

No. 25-1003

IN THE
Supreme Court of the United States

ERIC GUERRERO, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Petitioner,

v.

DEXTER JOHNSON,
Respondent.

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

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 19, 2026
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**APPENDIX A — SECOND OR SUCCESSIVE
PETITION FOR WRIT OF HABEAS CORPUS,
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION, WITH EXHIBITS,
FILED AUGUST 15, 2019**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. _____

DEXTER JOHNSON,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of
Criminal Justice, Correctional Institutions Division,

Respondent.

**SECOND OR SUCCESSIVE PETITION
FOR WRIT OF HABEAS CORPUS**

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THIS IS A CAPITAL CASE

**STATEMENT REGARDING FILING OF SECOND
OR SUCCESSIVE PETITION**

On August 8, 2019, Mr. Johnson sought authorization from the United States Court of Appeals for the Fifth Circuit to file a second or successive habeas petition in district court. Yesterday, August 14, 2019, that authorization requested was granted. *In re Johnson*, No. 19-20552, __F.3d__(5th Cir. 2019). Mr. Johnson attached the proposed petition to his filings in the Fifth Circuit. As noted in the proposed petition, he has updated the cover page, date, signature block, and included a verification and certificate of service before filing the petition in this Court. *See infra*, p. 3 n. 1. The authorization order and proposed petition filed in the Fifth Circuit are also attached.

[TABLE INTENTIONALLY OMITTED]

*Appendix A***I. Introduction.¹**

Texas stands on the precipice of executing an intellectually disabled man. Two recent, independently conducted expert evaluations reach the same conclusion: Dexter Johnson is intellectually disabled, placing him in a class of individuals categorically excluded from the death penalty. *See Atkins v. Virginia*, 536 U.S. 304 (2002); Ex. 1; Ex. 2. This claim comes to this Court at this late hour because Mr. Johnson's *Atkins* claim was previously unavailable to him at the time of his initial federal habeas proceedings. At the time of his 2007 trial and the filing of his initial federal habeas petition in 2011, the DSM-IV-TR was the most recent edition of that manual published by the American Psychiatric Association for the diagnosis of the disorder. That version of the manual heavily relied upon IQ test scores as the barometer for whether or not an individual was intellectually disabled. However, the newer version of that manual, the DSM-5, significantly alters the diagnostic criteria for the disorder and makes an *Atkins* claim available to Mr. Johnson.

Dr. Dale Watson testified at Mr. Johnson's 2007 trial that it was unnecessary to inquire into Mr. Johnson's adaptive functioning due to his borderline IQ scores. Ex. 3 at ¶5. However, the publication of the DSM-5 in 2013—after the filing of Mr. Johnson's initial federal petition—

1. This document contains Mr. Johnson's proposed second or successive habeas petition that he seeks authorization to file in the district court. If authorized to proceed below, he will update the cover page, caption, and include the signatures, compliance statements, and verification as may be necessary in the district court before filing.

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brought about significant changes in the diagnosis of intellectual disability. Based upon these changes, Dr. Watson recognizes that Mr. Johnson’s IQ scores do not preclude a diagnosis of intellectual disability, and as a result, no longer stands by his statement that an inquiry into Mr. Johnson’s adaptive functioning is unnecessary. Ex. 3 at ¶8.

Under the current medical diagnostic framework as described in the DSM-5, Mr. Johnson is intellectually disabled. *See* Ex. 1; Ex. 2. He has deficits in intellectual functioning as confirmed by a valid full-scale IQ score of 70 and other neuropsychological testing—including Dr. Watson’s prior testing. Mr. Johnson is at or below the bottom 2-percent of the population with regard to verbal learning and memory and is “well below the lowest one-percentile” of the population in language functioning. Ex. 1 at 11–14. Mr. Johnson presents considerable evidence of adaptive deficits throughout his life, including that he failed the second and ninth grades, was in special education classes, was unable to effectively socialize or communicate with his peers about simple concepts, and lacked the capacity to grasp practical skills, such as navigating a bus route, basic personal hygiene, or counting change. *See* Ex. 1. Significant evidence exists that these deficits manifested before he turned 18, which is unsurprising in light of that fact that he was barely over 18 at the time of the offense. *Id.*

Mr. Johnson requests that this Court find that he is intellectually disabled and exempt from execution under *Atkins* and the Eighth and Fourteenth Amendments to the constitution.

*Appendix A***II. Procedural history.**

Mr. Johnson was convicted and sentenced to death in the 208th District Court of Harris County on June 27, 2007. On July 23, 2009, Mr. Johnson filed an Initial Application for Writ of Habeas Corpus pursuant to Texas Code of Criminal Procedure, Article 11.071, presenting eleven claims for relief. The Initial Application did not include a claim that Mr. Johnson was ineligible for the death penalty under *Atkins v. Virginia*. Without holding a hearing, the convicting court made findings of fact and conclusions of law recommending that relief be denied. The Texas Court of Criminal Appeals denied habeas relief on June 30, 2010. *Ex parte Johnson*, No. WR-73, 600–01, 2010 WL 2617804 (Tex. Crim. App. June 30, 2010) (per curiam). Mr. Johnson’s federal petition for writ of habeas corpus—which also did not contain an *Atkins* claim—was denied on August 19, 2013. *Johnson v. Stephens*, No. 4:11-CV-02466, 2013 WL 4482865 (S.D. Tex. 2013) (Doc. 19). This Court affirmed on July 2, 2015. *Johnson v. Stephens*, 617 F. App’x 293 (5th Cir. 2015). Mr. Johnson’s petition for a writ of certiorari was denied on January 25, 2016. *Johnson v. Stephens*, 136 S. Ct. 980 (2016).

The trial court scheduled Mr. Johnson’s execution for May 2, 2019. Thereafter, on January 15, 2019, Mr. Johnson wrote a letter to the federal district court in which he explained that he was told by other prisoners that his attorney, Patrick McCann, had a conflict of interest in representing him because he was also his state habeas lawyer. Doc. 65. On January 29, 2018, Mr. Johnson filed a *pro se* motion for appointment of counsel, Doc. 68, and

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on February 5, 2019, the Court appointed the FPD as co-counsel, Doc. 70.

Based on its review of the case documents and initial investigations, the FPD discovered sufficient evidence to support a motion for Mr. McCann's removal as Mr. Johnson's counsel. Doc. 76. The Director opposed the motion, Doc. 81, and Mr. McCann filed his own motion under seal. On April 30, 2019, the district Court issued an order staying Mr. Johnson's execution, noting that "[t]he recent pleadings [] reveal troubling concerns about Johnson's current appointed legal representation which need resolution to preserve his rights before execution." Doc. 84 at 8. The Court stated it would schedule a hearing by separate order "to address the concerns raised in the motion to terminate Mr. McCann's appointed legal representation[.]" *Id.* at 9. Two days later, Mr. McCann moved to withdraw as Mr. Johnson's appointed counsel. Doc. 89.

On June 24, 2019, he filed a Rule 60(b) motion in federal district court asking to reopen the judgment against him. Doc. 95 (attached at Exhibit 6), which remains pending. Additionally, on August 6, 2019, he filed a subsequent application for writ of habeas corpus in state court raising the *Atkins* claim, among other issues, which remains pending.

As of today's date, Mr. Johnson's execution is scheduled for August 15, 2019.

*Appendix A***III. Mr. Johnson meets the requirements of 28 U.S.C. § 2244.**

When a petitioner seeks authorization to proceed on a second or successive habeas application, the circuit court performs an initial gatekeeping function. Pursuant to 28 U.S.C. § 2244(b)(3)(C), the circuit court “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.” At the gatekeeping stage, a petitioner is not required to prove that he satisfies the criteria for a merits resolution of his successive habeas application, nor that he is entitled to relief on his proposed claims. Instead, the petitioner must establish “simply a sufficient showing of possible merit to warrant a fuller exploration by the district court” and that “in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirement for the filing of a second or successive petition[.]” *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (quoting *Bennett v. United States*, 119 F.3d 468, 469–70 (7th Cir. 1997)).

If the circuit court authorizes a successive application, the district court then must ensure that the petitioner meets the requirement for filing a successive application before ruling on the merits of the claim itself. 28 U.S.C. § 2244(b)(4); *In re Cathey*, 857 F.3d 221, 226 (5th Cir. 2017). First, the petitioner must make a showing that the claim presented in the successive application was not presented in a prior federal application. 28 U.S.C. § 2244(b)(1); *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014). Second, for a

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claim that was not presented in a prior application to be authorized, a petitioner must show:

(A) . . . 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.

28 U.S.C. 2244(b)(2). If those are met, the district court can proceed to the merits of the claim.

A. Mr. Johnson has not previously presented an *Atkins* claim in federal court.

The initial question for this Court is whether Mr. Johnson did not present an *Atkins* claim in his prior federal application. 28 U.S.C. § 2244(b)(1); *In re Campbell*, 750 F.3d at 530. Mr. Johnson’s initial federal habeas petition did not contain an *Atkins* claim. While Mr. Johnson argued that he suffered from a mental illness “similar” to intellectual disability, it did not assert that

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he was intellectually disabled.² Rather, it requested an extension of *Atkins*. *Johnson v. Stephens*, 617 F. App'x 293, 303–04 (5th Cir. 2015). The claim suggested that Mr. Johnson's death sentence be overturned under the logic of *Atkins* and *Roper v. Simmons*, 543 U.S. 551 (2005), because he “is a brain-damaged schizophrenic.” Doc. 1.

Moreover, the Director has already taken the position that Mr. Johnson did not raise a claim that he was intellectually disabled, and thus exempt from execution, in his prior federal application. Doc. 11 at 28–29 (noting that the claim acknowledged that Mr. Johnson “does not presently fall within any of the current categorical exemptions from execution” and that his claim required an extension of the logic of *Atkins*). Therefore, Mr. Johnson has met his burden.

B. Mr. Johnson is intellectually disabled.

To be intellectually disabled, an individual must establish (1) deficits in intellectual functioning, (2) deficits in adaptive functioning, and (3) the onset of deficits during the developmental period. DSM-5 at 33. Mr. Johnson meets all three criteria.

Under the current medical diagnostic framework as described in the DSM-5, Mr. Johnson is intellectually disabled. Dr. Daniel Martell undertook an extensive evaluation of Mr. Johnson, including reviewing multiple

2. The initial federal petition did refer to Mr. Johnson as “mentally challenged” and “handicapped” in the context of a competency argument. Doc. 1 at 18.

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IQ scores, conducting neuropsychological testing, and conducting multiple clinical interviews with witnesses and Mr. Johnson. Ex. 1. Based on his analysis and clinical judgment, Dr. Martell concluded that Mr. Johnson has deficits in intellectual functioning as confirmed by his IQ score of 70 on the WAIS-IV, IQ scores from tests administered pretrial, and the clear cognitive deficits displayed on multiple neuropsychological tests. *Id.* at 23. Moreover, while Mr. Johnson must establish deficits in only one domain, Dr. Martell found deficits in adaptive functioning in all three domains—social, conceptual, and practical—identified in the DSM-5. *Id.* at 45. Mr. Johnson has severe language deficits, including a pronounced stutter and use of nonsense words. *Id.* at 24–27. He has struggled socially throughout his life as he was noticeably immature for his age, unable to make friends, and incapable of reading social cues. *Id.* at 28–32. And Mr. Johnson struggled with practical daily tasks. *Id.* at 33–44. His family had to remind him to wash with soap daily. *Id.* at 39. He could not handle basic money management and was taken advantage of because of his inability to count change. *Id.* at 35. Finally, Mr. Johnson’s deficits manifested in the developmental period, confirmed by numerous witnesses and school records. *Id.* at 45.

1. Mr. Johnson has limitations in intellectual functioning.

The first prong of an intellectual disability diagnosis is deficits in intellectual functioning. This includes deficits in reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from

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experience. DSM-5 at 33. Compared to its predecessor, the DSM-5 focuses less on specific IQ scores and more on clinical judgment. DSM-5 at 33–37; *see also Hernandez v. Stephens*, 537 F. App’x 531,533 n. 1 (5th Cir. 2013) (“The American Psychiatric Association’s fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), uses the term ‘intellectual disability (intellectual developmental disorder)’ in place of the term ‘mental retardation’ and de-emphasizes IQ scores as determinants of this condition.”).

The DSM-5 does so because IQ scores are “an approximation of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.” DSM-5 at 37. Thus, an individual with an IQ score above 70 may still qualify as intellectually disabled due to deficits in adaptive functioning. *Id.* The DSM-5’s emphasis on clinical judgment is a departure from previous medical diagnostic norms, which defined deficits in intellectual functioning only in relation to IQ score. DSM-5 at 37; *see also* Ex. 1 at 16 (“The DSM-5 definition of ID encourages a more comprehensive view of the individual than was true under the fourth edition, DSM-IV.”).

Because there is statistical error and uncertainty in any assessment of human behavior, intellectual functioning is best represented by a score range, rather than a single number. DSM-5 at 37. In addition to the IQ score itself, a clinician should consider factors that affect the score, including the practice effect and Flynn effect. *Id.* The DSM-5 also advises that cognitive profiles

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based on neuropsychological tests are “more useful for understanding intellectual abilities than a single IQ score.” *See* DSM-5 at 37.

Mr. Johnson achieved a full-scale IQ of 70 on the WAIS-IV and demonstrates neuropsychological impairments in speech and language, executive functioning, and memory. Ex. 1 at 18. This IQ score, combined with his poor performance on neuropsychological testing and poor record of academic achievement, establish that Mr. Johnson meets prong one of an ID diagnosis. *Id.* at 23.

In 2019, Mr. Johnson was administered the WAIS-IV intelligence test—a standardized measure. Ex. 1 at 18. It was individually administered by Dr. Greg Hupp and later reviewed by Dr. Martell. *Id.* at 2, 18. Mr. Johnson scored well on the effort scales, indicating that he was not malingering. Ex. 2 at 2, 5–6. Accordingly, the test score meets all of the requirements for a valid and reliable IQ score under the current medical standards. Ex. 1 at 19. Mr. Johnson’s IQ score was a 70, squarely in the range of intellectual disability.

Supporting this IQ score are the numerous intellectual functioning impairments identified by neuropsychological testing. Dr. Martell conducted a battery of neuropsychological measures and, after concluding that they provided a valid indication of Mr. Johnson’s cognitive functioning, determined that Mr. Johnson has multiple intellectual deficits beyond just the IQ score. Ex. 1 at 11. First, Mr. Johnson is at or below the bottom 2-percent of the population with regard to verbal

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learning and memory. *Id.* Second, the testing revealed that Mr. Johnson very likely has frontal lobe impairment and struggles with executive functioning. *Id.* at 13.³ Dr. Martell also observed significant impairments in Mr. Johnson's language functioning, including a pronounced stutter, mispronounced or nonsense words, and "severe impairment in his ability to name common objects[.]" *Id.* at 14. Mr. Johnson's score in language functioning placed him "well below the lowest one-percentile" of the population. *Id.* Finally, Mr. Johnson's motor-deficit testing demonstrated that his left-hand performance was significantly impaired, indicating right hemisphere brain dysfunction, and he exhibited mild to moderate impairments in his ability to correctly perceive the affect (or emotional expression) of others. *Id.* at 15.

Based on his clinical judgment, Dr. Martell concluded that Mr. Johnson's IQ scores, in conjunction with the numerous impairments documented through neuropsychological testing, demonstrate that Mr. Johnson has deficits in intellectual functioning sufficient to meet prong one of the intellectual disability diagnosis. *Id.* at 23.

Mr. Johnson scored outside of the typical ID range on two tests administered by Dr. Dale Watson in 2007. Dr. Watson's testing showed an IQ of 78 on the Stanford-Binet-5 and an 88 on the WAIS-III, administered shortly after the Stanford-Binet. Ex. 3 at ¶4. At that time, Dr. Watson believed there was no need to proceed to

3. Dr. Ruben Gur and Dr. Richard Dudley likewise found frontal lobe damage at the time of Mr. Johnson's trial. *See* 31 RR 240; 32 RR 186.

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evaluating Mr. Johnson’s adaptive functioning because the DSM—IV strictly defined deficits in intellectual functioning as a full-scale IQ of 75 or below. *Id.* However, Dr. Watson would no longer testify that Mr. Johnson is not intellectually disabled based on those scores. *Id.* The current medical diagnostic framework established in the DSM-5 specifically requires clinicians to exercise clinical judgment in making an ID diagnosis because an IQ score “may be insufficient” to assess a person’s actual functioning. DSM-5 at 37. Thus, as Dr. Watson now recognizes, the current medical standard dictates clinical judgment, real-world behaviors, and neuropsychological testing over strict IQ cutoffs. Ex. 3 at 2; DSM-5 at 37.

Moreover, Dr. Martell reviewed Dr. Watson’s 2007 testing and found that Mr. Johnson’s score of 78 on the Stanford-Binet 5 does “place Mr. Johnson in the clinical range for a diagnosis of Intellectual Disability under the DSM-5 criteria, particularly in light of his adaptive deficits[.]” Ex. 1 at 17. Dr. Martell also reviewed Mr. Johnson’s score of 88 on the WAIS-III and determined that the difference in the two 2007 scores can be explained by the different structure in the two intelligence tests. *Id.* at 18. In fact, 25% of individuals will receive an IQ score more than 10 points higher when taking another test. *Id.*

Mr. Johnson’s significantly sub-average IQ score, combined with the extensive deficits he exhibits in his neuropsychological testing, leads Dr. Martell to conclude that Mr. Johnson suffers deficits in intellectual functioning under the definition articulated in the DSM-5. Ex. 1 at 23. And because Mr. Johnson has a qualifying IQ score, an evaluation of his adaptive functioning is mandatory.

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Moore v. Texas, 137 S. Ct. 1039, 1049 (2017) (*citing Hall v. Florida*, 572 U.S. 701, 723 (2014)).

2. Mr. Johnson has deficits in adaptive functioning.

The second prong that an individual must meet for an intellectual disability diagnosis is deficits in adaptive functioning, which is a measure of how well the individual meets community standards of personal independence and social responsibility when compared to other people of similar age and sociocultural background. DSM-5 at 33. Under the current standards delineated in the DSM-5, deficits in adaptive functioning are given more weight than IQ score in determining whether an individual is intellectually disabled. *Id.* at 37.

Adaptive functioning is measured over three domains: conceptual, social, and practical. The conceptual (or 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 of behavior, and school and work task organization, among others. *Id.* Deficits or significant limitations in only one of the three adaptive functioning domains—conceptual, social, and practical—are needed to confirm a diagnosis of ID. *Id.* at 38.

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Dr. Martell evaluated Mr. Johnson and concluded that Mr. Johnson exhibited significant deficits in all three domains of adaptive functioning, as defined by the DSM-5. Ex. 1 at 45. In reaching his conclusion, Dr. Martell interviewed witnesses and reviewed declarations from Mr. Johnson's family, former coworkers, and a teacher; the trial testimony from the punishment phase; and numerous educational and medical records. *Id.* at 2–3.

a. Conceptual domain.

The conceptual domain includes skills like reading, writing, and arithmetic, as well as abstract thinking, such as planning and memorization. DSM-5 at 37. Dr. Martell found both empirical and anecdotal evidence that Mr. Johnson has significant deficits in functional academic skills, language skills, and concept formation and self-direction. Ex. 1 at 23–24.

Mr. Johnson repeated the second grade and his teacher during the second year, Annie L. Batiste, observed that Mr. Johnson struggled with reading comprehension and problem solving. *Id.* at 24.⁴ Even though Mr. Johnson was older than the other children in the class, he “had a hard time completing what he needed to do in class” and was in speech classes for his articulatory problems. *Id.* At times he could not get words out or would use the wrong word. *Id.* Ms. Batiste's observations of Mr. Johnson are corroborated by his school records, which show that he was in special education from elementary school continuing into high school. *Id.*

4. Supporting lay witness statements are attached as Exhibit 5.

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In high school, and during his second attempt at the ninth grade, Mr. Johnson still functioned at a sixth-grade level and was in special education in all subjects even though he should have been in the eleventh grade. *Id.* at 25. His high school record noted his need for support in multiple adaptive functioning areas including home and family living, career skills development, independent living, self-help activities, transportation training, money management, social skills, and driver's license training. *Id.*

Through his interview with Mr. Johnson's sister, Travalia, Dr. Martell learned that the word confusion he had observed in his neuropsychological testing had begun during Mr. Johnson's childhood. Mr. Johnson's family noticed that Mr. Johnson needed them to repeat things several times before he would understand. *Id.* at 25–26. He also had a stutter and mispronounced words, such as calling a “spoon” a “boon.” *Id.* at 26. The family sometimes teased Mr. Johnson for being “slow” and found that he “could barely read[.]” *Id.* at 27. Dr. Martell also recognized that Mr. Johnson had deficits in “receptive language skill,” meaning that he could not understand what others told him.

Mr. Johnson admitted that he did not like school because other children called him “dumb” and he could not keep up, which was “fusteratin” to him. *Id.* at 27. Mr. Johnson's younger sister frequently did his homework for him because he could not complete even special education assignments. *Id.* at 25. His teachers sometimes called Mr. Johnson's older sister out of class to help him because Mr. Johnson would become emotional when he could not handle the assignments. *Id.* at 26.

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Dr. Martell concluded that the struggles revealed by Mr. Johnson's academic records, and confirmed by the neuropsychological testing, as well as the description of Mr. Johnson's inability to read or communicate from multiple witnesses, demonstrate deficits in the conceptual domain as defined by the DSM-5. *Id.* at 28.

b. Social domain.

The social domain involves communication skills, friendship abilities, and social judgment. DSM-5 at 37. Individuals with deficits in this domain tend to be more immature than others of the same age, struggle regulating emotion, and may be naïve and easily taken advantage of. *Id.* at 34–36. Throughout his life, Mr. Johnson has struggled to make friends, was noticeably immature when compared to peers, and was easily taken advantage of.

Multiple witnesses reported that Mr. Johnson struggled socially. As a child, Mr. Johnson was bullied by other kids for being slow. Ex. 1 at 28. Despite the bullying, Mr. Johnson would tell his sister, Sheree, that he had made friends. *Id.* If another kid told him they were friends “he would automatically believe it[,] although in reality he barely knew the person.” *Id.* In interviews with Dr. Martell, Mr. Johnson's mother and younger sister, Marquette, noted that Mr. Johnson did not understand jokes because “[h]e took it literal.” *Id.* at 28. Even when someone broke the joke down and explained it, he did not understand. *Id.* at 29.

Mr. Johnson has never been able to maintain a conversation, preferring to just agree, wanting the other

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person to do most of the talking. *Id.* He cannot maintain eye contact. *Id.* When Mr. Johnson worked at Jack-in-the-Box as a teen, his social ineptitude meant that he could not handle communicating with customers. *Id.* at 30.

Growing up, Mr. Johnson was socially immature. He did not have friends and preferred to watch cartoons. *Id.* at 29. He mostly stayed home because he was “awkward in social situations.” *Id.* His social deficits often meant that Mr. Johnson was victimized by bullies. Other kids “just beat on him” and he even injured himself running from them. *Id.* at 30. His teacher remembered that he was never “part of the group” with other kids and was abused by them because he “was gullible.” *Id.* at 30–31. Other kids would tell Mr. Johnson to get out of his seat when the teacher left the room and then tattletale as soon as she came back. *Id.* at 31; *see also* DSM-5 at 38 (“Gullibility is often a feature, involving naivete in social situations and a tendency for being led by others . . . [which] may result in exploitation by others[.]”). His teacher also saw that Mr. Johnson struggled to control his emotions. He would clench his fists and cry for five minutes every day in class. *Id.* at 30. He could not sit still. *Id.*⁵

As a result, Mr. Johnson often felt left out. *Id.* at 32. He had trouble understanding what was happening around him and preferred to be alone so that no one would make fun of him. *Id.* Dr. Martell also noted that these social

5. Gullibility and inability to regulate emotion are specifically identified in the DSM-5 as particularly “important in criminal cases, including Atkins-type hearings involving the death penalty.” DSM-5 at 38.

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deficits mirror his findings in the neuropsychological testing. He administered the Comprehensive Affect Testing System to Mr. Johnson which tests one's ability to recognize and correctly identify the emotional expressions of others based on visual facial and auditory language cues. *Id.* at 32. Mr. Johnson exhibited mild to moderately severe impairment in all areas of this test. *Id.*

Dr. Martell determined that Mr. Johnson has mild to moderate impairment in the social domain as he struggles with spoken language, gullibility, and regulating emotion, Ex. 1 at 32–33, struggled to develop and maintain relationships, and was ostracized by others who perceived him as “slow.” *Id.* at 28–33.

c. Practical domain.

The practical domain involves personal care, money management, and job responsibilities. DSM-5 at 37. Dr. Martell concluded that Mr. Johnson displays significant deficits in this area because he could not follow bus or walking directions, struggles with personal hygiene, and cannot manage money or his own affairs.

Through interviews, Dr. Martell learned that Mr. Johnson's inability to “keep up” meant that he was often “short-changed.” Ex. 1 at 33. He could not keep track of his money, which led others to take advantage of him. For example, when Mr. Johnson received an income tax check for \$320, a check cashing store gave him \$32. *Id.* at 35. Mr. Johnson did not realize the difference and his sister directed him to go back and get his money. *Id.* His family knew that people took advantage of Mr. Johnson:

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“You couldn’t trust him to come out of the store with the right change. People could see how he was and they took advantage of that.” *Id.* at 33.

As a child, Mr. Johnson could not remember the rules of a simple card game like Old Maid. *Id.* at 33. No one wanted Mr. Johnson on their team when it came to sports because he could not keep up. *Id.* at 34. He also could not keep score during the game. *Id.* Mr. Johnson needed help ordering at restaurants because he struggled to read the menu and suffered from anxiety in public. *Id.* at 34. As a teen, he could not read a user-guide to learn how to use his cell phone. *Id.* Even his first “flip phone” was too difficult for him to navigate. *Id.* at 35. His sisters showed him how to set an alarm on the phone so he would get up on time but he would forget how to do it. *Id.* at 34. They took to setting the alarms for him. *Id.* Mr. Johnson struggled so much with reading that “he would just try to guess.” *Id.* at 36. He avoided texting, telling people just to call. *Id.* at 42. He once tried to put together an entertainment center for his mother but could not understand the instructions and it collapsed within a week. *Id.* at 36.

Although she tried to give Mr. Johnson chores, his mother realized that he had limits. He could put dishes in the dishwasher but got confused by the buttons. *Id.* at 39. He could not work the washer and dryer so his mother washed his clothes for him. *Id.* She limited his tasks to taking out the trash and sweeping the porch. *Id.*

Mr. Johnson often endangered himself by lack of common sense. He would chase a ball into the street without watching for cars and answer the door without

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checking who it was. *Id.* at 34. He never remembered to use a seat belt. *Id.* Mr. Johnson would do things that everyone else knew not to do, such as lighting a barbecue pit with his head inside the pit, burning himself. *Id.* at 35. At age 17, after he flooded his mother's house by breaking a pipe connected to the icemaker, his family no longer trusted him home alone. *Id.* at 36.

Multiple witnesses noticed that Mr. Johnson could not manage directions throughout his life. As a kid, he needed one of his sisters to take him to and from school because he would get lost. *Id.* at 35. Even as a teenager, he could not manage a bus route and took to walking everywhere. *Id.* at 42. When he did take the bus, he was sometimes able to get help from "nice bus drivers" who told him where to stand for the next bus and told him to ask the driver to let him know when to get off. *Id.* at 43. He once forgot which stop to get off at and came home from work four hours late. *Id.* at 35. When Mr. Johnson's younger sister, Marquette, once asked him to take her to school, he got lost. *Id.* at 40. She decided to walk Mr. Johnson back home to be sure that he made it. *Id.* His mother only sent him to the store with one of his sisters as an escort because he so often got lost. *Id.* at 39.

Mr. Johnson had poor personal hygiene. Witnesses informed Dr. Martell that Mr. Johnson had significant issues with halitosis and dressing himself. He needed help until he was 10 or 11 years old because he could not put on his shoes and socks the right way. *Id.* at 39. Mr. Johnson also needed help with using soap and shampoo until he was a teen. *Id.* His mother made him come with her into

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the women's restroom when they were out in public to make sure he washed his hands. *Id.* When he was older, he wanted to "starch" his pants to look like the other guys in the neighborhood and would mix flour and water, apply them to his pants, and wear them until they would "reek." *Id.* at 36, 43. Mr. Johnson admitted that people would complain to him that he smelled and tell him to brush his teeth. *Id.* at 42–43.

When it came to self-management, Mr. Johnson needed significant support. He needed help completing a job application. *Id.* at 38. When he had a job, he would hand his paychecks over to his girlfriend to manage because he did not have a bank account and could not keep track of his money. *Id.* As an adult, he did not understand what a credit card is, asking "is that what you get at the bank?" *Id.* at 44. When Mr. Johnson worked at Jack-in-the-Box, his supervisor had to help him because he was never able to pass periodic company tests about service, food portions, or customer service. *Id.* at 41. It took him longer than other employees to catch on. *Id.* His manager was his girlfriend's mother and she knew his "situation" and "looked out for him." *Id.* at 40. He worked in the back at Jack-in-the-Box because he lacked the skills to work the cash register or interact with customers. *Id.* at 37. Even there, he was at risk, burning himself on the fryer. *Id.* at 34.

Based on this evidence, Dr. Martell concluded that Mr. Johnson has deficits in the practical domain of adaptive functioning because he struggles with self-care, could not manage routine household tasks, and needed significant support with managing his job and money.

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Id. at 44. Moreover, with regard to all of Mr. Johnson’s adaptive deficits, Dr. Martell concluded that his “adaptive impairments are clearly related to his underlying cognitive limitations. There is substantial ‘convergent validity’ from anecdotal, contemporaneous, and empirical data sources supporting the conclusion that Mr. Johnson functions adaptively in the range of Intellectual Disability, which meets the second diagnostic prong.” *Id.* at 45.

3. The onset of the disorder was during the developmental period.

The third prong of an intellectual disability diagnosis is onset of deficits during the developmental period, which is defined as before the age of 18. The DSM-5 does not require that the deficits be present at birth or even be biomedical in nature.

Based on various witness declarations, trial testimony, and records, Dr. Martell has concluded that Mr. Johnson’s deficits began before age 18. Ex. 1 at 45. Dr. Martell also found that the presence of head injuries and other risk factors for intellectual disability that occurred during Mr. Johnson’s developmental period further supported the age of onset as pre-18. *Id.*⁶

6. For instance, Dr. Ruben Gur testified at Mr. Johnson’s trial that MRI results showed the brain tissue in Mr. Johnson’s left frontal lobe is three standard deviations lower than in the normal brain, which you find in less than one-tenth of one percent of the population. 30 RR 240.

*Appendix A***4. Mr. Johnson application is timely or he can establish equitable tolling.⁷**

Mr. Johnson has numerous arguments that allow him to establish the timeliness of his application. Section 2244(d) creates a one-year statute of limitations for bringing claims in a federal habeas corpus petition, which triggers based on the latest of a variety of conditions. The limitations period for Mr. Johnson’s application runs from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). Because the factual predicate for the claim relies on the publication of the DSM-5, it would not start running until Mr. Johnson should have been placed on notice of the salient changes in that manual, thus making the claim available.

Moreover, Mr. Johnson may establish equitable tolling for any claim that may fall outside the limitations

7. Because it is a fact bound question, the district court has the tools at its disposal—namely, the ability to hold an evidentiary hearing—to best address the question whether Mr. Johnson’s *Atkins* claim meets the federal statute of limitations. *In re Campbell*, 750 F.3d 523, 533–34 (5th Cir. 2014). This question can be heavily dependent on the merits of the claim itself, and thus the merits of the claim should be adjudicated first. *See Rivera v. Quatterman*, 505 F.3d 349, 355 (5th Cir. 2007) (“[A]nswering whether Rivera is retarded [*sic*] is logically antecedent—if not a core element itself—to determining whether equitable tolling is available.”). As such, this Court should delay a determination of the statute of limitations issue until after the fact-intensive inquiry regarding whether Mr. Johnson is intellectually disabled.

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period. Equitable tolling is a flexible, judicially-created remedy that is evaluated on the specific circumstances of the case, and which requires a petitioner to show that he has pursued his rights diligently, but extraordinary circumstances stood in the way of a timely filing. Such extraordinary circumstances can include “an attorney’s failure to satisfy professional standards of care.” *Holland v. Florida*, 560 U.S. 631, 649 (2010); *see also id.* at 651 (“[A]t least sometimes, professional misconduct that fails to meet the Eleventh Circuit’s standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling.”); *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012) (applying the two-prong *Holland* standard to the petitioner’s argument that equitable tolling was warranted). The fact-sensitive inquiry attendant to equitable tolling arguments is one that is best resolved at an evidentiary hearing. *See Holland*, 560 U.S. at 654.

Equitable tolling is warranted due to Mr. Johnson’s deficits. Moreover, equitable tolling is warranted due to his prior representation by conflicted counsel. *See* Ex. 6. Mr. Johnson diligently pursued his rights by timely requesting, *pro se*, the appointment of conflict-free counsel and timely seeking to reopen the judgment once he became aware of the conflict. In other filings, he has provided significant support for the proposition that his prior attorneys’ actions in his case fell far below the standards of professional care. *See, e.g.*, Doc. 95 at Ex. 2 (Schuwerk Declaration). He has also shown several extraordinary circumstances as outlined in his Rule 60(b) Motion, which weigh in favor of both reopening the judgment and finding that equitable tolling is warranted. *See* Ex. 6.

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Atkins claims may also fall into a class for which the statute of limitations can be bypassed based on a showing of actual innocence of the death penalty. In *McQuiggin v. Perkins*, the Supreme Court held that actual innocence of the crime, if proven, establishes a gateway to present constitutional claims even if the statute of limitations had otherwise expired. 569 U.S. 383 (2013). The *Perkins* court noted that the miscarriage of justice exception “survived AEDPA’s passage” and has been used to overcome various procedural hurdles. *Id.* at 392–93. *Perkins* applied the logic of *Schulp v. Delo*, 513 U.S. 298 (1995), which allows petitioners to overcome procedural default of a claim upon a showing of actual innocence and extends the rationale to the federal statute of limitations.

To the best of Mr. Johnson’s knowledge, neither the Supreme Court nor the Fifth Circuit has resolved the question whether *Perkins* applies to claims of actual innocence of the death penalty, such as an *Atkins* claim. See *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014) (explaining that the application of *Perkins* to actual innocence of the death penalty was “a question we do not decide here[.]”).⁸ *Schulp* itself relies heavily on the Supreme Court’s opinion in *Sawyer v. Whitley*, 505 U.S. 333 (1992), which involved the excuse of procedural default based on actual innocence of the death penalty. Because the *Schlup* standard applies to the statute of limitations period, so should the *Sawyer* standard. As such, a plausible

8. In *Henderson v. Thaler*, 626 F.3d 773, 781 (5th Cir. 2010), the court held that it would not create an actual innocence of the death penalty exception to the statute of limitations. However, this decision predated *Perkins*, and the question was explicitly left open in *Tamayo*.

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argument exists that the statute of limitations can be bypassed when a petitioner is able to establish actual innocence of the death penalty—such as showing that he is intellectually disabled.

C. Mr. Johnson’s *Atkins* claim was previously unavailable under 28 U.S.C. 2244(b)(2)(A), because his *Atkins* claim required the publication of the DSM-5.

To receive authorization to proceed under 28 U.S.C. 2244(b)(2)(A), Mr. Johnson must show that his *Atkins* claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” The Fifth Circuit has repeatedly held that an *Atkins* claim meets this requirement. *See, e.g., In re Campbell*, 750 F.3d at 530; *Mathis v. Thaler*, 616 F.3d 461, 467 (5th Cir. 2010); *Morris v. Dretke*, 413 F.3d 484, 486–87 (5th Cir. 2005). Thus, the question becomes whether Mr. Johnson’s *Atkins* claim was previously unavailable.

The fact that *Atkins* was issued before Mr. Johnson filed his initial federal petition for writ of habeas corpus is not dispositive of this question. *In re Cathey*, 857 F.3d at 229-34. To receive authorization to proceed, Mr. Johnson must present “sufficiently cogent arguments” that his *Atkins* claim was “unavailable at the time of his first petition and its disposition.” *Id.* at 230 (quotations omitted). If a rule becomes available to a petitioner while his first federal petition is pending, this Court assesses whether it was “feasible to amend his or her pending petition to

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include the new claim.” *Id.* at 229 (quoting *In re Wood*, 648 F. App’x 388, 391 (5th Cir. 2016)). It is not feasible to amend when, *inter alia*, the claim is “functionally unavailable” based on deficient representation in the initial federal habeas proceeding. *Id.* Cases that fall into “a gray area of previous unavailability despite technical availability” should receive authorization to proceed in district court. *Id.* at 230.

1. Under the controlling precedent of *In re Cathey*, Mr. Johnson’s *Atkins* claim was previously unavailable.

In *Cathey*, the initial federal petition was filed nearly two years after the *Atkins* decision and did not include an *Atkins* claim. 857 F.3d at 227. Two justifications were offered to explain why the *Atkins* claim was not previously available. The first explanation was that the Flynn Effect—which suggests that IQ scores should be reduced by .3 points per year from the year the test was normed—was not considered by courts until “at least 2005,” the year after Mr. Cathey filed his petition. *Id.* Mr. Cathey had a 77 IQ score, and was unable to pursue a viable *Atkins* claim until the courts recognized the validity of the Flynn Effect. *Id.* Second, evidence came to light in 2010 that Mr. Cathey had previously received an IQ score of “below 73” from TDCJ. *Id.* at 232.

The Director opposed authorization in *Cathey*. Among other arguments, she noted that the “Flynn Effect was recognized for at least twenty years before Cathey’s first federal petition” and that the documents referencing a

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“below 73” IQ score did not explain the basis for that score. *Id.* at 228. Despite that, the court found in *Cathey* that the petitioner had made a prima facie showing that it was not feasible to amend his petition to include an *Atkins* claim. The Court placed heavy emphasis on the fact that the petitioner was not required to *satisfy* 28 U.S.C. 2244(b)(2) at the authorization stage, but rather to make a “sufficient showing of possible merit.” *Id.* at 233 (citations omitted). In evaluating the availability of the Flynn Effect, the Court focused on the date when Texas courts, rather than the medical community, showed awareness of the phenomenon. *Id.* at 231. Because of the arguments presented, the case fell into a “gray area” and deserved encouragement to proceed in the district court. *Id.* at 230.

Under the controlling precedent in *Cathey*, Mr. Johnson’s *Atkins* claim was unavailable at the time he filed his initial federal petition. Similar to the petitioner in *Cathey*, Mr. Johnson’s intellectual disability claim was not available to him at the time he filed his initial federal petition under then-current standards for diagnosing the disorder.⁹ Mr. Cathey required, in part, the acceptance of the Flynn Effect for his *Atkins* claim to be available; Mr. Johnson’s claim hinges on the publication of the DSM-5 to make his claim available. In light of what the American Psychiatric Association (“APA”) labels “significant

9. Mr. Johnson is not arguing that he was not intellectually disabled at the time of the offense in question. Instead, his argument is that current prevailing professional norms establish that he was intellectually disabled at the time of the offense, although they may not have prior to the publication of the DSM-5.

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changes”¹⁰ to the diagnostic criteria as reflected in the DSM-5, Mr. Johnson is intellectually disabled, whereas under the prior version of the manual—which reflected outdated diagnostic criteria—he is not. As the Supreme Court has repeatedly made clear, reviewing courts must consider the *current* medical framework when determining whether an individual is intellectually disabled. *See Moore v. Texas*, 137 S. Ct. 1039 (2017) (requiring courts to consider current medical standards when determining whether an individual is intellectually disabled); *Hall v. Florida*, 572 U.S. 701 (2014) (same).

At the time of Mr. Johnson’s trial and the filing of his federal habeas petition, the DSM-IV-TR was the most recent APA manual outlining the standard for diagnosing intellectual disability, which was then known as mental retardation. The DSM-IV-TR criteria required: (1) significantly sub average general intellectual functioning, an IQ of about 70 or below on an individually administered IQ test; (2) accompanied by significant limitations in adaptive functioning in at least two skill areas; and (3) onset before age 18. Ex. 3 at ¶5. Mr. Johnson was administered two IQ tests at the time of his trial, but he did not meet the then-prevailing first prong of an ID diagnosis, and thus a comprehensive intellectual disability evaluation was not undertaken. 31 RR 263.

The DSM-5, published on May 18, 2013, made “significant changes” to the diagnostic criteria for intellectual disability. Ex. 4. In particular, the DSM-5

10. Ex. 4.

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places heightened focus on adaptive functioning deficits and lesser emphasis on IQ scores. *Id.* (noting that “the severity of impairment [is] based on adaptive functioning rather than IQ test scores alone.”). In fact, the DSM-5 went so far as to remove IQ scores from the diagnostic criteria, while noting that IQ testing should remain part of the overall assessment. *Id.*; see also *Hernandez v. Stephens*, 537 F. App’x 531, 533 n.1 (5th Cir. 2013) (“The American Psychiatric Association’s fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), uses the term ‘intellectual disability (intellectual developmental disorder)’ in place of the term ‘mental retardation’ and de-emphasizes IQ scores as determinants of this condition.”). The “DSM-5 ensures that [IQ scores] are not overemphasized as the defining factor of a person’s overall ability, without adequately considering functioning levels.” Ex. 4 at 1–2. The new diagnostic criteria account for the fact that “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 lower IQ scores.” Ex. 3 at ¶7 (quoting DSM-5 at 33).

Dr. Martell explains that the DSM-5 “encourages a more comprehensive view of the individual” as compared to the prior version of the manual. Ex. 1 at 16. In the newer manual, “[m]ore importance is placed on clinical judgment with regard to the presence of adaptive deficits, and less emphasis is placed on bright-line IQ cutoff scores.” *Id.*; see also *id.* (The DSM-V places “significantly more emphasis on adaptive functioning” as the “hallmark

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indicia of intellectual disability.”). These changes reflect the medical community’s evolving understanding that individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than IQ test scores. *Id.* (quoting DSM-5 at 37).¹¹

In light of these changes to the diagnostic criteria for intellectual disability, Dr. Watson no longer stands by his testimony that an assessment of Mr. Johnson’s adaptive functioning deficits is not necessary in light of his IQ scores. Ex. 3 at ¶9. And both of the experts who have met with and evaluated Mr. Johnson under the currently prevailing norms for diagnosing intellectual disability have concluded that he is intellectually disabled. Ex. 1; Ex. 2. Thus, the changes to the diagnostic criteria for intellectual disability in the DSM-5 have a clear and direct impact on the availability of an *Atkins* claim; Mr. Johnson would not have received a diagnosis of intellectual disability under the prior manual, but he has received such a diagnosis from two experts under the current version.

Moreover, Mr. Johnson’s recent full-scale IQ score of 70 provides additional support for a finding that the *Atkins* claim was previously unavailable. In *Cathey*, the

11. While the DSM-5 modified the criteria for the diagnosis, this does not mean that more individuals now qualify for the disorder than did under the DSM-IV-TR. In fact, one study found a 9% reduction in its sample size for those that qualified for the disorder under the DSM-5 as opposed to the DSM-IV-TR. See Aimilia Papazoglou et al., *To ID or Not to ID? Changes in Classification Rates of Intellectual Disability Using DSM-5*, 52 *Intellectual and Developmental Disabilities* 165 (June 2014).

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court held that vague notations on two TDCJ documents listing the petitioner’s IQ score as “below 73,” without an explanation for the basis of those notations, supported a finding that the petitioner’s *Atkins* claim was previously unavailable. 857 F.3d at 232–33. If a TDCJ notation of an IQ score below 73 supported a prima facie finding that Mr. Cathey’s *Atkins* claim was previously unavailable, then certainly Mr. Johnson’s report of a full-scale score of 70 on a recent administration of the WAIS-IV also supports such a finding.¹²

2. It was not feasible for Mr. Johnson to amend his *Atkins* claim into the initial petition.

It was not feasible for Mr. Johnson to amend his initial federal petition to include the *Atkins* claim. *See In re Cathey*, 857 F.3d at 229 (explaining that if a rule becomes available during the pendency of the initial petition in district court, a court looks to whether it would have been “feasible to amend his or her pending petition to include the new claim.”) (citations omitted). The DSM-5 was published on May 18, 2013, three months prior to the denial of Mr. Johnson’s federal habeas petition on August 19, 2013. DE 19.¹³ On August 2, 2013, the Fifth

12. To be clear, Mr. Johnson is not suggesting that IQ testing conducted after the disposition of the initial federal habeas petition, standing alone, is enough to clear the “previously unavailable” hurdle of the statute. However, just as in *Cathey*, this testing supports the argument of previously unavailability. 857 F.3d at 233.

13. The district court denied the petition at this point with the exception of one claim, which it ordered further briefing on.

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Circuit issued its opinion in *Hernandez v. Stephens*, 537 F. App'x. 531, which was—to the best of Mr. Johnson's knowledge—the first time a Texas court mentioned the DSM-5. *Id.* at 533, n. 1. Even assuming, *arguendo*, that a footnote in an unpublished opinion should have placed Mr. Johnson on notice of the new availability of an *Atkins* claim, it would not have been feasible to amend that claim into his initial petition in the seventeen days remaining before the petition's denial.¹⁴

Furthermore, Mr. Johnson can make a showing that “his representation in the initial federal habeas proceedings was so deficient as to render the *Atkins* claim functionally unavailable[.]” See *In re Cathey*, 857 F.3d at 229. Mr. Johnson has a Rule 60(b) motion to reopen the judgement against him pending in the district court, premised upon a conflict of interest between him and his former federal counsel and the resulting deprivation of his statutory right to adequate representation. Ex. 6. The pending motion argues that Mr. Johnson's former court-appointed attorney, Patrick F. McCann, operated under a significant conflict of interest that arose no later than May 28, 2013, when the Supreme Court issued its opinion in *Trevino v. Thaler*, 569 U.S. 413 (2013), as he served as both state and federal habeas counsel.

14. Evaluating an individual for intellectual disability is a time-consuming process. It requires a qualified professional to review voluminous documents, meet with the individual in person, and often conduct other interviews of those that know the individual to gain historical insight into their functioning. It is not reasonable to expect this, along with the preparation of court pleadings, to occur in seventeen days.

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Not only did Mr. McCann fail to inform Mr. Johnson of the conflict of the interest, but he took a number of steps in direct contravention of Mr. Johnson's best interests, including: (1) attempting to amend claims into the federal petition by invoking *Martinez* and *Trevino* to excuse the default of those claims while simultaneously arguing that he had not provided ineffective assistance in state habeas; (2) treating Mr. Johnson differently from other clients with whom he developed a *Martinez/Trevino*-based conflict and for whom he had sought the appointment of conflict-free counsel because it was "his ethical duty" to do so; (3) opposing Mr. Johnson's *pro se* request for conflict free counsel in the district court; and (4) filing a state successor application without informing Mr. Johnson or obtaining his consent to do so, even after he was placed on notice that doing so would erect significant obstacles to the presentation of other newly available claims in state. Ex. 6.

Robert P. Schuwerk, a leader in the field of attorney ethics, reviewed Mr. McCann's actions in this case and found that "conflicts did arise, that they were clear and serious, that Mr. McCann did not address them in a professionally appropriate manner and that, unless remedied by this Court, those missteps by Mr. McCann will cause irreparable injury to Mr. Johnson." Doc. 95 at 9. The conflicted and otherwise inadequate representation that Mr. Johnson received during his initial federal habeas proceeding rendered his *Atkins* claim functionally unavailable.

Previous unavailability is a fact-intensive question appropriate for resolution in the district court; yet, Mr. Johnson meets his *prima facie* burden at this stage.

*Appendix A***D. Mr. Johnson can make a showing of diligence and innocence under 28 U.S.C. § 2244(b)(2)(B).**

Mr. Johnson also requests authorization pursuant to 28 U.S.C. § 2244(b)(2)(B). Under this subsection, a petitioner must show that,

(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.

Id. For the reasons stated in Section IV(C), *supra*, the factual predicate for the *Atkins* claim—that Mr. Johnson is intellectually disabled—could not have been discovered previously through the exercise of due diligence, as it hinges on the publication of the DSM-5 in 2013. *See* 28 U.S.C. § 2244(b)(2)(B)(i). And, for the same reasons outlined in Section IV(B), *supra*, Mr. Johnson is able to establish that he is intellectually disabled by clear and convincing evidence, and therefore is actually innocent of the death penalty. As such, Mr. Johnson satisfies his burden under § 2244(b)(2)(B)(ii) as well.

Mr. Johnson is aware that the Fifth Circuit's precedent appears to foreclose an argument that a claim based on

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actual innocence of the death penalty can satisfy 28 U.S.C. § 2244(b)(2)(B)(ii). *See In re Webster*, 605 F.3d 256, 257–59 (5th Cir. 2010) (holding that 28 U.S.C. § 2255(h)(1) does not allow challenges relating to the sentence); *see also Turner v. Epps*, 460 F. App’x 322, 330 (5th Cir. 2012) (holding that the logic of *In re Webster* applies to 28 U.S.C. § 2244(b)(2)(B)(ii) because of the similarity in language between the statutes). However, subsequent Supreme Court developments have undercut the rationale in reaching that conclusion. *In re Webster*’s holding relied upon the court’s belief that the miscarriage of justice exception in *Sawyer v. Whitley*, 505 U.S. 333 (1992) did not survive the passage of AEDPA. *In re Webster*, 605 F.3d at 258. Subsequently, the Supreme Court has held that the miscarriage of justice exception has, in fact, survived the passage of AEDPA. *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013).

Mr. Johnson is not aware of any cases in which the Fifth Circuit has addressed the impact of *McQuiggin* on its holding *In re Webster*, and requests that this Court revisit this question on that basis. In *McQuiggin*, the Supreme Court explained that “[w]e have applied the miscarriage of justice exception to overcome various procedural defaults,” including, *inter alia*, “‘successive’ petitions asserting previously rejected claims” and “‘abusive petitions asserting in a second petition claims that could have been raised in a first petition.’” 569 U.S. at 392–93 (citations omitted). This language provides direct support for the proposition that the miscarriage of justice exception should be available to petitioners to excuse any potential procedural bar, including a petitioner such as Mr. Johnson invoking actual innocence of the death penalty to proceed under 28 U.S.C. § 2244(b)(2)(B)(ii).

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IV. Conclusion and prayer for relief.

For these reasons, Mr. Johnson requests that this Court enter an order that he is intellectually disabled and exempt from execution pursuant to *Atkins* and the Eighth and Fourteenth Amendments to the constitution.

DATED: August 15, 2019

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Jeremy Schepers
Jeremy Schepers
Supervisor, Capital Habeas Unit

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EXHIBIT 1

**Daniel A. Martell, Ph.D., A.B.P.P.
Forensic Psychology and Neuropsychology**

Forensic Neuroscience	(949) 230-7321 (Office)
Consultants, Inc.	(949) 786-7476 (Fax)
64 Fairlake	damartell@aol.com
Irvine, CA 92614	www.forensicneuroscience.com

BY ELECTRONIC MAIL

July 31, 2019

Jeremy Schepers
Supervisor, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Texas
525 S. Griffin St.
Suite 629
Dallas, TX 75202

RE: Dexter Johnson

Dear Mr. Schepers,

I am writing to share the findings and opinions from my examination and testing of Mr. Johnson, and review of the case materials you have provided pursuant to the above captioned matter.

*Appendix A***Referral Question**

You have asked that I examine and test Mr. Johnson in order to provide the Court with opinions regarding whether he meets the diagnostic criteria for Intellectual Disability pursuant to *Atkins v. Virginia*.

Basis for Opinions**Scope of Examination and Informed Consent**

I personally examined Mr. Johnson on June 13 and 14, 2019 in a quiet, semiprivate conference room with an officer observing through a glass window at the Allan B. Polunsky Unit in Livingston, TX for a total of approximately eight (8) hours.

Mr. Johnson was hands-free, but had his legs restrained with chains and cuffs during the examination. Comfort breaks were taken as needed.

He was advised that I had been retained by your office, of the limits on confidentiality in this forensic context, and of the lack of any treating relationship between us. Mr. Johnson was able to provide his informed consent to participate with this understanding.

In addition to my examination and testing of Mr. Johnson, I personally met with and interviewed several of his family members on June 12, 2019. This included his mother, Sharon, and his sisters Marquette whom I interviewed together for approximately one hour; and his sisters

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Sheree and Travalia whom I interviewed separately for approximately 45 minutes each.

Materials Reviewed

I have reviewed a large volume of material including the following:

1. Raw testing data from Dale Watson, Ph.D.
2. Raw testing data from Greg Hupp, Ph.D.
3. April 8, 2019, Determination of Intellectual Disability by Greg Hupp, Ph.D.
4. Punishment phase testimony from Mr. Johnson's 2007 trial
5. Statements
 - a. Declaration of Annie L. Batiste
 - b. Affidavit of Sharon Renee Johnson
 - c. Affidavit of Sheree Johnson
 - d. Affidavit of Marquette Pradia
 - e. Affidavit of Shunell Johnson
 - f. Affidavit of Travalia Johnson
 - g. Affidavit of Alicia Bishop
 - h. Affidavit of Georgia Bishop
 - i. Affidavit of David Bishop
 - j. Affidavit of Dominique Bishop
 - k. Affidavit of Chameka Williams

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6. Records
 - a. Available School Records
 - b. Harris County Jail Records
 - c. Harris County Juvenile Probation Records
 - d. Harris County Sheriff's Department Records
 - e. Northwest Pediatric Clinic Records
 - f. Settegast Health Center Records
7. April 5, 2019, Atkins excerpt
8. April 22, 2019 State's Answer to Subsequent Application

Background Information

Mr. Johnson's case, background, and family history have been extensively discussed elsewhere in the case materials, and will not be reiterated in detail here. Rather, information provided by him and others relevant to a determination of his intellectual and adaptive functioning will be presented below.

Family History

Mr. Johnson reported that he was born on June 7, 1988 in Houston TX. He told me that he is, "out of touch," with his father Ronald, and was only able to tell me that his father worked fixing cars. However, he is in touch with his mother Sharon, who is now 53 years old.

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He is single and has never been married, although he has a daughter with Dominique Fisher named Darniesha, who is 13 years old.

Educational History

Mr. Johnson reported that he completed the 8th grade in school but, “flunked the first year of high school.” He said he tried for a second time but, “I just couldn’t keep going.” He told me, “when I started going through high school I just couldn’t keep up.”

His school records indicate that he failed the second grade, and was placed in special education. His mother withdrew him from high school on 5/25/2005.

Employment History

Mr. Johnson told me that he worked at Jack-in-the-Box for, “a few months,” on 2 separate occasions. He described working on the, “fry station.”

He denied any military service.

Medical History

He stated, “I only remember bits and pieces of my childhood,” and was a fairly unreliable historian with regard to his early medical history.

His mother and his sister both reported that he suffered a significant head injury when he was six months old, and

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fell down a flight of stairs in his walker. Travalia Johnson, Dexter's older sister by three years, stated in her affidavit dated February 23rd, 2019:

When Dexter was 6 months old, he fell down a flight of stairs while strapped into his walker. I remember seeing him at the bottom of the stairs. He was unconscious and there was blood everywhere.

When Dexter was 4 years old, a pedestal fan fell on his head. It hit him in the exact same place he had gotten stitches when he was 6 months old. He did not go to the hospital. My mom was scared to take him to the hospital because she didn't want them to call CPS.

During my interview with her, she told me that this head injury occurred in her grandmother's garage. She explained that Dexter climbed on the fan and the rim slashed the top of his head when it fell.

Mr. Johnson reported being delayed in speech development as a youngster stating, "my sister is used to make fun of me about talking." I asked him why and he said, "I couldn't pronounce the words right." He gave as examples saying "boon" for spoon and "not being able to pronounce the word 'shrimp.'"

He denied any current medical illness other than hypertension, which he says was diagnosed, "a few years ago."

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He did however report a history of closed head injury. He described getting, “jumped,” and in the process, “I tripped and hit my head on a fire hydrant.” He stated that he was between 9 and 11 years old when this occurred. “Three boys jumped me. I was trying to run, one caught up and tripped me and I fell into the fire hydrant. I woke up bleeding. I walked home.” He reported that he did lose consciousness during this head injury and, “I had a cut on my head,” indicating the right frontotemporal area of his head. I asked him if he noticed any symptoms following this head injury, and he stated, “just a lot of headaches and migraines.” I also asked if he had headaches and migraines before that and he replied, “not that I know of.”

His Harris County Sheriff’s Department records also indicate that he had a history of head injuries, with notations that state, “fall down stairs with LOC x 2 days” and “hit in fight at age 13 w. LOC x 1 day.”¹

Mr. Johnson denied any history of seizures, strokes, and diabetes.

