IN THE Supreme Court of the United States

BYRON LEWIS BLACK,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSE SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appellate Courts

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

BYRON LEWIS BLACK v. STATE OF TENNESSEE

Criminal Court for Davidson County No. 88S1479

No. M2004-01345-SC-R11-PD

ORDER

On July 1, 2025, Byron Lewis Black, a death-row inmate scheduled for execution on August 5, 2025, filed a motion to recall the March 2006 mandate that issued following his unsuccessful appeal from the trial court's determination that he is not intellectually disabled. Mr. Black contends the 2005 opinion is outdated and legally erroneous, and he insists he is intellectually disabled under the current intellectual disability definition. Mr. Black asks the Court to either withdraw the 2005 opinion or issue a certificate of commutation based on these extenuating circumstances. In its response, the State maintains that Mr. Black's intellectual disability claim has been fully litigated on the merits and that he has presented no extenuating circumstances to warrant recall of the mandate or issuance of a certificate of commutation. We agree with the State.

Tennessee Rule of Appellate Procedure 42(d) provides that this Court has the power to recall its mandate. Tenn. R. App. P. 42(d). However, recalling the mandate is "an extraordinary remedy and should be exercised sparingly." *State v. Smith*, 151 S.W.3d 533, 544 (Tenn. Crim. App. 2003), *perm. app. denied* (Tenn. Oct. 4, 2004) (quoting *State v. Abu–Ali Abdur'Rahman*, M1998–00026–SC–DPE–PD (Tenn. Apr. 5, 2002) (order)). The power to recall the mandate is "one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)). Furthermore, the circumstances should be "sufficient to override the strong public policy that there should be an end to a case in litigation." *Id.* (quoting *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958)).

Mr. Black pursued an intellectual disability claim after this Court and the United States Supreme Court held that an intellectually disabled (formerly "mentally retarded") person is categorically ineligible for the death penalty. *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001); *Atkins v. Virginia*, 536 U.S. 304 (2002). After a hearing, the trial court

determined that Mr. Black failed to establish he is intellectually disabled. The Court of Criminal Appeals affirmed, and this Court denied Mr. Black's application for permission to appeal. *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006), *cert. denied*, *Black v. Tennessee*, 549 U.S. 852 (2006). The mandate issued on March 8, 2006.

Almost twenty years later, Mr. Black is seeking to recall the mandate on the eve of his scheduled execution and relitigate his intellectual disability claim. Mr. Black's core premise is that the 2005 decision is based on an intellectual disability definition that has been upended by subsequent decisions of this Court and the United States Supreme Court, initially citing Coleman v. State, 341 S.W.3d 221, 232 (Tenn. 2011), and Atkins. However, because Mr. Black's state intellectual disability proceedings overlapped with the federal habeas proceedings, the Sixth Circuit twice remanded the habeas corpus proceedings to the federal district court specifically for reconsideration of Mr. Black's intellectual disability claim in light of Atkins and Coleman and ultimately affirmed the denial of habeas relief. See Black v. Bell, 664 F.3d 81 (6th Cir. 2011), reh'g denied (6th Cir. 2012); Black v. Carpenter, 866 F.3d 734 (6th Cir. 2017), reh'g en banc denied (6th Cir. 2017), cert. denied sub nom, Black v. Mays, 584 U.S. 1015 (2018). Mr. Black also cites Hall v. Florida, 572 U.S. 701 (2014), and the 2021 amendments to Tennessee Code Annotated section 39-13-203 (our intellectual disability statute) as further support for his contention that the 2005 decision is constitutionally infirm. However, in 2021, Mr. Black pursued a new intellectual disability claim based on these developments. Black v. State, 2023 WL 3843397 at *3 (Tenn. Crim. App. June 6, 2023). The trial court concluded Mr. Black's new claim was precluded by the statute's procedural bar, rejecting the parties' attempt to avoid the bar via a stipulation. Id. at *4. In affirming the trial court, the Court of Criminal Appeals panel agreed that the amended statute barred the new claim and that the parties may not stipulate questions of law, and notably the panel further explained why the 2005 appeal is not undermined by Hall v. Florida. Id. at *4-11. Mr. Black chose not to seek review in this Court. Thus, Mr. Black's intellectual disability claim was fully litigated on the merits, and the judgment is final. He may not seek to recall the mandate as a vehicle to relitigate his claim.

Finally, Mr. Black alternatively asks the Court to issue a certificate of commutation based on the extenuating circumstances. *See* Tenn. Code Ann. § 40-27-106 (2018); *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000). This Court previously denied Mr. Black's request for a certificate of commutation in its February 24, 2020 order setting Mr. Black's original execution date. Mr. Black has presented no extenuating circumstances to warrant reconsideration of our earlier denial. Accordingly, it is hereby ORDERED that the motion to recall the mandate is DENIED.

It appearing to the Court that Mr. Black is indigent, costs are taxed to the State of Tennessee.

PER CURIAM

2023 WL 3843397

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, AT NASHVILLE.

Byron BLACK

v.

STATE of Tennessee

No. M2022-00423-CCA-R3-PD

November 8, 2022 Session

|
FILED June 6, 2023

Appeal from the Criminal Court for Davidson County, No. 88-S-1479, Walter C. Kurtz, Judge

Attorneys and Law Firms

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Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

Tom Greenholtz, J., delivered the opinion of the court, in which Camille R. McMullen and Robert H. Montgomery, Jr., JJ., joined.

OPINION

Tom Greenholtz, J.

*1 At the heart of this appeal is a narrow procedural question: whether the 2021 amendment to

Tennessee Code Annotated section 39-13-203 permits the Defendant, Byron Black, to move for a hearing on whether he has an intellectual disability and is therefore ineligible for the death penalty. The trial court dismissed the motion after determining that the Defendant was procedurally barred from bringing the issue. On appeal, we hold that because the issue of the Defendant's intellectual disability has been previously adjudicated, he may not file a motion pursuant to Tennessee Code Annotated section 39-13-203(g)(1). We also hold that the General Assembly's decision not to entitle the Defendant to a second hearing does not subject him to cruel and unusual punishment, nor does it deny him due process of law or the equal protection of the law. Accordingly, we respectfully affirm the judgment of the trial court.

FACTUAL BACKGROUND

On March 28, 1988, the Defendant shot and killed his girlfriend, twenty-nine-yearold Angela Clay, and her two daughters, nine-year-old Latoya Clay and six-year-old Lakeisha Clay. State v. Black, 815 S.W.2d 166, 170 (Tenn. 1991). After being convicted of three counts of first degree premeditated murder, the Defendant received consecutive life sentences for the murders of his girlfriend and her oldest daughter and a sentence of death for the murder of Lakeisha Clay.

After that, the Defendant sought post-conviction relief, alleging that he received the ineffective assistance of counsel and that the capital sentence was unconstitutional. *Byron Lewis Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299, at *1 (Tenn. Crim. App. Apr. 8, 1999). His post-conviction petition was denied, and this Court affirmed the denial on appeal. *Id.* After our supreme court denied permission to appeal, the Defendant filed a petition for a writ of certiorari, which the United States Supreme Court denied on February 28, 2000. *Black v. Tennessee*, 528 U.S. 1192, 120 S.Ct. 1249, 146 L.Ed.2d 106 (2000).

A. DEFENDANT'S 2002 PETITION TO REOPEN

On November 13, 2002, the Defendant filed a motion to reopen his post-conviction petition, "alleging that he was [intellectually disabled] and thus ineligible for the sentence of death." *Byron Lewis Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577, at *2 (Tenn. Crim. App. Oct. 19, 2005). ¹ At that time, our General Assembly had defined the term "intellectual disability" (then described as "mental retardation") as follows:

- (a) As used in this section, "mental retardation" means:
 - (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
 - (2) Deficits in adaptive behavior; and
 - (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

Tenn. Code Ann. § 39-13-203(a) (1997).

In support of his petition to reopen, the Defendant cited Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001), in which our supreme court "held as a matter of first impression that the execution of [an intellectually disabled] person violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution." Black, 2005 WL 2662577, at *2. The Defendant also relied upon Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held that the Eighth Amendment prohibits the execution of intellectually disabled offenders.

*2 After the hearing, the post-conviction court concluded that the Defendant was not intellectually disabled and was thus eligible for the death penalty. *Id.* at *11. The post-conviction court specifically found that "neither the requisites for I.Q. nor adaptive behavior manifested by his eighteenth birthday. All

I.Q. tests given before 2001 indicate an I.Q. above 70." *Id.* (footnote omitted).

The Defendant appealed this ruling. On appeal, this Court affirmed the post-conviction court's denial of relief. This Court held that, although the Defendant failed to meet the "bright-line cutoff" of having an I.Q. below 70, he also failed to establish that he had deficits in adaptive behavior or that his intellectual disability manifested before age eighteen. *Id.* at *15-17. Our supreme court denied the Defendant's application for permission to appeal, and the United States Supreme Court denied his petition for a writ of certiorari on October 2, 2006. *Black v. Tennessee*, 549 U.S. 852, 127 S.Ct. 120, 166 L.Ed.2d 90 (2006).

B. DEFENDANT'S FEDERAL LITIGATION

While the state post-conviction proceedings were ongoing, the Defendant also pursued federal habeas relief pursuant to 28 U.S.C. § 2254. The Defendant raised thirty-four claims, including that he could not be executed because he had an intellectual disability. The district court granted the State's motion for summary judgment, *Black v. Bell*, 181 F. Supp. 2d 832, 837 (M.D. Tenn. 2001), and the Defendant appealed that judgment to the United States Court of Appeals for the Sixth Circuit. *See Black v. Bell*, 664 F.3d 81, 85 (6th Cir. 2011) (reciting the federal court history of the Defendant's cases).

The Sixth Circuit granted the Defendant's motion to hold the case in abeyance until the Defendant exhausted his intellectual disability claims in the state courts. Id. After the conclusion of the state post-conviction proceedings denying relief, the Sixth Circuit remanded the case so that the district court could reconsider, among other things, the Defendant's intellectual disability claim under Atkins. Id. at 86, 122 S.Ct. 2242.

On remand, the district court again denied the Defendant's Atkins claim, but the Sixth Circuit vacated the denial and remanded for further proceedings. Id. at 86, 106. In part, the Sixth Circuit noted that the district court should consider the Defendant's "level of intelligence and adaptive deficits

by the time he was age 18," particularly in light of the Tennessee Supreme Court's opinion in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). *See Black*, 664 F.3d. at 100-01.

On this second remand, the district court concluded that the Defendant "failed to carry his burden of demonstrating intellectual disability by a preponderance of the evidence." Byron Lewis Black v. Ronald Colson, Warden, No. 3:00-0764, 2013 WL 230664, at *1 (M.D. Tenn. Jan. 22, 2013) (footnote omitted), aff'd sub nom. Black v. Carpenter, 866 F.3d 734 (6th Cir. 2017). The court concluded that the Defendant "has not shown significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or below manifested by age 18." Id. at *14. Additionally, the court said that "[a] full, independent review of the record persuades this Court that the Defendant has not shown weaknesses or deficits in his adaptive behavior prior to age 18 within the meaning of the statute." *Id.* at *18.

On his third appeal to the Sixth Circuit, the Defendant argued, among other things, that the district court "erred in its merits determination that [the Defendant] had not met his burden of establishing entitlement to

Atkins relief." Black, 866 F.3d at 740. The Sixth Circuit disagreed, stating that it could not "find fault with the district court's conclusion[.]" Id. at 748. In part, the appellate court concluded that the Defendant "cannot show that he has significantly subaverage general intellectual functioning that manifested before [the Defendant] turned eighteen." Id. at 750.

*3 The Defendant appealed the Sixth Circuit's decision, and the United States Supreme Court denied his petition for a writ of certiorari on June 4, 2018. Black v. Mays, — U.S. —, 138 S. Ct. 2603, 201 L.Ed.2d 1007 (2018).

C. DEFENDANT'S 2021 INTELLECTUAL DISABILITY MOTION

1. Statutory Amendments

In 2021, our General Assembly amended Tennessee Code Annotated section 39-13-203(a) to partially

revise the definition of "intellectual disability" in the context of capital sentencing. The legislature retained the requirements that deficits in adaptive behavior must exist and that the intellectual disability must have manifested during the developmental period, or by eighteen years. But, it revised the bright-line requirement that a person have "a functional intelligence quotient (I.Q.) of 70 or below." With the revised definition of "intellectual disability," the statute now provides as follows:

- (a) As used in this section, "intellectual disability" means:
 - (1) Significantly subaverage general intellectual functioning;
 - (2) Deficits in adaptive behavior; and
 - (3) The intellectual disability must have manifested during the developmental period, or by eighteen (18) years of age.

See 2021 Tenn. Pub. Acts, ch. 399, § 1 (eff. May 11, 2021) (codified at Tenn. Code Ann. § 39-13-203(a)).

In addition, the General Assembly established a new procedure by which certain defendants could raise and litigate a claim of intellectual disability by filing a "petition" or a "motion" with the trial court. *See id.* § 2 (codified at Tenn. Code Ann. § 39-13-203(g) (1)). Although this new procedure allowed some defendants to raise an "intellectual disability" claim, it also contained a provision limiting the ability of other defendants to raise such a claim. This limitation, which is presently codified in section 39-13-203(g)(2) (hereinafter "subsection (g)(2)") provides as follows:

(g)(2) A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits.

See id. These amendments became effective on May 11, 2021. See 2021 Tenn. Pub. Acts, ch. 399, § 3.

2. Filing of Defendant's Motion

About three weeks later, on June 3, 2021, the Defendant filed a "Motion to Declare [the] Defendant Intellectually Disabled Pursuant to Tenn. Code Ann. § 39-13-203[(g)(1)]." The trial court filed an order noting that neither party addressed the procedural bar contained in subsection (g)(2). The trial court further noted that the Defendant's "intellectual disability claim [was] the subject of multiyear litigation. All previous determinations in state and federal court concluded he was not intellectually disabled. These adjudications were all on the merits of [the Defendant's] claims." Given the prior adjudications, the trial court ordered the parties to file briefs addressing whether subsection (g)(2) would bar the Defendant from filing his motion.

3. Trial Court's Order

*4 After the parties' briefing, the trial court issued an order dismissing the petition on March 29, 2022. The trial court acknowledged that, after the Tennessee Supreme Court and the United States Supreme Court held in 2001 and 2002, respectively, that it was unconstitutional to apply the death penalty to intellectually disabled persons, the Defendant had "filed many appeals and has had hearings" to have himself declared intellectually disabled. After reviewing the procedural history of the case, the trial court found that the Defendant's "prior intellectual disability claim was 'previously adjudicated on the merits.'"

The trial court stated that subsection (g)(2) would be "superfluous" if it were not applied to the Defendant's case to prevent the relitigation of a previously adjudicated intellectual disability claim. The trial court insisted that "the 2021 statute merely codifies the state and federal case law that developed after the initial decisions regarding [the Defendant's] mental status." The trial court noted that the statutory definition of "intellectual disability" required the disability to manifest before the age of eighteen and for it to be present when the crime was committed. The record reflected that the Defendant committed his crime when he was thirty-three years old but that he was not

diagnosed as intellectually disabled until he was forty-five.

The trial court distinguished the Defendant's case from those of Pervis Payne and David Keen, two "death row inmates who ... filed intellectual disability claims under the recently enacted § 39-13-203(g)." See

Payne v. State, 493 S.W.3d 478, 492 (Tenn. 2016);

Keen v. State, 398 S.W.3d 594, 598 (Tenn. 2012).

The trial court stated that "[section] 39-13-203(g) was clearly meant to apply" to those cases because neither "ever had an evidentiary hearing on their intellectual disability claims[.]" Moreover, "no court of competent jurisdiction had ever ruled that those inmates were or were not intellectually disabled." In contrast, the court

found that the Defendant "has had both an evidentiary

hearing and a prior ruling on the merits of his claim."

The trial court also "acknowledge[d] that there have been several developments in the legal analysis and medical evaluation of intellectual disability claims since [the Defendant] filed his original *Atkins*-based motion to reopen." Nevertheless, the court found that "despite the developments in medical and judicial evaluation of intellectual disability cases since T.C.A. § 39-13-203 was first enacted in 1990, ... the General Assembly chose to include subsection (g)(2) in the revised version of § 39-13-203." The trial court determined that subsection (g)(2) "applies regardless of when that previous adjudication [of intellectual disability] occurred." Thus, the trial court dismissed the petition.

It is from this ruling that the Defendant currently appeals.

ANALYSIS

I. APPLICATION OF TENN. CODE ANN. § 39-13-203

A. STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?' "State v. Enix, 653 S.W.3d 692, 698 (Tenn. 2022). The issue in this case is whether the 2021 amendments to Tennessee

Code Annotated section 39-13-203 permit a defendant to move the trial court to determine whether he is "intellectually disabled" when a court has previously concluded that he is not. Because this issue requires a legal interpretation of a statute, the issue is one of law that this Court reviews de novo with no presumption of correctness. *State v. Jones*, 589 S.W.3d 747, 756 (Tenn. 2019).

*5 "In interpreting statutory provisions, our role is to determine how a reasonable reader would have understood the text at the time it was enacted." *Lawson v. Hawkins County*, 661 S.W.3d 54, 59 (Tenn. 2023). As our supreme court recently made clear in *State v. Deberry*, 651 S.W.3d 918, 924-25 (Tenn. 2022),

[t]his Court's role in statutory interpretation is "to determine what a statute means." Waldschmidt v. Reassure Am. Life Ins. Co., 271 S.W.3d 173, 175 (Tenn. 2008). Specifically, we must decide "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 33 (2012). Original public meaning is discerned through consideration of the statutory text in light of "well-established canons of statutory construction."

State v. Sherman, 266 S.W.3d 395, 401 (Tenn. 2008); see also Kisor v. Wilkie, — U.S. ——, 139 S. Ct. 2400, 2442, 204 L.Ed.2d 841 (2019) (Gorsuch, J., concurring in the judgment) (noting that judges have employed "traditional tools of interpretation ... for centuries to elucidate the law's original public meaning").

Deberry also reaffirmed important principles regarding statutory interpretation. First, a court must "give the words of a statute their 'natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose.' " Id. at 925 (quoting Ellithorpe v. Weismark, 479 S.W.3d 818, 827 (Tenn. 2015)). Additionally, a court should "consider the whole text of a statute and interpret each word 'so that no part will be inoperative, superfluous, void or insignificant.' "Id. (quoting Bailey v. Blount Cnty. Bd. of Educ., 303 S.W.3d 216, 228 (Tenn. 2010)). Finally, a court must "also consider '[t]he overall

statutory framework.' " *Id.* (quoting *Coffee Cnty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 846 (Tenn. 2019)).

Moreover, *Deberry* was careful to emphasize that "[a] court should deem statutory language ambiguous only after employing all of the traditional tools of statutory construction, including consulting dictionary definitions, examining statutory structure and context, and applying well-established canons of statutory construction." *Id.* at 930. Our supreme court further cautioned:

To be sure, "employing the traditional tools of statutory construction may require some effort."

F.3d 958, 970 (11th Cir. 2016) (en banc). But "that effort does not make a text ambiguous." Id. We reiterate, moreover, that when the plain meaning of a statute is clear after application of the traditional tools of statutory interpretation, a court should not "delve into the legislative history of an unambiguous statute." [State v. Welch, 595 S.W.3d [615,] 624 [(Tenn. 2020)]; see also D. Canale & Co. v. Celauro, 765 S.W.2d 736, 738 (Tenn. 1989) ("Where there is no ambiguity in the language of an act, comments of legislators, or even sponsors of the legislation, before its passage are not effective to change the clear meaning of the language of the act.").

Id.

Thus, "[w]hen statutory language is plain and unambiguous, this Court must not apply a construction apart from the words of the statute." State v. Nelson, 23 S.W.3d 270, 271 (Tenn. 2000). In other words, "we apply the plain language in its normal and accepted use" and "[u]nder such circumstances, there is no need for recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the Legislature's purpose." State v. Strode, 232 S.W.3d 1, 10-11 (Tenn. 2007) (internal quotation marks and citations omitted). Instead, our obligation "is simply to enforce the written language." In re Estate of Davis, 308 S.W.3d 832, 837 (Tenn. 2010); see State v. Terrell Jackson, No. W2019-01883-CCA-R3-CD, 2021 WL 1157025, at *3 (Tenn. Crim. App. Mar. 25, 2021) (quoting Davis, 308 S.W.3d at 837), perm. app. denied (Tenn. July 15, 2021).

B. TEXT OF THE STATUTE

*6 On appeal, neither party explicitly argues that subsection (g)(2) is ambiguous; instead, each party argues that the statute is unambiguous and should be interpreted in their favor. Specifically, the Defendant contends that subsection (g)(2) should not operate as a procedural bar to his instant motion because he "seeks adjudication in the *first* instance of whether he is intellectually disabled pursuant to Tennessee Code Annotated § 39-13-203 (2021)" as amended. In other words, the Defendant asserts that subsection (g) (2) only prohibits successive motions filed pursuant to subsection (g)(1) using the revised definition of "intellectual disability."

In response, the State argues that subsection (g) (2) plainly prohibits a defendant from seeking a second adjudication of his or her intellectual disability, irrespective of when the first adjudication occurred. The State asserts that if this Court "perceives any ambiguity in the statute," then the legislative history clarifies that the legislature intended to prohibit a second adjudication of the issue of intellectual disability. Upon review, we agree with the State that the statute is unambiguous and that subsection (g)(2) does not entitle the Defendant to a second hearing.

We start, as we must, with the plain language of Tennessee Code Annotated section 39-13-203(g), which provides:

- (1) A defendant who has been sentenced to the death penalty prior to [the effective date of this act], and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.
- (2) A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits.

Under the statute's plain language, three things must be true before a motion can be properly brought before a trial court:

- (1) A defendant must have been sentenced to death before the effective date of the statute;
- (2) A defendant's conviction must be final, and all direct appeals must have been concluded; and
- (3) The issue of whether the defendant has an intellectual disability has not been previously adjudicated on the merits.

For two reasons, we conclude that the Defendant is barred from filing a motion under the plain language of subsection (g)(2). First, the legislature's use of the words "previously adjudicated" is important. The phrase "previously adjudicated" could only have meaning on the date that the statute took effect if it were possible that an intellectual disability determination could have been made before that date, as it was.

The concept of "intellectual disability" in capital proceedings has existed under our law for over thirty years. See 1990 Tenn. Pub. Acts, ch. 1038. During this entire time, the law has specifically allowed a defendant to raise the issue of his or her intellectual disability during the capital trial itself. See id. Other defendants, such as the Defendant, have raised the issue of intellectual disability in postconviction proceedings as well. That the definition of "intellectual disability" was slightly different during a previous adjudication does not mean that the "issue" could not have been "previously adjudicated." Thus, the use of the term "previously" is textual evidence that the procedural bar applies when intellectual disability determinations have been made before the effective date of subsection (g)(2).

*7 Second, although the Defendant argues that the procedural bar is limited to a second motion seeking a hearing under the revised definition of "intellectual disability," no textual basis appears to limit or restrict the statute's application in this way. It is an axiom of statutory interpretation that "[a] statute should be read naturally and reasonably, with the presumption that the legislature says what it means and means

what it says." *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015). Had the General Assembly intended such a limitation, it only had to say that "a defendant shall not file a motion under subsection (g)(1) if the defendant has previously filed a motion under this section," as it has done in other cases. *Cf.* Tenn. Code Ann. § 40-30-102(c); § 39-17-432(h)(3)(A) (providing that a "court shall not entertain a motion made under this subsection (h) to resentence a defendant if (A) A previous motion *made under this subsection (h)* to reduce the sentence was denied after a review of the motion on the merits[.]" (emphasis added)). But the legislature did not say anything like this. Instead, it created a procedural bar that is significantly broader than the Defendant's limited formulation.

To create the restriction advanced by the Defendant would be contrary to the fundamental principle of statutory construction that the courts "must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004). As such, we respectfully decline to employ a forced or subtle construction to limit the application of subsection (g) (2) only to people who have previously filed a motion under subsection (g)(1). See Coleman, 341 S.W.3d at 240 (identifying a "principle" that has "guided our approach to the application and interpretation of Tenn. Code Ann. § 39-13-203" as being that "[t]he Court will decline to 'read in' language into the statute that the General Assembly did not place there").

In response, the Defendant appears to argue that he has not previously had a hearing to determine the issue of his "intellectual disability" because his prior hearing addressed the issue of his "mental retardation." Respectfully, because the two terms have always had an identical statutory meaning in capital sentencing, this is a distinction without a difference. As noted above, when the legislature substituted the term "intellectual disability" for "mental retardation" in 2010, it stated that it was only making "terminology changes in Tennessee laws." See 2010 Tenn. Pub. Acts. ch. 734. To remove any doubt as to this intention, the General Assembly expressly provided that "a reference to intellectual disability shall be considered to refer to mental retardation, as defined by that provision on the day before the date of enactment of this act." See

id. § 7. As such, any previous adjudication of one's "mental retardation" for capital sentencing purposes would constitute, as a matter of law, an adjudication of one's "intellectual disability." This argument is without merit.

We conclude that the procedural bar in subsection (g)(2) is unambiguous. ³ Its plain language applies to bar any motion for a hearing when the issue of a defendant's "intellectual disability" has been previously adjudicated on its merits. Accordingly, because the issue of the Defendant's "intellectual disability" has been "previously adjudicated," we conclude that he may not file a motion pursuant to subsection (g)(1).

C. HISTORY OF LEGISLATIVE DEBATES

*8 Although the parties essentially argue that the statute is unambiguous, the parties have nevertheless concentrated their appellate arguments on whether the legislative debates in the Senate and House of Representatives regarding the enactment of subsection (g) support their respective positions. As we stated earlier, because the language of subsection (g)(2) is plain and unambiguous, it is improper to resort to legislative debates to resolve an issue of interpretation. Indeed, "a cardinal rule of statutory interpretation precludes the consideration of legislative commentary to interpret statutory language when that language is clear and unambiguous." Waters v. Farr, 291 S.W.3d 873, 908 (Tenn. 2009); see State v. Michael Patrick Sullivan, No. E2019-01471-CCA-R3-CD, 2021 WL 1086886, at *7 (Tenn. Crim. App. Mar. 22, 2021) (after determining that language of Tenn. Code Ann. § 39-14-211 is unambiguous, stating that "[w]e need not, therefore, delve into the legislative transcripts").

This principle was reaffirmed by our supreme court in *Deberry*, which expressly recognized that "when the plain meaning of a statute is clear after application of the traditional tools of statutory interpretation, a court should not 'delve into the legislative history of an unambiguous statute.' "*Deberry*, 651 S.W.3d at 930. Nevertheless, it is also true that our supreme court has looked to legislative history or debates in limited circumstances even when a statute is unambiguous. For example, it has done so to confirm its interpretation of the language of a statute, *see In re Rader Bonding*

Co., Inc., 592 S.W.3d 852, 862 n.14 (Tenn. 2019), and to confirm that the legislative history did not conflict with its interpretation of a statute, *see State v. Marshall*, 319 S.W.3d 558, 562 (Tenn. 2010).

That said, to the extent that the legislative history has any relevance to our inquiry at all, it affords the Defendant no comfort. Notably, the legislative debates on Public Chapter 399 generally focused on issues other than the narrow one now before this Court. However, when discussing this narrow issue, both the House and Senate sponsors asserted that Public Chapter 399 would not permit a person to file a motion for a hearing under the newly amended statute when his or her intellectual disability had been previously adjudicated. In fact, upon being asked about this issue directly, the House sponsor responded that "[t]hose individuals on death row who have had the issue of intellectual disability adjudicated are not eligible to have that appeal hearing once again. So it's only individuals who have not had that." Hearing on H.B. 1062 Before the H. Crim. Just. Comm., 112th General Assembly (Tenn. Apr. 14, 2021) (Rep. Hawk).

Further, in the Senate Judiciary Committee, the bill's sponsor specifically observed that the original bill, which did not contain the subsection (g)(2) procedural bar, did "not exclude a small number of defendants who have raised and fully litigated the issue of intellectual disability in the ordinary review process. The bill would allow them a second opportunity to relitigate a decided issue." *Hearing on S.B. 1349 Before the S. J. Comm.*, 112th General Assembly (Tenn. Apr. 13, 2021) (Sen. Gardenhire). In other words, the originally proposed legislation would have allowed a defendant to bring a new action, even if the issue of the defendant's intellectual disability had already been fully litigated.

However, the Senate Judiciary Committee did not pass this original bill. Instead, the committee amended the bill to include the procedural bar to prevent cases like the Defendant's from being relitigated, and it sent this amended bill to the Senate floor. On the Senate floor, the House bill, which also contained the procedural bar, was substituted for the Senate Bill. In speaking about the bill, the Senate sponsor specifically stated that the legislation applied only to "the very limited number of individuals with an

intellectual disability" and who "have not had their intellectual disability claims fully adjudicated by the courts on the merits." *Hearing on S.B. 1349 Before the S. Floor Sess.*, 112th General Assembly (Tenn. Apr. 26, 2021) (Sen. Gardenhire). Indeed, in response to specific questioning about how the bill affected current defendants "on death row," the sponsor answered that "[t]hose that are currently, have had their cases adjudicated and are on death row, this bill, they cannot go back and retry the case." *Id.*

*9 In all cases, the legislative sponsors spoke of current death-row prisoners who "have had" hearings to determine the presence of an intellectual disability. Necessarily, these hearings could only have been held under the previous standards defining intellectual disability, including under the previous terminology.

Although we reject the need to resort to legislative debates to inform the meaning of an unambiguous statute, *see Deberry*, 651 S.W.3d at 930, we agree with the State that the legislative history confirms our interpretation of subsection (g)(2). As such, the trial court did not err in finding that subsection (g)(2) bars the Defendant's motion.

D. WAIVER

The Defendant next argues that the State has waived any "defense" that subsection (g)(2) bars his motion. In the trial court, the District Attorney General agreed with the Defendant that subsection (g)(2) did not bar the Defendant's motion and that the trial court "should consider the issue of [the Defendant's] intellectual disability." The State also stipulated that the Defendant "would be found intellectually disabled" and that "under current law and the medical reports before the [trial court], the State concedes that the [Defendant's] capital sentence should be commuted to one of life in prison, consecutive to his other sentences." The trial court declined to accept the agreed resolution.

In light of this stipulation in the trial court, the Defendant asserts that the State cannot now argue that his motion is barred by subsection (g)(2). He quotes Tennessee Rule of Criminal Procedure 12(f) to argue that "'a party waives any defense, objection, or request by failing to' timely and properly raise it." He also asserts that because the State agreed in the trial court that the Defendant was entitled to a hearing, the trial

court was not free to reject that waiver. In response, the State argues that "the parties cannot bind a court to an incorrect construction of a statute; indeed, parties simply may not stipulate to questions of law." We agree with the State.

As we noted earlier, "[s]tatutory construction entails questions of law." State v. Linville, 647 S.W.3d 344, 354 (Tenn. 2022). "The law is clear that questions of law are not subject to stipulation by the parties to a lawsuit and that a stipulation purporting to state a proposition of law is a nullity." Mast Advert. & Pub., Inc. v. Moyers, 865 S.W.2d 900, 902 (Tenn. 1993). Accordingly, courts "are not bound by stipulations pertaining to questions of law." Home Fed. Bank, FSB, of Middlesboro, Ky. v. First Nat. Bank of LaFollette, Tenn., 110 S.W.3d 433, 440 (Tenn. Ct. App. 2002).

In this case, no party could avoid the law simply by agreeing to a mechanism that the law affirmatively prohibits. The trial court recognized this principle when it observed that "[a] judge routinely and conciliatorily wants to resolve cases when the parties agree to a resolution but cannot do so when the law forbids the agreed resolution." In resolving the legal issue before it, the trial court did not act inappropriately in investigating the nature of the proposed concession before accepting it. In fact, the court had an obligation to make such an investigation.

See State v. Gomez, 163 S.W.3d 632, 654 (Tenn. 2005) ("Before accepting a concession, this Court independently analyzes the underlying legal issue to determine whether the concession reflects a correct interpretation of the law."), vacated on other grounds, 549 U.S. 1190, 127 S.Ct. 1209, 167 L.Ed.2d 36 (2007).

*10 Because the parties cannot stipulate to a procedure that the law forbids, the State could not have limited the trial court's authority by "waiving" the requirements of subsection (g)(2). ⁴ Accordingly, we respectfully conclude that this claim is without merit.

II. EIGHTH AMENDMENT

The Defendant next asserts that he and the State agreed in the trial court that he has an intellectual disability. From this agreement, the Defendant argues that "any interpretation of subsection (g)(2) that permits an intellectually disabled person to be put to death would be cruel and unusual, and unconstitutional" pursuant to the Eighth Amendment to the United States Constitution and article I, section 16 of the Tennessee Constitution.

Using virtually identical language, the federal and state constitutions prohibit "cruel and unusual punishments." U.S. Const. amend. VIII; Tenn. Const. art. I, § 16. Although "[t]he protection against cruel and unusual punishments afforded by the Eighth Amendment [to the United States Constitution] has defied precise delineation," State v. Smith, 48 S.W.3d 159, 170 (Tenn. Crim. App. 2000) (citation omitted), no one disputes that the execution of intellectually disabled persons is statutorily and constitutionally prohibited, see Tenn. Code Ann. § 39-13-203(b); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001). However, the issue in this case concerns the procedural mechanism for deciding whether a person has an intellectual disability.

require that the Defendant be offered a hearing under the revised definition of "intellectual disability." In *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court recognized that "[i]ntellectual disability is a condition, not a number," and that a definition of "intellectual disability" using a "strict IQ test score cutoff of 70" is "invalid under the Constitution's

As an initial matter, the Eighth Amendment does not

Cruel and Unusual Punishments Clause." See id. at 712, 723, 134 S.Ct. 1986. Against this backdrop, our General Assembly revised our statutory definition of "intellectual disability" for capital sentencing purposes.

Since Hall, though, courts have had the opportunity to address whether defendants already sentenced to death have the right to have a hearing under Hall's modified definition of "intellectual disability." Notably, our supreme court has held that Hall does not require a hearing under the revised standards and that, regardless, Hall's substantive

holding does not apply retroactively to capital cases on collateral review:

what procedural avenue the Petitioner in this case might be afforded a hearing on his claim of intellectual disability.

Hall does not stand for the proposition that the Petitioner is entitled to a hearing under the facts and procedural posture of this matter.

*11 Moreover, even if Hall held that a condemned inmate must be afforded a hearing on a collateral claim that he is intellectually disabled, the decision would benefit the Petitioner only if it applied retroactively. However, the United States Supreme Court has not ruled that Hall is to be applied retroactively to cases on collateral review. The United States Courts of Appeal for the Eighth and Eleventh Circuits have concluded that Hall does not apply retroactively to cases on collateral review. The Petitioner has cited us to no federal appellate decision holding that Hall must be applied retroactively to cases on collateral review. We decline to hold that Hall applies retroactively within the meaning of Tennessee Code Annotated section 40–30–117(a)(1).

See Payne, 493 S.W.3d at 490-91 (citing Goodwin v. Steele, 814 F.3d 901, 903-04 (8th Cir. 2014) (per curiam); In re Henry, 757 F.3d 1151, 1159-61 (11th Cir. 2014)).

In addition, the Eleventh Circuit has rejected an attempt by a federal habeas petitioner to file a second petition on the issue of intellectual disability, concluding that Hall is not retroactive. See Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301, 1316 (11th Cir. 2015). In discussing why such a rule would be problematic, the Eleventh Circuit noted that

[i]n Hall, the United States Supreme Court no longer took a hands-off approach to the

intellectual disability states' definitions. To retroactively apply this kind of new procedural rule to the final determination of state court appeal would impose uncertainty and very costs on the states that Teague warned against discouraging the states from rigorously developing following their intellectual disability law, decreasing the importance of finality and its effect on deterrence given the ever-changing nature of our understanding of intellectual disability, and unnecessarily pressing the states to reevaluate defendants each time intellectual disability standards are changed.

Id. at 1316 (citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). We agree and hold that the Eighth Amendment does not require that the Defendant be afforded a hearing under Tennessee Code Annotated section 39-13-203(g)(1).

A more significant issue is present, however. Perhaps overlooked in this litigation is that the 2021 amendments to the definition of "intellectual disability" do not directly affect the Defendant. For the past three decades, the statutory definition of "intellectual disability," and before it, "mental retardation," has required a showing that "[t]he [intellectual disability] must have been manifested during the developmental period, or by eighteen (18) years of age." This requirement was not changed, modified, or amended by the 2021 amendments; it is precisely the same as it has been since 1990.

This fact is significant because the Defendant has had a full and fair opportunity to show that any intellectual disability manifested during his developmental period. And every court looking at his case previously has concluded that the Defendant failed to show that any condition manifested before he was eighteen. The 2021 amendments to section 39-13-203(a) do not work to change those conclusions in the least. As such, the General Assembly's decision not to entitle the Defendant to a second hearing does not subject him to cruel and unusual punishment. *See Black*, 866 F.3d at 750; *Byron Lewis Black*, 2005 WL 2662577, at *17. This claim is without merit.

III. DUE PROCESS PROTECTIONS

The Defendant contends that "[d]ue [p]rocess is violated by a fundamentally unfair interpretation of subsection (g)(2)." The State responds that the Defendant's due process rights have been satisfied because the issue of the Defendant's intellectual disability has been previously adjudicated. We agree with the State.

*12 "The federal and state constitutions explicitly guarantee the right to due process of law." State v. Decosimo, 555 S.W.3d 494, 506 (Tenn. 2018); see U.S. Const. amend. XIV; Tenn. Const. art. I, § 8. "These constitutional provisions have been described as 'synonymous' in the scope of protection they afford." Decosimo, 555 S.W.3d at 506 (quoting Gallaher v. Elam, 104 S.W.3d 455, 463 (Tenn. 2003)). "Due process, at its most basic level, 'mean[s] fundamental fairness and substantial justice.' "State v. White, 362 S.W.3d 559, 566 (Tenn. 2012) (quoting Vaughn v. State, 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883 (1970)).

The Defendant argues that by interpreting subsection (g)(2) "so that it capriciously permits some defendants to receive the protection of the Eighth Amendment, but that it precludes others from constitutional relief is fundamentally unfair" In support of this contention, the Defendant asserts that "before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner."

Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992).

Inherent in the Defendant's argument is that any "interpretation" of subsection (g)(2) which is adverse to him is somehow "fundamentally unfair" as a

matter of policy. We respectfully disagree. Properly conceived, the judicial power is not a grant of authority for courts to choose between optimal goals

for advancing public policy. Coffman v. Armstrong Int'l, Inc., 615 S.W.3d 888, 899 (Tenn. 2021) ("We reiterate that the language of the TPLA dictates our decision here, and we do not opine on what we perceive to be the optimal outcome of this case in terms of public policy."). And courts do not review a "statute's wisdom, expediency, reasonableness, or desirability. These are matters entrusted to the electorate, not the courts." Waters v. Farr, 291 S.W.3d 873, 918 (Tenn. 2009) (Koch, J., concurring) (citations and footnotes omitted).

In other words, courts interpret statutes according to neutral legal principles without regard to "'what its members believe to be the best policy for the State; rather, [courts] must determine where public policy is to be found, what the specific public policy is, and how it is applicable to the case at hand.' "State v. Al Mutory, 581 S.W.3d 741, 750 (Tenn. 2019) (quoting Smith v. Gore, 728 S.W.2d 738, 746 (Tenn. 1987)). We respectfully disagree that an interpretation of subsection (g)(2) compelled by its plain language is somehow "fundamentally unfair" to the Defendant.

Of course, "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' " Seals v. State, 23 S.W.3d 272, 277 (Tenn. 2000) (quoting Phillips v. State Bd. of Regents, 863 S.W.2d 45, 50 (Tenn. 1993)). However, the Defendant has not been denied an opportunity to be heard "at a meaningful time and in a meaningful manner." Id. He exercised his opportunity to have the issue of his intellectual disability adjudicated, and he was found to not have an intellectual disability under standards and definitions that the 2021 amendments did not change. The General Assembly's decision not to grant the Defendant additional opportunities to relitigate this issue does not deny him due process of law. See Est. of Alley v. State, 648 S.W.3d 201, 231 (Tenn. Crim. App. 2021).

IV. EQUAL PROTECTION OF THE LAW

*13 Finally, the Defendant maintains that his "right to equal protection is violated if he is denied the benefit of the 2021 [amendments to Tennessee Code Annotated section 39-13-203] while similarly situated individuals receive relief." The State responds that the Defendant "is 'similarly situated' only to death row inmates who have been previously determined not to be intellectually disabled. And prohibiting those prisoners from readjudicating whether they are intellectually disabled poses no equal protection concerns." We agree with the State.

"The right to equal protection is guaranteed by the Fourteenth Amendment of the United States Constitution ... [and] by Article I, section 8, and Article XI, section 8, of the Tennessee Constitution." McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 695 (Tenn. 2020); see State v. Jenkins, 15 S.W.3d 914, 918 n.2 (Tenn. Crim. App. 1999). "While recognizing that '[t]he equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct,' this Court has stated that Article I, § 8 and Article XI, § 8 of the Tennessee Constitution confer 'essentially the same protection' as the equal protection clause of the United States Constitution." State v. Tester. 879 S.W.2d 823, 827 (Tenn. 1994) (quoting *Tenn. Small Sch.* Sys. v. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993)). Our supreme court has explained:

> The concept of equal protection espoused by the federal and our state constitutions guarantees that all persons similarly circumstanced shall be treated alike. Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. The initial discretion to determine what is 'different' and what is the same resides in the legislatures of the States, and legislatures are given considerable latitude in determining what groups are

different and what groups are the same.

City of Memphis v. Hargett, 414 S.W.3d 88, 110 (Tenn. 2013) (internal quotation marks and citations omitted); see State v. Robinson, 29 S.W.3d 476, 480 (Tenn. 2000). The primary question is "whether the classes of persons at issue are similarly situated; if not, then there is no basis for finding a violation of the right to equal protection. In evaluating whether two classes are similarly situated, courts focus on relevant similarit[ies] between the groups but should not demand exact correlation." City of Memphis v. Hargett, 414 S.W.3d 88, 110 (Tenn. 2013) (internal quotation marks and citations omitted); see State v. March, 395 S.W.3d 738, 787 (Tenn. Crim. App. 2011).

The Defendant contends that "[t]he reality of the disparate treatment is most obvious" when the Defendant's situation is compared "with that of the first individual to receive relief under [the 2021 amendments to Tennessee Code Annotated section 39-13-203], Pervis Payne." The Defendant acknowledges, "Procedurally, the only distinction between Mr. Payne's case and Mr. Black's is that Mr. Payne's lawyers did not seek relief following **Atkins** and **Van Tran**, while Mr. Black's attorneys were more zealous."

However, while the Defendant seeks to minimize this distinction, we believe that it is important. Unlike other capital defendants who have not had a hearing to adjudicate the issue of their intellectual disability, the Defendant here is in a different class: the issue of his intellectual disability has been previously adjudicated. And even if we were to compare the Defendant with the larger class of all capital defendants who wish to seek an intellectual-disability hearing, we agree with the State that subsection (g)(2) still does not violate any defendant's right to equal protection of the law. The statute grants each capital defendant, including the Defendant, the right to receive the same procedural benefit: a single adjudication. Because the Defendant is not being treated differently from similarly situated persons, we conclude that the General Assembly's decision not to grant the Defendant additional opportunities to revisit this issue does not deny him the equal protection of the law.

CONCLUSION

*14 In summary, we hold that, because the issue of the Defendant's intellectual disability has been previously adjudicated, he may not file a motion pursuant to Tennessee Code Annotated section

39-13-203(g)(1). We also hold that the General Assembly's decision not to entitle the Defendant to a second hearing does not subject him to cruel and unusual punishment, nor does it deny him due process of law or the equal protection of the law. We respectfully affirm the judgment of the trial court.

All Citations

Not Reported in S.W. Rptr., 2023 WL 3843397

Footnotes

- Tennessee Code Annotated section 39-13-203(a) was amended in 2010 to substitute the term "intellectual disability" for the term "mental retardation." See 2010 Tenn. Pub. Acts, ch. 734, §§ 1 to 3 (eff. April 9, 2010). In so doing, the legislature intended only to substitute new terminology without any other legal effect, substantive or otherwise. See 2010 Tenn. Pub. Acts, ch. 734, § 7 (eff. Apr. 9, 2010) ("For purposes of each provision amended by this act, a reference to intellectual disability shall be considered to refer to mental retardation, as defined by that provision on the day before the date of enactment of this act."); see also Coleman v. State, 341 S.W.3d 221, 227 n.5 (Tenn. 2011). Because the legal concepts are identical, we follow the lead of our supreme court to refrain from references to "retardation" except where they may be necessary for context. See Keen v. State, 398 S.W.3d 594, 600 n.6 (Tenn. 2012).
- Notably, the Defendant's prior attempts to have himself adjudicated as intellectually disabled were denied for multiple reasons. In the present case, he largely focuses on the change to the standards analyzing his general intellectual functioning. However, his petitions were also denied because he failed to show that he had deficits in adaptive behavior or that his intellectual disability manifested during his developmental period. See Black, 2013 WL 230664, at *14, 19; Black, 2005 WL 2662577, at *14-17. As we discuss further below, the statutory standards regarding the two latter requirements have remained unaltered since 1990.
- The Defendant urges this Court to apply the rule of lenity if we were to find that the statute is ambiguous. This Court has explained that "[t]he rule of lenity, which requires that an ambiguous criminal statute be resolved in favor of the defendant, is a 'tie-breaker' to be used only when an ambiguity remains after considering the plain language of the statute, the legislative history, and other canons of statutory construction." *State v. Curtis Logan Lawson*, No. E2018-01566-CCA-R3-CD, 2019 WL 4955180, at *7 (Tenn. Crim. App. Oct. 8, 2019) (quoting *State v. Marshall*, 319 S.W.3d 558, 563 (Tenn. 2010)); *see State v. Horton*, 880 S.W.2d 732, 735 (Tenn. Crim. App. 1994). However, because subsection (g)(2) is not ambiguous, the rule of lenity does not apply in this circumstance.
- While this case has been pending, the General Assembly enacted Public Chapter 182, which specifically provides that the Attorney General is not bound by any stipulations made by a district attorney general in these types of cases. See 2023 Tenn. Pub. Acts, ch. 182, § 1 (eff. April 28, 2023) ("The attorney general and reporter is not bound by any stipulations, concessions, or

other agreements made by the district attorney general related to a request for collateral review," including in "a proceeding under § 39-13-203(g).").

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866 F.3d 734

United States Court of Appeals, Sixth Circuit.

Byron Lewis BLACK, Petitioner-Appellant,

v.

Wayne CARPENTER, Warden, Respondent-Appellee.

No. 13-5224

| Argued: December 8, 2016

| Decided and Filed: August 10, 2017

Rehearing En Banc Denied October 27, 2017

Synopsis

Background: Following affirmance on direct appeal of petitioner's multiple state-court murder convictions, and death sentence, 815 S.W.2d 166, he filed federal habeas petition. The United States District Court for the Middle District of Tennessee, No. 3:00-CV-00764, Todd J. Campbell, J., 2013 WL 230664, denied the petition. Petitioner appealed.

Holdings: The Court of Appeals, Boggs, Circuit Judge, held that:

- [1] petitioner was not entitled to evidentiary hearing;
- [2] summary judgment procedures did not apply to habeas proceeding;
- [3] petitioner failed to demonstrate he was mentally retarded under Tennessee standard, as required for his execution to be barred under Atkins.

Affirmed.

Cole, Chief Judge, filed opinion, concurring in part.

West Headnotes (10)

[1] Federal Courts Subsequent Appeals

Appellate review of the interpretation of the mandate of the Court of Appeals upon appeal after remand is de novo.

3 Cases that cite this headnote

[2] Federal Courts 🕪 Mandate

Under the "mandate rule," a district court is bound by the scope of the remand issued by the Court of Appeals.

4 Cases that cite this headnote More cases on this issue

[3] Habeas Corpus Sentence and punishment

Mandate of Court of Appeals, remanding following District Court's denial of petitioner's habeas claim challenging his death sentence under Atkins. which prohibited execution of mentally retarded persons, was not de novo remand, but was remand limited in scope to whether Tennessee Supreme Court's decision, that Tennessee statute setting forth standard for mental retardation did not require that raw IQ test scores be accepted at their face value and that courts could consider competent expert testimony showing that such scores did not accurately reflect person's functional IQ or that raw scores were artificially inflated or deflated, changed determination of petitioner's IQ scores so that he met Tennessee definition of mental retardation; mandate expressly referenced the Tennessee Supreme Court decision, but allowed District Court to consider all of the evidence in the record relevant to the issue. Tenn. Code Ann. § 39-13-203(a)(1)and.

7 Cases that cite this headnote

[4] Habeas Corpus - Discretion of lower court

The Court of Appeals reviews the district court's denial of an evidentiary hearing on a petition for habeas corpus for abuse of discretion.

7 Cases that cite this headnote

[5] Habeas Corpus Discretion and necessity in general

When a federal habeas court is able to resolve a habeas claim on the record before it, it may do so without holding an evidentiary hearing.

6 Cases that cite this headnote

[6] Habeas Corpus Sentence and punishment

Petitioner convicted in Tennessee state court of multiple murders and sentenced to death was not entitled to evidentiary

hearing on his Atkins claim that his execution was barred on the grounds that he met the Tennessee statutory standard of mental retardation; petitioner failed to identify any evidence that he would introduce other than the exhibits and other evidence that were already part of the record. Tenn. Code Ann. § 39-13-203(a) (1).

1 Case that cites this headnote

[7] Habeas Corpus Sentence and punishment

Habeas Corpus Conduct of Hearing
Summary judgment procedures do not apply to a federal habeas court's final adjudication of a claim under Atkins, which bars execution of a mentally retarded person; rather, it is the petitioner

who has the burden of proving, by a

preponderance of the evidence, that he is entitled to relief. Fed. R. Civ. P. 56.

4 Cases that cite this headnote

[8] Habeas Corpus - Sentence and punishment

Habeas Corpus <table-cell-rows> Conduct of Hearing

Summary judgment procedures did not apply to habeas claim under Atkins asserted by petitioner convicted in state court of multiple murders, challenging his death sentence on ground that he was mentally retarded; parties did not move for summary judgment, and although no evidentiary hearing was held on the claim, that did not transform the proceeding into one for summary judgment. Fed. R. Civ. P. 56.

2 Cases that cite this headnote

[9] Habeas Corpus ← Scope and Standards of Review

Appellate review the district court's denial of habeas relief de novo; but the Court of Appeals reviews the underlying factual findings for clear error, and the petitioner carries the burden of persuasion.

1 Case that cites this headnote

Defendant convicted of multiple murders and sentenced to death failed to show that he had significantly subaverage general intellectual functioning as evidenced by functional IQ scores of 70 or lower before he turned 18 years old, as necessary to satisfy Tennessee standard of mental retardation, as required for defendant to prevail on **Atkins** challenge to his death sentence; defendant's school records revealed IQ scores of 83 to 97 when defendant was seven to 13 years old, subsequent IQ scores when

defendant was in his thirties were in the range of 73 to 76, no expert testimony or other evidence definitively established that his IQ scores were 70 or below before defendant was 18, even considering the Flynn Effect or other deviations that could require retroactive reduction of IQ scores, and although defendant had scores of 57 and 69 when he was age 45, those scores were not evidence of lifelong mental retardation that manifested during childhood. Tenn. Code Ann. § 39-13-203(a).

6 Cases that cite this headnote

*736 Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:00-cv-00764—Todd J. Campbell, District Judge.

Attorneys and Law Firms

ARGUED: Kelley J. Henry, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. John H. Bledsoe, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. ON BRIEF: Kelley J. Henry, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. Andrew H. Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

Before: COLE, Chief Judge; BOGGS and GRIFFIN, Circuit Judges.

BOGGS, J., delivered the opinion of the court in which GRIFFIN, J., joined, and COLE, C.J., joined in part. COLE, C.J. (pg. 750), delivered a separate opinion concurring in the majority opinion except for Section II.E and concurring in the judgment.

OPINION

BOGGS, Circuit Judge.

In 1986, Byron Black shot his girlfriend Angela's exhusband, Bennie. Black pleaded guilty to malicious shooting and was sentenced to two years of imprisonment at a Davidson County, Tennessee, workhouse. In 1988, while on a weekend furlough from that workhouse, Black entered Angela's home, shot Angela in the head as she slept, and then shot nine-year-old Latoya and six-year-old Lakeisha (Angela's children by Bennie) once and twice, respectively, killing all three victims. Black returned to the workhouse at the end of his furlough before lawenforcement officers discovered the bodies.

Black's trial and post-conviction proceedings have spanned nearly thirty years. Seventeen years have elapsed since Black filed the federal habeas petition presently before us. The Supreme Court and the Tennessee courts have recently recognized limitations imposed by the Eighth Amendment on the power of states to execute mentally retarded persons. But, for the reasons that follow, these jurisprudential developments do not give Black a reprieve from his sentence of death. We affirm the district court's denial of post-conviction relief.

Ι

Black stood trial for the 1988 triple murder. A jury found Black guilty of murder *737 and burglary and sentenced him to death for one murder and life imprisonment for the other two murders. The Tennessee Supreme Court affirmed on direct appeal. The Tennessee Court of Criminal Appeals denied post-conviction relief, and the Tennessee Supreme Court denied further post-conviction review. In 2000, Black filed a federal habeas petition in which he raised various claims including a claim that his mental retardation precluded the imposition of the death penalty. The petition was dismissed as meritless. Black v. Bell, 181 F.Supp.2d 832, 883 (M.D. Tenn. 2001). Black appealed to our court, but the Supreme Court shortly thereafter decided Atkins v. Virginia, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that the Eighth Amendment prohibits states from executing "mentally retarded criminals"), so we granted Black's motion to hold his appeal in abeyance while Black exhausted an Atkins claim in the Tennessee courts. *Black v. Bell*, No. 02-5032 (6th Cir. July 26, 2002) (order).

The Tennessee trial court conducted an evidentiary hearing and denied Black's Atkins claim as meritless, the Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied further review. Black v. State, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), perm. app. denied (Tenn. Feb. 21, 2006). Our court then remanded Black's appeal to the district court so that it could consider Black's federal habeas claim in light of Atkins. Black v. Bell, No. 02-5032 (6th Cir. May 30, 2007) (order). The Supreme Court in Atkins had "le[ft] to the States the task of developing appropriate ways to enforce" its prohibition on executing mentally retarded criminals. Atkins, 536 U.S. at 317, 122 S.Ct. 2242. The district court thus, quite understandably, looked to Tennessee law in analyzing Black's Atkins claim.

Tennessee had enacted a statute defining mental retardation as follows:

- Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
- (2) Deficits in adaptive behavior; and
- (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

Tenn. Code Ann. § 39-13-203(a) (2003).

The United States Supreme Court recently referred to a definition of mental retardation substantially similar to this tripartite Tennessee definition as the "the generally accepted, uncontroversial intellectual-disability diagnostic definition." *Moore v. Texas*, — U.S. —, 137 S.Ct. 1039, 1045, 197 L.Ed.2d 416 (2017).

For its part, the Tennessee Supreme Court held in 2004 that the first part of Tennessee's statutory definition of mental retardation imposed a "bright line rule"

requiring an **Atkins* petitioner to demonstrate an IQ of seventy or below. **Howell v. State*, 151 S.W.3d 450, 456–59 (Tenn. 2004) (agreeing with the State that § 39-13-203(a)(1) "should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded" (emphasis added)).

The district court considered Black's IQ scores as follows:

*738

IQ Scores Before Age 18				
Date of Test	Name of Test	Score	Black's Approximate Age	
1963	Lorge Thorndike	83	7	
1964	Unknown	97	8	
1966	Lorge Thorndike	92	10	
1967	Otis	91	11	
1969	Lorge Thorndike	83	13	
	IQ Score	s After	Age 18	
Date of Test	Name of Test	Score	Black's Approximate Age	
1989	Shipley-Hartford	76	33	
1993	WAIS-R	73	37	
1997	WAIS-R	76	41	
2001	WAIS-III	69	45	
2001	Stanford-Binet-IV	57	45	

Black argued to the district court that the Tennessee courts' denial of his Atkins claim was improper in part because those courts "refused to consider standard errors in test measurement [and] the 'Flynn Effect,' 1 permitted the State's experts to testify, and placed the burden of proof on the Petitioner." Black v. Bell, No. 3:00-0764, 2008 U.S. Dist. LEXIS 33908 at *15 (M.D. Tenn. Apr. 24, 2008). Black had argued in state court, and argued again to the district court, that his IQ scores should be reduced retroactively to account for both the standard error of measurement *739 (SEM) and the Flynn Effect. ²

The district court noted that the Tennessee Court of Criminal Appeals, in rejecting Black's argument to adjust his IQ scores downward to account for the SEM or the Flynn Effect, thoroughly considered the evidence provided by Black's experts and the State's experts. *Black v. Bell*, 2008 U.S. Dist. LEXIS 33908, at *15–20. The district court itself was "not persuaded"

by Black's arguments. *Id.* at *21. Applying *Howell*, which had also guided the decision of the Tennessee

Court of Criminal Appeals, the district court denied Black's Atkins claim on the basis that "the state court was not unreasonable in stating that the proof in the record did not support the conclusion, under a preponderance of the evidence standard, that [Black's] I.Q. was below seventy before age 18." *Id.* at *28–29. Nevertheless, the district court issued a certificate of appealability, and Black again appealed to our court.

*740 In 2011, however, before we issued an opinion on that appeal, the Tennessee Supreme Court changed course and overruled Howell, holding that Tenn. Code Ann. § 39-13-203(a)(1) "does not require that raw scores on I.Q. tests be accepted at their face value and that the courts may consider competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q. or that the raw I.Q. test score is artificially inflated or deflated."

**Coleman v. State*, 341 S.W.3d 221, 224 (Tenn. 2011) (emphases added).

In light of Coleman, over a dissent, we again remanded Black's Atkins claim to the district court. Black v. Bell. 664 F.3d 81, 84 (6th Cir. 2011). Even though the Tennessee Court of Criminal Appeals could not have known, at the time it denied Black's state habeas relief, that the Tennessee Supreme Court would replace Howell with its opinion in Coleman, we held that the Tennessee Court of Criminal Appeals' decision was "contrary to the latest Tennessee Supreme Court's decision on this subject." Id. at 96. And because Atkins allowed states to define the contours of Atkins itself (such that Atkins incorporated Coleman, so to speak. for purposes of Black's claim), we held that the Tennessee Court of Criminal Appeals' decision was "contrary to clearly established" federal "law under [the Antiterrorism and Effective Death Penalty Act (AEDPA)]." Id. at 100–01. Thus, because no court had yet evaluated Black's Atkins claim under Coleman, we remanded Black's Atkins claim for the district court to analyze it "according to the proper legal standard, which was set out by the Tennessee

Supreme Court in *Coleman*." *Id.* at 101. The district court denied Black's claim, and for the reasons that follow, we affirm.

II

On remand, the district court conducted a de novo review of Black's Atkins claim. The court accepted new briefing from Black and from the State. Black moved for an evidentiary hearing, and the court denied Black's motion on the ground that our remand was a limited remand directing the district court to review the record only, placing an evidentiary hearing "beyond the scope of the remand." R.150. Nevertheless, on January 3, 2013, the district court held oral argument on the merits of Black's Atkins claim, and the district court subsequently issued a 31-page opinion evaluating the record, analyzing the evidence provided by Black's experts and the State's experts, and concluding that Black had not "met his burden of proving intellectual disability by a preponderance of the evidence." Black v. Colson. No. 3:00-0764, 2013 WL 230664, at *19 (M.D. Tenn. Jan. 22, 2013) (emphasis added).

On appeal, Black contends that the district court erred in perceiving our remand to be a limited remand; erred in denying Black an evidentiary hearing; erred in failing to apply a summary-judgment standard in ruling on Black's Atkins claim; and erred in its merits determination that Black had not met his burden of establishing entitlement to Atkins relief. We address each issue in turn.

A. Our Remand Was a Limited Remand

[1] [2] We review the interpretation of our own mandate de novo. *United States v. Parks*, 700 F.3d 775, 777 (6th Cir. 2012). *741 Under the mandate rule, a district court is bound by the scope of the remand issued by our court. *Mason v. Mitchell*, 729 F.3d 545, 550 (6th Cir. 2013); Scott v. Churchill, 377 F.3d 565, 570 (6th Cir. 2004). In concluding that we had

issued a limited remand, the district court relied on this language from our prior opinion:

A complete review must apply the correct legal standard to all of the relevant evidence in the record. We therefore VACATE the district court's denial of Black's Atkins claim and REMAND the case for it to review the record based on the standard set out in Coleman and consistent with this opinion.

Black v. Bell, 664 F.3d at 101.

[3] We agree that our remand was limited: the scope of the remand, as expressly stated in this quoted language, was a review of the record under *Coleman*.

Black contends that the district court "erroneously restricted its review to the state court record alone." Appellant's Br. 5. When AEDPA deference applies to an Atkins claim, the district court would indeed be limited to reviewing the record that was before the state courts. Cullen v. Pinholster, 563 U.S. 170, 180-81, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). Here, however, because Black was entitled to a de novo review of his Atkins claim without AEDPA deference, the district court was free to consider the full record before it, including materials that were made part of the federal habeas record after the close of state habeas proceedings. Black argues that the district court "believed that it lacked authority ... to consider record evidence presented in federal court." Appellant's Br. 7. But the record does not support Black's argument: the district court, to be sure, stated that it was undertaking "a de novo review of the evidence admitted at the post conviction proceeding in state court," Black v. Colson, 2013 WL 230664, at *6, and that it "fully considered the evidence in the state court record,"

id. at *19, but nowhere in its memorandum opinion

did the district court state that it was considering *only* the state-court record, or that it was declining to consider (or otherwise excluding) any of the exhibits that Black had provided to the district court in the course of the federal habeas proceedings.

At oral argument before our court, Black's counsel stressed that the district court erred by failing to consider certain exhibits, namely the declaration of Dr. Marc J. Tassé, R.120-1, and the declaration of Dr. Stephen Greenspan, R.120-2. But nothing in the record indicates that the district court didn't consider these exhibits—which were made part of the federal habeas record in 2008—when it issued its opinion in 2013. Indeed, at the oral argument before the district court in January 2013, Black's counsel brought both declarations to the attention of the district court, including record citations to each, and the district court in no way indicated that it would decline to examine those items. R.160 at 22 ("I would be remiss to not point out another objective measure of Mr. Black's adaptive functioning in affidavit of Dr. Ste[ph]en Greenspan. And that's at Docket Entry 120-2."); id. at 60 ("The Court: Is that what you called the screening test? Ms. Henry: Yes, sir. And you will see in Docket Entry 120-1, there is testimony there from Dr. Mar[c] Tass[é], who is the nation's leading expert on assessing intelligence.").

We therefore hold that the district court did not err in apprehending the scope of its remand. The district court understood that its task was to conduct a de novo review of the record before it-including, at a minimum, a de novo review of the state-court record applying Coleman in the same way that the Tennessee Supreme Court would have done if the Atkins claim were instead before that court. And while *742 the district court was not prohibited under Pinholster from considering additional evidence beyond the state-court record (because the district court was not subject to AEDPA's constraints), it was not error for the district court not to state whether and to what extent it was considering materials such as Dr. Tassé's and Dr. Greenspan's declarations that were part of the federal habeas record only. Indeed, as noted above, when the district court heard oral argument, it did-without cavil-engage with aspects of the declarations of both Dr. Tassé and Dr. Greenspan.

B. The District Court Did Not Abuse Its Discretion in Denying an Evidentiary Hearing

[4] [5] Relatedly, Black argues that the district court erred in denying him an evidentiary hearing. We review the district court's denial of an evidentiary hearing for abuse of discretion. *Cornwell v. Bradshaw*, 559 F.3d 398, 410 (6th Cir. 2009); *Getsy v. Mitchell*, 495 F.3d 295, 310 (6th Cir. 2007) (en banc). The fact that Black was "not disqualified from receiving an evidentiary hearing under [AEDPA] does not entitle him to one." *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003). Rather, when a court is able to resolve a habeas claim on the record before it, it may do so without holding an evidentiary hearing. *See Sawyer v. Hofbauer*, 299 F.3d 605, 612 (6th Cir. 2002).

[6] Here, the district court did not abuse its discretion in denying Black's motion for an evidentiary hearing. Notably, even if we had authorized the district court to entertain new evidence in evaluating Black's Atkins claim, Black has not identified any evidence that he would introduce other than exhibits already made part of the state or federal habeas record. And while Black has cited authorities that support allowing an evidentiary hearing, Appellant's Br. 11, 15-16, 26, Black fails to support the contention that an evidentiary hearing was required in order for the district court properly to evaluate the voluminous record before it under Coleman. At oral argument, Black's counsel argued that an evidentiary hearing would have provided Black an opportunity to direct the court's attention to the findings and conclusions, for example, of post-conviction expert Dr. Tassé. But, as we have stated, Black was able to bring Dr. Tassé's declaration to the district court's attention at the oral argument before that court, and, in any event, the district court's task was to review the record in the same way the Tennessee Supreme Court would have reviewed it under *Coleman*—and the district court's thorough 31-page opinion reflects that it was able to do that within the scope of our limited remand and without conducting an evidentiary hearing.

