote a separate opinion, concurring in the denial of the motions in No. 21-1 and No. 21-2 and dissenting from the denial of the motion in No. 20-15.

For the Court

/s/ Patricia S. Connor, Clerk

WILKINSON, Circuit Judge:

I vote to deny a stay of execution and to deny all the subsidiary motions directed toward that singular end. The Supreme Court has warned against this flurry of last-minute motions designed to achieve a stay by virtue of allowing the courts severely limited consideration time. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (instructing courts to "police carefully against attempts to use [] challenges as tools to interpose unjustified delay" and explaining that stay requests can be denied if they are filed at the last minute). "Last-minute stays . . . should be the extreme exception, not the norm." *Barr. v. Lee*, 140 S. Ct. 2590, 2591 (2020) (internal quotation marks omitted). Here, Johnson had ample time to raise the issues that are only now advanced before us, giving us (and the Supreme Court) just a few days before the scheduled execution date. The very numerosity of filings, both statutory and constitutional, betrays a manipulative intention to circumvent not only the strictures of AEDPA but the Supreme Court's warnings against procedural gamesmanship designed to bring the wheels of justice to a halt. We should not reward such dilatory tactics.

It is disheartening to say the least to watch the Supreme Court's warnings disregarded. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Yet these interests have been ignored while Johnson's case has dragged on through the federal system for decades. Now Johnson seeks more delay, assaulting us with a barrage of last-minute claims, focusing primarily on the contention that he is intellectually disabled and

cannot be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002), or the Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c).

There has been no dearth of process here, and we squarely rejected his contention that he is intellectually disabled under *Atkins*. In 1993, a jury convicted Johnson of twenty-seven counts, including seven murders. At sentencing, the defense retained an eminently qualified University of Virginia psychologist, who gave a lengthy presentation to the jury showing that Johnson had experienced a difficult childhood and suffered from a learning disability, though he had to concede that Johnson was not intellectually disabled. Unpersuaded, the jury recommended seven death sentences. After a failed direct appeal, Johnson brought his first habeas petition in 1998, arguing *inter alia* that he could not be executed because he was intellectually disabled. The district court denied the petition and we affirmed, holding that he was not intellectually disabled and specifically rejecting his argument that he could not be executed under *Atkins*, the case Johnson now rests his hopes upon. *United States v. Roane*, 378 F.3d 382, 408-09 (4th Cir. 2004).

Since then, there have been seven more habeas petitions, accompanied by endless motions, district court decisions, rejected appeals, and denied certiorari petitions. Johnson has raised dozens of other claims that many different judges have rejected as meritless. The courts have given exhaustive attention to petitioner's case, and at some point allowing these proceedings to travel further along this indefinite and interminable road brings the rule of law into disrepute.

I should say finally that there is not the slightest question of innocence here. Johnson has committed multiple murders of a horrific nature, and even in the depressing annals of

capital crimes, his case stands out. As Judge Novak recounted below, Johnson is a brutal "serial killer" who was involved in at least ten murders as an enforcer for a large-scale narcotics operation. *United States v. Johnson*, No. 3:92cr68, 2021 WL 17809, at *1-2 (E.D. Va. Jan. 2, 2021). The time has long since passed for the judgment of the jury and that of so many courts thereafter to be carried out.

DIANA GRIBBON MOTZ, Circuit Judge, concurring in No. 21-1 and No. 21-2, dissenting in No. 20-15:

I.

I vote to deny the motions to stay execution in cases No. 21-1 and No. 21-2. I believe the motion in No. 21-2 is untimely. However, the claim asserted by Petitioner Johnson in No. 21-1 is both timely and raises grave concerns about the propriety of now executing him. I write separately to explain why I believe binding precedent nonetheless requires denial of that motion.

Since Johnson first contested his sentence on intellectual disability grounds, medical standards have evolved, "[r]eflecting improved understanding . . . of how mental disorders are expressed and can be recognized by trained clinicians." *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017). In light of these advances, courts now routinely recalibrate decades-old IQ test scores, recognizing the "statistically-proven phenomenon" that such test scores are artificially inflated. *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010); *see also Walker v. True*, 399 F.3d 315, 322–23 (4th Cir. 2005). Additionally, Johnson has, in the intervening years, uncovered contemporaneous records from his adolescence that, at the very least, raise significant questions about his intellectual functioning. No federal court has ever assessed this evidence or considered whether it forecloses a lawful imposition of the death penalty in Johnson's case.

The death penalty is "unusual in its pain, in its finality, and in its enormity," long understood to exist "in a class by itself." *Furman v. Georgia*, 408 U.S. 238, 287, 289 (1972) (Brennan, J., concurring). Indeed, whenever "a defendant's life is at stake," courts are "particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Congress created one such safeguard in 18 U.S.C. § 3596(c), which provides that "a sentence of death shall not be carried out upon a person who is mentally retarded." As Justice Sotomayor recently observed, the "text and structure" of this provision "lend significant support" to the view that the Government may not lawfully "'carr[y] out' a death sentence" when a prisoner "is" "intellectually disabled under current diagnostic standards." *Bourgeois v. Watson*, 141 S. Ct. 507, 509 (2020) (Sotomayor, J., dissenting) (quoting 18 U.S.C. § 3596(c)). The majority of the Court, however, refused to endorse this conclusion.

To obtain a stay of execution, Johnson must demonstrate "that he has a significant possibility of success on the merits." *Dunn v. McNabb*, 138 S. Ct. 369 (2017). Given recent Supreme Court precedent, I cannot conclude that Johnson has met this burden. Accordingly, I must vote to deny the motion in No. 21-1.

II.

I vote to grant a stay of execution in No. 20-15 because Petitioner Johnson presents a timely and serious challenge under the First Step Act that should be resolved prior to his execution. Thus, I dissent from the court's order denying a stay of execution in No. 20-15.

In my view, Johnson cannot be faulted for delay in bringing this motion because the claim has only been available to him for a brief time. Of course, we must follow the Supreme Court's instruction that courts "apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). But this is not a case where the "claim could have been brought more than a decade ago." *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992). The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, has been in effect only since December 21, 2018. And Johnson brought this claim in the district court months before his execution date was set, so it can hardly be described as "designed to achieve a stay." Concurrence at 1. The reason this matter is before us on the eve of Johnson's execution stems from the fact of the Government's chosen scheduling, not any "dilatory tactics" attributable to Johnson. *Id.*

On the merits, I am persuaded that Johnson's claim that his conviction under 21 U.S.C. § 848(e)(1)(A) is a covered offense under the First Step Act presents a novel question that is deserving of further consideration. In determining what is a covered offense, we look to the "statute of conviction." *United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020). Johnson presents compelling arguments that his statute of conviction is 21 U.S.C. § 848 — a cohesive statute centered on the definition of "continuing criminal enterprise" in § 848(c) — for which the penalties of various subsections have indisputably been modified. Alternatively, Johnson argues that, even viewing his statute of conviction

as § 848(e), Congress modified penalties for offenses embedded within that subsection, *i.e.* § 841(b)(1)(A). I believe these claims present difficult and important issues necessitating adequate consideration by this court. Indeed, we recently calendared a case for oral argument presenting these very questions. *See* No. 20-6505, *United States v. Jenkins*.

Accordingly, I vote to grant a stay of Johnson's execution in No. 20-15 while this serious and potentially meritorious claim remains unresolved.

REPORT

Corey Johnson's Status as a Person with Intellectual Disability

Daniel J. Reschly, Ph.D.

I. Executive Summary

In my opinion, Mr. Corey Johnson is clearly a person with intellectual disability based on my review of extensive prior records and evaluations, my evaluation of him, and my application of the criteria for intellectual disability established by authoritative national and international authorities. The generally accepted three-pronged standard to classify someone as having intellectual disability is met if the individual demonstrates significant limitations in intellectual functioning and significant limitations in adaptive behavior that were apparent in the developmental period. My evaluation has convinced me that there is evidence of Mr. Johnson's significant limitations in intellectual functioning and adaptive behavior that were documented by contemporaneous records created during his child, adolescent, and adult years and that are corroborated by a persuasive array of additional evidence.

Corey Johnson was raised in poverty by a single mother who suffered from a significant drug problem that started before the time that he was born and continued during his childhood and adolescence; in fact, his mother's family members and close friends who knew her when she was pregnant with Corey believe that she used drugs during that pregnancy. Corey Johnson had little contact with his father until he was an adolescent and never developed a significant relationship with him. His mother had a series of relationships with boyfriends during his childhood, and many of them were either emotionally abusive toward his mother and Corey, physically abusive to them, or both.

Because of his family circumstances, Mr. Johnson lived an unstable and transient young life. His mother moved Corey and his brother from home to home as she began and ended relationships with various men, interspersed by periods when she, Corey, or both of her children

lived with her family. For this reason, Corey Johnson and his brother attended numerous schools as children, in both New Jersey and New York, and in both the public and private school systems. He consistently failed as a student, and was held back and repeated early elementary school grades multiple times.

Although some of his school records have not been located, the records that do exist show that some of those schools that Corey Johnson attended referred him for educational assessments and psychological evaluations, including IQ testing, as he fell far behind academically. In addition, Mr. Johnson received services from several different social services agencies, and some of those agencies conducted psychological testing, including IQ tests. Mr. Johnson's chaotic and transient childhood led professionals to administer tests of intellectual functioning to him five times between the ages of 8 and 16; he was administered a sixth IQ test at age 23, after his arrest in the present case. Four of those six IQ tests are valid measures of Corey Johnson's intellectual functioning. Taken together, these four IQ tests demonstrate that Corey Johnson had significant deficits in intellectual functioning as a child, adolescent, and young adult.[1]

Table 1

Year Test Administered	1977	1981	1985	1992
Corey Johnson Flynn Effect Adjusted Score[2]	71.5	75.3	65.1	72.8

[1] For the reasons I explain in detail below, two other IQ tests administered to Mr. Johnson as a child lack validity and reliability and should be given little weight in determining whether Corey Johnson meets the criteria for Intellectual Disability. One of these tests had been published more than 30 years before it was administered to Corey Johnson and had already been replaced by a new version of the test whose content had changed dramatically. The use of this test was improper and raises serious questions about the competence of the administrator. The other test was seriously flawed because it was given to Corey Johnson within just a few months after he took the same test, which significantly inflated and the results and invalidated them.

[2] The Flynn Effect is explained on pages 9 and 10.

School, social services, and other records from Corey Johnson's childhood and adolescence are filled with concrete and vivid documentation of corresponding deficits in his adaptive functioning in conceptual, social and practical domains. Those records show academic failures and a consistent inability to learn and progress in school. They also show significant communication and language deficits, challenges with social interactions, gullibility and naiveté, an inability to care for himself, or to participate in age-appropriate social activities, and other deficits. These contemporaneous records are corroborated by descriptions from Corey Johnson's family, friends, treatment and social services professionals, and others who have known him over the course of his life. They are also corroborated by the results of a standardized adaptive behavior instrument that Dr. Gregory Olley administered to three individuals who knew Corey Johnson well before he turned 18 years old, two of whom have known him since birth.

Corey Johnson's reliable IQ scores were consistently two standard deviations below the mean. This satisfies the intellectual functioning prong. Moreover, records throughout Corey Johnson's life, statements obtained from those who knew him well, and standardized adaptive behavior instruments show that Corey Johnson had significant limitations in all three adaptive function domains and those limitations are directly related to his limitations in intellectual functioning, and they demonstrate particularly deficits in executive functioning, including reasoning, judgment, and decision-making. Finally, both Corey Johnson's significant limitations in intellectual functioning and his significant limitations in adaptive functioning manifested before he turned 18 years old. Based on my review of all of this information and based on my decades of experience, and applying my clinical judgment, I have concluded that Corey Johnson meets the criteria for intellectual disability because he had significant limitations in intellectual functioning and in adaptive functioning prior to age 18.

II. Overview and Credentials

I have been asked by counsel for Corey J. Johnson (Date of Birth [redacted]) to conduct an evaluation and to determine whether Mr. Johnson meets the criteria for the classification of intellectual disability. Mr. Johnson is imprisoned at the United States Penitentiary in Terre Haute, Indiana.

My credentials to support this opinion are summarized in Appendix A. Briefly, I have conducted clinical evaluations and developed expertise in assessing intellectual disability (ID) and learning disability (LD), engaged in research, and published in the field for over 40 years as a scholar, practitioner, and educator. I have authored many published articles in refereed journals, book chapters, presentations at professional conferences. I have testified in court proceedings and consulted with lawyers and state and national agencies. In 1999 I was selected by the National Academy of Sciences to chair a panel on determining eligibility for Social Security benefits in mental retardation.[3] (Reschly, Meyers, & Hartel, 2002). I have attached a condensed version of my curriculum vitae and a more complete description of my background and credentials in Appendix A.

I have reviewed a substantial amount of information concerning Corey Johnson, including contemporaneous educational, social services, treatment, residential placement and other records from Corey Johnson's childhood, adolescence, and young adulthood, as well as prison records since his incarceration. These records included academic assessments, psychological, and psychiatric evaluations, including IQ test results and other test results. I have also reviewed witness statements from people who have known him at various times during his

[3] The term *mental retardation* was changed to *intellectual disability* by the American Association on Intellectual and Developmental Disabilities. The terms have equivalent meaning. In 2010 Congress changed federal terminology from mental retardation to intellectual disability in what was called Rosa's Law (PL 111-256). In 2013 the American Psychiatric Association's DSM-5 discontinued the term mental retardation and adopted the term intellectual disability.

life. I met with Corey Johnson on July 30 and July 31, 2014, and administered the Woodcock Johnson-III achievement test. In this report I express my expert opinion that Mr. Johnson is a person with mild intellectual disability based on all of the information that I reviewed during my evaluation.

A. Intellectual Disability Criteria and Levels

Intellectual disability is defined in similar ways by the two leading national organizations in the field of intellectual disability, the American Association on Intellectual and Developmental Disabilities (AAIDD), in its "Intellectual Disability: Definition, Classification, and Supports" 11th Edition, Schalock et al. (2010) (AAIDD Classification Manual), and the American Psychiatric Association (APA), in its Diagnostic and Statistical Manual of Mental Disorders 5th Edition (2013) (DSM-5). The AAIDD Classification Manual and the DSM-5 use essentially the same criteria; both groups require that three conditions exist: (a) Significant limitations in intellectual functioning; (b) Significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills; and (c) Origination of the above limitations during the developmental period, which AAIDD ends at 18 while DSM-5 leaves undefined. In my opinion Mr. Johnson meets these criteria.

Intellectual disability can range across a wide continuum from relatively mild to profound. Regardless of the degree of sub-average intelligence, variability in intellectual disability severity is currently described by the level of support individuals need, with individuals with greater degrees of impairment requiring higher levels of support while those with relatively mild impairments require less support in order to function adequately in society. Typical adaptive behavior limitations in conceptual, social, and practical domains are described as a guide to the meaning of each of the levels.

In older definitions of what now is called intellectual disability the levels were characterized by ranges of scores on tests of intellectual functioning with means of 100 and standard deviations of 15. The mild level was defined by intellectual functioning scores of approximately two to three standards deviations below the population mean, or a score range of about 55 to 75, with consideration of the standard error of measurement for the test. (Grossman, 1973, 1983). The DSM-5 further indicates that this range can extend slightly higher if an individual demonstrates substantial adaptive behavior deficits.

The discussion of levels is relevant to the classification of persons with intellectual disability because *qualitative* as well as quantitative differences exist between the levels. Individuals with mild levels of intellectual disability typically present no characteristic identifiable biological bases for their disability. They demonstrate strengths and weaknesses in social roles, and thus require varying levels of support, and in some social roles or behavior, demonstrate no need for any support at all and yet meet the diagnosis of intellectual disability.

The characteristics of persons with more severe or even profound levels of intellectual disability are often and *incorrectly* attributed to all persons at the upper end of the range of intellectual disability, also known as persons with mild intellectual disability. Persons at the mild level of intellectual disability typically appear normal, that is, they do not show the stereotypical physical appearance of persons with intellectual disability. Moreover, about half of this population can become, with appropriate supports, self-supporting and independent functioning in the community. Community adjustment is precarious, often requiring assistance with basic areas of functioning such as judgment about social roles, employment, money handling, travel, law compliance, and relationships such as marriage. Absent the appropriate

supports, many persons with mild intellectual disability struggle with meeting basic community responsibilities, self-support, and/or law compliance.

The most current definition of intellectual disability has moved away from strict IQ thresholds below which an individual must fall to qualify for that diagnosis. This change has been due to the recognition that significant deficits in adaptive functioning support a conclusion of intellectual disability even if IQ scores fall slightly above traditional thresholds.

The key deficits of persons with mild intellectual disability are in the areas of learning and understanding abstract relationships in the conceptual, social, and practical areas of adaptive behavior. The learning abilities of people with intellectual disabilities are more concrete and dependent on supports than individuals with greater intellectual ability. Persons with intellectual disability have a significantly reduced capacity to learn, recall, and reason. (Campione, Brown, & Ferrara, 1982; Campione, Brown, Ferrara, & Bryant, 1985; Reschly, 1987; Snell et al., 2009). Such persons are particularly limited in applying abstract reasoning to practical situations and in spontaneously recalling thinking strategies to solve problems. These fundamental intellectual deficits affect everyday activities and responsibilities. Other learning deficits reported frequently with persons with low intellectual ability include difficulty in applying basic learning to new situations and severe limitations in literacy skills.

My evaluation of Corey Johnson as a person with mild intellectual disability is supported by evidence of his deficits in intellectual functioning and adaptive behavior that originated in the developmental period and continued to the time of the crime and beyond in his adult years. The AAIDD Classification Manual and DSM-5 classification criteria emphasize that the intellectual disability classification is defined by *deficits* and that intellectual disability typically is marked by a pattern of strengths and weaknesses. Identified strengths cannot, therefore, be used to rule

out the existence of mild intellectual disability. Mr. Johnson exhibited numerous deficits in his functioning in every-day life that are well documented, consistent, and compelling.

B. Significant Considerations in Interpreting Intellectual Functioning Results for Corey Johnson

Significant limitations in intellectual functioning are a defining feature of intellectual disability. Tests of intellectual functioning, called IQ tests, typically are used as part of the determination of limitations in intellectual functioning. Current clinical standards define significant limitations in intellectual functioning as performance in the range of IQ of approximately 75 or below, which is approximately two standard deviations below the mean (taking into consideration the standard error of measurement, which I describe in more detail below), *assuming* that appropriate consideration of several characteristics of tests of intellectual functioning occurs in interpreting scores. These considerations include the appropriateness of normative standards and correction for the obsolescence of norms (Flynn Effect), application of professional standards for administration, scoring, and interpretation of tests, and probable error in the assessment process, as well as application of the expert's clinical judgment.

Standards for the assessment of intellectual functioning in the context of mild intellectual disability diagnoses are described in the AAIDD Classification Manual. Briefly, these standards require use of a comprehensive, multiple factor measure of general intellectual functioning that is individually administered to the client by a professional with appropriate graduate education and supervised experience in order to administer, score, and apply appropriate clinical judgment to the interpretation of the test results. The testing must meet high professional standards for reliability and validity. The testing must be administered, scored, and interpreted in accordance with the standardized procedures developed by the test author/publisher. Cultural, social, individual, and situational conditions as well as special artifacts of intellectual assessment (such

as the Flynn Effect and Practice Effects, which I explain below) must be considered as part of decisions about general intellectual functioning. Finally, test scores on tests of intellectual functioning must be considered in relation to the individual's everyday functioning in conceptual, social, and practical skills.

In my review of the intellectual assessments administered to Mr. Johnson, I have given special attention to the obsolescence of normative standards, the qualifications and decision making of examiners, the standard error of measurement, and practice effects.

1. Obsolescence of normative standards (Flynn effect)

Sophisticated analysis of IQ test result data has shown that IQ scores across populations steadily rise over time after a specific IQ test has been normed and standardized. This phenomenon was corroborated by research conducted by James Flynn, is commonly known as the Flynn Effect (and more formally as "normed obsolescence"), and has been validated internationally.

The practical significance of the Flynn Effect is that scores across the population that are produced by a particular IQ test rise over time. The Flynn Effect is an especially important consideration when tests with outdated norms (also referred to as less stringent norms) are used in evaluations of persons with potential significant intellectual limitations. (Pietschnig & Voracek, 2015; Trahan et al., 2014). This is true because intellectual functioning for purposes of an intellectual disability diagnosis is assessed based on whether an individual's IQ scores deviate from the mean by approximately two standard deviations. Because the mean for IQ scores rises steadily over time due to the Flynn Effect, the significance of any particular IQ test that is given a significant time after the norming of the IQ instrument must be considered in light of the Flynn Effect. The existence of the declining stringency of norms has been established by hundreds of

articles from multiple nations involving a vast array of data (see recent review by Pietschnig & Voracek, 2015).

Flynn calculated the steady rise in IQ scores (across populations) at the rate of just above 0.3 points per year or a little more than three points for every ten years after an IQ test was normed; his calculation has been corroborated by numerous research studies conducted since he published his findings. See AAIDD *User's Guides* (Schalock et al., 2007, 2012); Pietschnig & Voracek, 2015; Trahan, Stuebing, Fletcher, & Hiscock, 2014 (meta-analysis from over 100 research reports concluded that Flynn Effect is a valid phenomenon scientific, the rate of norms obsolescence described as approximately 0.3 points per year is confirmed (the most up-to-date measurements calculate the rise as .33 points per year), and test interpretation should use the Flynn correction when IQ test results are used in high stakes decisions).

As a real world example of how the Flynn effect works, if the norms for an intelligence test are ten years old, the population mean on the test which ordinarily is set at 100 would no longer be 100. Instead, the population mean would become 103 [100 + (0.3 x 10)]. Moreover, the point that is two standard deviations below the mean would no longer be 70, but ten years later would be 73 (assuming a mean of 100 and standard deviation of 15).

In Mr. Johnson's case, all of known IQ tests administered to him as a child and adolescent had outdated norms necessitating the corrections described by Flynn.

2. Examiner expertise and experience and importance of clinical judgment.

One of the most basic competencies an examiner must exhibit is to select an appropriate test, including knowledge about the availability of tests, their characteristics, and the applicability to a specific client when they are administered. Best professional practices always

have emphasized the choice and use of the most recently standardized test in a series of tests such as the Wechsler Scales or the Stanford Binet Scales of Intelligence. Current professional standards are explicit regarding the use of the most recent version of standardized tests. *Standards for Educational and Psychological Testing* 2014, Standard 5-11, pp. 104-105; AAIDD *User's Guide* (Schalock et al., 2007) ("T]he clinician needs to use the most current version of an individually administered test of intelligence"). This basic premise was violated in the assessment of Mr. Johnson in 1979 when an outdated version of a Weschler IQ test was administered by Nathalie Smith to Corey Johnson five years after a new version of the test had been released (see later discussion).

In addition, examiners must be well prepared and educated about key decisions required in intellectual assessment. They must be objective and make sure that they neither intentionally nor inadvertently influence the test results. Examiners who stray from careful adherence to these principles can produce unreliable and invalid test results. During the administration of an IQ test to Corey Johnson in February 1982, there is documented evidence in the report by Dr. Cary Gallaudet that she provided assistance to Corey Johnson during her administration of that test, which compromised the reliability of her results (see the detailed discussion below).

3. Standard error of measurement (SEM)

Errors of measurement always must be considered in interpreting tests of intellectual functioning. Because IQ tests produce estimates of intellectual functioning, they are always subject to errors, which can be predicted statistically using the standard error of measurement (SEM). Once the SEM for a particular IQ test has been calculated, experts can determine the likelihood that the subject's score accurately reflects his or her true IQ within a particular range using a degree of confidence, which is called a confidence interval. While there is no correct or

definitive answer as to which level of certainty to use, a common confidence interval used for IQ tests is the 95 percent confidence interval (plus or minus two SEM), which means that subject's true IQ is likely to fall within the range of 95 percent certainty. For the typical IQ test, two SEM produces a range of plus or minus five points at the 95 percent confidence interval.

The AAIDD Classification Manual and the DSM-5, using two SEM, recognize a range of intellectual functioning scores of 65-75 as the approximate upper range for the mild intellectual disability classification, and this plus or minus five point range is generally used by professional practitioners, public and private agencies, and the courts in making determinations of intellectual functioning for purposes of an intellectual disability diagnosis.

Every IQ test has its own specific standard error of measurement which is established during the norming of the test. Furthermore, each test has an SEM depending on the age of the individual to whom the IQ test is administered at the time of the test As an alternate and more accurate method for determining the upper range of intellectual functioning that would be consistent with intellectual disability based on the individual's age and the specific test, it is also appropriate to use the SEM for the specific instrument and the age of the individual at the time the test was administered.

4. Practice Effect

Intellectual test performance also is influenced by the practice effect, meaning test scores tend to increase when the same test is used repeatedly. Repeated administrations of the same test can produce artificially inflated scores on individually administered tests of general intellectual functioning. Calamia, Markon & Tranel (2012) (showing practice effects are greater and more persistent than previously research had shown). This is because a test subject will become

familiar with the tasks involved in and concepts tested by a particular standardized instrument and can learn strategies for solving those tasks when exposed to the same test more than once.

The closer in time that the same test is given to a subject, the larger the practice effects. Practice effects undoubtedly significantly affected at least one of the intellectual functioning scores reported for Mr. Johnson, the February 1982 IQ results obtained by Dr. Gallaudet. As discussed below, Dr. Gallaudet administered the WISC-R test to Corey Johnson only four months after another psychologist gave him the exact same WISC-R IQ test in October 1981.

III. Corey Johnson Intellectual Functioning Assessment

As described above, Mr. Johnson's childhood was unstable and transient. As a result, Corey Johnson attended numerous schools and also came to the attention of several social services agencies and he was administered five IQ tests between age 8 and 16. Each of these IQ tests, and the IQ test administered to him during a mitigation evaluation when he was 23 years old after his arrest for the capital murder charges in this case, were a version of the Weschler intelligence tests. Specifically, Wechsler IQ tests were administered to Mr. Johnson in 1977, 1979, 1981, 1982, 1985, and 1992 as demonstrated in the following table:

Table 2

Date (administered by)	**Test**	**Full-Scale Score**	**Flynn-Adjusted Score**
March 25, 1977 (Figurelli)	WISC-R	73	71.5
May 3, 1979 (Smith)	WISC	91	81.4
October 1981 (Adams)	WISC-R	78	75.3
Feb. 5 & 8, 1982 (Gallaudet)	WISC-R	88	85
March 15,	WISC-R	69, (74)	65.1, (70.1)

1985 (Barish)			
October 9, 1992 (Cornell)	WAIS-R	77	72.8

The IQ results from these six tests have varying degrees of validity due to the obsolescence of norms, practice effects, and probable administration errors. I discuss each in turn below.

A. Figurelli WISC-R (1977).

The first administration of an individually administered test of intellectual functioning was by Dr. Jennifer Figurelli, a school psychologist for the Jersey City Public Schools. Dr. Figurelli assessed Corey Johnson in March 1977, when he was age 8 years 4 months and in the second grade. The assessment was prompted by the typical reasons school age children are referred for consideration of disability classification and special education services, specifically chronic and severe achievement problems including extremely low reading skills and poor concepts of numeracy resulting in academic failure and grade retention. Dr. Figurelli administered to Corey Johnson the Wechsler Intelligence Scales for Children-Revised (WISC-R; Wechsler, 1974); the WISC-R had been normed five years before this testing. The obtained scores using the uncorrected and Flynn corrected scores were Full Scale 73 (Flynn 71.5), Verbal 67 (Flynn 65.5), and Performance 84 (Flynn 82.5).

Unfortunately, Dr. Figurelli did not report subtest scores in her evaluation report nor has a copy of the test booklet that would contain the results of those individual subtests been discovered. The absence of raw data and the individual subtest scores makes it difficult to identify patterns of strengths and weaknesses within the scales. However I have known Dr. Figurelli for many years, am familiar with her experience and care, and have high regard for her

qualifications. Dr. Figurelli's test results were apparently free of practice effects since this was the first known time that a Wechsler Scale was administered to Mr. Johnson.

B. Smith WISC (1979).

The results from a second administration in 1979 of a Wechsler Scale are in sharp contrast to the first because the examiner used a significantly outdated, 30+year old test version that had already been replaced by a new version of the Wechsler test. This circumstance raises serious questions about the professional judgment of the administrator and undermines reliability of the results.

Nathalie Smith, who worked in the Evaluation Unit of the West Manhattan Center, gave Corey Johnson the WISC IQ test (Wechsler Intelligence Scale for Children, 1949). I am unfamiliar with Ms. Smith or her qualifications, background, and experience. Ms. Smith administered the WISC to Mr. Johnson in 1979, five years *after* Wechsler published a revised edition and 32 years after the normative standards for the original version were established. The reported WISC scores are Full Scale IQ 91 (Flynn Adjusted Full Scale IQ 81.4).

However, there are significant and serious flaws that undermine any reliability and validity from this test result. Most importantly, the original WISC version was completely outdated and had been replaced years before by an updated, culturally relevant version. For this reason, I believe the 1979 WISC results are not valid and should be given little if any weight in determining whether Corey Johnson meets the intellectual functioning prong of an intellectual disability evaluation.

The use of the 1949 WISC in 1979 rather than the revised 1974 WISC-R (which was the version given to Corey Johnson two years earlier by Dr. Figurelli) violated what was then and is currently a widely understood best practice of using the most recently standardized version of a

test. Current testing standards are explicit about using the recently developed version of a test series. *Standards for Educational and Psychological Tests,* 2014, pp. 104-105. The AAIDD Classification Manual starkly makes this point:

> The main recommendation resulting from this work [regarding the Flynn Effect] is that all intellectual assessments must use a reliable and appropriate individually administered intelligence test. In cases of multiple versions, the most recent version with the most current norms should be used at all times.

AAIDD Classification Manual at 37, quoting *User's Guide: Mental retardation definition, classification, and systems of supports.* (Schalock 2007). Even in 1979, practitioners widely understood that using the most current version of an IQ test was the generally accepted best practice. In this instance, the newer version had been available for five years and the vast majority of psychologists in 1979 used the newer rather than the older version. This circumstance raises questions about whether the examiner in 1979 had the appropriate experience and applied the proper and critical clinical judgment necessary to reach a reliable and valid result during the testing of Corey Johnson in 1979.

The 1979 WISC test was not only severely outdated when it was administered to Corey Johnson, many of the subtests were significantly revised because substantial cultural and societal changes occurred during the more than three decades between the time the WISC was normed and the time it was administered to Corey Johnson. Wechsler 1974, pp. 10-16. In fact, significant parts of the WISC test had been replaced in the WISC-R because those outdated portions of the WISC had a weak correlation to general intelligence. For all of these reasons, it is impossible to conclude that the 1979 WISC scores are valid and reliable measures of Corey Johnson's intellectual functioning. In my opinion, the Smith IQ tests results cannot be considered to be valid and should be given little if any consideration in determining if Mr. Johnson has significant limitations in intellectual functioning.

C. Adams WISC-R (1981).

The WISC-R was administered twice to Mr. Johnson within a short four month period in late 1981 and early 1982. Earnest Adams, M.S., who at the time worked at the Council's Center for Problems of Living, administered the WISC-R in October 1981, obtaining a Full Scale IQ of 78, converted to Full Scale IQ that was a fraction above 75 using the Flynn Correction for the age of the WISC-R norms. The subtest scores for Dr. Adams are available and there is nothing in those results or other aspects of Dr. Adams' evaluation that raises concerns about the reliability and validity of his results. The Full-Scale IQ of 78 adjusted for the obsolescence of the WISC-R norms (Flynn 75.3) is in the range of scores that can support a diagnosis of Intellectual Disability. Although the general SEM is commonly described as five points, the specific SEM for the WISC-R test administered by Dr. Adams to Corey Johnson, given his age at the time of the test (12 and a half years old) using the 95 % confidence interval is +/- 6.46 points, which would give a Flynn-adjusted Full Scale IQ of 68.84. Thus, Corey Johnson' 1982 IQ test administered by Dr. Adams falls well within the intellectual disability range.

D. Gallaudet WISC-R (1982).

Dr. Cary Gallaudet, a psychologist at the Pleasantville Diagnostic Center, administered the same WISC-R test to Mr. Johnson in early February 1982, four months after Dr. Adams' testing. Dr. Gallaudet obtained a Full-Scale IQ result of 82. Dr. Gallaudet has indicated in an affidavit that she was unaware of Dr. Adams' administration of the WISC-R just four months earlier. She has stated that had she known of Dr. Adams' recent use of the WISC-R test with Corey Johnson she would likely not have administered the WISC-R to him again. In fact, she has stated that she believes the practice effect impacted Corey Johnson's performance on the WISC-R tests she gave to him.

Studies have consistently shown that the practice effect is most pronounced when the same test is administered within a short period of time. Four months between test administrations is an extremely short period of time and, in my opinion, the repeat administrations of the exact same test inflated the results of the Gallaudet WISC-R results. Evidence of the practice effect in Corey Johnson's case stemming from the October 1981 and February 1982 administration of the exact same IQ tests can be seen on the following subtest scores, which all rose between the two administrations of the identical test: Information; Similarities; Comprehension; Picture Completion; Block Design; Object Assembly; and Coding. The two subtests that had the greatest increase between the Adams administration in October 1981 and the Gallaudet administration in February 1982 were Similarities and Object Assembly, and studies have shown that Object Assembly is one of the tests that is particularly prone to practice effects.

As noted previously, practice effects on psychological tests are larger than generally believed by psychologists. Calamia, et al., 2012. Verbal scale and performance scale subtests show varying degrees of practice effects with the latter scale generally showing larger practice effects than the former; Corey Johnson's scores on the performance scales rose slightly more than on the verbal scales, consistent with the research. Given the extremely short interval between the Adams and the Gallaudet administrations of the WISC-R and the clear evidence of the practice effect, the validity and reliability of the Gallaudet IQ test results are sorely undermined.

In addition, Dr. Gallaudet has conceded that she was an inexperienced practitioner at the time she administered the WISC-R to Corey Johnson. She was practicing under the supervision of a more experienced practitioner during the time she assessed Corey Johnson and he too has

noted her inexperience at the time that she evaluated Mr. Johnson. Dr. Gallaudet's evaluation report reflects her inexperience, because she noted in her report that "[f]requently Corey would interrupt his own work with irrelevant questions . . . and at those times, the examiner would have to help him refocus on the task at hand." Such efforts by the practitioner administering an IQ test artificially inflate the test score results. Moreover, Dr. Gallaudet has indicated that she was administering a large volume of evaluations during this time period and may have had a heightened chance for making errors during the testing of Corey Johnson. Dr. Gallaudet has specifically indicated that she believes that she may have made errors in her scoring of Corey Johnson's WISC-R testing.

Dr. George Sakheim was the chief psychologist at Pleasantville when Corey Johnson was a resident and he directly supervised Dr. Gallaudet during the time period when she evaluated Corey Johnson. Dr. Sakheim describes Dr. Gallaudet as a very inexperienced practitioner who had just started her professional career three months earlier. He notes Dr. Gallaudet's testing report indicating that she helped refocus Corey Johnson on task during testing and says he has observed such assistance from less experienced practitioners during his career. Dr. Sakheim said Dr. Gallaudet's evaluation report is consistent with her personality and her desire to be helpful to test subjects. Dr. Sakheim has further indicated that if an examiner provides assistance or extra time to a subject, the test findings are compromised. Dr. Sakheim has specifically indicated that he believes the results from Dr. Gallaudet's 1982 testing of Corey Johnson "may have been so compromised."

Although apparently Dr. Galluadet did not know of Mr. Adams' prior evaluations, the validity of the 1982 results are highly questionable regardless of her knowledge of prior assessments. There is no question that the practice effect elevated Corey Johnson's performance

on the Gallaudet IQ administration. Moreover, her inexperience, her statement upon reflection that she may have made scoring errors due to the volume of evaluations she was performing during that time, and the assistance she apparently provided to Corey Johnson during the testing all raise serious concerns about the reliability and validity of her results. For all of these reasons, the Full Scale WISC-R IQ score of 85 reported by Dr. Gallaudet cannot be considered to be valid and should be given little or no weight in determining if Mr. Johnson has significant limitations in intellectual functioning.

E. Barish WISC-R (1985).

Dr. Kenneth Barish, psychologist for the Pleasantville Cottage School where Mr. Johnson was placed, administered the WISC-R to Mr Johnson in 1985. This test yielded a Full Scale IQ score of 69. Moreover, application of the Flynn Effect correction to this score changes the Full Scale IQ score from 69 to 65.1. Either with or without correction for the Flynn Effect, the results of Dr. Barish's IQ test to Corey Johnson are clearly within the range for concluding that Mr. Johnson had significant limitations in intellectual functioning during the developmental period.

Dr. Barish also engaged in a process of "testing the limits." Testing the limits is done *after* a subtest has been given using the standardized procedures. It involves observing the improvement in performance when re-administering previously failed items giving additional time or hints and prompts to assist the examinee. Even with such assistance, Mr. Johnson's performance did not improve significantly through the testing the limits process and remained well within the intellectual disability range. Dr. Barish's test results make clear that he appropriately used the testing the limits process because he reported completely separate scores without assistance and with assistance.

Dr. Barish has indicated that he was not aware of Dr. Adams' IQ testing nor was he aware that Dr. Gallaudet's WISC-R testing occurred just four months after Dr. Adams administered the exact same IQ test to Corey Johnson. Dr. Barish's 1985 evaluation report reflects his lack of knowledge. In comparing Dr. Gallaudet's WISC-R Full Scale IQ result of 85 to his WISC-R Full Scale IQ result of 69, Dr. Barish stated: "This decline in IQ scores is difficult to account for." Dr. Barish has indicated that if he had known that these two WISC-R tests (Gallaudet's and Adams's) had been given within such close proximity, he would not have given weight to Dr. Gallaudet's testing and likely would have considered a "mental retardation" diagnosis (the term used at the time) for Corey Johnson.

Dr. Barish's declaration explains his original classification of Mr. Johnson as deficient-borderline in intellectual functioning. He recalled Mr. Johnson as one of the lowest functioning individuals he evaluated in his career. His report indirectly indicated that he followed all standardized procedures rigorously (note the testing the limits results) and his later declaration further verified that he knew Mr. Johnson well at the time of the evaluation and that he recalled him clearly.

Dr. Sakheim was also a colleague of Dr. Barish at Pleasantville. Dr. Sakheim indicates that in comparison to Dr. Gallaudet, Dr. Barish was a more experienced and objective psychologist at the time. His review of Dr. Barish's evaluation report has led him to believe that Dr. Barish's results are sound and more reliable than Dr. Gallaudet's for the reasons described above and because he concludes that Dr. Gallaudet's results may have been artificially inflated due to the practice effect. For all of these reasons, I believe the WISC-R IQ test results obtained by Dr. Barish are valid and reliable measures of Corey Johnson's intellectual functioning.

F. Cornell WAIS-R (1992).

In 1992 after being incarcerated on capital murder charges, Mr. Johnson was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R: Wechsler, 1981) by Dr. Dewey Cornell, a psychologist retained by Mr. Johnson's trial counsel. The obtained score of 77 by Dr. Cornell was based on normative standards that were 14 years out of date. The Flynn Correction to this score yields a Full Scale IQ of 72.8.

Dr. Cornell did not adjust his WAIS-R IQ test results in Corey Johnson's case for the Flynn Effect. This is not surprising because, while the Flynn Effect is a now a widely understood and accepted scientific fact, broad knowledge of the Flynn Effect and overwhelming scientific support for its existence did not emerge until at least the mid to late 1990s, well after Dr. Cornell's testing and testimony in Mr. Johnson's case. In fact, application of the Flynn Correction to adjust scores to take into account obsolete norms emerged as a practice about 2005, over a decade after Dr. Cornell's evaluation of Corey Johnson. In any event, the Flynn adjusted WAIS-R Full Scale IQ score of 73 places Corey Johnson well within the range significant limitations in intellectual functioning to support a current diagnosis of intellectual disability.

C. Analysis of Corey Johnson IQ results

Given the history of the Flynn Effect and particularly the fact that it did not become widely discussed within the psychology profession until after the six IQ tests were administered to Mr. Johnson, it is not surprising that corrections for the Flynn Effect were not applied to any of the Wechsler Scales at the time they were administered to Mr. Johnson. The necessity of applying the Flynn Correction now is amply established and I have adjusted Corey Johnson's IQ scores in Table 3 below.

I have summarized Mr. Johnson's performance on tests of intellectual functioning in Table 2, and provide the following opinion of the validity of the six IQ tests administered to him.

Two test administrations, by Smith and Gallaudet, clearly are outliers and suffer from significant flaws that undermine their validity. They deserve little if any weight due to significant interference from well-known features that compromise validity: obsolescence of item content (Smith); and practice effects, inappropriate examiner assistance, and possible examiner error (Gallaudet).

Smith's use of the 1949 WISC (normed in 1947) in 1979, a test with item content and norms that were over 30 years out of date, was inappropriate. Those results must be given little if any weight in consideration of Mr. Johnson's intellectual performance.

Gallaudet's WISC-R results obtained in February 1982 likewise must be given little if any weight due to significant flaws that compromise their validity, including practice effects, apparent on subtests most likely to be affected by prior exposure to the test items, and the admitted assistance provided to Corey Johnson during the test administration by an inexperienced examiner. Although the repeat administration of the same test after a short three to four month interval was apparently because Gallaudet was unaware of the recent test administered by Adams, such repeat administration would be indefensible professionally if done knowingly. Similarly, Dr. Gallaudet's WISC-R results are also compromised due to her admitted coaching/assistance to Corey Johnson during her administration of that IQ test, and her acknowledgment that due to her inexperience, she believes she may have made errors in the scoring of his IQ test results.

The remaining four IQ test results, each of which appear to be valid measures of intellectual functioning, establish that Mr. Johnson meets the standard for significant limitations in intellectual functioning based on obtained full-scale scores between 65 and 75 over the course of his life.

Table 3. Validity and Summary of Corey Johnson's Intellectual Functioning Results

Test	Year	Full-Scale IQ with Flynn Correction	Validity
WISC-R	1977 (March)	71.5	No threats to validity are apparent. However, subtest scores are not available and thus it is difficult to interpret strengths and weaknesses.
WISC	1979 (May)	81.4	Invalid for many reasons. Specifically, obsolete item content, limited normative sample, and obsolete population stratification due to use of 3-decade old test that had been superseded by WISC-R released 5 years before test administered to Corey Johnson. Serious questions exist about examiner experience, competence, and clinical judgment due to choice/use of obsolete test.
WISC-R	1981 (Oct.)	75.3	Valid; Norms were 7 years outdated requiring Flynn adjustment.
WISC-R	1982 (Feb.)	85.3	Invalid due to large practice effects. Examiner later disclosed she was unaware of October 1981 WISC-R, described her inexperience, and conceded: "I may have made errors in my scoring."
WISC-R	1985 (March)	65.1	Valid results from a measure that was administered, scored, and interpreted by a psychologist described as competent and experienced by his supervisor.
WAIS-R	1992 (Oct.)	72.8	Valid administration and scoring. Norms were 13 years outdated requiring a Flynn Correction of 4 points.

Those four Wechsler Scale administrations were at least two standard deviations below the mean (between 65 and 75) using the general SEM of plus or minus five points and with appropriate corrections for the Flynn Effect and were clearly in the range signifying significant limitations in intellectual functioning according to the AAIDD Classification Manual and the DSM-5): (1) Figurelli in 1977; (2) Adams in 1981;[4] (3) Barish in 1985; and (4) Cornell in 1992. Mr. Johnson's valid intellectual performance results were obtained when he was a child (age 8),

[4] The actual SEM for the WISC-R administered by Dr. Adams to Corey Johnson, based on Mr. Johnson's age at the time that test was administered to him, was +/- 3.23. If the actual SEM was calculated at the 95 percent confidence interval (+/- 6.46 points), rather than using the general 5 point SEM at the 95 percent confidence interval, the Adams test with a correction for the Flynn Effect would be 68.915 on the low end of the range, which is clearly two standard deviations below the mean and well within the range for significant deficits in intellectual functioning.

an adolescent (ages 13 and 16), and an adult (age 23), documenting significant limitations in intellectual functioning in childhood through adulthood.

IV. Corey Johnson Adaptive Behavior Assessment

My evaluation of the substantial educational, treatment, social services, and other records provided to me has persuaded me that Corey Johnson exhibited significant limitations in all three domains of adaptive behavior that are related to his limitations in intellectual functioning. After reaching my own conclusions, I had an opportunity to review the excellent and comprehensive adaptive behavior report by Dr. Gregory Olley that summarizes the extensive evidence supporting the conclusion that Mr. Johnson had significant adaptive behavior limitations during the developmental period (age birth to 18) that continued into the adult years. I agree with the analysis and conclusions in Dr. Olley's report. I address one further issue regarding adaptive behavior, specifically Mr. Johnson's competencies in the Conceptual Domain including educational performance, literacy, and his public education classification of emotional disturbance or specific learning disability rather than mild intellectual disability.

Adaptive behavior has been organized into different areas or domains in prior authoritative intellectual disability classification systems. The number of areas varied from ten adaptive skills in AAIDD 9th edition (Luckasson et al., 1992), 11 areas in DSM-4 TR (2000) and three broad domains in AAIDD's 10th and 11th editions (Luckasson et al., 2002, 2010 and the Classification Manual respectively) and the DSM-5.

The Conceptual Skills Domain of adaptive behavior is defined in the most recent AAIDD *Classification Manual* as "language; reading and writing; and money, time, and number concepts." In the DSM-5, conceptual skills are defined similarly. DSM-5 at 37. Literacy skills are an important component of both groups' constructs for the Conceptual Domain; indeed,

inadequate literacy skills establish an enormous barrier to adequate adjustment in the adult years. Failing school performance prior to age 18 is another important indicator of significant limitations in the Conceptual Skills Domain during the developmental period; continuing, life-long deficits in the Conceptual Skills Domain usually follow very poor school performance in literacy skills. Functional intelligence typically is revealed in several adaptive behavior domains, particularly the Conceptual Skills Domain.

A. Corey Johnson's school performance

Mr. Johnson's severe and chronic achievement problems were apparent early in his school career and continued into his high school and early adult years. Although some of the educational records have been destroyed, likely due to mandatory state legal requirements for purging special education records, sufficient evidence exists to clearly support the conclusion of chronic and severe achievement problems consistent with the classification of mild intellectual disability.

Mr. Johnson experienced consistent academic failure throughout his school career. He was retained multiple times in elementary school, repeating second grade at least three times. Mr. Johnson was in special education from the third grade through the remainder of his school career and he was classified as learning disabled and was never diagnosed as mentally retarded for a number of reasons that I explain below. When in the public school context, Corey Johnson was placed in a self-contained special class, the special education placement used most frequently with students with mild intellectual disability. Students with specific learning disability (SLD) typically were not placed in special self-contained classes where all of the students generally had similar and equally severe disabilities; rather, they were educated in part-time resource-teaching programs for time periods of approximately 40 to 120 minutes.

Even when placed in special classes, Mr. Johnson experienced academic failure. Over numerous school reports and teacher observations, Mr. Johnson had very low scores on language measures, including both expressive and receptive components. His reading performance varied little over numerous measures and was extremely low. When he attended the Jersey City Public Schools, Corey Johnson was described as "... having no concept of reading skills. He cannot retain sight vocabulary words." Third graders were expected to read approximately 110 words per minute in third grade reading materials. Mr. Johnson could not come close to this average level of performance. His math Grade Equivalent score on an achievement test at that time was at the first grade, fourth month, also markedly below grade level. There was little variation across his general intellectual functioning and educational achievement in key areas, a significant pattern more consistent with classification as mild intellectual disability than specific learning disability (see later paragraphs).

B. Corey Johnson's achievement test results as a child

The scores from standard achievement assessments support the above conclusion about chronic and severe achievement deficits.

Table 4: Corey Johnson Wide Range Achievement Test Results

Date	Age	Administrator	Arithmetic Grade Level/ Percentile	Reading Grade Level/ Percentile	Spelling Grade Level/ Percentile	Word Recognition Grade Level/ Percentile
3/25/77	8	Figurelli	1-44			
5/79	10	Price	3-9 (Level 1)			
2/22/82	13	Klerer	3		2	2
3/83	14	Barish	2%[5] (SS[6] 68)	1% (SS 62)	1% (SS 64)	

[5] "Percentile" means the percentile rank which indicates the percentile of people who scored below a particular point, e.g., in Corey Johnson's case, 98% of students of his age scored higher on an arithmetic subtest in 1983.

7/85	15	Hopper	3.4 (computation)			3.7 (sight vocabulary)

In 1981 when he was age 13 his math was about four years behind and his reading about six years below his chronological age. In 1982 on the Gray Oral Reading Test his oral reading and reading comprehension were both at the second grade level, approximately six grade levels below his grade placement. In 1983 at age 16 on the Woodcock Johnson his reading was still at the second grade level, but his math was about 5th grade, still well below expectations for his grade level and chronological age.

The reading, language, and mathematics performance patterns persisted through the school years. Mr. Johnson's skills as they were assessed during his childhood were consistently at an extremely low level and the contemporaneous school and achievement records show that Corey Johnson had significant limitations in language, communication, math and number concepts as a child during his developmental period.

C. Corey Johnson's achievement test results as an adult.

Mr. Johnson's literacy skills were assessed by Dr. Dewey Cornell in 1993 as part of an evaluation prior to his trial on the charges for which he was convicted. Dr. Cornell used a highly regarded achievement battery, the Woodcock-Johnson Tests of Achievement-Revised. Mr. Johnson obtained Grade Equivalent scores in Broad Reading and Broad Math of 2.5 and 5.9. While there was a minor discrepancy between these results, it is important to understand that this discrepancy does not meet the definition of nor support a conclusion that Corey Johnson was learning disabled (see Section V.A below for a detailed discussion). In order to classify a learning disability, "a child [must have] a severe discrepancy between achievement and intellectual ability." Reschly & Hosp, 2004; 34 C.F.R. 300.541. It is understandable that Dr.

[6] "SS" refers to standard scores on a scale with a mean of 100 and a standard deviation of 15.

Cornell likely interpreted this discrepancy as a sign of a learning disability because he did not apply the State of Virginia or the typical US criteria for a learning disability diagnosis.

Dr. Cornell also did not know about the severe practice effect that distorted the results of Gallaudet IQ tests. He did not discuss Dr. Adams or his evaluation at all in his report or his testimony during Corey Johnson's death penalty hearing, and the list of records he reviewed likewise does not include any materials from Adams. The only prior IQ tests that he reviewed were the 1982 Gallaudet, which his records describe as Mr. Johnson's first psychological evaluation, and the 1985 Barish test, which Dr. Cornell's records describe as Corey's second psychological evaluation. Thus, Dr. Cornell had no context to appreciate why Dr. Barish (who was also not aware of the recent prior WISC-R administration by Adams) did not conclude that Corey Johnson was intellectually disabled despite Barish's WISC-R results, which placed Mr. Johnson solidly in the intellectual disability range.

In any event, Mr. Johnson's broad reading and broad math scores on the achievement tests administered by Dr. Cornell (shown in Table 5 below) placed him well below basic adult literacy and math levels. On a language test Mr. Johnson scored at the second percentile, or to put it differently, 98% of a representative sample from the general population had language skills above his level.

Table 5: Corey Johnson Woodcock-Johnson Revised Results from January 1993 (age 23)

Test Name	Age	Raw Score	Age Equivalent	Grade Equivalent[7]
Letter-Word Identification	23	30	7-11	2.4
Passage Comprehension	23	15	8-1	2.6
Calculation	23	28	12-2	6.7

[7] GE stands for Grade Equivalent. The GE indicates that the score is at the level obtained by children with a specified amount of school experience. A GE of 3.4 means that the individual has obtained a score at the average of persons in third grade, in the fourth month of the year.

Applied Problems	23	33	10-4	4.9
Broad Reading	23		7-10	2.5
Broad Math	23		11-3	5.9

Mr. Johnson's recent achievement results on a test I administered mirror the clear documentation of comprehensive deficits in his educational records from his childhood. In Table 6, Mr. Johnson's achievement results are summarized from the Woodcock-Johnson Tests of Achievement (3rd Ed.) Standard Battery (WJ-3) Woodcock, McGrew, & Mather, 2001) administered by me on July 30, 2014 during my evaluation at USP Terre Haute.

Table 6: Corey Johnson Woodcock Johnson III Results, July 2014 (Age 46)

Achievement Cluster[8]	Standard Score	Grade Equivalent
Broad Written Language	74	2.8
Oral Language	83	3.5
Broad Reading	76	4.1
Broad Math	89	8.2
Total Achievement	77	4.6

Mr. Johnson's achievement test results from 1993 and 2014 are remarkably consistent and reflect scores substantially below his grade level. Most important, Corey Johnson's achievement test results when he was 23 and 46 years old respectively are not consistent with someone with a learning disability because they are not unexpected given his intellectual functioning as measured by his IQ tests. In order to diagnose someone with a learning disability, there must be a severe discrepancy between achievement and intellectual ability. Put another way, a person with a learning disability demonstrates unexpected low achievement in one or more areas than would be anticipated by assessments of the individual's intellectual functioning.

[8] Note: Woodcock Johnson-III Achievement Cluster scores are composed of two or more subtests as follows: (a) Broad Written Language is composed of Writing Samples, Spelling, and Writing Fluency; (b) Oral Language is composed of Understanding Directions and Story Recall; (c) Broad Reading is composed of Letter-Word Identification, Reading Fluency, and Passage Comprehension; (d) Broad Math is composed of Calculation, Math Fluency, and Applied Problems; (e) Total Achievement is composed of summary or composite score of the Woodcock Johnson-III subtest scores.

In Corey Johnson's case, his summary scores are extremely low except for his performance in Broad Mathematics. The highest score in this domain (GE 8.2, standard score 89) represents the results of the many years Mr. Johnson has studied the General Educational Diploma (GED) educational materials; Mr. Johnson reported to me and prison records support his statement that he has been studying for working toward his GED for 20 years. However, prison records show that Mr. Johnson has not advanced beyond the pre-GED phase and, therefore, he has never attempted to take the GED exam. Mr. Johnson brought his GED study materials to my evaluation. While he has made some progress in mathematics, particularly in simple calculations, he continues to have difficulty with fractions, decimals, negative numbers, and percentages, which are more conceptual and complicated math skills. The mathematics materials he was studying appeared to be at about the 7th to 8th grade levels. However, this must be put in context. Prison records show that Mr. Johnson has been practicing these broad math skills (basic arithmetic problems) consistently for several decades. Thus, while Mr. Johnson has done relatively better in simple math calculations than in other areas, his achievement in that area is not unexpected and is consistent with his significant limitations in intellectual functioning.

Mr. Johnson's 1993 and 2014 scores in language based achievement domains show little improvement. He obtained scores at the second to fourth grades levels in Broad Written Language (GE 2.8), Oral Language (GE 3.5), and Broad Reading (GE 4.1) despite concentrated efforts over many years to prepare for the GED. My review of the GED reading and grammar materials he was studying showed he was at a level involving basic parts of a sentence and reading materials at or below the fourth grade level. It appears from examining the GED preparation materials including the unit tests associated with the program that Mr. Johnson has

worked very hard to improve his literacy and numeracy skills. Despite his concerted efforts, his total achievement remains at the grade level of fourth grade sixth month, an overall level typical of adults with mild intellectual disability. Reschly (2013).

The materials I reviewed have convinced me that Mr. Johnson has significant limitations in the Conceptual Domain of adaptive behavior that appeared early in his life and continue to the present. Moreover, ample evidence gathered and summarized by Dr. Gregory Olley document Mr. Johnson's deficits with concepts of money, time, and numbers. It is critical to understand that these deficits emerged early and continued through the time of the crimes he committed.

Significant limitations in one of the three adaptive domains is sufficient to meet the adaptive behavior prong of the AAIDD 11th and DSM-5 intellectual disability classification criteria. Based on Mr. Johnson's limitations in the Conceptual Domain he meets the adaptive behavior prong of the intellectual disability classification. Mr. Johnson also has significant limitations in the Social and Practical Domains.

V. Analysis of Corey Johnson's Childhood Diagnosis of Severe Learning Disability

While Mr. Johnson meets all of the criteria for intellectual disability, he was not diagnosed as a child with mental retardation. Instead, at various times in his childhood, Mr. Johnson was diagnosed as severely learning disabled even though he did not meet the common classification criteria for specific learning disability—*unexplained* low achievement—that dominated SLD classification in the US from 1977 to 2006. Nor does he meet the definition for learning disabled today.

A. Learning disability classification

Achievement expectations related to specific learning disability can be established in a number of ways; however, the principal method in the US from 1977 through 2006 was the student's performance on achievement measures in defined areas and an individually administered test of general intellectual functioning such as the Wechsler or Stanford-Binet battery of tests. The key phrase in Federal and state legislation was the requirement that "a child has a severe discrepancy between achievement and intellectual ability" in one of seven specified areas of achievement (Reschly & Hosp, 2004; 34 C.F.R. 300.541). The achievement had to be at a level below intellectual ability that constituted a severe discrepancy.

B. Corey Johnson does not have a learning disability

Careful examination of Mr. Johnson's intellectual ability and achievement during his school age years *fails* to meet the requirement of achievement significantly *below* his intellectual ability. In fact, Mr. Johnson's record involving multiple measures of achievement and intellectual functioning revealed that his achievement was commensurate with his intellectual ability. Mr. Johnson did not meet the classification criteria for SLD.

1. Corey Johnson's IQ results are not consistent with learning disability

As discussed in earlier sections of this report, Mr. Johnson's IQ test results are consistent with intellectual disability and are not consistent with specific learning disability despite some variation across some of his subtest scores. Significant variation across the Wechsler subtest scores is typical for persons of *all* levels of intellectual ability, including persons with mild Intellectual Disability. As noted in the authoritative source AAIDD Classification Manual at p. 7, "Within an individual, limitations often coexist with strengths." This statement also is true of the intellectual and educational performance of persons with mild intellectual disability.

A finding of variability in an individual's sub-test scores has often led to the erroneous diagnosis of learning disability. This is because the typical profile for *groups* of people with intellectual disability (not individuals) is flat (relatively consistent scores showing little variability). However, the *individual* profiles of persons with mild intellectual disability typically show considerable variability across subtests or scale scores on a comprehensive test battery such as the Wechsler series of intellectual ability measures. Bergeron & Floyd, 2013.[9] The finding of considerable variability in the individual profiles of persons with mild intellectual disability requires re-examination of many prior interpretations of the performance of persons diagnosed as borderline rather than mild intellectual disability.

In addition to the variability in subtest scores due to an individual with intellectual disability's strengths and weaknesses, variability is also due to the Wechsler IQ test instruments themselves. Subtest scatter, that is, differences between Wechsler Scales subtest scores, should not be over-interpreted because a large component of the difference scores found by subtracting one subtest score from another is due to error.[10] The Wechsler subtests scores are on a standard score scale with a mean of ten and standard deviation of three. For example the difference between hypothetical scores for Vocabulary (8) and for Block Design (4) seems like a large difference. In fact, many children, youth, and adults have score differences of this and greater magnitude. Such variations are not unusual among the general population and persons with mild intellectual disability. Moreover, difference scores are less reliable than either of the scores that are compared. Cronbach, 1984, pp. 237, 312-314.

[9] Similarly, persons in the average range of ability (not those with mild intellectual disability) also show flat profiles as a group. But considerable variability has been known to exist for about 40 years in typical *individual* profiles of persons with average ability. Kaufman, 1976a, b.

[10] A difference score is a variable that has been formed by subtracting one variable from another.

Corey Johnson's performance appears to be a case on point. He had considerable variability across the components of intellectual measures that likely influenced interpretations that he was learning disabled rather than a person with intellectual disability. But, most critically to the proper conclusion that Corey Johnson did not have a learning disability but instead has a mild intellectual disability, Mr. Johnson never displayed *unexpected* low achievement, the most salient feature of the specific learning disability (see later paragraph). Put another way, Corey Johnson never exhibited a significant discrepancy between his IQ and his achievement, which in 1992 was the accepted federal definition of a learning disability. Code of Federal Regulations; Reschly & Hosp (2004). My review of the records suggests that Dr. Cornell interpreted Corey Johnson's 1992 performance on the WAIS-R as borderline performance for a number of reasons. The records he reviewed for Corey Johnson did not contain the October 1981 WISC-R results for the IQ testing administered by Adams and, therefore, he was not aware of the significant practice effect that artificially elevated the results of the Gallaudet testing just four months later. In fact, Dr. Cornell quoted in the materials he prepared as part of his evaluation of Corey Johnson Dr. Barish's discussion of the IQ results Barish obtained: "These scores reflect a significant decline since Corey was tested in 1982 [by Gallaudet] . . . . This decline is difficult to account for." What neither Barish nor Cornell appreciated was that the IQ test results from Gallaudet's administration were dramatically artificially inflated because of the practice effect. So the decline Barish observed in Corey Johnson's IQ results was due to severe practice effect from the administration of the identical IQ test twice within four months. In reality, there was no significant difference between Adams' IQ testing and Barish's and both should have led to the consideration of Corey Johnson's adaptive functioning deficits and to the conclusion that Corey

Johnson was likely intellectually disabled. That did not occur because neither Gallaudet nor Barish were aware of the Adams IQ testing shortly before Gallaudet's.

And, of course, Gallaudet's report notes that she refocused Corey on task, and that inappropriate assistance by an inexperienced practitioner most certainly skewed the results and inflated Corey Johnson's performance on the 1982 IQ test, as did the practice effect. Thus, considered in isolation, the Gallaudet scores clearly appeared to Barish and to Cornell to be outside of the intellectual disability range when, in fact, the Adams, Barish, and Cornell IQ results were within the intellectual disability range.

Dr. Cornell also did not adjust his WAIS-R results for the Flynn Effect, which is not surprising since the Flynn Effect was not widely understood in the early 1990s; such an adjustment alone would have placed Dr. Cornell's WAIS-R results clearly within the intellectual disability range, but without the proper Flynn adjustment, those results and the Gallaudet erroneously appeared more consistent with a learning disability diagnosis rather than an intellectual disability diagnosis.

2. Corey Johnson performed best on outdated subtests with weak correlations with general intelligence

We now know that typical variability across subtests for average performers *also* applies equally to persons with mild intellectual disability. Bergeron & Floyd, 2013. Variability across subtests should be expected both with persons scoring in the average range and in the extremely low range of intellectual ability. While the Object Assembly subtest is one of the performance scales that typically show the largest practice effect on studies of practice effects on the Wechsler Scales, it is critical to understand the Object Assembly and Picture Arrangement

subtests, the ones on which Corey Johnson performed best, are the WAIS-R performance tests that constituted relatively weak measures of general intelligence.

Moreover, for the most recent update of the Wechsler Adult Intelligence Scale (4th Ed.) (WAIS IV; Wechsler, 2008) these subtests were either deleted (Object Assembly), placed in a category of supplemental tests (Picture Arrangement), or reorganized into a third scale, (Processing Speed), that has a lower relationship to general intellectual functioning (Wechsler, 2008). Notably, these weaker subtests all appeared on the WAIS-R Performance Scale where Mr. Johnson obtained a higher score of 82. Thus, the Performance Scale subtests on which Corey Johnson produced the highest scores have been deleted or marginalized in the newer versions of the WAIS, because they have been shown to have less validity as measures of general intellectual functioning than previously believed.

When all of Corey Johnson's valid and reliable IQ test administrations are considered and the results properly corrected and when those results are compared to his achievement, it becomes clear that Corey Johnson does not meet and never met the learning disability diagnostic criteria. Instead, his valid IQ tests show that he had significant limitations in intellectual functioning, satisfying the intellectual functioning prong of the intellectual disability diagnosis. Moreover, my analysis of Corey Johnson's adaptive functioning, which is consistent with the comprehensive and detailed evaluation by Greg Olley, persuades me that Mr. Johnson has significant limitations in all three domains of adaptive behavior. As noted in authoritative sources, significant limitations in just one of the three critical domains meets the second prong for a classification of intellectual disability. Mr. Johnson's across the board impairments in adaptive functioning are also inconsistent with a diagnosis of learning disability. Finally, my review of all of the information related to Corey Johnson shows that his significant limitations in

intellectual and adaptive functioning began during the developmental period and persisted into adulthood.

3. Corey Johnson's diagnosis had little significance to his educational services

As a practical matter the classification of specific learning disability rather than mild intellectual disability made little or no difference in the special education services delivered to Mr. Johnson. For most of Mr. Johnson's career he was essentially in a self-contained special education class with speech therapy services, rather than a part-time resource program for students with learning disabilities. Yet, despite significant resources, a range of educational services and varied strategies devoted to supporting his learning, Corey Johnson did not advance, his performance improved only marginally while his peers surpassed him, and, thus, he fell further and further behind. Moreover, it is important to note that these types of self-contained classrooms were mostly used during this time period for students with intellectual disabilities, not children with learning disabilities. Regardless of whether students were classified as intellectually disabled (or at that time, as mentally retarded) or as learning disabled, the self-contained classroom setting was the manner for educating students with intellectual disabilities in that era. Children in such classes, regardless of diagnosis or clinical classification, received the same range of services. Given the controversy that raged around the over-classification of black students as mentally retarded (discussed below), the Bureau of Child Guidance (the New York City agency responsible for evaluating special education students) shied away from labeling students as "mentally retarded" at that time.

C. Factors that led to the reduction in the classification of with mental retardation during the period starting in the 1960s through the 1980s

Some further context is needed to explain why Mr. Johnson was not identified by school personnel as a child with mild intellectual disability even though his educational performance

and his scores on valid tests of general intellectual functioning would have been more consistent with intellectual disability rather than specific learning disability. Mr. Johnson was classified as "severe[ly]" learning disability at several different times as reflected in his school records, and by the staff at the Pleasantville residential facility. There is no differentiation of levels of specific learning disability in any special education classification system at the federal or state level (Mercer, King-Sears, & Mercer, 1990; Reschly & Hosp, 2004). When the adjective "severe" was attached to specific learning disability it often denoted a set of symptoms consistent with mild intellectual disability, for reasons that are explained below.

Mild intellectual disability was the most frequent classification of children served in special education programs in the first 75 years of the 20th century. Moreover, minority children, particularly African American children, were overrepresented in their classification as intellectually disabled (or, as they were classified at the time, mentally retarded) compared to their percentage in the population. However, a number of factors—including policy and practice changes, public attention brought on by litigation and advocacy efforts, and other reasons—modified this pattern beginning in the early 1970s and led to rapid reductions in the number of children and youth diagnosed with mild intellectual disability. And, as part of that rapid reduction and because of a public outcry about the overrepresentation of black students classified as intellectually disabled, schools and psychologists began to avoid the classification of children as having mild intellectual disabilities, and specifically, avoided classifying children with mild intellectual disability as mentally retarded.

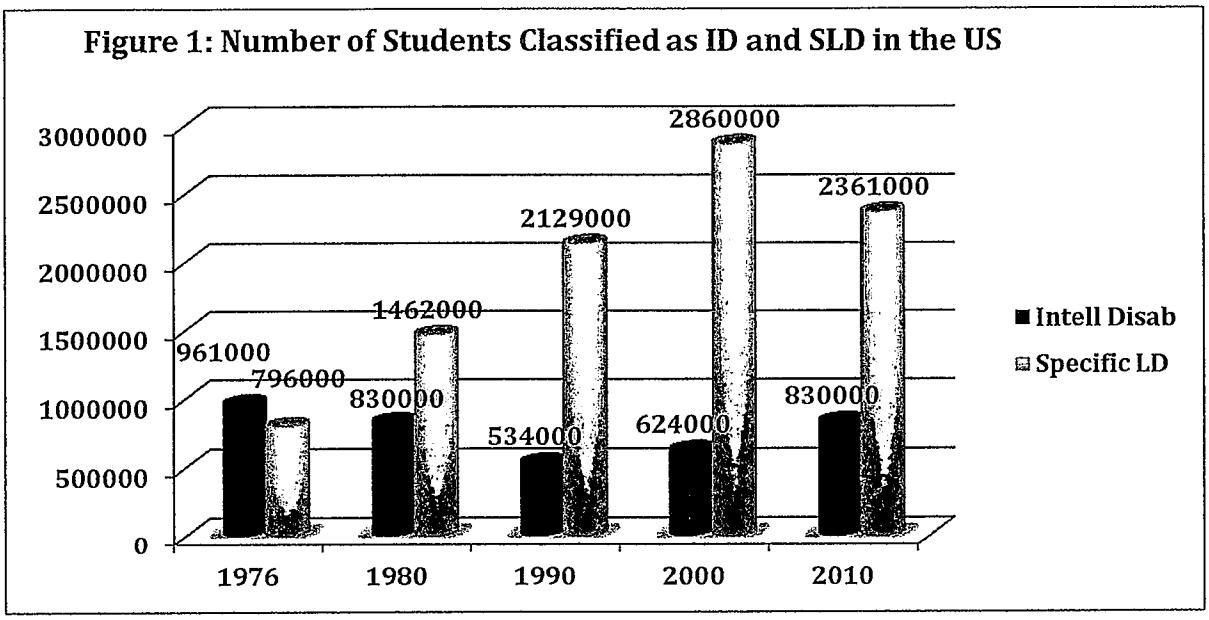
1. The national growth of the specific learning disability classification

Specific learning disability (SLD) was emerging as a special education category in some states and in federal legislation in the late 1960s and early 1970s. It was incorporated into

Federal mandatory special education law (Education of All Handicapped Children Act, 1975) after considerable controversy in Congress about identification procedures and likely prevalence (Reschly & Hosp, 2004; Federal Register, 1976, 1977).

SLD was approved and adopted by the states in the mid to late 1970s, producing an immediate impact on the classification of children with mild intellectual disability and SLD. In only four years, 1976 to 1980, SLD surpassed intellectual disability prevalence at a time when children and youth with more severe levels of intellectual disability were gaining access to the public schools for the first time. Reschly (2013). The national pattern of increasing classification of specific learning disability and declining classification of mild intellectual disability is represented in Figure 1. From 1976 to 2000 SLD increased steadily and dramatically while intellectual disability declined significantly. The national trend remained relatively stable from 2000 to 2010, with SLD continuing to be far more common than intellectual disability in special education classification.

Figure 1: Number of Students Classified as ID and SLD in the US



Even though during this period more children with severe levels of ID were gaining access to the public schools, the prevalence of intellectual disability classifications overall was

declining. This meant that the classification of children with mild intellectual disability was declining even more rapidly, and thus the decline in the number of children classified as having mild intellectual disability during this period was even larger than the depiction in Figure 1.

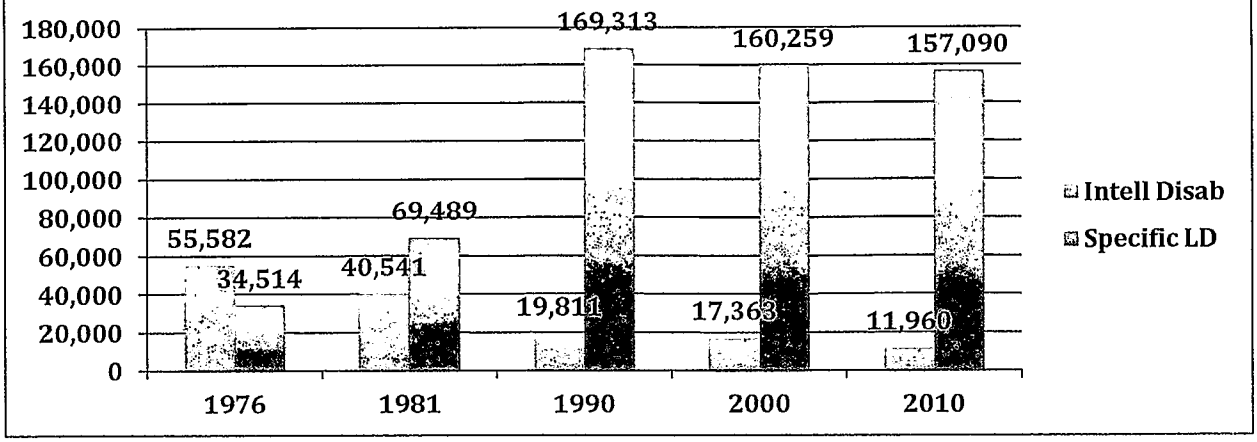
Modern research studies have consistently shown that beginning in the 1970s, as many as one-third of children diagnosed by schools as having a learning disability actually met the clinical criteria for mild intellectual disability. Gottlieb, J.C. Alter, M. Gottliebe, B.W. & Wischner, J. Special education in urban America: It's not justifiable for many. The Journal of Special Education, 27, 457-465; Gottlieb, J. Alter, M. & Gottlieb, B.W. Mainstreaming academically handicapped children in urban school districts. In A.C. Repp, J. Lloyd, and N. Singh (Eds.) The Regular Education Initiative. DeKalb, IL; Sycamore Press. 1992; MacMillan, Gresham & Bocian, (1998); Donald L. MacMillan and Gary N. Siperstein, Learning Disabilities as Operationally Defined by Schools (2002); McMillan, Siperstein, Leffert, "Children with Mental Retardation: A Challenge for Classification Practices" (2006).

2. Similar trend to classify children as learning disabled in New York City

The same general pattern that developed nationally is apparent in the classification of students for special education services in New York (see Figure 2). These changes in policies and practices likely explain why Corey Johnson was classified as a child with SLD while he was in the New York City Public Schools rather than mentally retarded or educable mentally retarded, terms used by the school district when Mr. Johnson was in the New York City public schools. The number of students classified as specific learning disabled (SLD) increased dramatically from 1976-77 to 1990-91, then leveled off over the last 20 years. In sharp contrast, the number of students in New York classified with intellectual disability declined significantly

from 1976-77 through 2010-11. The disability identification trends in the US and New York likely influenced the decisions regarding Mr. Johnson's special education classification.

Figure 2:
Number of Students Classified as ID and SLD in New York by Year



The movement away from mild intellectual disability to SLD was especially strong in urban school districts and with African-American children and youth. Further enforcing the national trends away from mild ID was the *Jose P.* and *Lora* litigation that led to a judgment concluding that the New York City Public Schools were seriously out of compliance in implementing the Education of the Handicapped Act of 1975, including the nondiscrimination provisions (Jose P., 1979, 1980; Lora v. Board of Education, 1978, 1980, 1984). The combined judicial orders placed intense pressure on the system and school psychologists to meet timelines, address language differences, avoid discrimination in assessment and overrepresentation of minority students in special education. The same trends in special education toward greater use of SLD and markedly diminished use of intellectual disability were apparent in both public and private schools in New York and overall in the US.

In an Appendix to *Lora* (1984) the court approved a statement on *Nondiscriminatory Standards and Procedures* that even by contemporary standards is well conceived and

constructive. These standards and the various decisions in *Lora* were concerned with fair assessment of minority students and avoidance of minority overrepresentation in special education programs, particularly mild intellectual disability and emotional disturbance. These standards, however, specify aspirations for improved assessment and decision making that are not easily applied to all cases and situations. The inherent ambiguity in the standards and the continuing *Jose P.* and *Lora* litigation and court ordered monitoring of the New York City special education practices created a situation where personnel were reluctant to make decisions that might be rejected by parents or be seen as discriminatory toward minority students. As a black student in an urban school district, Mr. Johnson presented the kind of case most likely to be influenced by the legal requirements that contributed to the large decline in mild intellectual disability identification in the late 1970s, 1980s and 1990s.

Due to political and social pressures and the desire not to stigmatize children with labels carrying perceived negative consequences, many schools and school districts simply stopped using the mental retardation label for children in the educational system. As noted previously, this development had little impact on how those children were taught or the programs made available to them so, from the schools viewpoint, there was little significance to classifying children as learning disabled rather than mentally retarded.

This phenomena was recognized by leading national organizations in the field. The National Research Council Panel report, *Mental retardation: Determining eligibility for social security benefits* (Reschly, Myers, & Hartel, 2002) expressed concern about the unreliability of public school assigned disability labels. The problem for the panel was how to interpret school-based diagnoses of SLD when the data developed by the school were more consistent with the mild intellectual disability classification. This question pertained directly to whether a person

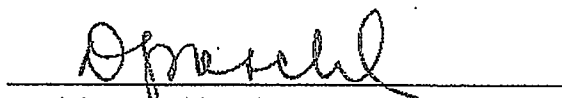
with a school classification of SLD met the developmental origin criterion for mild intellectual disability.

The panel reviewed extensive evidence on school-assigned disability categories and concluded that school assigned diagnoses were unreliable, particularly with regard to mild intellectual disability. The panel recommended paying close attention to school generated data on achievement, intellectual functioning, and behavior in decisions about the SSI eligibility of children and adults for mild intellectual disability classification, but to largely ignore the actual disability assigned by school teams.

My evaluation suggests a number of factors that led Corey Johnson to be erroneously classified as learning disabled during his school years rather than the correct classification as mentally retarded (or now, intellectually disabled). Several of the early IQ tests administered to him were flawed due to poor choice of instrument, examiner inexperience and inappropriate assistance provided during testing, and the lack of awareness of the recent prior administration of the identical test by subsequent examiners. The lack of appreciation of the need to correct for normed obsolescence at the time Corey Johnson's IQ tests were being interpreted (since Flynn did not first publish his research until after Mr. Johnson's last IQ test as an adolescent) played a significant role, and combined with the flaws in some of the tests obscured the strong evidence that mental retardation was the appropriate classification. Finally, the reluctance to label school children, particularly minority school children like Corey Johnson, with mental retardation also very likely led to the alternate, and erroneous classification of him as severely learning disabled which, as I noted above, has no educational meaning and was a euphemism for mental retardation.

VI. Summary and Conclusions

Mr. Johnson is a person with mild intellectual disability as conceptualized and defined by the AAIDD Classification Manual and the DSM-5. Significant limitations in intellectual functioning and adaptive behavior existed during child, adolescent, and adult years. He is by definition and classification criteria a person with intellectual disabilities.



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8-26-2016
Date

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Appendix B
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Rev. 5-15-20

DANIEL J. RESCHLY

Biographical Summary

Dan Reschly is Professor of Education and Psychology Emeritus in Peabody College, Vanderbilt University where he Chaired Department of Special Education from 1998-2006, gaining the #1 national ranking for the first time in 2003. From 1975 to 1998 Reschly directed the Iowa State University School Psychology Program where he achieved the rank of Distinguished Professor of Psychology. Reschly earned graduate degrees at the University of Iowa and the University of Oregon and served as a school psychologist in Iowa, Oregon, and Arizona. Reschly has published on identification of disabilities (Mild ID, SLD, minority issues), response to intervention, and policy issues in special education. In recent years he has served as an expert witness in trials involving claims of mild intellectual disability in death penalty cases. In 2015 Reschly was recognized as the second most cited author in the history of school psychology and is among the top 5 contributors to service and leadership. He has been active in state and national leadership roles including President of the National Association of School Psychologists (NASP), Editor of the *School Psychology Review*, Chair of NASP-NCATE Graduate Program Approval, President of the Society for the Study of School Psychology, and Chair of the Council of Directors of School Psychology Programs. Reschly served on the National Academy of Sciences Panels on *Standards-based Reform and the Education of Students with Disabilities* and *Minority Students in Special and Gifted Education*. He chaired the National Academy Panel on *Mental Retardation: Determining Benefits for Social Security*. He has received the NASP Lifetime Achievement Award, three NASP Distinguished Service Awards, the Stroud Award, appointment to Fellow of the American Psychological Association and the American Psychological Society, 1996 Outstanding Alumnus University of Oregon, 2000 NASP Lifetime Achievement Award, and the 2007 NASP Legend Award.

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Educational Background

BS 1966 Iowa State University, Honors Program, History/Psychology/Education
MA 1968 University of Iowa, NDEA Fellowship, School Psychology/Special Education
PhD 1971 University of Oregon, EPDA Fellowship, Educational Psychology/School Psychology

Professional Employment History

1967-1969: School Psychologist, Louisa County Schools, Wapello, IA
1969: Director of Summer Head Start Program, Louisa County, IA
1970-1971: School Psychology Intern, Albina Youth Opportunity Center and Portland Oregon Public Schools
1971-1975: Assistant Professor, Department of Educational Psychology, University of Arizona, Tucson, AZ
1975-1998: Associate Professor/Professor/Distinguished Professor and Director of the School Psychology Program, Joint Appointment to Department of Psychology (75%) and Professional Studies in Education (25%), Iowa State University (Promotions: to Professor in 1980; to Distinguished Professor 1991)
1996-1998: Associate Dean, College of Education, Iowa State University and Director of Research Institute for Studies in Education
1998-2014 Professor of Education and Psychology and Chair (1998-2006), Department of Special Education, Peabody College, Vanderbilt University
2014- Professor of Education and Psychology Emeritus, Department of Special Education, Peabody College, Vanderbilt University

Licensure

Nationally Certified School Psychologist (14126), renewed through June 30, 2021
State Licensure as a School Psychologist in Iowa, Oregon, and Arizona (Inactive)
Iowa Teaching Certification Endorsements in Special Education, K-12 Teaching Endorsement in Mental Retardation, Secondary Social Studies

Major Areas of Professional Interest

Teaching: Psychology and education of persons with disabilities, mild intellectual disability, special education policy
Research: Mild Intellectual Disability, School psychology services, high incidence disabilities (mild MR and SLD), minority overrepresentation

Professional Memberships

National Association of School Psychologists, American Psychological Association (Divisions 15, 16, & 33), American Association on Intellectual and Developmental Disabilities, Council for Exceptional Children,

Publications (refereed journals, book chapters and books)

Reschly, A. L., & Reschly, D. J. (2014). School consultation and response to intervention: Convergence, divergence, and future directions for research and practice. In W. P. Erchul & S. M. Sheridan (Eds), *Handbook of research in school consultation* (pp. 495-512). New York: Routledge.

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- Reschly, D., & Casey, A. (1987-1988). Iowa Department of Education, *Extension and expansion of the analysis and evaluation of mental disabilities programs*, $24,991.
- Reschly, D. J., & Reiher, T. C. (1987-1988). Iowa Department of Education, *Iowa behavior disorders research project,* $19,602.
- Reschly, D. J. (1987). National Association of School Psychologists Contract to edit *Directory of school psychology graduate programs*, $7,845.
- Reschly, D. J., & Reiher, T. C. (1988-1989). Iowa Department of Education, *Iowa Behavior Disorders Research Project Extension*, $24,950.
- Reschly, D. J. (1989-1992). Bureau of Special Education, Iowa Department of Education, "Evaluation of Renewed Services Delivery System for At Risk and Handicapped Children and Youth," $210,700.
- Peterson, C. & Reschly, D. (1994-1999). "School Psychologists in Early Childhood Preservice Training Project." Personnel Preparation Program, U. S. Department of Education. ($433,913).
- Reschly, D. J. (1994-1996). *Evaluation of Conventional and Alternative Special Education Assessment Procedures with Diverse Populations in an Urban School Environment.* Minnesota Department of Education, Bureau of Special Education. ($90, 000).
- Fuchs, D., Reschly, D., & Deshler, D. (Co-Directors) (2001-2006). *The National Research Center in Learning Disabilities.* U.S. Department of Education, Office of Special Education Programs ($3,500,000).
- Coulter, T., Dwyer, C., Laine, S., & Reschly, D., (Principal Investigators), National Comprehensive Center on Teacher Quality, (2005-2010) $5,000,000, US Department of Education.

  Reschly is the PI for the Vanderbilt University subcontract, 2005-2006 funding at $225,000; 2006-2007 funding at $248,920; 2007-2008 funding at $250,207; 2008-2009 funding at 250,000; 2009-2010 funding at $261, 066; 2010-2011 at $261,970; 2011-2012 at $270,000.

Refereed Papers Presented

- Reschly, D. (1972). *Rates of self-reinforcement as a function of task ambiguity and self-esteem status*. Paper presented at the meeting of the Rocky Mountain Psychological Association. Las Cruces, NM.
- Reschly, D. & Sabers, D. (1972). *An empirical study of attitudes toward open education*. Paper presented at the meeting of the Rocky Mountain Educational Research Association. Las Cruces, NM.
- Reschly, D., & Swanson, R. (1973, May). *An investigation of word difficulty of the adjective check list*. Paper presented at the meeting of the Rocky Mountain Psychological Association. Las Vegas.

- Reschly, D. (1974, March). *Diverse meanings of consultation as a means of providing school psychological services*. Paper presented at the meeting of the National Association of School Psychologists. Las Vegas.
- Reschly, D., Brown, D., Wasserman, H., & Davis, R. (1974, March). *Use of covert modeling and self-management procedures in modifying inappropriate teacher behaviors and children's hyperactivity*. Paper presented at the meeting of the National Association of School Psychologists. Las Vegas.
- Sabers, D., Reschly, D., & Meredith, K. (1974, April). *Age differences in degree of acquiescence on positively and negatively scored attitude scale items*. Paper presented at the meeting of the National Council on Measurement in Education. San Francisco.
- Reschly, D. (1975, April). *Empirical data on traditional and pluralistic assessment procedures with culturally different children*. Paper presented at the meeting of the National Association of School Psychologists. Atlanta.
- Reschly, D. (1975, April). Chair. *Practical differences among three approaches to school psychology consultation*. Symposium conducted at the meeting of the National Association of School Psychologists.
- Reschly, D. (1975, April). *Key variables in behavioral consultation*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1976, March). Chair. *Issues in behavioral consultation*. Symposium conducted at the meeting of the National Association of School Psychologists.
- Reschly, D. (1976, March). *Problems and tentative solutions for evaluating the outcomes of behavioral interventions in the schools*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D., Sabers, D., & Meredith, K. (1976, April). *Analysis of different concepts of cultural fairness using WISC-R and MAT scores from four ethnic groups*. Paper presented at the meeting of the American Educational Research Association. (ERIC Document Reproduction Service No. ED 126 111)
- Reschly, D. (1977, March). Chair. *Continuing Education for School Psychologists: Content, Method, and Means*. Symposium conducted at the meeting of the National Association of School Psychologists.
- Reschly, D. (1977, March). *School psychologists' evaluations of training programs and in service needs*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1977, March). *Nonbiased assessment: Differing conceptions and empirical results*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1978, March). *Predictive validity of WISC-R factor scores: Implications for nonbiased assessment*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1978, May). *Comparison of bias in assessment using conventional and pluralistic measures*. Paper presented at the meeting of the Council for Exceptional Children. (ERIC Document Reproduction Service No. ED 153 386)
- Reschly, D. (1979, March). Research with the WISC-R: Implications for assessment of minorities. In *Assessment of minorities*. Symposium conducted at the meeting of the National Association of School Psychologists.

- Reschly, D. (1979, March). Journal policies in school psychology. In *Editors of school psychology journals*. Symposium conducted at the meeting of the National Association of School Psychologists.
- Reschly, D. (1980, April). Journal policies in school psychology. In *Editors of school psychology journals*. Symposium conducted at the meeting of the National Association of School Psychologists.
- Reschly, D., & Kazimour, K. (1980, April). *Generalizability of SOMPA standardization data to other populations*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1981, April). *WISC-R differential validity: Psychological evidence vs court opinions*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1981, April). Journal policies in school psychology. In *Editors of school psychology journals*. Symposium conducted at the meeting of the National Association of School Psychologists.
- Reschly, D. (1981, April). Continuing education needs of school psychologists. In *Leadership in school psychology*. Symposium conducted at the meeting of the National Association of School Psychologists.
- Reschly, D. (1982, March). *SOMPA research: First facts*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1982, March). *Neuropsychological vs behavioral models: To explain or to change*? Invited paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1983, March). *Convergent and discriminant validity of the Children's Adaptive Behavior Scale*. Paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1983, March). *Neuropsychological vs behavioral models: To explain or to change*? Invited paper presented at the meeting of the National Association of School Psychologists.
- Reschly, D. (1983, April). The right questions (finally): Comments on the National Academy of Sciences report on mild mental retardation classification/placement. In *Placing children in special education: Findings of the National Academy of Sciences panel*. Symposium conducted at the meeting of the American Educational Research Association, Montreal, Canada. (Invited)
- Reschly, D. J. (1984, April). *ABIC and ELP validity: The search for psychological meaning and educational relevance*. Paper presented at the meeting of the National Association of School Psychologists, Philadelphia, PA.
- Reschly, D. J. (1984, April). *School neuropsychology: Excess baggage in psychoeducational assessment*. Paper presented at the meeting of the National Association of School Psychologists, Philadelphia, PA.
- Reschly, D. J., Graham-Clay, S., & Gresham, F. M. (1984, May). *Adaptive behavior measures with mildly retarded students: The name IS the same but the results are different*. Paper presented at the meeting of the American Association on Mental Deficiency.

- Reschly, D. J. (1984, July). *Mild mental retardation: An international perspective*. Paper presented at the meeting of the VII International School Psychology Colloquium, Orleans, France. (Invited)
- Reschly, D. J. (1985, April). *Psychometric differences between nonimpaired and mildly impaired black students*. Paper presented at the meeting of the National Association of School Psychologists, Las Vegas, NV.
- Reschly, D. J. (1985, April). *School neuropsychology: Excess baggage in psychoeducational assessment*. Paper presented at the meeting of the National Association of School Psychologists, Las Vegas, NV.
- Reschly, D. J. (1985, August). Myths and realities in minority special education overrepresentation. Invited paper in Placement of children in special education: Scientific issues and policy trends. Board of Scientific Affairs Symposium conducted at the Annual Convention of the American Psychological Association, Los Angeles, CA.
- Reschly, D. J., & Kicklighter, R. J. (1985, August). *Comparison of black and white EMR students from Marshall v. Georgia*. Paper presented at the meeting of the American Psychological Association, Los Angeles, CA.
- Reschly, D. J. (1985, December). Invited participant and speaker. Wingspread Conference on the Education of Students with Special Needs: Research Findings and Implications for Policy and Practice, Racine, WI.
- Reschly, D. J. (1986, April). *The research integration project and special education reform: Implications for school psychologists*. Paper presented at the meeting of the National Association of School Psychologists, Hollywood, FL.
- Reschly, D. J. (1986, April). Discussant. *New directions in the assessment of behavior disorders*. Symposium conducted at the meeting of the National Association of School Psychologists, Hollywood, FL.
- Reschly, D. J. (1986, April). Chair. *Refereed journals in school psychology*. Editor's Roundtable conducted at the meeting of the National Association of School Psychologists, Hollywood, FL.
- Corkery, J., McDougall, L., & Reschly, D. (1986, April). *Testing or intervention? Effects of behavioral interviews with referral agents*. Paper presented at the meeting of the National Association of School Psychologists, Hollywood, FL.
- Reschly, D. J. (1986, May). Moderator and Discussant. *The special education reform movement: Implications for students now classified as mildly mentally retarded*. American Association on Mental Deficiency, Denver, CO.
- Reschly, D. J. (1986, May). The quiet revolution: Changes in educational criteria, placement, and programming for the mildly retarded. Invited paper in *Sociocultural mental retardation: Perspectives and issues in prevention and treatment*. Multidisciplinary Session conducted at the Annual Convention of the American Association on Mental Deficiency, Denver, CO.
- Reschly, D. J. (1986, August). Adaptive behavior: Issues in classification, placement, program planning, and interventions. In *Social competence characteristics of mildly handicapped children.* Symposium conducted at the Annual Convention of the American Psychological Association, Washington, DC.
- Reschly, D., & Casey, A. (1987, March). Effects of behavioral consultation training on school psychologists. In *Special/regular education reform: Preparing for the revolution*

in school psychology. Symposium conducted at the Annual Convention of the National Association of School Psychologists, New Orleans, LA.

