

Exhibit B

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AFFIDAVIT

RE: Carl Henry Blue
20 October 2008

1. My name is James R. Patton. I am over the age of eighteen, and have first hand knowledge of the facts and opinions presented in this affidavit.

Professional Background

2. I have worked in the field of disabilities since 1974 and hold Master's and Doctoral degrees from the University of Virginia in the area of Special Education/Disabilities. I have taught in higher education since 1977 and have had faculty appointments at the University of Virginia, the University of Hawaii at Manoa, and the University of Texas at Austin. I have 34 years of experience working in the field of mental retardation. During my professional career, I have served as a special education teacher, consultant, and professor in the field of mental retardation/intellectual disability.
3. As a professional in the field of mental retardation, I have coauthored/co-edited two professional books specifically focused on the topic of mental retardation: Mental Retardation – 7th Edition (Beirne-Smith, Patton, & Kim, 2006) and Mental Retardation in the 21st Century (Wehmeyer & Patton, 2000). The former book, which is currently being revised in an eighth edition, is used widely throughout the county in courses on mental retardation/intellectual disabilities. The other book, which was sponsored by the Arc (formerly known as the Association for Retarded Citizens) in conjunction with the 50th anniversary of this organization, represents a compilation of a range of issues in the field of mental retardation/intellectual disabilities.
4. I have written extensively on the topic of mental retardation and other related disability-related topics in my career in this field. I have authored, coauthored, or edited 56 books (including revisions) since my first book was published in 1979. I have also authored or coauthored 36 chapters in professional books and 52 articles in professional journals. I have served as the editor or co-editor on 5 special series in professional journals and as the co-editor on a 15 book series on adult-related issues associated with disabilities. I have also coauthored two published standardized assessment instruments: Scholastic Abilities for Adults (Bryant, Patton, & Dunn, 1991) and the Transition Planning Inventory (Clark & Patton, 1997). In addition, I was one of the co-developers of the Word

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- Identification and Spelling Test (WIST) (Wilson & Felton, 2004). I am currently one of the authors of the revision of the AAMR Adaptive Behavior Scales that will be published by PRO-ED (Austin, Texas).
5. I have served on boards and committees of national, state, and local organizations that serve and represent persons with mental retardation. For six years, I served on the national board of the Division on Mental Retardation and Developmental Disabilities of the Council for Exceptional Children, serving as president of the organization for one of these years. This is an international organization dedicated to issues related to persons with mental retardation. I also served for seven years on the Programs and Services Committee of the Arc of Texas. I have also served on the editorial boards of two international journals in the field of mental retardation, Education and Training in Mental Retardation and Developmental Disabilities and Focus on Autism and Developmental Disabilities.
 6. I have taught courses that were specifically about the characteristics of individuals with mental retardation at a number of different universities in the U.S. (University of Virginia and University of Hawaii at Manoa) and internationally (Universidad Catolica de Santa María – Arequipa, Perú). I have taught a number of other courses that have included content related to the topic of mental retardation.
 7. I am a member of the following organizations – all of which have bearing on my credentials to comment on issues related to mental retardation: American Association on Intellectual and other Developmental Disabilities (AAIDD) – formerly called the American Association on Mental Retardation (AAMR); American College of Forensic Examiners International (ACFEI); Council for Exceptional Children (CEC).
 8. As James Ellis¹ has suggested, a need exists for trained professionals whose expertise is the field of mental retardation. “The expertise of skilled mental disability professionals is crucial to implementing *Atkins*’ protections and achieving the goals of the criminal justice system in these cases.” I have worked in the field of mental retardation for the last 34 years and over this time have gained the expertise to which Ellis refers. I offer the following points to substantiate my credentials. I have worked with hundreds of individuals who had mental retardation. As a result, I am very aware of the characteristics of this population from an *in situ* perspective. I have first-hand knowledge of how these characteristics manifest in the course of everyday situations.
 9. In my capacity as a special education teacher/diagnostician in the Charlottesville Public Schools, I assessed and taught many students with mild mental retardation. My duties included those of diagnostic assessment. I administered standardized and nonstandardized assessments, interpreted their results, presented these results to other professional staff, and served on the multidisciplinary team (MDT) that made eligibility decisions for special education. Many of the decisions, which