C. Principles of Summary Judgment Do Not Apply to a Merits Ruling on a Federal Habeas Claim

Black's brief on appeal makes various assertions that the district court should have applied a summaryjudgment standard in conducting its review, but Black cites no authority for this supposed rule—a rule that would mean, it is worth noting, that Black would prevail so long as any reasonable juror would grant him relief, giving Black the benefit of all reasonable factual inferences. Appellant's Br. 5 ("On remand, Black's request for an evidentiary hearing was denied. The district court erroneously ... resolved factual disputes in favor of Respondent."); id. 8 ("The district court compounded its error by failing to follow well-settled principles of summary judgment in its memorandum opinion. The district court credited the testimony of the State's witnesses in the face of the expert opinions of Black's witnesses. The district court refused to draw inferences in favor of Black. Rather, it did just the opposite."); *743 id. 28-29 (apparently treating the Atkins proceeding as a summary-judgment proceeding at which Fed. R. Civ. P. 56 governs because it was "a summary proceeding" without an evidentiary hearing).

[7] Summary-judgment procedures simply do not apply to a federal habeas court's final adjudication of an Atkins claim. Rather, it is Black who had the burden of proving, by a preponderance of the evidence, that he was entitled to relief. See Parke v. Raley, 506 U.S. 20, 34, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) (discussing "the preponderance of the evidence standard applicable to constitutional claims raised on federal habeas"); Tenn. Code Ann. § 39-12-203(c) ("The burden of production and persuasion to demonstrate intellectual disability by a preponderance of the evidence is on the defendant."). Part of the confusion in Black's briefing appears to arise from the fact that the State had filed a "Motion to Dismiss and for Summary Judgment" in the pre-Coleman federal habeas proceedings—and indeed, when Black originally filed his petition in 2002, before Atkins was decided, the district court granted "summary judgment" to the State on Black's claims.

[8] But the district court's decision that Black now appeals was not summary judgment-it was judgment. Indeed, nothing in the 2011-13 habeas proceedings leading up to the district court's January 2013 memorandum opinion was styled "summary judgment" at all: the State filed a "Brief Opposing [Black's] Atkins Claim," and Black filed a "Brief In Support Of His Atkins Claim," but nothing in the record appears to justify (and Black does not direct us to anything in the record that would justify) Black's contention that the district court's oral argument and opinion constituted a summaryjudgment proceeding. Nor is there any support for the proposition that the district court's Atkins determination was transformed into a summaryjudgment ruling because the district court declined to hold an evidentiary hearing, as Black's brief seems to imply. Appellant's Br. 5. The district court's Atkins determination was a final judgment on the merits of Black's Atkins claim, in which the district court properly weighed the evidence, made credibility determinations, and declared one party the victor.

At such a proceeding, under Atkins (as it incorporates state law), Black had to prove every element of his mental-retardation claim "by a preponderance of the evidence," without receiving the benefit of having any inferences drawn in his favor.

Tenn. Code Ann. § 39-12-203(c); see Coleman, 341 S.W.3d at 233 ("The statute places the burden on the criminal defendant to prove by a preponderance of the evidence that he or she had an intellectual disability at the time of the offense and requires the trial court rather than the jury to make the decision.").

We therefore hold that the district court did not err when it resolved the factual disputes before it rather than employing a summary-judgment standard.

D. The District Court's Merits Ruling Was Correct

[9] We review the district court's denial of habeas relief de novo. Bigelow v. Williams, 367 F.3d 562, 569 (6th Cir. 2004). But we review underlying factual findings for clear error, and we bear in mind that,

contrary to the assertions in Black's brief, Black carries the burden of persuasion:

Our review of the district court's factual findings is highly deferential. We start from the premise that a district court's factual findings in a habeas proceeding are reviewed for clear error.

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v. O'Dea, 179 F.3d 412, 416 (6th Cir. 1999). "

*Clear error' occurs only when [the *744 panel is] left with the definite and firm conviction that a mistake has been committed. If there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

United States v. Kellams, 26 F.3d 646, 648 (6th Cir. 1994). We are also mindful that in a habeas proceeding the petitioner "has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional

Caver v. Straub, 349 F.3d 340, 351 (6th Cir. 2003).

(11th Cir. 2001).

violation." Romine v. Head. 253 F.3d 1349, 1357.

The Supreme Court "le[ft] to the States the task of developing appropriate ways to enforce" its decision in Atkins, 536 U.S. at 317, 122 S.Ct. 2242, but the Court has invalidated state procedures for evaluating Atkins claims when those procedures are "[n]ot aligned with the medical community's information," *Moore*, 137 S.Ct. at 1044 (2017) (invalidating Texas scheme where "indicators of intellectual disability [were] an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source"), and thereby "creat[e] an unacceptable risk that persons with intellectual disability will be executed." — *Ibid.* (quoting — *Hall.* 134 S.Ct. at 1990; see also id. at 1992 (invalidating Florida scheme that foreclosed "all further exploration of intellectual disability" where prisoner's seven IQ scores in the evidentiary record were all above 70 (ranging from 71 to 80) and two IQ scores that had been excluded from the record were under 70)).

[10] To prevail on his Atkins claim under Coleman, Black would need to "prove by a preponderance of the evidence":

- (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
- (2) Deficits in adaptive behavior; and
- (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

Coleman, 341 S.W.3d at 233 (quoting Tenn. Code Ann. § 39-13-203(a) (2010)). 4

Black argues that the district court wrongly concluded that he did not have significantly subaverage general intellectual functioning as evidenced by a functional IQ score of seventy or lower before he turned eighteen. The district court's conclusion largely rested on its analysis of the series of IQ tests that Black has taken over the course of his life, see Black v. Colson, 2013 WL 230664, at *6–7, and the crux of Black's argument is that the court wrongly analyzed those IQ scores.

As set forth in Part I, *supra*, Black's school records reveal IQ scores ranging from 83 to 97 when Black was age seven to thirteen. After those tests, the next IQ test on record was administered to Black in 1989 (at age 33) before he stood trial for the triple murder: he scored 76. During *745 Black's first post-conviction proceeding in state court, he was twice administered the WAIS–R (once in 1993 at age 37, once in 1997 at age 41) and scored 73 and 76, respectively. And during federal habeas proceedings (*after* his death sentence had been upheld by the Tennessee courts), Black scored 69 on the WAIS–III and 57 on the Stanford-Binet-IV, both administered in 2001 when Black was 45.

The district court relied strongly on the IQ testing done during Black's school-age years as most probative of Black's mental condition prior to age eighteen.

Id. at *10. Not surprisingly, Black maintains that this reliance is misplaced. First, Black argues that these test scores are invalid because the tests were

"group-administered." ⁵ In the state post-conviction proceedings, Dr. Daniel H. Grant, a neuropsychologist and forensic psychologist, testified that the appropriate mental-health testing models establish that groupadministered tests are unreliable and should not be used to determine intellectual disability. Dr. Greenspan's declaration avers that group-administered tests are not acceptable for intellectual-disability determinations because they have much weaker reliability and validity and there is a lack of information about the circumstances under which the tests were administered. And Dr. Tassé's declaration avers that group-administered tests "are not well normed nor possess the psychometric properties necessary to be used in diagnostic decision-making." Dr. Tassé states that these tests "serve a screening purpose" but that he would not rely upon results from these tests "when making or refuting a diagnosis of mental retardation." Of course, these declarations do not, without more, provide much help for Black: even if Black had persuaded the district court to reject his childhood IQ scores as useful for "making or refuting a diagnosis of mental retardation," he would still have fallen short of carrying his burden to prove that he was intellectually disabled by age eighteen.

Moreover, a state expert and psychologist, Dr. Eric Engum, testified during state post-conviction proceedings that group-administered tests are relevant when considering whether an individual is intellectually disabled. While agreeing with Dr. Grant that these tests are not as accurate as individually administered tests, Dr. Engum believes that they are properly used as indicators of how well a child is functioning; if the test raised a concern about a child's intellectual capacity, the child would have been referred for more testing. Although the SEM for groupadministered tests is higher (up to eight points) than the SEM for individually administered tests (up to five points), ⁶ Black was not referred for more testing (and indeed, Black graduated high school with a standard diploma), and all his childhood test scores would still be well above the numerical threshold for intellectual disability even if they were retroactively adjusted downward by one SEM.

Black next argues that even his adulthood IQ tests administered between 1989 and 1997, the scores from which fall in the low-to-mid 70s, overstate his level

of intellectual functioning and that his results should be construed as below 70 when adjusted for the Flynn Effect. At oral argument, Black's counsel argued that the Supreme Court's decision in **Brumfield v. Cain,**— U.S. ——, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015), "require[s]" us to look **746 at the "Flynnadjusted scores" as reported in Dr. Tassé's report. R.120-2; Oral Argument 25:10-26:00 (discussing **Brumfield** and **Hall**). But neither **Brumfield** nor **Hall** imposes any such requirement—indeed, neither case even mentions the Flynn Effect.

What they do mention is the SEM. **Brumfield*, 135 S.Ct. at 2278 (rejecting the argument "that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence," where Louisiana law categorically prohibited consideration of factors such as the SEM when a defendant's reported IQ score was above 70); **Hall*, 134 S.Ct. at 1995—

IQ score was above 70); Hall, 134 S.Ct. at 1995–96 ("For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score."). But as noted above, the SEM accounts for the possibility that an individual's true IQ score is either higher or lower than the reported score. And while the Supreme Court has rejected rigid rules that prevent a court from considering evidence of the SEM altogether, see,

e.g., id. at 1999–2001, the Court's decisions in no way require a reviewing court to make a downward variation based on the SEM in every IQ score, let alone to do the same with the Flynn Effect.

Further, while the Tennessee Supreme Court in Coleman held that "an expert should be permitted to base his or her assessment of the defendant's 'functional intelligence quotient' on a consideration of" "a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q.," Coleman only requires a downward adjustment to counteract the Flynn Effect when the IQ test administered to a given individual

is an "older version" than the then-current version of the test on the market. *Coleman*, 341 S.W.3d at 242

n.55. Black has not raised any argument that any of his specific IQ scores is *required* to be corrected for the Flynn Effect under *Coleman* because an earliernormed version of the test was administered.

Rather, Black's argument is that we should retroactively lower his IQ scores because his experts say that we should. Black submitted evidence from various experts about the impact of the Flynn Effect. Dr. Grant testified, for instance (in the state postconviction hearing), that the Flynn Effect should result in a four-point reduction in his IQ score from the 1993 testing, lowering the score from 73 to 69. Dr. Grant also said that the Flynn Effect should lower the 1997 score by five points from 76 to 71. Dr. Grant also opined that the WAIS-III, administered in 2001, which produced a score of 69, was a more accurate instrument than the WAIS-R and thus produced more accurate results. Dr. Greenspan's declaration avers that the Flynn Effect would reduce the 1993 test by four points to 69 and the 1997 test by six points to 70. Dr. Greenspan also agreed that the 2001 test (with a score of 69) used a more current instrument than previous assessments had. Similarly, Dr. Tassé opined that the Flynn Effect would reduce Black's 1993 results by four points to 69 and his 1997 results by five points to 71. Dr. Tassé further maintained that the 2001 WAIS-III results should be lowered to a score of 67 due to the Flynn Effect.

On the other hand, the State presented testimony that the impact of the Flynn Effect was overstated by Black's experts. While Dr. Engum was aware of the Flynn Effect and the need to revise and restandardize IQ tests, he questioned the appropriateness of relying on the Flynn Effect to lower IQ scores retroactively based on the passage of time. Dr. Susan Vaught, a *747 neuropsychologist, testified that it was not standard practice to correct scores due to the Flynn Effect nor was it routinely considered by practitioners as a basis for lowering an IQ score. Upon consideration of the parties' evidence (including specific mention of Dr. Grant's, Dr. Engum's, and Dr. Vaught's testimony), the district court concluded that the Flynn Effect provided "weak support for the statutory requirement that [Black] have scores at or below 70 before he turned age 18." Black v. Colson, 2013 WL 230664, at *10. The court accepted the existence of the Flynn

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Effect but concluded that the 1993 and 1997 tests were not as probative of Flynn's mental ability before age eighteen as the earlier tests, and declined to accept Black's argument that retroactively reducing IQ scores was a "scientifically valid remedy" to account for the Flynn Effect.

Black further argues that the district court should have credited the 2001 IQ tests that placed Black's IQ score at 57 and 69. The district court noted, however, that Black was 45 years old when these tests were administered (and, incidentally, Black was 45 years old before he was ever "diagnosed as having mental"

retardation," id. at *13). The 2001 IQ scores were also generated after Black had been under a sentence of death for more than a decade. Unlike in a competency

hearing under Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), where these scores might be probative of a prisoner's insanity at the time of execution, these recent scores have far less probative value, if any, in showing Black's mental capacity before he turned eighteen. Black has argued that his mental retardation at age 45 was (unless rebutted by the State) evidence of lifelong mental retardation sufficient to satisfy the requirement that mental retardation manifest itself before age 18; indeed, Black presented expert witnesses' findings that Black had a brain disorder, perhaps caused by fetal alcohol spectrum disorder, but the district court found

those experts were "not persuasive." Id. at *14.

Specifically, Dr. Albert Globus, a neuropsychiatrist, examined Black and conducted an extensive review of his past medical records and social history. While he did not conduct any IQ testing, Dr. Globus reviewed recent positron emission tomography (PET) scans of Black's brain, which revealed "definite abnormalities," including "changes in the cerebral cortex, the brain ventricles, and the white matter indicating organic damage to the structure of the brain." Dr. Globus also observed "[h]ypometabolism of glucose in the orbito-frontal cortex, the medial and polar temporal cortex, and the caudate and/or the putamen." Based on Black's life history, Dr. Globus opined that Black had an organic brain disorder with an onset well before his current offense. Dr. Globus concluded that these findings were "consistent" with Black's having an IQ of 70 or lower, which rendered him intellectually

disabled—but while Dr. Globus stated that "evidence of early onset brain damage secondary to alcohol ingestion by [Black's] mother" was "sufficient to produce an IQ lower than all but two or three per cent of the population," Dr. Globus's evaluation of Black's mental ability centered around Black's *current* ability (in 2001, when Dr. Globus wrote his report). Dr. Globus did *not* affirmatively state that Black's IQ was 70 or lower before age eighteen.

The district court made several specific page citations to Dr. Globus's testimony. See, e.g., id. at *11. But the district court did not assign great weight to Dr. Globus's findings because Dr. Globus had not substantiated the facts concerning alcohol use by Black's mother that Dr. Globus relied upon in his report, and because Dr. Globus admitted that the brain scans that he analyzed did not actually reveal whether *748 Black's brain abnormalities were caused by fetal alcohol spectrum disorder or instead by an adulthood injury.

Dr. Ruben Gur, a neuropsychologist, also concluded that Black suffered from a brain disorder. Dr. Gur noted damage in Black's frontal- and temporallobe functions and commented that Black's "deficits are particularly pronounced in executive functions, memory and emotion processing." Dr. Gur opined that these limitations potentially resulted from certain exposures during Black's childhood. These exposures may have included his mother's alcohol consumption while pregnant with him, or lead poisoning arising from his childhood living conditions. Black also suffered several head injuries while playing football, although no formal diagnosis of concussion was ever made. At the time of Dr. Gur's report, Dr. Gur noted that Black demonstrated symptoms associated with serious psychiatric disorders, including paranoid and delusional beliefs—but these disorders are not necessarily concomitants of mental retardation.

The district court thoroughly evaluated all these reports, and the district court elected to disregard this most recent evidence of Black's mental ability because the district court was not persuaded that any injury that might have caused mental retardation had occurred

before Black turned eighteen. Id. at *14.

In short, Black's argument requires three steps: (1) reject Black's childhood "group-administered" IQ scores (83, 97, 92, 91, 83); (2) either rely exclusively on the 2001 IQ scores (69, 57), or else apply a downward adjustment to the pre-2001 adulthood IQ scores (76, 73, 76) to account for the Flynn Effect and the SEM, so as to reduce those scores to below 70; and (3) presume that the adulthood scores, in the absence of contradictory childhood IQ scores (and by disregarding evidence put on by the State to rebut Black's contention that his mother's alcohol consumption caused Black to suffer any brain damage that caused any level of mental retardation), are evidence of lifelong mental retardation that must have manifested itself before age eighteen. Each of these three steps is a necessary condition for Black to prevail on his Atkins claim as we see it. And Black has not shown us any authority that would support taking any of these steps.

At the end of the day, without stronger evidence that Black's childhood IQ scores did not accurately reflect his intellectual functioning before he turned eighteen, the district court held that Black could not carry his burden of showing, by a preponderance of the evidence, that he had significantly subaverage general intellectual functioning before he turned eighteen.

Having reviewed the entire record, we cannot find fault with the district court's conclusion; after all, even if Black's childhood IQ scores were reduced by both eight points to account for the SEM (using the higher SEM applicable to group-administered tests, rather than five points for individually administered tests) and up to four points to counteract the Flynn Effect, ⁷ they all would still exceed seventy. To be sure, there is almost always a *possibility* that a reported IQ score significantly higher than 70 is an inaccurate reflection of a true IO score of 70 or below-indeed, there is approximately a one-in-300 chance that a reported IQ of 92 on a group-administered test (like Black's 1966 Lorge Thorndike score) reflects a true score lower *749 than 70. But that possibility does not satisfy Black's burden to prove his intellectual disability by a preponderance of the evidence.

E. Implications of the Flynn Effect

There is good reason to have pause before retroactively adjusting IQ scores downward to offset the Flynn Effect. As we noted above, see n.1, supra, the Flynn Effect describes the apparent rise in IO scores generated by a given IQ test as time elapses from the date of that specific test's standardization. The reported increase is an average of approximately three points per decade, meaning that for an IQ test normed in 1995, an individual who took that test in 1995 and scored 100 would be expected to score 103 on that same test if taken in 2005, and would be expected to score 106 on that same test in 2015. This does not imply that the individual is "gaining intelligence": after all, if the same individual, in 2015, took an IQ test that was normed in 2015, we would expect him to score 100, and we would consider him to be of the same "average" intelligence that he demonstrated when he scored 100 on the 1995-normed test in 1995. Rather, the Flynn Effect implies that the longer a test has been on the market after initially being normed, the higher (on average) an individual should perform, as compared with how that individual would perform on a more recently normed IQ test.

At first glance, of course, the Flynn Effect is troubling: if scoring 70 on an IQ test in 1995 would have been sufficient to avoid execution, then why shouldn't a score of 76 on that same test administered in 2015 (which would produce a "Flynn-adjusted" score of 70) likewise suffice to avoid execution? Further, even if IQ tests were routinely restandardized every year or two to reset the mean score to 100, and even if old IQ tests were taken off the market so as to avoid the Flynn Effect "inflation" of scores that is visible when an IQ test continues to be administered long after its initial standardization, that would only mask, but not change, the fact that IQ scores are said to be rising.

Indeed, perhaps the most puzzling aspect of the Flynn Effect is that it is true. As Dr. Tassé states in his declaration, "[t]he so-called 'Flynn Effect' is NOT a theory. It is a well-established scientific fact that the US population is gaining an average of 3 full-scale IQ points per decade." The implications of the Flynn Effect over a longer period of time are jarring: consider a cohort of individuals who, in 1917, took an IQ test

that was normed in 1917 and received "normal" scores (say, 100, on average). If we could transport that same cohort of individuals to the present day, we would expect their average score today on an IQ test normed in 2017—a century later—to be thirty points lower: 70, making them mentally retarded, on average.

Alternatively, consider a cohort of individuals who, in 2017, took an IQ test that was normed in 2017 and received "normal" scores (of 100, on average). If we could transport that same cohort of individuals to a century ago, we would expect that their average score on a test normed in 1917 would be thirty points higher: 130, making them geniuses, on average.

It thus makes little sense to use Flynn-adjusted IQ scores to determine whether a criminal is sufficiently intellectually disabled to be exempt from the death penalty. After all, if **Atkins* stands for the proposition that someone with an IQ score of 70 or lower in 2002 (when **Atkins* was decided) is exempt from the death penalty, then the use of Flynn-adjusted IQ scores would conceivably lead to the conclusion that, within the next few decades, almost no one with borderline or merely below-average IQ scores should be executed, because **750 their scores when adjusted downward to 2002 levels would be below 70. Indeed, the Supreme Court did not amplify just what moral or medical theory led to the highly general language that it used in **Atkins* when it prohibited the imposition of

a death sentence for criminals who are "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus," 536

U.S. at 317, 122 S.Ct. 2242. If Atkins had been a 1917 case, the majority of the population now living—if we were to apply downward adjustments to their IQ scores to offset the Flynn Effect from 1917 until now—would be too mentally retarded to be executed; and until the Supreme Court tells us that it is committed to

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making such downward adjustments, we decline to do

Because Black cannot show that he has significantly subaverage general intellectual functioning that manifested before Black turned eighteen, we need not analyze whether Black has the requisite deficits in adaptive behavior, which he would *also* be required to demonstrate in order to be entitled to Atkins relief.

IV

In sum, the district court did not err in denying Black's *Atkins* claim under the applicable standard set forth by the Tennessee Supreme Court in *Coleman*.

AFFIRMED.

CONCURRENCE

COLE, Chief Judge, concurring in the opinion except for Section II.E.

I concur with the majority opinion except as to the section discussing the implications of the Flynn Effect. In holding that Black did not prove that he had significantly subaverage general intellectual functioning, we concluded that Black's childhood IQ scores would be above 70 even if we adjusted those scores to account for both the SEM and the Flynn Effect. Accordingly, I would not address the question of whether we should apply a Flynn Effect adjustment in cases generally because it is unnecessary to the resolution of Black's appeal. Regardless, courts, including our own in *Black I*, have regarded the Flynn Effect as an important consideration in determining who qualifies as intellectually disabled. *See, e.g.*,

Walker v. True, 399 F.3d 315, 322–23 (4th Cir. 2005).

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Footnotes

The Flynn Effect, named after intelligence expert James Flynn, is a "generally recognized phenomenon" in which the average IQ scores produced by any given IQ test tend to rise over time, often by approximately three points per ten years from the date the IQ test is initially standardized. See Ledford v. Head, No. 1:02-CV-1515-JEC, 2008 WL 754486, at *7 (N.D. Ga. Mar. 19, 2008); see also Am. Ass'n on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 36–41 (11th ed. 2010).

The WAIS–III test, for example, was published in 1997. When the WAIS-III was designed, it was administered to a "standardization sample" of 2,450 adults from the United States who were sorted into cohorts by age and other characteristics. D. Wechsler, The Psychological Corp., *WAIS–III Administration & Scoring Manual* (1997). IQ scores generated by the WAIS-III test essentially offer a measure of intelligence *relative to* the standardization sample of 2,450 people, all of whom took the test in 1995. The Flynn Effect would thus predict that average IQ scores generated by the WAIS–III in 2005 (ten years after it was normed) would be approximately three points higher, on average, than those generated in 1995, and would predict that scores generated by the same test in 2015 would be approximately six points higher, on average, than those generated in 1995.

But there is no legal or scientific consensus that *requires* an across-the-board downward adjustment of IQ scores to offset the Flynn Effect; rather, the Flynn Effect is one of many potential factors affecting the reliability and validity of any individual IQ score, and a professional who is assessing an individual's intelligence on the basis of an IQ score would take the Flynn Effect and other factors into consideration as part of that assessment.

The SEM is distinct from the Flynn Effect. The SEM allows for the possibility that an IQ score either overestimates or underestimates a subject's true IQ. Contrary to common understanding, a SEM of "five points" does not necessarily mean, for example, that a person with an IQ score of 75 must have a true IQ between 70 and 80. Rather, the SEM represents the standard deviation of true IQ scores from reported IQ scores. See, e.g., Leo M. Harvill, An NCME Module on Standard Error of Measurement, 10 Educ. Measurement: Issues & Prac. 33 (1991). Thus, a SEM of five points means that a person with a reported IQ of 75 is approximately 68% likely to have a true IQ within five points of 75 (i.e., between 70 and 80—one standard deviation on either side of 75), approximately 95% likely to have a true IQ within ten points (two standard deviations) of 75 (i.e., between 65 and 85), and approximately 99.7% likely to have a true IQ within fifteen points (three standard deviations) of 75 (i.e., between 60 and 90). It is therefore a gross oversimplification to attempt to account for error in measurement by retroactively reducing (or increasing) a reported IQ score by one SEM (or any number of SEMs).

Further, the SEM itself varies by test, subtest, and test-taker. The American Psychiatric Association states in its *Diagnostic and Statistical Manual of Mental Disorders* simply that "there is a measurement error of approximately 5 points in assessing IQ." Diagnostic & Statistical Manual of Mental Disorders 41–42 (4th ed., text rev. 2000). But on the WAIS–III, for example, the SEM for an individual between the ages of 45 and 54, for the full-scale IQ score (as opposed, for example, to a verbal-only or performance-only scale score) is reported as only 2.23 points. *See* Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification & Systems of*

Supports 51 (10th ed. 2002); see also Hall v. Florida, [—— U.S. ——], 134 S.Ct. 1986, 1995—96 [188 L.Ed.2d 1007] (2014).

Thus, when experts acknowledge a SEM of "up to five points" on widely accepted IQ tests such as the Wechsler (WISC and WAIS series) tests, and a SEM of "up to eight points" on "group-administered" tests like the Lorge Thorndike, they are not saying that the maximum gap between reported score and true score is five (or eight) points, respectively. Nor are they saying that, other than probabilistically, any given reported IQ score should be viewed as being up to five (or eight) points higher or lower than the true IQ score. Rather, they are saying that the maximum standard deviation between reported score and true score is five (or eight) points—meaning there is at least a 68% likelihood that the individual's true score is within five (or eight) points of the reported score.

It is worth noting that "group-administered" tests like the Lorge Thorndike are not really "group tests" in the conventional sense: that is, the questions are not answered orally by groups of individuals. Rather, these tests are administered (much like the SAT or the LSAT) to individuals who each complete an *individual* written IQ test but may do so at the same time as others in a classroom-style setting under the guidance of a single administrator, instead of in a one-on-one setting as Wechsler-series tests (like the WAIS) are administered.

In short, SEM is complicated—and there is no authority that *requires* any adjustment, let alone a *downward* adjustment (when the true IQ score might just as well be *higher* than the reported score) to account for the SEM when analyzing IQ scores as part of an Atkins determination.

- The Coleman court discussed "the validity and weight of raw scores of intelligence tests." Coleman, 341 S.W.3d at 242 (emphasis added). The court was not referring to actual raw scores but rather to reported full-scale IQ scores unadjusted for Flynn Effect, SEM, or other factors.
- The only difference between this statute and the 2003 version quoted in Part I, *supra*, is that the term "intellectual disability" replaced the term "mental retardation" in the 2010 version of the statute. In 2014, the Supreme Court in Hall used the term "intellectual disability" and acknowledged that previous opinions of the Court had used the term "mental retardation" to describe the same phenomenon. Hall, 134 S.Ct. at 1990. But the next year, in Brumfield v. Cain, U.S. —, 135 S.Ct. 2269, 2277, 2291, 192 L.Ed.2d 356 (2015), the Court used both terms in the same decision. Because the vast majority of Black's legal proceedings transpired before the term "mental retardation" began to fall out of favor, and because Atkins itself used "mental retardation," we have also used that term throughout this opinion, but we use "intellectual disability" in this section because it is the predominant term used by Coleman.
- As noted in Part I, *supra*, "group-administered" tests are written tests completed by individuals on their own; they are simply administered in a classroom setting as is the case with the SAT or other paper-based standardized tests.
- 6 See n.2, supra.
- Of Black's five childhood IQ scores, the 1969 Lorge Thorndike test is the most susceptible to Flynn Effect inflation. The Lorge Thorndike test was published in 1957, so a reduction of the 1969 score by approximately four points would offset the maximum expected inflation of that score that would be attributable to the Flynn Effect.

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United States District Court,

M.D. Tennessee,

Nashville Division.

Byron Lewis BLACK

v.

Ronald COLSON, Warden Riverbend Maximum Security Prison.

No. 3:00–0764.

Jan. 22, 2013.

Attorneys and Law Firms

Paul R. Bottei, Kelley J. Henry, Federal Public Defender's Office, Nashville, TN, for Byron Lewis Black.

MEMORANDUM

TODD J. CAMPBELL, District Judge.

I. Introduction

*1 This case is before the Court on remand from the Sixth Circuit to reconsider the Petitioner's claim made pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Black v. Bell, 664 F.3d 81 (6th Cir.2011); (Docket No. 134). The Court heard oral argument on the issue on January 3, 2013. For the reasons set forth herein, the Court concludes that the Petitioner has failed to carry his burden of demonstrating intellectual disability by a preponderance of the evidence.

II. Factual and Procedural Background

In 1989, Petitioner was convicted in Davidson County Criminal Court of three counts of first degree murder and one count of burglary in connection with the killing of his girlfriend, Angela Clay, and her two minor daughters, Lakeisha and Latoya. (See State v. Black, 815 S.W.2d 166 (Tenn.1991); Addendum 12). The Petitioner received a death sentence for the murder of Lakeisha, consecutive life sentences for the other two murder convictions, and a fifteen-year sentence for the burglary conviction. Id. Petitioner's convictions and sentence were affirmed on direct appeal, and in state post conviction proceedings. Id. (Black v. State, 1999 WL 195299 (Tenn.Crim.App. April 8, 1999); (Addendum 28).

The facts surrounding Petitioner's convictions were described by the Tennessee Supreme Court in its opinion on direct appeal as follows:

It appears that these bizarre and tragic murders occurred in the early morning hours of Monday, March 28, 1988. The bodies of the three victims were found Monday evening around 9:30 p.m. At the time of the murders, the Defendant was on weekend furlough from the Metropolitan Workhouse in Davidson County. The Defendant was serving a two-year sentence, after pleading guilty to malicious shooting, a felony.

... The Defendant was the boyfriend of Angela Clay, who had separated from her husband, Bennie Clay, about a year before her death. Bennie Clay was the father of Latoya and Lakeisha. Bennie Clay testified that at the time of Angela Clay's death, he and Angela were attempting to reconcile, but the Defendant was an obstacle to the reconciliation. He further testified that Angela began a relationship with the Defendant after their separation and that at times she was seeing both the Defendant and himself. In December, 1986, the Defendant and Bennie Clay had an altercation during a dispute over Angela. As Bennie Clay was returning to his car, the Defendant shot at him. One shot hit the car, another hit Clay in the right foot, and another shot hit him in the back of his left arm. The bullet that went through his left arm lodged under his collar bone. Clay testified that he started running up the street and the Defendant chased him, continuing to shoot. Clay was finally unable to run any farther. He fell down,

and the Defendant stood over him and had cocked the gun when Angela Clay ran up to the Defendant and pushed him away. Angela then took Bennie Clay to the hospital, where he remained for seven days. The Defendant pled guilty to the shooting and received the workhouse sentence, which included weekend furloughs.

*2 On Friday afternoon around 5:30 p.m., March 25, 1988, the Defendant was released from the workhouse on a weekend furlough. He returned to the workhouse on the evening of Monday, March 28, at approximately 5:15 p.m. after the murders were committed, but before the bodies were discovered.

Angela and her two daughters were last seen Sunday evening around 11 p.m. Angela's sister, Lenette Bell, had borrowed Angela's car on Sunday. Angela was employed at Vanderbilt Hospital, where she worked from 1:30 p.m. to 10 p.m. daily. Lenette Bell arranged to pick up Angela at the hospital at 10 p.m. When Lenette Bell arrived at the hospital, the Defendant was also waiting there for Angela. Angela's children, who were with Lenette Bell while their mother was working, chose to ride with the Defendant and their mother from the hospital. The Defendant drove Angela and her two daughters to the home of Amelia Bell, the mother and grandmother of the victims. Ms. Bell testified that the Defendant left her house in his car, and that her daughter and granddaughters left her house in her daughter's car about 10:20 p.m. Angela returned about 11 p.m. to pick up an iron she had forgotten. That was the last time Ms. Bell saw her daughter alive. Lenette Bell testified that Angela telephoned her at approximately 11:20 p.m. that evening. That was the last time any of the witnesses spoke to the deceased before her untimely death.

When Ms. Bell's daughter failed to return the iron the next morning, she telephoned her daughter but got no answer. She continued to call Angela throughout the day but received no answer. She became concerned and asked another daughter to drive to Angela's apartment. No one answered her knocks at the door. Ms. Bell made other telephone calls to try to locate her daughter and then went to her daughter's apartment with Lenette Bell, but no one responded to their knocks on the door. All the shades were drawn and Angela's car was parked

outside of her apartment. It was then they decided to call the police.

The police arrived at approximately 9:30 p.m. on Monday evening, March 28, 1988, and found no signs of forced entry into the apartment; the door was locked. Officer James was able to open a window after prying off a bedroom window screen. All the lights were off. He shined a flashlight into a child's room and saw a pool of blood on the bed and the body of a small child on the floor. He exited the room, and officers secured the scene.

Investigation revealed the bodies of Angela and her nine year old daughter, Latoya, in the master bedroom. Angela, who was lying in the bed, had apparently been shot once in the top of the head as she slept and was rendered unconscious immediately and died within minutes. Dr. Charles Harlan, Chief Medical Examiner for Davidson County, testified that she was probably shot from a distance of six to twelve inches and that her gunshot wound was the type usually caused by a large caliber bullet.

*3 Latoya's body was found partially on the bed and partially off the bed, wedged between the bed and a chest of drawers. She had been shot once through the neck and chest. Blood on her pillow and a bullet hole in the bedding indicated she had been lying on the bed when shot. Dr. Harlan testified that she was shot from a distance of greater than twenty-four inches from the skin surface. The bullet path and type of shot indicated that death was not instantaneous but likely occurred within three to ten minutes after her being shot. Bullet fragments were recovered from her left lung. Both victims were under the bedcovers when they were shot.

The body of Lakeisha, age six, was found in the second bedroom lying facedown on the floor next to her bed. She had been shot twice, once in the chest, once in the pelvic area. Dr. Harlan testified that she had died from bleeding as a result of a gunshot wound to the chest. She was shot from a distance of six to twelve inches and died within five to thirty minutes after being shot.

Abrasions on her arm indicated a bullet had grazed her as she sought to protect herself from the attacker. Bullet holes and blood stains on the bed indicated that she was lying in bed when shot and had moved from the bed to the floor after being shot. There were bloody finger marks down the rail running from the head of the bed to the foot of the bed. The size of the wounds and the absence of bullet casings indicated that a large caliber revolver had been used to kill the victims.

One projectile was collected from the pillow where Latoya was apparently lying at the time she was shot. Fragments of projectiles were collected from the wall above Angela's head; others were collected from the mattress where Lakeisha was found.

The receiver from the kitchen telephone was found in the master bedroom. The telephone from the master bedroom was lying in the hallway between the two bedrooms. The Defendant's fingerprints were the only prints recovered from the telephones. Two of his fingerprints were found on the phone in the hallway, and one was on the kitchen telephone receiver found in the master bedroom.

815 S.W.2d at 170–72.

Pursuant to 28 U.S.C. § 2254, Petitioner filed a Petition seeking habeas relief in this case on August 14, 2000. (Docket No. 1). After appointment of counsel, Petitioner filed an Amended Petition For Writ Of Habeas Corpus (Docket No. 8) raising numerous grounds, including an Eighth and Fourteenth Amendment claim that execution of the Petitioner would be cruel and unusual punishment because he is mentally retarded. The Court subsequently granted summary judgment to Respondent on all claims, including the mental retardation claim, on December 11, 2001. (Docket Nos. 82, 83).

The Petitioner filed an appeal, and while the case was pending, the United States Supreme Court issued its decision in **Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In Atkins, the Supreme Court held that executing a mentally retarded person violates the Eighth Amendment's ban on cruel and unusual punishment. The Court did not define the term "mentally retarded," but left to the states "the task of developing appropriate ways to enforce the constitutional restriction" upon their execution of sentences. 122 S.Ct. at 2252.

*4 After *Atkins* was issued, the Sixth Circuit Court of Appeals held its appeal in this case in abeyance pending a decision by the Tennessee courts on whether Petitioner is mentally retarded. (Docket No. 91). The Petitioner then moved to reopen his state post conviction proceeding to raise the mental retardation claim. *Black v. State of Tennessee*, 2005 WL 2662577 (Tenn.Crim.App. Oct.19, 2005). After an evidentiary hearing, the state trial court held that the Petitioner had not demonstrated mental retardation, and that decision was affirmed on appeal by the Tennessee Court of Criminal Appeals. *Id.* The Tennessee Supreme Court denied Petitioner's application for permission to appeal. *Id.*

The Sixth Circuit subsequently remanded the case back to this Court for reconsideration of Petitioner's mental retardation claim in this case in light of *Atkins*. (Docket No. 97). On the first remand, this Court applied the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and held that the Tennessee courts' decisions denying Petitioner's Atkins claim were entitled to deference. (Docket No. 127). The Petitioner appealed that decision to the Sixth Circuit on May 21, 2008. (Docket No. 130).

III. The Second Remand of Petitioner's Atkins Claim

On December 15, 2011, the Sixth Circuit issued an opinion vacating the Court's judgment regarding the *Atkins* claim, and remanding the case for further proceedings consistent with the opinion. **Black v. Bell. 664 F.3d at 84. 3

In considering the *Atkins* claim, the appeals court pointed out that capital defendants are considered "mentally retarded" if they meet the criteria set forth in Tennessee Code Annotated Section 39–13–203. That statute, which was amended while this case was on appeal to substitute the term "intellectual disability" for "mental retardation," ⁴ provides as follows:

(a) As used in this section, "intellectual disability" means:

- (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
- (2) Deficits in adaptive behavior; and
- (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

The statute also provides that the defendant has the burden of demonstrating intellectual disability by a preponderance of the evidence. Tenn.Code Ann. §

The appeals court summarized the decisions of the state courts applying this statute as follows:

The state trial court determined that Black's post-conviction *Atkins* claim merited an evidentiary hearing. At this evidentiary hearing, Black had the burden of showing by a preponderance of the evidence that he met Tennessee's definition of mental retardation under *Atkins*. After the hearing concluded, the court summarized what it viewed as the determinative evidence from the voluminous record and, based on this evidence, denied Black's *Atkins* claim for post-conviction relief.

*5 The TCCA affirmed the trial court's rejection of Black's claim. In its 'Analysis' section, the TCCA mostly reviewed, without taking a stance on, the conflicting expert assessments of the factual record. But the TCCA did recognize that, according to Black's experts, the Flynn Effect and/or the SEM brings his middle set of I.Q. scores into the mentally retarded range. Based on *Howell v. State, 151 S.W.3d 450, 457 (Tenn.2004), however, the TCCA determined that it was prohibited from considering these scientific concepts in assessing Black's numerical I.Q. score.

The TCCA's assessment of the factual record also makes clear that it was skeptical of the opinions of Drs. Globus and Gur regarding when Black's brain damage occurred. But the TCCA did not go so far as to make a definitive factual conclusion regarding the date of onset of Black's brain damage. The court also discounted Dr. Grant's conclusion

that Black displayed deficits in his adaptive behavior because, although Dr. Grant observed that Black had never engaged in a number of commonplace activities, 'there is no proof in the record that [Black] was unable to do these things.' *Black*, 2005 WL 2662577, at * 15. It also pointed out that none of Black's childhood I.Q. scores fell in the mentally retarded range. But the TCCA reached its ultimate conclusion that 'the proof in the record simply does not support that [Black's] I.Q. was below seventy or that [Black] had deficits in his adaptive behavior prior to age eighteen' without stating which pieces of evidence were essential to its conclusion. *Id.* at * 17.

664 F.3d at 89–90.

The Sixth Circuit ultimately determined that the decisions of the Tennessee courts were not entitled to AEDPA deference because they were at odds with

Coleman v. State, 341 S.W.3d 221 (Tenn.2011), a decision issued by the Tennessee Supreme Court while this case was on appeal, on April 11, 2011. The court determined that unlike the state court decisions in this case, Coleman required the consideration of evidence regarding the impact of the "Flynn Effect," the standard error of measurement ("SEM"), and other factors used by experts in determining a

defendant's ultimate I.Q. score. 664 F.3d at 92–97. As to the second criterion, the court determined that the state courts had erred because *Coleman* required that they "look at his weaknesses instead of at his strengths," and because they failed to consider the potential relationship between mental illness and mental retardation in assessing the Petitioner's deficits in adaptive behavior. 664 F.3d at 97–100. Consequently, the court concluded

that an independent, de novo review of the record is appropriate. 664 F.3d at 97, 100–01. In a dissent, Judge Boggs determined that remand was inappropriate, and that the Petitioner should seek to reopen his prior post conviction proceeding based on the

Coleman decision. 664 F.3d at 107–08. 5

This Court subsequently considered Petitioner's request to introduce new evidence, and denied the request based on the language of the Sixth Circuit's

opinion directing the Court to "review the record based on the standard set out in *Coleman* ..." (Docket No. 150, at 2).

IV. De Novo Review

*6 As directed by the appeals court, this Court undertakes a de novo review of the evidence admitted at the post conviction proceeding in state court to determine whether the Petitioner has satisfied the three statutory criteria. That record includes the testimony of Mary SmithsonCraighead, a teacher; Melba Faye Corley, the Petitioner's sister; Al Dennis, the Petitioner's high school football coach; Richard Corley, the Petitioner's brother-in-law; Petitioner's experts Dr. Albert Globus, Dr. Daniel Grant, and Dr. Ruben C. Gur (by deposition); and the State's experts Dr. Eric S. Engum and Dr. Susan Vaught. (Docket No. 106 (Addendum 30–31)). The record also includes the affidavits of Dr. Patti van Eys, James Lawler, Ph. D. and Michael Nash, Ph. D. (Docket No. 106 (Addendum 29, Volume 2 of 3)), and a number of other exhibits, including the experts' reports, the Petitioner's school records, medical records and prison records, and testimony from the Petitioner's trial and first post conviction hearing. (Docket No. 106 (Addendum 30)).

As set forth above, in order to demonstrate that he is "intellectually disabled" under Tennessee Code Annotated Section 39–13–203(a), the Petitioner has the burden of demonstrating the following criteria by a preponderance of the evidence:

(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

- (2) Deficits in adaptive behavior; and
- (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

The statute requires that all three criteria be met in order to establish "intellectual disability." *State v. Strode*, 232 S.W.3d 1, 18, 2007 WL 2316355 (Tenn.2007).

The record indicates that the Petitioner was born on March 23, 1956, and was 33 years old at the time the crimes were committed in 1988. Black v. Bell, 664 F.3d at 84. The Petitioner was approximately 48 years old when the state court proceedings on mental retardation were held in 2004. (Docket No. 106) (Addendum 29–31)).

A. IQ of 70 or below prior to age 18

Efficiency and logic suggest that, in this case, the Court consider the first criterion in conjunction with the third. Accordingly, the Court will first review the record to determine whether the Petitioner has shown: "Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below, ... manifested during the developmental period, or by eighteen (18) years of age." Tenn.Code Ann. § 39–13–203(a)(1), (3).

In the state post conviction proceeding on the issue of mental retardation, the parties introduced evidence of various IQ tests taken by the Petitioner over his lifetime. The Petitioner's school records indicate that prior to age 18, he scored as follows:

Date of test	Name of test	Score	Petitioner's Approximate Age
1963	Lorge Thorndyke	83	7
1964	Unknown	97	8
1966	Lorge Thorndyke	92	10
1967	Otis	91	11
1969	Lorge Thorndyke	83	13

*7 (Docket No. 106 (Addendum 30, Vol. 1, at 233 (testimony by Dr. Grant); Exhibit 1, Exhibit 36)). Prior to his trial in 1989, the Petitioner's attorneys retained mental health experts to evaluate him for

competency and sanity. At that time, the Petitioner scored as follows:

Date of test	Name of test	Administered by	Score	Pet's Approx. Age
1989	Shipley–Hartford	Dr. Kenneth Anchor/Dr. Pat Jaros	76	33

(*Id.* (Addendum 30, Exhibit 4, at 5–7, 11; Exhibit 25, at 2308–09)).

During the first state post conviction proceeding, Petitioner's counsel retained different mental health experts to evaluate his mental status. At that time, the Petitioner scored as follows:

Date of test	Name of test	Administered by	Score	Pet's Approx. Age
1993	WAIS-R	Dr. Gillian Blair	73	37
1997	WAIS-R	Dr. Pamela Auble	76	41

(Id., (Addendum 30, Exhibits 15, 16, 33, 34, 36)).

During the initial habeas proceeding in this Court, still other mental health experts evaluated the Petitioner. At that time, the Petitioner scored as follows:

Date of test	Name of test	Administered by	Score	e Pet's Approx. Age	
2001	WAIS-III	Dr. Patti van Eys	69	45	
2001	Stanford-Binet-IV	Dr. Daniel Grant	57	45	

(*Id.* (Addendum 30, Exhibits 10, 41)).

In summary, the Petitioner did not score 70 or below on an IQ test until 2001, when he was approximately 45 years old. The Petitioner argues that the test scores prior to that date are invalid, or the scores should be adjusted downward for various reasons. As for the IO tests administered during his years in school, the Petitioner argues that those tests should not be considered at all because they were group-administered tests, which are less reliable than individually-administered IQ tests. Indeed, the experts on both sides indicated that testing an individual one-on-one was the preferred method for measuring IQ. (Docket No. 106 (Addendum 30, Vol. 2, at 234-236, 300, 372-73)). There is no support in the record, however, for completely disregarding all group-administered tests. Instead, the group setting goes to the "weight" to be given the test score. As Dr. Engum explained:

- Q. What significance, if any, do you place on the tests scores administered, and tests scores he received when he was in school? Are those to be considered?
- A. Oh, absolutely.
- Q. Or how much weight, if any, do you give those?
- A. I think they're (sic) two answers to your question. Number 1, I fully agree with Dr. Grant, that group administered IQ test[s] are not as accurate as individually administered IQ test[s]. That is, they have a greater standard error of measurement. On the other hand, they're utilized in a number of settings to determine how children are functioning ... You might say the standard

error of measurement on the Wechsler Adult Intelligence Skill, Third Edition, is plus or minus five points, roughly. On a group administered IQ test, it may be plus or minor (sic) eight points. So it's not as accurate. The place where you really get into some question is, if you have a group administered IQ test let's say, 73, then I wouldn't make a diagnosis of borderline versus mental retardation on that score. I would send him out for further testing. But where the test scores are substantially higher, I don't see that there's any reason to suspect that he was mentally retarded; and, in fact, the school authorities did not see him in that way.

*8 (*Id.*, at 372–74). Applying the eight-point SEM suggested by Dr. Engum to reduce the Petitioner's IQ scores prior to age 18 results in a range from 75 to 89, still comfortably above the statutory criteria of 70 or below.

The Petitioner also argues that the school test scores should be discounted because the Petitioner was in a low-performing school, and that the teachers were under pressure to inflate the test scores. Petitioner bases this argument on the testimony of Mary Smithson-Craighead, who taught at Head School in Nashville from 1953 to 1965, when she became the coordinator of the Nashville Educational Improvement Project. (Docket No. 106 (Addendum 30, Vol. 1, at 24–25)). At that time, Ms. Smithson–Craighead moved to Carter Lawrence, the Petitioner's school, for two years, where she supervised kindergarten through third grade, but was not one of the Petitioner's teachers. (Id., at 26, 31-33, 53-54). According to Ms. Smithson-Craighead, Carter Lawrence was a segregated school and one of the schools that needed the most help. (Id.) She made the following statement about standardized testing:

- Q. And what were your observations of the way that standard tests were given?
- A. They were given, by the greater part, they were given exactly by direction. But being human, teachers who had, if they've been working with a child during the year, and that child was doing all that he or she could do; the teacher, when they tested that child may come around and say, well, take so-and-so, and give him a little bit of

extra help. Just because they like the child. And they realized a child had been doing all that he or she could do. And they'd be, well, do so-and-so, which was really against the directions of the test. It simply, really, made the testing invalid, but the test goes on with a group of tests. And that's it.

(*Id.*, at 37). Ms. Smithson–Craighead later testified that the IQ tests given at the school were administered individually by a psychologist from the District Office, but the experts who testified opined that she was mistaken about that. (*Id.*, at 49–51, 234).

The Court is not persuaded that this testimony warrants the discounting of Petitioner's school test scores. Ms. Smithson-Craighead's testimony does not include any time frame for the incidents she described, nor any specific information regarding the names of the teachers involved, the grade level of the classes involved, or whether she was referring to an achievement test, an IQ test, or some other test. Certainly, her testimony does not support the conclusion, apparently accepted by some of Petitioner's experts, that the *Petitioner's* scores were inflated on each of his IQ tests because his teachers helped him choose the correct answers. As for the performance level of the school, as Dr. Engum pointed out, the scores reflect a comparison of children across the country and is independent of the school system. (Docket No. 106 (Addendum 30, vol. 2, at 410-11, 422-23)).

*9 Petitioner's experts also questioned the reliability of the school test scores by pointing out that the Petitioner failed the second grade, and the results would be skewed upward if the Petitioner's answers were compared with younger children in the same grade. (*Id.*, at 301–02; 335–37). But there is no evidence that the tests were scored by grade rather than age. (*Id.*, at 417). Even so, Dr. Vaught testified that the results would not be dramatic because there would only be a year's difference in the comparison. (Docket No. 106 (Addendum 30, vol. 3, at 637, 639)).

Weighing against the Petitioner's arguments for reductions of his school test scores is the expert testimony that IQ tests tended to underestimate the intelligence of African American children in the 1960s. (*Id.*, vol. 1, at 309, 369; vol. 3, at 537–38). According to Dr. Vaught, this cultural bias "was one of the reasons

why that diagnostic criterion was changed back in the '70s, from one standard deviations (sic) to two standard deviations below the mean." (*Id.*, vol. 3, at 537).

Petitioner argues that his later scores, from 1993 and 1997, should be adjusted downward based on the "Flynn Effect." Dr. Grant explained that the Flynn Effect recognizes that after an IQ test is released it begins to age because the general population's level of knowledge increases over time, such that for every three years after the test is released, the norm IQ is inflated by one point. (Docket No. 106 (Addendum 30, vol. 1, at 239-45)). Based on this research, Dr. Grant deducted four points from the Petitioner's test score of 73 in 1993 and arrived at a score of 69; and deducted five points from Petitioner's score of 76 in 1997 for a score of 71. (Id., at 243-44). Dr. Grant did not use this theory to reduce the school IQ scores obtained from 1963 to 1969 before the Petitioner reached age 18. (Id., vol. 2, at 324). Dr. Grant relied on several articles to support his conclusion. (Id., at 239–42; vol. 2, at 322– 27).

To support application of the Flynn Effect, the Petitioner also filed an affidavit of Dr. Patti van Eys, which stated that the Flynn Effect is broadly accepted by the psychological community, but unlike Dr. Grant, she did not rely on that concept to retroactively reduce the Petitioner's test scores. (Docket No. 106 (Addendum 29)). Indeed, Dr. Engum and Dr. Vaught testified that, while the Flynn Effect supports the need to re-norm an IQ test over time, and is something to be considered in reviewing a person's test scores, there is no scientific support for retroactively reducing a particular test score based on the Flynn Effect. (*Id.*, at 374–76, 446–49, 462–68; vol. 3, at 538–39; 599–605). As Dr. Vaught explained:

I'm aware of the Flynn Effect, and I think most people are aware of that effect. However, it's not standard of practice to correct for it, in terms of looking at an IQ score. Again, you're aware of it. What the standard of practices (sic) to deal with the standard error of measurement on the instrument,

which is the likelihood of a person getting a score within a certain range, the next time you administer it. That's the correction most people are willing to use. And that's the one in common usage among clinicians who do this for a living.

*10 (Id., at 538-39).

The Court notes that the experts who administered the tests in 1993 and 1997 did not reduce the Petitioner's scores based on the Flynn Effect in light of the age of the tests they administered. In addition, the articles relied on by Dr. Grant describing the Flynn Effect do not appear to suggest the reduction of individual test scores as a scientifically valid remedy. (Docket No. 106 (Addendum 30–Exhibit 11)).

Nevertheless, the Court will consider Dr. Grant's reduction of individual test scores based on the Flynn Effect. Dr. Grant applied that reduction only to test scores from 1993 and 1997, however, which were obtained when the Petitioner was 37 and 41 years old, respectively. The six test scores obtained prior to that time were not at or below 70. Thus, application of the Flynn Effect in this case provides weak support for the statutory requirement that the Petitioner have scores at or below 70 before he turned age 18.

The Petitioner also argues that the standard error of measurement should be applied to reduce Petitioner's test scores. Indeed, there was support from the experts on both sides for considering the SEM in reviewing test scores. (Docket No. 106 (Addendum 30, vol. 1, at 231-33; vol. 3, at 538-39)). The SEM is applied in recognition of the fact that the test is not perfect, and according to Dr. Grant, the SEM for IQ tests is from one to five points, depending on the test. (Id., vol. 1, at 231–32). The Court notes, however, that the SEM does not require that test scores only be reduced, nor does it require that five points be used for every test. (*Id.*, vol. 2, at 431). In any event, even if the Court applies an SEM of eight points to reduce all of the Petitioner's test scores in school, as discussed above, the lowest score would be 75. Although applying the SEM to reduce

Petitioner's later scores may bring him closer to the statutory criteria, those scores provide weak support for the proposition that the Petitioner had scores at or below 70 before he turned age 18.

The Sixth Circuit criticized the state courts for failing

to resolve "which set of scores most accurately reflects Black's level of intelligence by the time he was 18 years of age." 664 F.3d at 87. This Court has fully reviewed the record in this case, has fully considered the "Flynn Effect," the SEM, and other factors weighing on the accuracy of the test scores, and for the reasons set forth above, specifically finds that the tests taken by the Petitioner in school 6 most accurately reflect the Petitioner's level of intelligence by the time he was 18 years of age.

Petitioner also argues that the results of his brain scans showing an abnormal brain further support the contention that he satisfied the statutory criteria by age 18. As a result of sophisticated imaging of the Petitioner's brain, Dr. Gur testified that the Petitioner had abnormally enlarged ventricles. (Docket No. 106 (Addendum 31, at 48–52, 60–61)). According to Dr. Gur, this damage would affect a person's ability to control aggression and to consider the outcome of his or her actions. (Id., at 72-73). Because of that brain damage, Dr. Gur opined that the Petitioner was mentally retarded, though he admitted that he is not an expert in mental retardation. (Id., at 102-03, 105-06). As to the cause of the brain damage, Dr. Gur testified that the damage would be consistent with that experienced by children whose mothers abused alcohol during pregnancy. (Id., at 99-102). Dr. Gur also opined, however, that the damage could also be caused by alcoholism in adults, lead poisoning, head injuries from football, and other conditions. (Id., at 105, 113-16). In discussing possible causes, he testified:

*11 Q. So just looking at all these possible causes along with your probable cause, there's really no way to say exactly what has caused the brain damage that you're saying that Mr. Black has with your findings?

A. Really, there isn't. I—

- Q. Now, another kind of similar but—as far as timing, again your probable cause is maybe the fetal alcohol syndrome or lead poisoning, or something, he fell down, or ate dirt. You know, a lot of different things were mentioned in these reports that possibly could have caused some brain damage.
- A. Uh-huh.
- Q. But again, with timing, is there any way to tell exactly what time in his life that this happened?
- A. No. The only—
- Q. I'm sorry. Go ahead, Doctor.
- A. What you can say is that this kind of a brain doesn't happen overnight ...

(*Id.*, at 116). Dr. Gur later testified that he would "absolutely agree" that he could not determine whether someone is mentally retarded simply by looking at the brain scans alone. (*Id.*, at 122–23).

Dr. Globus also opined that Petitioner's brain damage was possibly caused by the Petitioner's mother's consumption of alcohol during pregnancy, playing football, or lead poisoning. (*Id.*, at 159–62; 259–62; 265–66). Dr. Globus admitted, however, that the brain scans do not reveal the cause of the brain damage. (*Id.*, at 274). In determining whether the brain injury could have resulted from a deficiency in adulthood, Dr. Globus testified that "there's a rule of medicine, that you take the simplest explanation that fits the facts." (*Id.*, at 275). ⁷

Although Dr. Gur and Dr. Globus relied on the "fact" that the Petitioner's mother drank during her pregnancy, they did not cite to the particular information upon which they relied. The Court has reviewed the record of the post conviction hearing on the issue of mental retardation for evidence about alcohol consumption by the Petitioner's mother during pregnancy. That topic was discussed by Petitioner's aunt, Alberta Crawford, during her testimony in the first post conviction proceeding. (Docket No. 106 (Addendum 30–Exhibit 22)). Ms. Crawford testified that she is 13 years younger than the Petitioner's mother, Julia, who was 34 when she was pregnant

with the Petitioner. (*Id.*, at 526). Ms. Crawford testified that she and Julia "occasionally" went out and drank alcoholic beverages, specifically scotch. (*Id.*, at 527). As for drinking while she was pregnant, Ms. Crawford testified:

- Q. Okay. Did your sister's drinking patterns ever change during the period of time she was pregnant?
- A. That I can't remember.
- Q. Did she ever stop drinking and say, I'm pregnant, I can't drink? Do you recall that at all?
- A. I can't recall that, either. Because I wasn't around her, you know, after I got to be in high school and out of high school I wasn't with her all the time. So I really don't know.
- Q. Well, after you were out of high school, though, you still continued to go socialize with her, correct?
- *12 A. Not all the time. Like I said, I wanted to go to a nightclub and I chose her to carry me because I didn't have anybody else to carry me. And I wanted to go to the ball park to see my brother play ball and I would go with her. Not just by herself. It was other people too.

(*Id.*, at 528–29).

Petitioner's sister, Melba Faye Corley, who was approximately seven years old when her mother was pregnant with the Petitioner, testified about her mother's drinking:

- Q. What do you remember about your mother and her drinking of alcoholic beverages?
- A. Well, she was a member of like a little social club, and they would have like little dances and things. And they would get together and fix food, and they would have their own BYOB's, Bring Your Own Bottle, but it wasn't every month like that.
- Q. Okay. Do you know if she changed this behavior during—you were in the household when your mother was pregnant with both, your brother, Byron Black, and also with your sister, Frieda Black correct?

- A. Correct.
- Q. Do you remember anything about your mother's drinking when she was pregnant?
- A. She still drank, but I don't think it was ever stopped.

(Docket No. 106 (Addendum 30, vol. 1, at 80-81)).

Petitioner's uncle, Finas Black, was also questioned about the subject at the state post conviction hearing. (Docket No. 106 (Addendum 30–Exhibit 38)). Mr. Black testified that he was one of ten siblings of the Petitioner's mother, Julia, and that he was twenty, twenty-five or thirty years younger than Julia. (*Id.*, at 513, 515). He also testified that he was about eight or nine when the Petitioner was born. (*Id.*, at 516). Mr. Black said that he recalled Julia drinking "multiple drinks" of scotch "mostly on the weekends." (*Id.*, at 518–19). He went on to testify:

- Q. And when—to your recollection or do you know whether or not your sister Julia Mae stopped drinking during when she was pregnant either with Byron or with Frieda [Petitioner's younger sister]?
- A. No, I wouldn't say so.
- Q. You would say she didn't.
- A. Right. She didn't.
- Q. And do you know whether or not she breast-fed Byron for a while after he was born?
- A. Yes, she did.
- Q. Did she stop drinking during that period of time?
- A. No, I wouldn't think so.
- Q. And your sister Julia Mae was sort of known as a partier, is that a fair statement?
- A. Yes, yeah.

(*Id.*, at 519–20).

The testimony of Petitioner's mother, Julia Black, from the trial was admitted as an exhibit, but the question of whether she drank while pregnant with the Petitioner was not addressed during her testimony. (Docket No. 106 (Addendum 30–Exhibit 15)).

To the extent Dr. Gur and Dr. Globus based their opinion of Fetal Alcohol Syndrome or Fetal Alcohol Effects on the testimony of adults recalling events that took place when they were seven to nine years old, their opinions regarding the cause of Petitioner's brain damage are not particularly persuasive. Dr. Engum's testimony pointed to the conjecture underlying these opinions:

- *13 Q. And you believe, of course, that some of that analysis of people like Dr. Globus, who's a neurologist and Dr. Gur, who does brain imaging?
- A. Right. But everybody's speculating about how much alcohol the mother drank. And I don't think that we really know that. I don't know. And I understand the mother is now deceased.
- Q. But we do have proof from witnesses that have testified, at the various parts of this case, that she drank weekends; she didn't stop during pregnancy.
- A. I've seen that testimony. Again, I will just tell you, there are some people that tend to minimize her alcohol consumption. There are some people who seek to maximize it. I don't know how much she drank. It's in the realm of conjecture.

(Docket No. 106 (Addendum 30, vol. 2, at 475-76)).

Also weighing against the opinion that Petitioner's brain was damaged at birth is the absence of medical records from Petitioner's pediatricians at Vanderbilt University Hospital revealing developmental concerns. (Docket No. 106 (Addendum 30–Exhibits 7, 36)). Dr. Vaught testified that the "typical developmental impairments that you would see from Fetal Alcohol Effects or Fetal Alcohol Syndrome, apparently, were not present in this individual. He didn't have the milestone failures or be identified (sic) by his pediatricians as standing out like that." (Docket No. 106 (Addendum 30, vol. 3, at 625–26)).

Indeed, the Petitioner was not diagnosed as having mental retardation until he was 45 years of age, in

2001, as part of this litigation, though he was evaluated by numerous experts before that time. Dr. Kenneth Anchor, who was hired by the defense before the trial in 1989, testified that the Petitioner scored a 76 IQ, and opined that he suffered from a delusional disorder and was not competent to stand trial. (Docket No. 106 (Addendum 30, Exhibits 4 and 5)). Dr. Leonard Morgan and Dr. Bradley Diner testified that the Petitioner was competent, that he was at the lower end or the normal intelligence range, but not mentally retarded, and that he may have a personality disorder. (Id., at Exhibits 6–9). Dr. William Kenner, appointed by the trial court, also testified that the Petitioner was competent, was not mentally retarded, and that he may have a personality disorder. (Id., at Exhibit 12). At the penalty phase, the defense called Dr. Pat Jaros, who testified that she worked with Dr. Anchor in evaluating the Petitioner, and found the IQ score of 76 to be:

... just about right. I thought what came out on the I.Q. score was—there are some factors functioning here, perhaps some level of cultural deprivation or the people he grew up around perhaps had the same kind of grammar and syntax that he was exhibiting. Perhaps some of those factors, just subcultural influences may have been operating. But I thought the level that was obtained by the I.Q. test seemed pretty accurate.

(*Id.*, at Exhibit 25, at 2310; Exhibit 26). All of these experts interviewed and/or tested the Petitioner before rendering their opinions.

*14 Dr. Gillian Blair tested the Petitioner in 1993 and prepared a report indicating that the Petitioner scored a 73 IQ. (*Id.*, at Exhibit 37). Dr. Pamela Auble, who was hired by the defense for the post conviction hearing in 1997, testified that she administered an extensive battery of tests, and that the Petitioner scored a 76 IQ. (Docket No. 106 (Addendum 30, Exhibits 33 and 34)). Dr. Auble also expressed concerns about the

Petitioner's competence and possible brain damage. (*Id.*) Also in 1997, Dr. William Bernet testified that the Petitioner had a form of amnesia, and called for additional testing to determine the cause. (*Id.*, at Exhibits 39 and 40). All of these experts interviewed and/or tested the Petitioner before rendering their opinions.

As stated above, Dr. Globus, Dr. Gur, Dr. Grant and Dr. van Eys rendered their opinions of mental retardation some time later, in 2001, when the Petitioner was 45 years old. Based on all the evidence set forth above, and the entire record, the Court specifically finds that although the Petitioner may currently have a brain injury, the testimony of Petitioner's experts that the Petitioner's brain injury occurred prior to age 18 is not persuasive.

In summary, the Court concludes that the Petitioner has not shown significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or below manifested by age 18. In reaching its decision, the Court makes no finding, and finds it unnecessary to make a finding, as to why the Petitioner's test scores have declined over time—whether due to motivation or brain injury. ⁸

B. Deficits in adaptive behavior prior to age 18

The second criterion, considered in conjunction with the third, requires the Court to examine whether the Petitioner has shown: "deficits in adaptive behavior ... manifested during the developmental period, or by eighteen (18) years of age." Tenn.Code Ann. § 39–13–203(a)(2), (3). The Tennessee Supreme Court has described this requirement to mean "the inability of an individual to behave so as to adapt to the surrounding circumstances." *Coleman*, 341 S.W.2d at

248 (quoting State v. Smith, 893 S.W.2d 908, 918 (Tenn.1994)). The appeals court quoted a definition for the second criterion that has been applied by the Tennessee courts:

The second part of the definition—adaptive functioning—refers to how effectively individuals cope with common life demands

how well they meet and the standards of personal expected independence someone in their particular socio-cultural age group, background, and community setting. As discussed, mentally retarded person will have significant limitations in at least two of the following basic skills: communication, self-care, home living, social/ interpersonal skills, use of community resources, selfdirection, functional academic skills, work, leisure, health, and safety. Influences on adaptive functioning may include the individual's education, motivation, personality characteristics, social vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation.

*15 Rlack v. Bell. 664 F 3d at 98

Dr. Grant testified that the tests he administered in 2001 showed the Petitioner had deficits in adaptive behavior. (Docket No. 106 (Addendum 30, vol. 1, at 221–24)). Dr. Grant based his determination that the Petitioner had adaptive deficits prior to age 18 on the following:

- Q.... What can you show, from your evaluation, that establishes that Mr. Black was in fact mentally retarded before the age 18?
- A. I think there are several things: One, there are some findings from Dr. Globus and Dr. Gur, were that, from Dr. Globus' testimony is that there are some abnormalities in the brain that can best be explained through the things that happened early in life. We have the Coach's testimony that he had difficulty following plays, it took more time. We also know that he repeated a grade. That the

Differential Aptitude Test score put him with the 1 percentile. Although, we do have other scores that put him much higher, we have testimony that stems from that regional school: It was a very impoverished school; no one left the school that was at grade level; that was also a school chosen for the Ford Grant. I think that's the majority of what I can think of right now.