With regard to current medications he reported that he was on blood pressure medication but that, “when I moved back to death watch my prescription ran out. I’ve been waiting for the doctor to renew it for 2 weeks.”

1. Harris County Sheriff’s Department 3/02/06 medical history notes.

*Appendix A***Psychiatric History**

What I asked him if he had any psychiatric history he replied, “I don’t think I did.” However, his records tell a different story reflecting his lack of insight into his history of psychiatric illness. In fact, he himself provided additional information later in the examination that is described below.

I asked him about any testing or evaluation in school and he answered, “all I remember is they would bring me to a different classroom and do a lot of tests. Things on a computer.” He was unable to provide any greater detail.

History of suicidal and psychotic behavior. When I asked him about his history of suicidal ideation or behavior, he replied, “Yes, but not recent.” He then stated the last time was, “a few weeks ago.” He described that he had become frustrated and thought about cutting himself with a razor. I asked him why he did not do it, and he replied, “I don’t really know. I think it was a letter from my mom.”

I asked him why he did this and he replied, “thoughts in my head, trying to kill me for something I did not do, may as well kill yourself.” He also stated that on the night of his arrest, “I tried to get the police to shoot me then. They drew weapons, but didn’t shoot. Put me in handcuffs.”

He was not a reliable historian regarding his suicide history however, as he then told me that his first attempted suicide, “when I first got arrested in County jail,” although

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his records reflect suicidal attempts prior to that. I asked him what he did and he replied, "I had tried to hang myself. The sheet popped off the little shower head, and one of the guards saw me and ran and opened the door." There are jail reports that verifies this event.

He described another suicide attempt, "On the day they sentenced me. I tried to get police to shoot me in the courtroom." I asked him what happened and he explained, "they beat me up, handcuffed and shocked me. Then took me to the doctors."

He then described a fourth suicide attempt, "when I got gassed. I get short of breath really fast. Someone told me the gas could suffocate me to death." I asked him what he did, and he replied, "I got myself gassed. It did not work." I asked him when this happened and he replied, "last year in April." Here he was talking about behaving in a way to cause the corrections officers to use an aerosol spray to incapacitate him, with the belief that the spray would cause him to suffocate to death.

His Harris County Sherriff's Department records also indicate an incident of suicidal behavior on 02/18/07, during which he cut his left forearm and carved HATE into his knuckles. He acknowledged hearing voices at that time. He also admitted to cutting himself two months prior. A diagnosis of Major Depressive Disorder with psychiatric features was made. His history of auditory hallucinations was also described:

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“voices since age 10. Voices come from within his head, unfriendly and encourage him to harm himself. Voices are unfamiliar, male.”²

A 10/28/06 progress note also documents the bedsheet suicide attempt:

“Patient attempted suicide by tying bedsheets around neck holding end by foot and leaning back as far as he could. Red mark around neck noted. Deputy states he first saw him when he was leaning back with bed sheet around neck. Deputy states when he came back with other deputies, patient had already ceased leaning back.” The note goes on to indicate that he had hand-written on the wall, “time to die now.”

A detailed incident report in his Harris County Jail records provides further details, indicating that

“I observed inmate Johnston, Dexter . . . attempting to strangle himself with a bedsheet. Inmate Johnson was seated on the floor of his cell, with one end of the bed sheet strung from the shower head, and the other wrapped around his throat. He was in the process of applying pressure to his airway by leaning away from the shower stall. The words “I’m ready to die now,” were scrawled on the wall just above the sink in a crimson-colored substance, which appeared to be blood.

2. 10/28/06 Psychiatric Evaluation report at Harris County Jail.

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Upon viewing this, I immediately notified detention officer M. Jornet in the floor control center (FCC), who called for rover and medical assistance. I then opened the cell door and went to inmate Johnson's aid. By the time I reached him, he had stopped applying pressure to his throat, and the bed sheet had fallen from the shower nozzle. He was laying flat on his back, his face extremely reddened, and was gasping for air. I immediately untied the sheet from his neck and instructed inmate Johnson to lie still until help arrived. . . . There was slight discoloration around his neck from the bed sheet, and almost indiscernible scratches in a "capital X" pattern on his abdomen. When I asked why he had attempted suicide, inmate Johnson replied, "I was sick of that God damn cell and the damn law wasn't doing anything about it. I'm gonna get the needle anyway, so what do I got to lose?" inmate Johnson had in fact been claiming to hear voices for several weeks and had recently been seen by MHMRA.³

A 12/29/2006 progress note states, "He is still experiencing the auditory hallucinations. Says it sounds like a lot of voices at one time in his head, can't make out what they are saying." He also was described as experiencing visual hallucination at that time.

His Harris County Sherriff's Department records indicate that he was still experiencing psychosis on 02/18/2007, and was being treated with the antipsychotic medication

3. Bates 000408.

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Seroquel. 3/12/07 medication records indicate that he was taking Seroquel 300 mg at bedtime (and 200 mg in the morning); Wellbutrin 150 mg; and Klonopin 0.5 mg twice per day. Records also indicate that he was also treated with Effexor and Lexapro following a suicide attempt in February of 2007.

Mr. Johnson was ultimately diagnosed with Schizophrenia by Richard G. Dudley, M.D. who testified that:

“The psychotic process is consistent with Schizophrenia,” and that, “the onset of that appears to be in the mid-teens, 16, 17 . . . ”⁴

Substance Use History

Mr. Johnson reported smoking 10 cigarettes a day from the time he was 13 years old until he was arrested.

He also reported that alcohol was, “a big thing for me. Mostly MD 2020 and vodka, or Crown Royal.” I asked him how often he would drink and he replied, “pretty much stayed drunk. Off and on from age 11. Really drinking from age 14 or 15 until I was arrested.”

He also stated that he began to smoke marijuana when he was 12 or 13 years old and abused Xanax beginning at the same age. Finally, he said that he tried “ecstasy” once.

4. Testimony of Richard Dudley, M.D., p. 212–215.

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It is quite common for psychiatric patients, particularly those with psychotic disorders like Mr. Johnson, to carry dual-diagnoses.⁵

Examination Findings**Behavioral Observations and Mental Status Examination**

Dexter Johnson is a 31-year-old African American man of short stature who presented for testing wearing white prison issued scrubs over a white T shirt and tan boots. He appears younger than his stated age, with short black hair, a mustache and goatee. He had a tattoo on his left wrist that read “Nikki.”

He was cooperative and effortful throughout the examination and testing.

He was well-oriented to the world around him, knowing who he was, where he was, and the appropriate date and time. His motor behavior was graceful and coordinated, with no observable abnormalities of posture or gate.

His speech was produced at a slow rate and was garbled at times, but with a normal quantity of output.

5. Jan Horsfall, Michelle Cleary, Glenn E. Hunt & Garry Walter (2009). Psychosocial Treatments for People with Co-occurring Severe Mental Illnesses and Substance Use Disorders (Dual Diagnosis): A Review of Empirical Evidence, Harvard Review of Psychiatry, 17:1, 24–34

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His thoughts were expressed logical, coherent, and goal-directed fashion with no evidence of formal thought disorder. His thought content was free from fixed, false beliefs (i.e., delusions). However, he did endorse some abnormal sensory experiences. He reported hearing voices that began approximately when he was 10 years old but he clarified, “I don’t remember exactly when.” He was able to date them to, “after I got jumped and fell into the fire hydrant.” He told me, “they just seemed like they always been with me. Sometimes I just try to ignore them because it’s a bunch of them all trying to talk at once.” I asked him what the voices say to him and he replied, “I can’t often really understand them. I try to ignore them. When I can understand them it’s like they talk about whatever is going on. Normal things mostly.”

Hallucinated voices that maintain a running commentary on one’s experiences are a classic Schneiderian “first-rank” symptom of Schizophrenia. He went on to describe that, “sometimes they tell me to do something – ‘you going to take that? Do something.’” This type of auditory hallucination is referred to as a “command hallucination” because the voices tell the person to act in some particular way. Mr. Johnson described acting on his command hallucinations, resulting in him getting into trouble. “I did it a few times and got gassed last year.”

I asked him how often this happens and he replied, “constantly.” I asked if he was experiencing voices as we were talking and he replied, “Yes. They always there. . . . I can move them to the back, push them out of the front so it’s not all I hear.” I asked if he is receiving any treatment

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for this and he replied that he is not. He explained that his medications were discontinued when he was transferred to the Polunsky Unit, and that this resulted in increased intensity of his symptoms and, “louder voices.”

I asked him if he has ever experienced visual hallucinations and he replied, “I used to see things crawling. Snakes, spiders crawling on the walls.” I asked him when this started and he replied that it was when he was approximately 10 years old. I asked him if this had stopped and he replied, “I don’t know exactly when it stopped. I still out of the corner of my eye I think I see something, when I look it’s not there.” I asked him what he sees in these episodes and he replied, “I don’t know. Shadows or something.”

I also asked if he has difficulty with his thinking. He replied, “I just keep on switching, even if I try to write it, like writing family or friends. I write a line and then lose that train of thought. Takes me a few hours to write one letter.” I asked him how long this has been happening and he replied, “as long as I can remember.”

He also described somatosensory hallucinations of, “things crawling on me.” I asked him when this began and he replied, “when I was younger like 10 or 11 years old.” I asked him how often this occurs and he replied to, “every day I’m slapping at something that’s not there.”

Emotionally, his observable affect was sad, worried, and aggrieved. His affect was constructed in range and intensity, and this presentation remained stable throughout both days of the examination and testing. His

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affect was appropriately related to his mood and to the content of his thoughts. His underlying mood was inferred to be dysphoric and anxious. His insight was poor.

Neuropsychological Test Results

Data validity. In any forensic examination, it is critical to determine whether external factors may be affecting the reliability and validity of the test results, including things like poor effort or malingering. For this reason, a battery of both free-standing and embedded measures was administered to Mr. Johnson during the present examination.

His performances on each of these measures was within normal limits, including the validity scales of the CATS, the Forced-Choice trial of the CVLT-II, and the Verbal subtest of the Validity Indicator Profile. Based on these results, the neuropsychological test battery can be relied upon as providing a valid indication of his current level of his current neurobehavioral functioning.

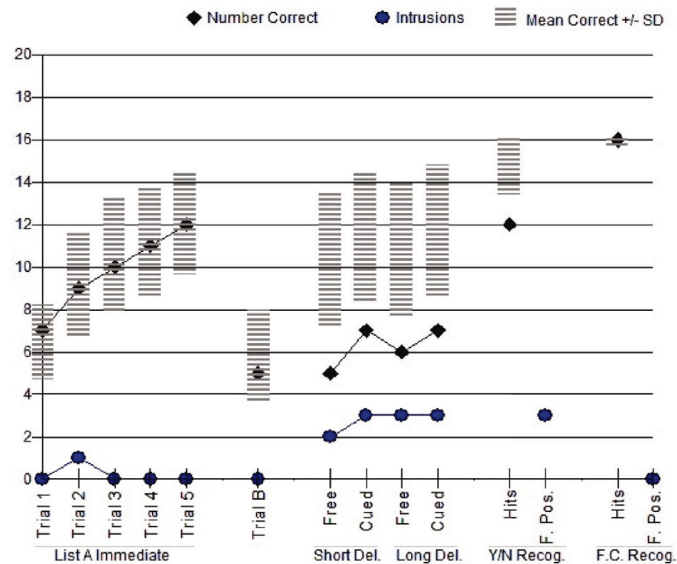
Attention, concentration, and speed of mental processing. Mr. Johnson exhibited mild-to-moderate impairment in his attention, concentration, and processing speed as reflected in his scores on the Speech Sounds Perception Test (T= 32), Seashore Rhythm Test (T= 35) and the Trail Making Test, Part A (T= 35).

Verbal learning and memory. On the California Verbal Learning Test – II, a task that requires the ability to learn and recall a list of 16 words over multiple trials, he demonstrated adequate initial learning, but significantly

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impaired delayed recall and retroactive interference, whereby new learning interferes with his ability to recall previously learned information. He also exhibited both a severe perseverative tendency (a pathological form of repetition where he would repeat a word he had already said without awareness of doing so), and confabulations (the pathological intrusion of extraneous words that he was not asked to remember). These latter phenomena reflect an executive deficit in self-monitoring, and place him at or below the bottom 2-percent of the population. His test performance is summarized in the tables below:

Raw Score Graph--Correct, Intrusions, Hits, and False Positives



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CVLT-II

Comprehensive Scoring System

Standard Form - Expanded Rep

Name : Dexter Johnson

Test Date : 6/13/2

Recall Errors

	<u>Raw</u>	<u>Standard Score</u>
Total Repetitions (All Recall Trials)	15	3
Total Intrusions (All Recall Trials, All Types)	12	2
Total Immediate Recall Intrusions (Trials 1-5, All Types)	1	0
Total Delayed Recall Intrusions (Free & Cued, All Types)	11	2.5
Total Free Recall Intrusions (Immed. & Delayed, All Types)	6	1.5
Total Cued Recall Intrusions (All Types)	6	1.5

	<u>Raw</u>	<u>Age Group Freq.</u>	
		<u>% with this score</u>	<u>Cum. % w/better score</u>
Total Non-Category Intrusions (All Recall Trials)	4.0	0.0%	98.0%
Total Synonym/Subordinate Intrusions (All Recall Trials)	0.0	83.0%	0.0%
Total Across-List Intrusions (List B & Delayed Recall Trials)	11.0	0.0%	100.0%

Frontal lobe / executive functioning. Mr. Johnson presented a mixed picture on tests of his executive abilities. The perseveration seen on the CVLT-II was also captured in his grapho-motor skills and his verbal fluency. This type of multi-modal perseveration is a particularly strong indicator of frontal lobe impairment.

On Luria's tests of Graphomotor Sequencing and Control, he exhibited severe perseveration on a test requiring him to write an alternating series of m's and n's (i.e., mnmnmn). This can be seen from his test data below:

mnmnmn



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On tests of his verbal fluency, he displayed impaired scores for both phonemic and semantic fluency. On a test that required him to produce as many words as he could in a minute that start with various letters (F-A-S), his score was approximately one-and-a-half standard deviations below the mean for his age and education. He also exhibited a mild tendency to perseverate on this test. On a separate test of his ability to name different kinds of animals (Animal naming), his performance was similarly impaired (-1.62 standard deviations).

Mr. Johnson also demonstrated mild to severe impairments on all trials of the Color-Word Interference subtest of the Delis-Kaplan Executive Function System. While he was mildly slow in his speed of proceeding both colors and words, he was severely impaired in his ability to inhibit incorrect and unwanted responses (Inhibition scaled score = 1), and his ability to switch between changing task demands (Inhibition-Switching scaled score = 1).

However, his performance on a test of his ability to alternate between number and letters in a “connect the dots” task (Trails B); and his visual problem-solving (Wisconsin Card Sort) were within normal limits for his age and education.

Language functioning. Mr. Johnson was observed to stutter during the present examination, for example at various times saying “es-eses-es-escalator,” uh-uh-uh-uh-uh-a-hammock,” and “tes-tes-testestiscope” for stethoscope. In addition, he exhibited the mild impairments seen in both phonemic and semantic verbal fluency noted above.

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He also produced occasional paraphasias (mispronounced and/or nonsense words), for example saying “ammum” when asked to produce words starting with the letter A.

Mr. Johnson also demonstrated a severe impairment in his ability to name common objects (a language impairment called dysnomia, which is a symptom of expressive aphasia). Some examples of these language impairments included saying, “rhinus” for rhinoceros; and “hilp-hapatomous” for hippopotamus. His scores on this test placed him well below the lowest one-percentile of the population for his age and education.

Motoric localizing signs. Mr. Johnson exhibited a pattern of pure motor deficit where his left-hand performance was consistently and significantly impaired in comparison to his right-hand abilities, which were in the normal range for a man of his demographic background. This disparity was seen in both pure motor speed (Finger Oscillation Test, right hand T= 51; left hand T= 36) and fine motor dexterity (Grooved Pegboard Test, right hand T= 46; left hand T = 33).

This pattern is indicative of right hemisphere brain dysfunction.

Testing of affect perception. Finally, computerized testing of Mr. Johnson’s ability to recognize and correctly identify the emotional expressions of others, based both on visual facial cues and auditory language cues (Comprehensive Affect Testing System) documented multiple impairments of mild to moderate severity in all

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areas. He had the greatest difficulty in identifying sad, fearful, angry, and disgusted emotional expressions.

This signifies a fundamental interpersonal deficit in accurately perceiving the emotional states and expressions of others, reading interpersonal cues, and responding appropriately in emotion-laden situations.

Evidence Regarding Intellectual Disability

The DSM-5 defines Intellectual Disability (ID) as a neurodevelopmental disorder that begins in childhood and is characterized by intellectual difficulties as well as difficulties in conceptual, social, and practical areas of living. The DSM-5 diagnosis of ID requires the satisfaction of three criteria:

1. Deficits and 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;
2. Deficits in adaptive functioning that result in failure to meet developmental in socio cultural 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,

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across multiple environments, such as home, school, work, and community; and

3. Onset of intellectual and adaptive deficits during the developmental period.

The DSM-5 definition of ID encourages a more comprehensive view of the individual than was true under the fourth edition, DSM-IV. More importance is placed clinical judgment with regard the presence of adaptive deficits, and less emphasis is placed on bright-line IQ cutoff scores. The DSM-5 has also placed significantly more emphasis on adaptive functioning and the performance of usual life skills as the hallmark indicia of intellectual disability.

Diagnostic Criterion A:
IQ and Neuropsychological Test History

The DSM-5 includes the following discussion with regard to evaluating Criterion A:

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 efficiency. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate,

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psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately 2 standard deviations or more below the population mean, including a margin for measurement error (generally +5 points).

* * * *

Factors that may affect his scores include practice effects and the “Flynn effect” (overly high scores due to out-of-date test norms).

* * * *

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 judgement, 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.⁶

6. DSM-5, p. 37.

*Appendix A***Mr. Johnson's IQ Test History**

School testing. The earliest estimate of Mr. Johnson's intellectual ability comes from a test of his non-verbal skills administered when he was 14 years-old and in the eighth grade. The was tested with the Test of Nonverbal Intelligence–2 (TONI-2) by Linda J. White, M.Ed. who was an Educational Diagnostician, and obtained a score of 90 which placed his non-verbal skills at the 26th percentile.⁷ However, this test cannot be relied on in forming an opinion about Intellectual Disability because it is not a *comprehensive* test of his intellectual abilities (i.e., there is no verbal-skills component to this test).

Dr. Watson's testing in 2007. Dr. Dale Watson tested Mr. Johnson in 2007 using two different IQ tests. On the Stanford-Binet 5, Mr. Johnson obtained a Full-Scale IQ of 78. Adjusting this score for norm-obsolescence (i.e., the “Flynn -effect”)⁸ results in a Full-Scale IQ of 76.2 +/- 5 points, which would place Mr. Johnson in the clinical range for a diagnosis of Intellectual Disability under the DSM-5 criteria, particularly in light of his adaptive deficits which will be described in detail below.

7. Bates 000324.

8. Dr. Watson administered the SB-5 in 2007 and obtained a FSIQ of 78; 2007-2001 (mid-year of norming data) = 6 X .3 per year correction = 1.8; Flynn-corrected FSIQ = **76.2**

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Later, Dr. Watson also administered the WAIS-III and obtained a Full-Scale IQ of 88, which equates to a Flynn-corrected score of 84.4 +/- 5 points.⁹

The question then arises as to why the second score is so much higher than the first. This can be accounted for by differences in the structure of the two tests and how they measure “intelligence.” Psychologists can anticipate that 1 in 4 individuals taking an intelligence test battery will receive an IQ more than 10 points higher or lower when taking another battery.¹⁰ Specifically, the Stanford-Binet extends low-end items (i.e. the “floor” of the test is lower) allowing earlier identification of individuals with delays or cognitive difficulties and producing scores that are often lower than the Wechsler scales.¹¹

2019 testing by Dr. Hupp. Mr. Johnson’s most recent IQ testing was administered by Dr. Greg Hupp on April 4, 2019 using the Wechsler Adult Intelligence Scale – IV, the most current and accurate version of this IQ test. He

9. Dr. Watson administered the WAIS-III in April of 2007 and obtained a FSIQ of 88; 2007-1995 (mid-year norming data)= 12 x .3 per year correction= 3.6; Flynn-corrected FSIQ = 84.4.

10. Floyd, R. G., Clark, M. H., & Shadish, W. R. (2008). The exchangeability of IQs: Implications for professional psychology. Professional Psychology: Research and Practice, 39(4), 414–423.

11. Wayne Silverman, Charles Mizejeski, Robert Ryan, Warren Zigman, Sharon Krinsky-McHale, and Tiina Urv, (2010). Stanford-Binet & WAIS IQ Differences and Their Implications for Adults with Intellectual Disability (aka Mental Retardation). Intelligence. 2010 March ; 38(2): 242–248.

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obtained a Full-Scale IQ in the “Extremely Low” range (70¹²) as shown in the summary table below:¹³

<i>Index</i>	<i>Standard Score</i>	<i>Percentile</i>	<i>Performance Level</i>
Verbal Comprehension	66	1	Extremely low
Perceptual Reasoning	73	4	Borderline
Working Memory	77	6	Borderline
Processing Speed	84	14	Below average
Full Scale IQ	70	2	Extremely low (z-score = -2.0)

SEM range 67-75

Average Standard score range is 85-115

Notably, Dr. Hupp was careful to include both free-standing and embedded measures of effort and malingering during this testing, which indicated that Mr. Johnson was putting forth a valid effort, was not malingering, and that the resulting test scores are a valid and reliable indication of his current intellectual abilities/functioning.

Dr. Hupp’s test results place Mr. Johnson’s IQ solidly in the clinical range for diagnosing Intellectual Disability.

12. Flynn-correction: Normed in 2007 2019-2007 = 12 x .3 = 3.6; 70 – 3.6 = **66.4**.

13. Dr. Hupp’s report, p. 7.

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Changes in measured intelligence over time. Contrary to common beliefs, intelligence is not fixed at birth and it is not stable throughout the lifespan. It is a malleable trait that is subject to change as a result of the interaction between inherent genetic predispositions and environmental experiences and events.

This is particularly true for IQ scores obtained during childhood. In childhood and adolescence, intelligence is particularly vulnerable to plasticity and change. The relation between brain size and IQ is lower in children than in adults, and IQ is related to brain development in complex ways.

IQ scores on intelligence tests administered to children are fluid and vary significantly from age to age and from test to test.¹⁴ The American Association on Intellectual and Developmental Disabilities (AAIDD) has recognized this dynamic, indicating that “early childhood IQ test scores are not very reliable for various reasons, including variable state and limited attention or motivation in young children, and test items that are fewer in number and very different tests given at older ages.”¹⁵

In addition, there is persuasive neuroscientific research showing a direct association between declining IQ scores and abnormal brain development:

14. Alan S. Kaufman, Elizabeth O. Lichtenberger (2005). Assessing Adolescent and Adult Intelligence. Hoboken, NJ: Wiley.

15. The Death Penalty and Intellectual Disability, AAIDD (2015), p. 144.

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- In a landmark study published in the prestigious journal *Nature*,¹⁶ scientists at University College London studied 33 healthy, normal adolescents (aged 12-16), with a wide mix of abilities. They tested their IQ in 2004, and then again 3-4 years later. During each test session, each child had their brains scanned using functional MRIs. *Thirty-three percent* of the participants showed a clear change in their total IQ score, ranging from an increase of 21 points, to a decrease of 18 points; and the IQ changes were directly related to differences in brain structure:
 - o “these changes in performance were validated by their close correlation with changes in local brain structure. . . . our results emphasize the possibility that an individual’s intellectual capacity relative to their peers can decrease or increase in the teenage years.”
- Another study involved 188 children and adolescents over a period of two years. MRIs of the study participants were taken at six sites across the US. This study was the first to show the association between cortical thickness and development on full scale IQ. Children with a significant decrease in IQ had exaggerated cortical thinning, implicating the

16. Ramsden, VS, Richardson, FM, Josse, G., et al. (2011). Verbal and non-verbal intelligence changes in the teenage brain. *Nature*, 479, p. 113–116.

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potential impact of environmental events on IQ and brain development:¹⁷

- o Importantly, individuals who showed large decreases in FSIQ displayed the steepest and most significant reductions in cortical thickness. Results support the view that there can be meaningful cognitive ability changes that impact IQ within relatively short developmental periods and show that such changes are associated with the dynamics of cortical thickness development.

There is also a longstanding body of research showing decreases in IQ over time in children with learning disabilities:

- A 2013 study looked at 344 children examined with the WISC-IV in connection with routine special education referrals.¹⁸ Over an average test-retest interval of 2.84 years, 25% of the children showed changes in Full Scale IQ scores of 10 or more points

17. Miguel Burgaleta, M., Johnson, W., Waber, DP, et al. (2014). Cognitive ability changes and dynamics of cortical thickness development in healthy children and adolescents NeuroImage, Volume 84, 1 January 2014, p. 810–819.

Schnack, HG, van Haren, NEM, Brouwer, RM, et al. (2015). Changes in Thickness and Surface Area of the Human Cortex and Their Relationship with Intelligence. Cereb. Cortex, 25 (6): 1608–1617.

18. Watkins, M. & Smith, L. (2013) Long-term stability of the Wechsler Intelligence Scale for Children – Fourth Edition. Psychological Assessment, 25(2), 477–483.

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from the first to the second testing. The largest observed change in Full Scale IQ for any child was 28 points. Changes on the sub-indices ranged in excess of 35 points.

- Similar decreases in FSIQ have also been reported in several other WISC-R stability studies involving students with learning disabilities.¹⁹

IQ declines over time in patients with schizophrenia and psychotic disorders. One of the insidious consequences of Schizophrenia and other psychotic disorders is the erosion of cognitive skills and IQ scores over time. This decline in intelligence has been well documented for years in psychiatric research. Approximately 70% of patients show a deteriorated intellectual quotient, including a borderline decline of 10–15 points in 14% of patients; a mild decline of 15–20 points in 16%; a moderate decline of 20–30 points in 26%, and a severe decline of 30 points or greater in 14%.²⁰

19. Bauman, E. (1991). Stability of WISC-R scores in children with learning difficulties. *Psychology in the Schools*, 28, 95–99.

Elliott, S. N., & Boeve, K. (1987). Stability of WISC-R IQs: An investigation of ethnic differences over time. *Educational and Psychological Measurement*, 47, 461–465.

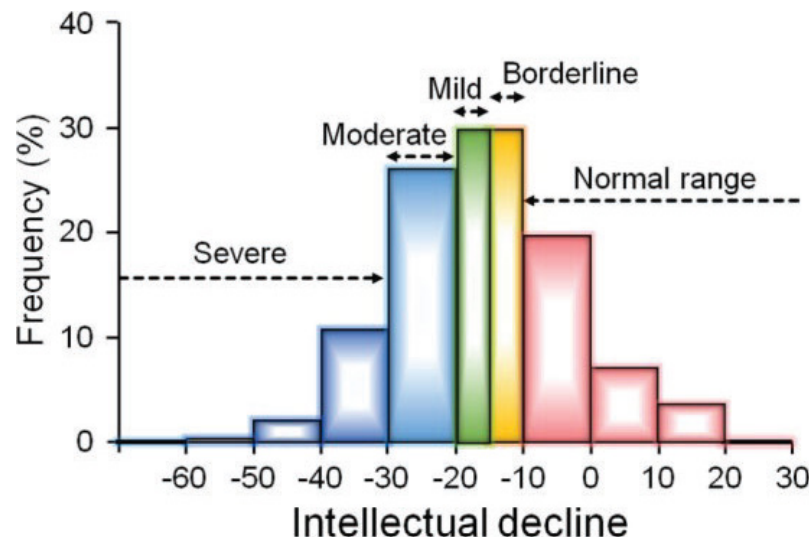
Stavrou, E. (1990). The long-term stability of WISC-R scores in mildly retarded and learning-disabled children. *Psychology in the Schools*, 27, 101–110.

Vance, H. B., Hankins, N., & Brown, W. (1987). A longitudinal study of the Wechsler Intelligence Scale for Children – Revised over a six year period. *Psychology in the Schools*, 24, 229–233.

20. Ohi K., et al. (2017). A Brief Assessment of Intelligence Decline in Schizophrenia As Represented by the Difference

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Mr. Johnson by all accounts has suffered from the burden of psychosis since his early adolescent years, making it quite likely that this contributed to the decline seen his IQ scores.



In addition, recent research has documented that this decrement in intellectual function is driven more by the duration of active psychotic symptoms, than by any particular diagnosis per se.²¹

between Current and Premorbid Intellectual Quotient. *Frontiers in Psychiatry*;8:293

21. Simonsen, C., Sundet, K., et al. (2011). Neurocognitive Dysfunction in Bipolar and Schizophrenia Spectrum Disorders Depends on History of Psychosis Rather Than Diagnostic Group. *Schizophrenia Bulletin*, Volume 37, Issue 1, January 2011, Pages 73–83,

*Appendix A***Conclusion Regarding Intellectual Functioning**

It is my opinion that Mr. Johnson meets Criterion A based on the valid, objective test scores that place him within the range for a diagnosis of intellectual disability. This determination does require the use of clinical judgment, and it is my clinical opinion that Mr. Johnson's impaired performance on the neuropsychological testing administered during this examination in conjunction with his prior IQ testing provides strong evidence of substantial impairments in intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding; as well as critical components that include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficiency.

Diagnostic Criterion II: Significant Deficits or Impairments in Adaptive Functioning

The second major prong of the Intellectual Disability diagnosis requires evidence of impairment in Adaptive Functioning. Impairments in adaptive functioning, rather

Rund, B.R., Barder, H.E., et al. (2016). Neurocognition and Duration of Psychosis: A 10-year Follow-up of First-Episode Patients. Schizophrenia Bulletin, Volume 42, Issue 1, January 2016, Pages 87–95,

Helene Eidsmo Barder, H.E., Sundet, et al (2015). 10 year course of IQ in first-episode psychosis: Relationship between duration of psychosis and long-term intellectual trajectories. Psychiatry Research, Volume 225, Issue 3, Pages 515–521.

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than low IQ, are usually the presenting symptoms in individuals with Intellectual Disability, and this appears to have been the case with Mr. Johnson.

Global impairment in adaptive functioning is not required for the diagnosis of Intellectual Disability. It is typical for adaptive strengths to co-exist with weaknesses in this population. However, the diagnosis itself is made based on the identification of adaptive weakness areas alone. Both the DSM-5 and American Association on Intellectual and Developmental Disabilities (AAIDD) criteria require impairment in one broad domain of functioning (i.e., Conceptual, Practical, or Social).

THE CONCEPTUAL DOMAIN

The **conceptual domain** involves skills in language, reading, writing, math, reasoning, knowledge, memory, and self-direction.

In this domain, there is both empirical and anecdotal evidence that Mr. Johnson has significant impairments that cluster in three broad areas, including:

- (1) functional academic skills:
- (2) language skills; and
- (3) concept formation and self-direction.

Mr. Johnson's second-grade teacher, Annie L. Batiste stated in her 07/18/2019 declaration:

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Dexter repeated the 2nd grade. I was his teacher the second time he took the grade. He was having behavioral issues, as well as problems with reading comprehension and problem-solving. I believe the school was in the process of placing him in special education, but first tried to save him by putting him in my class because I ran a strict classroom. Because of this, Dexter was one year older than most kids in the class.

Dexter was a willing student but he had a hard time completing what he needed to do in class. If he tried to answer a question in front of the class and was not correct in his response, he would seem like he felt he was failing and someone would laugh.

Dexter blinked his eyes a lot, like it was something he could not control. He also could not give eye contact. He would not really look at you when he was talking to you. He would look down or away. Many times I would ask a direct question and he would say "I dunno" and then look down. Even though he was a year older than most of the other kids, he was one of the smallest guys in the class, weight wise.

His clothes were inappropriate at times, with wrinkles or ill-fitting.

I think Dexter was in speech classes because he had some articulatory problems. There were times for him where the words would not come

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out. Other times he would use the wrong words so that what he said would not make sense. I could tell this frustrated him.

Mr. Johnson's records from Waltrip High School indicate that he had been a "resource student" since 1994 and was still a resource student in 1997. This continued in high school²², where he was functioning at a 6th grade level during his second year of 9th grade, and was receiving special education in all subject areas. An IEP at that time identified his need for training in multiple adaptive functioning areas including:

- Home and family living
- Career skills development
- Independent living
- Self-help activities
- Transportation training
- Money management
- Social Skills
- Driver's license training

During my interview with her, his mother Sharon described that Dexter had very slow speech and was, "constantly stuttering." She also told me that he would, "hit his head on walls from the time he was age two onward." She also stated that in the 2nd grade, his teachers would call her

22. 5/25/2004 IEP, Smiley High School Special Education records.

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about his “rocking and knocking.” She also described hand flapping behavior, especially when he was being dysfluent in his speech.

She stated that he was placed in, “umbrella” Special Ed, an indication that he needed assistance in all areas of academic functioning.

Mr. Johnson’s sister Sheree Johnson, who is one year younger than he is, provided the following statements in her affidavit dated March 18, 2019:

Even though I am the younger sister, I always had to lookout for Dexter.

Dexter was unable to keep up with his classmates in school. Even though I’m a year younger than Dexter, I used to do all of his homework for him. Dexter was unable to complete even the special education assignments.

Dexter had trouble understanding at home too. You would have to repeat yourself two or three times before he got what you were saying. It was really frustrating.

Travalia Johnson, Dexter’s older sister by three years, stated in her affidavit dated February 23rd, 2019:

Dexter has always been slower than other children his age and has a more difficult time understanding the world around him.

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Dexter struggled to keep up at school even after they put him in special education. Teachers used to call me out of class to come help him. They told me he would act out when the work was too hard for him.

At home, we had to repeat things over and over for Dexter.

During my interview with Mr. Johnson's sister Travalia, she told me with regard to his speech and language skills, that he had a stutter since he started talking. She said, "He could never get the word right," describing for example that he would pronounce the word spoon as, "boon."

With regard to his receptive language skills, she also described difficulties. She gave as an example an incident where their mother was not home and they were locked out of the house and the police came, but Dexter failed to comprehend what was happening. "Mom would leave, and he would get locked out. The police came, my sisters and I were all in tears in the back of the police car, Dexter didn't understand what was happening."

His youngest sister Marquette Pradia stated in her affidavit dated April 3, 2019 that:

Dexter often stuttered and mispronounced words when I brought him a book to read to me. Despite his helpful attempts, I became even more confused with my math problems under his direction. I would have to wait until my sisters were available to help me complete my homework.

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Dexter's sister Shunell Johnson, who is one year older, stated in her affidavit dated March 21, 2019 that:

Dexter has always seemed young compared to other kids his age, and was interested in more childish things than other kids.

Everyone knew Dexter was slow. His teachers called him slow, other kids teased him about being slow, and honestly, even we (his family) said it.

Dexter's teachers said he needed to be in special classes, but my mom didn't want him to be labeled. We would try to talk to her about it and tell her we need to try to help him to get up to the right level in school. Even with special education support, Dexter was far behind the other students his age.

Dexter could barely read and we had to help him all the time. I remember asking him why he couldn't understand stuff that are younger sister could do on her own. Even with all of our help, he never could get it.

When Dexter didn't understand something or it was hard, he didn't understand how to express that and his emotions would get the best of him.

Other kids teased Dexter because he couldn't read, he talked funny and because he wasn't on the right grade level for his age.

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During my interview with him, Dexter Johnson told me but he did not like his school experience because, “kids called me dumb. I couldn’t keep up. That was ‘fusteratin’ [frustrating] for me. . . . Teachers would call on me even if I didn’t raise my hand. I would say the wrong thing and everyone would laugh.”

With regard to his academic skills he told me that, “Math was a little bit better than spelling and reading. I always had trouble.”

His neuropsychological testing during my examination revealed significant cognitive impairments in multiple relevant areas including memory, expressive language use, attention, concentration, speed of mental processing, and executive functioning.

Conclusion Regarding Adaptive Impairment in the Conceptual Domain

The Diagnostic and Statistical Manual of Mental Disorders-5th Edition characterizes the various severity levels for adaptive impairments seen in Intellectual Disability. Based on the evidence summarized above, Mr. Johnson’s level of functioning is best captured by the DSM-5 description of “mild” severity in the **conceptual domain**:

For preschool children, there may be no obvious conceptual differences. For school age children and adults, there are difficulties in learning academic skills involved in reading, writing, or

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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.²³

THE SOCIAL DOMAIN

The **social domain** refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, and similar capacities. Mr. Johnson’s impairments in this area primarily revolve around deficits in social skills needed for effective social relationship formation.

In terms of receptive language skills his mother stated that he, “had to look at a person face to face,” in order to understand them. She described his listening and attentional skills as, “not so good, especially in school.” With regard to humor, she noted that he would have difficulty with jokes. His sister Marquette reported to me that with regard to jokes, “He took it literal. People would laugh because he wouldn’t get a joke or catch on fast enough.”

23. DSM-V, p. 34.

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Mr. Johnson's sister Sheree Johnson, who is one year younger than he is, provided the following statements in her affidavit dated March 18, 2019:

Dexter was constantly bullied and picked on for being slower than the other kids. . . . If someone told him they were his friend or that they were looking out for him, he would automatically believe it. He used to come home and tell me about all his friends and I would find out he barely even knew them, but he thought if he met them this made them friends.

With regard to his receptive communication skills, his younger sister Sheree explained to me during our interview that in addition to his stutter, "you had to repeat things 2 to 3 times before he would understand. He rarely talked or said anything. He wanted you to do more of the talking and he would just agree." She noted that he had difficulty making eye contact and, "to this day he still doesn't." She described that his eyes would, "wander off," when talking to him. She also observed that he often, "did not respond when spoken to by teachers or other kids."

With regard to his social relationships, Sheree explained that he wanted to be around his family, and that he wanted to, "mainly be around us. He felt more secure that way."

She stated that he was made fun of so much that he didn't want to go outside. "He really didn't have any friends at all." She described him as acting, "very childish," and that he liked to watch cartoons. When I asked if he was able to follow the rules in games she said, "No."

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Dexter's sister Shunell Johnson, who is one year older, stated in her affidavit dated March 21, 2019 that:

Dexter did not have a group of friends and was awkward in social situations. He had trouble understanding jokes, even when you broke it down and explained it to him, he still wouldn't get it.

During my interview with Mr. Johnson's sister Travalia, she told me with regard to his speech and language skills, that he had a stutter since he started talking. She said, "He could never get the word right," describing for example that he would pronounce the word spoon as, "boon."

With regard to his receptive language skills, she also described difficulties. She gave as an example an incident where their mother was not home and they were locked out of the house and the police came, but Dexter failed to comprehend what was happening. "Mom would leave, and he would get locked out. The police came, my sisters and I were all in tears in the back of the police car, Dexter didn't understand what was happening."

When I asked about his conversational skills and capacity for having a back and forth conversation she said, "mostly not. He didn't talk," and she described him as being, "quiet." She also described that, "he couldn't deal with customers at Jack-in-the-Box." With regard to his ability to maintain eye contact she described that, "he would look down or start stuttering."

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When I asked her about his listening and attentional skills she explained that she, “had to tell him things over and over.” She said he had poor attention, and that his teachers complained to her that they, “couldn’t get him to sit still for a minute.”

With regard to his social relationships she described that he spent his time with, “just family.” She explained that this was largely because other kids, “just beat on him.” She described an incident in which he fell from a carport onto a pipe while running from bullies.

With regard to playmates and friendships, she reported that by the time he was in high school his only friends were two of his cousins. She did note that he had a girlfriend named Dominique who he referred to as Nikki, and that when he fathered a child with her, “we were shocked,” because they didn’t think he had the knowledge or social skills to have done that.

Chameka Williams stated in her affidavit dated March 3, 2019 that:

Dexter came to live with my family and me when he was 15. Dexter was quiet. He would engage with you if you initiated it, but he never started any conversations.

Mr. Johnson’s second-grade teacher, Annie L. Batiste stated in her 07/18/2019 declaration:

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He lived in a community where all the kids knew each other and he always wanted to be part of the group, but was not. I think one reason was because he would cry easily and get teary-eyed if things did not go right. Sometimes I would ask him to call out the answers and he would get it wrong. He would get upset, clenches fists and tremble, while crying silently. He would not hurt anyone, he would get angry with himself. This would last three to four minutes and happened almost daily. I would talk to him to calm him down, telling him he did his best. I would talk to the class about not chuckling and giggling at him.

It was not always schoolwork that upset Dexter. It could be anything from not being the first in line, to him feeling someone pushed or shoved him, was talking about him, or looked at him the wrong way. I think he felt he was always being rejected because he was different.

Dexter could not defend himself. He would just sit and cry. I think he always felt attacked.

He was easily influenced by others and was not the leader personality. He wanted to be part of the group and if he was asked to do something, he would do it. If kids were playing a game they would tell him to come with them and he would go.

To me, Dexter seemed easily manipulated by the other children. He was gullible. For example, it

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was as simple as him getting out of his seat or talking when I stepped out of the room. Someone would suggest it and he would go along with it. When I came back and Dexter was “Dexter did it!” because they knew he would not fight back, that he would go along with the program.

With regard to his receptive language skills and understanding what other people say to him, during my examination Dexter Johnson told me that, “I still have that problem. I don’t understand what they say. Everybody was smarter than me. When they would talk about certain things I really did not get it. I did not understand what they were talking about I felt left out.”

He went on to say that, “I don’t remember too much from my younger days.” He said that prior to age 15, “I really don’t remember too much.”

We talked about his listening and attentional skills and he said that he has, “trouble understanding. My mind was always wondering to different things. Teachers telling me one thing, I was thinking about something else, I did not hear them.” He described attentional difficulties, not being aware of what was being discussed in class.

In discussing his social relationships and friendships he stated, “I did not understand a lot of what they were talking about. I felt left out. I preferred to be by myself, no one to make fun of me.”

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He described his family relationships as, “pretty good.” When I asked him about his playmates and friendships he said he really didn’t have any, “I was never much of a talker.” When asked about his dating life he stated, “my sisters knew girls who I met. That’s how relationships started. I never just walked up to someone myself.”

Notably, during the neuropsychological testing Mr. Johnson’s ability to recognize and correctly identify the emotional expressions of others, based both on visual facial cues and auditory language cues (Comprehensive Affect Testing System) documented impairments of mild to moderate severity in all areas. This data documents a fundamental interpersonal deficit in his ability to perceive the emotional states and expressions of others accurately, and read interpersonal cues.

Conclusion Regarding Adaptive Impairment in the Social Domain

The Diagnostic and Statistical Manual of Mental Disorders – 5th Edition (DSM-5) characterizes the various severity levels for adaptive impairments seen in Intellectual Disability. Based on the evidence summarized above, Mr. Johnson’s level of functioning is best captured by the DSM-5 descriptions for “Mild” to “Moderate” severity in the **social domain**.

Mild impairment in the social domain is described as follows:

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Compared with typically developing age-mates, the individual is immature and social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language or more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in an 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 their age, and the person is at risk of being manipulated by others (gullibility).²⁴

Moderate impairment in the social domain is described below:

The individual shows marked differences from peers in social and communicative behavior across development. Spoken language is typically a primary tool for social communication but is much less complex than that of peers. Capacity for relationships is evident in ties to family and friends, and the individual may have successful friendships across life and sometimes romantic relations in adulthood. However, individuals may not perceive or interpret social cues accurately. Social judgment and decision-making abilities are limited, and caretakers must assist the person with life decisions. Friendships with typically developing peers are often affected by

24. DSM-5, p. 35.

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communication or social limitations. Significant social and communicative support is needed in work settings for success.

THE PRACTICAL DOMAIN

The **practical domain** centers on self-management in areas such as personal care, job responsibilities, money management, recreation, and organizing school and work tasks.

Mr. Johnson's sister Sheree Johnson, who is one year younger than he is, provided the following statements in her affidavit dated March 18, 2019:

Dexter never seemed to catch up to everyone around him. As an adult, he would come to us with things he couldn't understand or figure out. For example, he came to me with his cell phone and the instruction booklet. Even with the booklet, he couldn't figure out how to work it.

Because he had trouble understanding, it was easy for people to take advantage of Dexter. You couldn't trust him to come out of the store with the right change. People could see how he was and they took advantage of that.

Dexter like to watch TV but, even as an adult, only watched little kid's cartoons. Up until the time he was arrested, Dexter's favorite shows were *Dexter's Laboratory* and *Recess*.

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During my interview with her, Sheree told me but Dexter got shortchanged a lot. She told me, “he passed it off, didn’t realize or know.

He was very shy and timid.” She described him as acting, “very childish,” and that he liked to watch cartoons.

When I asked if he was able to follow the rules in games she said, “No.” She gave as an example, “Cards like Old Maid, he wouldn’t understand. He would say, ‘teach me again how to play,’ and really didn’t understand.” She said he did enjoy playing Legos, and liked to draw.

With regard to his personal care skills, she described what she called, “OCD-like” behavior, indicating that, “he needed things neat and tidy.” She also explained that he didn’t like odd numbers. She gave as an example that if he had \$9.00 in his wallet, he would be uncomfortable all day until he could spend a dollar so he would have an even number.

When eating out at restaurants she said he was unable to read the menu, “we would have to order for him.” She also stated that when out in public, “he got really bad anxiety, especially if it was loud. He didn’t like a big crowd.”

She also described concerns about his awareness of personal safety. For example, she described that if a ball went in the street, “he would just run after it without looking. He would answer a knock at the door before seeing who it was.” She also reported that he rarely used a seat belt.

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I asked if he could keep the score during a game, and she said, “No. He liked to play, but he would get picked over. Nobody wanted him on their team because they would lose.”

I asked her about his ability to function independently and she replied that, “his girlfriend would call him and tell him what time to go to work, or me and my sisters had to set an alarm for him. . . . He had a phone, but did not know how to do anything with it. Even if we would show him he’d forget the next day.”

She described that, “he got burned on the fryer at Jack-in-the-Box.” She described him as, “learning as he went,” but said, “he didn’t know what he was doing.” She explained that they kept him in the back because he couldn’t make change or assist customers properly.”

Travalia Johnson, Dexter’s older sister by three years, stated in her affidavit dated February 23rd, 2019:

Dexter would do stuff that everyone else knew not to do. Once, he decided he wanted to be the one to light the barbecue pit, only he lit it while he was leaning over with his head inside the pit. He burned off all of his eyebrows and some of his hair.

Dexter needed support getting to and from most places. When he was little, he usually went to school and came home with one of us, but I remember one day he came home on his own

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crying because he'd gotten lost. This was coming home from a school that he'd been going to for some time.

When Dexter was a teenager, he worked at Jack-in-the-Box. He worked at night and got off of work at 2:30 AM. One day he didn't get home until 6:30 AM because he had forgotten where to get off the bus. From that point on, I would wait for him at the bus stop to make sure he got off at the right place and then drive him home.²⁵

Dexter also had trouble managing money. When Dexter got paid, he handed over his whole check to his girlfriend. He didn't have a bank account and couldn't keep track of his money.

One time, I took Dexter to cash his income tax check. I knew how bad he was, so I checked the amount before he went in and then asked him to show me the money when he came out. He went in with a check for \$320.00 and the lady only gave him \$32.00. He would have never known if I hadn't looked at it. I had to take him back into the store and ask the lady for his money.²⁶

25. During my interview she noted that he would get on the wrong bus from work, "over and over," and that she had to get up at 4:00 AM to go find him.

26. During my interview she mentioned that as an example of Dexter's OCD, if he had \$9 in his wallet because this was not an even number, "it would bother him all day."

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During my interview with Travalia she described his difficulty using the telephone. “His first flip phone, he couldn’t work it or program it. He was 16 years old. He just knew enough to answer an in-call.” She said that this was during the time he was working at Jack-in-the-Box.

With regard to his use of leisure time, she reported that for fun he liked to watch cartoons on TV and watch his sisters play Nintendo. When asked about creative play, she said that he did not play with toys, “or play with anything.”

With regard to his personal hygiene, she told me that he had a significant problem with halitosis. He also had difficulty with table manners and using utensils properly. She described him as a, “loud smacker,” who, “had no table manners.”

With regard to home life and safety she related the story that when he was 17 years old he flooded the whole house from the kitchen at his mother’s new residence. He apparently broke a pipe connected to the ice maker. Travalia told me that the family said, “[We] can’t leave you at home by yourself again. You can’t be trusted.”

She described that he liked use flour and water to make, “starch” for his pants, but that as he wore the pants they would begin to, “reek.” She also confirmed the stories in her affidavit about him getting lost on the bus and lost taking his sister to the school which was just across the street.

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With regard to his personal safety she repeated the barbecue pit story, and described how he would, “walk the street ‘crazy’ like he wasn’t afraid of cars.” She also described that he liked to climb up on the highest things seeking attention or thrills, “that scared the lights out of us.” She said she never saw him use a seat belt in the car.

With regard to practical skills she says she has never seen him use a ruler although he was able to measure things in the kitchen. However he did not know how to use a dictionary, and had great difficulty with anything, “if it had something to do with reading.” She explained that he couldn’t read anything, so he would just try to guess. For example, she described him putting together an entertainment center for his mother, but because he could not understand the instructions, “it collapsed within a week.”

With regard self-direction, she described him as, “more of a follower. He needed step-by-step supervision for everything.”

She also related that during his employment at Jack-in-the-Box, he had to work in the back on the grill, “because he lacked the interpersonal skills and money management skills to work the cash register and take orders from customers.”

Mr. Johnson’s mother, Sharon Renee Johnson stated in her affidavit dated March 21st, 2019 that:

My pregnancy with Dexter was normal and he was born without complications. However, Dexter

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was slow to potty train and he didn't walk or talk as fast as his older sisters did.

Dexter had lots of head injuries when he was very young. When Dexter was only 6 months old, he fell down a flight of stairs while in his baby Walker. He fell down at least 13 stairs. He was unconscious and had to stay in the hospital for a week.²⁷

When Dexter was 6 years old, he was staying with family in Beaumont. I got a call that Dexter had spiked a fever of 106 degrees. When I got to Beaumont, Dexter was already in the hospital. He had lots of seizures because of the fever and the doctors didn't think he was going to make it. He stayed in the hospital for several days before his fever came down and he could come home.²⁸

When Dexter was in the 2nd grade he fell, while running, and hit his head on a metal water spigot on the side of the house. There was a big gash in his head from the fall. I did not take him to the hospital. I thought he would be OK and I was scared that the hospital might call CPS.

27. During my interview with her she related that he almost broke his neck and was treated at LBJ hospital.

28. During her interview with me she reported that the fever got as high as 107 to 108 degrees, and told me that he had a cousin with tuberculosis and that he was put in West End clinic for 9 months of treatment for tuberculosis.

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When Dexter was a child, he had tremors. He would shake so bad his dinner would shake off his fork. Doctors told me it had to do with him hurting his head or maybe from his fever.²⁹

Dexter failed the 2nd grade.

He was placed in special education and had to repeat the 2nd grade.

Dexter was in special education classes from that time on.

Dexter had trouble keeping up in school and had severe speech problems.

Other kids bullied and picked on Dexter when he was in school.³⁰

Dexter did not have friends when he was growing up. My other children always had friends coming by the house and knocking on my door, but not Dexter. No one ever came to the house looking for him.

I used to have to tell him something over and over before he would finally come to understand what

29. During my interview with her his mother clarified that by tremors she meant autistic-like hand flapping.

30. During her interview with me she also noted that Dexter was constantly teased and bullied at school.

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I was telling him. He got a job at Jack-in-the-Box. His girlfriend's mother was the manager, so he did not have to fill out a job application. Dexter never got his driver's license, he never lived alone and he never had a bank account. When Dexter moved out of my house, he lived with his girlfriend and her mother. Dexter depended on them to handle any financial transactions and tell him what to do and when to do it.

During my interview with her, Mr. Johnson's mother told me Dexter never sought relationships with age appropriate friends. However his family relationships were good, and the family was very protective of him. His sister Marquette described that he mostly watched cartoons including "Dexter's Laboratory"; and watched his sisters play Nintendo. However, she did not remember him ever playing the game. They both told me that Nikki was his only girlfriend.

During my interview with her, his mother described that he was persistently bullied due to his placement in special education.

With regard to his expressive speech his mother told me that he stuttered, "a lot – words would not come out plain." She went on to say that his speech problems never resolved completely, but, "got better at age 16 or 17."

His mother also told me that with regard to personal care Dexter, "couldn't do clothes and shoes or socks the right way. His sisters had to help him. He would cry and shake

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his fingers. You have to talk slow to him.” She stated that his issues with dressing lasted until he was 10 or 11 years old, and identified Travalia as the sister that would help him the most.

His mother told me that he needed help with his personal hygiene, including washing daily with soap, shampooing, drying off with a clean towel, and drying and coming his hair until he was 15 or 16 years old. Up until that time, he required the assistance of his mother or his older sisters.

To be sure he would be clean and safe, they did not have him use the public restroom, and rather would take him to the ladies’ room to help him. When he got older they would wait outside the Men’s room for him to be sure he was safe and had washed.

With regard to home life his mother told me that he could put dishes in the dishwasher but, “didn’t know how to work the buttons.” He could not cook food for himself until he was 14 or 15 years old. He would leave his dirty clothes on the floor in his room, and did not know how to use the washer or dryer, so his mother would collect his clothes, and wash and fold them for him. She told me that he could not handle chores until his teenage years, and even then his only responsibilities were to take out the trash and sweep the porch.

With regard to organizing himself and maintaining a daily schedule, his mother told me that he could only do this, “with his sister by his side. She made sure he got up for

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school, he was clean, his hair was groomed, and assisted him in getting off to school.”

She also noted that he needed his sisters help him find his way in the neighborhood because he would often get lost. She also said that she would not send him to the store alone, “only with his sisters.” This was because he could not be trusted to purchase the correct items and count his change.

She said, he couldn’t appropriately ask for directions because he was, “always with his sisters’ escort.”

With regard to watching out for his own personal safety, his mother explained that he needed help with crossing the street, “especially if a car was coming. He had to be told.” She also said that he would not use a seat belt in the car, and that she would have to put it on him until he was 14 years old.

She did not recall him writing letters or sending emails during the time that he lived with her. He was unable to work independently without supervision until he was 16, although, “he could mow his grandmother’s lawn.” She stated that the manager at Jack-in-the-Box was his girlfriend’s mother, knew his, “situation,” and, “looked out for him.”

His youngest sister Marquette Pradia stated in her affidavit dated April 3, 2019 that:

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I recall a morning we walked my elementary school in which I had missed my bus. Dexter had stayed home that day, so I returned to our apartment and asked him to walk me to school. We were about 10 minutes into our walk, and I didn't quite think we were going the right direction. Dexter had informed me that it was a shortcut that he knew, so I took his word and we continued our walk. Within a few minutes Dexter paused and turned in a circle as if to show confusion; he admitted to be lost and did not know where my school was. I knew the way to my school, but I decided to lead us back home to prevent Dexter from walking home alone.

Dexter's sister Shunell Johnson, who is one year older, stated in her affidavit dated March 21, 2019 that:

When Dexter was a teenager, he got a job working at Jack-in-the-Box for his girlfriend's mother. He had to get a job this way, through family; he couldn't fill out a job application by himself.

Dexter had trouble remembering things. If you sent him to the store for 5 things, he'd call when he got there and ask what they were again. Then he might call again and say I have these 3 things. What am I forgetting?

Dexter had trouble following through on chores around the house. You would have to tell him and tell him before it would get done. It was like he would

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get confused, start something else, and completely forget what he was supposed to be doing.

Dexter was always acting before thinking. He used to jump off the roof of our grandmother's house and once he burned off all of his eyebrows trying to light the barbeque. We couldn't believe it and kept asking if he was OK. He just acted like it was no big deal.

Chameka Williams stated in her affidavit dated March 3, 2019 that:

Dexter came to live with my family and me when he was 15. Dexter was quiet. He would engage with you if you initiated it, but he never started any conversations.

Dexter was like a little kid in a 16-year-old body. I used to have to tell him all the time, you're too old for that. Why are you acting like a child?

Every day someone at the house would have to wake Dexter up and remind him to go to work or to school.

Dexter wouldn't want to watch movies and stuff that the rest of us were watching. Dexter always wanted to watch children's shows.

I worked at Jack-in-the-Box and was responsible for training Dexter when he got his job there.

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It took Dexter longer to catch on than other employees. He really had to work hard to learn the stuff I was teaching him. When he got it, he would be so happy, but he really struggled, especially at the beginning.

Jack in the box made us take tests every so often. There would be about service, food portions, or do's and don'ts with customers. I would always let Dexter try to take the test on his own, but he would never get it so I would end up doing it for him.