- Grimes, J., & Reschly, D. (1987, March). *Project RE-AIM goals and initial outcomes*. Paper presented at the meeting of the National Association of School Psychologists, New Orleans, LA.
- Reschly, D. (1987, May). *The influence of the AAMD classification manual on placement bias litigation*. Invited paper presented at the meeting of the American Association on Mental Deficiency, Los Angeles, CA.
- Reschly, D. (1987, May). *Development of the S-1 Federal Court defense against allegations of discrimination due to minority EMR overrepresentation.* Invited paper presented at the Annual Convention of the American Association on Mental Deficiency, Los Angeles, CA.
- Reschly, D. (1987, May). *The continuing saga of minority misclassification litigation*. In symposium conducted at the meeting of the American Association on Mental Deficiency, Los Angeles, CA.
- Reschly, D. (1987, August). Evaluation of RE-AIM. In *Alternative designs for alternative delivery systems*. Symposium conducted at the meeting of the American Psychological Association, New York, NY.
- Reschly, D. (1987, August). A statewide consultation project. *In Behavioral consultation research: A synthesis of the Mardi Gras symposium*. Symposium at the Annual Convention of the American Psychological Association, New York, NY.
- Reschly, D. (1988, April). Chair. *Special education reform/school psychology revolution.* Symposium at the Annual Convention of the National Association of School Psychologists, Chicago, IL.
- Binder, M., Marks, R., & Reschly, D. J. (1988, April). RE-AIM results: Participants' evaluation of training and commitment to reforms. In *Special education reform/school psychology revolution*. Symposium conducted at the meeting of the National Association of School Psychologists, Chicago, IL.
- Grimes, J. P., & Reschly, D. J. (1988, April). The relevant educational assessment and intervention models. In *Special education reform/school psychology revolution*. Symposium conducted at the meeting of the National Association of School Psychologists, Chicago, IL.
- Pierce, K., Reschly, D., Casey, A., & Derr, S. (1988, April). RE-AIM results: Acquisition of behavior consultation skills, consultee evaluations, and student outcomes. In *Special education reform/school psychology revolution*. Symposium conducted at the meeting of the National Association of School Psychologists, Chicago, IL.
- Reschly, D. (1989, March). *Legal and ethical issues in the design of alternative delivery systems*. Paper presented at the Annual Convention of the National Association of School Psychologists, Boston, MA.
- Reschly, D. J., & McMaster-Beyer, M. (1990, April). *Trends and non-trends in school psychology graduate education*. Paper presented at the meeting of the National Association of School Psychologists, San Francisco, CA.
- Prasse, D. P., & Reschly, D. J. (1990, April). *Legal challenges to special education reform*. Paper presented at the meeting of the National Association of School Psychologists, San Francisco, CA.

- Reschly, D. J. (1990, April). *The Iowa Renewed Services Delivery System baseline results: Implications for national reform plans*. Paper presented at the Annual Convention for the national Association of School Psychologists, San Francisco, CA.
- Reschly, D. (1990, July). *Trends in the graduate education of school psychologists in the United States.* Paper presented at the Thirteenth Annual International School Psychology Colloquium, Salve Regina College, Newport, RI.
- Reiher, T. C., & Reschly, D. J. (1990, October). *Teacher ratings of support services for Iowa behaviorally disordered students*. Paper presented at the meeting of the Iowa Council for Exceptional Children, Des Moines, IA.
- Reschly, D. J. (1991, March). *University faculty shortages: A 1989-1991 study of filled and unfilled vacancies*. Annual Convention of the National Association of School Psychologists, Dallas.
- Reschly, D. J. (1991, March). Symposium Organizer and Chair. *Personnel shortages: The school psychology crisis of the 1990s and beyond*. Meeting of the National Association of School Psychologists, Dallas, TX.
- Reschly, D. J., & Ullman, J. (1991, March). Redefining service delivery options for school psychologists: Current status and the Iowa experience. In *Training initiatives in school psychology: Programs and perspectives*. Symposium conducted at the meeting of the National Association of School Psychologists, Dallas, TX.
- Reschly, D. J., & McMaster-Beyer, M. (1991, March). *Program enrollment and graduates: A twenty-year decline*. Paper presented at the meeting of the National Association of School Psychologists, Dallas TX.
- Reschly D. J., & Connolly, L. M. (1991, March). University faculty shortages: A 1989-1991 study of filled and unfilled vacancies. In *Personnel shortages: The school psychology crisis of the 1990s and beyond*. Symposium conducted at the meeting of the National Association of School Psychologists, Dallas, TX.
- Reschly, D. J., Flugum, K., & Golbert, K. (1991, August). *Influences of intervention quality on the outcomes of prereferral interventions.* Annual Convention of the American Psychological Association, San Francisco.
- Reschly, D. J. & Starkweather, A. (1992, March). *Alternative educational delivery systems: The emerging consensus among practitioners and faculty*. Paper presented at the meeting of the National Association of School Psychologists, Nashville, TN.
- Reschly, D. J. (1992, March). *School psychology faculty and practitioners' demographics, job satisfaction, and role preferences.* Paper presented at the meeting of the National Association of School Psychologists, Nashville, TN.
- Reschly, D. J. (1992, March). IQ testing: Our past, not our future. Invited address. In *The Future of Psychological Assessment.* Symposium conducted at the meeting of the National Association of School Psychologists, Nashville, TN.
- Reschly, D. J. & Flugum, (1992). *Prediction of consultation short- and long-term outcomes.* Annual Convention of the American Psychological Association, Toronto.
- Reschly, D. J. (1993, August). *School psychology and minority overrepresentation.* Paper. SSSP. Toronto.
- Andresen, K. R., & Reschly, D. J. (1993). *Effects of the conceptualization of student problems on teacher self-efficacy.* Annual Convention of the National Association of School Psychologists. Washington DC

- Reschly, D. J. (1993, March). *The future of assessment.* Debate. Annual Convention of the National Association of School Psychologists, Washington D.C.
- Reschly, D. J. (1993, March). *Functional assessment for classification and intervention*. Preconvention Workshop. NASP.
- Reschly, D. J. (1994, March). *System reform implications for the training of school psychologists.* Annual Convention of the National Association of School Psychologists, Seattle.
- Reschly, D. J. (1994, March). *Analysis of minority overrepresentation research and litigation: Implications for system reform.* Annual Convention of the National Association of School Psychologists, Seattle.
- Reschly, D. J. (1994, March). Assessment issues and NASP Policy. Invited presentation. In *The future of psychological assessment*. Symposium. Annual Convention of the National Association of School Psychologists, Seattle.
- Reschly, D. J. (1994, August). Behavior Assessment Technology and the Revision of the Standards for Educational and Psychological Testing, Symposium. Annual Convention American Psychological Association, Los Angeles.
- Reschly, D. J. (1994, August). Variables related to behavioral consultation outcomes. In *Behavior consultation: Advances in research and practice.* Symposium. Annual Convention American Psychological Association, Los Angeles.
- Reschly, D. J. (1995, January). *IQ and Special Education: History, Current Status, and Alternatives*. Invited Address. Board on Testing and Assessment, National Research Council, National Academy of Sciences, LaJolla, CA.
- Reschly, D. J., Starkweather, A. R., Birtwistle, J., & Dawson, M. M. (1995, July). *Role Preferences and Priorities: Comparisons of British (Educational) and American (School) Psychologists.* Paper Presented at the XVIII International School Psychology Colloquium, University of Dundee, Dundee, Scotland.
- Reschly, D. J. (1995, August). *Characteristics of school psychology graduate education and school-based practice: Implications for doctoral specialty definition.* Paper presented at the meeting of the Council of Directors of School Psychology Programs Second Annual School Psychology Training Conference, American Psychological Association, New York, NY.
- Reschly, D. J. (1995, August). *System change in the heartland*. Paper presented at the Second Annual Institute for Administrators of School Psychological Services, American Psychological Association, New York.
- Reschly, D. J. (1995, August). *Politics or science—The Bell Curve controversy*. In symposium presented at the meeting of the American Psychological Association, New York.
- Reschly, D. J. (1996, April). Approaches to the Analysis and Resolution of Disproportionate Minority Participation in General and Special Education Programs, Mini-Skills Workshop, National Association of School Psychologists Annual Convention, Atlanta.
- Reschly, D. J., & Wilson, M. S. (1996, August). Psychologists' Choices of Assessment Instruments: Malpractice Litigation Looking for a Place to Happen? American Psychological Association Symposium Paper, Annual Convention, Toronto

- Reschly, D. J. (1997, March). Analysis and Prevention of Disproportionate Minority Representation in General and Special Education Programs. Annual Convention of the National Association of School Psychologists, Anaheim.
- Reschly, D. J. (1998, April). *Review and critique of the responsibilities of test users in the proposed APA/AERA/NCME standards*. Paper presented as part of symposium, "Standards for educational and psychological testing in the 21st century." Annual Convention of the National Association of School Psychologists, Anaheim, CA.
- Ikeda, M. J., & Reschly, D. J. (1997). *Application of problem solving to low incidence conditions and evaluation of effects of problem solving*. Presented as part of a day long workshop at the National Association of School Psychologists Annual Conference, Anaheim, CA, April 1997.
- Reschly, D. J. (1997). *Patterns of disproportionate representation and strategies to reduce overrepresentation in special education.* Paper presented at the Annual Convention of the National Association for Multicultural Education, Albuquerque, New Mexico.
- Reschly, D. J. (1998, April). *Securing school psychology's future: Data-based decision making and outcomes criteria.* Preconvention Workshop, Annual Convention of the National Association of School Psychologists, Orlando FL.
- Reschly, D. J. (1998, April). *Special education categorical diagnoses: Communicating too little and too much.* Paper presented as part of symposium, "Boxes, little boxes, no more little boxes: A shift from categorical to noncategorical needs-based special education." Annual Convention of the National Association of School Psychologists, Orlando FL.
- Reschly, D. J. (1998, April). *Profile analysis: Reification of error*. Paper presented as part of symposium, "A critical appraisal of *Kaufman's Intelligent Testing with the WISC-III.* Annual Convention of the National Association of School Psychologists, Orlando FL.
- Reschly, D. J. (1998, April). *Debate: School psychology and mental health: Is it time to sever the connection.* (with Irwin Hyman). Annual Meeting of the Trainers of School Psychologists, Orlando FL.
- Reschly, D. J. (1998, August). *School psychology: Is there evidence of change?* Annual Convention of the American Psychological Association, San Francisco.
- Reschly, D. J. (1999, August). *Dilemmas for psychologists who determine disability status in educational settings.* Annual Convention of the American Psychological Association, Boston.
- Reschly, D. J., Ikeda, M. (2000, March). *Comparisons of school psychologists with and without IQ: Roles, assessment practices, and job satisfaction.* Annual Convention of the National Association of School Psychologists,, New Orleans, LA.
- Reschly, D. J., & Hosp, J. (2000, August). *Regional and Setting Differences in School Psychology Practice.* Annual Convention of the American Psychological Association, Washington DC.
- Reschly, D. J. (2001, April). *Minority overrepresentation: New legal requirements, alternative criteria, and solutions.* Mini-skills Workshop, Annual Convention of the National Association of School Psychologists, Washington DC.

- Reschly, D. J. (2001, April). *Black School Psychologists: Roles, Satisfaction, Assessment Practices, and Reform Attitudes.* Poster, Annual Convention of the National Association of School Psychologists, Washington DC.
- Reschly, D. J. (2001, August). Black School Psychologists' Evaluations of Reform Themes and Special Education Acceptability. Poster, Annual Convention of the American Psychological Association, San Francisco.
- Reschly, D. J. (2001, August). Reform-Revolution Revisited: Outcomes Criteria and School Psychology Change in the 21st Century. Invited address, Division 16 at the Annual Convention of the American Psychological Association, San Francisco.
- Reschly, D. J. & Rosenfield, S. (February, 2002). Minority Overrepresentation: Legal Issues and Intervention Alternatives. Annual Convention of the National Association of School Psychologists, Chicago.
- Reschly, D. J. (February, 2002). *State and National Disproportionality Patterns by Disability and Sociocultural Group.* Mini-skills Workshop, Annual Convention of the National Association of School Psychologists, Chicago.
- Reschly, D. J., & Harry, B. (April 2002). *Minority Overrepresentation in Special Education: The NRC Report.* Council for Exceptional Children, New York.
- Reschly, D. J. (2002, August). *Symposium organizer and chair, The National Research Council Report on SSA Eligibility in MR* and paper *Combining Information on Intelligence and Adaptive Behavior in Eligibility Decisions.* Annual Convention of the American Psychological Association, Chicago.
- Reschly, D. J., Hosp, J. L., & Schmied, C. M. (February 2003). *And Miles to Go….State SLD Requirements and National Recommendations.* International Conference of the Learning Disabilities Association. Chicago
- Ysseldyke, J. E., Reschly, D. J., & Vanderwood, M. (April 2003). Full-day Workshop on Assessment. National Association of School Psychologists Annual Convention. Toronto.
- Reschly, D. J. (2003, April). *Redefinition of Learning Disabilities*. Council for Exceptional Children Annual Convention, Seattle.
- Reschly, D. J. (March 2003). *Demise of IQ-Achievement Discrepancy: What Are the Alternatives.* National Association of School Psychologists Annual Convention, Dallas
- Reschly, D. J. (March 2004).
- Reschly, D. J., Ysseldyke, J. E., & Vanderwood, M. (April 2004). Full-day Workshop on Assessment. National Association of School Psychologists Annual Convention. Dallas.
- Reschly, D.J. (April 2004). *Trends in State SLD Criteria*. Presented as part of the Symposium, NRCLD's Classification Studies, Focus Groups, and State Surveys. Council for Exceptional Children Annual Convention. New Orleans.
- Reschly, D. J. (June 2004). *Alternative Approaches to Disability Classification*. Third Anglo-American Conference on Special Education and School Reform. Cambridge England.

Note: Refereed presentations at national learned society meetings 2005-2006 to be added

- Reschly, D. J. (2007, April 19). *Specific learning disabilities identification policies: Choices and consequences.* Paper Annual Convention of the Council for Exceptional Children, Louisville, KY.
- Reschly, D. J. (2007, March 29). *Paradigm shift and beyond: Improving results for all.* Invited general session address, Annual Convention National Association of School Psychologists, New York City.
- Reschly, D. J., & Patton, J. M. (2007, March 30). *Overrepresentation policy, prevention, early intervention/treatment, and system change.* Invited 4 hour pre-convention workshop Annual Convention National Association of School Psychologists, New York City.
- Reschly, D. J. (2007, August 19). Organized symposium, *Controversies in determination of mental retardation in death penalty appeals* and presented paper, *Misunderstandings in death penalty appeals: Varying MR conceptions and criteria.* Annual Convention American Psychological Association, San Francisco.
- Reschly, D. J. (2009). *Consequences of school psychologists' decisions: Death penalty and SSI outcomes*. Annual Convention of the National Association of School Psychologists, Boston.
- Reschly, D. J. (2009, August 7). Organized symposium, *Death Penalty Court Decisions and Mental Retardation Classification and Research,* and presented paper, *Authoritative Conceptions of Mental Retardation and Atkins Decisions.* Annual Convention of the American Psychological Association. Toronto.
- Reschly, D. J. (2009, August 6). *School psychology paradigm shift: or Cronbach's two disciplines of scientific psychology.* Annual Convention of the American Psychological Association. Toronto.
- Reschly, D. J., & McGraner, K. L. (2010, March). *Improving teacher preparation with evidence-based innovation configurations in reading and math.* Annual Convention of the Council for Exceptional Children, Nashville, TN.
- Reschly, D. J., & Gresham, F. M. (2010, August*). Standard of practice and Flynn Effect testimony in death penalty appeals.* Annual Convention of the American Psychological Association, San Diego.
- Welsh, J. S. & Reschly, D. J. (2011, February 23). *Survival skills for litigation: Preparation, testimony, and the Daubert challenge.* Invited Workshop, National Association of School Psychologists, San Francisco.
- Oliver, R. M., & Reschly, D. J. (2011, February 25). *State SLD identification policies: A changing landscape since the reauthorization of IDEA 2004.* Poster Annual Convention National Association of School Psychologists, San Francisco.
- Reschly, D. J. (2011, April). *Evaluating teacher effectiveness: What does it mean for special educators.* Annual Convention of the Council for Exceptional Children, Washington DC.
- Welsh, J. S. & Reschly, D. J. (2012). *Survival skills for litigation: Preparation, testimony, and the Daubert challenge.* Invited Workshop, National Association of School Psychologists, Philadelphia.
- Welsh, J. S. & Reschly, D. J. (2013). *Survival skills for litigation: Preparation, testimony, and the Daubert challenge.* Invited Workshop, National Association of School Psychologists, Seattle.

Other Presentations

<u>Colloquia at the following universities</u> (listed in chronological order)

University of Wisconsin-Eau Claire, University of British Columbia, University of Utah, University of Oklahoma, University of Arizona, Wichita State University, Memphis State University, James Madison University, University of Georgia (twice), Pennsylvania State University (twice), New York University, University of Pittsburgh, University of Oregon (twice), Indiana State University, Illinois State University (twice), Louisiana State University, San Diego State University, University of California-Riverside (twice), Ohio State University, Syracuse University, University of Kentucky, Governor's State University (IL), Northern Illinois University, Vanderbilt University, University of South Carolina, Mississippi State University, University of Texas (twice), University of Minnesota, Iowa State University, City University of New York-Queens, University of Iowa, University of Otago (NZ), Massey University (NZ)

Colloquium topics have included empirical studies on bias in assessment, legal issues, mild mental retardation classification issues, and school psychology professional issues.

<u>Keynote Addresses and Workshops in 47 States (Over 300 presentations)</u>

- Reschly, D. (1976, February). *Use of behavioral consultation techniques in interventions for chronically disruptive students*. Presentation. Iowa Department of Public Instruction Workshop for School Psychologists.
- Reschly, D. (1976, August). *Issues in the classification, assessment, and interventions for children with emotional disabilities*. Presentation. Iowa Department of Public Instruction Workshop for School Psychologists, Waterloo, IA.
- Reschly, D. (1976, October). *Adaptive behavior assessment and interventions with mentally retarded students*. Presentation. Iowa Department of Public Instruction Workshop for School Psychologists, Ames, IA.
- Reschly, D. (1976, November). *Behavioral consultation in schools*. Presentation. Iowa Department of Public Instruction Workshop for School Psychologists, Des Moines, IA.
- Reschly, D. (1976, November). *Recent research in intellectual assessment*. Presentation. Metropolitan Nashville Inservice Meeting for School Psychologists, Nashville, TN.
- Reschly, D. (1977, April). *Behavioral consultation with parents and teachers*. Presentation. University of Wisconsin-Eau Claire, Sixth Annual School Psychology Institute, Eau Claire, WI.
- Reschly, D. (1977, May). *Nonbiased assessment and school psychologists*. Presentation. Michigan Association of School Psychologists.
- Reschly, D. (1977, May). *Legal challenges to school psychological assessment*. Presentation. Area Education Agency IX, Davenport, IA.
- Reschly, D. (1977, October). *Adaptive behavior assessment with the mildly retarded*. Presentation. Area Education Agency VII, Waterloo, IA.

- Reschly, D. (1977, November). School Psychologists and assessment in the future. P. O. Wagner Memorial Address, Ohio School Psychologist Association.
- Reschly, D. (1977, December). *Nondiscrimination in placement: The challenge to school psychologists*. Presentation. South Dakota Association of School Psychologists, Vermillion, SD.
- Reschly, D. (1978, February). *The measurement and use of adaptive behavior in special education classification and programming*. Presentation. Special Study Institute for Intern School Psychologists, Division of Special Education, Ohio Department of Education, Columbus, OH.
- Reschly, D. (1979, January). *Assessment of adaptive behavior in mental disabilities diagnosis and programming*. Presentation. Area Education Agency VI, Marshalltown, IA.
- Reschly, D. (1979, April). *Nonbiased assessment and mild mental retardation.* Presentation. Area Education Agency V, Ft. Dodge, IA.
- Reschly, D. (1979, May). *Measurement and use of adaptive behavior*. Workshop. Council Bluffs Public Schools and Iowa Department of Public Instruction, Council Bluffs, IA.
- Reschly, D. (1979, July). *What's new in assessment*. Colloquium. University of British Columbia, Vancouver, BC.
- Reschly, D. (1979, October). *Bias in assessment: What are the issues?* Keynote address. Georgia Association of School Psychologists Fall Workshop.
- Reschly, D. (1979, September). *University personnel as a support system for psychological research in the schools*. Presentation. Iowa Department of Public Instruction Workshop for School Psychologists.
- Reschly, D. (1979, December). *Bias in assessment: What are the issues?* Keynote address. Iowa Educational Research and Evaluation Association.
- Reschly, D. (1980, April). *Bias in assessment: Differing conceptions and empirical results*. Colloquium. University of Utah, Salt Lake City, UT.
- Oakland, T., & Reschly, D. (1980, April). *Nonbiased assessment*. Preconvention Workshop. National Association of School Psychologists Annual Convention, Washington, DC.
- Reschly, D. (1980, April). *Overview of PL 94-142*. Presentation. Morningside College, Sioux City, IA.
- Reschly, D. (1980, April). *Characteristics of handicapped children*. Presentation. Morningside College, Sioux City, IA.
- Reschly, D. (1980, May). *Adaptive behavior and nonbiased assessment*. Workshop. University of Wisconsin-Eau Claire, Ninth Annual School Psychology Institute.
- Reschly, D. (1980, May). *Bias in assessment: Differing conceptions and empirical results*. Keynote address. South Carolina Association of School Psychologists Spring Convention.
- Reschly, D. (1980, May). *Adaptive behavior: Background, assessment, and practices*. Workshop. Iowa Department of Public Instruction Special Institute.
- Reschly, D. (1980, June). *Nondiscriminatory assessment: Quality indicators*. Workshop. Indianapolis Public Schools.

- Reschly, D. (1980, June). Invited participant, Spring Hill Symposium on the Future of Psychology in the Schools. Minneapolis, MN.
- Reschly, D. (1980, July & August). *Psychoeducational assessment*. Workshop. Louisiana State Department of Education.
- Reschly, D. (1980, September). *Trends in school psychological assessment*. Keynote address. Association of School Psychologists.
- Reschly, D. (1980, October). *Nondiscriminatory assessment*. Workshop. Colorado Society of School Psychologists Fall Convention.
- Reschly, D. (1980, October). *Recent research on test bias*. Colloquium. University of Oklahoma.
- Reschly, D. (1980, November). *What's right about school psychology*. Keynote address. Oklahoma School Psychological Association Fall Convention.
- Reschly, D. (1980, November). *Nonbiased assessment*. Workshop. Oklahoma School Psychological Association Fall Convention.
- Reschly, D. (1980, December). *Nonbiased assessment*. Workshop. Illinois Department of Education and Illinois School Psychologists Association, Suburban Chicago.
- Reschly, D. (1981, January). Nonbiased assessment. Workshop for Illinois School Psychologists Association and the Chicago Public Schools.
- Reschly, D. (1981, January). *Empirical studies of test bias*. Colloquium. University of Arizona.
- Reschly, D. (1981, January). *Nonbiased assessment*. Workshop. Arizona State School Psychologists Association.
- Reschly, D. (1981, February). *School psychology and the issue of bias*. Colloquium. Wichita State University, Wichita, KS.
- Reschly, D. (1981, February). *Research on SOMPA*. Workshop. Wichita Public Schools, Wichita, KS.
- Reschly, D. (1981, February). *Trends in psychoeducational assessment*. Workshop. Heartland Area Education Agency 11.
- Oakland, T., & Reschly, D. (1981, April). *Nonbiased assessment*. Preconvention Workshop. National Association of School Psychologists Annual Convention, Houston, TX.
- Reschly, D. (1981, May). *Nondiscriminatory assessment*. Workshop. Texas Psychological Association.
- Reschly, D. (1981, May). *Research on performance of minorities on standardized tests*. Colloquium. Memphis State University.
- Reschly, D. (1981, July). *Trends in research, court opinions, and legislation regarding bias*. Colloquium. James Madison University Annual Summer Institute for School Psychologists.
- Reschly, D. (1981, August). *Psychoeducational assessment*. Workshop. Louisiana State Department of Education.
- Reschly, D. (1981, September). *Assessment of social skills*. Workshop. Iowa Department of Public Instruction.
- Reschly, D. (1981, October). *Current trends in school psychology*. Keynote address. Oklahoma School Psychology Association Fall Convention.

- Reschly, D. (1981, October). *Behavioral consultation*. Workshop. Oklahoma School Psychology Association Fall Convention.
- Reschly, D. (1981, November). Invited participant. Olympia Conference on Planning the Future of School Psychology.
- Reschly, D. (1981, November). *Nonbiased assessment*. Workshop. Florida Association of School Psychologists.
- Reschly, D. (1982, January). *Professional issues related to assessment of adaptive behavior*. Workshop. Grant Wood Area Education Agency 10, Cedar Rapids, IA.
- Reschly, D. (1982, April). *Current developments in school psychology*. Continuing Education Presentation. Mississippi Bend Area Education Agency 9 School Psychologists.
- Reschly, D. (1982, April). *Fair and useful assessment for minority students*. Workshop. Illinois State Board of Education, Mt. Vernon, IL.
- Reschly, D. (1982, April). *Placement bias litigation and psychoeducational assessment*. Invited paper. Buros-Nebraska Symposium on Measurement and Testing.
- Reschly, D. (1982, May). *Discrimination in special education assessment: Myth and reality*. Colloquium. University of Georgia.
- Reschly, D. (1982, September). *Assessing adaptive behavior*. Inservice. Arrowhead Education Agency.
- Reschly, D. (1982, October). *Nontest based assessment of children*. Workshop. North Carolina School Psychology Association Fall Conference, Wrightsville Beach, NC.
- Reschly, D. (1982, October). *School psychology today: Progress, not impasse*. Colloquium. Pennsylvania State University.
- Reschly, D. (1982, October). *Use of social competence data in classification/placement and program planning/intervention decisions*. Workshop. Sixteenth Annual Pennsylvania School Psychologists Conference.
- Reschly, D. (1983, January). *School psychology in the decade ahead: Old problems, new solutions*. Keynote address. New Jersey Association of School Psychologists Winter Meeting.
- Reschly, D. (1983, January). *Use of social competence information in classification/placement decisions*. Seminar. New York City Association of School Psychologists.
- Reschly, D. (1983, January). *Use of social skills and adaptive behavior data in programming: IEP objectives and least restrictive environment*. Keynote address. Cuyahoga Special Education Service Center, Cuyahoga, OH.
- Reschly, D. (1983, March). *Beyond test bias: Appropriate assessment and programming for handicapped minority students*. Keynote address. Mississippi Association for Psychology in the Schools Spring Meeting.
- Reschly, D. (1983, April). *Recent developments in ability testing*. Presentation. Iowa Psychological Association Continuing Education, Ames, IA.
- Reschly, D., & Fleig, G. (1983, May). *Conflicting assessment information: Separating the wheat from the chaff*. Invited workshop. Fourth National Institute on Legal Problems of Educating the Handicapped.

- Reschly, D. (1983, June). *Learning problems: Handicaps or cultural differences? Appropriate assessment for minority students*. Workshop. Central Ohio Special Education Regional Resource Center, Columbus, OH.
- Reschly, D. (1983, September). *Screening and monitoring referrals*. Workshop. Schaumberg Public Schools, Schaumberg, IL.
- Reschly, D. (1983, October). Keynote address. Georgia Association of School Psychologists, Rock Eagle, GA.
- Reschly, D. (1983, October). Keynote address. Washington Association of School Psychologists, Wenatchee, WA.
- Reschly, D. (1983, October). *Recent advances in assessment*. Workshop. AEA VII staff, Waterloo, IA.
- Reschly, D. (1983, November). Keynote address. North Dakota and Northwest Minnesota School Psychologists, Moorhead, MN.
- Reschly, D. (1983, November). *Assessment of adaptive behavior*. Keynote address and workshop. South Carolina Association of School Psychologists Fall Convention.
- Reschly, D. (1983, November). Assessment for the Teaching/Learning Process. Keynote address at the Ontario Institute for Studies in Education International Symposium on Exceptional Students, Toronto, Canada.
- Reschly, D. (1984, February). School Psychology Workshop. Gary, IN.
- Reschly, D. (1984, February). School Psychology Workshop. NSSEO Inservice, Palentine, IL.
- Reschly, D. (1984, March). *Current issues and recent advances in assessment of the handicapped*. State of Virginia Department of Education Workshop for Related Services Personnel.
- Reschly, D. (1984, April). *Recent developments in ability testing and nonbiased assessment*. Seminar. Iowa Psychological Association Continuing Education, Ames, IA.
- Reschly, D. (1984, May). *Beyond test bias and minority overrepresentation*. General Session Address. Fifth National Institute on Legal Problems of Educating the Handicapped, Chicago, IL.
- Reschly, D. (1984, May). *Assumptions in placement bias litigation: A research agenda in mild mental retardation*. First Annual Pittsburgh Symposium on Research with the Handicapped, Pittsburgh, PA.
- Reschly, D. (1984, May). *Adaptive behavior and social skills in classification and placement decisions*. Thirteenth Annual School Psychology Institute, University of Wisconsin, Eau Claire, WI.
- Reschly, D. J. (1984, July). Mild mental retardation: An international perspective. Paper presented at the VII International School Psychology Colloquium, Orleans, France.
- Reschly, D. (1984, September). *Choices and alternatives for compliance with psychoeducational legal requirements*. Iowa DPI Conference on Reevaluation of Assessment Practices.
- Reschly, D. (1984, September). *Due process and testing practices*. AEA7, Waterloo, IA.
- Reschly, D. (1984, September). *Social competence: Research and interventions*. Kentucky Association of School Psychologists, Lexington, KY.

- Reschly, D. (1984, October). *Avoiding placement bias litigation: Lessons from Larry P., PASE, and Marshall*. Presentation. National Association of Directors of Special Education.
- Reschly, D. (1984, October). *Potpourri of school psychology issues*. Iowa School Psychology Association.
- Reschly, D. (1984, October). *Social skills assessment and intervention*. Northern New England School Psychology Conference.
- Reschly, D. (1984, November). *Adaptive behavior research, assessment, and training*. Florida Association of School Psychologists.
- Reschly, D. (1984, November). *Social competence: Adaptive behavior and social skills*. Tennessee Association of School Psychologists.
- Reschly, D. (1984, November). *Understanding psychoeducational assessment evidence*. Workshop. Due Process Hearing Officers, Virginia Department of Education.
- Reschly, D. (1984, November). *Fair and useful assessment: Current trends*. Workshop. Washington Public Schools, Washington, DC.
- Reschly, D. (1984, December). *Legal influences on intellectual assessment*. Colloquium. University of Arizona, Tucson, AZ.
- Reschly, D. (1984, December). *Trends in assessment*. Workshop. Clark County Public Schools, Las Vegas, NV.
- Reschly, D. (1985, May). Colloquium. University of Oregon, Eugene, OR.
- Reschly, D. (1985, May). Workshop and Keynote Address. Oregon School Psychologists Association, Portland, OR.
- Reschly, D. (1985, June). Presentation. State Department Conference on Identification and Assessment, Maryland State Department of Education, Baltimore, MD.
- Reschly, D. (1985, October). Workshop. Florida State Department of Education, Tampa, FL.
- Reschly, D. (1985, October). Colloquium. School Psychology Faculty and Students. Indiana University, Bloomington, IN.
- Reschly, D. (1985, October). *Social competence*. Workshop. Canton, OH.
- Reschly, D. (1985, November). Address. University of Arizona Conference on Assessment of Minorities, Tucson, AZ.
- Reschly, D. (1986, January). *Assessment of adaptive behavior*. Presentation. South Suburban (Chicago) Special Education Cooperative, Chicago, IL.
- Reschly, D. (1986, February). *Non-biased assessment*. Colloquium. Illinois State University, Normal, IL.
- Reschly, D. (1986, March). *Adaptive behavior assessment*. Keynote address. Minnesota Association for Education of Mentally Retarded Students.
- Reschly, D. (1986, April). *Assessment of social competence for classification and programming*. Workshop. Wisconsin School Psychologists Association.
- Reschly, D. (1986, May). Keynote address. Minnesota Department of Education Conference on Special Education Assessment, Minneapolis, MN.
- Reschly, D. (1986, May). Keynote Address. Arizona Association of School Psychologists Spring Convention, Phoenix, AZ.

- Reschly, D. (1986, June). Address. New Jersey Conference on Special Education, Newark, NJ.
- Reschly, D. (1986, July). *Continuing education videotapes for school psychologists*. Arkansas State Department of Education.
- Reschly, D. (1986, September). Two-day RE-AIM workshop. Atlantic, IA.
- Reschly, D. (1986, September). Two-day RE-AIM workshop. Des Moines, IA.
- Reschly, D. (1986, October). Keynote address and workshop. Arkansas School Psychology Association, Little Rock, AK.
- Reschly, D. (1986, October). *MD data analysis*. Iowa Association of School Psychologists, Altoona, IA.
- Reschly, D. (1986, November). *Mental retardation classification criteria*. Workshop. Minnesota State Department of Education, Minneapolis, MN.
- Reschly, D. (1986, November). *Assessment of adaptive behavior*. Workshop. Minnesota State Department of Education, Brainard, MN.
- Reschly, D. (1987, January). Workshop & Keynote Address. Northern Ohio School Psychology and Special Education meetings, Richfield, OH.
- Reschly, D. (1987, January). *RE-AIM Continuing Education Presentation*. Cedar Rapids, IA.
- Reschly, D. (1987, January). *RE-AIM Continuing Education Presentation*. Elkader, IA.
- Reschly, D. (1987, February). Workshop. Northwest Ohio School Psychologists, Wapakoneta, OH.
- Reschly, D. (1987, February). Workshop. West Central Ohio SERCC, Bluffton College, Bluffton, OH.
- Reschly, D. (1987, March). *Large scale training and evaluation of the impact of behavioral consultation.* Colloquium. Louisiana State University, Baton Rouge, LA.
- Reschly, D. (1987, April). Invited Address. Seminar for Federal Judges sponsored by the Danforth Foundation, Park City, UT.
- Reschly, D. (1987, May). General Session Address. Eighth National Institute on Law and Education of the Handicapped, Scottsdale, AZ.
- Reschly, D. (1987, June). *Behavioral consultation*. Workshop. New Jersey School Psychologists, Freehold, NJ.
- Reschly, D. (1987, September). Keynote address. Minnesota State School Psychologists Meeting, Minneapolis, MN.
- Reschly, D. (1987, October). A*daptive behavior.* Keynote address and workshop. Nebraska State School Psychologists Fall Convention, Lincoln, NE.
- Reschly, D. (1987, November). *Behavioral consultation*. Workshop. Egg Harbor, NJ.
- Reschly, D. (1987, December). Keynote address and workshop. New Jersey Association of School Psychologists, Clark, NJ.
- Reschly, D. (1988, January). Assessment issues and legal developments. General Session Address. CEC-MR International Conference, Mental retardation: Emerging challenges for the future, Honolulu, HI.
- Reschly, D. (1988, March). *Assessment and legal issues*. Presentation. Iowa Conference on Futures in Mental Disabilities.

- Reschly, D. (1988, May). *Why the sky fell on IQ testing, but only in California*. Colloquium. University of California-Riverside, Riverside, CA.
- Reschly, D. (1988, May). *Preparation for the 1990s revolution in the practice of school psychology*. Colloquium. San Diego State University, San Diego, CA.
- Reschly, D. (1988, May). *Tangible evidence vs expert opinion: The psychologist's contribution to legal proceedings*. Presentation. Iowa Psychological Association.
- Reschly, D. (1988, June). *Expanding special Olympics opportunities to junior and senior high school students with mild mental retardation*. Joseph P. Kennedy, Jr., Foundation Symposium, Arlington, VA.
- Reschly, D. (1988, October). Keynote address and workshops. Virginia Association of School Psychologists-Virginia Psychological Association Fall Convention, Norfolk, VA.
- Reschly, D. (1988, October). Keynote address. Indiana Association of School Psychologists, Indianapolis, IN.
- Reschly, D. (1988, November). *Adaptive behavior. W*orkshops and Keynote address. Fall Conference of Florida Association of School Social Workers, Orlando, FL.
- Reschly, D. (1988, November). Workshop. School Psychologists, Bakersfield Public Schools Administration Center, Bakersfield, CA.
- Reschly, D. (1988, December). Presentation. Arkansas Department of Education Staff, Little Rock, AK.
- Reschly, D. (1989, January). *Terminology and classification in mental retardation*. Invited presentation. Committee on Terminology and Classification – Mental Retardation, National Headquarters of the American Association on Mental Retardation, Alexandria, VA.
- Reschly, D. (1989, January). Seminar for administrative law judges. University of Iowa, Iowa City, IA.
- Reschly, D. (1989, February). Keynote address. Utah Association of School Psychologists, Salt Lake City, UT.
- Reschly, D., & Stumme, J. (1989, March). *The school psychologist in the courtroom*. Pre-Convention Workshop (full day). National Association of School Psychologists, Boston, MA.
- Reschly, D. (1989, April). *Minority overrepresentation in programs for the mildly handicapped*. Keynote address. Arkansas Department of Education Conference, Little Rock, AK.
- Reschly, D. (1989, June). *Behavior consultation and school psychology in the 1990s*. Two-day workshop. California Department of Education, San Jose, CA.
- Reschly, D. (1989, July). Presentation. School Psychologists, California Department of Education, Lake Tahoe, CA.
- Reschly, D. (1989, August). Presentation. School Psychologists, California Department of Education, San Diego, CA.
- Reschly, D. (1989, August). Presentation. School Psychologists, Tampa, FL.
- Reschly, D. (1989, August). Presentation. School Psychologists, Clearwater, FL.
- Reschly, D. (1989, September). *Assessment and intervention in adaptive behavior and social skills*. Presentation. Psychologists. Little Rock, AK.
- Reschly, D. (1989, October). Colloquium. Ohio State School Psychology Program, Columbus, OH.

- Reschly, D. (1989, November). Keynote address and workshop. British Columbia Association of School Psychologists, Vancouver, BC.
- Reschly, D. (1989, November). Presentation to faculty representing 11 Ohio university school psychology programs regarding NASP approval procedures, Columbus, OH.
- Reschly, D. (1990, January). *Adaptive Behavior: Definition, assessment, and developing interventions*. Presentation. Iowa Department of Education, Des Moines, IA.
- Reschly, D. (1990, March). Keynote address. Connecticut Symposium on Special Education, Hartford, CT.
- Reschly, D. (1990, March). *Special education law and practice*. Workshop. ED Law Institute, Costa Mesa, CA.
- Reschly, D. (1990, April). Keynote address. Adaptive Behavior Conference, St. Paul, MN.
- Reschly, D. (1990, May). *Found our intelligence: What do they mean?* Invited Presentation. Invitational Conference Center for Applied Psychological Research, Memphis State University, Memphis, TN
- Reschly, D. (1990, June). *Presentation on social competencies*. Pinellas School Officials, Tampa, FL.
- Reschly, D. (1990, September). Colloquium. Riverside County School Psychologists Association, University of California-Riverside, Riverside, CA.
- Reschly, D. (1990, September). Keynote address. San Bernardino County School Psychologists Association, San Bernardino, CA.
- Reschly, D. (1990, September). *School psychology national standards*. Testimony. Oregon Teacher Licensing Commission , Salem, OR.
- Reschly, D. (1990, October). Keynote address. Oklahoma School Psychological Association Fall Meeting, Oklahoma City, OK.
- Reschly, D. (1990, October). *NASP program approval procedures and trends in graduate education.* Presentation. Faculty representing universities in northern California, San Jose, CA.
- Reschly, D. (1990, November). *Evaluation of the Iowa Renewed Services Delivery System*. Invited address. Iowa Educational Research and Evaluation Association, Des Moines, IA.
- Reschly, D. J. (1991, February). *Behavioral models and the 1990s school psychology revolution*. Colloquium. Syracuse University, Syracuse, NY.
- Reschly, D. J. (1991, February). Keynote address. 20th Annual School Psychology Institute, University of Wisconsin-Eau Claire, Eau Claire, WI.
- Reschly, D. J. (1991, February). *School psychology program approval and accreditation: Current standards and trends*. Colloquium. Southern California Consortium of School Psychology Faculty, Los Angeles, CA.
- Reschly, D. J. (1991, April). *The research base for delivery system reform and 1990s changes in school psychological services.* Keynote Address. New Jersey School Psychology Association, Newark, NJ.
- Reschly, D. J. (1991, May). Psychological and educational research and the legal basis for ADHD in the Education of Children with Disabilities Act. Invited Address, Institute on Law and Education of the Handicapped, Phoenix.

- Reschly, D. J. (1991, August). *Interventions for social skills and adaptive behavior deficits*. Continuing Education Workshop. Loess Hills Area Education Agency, Council Bluffs, IA.
- Reschly, D. J. (1991, August). *Evidence for changes in the delivery system and the roles of support services providers*. Continuing Education Workshop. Pine County Special Services Cooperative, Pine City, MN.
- Reschly, D. J. (1991, September). *The two disciplines of scientific psychology and the struggle for the future of school psychology*. Colloquium. University of Kentucky, Lexington, KY.
- Reschly, D. J. (1991, October). *The 1990s and school psychology*. Keynote address. Alabama Association of School Psychologists Annual Convention, Gulf Shores, AL.
- Reschly, D. J. (1991, October). *Preparation of expert witness testimony for <u>when</u> (not if) school psychologists appear in legal proceedings*. Workshop. Alabama Association of School Psychologists Annual Convention, Gulf Shores, AL.
- Reschly, D. J. (1991, November). *Trends in research and legal analyses of bias in assessment and classification*. Keynote address. Tennessee Association of School Psychologists Annual Convention, Chattanooga, TN.
- Reschly, D. J. (1992, January). Keynote address. Illinois Directors of Special Education, Bloomington, IL.
- Reschly, D. J. (1992, January). Colloquium. Psychology Department, Illinois State University, Normal, IL.
- Reschly, D. J. (1992, February). Keynote address. Alaska School Psychology Association, Anchorage, AK.
- Reschly, D. J. (1992, March). *NASP training program standards and preparation of program approval applications*. Workshop. National Association of School Psychologists, Nashville, TN.
- Reschly, D. J. (1992, October). Colloquium. Indiana State University, Terre Haute, IN.
- Reschly, D. J. (1993, March). *The future of assessment.* Debate. National Association of School Psychologists, Washington, DC.
- Reschly, D. J. (1993, March). *Functional assessment for classification and intervention*. Preconvention Workshop. National Association of School Psychologists, Washington, DC.
- Reschly, D. J. (1993, April). *Assessment as it relates to diagnosis and 1990s trends*. Oklahoma School Psychological Association Continuing Education, Oklahoma City, OK.
- Reschly, D. J. (1993, May). *Social skills intervention with survivors of traumatic brain injury*. Keynote address. Phoenix, AZ.
- Reschly, D. J. (1993, June). Colloquium. University of Oregon, Eugene OR.
- Reschly, D. J. (1993, June). Workshop. California Summer Institute, Fresno, CA.
- Reschly, D. J. (1993, August). *Behavioral consultation for school psychologists*. Continuing education presentation. Consortium of northern California counties, Red Bluff, CA.
- Reschly, D. J. (1993, October). Continuing education presentations. Orlando, FL..
- Reschly**,** D. J. (1993, October). Keynote address. Michigan Association of School Psychologists. Traverse City, MI.

- Reschly, D. J. (1993, November). Keynote address and workshop. Florida Association of School Psychologists, Miami, FL.
- Reschly, D. J. (1993, November). Continuing education presentation. Illinois school psychologists. Galesburg, IL.
- Reschly, D. J. (1994, February). *Behavioral problem solving.* Workshop. Psychologists in the High Plains Educational Cooperative, Garden City, KS.
- Reschly, D. J. (1994, March). *Minority assessment issues and the identification of children and youth with ADHD.* Colloquium. San Diego State University, San Diego, CA.
- Reschly, D. J. (1994, April). *Minority overrepresentation in mild disabilities: Expanded educational opportunities or denial of equal rights?* Colloquium. University of California-Irvine, Irvine, CA
- Reschly, D. J. (1994, April). *Re-learning social skills: Children and adolescents with traumatic brain injury.* Presentation. Columbus, OH.
- Reschly, D. J. (1994, September). *Behavioral problem solving.* Workshop. Central Illinois School Psychologists, Galesburg, IL.
- Reschly, D. J. (1994, September). Workshop. Michigan Psychologists, Detroit, MI.
- Reschly, D. J. (1994, October). Colloquium. Penn State School Psychology Program University Park, PA.
- Reschly, D. J. (1994, October). Continuing Education Presentation. Pennsylvania Association of School Psychologists, University Park, PA.
- Reschly, D. J. (1995, May). System Reform and Roles of School Psychologists. Mid-Eastern Pennsylvania School Psychology Association.
- Reschly, D. J. (1995, September). *Interventions for Children and Youth with ADHD and Conduct Disorders*. North Dakota Association of School Psychologists, September, 1995.
- Reschly, D. J. (1996, January). Pre-convention workshop and Keynote Address. Minnesota Association of School Psychologists, St. Cloud, MN.
- Reschly, D. J. (1996, February). Avoiding Due Process Hearings. School Administrators of Iowa, Des Moines.
- Reschly, D. J. (1996, March). *System Reform and the Problem of Minority Over-representation in Special Education Programs.* Keynote Address, California Association of School Psychologists.
- Reschly, D. J. (1996, April). Pre-Convention Workshop and Keynote Address. Tri-State (ID, OR, WA) School Psychology Conference, Portland, OR.
- Reschly, D. J. (1996, August) Behavioral Consultation. Sacramento Public Schools School Psychologists.
- Reschly, D. J. (1996, October). Legal Constraints on Disciplining Students with Behavior Disorders. Iowa Behavioral Initiative Fall Conference.
- Reschly, D. J. (1996, October). Conducting Section 504 Hearings. Iowa Association of School Boards Workshop.
- Reschly, D. J. (1997, June). Outcomes Criteria and Behavioral Intervention: The Keys to School Psychology in the 2000s. Continuing Education Conference for the State of Washington and the Washington Association of School Psychologists, Seattle.
- Reschly, D. J. (1997, September). Behavioral Consultation as the Base for System Reform. LaGrange Area Special Education Services Cooperative, Chicago.

- Reschly, D. J. (1997, October). Legal, Policy and Assessment Issues. Major address at the State of Iowa sponsored conference, Iowa's Culturally and Linguistically Diverse Children with Special Needs, Iowa City, IA.
- Reschly, D. J. (1998, March). Disproportionality: Questions, Statistics, Rationale, and Solutions? Keynote Address at the Twelfth Annual Conference on the Management of Federal/State Data Systems, WESTAT and OSEP, Bethesda, MD.
- Reschly, D. J. (1998, August). Analyses of Overrepresentation: Different Approaches and Different Outcomes. BEUNO National Conference, Sponsored by the University of Colorado, Vail, CO.
- Reschly, D. J. (1998, September). The Demise of the Old-time Religion and the System Reform Imperative. Iowa Department of Education inservice for special educators.
- Reschly, D. J. (1998, October). Securing the Future of School Psychology Through Data-Based Decision Making. Clark County School Psychologists, Las Vegas.
- Reschly, D. J. (1998, October). School Psychology and Leadership in System Reform and Workshop on Disproportionate Minority Representation in Special Education, South Carolina Association of School Psychologists, Columbia SC.
- Reschly, D. J. (1998, October). School Psychology in the 2000s. Keynote Address, Maryland Association of School Psychologists, Baltimore.
- Tilly, W. D. III, Reschly, D. J., & Knoster, T. (1998, November) Using functional assessment to improve the special education process. National Association of State Directors of Special Education Annual Conference, Baltimore.
- Reschly, D. J. (1998, November). School Psychology: Change or Stagnation, Keynote Address for the Mid-South (TN, AL, and MS) Biannual Conference on School Psychology, Tunica, MS.
- Reschly, D. J. (1999, January) Shifting from the old-time religion: Reform trends and system design alternatives. University of Oregon and Willamette Valley special educators. Eugene, OR.
- Reschly, D. J. (1999, January). System Reform in Special Education and School Psychology. South Carolina state-wide conference for directors of special education. Columbia, SC
- Reschly, D. J. (1999, February). The Charge for School Psychologists. Metro Nashville Public Schools Inservice for School Psychologists. Nashville, TN.
- Reschly, D. J. (1999, February) System Reform in Special and General Education. Inservice for general and special education personnel in the Dubuque (IA) Community Schools and the Keystone Area Education Agency
- Reschly, D. J. (1999, March) Design of system reform waivers for performance. Horry County (SC) Public Schools, Myrtle Beach.
- Reschly, D. J. (Multiple Occasions) Special Education Overrepresentation: Assessment Reforms and System Change. Alliance Project Seminars, Los Angeles March, 1999; Nashville, November 2000; Miami, January 2001, Honolulu, February 2001;
- Reschly, D. J. (April 2000). Keynote Address. System Reform and the Future of School Psychology. Tennessee Association of School Psychologists.
- Reschly, D. J. (June 2000). Classification Criteria in a Problem Solving System. Area Education Agency 5, Marshalltown, IA.

- Reschly, D. J. & Fagan, T. K. (November 2000). The Past and Future of School Psychology. Mid-South Regional School Psychology Conference, Mobile Alabama.
- Reschly, D. J. (March 2001). State-wide Testing and Students with Disabilities. Law and Education Conference, Washington DC
- Reschly, D. J. (June 2001). Avoiding Stereotypes: Overrepresentation Statistics, Risk or Composition? Council for Exceptional Children, IDEA Summit, Washington DC
- Reschly, D. J. (July 2001). Overrepresentation, It's Not What You Think It Is: Equal Treatment Studies. US Department of Education, Office of Special Education Programs, Project Directors Summer Meeting. Washington DCReschly, D. J. (August 2001). Keynote address, System Reform and the Design of Services for Students with Learning Disabilities. Minnesota Special Education Director's Conference, Grand Rapids MN
- Reschly, D. J. (August 2001). Reaction paper, *Minority Overrepresentation: The Silent Contributor to LD Prevalence and Diagnostic Confusion*. US Department of Education, Office of Special Education Programs. Learning Disabilities Summit.
- Reschly, D. J. (September 2001) Keynote Address, System Reform, Learning Disabilities, and the Future of School Psychology. Kentucky Association of School Psychologists, Louisville KY.
- Reschly, D. J. (October, November, December 2001). Disproportionate Representation: Facts, Myths, and Solutions. US Department of Education, Improving America's Schools Regional Conferences. Mobile, Reno, San Antonio.Reschly, D. J. (October 2001). Keynote Address, Overrepresentation Patterns and LD Classification Issues: Converging Trends to System Reform. Tennessee Association of School Psychologists, Nashville Reschly, D. J. (December 2001). Continuing Education Workshop, Metro Nashville Public Schools, "Converging Themes: Overrepresentation, MR and LD Classification Issues, and System Reform"
- Reschly, D. J. (February, 2002). National Academy of Sciences Study on Disproportionality of Minority Students in Special Education. U.S. Department of Education, Office of Special Education Programs, Joint Personnel Development/State Improvement Conference, Crystal City, VA.
- Reschly, D. J. (February, 2002). Invited Testimony, Minority Students in Gifted and Special Education. President's Commission of Excellence in Special Education, Houston.
- Reschly, D. J. (March, 2002). Minority Students in Gifted and Special Education. Mid-South Regional Resource Center, Nashville, TN.
- Reschly, D. J. (March, 2002). Minority Students in Gifted and Special Education. WESTAT Conference for State IDEA Data Managers. Washington, DC.
- Reschly, D. J. (April, 2002). Summary of Testimony: Research Recommendations. President's Commission of Excellence in Special Education, Nashville.
- Reschly, D. J., (April, 2002). System Reform Principles: The New Special Education Establishment. Innovations Conference, Kansas City.
- Reschly, D. J., (October, 2002). Reforms in Special Education Eligibility Criteria. Missouri Council of Special Education Administrators, Columbia, MO.
- Reschly, D. J. (July 2002). Legal Issues in School Mental Health Services. Memphis City Schools.

- Reschly, D. J. (October 2002). Mild Mental Retardation Identification. National Organization of Social Security Claimants' Representatives. San Francisco.
- Reschly, D. J. (October 2002). Keynote, RTI and Special Education Reform. 4th Annual Golden Empire Special Education Partnership Conference, Bakersfield, CA .
- Reschly, D. J. (November 2002). Response to Intervention. Northwest Ohio SERRC, Kitland, OH.
- Reschly, D. J. (February 2003). Keynote: SLD Identification and RTI. (psychologists, special educators, and principals) Charleston, SC.
- Reschly, D. J. (June 2003). Disproportionality Statistics and Interverntions. IDEA Partnerships 2nd National Summit on Implementation of IDEA 1997. Arlington, VA.
- Reschly, D. J. (October 2003). Keynote. RTI and Special Education Reform. Kern County School Psychology Conference, Bakersfield, CA.
- Reschly, D. J. (October 2003). Keynote. RTI and Special Education Reform. Washington Association of School Psychologists, Spokane, WA.
- Reschly, D. J. (October 2003). Keynote. RTI and Special Education Reform. Pennsylvania Association of School Psychologists.
- Reschly, D. J. (November 2003). Keynote Address. Keynote. RTI and Special Education Reform Florida Association of School Psychologists. Tampa
- Reschly, D. J. (September 2003). Keynote: The Dog Catches the Truck: What Next? National Innovations Conference. Charleston, SC.
- Reschly, D. J. (January 2004). Keynote. RTI and Special Education Reform. Bremerton Public Schools, Bremerton, WA.
- Reschly, D. J. (March 2004). Keynote. RTI and Special Education Reform. West Central Ohio SERRC, Wapakoneta, OH.
- Reschly, D. J. (March 2004). Keynote: RTI and Special Education Reform. Clark County School District, Las Vegas, NV.
- Reschly, D. J. (April 2004). Colloquium: Disproportionality Causes and Solutions. University of Texas, Austin, TX.
- Reschly, D. J. (October 2004). Keynote: Special Education Overrepresentation: Causes and Solutions. Mississippi Department of Education. Tunica, MS
- Reschly, D. J. (October 2004). Keynote: School Psychology and the Future. Mid-South Regional Conference on Psychology in the Schools. Memphis, TN.
- Reschly, D. J. (November 2004). Problem Solving and Key Intervention Principles. Clark County School District Related Services Personnel. Las Vegas NV
- Reschly, D. J. (February 2005). Keynote: Problem Solving and SLD Identification. School Psychology Institute, Normal IL.
- Reschly, D. J. (February 2005). Keynote: RTI at Three Tiers of Intervention. Pennsylvania Training and Technical Assistance Network. Hershey, PA>
- Reschly, D. J. (February 2005). Response to Intervention. West Chester, PA Schools.
- Reschly, D. J. (July 2005). Keynote: Preparation of School Personnel for RTI. Florida Department of Education Summer Institute for the Florida Association of Student Services Administrators. Stuart, FL.
- Reschly, D. J. (July 2005). Keynote: Alternatives for SLD Identification. National Association of School Psychologists Summer Institute, Las Vegas, NV.

- Reschly, D. J. (August 2005). Keynote: IDEA Re-authorization and RTI Principles. Wyoming School Psychologists Summer Institute. Jackson Hole, WY.
- Reschly, D. J. (August 2005). Keynote: RTI and Prevention of Prevention of Special Education Disproportionality. Louisiana Fall Pupil Appraisal Institute. Baton Rouge, LA
- Reschly, D. J. (August 2005). Fall In-service: RTI and Improving Classroom Results. Westside School District, Omaha NE.
- Reschly, D. J. (September 2005). Keynote: RTI and General Education Reforms. Oregon Confederation of School Administrators. Eugene, OR.
- Reschly, D. J. (September 2005). Keynote: Improving IEPs and Special Education Outcomes. Illinois Alliance of Administrators of Special Education. Chicago.
- Reschly, D. J. (September 2005). Keynote: RTI in General, Remedial, and Special Education. National Innovations Conference, Lansing, MI.
- Vanderbilt University, Kennedy Center for Research on Human Development, Developmental Disabilities Grand Rounds, *Persistence of Minority Overrepresentation in Mild Mental Retardation Despite Court, Legislative, and Social Science Prohibitions."* Nashville, TN, November 2, 2005.
- Reschly, D. J. (October 2005). RTI and Identification of SLD. South Carolina Special Education Administrators Conference, Columbia, SC.
- Reschly, D. J. (October 2005). State policy and RTI. Ohio Department of Education, Columbus, OH.
- Reschly, D. J. (October 2005). Keynote Address. RTI and the Future of School Psychology. North Carolina Association of School Psychologists Fall Conference. Charlotte NC.
- Reschly, D. J. (November 2005) Response to Intervention. Mississippi State Department of Education, Jackson, MS.
- Reschly, D. J. (January 2006). Keynote: Reducing Disproportionality through Early Identification-Treatment and Special Education Exit Criteria. Texas Council of Administrators of Special Education, Austin, TX.
- Reschly, D. J. (February 2006). Keynote: RTI and Special Education System Reform. Minnesota Council for Exceptional Children Winter Conference. Rochester MN.
- Reschly, D. J. (February 2006). Aligning Assessment with Improving Special Education Outcomes. Presentation to South Carolina Department of Education Staff, Columbia, SC.
- Reschly, D. J. (February 2006). Keynote: RTI and School Psychology Services. Mid-Winter Conference, Calhoun Intermediate School District, Marshall, MI.
- Reschly, D. J. (March 2006). Keynote: RTI and Learning Disabilities Identification. IDEA Partnership Regional Meeting. Miami, FL.
- Reschly, D. J. (May 2006). Keynote: Problem Solving. Illinois Problem Solving Conference, DeKalb, IL.
- Reschly, D. J. (May 2006). Keynote: Understanding RTI: What It Is and Why It Works. LRP National Institute on Legal Issues of Educating Individuals with Disabilities. Orlando, FL.

Note: Presentations 2007-2011 to be updated

- Reschly, D. J. (2009, October 3). *Overcoming Barriers to Effective Implementation of Response to Intervention.* Council for Learning Disabilities National Conference Keynote Address,. Dallas, , 2009
- Reschly, D. J. & Smartt, S. M. (2009, May 24). *Barriers to scientifically-based reading instruction.* Invited address, B. F. Skinner Lecture, Association for Applied Behavior Analysis International, Phoenix
- Reschly, D. J. (2010). *Teacher preparation and research-based principles of tiered instruction.* Invited keynote address, Wing Conference on Effective Educational Practices, Berkeley, CA.
- Reschly, D. J. (2011, February 7). *Mild intellectual disability: Characteristics and controversies.* Vanderbilt University Grand Rounds, Department of Hearing and Speech Services.
- Reschly, D. J. (2011, March 24). *Special education: Sky is falling or best is yet to be?* University of Iowa, Center for Disability Research and Education.
- Reschly, D. J. (2011, April 28). *Innovation configurations: Helping pre-service and in-service teachers implement effective classroom practices in urban schools.* Conference Great Teachers for Our City Schools National Summit, Denver, CO.
- Reschly, D. J. (2011, May 20). *Psychological testimony in death penalty appeals due to intellectual disability.* Annual Conference of the Tennessee Association of Criminal Defense Lawyers. Knoxville.
- Reschly, D. J. (2011, June 1).*Improving mathematics achievement through response to intervention.* District Teacher In-Service, Boone Co KY, Florence, KY.
- Reschly, D. J. (2011, June 13). *Developing great teachers for all schools.* Metro Nashville Public Schools.
- Reschly, D. J. (2011, July 20). *Improving the efficacy of teacher preparation programs: General and special education.* Invited paper on Office of Special Education Programs Panel, *Improving the efficacy of teacher preparation programs.* OSEP Project Directors Summer Meeting, Washington DC.
- Reschly, D. J., Holdheide, L. R., & Hougen, M. (2011, July 20). *Improving teacher preparation: Including knowledge and skills in evidence-based practices.* Invited Workshop at OSEP Project Directors Meeting, Washington DC.
- Reschly, D. J. (2011, October). *Issues in the implementation of RTI multiple tiers.* Keynote address, North Carolina School Psychologists Association, Winston-Salem, NC.
- Reschly, D. J. (2011, November 14). *US death penalty and the continuing dilemma of mild intellectual disability.* Colloquium, Department of Psychology, University of Otago, Dunedin, NZ.
- Reschly, D. J. (2011, November 22). *Closing gaps with response to intervention.* Keynote Address, Annual Educational Psychology Forum, Auckland, NZ.

University/Department Service (Since 1975)

- Chair, Iowa State University School Psychology Program Committee, 1975-1998
- Chair, ISU Psychology Department Teaching Evaluation committee, 1977-1980

- Member (elected), ISU Psychology Promotion and Tenure Committee, 1978-1981; 1984-1989, 1991-1997.
- Member, ISU College of Sciences and Humanities Promotion and Tenure Committee, 1982-1983
- Member, ISU Department Affairs Committee, 1977-1983
- Member, ISU Department of Psychology Graduate Program Committee, 1985-1997
- Member, ISU College of Liberal Arts and Sciences Representative Assembly (elected to represent department), 1987-1995; Executive Committee, 1992-1994; Chair, Executive Committee, 1994-1995
- Chair, ISU Faculty Search Committees, 1979; 1982; 1985; 1986; 1988; 1990, 1992, 1995
- Chair, ISU Department Head Search Committee, 1987-1988 (appointed by Dean, College of Sciences and Humanities)
- Member, ISU Psychology Department Grievance Committee, 1983-1988
- Member (elected), ISU Department of Psychology Executive Committee, 1988-1992; 1995-1997
- ISU Department of Psychology Faculty Enhancement (Chair, 1996-1997)
- ISU School/Counseling Diversity Search Member 1994-1996
- Member, ISU University Committee on Handicapped, 1979-1989
- Member, ISU Department of Psychology Faculty Development Committee, 1992-1996
- College of Liberal Arts and Sciences Committee on Faculty and Alumni Recognition (1992-98) (Chair, 1993-1998)
- ISU Provost's Ad Hoc Committee on Selection of University Distinguished Professors (Chair, 1994)
- ISU Ad Hoc Grievance Committee, Professional Studies in Education (Chair, 1994)
- ISU Ad Hoc Committee on Behavior Management, Department of Curriculum and Instruction (1995)
- ISU College of Liberal Arts and Sciences Associate Dean Search Committee (1994)
- ISU College of Liberal Arts and Sciences Five-Year Strategic Plan Writing Committee (1994-95)
- ISU Graduate College Premium for Academic Excellence Committee, 1997-1998
- ISU Co-Chair, College of Education and College of Family and Consumer Sciences Task Force on Collaborative Programs and Services, 1996-1998.
- Vanderbilt University Committee on Peabody College Undergraduate Programs, Member, 1998-2000
- Vanderbilt University Committee on Promotion and Tenure Grievances, Member, 1999-2002
- Vanderbilt University Ad Hoc Committee on the Human Development Counseling Program, Chair, 1998-1999
- Vanderbilt University Department of Leadership and Organizations Chair Search, Member, 1999-2001
- Vanderbilt University Search Committee for Kennedy Center Director, Co-Chair, 2000-2001

- Vanderbilt University Search Committee for Dunn Family Chair in Psychoeducational Assessment, Chair, 1999-2006
- Vanderbilt University Council on Teacher Education, 2000-2007
- Vanderbilt University, Chair Search Committee, Counselor Education 2001-2002
- Vanderbilt University, Member Mental Retardation Search Committee 2001-2002
- Vanderbilt University Chair Department of Special Education, 1998-2006
- Vanderbilt University Dean's Cabinet, 1998-2006
- Vanderbilt University Faculty Senate, 2007-2010
- Faculty Senate Committee on Professional Ethics and Academic Freedom, (Chair, 2008-2009)
- Vanderbilt University, Peabody College Promotion and Tenure Committee, 2008-09.
- Vanderbilt University, university-wide Promotion and Tenure Committee, 2009-2013 (Chair 2010-11 and 2011-12)

Professional Service and Leadership (Sample Activities)

- Editor, 1979-1981, School Psychology Review
- Editorial Board Memberships:
  - School Psychology Review, 1974-2000
  - Journal of School Psychology, 1982-1996
  - School Psychology Quarterly, 1984-1990 (Associate Editor, 1991-1994)
  - Journal of Psychoeducational Assessment, 1983-1988
  - Exceptional Child Quarterly, 1983-1988
  - Canadian Journal of School Psychology, 1990-
  - Contributing Editor, EDLAW Briefing Papers, 1990-1995
  - Journal of Learning Disabilities 1998-

- Ad Hoc Reviewer

  Journal of Consulting and Clinical Psychology
  American Psychologist
  Exceptional Child
  American Educational Research Journal
  Review of Educational Research
  American Journal of Mental Retardation
  Journal of Educational Psychology
  School Psychology International
  Psychological Bulletin

- President, National Association of School Psychologists (NASP), 1984-1985
- Chair, NASP Program Approval, 1989-1992
- Member, American Psychological Association Committee on Psychological Tests and Assessment, 1991-1994.
- Site Visitor, American Psychological Association Doctoral Program Accreditation

- Chair, NASP Publications Committee, 1982-1984, 1986-1988
- Member, NASP Accreditation, Certification and Graduate Training Committee, 1976-1980
- President, 1974-1975, Arizona Association of School Psychologists
- Member, NASP Executive Board, 1976-1978, 1981-1986
- Member, American Psychological Association, Division 16 Task Force on School Psychology Reform, 1990-1992
- Member, American Psychological Association (APA) Task Force on Children, Youth, and Families, 1981-1983.
- Member, APA Division 16 Committee on Testing Issues, 1982-1984
- Member, APA Division 16 Convention Program Committee, 1981-1985
- Member, APA Division 16 Task Force on the Future of the Practice of Psychology in Education, 1983-1985
- Chair or Member of numerous committees for the Arizona Association of School Psychologists and the Iowa School Psychologists Association
- President, Iowa School Psychologists Association, 1994-1995
- Member, National Academy of Sciences Panel on Goals 2000 and the Education of Students with Disabilities (7 meetings in 1995-1996)
- Member, State of Iowa Task Force on Mental Disabilities Classification Criteria 1995-1996
- Member, State of Iowa Task Force on Disproportionate Representation of African-American Students in Programs for Students with Disabilities 1995-1997
- External Reviewer, Lehigh University Personnel Preparation Grant, Preparing School Psychologists to Provide Services to Children with Developmental Disabilities
- Member, Iowa Department of Education Task Force on Assessment of Outcomes for Students with Disabilities, 1995-1997.
- Member, Seven Person Writing Team, *Assessment and Eligibility in Special Education: An Examination of Policy and Practice with Proposals for Change*, National Association of School Psychologists under contract with the Office of Special Education Programs, U. S. Department of Education, 1994
- President, President-Elect, and Past-President, Society for the Study of School Psychology, 1995-1998; 2001-2004
- President (1998-1999) and Board Member (1996-1999) Council of Directors of School Psychology Programs
- Member, National Academy of Sciences Panel on Overrepresentation of Minorities in Special Education, member 1999-2001
- Chair, National Academy of Sciences Panel on Disability Determination in Mental Retardation, 2000-2002
- Member, Office of Special Education Programs SLD Summit. November, 2003, Washington DC.
- Member, Disproportionality Determination Task Force, Office of Special Education and WESTAT, 2003.
- Co-chair, Division 33 (Mental Retardation and Developmental Disabiities) Program. American Psychological Association Annual Convention (Toronto 2003)

- Member, Executive Board, Higher Education Consortium in Special Education, 2002-2005.
- President, Division for Research, Council for Exceptional Children, 2005-2006.
- Invited testimony, US Commission on Civil Rights, December 3, 2007.
- US Department of Education, Institute for Educational Sciences, Task Force on the Evaluation of the Office for Special Education Programs Personnel Preparation and Doctoral Leadership Grants, 2008-2010.
- Member, Institute for Educational Sciences Proposal Review Board (Special Education), 2009-2012
- Co-chair, Transformation Leadership Group: Special Needs Students. Metro Nashville Public Schools, 2009-2012.
- Advisory Member, State of Wisconsin Governor's Panel on Educational Reform, March 30, 2011.
- External Review Team and author of chapter on special education, Webster Co. Parish Public Schools, April-October, 2011.
- Advisor, statistical analyses, and reports on special education disproportionality, Clark County School District, 2003-2019

Expert Witness and Case Consultation

3. **AZ v. Coleman,* 1972; (State Court Tucson, AZ; No. 20854). (Expert Witness Testimony). (State)
4. *Marshall v. Georgia* 1983; (Federal District Court); Savannah, GA. (Report and expert witness testimony). (Federal)
5. *Bradley, v. Robb*, 1985; (Federal District Court); Richmond, VA. (Expert witness testimony). (Federal)
6. *S-1 v. Turlington*, 1986; (Federal District Court); Miami, FL. (Report and expert witness testimony). (Federal)
7. *Little Rock v. Pulaski Co*., 1986. (Federal District Court); Little Rock, AR. (Expert witness testimony). (Federal)
8. *Egg Harbor Township Board of Education v. S. O*., 1992 (Federal District Court) (Expert witness testimony). (Federal)
9. *Coalition to Save Our Children v. Board of Education*, 901 F. Supp. 784 (D. Del. 1995), aff'd 90 F.3d 752 (3d Cir. 1996). (Report and expert witness testimony). (Federal)
10. *Campaign for Fiscal Equity, Inc. v. State,* 719 N.Y.S. 2d 475, 485-487 (Sup. Ct. N.Y. Ctny.2001) (Report and expert witness testimony). (State)
11. *Harper et al. v. Patterson et al*., 2003 (GA State Court, Civil Action No. 2:99-CV-0200 WCO); Elijay, GA. (Expert witness testimony) (State)
12. **Darick Demorris Walker v. William Page True,* United States District Court for the Eastern District of Virginia, Alexandria Division, Case No. 1:03-cv-00764 (CMH). (Report and expert witness testimony in 2005; Executed May 20, 2010). (Federal)
13. *School Districts' Alliance for Adequate Funding of Special Education v. The State of Washington.* State of Washington, Thurston County Superior Court, NO. 04-2-02000-7 (Report and expert witness testimony in November 2006) (State)

14. **Kevin Green v. Gene M. Johnson,* US District Court, Eastern District of Virginia, NO. 2:05cv340. (Report and expert witness testimony in October, 2006, Executed May 27, 2008). (Federal)
15. *Consortium for Adequate School Funding in Georgia, Inc., et al. v. State of Georgia et al.* (Report, Deposition, case dropped). (State)
16. **Penry v. Texas,* Death Penalty Appeal (Consultant, 2006-2008. Case Settled LWOP). (State)
17. **John Lionel Neal Jr. v. State of Alabama, 28th Judicial Circuit Court, Baldwin Co., No. CC 87-520.60.* (Consultant to Petitioner, 2006-2008, Case Settled LWOP). (State)
18. **Winston v. Kelly,* US District Court, Western District of Virginia, Roanoke, Case No. 7:ev00364. (Report and expert witness testimony in November 2008, Case Settled LWOP). (Federal)
19. **Bridgers v. Texas,* (Evaluation, Report, May 2009, Death Sentence pending). (State)
20. **Rollins v. Tennessee,* Circuit Court of Sullivan County, TN, Second Judicial District at Blountville. (Evaluation, Report and Expert Witness Testimony October, 2009; Case Settled Life Sentence). (State)
21. **Chase v. Mississippi, Circuit Court, Copiah County, MS. (*Expert Witness Report and Testimony August 2010, Atkins Claim Denied, Execution Pending) (State)
22. **Keen v. State of Tennessee,* Criminal Court of Shelby County Tennessee at Memphis Division 8. No. P-25157. (Report, August 2010, Trial pending). (State)
23. *S.R v. El Campo Independent School District et al.* Civil Action in District Court, Southern District of Texas. (Expert Report March 2011, Case settled)
24. **State of Tennessee v. Willie Clyde Puckett,* Sullivan County Criminal Court, No. S54,153. (Report May 2011, Case Settled LWOP). (State)
25. *Blunt, et al. v. Lower Merion Sch. Dist.,* 826 F.Supp. 749 760-61 (E. D. Pa., 2011). (Report & Deposition, June-July, 2011, Case Dismissed). (Federal)
26. **State of Tennessee v. Jawaune Massey,* Sullivan County Criminal Court No. S52,127. (Report, Expert Testimony 2012, Case Settled LWOP). (State)
27. **Chalmers v. Tennessee* (Evaluation, Report 2012-2014, Pending). (State)
28. **John Henretta v. Tennessee* (Evaluation, Report 2012, Case Settled LWOP). (State)
29. **David Jackson v. US* (Consultant 2013, Evaluation, Case Settled LWOP). (Federal)
30. **Pervis Payne v State of Tennessee* (Evaluation, Report 2012, Case Pending). (State)
31. **State of Texas v. Stanley R. Robertson* (Report 2011, Report, Expert Witness Testimony 2013, Case Settled LWOP). (State)
32. **State of Tennessee v. Lasergio Wilson* (Evaluation, Report 2013, Death Sentence 2017). (State)
33. **US v. Chastain Montgomery* (Report 2013, Report, Testimony, *Atkins* denied, LWOP). (Federal)
34. **State of Tennessee v. Calvin Rogers,* (Report 2013, Testimony, Case Settled LWOP). (State)
35. **State (GA) v. Favors*, 2014 (Evaluated Gregory Favors, Case Settled LWOP). (State)
36. **US v. Naeem Willians*, 2014 (Consultation, Brief Evaluation). (Federal)
37. * *People (CA) v. Townsell,* 2014 (Consultation, Reviewed Records, Report, LWOP). (State)
38. **US v. Guerrero* 2013-2014. N0 1:08-cr-00259-pmp (Evaluation, Report, Case Settled LWOP). (Federal)

39. **Eaton v. Wilson (WY),* No 09-cv-00261-J, 2014 (Evaluation, Report, Case settled LWOP). (State)
40. **KY v. Allman,* 2014 (Evaluation, Case settled LWOP). (State)
41. **Odom v. TN,* 2014 No 91-07049 (Evaluation). (State)
42. **Rice v. TN,* 2014, No. 01-0035 (Evaluation). (State)
43. **Caruthers v. TN,* 2014 (Evaluation, Report, Client deceased natural causes). (State)
44. **Corey Johnson v. VA,* 2014, (Evaluation, Report, Case Pending). (State)
45. **AZ v. Boyston,* 2014, No CR 2004-007442-001, (Evaluation, Report, Case Pending). (State)
46. **US v. Ronell Wilson,* 2014, No 04-CR-1016 (NGG). (Record Review, Consultation, Report, Case Settled LWOP). (Federal)
47. **SC v. Brown,* 2014 (Evaluation, Report, Expert Testimony, Court Opinion Atkins claim approved, LWOP). (State)
48. **TX v. Allen* 2014-2015 (Evaluation, Report, Case Settled LWOP). (State)
49. **Tuilaepa v. US,* 2014-2015, (Evaluation). (Federal)
50. **TX v. Adams,* 2014-2015, No 1372221. (Evaluation, Report, Case Settled LWOP). (State)
51. **AR v. Friar,* 2015, No CR-2013-75 (Consultation, Record Review, Case Settled LWOP). (State)
52. **KY v. Taylor,* 2015, (Evaluation, Case Settled LWOP). (State)
53. **US v. Bolton,* 2015, (Evaluation). (Federal)
54. **People (CA) v. Griffin*, 2010-2015, (Report 2010, Expert Testimony May 2015, Judicial decision for LWOP, Reversing Death Penalty Sentence). (State)
55. **Lard v. Arkansas, 2015* (Evaluation, Report, Expert Testimony, Decision Pending) (State)
56. *CJEFF v State of Connecticut,* (Report, Deposition, Testimony [April, 2016], Decision Pending). (State)
57. **State of Texas v. Charles E. Brownlow Jr.,* 422 Judicial District of Kaufman County, Kaufman TX. (Evaluation, Report, testimony, *Atkins* appeal denied. (May 16-17, 2016). (State)
58. **Debra Brown v. Shirley A. Jones, Case,* No.: 1:99-CV-00549. (2016, Evaluation, Report, LWOP). (Federal)
59. **US v James Nathaniel Watts, Criminal No. 14-40063-JPG. (2016-2017).* (Evaluation, Report, Case settled LWOP). (Federal)
60. **USA v Ulysses Jones Jr., Case No. 10-03090-CR-S-DGK.* US District Court for the Western District of Missouri, Southern Section. (Evaluation, Report, Expert Testimony, *Atkins* Claim Denied September, 2017; Jury Trial October 2017 awarded LWOP). (Federal)
61. **State of Oklahoma v Alton Alexander Nolen.* (Review of records and adaptive behavior evaluation, Report, Expert Testimony, *Atkins* Claim denied, April, 2017). (State)
62. **Smith v Dunn (State of Alabama).* Civil Action No.: 05-04744-CG-M. (Reviewed records and evaluations, Report, Expert Testimony May 2017, Decision Pending). (State) (Joseph Clifton Smith)

63. *Yazzie et al and Martinez et al v. New Mexico Public Education Department,* NO: D-101-CV-2014-0224. (Report, Expert Testimony August, 2017, decision pending). (State)
64. **Texas v. Antonio Cochran* (Evaluation, Report, Case settled LWOP, December 2017. (State)
65. **South Carolina v. Stephen Corey Bryant* (Evaluation, December 2017). (State)
66. **Robbins v. California* (Review of records, report, January 2018). (State)
67. **Eric Royce Leonard v. Ron Davis, Warden,* United States District Court, Eastern District of California, No. 2:17-CV-0796 JAM-AC (Evaluation, report, LWOP, 2018). (Federal)
68. **California v. Pearl Fernandez,* Case No. BA 425180 (Evaluation, report, LWOP, June 2018). (State)
69. **State of Texas v. Shaun Ruiz Puente* (Adaptive behavior evaluation only, testimony, LWOP awarded by a jury, February 2018). (State)
70. **US v. Chattam*, US District Court Eastern District of Michigan Southern Division, Case No: 17-20184. (Evaluation June 2018). (Federal)
71. **State of Nevada v. Paul Darrell Jones,* Case No. C-17-326614-1. (Evaluation, Report, Prosecution agreed to Intellectual Disability, October 2018.) (State)
72. **US v. Alonzo Horta,* US District Court for the Northern District of Illinois Eastern Division, Case No. 16 CR 463-23 (Evaluation December 2018). (Federal)
73. *Maestas v State of Utah,* Case No. 130907856, July 2018 (Adaptive behavior evaluation, report, client deceased in 2019).
74. **Webster v. Lockett,* Cause No: 2:12-cv-86-WTL-MJD, US District Court Southern District of Indiana Terre Haute Division, upheld at the 7th Circuit, USCOA-7th Circuit, No 19-2683, September 22, 2020 (Evaluation, Report, Testimony, *Atkins granted,* June 2019). (Federal)
75. **Texas v. Armando Luis Juarez*, 292nd Judicial Court of Dallas County, Texas N0 F18-70634-V (Evaluation, report 2019-2020)
76. **Florida v. Reginald Jackson,* Circuit Court of the 11th Judicial Circuit, Miami-Dade County, Florida, Case N0 F13-017684-A. (Report, Deposition, 2019-2020).
77. **US v. Juhwun Foster,* US District Court, Northern District of Illinois Eastern Division, N0. 17 CR 611-4 (Evaluation, LWOP awarded, 2019-2020).
78. *Gallegos v. Shinn, et al*., No. CV-01-01909-PHX-NVW, United States District Court for the District of Arizona. (Adaptive Behavior analysis from records).
79. *Fiorella*
80. *Davis.*
81. *Davis, R*

* Cases involving mild intellectual disability and death penalty issues, (N=57)

Summary: Expert witness in 29 cases, 19 state courts and 10 federal courts. Have never been denied expert witness status.

Consultant Activities (Sample Activities)

- Baltimore Public School Psychological Services, 1972-1974
- National Follow Through, 1971-1975
- Pima County Pluralistic Assessment Project, 1973-1975
- Iowa Department of Education Nonbiased Assessment Project, 1976-1979;
- Iowa Department of Education Adaptive Behavior Project, 1980-1982;
- State of Georgia, 1980 (Handbook for School Psychologists)
- Illinois-Indiana Race Desegregation Center, 1981-1982
- Florida Atlantic University SOMPA Standardization Project, 1982-1983
- University of California-Berkeley Nondiscrimination Assessment Project, 1982-1985
- Chicago Public Schools, 1984-1986
- Charles E. Merrill Test Division, 1983-1986
- Psychological Corporation, 1984, 1986, 1988
- Minnesota Department of Education, 1986-1987 (MR Classification Criteria)
- Florida Department of Education, 1986-1989 (MR Classification Criteria)
- ETS-NASP, 1989-1991 (regarding bias in the National School Psychology Licensing Examination)
- Administrative Law Judge, State of Iowa (Hearings Regarding Education of the Handicapped), 1989-1998
- Consultant, American Association on Mental Retardation Committee on Classification in Mental Retardation, 1989-1992.
- Consultant to Board on Testing and Assessment, National Academy of Sciences, Issues Related to the Appropriate Assessment of Minority Children and Youth with Disabilities, 1994.
- State of Florida, Development of Criteria for Identification of Learning Disabilities and Mild Mental Retardation, 1995-1997.
- Consultant to Department of Psychology, Minot State University, Development and Need of School Psychology Graduate Program Opportunities in North Dakota, May, 1994.
- Consultant, U. S. DE Office of Special Education Programs and U.S. DE Office for Civil Rights, Task Force on Over-representation of Minority Students in Special Education Programs, 1993-1995
- Member, U. S. Department of Education, Office of Special Education Programs, Task Force on Educational Outcomes for Students with Disabilities, March, 1994
- Member, Ford Foundation Task Force, Equity and Educational Assessment, May, 1996
- Grant Review Panel, U.S. Department of Education, Behavior Disorders Prevention and Intervention
- National Association of School Psychologists Panel, *Blueprint for School Psychology in the 21st Century (July, 1996 to March, 1997).*
- State of Iowa Committee on Implementation of the Federal Education of the Handicapped Act 1979- 1983
- National Advisory Panel for Buros-Nebraska Institute of Mental Measurements, 1981-1988
- Erlbaum Series Advances in School Psychology, 1983-1991
- United States Department of Education Task Force on At Risk Students, 1984-1986

- Guilford Press Child Practitioner Series, 1985-1991
- United States Department of Education Project: Research Integration on Handicapped Students, 1985-1988
- State of Georgia Advisory Committee on Student Assessment, 1986-1996
- State of Iowa Task Force on Special Education Reform, 1989-1991
- Member, United States Department of Education Task Force on ADHD Assessment and Interventions, 1991-1992
- Grant Review Panel, ADHD Grant Competition, United States Department of Education, Office of Special Education Programs, 1991
- Consultant, National Center for Educational Outcomes, University of Minnesota and U.S. Office of Special Education Programs, 1995-1998
- Consultant, State of Kansas Board of Regents, Wichita State University Proposal re: School Psychology Doctoral Program 1996
- Member, Leadership Council, State of New York, Department of Education, Division of Vocational Education and Special Education, 1997-2003
- Consultant, (Pro bono) European Roma Rights Center, Budapest, 1999- (Evaluations and consultation regarding Roma children placed in special education programs in Ostrava, Czech Republic.)
- Williamson County Schools, Franklin TN, School Psychology Department, 1998-2000
- Consultant, Florida Department of Education. Project on Identification of Educable Mental Retardation. 2000-2001.
- State of Tennessee Department of Education Task Force on IDEA rules revisions, 1999-2001
- Minneapolis Public Schools, Waiver Project Evaluation, December, 2001.
- Consultant, New York Department of Education Disproportionality Task Force, Presentation to State Board, December 2002
- State of Indiana Disproportionality Project. 2000-2003
- State of Missouri Department of Education, Division of Special Education, Criteria for Disability Determination, 2002-2004
- Grant review panels, Office of Special Education Programs, several grant competitions 2002-2013
- Clark County School District (Las Vegas), Disproportionality Analyses and reports, 2003-2015.
- Connecticut Department of Education, 2003-2005, Mental retardation criteria and manual.
- Member, National Advisory Committee, Voyager Learning Inc., Dallas, TX, 2008-
- Hancock County Schools (Georgia), Achievement gap and disproportionality. 2008
- Jefferson County School District (Louisville, Kentucky). Achievement gap and disproportionality. 2009-10

Awards/Honors

- Distinguished Service Award, "Outstanding Services in the Editing and Design of the School Psychology Review," National Association of School Psychologists, 1980

- New Jersey Association of School Psychologists Award for "Outstanding Contributions to the Development of School Psychology," 1983
- Distinguished Service Award, "Dedicated Service and Leadership as President," National Association of School Psychologists, March, 1987
- Fellow, Division 16 (School Psychology), "In recognition of outstanding contributions to the science and profession of psychology," American Psychological Association (Elected in 1985)
- Charter Fellow, American Psychological Society, 1989
- James B. Stroud Award, "Outstanding contributions to the practice of school psychology," Iowa School Psychologists Association, October 1989
- Distinguished Service Award, "Design and administration of the NASP program approval service," National Association of School Psychologists, 1990
- Fellow, Division 15 (Educational Psychology), "In recognition of outstanding contributions to the science and profession of psychology," American Psychological Association (Elected in 1990)
- Distinguished Professor of Liberal Arts and Sciences, a career title representing, "…the highest academic honor bestowed by Iowa State University," May, 1991
- Dorthy H. Hughes Memorial Award for Distinguished Service in Educational and School Psychology by the Department of Applied Psychology, New York University, May, 1994
- Charter Member, Iowa Academy of Education (one of 15 persons appointed by the FINE Foundation as Charter Members)
- Outstanding Alumnus Award, College of Education, University of Oregon, 1996
- Cited in 1999 as in top five of school psychologists providing service to the profession as editor, associate editor, or editorial board member on school psychology journals
- National Association of School Psychologists Lifetime Achievement Award, "In Recognition of Outstanding Achievement and Distinguished Service to the Profession of School Psychology, March, 2000
- Vanderbilt University Opportunity Development Center Award for "Exemplary Effort in Support of the University's Commitment to Promoting Opportunities for Persons with Disabilities, October 2004
- National Association of School Psychologists "Legend in School Psychology Award" March 27, 2007

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Psychological Evaluation

JOHNSON, Corey James
Date of Report: August 24, 2016

Date of Birth: [redacted]
Age: 47

I. Introduction and Summary of Opinions

I conducted an evaluation of Corey Johnson at the request of Mr. Johnson's attorneys in order to address the question of whether Mr. Johnson has intellectual disability (formerly referred to as mental retardation). In my opinion, Corey Johnson has intellectual disability that originated during his childhood and has persisted into adulthood.

Corey Johnson was raised in poverty and experienced a chaotic, abusive, and extremely unstable childhood. He lived in nearly a dozen different homes from his birth until he was 12 years old, and attended nearly as many different schools during that period. He failed at every level of school, repeatedly demonstrating that it was extremely difficult for him to learn and progress across all academic subjects. Corey also failed to learn how to interact with others, to read social situations, to communicate clearly, logically, and effectively, and to use judgment to solve problems. He further failed to learn how to care for himself and never developed the range of skills necessary to live independently as an adult.

My opinion concerning Corey Johnson's intellectual disability is based in part on my analysis of his intellectual functioning as reflected in the IQ tests administered to him between the time he was 7 years old and 23 years old. Four of those IQ tests produced valid and reliable results, but two of them were so flawed that their results have inadequate validity, and I did not consider them in my analysis. My analysis of the results for the four valid IQ tests is that they are consistent with significant impairments in intellectual functioning.

My opinion is also based on my comprehensive review of a broad array of records and other information related to Corey Johnson's adaptive functioning in the community. My assessment of his adaptive behavior revealed persuasive evidence that he has significant limitations in adaptive functioning in many areas, beginning in the developmental period before he was 18 years old and continuing into adulthood. More specifically, I reviewed contemporaneous educational, social services, treatment, and evaluation records created during Corey Johnson's childhood and adolescence. I

interviewed more than two dozen family members, friends, and professionals who had significant interactions with him and knew him well during various times throughout his life, and I reviewed written statements submitted by many of those individuals. Finally, I administered a standardized adaptive behavior instrument to three individuals who knew Corey Johnson particularly well in varied contexts. The information I considered as part of my adaptive behavior evaluation led me to conclude that Corey Johnson has significant limitations in all three domains of adaptive behavior—Conceptual, Social, and Practical—that are related to his intellectual functioning deficits. Based on my thorough evaluation and detailed analysis of the available information, discussed in detail below, the evidence is compelling and consistent that Corey Johnson is intellectually disabled and that his intellectual disability originated during his childhood and has continued into adulthood.

II. Overview

This report is sequenced chronologically and addresses the key factors that must be considered in determining a diagnosis of intellectual disability ("ID"). My qualifications are set out in Appendix A to this report.

As part of my evaluation, I reviewed records related to Corey Johnson's childhood, adolescence, and adulthood, including all available school records; foster care and social services records; psychological, psychiatric, and educational/achievement evaluations and treatment records; and residential placement and treatment records. I also interviewed over two dozen individuals who have known Corey Johnson, including family members; friends; peers; teachers; mental health evaluators and treatment professionals; and residential placement staff. I have reviewed declarations and statements obtained by Mr. Johnson's attorneys from these individuals and from others who have known Corey Johnson. I also administered a standardized adaptive behavior instrument to three individuals who knew Corey Johnson well. Finally, I have reviewed materials related to the criminal charges that led to Corey Johnson's 1993 death sentences. I have attached as Appendix B a list of the materials that I have reviewed as part of my evaluation.

a. Intellectual Disability Definition and Diagnosis

The most widely accepted definitions of intellectual disability are those of the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA"). The framework for defining intellectual disabilities by the AAIDD and the APA has been in substantial agreement for many years and consists of significant impairment in general intelligence (which has been recognized to mean approximately two standard deviations below the mean using properly administered and scored standardized IQ tests) concurrent with significant impairment in adaptive behavior, both of which must have originated in childhood before the age of 18, which is also referred to as the developmental period.

Specifically, the AAIDD, in its *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed., 2010) (hereafter "AAIDD Manual") states:

"Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." The AAIDD stresses the importance of clinical judgment in the accurate diagnosis of intellectual disability. The AAIDD defines clinical judgment as "a special type of judgment rooted in a high level of clinical expertise and experiences that emerge directly from extensive data."

The APA, in its *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., 2013) (also known as the "DSM-5"), states: "Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." The APA states that adaptive behavior deficits must be related to deficits in intellectual functioning in order to clarify that the three parts of the diagnostic criteria are not separate characteristics but interrelated parts of one disability.

b. Factors that influence IQ test scores and adaptive behavior assessment

Clinicians and research scientists recognize the research-supported factors that influence intelligence test scores and adaptive behavior assessment. Several of the factors summarized below, but not all of them, were not widely known or were not customarily applied by practitioners at the time Corey Johnson was sentenced to death:

i. While the essential diagnostic framework for intellectual disability diagnoses has remained constant, there has been significant shift over time in the emphasis and weight accorded to the general intelligence and adaptive behavior prongs of the diagnosis and stress on the importance of clinical judgment in making an accurate diagnosis. The most recent example of this shift, as far as APA is concerned, is its DSM-5, which was released in 2013, and states that:

> IQ scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

This is a significant change from the diagnostic criteria existing in 1993 when Corey Johnson was sentenced to death.

ii. Extensive research has indicated that average IQ scores have been rising and continue to rise at a rate of approximately three points per decade (the actual calculation is .33 points per year), although the reasons for this phenomenon are

not well understood. The phenomenon, known as norm obsolescence, aging norms, or the Flynn effect, should be taken into account by correcting IQ scores obtained from older tests. As an example, an individual given an IQ test in 1980 that was normed in 1980 and who received an IQ score of 70 (two standard deviations below the mean) would meet the intellectual functioning prong for an intellectual disability diagnosis. An individual given that same test (normed in 1980) 10 years later, in 1990, and who obtained an IQ score of 73 would also meet the intellectual functioning prong for an intellectual disability diagnosis, because .33 point per year rise in average IQ scores, identified as the Flynn effect, demonstrates that two standard deviations below the mean would then be a score of 73.3, rather than a score of 70. The validity of the Flynn effect is noted in the DSM-5.[1] Flynn first published his research related to norm obsolescence in the mid-1980s, but his research did not become widely known and generally accepted until well after Corey Johnson was sentenced to death.

iii. Experience with repeat administration of IQ tests commonly results in higher scores, particularly when repeat administration of the same IQ tests occurs close in time. This "practice effect" should be taken into consideration when a defendant has taken multiple IQ tests or multiple administrations of the same test or when the same test is given to an individual close in time to a previous administration of the same test, and when there is a demonstrated and unexplained rise in test scores.

iv. Whether considering assessment of intelligence or adaptive behavior, the examiner must acknowledge that people of low intelligence frequently have relative strengths that accompany their deficits. Because intellectual disability is defined by deficits, its diagnosis is a matter of documenting deficits (in both intelligence and adaptive behavior). Further, because relative strengths often accompany deficits, documenting strengths is not a valid method for ruling out intellectual disability.

v. The retrospective use of standardized adaptive behavior instruments is currently recognized as one method for gathering information on adaptive functioning. However, before the time that Corey Johnson was sentenced to death, there were few instances in which retrospective analyses were needed.