(Docket No. 106 (Addendum 30, vol. 2, at 285–86)). According to Dr. Grant, those with mental retardation can acquire academic skills up to the sixth grade level by their late teens. (*Id.*, at 287). ⁹ Because he had such strong family support, Dr. Grant testified, he was able to blend into the population in his adult years. (*Id.*)

In terms of family support, Petitioner's sister, Ms. Corley, testified that she and the Petitioner lived with their mother and three other sisters in the home of their grandparents, and that the Petitioner and his grandfather were the only males in the household:

- Q. What type of chores did Byron have to do in the home to your observation?
- A. Well, I know he didn't do any cooking, because that was, basically all the—my grandmother's job, and mine, my mother's. He didn't really have any particular chores that I remember him doing in particular.
- Q. What about things like ironing his clothes or cleaning his clothes. Did he have any responsibilities there?
- A. No. That was all done by the ladies.
- Q. What about things like washing the dishes?
- A. No.
- Q. And mowing lawns, did he ever do anything like that as a kid?
- A. Huh-huh. That was basically done by, any lawn mowing done was done by my grandfather.

(*Id.*, at 78, 89–90). Ms. Corley was not asked whether the Petitioner had tried to cook, do laundry or mow the lawn, and found he was unable to do so.

Ms. Corley went on to state that the Petitioner took pride in his personal appearance as a child. (*Id.*, at 92–93). She recalled that the Petitioner could read and write, and "[a]s far as I remember, he wasn't a slow learner at that time." (*Id.*, at 98–99). On cross-examination, Ms. Corley said that neither she nor her family members noticed anything odd about the Petitioner during his childhood that made them think he may be retarded or mentally ill. (*Id.*, at 88).

*16 The Petitioner has also relied on the testimony of Al Dennis, who coached football at Hume–Fogg High School while the Petitioner attended there, regarding his memory of the Petitioner:

Well, one thing I discovered, I remembered that when he, as a senior, he weighed 150 pounds, and he was 5' 8 tall. So he wasn't very big. But he was an outstanding defensive player of all three years that he played for me. His senior year, he was third on the team in tackles, and assists in tackles.

Now, offense is a different story. His sophomore year, he carried the ball one time. His junior year, he carried it twice. And the third year, we had an outstanding team we won the Division A, Class A, Championship. And we won several games by a fairly good margin. And we go to use back-up runners more than we normally did. And Byron ran the ball a number of times and scored several touchdowns. He's a good athlete. Good athlete.

(Docket No. 106 (Addendum 30, vol. 1, at 103–04)). Mr. Dennis testified that the offense he ran was a lot more complicated than the defense, and "I think that's probably why Byron didn't play more than he did, because it was difficult for him to learn the plays." (*Id.*, at 104–05). Mr. Dennis also testified that he always remembers the Petitioner as smiling all the time, even in response to criticism. (*Id.*, at 106).

On the other hand, Petitioner's brother, Thomas Black, testified that the Petitioner:

... was a very responsible child. There was a lot of things about him, like he was always neat. He always helped out. He always had some little job or something like this when he was coming up. A lot of that was influence from my grandfather.

(Docket No. 106 (Addendum 30—Exhibit 20, at 2259)). When asked why the Petitioner did not move out of the family home as an adult, Petitioner's sister, Arletta Delores Black, testified: "I'd say maybe he just didn't want the responsibility, I guess. I really don't know." (Docket No. 106 (Addendum 30—Exhibit 21, at 2265)).

Dr. Engum and Dr. Vaught considered this testimony and other information in reaching the opinion that the Petitioner did not show deficits in adaptive behavior prior to age 18. Dr. Engum testified that he did not find evidence of such deficits:

I could not find that there were any indications that he was not functioning like a child within his culture, in his community. He went to school. Admittedly, he was not the best student; I think I indicated that. But he did from, everything I can determine, graduate high school. He basically, his grades fluctuated. There was some D's. There were some C's. I can't speak to the quality of the school that he went to, but he did graduate. He played football. He appeared to be involved in those kinds of activities. I did not see any deficits or any mention of peer relationships, behavioral problems, problems attributable to Attention Deficit Disorder, problems attributable to any kind of learning disability.

*17 Again, there doesn't appear to be any individualized assessment by school psychologists. There's no indication of any significant problems with juvenile authorities when he was growing up. There don't appear to be any unusual behavioral problems of any type, prior to age 18.

As I look through the testimony of the individuals during mitigation: Everybody said, as a matter of fact, teachers commented upon him as being one of her brighter children. Apparently, people in the community recognized him as somebody who is helpful. Always smiling. Always involved in things. There just did not appear to be any major deficits.

Frankly, I think it's conjecture to sit there and say, well, people compensated for him, because there's no evidence in the records that anybody was compensating for, or setting limitations on him, or restricting his activities, as you would with somebody who might be mentally retarded.

(Docket No. 106 (Addendum 30, vol. 2, at 378-80)).

Dr. Vaught testified that she applied the framework suggested by the AAMR ("American Association on Mental Retardation") in examining whether the Petitioner had deficits in adaptive behavior, which focuses on three general areas: Conceptual, Social and Practical. (Docket No. 106 (Addendum 30, vol. 3, at 549–50)). Dr. Vaught explained that:

Mr. Black's childhood history did not follow the pattern that I typically find for a person with mild mental retardation who has escaped diagnosis. His family was not raising the issue, and commented on him being normally developing, even motivated, industrious.

Then he was receiving care through Vanderbilt University Medical Center Pediatrics. They were treating him off-and-on for a skin condition. They didn't raise the question of the developmental impairment and they should, you know, would. Vanderbilt is very much in the know about those things. And that, also, got my attention that none of the physicians treating him raised that condition. And he did have contact with the medical establishment. A lot of impoverished families don't. And so I don't have that data point. But in his case, he had doctor-contact, and they didn't raise the issue.

He proceeded through school, intermittent difficulty, graduated with a normal diploma.... He was not remembered by his family or his teachers as being slow.

(*Id.*, at 571–72). Dr. Vaught also pointed out that the Petitioner experienced the stress of a football injury, the birth of his first child and the death of one of his teachers while in high school, and he was still able to graduate. (*Id.*, at 573–74). Dr. Vaught testified that "I have very rarely, if ever, seen a person with mild mental retardation make it through high school with no assistance like that, and they've managed to get a

regular diploma." (*Id.*, at 574). Dr. Vaught testified that while the DAT ("Differential Aptitude Test") scores, referenced by Dr. Grant, were low, they were not at the level typically associated with mental retardation. (*Id.*, vol. 3, at 573–75).

*18 The Petitioner attacks the validity of the findings made by Dr. Engum and Dr. Vaught based on their failure to interview and test the Petitioner. Dr. Engum explained that he decided not to conduct further testing because he thought the Petitioner was probably "testwise" and "test-weary," and because the real inquiry is whether he met the statutory criteria at age 18, not at his current age. (Docket No. 106 (Addendum 30, vol. 2, at 367)). Dr. Engum further explained: "So, again, to do testing now is, in my mind, almost irrelevant and in (sic) somewhat misleading, because of, potentially, other intervening variables." (Id., at 510). Dr. Vaught testified that she did not interview the Petitioner primarily because "I didn't feel like I would add anything, because I already had, in my review of the records, determined that his adaptive functioning was higher than to be expected for a person with mental retardation. And that, I could not find any evidence that the problems onset before age 18." (*Id.*, at 535). ¹⁰

The Court finds that the opinions of Dr. Engum and Dr. Vaught are not undermined by their failure to interview and/or test the Petitioner at age 45 regarding whether he was intellectually disabled prior to age 18. As discussed above, the record indicates that the Petitioner was interviewed and/or tested by at least eight different mental health experts prior to the latest round of testing in 2001.

Both sides point to Petitioner's life after age 18 to support their argument that the Petitioner did or did not have deficits in adaptive behavior. The Respondent refers to evidence that includes indications that the Petitioner obtained a drivers' license, bought and maintained a car, held a job for nine years, and made intelligent statements to police during questioning. The evidence cited by Petitioner includes testimony that he always lived with his mother, did not pay child support, and performed menial tasks at his job. Having fully reviewed this and all the evidence in the record, the Court maintains its opinion that the Petitioner has not shown deficits in adaptive behavior prior to age 18.

In considering whether the record establishes deficits in adaptive behavior, the Sixth Circuit directed this Court to "focus on Defendant's deficits, not his abilities," 664 F.3d at 99 (quoting United States v. Lewis, No. 1:08 CR 404, 2010 WL 5418901, at *30 (N.D.Ohio Dec.23, 2010)), and to "look at his weaknesses instead of at his strengths." *Id.* A full, independent review of the record persuades this Court that the Petitioner has not shown weaknesses or deficits in his adaptive behavior prior to age 18 within the meaning of the statute.

The Sixth Circuit also directed the Court to consider that deficits in adaptive functioning can be caused by both mental retardation and mental illness: "mental retardation and any number of other factors may coexist as comorbid causes of a defendant's deficient adaptive functioning." 664 F.3d at 99–100. 11 Because the Court does not find any deficits in adaptive function within the meaning of the statute prior to age 18, it is unnecessary to determine whether such deficits were caused by mental retardation, mental illness, or both.

*19 In conclusion, the Court has fully considered the evidence in the state court record in applying the criteria set forth in Tenn.Code Ann. § 39–13–203, and concludes that the Petitioner has not met his burden of proving intellectual disability by a preponderance of the evidence.

V. Conclusion

For the reasons set forth above, the Court concludes that the Petitioner has not established that he is intellectually disabled by a preponderance of the evidence.

The Court concludes that Petitioner has made a substantial showing of the denial of a constitutional right as to his mental retardation claim, and reasonable jurists could find the Court's assessment of the constitutional claim debatable. *See, e.g.,* Castro v. United States, 310 F.3d 900 (6th Cir.2002). Accordingly, the Court will issue a certificate of appealability on Petitioner's mental retardation claim

under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

All Citations

It is so ORDERED.

Not Reported in F.Supp.2d, 2013 WL 230664

Footnotes

- The parties indicate that Riverbend Warden Ronald Colson should be substituted for Ricky Bell as the Respondent in this case.
- As discussed herein, the term "intellectual disability" has now replaced the term "mental retardation" for purposes of Petitioner's Atkins claim. Because the evidence in this case was obtained prior to this change, however, the Court uses the term "mental retardation" in discussing the evidence.
- The appeals court affirmed the denial of Petitioner's non-Atkins claims. 664 F.3d at 84, 106.
- 4 See 2010 Tenn. Pub. Acts 734.
- In a more recent decision, Keen v. State, S.W.3d, n. 13, 2012 WL 6631245 (Tenn. Dec.20, 2012), the Tennessee Supreme Court held that Coleman did not establish a new constitutional right to be applied retroactively, and noted its agreement with Judge Boggs that "Coleman decided how a Tennessee state statute should apply to a Tennessee state court opinion [i.e., Van Tran] decided under the Tennessee state Constitution." (quoting Black v. Bell, 644 F.3d at 107–08 (Boggs, J., dissenting)).
- As set forth above, those tests were taken from 1963 to 1969, and produced scores ranging from 83 to 97.
- 7 Dr. Globus also testified that his opinion was based on Petitioner's lack of exposure to other potential causes after his arrest and incarceration. (*Id.*, at 188–89). He did not discuss the 13 to 14–year time span between the time the Petitioner turned 18 and the time of his arrest and incarceration.
- The Court also makes no finding as to whether the Petitioner is competent to be executed under Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).
- Dr. Engum testified, on the other hand, that only "an exceptional mentally retarded individual" could perform at that level. (Docket No. 106 (Addendum 30, vol. 2, at 482)). Dr. Vaught testified: "Most of my mild mentally retarded patients function between the 3rd and 5th grades. Some, exceptional ones, achieve the 5th to 6th grade criteria." (Docket No. 106 (Addendum 30, vol. 3, at 573)).
- The Court notes Dr. Vaught's testimony that "I cautioned this man [the State's attorney] when he came to me: If I could, you know, find that this man is mentally retarded and keep him from being executed, I'm going to do it, you just need to understand that." (*Id.*, at 602). Consequently,

- Dr. Vaught gave the Petitioner "the benefit of the doubt" that his current testing showed mental retardation. (*Id.*, at 599–602; 539–44).
- Dr. Vaught's testimony that mental retardation has nothing to do with mental illness, read in context, relates to her criticism of Dr. Grant's statement that mental retardation is a form of mental illness. (Docket No. 106 (Addendum 30, vol. 3, at 579–80)). In making this statement, Dr. Vaught was not addressing the cause of any deficits in Petitioner's adaptive behavior because she did not find any deficits within the meaning of the statute prior to age 18. (*Id.*, at 583). Throughout her testimony, Dr. Vaught explained that the bad choices made by the Petitioner later in life, though they did not indicate deficits during the developmental period, may have had to do with personality issues.

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Not Followed on State Law Grounds Payne v. State, Tenn., April
7, 2016

664 F.3d 81
United States Court of Appeals,
Sixth Circuit.

Byron Lewis BLACK, Petitioner–Appellant,

Ricky BELL, Warden, Respondent-Appellee.

Nos. 02–5032, 08–5644.

| Argued: Dec. 8, 2010.
| Decided and Filed: Dec. 15, 2011.
| Rehearing Denied Jan. 4, 2012.

Synopsis

Background: Following denial of his petition for post conviction relief, affirmed at 1999 WL 195299, and denial of permission to appeal to Tennessee Supreme Court, state prisoner sought writ of habeas corpus, challenging his three murder convictions and death sentence, affirmed at 815 S.W.2d 166. The United States District Court for the Middle District of Tennessee, Todd J. Campbell, Chief Judge, 181 F.Supp.2d 832, district court's denied all of the claims that it decided on the merits, and denied a certificate of appealability (COA) regarding the claims that it dismissed as procedurally defaulted, and prisoner appealed. On remand, the district court denied prisoner's Atkins claim, and prisoner appealed.

[Holding:] After consolidation of prisoner's appeal of the district court's original dismissal of his habeas claims and his appeal of that court's denial of his *Atkins* claim, the Court of Appeals, Ronald Lee Gilman, Circuit Judge, held that state appellate court's assessment of Tennessee capital defendant's level of intellectual and adaptive functioning for purposes of *Atkins'* prohibition against execution of mentally

retarded defendants was contrary to federal law under *Coleman*.

Affirmed in part, vacated in part, and remanded.

Boggs, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): On Appeal.

West Headnotes (14)

[1] Habeas Corpus • Mental competency; examination

Habeas Corpus 🔑 Death sentence

Federal court conducting habeas review could look to state law that had been issued after the defendant's state conviction had become final in order to determine how **Atkins'* prohibition against execution of mentally retarded defendants applied to defendant's case. 28 U.S.C.A. § 2254(d).

4 Cases that cite this headnote

[2] Sentencing and Punishment ← Persons with intellectual disabilities

State appellate court's assessment of Tennessee capital defendant's level of intellectual and adaptive functioning for purposes of Atkins' prohibition against execution of mentally retarded defendants was contrary to federal law under Coleman where court did not specify which I.Q. scores it relied on and why; state court did not explain the extent to which its denial of Atkins claim relied on any of defendant's various I.Q. scores nor did it consider the potential impact of the Flynn Effect and the SEM (standard error of measurement), despite the court's consideration of the expert testimony that discussed the impact of those factors on defendant's middle set of I.Q. scores. U.S.C.A. Const.Amend. 8; West's T.C.A.

Const. Art. 1, § 16; West's T.C.A. § 39–13–203(a).

9 Cases that cite this headnote

[3] Habeas Corpus Adequacy or effectiveness of state proceeding; full and fair litigation

Where a state court's analysis contradicts the governing law, federal habeas court must conduct an independent review of that issue, unconstrained by limitations of Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2254(d)(1).

16 Cases that cite this headnote

[4] Sentencing and Punishment Persons with intellectual disabilities

A court reviewing whether a defendant is mentally retarded for purposes of **Atkins' prohibition against execution of mentally retarded defendants must focus on defendant's deficits, not his abilities

3 Cases that cite this headnote

[5] Habeas Corpus ← Competency Habeas Corpus ← Sentence and punishment

Because no court had yet analyzed habeas petitioner's *Atkins* claim according to the proper legal standard, reviewing court would refrain from reaching any independent conclusions and remand case to federal habeas court for determination of the claim. 28 U.S.C.A. § 2254(a).

3 Cases that cite this headnote

[6] Mental Health ← Mental disorder at time of trial

To be competent to stand trial, a defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.

5 Cases that cite this headnote

[7] Criminal Law Conduct of trial or hearing

A defendant's competence to stand trial is a question of fact.

10 Cases that cite this headnote

[8] Constitutional Law Course and conduct of proceedings

Due process in a competency hearing requires that only the most basic procedural safeguards be observed. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[9] Constitutional Law Course and conduct of proceedings

Criminal Law ← Conduct of trial or hearing

Process that undertaken was defendant's competency state-court hearing was not contrary to, nor did it involve an unreasonable application of, the process that was due to determine defendant's competence; court allowed both defendant and the prosecution to present their expert testimony at defendant's competency hearing, then, rather than base its determination on either of those experts, court appointed its own independent expert to evaluate defendant, and further afforded defendant a reevaluation at his attorneys' request after the voir dire. U.S.C.A. Const. Amend. 14.

4 Cases that cite this headnote

[10] Criminal Law - Adequacy of investigation of sentencing issues

Criminal Law ← Presentation of evidence regarding sentencing

A defense counsel's failure to reasonably investigate a defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance; in assessing the reasonableness of an attorney's mitigation investigation, the court considers not only the quantum of evidence already known to counsel, but also whether that evidence should have led a reasonable attorney to investigate further. U.S.C.A. Const.Amend. 6.

5 Cases that cite this headnote

[11] Criminal Law Adequacy of investigation of sentencing issues

Counsel has a duty to conduct an independent investigation regarding mitigating evidence regardless of the defendant's reluctance to investigate and disclose such evidence; because of that obligation, counsel cannot rely solely on information provided by the defendant and his family in determining the extent of a proper mitigation investigation, but a reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[12] Criminal Law ← Adequacy of investigation of mitigating circumstances Criminal Law ← Presentation of

evidence in sentencing phase

Capital defendant failed to show that his trial attorneys were ineffective in investigating and presenting mitigation evidence at the penalty phase of his trial; there was no evidence to support the conclusion that defendant's trial attorneys should have been aware at the time of defendant's trial that any further investigation into his social history would have produced more evidence beyond that already obtained by the competency experts. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[13] Criminal Law Argument and comments

Even if defense counsel did make a mistake and should have objected to the argument that giving defendant a life sentence rather than the death penalty would reward him for killings of additional victims, such error was not prejudicial under *Strickland* because it was unlikely that the objection would have had any effect on the jury's decision; jury did not sentence defendant to death for the killing of the victim about whom the argument was made, defendant's death sentence was supported by six aggravating factors. U.S.C.A. Const.Amend. 6.

[14] Constitutional Law Conduct of or affecting jurors; deliberations

Criminal Law Authority or discretion of court

Tennessee defendant did not have a due process right to have the trial court answer the jury's questions regarding his parole eligibility and the length of his sentence where defendant could be eligible for parole based on the jury's decision, and where defendant's future dangerousness was not at issue. U.S.C.A. Const.Amend. 14.

Attorneys and Law Firms

*84 ARGUED: Kelley J. Henry, Federal Public Defender's Office, Nashville, Tennessee, for Appellant. Joseph F. Whalen, III, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellee. ON BRIEF: Kelley J. Henry, Federal

Public Defender's Office, Nashville, Tennessee, for Appellant. Joseph F. Whalen, III, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellee.

Before: MARTIN, BOGGS, and GILMAN, Circuit Judges.

GILMAN, J., delivered the opinion of the court, in which MARTIN, J., joined. BOGGS, J. (pp. 107–08), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge.

Byron Black, who was tried in state court and sentenced to death in 1989 for committing three murders, appeals the district court's denial of his petition for a writ of habeas corpus. He raises various issues related to the court's 2001 denial of his original habeas petition as well as the court's 2008 denial of his amended petition based on **Atkins v. Virginia, 536** U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). For the reasons set forth below, we AFFIRM the district court's denial of Black's habeas petition regarding his

non-Atkins claims, VACATE the court's judgment regarding his Atkins claim, and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

Black was convicted on three counts of first-degree murder for the killing of his girlfriend Angela Clay and her two minor daughters, Latoya, age nine, and Lakeisha, age six. He was also convicted on one count of burglary arising out of the same incident. Black received a death sentence for the murder of Lakeisha, consecutive life sentences for the other two murders, and fifteen years of imprisonment for the burglary.

A. Factual background

Black was born on March 23, 1956. He was 33 years old when the murders were committed in 1988. The Tennessee Supreme Court, in deciding Black's claims

on direct appeal, summarized the facts of this case, in part, as follows:

It appears that these bizarre and tragic murders occurred in the early morning hours of Monday, March 28, 1988. The bodies of the three victims were found Monday evening around 9:30 p.m. At the time of the murders, the Defendant was on [a] weekend furlough from the Metropolitan Workhouse in Davidson County....

The Defendant was the boyfriend of Angela Clay, who had separated from her husband, Bennie Clay, about a year before her death. Bennie Clay was the father of Latoya and Lakeisha. Bennie Clay testified that at the time of Angela Clay's death, he and Angela were attempting to reconcile, but the Defendant was an obstacle to the reconciliation. He further testified that Angela began a relationship with the Defendant after their separation and that at times she was seeing both the Defendant and himself. In December, 1986, the Defendant and Bennie Clay had an altercation during a dispute over Angela.... The Defendant pled guilty to the shooting [of Bennie Clay] and received the workhouse sentence, which included weekend furloughs.

State v. Black, 815 S.W.2d 166, 170–71 (Tenn.1991).

*85 On the night of the murders, Black drove the victims to the home of Angela's mother. Angela and her two daughters were last seen that evening by her mother at around 11 p.m. Angela's mother testified that Angela telephoned her at approximately 11:20 p.m. that evening after Angela returned home. That phone call was the last time that any of the witnesses spoke to Angela before her death. The police arrived at Angela's apartment at approximately 9:30 p.m. the following night. They did not find any signs of forced entry into the apartment, but they found a pool of blood on the bed and the body of a small child on the floor. *Id.* The Tennessee Supreme Court continued its summary of the relevant facts, citing the testimony of Dr. Charles Harlan, Chief Medical Examiner for Davidson County:

Investigation revealed the bodies of Angela and her nine year old daughter, Latoya, in the master bedroom. Angela, who was lying in the bed, had apparently been shot once in the top of the head as she slept and was rendered unconscious immediately and died within minutes....

Latoya's body was found partially on the bed and partially off the bed, wedged between the bed and a chest of drawers. She had been shot once through the neck and chest....

The body of Lakeisha, age six, was found in the second bedroom lying facedown on the floor next to her bed. She had been shot twice, once in the chest, once in the pelvic area....

The receiver from the kitchen telephone was found in the master bedroom. The telephone from the master bedroom was lying in the hallway between the two bedrooms. The Defendant's fingerprints were the only prints recovered from the telephones. Two of his fingerprints were found on the phone in the hallway, and one was on the kitchen telephone receiver found in the master bedroom.

Id. at 171–72. A substantial amount of additional circumstantial evidence connected Black to the killings. Id. at 172–73.

B. Procedural history

In 1991, the Tennessee Supreme Court denied Black's numerous claims on his direct appeal. Black then filed a petition for post-conviction relief in the Davidson County Criminal Court. The trial court denied the petition after an evidentiary hearing, and the Tennessee Court of Criminal Appeals (TCCA) affirmed. Black's petition to appeal the denial of his post-conviction claims to the Tennessee Supreme Court was denied. The United States Supreme Court subsequently denied his petition for a writ of certiorari.

Black then filed a petition for a writ of habeas corpus in the district court, based on 28 U.S.C. § 2254, seeking relief on a number of evidentiary, procedural, and substantive grounds relating to both the guilt and penalty phases of his trial, as well as to issues that arose in his various state-court appeals. The district court denied all 34 of Black's habeas claims, including several subclaims, in December 2001. *Black v. Bell*, 181 F.Supp.2d 832 (M.D.Tenn.2001). It then issued Black a Certificate of Appealability (COA) for all of the claims that it decided on the merits and

denied a COA regarding the claims that it dismissed as procedurally defaulted. Black timely appealed the court's decision.

After the Supreme Court decided Atkins in 2002, this court granted Black's motion to hold his case in abevance so that Black could exhaust his Atkins claim in the state courts. Black then filed a motion in 2002 to reopen his post-conviction proceedings in the state trial court. That court determined that Black had made a sufficient *86 showing for his case to be reopened based on his Atkins claim. It held an evidentiary hearing, but ultimately determined that Black is not mentally retarded under the Atkins standard. The TCCA affirmed this decision in 2006, and the Tennessee Supreme Court denied Black's application for permission to appeal. The United States Supreme Court again denied Black's petition for a writ of certiorari. This court then remanded Black's pending appeal of the district court's denial of his § 2254 petition back to the district court so that it could reconsider Black's mental-retardation claim (which was one of Black's original 34 claims that the district court denied) in light of Atkins.

The district court did so in 2008, ultimately dismissing Black's Atkins claim on the basis that "the state court was not unreasonable in stating that the proof in the record did not support the conclusion, under a preponderance of the evidence standard, that [Black's] I.Q. was below seventy before age 18." It also dismissed Black's additional claim that the issue of his mental retardation should have been submitted to the jury, ruling that the claim was beyond the scope of this court's remand order, and also because the claim failed on the merits. But the district court granted Black a COA on his Atkins claim, and Black timely filed an appeal. We then granted Black's motion to expand his COA to include the issue of whether he had cause to excuse the procedural default of his claim that the jury improperly weighed an unconstitutional felonymurder aggravating circumstance. But we denied Black's motion to have two additional issues included in his COA.

Black's appeal of the district court's original dismissal of his habeas claims in 2001 and his appeal of that court's denial of his *Atkins* claim in 2008 have been consolidated in the present appeal. We thus have before

us the issues that are within his COAs from both decisions. Although Black's COAs cover many issues, he has limited his appeal to a total of five.

In addition to Black's *Atkins* claim, the other four district-court determinations that Black now challenges are (1) whether he was competent to stand trial and whether he was entitled to an evidentiary hearing on that issue, (2) whether his trial counsel was constitutionally ineffective in failing to fully investigate, present, and argue mitigating factors against the death penalty, (3) whether his trial counsel was constitutionally ineffective in failing to object to the prosecution's comment during closing argument at the penalty phase of the trial that giving Black a life sentence for all three of the murders would "reward" him, and (4) whether the trial court erred by declining to clarify for the jury, upon its request, the effect of a life sentence.

C. Atkins background

Under Tennessee law, capital defendants are considered mentally retarded if (1) they have "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) [they have d]eficits in adaptive behavior; and (3) [t]he intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age." Tenn.Code Ann. § 39–13–203(a).

Each side presented conflicting evidence concerning whether Black qualifies as mentally retarded. At Black's post-conviction proceedings on his *Atkins* claim, he presented four lay and three expert witnesses, the affidavit of another expert, and numerous exhibits in support of his claim. The State presented two expert witnesses in opposition. In addition, the state court considered the testimony of numerous lay *87 and expert witnesses who testified during the course of Black's pre-*Atkins* proceedings.

1. Black's numerical I.Q. scores

One major category of evidence dealt with Black's numerical I.Q. scores. In its post-conviction opinion on Black's *Atkins* claim, the TCCA observed that Black's intelligence has been tested numerous times, from his grade-school years through 2001. *Black v.*

State, No. M2004–01345–CCA–R3–PD, 2005 WL 2662577, at *13 (Tenn.Ct.Crim.App. Oct. 19, 2005).

These scores can be grouped into the following three categories: (1) tests that were administered while Black was in elementary school, with the scores ranging from 83 to 97; (2) tests that were taken in preparation for Black's trial and during his first round of post-conviction proceedings, from 1988 to 1997, which ranged from 73 to 76; and (3) tests that were administered in 2001 by Black's experts who testified at his *Atkins* hearing, which ranged from 57 to 69. In addition, Black took achievement tests in high school. Dr. Daniel Grant, a psychologist and one of Black's expert witnesses, explained that Black's scores on the Differential Aptitude Test in the ninth grade placed his level of intelligence in the mentally retarded range.

A major point of contention in the present case, and an issue that the TCCA did not resolve, is which set of scores most accurately reflects Black's level of intelligence by the time he was 18 years of age. Although Black's first set of I.Q. scores were taken during this key period of his life and are above 70, his experts challenge the accuracy of these scores based on the sparse information concerning the testing details as well as the questionable supervision of Black's academic progress at his segregated elementary school.

Black's I.Q. scores from 1988 through 1997 were also above 70, but Dr. Grant opined that, when adjusted for the "Flynn Effect" and/or the standard error of measurement (SEM) that applies to these tests, these scores should be considered 70 or below. As Dr. Grant explained, the Flynn Effect calls for adjusting downward the score that a subject receives on an older I.Q. test based on the idea that the general population's level of knowledge increases over time, thereby raising the average score obtained on older tests. Dr. Patti van Eys, a clinical psychologist who submitted an affidavit regarding her evaluation of Black, noted that the Flynn Effect is "broadly accepted by the psychological community and recognized by the American Association on Mental Retardation (AAMR)."

On the other hand, State witness Dr. Susan Vaught, a clinical psychologist, testified that although the Flynn Effect is a recognized issue that a clinician might consider when interpreting an I.Q. test, she did not think that it should be used to adjust the numerical score that a subject received on his or her test. She explained that "[y]ou don't apply a numerical correction to a score that you get based on the Flynn Effect. It's not in that kind of use amongst clinicians who test[]." Dr. Eric Engum, the other clinical psychologist for the State, also rejected the practice of correcting for the Flynn Effect because "[o]ne cannot arbitrarily ... go back in time and 'correct' or 'recalculate' a previously obtained IQ based on [subsequent] changes in standardization."

As for the SEM, Dr. Grant testified that because the I.Q. score achieved on any particular test is fallible, the scores generally involve a SEM of five points up or down from the given score. Dr. Vaught similarly stated in her report that it is "typical and expected" under the prevailing *88 standard of practice "to consider the [SEM] for any given test in order to determine if a patient's score could fall below 70."

The experts also disagree about the relevance of Black's 2001 I.Q. scores. Dr. Vaught conceded that, based on these most recent I.Q. scores, Black "currently meets the first criterion for mental retardation." *Black*, 2005 WL 2662577, at *14. But she and Dr. Engum were suspicious of the scores' validity based on comparisons to other indications of Black's level of intelligence. They suspected that Black was malingering (i.e., artificially deflating his scores) during these later tests. Black's experts, on the other hand, specifically determined that he was not malingering, and they were highly critical of the opinion of the State's experts that Black was malingering based solely on the written record, without having personally interviewed him.

Black's experts determined that his I.Q. fell in the mentally retarded range by the time he was age 18, but the State's experts disagreed. Dr. Vaught, in particular, noted that although Black's poor academic performance was "highly suggestive of learning disability or borderline intellectual capacity," she found "no compelling evidence that the lower-functioning picture I see now in Mr. Black's intellectual testing emerged prior to 18."

2. Black's brain damage

A56

Another key point of contention is whether Black suffered from brain damage at an early age. Dr. Albert Globus, an expert in psychiatry and neurology who examined Black in 2001 in order to assess his competency to stand trial, reexamined him just before the state court's post-conviction hearing. In addition, Dr. Ruben Gur, an expert in neuropsychology, testified in a video deposition taken after the hearing regarding the cause of Black's brain damage. Both Drs. Globus and Gur concluded, based on MRI and PET-scan images of Black's brain, that Black has extensive brain damage that was likely caused by his mother's drinking alcohol while pregnant, but might also have been caused by other occurrences during his childhood.

The State does not contest that Black currently has brain damage. But the source of his condition is highly disputed. This point is important to the assessment of Black's level of intelligence by the time he was age 18. If his current brain damage existed at an earlier stage of his life, then his current level of intelligence is all the more probative of his intellectual capacity at that earlier stage because any symptoms resulting from his brain damage would have also been present earlier on. Moreover, if Black's brain was damaged earlier in his life, that determination would impact the credibility of the conclusion by the State's experts—who never personally met with Black—that he was malingering on his recent I.Q. tests. Rather than offer an alternative explanation for his brain damage, the State argues that Black did not sufficiently prove that his brain damage was caused by the time he was age 18.

3. Expert assessments of Black's adaptive deficits

In addition to assessing Black's numerical I.Q. level, the various expert witnesses at his state post-conviction *Atkins* hearing testified regarding his level of adaptive functioning. These experts explained how Black functions in society and when his relevant characteristics manifested themselves. They dispute whether Black displays adaptive deficits and, if so, when these problems arose.

Black's experts explained that he has difficulty interacting according to ordinary social conventions and that he is paranoid, *89 delusional, naive, and inappropriately happy. They also determined that he has deficits in his communication and functional academic skills and that he displays symptoms

of various psychiatric disorders. Based on Black's childhood experiences, as well as the alleged early onset of his brain damage, Black's experts concluded that he had adaptive deficits by the age of 18.

But the State's experts determined that Black displayed adequate skills across a variety of practical, social, and intellectual categories of behavior. Although they thought that Black had various personality problems and that he might suffer from various mental disorders, they did not think that Black qualified as mentally retarded. The State's experts also determined that to the extent Black displayed adaptive deficits, he either strategically presented himself in that way (according to Dr. Engum) or had deteriorated more recently and therefore did not display these characteristics by the age of 18 (according to Dr. Vaught). After recounting some of the expert testimony on these issues, the TCCA concluded that Black did not meet his burden of proof to show that he had sufficient deficits in his adaptive behavior by the age of 18.

4. Lay witnesses

Black presented four lay witnesses at his Atkins postconviction hearing to testify regarding various aspects of his social and educational history. Mary Smithson-Craighead, who started working as an administrator at Black's elementary school in 1965 and was in charge of Black's grade level for, at most, a year and a half, testified regarding the conditions at Black's school. Black's sister, Melba Corley, talked about Black's upbringing. Al Dennis, Black's high school football coach, discussed Black's experience on the football team. Finally, Richard Corley, Black's brotherin-law, testified about Black's job as a courier at an insurance company. Both sides draw on various aspects of these witnesses' testimony to support their respective positions concerning Black's level of intellectual functioning and his adaptive behavior by the age of 18.

5. Prior decisions on Black's Atkins claim

The state trial court determined that Black's postconviction *Atkins* claim merited an evidentiary hearing. At this evidentiary hearing, Black had the burden of showing by a preponderance of the evidence that he met Tennessee's definition of mental retardation under *Atkins*. After the hearing concluded, the court summarized what it viewed as the determinative evidence from the voluminous record and, based on this evidence, denied Black's *Atkins* claim for post-conviction relief.

The TCCA affirmed the trial court's rejection of Black's claim. In its "Analysis" section, the TCCA mostly reviewed, without taking a stance on, the conflicting expert assessments of the factual record. But the TCCA did recognize that, according to Black's experts, the Flynn Effect and/or the SEM brings his middle set of I.Q. scores into the mentally retarded range. Based on *Howell v. State, 151 S.W.3d 450, 457 (Tenn.2004), however, the TCCA determined that it was prohibited from considering these scientific concepts in assessing Black's numerical I.Q. score.

The TCCA's assessment of the factual record also makes clear that it was skeptical of the opinions of Drs. Globus and Gur regarding when Black's brain damage occurred. But the TCCA did not go so far as to make a definitive factual conclusion regarding the date of onset of Black's brain damage. The court also discounted Dr. Grant's conclusion that Black displayed deficits in his adaptive behavior *90 because, although Dr. Grant observed that Black had never engaged in a number of commonplace activities, "there is no proof in the record that [Black] was unable to do these things." *Black*, 2005 WL 2662577, at *15. It also pointed out that none of Black's childhood I.Q. scores fell in the mentally retarded range. But the TCCA reached its ultimate conclusion that "the proof in the record simply does not support that [Black's] I.Q. was below seventy or that [Black] had deficits in his adaptive behavior prior to age eighteen" without stating which pieces of evidence were essential to its conclusion. Id. at *17.

In denying habeas relief to Black on his *Atkins* claim, the district court approvingly referenced the TCCA's rejection of the application of the Flynn Effect and the SEM based on *Howell*. It also concluded, based on a review of how other jurisdictions have dealt with the Flynn Effect, that the TCCA's rejection of these concepts did not render the state process arbitrary, unreasonable, or less than full and fair.

The district court further rejected Black's three remaining arguments in support of his Atkins

claim. First, the court determined that the TCCA's discounting of Dr. Grant's adaptive-deficits assessment did not render the state court's decision unreasonable. It found no basis to question the TCCA's ruling that, although the record indicated that Black *had not* performed the commonplace daily tasks mentioned by Dr. Grant, there was no showing that Black *could not* perform these tasks. Second, the court concluded that because Black had not shown that an aptitude test is equivalent to an I.Q. test, his low ninth-grade Differential Aptitude Test scores did not mean that his I.Q. was 70 or below by age 18.

Finally, the district court noted that "the evidence before the state court ... may or may not indicate that [Black's brain damage] existed and caused mental retardation" by the time Black was 18 years of age. The court based this observation on its determination that Drs. Globus and Gur were unable to point definitively to the cause of Black's brain damage or establish that this injury was the cause of Black's mental retardation. It also quoted the TCCA's reference to "Dr. Vaught's testimony explaining the difference between mental illness and mental retardation, and her conclusion that [Black's] early difficulties were likely caused by mental health issues or learning disabilities, rather than mental retardation."

II. ANALYSIS

A. Standard of review

Because Black filed his habeas petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), AEDPA's provisions apply to his case. Murphy v. Ohio, 551 F.3d 485, 493 (6th Cir.2009). This court in Murphy set out the standard of review under AEDPA as follows:

Under AEDPA, a federal court may grant a writ of habeas corpus with respect to a "claim that was adjudicated on the merits in state court proceedings" if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A habeas petition may also be granted if the state court's decision "was based on an unreasonable determination of the facts in

light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). A state-court decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing *91 law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent."

Williams [v. Taylor, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)]. A state-court decision is an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," id. at 407–08, 120 S.Ct. 1495, or if it "either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context," Seymour v. Walker, 224 F.3d 542, 549 (6th Cir.2000).

recently explained, our review under § 2254(d)(1) is "limited to the record that was before the state court."

Cullen v. Pinholster, — U.S. ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011).

B. Atkins claim

Black claims that he is not subject to the death penalty because he is mentally retarded, so that his execution would violate Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). A few months before Atkins was decided, the Tennessee Supreme Court also held as a matter of first impression in Van Tran v. State, 66 S.W.3d 790 (Tenn.2001), that the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution prohibit the execution of mentally retarded individuals.

Id. at 794, 812. Van Tran further held that its newly announced rule applied retroactively to cases on

The Supreme Court held in *Atkins* that, in light of "our evolving standards of decency," the Eighth Amendment prohibits the execution of mentally

collateral review. Id. at 811.

retarded offenders. Id. at 321, 122 S.Ct. 2242. But the Court in *Atkins* did not define what it means to be "mentally retarded," instead "leav[ing] to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." Id. at 317, 122 S.Ct. 2242 (brackets omitted) (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (dealing with the issue of insanity)).

Under Tennessee law, capital defendants are considered mentally retarded for the purposes of an Atkins claim if they have an "intellectual disability" under § 39-13-203(a) of the Tennessee Code. Howell v. State, 151 S.W.3d 450, 457 (Tenn.2004). Defendants will meet this standard if (1) they have "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy or below; and (2) [they have deficits in adaptive behavior; and (3) [t]he mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age." Tenn.Code Ann. § 39-13-203(a). Under Tennessee law, defendants have the burden of showing, by a preponderance of the evidence, that they qualify under this statutory definition. See Tenn.Code Ann. § 39-13-203(c).

In Coleman v. State, 341 S.W.3d 221 (Tenn.2011), the Tennessee Supreme Court recently issued a significant decision explaining the Atkins standard under Tennessee law. The State argues that this "recent state-law decision can have no impact on the reasonableness of the state courts' application of federal law or on the reasonableness of the state courts' factual determinations in light of the evidence presented in state court." This argument raises three distinct objections to our consideration *92 of Coleman, all of which we find have no merit.

1. Application of Coleman in the present case

First, citing Cullen v. Pinholster, — U.S. —, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the State argues that, under AEDPA, Black is limited to the record that was before the state court at the time the latter rendered its decision. But Cullen explicitly

dealt with the parameters of the *factual* record that the district court may consider on habeas review. Id. at 1399–1400. Coleman, however, elucidates Tennessee's interpretation of Atkins' s legal standard. Cullen therefore does not prevent us from considering Coleman's interpretation of Atkins under Tennessee law

The state also focuses on the fact that *Coleman* is a "recent state-law decision." But the date of the *Coleman* decision does not prevent us from considering its impact on the present case because *Atkins* "has been made retroactive to cases on collateral review." In re Bowling, 422 F.3d 434, 436 (6th Cir.2005).

[1] And because "Atkins reserved for the states 'the task of developing appropriate ways to enforce the constitutional restriction, "id. at 436–37 (quoting Atkins, 536 U.S. at 317, 122 S.Ct. 2242), federal courts conducting habeas review routinely look to state law that has been issued after the defendant's state conviction has become final in order to determine how Atkins applies to the specific case at hand. See Hill v. Anderson. 300 F.3d 679, 682 (6th Cir.2002) (remanding Hill's Atkins habeas claim to the Ohio state courts to "develop [their] own procedures for determining whether a particular claimant is retarded and ineligible for death"); Wiley v. Epps, 625 F.3d 199, 208 (5th Cir.2010) (assessing whether the defendant qualified for an evidentiary hearing on his Atkins claim based on the Mississippi Supreme Court's standard even though "Wiley was convicted before Atkins was decided, and although he filed his state post-conviction application before the Mississippi Supreme Court established the state's requirements for obtaining an Atkins hearing"). We will therefore consider Coleman in our review of Black's Atkins claim under AEDPA. See Fulcher v. Motley, 444 F.3d 791, 822 (6th Cir.2006) (Clay, J., concurring) (explaining that even where a Supreme Court precedent applies retroactively, a federal court conducting habeas review of a state-court decision must still determine whether the decision was "contrary to" the retroactively applicable Supreme Court precedent).

2. Significantly subaverage intellectual functioning

Under the Tennessee Code, the first requirement that

a defendant must meet in order to be considered mentally retarded under Atkins is that he or she must have "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below." Tenn.Code Ann. § 39–13–203(a). The Tennessee Supreme Court has determined that the statute's incorporation of an I.O. score of 70 is a "bright-line cutoff" that does not account for "a standard error of measurement in the test scores nor consideration of any range of scores above the score of seventy." Howell v. State, 151 S.W.3d 450, 458-59 (Tenn, 2004). But even this bright-line cutoff allows for the consideration of more than one single source in determining a defendant's I.Q. Because the Tennessee statute "does not provide a clear directive regarding which particular test or testing method is to be used" to determine whether an individual is mentally retarded for purposes of death-penalty eligibility, "[a] *93 court may certainly give more weight to one test, but should do so only after fully analyzing and considering all evidence presented." Id. at 459.

One of the defendant's full-scale I.Q. scores in Howell was a 73 on the WAIS—III test. Id. at 453. In support of his Atkins claim, the defendant presented the testimony of Dr. Daniel Grant (who also testified on Black's behalf in the present case) that a score on an I.Q. test represents a ten-point range of possible scores based on a five-point SEM in either direction. Id. When the SEM was considered, according to Dr. Grant, the defendant's I.Q. score of 73 in Howell fell in the mentally retarded range. Id. at 453– 54. But the Tennessee Supreme Court determined that Tennessee law provides a "bright-line cutoff" for determining whether a defendant's I.Q. is 70 or below. Id. at 458–59. The Court therefore agreed with the trial court's refusal to interpret "the requirement of an I.Q. of seventy or below, as contained in the Tennessee statute, ... as representing a range of scores between sixty-five and seventy-five or below." Id.

at 457. Based on this reasoning, the defendant's score

of 73 was not in the mentally retarded range. (But the Court in *Howell* remanded the case for an evidentiary because the lower court imposed an overly demanding burden of proof on the defendant.

Turning now to the case at hand, Black argues that

the Flynn Effect and the SEM should be considered in determining his functional I.Q. level. Black's experts, as explained above, applied the Flynn Effect to correct for the outdated nature of the I.Q. test that was taken. I.Q. scores are scaled so that the average score on any test should be 100, but the Flynn Effect postulates that the longer that an I.Q. test has been in existence, the higher the average score will be. See United States v. Davis, 611 F.Supp.2d 472, 486 (D.Md.2009) (explaining that "the Flynn Effect means ... that over time, the test norms become outdated, such that the average score is no longer 100, but something higher"). This increase in the general level of factual information that leads to higher average scores on older tests explains why I.Q. test scores would increase with the age of the test "without a corresponding increase in actual intelligence in the general population." Wiley v. Epps, 625 F.3d 199, 203 n. 1 (5th Cir.2010). According to the Flynn Effect, scores on outdated tests thus need to be corrected for this upward deviation in the average score. Id. The SEM, on the other hand, "is an index of the variability of test scores produced by persons forming the normative sample" that "allows the evaluator to know the amount of error that could be present in any test." Thomas v. Allen, 607 F.3d 749, 753 (11th Cir.2010).

As the TCCA noted, Black's experts testified that his adult I.Q. scores, including pre-*Atkins* scores, "fell within the mentally retarded range when adjusted by the [SEM] and/or the Flynn Effect." *Black*, 2005 WL 2662577, at *14. But the court refused to consider this testimony because it concluded that "*Howell* 's bright-line cutoff prohibited accounting for these adjustments under Tennessee law. *Id.* "*Coleman* directly addresses this interpretation of *Howell*.

a. The Coleman decision

The defendant in *Coleman* brought an *Atkins* claim to challenge his death sentence. As part of his proof that his I.Q. score was in the mentally retarded range under Tennessee law, Coleman offered evidence regarding the impact of the Flynn Effect and the SEM in determining his ultimate I.Q. score. But the TCCA in *Coleman* determined, based on *Howell*, *94 that Tennessee law does not provide "for the application of any standard error of measurement, including the 'Flynn effect,' to establish an IQ range rather than the bright-line cutoff of 70." Coleman v. State, No. W2007–02767–CCA–R3–PD, 2010 WL 118696, at *18 (Tenn.Crim.App. Jan. 13, 2010).

The Tennessee Supreme Court in *Coleman* acknowledged that *Howell* correctly interpreted the Tennessee statute in holding that "an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range (i.e., that the defendant's I.Q. falls somewhere between 65 to 75) but must be expressed specifically (i.e., that the defendant's I.Q. is 75 or is 'seventy (70) or below' or is above 70)."

Coleman, 341 S.W.3d at 242. But the lower state courts had misinterpreted *Howell* by extending its reasoning too far. As the Tennessee Supreme Court explained,

following Howell v. State, some trial courts and the Court of Criminal Appeals have construed our holding Tenn.Code Ann. that 39-13-203(a)(1) provided a "clear and objective guideline" for determining whether a criminal defendant is a person with intellectual disability to have established a mandatory requirement that only raw I.Q. test scores may be used to determine whether a criminal defendant has "significantly impaired general intellectual functioning" and that a raw I.Q. test score above seventy (70) may be sufficient, by itself, to disprove a criminal defendant's

claim that he or she is a person with intellectual disability.

The Tennessee Supreme Court noted in Coleman that

Id. at 240.

is that

the Tennessee Code "does not provide clear direction regarding how a person's I.Q. should be determined and does not specify any particular test or testing method that should be used. In fact, the statute does not even employ the words 'test' or 'score.' " *Id.* at 241 (citation omitted). The statute's purpose is for the courts to arrive at the defendant's true functional I.Q. score. " *Id.* But "[b]ecause the statute does not specify how a criminal defendant's functional I.Q. should be determined, we have concluded that the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below." " *Id.* The practical import of this reasoning

if the trial court determines that professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement, the Flynn Effect, the practice effect [which refers increasing test scores based on an individual being retested with the same or a similar test], or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q., an expert should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on a consideration of those factors.

Id. at 242 n 55

Allowing for the consideration of these factors was also found by the Court to be "consistent with current clinical practice," which may "require information from multiple sources." Id. at 244. Intelligence tests are just one of these sources. And because intelligence tests "are indirect rather than direct measures of intelligence, experts in the field recognize that they, like other measures of human functioning, are not actuarial determinations, that these tests cannot measure intelligence with absolute precision and that these tests contain a potential for error." Id. at 245 (citations, brackets, and internal quotation *95 marks omitted). Moreover, recent practice in the Tennessee courts

reflect[s] the parties' the courts' existing awareness that, as practical matter, a criminal defendant's "functional intelligence quotient" cannot be ascertained based only on raw I.Q. test scores. More importantly, they also reflect the parties' conclusion that Tenn.Code Ann. § 39–13–203(a) does not prevent them from presenting relevant and competent other evidence. than defendant's raw I.Q. test scores, either to prove or to disprove that the defendant's "functional intelligence quotient" when the crime was committed was "seventy (70) or below."

Id. at 247–48.

The *Coleman* decision also recognized that "[a]scertaining a person's I.Q. is not a matter within the common knowledge of lay persons. Expert testimony in some form will generally be required to assist the trial court in determining whether a criminal defendant is a person with intellectual disability for the

purpose of Tenn.Code Ann. § 39–13–203(a)." Id. at

241. "In formulating an opinion regarding a criminal defendant's I.Q. at the time of the offense, experts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields." Id. at 242. These expert opinions are subject to cross-examination, and the trial court is not bound to follow any particular expert. Id. But the trial court "must give full and fair consideration to all the evidence presented." Id.

b. Applying Coleman to the present case

The Tennessee Supreme Court went to great [2] lengths in Coleman to explain why its decision comported with its own prior precedent, Tennessee statutory law, other states' statutes, current clinical practice (which Atkins itself noted is generally incorporated in the various statutory definitions), and current litigation practice. Id. at 240–48. Even absent the Court's guidance in Coleman, the TCCA in the present case clearly misinterpreted the Flynn Effect's relevance under Howell. Although Howell emphasized the need to reach a single functional I.Q. score under Tennessee law, the decision made no mention whatsoever of the Flynn Effect. The purpose of adjusting for the Flynn Effect, after all, is to determine the single specific score that most accurately reflects the subject's I.Q. And unlike the SEM, adjusting for the Flynn Effect yields only one score. See United States v. Davis, 611 F.Supp.2d 472, 488 (D.Md.2009) (correcting for the Flynn Effect was found appropriate in order to more accurately determine whether the defendant met the "strict numerical cutoff"). Considering the Flynn Effect in determining a defendant's I.Q. score is therefore entirely consistent with Howell 's stated goal of assessing whether a defendant's single I.Q. score, rather than a range of scores, meets the statute's "bright-line cutoff."

Whether **Coleman* 's holding regarding the SEM clarifies *Howell* or deviates from *Howell* is more ambiguous. On the one hand, *Coleman* affirmed *Howell*'s holding that the Tennessee statute requires that an expert's assessment must be expressed in

of scores. Coleman, 341 S.W.3d at 242. On the other hand, the Court held that an expert should be permitted to consider "a particular test's standard error of measurement [the SEM], the Flynn Effect, the practice effect," or other "reliable practices, methods, standards, and data" in assessing the defendant's I.Q.

best be read as clarifying that although *Howell* prohibits interpreting the Tennessee statute *96 "as representing a range of scores," *Howell*, 151 S.W.3d at 457, it does not prevent the SEM, as well as all other relevant scientific evidence, from being used by an expert in determining a defendant's single most accurate functional I.Q. score. *See Duncan v. United States*, 552 F.3d 442, 444–45 (6th Cir.2009) (explaining that "a decision does not announce a new rule when it is merely an application of the principle that governed a prior Supreme Court case" (internal quotation marks omitted)). In any event, regardless of whether *Coleman* clarified *Howell* 's holding or

light of our earlier conclusion regarding Coleman's retroactive applicability.

Coleman is particularly applicable because the TCCA's

decision in the present case was cited to support

changed it regarding the SEM, the Tennessee Supreme

Court's recent elucidation of the Atkins standard under

Tennessee law must be applied in the present case in

the TCCA's conclusion in Coleman (before Coleman reached the Tennessee Supreme Court) that although evidence concerning the Flynn Effect or the SEM may be introduced into the record, neither of these factors may impact the court's ultimate determination of the defendant's specific I.O. score. Coleman v. State, No. W2007-02767-CCA-R3-PD, 2010 WL 118696, at *18 (Tenn.Crim.App. Jan. 13, 2010). The TCCA in Coleman explained that "both in Black and the present case, a challenge is made to the veracity of the brightline cutoff of 70 in establishing whether a defendant is not subject to the death penalty." Id. It then held that because Coleman, like Black, was allowed to present evidence regarding the Flynn Effect and the SEM, the defendant's due process rights were not violated. But as the Tennessee Supreme Court

explained in Coleman, allowing defendants to present

evidence regarding the Flynn Effect and the SEM is not enough. Tennessee courts must also *consider* this evidence in assessing a defendant's ultimate functional

I.Q. Coleman, 341 S.W.3d at 241–42.

3. Onset by the age of 18

In addition to having an I.Q. of 70 or below, this low level of intellectual capacity must have manifested itself by age 18 in order for the defendant to qualify as intellectually disabled under Tenn.Code Ann. § 39–13–203(a). Based on this rule, the TCCA in the present case denied Black's *Atkins* claim because it concluded that "the proof in the record simply does not support that [Black's] I.Q. was below seventy ... prior to age eighteen." *Black*, 2005 WL 2662577, at *17. But the TCCA did not explain the extent to which this conclusion relied on any of Black's various I.Q. scores. Nor did it consider the potential impact of the Flynn Effect and the SEM, despite the court's consideration of the expert testimony that discussed the impact of these factors on Black's middle set of I.Q. scores.

Just as the TCCA misinterpreted *Howell* in its *Coleman* decision, it made the same error here in deciding whether Black had demonstrated by a preponderance of the evidence that he had an I.Q. of 70 or below by the time he was 18 years of age. Although Black's experts testified regarding the value of the Flynn Effect and the SEM, the TCCA refused to consider these factors as a matter of law based on *Howell* rather than based on whether "professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement [or] the Flynn Effect."

See Coleman, 341 S.W.3d at 242 n. 55. The TCCA's decision is therefore contrary to the latest Tennessee Supreme Court's decision on this subject.

See Williams v. Taylor, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that "[a] *97 state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law"). And because Atkins defers to the individual states to set out the standard for a defendant to qualify as mentally retarded, the TCCA's misinterpretation of Howell is contrary to Atkins.

governing law, we must conduct an independent review of that issue, unconstrained by 28 U.S.C. § 2254(d)(1) (which mandates deference to state-court proceedings unless they "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"). Fulcher v. Motley, 444 F.3d 791, 799 (6th Cir.2006) (holding that after a federal court conducting habeas review determines that the state court's decision was contrary to clearly established Supreme Court precedent, the "federal court is unconstrained by § 2254(d)(1) and de novo review is appropriate" (brackets, citation, and internal quotation marks omitted)). We conduct this independent review because "we cannot grant habeas unless [the defendant] is 'in custody in violation of the Constitution or laws or treaties of the United States.'

" West v. Bell, 550 F.3d 542, 553 (6th Cir.2008)

(quoting 28 U.S.C. § 2254(a)).

Where a state court's analysis contradicts the

Because the TCCA reached its ultimate conclusion that Black did not show by a preponderance of the evidence that his I.Q. was below 70 or that he had adaptive deficits by the time he was age 18, without specifying which I.Q. scores it relied on and why, "[i]t is impossible to determine ... the extent to which the [TCCA's] error with respect to its reading of [Howell] affected its ultimate finding" that Black did not meet his burden of proof. See Williams, 529 U.S. at 414, 120 S.Ct. 1495; see also Mask v. McGinnis, 233 F.3d 132, 140 (2d Cir.2000) (holding under AEDPA that the "state court's determination of factual issues ... were so closely intertwined with the state court's articulation of an erroneous legal standard, to which we owe no deference, that we can discern no independent factual issues to which we should defer"); State v. Strode, 232 S.W.3d 1, 16 (Tenn.2007) (holding that "the question of whether an individual is mentally retarded for purposes of eligibility [for] the death penalty is a mixed question of law and fact").

4. Black's adaptive behavior

Even if Black's I.Q. was 70 or below by the time he was age 18, we recognize that he must also have had deficits in adaptive behavior by the time he was 18 in order to be considered mentally retarded under Tennessee's *Atkins* standard. Tenn.Code Ann. § 39–13–203(a). We therefore now turn to the issue of Black's adaptive behavior.

In addition to explaining Tennessee's standard for determining a defendant's level of intellectual functioning, *Coleman* clarified the adaptive-deficits element of Tennessee's *Atkins* standard. The Tennessee legislature did not define what characteristics constitute "deficits in adaptive behavior," but the Tennessee Supreme Court explained that "deficits in adaptive behavior 'means the inability of an individual to behave so as to adapt to the surrounding circumstances.' "Coleman, 341 S.W.3d at 248 (brackets omitted) (quoting State v. Smith, 893 S.W.2d 908, 918 (Tenn.1994)).

Although Smith did not adopt the clinical definition of deficits in adaptive behavior, "Tennessee's trial and appellate courts have repeatedly relied upon expert analysis of adaptive behavior or functioning *98 predicated upon definitions advanced within the relevant medical and psychological community and authoritative texts such as the AAIDD Manual and the DSM-IV." These documents are. respectively, the Manual of the American Association of Intellectual and Developmental Disabilities and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. As in Coleman, the TCCA in the present case looked to the definition of deficits in adaptive behavior that the Tennessee Supreme Court adopted in Van Tran v. State, 66 S.W.3d 790, 795 (Tenn.2001), which in turn

The TCCA quoted the following passage from *Van Tran* that it had previously quoted in *Coleman*:

based its standard on the DSM-IV.

The second part of the definition—adaptive functioning—refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of

someone in their particular age group, socio-cultural background, and community setting. As discussed, mentally retarded person will have significant limitations in at least two of the following basic skills: communication, self-care, home living, social/ interpersonal skills, use of community resources, selfdirection, functional academic skills, work, leisure, health, and safety. Influences on adaptive functioning may include individual's education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders general medical conditions that may coexist with Mental Retardation.

Black, 2005 WL 2662577, at *15 (quoting Van Tran, 66 S.W.3d at 795 (internal quotation marks omitted)).

The TCCA in Coleman determined that although

"[Coleman] has established that he has deficits in academic performance, he has not established that he suffers substantial limitations in at least two adaptive behavioral skill areas. Accordingly, he has failed to establish that he has adaptive deficits by a preponderance of the evidence." Coleman v. State. No. W2007-02767-CCA-R3-PD, 2010 WL 118696, at *29 (Tenn.Crim.App. Jan. 13, 2010). The Tennessee Supreme Court disagreed with the analysis of both the TCCA and the trial court. It determined that their erroneous interpretation of Howell led them to assess the possible causes of Coleman's apparent deficiencies in adaptive behavior without the benefit of "testimony indicating that Mr. Coleman's intellectual capacities rendered him intellectually disabled." Coleman, 341 S.W.3d at 249.

The lower courts' failure to properly consider this evidence concerning Coleman's intellectual capacities might have had "a substantial and injurious impact on the trial court and the Court of Criminal Appeals' decision-making in weighing the relative strengths of the causes of the seeming deficits in Mr. Coleman's adaptive behavior." *Id.* Notably, the Tennessee Supreme Court found that the lower courts' assessment of Coleman's adaptive deficits was flawed, even though they acknowledged that he had various personality problems, because they did not think that these personality problems could be characterized as deficits in adaptive behavior under Tennessee's *Atkins*

This problem is equally present in the TCCA's decision in the present case. Just as in Coleman, the TCCA here cited a number of expert assessments indicating that Black had various personality problems, but it concluded that these issues did not amount to deficits in his adaptive behavior. Black, 2005 WL 2662577, at *6–7, 10, 15–16. Even the State's experts acknowledged *99 that Black has serious personality problems. Coleman's conclusion that the erroneous exclusion of expert testimony concerning adjustments to Coleman's I.Q. score might have had "a substantial and injurious impact on the [lower courts'] decisionmaking in weighing the relative strengths of the causes of the seeming deficits in Mr. Coleman's adaptive behavior" is therefore equally applicable in the present case. See Coleman, 341 S.W.3d at 249.

The relevant question, however, is whether Black displayed the requisite deficits in his adaptive behavior by the time he was 18 years of age. See Tenn.Code Ann. § 39–13–203(a). As with the TCCA's analysis of Black's level of intellectual functioning, its conclusory reliance on the record as a whole and the ambiguity of the conflicting evidence make the TCCA's errors in assessing Black's adaptive deficits extend to the determination of whether these adaptive deficits manifested themselves by the time Black was age 18. The TCCA's analysis of the adaptive-deficits issue in the present case is thus contrary to Coleman.

[4] In addition to connecting the analysis of adaptive deficits to the proper assessment of intellectual capacities, *Coleman* contains several legal principles

regarding adaptive deficits that are relevant to the analysis in the present case. The Tennessee Supreme Court held that "the definition of 'intellectual disability' embraces a heterogeneous population ranging from persons who are totally dependent to persons who are nearly independent." Id. at 231. This position supports the idea that a court reviewing whether a defendant is mentally retarded "must focus on Defendant's deficits, not his abilities." United States v. Lewis, No. 1:08 CR 404, 2010 WL 5418901, at *30 (N.D.Ohio Dec. 23, 2010). Various experts from both sides in the present case also testified that someone might be mentally retarded but still be able to carry out any of a number of everyday activities, such as maintaining a simple job or driving a car. A full, independent review of whether Black showed by a preponderance of the evidence that he displayed adaptive deficits by the time he was age 18 must therefore look at his weaknesses instead of at his strengths.

The Tennessee Supreme Court in *Coleman* also determined that the lower courts erred in

their decision to distinguish between Mr. Coleman's mental illness and his intellectual disability as separate causes of his adaptive limitations. By concluding that Mr. Coleman's adaptive deficiencies were caused by his mental illness alone, the lower courts treated Mr. Coleman's mental illness and intellectual disabilities as separate dichotomous spheres rather than as interwoven causes.

Coleman, 341 S.W.3d at 249.

In making this point, the Tennessee Supreme Court explained that there is no consensus among the various state courts around the country, nor in the scientific literature, regarding "the role of causation with regard to assessing deficits in adaptive behavior." Id. at 250. The Tennessee Supreme Court in Coleman did not resolve this conflict because it determined that the matter should be addressed only after the record was more complete. Id. at 252. But even with the less-than-complete record before it, the Court noted that the expert testimony in the record established that mental retardation and other mental disorders are not mutually exclusive. See id. at 252–53. Rather, mental retardation and any number of other factors may coexist as comorbid causes of a defendant's deficient adaptive functioning. See id.

*100 The Tennessee Supreme Court thus concluded that the TCCA had erred in holding that Coleman's adaptive deficits were caused solely by his mental illness, without considering evidence that "intellectual disability and mental illness were inter-related and served to aggravate each other, combining to limit Mr. Coleman's adaptive functionality." Id. at 252. Moreover, although the Tennessee Supreme Court did not make a conclusive legal determination concerning the causal relationship between mental retardation and mental illness, the legal precedents and scientific literature that it cited explain that, at a minimum, courts must consider the possibility that a defendant's mental retardation and other mental illnesses might be comorbid causes of a defendant's personality problems. See id. at 251–53; Lewis, 2010 WL 5418901, at *32 ("Indeed, individuals with intellectual disability are three to four times more likely to have comorbid mental disorders than the general population."). Coleman thus establishes that even where a defendant suffers from mental illness, that finding does not preclude a concomitant determination that the defendant's personality problems constitute adaptive deficits under Tennessee's Atkins standard.

The TCCA in the present case repeatedly cited evidence that it interpreted as supporting the existence of Black's mental illness but not of his mental retardation. For example, the TCCA explained that Dr. Engum "believed that Petitioner suffered from personality problems, delusional problems, or psychological difficulties, [but that] those issues are separate and apart from the issue of whether Petitioner was mentally retarded." *Black*, 2005 WL 2662577, at

*16. The TCCA also concluded, based on Dr. Vaught's testimony, that mental retardation "has nothing, however, to do with mental illness." *Id.* at *10. This reasoning is similar to the TCCA's error in *Coleman* of treating "Mr. Coleman's mental illness and intellectual disabilities as separate dichotomous spheres rather than as interwoven causes." *Coleman*, 341 S.W.3d at 249. On remand, a proper analysis of Black's case under *Coleman* must consider the potential relationship between mental retardation and mental illness.

5. Conclusion on Black's Atkins claim

Overall, the record is rife with conflicting testimony regarding Black's level of intelligence and adaptive deficits by the time he was age 18. The TCCA's decision is of little help because the court made so few definitive factual determinations leading up to its ultimate conclusion that Black did not show by a preponderance of the evidence that he qualifies as mentally retarded. Moreover, the TCCA did not have the benefit of *Coleman's* guidance when it refused to consider either the Flynn Effect or the SEM in evaluating the mental-retardation issue. Habeas review by the district court was similarly constrained.

retarded under *Atkins* deal with questions of law. *See Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir.2006) (holding that the rules regulating the factors involved in the ultimate determination of whether a defendant qualifies as mentally retarded under *Atkins* raise questions of law); *see also Murphy v. Ohio*, 551 F.3d 485, 510 (6th Cir.2009) (reviewing the state court's resolution of the defendant's *Atkins* claim under AEDPA's standard for questions of law). The TCCA's assessment of Black's level of intellectual and adaptive functioning was therefore contrary to *Coleman* under AEDPA's legal standard.