When Dexter went to work or to go visit his daughter in the hospital, he struggled to catch the right bus. Dexter would walk for miles and miles from one place to another no matter what it was like outside because it was easier for him than catching the right bus.

If you sent Dexter to the store without telling him what to buy, he would get nothing but snacks. He would come home with candy and all kinds of goodies, but no real food. Nothing you could make a meal with.

I asked Dexter about his telephone skills and he replied while stuttering that he was, "just basic with it. When people call me. I do not like the t-t-t- texting, I told people don't do that just call me."

In terms of recreational and leisure activities, he stated that he did not play with toys or games or with other

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people. He told me that he would, “watch my sisters play Nintendo.” He also said he enjoyed watching cartoons on TV and listed a lot of programs that he liked to watch.

I asked him about personal care and he replied, “people think I got OCD, even the guards. I put everything back where it was. I like things facing a certain way or it irritates me.” He described that, “my deodorant and grease needs to face a certain way or it will bother me all day.” He also recounted his issues with even and odd numbers saying, “I don’t know why. I still don’t understand it.” Here he was referring to being uncomfortable with an odd number of items or an odd number of dollars in his wallet.

I asked him about difficulties dressing when he was growing up and he stated that he had trouble tying his shoes. “It took me a while to learn to tie them the right way and things.” I asked him how old he was when he was able to tie his shoes for himself and he replied, “more close to teenage years, 12 or 13, but even then basically I’d keep them tied together into just one big knot.”

He reiterated what his mother had told me, that she would help him wash with soap every day until he was in his teenage years. He also admitted that he has had problems with halitosis, “to me it wasn’t bad, but people would tell me I need to brush again.” I asked him how old he was when this was going on and he said, “in middle school.”

I asked him about his bathroom habits and whether he would wash his hands with soap after using the bathroom.

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He replied, “mom had to always tell me. Grandmother same thing. I had to turn back around because I had forgot to.” I also asked him about his habits in public restrooms and he replied, “my mom and sister would take me in the ladies’ room. I remember saying I wanted to pee like the girls.”

I asked him things about his home life growing up, and he reported that he did not know how to use the dishwasher, and that he would watch his mother and his grandmother cook and then, “do what they did.”

He explained that he would throw his dirty clothes, “in the basket,” and told a story about trying to use the washer and dryer, “once I got a little older, teenage years. I just remember mom and grandmother was doing it and just do that.” He then repeated his grandmother’s verbatim instructions to him. “She would stay with me while I did it. Eventually she felt I could do it alone.” I asked him if he would fold his clean clothes and he said, “I tried but it was not good. I could fold towels that was easy! I just didn’t know how to fold shirts and stuff right.”

I asked him if he ever had people complain that he was dirty or smelled bad, and he replied, “Well I didn’t realize, but the flour and water once you sweat starts smelling funny – so yes.” Here he was referring to using a mixture of flour and water in place of starch on his clothes, “I wanted to be like older guys with hard clothes. I would rub flour and water on my pants to make them hard when dry.”

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I also asked him about his experiences using resources in the community and get around. He explained that, “People had to tell me a few times. I forget easy. If you wasn’t with me to tell me where to go I’d get lost, so basically I needed someone to be with me.” I asked him if he was able to ask for directions or help and he replied, “once I got older, there were some nice bus drivers. They’ll give you directions. Tell me where to stand at for the next bus. Told me to ask the next driver to let me know when to get off.”

I asked him if he had ever used a bank and he replied that he did after his baby was born, while he was working at Jack-in-the-Box. I asked him about the tax refund story and he replied, “I don’t know how to do that. I don’t know how to read or what to do.” This is an example of his difficulty with receptive aphasia, he misunderstood my question and told me a story about trying to go to a tax preparer and not being able to fill out the papers, and getting, “a woman there to fill it out for me.”

I asked him if he had ever had a credit card and he replied, “is that what you get at the bank? The bank gave me a card. They told me I could get money off it and use it at stores and things.” He seemed to be describing a debit card and did not appear to understand what a credit card is.

I asked him a bit about his work experience and he stated that, “my shift manager always made sure I was doing things the way I was supposed to.” He did report, “a few times I drop the basket at work and got burned.”

*Appendix A***Conclusion Regarding Adaptive Impairment in the Practical Domain**

The Diagnostic and Statistical Manual of Mental Disorders – 5th Edition (DSM-5) characterizes the various severity levels for adaptive impairments seen in Intellectual Disability. Based on the evidence summarized above, Mr. Johnson’s level of functioning is best captured by the DSM-5 descriptions of “Moderate” severity in the **practical domain**.

Moderate impairment in the practical domain is described as follows:

The individual can care for personal needs involving eating, dressing, elimination, and hygiene as an adult, although an extended period of teaching and time is needed for the individual to become independent in these areas, and reminders may be needed. Similarly, participation in all household tasks can be achieved by adulthood, although an extended period of teaching is needed, and ongoing support will typically occur for adult level performance. Independent employment in jobs that require a limited conceptual and communication skills can be achieved, but considerable support from coworkers, supervisors, and others as needed to manage social expectations, job complexities, and ancillary responsibilities such as scheduling, transportation, health benefits, and money management. A variety of recreational skills can

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be developed. This typically requires additional supports and learning opportunities over an extended period of time. Maladaptive behavior is present in a significant minority and causes social problems.³¹

Summary of Opinions

Based on my examination, interviews, and review of the materials that I have been provided, I have reached the following opinions to a reasonable degree of psychological certainty.

Opinion with Regard to Intellectual Functioning

As noted above, it is my opinion that Mr. Johnson has significantly subaverage intellectual functioning based on valid, objective test scores within the range of intellectual disability.

Opinion with Regard to Impairments in Adaptive Functioning

Mr. Johnson exhibits significant deficits or impairments in all three domains of adaptive functioning (Conceptual, Social and Practical), at the level of “Mild” to “Moderate” severity. His adaptive impairments are clearly related to his underlying cognitive limitations. There is substantial “convergent validity” from anecdotal, contemporaneous, and empirical data sources supporting the conclusion

31. Ibid.

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that Mr. Johnson functions adaptively in the range of Intellectual Disability, which meets the second diagnostic prong.

Opinion with Regard to Age of Onset

It is my opinion that Mr. Johnson's intellectual and adaptive deficits find their origin in the developmental period. The data discussed above clearly show that he was exhibiting impairments in conceptual, social, and practical adaptive abilities during his development prior to age 18. The presence of head injuries and other risk factors for intellectual disability in the developmental period further support the onset of these deficits in the developmental period.

Based on these findings, is it clear that Dexter Johnson meets the criteria for a diagnosis of Intellectual Disability.

Thank you for the opportunity to evaluate this interesting case. If you have any questions, please feel free to contact me directly any time at (949) 230-7321.

Sincerely,

s/ Daniel A. Martell, Ph.D.

Daniel A. Martell, Ph.D., A.B.P.P.

Fellow, American Academy of Forensic Psychology

Fellow, National Academy of Neuropsychology

Fellow and Past President, American Academy of
Forensic Sciences

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EXHIBIT 2

Greg Hupp, Ph.D.
Clinical & Forensic Neuropsychology

DETERMINATION OF INTELLECTUAL DISABILITY

CAUSE #: 1085483-A 208th District Court
Harris County, Texas

DEFENDANT: Dexter Johnson EVALUATION DATE: April 4, 2019
BIRTH DATE: June 7, 1988 REPORT DATE: April 8, 2019

Executive Summary

The above-named Defendant, Dexter Johnson, was referred for an examination of his intellectual and adaptive functioning pursuant to the criteria identified in the *DSM-5* with regard to a determination of intellectual disability. A review of available documentation and collateral information was conducted to estimate Dexter's adaptive functioning during his developmental period prior to age 18. Dexter was administered both a screening and standardized comprehensive measure of his intellectual functioning and norm-referenced tests of effort and validity on April 4, 2019 by Greg Hupp, Ph.D., a licensed psychologist. The results yielded a full-scale intelligence quotient (FSIQ) of 70, which is in the extremely low range, at the 2nd%ile, and 2.00 standard deviations below the mean for the general population. His adaptive functioning resulted in significant deficits in several major life areas resulting in a General Adaptive Composite standard score

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of 60, which is also in the extremely low range compared to others his same age in the general population during his developmental period. With an identified traumatic brain injury at 6 months of age and the neuroimaging abnormalities noted by both MRI and PET scans at age 18 that identified a related condition according to 42 CFR 435.101, *Dexter meets the diagnostic criteria according to the DSM-5 as an individual with an Intellectual Disability, Mild with a mild ability rating (ABL=1)* according to the guidelines set forth by the American Association on Intellectual and Developmental Disabilities (AAIDD) in their 2010 classification manual.

Reason for Referral

The federal district court has not remanded the case in this matter – it is before the courts in a final habeas as a result of an execution date set for May 2, 2019. This referral was made specifically for a determination of Dexter’s intellectual and adaptive functioning pursuant to the Diagnostic and Statistical Manual – 5th Edition (DSM-5) (American Psychiatric Association, 2013) standards.

Qualifications

Greg Hupp, Ph.D. is a licensed psychologist in the State of Texas that has at least 24 hours of specialized forensic training and has met the continuing education requirements as required in Article 46B.022 of the Texas Penal Code.

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This report is for the referring source and those directly involved in the defendant's case. **It is not to be released to the defendant.** The psychologist is responsible for the clinical judgment as to whether the information contained in this report would be considered "harmful to the individual's physical, mental, or emotional health" according to the ethical rules and guidelines set forth by the Texas State Board of Psychological Examiners.

ProceduresMETHODS

Clinical Interview to review Dexter's developmental history

Review of Records

Order for Full Psychological Examination, Cause #1085483-A

Reporter's Record, Cause #1085483, Vol 30, dated 6/21/07

Reporter's Record, Cause #1085483, Vol 31, dated 6/22/07

Reporter's Record, Cause #1085483, Vol 32, dated 6/25/07

Reporter's Record, Cause #1085483, Vol 33, dated 6/26/07

Reporter's Record, Cause #1085483, Vol 34, dated 6/27/07

Affidavit – Sharon Johnson, mother of Dexter

Affidavit – Georgia Bishop, maternal grandmother of Dexter's daughter

Affidavit – Chameka Williams, friend of Dexter

Affidavit – David Bishop, uncle to Dexter's daughter

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Affidavit – Dominique Bishop, mother of Dexter’s daughter

Affidavit – Alicia Bishop, maternal aunt of Dexter’s daughter

Affidavit – Travalia Johnson, half-sister of Dexter

Affidavit – Sheree Johnson, sister of Dexter

Affidavit – Shunell Johnson, sister of Dexter

Affidavit – Marquette Pradia, sister of Dexter

Behavioral Observations

Test of Memory and Malinger (TOMM)

Vineland 3 Adaptive Behavior Rating Scales

Wechsler Adult Intelligence Scale, 4th Edition (WAIS-IV)

CONSENT

Dexter is currently incarcerated and was assessed in a private visitation room at the TDC Polunsky Unit. No other individuals were present during the approximately 110-minute evaluation.

Before proceeding with the evaluation, Dexter was provided with an explanation of the nature and general purpose of this evaluation, as well as the limitations on confidentiality, the legal and ethical responsibilities of the examiner, and the disposition of the final report. Dexter was then provided the opportunity to ask the Examiner any questions or clarifications regarding these limitations and responsibilities. Dexter assented to this evaluation.

Historical Review

Specific to the referral question and in accordance with the *Determination of Intellectual Disability: Best Practice*

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Guidelines (Texas Health & Human Services, 2016), this review is limited to Dexter's developmental history. According to the available information, Dexter was born full-term without complication followings a "normal" pregnancy. His mother was 22 years-old at the time of his birth. She did not receive any medication during the delivery. Throughout his childhood, Dexter had a chronic case of bronchitis and "was always wheezing and couldn't catch his breath. We used to have to take him to the hospital all the time." At one point, "they stuck a needle in in his back 'cause they thought maybe he had meningitis."

When Dexter was 7 years old, Dexter and his siblings escaped out of a second story window during an assault on his mother by her boyfriend. CPS was called to the case. The children were required to see a therapist. The boyfriend was incarcerated as a result. Prior to the assault, the boyfriend "whipped the children on a regular basis" despite their mother's protest. CPS was again called to the family after the children complained at school that their mother had been "whipping them."

Dexter has a history of several head injuries and other neurological impact.

- At 6-months of age, he fell down a flight of stairs while in his walker. His sister recalls that there "was blood everywhere." Dexter received staples in his head and remained hospitalized for about five-to-seven days. Dexter still bears a scar as a result of this injury.

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- At 4-years-old, a pedestal fan fell and hit him on top of his head.
- At 6-years-old, Dexter spiked a fever of 108 degrees and was taken to a hospital in Beaumont and was hospitalized for several days. During his hospitalization, Dexter experienced febrile seizures.
- At about age 8, Dexter fell and hit his head on a metal spigot that left a “gash.” His mother did not seek medical treatment for fear of another CPS investigation.
- Up until he was about 10 years old, Dexter had “bad tremors” and would “shake so bad. His dinner would shake right off his fork.”
- During his testimony on 6/21/07, Ruben Gur, MD reported that Dexter, at age 18, demonstrated significant brain abnormalities on a PET scan. The results of that neuroimaging identified that “the left frontal is 3 standard deviations lower than the normal brain.” Dr. Gur also interpreted an MRI of Dexter that revealed enlarged ventricles to which Dr. Gur opined revealed, “frontal lobe damage” that was both a combination of schizophrenia and traumatic brain injury.

Dexter was identified by the Houston Independent School District as a student with special needs. He began receiving special education in the 2nd grade. He also displayed some

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speech impairment at that time. Dexter repeated the 2nd grade. He dropped out of school in the 9th grade, is noted to have had “lots of behavioral problems in school.” Several of his siblings noted that they had to assist Dexter with his homework due to low comprehension, reading difficulties, and poor problem-solving skills.

Socially, Dexter had “lots of behavioral problems in school.” He was noted by his teachers to act-out when the work was too difficult for him. Dexter was “permanently” placed in an alternative behavior classroom from 6-9th grades according to his mother. Dexter was often bullied at school due to his special education status. He mostly stayed to himself or with his siblings. He met his one good friend in the second grade. He did not have any other close friends until his girlfriend when they met when Dexter was 15. Dexter had difficulty even trying to identify with a gang and would change the color of his bandana from one day to the next.

All of Dexter’s siblings have been identified with some sort of mental illness. Dexter is diagnosed with Schizophrenia.

Dexter had difficulty functioning on his own as a teenager. During middle school, his sister noted that she and Dexter got lost once when walking to school after they had missed the bus. During high school, Dexter would carry bus schedules for every route since he could never remember which number bus to take and would double-check the schedules once he was on. Dexter held one job in his life for a brief period of time. He worked for a fast food restaurant. While there, although he was cross-trained

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on several different job positions, he was not permitted to work the cash register except to briefly relieve someone due to his difficulty handling money. He was also not permitted to work the drive-through window because he could not handle “all the multitasking.” Dexter was left to work only in the fry-cook area. He could not manage his own money and relied on his girlfriend to make even simple purchases since he was cheated by cashiers on more than one occasion as noted by various sources.

Observed Behavior and Mental Status

Behavioral observations and other aspects of Dexter’s mental status are as follows:

Appearance: Dexter is an African-American male that appears of stated age, average height, and proportionate weight. His personal grooming and hygiene were good. He was dressed in a clean jail uniform. He was ambulatory with no noticeable gait disturbance or other physical impairment.

Manner: Dexter was candid and cooperative. He was alert and engaged. Dexter maintained appropriate eye contact. He maintained a calm temperament. He easily conversed with the Examiner. Dexter appeared to put forth a steady and consistent effort.

Orientation: Dexter was appropriately oriented to time, place, person, and purpose.

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Affect & Mood: Affective reactions were somewhat constricted but otherwise stable and appropriate. His mood was euthymic and friendly.

Thought Content: His responses were appropriate and conversational. His speech was simple but appropriate for volume and pace. Dexter remained on task throughout the evaluation. He reported non-command auditory hallucinations. Dexter did not appear to be responding to any type of internal stimuli.

Test ResultsValidity and Effort Testing

The following possibly attenuating factors were considered when considering the validity of this examination:

- *Cultural:* Dexter has lived in the United States for all of his life. He was raised with his siblings by his mother.
- *Language Abilities:* Dexter is a native English speaker. Dexter was noted by all the listed collateral sources to have had difficulty with pronunciation, minimal reading skills, and low verbal comprehension.
- *Education:* Dexter was reported by the Houston Independent School District to have received special education instruction while in school.

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- *Social:* Dexter had very few friends growing up. He mostly played with his siblings. He had one close friend since the second grade until he met his girlfriend when he was 15. Dexter was often bullied for his special education status.

Several measures were used to assess Dexter's effort throughout the test battery. Several of these measures were embedded in the tests themselves. The TOMM test is an external measure designed to assess performance effort on the part of the examinee. Dexter's performance on the TOMM was interpreted according to the publisher's standards and cross-referenced with the use of lower "cut scores" for those with mild intellectual disabilities (Shandera, Berry, Clark, et al., 2010).

Based on the combined results of both the external and internal validity measures, it appears as though Dexter put forth a credible, valid performance. Dexter's effort indices on the embedded measures and the external TOMM were as follows:

	<i>Response Rate</i>	<i>Cut-Off Score</i>	<i>Expected Performance</i>
WAIS-IV Digit Span	7	<5	Expected Response Rate
WAIS-IV Voc-DS scaled	+2	<-1.6	Expected Response Rate
TOMM Trial 1	37	n/a	Expected Response Rate

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TOMM Trial 2	48	45	Expected Response Rate
TOMM Retention	45	45	Expected Response Rate
TOMM Trial 2 % correct	96%	<78%	Expected Response Rate
TOMM Retention % correct	90%	<84%	Expected Response Rate

General Intellectual Abilities

Previously reported intellectual ability measures in this case have been presented with varying degrees of reliability as a result of different factors. The IQ score reported by the Houston Independent School District was only a partial score based on non-verbal performance measures only and is not considered a comprehensive full-scale of intellectual functioning. Dale Watson, Ph.D., a neuropsychologist, testified as to his findings of Dexter's intelligence during his testimony on 6/22/07 that, of the two comprehensive measures he used, the score from the Stanford-Binet, 5th Edition was "too high because every score has error involved" and acknowledged that he adjusted Dexter's IQ score on the WAIS-III because "I think that's probably a little bit high" due to several different factors beyond the scope of this evaluation. As such, the previously reported IQ scores for Dexter are considered invalid and cannot be endorsed as true and accurate measures of Dexter's intellectual functioning.

As part of this current evaluation, Dexter was administered the WAIS-IV to assess his intellectual capabilities. The

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WAIS-IV is a standardized measure of 10 separate subtests that provide an indication of a Dexter's overall cognitive abilities with a breakdown into four distinct index scores.

- The *Verbal Comprehension Index* is a measure of an individual's language skills and assesses their expressive vocabulary, general word knowledge, creativity of thought, richness of ideas, and concept formation skills.
- The *Perceptual Reasoning Index* measures an individual's nonverbal problem-solving skills, spatial orientation, cognitive mapping, pattern recognition, and visual learning capabilities.
- The *Working Memory Index* assesses an individual's rote memorization, auditory recall, auditory learning, and ability to sustain their attention and concentration for auditory information.
- The *Processing Speed Index* is a measure of an individual's visual scanning, symbol-association, visual transcription and copying abilities, and speed of nonverbal processing of information.

The results of Dexter's performance on the WAIS-IV are as follows:

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<i>Verbal Comprehension Subtests</i>	<i>Scaled Score</i>	<i>Perceptual Reasoning Subtests</i>	<i>Scaled Score</i>
Similarities	3	Block Design	8
Vocabulary	5	Matrix Reasoning	3
Information	4	Visual Puzzles	5

<i>Working Memory Subtests</i>		<i>Processing Speed Subtests</i>	
Digit Span	7	Symbol Search	7
Arithmetic	5	Coding	7

Average score range is 8-12

<i>Index</i>	<i>Standard Score</i>	<i>Percentile</i>	<i>Performance Level</i>
Verbal Comprehension	66	1	Extremely low
Perceptual Reasoning	73	4	Borderline
Working Memory	77	6	Borderline
Processing Speed	84	14	Below average
Full Scale IQ	70	2	Extremely low (z-score = -2.0)

SEM range 67-75

Average Standard score range is 85-115

Adaptive Functioning

The Vineland Adaptive Behavior Scales – 3rd Edition is an instrument to assist in delineating the developmental stage

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of a child in several domains, including communication, both receptive and expressive communication, daily living skills including personal, domestic and community areas, as well as socialization including interpersonal relationships in play, and identify any maladaptive behaviors.

- Adaptive communication skills identify how well a child listens, understands, how they use communication to gather and provide information, and their understanding of phonics and syntax.
- Daily living skills identify how a child eats, dresses, practices personal hygiene, what household tasks can be performed, and how well they understand and use time, money, telephone, computer, and job skills.
- Socialization skills assess how well a child interacts with others, how they play and use their leisure time, and how well they demonstrate responsibility and sensitivity to others.

This evaluation of adaptive functioning was completed retrospectively, meaning to determine Dexter's adaptive functioning during his developmental period according to written affidavits of several siblings, his mother, childhood friends, and friends of the family, to include the mother of his child. The results of Dexter's estimated adaptive behaviors based on this historical information are as follows:

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<i>Area</i>	<i>Std Score</i>	<i>Adaptive Level</i>
Communication	57	Low
Daily Living	60	Low
Socialization	59	Low
Adaptive Composite	60	Low

Diagnosis

Based on the current examination, the most likely diagnosis according to the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5)* published by the American Psychiatric Association that affect Dexter's functional capacity would be:

ICD-10 and DSM-5 Disorder, Condition, or Problem

- F70 Intellectual disability (intellectual developmental disorder), Mild
- G31.84 Mild neurocognitive disorder due to traumatic brain injury FSIQ= 70; ABL = 1 (mild)

Report of Findings

In accordance with the examination standards set forth in the Texas Health & Human Services Commission (HHSC) *Determination of Intellectual Disability: Best Practice Guidelines* (April 1, 2016), Dexter's performance on a full-scale comprehensive, standardized measure of intellectual

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functioning resulted in a full-scale intelligence quotient (FSIQ) standard score of 70, placing him 2.0 standard deviations below the mean for the general population and at the extremely low range of functioning. This FSIQ yields a standard error of measurement, a measure of 95% reliability and precision, with scores that would fall between 67-75. Available information from those closest to Dexter during his developmental period prior to age 18 noted Dexter to have significant deficits in adaptive functioning in the areas of communication, daily living, and socialization that are appraised to be Mild, Level I, as described by the American Association on Intellectual and Developmental Disabilities (AAIDD) in their 2010 classification manual.

There is no reason to believe that any of the following variables compromise the validity of this Determination of Intellectual Disability:

- cultural background
- language ability
- communication style
- physical impairments
- sensory impairments
- motivation
- emotional factors
- testing conditions

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Dexter's history is notable for several factors that could have contributed to his intellectual development and were considered as part of this examination. Those factors included the history of head trauma and seizures. The Code of Federal Regulations, Title 42, 435.1010 identifies medical, genetic, and acquired related conditions of a severe and chronic disability that, if manifested prior to the age of 22, are likely to continue indefinitely and result in substantial functional limitations in at least three areas of major life activity. The brain abnormality was documented by Ruben Gur, MD during his testimony on 6/21/07 based on the combined results of a PET scan, MRI imaging, and neuropsychological testing. Based on this determination by Dr. Gur, Dexter has an identified related condition that impacts his intellectual and adaptive functioning. Dexter has consistently demonstrated low intellectual and adaptive functioning with deficits noted in multiple areas to include academics, social, memory, and money management.

Based on all available information regarding Dexter's intellectual and adaptive functioning during his developmental period, Dexter **meets** the *DSM-5* criteria as a person with an ***intellectual disability, mild***.

This report is based on available information. I must reserve the privilege of revising this report if additional information becomes available. I have found that the foregoing is a true report of my findings and opinion upon the examination of the individual. Thank you for

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the referral. If you have any questions regarding this report, please feel free to contact me at my office.

Signed,

/s/ Greg Hupp, Ph.D.
Greg Hupp, Ph.D.
Psychologist
Texas License #31593

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Greg Hupp, Ph.D.
Clinical & Forensic Neuropsychology

ADDENDUM

CAUSE #: 1085483-A 208th District Court
Harris County, Texas

DEFENDANT: Dexter Johnson EVALUATION DATE: April 4, 2019
BIRTH DATE: June 7, 1988 REPORT DATE: April 8, 2019

In compiling the Determination of Intellectual Disability, several collateral sources of information were reviewed in addition to several professional and peer-reviewed scientific materials.

The collateral sources of information were identified in the body of the report.

The professional and peer-reviewed scientific materials reviewed and cited in the report are as follows:

42 CFR 435.1010 (2002). Office of the Federal Register. Washington, D.C. US Government Printing Office.

American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Arlington, VA: American Psychiatric Publishing.

Health & Human Services Commission (2016). *Determination of Intellectual Disability: Best Practice Guidelines*. Austin, TX.

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Schalock, R.L., Borthwick-Duffy, S. et al. (2010). *Intellectual Disability: Definition, Classification, and Systems of Supports (11th Edition)*. Silver Spring, MD. American Association of Intellectual and Developmental Disabilities.

Shandara, A.L., Berry, D.T., Clark, J.A. et al. (2010). Detection of Malingered Mental Retardation. Psychological Assessment, Vol. 22, No. 1, pp 50–56.

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EXHIBIT 3

DECLARATION OF DALE G. WATSON, PH.D.

1. My name is Dale G. Watson, Ph.D. I am a forensic neuropsychologist. A neuropsychologist is a psychologist with specialized training in understanding and evaluating the nature of brain-behavior relationships.
2. I have a Ph.D. in clinical psychology from the California School of Professional Psychology and am a licensed psychologist in California. I am also a member of the American Psychological Association (APA), the National Academy of Neuropsychology (NAN), the International Neuropsychological Society (INS), the American Association on Intellectual and Developmental Disabilities (AAIDD), the International Society for Intelligence Research (ISIR), and the Society for Personality Assessment (SPA). My current practice focuses on forensic assessment, primarily cases where the death penalty was sought. For many years I also maintained a clinical practice that included psychotherapy and the assessment of traumatic brain injury cases. I also teach a three-trimester course in adult assessment at the graduate level. My complete *curriculum vitae* is incorporated into this declaration as Attachment A.
3. Dexter Johnson's trial team asked me to conduct a neuropsychological assessment of him. I spent about 16 hours with Mr. Johnson over the course of three

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days, which included administering a battery of tests and interviewing him.¹

4. I gave Mr. Johnson two different IQ tests. They were the Stanford-Binet Intelligence Scales, Fifth Edition (SB-5), and the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III). Mr. Johnson's Full Scale IQ scores were 78 on the SB-5 and 88 on the WAIS-III. His score on the SB-5 translated to him functioning at an age equivalent of a ten-year-old. Mr. Johnson put forth good effort during the testing. I had no concerns about malingering or the effort he put forth.²
5. At the time of Mr. Johnson's trial, the DSM-IV-TR was the most recent manual published by the American Psychiatric Association for the diagnosis of mental retardation.³ To qualify for the diagnosis, an individual needed to meet three criteria: (1) significantly sub average general intellectual functioning, an IQ of about 70 or below on an individually administered IQ test; (2) accompanied by significant limitations in adaptive functioning in at least two skill areas; and (3) onset before age 18. Based on my testing of Mr. Johnson, I did not believe he met the first prong for the diagnosis of mental retardation. Because of that,

1. 31 RR 193.

2. 31 RR 196, 199, 203.

3. American Psychiatric Association (2000). *Diagnostic and statistical manual of mental disorders* (4th ed., Text Revision).

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it was my belief that an assessment of his adaptive functioning was not necessary.⁴

6. After Mr. Johnson’s trial, the DSM-5⁵ was published in 2013. Among other changes, it relabeled what was previously known as Mental Retardation as Intellectual Disability and modified the diagnostic criteria. To qualify for a diagnosis of Intellectual Disability, the criteria set out in the DSM-5 are: (1) deficits in intellectual functioning; (2) deficits in adaptive functioning; and (3) onset during the developmental period.
7. There were changes in DSM-5 that some have interpreted to be a reduced emphasis on IQ scores compared to adaptive functioning.⁶ For example, DSM-5 moved the specific IQ requirements for Intellectual Disability from the diagnostic criteria to the text description of the disorder. In addition, DSM-5 changed the basis for describing severity levels from IQ ranges to adaptive functioning levels. This manual reported, “The various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because is its adaptive functioning

4. 31 RR 263.

5. American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.).

6. The U.S. Supreme Court, in *Hall v. Florida*, 572 U.S. 701 (2014), noted, “Intellectual disability is a condition, not a number. . . . and understand that an IQ test score represents a range rather than a fixed number” (p. 10).

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that determines the level of supports required.”⁷ Further, it is noted, “Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score.”⁸ Moreover, DSM-5 makes clear that “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 lower IQ scores.”⁹ Finally, the DSM-5 also places an increased reliance on clinical judgment when evaluating whether someone meets the criteria for the disorder, which also decreases the strict reliance on IQ scores.

8. Considering the changes to the understanding of the diagnostic criteria for Intellectual Disability (previously Mental Retardation), a full assessment of Mr. Johnson’s adaptive functioning is reasonable. The scores that Mr. Johnson received on the IQ testing that I administered would not automatically preclude a diagnosis of Intellectual Disability if the other criteria are met.

I declare under penalty of perjury under the laws of the State of Texas and the United States of America that the foregoing is true and correct to the best of my knowledge.

7. *Id.*, p. 33.

8. *Id.*

9. *Id.*

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This two-page declaration was executed on August 2,
2019, in Contra Costa County, California.

/s/ Dale G. Watson, Ph.D.
Dale G. Watson, Ph.D.

*Appendix A***APPENDIX A****DALE G. WATSON, Ph.D.*****Clinical & Forensic Neuropsychology******Mail: 3377 Deer Valley Road, PMB 310, Antioch, CA 94531******Office: 866-536-5301 / Fax: 925-757-3690******Email: watson.dale@comcast.net***

CURRICULUM VITAE**AUGUST 2, 2019****EDUCATION:**

- 1988 Ph.D. California School of Professional
 Psychology-Berkeley/Alameda
 Clinical Psychology (APA accredited)
- 1980 M.A. John F. Kennedy University, Orinda, CA.
 Clinical Psychology
- 1975 B.A. California State College, Sonoma,
 Rohnert Park, CA.
 Psychology

PROFESSIONAL EXPERIENCE:

- 1990- Private Practice**
 Pinole, CA.
- Forensic Evaluation/Trial Consultation.
 - Comprehensive Neuropsychological/
Psychodiagnostic Assessment services.
 - Intellectual Disability (Mental
Retardation) “Atkins” evaluations.
 - Adjudicative Competency & to be
Executed, Insanity, Mitigation and
Future Dangerousness.

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- Trial testimony in Superior and Federal District Courts.
- Individual Psychotherapy.

2007-**Adjunct Faculty****1994-2000**

The Wright Institute, Berkeley, CA. (APA accredited)

- Teaching 3-trimester courses in Graduate Level Psychodiagnostic Assessment including intellectual and psychological evaluation and neuropsychological screening.
- Dissertation supervision.

2000-2016**Consulting Clinical Neuropsychologist**

Neurobehavioral Cognitive Services, Dixon, CA.

- Neurocognitive rehabilitation services including consultation and treatment planning.
- Individual and Group Psychotherapy with neurologically impaired patients.
- Neuropsychological and Psychodiagnostic Assessment.

1990-1992**Clinical Neuropsychologist NeuroCare, Concord, CA.**

- Acting program director (July 1991).
- Psychology team leader.
- Supervision of interns and the behavioral technician.
- Post-acute rehabilitation of the brain-injured.
- Neuropsychological evaluation.
- Treatment planning.

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- Individual/Couples/Group Psychotherapy.
- Substance Abuse treatment/Cognitive Rehabilitation/Crisis Intervention.

1989-1990 Psychological Assistant

Supervisor: James Cole, Ph.D.

NeuroCare, Concord. CA.

- Post-acute rehabilitation of the brain-injured.
- Neuropsychological evaluation.
- Treatment planning.
- Individual/Couples/Group Psychotherapy.
- Substance Abuse treatment/Cognitive Rehabilitation/Crisis Intervention.

1988-1990 Psychological Assistant

Supervisor: Virginia Wulf, Ph.D., Pinole, CA.

- Individual/Couples Psychotherapy.

1988-1989 Psychological Assistant

Supervisor: Norbert Ralph, Ph.D.

Comprehensive Assessment Services,
Sausalito Professional Clinic Sausalito, CA.

- Psychodiagnostic evaluations of hospitalized, adolescent substance abusers.
- Hospital Consultation (New Beginnings – Modesto).

1986-1989 Psychological Assistant

Supervisors: Michael Shore, Ph.D./Harry
Noda, Jr., Ph.D.

Specialized Rehabilitation Services
An affiliate of Transitions Bay Area Recovery
Centers, Fremont, CA.

*Appendix A***Brain Injury Rehabilitation Program (1986-1987)**

- Coordinating the Treatment Team.
- Neuropsychological and Psychodiagnostic Evaluation.
- Cognitive Rehabilitation.
- Individual Psychotherapy/Case Management.

Chronic Pain Management Program

- Individual/Group Psychotherapy.
- Case Management.
- Biofeedback Training.
- Patient education.

1981-1986 Clinical Coordinator/ Psychological Assistant

Supervisors: Sheila Bastien, Ph.D./
Ann Hoff, Ph.D.

Spectrum Psychology Associates, Berkeley, CA.

- Clinical Coordination.
- Neuropsychological, Psychodiagnostic and Vocational Evaluation.
- Evaluation of the Developmentally Disabled
- Individual Psychotherapy.
- Forensic psychology.

1984-1985 Clinical Psychology Intern (Academic Year)

Supervisor: Neil Young, Ph.D.

Community Education and
Counseling Center, Fremont, CA.

- Individual Psychotherapy within a Control Mastery framework.
- Group and Couples Psychotherapy.
- Community Needs Assessment (Program Evaluation).

*Appendix A***1983-1984 Clinical Psychology Intern (Academic Year)**

Supervisor: Joan Roth, Ph.D.

Northern California Reception Center,
California Medical Facility, Vacaville, CA.

- Psychodiagnostic Evaluation of court referred criminal offenders.
- Group Psychotherapy with Category “B” inmates (Pre-operational Transsexuals).
- Individual Psychotherapy.

1983 Teaching Assistant

Neuropsychological Measurement Laboratory
California Graduate School of Marital and
Family Therapy, San Rafael, CA.

- Taught the laboratory section of
Neuropsychological Assessment using the
Halstead-Reitan Battery.

1983 Clinical Psychology Intern

East Bay Activities Center, Oakland, CA.

- Milieu therapy in classroom setting with
emotionally disturbed children.

**1983 Co-Leader: Neuropsychological Assessment
– An In-service Training Workshop.**

Sonoma County Office of Education.

- 1-day in-service training workshop with
psychologists and nurses.

1982 Teaching Assistant

Neuropsychological Measurement Laboratory
California School of Professional Psychology,
Berkeley, CA.

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- Taught the laboratory section of Neuropsychological Assessment using the Halstead-Reitan Battery.

1982 Teaching Assistant
 Neuropsychological Measurement Laboratory
 California Graduate School of Marital and Family Therapy
 San Rafael, CA.

- Taught the laboratory section of Neuropsychological Assessment using the Halstead-Reitan Battery.

1979-1980 Counselor Intern
 Contra Costa County Alcoholism Information and Rehabilitation Service (AIRS), Antioch, CA.

- Conducted Alcoholism Education Orientations.
- Individual, Marital and Group Psychotherapy.

1978-1979 Counselor Intern
 John F. Kennedy University Community Counseling Center, Concord, CA.

- Individual, Marital, and Family Psychotherapy.
- Peer Supervision.

1975 Staff Counselor
 New Horizons Center, Pittsburg, CA.

- Milieu treatment of developmentally disabled and psychotic adolescents and young adults.
- Liaison to Consulting Psychiatrist.

*Appendix A***RECENT PROFESSIONAL TRAINING:**

- 2019 “The emerging role of Quantitative Electroencephalography (QEEG) in forensic assessment of Fetal Alcohol Spectrum Disorders (FASDs): Current and long-term implications.” Richard Adler, M.D., presented at the XXXVI International Congress on Law and Mental Health, July 24, 2019, Rome, Italy.
- 2019 “No stone unturned: QEEG as an integral part of the defense of criminally charged clients with a FASD.” Karen Steele, Esq., presented at the XXXVI International Congress on Law and Mental Health, July 24, 2019, Rome, Italy.
- 2019 “Convergence of data: Consistency between neuropsychological data and Quantitative Electroencephalography (QEEG) in individuals with Fetal Alcohol Spectrum Disorders (FASD).” Paul Connor, Ph.D., presented at the XXXVI International Congress on Law and Mental Health, July 24, 2019, Rome, Italy.
- 2019 “Voxel by voxel: What a detailed analysis of QEEG tracings has revealed.” Wesley Center, presented at the XXXVI International Congress on Law and Mental Health, July 24, 2019, Rome, Italy.
- 2019 “Not so ‘uncommon’ topics in competency and sanity evaluations.” Candyce Shields & Terrance Kukor, American Academy of Forensic Psychology, June 7, 2019, Burlington, VT, 7 CE Units.

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- 2019 “Evaluation of competency to stand trial.” Candyce Shields, American Academy of Forensic Psychology, June 6, 2019, Burlington, VT, 7 CE Units.
- 2019 “Core foundations and practical strategies for the assessment of criminal responsibility.” Maureen L. Reardon, American Academy of Forensic Psychology, June 5, 2019, Burlington, VT, 7 CE Units.
- 2018 “California Law and Ethics for Psychologists: Key Concepts Review.” Ce4Less.com, March 27, 2018.
- 2018 “A Critical Review of RPAS.” Society for Personality Assessment, March 17, 2018, Washington, D.C., 2 CE Units.
- 2018 “Symposium E: Exploring the Dynamics of Criminal and Violent Behavior: Theoretical Considerations and Rorschach Findings.” Society for Personality Assessment, March 17, 2018, Washington, D.C., 2 CE Units.
- 2018 “Clinical and Forensic Assessment of Alexithymia: Concept, Construct, and Experience.” Society for Personality Assessment, March 15, 2018, Washington, D.C., 2 CE Units.
- 2018 “Assessment of Psychological Vulnerabilities in Disputed Confession Cases.” Society for Personality Assessment, March 15, 2018, Washington, D.C., 3.5 CE Units.

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- 2018 “Roundtable Discussion Q: Graduate Training in Test Administration and Scoring: Barriers, Processes and Rubrics.” Society for Personality Assessment, March 15, 2018, Washington, D.C., 2 CE Units.
- 2018 “Using the Inventory of Problems – 29 (IOP-29) to Discriminate Feigned from Bona Fide Mental or Cognitive Disorders.” Luciano Giromini & Donald Viglione, Society for Personality Assessment, March 14, 2018, Washington, D.C., 3.5 CE Units.
- 2017 “R-PAS Coding Solutions.” Donald J. Viglione, Ph.D., Society for Personality Assessment, March 19, 2017, San Francisco, CA 7 CE Units.
- 2017 “Proficiency in Personality Assessment: Producing an Integrated Report.” Hades Pade, Psy.D. & A. Jordan Wright, Ph.D. Society for Personality Assessment, March 15, 2017, San Francisco, CA 3.5 CE Units.
- 2017 “Developmental Amnesia: Memory Formation in the Absence of Remembering.” Faraneh Vargha-Khadem, Ph.D., International Neuropsychological Society (INS) 45th Annual Meeting, February 1, 2017, New Orleans, LA 1 CE Unit.
- 2017 “Frontal Cortex and Human Behavior: Evidence from Intracranial Recording.” Robert T. Knight, M.D., International Neuropsychological Society

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(INS) 45th Annual Meeting, February 1, 2017, New Orleans, LA 1 CE Unit.

- 2017 “Adult Aphasia: Classifications. Localization, and Neuroimaging.” Nina Dronkers. Ph.D., International Neuropsychological Society (INS) 45th Annual Meeting, February 1, 2017, New Orleans, LA 3 CE Units.
- 2017 “Clinical Assessment of Frontal Lobe Functions: A Historical Perspective of the Application of the Boston VA Jamaica Plains VA Process Approach.” Donald Stuss, Ph.D., International Neuropsychological Society (INS) 45th Annual Meeting, February 1, 2017, New Orleans, LA 3 CE Units.
- 2016 “21st Century Neuroimaging Applications in the Practice of Clinical Neuropsychology.” Erin Bigler, Ph.D., National Academy of Neuropsychology, October 21, 2016, Seattle, WA. 3 CE Units.
- 2016 “Overview of Recreational and Medical Marijuana: Ethical, Scientific and Legal Issues Across the Lifespan.” Godfrey Pearlson, Ph.D., National Academy of Neuropsychology, October 20, 2016, Seattle, WA. 2.0 CE Units.
- 2016 “Neuropsychological Assessment and Preclinical Alzheimer’s Disease.” Dorene Rentz, Ph.D., National Academy of Neuropsychology, October 20, 2016, Seattle, WA. 3 CE Units.

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- 2016 “Historical, Conceptual, and Empirical Factors in Performance and Symptom Validity Assessment.” Glenn Larrabee, Ph.D., National Academy of Neuropsychology, October 19, 2016, Seattle, WA. 3 CE Units.
- 2016 “Legal and Ethical Challenges Using the DSM-5: Best Practices.” Pamela Harmell, Ph.D., Professional Psych Seminars, March 3, 2016. Online at <http://www.psychsem.com/> 6 CE Units.
- 2015 “Behavioral Neurology: Integrating the Neurologic Examination for the Neuropsychologist: Neuroanatomic Localization of Common Pathologies, Interventions, and Higher Cognitive Functions.” Lola Morgan, M.D., Annual Conference, National Academy of Neuropsychology, November 7, 2015, Austin. TX. 2 CE Units.
- 2015 “Moving Neuropsychology from the Backdoor to the Front Door: Embracing Outcomes in Research and Practice.” Gordon J. Chelune, Ph.D., Annual Conference, National Academy of Neuropsychology, November 6, 2015, Austin. TX. 1 CE Units.
- 2015 “The New Metabolic Cascade and Comprehensive Model of Concussion: Looking to Drive Clinical Practice.” Christopher Giza, M.D. and Michael McCrea, Ph.D., Annual Conference, National Academy of Neuropsychology, November 6, 2015, Austin, TX. 3 CE Units.

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- 2015 “Improving the Methodology for Assessing Mild Cognitive Impairment in Children, Adults, and Older Adults.” Grant L. Iverson, Ph.D., Annual Conference, National Academy of Neuropsychology, November 5, 2015, Austin, TX. 1 CE Units.
- 2015 “Performance Validity Testing in At-Risk Populations: Ethical Practices.” Kyle Brauer Boon, Ph.D., Annual Conference, National Academy of Neuropsychology, November 5, 2015, Austin, TX. 3 CE Units.
- 2015 “Frontal Lobe Functioning: Clinicians Beware – Appearances May Be Deceiving.” Donald T. Stuss, Ph.D., Annual Conference, National Academy of Neuropsychology, November 4, 2015, Austin, TX. 1 CE Units.
- 2015 “The Ethical Practitioner: Assessing Executive Functioning in an Emotional World.” Yana Suchy, Ph.D., Annual Conference, National Academy of Neuropsychology, November 4, 2015, Austin, TX. 2 CE Units.
- 2015 “Decision Making: The Role of Evidence-Based Practitioner.” Gordon Chelune, Ph.D., Annual Conference, National Academy of Neuropsychology, November 4, 2015, Austin, TX. 2 CE Units.

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- 2015 “R-PAS Intermediate Level Workshop: Sharpening Coding, Administration, and Interpretation Skills.” Philip Erdberg, Ph.D., ABPP & Donald Viglione, Ph.D., ASAP, October 24-25, 2015, San Francisco, CA. 13 CE Units.
- 2015 “Neuro-Oncology for Neuropsychologists.” Michael W. Parson, Ph.D., ABPP, 13th Annual Conference, American Academy of Clinical Neuropsychology, June 19, 2015, San Francisco, CA. 3 CE Units.
- 2015 “Chronic Issues and Controversies in Mild TBI.” Rodney D. Vanderploeg, Ph.D., ABPP & Heather G. Belanger, Ph.D., ABPP, 13th Annual Conference, American Academy of Clinical Neuropsychology, June 19, 2015, San Francisco, CA. 3 CE Units.
- 2015 “Multiple Performance & Symptom Validity Tests in Neuropsychological Assessment.” Glenn J. Larrabee, Ph.D., ABPP & Jeremy J. Davis, Psy.D., ABPP, 13th Annual Conference, American Academy of Clinical Neuropsychology, June 18, 2015, San Francisco, CA. 3 CE Units.
- 2015 “Current Controversies in Neuropsychology Computerized Brain Training: What’s the Evidence?” Aaron Nelson, Elkhonon Goldberg, & Robert S. Wilson, 13th Annual Conference, American Academy of Clinical Neuropsychology, June 18, 2015, San Francisco, CA. 1 CE Unit.

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- 2015 “Advanced Neuropsychological Report Writing.” Jacobus Donders, Ph.D., ABPP, 13th Annual Conference, American Academy of Clinical Neuropsychology. June 18, 2015, San Francisco, CA. 3 CE Units.

- 2015 “Development, Revision, and Implementation of the HCR-20 Version 3.” Kevin Douglas, Ph.D., Consolidated Continuing Education and Professional Training (CONCEPT), February 4, 2015, Webinar (3 CE units).

- 2014 “Ethics: Informed Consent, Confidentiality, and Diagnosing.” At Health, Inc. and PsychoEducational Resources, Inc. February 1, 2014. Online <http://www.athealthce.com>, (1 CE unit).

- 2014 “From Exner to R-PAS: Surviving the Transition.” Andrew Pojman, Ed.D. & Barbara Peterson, Ph.D. The Wright Institute Continuing Education Program. February 1, 2014. Berkeley, CA (6 CE units).

- 2013 “Statistics 2: Inference and Association.” Michelle Everson. The Institute for Statistics Education at Statistics.com. October 10, 2013 – November 11 2013. (5 CE units).

- 2013 “Cognitive Science, Technology, and Neuropsychological Test Development: A Look at the Past and Future.” Dean Delis, Ph.D. Annual Conference of the National Academy of

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Neuropsychology (NAN). October 18, 2013. San Diego, CA (2 CE credits).

- 2013 “Brains in the ‘Cloud’: The Amnesic Patients H.M., E.P. and the Digital Brain Library. Jacopo Annese, Ph.D. Annual Conference of the National Academy of Neuropsychology (NAN). October 18, 2013. San Diego, CA (2 CE credits).
- 2013 “Unfolding, Unfurling, and Unraveling: Imaging of Brain Development in Adolescence, Early, and Middle Adulthood.” Monte S. Buchsbaum, M.D. Annual Conference of the National Academy of Neuropsychology (NAN). October 18, 2013. San Diego, CA (3 CE credits).
- 2013 “Conners Continuous Performance Test: Revised Version of the Visual Paradigm and New Audio Paradigm.” Gill Sitarenios, Ph.D. & Kent Lam, Ph.D. Annual Conference of the National Academy of Neuropsychology (NAN). October 17, 2013. San Diego, CA (2 CE credits).
- 2013 “Scientific Update on Mild Traumatic Brain Injury (MTBI). New Evidence for Diagnosis and Management.” Michael McCrea, Ph.D. Annual Conference of the National Academy of Neuropsychology (NAN). October 17, 2013. San Diego, CA (3 CE credits).
- 2013 “Early Detection of Alzheimer’s Disease.” Ronald C. Petersen, M.D., Ph.D. Annual Conference of the

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National Academy of Neuropsychology (NAN).
October 16, 2013. San Diego, CA (1 CE credits).

- 2013 “Emotion, Decision-Making, and the Prefrontal Cortex Across the Lifespan.” Daniel Tranel, Ph.D. Annual Conference of the National Academy of Neuropsychology (NAN). October 16, 2013. San Diego, CA (3 CE credits).

- 2013 “Forensic Neuropsychology: A Scientific Approach to Forensic Neuropsychology.” Glenn J. Larrabee, Ph.D. Annual Conference of the National Academy of Neuropsychology (NAN). October 16, 2013. San Diego, CA (3 CE credits).

- 2013 “Statistics 1: Probability and Study Design.” Michelle Everson. The Institute for Statistics Education at Statistics.com. September 11, 2013 October 12, 2013. (5 CE units).

- 2013 “Schizophrenia: The Role of Symptom Domain on Patient Outcomes.” Henry A. Nazralla, M.D. & Joseph P. McEvoy, M.D. VICE LLC. Online <http://www.naccme.com/node/6424/course/6707/presentation>, January 24, 2013 (1.5 CME).

- 2012 “Meyers Neuropsychological Battery and Meyers Neuropsychological Software System.” John E. Myers, Psy.D., ABN, ABPdN. The American College of Professional Neuropsychology, June 15-16, 2012. Irvine, CA (12 CE credits).

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- 2011 “Introduction to the Rorschach Performance Assessment System: Practical Clinical Training and Case Illustrations.” Donald Viglione, Ph.D. & Philip Erdberg, Ph.D. Alliant International University, June 3 & 4, 2011. San Francisco, CA (12.5 CE credits)
- 2011 “Biopsychosocial Outcome from Mild Traumatic Brain Injury.” Grant Iverson, Ph.D. The American College of Professional Neuropsychology, March 12, 2011. Las Vegas, NV. (3 CE credits)
- 2011 “Reframing Nonverbal Learning Disorders: Identifying Clinical Subgroups.” Gail M. Grodzinsky, Ph.D., ABPdN. The American College of Professional Neuropsychology, March 12, 2011. Las Vegas, NV. (3 CE credits)
- 2011 “From Movement to Thought: Subcortical Contributions to Psychiatric and Learning Disorders.” Dana Chidekel, Ph.D., ABPdN & Deborah E. Budding, Ph.D., ABPdN, ABN. The American College of Professional Neuropsychology, March 11, 2011. Las Vegas, NV. (3 CE credits)
- 2011 “Neuropsychological Science and Forensic Competencies: Applications in Civil and Criminal Cases.” Daniel A. Martell, Ph.D., A.B.P.P. The American College of Professional Neuropsychology, March 11, 2011. Las Vegas, NV. (3 CE credits)

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- 2010 “Neuroanatomical Dissection: Human Brain and Spinal Cord.” William E. Cullinan, Ph.D., David A. Baker, Ph.D., Subhash C. Bhatnagar, M.S.-CCC (SPL), Ph.D., James P. Herman, Ph.D., John R. Mantsch, Ph.D., & Robert C. Thompson, Ph.D. Marquette University, July 15 – 17, 2010. (21 hours)
- 2010 “Finding Balance: Legal & Ethical Issues of Boundaries & Privacy in Psychotherapeutic Services.” Daniel Taube, J.D., Ph.D. John F. Kennedy University, March 12, 2010. Campbell, CA. (6 C.E. credits)
- 2010 “Neuropsychology and the Death Sentenced Inmate.” Michael B. Charlton, J.D. Annual Conference of the American College of Professional Neuropsychology, February 27, 2010. Las Vegas, NV. (3 C.E. credits)
- 2010 “Introduction to Empirically Based Assessment: Developing an EBA Model for AD/HD.” Steven J. Hughes, Ph.D., LP, ABPnN. Annual Conference of the American College of Professional Neuropsychology, February 27, 2010. Las Vegas, NV. (3 C.E. credits)
- 2010 “Central Auditory Processing in Children and Adolescents.” Teresa Bailey, Ph.D., Ph.D. Annual Conference of the American College of Professional Neuropsychology, February 26, 2010. Las Vegas, NV. (3 C.E. credits)

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- 2010 “What the Forensic Neuropsychologist Needs to Know about Death Penalty Litigation.” Thomas J. Reidy, Ph.D., ABPP. Annual Conference of the American College of Professional Neuropsychology, February 26, 2010. Las Vegas, NV. (3 C.E. credits)
- 2010 “Reitan Society Meeting.” Ralph Reitan, Ph.D., Deborah Wolfson, Ph.D., Jim Horn, Ph.D., & Janice Nice, Ph.D., February 24-25, 2010. Las Vegas, NV. (12 C.E. credits).

PUBLICATIONS:

- Thoma, J., & Watson, D. (2018). Working with Experts. In E. Kelley (Ed.) *Representing people with mental disabilities: A practical guide for criminal defense lawyers*. Chicago: American Bar Association.
- Watson, D. G. (2015). Intelligence Testing. In E. A. Polloway (Ed.), *The death penalty and intellectual disability* (pp. 113–140). Washington, DC: American Association on Intellectual and Developmental Disabilities (AAIDD).
- Blank, J., Evered, L., Watson, D., & Ruff, R. (2014). C-87 Malingering Madness: Distress as a Diagnostic Alternative (Abstract). *Archives of Clinical Neuropsychology*, 29(6), 605.
- McGrew, K.S., & Watson, D.G. (2012). Applied Psychometrics 101 Brief #14. Demographically adjusted neuropsych (Heaton) norm-based scores

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inappropriate for MR/ID dx. *Intellectual competence and the death penalty*. Retrieved from <http://www.atkinsmrdeathpenalty.com/2012/07/an-101-brief-14-deinographically.html>

Abueg, F., Woods, G.W., & Watson, D.G. (2000). Disaster Trauma. In Frank M. Dattillio & Arthur Freeman (Eds.) *Cognitive Behavioral Strategies in Crisis Intervention, Second Edition*. New York, N.Y.: Guilford Press.

Bastien, S., Peterson, D. & Watson, D.G. (1996). IQ abnormalities associated with chronic fatigue syndrome in repeated WAIS-R testing (Abstract). *Journal of Chronic Fatigue Syndrome*, 2(2/3).

PRESENTATIONS:

- 2019 “The neuropsychology of competency to stand trial.” Presented at the XXXVI International Congress on Law and Mental Health, July 26, 2019, Rome, Italy.
- 2019 “Neuropsychological functioning of murder defendants and capital appellants in the United States.” Presented at the XXXVI International Congress on Law and Mental Health, July 22, 2019, Rome, Italy.
- 2019 “Common problems in *Atkins* litigation.” Co-presented with John Blume and Emily Paavola. Sixteenth National Seminar on the Development and Integration of Mitigation

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Evidence. Administrative Office of the US Courts. March 15, 2019. Philadelphia, PA.

- 2019 “Prong one *of Atkins*: testing issues.” Sixteenth National Seminar on the Development and Integration of Mitigation Evidence. Administrative Office of the US Courts. March 15, 2019. Philadelphia. PA.
- 2019 “Neuropsychology: Basics and norms.” Co-presented with Julie Brain. 2019 Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 16, 2019. Monterey, CA.
- 2019 “Presenting neuropsychological evidence at trial.” Co-presented with Danalynn Recer. 2019 Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 17, 2019. Monterey, CA.
- 2019 “The impact of emotional trauma on the brain in early childhood development.” Presented at the Solano County Offices of the Public Defenders, February 13, 2019. Fairfield, CA.
- 2018 “Adolescent brain development.” Presented at the Habeas Corpus Resource Center Fall Conference. Habeas Corpus Resource Center. October 11, 2018. San Francisco, CA.

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- 2018 “Red flags for brain damage.” Co-presented with Emily Paavola. Fifteenth National Seminar on the Development and Integration of Mitigation Evidence: Mitigation Updates Neuroscience and More. Administrative Office of the US Courts. April 21, 2018. Miami Dadeland, FL.
- 2018 “Testing issues in Atkins cases, including clients whose native language is not English.” Fifteenth National Seminar on the Development and Integration of Mitigation Evidence: Mitigation Updates – Neuroscience and More. Administrative Office of the US Courts. April 20, 2018. Miami Dadeland, FL.
- 2018 “Emerging Issues in Neuropsychology” Co-presented with Sean O’Brien. 2018 Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 17, 2018. Monterrey, CA.
- 2017 “Neuropsychological Development and Presenting Findings.” Co-presented with Sean O’Brien. 2017 Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 18, 2017. San Diego, CA.
- 2017 “Neuropsychological Assessment: Overview of a Competent Assessment.” Co-presented with Denise Gragg, Esq. 2017 Capital Case Defense Seminar. California Attorneys for Criminal

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Justice/California Public Defender Association.
February 18, 2017. San Diego, CA.

- 2016 “New Issues in Atkins Cases.” Co-presented with James Patton, Ed.D., & Sara Coebra. 13th National Seminar on the Development & Integration of Mitigation Evidence. Administrative Offices of the U.S. Courts. April 2, 2016. New Orleans, LA.