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- the MDT made, involved the issue of whether a student had mental retardation or not. Although I am not licensed to administer tests of intelligence, I was trained and am able to administer a variety of assessment measures, including adaptive behavior measures and educational achievement measures.
10. During my doctoral program, I co-coordinated a continuing education program for adults with mental retardation called “Night College” in Charlottesville, Virginia. This program provided “life skills” classes for 60+ adults who lived in the city of Charlottesville and surrounding county (Albemarle County). The classes were offered one night per week and were located in Ruffner Hall on the campus of the University of Virginia. In addition to co-coordinating this program, I also co-taught classes in this program. This experience added to my knowledge and understanding of the characteristics and needs of individuals with mental retardation. In my interactions with adults who had mental retardation in a vocational training program in Honolulu, Hawaii, I was able to see, on a regular basis, how this group of individuals was able to deal with the demands of daily living. I had contact with this group in classroom and community-based settings over the course of three years. I am currently the faculty advisor for the “Best Buddies” chapter at the University of Texas at Austin. This program matches UT students with adults with mental retardation who live in the Austin community. I attend all events and interact with these adults on a regular basis.
 11. As a professional with a doctoral degree in special education, I have remained very active in the area of mental retardation/intellectual disabilities through my writings, service, and research. As the coauthor of the most widely used textbook on mental retardation in special education, I am very aware of literature on and issues associated with the definition and assessment of mental retardation. Serving on the editorial boards of two well-recognized professional journals associated with the area of mental retardation adds to my ongoing awareness of important topics in this field.
 12. As the co-author of two published standardized assessment instruments, I am acutely aware of the concepts of test development and the technical features (norms, reliability, and validity) related to these types of instruments. This knowledge provides me with a keen insight into the various issues associate with assessment. The fact that I am currently working on the revision of one of the major adaptive behavior instruments used in the field provides a unique perspective of the issues related to the measurement of adaptive skills.

Activities Performed To Date

13. I was asked by Mr. Blue’s counsel to examine his adaptive functioning. I have reviewed materials sent to me by Mr. Blue’s counsel. I met with Mr. Blue once – June 81, 2008. I conducted 7 other face-to-face interviews with the following individuals: JoAnn Blue (mother) – two interviews; Londell Blue (brother); George Blue (brother); Oscar Davenport (friend); Wayne Blanford (former

employer); and Hayward Peterson (former teacher). I also conducted one phone interview with Paul Peterson (former teacher).

Concept of Adaptive Behavior/Functioning

14. Adaptive behavior/functioning refers to a person's ability to deal with the everyday demands of life. The American Association on Mental Retardation (2002) defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives."² The American Psychiatric Association (2000) describes adaptive functioning as "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting."³
15. It is essential to point out that the American Association on Mental Retardation stresses that "within an individual, limitations coexist with strengths." What this means is that an individual does not have to show extreme deficits across all adaptive skill areas. It is important to note that, even with relative strengths, a person can still qualify as having deficits in adaptive behavior and meet this criterion of the definition.
16. Another aspect of adaptive behavior that warrants attention is the emphasis that the 2002 AAMR manual gives to the performance rather than acquisition of adaptive skills. "Thus it is expected that reasons for limitations in adaptive skills may include (a) not knowing how to perform the skill (acquisition deficit), (b) not knowing when to use learned skills (performance deficit), or (c) other motivational factors that can affect the expression of skills (performance deficit)."⁴
17. As supported in the professional definitions of mental retardation, a person ONLY has to show deficits in SOME of the many adaptive behavior areas, as indicated below.
 - a. AAMR (2002): significant limitation in ONE of the following three types of adaptive behavior: conceptual, social, or practical
 - b. American Psychiatric Associations (2000) -- Criterion B: significant limitations in AT LEAST TWO of following eleven areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
18. "Significant limitations" in adaptive functioning exist when a "consistency of information" obtained from a variety of sources and different settings indicates that "typical" adaptive functioning differs clearly and appreciably from the standards of personal independence expected of a person of the same age,