The rules governing what factors may be considered in

determining whether a defendant qualifies as mentally

[5] Ordinarily, where the state court's decision is contrary to clearly established *101 law under AEDPA, we will conduct an independent review of the record in order to determine whether the defendant is "in custody in violation of the Constitution or laws or treaties of the United States." West v. Bell, 550 F.3d

Fulcher v. Motley, 444 F.3d 791, 799 (6th Cir.2006) (holding that when we determine that the state court contradicted the governing law, we must conduct an independent review, unconstrained by 28 U.S.C. § 2254(d)(1)). But we will refrain from reaching any independent conclusions ourselves because no court has yet analyzed Black's *Atkins* claim according to

the proper legal standard, which was set out by the

542, 553 (6th Cir.2008) (quoting 28 U.S.C. § 2254(a));

Tennessee Supreme Court in Coleman. See Alley v. Bell, 405 F.3d 371, 372 (6th Cir.2005) (en banc) (granting rehearing en banc and remanding the case for the district court to determine in the first instance whether it had jurisdiction to consider the death-row inmate's motion for relief from judgment in light of an intervening case that the district court did not originally

consider); see also Thaddeus-X v. Blatter, 175 F.3d 378, 399 (6th Cir.1999) (vacating the district court's grant of summary judgment on the plaintiff's retaliation claim and remanding the case for the district court to apply the correct legal standard in the first instance).

A complete review must apply the correct legal standard to all of the relevant evidence in the record. We therefore **VACATE** the district court's denial of Black's *Atkins* claim and **REMAND** the case for it to review the record based on the standard set out in *Coleman* and consistent with this opinion.

6. Response to Dissent

We note that our dissenting colleague vigorously argues that *Coleman* "does nothing to implicate [Black's] *Atkins* claim," that "AEDPA forecloses consideration of this state court precedent as a ground for relief," and that a "[r]emand is unnecessary, inappropriate, and flatly contrary to federal law." For all of the reasons set forth above in this Part II. B., we respectfully disagree.

Moreover, we believe that the dissent fails to recognize that this case raises a unique set of circumstances. Retroactively applicable new rules under AEDPA and under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), are exceedingly rare occurrences. See Ochoa v. Sirmons, 485 F.3d 538,

540 (10th Cir.2007) (explaining that "Atkins reflects one of the rare instances in which the Supreme Court has announced a new rule of constitutional law that it has also expressly made retroactively applicable to cases on collateral review"). For the Supreme Court to explicitly leave to the states the task of defining the contours of such rules is even more out of the ordinary. But these are the unique circumstances that we face in this case, which is why we are convinced that a remand to the district court for reconsideration of Black's Atkins claim in light of Coleman is the proper resolution of this issue.

C. Competency to stand trial

[6] Black also challenges the state court's determination that he was competent to stand trial. He argues that, at the very least, the district court should have granted him an evidentiary hearing on this issue. To be competent to stand trial, a defendant must have " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and 'a rational as well as factual understanding of the proceedings against him.' "Filiaggi v. Bagley, 445 F.3d 851, 858 (6th Cir.2006) (quoting *102 Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam)). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but ... even one of these factors standing alone may, in some circumstances, be sufficient." Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

[7] A defendant's competence to stand trial is a question of fact. Filiaggi, 445 F.3d at 858. Under AEDPA, assuming that the state court's legal standard for determining whether a defendant is competent is not contrary to or an unreasonable application of clearly established Supreme Court precedent, the court's factual competency determination "must be upheld unless there is clear and convincing evidence to the contrary." *Id.* (internal quotation marks omitted).

Black argues that neither his experts nor the State's experts conducted a thorough evaluation of either his social history or his psychological and neurological impairments in assessing his competency to stand trial. But Black relies on evidence from his post-conviction proceedings, which was produced long after his trial, in order to support this claim. Although such after-the-fact evidence is relevant to competency determinations, "[t]he critical question is whether the evidence relied upon for determining a defendant's competence at an earlier time of trial was evidence derived from knowledge contemporaneous to trial." *Bowers v. Battles*, 568 F.2d 1, 4 (6th Cir.1977) (internal quotation marks omitted). Psychiatric opinions offered years after a habeas petitioner's trial are therefore not nearly as relevant as those issued at the time of trial.

Harries v. Bell, 417 F.3d 631, 636 (6th Cir.2005).

Black received a competency hearing shortly before his trial. At this hearing, a psychologist and one of Black's attorneys testified on Black's behalf that he was unable to understand the judicial process, did not understand his attorneys' role, did not understand the consequences of the trial, and that he was unable to assist his attorneys. But the prosecution's three mental-health experts all interviewed Black and testified that although his intelligence was at the lower end of the normal range and that he probably had a personality disorder, he was not delusional and was competent to stand trial.

The trial court then appointed another expert, a psychiatrist, to evaluate Black. This expert concluded that Black was "clearly competent." The court adopted this conclusion. When Black's attorneys raised the competency issue again after voir dire, this same expert reinterviewed Black and once more found that he was competent. The trial court then reaffirmed its ruling that Black was competent to stand trial. In reviewing Black's competency claim on direct appeal, the Tennessee Supreme Court determined that Black "understood the nature and object of the proceedings against him and was able to consult with and assist counsel in preparing his defense."

State v. Black, 815 S.W.2d 166, 174–75 (Tenn.1991).

Our earlier review of the TCCA's assessment concerning whether Black is mentally retarded under *Atkins* does not compel a similar result concerning his competency to stand trial because *Atkins* explicitly held that "[m]entally retarded persons frequently know

the difference between right and wrong" and can be competent to stand trial. See Atkins v. Virginia, 536 U.S. 304, 318, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The district court determined, and Black does not offer any evidence to the contrary, that Black's competency argument relies primarily on evidence from his post-conviction proceedings. *103 "None of these experts state an opinion as to whether Petitioner met the standard for competence at the time of trial." Black v. Bell, 181 F.Supp.2d 832, 843 (M.D.Tenn.2001). The district court thus correctly determined that Black's evidence did not amount to "the clear and convincing proof required for this Court to disregard the state court's findings." Id. And the state court's decision was not "contrary to, [nor did it] involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

[8] Black further argues that the procedures used by the state trial court to determine whether he was competent were inadequate under the Due Process Clause. Due process in a competency hearing requires "that only the most basic procedural safeguards be observed." Medina v. California, 505 U.S. 437, 453, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (internal quotation marks omitted). The court allowed both Black and the prosecution to present their expert testimony at Black's competency hearing. Then, rather than base its determination on either of these experts, the court appointed its own independent expert to evaluate Black. The court further afforded Black a reevaluation at his attorneys' request after the voir dire. Black has not pointed to any required process that he was denied. The process that was undertaken in Black's state-court competency hearing was therefore not contrary to, nor did it involve an unreasonable application of, the process that was required to determine Black's competence. In rejecting Black's challenge to the state court's determination of his competency to stand trial, we specifically note that we make no determination regarding his claim of incompetence to be executed, which the district court dismissed without prejudice because the claim was not yet ripe. Black, 181 F.Supp.2d at 882-83.

D. Ineffective assistance of counsel regarding mitigation evidence

Black next challenges the state court's rejection of his claim that his trial attorneys were ineffective in investigating and presenting mitigation evidence at the penalty phase of his trial. He contends that his attorneys failed to investigate his social history and failed to hire a psychiatrist regarding his mental-health issues.

To establish the ineffective assistance of trial counsel, Black must show that his counsel's performance (1) was deficient (i.e., that it was objectively unreasonable under prevailing professional norms), and (2) prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689, 104 S.Ct. 2052 (internal quotation marks omitted).

The test for prejudice is whether there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The *Strickland* prejudice component "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

[10] Defense counsel's failure to reasonably investigate a defendant's background *104 and present mitigating evidence to the jury at sentencing can constitute ineffective assistance. Wiggins v. Smith, 539 U.S. 510, 522–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In assessing the reasonableness of an attorney's mitigation investigation, the court considers "not only the quantum of evidence already known to counsel," but also whether that evidence should have led "a reasonable attorney to investigate further."

[11] Counsel has a duty to conduct an independent investigation regarding mitigating evidence regardless of the defendant's reluctance to investigate and disclose such evidence. Harries v. Bell, 417 F.3d 631, 638 (6th Cir.2005). Because of this obligation, counsel cannot rely solely on information provided by the defendant and his family in determining the extent of a proper mitigation investigation. Rompilla v. Beard, 545 U.S. 374, 388–89, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). But a "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Id. at 383, 125 S.Ct. 2456.

As for demonstrating prejudice under *Strickland*, Black was required to show that his new evidence differs "in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *See Fautenberry v. Mitchell*, 515 F.3d 614, 626 (6th Cir.2008) (internal quotation marks omitted). "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." *Nields v. Bradshaw*, 482 F.3d 442, 454 (6th Cir.2007) (internal quotation marks omitted).

[12] Black claims that the TCCA's analysis was contrary to Strickland because the court concluded that he was required to establish that "but for his counsel's deficient performance, the result of his trial would likely have been different." As Black correctly argues, Strickland requires only a "reasonable probability" that the result would have been different but for his counsel's deficient performance. He thus argues that the TCCA's requirement that his attorneys' deficient performance would "likely" have resulted in a different result, see Black, 1999 WL 195299, at *13, overstated the level of prejudice necessary for relief. The Supreme Court has in fact held that if a state court rejects a defendant's ineffective-assistance-of-counsel claim based on a preponderance-of-the-evidence standard for prejudice rather than asking whether there was a "reasonable probability that ... the result of the proceeding would have been different," then that decision would be contrary to clearly established federal law. Williams v. Taylor, 529 U.S. 362, 406,

120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052).

But the district court emphasized that "[i]n discussing the *Strickland* prejudice standard, courts frequently use the term 'likely' interchangeably with the phrase 'reasonable probability.' "*Black*, 181 F.Supp.2d at 861 (citing *Stanford v. Parker*, 266 F.3d 442, 455 (6th Cir.2001)). The court reasoned that, in using the term "likely," the TCCA "focused on the same analysis as required by the 'reasonable probability' standard." *Id.* Our review of the record supports the district court's conclusion.

Moreover, Black's mitigation argument would fail even de novo review. He summarily argues that, had his trial counsel hired a psychiatrist, the psychiatrist would have easily discovered that he "suffers serious mental illness, has neurological impairments, and severe memory deficits," which would have led to a diagnosis of *105 brain damage. But Black was in fact evaluated by various mental-health experts during the competency evaluation for his trial. Black now presents additional mental-health evidence that was obtained during his post-conviction process that he contends should have been uncovered by his penaltyphase attorneys. But Black's claim fails because there is no evidence in the record to support the conclusion that Black's trial attorneys should have been aware at the time of Black's trial (including the penalty phase) that any further investigation into his social history would have produced more evidence beyond that already obtained by the competency experts. See Wilson v. Parker, 515 F.3d 682, 698 (6th Cir.2008) (assessing the effectiveness of defense counsel's mitigation efforts by requiring a look at counsel's conduct "at the time of its occurrence (or when it should have occurred in the case of omissions)" (emphasis added)).

E. Ineffective assistance of counsel regarding the prosecutor's "reward" argument

[13] Black further claims that his trial counsel performed ineffectively by failing to object to the prosecution's penalty-phase closing argument that giving Black a life sentence rather than the death penalty would reward him for the additional killings of Latoya and Lakeisha Clay because Black was already

This claim is based on two Tennessee Supreme Court cases, State v. Smith, 755 S.W.2d 757 (Tenn.1988), and State v. Bigbee, 885 S.W.2d 797 (Tenn.1994), in which the prosecutor made similar arguments to the jury. The TCCA in the present case incorrectly accepted the lower court's distinction that whereas the defendants in those cases "had previously received life sentences for unrelated murders ..., [Black] was facing the death penalty in the same trial for three

related killings. Accordingly, as the [TCCA] noted, the

jury [in the present case] could not help but have full knowledge of all three sentences it was considering

for the three murders." Black, 181 F.Supp.2d at 857

(quoting the TCCA's opinion).

subject to a life sentence for the murder of Angela Clay.

The defendant in *Smith* was in fact tried for multiple murders in the same trial, just as Black was here. Although the Tennessee Supreme Court in *Smith* determined that the two separate murders should have been tried separately, it also concluded that the prosecution's "reward" argument was highly prejudicial specifically because the jury knew about the other murders. *Smith*, 755 S.W.2d at 767–68. In other words, *Smith* held that telling the jury that a life sentence will be "no additional punishment" because of the defendant's life sentence for a different murder is inherently prejudicial to the defendant even where the jury properly knows about the defendant's life sentence for another murder.

But, like the trial court, the TCCA ultimately did not decide whether counsel's performance was deficient because it agreed with the trial court that even if defense counsel did make a mistake and "should have objected to the argument," this error was not prejudicial because "it is unlikely that the objection would have had any effect on the jury's decision." Id. Black, however, claims that the prosecutor's argument was prejudicial because the jury sent a note asking the trial judge whether multiple terms for the murders would be served concurrently or consecutively, and it deliberated for 13 hours, allegedly showing that the jury was considering a life sentence. But, as the TCCA noted, the prosecutor made his "reward" argument about both of Angela's daughters, yet the jury sentenced Black to death for only Lakeisha's murder. Moreover, *106 Black's death

sentence was supported by six aggravating factors. We therefore agree that Black has not shown a reasonable probability that, but for the prosecutor's reward argument, the result of his penalty phase would have been different.

F. Instructing the jury regarding Black's parole eligibility

[14] Finally, Black argues that the trial court violated his due process rights by failing to answer the jury's questions regarding how long a life sentence actually was in Tennessee, and whether he could be paroled from a life sentence. Black contends that he had a due process right to have the jury receive instructions in response to these questions so that he could rebut the prosecution's improper argument that a life sentence would reward Black for the murders of Latoya and Lakeisha.

In support of this argument, Black cites Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001). But none of these cases dealt with the type of prosecutorial-misconduct argument that Black raises here. Gardner involved a defendant's right to rebut information contained in a presentence report. And Skipper concerned a defendant's right to offer evidence of his good behavior in prison in order to rebut the prosecution's arguments regarding the defendant's future dangerousness.

Simmons and Shafer provide the closest analogy to the present case. In Simmons, the Court held that "where a defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is not eligible for parole." Black, 181 F.Supp.2d at 870. But if "parole is an option for a defendant sentenced to life imprisonment, ... the Simmons Court emphasized that it will not second-guess the refusal of a State to allow proof, instruction, or argument to the jury on the availability of parole."

(emphasis in original). And, as the district court explained, "[b]ecause Tennessee is a state in which defendants sentenced to life imprisonment are eligible for parole, ... *Simmons* does not require that the jury be given information about parole availability." *Black*, 181 F.Supp.2d at 870 (citing Bush, 942 S.W.2d at 503).

In fact, *Shafer* itself explains that *Simmons* does not apply where, as here, the defendant might be eligible for parole based on the jury's decision. Shafer, 532 U.S. at 51, 121 S.Ct. 1263 ("Simmons applies where [,] as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." (emphasis and internal quotation marks omitted)). Moreover, Black does not contend that the prosecutor's reward argument put his dangerousness at issue. We therefore agree with the district court's denial of Black's claim that he had a due process right to have the trial court answer the jury's questions regarding his parole eligibility and the length of his sentence.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the district court's denial of Black's habeas petition regarding his non
Ratkins claims, VACATE the court's judgment regarding the denial of Black's petition concerning his **Atkins** claim, and **REMAND** the case for further proceedings consistent with this opinion.

*107 BOGGS, Circuit Judge, dissenting.

In Coleman v. State, 341 S.W.3d 221 (Tenn.2011)—decided after oral argument in this case—the Tennessee Supreme Court construed a Tennessee statute prohibiting the execution of mentally retarded defendants under Tennessee law. The panel remands Black's case to the district court in light of Coleman, reasoning that Coleman "elucidates Tennessee's interpretation of Atkins's legal standard." See Maj. Op. at p. 92. A thorough reading of Coleman reveals no such elucidation. Coleman is purely a construction

of a state statute that makes only fleeting references to *Atkins*. For this reason, I cannot join the panel, and respectfully dissent.

A

There are three major flaws with the panel's opinion.

First, the panel contends that it is appropriate to "look to state law that has been issued after the defendant's state conviction has become final in order to determine how Atkins applies to the specific case at hand." This position, while correct in the abstract, is not supported by the two precedents cited. In Hill v. Anderson, this court remanded Hill's Atkins habeas claim to the Ohio state courts—in which Hill had not yet exhausted his "retardation claim"—to allow the courts to "develop [their] own procedures for determining whether a particular claimant is retarded and ineligible for death." 300 F.3d 679, 682 (6th Cir.2002). Hill, decided in the uncertain aftermath of Atkins, has no bearing on this case. Black has had ample opportunity to exhaust and has exhausted his Atkins claim in state courts, and in federal courts. To the extent that Coleman has any bearing on Black's case, the appropriate forum to relitigate such a claim is in state court, not on remand to a federal district court.

The other case cited, Wiley v. Epps, is readily distinguishable, in light of the Fifth Circuit's finding that AEDPA deference was unwarranted where the "case was intertwined with the alleged due process violation by the state court's failure to conduct a hearing." 625 F.3d 199, 208 (5th Cir.2010). "Wiley was convicted before Atkins was decided" and on collateral review was not offered an evidentiary hearing to develop his claim of mental retardation. *Ibid.* As such, a remand was appropriate to afford Wiley an opportunity to state his *Atkins* claim. at 213 ("[I]t was an unreasonable application of clearly established federal law for the Mississippi Supreme Court to deny Wiley's Atkins claim without a hearing, and the district court correctly concluded that it was not bound to afford the state court's decision deference."). In contrast, as the majority notes, the state trial court "held an evidentiary hearing, but ultimately determined that Black [was] not mentally retarded under the *Atkins* standard." *See* Maj. Op. at p. 86. Black has had numerous opportunities to argue his *Atkins* claim, and the state court's determination is entitled to deference. *Coleman*, a creature of state law, does nothing to implicate his *Atkins* claim.

В

Second, the state law in question, enacted in 1990, has nothing to do with Atkins and its resulting jurisprudence, other than the fact that it relates to the execution of mentally retarded individuals. Tenn.Code Ann. § 39–13–203(a) prohibits the execution of an individual with an "intellectual disability" specifically defined as "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below." The Tennessee Supreme Court announced in Van Tran v. State that the *108 execution of mentally retarded individuals also violated the Tennessee Constitution. 66 S.W.3d 790, 812 (Tenn.2001). Noteworthy for our purposes, Van Tran was decided seven months before the Supreme Court's opinion in Atkins v. Virginia, but after certiorari was granted. Id. at 800. The Coleman opinion itself discusses Atkins only in the background section. The Tennessee Supreme Court's analysis in Coleman which contains only fleeting references to journal articles about Atkins—focuses on "construing [the state] statute," Coleman, at 241. Coleman offers no "elucidation" of Atkins.

 \mathbf{C}

Third, and perhaps most importantly, even assuming that *Coleman* explicated *Atkins*, such analysis would be of no moment for purposes of AEDPA. Although "*Atkins* reserved for the states the task of developing appropriate ways to enforce the constitutional restriction," In re Bowling, 422 F.3d 434, 436–37 (6th Cir.2005), the majority is incorrect in reasoning that *Coleman* "enforce[s] the constitutional restriction." The Tennessee Supreme Court in *Van*

Tran went out of its way to stress that its opinion issued seven months before Atkins—was grounded on state, and not federal constitutional law. 66 S.W.3d at 801 ("Accordingly, although we will refer to relevant analysis under the Eighth Amendment, all of our opinions and conclusions with respect to the execution of mentally retarded individuals —an issue of first impression for this Court—are separately and independently based upon article I, § 16 of the Tennessee Constitution."). Indeed, even if the Tennessee Supreme Court did rely on an interpretation of Atkins, it could not alter or elucidate the relevant AEDPA inquiry-which is what was "clearly established federal law" as of 2006, when the "TCCA affirmed" the state trial court's decision that "Black is not mentally retarded under the Atkins standard." See Maj. Op. at p. 86.

The majority's remand cannot be reconciled with this court's limited role under AEDPA to grant relief only for an "unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphasis added). See Bobby v. Dixon, — U.S. —, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011) (per curiam). Coleman decided how a Tennessee state statute should apply to a Tennessee state court opinion decided under the Tennessee state Constitution. This case was not decided based on the Federal Constitution, and does not implicate Black's federal habeas challenge. AEDPA forecloses consideration of this state court precedent as a ground for relief.

* * *

I find no possibility that a federal court's consideration of *Coleman* could afford Black any remedy. Remand is unnecessary, inappropriate, and flatly contrary to federal law. Just as Coleman did, Black can seek relief under this new precedent in Tennessee state courts "in the form of a motion to re-open his prior post-conviction petition." *Coleman*, 341 S.W.3d at 226.

Because Black's remedy does not lie in the federal courts, I respectfully dissent.

All Citations

664 F.3d 81

Footnotes

* Judge Boggs would grant the petition for rehearing.

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Court of Criminal Appeals of Tennessee, at Nashville.

Byron Lewis BLACK v. STATE of Tennessee.

No. M2004–01345–CCA–R3–PD.

| July 19, 2005 Session.
| Oct. 19, 2005.

Application for Permission to Appeal Denied by Supreme Court Feb. 21, 2006.

Appeal from the Criminal Court for Davidson County, No. 88–S–1479; Walter J. Kurtz, Judge.

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JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

OPINION

JOHN EVERETT WILLIAMS, J.

*1 This appeal is before us following the reopening of Petitioner's post-conviction petition for the limited purpose of determining whether Petitioner is mentally retarded and thus ineligible for the death penalty pursuant to our supreme court's decision in Van Tran v. State, 66 S.W.3d 790 (Tenn.2001) and the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The post-conviction court ultimately determined that Petitioner had failed to prove that he was mentally retarded and that the weight of the proof was that he was not mentally retarded. Accordingly, the court denied Petitioner's request for a new trial and denied and dismissed the petition for post-conviction relief. In this appeal as of right, this court must determine the following issues: (1) whether Petitioner proved by a preponderance of the evidence that he is mentally retarded; (2) whether Tennessee Code Annotated section 39-13-203, as interpreted by the supreme court in Howell v. State, 151 S.W.3d 450 (Tenn.2004), is constitutional in light of the principles outlined in Atkins v. Virginia; and (3) whether the absence of mental retardation is an element of capital murder requiring the State to bear the burden of proof and requiring submission of the issue to a jury. After review of the record and the applicable law, we find no errors of law requiring reversal. Accordingly, we affirm the post-conviction court's denial of postconviction relief.

Byron Lewis Black was convicted in 1989 of three counts of first degree murder for the shooting deaths of his girlfriend, Angela Clay, and her two daughters, Latoya and Lakeisha Clay. A jury sentenced Petitioner to death for the murder of Lakeisha Clay and to two life sentences for the murders of Angela and Latoya Clay. Petitioner was also convicted of one count of burglary, for which he received a fifteen-year sentence. The Tennessee Supreme Court affirmed Petitioner's convictions and sentences on direct appeal.

See State v. Black, 815 S.W.2d 166 (Tenn.1991).

Petitioner subsequently filed a petition for post-conviction relief, which was denied by the trial court and affirmed by this court on appeal. *See Byron Lewis Black v. State,* No. 01C01–9709–CR–00422, 1999 Tenn.Crim.App. LEXIS 324, 1999 WL 195299 (Tenn.Crim.App., at Nashville, Apr. 8, 1999).

The Tennessee Supreme Court denied Petitioner's application for permission to appeal this court's judgment, and the United States Supreme Court denied Petitioner's writ of certiorari. *See Black v. Tennessee*, 528 U.S. 1192, 120 S.Ct. 1249, 146 L.Ed.2d 106 (2000).

Subsequently, Petitioner filed a petition for writ of habeas corpus in the United States District Court, which was dismissed by the grant of summary judgment on December 11, 2001. *Black v. Bell*, 181 F.Supp. 832 (M.D.Tenn.2001). Thereafter, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, and the Sixth Circuit Court of Appeals is currently holding its appeal in abeyance pending the disposition of this action.

*2 On December 4, 2001, the Tennessee Supreme Court released its opinion in Van Tran v. State, 66 S.W.3d 790 (Tenn.2001). This opinion held as a matter of first impression that the execution of a mentally retarded person violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. The Van Tran Court further held that retroactive application of this new rule of law was warranted for cases on collateral review. Approximately six months later, on June 20, 2002, the United States Supreme Court held in

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that execution of mentally retarded persons was cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. In response to these two court opinions, Petitioner filed a motion to reopen his post-conviction petition on November 13, 2002, alleging that he was mentally retarded and thus ineligible for the sentence of death. The post-conviction court entered a preliminary order and found that Petitioner had made a sufficient showing for his petition to be reopened and held an evidentiary hearing.

Post-Conviction Proceedings

During the post-conviction proceedings, Petitioner presented the testimony of four lay witnesses, three expert witnesses, the affidavit of an additional expert witness, and numerous exhibits. The State presented the testimony of two expert witnesses. Petitioner's experts all found that Petitioner met the criteria to be diagnosed as mentally retarded. The State's experts found that Petitioner did not meet the criteria to be diagnosed as mentally retarded.

The lay witnesses presented by Petitioner testified as to various aspects of Petitioner's social and educational history. Mary Smithson-Craighead first testified on behalf of Petitioner. Ms. Smithson-Craighead had been the coordinator of the Nashville Education Improvement Project (NEIP) while Petitioner attended elementary school at Carter-Lawrence Elementary School. Ms. Smithson-Craighead testified that the particular elementary school that Petitioner attended had received funding from the NEIP because an assessment by Metro Nashville Schools had determined that the students at Carter-Lawrence were not at grade level. Ms. Smithson-Craighead further testified that at the time Petitioner attended elementary school, the schools in Nashville were segregated and the school Petitioner attended was made up of minority students who were financially disadvantaged.

Smithson-Craighead testified as to the administration of achievement tests and intelligence quotient ("I.Q.") tests during her tenure at Carter-Lawrence. She explained that the achievement tests were given in a group setting and were administered by the teachers. I.Q. tests, however, were administered individually by someone from the district office. Ms. Smithson-Craighead testified that for the most part the standardized tests were given exactly by direction, but there had been an occasion where a teacher may have assisted a student on an exam. It was Ms. Smithson-Craighead's opinion that teachers can recognize students who are mentally retarded but that some students do slip through the cracks. She maintained, however, that teachers were sensitive to the possibility that a student might be mentally retarded. During her tenure at Carter-Lawrence, she had four students who were tested, removed from the school, and placed in another school in a classroom designated for the mentally retarded. Although Ms. Smithson-Craighead was the kindergarten through third grade NEIP coordinator at Carter-Lawrence while Petitioner attended school there, she never taught Petitioner.

*3 Petitioner's sister, Melba Corley, testified that during Petitioner's childhood, their family lived in South Nashville in an asbestos-shingle siding home. She testified that during his childhood, Petitioner enjoyed playing outside and would at times get so dirty in the iron rust outside their home that he required two baths a day. She explained that Petitioner also adored their grandfather, who was the only other male in the home. She and her three sisters helped their mother and grandmother with the chores around the house, but Petitioner only had to help bring in the wood and coal from outside and keep his area of the room they slept in upstairs clean. Ms. Corley testified that she never considered her brother to be mentally retarded when they were growing up nor did anyone in her family ever discuss the possibility in her presence. She explained that he did require help with his homework and did not seem to enjoy reading like she did. He was able to keep himself clean and dress himself. She further testified that he had pride in himself. She related that she and her siblings received a yearly check-up by a doctor. Petitioner traveled with her and her husband to Colorado and California at different times. On those trips, Petitioner would help with the driving, but he was not very helpful with reading the maps. She did admit that her mother smoked and drank alcohol during pregnancy. She did not, however, testify as to the amount her mother drank while she was pregnant with Petitioner. Further, Ms. Corley could not recall Petitioner having an injury that would have caused brain damage.

Al Dennis, Petitioner's high school football coach, testified that he had coached Petitioner at Hume Fogg High School from 1972 through 1974. He explained that at the time Petitioner attended this school, it was a vocational school. Mr. Dennis testified that Petitioner was an outstanding defensive player. In fact, his senior year, he was third in tackles and assists on the team. Mr. Dennis also testified that during Petitioner's senior year, the team won the Division A, Class A state championship title. Although Petitioner was an outstanding defensive player, he was not a good offensive player. Coach Dennis explained that he ran a complicated offense on the team, and Petitioner simply could not learn or remember the plays. As a result, he would make mistakes. Therefore, he could only play on offense when the team had a significant lead. Coach Dennis testified that based on Petitioner's inability to remember and understand the plays, it was his belief that Petitioner had a lower intelligence. He also distinctly remembered that Petitioner smiled all the time, even when it was inappropriate to do so. Coach Dennis stated that even when Petitioner was being criticized, he would smile. According to the coach, Petitioner got along well with his teammates and was respectful of the coaches. He did not remember any problems Petitioner had at school that were brought to his attention by any of the teachers.

*4 Richard Corley became acquainted with Petitioner when Petitioner's sister, Melba, married his brother. Mr. Corley worked at the insurance company Caroon and Black and assisted Petitioner in acquiring a job there. It was his belief that Petitioner worked at Caroon and Black from approximately 1974 until 1989. Mr. Corley testified that Petitioner basically served as a courier. Petitioner would make runs in a company van to the warehouse and bank and ordered supplies. When he went to the bank, he would deliver deposits, but he was not required to complete the deposit slips. He described Petitioner's job as simple and routine. When Petitioner was out, he and other employees could step in and do the job. Mr. Corley testified that he never considered that Petitioner was mentally retarded when he recommended him for the position at Caroon and Black. Mr. Corley further testified that Petitioner got along well with the other employees, was well-liked by the other employees, and seemed to be a good employee.

Dr. Albert Globus testified as an expert in psychiatry and neurology on behalf of Petitioner. Dr. Globus evaluated Petitioner in 2001 and again immediately preceding the post-conviction hearing. Dr. Globus concluded that Petitioner has a damaged brain. He explained that Petitioner had very serious abnormalities in his mental status examination. Specifically, Petitioner has a lack of cognitive ability and poor recent memory. Dr. Globus explained that Petitioner is very slow in his thinking and has a disconnect between what he is talking about and his mood, which always seems euphoric. Dr. Globus opined that Petitioner's poor short-term memory very likely places him in the mildly mentally retarded range.

Dr. Globus opined that there were several factors in Petitioner's early life that would cause some sort of mental ratio of delays in life and would result in mild or severe mental retardation in many people. Specifically, Dr. Globus identified the drinking of alcohol by Petitioner's mother during pregnancy as the most important factor. Dr. Globus also identified several other potential etiological factors including playing of football, possible lead poisoning, and possible inadequate care at home. Dr. Globus testified that the playing of football is known to produce minor brain damage in people who "tackle with their heads." Petitioner reported to Dr. Globus that he had been hurt on several occasions in this fashion. Dr. Globus further explained that white paint had been made with a lead compound until it was outlawed because of its effects on development and the blood. Petitioner's sister had testified that there was white paint in Petitioner's childhood home and on the family crib, which had teeth marks on it. Dr. Globus testified that Petitioner had developed anemia during his first year or two of life, which could have been a result of lead exposure or poor nutrition or both.

Dr. Globus testified that brain imaging confirmed that Petitioner has brain damage. Dr. Globus had determined prior to the brain imaging that Petitioner's brain abnormalities exist in the frontal and temporal lobes. Dr. Globus testified that the brain imaging conducted by Dr. Robert Kessler confirmed such. Dr. Globus also testified that data gathered from Dr. Ruben Gur's assessment revealed that areas of Petitioner's brain are hypometabolic, which means that they process glucose at a rate below normal. Hypometabolism may indicate a site of a tumor, an epileptic fossa, a degeneration secondary to senile dementia or mental retardation. Dr. Globus also reviewed the findings of Dr. Daniel Grant and concluded that the psychological results are consistent with the other results. Finally, Dr. Globus concluded that Petitioner's mental retardation began before he was eighteen years old.

*5 On cross-examination, Dr. Globus explained that he was initially hired by the federal public defender's office to determine if the state court had erred in finding Petitioner competent to stand trial. Dr. Globus admitted that although he has opined that one of the etiological factors in determining that Petitioner is mentally retarded is that he received brain damage from playing football, Petitioner was

never evaluated by a medical professional because of a head injury received while playing football. Dr. Globus explained that many professional football players have cumulative minor injuries to the brain, which is probably also true of high school players. Dr. Globus also admitted that the etiological cause of mental retardation cannot be determined with certainty. Furthermore, it cannot be determined with certainty that the ingestion of alcohol during pregnancy will cause mental retardation.

Dr. Daniel Grant testified on behalf of Petitioner as an expert in neuropsychology and forensic psychology. In making his assessment, Dr. Grant interviewed Petitioner on two occasions, for a total of twelve to fourteen hours. During his testing of Petitioner, he saw no evidence of malingering, although he did not specifically test for it. Dr. Grant explained that he administered a battery of tests, which would in effect rule out malingering because it's difficult to perform poorly on the same concept areas on various tests. Dr. Grant testified that there are two major measures of adult intelligence: the Wechsler Adult Intelligence Scale-Third edition ("WAIS-III") and the Stanford-Binet Intelligence Test. In drawing his conclusion that Petitioner is mildly mentally retarded, he conducted a series of tests and applied the independent living scale.

Dr. Grant testified that when psychological tests are used to meet the criteria to diagnose retardation, the standard error of measurement must be considered. According to Dr. Grant, there is generally a one to five point standard error of measurement with all intelligence tests. Dr. Grant explained that both the American Association of Mental Retardation ("AAMR") and the Diagnostic Statistical Manual for Psychiatry ("DSM") account for a standard error of measurement ("SEM") in intelligence testing. Accordingly, Dr. Grant testified that a person who scored a seventy-one on an I.O. test may actually be classified as mentally retarded, because when adjusted by the SEM, the I.Q. score would fall within a range that extended both below and above seventy. Dr. Grant admitted that Petitioner received I.Q. scores while in school of eighty-three, ninetytwo, and ninety-one, which are all above the range for mental retardation, even when adjusted by the standard error of measurement. Dr. Grant, however, noted that the I.Q. tests given to Petitioner while in school were administered in a group setting, and both the AAMR and the DSM recommend only individually administered tests. Furthermore, Dr. Grant explained that the results could be skewed depending on how they were scored. If the tests were scored by grade level rather than by age, Petitioner's scores would be skewed because he repeated second grade.

*6 Dr. Grant also acknowledged that Petitioner scored a seventy-three on the WAIS intelligence test in 1993 and a seventy-six on the WAIS-R intelligence test in 1997. However, Dr. Grant opined that Petitioner's scores were inflated as the result of the Flynn Effect, which recognizes that people acquire more information and knowledge over time, which in turn requires that the I.O. tests be renormed to reflect the gain of knowledge. Dr. Grant testified that Dr. Flynn, for whom the Flynn Effect is named, has done research that shows that for every three years after norms are collected for an intelligence test, the I.Q. is inflated by one point. Therefore, in nine years, the person should score three points higher on the I.Q. test. Dr. Grant opined that although Petitioner scored a seventy-three on the WAIS in 1993, the test was published in 1980; therefore, Petitioner's corrected I.Q. would be sixty-nine, after adjusting for the four point increase in the population's I.Q. between 1980 and 1993. Furthermore, Petitioner's corrected WAIS-R score would be seventy-one, rather than seventy-six, because according to the Flynn Effect there would be a five-point inflation.

Dr. Grant testified that Petitioner's results from the independent living scale revealed problems with managing money, managing a home, transportation, and health and safety. Dr. Grant further concluded that Petitioner met the criteria for deficits in adaptive behavior as set forth in both the DSM-IV and the AAMR. Dr. Grant testified that Petitioner never lived independently, never cooked, never cleaned the house, never did laundry, never participated in the care of his son, never contributed financially to his family, and never had a bank account. Dr. Grant further noted that even while he was married, he and his wife lived with his family. Dr. Grant found that based on these factors, Petitioner had deficits in adaptive behavior. Dr. Grant explained that Petitioner had support from his family that would enable him to blend into the general population. Although there was testimony that

his family did not see him as retarded, Dr. Grant explained that this is not inconsistent with persons who fall into the mildly mentally retarded range.

Dr. Grant concluded that Petitioner's mental retardation existed prior to age eighteen. As evidence of this conclusion, Dr. Grant pointed to findings from Dr. Globus and Dr. Gur that there are abnormalities in his brain that can best be explained through things that happened to Petitioner early in life. He also highlighted Coach Dennis' testimony that Petitioner had difficulty following plays. He noted that Petitioner repeated the second grade. Petitioner scored in the one percentile on a differential aptitude test administered in the ninth grade. Dr. Grant also pointed to the fact that Petitioner attended a very impoverished school.

The State presented two witnesses at the hearing: expert witnesses Eric Engum, Ph.D., J.D., and Susan Vaught, Ph.D. After extensive cross-examination, Eric Engum was qualified and permitted to testify as an expert in clinical and forensic psychology and neuropsychology. Dr. Engum opined that Petitioner did not meet the criteria to be diagnosed mentally retarded. Dr. Engum admitted initially in his testimony that he did not conduct his own testing of Petitioner. Instead, he relied upon the Petitioner's previous testing. Dr. Engum further explained that he did not conduct additional testing because he believed Petitioner was probably "test-wise" or "test-weary." Dr. Engum further opined that he believed Petitioner has "some sophistication in knowing how to present himself on the tests to make himself look impaired."

*7 As to Petitioner's present I.Q., Dr. Engum testified that he relied upon Dr. Kenneth Anchor's testing who assessed Petitioner near the time of his trial. At the time of the testing conducted by Dr. Anchor, Petitioner scored an overall I.Q. of seventy-six, and Dr. Anchor indicated that he believed that despite the score of seventy-six, he suspected Petitioner actually performed at a much higher level in the community. Dr. Engum further explained that I.Q. tests tend to underestimate the intelligence of minorities. Dr. Engum also noted that Petitioner scored a seventy-six when tested by Pat Jaros, and he scored a seventy-three when tested by Dr. Gillian Blair in October 1993. Based upon his review of the testing of Petitioner, Dr. Engum testified that he could find no evidence that

Petitioner had an I.Q. of seventy or less at the time he committed the crimes at issue.

In addition to determining that Petitioner did not have an I.Q. of seventy or less, Dr. Engum also opined that Petitioner failed to meet the second criterion for mental retardation: deficits in adaptive behavior. Dr. Engum testified that he assessed Petitioner's adaptive behavior according to the legal standard in Tennessee. He testified that it was his understanding that under the Tennessee standard, the issue is whether a person can adapt his behavior to the surrounding circumstances, which is a different standard than that set out in the DSM-IV. The question he believed he must answer was whether the Petitioner could function within his environment in terms of going about and doing the daily activities that everyone else does. Dr. Engum testified that he relied upon the testimony of individuals who testified during the mitigation phase of Petitioner's trial, and those individuals "commented very favorably upon him in terms of his ability to function within the environment." Dr. Engum also testified that during his childhood, Petitioner functioned like a child within his culture and community. Dr. Engum further noted that prior to age eighteen, there was no individualized assessment by school psychologists, no indication of significant problems with juvenile authorities, and no unusual behavioral problems. According to Dr. Engum, there simply were no major deficits in Petitioner's adaptive behavior. Dr. Engum also assessed Petitioner's adult years prior to committing the crimes for which he was convicted, and again he found no deficits in adaptive behavior. Furthermore, Dr. Engum opined that Petitioner did not meet the standard for deficits in adaptive behavior under the Tennessee standard or under the criteria set forth in the DSM-IV. Although Dr. Engum believed that Petitioner suffered from personality problems, delusional problems, or psychological difficulties, those issues are separate and apart from the issue of whether Petitioner was mentally retarded.

On cross-examination, Dr. Engum admitted that Petitioner's grades were certainly not optimal and were highly inconsistent, but he determined that these problems may have resulted from motivational issues rather than mental retardation issues. Dr. Engum also acknowledged that the testing performed by Dr.

Anchor was a screening test and was not as reliable as other testing performed. During cross-examination, Petitioner's counsel also brought out the fact that Dr. Anchor's license was revoked or suspended following Petitioner's trial because he had destroyed documents and test results. Dr. Engum reiterated that none of the experts who assessed Petitioner prior to 2001 made any identification of mental retardation. Petitioner argues on appeal that Dr. Engum's testimony and opinions are completely unreliable and should be given no consideration.

*8 Dr. Susan Vaught also testified on behalf of the State as a clinical psychology and mental retardation expert. Dr. Vaught opined that Petitioner did not meet the criteria to be diagnosed as mentally retarded. As for the first criterion, Dr. Vaught explained that in recent testing Petitioner was "at or right at" criteria. She testified that because Petitioner's life was at stake, she wanted to give him the benefit of any doubt. She then explained that when he was first assessed Petitioner was above criteria, but he fell below criteria as time progressed. It was her opinion that there were a lot of alternative explanations for the decline other than long-standing mental retardation; therefore, she examined his history to determine onset.

Dr. Vaught testified that I.Q. tests have historically been biased against minorities. She explained that, therefore, if you have an African-American who tests in the seventies, the clinician must be very cautious with the interpretation, especially if mental retardation is being considered, because there is a bias in the test. Dr. Vaught also testified that she was aware of the Flynn Effect, but it was not the standard of practice to correct for it, in terms of looking at an I.Q. score. Dr. Vaught explained her concerns about the reliability of the recent I.Q. testing performed on Petitioner. She explained that the thumb print of Petitioner's scores is much more consistent with brain injury or an ongoing organic condition than it is for mental retardation. She went on to explain that with mental retardation, you generally see a global deficit of scores or an "elevator-down phenomenon" rather than some high scores and some very low scores. Dr. Vaught explained that she routinely performs assessments to determine whether a person qualifies for services in the State and that a part of her assessment must be whether the condition occurred prior to age eighteen

and is, therefore, chronic or whether it is a fairly recent problem. Dr. Vaught testified that as for Petitioner, she believed his recent I.Q. scores were a result of a motivational problem or an organic problem. In any event, however, she testified she gave the "benefit of the doubt in [Petitioner's] direction."

Dr. Vaught testified that to determine whether a person has deficits in adaptive functioning, she would first determine whether the person could complete normal tasks of daily living that most people accomplish. Next, the health history and school history must be reviewed. Dr. Vaught explained that it should be determined whether the milestones were met on time. She reviews the school records and programs in the school to determine educational history. She also reviews job history and marital history. As for Petitioner, Dr. Vaught had multiple sources of information, including but not limited to: medical records; school records; a taped interview with the police; testing performed by other clinicians; letters written by Petitioner; prior court testimony; and prison records. Dr. Vaught explained that in assessing deficits in adaptive functioning, she must consider three areas: conceptual, social, and practical.

*9 Language, reading and writing, money concepts, and self-direction are the four basic areas examined to determine if there is a deficit in the conceptual area of adaptive functioning. Dr. Vaught found that Petitioner had age appropriate functioning within the conceptual category. Further, Dr. Vaught found Petitioner's social skills were intact and at or above the level suggested by current measures of intellectual functioning. Although she determined that Petitioner may have had some mental health issues, he did not have social deficits in adaptive functioning. Finally, Dr. Vaught concluded that Petitioner had no practical deficits in his activities of daily living.

Dr. Vaught further opined that there was no onset of mental retardation of Petitioner prior to age eighteen. Dr. Vaught explained that Petitioner's childhood history did not follow the pattern of a person with mild mental retardation who has escaped diagnosis. Dr. Vaught admitted that Petitioner did not excel in school; his grades were low to average. He did, however, test within the normal range on standardized I.Q. and achievement testing in elementary and junior

high school. At one point, the testing may have indicated a learning disability in reading, but later testing showed he had progressed. Standardized testing in the ninth grade showed that he tested "far below age peers," but he continued on in school. Dr. Vaught also explained that during his high school years and in particular his ninth grade year, Petitioner suffered "multiple stressors," including the death of a teacher, football injury, and birth of his first child. In any event, Petitioner graduated with a regular diploma. Dr. Vaught testified that she had "rarely, if ever, seen a person with mild mental retardation make it through high school with no assistance like that, and they've managed to get a regular diploma." Dr. Vaught further pointed out that Petitioner played organized sports, was engaged in age appropriate activities such as dating, faced and managed a fairly high stress level, received his driver's license apparently without any vocational support, and kept employment without vocational support, training, or modifications.

Dr. Vaught candidly admitted that she neither personally interviewed nor tested Petitioner. She explained that she did neither for several reasons. One, she had been given voluminous records to review, and after her review of the records, she did not believe Petitioner met either the second or third criteria for mental retardation. Further, she saw a pattern of the scores on the I.Q. tests descending. She had also reviewed Dr. Jaros' report and believed that some organic results had occurred recently in Petitioner's life, and her findings would be skewed by such. It was also Dr. Vaught's opinion that as a result of the organic problems from which Petitioner was suffering, he would require clinical testing in the near future as a part of his diagnosis and treatment, and it was her belief that if she tested him, it would skew the results for the next clinician. Dr. Vaught further explained that she believed Petitioner had become savvy to the testing.

*10 On cross-examination, Dr. Vaught again reiterated that clinicians are aware of the Flynn Effect but that they do not adjust the scores based on it. Furthermore, she explained that she is very liberal in assessing a person to qualify for services as a result of mental retardation. She stated: "If I could possibly put somebody in for services that they need, I'm going to do it." She then testified that she had cautioned counsel for the State when he approached her for

taking the case that if she could find that Petitioner is mentally retarded and keep him from being executed, she was going to do it. Dr. Vaught further admitted that Petitioner has a relatively impaired brain. Dr. Vaught referenced on several occasions in direct and crossexamination testimony her displeasure with Dr. Grant's comment that mental retardation was a mental illness. Dr. Vaught explained that mental retardation and mental illness are separate issues. Dr. Vaught explained that mental illness is a medical illness that affects a person's ability to think like a normal person from the standpoint of thought formation and mood. Mental retardation, however, is a developmental disability. It is something that a person is born with or acquires in childhood. She stated that mental retardation is a structural problem in the brain or "a very bad roll of the genetic dice." It has nothing, however, to do with mental illness.

Following the post-conviction hearing, the video of Ruben deposition Gur, an expert neuropsychology, was taken and filed as part of the proof in the post-conviction proceedings. Dr. Gur concluded, after conducting an MRI and a PET scan, that Petitioner had brain damage. Dr. Gur testified that Petitioner's brain is damaged in the areas that control aggression and impulses, as well as Petitioner's ability to think about the future. Dr. Gur also testified that Petitioner had enlarged ventricles, which indicated that a lot of brain cells had died in the middle of Petitioner's brain. Dr. Gur explained that ventricular atrophy was a sign of several disorders and happens during gestation. He testified that large ventricles are a cardinal sign of schizophrenia but appear in mental retardation and in various forms of cerebral palsy or atrophy disorders. Dr. Gur testified that due to the scope of damage he found in Petitioner, he was looking for some major brain injury or a period of a coma, but neither of those are borne out in the record. Therefore, he found the most likely causes were fetal alcohol syndrome or a series of minor head injuries. He later admitted on cross-examination that he could not rule out other causes including adult alcohol and drug abuse. However, Dr. Gur testified that the results of Petitioner's PET scan also indicated brain damage resulting from fetal alcohol syndrome.

Dr. Gur explained that people with brain damage have "pockets of excellence" and "pockets of deficit,"

which explains why Petitioner may have performed well on some of the harder questions while missing some of the easier questions. Dr. Gur testified that the part of the brain that needed to be used to answer the easier questions may have been damaged. Accordingly, the fact that Petitioner correctly answered some of the harder questions while missing some of the easier questions is not an indication of malingering. Dr. Gur further testified that he did not test Petitioner for malingering because Petitioner appeared to be putting forth a lot of effort during the testing.

*11 Dr. Gur concluded that Petitioner is mentally retarded. He estimated that Petitioner has an I.Q. of sixty. He also opined that Petitioner's test results indicated he had deficits in adaptive behavior. Ultimately, Dr. Gur admitted that he could not specify a date certain when Petitioner's brain damage occurred. However, Dr. Gur testified that to a reasonable degree of medical certainty, Petitioner has serious brain damage and is mentally retarded.

Patti van Eys, a clinical psychologist at Vanderbilt University, submitted an affidavit regarding her evaluation of Petitioner. Dr. van Eys found Petitioner's I.Q. to be sixty-nine, based on the WAIS–II intelligence test. Dr. van Eys stated that she did not believe Petitioner was malingering. She also criticized the State's experts for failing to personally interview Petitioner in their assessments.

Analysis

In this appeal, we must determine whether the trial court erred in finding that Petitioner was not mentally retarded and thus eligible for the death penalty. In 1990, the Tennessee Legislature enacted Tennessee Code Annotated section 39–13–203, which prohibited the execution of mentally retarded persons. In so doing, the legislature set forth the criteria for determining whether a person is mentally retarded and the burden of proof to be applied. *See* Tenn.Code Ann. § 39–13–203(a) and (c). This statute, however, had an effective date of July 1, 1990, and did not address its effect on defendants previously sentenced to death. In 2001, in response to a motion to reopen a post-conviction petition filed by a defendant sentenced to death prior to the effective date of Tennessee Code Annotated

section 39-13-203, the supreme court determined that the statute does not have retroactive application. Van Tran v. State, 66 S.W.3d 790, 798 (Tenn.2001). However, the Van Tran Court determined that pursuant to Article I, Section 16 of the Tennessee Constitution, it was constitutionally impermissible to execute a mentally retarded person. Van Tran, 66 S.W.3d at 800. Further, the Van Tran Court held that this newly recognized constitutional right warranted retroactive application to cases on collateral review. Id. at 811. Approximately six months after the Van Tran decision, the United States Supreme Court released an opinion holding that executing a mentally retarded person violates the United States Constitution. Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Since releasing the *Van Tran* decision, our supreme court has had another occasion to address the *Van Tran* holding and its applicability. *See Howell v. State*, 151 S.W.3d 450 (Tenn.2004). In *Howell*, the supreme court elaborated on the appropriate criteria to be applied in determining whether a petitioner is mentally retarded, set forth the standards to be applied by the post-conviction court, set forth the appropriate burdens of proof, and determined that a petitioner is not entitled to have a jury determine whether he is mentally retarded. *Howell*, 151 S.W.3d at 457–58, 463–65. Accordingly, both the *Van Tran* and *Howell* decisions will be of paramount importance in our determination of whether the post-conviction court erred.

*12 In this appeal, Petitioner asserts that the trial court erred in determining that the evidence failed to prove that he satisfied the criteria to be deemed mentally retarded. Petitioner further asserts that Tennessee Code Annotated section 39–13–203 is unconstitutional as interpreted by the supreme court in *Howell v. State*. As a final argument on appeal, Petitioner contends that the supreme court erred in its holdings in *Howell*, that the petitioner bears the burden of proof, and that the determination of mental retardation is to be made by the court rather than a jury.

Standard of Review

The question of whether a defendant is mentally retarded and thus ineligible for the death penalty is a mixed question of law and fact. Accordingly, in this post-conviction appeal, we must review the post-conviction court's findings of fact de novo, with a presumption of correctness that is to be overcome only when the preponderance of the evidence is contrary to the court's findings. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn.2001). However, in reviewing the application of law to the facts, we must conduct a purely de novo review. *Id.* at 457. Thus, no presumption of correctness attaches to the post-conviction court's conclusions of law. *Id.* Bearing this in mind, we will first address the issue of whether Petitioner is mentally retarded and thus eligible for the death penalty.

Petitioner's Eligibility for the Death Penalty

As set forth supra, in determining whether Petitioner is mentally retarded and thus ineligible for the death penalty, this court must follow the holdings of our supreme court in *Van Tran* and *Howell*. Moreover, although Petitioner was tried and sentenced prior to the enactment of Tennessee Code Annotated section 39–13–203, this court must apply the criteria set forth in that statute in making our determination. *See Van Tran*, 66 S.W.2d at 812, which held that although Tennessee Code Annotated section 39–13–203 did not have retroactive application, the applicable criteria to be used by a court in making a determination of mental retardation are those set forth in the statute.

Tennessee Code Annotated section 39–13–203 sets forth the definition of mental retardation as follows:

- (1) Significantly sub-average general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
- (2) Deficits in adaptive behavior; and
- (3) The mental retardation must have been manifested during the developmental period or by eighteen (18) years of age.

Tenn.Code Ann. § 39–13–203(a) (2003). This definition sets forth a three-prong test, and all three of the prongs must be satisfied to establish mental retardation. Moreover, our supreme court clarified in

Howell that the demarcation of an I.Q. score of seventy in the statute is a "bright-line cutoff" and must be met.

Howell, 151 S.W.3d at 456, 458–59. "[T]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded." Id. at 456.

*13 During the post-conviction proceedings, Petitioner presented the testimony of four lay witnesses, three expert witnesses, the affidavit of an additional expert witness, and numerous exhibits. The State presented the testimony of two expert witnesses. Petitioner's experts found that Petitioner met the criteria to be diagnosed as mentally retarded. Conversely, the State's experts found that Petitioner did not meet the criteria to be diagnosed as mentally retarded. In determining whether Petitioner meets the criteria to be deemed mentally retarded under Tennessee Code Annotated section 39–13–203, it will be necessary for the court to apply the criteria to the evidence presented.

Significantly Sub-average General Intellectual Functioning As Evidenced By A Functional Intelligence Quotient (I.Q.) of Seventy (70) or Below

The evidence in this record shows that Petitioner's intelligence has been tested no fewer than nine times. Petitioner's education records show that he was tested five times during his school years. However, the proof demonstrated that it was possible that one of the scores may have been placed on his record in error. Accordingly, the trial court did not rely upon that test in making its determination and neither will this court. In any event, while in the second grade in 1963, Petitioner scored eighty-three on the Lorge Thorndyke intelligence test. In 1964, Petitioner scored ninety-seven on an intelligence test. In 1967, Petitioner scored ninety-one on the Otis Beta intelligence test, and in 1969, Petitioner scored eighty-three on the Lorge Thorndyke intelligence test.

Petitioner's intelligence was next tested after his arrest for the murders of Angela Clay and her two daughters. Dr. Kenneth Anchor and Pat Jaros were hired by Petitioner's defense team in preparation for trial. Dr. Anchor and Pat Jaros determined that Petitioner had an I.Q. of seventy-six in 1988. Dr. Anchor determined that despite Petitioner's I.Q. of seventy-six, he suspected that Petitioner would perform at a much higher level in the community. Pat Jaros, a psychological examiner, testified at trial that Petitioner's I.Q. score of seventysix was "just about right." Neither of Petitioner's experts found him to be mentally retarded. In 1993, Dr. Gillian Blair tested Petitioner's I.Q., and she found it to be seventy-three. During the post-conviction process, Dr. Pamela Auble also tested Petitioner. She determined his full-scale I.Q. was seventy-six. Dr. Auble found that Petitioner had neurological impairment, but she made no finding of mental retardation.

In 2001, Petitioner scored below seventy for the first time on an intelligence quotient test. Petitioner was tested by Dr. Patti van Eys, Ph.D., on the Wechsler Adult Intelligence Scale-Third edition ("WAIS-III"). On the WAIS-III, Petitioner scored sixty-nine. Dr. van Eys noted in her report that Petitioner's adult assessment results are consistently lower that his I.Q. estimates in childhood. She found this resulted from either later acute brain damage or a slower deteriorating process such as dementia or mental illness. She also noted that there was nothing in the records to substantiate acute brain damage. In 2001, Dr. Daniel Grant also evaluated Petitioner. Dr. Grant's testing showed that Petitioner scored fifty-seven on the Stanford-Binet Fourth edition test and sixty-four on the Comprehensive Test of Non-Verbal Intelligence ("CTONI").

*14 Based on the above testing, Petitioner's experts at the reopened post-conviction proceedings determined that Petitioner had subaverage general intellectual functioning as evidenced by an I.Q. score of seventy or less. The experts based their conclusions on Petitioner's recent I.Q. scores. Petitioner's experts, Dr. Grant specifically, also concluded that Petitioner's previous adult I.Q. scores fell within the mentally retarded range, seventy or below, when adjusted by the standard error of measurement and the Flynn Effect. Dr. Grant explained that according to the Flynn Effect, people acquire more information and knowledge over time, which in turn requires that the I.Q. tests be renormed to reflect the gain of knowledge. According

to Dr. Grant, the previous tests given to Petitioner during his adulthood had not been renormed in years, which caused Petitioner's I.Q. score to be inflated. Dr. Grant also opined that the tests given to Petitioner during his childhood were not reliable measures of his I.Q. because they were administered in a group setting, and both the AAMR and the DSM recommend only individually administered tests to measure I.Q.

Neither of the State's expert witnesses administered their own I.Q. tests of Petitioner. Instead, they relied upon the previous testing. Eric Engum, one of the State's experts, testified that Petitioner failed to meet the first criteria for mental retardation because his I.Q. was not seventy or below. In reaching this conclusion, he relied upon the testing of Petitioner conducted by his experts at trial and the initial post-conviction proceeding. Based upon his review of the testing of Petitioner, Dr. Engum testified that he could find no evidence that Petitioner had an I.Q. of seventy or less at the time he committed the crimes at issue.

Dr. Susan Vaught, also a State expert, testified that Petitioner was "at or right at" criteria in recent testing. She explained that I.Q. tests have historically been biased against minorities. She explained that, therefore, if you have an African–American who tests in the seventies, the clinician must be very cautious with the interpretation, especially if mental retardation is being considered, because there is a bias in the test. Dr. Vaught testified that she was aware of the Flynn Effect, but it was not the standard of practice to correct for it, in terms of looking at an I.Q. score. She, therefore, conceded that Petitioner currently meets the first criterion for mental retardation.

Petitioner's test scores have decreased as he has aged. During his childhood, he tested with scores in the eighties and nineties. Prior to trial and his initial post-conviction proceedings, Petitioner's own experts testified that his I.Q. score was above seventy. Only recently has Petitioner's I.Q. score fallen below seventy. Petitioner's experts testified that his adult scores fell within the mentally retarded range when adjusted by the standard error of measurement and/or the Flynn Effect. However, our supreme court has held that the I.Q. score of seventy in Tennessee Code Annotated section 39–13–203 is a "bright-line cutoff"

and must be met. Howell, 151 S.W.3d at 456,

458–59. As the *Howell* Court stated: "[T]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded." *Id.* at 456.

Deficits in Adaptive Behavior

*15 The second criterion Petitioner must meet to prove mental retardation is that he has deficits in adaptive behavior. The *Van Tran* Court explained the second prong of the test as follows:

The second part of the definition—adaptive functioning—"refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." As discussed, a mentally retarded person will have significant limitations in at least two of the following basic skills: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Influences on adaptive functioning may include the individual's "education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation."

Van Tran, 66 S.W.2d at 795 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual on Mental Disorders*, 39, 40 (4th ed.1994) (citations omitted)). In 1994, our supreme court construed the term deficits in adaptive behavior in its ordinary sense as "the inability of an individual to behave so as to adapt to surrounding circumstances." State v. Smith, 893 S.W.2d 908, 918 (Tenn.1994).

Both the lay witnesses and the experts testified as to how Petitioner adapted to his surrounding circumstances. The lay witnesses testified that Petitioner grew up in a large, close-knit family in a disadvantaged area of Nashville and attended a disadvantaged school. Petitioner repeated the second grade but appears to have functioned in the school

system otherwise. He played football in high school, got along well with the other members of the team, and respected the coaches. None of the witnesses testified that he had any behavior problems in school or at home. After high school, he obtained employment at Caroon and Black Insurance Company where he ordered supplies, drove the company van, took deposits to the bank, ran errands, and worked in shipping and receiving. He was well liked by the other employees. Moreover, Petitioner purchased a car, apparently paid for the car himself, drove independently, and took great pride in keeping the car neat and clean. Petitioner married and had a child. Although Petitioner has always lived with his family, even during his five-year marriage, there was no testimony that he could not live independently. None of the lay witnesses ever considered Petitioner to be mentally retarded.

Dr. Grant tested Petitioner on the independent living scale and found Petitioner had problems with managing money, managing a home, transportation, and health and safety. Dr. Grant further concluded that Petitioner met the criteria for deficits in adaptive behavior as set forth in both the DSM–IV and the AAMR. As support for his conclusion, Dr. Grant pointed to the fact that Petitioner had never lived independently, cooked, cleaned the house, did laundry, participated in the care of his son, contributed financially to his family, or had a bank account. However, there is no proof in the record that Petitioner was unable to do these things.

*16 State expert Eric Engum opined that Petitioner failed to meet the deficits in adaptive behavior criterion. Dr. Engum testified that he assessed Petitioner's adaptive behavior according to the definition set out by the supreme court in Smith. He testified that it was his understanding that under the Tennessee standard as defined by Smith, the issue is whether a person can adapt his behavior to the surrounding circumstances, which is a different standard than that set out in the DSM-IV. The question he believed he must answer was whether the Petitioner could function within his environment in terms of going about and doing the daily activities that everyone else does. Dr. Engum testified that he relied upon the testimony of individuals who testified during the mitigation phase of Petitioner's trial, and those individuals "commented very favorably upon him in terms of his ability to function within the environment." Dr. Engum also testified that during his childhood, Petitioner functioned like a child within his culture and community. Dr. Engum further noted that prior to age eighteen, there was no individualized assessment by school psychologists, no indication of significant problems with juvenile authorities, and no unusual behavioral problems. According to Dr. Engum, there simply were no major deficits in Petitioner's adaptive behavior. Dr. Engum also assessed Petitioner's adult years prior to committing the crimes for which he was convicted and again found no deficits in adaptive behavior. Furthermore, Dr. Engum opined that Petitioner did not meet the standard for deficits in adaptive behavior under the Tennessee standard or under the criteria set forth in the DSM-IV. Although Dr. Engum believed that Petitioner suffered from personality problems, delusional problems, or psychological difficulties, those issues are separate and apart from the issue of whether Petitioner was mentally retarded.

State expert Dr. Susan Vaught testified that she routinely assesses adaptive behavior in individuals to determine if there are deficits. She explained that to determine whether a person has deficits in adaptive functioning, she first determines whether the person can complete normal tasks of daily living that most people accomplish. Next, she reviews the health history and school history. It is important to determine whether the milestones were met on time. She reviews the school records and programs in the school to determine educational history. She also reviews job and marital history. As for Petitioner, Dr. Vaught had multiple sources of information, including but not limited to: medical records; school records; taped interview with the police; testing performed by other clinicians; letters written by Petitioner; prior court testimony; and prison records. Dr. Vaught explained that in assessing deficits in adaptive functioning, she must consider three areas: conceptual, social, and practical.

Language, reading and writing, money concepts, and self-direction are the four basic areas examined to determine if there is a deficit in the conceptual area of adaptive functioning. Dr. Vaught found that Petitioner had age appropriate functioning within the conceptual

category. Further, Dr. Vaught found Petitioner's social skills were intact and at or above the level suggested by current measures of intellectual functioning. Although she determined that Petitioner may have had some mental health issues, he did not have social deficits in adaptive functioning. Finally, Dr. Vaught concluded that Petitioner had no practical deficits in his activities of daily living. As a result, Dr. Vaught concluded that Petitioner did not have deficits in adaptive behavior.

Manifestation of Mental Retardation During the Developmental Period

*17 Finally, to prove mental retardation, Petitioner must prove that his mental retardation manifested prior to age eighteen; in other words, he must show that he had an I.Q. below seventy and had deficits in adaptive behavior by age eighteen. The proof in the record simply does not support such a conclusion.

None of Petitioner's I.Q. scores were below seventy prior to age eighteen. Dr. Vaught noted that Petitioner's I.Q. scores have steadily decreased over the years. She explained that with mental retardation, you generally see a global deficit or suppression of all the scores rather than some high scores and some very low scores. Dr. Vaught explained that she routinely performs assessments to determine whether a person qualifies for services in the State, and a part of her assessment must be whether the condition occurred prior to age eighteen and is, therefore, chronic or whether it is a fairly recent problem. Dr. Vaught testified that as for Petitioner, she believed his recent I.Q. scores were a result of a motivational problem or an organic problem. Dr. Vaught further testified that her findings were consistent with Pat Jaros, Petitioner's own expert, who testified at Petitioner's trial

As the United States Supreme Court has noted:

[M]ental retardation is easier to diagnose than is mental illness. That general proposition should cause little surprise, for mental retardation is a developmental disability that becomes apparent before

adulthood.... By the time the person reaches 18 years of age the documentation and other evidence of the condition have been accumulated for years. Mental illness, on the other hand, may be sudden and may not occur, or at least manifest itself, until adulthood.

Heller v. Doe, 509 U.S. 312, 321–22, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citations omitted).

Although Petitioner's experts maintain that his mental retardation is a result of his mother's drinking of alcohol while she was pregnant, the proof in the record simply does not support that Petitioner's I.Q. was below seventy or that Petitioner had deficits in his adaptive behavior prior to age eighteen. Accordingly, Petitioner cannot meet the third prong of the test for mental retardation. Because Petitioner failed to prove that he is mentally retarded by a preponderance of the evidence, he is not excluded from the sentence of death.

Constitutionality of Tennessee Code Annotated Section 39–13–203

Petitioner argues that the bright line test adopted in *Howell* that rejects an adjustment of an I.Q. score by the standard error of measurement excludes persons who are recognized as mentally retarded in the scientific community. Petitioner further argues that the approach adopted in *Howell* is in conflict with prevailing scientific practices. Petitioner contends that the prevailing scientific norm recognizes that an I.Q. score of seventy represents a range of sixty-two to seventy-eight, which accounts for the standard error of measurement.

Petitioner bases his argument on the Tennessee Supreme Court's 1997 decision that set the standard for evaluating scientific evidence, *McDaniel v. CSX Transportation*, 955 S.W.2d 257, 266 (Tenn.1997). In *McDaniel*, the supreme court held that when determining the admissibility of scientific evidence

under Tennessee Rules of Evidence 702 and 703, a trial court may consider a potential rate of error to determine if the evidence is reliable. *McDaniel* does not require courts to consider a potential rate of error when applying scientific evidence. Instead, *McDaniel* allows courts to consider a potential rate of error in determining whether scientific evidence is reliable and therefore admissible. *Howell* does not affect the admissibility of evidence. Indeed, evidence was presented by Petitioner's experts in this case as to the standard error of measurement.