- 2016 “Traumatic Brain Injury.” Co-presented with Jackie Walsh, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 14, 2016. San Diego, CA.

- 2016 “Emerging Issues in Neuropsychology.” Co-presented with Michael Laurence, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 14, 2016. San Diego, CA.

- 2015 “Neuropsychological Assessment.” National Association of Criminal Defense Lawyers’ Seminar, “Making the Case for Life” August 22, 2015 Las Vegas, NV.

- 2015 “Working with Mental Health Experts.” Co-presented with Mark Olive, Esq. National Association of Criminal Defense Lawyers’ Seminar, “Making the Case for Life,” August 22, 2015, Las Vegas, NV.

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- 2015 “*Atkins, Hull, and Brumfield*.” Co-presented with Mark Olive, Esq. National Association of Criminal Defense Lawyers’ Seminar, “Making the Case for Life,” August 22, 2015, Las Vegas, NV.

- 2015 “Litigating Intellectual Disability Post-Hall: *Atkins, Hall, and Brumfield*.” Co-presented with Stephen Harper, Esq. 36th Annual Death Penalty Training Conference, Airlie Conference Center, July 12, 2015, Warrenton, VA.

- 2015 “Understanding (and Avoiding the Pitfalls of) Neuroimaging.” Twelfth National Seminar on the Development and Integration of Mitigation Evidence. Habeas Assistance and Training Counsel/Administrative Offices of the United States Courts. April 12, 2015, Baltimore, MD.

- 2015 “An Overview of IQ Scores and Testing.” Twelfth National Seminar on the Development and Integration of Mitigation Evidence. Habeas Assistance and Training Counsel/Administrative Offices of the United States Courts. April 10, 2015, Baltimore, MD.

- 2015 “Litigating Atkins Claims at Trial and on Post-conviction Review.” Co-presented with Mark Olive, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 14, 2015. Monterey, CA.

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- 2015 “Advanced Issues in Neuropsychology, including Presenting Data.” Co-presented with Michael Laurence, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 14, 2015. Monterey, CA.
- 2014 “Neuropsychological Assessment.” Making the Case for Life conference. National Association of Criminal Defense Lawyers (NACDL). October 25, 2014. Charlotte, NC.
- 2014 “Intellectual Disability.” CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 15, 2014. Monterey, CA.
- 2014 “Emerging Trends in Neuropsychology.” Co-presented with Michael Laurence, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 15, 2014. Monterey, CA.
- 2013 “What is Mental Retardation/Intellectual Disability?” Co-presented with Michael Burt, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 16, 2013. Monterey, CA.

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- 2013 “Neuropsychology 201: Neuropsychological Testing.” Co-presented with Michael Laurence, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 16, 2013. Monterey, CA.
- 2013 “Neuropsychology 301: Presenting Neuropsychological Evidence.” Co-presented with Michael Laurence, Esq. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 16, 2013. Monterey, CA.
- 2012 “Psychosis Risk and Attenuated Psychosis Syndromes: Current Understanding.” Contra Costa Psychological Association. October 10, 2012 (2 CE units).
- 2011 “Atkins and Neuro-Psychological Testing.” Co-presented with Mark Olive, Esq. Capital Case Litigation Training Conference, Office of the Public Defender of the State of Delaware. October 13, 2011, Dover, Delaware.
- 2011 “The Neuropsychology of Fetal Alcohol Spectrum Disorders.” Capital Mitigation – Beyond Atkins. Center for American and International Law. July 9, 2011. Houston, TX.
- 2011 “Uncovering Evidence of Brain Damage: Phineas Gage.” Co-presented with Richard Burr, Esq. and

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Russell Stetler, National Mitigation Coordinator.
National Capital Habeas Unit (CHU) Conference.
Administrative Office of the United States Courts.
April 8, 2011. Austin, TX.

- 2011 “Testing Issues in Intellectual Disability/ Atkins Cases.” Eighth National Seminar on the Development and Integration of Mitigation Evidence: Mitigation Narratives. Habeas Assistance and Training Counsel/Administrative Offices of the United States Courts. April 2, 2011, Chicago, IL.
- 2011 “Winning *Atkins* hearings: Case Studies.” Co-presented with Michael Burt, Esq. Eighth National Seminar on the Development and Integration of Mitigation Evidence: Mitigation Narratives. Habeas Assistance and Training Counsel/Administrative Offices of the United States Courts. April 2, 2011, Chicago, IL.
- 2011 Plenary Presentation: “DSM-5 (Psychosis Risk Syndrome/Intellectual Disability).” CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 20, 2011. Monterey, CA.
- 2011 “Cross Examination of a Defense Mental Retardation/Intellectual Disability Expert.” Co-presented with Edward Souza, J.D. CACJ/CPDA Capital Case Defense Seminar. California

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Attorneys for Criminal Justice/California Public Defender Association. February 19, 2011. Monterey, CA.

- 2011 “Basic Neuropsychology (Brain Dysfunction).” CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 19, 2011. Monterey, CA.
- 2011 “Current Issues in Neuropsychology.” Fourth National Seminar on Mental Health and the Criminal Law. Habeas Assistance and Training Counsel/Administrative Office of the United States Courts. January 15, 2011. New Orleans, LA.
- 2010 “DSM-5: Proposed Changes.” Habeas Corpus Resource Center Spring Conference. Habeas Corpus Resource Center. May 17, 2010. San Francisco, CA.
- 2010 “Neuropsychology of Mental Retardation.” CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 14, 2010. Monterey, CA.
- 2010 “Model Direct of a Mental Retardation Neuropsychologist.” Co-presented with Edward Sousa, J.D. CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal

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Justice/California Public Defender Association.
February 14, 2010. Monterey, CA.

- 2009 “Presenting a Reason to Vote for Life via the Testimony of a Neuropsychologist.” 2009 Death Penalty Defense Seminar. Oregon Criminal Defense Lawyers Association (OCDLA), October 23, 2009, Bend, Oregon.
- 2009 “The Neuropsychology of Intellectual Disabilities: Current Research on Intellectual Impairment.” 14th Annual Federal Habeas Corpus Seminar. Administrative Offices of the U.S. Courts. August 22, 2009, Pittsburgh, PA.
- 2009 “The Neuropsychology of Schizophrenia.” 14th Annual Federal Habeas Corpus Seminar. Administrative Offices of the U.S. Courts. August 22, 2009, Pittsburgh, PA.
- 2009 “Testing and Other Psychological Issues.” Habeas Corpus Resource Center Spring Conference. Habeas Corpus Resource Center. June 19, 2009. San Francisco, CA.
- 2009 Plenary Presentation: “The Neuropsychology of Intellectual Disabilities: Current Research on Intellectual Impairment.” Fifth National Seminar on the Development and Integration of Mitigation Evidence. Administrative Offices of the U.S. Courts. April 18, 2009, Philadelphia, PA.

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- 2009 “Neuropsychological Assessment and Brain Impairment.” Life in the Balance 2009. The National Legal Aid & Defender Association. March 7, 2009. New Orleans, LA.
- 2009 “Mental Health/Mental Retardation Testing.” Life in the Balance 2009. The National Legal Aid & Defender Association. March 7, 2009. New Orleans, LA.
- 2009 Plenary Presentation: “The Neuropsychology of Psychiatric Disorders – Schizophrenia.” CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 15, 2009. Monterey, CA.
- 2009 “New Developments in Psychological Testing.” CACJ/CPDA Capital Case Defense Seminar. California Attorneys for Criminal Justice/California Public Defender Association. February 15, 2009. Monterey, CA.
- 2008 “Executive Functioning.” 2008 Capital Case Seminar. Los Angeles County Public Defender. October 17, 2008. Los Angeles, CA.
- 2008 “Recent Developments in the Science of Brain Damage and Observations on Interviewing Experts.” Mitigation Workshop. Virginia Capital Representation Resource Center (VCCRC). September 25, 2008. Charlottesville, VA.

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- 2008 “Intellectual Disabilities: IQ and Adaptive Functioning Evaluation.” Life in the Balance 2008: Defending Death Penalty Cases. The National Legal Aid & Defender Association. March 8, 2008. Atlanta, GA.
- 2008 “Neuropsychological Evaluation.” Life in the Balance 2008: Defending Death Penalty Cases. The National Legal Aid & Defender Association. March 8, 2008. Atlanta, GA.
- 2007 “The Roles of Psychology and Neuropsychology in Forensic Evaluations.” Second Annual Solano County Public Defender Felony Transition Seminar. Office of the Solano County Public Defender. September 28, 2007. Fairfield, CA.
- 2007 “Attacks on Neuropsychological Norms.” National Seminar on the Development and Integration of Mitigation Evidence in Capital Cases. Administrative Office of the US Courts. March 30, 2007. Washington, D.C.
- 2007 “Intelligence Testing.” National Seminar on the Development and Integration of Mitigation Evidence in Capital Cases. Administrative Office of the US Courts. March 30, 2007. Washington, D.C.
- 2007 “Neuropsychological Evaluation: The Impact of Norms.” 2007 CACJ/CPDA Capital Case Defense Seminar. February 18, 2007. Monterey, CA.

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- 2007 “Frontal and Temporal Brain Systems and Functions.” Co-presented with Karen Froming, Ph.D. 2007 CACJ/CPDA Capital Case Defense Seminar. February 18, 2007. Monterey, CA.
- 2006 “Neuropsychological Assessment.” Making the Case for Life IX: Mitigation and Jury Selection in Capital Cases. National Association of Criminal Defense Lawyers and the Southern Center for Human Rights. September 30, 2006. Las Vegas, NV.
- 2006 “Foundations of Neuropsychology.” First Annual Felony Transition College. Solano County Public Defender’s Office. June 23, 2006. Fairfield, CA.
- 2006 “Psychological and Neuropsychological Testing.” Motions, Evidence & Expert Witnesses. The Center for American and International Law. May 21, 2006. Plano, TX.
- 2006 “Brain, Behavior, and Cognition.” Co-Presented with James R. Merikangas, M.D. National Seminar on the Development and Integration of Mitigation Evidence. Administrative Offices of the U.S. Courts. April 28, 2006. Washington, DC.
- 2005 “Executive Functions.” Second National Seminar on Development and Integration of Mitigation Evidence. Administrative Office of the U.S. Courts. April 22, 2005. Salt Lake City, UT.

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- 2005 “Law and the Brain – The Neurobiology of Violence.” Washington State Appellate Courts Spring Judicial Conference. April 6, 2005. Walla Walla, WA.
- 2005 “Mental Retardation.” Texas Criminal Defense Lawyers Association. February 23 & 24, 2005. Dallas, TX.
- 2005 “Neuropsychological Evaluation.” 2005 CACJ/CPDA Capital Case Defense Seminar. February 21, 2005. Monterey, CA.
- 2005 “Mental Retardation.” CACJ/CPDA Capital Case Defense Seminar. February 21, 2005. Monterey, CA.
- 2004 “Developmental Aspects of Executive Functions.” 2004 CACJ/CPDA Capital Case Defense Seminar. February 15, 2004. Monterey, CA.
- 2004 “Advanced Determination of Competency – A Case Study (Workshop).” Co-presented with John Philipsborn and Judge Michael Ryan. 2004 CACJ/CPDA Capital Case Defense Seminar. February 15, 2004. Monterey, CA.
- 2003 “Update on IQ Testing: Neuropsychology for the 21st Century.” Paper presented with George W. Woods, M.D. at the 2003 Annual Meeting of the American Academy of Psychiatry and the Law (AAPL), October 19, 2003, San Antonio, TX.

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- 2003 “The Subtlety of IQ Testing.” 8th Annual National Federal Habeas Corpus Seminar. Administrative Office of the United States Courts and Habeas Assistance and Training Counsel. Chicago, IL.
- 2003 “Mental Retardation.” Investigating Capital Cases Seminar. Virginia Capital Representation Resource Center. Charlottesville, VA.

DISSERTATION:

“Screening for Neurotoxicity: A Comparison of the Neurobehavioral Evaluation System and the California Neuropsychological Screening Battery”

LICENSES, QUALIFICATIONS AND CERTIFICATES:

- 1990-Present State of California Licensed Psychologist (PSY11899)
- 2018-2020 Association of State and Provincial Psychology Boards Interjurisdictional Practice Certificate (IPC) (Valid in Georgia, Idaho, Kentucky, Mississippi, Ohio, and South Carolina) #4462
- 2018-2019 State of Oregon Visitor’s Permit OAR 858-010-0055
- 2018-2019 State of Texas Temporary License NTLT-18-0030
- 2017-2018 State of Oregon Limited Visitor’s Permit 348
- 2017-2018 State of Washington Temporary Permit TE600672389

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2016-2018	Association of State and Provincial Psychology Boards Interjurisdictional Practice Certificate (IPC) (Valid in Georgia, Idaho, Kentucky, Mississippi, Ohio, and South Carolina) 44462
2016-2017	State of Nevada Non-Resident Consultant Permit.
2016	State of Louisiana Temporary Registration
2016	State of Idaho Temporary License No PSYT – 202955
2016	State of Oregon Limited Visitor's Permit 309
2015-2016	State of Texas Temporary License NTLP-15-0002
2014-2016	State of Indiana Limited Scope License No. 990651 19A
2014-2015	State of Alaska Courtesy License No 33
2014-2015	State of Mississippi Temporary Practice Certificate
2012	State of Texas Temporary License TLP-13-0008
2012	State of Texas Temporary License TLP-13-0003
2012-2014	State of Indiana Limited Scope License No. 99054133A
2012-2013	State of Oregon Psychology Visitor's Permit No. 218
2012	State of Louisiana Temporary Registration
2011-2012	State of Indiana Limited Scope License No. 9904855IA

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2011	State of Texas Psychology Temporary License No. TLP-11-0023
2010	State of Louisiana Temporary Registration
2010-2011	State of Washington Psychology Temporary Permit (Credential #: TE 60072389)
2010	State of Texas Psychology Temporary License No. TLP-10-0019
2009-2010	State of Washington Psychology Permit (Credential #: TE 60072389)
2007	State of Texas Psychology Temporary License No. TLP-07-0014; TLP-07-0015
2007	State of Texas Psychology Temporary License No. TLP-07-0009; TLP-07-0012
2003-2004	State of Washington Psychology Permit (030503)
2002-2004	State of Oregon Psychology Permit (LP 077)
2001-2002	State of Washington Psychology Permit (010903)
1992-1994	Qualified Medical Examiner Psychology (State of California Industrial Medical Council # 009321)

HOSPITAL PRIVILEGES:

2000-2003	Doctors Medical Center – San Pablo Campus
1991-2003	Doctors Medical Center – Pinole Campus
1992-1997	East Bay Hospital, Richmond, CA.
1993-1995	First Hospital of Vallejo

*Appendix A***PROFESSIONAL AFFILIATIONS:**

International: Member, International Neuropsychological Society (2004-present)

Member, International Society for Intelligence Research (2011-present)

National: Member, American Psychological Association (1988-present).
Member, Division 12 (Society of Clinical Psychology), Section IX (Assessment)
Member, Division 33 (Intellectual and Developmental Disabilities)
Member, Division 40 (Clinical Neuropsychology)
Member, Division 41 (American Psychology – Law Society)
Member, National Academy of Neuropsychology (1995-present)
Associate Member (1983-1994)
Member, the Reitan Society (1998-2006)
Member, American Association on Intellectual and Developmental Disabilities (2007-present)
Member, Society for Personality Assessment (2009-present)

**APPENDIX B — AMENDED SECOND OR
SUCCESSIVE PETITION FOR WRIT OF HABEAS
CORPUS, UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION, NO EXHIBITS ATTACHED,
FILED NOVEMBER 12, 2019**

CIVIL ACTION NO. 4:19-CV-03047

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEXTER DARNELL JOHNSON,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of
Criminal Justice, Correctional Institutions Division,

Respondent.

DEATH PENALTY CASE

**AMENDED SECOND OR SUCCESSIVE PETITION
FOR WRIT OF HABEAS CORPUS**

JASON D. HAWKINS
Federal Public Defender

Jeremy Schepers (TX 24084578)
Supervisor, Capital Habeas Unit

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Jessica Graf (TX 24080615)
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**STATEMENT REGARDING FILING OF SECOND
OR SUCCESSIVE PETITION**

On August 8, 2019, Mr. Johnson sought authorization from the United States Court of Appeals for the Fifth Circuit to file a second or successive habeas petition in district court. On August 14, 2019, that authorization request was granted. *In re Johnson*, 935 F.3d 284 (5th Cir. 2019). Mr. Johnson attached a proposed petition to his filings in the Fifth Circuit and subsequently filed it in this Court on August 15, 2019. On September 13, 2019, this Court granted Mr. Johnson sixty days to amend his successive petition. Doc. 7. Mr. Johnson timely files this amended petition on November 12, 2019.

[TABLE INTENTIONALLY OMITTED]

I. Introduction.

Two recent, independently conducted expert evaluations reach the same conclusion: Dexter Johnson is

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intellectually disabled, placing him in a class of individuals categorically excluded from the death penalty. *See Atkins v. Virginia*, 536 U.S. 304 (2002); Ex. 1; Ex. 2.¹ This claim comes to this Court through a successive petition because Mr. Johnson's *Atkins* claim was previously unavailable. At the time of his 2007 trial and the filing of his initial federal habeas petition in 2011, the DSM-IV-TR was the most recent edition of the manual published by the American Psychiatric Association for the diagnosis of the disorder. That version of the manual relied heavily on IQ test scores as the barometer for whether an individual was intellectually disabled. The newer version of the manual, the DSM-5, significantly alters the diagnostic criteria for intellectual disability and makes an *Atkins* claim available to Mr. Johnson.

Dr. Dale Watson testified at Mr. Johnson's 2007 trial that it was unnecessary to inquire into Mr. Johnson's adaptive functioning because of his borderline IQ scores. Ex. 3 at ¶5. However, the publication of the DSM-5 in 2013—two years after Mr. Johnson's initial federal petition was filed—brought about significant changes in the diagnosis of intellectual disability. Based on these changes, Dr. Watson now recognizes that Mr. Johnson's IQ scores do not preclude a diagnosis of intellectual disability, and he no longer stands by his prior testimony that an inquiry into Mr. Johnson's adaptive functioning is unnecessary. Ex. 3 at ¶8.

1. The exhibit citations reference those filed with the successive petition.

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Under the current medical diagnostic framework as described in the DSM-5, Mr. Johnson is intellectually disabled. *See* Ex. 1; Ex. 2. He has deficits in intellectual functioning as confirmed by a valid full-scale IQ score of 70 and other neuropsychological testing—including Dr. Watson’s prior testing. Mr. Johnson is at or below the bottom 2-percent of the population regarding verbal learning and memory and is “well below the lowest one-percentile” of the population in language functioning. Ex. 1 at 11–14. Mr. Johnson presents considerable evidence of adaptive deficits throughout his life, including that he failed the second and ninth grades, was in special education classes, could not effectively socialize or communicate with his peers about simple concepts, and lacked the capacity to grasp practical skills, such as navigating a bus route, basic personal hygiene, or counting change. *See* Ex. 1. Significant evidence exists that these deficits manifested before he turned 18, which is unsurprising given that fact that he was barely 18 at the time of the offense. *Id.*

Mr. Johnson requests that this Court find that he is intellectually disabled and exempt from execution under *Atkins* and the Eighth and Fourteenth Amendments to the Constitution.

II. Procedural history.

Mr. Johnson was convicted and sentenced to death in the 208th District Court of Harris County on June 27, 2007, Judge Denise Collins presiding. On July 23, 2009, Mr. Johnson filed an Initial Application for Writ of Habeas Corpus pursuant to Texas Code of Criminal

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Procedure, Article 11.071, presenting eleven claims for relief. The Initial Application did not include a claim that Mr. Johnson was ineligible for the death penalty under *Atkins v. Virginia*. Without holding a hearing, the convicting court made findings of fact and conclusions of law recommending that relief be denied. The Texas Court of Criminal Appeals (“CCA”) denied habeas relief on June 30, 2010. *Ex parte Johnson*, No. WR-73, 600–01, 2010 WL 2617804 (Tex. Crim. App. June 30, 2010) (per curiam). Mr. Johnson’s federal petition for a writ of habeas corpus—which also did not contain an *Atkins* claim—was denied on August 19, 2013. *Johnson v. Stephens*, No. 4:11-CV-02466, 2013 WL 4482865 (S.D. Tex. 2013) (Doc. 19).² The Fifth Circuit affirmed on July 2, 2015. *Johnson v. Stephens*, 617 F. App’x 293 (5th Cir. 2015). Mr. Johnson’s petition for a writ of certiorari was denied on January 25, 2016. *Johnson v. Stephens*, 136 S. Ct. 980 (2016).

The trial court scheduled Mr. Johnson’s execution for May 2, 2019. Thereafter, on January 15, 2019, Mr. Johnson wrote a letter to this Court in which he explained that he was told by other prisoners that his federal court-appointed attorney, Patrick McCann, had a conflict of interest because he had also represented him in state habeas. Doc. 65. On January 29, 2018, Mr. Johnson filed a *pro se* motion to appoint counsel, Doc. 68, and on February 5, 2019, the Court appointed the Federal Public Defender for the Northern District of Texas (“FPD”) as co-counsel, Doc. 70.

2. The docket entries referenced in this petition refer to entries in Mr. Johnson’s prior federal habeas case, No. 4:11-CV-02466.

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Based on its review of the case documents and initial investigations, the FPD discovered sufficient evidence to support a motion for Mr. McCann's removal as Mr. Johnson's counsel. Doc. 76. The Director opposed the motion, Doc. 81, and Mr. McCann filed his own motion under seal. While that motion was pending, Mr. McCann filed a subsequent application for writ of habeas corpus in state court—without Mr. Johnson's consent—raising an *Atkins* claim. The CCA dismissed that application as an abuse of the writ. *Ex parte Johnson*, 2019 WL 1915204 (Tex. Crim. App. Apr. 29, 2019) On April 30, 2019, this Court issued an order staying Mr. Johnson's execution, noting that "[t]he recent pleadings [] reveal troubling concerns about Johnson's current appointed legal representation which need resolution to preserve his rights before execution." Doc. 84 at 8. The Court stated it would schedule a hearing by separate order "to address the concerns raised in the motion to terminate Mr. McCann's appointed legal representation[.]" *Id.* at 9. Two days later, Mr. McCann moved to withdraw as Mr. Johnson's appointed counsel. Doc. 89. Shortly thereafter, the trial court reset Mr. Johnson's execution for August 15, 2019.

On June 24, 2019, Mr. Johnson filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) in this Court, Doc. 95 (attached at Exhibit 6), which was denied on August 12, 2019, Doc. 100. Additionally, on August 6, 2019, he filed a subsequent application for writ of habeas corpus in state court raising an *Atkins* claim, among other issues. The CCA dismissed his application on August 13, 2019 as an abuse of the writ,

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“without reviewing the merits of the claims raised.” *Ex parte Johnson*, 2019 WL 3812803 (Tex. Crim. App. Aug. 13, 2019).

On August 8, 2019, Mr. Johnson filed a motion in the Fifth Circuit requesting authorization to file a second or successive habeas petition. Among other things, Mr. Johnson argued that his *Atkins* claim was previously unavailable because he did not qualify as intellectually disabled under the medical standards in place at the time he filed his initial federal petition, but that he does qualify under the standards in place today. On August 15, 2019, the Fifth Circuit stayed Mr. Johnson’s execution and granted his motion to file a successive petition. *In re Johnson*, 935 F.3d 284, 287 (5th Cir. 2019).

In its order authorizing the filing of this petition, the Fifth Circuit held that Mr. Johnson made a *prima facie* case that his *Atkins* claim was previously unavailable to him. *Id.* at 293. The Court relied on its holding in *In re Cathey*, 857 F.3d 221, 237–38 (5th Cir. 2017), that a claim is “previously unavailable” for 28 U.S.C. § 2244(b)(2)(A) purposes if it had no possibility of merit at the time of the initial petition. *Id.* at 292. “The significant change” in the law, according to the Court, “was in the medical methodology for evaluating the relevant disabilities and in courts’ recognition of those changes.” *Id.* at 293; *See also id.* at 294 (“What opens the door for Johnson is the *Cathey* decision, which has precedentially determined that it is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*.”). Moreover, the

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Court concluded that it is enough under § 2244(b)(2)(A) that *Atkins* “in a generic sense was a rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court[.]” *Id.* at 293.

The Court proceeded to find that Mr. Johnson made a *prima facie* showing of intellectual disability based on his IQ scores, neuropsychological testing, and pre-18 adaptive deficits. *Id.* at 294.

The Fifth Circuit left it for this Court to decide whether any deference is owed to the CCA’s dismissals of Mr. Johnson’s two subsequent state habeas applications and further noted that the relitigation bar of § 2254(d) is irrelevant to its analysis as required by § 2244(b)(3)(C). *Id.* at 294–95. Finally, the Court concluded that this Court is “better positioned than are we to gauge the timeliness of the motion for a successive application.” *Id.* at 296.

III. Mr. Johnson meets the requirements of 28 U.S.C. § 2244.

When a petitioner seeks authorization to proceed on a second or successive habeas application, the circuit court performs an initial gatekeeping function. Under 28 U.S.C. § 2244(b)(3)(C), the circuit court “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.” At the gatekeeping stage, the petitioner must establish “simply a sufficient showing of possible merit to warrant a fuller exploration by the district court” and that “in

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light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirement for the filing of a second or successive petition[.]” *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (quoting *Bennett v. United States*, 119 F.3d 468, 469–70 (7th Cir. 1997)).

Once the circuit court authorizes a successive application, the district court “is the second ‘gate’ through which the petitioner must pass” before the merits of the claim are heard. *See In re Morris*, 328 F.3d at 741; *In re Cathey*, 857 F.3d 221, 226 (5th Cir. 2017). At this stage, the petition should be dismissed only if it “*conclusively* demonstrates that it does not meet AEDPA’s second or successive motion requirements.” *See Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (citation and internal quotation marks omitted) (emphasis added).

Those requirements are twofold. First, the petitioner must show that the claim presented in the successive application was not presented in a prior federal application. 28 U.S.C. § 2244(b)(1); *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014). Second, for a claim not presented in a prior application to be authorized, the petitioner must establish that:

(A) . . . 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

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(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.

28 U.S.C. 2244(b)(2). If those are met, the district court can proceed to the merits of the claim. The Court’s gatekeeping analysis precedes consideration of the merits or potential procedural hurdles, including § 2254(d). *See* Section III(E), *infra*.

A. Mr. Johnson has not previously presented an *Atkins* claim in federal court.

The initial question for this Court is whether Mr. Johnson presented an *Atkins* claim in his prior federal application. 28 U.S.C. § 2244(b)(1); *In re Campbell*, 750 F.3d at 530. Mr. Johnson’s initial federal habeas petition did not contain an *Atkins* claim. While Mr. Johnson argued that he suffered from a mental illness “similar” to intellectual disability, he did not assert that he was intellectually disabled.³ Rather, the initial petition requested an

3. The initial federal petition did refer to Mr. Johnson as “mentally challenged” and “handicapped” in the context of a competency argument. Doc. 1 at 18.

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extension of *Atkins* to cover persons suffering from severe mental illness. *Johnson v. Stephens*, 617 F. App'x 293, 303–04 (5th Cir. 2015). The claim suggested that Mr. Johnson's death sentence be overturned under the logic of *Atkins* and *Roper v. Simmons*, 543 U.S. 551 (2005), because he “is a brain-damaged schizophrenic.” Doc. 1. Moreover, the Director has already conceded that Mr. Johnson did not raise a claim that he was intellectually disabled, and thus exempt from execution, in his prior federal application. *In re Johnson*, 935 F.3d at 292. Therefore, Mr. Johnson has met his burden.

B. Mr. Johnson's *Atkins* claim was previously unavailable under 28 U.S.C. § 2244(b)(2)(A).

Next, to receive authorization to proceed under 28 U.S.C. 2244(b)(2)(A), Mr. Johnson must also establish that his *Atkins* claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” The Fifth Circuit has repeatedly held that an *Atkins* claim meets this requirement. *See, e.g., In re Johnson*, 935 F.3d at 293; *In re Campbell*, 750 F.3d at 530; *Mathis v. Thaler*, 616 F.3d 461, 467 (5th Cir. 2010); *Morris v. Dretke*, 413 F.3d 484, 486–87 (5th Cir. 2005). Thus, the question becomes whether Mr. Johnson's *Atkins* claim was previously unavailable.

The fact that *Atkins* was issued before Mr. Johnson filed his initial federal habeas petition is not dispositive of the question. *See In re Johnson*, 935 F.3d at 292–93; *In re Cathey*, 857 F.3d at 229–34. This is because the

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Fifth Circuit has squarely held that “a claim must have some possibility of merit to be considered available.” *In re Cathey*, 857 F.3d at 232; *see also In re Johnson*, 935 F.3d at 292–93. In the context of an *Atkins* claim, the Fifth Circuit has “precedentially determined that it is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*.” *Id.* at 294. Because Mr. Johnson’s *Atkins* claim first became available to him while his initial federal was petition was pending, this Court must assess whether it was “feasible to amend [the] petition to include the new claim.” *Id.* at 229 (quoting *In re Wood*, 648 F. App’x 388, 391 (5th Cir. 2016)). It is not feasible to amend when, *inter alia*, the claim remains “functionally unavailable” based on deficient representation in the initial federal habeas proceeding. *Id.*

1. Mr. Johnson’s *Atkins* claim was not viable until the publication of the DSM-5.

The Fifth Circuit’s opinion in *In re Cathey* is directly relevant to this case and clearly establishes the previous unavailability of Mr. Johnson’s *Atkins* claim. *In re Johnson*, 935 F.3d at 292–93. In *Cathey*, the initial federal petition was filed nearly two years after *Atkins* and did not include an *Atkins* claim. 857 F.3d at 227. When the petitioner later sought authorization to file a successor petition presenting an *Atkins* claim, two arguments were proffered to establish the claim’s previous unavailability. The first argument was that courts did not recognize the validity of the Flynn Effect—which suggests that IQ scores should be reduced by .3 points per year from the

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date the test was normed—until “at least 2005,” the year after Mr. Cathey filed his initial petition. *Id.* Mr. Cathey had a 77 IQ score, and could not pursue a viable *Atkins* claim until courts began treating the Flynn Effect as factually relevant. *Id.* Second, evidence came to light in 2010 that Mr. Cathey had previously received an IQ score of “below 73” from the TDCJ. *Id.* at 232.

Under *Cathey*, which is a published Fifth Circuit opinion, and as reaffirmed by the Fifth Circuit in its published opinion in this case, Mr. Johnson’s *Atkins* claim was unavailable at the time he filed his initial petition. *See Johnson*, 935 F.3d at 294 (“What opens the door for Johnson is the *Cathey* decision. . . .”). Mr. Cathey’s claim depended, in part, on the acceptance of the Flynn Effect; Mr. Johnson’s claim hinges on the publication of the DSM-5, which updated the standards for diagnosing intellectual disability based on the most recent and accurate scientific data.⁴ As the Supreme Court has repeatedly made clear, reviewing courts must consider the *current* medical framework when determining whether an individual is intellectually disabled. *See Moore v. Texas*, 137 S. Ct. 1039 (2017) (requiring courts to consider current medical standards when determining whether an individual is intellectually disabled); *Hall v. Florida*, 572 U.S. 701 (2014) (same). In light of what the American Psychiatric

4. Mr. Johnson is not arguing that he was not intellectually disabled at the time of the offense in question. Instead, his argument is that current prevailing professional norms establish that he was intellectually disabled at the time of the offense, although they may not have prior to the publication of the DSM-5.

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Association (“APA”) labels “significant changes”⁵ to the diagnostic criteria as reflected in the DSM-5, Mr. Johnson is intellectually disabled, whereas under the prior version of the manual—which reflect outdated diagnostic criteria—he is not. As the Fifth Circuit explained:

The new diagnostic guidelines included significant changes in the diagnosis of intellectual disability, which changed the focus from specific IQ scores to clinical judgment. The DSM-5 recognizes that an individual with an IQ score over 70 may still qualify as intellectually disabled. The previous diagnostic manual, in effect when Johnson filed his initial federal habeas petition, did not classify Johnson as intellectually disabled because of his IQ.

See In re Johnson, 935 F.3d at 293.

At the time of Mr. Johnson’s trial and for years following the filing of his federal habeas petition, the DSM-IV-TR outlined the standard for diagnosing intellectual disability, which was then known as mental retardation. The DSM-IV-TR criteria required: (1) significantly sub average general intellectual functioning, an IQ of about 70 or below on an individually administered IQ test; (2) accompanied by significant limitations in adaptive functioning in at least two skill areas; and (3) onset before age 18. Ex. 3 at ¶5. Mr. Johnson was administered two IQ tests at the time of his trial, but he did not meet the

5. Ex. 4.

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then-prevailing first prong of an ID diagnosis, and thus a comprehensive intellectual disability evaluation was not undertaken. 31 RR 263.

The DSM-5, published on May 18, 2013, made “significant changes” to the diagnostic criteria for intellectual disability. Ex. 4; *see also In re Johnson*, 935 F.3d at 293. The APA now places heightened focus on adaptive functioning deficits and lesser emphasis on IQ scores. *Id.* (noting that “the severity of impairment [is] based on adaptive functioning rather than IQ test scores alone.”). In fact, the DSM-5 went so far as to remove IQ scores from the diagnostic criteria, while noting that IQ testing should remain part of the overall assessment. *Id.*; *see also Hernandez v. Stephens*, 537 F. App’x 531, 533 n.1 (5th Cir. 2013) (“The American Psychiatric Association’s fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), uses the term ‘intellectual disability (intellectual developmental disorder)’ in place of the term ‘mental retardation’ and de-emphasizes IQ scores as determinants of this condition.”). The “DSM-5 ensures that [IQ scores] are not overemphasized as the defining factor of a person’s overall ability, without adequately considering functioning levels.” Ex. 4 at 1–2. The new diagnostic criteria account for the fact that “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 lower IQ scores.” Ex. 3 at ¶7 (quoting DSM-5 at 33).

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Dr. Martell explains that the DSM-5 “encourages a more comprehensive view of the individual” as compared to the prior version of the manual. Ex. 1 at 16. In the newer manual, “[m]ore importance is placed on clinical judgment with regard to the presence of adaptive deficits, and less emphasis is placed on bright-line IQ cutoff scores.” *Id.*; *see also id.* (The DSM-5 places “significantly more emphasis on adaptive functioning” as the “hallmark indicia of intellectual disability.”). These changes reflect the medical community’s evolving understanding that individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than IQ test scores. *Id.* (quoting DSM-5 at 37).⁶

In light of these changes to the diagnostic criteria for intellectual disability, Dr. Watson no longer stands by his trial testimony that an assessment of Mr. Johnson’s adaptive functioning deficits is unnecessary in light of his IQ scores. Ex. 3 at ¶19. And both of the experts who have evaluated Mr. Johnson under the currently-prevailing norms for diagnosing intellectual disability have concluded that he is intellectually disabled. Ex. 1; Ex. 2. Thus, the

6. While the DSM-5 modified the criteria for the diagnosis, this does not mean that more individuals now qualify for the disorder than did under the DSM-IV-TR. In fact, one study found a 9% reduction in its sample size for those that qualified for the disorder under the DSM-5 as opposed to the DSM-IV-TR. *See* Aimilia Papazoglou et al., *To ID or Not to ID? Changes in Classification Rates of Intellectual Disability Using DSM-5*, 52 *Intellectual and Developmental Disabilities* 165 (June 2014). This indicates that, rather than relaxing the diagnostic criteria, the DSM-5 has simply made the diagnostic criteria more accurate.

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changes to the diagnostic criteria for intellectual disability reflected in the DSM-5 have a clear and direct impact on the availability of Mr. Johnson's *Atkins* claim.

Moreover, Mr. Johnson's recent full-scale IQ score of 70 provides additional support for a finding that the *Atkins* claim was previously unavailable. *Johnson*, 935 F.3d at 293 ("Further bolstering that his claim was unavailable until now, Johnson under a current full-scale IQ testing scored 70, within the *Atkins* range."). In *Cathey*, the court held that vague notations on two TDCJ documents listing the petitioner's IQ score as "below 73," without an explanation for the basis of those notations, supported a *prima facie* finding that the petitioner's *Atkins* claim was previously unavailable. 857 F.3d at 232–33. If a TDCJ notation of an IQ score below 73 supported such a finding, then Mr. Johnson's report of a full-scale score of 70 on a recent administration of the WAIS-IV also supports such a finding.⁷

2. It was not feasible for Mr. Johnson to amend his *Atkins* claim into the initial federal petition.

It was not feasible for Mr. Johnson to amend his initial federal petition to include the *Atkins* claim at the time of the DSM-5's publication. *See In re Cathey*, 857 F.3d at 229 (explaining that if a rule becomes available during the

7. To be clear, Mr. Johnson is not suggesting that IQ testing conducted after the disposition of the initial federal habeas petition, standing alone, is enough to clear the "previously unavailable" hurdle of the statute. However, just as in *Cathey*, this testing supports the argument of previous unavailability. 857 F.3d at 233.

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pendency of the initial petition in district court, a court looks to whether it would have been “feasible to amend his or her pending petition to include the new claim.”) (citations omitted). The DSM-5 was published on May 18, 2013, fifteen months after the State filed its answer, ten months after Mr. Johnson replied, and only three months before the denial of Mr. Johnson’s federal habeas petition on August 19, 2013. Doc. 19.⁸ On August 2, 2013, the Fifth Circuit issued its opinion in *Hernandez v. Stephens*, 537 F. App’x 531, which was—to the best of Mr. Johnson’s knowledge—the first time a Texas court mentioned the DSM-5. *Id.* at 533, n. 1. Even assuming, *arguendo*, that a footnote in an unpublished opinion should have placed Mr. Johnson on notice of the new availability of an *Atkins* claim, it was not feasible to secure investigative funding and leave to amend the petition at that time.⁹

Furthermore, Mr. Johnson can show that “his representation in the initial federal habeas proceedings was so deficient as to render the *Atkins* claim functionally unavailable[.]” See *In re Cathey*, 857 F.3d at 229. Mr. Johnson’s former court-appointed attorney, Patrick McCann, operated under a significant conflict of interest

8. The district court denied the petition at this point with the exception of one claim that it instructed the parties to brief further.

9. Evaluating an individual for intellectual disability is a time-consuming process. It requires a qualified professional to review voluminous documents, meet with the individual in person, and often conduct other interviews of those that know the individual to gain historical insight into their functioning. It is not reasonable to expect this, along with the preparation of court pleadings, to occur in seventeen days.

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that arose no later than May 28, 2013, when the Supreme Court issued its opinion in *Trevino v. Thaler*, 569 U.S. 413 (2013), as he served as both state and federal habeas counsel. Because *Martinez* and *Trevino* made state habeas counsel's ineffectiveness a new ground for establishing cause to overcome procedural default, federal habeas attorneys that had also represented their clients in state habeas proceedings developed conflicts with their clients in relation to the investigation and litigation of defaulted trial counsel ineffectiveness claims. *See, e.g., Mendoza v. Stephens*, 783 F.3d 203, 203 (5th Cir. 2015); *Speer v. Stephens*, 781 F.3d 784, 784 (5th Cir. 2015); *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2014); *Rhines v. Young*, 2015 WL 4651090 (D.S.D. 2015). Mr. McCann was aware of the conflict that had developed between himself and Mr. Johnson, but took no steps to inform Mr. Johnson of his rights or remedy the situation. Indeed, he affirmatively acted against Mr. Johnson's interests in order to further his own.¹⁰

Robert P. Schuwerk, a leader in the field of attorney ethics, reviewed Mr. McCann's actions and found that "conflicts did arise, that they were clear and serious, that Mr. McCann did not address them in a professionally appropriate manner and that, unless remedied by this Court, those missteps by Mr. McCann will cause irreparable injury to Mr. Johnson." Doc. 95 at 9. The conflicted and otherwise inadequate representation that Mr. Johnson received during his initial federal habeas

10. In support of this argument, Mr. Johnson incorporates, by express reference, Docs 76, 77, 80, 82, 95 & 96.

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proceeding rendered his *Atkins* claim functionally unavailable.

IV. Mr. Johnson is entitled to relief.

Mr. Johnson is intellectually disabled and exempt from the death penalty. Dr. Daniel Martell undertook an extensive evaluation of Mr. Johnson, including reviewing multiple IQ scores, conducting neuropsychological testing, and conducting multiple clinical interviews with witnesses and Mr. Johnson. Based on his analysis and clinical judgment, Dr. Martell concluded that Mr. Johnson has deficits in intellectual and adaptive functioning, all which manifested before he reached adulthood.

Moreover, Mr. Johnson's petition is timely. Because the publication of the DSM-5 was critical to the viability of Mr. Johnson's claim, his statute of limitations began to run on the date he should have known of the salient changes contained in that manual, thus making the claim available. Mr. Johnson will also establish equitable tolling if that claim falls outside the limitations period. His deficits, combined with his prior attorney's ineffectiveness and misconduct, warrant equitable tolling.

A. Mr. Johnson is intellectually disabled.

To be intellectually disabled, an individual must establish (1) deficits in intellectual functioning, (2) deficits in adaptive functioning, and (3) the onset of deficits during the developmental period. DSM-5 at 33. Mr. Johnson meets all three criteria.

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Under the current medical diagnostic framework as described in the DSM-5, Mr. Johnson is intellectually disabled. Dr. Daniel Martell undertook an extensive evaluation of Mr. Johnson, including reviewing multiple IQ scores, conducting neuropsychological testing, and conducting multiple clinical interviews with witnesses and Mr. Johnson. Ex. 1. Based on his analysis and clinical judgment, Dr. Martell concluded that Mr. Johnson has deficits in intellectual functioning as confirmed by his IQ score of 70 on the WAIS-IV, IQ scores from tests administered pretrial, and the clear cognitive deficits displayed on multiple neuropsychological tests. *Id.* at 23. While Mr. Johnson must establish deficits in only one domain, Dr. Martell found deficits in adaptive functioning in all three domains—social, conceptual, and practical—identified in the DSM-5. *Id.* at 45. Mr. Johnson has severe language deficits, including a pronounced stutter and use of nonsense words. *Id.* at 24–27. He has struggled socially throughout his life as he was noticeably immature for his age, unable to make friends, and incapable of reading social cues. *Id.* at 28–32. And Mr. Johnson struggled with practical daily tasks. *Id.* at 33–44. His family had to remind him to wash with soap daily. *Id.* at 39. He could not handle basic money management and was taken advantage of because of his inability to count change. *Id.* at 35. Finally, Mr. Johnson’s deficits manifested in the developmental period, confirmed by numerous witnesses and school records. *Id.* at 45.

*Appendix B***1. Mr. Johnson has limitations in intellectual functioning.**

The first prong of an intellectual disability diagnosis is deficits in intellectual functioning. This includes deficits in reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. DSM-5 at 33. Compared to its predecessor, the DSM-5 focuses less on specific IQ scores and more on clinical judgment. DSM-5 at 33–37; *see also Hernandez v. Stephens*, 537 F. App’x 531, 533 n. 1 (5th Cir. 2013) (“The American Psychiatric Association’s fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), uses the term ‘intellectual disability (intellectual developmental disorder)’ in place of the term ‘mental retardation’ and de-emphasizes IQ scores as determinants of this condition.”). The DSM-5 does so because IQ scores are “an approximation of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.” DSM-5 at 37. Thus, an individual with an IQ score above 70 may still qualify as intellectually disabled due to deficits in adaptive functioning. *Id.* The DSM-5’s emphasis on clinical judgment is a departure from previous medical diagnostic norms, which defined deficits in intellectual functioning only in relation to IQ score. DSM-5 at 37; *see also* Ex. 1 at 16 (“The DSM-5 definition of ID encourages a more comprehensive view of the individual than was true under the fourth edition, DSM-IV.”).

Because there is statistical error and uncertainty in any assessment of human behavior, intellectual

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functioning is best represented by a score range, rather than a single number. DSM-5 at 37. Besides the IQ score itself, a clinician should consider factors that affect the score, including the practice effect and Flynn effect. *Id.* The DSM-5 also advises that cognitive profiles based on neuropsychological tests are “more useful for understanding intellectual abilities than a single IQ score.” *See* DSM-5 at 37.

Mr. Johnson achieved a full-scale IQ of 70 on the WAIS-IV and demonstrates neuropsychological impairments in speech and language, executive functioning, and memory. Ex. 1 at 18. This IQ score, combined with his poor performance on neuropsychological testing and poor record of academic achievement, establish that Mr. Johnson meets prong one of an ID diagnosis. *Id.* at 23.

In 2019, Mr. Johnson was administered the WAIS-IV intelligence test—a standardized measure. Ex. 1 at 18. It was individually administered by Dr. Greg Hupp and later reviewed by Dr. Martell. *Id.* at 2, 18. Mr. Johnson scored well on the effort scales, indicating that he was not malingering. Ex. 2 at 2, 5–6. The test score meets the requirements for a valid and reliable IQ score under the current medical standards. Ex. 1 at 19. Mr. Johnson’s IQ score was a 70, squarely in the range of intellectual disability.

Supporting this IQ score are the numerous intellectual functioning impairments identified by neuropsychological testing. Dr. Martell conducted a battery of neuropsychological measures and, after

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concluding that they validly indicated Mr. Johnson's cognitive functioning, determined that Mr. Johnson has multiple intellectual deficits beyond just the IQ score. Ex. 1 at 11. First, Mr. Johnson is at or below the bottom 2-percent of the population regarding verbal learning and memory. *Id.* Second, the testing revealed that Mr. Johnson very likely has frontal lobe impairment and struggles with executive functioning. *Id.* at 13.¹¹ Dr. Martell also observed significant impairments in Mr. Johnson's language functioning, including a pronounced stutter, mispronounced or nonsense words, and "severe impairment in his ability to name common objects[.]" *Id.* at 14. Mr. Johnson's score in language functioning placed him "well below the lowest one-percentile" of the population. *Id.* Finally, Mr. Johnson's motor-deficit testing demonstrated that his left-hand performance was significantly impaired, indicating right hemisphere brain dysfunction, and he exhibited mild to moderate impairments in his ability to correctly perceive the affect (or emotional expression) of others. *Id.* at 15.

Based on his clinical judgment, Dr. Martell concluded that Mr. Johnson's IQ scores, in conjunction with the numerous impairments documented through neuropsychological testing, demonstrate that Mr. Johnson has deficits in intellectual functioning sufficient to meet prong one of the intellectual disability diagnosis. *Id.* at 23.

Mr. Johnson scored outside of the typical ID range

11. Dr. Ruben Gur and Dr. Richard Dudley likewise found frontal lobe damage at the time of Mr. Johnson's trial. *See* 31 RR 240; 32 RR 186.

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on two tests administered by Dr. Dale Watson in 2007. Dr. Watson's testing showed an IQ of 78 on the Stanford-Binet-5 and an 88 on the WAIS-III, administered shortly after the Stanford-Binet. Ex. 3 at ¶14. Dr. Watson believed there was no need to proceed to evaluating Mr. Johnson's adaptive functioning because the DSM-IV strictly defined deficits in intellectual functioning as a full-scale IQ of 75 or below. *Id.* However, Dr. Watson would no longer testify that Mr. Johnson is not intellectually disabled based on those scores. *Id.* The current medical diagnostic framework established in the DSM-5 specifically requires clinicians to exercise clinical judgment in making an ID diagnosis because an IQ score "may be insufficient" to assess a person's actual functioning. DSM-5 at 37. Thus, as Dr. Watson now recognizes, the current medical standard dictates clinical judgment, real-world behaviors, and neuropsychological testing over strict IQ cutoffs. Ex. 3 at 2; DSM-5 at 37.

Dr. Martell reviewed Dr. Watson's 2007 testing and found that Mr. Johnson's score of 78 on the Stanford-Binet 5 does "place Mr. Johnson in the clinical range for a diagnosis of Intellectual Disability under the DSM-5 criteria, particularly in light of his adaptive deficits[.]" Ex. 1 at 17. Dr. Martell also reviewed Mr. Johnson's score of 88 on the WAIS-III and determined that the difference in the two 2007 scores can be explained by the different structure in the two intelligence tests. *Id.* at 18. In fact, 25% of individuals will receive an IQ score over 10 points higher when taking another test. *Id.*

Mr. Johnson's significantly sub-average IQ score, combined with the extensive deficits he exhibits in his

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neuropsychological testing, leads Dr. Martell to conclude that Mr. Johnson suffers deficits in intellectual functioning under the definition articulated in the DSM-5. Ex. 1 at 23. And because Mr. Johnson has a qualifying IQ score, evaluating his adaptive functioning is mandatory. *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017) (citing *Hall v. Florida*, 572 U.S. 701, 723 (2014)).

2. Mr. Johnson has deficits in adaptive functioning.

The second prong that an individual must meet for an intellectual disability diagnosis is deficits in adaptive functioning, which is a measure of how well the individual meets community standards of personal independence and social responsibility when compared to other people of similar age and sociocultural background. DSM-5 at 33. Under the current standards delineated in the DSM-5, deficits in adaptive functioning are given more weight than IQ score in determining whether an individual is intellectually disabled. *Id.* at 37.

Adaptive functioning is measured over three domains: conceptual, social, and practical. The conceptual (or 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 of

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behavior, and school and work task organization, among others. *Id.* Deficits or significant limitations in only one of the three adaptive functioning domains—conceptual, social, and practical—are needed to confirm a diagnosis of ID. *Id.* at 38.

Dr. Martell evaluated Mr. Johnson and concluded that Mr. Johnson exhibited significant deficits in all three domains of adaptive functioning, as defined by the DSM-5. Ex. 1 at 45. In reaching his conclusion, Dr. Martell interviewed witnesses and reviewed declarations from Mr. Johnson’s family, former coworkers, and a teacher; the trial testimony from the punishment phase; and numerous educational and medical records. *Id.* at 2–3.

a. Conceptual domain.

The conceptual domain includes skills like reading, writing, and arithmetic, and abstract thinking, such as planning and memorization. DSM-5 at 37. Dr. Martell found both empirical and anecdotal evidence that Mr. Johnson has significant deficits in functional academic skills, language skills, and concept formation and self-direction. Ex. 1 at 23–24.

Mr. Johnson repeated the second grade and his teacher during the second year, Annie L. Batiste, observed that Mr. Johnson struggled with reading comprehension and problem solving. *Id.* at 24.¹² Even though Mr. Johnson

12. Supporting lay witness statements are attached as Exhibit 5.

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was older than the other children in the class, he “had a hard time completing what he needed to do in class” and was in speech classes for his articulatory problems. *Id.* At times he could not get words out or would use the wrong word. *Id.* Ms. Batiste’s observations of Mr. Johnson are corroborated by his school records, which show he was in special education from elementary school continuing into high school. *Id.*

In high school, and during his second attempt at the ninth grade, Mr. Johnson still functioned at a sixth-grade level and was in special education in all subjects even though he should have been in the eleventh grade. *Id.* at 25. His high school record noted his need for support in multiple adaptive functioning areas including home and family living, career skills development, independent living, self-help activities, transportation training, money management, social skills, and driver’s license training. *Id.*

Through his interview with Mr. Johnson’s sister, Travalia, Dr. Martell learned that the word confusion he had observed in his neuropsychological testing had begun during Mr. Johnson’s childhood. Mr. Johnson’s family noticed that Mr. Johnson needed them to repeat things several times before he would understand. *Id.* at 25–26. He also had a stutter and mispronounced words, such as calling a “spoon” a “boon.” *Id.* at 26. The family sometimes teased Mr. Johnson for being “slow” and found he “could barely read[.]” *Id.* at 27. Dr. Martell also recognized that Mr. Johnson had deficits in “receptive language skill,” meaning he could not understand what others told him.

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Mr. Johnson admitted that he did not like school because other children called him “dumb” and he could not keep up, which was “fusteratin” to him. *Id.* at 27. Mr. Johnson’s younger sister frequently did his homework for him because he could not complete even special education assignments. *Id.* at 25. His teachers sometimes called Mr. Johnson’s older sister out of class to help him because Mr. Johnson would become emotional when he could not handle the assignments. *Id.* at 26.

Dr. Martell concluded that the struggles revealed by Mr. Johnson’s academic records, and confirmed by the neuropsychological testing, and the description of Mr. Johnson’s inability to read or communicate from multiple witnesses, demonstrate deficits in the conceptual domain as defined by the DSM-5. *Id.* at 28.

b. Social domain.

The social domain involves communication skills, friendship abilities, and social judgment. DSM-5 at 37. Individuals with deficits in this domain tend to be more immature than others of the same age, struggle regulating emotion, and may be naïve and easily taken advantage of. *Id.* at 34–36. Throughout his life, Mr. Johnson has struggled to make friends, was noticeably immature when compared to peers, and was easily taken advantage of.

Multiple witnesses reported that Mr. Johnson struggled socially. As a child, Mr. Johnson was bullied by other kids for being slow. Ex. 1 at 28. Despite the

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bullying, Mr. Johnson would tell his sister, Sheree, that he had made friends. *Id.* If another kid told him they were friends “he would automatically believe it[,] although in reality he barely knew the person.” *Id.* In interviews with Dr. Martell, Mr. Johnson’s mother and younger sister, Marquette, noted that Mr. Johnson did not understand jokes because “[h]e took it literal.” *Id.* at 28. Even when someone broke the joke down and explained it, he did not understand. *Id.* at 29.

Mr. Johnson could not maintain a conversation, preferring to just agree, wanting the other person to do most of the talking. *Id.* He cannot maintain eye contact. *Id.* When Mr. Johnson worked at Jack-in-the-Box as a teen, his social ineptitude meant that he could not handle communicating with customers. *Id.* at 30.

Growing up, Mr. Johnson was socially immature. He did not have friends and preferred to watch cartoons. *Id.* at 29. He mostly stayed home because he was “awkward in social situations.” *Id.* His social deficits often meant that Mr. Johnson was victimized by bullies. Other kids “just beat on him” and he even injured himself running from them. *Id.* at 30. His teacher remembered that he was never “part of the group” with other kids and was abused by them because he “was gullible.” *Id.* at 30–31. Other kids would tell Mr. Johnson to get out of his seat when the teacher left the room and then tattletale when she came back. *Id.* at 31; *see also* DSM-5 at 38 (“Gullibility is often a feature, involving naiveté in social situations and a tendency for being led by others . . . [which] may result in exploitation by others[.]”). His teacher also saw that

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Mr. Johnson struggled to control his emotions. He would clench his fists and cry for five minutes every day in class. *Id.* at 30. He could not sit still. *Id.*¹³

As a result, Mr. Johnson often felt left out. *Id.* at 32. He had trouble understanding what was happening around him and preferred to be alone so that no one would make fun of him. *Id.* Dr. Martell also noted these social deficits mirror his findings in the neuropsychological testing. He administered the Comprehensive Affect Testing System to Mr. Johnson which tests one's ability to recognize and correctly identify the emotional expressions of others based on visual facial and auditory language cues. *Id.* at 32. Mr. Johnson exhibited mild to moderately severe impairment in all areas of this test. *Id.*

Dr. Martell determined that Mr. Johnson has mild to moderate impairment in the social domain as he struggles with spoken language, gullibility, and regulating emotion, Ex. 1 at 32–33, struggled to develop and maintain relationships, and was ostracized by others who perceived him as “slow.” *Id.* at 28–33.

c. Practical domain.

The practical domain involves personal care, money management, and job responsibilities. DSM-5 at 37. Dr. Martell concluded that Mr. Johnson displays significant

13. Gullibility and inability to regulate emotion are specifically identified in the DSM-5 as particularly “important in criminal cases, including Atkins-type hearings involving the death penalty.” DSM-5 at 38.

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deficits because he could not follow bus or walking directions, struggles with personal hygiene, and cannot manage money or his own affairs.

Through interviews, Dr. Martell learned that Mr. Johnson's inability to "keep up" meant that he was often "short-changed." Ex. 1 at 33. He could not keep track of his money, which led others to take advantage of him. For example, when Mr. Johnson received an income tax check for \$320, a check cashing store gave him \$32. *Id.* at 35. Mr. Johnson did not realize the difference and his sister directed him to go back and get his money. *Id.* His family knew that people took advantage of Mr. Johnson: "You couldn't trust him to come out of the store with the right change. People could see how he was and they took advantage of that." *Id.* at 33.