[1] *See*, Trahan, L., Stuebing, K. K., Hiscock, M. K., & Fletcher, J. M. (2014). *The Flynn effect: A meta-analysis*, *Psychological Bulletin*. *140*, 1332–1360.

III. Corey Johnson's Social History

In order to diagnose a person with intellectual disability, it is not necessary to identify the causes of his or her impairment; in fact in about half of the cases of individuals with a mild intellectual disability, no specific cause can be determined. However, there are risk factors that can increase the probability that someone might develop intellectual disability. I have found several of these risk factors in Corey Johnson's social history.

In the AAIDD Manual, risk factors for intellectual disability are organized by type of risk. During Corey Johnson's prenatal development and his childhood, he was exposed to most of these risk factors.

a. Risk factors for intellectual disability

i. Biomedical factors: genetic disorders; prenatal nutrition and disease; young parental age.

- Emma Johnson was Corey Johnson's mother, and James Sykes was his father. Both his parents were 17 years old when Corey was born.

ii. Environmental factors: poverty, domestic violence; lack of access to prenatal care; impaired child-caregiver interaction; lack of adequate stimulation; family poverty; parental drug use; parental alcohol use; parental smoking; parental immaturity; parental rejection of caretaking; parental abandonment of child; child abuse and neglect; domestic violence; inadequate safety measures; social deprivation; parental lack of preparation for parenthood; impaired parenting; inadequate early intervention services; and inadequate family support.

- James Sykes was in prison when Corey was born, and Corey did not meet his father (other than a brief encounter when Corey was an infant) until Corey was approximately 9 or 10 years old.
- Corey lived in poverty through his childhood. His mother, Emma, rarely worked and was often on public assistance.
- Corey and his mother and brother lived in at least 11 different apartments between his birth and age 13 in Brooklyn, Manhattan, Queens, Long Island, and New Jersey.
- Corey's mother was emotionally and physically abusive toward Corey. She was also involved in several relationships with men who were not Corey's father; one of them was emotionally abusive toward Corey, his brother, and his mother, and another was physically abusive toward all three.

- Both Corey's mother and father had serious drug problems as did one of the men with whom Corey and his mother lived for several years. Corey's maternal grandfather, with whom he lived on several occasions, was a chronic alcoholic.
- Emma Johnson was an immature parent who was more focused on her own needs and desires, rather than on those of her children. She was often emotionally distant from Corey.
- Corey's mother often left him with other caregivers while she was out of the home using drugs or partying, sometimes for weeks at a time.
- Corey's mother voluntarily surrendered Corey and his brother to foster care under the custody of the Department of Social Services when Corey was about 13 years old, because she was unable to care for her children and was focused on her own needs and desires.
- Corey attended at least ten different schools (mostly public schools but also two private schools) between age 5 and age 13 in the Bronx, Brooklyn, Manhattan, Queens, and New Jersey.
- Corey apparently retained in the second grade for three years and may have repeated third grade as well.
- Corey was not placed in a special education program until approximately age 10.

b. Corey Johnson's Background and History

i. Corey Johnson's parents and siblings

Corey Johnson was born on [redacted] in Brooklyn, New York. His parents, Emma Johnson and James Sykes, were both 17 years old when he was born. James Sykes was a gang member who went to prison before Corey was born. James returned from prison when Corey was 18 months old but then was sent back to prison, and Corey did not meet his father until he was 9 or 10 years old, and Mr. Sykes never played a significant role in raising Corey.

Corey Johnson has two half-brothers. Emma Johnson had another son, Robert Johnson, with a later boyfriend, Robert Butler. Corey's half-brother, Robert, is two years younger than Corey, and he and Corey were raised and spent their childhood together. James Sykes had a second son too, named James, Jr., with another woman, but Corey did not have much, if any, relationship with his half-brother, James, Jr.

ii. Parental substance abuse

Both Emma and James Sykes developed drug addictions at a young age. Emma, Corey's mother, battled substance abuse for most of her life, including addictions to powder and later crack cocaine. She experimented with drugs before she was pregnant

with Corey at age 17, and her family members believe she likely continued her drug use while pregnant with Corey. According to family members, Emma's drug abuse became progressively worse after she had Corey and his younger half-brother Robert Johnson. Emma lost multiple jobs due to her drug use, was on and off welfare, and spent much of her money on drugs when she was using heavily. Emma left drug paraphernalia around their apartment and spent time with drug users. In 1995, after many years of chronic drug use, Emma died of a cocaine overdose at the age of 45.

Corey's father, James became a heroin user at age 18 when he was released from incarceration sometime after Corey was born. James Sykes has battled a heroin addiction for most of his adult life.

iii. Family academic/educational history

Both Emma and James experienced significant academic challenges during their school-aged years. Emma was a poor student and usually received grades in the 60s on her school work. In high school, Emma still could not read well and dropped out. Emma's younger son, Robert Johnson, also faced significant learning challenges. Robert took intelligence tests in 1979 and 1983 at the ages of 8 and 12 and obtained IQ scores of 76 and 75, respectively. Robert was placed in Special Education in the first grade but failed to make any progress in the special classes. At the age of 11, he was still reading at a second grade level and could not relate to his peers and adult caretakers in an age-appropriate manner.

Corey's father, James Sykes, dropped out of high school in the ninth grade. At the time, he was reading at a fifth grade level. As he got older, James discovered that he had a learning disability and spatial deficits. He was diagnosed as learning disabled and dyslexic. As an adult, James Sykes was evaluated by the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) and was found to qualify for services. Years after Corey's birth, James had a son, James, Jr. (Corey's other half-brother), with another woman. James, Jr. was in Special Education classes growing up and never attended high school.

iv. Transient home life

Corey spent his first years in Brooklyn with Emma and his maternal grandmother, Esther Johnson. When Corey was a toddler, Emma began to date Robert Butler, and they had Corey's half-brother, Robert Johnson, when Corey was 2-years-old. Corey, Robert, Emma, and Robert Butler lived with Emma's mother before moving into an apartment in Manhattan together.

When Corey was about 6 years old, Robert Butler left Emma due to her drug use and associated lifestyle. After the breakup, Emma moved frequently because of her drug use, volatile relationships with men, and inability to hold a job. Between boyfriends and apartments, Emma, Corey, and Robert Johnson stayed with Esther or with Emma's father, Love Johnson, in Brooklyn. At times, Corey and Robert also stayed with other relatives and friends for prolonged periods.

When Corey was 7, Emma moved with her sons to Jersey City, New Jersey to live with her then boyfriend, Robert "Mitch" Mitchell. Mitch lived in public housing and was unemployed. After about 18 months, Emma and Mitch split up. Emma and her sons moved in with Emma's brother Amos, and his family in Hollis, Queens. After a few months, Emma again moved with her sons, this time to an apartment in Harlem.

In Harlem, Emma met a new boyfriend named Bobby Koger, who was a violent heroin addict. When Corey was about 9 years old, Emma and her children moved in with Bobby Koger in an apartment in Harlem. When Corey was about 10 years old, after his mother lost her temper and was physically abusive toward him, Corey lived with his mother's close friend, Antoinette Joseph, for approximately six months.

When Corey was about 11 years old, his mother sent him to live with her father, Love Johnson, in Brooklyn, because she claimed that Corey exhibited behavior problems that she could not handle. Love Johnson was an active alcoholic. After living with his grandfather for several months, Corey returned to live with his mother and brother in Manhattan. When Corey was 13 years old, his mother surrendered custody of him to the foster care system, and Corey was placed in the Pleasantville Cottage School. Corey remained at the Cottage school for three years and then was transitioned to a group home in an attempt to prepare him for independent living. For about two years, he lived in the group home called Elmhurst Boys Home and attended Newtown High School.

Shortly before graduation, Corey was suspended from school and left Elmhurst to return to live with his mother. He then lived for several months with his mother's former boyfriend, Robert Butler and his wife, Ann, in Goldsboro, North Carolina before returning to Brooklyn. Not long after his return, Corey moved to Trenton, New Jersey with a group of people selling drugs there, and he lived in Trenton for several years, sometimes with his drug associates and other times with girlfriends. Finally, after the leaders and others in that drug gang were arrested, Corey and two of his later co-defendants in his capital case moved to Richmond, Virginia and continued selling drugs there.

v. Domestic abuse and neglect

Emma was volatile and angry toward her children. She screamed at her sons, hit them, and threw things when she got mad. Corey wet the bed fairly often as a child, and he sometimes had bowel-movement accidents while sleeping as well (encopresis). When Emma found wet or soiled sheets that Corey hid after having an accident, she screamed at Corey, sometimes beat him, and sometimes refused to wash Corey's sheets, making him sleep in the soiled sheets. Although she got angry frequently at both her sons, Emma was particularly physically abusive to Corey, and she would smack and hit him, sometimes on the head. Emma's best friend, Antoinette Joseph, reported that Emma said she was tired of her sons, described them as getting on her nerves, and even threatened to kill them. During this period Emma continued to be physically and emotionally abusive toward her children. She repeatedly punished Corey for bedwetting, which he continued to do until he was 11 years old.

Even when Corey and Robert were young, Emma would leave them home alone while she was out on the streets or with friends and abusing drugs. Sometimes she would leave them with family, friends, and acquaintances for days upon end. In general, family members and friends stated that Emma shirked her responsibilities of motherhood and did not show much affection or concern for her sons.

Emma was also the victim of abuse. Robert Butler was emotionally abusive to Emma, and the children regularly witnessed their arguments. Emma's next boyfriend, Mitch Mitchell, was militant and inflexible. He and Emma constantly fought and created a turbulent environment for Corey and Robert.

After breaking up with Mitch Mitchell, Emma dated Bobby Koger, and she and the children lived with him. Koger was violent and abusive man. Corey, Emma, and Robert were all the targets of Koger's emotional and physical abuse. Other family members, including Emma's sister, Minnie, Corey's grandmother, Esther, Corey's biological father, James Sykes, Corey's godmother, Antoinette, and Bobby Koger's older son, Kevin Koger, have reported seeing bruises on Corey, Robert, and Emma on several occasions during Emma's relationship with Bobby Koger. Koger inflicted injuries on Emma that required hospital visits and once set fire to her apartment. Emma later acknowledged to social workers that Koger was a violent heroin addict who was "abusive to the kids" and that she and Bobby were prone to violent conflict. One social worker noted:

> Mrs. Johnson stated that her home environment has been unstable and chaotic since she started living with Mr. Krager [Koger]. He required numerous emergency hospitalizations and Corey and his brother witnessed many fights and arguments between Mrs. Johnson and Mr. Krager . . . . This has been a destructive and chaotic relationship and Mrs. Johnson who has been quite depressed over this relationship has not been able to extricate herself. Mr. Krager has been drug addicted and has been involved with another woman over the past two years and this has been a very painful situation for Mrs. Johnson who feels trapped and, wants help to reorganize her life.

vi. Corey Johnson's academic/educational failure

Corey attended at least six different elementary schools before he finished the second grade, and he attended at least ten schools by the time he was 13 years old, all because his family repeatedly moved as his mother began and later ended relationships with a series of boyfriends. Corey struggled in school from an early age and exhibited profound difficulties in all academic subjects. Although detailed school records from all of his elementary school years and some of his middle school years could not be located, the records that have been obtained paint a uniform picture of complete academic failure.

When Corey was 8, he was referred for an academic evaluation, and records note that he was kept in second grade and required evaluation, because he "[c]ouldn't perform third grade work," or follow directions. Corey's results on an achievement tests demonstrated that he was performing at the first grade level, though he was repeating

second grade for the second time. Despite being 8 years old, Corey's developmental age was 4 years and 9 months on one test and 5 years and 5 months on another. Corey ultimately was retained in second grade for three years as he continued to struggle both at school and at home.

Corey was referred to the Committee on the Handicapped for counseling and services in 1978 and again in 1979 due to "ongoing school failure . . . ." Based on the results of those evaluations, the Committee on the Handicapped determined that Corey had special education needs and placed him in Special Education classes in August 1979. Corey was only in Special Education for that one school year, as his mother then sent him to live with his grandfather in Brooklyn, where he apparently briefly attended a private parochial school.

In October 1981, when Corey was almost 13 years old, Emma brought Corey to a mental health center, the Council's Center for Problems of Living in West Harlem. The Council's Center was an outpatient treatment facility for adolescents and children. After an evaluation by the Center in January 1982, Emma signed papers to voluntarily place both Corey and his brother Robert in foster care; at the time, Corey was 13 and Robert was 11 years old. Corey was placed by a court in the care and custody of the Department of Social Services, which then placed Corey in a foster care placement under the supervision of the Jewish Child Care Association ("JCCA"). The JCCA placed Corey in the Pleasantville Cottage School in Pleasantville, NY. The Pleasantville Cottage School was a residential program for youths with troubled backgrounds. Corey lived in a residential cottage and spent several months in the Pleasantville Diagnostic Center. He then he was placed in the Mount Pleasant School, which is also part of the larger Pleasantville facility.

One of Corey's Pleasantville evaluators, Leona Klerer, who worked with children with significant learning disabilities, said that the other children with whom she worked, unlike Corey, all learned to read at a reading level higher than a second grade level. Based on her assessment of Corey and the "unusual and significant" facts that he was in Special Education classes, was over 13 years old, and still was reading at a second grade level, Ms. Klerer concluded that Corey could be mentally retarded.

Throughout the approximately three years Corey spent at Pleasantville, he stood out as being particularly slow intellectually compared to the other residents. Corey's initial adjustment to school at Pleasantville was problematic, and he often wandered from class like "a frightened animal," unable to sit or pay attention. June 9, 1982, Report of Gloria Caro. By the beginning of 1983, Corey's teacher reported that his "progress in class ha[d] been very, very, very slow almost to the point where one might feel that he is not learning." Even with Special Education and tutoring in reading and Pleasantville's efforts to use a variety of teaching strategies with Corey, his academic skills did not progress, and Corey kept falling further behind his peers as he failed to respond to any of Pleasantville's teaching methods. Despite being placed in a small class setting, his academic performance did not improve, and his reading and math performances were consistently below his grade level. Corey's reading ability plateaued at the second grade level.

During another assessment in March 1983, when Corey was almost 14 and a half years old, Dr. Kenneth Barish, psychologist, "confirm[ed] the presence of severe learning disabilities in reading, spelling and arithmetic . . . ." Corey obtained a reading score and spelling score at the first percentile, or lowest one percent of the population, and an arithmetic score at the second percentile, or lowest two percent of the population.

In 1985, after three years at Pleasantville, the JCCA transitioned Corey to an off-campus school program, because Corey was 16 years old, his mother, Emma, was not willing to have him return to her care, and he needed to learn independent living skills to prepare him to live on his own. JCCA, therefore, moved Corey to a residential program in New York City called the Elmhurst Boy's Residence.

Corey arrived at Elmhurst Boys' Residence in June 1985. Elmhurst consisted of two apartments and housed up to eight boys at a time, with staff living in a separate apartment on site. To staff members and the social worker at Elmhurst, Corey stood out as having significant intellectual limitations and being cognitively slower than the other residents at the group home.

While living at Elmhurst, Corey attended Newtown High School where, unlike most of the other boys in the residence who attended mainstream classes and were expected to move on to college, he was placed in Special Education classes. Despite receiving three years of special education and remediation at Pleasantville, Corey, at age 16, was still functioning at second and third grade levels for reading and math. After arriving in Elmhurst, Corey was enrolled in Special Education and Vocational Education classes at Newtown High School. He attended remedial math and reading classes in summer school but failed those and many of his other classes as well. He also exhibited significant attendance problems. Corey's teachers noted that he would not be able to pass any of the school competency tests and, therefore, would not be able to graduate but would receive a certificate of completion if he completed his senior year. However, just a short time before the end of his senior year, Corey was suspended for misbehavior and ended his attendance at Newtown.

IV. Intellectual Disability Evaluation

I have concluded, based on my thorough examination of a wide and comprehensive array of materials and more than two dozen interviews, that Corey Johnson is intellectually disabled, and his intellectual disability began before age 18 and persisted into his adulthood, including at the time he committed the capital crimes for which he is currently sentenced to death, which is the relevant time period. In my opinion, the evidence for Corey Johnson's intellectual disability diagnosis is strong and deep, and it is corroborated by contemporaneous records created by professionals during his childhood and adolescence, by my interviews of a diverse group of people who knew him best from an array of perspectives, by statements given by many of those individuals and by others, and by standardized testing.

My evaluation has also led me to conclude that no similar comprehensive, exhaustive evaluation of Corey Johnson by experts in intellectual disability has been

previously conducted before two other experts, Drs. Daniel Reschly and Gary Siperstein, and I were retained by Corey Johnson's attorneys. Instead, my review of the available materials related to Corey Johnson makes clear that despite many referrals and evaluations during his childhood, beginning at age 8 through at least age 16, including at least five known administrations to him of IQ tests, there was never a sophisticated analysis of Corey Johnson's IQ test results, and there does not appear to have been consideration in later years (after he had taken several IQ tests) of the factors that may have affected those IQ results. Nor was there a comprehensive evaluation that included a thorough review of his adaptive functioning to determine if Corey Johnson was mentally retarded (the term at the time, but what is now referred to as intellectually disabled). Instead, the records contain, at times, the conclusion that Corey had a severe learning disability, seemingly based almost exclusively on IQ test results, but lack any discussion or analysis of whether he had limitations in adaptive functioning that would support a diagnosis of mental retardation (intellectual disability).

The psychologist who conducted a mitigation evaluation of Corey in preparation for the sentencing phase of his capital trial, Dr. Dewey Cornell, collected some of the educational, social services, evaluation and treatment records related to Corey Johnson. The records Dr. Cornell obtained labeled Corey as a severely learning disabled child, and Dr. Cornell also spoke to a handful of staff members from his residential placements. But Dr. Cornell did not obtain many critical records that would have revealed flaws in the administration of some of the IQ tests nor did he interview some of the staff professionals who knew Corey Johnson best. In addition, Dr. Cornell did not correct the results of the IQ test he administered for the Flynn effect (likely because the Flynn effect was not a widely known or discussed phenomenon in 1993 nor had it been at that point validated by the enormous body of research that exists today). Finally, apparently because Dr. Cornell concluded that Corey Johnson just missed the IQ score threshold for a mental retardation (intellectual disability) diagnosis by a few points, he did not conduct a comprehensive assessment of Corey's adaptive functioning.

I have divided my discussion and analysis of Corey Johnson's appropriate diagnosis into two parts. First, I analyze the intellectual functioning prong, including the six IQ tests administered to Corey and the factors that affected the results of those tests. Next, I thoroughly review all of the relevant material to analyze Corey Johnson's adaptive functioning as a child, adolescent, and young adult.

a. Prong 1: Deficits in Intellectual Functioning

Psychologists, psychiatrists, and social workers conducted many evaluations of Corey Johnson during his childhood and adolescence. This summary will refer only to those tests that are relevant to a diagnosis of intellectual disability. For example, personality tests and tests of motor skills are not discussed, nor are some neuropsychological tests that are not directly related to the determination of whether Mr. Johnson has intellectual disability.

IQ tests are approximations of intellectual functioning. The customary cutoff for the intellectual functioning prong of a diagnosis of intellectual disability is two standard deviations below the population mean. However, as noted in section II.b.i. above, the APA's most current expression of the diagnostic criteria for intellectual disability in the DSM-5 notes that attained scores above two standard deviations, if accompanied by such severe adaptive behavior problems, can support the conclusion by a practitioner applying clinical judgment that the person's actual functioning is comparable to that of individuals with lower IQ scores.

Proper interpretation of obtained IQ scores takes into account the error inherent in all tests. This error is expressed in the statistic called the standard error of measurement (SEM). By applying the SEM of the test, one can compute a confidence interval around the obtained score and note the probability that the "true" score lies within this range. Applying the customary 95 percent confidence interval to this cutoff results in a range of 65-75 as the upper end of the range for intellectual disability for a typical IQ test. Thus, obtained scores of 75 or lower have for many years been considered sufficient to support a diagnosis of intellectual disability, assuming they are accompanied by significant limitations in adaptive functioning.

Psychologists apply other psychometric principles to the interpretation of obtained scores. These include the practice effect and the effect of aging or obsolete norms, known as the Flynn effect. These factors are discussed below as they apply.

It is important to understand the context for Corey Johnson's history of IQ testing. During Corey's childhood, he and his mother moved repeatedly from New York City borough to borough, as well as from New York City to New Jersey and back to New York City. He attended many different schools and was referred for educational and psychological evaluations in New Jersey, Manhattan, and Westchester. It is clear from the records from these agencies that they were not always aware of the results of previous evaluations or of the specific test instruments that were used during those evaluations.

i. Corey Johnson IQ Testing

With regard to intelligence testing, Mr. Johnson's first test for which records are available was on March 25, 1977, when he was 8 years, 4 months old. Jennifer Figurelli, Ph.D. of the Jersey City Schools administered the Wechsler Intelligence Scale for Children-Revised (WISC-R) and obtained a Full Scale IQ of 73. Corrected for aging norms, this IQ score would be corrected to 71.8.

Two years later on May 3, 1979, Nathalie Smith, of the Evaluation Unit of the West Manhattan Center administered the original Wechsler Intelligence Scale for Children, which yielded a much higher IQ of 91. It must be noted that there are serious problems with the choice of this test. First, the updated version of the Wechsler IQ test for children, the WISC-R, had been available for 5 years, so administration of the WISC, which had been published in 1949 and was 30 years old and well out of date when Smith selected it, was a violation of the American Psychological Association's *Standards for Educational and Psychological Testing* at that time and now. Significantly, the norming of the WISC, as noted, was more than 30 years old when Smith administered it to Corey

Johnson. By current psychometric standards, the norms were so old and so culturally out-of-date that their use was inexcusable and their results invalid. Finally, not all of the subtests of the WISC were administered, and the score was obtained by prorating. In my opinion, these cumulative problems make this score uninterpretable, invalid, and unreliable.

In October 1981, Ernest Adams, M.S., from the Council Center for Problems of Living in Manhattan, administered the WISC-R to Corey Johnson again, and Corey obtained an IQ of 78. Corey was 12 years, 1 month old, and this was his third administration of a Weschler IQ test in 4 and a half years. Further, the WISC-R had been normed almost nine years earlier. Taking into consideration norm obsolescence, the obtained score should be corrected by nearly three points, to a fraction above 75 (specifically 75.36).

Only three or four months later, on February 8, 1982, Cary Gallaudet, Psy.D., administered another WISC-R to Corey at the Pleasantville Diagnostic Center in Westchester, New York; this was the fourth administration of a Weschler IQ test to Corey in 5 years. Dr. Gallaudet obtained an IQ of 88 on the WISC-R, which correcting by three points for the Flynn effect, would become a score of 85. In addition, Dr. Gallaudet has indicated that she was not aware that Mr. Adams had administered the identical WISC-R test just a few months earlier at a different agency in Manhattan. Dr. Gallaudet has also said that she would not have given Corey the WISC-R test if she had known that Corey had taken it so recently. The practice effect surely inflated this score to some unknown but likely significant extent.

Moreover, Dr. Gallaudet acknowledged in her test report that she provided assistance to Corey during the testing process by refocusing him to keep him on task when his attention strayed. Dr. Gallaudet has also acknowledged that she was an inexperienced psychologist in 1982, and this has been substantiated by her supervisor at the time. It is likely that Dr. Gallaudet's assistance to Corey during testing also artificially inflated his score. Her supervisor at the time, George Sakheim, Ph.D, has indicated that providing this type of assistance compromises the results of the testing. For all of these reasons, the February 8, 1982, WISC-R results have compromised validity and cannot be properly interpreted.

On March 15, 1985, when Corey was 16 years, 4 months old, Kenneth Barrish, Ph.D. again administered the WISC-R to Corey Johnson and obtained an IQ of 69. Corrected for aging norms, the IQ test given to Corey Johnson by Dr. Barish is 65.04. I interviewed Dr. Barrish who remembered Corey Johnson well. Dr. Barish described Corey Johnson as the child with "the most profound impairment in learning" of any child he evaluated in his more than 3 decades of clinical practice. Dr. Barish was an experienced psychologist when he evaluated Corey Johnson. He also has stated that he was not aware of the October 1981 administration of the WISC-R to Corey Johnson by Adams and of the likely practice effect due to Dr. Gallaudet's administration of the identical IQ test just a few months later. This is corroborated by Dr. Barish's report at the time, because he noted that the significant drop in Corey's IQ results from the results obtained by Gallaudet "was difficult to account for." In any event, Dr. Barish's results

placed Corey Johnson solidly in the intellectual disability range on the intellectual functioning prong of the diagnostic framework.

Finally, on October 9, 1992, when Corey Johnson was 23 years, 11 months old, Dewey Cornell, Ph.D. of the University of Virginia, administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and obtained a score of 77. This was Corey's sixth administration of a Wechsler test, and the norms of the test were over 14 years old. If corrected for aging norms, the score would be 72.8.

In summary, correcting scores for aging norms (without any consideration of practice effects) would yield four scores compatible with the diagnosis of intellectual disability (Figurelli 71.8; Adams 75.6; Barish 65.4; and Cornell 72.8). The 1979 administration of the extremely outdated WISC test, both temporally and culturally, renders the results of that test invalid. Thus, only the February 1982 WISC-R was an outlier, but that test was surely significantly artificially inflated by the practice effect, as it was given on the heels of the same test in October 1981 and by the admitted assistance given to Corey by an inexperienced examiner; its results lack validity. Based on my clinical judgment and experience, I find the four IQ test administered by Figurelli, Adams, Barish, and Cornell to be the only IQ tests valid for diagnosis. In my opinion, based on my analysis of the valid IQ tests in this case and on the comprehensive analysis conducted by Dr. Daniel Reschly, an expert in both intellectual disability and learning disorders, Corey Johnson meets the intellectual functioning prong of the intellectual disability framework, because his IQ test results show significant limitations in his intellectual functioning before the age of 18.

b. Prong 2: Deficits in Adaptive Behavior

i. Adaptive Behavior Standards

As noted earlier, significant deficits in adaptive behavior is the second prong of a diagnosis of intellectual disability. The current definition used by the AAIDD refers to three areas of adaptive behavior and requires a significant impairment in at least one of the three areas—Conceptual skills; Social skills; and Practical skills—or significant impairment in a measure of overall adaptive functioning.

The American Psychiatric Association in its DSM-5 uses a very similar construct for an adaptive behavior assessment. Like the AAIDD structure, the DSM-5 identifies three domains of adaptive behavior—Conceptual; Social; and Practical. Like the AAIDD, the DSM-5 provides that in order to establish significant impairments in adaptive functioning sufficient to support a diagnosis of intellectual disability, a person must have significant limitations in at least one of the three areas or domains of adaptive functioning. Moreover, as mentioned above, compelling evidence of adaptive behavior impairments can be considered in the interpretation of intellectual functioning under prong one of an intellectual disability diagnosis, according to the DSM-5.

ii. Adaptive Behavior Assessment Methodology

A comprehensive collection of information concerning adaptive functioning requires gathering information from a wide array of people who knew the individual at different times in the person's life, in a variety of settings, and from different perspectives. The purpose of obtaining a broad spectrum of information is to try to identify consistencies in functioning across times and settings. It is important to note that some inconsistency is to be expected, and clinical judgment is, therefore, required to synthesize all of the available information to reach a diagnostic conclusion.

In order to assess Corey Johnson's adaptive functioning, I reviewed a wide array of contemporaneous school, social services, treatment, and institutional records created during his childhood, adolescence, and young adulthood before his current incarceration. I also interviewed over 25 family members, friends, members of the drug dealing groups with whom Mr. Johnson associated; and teachers, staff members, and other professionals who knew him when he was placed in schools and institutional environments. I reviewed statements prepared by many of these individuals and by others whom I did not interview.

To complement the information obtained from documents and interviews and to obtain a retrospective standardized assessment of Mr. Johnson's adaptive functioning, I administered a standardized adaptive behavior rating instrument to three people who knew Corey Johnson well, although each had a different relationship with him. The Adaptive Behavior Assessment System (2nd ed.) ("ABAS-II") is a rating scale of adaptive behavior administered to people who knew the individual well enough to provide ratings in each of the areas used to assess adaptive functioning. In Mr. Johnson's case, I was not able to obtain a standardized assessment of his work history, because he did not have enough of a work history to allow for valid ratings.

The three raters were (1) Antoinette Daniels Joseph, best friend of Corey Johnson's mother, (2) Minnie Hodges, maternal aunt of Corey Johnson, and (3) Richard Benedict, former teacher and administrator at Pleasantville Cottage School. Ms. Joseph and Ms. Hodges completed ratings using the Parent Form of the ABAS-II, and Mr. Benedict completed the Teacher Form. The items on the Teacher Form are limited to adaptive behavior shown in school.

It is important to note that Mr. Benedict knew Corey Johnson only in an institutional setting, the Pleasantville Cottage School, where staff and other professionals provided many supports to residents. As I noted above, while administering standardized instruments to raters who knew or observed an individual only in an institutional setting is permissible, caution should be used when interpreting the results, because adaptive functioning for purposes of an intellectual disability diagnosis is focused on adaptive behavior in the community setting, which is significantly different from an institutional setting. Mr. Benedict's ratings must be considered in this context; institutional settings can artificially inflate assessments of adaptive functioning, because they do not take into account the significant institutional supports provided to residents.

On the ABAS-II, scores for the three areas of adaptive behavior are derived from scores in nine areas. A mean score on the nine areas rated is 10 with a standard deviation of three. Thus, a score indicating significant impairment (two standard deviations below the mean) is a score of 4 or lower. Attached as Appendix C are charts depicting the full ABAS-II results.

As I explain below, I have concluded that Corey Johnson demonstrates significant limitations in all three adaptive behavior domains. Corey Johnson's adaptive behavior limitations are well documented in contemporaneous school and treatment records. They are also reflected in numerous statements from the people who knew him best during his childhood, adolescence, and adulthood. And they are corroborated, particularly in the Conceptual and Practical domains, by the results of the retrospective administration of standardized adaptive behavior instruments.

As noted above, significant limitations in only one domain is all that is required to support a diagnosis of intellectual disability, as long as there are accompanying significant limitations in intellectual functioning as measured by standardized IQ tests and as long as the significant limitations in intellectual functioning and adaptive functioning were manifested in the developmental period.

I have structured my evaluation and analysis below for each of the three domains in the same manner, starting with an explanation of the skills encompassed by the three separate domains. I then include a summary of my significant findings and conclusions for each domain, followed by selected examples of support found in the contemporaneous institutional records created during Corey Johnson's childhood and adolescence and from the recollections of professionals who worked with, evaluated, or treated Corey. I then highlight relevant observations from Corey's family, friends, and others who have known him over the years. Finally, I summarize the results from my administration of the ABAS-II standardized adaptive behavior instrument for each domain and the relevant categories.

iii. Conceptual Adaptive Behavior Domain

The AAIDD definition of the Conceptual domain encompasses the following areas: language; reading and writing; and money, time, and number concepts. The DSM-5 definition is very similar, as it includes: competence in memory; language/reading/writing; math reasoning; acquisition of practical knowledge; problem solving and judgment in novel situations; among others. For ease of analysis, I have grouped these areas into the following four areas for the Conceptual domain: (a) Academic performance; language and communication; (b) Number comprehension, money, and time; and (c) Judgment, planning and problem solving.

As the discussion below vividly demonstrates, Corey Johnson had significant limitations in all of the areas encompassed by the Conceptual functioning domain during his childhood and adolescence, and into adulthood. Corey failed educationally and academically. He was never able to learn to read or write adequately, to analyze or understand rudimentary subjects, or to develop a more than superficial store of

knowledge. For these reasons, Corey repeated grades over and over without success and never came close to graduating from high school. Various achievement tests administered to Corey over the years placed him far below his age and grade level, and even as an adult, his achievement plateaued at a young middle school level for the most part.

Corey Johnson also demonstrated from an early age significant challenges with language and communication. As a youngster, he stuttered and had a lisp. But his limitations went well beyond those obvious speech impediments. In addition to his rudimentary reading and writing ability, Corey's oral language abilities and comprehension have been compromised throughout his life. He has often had to rely upon simple language or slang to communicate with others, and those who have known him have limited their conversations with him to basic, concrete language. But even so, they report that he often did not grasp what was being said to him.

Similarly, Corey Johnson lacked proficiency in math, particularly when tasks involved more than basic computation. Those challenges expressed themselves in related life skills, such as telling time or correctly calculating change when making purchases.

Finally, the results of the standardized ABAS-II instrument that I administered corroborate that Corey Johnson had significant limitations in the Conceptual domain. For all of these reasons, in my opinion, there is overwhelming evidence that Corey Johnson has significant limitations in adaptive functioning for skills encompassed within the Conceptual domain that manifested when he was child, adolescent, and an adult at the time of the crime in this case.

A. Academic performance

Corey Johnson's school and academic performance history reflects a persistent pattern of failure. As I described above, Corey experienced a chaotic childhood characterized by constant upheaval and repeated moves from place to place—a pattern that involved living with his mother and close family members, then living with his mother and one of her boyfriends, and back with family—in various boroughs in New York City and in New Jersey. That disruptive and transient life led to Corey's being enrolled and attending school after school. He attended at least ten different schools in Manhattan, Brooklyn, New Jersey, and the Bronx before he was placed in the Pleasantville residential program in Westchester County, New York at age 13 for middle school and high school. Corey also attended a high school in Queens after his transfer from the Pleasantville residential facility.

From the very beginning, Corey's contemporaneous school and treatment records show that he was failing academically and far behind his peers. At times, Corey repeated grades because he could not progress. However, despite remaining in the same grade as his peers advanced, Corey could not improve his performance. At other times, the records suggest that Corey was advanced to the next grade, despite his continued

academic failure. As he got older, the records show that Corey fell further and further behind, because, simply put, he could not learn.

Nevertheless, school and treatment records created when Corey was a child reflect numerous attempts by educators and clinical treatment providers to assist him. They document a variety of strategies and efforts by those professionals to assist him in his academic performance and a range of supports to address his significant needs. The records also regularly reported that Corey tried hard, exhibited good effort, and the records repeatedly noted that he was motivated to learn. Despite the variety of strategies and supports he received and his sincere efforts, Corey could not learn and failed academically at every turn. Corey's academic deficits in childhood cut across all academic subjects and generalized to applications in community life, such as shopping and reading for pleasure or for general information.

Despite significant efforts by Corey Johnson's current attorneys to gather his school records, comprehensive educational records could not be located. However, references in later records help fill in some of the gaps in his school history. Most importantly, the contemporaneous records summarized below starkly demonstrate Corey Johnson's educational and academic failure.

Corey appears to have attended first grade at both PS 103 and PS 63. This is corroborated by later records from the Bureau of Child Guidance, Upper West Side Center when Corey was in third grade, which indicate that he was retained in the first grade and had a history of poor academic performance.

There are also records suggesting that, for a period of time in 1974 (when Corey was 6 years old), he attended first grade at St. Rita's, a private Catholic school. Records show that Corey was in the second grade at PS 309 in Brooklyn when he was 6 years old in 1975 and that he repeated the second grade at PS 16 in Jersey City, New Jersey when he was 7 years old. Records also show that Corey was still in the second grade when he attended PS 134 in Queens in 1978 when he was 9 years old, and they show that he remained in the second grade at PS 76 in Manhattan in 1979 after he turned 10 years old.

The first documented concern about Corey's academic performance that has been located was when he was identified for testing when he was 8 years old and repeating the second grade in New Jersey. In March 1977, at the age of 8 years, 4 months and in the second grade, Corey participated in an evaluation by the Learning Consultant to the Child Study Team of the Jersey City Public Schools. The report of this evaluation by Cheryl Spillane, Learning Consultant, indicated that Corey was enrolled in PS 16 Elementary School in Jersey City and that he was referred for evaluation because he:

> [c]ouldn't perform third grade work. Being retained in second. Cannot follow directions. No concept of number facts, low comprehension. No reading skills. Unable to retain sight vocabulary.

In February 1979, when Corey was 10, he was referred to the Committee on the Handicapped, by the Bureau of Child Guidance for reason described as "school failure." Records from the Evaluation Unit of the West Manhattan Center in May 1979 (age 10

years, 5 months) included an Education Assessment. Corey was administered the Peabody Individual Achievement Test, Reading Recognition subtest, and scored a grade equivalent of 1.3, which placed him at the first grade level with visual discrimination and reversals noted. Arithmetic on the Wide Range Achievement Test was at the 3.9 grade level. This evaluation determined that Corey had special education needs and placed him in Special Education classes with a curriculum that included (1) a special reading program to teach visual discrimination of letters and words; (2) perceptual motor training to improve writing skills; and (3) maximize auditory processing by giving small chunks of information which Corey could act upon in meaningful ways.

Records show that Corey was placed in the third grade in the fall of 1979 at PS 200, when he was 10 years old. But the next academic year (in the fall of 1980), records show that Corey was placed in Special Education classes in the fifth grade at PS 92. There is no explanation for why Corey skipped from the third grade to the fifth grade, and it is not clear if he ever was placed in the fourth grade at any school.

A Social History at Pleasantville Cottage School (3-19-85) noted, "Corey was left back in school in the 3rd and 4th grade[s] and was placed in a special class in 1980." Records of St. Rita's Catholic School indicate that Corey also attended that school in 1980 at age 11, when his mother then sent him to live with his grandfather in Brooklyn. Corey was only enrolled briefly at St. Rita's, and then he enrolled at a public school, PS 213, in Brooklyn.

A Child Assessment Evaluation Summary dated December 9, 1981, when Corey was 13 years old, indicates that Corey's mother took him to the Washington Heights-West Harlem Community Mental Health Center for assistance "due to academic failure and behavior problems."

When Corey was 13, his mother placed him in foster care through the supervision of the Department of Social Services ("DSS"), and the DSS put Corey in the care of the JCCA. The JCCA placed Corey in its facility at the Pleasantville Cottage School in Pleasantville, NY and conducted a diagnostic screening of Corey upon his admission. The screening records noted that his Wide Range Achievement Test scores showed functioning on second and third grade levels in word recognition, spelling, and arithmetic. He could only recite the months of the year up to August.

Despite the specialized services at Pleasantville, his report cards indicate that Corey continued to perform far below grade level, even though he demonstrated "sustained . . . effort" and was seen as "extremely cooperative." The Pleasantville records repeatedly describe Corey as having a severe learning disability, a label that does not have any diagnostic significance for intellectual disability. The records note time and again that Corey was barely able to read.

Pleasantville prepared an Individualized Education Program ("IEP") for Corey in June 1985, when he was 16 years old and when he was at the end of his last academic year at Pleasantville before transferring to a group home and Newtown High School. Corey's IEP notes an assessment of his reading comprehension on the Brigance Inventory of Essential Skills as 40 percent at the third grade level and his oral comprehension

ability on the Gray Oral Reading Test at 75 percent at the second and third grade level. Other achievement testing assessed his sight vocabulary level on the Wide Range Achievement Test as a grade equivalent of 3.7 (third grade) and his arithmetic ability on the Wide Range Achievement Test as a grade equivalent 3.4 (also third grade). Thus, after three years in Special Education and remediation classes at Pleasantville, Corey was still functioning at the second and third grade levels for reading and math at age 16.

It should be noted that every staff member from Pleasantville who provided an interview or declaration remembered Corey Johnson, and each described Corey as the slowest student or the most impaired student they had ever known to come through that institution. For instance, Ann Harding, a residential staff member wrote, "Corey was very slow intellectually. I knew this by the way he would talk to me. I do not remember anyone else at Pleasantville who was similarly slow intellectually."

The JCCA placed Corey at the Elmhurst Boys Residence when he was 16 years old and aged out of Pleasantville. This placement was supposed to prepare Corey for independent living, because his teachers and counselors concluded that returning to the care of his mother was not an option that was in Corey's best interest. Ms. Odette Noble conducted individual and group therapy sessions while Corey was at Elmhurst, and Corey Johnson attended those weekly. Ms. Nobel stated in her affidavit, "Compared to virtually all of the other boys I encountered at Elmhurst, Corey was much weaker cognitively."

Corey attended Newtown High School, his last school placement, while he lived at Elmhurst. At Newtown, Corey was placed in remedial, Special Education, and Vocational Education classes. Corey failed almost all of his classes, despite regular support from his friend, Courtney Daniels. Courtney recalled helping Corey several times a week for a couple of hours in the afternoon, providing particular support to Corey in math by giving him step-by-step instructions about how to tackle a problem. Yet those efforts did not help Corey succeed. For example, in his "junior year" of high school, Corey took fifth and sixth grade English classes and barely passed with a D. He was placed in fundamentals of math both his junior and senior year and received a D his junior year and failed his senior year. He also received a D in typing his junior year. Corey attended remedial math and reading classes in summer school but failed those classes and failed nearly every class his senior year. During his time at Newtown, teachers determined that he was unable to pass school competency tests. Corey left Newtown without graduating or obtaining a certificate of attendance.

After Corey Johnson was charged with the capital offenses that have prompted this evaluation, his court-appointed defense psychologist, Dr. Dewey Cornell, conducted the mitigation evaluation noted above. Dr. Cornell testified briefly at the capital sentencing hearing in Corey's case about some of Corey's adaptive functioning. Dr. Cornell stated: "Certainly, functional academics, the ability to do academic work is one in which he has impairment."

Dr. Cornell also administered the Test of Written Language ("TOWL") and the Woodcock-Johnson Test of Achievement-Revised in January 1993, when Corey was 24-years-old. On both tests, Corey Johnson obtained age equivalents substantially below his chronological age and obtained grade equivalents between second and sixth grades.

Since that time, Corey Johnson has diligently studied while in prison in pre-GED classes, because he has stated that one of his most important life goals is to pass the GED. Despite several decades of study, Corey Johnson's achievement has remained relatively constant. In 2014, Dr. Daniel Reschly administered the latest version of the Woodcock Johnson Test of Achievement-III to Corey Johnson. With the exception of concrete math calculations, on which his performance has improved after diligent study, the vast majority of Corey Johnson's grade equivalent achievement test results remain in the second to the fourth grade range.

B. Language and communication

Corey Johnson's school and treatment records show that he had language and communication deficits that began at an early age and continued throughout his life. He had marked speech impediments at an early age. Records show that he exhibited "marked stuttering" when he was young up until age 5, and had "some stuttering problems" later on as well as a slight lisp.

While those obvious speech difficulties eased as he got older, his school and mental health evaluations during Corey's childhood and adolescence documented communication difficulties, debilitating disabilities in reading, writing, and oral expression, and limitations in his ability to understand others. Achievement testing showed that as an adolescent and even as an adult, his reading, comprehension, and oral communication skills were far below his age. As noted earlier, his oral comprehension ability on the Gray Oral Reading Test was at 75 percent at the second and third grade level. In other words, as a mid-teenager, he understood little of what people spoke to him.

Family members and friends similarly described Corey's having difficulty understanding what others say, which required that they communicate with him using simple words and phrases. Nevertheless, they said he often did not comprehend what they said to him. In my interview with Corey Johnson's capital defense attorney, he similarly stressed that he had more difficulty explaining issues to Corey than he had with "other low-intelligence" clients he has represented during his career. He had to explain thing to Mr. Johnson more times than with his typically low-intelligence clients and said that Mr. Johnson would sit there and nod his head but not understand. All of the information I reviewed, some of which is summarized below, demonstrates Corey Johnson's significant limitations in language and communication.

The earliest set of school records that have been located document his reading and communication deficits. In March 1977, at the age of 8 years, 4 months and in the second grade, Corey participated in an evaluation by the Learning Consultant to the Child Study Team of the Jersey City Public Schools. Cheryl Spillane, Learning Consultant, described Corey's speech as "at times quality is unclear . . . [s]ays v for b sometimes. Needs further investigation." The evaluations done at this time show that Corey was functioning below his chronological age on speech and language tests. Among other deficits, the evaluation shows that he could not perform the most basic function of

writing his own name. The recommendations at the conclusion of the evaluation included a recommended referral for a speech evaluation.

Dr. F. A. Figurelli, a psychiatrist who evaluated Corey for the Jersey City Board of Education in October 1977, when Corey was 8 years old, wrote that "[h]e reveals a speech defect." Additional records consistently show that serious concerns about Corey's speech and language development were repeatedly noted. However, as late as when Corey was a teenager at Pleasantville, despite several evaluations recommending speech therapy from the time he was 10 until he was 15, he did not receive those services. Elizabeth Clemmens, Psychiatric Summary, December 1984.

The Pleasantville records, beginning when Corey was 13, repeatedly describe him as having speech impediments and disorders, receptive and expressive language disorders, as well as noting that he is barely able to read and functions at a second grade level. They note that Corey's deficits were evident during his initial evaluations. Corey spoke with "markedly slurred speech," had very poor reading skills, a poor understanding of what he was reading and no understanding of how to read. Barely able to write his own name and unable to recognize the sounds of many letters on the page, Corey was reading on a second grade level, indicating "a significant deficit in his abilities." Lynda Coccaro Speech and Language Evaluation, October 5, 1983.

Janet Valentine (former counselor and clinical social worker at Pleasantville Cottage School) described Corey to me as follows: "He wasn't very expressive." She reported that he didn't use many sentences, was basically a listener. "I thought it was a processing problem." She said that he had difficulty processing both receptive and expressive language. She said that she "Didn't know if he couldn't express or just didn't understand." "He could follow one or two step directions, but nothing elaborate." "You had to show him, I'm talking about basic living things." "I couldn't take for granted that he understood, so I showed him." "I remember him because he just wasn't getting it."

As noted above in Section IV.a.iii.A., Corey's assessment on the Brigance Inventory of Essential Skills showed that he understood less than half of what he read at the third grade level and his oral comprehension was only 75 percent at the second and third grade level.

In January 1993, at age 24, Dr. Cornell administered the TOWL. The oldest age group for the results of this test was 17 years old, and on two portions of the test, contextual vocabulary and syntactic maturity, Corey scored as low as one to two percent of the 17 year age group population respectively. His score on the latter of those two tests was comparable to children aged 7 to 8. Based on those TOWL results and the rest of Dr. Cornell's evaluation, he testified that, in the context of adaptive functioning, "communication deficits with his speech impairment and communication problems, he has some deficits there."

Corey's family members and friends described communication difficulties that mirrored the evaluations of his teachers, case workers, and mental health professionals and his performance on various evaluations. Corey's Aunt Minnie Hodges stated that "Corey had difficulty following certain instructions, and I would have to repeat myself

many times before he could comprehend what I was directing him to do. (Esther Johnson said the same thing in her affidavit.) Sometimes he appeared to be puzzled or mixed up when I would tell him certain things." Corey's friend from childhood, Holly Scott, described his communication as all slang and said she had difficulty picking up on it. She said in her affidavit, "Our conversations were always very simple." Her comments were mirrored by Sonya Hilton, who dated Mr. Johnson when he was about 20. She stated that: "He had a limited vocabulary, and he spoke mostly using street words and slang." She further recalled that: "If Corey was in the room with four other people, it was clear that Corey was not on the same intellectual level as the other people and had difficulty keeping up with the conversation. For example, if the group was talking about the weather, Corey would abruptly talk about a race car show." Corey's cousin, Queenie Hodges, described Corey as "quiet; he may not have understood." She said that Corey would often change topics and was disorganized in his conversations. She stated that although someone had been helping him to write letters to her recently, his "letters are just nonsense." She described them as disorganized like his conversation.

Similarly, maternal aunt Minnie Hodges reported, "He wouldn't understand others but didn't want to look bad." She also felt that he had difficulty making himself understood. She said that even when he calls her today, she has to tell him to explain, because she doesn't understand him.

In my discussion with former Warden Mark Bezy, he indicated that he met with all death-row inmates weekly. He described his conversations with Mr. Johnson as "very simple" and noted that Mr. Johnson never raised any legal discussion or engaged in discussion of any other complex matter.

These comments and others by people who have known Mr. Johnson well indicate that his communication has been adequate for some of the simple communication demands of everyday life but were at the concrete level of a child. All of the information I reviewed clearly establishes that Corey Johnson has never demonstrated the conceptual aspects of communication appropriate for his age, and, instead, his language and communication abilities are significantly impaired.

C. Number comprehension, money, and time

The records I reviewed and my interviews with those who knew Corey Johnson uniformly portray him as a child, adolescent and adult with impaired abilities with respect to number concepts, the use of money, and the concept of time. Even the leaders of the drug operation in New Jersey for whom Corey Johnson sold drugs recognized his unreliability in keeping track of how much money customers owed him for the drugs and how much money Corey owed his superiors. Corey's achievement testing at various stages during his educational career reinforce and corroborate those conclusions. His performance on the Arithmetic subtest on the valid IQ tests that Corey Johnson was administered also reflect his limitations with numbers.

Corey's first documented academic evaluation at age 8 revealed that he demonstrated "[n]o concept of number facts . . . ." That same evaluation showed that

Corey: "had no understanding of his date of birth. He thought he was born in March," although he was born in November.

When he was repeating second grade for the first time, records note that Corey was not able to work out math problems that children his age and younger were able to do by themselves, and they describe Corey's math skills as similarly poor and state that they did not improve despite receiving help. In addition, Corey was only able to tell time on the hour, and although he knew there were 12 months in the year, he could only recite the months in sequence up to August. He also could not multiply by three, divide a single digit by two, or read numbers of more than four digits.

At Pleasantville Cottage School, as a teenager, records show that despite being placed in a small class setting, Corey's math performance was consistently below his grade level. Later, when Corey was 16 and 17 years old at the Elmhurst group home, one of his counselors, Odette Noble, recalled that: "Mr. Johnson's limitations in school achievement and functional academics continued in his later adolescence and adulthood." While at Elmhurst, goals for Corey included "learn how to handle money so that [Corey] can shop for himself." She also noted: "Caseworker, houseparents [sic] and teachers will help Corey learn enough simple arithmetic that he will be able to figure out correct change." These objectives were not obtained, because handling money was consistently identified as a goal for Corey throughout his stay at Elmhurst.

Interviews and statements from family and friends sketch a similar picture. Cousin Queenie Hodges reported to me in interview that at age 11 or 12, Corey could not tell time and that even at later ages, he consistently spelled her name wrong. Aunt Minnie Hodges recalls that when Corey was 12 or 13 years old, unlike other children his age, he could not count small change without making mistakes, a problem she said continued into his late teens. Priscilla Hodges and Antoinette Joseph said they ordinarily would have to accompany Corey to the store and would need to tell him whether he received the proper change after buying something.

The affidavit of Esther Johnson states that she did not feel comfortable trusting Corey with money and would send his younger brother, Robert, to accompany Corey to the store to make sure the purchase was done correctly and the proper change was received. Many similar examples of problems in both school achievement and functional academics in childhood can be found in affidavits and interviews.

After leaving Elmhurst and after about a 6 month stay with his mother's former boyfriend, Robert Butler and his wife, Ann, in Goldsboro, North Carolina, Corey began working under the Brown brothers in their drug selling operation in Trenton, New Jersey. Their statements to me during my interviews detail the problems that Corey Johnson had with handling money. The Browns limited Corey's role to be sure he did not handle and lose their money.

D. Judgment, planning and problem solving

Corey Johnson also exhibited significant limitations in judgment, planning, and problem solving, the final aspect of the Conceptual adaptive behavior domain. In later

pages of Corey Johnson's adaptive functioning in the Social domain, I document the records and the anecdotes from a range of reporters who described Corey Johnson as highly gullible and naïve. Several of those anecdotes also demonstrate his poor judgment and rash, impulsive actions. For example, Corey's willingness on a dare to ride his bike across a street through traffic and to roller skate down a steep hill show his limited judgment and inability to consider the consequences of his actions, in addition to reflecting his susceptibility to peer pressure. Another time, when Corey was living with Robert Butler and his wife, they reported that he borrowed a 10-speed bicycle and rode it in the woods as if it were a dirt bike. He did this while wearing nice church clothes and returned from his ride in the woods covered in mud.

My evaluation also shows that Corey Johnson thought little about the future but instead simply reacted to events as they occurred to him. My review has also revealed that Corey Johnson had very limited problem solving skills. Those who knew him best said that he would do as he was told by peers, regardless of whether it was the best course of action or the right thing to do. As the records and anecdotes discussed below show, Corey Johnson exhibited significant impairment in judgment, planning, and problem solving.

When he was evaluated in 1979 at the West Manhattan Center, Nathalie Smith reported that at age 10 years, 5 months, "Corey would like to be a policeman when he grows up. His range of interests appeared very limited in view of his intelligence . . . ." In discussing Mr. Johnson's time at Pleasantville with Ms. Janet Valentine, I asked whether he had any plans for the future or independent living. Ms. Valentine replied that Corey did not take initiative in many things. "He didn't process things like that. I don't think he gave things like that a thought. I don't think he was on that level." She also said, "I saw no skills of being independent at all" compared to others his age.

By adolescence Corey Johnson still had not developed any plan for his future life. In reporting on Corey's time at Elmhurst, Ms. Odette Noble, social worker, said that he could not plan life decisions. She described such planning as "too complex a series of tasks for him." Ms. Noble discussed with Corey in counseling about the need to make good decisions, such as determining who is trustworthy. She said that he could talk about the future but "in the moment, he couldn't make sensible decisions that would help his future." She said Corey "lived in the moment." When I asked Robert Johnson whether his brother had plans for the future, Robert remembered that Corey said he planned to go to college, which given his complete academic failure, was impossible, and that he wanted to play basketball in the NBA, which, while a common teenaged boy's dream, was also unrealistic.

Dr. Dewey Cornell testified that in his early 20s, Corey Johnson had impaired ability to reason, use good judgment to control his behavior, and understand and foresee the consequences of his actions. This is consistent with Odette Noble's observation during Corey Johnson's time at Elmhurst that Corey "lacked the ability to understand the consequences that his actions could have."

In my interview with her and in her affidavit, Corey's friend, Holly Scott, said that he never discussed his future plans. Queenie Hodges reported (to me and in her

affidavit) that she did not remember Corey ever having stated any goals. She stated in her affidavit, "Corey was definitely not a leader and he never took authority over anything. He was a passive follower; he just went with the flow." Robert Butler said he never heard Corey speak about his goals in life. Darnell Brown stated in his affidavit that "Corey also seemed incapable of taking any initiative on his own . . . ." In her affidavit, Priscilla Hodges stated, "Corey struck me as directionless." Former girlfriend, Monica Dawkins, stated in her declaration, "[h]e would follow directions, whether they were good or bad."

E. Conceptual domain ABAS-II results

Using the current AAIDD and APA system of assessing adaptive behavior, the ABAS-II standardized results for all three raters demonstrate significant limitations in adaptive functioning in the Conceptual domain, as shown by the following chart. The reported scores are standard scores with a mean of 100 and a standard deviation of 15 and can be interpreted in a similar way as IQ scores. Thus, two raters provided scores below 70, and one rater provided a score approximately two standard deviations below the mean using the 95 percent confidence interval.

ABAS-II Raters	Conceptual Domain Scores
Antoinette Joseph	63
Minnie Hodges	57
Richard Benedict	74

F. Conceptual domain conclusion

Based on all of the information I reviewed, it is my opinion that that the evidence is persuasive that Corey Johnson had a significant impairment in all aspects of adaptive behavior domain of Conceptual beginning in childhood and continuing through his adolescence and adulthood.

iv. Social Adaptive Behavior Domain

The AAIDD defines the Social domain as encompassing the following: interpersonal skills; social responsibility; self-esteem; gullibility/naïveté (i.e., wariness); follows rules/obeys laws; avoids being victimized; and social problem solving. Similarly, the APA DSM-5 definition of the Social domain includes: awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. For purposes of this evaluation, I have grouped these skills as follows: (a) Interpersonal skills and friendship; and (b) Leisure activities; and (c) Leadership, gullibility, naiveté, and victimization.

The records I reviewed and my interviews show that Corey Johnson was a solitary, fearful child who had few friends and felt most comfortable playing by himself or with younger children. As an awkward, anxious child, he was teased by other children

and had few if any skills to cope, other than turning to adults to intervene. My review suggests that as he got older and became an adolescent, Corey had real problems in understanding how to interact with peers and adults and marked difficulty in understanding social cues and norms. His inability to master basic social interactions led him at times to engage in disruptive behavior, such as playing the role of class clown, and left him with few friends as an adolescent. The only close friends he had were girls, particularly those who took a protector role. While Corey had a few recreational activities that he enjoyed—sports and watching cartoons—family and friends repeatedly portrayed Corey as someone who was passive, who followed others' leads, and engaged in whatever activities those around him pursued. Corey is also described in contemporaneous records as naïve, easily influenced by others, and someone who was vulnerable to and succumbed to peer-pressure, which on a number of occasions led him to misbehave or even break the law.

Time and again, those I interviewed or the records and statements I reviewed described Corey as engaging in behavior suggested by others without considering the consequences to him or others. His lack of social skills led him to be easily victimized by others, including his mother, brother, and school peers. My review of contemporaneous records created during Corey's childhood and adolescence and the more recent statements and my interviews with those who knew him, provide support for the finding that Corey Johnson had significant limitations in the Social domain, starting in childhood and continuing as an adolescent and young adult. The retrospective standardized ABAS-II results are mixed, ranging from one reviewer whose responses clearly placed Corey in the significantly impaired range, another who placed him in the borderline range, and the third (the teacher who only knew Corey in the structured Pleasantville Cottage School setting, with its range of supports) rating him higher.

A. Interpersonal skills, friendship

Corey Johnson's school and treatment records are filled with references to his limitations in making friends and interacting with peers and adults. For example, a March 1977 home visit report when Corey Johnson was 8 years old stated that he could be easily manipulated and would become upset when teased by other children. In her psychological evaluation four months later, Dr. Jennifer Figurelli described Corey as a "solitary figure." In December 1978, when Corey was 10 years old and in third grade, an evaluation by the Bureau of Child Guidance, Upper West Side Center stated that Corey was referred by teacher due to, among other reasons, "poor peer relations."

During his time in the Pleasantville Diagnostic Center, a psychosocial summary in March 1982 noted that Corey "relates like a younger child and appears limited . . . . Corey does not have friends, he appears frightened of children and does not like any physical contact with them." A Cottage School Initial Conference, Current Assessment and Transfer Summary dated June 9, 1982, described Corey as "frequently isolated from the other children . . . . He does not appear ready to engage with other children . . . ." The Assessment went on to say: "He is frightened and expects to be rebuffed. He will need a good deal of experience and contact before he will be ready to engage."

In reflecting on Corey's time at Pleasantville, Janet Valentine told me that she observed "teasing by other children, poor social judgment, not being aware of why others were upset with him; he just didn't fit in." She added: "He could be quite vulnerable with other kids." "He initiated it (e.g., teasing, just outright lying) to get a rise out of kids." "Peer relations were a significant problem." "Initially, the other students ignored him, and then he would provoke others and he would go to the female staff for protection. He didn't seek out the staff except when he was in trouble with the other kids." Ms. Valentine also reported silliness and immaturity. She said that Corey never took initiative with the girls like the other boys did. "We used to have a prom. I don't remember him ever participating." This is despite other references to Corey being "girl-crazy" at the time, which suggests that his interest in girls exceeded his constrained ability to interact with them.

Odette Noble, a social worker at Elmhurst, remembers stark details about Corey's peer relations based on the 20 months that Corey participated in weekly individual and group counseling with her when Corey was ages 16 to 18. According to Ms. Noble, "[i]n social settings, he did not initiate action, but rather went along with what others did . . . . Corey did not have a good 'read' of situations or other people. He was not very sensitive to social cues. He had difficulty 'learning the rules of the game' and understanding who was in charge."

Observations by Corey's family and friends paralleled the observations from Corey's treatment professionals and educators. Corey's Aunt, Minnie Hodges, remembered that Corey played by himself as a child most of the time, because the other children would tease him or try to take the ball, money, candy, or other possessions away from him. Aunt Minnie described how his limitations constrained his interactions with peers when things did not go his way, noting: "He wouldn't understand others but didn't want to look bad." Similarly, his grandmother, Esther Johnson, said that growing up, Corey did not engage much with other children and did not make friends easily. She said he was withdrawn socially both as a child and a teenager and, even when he did have friends, he did not appear to be close to any of them.

Corey spent time from infancy through early adulthood with his mother's best friend, Antoinette Daniels Joseph, and her daughter, Courtney Douglas. Antoinette Joseph stated in her affidavit that "Both as a child and as a teenager, Corey was withdrawn socially." Ms. Joseph said that she thought hanging out with her family was a stabilizing influence for Corey. She expressed concern that "people would take advantage of him" (e.g., ask for money and never give it back)." "Robert [Corey's younger brother] took advantage of him."

Courtney Douglas is just a few months older than Corey. In an interview with me, Courtney described Corey as shy and withdrawn. She also described him as mild and meek. She said that as a teenager, Corey probably had friends, but he did not bring them home. She said that he hung out with Courtney, Holly Scott, and their friends. In Courtney Daniels' affidavit, she described Corey as he was growing up as "a cautious observer, rather than an active participant." "Corey rarely talked about himself or shared if he was upset by something. Instead Corey always asked me how I was doing and whether or not anyone was bothering me." She described how protective he was of

friends and family, particularly women. "Corey was generally very quiet around girls. I never saw him approach a girl on his own. Corey would ask me to talk to girls for him." "Through all the years that I knew Corey, Corey and I did not have serious conversations."

B. Leisure activities

With regard to leisure interests, the records I reviewed and my interviews paint a mixed picture. Janet Valentine reported that Corey never talked about sports. She said he would watch others play basketball, but she did not recall his playing. She said there was so much teasing going on, he would have been scapegoated if he played and was not good enough. (This report is inconsistent with records that show he played on the basketball team later at Newtown High School.)

Mr. Johnson did have an early interest in playing basketball, but apparently he had no other consistent interest and did not use his leisure time to do more than hang around the house of whomever he was staying with. He did not initiate leisure interests or explore available community leisure opportunities. Affidavits of Minnie Hodges, Antoinette Joseph, Sonya Hilton, and Darnell Brown.

With regard to leisure interests, JCCA conference notes (2-19-86) indicated that while at Elmhurst Boys Residence and attending Special Education classes at Newtown High School, Mr. Johnson was on the wrestling team. The same document identified a goal that "Corey will pursue his wrestling activity which will help build his self-esteem and build confidence." There is no indication that he followed up on this interest. Another goal was "Corey will learn to seek out leisure activities on his own and take initiative to participate." In his affidavit, David Washington, former staff member at Elmhurst, stated Corey "did not join other residents to play games or for other recreational activities."

Queenie Hodges reported (in my interview and her affidavit) that she could not remember Corey having any leisure activities other than basketball and TV cartoons. Minnie Hodges's affidavit also identified only cartoons and playing by himself as leisure activities. Courtney Daniels, Robert Johnson, and Kevin Koger also remembered Mr. Johnson's playing basketball when he was younger. His friend, Holly Scott, said that he just hung out when he visited her and Courtney; sometimes they would go to a park. She said that they never went to parties or movies. The leisure activities that Mr. Johnson participated in were usually initiated by someone else, as indicated in cousin Priscilla Hodges's affidavit. She gave the examples of skating and going to the movies together. Ms. Noble said that while at Elmhurst, Mr. Johnson engaged in passive activities, such as listening to music or hanging out at the mall, but she could not recall his having any particular interests.

In describing Mr. Johnson's role within the group of drug-sellers in New Jersey, Darold Brown described Mr. Johnson's leisure interests as going to people's houses, drinking, and listening to music. He went with the group when they went to hang out at someone's house. He did not go to clubs. Mr. Brown could not think of any other leisure interests besides hanging with the group. Although Mr. Johnson appeared to know his

way around the areas in which he lived, and by adolescence he had learned to use public transportation, he did not participate in community life or take advantage of the opportunities that his community offered.

C. Leadership, gullibility, naiveté, and victimization

Everyone whom I interviewed described Corey Johnson as a follower rather than a leader. In describing Corey's time at Pleasantville, Ann Harding, a supervisor at the Pleasantville Cottage School's older boys' cabin, where Corey lived in 1984 and 1985, stated, "I do not think Corey possessed leadership qualities. To the contrary, he was more of a follower than a leader in his interactions. I believe that Corey was probably taken advantage of by the other students occasionally."

Janet Valentine, who was also a counselor at Pleasantville, said, "He was a follower. He was not a leader at all." "Peers could lead him to do things, but he never initiated except for that teasing thing (e.g., he wouldn't get a group of guys together to play basketball or something)." She added: "He just did that immature teasing like a much younger child." When asked if he had friends, Ms. Valentine said that the other kids tolerated him: "He'd play the role of 'victim' a lot. I didn't see any maturing. He had poor self-esteem."

In describing Corey Johnson at Pleasantville, Richard Benedict reported that Corey wanted to "please" adults and was not a leader. "It would baffle me if he could get a group to do anything. He couldn't do it." "Being a leader doesn't match Corey." "In class he was more of a clown than a leader." Mr. Benedict reported that Corey "sought out adult approval, but didn't have the ability to do it." As noted above, Pleasantville records indicated that Mr. Johnson did not make friends easily, often stayed by himself, and was afraid of the other children at the facility. In fact, Mr. Benedict said that Corey often required protection from the other children in his class, because they "frequently scapegoated him." Benedict further explained that Corey was desperate to be accepted by his peers and would do anything that someone told him to do.

Odette Noble noted many things identified by others who knew Mr. Johnson, such as going along with others, susceptibility to peer pressure, failure to make good social decisions, and trusting the wrong people. In her affidavit, Ms. Noble noted that in August 1986, Corey was persuaded to go along with an older resident's plan to rob another resident of his paycheck. Although he was not the leader and went along with the plan just to be accepted and make friends, this incident resulted in Corey's being arrested and jailed at Riker's Island for robbery.

Dr. Dewey Cornell testified during the sentencing phase of Corey Johnson's death penalty trial about Corey's "social skills." In the context of the consideration of Corey Johnson's adaptive functioning, Dr. Cornell testified that social skills were an area, among others, that Corey's functioning was not at a normal level.

Corey's family and friends provided similar descriptions. Corey's cousin Priscilla Hodges and his Aunt Minnie Hodges both flatly said that Corey was a follower, not a leader. Similarly, Holly Scott remembered, "Corey never seemed to be a leader during

any of the years I saw him – even the years in which I saw him less frequently. Courtney and I used to be able to talk him into just about anything. We would ask him to go places with us, and he would end up coming even when he did not want to."

Corey's Aunt Minnie Hodges reported that "Other people took advantage of him, such as taking his lunch money. People found it easy to take advantage of him all throughout his childhood and teen years. He wouldn't understand others but didn't want to look bad, so other children easily tricked and manipulated him." She further stated:

> He would cry much longer than the other children. He would get very upset when he was teased by the other children. When Corey would interact with the other children, he would mainly play by himself, but the other children would tease him and try to take his ball away from him. If my children or Robert didn't intervene, the children in the neighborhood would bully him and take his ball or candy away from him. He could not defend himself or stick up for himself without protection and chose to play by himself most of the time instead.

Cousin Priscilla Hodges described similar experiences in her affidavit. "As a child, Corey complained that other kids bothered him and would take his money, ball, or other possessions. Corey would not assert himself with these other kids." "Corey was a follower, rather than a leader, first as a child and then as a teenager. Corey was easily influenced by others and could be persuaded to do things that, in my view showed very poor judgment. He would go to great lengths – and jeopardize his own well-being – just to fit in with the crowd." Priscilla remembered an incident that captured Corey's poor judgment and susceptibility to peer-pressure: "Once, when Corey was in his early teenage years, his 'friends' dared him to roller skate down an incredibly steep hill, an act that no one else would attempt. I told him not to do it, but his friends insisted. He ended up falling and suffering a bruise and scrapes. I believe he accepted the dare only to please his 'friends.'" She gave another example of Corey's riding a bike across a busy 2-way street. "Corey would do whatever his 'friends' told him to do, even if it could have killed or seriously hurt him." This deficit in judgment is also indicative of a deficit in Safety, which is a component of the Practical adaptive behavior area.

Corey and Robert Johnson both spent time regularly with Emma's mother, Esther Johnson, whom many described as the ruler of the family and the strict one. At the time of my interview, she was 84 years old and in frail health. Her memory for details was poor; however, she did remember instances of other children taking advantage of Corey. She said, for instance, every time he got a new sweater, somebody at school took it. When I asked if the same was true for Robert, she clearly said no. When I asked if Robert could stand up better to the other kids (although 2 years younger), she said, "You know it!" She described Corey as the easy one to take advantage of. This same information is confirmed in Esther Johnson's affidavit.

Mr. Johnson's maternal aunt, Minnie Hodges, told similar stories of other children taking advantage of him (e.g., taking his lunch money). She said that throughout his life, he was easily taken advantage of. She said that he was never a leader and just followed

others. Kevin Koger also described Corey in childhood as someone who "could be manipulated by others."

Corey Johnson spent most of his weekends before going to Pleasantville with his maternal aunt, Minnie Hodges and Ms. Hodges' daughters, Queenie and Priscilla. In interview, Aunt Minnie remembered Corey as a child who liked to be by himself a lot. She felt that she needed to look after him and that he needed more attention because "he played by himself and his mind wandered." "He liked to be alone." Aunt Minnie said that other children teased him, because he was considered strange and maybe slow, and he could not keep up conversation like other kids his age. Other kids took advantage of him by taking his ball and other toys. Cousin Priscilla independently reported that kids realized that they could take advantage of Corey. "They could get him to do anything."

D. Social domain ABAS-II results

Using the current AAIDD and APA system of assessing adaptive behavior, the ABAS-II standardized results by Antoinette Joseph demonstrate significant limitations in Corey Johnson's adaptive functioning in the Social domain. In contrast to my interview with her and the descriptions she provided in a later statement, which highlight Corey's social limitations, Minnie Hodge's ratings of Corey on the ABAS-II Social domain are higher. Similarly, Richard Benedict's ratings for Corey Johnson on the Social domain, are bit higher than and are inconsistent with the information he gave me in my interview of him.

ABAS-II Raters	Social Domain Scores
Antoinette Joseph	56
Minnie Hodges	81
Richard Benedict	88

E. Social domain conclusion

The contemporaneous records I reviewed contain numerous descriptions of Corey Johnson's deficiencies interacting with his peers and with adults at various times in his childhood and adolescence and in different social contexts and situations. They also document his gullibility and susceptibility to peer pressure, and his poor judgment. My interviews with the professionals who worked with Corey during that time and with family, friends, and associates who have known him throughout his life paint similar pictures of Corey Johnson's substantial deficiencies in social interactions and judgment.

As indicated earlier, the adaptive behavior evaluation relies upon information from as many different sources as possible. This approach has the advantage of gathering information that describes the individual at different time in his life and from the vantage point of different individuals who knew him in different ways. Thus, it is to be expected that there would be inconsistencies in the obtained information. For example, Mr. Benedict knew Corey Johnson in the structured environment of a residential school where

students' performance would be expected to be higher than in the unstructured environment in their neighborhood. Further, ratings of adaptive behavior can be influenced by the rater's positive feelings toward the individual. Ms. Joseph and Ms. Hodges knew Corey Johnson in different settings and over a longer period of time than Mr. Benedict. Inconsistencies are not unusual when considering information from many sources spanning many years. What is important is to examine the comprehensive evidence to determine an overall assessment.

Overall, the historical, documentary evidence I obtained related to Corey Johnson's adaptive functioning with respect to the Social domain and my interviews provide strong support for the conclusion that he had significant limitations in the Social adaptive behavior domain, while the standardized test results are mixed. Corey's school and treatment records document a consistent pattern of social impairments and significant limitations in judgment. Many of the professionals and family and friends whom I interviewed also described significant adaptive functioning impairments in the Social domain. Given the strong support in the records and the vivid descriptions from a wide array of professionals and lay-persons describing Corey's social abilities, I have concluded that Corey Johnson has significant limitations in the Social Domain that manifested themselves during his childhood, adolescence, and adulthood.

v. Practical Adaptive Behavior Domain

The AAIDD definition for the Practical adaptive behavior domain consists of the following skills: activities of daily living (personal care); occupational skills; use of money; safety/health care; travel/transportation; schedules/routines; and use of the telephone. The APA's DSM-5 defines the Practical domain as learning and self-management across life settings in similar terms to the AAIDD definition, including: personal care; job responsibilities; money management; recreation/leisure; self-management of behavior; and school and work task organization; among others. I have grouped my assessment of Corey Johnson's adaptive functioning in the Practical domain into the following categories: (a) Personal care/self-care; (b) Community use, travel, and transportation; (c) Health and safety; (d) Home living; and (e) Work.

The records and information I have considered demonstrate that Corey Johnson had significant limitations in personal and self-care from an early age that continued all the way up to his young adulthood. Corey wet his bed and soiled his sheets until he was about 12 years old. He needed constant reminders to clean himself after these accidents and to generally keep his body clean. He neglected cleaning his teeth and developed dental problems as a result. His self-care performance improved only slightly in the structured environments at Pleasantville and Elmhurst, and those who visited him as an adult, particularly when he lived in Trenton, described his living in apartments that were dirty and strewn with trash, dishware, and clothes. Corey demonstrated similar limitations in getting around in his neighborhoods. As a child, his caregivers did not trust him to travel alone, and his younger brother, Robert, was asked to lead Corey when they went out together. As a teenager and adult, Corey apparently never obtained a driver's license nor owned a car, and those who knew him recall that he often took cabs to get from place to place, although he sometimes used public transportation.

During the last few years that he was in a structured environment, Corey's caseworkers recognized that he would need to focus on independent living skills, because returning to his mother would not be in his best interest. Despite this critical goal, Corey was not able to develop independent living skills, nor did he possess the judgment to ensure his safety. He continued to succumb to the influence of others to engage in risky and unhealthy behavior. As I noted in the previous section on Corey Johnson's limitations in the Conceptual domain, he also demonstrated long-standing limitations with math and counting as it relates to the use and managing of money. As a result, he was never able to learn how to perform simple money management tasks, such as paying bills or making and following a budget. When he did earn money through drug dealing, friends often kept it for him so he would not spend it. Sometimes, family members (including his mother) and others took advantage of Corey by borrowing money from him and never paying him back.

After leaving Elmhurst abruptly, Corey never was able to live on his own but instead moved from living with his mother and brother, to a brief stay with his mother's ex-boyfriend and his wife in North Carolina, and then with a series of girlfriends and drug colleagues in New Jersey and later in Richmond, Virginia. Other than participating in structured work programs while at Elmhurst, Corey never held a job other than dealing drugs. Those with whom he engaged in the drug trade described Corey as challenged in his ability to count money and to keep track of drug sales, and described him as a passive participant who followed the directions of others.

Finally, two of the raters on the ABAS-II standardized rating scale produced scores corroborating his significant limitations in the Practical domain. Richard Benedict's ratings, which again were based only on his interactions with Corey Johnson in a structured setting, were substantially higher. Based on the information I have reviewed, some of which is highlighted below, I have concluded that Corey Johnson has significant limitations in the Practical adaptive functioning domain that demonstrated themselves when he was a child, adolescent, and adult up to the time of his crime.

A. Personal care/self-care

The Committee on the Handicapped records from the time when Corey was 10 years old noted that Corey was enuretic (wetting the bed) and encopretic (soiling himself) well into his middle school years.

When Corey was 13, a Child Assessment Evaluation Summary noted that he had dental cavities and gingivitis, evidence that he did not properly care for and brush his teeth. Consistent with that note, Janet Valentine said that Corey's self-care at Pleasantville was a problem initially, but over time he was able to slightly improve his self-care. As she put it: "He didn't come with those skills, but got a little better." However, a Comprehensive Service Plan for Corey from May 1985 indicates that by age 16 and a half and shortly before he was transferred to a group home as part of an attempt to transition him to independent living, Corey had not acquired independent living skills.

Dr. Dewey Cornell testified during the sentencing phase of Corey Johnson's capital that self-care was one of areas in which Corey's functioning was not at a normal level. Specifically, Dr. Cornell stated:

> Self care . . . work, the ability to maintain a job, to have good work habits, to use the kind of common sense you need to hold a job, all of those are possible areas in which his functioning is not at a normal level.

The reports from Corey's family describe similar limitations in self-care. Affidavits of Minnie and Priscilla Hodges also indicate that Corey Johnson wet the bed until age 11 and also soiled himself sometime between ages 8 and 12. Corey's Aunt Minnie recalled that she needed to remind Corey not to drink too many fluids before he went to bed, but he would still wake up with wet clothes, a wet bed, and an embarrassed look on his face. After these accidents continued for a while, she started waking him up in the middle of the night to use the bathroom. Minnie's daughter, Priscilla Hodges, remembered that Corey would try to cover the wet sheets with a comforter to hide the fact that he had wet the bed. His brother, Robert and friend, Antoinette Joseph, also remember Corey's wetting the bed. Regarding self-care in childhood, Cousin Queenie Hodges reported that Corey needed reminders to "wash up." Her affidavit indicated that he needed these reminders to bathe when he wet the bed up to about age 10. Queenie's mother, Minnie similarly reported to me that Corey was slower than other children to learn habits of hygiene and that she was still looking after him at age 8 to 10 to wash up. As noted earlier, Corey relied on reminders and structure in his early years but apparently learned some minimal standards of self-care while living at Pleasantville and Elmhurst by the time he was 18.

B. Community use, travel, and transportation

Mr. Johnson's Individualized Education Program (IEP) at Pleasantville (7-1-85, age 16 to 18) noted "Corey needs travel training until he is familiar with route and new neighborhood."

With regard to community use, in his affidavit, Robert Johnson noted, "Corey also had a hard time finding his way around. In terms of travelling, I would be able to pick up on a route the first time just by paying attention. But Corey needed a lot more training in that area. Around the ages of 8 to 10, my mother would choose me rather than Corey to go to my grandfather's house in Brooklyn, because she knew that Corey would get lost."

C. Health and safety

With regard to health and safety, health decisions in childhood were made by others. Corey did have a history of compromising his safety in order to ingratiate himself to peers. Cousin Priscilla Hodges gave examples of times when "friends" dared Corey to do dangerous things, and he foolishly complied. In the earlier section of this report on Social adaptive behavior, the example is given of roller skating down a steep hill and

riding a bike across a busy street, which was unsafe. Priscilla told him not to do it, but he did anyway and was nearly hit by a car.

D. Home living

With regard to home living, Mr. Johnson's Comprehensive Service Plan Child, dated May 28, 1985, when he was 16 and a half and winding down his time at Pleasantville, stated: "Corey will use opportunities offered him to learn independent living skills."

While at Elmhurst, Corey's team established goals for him to "learn how to handle money so that [Corey] can shop for himself" and "Caseworker, houseparents [sic], and teachers will help Corey learn enough simple arithmetic to figure out correct change." However, these objectives were not achieved; handling money was consistently identified as a goal throughout Corey's stay at Elmhurst.

Describing his time at Elmhurst, Odette Noble told me, "He's the kind of kid who I don't think could make it on his own – pay his rent, etc. Some people should stay in a protected setting all of their lives." "He couldn't negotiate all of the things that community life means." Ms. Noble repeated her concerns in her affidavit, stating, "I questioned Corey's ability to negotiate even the simple, day-to-day tasks that community life requires, such as paying the bills, obtaining a driver's license, or purchasing and maintaining a car. Somewhat more complex skills—like planning a budget—were clearly beyond Corey's abilities."

Ms. Noble reported that while living in the structured and supervised setting at Elmhurst, Corey Johnson kept clean, kept his room clean, did the dishes, and set the table. However, she recognized that the support structure at Elmhurst was critical to Corey. He did not have much occasion to cook or shop for food or household supplies. And, more fundamentally, she questioned whether he could live successfully on his own. "Because of Corey's intellectual limitations, I had concerns that Corey would not be able to hold a job. In short, I doubted that Corey was equipped to make it on his own, to live independently as an adult. Some people stay in a protected setting their entire lives and that may have been what was appropriate for Corey."

Corey's family and friends provide similar descriptions of his inability to care for himself and live on his own. For example, Queenie Hodges stated in her affidavit, "I do not remember him ever preparing a meal for himself." With regard to home living, Queenie Hodges reported that her mother had rules and expectations, but she had to remind Corey, "Pick up after yourself." She said she did not remember Corey ever doing any meal preparation. She also said that when he would pour milk in a bowl for cereal, he would make a mess, so Minnie would just do it for him.

Aunt Minnie Hodges's affidavit told a similar story. She said, "At age 10 to 13, he couldn't prepare a meal or even a simple sandwich. By age 15, he only improved a little in that he didn't make as much of a mess when preparing simple meals. I didn't give him much to do, because he couldn't do it . . . . Even when he made a sandwich, I'd

have to stand there and check." In my interview with Ms. Hodges, she told me essentially the same thing.

Ann Butler noted that when Mr. Johnson was 18 and living with her and Mr. Butler in Goldsboro, "he was still like a little boy. He could not have taken care of himself on his own." As noted earlier, the Butlers described an incident when Corey rode a bike in the woods wearing nice clothes and returned covered in mud. Ms. Butler said that she did things for him around the house, because he could not do them. According to her, Corey was too child-like. Although he had been taught home living skills at Pleasantville and Elmhurst, he still had to be reminded to carry out the simplest home tasks.

Mr. Johnson's brother, Robert, like others, indicated that Corey never lived by himself. But Robert, unlike all other reporters who expressed an opinion, thought that Corey could have lived independently. He had help from girls and guys he knew in New Jersey. Robert indicated that Corey could not live in the streets, although he did not give a clear reason why. People Robert was involved with would let Corey into their group, because they knew Robert well. In his affidavit, Robert Johnson stated, "He lived in several different places while in Trenton, always with others. Corey never lived by himself." In my interview and in his affidavit, Robert Johnson said Corey lived in New Jersey with a young girl whose nickname was "Mudda" (Ayesha Harris). He described the place where they lived as a shack. Robert said, "I thought it must be a crack spot. It was not something I would have lived in. Everything was cold, dark, and untidy."

Darnell Brown who was a leader of the group with which Mr. Johnson sold drugs in New Jersey said with regard to living conditions that the group lived everywhere, often crashing with whichever woman would provide meals. The group members did not have to pay for meals or lodging. Mr. Brown pointed out that Mr. Johnson never had his own place to live, never paid bills, and never had any responsibilities beyond his minor role in selling drugs.

Monica Dawkins, who dated Corey for 2 and a half years during the time that he lived in Trenton, New Jersey, said she once asked him to pay the phone bill in downtown Trenton, because she had to go to school. She said that Corey went downtown but did not pay the bill and instead claimed that he had forgotten, but she thought that the reason was because he was not able to figure out how to pay the bill.

Corey's friend, Sonya Hilton, knew Corey when he was living in Trenton, New Jersey. She recalled that Corey was very forgetful, sometimes forgetting plans he made in the morning by the afternoon. She said he frequently lost his keys and lost money. In fact, she said that he began to leave the back door to his house unlocked, because he had lost the front door key and had been locked out so many times.

The institutional records and my interviews showed that from his early adolescence until he left institutional care, many of the staff attempted repeatedly to teach Corey Johnson independence and home living skills. In fact, those were considered important goals as he became an older teenager to prepare him for adult life. With supervision and support in his institutional settings, Corey was able to make limited

progress. However, when that support ended and he left the institutional settings, my evaluation shows that Corey failed to apply those skills.

E. Work

All of Corey Johnson's work opportunities were in structured settings with significant supports. With regard to Work, Dr. Cornell reported in his 1993 testimony that Mr. Johnson had summer jobs involving manual labor while he was at Pleasantville Cottage. Dr. Cornell went on to say "He also was placed in a more vocational-oriented program called BOCES. It is a special educational program in which he was learning carpentry and did reasonably well. He tended to do best when he did things with his hands that did not involve language" (p. 3605). Mr. Benedict from Pleasantville said Corey "had a job at the school and liked making money – some kind of clean up."

A Psychiatric Summary from Pleasantville Cottage School (Elizabeth Clemmens, M.D., 1-18-85) stated: "During the summer, he worked at the Pace Farm as part of the Youth Employment Summer Program, doing manual labor. In September, he continued classes at BOCES where he learns carpentry and apparently is doing well."

Ms. Noble told me Mr. Johnson participated in a summer Neighborhood Youth work program while at Elmhurst. In my interview with Mr. Johnson, reported previously, he described several brief, unskilled jobs during this period. The jobs were, in Mr. Johnson's words, "simple."

Mr. Johnson fared well in structured work preparation programs that required manual labor. He did not demonstrate any skills or initiative at job-seeking, and he did not make the effort to stay in jobs for more than brief periods. Priscilla Hodges, Robert Johnson, Holly Scott, Darold Brown, and Darnell Brown each reported to me that Corey never had a job that they knew about. Commenting on Mr. Johnson's job prospects, Darold Brown stated in his affidavit that the only "job I could have believed Corey to be able to perform would have been a job requiring manual labor . . . where the work is repetitive and a supervisor would have been available to tell Corey what to do. Corey could not handle a job where unexpected problems came up, as he would not know what to do. Corey was not a problem solver." "Corey needed to be told what to do."

F. Practical domain ABAS-II results

Using the current AAIDD and APA system of assessing adaptive behavior, the ABAS-II standardized results by Antoinette Joseph and Minnie Hodges demonstrate significant limitations in Corey Johnson's adaptive functioning in the Practical domain. The ABAS-II results from Richard Benedict were substantially higher. However, Mr. Benedict's results must be understood as having been based on observations that occurred in the context an institutional environment, where supports and structure can artificially inflate the scores.

ABAS-II Raters	Practical Domain Scores
Antoinette Joseph	60
Minnie Hodges	65
Richard Benedict	88

G. Practical domain conclusion

In my opinion, the records, statements, interviews, and adaptive behavior instrument in the Practical domain strongly demonstrate that Corey Johnson has significant limitations in adaptive functioning in this area starting in his childhood and continuing through his adolescence and into adulthood up until the time he committed the crimes in this case.

vi. Adaptive Behavior Conclusion

As I noted at the outset, in order to meet the adaptive behavior prong of an intellectual disability diagnosis, it is only necessary to find significant limitations in adaptive functioning on one of the three domains or significant impairment in a measure of overall adaptive functioning. My review above of the contemporaneous records created during Corey Johnson's childhood and adolescence, my review of statements from those who knew him well, and my interview of those individuals led me to conclude that Corey Johnson demonstrated significant limitations in all three domains.

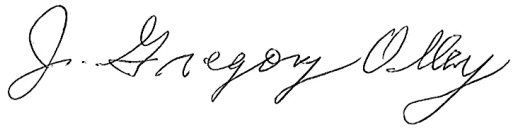
The ABAS-II results corroborate this conclusion, because the General Adaptive Composite ("GAC") score for all three raters, depicted below, demonstrates significant impairments in adaptive functioning. A GAC score of 75 or below meets the diagnostic standard for the adaptive behavior prong of an intellectual disability diagnosis.

ABAS-II Rater	General Adaptive Composite Score	Percentile
Antoinette Joseph	60	0.4
Minnie Hodges	64	1
Richard Benedict	74	4

V. Conclusion

This report summarizes extensive information regarding Corey Johnson's intelligence and adaptive behavior in childhood and in adolescence and adulthood. This information supports my diagnostic opinion that Corey Johnson has significant impairment in intellectual functioning and adaptive behavior, and that these impairments originated in childhood. This conclusion is based on IQ testing between ages 7 and 24,

adaptive behavior information from numerous and varied sources, corroborated by a standardized adaptive behavior scale. Mr. Johnson was administered six Wechsler intelligence tests between ages 8 and 23, four of which produced valid and reliable results and all four demonstrate significant limitations in intellectual functioning. Adaptive behavior information from my interviews, administration of the ABAS-II to three raters, and documents from numerous sources was consistent in indicating significant impairment in adaptive behavior. Based on all of this information, it is my opinion that Corey Johnson has intellectual disability originating in childhood and persisting into adulthood.



J. Gregory Olley, Ph.D.
Psychologist

Date: August 24, 2016

Appendix A

John Gregory Olley received a bachelor's degree in psychology from the College of William and Mary in 1966, a master's degree in general-experimental psychology from Wake Forest University in 1968, and a Ph.D. in psychology with emphasis in mental retardation (now intellectual disability) from George Peabody College (now George Peabody College of Vanderbilt University) in 1973. He completed a clinical psychology internship at the University of Kansas Medical Center in 1972. He has been licensed to practice psychology since 1974.

Dr. Olley has held positions as Assistant Professor in the Department of Psychology at the University of Massachusetts at Amherst and Clinical Associate Professor in the Department of Psychiatry and the School of Education at the University of North Carolina at Chapel Hill. During this period at UNC-Chapel Hill, Dr. Olley was Director of Training for Division TEACCH, the statewide program for children and adults with autism. After a brief stint at the Groden Center in Providence, Rhode Island, Dr. Olley returned to UNC-Chapel Hill as a psychologist in the Clinical Center for the Study of Development and Learning, which is now the Carolina Institute for Developmental Disabilities. Dr. Olley retired in July 2016 but continues to hold an academic appointment as Clinical Professor in the Department of Allied Health Sciences in the UNC School of Medicine.

Dr. Olley has published extensively in many aspects of developmental disabilities. In addition to his research and teaching roles, he has been engaged in a variety of professional and public service activities. Dr. Olley is a Life Member and Fellow in the American Psychological Association. He is a past President of the Division on Intellectual/Developmental Disabilities and Autism of APA and is a member of the Division's Executive Council. He is a Life Member and Fellow of the American Association on Intellectual and Developmental Disabilities.