- sociocultural background, and community setting. This determination is based on professional judgment that results from training and an extensive experiential background in working with individuals with mental retardation.
19. Significant limitations in adaptive functioning are defined differently, depending on the assessment technique employed. According to the AAMR (2002), when a formal, standardized, norm-referenced instrument is used, “significant limitations in adaptive behavior are operationally defined as performance that is at least two standard deviations below the mean.” A formal, standardized, norm-referenced instrument was not used in this case.
 20. When clinical assessment techniques (informal data collected through collateral interviews) are utilized, “significant limitations” can be identified when nature of the adaptive deficits has a major impact on the person’s functioning that clearly deviates from the standards of personal independence and social responsibility expected of the person’s age and cultural group. Furthermore, “significance” is underscored when the information obtained from different sources corroborates these deficits (i.e., convergent validity).
 21. As indicated, the determination of adaptive behavior must be done by the collection of data from a variety of sources. Sources can include records, previous test results, and interviews with key individuals who knew the person on whom adaptive information is needed. When obtaining information through interviews, the following conditions must be met to ensure valid results:
 - reliable, credible respondents are available
 - respondents had frequent contact with the individual
 - respondents had contacts of long duration
 - respondents had an opportunity to observe behaviors associated with the specific skill areas of adaptive functioning
 - respondents were in close contact, as indicated above, with the individual prior to age 18, if retrospective assessment is used
 - at least one of the respondents should be from the individual’s cultural background
 22. For the purposes of this affidavit, three primary sources were used to examine the levels of adaptive functioning displayed by Mr. Blue: review of school records; interviews with family members; and interviews with nonfamily members who had contact with Mr. Blue.

Adaptive Functioning: Findings From Review of School Records and Interviews with School Personnel

23. A review of school records indicates that Mr. Blue demonstrated a consistent inability to perform academically. The records suggest that he received “special education.” It is important to recognize that Mr. Blue attended elementary school

- prior to the full implementation of the Education of All Handicapped Children Act (enacted in 1975) that mandated a free, public education for all children who qualified for special education. Prior to this law, special education is likely to have been provided but it was typically limited and few procedural safeguards were in place to ensure that appropriate identification and placement occurred.
24. According to Oscar Davenport, Carl was placed in small special education classes for as long as he was in school.
 25. There is no question that he was placed in remedial classes at the middle school level. Although Mr. Blue was socially promoted many years, he did have to repeat a grade.
 26. According to Hayward Peterson (one of Carl's former teachers), Mr. Blue was placed in classes for students who were struggling when he was at the Stephen F. Austin Middle School. He mentioned that, while these were not official "special education" classes, they mostly had lower functioning students.
 27. An examination of the grades that Mr. Blue received over the course of his school career also reflects significant difficulties with meeting the requirements of the classes he was taking. His grade reports from middle school indicate that he failed many classes during this period.
 28. Hayward Peterson described the requirements of his class, indicating how someone like Mr. Blue could obtain a grade of "C" in his middle school classes. Features of the class include:
 - The content was "somewhat watered down."
 - Grades were determined by participation in class, tests, and homework assignments.
 - Mr. Peterson provided opportunities for students to "make-up points."
 - Students with reading problems, like those that Carl displayed, could get by because Mr. Peterson "talked about content in class."
 According to Mr. Peterson, Carl would do just enough to get by in his class, and, with the way the class was organized, Carl "could keep a C."
 29. Mr. Blue's performance on the *California Comprehensive Test of Basic Skills* provides further evidence that he struggled with the academic demands of school. The two years of CTBS results (1978 and 1979) – when he was at the middle school level – indicated that he was functioning, on an acquired knowledge level, at the third grade level on average.