*18 The United States Supreme Court in *Atkins* left it to the states to develop an appropriate way to enforce the constitutional prohibition of executing mentally retarded persons. *Atkins*, 536 U.S. at 321. The Tennessee Legislature developed such a procedure in Tennessee Code Annotated section 39–13–203. *Atkins* did not require states to adopt a procedure that defined mental retardation using a standard error of measurement.

This issue is without merit.

End of Document

Submission of Issue of Mental Retardation to a Jury and Burden of Proof

Finally, Petitioner contends that he has a fundamental right to life and that because the question of eligibility for the death penalty is a substantive element of capital murder, the state must bear the burden of proving that he is not mentally retarded and the issue must be submitted to a jury. Petitioner acknowledges that the Tennessee Supreme Court has rejected this argument but makes the argument in order to preserve it for later review. See State v. Edwin Gomez, 163

later review. See State v. Edwin Gomez, 163 S.W.3d 632 (Tenn.2005) ("Indeed, a defendant is never precluded from raising an issue simply because a prior decision has rejected it."). Petitioner is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the order of the post-conviction court denying post-conviction relief.

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Susan R. Vaught, Ph.D.

February 28, 2022

Kelley Henry Supervisory APPD, Capital Habeas Unit 810 Broadway Suite 200 Nashville, TN 37203

Re: Byron Black, Intellectual Disability Determination

REASON FOR OPINION

I was retained by attorney Kelley Henry, accompanied by Coordinating Investigator Ben Leonard, from the Office of the Federal Public Defender in Nashville, to reconsider my May, 2003 opinion on the question of intellectual disability for Byron Black. Specifically, Ms. Henry asked me to review additional documentation now available in this case, and to consider changes in Tennessee law, standards of care, and diagnostic criteria that have occurred since I rendered the original opinion. As was the case in 2003, I have completed this task exclusively by review of records, and have not, at any time, personally evaluated Mr. Black. Now, as in 2003, I will not be offering a diagnosis, but instead commenting on whether or not there is sufficient evidence to suggest that Mr. Black's functioning meets the three prongs necessary to consider a diagnosis of intellectual disability.

QUALIFICATIONS

I obtained my Bachelor of Arts Degree in Psychology and English from the University of Mississippi (1985). While working my way through undergraduate school, my primary job was as a direct care staff member for North Mississippi Retardation Center, now renamed North Mississippi Regional Center. Following undergraduate school, I obtained my Master's Degree in Clinical Psychology and Intellectual and Developmental Disabilities Research (then called Mental Retardation Research) in 1989, and my Doctoral Degree in Clinical Psychology and Intellectual and Developmental Disabilities Research (then called Mental Retardation Research) from Vanderbilt University in 1991. To fund my graduate studies, I was awarded a Kennedy Center Traineeship in Intellectual and Developmental Disabilities (then called Mental Retardation).

I pursued my clinical internship at Temple University Health Sciences Center in Philadelphia, PA, where I split my time between Clinical Psychology and Neuropsychology (1991). On internship, my training in

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intellectual and developmental disabilities often came to bear, and I frequently assessed clients who were both mentally ill and developmentally disabled. I then pursued a fellowship In Clinical Neuropsychology, also at Temple (1992). Once more, I frequently assessed persons with developmental disability. I worked as a behavioral specialist for persons with developmental disability, contracted with the State of Pennsylvania 8 hours a week for nine months during this two year period, and worked 15 hours per week as-a unit psychologist for a private Intellectual and Developmental Disabilities program for seven months.

Following fellowship, I maintained a clinical practice as well as a specialty practice in neuropsychology in Tennessee (1993-2008). As a part of that specialty practice, I saw difficult to manage patients for the State of Tennessee. I assumed my current position at Western State Hospital in Kentucky in 2008. Currently, I am Director of Psychology and Director of Western Kentucky Psychology Internship Consortium. During the last 13-14 years, I have continued to assess, consult, and contract to see individuals with intellectual and developmental disabilities. I would estimate I have performed over 3000 assessments of such individuals since licensure in 1991-1992, in addition to consulting with programs who serve people with intellectual and developmental disabilities, speaking at conferences, and providing local and state level trainings in this area.

I am licensed in Kentucky and Tennessee, and in the course of my current position, I routinely testify in the State of Kentucky on matters of civil and criminal competence, with many of those cases involving persons with intellectual or developmental disabilities.

RECORDS REVIEWED

At the request of the above-noted attorney, I have reviewed the following documents:

12/13/2021	Supplemental Report (Daniel A. Martell, Ph.D., A.B.P.P.)
06/04/2021	Motion to Declare Petitioner Intellectually Disabled Pursuant to Tennessee Code Annotated §39-13-203
08/25/2020	Psychological Report (Daniel A. Martell, Ph.D., A.B.P.P.)
07/20/2019	Revised Declaration of Stephen Greenspan, Ph.D.
03/15/2008	Declaration of Melba Black Corley
03/13/2008	Declaration of Stephen Greenspan, Ph.D.
03/08/2008	Declaration of Marc J. Tassé, Ph.D., FAAIDD
03/15/2008	Declaration of Rossi Turner
11/15/2001	Declaration of Ruben Gur, Ph.D.
11/04/2001	Declaration of Ross Alderman, Esq.

Of particular note, all but two of these documents were completed five or more years after my initial review of records for Mr. Black. Additionally, scientific knowledge, clinical practice and diagnostic standards based on that science, and terminology related to developmental and intellectual disabilities

have evolved considerably in the nearly two decades since I last reviewed this case, which does have bearing on the opinion I will offer.

Using the above-referenced data, I considered the criteria necessary for diagnosis of intellectual disability, according to Tennessee's most recent 2021 iteration of § 39-13-203.

I. SIGNIFICANTLY SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING.

This aspect of the diagnosis of intellectual disability has undergone transformative change across methods of scientific consideration, clinical practice, and diagnostic criteria since 2003. Clinical studies, standard of practice, and now Tennessee state law reject the use of "bright-line" standards. It has always been established clinical practice to consider standard error of measurement, and this standard of practice has now been codified in Tennessee. Additionally, the numerical criteria have been removed from both the DSM-5 definition of intellectual disability and legal requirements for the use of the diagnosis in the State of Tennessee. DSM-5-TR, due to be released March 18, 2022, continues this practice. Taken as a whole, these changes in standard of practice and diagnosis give considerable flexibility in the clinical interpretation of IQ scores from individually-administered tests, and arbitrary "cut-offs" no longer apply.

As noted in Dr. Greenspan's revised 2019 declaration, he reviewed measures of intellectual capacity completed on Mr. Black in 1993, 1997, and 2001 (March, and November x 2), across a span of 8 years, reporting, "All of the full-scale IQ tests cluster around or below an IQ of 69." He accurately noted that the lower score of 57 on the Stanford-Binet is not an outlier, but consistent with the fact that this measure routinely produces lower scores than the Wechsler series. To this we can add Dr. Martell's 2020 findings, where Mr. Black again achieved a full-scale IQ of 67 on the WAIS-IV, with no subtest scatter. Dr. Martell also conducted a robust evaluation for malingering, and noted that results indicated that Mr. Black appeared to be putting forth his best effort, and that results could be considered to be a valid estimate of Mr. Black's intellectual and cognitive functioning. Additionally, using the multiple consistent and unchanging data points now available and spanning 19 or more years of measurement, progressive cognitive decline can be ruled out as alternative explanations for test findings.

My clinical opinion in 2022, as in 2003, is that Mr. Black has consistently tested in the Mild Range of Intellectual Disability as an adult, and continues to do so. I believe that he meets this criteria for the diagnosis of intellectual disability, and that the findings of practitioners who have directly assessed his intelligence should continue to be given considerable weight. Further, using current standards of science and practice, as well as historical standards of science and practice, if there are previous assessments in which clinicians did not appropriately consider standard error of measurement in interpretation of testing results, these should not be given weight.

II. DEFICITS IN ADAPTIVE BEHAVIOR

Just as with intellectual capacity, a diagnosis of intellectual disability no longer relies on a specific cut-off score with respect to formal measurement of adaptive capacity. Additionally, since my 2003 report, Mr. Black's adaptive capacity has been formally measured at different points in time, and in my clinical

opinion, definitively measured by Dr. Greenspan in 2008 (with reiteration of findings in 2019), in both his evaluation of Mr. Black's self-report, and his use of retrospective averaging of multiple sources to obtain a valid Vineland-2 profile. All subtest scores and the Composite score were consistent with intellectual capacity scores.

In the intervening time from 2003 record review, more information has been brought forth about his general functioning in society as a child, teen, and young adult, based on reports of family, friends, and trained educators, that reflects "real world" functioning was not adequate or age-appropriate. Additional evaluation of academic testing records has also ensued, and convincing evidence put forth that Mr. Black never developed any academic or functional living skills beyond the level of a primary or middle-school student. His job and driving skills were noted not to have exceeded those achieved by many persons with Mild Intellectual Disability, and reports indicated that his adaptive issues were more capacity-based (developmental) than choice-based (criminal behavior/personality disorder). He appeared to make genuine effort to learn and to comply, per these reports, and was not failing in these areas because he simply preferred to focus on his own needs/not meet demands of job, family, and society.

With the addition of Dr. Greenspan's findings, the changes in diagnostic and interpretive criteria (especially the move away from numerical cutoffs), the consistency of Mr. Black's scores over time, and the additional information now available about his real-world functioning, my 2022 opinion differs from my 2003 opinion in that I believe the preponderance of data in Mr. Black's record shows that he does meet the diagnostic criteria of developmentally-based adaptive deficits.

III. THIS CONDITION MANIFESTED DURING THE DEVELOPMENTAL PERIOD.

On this criteria, considerably more information was available in the record than I had in 2003. Specifically, the following data points stand out as most relevant:

Melba Corley (Sister)

"Byron didn't mature like he should have."

"His entire life, Byron never lived on his own"

Ms. Corley discussed the fact that even though Mr. Black married, he and his wife lived with either her family members or his, seemingly because they needed assistance with adult living skills.

Rossi Turner (Childhood Friend)

"He was not too well coordinated."

"Because Byron couldn't remember things, folks would have to repeat things to him especially if it was a direction."

Mr. Turner noted that Mr. Black could not grasp the basic rules and procedures for typical children's games, and gave multiple examples. His description of Mr. Black's personality and these events suggested that Mr. Black was not oppositional, but forgetful, and that he had significant difficulty learning and remembering steps and tasks. Mr. Black did not improve in these skills with practice, or with age. Additionally, Mr. Black tended to smile in a child-like fashion, even when this was not appropriate, which continues in present time.

Dr. Gur

"Byron Black was exposed to neurotoxins in utero and as a small child...Mr. Black's mother drank throughout pregnancy...high risk for lead poisoning and likely exposed to lead."

Dr. Gur noted that Mr. Black had pediatric iron deficiency anemia. This is a known risk factor for intellectual disability.

"Mr. Black has been an avid football player at varsity level and has suffered several head injuries..." When Dr. Gur completed these studies, little was in the literature about post-concussive syndromes or the toll of repeated blows to the head related to playing football, even as a child or teen/young adult. Literature now abounds on Chronic Traumatic Encephalopathy, which would be a consideration for Mr. Black, and also would have occurred in the now more flexible developmental period (prior to the age of 22 years). This more than any other specific factor may account for the "islands of preserved functioning" seen across testing, where Mr. Black performs better than expected in some areas, but significantly worse in skills associated with bilateral frontal regions.

Dr. Gur's findings also included abnormalities of the Corpus Callosum (midbrain) on MRI, suggestive of what was then called Fetal Alcohol Effects, but now based on Mr. Black's childhood presentation, would more currently be labeled alcohol-related neurodevelopmental disorder (ARND).

Dr. Greenspan

In his original report, Dr. Greenspan addressed the group intelligence testing scores after additional exploration of direct reports from teachers, family, and schoolmates, noting "...It is very possible, indeed likely, that these tests (which even state experts testified are not appropriate for diagnosing MR) were administered in a non-standard manner that could have even involved teacher assistance."

He also pointed out, "Even so, it should be noted that the IQ criterion for diagnosing MR was mins 1 SD (full-scale score of 85) during the years 1961-1973, and that the 85 that Mr. Black obtained on the Otis-Lennon group IQ test could, thus have qualified him at that time."

He further provided a concise historical summary, noting, "Mr. Black never lived independently (lived with parents, even after marriage), never had a checkbook, never cooked, never washed his clothes, never did anything suggestive of adult status other than holding a job...and driving a car...high school football coach, Al Harris, who indicated that in over 30 years as a coach, Mr. Black stood out as especially slow...generally could not be used on offense for the reason that he could not learn the plays and was used on offense only when a highly simplified playbook was developed for his use."

In his revised declaration, Dr. Greenspan revisited his initial results using updated terminology and current criteria from diagnostic manuals and standard of care guidelines for persons with intellectual disabilities, and these guidelines only reinforced and strengthened his original opinion.

Changes In Standard of Practice and Diagnostic Criteria

Adding to this additional information are changes in standard of practice and what is in common use in daily clinical care and diagnosis. In 2003, the Flynn Effect was a valid and robust research concept that was just beginning to make its way into clinical practice, and it was not yet in common usage by the preponderance of relevant practitioners. In the intervening 18-19 years, the Flynn Effect has been even more thoroughly researched and repeatedly validated, is now included in most testing manuals, and in short, in 2022, considering the changes in population intelligence is a common and well-accepted scientific and clinical practice related to the measurement of IQ. As such, applying this correction to scores from older versions of tests, and older scores, in order to look at them through today's lens for clinical diagnosis, not only should be done, but must be done for accuracy's sake. This, coupled with the removal of strict number-based criteria, changes the interpretation of Mr. Black's prior known scores, and places them squarely in the range of Mild Intellectual Disability.

Unlike many of the practitioners whose declarations are cited in this document, I am not a forensic psychologist, but a practicing clinician who works daily with individuals who have intellectual and developmental disabilities, in clinical treatment settings. My area of specialization is more clinical nuance than the crossroads between clinical and legal nuance. I routinely review cases and assist with developmental histories, and review clinical indications of age of onset of deficits for the State of Kentucky. I can say with a strong degree of clinical certainty that the information I have delineated in this section would be sufficient to meet the onset criteria of the diagnosis of intellectual disability, and it would be sufficient to qualify someone for services for person with intellectual and developmental disabilities in Kentucky. In my more recent work in the State of Tennessee on clinical cases (2019/2020), the same would be true.

In summary, then, my 2022 opinion differs from my 2003 opinion in that I believe the preponderance of data in Mr. Black's record shows that based on current scientific knowledge and standards of clinical practice, Mr. Black does meet the onset criteria for the diagnosis of intellectual disability.

GENERAL SUMMARY OF OPINION

Based exclusively on review of extensive available records, in my professional opinion, Byron Black does meet criteria established in the 2021 changes to § 39-13-203 for diagnosis of intellectual disability. This represents a change in my 2003 opinion, based on new information in his record, the ability to review his performance at multiple points in time across multiple practitioners, changes in scientific knowledge and standards of practice, and changes in diagnostic criteria, which I have outlined in the body of this report.

Due to my opinion being based on records review alone, I am not formally applying any diagnosis for Mr. Black; however, all of the very qualified experts who have directly assessed his capacity also believed he met these criteria, formally applied the diagnosis of intellectual disability, and have provided current, detailed, and valid clinical reasons for their opinions. Moreover, they have offered additional opinions that their findings remain valid under DSM-5, the upcoming DSM-4-TR, and changes in Tennessee law.

I hope this information is beneficial to you in moving forward with Mr. Black's case. Please let me know if I may be of additional assistance in this case.

Susan Redmond-Vaught, Ph.D

Licensed Clinical Psychologist/HSP

IN THE CRIMINAL COUR	RT FOR DAVIDSON COUNT AT NASHVILLE	ry, tennesseë 2022 har - 9 PM 3: 02
BYRON BLACK, Petitioner, v. STATE OF TENNESSEE, Respondent.)) No. 88-S) Capital C))	

STATE'S RESPONSE REGARDING PETITIONER'S MOTION FOR A DETERMINATION OF INTELLECTUAL DISABILITY

Petitioner Byron Black has filed a motion to be declared intellectually disabled pursuant to Tenn. Code Ann. § 39-13-203(g), which provides:

- (1) A defendant who has been sentenced to the death penalty prior to the effective date of this act and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.
- (2) A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits.

Subsection (g) went into effect on May 11, 2021, and Petitioner filed his motion on June 3, 2021. In an order filed February 22, 2022, this Court noted that Respondent had yet to respond to Petitioner's motion and that Petitioner had not addressed the second prong of the statute. The Court directed the parties to file briefs addressing the application of Tenn. Code Ann. § 39-13-203(g)(2) to the issue of whether Petitioner's intellectual-disability claim had been previously adjudicated on the merits. As outlined below, Respondent respectfully submits that, pursuant to section 39-13-203, the issue of whether Petitioner has an intellectual disability has not been

previously adjudicated on the merits under the new statutory standard. Therefore, further proceedings are warranted, and the Court should consider the issue of Petitioner's intellectual disability.

The basis for the Court's question regarding whether there has been a previous adjudication of Petitioner's intellectual-disability claim is the 2004 hearing and order on the issue of what was then characterized as his "mental retardation." As developed below, based on the authority of the Tennessee Supreme Court regarding issue preclusion, the issue addressed by this Court in Petitioner's 2004 hearing is *not* the same issue raised in the petition currently before the Court. As such, pursuant to Tenn. Code Ann. § 39-13-203(g)(2), the issue of Petitioner's intellectual disability has not been previously adjudicated on the merits.

In Reid ex rel. Martiniano v. State, 396 S.W.3d 478 (Tenn. 2013), the Tennessee Supreme Court addressed whether a previous court's competency ruling precluded a subsequent court from addressing the issue of competency. Our Supreme Court affirmed the Court of Criminal Appeals' opinion² that none of the requirements of the various preclusion doctrines had been satisfied and also adopted its reasoning. *Id.* at 516. Particularly relevant to the issue raised in Petitioner's motion to be declared intellectually disabled, our intermediate appellate court, in addressing the preclusion doctrine of collateral estoppel, observed:

Reid commonly refers to the "issue" of his competency in his briefs before this Court. Although the ultimate question to be decided in these cases is whether Reid is competent, the *legal* issues in the state post-conviction cases and the federal court actions are different.

¹ Memorandum and Order, *Byron Lewis Black v. State of Tennessee*, No. 88-S-1479 (Post Conviction), Fifth Circuit Court, Davidson County, Tennessee (May 6, 2004) (Hereafter, "Order" or "2004 order.")

² Reid v. State, Nos. M2009-0360-CCA-R3-PD, M2009-00360-CCA-R3-PD, M2009-01557-CCA-R3-PD, 2011 WL 3444171 (Tenn. Crim. App. Aug. 8, 2011).

Reid v. State, 2011 WL 3444171, at *30 (emphasis in original).

The court further noted that, "[t]he doctrine of collateral estoppel requires that the issue to be precluded in the present case is identical, not merely similar, to the issue decided in the earlier action." *Id.* (citing *Beaty v. McGraw*, 15 S.W.3d 819, 827 (Tenn. Ct. App. 1998)).

P .

On the question of the issue presented by Petitioner as to his intellectual disability in his June 3, 2021 petition versus the issue adjudicated by this Court in 2004, a few passages from the Court's 2004 order are illustrative of the differences between them. Initially, the first sentence of the order's analysis highlights the precise issue before the court: "Obviously the definition of mental retardation must be determined in order to decide this case." (Order at 4.)

The order continued by looking to the now-obsolete twenty-five-year-old definition of mental retardation:

The applicable criteria are those presently set forth by statute: (1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in adaptive behavior; and (3) mental retardation manifested during the developmental period, or by eighteen (18) years of age. See Tenn. Code Ann. § 39-13-203 (1997).

(Order at 5.)

After establishing the issue to be decided in the 2004 order by settling on the thenprevailing definition of mental retardation, the Court analyzed the findings of the various experts as to Petitioner's mental retardation or lack thereof. (*Id.* at 11-21.) Throughout these findings are many references to and emphasis placed on Petitioner's performance on various IQ tests.⁴ And

³ The mere fact that the antiquated terminology of "mental retardation" was in effect the time is at least a harbinger that the issue to be determined now—Petitioner's intellectual disability—is not the same issue decided by the 2004 order.

⁴ Significantly, the section of the order immediately following the summaries of findings is entitled, "I.Q." and begins by noting that, "[t]he first criteria to be explored is whether the petitioner

the last expert whose findings are outlined in the Order are those of Dr. Susan Vaught⁵ who concluded: "In my professional opinion, Byron Black does not meet criteria established in section 39-13-203 for diagnosis of mental retardation." (Order at 21.) Because the criteria in section 39-13-203 for determining intellectual disability have changed, the issue adjudicated in 2004 is not the same issue presented in Petitioner's 2021 motion.

As noted by Petitioner, under the governing statutory law now in effect, to establish an intellectual disability, Petitioner must demonstrate that he suffers from (1) significantly subaverage intellectual functioning; (2) deficits in adaptive behavior; and (3) that this condition manifested during the developmental period. Tenn. Code Ann. § 39-13-203(a) (2021). This is a different legal standard from the one that existed in the previous iteration of section 39-13-203, which the Court applied in 2004 to find that Petitioner did not meet that standard of mental retardation. "Different legal standards as applied to the same set of facts create different issues." *Reid*, 2011 WL 3444171, at *30 (quoting *Beaty*, 15 S.W.3d at 827); *see also State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 179 (Tenn. Ct. App. 2000) ("The relitigation of an issue of law between the same two parties is not precluded when a new determination is warranted in order to take account of an intervening change in the applicable law or to avoid the inequitable administration of the law.") (citations omitted). Therefore, the issue presented by Petitioner in the motion currently before the Court is a different issue than the one it determined in 2004. Because the issues are not the same, the law pertaining to issue preclusion as decided by the Tennessee Supreme Court requires

had a significantly sub-average general intelligence quotient (I.Q.) of seventy (70) or below." (Order at 21.)

⁵ As recently submitted to the Court by Petitioner, based in part on the changes in the legal criteria for intellectual disability, Dr. Vaught has reconsidered her position on Petitioner's intellectual disability—further demonstrating that the issue determined by the Court in 2004 is not the same issue before presently before it.

Respondent to acknowledge that Tenn. Code Ann. § 39-13-203(g)(2) does *not* operate to preclude Petitioner from filing and seeking a determination on the issue of his intellectual disability pursuant to Tenn. Code Ann. § 39-13-203(g)(1).

Moreover, as detailed below, two (2) experts, historically relied on in capital cases in determining issues of intellectually disability and competency, have now determined that Petitioner meets the criteria for intellectual disability required by Tenn. Code Ann. § 39-13-203(a) (2021), the State must also stipulate that Petitioner would be found intellectually disabled.

Dr. Daniel A. Martel, Ph.D., has routinely been relied on by the State of Tennessee in various stages of capital prosecutions to challenge claims regarding competency and/or intellectual disability. *Coe v. State*, 17 S.W.3d 193, 204-05 (Tenn. 2000); *State v. Reid*, 91 S.W.3d 247, 270-271 (Tenn. 2002); *State v. Reid*, 213 S.W.3d 792, 809-810 (Tenn. 2006). As the Court is aware⁶, Dr. Martel has examined Petitioner and found that Petitioner meets all the criteria for a diagnosis of intellectually disability required by Tenn. Code Ann. § 39-13-203(a) (2021).

As previously noted, Dr. Susan Redmond-Vaught, Ph.D., was one of the State's experts relied on by the Court in its 2004 Order to determine that Petitioner did not meet the criteria for mental retardation pursuant to the now-obsolete iteration of Tenn. Code Ann. § 39-13-203. (2004 Order at 18-21.) In light of the 2021 changes to Tenn. Code Ann. § 39-13-203(a)—as well as newly available documentation, changes in the standards of care, and changes in diagnostic criteria—Dr. Vaught has recently reconsidered her opinion on the question of Petitioner's intellectually disability. Contrary to her former opinion that he did not meet the then-existing

⁶ Martel report of August 25, 2020, attached to Petitioner's June 3, 2021 Motion. (Also attached here as Attachment 1.)

statutory criteria for mental retardation, Dr. Vaught is now of the opinion that Petitioner "does meet criteria established in the 2021 changes to § 39-13-203 for diagnosis of intellectual disability." This finding is in step with similar results in at least one other jurisdiction of the State since the updating of Tenn. Code Ann. § 39-13-203, where the mental health experts concluded that a petitioner would meet the criteria for a diagnosis of intellectual disability. See *Pervis Tyrone Payne v. State of Tennessee*, Nos. 87-04409, 87-04410, 30th Judicial District Criminal Court, State's Notice of Withdrawal of Request for Hearing (November 18, 2021); Order Vacating Capital Sentences (November 23, 2021). (See Attachment 3.)

Because these experts have concluded Petitioner does, in fact, meet the criteria for a diagnosis of intellectual disability, the State stipulates that Petitioner would be found intellectually disabled were a hearing to be conducted.

The State has met with the victims' family members and explained the change in the law and the reports of Dr. Martel from 2020 and Dr. Vaught from 2022. These family members still want Mr. Black executed. However, under current law and the medical reports before the Court, the State concedes that the Petitioner's capital sentence should be commuted to one of life in prison, consecutive to his other sentences.

Respectfully submitted,

GLENN R. FUNK

Tenn. Sup. Ct. Reg. #011492

District Attorney General

20th Judicial District

Washington Square Bldg., Suite 500

222 Second Avenue North

Nashville, TN 37201

(615) 862-5500

⁷ Vaught report of February 28, 2022. See Attachment 2.

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Response was served by U.S. Mail, postage paid, to the Office of the Federal Public Defender for the Middle District of Tennessee, 810 Broadway, Suite 200, Nashville, TN 37203, and to:

Pursuant to this Court's Administrative Order, this Response has been submitted for filing to the attention of Mr. Nicholas Kiefer, Courts Director for State Trial Courts, Office of the Criminal Court Clerk, 20th Judicial District, Nashville, TN, by email to: nkiefer@jisnashville.gov

All on this the $\frac{2}{3}$ day of March, 2022.

cc:

District Attorney General

and

The Honorable Walter C. Kurtz at <u>kurtzjudge@gmail.com</u>
Mr. Jason Steinle at <u>jason.steinle@tncourts.gov</u>

Declaration of Daniel A. Martell

I, Daniel A. Martell, being of lawful age and legal resident of Irvine, Orange County, California declare the following, based on my personal knowledge:

- 1. I am a licensed clinical neuropsychologist and forensic psychologist.
- At the request of his counsel, I have conducted several assessments of Mr. Byron Black.
- 3. In each instance, I submitted a report of my findings. My report dated August 25, 2020 is attached to this declaration as Attach. A. My supplemental report dated December 13, 2021 is attached as Attach. B. My report dated May 27, 2025 is attached as Attach. C. A copy of my curriculum vitae is attached as Attach. D. The contents of each of those reports and my vitae are true and accurate.
- 4. Each of my reports reflects my best clinical judgment and contains information to which I would testify under oath.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct. Dated this 28th day of June 2025 in Irvine, Orange County, California.

Daniel A. Martell

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

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

BY ELECTRONIC MAIL

August 25, 2020

4 4

Kelley J. Henry Supervisory Asst. Federal Public Defender 810 Broadway, Suite 200 Nashville, TN 37203

RE: Byron Black Examination

Dear Ms. Henry,

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

Referral Question

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

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:

- Mr. Black has significantly subaverage intellectual functioning based on valid, objective test scores that fall within the range of Intellectual Disability.
- (2) Mr. Black exhibits significant deficits or impairments in all three domains of adaptive functioning (Conceptual, Social and Practical) at the level of "Mild" to "Moderate" severity.

- (3) Mr. Black's intellectual and adaptive deficits originated in the developmental period.
- (4) Mr. Black meets all of the criteria for Intellectual Disability pursuant to <u>Atkins v. Virginia</u>.

Qualifications of Examiner

I was an expert witness for the Government in *Atkins v. Virginia*, and I have since consulted on dozens of *Atkins*-related cases for both prosecutors and defense attorneys throughout the country.

I received a Bachelor's Degree in psychology with honors from Washington and Jefferson College (1980), a Master's Degree in psychology from the University of Virginia (1985), and a Ph.D. in clinical psychology from the University of Virginia (1989). I completed my clinical psychology internship specializing in forensic psychology at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center in New York City (1986-1987), and was awarded a Post-Doctoral Fellowship in Forensic Psychology, also at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center during which I specialized in forensic neuropsychology (1987-1988).

I am Board Certified in Forensic Psychology by the American Board of Forensic Psychology of the American Board of Professional Psychology, Diplomate Number 5620. I am a Fellow of the American Academy of Forensic Psychology; a Fellow and Past-President of the American Academy of Forensic Sciences; and a Fellow of the National Academy of Neuropsychology. I am licensed as a clinical psychologist by the State of California, License Number PSY15694.

I am also licensed as a clinical psychologist by the State of New York, License Number 011106.

I am currently an Assistant Clinical Professor of Psychiatry and Biobehavioral Sciences at the Semel Institute for Neuroscience and Human Behavior and the Resnick Neuropsychiatric Hospital of the David Geffen School of Medicine at UCLA. From 1992 to 1996 I was a Clinical Assistant Professor in the Department of Psychiatry at New York University School of Medicine.

I have authored over 100 publications and presentations at professional meetings, with a research emphasis on forensic issues involving forensic neuropsychological assessment, mental disorders, brain damage, intellectual disability, elder capacities, and violent criminal behavior.

I have been admitted to testify as an expert witness in more than two hundred cases, including testimony in both criminal and civil matters in federal and state courts throughout the United States. I have consulted and testified for both prosecutors and defense attorneys in criminal cases, as well as plaintiffs and defense attorneys in civil matters.

Basis for Opinions

Scope of Examination and Informed Consent

I personally examined Mr. Black December 10 and 11, 2019 in a quiet, private room at the Riverbend Correctional Institution for a total of approximately seven (7) hours. 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. Black was able to provide his informed consent to participate with this understanding.

Materials Reviewed

I have reviewed the following background materials provided by your office:

- Deposition of Dr. Gur 03/19/2004
- Quantitative Structural Brain Imaging Consultation Draft 03/17/2004
- · Declaration of Dr. Gur 11/15/2001
- Quantitative Functional Brain Imaging Consultation Draft 02/29/2004
- · Report of Dr. Pamela Auble
- Report of Dr. Patti VanEys
- · Report of Dr. Gillian Blair
- Report of Dr. Kenneth Anchor

- Declaration Of Marc Tasse
- Declaration of Stephen Greenspan
- Declaration of Daniel Grant, 11/16/2001
- · Affidavit of Dr. Dan Grant
- Dr. Albert Globus 11/14/2001
- · Declaration of Ross Alderman
- Declaration of Connie Westfall
- Declaration of Rossi Turner
- Declaration of Freda Black Whitney
- Declaration of Melba Black Corley
- RMSI Records
- VUMC Records-Byron
- Height and Weight Chart
- VUMC Brain imaging studies

Tests and Procedures Administered

During my examination I administered a battery of intellectual and neuropsychological tests and procedures including:

- o Behavioral Observations and Mental Status Examination
- o Structured Neuropsychological Interview
- o Rey's 15 Items
- o Test of Memory Malingering
- o ACS Word Choice Malingering Test
- Wechsler Adult Intelligence Scale-IV
- Wechsler Memory Scale-IV
- o California Verbal Learning Test-II
- o Wide Range Achievement Test-IV
- o Trail Making Test, Parts A and B
- Boston Naming Test
- Tests of Verbal Fluency (F-A-S and Animal Naming Test)
- o d2 Test of Attention
- Delis-Kaplan Executive Function System
 - Color-Word Interference Test
- Wisconsin Card Sort
- Halstead Categories Test
- Luria's Tests of Graphomotor Sequencing and Inhibition
- Luria's Tests of Motor Sequencing and Control
- Hooper Visual Organization Test
- o Line Bi-Section Test
- Adaptive Functioning History and Clinical Interview

Background Information

Mr. Black'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.

Examination Findings

Behavioral Observations and Mental Status Examination

Byron Black is a 63-year-old African American man who presented for testing dressed in a gray sweatshirt under light yellow, prison-issued scrubs. He was rolled into the examination room sitting on a small desk chair as he can only walk very short distances. He had short wavy hair that was combed back, and a mustache although he was otherwise was clean-shaven. He wore glasses.

Upon my first meeting him and throughout both days of the examination he had a very outgoing and overly-familiar way of interacting with me that was indicative of disinhibited social judgment. However, he was very 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 approximate date and time.

His speech was produced at a normal rate and volume with clear articulation and a normal quantity of output.

His thoughts were expressed in a coherent and logical fashion, although he had a tendency randomly to go into tangential details unrelated to the topic at hand. This is a problem with self-monitoring and goal-directed thinking known as tangentiality.

Emotionally his observable affect was constricted in range and intensity and this presentation remains stable over both days of examination and testing. His underlying mood was inferred to be euthymic. His insight was fair.

He described his appetite as, "pretty good," but he said that his weight goes, "up and down," as a consequence of his diabetes. He also described his sleep as, "pretty good." He stated that he gets along with no changes in his interpersonal relationships or activities recently.

When asked how he's been doing emotionally he reported, "I guess OK." He then stated that he has health concerns that trouble him, as he has a painful broken hip that cannot be repaired due to his heart condition.

Mr. Black has a complicated history of serious medical problems, including prostate cancer surgery with complications due to accidentally cutting into his bladder, diabetes, congestive heart failure, hypertension, and a degenerative bone disease that has caused him to break his right hip.

He is unable to undergo surgery to repair his broken hip due to his fragile heart condition and 25% ejection fraction, so he is confined to a rolling desk chair and can only ambulate very short distances. He indicated that his physician has warned him that his other hip is also degenerated and also at imminent risk for fracture.

He reported that he was diagnosed with "prostrate" [sic] cancer in 2019. He had a PSA of 9.7 which, "made my heart start getting weak." He reported that during his cancer surgery they accidentally cut into his bladder and as a result he has two catheters.

He also stated that he was diagnosed with diabetes in 2017, and that he is had shortness of breath and a heart condition, "for a few years now, since 2017 I think. I only had 25% heartbeat." He reported that he had three stents placed in his heart in September of 2018, and also had a hernia operation the same year.

Neurocognitive Testing Results

Data Validity

In any high-stakes forensic examination such as this one, it is imperative to determine whether the individual being tested is putting forth their best effort, and to rule-out malingering. Therefore, a part of my examination I administered a variety of both free-standing and

embedded measures of effort and malingering to test the validity of Mr. Black's test findings.

He "passed" with a valid performance on each of these tests, including:

- (1) the Rey 15 Item Malingering Test,
- (2) the Test of Memory Malingering,
- (3) Reliable Digit Span,
- (4) the ACS Word Choice Test, and
- (5) the Forced-Choice Trial of the CVLT-II.

This level of performance indicates that he was putting forth his best effort, and the test results obtained can be relied upon as valid indictors of his current level on intellectual and cognitive functioning.

Intelligence (IO) Testing

I administered the Wechsler Adult Intelligence Scale -IV to Mr. Black, the current gold-standard for IQ testing in the United States. He obtained a Full-Scale IQ of 67, which is a significantly subaverage score, falling more than two standard-deviations below the mean in the "Extremely Low" range, and places him squarely in the range of Intellectual Disability. There was no significant "scatter" between his subtest scores, indicating that his limited cognitive abilities are evenly developed, with no areas of particular strength or relative weakness.

His WAIS-IV IQ scores are summarized in the table below:

Composite Score Summary

Scale	Sum of Scaled Scores	Composite Score		Percentile Rank	95% Confidence Interval	Qualitative Description
Verbal Comprehension	15	VCI	72	3	67-79	Borderline
Perceptual Reasoning	17	PRI	75	5	70-82	Borderline
Working Memory	9	WMI	69	2	64-78	Extremely Low
Processing Speed	9	PSI	71	3	66-82	Borderline
Full Scale	50	FSIQ	67	1	64-72	Extremely Low
General Ability	32	GAI	71	3	67-77	Borderline

Confidence Intervals are based on the Overall Average SEMs. Values reported in the SEM column are based on the examinee's age.

The GAI is an optional composite summary score that is less sensitive to the influence of working memory and processing speed. Because working memory and processing speed are vital to a comprehensive evaluation of cognitive ability, it should be noted that the GAI does not have the breadth of construct coverage as the FSIQ.

Academic Achievement Testing

Testing with the Wide Range Achievement Test-IV showed that the academic difficulties that he had during his school years have endured into adulthood. Academically, he repeated the second grade which is an early indication of his cognitive limitations, and struggled in school.

Results from my testing indicate that his academic skills fall at the bottom 2nd percentile for Math, and the bottom 4th percentile overall for Reading:

	National Percentile	Grade Equivalent
Word Reading	4	5.1
Sentence Comprehension	n 5	7.0
Spelling	21	8.9
Math	2	3.5
Reading Composite	4	n/a

Attention and Speed of Information Processing

Mr. Black exhibited mild impairment on a test of his visual attention and speed of information processing (Trails A). These deficits were also seen as mild-to-moderate impairments on the Symbol Search and Coding subtests of the WAIS-IV.

Memory Testing

On the Wechsler Memory Scale–IV, Mr. Black exhibited significantly impaired memory functioning, both Verbal and Visual memory, as well as Immediate and Delayed memory, placing his scores at a level commensurate with his Intellectually Disabled IQ. His subscale scores are summarized in the table below:

WMS-IV Alternate Index Score Summary

Index	Sum of Scaled Scores	Index Score	Percentil e Rank	Confidence Interval	SEM	Qualitative Description
Immediate Memory (LMVR)	9	69	2	64-80	4.5	Extremely Low
Delayed Memory (LMVR)	10	70	2	65-79	3.67	Borderline
Auditory Memory (LM)	9	71	3	66-81	4.5	Borderline
Visual Memory (VR)	10	73	4	69-79	2.12	Borderline

WMS-IV Alternate Indexes derived using Logical Memory and Visual Reproduction (LMVR). Confidence Intervals reported at the 95% Level of Confidence.

A similar pattern of impaired memory was seen on the California Verbal Learning Test-II, which tests his ability to learn a list of words over multiple trials, and repeat them back after a distractor list and delay periods. Here, Mr. Black was able to learn some of the list of words after multiple trials, but had difficulty recalling them after a short delay period.

Learning the original list of words also significant interfered with his ability to learn a second list, a phenomenon called "proactive interference." His score was two standard deviations below the mean and in the bottom two percent of people of his age and education.

He also had an abnormal tendency to confabulate – a pathological process of repeatedly inserting words that were not on the list into his memory, resulting in contaminated recall. His confabulation score placed him at the bottom 0.7 percentile for people of his age and education. In other words, he confabulated more that 99.3% of others of his background.

Finally, after a 20-minute delay period, he had enormous difficulty distinguishing the words he had been asked to learn from a list of unrelated words. His score here was five standard deviations below average, placing him below 1 in 10,000 others of his age and education.

Language Functioning

His language functioning is significantly impaired, with clinical evidence of expressive aphasia including severe impairment in his language functioning characterized by frank anomia (an inability to find words for things); and impaired sematic verbal fluency (e.g., the ability to name things in categories such as animals). He also exhibited clinical evidence of paraphasia, for example saying "prostrate" when he meant prostate.

His score on the Boston Naming Test, which evaluates his ability to find the words for common objects, was 5.6 standard deviations below expectation for his age, and 3.3 standard deviations below expectation for his level of education. His word-finding ability is more impaired than over 99.9% of others of his age or education.

Frontal Lobe - Executive Functioning

Testing of Mr. Black's frontal lobe or higher-level "executive" mental functions revealed multiple deficit areas involving the following cognitive abilities:

- (a) divided attention,
- (b) multitasking,
- (c) abstract problem-solving,
- (d) defective self-monitoring resulting in severe confabulation,
- (e) evidence of multimodal perseveration (a pathological repetition of behavior without awareness, seen in both graphomotor and problem-solving abilities).

His performance on the Wisconsin Card Sort (a test of visual abstract problem solving) revealed a tendency to perseverate in seeking to generate problem-solving ideas. His score on the Halstead Category test, which measures abstract reasoning and the higher-order cognitive skills needed for problem solving and learning from mistakes was also impaired.

Mild grapho-motor perseveration was seen on a test where he was required to write a line of alternating m's and n's, where his ability to switch smoothly and effectively was impaired.

Finally, he demonstrated severe impairment on a test of his ability to switch effectively between competing stimuli (Trails B), again indicating difficulty with set-switching and multitasking. He repeatedly lost track of what he was supposed to be doing and needed external redirection to get back on track.

Visual Perception and Organization

Tests of Mr. Black's visual perception and organization skills (Hooper Visual Organization Test) were indicative of moderate impairment in his visual organization and processing skills. He scored lower than 91% of others of his age and education on this test.

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:

- 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;
- 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, across multiple environments, such as home, school, work, and community; and
- 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, 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.¹

Mr. Black's IQ and Neurocognitive Functioning

During my examination and testing, Mr. Black achieved a Full-Scale IQ score of 67, in the "Extremely Low" range of intellectual functioning. Mr. Black thus has significantly subaverage intellectual functioning that falls in the range of Intellectual Disability.

This finding is consistent with Mr. Black's history of past IQ testing, (which is described accurately and in detail by Dr. Marc Tasse in his declaration²) that has repeatedly shown his IQ to be significantly

¹ DSM-5, p. 37.

² 2008 Declaration of Marc Tasse, Ph.D., FAAIDD, p.13.

subaverage and in the range of Intellectual Disability using individually-administered, culturally-appropriate intelligence tests dating back to 1993. Four different examiners, using several different intelligence tests,³ all placed Mr. Black in the range of Intellectual Disability with his Flynn-adjusted Full-Scale IQ scores falling between 53 and 71. Dr. Stephen Greenspan also came to the same conclusions regarding this evidence of Intellectual Disability in his 03/13/2008 declaration.⁴

During my examination, I also did additional neurocognitive testing to look at Mr. Black's capacity for reasoning, problem-solving, planning, abstract thinking, academic learning, and learning from experience. The results of that testing revealed clinically significant and significantly subaverage functioning in the following areas:

- (1) significant memory impairment at a level commensurate with his Intellectually Disabled IQ score;
- (2) extreme confabulation (abnormal intrusions of extraneous, irrelevant, and incorrect information into his recall);
- (3) Severe deficit in attention
- (4) severe impairment in his language functioning characterized by frank anomia (an inability to find words for things) and impaired sematic verbal fluency (e.g., the ability to name things in categories such as animals);
- (5) impaired visual organization processing; and
- (6) deficits in his frontal lobe/executive abilities including:
 - divided attention,
 - · multitasking,
 - · abstract problem-solving, and

³ Including the Wechsler Adult Intelligence Scale – Revised in 1993 by Dr. Blair (FSIQ=69) and again in 1997 by Dr. Auble (FSIQ = 71); the Wechsler Adult Intelligence Scale – III in 1995 by Dr. van Eys (FSIQ= 67); and the Stanford-Binet 5th Edition in 1986 by Dr. Grant (FSIQ=53).

⁴ Declaration of Stephen Greenspan, Ph.D., 03/13/2008, p. 13-14.

 evidence of multimodal perseveration (a pathological repetition of behavior without awareness, seen in both graphomotor and problem-solving abilities).

Dr. Daniel H. Grant, who examined and neuropsychologically tested Mr. Black in October of 2001, noted that in addition to his significantly subaverage intellectual functioning, Mr. Black had significant neuropsychological impairments in the areas of:

- (1) verbal memory;
- (2) listening comprehension and oral expression;
- (3) receptive and expressive vocabulary; and
- (4) deficits in functional academic skills including reading comprehension and arithmetic skills.⁵

Dr. Pamela Auble, who examined and neuropsychologically tested Mr. Grant in February and March of 1997 found no evidence of poor effort or malingering, and significant neurocognitive deficits involving:

- (1) attention;
- (2) memory;
- (3) word-finding;
- (4) manual dexterity; and
- (5) executive abilities including abstract problem solving and multi-tasking.⁶

These findings are consistent with the structural and functional neuroimaging findings reported by Dr. Gur in 2001 (MRI scan) and 2004 (PET scan).

The findings from the neuropsychological testing provide additional evidence of neurocognitive deficits that indicate and support a finding of significantly subaverage intellectual functioning.

⁵ Dr. Grant's 11/16/2001 declaration, p. 6-7.

⁶ Report of Pamela Auble, Ph.D., 3/5/1997.

Conclusion Regarding Mr. Black's Intellectual Functioning

It is my opinion that Mr. Black meets Criterion A based on test scores that place him within the range for a diagnosis of intellectual disability. Mr. Black's impaired performance on the neuropsychological testing administered during this examination in conjunction with his current and prior IQ testing provides clear evidence of substantial impairment 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.

<u>Diagnostic Criterion B:</u> Significant Deficits or Impairments in Adaptive Functioning

The second major prong of the Intellectual Disability diagnosis requires evidence of impairment in Adaptive Functioning. *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 just 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. Black has significant impairments that cluster in three broad areas, including:

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

Examples of Mr. Black's Conceptual Domain impairments include the following:

 Academically, he repeated the second grade which is an early indication of his cognitive limitations, and struggled in school.

During my examination I asked Mr. Black about his school experience. He did not know why he had to repeat the 2nd grade but he did state, "I did not understand some things."

 Findings from my neurocognitive testing indicate that his academic skills fall at the bottom 2nd percentile for Math, and the bottom 4th percentile for Reading.

During my examination when I asked Mr. Black about his school experience, he reported being socially awkward. "I mostly stayed to myself. I'm a quiet person." Then out of the blue he stated, "We have communion here every Sunday."

Rossi Turner grew up with Byron Black, lived on the same street, and attended the same school. She shared the following observations regarding his abilities as a child in her declaration:

I am two years younger than Byron Black. Byron had to repeat the 2nd grade so I was one grade behind him.

[When playing] a Tisket a Tasket, ... Byron never seemed to catch on when the bag was dropped behind him. One of the other children would have to yell at him, "Byron, look behind you."

When we played red light, green light ... Byron would get put out all the time. He was generally the first one out.

Even in marbles, Byron wasn't good. He was not too well coordinated.⁷

Dr. Daniel H. Grant, who examined and neuropsychologically tested Mr. Black in October of 2001, noted that in addition to his significantly subaverage intellectual functioning, Mr. Black had significant neuropsychological impairments in the areas of:

⁷ Declaration of Rossi Turner, 3/15/2008, p.1-4.

- (1) verbal memory;
- (2) listening comprehension and oral expression;
- (3) receptive and expressive vocabulary; and
- (4) deficits in functional academic skills including reading comprehension and arithmetic skills.⁸

Dr. Pamela Auble, who examined and neuropsychologically tested Mr. Grant in February and March of 1997 found no evidence of poor effort or malingering, and significant neurocognitive deficits involving:

- (1) attention;
- (2) memory;
- (3) word-finding;
- (4) manual dexterity; and
- (5) executive abilities including abstract problem solving and multi-tasking.⁹

Ross Alderman, who was Mr. Black's attorney during his capital murder trial, declared as follows:

during our interactions with Byron Black, Byron completely could not focus on the case. ... An example of just how out of touch Byron was with what was going on in the trial is when after the jury went out to deliberate on the issue of sentence, Byron asked me, "Do I get to testify now?" It was clear to me that Byron had not understood what had occurred in the proceedings. I believe that he had no clue about what had been going on for the past two weeks. He lacked the ability to process what had been occurring. 10

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

Dr. Grant's 11/16/2001 declaration, p. 6-7.
 Report of Pamela Auble, Ph.D., 3/5/1997.

¹⁰ Declaration of Ross Alderman, Esq., 11/14/2001, p.1-2.

in Intellectual Disability. Based on the evidence summarized above, Mr. Black'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 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.¹¹

THE SOCIAL DOMAIN

The **social domain** refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, gullibility and vulnerability to manipulation, and similar capacities.

Mr. Black's record reflects deficits in his Social Domain functioning. Examples of his social domain impairments include:

- o Socially, he his overly-familiar with strangers and has problems with boundaries and personal space. He is very outgoing, overly friendly, and relates in a somewhat child-like manner as if he has known you for a long time even when you first meet him, waving and expressing affection. His attorney at trial observed this as well.
- A childhood friend described him as not having many close friends. He was unable to "catch on" to the rules of simple childhood games like Tisket-a-Tasket, Red Light-Green Light, or marbles. He was described as findings things that others could do easily to be too difficult for him. He was also described as having memory problems during childhood, and difficulty keeping track of time, and needing support from others to function effectively in his daily life.

¹¹ DSM-V, p. 34.

o His high school football coach, Al Harris, described him as unable to learn and remember plays.

Rossi Turner grew up with Byron Black, lived on the same street, and attended the same school. She shared the following observations regarding his abilities as a child in her declaration:

Looking back on it, Byron was different. Things that others could do so easily were difficult for him. And, Byron smiled a lot, but it looked off key. ...

Although Byron had a lot of cousins and a pretty big family, he didn't have many close friends. Byron would occasionally make small talk with people, but not often.

[When playing] a Tisket a Tasket, ... Byron never seemed to catch on when the bag was dropped behind him. One of the other children would have to yell at him, "Byron, look behind you."

When we played red light, green light ... Byron would get put out all the time. He was generally the first one out.

Even in marbles, Byron wasn't good. He was not too well coordinated. 12

Ross Alderman, who was Mr. Black's attorney during his capital murder trial, declared as follows:

Byron almost constantly wore a big childlike smile on his face, a smile which was often out of place, given the circumstances. ... Also, when talking, he would get close-in to my face, not in a threatening way, but in a socially inappropriate way.¹³

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

¹² Declaration of Rossi Turner, 3/15/2008, p.1-4.

¹³ Declaration of Ross Alderman, Esq., 11/14/2001, p.1.

summarized above, Mr. Black's level of functioning is best captured by the DSM-5 descriptions for "Mild" severity in the **social domain**.

Mild impairment in the social domain is described as follows:

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 are 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).¹⁴

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.

The records also establish impairment in Mr. Black's Practical Domain functioning, including:

- His younger brother reported that he did not read, did not cook, and would repeat things over and over (perseveration). He is described as never living independently, and not having a checking account.
- o Interviews with Lynette Childs Black who was briefly married to him, indicated that he was never able to live independently and that they lived with his mother when they got married. She described him as "childish" and reliant on his family members for support.

There has also been objective testing of his adaptive functioning that supports a finding of deficits in these domains, including:

Dr. Grant administered the Independent Living Scales
 (ILS) and obtained impaired scores reflecting deficits in

¹⁴ DSM-5, p. 35.

Mr. Black's practical adaptive skills involving money management, managing home and transportation, health, and safety.

- O Dr. Greenspan administered the Street Skills Survival Questionnaire (SSSQ) and obtained similar evidence of impairment in Mr. Black's Practical functional abilities, including independent living skills.
- Dr. Greenspan also did a retrospective administration of the Vineland Adaptive Behavior Scales—Second Edition (Vineland-2) with multiple reporters which while not a standardized way of using the test, did obtain highly convergent findings across reporters indicating overall impairment in Mr. Black's functional abilities in all three diagnostic domains.

Dr. Daniel H. Grant, who examined and tested Mr. Black in October of 2001, noted in his declaration that:

It is important to note that Mr. Black never lived in dependently. He never did the laundry, cooked, cleaned the house or participated in the care of his son. Even when married he and his wife lived with relatives who cared for Mr. Black. He did not contribute financially to his family and his wife said he never had a bank account. He never contributed financially to the cost of housing or utilities.¹⁵

Rossi Turner, grew up with Byron Black, lived on the same street, and attended school. She shared the following observations regarding his abilities as a child in her declaration:

I remember his grandpa having to tell him time and time again to do his chores and how to do it the right way. Byron had to bring in kindling and coal. ... Byron wasn't lazy, he just had trouble remembering to do his chores.

Because Byron couldn't remember things folks would have to repeat things to him especially if it was a direction. I remember his sisters saying over and over, "Byron, I just told you to do

¹⁵ Declaration of Daniel H. Grant, Ed.D,12/24/2001, p. 7.

that." He had a thing about snapping his fingers and say [sic], "yeah, I forgot that," when someone reminded him.

Byron would forget and lose track of time. He would be told to get home at a certain time but he wouldn't remember and his grandpa would come and get him saying, "Byron, what did I tell you?" Byron would meekly say, "Yes, grandpa." 16

Freda Black Whitney, who is Byron Black's younger sister by five years, shared the following observations in her declaration:

I have noticed that Byron repeats a lot of the same things over and over.

I never saw Byron read for pleasure.

I've never known Byron to cook. I don't think he knows how to cook.

While all of us left home and took care of ourselves and our families, Byron never did. Even when he was married he did not provide an independent residence for his family but continued to live with either our mother or father or with his wife's family. He didn't even have a checking account.¹⁷

Melba Black Corley, Byron Black's older sister by six years, provided the following observations in her declaration:

I did not see him just sitting around reading for fun. Although my sisters and I would use the mobile library that went to our school, I do not remember Byron using this library. He only read what he had to for school. Byron didn't mature like he should have.¹⁸

Investigator Connie Westfall interviewed **Lynette Childs Black**, who was briefly married to Byron Black, in April of 1997. She prepared a declaration that includes a memo documenting that interview, which notes:

...as a couple Lynette and Byron never had their own place. After divorcing they went their separate ways, ... Lynette characterized Byron as being quote childish, "he wanted to stay

¹⁶ Declaration of Rossi Turner, 3/15/2008, p.1-4.

¹⁷ Declaration of Freda Black Whitney, 3/16/2008, p. 1-2.

¹⁸ Declaration of Melba Black Corley, 3/15/2008, p.1-2.

up underneath his family." That was the thing that broke them up.19

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. Black'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 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.²⁰

¹⁹ Westfall declaration attachment, p. 1.

²⁰ Ibid.

<u>Diagnostic Criterion C:</u> Onset of Intellectual and Adaptive Deficits During the Developmental Period

Both the record and my clinical examination make a clear and unequivocal case that the onset of Mr. Black's Intellectual Disability occurred during the developmental period.

Both the record and my clinical examination indicate that the onset of Mr. Black's Intellectual Disability occurred during the developmental period, thus meeting the third prong of the diagnostic criteria.

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. Black 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. Black 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 that Mr. Black 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. Black'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. Based on these findings, it is my opinion that Byron Black meets the all of the criteria for a diagnosis of Intellectual Disability pursuant to Atkins v. Virginia.

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,

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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

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

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BY ELECTRONIC MAIL

December 13, 2021

Kelley J. Henry Supervisory Asst. Federal Public Defender 810 Broadway, Suite 200 Nashville, TN 37203

RE: Byron Black Supplemental Report

Dear Ms. Henry,

I am writing to update and elaborate on my opinions regarding Mr. Black's diagnosis of Intellectual Disability pursuant to the above captioned matter.

Supplemental Referral Questions

You have asked that I address three supplemental referral questions:

- 1. Is the Sixth Circuit Court of Appeals' analysis and conclusion that Mr. Black's significantly subaverage intellectual functioning did not manifest prior to age-18 consistent with the most current scientific standards, including those set-forth in the AAIDD-12, and the forthcoming DSM-V-TR?
- 2. Taking into consideration all of the evidence before you, including the documents you have reviewed and your independent examination of Mr. Black in 2019, and while applying the most current scientific standards including those set-forth in the AAIDD-12 and forthcoming DSM-V-TR, did Mr. Black's intellectual disability manifest prior to age 18?
- 3. Did the Sixth Circuit Court of Appeals in their majority opinion correctly understand the Flynn effect and its implications?

<u>Supplemental Materials Reviewed</u>

I have previously been provided with the documents detailed in my report dated August 25, 2020 (see "Materials Reviewed" on pp. 3-4). In addition, to assist in addressing the supplemental referral questions listed above, I have been provided with the following:

- 1. The Sixth Circuit Court of Appeals decision in Black v. Carpenter, 866 F.3d 734 (6th Cir. 20h17).
- 2. Bryon Black's school records, which include the test scores referenced by the Court of Appeals.
- 3. The amicus brief submitted by the American Association on Intellectual and Developmental Disabilities in support of Mr. Black's petition for rehearing.

Opinions Regarding Supplemental Referral Questions

I have reached the following opinions regarding the supplemental referral questions to a reasonable degree of neuropsychological certainty:

1. Is the Sixth Circuit Court of Appeals' analysis and conclusion that Mr. Black's significantly subaverage intellectual functioning did not manifest prior to age-18 consistent with the most current scientific standards, including those set-forth in the AAI DD-12, and the forthcoming DSM-V-TR?

It is my opinion that the Sixth Circuit Court of Appeals analysis and conclusion is not consistent with the most current scientific standards for the diagnosis of Intellectual Disability.¹

In 2017, the Sixth Circuit Court of Appeals found that Byron Black failed ailed to establish intellectual disability based on their conclusion that he could not "show that he has significantly subaverage general intellectual functioning that manifested before Black turned eighteen." *Black v. Carpenter*, 866 F.3d 734, 750 (6th Cir. 2017).

In reaching their conclusion that Mr. Black failed to prove age-of-onset of his intellectual disability, the Sixth Circuit defined the problem as follows:

¹ Determining whether a capital defendant has intellectual disability requires courts to follow clinical standards developed by disability professionals. Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).

Black's argument requires three steps: (1) reject Black's childhood "group-administered" IQ scores (83, 97, 92, 91, 83); (2) either rely exclusively on the 2001 IQ scores (69, 57), or else apply a downward adjustment to the pre-2001 adulthood IQ scores (76, 73, 76) to account for the Flynn Effect and the SEM, so as to reduce those scores to below 70; and (3) presume that the adulthood scores, in the absence of contradictory childhood IQ scores (and by disregarding evidence put on by the State to rebut Black's contention that his mother's alcohol consumption caused Black to suffer any brain damage that caused any level of mental retardation), are evidence of lifelong mental retardation that must have manifested itself before age eighteen. Each of these three steps is a necessary condition for Black to prevail on his *Atkins* claim as we see it.²

Unpacking the Sixth Circuit Court of Appeals analysis, they identify three areas that bear reconsideration in light of evolving standards of professional decision-making regarding the diagnosis of Intellectual Disability:

- Whether it is professionally appropriate to consider "groupadministered" intelligence scores in making a diagnosis of Intellectual Disability;
- b) Whether it is professionally appropriate to consider and adjust IQ test scores for norm obsolescence (i.e., the "Flynn Effect); and
- c) Whether IQ scores obtained in adulthood are valid indications that Mr. Black had impairment in IQ during the developmental period as required for a diagnosis of Intellectual Disability.

The acknowledged authorities for the professional standard of care used in the diagnosis of Intellectual Disability are found in two treatises: (1) The *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition* (DSM5); and (2) the 12th edition of *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* published by the American Association on Intellectual and Developmental Disabilities (AAIDD).

Impropriety of group-administered tests. *Group-administered* tests of intelligence, as the moniker implies, are given to groups of people all at the same time, typically in a classroom setting, similar to taking the SAT test for college admissions. They permit obtaining intelligence estimates on large groups of people at once, but at the cost of poor precision because they are

² Id. at 748.

limited in the scope of functions they assess, and do not correlate well with standardized, individually-administered IQ tests.

Individually-administered IQ tests are given in a private, one-on-one setting with a clinical psychologist who gives the test, records and scores the responses, and observes with behavior of the individual during each of the subtests involved.

Both the DSM5 and the AAIDD standard specify that only *individually-administered* IQ tests are appropriate for use in diagnosing Intellectual Disability. The DSM5 states, "Invalid scores may result from the use of brief intelligence screening tests or group tests." The AAIDD specifies the professional standards of this requirement in detail:

In reference to determining significant limitations in intellectual functioning, a full-scale IQ score should be used. This best practice guideline: (a) is based on the general factor of intelligence (i.e., g), which was initially identified by Spearman (1927) and is at the apex of the Carol three-stratum model of human intelligence (Carol, 1993); and (b) reflects the fact that, despite differences among current test developers in terms of the abilities assessed on different intelligence tests, the consensus is that general intelligence, and by inference intellectual functioning, is most accurately assessed and represented using a current reliable, valid, individually administered, comprehensive, and standardized test that yields a full-scale IQ score. In implementing this best practice, we endorse using Floyd at al.'s (in press) guideline for selecting a comprehensive test of general intelligence. Such a test should: (a) include at least six subtests, and (b) sample at least three (preferably more) CHC broad- strata abilities. 4

Thus, the professional requirement that IQ testing must utilize individually-administered, comprehensive testing explicitly <u>precludes</u> reliance on group-administered test scores. This is true for several reasons including, for example, their lack of comprehensiveness due to the limited number of cognitive domains that they assess, and the lack of reliability and validity of the IQ scores obtained from them when compared to the gold-standard

³ DSM5, p.37.

⁴ AAIDD Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports, 12th Edition, p. 28-29.

individually-administered tests. Just as scores from group-administered tests cannot be used as a basis for diagnosing Intellectual Disability, neither can they be used to rule it out. Mr. Black's group-administered test scores are simply not professionally relevant under the current standard of care.

Adjusting IQ test scores for norm obsolescence. The professional standards set out by both the DSM5 and the AAIDD both specifically endorse adjusting IQ scores for norm obsolescence. Norm obsolesce is a statistical artifact that arises from scientific evidence that humans get incrementally more intelligent as they evolve. This has been termed the "Flynn Effect" after James Flynn who discovered this by studying populations throughout the world.

A recent meta-analysis of the Flynn Effect, based on an analysis of 285 studies dating back as far as 1951, has demonstrated conclusively: (a) that the effect is real and legitimate, (b) that the data support previous estimates of the magnitude of the Flynn effect (at 0.3 IQ points per year since the norming of the test used); and (c) that the universe of studies demonstrates its robustness across different age groups, IQ measures, clinical samples, and levels of performance.⁵

As a result, the professional standard of care has evolved to address incorporation of adjustments for norm obsolescence. For example, the DSM5 states: "Factors that may affect test scores include practice effects and the "Flynn effect" (i.e., overly high scores due to out- of- date test norms). The AAIDD states:

Interpreting previously administered intellectual functioning assessments in terms of the extent to which the assessment: (a) used a standardized and individually administered comprehensive intelligence test; (b) was the [then] most recent version of the standardized test used, including the most recent norms; (c) took into consideration the confidence interval within which the person's true score fell; and (d) was corrected for the age of the norms employed. Current best practice guidelines recommend that in cases in which an IQ test with aged norms is used as part of a diagnosis of ID, a correction of the Full-Scale IQ score of 0.3 points per year since the

⁵ Trahan, L. H., Stuebing, K. K., Fletcher, J. M., & Hiscock, M. (2014). The Flynn effect: a meta-analysis. Psychological Bulletin, 140(5), 1332–1360.

⁶ DSM5, p.37.

test e-norms were collected is warranted (Fletcher et al., 2010; Gresham and Reschly, 2011; Kaufman, 2010; Reynolds et al., 2010).

Hence, adjusting Mr. Black's IQ scores for norm obsolescence is consistent with current professional standards, and the correct thing to do.

Whether IQ scores obtained in adulthood are valid indications of Mr. Black's IQ during the developmental period. Having a diagnosis of ID is not required during the developmental period. It would be a deviation from professional standards of care not to diagnose ID simply because an individual was never formally assessed during the developmental period.

The lack of a formal ID assessment can arise due to a number of factors including a lack of resources, having ID mistaken for other disorders, a desire to socially-promote students and move them along to avoid social stigma, or the diagnosis having simply been "missed." Because of these issues, neither the DSM5 nor the AAIDD requires that a diagnosis be made during the developmental period.

Thus, it is entirely reasonable and appropriate to rely on IQ and neurocognitive test scores obtained later in life to make the diagnosis, if those scores are indicative of substantial impairment in intellectual functioning. In Mr. Black's case, he has been tested by different doctors, using different tests, and at various points in time – with all the results being consistent with a finding of, "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." 8

wThis is evidence of what is known as, "convergent validity," that his intellectual functioning is significantly impaired, and hence serves as evidence that he meets diagnostic criteria for Intellectual Disability. This is further supported by evidence in the record of impairment in his cognitive functioning as a child and throughout the developmental period as reflected by: (1) his repeating the second grade, (2) being placed in an "ungraded" class in the third grade, (3) having poor academic achievement test scores

⁷ AAIDD Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports, 12th Edition, p. 42 (emphasis added).

⁸ DSM 5, p. 33.

that have persisted to the present day, and (4) statements describing his cognitive deficits from witnesses who knew him well during that time.

2. Taking into consideration all of the evidence before you, including the documents you have reviewed and your independent examination of Mr. Black in 2019, and while applying the most current scientific standards including those set-forth in the AAI DD-12 and forthcoming DSM-V-TR, did Mr. Black's intellectual disability manifest prior to age 18?

Yes. I base this opinion on the answers provided above as well as the following:

The AAIDD lays out professional guidelines for establishing onset during the developmental period:

It is possible to make a retrospective diagnosis of ID after the individual attains age 22. To do so, the clinician must establish that the significant deficits in both intellectual functioning and adaptive behavior were present during the period of the individual's development. In this situation, when the person does not have a diagnosis of ID established during the developmental period, it is necessary for clinicians to assess the past functioning of the individual to determine whether a diagnosis of ID applies to person.⁹

This endeavor also requires the use of clinical judgment. The primary purpose of establishing the age of onset is one of differential diagnosis, in order to differentiate individuals with ID from those with late-acquired low intellectual functioning due to traumatic brain injuries, degenerative disorders, infectious diseases, and other causes.

Evidence of cognitive impairment. As I noted in my 08/25/2020 report, there were indications of intellectual deficits quite early in Mr. Black's life. He struggled in school, and had to repeat the second grade – the first clear indication that he was impaired intellectually and as a result struggled academically from a very young age. Even today he still functions at the early elementary school level in the bottom 2 percent for math and the bottom 4 percent for reading skills.