Among his public service roles, Dr. Olley is a member of the Policy and Positions Committee of the Arc of the United States and the American Association on Intellectual and Developmental Disabilities, and he is Past Chairperson of the North Carolina Commission on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Appendix B

The sources upon which this report is based are as follows:

- School and residential records from Mount Pleasant Cottage School (a.k.a. Pleasantville Cottage School) for Corey Johnson
- Records of Bureau of Child Guidance, Upper West Side Center
- Report of Learning Consultant Evaluation to the Child Study Team, Jersey City Schools, 3-18-77
- Report of Psychological Examination of Corey Johnson by Jennifer Figurelli, Ph.D., 3-25-77
- Report of Psychiatric Evaluation of Corey Johnson by F. A. Figurelli, M.D., 10-4-77
- Psychological Report for Corey Johnson by Nathalie Smith, Ph.D., Manhattan Center, 5-3-79
- Report of Psychodiagnostic Evaluation of Corey Johnson by Ernest H. Adams, The Council's Center for Problems of Living, 12-11-1981
- Report of Psychological Evaluation of Corey Johnson by Cary Gallaudet, Psy.D., Pleasantville Cottage School, 2-8-1982
- Report of Speech-Language Evaluation at the Donald Reed Speech Center, September and October 1983
- Memo from Louise Sciaruto, Jewish Child Care Association, regarding speech therapy, January 19, 1984
- Report of Psychological and Educational Evaluation of Corey Johnson by Kenneth Barish, Ph.D., Pleasantville Cottage School, 3-15-1985
- Newtown High School records for Corey Johnson
- Interview with Corey Johnson at Federal Correction Center, Terre Haute, IN, February 7, 2011
- Interview by telephone with Mark A. Bezy, former warden at the Federal Correction Center, Terre Haute, IN, January 19, 2011
- Interview by telephone with James Sykes, father of Corey Johnson, January 21, 2011
- Affidavit of James Sykes, May 17, 2011
- Interview with Robert West, former pastoral counselor to Corey Johnson, at his church in Salem, VA, June 2, 2010
- Interview with Sarah West, former pastoral counselor to Corey Johnson at her husband's church in Salem, VA, June 2, 2010
- Interview by telephone with Pernell Williams, friend of Corey Johnson, June 25, 2010

- Interview with Holly O. Scott, friend of Corey Johnson at her apartment, Brooklyn, NY, July 17, 2010
- Affidavit of Holly Scott, June 23, 2011
- Interview with Courtney Daniels, childhood friend of Corey Johnson, New York, NY, May 22, 2010
- Affidavit of Courtney Daniels, May 21, 2011
- Interview with Esther Johnson, grandmother of Corey Johnson at her apartment, New York, NY, May 21, 2010
- Affidavit of Esther Johnson, April 30, 2011
- Interview with Robert Lee Johnson, half-brother of Corey Johnson, New York, NY, May 7, 2010
- Affidavit of Robert Johnson, June 29, 2011
- Interview with Antoinette Daniels Joseph, best friend of Corey Johnson's mother, New York, NY, July 17, 2010
- Affidavit of Antoinette Daniels Joseph, May 21, 2011
- Interview with Minnie Lee Johnson Hodges, maternal aunt of Corey Johnson at her apartment, New York, NY, May 8, 2010
- Affidavit of Minnie Hodges, April 30, 2011
- Interview by telephone with Kevin Koger, step-brother of Corey Johnson, August 3, 2010
- Affidavit of Kevin Koger, May 26, 2011
- Interview by telephone with Dr. Claire Barabash, former Deputy Superintendent of the New York Board of Education, April 23, 2010
- Interview with John McGarvey, former defense attorney for Corey Johnson, Richmond, VA, June 3, 2010
- Interview with Craig Cooley, former defense attorney for Corey Johnson, Richmond, VA, June 3, 2010
- Interview with Darold Brown, friend of Corey Johnson, New York, NY, May 21, 2010
- Affidavit of Darnold Brown, June 15, 2011
- Interview with Darnell Brown, friend of Corey Johnson, New York, NY, May 21, 2010
- Affidavit of Darnell Brown, October 14, 2011
- Interview with Queenie Hodges, cousin of Corey Johnson, at her apartment, New York,
- NY, May 8, 2010
- Affidavit of Queenie Hodges, April 30, 2011
- Interview with Priscilla Hodges, cousin of Corey Johnson, at her apartment, New York, NY, May 8, 2010

- Affidavit of Priscilla Hodges, April 30, 2011
- Affidavit of Elizabeth Sykes, half-sister of Corey Johnson, October 15, 2011
- Affidavit of Sonya Hilton, former girlfriend of Corey Johnson, June 15, 2011
- Interview with Gerald Lefkowitz, M.S.W., former Unit Administrator of the Pleasantville Diagnostic Center, and Richard Benedict, former teacher and administrator at Pleasantville Cottage School, May 7, 2010
- Declaration of Leona Klerer, a reading teacher formerly employed at the Mount Pleasant Cottage School, June 3, 2011.
- Declaration of George Sakheim, Ph.D., formerly a supervising psychologist at the Pleasantville Diagnostic Center and Pleasantville Cottage School, June 17, 2011.
- Affidavit of Gerald Lefkowitz, December 5, 2011
- Interview with Ms. Odette Noble, M.S.W., former social worker at Elmhurst Residential Home, New York, NY, May 7, 2010
- Affidavit of Odette Noble, December 1, 2011
- DVD of interview of Corey Johnson by Dewey Cornell, Ph.D., January 8, 1993
- Transcript of testimony of Dewey Cornell, Ph.D. at trial of Corey Johnson, January 1993
- Transcript of testimony of Gerald Lefkowitz, M.S.W. at trial of Corey Johnson, January 1993
- Transcript of testimony of Odette Noble, M.S.W. at trial of Corey Johnson, January 1993
- Telephone interview with Janet Valentine, former counselor and clinical social worker at Pleasantville Cottage School, May 5, 2011
- Declaration by Ann Harding, former staff member at Pleasantville Cottage School, November 21, 2011
- Interview with Robert Lee Butler, step-father of Corey Johnson, at his home in Lawrenceville, Georgia, December 17, 2011
- Interview with Ann Butler, wife of Robert Lee Butler, at her home in Lawrenceville, Georgia, December 17, 2011
- Declaration by Robert Lee Butler, December 17, 2011
- Declaration by Ann Butler, December 17, 2011
- Affidavit of David Washington, former staff member at Elmhurst Boys Residence, March 1, 2012
- Declaration by Cary Gallaudet, Ph.D., psychologist formerly employed at the Pleasantville Diagnostic Center, March 1, 2012
- Affidavit of Mary Sitgraves, Ph.D., psychologist, July 5, 2012
- Declaration by Monica Dawkins, former girlfriend of Corey Johnson, July 16, 2012

- Declaration of Kenneth Barish, formerly a psychologist at the Pleasantville Cottage School, July 22, 2014.

Appendix C

I. ABAS-II Results (3 Domains):

ABAS-II: 3 Domains	Antoinette Joseph	Minnie Hodges	Richard Benedict
Conceptual	63	57	74
Social	56	81	88
Practical	60	65	88
GAC	60	64	74
Percentile	0.4	1	4

II. ABAS-II Results (10 Domains):

The mean score for the general population is 10. A score of 4 or below indicates significant impairment (two standard deviations below the mean).

ABAS-II: 10 Domains	Antoinette Joseph	Minnie Hodges	Richard Benedict
Communications	7	2	1
Functional Academics	2	1	3
Self-Direction	1	4	4
Leisure	2	3	8
Social	1	9	7
Community Use	8	5	8
Home Living	3	1	8
Health-Safety	1	3	7
Self-Care	4	4	6
Work	-	-	-
GAC	60	64	74
Percentile	0.4	1	4

CURRICULUM VITA

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Education

College of William and Mary
Williamsburg, Va., A.B., 1966, Psychology

Wake Forest University
Winston-Salem, N.C., M.A., 1968, General-Experimental Psychology

George Peabody College for Teachers (now George Peabody College of Vanderbilt University) Nashville, Tenn., Ph.D., 1973, Mental Retardation Research - Clinical Psychology; "Related Area" - Special Education

Current Position

Psychologist, Adjunct Professor, Carolina Institute for Developmental Disabilities and Clinical Professor, Division of Clinical Rehabilitation and Mental Health Counseling, Department of Allied Health Sciences, School of Medicine, University of North Carolina at Chapel Hill

Previous Positions Held

Program Director, Behavioral Associates of Massachusetts, Inc., Attleboro, MA and Associate Clinical Director, The Groden Center, Inc., Providence, RI, June 1986 to July 1988.

Clinical Associate Professor, Department of Psychiatry, and Director of Training, Division TEACCH (Treatment and Education of Autistic and related Communication handicapped CHildren), and
Clinical Associate Professor, Division of Special Education, School of Education, University of North Carolina at Chapel Hill, March 1978 to June 1986.

Assistant Professor, Department of Psychology, University of Massachusetts, Amherst, MA, September 1972 - March 1978.

Director, Preschool Intervention Project, Psychological Services Center, University of Massachusetts, June 1973 - June 1975.

Professional Preparation

Graduate Assistant in Psychology, Developmental Evaluation Clinic, Bowman Gray School of Medicine of Wake Forest University, Winston-Salem, NC, September 1966 - August 1968.

Fellow, Training Program for Research Behavioral Scientists in Mental Retardation, George Peabody College, Nashville, TN, September 1968 - August 1971.

Clinical Psychology - Mental Retardation Intern, Division of Medical Psychology, Neuropsychiatric Institute, Center for the Health Sciences, University of California, Los Angeles, CA, June 1970 - August 1970.

Clinical Child Psychology Intern, Children's Rehabilitation Unit, University of Kansas Medical Center, Kansas City, KS, September 1971 - August 1972.

Editorial Work

Served as Guest Editor for: *American Journal on Mental Retardation, American Journal of Psychiatry, Behavior Therapy, Applied Research in Mental Retardation, Child Development, Journal of Applied Behavior Analysis, Journal of Autism and Developmental Disorders, Journal of Child and Family Studies, Journal of Clinical Child Psychology, Journal of Mental Health Research in Developmental Disabilities, Journal of the Association for Persons with Severe Handicaps, Journal of Intellectual Disabilities Research, Journal of Policy and Practice in Intellectual Disabilities, International Journal of Forensic Mental Health, Law & Social Inquiry, Merrill-Palmer Quarterly, Research in Autism Spectrum Disorders, Research in Developmental Disabilities*

Book Review Editor: *Journal of Autism and Developmental Disorders*, 1982 - 1986.

Consulting Editor: *Preventing School Failure* (formerly *The Pointer*), 1979 - 2016.

Consulting Editor: *Focus on Autism and Other Developmental Disabilities*, 1995 - 2016

Grants and Contracts

Principal Investigator: Contract with the North Carolina Council on Developmental Disabilities: Development of the Council's 5-Year Plan (March 2005-November 2005)

Principal Investigator: Youths for Advocacy, a Project of National Significance funded by the U. S. Administration on Developmental Disabilities. (October 2007-September 2010)

Principal Investigator: Work Group on the Role of Psychologists in *Atkins* Hearings, funded by the American Psychological Association (January 2007-November 2008)

Principal Investigator: Next Generation: Acting for Advocacy, a Project of National Significance funded by the U. S. Administration on Developmental Disabilities. (October 2004-September 2007)

Principal Investigator (with Anne Wheeler): Linking Learning with Neurodevelopmental Functioning: Management Strategies for Children with Prader-Willi Syndrome. Grant from the Prader-Willi Research Foundation. (May 2006-April 2007)

Principal Investigator: 5-Year Plan Project, grant from the North Carolina Council on Developmental Disabilities. (October 2005-June 2006)

Principal Investigator: Transition to Community, contract with the NC Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. (June 2005 – September 2007)

Principal Investigator: Shifting the Power, a Project of National Significance funded by the U.S. Administration on Developmental Disabilities. (October 2000 – September 2003)

Principal Investigator: Steps Toward Independence and Responsibility funded by the North Carolina Council on Developmental Disabilities (September 2001 – August 2004)

Principal Investigator: contracts with Developmental Disabilities Section of NC Department of Health and Human Services for surveys associated with the Core Indicators Project (September 2000-June 2003), Summer Apprenticeship (April 1998-June 2000), Behavioral Supports Clearinghouse (August 1998 – June 2000), training in Problem Solving for Life (August 1998 –June 2000), Self-Determination and Self-Advocacy (April 1998 – present), and consultation to community programs (September 1995 – June 2000).

Principal Investigator: "Learning for Life," U.S. Administration on Developmental Disabilities, October 1994-June 1997; July 1997-June 2001.

Contract with *Thomas S.* Section of NC Department of Human Resources, Screening of Adults for Eligibility in the *Thomas S.* Class, February 1995-March 1996.

Principal Investigator: "Survey of Summer Campers with Spina Bifida and Their Siblings," University Research Council, University of North Carolina at Chapel Hill, June 1991 - May 1992.

Principal Investigator, Grumman Grant for continuing education for teachers to use the TEACCH communication and social skills curricula, from Division of Extension and Continuing Education, University of North Carolina, July 1, 1984 - June 30, 1985.

Early Education Component Director, "Model Educational Program for Autistic Children and Youth," contract from Office of Special Education, October 1980 - January 1984.

One of the Participating Trainers, "National Personnel Training Program for Teachers of Children with Autism," grant from Office of Special Education to National Society for Children and Adults with Autism, August 1981 - May 1985.

Co-Director (with Eric Schopler): "Special Project: Comprehensive Inservice Training Program for Personnel Serving Autistic Children," Office of Special Education, June 1979 - May 1982.

Co-Principal Investigator (with R. J. Simeonsson and L. M. Marcus): "An Observational Approach to the Investigation of Educational Skills of Autistic Children," Research Grants in Education for Young Scholars in the Behavioral Sciences, School of Education, University of North Carolina at Chapel Hill, July 1978 - June 1979.

Co-Director (with Beth Sulzer-Azaroff): "Training Grant for Educational Change Strategists for the Severely Handicapped," Bureau of Education for the Handicapped, July 1974 - March 1978.

Principal Investigator: Faculty Research Grant, University of Massachusetts, "Investigation of Effects of Modeling on Diversity of Children's Drawings" (in collaboration with Richard Dubanoski, University of Hawaii), June 1976 - May 1977.

Principal Investigator: Broadened Faculty Research Grant, University of Massachusetts, "Relaxation as a Self-Control Procedure for Children," fall semester, 1975.

Principal Investigator: contract between University of Massachusetts and Massachusetts Department of Public Welfare for the Preschool Intervention Project, May 1973 - June 1975.

Honors

Fellow, Division on Intellectual and Developmental Disabilities, American Psychological Association

Fellow, American Association on Intellectual and Developmental Disabilities

Recipient of the North Carolina Arc LIFEguardianship Distinguished Service Award, 1994

Recipient of the Excellence in Applied Behavior Analysis Award from the North Carolina Association for Behavior Analysis, 1991

Recipient of the Distinguished Teacher in Psychology Award from Council of Undergraduate Students in Psychology, University of Massachusetts, Amherst, 1974 and 1976.

Research and Publications

Olley, J. G. (1968). *The effect of ready signal contingency and partial reinforcement on eyelid conditioning.* Unpublished master's thesis, Wake Forest University, Winston-Salem, NC.

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Papers presented (since 1990 only)

Olley, J. G. (1990, March). *Behavioral services for adults with developmental disabilities in the community.* Invited address presented at the meeting of the North Carolina Association for Behavior Analysis, Charlotte.

Olley, J. G. (1990, October). *Workshop on assessment and treatment for people with dual diagnosis.* Workshop presented at the meeting of the Berkshire Association for Behavior Analysis and Therapy, Amherst, MA.

Olley, J. G. (1991, February). *A behavioral look at dual diagnosis.* Invited presentation at the meeting of the North Carolina Association for Behavior Analysis, Greensboro, NC.

Olley, J. G., & Larkins, C. H. (1991, February). *Implications of the 'Thomas S.' lawsuit for community services.* Invited presentation at the Creative Dimensions in Developmental Disabilities conference, Greenville, NC.

Olley, J. G., & Hooper, S. R. (1991, August). *Do people with mental retardation understand what they are asked in personality tests?* Paper presented at the meeting of the American Psychological Association, San Francisco.

Olley, J. G. (1991, October). *The future of research and services in autism.* Keynote address at the annual EDEN Institute Conference on Autism, Princeton, NJ.

Olley, J. G. (1994, May). *Psychopathology in individuals with mental retardation: A behavioral look at dual diagnosis.* Paper presented at the meeting of the North Carolina Psychological Association, Atlantic Beach, NC.

Olley, J. G. (1995, August). *Curriculum issues in autism.* Invited presentation at the meeting on autism of the Texas Education Agency, Austin, TX.

Olley, J. G., Jens, K. G., & Klindworth, L. M. (1995, November). *Learning for Life: Adult Education for Individuals with Mental Retardation.* Paper presented at the meeting of the National Association for Adults with Special Learning Needs, Chicago, IL.

Olley, J. G. (1995, December). *Psychopathology and mental retardation: Educational and environmental approaches.* Invited presentation at the meeting of the Alabama Council for Children with Behavioral Disorders, Birmingham, AL.

Olley, J. G. (1996, February). *Behavioral treatment of individuals with Prader-Willi syndrome.* Paper presented at the meeting of the North Carolina Association for Behavior Analysis, Asheville, NC.

Olley, J. G., & Jens, K. G. (1996, May). *Issues in the education of adults with mental retardation.* Paper presented at the meeting of the Commission on Adult Basic Education, Pittsburgh, PA.

Olley, J. G. (1996, May). *What information do policymakers need to make policy in developmental disabilities?* Symposium chaired at the meeting of the American Association on Mental Retardation, San Antonio, TX.

Olley, J. G., Jacob, A. V., Paraschiv, I., Klindworth, L. M., & Jens, K. G. (1996, May). *Diagnosis of mental retardation in adults.* Paper presented at the meeting of the American Association on Mental Retardation, San Antonio, TX.

Olley, J. G., & Paraschiv, I. (1996, September). *Problem Solving for Life: Instruction for adults with mental retardation.* Paper presented at the meeting of the National Association for Adults with Special Learning Needs, New Orleans, LA.

Olley, J. G. (1996, October). *Autism: Conventional wisdom, careful research, and controversial approaches.* Invited presentation at the 1996 Cornwell Lecture Series, Morganton, NC.

Olley, J. G. (1997, October). *Curriculum for children and adults with autism.* Paper presented at the meeting of the North Carolina American Association on Mental Retardation, Greensboro, NC.

Paraschiv, I., & Olley, J. G. (1998, April). *Problem Solving for Life: Social skills training for adults with mental retardation/developmental disabilities.* Paper presented at the conference of the YAI: National Institute for People with Disabilities, New York, NY.

Olley, J. G., Golden, J., & Bailey, J. (1998, May). *One act with three players: Turning critics of behavior analysis into partners for positive change.* Symposium presented at the meeting of the Association for Behavior Analysis, Orlando, FL.

Olley, J. G. (1998, May). Discussant for symposium *The Ralph J. Bauduin Oral School: Research and program design for children with autism.* Symposium presented at the meeting of the Association for Behavior Analysis, Orlando, FL.

Olley, J. G. (1998, September). *What do we know about autism that is new?* Invited paper presented at the meeting of the North Carolina American Association on Mental Retardation, Greensboro, NC.

Olley, J. G., Carswell, R., & Palmer, G. (1998, October). *Successful behavior interventions.* Invited presentation at Together We Can! Using Positive Behavior Support in the Classroom and at Home. Greensboro, NC.

Olley, J. G., & Paraschiv, I. (1998, November). *A program to teach problem solving skills for independent living.* Paper presented at the meeting of NADD: An Association for Persons with Developmental Disabilities and Mental Health Needs, Albuquerque, NM.

Olley, J. G., Paraschiv, I., & Carswell, R. (1999, May). *Problem solving as a format for supporting self-determination and choice-making.* Pre-conference workshop presented at the meeting of the American Association on Mental Retardation, New Orleans, LA.

Olley, J. G. (1999, September). *Mental retardation and the criminal justice system.* Paper presented at the meeting of the North Carolina American Association on Mental Retardation, Greensboro, NC.

Olley, J. G. (1999, September). *Progress in services and supports for people with disabilities: One person makes a difference.* Invited presentation at the meeting of the North Carolina American Association on Mental Retardation, Greensboro, NC.

Olley, J. G. (1999, October). *Prader-Willi syndrome and other low prevalence disorders.* Paper presented at the meeting of the Community Living Association, Atlantic Beach, NC.

Olley, J. G., Tassé, M., & Havercamp, S. (2000, February). *Applications of applied behavior analysis in community settings serving people with disabilities.* Paper presented at the meeting of the North Carolina Association for Behavior Analysis, Asheville, NC.

Olley, J. G., Carswell, R., Finks, W., & Dorton, R. (2000, April). *Sex and relationships: When to say yes and when to say no.* Workshop presented at the North Carolina Self-Advocacy Convention, Winston-Salem, NC.

Olley, J. G. (2000, May). *Activity schedules as a guide to community consultation: A call for research.* Paper presented at the meeting of the Association for Behavior Analysis International, Washington, DC.

Dykeman, C., Pennell, R. L., Dawkins, B., Holden, J., & Olley, J. G. (2001, May). *Factors associated with problem behavior in the Special Olympics World Summer Games.* Paper presented at the meeting of the Association for Behavior Analysis International, New Orleans, LA.

Holburn, C. S., Vietze, P. M., Olley, J. G., & Baer, D. M. (2001, May). *Is applied behavior analysis adapting to the changing DD environment?* Panel discussion at the meeting of the Association for Behavior Analysis International, New Orleans, LA.

Golden, J. A., Strickland, D., Olley, J. G., & Cripe, M. (2001, May). *Trauma in foster children: Perspectives and contributions from behavior analysis.* Pannel discussion at the meeting of the Association for Behavior Analysis International, New Orleans, LA.

Olley, J. G., & Yates, L. (2001, May). *Criminal justice initiatives: A report from the DD/Criminal Justice Work Group.* Paper presented at the Best Practices in Developmental Disabilities Conference, Greensboro, NC.

Olley, J. G. (2002, February). *Effective services for students with autism: What do we know and what do we need to know?* Invited presentation at the Alaska Statewide Special Education Conference, Anchorage, AK.

Olley, J. G. (2002, April). *Autism and developmental disorders.* Invited presentation at the meeting of the Maryland School Psychology Association, Baltimore, MD.

Paraschiv, I., & Olley, J. G. (2003, February). *Teaching problem solving for community living.* Paper presented at the meeting of the Council on Exceptional Children's Division on Developmental Disabilities, Koloa, HI.

Olley, J. G. (2003, April). *Autism: What do we know and what do we need to know?* Invited paper presented at the 19th Annual Sharing Our Best Conference, Hastings, NE.

Olley, J. G. (2003, May). *Cautions in evaluating alternative therapies and approaches.* Paper presented at the Best Practices in Developmental Disabilities Conference, Greensboro, NC.

Olley, J. G. (2003, November). *Mental retardation and the death penalty: The psychologist as expert witness.* Invited presentation at the meeting of the Virginia Bar Association, Richmond, VA.

Everington, C., & Olley, J. G. (2004, March). *An analysis of forensic psychological evaluations in capital cases involving defendants with mental retardation: Has Atkins made a difference?* Paper presented at the meeting of the American Psychology-Law Society, Scottsdale, AZ.

Olley, J. G. (2004, May). *Psychological assessment of mental retardation in capital cases*. Invited presentation at the Capital Habeas Unit Conference, Administrative Office of the U.S. Courts, Ponte Vedra Beach, FL.

Olley, J. G. (2004, October). *Recent advances in the education of children with autism*. Presentation at the Fall NCAAMR Institute, Morganton, NC.

Olley, J.G. (2006, May). *The death penalty: Issues in expert testimony in Atkins hearings.* Paper presented at the meeting of The International Summit for the Alliance on Social Inclusion, Montreal, Canada.

Olley, J. G. (2006, August). Symposium Chair*: Mental retardation and the death penalty: Challenges facing psychologists.* Symposium at the meeting of the American Psychological Association, New Orleans, LA.

Olley, J. G. (2006, August). *Search for professional standards in Atkins hearings.* Paper presented at the meeting of the American Psychological Association, New Orleans, LA.

Olley, J. G., & Everington, C. (2007, March). *The measurement of adaptive behavior in Atkins cases.* Paper presented at the Off the Witness Stand conference, John Jay College of Criminal Justice, New York.

Salekin, K. L., & Olley, J. G. (2008, March). *Conducting an "Atkins" evaluation: What we know, what we don't know, and what we need to find out.* Workshop presented at the meeting of the American Psychology-Law Society, Jacksonville, FL.

Olley, J. G. (2008, August). *Psychology training in developmental disabilities at the University of North Carolina at Chapel Hill.* Paper presented at the meeting of the American Psychological Association, Boston, MA.

Olley, J. G. (2008, August). Symposium Chair: *Intellectual disability and the death penalty: Current and future contributions of psychologists in Atkins cases.* Symposium at the meeting of the American Psychological Association, Boston, MA.

Salekin, K. L., & Olley, J. G. (2008, August). *What does research tell us, and what research do we need in Atkins cases?* Paper presented at the meeting of the American Psychological Association, Boston, MA.

Olley, J.G. (2008, November). Symposium Chair: *Challenges facing professional organizations in developmental disabilities*. Symposium at the Annual Meeting of the Association of University Centers on Disabilities, Washington, DC.

Olley, J. G., Salekin, K. L., & Siperstein, G. N. (2009, March). *Diagnosis of intellectual disability in high stakes conditions:* T*ranslating basic research to practice in death penalty cases*. Paper presented at the 43rd Annual Gatlinburg Conference on Research and Theory in Intellectual and Developmental Disabilities, New Orleans, LA.

Olley, J. G. (2009, October). *Investigating intellectual disabilities with a focus on adaptive functioning*. Invited presentation at the Capital Case Seminar of the Los Angeles County Public Defender's Office, Los Angeles, CA.

Olley, J. G., & Stevens, K. C. (2010, January). *Recognizing and explaining mild mental retardation*. Death Penalty 2010: Continuing Legal Education Seminar of the North Carolina Advocates for Justice, Cary, NC.

Olley, J. G. (2010, August). *The death penalty, the courts, and what we have learned about intellectual disability.* Division 33 Presidential *Address* presented at the meeting of the American Psychological Association, San Diego, CA.

Olley, J. G. (2011, February). *The expert witness, intellectual disability, and the death penalty.* Invited address presented at the California Attorneys for Criminal Justice and California Public Defenders Association Capital Case Defense Seminar, Monterey, CA.

Olley, J. G., & Yackel-Christenson, J. (2011, March). *Atkins investigation: Roles and responsibilities of the mitigation specialist.* Invited 3-part presentation at the meeting of the National Alliance of Sentencing Advocates and Mitigation Specialists, Orlando, FL.

Olley, J. G. (2011, March). *Lessons learn*ed *from Atkins v. Virginia: Implications for juveniles*. Invited presentation at the National Judges' Science School: Developmental Forensics of Children Adjudicated by Courts, Chapel Hill, NC.

Olley, J. G. (2011, August). Chair: *Perspectives on intellectual disability and the death penalty – Toward more effective contribution of psychologists in Atkins cases*. Invited Symposium at the Convention of the American Psychological Association, Washington, DC.

Salekin, K. L. & Olley, J. G. (2011, August). *Eligible for execution? Assessment of intellectual disability as per Atkins*. Continuing Education Workshop presented at the Convention of the American Psychological Association, Washington, DC.

Olley, J. G., & Yackel, J. C. (2011, October). *Building partnerships: The complementary role of mitigation specialist and evaluating experts*. Invited presentation at Advanced Capital Training, New Orleans, LA.

Greenman, L., & Olley, J. G. (2011, November). *Exploring intellectual disability in your client*. Invited presentation at the Virginia Bar Association Capital Defense Workshop, Richmond, VA.

Olley, J. G., & Yackel, J. C. (2011, November). *Investigating capital cases involving dual diagnosis*. Paper presented at the annual meeting of NADD: An Association for Persons with Developmental Disabilities and Mental Health Needs, Nashville, TN.

Salekin, K. L., Olley, J. G., & Ellis, J. (2012, June). *The assessment of ID in capital cases*. Workshop presented at the annual conference of the American Association on Intellectual and Developmental Disabilities, Charlotte, NC.

Yackel, J. C., & Olley, J. G. (2012, November). *Understanding the law and science between Atkins and its progeny.* Invited presentation at the Life in the Balance conference of the National Legal Aid and Defender Association, St. Louis, MO.

Garvey, S., & Olley, J. G. (2013, October). *Investigating and presenting evidence of adaptive deficits*. Invited presentation at the Habeas Corpus Resource Center Fall Conference 2013, San Francisco, CA.

Salekin, K. L., & Olley, J. G. (2014, March). *Evaluation of intellectual disability in capital cases: Twelve years post Atkins*. Workshop presented at the meeting of the American Psychology-Law Society. New Orleans, LA.

Olley, J. G., & Miller, C. N. (2014), June). *Challenges in assessing intellectual and adaptive functioning in foreign nationals*. Paper presented at the meeting of the American Association on Intellectual and Developmental Disabilities, Orlando, FL.

Olley, J. G. (2014, November). *People with intellectual disability and autism in the criminal justice system*. Paper presented at the meeting of NC Training, Instruction, Development, and Education, Asheville, NC.

Nygren, M. A., Polloway, E. A., Tassé, M. J., & Olley, J. G. (2015, June). *Focus on the death penalty.* Panel presentation at the meeting of the American Association on Intellectual and Developmental Disabilities, Louisville, KY.

Olley, J. G. (2015, August). *Stereotypes of intellectual disability affect death penalty decisions: Examples from court opinions.* Paper presented at the convention of the American Psychological Association, Toronto, Ontario.

Olley, J. G. (2015, August). *Adaptive deficits: The current state of the science*. Invited presentation at the Twentieth Annual National Federal Habeas Corpus Seminar, Charlotte, NC.

Olley, J. G. (2016, September). *Identifying persons with intellectual disability*. Keynote Address at the Georgia Capital; Defenders' Quarterly Training Conference, Atlanta, GA.

Olley, J. G. (2016, October) *Intellectual disability: Understanding intelligence testing*. Invited address at the 2016 Association of Administrative Law Judges Education Conference, San Diego, CA.

Olley, J. G., & Hazelrigg, M. (2017, May). *Intellectual disability*. Presentation at Capital Case Management for Superior Court Judges, North Carolina Judicial College, Chapel Hill, NC

Olley, J. G. (2018, January). *Gathering information and providing expert testimony on adaptive behavior functioning in capital cases.* Invited paper presented at the 2018 Texas Summit on the Assessment of Adaptive Behavior in Capital Cases, Austin, Texas.

Olley, J. G. (2019, May). *Interviewing victims: Key issues and challenges*. Invited presentation at the Annual Meeting and Conference of the North Carolina Partnership to Address Adult Abuse, Raleigh, NC.

Olley, J. G., Reschly, D., Yackel, J., & Salekin, K. (2019, August). *New developments in the death penalty and people with intellectual disability*. Continuing education workshop presented at the Convention of the American Psychological Association, Chicago, IL.

Olley, J. G. (2020, July). *Evaluation of intelligence in Atkins cases*. Continuing education symposium presented by Zoom at the National Association for Public Defenders Symposium.

Posters

Olley, J. G., Hooper, S. R., & Flagler, S. (1990, October). *Assessment of the social-emotional status of adults with mental retardation using self-report.* Poster presented at the meeting of the American Association of University Affiliated Programs in Developmental Disabilities, Madison, WI.

Olley, J. G., Hooper, S. R., & Flagler, S. (1990, October). *Personal adjustment counseling for young adults with mental retardation.* Poster presented at the meeting of the American Association of University Affiliated Programs in Developmental Disabilities, Madison, WI.

Olley, J. G., Paraschiv, I., Allison, J., & Jacob, A. V. (1996, September). *Problem Solving for Life: Adult education for individuals with mental retardation.* Poster presented at the meeting of the North Carolina chapter of the American Association on Mental Retardation, Raleigh, NC.

Olley, J. G., Paraschiv, I., & Jacob, A. V. (1997, May). *Learning for Life: A training program to assist the Compensatory Education of adults with mental retardation.* Poster presented at the meeting of the American Association on Mental Retardation, New York, NY.

Paraschiv, I., & Olley, J. G. (1997, May). *Effectiveness of a training program in social problem solving skills.* Poster presented at the meeting of the American Association on Mental Retardation, New York, NY.

Olley, J. G., & Carswell, R. (1998, September). *The behavioral supports clearinghouse.* Poster presented at Together We Can! Using Positive Behavior Support in the Classroom and at Home, Greensboro, NC.

Paraschiv, I., Olley, J. G., & Carswell, R. L. (1999, April). *A program to teach problem solving as a skill for independent decision making.* Poster presented at the meeting of the Council for Exceptional Children, Charlotte, NC.

Book Reviews

Olley, J. G. (1979). Review of *Mental Retardation: A developmental approach* by C. C. Cleland, *Mental retardation: The changing outlook* by R. P. Ingalls, and *Retardation: Issues, assessment, and intervention* by J. T. Neisworth & R. M. Smith. *Journal of Autism and Developmental Disorders*, *9*, 131-133.

Olley, J. G. (1986). Review of *Annotated bibliography of autism: 1943-1983* by A. J. Tari, J. L. Clewes, & S. J. Semple. *Journal of Autism and Developmental Disorders*, *16*, 245-246.

Olley, J. G. (1986). Review of *Classic readings in autism* by A. Donnellan (Ed.). *Journal of Autism and Developmental Disorders*, *16*, 394-395.

Olley, J. G. (1987). Review of *Management of autistic behavior: Information service for educators.* Edited by R. L. Simpson & M. Regan. *Journal of the Association for Persons with Severe Handicaps*, *12,* 72-73*.*

Olley, J. G. (2006). *Review of Lessons learned from a lawsuit: Creating services for people with mental illness and mental retardation*, Social *Science & Medicine*, *62*, 523-524.

Instructional Materials

Olley, J. G., Paraschiv, I., Allison, J., & Jacob, A. V. (2000). *Problem solving for life: Teaching problem solving to adolescents and adults with developmental disabilities.* Clinical Center for the Study of Development and Learning, University of North Carolina at Chapel Hill: Chapel Hill, NC.

Memberships in Professional Associations

American Psychological Association (Life Member; member of Divisions 25 & 41; Fellow in Division 33)
President, Division on Intellectual and Developmental Disabilities 2009-2010
American Association on Intellectual and Developmental Disabilities (formerly American Association on Mental Retardation) (Fellow, Life Member)
North Carolina Chapter, American Association on Intellectual and Developmental Disabilities (Chair, Committee on Research)
North Carolina Association for Behavior Analysis (President 1992-93)

Licensure

Licensed Psychologist, North Carolina, license number 587.

Community and Professional Service (since 1990 only)

1990 - 1993	Member, Exceptional Children's Advisory Council, Chapel Hill-Carrboro City Schools
1992 - 1993	President, North Carolina Association for Behavior Analysis
1992 - 2007	Behavioral consultant to NC Arc Lifeguardianship
1993 - 1998	Member, National Community Education Directors Council, American Association of University Affiliated Programs
1994 - 2002	Member, Area Board of the Orange-Person-Chatham Mental Health, Developmental Disabilities, and Substance Abuse Services (Secretary 1999-2002); Committee on Developmental Disabilities (1994-2002); Client Rights Committee (1994-2008)
1995 - 2006	Consultant: The North Carolina Mentor Network
1995 - 2000	Consultant: Southeastern Regional MH, DD, and SA Services, *Thomas S.* Section
1996 - 1998	Consultant: Piedmont Area MH, DD, and SA Services, *Thomas S.* Section
1998	Grant Application Panel Review Member. National Institute on

	Disability and Rehabilitation Research, U.S. Dept. of Education
1998 - 2008	Member, North Carolina Council on Developmental Disabilities
2000 – 2012	Chair, Committee on Research, North Carolina American Association on Intellectual and Developmental Disabilities
2002 – 2007	*Ex Officio* Member, North Carolina Governor's Advocacy Council for Persons with Disabilities
2002	Member, NC Health Choice Task Force
2000 – 2007	Member, North Carolina Partners in Justice Advisory Committee
2005 - present	Member, *ad hoc* Committee on Developmental Disability and the Criminal Justice System, Division 33, American Psychological Association (Chair 2005-2015)
2008	*Ex Officio* Member, Disability Rights North Carolina
2008 - 2014	Member, North Carolina Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Vice-Chair, 2009 – 2011 ; Chair, 2011-2014)
2009 -2011	Member, American Association on Intellectual and Developmental Disabilities Task Force on Intellectual Disability and the Death Penalty
2014-2019	Member, Policy and Positions Committee, Arc of the United States
2018-2020	Chair, Committee on the Constitution and By-Laws, Division 33 of the American Psychological Association.

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Center for Social Development and Education

December 19, 2016

Donald P. Salzman
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

Re: Corey Johnson

Dear Mr. Salzman:

You have asked me to prepare a letter concerning my evaluation of Corey Johnson to determine whether he meets the diagnostic criteria for intellectual disability. You have also asked me to comment on reports prepared in 2016 by experts in the fields of intellectual disability and learning disability who also evaluated Corey Johnson, as well as a recent affidavit from an expert on the role of race in the classification of children as either intellectually disabled or learning disabled during the period when Corey Johnson was a child.

Summary of review and records considered

I was first asked to examine whether Corey Johnson has intellectual disability in late 2007 and early 2008 by Lisa Greenman, a counsel affiliated with the Federal Capital Habeas Project. At that time, I thoroughly reviewed an extensive set of materials that Ms. Greenman provided to me. Based on my review, I expressed my conclusion, in a January 11, 2008 letter to Ms. Greenman (which I have enclosed as Appendix A), that Corey Johnson's significant cognitive impairments and impairments in adaptive behavior, demonstrated before the age of 18, are consistent with mild mental retardation.[1]

Over the last several years, I have reviewed a significant number of additional records related to Mr. Johnson that I understand included contemporaneous records that had not been located at the time that Ms. Greenman asked me to conduct my earlier evaluation, plus extensive materials that were not in existence at the time of my January 2008 analysis. The new materials included intellectual disability evaluations conducted by two leading experts in the field, Daniel J. Reschly, Ph.D. and J. Gregory Olley, Ph.D. The new set of materials that were not available to me in 2007 and 2008 also included additional IQ test results from Corey Johnson's childhood that provide important insights in Corey Johnson's intellectual functioning and other new records concerning Corey Johnson's childhood related to his education and social services he received, among others. These materials also provide a significantly more expansive picture of Corey Johnson's adaptive functioning, one that is greatly enhanced by dozens of interviews with and

[1] "Mental retardation" is the term that was generally accepted in 2008 but has since been replaced by "intellectual disability," which is a synonym that describes the same level of impairment.

statements by family, friends, teachers, mental health professionals and others as well as the results from the administration of a standardized adaptive behavior instrument given to key individuals who knew Mr. Johnson best in different settings.

Overall, the materials I reviewed in 2008 and again recently, as well as the new materials, are comprehensive and include: school, social services, and institutional records for Corey Johnson; reports of Corey Johnson's psychological evaluations as a child and adolescent; the mitigation report by Dr. Dewey Cornell, a psychologist retained by the defense before trial, and his subsequent testimony at Corey Johnson's sentencing hearing; the report by Dr. Edward Peck, a neuropsychologist retained by the defense, concerning his neuropsychological exam, also presented during Corey Johnson's sentencing hearing; several dozen affidavits, declarations, and witness interview summaries collected long after Corey Johnson was sentenced to death from professionals, family members, and friends who knew Corey Johnson in a variety of settings during childhood, adolescence, and/or adulthood concerning Corey Johnson's adaptive functioning. These materials were analyzed in a report dated August 26, 2016 prepared by Dr. Reschly and a report dated August 24, 2016 prepared by Dr. Olley, including the results of the standardized adaptive behavior instrument administered by Dr. Olley to three individuals, which I have carefully reviewed. Finally, I have reviewed a declaration from Dr. Jay Gottlieb. My thorough and independent review of all of this information has strongly reinforced and reconfirmed my previous opinion that Corey Johnson's significant cognitive impairment and impairments in adaptive behavior, demonstrated before the age of 18, clearly demonstrate that Corey Johnson has mild intellectual disability.[2]

Background and experience

To arrive at my conclusion that Corey Johnson has intellectual disability, I have drawn from my extensive background and experience in the field of intellectual disability, including nearly 50 years of teaching, research, program and policy development, and clinical service. As the founder and director of the Center for Social Development and Education at the University of Massachusetts Boston, I have managed more than $25 million of research in intellectual disability and related disabilities. I have authored over 100 articles, chapters, and books on intellectual disability; topics including the identification and diagnosis of intellectual disability and teaching children with intellectual disability. I have also served as associate editor and editor for major journals (AMERICAN JOURNAL OF MENTAL RETARDATION, AAMR's *Research Monograph* series) and as a consulting editor to numerous journals in developmental disabilities.

I have served in leadership roles at the local, state, and national levels including, for example, board memberships on the Governor's Council for Mental Retardation and as a consultant to the President's Commission on People with Intellectual Disabilities. As a licensed Psychologist, my work as a practitioner in the area of intellectual disability has also been extensive, particularly involving the intellectual assessment of children with intellectual

[2] When I use the term "mild intellectual disability," I am referring to Corey Johnson as someone who has *significant* impairments and who is at the upper range of all individuals with intellectual disability, but the adjective "mild" should not be interpreted to mean that he is not significantly impaired.

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disability. My educational background includes an APA Post-Doc Fellowship in the Developmental Evaluation Clinic (DEC), Children's Hospital, Harvard University.

I have directly tested and evaluated over 100 children and adolescents in diagnostic settings to determine whether they have intellectual disability. In addition, through my research, I have personally observed hundreds of children and adolescents with intellectual disability. I have also reviewed hundreds of students' records for the purpose of confirming the prior diagnoses by others of intellectual disability, and thus to determine whether or not they were eligible for inclusion in our federally funded research studies and our summer program for children with disabilities. I have enclosed my curriculum vitae as Appendix B.

Intellectual disability criteria

The diagnosis of intellectual disability has three parts, or prongs. To be intellectually disabled, a person must demonstrate significant limitations in intellectual (cognitive) functioning, which is measured through the administration of standardized IQ tests. The person also must demonstrate significant limitations in adaptive functioning (how their cognitive limitations are reflected in their behavior and functioning in every-day life), and specifically must show significant limitations in at least one of three areas (known as domains)—conceptual, social, and practical—of adaptive behavior. Finally, the individual's limitations in intellectual functioning and adaptive functioning must have originated during the developmental period (during childhood).

Analysis of Corey Johnson's intellectual functioning

I explained in my 2008 letter that it is clear that Corey Johnson meets the criteria for intellectual disability. The additional materials that I have reviewed recently only reinforce and strengthen my conclusion.

On the intellectual functioning prong, the discovery by Corey Johnson's current clemency counsel—after I wrote my 2008 letter—of two additional IQ tests whose existence was not known at the time he was sentenced to death is critical new corroboration of my previous conclusion. First, the test administered by Dr. Figurelli when Corey was eight years old produced a Full Scale IQ of 73, which is clearly within the mild intellectual disability range, and is consistent with the scores obtained by Dr. Barish, when Mr. Johnson was 16, and by Dr. Cornell, when he was 22. Second, the discovery of the WISC-R IQ test administered by Dr. Adams in October 1981 when Corey Johnson was age 12, is vital evidence that eviscerates any validity of the identical WISC-R IQ test given to Corey Johnson only four months later by Dr. Gallaudet. The Gallaudet test (a clear outlier) played a central role in the erroneous classification (which I discuss below) of Corey Johnson as a "severely learning disabled" child, rather than as a child with intellectual disability.

The opinions I expressed concerning Corey Johnson's significant impairments in intellectual functioning are echoed and expanded upon in Dr. Reschly's August 2016 report, which focuses principally on the intellectual functioning prong of the intellectual disability diagnosis. He provides a comprehensive explanation of the evolution in the understanding and

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conceptualization/definition of intellectual disability over the past several decades, particularly on the assessment of intellectual functioning. He clearly captures the essence of the Flynn effect and the statistical concept of the standard error of measurement (SEM), two critical components to interpreting the results of intelligence testing. For persons with mild intellectual disability, it is vital that we recognize, as Dr. Reschly does, the importance of up-to-date norms of intelligence tests, and understand that when "cut-off" points for intellectual disability are considered, confidence intervals (based on the standard error of measurement) must be taken into account. Today's definition of intellectual disability by the leading professional organizations, as discussed by Dr. Reschly, puts the Flynn effect and confidence intervals in bold relief. Their applications to diagnosing and applying the intellectual disability definition have become standard practice, as the meta-analysis demonstrating the Flynn Effect by Trahan *et. al.*,[3] and the Supreme Court's holding in *Hall v. Florida*, recognizing the consensus among practitioners that the SEM must be taken into account in any *Atkins* determination, make clear.

Applying these two elements to interpreting the multiple administration of the WISC and the WAIS to Corey Johnson, Dr. Reschly persuasively concludes that Corey Johnson has significant deficits in intellectual functioning, a conclusion that I had arrived at independently in 2008 and continue to share today. Dr. Reschly's report contains a detailed and in-depth analysis of Corey Johnson's IQ test results. He explains why four of the IQ tests given to Corey Johnson are valid, consistent with each other, and place Corey clearly within the range of intellectual disability. Dr. Reschly also persuasively shows why two other tests are severely flawed, hold little validity, and should be given little, if any, weight in assessing Mr. Johnson's intellectual disability. Dr. Reschly explains that one of those invalid tests (administered by Smith in 1979) was out-dated by decades at the time it was given to Corey Johnson, and had been superseded by a then-recent, culturally relevant version of the same test. He further describes how the other IQ test (the WISC-R test given by Gallaudet that I discuss above) was inadvertently administered to Corey Johnson just four months after he was given the identical WISC-R IQ test by Dr. Adams, artificially inflating the results of the Gallaudet test and rendering it invalid and useless. Overall, based on my 50 years of work in the field of intellectual disability, the conclusions Dr. Reschly draws concerning Corey Johnson's intellectual functioning are irrefutable.

Analysis of Corey Johnson's adaptive behavior functioning

In my 2008 letter, I concluded that, in addition to his significant cognitive impairment, Corey Johnson also demonstrated significant deficits throughout his childhood in all three areas of adaptive functioning—conceptual, social and practical skills—even though significant impairment in only one of these areas is necessary to support an intellectual disability diagnosis. I explained that those deficits were documented by the contemporary records from Corey Johnson's childhood and adolescence and by information contained within the psychological report prepared by Dr. Cornell and Dr. Cornell's 1993 sentencing hearing testimony, as well as other records and information I reviewed in 2008.

[3] Trahan, L.H, Stuebing, K.K., Fletcher, J.M., & Hiscock, M. (2014). *The Flynn Effect, A meta-analysis. Psychological Bulletin*, 140, 1332-1360.

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The new evidence developed by Corey Johnson's current clemency counsel and by Dr. Olley since 2008 provides a wealth of additional support for the conclusions I reached in 2008. They have gathered substantial new information demonstrating that Corey Johnson's adaptive functioning deficits are corroborated by numerous written statements from and interviews with Corey Johnson's teachers, mental health professional, relatives, and friends, who were interviewed by Dr. Olley and by Mr. Johnson's current clemency counsel. Those interview statements, affidavits, and declarations are further corroborated by numerous contemporaneous records created by professionals during Corey Johnson's childhood and adolescence.

Building upon and concurring with the thorough analysis of the intellectual functioning prong of the intellectual disability diagnosis by Dr. Reschly, Dr. Olley focuses the majority of his excellent report on the evidence supporting his conclusion that there is overwhelming, undeniable evidence that Corey Johnson suffered significant impairments in all three areas of adaptive functioning. His logic and the clarity of facts and interpretation contained in his comprehensive report impeccably reflect the most rigorous interpretation and explanation possible concerning Corey Johnson's intellectual disability, and the conclusions he draws are both sound and irrefutable. Dr. Olley employs the strictest reading and rigorous application of the standards incorporated in the definitions of intellectual disability put forth by the American Psychiatric Association (APA) in its most recent Diagnostic and Statistical Manual (DSM-5) and by the American Association on Intellectual and Developmental Disabilities (AAIDD), the two leading medical and professional organizations in the field.

Dr. Olley's assessment is extensive and goes well beyond what would be expected of an evaluation. He painstaking and thoroughly weighs all factors individually and in combination. He sought out multiple sources of information, recreating with clarity Corey Johnson's developmental, educational, and family history, placing it all within the context of the changing field of intellectual disability. Most importantly, Dr. Olley has illuminated the nexus between Corey Johnson's developmental history and the context within which that development took place. Throughout, he provides corroborating evidence, documenting with the utmost detail the overwhelming risk factors that were the pathway to a diagnosis of intellectual disability. At the same time, Dr. Olley provides a clear explanation of why a diagnosis of intellectual disability was never rendered when Corey Johnson was a child, adolescent, or even an adult facing the death penalty, a critical point that both Dr. Reschly and Dr. Gottlieb also address, and one that I discussed in my 2008 letter. And he has shown why a diagnosis of intellectual disability was called for at the time Corey Johnson was in elementary school, given the weight of overwhelming evidence of the breadth and severity of his impairments.

Guided by his rigorous interpretation of the standards for the diagnosis of intellectual disability established by the APA and the AAIDD, Dr. Olley utilizes well recognized best practices for extrapolating and assessing Corey Johnson's adaptive behavior. Dr. Olley addresses Corey Johnson's academic performance, including multiple grade retentions that did not help in improving Corey's academic performance, which characterized his repeated academic failure. In his early elementary years, he was clearly a candidate for special education services, yet he did not receive them. Without intensive services, Corey showed no improvement in learning during his elementary grades; in fact, his academic performance significantly deteriorated. And when he finally received special education services, first when he

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was about 10 years old, then as a teenager at the residential Pleasantville Cottage School program, and later as a high school student, Corey continued to show no improvements.

The corroboration of Corey Johnson's language deficits by Dr. Olley leaves no doubt of the seriousness of Corey's deficit in this area. Dr. Olley explains how Corey entered the early grades at a disadvantage. Later, when he entered the Pleasantville Cottage School, Corey's significant absence of both expressive and receptive language skills at his age is further evidence of an adolescent with intellectual disability.

Similarly, Dr. Olley's documentation of Corey's significant lack of social skills across his lifespan, from early childhood to adulthood, underscores the fact that intellectual disability was present since a young age. Notwithstanding all the attempts to support Corey Johnson through direct instruction and counseling, he showed little if any improvement in his social skills. As someone who has written two books on teaching social skills to children with intellectual disability, I can confirm that if Corey Johnson did not have an intellectual disability, there would been a natural improvement in his social skills over the years, yet his deficit in social skills was not remediable. This is a clear sign of his intellectual disability. Dr. Olley further recounts numerous practical skill deficits in support of his conclusion that Corey Johnson had significant impairments in the practical domain, a conclusion I share.

Finally, the conclusions that Dr. Olley draws from his review of all of the records and the information he collected from various sources were confirmed by the results of the administration of the ABAS-II, which he gave to three key sources. Thus, Dr. Olley's multiple prong approach to evaluating Corey Johnson's adaptive functioning in all three domains of adaptive behavior leads inexorably to only one conclusion. Using the expression "leaving no stone left unturned," Dr. Olley systematically and painstakingly demonstrates that Mr. Johnson's significant deficits in adaptive behavior were clearly recognizable at an early age and have lasted into adulthood. His summary of voluminous information and his careful interpretation of that information leave no room to doubt his conclusion that Corey Johnson has an intellectual disability, a conclusion that I wholeheartedly and unequivocally share and one that I reached in 2008.

Failure to classify Corey Johnson as intellectually disabled as a child

As I explained in my 2008 letter, Corey Johnson attended school during the 1970s and 1980s when the trend in education, particularly with respect to poor, minority children (especially African American children) in schools in urban districts, was to avoid labeling students as "mentally retarded." Instead, the less stigmatizing label of "learning disabled" was chosen for children who actually met the criteria for mental retardation. Forty-five years ago (1971), I had the opportunity to observe the clinical assessment of children referred for special education in the New York Public School system. As the program evaluator of the newly established Evaluation and Placement Centers throughout the five boroughs of New York City, I personally sat in and observed the deliberations of the interdisciplinary clinical teams. I can attest to the proclivity of the teams to not place children in special education classrooms designed for students with mental retardation, even when there were clear indications of mild intellectual disability. Dr. Gottlieb was one of the key social science researchers to study this

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trend and demonstrates its existence on a broad scale (as I had personally observed it occur on a more individual level). His declaration provides a detailed explanation of how well-meaning litigation efforts that began in the 1960s and other factors created a climate where educators and mental health professionals felt pressure not to label children with mental retardation, particularly when the label was not important to the services children received in school.

Dr. Reschly cogently explains in his report that the label of "severe learning disability"—which has no diagnostic meaning but was repeatedly applied to Corey Johnson—was a euphemism for mental retardation during the time that Corey was in school. He also describes why the learning disabled diagnosis did not then, and does not now, fit Corey Johnson's comprehensive, consistent, and significant impairments. He documents how Corey Johnson's impaired achievement was consistent with his impaired intellectual functioning, which is diagnostic of intellectual disability and inconsistent with learning disability. Finally, Dr. Reschly punctuates his report with statistics graphically demonstrating how the learning disability diagnosis exploded in numbers over the past few decades, while the "mental retardation" and later "intellectual disability" diagnosis declined, even though professionals have understood all along that the actual number of children fitting the diagnostic criteria for these conditions has not changed.

I concur with Dr. Reschly and in a past chapter, Learning Disabilities as Operationally Defined by Schools (MacMillan and Siperstein (2002)), we clearly explain how the process schools adopt to identify students with learning disabilities did not conform to the federal definition and resulted in almost a third of students with mild intellectual disabilities being otherwise diagnosed and incorrectly placed in programs for the learning disabled. Subsequent research by MacMillan and his colleagues documented that, in fact, up to one-third of minority students in classrooms for the learning disabled met the criteria for mild intellectual disability.

Conclusion

Based on all of the documents I reviewed, and my nearly 50 years of extensive involvement in the field of disabilities, I unequivocally conclude that Corey Johnson meets all three prongs of the most recent definition of Intellectual Disability (APA, AAIDD) and clearly is mildly intellectually disabled.

Sincerely,

Gary N. Siperstein, Ph.D.
Professor Emeritus
Director
Center for Social Development and Education
University of Massachusetts Boston

Enclosure

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APPENDIX A

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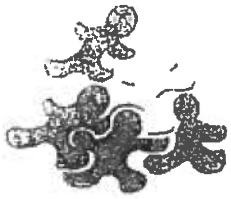

January 11, 2008

Lisa Greenman, Esq.
3925 Morrison Street NW
Washington, DC 20015

Dear Ms. Greenman,

I have reviewed the documents pertaining to Corey Johnson and provide here, in summary form, my opinion on the question concerning a diagnosis of mental retardation. The material that I reviewed was extensive and included reports of Corey Johnson's psychological evaluations, his neuropsychological exam, information about his behavioral and emotional issues in a variety of settings as well as the mitigation report by Dr. Dewey Cornell and subsequent testimony. Based on my thorough review of all of this information, it is my opinion that Corey Johnson's significant cognitive impairment and impairment in adaptive behavior, demonstrated before the age of 18, is consistent with mild mental retardation, not a learning disability.

To arrive at this conclusion I have drawn from my extensive background and experience in the field of mental retardation including over 40 years of teaching, research, program and policy development, and clinical service. As the founder and director of the Center for Social Development and Education at the University of Massachusetts Boston, I have managed more than $20 million of research in mental retardation and related disabilities. I have authored over 100 articles, chapters, and books on mental retardation; topics including the identification and diagnosis of mental retardation and teaching children with mental retardation. I have also served as an editor for major journals (AMERICAN JOURNAL OF MENTAL RETARDATION, AAMR's *Research Monograph* series) and as a consulting editor to numerous journals in developmental disabilities. I have served in leadership roles at the local, state, and national levels including, for example, board memberships on the Governor's Council for Mental Retardation and as a consultant to the President's Commission on People with Intellectual Disabilities. As a licensed Psychologist, my work as a practitioner in the area of mental retardation has also been extensive, particularly involving the intellectual assessment of children with mental retardation. Not only have I directly tested and evaluated over 100 children and adolescents with mental retardation in diagnostic settings, through my research I have personally observed hundreds of children and adolescents with mental retardation and have reviewed hundreds of students' records for the purpose of substantiating students' diagnosis of mental retardation for inclusion in our federally funded research studies.

With regard to intellectual functioning, it is clear that Corey Johnson meets the criteria for mental retardation. The consistent pattern of strengths and weaknesses that emerges

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across the intelligence assessments administered by Drs. Barish and Cornell clearly point to significant intellectual impairment. On the administration of the WISC-R by Dr. Barish in 1985, Corey Johnson showed significant intellectual impairment (Full Scale IQ = 69). It is important to point out that there was no statistically significant difference between Corey Johnson's Verbal IQ (68) and Performance IQ (78) – the two major components that make up his Full Scale IQ score (it should be noted that when there is a significant difference between the Verbal and Performance IQ, this difference is often characteristic of a person with a learning disability). Furthermore, Corey Johnson's Verbal IQ subtest scores showed no significant scatter; that is all of the scores were similar (i.e., reflecting a flat profile of scores across the verbal subtests). In addition, with regard to his Performance IQ subtest scores, three of the five were not only similar to each other, but also similar to the Verbal IQ subtest scores. This flat profile of subtest scores is characteristic of someone with mental retardation, not a learning disability.

Corey Johnson's performance on the adult version of the Wechsler (WAIS-R), administered by Dr. Cornell in 1992, is strikingly similar to his previous performance particularly when one takes into account the Flynn effect. The Flynn effect, supported by extensive research by Dr. James Flynn, represents the well-established finding that intelligence test norms "age" or slowly go out of date at the rate of 0.3 Full Scale IQ points per year. The norms used to assess Corey Johnson's performance in 1992 were collected in approximately 1979, because the WAIS-R was published in 1981.The 13-year gap between the date when the norms were established and the year Corey Johnson was tested means that his Full Scale IQ would be overestimated by about 4 points (i.e., 13 X 0.3 = 3.9 points). As such, Corey Johnson's Full Scale IQ of 77 is inflated by approximately 4 points. [Note: See Flynn and Widaman (in press) for discussion of the need to adjust for outdated norms when identifying individuals with mental retardation.]

After adjustment for the Flynn effect, the best estimate of Corey Johnson's Full Scale IQ is 73. Dr. Cornell's decision not to factor in the outdated norms in light of the Flynn effect was mistaken. It is the established procedure in the field that the Flynn effect be invoked, and an adjusted Full Scale IQ calculated based on a correction for the changes in norms over time, before a decision is made regarding the presence of mental retardation. The adjusted Full Scale IQ score of 73 is notably consistent with the Full Scale IQ score of 69 obtained when Corey Johnson was tested in 1985. Indeed, the standard error of measurement, which is the standard deviation of scores obtained by an individual across multiple measurements, is about 3 points for the WAIS-R. The 95% confidence interval for his score would be calculated as his obtained IQ score plus or minus twice the standard error or measurement, or his score plus or minus 6 points. His adjusted Full Scale IQ score of 73 in 1992 falls only 4 points from the Full Scale IQ score of 69 he received in 1985, and this is entirely consistent with the standard error of measurement for the WAIS-R. Corey Johnson's adjusted Full Scale IQ score of 73 clearly falls within the IQ range of 70-75 that allows diagnosis of a person as having mental retardation.

Focusing specifically on his performance on the adult version of the Wechsler, as was the case on the child version, there was no statistically significant difference between his Verbal IQ (75) and Performance IQ (82). Also, across all eleven subtests, only the Object

Assembly subtest differed significantly from the other subtest scores. Here again, as with the WISC-R, Corey Johnson's performance is relatively flat across the subtests of the WAIS-R. Furthermore, Corey Johnson's performance on the specific subtests of the WAIS-R was strikingly similar to his performance on the subtests of the WISC-R administered 7 years earlier. [Note: Only two subtests - Block Design and Object Assembly - were different from the WISC-R subtests.] Overall, it is evident that Corey Johnson's performance on the WAIS-R in 1992 and his performance on the WISC-R in 1985 are both characteristic of a person with mild mental retardation.

In addition to his significant cognitive impairment, there are strong indications that Corey Johnson also experienced deficits throughout his childhood in all three areas of adaptive functioning: conceptual, social and practical skills. Although there was no direct assessment of Corey Johnson's adaptive behavior using a standardized measure, there is information in the documents provided that describes his adaptive behavior, or more descriptively his ability to perform activities required for everyday living. The available information, particularly that which was provided in the mitigation report by Dr. Cornell and his subsequent testimony, and in Dr. Peck's neuropsychological evaluation, indicates that Corey Johnson has significant difficulties with tasks common to everyday living. For example, Dr. Peck states in his evaluation that Corey Johnson, "...would be at risk for day-to-day difficulty in the area of logical thinking" and that his findings "indicate an increased risk for interpersonal difficulty wherein he might misinterpret situations." Comments from one of Corey Johnson's former social workers included in Dr. Cornell's report also allude to his adaptive limitations in that while in school, Corey Johnson was characterized as, "a follower who was so eager to be accepted by his peers that he would act without thinking." His deficits with practical skills were also referenced in several places. For example, Corey Johnson was (and still is) unable to handle money or tell time. Dr. Cornell also indicates in his report and during his testimony that Corey Johnson has significant impairment in adaptive behavior in several areas. He states, "certainly functional academics....communication deficits with his speech impairment and communication problems....self care, social skills.... the ability to maintain a job....all of those are possible areas in which his functioning is not at a normal level." Corey Johnson's deficits in adaptive behavior combined with his significant cognitive impairment are characteristic of mental retardation, not a learning disability.

I am fully aware that my conclusion of mental retardation is in stark contrast to the conclusion first rendered by Dr. Barish in 1983 when Corey Johnson was 15 years old. It is important to consider however, that while the initial diagnosis of a learning disability made by Dr. Barish was based on his personal administration of a number of tests (e.g. achievement level, visual motor coordination, language, speech sound discrimination etc.) significantly, there was no IQ testing done by Dr. Barish at that time. Rather, Dr. Barish's understanding of Corey Johnson's intellectual functioning was based on the report he received of an earlier administration of the WISC-R conducted by another clinician. Dr. Barish did not personally administer the IQ test which reported Corey Johnson's IQ to be in the normal range -- a conclusion that is inconsistent with all other reports about his intellectual functioning.

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To clarify, the diagnosis of a learning disability Dr. Barish reached was based on his belief, based on the earlier IQ testing, that Corey Johnson had average intellectual functioning. This would make his seriously deficient academic achievement (i.e., in the 1st and 2nd percentile when compared to national norms) "unexpected" (MacMillan and Siperstein, 2002). It is unexpected in that in the absence of a learning disability, a person with an average IQ would not be so seriously deficient in his or her achievement; thus, this deficiency is explained by the presence of a learning disability. However, such deficient academic achievement in a child who also has a significant cognitive impairment is "expected". That is, it is expected that a person with significant intellectual impairment would also be deficient in his or her academic achievement; thus, this deficiency is explained by the presence of mental retardation. I believe that Dr. Barish would in fact have made the diagnosis of mental retardation if he had based his initial decision solely on his own administration of the WISC-R two years later in 1985 (Full Scale IQ = 69). In doing so it is clear that Corey Johnson's deficient academic achievement is attributable to his significant intellectual impairment – mental retardation. Instead Dr. Barish's diagnosis was based on what appears to be an invalid assessment of Corey Johnson's intellectual functioning in 1982 as it is inconsistent with all subsequent assessments of his intelligence.

I know from extensive experience in similar situations that there are several reasons why Corey Johnson's diagnosis of learning disability was perpetuated by psychologists and educators even when challenged with his performance on IQ assessments that represented mild mental retardation. Educators rarely change an initial diagnosis particularly if the change involves moving from the label of a learning disability to mental retardation. Educators generally lean toward the least stigmatizing diagnosis (in this case a learning disability) particularly when the educational programs and support services recommended are the same as those that would be recommended for a child with mental retardation. For example, in reviewing the educational plan in place for Corey Johnson while attending the Pleasantville Cottage School it is clear that there would have been minimal changes in his goals had his diagnosis been revised from a learning disability to mental retardation.

Another reason the diagnosis was perpetuated was due to the mindset of the 1980's regarding labeling children. The materials I reviewed in Corey Johnson's case paint a complex portrait of a child growing up during a time where the trend in education was to avoid labeling a student as having mental retardation; this was particularly true for African American children. In fact, in the late 1970's, African American children were found to be overrepresented in special education classes, which resulted in a series of landmark court cases (e.g. Larry P. v. Riles, 1972; Marshall v. Georgia, 1984) and position papers by the Office of Civil Rights. At the same time, attention was drawn to the inadequacy and inherent bias of IQ tests for assessing African American students (Mercer, 1973; 1974). During the time Corey Johnson was in school, teachers and administrators were hesitant to refer an African American child for special education services and, moreover, reluctant to administer an IQ test, even when the child was significantly at risk. This helps explain the school system's response to Corey Johnson's significant academic deficits. Only after he was retained in the 3rd grade and then again in

the 4th grade, and all intervention failed, was he (at the age of 12) finally referred for special education services.

Lastly, it is not at all surprising that there was not only a considerable delay in the referral of a child representing such significant academic problems for special education services, but also that the diagnosis of mild mental retardation was missed when Corey Johnson was a child. It is not unusual for this to happen; in fact it is frequently the case with mild mental retardation. Many teachers, as well as the public, perceive people with mental retardation as being moderately to severely impaired, i.e. those who need external supports for the most basic needs (Siperstein & Bak, 1980; Siperstein, Norins & Corbin, 2002; Siperstein, Parker, Norins Bardon & Widaman, 2007). It is expected that a person with mental retardation has physical stigmata and engages in stereotypic behavior that is often accompanied by motor problems. From the records I reviewed, Corey Johnson did not fit these preconceptions. Therefore, because he did not fit the stereotypic image of a child with mental retardation, his significant academic problems did not appear to be due to a significant cognitive impairment. Recent research supports this in that my colleagues MacMillan and Gresham have consistently found that up to 1/3 of children diagnosed by schools as having a learning disability actually meet the clinical criteria for mild mental retardation (MacMillan, Gresham & Bocian, 1998).

In order to be identified as having a learning disability, even a severe learning disability, an individual must display a range of abilities such that the learning disability affects a very circumscribed area of academic functioning, while other areas are unimpaired. Corey Johnson demonstrates a consistent pattern of significant subaverage intellectual functioning accompanied by a pattern of significant below average achievement in all areas that is inconsistent with a diagnosis of a learning disability. Furthermore, there is every indication that Corey Johnson displayed subaverage adaptive behavior when he was in school.

I have tried in this letter to set down the major points we discussed in our phone call, and I would be happy to elaborate further if needed. As I have said, even among mental health professionals and special educators, mild mental retardation is misunderstood and the diagnosis is frequently missed for the complex reasons we talked about. This typically happens in an effort to offer the child and his family an optimistic prognosis. Please let me know if I can be of further assistance.

Sincerely,

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2008 - 2013	Professor of Policy Studies, John W. McCormack Graduate School of Policy and Global Studies, University of Massachusetts Boston
1976 - 2007	Professor of Psychology, College of Public and Community Service, University of Massachusetts Boston
1986 - 1990	Psychologist, Developmental Evaluation Clinic, Children's Hospital, Harvard University
1973 - 1976	Senior Research Associate: Research Institute for Educational Problems, Cambridge, Massachusetts

MEMBERSHIPS

2010 – 2017	Board of Directors, National Inclusion Project
1998 – 2007	State Advisory Council, Department of Mental Retardation, Commonwealth of Massachusetts
2001 – 2007	Governor's Commission on Mental Retardation, Commonwealth of Massachusetts
1998 – 2009	Research and Policy Committee, Board of Directors, Special Olympics International
2003 - 2005	President, Division of Research, Council for Exceptional Children
2000 – 2002	National Academy of Science, Committee on Disability Determination for Mental Retardation
1999 - 2004	Standing Review Panel, US Department of Education, Office of Special Education Programs
1984 – 1990	Ad hoc reviewer, National Institute of Child Health and Human Development

EDITORSHIPS

Editorial Board Member:	*Journal of Special Education* (2007 – 2010)
Editor:	*AAMR's Research Monograph Series* (1993-1998)
Associate Editor:	*American Journal on Intellectual & Developmental Disabilities* (1988-1992)
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EDUCATION

1985	Post-doctoral Fellow, Children's Hospital, Harvard University, Boston, MA 1972 Ph.D. in Developmental Psychology/Special Education, Ferkauf Graduate School of Psychology, Yeshiva University, New York, NY
1967	M.A. in Experimental Psychology, Hofstra University, Hempstead, NY
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AWARDS

2017	HPOD Award for the Betterment of Humanity, Harvard Law School
2008	Chancellors Award for Distinguished Scholarship, University of Massachusetts Boston
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PUBLICATIONS

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Butterfield, E. C., & Siperstein, G. N. (1972). Influences of contingent auditory stimulation upon non-nutritive sucking. In *Oral sensation and perception: The mouth of an infant*. Springfield, IL: C. C. Thomas.

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FEDERAL AND PRIVATE FOUNDATION GRANTS

2019 – Present	Special Olympics Texas Unified Champion Schools Evaluation. Special Olympics Texas.
2018 – Present	Promoting Social and Emotional Learning Through Special Olympics Unified Champion schools. Special Olympics Inc.
2018 – 2019	Evaluation of Camp PALS. PALS Programs

2017 – 2019	Special Olympics Panama: Evaluation of Unified Schools Model. Special Olympics Inc. and Special Olympics Latin America.
2016 – 2019	Standards and Accreditation for Inclusive Recreation. National Inclusion Project.
2008 – Present	National Evaluation of Unified Champion Schools. Special Olympics Inc.
2016 – 2017	Comprehensive Description of SOTX Athletes and Families. Special Olympics Texas.
2015 – 2016	CHildren in Action: Motor Program for PreschoolerS (CHAMPPS). U.S. Department of Education. Institute of Education Sciences.
2012 – 2013	Public Perceptions and Understanding of Steroids. National Baseball Hall of Fame and Museum, Taylor Hooton Foundation, and Professional Baseball Athletic Trainers Society.
2010 – 2013	Unified Sports Plus. U.S. Department of Education, OSERS, Rehabilitation Services Administration.
2001 – 2010	Parent Involvement in Public School Programs for Young Children with Autism. U.S. Department of Education, OSERS, Division of Research to Practice.
2005 – 2008	What ED Means in Different School Contexts: Implications for Served and Unserved populations. U.S. Department of Education, OSERS, Division of Research to Practice.
2001 – 2005	Tools for Teachers: Development of Assessment and Instructional Tools for Improving the Social Functioning of Children with Mental Retardation in General Education Classrooms. U.S. Department of Education, OSERS, Division of Research to Practice.
2001 - 2005	Translating Social-Cognitive Research into Practice: The Development and Validation of a Social Cognitive Assessment and Instructional Planning Resource for Children with Mental Retardation. U.S. Department of Education, OSERS, Division of Research to Practice.
2001 – 2003	Multinational Study of Attitudes toward Individuals with Intellectual Disabilities. Special Olympics Inc.
2000 – 2001	National Evaluation of the Unified Sports Program. Special Olympics Inc. 1998
- 2001	Promoting Social Success: An Intervention to Improve the Social Adjustment of Students with Mental Retardation. Joseph P. Kennedy Jr. Foundation.
1998 - 2001	Maximizing School Adjustment for Students with Learning Problems Making the Transition into Middle School. U.S. Department of Education, OSERS, Division of Research to Practice.

1998 - 2001	Improving the Social Adjustment of Students with Mental Retardation: An Intervention Based on a Social Information Processing Model. U.S. Department of Education, OSERS, Division of Research to Practice.
1995 - 1998	The Influence of Teacher Characteristics on the Academic Performance and Behavioral Adjustment of Students with Attention Deficit Hyperactivity Disorder. U.S. Department of Education, OSERS, Division of Innovation and Development.
1994 - 1998	Stress, Social Support and Adjustment to Middle School Transition in Children with Learning Disabilities. U.S. Department of Education, OSERS, Division of Innovation and Development.
1994- 1996	The Role of Social Information Processing in Social Competence of Children with Mental Retardation. U.S. Department of Education, OSERS, Division of Innovation and Development.
1992 - 1995	Inservice Training Curriculum to Provide Teachers with the Knowledge and Skills to Improve the Social Functioning of Children with Attention Deficit Hyperactivity Disorder. U.S. Department of Education, OSERS, Division of Personnel Preparation.
1982 - 1995	The Social Acceptability of Mentally Retarded Children. National Institute for Child Health and Human Development (NICHD).
1993 - 1994	Students with Learning Disabilities' Adjustment in Middle School: The Impact of Stress and Social Support. U.S. Department of Education, OSERS, Division of Innovation and Development.
1989 - 1994	A Longitudinal Investigation of Mentally Retarded Children's Social Networks and Social Support During Transition to Middle School (Mentor). U.S. Department of Education, OSERS, Division of Innovation and Development.
1990 - 1992	Development of an Inservice Training Curriculum to Provide Teachers with the Knowledge and Skills to Reduce Stress in Children with Disabilities. U.S. Department of Education, OSERS, Division of Personnel Preparation.
1987 - 1990	The Development of Conversational Skills and their Relationship to Linguistic and Social Cognitive Abilities in Mentally Retarded Children. U.S. Department of Education, OSERS, Division of Innovation and Development.
1987 - 1990	Development of an Inservice Training Curriculum for Special Educators to Improve the Social Functioning of Handicapped Children, U.S. Department of Education, OSERS, Division of Personnel Preparation.
1987 - 1989	Assessing the Outcomes of Mentally Retarded Adults in the Three Areas Where Professionals Prognosticate. U.S. Department of Education, National Institute of Disability and Rehabilitation Research.

1985 - 1989 Special Education Preservice Training Program at the Masters Level: The Social Development, Assessment and Training of Children with Special Needs. U.S. Department of Education, OSERS, Division of Innovation and Development.

1984 - 1989 An Investigation of the Relationship between Professional and Parental Performance Expectations and Prognostications and Actual Outcomes in Handicapped Children. U.S. Department of Education, OSERS, Division of Innovation and Development.

1987 - 1988 An Investigation of the Relationship between Physicians' Performance Expectations and Prognostications and their Medical Decision-Making for Disabled Infants. U.S. Department of Education, National Institute of Disability and Rehabilitation Research.

1985 - 1988 Social Skills Inservice Training Curriculum: Preparing Facilitators on the National Level. Foundation for Children with Learning Disabilities.

1983 - 1986 Development of an Inservice Training Curriculum for Improving the Social Functioning of Learning Disabled Children. U.S. Department of Education, OSERS, Division of Personnel Preparation.

1983 - 1984 Improving the Social Adjustment of Children with Learning Disabilities: A Teaching Module. Foundation for Children with Learning Disabilities.

1981 - 1983 Empowering the Disabled Student in Postsecondary Education. U.S. Office of Education, OSERS, Division of Regional Education Programs.

1980 - 1983 An Investigation of Classroom Intervention Strategies on Children's Acceptance of Handicapped Peers. U.S. Office of Education, OSERS, Division of Innovation and Development.

1978 - 1980 An Investigation of Teachers' Stereotypes, Feelings, and Behaviors Concerning Handicapped Children. U.S. Office of Education, Bureau of Education for the Handicapped.

1977 - 1979 An Investigation of Factors Mediating Children's First Impressions of Handicapped Peers. U.S. Office of Education, Bureau of Education for the Handicapped.

NATIONAL AND INTERNATIONAL PRESENTATIONS

Apr 2020 "People just judge you": Middle school students negotiate the social barriers to acting inclusively. Roundtable presentation at the American Educational Research Association Conference, San Francisco, CA. With May, N.G., Jacobs, H.E., Van Gaasbeek, E.K. & Ballard, S.C.

Mar 2020 The role of social responsibility in adolescent prosocial reasoning: Doing the "wrong thing" for the "right reason," presentation at the

	Society for Research on Adolescence Biennial Meeting. With Jacobs, H.E. Ballard, S.C. , Van Gaasbeek, E.K. & May, N.G.
Oct 2019	Fulfilling the promise: Moving from best practices to standards for inclusive camp programs, presentation at the First International Symposium on Inclusive Leisure Experiences. With McDowell, E., Spolidoro, M., Dattilo, J., Schleien, S. J., & Block, M. E.
Oct 2019	Promoting social and emotional learning through inclusive extracurricular activities, presentation at the Social and Emotional Learning Exchange. With Jacobs, H. E., Smith, L. B., Van Gaasbeek, E., & Cahn, A. L.
Aug 2019	Camp PALS: Changing Perspectives about People with Down Syndrome, Poster Presentation at the 2019 IASSIDD World Congress. With Jacobs, H., Landis, K., Newbury Ross, J., Meltzer, W. A..
Aug 2019	Inclusive Extracurricular Activities Facilitate Higher Quality Friendships between Students with and without Intellectual Disability, Poster Presentation at the 2019 IASSIDD World Congress. With Jacobs, H., Smith, L., & Osborne, K.
Apr 2019	Inclusive Extracurricular Activities as a Pathway to Social Inclusion in High Schools, Presentation at the 2019 AERA Conference. With McDowell, E. D., Jacobs, H. E., Stokes, J. E. & Cahn, A. L.
Feb 2019	Moving from Best Practices to Standards for Inclusion. Jewish Community Centers Annual Meeting, Orlando, FL. With Spolidoro, M.
Nov 2018	A schoolwide approach to social inclusion in high schools, Presentation at the2018 CASE Conference.. With
Apr 2018	The Attitudes toward Classroom Inclusion Scale: Factor structure, correlates, and use as an outcome measure, 2018 American Educational Research Association (AERA) Conference, New York, NY.. With Jacobs, H. E. & Widaman, K.
Apr 2018	Sticks, stones, and stigma: Student bystander behavior in response to hearing the word “retard,” 2018 Society for Research on Adolescence Biennial Meeting, Minneapolis, MN.. With Albert, A., Jacobs, H. E., McDowell, E. D., Osborne, K. O. & Jang, Y.
Jun 2017	The Social World of High School: Are Students with Intellectual Disability Included? Presented at the American Association on Intellectual and Developmental Disabilities (AAIDD) 141st Annual Meeting, Hartford, CT. With Jacobs, H. E.

Jul 2012	Special Olympics participation enhances family well-being: Findings from a national survey. In J. Kersh (Chair), Quality of Life Enhancement through Special Olympics. Paper symposium presented at the International Association for the Scientific Study of Intellectual Disabilities World Congress 2012, Halifax, Nova Scotia.. With Kersh, J., & Moskowitz, A.
Oct 2012	Young Athletes: Effects of a Structured Motor Program on the Motor Skills of Young Children with Disabilities. DEC's 28th Annual International Conference on oung Children with Special Needs and Their Families, Minneapolis, MN. With Favazza, P.C., Zeisel, S., & Odom, S.L.
Oct 2011	Seeing Red, Feeling Blue: State Political Leaning and Under-Identification of ED. The 35th Annual TECBD Conference, Tempe, AZ. With Wiley, A. L.
Oct 2011	Academic and Behavioral Progress of Students with ED served in Low Income versus High Income Schools. The 35th Annual TECBD Conference, Tempe, AZ. With Wiley, A. L. & Forness, S. R.
Apr 2011	Fulfilling the Promise of Inclusion: Recreational Settings. National Inclusion Project Annual Conference. Raleigh, NC.
Apr 2011	Young Athletes: Promoting Motor Skill Development In Preschool Aged Children With Disabilities. Council for Exceptional Children 2011 Annual Convention. National Harbor, MD. With Favazza, P.
Mar 2011	Revisiting Inclusive Recreation: Predictors of Social Acceptance in a Camp Setting. Gatlinburg Conference on Research & Theory in Intellectual & Developmental Disabilities. San Antonio, Texas.. With Collins, M., & Kersh, J.
Jan 2011	Promoting Social Inclusion through Unified Sports. Special Olympics Unified Sports Leadership Summit. Middletown, Connecticut. With Kersh, J., and Norins, J.
Apr 2009	Gender differences in the relationship between academic difficulties and school stress: Are adolescent girls at risk? Society for Research in Child Development Biennial Meeting. Denver, CO. With Glick, G.C., & Wenz-Gross, M.
Mar 2009	The Positive Contributions of Special Olympics to Individuals and Families. Gatlinburg Conference on Research & Theory in Intellectual & Developmental Disabilities. New Orleans, LA. With Kersh, J.
Aug 2008	Universal Trends in Youths' Attitudes toward Students with Intellectual Disabilities. International Association of the Scientific Study of Intellectual Disability 13th World Congress. Cape Town, South Africa. With Norins Bardon, J., Corbin, S.B., & Widaman, K.F.
Apr 2008	Documenting the attitudes of multinational youth toward inclusion of students with intellectual disabilities. Council for Exceptional Children 2008

	Annual Convention. Boston, MA. With Norins Bardon, J., Corbin, S.B., & Widaman, K.F.
Apr 2008	Young Athletes: A New Avenue for Promoting Development in Young Children. Council for Exceptional Children 2008 Annual Convention. Boston, MA. With Favazza, P.C.
Apr 2008	Summer Camp can promote the social inclusion of children with intellectual disabilities. Council for Exceptional Children 2008 Annual Convention. Boston, MA. with Glick, G.C.
Nov 2006	Understanding the benefits of sports and physical activity for athletes with intellectual disabilities. International Olympic Committee Sport For All Conference, Havana, Cuba. With Corbin, S.B., Harada, C.M.
Nov 2006	Attitudes as a Barrier to the Full Inclusion of People with Intellectual Disabilities. American Public Health Association 134th Annual Meeting and Exposition. With Norins Bardon, J. & Corbin, S.B.
Nov 2006	Community partnerships in addressing youth violence. In roundtable presentation *Applications of and Outcomes from Community-Based Public Health Research and Education.* American Public Health Association 134th Annual Meeting and Exposition. With Pearrow, M., Irwin, B., Desai, S., & Siperstein, G.
May 2006	Global Attitudes Toward People with Intellectual Disabilities: A formidable barrier to social inclusion. International Summit Alliance on Social Inclusion AAMR Conference. Montréal, Canada. With Norins Bardon, J. & Corbin, S.B.
May 2006	Comprehensive National Survey of Youth Attitudes Toward the Inclusion of Students with Intellectual Disabilities. International Summit Alliance on Social Inclusion AAMR Conference. Montréal, Canada. With Norins Bardon, J., Corbin, S.B. & Widaman, K.F.
Oct 2005	Motivation for sport participation and withdrawal in athletes with intellectual disabilities. Annual meeting of the Association for the Advancement of Applied Sport Psychology (AAASP), Vancouver, British Columbia.With Harada, C.M., McGuire J. & Hardman, M.
Oct 2005	A cross-national, intergenerational perspective on attitudes toward individuals with intellectual disabilities. Southeastern Ontario Community-University Research Alliance in Intellectual Disabilities Conference. Kingston, Ontario. With Norins Bardon, J., Corbin, S.B. & Widaman, K.F.
Jul 2004	Public attitudes about the health care of individuals with intellectual disabilities. Presented at the Annual Conference of the National Center on Birth Defects and Developmental Disabilities, Washington, D.C.

Jul 2004	Parent engagement, problem behaviors, and adaptive functioning in children with ASD. Presented at the OSEP Research Project Directors' Conference, Washington, D.C. With Paul Benson.
Jul 2004	Changing attitudes in America: The need for an effective public awareness campaign. Presented at the National Down Syndrome Society, Washington, D.C.
Jun 2004	Measurement of social perception skills in children with mild intellectual disability. Presented at the 10th World Congress of the International Association for the Scientific Study of Intellectual Disability, Montpelier, France. With Jim Leffert.
Apr 2004	Improving the social skills in diverse learners: A cognitive-based approach. Presented at the Annual Conference of the Council for Exceptional Children, New Orleans, LA. With Mary Brady.
Apr 2004	A cognitive model for understanding the social behavior of children with mental retardation: A springboard to social skills training. Presented at the Leonard and Frances Blackman Lecture Series, Teachers College, Columbia University, NY.
Nov 2003	Multinational Study of Attitudes Toward Individuals with Intellectual Disabilities. Presentation to the American Public Health Association. San Francisco, CA. With Jennifer Norins.
Jun 2003	Multinational Study of Attitudes Toward Individuals with Intellectual Disabilities. Special Olympics Summer World Games, Scientific Symposium, Belfast, Northern Ireland. With Jennifer Norins.
Sept 2003	Preparing for a Public Awareness Campaign: Findings of Multinational Attitude Study and Review of Attitude Change Research. Presentation to the President's Committee for People with Intellectual Disabilities. Washington D.C.
Apr 2003	World Views on Educational Inclusion. Annual Conference of the Council for Exceptional Children. Seattle, Washington. With Jennifer Norins.
Nov 2002	Special Olympics Unified Sports Program: The value and impact of inclusive sports for athletes with and without mental retardation. American Public Health Association, 130th Annual Meeting.
Apr 2002	Social cognition: A key to understanding adaptive behavior in individuals with mental retardation. Conference on Human Development in Charlotte, North Carolina..
Nov 1999	The Impact of Academic Stress on Social Emotional Adjustment. Harvard Graduate School of Education: 15th Annual Learning Disorders Conference.

Jun 1999	Psychological Aspects of the Special Athlete. American Academy of Orthopaedic Surgeons. 30th Special Olympic International Games.
Jun 1999	Professional Attitudes Towards People with Mental Retardation: How it Impacts Health Care. Healthy Athlete Programs Symposium – 30th Special Olympic International Games.
Apr 1999	The Concept of Mental Retardation: Changes in the 21st Century. National Institute for People with Disabilities – YAI's 20th Annual International Conference on Mental Retardation and Developmental Disabilities.
Apr 1999	Social Perception and Strategy Generation: Two Key Social-Cognitive Processes in Children with Mental Retardation. Biennial meeting of the Society for Research and Child Development. With James Leffert and Emily Millikan.
Apr 1997	Stress, Social Support, and Adjustment During the Transition to Middle School. Biennial meeting of the Society for Research in Child Development. With Melodie Wenz-Gross and Robin Parker.
Mar 1997	Mental Retardation: Utility of a Concept for the 21st Century. Johns Hopkins Medical Institutions,
Apr 1996	Student Stress and Its Implications for Learning in the Classroom Conference for Regular Classroom and Special Educators on Creating Supportive Learning Environments across the Ability/Needs Spectrum, Project ERR,
Mar 1996	The Effect of a Home Visit on the Third Year Medical Students' Knowledge, Beliefs and Attitudes about Families and their Children with Mental Retardation: A Randomized Prospective Study. Council on Medical Student Pediatric Education Annual Meeting, With Ben Siegel, et al.
Apr 1995	Improving the Social Functioning of Students with ADHD. The Council for Exceptional Children (CEC) Convention, With Ross Greene and Catherine Marchant
May 1995	Improving the Social Functioning of Students with ADHD: Conceptual Issues and Research Findings. National Association of School Psychologist 27th Annual National Convention, With Ross W. Greene, Catherine Marchant, et al.
Oct 1994	Improving Social Competence for Students. National Association for Pupil Services Administration (NAPSA), With Janice A. Magno.
Mar 1994	Helping parents reduce stress in the home. Massachusetts Chapter One Statewide Dissemination Project, Annual Conference.
May 1993	Transition Issues. Sharing the Responsibility Educating Children With Attention Deficit Disorder (ADD). Children With Attention Deficit Disorders (CH.A.D.D.) Conference,

Apr 1993	Social support and adjustment in children with disabilities. Poster presented at the Biennial Meeting of the Society for Research in Child Development, New Orleans, Louisiana. With Melodie Wenz-Gross.
Mar 1993	The relationship of intelligence to quality of life. Developmental Evaluation Center (UAP) 25th Anniversary Conference.
1992	Exploring social competence in children with mental retardation: a social cognitive approach. Distinguished lecture on Human Development and Mental Retardation: Kennedy Center, Vanderbilt University.
1992	Helping children with learning disabilities manage stress. Northeast Conference on Learning Disabilities and Mental Health.
1992	Substantiating physicians prognoses for children born with mental retardation: The actual outcomes of adults with mental retardation. Gattlinberg Research Conference, 1992. With Mark L. Wolraich.
Apr 1991	Behavioral antecedents of emerging social status among mentally retarded and nonretarded children in academic and play situations. Biennial meeting of the Society for Research in Child Development, With Melodie Wenz-Gross and Kate Sullivan.
Nov 1991	Social competence: Improving the social skills of the at-risk child. Keeping the At-Risk Student in the Mainstream. Conference sponsored by the Center for the Study of Social Acceptance
Apr 1991	Relationship between social status and peer assessment of social behavior among mentally retarded children and nonretarded children. Biennial meeting of the Society for Research in Child Development. With Paul O'Keefe and Susan Saxon.
1990	Social Competence and Stress in the classroom: A developmental perspective. Northeast conference on Learning Disabilities and Mental Health.
Oct 1989	Pediatricians' and neonatologists' prognostications and decisions about treatment for infants with varying degrees of intraventricular hemorrhage. American Academy for Cerebral Palsy and Developmental Medicine 43rd Annual Meeting. With Mark L. Wolraich.
Oct 1989	Techniques for Fostering Social Competence. Association of Teachers of Exceptional Children, Halifax, Nova Scotia.
Oct 1989	Social Relationships Among Exceptional Children. Association of Teachers of Exceptional Children, Halifax, Nova Scotia.
Apr 1983	Improving peer relationships of rejected children. Paper presented at the Biennial Meeting of the Society for Research in Child Development.

Oct 1983	Teaching Psychology to the Adult Student in the Urban Community. Paper presented at the New England Psychological Association,
Apr 1984	Peer acceptance of handicapped children. Paper presented at the University of Delaware Symposium on Mainstreaming Handicapped Children,
May 1984	Mentally retarded children's friendships in special school settings. Paper presented at the annual meeting of the American Association on Mental Deficiency. With S. Jay Kuder.
May 1984	Social behavior: How it affects children's acceptance of mildly and moderately retarded peers. Paper presented at the annual meeting of the American Association on Mental Deficiency. With John J. Bak.
May 1985	Professional expectations and prognostications about mental retardation. Paper presented at the annual meeting of the American Association for Mental Deficiency. With Mark L. Wolraich.
May 1986	Establishing the ecological validity of children's attitudes toward mentally retarded peers: Two related studies. Paper presented at the annual meeting of the American Association for Mental Deficiency, With John J. Bak.
Jun 1986	Attitudes: A barrier between children. Paper presented at Hofstra University Conference on Attitudes toward Persons with Disabilities.
Oct 1986	The expectations and prognostications of pediatricians about mentally retarded children. American Academy of Cerebral Palsy and Developmental Medicine With Mark L. Wolraich.
Nov 1986	Mainstreaming in Public Education: 766 Eleven Years Later. The Governor's 1986 Conference on Disability Issues,
Nov 1987	Pediatricians' expectations and prognostications about mental retardation (Child Development Section). American Academy of Pediatrics, With Mark L. Wolraich.
Oct 1988	Prognostications for AAUAP members. American Association of University Affiliated Programs. With Mark L. Wolraich.
Apr 1989	Improving social skills in schools. Keynote address to the Massachusetts Down Syndrome Congress.
Apr 1989	The relationship of social competence to social acceptance and rejection among mainstreamed mentally retarded children. Paper presented at the Biennial meeting of the Society for Research in Child Development. With Lowry E. Hemphill.
Apr 1989	Social interchanges between mentally retarded and nonretarded friends and acquaintances. Biennial meeting of the Society for Research in Child Development,. With Mary V. Brownley & Cynthia K. Scott.

Oct 1989	Primary care physicians' and pediatric surgeons' prognostications and decisions about surgery for infants with Down Syndrome. American Academy for Cerebral Palsy and Developmental Medicine 43rd Annual Meeting,. With Mark L. Wolraich and David Reed.
Apr 1981	Development of attitudes and problems in changing attitudes: Public attitudes, professional attitudes, community attitudes, neighborhood and employer attitudes. Paper presented at the Young Adult Institute and United Nations Conference in support of the International Year of Disabled Persons.
Apr 1981	Teachers' behavior toward children who differ academically and socially: The importance of teacher awareness as an intervention strategy. Paper presented at the 1981 Biennial Meeting of the Society for Research in Child Development.
Sept 1980	A strategy to change children's attitudes toward mentally retarded peers. Paper presented at the 88th Annual Meeting of the American Psychological Association.
Apr 1980	Students' perceptions of their non-handicapped and handicapped peers: Evidence of implicit personality theory. Paper presented at the 51st Annual Meeting of the Eastern Psychological Association.
Sept 1979"	Mentally retarded" vs. "retard": Children's reactions to a label. Paper presented at the 87th Annual Meeting of the American Psychological Association.
Mar 1977	Development of clustering as a free recall strategy among middle and lower class black and white students. Paper presented at the Biennial meeting of the Society for Research in Child Development.
May 1976	Socialization of the special needs child. Paper presented at the Annual Meeting of the New England Educational Research Organization.
Apr 1975	Noun-paired learning at different ages under self-paced and experimenter-paced conditions. Paper presented at the Biennial Meeting of the Society for Research in Child Development.
Mar 1973	Differential modifications of neonatal behavior. Paper presented at the Biennial Meeting of the Society for Research in Child Development.
May 1969	The vocational performance of mentally retarded trainees and physically disabled workers: A comparative and predictive analysis. Paper presented at the 93rd Annual Meeting of the American Association on Mental Deficiency.
Mar 1969	Aspects of temporal perception in the mentally retarded. Paper presented at the Annual Meeting of the Council for Exceptional Children.

3544

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff;

v. CRIMINAL ACTION
92CR68

RICHARD TIPTON, CORY JOHNSON,
JAMES H. ROANE, JR., AND
SANDRA REAVIS,

Defendants.

VOLUME XX

February 10, 1993
Richmond, Virginia
10:00 a.m.

BEFORE: HONORABLE JAMES R. SPENCER
United States District Judge

APPEARANCES: HOWARD C. VICK, JR., ESQ.
WILLIAM H. PARCELL, III, ESQ.
Office of the United States Attorney;
Counsel for Government;

ROBERT P. GEARY, ESQ.
ERIC D. WHITE, ESQ.
Counsel for Defendant Tipton;
CRAIG S. COOLEY, ESQ.
JOHN F. McGARVEY, ESQ.
Counsel for Defendant Johnson;
DAVID P. BAUGH, ESQ.
ARNOLD R. HENDERSON, V, ESQ.
Counsel for Defendant Roane;
ROBERT J. WAGNER, ESQ.
Counsel for Defendant Reavis.
JEFFREY B. KULL
OFFICIAL COURT REPORTER

3545

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Case Number 92CV68: United States of America versus Richard Tipton, Cory

Johnson, and James H. Roane, Jr., the twentieth day of trial. Are counsel ready to proceed?

MR. VICK: Government is ready.

MR. McGARVEY: Defendant Johnson is ready.

MR. GEARY: Defendant Tipton is ready.