As a child, Mr. Johnson could not remember the rules of a simple card game like Old Maid. *Id.* at 33. No one wanted Mr. Johnson on their team when it came to sports because he could not keep up. *Id.* at 34. He also could not keep score during the game. *Id.* Mr. Johnson needed help ordering at restaurants because he struggled to read the menu and suffered from anxiety in public. *Id.* at 34. As a teen, he could not read a user-guide to learn how to use his cell phone. *Id.* Even his first "flip phone" was too difficult for him to navigate. *Id.* at 35. His sisters showed him how to set an alarm on the phone so he would get up on time but he would forget how to do it. *Id.* at 34. They took to setting the alarms for him. *Id.* Mr. Johnson struggled so much with reading that "he would just try to guess." *Id.* at 36. He avoided texting, telling people just to call. *Id.* at

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42. He once tried to put together an entertainment center for his mother but could not understand the instructions and it collapsed within a week. *Id.* at 36.

Although she tried to give Mr. Johnson chores, his mother realized that he had limits. He could put dishes in the dishwasher but got confused by the buttons. *Id.* At 39. He could not work the washer and dryer so his mother washed his clothes for him. *Id.* She limited his tasks to taking out the trash and sweeping the porch. *Id.*

Mr. Johnson often endangered himself by lack of common sense. He would chase a ball into the street without watching for cars and answer the door without checking who it was. *Id.* at 34. He never remembered to use a seat belt. *Id.* Mr. Johnson would do things that everyone else knew not to do, such as lighting a barbecue pit with his head inside the pit, burning himself. *Id.* at 35. At age 17, after he flooded his mother's house by breaking a pipe connected to the icemaker, his family no longer trusted him home alone. *Id.* at 36.

Multiple witnesses noticed that Mr. Johnson could not manage directions throughout his life. As a kid, he needed one of his sisters to take him to and from school because he would get lost. *Id.* at 35. Even as a teenager, he could not manage a bus route and took to walking everywhere. *Id.* at 42. When he did take the bus, he was sometimes able to get help from "nice bus drivers" who told him where to stand for the next bus and told him to ask the driver to let him know when to get off. *Id.* At 43. He once forgot which stop to get off at and came home from work four

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hours late. *Id.* at 35. When Mr. Johnson's younger sister, Marquette, once asked him to take her to school, he got lost. *Id.* at 40. She walked Mr. Johnson back home to be sure that he made it. *Id.* His mother would only send him to the store with one of his sisters as an escort because he so often got lost. *Id.* at 39.

Mr. Johnson had poor personal hygiene. Witnesses informed Dr. Martell that Mr. Johnson had significant issues with halitosis and dressing himself. He needed help until he was 10 or 11 years old because he could not put on his shoes and socks the right way. *Id.* at 39. Mr. Johnson also needed help with using soap and shampoo until he was a teen. *Id.* His mother made him come with her into the women's restroom when they were out in public to make sure he washed his hands. *Id.* When he was older, he wanted to "starch" his pants to look like the other guys in the neighborhood and would mix flour and water, apply them to his pants, and wear them until they would "reek." *Id.* at 36, 43. Mr. Johnson admitted that people would complain to him that he smelled and tell him to brush his teeth. *Id.* at 42–43.

With self-management, Mr. Johnson needed significant support. He needed help completing a job application. *Id.* at 38. When he had a job, he would hand his paychecks over to his girlfriend to manage because he did not have a bank account and could not keep track of his money. *Id.* As an adult, he did not understand what a credit card is, asking "is that what you get at the bank?" *Id.* at 44. When Mr. Johnson worked at Jack-in-the-Box, his supervisor had to help him because he could not pass periodic company

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tests about service, food portions, or customer service. *Id.* at 41. He took longer than other employees to catch on. *Id.* His manager was his girlfriend's mother and she knew his "situation" and "looked out for him." *Id.* at 40. He worked in the back at Jack-in-the-Box because he lacked the skills to work the cash register or interact with customers. *Id.* at 37. Even there, he was at risk, burning himself on the fryer. *Id.* at 34.

Based on this evidence, Dr. Martell concluded that Mr. Johnson has deficits in the practical domain of adaptive functioning because he struggles with self-care, could not manage routine household tasks, and needed significant support with managing his job and money. *Id.* at 44. With regard to all of Mr. Johnson's adaptive deficits, Dr. Martell concluded that his "adaptive impairments are clearly related to his underlying cognitive limitations. There is substantial 'convergent validity' from anecdotal, contemporaneous, and empirical data sources supporting the conclusion that Mr. Johnson functions adaptively in the range of Intellectual Disability, which meets the second diagnostic prong." *Id.* at 45.

3. The onset of the disorder was during the developmental period.

The third prong of an intellectual disability diagnosis is onset of deficits during the developmental period, which is defined as before the age of 18. The DSM-5 does not require that the deficits be present at birth or even be biomedical.

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Based on various witness declarations, trial testimony, and records, Dr. Martell has concluded that Mr. Johnson’s deficits began before age 18. Ex. 1 at 45. Dr. Martell also found head injuries and other risk factors for intellectual disability that occurred during Mr. Johnson’s developmental period further supported the age of onset as pre-18. *Id.*¹⁴

B. Mr. Johnson’s petition is timely or he can establish equitable tolling.¹⁵

Section 2244(d) creates a one-year statute of limitations for bringing claims in a federal habeas corpus petition, which is triggered based on a variety of conditions. The limitations period for Mr. Johnson’s petition runs from

14. For instance, Dr. Ruben Gur testified at Mr. Johnson’s trial that MRI results showed the brain tissue in Mr. Johnson’s left frontal lobe is three standard deviations lower than in the normal brain, which you find in less than one-tenth of one percent of the population. 30 RR 240.

15. Because it is a fact bound question, this Court has the tools at its disposal—namely, the ability to hold an evidentiary hearing—to best address the question of whether Mr. Johnson’s *Atkins* claim meets the federal statute of limitations. *In re Campbell*, 750 F.3d 523, 533–34 (5th Cir. 2014). In this case, this question is heavily dependent on the merits of the claim itself, and thus the merits of the claim should be adjudicated first. *See Rivera v. Quarterman*, 505 F.3d 349, 355 (5th Cir. 2007) (“[A]nswering whether Rivera is retarded [*sic*] is logically antecedent—if not a core element itself—to determining whether equitable tolling is available.”). As such, this Court should delay a determination of the statute of limitations issue until after the fact-intensive inquiry regarding whether Mr. Johnson is intellectually disabled.

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“the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). Because the publication of the DSM–5 was necessary to the viability of Mr. Johnson’s claim, his statute of limitations began to run on the date he should have known of the salient changes contained in that manual, thus making the claim available.

Moreover, Mr. Johnson may establish equitable tolling for any claim that falls outside the limitations period. Equitable tolling is a flexible, judicially-created remedy that is evaluated on the specific circumstances of the case, and which requires a petitioner to show that he has pursued his rights diligently, but that extraordinary circumstances stood in the way of a timely filing. *See Palacios v. Stephens*, 723 F.3d 600, 606 (5th Cir. 2013) (stating that “equitable tolling does not lend itself to bright-line rules”). Such extraordinary circumstances can include “an attorney’s failure to satisfy professional standards of care.” *Holland v. Florida*, 560 U.S. 631, 649 (2010); *see also id.* at 651 (“[A]t least sometimes, professional misconduct that fails to meet the Eleventh Circuit’s standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling.”); *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012) (applying the two-prong *Holland* standard to the petitioner’s argument that equitable tolling was warranted). The fact-sensitive inquiry attendant to equitable tolling arguments is best resolved at an evidentiary hearing. *See Holland*, 560 U.S. at 654.

*Appendix B***1. Mr. Johnson diligently pursued his rights.**

Mr. Johnson's deficits, combined with his prior attorney's ineffectiveness and flagrant misconduct, warrant equitable tolling. *See Fisher v. Johnson*, 174 F.3d 710, 715–16 (5th Cir. 1999) (noting that mental incompetence may support tolling the AEDPA statute of limitations). Mr. Johnson diligently pursued his rights by timely requesting, *pro se*, the appointment of substitute counsel after learning from fellow inmates that Mr. McCann had developed a conflict of interest, and by timely seeking to reopen the judgment after the Court appointed the FPD. On January 15, 2019, Mr. Johnson wrote a letter to this Court in which he explained that he learned from other prisoners that Mr. McCann had developed a conflict of interest post-*Trevino*; that Mr. McCann had not communicated with him about his case; and that he was requesting new counsel. Doc. 65. Despite his knowledge of the conflict, Mr. McCann opposed Mr. Johnson's request. Doc. 66. On January 29, 2018, Mr. Johnson filed a *pro se* motion for appointment of counsel, Doc. 68, and on February 5, 2019, the Court appointed the FPD as co-counsel, Doc. 70. The FPD quickly undertook a thorough review of Mr. Johnson's case, identified the *Atkins* claim at issue, and—under significant time constraints—moved for Mr. McCann's removal. Doc. 76. On April 30, 2019, this Court issued an order staying Mr. Johnson's execution, noting that “[t]he recent pleadings [] reveal troubling concerns about Johnson's current appointed legal representation which need resolution to preserve his rights before execution.” Doc. 84 at 8. The Court scheduled a hearing by separate order “to

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address the concerns raised in the motion to terminate Mr. McCann's appointed legal representation[.]” *Id.* at 9. Two days later, Mr. McCann moved to withdraw as Mr. Johnson's appointed counsel. Doc. 89. This Court granted the motion and cancelled the hearing. Doc. 91.

Mr. Johnson has significant intellectual deficits, as detailed in Section IV(A), was kept in the dark by his former counsel, and was represented in his initial proceeding by an attorney that actively litigated against his best interests. Under the circumstances, Mr. Johnson diligently pursued all available remedies.

Additionally, multiple extraordinary circumstances in this case merit equitable tolling. Mr. Johnson has provided significant support for the proposition that he has intellectual and adaptive deficits and that his prior attorney's actions fell far below the standards of professional care. The flagrant misconduct and ineffective assistance by Mr. McCann are truly extraordinary, as he consistently took actions that shielded himself from scrutiny, in direct contravention of Mr. Johnson's litigation interests.

a. Mr. McCann repeatedly acted against Mr. Johnson's best interests.

As chronicled in Section III(B), *Trevino* prompted a conflict of interest between Mr. McCann and Mr. Johnson. Disastrously for Mr. Johnson, he never received the competent, disinterested counsel that he was entitled to post-*Trevino* because Mr. McCann never informed

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him or the Court of his conflict. Instead, Mr. McCann made the extraordinary decision to attempt to raise a new ineffective-assistance-of-trial-counsel claim under *Martinez* at the same time and in the same pleadings in which he critically undermined his client's chances for prevailing on those arguments. In doing so, he took proactive measures to protect himself from a finding by this Court that he had been ineffective in state habeas. Mr. McCann, therefore, not only silently sat on the conflict that had become apparent to him, but he decided to place his own interests before the litigation interests of his capital-sentenced, severely brain-damaged client.

Mr. McCann went still further. At some point, other capital prisoners made Mr. Johnson aware of the conflict of interest and Mr. Johnson reached out to Mr. McCann about the conflict, making his unhappiness with his representation clear. *See* Doc. 65. Even then, Mr. McCann did not remedy the conflict. And when Mr. Johnson made the desperate move of filing letters and motions in this Court asking for conflict-free representation on the eve of his execution, Mr. McCann resisted those efforts—again without consulting Mr. Johnson—in pleadings filed under seal. Doc. 66.

Even after the appointment of the FPD, Mr. McCann continued to take actions that were against Mr. Johnson's best interests that violated his ethical and professional responsibilities to Mr. Johnson. On April 5, 2019, the FPD filed an Opposed Motion to Terminate Patrick F. McCann's Appointment in Mr. Johnson's case, (Doc. 76), and moved for a stay of execution on April 8, 2019. Doc. 77.

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In that motion, the FPD outlined various allegations that Mr. McCann provided ineffective assistance of counsel to Mr. Johnson and that a conflict of interest existed between Mr. McCann and Mr. Johnson. Doc. 76 at 7–17. That filing detailed several unrepresented, potentially meritorious claims for relief, including the *Atkins* claim, for which viable procedural arguments exist in state and federal court. *Id.* at 18–32. That motion also repeatedly referenced the fact that Mr. McCann would be unable to present many of those arguments for relief, as the procedural arguments necessary to establish Mr. Johnson’s right to merits review would rely on evidence that Mr. McCann was conflicted and/or ineffective. *Id.* at 1, 29–38. Mr. McCann filed a sealed response to that motion on April 9, 2019. Doc. 78.

As noted in the motion to terminate Mr. McCann’s appointment, filing a state successor application triggers various procedural hurdles for any subsequent filings in that forum. *Id.* at 35. As such, it is imperative to include all viable claims for relief in the first filing. The FPD’s motion placed Mr. McCann on notice that, among other issues: (1) he was operating under a conflict of interest; (2) numerous previously unrepresented claims existed, many of which would require assertions that he was ineffective; and (3) filing a state successor application without these claims could result in the waiver of many of Mr. Johnson’s arguments in favor of authorization and relief. Despite this, Mr. McCann filed a state successor application on April 11, 2019. That application included a single claim spanning a mere eight pages arguing that Mr. Johnson is intellectually disabled. The application contained no mention of the federal litigation, Mr. McCann’s conflict of interest, or the additional claims identified by the FPD.

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Continuing his pattern of failing to adhere to basic tenets of professional responsibility, Doc. 76, *Mr. McCann did not even inform Mr. Johnson that he filed a state successor on his behalf*, much less obtain his informed consent before doing so. Doc. 80 at 14.¹⁶ According to Texas ethics expert Robert Schuwerk, Mr. McCann's actions regarding filing the state successor "violated his fiduciary duty of loyalty to Mr. Johnson, as well as the corresponding disciplinary rule outlining his ethical duties as an attorney for Mr. Johnson[.]" Ex. 2 at ¶14. In these circumstances, Mr. McCann should have advised Mr. Johnson of:

(i) his intent to file a successor state habeas petition, (ii) the alleged existence of previously unasserted IATC and IAAC claims that the FPD asserted existed that would implicate the quality of his (Mr. McCann's) representation of his client, (iii) the claim the contemplated habeas petition would advance and those it would omit, (iv) the difficulties that would arise from not including the omitted claims in the successor state habeas petition, (v) his own ability to give disinterested advice to Mr. Johnson as to whether or not Mr. McCann should file the successor state habeas petition in

16. Additionally, Mr. McCann's failure to obtain informed consent from Mr. Johnson prior to filing the state successor violated controlling Texas precedent. *See Ex parte Gallo*, 448 S.W.3d 1, 4 (Tex. Crim. App. 2014) (holding that an attorney filing a habeas petition on an applicant's behalf "must at least have the applicant's informed consent to do so.").

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its contemplated form (vi) his recommendation that Mr. Johnson secure independent legal advice as to his best course going forward and (vii) Mr. McCann's willingness to abide by Mr. Johnson's directions going forward after receiving that independent legal advice. Because of the importance of the steps he was contemplating taking (and subsequently did take) for the interests of Mr. Johnson at stake in this matter, both fiduciary principles and disciplinary standards imposed an affirmative duty on Mr. McCann to undertake such consultative measures before proceeding with those measures.¹⁷ However, none of those steps occurred. Consequently, Mr. McCann violated both his fiduciary duty of candor to Mr. Johnson and his disciplinary obligation to keep Mr. Johnson apprised of significant developments in his case, as contained in TDRPC Rules 1.03 and 1.06(c).

Id. at ¶15.

17. See Robert P. Schuwerk and Lillian B. Hardwick, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS: ATTORNEY TORT STANDARDS, ATTORNEY ETHICS STANDARDS, JUDICIAL ETHICS STANDARDS, RECUSAL AND DISQUALIFICATION OF JUDGES 2019 (Thomson * Reuters 2019).

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b. Mr. McCann failed to conduct investigations to support Mr. Johnson’s habeas claims for relief.

Despite being the only postconviction attorney ever appointed with the mandate to conduct an investigation into the constitutionality of Mr. Johnson’s conviction and sentence prior to the FPD, Mr. McCann did not present a single new, case-specific fact in state or federal habeas.

The petition Mr. McCann filed in this Court was copied nearly verbatim from the state habeas application, with the additional insertion of a single constitutional challenge that was raised on direct appeal.¹⁸ Mr. McCann presented no new, extra-record evidence in support of the claims he raised in state habeas, and he did not seek federal investigative or expert services to aid in the development of those or any new claims in federal habeas.¹⁹ The state habeas claims were copied verbatim into the federal petition, with the single exception that references to Mr. Johnson were changed from “applicant” to “petitioner.”

Mr. McCann would later argue, post-*Trevino*, that the defaulted ineffectiveness claim he sought to untimely amend into the federal petition occurred to him at some point *during* his state habeas representation; however,

18. The claim raised originally on direct appeal is the only claim for which this Court issued a certificate of appealability.

19. Even after seeking to amend the petition post-*Martinez*, Mr. McCann sought no funds to investigate the proposed ineffectiveness claim.

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he did not include it in the federal petition, rendering the claim not only procedurally defaulted but also factually unsupported and time-barred under the AEDPA's statute of limitations.

c. Mr. McCann failed to maintain a complete case file.

The FPD also discovered, as it began to collect former counsel's files immediately upon its appointment, that Mr. McCann failed to fulfill the most fundamental and straightforward duty of postconviction counsel: that is maintaining a complete case file. This fact sets Mr. Johnson's case apart from others and makes it extraordinary.

A basic duty of post-conviction counsel is collecting the client's entire case file, which requires reaching out to the client's prior attorneys, investigators, and experts who have worked on the case over the years. The duty of post-conviction counsel to collect the client's entire case file is well-established. State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel* (2006), reprinted in Texas Bar Journal Vol. 69, No. 10, Guideline 11.1.B ("Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes *at a minimum* interviewing prior counsel and members of the defense team and examining the files of prior counsel."); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), reprinted in 31 Hofstra L.

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Rev. 913, Guideline 10.7.B.1 (same); National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (1988), Standard 11.9.3(b) (“With the consent of the client, postconviction counsel should obtain and review all prior counsels’ file(s).”). Yet, Mr. McCann failed to perform this basic function, an inexcusable omission.

After appointment, the FPD began reaching out to various prior attorneys and critical trial team members. A troubling fact pattern emerged—that Mr. McCann had either never, or only recently, requested files from them. Anthony Osso, Mr. Johnson’s second chair counsel from trial, was contacted less than a week after the appointment of the FPD. At that time, Mr. Osso informed the FPD that *Mr. McCann had first requested his files only the previous week—the same week that the FPD was appointed*. It is likely not a coincidence that immediately after this Court appointed co-counsel to assess whether Mr. McCann had provided ineffective assistance, he reached out to Mr. Osso to at last collect these files. There is no viable excuse for why Mr. McCann was unable to complete this basic task in the previous ten-plus years that he represented Mr. Johnson.

Similarly, Mr. McCann failed to collect files from lead trial counsel Jim Leitner. The materials from Mr. Leitner, which the FPD received, amount to four full bankers boxes of various materials. Mr. Leitner does not “REMEMBER PAT GETTING ANY OF MY FILES.” Doc. 80, Ex. 2 (emphasis in original). Additionally, the trial team’s mitigation investigator, Danalynn Recer,

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had a large quantity of material that Mr. McCann had not obtained. In sum, the files Mr. McCann neglected to collect and review are a substantial quantity of both paper and electronic files.

2. Alternatively, *Atkins* claims are not subject to the statute of limitations.

Atkins claims fall into a class for which the statute of limitations can be bypassed based on a showing of actual innocence of the death penalty. In *McQuiggin v. Perkins*, the Supreme Court held that actual innocence of the crime, if proven, establishes a gateway to present constitutional claims even if the statute of limitations has otherwise expired. 569 U.S. 383 (2013). The *Perkins* court noted that the miscarriage of justice exception “survived AEDPA’s passage” and has been used to overcome various procedural hurdles. *Id.* at 392–93. *Perkins* applied the logic of *Schulp v. Delo*, 513 U.S. 298 (1995), which allows petitioners to overcome procedural default of a claim upon a showing of actual innocence and extended the Court’s rationale to the federal statute of limitations.

To the best of Mr. Johnson’s knowledge, neither the Supreme Court nor the Fifth Circuit has resolved whether *Perkins* applies to claims of actual innocence of the death penalty, such as an *Atkins* claim. See *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014) (explaining that applying *Perkins* to actual innocence of the death penalty was “a question we do not decide here[.]”).²⁰ *Schulp* itself relies

20. In *Henderson v. Thaler*, 626 F.3d 773, 781 (5th Cir. 2010), the Fifth Circuit held that it would not create an actual innocence of the death penalty exception to the statute of limitations. However,

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heavily on the Supreme Court’s opinion in *Sawyer v. Whitley*, 505 U.S. 333 (1992), which involved the excuse of procedural default based on actual innocence of the death penalty. Because the *Schlup* standard applies to the statute of limitations period, so should the *Sawyer* standard. As such, the statute of limitations can be bypassed when a petitioner establishes his actual innocence of the death penalty—such as demonstrating that he is intellectually disabled.

C. Mr. Johnson’s *Atkins* claim satisfies other procedural requirements, which can only be assessed if this Court determines that 28 U.S.C. § 2244 is satisfied.

The instant petition poses a variety of complex legal issues for this Court to resolve, but this Court must first determine whether Mr. Johnson meets the requirements for consideration of his *Atkins* claim under 28 U.S.C. § 2244. Section 2254(d) is not part of that analysis. *See Tyler v. Cain*, 218 F.3d 744 (Table), 2000 WL 821489 at *1 (5th Cir. 2000) (“The district court erred in not determining first whether Tyler’s petition satisfied AEDPA’s successive habeas standard [before applying § 2254(d)].”); *see also Johnson*, 935 F.3d at 295 (noting that § 2254(d) is not referenced in § 2244 and that state court findings are “wholly irrelevant” to whether a petitioner may proceed on a federal habeas petition).

this decision predated *Perkins*, and the question was explicitly left open in *Tamayo*.

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Thus, it is premature to decide whether, and to what extent, this Court should consider the orders dismissing Mr. Johnson’s prior state habeas applications as part of the merits analysis of his *Atkins* claim. Mr. Johnson requests that the Court afford the parties an opportunity to fully brief these attendant procedural questions after the § 2244 decision is made. Deferring consideration of Mr. Johnson’s right to relief is particularly important in the instant case, where Mr. Johnson is requesting an evidentiary hearing to resolve the preliminary question whether he meets the standards outlined in 28 U.S.C. § 2244. That hearing, if granted, may well have significant bearing on other procedural matters. However, Mr. Johnson will briefly address potential procedural defenses in this pleading.

1. The *Atkins* claim is exhausted.

With a few narrow exceptions, a federal court cannot grant a writ of habeas corpus unless the petitioner has exhausted his claims for relief in state court. 28 U.S.C. § 2254(b)(1). When a petitioner has presented the substance of his claim in state court and has “not fundamentally alter[ed] the legal claim already considered by the state courts,” the exhaustion requirement is satisfied. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Mr. Johnson exhausted his *Atkins* claim by presenting it to the state court, and he has not fundamentally altered the claim here. *See Ex parte Johnson*, 2019 WL 3812803 (Tex. Crim. App. Aug. 13, 2019).

*Appendix B***2. The *Atkins* claim is not procedurally defaulted.**

The CCA dismissed Mr. Johnson’s application containing this *Atkins* claim as an abuse of the writ, purportedly “without reviewing the merits of the claims raised.” *Ex parte Johnson*, 2019 WL 3812803 (Tex. Crim. App. Aug. 13, 2019). “A federal habeas court will not review a claim rejected by a state court ‘if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’” *Walker v. Martin*, 562 U.S. 307, 315 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009)); see also *In re Davila*, 888 F.3d 179, 187 (5th Cir. 2018) (“[I]f the petitioner raised the claim in state court, the claim is procedurally defaulted in federal court if the state court clearly and expressly bases its dismissal of a prisoner’s claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal.”) (internal quotation omitted). However, the procedural default inquiry is not focused narrowly on the language used in the CCA order. Even a state court decision specifying that the claim was dismissed without reaching the merits may not have been made independently of the federal question presented. *In re Davila*, 888 F.3d at 187–89.

When a Texas petitioner raises an *Atkins* claim in a state successor, the CCA makes a threshold determination whether the petitioner has “asserted facts, which if true, would sufficiently state an *Atkins* claim to permit consideration of the successive petition.” *Busby v. Davis*,

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925 F.3d 699, 707 (5th Cir. 2019); *see also Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (under Texas Code of Criminal Procedure, Article 11.071, § 5(a)(3), the CCA looks for “a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find [intellectual disability].”). Because that determination necessarily entails an assessment of the federal question—the *Atkins* claim—it is not an independent state law question, and thus *Atkins* claims are generally never procedurally defaulted in federal court. *See Busby*, 925 F.3d at 710.

Here, the CCA’s dismissal of Mr. Johnson’s *Atkins* claim was not independent of the federal question because it must have included an assessment of the facts presented in support of the *Atkins* claim. In a similar scenario,²¹ the Fifth Circuit held that a CCA order dismissing an *Atkins* claim “was not independent of the federal question” because it “necessarily entailed an assessment of the facts presented in support of the *Atkins* claim.” *Busby*, 925 F.3d at 706–07. The Court reached its conclusion in *Busby* despite the fact that, as in Mr. Johnson’s case, the CCA order dismissing the application stated that it did so without considering the merits of the claims raised. *See id.* at 707; *Ex parte Johnson*, 2019 WL 3812803 (Tex. Crim. App. Aug. 13, 2019). Similar to the analysis in *Busby*, Mr. Johnson’s *Atkins* claim is not procedurally defaulted regardless of the language of the CCA order.

21. In *Busby*, the petitioner was litigating his initial federal habeas petition, while Mr. Johnson’s current petition is successive. That distinction is immaterial to the resolution of whether the *Atkins* claim is procedurally defaulted.

*Appendix B***3. The relitigation bar of 28 U.S.C. § 2254(d) does not apply to the *Atkins* claim.**

When a petitioner presents an exhausted claim that is not procedurally defaulted, the court must also determine whether the relitigation bar of 28 U.S.C. § 2254(d) applies. If the state court has adjudicated a claim on the merits, § 2254(d) limits the availability of federal habeas relief to instances in which the state court adjudication was contrary to, or involved an unreasonable application of, clearly established law, or those in which the adjudication was based on an unreasonable determination of the facts in light of the state court record. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). When a claim was presented to the state court, a rebuttable presumption exists that the claim was adjudicated on the merits. *Johnson v. Williams*, 568 U.S. 289, 301–02 (2013). That presumption can be rebutted in a variety of ways, including by showing that the state standard is either less protective or “quite different from” the relevant federal standard. *Id.* at 301.²² If the presumption is rebutted, federal court review of the constitutional claim is *de novo*. *Id.* at 302.

The CCA’s review of Mr. Johnson’s *Atkins* claim was not an adjudication on the merits for purposes of 28

22. The Supreme Court rejected the notion that the presumption of a merits review was irrebuttable. *See Johnson*, 568 U.S. at 301. Federal courts must analyze this question on a case-by-case basis rather than creating *per se* rules of applicability. Thus, the fact that courts have applied 28 U.S.C. § 2254(d) in other cases where an *Atkins* claim was first presented to a state court in a subsequent application does mean that it applies in this case.

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U.S.C. § 2254(d). When the state court fails to conduct a comprehensive evaluation of the evidence, the resulting decision is not “on the merits”:

A judgment is normally said to have been rendered “on the merits” only if it was “delivered after the court . . . heard and *evaluated* the evidence and the parties’ substantive arguments.” Black’s Law Dictionary 1199 (9th ed. 2009) (emphasis added). And as used in this context, the word “merits” is defined as “[t]he *intrinsic rights and wrongs of a case as determined by matters of substance, in distinction from matters of form.*” Webster’s New International Dictionary 1540 (2d ed. 1954) (emphasis added).

Johnson, 568 U.S. at 303.

The Fifth Circuit has held that deference under § 2254(d) is not required when “the factfinding procedures upon which the [state] court relied were ‘not adequate for reaching reasonably correct results’ or, at a minimum, resulted in a process that appeared to be ‘seriously inadequate for the ascertainment of the truth.’” *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007) (quoting *Ford v. Wainwright*, 477 U.S. 399, 423–24 (1986) (Powell, J., concurring in part and concurring judgment)). Furthermore, the factfinding process must afford the petitioner due process of law. *Id.* at 953–54. In *Wiley v. Epps*, the petitioner argued that the state court decision was not entitled to AEDPA deference because the state

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court's failure to hold a hearing on an *Atkins* claim violated due process of law. 625 F.3d 199, 207 (5th Cir. 2010). The Fifth Circuit held that “when a petitioner makes a prima facie showing of [intellectual disability], a state court’s failure to provide him with an opportunity to develop his claim deprives the state court decision of the deference ordinarily due under the AEDPA.” *Id.* (citing *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007)).

Here, the state court was presented with a substantial quantity of documentation in support of Mr. Johnson’s claim that he is intellectually disabled under prevailing professional norms, including a formal diagnosis of the disability from Dr. Martell. Yet the CCA refused to authorize the claim to proceed and thus forestalled the presentation of Mr. Johnson’s evidence at a hearing, which would have provided him the opportunity to prove his claim. Certainly, state courts are not required to authorize successive petitions and hold hearings any time an *Atkins* claim is presented to them. However, in the instant case, and in light of the factual support presented to the state court, the process by which it dismissed the claim did not provide Mr. Johnson an adequate forum for proving its merit, was inadequate for the ascertainment of the truth, and violated due process of law. *See Johnson*, 568 U.S. at 303; *Panetti*, 551 U.S. at 953–54; *cf. In re Johnson*, 935 F.3d at 295 (finding that the instant claim “has at least made a *prime facie* showing of intellectually disability.”).²³

23. For the same reasons, if this Court determines that the claim was adjudicated on the merits, the CCA decision was an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). *See* Section IV(C)(3), *infra*.

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This argument is further supported by the fact that the Fifth Circuit, reviewing the same evidence that was presented to the CCA, found that Mr. Johnson had made a *prima face* showing of intellectual disability.

The relitigation bar of 28 U.S.C. § 2254(d) also does not apply to the *Atkins* claim because the state standard is either less protective or “quite different from” the relevant federal standard. *Johnson*, 568 U.S. at 301. Here, the Fifth Circuit gave authorization to proceed to a § 2244(b) (2)(A) determination by this Court. *In re Johnson*, 935 F.3d at 296. If the Court determines that Mr. Johnson meets the requirements for a successive petition, and other procedural requirements are met, this Court must then assess whether Mr. Johnson can establish his *Atkins* claim by a preponderance of the evidence. *See Wiley*, 625 F.3d at 216 (applying a preponderance of the evidence standard to the adjudication of an *Atkins* claim). Texas’s standard under 11.071 § 5(a)(3) is quite different from, and significantly less protective than, the federal successor standard. The state standard requires a showing that “by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state’s favor one or more of the special issues that were submitted to the jury in the applicant’s trial.” Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). This standard places a much higher burden on successive state habeas petitioners than the preponderance of the evidence standard under the federal successor framework. Because of the higher burden under the state successor framework, there is no equivalent determination for the federal court to defer to. *Cf. Brumfield v. Cain*, 135 S. Ct.

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2269, 2282–83 (2015) (“There is thus no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied § 2254(d).”); *see also* *Benge v. Johnson*, 474 F.3d 236, 246–47 (6th Cir. 2007); *Williams v. Runnels*, 432 F.3d 1102, 1105 (9th Cir. 2006).

Finally, the state court’s dismissal of Mr. Johnson’s *Atkins* claim was not “an adjudication on the merits” because the claim was never authorized for review, and thus relief on the claim was prohibited. Tex. Code Crim. Proc. art. 11.071 § 5(a) (stating that, unless one of three criteria is met, “a court may not consider the merits of or grant relief based on the subsequent application”). While the CCA applied federal constitutional law in its review of Mr. Johnson’s subsequent application, it did so only to decide whether to allow the application to proceed. Having decided not to authorize Mr. Johnson to proceed, no state court ever assumed or was granted jurisdiction over the claim.

4. Alternatively, 28 U.S.C. § 2254(d) is satisfied.

Even if this Court later finds that the *Atkins* claim was adjudicated on the merits in state court and that 28 U.S.C. § 2254(d) applies, Mr. Johnson is able to meet the requirements of that relitigation bar.²⁴ AEDPA’s amendment of § 2254(d) “place[d] a new constraint on the power of a federal habeas court to grant a state prisoner’s

24. Mr. Johnson does not concede that 28 U.S.C. § 2254(d) applies, and only makes this argument in the alternative.

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application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Under § 2254(d), a claim that was adjudicated on the merits in state court is barred unless the adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1–2). The CCA’s resolution of Mr. Johnson’s *Atkins* claim was unreasonable under both prongs of this statute, although only one needs to be met.

First, the CCA’s dismissal of Mr. Johnson’s *Atkins* claim was an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). Following the Supreme Court’s dual decisions in *Moore*, Texas was instructed to cease applying a standard under which “a consensus of Texas citizens would agree that a person should be exempted from the death penalty,” *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004), and to start applying current standards accepted and implemented by the medical community. *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017). The current medical framework for intellectual disability has eliminated hard

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IQ cutoffs in recognition of the fact that an intellectual disability diagnosis should be grounded in the individual's actual functioning, not a test score. Under the updated medical diagnostic framework, Dr. Martell has diagnosed Mr. Johnson as intellectually disabled based on Mr. Johnson's IQ scores, neuropsychological testing, and a comprehensive review of his adaptive functioning. *See* Section IV(A), *supra*. The CCA's dismissal of Mr. Johnson's extensive evidence of intellectual disability, denying him a forum in which to prove his allegations, is an unreasonable application of *Moore*.

The failure to provide a capital petitioner an evidentiary hearing on an *Atkins* claim is an unreasonable application of clearly established federal law if the petitioner has presented a prima facie case that he is intellectually disabled. *Wiley*, 625 F.3d at 213; *Rivera*, 505 F.3d at 561. The Fifth Circuit held that Mr. Johnson has established a prima facie case of intellectual disability in accordance with the federal successor requirements. *In re Johnson*, 935 F.3d at 295. While *Atkins* itself does not mandate states to use a specific set of procedures, "it was decided against the backdrop of the Supreme Court's and lower courts due process jurisprudence." *Rivera*, 505 F.3d at 358. Just as in *Wiley* and *Rivera*, the state court's failure to provide Mr. Johnson an evidentiary hearing means that deference is not required under AEDPA to that decision. *See Rivera*, 505 F.3d at 358 ("The lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of [intellectual disability] as Rivera did, the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due.").

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The CCA's dismissal of Mr. Johnson's *Atkins* claim was also "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). Despite failing to make explicit factual findings regarding Mr. Johnson's *Atkins* claim, the CCA necessarily held that Mr. Johnson had not met the threshold showing of proof required to proceed on the claim. *See Busby*, 925 F.3d at 716. As detailed in Section IV(A), *supra*, Mr. Johnson presented significant factual support for his intellectual disability claim in state court. This included a 70 IQ score, substantial lay witness statements establishing adaptive deficits and that the onset of the disability occurred during the development period, and Dr. Martell's diagnosis of intellectual disability. The CCA's decision not to credit this information was unreasonable.²⁵

V. Conclusion and prayer for relief.

For these reasons, Mr. Johnson requests that this Court find his successive petition meets the requirements of 28 U.S.C. § 2244, grant an evidentiary hearing, *see* Doc. 9, and enter an order that he is intellectually disabled and exempt from execution pursuant to *Atkins* and the Eighth and Fourteenth Amendments to the constitution.

DATED: November 12, 2019

25. Moreover, the process by which the CCA evaluated the information was unreasonable, in that it apparently made this determination without holding an evidentiary hearing.

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Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Jeremy Schepers
Jeremy Schepers (24084578)
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*Appendix B***VERIFICATION BY ATTORNEY**

I, the undersigned, am the attorney appointed by this Court pursuant to 18 U.S.C. § 3599 to represent Petitioner Dexter Johnson in these proceedings. I have met with Mr. Johnson, consulted with other staff in the Federal Defender's Office regarding the case, and directed experts and investigators regarding the circumstances of Mr. Johnson's conviction and sentence of death. It is in that capacity that I verify this Petition. I declare under penalty of perjury that the foregoing allegations in this Petition are true and correct to the best of my knowledge and that this Petition for Writ of Habeas Corpus is being filed using this Court's CM/ECF system on November 12, 2019.

Subscribed by me November 12, 2019,
in Dallas, Texas.

/s/ Jeremy Schepers
Jeremy Schepers

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Petition for a Writ of Habeas Corpus has been served by CM/ECF upon counsel for Respondent on November 12, 2019, to:

Ellen Stewart-Klein
Office of the Attorney General
P.O. Box 12548
Capitol Station
Austin, TX 78711

/s/ Jeremy Schepers
Jeremy Schepers

**APPENDIX C — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF TEXAS, HOUSTON DIVISION,
FILED JULY 30, 2020**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:19-CV-3047

DEXTER JOHNSON,

Petitioner,

VS.

LORIE DAVIS,

Respondent.

ORDER

Petitioner Dexter Johnson has already litigated a federal habeas challenge to his Texas capital conviction and death sentence. Johnson seeks leave to file a successive federal habeas petition based on the question of whether intellectual disability precludes his execution. (Docket Entry No. 8). Johnson also moves for an evidentiary hearing. (Docket Entry No. 9). Respondent Lorie Davis has filed a motion to dismiss Johnson's petition without additional factual development. (Docket Entry No. 13).

At this stage of the proceedings, this Court has two duties: (1) decide whether Johnson is entitled to

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proceed with his successive petition and (2) examine the timeliness of Johnson's successive petition. Additional factual development relating to his federal representation is necessary before the Court can fairly adjudicate those issues. For the reasons discussed below, the Court **GRANTS** Johnson's motion for an evidentiary hearing **IN PART**. The Court **DENIES** Respondent's motion to dismiss **WITHOUT PREJUDICE** to reurging after the development of additional evidence.

BACKGROUND

Courts have previously described the details of the crime that resulted in Johnson's death sentence. *See Johnson v. Stephens*, 617 F. App'x 293 (5th Cir. 2015); *Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 84 at 1–4; *Johnson v. State*, 2010 WL 359018, at *1 (Tex. Crim. App. 2010). For the purposes of the issues needing adjudication at this stage, the Court provides the following summary of relevant facts. In doing so, the Court will also review developments in psychology and in the law that guide the issues present in this lawsuit.

I. Trial

Johnson's capital conviction and death sentence arise from the murder of Maria "Sally" Aparece during the course of a robbery on June 18, 2006. Four years before Johnson's trial the Supreme Court had held in *Atkins v. Virginia*, 536 U.S. 303 (2002), that the execution of criminals who are intellectually disabled violates the

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Eighth Amendment.¹ The trial defense relied on expert testimony about various mental-health issues which Johnson suffered. The testimony, and most particularly that provided by neuropsychologist Dr. Dale Watson, specifically precluded any diagnosis of intellectual disability under the then-governing professional standards.²

On June 28, 2007, Johnson was sentenced to death. That same day, the trial court appointed Patrick F. McCann to represent Johnson in state habeas corpus proceedings.

After the state courts denied appellate and habeas remedies, the Court appointed McCann as counsel of record on July 30, 2010. (*Johnson v. Thaler*, 4:10-mc-318, Docket Entry No. 2).³ At that time, federal courts

1. At the time of the *Atkins* decision, the psychological community used the term “mental retardation” which it has replaced with the term “intellectual disability.” See *Hall v. Florida*, 572 U.S. 701, 704 (2014).

2. Dr. Watson assessed Johnson’s IQ through two tests: the Stanford Binet Intelligence Scale, Fifth edition, and the Wechsler Adult Intelligence Scale, Third edition (WAIS-III). 31 RR 196. Applying a standard error of measurement and a principle called the Flynn Effect, Dr. Watson opined that Johnson’s IQ was somewhere between 74 and 88. 31 RR 204. Dr. Watson testified that Johnson did not have obvious deficits in adaptive behavior. 31 RR 206. Dr. Watson testified that Johnson was not intellectually disabled. 31 RR 20.

3. Federal law allows for the appointment of “one or more attorneys” in capital habeas cases. 18 U.S.C. § 3599(a)(2). Johnson

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frequently appointed an inmate's state habeas counsel with the understanding that an attorney's experience in state court would aid the preparation and litigation of a federal habeas petition.⁴

II. Developments in the Law and Psychology

On June 28, 2011, McCann filed a federal petition for a writ of habeas corpus on Johnson's behalf. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 1). This Court has already extensively discussed various details of the representation provided by McCann. *Johnson v. Stephens*, 4:11-cv-2466 (Docket Entry No. 84 at 2–4). Three circumstances during the pendency of Johnson's petition give rise to the matters now before the Court.

A. *Martinez v. Ryan*

First, in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court carved out a limited equitable exception to federal procedural default rules based on a state habeas attorney's legal representation. *Martinez* provided a narrow remedy: forgiveness for the default of ineffective-assistance-of-trial-counsel claims when state habeas

did not request that another attorney assist McCann in the litigation.

4. Under the heading "Continuity of Representation," the CJA Guide to Judiciary Policy stated, and still states, that "in the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified . . . when the case enters the federal system." 6 Guide to Judiciary Policy § 620.70.

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counsel deficiently failed to raise them. *See Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2062 (2017) (labeling the *Martinez* exception “narrow,” “highly circumscribed,” and available only in “limited circumstances”). *Martinez* posed a potential concern in this case: McCann represented Johnson in both state and federal court. An attorney cannot “be expected to argue his own ineffectiveness as state habeas counsel.” *Clark v. Davis*, 850 F.3d 770, 773 (5th Cir. 2017). However, *Martinez* was not directly applicable as Johnson’s initial petition did not raise any claim that trial counsel provided ineffective representation under *Strickland v. Washington*, 466 U.S. 668 (1984).

Martinez became a potential issue in the initial proceedings when, almost two years after filing the initial federal petition, McCann filed a motion on December 28, 2012, seeking to raise two new claims. McCann argued that he could litigate the new issues either by staying his federal action to allow exhaustion or by amending his federal petition. One of his new claims would have faulted trial counsel for not “present[ing] any evidence whatsoever of [his psychological and biological mental] impairments during the guilt innocence of the trial” even though counsel had prepared such evidence for the punishment phase. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 14 at 8). Johnson, however, did not suggest that *Martinez* would provide an avenue to federal consideration of any claim.

Martinez did not provide guidance on its influence in an ongoing federal habeas action.⁵ With the possibility

5. Subsequent circuit cases have encouraged the appointment of supplemental counsel or other remedial steps to give *Martinez*

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that *Martinez* could pose a concern, the Court ordered the parties to provide supplemental briefing. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 16). McCann “admit[ed] that he was remiss in not filing the new claims of ineffective assistance of counsel” and argued that *Martinez* would allow him to overcome any procedural bar (but asking for an extension of *Martinez* because the state courts had prevented him from developing a *Strickland* claim). (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 18 at 2). McCann did not ask for the substitution of counsel in order to give *Martinez* effect.⁶ McCann remained the sole counsel of record until the State set an execution date years later.

B. The DSM-5

Second, developments in the psychological community’s understanding of intellectual disability provide the basis for this lawsuit. In May 2013, the American Psychiatric Association’s (APA) published a revision of its diagnostic manual, the DSM-5. The DSM-5 significantly altered the manner in which clinicians view the relationship between IQ scores and intellectual disability. The DSM-5

effect in active federal habeas cases. See *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015); *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015). The law before this Court entered judgment, however, did not advise the substitution of counsel. To date, no Supreme Court or Fifth Circuit case law has required a federal court to *sua sponte* remove federal counsel because of *Martinez*.

6. Around the same time, however, McCann requested the appointment of supplemental counsel in another case because of *Trevino. Martinez v. Stephens*, No. 4:13-cv-01994 (S.D. Tex).

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repudiated previous over-reliance on IQ test scores: “IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.” *Hall v. Florida*, 572 U.S. 701, 721–22 (2014) (quoting DSM-5 at 37). Thus, “[t]he latest DSM-5 manual changed the diagnostic framework for intellectual disability. Higher IQ scores no longer bar a diagnosis of an intellectual disability.” *In re Johnson*, 935 F.3d 284, 292 (5th Cir. 2019). McCann did not raise any issue relating to the DSM-5 during the pendency of Johnson’s initial petition.

C. Texas’ *Atkins* Jurisprudence

Interplay between Supreme Court precedent and Texas law provides the third circumstance that influences the course of this lawsuit. When the Supreme Court issued *Atkins* in 2002, it left to “the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.” *Atkins*, 536 U.S. at 317 (quotation omitted). As States interpreted this responsibility, jurisdictions varied in their reliance on the standards developed by professional organizations. The Texas State Legislature did not initially enact any statute that gave effect to the *Atkins* decision, leaving its interpretation to the courts. In *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), the Court of Criminal Appeals decided that Texas would adopt the definition of intellectual disability in the 1992 edition of a certain diagnostic manual, but would temper that evaluation with judicially created factors lacking any foundation in psychological science.

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The flow of *Atkins* cases nationwide turned when the Supreme Court relied on the most recent versions of leading diagnostic manuals—including the DSM-5—in *Hall v. Florida*, 572 U.S. 701(2014). In *Hall*, the Supreme Court relied on the DSM-5 to recognize that, while not “unhelpful” and “of considerable significance,” IQ scores are not the only consideration in an *Atkins* inquiry. *Hall*, 572 U.S. at 723. Simply, “intellectual disability is a condition, not a number.” *Id.* *Hall* explicitly held that the *Atkins* determination must be “informed by the medical community’s diagnostic framework.” 572 U.S. at 721. The Supreme Court would continue to emphasize the importance of relying on the current standards relied on by professional mental-health organizations. *See Brumfield v. Cain*, 576 U.S. 305, 308 (2015).

Hall, however, did not initially bring about a sea change in Texas’ approach to *Atkins* cases. As the Supreme Court brought *Atkins* jurisprudence in sync with the medical community, the Texas courts continued to apply outdated standards and judge-made rules. *See Ex Parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015) (refusing to adopt a recommendation that habeas relief be granted when the lower court relied on the DSM-5); *Ex parte Cathey*, 451 S.W.3d 1, 10 (Tex. Crim. App. 2014) (mentioning, but not relying on, the DSM-5 standards). Texas’ approach did not face scrutiny until 2017 when the Supreme Court threw out the *Briseno* standards in *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039, 1051 (2017). In 2018 the Court of Criminal Appeals finally “conclude[d] that the DSM-5 should control [its] approach to resolving the issue of intellectual disability.” *Ex parte Moore*, 548

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S.W.3d 552, 560 (Tex. Crim. App. 2018). Even then, the Supreme Court had to rectify Texas’ failure to adhere closely to the professional judgment of the psychological profession. *See Moore v. Texas*, ___ U.S. ___, 139 S. Ct. 666 (2019).

In sum, McCann’s representation in both state and federal courts, the evolution of psychological standards to assess intellectual disability, and legal responses to the new DSM-5 standards provide a backdrop to the matters now before the Court.

III. Litigation Leading to Johnson’s *Atkins* Claim

A. Federal Litigation of Johnson’s Initial Federal Petition

Respondent filed an answer to Johnson’s petition on February 23, 2012. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 11). On December 28, 2012, Johnson moved to amend or abate his federal petition to include new claims. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 14). When the DSM-5 was published on May 18, 2013, the parties were still briefing the motion to amend or abate.

On August 13, 2013, the Court entered a Memorandum and Order that both denied the motion to alter and amend and also denied habeas relief on all but one claim. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 19). The Court refused to abate the proceedings because Johnson “knew about the putative claims during state habeas review” but

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“did not advance them until December 28, 2012,” he did “not show good cause for failing to raise his unexhausted claims until federal review,” and “Texas would apply its procedural law to prohibit the filing of a successive state application.” (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 19 at 12–13). The Court denied his request to amend because “[r]estarting the process at th[at] stage would needlessly insert delay into the proceedings,” “Johnson would face high procedural obstructions to federal habeas review and relief” such as the exhaustion and procedural bar doctrines, and Johnson provided little information about the claim he wished to raise. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 19 at 13–15).

McCann litigated Johnson’s case in a manner that delayed issuing final judgment. Johnson unsuccessfully moved to reconsider the Court’s August 13, 2013 Order. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 20). Johnson then filed an interlocutory appeal. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 25; *Johnson v. Stephens*, No. 13-70032). With that litigation, the Court did not enter a final judgment until June 25, 2014. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 32).

Johnson continued to litigate issues from his federal petition even after the Fifth Circuit denied his appeal, *Johnson v. Stephens*, 617 F. App’x 293 (5th Cir. 2015), and the Supreme Court denied certiorari review, *Johnson v. Stephens*, ___ U.S. ___, 136 S. Ct. 980 (2016). In 2017, Johnson specifically asked to reopen the judgment because the Court had allegedly been incorrect in denying leave to amend. Johnson also wished to litigate issues relating

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to his mental health. Specifically, Johnson argued for an extension of the *Atkins* decision to offenders suffering from other psychological conditions including schizophrenia. The Court denied the motion for a new trial and a subsequent motion for reconsideration. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry Nos. 49, 51). The Fifth Circuit affirmed on August 24, 2018. *Johnson v. Davis*, 746 F. App'x 375 (5th Cir. 2018). In total, McCann actively litigated issues relating to Johnson's initial habeas petition for over eight years.

B. Appointment of New Counsel

The changes brought about by the DSM-5 and *Martinez* came together after December 6, 2018, when the State of Texas set Johnson's execution for May 2, 2019. As the execution neared, Johnson wrote to the Court and expressed concerns about McCann's representation. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 65). To preserve Johnson's rights, the Court appointed Jeremy Schepers of the Office of the Federal Defender, Northern District of Texas as co-counsel with the specific duty to "explore whether Johnson can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez*, whether those claims merit relief, and whether a viable vehicle exists for raising those claims in federal court." (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 70 at 3).⁷

7. In doing so, the Court followed the Fifth Circuit's suggestion in similar cases that the appointment of supplemental counsel would allow for "determining whether [an inmate] has additional habeas claims that ought to have been brought" while

*Appendix C***C. Second State Habeas Application**

As the execution date approached, both sets of attorneys pursued different litigation strategies. McCann secured the services of a mental-health expert who evaluated Johnson under the DSM-5 standards. With the DSM-5's changes, Dr. Greg Hupp departed from prior opinions and diagnosed Johnson with intellectual disability. Specifically, Dr. Hupp found that Johnson had a Full Scale IQ score of 70 and had significant deficits in adaptive functioning during his formative years. McCann also acquired affidavits from family members and school records to verify Johnson's adaptive deficits.

Unlike federal law, Texas state practice does not impose time limits on litigating new constitutional claims. *See* Tex. Code Crim. Pro. art. § 11.071 § 5(a). McCann filed a successive state habeas application raising an *Atkins* claim on April 11, 2019. *Ex parte Johnson*, WR-73,600-02 (Docket Entry No. 11, Exhibit 2).⁸ McCann requested that the Texas courts stay his execution to allow litigation of his *Atkins* claim. The Texas Court of Criminal Appeals denied leave to proceed on his second habeas application. *Ex parte Johnson*, NO. WR-73,600-02, 2019 WL 1915204 (Tex. Crim. App. 2019).

maintaining “the rich resource of the counsel who has been through the state habeas process and who has prosecuted the federal habeas action.” *Speer*, 781 F.3d at 786; *see also Mendoza*, 783 F.3d at 203 (remanding for the appointment of supplemental counsel).

8. Attorney Mandy Miller assisted McCann in filing Johnson's second state habeas application.

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Despite this Court's specific charge to focus on finding unraised *Strickland* claims possibly made available for federal review under *Martinez*, Johnson's current attorneys did not identify any *Strickland* issue needing development. Instead, Johnson's attorneys moved to stay the execution date based on McCann's appointment. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry Nos. 76, 77).⁹ With four days remaining, this Court stayed Johnson's execution date under 28 U.S.C. § 2251(a) (3) which allows for a stay of execution for ninety days after the appointment of counsel. (Docket Entry No. 84). McCann later voluntarily withdrew from the case, removing the earlier concerns about the relationship between his attorneys. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 89).

D. Third State Habeas Application

The State of Texas set a new execution date of August 15, 2019. On August 6, 2019, Johnson filed a third state habeas application. Among other issues, Johnson argued that, because he is intellectually disabled, his execution would violate the Eighth and Fourteenth Amendments. Johnson supported his third habeas application with a report from Dr. Daniel A. Martell. Dr. Martell examined Johnson on June 13 and 14, 2019. Dr. Martell did not perform any IQ testing, but relied on Dr. Hupp's evaluation which resulted in an IQ score of 70. Dr. Martell did not assess Johnson's adaptive behavior through testing

9. Johnson's current attorneys have not tried to litigate any *Strickland* claim in this Court that should have been, but was not, raised in state court.

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instruments. By interviewing Johnson and reviewing affidavits from family members, Dr. Martell concluded that Johnson met *Atkins*' second prong. Dr. Martell opined that Johnson suffered from deficits before age 18.

On August 13, 2019, the Court of Criminal Appeals found that Johnson's third application failed to meet the requirements of Tex. Code Crim. Pro. art. 11.071, §5 for successive habeas proceedings. *See Ex parte Johnson*, WR-73,600-03, 2019 WL 3812803 (Tex. Crim. App. 2019).¹⁰

E. Johnson's Current Lawsuit

Johnson litigated in federal court concurrent to his third state habeas application. On June 24, 2019, Johnson filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b). (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 95). Johnson's 2019 Rule 60(b) motion relied on *Martinez* to argue that McCann's appointment in state and federal court provided an extraordinary circumstance requiring the reopening of the judgment. Johnson also moved to stay his execution on that basis. (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 96).

On August 12, 2019, the Court denied Johnson's 2019 Rule 60(b) motion and denied his motion to stay

10. Johnson also moved for the Court of Criminal Appeals to strike as unauthorized the earlier successive habeas application filed by McCann. *See Ex parte Johnson*, WR-73,600-02, 2019 WL 3812803 (Tex. Crim. App. 2019). The Court of Criminal Appeals denied that motion.

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his execution. The Court noted that “[a]s a general premise, Johnson’s Rule 60(b) motion is correct: McCann’s representation created a ‘potential conflict of interest.’” (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 100 at 15). That conflict, however, was limited to the “narrow” and “highly circumscribed” nature of *Martinez. Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2065–66 (2017). “Johnson’s Rule 60(b) motion . . . [did] not describe what ineffective-assistance-of-trial counsel claims conflict-free habeas counsel would have raised..” (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 95 at 14). Johnson had hinted at one *Strickland* issue that merited investigation but “ha[d] not provided any basis to decide whether McCann’s failure to advance that claim was error under *Martinez*: he does not show the *Strickland* claim is substantial and that McCann was ineffective for not advancing it.” (*Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 100 at 17).

The Fifth Circuit affirmed and agreed that any allegations of inept lawyering by McCann were insufficient to provide for Rule 60(b) relief. The Fifth Circuit affirmed “because Johnson failed to brief any waived claims sufficient to allow the district court to determine whether any of them had some merit.” *In re Johnson*, 935 F.3d 284, 291 (5th Cir. 2019).

At the same time, Johnson separately moved for the Fifth Circuit to grant him leave to file a successive federal habeas petition. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes restrictions on a prisoner’s ability to file a second or successive habeas

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petition. *See* 28 U.S.C. § 2244. Among other limitations, an inmate must first receive permission from a circuit court before a district court may consider successive habeas claims. A circuit court may not authorize a filing unless the inmate makes a *prima facie* demonstration that he can comply with the AEDPA's requirements:

(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

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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.

28 U.S.C. § 2244(b)(2)(B).

Johnson’s pleadings in the Fifth Circuit relied on Section 2244(b)(2)(A) which required three showings: (1) the claim was not presented in a prior petition; (2) the inmate relied on a new rule of constitutional law that the Supreme Court had made retroactive; and (3) he made a prima facie showing that his claim had merit. Respondent conceded that Johnson had not presented his *Atkins* claim in a previous petition. *See In re Johnson*, 935 F.3d 284, 292 (5th Cir. 2019). Relying on *In re Cathey*, 857 F.3d 221 (2017), the Fifth Circuit found that the DSM-5’s “significant change . . . in the medical methodology for evaluating the relevant disabilities and . . . courts’ recognition of those changes” made Johnson’s *Atkins* claim previously unavailable to him. *Johnson*, 935 F.3d at 292–93. Primarily based on Dr. Martell’s report, the Fifth Circuit found that Johnson made a prima facie showing that his claim has merit. *Johnson*, 935 F.3d at 294. The Fifth Circuit authorized Johnson’s petition to proceed and stayed Johnson’s execution.

On August 15, 2019, Johnson filed his successive habeas petition in this Court. (Docket Entry No. 1). Johnson amended his successive petition on November 12, 2019, (Docket Entry No. 8), and moved for an evidentiary

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hearing, (Docket Entry No. 9). Respondent has moved to dismiss the successive petition. (Docket Entry No. 13).