⁹ Ibid., p. 41.

A review of his academic records reflects his struggles academically, particularly with standardized tests of cognitive skills like reading readiness and academic achievement. On the Metropolitan Reading Readiness Test administered in June of 1962 when he was 6 years old, he obtained a score of 39, placing him at risk for reading problems. Reading readiness tests generally, "measure physiological maturity, comprehension or the spoken language, ability to perceive similarities and differences, ability to follow directions, and the ability to draw simple figures." ¹⁰

His school records indicate that he had to repeat the second grade, and that once he was promoted to the third grade he was placed in an "ungraded" class (i.e. no grades were assigned for him) prior to being promoted to the fourth grade.

By the time he was in the 7th grade, his scores on the Metropolitan Achievement Test indicated that he was two to three years behind in all subjects (i.e., functioning at the 4th or 5th grade level although he was in the 7th grade). Impaired scores in all subjects is indicative of intellectual Disability rather than a specific learning disability.

Dr. Daniel Grant stated in his 11/16/2001 declaration:

Mr. Black's performance on the Differential Aptitude Test (DAT) administered in the ninth grade would be the best indicator of his level of functioning. This is a well normed test and is published by the publishers of the Wechsler Scales (WAIS-R and WAIS-III). His performance on the Verbal Recognition yielded a percentile of 3, stanine 1; Nonverbal yielded a percentile of 2, stanine of 1; and the VR&NA (a good predictor of intelligence and general ability) yielded a percentile of I and a stanine of 1. His performance on the DAT places Mr. Black's level of functioning within the mildly retarded range.

After reviewing Mr. Black's educational records and reading the interview of Jackie Thomas, Byron Black's Sixth grade teacher, and Mrs. Ford, Byron Black's fifth grade teacher, his true academic performance is suspect. Jackie Thomas stated," ... In my class what I did was I gave work that they could succeed at." Mr. Thomas further stated, "I always gave them something that they could do well. I would not allow a student to get a bad grade in my class." Mrs. Ford

¹⁰ Arthur w. Heilman, Principles and Practices of Teaching Reading (Columbus, Ohio: E. Merrill Books, Inc., 1967), p. 28.

stated, "The black teachers were liberal in their grading." She further noted that A's and B's at that time probably would be C's and D's now.

* * * * *

His mental retardation manifested during the developmental period as noted by his not developing age-appropriate independent living skills before the age of eighteen and as noted by his significantly subaverage performance on the Differential Aptitude Test that was administered when he was in the ninth grade. His performance on the VR&NA on the DAT yielded a percentile score of I which indicates 99 out of a 100 individuals scored better than Mr. Black on that test.

Evidence of impairment in adaptive functioning. I have described specific evidence of impairment in Mr. Black's adaptive functioning during the developmental period on pages 15-23 of my August 25, 2020 report, and those findings are directly relevant to establishing that he evinced deficits in his adaptive functioning prior to age 18. Siblings, neighbors, and cousins who grew up with him during his developmental period describe him as slow, challenged in school, and behind his peers in social and adaptive skills and abilities.¹¹

These findings are further supported by impairments described in the March 13, 2008 declaration of Dr. Stephan Greenspan:

Outcome-based evidence, such as a child being retained in elementary school (which occurred in this case) and very low academic achievement (also true in this case) can also be used as evidence that the developmental criterion has been met.

* * * *

Individualized IQ data for Mr. Black as a child is lacking, for the simple reason that he left high school in the very same year that the federal statute (PL-94-142) that mandated special education was enacted. During the time that Mr. Black was in elementary school, the assumption was that a child would be socially promoted if he was well-behaved (which by all accounts, Mr. Black was), regardless of how little he learned (see Affidavit by Mary Craighead, an administrator at Mr. Black's elementary school). Just the same, Mr. Black was retained

¹¹ Cf. declarations of Freda Black Whitney (sister); Rossi Turner (neighbor he grew up with); Melba Black Corley (sister); Statements of Dr. Sallye Renee Granberry (cousin) to investigator Gaye Nease.

in the second grade, even given that tendency to overlook such learning difficulties. Undoubtedly, an individualized IQ test would have been administered had Mr. Black been born ten years later. The absence of such IQ data makes it impossible to know whether he would have qualified for a diagnosis of MR during that period. Mr. Black's relatively good report cards in elementary school are incongruent with the fact that he was retained and also with his marginal or failing grades in High School. The mystery is cleared up when reading the statements by his fifth and sixth grade teachers (noted in point #17 in the declaration by Dr. Grant). They stated that "I would never allow a student to get a bad grade" (6th grade teacher) and "teachers were liberal in their grading" and a B would be the equivalent of a D at a later time (5th grade teacher). Furthermore, administrator Mary Craighead indicated in her affidavit that the emphasis back then was on helping low-achieving African-American children to feel good about themselves and to experience success in all of their endeavors. This attitude likely also explains why Mr. Black obtained relatively high scores on group administered IQ tests, as it is very possible, indeed likely, that these tests (which even state experts testified are not appropriate for diagnosing MR) were administered in a non-standard manner that could even have involved teacher assistance. Even so, it should be noted that the IQ criterion for diagnosing MR was minus 1 SD (full-sale score of 85), during the years 1961 to 1973, and that the 85 that Mr. Black obtained on the Otis-Lennon group IQ test could, thus, have qualified him at that time.

Dr. Grant correctly noted that the best evidence that Mr. Black would have met the MR intellectual functioning criterion in the Developmental period was his very low performance (standard scores of 71 and 67) on the Differential Abilities Test (DAT). Although not specifically termed an IQ test, the DAT correlates very highly with IQ and in the absence of an IQ test can be used as a substitute. Furthermore, Mr. Black's mostly failing grades in High School (where the overprotective stance of his elementary school no loner applied) is probably a better indicator of the depth of his intellectual limitations. Those limitations carry over today into his very low achievement standard score (72) as an adult on the WRAT-III and the Nelson-Denny reading test.

* * * *

Although he attended an elementary school considered the most disadvantaged and low-functioning in the district (as reflected in its being chosen for a special Ford Foundation program), Mr. Black was made to repeat second grade, which is a clear indication that he was considered to be very "slow" even in that much slower than average setting. There is also very clear evidence from standardized achievement scores that Mr. Black functioned intellectually at a very low level.

The findings from Dr. Greenspan provide solid evidence in support of my opinion that Mr. Black exhibited deficits in adaptive functioning specifically in the Conceptual Domain during the developmental period. Notably, although there is evidence that he was impaired in the other domains as well (i.e., Social and Practical) the diagnostic criteria only require a finding of impairment in <u>one</u> area in order to make the diagnosis.

3. Did the Sixth Circuit Court of Appeals in their majority opinion correctly understand the Flynn effect and its implications?

No.

The Sixth Circuit Court of Appeals statement that, "If *Atkins* had been a 1917 case, the majority of the population now living—if we were to apply downward adjustments to their IQ scores to offset the Flynn Effect from 1917 until now—would be too mentally retarded to be executed," 12 reflects a fundamental misunderstanding of the Flynn effect and its application in this setting. As I have already discussed above, adjustments to IQ test scores due to norm obsolescence (i.e., the Flynn Effect") are the standard of care under the current professional guidelines for the diagnosis of Intellectual Disability (i.e., the DSM and the AAIDD). In the Atkins context, this is particularly true given the need for the utmost precision required in such a high-stakes context.

Like milk in the refrigerator, as the norms for the IQ test age they spoil and require adjustments in order to maintain their diagnostic accuracy. Because the mean (average) IQ score in the population has been shown to increase by approximately three (3) points per decade, so too the statistical point that falls two standard-deviations below that mean also slowly creeps up.

¹² Id. at 749.

In order to be precise in determining whether an individual's IQ is objectively substantially impaired, the period of time between when the normative data for the IQ test was collected and when the test was administered has to be taken into consideration; and adjustments based on that period of time need to be made by subtracting 0.3 IQ points per year multiplied by the number of years between when the test was normed and when the individual was tested with it. This provides the most accurate indication of how far the person being tested falls from the average IQ in the population, which is critical for establishing the first prong of the ID diagnosis. The Flynn Effect and its role in *Atkins* litigation is discussed in much greater detail a chapter by McGrew.¹³

Hence, in controversion to the Sixth Circuit Court of Appeals suggestion that Flynn Effect adjustments are timed from the date that Atkins was decided, in actuality the window of time for the adjustment is narrow and goes forward from the time that the normative data for the test was obtained to the date that an aging test was administered.

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,

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

¹³ McGrew, KS. (2015). Norm obsolescence: the Flynn Effect. Chapter 10 in Polloway, EA (Ed.), <u>The Death Penalty and Intellectual Disability</u>. Washington DC: American Association on Intellectual and Developmental Disabilities.

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

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BY ELECTRONIC MAIL

May 27, 2025

Marshall Jenson Asst. Federal Public Defender 810 Broadway, Suite 200 Nashville, TN 37203

RE: Byron Black Updated Examination

Dear Mr. Jensen,

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

Referral Questions

- 1. Based upon your most recent assessment of Mr. Black, do you continue to hold your opinion that Mr. Black is intellectually disabled? Please supply the basis for your opinion.
- 2. Please describe any changes in Mr. Black's condition since you previously assessed him 2019 and the basis for your conclusions.
- 3. Please describe any deficits that Mr. Black exhibits with respect to memory, linguistic fluency, and cognitive functioning.
- 4. Please describe your conclusions regarding Mr. Black's ability to manage his own affairs, with a particular focus on his ability to manage financial affairs and his ability to live independently.
- 5. At common law, an individual was categorically exempt from execution if he or she was found to be non compos mentis. Does Mr. Black meet the following criteria for being non compos mentis?

- a. An idiot is an individual who exhibits low intellectual functioning from nativity and who is incapable of managing his affairs.
- b. A person is non compos mentis if by reason of disease, accident, or other mental condition loses memory and understanding such that he is incapable of managing his own affairs.
- 6. Please describe the symptoms associated with profound intellectual disability. In your opinion, would such an individual be capable of planning and committing a homicide?

Qualifications of Examiner

I received a bachelor's degree in psychology with honors from Washington and Jefferson College (1980), a master's degree in psychology from the University of Virginia (1985), and a Ph.D. in clinical psychology from the University of Virginia (1989). I completed my clinical psychology internship specializing in forensic psychology at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center in New York City (1986-1987), and was awarded a Post-Doctoral Fellowship in Forensic Psychology, also at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center during which I specialized in forensic neuropsychology (1987-1988).

I am Board Certified in Forensic Psychology by the American Board of Forensic Psychology of the American Board of Professional Psychology, Diplomate Number 5620. I am a Fellow of the American Academy of Forensic Psychology; a Fellow and Past-President of the American Academy of Forensic Sciences; and a Fellow of the National Academy of Neuropsychology. I am licensed as a clinical psychologist by the State of California, License Number PSY15694.

I am also licensed as a clinical psychologist by the State of New York, License Number 011106.

I have recently retired as an Assistant Clinical Professor of Psychiatry and Biobehavioral Sciences at the Semel Institute for Neuroscience and Human Behavior and the Resnick Neuropsychiatric Hospital of the David Geffen School of Medicine at UCLA where I have been since

1995. From 1992 to 1996 I was a Clinical Assistant Professor in the Department of Psychiatry at New York University School of Medicine.

I have authored over 100 publications and presentations at professional meetings, with a research emphasis on forensic issues involving forensic neuropsychological assessment, mental disorders, brain damage, intellectual disability, elder capacities, and violent criminal behavior.

I have been admitted to testify as an expert witness in more than two hundred cases, including testimony in both criminal and civil matters in federal and state courts throughout the United States. I have consulted and testified for both prosecutors and defense attorneys in criminal cases, as well as plaintiffs and defense attorneys in civil matters. I was the **Commonwealth's** expert in *Atkins v. Virginia*, and have testified for the State of Tennessee in two prior *Ford* cases, including *State v. Paul Dennis Reid*, *Jr.* and *State v. Robert Glen Coe*.

Basis for Opinions

Scope of Examination and Informed Consent

I personally re-examined and re-tested Mr. Black on April 28, 2025 in a quiet, private room at the Riverbend Correctional Institution for a total of approximately five hours. 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. Black was able to provide his informed consent to participate with this understanding.

<u>Tests and Procedures Administered</u>

During my re-examination I administered a battery of intellectual and neuropsychological tests and procedures including:

- o Behavioral Observations and Mental Status Examination
- Structured Neuropsychological Interview
- o Advanced Clinical Systems Word Choice/Effort test
- o Dementia Rating Scale -2
- o Independent Living Scales

- o California Verbal Learning Test-3
- o Boston Naming Test
- o Trail Making Test, Parts A & B
- o Delis-Kaplan Executive Function System
 - Verbal Fluency
 - Color-Word Interference

Examination Findings

Behavioral Observations and Mental Status Examination

Byron Black is now a 69-year-old African American man who presented for testing dressed in yellow, prison-issued scrubs. He arrived at the examination room in a wheelchair. He had a mustache, and his thinning black hair was slicked down and longer at the back of his head. He wore glasses. He was very friendly and outgoing, and recognized me from my previous examination. He was again cooperative and effortful throughout.

He was adequately oriented to the world around him, knowing who he was, where he was, and the approximate date and time. His speech was produced at a normal rate and volume with clear articulation and a normal quantity of output.

His thoughts were expressed in a coherent and logical fashion, although he still exhibited a tendency to go into random tangential details and tell stories unrelated to the topic at hand.

Emotionally his observable affect was stable and broad in range and intensity. His affect was appropriately related to his mood and to the content of his thoughts. His underlying mood was inferred to be euthymic. His insight was fair.

He is in extremely poor health. He described that his weight has increased, having gone from 193 to 200 pounds due to being placed on a "kidney diet." He has Stage 4 renal failure requiring periodic dialysis. He is also diabetic, and reported that he has "Stage 4 heart failure," having had a pacemaker implanted on 5/24/2024. He had surgery to replace his right hip in April of 2025, and is awaiting surgery for his left hip as well. Mr. Black also has a complicated history of other serious medical problems, including prostate cancer surgery with complications due to accidentally cutting into his bladder,

diabetes, congestive heart failure, hypertension, and a degenerative bone disease that has caused him to break his right hip. He had three stents placed in his heart in September of 2018, and also had a hernia operation the same year.

He described his sleep as, "pretty good," using the same words that he did at the time of my prior examination. He stated that his interpersonal relationships or activities are, "OK." When I asked how he has been doing emotionally he said, "pretty good."

He denied awareness of any changes in his speech, language, cognition, or memory, although the testing results contradicted this.

Test Findings

Data Validity

In every high-stakes forensic examination such as this one, it is imperative to determine whether the individual being evaluated is putting forth their best effort, and to rule out malingering. Therefore, as part of my examination I again administered both free-standing and embedded measures of effort and malingering to assess the validity of Mr. Black's test findings.

As before, he "passed" with a valid performance on both the freestanding ACS Word Choice/Effort Test and the embedded Forced-Choice Trial of the CVLT-III. These results indicate that he was putting forth his best effort, and the other tests I administered can be relied upon as valid indicators of his current level of neurocognitive functioning.

Functional Living Ability

I administered the **Independent Living Scales** (ILS) to Mr. Black during this examination. The ILS is a standardized, performance-based assessment designed to evaluate an individual's functional competence and capacity to live independently. It assesses abilities critical to everyday living, particularly in older adults or individuals with cognitive impairments, brain injuries, or psychiatric conditions. It is comprised of five subscales:

1. Memory/Orientation – Awareness of personal information, time, and place.

- 2. Managing Money Ability to make financial decisions and perform monetary calculations.
- 3. Managing Home and Transportation Skills in home maintenance, meal preparation, and transportation.
- 4. Health and Safety Ability to respond to emergencies and manage health-related tasks.
- 5. Social Adjustment Judgment in social interactions and use of community resources.

It also includes Problem-Solving and Performance-Information Discrepancy indices to assess discrepancies between knowledge and actual task performance.

Mr. Black obtained the following scores on the ILS:

Scale	Score	Interpretation
Memory/Orientation	42	Moderate impairment – impairment in basic orientation and memory for daily functioning.
Managing Money	26	Extremely low – Indicates severe difficulty with financial management; high risk/not safe to manage funds independently.
Managing Home/Transpor	tation 35	Extremely Low - Major deficits in home-related tasks and safe transportation use.
Health and Safety	36	Extremely low - Poor judgment regarding health decisions and personal safety; limited ability to manage health needs and respond to unsafe situations.

Social Adjustment	43	Moderate impairment – Significant difficulties in social interactions and use of community resources
Problem Solving	28	Extremely low - Severe impairment in applying reasoning and decision -making skills to real-world situations. Unable to make sound, independent decisions.
Performance-Information Discrepancy Index	34	Large discrepancy – Indicates that Mr. Black may know what to do in theory but cannot execute tasks effectively in practice.
Full Scale Score	73	Extremely low - Overall, Mr. Black shows marked global impairment in skills essential for independent living.

Mr. Black's ILS results reflect broad and significant impairment in his adaptive functioning, especially in the areas most critical for safe and autonomous living. Of particular concern is the Managing Money score of 26, suggesting he lacks even basic financial decision-making skills and would be highly vulnerable to financial exploitation or mismanagement. His scores reflect an inconsistent ability to manage daily routines, environmental safety, and personal health needs, indicating that he would be at high risk if left unsupervised. His Problem-Solving Index score is also severely deficient, reflecting poor practical reasoning, diminished judgment, and difficulty adapting to new or unstructured challenges, a key marker of functional incompetence.

Dementia Testing

The **Dementia Rating Scale-2** (DRS-2) is a test that measures multiple cognitive functions associated with dementia including standardized tests of attention and concentration, memory, praxis and constructional ability, and executive functioning. It is normed using data collected as part of the Mayo Clinic's Older Americans Normative Studies (MOANS) and permits the comparison of Mr. Black's test performance with a national sample of 623 community-dwelling elderly participants.

Mr. Black's DRS-2 profile is consistent with a moderate dementia syndrome, with disproportionately severe impairment in executive function, relative preservation of attention and construction, and moderate deficits in memory and conceptualization. His Total Score places him in the bottom 3-5% of others his age.

His scores support the presence of cognitive deficits that affect his functional independence and decision-making capacity. Importantly, the pattern of disproportionate executive impairment could be indicative of frontal-subcortical involvement (e.g., vascular cognitive impairment, frontotemporal dementia) rather than purely Alzheimer's-type pathology.

Neuropsychological Test Score Changes

At the time of my previous testing in 2019, in addition to establishing an IQ in the range of intellectual disability (Full Scale IQ = 67), my testing showed marked impairments in $\mathbf{Mr. Black's}$ attention and memory, higher-order executive functioning, and language skills. For the present examination, I selected a battery of neurocognitive tests looking for any changes in his brain functioning in these areas.

Results indicated a very significant neurocognitive decline. His scores over time are summarized in the table below. All test results are expressed in national percentiles, comparing Mr. Black to others of his age, sex, and education:

¹ 8/25/2020 report, p. 13.

Test	12/2019	04/2025		
Boston Naming Test	<0.1%	<0.0001%		
F-A-S Verbal Fluency	25%	2%		
Delis-Kaplan Executive Function System Color-Word				
Color Naming	16%	1%		
Word Reading	16%	2%		
Inhibition	50%	50%		
Switching	75%	25%		
California Verbal Learning Test				
Trials 1-5 Correct	32%	5%		
Delayed Recall Correct	9%	1%		
Total Recall Correct	19%	3%		
Trail Making Part A	2%	16%		
Trail Making Part B	0.2%	18%		

Attention and memory. Mr. Black's scores have fallen significantly in this area, to the point where his ability to attend to a list of items and repeat them back, even after multiple repetitions is severely impaired. After a short delay period, his memory for those same items falls to the bottom first percentile (i.e., 99 out of 100 men of his age and education can remember more of the list). His score on the Trail Making Test, Part A however, did show improvement, but still fell in the bottom 16th percentile.

Language. Mr. Black has also experienced a substantial loss in his ability to find words to express himself. He was severely impaired in this area in 2019 (less than one man in a thousand performs as badly as he did), but his expressive language in this area is now even more profoundly disabled, to the point where less that one in over 10,000 are as impaired as he is. His verbal fluency, as measured by his ability to say words beginning with different letters (F-A-S), fell from the 25th percentile to the bottom 2nd percentile nationally.

Executive functioning. His higher-order cognitive abilities required for reasoning, problem-solving, and abstract thinking have also diminished significantly. For example, he was impaired in his ability to name things one might buy in a grocery store. He had great difficulty

with dividing his attention between competing ideas, like switching between naming pieces of fruit and pieces of furniture, or naming colors, and reading words for colors, and switching between them. His score on the Trail Making Test, Part B, however, showed improvement.

Answers to Referral Questions

1. Based upon your most recent assessment of Mr. Black, do you continue to hold your opinion that Mr. Black is intellectually disabled? Please supply the basis for your opinion.

Mr. Black met all the criteria for a diagnosis on Intellectual Disability at the time of my assessment in 2009. Since that time, he has experienced substantial physical and mental decline that have affected both his his neurocognitive capacity as well as his functional adaptation skills. He is now fully dependent on others for basic functional activities of daily living, and unable to fend for himself independently if left unassisted.

He remains Intellectually Disabled.

2. Please describe any changes in Mr. Black's condition since you previously assessed him 2019 and the basis for your conclusions.

As reported in detail above, Mr. **Black's** mental condition has deteriorated significantly over the past six years. He has experienced substantial neurocognitive losses in the areas of memory, language, and executive functioning that are most likely attributable to a combination of his multiple medical

conditions, most notably stage 4 renal failure, ² and stage 4 heart failure; ³ as well as his advancing age.

3. Please describe any deficits that Mr. Black exhibits with respect to memory, linguistic fluency, and cognitive functioning.

Mr. Black has experienced additional significant declines in his memory, verbal fluency, and executive functioning with many of his current test scores placing him in the very bottom percentiles of the population in these areas. These impairments are described in detail above. His neurocognitive functioning is following a deteriorating course.

4. Please describe your conclusions regarding Mr. Black's ability to manage his own affairs, with a particular focus on his ability to manage financial affairs and his ability to live independently.

Based on his history and the present testing, Mr. Black is unable to manage his own affairs. He is unable to live independently without external sources of support, and this has been true throughout his lifetime. He is also dependent on others for managing financial affairs.

Zammit AR, Katz MJ, Bitzer M, Lipton RB. Cognitive Impairment and Dementia in Older Adults With Chronic Kidney Disease: A Review. Alzheimer Dis Assoc Disord. 2016 Oct-Dec; 30(4): 357-366.

Sánchez-Román S, Ostrosky-Solís F, Morales-Buenrostro LE, Nogués-Vizcaíno MG, Alberú J, McClintock SM. Neurocognitive Profile of an Adult Sample With Chronic Kidney Disease. Journal of the International Neuropsychological Society. 2011;17(1):80-90.

Tirziu, Daniela et al. (2023). Impact and Implications of Neurocognitive Dysfunction in the Management of Ischemic Heart Failure. Journal of the Society for Cardiovascular Angiography & Interventions, Volume 2, Issue 6, 101198.

² Weiner DE, Seliger SL. Cognitive and physical function in chronic kidney disease. Curr Opin Nephrol Hypertens. 2014 May; 23(3): 291-7.

³ Goyal, P., Albert, N., et al. (2024). Cognitive Impairment in Heart Failure: A Heart Failure Society of America Scientific Statement. Journal of Cardiac Failure, Volume 30, Issue 3, 488 – 504.

- 5. At common law, an individual was categorically exempt from execution if he or she was found to be non compos mentis. Does Mr. Black meet the following criteria for being non compos mentis?
 - a. An idiot is an individual who exhibits low intellectual functioning from nativity and who is incapable of managing his affairs.
 - b. A person is non compos mentis if by reason of disease, accident, or other mental condition loses memory and understanding such that he is incapable of managing his own affairs.

Yes, Mr. Black meets this definition. His intellectual deficits are documented to have been life-long, he has never been capable of managing his own affairs or living independently, and he is totally dependent on others at the present time.

6. Please describe the symptoms associated with profound intellectual disability. In your opinion, would such an individual be capable of planning and committing a homicide?

The severity of intellectual disability is graded on a scale from mild to moderate to severe to profound. A person with profound intellectual disability (ID) is extremely unlikely to be capable of committing murder in the conventional legal or psychological sense, due to the severity of their cognitive and adaptive impairments.

Individuals with profound ID typically have IQs below 20–25 and function at the level of an infant or toddler. They are nonverbal or minimally verbal, **don't** understand cause-and-effect relationships, and require 24/7 supervision for all activities, including basic self-care. They lack understanding of abstract concepts, including legal or moral ideas such as right/wrong, intent, or consequences.

As a result of these profound limitations, they would lack the capacity to form the intent to kill, as they would be incapable of planning or understanding the nature or consequences of a homicidal act. In rare cases where a person with profound ID is physically involved in an act that causes another's death, the

context is typically accidental or the result of impulsive behavior without understanding the consequences.

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,

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

Ruben C. Gur, PhD



Professor, Departments of Psychiatry, Radiology & Neurology Director, Brain Behavior Laboratory & the Neuroimaging & Cognitive Core

 PATIENT NAME:
 BYRON BLACK

 DATE OF BIRTH:
 03/23/1956

 DATE OF IMAGING:
 MRI: 05/10/2022

 PET: 05/10/2022

05/20/2025

DATE OF REPORT: 05/28/2025

INTEGRATION BY: Ruben C. Gur, PhD; Jack C. Lennon, MA

REFERRED BY: Amy Harwell, Esq.

Background

Mr. Black is a 69-year-old male who was referred for quantitative analysis of structural and functional neuroimaging data, specifically structural magnetic resonance imaging (sMRI) and positron emission tomography (PET). Other medical, psychological, and legal records were not available for review and, therefore, do not inform the present evaluation.

Results of Magnetic Resonance Imaging (MRI): Volumetric Structural Analysis

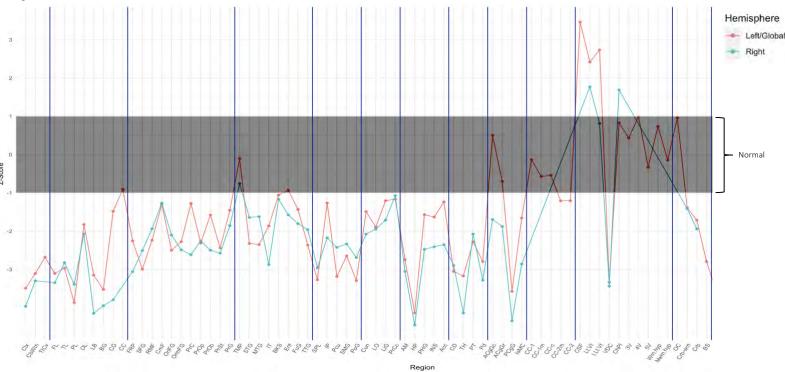
MR images were analyzed using FreeSurfer (v7.4.0; https://surfer.nmr.mgh.harvard.edu/), an open-source software platform for processing and analyzing (human) brain MRI. A clinical read dated 05/11/2022 was provided by Dr. M. Erik Landman of Vanderbilt University Medical Center indicating "No acute intracranial findings. Mild presumed chronic white matter small vessel ischemic changes."

Mr. Black demonstrated total cortical volume that is 3.49 standard deviations below normal, with total gray matter volume (z = -3.97), subcortical gray matter (z = -4.17), and overall segmented brain tissue volume (z = -4.03) also markedly reduced. Total intracranial volume is significantly below normal (z = -2.68). Cortical atrophy is also present in parietal and occipital areas (e.g., precuneus z = -3.18 left; cuneus z = -1.49 left), with involvement of posterior medial structures that support visual-spatial awareness and memory retrieval. The right hemisphere generally exhibits greater atrophy, particularly in limbic and medial structures, while the left hemisphere shows a broader pattern of volume reduction across cortical regions. Volume reductions are especially severe in bilateral limbic and medial temporal regions. Specifically, bilateral hippocampal volume is profoundly reduced (z = -4.13 left, -4.45 right), along with the thalamus (z = -4.14 right), posterior cingulate cortex (z = -4.34 right), and several other subcortical hubs critical to cognition and emotional regulation. This pattern of widespread structural loss suggests global brain atrophy. Correspondingly, ventricular volumes are elevated, with enlargement of the inferior lateral ventricle (z = +2.73 left), lateral ventricles (z = 2.42 left, 1.77 right), and cerebrospinal fluid (CSF) volume overall (z = 3.46). These findings are consistent with loss of parenchymal brain tissue and potential compensatory expansion of fluid-filled spaces.

These widespread reductions in cortical and subcortical volumes are likely to impair Mr. Black's ability to regulate behavior, integrate emotional and cognitive input, and reason effectively. The extensive damage to hippocampal and thalamic structures, together with posterior cingulate hypotrophy, strongly suggests memory impairment, difficulty with orientation, and compromised ability to learn from prior experience. Parietal lobe damage, especially in precuneus, portend difficulties in the integration of multimodal information and the sense of self-agency. Deficits in these brain regions thus increase vulnerability to confusion, suggestibility, and confabulation — wherein memory gaps may be unintentionally filled with inaccurate information.

Collectively, structural MRI findings in Mr. Black indicate profound and widespread volume loss. The degree of hypotrophy observed is well beyond the expected range for healthy male controls, and functional consequences are expected across cognitive, emotional, and social domains.

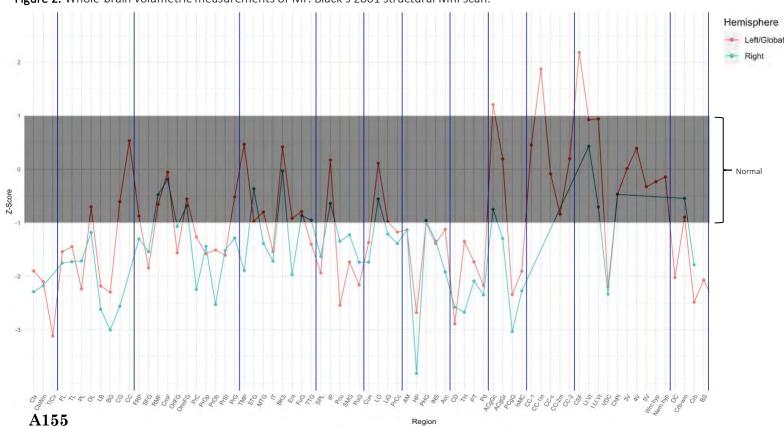
Figure 1. Whole-brain volumetric measurements of Mr. Black's 2022 structural MRI scan.



Results are expressed as Z-scores relative to a comparison group of healthy males over 30 years of age.

Ctx = Cortex Volume, CbVMm = Cerebral White Matter Volume, TiCv = Estimated Total IntraCranial Volume,
FL=Frontal Lobe, TL=Faproral Lobe, DL=Parietal Lobe, OL=Occipital Lobe, LB=Limbic Area, BG=Basal Ganglia, CG=Cingulate, CC=Corpus Callosum, FRP=Frontal Pole, SFG = Superiorfrontal,
RMF = Rostralmiddlefrontal, CmF= Caudalmiddlefrontal, OriFG= Lateralorbitofrontal, OrmFG= Medialorbitofrontal, PrC = Paracentral, PrOp = Parsopercularis, PrOb = parsorbitalis,
PrSt = Parstriangularis, PrG = Precentral, TMP = Temporal Pole, STG = Superiortemporal, MTG = Middletemporal, IT = Inferiortemporal, BKS = Bankssts, Ent = Entorbinial,
FuG = Fusiform, TTG = Transversetemporal, SPL = Superiorparietal, IP = Inferiorparietal, Pcu = Precurueus, SMG = Superiangrinal, PoG = Postecentral, Cun = Cuneus, LO = Lateraloccipital,
LIG = Lingual, PrCc = Pericalcarine, AM = Amygdala, HP = Hippocampus, PHG = Parahippocampal, INS = Insula, Acc = Accumbens Area, CD = Caudate, TH = Thalamus, PT = Putamen,
Pd = Pallidum, ACgGc = Caudalanteriorcingulate, ACgGr = Rostralanteriorcingulate, PCG = Posteriorcingulate, CC-1 = Corpus Callosum Anterior,
CC-1m = Corpus Callosum Mid Anterior, CC-2 = Corpus Callosum Mid Anterior, CC-2 = Corpus Callosum Mid Anterior, CS-2 = Corpus Callosum Posterior, CSF = Cerebral Spinal Fluid,
Lt.Vt = Lateral Ventricle, 1.Lt.Vt = Inferior Lateral Ventricle, VDC = VentralDC, ChPl = Choroid Plexus, 3V = 3rd Ventricle, 4V = 4th Ventricle, 5V = 5th Ventricle,
Wm.hyp = White Matter Hypointensities, Nwm.hyp = Non White Matter Hypointensities, OC = Optic-Chiasm, Crb-wm = Cerebellum White Matter, Crb = Cerebellum Cortex, BS = Brain Stem

Figure 2. Whole-brain volumetric measurements of Mr. Black's 2001 structural MRI scan.



Comparison of Volumetric Data Across 2001 and 2022

Between 2001 and 2022, several brain regions exhibited marked volumetric changes. Notably, the volume of both cortex and white matter are now below 3 SDs lower than the normative sample, and several cortical and subcortical regions showed clear evidence of further atrophy. Correspondingly, there were substantial increases in cerebrospinal fluid-associated structures, including the optic chiasm (+135.8%), right inferior lateral ventricle (+133.5%), right choroid plexus (+113.1%), and white matter hypointensities (+93.3%), indicating ventricular expansion. In addition, the mid-anterior segment of the corpus callosum declined by -45.8%, the anterior cingulate cortex dropped by -42.5%, and the right rostral anterior cingulate shrank by -41.2%. Additional reductions were seen in the left inferior parietal lobe (-32.5%) and the frontal pole (-30.3%). These changes reflect measurable regional atrophy despite consistent comparison standards across both time points, suggesting the possibility of a neurodegenerative process or other accelerated decline not sufficiently explained by normal aging. Also evident is structural expansion in fluid-filled and periventricular regions, as when tissue dies, it is replaced by fluid.

Results of Positron Emission Tomography (PET)

The PET study from 05/10/2022 examined the regional distribution of cerebral metabolic rates for glucose (CMRgl) using 18^{F} -fluoro-d-2-deoxyglucose (FDG). Dr. Jacob Dubroff reported that "the technique described in the corresponding report appears standard of care and in line with most recent guidelines.[1]" The PET study was subjected to a quantitative analysis using a standard regions of interest (ROI) approach. Dr. Dubroff conducted this analysis with MIMneuroTM (v. 7.3.4), a proprietary software product developed and distributed by MIM Software, Inc. (https://www.mimsoftware.com/about/MIM).

Dr. Dubroff continued, "In reviewing the images, they are of acceptable quality without significant artifact. Using MIMneuroTM version 7.3.4 and the high-resolution, unenhanced T1 sequence with isotropic voxels from brain MRI obtained on 05/10/2022, studies were co-registered and analyzed.[2, 3] The images show decreased radiotracer distribution throughout the cingulate gyrus" (Figure 3)

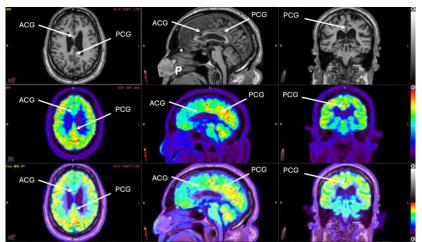


Figure 3. Figure shows decreased glucose metabolism in the cingulate gyrus including the anterior (ACG) and posterior (PCG) portions. [18F]FDG-PET brain and MRI T1 sequence were coregistered. MRI T1 sequence images (top row) and PET images (middle row) were co-registered into fused PET/MRI images (bottom row). Arrows identify the "ACG" and "PCG" in the transaxial (first column), sagittal (2nd column), and coronal (3rd column) planes. PET images are shown using a rainbow color scale. Scale bar on the right depicts relative metabolism (red=higher, violet=lower). MRI images are shown in gray scale. (Dr. Jacob Dubroff, 04/25/2025).

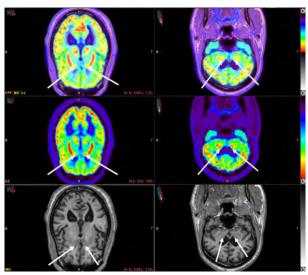


Figure 4. Figure shows location of the bilateral caudate (white arrows) which quantitative analysis demonstrated bilateral hypometabolism, decreased glucose metabolism. [18F]FDG-PET brain and MRI T1 sequence were co-registered. MRI T1 sequence images (top row) and PET images (middle row) were co-registered into fused PET/MRI images (bottom row). Arrows identify the right and left caudate in the transaxial (first column) and coronal (2nd column) planes. PET images are shown using a rainbow color scale. Scale bar on the right depicts relative metabolism (red=higher, violet=lower). MRI images are show in gray scale. (Dr. Jacob Dubroff, 04/25/2025).

In conclusion, Dr. Dubroff reported "both qualitative and quantitative examination of this [18F]FDG-PET brain imaging study demonstrate abnormally depressed glucose metabolism in the cingulate gyrus. Quantitative analysis reveals hypometabolism of the bilateral caudate (Figure 4). These findings are not specific for a particular condition. While cingulate hypometabolism can be observed in the setting of neurodegenerative disorders and dementia such as Alzheimer's disease [2-4], the absence of involvement of other typical locations like the temporal or parietal lobes argues against such an etiology. Cingulate gyrus hypometabolism, however, has been observed in the setting of traumatic brain injury [5-7]. More specifically, two of the references implicate diffuse axonal injury is characterized by widespread damage to axons, long projections of nerve cells that conduct signals,

throughout the brain usually caused by a rapid decelerating injury such as during automobile accidents – it was first described in boxers[8]. [¹8F]FDG-PET brain demonstrating hypometabolism of the caudate is also an indeterminate finding; it has been observed in different movement disorders such as Parkinson's disease and multiple system atrophy (MSA)[9,10]. Animal models of traumatic brain injury measuring brain glucose metabolism with [¹8F]FDG-PET have identified decrease in the caudate[11,12]. Lombardi et al. found those traumatic brain injury patients with more preservative responses, inappropriately repetitive despite the absence of a stimulus, to a frontal lobe behavioral task demonstrated greater caudate hypometabolism using [¹8F]FDG-PET brain imaging[13]. No regions of qualitatively increase brain glucose metabolism were identified. Increased metabolism in the bilateral superior parietal lobule is favored to reflect a normal variant and not consistently observed during a particular brain injury or condition. Three-dimensional display of brain regions with decreased glucose metabolism can be found in **Figure 5** and results of the above analysis of CMRgl relative to whole brain are plotted in **Figure 6** for all regions sampled (Left hemisphere in red, Right hemisphere in turquoise). Graphical visualizations of statistical results for the MRI and PET studies were conducted with R (v4.4.1), a programming language for statistical computing and graphics, and RStudio Desktop (v2024.09.0+375), an integrated development environment for R.

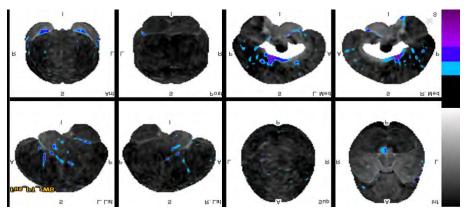
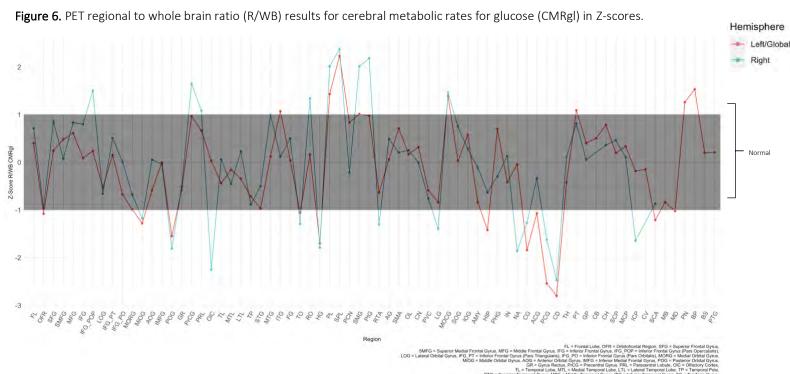


Figure 5. Figure illustrates a 3-dimensional display of brain regions with decreased glucose metabolism determined by Z-scores (color) overlaid onto the corresponding MRI T1 sequence (gray scale). The color bar (right) indicates Z-score: teal=1.5 to 2.25, navy blue=2.25 to 3, and purple > 3. (Dr. Jacob Dubroff, 04/25/2025).

As can be seen in **Figure 6**, consistent with Dr. Dubroff's report, there was bilaterally reduced metabolism in the cingulate gyrus and caudate. The evaluation also showed regions of hyper-metabolism (>2 SDs above normal) in the bilateral parietal lobe, particularly superiorly, as well as right-sided hypermetabolism within the supramarginal gyrus and postcentral gyrus.



Summary and Conclusions

Results of the structural neuroimaging findings show brain dysfunction that may impair Mr. Black's ability to integrate information and base decisions on intact reasoning and appreciation of situation-specific contingencies. He likely experiences cognitive deficits, particularly in the context of executive and memory functions, multimodal integration of sensory information, as well as deficits in emotional regulation and motivation. The structural neuroimaging data show significant hypotrophy across frontal, temporal, parietal, and occipital lobes, some extend up to nearly 4SDs below the expected range. The PET findings likewise show marked variability among regions, with several key regions showing abnormal metabolic activity. Specifically, the cingulate gyrus and caudate are notable concerns, which are functionally interconnected through shared roles in emotion, cognition, motor behavior, and motivation. Notably, the PET scan was performed during a "default-mode" state, namely Mr. Black was not facing a task. Current theory is that regions hyperactivated in this state will become hypoactivated and, conversely, hypoactivated regions will become hyperactivated when the individual is challenged. By that theory, when individuals with this configuration of default mode activity are faced with a challenge, their emotional brain (hippocampus, insula, cingulate) and more primitive basal ganglia will become hyperactive while their 'thinking executive brain' (parietal cortex) will be 'shutting down.' [14-16]

These abnormalities in brain structure encompass brain systems that are important for regulating emotion and behavior, as well as learning from past experiences and recalling complex past events. Individuals with such abnormalities may face difficulties using normative means for regulating behavior and resisting impulses to act on motivations, especially situations with high perceived threat or reward. For instance, Mr. Black may behave impulsively even if such behaviors result in negative consequences, as motivation for reward may be too great to suppress by the faulty parietal cortex integration system and frontal lobe control. These behaviors could include those related to substance use, poor financial decisions, hypersexuality, overeating, or other behaviors that convert reward motivation into action. This could also be related to increased suggestibility and poor decision-making under situations of high stress.

The etiology of these abnormalities is difficult to determine and requires clinical evaluation and integration with history. However, the lower overall brain volume is likely a result of combined genetic and environmental factors and could indicate a neurodevelopmental disorder due to largely symmetrical findings. Within this background, hypotrophy of several limbic regions could suggest PTSD or other mood or trauma-related disorder. Traumatic brain injury is also consistent with several findings of structural and functional abnormalities, such as decreased metabolism in the cingulate gyrus and signs of diffuse axonal injury. Given the changes over the past two decades, several findings may also suggest a neurodegenerative process, such as Alzheimer's disease or Parkinson's disease.

Thank you for the opportunity to participate in Mr. Black's evaluation. The opinions I express with regard to the neuroimaging findings meet standards of scientific certainty. Please let me know if you have questions or need further elaboration or analysis.

Sincerely,

Ruben C. Gur, PhD

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DECLARATION OF RUBEN C. GUR, PH.D.

- I, Ruben C. Gur, Ph.D., state the following:
- 1. I am a neuropsychologist, with a special focus on imaging applications to the diagnosis and study of people with severe behavioral disturbances associated with brain dysfunction. Counsel for Byron Black requested that I evaluate records and results of preliminary psychological and neuropsychological testing, perform my own evaluation, and render an opinion regarding his diagnosis and competency and recommend additional steps needed to diagnose his condition.
- 2. Having done so, it is my expert opinion that there is sufficient evidence in the available data to indicate brain dysfunction. This declaration details my background, identifies the bases for my opinion, and presents my expert opinion.

Synopsis of Curriculum Vitae

- 3. My Curriculum Vitae is attached to this declaration. My qualifications for the opinions I state in this declaration include the following:
- a. I have been licensed as a psychologist in Pennsylvania since 1976. I received a B.A. from the Hebrew University of Jerusalem and an M.A. and a Ph.D. in Clinical Psychology from Michigan State University. I completed Postdoctoral Fellowships at Stanford University and at the University of Pennsylvania.
- b. I am a Diplomate on the American Board of Professional Psychology, with Specialty in Clinical Neuropsychology (ABPP/CN).
- c. I am, or have been, a member of the American Psychological Association,
 Division of Physiological and Comparative Psychology (Fellow), Division of Neuropsychology
 (Fellow), the American Psychological Society (Fellow), the American College of
 Neuropsychopharmacology (Fellow), the American Association for the Advancement of
 Science, the International Neuropsychological Society, the National Academy of
 Neuropsychologists, the New York Academy of Science, and the John Morgan Society.

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- d. Among other honors, I have received the Erikson Award for Scientific Excellence and the 1990 Stephen V. Logan Award from the National Alliance for the Mentally Ill. I have authored or co-authored refereed publications in peer-reviewed journals, made numerous national and international presentations in the field of imaging and brain dysfunction, have served and am serving on Editorial Boards of professional journals, have served on Search Committees for journal Editorship, and have reviewed manuscripts for leading journals in the areas of imaging, brain and behavior, and schizophrenia, have served on Advisory Panels and Study Sections of the National Institutes of Health and currently serve on the NIH Review Group on "Clinical Neuroscience and Biological Psychopathology." I have contributed chapters to textbooks and other scholarly volumes on the topic of brain imaging, neuropsychology and schizophrenia.
- the University of Pennsylvania, with a primary appointment in Psychiatry and secondary appointments in Neurology and in Radiology. I am currently the Director of Neuropsychology, Department of Psychiatry at the Hospital of the University of Pennsylvania. I am Principal Investigator of the Neuropsychology Core and the Functional Imaging Core of the Federally funded Schizophrenia Center, Co-PI of the functional MRI project of the Conte Center for Neurosciences, and Co-PI and investigator on several individual NIH grants (RO1s) on brain imaging and psychopathology. I also supervise interns and practicum students in neuropsychology. I am the Co-founder and advisor of the Biological Basis of Behavior Undergraduate Major Program at the University of Pennsylvania. Additionally, I am a supervisor of postdoctoral Fellows and doctoral students in Psychology and Neuroscience and Co-PI of a Federally funded Training Program in the behavioral neurosciences.
- f. I have participated in the diagnosis of hundreds of individuals where issues similar to this case were raised requiring neuropsychological testing and neuroimaging.
- g. I have been recognized as an expert and allowed to testify with respect to my expert opinions in the specialty of Neuroimaging and Neuropsychology in state and Federal

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courts.

Bases of Opinion-Background and Clinical History

I have reviewed the following documents: 4.

Birth Certificate of Byron Black

Hospital Birth Records of Byron Black

Educational Records of Byron Black

Medical Records of Byron Black

Baptist Hospital

Meharry Hospital (General Hospital formerly)

Metro Health Records

Riverbend Maximum Security Prison Health Records

Vanderbilt Clinic & Hospital Records

Incarceration Records of Byron Black

Psychological Records and Transcript of Testimony

Kenneth Anchor, Ph.D. ABPP Licensed/Board Certified and Clinical Psychologist

Pamela Auble, Ph.D. Clinical Neuropsychologist

William Bernet, M.D. Psychiatrist

Gillian Blair, Ph.D. Licensed Psychologist

DeDe Wallace Center Competency Records

Calvilyn Y. Allmon, M.S.S.W.

Bradley Diner, M.D.

Leonard Morgan, Jr., Ph.D. Clinical Psychologist

Pat Jaros, M.A. Licensed Psychological Examiner

William Kenner, M.D. Psychiatrist

Patti van Eys, Ph.D. Licensed Clinical Psychologist

Transcript of Competency Hearing Byron Black

Mackey v. State 537 S.W.2nd 704 (TN 1975)

First Degree Murder Statute

Mental Retardation Statute 39-13-203 pages 45-47

Mitigation Statute 39-13-204 page 25

Interview by Libby Moore April 23, 1997 of Julia Mai Black, Finis Black, Dan Black and

Alberta Black Crawford

Declaration of Connie Westfall

Interview of Lynette Childs Black 04/26/97 by Connie Westfall

Declaration of Gaye Nease

Interview of Jackie M. Thomas 09/26/01 by Gaye Nease

Interview of Alberta Black Crawford 03/19/01 by Gaye Nease

Interviews of Lynette Childs Black 03/24/01 & 11/10/01 by Gaye Nease

Interview of Johnny Moore 08/15/01 by Gaye Nease

Interview of Mary Frances Coplan 11/05/01 by Gaye Nease

Interview of Finis Black 03/23/01 by Gaye Nease

Interview of Mary C. Harrison 03/15/01 by Gaye Nease

Interview of Arleta Black Swanson and Karen Black Greet 10/18/01 by Gaye Nease

Interview of Richard Corley 10/11/01 by Gaye Nease

Interviews of Melba Black Corley 03/22/01 & 10/10/01 by Gaye Nease
Interview of Freda Black Whitney 03/17/01 by Gaye Nease
Miranda Warning information
Transcript of Evidence State of Tennessee v. Walter R. Kendricks, Case # 92-C-1496 pgs 73152
Medical and Death Information on Julia Mai Black
Declaration of Ross Alderman

- 5. The documents I have reviewed provide a moderately high index of suspicion that Mr. Black suffers from a brain disorder. The main factors in support of this possibility are: I. Reports of head injuries; II. Reports of exposure to neurotoxins; III. Reports of physicians and family members; IV. Performance on the psychological and neuropsychological tests; V. Behavior during trial and appeals; VI. Behavior in prison; VII. Behavior during interview
- 6. The behavioral effects of brain injury are assessed with neuropsychological testing. These procedures provide measures of performance on major behavioral domains that can be linked to brain systems. There are several standardized "Neuropsychological Batteries" and several such batteries have been administered to Mr. Black. They reveal significant deficits indicative of brain dysfunction. The areas of deficits, combined with my own testing and information from the records I have reviewed indicate damage in frontal and temporal lobe functions, particularly those related to the limbic system. Against a background of low intellectual abilities, deficits are particularly pronounced in executive functions, memory and emotion processing. This conclusion is buttressed by the "behavioral imaging" algorithm1

¹ Gur RC, Trivedi SS, Saykin AJ, Gur RE. "Behavioral imaging" - a procedure for analysis and display of neuropsychological test scores: I. Construction of algorithm and initial clinical evaluation. Neuropsychiatry, Neuropsychology and Behavioral Neurology, 1988, 1, 53-60.

Gur RC, Saykin AJ, Blonder LX, Gur RE. "Behavioral imaging": II. Application of the quantitative algorithm to hypothesis testing in a population of hemiparkinsonian patients. Neuropsychiatry, Neuropsychology and Behavioral Neurology, 1988, 1, 87-96.

Gur RC, Saykin AJ, Benton A, Kaplan E, Levin H, Kester DB, Gur RE. "Behavioral imaging": III. Inter-rater agreement and reliability of weightings. Neuropsychiatry, Neuropsychology, and Behavioral Neurology, 1990, 3, 113-124

applied to the available neuropsychological data (see Figure enclosed). Such deficits indicate cerebral dysfunction even when abnormalities are undetected by MRI or PET. They are seen in people with head injuries and in schizophrenia.

- 7. These deficits result in difficulty focusing and sustaining attention. Byron Black is unable to persevere with a task for a sustained period of time. He is easily distracted by irrelevant stimuli. His deficits have a significant deleterious effect in many aspects of real world functioning such as participating meaningfully in a courtroom setting. A person with his deficits is likely to misinterpret or miss altogether significant portions of courtroom proceedings.
- 8. Mr. Black's brain is damaged in those areas responsible for impulse control and inhibition. A person with his deficits is likely to jump to conclusions, misinterpret emotional expressions of others be unusually emotional himself. He is prone to act impulsively and to have significant difficulty controlling his behavior.
- 9. Mr. Black will have unusual difficulty learning to associate causes and effect and will have a significantly diminished ability to recognize or avoid undesirable consequences.
- 10. Mr. Black is likely to misinterpret the statements and actions of others and to act impulsively on that misinterpretation.
- 11. His brain impairments are clearly revealed in tests of memory functioning both verbal and non verbal. It affects his short term recall, as well as long term. He has significant deficits in non verbal memory and his performance declines markedly as the complexity of the task increases. His overall performance on the Halstead-Reitan is in the moderately severe impairment range, which is significant.
- 12. These impairments effect all aspects of his ability to problem solve and process information. His impairment would seriously interfere with his ability to keep pace with courtroom proceedings.
 - 13. Byron Black was exposed to neurotoxins in utero and as a small child. It is

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documented that Mr. Black's mother drank throughout pregnancy. Additional exposures include the fact that Mr. Black was at high risk for lead poisoning and likely exposed to lead. Some risk factors for lead poisoning which are relevant to Mr. Black include that he grew up in a house that was built before 1950 and in zip code where more than 27% of the housing was built before 1950 (lead paint and lead water pipes), he ate and chewed on non-food items such as paint (as a baby Byron chewed on an old, wooden, shellacked crib) or dirt (yard area was dirt, Byron liked to play in the dirt), had a family member that worked in house construction or repair, (as a young child, Byron followed his grandfather to work doing house repairs in the neighborhood) and belonged to a high risk group, e.g. poverty level. In addition, Byron had iron deficiency anemia as an infant. We know that iron deficiency can increase gastrointestinal absorption of lead. Finally, Mr. Black has been an avid football player at varsity level and has suffered several head injuries, some requiring stitches. While there has not been a formal diagnosis of concussion, such head injuries, individually and cumulatively, are likely contributors to some of the symptoms of brain damage displayed in his behavior and testing.

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- Each of these exposures can contribute to impairment of frontal lobe functioning, 14. including poor impulse control and emotional disinhibition. Exposure to these toxins causes structural damage to the brain, including orbital frontal and temporal lobes that contribute to attentional disorder and motor impairment.
- Byron also demonstrates a symptom complex associated with serious psychiatric 15. disorders. The symptoms include: paranoid and delusional beliefs, as well as negative symptoms of schizophrenia. These symptoms produce altentional problems as well as misinterpretations of environmental stimuli, such as courtroom proceedings. These psychiatric symptoms coupled with frontal, temporal, and limbic system impairment compound his inability to understand and appreciate reality. He is unable to distinguish between reality and his delusions and is unaware that he suffers from psychiatric illness.
- His neurologically based impulse control deficits, his inability to control his 16. behavior in order to avoid undesirable consequences, his unusually high distractability and his

impaired and paranoid ideation, greatly compromise his capacity for careful thought and weighing of consideration for and against a proposed course of action. His perception of self interest was severely distorted by his underlying psychiatric disorder and damaged brain. Byron lacks the abilities to make decisions based on their long term consequences.

- 17. The brain is a complex organ, as could be expected from the complexity of human behavior, and lacking tools for studying the living brain has made scientific progress slow and laborious. However, methods developed in the '70s and implemented in the '80s have yielded powerful tools for obtaining reliable measures of brain structure, function and behavior. These methods have become standard in the assessment of brain disorders.
- 18. Magnetic Resonance imaging (MRI) has become the major method for assessing the structural integrity of the brain, namely brain anatomy. Many brain disorders, formerly requiring expert and sometimes ingenious clinical procedures for diagnosis, can now be diagnosed by visual inspection of the MRI scans. MRI also permits highlighting of specific features of the brain by controlling scan parameters and using contrast agents. Clinical reading of the printed images is sometimes, unfortunately, insufficient to detect effects of some disorders, particularly those associated with diffuse or subtle loss of tissue. Such disorders require the use of reliable methods for soft tissue segmentation and volumetric analysis, which permit accurate quantitation of global and regional gray matter, white matter, and cerebrospinal fluid compartments.
- Brain anatomy can be intact yet the brain is still dysfunctional because of aberrant activity. This is seen in many brain disorders, including cases of epilepsy, Parkinson's disease, and early dementia. Brain activity is associated with physiologic change, and positron emission tomography (PET) provides the most accurate quantitative measures of several parameters important for assessing brain physiology. Although PET is a versatile method enabling the measurement of parameters related to both energy metabolism and neurotransmitter function, most relevant for assessing brain dysfunction is the ability to measure local glucose metabolism using 18F-fluoro-d-2-deoxyglucose (FDG). Normative data are available to detect and document

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abnormalities. Ideally, the procedure should include quantitative measurement using arterial or arterialized blood samples. However, the data can be useful even if the study is done in a facility that has not been certified for arterial modeling studies. It is also helpful, although not always essential, to perform measurement of cerebral blood flow (CBF) using an appropriate ligand (e.g., 15OH₂). Ideally, CBF should be obtained both at rest and during activation with neurobehavioral probes. However, even resting baseline values will help establish areas of uncoupling that could be both diagnostic and prognostic.

20. Integration of the clinical, neuroanatomic, neurophysiologic and neuropsychological data is required to determine competency, diagnosis, and the extent to which brain impairment may have caused Mr. Black's behavior. I have experience in such integration, have done it in other capital cases (including death penalty appeals). I have been consulting with Dr. Robert Kessler, a neuroradiologist at Vanderbilt University, in an effort to coordinate a comprehensive neuroimaging study on Mr. B ack. Unfortunately, time constraints have prevented us from being able to conduct the testing prior to today's filing deadline. After reviewing the neuroimaging results, I will be able to render a final opinion.

DATE: 11/15/2001

Dr Ruben Gur PhT

DECLARATION OF DANIEL H. GRANT, Ed.D.

- 1. I am Daniel H. Grant. I am licensed as a psychologist by the State of Georgia (Georgia License Number 859) with training in psychological and neuropsychological evaluation procedures. I have an Ed.D. in school psychology from the University of Georgia, with a major in school psychology and a minor in mental retardation and reading. In addition to attaining the qualifications for licensure in psychology, I obtained both pre and post-doctorial training at the Medical College of Georgia in clinical neuropsychology. I am board certified as a clinical neuropsychologist by the American Board of Professional Neuropsychology. I am also a board certified forensic examiner and a Fellow of the American College of Forensic Examiners.
- 2. My professional experience includes employment as a staff psychologist at Georgia Regional Hospital in Savannah, Georgia, an assistantship with Dr. Allen Kaufman in the Department of Educational Psychology at the University of Georgia, A school psychologist with the Hall County Hall County Board of Education in Gainesville Georgia, Georgia. For almost fifteen years I was a consultant psychologist (30 hours a week) for the diagnostic unit of the Coastal Correctional Institution in Garden City, Georgia, where I assessed approximately 2500 inmates with the majority being below the IQ of 80. I made recommendations regarding housing, and assisted in assessing inmates for potential problems with adaptability and adjustment to prison life. For six years I was a contract neuropsychologist for the Out Patient Psychiatry Department at Winn Army Hospital at Fort Stewart, Georgia. For the past three years I have been a contract parttime psychologist with the Georgia Department of Juvenile Justice at the Savannah Regional Youth Detention Center in Savannah, Georgia. My responsibilities there include providing assessment and treatment, making recommendations regarding housing, and assessing residents for potential problems with adaptability and adjustment to incarceration. I have also maintained a private practice in psychology and clinical neuropsychology. A true copy of my curriculum vitae is attached to this affidavit.
- 3. October 15 and 16, 2001 I evaluated Mr. Black. I met with Mr. Black at the Riverbend Maximum Security Institution in Nashville Tennessee. I conducted a clinical interview and administered a series of tests and procedures to assess Mr. Black's level of intelligence, adaptive functioning, language skills and memory functioning. The tests I administered included: Stanford Binet Intelligence Scale-Fourth Edition, Comprehensive Test of Nonverbal Intelligence, Peabody Picture Vocabulary Test, Expressive Vocabulary

Test, Visual Naming Test from the Multilingual Aphasia Examination, Oral and Written Language Scales, Letter and Category Fluency (F-A-S and Animals) Test, Wide Range Achievement Test-Revision Three(Arithmetic Subtest), Nelson Denny Reading Comprehension Test (Form H), Reitan Story Memory Scale, Denman Neuropsychological Memory Scale (Short Form), Visual Search and Attention Test, Benton Visual Form Discrimination Test, Benton Judgment of Line Orientation, Color Trials 1 and 2, Bender Gestalt, Independent Living Scales, Rapid Alternating Hand Task, structured clinical interview. These are the types of tests which experts in my field normally and regularly rely upon when forming and expressing expert opinions. I am trained at the administration and interpretation of these tests.

- 4. I have also examined a voluminous number of records, documents and testimony pertaining to Mr. Black. The reports I relied on the most are included below, the other documents are attached to the end of this declaration:
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- 2. Interview with Mary Frances Coplan by Gaye Nease
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- 21. Mitigation Statute 39-13-204 page 25
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5. Mental Retardation

I understand the state of Tennessee defines mentally retarded defendants- Death sentence prohibited As used in section39-13-203 as:

- 1. Significantly subaverage general intellectual functioning as evidenced by a functional Intelligence Quotient (IQ) of seventy (70) or below:
- 2. Deficits in adaptive behavior and
- 3. The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

This Standard derives from the classification systems of the American Association on Mental Retardation (AAMR, 1983 & 1992 ed.) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R, 1987 & DSMIV-TR, 2000) which I have specifically considered in setting forth my opinion in this matter.

- 6. General intellectual functioning is defined as an intelligence quotient (IQ) obtained by assessment with one or more individually administered general intelligence tests, such as the WAIS-III or Stanford Binet or the Comprehensive Test of Nonverbal Intelligence (CTONI). Significantly subaverage general intellectual functioning is defined by the AAMR and the DSMIV-TR as an IQ of approximately 70-75 or below on a standardized, individually administered test of general intellectual functioning. Since any measure is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with so flexibility permits inclusion of people with IQ's somewhat higher than 70 who exhibit significant deficits in adaptive behavior.
- 7. Deficits in adaptive behavior (also known as "adaptive functioning "or "adaptive skills") refer to limitations in practical and social intelligence. Practical intelligence refers to the ability to maintain oneself as an independent person in managing the ordinary activities of daily living, and is important for adaptive abilities like functional academics, work, leisure, self-direction, and self-care. Social intelligence refers to the ability to understand social expectations and the behavior of other persons and to judge appropriately how to conduct oneself in social situations, and is central to such adaptive abilities like social skills, communication, work, leisure, home living, functional

academic skills and use of the community. It is a measure of an individual's ability to function effectively in society, and refers to the person's effectiveness in areas such as social skills, communication, and daily living skills, and how well the person meets the standards of personal independence and social responsibility expected of his or her age by his or her cultural group. Specific adaptive limitations often coexist with strengths in other adaptive or personal capabilities. In order to qualify for a diagnosis of Mental retardation, an individual must possess deficits in adaptive functioning in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety.

- 8. Most mentally retarded people do not have obvious physical abnormalities. Oftentimes they appear to have nominally average language skills. Unless the disability is severe, many mentally retarded persons can perform semi-skilled and repetitive tasks with relative ease. They can drive cars. They can maintain lower level jobs with repetitive unskilled tasks. Mentally retarded people often develop coping skills in which they try to hide their disability in an attempt to appear as being "normal." One of these coping skills is the tendency to answer in the affirmative. For these reasons, many people who are thought of as simply being "slow" are in fact mentally retarded. Oftentimes there are no glaring indicators that a person may be mentally retarded.
- 9. A mentally retarded person does not have the mental capacity of an average person. The abilities to plan, organize and reason are often diminished, judgment is often limited, depending upon the complexity of the situation. Mentally retarded persons have limited learning abilities and poor abstract reasoning. They tend to think in concrete terms. Mentally retarded persons also tend to exhibit intellectual rigidity, which is often demonstrated by difficulty understanding and learning from mistakes and by persisting in counterproductive behaviors; for this reason, mentally retarded persons often experience difficulties in independently arriving at a behavior appropriate for a given situation. All of these limitations help explain why many mentally retarded people have difficulties understanding legal proceedings or legal defenses.