MR. BAUGH: Defendant Roane is ready.

THE COURT: All right. Let's bring in the jury.

(The jury entered the courtroom.).

THE COURT: All right. Mr. McGarvey?

MR. McGARVEY: Thank you, Your Honor. May it please the Court, co-counsel, ladies and gentlemen of the jury and of the prosecution: Folks, why are we here today? Well, I figured it would be easier to tell you why we are not here. We are not here to try to excuse the acts of Cory Johnson. There is no excuse for eight murders. That's not what this is about. We are not here to try to tell you that Mr. Johnson didn't know the difference between right or wrong. When you folks entered your verdict, you decided that Mr. Johnson knew the difference between right and wrong. We are not here today to ask you

3546

not to punish Mr. Johnson. The alternatives here are life in the penitentiary without possibility of parole, to die in the penitentiary. I should think that anyone would think that is punishment. What we are here today to do is to decide whether or not to kill Cory Johnson. That's what it boils down to.

Traditionally, the death penalty in this country is reserved for the most severe cases, the cases where the guilty person is completely and totally blameworthy, fully responsible for his actions. Those factors which tend to lessen blame, which indicate that a person is not fully and totally blameworthy, should indicate that that person does not merit the most severe punishment; i.e., to be killed.

This isn't my point of view. This is the law. And the law requires this hearing before anyone can be given the death penalty. The purpose of this hearing is to assure that you folks consider that the guilty person deserves the maximum sentence of death. That person is guaranteed the right to this hearing in order to present reasons from our point of view why he doesn't deserve the maximum punishment. These reasons are called mitigation. The government has already put on what they called the aggravating

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factors. This is our opportunity to put on what is called mitigation.

The law states that mentally retarded persons cannot be executed. And the reason that they are excluded is because the law recognizes that mentally

retarded persons are not totally and completely blameworthy. They are not fully responsible for their actions.

Now, I'm not intending to suggest at this juncture or any other juncture that Cory Johnson is mentally retarded. It doesn't suggest that mentally retarded persons aren't responsible for their actions. It just indicates that the law recognizes that they are not as fully and totally blameworthy as an individual who has all his faculties.

Mentally retarded people have capabilities. Most mentally retarded people can hold jobs, raise families, be educated. Mildly mentally remember retarded people can be educated to, say, a sixth-grade reading level. I'm not suggesting that that is the case in the most severe cases of mental retardation, but in mildly mentally retarded cases, they can be educated. They can be arrested and they can be held accountable for their actions. However, because of the limitations that mentally retarded

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people have, they are not as fully responsible, as I indicated, not as fully blameworthy.

In this case, Cory Johnson, as I said, is not mentally retarded. But he has substantial mental, intellectual deficits that he has been plagued with his entire life. His IQ is within two points of being classified by the law mentally retarded, and therefore, legally not executable. Two points. He has severe neuropsychological impairment, and he is severely learning-disabled. This was diagnosed back when he was 13 years old, and we will present evidence today by Dr. Cornell here, who has administered tests and neuropsychological tests that have verified this. He has an IQ of 77.

In listening to Mr. Tipton's presentation yesterday, I was struck by the fact that he indicated that these learning-disabled ADD-type people tend to group together. And I think ultimately that's what we are going to be able to show you folks; that they somehow gravitated to each other. And when Dr. Evans yesterday was talking about the fact that learning-disabled people and ADD people have great difficulty in problem-solving, that they are very narrow minded, very focused, inflexible, I believe we will be able to show you folks today that that is the

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case with Cory Johnson. I don't just believe it. It is going to be shown. That is coupled with this severe learning disability and an IQ of 77.

Cory's situation, Cory's physical impairment, which I can't overemphasize is not Cory's fault -- what Cory did is Cory's fault, but what Cory's physical problems are are not his fault -- as I said,

they don't meet the standard definition of mental retardation. But his condition is very, very similar. As I indicated, mentally retarded people, mildly mentally retarded people can learn to read up to a sixth-grade level. But from the age of six to seven, Cory has been in special education. At 13, as I indicated, he was diagnosed with this learning disability. And after years and years of special education and the like, he is still only able to read on a second to third-grade level. So when I say that his condition is very similar to the mildly mentally retarded, in some instances it is much more severe. I've just given you an example of that. And this is after years and years of special instruction.

Now, we couple that with severe emotional deprivation as well. Again, when I was listening to Mr. Tipton's presentation yesterday I was struck by the similarity in backgrounds. Cory Johnson had a

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family. And I use "family" in quotations. He met his father when he was 12 years old. In the course of his lifetime he has seen his father three to five times since he was 12 years old. From age one until he was 12 years old, Cory Johnson moved at least 12 times. He moved 12 times to some relatives, to some friends, lived principally with his mother. And again, I mean no disrespect to Mr. Johnson, but I use the term "mother" in quotes as well. His mother was a drug abuser. His mother was abusive emotionally and physically to Cory. And to make matters worse, his mother took up with a number of gentlemen who were also drug abusers and physically abusive to Cory and his younger brother.

When Cory was 12-and-a-half to 13 years old, the New York justice system took jurisdiction over Cory and his brother and placed him in a foster care situation; principally, not because Cory had done anything wrong, but because his mother was flat-out unable, to put it charitably, to take care of him.

When I talked about emotional abuse, I'd like to illustrate that. Principally, the emotional abuse from his mother came about as a result of expectations that once again Cory Johnson couldn't meet. And he couldn't meet those expectations not

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because of anything that he had done, but because he was born with this severe neurological impairment. Despite that, Cory tried. His mother, believe it or not, expected Cory to go to college. And try as Cory Johnson might have, Cory Johnson couldn't read beyond the second-grade level. When the New York justice system took jurisdiction of Cory, they placed him in a foster home situation. This was the Pleasantville Cottage Home. You will hear from two people who

worked with him in this, the Jewish Child Care Association of New York. And what you will hear from these people and from the reports that we are going to give you is that despite Cory's mental and physical limitations, Cory always wanted to please. Cory was not a mean-spirited person. Despite his background, Cory wanted to learn. He wanted to learn. And I would suggest to you folks it is going to be shown that he wanted to learn because he wanted to please his mother. But there wasn't a darn thing that Cory could do to please his mother.

The reports are rife with references to the fact that Cory was not visited by his mother; that his mother took no interest in the fact that he was trying; and that on the few occasions that his mother actually did visit him, the notes suggest that she

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was very rejective of him to the point that the staff there made comments about it; that she would get phone calls from the Home, and she wouldn't return the phone calls. She would call only to cancel an appointment, and not reschedule them. But despite this, Cory tended to treat his mother like a goddess.

There was a quote that you folks are going to have in front of you that I found particularly instructive and particularly touching, and I'd like to read it to you now. This is from a January, 1983 treatment review of Cory Johnson by Gail Turnquest, the caseworker at the Pleasantville Cottage School.

"Child care workers note that Cory's behavior deteriorates when he has no contact with his mother. He can also become quite depressed when he has not heard from or seen her for a period of time. It is the opinion of his child care workers that Pleasantville is good for him and that he is functioning fairly well here. Cory realizes his learning disabilities. However, he struggles to do his homework. He is truly motivated to do well and to succeed, and has not yet given up on himself.

"Cory presents with no real behavior problems. Within the last two weeks, there has been some

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decline. Cory fantasizes that his mother will come up in a car and take him to Pizza Hut. Child care workers report that Cory's mood is basically that of a depressed child. He longs for his mother and acts out his realization that in fact his mother is emotionally unavailable to him. However, he denies his feelings when confronted directly. He also struggles to involve his father --" his father who he had seen three to five times in his life "-- who also does not come through for him. Sundays can be very difficult for Cory because he usually doesn't

have any visitors."
From the age of twelve-and-a-half until he was 18, this basically was Cory Johnson's life: attempting to learn and not being able to learn; attempting to be accepted by the only family that he had, his mother, and to be continually rejected by his mother. And you couple that with a childhood that was -- if you can call it a childhood -- basically, Cory took care of himself since he was three years old because his mother was too busy doing drugs and taking care of herself and living with her boyfriends.
When you couple this background of abuse, depression, lack of acceptance, rejection by the one

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person who mattered most to him, along with the severe, and I'm talking severe, cognitive deficiencies in Cory, it might provide somewhat of an explanation of what happened. As I suggested to you, there is no excuse.
At the conclusion of this presentation, I would suggest to you folks that the question you have to ask yourself is not whether Cory is guilty, not whether he should be punished, not whether he knew what he was doing was right or wrong. Those have already been decided. But whether he is fully and completely blameworthy; whether he is totally responsible for his actions. This penalty phase is, as the Supreme Court says, a narrowing process. Because as I indicated, the death penalty is reserved for those who are totally and completely blameworthy in the most severe cases.
When you ask yourself that question, you have to ask whether or not, after this presentation, Cory is fully and totally blameworthy; whether he is completely responsible for his actions. Has he lived his life as the normal, average person, who might be totally and fully responsible? Or has he lived his life under these situations that I have described.
We will demonstrate to you today that Cory is

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not a normal young person. He is 24 years old now. He has severe neurological impairment. He is two points above being mentally retarded. And when you couple that with this abusive background, I think you are going to be able to see that he is not as totally and completely responsible as a person who doesn't have those deficits. And life in the penitentiary without possibility of parole is no bargain, either. Thank you, folks.
THE COURT: All right. Call your first witness.
MR. COOLEY: Our first witness will be Dr. Dewey Cornell.

DEWEY CORNELL,
called as a witness by and on behalf of defendant Johnson, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COOLEY:

Q Dr. Cornell, good morning to you.

A Good morning.

Q Would you please tell the ladies and gentlemen of the jury your full name and your profession?

A Dr. Dewey G. Cornell. I'm a clinical psychologist and associate professor.

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Q And where are you employed?

A University of Virginia.

Q And is your title there associate professor?

A I'm associate professor of education in the programs in clinical and school psychology at the University of Virginia. I am also a faculty associate of the Institute of Law, Industry and Public Policy.

Q And what are your professional duties as an associate professor?

MR. VICK: We would stipulate as to his expertise.

MR. COOLEY: I very much appreciate that, Your Honor. I would like for the jury to know something about him.

THE COURT: Go ahead.

BY MR. COOLEY:

Q Doctor, what are your professional duties as an associate professor?

A My principal duties are teaching, research, and service at the University of Virginia. I teach graduate courses in our training program that trains Ph.D.s in clinical and school psychology. I teach courses in personality assessment, in psychopathology; that is, in mental disorders. I am

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I am also the assistant director of our training clinic, which is a clinic that provides psychological assessments, and I'm in charge of the psychological assessments that our university clinic provides. I also am involved in the training of psychologists and psychiatrists who specialize in forensic mental health, and I conduct research in those areas as well.

Q I see. Doctor, can you describe briefly your educational background and any training that you had in clinical psychology?

A My training in clinical psychology began at the University of Michigan. I obtained my Master's degree in 1979 and my Ph.D. in 1981 at the University of Michigan from the Department of Psychology, from

the training program in clinical psychology. As part of my doctoral training, I had course work in clinical psychology, in diagnosis assessment, treatment of individuals with mental and emotional disorders. I also had internship training, clinical practice training. I worked at the Yorkwood Center, which was a children's psychiatric hospital working with emotionally disturbed children and adolescents. I also worked at the University of Michigan psychological clinic, which is a psychotherapy clinic

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for young adults with emotional problems.

I also worked at the learning evaluation clinic by the School of Education in the University of Michigan, which is involved in the diagnosis and assessment of learning problems in children.

I completed those training experiences and my doctoral research in 1981, and at that point I accepted a post-doctoral position as a post-doctoral scholar in psychology in the Medical School at the University of Michigan, where I worked in the adult psychiatric hospital providing diagnosis assessment and treatment of individuals, of adults, with mental disorders. And I conducted research there on these same problems and disorders. I was there for two years.

Q All right. Doctor, would you explain to the folks, the ladies and gentlemen of the jury, the distinction between clinical psychology and forensic clinical psychology?

A Yes. Clinical psychology is the branch of psychology that is concerned with clinical practice, with working with individuals who have emotional disorders or problems in living that require treatment. Forensic clinical psychology is a subspecialty. It is the application of clinical

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psychology to legal matters. And it is an area in which the person may evaluate individuals who have been charged with crimes, or may assist the Court in some way in answering legal questions that require some psychological information. So it is a specialty of providing information in psychology that's relevant to legal questions.

Q Doctor, have you had any special training in the field of forensic clinical psychology?

A Yes, I have. Beginning in 1983, I began specialized training and practice in forensic clinical psychology. I was employed as a forensic clinical psychologist in Michigan at the Center for Forensic Psychiatry. This is a state institution, a hospital, which provides diagnosis and treatment to individuals who have been charged with serious crimes, individuals who are violent, who are either

not competent to stand trial, or who might be considered legally insane, or for other reasons cannot be managed in the legal system or in the prison system. And those individuals are treated at the forensic center. I completed six months of training at that agency and became a certified forensic examiner for the State of Michigan and worked and conducted research and provided treatment

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in that setting.
Q Doctor, have you conducted forensic evaluations of criminal defendants?
A Many. Hundreds of them.
Q And did those include defendants charged with murder?
A Yes.
Q Have you treated individuals who have committed murder?
A I have treated dozens of individuals who have committed murders of various kinds.
Q Doctor, in terms of your professional background, are you licensed in clinical psychology?
A Yes. I'm licensed in the State of Virginia as a psychologist and as a clinical psychologist.
Q Are you a member of any professional organizations in psychology?
A I am a member of the American Psychological Association, the Virginia Psychological Association, several divisions of the American Psychological Association, the Society for Personality Assessment, the American Orthopsychiatric Society, and several other professional organizations.
Q Within your profession, have you presented any papers in the area of forensic clinical psychology,

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any conferences? And if so -- or professional meetings -- if so, briefly tell the ladies and gentlemen of the jury about them.
A I am very actively involved in the forensic field and in conducting research and presenting the findings of my research at meetings of professional organizations. This would include presentations I've made at national conferences of the American Psychological Association, the American Psychiatric Association, as well as state and local conferences as well.
Q And have you published any books or articles in the area of forensic clinical psychology?
A I have published a number of articles, particularly in the area of homicide. I have published a book with Eliza Benedict on juvenile homicide, a series of articles on the origins and development of violent behavior in young persons. I have also conducted research on malingering, which is

the tendency of some individuals to present false symptoms or to try to deceive mental health professionals. I have also published research on the assessment and diagnosis of mental disorders that are found commonly in individuals who are charged with violent crimes, such as depression, borderline

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personality disorder, other types of personality disorders.

Q Your curriculum vitae indicates that you are a journal reviewer for national journals. Would you tell the ladies and gentlemen of the jury what a journal reviewer is?

A Scientific journals in the field publish research articles and theoretical articles only after an extensive review process. Articles are submitted to the journal. They are then reviewed anonymously by a panel of experts in the field, who evaluate and critique the articles, reject the majority of them, and accept a small number of them as acceptable for publication. And I have had the opportunity to be selected as a journal reviewer for a number of journals in the forensic area: Law and Human Behavior, Behavioral Sciences and the Law, for example.

Q Have you received any grants to conduct research in forensic clinical psychology?

A I received a series of grants to conduct research on violent behavior; on the family background, personality, and development of individuals who commit violent crimes. I have received grants from the State of Michigan and

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national grants from the Guggenheim Foundation.

Q Have you had any experience in training others to work in the field of forensic clinical psychology?

A In my current position, which I've held since 1986, I have been involved in training individuals in the State of Virginia to be certified to conduct forensic evaluations. That is, the state has a training program to train psychologists and psychiatrists to do court evaluations. And those individuals come to our agency at the University of Virginia for training. I'm a lecturer there, also a supervisor of the cases that we conduct there.

Q You indicated a little earlier that you had personally conducted forensic evaluations, somewhere between 400 and 500 criminal defendants; is that correct?

A Probably 400 to 500 criminal defendants that I have evaluated for forensic purposes, yes.

Q Did the referrals requesting you to do those evaluations, did they come from the prosecution, or

do they come from the defense?
A They come from both sides of the case.
Q And when you were doing these in Michigan, where did the referrals come from?

A Michigan has a system whereby the referrals come from the court. The referrals that I received were from the court, not from either one side or the other. I would submit a report and then either the prosecution or the defense would call me depending on which side felt my testimony would be of value to them.
Q How many times altogether, Doctor, have you been called to testify in court proceedings?
A Including other states other than Michigan, probably 40 to 50 times.
Q And during the course of that testimony, was it more often for the prosecution or more often for the defense?
A I have been called many times by both sides. I would guess that I have been called more by the prosecution than by the defense.
Q And you have testified not only here in Virginia, but also in some other states; is that correct?
A Yes.
Q Those would include Maryland and Michigan and Wisconsin?
A And Virginia, yes. Those four states.
Q And that would also include some experience

being qualified as an expert in federal courts in Virginia; is that correct?
A On one occasion I have testified in federal court in Virginia as well.
Q If we can, let's turn to your role here today. I'd like for you to help us clarify that for the ladies and gentlemen of the jury. You are aware that Mr. Cory Johnson has been convicted of seven murders in the course of or in furtherance of a Continuing Criminal Enterprise; is that correct?
A Yes. I am very aware of the charges and his conviction on them.
Q In addition, one other murder that was not related to the Continuing Criminal Enterprise for a total of eight; you are aware of that?
A I am aware of eight, yes.
Q All right. Are you here today to testify that Cory Johnson is not responsible for his actions in committing those crimes?
A No, I am not.
Q Are you here to testify that Cory Johnson should be excused for the crimes for which he has been convicted?

A Absolutely not.
Q Now, if you believe that Mr. Johnson is

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responsible for his actions and shouldn't be excused for his crimes, tell the ladies and gentlemen of the jury what the basis of your testimony is today.
A The basis of my testimony is very narrow. That is, when a person is charged with a capital crime, there is a capital sentencing evaluation. And the purpose of that evaluation is to provide the jury with as much information as possible that they would need to make a decision of mitigation. And in this case, the decision on which my evaluation is based is whether there is information relevant to the jury's decision of receiving the death penalty or life in prison without parole. And so all of my testimony and evaluation today is only intended to give the jury information on making that distinction, and I want to make that very clear: that it is not an issue of whether Cory should be excused for the actions or not considered responsible for the crimes that he has been convicted of.
Q Now, Doctor, you have been asked to evaluate Cory in a number of capacities; is that correct?
A There are three issues that I was asked to evaluate him for, one being mitigation, the capital sentencing evaluation that I am testifying about. There are two prior issues that I also evaluated him

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for. One was whether he was competent to stand trial, whether the trial could proceed because he was capable of doing that; and the other was whether he could be considered criminally responsible or not responsible -- that is, insane -- at the time of the offenses. And so I did separate evaluations of him addressing -- I addressed those questions separately, I should say.
Q Now, Doctor, so let's take them individually. As to the evaluation as to Cory's competence to stand trial, did you find that he was competent or incompetent?
A Well, despite his intellectual limitations, I thought he met the very low standard for being considered competent to stand trial, minimally competent to stand trial.
Q As to your evaluation relating to what would commonly be called sanity at the time of the offense, did you find that Cory was insane or not criminally responsible, or did you find that he was sane and criminally responsible?
A I could not support a finding that he was insane or not responsible.
Q Your testimony today relates only to the area of presenting to the ladies and gentlemen of the jury

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those elements and conditions which might be considered by them to be mitigating; is that correct?
A That's right.
Q If you would, let's focus on the mitigation evaluation. Would you describe for these folks what you did that constituted a mitigation evaluation?
A Yes. Mitigation evaluation for capital sentencing should be a very thorough evaluation. And first of all, there are several parts to my evaluation. The first part of my evaluation was that I met with him individually and interviewed him. I met with him on three occasions. I spent approximately 15 hours with him, interviewing him and giving him psychological tests. I tested his intelligence, his school achievement, his personality. I also obtained from him a complete account of his life, from his earliest recollections up to the present time, in order to provide the jury with a complete account of who he is and how he became the person that he is today. That is the first part of my evaluation.
The second part of my evaluation is really to review as much collateral information, independent information, as I can to either confirm or disconfirm
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what Cory Johnson tells me, and also to add additional information that he did not touch upon. For that purpose, I had really extensive records that I received to evaluate him. I had records received from the prosecution --
MR. COOLEY: Judge, if I could, those would be the items that I am holding up here; is that correct?
THE WITNESS: That would be about the right size of it, yes.
BY MR. COOLEY:
Q These were items supplied by whom?
A My understanding is that they were supplied by the prosecution, describing the allegations and the offenses.
Q I'm sorry to interrupt you.
A I also received additional records, school records, from New York City Public Schools, records from the Jewish Child Care Association, where Cory spent time at a residential treatment center there for about four years. So there are about four years of records there. He also spent some time in a group home, over a year there, and I received records from them. He also spent some time in Riker's Island jail in New York City, and I received records from them.
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Q Let me ask you, if I may, are those records

contained in these four notebooks?
A I have a copy very much like that, four binders with those records in them.
Q Quantity-wise, this would appear to be consistent with the records that were available to you and reviewed by you?
A That's right.
Q Were those records reviewed in depth?
A Yes. And they were well over 500 pages of records that I reviewed.
Q In addition to your meetings with the defendant, with Cory, did you have occasion to interview anyone else relating to developing your mitigation testimony?
A I conducted additional interviews. I had the opportunity to meet and have a face-to-face interview with his mother. I also conducted telephone interviews with individuals who worked with Cory when he was at the Pleasantville Cottage School in New York, and Elmhurst Boys' Home in New York. There were about six individuals, staff members there, two psychiatrists, a psychologist, and several social workers that I interviewed as well.
Q And two of those folks are here today; is that

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correct?
A Yes. I had the opportunity to meet them this morning face-to-face.
Q I see. Doctor, did you also refer Cory for any specialized testing which has been made a part of your evaluation?
A Yes. Based on my initial testing, I felt that there was strong evidence of brain impairment. So I referred him for a more specialized testing, neuropsychological testing by a neuropsychologist, Dr. Edward Peck. And I received a written report from Dr. Peck, and then I also spoke with him about his report and got an oral report as well from him.
Q Doctor, based on all of the information that you had at your disposal and that was made available to you, you prepared a mitigation report; is that correct?
A Yes.
Q Did you prepare anything beyond that report?
A In addition to the report itself, I also assembled together quotations from the records that I reviewed, quotations that I thought best summarized the mitigation reports, my mitigation report. I also assembled Dr. Peck's report, a series of materials that I felt summarized the basis for my mitigation

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report; that is, the primary findings that I relied on, including some charts of my own psychological test results.

Q All right. And did you include certain things such as definitions of some of the conditions that Cory has?
A Yes. I also included the federal and accepted professional definitions for learning difficulties, learning disabilities, and mental retardation as well.

MR. COOLEY: Your Honor, with the Court's permission, we have a copy of the full report and appendages for each member of the jury. The government already has their copies, and also a copy for each defense counsel and the Court.

THE COURT: All right.

(Documents proffered to Court, counsel, and jury.)

MR. COOLEY: If I could be so bold as to request of those folks who have received a copy if they could try to follow along with us as we go through it rather than leafing through, which I think is a tendency, naturally. We would appreciate that in presenting it in the form Dr. Cornell has set it up.

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THE COURT: All right.

BY MR. COOLEY:
Q Doctor, if you would, we would like to start with a review of Cory's life and ask you, based on your evaluation and various sources of information that you have described to the ladies and gentlemen of the jury and obtained during the course of your evaluation, did you formulate an opinion about the psychological background, development of Cory Johnson?
A Yes, I did.
Q Could you summarize for us what you concluded?
A When I put all the information that I reviewed together, I think there are two primary factors that I felt the jury should be informed about for purposes of mitigation. The first of these is Cory Johnson's upbringing in a severely unstable, neglectful, and abusive family environment, which had a devastating effect on his psychological development and his emotional maturity.

The second main factor that I felt was important was his degree of brain impairment, which is exhibited as a very severe learning disability, a speech impairment which he suffered during his childhood years and still has remnants of today, and

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his generally impaired intelligence, which places him just above the level of mental retardation. Those two factors in combination, I feel, made Cory unprepared to function in society, unprepared to survive on his own when he left institutional care

and had no place to turn to, and made him unable to cope and adapt to society in a way that a normal individual would.

Q I'd like for you to explain to me and to the ladies and gentlemen of the jury, if you would, how you came to those conclusions. Can you tell the Court what information about Cory's background led you to this, or these, conclusions?

A This would take some time. First, regarding his upbringing, I looked at his life as being in three phases: the first phase being his life with his mother up until about age 13; and then the years that he spent in institutional settings; and then finally, the third phase, after he left the institutions and was out pretty much on his own.

During that first phase of time when he was with his mother, or at least mother had formal legal custody of him, he lived in an extremely unstable situation. He actually was under his grandmother's care initially as an infant. When I interviewed his

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mother, she had very poor recollection of his upbringing and was not very involved in his child care. That was either taken care of by her own mother, when she lived at home for a couple of years, or he was left basically unattended for long periods of time. The mother could not recall details of his life, basic things that most mothers can recall about their children, such as when they learned to walk and talk, and how they were potty-trained, and how they did when they were in school. Stories from their childhood.

She was not around very much during his upbringing. She was involved in jobs that she held. She was involved in relationships with a series of men. And as she said a number of times, he couldn't fit into her life, and neither could his half-brother, Robert. The father, of course, was not in the picture at all. He was in prison. He had no contact with Cory. Cory was led to believe by his mother that his father was actually a man named Robert Butler, who was actually father to Cory's brother. Cory only met his father, basically by coincidence, when he was 12 or 13 years old. And up until that time, he thought the man named Robert Butler was his father. This was a man that his

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mother lived with for a short period of time. He was abusive. They had a parting of the ways and he was one of a series of men that she lived with at various times who were abusive to her and to the children, and who were involved in drug abuse. And at various times, those individuals moved in and out of the residence.

Now, it was very difficult for me to determine where Cory lived and how many times he moved. I know that at least 12 times, his mother changed residence. But there were many more times in which Cory was sent back and forth to other relatives. He didn't have a stable place that was his home. He didn't have a single individual that he could regard as a parent in the sense of someone who is going to always be there, be there and take care of him. His mother nominally would be his parent, but his involvement with her was neglectful and abusive. And he and his brother had evidence of serious emotional problems well before they were teenagers.

He had troubles with enuresis, bedwetting, up until age 11; encopresis, fecal soiling of pants, when he was 10 and 11 years old, which are signs of quite serious emotional disturbance. His brother Robert, at a young age, I believe ten or eleven, made

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a suicide attempt and was hospitalized for five months in a psychiatric setting. So both these boys were quite emotionally troubled; understandably so, given the kind of extremely unstable environment that they grew up in.

And I mentioned also that there were abusive boyfriends. And the mother related to me a number of violent incidents in which either she or the boys were physically assaulted and threatened by various boyfriends. And Cory had quite serious difficulties with one boyfriend, to the point that she did not think it was safe for him to stay in her residence any longer. That is basically the first phase of Cory's life up until about age 13.

Q If I could ask the ladies and gentlemen of the jury to go, and you as well, to the green tab and to turn that over to the chronology of events in Cory Johnson's life.

You have basically described what would be the top third of that chronology, I believe.

A Yes.

Q And he was, of course, born in Brooklyn, and his birthdate was in [redacted]. You have indicated a number of movements by Cory with his mother or without his mother during the time frame

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from birth to the age of 13, at which time he was committed by her to the state, and ultimately placed in foster care; is that correct?

A That's correct. At approximately age 13, he was placed in the Pleasantville Diagnostic Center, a residential facility for diagnosis of children with emotional disturbance. He was there for two months of evaluation, and at that point they felt it was more appropriate for him to be placed in an

institutional setting. It is called the Pleasantville Cottage School. It is called Cottage School, but actually what it involves is that he lives in a home that's supervised -- in a cottage with several other emotionally-disturbed boys on the grounds. There is also a school that he would attend during the day. And he was placed there basically because the Court determined that his mother was not appropriate, and that he could not be well-raised at home. He remained there from about age 13 to 16.

Q If I could refer the jury to the blue tab in your book, open that first document that is behind the blue tab.

Doctor, you have blown that up, I believe. You have taken a quotation from the petition which removed Cory from the home and indicated -- and I

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don't want to belabor this because I know that each person who has this can read for themselves -- but in that petition, and this is the language from the Court itself, there was a determination that the child, Cory, had been removed from his home on February 1st, 1982, and that the parent was unable to make adequate provision for his care, maintenance, and supervision; is that correct?

A That's correct. And in this tab are the quotations that I selected. Now, in order to give you the context for these quotations, the next tab has the report, the legal petition, for example, that the quote comes from. So I'm going to focus on the quotation, but it is possible for anyone to look at where that quotation came from and to read what came before it and what came after it. In addition, there are other reports as well.

Q If I can, so that everyone can understand what we are doing, the volume that's behind the blue tab are quotations which you have drawn from reports from the child care agencies.

A Right.

Q The specific reports from which these quotations are drawn are behind the orange tab.

A That's right.

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Q We do not intend to read all of those reports or to require you to read them, but they are there in case there was a concern that your quote had been taken out of context; is that correct?

A That's correct.

Q And the items that are behind the orange tab are excerpts from the reports that are contained in these volumes that were supplied by the child care agencies.

A That's right.

Q If you would, can you relate to the ladies and

gentlemen what occurred and how things were occurring once this second stage arrives in Cory's life, where he has been voluntarily, by his mother, removed from his home or her home and placed with the state?
A Yes. Once he was placed with the state he had a series of psychiatric, psychological, and educational evaluations. He had those initially when he first came there so that they could decide what needed to be done, and then he had further evaluations repeatedly over the years that he was there as they tried to monitor his progress and refine their treatment to help him.
And what I have done is I've gone through all of those records page by page, and what I have selected

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here are the ones that I felt that were most influential to me in formulating my opinion, and which I think accurately reflect his time spent at this institution. And then I follow that up by contacting the authors of most of these reports. I talked to six individuals that I could identify, and spoke with them about the reports to make sure I understood what they were saying and that I had an appropriate interpretation of what was said.
First of all, from the very beginning, they assessed that he had serious emotional problems. They reported emotional disturbance that he had prior to coming to the child agency, and then they described what he was like once he is there.
The first psychiatric evaluation, which actually is page six of these quotations, describe that he was cooperative, that he related well, but that he had a slurred speech, and he said he doesn't want to come home for awhile so that "I can straighten my head and my mother can straighten herself out." Quotations that he made to the psychiatrist who saw him, Collimuttam.
Cory feels he has problems with learning and reading. He likes the school and the counselor here. Cory feels sad when his mother keeps telling

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him about his father being in jail. He has felt at times like wanting to stab himself, but has never done anything to hurt himself and doesn't think he will ever do it. Cory talked about his brother trying to kill himself, "because of my mother," he said, and says that he feels very sad about it.
Q Cory's brother was younger?
A His brother was two years younger. He made a suicide attempt and was placed at another agency called Children's Village, and he was there for awhile and then later was switched to Pleasantville as well.
Dr. Collimuttam I thought, summarized well his

early impression on page seven. He says, "life has been very chaotic for this family with Cory's mother having had financial problems, having difficulties with her job and her relationships. Mother appears depressed and unavailable to the child emotionally. There have been frequent moves, stays in the homes of relatives often with the mother and children being in different homes. This was followed up with a period of being with the mother's boyfriend, who Cory did not get along with and would steel from to get back at home. Cory is a child who has been reacting to the chaotic life in the last four years. In

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addition, he has shown evidence of mild to moderate neurological deficits of dyslexia and speech impairment."

And then Dr. Collimuttam gave him diagnoses using our standard diagnostic manual, the DSM-III. He saw him as having an adjustment disorder, which means he was reacting to stressful events in his life with symptoms. He was diagnosed as having a special developmental reading disorder. It is another term for dyslexia. It is another term for learning disability. Those are all interchangeable terms. He was also diagnosed as having positive soft neurological signs, which means that there was evidence that he had brain damage.

He was then given a psychological evaluation by a psychologist. This is a little bit out of order. This is on page five. Dr. Cary Gallaudet gave him a series of psychological tests. He described serious problems, deficits in nonverbal abstract reasoning, perceptual organization, visual perception and perceptual motor functioning. These weaknesses were also evident in his Bender-Gestalt test, which was characterized by rotations and distortions. Performance was comparable to a child five years below his chronological age, an underlying

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neurological deficit.

Q Cory was age 14 at this point in time. Then he would have been operating at the level of a normal nine year old?

A At the level of a 9 year old, yes. Yes, in these areas where he showed brain impairment. It says, "In summary, Cory is a sensitive and dependent boy who is struggling with issues revolving around independence. An underlying organic component," that means brain damage, "serves to exacerbate the anxiety, dependence, affectional needs, and hostile impulses, and as a result, Cory has an extremely hard time trying to integrate emotional challenges. Although evidence of a learning disability exists, he continues to be an ambitious boy who is motivated to

improve his situation and would benefit highly from both remediation in academic areas as well as psychotherapy."

What's surprising about this statement and other statements that follow is that Cory remained very motivated. He remained cooperative, eager to learn, and willing to take on the challenge of his disability. If any of you have had experience with learning-disabled youngsters, you know that even mildly disabled youngsters become discouraged. They

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try to avoid their disability, understandably so. What was unique about Cory was, first of all, that he had a very severe learning disability -- I'll talk more about that later -- but that he continued to be motivated to try to overcome it. He had an educational evaluation. That's page eight of the quotations, by an education specialist who again pointed out that he was reading on the second-grade level. Third-grade level was too difficult to read. His spelling was second-grade level. His arithmetic was mid-third grade. It said that he couldn't multiply by three. He couldn't divide a number by two. He couldn't read digits of more than four digits. He could recite the months of the year only up to August. He knew there were 12 months, but he couldn't say them all. So this is when he is 13 years old. And he doesn't know all the months in the year, he can't read and do arithmetic beyond about a second or third-grade level. Of course, he has moved at least 12 times and had to change schools and classrooms, and I'm sure that he wasn't given much of an opportunity for teachers to work with him while he was in schools.

I also looked at part of this at what his mother was like at this time. Because a very important part

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of any kind of treatment is to get the family involved and to work with them. And I got very consistent descriptions of his mother, who was the only family member that they had any contact with. This is on page nine, Gloria Caro, caseworker assigned to work with him, they have a conference report. This conference involves a psychiatrist, a psychologist, teachers. The mother is invited to come, although most of the time she did not come, and Cory participates in parts of these conversations. But the caseworker -- he had a series of caseworkers -- the first one said, "Ms. Johnson is an attractive, stylishly-dressed woman who works as a receptionist. She is an articulate woman who reacted to my statement with anger, indicating she is trying to put her life together. She says right now she does not have too much energy or time for her kids.

She believes they will have to understand it.
"The message is, if her kids can live her life right now, okay. If not, she can't see them. She says she loves her kids, but putting her life together comes first.
"A joint interview with Cory elicited almost no comment from Cory, who stared at the ceiling while his mother pretty much lectured to him on how

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insensitive he was to 'where I am now and have to be.' It was not concern for him and his situation, being separated from family, being institutionalized."
She continues. She says, "It is difficult to see how Ms. Johnson can be engaged unless her needs are seen as primary. She refuses referral for treatment for herself. Further contact will reveal how fixed she is in this narcissistic, self-focused stand."
This is June. He has been in the setting for about four months. They are concerned that they cannot work with the mother, and this continued. In January of 1983, this is page ten, he now had a new caseworker, had a change in caseworker. He has now been in the institution almost a year. And here we have the quotation you may have heard before: "Child care workers note that Cory's behavior deteriorates when he has no contact with his mother. He can become quite depressed when he has not heard from or seen her for a period of time. It is the opinion of the child care workers that Pleasantville is good for him, that he is functioning fairly well here. Cory realizes his learning disabilities. However, he struggles to do his homework. He is truly motivated

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to do well and succeed, and he has not yet given up on himself. Within the last two weeks, there has been some decline. Cory fantasizes that his mother will come up in a car and take him to Pizza Hut. Child care worker reports that Cory's mood is basically that of a depressed child."
It continues to report that Cory wants to have contact with his mother, wants to have contact with his father. He tries to maintain the view that they are available to him. He cares about them, but not accepting that they are not available to him.
Q If I might, obviously, these reports being written by his workers in 1982 and 1983, and for that matter, the remaining ones that you are going to comment on, obviously were not done in anticipation of a trial proceeding.
A That's right.
Q These are excerpts taken from the reports of evaluations being done of Cory in an effort to help

him adjust to the problems that he had; is that correct?
A That's right.
Q Different from, obviously, your report which has been prepared in anticipation of this trial.
A That's right.

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Q But these excerpts are not so.
A That's correct.
Q Go ahead.
A These individuals had no inkling of what would happen in Cory's future. In fact, when I interviewed them they were shocked at what had happened, very troubled by it. As one of them said, "There is lots of boys that I work with here that I wouldn't have been so surprised if you told me what he was charged with," but they were very shocked to hear this about Cory. Cory was one of the better-adjusted boys at this school. But he was hampered because he was one of the most severely learning-disabled boys that they had seen. And they reported that he worked and worked, and try as he might, he couldn't read above about a second or third-grade level. And over a period of months and years he became extremely frustrated by that. He was given some educational tests after he had been there one year. They did a fairly comprehensive reevaluation of where is he, why isn't he learning, what is the problem here. This was Dr. Barish, a clinical psychologist called in as a consultant to test him to try to find out why isn't Cory learning in school, why is it that he appears motivated but isn't able to learn.

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Q I am going to ask if we could put the easel close enough for the jury to see. This is a blow-up of what is already included on page 13. The jury may want to make reference to that.
(Easel displayed to jury.)
The second psychological evaluation that's now before the jury on page 13, what did it show?
A Well, it showed that he was severely learning disabled. This psychologist gave him not only tests of his school achievement and found that after a year in this setting he still is reading at the first percentile, he has spelling at the first percentile, arithmetic at the second percentile. That means compared to other children his age, he is in the bottom one percent.
Q Is it possible under the testing that was available then, and I suspect available now, for one to test lower than the first percentile?
A That's as low as you go. He was at the bottom. That is, 99 percent of other kids were ahead of him despite his being in special education, despite his

good motivation. He could not learn to read or spell. He is a little bit better in arithmetic, and that turned out to be a little bit better for him later on. He was also given neuropsychological tests

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similar to what Dr. Peck gave him this year, which also confirmed that there was brain impairment; that this was not a problem that he wasn't motivated, or was emotionally disturbed, but the brain was not functioning properly for him to learn.

"The present test findings confirm the presence of severe learning disabilities in reading, spelling and arithmetic. There is an abundance of findings which strongly suggest diffuse neurological dysfunction with associated impairment in many aspects of cognitive functioning."

I spoke with the doctor. He said this is the most severe case of learning disability that he has, up until now, ever encountered.

Q For those of us who are not -- I'm certainly one -- not familiar with the phraseology, can you tell these folks what "diffuse neurological dysfunction with associated impairment" might mean?

A Pardon me for just rushing over that. Diffuse neurological dysfunction means that there is evidence of impairment in his nervous system in his brain. It is diffuse, meaning that it occurs not in one specific area, but in a number of different areas in the brain. So that this is one of the reasons he couldn't learn. Many individuals with learning

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disabilities have local deficits, or specific deficits. They can't process visual information very well.

They learn to compensate for that. Most learning-disabled children can learn to compensate. If they can't learn one way, they learn another way. If they can't learn by reading something, they have it read to them. Or, if they can't learn through writing, they learn orally. They can learn a number of different ways and they compensate. The problem with Cory is that his -- his disability was so severe, so diffuse, he couldn't compensate. There was no area that was unimpaired so that he could rely on that area. These scores, they also have standard scores, 66, 64, 64. Those are all in the mentally retarded range. Scores in the 60's are in the mildly retarded range.

Q On the chart that is before the ladies and gentlemen of the jury on the easel, as well as on page 13, not only was he testing in the lowest possible percentile on two of the three, and in the second percentile in arithmetic, but his standard test scores at that time would have put him

well-within the mentally retarded range?
A Yes.

Q Is this the same point in time where those workers who were dealing with him and working with him were reporting that he remained highly motivated, was trying to learn, trying to do the best he could?
A That's correct.
Q Was there anything in these reports at that point in time that indicated in any manner that Cory was, for instance, faking or refusing to participate in these tests, trying to score low?
A Well, not -- certainly not faking. Certainly he tried his best whenever he was tested. However, I think they report that there were times he was very frustrated by this. And I don't want to give the impression that any 13-year-old is always motivated and always on task and always trying to learn. I think there were undoubtedly times when Cory was less motivated, would give up on something he was trying to learn. But what is most striking, very different from other records I've seen and other kids I've seen, is the level of motivation he showed at this time; that he was trying very hard.
Q Psychologists, of course, are trained to watch for things which would suggest that the person was intentionally trying to do poorly.
A Absolutely.

Q Is there any indication in any of these tests that they found these tests to be invalid?
A No. I don't have any concern about these test results. They are very consistent.
Q If I could ask you to refer back to Page 11. This remains under the blue tab. Page 11 and 12 are the reports that indicate his treatment review and progress in school immediately preceding the testing that is currently sitting on the easel and also on page 13.
A Yes.
Q Would you comment as to those two pages, either read or clarify them?
A The statement "His progress in class has been very, very, very slow, almost to the point where one might feel he is not learning. He received remedial reading two to three times per week. However, his reading and spelling is on a second-grade level."
This is why they did this kind of extensive evaluation. The teachers were frustrated. They were working with him, they saw him trying, and they saw no progress. And so it was very mysterious to them how this could be, and why he wasn't performing better. Because in many respects, Cory looks like a normal young man. He can act like a normal young

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man. So, you know, if he had been disfigured, if he had looked like someone who was maybe mentally retarded with a syndrome that involves facial abnormalities or something, then that would make some sense to them. They would see evidence that he wasn't normal. Instead, they don't see that. All they see is a motivated boy who can't learn.
Q The second paragraph on Page 11 makes reference to the fact that he had been referred to his speech therapist at that point in time.
A Yes.
Q Back on the quotation from page two in November of 1983, he had been early on -- there was a determination that he had significant speech disorder.
A Yes.
Q And can you comment briefly on what that would have involved?
A Individuals with learning disabilities and with brain impairment may also have speech problems. And they noticed slurred speech and other speech problems early on. They referred him for speech therapy. He was very eager to receive it, because in fact it was very embarrassing for a youngster to talk funny, as he would have put it. And he was referred -- they
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did not have available staff to give him speech therapy. Actually, he got a very extensive evaluation at an independent center, independent hospital, and had a very thorough evaluation which again confirmed a learning disability and speech impairment, quite serious speech impairment. And they strongly recommended that he receive speech therapy.
And after several months, they did a follow-up, found out he still wasn't receiving speech therapy, and they wrote a rather heated letter saying, "What's happened here, why hasn't he received that speech therapy that he needs?"
Q The third paragraph on Page 11, and this would have been the point in time where Cory, by age, would have been 14 years old --
A Yes.
Q -- that paragraph indicates that he still was a well-related, but depressed, anxious, and severely learning-disabled boy.
A Yes.
Q And it also makes references to his continuing experience with his mother.
A That's right. This continues to be a problem, that they can't make contact with the mother. They
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can't get the mother to be involved in treatment. He

would go home to spend some weekends with her, but he wouldn't have much contact with her. She would go off and do her own thing and he would be on his own to do whatever he found that he could do on his own. She couldn't get her involved in treatment. They became concerned that she was verbally abusive of him. That is, she would deride him and castigate him because he couldn't do better in school.

And they tried repeatedly to explain to her that he had a learning disability, that this was not his fault, that he wanted to learn, and that there was no way, as they found out, that he could do better than he was doing. I mean, it is analogous to if a child had a handicap and couldn't walk and the mother says, "You have got to get up and walk," and there is no way he could. Because his disability was not visible, it wasn't tangible, the mother wouldn't accept it. She wanted him to go to college. She told him he was dumb. And Cory was very devastated by this, to have the only person, really, in his life, the only family member that he could have some connection to other than his brother, telling him to do something impossible.

Q You indicated in your preliminary remarks to the

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jury that your conclusions, you had come to the conclusion that there were two factors that affected Cory's psychological development and his ability to adjust in society.

A Right.

Q And you indicated that one of those was the unstable family circumstances and rejection of his mother.

A Yes.

Q And the second was his severe learning disability.

A That's right.

Q And in January of 1983, when he was age 14, Ms. Turnquest's comment in that third paragraph on Page 11 is simply that, that Cory is a well related, depressed, anxious, severely learning-disabled boy who has experienced his mother's rejection and emotional unavailability."

A Yes.

Q So that diagnosis is certainly not a new one for Cory; is that correct?

A That's right. This is not my retrospective diagnosis. This was written time and time again in the records. This is echoed later on in further records, too, that we can come to if you wish.

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Q On page 12, the December, 1983 treatment review, can you touch upon that?

A Yes. "Cory readily states he does not want to

go home at this time and that he needs to work on his problems. Cory's primary concern is his learning difficulties. He is quite frustrated by his reading disabilities and worries about his future. Cory receives remedial reading three times weekly."

Then it says, "It is important to note that Ms. Johnson spent the entire day with Cory and child care workers observed how extremely rejecting his parent is towards Cory. In the cottage later in the day, she had almost nothing positive to say to him."

Consistently, when the child care workers saw Cory with his mother, they became discouraged and concerned, because she was so habitually negative and demeaning to him. And this just simply aggravated his low self-esteem, his sense of himself as not good enough, and uncapable.

Q I don't want to take you out of an order that you want to follow, but if we could address the speech and language disorder problems and the testing which followed that.

A Right. That was November of 1983 is when they sent him to Phelps Memorial Hospital Center and gave

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him a very extensive evaluation. That's on page two and three. It is out of order here.

Q That is the initial diagnosis, and then was there a testing done of him, and is that contained on page three?

A Page three are some of the test results from that November, 1983 evaluation. So he has been there a year-and-a-half now, and had this evaluation. Chronological age is 14 years, and on these tests he ranges from nine years to 12 years in his level of functioning on these speech and language-related tasks.

Q The Peabody Picture Vocabulary Test, where he had a demonstrated standard score of 69 and that would equate to a roughly nine-and-a-half year old child --

A That's right. That's in the mentally retarded range.

Q That would have --

A That's the performance of somebody 14 years old who is mildly mentally retarded. They did not view him as mildly retarded because they knew of his learning disability, but his function in that area was that low.

Q Dr. Cornell, as Cory aged over a period of time

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to his current age, did he advance or did his abilities stay at this age level?

A Well, they advanced somewhat, but he wasn't advancing at his chronological growth rate. That is, he was falling behind. And the older he gets, the

further behind he would fall. In the area of reading, though, he has advanced very little if at all. In arithmetic, he advanced up to about the sixth-grade level, I found in my testing.
Q On page four there is a reference that I think you mentioned earlier in your testimony. Did Cory want to be treated for this speech disorder?
A He wanted treatment for it very much. He got increasingly frustrated that he did not get speech therapy. He was promised it, he looked forward to it. For him it was one of the reasons why he was agreeing to not be at home. No kid wants to live in an institution. But to his credit, he wanted to live there to get help. And he did not get this help while he was there. This was frustrating to him. It was also frustrating to the other staff, who were upset that he was not receiving it.
Q The third paragraph down on page four indicates that Cory had a very intensive evaluation in September of that year.

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A Right. That's the scores that I just mentioned. Yes.
Q It indicates that in those five appointments, he was most cooperative during this analysis and is anxious to start therapy.
A That's right.
Q And that pervades these reports; is that correct?
A That's right. For a number of years, he kept up very high motivation and ambition to do well.
Q That speech difficulty, did it also -- was there evidence of stuttering or such problems as that?
A There had been stutterings, marked stuttering when he was real young, and then he continued to show some stuttering problems later.
Q Is it normal for such disability as speech difficulty to affect one's self-esteem?
A Absolutely. That's one of the most serious negative consequences. People who stutter or have other speech problems become acutely embarrassed. Other kids tease them about talking funny. And Cory was very sensitive about that.
MR. COOLEY: Now if I might, Your Honor, if we might, we still have a ways to go with Dr.

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Cornell. I don't know if the Court feels it is an appropriate time for a short break.
THE COURT: We will take a brief break. All right, everyone remain seated while the jury leaves the courtroom.
(The jury left the courtroom.)
THE COURT: All right, Mr. Marshal, you may

remove the defendants.
(Defendants removed from courtroom.)
All right. We will take ten minutes.
(Recess taken from 11:35 a.m. to 11:57 a.m.)
THE COURT: Let's bring in the jury, please.
(The jury entered the courtroom.)
BY MR. COOLEY:
Q Dr. Cornell, I want to call your attention, if you could at this point, to page 14 behind the blue tab. This is a point in time where Cory has had a second psychiatric evaluation, and a report is made as to his circumstances at that point in time.
A Yes. This evaluation is by Dr. John Stadler, who is a psychiatrist and who is the clinical director of the facility.
He says, "At the Cottage School Cory has a reputation of being a good boy, one who stays out of

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trouble, even though he lives in a cottage where there is a good deal of trouble. He does not drink or smoke pot. He does not run away. I have never known him to be suspected of stealing. On the other hand, his learning disorder is not responding to any of our teaching methods."
He did not give him an Axis I disorder, although he noted a history of parent/child problems and of conduct disorder which he says are not present now. He did give him a diagnosis for the learning disabilities, that's Axis II, "Longstanding Developmental Reading and Arithmetic Disorders, Severe." He also noted positive soft neurological signs and evidence on psychological testing of central neurologic dysfunction, diffuse. I realize some of this is repetitious. But my concern is that there was consistency across experts, across time, when people saw him. And I spoke with Dr. Stadler and asked him about his evaluation. He remembered Cory. He remembered that he was very troubling to the staff because he was so well-adjusted, yet so impaired. He also complained as the director of the agency that they had not had a speech therapist and sufficient remedial reading teachers to assist him as they wanted to, and that that was a chronic problem

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which they still had to the present day.
Q On the following page, page 15, that contains -- this, time-frame-wise, we are now at a point in time where Cory has just turned 16. He remains at the school at that point in time. He remains in a residential program rather than being at home, and he has been transferred at this point in time from a cottage that contained younger boys to a cottage called a senior cottage; is that correct?

A That's right.
Q That transfer was made in the summer of 1984.
A They made the transfer, started giving him summer employment jobs, doing manual labor. He held a variety of summer jobs. He was proud of the fact when I spoke with him, Cory was, that he stuck out those jobs. He worked at them even though he didn't particularly like the manual labor that he had to do. He also was placed in a more vocational-oriented program called BOCES. It is a special educational program in which he was learning carpentry and did reasonably well. He tended to do best when he did things with his hands that did not involve language. Anything that involved language, he had serious impairment in.
Q The last sentence in that first paragraph on

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page 15?
A Yes. "He is supposed to receive remedial reading and speech therapy, but for reasons not clear, has had no one-to-one instruction for several months." This is a report of another psychiatrist, Dr. Clemmens. This is, I think, the third psychiatrist to see him. And again, they had trouble providing him with the special services he needed, and for some reason these services lapsed at various times.
Q And this certainly was in spite of his desire to be -- to have this treatment, to address his problem; is that correct?
A He voices it here. I think now at 16, he has been there several years. He says, "Cory was sarcastic and extremely resentful about receiving neither remedial reading or speech therapy." The psychiatrist quotes him. "'School-wise, they haven't done a thing for me.' When I questioned the lack of remedial reading he answered angrily, 'They get my hopes up high and then you do no shit. That's why I want to depend on nobody no more. You are all full of shit, every one of you. Nobody has raised a finger."
He had an angry outburst to this psychiatrist

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over his frustration. And then when I read that I thought well, he is now starting to really bad mouth the institution and show a more negative attitude. I wondered what the staff think of him. Dr. Clemmens in that report says -- he agreed with him. She said, "Outside of being raised in a problematic family he has to cope with a severe learning disability which is highly frustrating and embarrassing. It is understandable that he feels bitter and resentful about not receiving adequate help. In addition, it is difficult for him that he

had to relate to five different social workers within one year."

I spoke with Dr. Clemmens. She also remembered Cory well despite the passage of time, and she similarly expressed frustration. She was not offended at his criticism of his treatment. She agreed with him that he had not received the kind of treatment that he had been promised, and that he was very frustrated by that.

Q On page 16, and what has just been placed before the jury, is a report of the fourth psychological evaluation of Cory, being done in March of 1985.

A Right. He is sixteen-and-a-half. A psychologist who had seen him before who had first

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diagnosed the severe learning disability came back, did a second evaluation, and found a decline in his performance, found that his scores, his IQ scores, had dropped and were now in the mentally retarded range or close to the mentally retarded range, depending on the particular score. In the verbal area, his verbal IQ was 68 to 70. That is in what he calls "mentally deficient," same thing as mentally retarded borderline range. His performance IQ was slightly higher. His ability to form non-language, nonverbal tasks with his hands, 78 to 81. That's in the borderline to low average range. So he is better in that area. His full IQ, though, which combines those two, was 69 to 74, which is in the mildly retarded range. It is right on the edge, on the upper limit of the borderline mentally retarded range. But it falls into a range of mentally retarded individuals. Dr. Barish says these scores reflect a significant decline since Cory was tested in 1982. "This decline is difficult to account for. However, several factors may be involved. The current scores may reflect in part the increasing demands of the task presented..." that is, the tests are now harder because he is an older fellow, so he is getting harder questions, as well as Cory's

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failure to learn at an expected pace, that he is not learning at a regular pace. He is falling further behind.

He also says, "They also undoubtedly reflect the effects of Cory's severe discouragement and depression with respect to cognitive tasks." That is, he is starting to become discouraged and to give up. And elsewhere in this report, not quoted here, Dr. Barish points out that when he gave Cory some extra help and gave him some extra opportunity, he showed that he could do a little bit better. But he is becoming discouraged.

He also did personality testing, and this last

paragraph says that. "Personality assessment reveals a thoughtful, highly reflective, but affectively constricted adolescent. Cory expends considerable energy in his efforts to suppress anger. He appears vulnerable to periods of depression and frustration. There is also evidence of feelings of aloneness and a desire for help that is not being heard. Several responses suggest that Cory feels he is not being listened to. Cory's test responses also reveal an effort toward maturity that is particularly impressive considering his severe learning disabilities."

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So they are noting mounting frustration, mounting difficulties, continued motivation, continued attempts to do well, but considerable stress that he is showing now.

Q If you would continue on to the March, 1985 treatment conference. Paraphrase that, if you will.

A They summarized, sort of did a summary of why he was there, what kind of problems he had when he came there. They point out in this quotation that it was arranged for him to have remedial education. They say, "However, due to Cory's reluctance to attend, and staff's miscommunications around the time of the appointment, sessions were infrequent, irregular, and this was not beneficial to Cory."

They shift some of the blame on to Cory for not showing up for some of the classes. They also do acknowledge, this person does, that there were some problems with arranging services. As I've mentioned before, I talked with Dr. Stadler and Dr. Clemmens about that, and they felt that they did not have the appropriate staff to give him services at those times.

Q Now, on page 18 in the March treatment conference, March of 1985, they continue to see difficulties with the programs being able to have any

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meaningful contact or for Cory to have any meaningful contact with his mother; is that correct?

A That's right. Now he has been there several years. This is a time ordinarily when you send people back to their home. And they have had very little contact with the mother. She has not been available. And in fact, she seems to withdraw more. They say, "Ms. Johnson withdrew more from Cory. She requested home weekend trips go back to two times a month. Cory had been going home weekly, and refused a visit at the last minute. Cory reacted with anger, and it was seen as a good sign that for the first time he was able to verbally state his anger with her. Cory regressed somewhat during this time period. He refused to attend school on several

days. He was despondent, depressed, acting inappropriately in the cottage, making animal noises, and he avoided sessions with the worker. Cory was able to mobilize self and pull out of the depression before acting out in any serious manner. This is seen as a positive progression for Cory."

As his mother pulls away from him, he becomes very upset and frustrated and his behavior deteriorates. He is still attached to her; he very much wants to be with her. She is someone that he

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admires.

Continuing this report: "Ms. Johnson continues to be surfacely involved with Cory and PCS. Though available to attend some meetings with the agency, she has frequently canceled appointments for apparently valid reasons. She does not visit Cory on campus. Ms. Johnson is a self-focused woman concerned primarily with her own needs. Though verbally expressing her concern for Cory, her actions continue to speak to her emotional unavailability to him."

This is very strong language for somebody to put in writing. I can tell you from working at agencies like that that you are very careful when you criticize a parent and you don't write things like this unless it is quite serious and you can back it up. So when I read this, I was quite impressed by this level of criticism of her.

Q The Freedom of Information Act would allow her to get this and potentially file an action against these folks?

A Absolutely.

Q Could and probably would have. Whatever.

A We are all concerned about this when we write these things.

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Q The petition that is shown on page 19, this involves a change of manner in which Cory is going to be held, or the type of facility that's going to be available for him?

A Yes. The usual plan in Cory's situation and in all similar situations is to return home. Children are placed in institutions temporarily, and the goal is to return them to their parents. It is unusual for a change in that plan. They felt they had to change that plan; that Cory's mother was not capable or willing to take him back. The Court petition, Family Court of the State of New York, says, "Father is not involved. Mother is involved in her own personal problems and shows only minimal interest in child. She does not cooperate with agency in planning for child, and reveals only scant information about herself. Child is equally

secretive about his mother's lifestyle and will not discuss it. However, he has adjusted well in the group home and is on good terms with staff and peers."

This reference to the secretiveness is because they had concerns that she was involved in criminal activity and drug use. They could not prove it or establish it, although subsequently she was arrested,

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and although Cory revealed that he learned of it himself. But they worded that very carefully in this legal statement here.

Q That petition placed Cory in a group home, occurred when he was 17 years old; is that correct? This came from June of 1986.

A June of 1986. That's right. They decided that rather than send him back to his home, they would try to find a group home for him. Initially, they didn't have a place. They didn't know where he was going to go, but they felt he couldn't go to his home. And eventually an opening became available in an apartment in Queens, New York, in a large apartment building where they had several boys of his age living there with some foster parents who took care of him. So there was an opening and that became the goal, for him to go live there. This was, of course, quite disappointing to him. All along he had been planning to return to live at home. He had been making weekend visits home, and then that wasn't going to happen. He was going to have to go somewhere else, live in Queens.

Q This additionally would have been a change in setting for this young man; is that correct?

A A very big change. He is going to be living in

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a large apartment building, highrise, in an apartment in that building. He is not going to be in the Cottage School, which is basically a campus that has its own athletic facilities, own school, own residential area. There are comments not included in the record where he expressed apprehension about that; that he felt protected and safe in the Cottage School. He didn't want to go back into the streets of New York where he had -- where he had been threatened, been assaulted, where he had seen a lot of violence take place. And he was none too happy to go live, not with his mother, but with strangers in an apartment there.

Q The report there by Odette Noble, a social worker on page 20 --

A Yes, this is a change. Odette Noble began to work with him when he went to the group home. That is, he left Pleasantville Cottage, went to the foster group home, Elmhurst Boys' Residence. It is an

apartment in a highrise. A social worker is assigned to meet with him weekly, to meet with the mother, and to continue to work towards Cory eventually going home. That's the plan. She expressed in this quotation her frustration.

"Ms. Johnson is extremely elusive. I have made

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numerous appointments with her and she has not kept them. She will call and cancel, but she will not follow up and make another appointment. She is also not terribly responsible about calling and arranging for Cory to come home over the weekend. Even though Ms. Johnson is quite irresponsible in her relationship to Cory, Cory talks about her as if she is a goddess and is terribly responsible in relation to her. It is as if he is compensating for her real neglect of him." This is stated several times in the records.

Q Ms. Noble makes a second report in the group home conference report on page 21.

A Right. It is now 1986, six months later or so. "On the whole, Cory continues to be using the residence well, and would seem to want to remain living there. He has made relationships with both the house parents and the boys, and is liked by both. Cory continues to be quite active and assertive in how he handles himself. And he can be a bit of a monopolizer. But the boys continue to take this in their stride and not seem to mind it. He talks a lot, apparently, in group meetings. Part of the boys' acceptance would seem to be related to Cory's ingenuousness and decency. Cory is very in

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earnest about succeeding and articulates that point of view to the other boys." At another place, they talk about him sort of almost like having a preacher quality. He is telling the other boys they have to do well.

MR. VICK: The editorialization, I thought, was not appropriate. I object to it.

THE COURT: The objection is overruled.

BY MR. COOLEY:

Q That reference is not -- that's coming out of the reports, isn't it?

A I'm referring to portions of the report that I read, that are not in the quotation, to try to explain them. Let me just read verbatim what he says here. "One senses that periodically Cory might feel the wish to live with his mother, but he doesn't discuss it openly and, I think, deep down he knows that his mother is just not able to provide a stable, secure home for him. Cory is quite secretive about his mother's lifestyle and doesn't share with me and, I don't believe, with the house parents, some of his

chagrin at what his mother does. We only pick it up by his behavior and what he does not say."
Q Finally, Doctor, the difficulties with his mother continued to be reported in the June, 1986

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report. They had not seen her or had any contact with her at that point in time?
A Right.
Q And then Cory became aware of her own -- of her, being his mother's, difficulties with the authorities.
A That's right. It says at the beginning of March '86, Cory learned that she was arrested and was in jail in New Jersey. He told his house parent to inform me, and then Cory and I discussed it. I haven't heard from her or any other family member. Cory states he doesn't believe his mother is guilty and that she was framed. He acknowledged it had something to do with the use of credit cards. I suspect Cory knows the truth, but is keeping it from us."
Q Doctor, let me ask you if you would to go back to the chronology, which is behind the green tab at the front of the book. At this point in time, you have brought him down through the summer of 1986.
A Yes.
Q In the summer of 1986, the entry there on chronology that shows his age, 17, he was involved in something that brought him into the criminal justice system.

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A Yes. That's right. During this time he became aware of his mother's increasing involvement in drug abuse, crack addiction. He was very upset by that. His attitude declined dramatically. And he became more involved with several of the other boys, Dwight and Mitch, who lived in the group home. And he related to me that he wanted very much to be accepted by these boys; they were his friends. He felt like they were -- like he was loyal to them. And one fellow, Mitch, whom he looked up to, told him he was having trouble with another boy. He referred to him as a Hispanic young man. And Mitch encouraged Dwight and Cory to go with him to try to intimidate this other boy.
And Cory related to me that they in fact did go up to this boy and threatened him, and that this boy, somewhat to his surprise, pulled out his paycheck -- Mitch and this boy worked together -- and gave it to them. So in essence, they robbed him. He told me at first they hadn't intended to do that, but when they saw that this boy did it, they went back and did it a second time. And when that happened, the police were contacted. Mitch was arrested. Mitch then was

interviewed by the police and revealed that he was assisted by Cory and Dwight. Cory and Dwight then

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spoke with their foster care people and went down to the jail or to the police department and turned themselves in.

Q He was, in fact, incarcerated at that time at Riker's Island?

A He was put in jail initially. He was bailed out by the foster parents. He then pled guilty and received a sentence of, I think, ten to twelve days in Riker's Island, which is a rather well-known, rather rough jail in an island in New York City. And he was very distressed by that experience. That was a very troubling experience. He had never been exposed to quite that kind of environment before. But he had got involved with Dwight and Mitch, wanted to be accepted by them. Mitch wanted to take revenge on another boy, and Cory, who I don't think really knew this boy, wanted to be loyal to his friends and do what his friends did, and he got himself involved. He admitted this candidly do me.

Q No disputing he was guilty of that?

A No. He told me he was guilty. He told me what he did. He told me he was in jail.

Q He continued after that to stay at Elmhurst for some months; is that correct?

A Well, he came back to Elmhurst, after his time

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in jail. He showed a real decline in attitude. He seemed very uncooperative with the foster parents there. He expressed a lot of anger. They continued to press him about what was going on with his mother. He got angry. He was offended by that and he defended his mother. And at one point, I believe in February, several months after this arrest, he had an argument with the staff and they laid down the law to him. They told him "Look, if you aren't more cooperative, if you don't agree to follow our rules, you are going to have to leave." I checked into it carefully. He had not assaulted anyone. He had not broken laws there. But he was showing a bad attitude and they didn't accept boys there who didn't show that they wanted to be there. So they told him that he would have to temporarily go home until his attitude improved. And so he abruptly left, and he did not return.

Q And thereafter, was there an occasion in which he was charged with an offense?

A That's right. He returned home to his mother, continued going to school, was suspended from school for squirting a teacher with a fire extinguisher the last week of school, did not attend his graduation.

Q Was he to receive a diploma if he graduated?

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A Well, there is -- the mother couldn't tell me. She didn't know. My best understanding from the records and from what Cory told me is that he was to get a certificate of completion; that he couldn't get a full diploma because he was in the occupational training program and he could not pass the literacy test to get a diploma.
Q Thereafter, he got into some trouble; is that correct?
A Yes. After that time, he was arrested and accused of another robbery with several other young men. He was put in a police line-up and he was identified in the police line-up. He strongly indicated to me and also indicated in the record at that time that he was mistakenly identified; that he was not -- that he did not commit this offense.
Q So as to that alleged attempted robbery, he denied that he was indeed the person who had committed that?
A Yes. That's the only thing he ever denied to me.
Q From the birth through age 21.
A Ever.
Q In discussing those items with him, he acknowledged guilt and wrongdoing at any point where
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it was raised.
A Yes.
Q But as to this issue he did not, and in fact adamantly proclaimed his innocence; is that right?
A That's right. He acknowledged to me a number of extensive involvement in some drug dealing and illegal activity. This is the only incident of which he was accused which he told me he did not do and that he was falsely accused.
Q In spite of his proclamation of innocence, based on one-on-one identification of Cory, he was indeed convicted.
MR. COOLEY: And Judge, we would reference for the record, I believe it is Government Exhibit PP-1, which is the conviction for attempted robbery.
BY MR. COOLEY:
Q And he received what penalty?
A I don't know the exact penalty. He decided to plead guilty because he was told that he would receive several years in prison if he were convicted, and that he would be convicted. And he decided that if he pled guilty he would get a period of up to a year.
MR. COOLEY: And indeed, Judge, if we can ask the Court to take judicial notice of that, that
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exhibit, there is a one-year sentence to Riker's

Island.
BY MR. COOLEY:
Q And that is when he went to Riker's Island the second time; is that right?
A That's right.
Q During that period of time at Riker's Island, did Cory express to you any circumstances which concerned him?
A Well, he was -- after he pled, he became distraught. He regretted his decision. He became upset. He had had some plans and hopes of entering into the military, of joining the Navy, and came to the belief that because of this conviction he would not be allowed to do that. I don't know whether that's true or not, but that was his belief. He also received a letter from his father which was very upsetting to him and he began to have nightmares and to be very troubled, appear very troubled in the jail.

He was seen by a chaplain in the jail who was sufficiently concerned about him to refer him to a psychologist, who then saw him weekly for, I think, about two months up until the time he was released. This psychologist reported that at that time, Cory

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was expressing regret that he had pled guilty to something that he didn't do, a great deal of emotional distress over what had happened to him, and he was seen as someone in need of psychological counseling for this time in jail. And subsequent to that, he finished out his time at Riker's Island and was released.
Q Now, the first visit when he admits he got into the situation where he went down and turned himself in but spent some days at Riker's Island, he was 17 at that time. At the time when he receives this 12-month or one-year sentence at Riker's, he is 18 and serves during his 18th and 19th year; is that correct?
A That's correct.
Q In terms of his one year at Riker's Island, of what are you aware in terms of any visitation by family or others?
A Well, the records indicate that he complained that he did not receive visitors during the lengthy time period that he was there, and he was quite despondent that he didn't have family contact while he was there.
Q And based on your discussions with him during the course of that one year, did his mother or any

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other family member ever visit him?
A He told me that she did not. His mother told me, quote, "I wasn't there for him." She said she

was too involved in her drug problems and her relationship with her boyfriend, and that she could not be available, and that she regretted that but she couldn't.
Q Following release from Riker's, he went back to New York, or did he move to another area?
A After he was released he went to North Carolina for several months and spent part of that time with his half-brother's father, I believe, Mr. Butler, a person that he had lived with when he was young who agreed to take him in for a period of time. He spent several months there in North Carolina, and then subsequently returned to New York.
Q All right. He ultimately, after working for awhile with a warehouse job loading or unloading trucks, he then moved to New Jersey and became involved with drug distribution?
A He met some young men while in New York whom he had met on the streets who told him that he could make a much better living selling drugs in New Jersey. He had by this time already become involved in using marijuana, and had sold marijuana, he told

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me. And he began to sell marijuana to support himself at this time.
Q Ultimately, after that he moved back to New York for a brief period of time, and then came to Virginia in the fall of 1991 at the age of 22; is that correct?
A That's correct.
Q All right, sir.
MR. COOLEY: Your Honor, in discussions with the government, and I will ask the Court for its preference in this, we have still more to produce through Dr. Cornell. We have two witnesses, one of which we would like to call out of order. I think the government does not object.
MR. VICK: I have no objection.
MR. COOLEY: We would like to call one of those witnesses before lunch, or if the Court prefers immediately after lunch. The second witness we would like to put after lunch, and then finish with Dr. Cornell. That witness I would anticipate being roughly 20 minutes. Whatever the Court's preference is.
THE COURT: I think we may have to put it off.
(Court conferring with Clerk.)

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All right, let's say about 20 minutes. Let's go ahead and try to get that in.
MR. COOLEY: If we could excuse Dr. Cornell for just a moment and call Mr. Jerry Lefkowitz.
(Witness stood aside.)

GERALD LEFKOWITZ,
called as a witness by and on behalf of defendant Johnson, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COOLEY:

Q Good afternoon to you. If you would address your responses to the ladies and gentlemen of the jury. Would you tell them, please, your full name?

A My name is Gerald Lefkowitz.

Q Your profession?

A I am a social worker.

Q And do you have any particular education or license, any background?

A I have a Master's in social work degree from Adelphi University in Long Island.

Q And you are employed by whom?

A I am employed as the director of the Pleasantville Diagnostic Center, which is a branch of the Jewish Child Care Association.

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Q How long have you been associated with the Jewish Child Care Association, and specifically, with the Pleasantville facility?

A Eleven years.

Q All right. Can you tell the ladies and gentlemen of the jury, please, the components of the facility there at Pleasantville?

A There are two basic programs in the residence. One is the Pleasantville Diagnostic Center, which is a short term two-month program where kids come for an evaluation. And the second part of the program is a long term residential treatment center called the Pleasantville Cottage School.

Q Now, the diagnostic center is associated with the Jewish Child Care Association?

A Yes.

Q And on the facility grounds, is there a school?

A Yes.

Q And what is the name of the school?

A The Mt. Pleasant Cottage School.

Q And is that school, that academic school, associated formally with the Jewish Child Care Association?

A It is not part of the Jewish Child Care Association, although it is mandated to provide an

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education for all the children who are on the grounds of the Pleasantville Cottage School and the diagnostic center.

Q Is it affiliated with and licensed by New York State?

A Yes.

Q Now, in your capacity there, the Pleasantville

Cottage School, does it involve a residential program for youth?
A Yes. The kids live there.
Q And they are educated at, I take it, Mt. Pleasant Cottage School, they live at Pleasantville Cottage School, and before they are allowed entry to either of those they must pass through a diagnostic center called Pleasantville Diagnostic Center?
A Not everyone comes through the diagnostic center. Some of the kids come referred from the Family Court or from the Department of Social Services or from other agencies.
Q I see. The residential treatment center is set up with what type of residences?
A The kids live in cottages. There are about 14 kids to a cottage, four staff members working in taking care of the kids in the cottage.
Q Are there potential goals once a youngster comes

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through or comes to the school, is placed at the residential facility? Are there goals set up for that child?
A There are goals that are set up immediately when we interview the child and the family upon admission. Then there is an initial treatment plan in which goals are set up. That's done two months after a child is there. And then those goals and plans are evaluated every six months thereafter with the team, with the child, and with the family.
Q Mr. Lefkowitz, the ultimate goal for any child who is brought into the program, are there indeed three ultimate goals, one of which must be selected?
A Well --
Q In terms of the ultimate placement of the child?
A In the State of New York all children coming into foster care, and this is part of the foster care system, there can only be three possible goals for the child. It is either return home or free the child for adoption, or when the child becomes fourteen, a goal can be for him to, or her, to go to independent living. So those are the three possibilities, possible goals.
Q Mr. Lefkowitz, during the mid-1980's, 1982 and

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1983 and 1984 and 1985, did you have occasion to have contact with the young man seated over here, Cory Johnson?
A Yes.
Q And did Cory come into your facility by first passing through the diagnostic center?
A Yes.
Q And he was, I believe, placed there by a voluntary petition from his mother which would have

brought him into that circumstance; is that correct?
A That's correct.
Q You have reviewed --
MR. COOLEY: And for the jury and the Court, I would make reference to page one under the blue tab.
BY MR. COOLEY:
Q There is a petition that was entered, or a ruling entered by the Family Court of the State of New York which indicated that it had found and determined that Cory Johnson, said child, was removed from his home on February 1st, 1982; that the parent is unable to make adequate provision for the care, maintenance, and supervision of the child in her home, and it is determined to be in the best interests and welfare of Cory that -- his interests

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would be promoted by removal of the child, Cory, from his home. And in your discussions with me regarding that, what is the necessity of that finding by the Court? Why was that made?
A Those findings are applied to voluntary placements. And shortly after a voluntary placement is made between the mother and the Department of Social Services or the parent and the Department of Social Services, the Court must review that that agreement was in fact something that the parent has knowledge of, understands, and is in agreement with. And that was the nature of that document.
Q For a youngster, once they arrive there where a parent has voluntarily turned them over, even so, the state prefers that that child be returned to the home; and in order for the child to stay, a review must be made after two months to determine whether the family, or the mother in this case, is ready to take him back, able to take him back. And if not, this ruling would allow the child to stay in foster care?
A Not quite. The purpose of that review was that the parent understood the nature of what the placement was going to be; that she agreed with it; that not only did she agree with it, but she

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understood what she was agreeing to. And a Family Court Judge would oversee that. That was the case.
Q During those years I've described, 1982 to 1985, what was your role at Pleasantville?
A I was unit administrator.
Q And your duties would have involved what?
A I was in charge of a unit that consisted of three living cottages and all the staff associated with those three cottages. That's child care staff, social work staff, psychiatrist, psychologist. I did the liaison work with the school people and

recreation and that kind of thing.
Q You were the head man of that unit?
A That's correct.
Q And you were supervising these other folks and you also, I believe, were in charge of discipline; is that correct?
A That's correct.
Q All right. Did you have occasion -- and I don't want to give the false impression by having asked you the question about discipline -- but did you have, in the course of your dealings with the staff and such and the children that were placed there, have occasion to see the students, to see the children who were in the care?

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A I would see the kids in the course of a working day daily. I would visit the cottages, see them at school. When they came in for their social work appointments or testing, they would stop by and I would get a chance to see them. And I would also see the kids when they were brought into me for disciplinary reasons.
Q Now, in the course of your day-to-day functioning and supervising, did you have occasion on a daily basis, or near daily basis, to see Cory Johnson?
A Yes.
Q I take it that was not in a disciplinary mode on a daily basis?
A No.
Q Or anything like that; is that correct?
A That's correct.
Q Do you recall Cory during those years?
A Yes.
Q Can you give a brief description to the ladies and gentlemen of the jury of your impressions of Cory when he first came to the program?
A When he first came to the program?
Q Yes.
A Anxious youngster, a good kid, a kid who was not

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a troublemaker, a kid who knew that he couldn't read, knew that he had learning problems, wanted to do something about it.
Q Was he motivated to improve his skills?
A He was motivated to learn.
Q In the early years that he was there, was it your impression that Cory saw himself as ultimately being able to conquer these problems and to advance and to live the normal American life?
A I believe that he felt that he could learn and that he wanted to learn, even though there was nothing in his experience that would lead him to believe that. I think we held out the hope that he

could learn and he would learn. And I think he wanted to. He was one of the few kids who did not hide that fact from the other kids. I think everybody knew that Cory had this problem because Cory let everybody know in those early years.
Q That he couldn't read?
A That he couldn't read, that that was a problem for him, and that he wanted to do something about it.
Q And in terms of -- let me ask you just briefly about his family. There was a point in time where he had a younger brother that actually was placed as

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well at this institution; is that correct, this facility?
A His brother, Robert, was placed at another facility before Cory came into placement, another institution, another residential treatment center similar to ours. His brother was the first of the two boys to be placed.
Q Did there ever come a point in time where Robert was transferred to Pleasantville as well?
A Robert left that agency, went home, and within -- I don't remember exactly how many months, but within a number of months he began to be problematic seriously at home and he went to the Pleasantville Diagnostic Center for an evaluation while Cory was in placement with us.
Q Now, as relates to the goal for Cory, when Cory first came to Pleasantville the three goals you indicated of ultimately getting either back home, independent living, or adoption, which of those goals was set by the staff along with Cory? What was designed for him ultimately when he left Pleasantville?
A To return home.
Q To return home. Was that his desire?
A That was his desire.

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Q And during the course of the time he was there, did there come a point in time where a change in his ultimate goal had to be made?
A Well, I don't know if it had to be made. We made the change. At about the halfway point, for many reasons, we changed the stated goal from return home to independent living.
Q For most of the kids who come through there, the goal is to return home; is that correct?
A That's correct.
Q For most of the kids that come through there, they do ultimately return home?
A That's correct.
Q But for Cory, that just never happened.
A No, it didn't happen. He didn't go home from

Pleasantville. He went, after three years, to a group home.
Q And normally, before a final discharge, kids are allowed to start visiting with their home, go home for weekends and such; is that correct?
A Well, right from the beginning, the kids go home. We have a calendar of visits, and it is about every other weekend. And Cory would go home most of the time every other weekend, and then there was a time when, upon his request and for many different

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reasons, we increased it to every weekend. I recall it because it was -- there was contention in the team in that we had changed the goal to independent living, and yet we were sending him home every weekend. Some of the team felt that there was something incongruous about that.
And those of us who prevailed felt that he needed to come to grips with the reality of his situation at home, and the more frequent visits would bring that home to him. Plus there was another advantage: that he would be able to negotiate the -- become more independent with the traveling by himself, be able to do those things that would make him more independent.
Q So at the same time the goal was changed to independent living, rather than to return home, he was asking to go home more often?
A That's correct.
Q That was allowed because he wanted it.
A Right.
Q And also, because of you all's hope would be that he would begin to recognize, as he matured, the facts of life at home; that he really wasn't wanted there, and that there were other problems. Is that fair to say?

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A Yes.
Q All right. Now, in the course of things, do you recall having discipline problems with Cory?
A Not many discipline problems, no. Not in the sense that he was a troublemaker or that he broke rules or that he fought a lot. Not in that sense. Where we would have some problems with him was when he would kind of like shut down. He would not go to school for a couple of days or not come to a conference or not come to his social work appointments. It was that kind of problem that you had to help him get through, rather than discipline problems of an acting out or a criminal nature.
Q As he stayed for the second and third years there at Pleasantville, and it was not aiming at that point to go home, he still of course suffered from this severe learning disability; is that correct?

A Well, he never really progressed much with it at all.
Q And as the other kids got older and as Cory got older, did the disparity between what he should be able to do and what he could do increase?
A Yes. Obviously, it increased. What also increased was his -- you know, I wouldn't say he gave up, that he really gave up, but he became

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terribly frustrated, terribly angry.
Q As he got further and further behind, that frustration got more and more?
A Yes.
Q Obvious, I suppose.
A Yes.
Q Now, the mother's role in assistance there, was she ever a factor, a help, a benefit to you all?
A That's a very complicated question.
Q Let me break it down. Was she easy to contact for you all?
A Well, let me say she didn't come up to the institution much. She didn't participate very much in our meetings. She would come to her appointments in the city. We have an office in the city, and the social workers would come to the city on a regular basis and she would come to those. But she was unpredictable in the way in which she worked with us.
Q Do you recall a specific incident in which Ms. Johnson called upon Cory, while he was there as a child, for help, for him to help her?
A Yes. I didn't know Ms. Johnson very well, because she didn't come up to the institution very much. I might have had contact with her three or

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four, maybe five times in the three years. But there was one time that I did, and that involved her asking Cory for a loan. And I remember this very well because I have a very, very firm policy that I never, ever altered. And that is that when kids had the opportunity of working and earning some money, I made them open up a bank account and save half their money. 50 percent of what they earned they had to put in the bank and they couldn't touch that. They couldn't touch that money, even though they always argued with me about the fact that it was their money. The other 50 percent they could do what they wanted with, within reason, but that 50 percent of the money, I was adamant that it was theirs when they left and they would have some kind of a stake when they left the Cottage School.
And I never varied from that except in this one instance, where I believe the mother asked Cory for the loan. Cory came to me and said she was going to

pay it back. And I vaguely recall that it was for the payment of rent, that she was falling behind. I think she always presented that she had financial problems, but this was, you know, unique. And I went with them to the bank to take out the money. And I went with them because I was afraid that if I didn't

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go, that the bank book would be wiped out. And I think it was a couple of hundred dollars, $250 maybe, maybe half of what he had earned over a couple of years. And I don't think he ever got that money back.

Q She took the money from the bank?

A Yes. She was going to pay it back.

Q To the best of your knowledge, that was never returned.

A No.

Q There came a point in time where Cory aged out of one cottage and was placed in another. Was that an easy transition for him; was he anxious for change or did he resist change?

A I don't think change was ever easy for Cory. In his first cottage he was comfortable. He was comfortable with the people there, comfortable with the routine. I think he understood that he had to move on, that he was older, you know. The kids in the older cottage were doing things that were more age-appropriate. With Cory, it kind of took longer to prepare him, to get him to accept moving on. He eventually did, eventually did okay.

Q Now, Mr. Lefkowitz, he then ultimately was moved on to Elmhurst; is that correct? To the group home

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program?

A Right.

Q And was that because he was difficult to deal with or lacked motivation or what occurred when that time frame came?

A It was time to move on. He had been there a couple of years. It didn't look like we could pin the mother down to plan with us to take him back, and then it was a question of what would happen to him. He was in a vocational program, doing okay in the vocational program. You know, there comes a point of diminishing returns and it seemed like that was happening for Cory. He was getting more frustrated with being here and being with us.

Q And his inability to advance in terms of academics?

A I think we were all kind of stuck. And he needed to move on. That's what we felt. Cory accepted it, you know. Cory was the kind of kid at that time who kind of accepted, you know, whatever you wanted to do for him. He would accept it.

MR. COOLEY: Mr. Lefkowitz, if you would, answer any questions that either counsel for the government might have.

THE COURT: Do you have any questions for this witness?

MR. PARCELL: Briefly, Judge.

CROSS-EXAMINATION

BY MR. PARCELL:

Q Good morning, sir. Are you aware that I think it is the orange tab, that the young man was tested at your school in February of 1982; is that correct, given a psychological evaluation?

MR. COOLEY: I don't think he has this book.

MR. PARCELL: I will ask him to be given it.

(Document proffered to witness.)

BY MR. PARCELL:

Q Just the fifth tab, sir. If you would go to the fourth page.

A Yes, sir.

Q And at the top it says, "In the verbal area Cory achieved his highest score in comprehension"; are you following me? Page two?

A Yes.

Q Would you read this first three lines, if you would?

A "In the verbal area, Cory achieved his highest score on comprehension."

Q Next two lines, also.

A "His average score here suggests that Cory has a maturing conscience and moral sense. His thinking is appropriate and his ability to use practical judgment in every-day social situations is a strength."

Q And then you indicated he was doing well in school. And I would ask you to look at what's been given to the government labeled Mt. Pleasant Cottage School Report Card, 1983 through 1984. And would you please read the writing on periods three and four?

A "Cory's attitude has greatly changed since the first two marking periods. He has become much more difficult behaviorially in class. He often comes without homework assignments. His overall academic development and personality suffered.

Q Thank you, sir. Your facility is one that's funded and established by the State of New York?

A It is a private agency that gets its funding from the New York City Department of Social Services.

Q And you all try to have a very caring, supporting environment for the students?

A Yes, we do.
Q And the other gentlemen who testified before you
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has indicated that Mr. Johnson was better adjusted than most of your students; is that a fair statement?
A I think he was less problematic in terms of antisocial behavior than most of the students, yes.
Q And is it safe to say that his biggest problem at your school was his learning disability?
A I think that was a major problem, yes.
Q You understand he stands before this jury convicted of eight murders?
A I understand that.
MR. PARCELL: No further questions. I will ask that that card be returned.
MR. COOLEY: Could I see it, please?
THE COURT: All right. May the witness stand down, Mr. Cooley?
MR. COOLEY: One question.
REDIRECT EXAMINATION
BY MR. COOLEY:
Q Mr. Lefkowitz, from that 1982 form that you were asked to read from which is not yours, but the comment about his efforts at the beginning, did that change as his frustration level increased, as he began to lose ground over those next few years?
A Are you referring to the conscious and moral
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sense?
Q Yes, sir.
A It is a hard question. Cory for the most part kept away from some of the things that were going on, the kids -- some of the things that his friends were doing. Whether they were smoking pot or they were sneaking out of the cottage or fighting with each other, he kept away, and for a period of time expressed contempt for that. I had a sense that as he left, that was not as strong a position that he felt and took.
MR. COOLEY: Thank you very much.
THE COURT: All right. You may stand down, sir. Thank you very much.
(Witness stood aside.)
All right. We will stop here for lunch and we will get started up at around 2 o'clock. Everyone remain seated while the jury leaves the courtroom.
(The jury left the courtroom.)
All right, Mr. Marshal, you may remove the defendants.
(The defendants were removed from the courtroom.)
We will be in recess until 2 o'clock.
(Luncheon recess taken from 1:05 p.m. to 2

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o'clock p.m.)
(In Chambers.)
MR. GEARY: We requested an ex parte meeting with you.
THE COURT: All right, Mr. Vick, go outside. You may have to come back in.
MR. GEARY: We have asked for it, not to raise anything that the government would be required to be here, but simply to state what we perceive as a problem for the record for later on if that becomes necessary. In the joint penalty phase of the case, the problems are developing which we can't actually go to the other counsel with on the defense side or the prosecutors. Fingerprints, yesterday Mr. Baugh's cross-examination of Dr. Evans was totally unexpected. We sit there wondering what is going to open up. This morning, Mr. McGarvey's case for Cory Johnson will show that Johnson was a leader. The obvious question the jury -- excuse me, a follower. If he is the follower, whose the leader? That's replete with what he said in the opening and in their documentation. We just want to alert the Court to the fact that we are aware of these things and I think we have a duty to make it known in some shape or form to the Court. Eric and I discussed how
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you do this. You really can't be antagonistic to the other lawyers. But I think we need to preserve for the record, and I think that's the reason we have to come back here.
THE COURT: I understand what you are saying, especially about Mr. Baugh. I don't know what you can do about that. But I certainly was shocked to see him stand up to ask anything.
MR. GEARY: One thing off the record.
(Off the record discussion held with the Court, Mr. Geary, and Mr. White.)
THE COURT: All right, let's bring in the jury, please.
(The jury entered the courtroom.)
All right, call your next witness, please.
MR. McGARVEY: I call Odette Noble, Your Honor.
ODETTE NOBLE,
called as a witness by and on behalf of defendant Johnson, having been first duly sworn by the Clerk, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. McGARVEY:
Q Good afternoon, ma'am. Would you tell the ladies and gentlemen of the jury your name, please?
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A My name is Odette Noble.

Q And what is your profession, ma'am?
A I'm a social worker.
Q And back in 1985, let's say 1985 through 1987, were you employed as a social worker?
A Yes, I was.
Q Will you tell the folks your background, educational?
A I have my Master's in social work, which I received in 1973, and I worked even before I got my Master's as a social worker. And then in 1973 I started working at Jewish Child Care Association.
Q And you were employed there from 1985 until 1987?
A From 1973 to 1987.
Q But you were employed there during that period of time?
A Right.
Q Now, during that period of time, did you have an association with Elmhurst Residential Home?
A Yes, I did.
Q Will you tell the folks what that residential home was?
A It was a group home in the community, in Queens, where eight teen-aged boys lived who essentially were

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not able to live with their families. They went to school in the community; they made friends in the community. And I as the social worker met with each boy every week for an hour a week and also ran a group meeting then with the boys and the house parents every other week.
Q How about physically the layout of the house? Where was it situated?
A It was in an apartment unit in Queens, in kind of a shopping neighborhood, residential neighborhood. It was a residential community, Queens is, about 40 minutes from my office in Manhattan.
Q So in order to get to your office, the individuals at the house had to take a bus or cab?
A They took the subway.
Q They took the subway. Now, how was the house set up?
A It was two apartments made into one. So there was one room that had just one boy and then there were, I think, two with three in them, so that eight boys could live there all together. The house parents lived with the boys.
Q Who were the house parents? Not names, but generally what were their duties?
A They alternated sleeping in. One would maybe

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come on a Monday and stay until Wednesday; another one would come Wednesday and stay until Thursday. Sometimes there would be two people on at the same

time. But only one house parent slept in with the eight boys.
Q And always there was some house parent there for supervision?
A Yes, always.
Q Were they controlled by someone else or were they supervised by someone else?
A Well, the agency was very involved because the people downtown like myself, we were very closely involved. So they came down every other week, the house parents, for treatment team meetings with the psychiatrist and the psychologist and the director and myself. They also came downtown every other week for group meetings with myself and the boys. And they had their own staff meeting, so there was a lot of effort to try to help them be more successful in their relationships with the boys.
Q Can you give us just an overall view of what kind of boys came to that group home?
A Well, they were generally about 14 to 19, youngsters who for various reasons couldn't live with families. And they had kind of come to the

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determination that while we wanted to help them maintain good relationships with their families, that living together was not something that was possible. So that our goal with almost all the boys in the residence was that they would eventually be able to move into the community and function independently, get jobs, do what they needed to do.
Q Now, do you know Cory?
A Yes, I do.
Q Can you tell the ladies and gentlemen of the jury when you met Cory and in what capacity?
A He came to the Elmhurst Boys' Residence from Pleasantville Cottage School. He moved in in June of 1985. We had had a preparation process where he came to the residence and met the boys and then went back to Pleasantville and talked about it, and then he moved in in June of 1985.
Q And how long was he there?
A He left in February of 1987.
Q And during that period of time, you were his only social worker; is that correct?
A Yes.
Q And you saw him on a weekly basis?
A Yes, I did.
Q Did you get to know Cory pretty well?

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A Yes, I did.
Q Will you characterize Cory for us during that period of time, that two-year period of time? What kind of a boy was he?
A Cory was a really sweet guy. I mean, teenagers

are never completely easy, but Cory was very -- I related to him very well. He could listen. He seemed to care about succeeding. He wanted to do well in school. But he had, you know, he had serious learning difficulties which mitigated against him, you know, doing as well as he wanted to do, and as well as maybe his mom would have liked him to do. But in fact, in looking back on my notes, I described him as ingenuous, not mean-spirited, certainly not one of the more difficult boys that I worked with in my years of working with teenagers.

Q Compared to the other boys that were in the home at the time, was Cory aggressive?

A Well, Cory was assertive, ingenuous. He could take a stand with the boys if he felt that it had to do with right, if it had to do with being decent. He certainly wasn't afraid to assert himself and stand up. But he generally stood up for what he perceived as good values and good things.

Q From a physical standpoint, did you see any

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evidence of aggression outside of the arrest?

A Well, I mean, he was arrested. But that was kind of to help a boy out in the residence who had gotten into a --

Q We will get to that.

A But we were very strict in the residence that there was no physical confrontations. And Cory and all the other boys abided by that. I mean, if he got into stuff in the street, I don't remember it being a problem.

Q Anything major?

A No.

Q Would you characterize his relationship with the other boys as a leader or a follower?

A Well, he was a follower in the sense that if they had an idea that he thought he would go with, he would go with it. But he was a leader in terms of his ingenuousness and his assertiveness and his kind of openness, you know. So the boys would look to that because they knew they could go to Cory if they had a plan or an idea, that he would be ready help out and do. So I mean, it was kind of mixed. He was both a leader and a follower.

Q When you say he was a leader, I believe you gave me an example of like haircuts, things like that.

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A Yes. Cory was perhaps a little bit more street savvy in terms of street culture than some of the boys that lived in the residence. So that they, I mean, you know teenage boys, they love to -- it is good to be bad and that kind of philosophy. So he could, you know, he could lead the way in that sort of thing. But those were not substantial things.