THIS COURT’S ROLE

The Fifth Circuit tentatively authorized Johnson to proceed with a successive federal petition, but that decision does not bind this Court. *See In re Swearingen*, 556 F.3d 344, 349 (5th Cir. 2009) (“We reiterate that this grant is tentative in that the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits, if the court finds that the movant has not satisfied the § 2244(b)(2) requirements for the filing of such a motion.”); *see also Jordan v. Secretary, Dept. of Corrections*, 485 F.3d 1351, 1358 (11th Cir. 2007) (stating that it makes “no sense for the district court to treat [that] *prima facie* decision as something more than it is or to mine [the circuit court’s] order for factual ore to be assayed. The district court is to decide the § 2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*.”); *Brown v. Lensing*, 171 F.3d 1031, 1032 (5th Cir. 1999) (“[T]he trial court must make its own determination that the statutory prerequisites are satisfied.”). This Court must determine if the pending petition conclusively meets AEDPA’s second or successive motion requirements.

The burden of showing statutory compliance rests on the petitioner. *See Moore v. Dretke*, 369 F.3d 844, 845 n.1 (5th Cir. 2004) (“The applicant bears the burden of demonstrating that the petition does in fact comply with the statute, and the district court shall dismiss the petition unless that showing is made.”); 28 U.S.C. § 2244(b)(4)

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(“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.*”) (emphasis added). If a petitioner fails to meet his burden, this Court is “required to dismiss” the petition. *Tyler*, 533 U.S. at 667.

In addition to the successive petition standards, an inmate must also comply with AEDPA’s other requirements. *See In re Johnson*, 325 F. App’x 337, 340 (5th Cir. 2009) (finding that “a successive federal petition based on mental retardation claims is subject to § 2244(d)’s one-year statute of limitations”). In particular, AEDPA established a one-year limitations period running 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

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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.

28 U.S.C. § 2244(d)(1). Johnson argues that the limitations period began to run when the factual predicate of his *Atkins* claim could have been discovered through the exercise of due diligence, which in this case was the May 18, 2013, publication of the DSM-5. *See* 28 U.S.C. § 2244(d)(1)(D).

ANALYSIS

Before his successive action will continue, Johnson must comply with AEDPA's statutory requirements for successive habeas proceedings by showing that (1) he did not raise his claim in a prior petition; (2) he "relies on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(B); and (3) he filed in a timely manner. Respondent concedes that Johnson's *Atkins* claim was not presented in a prior petition. (Docket Entry No. 13 at 30). Respondent moves to dismiss this case on two grounds. First, Respondent argues that this Court should dismiss the petition as successive because (1) the Fifth Circuit incorrectly found that Johnson's *Atkins* claim was not available until the DSM-5 was published; (2) McCann was not ineffective in failing to

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raise an *Atkins* claim; and (3) the state court dismissals of Johnson's *Atkins* claims require deference under the relitigation bar of 28 U.S.C. § 2254(d). Second, Respondent argues that Johnson's successive petition does not comply with AEDPA's one-year limitations period. *See* 28 U.S.C. § 2244(d).

The Court will first discuss whether Johnson has passed AEDPA's bar on successive habeas petitions before turning to the question of whether he has filed in a timely manner. As the Court will discuss below, McCann's representation is the lynchpin to the remaining issues before Johnson can proceed with his successive petition.

I. Successive Petition Requirements

Johnson claims that he has met the requirements of Section 2244(b)(2)(A) because *Atkins* is a new, retroactive rule of constitutional law that was previously unavailable. Courts have agreed that "*Atkins* created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court." *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014); *see also In re Wood*, 648 F. App'x 388, 391 (5th Cir. 2016). To proceed in this successive litigation, Johnson must show that *Atkins*' new rule was unavailable to him.

A. Publication of the DSM-5

The Supreme Court decided *Atkins* well before the trial in this case. Johnson, nevertheless, argues that *Atkins* was unavailable because the DSM-5 fundamentally

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changed the framework for intellectual disability. The Fifth Circuit tentatively approved successive proceedings because it had previously decided in *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), “that it is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*.” *In re Johnson*, 935 F.3d 284, 293–94 (5th Cir. 2019). Respondent disputes the reasoning behind the Fifth Circuit’s reliance on *Cathey* to justify the filing of successive proceedings. Respondent asserts “that *Cathey* was effectively overruled by the Supreme Court in *Shoop v. Hill*, 139 S. Ct. 504, 507–08 (Jan. 7, 2019) (per curiam).” (Docket Entry No. 13 at 31). The Court does not need to discuss this argument because the Fifth Circuit conclusively held that “*Shoop* . . . did not overrule *Cathey* . . .” *Johnson*, 935 F.3d at 293. This Court lacks authority to overrule the Fifth Circuit on that legal determination. The Court will consider Johnson’s *Atkins* claim to be previously unavailable until the publication of the DSM-5 in May 2013.

B. McCann’s Representation and Availability

Respondent argues that, even if counting the publication of the DSM-5 as the starting point for availability, Johnson had opportunities to litigate that claim well before he filed his successive petition. This Court had not yet issued a final judgment when the DSM-5 was published on May 18, 2013. The Court denied summary judgment on August 19, 2013, on all but one claim. (Docket Entry No. 19). The Court ordered additional briefing and denied Johnson’s petition on June 25, 2014. (Docket Entry

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No. 31). Over a year transpired between the publication of the DSM-5 and the issuance of judgment in this case. According to Respondent, Johnson should have sought leave to amend his federal petition with an *Atkins* claim during the first round of habeas proceedings.

When “a new constitutional rule . . . was announced while a petition was pending,” the Fifth Circuit asks whether it was “feasible to amend [the inmate’s] pending petition to include the new claim.” *In re Wood*, 648 F. App’x 388, 391 (5th Cir. 2016) (quoting *In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015)).¹¹ In other words, the Fifth Circuit’s “feasibility” requirement asks whether the petitioner should have sought “amendment of his federal petition, stay of federal proceedings, and the pursuit of his *Atkins* claim in state court.” *Wood*, 648 F. App’x at 392. In doing so, the Fifth Circuit has “essentially adopted a rebuttable presumption that a new rule of constitutional law was previously available if published by the time a district court ruled on a petitioner’s initial habeas petition.” *Cathey*, 857 F.3d at 229.

Johnson makes three arguments why it was not feasible to amend his petition. First, Johnson argues that his attorney was not put on notice of the DSM-5 until it was first mentioned in a court opinion. (Docket Entry No.

11. Before adopting the feasibility standard, the Fifth Circuit questioned whether there “may be room for debate as to whether, while a petitioner is this far along in his initial petition and waiting a decision, he should be required to add a freshly minted claim to it” *Leal Garcia v. Quarterman*, 573 F.3d 214, 223 n.47 (5th Cir. 2009).

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8 at 14–15). Pointing to the Fifth Circuit’s first mention of the DSM-5 standards on August 2, 2013, in *Hernandez v. Stephens*, 537 F. App’x 531 (5th Cir. 2013), Johnson argues that, “[i]t is not reasonable to expect” that Johnson would try to amend his federal petition in the “seventeen days”¹² before the Court issued its first memorandum and order in this case. (Docket Entry No. 8 at 15). Courts, however, have generally gauged the availability of a new claim from the emergence of the new rule, not its citation in legal authority. See *In re Sparks*, 944 F.3d 572, 576 (5th Cir. 2019) (calculating the availability of an *Atkins* claim from the publication of the DSM-5); *In re Soliz*, 938 F.3d 200, 204 (5th Cir. 2019) (same). Johnson does not describe why the new DSM-5 standards were available to the court and parties in *Hernandez*, but not in his own case. Johnson’s first argument regarding feasibility, however, raises the question of what duty an attorney has to keep abreast of such developments, which is conditioned by both the individual facts of the case and the state of legal precedent.

Second, Johnson argues that it was not feasible to raise his *Atkins* claim because of when the DSM-5 publication happened in relation to the litigation in his own case. The DSM-5 publication came “fifteen months after the State filed its answer” and “ten months after Mr. Johnson replied.” (Docket Entry No. 8 at 14). At that

12. The Fifth Circuit appears to have misunderstood this argument when it commented that “Johnson also argues that although the DSM-5 was published before his habeas petition was denied for the first time in federal court, the DSM-5 was published only 17 days before the denial, which renders his claim not feasible as an amendment to his first petition.” *Johnson*, 935 F.3d at 293.

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point, the parties were litigating Johnson's request to amend the petition on other grounds. A few months later, the Court would deny amendment at that "late date" for several reasons, including that "[r]estarting the process at [that]stage would needlessly insert delay into the proceedings" and "Johnson would face high procedural obstructions to federal habeas review and relief" such as the "exhaustion and procedural bar doctrines." *Johnson v. Stephens*, 4:11-cv-2466 (Docket Entry No. 19 at 13–15). This Court's order disallowing amendment, issued only months after the DSM-5 was published, could discourage an attorney from attempting to insert an *Atkins* claim into the proceedings.

Importantly, the landscape of Texas *Atkins* jurisprudence at that stage may not have favored allowing an amendment of Johnson's petition based on the DSM-5. Even with the DSM-5's new standards, an attorney would face daunting procedural hurdles in federal court such as the exhaustion doctrine which would encourage a return to state court, but to a state court which would not consider the new psychological standards. Only with maturation of *Atkins* jurisprudence would the link between the constitutional protection and medical standards provide an inmate such as Johnson a viable ground for relief. Given the emphasis of the Texas courts on stale standards and non-clinical concerns, an attorney at that time might have not felt urgency to develop a claim based on progressing standards. Accordingly, while the DSM-5 made an *Atkins* claim based on its standards theoretically available, an attorney at that point in time may not have felt that it was feasible to raise a viable claim based on its revised

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standards. Thus, at its core the feasibility of raising the new *Atkins* claim during the initial habeas action turns on Johnson’s third argument: whether McCann should have raised a claim during the pendency of the initial proceedings.

At this stage, the record does not contain any information about why McCann did not seek to advance an *Atkins* claim after the DSM-5’s publication. The Fifth Circuit has suggested that an *Atkins* claim may be previously unavailable when a petitioner’s “representation in the initial federal habeas proceedings was so deficient as to render the *Atkins* claim functionally unavailable.” *Wood*, 648 F. App’x at 392. Johnson argues that McCann’s representation made his *Atkins* claim “functionally unavailable.” (Docket Entry No. 16 at 8). As the Court will describe with respect to Respondent’s equitable tolling argument, the Court needs more information about McCann’s representation before finding that the *Atkins* claim was previously unavailable

C. Deference to State Court Decisions

Johnson twice unsuccessfully tried to litigate habeas applications based on the DSM-5’s standards. The Texas Court of Criminal Appeals dismissed both pleadings under its abuse-of-the-writ doctrine. In some cases, such a dismissal may amount to an adjudication on the merits. *See Garcia v. Stephens*, 757 F.3d 220, 225 (5th Cir. 2014); *Ladd v. Stephens*, 748 F.3d 637, 641 n.10 (5th Cir. 2014); *Rivera v. Quarterman*, 505 F.3d 349, 359–60 (5th Cir. 2007). Respondent argues that the Court must dismiss the

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case because deference under Section 2254(d) precludes relief on the merits of Johnson’s *Atkins* claim.

Section 2254(d) subjects state court decisions to “heightened deference” but that “deference does not imply abandonment or abdication of judicial review.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The Fifth Circuit held in *In re Cathey* that “the state court findings concerning the *Atkins* claim are wholly irrelevant to our inquiry as to whether [the petitioner] has made a prima facie showing of entitlement to proceed with his federal habeas application, which is an inquiry distinct from the burden that [the petitioner] must bear in proving his claim in the district court.” 857 F.3d at 236 (alteration in original). Other circuits have likewise held that “while [an inmate] must ultimately show that his sentence violated ‘clearly established Federal law, as determined by the Supreme Court of the United States’ to win habeas relief, 28 U.S.C. § 2254(d)(1), that language is absent from § 2244(b)(3)(C), and thus he need not meet that demanding requirement . . . to authorize the district court merely to consider his second or successive habeas petition.” *In re Harrell*, 2016 WL 4708184, at *2 (6th Cir. 2016); *see also* *Quezada v. Smith*, 624 F.3d 514, 521 (2d Cir. 2010). Other circuits do not transpose the relitigation bar into the review of when a successive petition should be filed because Section 2254 is limited to when a court “may *issue* a writ of habeas corpus.” *Quezada*, 624 F.3d at 521 (citing 28 U.S.C. § 2254(d)(1)). While the relitigation bar may later define this Court’s review of Johnson’s *Atkins* claim, it is not a consideration at this stage of the proceedings.

*Appendix C***D. Conclusion of Successive Petition Review**

Johnson has provided sufficient evidence warranting successive proceedings. While trial testimony explained that Johnson was not intellectually disabled, his expert relied on standard superceded by the DSM-5. Based on Dr. Hupp's testing, two experts have concluded that Johnson's score of 70 on the WAIS-IV qualify him for a diagnosis of intellectual disability. The experts have also concluded that Johnson exhibits deficits in all three domains of adaptive functioning. Finally, the experts opine that the onset of Johnson's disability was during the developmental period. Johnson's expert at trial has also withdrawn his opinion that Johnson is not intellectually disabled.

Respondent identifies various concerns about the veracity of the experts' conclusions. Future proceedings may flesh out whether Johnson is indeed entitled to *Atkins* relief. However, the Court finds that the evidence supporting Johnson's successive petition is sufficient to survive Respondent's motion to dismiss on that ground. The Court, however, requires more information about McCann's representation before deciding the question of whether his *Atkins* claim was previously unavailable.

II. Timeliness

Under some circumstances, AEDPA requires an inmate to raise his claim within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The Fifth

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Circuit recognized that “[t]he date that factual predicate became available was on May 18, 2013, with the publication of the DSM-5.” *Johnson*, 935 F.3d at 296. Johnson filed his *Atkins* claim many years later. The Court can only reach the merits of Johnson’s *Atkins* claim if he can show equitable tolling forgives a strict application of the AEDPA limitations period.

“Equitable tolling is permissible only in ‘rare and exceptional circumstances.’” *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (quoting *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). “To obtain the benefit of equitable tolling, [an inmate] must establish that (1) he pursued habeas relief with ‘reasonable diligence’, and (2) some ‘extraordinary circumstances’ stood in his way and ‘prevented’ timely filing.” *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (quoting *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012)); see also *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Both criteria must be satisfied, and a petitioner seeking application of the doctrine bears the burden of showing that it should apply to him. See *Lawrence*, 549 U.S. at 336.

“[P]rofessional misconduct” by an attorney may constitute an extraordinary circumstance warranting equitable tolling if the misconduct is not a “garden variety claim of excusable neglect,” but is “egregious behavior” equivalent to abandonment. See *Holland*, 560 U.S. at 649–53; see also *Maples v. Thomas*, 565 U.S. 266, 283 (2012). The parties, however, disagree sharply about McCann’s role in the failure to raise an *Atkins* claim in a timely

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manner. Johnson argues that McCann’s “ineffectiveness and flagrant misconduct” warrants equitable tolling. (Docket Entry No. 8 at 32).¹³ Throughout his pleadings, Johnson repeatedly and vigorously describes McCann’s representation as being conflicted because of *Martinez*. *Martinez* “did not create a new right to conflict-free counsel on collateral review” but only provided “remedial relief to procedural bars standing in the way of presenting defaulted claims in federal courts.” *Beatty v. Davis*, 755 F. App’x 343, 349 (5th Cir. 2018); *see also Johnson v. Warden*, 738 F. App’x 1003, 1005–06 (11th Cir. 2018) (“We have consistently rejected the argument, however, that *Martinez* provides a basis for equitable tolling of the statute of limitations. We have also rejected the argument that we should broaden the equitable reasoning behind *Martinez* because it would ignore the Supreme Court’s statement that *Martinez* created only a narrow exception to the procedural default doctrine.” (citations omitted)). The Fifth Circuit has defined the use of the term “conflict” in the *Martinez* context: “conflicted only in the sense that every lawyer charged to examine the performance of counsel is conflicted in that task when the performance is his own.” *Speer v. Stephens*, 781 F.3d 784, 785 (5th Cir. 2015).

13. Johnson also argues that his intellectual disability itself warrants equitable tolling. (Docket Entry No. 8 at 32). The law Johnson cites, however, applies to *pro se* inmates who suffer periods of mental incompetency. *See Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). When an attorney represents an intellectually deficient inmate the concern is ineffective assistance, not clinical diagnoses of impairment.

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Possibly recognizing that the law has not read *Martinez* as creating a general rule of conflict, Johnson argues that “McCann acted to protect his own best interest by shielding himself from meaningful inquiry into his ineffectiveness as Mr. Johnson’s state habeas counsel” (Docket Entry No. 9 at 7). At its core, Johnson argues that McCann “failed to communicate with Mr. Johnson, failed to properly investigate the case, and failed to maintain a proper case file.” (Docket Entry No. 9 at 7). Apparently, Johnson sees these factors as tainting McCann’s relationship in a way that raises his failure to litigate an *Atkins* claim above the level of mere neglect.

Respondent, in turn, emphasizes that “Johnson had over a year to seek to amend his federal habeas petition. Yet Johnson did not seek to amend his petition at that time.” (Docket Entry No. 13 at 21). Respondent encourages the Court not to look at what McCann did or should have done. In that context, Respondent argues that McCann was merely neglectful and ““mere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified.”” (Docket Entry No. 13 at 23) (quoting *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002)).

“Tolling based on counsel’s failure to satisfy AEDPA’s statute of limitations is available only for “serious instances of attorney misconduct.”” *Christeson v. Roper*, 574 U.S. 373, 378 (2015) (quoting *Holland*, 560 U.S. at 651–52). The parties present different interpretations of the choices McCann made, the things that he did not do, and his general level of representation. On one hand, it is clear that McCann did not pursue an *Atkins* claim for

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years after the publication of the DSM-5. On the other hand, nothing in the record provides information on why McCann did what he did. McCann actively litigated various other challenges and raised unique arguments. McCann litigated aggressively in federal court, including seeking novel avenues of relief even after his initial federal petition had run its course. McCann eventually filed a successive habeas application based on *Atkins*, but nothing in the record explains why he only did so at the last minute.¹⁴ Placed within the context of what McCann otherwise did to represent Johnson, questions remain about why he did not diligently pursue an *Atkins* claim.

As Johnson properly remarks, questions surrounding “Mr. McCann’s performance[] and the breakdown in

14. Johnson argues that McCann provided deficient representation in filing the second state habeas writ because “filing a state successor application triggers various procedural hurdles for any subsequent filings in that forum.” (Docket Entry No. 8 at 35). Johnson, however, does not provide any legal support for that statement. While questions of strategy may dictate when an attorney files successive state proceedings, Texas law does not contain any explicit limitation on the number or timing of successive state habeas applications. Tex. Code Crim. Pro. 11.071 § 5(a)(1) does prohibit an inmate from raising issues that could have been presented “in a previously considered application.” But the core of the habeas application filed by Johnson’s current attorneys—the report from Dr. Martell—relied heavily on and does not depart significant from the core of the habeas application filed by McCann—the report from Dr. Hupp. Johnson must show that McCann’s representation was objectively unreasonable, independent of questions of strategy in which reasonable attorneys may differ.

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the attorney-client relationship cannot be adequately resolved on the current record and will require credibility determinations by the Court.” (Docket Entry No. 9 at 2). The Court will hold an evidentiary hearing on the question of whether McCann’s representation rendered Johnson’s *Atkins* claim previously unavailable and whether it entitles Johnson to equitable tolling.

Johnson, however, asks for an evidentiary hearing that extends to consideration of the merits. Johnson argues: “The § 2244, intellectual disability, and equitable tolling issues involve inextricably interwoven questions of fact. A single hearing is the most efficient means of resolving them.” (Docket Entry No. 9 at 2). AEDPA’s successive-petition provisions are jurisdictional. *See Ramirez v. Davis*, 780 F. App’x 110, 114 (5th Cir. 2019). This Court has no authorization to address the merits until deciding whether Johnson has complied with Section 2244’s requirements. The evidentiary hearing will not address the substance of Johnson’s *Atkins* claim.

Johnson has not yet described what evidence he wishes to present or what witnesses he would like to call in an evidentiary hearing. While the parties will have some latitude, the Court anticipates that McCann’s testimony will be the centerpiece of that inquiry and the need for additional witnesses or evidence is limited.

CONCLUSION

For the reasons discussed above, the Court **DENIES** Respondent’s motion to dismiss. (Docket Entry No. 13).

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The Court **GRANTS** Johnson's motion for an evidentiary hearing **IN PART**. (Docket Entry No. 9). The parties will confer and discuss the scope and timing of an evidentiary hearing. The parties will provide a status report within thirty (30) days from the entry of this Order and describe what witnesses they wish to call and what evidence that they will present. The parties will also estimate the time necessary to conduct the hearing. The Court will schedule an evidentiary hearing after receiving that report.

The Clerk will provide copies of this Order to the parties.

SIGNED on July 30, 2020 at Houston, Texas.

/s/ Alfred H. Bennett
ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

**APPENDIX D — TRANSCRIPT OF EVIDENTIARY
HEARING IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
TEXAS, HOUSTON DIVISION, MARCH 31, 2022**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

4:19-CV-03047

DEXTER DARNELL JOHNSON

VS.

BOBBY LUMPKIN-DIRECTOR
TDCJ-CID

MARCH 31, 2022

**TRANSCRIPT OF EVIDENTIARY HEARING
PROCEEDINGS HEARD BEFORE THE
HONORABLE ALFRED H. BENNETT UNITED
STATES DISTRICT JUDGE**

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[4] **PROCEEDINGS**

THE COURT: Good morning. Thank you. Please have a seat.

Cause No. 4:19-cv-3047, Dexter Darnell Johnson versus Bobby Lumpkin.

Counsel, your appearances for the record.

MR. KAWI: Michael Kawi on behalf of Dexter Johnson. Good morning, Your Honor.

MR. SCHEPERS: Jeremy Schepers on behalf of Dexter Johnson.

MS. VINDELL: Gwendolyn Vindell on behalf of the Director.

MS. BRODBECK: Lori Brodbeck on behalf of the Director.

THE COURT: Is Mr. Johnson present?

MR. JOHNSON: Yes, sir.

THE COURT: Let the record reflect that the defendant is present and is represented by legal counsel. Thank you.

Counsel for the petitioner, are you ready to proceed?

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MR. KAWI: We are, Your Honor.

THE COURT: Respondent?

MS. VINDELL: Yes, Your Honor. We just had a couple of housekeeping matters we wanted to address just prior to the testimony if that's all right with the Court.

THE COURT: Proceed.

[5] MS. VINDELL: Okay. First of all, just as a matter of preserving the record, we wanted to note that as consistent with our motion to reconsider in our prior filings, we object to the hearing today.

As noted in those filings, we believe the matters discussed in the hearing today far exceed the scope of the success in this inquiry. And, again, we're making that to preserve the record for appeal.

Secondly at last week's pre-hearing conference, we discussed Mr. Johnson's exhibits, but we did not discuss the director's and so at this point, we would ask to go ahead and move those into admission. Mr. Johnson did not have any objection to them, and we think it will make the cross-examination in the proceedings more efficient and faster if we were able to just go ahead and admit those now.

THE COURT: Do you have a list of them?

MS. VINDELL: I do. Yes. So it's Director's Exhibits 1 through—sorry.

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THE COURT: Could you hand them up to the clerk first, the list?

MS. VINDELL: I have the exhibit binders.

THE COURT: Okay.

MS. VINDELL: I have the two copies per the Court rules. Would you like a copy as well? Okay.

THE COURT: I see Exhibits 1 through 12; is that [6] correct?

MS. VINDELL: Correct.

THE COURT: You're moving for admission for all 12?

MS. VINDELL: So for Exhibits 8 and 10, we are moving them into admission for a limited purpose under 105 and that is just to show communication and the rest we move full admission.

THE COURT: Any objection from the petitioner?

MR. KAWI: No, Your Honor.

THE COURT: Respondent's Exhibits 1 through 7 are admitted without objection as well as Exhibits 9 and 12 and Exhibits 8 and 11—is that correct—were moved?

MS. VINDELL: 10, Your Honor.

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THE COURT: I'm sorry. 10. So Exhibits 1 through 7, 9 and 11 and 12 were admitted without objection, and Exhibits 8 and 10 are admitted for the limited purpose stated by the respondent.

Anything else?

MS. VINDELL: The final thing, Your Honor, is the deposition designation objections we didn't take up last week.

The Director would just ask, we think, to kind of get the proceedings moving that we do that after Mr. McCann testifies. That way, you know, a witness can be released; and also we think that it will help Your Honor in making some of the relevancy determinations pursuant to our objections after hearing Mr. McCann testify.

[7] THE COURT: Very well.

MS. VINDELL: Nothing further from the Director.

THE COURT: Very well.

Petitioner, you may proceed.

MR. KAWI: Thank you, Your Honor.

Just a couple of preliminary matters from us, as well, before I call Mr. McCann as a witness and we get started.

First of all, I agree with taking up the deposition designations after the fact. My plan was simply to ask that

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they be moved into evidence pursuant to prior agreement that the depositions be taken by designation after Mr. McCann's testimony, but understanding that they were currently subject to objections.

So whatever Your Honor wants to do with that is fine with us as well.

Even though there's only one witness, I'm going to invoke the rule. Mr. McCann isn't in here at present and the reason that I am asking for that is obviously not to prevent other witnesses from seeing his testimony, but just if there are—to highlight that if there are evidentiary discussions or any discussions that would involve strategy on our part, we would just want those discussions to take place outside of the witness' presence, but he's the only witness. So there's no other witness that can be contaminated by his presence or lack of presence.

[8] And the last thing, before I call Mr. McCann, I felt that this was probably better to address prior to him coming in because it probably would come up pretty quickly.

Under Federal Rule of Evidence 611, which governs the mode and order of examining witnesses, leading questions are permitted when the witness is a witness who is hostile in fact, meaning a biased witness or a witness that is identified with an adverse party.

The petitioner's intention is to proceed under that provision of the Rule. We are calling Mr. McCann, so technically it is a direct examination—

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THE COURT: Until he demonstrates he's hostile, you'll ask open-ended questions. Once he's demonstrated that he's hostile, then you can make that request.

MR. KAWI: Yes, Your Honor. Understood. The only point I would make now, just because it is evidentiary or strategic so I wouldn't want to have him come in and sit down and a few questions later ask that he step out, is that our position is that a demonstration of hostility would mean adversity to our claims.

And what I mean by that is this is a witness—this is why I felt it was better as a preliminary matter in that hostility as a legal matter is already demonstrated. This is a witness who when he withdrew from the case stated in his motion to withdraw from the case to this Court that the reason [9] he had to do that was because he had been placed in an adverse position to counsel and to his own client. So he—

THE COURT: That was a very distinct legal issue on which he made that statement. Again you're calling this witness; and until such time as he demonstrates hostility to your questions and to your position, you're in the courtroom, proceed in an open Q and A. As soon as he demonstrates that he needs to be treated as a hostile witness, you can make that request and I will rule.

What's next, Counsel?

MR. KAWI: Mr. McCann is next, Your Honor.

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THE COURT: Very well.

MR. KAWI: Petitioner calls Patrick McCann.

THE COURT: Mr. McCann to the stand, please. Are you going to retrieve him?

MR. KAWI: I will. Would Your Honor like us to question from the podium or—

THE COURT: You may do it from the podium or from your seat, however you would like.

MR. KAWI: Okay.

THE COURT: Mr. McCann, if you'll come forward, stand next to the witness stand. Stand and face me. Raise your right hand.

(The oath was administered.)

MR. KAWI: May I adjust this a bit?

[10] THE COURT: Yes, absolutely. Counsel, as you well know, we have a court reporter who is taking down the testimony. He cannot take down two people talking at once. As a result, please allow the lawyers to finish their questions before you begin your answer. I will make sure they extend to you that same courtesy of allowing you to finish your answer before they begin the next question. Is that understood?

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THE WITNESS: Yes, Your Honor.

THE COURT: It's generally my experience that the best aim point for that mic is your chin. That way it picks up your response.

Counsel, you may proceed.

PATRICK MCCANN,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAWI:

Q. Good morning, Mr. McCann.

A. Good morning.

Q. Could you just say your full name for the record?

A. Of course. Patrick McCann, M-c-C-a-n-n, as in November.

Q. What do you do for a living?

A. I'm an attorney in private practice in Houston and Fort Bend.

Q. What's your primary area of practice as an attorney?

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A. Criminal.

[11] Q. Okay. How long have you been a practicing criminal attorney?

A. May of '95.

Q. Okay. Did you ever in the course of your practice as an attorney represent an individual named Dexter Johnson?

A. I did.

Q. At what point did you begin representing Dexter Johnson?

A. I was appointed by the 208th State District Court to represent him on state habeas, I believe, back in—after his conviction in late 2007. The paperwork may be dated 2008.

Q. And from that point, how long did you represent Dexter Johnson?

A. Up until mid-2019.

Q. From that first date that you just mentioned to this 2019 date, was that representation continuous?

A. Yes.

Q. For what reason did you withdraw from the—did you withdraw from the case?

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A. Without meaning to be argumentative, your office's appointment had made my continued representation, I believed, not in my client's best interest.

Q. Would you say that when you withdrew from the case it was because you had been placed in an adverse position to us as co-counsel?

MS. VINDELL: Objection. Leading.

[12] THE COURT: Overruled.

A. I would say that is—that is fair, if incomplete, yes.

BY MR. KAWI:

Q. "Fair and"...

A. If complete, that is a fair summation, yes.

Q. Okay. What was your recollection of your co-counsel's, I'll say—for clarity of the record, I'll say your co-counsel's arguments at the time that caused you to withdraw?

A. It was less your arguments than the fact that answering accusations of ineffective assistance and a client with too many cooks for one soup bowl made practical representation an impossibility.

Q. Let's stick to the legal terminology. You mentioned ineffective assistance?

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A. Uh-huh.

Q. Is that a “yes”?

A. I’m sorry. Yes.

Q. Just to make sure it’s clear what you’re saying, I think I understand what you were saying, but is it your understanding that our arguments prior to the—just prior to you withdrawing involved you providing ineffective assistance of counsel to Mr. Johnson?

A. Yes.

Q. Okay. Did you agree with our assessment?

A. No.

[13] Q. Is it your understanding that that remains the subject of these proceedings, including this hearing?

A. Well, it’s a subject. I mean, the court order also directs this Court to make a determination of whether bringing the finding of intellectual disability was timely on my part which, in effect, is an IAC claim, but also a legal determination for the Court.

Q. Okay. Fair enough.

So you’d agree with part of it is—part of the claims currently or the subject of this hearing is whether or not you provided proper and effective assistance to Mr. Johnson?

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A. Yes.

Q. Okay. And there are other aspects of it, but you understand that today your testimony will concern whether or not you yourself were effective?

A. Yes.

Q. Okay. And you disagree with our positions currently, as you understand them? “Our” meaning your former co-counsel?

A. Yes.

Q. Okay. We have a few subject areas to go through. I’ll try and keep it clear which subject area I’m asking about.

Just as I sort of advised during the deposition, if you don’t understand a question I’m asking, would you agree not to try and answer it or assume what I’m saying, but instead ask for clarification?

[14] A. You were kind enough in the deposition to do that, and I tried to follow that then. I will try and follow it now.

Q. And I know that given the subject areas of today’s hearing there may be certain facts which you’ll want to give explanations for and that’s certainly part of the hearing today.

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But to stay orderly and efficient for Judge Bennett this morning, would you agree to any extent possible answer the questions as they are asked and if more explanation is needed, that that's the party's job to ask follow-up questions and give explanation—and get explanations from you?

A. No, because I believe that some of your questions are going to require more explanation to give an answer to your question properly and let the Court decide. If I go beyond that, I absolutely understand that you may object and ask for the Court to restrict my response.

But in all candor, a lot of your questions in the depo were not “yes” or “no” answers and a lot of your questions today, I expect, will not be “yes” or “no” answers. I will do my best but—

Q. Okay.

A.—I reserve the right to sit there and try and explain.

Q. All right. Well, when you say “reserve the right,” you're a—obviously a witness here today, right?

A. Certainly.

[15] Q. Okay. And you've also been a lawyer for a long time?

A. Absolutely.

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Q. Is that fair to say?

So you understand that witnesses don't decide which questions get asked. Fair to say?

A. That is not inclusive of the fact that witnesses decide how to answer those questions and whether or not their answers are correct and truthful. And I am simply telling you that I will do my best to work with you; but I'm going to explain at some point, so that's the best I can do.

Q. So then just to be perfectly clear, my original question was: If a question is a "yes" or "no" question, you're not agreeing to answer them as "yes" or "no" questions and rely on the lawyers to decide what questions should be asked as follow-up? You're saying that if you disagree that a question should have been "yes" or "no," you expect today based on the deposition and prior filings and your understanding of what we're going to say today and discuss that you will explain your answers even if it was a "yes" or "no" question?

A. Forgive me. That was a bit long. If—I will try and answer it "yes" or "no" if I can. Fair?

Q. I understand that response. Okay.

MR. KAWI: Your Honor, perhaps the Court wishes to hear more before this point; but given the witness' positions on answering questions and also that as a legal matter in fact he [16] has agreed with us that the subject of this hearing today are issues that caused him to withdraw

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from the case and that he specifically disagrees with our positions which are the subject of hearings today, I can continue to ask, of course, if the Court disagrees.

But as a preliminary matter, I think that that's the threshold that 611 requires for me to be able to proceed in, I think, a more efficient manner for the Court with leading questions.

THE COURT: That request is denied at this time. Let me actually hear a question that he pushes back on before I make that decision.

MR. KAWI: Understood.

BY MR. KAWI:

Q. So, Mr. McCann, we're going to start—we both know the subject areas of basically what we're going to be talking about today. So I'm going to start with the area of collecting and maintaining files.

A. Certainly.

Q. So is it important to—when you said you were appointed as state habeas counsel, is it an important part of the duties of state—being state habeas counsel to gather information about a case?

A. Of course. Habeas is about facts outside the record.

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Q. And so regarding file gathering specifically, is it part [17] of your job as state habeas counsel generally to maintain the files in a case?

A. I am—my understanding is that I am to gather, you know, the files that I believe are useful to my investigation and maintain those.

Q. And generally what would those files consist of that could be useful to your representation as state habeas counsel?

A. I mean, generally you're looking at the trial lawyer's file, examining the state's file if they are willing to cooperate and give you a copy. Then if there's not a disagreement about what's their work product, certainly you want to cooperate with appellate counsel; but that's not always possible because of our dual-track system here in Texas wherein under 11.071, the habeas and the appellate attorney proceed more or less on parallel tracks. One gathers the files if one can from the jail if they're not already in the trial lawyer's file and the mitigation files if they're already not in the trial lawyer's file.

Q. You were using the phrase, "the trial lawyer." Are there situations where somebody has multiple attorneys that are assigned to their case?

A. Certainly under statute and practice here in Harris, two lawyers are generally appointed.

Q. And is it possible that others are appointed in support roles such as mitigation specialist?

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[18] A. If they're lawyer's. Mitigation specialists are not required to be lawyers, but yes, certainly.

Q. But even if a mitigation specialist is not a lawyer, they could be—I guess they wouldn't be appointed, but they could be brought into a case by some means. Fair to say?

A. Yes.

Q. It is possible for a mitigation specialist to be a lawyer.

Also fair to say?

A. Yes. I've worked with mitigation specialists who are licensed masters of social work, reporters, parsons and lawyers.

Q. Could those mitigation specialists, whether they are lawyers or not, also be maintaining files, in your experience?

A. They could be, but the mitigation specialist's file should be part of the trial lawyer's file.

Q. Fair enough. Should be doesn't always happen in criminal practice. Is that fair to say?

A. That's more than fair to say, yes.

Q. So would it be a fair assessment given your experience that even though we know what things should

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happen that we're trying to get all the information regardless of what should happen?

A. Yes.

Q. Okay. So if there was more than one trial attorney or more than one team member with a file, as a general matter as [19] state habeas counsel, would those be good things to get, in your opinion?

A. No, not always. It depends on if you're looking at duplicative efforts; in other words, if there's one master file that should have everything such as lead counsel's file, then it is duplicative and honestly not necessarily helpful to get separate copies of the same exact stuff.

Q. You used that word "should" again. How would somebody based on your experience determine whether or not files were the same?

A. I'm sorry. Could you repeat the last word? I couldn't hear you.

Q. "The same." How would you as an attorney determine conclusively whether different files—well, files from different sources are, in fact, the same, or duplicative, as you said?

A. You could ask the counsel "Did you have anything that the other counsel didn't have?"

Q. Are there any other ways?

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A. Sure. Examination. You could have an intern or somebody else go through it.

Q. “Go through it” meaning you’d have to have access to the file to do that. Fair to say?

A. Sure.

Q. In your experience, are files sometimes unavailable to you [20] when you ask for them or can they become unavailable over periods of time?

A. In almost every case that happens for some reason or other.

Q. What could those reasons be?

A. Natural disaster, fires, death of the attorney. In cases where state records are maintained, particularly on this coast, hurricanes, floods, that type of stuff.

Q. Why is it important to get these files? What could— what use could you make out of them as state habeas counsel?

A. Well, it’s a starting point. One looks at the files to determine if there was a thorough investigation of a potential claim by the trial lawyer. One looks at it to see what the decision-making process was, whether or not they considered an issue and made a trial strategy decision to forgo it because of risk. As an example—I don’t want to keep going if you don’t want me to.

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Q. Well, I think you've answered this particular question for now. As I said earlier, follow-up questions will be the responsibility of the attorneys; and if people want more information on that, we'll ask for it.

A. Fair enough.

Q. Thank you for that.

I'll continue with—perhaps I'll ask a question that provokes whatever answer you were about to give.

[21] Could trial files contain raw data that's related to the case?

A. They could. To be candid, the—if the trial lawyer has good investigators and mitigation specialists, their notes from interviews would be in that category in the file and you would be able to get that raw data from them and from the experts.

Q. I think you basically summarized this; but trial files, could they also contain information about what the lawyer's strategic choices were?

A. Yes.

Q. Can those be important to your representation in state habeas proceedings?

A. Certainly, but speaking to them is also important.

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Q. Understood.

Turning to this case, how many trial attorneys did Mr. Johnson have?

A. Two.

Q. Who were they?

A. Forgive me. Jim Leitner and—forgive me. He was the fellow who just represented the shooter of the deputy. Forgive me. I plead lack of caffeine. It is an attorney I've worked with. Oh. Anthony Osso. I'm sorry.

Q. Okay. Can you spell that, please?

A. Yes. It's Anthony Osso. It's O-s-s-o, like "bear" in Spanish.

[22] Q. And to your knowledge, were there any other attorneys on Mr. Johnson's original trial team even if they weren't designated as first-chair or second-chair attorneys?

A. His mitigation specialist was GRACE, which is the Gulf regional assistance for capitals. And I believe their head is a Danalynn Recer and she is an attorney.

Q. She, as far as you know, was on Mr. Johnson's team originally?

A. If you're asking me was she the first one they got, I can't speak to that.

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Q. I'll clarify. During the course of when Mr. Johnson's case was in the trial stage originally—

A. Yes.

Q.—prior to his conviction, to your knowledge, was she on that team?

A. Yes.

Q. All right. Prior to 2019, had you ever—did you ever ask Anthony Osso for a copy of his trial file?

A. No. We had discussed the case, but my questions to him were from the lead counsel's file and my notes from that.

Q. Okay. So to be clear that's a "no"? You never asked Anthony Osso for his file before 2019?

A. I don't believe I did, no. Forgive me. I believe I asked him if he still had his file in one of our sessions in the hallway at 13—1201; but I don't think I asked him to copy it [23] for me or to give it to me and make a copy for himself yet. I just wanted to know that he had a file, so—

Q. First of all, what's 1201?

A. Forgive me. 1201 is 1201 Franklin. That is the criminal courthouse. It's where we encounter each other and meet either in the hallway or over coffee.

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Q. When you're saying you asked him this, this case takes place over a number of years. Do you remember the general time period when that was?

A. It was after Harvey, because I had lost my file then. It probably would have been sometime in '18 when we were back at—you have to understand after Harvey the courthouse was closed for a while. But when we started going back, I believe I ran into him and just made sure that he had a copy still so that I could get one if I needed one.

Q. Prior to 2019, did you ever ask GRACE or Danalynn Recer for a—directly for a copy of their files in Mr. Johnson's case?

A. No. My understanding was that her file had been turned over to Jim Leitner.

Q. Okay. But again I didn't ask for your understanding at this point. Your answer to the fact is you did not ask the mitigation specialist for their file, to review yourself, from them?

A. No.

[24] Q. You just mentioned losing records in Hurricane Harvey.

A. Yes.

Q. We have not talked about that yet today. So to make everything clear—

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A. “Yesterday”? I’m sorry. Did you say, “yesterday”?

Q. I did not.

A. Oh, okay. I misheard you.

Q. I said, “today”—

A. Okay.

Q.—but it doesn’t matter.

What I’m going to ask you is to explain that a little to the Court because we have not discussed it here today. Hurricane Harvey was a massive storm here locally in the Houston area. I think we’ll agree on that, right?

A. Yes.

Q. Okay. Did you have a storage facility at the time where you stored old files?

A. Yes.

Q. Okay. What happened during Hurricane Harvey with that storage facility where your files were?

A. It got flooded and destroyed pretty much every paper file I had left.

Q. If Dexter Johnson’s file were in that storage shed, would it have also been destroyed?

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A. Yes.

[25] Q. So basically whatever else we disagree on today, from Hurricane Harvey in 2017 from that point forward for some time, you did not have any of Dexter Johnson's trial files. Is that accurate based on what you've said?

A. That's accurate.

Q. Okay. And in 2019 you eventually contacted—did you eventually contact Anthony Osso to get Dexter Johnson's trial file?

A. Yes.

Q. From those two dates that we just discussed from 2017, Hurricane Harvey, to whenever you asked Anthony Osso for a new copy of his trial file, during that period of time, did you have any of Dexter Johnson's trial files—

A. No.

Q.—in your possession?

That was a “No”?

A. Yes. No. Forgive me. Let me clarify, that was “No.”

Q. Okay.

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THE COURT: Counsel, I misunderstood something from this testimony. I thought the witness earlier said that he did not ask Mr. Osso for a file. He just asked whether or not he had it in his possession. So I thought I just heard you say that he asked him for a copy. Am I—did I mishear what you said?

MR. KAWI: You did not mishear, Your Honor. I can [26] clarify. My prior question was that prior to 2019, Mr. McCann had never asked Mr. Osso for a file, to which Mr. McCann agreed with that fact.

What I did not clarify on the record is that in 2019—I'm fine saying this in front of him because I think he's about to agree to it—that he did ask Mr. Osso for a file in—but not until 2019. So I'll clarify that.

THE COURT: Thank you.

BY MR. KAWI:

Q. Obviously, Mr. McCann, you just heard that discussion between me and the judge. Do you agree with what I said that you never asked Mr. Osso for his file prior to 2019, but that in 2019 you did ask Mr. Osso for his file?

A. Generally, yes. I believe I did ask him if he still had his file and would I be able to get it if I needed it. And he had said, “Yes.”

And then I asked him for the file, I believe, as you said, in early—early 2019.

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Q. Okay. Now, Mr.—when you did eventually contact Mr. Osso in 2019 to try and get a copy of the trial file, what did you tell him about how fast you needed it?

A. I mean, as soon as it was convenient for him for us to swap it, I believe. I'm afraid that I don't understand.

Q. Did you tell Mr. Osso that time was of the essence in getting you the file at that time?

[27] A. No. He already knew that.

Q. Okay. So just to clarify, then, it's your testimony today that you did not say to Anthony Osso in 2019 that time was of the essence in you getting Dexter Johnson's file?

A. I certainly didn't use that phrase, but Anthony already knew that there was a potential death date and we had discussed that in the hallway. So there was no need to have that specific warning. He knew that I was attempting to work quickly, if that's what you were asking.

Q. Part of it. Okay.

A. Okay.

Q. So from that last part of your response, would you agree that Anthony Osso, once you officially asked him for the file, moved quickly to get you the file?

A. My memory is that he did, yes.

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Q. Was it—is it your memory that he was responsive to your requests and didn't delay getting you the trial file?

A. Yes.

Q. Why did you think it was necessary to get a copy of Mr. Johnson's trial file at that point when you had not asked for it from Mr. Osso prior to 2019?

A. We had an execution date set.

Q. What date—what was the execution date?

A. Well, originally it was withdrawn and then they redid it for—forgive me. If you had the governor's warrant, I can [28] tell you from that; but my own memory would be probably incorrect.

Q. Okay. We do have the—a copy of the warrant.

A. Okay. I—

Q. Would it refresh your recollection to look at the execution warrant?

A. Yes.

Q. Okay.

MR. KAWI: One moment, Your Honor.

THE COURT: Let me—I'm switching it over to her control if she's the one that's going to use it.

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MR. KAWI: Okay. I'm not sure, Your Honor, if we are connected to the monitors.

MS. VINDELL: Your Honor, we're happy to stipulate on the dates of this. They're public records.

THE COURT: Counsel's fine.

MS. VINDELL: Okay.

THE COURT: He can proceed in the fashion that he so chooses.

All right. Are you having connection issues?

MS. VINDELL: I haven't connected yet, Judge.

THE COURT: Oh, okay.

Did you want to use a hard copy, Counsel?

MR. KAWI: I can use a hard copy, Your Honor.

THE COURT: Okay.

[29] MR. KAWI: So this was not originally part of the exhibits because if we were going to use it, it was going to be just for this exact purpose, refreshing recollection. I haven't been in your court before. So it's not marked in any way because it's not an exhibit.

THE COURT: I believe in regards to your exhibits—let me see here, Counsel. The last exhibit number I have

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for you is Exhibit 17, so we'll call this Exhibit 18 for purposes of this hearing.

And with that being said, you may proceed.

MR. KAWI: Thank you, Your Honor. I'm going to provide opposing counsel a copy.

MS. VINDELL: Thank you.

MR. KAWI: May I approach the witness with a hard copy?

THE COURT: You may, sir.

BY MR. KAWI:

Q. Mr. McCann, I am handing you what has been marked for identification purposes as Petitioner's Exhibit 18. I think the sticker says: "Plaintiff."

If you could, review this document and I'm going to direct you, for efficiency, to the second actual paragraph of the document and I'm also going to direct you further—well, to the last actual paragraph of the document, because my questions will quickly move to that as well.

When your memory is refreshed, if you could, just look up. [30] Is your memory refreshed?

A. Yes.

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Q. I'm going to retrieve the document.

What was Dexter Johnson's execution date in 2019?

A. 2nd of May.

Q. When had that date been set?

A. It was in December. I believe the governor's warrant is signed the 6th, but it was read in open court a week or perhaps two later in Denise Collins' court.

THE COURT: Judge Collins?

THE WITNESS: Yes.

THE COURT: I believe you said, "Denise Collins." I believe the proper reference is "Judge Collins."

THE WITNESS: That is fair, Your Honor.

A. Judge Collins.

BY MR. KAWI:

Q. Would it also be fair to say that the state would have had to file a motion seeking that execution date at some time prior to that?

A. Yes, they had called me, if my memory serves, either the week before or that week that they were going to seek and that they followed through with it and then we had the reading of the warrant.

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Q. When you say, “the week before or that week,” do you mean the week before or the week of December the 6th?

[31] A. The week before it was read—I’m sorry if I was unclear—which would have been, I believe, the week of the 6th.

Q. Okay. So basically around the date that this order is signed is when you would have found out about it?

A. Yes.

Q. The Federal Public Defender’s Office was eventually appointed on this case as well in originally a limited purpose?

A. Yes.

Q. Do you recall that the federal public defender was not appointed until February 5th of 2019?

A. That jibes with my memory. That’s correct.

Q. Okay. I phrased it that way so that perhaps it would be easier because it’s just a date.

Do you agree that it was February 5th that we were appointed?

A. Yes.

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Q. I'm going to move on to a different subject area for now. Are you familiar with the Supreme Court cases of *Martinez* and *Trevino*?

A. Yes.

Q. And if you could summarize them together or if you believe you need to answer separately for each case, what did those cases establish or what did they hold?

A. I would say they are separate. I would say that one [32] establishes the ability to bring a gateway claim of ineffective assistance against a habeas counsel because the prior rulings had established that since there was no right to habeas counsel under the Constitution, there was a right to habeas, but not habeas counsel, ergo you couldn't bring an IAC claim—I'm sorry, for the court reporter that's ineffective assistance claim—against habeas counsel.

And then the second decision established the—perhaps it's not as much procedure, but at least the ability to bring such a claim in death penalty habeas and how to deal with that when it's done.

Q. Okay. Would you agree that after the *Martinez* and *Trevino* cases became law that federal habeas counsel had to evaluate whether state habeas counsel had provided ineffective assistance of counsel? That was one of the things that federal habeas counsel had to do?

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A. I think after both of those, yes, that's fair.

Q. And would you agree that it was possible after those cases, *Martinez* and *Trevino*, to have new claims that were legally available based on that gateway claim that you were mentioning before?

A. This is one of those cases where I—I would ask you are you asking me if it's possible to bring a claim that was, for lack of a better reference, either unexhausted or procedurally defaulted; or are you asking me about a new factual or legal [33] claim? Because there's a separate way to bring those. So I'm just—

Q. Well, for right now I'm just asking in the context of the new rules or law created by the *Martinez* and *Trevino* cases. So I understand that there may be a myriad of ways that new claims, as the most general matter, could become legally available in a general sense.

But when we're just looking at *Martinez* and *Trevino*, all I'm asking for right now is whether or not you would agree that those cases made it possible that new claims would become legally available to those who prior to those cases they weren't available to?

A. They could, yes.

Q. Okay. Do you believe or is it your position that under *Trevino* that clients should have at least one set of objective eyes to judge the work done by you?

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A. That's trickier. By that logic, there should be somebody examining your homework when this is done, whatever the conclusion is, to see if you missed anything and then by extension, someone to examine their homework. So, no, I wouldn't say it requires it. I would say that on certain instances if counsel had brought forward an actual abandoned or uninvestigated issue that that could be a fair interpretation, but as far as a bright-line rule, no.

Q. Would you agree that you cannot ethically go forward on a [34] matter and be in a position where you would be forced to investigate your own potential failure to provide effective assistance?

A. I disagree with your framing of the question. My legal obligation is to continue until all appeals are exhausted. If I perceived a conflict, then I would agree with you that I should withdraw; but until there actually is a conflict or until some other issue comes up, I disagree with your framing of the question.

Q. Okay. So, then, I just want to be very clear here. You—you disagree with the question as I've phrased it?

A. Yes.

Q. Okay. So your testimony today is that you can ethically go forward on a matter where you are in a position where you're forced to investigate your own potential failure to provide effective assistance?

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A. No. That's a clever twisting, but no.

Q. Thank you.

A. The thing that I would agree with is if you presented or I as counsel found something that could potentially be a conflict, then I would agree with you and say that that would be a time to withdraw. But you—you can't withdraw from something because down the road you might find something that would be a conflict. In other words, we do as attorneys every day decide conflict resolution with prior client lists, with [35] conflict checks, with issues and you make determinations based on facts, not—not hypotheticals.

THE COURT: Counsel, you framed, I believe, this area of question in light of *Trevino* and *Martinez* and a couple of your questions have been posed to the witness as "you."

As I understand it, this witness served two roles—state habeas counsel and later federal habeas counsel. I would assume your questions are asking him his role as federal habeas counsel looking back to his role as state habeas counsel. Your question wasn't as clear to that, but that's why I assume that you're doing it. And you might want to clarify that just to be clear.

MR. KAWI: Okay. Thank you, Your Honor. The Court's assumption is correct, but I will clarify it and use clearer terminology moving forward.

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BY MR. KAWI:

Q. So, Mr. McCann, following exactly what Judge Bennett just said, my questions in this section are, as the Court just said, dealing with your role as federal habeas counsel evaluating your prior role as state habeas counsel, just so that's understood.

A. Okay.

Q. We'll back up right to the beginning, then.

Just to confirm that the Judge's assumption is correct, you had two roles in this case as an attorney. Fair to say?

[36] A. I would say that's fair. I appeared as habeas counsel in both state and federal.

Q. Okay. So those are two separate legal roles?

A. Yes.

Q. Okay. Two totally different courts, right?

A. Yes.

Q. Okay. And after *Martinez* and *Trevino*, one of the duties of federal habeas counsel became to evaluate whether state habeas counsel had provided ineffective assistance. Is this a fair summary of what we've discussed?

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A. It could be, but my problem with, again, your framing on this is that while you would put it as a general principle, I might say that if—for instance—

THE COURT: Mr. McCann, hold on.

THE WITNESS: Oh, I'm sorry, sir.

THE COURT: I want to make sure that he has the opportunity to ask very clipped questions and if possible get clipped answers.

So I understand your question perfectly and I would like to get an answer to it. So why don't you try your question again such that the witness perhaps can provide you with a concise answer.

MR. KAWI: Okay.

BY MR. KAWI:

Q. After *Martinez* and *Trevino*, does federal habeas counsel [37] have a duty to evaluate whether state habeas counsel provided ineffective assistance of counsel?

A. I think that the answer to that would be yes.

Q. Okay. Now, I do want to go back. Thank you for the clarity of that answer, but I do want to go back to a statement that you said that you disagreed with and we had moved on because there were a few parts of your answer; but I do still want to go back to it.

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You have referenced a couple of times, you know, what I might—me personally, what I might want to say about a case or a situation and I'll acknowledge to you right now that what I think today, I know it doesn't matter, right, today is your testimony. So I want to focus on what you said and what you think about these things and these decisions that you are making throughout all these subject areas.

And you said to me a couple of minutes ago that you did not agree with the statement I made that an attorney in this situation cannot ethically go forward on a matter and be in a position where they're forced to investigate their own potential failure to provide effective assistance. You said you disagreed with what you called my formulation of that phrase.

A. I believe I did say that, yes.

Q. Of course, Mr. Johnson is not the only person that you have ever represented. We know this, right?

[38] A. Yes.

Q. You've represented a number of people—defendants who are in this posture of having to have at one point both a state habeas counsel and a federal habeas counsel. Fair to say?

A. Yes.

Q. And, in fact, you've at various points been state habeas counsel when the case is moved into the federal habeas proceedings. Is this also fair to say?

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A. That was the practice—

Q. Okay.

A.—and still is in many cases.

Q. You have had to, during the course of your career, file motions to get new attorneys appointed to cases?

A. Yes.

Q. And in those motions, you make statements to the courts, right? That's not a trick question. That's just what a motion is is you have to make statements to a court in order to ask for what you want?

A. Yes.

Q. When you're making statements to the court whether it's in Mr. Johnson's case or in another case, you're making accurate statements, right.

A. You have a duty of candor to the courts, yes.

Q. So you're not—well, yeah, you have a duty of candor to [39] the court.

MR. KAWI: So if I could, I'm going to direct opposing counsel, just your attention while I get into it, to Exhibit—it's already currently Petitioner's Exhibit 11—and the Court as well. And I think I'm going to have to keep proceeding with hard copy at this point, Your Honor, but that's fine with me if that's fine with the Court.

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THE COURT: It is, yes.

MR. KAWI: So can I approach the witness with a binder?

THE COURT: You may, and you don't have to ask to approach this witness again.

MR. KAWI: Thank you, Your Honor.

BY MR. KAWI:

Q. Mr. McCann, I'm handing you—let me come around to the side here and let me stay here if you don't mind for a minute.

I'm handing you what's been marked right now for identification purposes only as Petitioner's Exhibit 11. I'm going to just—what we're looking at here is a document titled Motion for Appointment of Counsel.

Did I read that correctly?

A. Yes.

Q. It's in a case called *Raymond DeLeon Martinez*.

Did I say that correctly?

A. You did.

Q. *Versus Brad Livingston?*

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[40] A. That is correct.

Q. I'm just flipping to the second page of that exhibit for everyone's reference. This signature here, it is—

A. It's electronic, yeah.

Q. It's an electronic signature, but it says "Patrick McCann"?

A. Yes.

Q. Is this the same Patrick McCann—is that you?

A. Yes, it is.

Q. This was a motion you actually filed in Mr. Martinez's case?

A. Yes.

Q. So I want to direct your attention—I'm sorry for the awkwardness of this, but I'm going to direct your attention to Item No. 5 for opposing counsel, the Court and yourself and I'm going to read it aloud and if you could just follow along with me.

A. Of course.

Q. It says: "Counsel thus believes that he cannot ethically go forward on this matter and thus be in a position where he would be forced to investigate his own potential failure to provide effective assistance."

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A. Yes, it does say that.

Q. Did I—did I read that correctly?

A. It says that.

[41] Q. Okay. And you actually—you underlined the word cannot.

Is that fair to say?