RESULTS OF THE EVALUATION OF BYRON BLACK

- 10. Mr. Black's performance on the Stanford Binet-Fourth Edition yielded a test composite score of 57 placing his level of intelligence within the mildly mentally retarded range of intelligence. Mr. Black's performance indicated that 99 percent of the population on which the test was normed scored better than did Mr. Black. Standard scores on the individual components of the test were: Verbal Reasoning 56, Abstract Reasoning 76, Quantitative Reasoning 61, Short-term Memory 56.
- 11. I also administered the Comprehensive Test of Nonverbal Intelligence (CTONI), a widely and professionally accepted test of nonverbal intellectual functioning which measures nonverbal planning, organizational skills, problem solving and spatial ability. His performance yielded a Nonverbal IQ of 64 (placing him at the 1 percentile), Pictorial Nonverbal IQ of 66 (placing him at the 1 percentile) and a Geometric Nonverbal IQ of

- 68 (placing him at the 2 percentile). Mr. Black's scores indicate that 98 to 99 percent of the population performed better than Mr. Black on this test. His performance on the CTONI placed Mr. Black's intellectual performance on all three intellectual measures within the mildly mentally retarded range of intelligence. Mr. Black's performance indicated the severity of his deficits in nonverbal reasoning, nonverbal planning, organizational skills and higher level complex spatial ability.
- 12. All of Mr. Black's scores were within the mildly mentally retarded range. It is my opinion, to a reasonable degree of psychological certainty, that Mr. Black's performance on these two measures of intelligence placed his intellectual abilities within the mildly mentally retarded range of intelligence.
- 13. Mr. Black was administered the WAIS-R on 10-7-93 by Gillian Blair. His performance on the WAIS-R yielded a Verbal IQ of 73, Performance IQ of 75 and a Full Scale IO of 73. It should be noted the WAIS-R was normed in 1980. The Psychological Corporation, the publisher of the Wechsler Scales published an article in 1996 which stated individuals tend to gain approximately 3 to 5 IQ points over a 10 year period. One of the main reasons stated for revising the WAIS-R was outdated normative information. If Mr. Black's WAIS-R IQ scores are corrected for the age of the normative information his intellectual performance would be within the mildly retarded range of intelligence. His Full Scale IQ Score would be between 68 and 70. Pamela Auble, Ph.D. administered the WAIS-R to Byron on either 2-27-97 or 3-5-97. He received a Verbal IQ score of 76, Performance IQ of 77 and a Full Scale IQ of 76. When these scores are corrected for the outdated normative information Mr. Black's intellectual performance on this administration of the WAIS-R should be reduced by 5 to 6 points. This would correct his Full Scale IQ by reducing it to an IQ of 70 or 71. On 3-28-01 Patti van Eys, Ph.D. administered the WAIS-III to Mr. Black. His performance on the WAIS-III yielded a Verbal IQ of 67, Performance IQ of 76 and a Full Scale IQ of 69.
- 14. It is important to note all of the individually administered intelligence tests administered to Mr. Black have yielded consistent results. His full Scale IQ on all of these tests place Mr. Black's level of intelligence within the mildly retarded range according to the DSMIV-TR and AAMR diagnostic criteria.
- 15. Mr. Black was given several group administered intelligence tests while a student. Mr. Black repeated the second grade and often group administered tests in school are scored by grade and not by age as individually administered IQ tests are. If you had repeated a grade this could inflate your IQ score significantly. Group administered tests are not as carefully normed in relation to the national census or socioeconomic data. When a test is administered in a group there can be little control of the testing situation. As Dr. Thompson said in his testimony in the State of Tennessee v. Walter Kendricks "They(group administered IQ tests)...predict some things, but it's not as accurate a measure of intelligence or ability as we'd like to have, but it was what we used back then." He went on to say that an 85 on an Otis-Lennon ... "did not rule out mental retardation." It is important to note the DSMIV-TR and the AAMR do not allow the use of a group administered intelligence test in the diagnosis of Mental Retardation.

- 16. Mr. Black's performance on the Differential Aptitude Test (DAT) administered in the ninth grade would be the best indicator of his level of functioning. This is a well normed test and is published by the publishers of the Wechsler Scales (WAIS-R and WAIS-III). His performance on the Verbal Recognition yielded a percentile of 3, stanine 1; Nonverbal yielded a percentile of 2, stanine of 1; and the VR&NA (a good predictor of intelligence and general ability) yielded a percentile of 1 and a stanine of 1. His performance on the DAT places Mr. Black's level of functioning within the mildly retarded range.
- 17. After reviewing Mr. Black's educational records and reading the interview of Jackie Thomas, Byron Black's Sixth grade teacher, and Mrs. Ford, Byron Black's fifth grade teacher, his true academic performance is suspect. Jackie Thomas stated, "...In my class what I did was I gave work that they could succeed at." Mr. Thomas further stated, "I always gave them something that they could do well. I would not allow a student to get a bad grade in my class." Mrs. Ford stated, "The black teachers were liberal in their grading." She further noted that A's and B's at that time probably would be C's and D's now.
- 18. Mr. Black's Performance on the Oral and Written Language Scale (OWLS) a test of receptive and expressive language skills, yielded a Listening Comprehension standard score of 71 (test age 10-6) and an Oral Expression standard score of 67 (test age 8-6). His performance on the OWLS indicates significant deficits with Mr. Black's Listening Comprehension and Oral Expression. Mr. Black's Performance on the Peabody Picture Vocabulary Test-Third Edition (PPVT-III), test of an individual's "hearing" or listening vocabulary, yielded a standard score of 66. Mr. Black's performance reveals a significant deficit in his listening or receptive language skills. His performance on the Expressive Vocabulary Test (EVT), a measure of expressive vocabulary, yielded a standard score of 57 indicating a significant deficit in Mr. Black's expressive vocabulary skills. To further measure his expressive language skills he was administered the Visual Naming subtest from the Multilingual Aphasia Examination. This is a test of naming pictures of familiar objects. Mr. Black's performance was severely defective and below the 2 percentile level. Mr. Black's significant deficits on the Expressive Vocabulary Test, Vocabulary Reasoning subtest of the Stanford Binet-Fourth Edition, and the Visual Naming subtest of the Multilingual Aphasia Examination probably also indicate a deficit in word retrieval and /or retrieval deficits in general. Mr. Black exhibited a strength in his verbal fluency (list all the words he can think of beginning with the letters F-A-S in one minute) on which he received a standard score of 90. His Category Fluency (list all the animals he could think of in one minute) yielded a standard score of 78. Mr. Black's lower Category Fluency standard score of 78 is most likely related to his word retrieval difficulties. t
- 19. Mr. Black's performance on the Arithmetic subtest of the Wide Range Achievement Test-Revision Three (WRAT-III) yielded a standard score of 72 and grade equivalent of 4.6. His performance on the Nelson-Denny Reading Comprehension Test yielded a grade equivalent of 4.7. Mr. Black's performance on these academic tests indicate significant deficits in his functional academic skills.

- 20. Mr. Black's performance on the Denman Neuropsychological Memory Scale (Short Form) Yielded a Verbal Memory Standard score of 65 which indicates a moderate impairment in Mr. Black's verbal memory. His performance on the Reitan Story Memory Scale yielded a learning standard score of 58 after five learning trials (story repartitions). His retention score after a four hour delay yielded a standard score of 116. This is a significant strength and indicates Mr. Black exhibits much difficulty with the acquisition and encoding of new information but once the information is acquired he is able to retain the information.
- 21. Mr. Black 's performance on the Visual Search and Attention Test yielded a percentile score of 19. This is a visual cancellation task and is a measure of sustained attention for one minute. Mr. Black's performance on the Color Trails 1 yielded a standard score of 88 indicated low average ability in his sustained visual attention involving perceptual tracking and simple sequencing. His performance on the Color Trails 2 which involves an alternating sequencing pattern and is a measure of visual scanning, sustained visual attention and graphomotor skills was within the lower limits of the average range. His sustained attention as measured on these tests is within the low average range. This would indicate Mr. Black's memory deficits are related to encoding difficulties and not to difficulties with sustained attention.
- 22. Mr. Black was administered the Benton Visual Form Discrimination Test and his performance was within the average range indicating good visual discrimination skills. His performance on the Benton Judgment of line orientation was within the low average range adequate visual orientation skills.
- 23. Mr. Black's performance on the Independent Living Scale placed his ability to manage money, do monetary calculations, pay bills and take precautions with money at a standard score of 73. His ability to manage the home, use public transportation and maintain a safe home was at a standard score of 73. His awareness of personal health status and ability to evaluate health problems, handle medical emergencies, and take safety precautions and use of health and safety was at a standard score of 72. His performance on the Memory and Orientation subtest was within the average range. It is a measure of his awareness of his surroundings and assesses short-term memory for brief facts rather than large chunks of semantically related information (a story) as measured by the two tests of memory described in section 20 of this declaration. Mr. Black rated his level of social adjustment as average but it is apparent this is a skewed self rating.
- 24. It is important to note Mr. Black never lived independently. He never did the laundry, cooked, cleaned the house or participated in the care of his son. Even when married he and his wife lived with relatives who cared for Mr. Black. He did not contribute financially to his family and his wife said he never had a bank account. He never contributed financially to the cost of housing or utilities.
- 25. Mr. Black is mentally retarded. His performance on the Wais-III administered by Dr. Patti van Eys yielded a Full Scale IQ of 69. His corrected Full Scale IQ on the WAIS-R

administered by Dr. Gillian Blair was 70 or less and his corrected Full Scale IQ score on the WAIS-R administered by Dr. Pamela Auble was 70 or 71. His performance on the Stanford Binet-Fourth Edition yielded a Test Composite (standard score) of 57. His performance on the Comprehensive Test of Nonverbal intelligence yielded a Nonverbal IQ of 64. All of these scores meet the criteria for significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of 70 or below especially when the standard error of measurement is considered.

26. Mr. Black has significant deficits in adaptive behavior. For example communication skills as measured by Oral and Written Language Scales placed his listening Comprehension skills at a standard score of 71 (test age 10-6) and Oral Expression standard score 67 (test age 8-6) are significantly impaired. His performance on the Peabody Picture Vocabulary Test-Third Revision, standard score of 66 and his standard score of 57 on the Expressive Vocabulary Test revealed Mr. Black's expressive and receptive vocabulary are also significantly impaired. Mr. Black also had significant deficits on a test of visual naming and on the Verbal Reasoning subtest of the Stanford Binet- Fourth Edition. These test results indicate Mr. Black has a significant deficit in his communication skills.

Mr. Black's performance on the Nelson-Denny Reading Comprehension test placed his reading comprehension skills at the 4.7 grade level. His arithmetic skills as measured by the Arithmetic subtest on the Wide Range Achievement Test were at the 4.6 grade level. His performance on the Managing Money subtest of the Independent Living Scale placed his ability to manage money, do monetary calculations, pay bills and take precautions with money was at a standard score of 73. Mr. Black's performance on these tests indicate his functional academic skills are significantly impaired.

It is also important to add Mr. Black has never lived independently, never did the laundry, cooked, cleaned the house, cared for his son or contributed financially to his family or to the maintenance of his residence.

- 27. His mental retardation manifested during the developmental period as noted by his not developing age appropriate independent living skills before the age of eighteen and as noted by his significantly subaverage performance on the Differential Aptitude Test that was administered when he was in the ninth grade. His performance on the VR&NA on the DAT yielded a percentile score of 1 which indicates 99 out of a 100 individuals scored better than Mr. Black on that test.
- 28. The Declaration of Ross Alderman, who was trial counsel for Mr. Black, describes behaviors Mr. Black presented at trial that are consistent with an individual who has significant deficits in language skills, memory, verbal reasoning, problem solving skills and significant subaverage intelligence. It is also important to note Mr. Black's deficits and difficulties reported in my declaration would be expected to become more apparent and he more dysfunctional in a stressful situation such as court. Therefore I was not surprised at Mr. Alderman's description of Mr. Black's behavior during his trial.

29. It is important to note the waiver used to obtain permission from Mr. Black to search his premises was written at a 12.0 grade level based on the Flesh-Kincaid Readability Formula. This is a formula that is regularly relied upon by linguists and reading specialists in order to determine the readability of written passages. As I have stated above Mr. Black's reading comprehension level is at the 4.7 grade level. He has significant deficits in his listening comprehension skills and a limited receptive or listening vocabulary. Given the fact that Mr. Black possesses reading and language skills within the fourth to fifth grade level it is probable that he may not have fully comprehended and understood the consequences of giving consent for the purposes for which these forms were intended, or do to his significantly subaverage intelligence that he could rationally make such a decision. This is further supported by the difficulty Mr. Black experienced comprehending and understanding the "happenings" in the court room and the difficulty he had in assisting his counsel which was noted in Mr. Alderman's Declaration. The concept of what constitutional rights are, the meaning of hereinafter, hereby authorize, the concepts of refusal of consent and of search warrants, are abstract. It would take great explanation and questioning to ensure that Mr. Black intelligently and knowingly comprehended the intent and potential harm to him entailed by his waiver of rights as set forth in these forms.

Date 16 November 2001

Daniel H. Grant, Ed.D

Birth Certificate of Byron Black Hospital Birth Records of Byron Black

Educational Records of Byron Black

Medical Records of Byron Black

Baptist Hospital

Meharry Hospital (General Hospital formerly)

Metro Health Records

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Psychological Records and Transcript of Testimony

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William Bernet, M.D. Psychiatrist

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Mackey v. State 537 S.W.2nd 704 (TN 1975)

First Degree Murder Statute

Mental Retardation Statute 39-13-203 pages 46-47

Mitigation Statute 39-13-204 page 25

Interview by Libby Moore April 23, 1997 of Julia Mai Black, Finis Black, Dan Black and Alberta Black Crawford.

Declaration of Connie Westfall

Interview of Lynette Childs Black 04/26/97 by Connie Westfall

Declaration of Gaye Nease

Interview of Jackie M. Thomas 09/26/01 by Gaye Nease

Interview of Alberta Black Crawford 03/19/01 by Gaye Nease

Interviews of Lynette Childs Black 03/24/01 & 11/10/01 by Gaye Nease

Interview of Johnny Moore 08/15/01 by Gaye Nease

Interview of Mary Frances Coplan 11/05/01 by Gaye Nease

Interview of Finis Black 03/23/01 by Gaye Nease

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Interview of Freda Black Whitney 03/17/01 by Gaye Nease

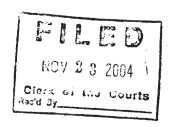
Miranda Warning information
Consent to search information
Transcript of Evidence State of Tennessee v. Walter R. Kendricks, Case # 92-C-1496 pgs 73152
Medical and Death Information on Julia Mai Black

Declaration of Ross Alderman



IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

BYRON LEWIS BL	ACK,)
)	Case No. 88-S-1479
Petitioner)	
)	Death Penalty Case
v.)	
)	
STATE OF TENNE	SSEE)
)	
Respondent)	



AFFIDAVIT OF DR. DANIEL GRANT

STATE OF GEORGIA

COUNTY OF BRYAN

- 1. I am Daniel H. Grant. I am licensed as a psychologist by the State of Georgia (Georgia License Number 859) with training in psychological and neuropsychological evaluation procedures. I have an Ed.D. in school psychology from the University of Georgia, with a major in school psychology and a minor in mental retardation and reading. In addition to attaining the qualifications for licensure in psychology, I obtained pre and post-doctoral training at the Medical College of Georgia in clinical neuropsychology. I am board certified as a clinical neuropsychologist by the American Board of Professional Neuropsychology. I am also a board certified forensic examiner and a Fellow of the American College of Forensic Examiners.
- 2. My professional experience includes employment as a staff psychologist at Georgia Regional Hospital in Savannah, Georgia, an assistantship with Dr. Allen Kaufman in the Department of Educational Psychology at the University of Georgia, a school psychologist with the Hall County Board of Education in Gainesville, Georgia. For almost fifteen years I was a consultant psychologist (30 hours a week) for the diagnostic unit of the Coastal Correctional Institution in Garden City, Georgia where I assessed approximately 2,500 inmates with the majority being below the IQ of 80. I made recommendations regarding housing and assisted in assessing inmates for potential problems with adaptability and adjustment to prison life. For six years I was a contract neuropsychologist for the Outpatient Psychiatry Department at Winn Army Hospital at Fort Stewart, Georgia. For the past four years I have been a contract part-time psychologist with the Georgia Department of Juvenile Justice at the

Savannah Regional Youth Detention Center in Savannah, Georgia. My responsibilities there include providing assessment and treatment, making recommendations regarding housing, and assessing residents for potential problems with adaptability and adjustment to incarceration. I have also maintained a private practice in Forensic psychology and clinical neuropsychology. A true copy of my curriculum vitae is attached to this affidavit.

- On October 15 and 16, 2001, I evaluated Mr. Black. I met with Mr. Black at the Riverbend Maximum Security Institution in Nashville, Tennessee. I conducted a clinical interview and administered a series of tests and procedures to assess Mr. Black's level of intelligence, adaptive functioning, language skills and memory functioning. The tests I administered included: Stanford Binet Intelligence Scale-Fourth Edition, Comprehensive Test of Nonverbal Intelligence, Peabody Picture Vocabulary Test, Expressive Vocabulary Test, Visual Naming Test from the Multilingual Aphasia Examination, Oral and Written Language Scales, Letter and Category Fluency (F-A-S and Animals) Test, Wide Range Achievement Test-Revision Three (Arithmetic Subtest), Nelson Denny Reading Comprehension Test (Form H), Reitan Story Memory Scale, Denman Neurpsychological Memory Scale (Short Form), Visual Search and Attention Test, Benton Visual Form Discrimination Test, Benton Judgment of Line Orientation, Color Trials 1 and 2, Bender Gestalt, Independent Living Scales, Rapid Alternating Hand Task and structured clinical interview. These are the types of tests which experts in my field normally and regularly rely upon when forming and expressing expert opinions. I am trained at the administration and interpretation of these tests.
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Kendricks, Davidson County, Tennessee

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I understand the state of Tennessee defines mentally retarded defendants-death sentence prohibited as used in § 39-13-203 T.C.A. as follows:

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This standard derives from the classification systems of the American Association on Mental Retardation (AAMR, 1983 & 1992 ed.) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R, 1987 & DSMIV-TR, 2000) which I have specifically considered in setting forth my opinion in this matter.

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- 8. Most mentally retarded people do not have obvious physical abnormalities. Oftentimes they appear to have nominally average language skills. Unless the disability is severe, many mentally retarded

persons can perform semi-skilled and repetitive tasks with relative ease. They can drive cars. They can maintain lower level jobs with repetitive unskilled tasks. Mentally retarded people often develop coping skills in which they try to hide their disability in an attempt to appear as being "normal." One of these coping skills is the tendency to answer in the affirmative. For these reasons, many people who are thought of as simply being "slow" are in fact mentally retarded. Oftentimes there are no glaring indicators that a person may be mentally retarded.

9. A mentally retarded person does not have the mental capacity of an average person. The abilities to plan, organize and reason are often diminished, judgment is often limited, depending upon the complexity of the situation. Mentally retarded persons have limited learning abilities and poor abstract reasoning. They tend to think in concrete terms. Mentally retarded persons also tend to exhibit intellectual rigidity, which is often demonstrated by difficulty understanding and learning from mistakes and by persisting in counterproductive behaviors; for this reason, mentally retarded persons often experience difficulties in independently arriving at a behavior appropriate for a given situation. All of these limitations help explain why many mentally retarded people have difficulties understanding legal proceedings or legal defenses.

RESULTS OF THE EVALUATION OF BYRON BLACK

- 10. Mr. Black's performance on the Stanford Binet-Fourth Edition yielded a test composite score of 57 placing his level of intelligence within the mildly retarded range of intelligence. Mr. Black's performance indicated that 99 percent of the population on which the test was normed scored better than did Mr. Black. Standard scores on the individual components of the test were: Verbal Reasoning 56, Abstract Reasoning 76, Quantitative Reasoning 61, Short-term Memory 56.
- 11. I also administered the Comprehensive Test of Nonverbal Intelligence (CTONI), a widely and professional accepted test of nonverbal intellectual functioning which measures nonverbal planning, organizational skills, problem solving and spatial ability. His performance yielded a Nonverbal IQ of 64 (placing him at the 1 percentile), Pictorial Nonverbal IQ of 66 (placing him at the 1 percentile) and a Geometric Nonverbal IQ of 68 (placing him at the 2 percentile). Mr. Black's scores indicate that 98 to 99 percent of the population performed better than Mr. Black on this test. His performance on the CTONI placed Mr. Black's intellectual performance on all three intellectual measures within the mildly mentally retarded range of intelligence. Mr. Black's performance indicated the severity of his deficits in nonverbal reasoning, nonverbal planning, organizational skills and higher level complex spatial ability.
- 12. All of Mr. Black's scores were within the mildly retarded range. It is my opinion, to a reasonable degree of psychological certainty, that Mr. Black's performance on these two measures of intelligence placed his intellectual abilities within the mildly retarded range of intelligence.
- 13. Mr. Black was administered the WAIS-R on 10/7/93 by Gillian Blair. His performance on the WAIS-R yielded a Verbal IQ of 73, Performance IQ of 75 and a Full Scale IQ of 73. It should be noted the WAIS-R was normed in 1980. The Psychological Corporation, the publisher of the Wechsler Scales published an article in 1996 which stated individuals tend to gain approximately 3 to 5 IQ points over a 10 year period. One of the main reasons stated for revising the WAIS-R was outdated normative information. If Mr. Black's WAIS-R's IQ scores are corrected for the age of the normative information, his intellectual performance would be within the mildly retarded range of intelligence. His Full Scale IQ score would be between 68 and 70. Pamela Auble, Ph.D. administered the WAIS-R to Byron on either 2/27/97 or 3/5/97. He received a verbal IQ score of 76, Performance IQ of 77 and a Full Scale IQ of 76. When these scores are corrected for the outdated normative information, Mr. Black's intellectual performance on this administration of the WAIS-R should be reduced by 5

to 6 points. This would correct his Full Scale IQ by reducing it on an IQ of 70 or 71. On 3/28/01 Patti van Eys, Ph.D. administered the WAIS-III to Mr. Black. His performance on the WAIS-III yielded a Verbal IQ of 67, Performance IQ of 76 and a Full Scale IQ of 69.

- 14. It is important to note all of the individually administered intelligence tests administered to Mr. Black have yielded consistent results. His Full Scale IQ on all of these tests place Mr. Black's level of intelligence within the mildly retarded range according to the DSMIV-TR and AAMR diagnostic criteria.
- 15. Mr. Black was given several group administered intelligence tests while a student. Mr. Black repeated the second grade and often group administered tests in school are scored by grade and not by age as individually administered IQ tests are. If you had repeated a grade, this could inflate your IQ score significantly. Group administered tests are not as carefully normed in relation to the national census or socioeconomic data. When a test is administered in a group, there can be little control of the testing situation. As Dr. Thompson said in his testimony in the State of Tennessee v. Walter Kendricks, "They . . . (group administered IQ tests) . . . predict some things, but it's not as accurate a measure of intelligence or ability as we'd like to have, but it was what we used back then." He went on to say that an 85 on an Otis-Lennon . . . "did not rule out mental retardation." It is important to note the DSMIV-TR and the AAMR do not allow the use of a group administered intelligence test in the diagnosis of mental retardation.
- 16. Mr. Black's performance on the Differential Aptitude Test (DAT) administered in the ninth grade would be the best indicator of his level of functioning. This is a well normed test and is published by the publishers of the Wechsler Scales (WAIS-R and WAIS-III). His performance on the Verbal Recognition yielded a percentile of 3, stanine 1; Nonverbal yielded a percentile of 2, stanine of 1; and the VR&NA (a good predictor of intelligence and general ability) yielded a percentile of 1 and a stanine of 1. His performance on the DAT places Mr. Black's level of functioning within the mildly retarded range.
- 17. After reviewing Mr. Black's educational records and reading the interview of Jackie Thomas, Byron Black's sixth grade teacher, and Mrs. Ford, Byron Black's fifth grade teacher, his reported academic performance is suspect. Jackie Thomas stated, "... In my class what I did was I gave work that they could succeed at." Mr. Thomas further stated, "I always gave them something that they could do well. I would not allow a student to get a bad grade in my class." Mrs. Ford stated, "The black teachers were liberal in their grading." She further noted A's

and B 's at that time probably would be C's and D's now. 18. Mr. Black's performance on the Oral and Written Language Scale (OWLS) a test of receptive and expressive language skills, vielded a Listening Comprehension standard score of 71 (test age 10-6) and an Oral expression standard sc ore of 67 (test age 8-6). His performance on the OWLS indicates significant deficits with Mr. Black's Listening Comprehension and Oral Expression. Mr. Black's Performance on the Peabody Picture Vocabulary Test-Third Edition (PPVT-III), test of an individual's "hearing" or listening vocabulary, yielded a standard score of 66. Mr. Black's performance reveals a significant deficit in his listening or receptive language skills. His performance on the Expressive Vocabulary Test (EVT), a measure of expressive vocabulary, vielded a standard score of 57 indicating a deficit in Mr. Black's expressive vocabulary skills. To further measure his expressive language skills he was administered the Visual Naming subtest from the Multilingual Aphasia Examination. This is a test of naming pictures of familiar objects. Mr. Black's performance was severely defective and below the 2 percentile level. Mr. Black's significant deficits on the Expressive Vocabulary Test, Vocabulary Reasoning subtest of the Stanford Binet-Fourth Edition, and the Visual Naming subtest of the Multilingual Aphasia Examination probably also indicate a deficit in word retrieval and/or retrieval deficits in general. Mr. Black exhibited a strength in his verbal fluency (list all the words he can think of beginning with the letters F-A-S in one minute) on which he received a standard score of 90. His Category Fluency (list all the animals he could think of in one minute) yielded a standard score of 78. Mr. Black's lower Category Fluency standard score of 78 is most likely related to his word retrieval difficulties.

- 19. Mr. Black's performance on the Arithmetic subtest of the Wide Range Achievement Test-Revision Three (WRAT-III) yielded a standard score of 72 and grade equivalent of 4.6. His performance on the Nelson-Denny Reading Comprehension Test yielded a grade equivalent of 4.7. Mr. Black's performance on these academic tests indicate significant deficits in his functional academic skills.
- 20. Mr. Black's performance on the Denman Neuropsychological Memory Scale (Short Form) yielded a verbal Memory Standard score of 65 which indicates a moderate impairment in Mr. Black's verbal memory. His performance on the Reitan Story Memory Scale yielded a learning standard score of 58 after five learning trials (story repetitions). His retention score after a four hour delay yielded a standard score of 116. This is a significant strength and indicates Mr. Black exhibits much difficulty with the acquisition and encoding of new information but once the information is acquired, he is able to retain the information.

- 21. Mr. Black's performance on the Visual Search and Attention Test yielded a percentile score of 19. This is a visual cancellation task and is a measure of sustained attention for one minute. Mr. Black's performance on the Color Trails 1 yielded a standard score of 88 indicated low average ability in his sustained visual attention involving perceptual tracking and simple sequencing. His performance on the Color Trails 2 which involves an alternating sequencing pattern and is a measure of visual scanning, sustained visual attention and graphomotor skills was within the lower limits of the average range. His sustained attention as measured on these tests is within the low average range. This would indicate Mr. Black's memory deficits are related to encoding difficulties and not to difficulties with sustained attention.
- 22. Mr. Black was administered the Benton Visual Form Discrimination Test and his performance was within the average range indicating good visual discrimination skills. His performance on the Benton Judgment of line orientation was within the low average range adequate visual orientation skills.
- 23. Mr. Black's performance on the Independent Living Scale placed his ability to manage money, do monetary calculations, pay bills and take precautions with money at a standard score of 73. His ability to manage home, use public transportation and maintain a safe home was at a standard score of 73. His awareness of personal health status and ability to evaluate health problems, handle medical emergencies, and take safety precautions and use of health and safety was at a standard score of 72. His performance on the Memory and Orientation subtest was within the average range. It is a measure of his awareness of his surroundings and assesses short-term memory for brief facts rather than large chunks of semantically related information (a story) was measured by the two tests of memory described in section 20 of this declaration. Mr. Black rated his level of social adjustment as average but it is apparent that this is a skewed self-rating.
- 24. It is important to note Mr. Black never lived independently. He never did the laundry, cooked, cleaned the house or participated in the care of his son. Even when he married, he and his wife lived with relatives who cared for Mr. Black. He did not contribute financially to his family and his wife said he never had a bank account. He never contributed financially to the cost of housing or utilities.
- 25. Mr. Black is mentally retarded. His performance on the WAIS-III administered by Dr. Patti van Eys yielded a Full Scale IQ of 69. His corrected Full Scale IQ on the WAIS-R administered by Dr. Gillian Blair

was 70 or less and his corrected Full Scale IQ score on the WAIS-R administered by Dr. Pamela Auble was 70 or 71. His performance on the Stanford Binet-Fourth Edition yielded a Test Composite (standard score) of 57. His performance on the Comprehensive Test of Nonverbal intelligence yielded a Nonverbal IQ of 64. All of these scores meet the criteria for significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of 70 or below especially when the standard error of measurement is considered.

26. Mr. Black has significant deficits in adaptive behavior. For example, communication skills as measured by Oral and Written Language Scales placed his listening Comprehension skills at a standard score of 71 (test age 10-6) and Oral Expression standard score 67 (test age 8-6) are significantly impaired. His performance on the Peabody Picture Vocabulary Test-Third Revision, standard score of 66 and his standard score of 57 on the Expressive Vocabulary Test revealed Mr. Black's expressive and receptive vocabulary are also significantly impaired. Mr. Black also had significant deficits on a test of visual naming and on the Verbal Reasoning subtest of the Stanford Binet-Fourth Edition. These test results indicate Mr. Black has a significant deficit in his communication skills.

Mr. Black's performance on the Nelson-Denny Reading Comprehension test placed his reading comprehension skills at the 4.7 grade level. His arithmetic skills as measured by the Arithmetic subtest on the Wide Range Achievement Test were at the 4.6 grade level. His performance on the Managing Money subtest of the Independent Living Scale placed his ability to manage money, do monetary calculations, pay bills and take precautions with money at a standard score of 73. Mr. Black's performance on these tests indicate his functional academic skills are significantly impaired.

It is also important to add Mr. Black has never lived independently, never did the laundry, cooked, cleaned the house, cared for his son or contributed financially to his family or to the maintenance of his residence.

27. His mental retardation manifested during the developmental period as noted by his not developing age appropriate independent living skills before the age of eighteen and as noted by his significantly subaverage performance on the Differential Aptitude Test that was administered when he was in the ninth grade. His performance on the VR&NA on the DAT yielded a percentile score of 1 which indicates 99 out of a 100 individuals scored better than Mr. Black on that test.

- 28. The Declaration of Ross Alderman, who was trial counsel for Mr. Black, describes behaviors Mr. Black presented at trial that are consistent with an individual who has significant deficits in language skills, memory, verbal reasoning, problem solving skills and significant subaverage intelligence. It is also important to note Mr. Black's deficits and difficulties reported in my affidavit would be expected to become more apparent and he more dysfunctional in a stressful situation such as court. Therefore, I was not surprised at Mr. Alderman's description of Mr. Black's behavior during his trial.
- 29. It is important to note the waiver used to obtain permission from Mr. Black to search his premises was written at a 12.0 grade level based on the Flesh-Kincaid Readability Formula. This is a formula that is regularly relied upon by linguists and reading specialists in order to determine the readability of written passages. As I have stated above, Mr. Black's reading comprehension level is at the 4.7 grade level. He has significant deficits in his listening comprehension skills and a limited receptive or listening vocabulary. Given the fact that Mr. Black possesses reading and language skills within the fourth to fifth grade level, it is probable that he may not have fully comprehended and understood the consequences of giving consent for the purposes for which these forms were intended, or due to his significantly subaverage intelligence that he could rationally make such a decision. This is further supported by the difficulty Mr. Black experienced comprehending and understanding the "happenings" in the court room and the difficulty he had in assisting his counsel which was noted in Mr. Alderman's Declaration. The concept of what constitutional rights are, the meaning of hereinafter, hereby authorize the concepts of refusal of consent and of search warrants, are abstract. It would take great explanation and questioning to ensure that Mr. Black intelligently and knowingly comprehended the intent and potential harm to him entailed by his waiver of rights as set forth in these forms.
- 31. I have read the Tenth Edition of Mental Retardation, Definition, Classification and Systems of Supports published by the American Association on Mental Retardation. It is my clinical opinion that Byron Black meets the criteria for mental retardation as defined in this manual. I have read the United States Supreme Court's decision in Daryl Renard Atkins, Petitioner v. Virginia and the Tennessee Supreme Court decision in Heck Van Tran v. State of Tennessee and reviewed my psychological test results and the documents provided me in Byron Black's case and it is my clinical opinion that Byron Black meets the criteria of retardation as set forth in those decisions. Furthermore, the United States Supreme Court in the "Atkins" decision noted retarded individuals by definition have diminished ability to understand and process information, to engage

in logical reasoning, are less able to give meaningful assistance to their counsel and their demeanor may create an un warranted impression of lack of remorse for their crimes at their trial. These were difficulties and behaviors noted by me and most were noted by his trial counsel Ross Alderman, Esq.

FURTHER AFFIANT SAITH NOT.
DANIEL H. GRANT, Ed.D. Personally appeared before me, the undersigned, a notary public in and for said county and state, Daniel H. Grant, Ed.D., and having been duly sworn, affirms, under the penalties of perjury, that the statements made herein are true and correct to the best of his knowledge, information and
Sworn and subscribed to me before me this day of, 2002.
NOTARY PUBLIC
My Commission Expires:

APPENDIX TO "A" TO AFFIDAVIT OF DANIEL GRANT

RECORDS REVIEWED

Birth Certificate of Byron Black

Hospital Birth Records of Byron Black

Educational Records of Byron Black

Medical Records of Byron Black

Baptist Hospital

Meharry Hospital (formerly General Hospital)

Metro Health Records

Riverbend Maximum Security Prison Health Records

Vanderbilt Clinic & Hospital Records

Incarceration Records of Byron Black

Psychological Records and Transcript of Testimony

Kenneth Anchor, Ph.D., ABPP Licensed/Board Certified and Clinical

Psychologist

Pamela Auble, Ph.D. Clinical Neuropsychologist

William Bernet, M.D. Psychiatrist

Gillian Blair, Ph.D. Licensed Psychologist

DeDe Wallace Center Competency Records

Calvilyn Y. Allmon, M.S.S.W.

Bradley Diner, M.D.

Leonard Morgan, Jr., Ph.D. Clinical Psychologist

Pat Jaros, M.A. Licensed Psychological Examiner

William Kenner, M.D. Psychiatrist

Patti van Eys, Ph.D. Licensed Clinical Psychologist

Transcript of Competency Hearing Byron Black

Mackey v. State, 537 S.W.2d 704 (TN 1975)

First Degree Murder Statute

Mental Retardation Statute §39-13-203 pages 46-47

Mitigation Statute §39-13-204, page 25

Interview by Libby Moore, April 23, 1997, of Julia Mai Black, Finis Black,

Dan Black

and Alberta Black Crawford

Declaration of Connie Westfall

Interview of Lynette Childs Black 04/26/97 by Connie Westfall

Declaration of Gaye Nease

Interview of Jackie M. Thomas 09/26/01 by Gaye Nease

Interview of Alberta Black Crawford 3/19/01 by Gaye Nease

Interviews of Lynette Childs Black 03/24/01 and 11/10/01 by Gaye Nease

Interview of Johnny Moore 8/15/01 by Gaye Nease

Interview of Mary Frances Coplan 11/05/01 by Gaye Nease

Interview of Finis Black 03/23/01 by Gaye Nease

Interview of Mary C. Harrison 03/15/01 by Gaye Nease

Interview of Arleta Black Swanson and Karen Black Greer 10/18/01 by Gaye Nease Interview of Richard Corley 10/11/01 by Gaye Nease Interviews of Melba Black Corley 03/22/01 and 10/10/01 by Gaye Nease Interview of Freda Black Whitney 03/17/01 by Gaye Nease Miranda Warning Information
Consent to Search Information
Transcript of Evidence, State of Tennessee v. Walter R. Kendricks, Case No. 92-C-1496
pages 73-152
Medical and Death Information on Julia Mai Black
Declaration of Ross Alderman

SUPPLEMENTAL REPORT TO DECLARATION OF DANIEL H. GRANT, Ed.D.

To the extent that it was not clear before it is now clear that Byron Black was not competent before and at the time of trial. This is based on his performance on the psychological test battery administered to Mr. Black on October 15 and 16, 2001. His performance on that battery of tests placed his intellectual abilities within the mildly mentally retarded range. Notable were his significant deficits in listening comprehension, oral expression, verbal memory, communication skills, reading comprehension skills, verbal reasoning skills and skills of independent living. The declaration of Ross Alderman, Esq. clearly emphasizes the impact of the above defined deficits as well as other deficits on Mr. Black's court room behavior, his ability to comprehend the trial process, comprehend testimony and to assist his counsel in his own defense.

Date 24 De comba 2001 Daniel N. Hant ED Daniel H. Grant, Ed.D.

Albert Globus, M. D.

American Board of Psychiatry and Neurology
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(915)447-2240/Fax(916)447-5025
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November 14, 2001

Kelley Henry
Assistant Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, TN 37203

Re:

Preliminary Neuropsychiatric Evaluation Byron Black

20 A Lance of 16705

Dear Ms. Henry:

At your request I am submitting a brief preliminary report in this case although there remains considerable medical evaluation yet to be done. The work currently foreseen consists largely of laboratory assessment of the neuro-anatomical, -physiological, -psychological, and -chemical status of Mr. Black's brain. I will describe what is yet to be done later in this letter report. Nevertheless considerable medical investigation has been completed including a careful and thorough psychlatric history, a clinical mental status examination, and neurological assessment along with an extensive review of collateral documents. These documents include multiple psychological and psychiatric examinations, a description of the facts of the case as determined by the court, statements of lay witnesses, school psychological records, and statements by defense attorneys involved in the guilt phase of his trial. The documents reviewed will be listed along with their relevant findings in the text of this letter report. Due to the nature of this brief report the inferences and the datum used to form the basis of my conclusions will be mixed together in the text. While this is regrettable, it is unavoidable, I ask the indulgence of the reader to distinguish carefully between the data base and various levels of interential commentary. I will do my best to make a clear distinction between the former and latter in my writing.

I have found ample support for my conclusion that Byron Black suffers from substantial mental Illness whose etiology is perinatal organic impairment of his brain. Obviously brain and behavior are functionally inseparable. Therefore he has a clinical picture of gross impairments in cognition, affect, and therefore social judgment that mimic to some degree two psychiatric diagnosis: Ganser Syndrome and schizophrenia. His disorder is not functional, purely psychogenic, or under his personal control or volition. His personal family history strongly supports probable damage to his brain secondary to his mother's drinking during her pregnancy. Other unknown etiological factors may have been important in his clinical picture, however currently we have no psychiatric means to elucidate them. His school records seem to indicate little or no evidence of mental retardation, however on close examination the testing is

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belied by his probable academic capability. Inconsistencies, not only in the facts he related regarding the alleged offense, but in other matters not related to guilt, support the contention that he suffers from major deficiencies in attention, memory, cognition, affect and social judgment that are consistent with a diagnosis of mental retardation. Psychological testing in the past and preliminary findings of Dr. Ruben Gur, Ph.D. as well as prison records also are consistent with this interpretation as are the findings of my mental status examination. It is my current opinion that the brain abnormality from which Mr. Black suffers will prove to involve the frontal and temporal corteces. However, such a clinical prediction at this point in his evaluation is not reliable. What is reliable is that he has a long standing brain abnormality that has lead to a variety of psychosocial signs and symptoms.

The exact diagnostic formulation awaits consideration of the neuropsychological findings of Dr. Gur's work as well as the findings of one or multiple electroencephalograms, either paper tracing or computerized; a brain nuclear magnetic resonance scan; and a brain positron emission tomography. While the fundamental effects of his organic disorder are apparent at this time, the results of these tests will allow a more meaningful description of the relationship between the locus and nature of the brain disorder and his substantial psychosocial abnormalities of his behavior. However, I must warn the court that though the findings are serious, they do not in and of themselves specifically point to a psychiatric disorder that elucidates or proves guilt. In fact, in my experience of twenty two years of forensic work, his personal history and his clinical findings to this point seem atypical of those individuals I have examined that are clearly responsible for Impulsive, psychiatrically based killings.

In this case his perinatal history is of great importance to the diagnostic formulation. However, one should keep in mind that there are many causes of brain damage that are difficult or impossible to trace with the present state of our technology. Thus if the contention that alcohol ingestion by his mother during the time she was pregnant proves insupportable by future investigation, it does not negate the possibility of these other causes. That there was some such brain injury is amply demonstrated by his clinical findings outlined below. Nevertheless his mother's Ingestion of alcohol during his pregnancy is strongly supported. His account indicates that his mother was a long time drinker of Crawford Liquor, a form of scotch. His mother admitted that she drank "a good bit." Her life style supports at least her use, if not her abuse of drinking. Her brother reported she drank during her pregnancy. Byron Black's father said she "wasn't doing like she should have been doing" and that she drank while carrying Byron. Her daughters said she stayed out all night, went to clubs, and "drank but not at home." Of but suggestive importance is the fact that she had no prenatal care and knew nothing of Byron's early medical and development history. In short she appeared to be alcoholic and to drink almost all the time as well as when she was pregnant with Byron. The medical literature is clear that there is a dose related toxic effect of alcohol on fetuses and, even though the classical stigmata of fetal alcohol syndrome does not always appear, developmental abnormalities in brain function are produced by even small amounts of alcohol ingestion during pregnancy.

His early life history is remarkably free of the child abuse and family dysfunction almost always found in individuals who have committed killings of this type. Nevertheless some minimal evidence of at least lack of individual attention is consistent with his personal history. However, it does not seem to be sufficient to explain his psychosocial abnormalities as an adult. In fact, largely because of the positive impact of his extended family, his early life could best be described as supportive and nurturing, but not strongly attentive to his special needs as an individual suffering from mild brain damage. He lived a stable life in a house his grandfather built. He accompanied his grandfather at work as source of many fond memories and

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corroborated by the statements of relatives. His mother could not recall any of his maturational milestones or of his childhood illnesses, a fact that is atypical of maternal memories with which I am familiar. He had a loving relationship with his father (though somewhat distant), his grandfather, and his mother. His grandfather and father were good models for him. His mother and his siblings lived with his grandparents. He said of his parents' relationship: "I would not say they were a couple. He was there for all of us. I would say that he was our father and she was our mother." His father was with his mother's family for dinners and was kind to him and his siblings. He recalls his father buying popcycles for all the kids. There was no known physical, psychological, or sexual abuse. Byron Black developed long term friends. Byron recalls loving school and great academic and athletic success. While there is some doubt about his academic and athletic capabilities, he apparently did enjoy school and has good memories of this experience. There is no evidence of substantial rejection or mistreatment by peers. He was not a disciplinary problem and was described by one teacher as a "nice boy." Thus there seems to be little in his early life history that would indicate a powerfully negative impact on Byron Black's mental health.

As an adult, Byron Black worked consistently. While his jobs did not require much education or training, they did require some responsibility and reliability. He is very proud of his work records and seemed to inflate his importance. His wife supported his contention that he worked regularly.

A number of lay persons have commented on his personality and mental health. Oftentimes these type of observations are most helpful to fill in some of the gaps necessitated by the post facto examinations of clinicians. They are often acute. His former wife, Lynette Childs, described him as "childish" and "not responsible." He tried to be a good father, but did not help much financially. When they were married, they never had a place of their own. She denied that he was impulsive saying he never got angry. He did not even respond physically to her hitting him with a calculator. She never knew him to fight. She did believe he was in a "mild delusional state." She said: "He acts like his mind is gone, like he's still in high school." She described his talk as "crazy." When he is pressed emotionally, she claimed he "does not make sense." He tends to "block out things." He still believes himself to be married to her. She has never done anything to encourage this belief, nevertheless he still holds fast to this view of their relationship. "I think about him having a mental problem with delusions because of the way he thinks we are going to get back together." She made an insightful observation regarding his affective state (the relationship between what is happening and his internal emotional state). When on television after his arrest for a triple homicide, he was smiling. Flattened or inappropriately elevated affect is commonly seen in mentally retarded individuals who do not understand and in Individuals who suffer from schizophrenia. Melby Corley, his sister, said she had never seen him in conflict with his friends and had not seen him show any aggressive behavior out of the ordinary. Freda Whitney, another sister, never saw him out of control. These commentaries are of interest. They point to the following inferences. His lack of responsibility is consistent with poor social judgment and defective cognition. His persistence in believing that he and Lynette are deeply in love and spiritually inseparable to this day borders on the delusional. It coincides with his firm belief that he lost a lung in high school and that he got outstanding grades in high school. He has persisted in these beliefs despite efforts to convince him otherwise. Delusions are defined as tixed false beliefs inconsistent with one's culture and education. Fixed means unchangeable despite convincing presentation of contrary facts. While these signs and symptoms are not exactly typical of delusions seen in schizophrenia or the unconscious or dissociative representations of facts in Ganser syndrome, they are consistent with mild brain damage seen in mentally retarded individuals. His lack of aggressive

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behavior and passive indifference is also typical of many who suffer mild brain damage from early in life. This is especially consistent with his description that his mother gives of his early behavior. He was a very easy baby who slept a lot. Of itself this description would not be of much help in diagnosis. But it grows more significant considering his mild brain damage resulting from his mother's ingestion of alcohol.

In my opinion, the most creditable psychiatric and psychological evaluations point to sufficient brain damage to explicate much of his abnormal behavior, thought and feeling. Some of the examinations point either to the complete absence of behavioral and cognitive abnormalities or to very mild degrees of personality disturbance. These latter examinations suffer from very short interviews; insufficient analysis of school records; inadequate review of personal history, prison records, and psychological testing; lack of interviews of family members or witnesses; and inadequate reporting that does not reveal either the data base nor the logic leading to their interences.

School records reveal little or no evidence of mental retardation. IQ scores were B3 in 1963, 97 in 1964, and 91 in 1967. The values of the IQ tests may be the result of group testing, poor administration, or incompetent scoring. Although I do not know why there was this repeated testing, a couple of hypotheses are possible. One is, of course, that it was the school systems routine. Another is that some teachers were wondering about some of his behaviors in school. What teacher commentary is available is also not particularly supportive of mild mental retardation. The grades reported are fair ranging from C's to B's. Their inconsistency with later testing and opinion of all the examiners call them into question. The possibility of an intervening medical event producing brain damage is yet another possibility, but it is not born out by the medical records I have available. However one commentary by his sixth grade teacher may be helpful. Jackie Thomas said he never saw any "mental retardation." However he readily admitted that his pedagogic practice would not yield much information about mental retardation. "I don't mind saying that he might have been, because in my class what I did was I gave work that they could succeed at." He also said that he had one female student, who was very helpful to him and who was under his close observation, and who turned out to be mentally retarded in her testing. He learned this from the school psychologist and was quite surprised. However, there seems to be no reliable answer to the discrepancy between his school testing and that of the later experts unless the reason might lie in cultural factors affecting the practices of his school such as social promotion or inadequate resources.

Dr. Kenneth Anchor, Ph.D. performed an examination in January of 1989. He did not interview anyone but Mr. Black. He reported that Byron told him he had a lung removed and that he was inordinately proud of his work record. On the Shipley Hartford Intelligence Test Byron Black scored 76. This test is not very accurate below 85 and above 110. Dr. Anchor believed he suffered from impaired cognition, was repressed and rigid, had "emotional blockage", was easily offended, and showed no personality disorders. His defense mechanisms were marginal, a finding that would suggest poor coping and impaired social judgment. His Goldberg Index indicated a psychotic disorder. His Minnesota Multiphasic Personality Disorder showed evidence of adjustment disorder, delusional disorder of paranoid type, and/or paranoid schizophrenia. He was of the opinion that his mental defects rendered him not competent to stand trial apparently for reasons of psychological defects rather than lack of gross understanding of the functions of the court. Incidentally no one, including myself, found him not able to describe the functions of the court and its functionaries although a number found him incompetent. In regard to his potential of brutal killings he commented: "This young man does not appear to be prone to irrationally or self defeatingly initiate physical abuse of others."

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In February and March of 1997, Dr. Pamela Auble, Ph.D tested him. She too reported discrepancies in his personal history regarding his marriage and the number of his children. his removed lung, and his grades in school. She commented on how resistant he was to changing some of these beliefs, a characteristic of delusional beliefs as mentioned above. His self image was primitive. He suffered from defects in fine motor speed, immediate recall, attention to task, learning ability, and verbal reasoning. Further he suffered from dysnomia, word finding difficulty, "some type of confabulation", concrete thinking, difficulty in imposing structure on his thinking, perseveration, and impaired mental flexibility. She also concluded he suffered from dissociative phenomena as he met a woman, yelled at her, and a then claimed he never met her. She commented on his abnormal view of life which might be paraphrased by saying he had a extraordinarily rosy view of life. It was more optimistic than Dr. Auble deemed realistic. At the same time as he was distrustful, he claimed a special relationship with his former wife: "I love you forever, God bless you. Amen. And that if he could change his ex-wife, my life would be complete, Mr. and Mrs. Black." His defense mechanism are primitive and ineffective: repression and denial. Personality testing did not suggest malingering but was not particularly valid. The Rorschach showed some signs of a schizophrenic diagnosis and organic disorder of the brain. All of these findings are consistent with the diagnosis of mild mental retardation and show some similarity to the delusions seen in schizophrenia in a person of low intelligence. She strongly recommended a neurological evaluation.

In March of 2001, Dr. Patti van Eys, Ph.D. tested him. She described past testing as being consistent with delusional thinking, concrete thought pattern, poor insight, and impaired social judgment. An example was his request that she hunt up a niece of his at a football game to send her greetings, something Dr. Eys could not do. He worked hard at his testing but scored full scale IQ of 69, verbal of 67, and performance 79. Her verbal IQ places him below ninety eight of one hundred persons, her performance IQ below ninety five of one hundred. Verbal IQ is very important to social judgment. Such a large discrepancy between verbal and performance IQ suggest medical trauma to the brain rather than a genetic effect. It is very common in brain damaged individuals. His working memory, a measure of mental flexibility, was but 61, placing him at the lowest of one hundred and ninety nine people. Her findings are consistent with neurological impairment and mental retardation as she found poor social judgment as well as a low IQ score.

Patricia Jaros, MA, a licensed psychological examiner, reviewed the records, tested him and testified. She found his answers "difficult to follow", replete with loose associations (a finding consistent with schizophrenia), "marginally delusional", and subject to gross exaggerations of positive attributes. For instance he told her he handled millions and millions of dollars during his employment. He showed signs of paranoia and lacked sufficient insight. His defense mechanisms were primitive and included denial, projection, and repression. She described him as low average or mentally retarded. All of these findings are consistent with degraded social judgment sufficient to impair his competence.

In August and September of 1993, Dr. Gillian Blair, Ph.D. interviewed and tested him. He found loose associations, circumstantial thinking, suspiciousness bordering on delusion, a flattened affect manifested by a fixed grin, and multiple contradictions. In his personal history. His Rorschach test showed elevated indices of schizophrenia, perception of others in a distorted fashion, superficial and lack of maturity, impulsivity when stressed, and disorganized and lacking capacity for cognitive control. On the Minnesota Multiphasic Personality Inventory he was defensive, fake good (made himself look healthier than he was, the opposite of what a

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malingerer would show), inhibition, massive over control, and defense mechanisms of repression, denial, projection, and rationalization. These findings would suggest he may misperceive his psychosocial environment, have poor coping skills, and suffer from a defect in social judgment. These finding would suggest significant problems in regard to competency. His WAIS-R and WMS-R revealed an IQ full scale 73, verbal 73, and performance 75. The standard deviation were three and the spread in the subtests was high. His memory index was only 61. While he made no statement regarding competence, he found Byron Black's function was borderline retarded. Please keep in mind that social function tends to be more impaired than one would expect from the IQ testing alone.

In November of 1992, Dr. William Bernet, M. D., a psychiatrist, did an evaluation. He found Byron Black to misstate the facts of his life not in a fashion typical of lies and also not typical of delusions. He gave approximate statements. Often times he was paranoid, practiced psychological denial, avoided reality, and presented with a persistent smile. He could not comprehend the seriousness of his situation. He was extraordinarily positive and complimentary being grandiose and not dealing with reality. He showed evidence of perseveration. He found his intelligence lower than average. He believed he might suffer from a Ganser Syndrome. He described his findings as consistent with organicity and with not being competent to stand trial.

Particularly impressive are the mental health records from Riverbend Prison. In 1995 he "appeared paranold" and believed his clothes were stolen by other inmates with the complicity of the staff. He was considered a security risk because of these irrational beliefs. In 1994 he showed a "happy affect" and seemed "glddy." Mention is made of possible chronic delusional material. In 1993 he complained of other inmates wearing his clothes. Staff considered him to be mildly paranoid or delusional. These observations are consistent with lay opinion and psychological testing.

Several professionals did evaluations which did not point to organicity, did suggest personality defects, and supported borderline mental retardation.

Dr. William Kenner, M. D., a psychiatrist, found him competent to stand trial on the basis of a two and one half hour interview. While he knew the functions of the court, he did not know about the nature of a divided trial. While his IQ was quoted as 76, no mention was made of the Shipley Hartford test and its proclivity for error in the lower range, nor its relative inaccuracy compared to more extensive testing. Dr. Kenner did not mention his verbal IQ, a most important factor in competence and social judgment, nor did he mention the spread in the sub scores indicative of organic disorder of the brain. He did not explore his interpersonal skills. He attributed his paranoid stance and inaccuracy to a personality defect. He mentioned Byron Black trusted his attorney, a fact not in particular contention. He made no effort to evaluate him for brain damage and provided no formal report allowing study of his reasoning based on his findings or comparison to the basic data revealed by other experts.

Dr. Bradley Diner, M. D., a psychiatric resident, provided a very short report and brief testimony based on a forty five minute interview. He thought that Byron Black had "good understanding" and was competent. He found no evidence of thought disorder, religiosity, or interpersonal difficulties. On page 99 of his testimony he agreed that Byron Black was delusional, on page 100 "I do not think he's delusional." He did indicate he thought he was of borderline intellectual function, but offered no testing and no review of other testing.

FROM:

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In September of 1988, Dr. Leonard Morgan, Ph.D., assessed him for one hour. He described Byron Black as a salesman, an observation that apparently did not occur to the other professionals who interviewed him. He described Byron's view of the world as "simple" but observed he "did not look like he was retarded." He did no testing and did not review any testing. He emphatically asserted he was not delusional and was competent.

In September of 1988, Calvilyn Y. Allmon, MS SW did a 45 minute interview and submitted a very brief report. She offered no data in the way of information and based her opinion that he was competent on her conversation with the defendant.

Recently, Ruben Gur, Ph.D., evaluated Byron Black. In a telephone conference he told me he does not yet have a formal report. He found Byron Black to have substantial difficulty with awareness of his emotions, in fact he was "very impaired." He was impulsive, rigid, showed a defective memory, and inappropriate affect. He believes these findings stem from organic disorder in the orbital frontal and/or temporal corteces of the brain. He will participate with me in a complete neurological evaluation to be described below.

Finally two lawyers have testified in a manor to support the diagnosis of mental retardation or dissociative delusional state. Mr. Ross Alderman will submit a declaration that Byron Black asked that he testify after the jury was recessed. He testified: "He was never able to comprehend or understand the significance of the evidence we were talking about." (page 204) Byron said of the damaging evidence presented in court that God would save him and then he smiled. He could not deal with negative evidence because he believed God would protect him. He never seemed to be disturbed that the state was seeking a death penalty. Patrick McNally testified to his "religious Ideation" and said: "Honestly, I'm not sure Byron understood a lot of what was going on." (page 312) Such firmly and unrealistically held religious beliefs correspond to a common finding in schizophrenia and sometimes in temporal lobe injuries, named religiosity. However, these are more commonly prodromal in nature and are presented in a different fashion. They are consistent with the poor comprehension common in mentally retarded individuals.

My mental status examination showed many abnormalities. I noticed that the circumference of his cranium seemed mildly out of proportion to the size of his head and his forehead sloped. Whether these findings are of any significance awaits magnetic scan of his brain. His self image, especially in regard to attractiveness, bordered on the delusions. He firmly believes his former wife awaits his return. He has an immensely distorted view of the world, it is simply full of flowers, love, and Godliness as are his letters. He holds these views while holding a discordant view represented by almost pathological suspiciousness and having a loner life style devoid of even the limited companionship available to him in his incarceration. He stands very close, not respecting our culturally acceptance interpersonal distance. His eye contact is intense and inappropriate socially. He wears a constant smile suggesting either a delusional state or a flattened and abnormally elevated affect. His speech is slow and soft. His anxiety level is very low given his circumstances. His affect is inappropriate, almost euphoric. He loves everybody and is simultaneously consumed by paranoid suspicions. He seems delusional about his appearance, his attractiveness, his academic abilities, his medical history, the role of the staff in regard to the loss of clothes sent by his mother, his importance and most importantly for competence about his social and legal circumstances. Immediate recall and registration is poor. His thinking is circumstantial, marked by religiosity, perpetual mourning, and concrete. His ability to abstract is poor. For example when asked what people who live in glass houses meant, he replied: "An expression like that is stay out of trouble and don't do anything wrong."

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These findings are consistent with temporal lobe lesions as is his preoccupation with religious themes as demonstrated by his letters. These abound with hearts, birds, "I love you", religious platitudes, "love, love, love." For example: "My family really loves and cares about you and so do I. Keep on smiling because I am always smiling." His writing in court is repetitious, simplistic, shows frequent misuse of words, and has inappropriate comments about abuse of his constitutional rights. His defense mechanisms are immature, promote misunderstanding and rigidity, and poor social judgment. These findings are consistent with poor perception, memory delect, low intelligence in the range IQ of 70 or below, and the effects of a long standing organic disorder of the brain on his current behavior.

Given the fact that a full neurological work up is planned, a formal diagnosis at this time is inappropriate. Suffice it says Byron Black is, in my opinion, mentally retarded and disabled in regard to social judgment. His diagnosis will be organic brain syndrome, probable etiology toxic effects of alcohol ingestion by his mother during pregnancy, and rule out atypical schizophrenia or dissociative states. The electroencephalogram, computerized or paper tracing, the magnetic resonance image of the brain, and the positron emission tomography along with the comprehensive neuropsychological evaluation of Dr. Gur should provide the data base for a more detailed and specific diagnosis.

In summary, the clinical history reveals evidence of early onset brain damage secondary to alcohol ingestion by his mother. It was sufficient to produce an IQ lower than all but two or three per cent of the population. His verbal ability, learning, disability, memory defects, and poor perception of reality have induced a mental state resembling delusional. It has rendered him so defective in understanding that he can not ably and reasonably assist his attorney in his defense. In competency, verbal intelligence is paramount. An accurate memory of his life and a realistic view of his capability also play a major role. Experts in the past who have found him competent, failed to take sufficient history, performed very short interviews, did not use the collateral data base that is available, and seemed to suffer from pre-conceived view of his status. They did not examine the role of disturbed and pathological affect (relation between his thinking and his mood) so abundant in his findings. Experts finding for competence tended to perform longer interviews, saw him as retarded and socially dysfunctional, gave credence to his semi-delusional state, relied on previous examinations and testing, looked into his defect in reasoning ability, and assessed his disturbed affect.

Thank for this opportunity to be of service to you, your client, and the court and for your expression of confidence in my work by the referral of this fascinating and challenging case. Please feel free to call or write at your convenience.

Respectfully yours,

Albert Globus, M. D.

FROM:

BYRON LEWIS BLACK, Petitioner No. 3:00-0764 vs. Judge Campbell RICKY BELL, Warden, Respondent DECLARATION OF STEPHEN GREENSPAN, Ph.D. Declarant, Dr. Stephen Greenspan, states: **Background and Focus of My Evaluation** 10 11 I was retained by attorneys Kelley Henry and Michael Passino of the Office of the Federal Public Defender in Nashville to perform various tasks in 12 order to render an opinion concerning the validity of the claim of their 13 client, Byron Lewis Black, to have mental retardation (MR) and, thus, to be exempt from execution in light of the 2002 US Supreme Court ruling in 14 Atkins v. Virginia. I am being compensated at the rate of \$200 per hour, 15 plus travel expenses, for my services in this case. 16 Byron Black is an African-American male who at the present time is within 17 a week or two of his 52nd birthday. He is under a sentence of death for 18 three homicides committed in 1988, when he was 32 years of age. In 2004, a hearing was held before Tennessee Circuit Court judge Walter C. Kurtz to 19 determine whether Mr. Black was exempt from execution under Atkins as 20 well as van Tran v. State (Tennessee, 2001). On May 5, 2004, Judge Kurtz ruled that Mr. Black did not have MR. It is my understanding that my role 21 is to render an opinion, based on my review of documents as well as new 22 data collected by me, concerning whether or not I believe the earlier conclusion (namely that Mr. Black does not have MR) was justified. 23 24 The main basis for Judge Kurtz's conclusion, as I understand it, was that Mr. Black did not appear to meet the third—"Developmental Criterion"-25 prong of the legal definition of MR. This prong requires that "significant 26 deficits in intellectual functioning" (the first prong) and "deficits in adaptive functioning" (the second prong) need to have been present and 27 28

noted before the age of 18. With respect to the period before age 18, Judge Kurtz was unconvinced that Mr. Black met either the intellectual or adaptive functioning criteria. With respect to Mr. Black's status as an adult, Judge Kurtz stated that while it appeared that Mr. Black did meet the intellectual functioning prong, he was unconvinced that he met the adaptive functioning prong as an adult.

The main focus of my evaluation is on whether I believe that Mr. Black did or did not meet the intellectual and adaptive functioning criteria during the developmental period. In addition, I will render an opinion as to whether or not Mr. Black meets the adaptive functioning criterion as an adult.

My Qualifications

In the past four years, I have been qualified as an expert on MR and related cognitive disorders in four or five capital proceedings in the states of Arizona, California and Colorado. In addition, I have previously been qualified as an expert on MR in family court proceedings in New Jersey and Connecticut. I am a licensed psychologist in the state of Nebraska and was previously licensed in the state of Tennessee (current status: inactive). In addition to testifying in several so-called "Atkins" proceedings, I have been a consultant (and submitted declarations) in numerous other cases. Although my work thus far has always been at the request of attorneys representing defendants, I have found that a claim of mental retardation was unjustified in approximately half of the cases in which I actually examined a defendant (in contrast to other cases, in which my role was limited to educating the court about the nature of mental retardation and/or opined about the adequacy of reports by other experts.)

I am a Clinical Professor of Psychiatry at the University of Colorado Health Sciences Center, and Emeritus (retired) Professor of Educational Psychology at the University of Connecticut. I received a Ph.D. in Developmental Psychology from the University of Rochester, and was a Postdoctoral Fellow in Mental Retardation and Developmental Disabilities at the University of California at Los Angeles' Neuro-psychiatric Institute. Before moving to Connecticut, I held academic appointments at the University of Nebraska and at George Peabody College of Vanderbilt University.

	I have been elected "Fellow" (a designation given only to the most qualified
,	members) by the Mental Retardation division of the American
	Psychological Association and by the American Association on Mental
	Retardation. I was also elected to a term as President of the Academy on
•	Mental Retardation, which is the most prestigious research organization in
,	the field. I have published extensively on MR, with particular emphasis on
	"adaptive behavior." I am a leading scholar in the MR field, as seen in the
)	most recent diagnostic manual of the American Association on Mental
,	Retardation (AAMR), AM. ASS'N ON MENTAL RETARDATION,
	MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND
)	SYSTEMS OF SUPPORTS (10th Edition, 2002) (hereinafter "the 2002
)	AAMR Manual"), which cited at least twelve publications by me, more
0	than that of any other authority. My book WHAT IS MENTAL
U	RETARDATION, co-edited with H. Switzky (AAMR; 2003; rev. ed. 2006)
1	has, in a short time, become one of the most-quoted reference works in the
2	field of mental retardation and has been described by Yale professor
	Edward Zigler as "the best book ever written about the definition and
3	diagnosis of mental retardation." In 2008, AAMR recognized my
4	contributions to the field by granting me its highest honor, the Gunnar and
	Rosemary Dybwad Award for Humanitarianism.
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6	Materials Examined and Activities Performed

17 **Expert reports or declarations examined:**

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- Expert disclosure of Eric Engim, PhD dated July 2, 2003
- Declaration of Ruben Gur, PhD dated November 15, 2001
- Declaration of Daniel Grant, EdD, dated November 16, 2001
- Psychological Evaluation by Patti van Eys, PhD, dated March 28, 2001
- Report by Albert Globus, MD, dated November 14, 2001
- Report by Susan Vaught, PhD, dated May 2003

Affidavits and Interviews from lay witnesses examined:

- 25 Affidavit of Arlita Black Swanson (sister), dated January 11, 2003 26
 - Affidavit of Freda Black Whitney (sister), dated January 11, 2003
 - Affidavit of Lynette Childs Black (sister), dated January 15, 2003

1	 Affidavit of Finis Black (uncle),, undated copy
h	Affidavit of Alberta Black Crawford (sister), dated January 13, 2003
Z.	 Affidavit of Melba Black Corley (sister), dated January 11, 2003 Affidavit of Mary Craighead (Elementary School Administrator)
3	 Affidavit of Mary Craighead (Elementary School Administrator) dated May 8, 2003
4	 Notes of Interviews with most of the above
5	 Notes of interview with Julia Mai Black (mother)
) _	 Notes of interview with Renee Granberry, MD (cousin)
6	 Notes of interview with Richard Corley (co-worker and supervisor)
7	 Notes of interview with Rossi Turner (childhood friend)
R	Notes of interview with Bart Tucker (high school counselor)
2 3 4 5 6 7 8	Notes of interview with Karen Greer (sister)
9 10	Other Documents examined:
	- Di da de la Calcalant de marcado for Demon Disab
11	 Elementary and Secondary School grade reports for Byron Black Momorandum and order by Judge Welter C. Kurtz, deted may 5
12	 Memorandum and order by Judge Walter C. Kurtz, dated may 5, 2004
13	 Independent Living Scale manual and record form (faxed from Dr.
14	Grant)
15	Activities Performed:
16	 In-person Interview with Al Harris (former high school football
17	coach)
18	Phone interview with Mary Black (aunt by marriage)
19	 In-person interview and Vineland adaptive behavior assessment with
	Rossi Turner
20	 In-person joint interview and Vineland adaptive behavior assessment
21	with Melba Black Corley and Freda Black Whitney
2	 In-person interview and assessment of Byron Black Phone interview with Dr. Deniel Creat (regarding the Independent)
	 Phone interview with Dr. Daniel Grant (regarding the Independent Living Scale)
23	Diving Seule)
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Criteria To Use in Diagnosing Mental Retardation

As described in my widely-cited book WHAT IS MENTAL RETARDATION? (American Association on Mental Retardation, 2006), MR is not always an easy diagnosis to make, especially with individuals in the range of mild MR, where virtually all Atkins applicants are likely to be found. In this brief discussion, I shall discuss the three prongs to be used in diagnosing MR, emphasizing both the letter and the spirit of these prongs.