Those were insubstantial.
Q So are you saying that in terms of insubstantial things he was a leader; in terms of substantial things he was --
A He was, you know, it is hard for me to imagine -- I mean, it is hard for me to imagine Cory doing the kinds of things that he has been convicted of. It is just not the Cory that I knew, certainly.
Q Now, you made reference to a robbery, a robbery charge. Will you tell the ladies and gentlemen of the jury when that happened and what that was about --
A It was August of 1986. One of the boys in the residence who was probably -- Mitch was kind of maybe a bit more fast talking and a bit more, oh, I don't, know how you describe Mitch? But anyway, Mitch was having trouble with one of the youngsters that he worked with in the neighborhood youth corps.

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And he had gotten into a confrontation because Mitch was somewhat grandiose and wanted to boss people around. So he told the kid at work that "If you don't watch out," because the kid was bossing Mitch around, and nobody should boss Mitch around, so he told the kid at work that "I am going to get my guys after you." So he got two boys in the residence, Cory and Dwight, to rob this kid on the way to work.
Well, of course the kid immediately went to work and said, "Mitch and two friends robbed me." Immediately they came after Mitch, and then Mitch immediately told on Cory and Dwight, the other kid, and so they were arrested. It was kind of ridiculous, but it happened.
Q With respect to that, you were telling me earlier about Mitch. Do you recall what the story was that Mitch had told Cory?
A Well, I mean, I think what Mitch said is that this guy at work was giving him a hard time, he didn't like it, and he must have embellished it enough that Cory and Dwight thought that Mitch had a just problem with this kid. So they went to help Mitch out.
Q And what happened as a result of that?
A Well, Mitch was arrested first, and then the

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police came to the residence and arrested Cory and Dwight.
Q How old was Cory at the time?
A I think he must have been 18 at the time.
Q 18?
A Yes.
Q Where was he taken?
A He was taken to Riker's Island, which is the prison that's used kind of as a --

Q For how long a period of time, do you recall?
A He was taken to Riker's and then they went to court. Or maybe they held him in court. And then it was put off until November. The arrest was August 19th, and then he went back to Court in November 26th, and then he went to Riker's for eight days after that.
Q Did you have occasion to visit him at Riker's?
A Yes.
Q Will you tell the ladies and gentlemen of the jury, what was that like? What was Riker's Island like?
A It was awful. You had to go through the guards three times, you know. I had identification. And then you had to take the bus and then you had to go show your identification again. And they took their

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time bringing Cory out to see us, and then Cory, of course, had to take off his shoes, you know, go through the whole thing. It was very uncomfortable. I didn't even think the guards were very nice. But it was not a pleasant place.
Q Did Cory have occasion to tell you any stories about what he saw at Riker's Island?
A Yes. We talked about it afterwards because he came out and he was only there eight days. He said -- he admitted it was pretty awful, and that he saw guys having sex in the beds, and of course there was the searching, and you could never use the telephones. It was a pretty awful experience for him.
Q During this period of time, when I was asking you earlier about his mother, you had difficulty in even remembering his mother. Was that unusual?
A Oh, yes. It was highly unusual. In most of the boys, even though they couldn't live with their families, most of the boys that lived in the residence had families that I had sessions with or I would go in a home visit with the boy, or I would have contact with the family. In fact, the two boys that were with Cory, they had families that were very involved and very concerned. But Cory's mom was very

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elusive. I think I met her once or twice. I mean, I knew Cory cared about her, but I didn't get any -- she didn't work with us. She didn't really try to help us help Cory. And she was almost nonexistent in Cory's life, as far as I was concerned.
Q How many times would you say during that two-year period did you actually see her?
A I think twice.
Q Twice?
A Yes.
Q Did you have occasion to contact her on the

telephone, or attempt to contact her on the telephone?
A Absolutely. Part of our program is to make sure that we do try to maintain relationships with the families, because long after we are out of the guys' life, we want them to have relationships with their family. We did a lot of reaching out to Cory's mom, but she just didn't respond.
Q You made reference to one of your quotes in here, that Cory talked about his mother as if she was a goddess. Can you explain that to the ladies and gentlemen of the jury?
A Well, it was hard for Cory, I think, to admit to himself, and furthermore to us, that his mom just

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wasn't there for him. He wished that she would have been, but to admit it to himself and to us would have been hard. So he acted as if his mother was terrific. You know, and he and I would try to talk about it, but it was hard for him to admit much. But you sensed by his behavior that he was really very hurt and that his mother wasn't all he said she was. But she is attractive, and I think kind of interesting to be with when he was with her face-to-face, right? So then you know, he would have those moments of being with her, and then when he wasn't with her, she was gone from him. But it was not an area that was easy for Cory to discuss with me. We tried, but I didn't want to push too hard.
Q You have indicated that you were aware of a very severe learning disability with respect to Cory. In terms of the other boys, how would you rate that or relate that?
A Well, Cory was in a house where all the other kids went to regular classes. So that Cory certainly was their peer when it came to the playground, playing basketball, doing things socially, but when it came to going to school they all went to Newtowne High School, but he went to special classes. He wasn't their peer in terms of his educational level.

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That was a source of distress for him. All the other kids were mainstream, had mainstream classes. I don't know if it is true here in Virginia, but there is also issues of kids in special ed, you know, in regular high school, and Cory was in special ed classes.
Q At that point, would you characterize him as very susceptible to peer pressure?
A Sure.
Q In terms of his motivation, though, while he was at school or at the boys' residence, were you aware of a very severe learning disability? Did he remain motivated to learn?

A You know, it is hard. He always tried. But then I think when he got into -- as you look back on the situation, maybe he was getting more and more discouraged, I think, as he was getting older. And then the experience of Riker's in August, and then going to --
Q Let me stop you there. Did you notice a change in Cory after he went to Riker's Island?
A Well, yes. Because then he left our residence two months after he got out of Riker's.
Q Can you characterize that? I mean in terms of the change, I understand he left, but did you notice

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a change in his attitude?
A Well, I think he started being more difficult with the house parents and not wanting to abide by the expectations, because we had fairly clear expectations. And so, I mean, he didn't verbalize it at the time, but looking back on it, I wonder if he didn't just say "I can't live up to these expectations, I can't do it," and so that ultimately when he left in February, it was, you know, that he didn't want to be in our residence anymore, didn't want to keep trying.
Q Do you feel like he gave up after that?
A Right.
Q Threw up his hands and gave up?
A Right.
Q When he left, did you folks ask him to leave or did he leave on his own, or how did that happen?
A Well, our residence was a program to help young people grow up. We were not a rescue operation. So if youngsters wanted our help, we would give as much as we could to help them. And sometimes if one of the boys went home for awhile, they would come back with a renewed sense that "Hey, this is the lifestyle I want to live, this is the way I want to be." So Cory was showing by his behavior that maybe it wasn't

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working out. So he went home to his mother and we were hoping he would come back. We wanted him to come back.
Q Why did you feel he would come back if he went back to his mother?
A Because then maybe he would begin to think about, well, our expectations weren't so hard, and that maybe he could build a life for himself, and that we were people who cared about him and this was a place where he could get his life together. And so we wanted him to come back. We were hoping he would come back.
Q Personally, you wanted him to come back as well as the rest of the staff?
A Absolutely.

Q After he left, you haven't heard from him since; is that correct?
A No.
Q His mom, though, in fact registered a complaint against your school for sending him back home, didn't she?
A Right.
MR. McGARVEY: Thank you, Ms. Noble. Please answer the questions of the government.
THE COURT: Any questions?

MR. VICK: Yes, sir.

CROSS-EXAMINATION

BY MR. VICK:
Q It is fair to say that the environment you attempted to provide for Cory Johnson was a loving, care environment, supportive? Correct?
A Yes.
Q That was your purpose.
A Right.
Q And Cory ultimately rejected that environment, didn't he?
A Well, in a way, yes.
Q Isn't it clear that that's what he did? And I refer you to your letter of February 18th, 1987, to the Principal at Newtowne High School. In your last two lines you say, "We felt Cory needed some time away from our residence to reconsider his behavior and attitude. We have not heard from Cory, so it would appear he is not interested in changing his behavior and attitude and returning to the residence." It is pretty clear when you wrote that that he had rejected that caring atmosphere that you were providing, correct?
A I think maybe he was despairing that he couldn't do it, giving up.

Q But he walked away willingly?
A Right. Well, I don't know how willingly, but yes, he walked away.
Q Did you force him out?
A No. Well, we said, "Your behavior has to change."
Q But you told him he could come back, and he stayed away?
A Yes.
Q He didn't want what you had to offer, did he?
A I have to say that.
Q While he was there, he exhibited a great amount of street savvy?
A Yes.
Q He was socially very able with the other students, the other residents?
A Yes.

Q A leader of sorts?
A Yes. He was liked and cared about, and respected.
Q And very interactive with them?
A Yes.
Q Very much able to express himself and his position?
A Yes.

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Q And very much aware of what was right and what was wrong?
A Yes.
Q You no indication whatsoever that he didn't know what was right as opposed to what was wrong?
A No. Cory knew right from wrong.
Q In fact, he had a very good sense of what good values were, didn't he?
A I think so, yes.
Q Yet he was able on at least a couple of occasions there to commit robberies?
A Well, just one occasion.
Q Didn't he rob tennis shoes from another boy there?
A Oh, no. I don't think he --
Q I'll read you your report from September 28th, 1985. "Cory is one of the first to speak up and was recently involved in an event in the community where his tendency to speak up caused a bit of a problem. One of the other boys ended up getting his sneakers stolen. When we discussed this in an emergency meeting, Cory was able to acknowledge his responsibility and help contribute money to replace the man's sneakers."
A That didn't mean he stole the sneakers. He

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spoke up. I can't remember the details of that. I read that in preparing for this. But I don't think that meant that Cory stole the sneakers.
Q He indicated his responsibility?
A Yes. I think it was one of the kids. I don't remember the details.
Q But he did go on to rob another young man with Mitch, didn't he?
A Robbery wasn't the motive. It was to get even, to help Mitch. They took a watch. The kid didn't even have a lot of money. It wasn't like he was wealthy.
Q Ended up taking his paycheck, too?
A Yes. But it was a blank paycheck. They couldn't cash it.
Q But they tried to take it from him, didn't they?
A Yes.
Q They robbed him of it, didn't they?

A Yes.
Q But he knew the difference between right and wrong.
A Yes.
MR. VICK: No further questions.
BY MR. McGARVEY:

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Q I hesitated to bring this up on direct, but Mr. Vick asked you about a loving, caring environment. You made reference in one of your reports to -- you used the term "sadistic" in terms of the house parents or some of the house parents. Can you explain what that meant?
A Well, you know, child care -- I mean, raising children is not easy. And getting house parents who are really caring and loving and nurturing all the time is rough. And Cory, I mean, the house parents that he had were not -- I have worked with a lot of house parents through the years. They were not the greatest. They were okay, but they were not as good as many of the other cycles of house parents that I have. So that a couple of his house parents I really didn't feel were real enlightened in terms of handling not only Cory, but some of the other boys, and could be a little bit mean and subtly sadistic in their approach to discipline and how they tried to teach the guys what was the proper way to handle a problem.
Q Was that part of the -- what was your responsibility with respect to the house parents vis-a-vis the kids?
A Well, you have to be real careful not to split,

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you know, so if one of the boys would come and say, "Ms. Noble, John is," so on, complain, my role is to try to help them go back to the house parent and resolve it with the house parents. Because even if I couldn't have a great relationship with the house parents, sometimes the youngsters themselves could find a way to work things out. I would always send them back to the house parent and then maybe indirectly we would talk about it in a staff meeting, to try to get the house parent to see a different approach might work or something else might work. But as tempting as it was, I never could really take the side of the youngsters. I would always have to send them back to the house parent to try to resolve whatever problem they might have, unless it was, you know, unless the house parent did something immoral or illegal. Then it would be a different answer.
Q So in terms of what Mr. Vick asked you about, the loving and caring environment, in fact Cory had voiced some displeasure, in fact a lot of displeasure with some of these house parents; and in fact, you

were constrained to side with the house parents. Is that correct?
A Yes. For the sake of the guys.
Q I understand that.

MR. McGARVEY: Thank you.
THE COURT: You may stand down, ma'am.
(Witness stood aside.)
Call your next witness.
MR. COOLEY: We recall Dr. Cornell.

DR. DEWEY CORNELL,

recalled as a witness by and on behalf of defendant Johnson, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COOLEY:
Q Dr. Cornell, you obviously were previously sworn, and I would ask you to continue, if you would. I want to ask you about your reliance on Cory as a source of information for the report and the exhibits that you have prepared.
A Okay.
Q How much did you rely on what Cory told you?
A Well, I never completely rely on what a defendant tells me. Defendants may well be motivated to present themselves in the most favorable light, so as much as is practically possible, I try to confirm or disconfirm whatever I am told through collateral sources of information.
Q Did you have any doubts about the things when Cory talked with you? Did you have doubts about what he was telling you? And if so, can you be somewhat specific about them?
A There were several points which I doubted what he was telling me. He told me he was very well adjusted while he was at the Pleasantville Cottage School, for example. And initially, I was skeptical of that. And I went to great lengths to try to confirm that and find out if in fact that was not the case. I found out that he was in fact telling me the truth. I also didn't think he was being completely forthcoming about his mother. He initially described her in very glowing terms, which also didn't seem plausible to me given the problems that he had.
Q Did he tell you that she was very devoted and very loving?
A Yes.
Q That sort of thing?
A Yes. Devoted, loving, responsible, always taking him places, doing things for him. He described her as a kind of an ideal mother. I mean, it didn't seem plausible to me.
Q And when you began to check it, of course that

did not pan out.
A That's right. And I went back and talked with
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him subsequently when I had records and further information, and he was willing to acknowledge a little bit, that there were areas in which his mother was a disappointment to him. When I interviewed the mother, also, I also was able to confirm my impression of her.
Q If we can, I'm going to turn your attention to the area of learning disability. I'm going to ask you, if you would, to somewhat briefly describe to the ladies and gentlemen what is involved when we talk about a learning disability. Make reference to this.
MR. COOLEY: This will be, ladies and gentlemen and Your Honor, this will be the second green tab in the book.
BY MR. COOLEY:
A In a nutshell, learning disability is a form of impairment in the brain that affects the person's ability to learn. A person might have adequate intelligence, they might have adequate motivation, but because of some defect in their ability to use language or understand language, or process language, they are impaired in some academic area. It may be one area or it may be multiple areas. In Cory's case, reading and spelling were the main areas. This
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term "learning disability" is a fairly broad term. It is used sometimes to describe pretty mild conditions.
In Cory's case, it is a severe learning disability. Sometimes the term dyslexia is used for individuals who have a specific reading disability. Sometimes the term minimal brain dysfunction or developmental aphasia, those are all terms that are used somewhat interchangeably. The federal definition of learning disability of 1977, which I included in here, is one that sort of pulls all those terms together and gives a more general definition of learning disability. It also points out that this is not because the person is mentally retarded or has emotional disturbance or who has economic disadvantage. It is a defect in the basic psychological process of using or interpreting or understanding language. There is a second definition that's also used in the field on the next page. The National Joint Committee for Learning Disabilities. It echoes very much the federal definition. It also adds to it; that these individuals may have problems in their social behavior, not just in reading and writing, but they may not be able to perceive and interact socially in a normal fashion as well, even

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though that's not a learning disability by itself. But that seems to be a secondary problem.
It also points out that you can be learning disabled and mentally retarded and/or emotionally disturbed in addition. You can have more than one problem. Those two definitions are the definitions I use and that are the generally-accepted definitions in the field of learning disability.
Q What causes a learning disability like Cory's?
A Well, there are probably multiple causes of learning disability, anything that can damage the brain or impair the brain. This may be genetic. Certainly there is research which finds that learning disabilities run in families. Anything toxic to the brain, particularly drug use by a mother during pregnancy, can be a factor, or a head injury sustained at some point in life. But we don't know all of the different causes or the different ways in which the brain can be injured to produce a learning disability. And we don't know what was the cause in Cory's case.
Q Certainly it is not a voluntary thing, not something one says "I want this," or "I don't want this." It is not something that can be discarded?
A Right. Correct.
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Q Now, when was Cory first diagnosed as learning disabled?
A To my knowledge, when he was 13 when he went to the Pleasantville Diagnostic Center.
Q I refer you to the yellow tab, the fifth page of your mitigation report, and I'm somewhat rapidly going to move you through that. But on page five of that report in the yellow tab, the last -- the first yellow tab, pardon me. The last three paragraphs contain comments made by various psychiatrists or psychologists in his case. The first of those was from John Stadler. He stated Cory was a remarkably peaceful kid trying very hard to do better. And this is a quote: "He had a terrible neurological impairment to learning and though he wanted to learn, he couldn't." And Dr. Stadler felt that Cory did very well in a structured setting, "but like many boys like him, I imagine he is very susceptible to his environment."
That is a quote from the reports; is that correct?
A Yes. That's a quote that he said to me. He stated to me.
Q Stated to you.
A Yes.
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Q All right. And he did express some regret that

Pleasantville didn't have some of the resources to address Cory's problems; is that correct?
A Yes. He expressed regret about that.
Q You spoke with Dr. Elizabeth Clemmens; is that correct?
A Yes.
Q She described that Cory is a severely learning-disabled boy who became very frustrated when he did not receive the remedial help in speech therapy that he was promised?
A Yes.
Q She felt he was right to feel frustrated.
A Yes.
Q Because of the limitations and those things that were not being addressed.
A Yes.
Q You also spoke with Dr. Ken Barish, and he described to you and recalled Cory and described Cory to you as one of the most severe cases of learning disability he has ever encountered.
A That's right.
Q And that his impairment was so severe and so pervasive in his cognitive processes that Cory was unable to learn how to compensate for his problems

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like other learning-disabled children.
A That's correct.
Q In other words, that even other disabled children, learning disabled, could learn to do things Cory simply could not do and he was not able to compensate for that.
A That's correct.
Q Indeed, when he gives lectures, he cites Cory's case in his lectures as an example of that type of severe disability.
A He, for example, recalled that when he asked Cory to spell the word arm, A-R-M, that Cory replied H-M-E as his spelling for arm. And I have, too, in my evaluation found those kinds of spelling problems.
Q And he also felt that there was absolutely no question in his mind that Cory's disability was a result of neurological impairment.
A He had no question about that.
Q You have testified now that Cory has this learning disability. That's obvious from the reports that are before the ladies and gentlemen of the jury.
Is there further documentation of that coming from a more recent test?

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A As you might imagine, I'm trying to be thorough about this. And in fact, I gave him my own set of tests to confirm that this learning disability was

still present and that I would arrive at the same diagnosis based on my own sources of information. So I went back and conducted my own psychological testing of Cory.

Q Now, these would be found behind the white tab in the book; is that correct?

A Yes.

Q And there are some blown-up -- Marshal, could you help me?

(Documents displayed on easel before jury.)

BY MR. COOLEY:

Q Doctor, can you tell the ladies and gentlemen of the jury the results of your tests? And they have before them in an expanded version, blown-up version, the graph.

A Yes. I'll try to be brief about this. First, I wanted to document his level of intelligence. I gave him the standard individual intelligence test called the Wechsler Adult Intelligence Scale-Revised Version. It is a standard test for adults to assess their intelligence. He had been previously given the children's version of that test when he was younger.

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This test is composed of a number of sub-tests that are listed here: information, digit span, vocabulary, and so on. And those scores are combined to give you the person's IQ. You expect that on each of these tests, the average score is a 10. That is, the person right at the fiftieth percentile, right in the middle of the population in his age group, would attain a 10 sub-test score. The average person gets a 10, sometimes you get a 9, 11, 12. You vary a little bit around 10 as a big point.

Obviously, a very bright person gets scores over 10, and a less intelligent person gets scores much lower than 10. In Cory's case, you will see he started off getting 5's and 6's in all of these first set of tests. Those are consistent with someone who is mildly retarded. That is, if he had continued to get that pattern of 5's and 6's on all his tests he would have scored in the retarded range. Those initial tests, the first ones that are listed there where he got the 5's and 6's, are all of the verbal tests, the language tests, vocabulary, arithmetic, comprehension, all things that involve use of language.

The latter tests where he started to score higher are the nonverbal tests, sometimes called the

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performance tests. These are tests that involve puzzles, blocks, things that he does with his hands. You will recall he had some carpentry training that probably enhanced his skills in that area. And in those areas, he did better. And actually, on one of

them he got a 10, which would be the average expected score for a normal individual.

Because these latter scores were higher, his overall IQ fell above the range of mental retardation, just above that range.

(Another document displayed on easel.)

BY MR. COOLEY:

Q The next to the last page in that section is a bar graph that is entitled "Reading and Math Scores." Would you tell the ladies and gentlemen of the jury very briefly what that entails and what that shows us?

A I gave him an intelligence test, but also gave him an achievement test. Again, I gave him the standard individually-administered achievement test, the Woodcock-Johnson Test of Achievement. This is a test. Actually, I didn't give him the entire test. There are 20-some parts to this test. But I gave him specifically the tests in reading, two tests in reading and two tests in math, identification, and

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comprehension. Identification is his ability to identify a word -- identify words. He is presented a word, has to be able to pronounce what that word is to show he can identify it. In Comprehension, he has to be able to comprehend the meaning of a sentence and choose the correct word to complete a sentence. Those turn out to be too easily objectively scored tests of reading ability. On both of those he scored at the second-grade level, a 2.4 means at the second-grade level, a 2.6 also is at the second-grade level.

In the area of mathematics. The first is calculation, which is ability to do arithmetic problems: addition, subtraction, division, multiplication. And there he scored at the sixth-grade level, 6.7. He also had applied problems, which are kind of common sense word problems, such as how much change should you get back if you are buying something that costs a certain amount of money, so forth. That's sort of a practical arithmetic skill. There he was at the fourth-grade level. So certainly, the second-grade scores in reading were very consistent with what he had obtained when he was a teenager. The somewhat higher scores reflect the fact that he was able to do

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somewhat better in arithmetic, although obviously still a very low level.

Q Finally, the last bar graph, the last page of that section, is labeled "Intelligence and Achievement." Can you tell the ladies and gentlemen of the jury what that represents?

A This bar puts together those two tests. That

is, we look at someone's intelligence and look at their achievement and see if they correspond. We expect that a person's achievement should be commensurate with their intelligence. That is, even if you have got low intelligence, you ought to achieve up to the level of your intelligence. Now, if you look here on just the right-hand side, you will see where it says "Math." The black bar graph where it says 100, that's the expected level that the average person at the 50th percentile would get in both intelligence and achievement. So that's sort of our standard. In intelligence he gets a 77. That was his IQ result. That's clearly well below average. It is close to the level of mental retardation. In math he gets a 77. If I take those grade-level scores and I can look them up in a table and transform them into a standard score, he gets a 77. So his math level is equivalent, exactly

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equivalent, to what his intellectual level is. That to me is an indication that he is not learning disabled in math. He is low in math, but he is at the level you would expect, given his intelligence.

If we look on the left, those three bars are not even. We have the 100 standard bar that's black on the left, and he has a 77, which is the same intelligence score. But then his reading is 53. That is, if you transform that second-grade reading level into a standard score, it is a standard score of 53. And that is clearly in the mentally retarded range, in the moderately retarded range, actually. So that we cannot only see in this graph that his general intelligence is low, but his ability to learn in the area of reading is lower still. So a person can be both mentally retarded and learning disabled. In his case, he is very low in general intelligence, although not retarded, and learning disabled.

Q Doctor, also, I believe you did a test in the course of this relating to Cory's writing.

(Document displayed on easel.)

A I gave him a standard test of his ability to write, a test of written language, TOWL, the part of the test that is most commonly used. The person is given a picture. You see this outer-space scene.

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And the young person is asked to make up a story to go with the picture. They are given 15 minutes to write up a story. Then you evaluate the story for its vocabulary, spelling, grammar, for its complexity of the themes that are presented, and this is the story that Cory gave me to this picture. This was very striking to me because this story is very immature. The writing is very immature. The spelling is very immature, leaving aside the

penmanship.
Q This is reprinted in the book before the ladies and gentlemen. It is the fourth page back in behind the white tab. And the third page back is your findings related to that; is that right? And it also includes your typed-out interpretation of what Cory wrote.
A Yes, I typed out what I thought he wrote. There were a couple words I couldn't decipher, but I typed out the story which you can read and see is a very immature story. And then below that, I have listed the scores that he received for this story, and the typical age level of someone who writes a story of that type.
Q He begins his story with "Me and my mom."
A You want me to read that?

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Q Well --
MR. VICK: It is all in front of the jury.
MR. COOLEY: I'm not going to use it.
THE COURT: All right. Go on.
BY MR. COOLEY:
Q But the story was about Cory and his mother going to the moon?
A That's right. He chose to tell a story about he and his mother going on a trip together to see the rockets.
Q And obviously there was more space, but he ended where he did.
A Yes. His story was a little short for someone of his age.
Q Now, Doctor, you also had an opportunity to refer Cory for evaluation by Dr. Peck; you made some reference to that. Dr. Peck is a neuropsychologist. His report is found behind the pink tab in the book. And I will ask you to somewhat rapidly summarize what the findings from Dr. Peck showed.
A I gave intelligence and achievement. I asked Dr. Peck to give him neuropsychological tests, which are sensitive to brain damage, to see if we could identify specific areas of brain impairment or dysfunction. These tests are commonly given when

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someone has had a head injury or has -- there is reason to believe that they have had some kind of brain impairment. They are very technical tests. There is a large number of them. Nobody is expected to do poorly on all of them; that is, they tap as many areas of brain functioning as we have tests for, everything from abstract reasoning to fine motor coordination, visual motor coordination, auditory processing, lots of different areas.
And what Dr. Peck found is that Cory's performance indicated abnormal neuropsychological

functioning. That is, it did indicate impairment, brain impairment, in a number of areas. First of all, he found that he had impairment in visual memory, memory for things he sees, and visual sequencing. That is, the ability to keep things in proper order sequentially, visually. Now, if you think about reading, those are two critical skills. You have to keep the letters in the proper order and the words in the proper order, and you have to be able to remember what words are, how they are spelled and so forth, in order to read. He has deficits in both those areas.

In addition, Dr. Peck found that he had deficits in auditory processing. That is, often, if somebody

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can't read and they have visual problems, you try to teach them auditorily through the spoken word. But he has deficits in auditory discrimination; that is, the ability to listen and understand what is said to him. At the end of this complicated report that Dr. Peck has written, he points out that this kind of person could have difficulty understanding what people are saying, and that that could create social and interpersonal difficulties for him. He doesn't quite understand when people are arguing with him or talking with him, what they are saying and what their intention is, and he doesn't have good skills in that area. Abstract reasoning and judgment were poor. For example, on the category test, which is a highly sensitive test to brain impairment, he shows inflexible thinking; that is, kind of approach to problems where he cannot shift from one approach to another approach. He cannot, when he is making an error or making a mistake in solving a problem, he does not show the ability to recognize a mistake and to shift from that mistake to another strategy. He tends to persist in a poor strategy of solving problems.

So in a number of different areas, he shows neuropsychological impairment. Not all areas.

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Rarely does anyone show impairment in all areas. But he shows impairment in quite a number of them.

Q If I could, I would move your attention to the concept of mental retardation. I would ask you to look at this last chart that's being displayed to the jury. Can you tell the ladies and gentlemen of the jury what they are being shown at this point? And this would be the last page behind the second green tab, the definition of mental retardation.

A Yes.

Q What does the term mean?

A Mental retardation means that the person has significantly sub-average intelligence which can be

measured by a general intelligence test, as well as impairment in adaptive behavior. Adaptive behavior means their ability to sort of function in every day life; to have practical intelligence, if you will, and good survival skills. And you can measure the first part by giving them an intelligence test. Individuals that fall in the range of 70 to 75 can be considered in the range of mental retardation. And then of course, anything lower than that indicates mental retardation. In addition to having low intelligence, you need to show that the person has impaired adaptive behavior in any two of about ten

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areas that are listed there. Certainly functional academics, the ability to do academic work is one in which he has impairment. Also, communication deficits with his speech impairment and communication problems, he has some deficits there. Self care, social skills, work, the ability to maintain a job, to have good work habits, to use the kind of common sense you need to hold a job, all of those are possible areas in which his functioning is not at a normal level. As I said before, my conclusion was that he is just above the level of mental retardation.

Q And Doctor, when you made that, reached that conclusion, you were aware that if he could be categorized as mentally retarded, that Cory would not be death-eligible under the statute; is that right?

A Yes. I realized this was a very serious issue. The law states very specifically that if he were mentally retarded, we would not have this sentencing hearing for the death penalty. So I checked my scores, went back, and saw him a second time. I consulted with colleagues. I wanted to make very sure that this was an accurate score. Because the definition of mental retardation is not a hard and fast absolute. It is a gray area. And people have

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stereotypes of mental retardation as someone who looks very impaired and looks unusual and so forth. But in fact, many mentally-retarded people look very normal and can function fairly well in daily life. So I did not very easily reach this conclusion that he is just above the level of mental retardation.

Q And exactly where is he? How close is he to being mentally retarded?

A The IQ score I got was 77. If he had gotten a 75, he would be within the range that counts as mental retardation. 70 to 75 is kind of the gray area. If you are in that area, you can be mildly retarded. He was two points above that, which is a matter of one or two questions on an intelligence test that would make the difference there.

Q Doctor, would it be fair to say that most mentally-retarded folks are only mildly retarded?
A Yes. There is a social stereotype we have of the retarded person that really is of the more seriously retarded person. We used to think that everybody who was mentally retarded would have to be put in an institution and they could never live on their own or function or hold a job. In fact, if you put people in institutions they will become institutionalized and sort of look and function that

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way.

We now know that a mildly retarded person can be educated up to about the sixth-grade level. We know that a mildly retarded person can hold a job if they have good training, if it is a structured job, if they have good supervision. We know that many mildly retarded people get married, live on their own, pay their bills, have families. So we know that mild mental retardation doesn't mean that the person is completely dysfunctional, the way that you might characterize it on television, but has some capabilities. And so I had to compare that to Cory.
Q On some tests Cory was given by you and on some of the tests he was given by the folks at Pleasantville Cottage School back in his adolescent years, Cory in fact scored in the mentally retarded range, did he not?
A Yes.
Q And would it be fair to say that in some areas, Cory functions on the same level as someone who is mentally retarded?
A That's correct.
Q And is it fair to say that because of his intellectual limitations, that Cory Johnson has impaired ability to reason?

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A Yes.
Q Would it be fair to say that Cory Johnson has an impaired ability to use good judgment to control his behavior?
A Absolutely.
Q Would it be fair to say that Cory Johnson has impaired ability to understand and foresee the consequences of his actions?
A He has impairment in that area, yes.
Q Is there anything in the scientific literature on mental retardation about individuals with these limitations committing illegal acts?
A Yes. It is not uncommon for individuals who are mildly retarded to commit illegal acts. We find, in part of assessing their adaptive behavior, that very commonly they do break the law. They use poor judgment. They don't have good self control. And

they do break the law.
Q Is it the case that mentally retarded individuals are often very dependent on others and tend to rely on others in the decisions they make?
A Yes. That's one of the factors you have to consider, because part of the limitation is that the person then is more vulnerable to what other people tell them to do or suggest that they do, or look for

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cues in what other people are doing and try to fake it, emulate them. And individuals with severe intellectual deficits are very susceptible to that kind of pressure.
Q And while Cory Johnson is technically not mentally retarded, because he does have these similar intellectual limitations, would it be fair to say that he may be overly dependent on others and tend to rely on others for decisions?
A Yes.
Q Is it not the case that mentally retarded individuals are often overly susceptible to influence by others, doing what others direct them to do?
A That's a standard part of when you evaluate anyone who is mentally retarded; you expect that that problem is going to be present to some degree, and it usually is.
Q Part of their brain impairment is impairment in the ability to use independent judgment when somebody wants them to do something.
A Yes. And to foresee future consequences of actions. That is, you can put a mildly retarded person and give them a very structured question, a very specific situation, and they can sort of give you the right answer. But then you put them in a

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different situation when they are in a different emotional state and they don't give you the right answer anymore. They don't use the same level of judgment. They are variable in their level of functioning.
Q Would it be fair to say with the limitations that Cory Johnson has, as you and the other professionals and the reports have indicated, would it be fair to say that he, too, could be lacking in independent judgment and susceptible to being influenced by others?
A To some degree, yes. He would have to be.
Q Does learning ability only affect ability to read and write or to do other kinds of schoolwork?
A No. That term is used because that's where it is first identified, but there is more to it.
Q Is that just your opinion?
A No, it is not. If you take any standard textbook on learning disability, Handbook of Learning

Disabilities, the Kaufmann textbook on learning disabilities, any standard textbook will have a chapter or chapters on the non-academic problems that learning-disabled children and young adults have. That is, they have social problems. They don't judge and reason well in social situations. They have very

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poor self-esteem. They are much more prone to get involved in delinquent activity. In fact, that's a whole research area. Delinquency and learning disability are linked.

Q Why would learning disability have anything to do with someone getting involved with criminal behavior?

A What you find is that the deficit that they have that affects their ability to learn also affects their judgment, their ability to control their behavior, and to foresee the consequences of their action. In my own research with violent delinquent youth, they consistently have verbal deficits. That is, their IQ is consistently lower in those verbal areas. They don't reason well. And we rely on language to a large extent to guide our behavior and to tell us right from wrong and to tell us "Wait a minute, think about this, consider some other course of action." If you have deficits in language, those whole steps in the reasoning process get aborted, get skipped.

Q And your findings that folks with these learning disabilities may well gravitate to that or be more susceptible to that, is that also consistent with the other studies in the field?

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A Yes. There are a number of studies in the field which find that having a learning disability makes one at risk to become involved as a delinquent in anti-social and criminal behavior. And if you were to assess -- I'm doing a study right now in which we are assessing individuals at Staunton State Prison. There is a high incidence of learning disabilities in this general population.

Q Now, Doctor, you have spent several hours here talking with these ladies and gentlemen describing Cory's learning disability and his background. I am going to ask you again, do the things that you have brought forward in your mind, was there an effort to excuse the acts for which Cory has been convicted?

A No. And this is very important to me to make this distinction. I don't want any of my testimony to be construed that I am condoning what he is doing or minimizing what the crimes are that he has been convicted of. I am only here to inform the jury and address the very specific issue of whether he has complete blameworthiness that would indicate that he

would receive a death sentence as opposed to life in prison without parole. And I would be very uncomfortable presenting my testimony under any other basis than that, that narrow basis.

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Q Doctor, the factors that you have described, do they make -- do they, in fact, make Cory Johnson less responsible for his actions --

MR. VICK: That's the jury's ultimate province.

THE COURT: He can answer the question.

BY MR. COOLEY:

Q -- than a person who has full cognitive skills?

A I would have to say they make him less than normal. They make him substantially less than normal. They impair his judgment, his ability to control his actions, foresee the consequences of his actions. I don't think they excuse his behavior. I don't think that means he does not know that things are wrong, that killing is wrong, and that drug dealing is wrong. I have to leave it to the jury to make the value judgment of how much to weigh that and what to do with that. I believe it does make him not a normal individual, not as responsible as the ordinary citizen.

MR. COOLEY: Thank you. Answer any questions of the government.

CROSS-EXAMINATION

BY MR. VICK:

Q Good afternoon. As I understand your testimony,

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you have spent a total of some 15 hours, approximately, with Cory Johnson interviewing him concerning the subject of your testimony here this afternoon.

A Yes.

Q Indeed, you went into great detail with him concerning his involvement in crime.

A Yes, I did.

Q He detailed that to you in an open, candid manner?

A Surprisingly open, yes.

Q He detailed extensive criminal involvement on his part?

A He detailed extensive drug dealing.

Q Throughout this, it is clear, is it not, that he knew exactly what he was doing when he was dealing drugs?

A He knew that it was wrong to deal drugs, yes.

Q The ladies and gentlemen of the jury have heard several weeks of testimony which outlined a structure to this drug dealing; that is, Cory Johnson, other people involved here, maintained a level of supervision and organization and had people working

for them. That indeed is inconsistent with someone who is mentally retarded, isn't it?

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A I don't think Cory was pulling strings and giving orders and directing people around.
Q That's based upon your testing of him?
A And the review of records. My complete evaluation.
Q You weren't out there on the street with him, so you really don't have any idea?
A That's correct. I wasn't out on the street with him.
Q If the testimony was that indeed Cory was one of the people who organized and supervised people to distribute drugs, that's inconsistent with mild mental retardation, or close to it?
A I would be very skeptical of that, yes.
Q Indeed, when you gave these tests to Cory Johnson and you came up with a mental -- with an IQ, he knew he was being tested for this very testimony in Court, if indeed he happened to be found guilty and was facing the death penalty.
A I don't think his understanding was as specific as that.
Q He didn't know you were testing him in an effort -- so that you could testify for him in the death penalty phase of this case?
A He did know that, yes.

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Q Very simply, he did know that.
A Yes.
Q All right. The testing that had been done previously shows a different IQ than that for Mr. Cory Johnson, doesn't it?
A As is always the case in testing, there are some scores higher and some lower. Mine is in the middle.
Q Indeed, Dr. Gallaudet, I believe, gave him a full scale IQ of 88, a performance IQ of 93, in 1982.
A When he was 13 years old, yes.
Q That's in the very normal range of IQ, isn't it?
A No, that's in the low average.
Q Average.
A For some areas that were deficient, yes.
Q Indeed, you have quoted here extensively the test given by Dr. Barish which resulted in his appearing to be mildly retarded in some categories, correct?
A Yes.
Q In that same report he goes on to say that Cory's very deficient score on the block design subtest is the result of several rotations of design

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that he easily corrected when his error was pointed out to him. These scores should therefore not be taken as an indication of Cory's intellectual potential.
A Of his potential, that's correct. It is common for brain-damaged individuals to rotate the designs, and then after somebody else points out the rotation they say, "Oh, yes, it is rotated," and then fix it.
Q But his --
MR. COOLEY: I would ask he be allowed to finish.
THE COURT: Sustained.
BY MR. VICK:
Q Were you finished?
A What I wanted to say about that, I think you are misinterpreting that particular sentence. The fact that he was able to recognize that he had rotated the design is very commonly found in brain-damaged individuals. It doesn't mean that he wasn't trying hard, and it doesn't mean that he actually is smarter than that. What it means is that that was another indication that he had the kind of deficit of a brain-damaged person.
Q Intellectual potential is another way of saying IQ, isn't it?
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A Not really.
Q What did the doctor mean when he said, "These scores should not therefore be taken as an indication of his intellectual potential"?
A He is trying to be as optimistic as he can about a very difficult situation.
Q IQ is only one of a number of factors that are to be considered when determining whether someone is mentally retarded or not?
A That's probably the main one and first one, but it is not the only factor.
Q In fact, before the jury, I believe, there are a number of other factors that go into that.
A Adaptive behavior is the other.
Q Socialization? Is that another way of putting that? His ability to get along with others?
A No. Not the ability to get along with other people, no.
Q Did you happen to be in the courtroom during the testimony of Ms. Odette Noble?
A I came in in the middle of her testimony.
Q Did you hear the portion of her testimony that indeed Cory Johnson was a leader of sorts in the residence that she ran?
A Well, not only did I hear that, but I asked her
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about it when I interviewed her over the phone, and

then talked with her about it again today to understand what she meant by that.
Q Very able to express himself verbally to the others, very able to take care of himself?
A They said he was a big talker, that he was the first one to adopt new styles on the street, such as hair styles and clothing styles. I think trend-setter is probably a better term in terms of what she described. I asked her specifically whether he was a leader in terms of ability to initiate and carry out criminal activity, because that's really the issue I'm concerned about. And what she said, which I put in my report, I quoted her in my report because I thought that was important. She said Cory wouldn't be the leader because he wouldn't have the brains, but he would be the point man. He would be the one to stand up and do the speaking, he wanted to belong so much. That was my impression. That if somebody says, "Cory, go do something," he might be the first one to go do it, because he is trying so hard to do what the other person wants him to do. That's a different sense of the term "leader" than I thought you had in mind.
Q But he was able to socialize and express himself

3706

and tell the other people in the residence exactly what was going on in his mind, correct?
A He would express himself, apparently, a lot in the group therapy meetings.
Q In fact, throughout his Mt. Pleasant Cottage stay, that was a consistent theme. He is able to handle himself very well verbally, isn't he?
A He has speech articulation problems. But he has no reluctance to express himself, to try to say what is on his mind.
Q In fact, Dr. Peck found that he was in the superior range, structure, as to word fluency. He scored at the 85th percentile.
A He could come up with words and say a lot of words one after another, and was not reluctant at all to give a series of words.
Q That's inconsistent with mental retardation, too, isn't it?
A Not inconsistent with mental retardation.
Q It would be a factor that would tend to make you think he was not mentally retarded, isn't it?
A No. It is not in the mentally retarded range. But even someone who is mildly retarded is not retarded in every single area of their functioning. And there are mentally retarded kids who are very

3707

verbal, who talk a lot, who talk and chatter all the time. There are others who say very little. It varies.

Q There is no doubt Cory is able to express himself and tell you where he stands.
A I would agree with that.
Q And socialize to the point of being a peer in a group of people?
A He is very talkative socially.
Q If the testimony that this jury has heard over the last several weeks is that he has indeed been one of these people who organized others to work below him selling drugs, it is consistent with that, isn't it?
A What do you mean by "organized others"?
Q Just that. Organized other people to sell drugs.
MR. COOLEY: I am not sure he is correct. The government gave a very specific definition of "organized." So to say it is in its normal sense --
THE COURT: Mr. Vick, I don't know how helpful it is to tell this witness about all that we have heard and get his estimation of it. Go ahead and ask your questions, but hurry up.

3708

BY MR. VICK:
Q His ability to verbalize himself is very consistent with an ability to organize people to work for him, wouldn't it be?
A No. I think he has the ability to abstractly decide what people should do and to give them commands and to foresee what the consequences are of their actions. When you talk about organize and to be in a leadership position, I think you have got to be able to say, "I want you to do X, Y, and Z because I think this will happen or that will happen." Now, just being able to talk to somebody and express your views to somebody, I think, is very short of that.
Q You are saying he would be incapable of saying to someone, for example, "I want you to take me to a certain residence because there is something I want to do there"?
A To that limited degree, I don't think that would be a problem.
Q He could make those decisions?
A He could say, "Take me somewhere, I want to go somewhere," sure.
Q "I want to kill somebody because they bothered me"?
A I think he could say that.

3709

Q He also could hold a job, couldn't he?
A Well, I have doubts about that.
Q Your own report indicates that he held a job and walked away from it.
A He held jobs during the Summer Youth Corps. He

also held a job apparently, for a brief time, at a grocery store, and apparently on a loading dock. But the fact that he could not maintain those jobs is why I'm not sure he can hold a job.
Q People who have low intelligence don't necessarily all resort to criminal behavior, do they?
A You are quite right about that.
Q And people, you are certainly not excusing his -- you are not saying his low intelligence is an excuse for his resorting to criminal behavior?
A That's correct.
Q People who have low intelligence certainly don't resort, all of them, to violent activity, do they?
A Well, more so than a normal person.
Q My question is --
A But not the overwhelming majority.
Q As I understand your testimony, he is very suggestible?
A I would qualify that a little bit. But he is

3710

suggestible.
Q And susceptible to pressure?
A To his environment.
Q If that has resulted in the past in his committing very violent acts, does that mean that that sort of pressure --
MR. McGARVEY: I object.
THE COURT: The objection is sustained.
MR. McGARVEY: Thank you.
BY MR. VICK:
Q In jail, do you think he will be susceptible to peer pressure?
MR. McGARVEY: Same objection.
THE COURT: Sustained.
MR. VICK: Beg the Court's indulgence.
(Counsel conferring with co-counsel.)
I have no further questions.
THE COURT: All right. May the witness stand down?
MR. COOLEY: He may, Your Honor.
(Witness stood aside.)
Mr. Cooley, call your next witness.
MR. COOLEY: We don't have any more witnesses. There is one matter we may want to seek regarding a potential stipulation.

3711

(At Bench.)
MR. COOLEY: The only other thing we have is we would want to put in as part of our case the stipulation that I believe Mr. Baugh has filed regarding Jerry Gaiters, the fact that he was not death-eligible under that conviction.
MR. VICK: We never sought the death

penalty against him, never intended to seek the death penalty against him prior to his pleading guilty.

MR. COOLEY: I'm not disputing that.

MR. VICK: I don't think this is the stipulation. Jerry Gaiters was charged in the indictment, and we have ample evidence to argue that he was not death-eligible.

MR. BAUGH: As we obviously tell the United States in the position that it did not qualify him to be, we would submit that the Court, as a matter of law, must acknowledge that it was not an issue in controversy that can be argued to the jury to decide one way or the other. As a matter of law, Mr. Gaiters pled guilty to 848 death penalty charges, and they didn't move for the death penalty. Therefore, he would not get the death penalty. That's a matter of law.

THE COURT: No. It is just not something

3712

that I want to get involved in. You all can argue that to the jury or Mr. Vick can state it.

MR. BAUGH: We object.

THE COURT: I understand.

MR. COOLEY: Judge, respectfully, I would move into evidence the book, the mitigation book. And we will obviously have no objection if the Court wants to allow a sufficient number of copies to go to the jury.

THE COURT: All right.

MR. COOLEY: With the possible exception of wanting to join in and adopt the testimony of a witness relating to the discussion we just had at the bar conference, defendant Johnson rests at this time.

MR. VICK: We obviously have no objection to that going in.

(In Open Court.)

THE COURT: All right.

Ladies and gentlemen, that completes Mr. Johnson's mitigation presentation. I need to give you all some direction about how things are going to proceed. I need to tell you today so that you all can make some planning. Some of you may not like this very much, but I have decided, in consultation

3713

with the lawyers, that this is the better course to proceed on and this is what we are going to do.

We now know that tomorrow we will hear from Mr. Roane, his mitigation case. That should take up the better part of tomorrow. Then we would have our instructions conference to go through, then we would have the arguments to you on the penalty phase, which would probably start on Friday morning. And then, of course, I will give the instructions.

If that time line follows as we expect it to, you would then, therefore, get the case to start your deliberations in this phase Friday afternoon. Early, late, somewhere in the afternoon on Friday.

Now, once you start to deliberate on this phase, we are going to keep you until you have finished deliberating. What that means for you practically is when you come here on Friday, I want you to pack a little bag as though you may be staying for two or three days. Because we will keep you Friday night at a hotel, and we will bring you back in and start your deliberations again on Saturday. You would deliberate during the course of Saturday. And if your deliberations are not complete, we will keep you until it is over. So Friday when you come here, come prepared to stay for a couple of days. We will

3714

explain in more particularity through the Marshals how this all will be handled. But I wanted you to know that now so you can start to make your preparations. I've held off on this as long as I can.

All right, we will see you tomorrow morning at 10 o'clock.

(The jury left the courtroom.)

Mr. Marshal, you can remove the defendants.

(The defendants were removed from the courtroom.)

All right. We will be in adjournment until 10:00 a.m.

(Proceedings adjourned at 3:35 p.m.)

DECLARATION

I, KENNETH BARISH, Ph.D., hereby affirm the following:

1. My professional address is 280 North Central Avenue, Hartsdale, New York, 10530.

2. By way of background, I have been a psychologist licensed to practice in the State of New York since 1981. I have held faculty positions in psychology at Weill Medical College of Cornell University, the Westchester Center for the Study of Psychoanalysis and Psychotherapy, and the William Alanson White Institute's Child and Adolescent Psychotherapy Training Program. I also have maintained a private practice in child and adolescent psychology that includes the evaluation of learning and emotional disorders in children and adolescents. During the course of my thirty-two years of practice, I have conducted hundreds of psychological and educational evaluations of children and adolescents.

3. During the early 1980s, I was a staff psychologist at Pleasantville Cottage School, a residential treatment facility located in Pleasantville, New York. From approximately 1982 to 1985, Corey Johnson was in residence at Pleasantville.

4. During Corey's stay at Pleasantville, I conducted two evaluations of him: the first in 1983 and the second in 1985. Each evaluation lasted between two and four hours. For reasons explained below, although decades have passed since my last interaction with Corey, I continue to have a strong independent recollection of Corey – and my meetings with him – to this day.

5. I make the statements in this declaration based upon my independent recollection of Corey and review of my own written evaluations – as well as, to the limited

extent indicated below, my review of materials recently brought to my attention by Mr. Johnson's current legal counsel.

6. A true and correct copy of the report of my March 1983 psychological and educational evaluation of Corey is attached as Exhibit 1 to this declaration.

7. A true and correct copy of the report of my March 1985 psychological evaluation of Corey is attached as Exhibit 2 to this declaration.

8. Nearly 30 years after I met and evaluated him, Corey still stands out in my mind due to his profound impairment in learning.

9. Corey's deficit in phonological processing remains the most profound impairment of this kind I have encountered in three decades of clinical practice.

10. For example, when I saw him in 1983, when he was 14 years old, Corey laboriously attempted to spell the word "arm." Instead, Corey spelled this word: "hme."

11. So profound was Corey's deficit that I have used it over the past 30 years as a teaching example in my classes. Corey had effectively no ability to discriminate between vowel sounds.

12. Overall, the severity of Corey's impairment in reading, spelling and math skills remains striking to me even today.

13. As set forth more fully in the attached reports, at the times I evaluated Corey, I identified widespread and highly significant cognitive deficits, indications of diffuse neurological dysfunction, and severe learning disabilities in reading, spelling and arithmetic.

14. For example, in 1983, Corey's scores for reading and spelling were at the 1st percentile, that is, at the lowest 1% of the population for his age. His score for arithmetic achievement was at the 2nd percentile (at the lowest 2% of the population for his age). Also

present in Corey in 1983 were highly significant impairments of attention and concentration, visual-spatial analysis, and visual-motor coordination.

15. As part of my evaluation of Corey in 1985, I administered the WISC-R test. Corey was 16 years old at the time this test was administered. I reported a Full Scale IQ score of 69 for Corey. I also reported an "alternate" score of 74. It is important to note that, consistent with my assessment practice at that time and as set forth in the evaluation report, I reported "alternate" scores that reflected improvements in a child's performance when the child was given more time and/or assistance from the examiner, beyond that allowed by the rules of test administration. I presented such "alternate" scores only for consideration by other clinicians as to the child's possible response to interventions. Such "alternate" scores did not represent the true IQ score for Corey or any child for whom I reported an "alternate" score.

16. The true Full Scale IQ score for Corey Johnson, that is, the score Corey obtained under standard administration conditions, was 69. A score of 69 falls in the Mentally Deficient range of intellectual functioning.

17. At the time I conducted the 1985 evaluation, because of previous cognitive test results which are noted in the evaluation, I did not consider a diagnosis of mental retardation for Corey.

18. However, I was not aware at the time (in 1985) that approximately four to five months before Dr. Cary Gallaudet administered the WISC-R to Corey, Corey had been administered the WISC-R in October 1981 by Ernest Adams, and had scored 10 points lower than when Dr. Gallaudet administered it to Corey.

19. If I had been aware in 1985 of this earlier WISC-R test administered to Corey by Mr. Adams, I would not have given weight to Dr. Gallaudet's testing and likely would have considered a diagnosis of mental retardation.

20. In my opinion, my diagnosis as of 1985 can reasonably be re-considered by experts in the field of mental retardation and learning disability. Although I have extensive experience in the evaluation of attention and learning disorders and have training and experience in the specific psychological and educational evaluations that I administered to Corey, I am not a specialist or expert in the diagnosis of mental retardation, particularly the differentiation of mental retardation from profound learning disabilities.

I declare the above is true and correct.

Dated: July 22, 2014

Kenneth Barish Ph.D.
KENNETH BARISH, Ph.D.

City of Hartsdale
State of New York

PLEASANTVILLE COTTAGE SCHOOL

Name of Child: COREY JOHNSON
Date of Birth: [redacted]
Date of (PCS) Adm: _____

Date of Testing: 3/83
By: Ken Barish, Ph.D.
Social Worker: Gayle Turnquest

PSYCHOLOGICAL AND EDUCATIONAL EVALUATION

Referral:

Corey was evaluated at Pleasantville Diagnostic Center in February 1982. At that time Corey achieved a Full Scale I.Q. of 88, with a Verbal I.Q. of 85 and a Performance I.Q. of 93. Indications of diffuse neurological dysfunction were evident as well as very strong depressive tendencies and an emphasis on denial as a defense. Corey remained ambitious, however, with a strong conscience and capacity for empathy.

In conference it was reported by Corey's teacher that his academic skills are very poor. This evaluation was requested to provide additional clarification of the nature and extent of Corey's learning difficulties and to make recommendations for remedial strategies.

Tests Administered:

Wide Range Achievement Test
Neuropsychological Screening Tasks
Bender-Gestalt
Benton Visual Retention Test
Spreen-Benton Aphasia Tests
Raven's Progressive Matrices
Purdue Pegboard
Gilmore Oral Reading Test
Human Figure Drawings

Observations:

Corey was cooperative throughout the evaluation and demonstrated generally good frustration tolerance despite the very real difficulty he encountered on many of the tasks presented to him. Corey's willingness to continue to put forth effort on academic tasks without impulsivity or withdrawal is an impressive strength, particularly considering the severity of his learning disabilities.

Test Findings:

The present test findings confirm the presence of severe learning disabilities in reading, spelling and arithmetic. There is an abundance of findings which strongly suggest diffuse neurological dysfunction with associated impairment in many aspects of cognitive functioning. Difficulties in attention and concentration are a prominent factor in Corey's learning difficulties. In addition, Corey demonstrates specific language deficits (i.e. speech sound discrimination, phonic associates, sound blending) and also deficits in visual-spatial analysis, visual-motor and fine motor coordination and perhaps also visual memory. These findings will be discussed below.

On the Wide Range Achievement Test Corey obtained a Reading Score at the 1st percentile (SS 62), a Spelling Score at the 1st percentile (SS 64) and an Arithmetic Score at the 2nd percentile (SS 68). Corey understands basic arithmetic operations including borrowing and carrying but has difficulty with division and more complex operations. Some of Corey's errors seem to result from inability to sustain attention on problems, and also from some confusion in the spatial analysis on arithmetic problems. With regard to reading, Corey has a small sight vocabulary but has great difficulty in analyzing words phonetically. Reversals were occasionally noted in Corey's naming of letters and sound sequencing errors were common in his reading. Attentional errors also appeared to impair Corey's reading. Corey can spell only a few simple words. His ability to read or spell using a phonetic approach is severely limited, and Corey's attempt to spell even some simple words (e.g. "arm") are unrecognizable. Also apparent is some difficulty in the formation of letters and numbers, perhaps also some difficulty in discriminating letters of similar shape.

Corey's reproductions of the Bender designs reveals a significant deficit in visual-motor coordination. His performance on the Benton Visual Retention Test strongly suggests a deficit in visual memory or visual-motor functioning. A significant problem in visual-spatial analysis was evident on the Raven's Progressive Matrices. Attentional difficulties also contribute to Corey's poor performance on this task. Corey's performance on the Purdue Pegboard reveals significant problems also in fine motor coordination. Corey is right dominant in hand, foot and eye preference. Left-right awareness is well established on self, but not for mirror rotation; Corey consistently misplaced right and left on an examiner facing him. Finger recognition is unimpaired. Corey showed no difficulty with tongue and mouth movements.

Several tests of language functions were also administered. Language comprehension (Token Test) is unimpaired, except for occasional inattention. Naming of colors, body parts, and common objects was also unimpaired. Corey's immediate memory for digits, although improved over previous testing remains poor. Mild articulation errors were noted.

A specific deficit in speech sound discrimination was apparent. Corey knows the names of all the letters of the alphabet and the consonant sounds. Discrimination of vowel sounds, however, is very poor. When asked to say the sounds of different vowels, Corey produced essentially the same sound for each vowel. When asked to blend sounds into nonsense words, Corey would blend adequately but often misprounced the vowel sounds.

Conclusions and Recommendations:

This evaluation confirms the presence of severe learning disabilities in reading, spelling and arithmetic. Corey's learning difficulties result from wide spread cognitive deficits, including problems in

attention and concentration, visual processing, and speech sound discrimination and phonics. It is probably because of this that Corey has been unable to find compensations that would enable him to achieve a higher level of academic skill. With regard to remediation, it would appear that a whole word sight vocabulary approach, bypassing phonics and sound blending would be more productive in improving Corey's reading and spelling. Corey and his family should be counselled regarding the nature of his learning difficulties and a school program with less focus on academic skills should be considered.

Ken Barish, Ph.D.:ww D-4/11/83 T-4/29/83

Ken Barish, Ph.D.
Psychologist

PLEASANTVILLE COTTAGE SCHOOL

Name of Child: COREY JOHNSON
Date of Birth: [redacted]
Date of (PCS) Adm: _____

Date Tested: 3/15/85
By: Kenneth Barish, Ph.D.
Social Worker: Christine Aaron

PSYCHOLOGICAL EVALUATION

Referral:

Corey was referred for re-evaluation to assess his current cognitive and emotional functioning. Corey was last tested in March 1983, by this examiner, and in February 1982 at Pleasantville Diagnostic Center. These evaluations reveal severe learning disabilities in Reading, Spelling and Arithmetic, associated with impairment of attention and concentration, visual-spatial skills and specific language deficits; significant depressive tendencies were also noted.

Tests Administered:

WISC-R
Rorschach
TAT

Test Findings:

On the WISC-R Corey achieved a Verbal I.Q. of 68-70 (Mentally Deficient-Borderline range), a Performance I.Q. of 78-81 (Borderline-Low Average range), and a Full Scale I.Q. of 69-74 (Deficient-Borderline range). Subtest scaled scores are presented below:

Information	4	Picture Completion	8(9)
Similarities	5(6)	Picture Arrangement	9
Arithmetic	6(7)	Block Design	1(5)
Vocabulary	5	Object Assembly	5(6)
Comprehension	4	Coding	6
(Digit Span	6)		

(Alternate scores reflect improvement in performance with additional time and/or assistance from the examiner.)

These scores reflect a significant decline in both Verbal and Performance I.Q. since Corey was tested in 1982. At that time a Verbal I.Q. of 85, a Performance I.Q. of 93 and a Full Scale I.Q. of 88 were reported. There is also some difference in a pattern of subtest scores. Corey achieved significantly lower scores on the current testing on both the Comprehension and Object Assembly subtests. This decline in I.Q. scores is difficult to account for. However, several factors may be involved. The current scores may reflect in part, the increasing demands that the tasks presented as well as Corey's failure to learn at an expected pace.

They also undoubtedly reflect the effects of Corey's severe discouragement and depression with respect to cognitive tasks. For example, with minimal assistance, Corey was able to improve his performance considerably in many instances. This was evident on the Similarities, Arithmetic, Block Design and Object Assembly subtests. Corey's very deficient score on the Block Design subtest is the result of several rotations of designs that he easily corrected when his error was pointed out to him. These scores, should, therefore, not be taken as an indication of Corey's intellectual potential. Corey's intellectual difficulties remain clearly evident, however, and my recommendation now, even more strongly than two years ago, is that Corey needs a highly vocationally oriented school program. Some efforts should be made to help Corey achieve a level of literacy that will enable him to function in the working world, however, Corey is unlikely to improve significantly in this area.

Personality Functioning:

Personality assessment reveals a thoughtful, highly reflective, but affectively constricted adolescent. Corey expends considerable energy in his efforts to suppress anger. He appears vulnerable to periods of depression and frustration. There is also evidence of feelings of aloneness and a desire for help, that is not being heard. Several responses suggest that Corey feels that he is not being listened to.

Corey's test responses also reveal an effort toward maturity that is particularly impressive, considering his severe learning disabilities. Corey's TAT stories reveal, for example, an awareness that life has trials and tribulations that must be coped with and an acceptance of the reality that life is sometimes painful, for example, that there are painful separations. Corey's stories emphasize his concerns regarding the future and his constructive and mature goals. For example, he tells a story about a young man "wondering if he's going to have a job and a nice life, maybe some kids and a wife to support and help him move on in life." This effort towards maturity is at the cost of a constriction of Corey's emotional life, particularly a suppression of anger and rebelliousness and an overly compliant attitude towards authority. Corey also tends towards extremes of either/or, good/bad in his thinking about himself and his life. Corey could benefit from greater acknowledgement and acceptance of his anger, integrating anger into his identity along with a less narrow definition of maturity.

Recommendations:

As indicated earlier, Corey needs a vocational school program with some remediation in literacy skill. He could also benefit from counselling and supportive psychotherapy both in regard to problems of self-esteem related to his learning disabilities and also supporting and broadening his efforts to become a mature adult.

Kenneth Barish, Ph.D.:ww D-4/15/85 T-4/15/85

Kenneth Barish, Ph.D.
Psychologist

AFFIDAVIT

State of New York)
) ss:
County of New York)

MINNIE HODGES, being duly sworn, deposes and says:

1. I reside at 2133 Madison Avenue, Apartment 5C, New York, New York 10037.

2. I am Corey Johnson's aunt. My younger sister, Emma Lee Johnson, who is now deceased, was Corey's mother.

3. I have known Corey Johnson since he was born. I regularly cared for Corey as a child. He often spent long periods of time at my home.

My Background

4. I was born on [redacted] in Sumpter, South Carolina. I am the oldest of three children. My younger sister, Emma Lee Johnson, was Corey Johnson's mother. My biological father died of pneumonia when I was very young, long before Emma was born. My mother remarried, and Emma's father was my stepfather. I lived with my mother and stepfather, Love Johnson, in South Carolina until I was about 9-10 years old, when they left South Carolina and came to New York to work. Emma was about 3 years old at that time.

5. After my mother and stepfather left South Carolina, Emma, my brother, and I lived with our grandmother in South Carolina. My mother and stepfather visited us in South Carolina and when in New York, they sent us boxes of clothing and belongings, as well as money to take care of ourselves.

6. I, along with Emma and my brother, were reunited with my mother and stepfather when I was a teenager. My stepfather had a drinking problem which was

exacerbated when they moved to New York, and eventually caused my mother to separate from him. Before my mother left him, he was physically abusive to her and was violent towards her in front of me and my siblings. Being the eldest, I felt I had to protect my mother and would stay by her side or try to get in between them to prevent her from getting hurt when they fought. I remember trying to protect my mother by hitting Love with a broom, my fists, a mop- anything I could find to get him off her, especially when he was choking her. I was often scared to go to school because I did not want to leave my mother by herself with Love. My brother would also physically intervene in their fights. Emma would just cry when our parents were fighting.

Corey's Childhood

7. I was close with my sister Emma since she was born.

8. Emma started abusing drugs, particularly crack and cocaine, when she was a teenager. I now believe that she was using drugs while she was pregnant with Corey and her younger son Robert, although I did not know of her drug abuse until after she gave birth to Corey.

9. Emma lived with our mother when Corey was born, but then moved out and lived with Robert Butler, the father of her younger son, Robert. She worked and had good jobs, but would always eventually lose her jobs due to her drug use.

10. I took care of Corey and Robert a great deal when they were babies and on and off during their pre-teen lives. Emma would initially ask me to watch them for a day and this would turn into an overnight, the weekend, and sometimes the entire summer.

11. In addition to the many occasions where I took care of Corey and Robert at their house when Emma would leave for undetermined amounts of time, Corey

and Robert often used to sleep over at my house when they were young children. Emma would call me and ask if I wanted to take care of my nephews, and would ask me to come and get them or else Emma would bring them to my house herself. I would always volunteer to take Corey and Robert because I knew Emma did not have patience with them and did not provide them with the attention they needed. When Corey and Robert would come over, the two boys would sleep in my daughters' room in twin beds, and my daughters would sleep in the living room. I noticed that both Corey and Robert were nervous most of the time, and they behaved differently from my children.

12. In addition to leaving Corey and Robert with me, Emma did not spend much time with her sons. She would ask me and others, such as her friend Antoinette Joseph, to come to her house to watch Corey and Robert when she left to use drugs and be on her own, or else she would ask me and others to take her sons for sleepovers or weekends. Emma started doing this almost immediately after Robert was born, and this behavior lasted until Corey was old enough to take care of himself.

13. I witnessed behavior that led me to believe Emma was often getting high while caring for her children. The first time I witnessed Emma using drugs was shortly after Corey was born. I saw Emma sniffing white powder, and afterwards, she was behaving strangely and had bloodshot eyes.

14. Emma's drug addiction became significantly worse as soon as Robert was born, and continued to get progressively worse as her two sons were growing up. I used to go to Emma's house to baby-sit Corey and Robert, and Emma's eyes would be bloodshot and she would be behaving strangely.

15. Moreover, Emma often used drugs with a friend named Carol. Carol would bring her son over to play with Corey and Robert, and Emma and Carol would get high together in the other room.

16. On many occasions, my mother and I would speak to Emma about her drug addiction and try to convince her to get help.

17. When Emma's drug use escalated, she spent even less time with her sons and became more and more frustrated with taking care of them. Her main interest was in getting high and running around with different men.

18. Emma lived with different men. She was on and off of welfare, but during her times of heavy drug use, she was unable to hold on to her money. She would try to take care of her children, but there were many times when she was not providing them with care.

19. Corey told me that Emma always had visitors in their apartment and music would be played so loudly that Corey could not sleep at night. He said that he was tired at school during the day and couldn't concentrate on his schoolwork.

20. She would sometimes show up at our mother's house high on drugs. We were very worried about her and about how she was treating Corey and Robert.

21. On a number of occasions, Emma would call me, crying, and I would go over to her apartment to care for her. Her mood was always very sad and depressed.

22. I continued to have Corey and Robert stay over at my house often, particularly for weekends, and was worried when they would return back to their home with Emma.

23. Emma did not have much patience with Corey and Robert and she hit them and cursed and yelled at them quite often. I was particularly worried about Emma's treatment of Corey. I saw Emma hit and smack Corey many times. Corey also told me on many occasions how his mother beat him and hit him on the head. I would tell Emma not to hit Corey on the head.

24. One time, Emma and Corey separately told me that she had beaten Corey with her high heel shoe because he either got left back in school or failed in school. I was very furious with Emma for having hit Corey with her shoe, and my mother and I told her never to hit Corey again.

25. I had a feeling that one of Emma's boyfriends, Bobby Koger, also was hitting Corey and Robert, but when I asked Emma, she immediately denied it. I saw bruises on the boys' bodies when they spent the night at my house, but they told me that these were bruises from when they were playing. I was very concerned that the boys were being abused, and I told my mother about it. Emma continued to deny that anything was wrong. I also saw bruises on Emma, who would wear shades to cover bruises on her face. On one occasion, I went over to Emma's apartment after she called me and I remember almost getting into a fight with Bobby for hitting Emma. I felt bad for my sister but was angry with her for subjecting her sons to such a bad environment.

26. When I asked Corey and Robert how Bobby Koger treated them, they told me that he was very mean. I believed that Emma or Bobby (or both of them) instructed the boys not to say anything more than that about how they were being treated.

27. I was very concerned when Emma would take Corey and Robert back to their apartment, as I did not know whether they would be taken care of, and I worried about them having food to eat and being in a safe environment. Corey appeared

sad a great deal of the time. Sometimes when I would ask him why he was so sad, he would tell me that he did not like his mother around "those kind of people." He would also tell me how it upset him to see his mother using drugs.

28. Corey and Robert would often get locked out of their apartment because they didn't have a key and Emma would not be at home when they came back from school. They would usually hang around the neighborhood until she returned home.

29. Sometimes when at my house, Corey would not go outside with the other children, but wanted to stay in the house with me. Corey appeared so sad that I figured something must have happened at home prior to his coming over to my house. When he would first arrive at my home at the beginning of a weekend, he would remain very quiet and look very sad. Towards the end of the weekend, his mood would lighten because my children would engage him in playing and going outside.

30. Even so, I cannot recall ever seeing Corey genuinely happy.

31. He would cry when his mother left him at my house, and Emma would tell him that if he did not stop she would spank him, or she would hit him on the hand and tell him to be quiet. Robert would also cry, and sometimes he would wake up in the middle of the night from crying in his sleep.

32. I tried to keep them at my house as much as possible so they wouldn't have to stay with Emma while she was using drugs and creating a bad environment for them.

33. Corey used to tell me that he didn't think his mother loved him. He would say this to me quite often – at least every other time he visited me. I would reassure him that Emma did love him, but Corey would overhear conversations when Emma would complain to me about how her children didn't listen and she wanted to put

them away. I told Emma that neither Corey nor Robert behaved badly or gave me a hard time, and that they generally listened to me. Corey used to ask to live with me, but he also told me that he was concerned about his mother's well being and did not want to be away from her. He told me that he didn't like the people his mother associated with. He seemed very conflicted and depressed when he thought about his mother.

Corey was slower than other children

34. When Corey and Robert would stay with me, I spent more time with Corey because he appeared slower than Robert and my two daughters, Queenie and Pricilla. When my daughters read books, they were able to read better than Corey even though Priscilla was the same age as Corey and Queenie was younger. Corey had difficulty reading and my daughters would help him to figure out how to read the words. Priscilla would tell me how Corey did not know how to read little words. Corey was also not able to work out math problems that my daughters were able to do by themselves. It would take much longer to explain things to Corey than to the rest of the children, and he could not do ordinary things that the others did, such as telling the time. Even when Corey first started walking, he was not on the same level as the other children his own age.

35. I told Emma to take him to the doctor when he was younger to have him evaluated. Emma told me that she took Corey to the pediatrician and was told he was fine. I explained to Emma that she had to disclose to the doctor what she observed in Corey, or the doctor would not know to look for the symptoms.

36. From the time Corey was a young child until he was about ten years old, Corey would wet the bed in his sleep. His clothing and the bed would be wet in the morning. He would come to me in the morning with an embarrassed look on his face,

and I would reassure him that it was okay. I would remind him not to drink too many fluids before going to bed, and I started to wake him up in the middle of the night to use the bathroom. Corey's mother would yell at Corey and complain about his bedwetting. I repeatedly told my sister not to yell at him, and that yelling would only make the problem worse. I tried to remind her that the doctor told us that Corey would eventually grow out of this problem, but my sister continued to yell at him. I never knew whether the sheets were washed at Corey's house after he wet the bed. My sister was not fond of housework or cooking, and I am not sure whether Corey washed the bed sheets himself or continued to sleep in the soiled bedding.

37. Corey had difficulty following certain instructions, and I would have to repeat myself many times before he could comprehend what I was directing him to do. Sometimes he appeared to be puzzled or mixed up when I would tell him certain things.

38. At age 10-13, he couldn't prepare a meal or even a simple sandwich. By age 15, he only improved a little in that he didn't make as much of a mess when preparing simple meals. I didn't give him much to do because he couldn't do it. I pampered him a lot because he needed more attention. Even when he made a sandwich, I'd have to stand there and check.

39. In early adolescence, he would switch topics during a conversation, so if you asked him a question, he would answer about something else.

40. When he was about 12-13 years old, I would send him to the store either by himself of with my children to buy snacks such as cookies, potato chips, soda or juice. I never gave him more than $5.00. I would usually give him change or dollar bills. Sometimes I told him exactly how much change he was supposed to get back from the

clerk, and other times I didn't tell him anything. Sometimes he would count the change in front of me, and he would always make mistakes and be a few cents short. I would correct him, even though I noticed that the other children who were the same age were able to count small change all the time without making any mistakes. Corey struggled and always made mistakes.

41. Corey used to tell me that the children in school teased him a great deal about his academic abilities. He would often look very sad when he told me about this. I told him that some children cannot do as well as others, but he should keep trying to do the best he could.

42. At age 14, his only interest was watching cartoons on television and playing by himself. He would bring his homework with him when he spent the weekends at my house, but my children would get frustrated when they tried to help him because he struggled with his work. My daughters would tell Corey how to say a word and he would immediately forget when he was shown the word again. My daughters were frustrated that they would have to repeat the same thing to Corey over and over again. They would show him how to do something, but if they moved on to something else, he would forget what he previously learned. They complained that he had difficulty reading even the small words, and was not able to work out math problems that they were able to do on their own. Sometimes Corey overheard my daughters complaining, or they would tease him for being slow to his face, and he would feel really badly about himself.

43. Corey could not keep up academically with the other children, and I felt very sorry for him.

44. Other people took advantage of him, such as taking his lunch money. People found it easy to take advantage of him all throughout his childhood and teen years. He wouldn't understand others but didn't want to look bad, so other children easily tricked and manipulated him.

45. Corey would get very frustrated or upset, and almost have a tantrum. He could not express himself in a mature fashion. He would cry much longer than the other children. He would get very upset when he was teased by the other children. When Corey would interact with the other children, he would mainly play by himself, but the other children would tease him and try to take his ball away from him. If my children or Robert didn't intervene, the children in the neighborhood would bully him and take his ball or candy away from him. He could not defend himself or stick up for himself without protection, and chose to play by himself most of the time instead.

46. Based on my relationship and observations of Corey since he was a young child through elementary school, I believe that Corey was seriously disabled and slower than others. He was always embarrassed by his slowness, and wanted to be considered a strong man who would have done what others told him to be more accepted in the group.

Minnie Hodges
MINNIE HODGES

Sworn to before me on this
30th day April, 2011

Delores Green
Notary Public

DELORES GREEN
Notary Public, State of New York
No. 31-4527811
Qualified in New York County
Commission Expires Aug. 31, 2014

AFFIDAVIT

State of New York)
) ss:
County of New York)

ODETTE NOBLE, being duly sworn, deposes and says:

1. I reside at 101 W. 85th St. Apt. 6-1, New York, New York.

2. I received my master's degree in social work in 1973. From approximately 1973 until 1987, I was a caseworker for the Jewish Child Care Association (JCCA). During some of that period, as part of my work for JCCA, I ran therapy sessions for boys who lived at Elmhurst Boys Residence in Queens, New York (Elmhurst).

3. Elmhurst was a group home located in an apartment unit. The residence housed eight boys – typically between 14 and 19 years of age – who, for various reasons, were not able to live with their families. Several individuals acted as house parents and provided supervision at the home. One house parent slept at the residence each night.

4. As a social worker with responsibilities for Elmhurst, I met with each of the resident boys individually for an hour each week. I also conducted a group session with the boys and the house parents every other week.

5. I met Corey Johnson when he was 16 years old, shortly after he moved into Elmhurst in June 1985. For approximately the next 20 months, until February 1987, when Corey left Elmhurst when he was age 18, Corey regularly attended my weekly individual therapy sessions as well as my bi-weekly group therapy sessions. In total, I met with Corey more than 100 times, either individually or in a group setting.

6. After Corey left Elmhurst in 1987, I did not see Corey again until 1993, when I saw him in the court room as I testified at his trial in Richmond, Virginia. I have not seen Corey since the trial in 1993.

7. Compared to virtually all of the other boys I encountered at Elmhurst, Corey was much weaker cognitively.

8. While living at Elmhurst, Corey attended special education classes at Newtown High School in Queens. Most of the other boys in the residence attended mainstream classes at high schools in the area and were expected to go on to college. I believe that this upset Corey.

9. Corey had real intellectual limitations. During our sessions, I sometimes read to him and his comprehension of what I had read was poor. His own ability to read was very limited.

10. Corey worked very hard, but because of these limitations, could just not perform well in school.

11. Based on my regular interactions with Corey, I believe that Corey's cognitive problems were not limited to his school work.

12. For example, even though he could understand the rules regarding group meetings well enough to follow those rules most of the time, he never understood the purpose or reasoning behind the rules.

13. Corey did not pose any serious behavior problems for me. He was a very sweet kid -- not mean-spirited. He generally got along with and was liked by the other boys in the residence. Corey certainly was not one of the more difficult boys that I worked with in my years of working with teenagers.

14. The residence had a strict policy against physical confrontations and, to my knowledge, Corey abided by that policy.

15. During the time I knew Corey (from ages 16 to 18), he was "girl crazy" and we often spoke of him trying to develop close relationships.

16. In my view, Corey was not capable of "consequential" thinking. Thus, I believe, he lacked the ability to understand the consequences that his actions could have.

17. In social settings, he did not initiate action, but rather went along with what others did. He was very susceptible to peer pressure.

18. Corey did not have a good "read" of situations or other people. He was not very sensitive to social cues. He had difficulty learning "the rules of the game" and understanding who was in charge.

19. In counseling him, I spoke with him about making good decisions and trying to judge who was trustworthy and who was not, but Corey seemed unable to apply our discussions to his actions.

20. Corey was a poor social decisionmaker. When it came to making decisions, Corey seemed to live in the moment. As a result, Corey could be easily influenced into doing what his peers wanted him to do. If some of his more intellectually developed peers convinced Corey to do something, he would go along with it even if he did not perceive any logical reason for doing so. He would act in this way in circumstances in which, if he had been more intelligent, he would have realized that his actions could get him into difficulty.

21. I believe that Corey's arrest for robbery in August of 1986 is an example of such a circumstance. Corey was arrested for robbery, along with two other teenagers, Mitch and Dwight. Mitch worked in the Youth Corps and apparently had a bossy co-worker against whom he wanted to retaliate. It is my understanding that Mitch enlisted the help of Dwight and Corey to rob the co-worker. I believe Mitch may have explained the situation to Dwight and Corey in a way that was intended to make it seem

as if Mitch had somehow been wronged. Mitch was clearly the leader in this robbery. I believe Mitch may have chosen Corey as an accomplice due to Corey's known susceptibility to peer pressure. True to form, Corey went along with Mitch's plan.

22. Corey's mother very rarely visited him at Elmhurst. I met Corey's mother only once or twice during Corey's nearly two-year stay at Elmhurst, which was an unusually low number. By contrast, I met other boys' families much more frequently.

23. I frequently tried to contact Corey's mother by telephone, but she did not respond.

24. In short, Corey's mother was almost non-existent in his life while he was living at Elmhurst.

25. Whenever we talked about his mother, Corey could not discuss or consciously express any anger towards her. He would always talk about her as if she were terrific.

26. In my experience, Elmhurst gave a chance to youths who were coming out of bad, controlling situations to get their lives on track if they could honestly deal with their emotions. Corey did not confront his emotions with respect to his mother, and in my view, Corey's inability to do so was a problem for his development.

27. Elmhurst provided a structured environment for its residents. For example, the house parents shopped and cooked for the boys and even some of the leisure time was structured by the program.

28. That said, there was somewhat less structure at Elmhurst than at Pleasantville, where Corey had previously resided.

29. Corey may have needed more structure and support than Elmhurst provided.

30. Towards the end of his time at Elmhurst, Corey began to ignore the instructions of house parents and the house rules.

31. In or about February of 1987, there was a meeting at which Corey was asked to leave Elmhurst for violating house rules. In my view, the message we were trying to communicate to Corey was "you should go away and think about this for awhile, and then come back."

32. However, Corey left Elmhurst permanently. We tried to invite Corey back to the residence, which we felt provided a structured and loving setting for him, especially compared to life with his mother or life on the streets. I, personally, as well as the rest of the staff wanted Corey to come back.

33. I believe that Corey's decisions to move out and stay out of the Elmhurst residence despite the staff's desire to have him back was an example of Corey's inability to think about the consequences of his actions and plan for his future.

34. I and my colleagues worried greatly for his future after he left Elmhurst.

35. As I mentioned above, while most of the boys living at Elmhurst were expected to (and did) go on to college, neither I nor my colleagues believed that Corey would be able to do so, because of his limited cognitive abilities.

36. Because of Corey's intellectual limitations, I had concerns that Corey would not be able to hold a job.

37. Beyond that, I questioned Corey's ability to negotiate even the simple, day-to-day tasks that community life requires, such as paying bills, obtaining a driver's license, or purchasing and maintaining a car. Somewhat more complex skills – like planning a budget – were clearly beyond Corey's abilities, in my view.

38. In short, I doubted that Corey was equipped to make it on his own, to live independently as an adult. Some people stay in a protected setting their entire lives and that may have been what was appropriate for Corey.

ODETTE NOBLE

Sworn before me on this
1st day of December, 2011

Notary Public

PATRICIA TERRANOVA-GERACI
NOTARY PUBLIC, State of New York
No. 01TE5063454
Qualified in New York County
Commission Expires July 22, 2014

SOCIAL HISTORY

I. IDENTIFYING DATA-

Name: Corey Johnson [redacted]
Address: 280 Henderon Street,Apt. 8I. Sex- Male
Telephone: 332-3191 School: P.S.NO.
Home Visit Date: 3/4/77

Informant- Mother and Husband

II. SOURCE OF REFERRAL- Corey was referred to the Child Study Team by the In-School-Team at P.S.NO. 16.

III. REASON FOR REFERRAL- Corey has no concept of number facts, no reading skills, cannot retain sight vocabulary words and is very disruptive in class.

IV. FAMILY COMPOSITION AND BACKGROUND- Emmalle Johnson lived with Robert Butler for 5 years since the birth of Corey. He is the father of Corey. She is presently living with Mr. Mitchell (the two Johnson children live with them).

Robert Butler, born [redacted] in Georgia and attended 11 years of school. He had been employed as a cab driver for 5 years. He has not been seen or heard from for the past year. His relationship with the children was poor, as he was an absentee fath

Robert Mitchell (stepfather) is presently living with the mother They are not married. He has two children by a previous marriage He was defensive and evasive as to the type of employment he performed. It is believed that he is collecting unemployment compensation. His health is good and he is described as a militant type person and is lacking flexibility. This is in complete contrast with the mother's philosophy.

Emmalle Johnson , [redacted] was born in South Carolina. She completed 11 years of schooling and has always been a housewife. Her disposition is described as moody. She can normally be very easy going, but changes to a loud aggressive person. She is also a nervous person. Mother's health is fair and she suffers from a bad heart. No remarkable medical problems reported on th maternal side of the family.

Siblings are: Corey Johnson, [redacted], attends P.S.NO. 16 School, Grade 2; and Robert Johnson, born [redacted], attends P.S.NO. 16 School, Grade-Kindergarten.

Family lives on the 8th floor of a 160 family apartment complex. They have three large rooms. The immediate area is residential in the downtown section of Jersey City. The area is of a mixed ethnic nature and is considered fairly an expensive apartment complex.

(CONTINUED)

Corey sleeps in the same room as brother Robert. The atmosphere at home is very upsetting with much conflict between mother and father. They seem to disagree on how the children should be raised.

Mrs. Johnson had a good relationship with father during her pregnancy Her health was fair as she is an anemic person at that time. She was 18 years old at time of Corey's birth.

V. CHILD- Corey was 6 lbs, 4 oz, a 9 month, full term, head first presentation, born in the Margaret Hague Maternity Hospital. Instruments were used in the delivery and mother was put to slee Corey's eating and sleeping habits were good. There were no birth defects noted.

All milestones were developed within normal limits with the possibility of a speech defect. He is not in speech classes.

There are no remarkable problems with Corey's medical history. He has had the measles and the chicken pox. No reported acciden or hospitalization. He has received all of his inoculations.

Corey's friends are mostly females about his own age. He is an outward person who is also moody. Corey is very attached to his mother, and gets along well with his brother. His stepfathe feels Corey should be more obedient and responsive to the stepfather. Mother sides with Corey in areas of disagreement. This is an area of conflict that Corey has dealt with for the past 3 years.

Corey has been known to steal and lie. He can be easily led into doing bad things. He enjoys sports.

VI. COLLATERAL SOURCES- None.

VII. IMPRESSIONS- Corey is respectful at home and of average size who has a good self image of himself. He is a sensitive child who becomes very upset if he is teased. He has done poorly in school. There appears to be underlying emotional problems that could cause Corey's academic difficulties.

There is total disagreement between parents on how child should be brought up.

VIII. SUMMARY- Corey comes from a broken home with a substitute father present. His natal history indicates that instruments were used during the delivery. No birth defects noted. Developmental milestones achieved within normal limits. No remarkable problems with medical history. Parent have become more cooperative with school authorities.

(CONTINUED)

IX. RECOMMENDATIONS-

1. Complete evaluation by the Child Study Team.
2. Parents should be urged to seek counseling in order to better deal together with child's problems.
3. Refer to speech teacher for speech evaluation.
4. Counseling for child.

GREGORY F. JUDGE,
School Social Worker

js
8/1/77.

7&H
9/23/7

BUREAU OF PUPIL PERSONNEL SERVICES
JERSEY CITY PUBLIC SCHOOLS
JERSEY CITY, NEW JERSEY

LEARNING CONSULTANT EVALUATION
TO
CHILD STUDY TEAM

CONFIDENTIAL INFORMATION — NOT TO BE RELEASED

Name of Student:	COREY JOHNSON	Sex:	M (2)
Address:	280 Henderon Street	School:	P.S.NO. 16.
Date of Birth:	[redacted]	Grade:	2
Age:	8-4	Date of Test:	3/18/77

Reason for Referral: Couldn't perform third grade work. Being retained in second. Cannot follow directions. No concept of number facts, low comprehens No reading skills. Unable to retain sight vocabulary. Hyperactive with a short attention span.

Tests Administered:
Peabody Picture Vocabulary Test
Illinois Test of Psycholinguistic Abilities
Slosson Oral Reading Test (Attempted)
Jan Test of Visual Discrimination
Beery-Developmental Test of Visual Motor Integration
California Test of Fine Motor Abilities
Informal Examiner Made Tests

Test Results and Observations: Corey is a friendly, nice looking 8 year old boy of average height and weight. He came willingly for testing and enjoyed the individual attention it seemed. His responses were expressive, he was relaxed but gradually became more fidgety as testing continued He is impulsive and had difficulty following more than one direction at a time. When asked his address he said, "Oh you mean my phone Number?". Correct response was obtained after explaining the questio

He is a very likable boy who knows he is failing. Corey was pleased with this successful testing situation and appears anxious to learn. He was so pleased with approval that he said "I didn't know I could do all this!"

The folbwing tests were used in the assessment of Corey's academic and perceptual abilities:

Significant Medical Information
Auditory Acuity: adequate for testing but needs evaluation.
Visual Acuity: R 20/20 L 20/25.

Cerebral Dominance
Right-sided consistent

Speech- At times quality is unclear, expressive ability is fair. Quantity is fair. Says v for b sometimes. Needs further investigation.

Directionality and Motor Development
directionality- knows right from left, in front/in back, on under, up down.
gross motor ability- good, runs, hops, jumps, skips, throws and catches a ball.
balance- fair although he says he rides a bike. He could stand on 1 fo but wasn't too steady.
fine motor ability- poor, cutting skills fair.

CALIFORNIA TEST OF FINE MOTOR ABILITY
Possible Score-20
Raw Score-6 (turned paper sideways)
Rating-poor

Handwriting- Copying skills poor. Omissions, spacial quality poor.
Legibility-fair, immature letter formation. Confuses m/n reversed B.

PEABODY PICTURE VOCABULARY TEST (receptive language) form A
Raw Score-62
I.Q. -93
M.A. 7-3
Corey often had to be reminded to look at all 4 pictures (one page presented)before responding. He would point impulsively.

SLOSSON ORAL READING TEST (word recognition)
attempted. Recognized up and is from a primer list of 20 words.

ILLINOIS TEST OF PSYCHOLINGUISTIC ABILITIES

Subtest	Raw Score	Age Score	Scaled Score	Deviation Mean SS.
Auditory Reception	18	4-10	19	-3
Visual Reception	11	4-7	13	-9
Visual Memory	8	3-10	15	-7
Auditory Association	25	7-0	29	+7
Auditory Memory	19	5-3	28	+6
Visual Association	17	5-3	23	+1
Visual Closure	18	5-10	25	+3
Verbal Expression	22	6-2	28	+6
Grammatic Closure	7	4-2	4	-18
Manual Expression	28	8-8	37	+15

Composite PLA 5-6 (C.A. 8-4) Binet Estimate 5-8
Mean SS-22

Interpretation
Test scatter indicates some form of neurological dysfunction. Visual reception-the ability to gain meaning from visually presented symbols is deficient. Visual memory (which requires a motor sequential respon is also a deficit. Corey has not learned many of the redundancies on t automatic level of language (grammatic closure). He would try to say sentences with me then fill in theanswer.

In summary, he does not have, at present, the abilities necessary to read. Auditory Association (+7) would indicate that he has the ability to relate concepts presented orally but his short attention span would limit his ability.

JAN TEST OF VISUAL DISCRIMINATION
Possible Score-14
Raw Score-9
Rating-Poor

Had difficulty performing independently.

BEERY-TEST OF VISUAL MOTOR INTEGRATION
Raw Score-9
VMI Age Equivalent 5-3

Informal Examiner Made Tests and Observations-Corey knew his shapes and colors. He could count orally by 1's to 50 but had difficulty counting concrete and pictured objects corresponding one to one. He had difficulty saying the alphabet but recognized letters. He was unable to give his birth date but knew his age. He said the days of the week; had no idea what month it is but knew the day. He talked about the weather and was able to tell appropriate clothing to wear.

Corey drew a "girl and her sister" when asked to draw a person. Although his body image is good his drawings are immature. Throughout testing his impulsiveness was apparent. He listened to a short story (5 sentences) when I asked him simple questions relating to the story at first he said anything then he thought more and responded correctly.

RECOMMENDATIONS:
I. A neuro- psychiatric examination.
II. Refer for a speech evaluation.
III. Development of fine motor skills and visual motor integration abili
    a. cutting
    b. working with clay.
    c. stringing bead design i.fingerpaint
    d. follow-the-dow exercises i. painting
    e. card sewing
    f. tracing
    g. use of templates
    h. coloring inside lines.
    i. finger paint
    j. painting

COREY JOHNSON
D.O.B. [redacted]
D.O.T. 3/18/77

IV. Gross motor development in an adaptive physical education program emphasizing
   a. rhythmic exercises
   b. following game rules
   c. basket-ball or bean bag toss
   d. jump rope
   e. hopping-skipping-running relay races
   f. directional skills-"Simon Says", "Giant Step".
   g. positions in space-imitative

V. Language Development through a meaningful auditory-visual-tactile (when possible) approach.
   a. Develop responsiveness by having him imitate actions, sit down, touch nose, clap hands.
   b. Show animal pictures and make sounds.
   c. Collect common objects and request names. Write names-eventually match.
   d. Label things around room. Have child"read" names. Remove . Have him replace.
   e. Have pupil cut out pictures for vocabulary picture card file. Use index cards to paste picture, write name. Extend to abstract words (love, help, made) with picture assocations and discussions of meaning.
   f. Encourage self-expressive.
   g. Review alphabet.
   h. Follow directions.

VI. To improve numberical concepts:
   a. Reinforce concepts of more/less, big/little, many/few.
   b. Use M & M's arrange in groups ask how many? more/less....
   c. Use pegboard and marble board or any concrete objects to count and arrange in groups.
   d. Include number words.
   e. Give seatwork and matching problems, with pictures and correct number.
   f. Drill rote counting by 1's.
   g. Review and reinforce numbers 1 to 5.

Cheryl M. Spillane

CHERYL SPILLANE,
Learning Consultant

js
8/1/77

No. R

BUREAU OF CHILD GUIDANCE
UPPER WEST SIDE CENTER

NOT ON ROLLS

Child's Name Corey Johnson

School PS 200 - 3[313] Age 10

Date 12/11/78 Worker EGlantz

CASE SERVICE

Corey was seen on 12/11/78 having been referred by teacher because of disruptive classroom behavior, poor academic performance + poor peer relations. His brother, Robert, in the 2nd grade, is an active case who was referred for similar behavior & learning difficulties.

Corey is a tall, intense boy who assumes much of the responsibility for Robert in + out of school. The single mother presently works & constantly reminds Corey that he's "a man now". Corey appears angry at mother, and at father for leaving the family.

Corey thinks he can do better in school, but "worries" alot about mother + Robert, as well as potential violence (mother being killed). The family has moved often in the past year and Corey does not like "the moving around", + he has ~~that~~ no friends

Case will be opened when consent from mother is obtained.

EGlantz social worker

MOUNT PLEASANT COTTAGE SCHOOL
SCREENING UPON ADMISSION

A. Name: Corey Johnson
Birthdate: [redacted]
Chrono. Age: 13-3
Date Of Admission: 2/1/82
Admitted From: Man. S.S.C.
Current Placement: Diagnostic Ctr.

Date Of Testing: 2/22/82
Tested By: Leona Klerer
Grade: 7
Teacher: Lily Jones
Social Worker: A.Offer

B. Information From Student's Record:

C. Behavior During Testing:

Cooperative and tried to do his best.

D. Handwriting:

Right handed with fairly legible manuscript. He can write his first name only clearly in cursive.