A. Yes.

Q. Why did you do that?

A. It's a writing style issue where one tries to draw people's attention to the word that you believe is important.

Q. Why did you believe that that particular word was important in this particular context?

A. Because in that particular case, there could have been a potential conflict without going into client matters that are not directly on point here. The lawyers that I was hoping would take that over had approached me about that. And in that case, they made a good-faith argument that they had a claim that they were probably going to bring and I said, "Okay. That's fine."

I don't remember—

Q. If I could stop you just to make sure we're clarifying as—

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A. Sure.

Q.—we go on.

Was it a claim that you had provided ineffective assistance?

A. I believe it was—they talked about it like it could be. I said, okay. You guys are obviously capable of taking this. I understand your position and you can bring that. I disagree [42] with you, but that's fine. You can bring that. But they had an actual issue, if I recall, that case—that is Mr. Martinez's case?

Q. *Raymond DeLeon Martinez* is the name on the case, yeah.

A. I believe that was the subject of a conversation that they had. I don't know if they ever brought that claim, though.

Q. Okay. Fair enough. Just a couple of questions, then. You do agree that you make this general statement in the motion that you cannot ethically go forward in that manner? I'm not going to read it again.

A. I made a statement—and I'm sorry for being disagreeable—but this is an important point between your office and I is that I believe that if a counsel sees or is made aware of a potential issue that they found at the time possibly meritorious or at least, you know, arguable,

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then that would be a fair thing to do to withdraw and seek other counsel.

I don't think you can make that rule as a blanket statement because if you did that, then nobody could continue forward even if a client wanted them on the case or, again, we get to an endless place where your representation is subject to another challenge and another one and another one.

And I get that that would be disruptive against the death penalty, but that's not the oath that you took when you were appointed to the case, which was you would see this through all appeals until everything was exhausted and it's particularly [43] not the kind of thing where someone is going to abandon a disabled client. That's my answer. Sorry.

Q. Okay. Well, let's just make sure a few things are clear before we just move on from this. First of all, the claim that you're making that you had an actual—you had actually been informed of an actual conflict that other lawyers had brought to your attention. Certainly you will disagree that that description you just gave is not contained in your motion to withdraw to the Court?

A. No, because they had not filed anything at that moment and—but they had approached me with it and I—I talked to them about it and I said, “Okay. I'll agree that, you know, in this case—because I had worked with those lawyers and I trusted those lawyers to go forward

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and do their best to do what they were supposed to do, that they would inform me of this and they wanted to take the case, any case.

Q. Whatever your assessment, then, of the facts, what you stated to the Court was that you couldn't continue on because you couldn't be in a position where you had to potentially investigate your own misconduct? Just potential. You used the word "potential."

A. But based on—based on an actual—I did use the word potential, but it's based on an actual discussion of an issue that they believed they had if you follow the difference.

And I'm not, again, trying to be argumentative. I'm [44] simply saying that I think ethically one can withdraw if one agrees that there's either a conflict or if there's an issue that is a problem. But I don't think that's true in every case. It certainly can't be true in every case, but—

Q. Let's talk about that, then.

A. Okay.

Q. Because I was going to ask a couple of questions about that point that you had made just a second ago.

A. Okay.

Q. Now, certainly you would agree, I would have to agree, that there's not a rule after *Martinez* and *Trevino*

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that every single state habeas counsel has to withdraw from the case when it moves to federal habeas. The courts have never found that that is the rule?

A. I would agree.

Q. Okay. But withdrawing from the case, perhaps you will agree, is not the only remedy for having someone investigate whether or not there was prior ineffective assistance by a state habeas counsel. There are other remedies for that. Would you agree with this?

A. I'm not sure what you mean.

So if you could illustrate, it would be helpful.

Q. Sure. So, for instance, could a state habeas counsel who wants to remain on a case as federal habeas counsel but is worried with this potential *Martinez-Trevino* issue, okay, [45] that's kind of our hypothetical here.

A. Okay.

Q. In that position, could you speak to an actual ethics attorney about your case?

A. Well, you mean an ethics attorney that's actually represented death row inmates and has dealt with disabled inmates, no. I mean, you could speak to other attorneys who have similar experience, but I—with all due respect, if you can find an ethics attorney that has dealt with these

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issues, I would happily call their hotline, but I don't know of any. I know other people who have a similar experience whom I did talk to regarding almost every case that, you know, I had still pending.

Q. Okay.

A. But those are attorneys who handle habeas work. They are attorneys who handle difficult death penalty litigation. I don't think that—even if such an ethics attorney existed, someone who teaches about the MPRE, I would defy your office, with due respect, to find a question that would fit these circumstances from their academic classroom.

Q. Well, certainly the circumstances as you just chose to define them are very, very narrow, but that actually was not what my questions was. I'm actually going to back up and make it a little bit more elementary—

A. Sure.

[46] Q. —and maybe we can back into it a different way.

Would you agree that there are attorneys within our profession who are experts in the rules of ethics for their jurisdictions, whatever they may be?

A. Not really. Not in this area, no. There are attorneys who teach ethics courses. There are attorneys

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who talk about things in an academic setting endlessly. If you can find me an attorney who has dealt with disabled death row inmates in a real context written about that and published on that, I would agree. I know of no such person.

Q. Then I suppose that's your answer, then; and that's your testimony here today and the only thing I can ask, then, is to clarify your position. It sounds like it's your position that you're saying here today that there would not be—it would not be useful to speak to an expert on the rules of ethics generally unless they had such specific experience that they had dealt with cases that are in an incredibly similar posture to exactly the one you're handling, is—

A. No. I'm saying that an ethics professor, if you could find one who would talk to you, would not have the experience or really any cases to sit there and point to that would help with these sets of dilemmas. I salute the effort, but the only people who have done this are other death penalty lawyers. And other death penalty lawyers are the people that I talk to about questions like this and I—I'm not denigrating any person who [47] believes that teaching ethics is not a worthy calling. I'm just asking what relevance someone who has never dealt with these issues has for those of us who do.

THE COURT: Counsel, I believe you're answering a different question. I believe counsel asked you and I wrote it down because I thought it was an important question. He said "ethics counsel." He didn't say "ethics professor."

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THE WITNESS: Well—

THE COURT: So there are lawyers who are non-professors who have written about and who are held out as ethics experts that—be it legal malpractice counsel who examine the duties of other counsel and as you’ve correctly pointed out, there are other counsel who have practiced in the specific area of the—of a particular area of law that could be considered ethics experts within that area of law.

Counsel’s question is simply in regards to contacting counsel who has an expertise in ethics in this particular area of law, would that have been helpful to your determinations in moving forward?

THE WITNESS: May I speak to the Court’s question?

THE COURT: Do you understand my question?

THE WITNESS: I believe I did.

THE COURT: Well, my question can be answered “yes” or “no.”

Would it be helpful to contact such a counsel?

[48] THE WITNESS: Respectfully to the Court, I do not know of people in my line of work—

THE COURT: Okay. Let’s say such person existed.

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THE WITNESS: Yes.

THE COURT: Would it be helpful to contact such a person?

THE WITNESS: Yes. If that person existed, yes.

THE COURT: All right, Counsel.

MR. KAWI: Thank you, Your Honor.

BY MR. KAWI:

Q. Okay. So I think we have the answer to that. There are also—this is separate from ethics counsel who have their own practice.

You are also a member of the Texas Bar Association?

A. Yes.

Q. Right. And I think I'm safe to assume you have been since you became a lawyer or very close in time to when you went to law school. Fair to say?

A. Yes.

Q. Okay. As many bar associations do, the Texas Bar Association has ethics resources. Is this fair to say?

A. It is fair to say.

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Q. And when I say ethics resources, they have—for instance, there are—there's hotlines that you can call when [49] attorneys have ethical questions and they're worried about their own practice. You can call and you can make an inquiry. You can try and get resources. Is that fair to say?

A. It is fair to say.

Q. So attorneys in this situation if they believed that this was an ethical issue of whether they could ethically go forward and be in a position such that we have talked about, they could reach out to those resources at the bar?

A. They could. It would be useless, but they could.

Q. Why useless—

A. If you ever tried to get an answer to a state bar ethics hotline question and—and I urge you to do so—you will be in for a vast sea of disappointment and non-answering. If they get back to you at all, it will be much later and far too past the time.

And, again, the state bar ethics hotline is not set up for this realm. The people that I talk to are other lawyers who do this work and that's who I rely on for ethical advice when I'm trying to figure out a question like this.

And that's all I meant to the Court is that there's a—there's just not a pool of death penalty ethics experts that one can tap and I wish there was.

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Q. Okay. I think we have your answer to that—those series of questions, then.

THE COURT: Just a moment, Counsel. I'm writing down [50] your answer. It's a very important answer. That is actually your position. I'm going to read it back to you to make sure I've understood your testimony.

“There is not a pool of death penalty ethics experts you can tap.” Is that what you said?

THE WITNESS: That's exactly what I said, Your Honor.

THE COURT: Thank you.

You may continue, Counsel.

MR. KAWI: Thank you, Your Honor.

BY MR. KAWI:

Q. So we've had some disagreements and there's some back and forth about that issue, but what you did agree on is that if there were—if it were more than just a potential conflict if you could identify something that got closer to an actual issue in state habeas counsel's work that you agreed it sounded like, you'll confirm now, that that actually would be a problem that could—that would merit at least additional steps if not withdrawal from the case?

A. It could.

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Q. Okay. Do you remember filing a motion to abate and amend your petition in Dexter Johnson's case specifically?

A. Yes.

Q. Okay. In that motion, do you recall attempting—that the point of that motion was to attempt to amend in claims of trial counsel's ineffective assistance?

[51] A. As a gateway to a systemic challenge of how we were doing stuff in state habeas, yes.

Q. Whatever the—whatever your overall strategy was, your way of getting into it was to try and amend in a new claim of trial counsel ineffective assistance?

A. Yes.

Q. And you also included an allegation of the ineffective assistance of direct appeal counsel in failing to raise the claims that you wanted to amend in about trial counsel's ineffective assistance?

A. Yes, that was part of the parallel track challenge.

Q. Okay. In doing this in this motion to abate and amend, do you recall citing in that motion and discussing the cases of *Martinez* and *Trevino*?

A. Yes.

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Q. Okay. And do you agree that you admitted in that motion that you were remiss, quote, unquote, remiss in not filing this claim at prior opportunities?

A. I believe that's in the motion.

Q. When you say you believe, do you need to see it or is that in the motion?

A. I'm not a memory phenomenon. If it's in there, I believe you.

Q. Well, thank you for that; but unfortunately, you believing me on that point isn't going to make the record complete.

[52] So we're just going to—I'm going to—would it refresh your recollection entirely apart from your belief in my statement if I were to show you that motion?

A. Yes.

MR. KAWI: For opposing counsel's reference, this is one of our pre-submitted exhibits, so it's Exhibit 5 and I'm going to approach the witness with that.

BY MR. KAWI:

Q. Mr. McCann, I'm approaching you with what's just been marked for identification purposes at this point as Exhibit 5. This is just a memory refreshing. You can have the opportunity to go through any part of this that you think will refresh your memory.

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I believe if I could direct you for efficiency that it is the fifth page and that's for opposing counsel as well. If we tilt it this way, I might be able to make it even faster for you. Let's make sure I got the page right. I did not. I misspoke earlier.

MR. KAWI: Just for the record, I'm going to direct opposing counsel to Page 8 of that same exhibit.

BY MR. KAWI:

Q. I'm showing you now Page 8 of that same exhibit, but you're certainly welcome to look at any other part of the exhibit that you think would refresh your memory. I think the best thing at this point just for context is just for you to [53] read through Page 8. Just look up without saying anything when you are finished with that.

THE COURT: Counsel, just for your planning purposes, we'll take a break at the bottom of the hour.

MR. KAWI: Thank you for that, Your Honor.

THE COURT: Okay.

THE WITNESS: Forgive me. I don't see the phrase that you mentioned. Am I missing it?

BY MR. KAWI:

Q. Okay. I'm going to direct you to just the last paragraph on that page.

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A. Okay.

Q. Obviously read the whole paragraph, but I'm also going to direct you to the third line of the paragraph—

A. Oh, okay.

Q.—beginning—

A. Yes, that does refresh my recollection. Yes, remiss was the word I used.

Q. Okay. So is your recollection refreshed?

A. Yes.

Q. All right. And so in this motion to abate and amend in Dexter Johnson's case, did you use as—make as part of your argument that you as counsel were remiss in not making these arguments at prior opportunities?

A. I did.

[54] Q. Okay. Thank you.

Would you agree that given everything we've discussed in Mr. Johnson's case, you evaluated yourself whether or not there was a conflict of interest after *Martinez* and *Trevino*?

A. Yes.

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Q. Sitting here today, would you agree that you cannot tell me about any specific time where you explained this law or potential conflict of interest to Dexter Johnson?

A. I'm sorry. I don't understand.

Q. Can you tell me about it—can you tell the Court about a time today where you explained this law or the potential conflict of interest that this law created to Dexter Johnson where you as his attorney explained to him that this potential conflict could exist for some people?

A. I did not, but this is also one of those answers I'd like to expand on, but I'll let you decide whether you want me to or not.

Q. For now it's just that “yes” or “no” question and we have multiple attorneys here if they decide if that point needs follow-up.

Just to be clear, you cannot tell the Court today about a time where you explained this law or this potential conflict of interest directly to Dexter Johnson?

A. I cannot.

Q. You cannot, yes?

[55] A. I'm sorry. I cannot point the Court to that, no.

Q. We're going to move on to a different subject area at this time.

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Are you familiar with a publication called the DSM?

A. Yes.

Q. Okay. And just so the record is exceedingly complete, what—what do those letters stand for? What is that book?

A. Diagnostic and Statistic Manual. They're currently on Version 5. At the time of Dexter's trial and his initial petition, they would have been on Version 4.

Q. How, if at all, is the DSM as I'll refer to it from here on out and then by publication number when appropriate—how important, if at all, is the DSM to defense work generally, not even capital work, just defense work generally?

A. Extremely important.

Q. Why?

A. It's the manual that psychologists and psychiatrists use to examine our clients for evidence of competency and insanity under Chapter 46 of the Code of Criminal Procedure in Texas and in federal courts for the same issues under different statutes.

It is also what they use to determine mitigating evidence such as the presence of mental illness that does not rise to the level of those incapacities.

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It is also the manual that is used to define developmental disorders such as Asperger's, which is no longer considered to [56] be a disorder, but autism and as well as intellectual disability.

Q. Okay. And your answer may largely be the same then given that description, but is the DSM important to capital defense work specifically?

A. Extremely.

Q. Okay. And is it extremely important to capital defense work for those same reasons you were just giving that it defines all of those different disorders which could be mitigating or provide defenses?

A. Yes.

Q. Would you agree that because of its tremendous importance that you have agreed to, that as defense attorneys especially in the capital context, we have to become as familiar with the DSM as we humanly can be?

A. I would consider it as important as being familiar with the Code of Criminal Procedure.

Q. Almost like an extra law book for capital defense attorneys?

A. That's fair.

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Q. And, now, this is actually—just to be clear, though, I think that description is well taken, but it's not actually a law book. It's a medical publication. Fair to say?

A. Yes, it's done by, I believe, the APA, the American Psychological Association.

[57] Q. So it's—the publication is directly related to the profession for psychologists, psychiatrists, doctors, these sorts of professions?

A. Yes.

Q. Even though we're not in the profession that it's directed to primarily, would you agree with the statement that we have to try and become as familiar with this particular manual as those psychologists and psychiatrists and doctors in that profession?

A. As much as possible. The manual also directs and refers to testing instruments that we don't actually administer because that would make us a witness, but yes.

Q. Fair enough. But to whatever extent possible even though we're mere lawyers and not in those professions, we should become as familiar as possible?

A. Absolutely.

Q. Okay. Can the DSM change from publication to publication?

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A. It has. In fact, it changed during the course of publishing the 5th Edition while I was representing Dexter.

Q. We're certainly about to get to all that. We'll get through a little bit of background first as we lead up to it.

Is it generally—before we even get to Mr. Johnson—is it generally important to stay up to date on those changes?

A. Yes.

Q. Why?

[58] A. Like all science hopefully, we're advancing and there have been significant advances in neuroscience and research and those changes, albeit with some filtering and some apparently discussions among the various psychologists and psychiatrists, eventually make their way into the DSM manual.

For instance, homosexuality which was once defined as a disorder I think as late as Edition 3 is no longer considered such. And it also can change the diagnostic criteria for various forms of mental illness and in the recent edition for intellectual disability.

Q. We're going to talk about that in just a second.

Did the DSM change significantly specifically from the 4th publication to the 5th publication?

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A. Oh, yes.

Q. Okay. And obviously there can be any number of changes, but we're not going to obviously go through all of them. For that, we will move to the specifics of this case.

The DSM-5, would you agree that it was published—that publication, that edition, on May 18th, 2013?

A. I agree. I believe there have been a—modifications since then, but yes.

Q. But the first appearance of the DSM-5 in an official sense, you'd agree, was May 18, 2013? We can work off of that date. You agree with it?

A. Yes.

[59] Q. Would you agree or not that the DSM-5 had a tremendous impact on the definition of intellectual disabilities specifically?

A. Yes.

Q. In what way?

A. It, essentially—and if I may give a little bit of background for the Court—the DSM has in the 4 and the 5 defined intellectual disability as a developmental disorder. It listed an intelligence quotient assessing score in at least two standard deviations below the norm, the norm being a hundred. So you're looking at a 70 or so score. The score

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was made less important in the 5 because there's a testing error and there's also a thing called Flynn effect which affects the scoring.

Putting that aside, the 5 puts less emphasis on the 70, more emphasis on adaptive deficits and problems and all of these have to occur in the developmental age.

And in the 5 because of neuroscience, they extended at least in males developmental age until about 24, 25, and it also placed a greater emphasis on clinical judgment by the examining psychologist or psychiatrist who was doing that. So it was significant change in that.

Q. Thank you.

When you say "significant change," the change was so significant that it would eventually lead these changes to be [60] considered, you know, new facts for people's legal claims. I'm jumping ahead a little bit there, but that's how significant it was?

A. It became a source of legal claims for new facts, yes.

Q. Now, to go back to this adaptive deficit question because you said one of the big changes in addition to lowering the importance of IQ scores is it elevated the importance of what you call adaptive deficits?

A. Yes.

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Q. There are—adaptive deficits can mean a number of things. Fair to say?

A. That is fair.

Q. Would you agree that to show adaptive deficits, you could do things like offer school records into the record?

A. That's one category, yes.

Q. Would you agree that school records could show things like poor or failing grades?

A. Yes.

Q. Would you agree that school records could show special education classes being taken?

A. Yes.

Q. And all of this would be part of a showing of adaptive deficits or could potentially be?

A. Yes.

Q. Would you agree that to, in part, prove adaptive deficits, [61] a party could show difficulty or deficits in maintaining employment?

A. Yes.

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Q. Would you agree that to show adaptive deficits, a party could show evidence of difficulty in day-to-day functioning?

A. If you mean cooking, cleaning, transportation, yes.

Q. Yes. Day-to-day functioning?

A. Yes.

Q. So you agree with that?

A. Yes.

Q. Speaking specifically about the trial record in Mr. Johnson's case, apart from this issue of trial file collection, the trial record you were aware existed and you had access to.

A. Yes.

Q. Fair to say? Yeah?

A. I'm sorry. If you couldn't hear me, I'll speak more loudly. Yes.

Q. It wasn't that I couldn't hear. I think on that one we talked a little bit at the same time, and I just want to make sure all the answers are clear on the—on the record.

A. Fair enough. The answer was yes.

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Q. Okay. And would you agree that Dexter Johnson's trial team in the trial record was able to demonstrate difficulties in school to his jury?

[62] A. Yes.

Q. Would you agree that Dexter Johnson's trial team was able to provide evidence of significant employment difficulties to the jury?

A. Yes.

Q. Would you agree that Dexter Johnson's trial team was able to demonstrate evidence of difficulty in day-to-day functioning in the ways that you described to the jury?

A. Yes. Less so perhaps, but yes, some.

Q. But overall, that was in their trial record?

A. I would say there was some evidence of that, yes. There was less probably since he—that wasn't really a focus, but yes.

Q. But overall yes? It was in there?

A. Yes.

Q. All right. And now the appellate record, you'll—would you agree that the early stage pleadings in Mr. Johnson's appellate record dealt with, in part, brain damage, his brain damage?

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A. Oh, his brain damage was recorded and was significant, yes.

Q. And you know this because that was something you worked on in the early stages of his appellate litigation?

A. Yes.

Q. You were personally working on issues of Mr. Johnson's [63] brain damage and the affect it could possibly have legally on his case?

A. Yes.

Q. Okay. I want to talk about the time when the DSM-5 was published. At that time when the DSM-5 was published having a tremendous impact as you've agreed on the definition of intellectual disability, you were closely tracking these issues because you were looking to litigate them if you could. Is this a fair assessment?

A. I was litigating them at the time and I was looking to litigate them in the future, yes.

Q. Based on the change in the DSM-5 being incorporated into your litigation, can I assume?

A. Yes, but not alone. You had to temper that with the fact that in Texas we were facing a *Briseno* standard which was extra medical. The change in facts was one factor to look at, but the true problem we were grappling with was the *Briseno* standard which added a series

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of judicially created factors that had no medical basis whatsoever. That legal standard was, in my view, the greatest problem with bringing these claims and as we litigated them at the time in *Calvin Hunter* and *Moore*, I think that that was proven; but yes.

Q. Yeah. And we're definitely going to talk more about those specific legal standards very shortly today. I'm going to stay a little bit in order just so that the record is as clear as [64] possible, but we are going to get back to the details of some of what you just said, I'll tell you that.

THE COURT: Counsel, let's stop here.

MR. KAWI: Okay.

THE COURT: Let's take a 15-minute break.

Just by way of timing what we have, how much more do you anticipate?

Mr. McCann, you can go ahead and step down at this time.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right.

MR. KAWI: Probably 45 if I can stay at a decent clip.

THE COURT: And, then, Counsel, how much do you anticipate?

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MS. VINDELL: I would say at this point it would not be any more than an hour, though I would still have to wait to see—

THE COURT: Absolutely.

MS. VINDELL: —what his questions are.

THE COURT: I have cancelled a 10:30, but I do have an 11:30 which I presume is going to take probably about 45 minutes, so that takes me into probably 12:15. And then I believe I have a 1:30. So what I'm thinking is we'll go until—approximately when we resume until 11:30, maybe come back after lunch and then at 1:00 grab that 30 minutes before [65] the 1:30 and then depending on how much, we may push back the 1:30 if we're talking about just grabbing 20 or 30 minutes.

I think Counsel will be accommodating to push that back; but I'm going to try and keep you as grouped as much as opposed to having you come back at 3:00 this afternoon or whatever the case may be.

So that's kind of the game plan, all right, by way of timing for your planning purposes.

MR. KAWI: And thank you for your accommodations today with your schedule.

THE COURT: Very well, Counsel. We'll resume at 10:45.

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THE LAW CLERK: All rise.

(Court is in recess.)

THE COURT: Thank you. Please have a seat.

Counsel, you may resume.

MR. KAWI: Thank you, Your Honor.

BY MR. KAWI:

Q. Okay. So Mr. McCann, when we left off, you had just started to describe, but we were going to hold off discussing the specifics of, I just want to link it up to what we were talking about that when the DSM-5 was initially published, you were tracking those issues regarding intellectual disability and the definition very closely because it was a potential issue in a number of cases that you have. Was this what we were discussing?

[66] A. Yes.

Q. Okay. Now, more specifically, though, when the DSM-5 was published, you believed at that time that it would be applicable to Dexter Johnson. Would you agree with that?

A. It would be, but for the legal standard, yes.

Q. Okay. And I know we have a lot to discuss on that, but the general point of the definitional—definitional definition—the definition of intellectual disability even at

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that initial assessment, you believed that it as a medical standard would be applicable to Dexter Johnson?

A. Yes.

Q. And you've always believed, especially at that point when the DSM-5 was published, that Dexter Johnson would need more investigation specifically around these issues of intellectual disability at some point in his case?

A. To develop it at some point, yes.

Q. Okay. Just to be clear, the dates are the dates, but we have already given the date in May 2013 that the DSM-5 was published. Within that first year of the DSM-5 being published from May 2013 to then the same date in May 2014, you'll agree, of course, that you do not file any *Atkins* claim on behalf of Dexter Johnson in any court, whether state or federal, agreed?

A. No, I did not.

Q. Okay.

THE COURT: Just a moment. You agree or you do not [67] agree? I didn't understand you.

THE WITNESS: Oh, I understand the Court's confusion. I'm sorry.

I did not file an *Atkins* claim for him during that time.

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BY MR. KAWI:

Q. Okay. Now, to expand that time period a little bit more, what—we're going to discuss the actual holdings and their effect very, very shortly; but just for right now, there eventually was a Supreme Court case for another client of yours, Bobby Moore?

A. Yes.

Q. And just preliminarily, would you agree that the *Bobby Moore* Supreme Court case, the first one dealt with the issue of intellectual disability and what the proper standards were for handling it, just as a general matter?

A. Yes.

Q. Okay. Between the DSM-5 being published and the Supreme Court's decision in I'm going to call it *Moore I*, okay, there was no work on factual development for Dexter Johnson's intellectual disability claim during that time period. Would you agree with that statement?

A. Yes.

Q. Okay.

THE COURT: Counsel, maybe I didn't hear you. I failed [68] to hear you say when *Moore I* came out.

MR. KAWI: Okay. Yes. I did not currently, but we can put that on the record now.

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BY MR. KAWI:

Q. Would you agree that the first *Bobby Moore* Supreme Court case, which I'm going to refer to for record purposes as *Moore I*, was decided on March 28th of 2017?

A. Yes.

Q. All right. You mentioned before and I promised you we would talk about it again, a case called *Briseno* in Texas?

A. Yes.

Q. Now, just to be perfectly clear time line wise, when the DSM-5 is published in May of 2013, in Texas there is a case—there is case law and the case is called *Briseno*?

A. Yes.

Q. Okay. And *Briseno* you were starting to mention, but would you agree that *Briseno* contains factors that were not created by the scientific community but were instead kind of invented by the court system?

A. That's a fair statement, yeah.

Q. Okay. This is a very general statement, this next one; but just so that we can get into the discussion, would you agree that the *Briseno* factors generally had the effect of making it harder for defendants to get relief when making intellectual disability claims in Texas?

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[69] A. Yes.

Q. Now, this is—this question is going to seem obvious and that's because it's not a trick question.

It is: At that time when the DSM-5 was published and *Briseno* is the law in Texas, you didn't know for a fact what was ever going to happen in the future. Can you agree to this?

A. In regards to these cases, no, I did not.

Q. Well, that will suffice for now.

A. I was going to ask you to clarify.

Q. You can't tell the future. That's basically my question? Is that what you would agree?

A. I cannot.

Q. Okay.

A. I cannot.

Q. All right. So to expand on that in this context, would it be fair to say that you did not know if Texas was ever going to overturn this *Briseno* case?

A. Oh, I—I expected Texas would not. I mean, in fairness to your question, I expected and anticipated that

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the CCA, the Court of Criminal Appeals, would fight to maintain their decision to the bitter end. I was hoping that some case would overturn it, probably a Supreme Court case.

Q. Okay. Thank you for that answer.

So you didn't know one way or another whether it would ever be overturned; but you expected, even if people would try, [70] that it would be difficult to get it overturned within Texas. Is that an accurate summary of what you just said?

A. Pretty much, yes.

Q. And you also didn't know—regardless of expectations, just in terms of knowing what would happen in the future with the information you had at the time, you also didn't know whether the Supreme Court was ever going to take this issue up again or ever?

A. I couldn't say with certainty, but we, meaning the habeas community, were discussing this all the time and looking for cases to take up at the time. Most of us thought the *Petetan*, P-e-t-a-t-e-n [sic], case would probably have been the one to go up. As it turned out, it was *Moore*.

Q. Okay. And we're going to get more and more into the details of that, but just to stick with just these foundational questions. I want to discuss with you something that you just said. I think it's a good time to do it.

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But just foundationally, you couldn't know—regardless of what your plans were or the habeas community wanted in a general sense, you could not know at the time the DSM-5 was published whether the Supreme Court would ever take up or overturn the *Briseno* decision in Texas?

A. Not for certainty, no.

Q. But even though we as lawyers don't know what's going to happen in the future, you were just discussing how part of the [71] work of being a lawyer is trying to plan for challenges to laws that we believe are either unjust or unconstitutionally unfavorable, I'll say. Is that a fair statement?

A. Yes.

Q. Okay. So to this end in this specific situation, it sounds like you were basically just saying it, but would you agree that in the capital or habeas community, one of the active discussions happening was how best to challenge *Briseno*?

A. Yes.

Q. Okay. And this is because *Briseno*—well, let's just start with you personally. You think it was a terrible case?

A. I believe that it added a really difficult layer of extra factors that had no basis in medicine that one has to overcome in order to get to a finding of mental retardation or as we call it now, intellectual disability.

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Q. And would you agree that it's that—the total lack of connection to the scientific community was one of—was probably the worst thing about the decision as far as whether it was good law, whether it was properly decided law? Would you agree with that or phrase it differently?

A. I would phrase it differently. I would say that the factors that the Court of Criminal Appeals came up with had very—as you pointed out, had very little to do with science.

Q. Yes.

A. And, in fact, I believe one of the judges wrote a [72] concurring opinion where she discussed the John Steinbeck classic *Of Mice and Men* and how those factors might play in and if I get this wrong, I apologize.

But as I recall, the Lennie factors would be what one would call them of the character in that book who suffered from mental retardation and it seemed to be a spun out of whole cloth and honestly to have no relation to anything that we as litigators could actually get a handle on.

Q. Yeah. Thank you for that.

And so to that end, would you agree that you believed at the time that all this was going on with Dexter Johnson's case, when the DSM changed but *Briseno* still existed, that for intellectual disability law to improve in Texas for it to be more reflective or at all reflective of the actual medical standards, *Briseno* would have to change. Would you agree with this statement?

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A. Yes.

Q. Okay. And would you agree that the definition—the definitional change in intellectual disability in the DSM-5 provided potentially an opportunity to point out, yet again, to the Courts the *Briseno* factors do not match up with the medical standard?

A. It did provide a way to advocate that those things don't match up and they should be changed, yes.

Q. Thank you.

[73] And you believed at the time that the DSM changed—that the DSM-5 was published and *Briseno* was still law that you had—that Texas criminal defense attorneys had a chance to change the standard for Texas with good facts. Do you agree with that statement?

A. I think we had a lot of chances to change that standard. One of them would have been good facts, yes.

Q. And you also—your belief at the time was that Dexter Johnson's case had more aggravated facts in its trial record than the other cases where you were litigating intellectual disability or looking to litigate it when the DSM-5 was published?

A. Objectively and under *Briseno* specifically, yes.

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Q. Okay. But would you agree with the statement that the facts—the facts of a crime, aggravating or not, are not—of the actual case itself, the crime itself, they are not included in the factors in the DSM-5? Fair to say?

A. For evaluation of—

Q. Intellectual disability.

A.—intellectual disability, no, they're not.

Q. You believed that if you were able to—if Texas criminal defense attorneys were able to get in front of the Supreme Court with the right case, that you, meaning Texas criminal defense attorneys, could possibly make headway in getting rid of *Briseno*. Would you agree with that statement?

[74] A. Yes, very much.

Q. Okay. You believed that somebody had to bring the right case to get rid of *Briseno* during that time period. Fair statement?

A. As a preliminary to bringing up other facts, yes.

Q. Okay.

A. The first thing has to be that *Briseno* has to go.

Q. So you've referenced this, including the names already, but just so that the record stays clear and in order, I'll just sort of go through some of them again.

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You've mentioned that you were litigating intellectual disability cases or cases that had that as an issue, including—in addition to Dexter Johnson's at the time the DSM-5 was published?

A. Yes.

Q. Right. You mentioned a few names. Just to get them all grouped together here, would you agree you were litigating the case of Calvin Hunter?

A. Yes.

Q. Would you agree that you were representing Bobby Moore who had potential claims of intellectual disability?

A. Yes.

Q. Would you agree you were representing a client named Michael Norris who could have been impacted by intellectual disability issues or developments in the law or thinking around [75] it?

A. Yes. He was not granted relief on that basis by the Fifth Circuit. It was a different—it was a Penry-based claim, but yes.

Q. You were still—regardless of what eventually happened, it was yet another case you were working on these intellectual disability issues for?

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A. Yes.

Q. And you actually even had a pretrial—would you agree you had a pretrial murder case where you thought intellectual disability issues could possibly be presented to the prosecutor as mitigation?

A. Yes. We were struggling with whether to get a competency finding or not, but certainly as mitigation, yes.

Q. Just to be clear, the reason I say a pretrial murder case instead of the names like the other ones is based on our previous discussions, that one you just can't remember the name of that particular one, the pretrial—

A. Yes. Yes. That's correct.

Q.—murder client?

I just wanted that to be clear. There wasn't another reason I'm not saying that particular name.

So this is another just foundational question, not more complicated than it sounds, but would you agree that by filing a claim in a lower court, you preserved that claim for appeal [76] in higher courts?

A. In habeas terms, you mean you exhaust it?

Q. Well, this is certainly one way of describing it, but just that general statement that the way of preserving a claim for appeal in a higher court, whether it's through

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exhaustion or whether it's through just filing a claim in a lower court, even a trial court before you appeal it, if you argue a claim properly in a lower court, that preserves it for appeal in a higher court. Would you agree with this?

A. Yes. The exhaustion requires it to be presented to the highest court in the state. So if one were to present a fact-based claim to a lower court, get fact findings and conclusions of law that the CCA then adopts or rejects—and that's an important thing—then the issue is exhausted for purposes of presentation to the court.

Q. And I certainly appreciate the rest of that answer.

Certainly we can all agree that a number of complexities can happen with all of those issues depending on the case or moving on from—as we as lawyers attempt to litigate them, but that foundational idea is all I'm asking about in a general matter at this point that the way we preserve a claim for appeal is it does have to be in some form argued in a lower court?

A. Yes.

Q. And, in fact, this is another question not intended to be tricky.

[77] In order to challenge a ruling or a legal standard on appeal, you have to lose under that standard first?

A. Yes, but what you say leaves out half the equation. The matter has to be presented, but you have to have a standard that will assist your client.

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In other words, the standard of review under *Briseno* was not going to help Dexter no matter when it was brought until *Briseno* was killed. Dexter had very difficult facts to work—

THE COURT: Mr. McCann—

THE WITNESS: Yes, sir.

THE COURT: —it would be my preference if you would refer to the defendant as “the defendant” or “Mr. Johnson.”

THE WITNESS: Oh, of course, Your Honor. I’ve known him for some time, but you’re right. That’s fair.

Mr. Johnson’s claim and remember that a legal ruling on a change in law also provides the basis of *Briseno* was killed, then you have a new standard to bring a client. So I agree with your—I agree with your question and I agree with the premise of it. I’m just saying that it’s not a complete question.

Q. Okay. I understand your position on it. I do just want to clarify, for the record, this will be, you keep using sort of a phrase “when *Briseno* was killed,” okay?

A. Yes.

Q. Because this is all going to turn into a paper transcript, [78] I know what you mean and I’m pretty sure Judge Bennett knows what you mean as well.

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Briseno was an actual person who was facing a death sentence, so using the phrase “when *Briseno* was killed” could arguably mean a couple of things.

When you say that, what you mean is the *Briseno* case law was overturned by some court?

A. Yes.

Q. So every time you’ve said, “*Briseno* was killed,” you did not mean that his case ended because he had been executed. You’re referring to the case law being overturned?

A. Yes.

Q. Okay. I just wanted to make that clear once in the record. Okay. One second.

I do understand the last answer that you just gave, just to move to the next step of the sort of general principles for appellate litigation or arguing claims, you keep talking about getting *Briseno* overturned.

Based on these basic principles that we’ve discussed, would you agree that for a Court to overturn *Briseno*, that means somebody, the defendant in whichever case that is, had to lose under the *Briseno* standard in order to then appeal it to a higher court which overturns it. Is this basic fact correct?

A. Yes.

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Q. And, in fact, you know, you represented Bobby Moore?

[79] A. Yes.

Q. You've already testified to that?

A. Yes.

Q. Bobby Moore's case went to the Supreme Court.

A. Yes.

Q. But before that, it was a Texas case, right? You're a Texas lawyer?

A. Yes.

Q. So I just want to talk about what happened with Bobby Moore then. Would you agree that initially in Bobby Moore's case, a state trial court initially found Mr. Moore was intellectually disabled under the DSM-5 definition?

A. Forgive me for asking this clarification, but Mr. Moore had a long history. Are you talking about my hearing or are you talking about the hearing from prior courts?

Q. I believe I'm talking about your hearing that eventually led to the Supreme Court litigation.

A. Yes. We had a trial court judge who made findings that he was intellectually disabled. Those findings were

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kicked back essentially by the Court of Criminal Appeals for correction in line with *Briseno*.

Q. The CCA overturned the trial court's decision or said it was incorrectly reasoned. Is this fair to say?

A. Well, twice. She—Judge Brown then pluckily maintained [80] her findings and the CCA rejected them and gave the first Court of Criminal Appeals *Moore* decision, so they actually did it twice to her and they said that he was not mentally retarded and that was the decision that went up.

Q. When you say that's the decision that went up, would you agree it then went to the Supreme Court because the Supreme Court of the United States accepted the case for argument?

A. Yes.

Q. Okay. And the Supreme Court of the United States overturned the Texas Criminal Court of Appeals' decision?

A. Yes.

Q. And we already have that case was decided March 28th, 2017, Bobby Moore's first Supreme Court decision?

A. Correct.

Q. And would you agree that in overturning the CCA, the United States Supreme Court reiterated

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what they had said in prior cases that adjudications of intellectual disability should be informed by the views of medical experts. Would you agree with that statement?

A. I would.

Q. Would you agree that the United States Supreme Court held that the *Briseno* factors are an invention of the CCA untied to any acknowledged source. Would you agree with that statement?

A. Yes.

[81] Q. Would you agree that the United States Supreme Court said of the *Briseno* factors that they are not aligned with the medical community's information?

A. Yes.

Q. Would you agree that the United States Supreme Court said that the *Briseno* factors create an unacceptable risk that persons with intellectual disability will be executed?

A. Yes.

Q. And, finally, would you agree that the United States Supreme Court held that the *Briseno* factors may not be used as the CCA used them to restrict the qualification of an individual as intellectually disabled?

A. Yes.

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Q. Although it was a 6-3 decision on paper, would you agree that all nine justices actually agreed when you read the opinions that *Briseno* violated the Eighth Amendment?

A. The dissent criticized the *Briseno* standard; so, I would phrase it differently than you. But, in essence, all nine judges agreed that that standard was not appropriate.

Q. Not appropriate in the context of the Supreme Court means not constitutionally valid. Would you agree?

A. Yes.

Q. Okay. Okay. Now, I already said the date a couple of times, but just to keep it in our heads as we're going through this, the *Bobby Moore I* decision is March 28th, 2017, right?

[82] A. That's correct.

Q. Would you agree that—this is just a little math here—one year from that date would, of course, be March 28th, 2018?

A. Yes.

Q. Between March 28th, 2017, and March 28th, 2018, would you agree that you do not file an *Atkins* claim for Dexter Johnson in state court?

A. Because of the intervening Court of Criminal Appeals' decision, that is correct.

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Q. Just to be clear that the one year from *Moore I*, that case law that I just went through, you do not file an *Atkins* claim on Dexter Johnson's behalf?

A. I did not.

Q. And you don't file an *Atkins* claim in federal court either, just to be clear, during that period of time?

A. I did not.

Q. Okay. You referenced intervening litigation after the *Moore I* decision?

A. Yes.

Q. Yeah. Okay. Were you trying to say that that was the reason you did not file anything for Dexter on this issue after *Moore I*?

A. *Briseno* wasn't—*Briseno's* case law had not been truly overturned at this point and for the very reason that the Court of Criminal Appeals issued their second decision which [83] said again that Mr. Moore was not intellectually disabled and that essentially what they did was take the *Briseno* factors and rename or repackage them. Thus, honestly, not doing as they were told by the Supreme Court. And this is—this is why having worked around the CCA for quite a while and having seen what they did in their findings and having seen what they did in Calvin Hunter's case, I told my colleagues who were on the briefing team for Mr. Moore that the CCA would not stand by this decision and would try to find a way around it.

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They did, which resulted in *Moore II*, which was another decision where the Supreme Court finally simply told them that they actually made what appeared to be a fact finding which the Supreme Court rarely does, that this individual was mentally disabled and that they weren't going to get around their prior *Moore I* decision by taking these factors and repackaging them.

At that point, *Briseno* was—to use my earlier analogy, he was done. That case was done. That was in 2019 and it was after that that I filed a subsequent petition going into Mr. Johnson's intellectual disability because the legal standard was at that point, I believe, fully and firmly established.

Q. Okay. So let's just break that down a tiny bit. We just went through all of the holdings that *Moore I* explicitly stated, you and I together in this courtroom. You recall this a couple of minutes ago?

[84] A. Correct.

Q. Okay. Let's go back to the just—

A. Repeating it won't help, Counsel. The issue is that—

Q. I'm not going to repeat it.

A. Okay.

Q. Don't worry about that.

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A. I'm sorry.

Q. What I'm going to say is let's go back to the moment or the immediate aftermath of *Moore I* being decided. Okay? I'm not going to repeat the things, but that's the decision that's out there, those things that we just discussed on the record?

A. Yes.

Q. I want to make sure that your position for Judge Bennett is clear for when we eventually argue about what it means.

We talked earlier in this examination that you, like the rest of humanity, do not have the ability to know what the future is, either in legal circumstances or any other circumstances. Is this fair to say still?

A. Yes.

Q. Okay. But it seems to be and I want it to be clear that your position for this Court is that you did not file an intellectual disability, an *Atkins* claim, on Dexter Johnson's behalf because you expected the Texas Criminal Court of Appeals to disobey the United States Supreme Court?

A. Yep, exactly. And that's exactly what they did.

[85] Q. Okay. When *Moore I* is decided by the United States Supreme Court, regardless of whatever other bad

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actors there are in the system if that's what they are, the United States Supreme Court is the highest court in the land, that you will, of course, agree with this?

A. Absolutely.

Q. So when they make a clear holding, that is—the second it's made, that's the law in the United States of America, state, federal, that's the law. Am I right?

A. I agree with you.

Q. Okay.

A. I don't believe the CCA agreed with you.

Q. Okay. Well, you may have this belief about what the CCA is thinking or wants to do.

A. It's not belief. It's experience. Having worked—I have worked around that court for a quarter century.

Q. Okay.

A. I have seen them go through, you know, multiple iterations of what mitigation is, *Penry I* and *II* as examples. It is not a, you know, wild guess on my part. It is based on having seen them kick back findings from good trial judges on intellectual disability if they went against *Briseno*.

I, from experience and from watching them for all that time, knew that they would sit there and—honestly,

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I would have bet money on it. If there was a betting pool available [86] for it, I would have bet money; and the problem is that this is a group of folks that are very proud of their decisions and very proud of the law.

And even the recent *Andrus* case out of Fort Bend where I also practice has shown that the Supreme Court can tell them to do something and they will attempt to work around it. The Supreme Court sent that case back and *Andrus* is—I'm sorry—A-n-d-r-u-s, I believe, and they will send it back and the CCA in a 5-4 decision said “Well, we appreciate your help, Supreme Court; but we're still going to find that this lawyer was doing a fine job of punishment.”

They are honestly known for the fact that they will fight against decisions by the Supreme Court that disagree with them. I'm just telling you this was not a speculation—

Q. Yep.

A.—or a wild guess. It was—it was rooted in experience.

Q. And when I say “belief,” that doesn't mean that it's not rooted in experience. But you don't know what's going to happen in the future just because your experience leads you to believe something. That basic fact remains true?

A. Sure.

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Q. Okay.

A. Sure.

Q. Just to kind of zoom out a little bit here, your reason [87] for not filing a claim on Dexter's behalf when *Briseno* existed as case law was because the CCA had made a bad decision on a case in your estimation in the past, that's why it was case law then. Right?

A. Well, it wasn't only—I mean, they have a whole body of *Briseno*-based case law that one can look at and I'm happy to try and challenge stuff. The issue is that I needed a—at least a fair standard of review to bring a difficult case like Mr. Johnson's before them and that's what this is about.

If the decision to uphold or overturn *Briseno* and all that that got you for Texas, state convicting courts that would review a habeas application and make findings under a bad standard, whether you called it *Briseno* or something else or *Moore II*, it was going to be fatal to Mr. Johnson and I mean that quite literally. It's not a euphemism.

Q. I understand. Let's just stick to the individual questions. I think you've gotten your reasoning on the record at various points and we can continue to discuss it or if Judge Bennett has questions, he can ask them and we also have opposing counsel that has not had a chance to ask questions. I'm sure there will be opportunities to ask that.

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But just to stick to the one question that I was just asking, your argument or your position, your explanation of your actions is that you did not file an intellectual disability claim on Dexter Johnson's behalf when *Briseno* [88] existed was because *Briseno* had been decided in the past and it was, therefore, bad current case law?

A. I would phrase it differently, but close enough.

Q. Okay. And *Moore I* gets decided in 2017—

A. Sure.

Q.—we've already mentioned that five times at this point. The Supreme Court makes those statements and now you're telling the Court that you still did not file an *Atkins* claim because you believed there would be bad case law from Texas in the future?

A. Exactly. And they have demonstrated that capacity.

Q. Capacity is one thing, but when *Moore I* is decided, would you agree that those holdings by the Supreme Court are clear?

A. Again, it's not you that I have to convince. It's a reviewing court operating under a state standard of interpreting that and that is—and it goes to the CCA for final approval.

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So until they are, for lack of a better term, firmly told that this is no longer—you can't try this again, I would have been bringing a claim in a state court under the CCA standards—you can call it what you wish, but it's a *Briseno* standard when they repackaged it or not.

THE WITNESS: Go ahead, sir.

THE COURT: My understanding of Counsel's question is slightly different than what you're answering. And let me [89] perhaps ask a question that will bring some clarity to it for both of us.

As a learned counsel, you knew that *Moore I* directly addressed the factors in *Briseno*, correct, that were used in *Briseno*? Correct?

THE WITNESS: Yes, sir.

THE COURT: You knew as learned counsel that *Moore I* was the law of the land, correct?

THE WITNESS: Yes, sir.

THE COURT: You knew as learned counsel that *Moore I* affected the rights of your client, correct?

THE WITNESS: Yes, sir.

THE COURT: This is no trivial issue. It was a life-and-death issue, correct?

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THE WITNESS: Absolutely, sir.

THE COURT: As learned counsel out of an abundance of caution seeing a potential to advance your client's interest, you still decided not to pursue that opportunity to file an *Atkins* claim because you had a belief that a Texas court would ignore the law of the land, correct?

THE WITNESS: No, sir. They would—

THE COURT: Go ahead.

THE WITNESS: I believe that the CCA from working before them and presenting these things—

THE COURT: I get that. They were going to do what [90] they were going to do based upon your experience and belief. I get that.

THE WITNESS: Yes, sir.

THE COURT: I understood that.

THE WITNESS: What I couldn't guarantee—

THE COURT: No. What I'm asking you—

THE WITNESS: Okay.

THE COURT: —is something more fundamental.

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No matter what the percentage might be, from one percent to a hundred percent, you had a chance to follow the new ruling in *Moore I* and file relief on behalf of your client on this life-or-death issue, correct?

THE WITNESS: Yes, sir.

THE COURT: You chose not to do so, correct?

THE WITNESS: I—

THE COURT: You chose not to do so?

THE WITNESS: Yes, for a reason.

THE COURT: Okay. I've got that. You've already told me that reason.

THE WITNESS: All right.

THE COURT: Regardless of your experience and belief as to what the CCA would do, there was a chance to pursue a new remedy under *Moore I*, but you elected not to do so?

THE WITNESS: Yes. I hope the Court will—

THE COURT: I understand your reasoning.

[91] THE WITNESS: I—

THE COURT: You've testified to it. I'm just simply saying: It is a fact that you've acknowledged that *Moore*

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I was the law of the land, which upon a clear reading afforded your client potential new rights under a life-or-death issue and you chose not to pursue that remedy under *Moore I*, correct?

THE WITNESS: I chose to pursue it under *Moore II*, that's correct.

THE COURT: All right.

MR. KAWI: Thank you, Your Honor.

BY MR. KAWI:

Q. So, you said just now you chose to pursue it under *Moore II*?

A. That's correct.

Q. Okay. So towards the end of your time on Dexter Johnson's case, one of the last substantive things that you did on his behalf is you filed a state's successor petition in Mr. Johnson's case?

A. Yes.

Q. Okay. You filed it after the Supreme Court decision in *Moore II*?

A. Yes.

Q. Okay. That state successor cited numerous times, I believe, the DSM-5?

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A. Yeah.

[92] Q. Okay. You specifically referenced a change in the science as one of the reasons you could bring the successor?

A. That was one of the reasons. The main reason was the change in law, but yes.

Q. But when discussing the change in law, you cited and argued the decision in *Moore I*, right?

A. You would have to to give context to the Moore II claim.

Q. Well, give context to. Mr. McCann, in that state successor petition, you do not use *Moore*—you do not at any point argue that *Moore II* was the trigger for a new claim in that state successor petition. Would you agree with that?

A. No, I would not agree with that.

Q. Okay.

MR. KAWI: One second, Your Honor.

I'm handing a copy of what I have marked for identification purposes as Petitioner's Exhibit 19 to opposing counsel. I'm approaching the witness and I'm handing Mr. McCann a copy of what I've marked as identification as Petitioner's Exhibit 19. Again, the sticker

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says “Plaintiff’s.” I don’t want that to be unclear. I have an extra copy if the Court wants.

BY MR. KAWI:

Q. And so, Mr. McCann, what I’ve just handed you is your application for a subsequent application for writ of habeas corpus in Dexter Johnson’s case, right?

[93] A. Yes.

Q. Okay. This is the document that we were just discussing?

A. Yes.

Q. Okay. Please find for me in that document where you argue that *Moore II* is the trigger for new legal claims in Dexter Johnson’s case.

A. Page 9, the top, *Moore v Texas*, 139 Supreme Court 666, 2019, quoting the DSM-5 at 37.

Q. Okay. Now, yes, you have correctly identified where you have cited the 2019 *Moore II* decision.

A. Yes.

Q. That is not an argument. That citation is not preceded by an argument that it triggered a new legal claim, if you look on where it comes from on Page 8.

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A. I would disagree with you. On Page 8, it seems pretty clear that we're arguing deficits in intellectual functioning. There is explanation beforehand. I'm not—I guess I would just disagree with you.

Q. Well, the paragraph that ends with your *Moore* 2019 citation, where in that preceding paragraph that is the subject of your citation does it say that *Moore II* created a new legal standard?

A. *Moore II* was the one that took apart the *Briseno* stuff that was relabeled and, in fact, I think it—I think the ex parte *Moore* was the CCA's second decision which basically [94] disobeyed the Supreme Court and that's why that's cited there. But I—again, I'm just going to disagree with you and say we did cite that.

Q. It's not about disagreement with this particular question.

I'm going to direct you back to the question.

First of all, just for a little bit more context, is this the only time in this pleading that you cite *Moore II*?

A. Let's see. *Moore II* is cited at 9. *Moore I* is cited a couple of other times.

Q. I'm sorry. I was conferring with co-counsel.

Was there another citation to the 2019 *Moore II*?

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A. To the 2019, no, that was it.

Q. Okay. And so I'm just going to reask before finishing this up.

In that preceding paragraph where you then cite the 2019 *Moore II*, it does not say anywhere in that section preceding the citation that *Moore II* is the new legal standard—that it created a new legal standard for intellectual disability litigation? I know you disagree with me about what it all means, but in the text—

A. I do and I'm going to stay with my answer, Counsel.

Q. I—

A. I don't believe that what you're saying is correct because we did this directly after *Moore II* came down well within—in fact, within a couple of months. We did the work to show it [95] and had a report and filed it and based that and that report was attached to this. So—

Q. I'm not asking about any of that, though. We're dealing with a very narrow question here.

When you cite *Moore II* in the paragraph that you write, before you cite it, where do you say that you're arguing that *Moore II* created a new legal standard, just in the text? Is it there?

A. It does not say that in that—

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Q. Okay. And just one more thing just to make sure everything is clear. If you could turn to Page 6 so that we're all literally on the same page, if you want to. There is a section in your pleading called cognizability on subsequent application. I'll let you get there.

Are you there?

A. Yes.

Q. Cognizability on subsequent application. In this section, you discuss why this pleading at this late time close to Mr. Johnson's execution date would be appropriate to file as a subsequent application. Is this accurate? Is that fair to say?

A. Yes.

Q. Okay. In this section where you tell the Court why you are correct to be filing a new pleading at this time, you cite a few things, right?

[96] A. Yes.

Q. Okay. You talk about *Briseno* and how it was not constitutionally valid, right?

A. I do.

Q. For that proposition, you cite *Moore versus Texas*, 2017, right?

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A. Yes.

Q. And that is *Moore I*?

A. That is *Moore I*.

Q. And you also talk about the DSM-5, right?

A. Yes.

Q. And how it changed all the way back in 2013, right?

A. Absolutely.

Q. Okay. And nowhere in this section where you are telling the Court why they should take this as a new claim, nowhere in that section do you cite *Moore II*, right?

A. Not in that section. That's fair.

MR. KAWI: Your Honor, I pass the witness.

THE COURT: Very well. We're going to recess for lunch. Counsel, return at—return at 1:00 p.m. and we will take up your examination at that time.

Counsel for the petitioner, anything we need to take care of before you leave?

MR. KAWI: Not from us, Your Honor.

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THE COURT: Respondent?

[97] MS. VINDELL: Nothing from the Director, Your Honor.

THE COURT: Enjoy your lunch. See you at 1:00. Mr. McCann, you may step down.

THE WITNESS: Thank you.

THE LAW CLERK: All rise.

(Court is in recess.)

THE COURT: Thank you. Please be seated.

Mr. McCann?

MR. KAWI: He is seated outside.

THE COURT: We are back on the record in the courtroom. Counsel is present. Let the record reflect that the defendant is also present.

Respondent, do you have any cross-examination for this witness?

MS. VINDELL: I do, Your Honor. And I will conduct it seated.

THE COURT: Very well. Just pull your mic down.

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MS. VINDELL: Is that all right on the sound?

THE COURT: Yes.

CROSS-EXAMINATION

BY MS. VINDELL:

Q. Good afternoon, Mr. McCann.

A. Good afternoon.

Q. Okay. I will get into the substance of some of the things that we've talked about today here, but before doing that, I [98] wanted to briefly talk a little bit more globally about your background.

A. Certainly.

Q. I don't think you mentioned it. Could you tell us a little bit about your educational background?

A. I have a JD from University of Houston. I graduated in '94.

Prior to that, I was in the Navy as an intelligence officer; and prior to that I graduated from Boston College.

Q. How long were you with the Navy?

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A. 21 active and reserve. I retired in 2007 after a tour of Guantanamo on a recall.

Q. Okay. And you said you graduated from law school, and was it 1994?

A. '94.

Q. Was that the same year that you were admitted to the Texas bar?

A. That was in May of '95.

Q. And so today on the stand, you've been a practicing attorney for over 25 years; is that correct?

A. Yes.

Q. You spoke about the Navy earlier. But you are now retired from the Navy; is that correct?

A. Yes, ma'am.

Q. Okay. How much of your legal practice during those 25 [99] years is criminal law?

A. Pretty much all of it.

Q. And was that mostly defense work?

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A. Yes. I had an internship in college with the prosecutor's grand jury office, but that was the only time I've worked for the state.

Q. Okay. So since you graduated from law school, it has been exclusively defense work?

A. Yes, ma'am. I hung up my shingle the day after I graduated—excuse me—the day after I passed.

Q. That means you've also always been a solo practitioner throughout this time?

A. Yes, ma'am.

Q. Would you say the focus of your work is primarily appellate work?

A. It's a significant portion. That's how I started. When folks realized I was handling appeals, they would ask me to sit with them in trial to help them preserve error and to do motions drafting.

Q. So you've sat in on trials essentially as an appellate consultant; is that—

A. I was second chair. When you're in a serious felony trial, there's not a lot of—you have to do windows; so, yes, I had to do everything.

Q. Okay. So you do have some trial experience as defense [100] counsel?

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A. I have extensive trial experience as a defense counsel.

Q. Do you have a guess of how many jury trials you've helped or assisted with?

A. I think death around seven, I think, or eight. I think—I'm trying to remember. It was 35 or 40. Somewhere with, you know, serious felony trials.