Virtually all legal definitions of MR used in the US are derived from either or both of the diagnostic manuals published by the American Association on Mental Retardation (AAMR, recently renamed the American Association on Intellectual and Developmental Disabilities) and the American Psychiatric Association, through its "Diagnostic and Statistical Manual" (DSM). The AAMR diagnostic manual has gone through several revisions, with the most recent being the tenth edition (AAMR-10), published in 2002. DSM has also gone through several revisions, with the most recent being the text-revised fourth edition (DSM-4TR), published in 2000. Starting with DSM-3 (1980), the definition of MR contained in each version of DSM has been derived entirely, except for minor wording changes, from the most current AAMR manual. Thus, the definition of MR contained in the 2000 DSM-4TR is derived from the 1992 AAMR-9, while it is highly likely that the definition of MR in the forthcoming DSM-5 will be nearly identical to the definition of MR contained in the 2002 AAMR-10. Therefore any differences in the definitions of MR in DSM and AAMR manuals reflect the fact that the most recent DSM manual pre-dates the most recent AAMR manual, and does not reflect substantive or philosophical differences between the two organizations.

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The definitions of MR in the AAMR and DSM manuals contain two parts: a conceptual (abstract) definition, followed by an operational (concrete) definition. While the operational definitions of MR have changed somewhat over the years, the conceptual definitions have remained essentially unchanged since they were first formulated by AAMR over 45 years ago, in the fifth edition of its manual, published in 1961.

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The conceptual definition of MR, as reflected in both AAMR and DSM manuals, and in statutes and court opinions in Tennessee and most other states, has three parts: (a) deficits in intellectual functioning, (b)

concurrent deficits in adaptive functioning (also known as adaptive behavior), and (c) evidence of the disorder before the onset of adulthood. As stated above, these conceptual criteria have remained essentially unchanged in various AAMR and DSM editions.

One difference between DSM 4-TR and AAMR-10 is that DSM 4-TR emphasizes "significantly subaverage intellectual functioning" and "concurrent deficits or impairments in present adaptive functioning" while AAMR-10 emphasizes "significant limitations in intellectual functioning and in adaptive behavior".

The Tennessee statute (TCA-39-13-203) defining MR in criminal cases is aligned more closely with DSM 4-TR, in that it emphasizes "deficits" in adaptive functioning rather than "significant deficits". Specifically, the statute reads: "...Mental Retardation means significant subaverage general intellectual functioning ..., deficits in adaptive behavior ... [and it] must have been manifested during the developmental period..."

This difference between "deficits" and "significant deficits" is more than a semantic distinction, in that it has implications for the operational definition that follows. The difference is that AAMR-10 applies the same criterion (approximately two standard deviations below the mean, or the second percentile of the population) for both intelligence and adaptive behavior, while DSM 4-TR applies the two standard deviation criterion only for intellectual functioning but does not specify any statistical criterion for meeting the second prong of the definition. Thus, "significant deficit" implies a more stringent criterion (typically set at the second percentile of the population) while "deficit" or "impairment" implies a much less stringent criterion, which if it is specified (not the case with DSM 4-TR or the Tennessee statute) is typically set at approximately one standard deviation below the mean (a standard score of 85, which indicates a percentile rank of about the 16th percent of the population).

The operational criteria for diagnosing MR, and the complications involved in applying them in this particular case, are discussed briefly in the following three sub-sections and in the Findings section that follows those.

(1) The Intellectual Criterion. MR is a disorder whose core impairment is in the area of intelligence. This construct is typically measured through one's performance on an individually-administered test of intelligence which results in a full-scale IQ score that locates one's functioning in relation to the mean for the general population. IQ tests are constructed so that the population mean is set at a score of 100, with a standard deviation (an index of statistical variability) of 15. The ceiling for MR is currently established as "approximately two standard deviations below the population mean". The term "approximately" refers mainly to the fact that no test is fully reliable and one should take various factors into account when interpreting a test number. The main thing to take into account is the fact that test scores vary approximately five points around one's "true score". As two standard deviations (2 x 15) equals 30 points, the upper IQ level for meeting the intellectual criterion for MR is 75 (100 minus 30 plus 5 [the reliability index]). In addition, one should take into account factors such as practice effect (possible learning from taking a second test too soon), changes in and adequacy of test norms, and possible malingering.

One of the factors to take into consideration when interpreting IQ scores is what has been termed the "Flynn effect". This term refers to the fact that the overall population has been gaining in performance on IQ tests at a

rate of 3 points per decade (0.3 points per year), and this finding is taken into account by test developers when they develop new test editions every

few years, in that the norms are toughened. Because a diagnosis of MR could be affected significantly depending on when in a test's cycle a person

is tested, the Flynn effect has been used to adjust Full Scale IQ scores using the following formula: (a) subtract the year of the of the test's publication

20 (or, ideally, when the norms were compiled, which typically is two years earlier) from the year a test was administered; (b) multiply this figure by

0.3; (c) subtract this figure from the person's obtained IQ score, with the

resulting number being the Flynn-adjusted score.

Thus if someone was tested in 1990 on a test normed in 1978 and received an IQ score of 78, one would multiply 12 (1990-1978) by 0.3, with the

resulting number being 3.6. Subtracting 4 points (the rounded sum) from 78, one would receive an adjusted IQ score of 74. A discussion of the Flynn

effect in diagnosing MR is contained in a paper by me (Stephen Greenspan,

Spring 2006. Issues in the use of the Flynn Effect to adjust IQ scores when

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diagnosing MR, which appeared recently in PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, which is the official publication of the mental retardation Division of the American Psychological Association. As indicated in that paper, the Flynn effect adjustment formula when diagnosing MR has been accepted as a legitimate practice by state and Federal trial courts (e.g., Walker v. True, 399 F.3d 315, 322-32, 4th Cir. 2005). It is also beginning to be recognized in various appellate courts. As example, on February 28, 2007 the U.S. Navy-Marine Corps Court of Criminal Appeals stated: "In determining whether an offender meets this definition [of MR], standardized IQ scores scaled by the SEM and the Flynn effect will be considered" (web: NMCCA, code 07).

To summarize, the phrase "approximately two standard deviations below the population mean on a standardized test of intelligence" means that one should not rely rigidly on an IQ score number, but should take into account the adequacy of the test, the nature and meaning of the norms, the context in which the test was administered, ethnic and linguistic factors, etc. This is the main use for "clinical judgment" in diagnosing MR. As noted in the book CLINICAL JUDGMENT (AAMR, 2006) by Robert Schalock and Ruth Luckasson (two of the main authors of AAMR-10), clinical judgment in diagnosing MR is <u>not</u> a matter of relying on intuition or gut feeling (which can be misleading, especially in unqualified clinicians) but rather involves using test scores in a thoughtful and scientifically valid manner. A rigid reliance on a test score, without such thoughtfulness, can and often does result in "false positives" (wrongly concluding someone has MR when he does not) or "false negatives" (wrongly concluding someone does not have MR when he does".)

Although a clinician diagnosing MR should not rely on gut feeling (which can vary from clinician to clinician), the notion of clinical judgment (which is relied on heavily in reaching any diagnosis in the human services, not just MR) requires the clinician to interview and have some personal contact, however brief, with the person he or she is diagnosing. This is a matter of basic professional ethics and practice. In the 2004 state court MR hearing both of the two prosecution psychologists testified that they did not believe Mr. Black to have MR, in spite of their never having interviewed or even laid eyes on him. To me, such a "paper diagnosis" lacks credibility and serves to undermine the validity of their findings.

Because in the past, clinicians often relied rigidly and mindlessly on an IQ number, and particularly failed to rake into account the five-point standard error of test scores, AAMR-10 operationally defined approximately two standard deviations below the mean as "a score below 70-75". This indicates that clinicians or agencies making a determination of MR solely on whether a score is below or above 70 are not engaging in acceptable practice. Raising the ceiling from 70 into 70-75 also reflected a policy decision that past manuals, in their concern to eliminate false positives had defined the MR class too narrowly and some loosening of the criteria needed to be undertaken to avoid the now-widespread problem of false negatives.

DSM 4-TR (which preceded AAMR-10) does not use the 70-75 formula. However, it is stated quite clearly that one should take into account standard error of the test and not just rely rigidly on the obtained score. In addition, both AAMR-10 and DSM 4-TR indicate that there are circumstances where reliance on a single "full-scale" IQ score can be misleading. Specifically, it is well-known that individuals with known brain damage syndromes present a mixed pattern of intellectual competence and incompetence, and summarizing across to obtain a single score can serve to obscure the true nature and extent of an individual's impairment. In such circumstances, one must be especially careful to go beyond just full-scale IQ and look at other (sometimes more qualitative) sources of data where these are available and useful.

Finally, the emphasis in both AAMR-10 and DSM 4-TR is on use of individualized and adequately standardized measures, and not on group administered and/ or brief screening instruments. There are only a few such individualized instruments suitable for diagnosing MR, such as the Wechsler scales (WAIS-3), the Stanford-Binet (SB-5), the Woodcock Johnson cognitive battery, etc. Group measures are not acceptable for ruling MR in or out for several reasons, the two most important being: (a) their much weaker reliability and validity, and (b) lack of information about the circumstances of administration (e.g., the possibility that someone may have received help, not been paying attention, etc).

(2) The Adaptive Behavior Criterion. For over the past 45 years, it has no longer been considered adequate to rely solely on IQ scores in determining whether one has or does not have MR. This is because IQ test scores, particularly in the "mild" level of impairment, do not always translate to other settings, and a diagnosis of MR should indicate a fairly global impairment affecting many areas of functioning. Thus, to qualify for a diagnosis of MR, one should show significant deficits in both IQ and "adaptive behavior". The current conceptualization of adaptive behavior relies on a "tripartite model" of intelligence and adaptive functioning that I developed over 25 years ago, and uses my work as the basis. This model has three parts: (a) "conceptual" adaptive skills (understanding academic processes); (b) "practical" adaptive skills (understanding physical processes) and (c) "social" adaptive skills (understanding people and social processes). In determining if someone meets the Adaptive Behavior criterion, it is necessary to show significant deficits in only one of these three areas (AAMR-10). Sources of data can come, preferably, from formal test scores on rating instruments (such as the Vineland or ABAS) administered to informants, supplemented sometimes by formal test scores on individually administered measures (such as the Street Smarts Survival Questionnaire), and from qualitative information gathered from affidavits, records, and observation by an evaluator.

The 2002 AAMR manual specified that the most important source of information regarding whether an individual meets the adaptive behavior criterion is whether one falls approximately two standard deviations (i.e., a standard score below the 70-75 range) on a standardized rating measure of adaptive behavior such as the Vineland. Two pathways to meeting the AAMR's adaptive behavior criterion were offered: (a) a standard score below 70-75 on an overall (composite) score, or (b) a standard score below 70-75 on at least one of the three adaptive skill areas of conceptual adaptive skills, practical adaptive skills or social adaptive skills.

In establishing the possibility of being above 70-75 in one or even two of the three adaptive skill areas (or having good scores on particular items within sub-average adaptive skill areas), the AAMR wished to emphasize that having mild MR is not incompatible with being able to do many things, such as drive a car, hold a job, be married, have relatively normal language and (even) commit crimes that may require some degree of planning and volition.

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In its Users Guide, which is a supplement to the 2002 Manual and written by the same authors, the AAMR indicates that in high stakes assessments, such as an Atkins hearing, the use of retrospective ratings of adaptive behavior is often necessary, and is justified in such cases. In such retrospective ratings, raters are asked to rate an individual not as he is today but as he was at the time when the rater knew him best, living in the community. Retrospective ratings are needed because the current setting (e.g., Death Row) does not provide opportunities to assess success or failure in more typical roles (e.g., worker) or tasks (e.g., operating appliances or dealing with neighbors). Also, MR is a disability that can best be understand as a need for supports in fulfilling such community roles and tasks. Another reason for retrospective assessment of adaptive behavior is because such assessments may not have been carried out during the Developmental period and retrospective assessment helps to establish if the individual had significant impairments during that period.

As already mentioned, one operational difference between AAMR-10 and DSM 4-TR, in terms of adaptive behavior/ functioning, is that DSM uses the words "limitations" and "deficits", implying either no statistical cutting score or, at most, a minus one SD (standard score of 85) criterion. AAMR-10, on the other hand, uses the words "significant deficits", implying minus two SDs (standard score below 870-75), although as mentioned, this can be accomplished either in terms of an overall adaptive composite (quotient) of 70-75 or less, or such a score in only one of the three domains of "social", "practical" or "conceptual" adaptive skills.

In DSM 4-TR, the criterion for adaptive functioning (the term this manual prefers, but which means the same thing as adaptive behavior) is defined as deficits in at least two out of eleven functional areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. This list is derived from AAMR-9 (1992), which was published eight years before DSM 4-TR. In AAMR-9, the adaptive behavior criterion was established as deficits in 2 out of 10 adaptive skill areas (health and safety were combined into one area) or deficits in overall composite adaptive quotient. In AAMR-10, these ten (11 in DSM 4-TR) skill areas were collapsed into the three adaptive behavior domains (social, practical, conceptual) mentioned above.

In the Tennessee statute (TCA-39-13-203), the adaptive behavior criterion (which is described simply as "deficits in adaptive behavior"), is stated globally and is not broken down into component skills or domains (unlike DSM 4-TR's 11 skills and AAMR-10's 3 domains). Because of that globality, and also because the standard is "deficits" rather than "significant deficits", the Tennessee definition appears to offer considerable flexibility (including the use of non-statistical data) in determining whether or not someone meets the adaptive behavior criterion.

(3) The Developmental Criterion. MR is a term indicating that an individual has serious intellectual impairments which first manifested during what is termed the "developmental period". The developmental period is defined as anytime between birth and 18 (some interpret this as before the end of one's 18th year). The purpose of this criterion is to rule out those who were normal in childhood but whose impairments first manifested in adulthood, such as through a motor vehicle accident. Information about whether one meets the developmental criterion can come from a variety of sources, such as medical or school records and testimony by teachers, family members and peers.

One of the controversies in interpretation of the developmental criterion involves whether or not the individual must have been eligible for a diagnosis of MR before the age of 18. This appears to have been the standard used by Judge Kurtz, but it my respectful view that he was mistaken in making that interpretation. If one takes that tack, then one can use the absence of any IQ score, or adaptive behavior score, before the age of 18 as evidence that would rule out a current diagnosis of MR. In my view, this is an incorrect, and overly rigid, interpretation of the developmental criterion.

A more appropriate, and flexible, interpretation of the developmental criterion is that when a person qualifies as having MR as an adult, one should be able to show that there were precursors or indicators that developed or were evident during the childhood or adolescent period. In other words, a diagnosis of MR would be inappropriate if a child was of average or above average intellectual and adaptive functioning prior to 18 but suddenly showed a steep decline, perhaps because of some injury that developed during adulthood. Outcome-based evidence, such as a child being retained in elementary school (which occurred in this case) and very

low academic achievement (also true in this case) can also be used as evidence that the developmental criterion has been met.

A related issue has to do with evidence of organic (i.e., biological) etiology, such as diagnosed brain damage that is most likely attributable to a developmental process that started early in life. To establish mild MR (which is the sub-category most relevant in this case), one does not have to have evidence of a known etiology, and such evidence is typically lacking. However, such evidence-when it exists—can by itself be used to satisfy the developmental criterion. A good example of this is if there is brain imaging evidence that is highly suggestive of neurological abnormalities indicative of Fetal Alcohol Spectrum Disorder (a major known cause of mild MR). Where such evidence exists (as it does in this case), this could also be used to buttress the conclusion that the third prong for a diagnosis of MR has been met.

My Findings Regarding Whether Byron Black Has MR

It is my conclusion that Byron Black qualifies for a diagnosis of mild MR. My reasons flow from my finding that he meets all three of the definitional prongs. These are discussed under each of the prongs below.

(a) Intellectual Functioning Prong. In adulthood, it is clear that Mr. Black meets the intellectual functioning prong of a diagnosis of MR. In November 2001, Dr. Daniel Grant obtained a full-scale IQ on the Stanford-Binet (SB-4) of 57. On the C-TONI, the best non-verbal IQ test which correlates highly with full-scale IQ, Dr. Grant obtained an IQ score of 64. In October 1993, Dr. Gillian Blair obtained a WAIS-R full-scale IQ score of 73, which is under the 70-75 ceiling. The WAIS-R was normed in 1979 and was, thus, 14 years obsolescent in 1993. A Flynn adjustment would reduce this IQ score by 4 points (0.3 for each year of norm obsolescence), bringing it to 69. In 1997, Dr. Pamela Auble also used the WAIS-R and obtained a full-sale IQ score of 76, which would be reduced another 6 points (for the 18 years of norm obsolescence). In March, 2001, Dr. Patti van Eys administered the more current WAIS-3 and obtained a full-scale IQ of 69, which is under the 70-75 cutting score, and very much in line with the Flynn-corrected scores for the outdated WAIS-R.

Thus, the overwhelming consensus among all of these individualized IQ administrations is that Mr. Black meets the first intellectual functioning) prong for a diagnosis of MR as an adult.

Individualized IQ data for Mr. Black as a child is lacking, for the simple reason that he left high school in the very same year that the federal statute (PL-94-142) that mandated special education was enacted. During the time that Mr. Black was in elementary school, the assumption was that a child would be socially promoted if he was well-behaved (which by all accounts, Mr. Black was), regardless of how little he learned (see Affidavit by Mary Craighead, an administrator at Mr. Black's elementary school). Just the same, Mr. Black was retained in the second grade, even given that tendency to overlook such learning difficulties. Undoubtedly, an individualized IQ test would have been administered had Mr. Black been born ten years later. The absence of such IQ data makes it impossible to know whether he would have qualified for a diagnosis of MR during that period.

Mr. Black's relatively good report cards in elementary school are incongruent with the fact that he was retained and also with his marginal or failing grades in High School. The mystery is cleared up when reading the statements by his fifth and sixth grade teachers (noted in point #17 in the declaration by Dr. Grant). They stated that "I would never allow a student to get a bad grade" (6th grade teacher) and "teachers were liberal in their grading" and a B would be the equivalent of a D at a later time (5th grade teacher). Furthermore, administrator Mary Craighead indicated in her affidavit that the emphasis back then was on helping low-achieving African-American children to feel good about themselves and to experience success in all of their endeavors.

This attitude likely also explains why Mr. Black obtained relatively high scores on group administered IQ tests, as it is very possible, indeed likely, that these tests (which even state experts testified are not appropriate for diagnosing MR) were administered in a non-standard manner that could even have involved teacher assistance.

Even so, it should be noted that the IQ criterion for diagnosing MR was minus 1 SD (full-sale score of 85), during the years 1961 to 1973, and that the 85 that Mr. Black obtained on the Otis-Lennon group IQ test could, thus, have qualified him at that time.

Dr. Grant correctly noted that the best evidence that Mr. Black would have met the MR intellectual functioning criterion in the Developmental period was his very low performance (standard scores of 71 and 67) on the Differential Abilities Test (DAT). Although not specifically termed an IQ test, the DAT correlates very highly with IQ and in the absence of an IQ test can be used as a substitute. Furthermore, Mr. Black's mostly failing grades in High School (where the overprotective stance of his elementary school no loner applied) is probably a better indicator of the depth of his intellectual limitations. Those limitations carry over today into his very low achievement standard score (72) as an adult on the WRAT-III and the Nelson-Denny reading test.

In short, Mr. Black gave clear evidence of intellectual limitations in the developmental period, and there is continuity rather than discontinuity linking his intellectual limitations today and his intellectual limitations as a child.

(b) Adaptive Functioning Prong. The main focus of my evaluation of Byron Black was on his level of adaptive functioning. That is because he appears, as summarized above, to meet the intellectual criterion, but questions were raised by Judge Kurtz regarding whether he met the adaptive functioning criterion either currently, or more specifically, prior

Adaptive Behavior is most typically evaluated through a rating instrument, such as the ABAS-2 or the Vineland-2 (the two instruments which, along with the SIB, are most widely used in Atkins cases). Using a rating instrument to evaluate the adaptive functioning of someone who has been in prison, especially death row, for a number of years is difficult, if not impossible, for a number of reasons. These reasons include the difficulty in finding raters but more importantly, the absence of opportunities to perform many of the behaviors (such as cooking or using public transportation) that are items on such instruments. Furthermore, the whole purpose underlying the development of these instruments is to assess the supports needed to live successfully in the community, and to face the kinds of challenges and ambiguities one would find in the community. Obviously, death row is a setting that provides few such challenges and ambiguities.

to the age of 18.

A common mistake that is often made when evaluating the adaptive functioning of someone in prison is to look at his level of adjustment, such as through the presence or absence of discipline write-ups. Some experts, usually those testifying for the state, will look at a defendant who is not a discipline problem and conclude that he could not have MR. The problem with such a conclusion is that adjustment in prison is typically a matter of whether or not one has a cooperative versus hostile personality, and being a cooperative and pleasant person in no way rules out MR. In fact, it is likely the case that people with mild MR, assuming they do not also have mental illness, will tend to be more apt to go along with rules and orders, in part because such a tendency generally served them well in covering up their limitations in work, school and other settings in the community. Furthermore, there are relatively few choices one has to make on death row, and the rules are few, clear and unambiguous. So it is fair to say that people with mild MR are likely to adjust better in a highly structured setting such as death row, and such adjustment in no way can be used to infer how impaired one's adaptive functioning would be in the community.

For these reasons, to assess one's level of current adaptive functioning in prison, one would most likely have to rely on the few "direct" measures of adaptive functioning, such as the "Independent Living Scales" (ILS) used by Dr. Grant, or the "Street Survival Skills Questionnaire" (SSSQ) used by me. Both measures are direct in the sense that one presents everyday problems to a subject (such as filling out a bank deposit slip, or figuring out a paycheck) and seeing whether the subject passes such items. Both the ILS and the SSSQ are mainly measures of the "Practical Adaptive Skills" domain of adaptive functioning, and they have population norms.

Dr. Grant stated in his report that Mr. Black received a standard score in the 70-75 range on three of the five ILS sub-scales that, together, give information about the adaptive behavior domain of "Practical Adaptive Skills". These sub-scales are labeled "managing money" (standard score of 73), "managing home and transportation" (standard score of 73), and "health and safety" (standard score of 72). He was in the normal range on two other ILS sub-scales that, in my view, are unrelated to MR: memory and "social". The reasons why the social sub-scale on the ILS is not diagnostically relevant are two-fold: (a) it mainly taps happiness/ agreeableness which I have already noted is not indicative one way or the other of MR, and (b) it involves solely self-report (rather than problem-

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solving) and self-report is notoriously unreliable as a source of diagnostic information in people with MR (who almost universally inflate their description of themselves in order to appear competent (this well-established phenomenon is termed "the cloak of competence". See the classic book of the same name by UCLA Professor Robert Edgerton).

As an independent validation of Dr. Grant's ILS data, I administered the SSSQ, another direct measure of adaptive behavior that mainly taps Practical Adaptive Skills. This test has over 200 items in which a subject is presented with an object or process and then picks the correct one out of four pictures that depicts the object or process. Mr. Grant obtained an overall standardized score (78) which is highly congruent with the 73, 73 and 72 standard scores obtained by Dr. Grant on three relevant sub-scales and certainly meets the "deficit" or "impairment" (minus one SD) standard implicit in DSM 4-TR and in TCA-39-13-203. Also, I found that Mr. Black was below the minus 2 SD standard on three of the nine SSSQ sub-scales and below the minus one SD standard on a fourth.

Before testing Mr. Black on the SSSQ, I administered the Dot Counting Test, which is one of the most used and respected measures of possible malingering on cognitive tasks. This test shows pictures with dots and the task is to count them correctly and in a short period of time. Mr. Black made zero mistakes, and this fact plus the very short average time per picture gave very strong indication that he approached the testing situation in a fully attentive and effortful manner. Thus, I concluded that the SSSQ scores were highly valid and lacked any indication of malingering.

Qualitative data suggesting Mr. Black met the adaptive behavior criterion in adulthood (but prior to conviction in this case) are that he never lived independently (lived with parents, even after marriage), never had a check book, never cooked, never washed his clothes, never did anything suggestive of adult status other than holding a job (which most adults with mild MR do) and driving a car (which many individuals with mild MR do, as suggested in the AAMR criterion of significant impairment in only one out of three domains). Another indication of Mr. Black's impaired adaptive status came from my interview with his high school football coach, Al Harris, who indicated that in over 30 years as a coach, Mr. Black stood out as especially slow. He indicated that although Byron had good physical skills, he could generally not be used on offense for the reason that he could

not learn the plays and was used on offense only when a highly simplified playbook was developed for his use.

Because lack of evidence of adaptive incompetence before the age of 18 appeared to be a major issue in Judge Kurtz's ruing, I conducted a retrospective assessment of Mr. Black's adaptive functioning, using the age 17 years-six months as the target age. I used the most widely-used and respected adaptive behavior rating instrument, the Vineland-2. This instrument is published by Pearson Assessment, the publisher of the most widely respected intelligence test, the Wechsler Scales, and is the publisher that adheres to the highest standards for test development.

The Vineland-2 is filled out by an examiner after each interview with one or more informants. I conducted two such interviews, one with a boyhood friend, Rossi Turner, who knew Mr. Black until he left Nashville to go to school outside the state, and a joint interview with two sisters: Melba Black Corley (older sister) and Freda Black Whitney (younger sister). In the latter interview, I asked for consensus between the two sisters before scoring each item and generally such consensus was obtained. I should note that all three informants hold responsible professional jobs and appear to be people of average or above average intelligence. All three of them indicated they knew Mr. Black very well during the age period (17-6) being rated.

The Vineland-2 labels its domains somewhat differently than does AAMR-10, but they are generally equivalent. The three domains on the Vineland-2 are: "Communication" (which taps basically what AAMR-10 calls "Practical Adaptive Skills"; "Daily Living Skills" (which taps what AAMR-10 calls "Practical Adaptive Skills") and "Socialization" (which taps what AAMR-10 calls "Social Adaptive Skills"). In addition, one sums across all of the items on the scale to obtain a Composite (overall) adaptive quotient.

The standard scores obtained on the Vineland-2 were as follows: On Communication (Conceptual Adaptive Skills), Mr. Black received a standard score of 75 on the Vineland based on interview with the sisters, while he obtained an identical score on the Vineland based on interview with Mr. Turner.

On Daily Living (Practical Adaptive Skills), Mr. Black received a standard score of 76 on the Vineland based on interview with the sisters, while he obtained a standard score of 71 on the Vineland based on interview with Mr. Turner.

On Socialization (Social Adaptive Skills) Mr. Black received a standard score of 63 on the Vineland based on interview with the sisters, while he obtained a standard score of 67 on the Vineland based on interview with Mr. Turner.

On overall Composite Adaptive Behavior, Mr. Black received a standard score of 70 on the Vineland based on interview with the sisters, while he obtained an identical standard score of 70 on the Vineland based on interview with Mr. Turner.

In short, Mr. Black met the AAMR-10 criterion of significant (minus two SD) deficit on adaptive behavior on both sets of Vineland ratings, and he also met the AAMR criterion of significant (70-75 or below) on one out of three domains. Using the somewhat less stringent standards embedded in DSM 4-TR and the Tennessee statute, his qualification is even more clear-cut.

(c) <u>Developmental Prong.</u> As indicted earlier, this prong can be interpreted as either meaning that one must show evidence that could cause a diagnosis of MR to be met prior to 18 (Judge Kurtz's apparent interpretation) or rather only evidence that adult impairments can be traced to indicators of failure, low functioning or causation evident prior to 18 (my interpretation).

Using the looser interpretation, there is no doubt in my mind that Mr. Black satisfies this prong. Although he attended an elementary school considered the most disadvantaged and low-functioning in the district (as reflected in its being chosen for a special Ford Foundation program), Mr. Black was made to repeat second grade, which is a clear indication that he was considered to be very "slow" even in that much slower than average setting. There is also very clear evidence from standardized achievement scores that Mr. Black functioned intellectually at a very low level.

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Finally, very powerful evidence that Mr. Black meets the developmental criterion can be found in the very clear-cut evidence obtained by Dr. Gur of structural damage to his brain (abnormal corpus colussum, or midbrain, seen in MRI image) suggestive of Fetal Alcohol Spectrum Disorder).

Using the more stringent approach to the Developmental criterion apparently used by Judge Kurtz, I believe Mr. Black also meets the developmental criterion, defined in TCA-39-13-203 as "the MR must have been manifested during the developmental period, or by eighteen (18) years if age". The main evidence that could be pointed to as suggesting that Mr. Black was of normal intelligence were the group IQ scores, but these are unreliable tests that cannot be substituted for individualized tests which were not routinely administered (because special education had not yet been federally mandated). Furthermore, the atmosphere at that time was one of helping children such as Byron Black to have feelings of success and it is possible, indeed likely, that he was given assistance with those tests. The Differential Aptitude Test given in 9th grade, and which showed scores under the 70-75 ceiling, along with mostly failing grades in High School are much stronger evidence of the extent of Mr. Black's limitations during the period before he turned 18.

Conclusion

It is my professional opinion, to a high degree of psychological certainty, that Byron Lewis Black meets all three criteria for a diagnosis of mild MR, whether using DSM 4-TR, AAMR-10 or TCA 39-13-203.

FURTHER DECLARANT SAITH NOT.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 13, 2008

son- Brown

Stephen Greenspan, Ph.D.

DECLARATION OF MARC J. TASSÉ, PhD, FAAIDD

I, Marc J. Tassé, declare under penalty of perjury and the laws of the United States, the following to be true to the best of my information and belief:

1. My name is Marc J. Tassé, Ph.D., FAAIDD and I am a licensed psychologist in North Carolina (NC #2613). I completed my Ph.D. in research-clinical psychology at the Université du Québec à Montréal. My doctoral dissertation focused on the study of adaptive behavior assessment in individuals with mental retardation. Following my Ph.D., I completed a post-doctoral fellowship in mental retardation and developmental disabilities at The Ohio State University Nisonger Center, University Center for Excellence in Developmental Disabilities Education, Research, and Service. I am also a "Fellow" of the American Association on Intellectual and Developmental Disabilities.

I am an Associate Professor in the Department of Child and Family Studies at the University of South Florida (USF). I am also the Associate Director of the USF Florida Center for Inclusive Communities (FCIC). The USF FCIC is a federally funded University Center for Excellence in Developmental Disabilities. Our Mission is three-fold: (1) provide training to undergraduate, graduate and post-graduate students in the field of mental retardation and related developmental disabilities (MR/DD), (2) offer services and state-wide technical assistance to individuals with MR/DD across the age span and to agencies providing supports and services to these individuals, and (3) conduct research in the field of MR/DD.

I've worked with individuals with mental retardation for the past 20 years. I have provided direct clinical services as well as supervised graduate and post-graduate psychology students in providing direct services to individuals with MR/DD. I've been involved in hundreds of psychological assessments and eligibility/diagnostic evaluations of mental retardation involving children, adolescents, and adults. I have worked extensively over the past 20 years directly with individuals with mental retardation of all ages. I have provided consultative services and technical assistance to families, service providers, and state MR/DD agencies. Over the past 10 years, I have also been involved in providing individual therapy to adolescents and adults with mental retardation and co-occurring psychiatric disorders or complex behavior problems.

In the past (i.e., 1985 to 1993), I also worked as a behavior specialist (Douglas Hospital; Montreal, Canada), providing behavior programming and developing intervention plans for children and adults with mental retardation and co-occurring behavior problems or psychiatric disorders.

In addition to my clinical work, I actively conduct research in the field of mental retardation. I have published over 65 book chapters, peer-reviewed journal articles, and monographs in the area of mental retardation or developmental disabilities. I have given over 100 presentations, workshops, or seminars at local, state/provincial, national, and international scientific/professional meetings in the field of mental retardation.

I am a co-author on the American Association on Intellectual and Developmental Disabilities (AAIDD; formerly known as the American Association on Mental Retardation) 20021 Manual that defines mental retardation and the recently published AAIDD User's Guide (Schalock et al., 2007)². I have also worked on the development of standardized tests in the field of mental retardation. One such assessment instrument was the Supports Intensity Scale (SIS). The SIS is a standardized measure of individual support needs for adolescents and adults with mental retardation. I have also worked on the development and refinement of the Quebec Adaptive Behavior Scale, as well as other standardized assessment instruments in the area of measuring problem behavior and psychopathology in individuals with mental retardation. I currently Chair the American Association on Intellectual and Developmental Disabilities' ad boc committee on the development of the Diagnostic Adaptive Behavior Scale (DABS). The DABS has been in development for approximately three years and should result in a standardized test of adaptive behavior that will focus on diagnosing the presence of "significant adaptive behavior deficits" for the purpose of diagnosing mental retardation. I was recently awarded the "Service" award by the American Association on Intellectual and Developmental Disabilities for my work with individuals with mental retardation and complex behavior support needs.

I am an active member of the following professional associations:

- American Association on Intellectual and Developmental Disabilities (Fellow)
- American Psychological Association [member of Divisions: 5 (Assessment), 33 (I&DD),
 41 (Psychology & Law Society)]
- International Association for Behavior Analysis
- National Association for the Dually Diagnosed (MR/MI)
- North Carolina Psychology Board of Psychologists (License #2613)

I am an ad hoc reviewer for the following professional journals:

- American Journal on Mental Retardation
- Intellectual and Developmental Disabilities
- International Clinical Psychopharmacology
- Journal of Autism and Developmental Disorders
- Journal of Intellectual Disability Research
- Research in Developmental Disabilities
- Revue francophone de la déficience intellectuelle
- 2. I was asked by Attorneys Kelley Henry and Michael Passino, on behalf of their client Mr. Byron Black (D.O.B.: 3/23/1956), to do the following:

¹ Luckasson, R., Borthwick-Duffy, S., Buntinx, W. H. E., Coulter, D. L., Craig, E. M., Reeve, A., Schalock, R. L., Snell, M. E., Spitalnik, D. M., Spreat, S., & Tassé, M. J. (2002). *Mental retardation: Definition, classification, and system of supports.* Washington, DC: American Association on Mental Retardation.

² Schalock, R. L., Buntinx, W. H. E., Borthwick-Duffy, S., Luckasson, R., Snell, M. E., Tassé, M. J., & Wehmeyer, M. L. (2007). User's Guide Mental Retardation: Definition, Classification, and Systems of Supports, 10th Edition. Applications for Clinicians, Educators, Disability Program Managers, and Policy Makers. Washington, DC: American Association on Intellectual and Developmental Disabilities.

- a. Discuss the nature and common characteristics of mental retardation (MR) and the criteria and methods used in making a diagnosis of MR.
- b. Review available reports by other experts in this case and evaluate their adequacy in relation to the criteria and methods discussed in (a).
- c. Make recommendations to the attorneys regarding what additional assessment information might be needed to further establish the presence or absence of a diagnosis of mental retardation in this case.
- d. Read the Memorandum and Order written by Judge Walter C. Kurtz of the Fifth Circuit Court for Davidson County, Tennessee on May 5th, 2004. Provide comments on aspects related to the diagnosis of mental retardation contained in this Order that might shed additional light in this case.
- 3. In undertaking the tasks described above, I examined the following relevant case materials relating to Mr. Byron Black:
 - Psychological/Psychiatric Evaluation/Opinion: Ms. Jaros and Drs. Anchor, Auble, Blair, van Eys, Vaught, Grant, Engum, Gur, Bernet.
 - Declaration of Dr. Globus
 - Deposition of Dr. Gur
 - Declaration of Dr. Greenspan
 - Social History and Life Time Line
 - Judge Kurtz's Memorandum and Order in the Fifth Circuit Court for Davidson County, TN (5/5/2004)
 - Post-conviction Hearing Transcripts 1989
 - Post-conviction Hearing Transcripts 2004
- 4. DEFINITION OF MENTAL RETARDATION

Van Tran v. State determined the mental retardation definition to be applied in Tennessee. Van Tran v. State defined mental retardation as follows: "significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in adaptive behavior; and (3) mental retardation manifested during the developmental period or by eighteen (18) years of age."

The definition of mental retardation found in the Tennessee Code is consistent with the definitions endorsed by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR; American Psychiatric Association, 2000)³ and the American Association on Intellectual and Developmental Disabilities (AAIDD; Luckasson et al., 2002).

The **DSM-IV-TR** defines mental retardation as follows: (a) significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test; (b) concurrent deficits or impairments in present adaptive functioning in at least two of the

³ American Psychiatric Association (2000). *Diagnostic and Statistical Manual of Mental Disorders (4th Edition, Text Revision; DSM-IV-TR)*. Washington, DC: Author.

following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and (c) onset is before age 18 years.

The American Association on Intellectual and Developmental Disabilities' (AAIDD; formerly known as the American Association on Mental Retardation) defines mental retardation as: "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Mental retardation originates before age 18." The AAIDD operationally defined "significant limitations" to be at least two standard deviations below the population mean (i.e., typically a standard score of 70 when the mean = 100 and the standard deviation = 15). The adaptive behavior prong of this definition is met if the individual has significant limitations in (1) conceptual, practical, or social skills or (2) the overall composite (e.g., full-scale) score of adaptive behavior.

Intellectual Functioning

The assessment of intellectual functioning is a task that requires specialized professional training. For the purpose of diagnosing mental retardation, AAIDD stipulates that IQ assessment data should be obtained and interpreted by an examiner experienced with people who have mental retardation and who is qualified in terms of professional and state regulations as well as publisher's guidelines for conducting thorough and valid evaluations of intellectual functioning.

The determination that an individual's intellectual functioning is "significantly" sub-average fulfills the first requirement for being diagnosed with mental retardation. "Significant sub-average intellectual functioning" is defined as a performance that is represented by a full-scale IQ score of approximately 70 or less, while considering all sources of test error. A standard score or intelligence quotient of "70" represents a population-referenced performance that is two standard deviations below the population mean (i.e., population average score = 100, standard deviation = 15). Significant deficits in intellectual functioning are best determined using an individually administered standardized test of intelligence. The full scale or composite IQ is generally regarded as the best estimate of an individual's general intellectual functioning (Luckasson et al., 2002).

Assessment of intellectual functioning must be done using an individually administered comprehensive standardized test of intelligence. The results obtained from group administered tests of intelligence or abbreviated measures of intellectual functioning lack the sufficient reliability and psychometric robustness to be used for the purpose of making a diagnosis of mental retardation. These instruments serve a screening purpose but should not be relied upon when making or refuting a diagnosis of mental retardation.

The Wechsler Adult Intelligence Scale – Third Edition, when used in accordance to best practice, is considered by many as the gold standard for measuring an adult individual's intellectual functioning. Other well accepted individually administered full-scale measures of intellectual functioning for adults include: Stanford-Binet Intelligence Scale-Fifth Edition, Woodcock-Johnson III Test of Cognitive Abilities, and Kaufman Adolescent and Adult Intelligence Test.

Established practice in intellectual assessment informs us that there are several important factors to consider when interpreting the IQ score. The IQ score obtained on any standardized IQ test is an estimate of the individual's "true" intelligence. This estimate is not without error. In addition to the standard error of measurement of the test used, it is important to consider the Flynn effect and possible practice effect when interpreting IQ results (see AAIDD's User's Guide).

The AAIDD User's Guide proposed a number of guidelines to ensure proper assessment of intellectual functioning for the purpose of diagnosing mental retardation. Chief among these elements are the following:

- "intellectual functioning is best understood as being composed of a general factor ('g') [i.e., full-scale IQ score].
- appropriate standardized measures should reflect the individual's social, linguistic, and cultural background and that proper adaptations must be made for any motor or sensory limitations.
- psychometric instruments that assess intelligence perform best when used with people who score within two to three standard deviations of the mean and that extreme scores are more subject to measurement error.
- assessment of intellectual functioning through the reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement." (Schalock et al., 2007; page 12).

Sources of Error for the Test Administered

The AAIDD and DSM-IV-TR agree on the importance of taking into consideration all factors contributing error to the obtained IQ test results when interpreting someone's intellectual functioning for the purpose of making a diagnosis of mental retardation. The AAIDD (Luckasson et al., 2002) stipulated the following: "Although far from perfect, intellectual functioning is still best represented by IQ scores when obtained from appropriate assessment instruments. The criterion for diagnosis is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instrument's strengths and weaknesses." (page 14). Furthermore, according to the DSM-IV-TR (American Psychiatric Association, 2000), the IQ prong of mental retardation is met if an individual's full-scale IQ score falls between 70 – 75 (roughly accounting for a 95% confidence interval resulting from standard error of measurement on most IQ tests) or lower (DSM-IV-TR; see pages 41 – 42). In addition to the standard error of measurement, sources of error surrounding the obtained IQ score may include error that is attributable to the Flynn effect and/or practice effect, and thus the interpretation of the results should account for these factors (see Schalock et al., 2007).

Flynn Effect

The "Flynn effect" is a well-established scientific fact that IQ scores on standardized tests for the American population have been steadily increasing for more than 70 years. Dr. James R. Flynn is a well-respected researcher who studied this rise in IQ scores. Flynn's research uncovered that IQ scores have been increasing from one generation to the next in the United States, as well as in all other developed countries for which we have IQ data. This increase in IQ scores over time was dubbed the "Flynn effect" by Hernstein and Murray, the authors of the book *The Bell Curve*. Some have advanced plausible explanations for this increase in IQ scores that have included: improved nutrition, trend towards smaller families, better education, etc. The

only theoretical aspect to the Flynn effect is the "why." The causal factors driving this trend have not yet been scientifically established. Most likely, it is an interaction of multiple factors.

Flynn reported a greater increase in the Wechsler Performance IQ, which is more heavily loaded on fluid abilities, than on the Wechsler Verbal IQs. According to Flynn's research, the average gain in global IQ scores since 1932 is approximately 0.3 points per year. Because of this, IQ tests need to be renormed periodically to recalibrate the scores. In cases where a test with aging norms is used, a correction for the obsolescence of the norms is warranted (e.g., 0.3 points per year since norms were compiled). I will use the WAIS-III to illustrate this point. The population mean on the WAIS-III was set at 100 when it was originally normed in 1995 (test published in 1997). Hence, if the WAIS-III was used to assess an individual's IQ in 2005, the individual's score should be corrected downward as follows: 0.3 points x 10 = 3 points ("10" being the number of years elapsed since the norming of the WAIS-III). After taking the Flynn effect into consideration it is still necessary to account for the test's standard error of measurement when interpreting an individual's test results.

The AAIDD *User's Guide* (Schalock et al., 2007) emphasizes the importance of considering the Flynn effect when interpreting an individual's IQ score in making a diagnosis of mental retardation.

The so-called "Flynn effect" is NOT a theory. It is a well-established scientific fact that the US population is gaining an average of 3 full-scale IQ points per decade. The Flynn effect has been consistently documented over the past 60-plus years. There is NO published scientific evidence currently existing that casts any doubt over it relevance with respect to ongoing IQ gains in the American population. In fact, a recent study published in the American Psychologist (a top-rated peer-reviewed scientific journal published by the American Psychological Association), reported on data supporting the effects of the Flynn effect specifically on individuals with mental retardation (see Kanaya, Scullin, & Ceci, 2003*). The passage of time since an IQ test was normed is directly related to that test's obsolescence. More time has passed since the norming of an IQ test the greater will be the artificial inflation of the obtained IQ scores on that test. This obsolescence of the test's norms contributes to the error that surrounds the obtained IQ score and we must take this source of error into account when interpreting an individual's obtained IQ score.

National standards are crucial in any field to ensure a uniform and consistent application of best practice. National standards are based on a foundation of empirical knowledge, science, and peer-review and are meant to serve as a guide for proper practice in that respective field. Professional practice should be consistent with established national guidelines, when such standards are available. The AAIDD User's Guide published by the former American Association on Mental Retardation (Schalock et al., 2007) represents the accepted national standard on the proper diagnosis of mental retardation. These national standards clearly indicate that when trying to establish a diagnosis of mental retardation, with respect to the assessment of general intellectual functioning, it is necessary to correct any obtained IQ score for all sources of error associated with the test used. These professional guidelines specifically mention correcting for the obsolescence of a test's norms (i.e., "Flynn effect").

⁴ Kanaya, T., Scullin, M. H., & Ceci, S. J. (2003). The Flynn effect and U.S. policies: The impact of rising IQ scores on American society via mental retardation diagnoses. *American Psychologist*, 58, 778 – 790.

Adaptive Behavior

Van Tran defines adaptive behavior as referring to "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." In the AAIDD 2002 manual, adaptive behavior is defined as an individual's conceptual, social, and practical adaptive skills (see Luckasson et al., 2002). The AAIDD recommended that significant limitations in adaptive behavior be established through the use of standardized measures that have been normed on the general population. These three adaptive skills domains are defined as follows:

Conceptual Skills: defined by communication skills, functional academics, and self-direction.

Social Skills: defined by such abilities as interpersonal skills, social responsibility, following rules, and self-esteem. Higher order social skills have also been identified to include such elements as gullibility, naiveté, and avoiding victimization.

Practical Skills: consist of basic personal care skills such as hygiene, domestic skills, health and safety as well as work skills.

The AAIDD specified: "The examination of adaptive skills must be documented within the context of community environments typical of the individual's age peers and culture" (page 78). Hence, assessing an individual's adaptive behavior in an institutional context is inappropriate for the purpose of determining if an individual has mental retardation. Assessing if someone is well adapted in an institutional setting (e.g., a prison) might be useful for determining if additional structure is needed or for planning interventions to facilitate integration, but has no relevance in determining how an individual's adaptive functioning compares to the general population for the purpose of establishing a diagnosis of mental retardation.

Another important aspect of adaptive behavior assessment is the measure of the individual's "typical performance" and not best or assumed ability (Luckasson et al., 2002). Thus, when assessing the individual's adaptive behavior, we assess what the person **typically does** and not what he/she can do or could do. This is a critical distinction with the assessment of intellectual functioning, where we assess best or maximal performance.

The AAIDD 2002 definition reminded us of an important understanding about mental retardation. Namely, that within an individual with mental retardation, significant impairments often co-exist with strengths. Individuals with mild mental retardation are capable of doing many things. Most of these individuals will have strengths and areas of competence that might surprise many laypersons or even professionals who have limited experience in working with individuals with mild mental retardation. In the process of diagnosing mental retardation, the finding of significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the presence of some ability on the individual's part. These discrete abilities are not uncommon in individuals with mild mental retardation and should not be viewed as discounting a diagnosis of mental retardation.

Age of Onset and Etiology

With respect to the possible cause of mental retardation, more than 40% of all cases of mild mental retardation are of undetermined etiology. The cause of mental retardation is often likely related to a combination of risk factors. These might include, but are not limited to, pre-natal maternal malnutrition, in uterine insult or trauma, genetic disorders, fetal alcohol spectrum disorder, pre-natal and post-natal exposure to toxins, childhood malnutrition, neglect, abuse, and/or impoverished and under-stimulating home environment.

There are several hundreds of disorders associated with mental retardation. Genetic disorders, such as Down syndrome, which have a well known phenotype (including almond shaped eyes, short stature, round face, etc) is more often associated with moderate to profound level of mental retardation. Again, the cause for more than 40% of cases of mild mental retardation remains unknown. AAIDD has listed numerous risk factors that might explain mental retardation, these risk factors may be of prenatal origin, perinatal, and/or postnatal (see table below).

Mental Retardation is a functional diagnosis, based on evidence regarding someone's functioning in academic and real-world settings. As such, knowledge of the cause of someone's mental retardation is not necessary in order to make a diagnosis, and in the majority of cases (especially of mild MR) one cannot say for certain what caused the condition. Nevertheless, knowledge of a possible or likely cause is a valuable thing to have, especially in establishing whether someone meets the developmental criterion. In the case of mild MR, especially in individuals from impoverished and disadvantaged backgrounds, it is often the case that environmental deprivation and parental understimulation in infancy and early childhood are contributing risk factors. However, one can be from such a background and still have contributing biological factors such as pre-maturity, low birth weight, prenatal infection or malnutrition, mother's alcohol consumption during pregnancy, birth trauma, chromosomal syndromes, etc. The key in diagnosing individuals from disadvantaged backgrounds is to see if an individual is viewed within his own family and community as unusually impaired, even when compared to other individuals from the same background. It also helps in making a diagnosis if one can also point to biological risk factors, such as severe head injuries or maternal alcohol consumption during pregnancy, even though evidence of a known cause is not necessary to make a diagnosis of mental retardation.

Table 1. Table of Risk Factors for Mental Retardation (see Luckasson et al., 2002; page 127)

	Biomedical	Social	Behavioral	Educational	
Prenatal	Chromosomal Dx	Poverty	Parental drug use	Parental cognitive	
	Single-gene Dx	Maternal	Parental alcohol use	disability without	
	Syndromes	malnutrition	Parental smoking	supports	
	Cerebral dysgensis	Domestic violence	Parental immaturity	Lack of preparation	
	Maternal illnesses	Lack of access to	*	for parenthood	
	Parental age	prenatal care		*	
Perinatal	Prematurity	Lack of access to	Parental rejection of	Lack of medical	
	Birth injury	birth care	caretaking	referral for inter-	
	Nenatal Dx		Parental abandon-	vention services	
			ment of child	at discharge	

Postnatal	Traumatic brain	Impaired child-	Child abuse and	Impaired parenting	
	injury	caregiver	neglect	Delayed diagnosis	
	Malnutrition	Lack of adequate	Domestic violence	Inadequate early	
	Meningoencephalitis	stimulation	Inadequate safety	intervention	
	Seizure Dx	Family poverty	measures	services	
	Degenerative Dx	Chronic illness in	Social deprivation	Inadequate special-	
		the family	Difficult child	education services	
		Institutionalization	behaviors	Inadequate family	
				Support	

Dx = Disorders

5. MYTHS AND MISCONCEPTIONS REGARDING MENTAL RETARDATION

For most people with mental retardation, there is not a "mentally retarded" look. There are no distinctive features or personality types to mental retardation. It is important to remember the sage words of Ruth Luckasson (1990): "Ninety percent of persons with mental retardation don't drool, don't stumble, aren't mute. They have significantly impaired intellectual ability, but often don't have any physical stigmata that indicate mental retardation. They won't 'look' a certain way." It is dangerously naïve to think that one can "tell" if someone is mentally retarded, or not mentally retarded, by looking or talking to them. Less than 10% of all cases of mental retardation are attributable to a condition such as Down syndrome. The vast majority (approximately 80%) of individuals with mental retardation function in the mild range of intellectual and adaptive behavior deficits.

The DSM-IV-TR notes: "No specific personality and behavioral features are uniquely associated with mental retardation. Some individuals with mental retardation are passive, placid, and dependent, whereas others can be aggressive and impulsive" (see page 44 – 45). Additionally, mental retardation can co-exist with any number of other psychiatric disorders or personality traits. The DSM-IV-TR is quite explicit on page 47 when it states: "The diagnostic criteria for mental retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder." Thus, for example, an individual may have both mental retardation and conduct disorder as a child or mental retardation and antisocial personality disorder as an adult. The presence of a co-existing mental disorder should not summarily be used to deny the individual's functioning if it meets criteria for a diagnosis of mental retardation.

6. CLINICAL JUDGMENT

The American Association on Intellectual and Developmental Disabilities (Luckasson et al., 2002) has recognized the important role of the professional's experience and knowledge of mental retardation and individuals with this condition, in diagnosing mental retardation. The AAIDD has defined clinical judgment as it relates to diagnosing mental retardation as follows:

"Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data. It is based on the clinician's explicit training, direct experience with people who have mental retardation, and familiarity with the person and the person's environments" (page 95).

AAIDD further clarified clinical judgment by stating:

"... [clinical judgment] should be viewed as a tool of clinicians with training and expertise in mental retardation and ongoing experiences with — and observations of — people with mental retardation and their families' (page 95).

The professional must use his or her clinical judgment throughout the diagnostic process. The experience and clinical judgment in mental retardation informs the professional to take well-established phenomena such as Flynn effect, practice effect, and cloak of competence into consideration when evaluating the data used in making a diagnosis of mental retardation (see AAIDD User's Guide; Schalock et al., 2007).

When diagnosing other mental health disorders such as schizophrenia, clinical judgment plays a central role. In such a process, the clinician weighs various bits of evidence and then judges if an individual fits the behavioral criteria for a particular disorder. In the case of MR, however, the role of clinical judgment has very little room to operate, and is used mainly to see if test scores can be depended on reliably. There are two reasons for this: (a) many psychologists and psychiatrists have little or no training or experience in this area, and their clinical judgment about MR may be untrustworthy; and (b) because people with mild MR can have areas of relatively normal functioning, and not express obvious signs of sub-normality, clinical judgment can be very misleading, especially when it is used to rule out a diagnosis of MR. Thus, while clinical judgment has a role in diagnosing MR, it does not play as prominent a role as in other disorders (in which test scores have little or no diagnostic role) and clinical judgment should not be used as an independent diagnostic criterion separate from its use in commenting on and interpreting IQ and adaptive behavior test scores.

7. REVIEW OF EXPERT REPORTS REGARDING MENTAL RETARDATION

The records indicate that Mr. Black was never administered an individual standardized test of intellectual functioning prior to his incarceration. All IQ scores reported in his school records were obtained from group administered tests of intelligence. These measures are not well normed nor possess the psychometric properties necessary to be used in diagnostic decision-making. For this reason, these results cannot be relied upon to confirm or refute prong 1 of a diagnosis of mental retardation.

Since his incarceration, Mr. Black has been evaluated on several occasions using individually administered tests of intellectual functioning. In this section I focus my comments on the psychological evaluations and reports that centered on the question of mental retardation.

Kenneth Anchor, Ph.D. Psychological Evaluation dated 1/17/1989 - Mr. Black was 32 years old.

Dr. Anchor interviewed and conducted some individual assessments with Mr. Black. Dr. Anchor administered the Shipley-Hartford Institute of Living Scale – Revised Norms and obtained an IQ score of 76. It should be noted that the Shipley-Hartford Institute of Living Scale is a short self-answered paper-pencil questionnaire that provides an abbreviated estimate of intellectual functioning and should not be relied upon for the purpose of confirming or refuting a diagnosis of mental retardation (see AAIDD; Luckasson et al., 2002).

Gillian Blair, Ph.D. Psychological Report dated 10/7/1993 - Mr. Black was 37 years old.

Dr. Blair administered the WAIS-R during an evaluation conducted at the Riverbend Maximum Security Institution. During this evaluation, Mr. Black obtained the following scores on the WAIS-R: VIQ = 73, PIQ = 75, FSIQ = 73. Dr. Blair also administered to Mr. Black a series of other tests that measured memory and personality (e.g., Rorchach, MMPI-2, PAI, Sentence completion test, WMS-R); however, she did not attempt to assess his adaptive behavior.

Pamela Auble, Ph.D. Psychological Report dated 3/5/1997 - Mr. Black was almost 41 years old.

Dr. Auble administered a battery of tests of personality, malingering, attention, memory, and intellectual functioning. Dr. Auble administered the WAIS-R (an individually administered test of intellectual functioning) to Mr. Black and obtained the following scores: VIQ = 76, PIQ = 77, FSIQ = 76. There was no assessment attempted of Mr. Black's academic skills or adaptive behavior.

Patti van Eys, Ph.D. Psychological Report dated 3/28/2001 - Mr. Black was 45 years old.

Dr. van Eys was retained to assess Mr. Black's intellectual functioning. Dr. van Eys administered the WAIS-III on which Mr. Black obtained a VIQ = 67, PIQ = 79, FSIQ = 69. No other assessment instruments were completed at this time.

Daniel H. Grant, Ph.D. Affidavit of Testing Conducted on 10/15 & 10/16/2001 - Mr. Black was 45 years old.

Dr. Grant administered a battery of assessment instruments to Mr. Black at Riverbend Maximum Security Institution. During this psychological evaluation, Dr. Grant assessed Mr. Black using the Stanford-Binet Intelligence Scale – Fourth Edition (SB-FE), Wide Range Achievement Test – 3rd Edition (WRAT-3), Nelson-Denny Reading Comprehension Test, among other tests.

Mr. Black's academic skills as measured on the WRAT-3 and Nelson-Denny Reading Comprehension Test yielded grade-equivalents of 4th grade for both arithmetic and reading comprehension. His performance on the SB-FE yielded the following scores: Verbal Reasoning = 56, Abstract Reasoning = 76, Quantitative Reasoning = 61, Short-term Memory = 56, and Composite Score = 57. The SB-FE Composite Score is comparable to the WAIS-III FSIQ. It should be noted, however, that the mean and standard deviation on the SB-FE are 100 and 16, respectively. Thus, a Composite Score = 68 would represent a score that is 2 standard deviations below the population mean.

Dr. Grant also administered the CTONI, a test of non-verbal intelligence. I will not review Mr. Black's results on this instrument since it is a narrow band test of intelligence and not as reliable as the SB:FE and should be used only when more robust and global measures cannot be used, according to AAIDD 2002 (Luckasson et al., 2002), which was not the case here.

Susan R. Vaught, Ph.D. Review of Existing Psychological Evaluation Data and Professional Opinion Regarding the Question of Mental Retardation dated May 2003 – Mr. Black was 45 years old.

Dr. Vaught was asked to conduct a file review of Mr. Black's previous psychological evaluations and extensive records. Following this review of previously administered intellectual evaluations, Dr. Vaught concluded that Mr. Black met prong 1 of the diagnostic criteria for mental retardation.

It would appear that Dr. Vaught never met with, nor interviewed, Mr. Black or anyone else who may have had knowledge about his adaptive behavior or developmental/social history. Dr. Vaught's conclusions regarding Mr. Black's adaptive behavior appear to be based entirely on a paper review. There is no evidence in Dr. Vaught's report either that she requested any specific or additional standardized testing be done to assist her in reaching her clinical opinion in this matter. It should be noted that Dr. Vaught relied on the AAIDD (Luckasson et al., 2002) Manual in making her determination of prong 2 "deficits in adaptive behavior"; however, AAIDD (2002) clearly specifies that "for the diagnosis of mental retardation, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is at least two standard deviations below the mean of either (a) one of the following three types of adaptive skills: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills" (see Luckasson et al., p. 76).

Eric S. Engum, Ph.D., J.D. Review of Existing Psychological Evaluation Data and Professional Opinion Regarding the Question of Mild Mental Retardation dated 7/2/2003 – Mr. Black was 45 years old.

Dr. Engum was asked to review the data from existing psychological evaluations and case records and opine regarding whether or not Mr. Black has mental retardation. Dr. Engum neither assessed nor interviewed Mr. Black before formulating his clinical opinion and completing his written report. Dr. Engum reviewed Dr. van Eys' psychological evaluation and asserted that Mr. Black had to be malingering during Dr. van Eys' administration of the WAIS-III because he obtained a scaled score of 4 on Digit Span and scaled score of 2 on Arithmetic. Dr. Engum's inference is solely based upon the fact that Mr. Black's scaled scores on these two subtests on the WAIS-III administration done in 2001 by Dr. van Eys were lower that Mr. Black's scores obtained on the previously administered WAIS-R in 1997 by Dr. Auble. First, one must be very cautious comparing results on different versions of an intelligence test. In 1997 Mr. Black was administered the WAIS-R and in 2001 he was administered the WAIS-III. These are entirely different versions of the WAIS and research has shown that individuals obtain consistently lower IQ scores when tested on a more recent version of the same IQ test (see above – the Flynn effect). This difference in scaled scores should not be assumed to be an indication of malingering on Mr. Black's part.

I disagree with Dr. Engum's assertion that one cannot or should not correct obtained IQ scores for error of measurement. Research over the past several decades has clearly shown that IQ scores are rising and that an individual score artificially higher on a test with aging norms than he would on a test with more recent norms (see Table 1 & Flynn effect above). This is in fact recommended by

Mr. Byron's Previous Results on IQ Testing

Flynn effect: 1	[Q inflation =	0.3/year						TEST
TEST USED	YEAR NORMED	YEAR ADMIN.	# YEARS ELAPSED		IQ SCORES OBTAINED	IQ INFLATION	IQ SCORES CORRECTED FOR FLYNN EFFECT	STANDARD ERROR OF MEAUREMENT IQ < 70 - 75 PRONG 1 MET?
WAIS-R	1979	1993	14	VIQ	73			TAONOTHEI:
		Age: 37 y.o.		PIQ	75			
Dr. Blair				FSIQ	73	4.2	69	YES
WAIS-R	1979	1997	18	VIQ	76			
		Age: 41 y.o.		PIQ	77			
Dr. Auble				FSIQ	4	5.4	71	YES
WAIS-III	1995	2001	6	VIQ	67			
		Age: 45 y.o.		PIQ	79			-
Dr. van Eys				FSIQ	69	1.8	67	YES
SB-FE	1986	2001	15	VR	56			
		Age: 45 y.o.		AR	76			
Annual Control of the				QR	61		To the state of th	
	L. Control of the Con	T THE STATE OF THE		Mem	56	**************************************	нималаладуун Тоо	
Dr. Grant				Comp	1990 (1990) Section 57	4.5	53	YES

the AAIDD when interpreting IQ results for the purpose of making a diagnosis of mental retardation. It should be noted that when Mr. Black was administered the WAIS-R in 1993 by Dr. Blair, the WAIS-R had been normed almost 15 years earlier, thus resulting in an inflation of approximately 4 points on the WAIS-R Full Scale IQ. This is a significant source of discrepancy between the measured IQ (obtained on the WAIS-R) and the individual's true IQ.

I respectfully disagree with Dr. Engum's conclusion that there is no evidence indicating that Mr. Black has significant subaverage intellectual functioning. Table 1 clearly indicates that Mr. Black meets prong 1 of the definition of mental retardation.

8. After reviewing the existing psychological evaluations and reports available, I recommended to Mr. Black's attorneys that they hire a professional to conduct a thorough assessment of Mr. Black's adaptive behavior. This adaptive behavior assessment should be conducted by a professional experienced in the area of mental retardation and adaptive behavior assessment. Since Mr. Black has been incarcerated for numerous years and that a contemporary assessment of his current adaptive behavior is impossible, the best available method would be to interview relatives and other individuals who knew him well prior to his incarceration and possibly prior to age 18 years. Retrospective assessment of adaptive behavior is recommended in such cases by the AAIDD Guidelines for diagnosing mental retardation. I thought that this assessment would yield definitive information regarding prong 2 and contribute valuable clinical information regarding whether or not Mr. Black has mental retardation.

9. RECENT COMPREHENSIVE ASSESSMENT OF Mr. BLACK'S ADAPTIVE BEHAVIOR

Stephen Greenspan, Ph.D., a nationally-recognized and respected expert in the field of mental retardation, conducted a comprehensive adaptive behavior assessment using multiple sources of information including: the Vineland Adaptive Behavior Scales – 2nd Edition (a comprehensive standardized assessment of adaptive behavior), a review of existing records, a review of existing affidavits from relatives and other individuals who know Mr. Black.

Dr. Greenspan followed the guidelines put forth by the AAIDD (Schalock et al., 2007) in conducting his retrospective adaptive behavior assessment. Dr. Greenspan interviewed three different individuals in order to complete the VABS-2. A retrospective assessment is sometimes the best method available of assessing the individual's adaptive behavior. Again, adaptive behavior must be assessed in relation to community living. Using a retrospective assessment of adaptive behavior is in some circumstances the only adequate means of assessing adaptive behavior since all existing diagnostic systems, including Van Tran, define adaptive behavior as: "[adaptive behavior] refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." Hence, this refers to how the individual copes and adapts to society's expectations in the community, not prison.

Dr. Greenspan also asked these individuals to recall and assess Mr. Black's adaptive behavior prior to his 18th birthday. The advantage of conducting a retrospective assessment in this manner is that it also allows a determination if the age of onset (prong 3) criterion was met.

Based on Dr. Greenspan's evaluation of Mr. Black's adaptive behavior, Mr. Black presents significant deficits in social adaptive skills as well as significant deficits in his overall adaptive behavior (VABS-2 Composite Score = 70), thus meeting AAIDD (Luckasson et al., 2002) and Tennessee Code Annotated section 39-13-203's prong 2 criterion for mental retardation.

10. COMMENTS ON JUDGE KURTZ'S CONCLUSIONS REGARDING MENTAL RETARDATION

Mental retardation is a developmental disability, with its origin during the developmental period. Again, although it originates during the developmental period, it is not always correctly identified and diagnosed during this developmental period. Mental retardation is a chronic and life-long condition from which one seldom out grows. Conversely, one does not acquire mental retardation in adulthood. Mental retardation is a functional definition, which has no pre-set cause or etiology that must be present to be diagnosed. Similarly, there are no co-existing conditions that preclude making a diagnosis of mental retardation. Hence, if an individual functions with significant impairments in intellectual and adaptive functioning and it can be reasonably assumed to have originated during the developmental period a diagnosis of mental retardation is warranted.

There was no reliable individualized assessment of Mr. Black's intellectual functioning conducted during his school years. One should not assume that because a child was not referred for testing or special education that the child in question was not struggling in school. Clearly Mr. Black struggled in school, doing poorly in reading and having been retained in second grade.

There appears to be compelling evidence that Mr. Black's current intellectual functioning is significantly subaverage. Most experts agree that Mr. Black meets prong 1 of the definition of mental retardation. Dr. Greenspan's recent comprehensive evaluation of Mr. Black's adaptive behavior provides strong evidence indicating that Mr. Black has significant limitations in adaptive behavior and that these deficits were manifested prior to age 18 years.

As per any diagnostic system as well as the Tennessee statute 39-13-203, prong 3 refers only to documenting that the onset of significant subaverage intellectual functioning and deficits in adaptive behavior were manifested prior to age 18. No diagnostic system requires that a definitive diagnosis of mental retardation be made before the individual reaches the age of 18 years. An initial diagnosis of mental retardation can be made at any age, as long as the manifestation of prongs 1 and 2 can be documented during the developmental period or in other words, before the individual turns 18 years old.

I declare under penalty of perjury and the laws of the United States that the foregoing is a true and correct statement.

Signed on this 17th day of March, 2008.

Marc J. Tassé, PhD, FAAIDD