E. Test Results:

Tests	Areas Examined	Grade Level
Wide Range Achievement Test Level 1	Word Recognition	2.1
	Spelling	2.2
	Arithmetic	3.7
Gray Oral Reading Test Form B	Oral Reading	2nd
Comprehension 100 % at the 2nd Grade Level		
Roswell-Chall Diag. Rdg. Test of -Word Analysis Skills	Decoding Skills No score obtained Test given for analysis only.	
Nelson Reading Skills Test Form ___	Vocabulary	
	Reading Comprehension	
	Total Reading	

Woodcock Reading Mastery Tests Form ___	Independ. Lev.	Instruct. Le
Letter Identification		
Word Identification		
Word Attack		
Word Comprehension		
Passage Comprehension		
Total Reading		

Visual - Snellen eye chart Right eye 20-30
Left eye 20-30

F. Comments on Test Results:

The Gray oral test indicates Corey is reading with comprehension on a second grade level. He has evidences of some learning disabilities. He exhibited much angulation and distortion of symbols (WRAT) which indicates some visual motor difficulty. He is a better context reader and substitutes similar words for unread words, e.g. "shock for surprise". He was unable to read single syllable short vowel words in isolation. He could not name the sounds of the short vowels. When reading, Corey had to keep his finger on the words to keep from skipping. In reading the Snellen Eye Chart, he was not able to read the letters consecutively but omitted several.

The third grade level (Gray) was too difficult to read. He is a word by word reader but seems to comprehend material on a concrete level.

His phonic knowledge is lacking: he did not know the sounds of g and c. He was not sure of the consonant sound of m and y. He was able to blend consonants with difficulty but he did not know the consonant digraph sh. He did not know the rule of silent e. He could not read any words in isolation with vowel combinations. He was able to determine the number of syllables in a word presented with 50% accuracy.

Spelling subtest (WRAT) yielded a beginning second grade score.

Arithmetic (WRAT subtest) yielded a mid-third grade score. This score is somewhat inflated as Corey could not multiply by 3, divide a single digit by 2, or read numbers of more than 4 digits. He could multiply a single digit by 2 and add with renaming but not subtract with borrowing.

G. Summation:

Corey, 13-3, is currently placed in the Diagnostic Center. This examiner has determined that he is reading on a second grade level. Although he achieved 100% comprehension, some unknown words were guessed on this level.

The three tests given indicate a lack of phonic skills which might enable him to sound out words. He also has a minimal sight vocabulary. He has difficulty blending.

G. Summation:(cont.)

These factors combined make reading very difficult for Corey.

His serial memory is not as expected. He could recite the months of the year in sequence only up to Aug. although he knew there were 12 months in the year.

Corey would tell time on the hour only but seemed to feel that he could learn in a short time.

A trial lesson in reading digits indicated a potential for learning concrete material.

H. Recommendations:

1. Teach how to tell time for utilization reasons and for effect on self esteem.

2. Use Glass Analysis Technique for key into reading and phonics.

3. Math - basic math laws of subtracting, division and multiplication.

LK:jj L. Klerer

cc:D.Schwarz,A.Richmond,A.Offer,L.Jones,B.Kramer

PLEASANTVILLE COTTAGE SCHOOL

Name of Child: COREY JOHNSON
Date of Birth: [redacted]
Date of (PCS) Adm:

Date of Testing: 3/83
By: Ken Barish, Ph.D.
Social Worker: Gayle Turnquest

PSYCHOLOGICAL AND EDUCATIONAL EVALUATION

Referral:

Corey was evaluated at Pleasantville Diagnostic Center in February 1982. At that time Corey achieved a Full Scale I.Q. of 88, with a Verbal I.Q. of 85 and a Performance I.Q. of 93. Indications of diffuse neurological dysfunction were evident as well as very strong depressive tendencies and an emphasis on denial as a defense. Corey remained ambitious, however, with a strong conscience and capacity for empathy.

In conference it was reported by Corey's teacher that his academic skills are very poor. This evaluation was requested to provide additional clarification of the nature and extent of Corey's learning difficulties and to make recommendations for remedial strategies.

Tests Administered:

Wide Range Achievement Test
Neuropsychological Screening Tasks
Bender-Gestalt
Benton Visual Retention Test
Spreen-Benton Aphasia Tests
Raven's Progressive Matrices
Purdue Pegboard
Gilmore Oral Reading Test
Human Figure Drawings

Observations:

Corey was cooperative throughout the evaluation and demonstrated generally good frustration tolerance despite the very real difficulty he encountered on many of the tasks presented to him. Corey's willingness to continue to put forth effort on academic tasks without impulsivity or withdrawal is an impressive strength, particularly considering the severity of his learning disabilities.

Test Findings:

The present test findings confirm the presence of severe learning disabilities in reading, spelling and arithmetic. There is an abundance of findings which strongly suggest diffuse neurological dysfunction with associated impairment in many aspects of cognitive functioning. Difficulties in attention and concentration are a prominent factor in Corey's learning difficulties. In addition, Corey demonstrates specific language deficits (i.e. speech sound discrimination, phonic associates, sound blending) and also deficits in visual-spatial analysis, visual-motor and fine motor coordination and perhaps also visual memory. These findings will be discussed below.

On the Wide Range Achievement Test Corey obtained a Reading Score at the 1st percentile (SS 62), a Spelling Score at the 1st percentile (SS 64) and an Arithmetic Score at the 2nd percentile (SS 68). Corey understands basic arithmetic operations including borrowing and carrying but has difficulty with division and more complex operations. Some of Corey's errors seem to result from inability to sustain attention on problems, and also from some confusion in the spatial analysis on arithmetic problems. With regard to reading, Corey has a small sight vocabulary but has great difficulty in analyzing words phonetically. Reversals were occasionally noted in Corey's naming of letters and sound sequencing errors were common in his reading. Attentional errors also appeared to impair Corey's reading. Corey can spell only a few simple words. His ability to read or spell using a phonetic approach is severely limited, and Corey's attempt to spell even some simple words (e.g. "arm") are unrecognizable. Also apparent is some difficulty in the formation of letters and numbers, perhaps also some difficulty in discriminating letters of similar shape.

Corey's reproductions of the Bender designs reveals a significant deficit in visual-motor coordination. His performance on the Benton Visual Retention Test strongly suggests a deficit in visual memory or visual-motor functioning. A significant problem in visual-spatial analysis was evident on the Raven's Progressive Matrices. Attentional difficulties also contribute to Corey's poor performance on this task. Corey's performance on the Purdue Pegboard reveals significant problems also in fine motor coordination. Corey is right dominant in hand, foot and eye preference. Left-right awareness is well established on self, but not for mirror rotation; Corey consistently misplaced right and left on an examiner facing him. Finger recognition is unimpaired. Corey showed no difficulty with tongue and mouth movements.

Several tests of language functions were also administered. Language comprehension (Token Test) is unimpaired, except for occasional inattention. Naming of colors, body parts, and common objects was also unimpaired. Corey's immediate memory for digits, although improved over previous testing remains poor. Mild articulation errors were noted.

A specific deficit in speech sound discrimination was apparent. Corey knows the names of all the letters of the alphabet and the consonant sounds. Discrimination of vowel sounds, however, is very poor. When asked to say the sounds of different vowels, Corey produced essentially the same sound for each vowel. When asked to blend sounds into nonsense words, Corey would blend adequately but often mispronounced the vowel sounds.

Conclusions and Recommendations:

This evaluation confirms the presence of severe learning disabilities in reading, spelling and arithmetic. Corey's learning difficulties result from wide spread cognitive deficits, including problems in

attention and concentration, visual processing, and speech sound discrimination and phonics. It is probably because of this that Corey has been unable to find compensations that would enable him to achieve a higher level of academic skill. With regard to remediation, it would appear that a whole word sight vocabulary approach, bypassing phonics and sound blending would be more productive in improving Corey's reading and spelling. Corey and his family should be counselled regarding the nature of his learning difficulties and a school program with less focus on academic skills should be considered.

Ken Barish, Ph.D.:ww D-4/11/83 T-4/29/83

Ken Barish, Ph.D.
Psychologist

Intellectual Disability

Definition, Classification, and Systems of Supports

THE 11TH EDITION OF THE AAIDD DEFINITION MANUAL

aaidd

Intellectual Disability

Definition, Classification, and Systems of Supports

The AAIDD Ad Hoc Committee on Terminology and Classification

11th Edition

aaidd
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CONTENTS

Definition of Intellectual Disability

Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18. The following five assumptions are essential to the application of this definition:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.
5. With appropriate personalized supports over a sustained period, the life functioning of the person with intellectual disability generally will improve.

(Schalock, Luckasson, & Shogren, 2007). The concept of adaptive skills implies an array of competencies and provides the foundation to three key points: (a) the assessment of adaptive behavior is based on an individual's typical performance during daily routines and changing circumstances, not to maximum performance; (b) adaptive skill limitations often coexist with strengths in other adaptive skill areas; and (c) a person's strengths and limitations in adaptive skills should be documented within the context of ordinary community environments typical of the person's age peers and tied to the person's individualized needs for support. Readers are referred to chapter 5 for a detailed discussion of adaptive behavior and its assessment.

DIMENSION III: HEALTH

The World Health Organization (1999) defined *health* as a state of complete physical, mental, and social well-being. Health is a component of an integrated understanding of individual functioning because the health condition of an individual can affect his or her functioning directly or indirectly in each or all of the other four dimensions of human functioning. Health problems are disorders, diseases, or injuries and are classified in the *International Statistical Classification of Diseases and Related Health Problems—ICD-10* (World Health Organization, 1999).

For people with ID, the effects of health and mental health on functioning range from greatly facilitating to greatly inhibiting. Some individuals enjoy robust health with no significant activity limitations, which allows them to participate fully in social roles such as work, recreation, or leisure activities. On the other hand, some people have a variety of significant health limitations, such as epilepsy or cerebral palsy, that greatly impair body functioning in areas such as mobility and nutrition and that severely restrict personal activities and social participation. Similarly, some individuals may have activity and other limitations related to mental illness. Most individuals with ID are somewhere in between these extremes. Readers are referred to chapter 11 for a detailed discussion of mental and physical health-related supports.

DIMENSION IV: PARTICIPATION

Participation, which is the performance of people in actual activities in social life domains, is related to the functioning of the individual in society. Participation in everyday activities is important for an individual's learning and is a central feature of development-in-context perspectives of human growth and development (Bronfenbrenner, 1999; Dunst, Bruder, Trivette, & Hamby, 2006).

Participation refers to roles and interactions in the areas of home living, work, education, leisure, spiritual, and cultural activities. It also includes social roles that are valid activities considered normative for a specific age group. Participation is best reflected in the direct observation of engagement and the degree of involvement in everyday activities.

critical of the often used classification categories of mild, moderate, severe, and profound "levels of mental retardation" because these categories, based only on an intelligence test score, were too often used as profiles to make decisions about support needs. This stated concern was misinterpreted by some to mean that AAIDD was opposed to IQ classification for *any* purpose. Although classification by IQ subgroups might be appropriate for a research study in which measured intelligence is a relevant variable, it is not useful for decisions about residential or educational placement. Instead, such classification decisions should be based on more meaningful assessment information and planning procedures related to the purpose of developing support systems.

As shown in Table 3.1, assessment in the field of ID is conducted in order to diagnose a disability, classify by relevant characteristics, and plan for an individual's needed supports. As shown in the second column, each broad assessment function can be purposefully directed to take certain actions. The third column illustrates examples of assessment measures, tools, and methods that are needed to conduct assessments associated with different purposes. For diagnosis, certain assessment tools are required, while other assessment purposes typically necessitate different measures, tools, and assessment methods.

Assessing to Diagnose Intellectual Disability

Intellectual disability is diagnosed using assessment information obtained from standardized and individually administered instruments that assess intellectual functioning and adaptive behavior (along with the criterion that age of onset is documented). If criteria for a diagnosis of ID are met, the diagnosis may be applied to achieve several focused purposes, including, but not limited to, establishing the presence of the disability in an individual and confirming an individual's eligibility for services, benefits, and legal protections. Chapters 4 and 5 provide specific guidelines and recommendations for the assessment of intelligence and adaptive behavior, respectively.

Assessing to Classify

Information about individuals with ID (or the individuals themselves) can be grouped or classified for several purposes, such as conducting research, providing service reimbursement/funding, developing services and supports, and communicating about selected characteristics. As discussed in chapter 7, clinicians and other users of this *Manual* should select classification systems that are consistent with a specific purpose and must be careful not to use classification information for inappropriate purposes. For example, a clinician may classify adults with ID by their adaptive behavior levels if this information contributes to an agency's systematic way of determining caregiving reimbursement rates; but adaptive behavior levels should not guide programming content and work choice options. Multiple classification systems are available based on the assessment of adaptive behavior, intellectual functioning, educational requirements, and individual support needs. To prevent inappropriate grouping of individuals with ID, classification systems

TABLE 3.1
Framework for Assessment

Assessment function	Specific purpose	Examples of measures, tools, and assessment methods[a]
Diagnosis	Establish presence or absence of intellectual disability Establish eligibility for services Establish eligibility for benefits Establish eligibility for legal protections	• Intelligence tests • Adaptive behavior scales • Documented age of onset • Developmental measures • Social history and educational records
Classification	Classify for intensity of needed support(s) Classify for research purposes Classify by selected characteristics Classify for special education supports Classify for reimbursement/ funding	• Support needs intensity scales • Levels of adaptive behavior • IQ ranges or levels • Environmental assessment • Etiology-risk factor systems • Mental health measures • Benefit categories
Planning and developing a systems of supports	Support to enhance human functioning Support to improve outcomes Support to help implement person's choices Support to assure human rights	• Person-centered planning • Self-appraisal • Ecological inventory • Developmental tests • Speech/language, motor, sensory assessment • Achievement tests • Support needs intensity scales • Functional behavioral assessment • Behavior support plan • Family centered support plan • IFSP, IEP, ITP[b] • Self-directed plan

[a] Column 2 purposes are not parallel to Column 3 examples.
[b] IFSP = Individualized Family Support Plan, IEP = Individualized Education Program, ITP = Individualized Transition Plan.

PART II

DIAGNOSIS AND CLASSIFICATION OF INTELLECTUAL DISABILITY

OVERVIEW

A diagnosis of *intellectual disability* (ID) involves meeting three criteria: (a) significant limitations in intellectual functioning, (b) significant limitations in adaptive behavior, and (c) age of onset before age 18. As discussed more fully in Schalock, Luckasson, and Shogren (2007), there has been considerable consistency in these three criteria—and their operational definitions—for the last 50 years. As discussed more fully in chapters 4 and 5, the operational definitions of the first and second criteria are as follows:

- *Intellectual functioning*: 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
- *Adaptive behavior*: performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without ID that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills

The third criterion, *age of onset*, refers to the age at which the disability began. The purpose of the age of onset criterion is to distinguish ID from other forms of disability that may occur later in life. Intellectual disability typically originates close to the time of birth—either during fetal development, the birth process, or soon after birth. Sometimes, however, especially when the etiology of the disability indicates progressive damage (such as malnutrition) or damage related to an acquired disease or injury (such as infection or traumatic brain injury), the condition may originate later. Thus, disability does not necessarily have to have been formally identified, but it must have originated during the developmental period. The early onset criterion is apparent in the earliest formulation of

Comparability of Scores From Different Tests

Not all scores obtained on intelligence tests given to the same person will be identical. Specifically, IQ scores are not expected to be the same across tests, editions of the same test, or time periods (Evans, 1991). A number of studies have revealed significantly different results from appropriately selected tests. For example, Quereshi and Seitz (1994) reported that the Wechsler Preschool and Primary Scale of Intelligence-Revised (WPPSI), Wechsler Intelligence Scale for Children-Revised (WISC-R), and the Wechsler Preschool and Primary Scale of Intelligence-Revised (WPPSI-R) did not yield the same results when used on young children. Highest IQ scores were obtained on the WPPSI and lowest on the WPPSI-R. The SBIS-4 yielded significantly higher scores (by over 14 points) than did the WISC-R for students with lower IQ scores but yielded significantly lower scores for students with higher IQ scores. The two tests yielded similar scores for students with IQ scores between 70 and 90 (Prewett & Matavich, 1992). Scores on the WISC-III were significantly correlated with scores on the SBIS-4 with a population of students with mild mental retardation, but the average IQ on the WISC-III was 8 points lower (Lukens & Hurrell, 1996). Nelson and Dacey (1999) reported that in a sample of adults who had mild to moderate mental retardation an SBIS will yield a significantly lower score than a Wechsler test. Their results were consistent with earlier work published in the Stanford Binet Technical Manual (Thorndike, Hagen, & Sattler, 1986b).

Users of this *Manual* need to be aware of—and sensitive to—potential differences in scores obtained from two different tests. Sources of variation can result from (a) group versus individually administered tests; (b) the purposes for which the test was administered (e.g., administered initially to measure academic achievement but later used to derive an IQ score); (c) the properties of the test (e.g., using two tests with very disparate standard errors of measurement); (d) nonstandardized administration of the assessment instrument(s); (e) test content across different scales and between different age levels on the same scale; (f) scores obtained on verbal versus nonverbal tests; (g) differences in the standardization samples; (h) changes between different editions of the same scale/test; (i) use of an alternative scale as an individual's chronological age increases; and/or (j) variations in the person's abilities or performance.

Practice Effect

The *practice effect* refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument. Kaufman (1994) noted that practice effect can occur when the same individual is retested on a similar instrument. For example, the WAIS-III *Manual* presents data showing the artificial increase in IQ scores when the same instrument is readministered within a short time interval. The WAIS-III *Manual* also reports the average increase between administrations with intervals of 2 to 12 weeks (Wechsler, 1997). For this reason, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence.

CHAPTER 5

ADAPTIVE BEHAVIOR AND ITS ASSESSMENT

Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.

For the diagnosis of intellectual disability, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills. The assessment instrument's standard error of measurement must be considered when interpreting the individual's obtained scores.

OVERVIEW

The inclusion of the concept of adaptive behavior in the diagnosis of persons with *intellectual disability* (ID) has a long history. Nihira (1999), for example, cited early leaders, such as Itard, Seguin, Voison, and Howe, who referred to signs of ID that included the absence of social competency, a need for skill training, an inability to meet social norms, and difficulty with fending for one's self. Although adaptive behavior did not play a formal role in the diagnosis of ID during the first half of the 20th century, the construct's importance to understanding ID was not completely abandoned. Doll, for example, introduced the Vineland Social Maturity Scale in 1936, an instrument that included 117 items focused on practical skills used in everyday situations.

When the intelligence test, resulting in an IQ score, was introduced in the early 1900s, it was embraced as an efficient and objective means to distinguish individuals with ID from the general population (Scheerenberger, 1983). The intelligence test not only produced a highly reliable score, but because it was normed on the general population, it yielded an unambiguous indicator of how much a person deviated from others. However, dissatisfaction with the IQ score as the sole indicator of ID emerged over time. Among the greatest concerns about intelligence testing was that IQ scores only provided a narrow measure of intellectual functioning related to academic tasks (i.e., linguistic, conceptual,

and mathematical abilities and skills), thus ignoring important aspects of intellectual functioning that included social and practical skills. Also, the perception that IQ scores contributed to misdiagnosing children from poor and minority backgrounds shook people's confidence in using the IQ as the sole diagnostic measure (Reschly, Myers, & Hartel, 2002; Scheerenberger, 1983).

As a result of this dissatisfaction, adaptive behavior reemerged in 1959 as one of the three criteria used to diagnose ID. According to Heber in the AAIDD 1959 *Manual on Terminology and Classification*, "measured intelligence cannot be used as the sole criteria of mental retardation [the term in use then] since intelligence test performances do not always correspond to level of deficiency in total adaptation" (pp. 55–56). *Adaptive behavior* was defined by Heber (1959) as

> the effectiveness with which the individual copes with the nature and social demands of his environment. It has two major facets: the degree to which the individual is able to function and maintain himself independently, and the degree to which he meets satisfactorily the culturally-imposed demands of personal and social responsibility. (p. 61)

Grossman (1973, 1983) reaffirmed the importance of adaptive behavior in the diagnosis of ID. Grossman's (1983) definition of adaptive behavior was "the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his age and cultural group" (p. 1). The importance of adaptive behavior in the diagnosis of ID has been reaffirmed in each of the successive AAIDD *Terminology and Classification Manuals* (Luckasson et al., 1992, 2002).

Both Heber and Grossman recognized the multidimensionality of adaptive behavior and the influence of culture on the assessment of the construct. Heber conceptualized adaptive behavior as consisting of three primary factors: maturation, learning, and social adjustment. These three domains continue to be part of the most current conceptualization of adaptive behavior but are reframed as practical, conceptual, and social skills.

The consensus, based on considerable published research on the factor structure of adaptive behavior (e.g., Harrison & Oakland, 2003; McGrew, Bruininks, & Johnson, 1996; Thompson, McGrew, & Bruininks, 1999), is that adaptive behavior is multidimensional and includes the following:

- *Conceptual skills*: language; reading and writing; and money, time, and number concepts
- *Social skills*: interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving
- *Practical skills*: activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone

In this chapter we discuss the role that adaptive behavior and its assessment plays in the diagnosis of ID. The seven sections of the chapter are (a) key factors to keep in mind

when reading the chapter, (b) the assessment of adaptive behavior, (c) the use of standard error of measurement in score interpretation, (d) adaptive behavior versus problem behavior, (e) special considerations in the assessment of adaptive behavior, (f) guidelines for selecting an adaptive behavior instrument, and (g) future considerations. Throughout the chapter, adaptive behavior is defined as the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives. Material included in the chapter regarding assessment guidelines and the technical adequacy of adaptive behavior assessment instruments is based on the published work of Finlay and Lyons (2002), Greenspan (1999, 2006a), Harrison and Raineri (2008), and Reschly et al. (2002).

Key Factors to Keep in Mind When Reading This Chapter

In this chapter we discuss in more detail the following 10 key factors about adaptive behavior and its assessment that are relevant to a diagnosis of ID:

1. There are three criteria for a diagnosis of ID: significant limitations in intellectual functioning, significant limitations in adaptive behavior, and age of onset before age 18. Adaptive behavior and intellectual functioning should be given equal consideration.
2. Adaptive behavior is a multidomain construct. The domains that have emerged from a long history of factor-analytic studies are consistent with a conceptual model of adaptive behavior that has three general areas of adaptive skills: conceptual, social, and practical.
3. Adaptive behavior as defined in this *Manual* is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.
4. The concept of adaptive skills implies an array of competencies and provides a foundation for three key points: (a) the assessment of adaptive behavior is based on the person's typical (not maximum) performance, (b) adaptive skill limitations often coexist with strengths, and (c) the person's strengths and limitations in adaptive skills should be documented within the context of community and cultural environments typical of the person's age peers and tied to the person's need for individualized supports.
5. Although no existing measure of adaptive behavior completely measures all adaptive behavior skills, most provide domain scores that represent the three domains used in this *Manual*: conceptual, social, and practical. A comprehensive assessment of adaptive behavior will likely include a systematic review of the individual's family history, medical history, school records, employment records (if an adult), other relevant records and information, as well as clinical interviews with a person or persons who know the individual well.

ASSESSMENT OF ADAPTIVE BEHAVIOR

Use Standardized Measures

Significant limitations in adaptive behavior are established through the use of standardized measures and, like intellectual functioning, significant *limitations in adaptive behavior* are operationally defined as performance that is approximately two standard deviations below the population average on one of the three adaptive skills domains of conceptual, social, or practical. In evaluating the role that an adaptive behavior score—as assessed on a standardized measure—plays in making a diagnosis of ID, clinicians should (a) determine the standard error of measurement (see following section) for the particular assessment instrument used, realizing that the standard error of measurement is test-specific and is used to establish a statistical confidence interval within which the person's true score falls and (b) assure that within reporting, standard error of measurement is properly addressed.

Focus on Typical Performance

The assessment of adaptive behavior focuses on the individual's typical performance and not their best or assumed ability or maximum performance. Thus, what the person typically does, rather than what the individual can do or could do, is assessed when evaluating the individual's adaptive behavior. This is a critical distinction between the assessment of adaptive behavior and the assessment of intellectual functioning, where best or maximal performance is assessed. Individuals with an ID typically demonstrate both strengths and limitations in adaptive behavior. Thus, in the process of diagnosing ID, significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills.

Use Knowledgeable Respondents

Using standardized adaptive behavior measures to determine significant limitations in adaptive behavior usually involves obtaining information regarding the individual's adaptive behavior from a person or persons who know the individual well. Generally, individuals who act as respondents should be very familiar with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times. Very often, these respondents are parents, older siblings, other family members, teachers, employers, and friends. Parents are often the best respondents available because they have known the individual the longest and observed attainment of developmental milestones, maturation, and the achievement of adaptive behavior skills. Because adaptive behavior assessment relies on third party respondents, it is important for clinicians to assess the reliability of any respondent providing adaptive behavior information. Obtaining information from multiple respondents and other relevant sources (e.g., school records, employment history, previous evaluations) is essential to providing corroborating information that provides a comprehensive picture of the individual's functioning.

CHAPTER 6

ROLE OF ETIOLOGY IN THE DIAGNOSIS OF INTELLECTUAL DISABILITY

Etiology represents a multifactorial construct composed of four categories of risk factors (biomedical, social, behavioral, and educational) that interact across time and affect the individual's overall functioning. Diagnostic assessment and classification of the etiology consists of a description of all of the risk factors that are present in a particular individual and that contribute to the individual's present functioning and potential diagnosis of intellectual disability. Genotype-phenotype correlations may be useful, but caution is needed when applying these data to individual circumstances.

OVERVIEW

In this chapter we describe the multifactorial nature of the etiology of *intellectual disability* (ID) and how etiology is determined and classified based on biomedical, social, behavioral, and educational risk factors. The five sections of the chapter cover (a) the importance of etiology, (b) the multifactorial nature of etiology, (c) etiologic assessment, (d) etiologic diagnosis and classification, and (e) etiology and performance. These five sections incorporate genetic research advances and research about behaviors that are associated with specific etiologies. Additionally, the system for etiologic diagnosis and classification presented in the chapter is consistent with the multidimensional approach to ID presented in this *Manual* and facilitates the design and implementation of strategies for prevention and support (see chapter 10).

IMPORTANCE OF ETIOLOGY

Consideration of the etiology of ID is important for several reasons. Chief among these are the following:

1. The etiology may be associated with other health-related problems that may influence physical and psychological functioning.

2. The etiology may be treatable, which could permit appropriate treatment to minimize or prevent ID.
3. Accurate information is needed for the design and evaluation of programs to prevent specific etiologies of ID.
4. Comparison of individuals for research, administrative, or clinical purposes may depend on formation of maximally homogeneous groups composed of individuals with the same or similar etiologies.
5. The etiology may be associated with a specific behavioral phenotype that allows anticipation of actual, potential, or future functional support needs.
6. Information about the etiology facilitates genetic counseling and promotes family choice and decision making, including preconception counseling.
7. Individuals and families can be referred to other persons and families with the same etiologic diagnosis for information and support.
8. Knowing the etiology facilitates self-knowledge and life planning for the individual.
9. Understanding the etiology may clarify clinical issues for service providers.
10. Clarification of biomedical, social, behavioral, and educational risk factors that contribute to the etiology offers opportunities for prevention of the disability.

Performing a diagnostic evaluation to determine the etiology may be questioned by some providers. They may argue that the cost of testing is excessive and that the results will not change the individual's treatment. If the parents do not plan to have any more children, they may argue that testing for an inherited disorder is pointless. When the individual with ID is an adult, the parents may no longer have any interest in finding the etiology. Adult service providers may feel that the etiology is irrelevant to the development of the individual's plan of supports and services. These objections can be answered by considering the reasons for establishing the etiology listed earlier, and the cost of diagnostic testing can often be justified in specific situations. For example, knowing that an adult with cognitive decline has Down syndrome should alert the provider to look for hypothyroidism or depression. Knowing that a child with cognitive decline has Angelman syndrome should alert the provider to look for subclinical seizures. Knowing that an individual with new neurological findings has tuberous sclerosis should alert the provider to look for the characteristic brain tumor associated with this diagnosis. Knowing that an adult man has fragile X syndrome should alert the provider to offer genetic testing to the man's sisters who may be carriers and could have affected sons. Knowing that a child has a particular condition allows the family to search the Internet and to contact other families affected by this diagnosis, thereby learning more about it than their health care provider may know. These examples illustrate why testing to establish the etiologic diagnosis may be important for many individuals with ID.

MULTIFACTORIAL NATURE OF ETIOLOGY

In this chapter we build on the approach to etiology described in previous AAMR *Manuals* (Luckasson et al., 1992, 2002). Etiology is conceptualized as a multifactorial

construct composed of four categories of risk factors (biomedical, social, behavioral, and educational) that interact across time, including across the life of the individual and across generations from parent to child. This construct replaces prior approaches that divided the etiology of ID into two broad types: ID of biological origin and ID due to psychosocial disadvantage (Grossman, 1983). The two-group approach (biological and cultural-familial) was defended on the basis of developmental theory (Hodapp, Burack, & Zigler, 1990). Different developmental pathways were associated with ID due to identified biological disorders compared to ID for which no organic etiology is apparent (due to cultural-familial factors or psychosocial disadvantage). These researchers recommended a biological or genetic classification of etiology, in which there is either a demonstrated biological cause or there is not. This approach is consistent with the approach presented in this chapter. In fact, the risk factor approach can be seen as a fine-tuning of the developmental (two-group) approach. What was called "ID of biological origin" can be seen as involving individuals for whom biomedical risk factors predominate, while "ID of cultural-familial origin" can be seen as involving individuals for whom social, behavioral, or educational risk factors predominate.

The two-group distinction is often blurred in real life, however. The multiple risk factor approach correctly notes that biomedical risk factors may be present in persons with ID of cultural-familial origin, and social, behavioral, and educational risk factors may be present in persons with ID of biological origin. For example, individuals with the same biomedical genetic etiology often vary widely in functioning, presumably as the result of other modifying risk factors. The multiple risk factor approach to etiology thus is the logical extension of previous work in this area and provides a more comprehensive explanation of the many interacting causes of impaired functioning in persons with ID (Chapman, Scott, & Stanton-Chapman, 2008).

There has been an explosion of new genetic information in the past decade (cf. Butler & Meaney, 2005). This explosion has led some to consider the etiology of ID primarily in genetic terms. The recommendations of the American College of Human Genetics for the etiologic evaluation of ID (Curry, Stevenson, Aughton, & Byrne, 1997) emphasized genetic testing, as did the recommendations of the Committee on Genetics of the American Academy of Pediatrics (Moeschl & Shevell, 2006). The Child Neurology Society's practice parameter on the evaluation of children with global developmental delay (Shevell et al., 2003) also emphasized biomedical causes and included evidence-based recommendations for genetic testing. Although in a recent textbook on ID, Harris (2006) mentions AAIDD's multifactorial risk factor approach presented in the 2002 *Manual* (Luckasson et al.), the author discusses in depth primarily genetic and other biomedical causes.

Clearly, genetics cannot explain the cause of ID in every case. Individuals may be born with perfectly normal DNA and still develop ID due to a birth injury, malnutrition, child abuse, or extreme social deprivation. Understanding the cause of ID in these cases requires consideration of other biomedical, behavioral, and social risk factors. The guidelines reviewed above all note that even the most extensive and up-to-date genetic and biomedical testing will identify an etiology in less than half of all cases. Indeed, even if one could measure the entire genome in patients with ID (which should become

feasible within the next 10 years), the results would not explain the cause when ID is due primarily to social or behavioral risk factors. On the other hand, at least one or more of the risk factors shown in Table 6.1 will be found in every case of ID. Thus a multifactorial approach to etiology (which incorporates all of the above genetic and biomedical testing,

TABLE 6.1
Risk Factors for Intellectual Disability

Timing	Biomedical	Social	Behavioral	Educational
Prenatal	1. Chromosomal disorders 2. Single-gene disorders 3. Syndromes 4. Metabolic disorders 5. Cerebral dysgenesis 6. Maternal illnesses 7. Parental age	1. Poverty 2. Maternal malnutrition 3. Domestic violence 4. Lack of access to prenatal care	1. Parental drug use 2. Parental alcohol use 3. Parental smoking 4. Parental immaturity	1. Parental cognitive disability without supports 2. Lack of preparation for parenthood
Perinatal	1. Prematurity 2. Birth injury 3. Neonatal disorders	1. Lack of access to prenatal care	1. Parental rejection of caretaking 2. Parental abandonment of child	1. Lack of medical referral for intervention services at discharge
Postnatal	1. Traumatic brain injury 2. Malnutrition 3. Meningoencephalitis 4. Seizure disorders 5. Degenerative disorders	1. Impaired child-caregiver interaction 2. Lack of adequate stimulation 3. Family poverty 4. Chronic illness in the family 5. Institutionalization	1. Child abuse and neglect 2. Domestic violence 3. Inadequate safety measures 4. Social deprivation 5. Difficult child behaviors	1. Impaired parenting 2. Delayed diagnosis 3. Inadequate early intervention services 4. Inadequate special education services 5. Inadequate family support

as well as consideration of all of the other potential risk factors that might be operative) provides the most thorough way to evaluate the etiology of ID in a particular case.

The multifactorial approach to etiology presented in this chapter expands the list of causal factors in two directions: types of factors and timing of factors. The first direction expands the types or categories of factors into four groupings:

1. *Biomedical*: biologic processes, such as genetic disorders or nutrition
2. *Social*: social and family interaction, such as stimulation and adult responsiveness
3. *Behavioral*: potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse
4. *Educational*: availability of educational supports that promote mental development and the development of adaptive skills

The second direction concerns the timing of the occurrence of causal factors according to whether these factors affect the parents of the person with ID, the person with ID, or both. This aspect of causation is termed *intergenerational* to describe the influence of factors present during one generation on the outcome in the next generation. The modern concept of intergenerational effects must be distinguished from the historical concept that ID was related to "weak genes" due to psychosocial, cultural, or familial factors (Scheerenberger, 1983). This modern concept recognizes that reversible environmental factors in the lives of some families may be related to the etiology of ID and stresses that the understanding of these factors should lead to enhanced individual and family supports. Because of the relationship to prevention and supports, these intergenerational effects are considered further in chapter 10 (see Table 10.1 in particular).

Table 6.1 lists risk factors for ID by category and by the time of occurrence of the risk factor in the life of the individual. Unlike classification systems based primarily on biomedical conditions (such as the *ICD-10* [World Health Organization, 1993]), the classification system outlined in Table 6.1 represents a multifactorial approach to the etiology of ID. It incorporates biomedical risk factors but places them in context by including other risk factors that may be of equal or greater importance in determining the individual's level of functioning. The list of risk factors in Table 6.1 is not exclusive and can be expanded as new risk factors are discovered. Research should result in continual revision and updating of these specific risk factors, but the basic structure of the table should be relevant for the foreseeable future.

Because ID is characterized by impaired functioning, its etiology is whatever caused this impairment in functioning. A biomedical risk factor may be present but by itself may not cause ID (as, for example, when a patient with a genetic disorder has average intelligence). Any risk factor causes ID only when it results in impaired functioning sufficient to meet the criteria for a diagnosis of ID as described in this *Manual*. Table 6.1 emphasizes that the impairment of functioning that is present when an individual meets the three criteria for a diagnosis of ID usually reflects the presence of several risk factors that interact over time. Thus, the search for the etiology of ID in a particular individual must consist of a search for all of the risk factors that might have resulted in impaired functioning for that person. This search involves obtaining as much historical medical

information as possible, performing psychological and physical examinations, and pursuing sufficient laboratory investigations to consider reasonable possibilities.

Etiologic Assessment

Medical History

Diagnostic assessment begins with a complete history and physical examination to uncover all of the potential risk factors that may be present in each of the four categories shown in Table 6.1. The medical history begins at conception and includes detailed information about the prenatal, perinatal, and postnatal periods. Information needed about the prenatal period includes maternal age; parity and health (including maternal infections such as hepatitis, HIV, rubella, cytomegalovirus, group B streptococcus, etc.); the adequacy of maternal nutrition; the amount and quality of prenatal care (including results of prenatal screening, ultrasound examinations, and amniocentesis if performed); maternal use of drugs, alcohol, and other substances; maternal exposure to potential toxins or teratogens (such as lead or radiation); and occurrence of any significant maternal injuries during the pregnancy. Information needed about the perinatal period includes growth status at birth (gestational age at birth, birthweight, length, and head circumference); labor and delivery experiences (including onset, duration, route of delivery, presence of fetal distress prior to delivery, Apgar scores after birth, need for resuscitation); and the occurrence of any neonatal disorders after birth (such as seizures, infections, respiratory distress, brain hemorrhage, and metabolic disorders). Information needed about the postnatal period includes the history of any significant head injuries, infections, seizures, toxic and metabolic disorders (such as lead poisoning), significant malnutrition or growth impairment, and any indication of loss of previously acquired developmental skills that could indicate the presence of a progressive or degenerative disorder or a disorder on the autism spectrum.

A detailed family history is necessary to identify potential genetic etiologies (Curry et al., 1997). A detailed three-generation pedigree is recommended that includes information about the health status, medical and psychological disorders, and level of functioning of all known relatives. In particular, relatives who were affected by conditions that may be associated with ID (such as autism) or who were diagnosed with ID should be noted. Additional records concerning these individuals may be requested to provide further details. The occurrence of ID in other family members does not necessarily imply a genetic mechanism however. Multiple individuals in a family may be affected by fetal alcohol syndrome, for example, or ID in a relative may be due to childhood infections or head trauma. Results of genetic testing performed previously on any relatives should be sought and examined for completeness because testing performed more than 5 to 10 years earlier may have missed conditions diagnosable with current methods.

Table 6.2
Hypotheses and Strategies for Assessing Etiologic Risk Factors

Onset	Hypothesis	Social
Prenatal	Chromosomal or single gene disorder	Extended physical examination Referral to clinical geneticist Chromosomal and DNA analyses
	Syndrome disorder	Extended family history and examination of relatives Extended physical examination Referral to clinical geneticist
	Inborn error of metabolism	Newborn screening using tandem mass spectrometry Analysis of amino acids in blood, urine, and/or cerebrospinal fluid Analysis of organic acids in urine Blood levels of lactate, pyruvate, very long chain fatty acids, free and total carnitine, and acylcarnitines Arterial ammonia and gases Assays of specific enzymes in cultured skin fibroblasts Biopsies of specific tissue for light and electron microscopy and biochemical analysis
	Cerebral dysgenesis	Neuroimaging (CT or MRI)
	Social, behavioral, and environmental risk factors	Intrauterine and postnatal growth Placental pathology Detailed social history of parents Medical history and examination of mother Toxicological screening of mother at prenatal visits and of child at birth Referral to clinical geneticist
Perinatal	Intrapartum and neonatal disorders	Review of maternal records (prenatal care, labor, and delivery) Review of birth and neonatal records

TABLE 6.2 (*continued*)

Onset	Hypothesis	Social
Postnatal	Head injury	Detailed medical history Brain X-rays and neuroimaging
	Brain infection	Detailed medical history Cerebrospinal fluid analysis
	Demyelinating disorders	Neuroimaging Cerebrospinal fluid analysis
	Degenerative disorders	Neuroimaging Specific DNA studies for genetic disorders Assays of specific enzymes in blood or cultured skin fibroblasts Biopsies of specific tissue for light and electron microscopy and biochemical analysis Referral to clinical geneticist or neurologist
	Seizure disorders	Electroencephalography Referral to clinical neurologist
	Toxic-metabolic disorders	See "Inborn errors of metabolism" above Toxicological studies Lead and heavy metal assays
	Malnutrition	Body measurements Detailed nutritional history Family history of nutrition
	Environmental and social disadvantage	Detailed social history History of abuse or neglect Psychological evaluation Observation in new environment
	Educational inadequacy	Early referral and intervention records Review of educational records

TABLE 8.3

Critical Thinking Skills Involved in the Synthesis of Information

Analysis: Examine the case, its elements, and its component parts; reduce the complexity of the case into simpler or more basic components or elements. Important subskills include looking for contradictory explanations for findings and contradictory evidence, recognizing the limits of anecdotal evidence, and recognizing the bias in hindsight analysis (i.e., knowing the outcome of events biases our recall and interpretation of events).

Evaluation: Determine the precision, accuracy, and integrity of available information through careful appraisal and study. Important subskills include using evidence-based decision making; assessing the validity of premises, assumptions, and conclusions; seeking confirmation to reduce uncertainty; understanding the limitations of statistical analysis (e.g., correlation does not mean causation) and the fallibility of human memory; avoiding appeals to ignorance (i.e., lack of information on an issue cannot be used to support an argument); and judging the credibility of an information source.

Interpretation: Integrate the available information in light of the individual's beliefs, judgment, or circumstance. Important subskills include recognizing mental models and the way that definitions shape how we think about issues and constructs such as ID, appreciating the limits of extrapolation, understanding how contrast effects can influence judgments and decisions, and understanding the limits of correlational evidence (i.e., relationship vs. causal).

Inference: Form conclusion or recommendation by integrating all of the facts and tested hypotheses. Important subskills include avoiding reification (i.e., the tendency to treat hypothetical constructs as if they were concrete things); avoiding common fallacies, such as irrelevant reasons, circular reasoning, slippery slope reasoning, weak analysis, and false dichotomies; and discarding previously held theories and/or mental models.

Synthesis Guidelines

The following 12 guidelines augment the critical thinking skills listed in Table 8.3.

1. Show clearly that the obtained data are aligned with the critical question(s) asked. Those questions will relate to diagnosis, classification, or systems of supports.
2. Integrate information from multiple sources. A valid diagnosis of ID is based on multiple sources of information that include a thorough history (social, medical, educational), standardized assessments of intellectual functioning and adaptive behavior, and possibly additional assessments or data relevant to the diagnosis. When considering the relative weight or degree of confidence given to any assessment instrument, the clinician needs to consider (a) the technical adequacy of the instrument, including content and construct validity, reliability, stability of the obtained measures; the generalization of scores; predictive validity; and appropriateness to the individual being assessed; (b) the purpose of the test(s); (c) the

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Contents

Section III
Emerging Measures and Models

Appendix

cians an opportunity to document factors that may have played a role in the etiology of the disorder, as well as those that might affect the clinical course. Examples include genetic disorders, such as fragile X syndrome, tuberous sclerosis, and Rett syndrome; medical conditions such as epilepsy; and environmental factors, including very low birth weight and fetal alcohol exposure (even in the absence of stigmata of fetal alcohol syndrome).

Intellectual Disabilities

Intellectual Disability (Intellectual Developmental Disorder)

Diagnostic Criteria

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

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

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

Note: The diagnostic term *intellectual disability* is the equivalent term for the ICD-11 diagnosis of *intellectual developmental disorders.* Although the term *intellectual disability* is used throughout this manual, both terms are used in the title to clarify relationships with other classification systems. Moreover, a federal statute in the United States (Public Law 111-256, Rosa's Law) replaces the term *mental retardation* with *intellectual disability,* and research journals use the term *intellectual disability.* Thus, *intellectual disability* is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups.

Specify current severity (see Table 1):

317 (F70) Mild
318.0 (F71) Moderate
318.1 (F72) Severe
318.2 (F73) Profound

Specifiers

The various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required. Moreover, IQ measures are less valid in the lower end of the IQ range.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder)

Severity level	Conceptual domain	Social domain	Practical domain
Mild	For preschool children, there may be no obvious conceptual differences. For school-age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. In adults, abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (e.g., reading, money management), are impaired. There is a somewhat concrete approach to problems and solutions compared with age-mates.	Compared with typically developing age-mates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in age-appropriate fashion; these difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations; social judgment is immature for age, and the person is at risk of being manipulated by others (gullibility).	The individual may function age-appropriately in personal care. Individuals need some support with complex daily living tasks in comparison to peers. In adulthood, supports typically involve grocery shopping, transportation, home and child-care organizing, nutritious food preparation, and banking and money management. Recreational skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support. In adulthood, competitive employment is often seen in jobs that do not emphasize conceptual skills. Individuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently. Support is typically needed to raise a family.

Diagnostic Features

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

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65–75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance.

Factors that may affect test scores include practice effects and the "Flynn effect" (i.e., overly high scores due to out-of-date test norms). Invalid scores may result from the use of brief intelligence screening tests or group tests; highly discrepant individual subtest scores may make an overall IQ score invalid. Instruments must be normed for the individual's sociocultural background and native language. Co-occurring disorders that affect communication, language, and/or motor or sensory function may affect test scores. Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning.

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning.

Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations. Scores from standardized measures and interview sources must be interpreted using clinical judgment. When standardized testing is difficult or impossible, because of a variety of

factors (e.g., sensory impairment, severe problem behavior), the individual may be diagnosed with unspecified intellectual disability. Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.

Criterion B is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Criterion C, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

Associated Features Supporting Diagnosis

Intellectual disability is a heterogeneous condition with multiple causes. There may be associated difficulties with social judgment; assessment of risk; self-management of behavior, emotions, or interpersonal relationships; or motivation in school or work environments. Lack of communication skills may predispose to disruptive and aggressive behaviors. Gullibility is often a feature, involving naiveté in social situations and a tendency for being easily led by others. Gullibility and lack of awareness of risk may result in exploitation by others and possible victimization, fraud, unintentional criminal involvement, false confessions, and risk for physical and sexual abuse. These associated features can be important in criminal cases, including Atkins-type hearings involving the death penalty.

Individuals with a diagnosis of intellectual disability with co-occurring mental disorders are at risk for suicide. They think about suicide, make suicide attempts, and may die from them. Thus, screening for suicidal thoughts is essential in the assessment process. Because of a lack of awareness of risk and danger, accidental injury rates may be increased.

Prevalence

Intellectual disability has an overall general population prevalence of approximately 1%, and prevalence rates vary by age. Prevalence for severe intellectual disability is approximately 6 per 1,000.

Development and Course

Onset of intellectual disability is in the developmental period. The age and characteristic features at onset depend on the etiology and severity of brain dysfunction. Delayed motor, language, and social milestones may be identifiable within the first 2 years of life among those with more severe intellectual disability, while mild levels may not be identifiable until school age when difficulty with academic learning becomes apparent. All criteria (including Criterion C) must be fulfilled by history or current presentation. Some children under age 5 years whose presentation will eventually meet criteria for intellectual disability have deficits that meet criteria for global developmental delay.

When intellectual disability is associated with a genetic syndrome, there may be a characteristic physical appearance (as in, e.g., Down syndrome). Some syndromes have a *behavioral phenotype*, which refers to specific behaviors that are characteristic of particular genetic disorder (e.g., Lesch-Nyhan syndrome). In acquired forms, the onset may be abrupt following an illness such as meningitis or encephalitis or head trauma occurring during the developmental period. When intellectual disability results from a loss of previously acquired cognitive skills, as in severe traumatic brain injury, the diagnoses of intellectual disability and of a neurocognitive disorder may both be assigned.

Although intellectual disability is generally nonprogressive, in certain genetic disorders (e.g., Rett syndrome) there are periods of worsening, followed by stabilization and in

others (e.g., San Phillippo syndrome) progressive worsening of intellectual function. After early childhood, the disorder is generally lifelong, although severity levels may change over time. The course may be influenced by underlying medical or genetic conditions and co-occurring conditions (e.g., hearing or visual impairments, epilepsy). Early and ongoing interventions may improve adaptive functioning throughout childhood and adulthood. In some cases, these result in significant improvement of intellectual functioning, such that the diagnosis of intellectual disability is no longer appropriate. Thus, it is common practice when assessing infants and young children to delay diagnosis of intellectual disability until after an appropriate course of intervention is provided. For older children and adults, the extent of support provided may allow for full participation in all activities of daily living and improved adaptive function. Diagnostic assessments must determine whether improved adaptive skills are the result of a stable, generalized new skill acquisition (in which case the diagnosis of intellectual disability may no longer be appropriate) or whether the improvement is contingent on the presence of supports and ongoing interventions (in which case the diagnosis of intellectual disability may still be appropriate).

Risk and Prognostic Factors

Genetic and physiological. Prenatal etiologies include genetic syndromes (e.g., sequence variations or copy number variants involving one or more genes; chromosomal disorders), inborn errors of metabolism, brain malformations, maternal disease (including placental disease), and environmental influences (e.g., alcohol, other drugs, toxins, teratogens). Perinatal causes include a variety of labor and delivery-related events leading to neonatal encephalopathy. Postnatal causes include hypoxic ischemic injury, traumatic brain injury, infections, demyelinating disorders, seizure disorders (e.g., infantile spasms), severe and chronic social deprivation, and toxic metabolic syndromes and intoxications (e.g., lead, mercury).

Culture-Related Diagnostic Issues

Intellectual disability occurs in all races and cultures. Cultural sensitivity and knowledge are needed during assessment, and the individual's ethnic, cultural, and linguistic background, available experiences, and adaptive functioning within his or her community and cultural setting must be taken into account.

Gender-Related Diagnostic Issues

Overall, males are more likely than females to be diagnosed with both mild (average male:female ratio 1.6:1) and severe (average male:female ratio 1.2:1) forms of intellectual disability. However, gender ratios vary widely in reported studies. Sex-linked genetic factors and male vulnerability to brain insult may account for some of the gender differences.

Diagnostic Markers

A comprehensive evaluation includes an assessment of intellectual capacity and adaptive functioning; identification of genetic and nongenetic etiologies; evaluation for associated medical conditions (e.g., cerebral palsy, seizure disorder); and evaluation for co-occurring mental, emotional, and behavioral disorders. Components of the evaluation may include basic pre- and perinatal medical history, three-generational family pedigree, physical examination, genetic evaluation (e.g., karyotype or chromosomal microarray analysis and testing for specific genetic syndromes), and metabolic screening and neuroimaging assessment.

Differential Diagnosis

The diagnosis of intellectual disability should be made whenever Criteria A, B, and C are met. A diagnosis of intellectual disability should not be assumed because of a particular

genetic or medical condition. A genetic syndrome linked to intellectual disability should be noted as a concurrent diagnosis with the intellectual disability.

Major and mild neurocognitive disorders. Intellectual disability is categorized as a neurodevelopmental disorder and is distinct from the neurocognitive disorders, which are characterized by a loss of cognitive functioning. Major neurocognitive disorder may co-occur with intellectual disability (e.g., an individual with Down syndrome who develops Alzheimer's disease, or an individual with intellectual disability who loses further cognitive capacity following a head injury). In such cases, the diagnoses of intellectual disability and neurocognitive disorder may both be given.

Communication disorders and specific learning disorder. These neurodevelopmental disorders are specific to the communication and learning domains and do not show deficits in intellectual and adaptive behavior. They may co-occur with intellectual disability. Both diagnoses are made if full criteria are met for intellectual disability and a communication disorder or specific learning disorder.

Autism spectrum disorder. Intellectual disability is common among individuals with autism spectrum disorder. Assessment of intellectual ability may be complicated by social-communication and behavior deficits inherent to autism spectrum disorder, which may interfere with understanding and complying with test procedures. Appropriate assessment of intellectual functioning in autism spectrum disorder is essential, with reassessment across the developmental period, because IQ scores in autism spectrum disorder may be unstable, particularly in early childhood.

Comorbidity

Co-occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population. The prognosis and outcome of co-occurring diagnoses may be influenced by the presence of intellectual disability. Assessment procedures may require modifications because of associated disorders, including communication disorders, autism spectrum disorder, and motor, sensory, or other disorders. Knowledgeable informants are essential for identifying symptoms such as irritability, mood dysregulation, aggression, eating problems, and sleep problems, and for assessing adaptive functioning in various community settings.

The most common co-occurring mental and neurodevelopmental disorders are attention-deficit/hyperactivity disorder; depressive and bipolar disorders; anxiety disorders; autism spectrum disorder; stereotypic movement disorder (with or without self-injurious behavior); impulse-control disorders; and major neurocognitive disorder. Major depressive disorder may occur throughout the range of severity of intellectual disability. Self-injurious behavior requires prompt diagnostic attention and may warrant a separate diagnosis of stereotypic movement disorder. Individuals with intellectual disability, particularly those with more severe intellectual disability, may also exhibit aggression and disruptive behaviors, including harm of others or property destruction.

Relationship to Other Classifications

ICD-11 (in development at the time of this publication) uses the term *intellectual developmental disorders* to indicate that these are disorders that involve impaired brain functioning early in life. These disorders are described in ICD-11 as a metasyndrome occurring in the developmental period analogous to dementia or neurocognitive disorder in later life. There are four subtypes in ICD-11: mild, moderate, severe, and profound.

The American Association on Intellectual and Developmental Disabilities (AAIDD) also uses the term *intellectual disability* with a similar meaning to the term as used in this

manual. The AAIDD's classification is multidimensional rather than categorical and is based on the disability construct. Rather than listing specifiers as is done in DSM-5, the AAIDD emphasizes a profile of supports based on severity.

Global Developmental Delay

315.8 (F88)

This diagnosis is reserved for individuals *under* the age of 5 years when the clinical severity level cannot be reliably assessed during early childhood. This category is diagnosed when an individual fails to meet expected developmental milestones in several areas of intellectual functioning, and applies to individuals who are unable to undergo systematic assessments of intellectual functioning, including children who are too young to participate in standardized testing. This category requires reassessment after a period of time.

Unspecified Intellectual Disability (Intellectual Developmental Disorder)

319 (F79)

This category is reserved for individuals *over* the age of 5 years when assessment of the degree of intellectual disability (intellectual developmental disorder) by means of locally available procedures is rendered difficult or impossible because of associated sensory or physical impairments, as in blindness or prelingual deafness; locomotor disability; or presence of severe problem behaviors or co-occurring mental disorder. This category should only be used in exceptional circumstances and requires reassessment after a period of time.

Communication Disorders

Disorders of communication include deficits in language, speech, and communication. *Speech* is the expressive production of sounds and includes an individual's articulation, fluency, voice, and resonance quality. *Language* includes the form, function, and use of a conventional system of symbols (i.e., spoken words, sign language, written words, pictures) in a rule-governed manner for communication. *Communication* includes any verbal or nonverbal behavior (whether intentional or unintentional) that influences the behavior, ideas, or attitudes of another individual. Assessments of speech, language and communication abilities must take into account the individual's cultural and language context, particularly for individuals growing up in bilingual environments. The standardized measures of language development and of nonverbal intellectual capacity must be relevant for the cultural and linguistic group (i.e., tests developed and standardized for one group may not provide appropriate norms for a different group). The diagnostic category of communication disorders includes the following: language disorder, speech sound disorder, childhood-onset fluency disorder (stuttering), social (pragmatic) communication disorder, and other specified and unspecified communication disorders.

Senate

THURSDAY, MAY 24, 1990

(Legislative day of Wednesday, April 18, 1990)

The Senate met at 8:30 a.m., on the expiration of the recess, and was called to order by the President pro tempore.

The PRESIDENT pro tempore. The Senate will come to order. As we prepare to reverence Him who hast been our dwelling place in all generations, the Senate Chaplain will deliver the prayer, Dr. Halverson.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

The son of our man who presides at the guard desk, Art Fleming, will have surgery tomorrow. Let us just have a moment of silent prayer remembering him.

The Lord is thy keeper: the Lord is thy shade upon thy right hand. The sun shall not smite thee by day, nor the moon by night. The Lord shall preserve thee from all evil: He shall preserve thy soul. The Lord shall preserve thy going out and thy coming in from this time forth, and even for evermore.—Psalm 121:5-8.

Eternal God, omnipotent, omniscient, and omnipresent, as the Senators disperse for their varied activities during this recess, may this promise of the Psalmist be fulfilled in their lives. Bless their time with their families and opportunities with constituents and whatever responsibilities fall to them. Help them to find time for rest and recreation and renewal. And bring them safely back to the tasks which await them.

"The Lord bless you, and keep you: The Lord make His face to shine upon thee, and be gracious unto thee: The Lord lift up His countenance upon thee, and give thee peace." Amen.

The PRESIDENT pro tempore. The Senate will be in order.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order the leadership time is reserved.

OMNIBUS CRIME BILL

The PRESIDENT pro tempore. The Senate will now resume consideration of S. 1970, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1970) to establish constitutional procedures for the imposition of the sentence of death, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Thurmond amendment No. 1690, to add a "right versus wrong" standard to the term mentally retarded.

The PRESIDENT pro tempore. The pending amendment is the amendment by Mr. THURMOND, amendment No. 1690, on which there will be 90 minutes of debate equally divided and controlled by Mr. THURMOND and Mr. BIDEN. Mr. THURMOND is recognized.

Mr. THURMOND. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The absence of a quorum has been suggested, and the clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. THURMOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. THURMOND. Mr. President, the underlying bill contains as title I, a modified version of the Federal Death Penalty Act, which I introduced. There are several serious problems with this version of the death penalty and this amendment addresses one of them.

I am opposed to the provision in the underlying bill, S. 1970, which would categorically prohibit the execution of a capital defendant solely because he claims he is mentally retarded without regard to whether the defendant knew the difference between right and wrong.

The amendment I am offering to the bill modifies the underlying death penalty language and is based upon the constitutionally recognized principle that punishment must be directly related to the defendant's personal culpability. It would require that no person could be executed who was mentally retarded and who wholly lacks the capacity to appreciate the wrongfulness of his actions. In other words, it would prohibit the execution of mentally retarded persons who do not know the difference between right and wrong.

This principle was recently affirmed by the Supreme Court of the United States in the case of Penry versus Lynaugh. In this case, Mr. Penry was sentenced to death in Texas for having brutally raped, beaten, and stabbed to death, with a pair of scissors, Pamela Carpenter, the sister of former Redskins kicker Mark Moseley.

The issue before the Supreme Court was whether Penry was sentenced to death in violation of the eighth amendment because the jury was not instructed that it could consider and give effect to mitigating evidence related to his moderate mental retardation when deciding whether the death penalty should be imposed.

The Court held that the jury, in a capital case, must be allowed to consider and give effect to mitigating evidence of mental retardation. In fact, the Court remanded the case to the Texas State court for a new sentencing hearing.

Mr. President, the Penry decision appropriately recognized that it is cruel and unusual punishment to execute severely retarded persons and those lacking in the capacity to appreciate the wrongfulness of their actions.

I do not dispute this holding. The Court went on to note that such retarded persons would not be convicted today since the modern insanity defense generally includes "mental defect" as part of the legal definition of insanity.

In addition, retarded persons would not be considered since the case of Ford versus Wainwright prohibits the execution of persons who are unaware of their punishment and why they are being punished. Proponents of this amendment would have the Nation believe the Supreme Court has authorized the execution of severely retarded individuals. This is not the case.

Where the Supreme Court and this bill's proponents part company is on the issue of whether the eighth amendment categorically prohibits the execution of all mentally retarded capital murderers regardless of whether the murderer knew the difference between right and wrong and was capable of conforming his conduct to the requirements of law.

The Supreme Court held that the eighth amendment does not prohibit the execution of such individuals. The Court concluded that it cannot be said that all mentally retarded people, by virtue of their mental retardation alone, inevitably lack the ability to understand the difference between right

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

and wrong and conduct themselves accordingly.

Mr. President, the Court went on to hold that the concept of "mental age" or "intelligence quotient" is an insufficient basis for the eighth amendment rule since it is imprecise, and does not adequately account for individuals' varying abilities.

I would like to repeat that because I think that is a very key point in this matter.

The Court went on to hold that the concept of "mental age" or "intelligence quotient" is an unsufficient basis for an eighth amendment rule since it is imprecise, and does not adequately account for individuals' varying abilities. Proponents of this legislation would have an IQ test, or a mental age determination by a partisan witness, determine whether a sentence of death is appropriate rather than the determination of jurors and judges sworn to uphold the law. The issue of whether these defendants knew right from wrong would be tossed aside.

Finally, opponents of this amendment suggest that there is a national consensus against executing any, and all, capital murderers who are retarded. Yet, the Supreme Court in Penry found this not to be the case. In fact, only one in three States currently have categorical prohibitions against the execution of the mentally retarded.

In closing, the decision whether to sentence a capital murderer to death should not rest on the imprecise findings of psychologists. Every Senator here today knows that all death row inmates will claim they are mentally retarded and will be able to hire unlimited psychologists who will agree with them. The decision whether to give a particular defendant the death penalty should rest upon the—whether he knew right from wrong and could conform his behavior to the law. The more Congress takes away these decisions from the juries and gives them to statisticians and psychologists, the more we throw into serious question the principles that underlie our criminal justice system.

For these reasons, I urge my colleagues to vote for this amendment.

Mr. President, no right thinking human being wants to execute a person who does not know right from wrong. But just to claim that they are mentally deficient without an appropriate standard does not make sense. In other words, if a man goes out here and kills seven or eight people and then tries to go in court and claim mental retardation without the question being decided as to whether he knew what he was doing—and knew right from wrong, then the Supreme Court says that he can be held responsible for his actions. If he did not know right from wrong, then he would not be held legally responsible. That is the issue here today.

Are we going to follow the Supreme Court's ruling when a man is charged with a crime to say whether he knew right from wrong? If he did not know right from wrong, that is one thing. If he did know right from wrong and he knew what he was doing when he murdered the innocent, why should be not be held responsible? We feel that is the only sensible course to take.

This matter has gone on for years and years in different States and different courts. The Supreme Court has ruled that you will not hold a man responsible if he does not know right from wrong. You will hold him responsible if he does know right from wrong. What fairer test could you have?

This is the standard in most States, it is the standard the Supreme Court of the United States has held is a proper test. We feel that that this amendment that I have offered should be adopted.

I urge my colleagues to take the view the Supreme Court has taken, and the courts in most of the States have taken, and follow this course.

Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The absence of a quorum has been suggested. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BIDEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Delaware is recognized.

Mr. BIDEN. Mr. President, I would like to make it clear what I think this debate and this amendment is all about. This is not about being against the death penalty. So I think it is important we start off there.

I have introduced a bill with the cosponsorship of many of my colleagues that increases the number of offenses for which death is a possible penalty. But I have always believed when we are talking about the death penalty that we should be sure that when that ultimate sanction is being imposed we are as reasonable, we are as fair, and we are as judicious as we possibly can be. And, as a society, once having decided that that ultimate sanction will be applied, we should at least have it reflect, in the process of deciding that, the values that we as a nation and we as civilized people stand for.

I realize there are many among us who disagree with me and with the Presiding Officer and others in this body and suggest that the death penalty under any circumstances for any reason is not a legitimate reflection of what the values of this society should be, and there is healthy and honest disagreement on that point. But I happen to think that there are certain crimes and acts for which society has the right to impose the ultimate sanction.

But, Mr. President, when one concludes that that sanction should be imposed, there are limits upon which one would consider imposing it. For example, no one would consider, to take the extreme—and I do not think anyone disagrees with this—no one would consider that if a 6-year-old or a 5-year-old child committed murder, that we would go out to the public gallows and string up a 6-year-old.

I do not think anyone, on the other hand, would suggest if anyone who was clearly mentally retarded, clearly lacking the intelligence quotient to be able to comport themselves in any way remotely like what we in society would think would be normal behavior—not because of anything they did themselves, not because of anything that they intended, just because they were born that way—that that person should be strung up or sat in an electric chair or given a lethal injection.

So I suspect as we debate this issue and as we come to resolution on it shortly, we are all going to have to reach down inside and decide are there circumstances under which we would need to put someone away because they are such a threat to society, because they are dangerous—are there circumstances where we would put them away, but conclude that we should not put them to death; whereas, someone else, a different age, with a different mental capacity, we might very well conclude they should be put to death? So, what we are talking about here is not death penalty versus no death penalty. We will have that argument later.

We have outstanding colleagues on this floor who believe with every fiber in their being the death penalty is immoral, a negative reflection of the values of Judeo-Christian ethics, and others do not. That is the debate on death. This is a debate on humanity. This is not about death. This is about measuring ourselves in the degree to which we are humane.

It seems to me my distinguished colleague, Senator THURMOND, and I have reached a compromise—at least he and I have—on the death penalty bill. He and I agree on the number of crimes to which the death penalty shall be extended. He and I agree that we should not put someone to death for having committed a crime while they are a minor. We may put them in jail for the rest of their lives, but we do not put them to death. He agrees with that.

What we are disagreeing about here is whether or not someone who is not criminally insane, not the victim of temporary insanity, not someone who acted in the heat of passion, but someone who is mentally retarded, who does not have the mental capacity to achieve the ability to act, ever, as an adult. We all know people that way. We all know families into which people are born who do not have a high enough intelligence quotient to

ever achieve a degree of maturation about which society would say we can justly and fairly measure their actions against every other person in society, notwithstanding they do not have the mental capacity. Nothing in the world that they can do—nothing—can bring them to the point where they will be able to achieve the degree of maturity that their brothers and sisters in the same families, that their mothers or fathers, or that anyone else can.

As I said, some antideath people may think if we are going to have the death penalty the retarded should be eligible, too, as well as those prodeath people who think that as well. But I think we are being incredibly naive, and saying so much about ourselves as a nation that is negative, if we cannot distinguish, if we cannot understand that there are graduations of culpability, and that there should be circumstances under which we as a civilized nation say, my God, am I going to put to death someone with a 45 or a 50 I.Q., who can barely walk and talk, because they committed an offense that resulted in the death of someone else?

We may have to take that person and say take them off the street and they will be put away forever and a day. But, my God, I cannot fathom the notion of strapping down someone with a 60 I.Q. in a chair and saying now you are going to die for your sins against humanity. From their perspective there has already been a sin against humanity committed and it was one committed on them when they were born.

Let me tell my colleagues what else this is not about, and I make this point again: It is not about mental insanity, it is not about instability, it is not about emotional upset; this amendment has nothing to do with John Hinckley; this amendment has nothing to do with the insanity defense; this has nothing to do with temporary insanity or mental derangement. This is about mental retardation, a permanent condition of being stunted in your mental growth. That is what it is about.

If we say here it is humane not to put to death a 15-year-old person who commits an offense, why would we put to death a 30-year-old person, a 40-year-old person, with the mental capacity and growth of a 14-year-old? Why would we do that? Why do we say that if a child commits an offense we will not hang him, but if it is done by a 50-year-old man or a 50-year-old woman with a mental capacity less than that child, oh, we will hang that one?

(Mr. REID assumed the chair.)

Mr. BIDEN. Mr. President, is physical maturation a test of one's ability to function in society? If we do that, then we should go along with a tape measure and decide everybody who is 6 feet should be held at a higher standard, no pun intended, than someone 5 foot 10; someone who is 6 foot 3 at a higher standard than someone 5 foot 7.

This is crazy. What are we? What possible benefit do we get as a nation? What do we say about ourselves when, for the possible one person in probably 20 years who will fall under this Federal death penalty provision for the mentally retarded, we insist as a nation to write on our books that we are going to put mentally retarded people to death.

What I am about to say I think is very important. There is no dispute over what the meaning of retardation is, no dispute, Even the Supreme Court who said you can execute the retarded recognize we all know the definition of retarded. The definition is a person with an IQ of 70 or less, or put another way, with a mental capacity, with a mental age of 12 or less.

Think about how incongruous we are about to become if we vote for this amendment. We are going to say we cannot put to death someone who is less than 17 years old at the time they committed the offense, yet every psychologist, psychiatrist, every physician, everyone agrees that someone lacking the IQ of 70 cannot and does not achieve the socialization, the maturity, the intellectual capability of anyone over the age of 12. We all agree to that. We all understand that.

So we are going to say in the same bill, put them to death at age 12, in terms of their capability. Keep in mind, now, we are not talking about some sort of artsy craftsy liberal notion of was this person insane at the moment. I have 14 psychiatrists who say he is, and 12 that say he is not. I have nine that say what triggered him was his flashback at a moment to an event when he was 7 years old that caused him great pain, and all that malarkey.

We are not talking about that. We are not saying that at all. We are saying if you march into a courtroom a child who happens to be 40 years old, you can look at him, you can talk to him, you can tell that person has an exceedingly low IQ. We are saying we are going to put that person to death.

Senator THURMOND and I are not fighting over the definition of mental retardation. We both know what it means. Our debate is over whether or not we should execute the retarded. Senator THURMOND says that if the retarded person knows the difference between right and wrong, they should be eligible for the death penalty.

I say that we should ban the execution of the retarded, period. It is barbaric. Keep in mind, a 15-year-old knows the difference between right and wrong, and we are all agreeing we are not going to put a 15-year-old to death.

A 10-year-old can know the difference between right and wrong. There is no dispute about that. But we are agreeing, whether they do or not, we are not going to put them to death as a society. We are not going to say, "Ten-year-old kid, you did it; you're dead." Everyone in here is saying we are not going to do that. We are talking about someone who is not insane, not temporarily insane, not temporarily deranged. What we are saying now is very basic and very simple: If you are so mentally stunted in your growth, and observably so; if you have the inability because of your diminished mental capability of ever achieving a level of maturation above the age of someone who is 10 of 12 or 14—we do not even get that high—we are not going to put you to death. We will put you in prison for life with no possibility of probation or parole, but we are just not going to do that.

This is coming from a guy who supports the death penalty. Let my colleagues who are listening to this make no mistake. It is the Biden death penalty bill that we are voting for. It is the Biden death penalty bill that increases the number of offenses for which someone can be put to death. And it is Biden who is saying, but for God's sake, if we acknowledge you should not put children to death, acknowledge we should not as a nation put to death the mentally retarded.

One other point I want to make to my colleagues, this is not a case about dueling experts. Now we are each going to bring into court our experts. It is kind of hard to fake your IQ. You have to be awfully smart to be able to fake for your whole life that your IQ is below 70. I never could quite understand the rationale for trying to do that your whole life, because that is what we are talking about.

It is not someone who walks in and says, "By the way, my client, look at her; she has an IQ of 70. She took a test in the pyschologists's office and she flunked."

They roll in five people who say, "How come I saw that kid go through high school with me? How come that person was able to do—"

A person is not going to fake having an IQ below 70. So this is not about dueling experts: My expert says this person is insane; my expert says this person is not insane. Forget the experts. They are out of it. This is simple common sense and humanity.

By the way, let us talk about what the Supreme Court said, because we all around here, myself included, my colleague Senator THURMOND and my colleague Senator HATCH, quote the Supreme Court in tones of reverence when we agree with them. And when we do not agree with them, like Senator DANFORTH does not, and others do not, on their ruling relative to segregation, we intone them about nine arrogant people sitting on the bench. We can do it all in the same day, in the same breath.

Right now, you will hear the Supreme Court intoned. The Supreme Court says it is all right to put mentally retarded people to death. Just because the Supreme Court said we can, that does not mean we should, because what the Supreme Court went on to

say was that the decision is not up to them.

All the Court said was we could execute a retarded person if we wished; that the moral decision was ours because we in this body, and our colleagues in the House, are supposed to reflect the moral values of the Nation. The Court said, if you do not think there is a moral value consequence, we cannot write it into the law.

Or conversely: Because you did not express whether or not there should be a moral prohibition and a legal prohibition as a society from executing 12-year-olds, mental 12-year-olds and physical 12-year-olds, because of that, the Court said you can do it.

Last year when we passed the death penalty for drug kingpins, we prohibited the execution of the retarded. We made that choice. We did it last year.

For all those of my colleagues going around with good reason and saying they supported that bill that Biden and many others had in there last year that included death for drug kingpins—the thing the President keeps saying he wants and he forgets he has—when my colleagues voted for that, they voted to say we are not going to execute someone who is mentally retarded.

We made that choice once already. My colleagues have already voted once for sanity, for social sanity. Let us make that same choice again.

Let us show that our support for the death penalty is bounded by humanity, that we support the death penalty, but it is bounded by humanity. Let us forbid the execution of people who mentally, under a measure agreed upon by all, are children under the age of 12. We do not execute children. Let us not execute people who never get beyond that stage in their life through absolutely no fault of their own.

In conclusion, there are other death penalty States that ban execution of the retarded, I might add for my colleagues. This is not something wacky. This is not something crazy. This is not something that some of my liberal friends have come to me and said, "Joe, I can support your death penalty ban, but put this in so we can show it up." I never heard anybody talk about the border States in the South being particularly antideath. The State of Georgia says hang them unless they are mentally retarded. The State of Maryland says death unless they are mentally retarded—not insane, mentally retarded. The State of Kentucky says death but not for mentally retarded. The State of Tennessee says death but not for the mentally retarded.

I believe the reason why many more States have not passed such a law is there is the implicit assumption that we would not put to death people who are under the age of 12 in their capability by any measure. These are people who from the time they were born, in most cases, were never able to achieve, never able, through no fault of their own, to reach any degree of maturity. I only hope that they will resist the Thurmond amendment and support the Biden death penalty bill with which the Senator from South Carolina is now only in disagreement on two points, this being one of them.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I yield the distinguished Senator from Utah as much time as he requires.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I think it is time to put this in perspective. If the Biden amendment stays in the way it is and we do not vote for the Thurmond amendment, then I guarantee that in every case they are going to claim mental retardation. Seventy percent of all of the convicted murderers in this country today claim mental retardation, maybe not even at trial but long after trial because of the suffering and pain that they have experienced.

All the distinguished Senator from South Carolina would like to do is allow the mental retardation defense for defendants who do not know right from wrong. But his point is this: If they know right from wrong, they ought to face the consequences. The majority of prisoners on death row today claim that they are retarded, not that they do not know right from wrong, not that they did not commit the murder or murders as is the case; as many, I understand, as 70 percent of them. I can bet you that almost 100 percent will claim it if S. 1970 is enacted and the Thurmond amendment is not added to it.

Let us understand something. The trial comes up. Defendants can raise any issue about mental capacity, disability, or retardation they want. The jury will determine whether that person is mentally retarded enough to not know right from wrong in most jurisdictions in this country. They have a full at bat for showing mental retardation and influencing the jury. They can bring in all the psychiatrists they want, all the social workers, friends and family, all the associates. They can bring in experts galore. The jury then decides, "No, you knew what you were doing. You cold-bloodedly murdered that person, and we find you guilty."

Then the sentencing comes up. They have a right to come in and do it all over again. They can then go completely through it again with psychiatrists, social workers, all the experts they want to bring in to show mitigation. The jury says, "No, you knew what you were doing. You killed these people. You did it in cold blood. It was a cold-blooded murder, and we find, after all of this testimony"—this is a jury of peers—"death is the sentence you should have."

The Biden amendment in this bill then goes and gives them a third time, only it says it a little bit differently. It says, if you can show you are mentally retarded, you cannot be executed. You will stay in jail the rest of your life, but do you not have to suffer the death penalty. This is better than habeas corpus for prisoners. They can raise it at any time.

We went through habeas corpus yesterday, and we are going to vote on it again today, but we went through habeas corpus yesterday and we know that just the appeal process in the Gacy case took 9 years. The trial started in 1980, as I recall, and it went 9 years, to 1989, before the Supreme Court rejected the appeal on the matters affecting the trial. The habeas process starts this year, and, if it is like William Andrews in Utah, you can count on 10 more years after this year and maybe way beyond that if the current Graham habeas language is kept in this bill. That is about 27 years at that point, and he is still not executed. I can guarantee you in that 27 years they will be back in time and time again, time and time again claiming mental retardation. And if they can find a sympathetic forum, they are going to get off from what the jury of their peers decided, what the Court decided, what the appellate process decided, what the habeas process decided, in countless appeals, even if the Graham habeas amendment is what we wind up with in this bill.

All the distinguished Senator from South Carolina is saying is, look, we will give consideration to mental retardation, but, if they know right from wrong, they should not be able to use that ad infinitum and they should not be able to use that over and over again until they finally are able to convince somebody down the road, be it a 27-year period, or 17-year period as in the case of Andrews, or 9-year period as in the case of Gacy that is going on forever—if they find some sympathy in that 27 years, they can then get off from the heinous murder that they have caused.

This is a soft, artsy, liberal approach that is for one reason and one reason only, and that is—and it is a legitimate reason if you believe this way—the folks who advocate it do not want the death penalty under any circumstances, and this is just another way that they can prevent the death penalty.

Mr. BIDEN. Will the Senator yield for a question, a very short one?

Mr. HATCH. Go ahead, on the Senator's time.

Mr. BIDEN. On my own time. Does the Senator think we should put to death a 12-year-old child who knows right from wrong and says, "Daddy, I'm shooting you," boom? I do not think we should put to death a person who is mentally retarded.

I yield the floor.

Mr. HATCH. Wait. Who does not know the difference between right and wrong?

Mr. BIDEN. What is the distinction, if I may ask my friend?

Mr. HATCH. The distinction is that the law takes empathy and has sympathy for children and the law does not have the same degree of sympathy for adults who know right from wrong even though they might not be geniuses.

Mr. BIDEN. Even though they are mentally retarded?

Mr. HATCH. Mental retardation, who determines that? Are we going to determine it by objective tests, because there are none. Are we going to determine that because there is some scientific way of determining mental retardation? There is no way of doing that. It comes down to what experts say, and you have experts on both sides of that question. And, if they can, in that 27-year period I have just outlined, find some sympathetic group, liberal, if you will, they are going to get off. It is that simple. The American people say, we are sick of it. We have jails competely full of these people who have committed cold-blooded, premeditated murder who are adults who know right from wrong, and the majority of them claim they are mentally retarded.

Seventy percent have made claims at one time or another, as I understand it. Look at S. 1970, the Supreme Court ruling in the recent case of Penry versus Lynaugh. In that case, the Court held that the eighth amendment does not categorically prohibit the execution of mentally retarded capital murderers. The Court stated that it may indeed be cruel and unusual punishment to execute persons who are wholly lacking in the capacity to appreciate the wrongfulness of their actions. Such persons however are not likely to be convicted or face the prospect of punishment today, since the modern insanity defense generally excludes mental defect as part of the legal definition of insanity.

Ford versus Wainwright prohibits the execution of persons who are unaware of their punishment. They should not suffer.

There are plenty protections for mental retardation in the law today. I agree with those. I would even go farther. If the crime is not heinous, if it is not willfully meditated, heinous, vicious crimes, I would have a difficult time using the death penalty under those circumstances. But where you have a heinous, vicious, willful, premeditated crime, where the person knows right from wrong, they should not escape from the consequences just because somebody else claims they are mentally retarded.

I remember when people felt that Steinmetz, the greatest mathmetician in the world at the time—because he did not make good grades in certain areas of schooling—was mentally retarded. He turned out to be one of the greatest geniuses in the history of the world.

We all know that every criminal claims that he is not responsible for what happened because of what happened in his past. The court has provided guidance in each case. A criminal cannot be executed if he or she was insane at the time the murder took place, or at the time of trail. The language of the amendment of the Senator from South Carolina follows the courts' criteria. As such, the defendant's mental condition will not be ignored. It has to be considered as a mitigating factor.

So, to summarize, I believe truly mentally retarded people who do not know what they were doing should not be sentenced to death. I agree with that. Any humane person would. But there has to be a standard. That standard ought to be, if they know right from wrong, they should not be able to escape the responsibility for it.

Dalton Prejean willfully and premeditatedly killed a police officer, a Louisiana State trooper. What was his defense? He was mentally retarded.

I have to admit, if he was truly mentally retarded and did not know right from wrong and the jury determined that, he should have gotten life in prison or have been put in a mental institution. But he knew right from wrong. The jury knew he knew right from wrong. The jury knew that he knew what he was doing. He was not mentally retarded enough to not know what he was doing.

That is all the distinguished Senator from South Carolina is saying. If they are mentally retarded, they do not know what they are doing, you are right, Senator BIDEN. But, if they are mentally retarded or claimed they are, they know what they are doing, they did it in a willful, vicious, premeditated way, by gosh, society ought to be able to have this option to prevent it in the future, because mentally retarded people who know right from wrong can be deterred from doing these things if they know there is an ultimate sanction against what they are doing.

But the real issue is this. People who are not mentally retarded, but who will act like they are, who will claim that they are, and who can get any kind of a psychiatrist they want to say that they are, these people will be making these claims ad infinitum, long after the trial where they are protected on the insanity defense, long after the sentences where they are protected on the insanity defense, and long after any mitigating circumstances thereafter, or all of these repetitive habeas appeals or petitions in accordance with the Graham amendment, if that is what we adopt here today.

The fact of the matter is, we have to set some standards that society can live with, that protects society. That is all the distinguished Senator from South Carolina is doing. He is not saying we are insensitive to mental retardation, nor that we are insensitive to murder, nor that we are insensitive to our fellow human beings being killed in a premeditated way, nor that we are insensitive to not doing what we can for those people by stopping it and deterring it. That is why we have the death penalty. It works. Prejean is never going to kill another trooper again.

There are all kinds of other illustrations just like it. In every case, you are going to find these people claiming mental retardation, except where it is patently clear that they cannot. It is just another way of trying to prevent the death penalty. It is clear that is what it is.

I ask my colleagues to listen to the distinguished Senator from South Carolina. He is right on this issue. We ought to support him. Those who are totally against the death penalty, they are going to vote the other way. We understand that. They are principled in doing so. Wrong, but principled.

The fact of the matter is, let us not be misled by this type of an argument that these mentally retarded people are all going to claim. Many, many more are going to get off. There are going to be other Prejeans who kill troopers. People will say, why were we not doing something about it when we had the chance. This is the time to do it. The only way you can do anything about it is to vote for the Thurmond amendment.

I reserve the remainder of our time.

The PRESIDING OFFICER. Without objection, the Senator from Massachusetts is recognized for 10 minutes, the time to be charged to Senator BIDEN.

Mr. KENNEDY. Thank you very much, Mr. President.

I want to state at the outset that I do not come to this debate without strong personal feelings since I have a sister who is mentally retarded. So I have spent some time learning about the affliction and I have strong feelings about this particular amendment.

It is truly amazing to me, Mr. President, that we would be addressing this particular amendment of the Senator from South Carolina on this measure. In 1988, we passed the drug bill containing the first Federal death penalty provision since Furman and Gregg. In that law we excluded from the possible application of the death penalty those with mental retardation. I have to ask my colleagues who are supporting this particular proposal: What has happened in this country over the period of the last 2 years that should lead us now to make sure that we are going to be able to give the ultimate penalty, the ultimate penalty to those who have mental retardation? Where is the crime wave by the mentally retarded? Where is it, Mr. President? What has happened in the last 2 years since the Senate went on record in the 1988 omnibus drug bill against execution of the retarded? That bill did not say we will not punish the retarded; it

did not say we could not give lifetime in prison to those individuals who have the mental capacity of a 12-year-old. It did not say that.

But the pending amendment says that if they have retardation but can tell the difference between right and wrong, they are going to be eligible for the ultimate penalty of death.

In fact, Mr. President, this is not just a little add-on to the mental retardation provision in S. 1970. Include those words of the Senator from South Carolina, and you change the ball game in a very dramatic and significant way. The reason is that the Thurmond amendment describes an empty set. We ought to understand that from various court holdings. If you cannot tell the difference between right and wrong, you probably will not be tried in the first place, whether you are mentally retarded or not. You are probably criminally insane or incompetent to stand trial.

So let us understand the significance of the few little words, the difference between right and wrong. Generally speaking, maybe with rare exceptions, if you cannot tell the difference between right and wrong, you do not go to trial, mentally retarded or not.

So, Mr. President, these few words about telling the difference between right and wrong added to the words that exist in the current proposal effectively say you can go ahead and execute just about anyone, mentally retarded or not.

Mr. President, an argument has been made here on the floor of the U.S. Senate that all criminals are going to say that they are mentally retarded, and therefore escape blame. This is ridiculous on its face and the argument would not be made by anyone who understands mental retardation. Under the existing legislation, the burden of persuasion is upon the defendant to demonstrate that he is mentally retarded and lacks the IQ of 70, part of the definition which has been accepted by the Supreme Court of the United States. We heard just now that there is no definition. That is not so.

The Supreme Court of the United States has recognized that there is a definition, and referenced it in the Penry case. That is the same kind of definition that is included and referred to in the Biden bill currently. It has been accepted by the American Psychiatric Association and by the American Association on Mental Retardation.

Effectively, if you are going to be able to qualify as mentally retarded, you have to demonstrate over the course of a lifetime that you have needed treatment. You cannot just go in and say I am mentally retarded. Any court would throw you out. You have to demonstrate over a lifetime of examinations or medical treatment, over a lifetime, that you have these deficiencies.

So anyone that says that, well, you are going to be found guilty and then you are going to say mental retardation, does not understand what mental retardation is about, has no idea what it is about. None.

Mr. President, it is extraordinary to me that we say on the one hand we will not apply the death penalty to someone who is 16 years old, on one part of the bill, and say, OK, over here someone who only has the mental capability and intelligence of a 12-year-old, we are going to fry them. I cannot understand the logic of that. I just cannot understand that, Mr. President.

This is really a proud moment in the U.S. Senate as we are about to enter the 21st century, about the only democracy in the world that has the death penalty, and we are debating now whether we are going to execute the mentally retarded. That says a lot about our society, about the United States of America. Where are we? Where are we, Mr. President?

The proponents of the amendment say: Let us go ahead and execute those individuals. Let us go ahead. But what are we trying to accomplish? Are we going to try to deter with the punishment of the death penalty, that we are going to take individuals of 70 IQ or less, and we are going to deter them because we here in the United States are passing a death penalty? Does anybody believe that is going to deter the mentally retarded? Of course, it is not. Are we declaring here in the U.S. Senate that we want retribution on those mentally retarded, so we are going to execute them? That is real retribution for our society. Mr. President, that says more about our society today than anything else.

I hope that we will accept the challenge of the Supreme Court in the Penry case, which is very clear. The Court in that particular decision was inviting legislatures to act and respond. A number of the legislatures have done it. Four States have acted and responded, and we have a responsibility to act and respond as well with the criteria that we want in terms of the death penalty.

I believe that what is included in the current legislation, its definition of mentally retardation, is a definition that has been accepted by the Association of Mental Retardation, the American Bar Association, referenced by the Supreme Court of the United States, and would, I believe, be accepted by the broad scope of American public opinion. By adding the language of the Senator from South Carolina, we are effectively gutting any kind of effective protection for the mentally retarded. I hope that the amendment will be rejected. I yield back the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. I yield 5 minutes to the Senator from Wyoming.

The PRESIDING OFFICER. The Senator from Wyoming is recognized for 5 minutes.

Mr. SIMPSON. Mr. President, I have listened to my friend from Massachusetts, who I work with in so many areas and who I enjoy so very much. He is a spirited legislator, and I was off the floor the other day musing in the library when I suddenly heard this ringing voice coming from inside the Chamber—as if the very pillars were to be pulled in upon each other. It was my friend from Massachusetts.

He and I have had spirited debates like that, and he speaks with great passion. He speaks from a source that none of us will really ever know in these areas, because of the loss of two dear and stalwart brothers at the hands of two really sick people. So, that is something we have to weigh and consider always when we hear our friend from Massachusetts speak. That passion is something none of us would ever even perceive.

With that in perspective, to get back to this issue—and it is tough one—for we are talking about killing people. But we are also talking about killing people who have killed other people. And we are talking about people who did it in a hideous, vicious, brutal, and foul way. That is what we are talking about.

My friend says, "What has happened in America? What has happened at this time of our life as a Nation?" I guess the answer is, and it has to be heard, "Too many people are getting away with murder." It is that simple. Too many people are getting away with murder. They are clever. They have a battery of attorneys who join them. We fund attorneys in this country to help the poor and the destitute with divorce, and rent, and problems of everyday life, and for some reason, they all gravitate to these screwballs. They help them petition, and petition, and petition, ad infinitum. That is a sick part of what has happened in society. We set up a system to take care of people and all those funds and energies have been subverted by people who just cannot wait to get in and see if we can find another Birdman or somebody else. At best, you get about 1 out of 1,000.

But I tell you, we must remember that before you can be charged for first degree murder, you must have known the difference between right and wrong. The prosecution must prove it to a jury. The Government must prove that the defendant did the act and did it knowing right from wrong. That is the law. Also, to be convicted of first-degree murder and be sentenced to death, the defendant had to have committed the murder in an especially cruel and beastly and vicious manner. That is now the law.

It is not like the 8-year-old or the 12-year-old shooting his dad and going, "Zap, you are gone, dad." That is not it. Maybe I am the only one that ever was involved in a couple of first degree murders. I have dealt with heavy lidded, slack jawed people, who sat

there after raping and pounding some woman to pieces and I said, "Why did you do that?" And he said, "I like it." And I said; "You sick slob."

I remember doing that with one man, and the "shrink" ran in from the other room and said, "You cannot call him a sick slob." I said, "I just did." And he said, "Oh, now we are going to have to go now and repair 283 hours of psychotherapy."

I said, "I am not sorry that I did that, but since I was court appointed here, I thought I would ask that. Now I have another question, Doctor. What is there to make us feel certain that he won't do it again?" Then the doctor said, "Oh, I hope you would have asked that question outside of his presence. That will set him back another 10 years."

Well, it must have.

Anyway, he was released and he went back into society and he got a job and his roommate did not know what his past was—thank heavens. He got through that period of his life, and then he married. Then he came home 1 day after a day at his job and he sliced his wife up into 83 sections and plastered her on the wall.

So for every story you have to tell me, I have one to tell you. That is what often irritates people on the other side. There are some people in life who are humans only in the name of anatomical essence. Other than that, they are bums, animals, and beasts, and they ought to be salted away.

Mr. President, I support capital punishment. This is crucial to meaningful crime control. I understand, though, that this is a deep and personal moral issue, too—my own father stands exactly and diametrically apart from me on this issue. When he was Governor of Wyoming, he refused to carry out the final act of capital punishment—he commuted the sentences of several on death row. So I understand fully the reasons of those who honestly and openly oppose capital punishment.

I, on the other hand, feel that capital punishment is an important deterrent to crime. I support that concept—there is also an important factor of "social retribution" served by capital punishment.

We should not allow our compassion for the life of a convicted man to dilute our revulsion and disgust at what that individual has done. Capital punishment is reserved for only the most heinous of crimes. These are crimes so brutal, so devious, so evil, that even the strongest-willed individual is sickened by the act.

These murderers are human only biologically—they are animals in terms of behavior. Too many of these individuals commit their atrocities, are apprehended, and sit smugly in court laughing at society and the judicial system—they know that they will likely die of old age before society has its due. They have no remorse or regret. There is no atonement in these people. They are evil through and through, and society is better off without them.

By their own actions, these individuals have let it be known that they will kill again if given the chance—either while in prison or out on parole, they will kill again. The only certain method to assure that these persons do not kill again is through the use of capital punishment.

Government has another role in this issue. The families of the victims of these atrocities are now looking to Government to keep its end of the contract. The victims' families are following the rule of law, they are asking society—Government—us—to do what we promised and mete justice out where this particular form of justice is warranted.

Think very carefully about the kind of beings that are subject to the ultimate sanction. We are not talking about, as prosecuters say: the "garden variety muderer." What we are talking about in capital murders are the most cruel, the most vicious, the most beastly acts of inhumanity imaginable.

These murderers have made their views of the value of human life very clear: to them, human life has no value; to these murderers, human life is beneath contempt, it is something to be "snuffed out" with absolutely no remorse what so ever. Many of these murderers enjoy killing; they may even delight in it! Many want to do it again. Many have. And some of those who are interminably delaying their executions with countless frivolous appeals will kill again, even while they are in prison.

As long as these particular individuals live, society is at risk. We should not waste our compassion on these individuals.

Direct your compassion, instead, to the families and loved ones of the victims of these heinous acts. Consider the suffering that is with them every time an execution is delayed on a string of frivolous appeals. Have compassion for these people, if you have no compassion for the suffering of the victim.

Juries may not consider the suffering of the victim during the guilt phase of a murder trial. Consider also, and have special compassion for, the families and loved ones of future victims. Even if those are the families and loved ones of prisoners who, themselves, are at risk during their terms of incarceration.

We constantly talk about the rights of individuals. A criminal trial is carefully conducted to ensure that the rights of a defendant are guaranteed and scrupulously protected. Great pains are taken to make very sure that a conviction is based purely on the evidence—a great deal of potential evidence is never presented to a jury because of the overwhelming concern for the defendant's rights.

That is why the Thurmond amendment is important—crucial—if we are going to enact meaningful legislation. This amendment clarifies language that would frustrate the desires of the American people.

Many are going to suggest that we are going to be executing mental incompetents if this amendment is passed. That is simply not true. The crafters of the language we are trying to amend know that and the opponents of the Thurmond amendment know that.

The simple fact is this: mental competency must be proven, not argued, but proven, at the beginning of the trial stage. It must also be proven during the sentencing phase. That is already the law.