Q. Okay. And are you currently an active member of any bar associations?

A. Yes. Texas Criminal Defense Lawyers Association. I'm a board member of TCDLEI, which is the group that funds and puts on CLE from TCDLA.

I'm a past president of the Harris County Criminal Lawyers Association and a past president of the Fort Bend County Criminal Defense Attorneys Association.

I'm a member of the ABA, but not active on their committees this year. And I was a member of the National Legal Aid & Defender Association, but I have ceased that membership.

Q. Have you also actually done some legislative type work in your career?

A. Yes. I was legislative liaison from both the Harris County Criminal Lawyers Association and the Fort Bend

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Criminal Lawyers Association and have helped draft proposed legislation and one that actually got passed for the Veterans Court authorization as a treatment court. And I'm a [101] proud founder of—founding teammate of both Veterans Courts in Harris and in Fort Bend.

Q. Okay. I think you might have mentioned this a little earlier, but digging kind of a little more specifically into your background, how many death penalty cases have you handled in your career, just totals?

A. Somewhere over 50, if you count habeas, direct appeal and trial and out of state and military.

Q. Okay. And how many, if you could hazard a guess, were Texas capital habeas cases?

A. Just state habeas, probably over 20. Some of those I took into federal. I'm not sure what the number would be. It would be over ten certainly.

Q. Ten federal habeas cases?

A. Yes.

Q. Okay. And how many direct appeals have you handled?

A. Let me count. It would be over ten. I think it's around 12, but I—I would have to go count them up.

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Q. Okay. And then I think you mentioned out-of-state cases as well. Have you handled out-of-state death penalty cases?

A. Yes. I worked on a case for a fellow named Vernon Madison out of Alabama. And I worked on Kenny Parker's military death penalty appeal and I consulted on the—one of the Army's Afghanistan death cases.

Q. Would that be when you were working at Guantanamo?

[102] A. No, that was intelligence work. That was in the joint intelligence group from 2006 to 2007.

Q. Okay. We've been talking about this all day, so I know you're familiar with *Atkins*. I want to talk a little bit more in depth about your specific experience litigating intellectual disability claims.

How many times throughout your career would you say that intellectual disability issues have come up in your cases?

A. Including non-capital?

Q. Yes.

A. At least 20, 25 times.

Q. And do you recall the first case you had in which an intellectual disability claim came up?

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A. We had—I'm sorry. Myself and a retired judge named Ruben Guerrero had a client many years ago who in the service had suffered a traumatic brain injury at a pretty young age and I think it was in the punji stick training, and we investigated that and pretrial and worked out a reduced charge on that case. And that's the first time I remember it being a clear issue in one of the felony cases. It was—that was before I took on Mr. Johnson.

Q. And so my follow-up question was going to be actually: Do you have a guess around when that happened?

A. That murder case was in the late '90s. I think we discovered it, brought it to the state's attention and they [103] were amenable to a plea rather than us litigating competency and it worked out around the time that I got called up for *Briseno*.

Q. So this would be the case, then, that you were referring to earlier with opposing counsel that was the pretrial plea whose name the defendant you don't recall?

A. That's correct.

Q. Would Marcos Olivares happen to sound familiar at all?

A. It could be. I won't tell you that it is—

Q. Okay.

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A.—but it could be.

Q. And then, as we just discussed, I know my opposing counsel went through several of the cases that you've worked on; but I wanted to talk a little but more about your specific role in those cases.

So first I'd like to talk about *Calvin Hunter*. That was a case in which you were the lead counsel litigating an intellectual disability claim, correct?

A. Yes.

Q. In that case, the state trial court recommended granting relief on the intellectual disability claim in October 2015. Does that sound about right?

A. That's right. I think, yes, they had had a—again, they had two sets of findings, one that went up and were adopting medical-based findings and the CCA kicked it back and wanted [104] them to—excuse me—wanted the judge to focus on Dr. Denkowski's role in that case rather than the medical findings.

Q. Okay. And was there an evidentiary hearing in that case?

A. Yes, but it was not a—it was not a lot of testimony. The judge took the reports and, in all honesty, I believe the state was more focused on what was going to happen to Dr. Denkowski at that time, so they were—they probably were not opposing it except for the fact that they didn't want Dr. Denkowski to be attacked.

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THE COURT: Counsel, is that soda or water?

MS. VINDELL: It's a sparkling water.

THE COURT: Water only.

MS. VINDELL: Not sparkling?

THE COURT: No.

MS. VINDELL: I'm very sorry about that. I apologize, Your Honor.

BY MS. VINDELL:

Q. Okay. You just alluded there might have been a couple of back and forths between the trial court and the CCA. But ultimately did the CCA adopt the trial court's findings and conclusions that Mr. Hunter was intellectually disabled?

A. Yes.

Q. And do you recall was that around March 2016?

A. That sounds correct, yes.

[105] Q. Now, we've touched briefly here and there throughout your testimony today about your work on the *Bobby Moore* case?

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A. Yes, ma'am.

MS. VINDELL: And for the record just in case it hasn't been clear, Moore is M-o-o-r-e.

BY MS. VINDELL:

Q. In that case, you actually handled the state habeas evidentiary hearing, correct?

A. Yes, ma'am.

Q. And that hearing was in January 2014; is that correct?

A. That is correct.

Q. Now, after having that hearing, isn't it true that you succeeded in convincing the trial court that Bobby Moore was intellectually disabled?

A. Yes, ma'am.

Q. In fact, did you draft the proposed findings of fact and conclusions of law in that case?

A. Yes. I—I submitted a set. The state submitted a set and she adopted ours. She may have edited some of it.

Q. Okay. And in those findings, did you cite to the DSM-5?

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A. Yes.

Q. And as you just said, the trial court, in fact, adopted those findings, correct?

A. That's correct.

Q. And was that in February 2014?

[106] A. She signed them pretty shortly after we were finished; so, I believe that's correct.

Q. Okay. And ultimately, however, those findings were not adopted by the CCA; is that accurate?

A. Fair and accurate.

Q. Now, did you assist with the appeal of the CCA's decision to the Supreme Court on the first go-round?

A. Not the first one. That was a team from Skadden. Forgive me, S-k-a-d-d-e-n. They're a firm out of Washington, D.C. On the second, I did.

Q. Okay. And so that's going to be my next question. You did assist with the briefing team on *Moore II*, correct?

A. Yes.

Q. Okay. And meanwhile, throughout all of these cases, the DSM-5 had been published in May 2013, right?

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A. That's correct.

Q. So it's fair to say that you were actively litigating intellectual disability issues in other cases when the DSM-5 was published, right?

A. Yes, ma'am.

Q. And it's also fair to say that you were well aware of intellectual disability claims, correct?

A. Yes.

Q. In fact, isn't it true that you've taught CLEs on using and identifying intellectual disability claims?

[107] A. Yes.

Q. How many times have you done that?

A. Up through today?

Q. Yes.

A. Seven, I think.

Q. In fact, you also recently received authorization to proceed from the CCA on another intellectual disability claim, correct?

A. Oh, Mr. Escobedo, yes, that was good news.

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Q. That was just in 2020, correct?

A. Yes.

Q. Okay. Now, I'm going to kind of continue staying at a global level here and I want to go over a general timeline in this case vis-a-vis your experience in other cases as well.

So as we discussed on direct, you were appointed as state habeas counsel for Mr. Johnson in 2007, correct?

A. Yes.

Q. Then you filed a state writ on Mr. Johnson's behalf in 2009, correct?

A. Yes.

Q. And the CCA denied Mr. Johnson state habeas relief about a year later; is that right?

A. That—that would be 2010?

Q. Yes.

A. I think that's correct.

[108] Q. You then were appointed as federal habeas counsel, correct?

A. Yes, ma'am.

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Q. And you filed a federal petition on behalf of Mr. Johnson in June 2011. Does that sound right?

A. Yes.

Q. About nine months after you filed your federal petition, *Martinez v Ryan* was issued by the Supreme Court; does that sound right?

A. Martinez and Ryan was 2012, if I remember right, so I think that's right.

Q. Was *Martinez* a fairly big deal for habeas practitioners at the time?

A. Sure.

Q. Did the defense bar kind of have to figure out what *Martinez* meant for Texas?

A. Yes.

Q. That's because *Martinez* did not directly apply to Texas' post-conviction scheme, did it?

A. Not the way I read it, no.

Q. And, in fact, isn't it true that not long after *Martinez* came out, the Fifth Circuit decided in *Ibarra v Thaler*—and for the record, that's I-b-a-r-r-a. The case cite to that is 687 F.3d 222.

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Didn't the Fifth Circuit decide in *Ibarra* that *Martinez* [109] did not apply to Texas?

A. Yes.

Q. Regardless of that, after *Ibarra*, six months after *Ibarra*, you filed the motion to stay and abate that you discussed with opposing counsel during your direct, correct?

A. That sounds right because I remember doing it fairly quickly after that came out, so.

Q. And in that motion, you raised what I'm going to shorthand for the record as an IATC claim, but references an ineffective assistance of trial counsel claim that you had not previously raised in federal proceedings, correct?

A. Yes.

Q. But you did not argue your own ineffectiveness for failing to previously raise that claim, correct?

A. That's correct.

Q. Now, we kind of just talked about this, but when you filed that motion, *Trevino* still had still not actually been decided, had it?

A. No.

Q. So the prevailing law at that time in this circuit was that *Martinez* did not apply to Texas?

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A. That's correct.

Q. Wasn't it your opinion regardless that *Martinez* basically required you to perhaps try to raise an IATC claim?

A. Well, may I expound a bit—

[110] Q. Yes, you may.

A.—or is “yes” enough?

I thought *Martinez* was an opportunity to perhaps attack some of our systemic problems in Texas, but one of the things that's frustrating with the state system is that you run the appellate and the post conviction on the same track. So it's difficult to do anything to appellate counsel and, in fact, we've now adopted—well, we, many of us, have adopted a practice of trying to work with appellate counsel early to separate work; but at the time and still today, we can't really go after them because of some of the limitations on that.

I was—I was hoping that this would provide at least some window to go in after that structural problem, which if I'd—if I'd been successful would have been, I think, a good win. I was not, so...

Q. Okay. And so essentially your perspective was that *Martinez* because it did not directly apply to Texas might have provided an avenue to challenge that Texas post-conviction scheme?

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A. Yes.

Q. And so you raised an IATC claim that, in your opinion, was actually not particularly strong?

A. That's fair.

Q. And would another way of saying that an IATC claim that it's not strong be that it's not substantial?

[111] A. Yes.

Q. And in further looking at what we now understand *Martinez* to be, then, isn't it true that if a claim is not substantial, you wouldn't be looking at the effectiveness of state habeas counsel?

A. Not now, no.

Q. And so even though you did not think the claim was strong, you raised it anyway and I think you've explained a little bit about why, but just could you answer that question, the pointed question of why did you choose to raise it regardless?

A. It seemed that this, at the time, was the only way to get federal review of a state procedural matter that honestly impaired post-conviction relief.

Q. Okay. And that's what we discussed earlier that you wanted to challenge the system?

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A. As much as possible, sure.

Q. And that would be, then, why you raised a systemic challenge in conjunction with your motion to stay and abate?

A. I believed that the *Martinez* claim could provide a gateway for that.

Q. And would it be fair to say that as zealous capital defense counsel, you would raise everything you reasonably could when there's little to no risk to future possible litigation?

A. I think risk calculation is one of the most important [112] things that we do as capital lawyers, whether it's at trial or direct appeal or habeas. Certainly on direct appeal, your obligation is to winnow out the best issues.

On habeas, litigating a claim and losing, while it may sound good is, unfortunately, out of deference under AEDPA that can be very risky for your client.

Q. Okay. So is it also true that the Supreme Court has recognized that delay in post-conviction cases is a win for capital sentenced inmates?

A. I don't mean to be glib, but I think every day that a client of mine is breathing is a win.

Q. Even though you didn't have a substantial IATC claim, it was worth the shot, wasn't it?

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A. I thought so, yes.

Q. Ultimately, though, after you filed that, *Trevino* was decided about five months after that motion; is that correct?

A. Yes. I—I don't remember the exact date, but I believe it was decided that year.

Q. Okay. And if the DSM-5 was published on May 18, 2013, that was right around the time that *Trevino* came out. Does that sound about right?

A. That would be—yes, it does.

Q. Okay. And as we talked about earlier, you were actively litigating intellectual disability claims at that time, correct?

[113] A. Yes.

Q. And so you were aware when the DSM-5 was published, correct?

A. I was very aware. We had been actually hoping for some changes on that area.

Q. You were excited for those changes, weren't you?

A. Yes, ma'am.

Q. And, actually, was it also the case the DSM-5 was published in parts before it was fully published?

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A. They did it—I'm not sure what they called it, but I would call it slices. They put out a portion and a section and then another section.

The full thing was finally, I think, in '13. But they had put out portions relating to certain topics before that.

Q. And you kept up-to-date on those portions as well?

A. Yes, ma'am. I was at the reference library—it was expensive to get on the advances, but they came to the reference desk at the law library; so, yes.

Q. In fact, did you own a copy of prior versions of the DSM?

A. Oh, yeah, heavily tabbed and dog-eared, which is folding over the relevant page.

Q. And you would receive notes from the publishers that updated editions were going to be published, correct?

A. Yes.

Q. Okay. So turning back to the case, this Court denied the [114] majority of Mr. Johnson's habeas claims in August of 2013; is that correct?

A. It was '13, yes.

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Q. Okay. And at that time, did the Court also deny your ability to stay and amend the IATC claims you had previously raised?

A. Yes.

Q. And the Court's denials, those were just a few months after the DSM-5 had been published, correct?

A. Yes.

Q. You did not raise an *Atkins* claim in those few months, correct?

A. I did not.

Q. Why was that?

A. At that point, and this involves a whole bunch of decisions that come together, but the primary thing was that we had a certificate of appealability on at least one issue, if I recall correctly on the first; but also because we were still struggling with the *Briseno* standard. And if one puts one's self in that position trying to overcome these matters with medical issues was not only not going anywhere, it was actively being rejected.

And the topics that they looked at, you know, leadership, consciousness of guilt, that type of stuff, it was so vague that it was very difficult to anticipate; so, honestly, I [115] didn't think it was the right time to bring that type of claim.

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Q. Okay. And so instead, what you did was tried to appeal the Court's denial of the majority—the initial denial essentially of the majority of the habeas claims, correct?

A. That's correct.

Q. And you weren't successful in that, correct?

A. No.

Q. Okay. Almost a year after the Court initially denied relief, it then denied Mr. Johnson relief on the remaining claim, correct?

A. Yes. I think—I believe that was the issue of the confession. Forgive me if I'm incorrect, but that's my memory.

Q. Does it sound right that the Court made that decision around June 2014?

A. I'm sorry. I'm doing a calendar in my head. Yes.

Q. Okay. And as we discussed earlier, in that year between the Court's two decisions, the two denials of relief for Mr. Johnson, you handled the *Bobby Moore* state habeas hearing, correct?

A. Yes.

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Q. But you didn't raise an *Atkins* claim in Mr. Johnson's case then, did you?

A. No.

Q. And why was that?

A. In comparison to Moore's case, Mr. Johnson's facts are [116] very difficult to overcome and, to be honest, again, I'd run up against—the testimony in Mr. Johnson's case was that he actually met a number of the *Briseno* factors that frankly would have resulted in a denial of that claim at that time.

Q. Okay. So then basically the short answer would be that *Briseno* was still good law then?

A. Yes. And, in fact, they were coming out with new cases on that standard.

Q. Okay.

A. None of which were helpful.

Q. Okay. So after the Court enters final judgment in this case, you appeal it to the Fifth Circuit, correct?

A. That's correct.

Q. You're not successful there, correct?

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A. Correct.

Q. And then you seek certiorari review from the Supreme Court, correct?

A. Correct.

Q. Now, while that appeal was happening, the CCA enters its opinion denying Moore leave on the intellectual disability claim, correct?

A. Yes, ma'am.

Q. And around this time is also when you won Calvin Hunter's intellectual disability claim; is that right?

A. Yes.

[117] Q. So the Supreme Court denies certiorari review in this case in January 2016. Does that sound about right?

A. I think that's right because it was the beginning. I thought in my head it was in February, but I think you're correct.

Q. Okay. So early 2016?

A. Yes.

Q. But about a year later is when the Supreme Court issues its opinion in *Moore I*; is that right?

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A. Yes, ma'am.

Q. And after *Moore I*, you did not then raise an intellectual disability claim in Mr. Johnson's case, correct?

A. I did not.

Q. And why was that?

A. Because if one is looking at the CCA and what they would do and one had *Briseno* as your guide and one had the CCA's prior behavior, to my mind, something else had to occur. They had to either come up with a new state standard that I could deal with in regards to *Moore*.

If they had adopted the Supreme Court's logic and reasoning, great, I can go forward on that in a state court and exhaust that issue. They did not. They renamed the *Briseno* factors. It would be the equivalent of me calling them banana and then saying you must meet the banana standard. They went forward and simply used the same problematic extra medical [118] factors.

So now if I brought the claim then I'm under this thing, which is essentially *Briseno* renamed. I had talked with the folks on his appellate team about the possibility that this would occur, the strong possibility in my view, and they were prepared for the fact that we were going to have to go up again and get either—a grant vacate and remand order from the Supreme Court or the actual decision, which is what we hoped for, that would put the kibosh on attempting to work around their standard.

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When that happened in *Moore II*, I filed his intellectual disability claim.

Q. Okay. So essentially you expected, based on your long experience practicing in front of that court, that the CCA was not going to budge after *Moore I*, correct?

A. I did.

Q. And so long as they didn't budge, Mr. Johnson would lose an intellectual disability claim in state court, correct?

A. In my view, yes.

Q. So instead of pursuing that path, you chose instead to file a Rule 59 motion in federal court on a technical final judgment issue, correct?

A. It was a very technical issue, but it was one I felt had a fighting chance; so, yes.

Q. Okay. And then that appeal of that issue goes through November 2018 when you file a certiorari petition in the [119] Supreme Court, correct?

A. That's correct.

Q. Now, shortly after that is, as we discussed earlier, when Harris County sets Mr. Johnson for execution, correct?

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A. Yes.

Q. And yet a couple of months later the—Mr. Johnson's current counsel, the Federal Public Defender's Office, is appointed, correct?

A. Yes. I believe it was in February.

Q. What was your understanding of the reason they were appointed?

A. My understanding, because I had seen a letter in the state's file when we reviewed it, is that a death penalty activist had urged Mr. Johnson to contact their office and see if they would take the case. The request came down for a conflict-free counsel. I did not believe I had a conflict at that time, but the Court appointed the Capital Habeas Unit and there they went off.

Q. Okay. Shortly after that appointment is when the Supreme Court issued its opinion in *Moore II*, correct?

A. Very shortly.

Q. After that, you asked Dr. Gregory Hupp, is that his name—

A. Yes.

Q.—to evaluate Mr. Johnson for intellectual disability, [120] correct?

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A. Yes, we had talked about it before. I explained to him I'm waiting on a decision from something and if it happens, then I'm going to ask you to jump on it and get going.

Q. So you talked to Dr. Hupp before *Moore II* came out?

A. In a—forgive me.

Yes, in a general way about what I was doing and would he make himself available if this came out, you know, sometime in the spring.

Q. Okay. And then Dr. Hupp did, in fact, evaluate Mr. Johnson in March 2019, correct?

A. I believe that's correct, because that's right before we filed the application.

Q. Then on April 5th, 2019, did the Federal Public Defender's Office move to terminate your appointment?

A. Yep.

Q. And did you oppose that motion?

A. Yes.

Q. Why did you oppose it?

A. I believe that we had a good, viable, timely issue that was to be litigated and should have been litigated.

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Q. And so on April 11th, 2019, you filed a subsequent writ in the state court raising an intellectual disability claim based on Dr. Hupp's report, correct?

A. Yes.

[121] Q. Now, this writ, isn't it true that Mr. Johnson's current counsel asked you not to file an intellectual disability claim?

A. Yes.

Q. And I want to be clear on this. They did not ask you to wait, did they?

A. They said we don't want—we want you to stand down and basically we want to take it and trust us.

Q. So they said not to file and just to trust them?

A. I would phrase it a little bit differently, but yes.

Q. Now, do you recall how soon into their representation of Mr. Johnson they asked you not to file an intellectual disability claim?

A. It was right before I filed the claim.

Q. And did you listen to them?

A. I—I listened to them. I just believed that my duty was to file the claim.

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Q. And so essentially what you decided was that at the point that *Moore II* had finally overturned *Briseno*, you needed to raise what you believed was a valid claim as soon as possible, correct?

A. Yes.

Q. And you did not believe you should sit on your hands with Mr. Johnson's May 2019 execution looming, correct?

A. That's correct.

Q. And eventually you moved to withdraw yourself from [122] Mr. Johnson's case, correct?

A. Yes.

Q. Now, when you withdrew from Mr. Johnson's case, do you recall whether Mr. Johnson's current counsel had raised an IATC claim in this proceeding?

A. I—forgive me. I know they did eventually raise one, but where the sequence was with my withdrawal, I would have to have something to refresh my memory. Honestly, I cannot remember right now.

Q. And you said you know they did eventually raise one. How would you know? What's the source of that knowledge?

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A. I was still on the service list for pleadings and filings in the cases; so, when something was filed, I would get notice.

Q. Okay. Now, having established that broad time line, I'm going to go ahead and pick up on specific parts of it and before getting into some more of the substance, I want to turn very quickly to the issue of the trial counsel files.

Now, I want to be very clear about your testimony because the issues come up in various ways. You were not disputing that you did not obtain Anthony Osso's file until 2019, correct?

A. That, I'm not disputing that, that's correct.

Q. And the reason you asked for it then was that because— was because Mr. Johnson's execution date was set, correct?

A. Yes.

[123] Q. And because you wanted to get an investigation going on an intellectual disability claim, correct?

A. Yes.

Q. And what you needed from Mr. Osso's file was some contact information for adaptive deficit affidavits, correct?

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A. That was the substance of what we needed, yes. The brain injury was already well documented in the appellate record and the adaptive deficits were going to be the key to this under the new standard.

So as many family members as we could get, I wanted—my mitigation investigator had some, but I don't—I don't remember if she had all of them and she asked me if we could get that file.

Q. Okay. And the reason you asked Mr. Osso for his file in 2019 and not Mr. Leitner is because you saw Mr. Osso in the hallways around that time, correct?

A. I saw him first, right.

Q. So it was more convenient to ask him?

A. First one I saw, I was going to ask; so yes.

Q. And you knew what you were looking for in Mr. Osso's files, correct?

A. Yeah, contact information.

Q. And that's because you had Mr. Leitner's files for years before they were destroyed in Hurricane Harvey, correct?

A. Yes.

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[124] Q. And if Hurricane Harvey occurred in 2017, then the reason that you didn't ask for the files between 2017 when Hurricane Harvey destroyed them and 2019 when you asked Mr. Osso for his files was because the only issue being litigated in any court at that time was a very technical procedural issue on federal habeas; correct?

A. That's correct. As far as timing goes, yes.

Q. And that had nothing to do with the files, correct?

A. The files wouldn't have assisted me on those issues.

Q. And it's true, though, that you always anticipated filing an intellectual disability claim, correct?

A. For some time—ever since after my first year with Mr. Johnson, probably that that was going to come up.

Q. And you knew what you needed was the law, not the facts, correct?

A. This is my view. I—I understand that someone may come to a different conclusion, but to me, if I couldn't get a fair standard of review, then none of this was going to help because I'd be litigating it in a state court where I was likely to get an adverse finding.

Q. And that's fair enough. And, again, we will discuss that in a bit. I want to limit this specifically to the trial counsel filings.

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So given that your opinion was that it was the law and not the facts, the trial counsel files don't give you the law, do [125] they?

A. No. And I apologize. I'm apparently as difficult for the state's lawyer as I am for opposing counsel, so I apologize if I've been somewhat difficult to corral.

THE COURT: Counsel, how much more do you have?

MS. VINDELL: Perhaps about half an hour.

THE COURT: Let's take a short break and I'll take up this other matter and see if I can dispose of that and get them out of here.

And for purposes of this, you can just step back and you don't have to exit the courtroom, but you're free to mingle outside if you want to.

THE WITNESS: May I step down, Your Honor?

THE COURT: You may, sir.

THE WITNESS: I apologize.

THE COURT: No problem.

(Court is in recess.)

THE COURT: Counsel and Mr. McCann, thank you for your indulgence and your patience. As you can see, the

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Court had a very busy docket today and I appreciate—and Mr. Johnson as well, I appreciate your patience as well and your indulgence.

With that being said, Counsel, you may resume your examination.

MS. VINDELL: Yes, Your Honor.

CONTINUED CROSS-EXAMINATION

[126] **BY MS. VINDELL:**

Q. Okay. Mr. McCann, I believe when we left off we had started discussing the trial counsel files in this case—

A. Yes.

Q.—specifically Mr. Leitner’s and Mr. Osso’s files. We talked a little bit about Mr. Osso’s file. I now want to turn to Mr. Leitner’s file.

It’s true, isn’t it, that you obtained a copy of Mr. Leitner’s file in 2007 or 2008, correct?

A. Yes.

Q. So that would have been shortly after your appointment as state habeas counsel?

A. Yes.

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Q. Why do you remember when you obtained Mr. Leitner's file?

A. Well, Jim was taking a job for—forgive me—Mr. Leitner was taking a job as first assistant with the elected DA and I believe that at that time, I wanted to get the file before he closed down or, you know, he got quite busy as first assistant. So there was a little bit of time crunch to get that before everything at his place went to storage.

Q. Okay. So then you remember getting it around that time because that was around the time when Mr. Leitner returned to public service; is that fair?

A. Yes.

Q. And was it your recollection that when he did return to [127] public service, he was essentially fire walled from Mr. Johnson's state habeas proceedings?

A. Yes.

Q. Now, you obtained a copy of Mr. Leitner's file; is that correct?

A. I—I can't remember whether he copied the file and kept a copy or gave me a copy because it wasn't him to me, if that makes sense. It was—I asked my assistant to call his office and get the file and the file showed up, so I have the file.

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Q. Okay. So when I say “you,” we’re really talking about your assistant having gone and obtained the file?

A. That’s my recollection, yes.

Q. And I’m understanding your testimony to be that you’re not maybe officially certain whether it was a copy or not; is that correct?

A. Yes.

Q. But it would be fair to say that your general practice at that time was only to obtain copies of trial counsel files, correct?

A. It was whatever they wished to give me. We talked about that, I believe, after Mr. Johnson’s conviction, but the truth is that if at that time before the decision in my case out of Fort Bend where the client owns the file and you keep the copy, a lot of the practice was that the trial lawyer would retain a copy of the file so that if they had to participate in a [128] post-conviction proceeding, it would be handy.

Q. Okay. So it’s not generally your habit to keep the originals of the trial files, correct?

A. It was not then.

Q. And you say that because now things are a little different given the digitization of files, right?

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A. Yes. I mean, saying what's original and saying what's not is kind of difficult, plus there's been a decision that I was involved in out of Fort Bend that says the client owns the file and the lawyer would be normally permitted to keep a copy of it if it was necessary to answer any claims. But that the file itself belongs to the actual litigant.

Q. That decision is actually the eponymous *In Re: McCann*?

A. Yes, ma'am.

Q. And where did you store the file when you obtained a copy of it?

A. It was in—I was in—I got the copy. It would have been in the main storage room at North Main before I moved—no, I'm sorry. By that time, it would have been moved. I would have kept it at my storage room at the Rice Hotel.

Q. And that's where your office was located—

A. Yes.

Q.—in the Rice Hotel.

Now, back in 2007-2008 when you were obtaining the file from Mr. Leitner, why did you go to Mr. Leitner and not [129] Mr. Osso?

A. He was lead counsel and as far as I knew, had everything in his file. I believe—you can check with Mr.

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Osso, but I believe he verified he gave everything today to Jim—to Mr. Leitner.

THE COURT: Just a moment.

MR. KAWI: Objection. Hearsay.

THE WITNESS: That's fine. I—

THE COURT: Just a moment.

MS. VINDELL: Your Honor, these statements are not offered for their truth, but for their effect on McCann's actions vis-a-vis the files which is the question that's currently at issue in this case.

THE COURT: Overruled.

BY MS. VINDELL:

Q. Is it also your experience generally in habeas cases that sometimes lead counsel, lead trial counsel in a case will essentially keep what may be colloquially referred to as the master file?

A. Yes.

Q. And here you just said Mr. Leitner was lead counsel in Mr. Johnson's case, correct?

A. Yes.

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Q. And I believe you also indicated that Mr. Osso had, in fact, indicated to you that his file was essentially a [130] duplicate of Mr. Leitner's file, correct?

MR. KAWI: Objection. Hearsay.

THE COURT: Rephrase it.

BY MS. VINDELL:

Q. And was it your understanding that Mr. Leitner's file was essentially a duplicate of Mr. Osso's file?

A. Yes.

MR. KAWI: Objection. Hearsay.

THE COURT: Overruled as to his understanding.

MR. KAWI: Your Honor, if I could just—

THE COURT: I just overruled your objection. Have a seat, Counselor.

BY MS. VINDELL:

Q. Okay. A couple of last questions on this topic.

You said that your file was stored at your office in the Rice Hotel. Was it eventually moved?

A. Yes. I left the Rice and took a office across the

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street from this building at what we call the Ziggurat-looking building at 700 Louisiana and a few of the files that were either, honestly, too large to quickly or easily digitize were taken with me and a couple of new ones that I had made before we made that move, they were all stored at my off-site facility.

Q. And was Mr. Johnson's file one of those files that was too large to digitize?

[131] A. Yes, his and two other capitals, I think.

Q. And that's because, in part, you are a solo practitioner, right?

A. Yes.

Q. So taking the time to digitize those would have cost you money?

A. We moved to digital, but it did cost money and what I had budgeted had already been well exceeded and it was honestly just easier to move this and stored them there.

Q. And ultimately those files were destroyed in Hurricane Harvey, correct?

A. Along with quite a bit of other stuff from my office, yes.

Q. I would now like to turn to *Martinez* and *Trevino* a bit generally.

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You were asked earlier on direct a question about essentially whether *Martinez* and *Trevino* created a duty on federal habeas counsel to investigate their own ineffectiveness if they were also state habeas counsel. Do you recall being asked a question along those lines?

A. Yes.

Q. And you said, I believe one of your responses was you did not feel that was an appropriate or fair framework for what *Martinez* held. Do you recall testifying to that?

A. Yes.

Q. Can you explain to the Court now why you don't feel that [132] was an appropriate framework?

A. Both *Martinez* and *Trevino* covered different aspects and questions to my mind.

Martinez essentially permitted a, quote, unquote, gateway claim to be raised against state habeas counsel if the post-conviction system in any individual state allowed—forgive me—post conviction IAC claims to only be brought via a specific post-conviction proceeding.

And the Fifth Circuit eventually determined that was not us and then was subsequently overruled.

But basically, an example would be Alabama where I worked on Vernon Madison's case. They very specifically limit ineffective assistance of counsel claims to a specific type of pleading called a Rule 32 Petition.

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And in those petitions, you would be limited to raising this and if you failed to raise certain claims, in theory, *Martinez* could provide you a gateway claim to go after the state habeas counsel or state post-conviction counsel, however one wants to put it.

THE COURT: Counsel—

THE WITNESS: Yes, sir.

THE COURT: —I didn't understand a portion of your response. You said the Fifth Circuit said that is not us. Who is the us? I didn't understand you.

THE WITNESS: Oh, forgive me.

[133] My recollection is that when *Martinez* was first in front of the Fifth Circuit in the *Ibarra* case—and I believe you spelled it earlier, but I can't remember—that that did not apply to our circuit.

THE COURT: Circuit?

THE WITNESS: Yes.

THE COURT: Not your case specifically?

THE WITNESS: Correct. Yes, sir. Forgive me. I understand the confusion.

THE COURT: Thank you.

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BY MS. VINDELL:

Q. Okay. If I may clarify.

So I believe that I understand the answer as applied to *Martinez*, correct? What about *Trevino*? So at that point, fair to say the Supreme Court has applied it to Texas, correct?

A. In essence, yes, that's the nub of the holding.

Q. And you can correct me if I'm wrong, but my understanding of what you were disagreeing with in the questions you were asked earlier is essentially that you didn't think it would be a fair characterization that when *Trevino* came out there was essentially an automatic duty to view your own ineffectiveness?

A. I would agree with that.

Q. And why would you agree with that?

A. *Trevino* answered a question—because we in Texas can raise, for instance, ineffective assistance on direct appeal [134] and via a motion for a new trial. *Trevino* answered the question of whether *Martinez* applied to Texas because our system is the way it is.

To me, while that certainly creates increased pressure on the habeas counsel to bring whatever claims he can. In other words, changing the dynamic maybe from an analysis weighted towards your best, most provable claims

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to any claim that you can bring at the time provided there's, again, not a risk to your client if you bring it, if that makes any sense. Is that a fair answer?

Q. I believe it answered my question, but I will have some follow-ups about your understanding about *Trevino*.

I guess maybe my question is: Is it your view that *Trevino* was a per se rule of conflict?

A. No, it's not my view. I don't believe that's the holding and I don't believe that it's been interpreted that way.

Q. So the mere fact that you were both state habeas and federal habeas counsel does not itself give rise to a conflict. Would you agree with that statement?

A. I would.

Q. And, in fact, hasn't the Fifth Circuit said that Martinez's conflict is not even a conflict in the, quote, traditional sense?

A. Yes.

Q. And hasn't the Fifth Circuit also said that *Martinez* did [135] not create a right to conflict-free counsel?

A. It has said that.

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Q. So essentially, neither *Martinez* nor *Trevino* required you to go on what might amount to a fishing expedition to find meritless IATC claims to raise in federal court. Do you agree with that?

A. I do.

Q. And I believe you testified earlier that you thought that IATC claims had been raised in these proceedings. But were you aware that in 2020, Mr. Johnson filed a cert petition and in that cert petition, he said that no trial counsel ineffectiveness claim has been previously raised on Mr. Johnson's behalf in state or federal habeas?

A. I was not aware that that claim went to cert. I was not aware it went to cert.

Q. So if no meritorious IATC claim has ever been raised in these proceedings, is there a conflict under *Martinez*, in your view?

A. No.

Q. And counsel touched a little bit about this earlier. But the idea of essentially whether you consulted with anyone or talked to anyone about your interpretation of *Martinez*, I believe your testimony earlier was a very limited question. The question was: Is there ethics attorneys—experts in ethics that you conferred with about *Martinez* and *Trevino*. Do [136] you recall being asked that question?

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A. I do.

Q. And your answer was there is not a pool of ethic experts that you could consult for these matters; is that true?

A. That is true.

Q. Now, that's ethics experts, correct?

A. Yes.

Q. But there are death penalty practitioners who have been doing the exact same work you've been doing for years, correct?

A. Yes.

Q. And there's a pool of those practitioners, isn't there?

A. Yes.

Q. And you did talk with those practitioners, didn't you?

A. As often as I could.

Q. And you regularly meet to discuss your interpretation of the case law, correct?

A. Yes, although it's not like a scheduled meeting of a bar section. It's more, to be honest, that we get together

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for dinner, lunch or drinks and talk about these things and we certainly do that after every CLE.

Q. Fair enough. So there are two components I wanted to follow up there. You have informal discussions with your peers about issues that arise in the Supreme Court and relevant to your cases, correct?

A. All the time.

[137] Q. And then you also attend CLEs in which these issues are discussed, correct?

A. Yes, ma'am. We are required to get at least 20 hours of capital-specific CLE every two years and I teach at some of those, but I also take extra.

Q. And at those CLEs, you have further informal discussions with your peers about perhaps how it might apply to your case, correct?

A. Oh, yeah, it flows very naturally from some of the presentations. Other times it's just the case that came out and you want to discuss it with someone you consider to be a good, smart lawyer.

Q. This is not an instance where you didn't talk to a single person in the world about how *Martinez-Trevino* might have applied in your cases, correct?

A. It's not. I took that responsibility seriously and I did speak to other people.

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Q. Okay. And, now, I'd like to move on to, you know, the main question essentially, *Moore* and timeliness. And I want to get this straight out on the record and right off the bat. You believe Mr. Johnson is intellectually disabled, don't you?

A. Yes.

Q. And you've always believed that, haven't you?

A. I have since the—I believe I said this earlier. Since after my first year assigned to his case and after discussions [138] with him, I believe that that would be a probably valid issue.

Q. So in your mind, this was never a question about whether the facts show that he was intellectually disabled, correct?

A. No, although to be fair, I didn't have a psychologist's opinion; but I believe that based on his damage and the testimony that I would be able to establish those prongs, clearly the source of it being the brain damage and that if he was tested, he would come in very close or below and that we would be able to, assuming we could get folks to open up because retardation is difficult to get people to talk about, that there would be evidence of deficits.

Q. That's fair enough. That was a fair clarification, I suppose. My question then really is: It was always your belief that you could probably prove as a factual matter that Mr. Johnson was, in fact, intellectually disabled, correct?

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A. Yes.

Q. And for you it was a question about the law, correct?

A. It was a very serious question because I believe that that standard was terribly limiting and could be very damaging to my client.

Q. Would you agree with me that the DSM-5 is not a law?

A. Certainly. Yeah. It's a psychological reference book and standard book.

Q. So when the DSM-5 came out, did it have any effect on the merits of the claim as a legal matter in your view?

[139] A. No, it didn't address them at all and was pretty much no help.

Q. And that's because *Briseno* was still good law, correct?

A. Yes, ma'am.

Q. Now, you alluded earlier to this, but I believe your testimony was that Mr. Johnson's case was a difficult case under *Briseno*. Do you recall testifying to that?

A. Yes.

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Q. Can you explain to the Court why Mr. Johnson's case was a difficult case under *Briseno*?

A. The testimony at Mr. Johnson's trial from admittedly by his co-defendants was that he was more or less in charge, which shows leadership. That he hid the vehicle and that he was also the shooter and it showed all the factors that one looks at in *Briseno* and says that, you know, this has nothing to do with whether or not he is intellectually disabled and there was also an extraneous killing that was Mr. Johnson's responsibility that was introduced at punishment.

So as far as bad facts, he had some pretty bad facts to overcome and under the *Briseno* standard, he would not have made a retardation claim.

Q. So another way of saying that would be that had you raised an intellectual disability claim while *Briseno* was good law, the risk to your client that he would lose that claim was, in your view, very great?

[140] A. Yes.

Q. Now, when the DSM-5 was published, did you consider whether there was a new statute of limitations for federal habeas purposes that you needed to operate under?

A. Of course.

Q. And what was your opinion or what was your assessment of that?

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A. Well, the way the statute reads, it's an or formulation. You have a new factual basis or a new legal basis and essentially you'd have one year from the time of either.

Q. And so ultimately did you decide that a statute of limitations did not start running from the DSM-5?

A. I did not see how it could since I was waiting for the law to change and that—it's not that I was unaware of or not considering those facts. It's that—or the medical standards. It's that in my view, unless and until we got a favorable or at least a fair standard of review, that was not going to be a successful claim.

Q. So then essentially if I can summarize, you weighed whether you would prefer to proceed under the new rule of law on the timeliness component or the timeliness analysis or the factual predicate date, correct?

A. Yes.

Q. And it was your belief that it would be a more favorable outcome for Mr. Johnson if you attempted to proceed under the [141] new rule of law rather than a factual predicate date?

A. Absolutely.

Q. So then you considered as a strategy that you could attempt to quote, I believe the word my opposing

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counsel used was “preserve the claim,” after the DSM-5, correct? You considered that?

A. I did.

Q. But ultimately you rejected it?

A. Yes.

Q. And you rejected that in favor of a strategy of waiting until you could get a merits adjudication under more favorable law, correct?

A. Yes.

Q. I want to come back to that idea about merits adjudication because we can’t forget here we’re operating under AEDPA, correct?

A. Yes, the Anti-terrorism and Effective Death Penalty Act. Yes, we are.

Q. And under AEDPA, it is exceedingly difficult to win merits relief in federal court. Is that fair to say?

A. I think that is a charitable understatement, yes.

Q. That’s because AEDPA’s purpose—would you agree with the statement, that AEDPA’s purpose is that these issues get resolved in the state courts?

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A. Yes. The whole statute seems built on comity and allowing [142] the states to have first bite and a significant bite at this apple.

Q. So when you're making decisions as habeas counsel about what's best for your client, you have to sometimes make some tough decisions about which court you want to proceed in front of, correct?

A. I am in a forced game of—that I, you know, would love not to play in, but, yeah, basically.

Q. When we're talking about Mr. Johnson's case specifically, the question has come up about why not after *Moore I*, did you not go straight back to the state court and raise it after *Moore I*? Why is that?

A. Whenever one tries to ask for relief, you have to be careful what you ask for. If I went back with Mr. Johnson and attempted to prove under a bad standard that he was intellectually disabled and I lost, then while that claim is exhausted, it is also entitled to deference under a AEDPA and *Harrington* and other—H-a-r-r-i-n-g-t-o-n—and other cases from the Supreme Court that have made it very clear that they will follow AEDPA and so you have a difficult standard that would be basically unfair to my client and factual findings and conclusions that would be entitled to deference.

To me, while that's—that seems a rigged game for my client, I thought the better option would be to see if we could find some way under a new standard or to get a

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new standard [143] developed. And I worked with other people to help their cases. They contributed to the *Moore* case. You know, it's a false thing to say that was only my case. That was a very good team of people that helped put that through, but it is—it is a decision that I thought long and hard about.

THE COURT: Counsel—

THE WITNESS: Yes, sir.

THE COURT: —you said—you said it two different ways. You said—the question was after *Moore I*, you were making legal decisions and you said to prove—you first said prove under a bad standard and then you later said prove under a difficult standard. What are you referring to as a bad or difficult standard? *Moore I*?

THE WITNESS: No, sir.

THE COURT: Okay. Well, see, that was the question that I thought she had posed was after *Moore I*; and so, what were you—you were not referring to *Moore I* as being bad or difficult. What were you referring to?

THE WITNESS: I was referring to the Court of Criminal Appeals' decision after *Moore I* to essentially keep *Briseno* under a different name.

THE COURT: Maybe that's where my confusion—immediately after *Moore I* was issued by the United States Supreme Court, there was a lag in time between

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that decision and the subsequent decision by the CCA, correct?

[144] THE WITNESS: There was.

THE COURT: How much time?

THE WITNESS: I would have to look back. It was—their decision came out. We had Harvey and then I think it was a couple of months after that and—

THE COURT: A couple of months?

THE WITNESS: I believe. I would need to look to see that.

THE COURT: Let's just say for purposes of discussion it was two months.

THE WITNESS: All right.

THE COURT: So after *Moore I* but before the subsequent opinion from the CCA where I think you would agree with me that *Moore I* was the law of the land as it was the opinion of the United States Supreme Court, was it still—would it have still been your position during that two-month period not to proceed with the ID claim on behalf of Mr. Johnson?

THE WITNESS: My position—and I realize you're trying to get to the nub of this, I think, Your Honor. My position would have been if the decision—

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THE COURT: What decision?

THE WITNESS: From the CCA, had gone past things or gone past the time line, that's a potential decision point where you would have made a different call. But so that I'm clear, I did anticipate there—it was a gamble. I'm looking [145] you in the eye and telling you it was a gamble. But I gambled correctly on what they would say and whether it's *Briseno* or whether it's called, you know, something else, that standard was going to be unfavorable.

THE COURT: Understood. Thank you, Counsel.

THE WITNESS: Thank you.

THE COURT: I apologize for the interruption. You may proceed.

MS. VINDELL: Thank you, Your Honor. That's largely where I was going with some of these questions, but just to make sure—making it clear for the record.

BY MS. VINDELL:

Q. When you say before *Moore I*, *Briseno* was bad law and Mr. Johnson, in your view, would always lose under *Briseno*, correct?

A. Yes.

Q. And then *Moore I* came out and it was your opinion based on your experience with the CCA that it

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was likely that the CCA was not necessarily even going to ignore, though that's one way to put it, but misapply *Moore I*, correct?

A. Yes.

Q. And because of that, the risk to your client of putting a—getting a merits adjudication under still not favorable CCA law was too great to raise the claim; is that correct?

A. At that point, yes.

[146] Q. And it turned out that you were right about the CCA, weren't you?

A. I—that's something I would like not to have been right about, to be candid; but, yes.

Q. In fact, between *Moore I* and *Moore II*, Chief Justice Roberts switched sides in terms of what he thought the applicable law was; is that correct?

A. If you're looking at the breakdown, yes.

Q. So Chief Justice Roberts dissented in *Moore I*; is that correct?

A. Yes.

Q. And in *Moore II*, he concurred in judgment; is that fair?

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A. Yes. Apparently they had to tell them twice that it was the law of the land.

Q. And do you recall that Chief Justice said this in his concurring opinion in *Moore II*: “On remand, the Court repeated the same errors that this Court previously condemned, if not quite”—and this is Latin and I do not know how to pronounce it—“*in haec verba*, certainly in substance”?

A. Yes.

Q. Does that comport with your memory of what *Moore II* effectively held?

A. It comports with my memory of what it held and it comports with my memory of what the CCA’s intervening decision was.

Q. So that means that in the time from *Moore I* to *Moore II*, [147] you had a couple of options. You could have raised the claim even though the CCA’s case law was still not favorable to Mr. Johnson, correct?

A. Correct.

Q. If you did that, you would have risked an unfavorable merits adjudication, correct?

A. I believe I would have gotten an unfavorable merits adjudication.

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Q. And had you gotten that, that unfavorable merits adjudication would have gotten deference in federal court under AEDPA, correct?

A. Yes, it would.

Q. As we discussed earlier, it would have been exceedingly difficult to ever show the CCA was incorrect—or to show that he would get relief on an ID claim in that instant, correct?

A. Yes. The only people who seemed to be able to tell the CCA what to do ever are the—is the Supreme Court and they have to do it more than once.

Q. I believe you just touched on this with the Court, but this all happened pretty quickly on. The CCA did essentially just reaffirm its prior decision within the year of *Moore*, correct?

A. That is correct.

Q. So had you exceeded the year, maybe at that point you would have considered raising the claim to preserve your [148] federal timeliness, fair enough?

A. Yes.

Q. But then you have *Moore II* in 2019, correct?

A. That's correct.

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Q. And at that point, I believe you testified earlier that's when *Briseno*, the case law, was killed officially?

A. I apologize for using that word in a death penalty context. Let me restate it.

That case was firmly overturned.

Q. So at that point, you have a new decision tree, don't you?

A. Yes.

Q. And your options are essentially this: On the one hand, you can raise what you think has always been a meritorious claim, meritorious intellectual disability claim in the state court and hope that now that they've been told how to properly apply intellectual disability, you might win, correct?

A. Yes. I thought that was his best chance.

Q. In fact, that's kind of the best outcome under AEDPA a lot of the time, correct?

A. Yes.

Q. Alternatively, if you raise the claim in state court and it was dismissed as subsequent—which is what happened here, correct?

A. That is correct.

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Q. Isn't it also true that the Fifth Circuit has said that a [149] dismissal of a subsequent *Atkins* claim by the CCA is treated as a merits adjudication?

A. Yes.

Q. So now when you return to federal court, wouldn't you then have the benefit of *Moore I* and *Moore II* to argue why the CCA's merits adjudication of Mr. Johnson's intellectual disability claim was unreasonable?

A. That was the hope.

Q. And doesn't that put you or—wasn't it in your view that that put you in a significantly better position to actually get relief for Mr. Johnson?

A. Very significantly better.

Q. And I think you would acknowledge that not every attorney is going to do exactly the same thing as you did; is that fair?

A. It's very fair. Two habeas attorneys can come to the same problem and approach it in different ways.

Q. You arrived at this conclusion after a great deal of thought, correct?

A. Yes.

Q. And based on—

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A. And some sleepless nights.

Q. Fair enough. And also based on your extensive experience litigating these claims over years, correct?

A. I had literally only a few years before gotten exactly the result I expected from the CCA and I can only point to past [150] behavior as a guide, yes.

Q. So fair to say that choosing which way to proceed is a judgment call that different attorneys may make differently?

A. That's fair.

Q. And that your goal was always to save your client's life?

A. Everything I ever did was solely for the purpose of keeping Mr. Johnson alive and giving him the best shot at relief. Everything.

Q. And there are risks no matter which way you go; is that fair?

A. There's always risks. If I had gotten a merits adjudication and lost, I think I'd still be in this seat.

Q. And ultimately, it was your opinion that there was less risk to Mr. Johnson's life waiting until you had the best law you possibly could have for a merits adjudication than there was risk in choosing to raise I believe you've

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used the phrase before “unripe” intellectual disability claim; is that fair?

A. Yes.

MS. VINDELL: I pass the witness, Your Honor.

THE COURT: How much more redirect will you have? MR. KAWI: You know, probably not very much at all, Your Honor, but if I could just have a moment to—

THE COURT: Let’s take a ten-minute break. I think I need it and the court reporter needs it. We’ve been on the bench since 1:00. 3:10.

[151] THE LAW CLERK: All rise.

(Court is in recess.)

THE LAW CLERK: All rise.

THE COURT: Thank you. Please be seated.

Counsel, do you have any redirect for this witness?

MR. KAWI: Yes, Your Honor.

THE COURT: You may proceed.

MR. KAWI: This isn’t going to take long, Mr. McCann.

*Appendix D***REDIRECT EXAMINATION****BY MR. KAWI:**

Q. So just—I wanted to go back just to a couple of points here. The first one was part of your testimony was that my office had told you that we did not want you filing claims at a specific time when we were both on the case. Do you remember testifying to that?

A. Yes.

Q. I just wanted to be clear so that everything is sort of out in the open. You're aware that the Federal Public Defender's Office filed obviously the motion to terminate you as counsel, right?

A. Of course.

Q. Then we also filed a 60(b) motion in this case on behalf of Mr. Johnson?

A. Yes.

[152] Q. Okay. And you're aware that we—we actually briefed the issue of why our office at that very specific time took the position that you should not be filing pleadings?

A. I believe I—I read your 60(b) pleadings, but it was after the phone conversation, to my memory.

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Q. Fair enough. Whether it was after a phone conversation or not, I just wanted it to be clear or see if you knew that my office briefed that issue. It wasn't some behind-closed-doors conversation or at least it came out in the open in the federal pleadings. The Court has access to them.

A. I would agree with the latter statement, absolutely.

Q. All right. And then the only other thing, you know, you got a lot of questions from the Director about what a difficult standard AEDPA is. And that's certainly true; but just very quickly, the fact of the matter is with Bobby Moore that whatever else we've discussed in your positions on other issues, the fact is Bobby Moore when he had his case litigated also lost under *Briseno* initially?

A. Yes.

Q. And after he lost under *Briseno*, because that issue is properly preserved, he was able to make it into federal court properly and eventually get relief in the Supreme Court under a constitutional standard. Accurate?

A. It is fair that under his facts that we were able to get there, yes.

[153] Q. Even though he lost under *Briseno* in Texas state court?

A. Yes.

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MR. KAWI: No further questions, Your Honor.

THE COURT: Any recross?

MS. VINDELL: Very briefly.

RECROSS-EXAMINATION

BY MS. VINDELL:

Q. To my opposing counsel's last few questions there, it's important to note, though, that Bobby Moore won in the trial court, didn't he?

A. Yes.

Q. Under *Briseno*, correct?

A. Yes.

Q. So while the CCA didn't agree, some court did think that he was intellectually disabled under the prevailing case law at the time, correct?

A. Yes, under that case law, they still found him to be— they acknowledged the case law in the first set of findings and still found him—

Q. And he won because he had better facts showing an intellectual disability claim at that time than Mr. Johnson did, didn't he?

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A. I believe he had better facts on all levels than Mr. Johnson's case did.

Q. And his case was—well, excuse me. And Mr. Johnson's [154] case had worse facts than Mr. Moore that you didn't think would get relief under *Briseno* at any time?

A. That's correct.

Q. So those cases are not the same, are they?

A. Not at all.

MS. VINDELL: Pass the witness, Your Honor.

THE COURT: Mr. McCann, you may step down.

MR. McCANN: Thank you, Your Honor. Does the Court wish me to stand by?

THE COURT: For today? No, your testimony is concluded. You're excused.

MR. McCANN: Thank you, Your Honor.

THE COURT: Counsel for the petitioner, any wrap-up points you need to make?

MR. KAWI: Well, we certainly don't have any more live witness testimony, Your Honor. The only thing that remains to be made official is the admittance of the

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deposition designations into the record. I know there are pending objections.

I don't think—as far as wrap-up points beyond the deposition designations, we did just at the conclusion of this entire proceeding want to let the Court note we know there's a briefing schedule. So we're looking forward to providing arguments in that format as well.

Our position, as we've discussed it in the [155] preparation of this hearing, is that while certainly it will be up to the Court, we would request the opportunity to return at some point after that briefing schedule and present additional oral argument or a presentation to the Court. Clearly that is entirely your decision, of course.

And as far as legal matters in the case, it's just the deposition designations that remain from our perspective.

THE COURT: Very well.

Counsel, from your side, anything else?

MS. VINDELL: From our side also, just the objections. We're open to other ways of handling those if the Court would prefer to do something different, but—

THE COURT: I mean, you've submitted them and I think I can go through and rule on them.

Are there any you need to bring to my attention?

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MR. KAWI: I don't think so, Your Honor.

MS. VINDELL: If Your Honor would like the Director's response to—we objected. They responded and we haven't done a reply. That's the only thing we had thought we would be raising in court.

THE COURT: A reply to the objection?

MS. VINDELL: A reply to the response that they filed.

THE COURT: On the objection?

MS. VINDELL: Yes. I'm sorry.

[156]THE COURT: I don't think it's that complicated, so I don't think that the reply is needed. I mean, it's pretty straightforward. You lodged the objection. There was a response. This is very—not to minimize it, it's very basic stuff. The most helpful information obviously was hearing Mr. McCann's decision-making process under oath why he decided to do certain things.

By way of briefing schedule, without Ms. Edwards here, I'm kind of at a loss.

I think we're able to move to the Court's position on this after additional consideration and discussion pretty easily. I don't—I mean, do you see a need for the parties to submit findings of fact and conclusions of law that may aid me, but from my perspective, I think they would not be overly illuminating.

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MR. KAWI: One second, Your Honor.

THE COURT: Okay. You had a conference as well?

MS. VINDELL: Yes.

THE COURT: My trusty law clerk was just telling me that the briefing you were referring to was additional briefing 30 days after the transcript is filed. So if there's anything additional that you want to add, I'm happy to await that obviously, but I think this is pretty straightforward from what I've heard and what I've seen by way of the briefing. So I'm happy to await the additional briefing.

[157] MR. KAWI: Okay.

THE COURT: But as to my original question, findings of fact and conclusions of law, you wanted to weigh in?

MR. KAWI: Well, so, there's the briefing and then the findings of fact. I think our overall position is that as long as we're able to provide written argument on what has transpired, that's our chief concern. What the title of the document is, I think we're less concerned with that; but I will just say that I do think that there are some points that are contained within the fact sets in this record that have not been tied together in a way that we anticipate could be persuasive. So we do look forward to the briefing for that.

THE COURT: Very well.

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MS. VINDELL: And I think I largely agree, Your Honor. I think the Director's position is we would prefer to treat it as just post-hearing briefing. If the Court doesn't want specifically findings, then we would just write a brief generally.

THE COURT: Do your briefing and then after I look at your briefing, if I determine that additional findings of fact and conclusions of law stage is necessary, I will so inform you.

MS. VINDELL: Okay. Just to clarify. It's just general post-argument brief.

THE COURT: Post-hearing briefing that you want to [158] bring up and I'll deal with it.

MR. KAWI: That's understood, Your Honor. With that, we have no more legal issues. We did have one matter that we wanted to actually approach on?

THE COURT: Approach?

MR. KAWI: Yeah.

THE COURT: All right. Come on up.

(Bench conference held off the record.)

THE COURT: Very well. Anything else from the petitioner?

MR. KAWI: No, Your Honor.

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THE COURT: Respondent?

MS. VINDELL: Nothing further from the Director.

THE COURT: The point that was mentioned is that Mr. Johnson has family here in the courtroom and counsel talked about the opportunity for them to say good-bye. I think that's appropriate, but it's a no-contact good-bye.

So to the extent that Mr. Johnson can stand at the end of the table, the family can approach the podium—the railing there and speak from the other side of the railing and say good-bye since he's here and present, but there is to be no contact.

And for the folks from TDC, thank you for your professionalism and I know it's always difficult transporting defendants like this and the Court greatly appreciates your [159] work today.

Anything else?

MS. VINDELL: Nothing further, Your Honor.

THE COURT: Very well. The Court will await your additional briefing.

We're adjourned and you're excused.

THE LAW CLERK: All rise.

(The proceedings were adjourned.)