As the language currently stands, the most heinous, devious, clever and deceptive butchers on death row will be able to fake mental retardation to avoid the only penalty which is appropriate for their acts of butchery. That is what we are talking about. Insidiously clever butchers, and only those kinds of people, get the death penalty. All that we are trying to do with this amendment is to make it clear that the death penalty will not be imposed if it can be proven to the court that the murderer, at the time of execution was completely and wholly "lacking in the [mental] capacity to appreciate the wrongfulness of his act."

Do not allow yourselves to be duped into believing that such a person could ever be convicted of murder in the first degree, a person must be proven to have acted with the knowledge and intent of killing. Planned, premeditated, and carefully orchestrated acts of butchery. As the law is today, a convicted murderer can not be given the death penalty if they do not comprehend right from wrong.

Society has rights, too. Society's concerns are not voiced in a criminal trial. The courts are charged with the duty of enforcing the law and protecting individual rights. It is only here, in Congress, that the rights of society are considered. It is in this body where the rights of society must be debated.

We are charged with the duty of protecting the rights of society. So far, I fear, we have fallen behind in ensuring the right of society to be protected from vicious crime. We have a constitutional and moral obligation to the law-abiding citizens of this country to make sure that they are not put at risk of life and limb needlessly. We now have a unique opportunity to partially fulfill that obligation and enact tough, meaningful, and constitutional criminal law reform. By voting for the Thurmond amendment, we are telling the country that we do, indeed, take our responsibilities seriously.

The PRESIDING OFFICER. The time has expired.

Who yields time?

Mr. THURMOND. Mr. President, I yield 5 minutes to the able Senator from Mississippi.

The PRESIDING OFFICER. The Senator from Mississippi is recognized for 5 minutes.

Mr. LOTT. Thank you, Mr. President, and I thank Senator THURMOND for yielding me this time.

I say to my colleagues, over the past 40 years we have lost control of crime in this country. Society is suffering because of what is happening over all these past 40 years. The courts have made it impossible for us to do the job we need to do in fighting crime in this country. Victims are being ignored. The people who have to pay the true penalty for these crimes that we are talking about and law enforcement officials have been damned with laws that make it impossible for them to do their job.

We have set up procedures to protect the criminals and not just the petty criminal, the hardened, repetitive raper, murderer, drug pusher, the system is set up to protect their rights. What about the rights of society? What about the rights of the victims? What about the ability of law enforcement officials to do their job?

The court systems is collapsing, prisons are bulging, overcrowded with courts saying you cannot have the systems where the jails are not adequate for prisoners.

I had a situation recently in my own State where we were housing some Federal prisoners and the Federal officials called and said, "We are not going to allow them to stay any longer because the jails are not air-conditioned." We are worried about prisoners not having air-conditioning when people out in society working and paying the bills do not always have air-conditioning.

We have a cost of $1.1 billion a year just to house these prisoners. It was asked earlier this morning what has happened to this country. I will tell you what has happened to this country. Crime has happened to this country and the people are fed up with it. They want something done.

What does this amendment do? Is it so dastardly? It says, "and is wholly lacking in the capacity to appreciate the wrongfulness of his actions." Is that asking too much? What is mentally retarded? I still think there is a world of question about where that level is. Is it a 20 IQ, 50? Maybe 70? The Senator referred earlier here as 70 being the magic mark. Or is it 90?

Let us just follow what the Supreme Court and what the law has been interpreted to mean. In the Penry decision, if these criminals have the ability to understand right from wrong, the wrongfulness of their act, they should pay for these ghastly, heinous crimes that they have committed. We have a court system. They can make these decisions.

When we have a person that is only moderately retarded, can he appreciate the wrongfulness of his acts? We can all cite these crimes that have been committed that will turn your stomach. People have had enough in this country. In State after State where for years they could not have capital punishment, they are now going back to it.

There was this recent case in Louisiana where for months, years, there was a fight to prevent the execution of a criminal who had been repetitive in his actions, but the Governor made the decision and the appellate courts made the decision they should go forward with this execution.

We need a minimal standard. Yes, we should consider mental retardation. It is a factor that should be considered and the courts can do that. But if they know what they are doing they should pay the price.

It is time I say to my colleagues, the American people demand that we do more in fighting crime in this country. We have an opportunity with this legislation to address a myriad of questions to put criminals in jail and to excute those criminals who need to be executed.

We cannot have the insanity plea or mental retardation plea or, gee wheez, I am sorry, suffice to punish these criminals that are causing so many problems in this country.

So I say to my colleagues, I urge the adoption of this minimal standard that the Senator from South Carolina has proposed here this morning.

I yield my time.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I yield 2 minutes to the distinghished Senator from Utah.

The PRESIDING OFFICER. The Senator is recognized for 2 minutes.

Mr. HATCH. Mr. President, why does not the other side just admit that they are against the death penalty? They have a principled position there. I disagree with it but it is principled. They use anything to get rid of the death penalty in any way, in any instance.

As a matter of fact, there will be a big loophole if S. 1970 stays the way it is, if we do not put the Thurmond "right or wrong" language in. That language is better than current law or habeas because it means that after they have had a full trial and they brought up all the psychiatrists, social workers, and everybody else they can, to show the person really did not know what that person was doing or was mentally retarded or whatever, and the jury rejects that, and then they have a full hearing on sentencing with all the mitigation brought out and the jury rejects that and sentences the person to death, then from that point on, anytime a capital defendant can show any change, they can raise the point that the person is mentally retarded. As soon as they find, during those years and years and decades under current law, one group that will say he is mentally retarded for any reason, then they can stop the death penalty in that case.

All Senator THURMOND is trying to say is look, and this is the bottom line—neither Senator THURMOND nor I, nor anyone else who is supportive of Senator THURMOND's position, none of us want mentally retarded persons to be sentenced to death, none of us do if they do not know right from wrong, and if a jury of their peers agree, that is the botton line.

The PRESIDING OFFICER. The Senator's time has expired.

Who yields time?

Mr. THURMOND. How much time do we have remaining?

The PRESIDING OFFICER. Three and a half minutes.

Mr. THURMOND. Mr. President, say this: We want to keep the present law. They want to change the present law. If a man is charged with a crime—and I am told according to the statistics about 70 percent of those who are charged with murder claim they are mental retarded—if they are truly mentally retarded and do not know right from wrong, we do not want them executed.

Our amendment does not do that. The amendment says if they do know right from wrong and they have committed a serious murder, a vicious, heinous murder, they should face the ultimate punishment. Under this bill, they would not face capital punishment.

I thought we were going to pass a tough crime bill. If this amendment is adopted, you will have a tougher crime bill on this subject. Make up your minds. Do you want a tougher crime bill or not? Do you favor the death penalty or not?

I have a feeling some of the people taking a position against this amendment do not favor the death penalty under any condition. If a defendant knows right from wrong and commits a serious crime, he should have to pay the ultimate penalty. That is all we are asking. The Supreme Court has decided that. That is the law now. It is the law in most States. Why do the opponents want to undo it?

I say a man who is guilty should not be allowed to claim mental retardation when the facts do show he knew right from wrong. Why should we just pass a law that categorically under all circumstances makes one who is mentally retarded but knows right from wrong, not responsible?

Mr. President, that does not make sense. This Senate knows it does not make sense. Again, if he is truly mentally retarded, does not know right from wrong, our bill does not affect that person at all. But if an individual claims mental retardation when he knows right from wrong, if sentenced to the ultimate punishment, then we feel that decision should stand.

I say let us stand by the present law on this. Do not weaken the law. Why pass a crime bill if you are going to come in here and weaken current law? We thought we were going to pass a

stronger crime bill. This will be a weaker crime bill.

Mr. President, it would be a great mistake not to adopt this amendment. The Supreme Court of the United States has laid down the rule. All we are asking is to stand by that rule. They have approved it. Let us stand by it. Let us protect the law abiding people. Those who are guilty cannot be allowed to avoid appropriate punishment by claiming they are mentally deficient when they are not, when the courts have found they know right from wrong. If they know right from wrong, they are responsible; if they do not know right from wrong, they are not responsible. That is all my amendment does, Mr. President.

The PRESIDING OFFICER. The Senator's time has expired. All time controlled by the Senator from South Carolina has expired.

The Senator from Delaware has 8½ minutes.

Mr. BIDEN. Mr. President, I yield myself 3 minutes.

Everyone gets emotional on this subject, but it is time I think we set a few facts straight. First, this does not change the law. The only Federal law on the books relating to death says you cannot put a mentally retarded person to death. That is the law. Boom, point one.

Second, they do not go free. Nobody, nobody, nobody is suggesting that anyone, mentally retarded or not, will go free.

Third, my friend from Mississippi, the home of Faulkner, would have, in the "Sound and the Fury," put Ben to death. Ben knew right from wrong. But he was mentally retarded.

Under this law, if it is changed, if we changed the Federal law now, we say we can put a mentally retarded person to death. If you watch "L.A. Law," old Benny, he is right for the block. He knows right from wrong. He knows you put your hand on the copy machine, instead of your nose or ears. He knows you do not go and knock people down. But he is mentally retarded as portrayed. Just like the 12-year-old kid and the 16-year-old kid who work in that office knows right from wrong.

We are saying here, all my colleagues looking very smug on this, and saying we are going to get tough. Well, if it is get tough, let us eliminate the provision saying you do not put children to death, you do not put children to death. Lay them out there, too; smack them up against the wall. Strap them in, I say to my friend from Wyoming; let them fry. Let us do that, too. They know right from wrong.

Is anyone here suggesting a 16-year-old does not know right from wrong? But we are agreeing in this bill, even though they know right from wrong, they cannot be put to death. Anyone suggesting a 17-year-old does not know right from wrong? But we are agreeing, in this tough bill, we will not put them to death. And you all are voting for that.

Anybody suggesting that a 14-year-old, any of these pages, do not know right from wrong? But you are agreeing that none of them can be put to death. So you are either having a double standard here or you just do not like mentally retarded people, you have some kind of prejudice or something. I do not know what else it is.

Because you are saying, you are acknowledging, a 12-year-old knows right from wrong, but we are not going to put him to death. You are acknowledging, in your own bill, a 17-year-old knows right from wrong, a 16-year-old knows right from wrong, but we are not going to put them to death. No, we say we are not going to do that because they are 16, because they are 15, because they are 12, because they are 10. But you are saying that if someone—and, by the way, faking mental retardation is a lifetime's work. That is a good one. Faking mental retardation. Fake your way through an IQ of 60. It is easily rebuttable. Come in and say they have an IQ of 60. You can present evidence and say, by the way, how come this guy graduated at the top of our class; how come this guy holds a job as an assistance to Senator BIDEN or Senator SIMPSON; how do they do that?

What are we talking about? You do not fake mental retardation. You either are or you are not.

And so I say to my friend from Mississippi, we have to get tough, we have to start helping victims. I agree. That is why I hope he will agree to put more money in the victims fund in the bill this year, which he does not like to do, I might add. Let us help victims.

We also want to go out and help law enforcement. Well, I say to my friend from Mississippi, let us help them. Vote for the Biden amendment for $900 million for them. Vote to take away those guns that are killing them. Let us help law enforcement.

What is all this stuff? This is about a simple proposition, and that is as a society we have collectively in here and in this Nation made a judgment: we will not put children to death, even though they know right from wrong, even though they may commit a heinous crime, even though they may be an ax murderer; that is what these gentleman and I are voting for.

Now if we say that, what is this tremendous leap? If I can quote in another context, for another reason, a Supreme Court Justice talking about pornography said, "I cannot define it, but I know it when I have seen it." Have any of you never seen a mentally retarded person? They know right from wrong; most know right from wrong. But, nonetheless, they are mentally retarded. Which means not that they are psychotic, not that they are insane, not that they have antisocial behavior that puts them in a category that says they should be not guilty of by reason of mental insanity but because they simply do not have enough gray matter to be able to ever in their entirety of their life, in their whole life, to achieve an ability to operate in society beyond that of a 12-year-old. My God, what have we come to?

I yield what remaining time I have, if I do, to the Senator from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. I cannot improve on the case that the Senator from Delaware has made, Mr. President.

I yield back to him or yield the balance of the time.

Mr. BIDEN. Is there any time left?

The PRESIDING OFFICER. Two minutes.

Mr. BIDEN. Does the opposition have any time?

The PRESIDING OFFICER. No.

Mr. BIDEN. I yield back my time.

The PRESIDING OFFICER. Both sides have yielded their time. Under the agreement, at 10 a.m., the question will recur on the motion to reconsider the vote by which amendment No. 1687 was defeated.

Mr. GRASSLEY. Mr. President, I rise to support the amendment offered by my colleague from South Carolina [Mr. THURMOND].

Societies are created for the mutual protection of the individuals who are the elements of any given society. Where the safety of its citizenry can no longer be guaranteed, a society can no longer justify its reason for existing.

In providing its individual members protection, society must do what is necessary within its legal framework to deter those who would break its laws and to punish, in an appropriate manner, those who choose to do so.

Along with controlling behavior, a criminal law structure worth enforcing must promote respect for life, moral integrity, and property rights.

In a country that cherishes a separation between the state and any officially sanctioned religious practice, the criminal law is one of the few available institutions through which society can make a moral statement and hope to promote the goals I have just mentioned above.

A society makes a moral statement when it punishes. Therefore. to be successful, a society must establish punishments appropriate to what has been offended.

As the scholar Walter Berns once wrote:

> If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made to be awful or awe inspiring is to entitle society to inflict the penalty of death.

Mr. President, it is not enough to proclaim the sanctity and importance of innocent life. Innocent life must be—and can only be—secured by a society that is willing to impose its severest penalty upon those who threaten such life.

As Professor Berns observed:

We think that some criminals must be made to pay for their crimes with their lives, and we think that we, the survivors of the world they violated, may legitimately extract that payment because we, too, are their victims. By punishing them, we demonstrate that there may be laws that bind men across generations as well as across and within nations, that we are not simply isolated individuals, each pursuing his selfish interests.

Consequently, imposition of the death penalty may be necessary, in certain circumstances, to adequately protect society in the future from the possible actions of those who have already committed capital crimes.

Mr. President, by an overwhelming majority, the American public supports the imposition of capital punishment. The American people are usually out in front of politicians on the issues that matter the most—issues of basic fairness, equality, and true justice.

As for the ultimate criminal sanction—the death penalty—the American people are not out to fill some psychological blood lust.

However, they do know that when it comes to heinous, outrageous, and abominable criminal acts, the death penalty is necessary, appropriate, and in these certain circumstances the only just punishment.

To attach a lesser sanction against such criminal acts would, in my view, undermine our system of justice and its ability to deter crimes.

Worse, the lack of the capital sentencing option is an abdication of one of our most fundamental duties: the protection of the people.

To advocate the use of society's ultimate criminal sanction is not something I take lightly. But the Constitution permits us the option to end a convicted criminal's life if certain prescribed procedures are followed, including appropriate and constitutional due process procedural safeguards.

As a longstanding and strong supporter of the death penalty, I do not believe in an across-the-board absolute prohibition against imposing the death penalty based solely on mental impairment.

I opposed a similar provision in the Judiciary Committee because the issue should not simply be one of whether a capital defendant is mentally retarded, but whether or not the defendant understands the difference between right and wrong.

This issue was considered by the Supreme Court in Penry versus Lynaugh, in 1989. In this case, the Court, when addressing the issue of imposing the death penalty on an individual who is mildly retarded articulated a standard of whether the defendant knows the difference between right and wrong.

The Court held that if a mentally retarded individual has the cognitive and moral capacity to act with a degree of culpability associated with the death penalty, it may be imposed.

It should be acknowledged that proponents of the categorical prohibition against the execution of mentally deficient capital murderers are also, for the most part, against the death penalty.

As a part of their campaign against the death penalty, they would have us believe the Supreme Court has authorized the execution of severely retarded individuals. This simply is not true. In fact, the Court noted that retarded persons would not be convicted today because the modern insanity defense includes "mental defect" as part of the legal definition of insanity.

Further, the case of Ford versus Wainwright prohibits the execution of those who are unaware of their punishment and why they might suffer its consequences. True insanity is and should be a valid mitigating factor in the fact finder's deliberations.

Therefore, it would be inappropriate to find that all mentally impaired people—by virtue of their mental impairment alone—inevitably lack the ability to understand the difference between right and wrong, nor do they understand the ultimate consequences of their choice of conduct.

The Thurmond amendment now before us embodies the holding of the Court in its decision in Penry. Senator THURMOND offered similar language, which I supported, to the general Federal death penalty bill during its consideration by the Senate Judiciary Committee.

The effect of the Thurmond amendment would be to prohibit the execution of those who are mentally deficient and who lack the ability to appreciate the wrongfulness of their actions.

I believe this provision should be a part of any general Federal death penalty statute because it recognizes that severely mentally deficient individuals who do not understand the difference between right and wrong should not and would not be subject to society's ultimate criminal sanction.

The Thurmond amendment is humanitarian. It protects the valid rights of the mentally deficient who do not know the wrongfulness of their actions. It allows the finder of fact to consider the ability of the defendant to know the difference between right and wrong.

However, it also recognizes when Congress seeks to categorically limit or totally eliminate important fact determinations from juries, it tends to give these decisions to statisticians and psychologists. I believe to do so throws into serious question the principles that underlie the operation of our criminal justice system.

Mr. President, in our system of justice, computers do not hand down sentences. So there is no role for statisticians or social scientists in the courtroom. Rather, for more than 200 years, our system has dispensed justice through the efforts of prosecutors, judges, and juries. They take an oath to serve the ends of justice.

Lady Justice, unlike the social scientists, is blind. She dispenses justice without regard to color, race, religion, gender, or national origin. Lady Justice hears only the facts of the case. She serves the facts, not some political agenda.

The Congress should not impose an arbitrary, across-the-board, and blanket standard—against the valid will and common sense of the people—upon prosecutors, judges, and juries.

If a defendant knows the difference between right and wrong, and commits a heinous and abominable crime of murder, he is responsible for the consequences of his own actions. And he should be liable to society's ultimate criminal sanction.

I urge my colleagues to support the Thurmond amendment.

Mr. BIDEN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BIDEN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. LIEBERMAN). Without objection, it is so ordered.

VOTE ON MOTION TO RECONSIDER

The PRESIDING OFFICER. The question is on agreeing to the motion to reconsider the vote by which the amendment numbered 1687 was defeated.

The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Hawaii [Mr. AKAKA] is necessarily absent.

Mr. SIMPSON. I announce that the Senator from Rhode Island [Mr. CHAFEE] is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced, yeas 52, nays 46, as follows:

[Rollcall Vote No. 106 Leg.]

YEAS—52

Armstrong	Gorton	Murkowski
Bond	Gramm	Nickles
Boren	Grassley	Nunn
Boschwitz	Hatch	Pressler
Breaux	Heflin	Rockefeller
Burns	Heinz	Roth
Byrd	Helms	Rudman
Coats	Hollings	Shelby
Cochran	Humphrey	Simpson
Cohen	Johnston	Specter
D'Amato	Kassebaum	Stevens
Danforth	Kasten	Symms
Dixon	Lott	Thurmond
Dole	Lugar	Wallop
Domenici	Mack	Warner
Durenberger	McCain	Wilson
Exon	McClure	
Garn	McConnell	

NAYS—46

Adams	Bingaman	Burdick
Baucus	Bradley	Conrad
Bentsen	Bryan	Cranston
Biden	Bumpers	Daschle

DeConcini	Kerrey	Pell
Dodd	Kerry	Pryor
Ford	Kohl	Reid
Fowler	Lautenberg	Riegle
Glenn	Leahy	Robb
Gore	Levin	Sanford
Graham	Lieberman	Sarbanes
Harkin	Metzenbaum	Sasser
Hatfield	Mikulski	Simon
Inouye	Mitchell	Wirth
Jeffords	Moynihan	
Kennedy	Packwood	

NOT VOTING—2

Akaka Chafee

So the motion was agreed to.

The PRESIDING OFFICER. The Chair recognizes the majority leader.

Mr. MITCHELL. I ask unanimous consent that the vote on the Thurmond amendment, No. 1687, occur at 11 a.m. this morning, and that the vote now scheduled to occur at 11, occur immediately following the disposition of the Thurmond amendment.

The PRESIDING OFFICER. Is there objection?

Mr. SPECTER. Reserving the right to object, Mr. President, I do not understand. What time would the vote be on the underlying amendment?

Mr. MITCHELL. At 11 o'clock this morning.

Mr. President, I withdraw my request and I ask that we have a voice vote on the question.

The PRESIDING OFFICER. Is there objection?

Mr. SPECTER. Reserving the right to object, I did not hear what the Senator said.

Mr. MITCHELL. I asked to be done what the Senator just asked me to do.

Mr. SPECTER. Then I will not object.

AMENDMENT NO. 1687

The PRESIDING OFFICER. The question is now on agreeing to amendment No. 1687.

The amendment (No. 1687) was agreed to.

Mr. HATCH. I move to reconsider the vote.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. MITCHELL. Mr. President, may I have the attention of Members of the Senate.

The PRESIDING OFFICER. The Chair recognizes the majority leader.

Mr. MITCHELL. Mr. President, the Senate is about to recess to permit Senators to attend the ceremony outside on the Capitol steps honoring 40 years of American military heroism. These are the men and women who, in the post World War II period, have given their lives and their limbs to defend our Nation. I hope that as many Members of the Senate as possible will take the time and trouble to just walk a few steps outside of this Senate Chamber to help us pay tribute to these courageous men and women. That is the reason the Senate will go into recess momentarily, and I urge and encourage my colleagues to attend.

RECESS UNTIL 11 A.M.

The PRESIDING OFFICER. Under the previous order, the Senate will now stand in recess until the hour of 11 a.m.

Thereupon, the Senate, at 10:26 a.m., recessed until 11:01 a.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer [Mr. CRANSTON].

AMENDMENT NO. 1690

The PRESIDING OFFICER. The question occurs now on the Thurmond amendment, No. 1690.

Mr. SPECTER. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from South Carolina [Mr. THURMOND].

The yeas and nays have been ordered and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BOREN (after having voted in the affirmative). On this vote I have a pair with the distinguished Senator from Hawaii [Mr. AKAKA]. If he were present and voting, he would vote "nay." If I were at libety to vote, would vote "yea." I withdraw my vote.

Mr. CRANSTON. I announce that the Senator from Hawaii [Mr. AKAKA], is necessarily absent.

Mr. SIMPSON. I announce that the Senator from Rhode Island [Mr. CHAFEE], is necessarily absent.

I further announce that, if present and voting, the Senator from Rhode Island [Mr. CHAFEE], would vote "nay."

The PRESIDING OFFICER (Mr. KERREY). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 38, nays 59, as follows:

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

BOREN, for

[Rollcall Vote No. 107 Leg.]

YEAS—38

Armstrong	Heflin	Nickles
Bond	Helms	Pressler
Burns	Hollings	Robb
Byrd	Humphrey	Roth
Coats	Kasten	Rudman
Cochran	Lieberman	Shelby
Dixon	Lott	Simpson
Exon	Lugar	Symms
Garn	Mack	Thurmond
Gorton	McCain	Wallop
Gramm	McClure	Warner
Grassley	McConnell	Wilson
Hatch	Murkowski	

NAYS—59

Adams	Cohen	Ford
Baucus	Conrad	Fowler
Bentsen	Cranston	Glenn
Biden	D'Amato	Gore
Bingaman	Danforth	Graham
Boschwitz	Daschle	Harkin
Bradley	DeConcini	Hatfield
Breaux	Dodd	Heinz
Bryan	Dole	Inouye
Bumpers	Domenici	Jeffords
Burdick	Durenberger	Johnston
Kassebaum	Mikulski	Rockefeller
Kennedy	Mitchell	Sanford
Kerrey	Moynihan	Sarbanes
Kerry	Nunn	Sasser
Kohl	Packwood	Simon
Lautenberg	Pell	Specter
Leahy	Pryor	Stevens
Levin	Reid	Wirth
Metzenbaum	Riegle	

NOT VOTING—2

Akaka Chafee

So, the amendment (No. 1690) was rejected.

Mr. KENNEDY. Mr. President, I move to reconsider the vote by which the amendment was rejected.

Mr. BIDEN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Under the previous order, the Senator from Florida is to be recognized to offer an amendment on which debate is limited to 2 hours equally divided and controlled by the Senator from Florida and the Senator from Delaware.

Mr. BIDEN. Mr. President, I ask unanimous consent that I be given 1 minute to make a brief explanation of something said earlier in the debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BIDEN. Mr. President, during the debate on the last amendment I said:

> We are saying here, all my colleagues looking very smug on this, and saying we are going to get tough. Well, if it is get tough, let us eliminate the provision saying you do not put children to death, you do not put children to death. Lay them out there, too; smack them up against the wall. Strap them in, I say to my friend from Wyoming; let them fry. Let us do that, too. They know right from wrong.

My friend from Wyoming and others may have thought I was implying that I thought he wished to see children who committed a capital offense put to death. That was not my intention. That is not what I meant to say. I do not think I did say that. I know better, as well as anyone here, my friend from Wyoming has a great deal of compassion and wisdom. I would not even remotely suggest that that is what he had in mind.

It was by way of trying to compare the law saying minors do not get put to death, to what we would be saying had we voted the other way. I thank my colleague.

The PRESIDING OFFICER (Mr. FORD). The time of the Senator has expired.

Mr. BIDEN. Mr. President, I ask unanimous consent my friend from Wyoming be able to proceed for 1 minute.

The PRESIDING OFFICER. Without objection, the Senator may proceed for 1 minute.

Mr. SIMPSON. Mr. President, that is a very kind gesture on behalf of the Senator from Delaware. It is much appreciated and relieved. It was not quite necessary. I understood the spirit and the energy of the debate, and he is a

EXECUTION SCHEDULED FOR JANUARY 14, 2021

No. 21-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

COREY JOHNSON, A/K/A O, A/K/A CO,

Defendant – Appellant.

CAPITAL CASE

INFORMAL PRELIMINARY BRIEF, WITH REQUEST FOR CERTIFICATE OF APPEALABILITY

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

INTRODUCTION

Corey Johnson, the Appellant in this capital case, is intellectually disabled. Federal law explicitly prohibits the government from implementing his death sentence—among the first in the modern era of the death penalty—on account of his infirmity, which is established by overwhelming evidence that no court or jury has ever heard. His disqualifying condition notwithstanding, the government is planning to carry out his execution on Thursday, January 14.

As explained in this brief, the district court erred in its interpretation of the federal statute prohibiting a death sentence from being "carried out upon a person who is mentally retarded." Based on that erroneous reading, which is contradicted by the statute's plain language, the legislative history, and the government's own long-standing interpretation, the district court improperly determined Mr. Johnson's pleading to be successive. For the reasons set forth herein, Mr. Johnson respectfully requests that this Court grant a Certificate of Appealability ("COA") and remand his case to the U.S. District Court for the Eastern District of Virginia for further proceedings.

STATEMENT OF JURISDICTION

Corey Johnson moved to prohibit the carrying out of his death sentence under 28 U.S.C. § 2255 (the "§ 2255 Motion" or "2255 Mot."). The district court dismissed the § 2255 Motion as successive and denied a COA. On January 4, 2021,

Mr. Johnson noticed his appeal, which is from a final order. Pursuant to Fed. R. App. P. 22(b)(1), (2), and L.R. 22(a), Mr. Johnson files this brief and requests a COA. If granted, jurisdiction will arise under 28 U.S.C. §§ 1291, 2253.

STATEMENT OF THE ISSUES

Corey Johnson respectfully requests that this Court issue a certificate of appealability on the following question:

Whether a second-in-time § 2255 motion filed by a death-sentenced federal prisoner seeking to establish his intellectual disability at the time of the implementation of his sentence, pursuant to the express language of 18 U.S.C. § 3596(c) and 21 U.S.C. § 848(*l*), must be deemed successive, even where the evidence proving his disability has never been considered by any court?

STATEMENT OF THE CASE

A. Trial and Sentencing Proceedings

Corey Johnson's 1993 trial was among the first federal capital trials in the modern era of the death penalty. Mr. Johnson and six co-defendants were charged in a 33-count indictment with offenses arising from a drug conspiracy pursuant to the Anti-Drug Abuse Act (the "ADAA"). (4/24/92 Indictment, Dkt. 1.) The

government sought the death penalty for three of the co-defendants[1]—Mr. Johnson, Richard Tipton, and James Roane—and tried them together.

In February of that year, the jury convicted Mr. Johnson of all the counts in the government's superseding indictment, including seven murders in the course of a continuing criminal enterprise ("CCE") under 21 U.S.C. § 848(e)(1)(A).[2]

At his penalty phase hearing, Mr. Johnson's defense team presented evidence to mitigate the death penalty, much of it through a University of Virginia psychologist, hired by the defense, named Dewey Cornell.[3] Dr. Cornell testified about Mr. Johnson's tumultuous and traumatic childhood, and what he

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[1] The government initially filed a notice of intent to seek the death penalty against co-defendant, Vernon Lance Thomas who was eventually convicted of killing four people. 2255 Mot., Ex. 62 (10/28/92 Notice of Intention to Seek Death Penalty as to Mr. Thomas). Mr. Thomas's case was severed from that of the other three defendants for reasons related to the availability of his appointed counsel. Following authorization, but prior to trial, Mr. Thomas presented an expert report to the government that concluded Mr. Thomas had an IQ of 71 and was "mentally retarded." Shortly thereafter, the government withdrew its death authorization, and Mr. Thomas faced a maximum penalty of life without parole at his trial. 2255 Mot., Ex. 66 (4/15/93 Mot. to Have Def. Declared Mentally Retarded).

[2] The indictment also charged Mr. Johnson with conspiracy to violate provisions of the ADAA under 21 U.S.C. § 846, murder in the course of a CCE under 21 U.S.C. § 848(e)(1)(A), using a firearm during a crime of violence under 18 U.S.C. § 924(c), possession of cocaine base with the intent to distribute under 21 U.S.C. § 841(a)(1), and killing and maiming in aid of racketeering under 18 U.S.C. § 1959(a). 2255 Mot., Ex. 61 (Second Superseding Indictment).

[3] The defense specifically asked Dr. Cornell to: (1) determine whether Mr. Johnson was competent to stand trial; (2) determine if he was criminally responsible for his crimes; and (3) gather, analyze, and prepare potential mitigation evidence for the capital sentencing hearing. 2255 Mot., Ex. 15 ¶ 9 (9/20/16 Aff. of C. Cooley).

characterized as a severe learning disability. 2255 Mot., Ex 7 (2/10/93 Trial Tr. 3574).[4] Based on Dr. Cornell's conclusion that Mr. Johnson suffered from a broad learning disability, and that, having scored score a 77 on the IQ score the Dr. Cornell had administered, he could not have mentally retardation, the defense informed jurors in both opening and closing arguments that Mr. Johnson was *not* mentally retarded and that they would not be asked to make such a determination. 2255 Mot., Ex. 7 (2/10/93 Trial Tr. 3547); 2255 Mot., Ex. 9 (2/12/93 Trial Tr. 3921). The jury recommended Mr. Johnson be sentenced to death on each of his CCE convictions.[5] 2255 Mot., Ex. 65 (2/16/93 Special Findings, Dkt. 508).

[4] Exhibits to the § 2255 Motion are located in the Joint Appendix at J.A.148-J.A.1434.

[5] Mr. Johnson's death sentences, it should be noted, are infirm on several grounds. He is therefore currently seeking authorization from the U.S. Court of Appeals for the Fourth Circuit to challenge his § 924(c) convictions under *United States v. Davis*, 139 S. Ct. 2319 (2019). Mot. for Authorization to File a Successive Mot. Pursuant to 28 U.S.C. § 2255(h)(2), *In re Corey Johnson*, No. 20-8 (4th Cir. May 22, 2020), ECF No. 2-1. He is also appealing to the Fourth Circuit the denial of relief he sought pursuant to the First Step Act. Mem. Order (E.D. Va. Nov. 19, 2020), ECF No. 75, *appeal docketed*, *United States v. Johnson*, No. 20-15 (4th Cir. Nov. 23, 2020). Mr. Johnson has also separately filed a Motion for Authorization in this Court raising two claims under the Eighth Amendment, one arguing that in light of the unique circumstances of his case, a previously unavailable *Atkins* claim should be heard, and the other asserting the unreliability of his death sentences.

B. Appeal and 28 U.S.C. § 2255 Proceedings

Mr. Johnson timely appealed to this Court, raising issues relating to the guilt and penalty phases of his trial. No issue regarding intellectual disability was raised.

In the subsequent motion for collateral relief pursuant to 28 U.S.C. § 2255, Mr. Johnson's attorneys alleged for the first time that Mr. Johnson could not be sentenced to death because he was intellectually disabled. His attorneys did not, however, argue that Mr. Johnson met the criteria for a diagnosis of intellectual disability nor present any evidence to prove his intellectual disability. Instead, they asserted that trial counsel were ineffective for failing to challenge the IQ score results of Dr. Cornell's testing of Mr. Johnson; and that if Dr. Cornell had adjusted all of Mr. Johnson's IQ scores using the Flynn Effect, that would have led him to more fully evaluate Mr. Johnson for intellectual disability.[6]

The district court, in 2003, granted the government's motion for summary judgment, denying Mr. Johnson relief on all grounds. 2255 Mot., Ex. 73 (5/1/03

[6] Although at the time it was not widely accepted, the Flynn Effect is now routinely regarded as valid, "persuasive," and "best practice," by the courts considering federal capital cases, including those in the Fourth Circuit, and must be taken into account when expert testimony supports its use. *See United States v. Davis*, 611 F. Supp. 2d 472, 488 (D. Md. 2009); *United States v. Roland*, 281 F. Supp. 3d 470, 503 (D. N.J. 2017); *see also United States v. Salad*, 959 F. Supp. 2d 865, 872 n.10 (E.D. Va. 2013) ("The Flynn Effect describes a documented increase in IQ levels over time. As a result, IQ tests must be periodically re-normed to account for the population becoming more intelligent; a score on an outdated test might overstate IQ relative to the contemporary population.").

Mem. Op., Dkt. 896). In light of the fact that no new evidence had been offered with respect to the issue of Mr. Johnson's mental retardation, the Court found that "the record before the Court demonstrates that Johnson is not mentally retarded" and that Mr. Johnson's trial counsel was not ineffective for failing to raise the issue that Mr. Johnson's IQ score was overstated because counsel had reasonably relied on Dr. Cornell's assessment at trial. *Id*. at 82-84.

Post-conviction counsel appealed to this Court, arguing the district court had made a mistake in refusing to consider scores corrected for the Flynn Effect because the court had simply assumed that Dr. Cornell had considered the Flynn Effect, even though no evidence supported that assumption. 2255 Mot., Ex. 74 at 145-46 (Br. for Appellants Cory Johnson and Richard Tipton, *United States v. Johnson*, No. 03-13(L), 03-26, 03-27 (4th Cir. Feb. 17, 2004) (Excerpt)). This Court did not rule on that issue directly but instead adopted the district court's rationale—that the IQ score Dr. Cornell had assigned Mr. Johnson placed him outside the diagnostic range for mental retardation and that ended the inquiry. The Court also agreed with the district court that Mr. Johnson's counsel were not ineffective for failing to consider the Flynn Effect at sentencing because they were "under no mandate to second-guess" Dr. Cornell's report. *United States v. Roane*, 378 F.3d 382, 408-09 (4th Cir. 2004); *see also id.* at 408 ("Johnson exhibited an IQ of 77, which indicated a 'generally impaired intelligence,' placing him 'just above the level of mental retardation.'").

The U.S. Supreme Court denied his subsequent petition for certiorari. *Johnson v. United States*, 546 U.S. 810 (2005).

In 2006, the government set an execution date for Mr. Johnson that was stayed as a result of litigation challenging the government's planned method of execution. That stay remained in effect until September 20, 2020, when it was vacated by the district court. On November 20, 2020, the Bureau of Prisons notified Mr. Johnson that they intended to execute him on January 14, 2021. Shortly thereafter he filed the § 2255 Motion in district court which is the subject of this appeal.

SUMMARY OF ARGUMENT

The Court should grant Mr. Johnson's request for a COA, reverse the district court's dismissal of his § 2255 Motion, and remand this case to the Eastern District of Virginia for further proceedings, because his § 2255 Motion was, contrary to the district court's determination, non-successive. Rather, the claim asserted in his motion is based on a provision of federal law—18 U.S.C. § 3596(c) (which the district court correctly found was identical to now-repealed 21 U.S.C. § 848(*l*) under which Mr. Johnson was convicted)—that prohibits the implementation of his death sentence on account of his intellectual disability, and provides for review when an execution date is imminent. His asserted claim became timely when the government set his execution date.

This reading of the provision is correct based on the plain language of § 3596(c), which demonstrates that a determination of mental status must be made when an execution date is set; is supported by the government's own concessions making abundantly clear that because the provision concerns "implementation" of the sentence, it governs the process at the time the execution date is set and not earlier; and is evident when considered in the broader context of the other provisions in the statute as well as legislative history that demonstrate Congress's intent to ensure that intellectually disabled individuals like Mr. Johnson did not slip through the cracks and that federal law would not condone their execution. The decision of the district court below that it did not have jurisdiction to entertain this claim—although it clearly can be raised if viable at the time of execution—is, respectfully, incorrect and at the very least debatable by jurists of reason.

ARGUMENT

I. COREY JOHNSON IS INTELLECTUALLY DISABLED

Overwhelming evidence establishes that Corey Johnson is intellectually disabled and ineligible for execution. Three of the nation's most respected experts in the field—Daniel J. Reschly, Ph.D., J. Gregory Olley, Ph.D., and Gary N. Siperstein, Ph.D.—all of whom comprehensively evaluated Mr. Johnson under modern medical standard—independently agree that he meets the clinical and legal criteria for intellectual disability: (1) he has significant deficits in intellectual functioning, usually represented by IQ scores of 75 or below; (2) he exhibits

significant deficits in adaptive functioning (i.e., "the inability to learn basic skills and adjust behavior to changing circumstances"); and (3) the onset of his impairment was before the age of 18. *See* 2255 Mot., Ex. 75 (American Association on Intellectual and Developmental Disabilities Definition Manual ("AAIDD-11")); 2255 Mot., Ex. 77 (Diagnostic and Statistical Manual of Mental Disorders ("DSM-5")); *see also Moore v. Texas*, 137 S. Ct. 1039, 1042, 1045 (2017) (quoting *Hall v. Florida*, 572 U.S. 701, 710 (2014), 1048 (recognizing these standards)); *see also* 2255 Mot. at 15-20.

Multiple IQ tests administered to Mr. Johnson when he was a child and young adult—which included Flynn-adjusted[7] scores of 72 at age 8, 75 at age 12, 65 at age 16, and 73 at age 23 —as well as other contemporaneous records created during his childhood, adolescence, and young adulthood contain evidence proving his intellectual disability. *Id.* at 20-43 (setting forth in greater depth the evidence of Mr. Johnson's intellectual disability). The records are corroborated by statements from more than two dozen family members, friends, teachers, mental health professionals, and others who have known Mr. Johnson and witnessed his

[7] Under the prevailing clinical standards, these IQ testing results reflect scores corrected for the Flynn Effect, which as noted previously is a testing phenomenon that causes IQ scores to inflate over time and requires scores to be corrected accordingly. 2255 Mot. at 17-18. Even uncorrected (though law and medicine demand they all should be corrected), two of the scores still demonstrate Mr. Johnson's intellectual functioning is consistent with intellectual disability. *Id*. at 21-24.

profound limitations; this evidence is confirmed by adaptive behavior instruments administered to individuals who knew Mr. Johnson well during his childhood and whose standardized scores place him solidly within the intellectual disability range for adaptive functioning. *Id.*

Indeed, bearing out these findings, Mr. Johnson's social history is rife with telltale experiences of an intellectually disabled man with profound intellectual and adaptive deficits. He remained in the second grade for three years; repeated third and fourth grades; and, as he got older, fell further and further behind academically despite having a strong motivation to learn. *See e.g.*, *id.* at 25-29. At age eight, Corey Johnson had "no concept of number facts, no reading skills, [could not] retain sight vocabulary words," and "had difficulty saying the alphabet"; while in the second grade, when asked his birthday, he thought it was in March even though he was actually born in November. *See e.g.*, *id.* at 25, 30 (internal citations omitted). At age thirteen, he could barely write his own name; and while he knew there were 12 months in the year, he could recite them only up to August. *See e.g.*, *id.* at 27, 30. Corey was not able to tell time or perform arithmetic beyond a third-grade level. *Id.* at 30. At age 18, his teachers determined that he was unable to pass school competency tests, and he ultimately left high school without graduating. *Id.* at 26. In his early twenties, achievement testing demonstrated Mr. Johnson's reading and writing abilities were no higher than the second-grade level, and when he was last tested at age 45, he was still at an elementary school level. *Id.* at 28-29.

Corey Johnson struggled throughout his life with self-care: He wet and soiled his bed until he was 12 years old and needed constant reminders to keep himself clean. *Id.* at 37-38. As he entered his teen years and into his adulthood, Mr. Johnson continued to function like a younger child. At school, without the assistance of an assigned aide, he would get lost on his way back to class and wander into other classrooms. *Id.* at 38. He could not be expected to go to the store and receive correct change. *Id.* at 31. He was never able to make his way alone through any but the most familiar streets, even as he approached adulthood. *Id.* at 38. He has never managed to live on his own or hold down a job. *Id.* at 38-40. Displaying other hallmarks of intellectual disability, Mr. Johnson had "difficulty in understanding social cues and norms," and was, over the course of his life, the quintessential follower, easily influenced by and victimized by peers, who took his money, tricked and manipulated him; his desire to be accepted by them—to, as a cousin put it, "fit in with the crowd"— also led him to engage in risky behavior. *Id.* at 33-36 (citations omitted).

Mr. Johnson is irrefutably intellectually disabled as is evident from the evaluations of the field's foremost experts that were before the court below. He is, nonetheless, now scheduled to be executed on January 14, 2021. But he cannot be executed without the government violating the law.

II. LEGAL STANDARD FOR CERTIFICATE OF APPEALABILITY

The Supreme Court has determined that the "substantial showing" necessary for a COA to issue under the Antiterrorism and Effective Death Penalty Act (the "AEDPA")—a pre-condition to appellate review of the denial of a motion brought pursuant to 28 U.S.C. § 2255—presents a low bar. 28 U.S.C. § 2253(c)(2). Proof of ultimate success is not required and the grant of a COA is especially favored in a capital case.

The leading cases on this issue are *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Slack v. McDaniel*, 529 U.S. 473 (2000). These opinions demonstrate that the Supreme Court has adapted to the AEDPA the standards that were formerly applied to the issuance of a certificate of probable cause in pre AEDPA habeas litigation. *See Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983). In elaborating on the "substantial showing" language of the statute, *Miller-El* explained that the standard is met if "jurists of reason could disagree with the district court's resolution" of the claim or that "the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. The determination of whether the standard is met is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id*. at 336. In *Slack*, the Court noted that an applicant met the standard if it was "debatable" whether the district court's assessment of the claim was correct. *Slack*, 529 U.S. at 484.

The Supreme Court also has been clear that a COA application does not have to show "entitlement to relief." *Miller-El*, 537 U.S. at 337. "The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Id*. A COA should issue even if it is unclear that relief will ultimately be obtained. *Id*. at 337-38 (holding that the COA standard "does not require a showing that the appeal will succeed," but merely "'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." (citation omitted)).

The fact that this is a death penalty case further counsels in favor of granting a COA. In *Barefoot*, the Court emphasized that "in a capital case, the nature of the penalty is a proper consideration" in determining whether to certify an issue for appeal. *Barefoot*, 463 U.S. at 893.

III. "SECOND OR SUCCESSIVE" IS A TERM OF ART THAT DOES NOT APPLY TO ALL SECOND-IN-TIME § 2255 MOTIONS

As the Supreme Court has repeatedly explained, the phrase "second or successive" "does not simply 'refe[r] to all [§ 2255] applications filed second or successively in time.'" *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (first alteration in original) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). Rather, the phrase is a "term of art" that takes its full meaning from the Supreme Court's case law, including decisions predating the enactment of the AEDPA. To

determine whether a second-in-time pleading should be deemed successive, a court must look to the purposes of the AEDPA, which are "to further the principles of comity, finality, and federalism." *Panetti*, 551 U.S. at 947.[8] The Supreme Court has cautioned courts to ensure that "petitioners [do not] 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review'" and to "resist[] an interpretation of the statute that would . . . 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Id*. at 945-46 (citations omitted); *see also Castro v. United States*, 540 U.S. 375, 380-81 (2003).

A second-in-time petition should be treated as non-successive where the asserted claims did not arise until after a prior petition was filed, or where the claim was premature, or where a subsequent filing is expressly contemplated by statute. *United States v. Hairston*, 754 F.3d 258, 262 (4th Cir. 2014); *see also Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001) (allowing second-in-time claim in federal capital case where issue, by its very nature, could only be raised after first

[8] It bears emphasis that two of these goals—comity and federalism—have no relevance in the context of a federal post-conviction case where no state court determination is being disturbed. This Court is interpreting federal law as applied to a federal case.

post-conviction review was completed).[9] Mr. Johnson's motion presented such a claim.

IV. REASONABLE JURISTS COULD DEBATE THE DISTRICT COURT'S CONCLUSION THAT MR. JOHNSON'S SECOND-IN-TIME § 2255 MOTION IS SUCCESSIVE

The district court's dismissal of Mr. Johnson's § 2255 Motion as successive is plainly the type of issue that "deserves encouragement to proceed further" and is debatable by jurists of reason. *See Hairston*, 754 F.3d at 259 (granting COA and concluding second-in-time motion was not successive where basis for sentencing claim did not arise until after first § 2255 motion was denied); *United State v. Rodgers*, 803 F. App'x 728, 729 (4th Cir. 2020) (per curiam).

[9] Mr. Garza proceeded under 28 U.S.C. § 2241 but only after the Fifth Circuit deemed his pleadings successive. The Seventh Circuit, in its subsequent opinion, questioned that holding and suggested that, under *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), his claim should have been considered non-successive. *Garza*, 253 F.3d at 923. Ultimately, the Seventh Circuit speculated that the Fifth Circuit must have rejected such an argument because Mr. Martinez-Villareal had previously raised the claim and it had been dismissed whereas Mr. Garza had not raised it in his initial § 2255 motion. *Id*. at 924. As this Court is aware, the Supreme Court in *Panetti* explicitly rejected that Fifth Circuit reasoning several years later.

A. Mr. Johnson's Claim Is Not Successive Because It Is Based on a Statutory Provision That Provides for Review When an Execution Is Imminent

Mr. Johnson brings his claim pursuant to 18 U.S.C. § 3596(c)[10], a statute governing implementation of a death sentence. The plain language, structure, and statutory history of the FDPA establish that Mr. Johnson is permitted to raise his status as a person with intellectual disability now, at the time when he has a

[10] The government argued strenuously below that Mr. Johnson cannot rely on § 3596 because he was convicted pursuant to 21 U.S.C. § 848. This argument is both immaterial and questionable. First, as the district court found, "§ 848(*l*) and § 3596(c) contain identically worded prohibitions on executing intellectually disabled individuals." Mem. Op. at 10 n.5 (Dismissing § 2255 Petition), ECF No. 99. The prohibition thus exists no matter which statute forms its basis, and both prohibited the "implementation" of a death sentence on a person with mental retardation. Discussion of the identical provision in the § 3596(c) legislative debate is thus instructive. Mr. Johnson will refer to both provisions because his argument is the same under either.

But second, the government has never been consistent in its view of whether the cases of those convicted under § 848 should now be governed by that since-repealed statute or by § 3596. *See, e.g.*, Defendants' Opposition to Plaintiff Intervenor Dustin Lee Honken's Motion for a Preliminary Injunction at 5 n.1, *In re Federal Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-00145, ECF No. 36 (D.D.C. Nov. 12, 2019) (where government contended that "[t]he FDPA did not initially govern death sentences, like [Dustin] Honken's, under the ADAA, 21 U.S.C. § 848(e) (1988)" and that "[i]n 2006, Congress repealed the capital provisions of § 848, 'effectively rendering the FDPA applicable to all federal death-eligible offenses'" (quoting *United States v. Barrett*, 496 F.3d 1079, 1106 (10th Cir. 2007))); Mem. Op. at 5, *In re Federal Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-00145, ECF No. 378 (D.D.C. Dec. 30, 2019) (court holding that "Defendants clearly took the position at the beginning of this litigation that all plaintiffs were subject to the FDPA").

This Court should grant a Certificate of Appealability on this important question regardless of which provision it finds governs.

pending execution date. Unlike other claims by federal inmates seeking to challenge their convictions or sentences that must be raised in an initial § 2255 motion, this provision contemplates that, where applicable, a determination of "mental retardation" will be made when the government sets an execution date. Indeed, very the language of § 3596(c) and § 848(*l*) indicates that the question arises only after a death sentence has been imposed and when it is to be implemented. *See* 18 U.S.C. § 3596(c) ("A sentence of death shall not be *carried out* upon a person who is mentally retarded.") (emphasis added); 21 U.S.C. § 848(*l*) (same).

This statute creates an independent, substantive prohibition on the implementation of the sentence based on intellectual disability. It is unique to the federal death penalty: the § 2254 statute, pursuant to which state prisoners must raise their challenges, lacks a corresponding proscription. At the same time, it is not unlike the jurisprudentially required mechanism in § 2254 for resolving mental competency claims when an execution becomes imminent. *See Panetti*, 551 U.S. at 934-35; *Martinez-Villareal*, 523 U.S. at 644-45; *Ford v. Wainwright*, 477 U.S. 399, 418 (1986). In both instances, the claim if viable must be heard at the time of implementation even if presented in a second habeas motion.

As *Panetti* and *Martinez-Villareal* make clear, similar claims are not successive even though they are second-in-time because they should be litigated when an execution date is set. The Bureau of Prison's action setting an execution

date triggers the question raised in § 3596(c) (or § 848(*l*)): if the individual has mental retardation, is pregnant, or cannot appreciate the reason for the execution, the execution cannot be carried out. In that sense, prior to the Bureau of Prison's notice of an execution date, adjudication pursuant to § 3596(c) on the question of *implementation* is premature. *Cf. Hoxha v. Levi*, 465 F.3d 554, 564-65 (3d Cir. 2006) (finding, in habeas proceeding challenging extradition, that Administrative Procedure Act challenge under particular federal statute premature because agency action had not yet occurred and the government "may ultimately decide not to extradite Petitioner"). Whether the person has earlier litigated the legality of his sentence on the ground of intellectual disability thus would not obviate the statute's stated prohibition on implementation which could, as is the case here, come many years later.

Section 3596(c) (and § 848(*l*)) provide more specific process for inmates with compelling claims of intellectual disability than is afforded by the Eighth Amendment. Limiting § 3596 to the minimum process required by the Constitution ignores the reality of the FDPA. Indeed, the FDPA includes provisions clearly intended to provide greater protection than the minimum. This particular section, however, differs from other such provisions because it is not restricted by or dependent upon another avenue of review. *Cf.* 18 U.S.C. § 3595(c) (mandating independent review of death sentence to ensure it is free from arbitrariness and clearly stating this review is a part of the direct appeal). In contrast, the review

required by § 3596 is not confined to an earlier stage of review, and it articulates no limitation on claims previously raised.[11] When there is evidence that a prisoner scheduled for execution is a person with intellectual disability ("mental retardation" in the statute and legislative history), § 3596(c) requires that assessment to be made when the sentence is set to be implemented, even if that issue had been previously litigated.[12]

1. The Plain Language of § 3596(c)[13] Demonstrates That a Determination of Mental Status Must Be Made When an Execution Date Is Set

Section 3596(c) applies when the sentence of death is to "be carried out." In its plainest terms, the § 3596(c) bar pertains to the period of time in which the sentence is "complete[d]" or "accomplish[ed]"—or "put into execution." *Carryout*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/carryout (last visited Jan. 5, 2021). It applies *after* the defendant is "sentenced" and *after* a federal death row inmate has "*exhaust[ed] . . . the procedures for appeal of the judgment of conviction and for review of the sentence*." 18 U.S.C. § 3596(a) (emphasis added). As is made clear by the title of the section, § 3596(c) applies at

[11] This is, again, the same for § 848, with the identical wording, in the ADAA.

[12] As addressed below, this was openly discussed during Congressional debate. *See* 2255 Mot., Ex. 79 (136 Cong. Rec. S6873, S6876 (daily ed. May 24, 1990)).

[13] Again, the language in § 848(*l*) is identical: "sentence of death shall not be carried out upon a person who is mentally retarded."

the "implementation" of the sentence: both § 3596(c) and § 848 (*l*) contemplate that a death sentence has already been imposed when the prohibition comes into play. Congress did not otherwise qualify this bar.

2. The Government Itself Has Conceded That Because § 3596 Concerns the "Implementation" of The Sentence, It Governs the Process at the Time the Execution Date Is Set and Not Earlier

Just over a week ago, the government filed a brief *in this Court* arguing the very point that Mr. Johnson makes—that because § 3596 concerns the *implementation* of the sentence, it governs actions to be taken when the execution date is set, and not earlier. *See* Exhibit A (Excerpt of Brief of the Appellant and, in the Alternative, Petition for Writ of Mandamus, *United States v. Higgs*, No. 20-18 (4th Cir. Dec. 31, 2020), ECF No. 6) ("Higgs Brief"). In *Higgs*, the government argues that under the plain terms of § 3596, a court's designation of the state law that will govern the manner of execution cannot be restricted to the time that the death sentence is *imposed*, but rather must include the time when the sentence will be carried out. *See* Higgs Brief at 18-19 ("[T]he temporal terms in § 3596(a) reinforce that the alternative-designation provision remains available post-sentencing. . . . The unmistakable temporal flow and present-tense verbs in Section

3596(a) *leave no room for a reading that the fallback provision can be invoked only at the time the death sentence is imposed*." (emphasis added)).[14]

In fact, the government has accepted this reading of § 3596 for almost two decades. As far back as 2002, the government had argued that § 3596 does not prohibit a death sentence from being *imposed* on a person with intellectual disabilities, but rather—like a *Ford* claim—is triggered at the time that the sentence is to be carried out to prevent or delay the execution.

> [S]ubsection 3596(c) does not provide a "defense" to the *imposition* of the death penalty. Section 3596 is entitled "Implementation of a Sentence of Death." Subsection 3596(a) - subtitled "In general" - provides, *inter alia*, that "[a] person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence." Subsections 3596(b) and 3596(c) are subtitled "Pregnant woman" and "Mental capacity," respectively. Subsection 3596(b) provides that a sentence of death shall not be carried out upon a woman while she is pregnant, while subsection 3596(c) prohibits the carrying out of a sentence of death upon a person who is mentally retarded or who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person. See 18 U.S.C. § 3596. *From the language of these subsections and as is signaled by the title of the statute, it should be clear that neither mental retardation nor pregnancy precludes the imposition of the death penalty under the statute, rather it prevents and/or may delay the implementation of the death penalty.*

[14] *See also id*. at 18 (arguing that Congress explicitly recognized the temporal distinction by enacting "a separate provision of the FDPA—18 U.S.C. § 3594—that governs '[i]mposition of a sentence of death.' Section 3596, by contrast, governs '[i]mplementation of a sentence of death.'" (alterations in original)).

See Exhibit B (Excerpt of Government's Response in Opposition to "Amended Motion of Bruce Carneil Webster to Vacate Conviction and Sentence and for New Trial Pursuant to 28 U.S.C. § 2255 and Rule 33 of the Federal Rules of Criminal Procedure" at 44, *Webster v. United States*, No. 4-94-CR-0121-Y (N.D. Tex. Nov. 14, 2002) (emphasis added)).[15]

The government's own interpretation of § 3596—for nearly two decades, and as recently as last month—is sufficient to establish that Mr. Johnson's reading of the statute is, at the very least, debatable.

3. The Other Provisions of § 3596(c), as Well as the Broader Structure of the FDPA, Reinforce That the § 3596(c) Bar Is Properly Raised After an Execution Date Is Set

Statutory terms must be interpreted "in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The "statutory scheme surrounding the specific language" of § 3596(c) "reinforces" its plain text. *Murphy v. Smith*, 138 S. Ct. 784, 789 (2018).

Congress placed the prohibition on carrying out the execution of persons with mental retardation (containing language identical to that in § 848(*l*)) in the "implementation" section of the FDPA statute, situating the intellectual disability bar between the pregnancy bar and mental competency bar—all challenges that are

[15] It should be noted that § 3596 took many of the same provisions of § 848 and reordered them so that they would appear in chronological order in terms of pretrial, trial, post-conviction, and execution. The provisions of the earlier statute were disorganized in that regard.

raised once execution is imminent. By structuring the statute in this manner, Congress made plain and clear its intent that an inmate seeking relief under these three prohibitions should do so when an execution is imminent.

The placement of the "mental retardation" provision within § 3596 is dispositive. Whereas the first subsection, § 3596(a) (entitled "In [G]eneral"), circumscribes this section of the U.S. Code and provides instructions about how and when the sentence is be implemented generally—after all appeals have concluded and the prisoner is released to the custody of a U.S. marshal—subsection (b) and (c) limit the marshal's implementation of the sentence by enumerating prohibitions to be raised "[w]hen the sentence is to be implemented." *See* 18 U.S.C. § 3596(a).

The FDPA's entire structure, moreover, which generally follows the chronological stages of a capital case, further supports this conclusion: the implementation provisions in § 3596, including the prohibitions on implementation, were placed after those subsections governing pre-trial and trial proceedings, *see* §§ 3591-3594; direct appeal provisions, *see* § 3595; and before those governing execution procedures once the U.S. marshals take custody of the prisoner. *See* § 3597.[16]

[16] The last two sections of the FDPA are miscellaneous provisions that do not have any temporal components: § 3598 governs capital proceedings for crimes occurring within the boundaries of Indian country, and § 3599 addresses the right to counsel in capital cases.

Congress's decision to place the mental retardation bar after the provisions governing ordinary judicial review of a capital proceeding, and specifically in the section titled "Implementation of a sentence of death," is telling: It intended that claims related to § 3596 prohibitions could be raised up to the eve of execution.

4. The Legislative History of § 3596(c) Demonstrates Congress's Intent

The legislative history of the intellectual disability bar confirms that Congress understood that the FDPA would allow defendants to raise such claims "at any time," including between judgment and execution, and including after an execution date has been set, even if a claim based on intellectual disability was litigated earlier. *See* 2255 Mot., Ex. 79 (136 Cong. Rec. S6873, S6876 (daily ed. May 24, 1990) (comments by Sen. Hatch)).

During debate of the FDPA in May 1990, Senator Strom Thurmond of South Carolina introduced an amendment (the "Thurmond Amendment") to Senate Bill 1970, 101st Cong. (1990), which had been introduced by then-Senator Joseph Biden of Delaware. The amendment proposed to modify the existing mental retardation provision in the ADAA, which had passed two years earlier. Specifically, Senator Thurmond proposed to limit the mental retardation prohibition to only cases in which the defendant "lack[ed] the capacity to appreciate the wrongfulness of his actions" so that "it would prohibit the execution of mentally retarded persons who do not know the difference between right and

wrong." 2255 Mot., Ex. 79 (136 Cong. Rec. S6873, S6877, 6880 (daily ed. May 24, 1990) (comments by Sen. Thurmond)). During the debate on the Thurmond Amendment, Senator Orrin Hatch expressed his understanding of the intellectual disability prohibition both as incorporated in Senate Bill 1970, and as enacted in the ADAA.

> Let us understand something. The trial comes up. Defendants can raise any issue about mental capacity, disability or retardation they want. . . .
>
> Then the sentencing comes up. They have the right to come in and do it all over again. . . .
>
> The Biden amendment in this bill[17] then goes and *gives them a third time*, only it says it a little bit differently. It says, if you can show you are mentally retarded, you cannot be executed. You will stay in jail the rest of your life, but do you not [sic] have to suffer the death penalty. *This is better than habeas corpus for prisoners. They can raise it at any time.*

2255 Mot., Ex. 79 (136 Cong. Rec. S6873, S6876 (daily ed. May 24, 1990) (comments by Sen. Hatch) (emphasis added)).[18]

[17] Senator Hatch's reference to the "Biden Amendment in this bill" is a reference to the already enacted "mental retardation" death penalty bar in the 1988 ADAA. *See* 2255 Mot., Ex. 79 (136 Cong. Rec. S6873, S6876 (daily ed. May 24, 1990)).

[18] Of course, this is not what has happened here. Corey Johnson's case relies not on finding a new expert but on the development and refinement in the medical profession, and the subsequent adoption by the courts, of standards for diagnosing intellectual disability that did not exist at the time he was tried in 1993 or pursued remedies in § 2255 in the late 1990s. No court has heard the compelling evidence establishing Mr. Johnson's intellectual disability.

Notably, no one, neither supporters nor opponents of § 3596(c), contradicted Senator Hatch's interpretation of S. 1970 that an intellectual disability claim could be brought long after an inmate was sentenced to death and could be brought more than once. Instead, the Senate rejected the Thurmond Amendment by a vote of 59 to 38. 2255 Mot., Ex. 79 (136 Cong. Rec. S6873, S6883 (daily ed. May 24, 1990)). Both houses of Congress passed the FDPA, with bipartisan support, and it was signed into law in 1994, with the intellectual disability provision intact.[19]

B. Mr. Johnson's Implementation Claim Was Not Ripe until the Execution Date Was Set

The district court opined that since Mr. Johnson had an opportunity to challenge the sentence based on intellectual disability at earlier stages, his claim ripened prior to the setting of his execution date and further review is foreclosed. Op. at 16, 18. This is not so. Although it is correct that the FDPA and the ADAA permit such challenges at the time of trial and the initial § 2255 proceeding, it does not follow from that fact that review of a prisoner's intellectual capacity should therefore be precluded at the time of the implementation of the sentence. The plain language and legislative history of § 3596 demonstrate that Congress intended that

[19] The less lengthy legislative history of the ADAA, which preceded the FDPA, reflects a similar commitment to ensuring that a person with intellectual disability will not be executed by the federal government. *See* 2255 Mot., Ex. 78 (134 Cong. Rec. 22,926, 22,993 (1988)) ("I think there is no danger here that there would be effective abuse by someone who inappropriately claimed mental retardation. *The purpose of this is very much confined to prohibit execution of those who are mentally retarded.*") (statement of Sen. Levin) (emphasis added).

review be available at the time the sentence is carried out; indeed, it is only then that a claim about the *implementation* of the sentence could become ripe. That the statute does not preclude the raising of a claim earlier about the *imposition* of the sentence does not transform that claim into one about implementation. The district court's conclusion otherwise is, at the very least, debatable by jurists of reason.

So, too, is the district court's opinion that the claim is barred by *res judicata*. Op. at 14. That doctrine does not apply to claims that were not yet ripe at the time of the prior adjudication. *See Lambert v. Williams*, No. 98-2070, 1998 WL 904731, at *1 (Dec. 29, 1998 4th Cir. 1998) (per curiam). Nor was the prior adjudication based on the same facts as those presented in Mr. Johnson's second-in-time § 2255 motion: indeed, the only fact that prior opinions relied on was that the psychologist trial counsel hired, who was not an expert in intellectual disability, believed that (an unadjusted) IQ score of 77 precluded a finding of intellectually disability altogether. (A "fact" we know now is incorrect.) *Res judicata* is not an issue here.[20]

The district court's attempt to distinguish *Ford* claims is unavailing, or at least debatable. *See* Op. at 15-16. Congress itself made no such distinction between

[20] First, it is questionable whether the doctrine is even applicable in habeas cases. *See Panetti*, 551 U.S. at 947 (describing the AEDPA as encompassing its own, "modified" *res judicata* rule (citation omitted)); *United States v. Barrett*, 178 F.3d 34, 44 (1st Cir. 1999) (holding that *res judicata* rule would not make sense in litigation of second petitions); *Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 538 (9th Cir. 1998) (en banc) (holding that *res judicata* does not apply to habeas cases.). But more significantly, that is a question that would arise for a court considering the merits, only after it has assumed jurisdiction.

lack of competency and intellectual disability. They are treated equally and are even contained in the same subdivision of the implementation statute: § 3596(c). Although the district court opined that it "makes little sense" to provide the same statutory remedy to intellectually disabled prisoners as to those who are incompetent at the time of execution, Op. at 18, the court was not entitled to substitute its own judgment for that of Congress. Congress designed both § 3596(c) and § 848(*l*) to act as one last safeguard—to ensure that an intellectually disabled person with a death sentence did not slip through the cracks—regardless of any prior litigation.

Indeed, the court's reliance on the "permanency" of intellectual disability, Op. at 18-19, is wholly irrelevant to the question at hand: whether § 3596 or § 848 permits review of a prisoner's mental status at the time of the implementation of the sentence. The fact that a court might at that stage be in a position to prevent such a person from being executed, based on the most current science and best evidence available, is entirely consistent with the plain language and legislative history of the statute—ensuring that an individual with intellectual disability will not be executed by the federal government.

The court's conclusion that Mr. Johnson's reading of the statute would frustrate the purposes of AEDPA or override the ban on successive § 2255 motions, *see* Op. at 20, is similarly misplaced, or at least debatable. First, its reliance on *Bourgeois v. Watson*, 977 F.3d 620 (7th Cir. 2020) is inapposite. The

concern raised there—that a fresh intellectual disability claim would arise every time the medical community updates its literature, *see* Op. at 20—has no relevance here.[21] What triggers potential review under § 3596 or § 848 is the setting of an execution date, not advancements in medical science.

Second, the population for whom this implementation provision is potentially applicable is tiny. Indeed, Mr. Johnson's case is a relic: he was tried in 1993, at a time when there were no federal standards and little understanding of how intellectual disability claims should be developed and litigated. The unique convergence of conditions that made it possible for Mr. Johnson's intellectual disability to be missed is also precisely what make his case so rare and unlikely to be repeated. Resort to § 3596 to identify other intellectually disabled prisoners simply will not be necessary in most cases. Here, though, there was essentially no factual record on Mr. Johnson's intellectual disability at the time of his trial, and what was presented—that a single, unadjusted (and therefore inaccurate) IQ score of 77 meant he was not intellectually disabled—depended on an outdated, rejected

[21] Unlike Mr. Johnson, Mr. Bourgeois, it should be noted, received a full evidentiary hearing concerning his intellectual disability claim at the time of his initial § 2255 proceeding. The courts also found that the district judge applied the correct medical and legal standards in making the requisite determination. *Bourgeois*, 977 F.3d at 625, 635-36. The fact-findings made in his robust post-conviction proceedings, moreover, received review in the Fifth Circuit and following that, in the Seventh Circuit. *Bourgeois v. Watson*, 977 F.3d 620, 625-26 (7th Cir.), *cert. denied*, 141 S. Ct. 507 (2020); *United States v. Bourgeois*, 537 F. App'x 604, 643-65 (5th Cir. 2013). Corey Johnson has never had a court consider or review the facts that prove he is intellectually disabled.

view of how to properly make such a determination. The remedy afforded by § 3596 therefore is necessary to ensure that an otherwise ineligible individual is not executed.

Finally, unlike with claims brought by state prisoners under § 2254, federal prisoners are not prohibited from raising the same claim in a second or successive § 2255 motion. Section 2244(b)(1) unambiguously states: "A claim presented in a second or successive habeas corpus *application under section 2254* that was presented in a prior application shall be dismissed." (Emphasis added). By the plain language of § 2244, it is clear that Congress intended for the same claim successor bar to apply only to claims brought by state prisoners under 28 U.S.C. § 2254, not to claims by federal prisoners, like Mr. Johnson. *See, e.g.*, *United States v. Winestock*, 340 F.3d 200, 204-05 (4th Cir. 2003) (noting that § 2244(b)(1) "is limited by its terms to § 2254 applications"); *United States v. MacDonald*, 641 F.3d 596, 614 n.9 (4th Cir. 2011) (noting application of § 2244(b)(1) to § 2255 motion is an open question in the circuit); *see also Stanko v. Davis*, 617 F.3d 1262, 1269 n.5 (10th Cir. 2010) (holding § 2244(b)(1) & (2) "concern only 'habeas corpus application[s] under section 2254'" (citation omitted)). Thus, the district court's conclusion that consideration of this claim would frustrate AEDPA's purpose is, at the very least, debatable.

CONCLUSION

Corey Johnson is an intellectually disabled man slated for federal execution in less than a week. Federal law precludes the implementation of a sentence of death previously imposed on a person with intellectual disability. Whether Mr. Johnson, who has never even had a hearing on his ineligibility for a death sentence, may avail himself of the law as written to protect someone like him or is precluded from doing so by provisions of § 2255(h) is a question that reasonable jurists can surely debate. For the foregoing reasons, Mr. Johnson respectfully asks this Court to grant a COA, reverse the district court's dismissal of his § 2255 Motion, and remand the case for further proceedings.

Dated: January 8, 2021

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

To counsel's present knowledge, this Court has not addressed the specific issues presented by this case. Counsel for Appellant accordingly asserts that the issues raised in this brief may be more fully developed through oral argument, and respectfully requests the same.

CERTIFICATE OF COMPLIANCE

1. This brief contains 8155 words, excluding the parts of the brief exempted from the word count by Fed. R. App. P. Rule 27(d)(2) and Rule 32(f).

2. This brief complies with the font, spacing, and type size requirements set forth in Fed. R. App. P. Rule 32(a)(5).

/s/ Donald P. Salzman

CERTIFICATE OF SERVICE

I certify that on this 8th day of January 2021, the foregoing document was served on all parties or their counsel of record though the CM/ECF system, which will then send notification of such filing to all parties and counsel included on the Court's Electronic Mail notice list.

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STATUTORY ADDENDUM
(Relevant Excerpts)

Key Statutes

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II. CRIMINAL PROCEDURE
CHAPTER 228. DEATH SENTENCE

18 U.S.C. § 3596. Implementation of a sentence of death

* * * * *

(a) In general.—A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

(b) Pregnant woman. —A sentence of death shall not be carried out upon a woman while she is pregnant.

(c) Mental capacity. —A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.

* * * * *

UNITED STATES CODE
TITLE 21. FOOD AND DRUGS

21 U.S.C. § 848 (1988) (repealed 2006) Continuing criminal enterprise

* * * * *

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203-24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section-

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the

performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g) Hearing required with respect to death penalty

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

(h) Notice by Government in death penalty cases

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice—

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

(i) Hearing before court or jury

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing

to determine the punishment to be imposed. The hearing shall be conducted—

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if—

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

(j) Proof of aggravating and mitigating factors

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors

may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) Return of findings

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of

death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

(l) Imposition of sentence

Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

> (1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or
>
> (2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

> (1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
>
> (2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
>
> (3) The defendant is punishable as a principal (as defined in section 2 of title 18) in the offense, which was committed by another, but the defendant's

participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

(n) Aggravating factors for homicide

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant-

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which—

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this subchapter in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 845 of this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(o) Right of defendant to justice without discrimination

(1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall—

(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.];

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report, death penalty cases involving crimes similar to those covered under this section.

(p) Sentencing in capital cases in which death penalty is not sought or imposed

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

(q) Appeal in capital cases; counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that—

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post-conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available

judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications, for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

(r) Refusal to participate by State and Federal correctional employees

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

* * * * *

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

28 U.S.C. § 2244 Finality of determination

* * * * *

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the
pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * * * *

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

28 U.S.C. § 2255 Federal custody; remedies on motion attacking sentence

* * * * *

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it

also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

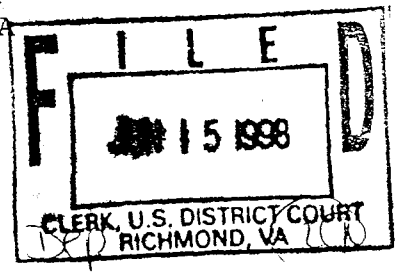
(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division



CORY JOHNSON, Petitioner, v. SAMUEL PRUETT, WARDEN, Mecklenburg Correctional Center, Boydton, Virginia, Respondent.	)	Crim. No. 3:92CR68 Civil No. 3:97CV895

MEMORANDUM IN SUPPORT OF

INITIAL PETITION FOR WRIT OF HABEAS CORPUS

PURSUANT TO 28 U.S.C. SECTION 2255

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Counsel for Cory Johnson

June 15, 1998

TABLE OF CONTENTS

prejudiced as there was a reasonable probability of a different result at the guilt phase.

8. Defense Counsel Failed To Object To Improper And Highly Prejudicial Conduct And Arguments By The Prosecutors Throughout Johnson's Capital Trial

During the course of Johnson's trial, the prosecutors engaged in a variety of improper and highly prejudicial conduct. The prosecutors misled the jury by vouching, in inflammatory terms, as to their personal belief in Johnson's guilt and the veracity of witnesses. They introduced inadmissible evidence suggesting that Johnson and the other defends had threatened the lives of witnesses. The prosecutors misled the jury into believing it had a duty to convict and to impose death sentences. The prosecutors misled the jury by making misleading and inflammatory arguments, unsupported by the evidence, regarding the conditions Johnson would face if given a life sentence. The prosecutors improperly emphasized that Johnson and the other defendants did not testify. They suggested that a Government witness passed a polygraph test. The prosecutors improperly treated Johnson and the other defendants as a group, rather than as individuals. They improperly argued that sentencing should be based on deterrence. The prosecutors presented testimony lacking proper foundation. They presented improper testimony about the CCE supervision element and the use of key terms. The prosecutors excluded women from the jury. This misconduct is set forth in detail at Claim V, infra, and is incorporated by

reference herein. With few exceptions, defense counsel failed to object to the prosecutors' repeated, improper behavior. Defense counsel's performance in this regard was well below that of a reasonably competent counsel, and Johnson was prejudiced, for the reasons set forth in Claim V, as there was a reasonable probability of a different result at the guilt and sentence phases.

B. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT THE SENTENCE PHASE

1. DEFENSE COUNSEL FAILED TO ARGUE THAT JOHNSON'S MENTAL ABILITY WAS NOT ACCURATELY REFLECTED BY HIS I.Q. TEST AND, IN FACT, WAS BELOW 77.

Johnson's scores during his teen years placed him within the mentally retarded range, and he scored only slightly higher in tests prior to his capital trial. Under federal law, a mentally retarded defendant cannot be executed. 21 U.S.C. sec. 848(l); 18 U.S.C. sec. 3596(c)[Added 9/13/94]. In his opening statement at the sentencing phase, defense counsel harmed Johnson's mitigation case by conceding that Johnson was not mentally retarded. Counsel stated:

> The law states that mentally retarded persons cannot be executed. And the reasons that they are excluded is because the law recognizes that mentally retarded persons are not totally and completely blameworthy. They are not fully responsible for their actions.
>
> Now, I'm not intending to suggest at this juncture or any other juncture that Cory Johnson is mentally retarded.

JA. at 4372.

> In this case, Cory Johnson, as I said is not mentally retarded. But he has substantial mental, intellectual deficits that he has been plagued with his entire life.

> His IQ is within two points of being classified by the law [as] mentally retarded, and therefore, legally not executable. . . . He has an IQ of 77.

JA. at 4374.

Contrary to counsel's concessions to the jury, Johnson's intelligence was probably lower than his test scores indicated. Studies demonstrate that IQ determination has significant variables. Defense counsel and his expert could have and should have used widely accepted studies to argue that Johnson in fact had a lower IQ than the pretrial testing revealed. Such evidence and argument would have created a reasonable doubt in the minds of the jurors. This argument would likely have persuaded one or more jurors that a life sentence, not death, was the appropriate punishment where the execution of the mentally retarded is prohibited under federal law. Instead, counsel wrongly conceded a critical fact issue.

The Wechler Adult Intelligence Scale Revised (WAIS-R) is one of the most widely used IQ tests. This was the test given to Johnson. Studies reveal that IQ measurement on this test increases over time. The phenomenon of "IQ inflation" is explained as follows:

> Work by James Flynn (1984, 1988) has indicated that there is a real phenomenon of IQ gains over time. Individuals appear to gain approximately 3-5 IQ points over a 10 year period. Since the WAIS-R was published in 1981 and the data was collected a year prior to the publication, this inflation factor could mean that the average IQ could be as high as 105-107 points rather than the accepted value of 100.

See Ex. 7 at 2.

Dr. Dewey Cornell, an expert assigned by the court, administered the WAIS-R to Johnson on October 1992. Johnson's overall IQ score was 77 which placed him in the 6th percentile and in the borderline mentally retarded range. The test Johnson took was published in 1981 and was based on data collected one year before. Thus, the normative data was twelve years old when Johnson took the test in 1992. Johnson's score of 77 was therefore inflated by at least 3-5 points and possibly more. Allowing for the inflation effect, Johnson's score was actually in the 72-74 range or lower, placing him within the recognized range of mental retardation. JA at 4515, 4517 (Dr. Cornell: 70-75 I.Q. can be considered in the range of mental retardation). This adjusted score would be consistent with his prior, lower test results during his teens.

Low intelligence was a mitigating factor found by the jurors. Eight jurors found that Johnson's IQ was 77. JA. 433. This was one of eighteen mitigating factors found by the jurors. Given the wealth of mitigating evidence found by the jurors, defense counsel missed a critical chance to create reasonable doubt in the minds of the jurors concerning Johnson's mental capabilities. If only one juror concluded that Johnson was in fact mentally retarded, then that juror may well have concluded that a sentence of life rather than death was appropriate. Counsel was ineffective for failing to present this evidence. See Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996)(counsel ineffective for failing to present mitigation evidence, including

fact that defendant had diminished IQ); Henricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996)(counsel ineffective for failure to adequately prepare and present statutory mitigation evidence even where defense expert was presented); Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), cert. denied, 479 U.S. 1087 (1987)(counsel ineffective during sentencing phase where he failed to present evidence that defendant was mentally retarded).

Johnson was certainly prejudiced given the wealth of mitigation evidence found by the jurors. There was a reasonable probability of a different result at sentencing if the jurors had heard this additional evidence. See Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991)(where some jurors inclined to mercy absent any mitigating evidence and such evidence was available but not presented, there was a reasonable probability of a life sentence); Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995)(counsel failed to present persuasive mitigation evidence). The writ should be granted on the sentence.

2. DEFENSE COUNSEL FAILED TO PRESENT EVIDENCE OF JOHNSON'S PRISON CONDITIONS IF SENTENCED TO LIFE

The public, and jurors, assume that prison conditions are unduly comfortable for inmates. Effective capital counsel must provide jurors with accurate information. The jurors were presented with two alternative punishments -- death or life without parole. While the jurors clearly understood the first alternative, they received no evidence concerning the second.

Defense counsel failed to portray the bleak existence facing Johnson if the jurors sentenced him to life imprisonment. Counsels' omission was particularly harmful in light of the prosecutor's summation at the sentencing phase. Accurate information is essential in any capital case. It was especially so here as the prosecutor argued without any basis in fact:

> Ask yourself, should they be punished beyond incarceration? I'm not telling you incarceration is nice and a lifetime of incarceration is not punishment. But think about each and every day of their existence in jail. They will wake up, bathe, be fed. They will be able to watch TV, read books. They will be able to use the telephone to talk to their loved ones.

JA. 4729 (Tr. 3904). Johnson's counsel objected on the grounds that these facts were not in the record, and the Court sustained the objection. Id. However, the jury was never told about the realities of a life sentence.

Trial counsel should have demonstrated this point in at least two different ways. First, they should have called an inmate who was serving a life sentence in a maximum security prison to testify about the day to day living conditions. See Ex. 8. That inmate could have described the small cell used to house two inmates, and the minimal furnishings. Jurors would have learned that inmates spend much of their time locked in their cell, that "lockdowns" can last for days, that searches (including strip searches) occur at random, and that inmates have no privacy in any aspect of prison life. Ordinary events such as bathing are strictly limited and regulated, and many prisons have no air conditioning. Access to television is restricted. Some

reading materials are prohibited. The jurors would have heard about prison violence, gangs, and the constant threats to personal safety.

Second, counsel should have called a corrections expert, such as a former or current warden or prison administrator. Ex. 9. A corrections expert could describe the conditions in a maximum security prison including the limitations on recreation, personal visits, medical care, and personal correspondence. In some "super" maximum prisons, inmates spend 23 hours a day in their cells and never see the outside.

Testimony on life in a maximum security prison would have refuted the prosecution's argument that Johnson would be facing a relatively easy life if given a life sentence. The jurors should have heard about the realities of prison life. Where only one vote could defeat a death sentence, counsels' failure to present testimony about actual prison conditions constituted ineffective assistance of counsel and Johnson was prejudiced. In any event, after the prosecutor made his improper statements to the jury, trial counsel should have sought leave to introduce evidence that would correct the false impression created by the prosecutor.

Johnson was prejudiced by these omissions as there was a reasonable probability of a different result on sentencing if this testimony had been presented.

CERTIFICATION

I hereby certify that one copy of the attached Memorandum In Support Of Initial Petition For Writ Of Habeas Corpus Pursuant To 28 U.S.C. Section 2255 was mailed on June 15, 1998, to counsel for the Respondent:

Robert J. Erickson
United States Department of Justice
Room 6102, Patrick Henry Building
601 D. Street, N.W.
Washington, DC 20530
(202) 514-2841

Barbara L. Hartung

PLEASANTVILLE COTTAGE SCHOOL

CURRENT ASSESSMENT

Name of Child: COREY JOHNSON
Date of Birth: [redacted] Age:
School Grade: 8th

Date of Admission: 4/26/82
Date of Assessment: 1/31/83
Date of Conference: 1/12/83

CHILD:

Child care workers note that Corey's behavior deteriorates when he has no contact with his mother. He can also become quite depressed when he has not heard from or seen her for a period of time. It is the opinion of his child care workers that Pleasantville is good for him and that he is functioning fairly well here. Corey realizes his learning disabilities, however, he struggles to do his homework. He is truly motivated to do well and to succeed and has not yet given up on himself. Corey presents with no real behavior problems. Within the last two weeks there has been some decline. Corey fantasizes that his mother will come up in a car and take him to Pizza Hut. Child care worker reports that Corey's mood basically is not that of a depressed child.

Mr. Greenstone reports that Corey's progress in his class has been very, very, very slow almost to the point where one might feel that he is not learning. He received remedial reading two to three times per week, however, Corey's reading and spelling is on a 2nd grade level, math is on a 3rd grade level. Mr. Greenstone states that Corey can understand on an 8th grade level but he cannot read it. B.O.C.E.S. is being considered as a possibility for this child.

Response to Treatment:

Corey resists individual appointments. There is no eye contact. He appears depressed and hopeless about his situation. He longs for his mother and acts out his realization that in fact his mother is emotionally unavailable to him. However, he denies his feelings when confronted directly. He also struggles to involve his father who also does not come through for him. Sundays can be very difficult for Corey because he usually does not have visitors. This worker will consider seeing Corey in a group.

Ms. Johnson keeps regular appointments in the New York City Office with this worker. She is seen jointly with Corey. Focus has been around Corey's need to see her and Corey's need to have her involved. She gives clear messages in joint sessions that she is in the process of getting her life together and that she really is not emotionally available. She is preoccupied with her own situation, her own financia struggle, is trying to get an additional job which will make her even more unavailable to Corey. She expresses concern about his welfare and wishes him well but is not willing to become more active on his part at this time.

Corey is not on any medication at this time.

Psychological:

Psychologist reports that Corey has a poor memory, that he also has visual problems and language problem and has conflicting dependency needs. In attempting to get a better understanding of Corey's learning difficulties, recommendations have been made that 1) psychologist will exam Corey's reading and writing, 2) clarify his deficits, 3) offer recommendations for teaching, 4) meet with Mr. Kosha.

Speech Therapy:

This worker has made a referral to the speech therapist for Corey. He was seen once for an evaluation. Followup reveals that Corey is on the waiting list but she is not able to see him at the present time.

Mother's Concerns:

Ms. Johnson presents that she wonders where Corey will go from here if he does not reach his grade level. She expresses a great deal of concern around his difficulty learning and wonders about the possibility of vocational training for him. She sees changes in Corey. She feels that he is more verbal and truly a pleasure to be around. He presents with no problems at home, however, earlier on Corey lied, stole and stayed out late.

Corey states that after he leaves Pleasantville he would like to go to a group home. He would like to stay at Pleasantville Cottage School for another year and would like to get his head straight for his mother Corey feels that he and his brother get along better now.

PSYCHODYNAMIC EVALUATION:

Corey is a well related depressed, anxious, severely learning disabled boy who has experienced his mother's rejection and emotional unavailability. Ms. Johnson is an upwardly mobile intelligent and articulate woman who was self-involved and who struggles to get her life in order. She has not provided him with the care he needed in early years and is not able to provide him with the attention he so badly craves for.

Gayle Turnquest:ww D-1/31/83 T-2/9/83

Gayle Turnquest
Caseworker

FILED: January 14, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-15
(3:92-cr-00068-DJN-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

COREY JOHNSON, a/k/a O, a/k/a CO

Defendant - Appellant

No. 21-1
(3:92-cr-00068-DJN-2)
(3:20-cv-00957-DJN)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

COREY JOHNSON, a/k/a O, a/k/a CO

Defendant - Appellant

THE CONSTITUTION PROJECT AT THE PROJECT ON GOVERNMENT OVERSIGHT

Amicus Supporting Appellant

O R D E R

The Court denies the petition for rehearing en banc for Case Nos. 20-15 and 21-1.

A requested poll of the Court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Judge Wilkinson, Judge Niemeyer, Judge Agee, Judge Diaz, Judge Floyd, Judge Richardson, Judge Quattlebaum, and Judge Rushing voted to deny rehearing en banc. Chief Judge Gregory, Judge Motz, Judge King, Judge Keenan, Judge Wynn, Judge Thacker, and Judge Harris voted to grant rehearing en banc.

Judge Wilkinson wrote a separate opinion concurring in the denial of rehearing en banc. Judge Wynn wrote a separate opinion dissenting from the denial of rehearing en banc.

Entered at the direction of Judge Wilkinson.

For the Court

/s/ Patricia S. Connor, Clerk

WILKINSON, Circuit Judge, concurring in the denial of rehearing *en banc*:

The reasons for my vote are set forth in my statement accompanying the panel's order denying the stay of execution.

WYNN, Circuit Judge, dissenting from the denial of rehearing en banc:

Corey Johnson is an **intellectually disabled death row inmate** who is scheduled to be executed later today at 6 p.m. EST. His emergency motion to stay execution was denied by a panel of this Court, and he seeks a rehearing *en banc*. Because Johnson has at least two potentially meritorious claims against his execution, I respectfully dissent from the denial of rehearing *en banc*.

In 20-15, Johnson seeks reconsideration of his death sentence under the First Step Act. He was sentenced to death for the murders he had committed in relation to crack cocaine distribution, in violation of 21 U.S.C. § 848(e). Under Fourth Circuit precedent, his convictions under § 848(e) are "covered offenses" for purposes of the First Step Act. *See, e.g.*, *United States v. Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019); *United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020); *United States v. Chambers*, 956 F.3d 667, 670 (4th Cir. 2020). Therefore, Johnson is legally entitled to reconsideration of his sentence, and the sentencing judge must properly consider factors including the overwhelming evidence of his intellectual disability and his excellent prison record. The district court clearly erred in holding that he would not be entitled to a sentence reduction even if his convictions were "covered" by the First Step Act.

In 21-1, Johnson makes a compelling statutory argument that the Federal Death Penalty Act, 18 U.S.C. § 3596(c), prohibits his execution. Under § 3596(c), a death sentence "shall not be carried out upon a person who is mentally retarded." The plain text, structure, and history of the statute seem to clearly indicate Congress's intent to allow an inquiry at the time of execution. Although Johnson fell just 2 points short (77) of the IQ

threshold for intellectual disability (70–75) in 1993, the newly available evidence convincingly demonstrates that his old IQ score is incorrect and that he is intellectually disabled under current diagnostic standards. But no court has ever considered such evidence. If Johnson's death sentence is carried out today, **the United States will execute an intellectually disabled person**, which is unconstitutional.

In sum, Johnson should be afforded an opportunity to have his meritorious claims properly considered and to vindicate his rights. And contrary to the Government, he is not making a "last-minute" attempt to unduly delay his execution. He has timely pursued his challenges under both the First Step Act and the Federal Death Penalty Act. If anything, these emergency motions became necessary only because the Government scheduled his execution while his First Step Act claim was being litigated. Therefore, I vote to grant his petition for rehearing *en banc*.

EXECUTION SCHEDULED FOR JANUARY 14, 2021 AT 6:00 P.M. ET

No. 20-15

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Of America
Plaintiff - Appellee,

v.

Corey Johnson, A/K/A O, A/K/A CO,
Defendant - Appellant.

No. 21-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Of America
Plaintiff - Appellee,

v.

Corey Johnson, A/K/A O, A/K/A CO,
Defendant - Appellant.

CAPITAL CASE

EMERGENCY MOTION FOR STAY OF EXECUTION PENDING APPEAL

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Counsel for Corey Johnson

Appellant Corey Johnson respectfully moves for a stay of execution pending his appeal of the Court's January 13, 2021 order denying his motion to stay his execution. (No. 20-15, ECF No. 26.) Mr. Johnson recognizes that the Court concluded that he is not entitled to a stay and then denied his Emergency Petition for Rehearing En Banc. Nevertheless, United States Supreme Court Rule 23.3 counsels that Appellant first move this Court for a stay pending appeal before seeking such relief from the United States Supreme Court. Mr. Johnson intends to file an emergency application to stay his execution with the United States Supreme Court today.

Accordingly, for the reasons stated below and in Mr. Johnson's earlier motions for stay and Emergency Petition for Rehearing En Banc, Mr. Johnson respectfully asks the Court to stay his execution pending appeal. (No. 20-15, ECF Nos. 15 and 27; No. 21-1, ECF Nos. 8 and 26.) Mr. Johnson is entitled to a stay of execution because (1) he has a significant possibility of success on the merits; (2) he is likely to suffer irreparable injury otherwise; (3) the balance of equities tip in his favor; (4) an injunction is in the public interest; and (5) he did not unduly delay in bringing his claims. *See generally Dunn v. McNabb*, 138 S. Ct. 369 (2017).

First, Mr. Johnson is likely to prevail on the merits of his appeals. Because Mr. Johnson's convictions under 21 U.S.C. § 848(e) are "covered offenses" under the First Step Act, he is permitted to ask a jury to reconsider his death sentences.

In addition, the Federal Death Penalty Act (the "FDPA") prohibits Mr. Johnson's execution because he is intellectually disabled.

Second, because the United States intends to execute Mr. Johnson today, he unquestionably faces irreparable injury. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (recognizing that irreparable injury "is necessarily present in capital cases").

Third, the balance of equities tips in favor of granting the stay. Staying Mr. Johnson's execution briefly for this Court to consider these grave issues will not substantially injure the United States. Although the government normally has a "strong interest" in "proceeding with its judgment," *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004) (citation omitted), that interest should sensibly yield here to afford Mr. Johnson the chance to vindicate those rights.

Fourth, the United States has no legitimate interest in executing a prisoner in violation of federal law.

Fifth, Mr. Johnson did not unnecessarily delay in bringing his claims under the FDPA and the First Step Act. Mr. Johnson sought relief under the First Step Act in August 2020, just months after courts determined in non-capital cases that 21 U.S.C. § 848 was a covered offense, and after the district court determined that any sentencing reconsideration had to consider post-conviction conduct. *See e.g.*, *United States v. Davis*, No. 93-CR-30025, 2020 WL 1131147, at *2 (W.D. Va.

Mar. 9, 2020). And when the government scheduled Mr. Johnson's execution for January 14, 2021, Mr. Johnson promptly filed his § 2255 motion challenging the implementation of his sentence under the FDPA.

For these reasons, Appellant Corey Johnson respectfully requests that the Court stay his scheduled execution pending his appeal of the Court's Memorandum Opinion and Order denying a stay.

Dated: January 14, 2021

Respectfully submitted,

/s/ Donald P. Salzman

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CERTIFICATE OF COMPLIANCE

1. This motion contains 542 words, excluding the parts of the brief exempted from the word count by Fed. R. App. P. Rule 27(d)(2) and Rule 32(f).

2. This motion complies with the font, spacing, and type size requirements set forth in Fed. R. App. P. Rule 32(a)(5).

/s/ Donald P. Salzman

CERTIFICATE OF SERVICE

I certify that on this 14th day of January 2021, the foregoing document was served on all parties or their counsel of record though the CM/ECF system, which will then send notification of such filing to all parties and counsel included on the Court's Electronic Mail notice list.

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