Adaptive Functioning: Findings From Interviews

30. As indicated earlier in this report, 8 interviews were conducted. Some of those individuals had knowledge of his levels of functioning across all areas of adaptive

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behavior; others had information on specific areas only. The dates and names/affiliations of the individuals interviewed are as follows:

18 June 08: Carl Blue
22 August 08: Oscar Davenport (friend); Jo Ann Blue (mother);
 Londell Blue (younger brother)
25 August 08: Paul Peterson (former teacher)
12 September 08: George Blue (younger brother); Jo Ann Blue (mother)
 Hayward Peterson (former teacher)
10 October 08: Wayne Blanford (former employer)

31. The information gathered from the interviews is organized according to the three adaptive skill areas (conceptual, social, and practical) identified in the AAMR 2002 definition of mental retardation. The first section addresses some general comments provided by the interviewees.
32. General Comments: A number of those persons who were interviewed expressed a concern that Mr. Blue learned differently and at a much slower rate than others of his age.
- Oscar Davenport noted that “it took him [Carl] a few times to learn something”
 - His mother, Jo Ann, commented “it took him longer than other kids to learn things.” She also stated that Carl “didn’t catch on as well on certain things.”
 - Hayward Peterson described Carl as “not the smartest.”
33. Conceptual Adaptive Skills – includes areas such as language, reading, writing, money concepts, and self-direction:
- A number of people indicated that Carl had difficulty following directions. Oscar Davenport stated that Carl had trouble with multistep directions. Wayne Blanford said, when giving instructions, they had to be “the simplest of directions.” Carl himself said that he had trouble following directions.
 - Wayne Blanford indicated that you had to tell Carl things more than once. Wayne would ask Carl to repeat what had been said and he could not, resulting in him [Carl] getting upset. Carl reported that he cannot understand what others sometimes say to him and that he has trouble restating what is said.
 - Reading was a major problem for Carl throughout his school years and into adulthood. Carl acknowledged that reading was a “real problem” and that he “didn’t read.” Jo Ann indicated that this was a problem for Carl in school. She noted that he did not ever get a driver’s license because he could not pass the written test. Carl indicated that he tried to get a license on three separate occasions. Wayne Blanford related two examples of Carl’s reading problems: Carl never read the menu at fast food restaurants like the Lone Star Grocery – he would either point to what he wanted, if he could see it, or he would

regularly say “I’ll take what you have” after Wayne had ordered. George Blue stated that he saw Carl looking at a newspaper – sports and comics – but was pretty sure that Carl was not really reading it.

- Jo Ann Blue stated that Carl would get very frustrated when he attempted to write. Carl indicated that usually did not turn in work that required writing – however, if he did, he said “the teacher wouldn’t know what was written.”
- Carl also displayed difficulties in the area of math. His brother, George, noted that he was “not too good” at math. Carl stated that he did not know how to multiply or divide. He was deficient in money skills, as noted by his mom and by Wayne Blanford. Jo Ann Blue said that he did not know how to make change. Wayne shared a situation when Carl purchased some items and was due back \$5 or \$6, but, he didn’t know that he was due that much money, began to walk away, and had to be told to get his change. Wayne said that Carl would ‘ball up’ his paper money such that all denominations were intertwined. Carl indicated that he did not have a checking account, as he did not know how to operate one. Carl demonstrated significant problems in the area of measurement. Wayne Blanford provided two examples. Carl could not measure the appropriate amount of feed for the animals and asked Wayne to mark the bucket so that he did not have to measure out the proper amount. Wayne asked Carl to dig a post 2 feet into the ground but Carl could not measure the post accurately – he put it 4 feet deep. Carl asked Wayne to create a stick with the proper length so that all he had to do was use the stick to determine the right length. This happened a few times; Carl eventually learned this task “after much teaching.” Wayne also said that Carl had trouble with directions. Wayne asked Carl to “take cows to the north side” but Carl put them on the south side after being told the difference by Wayne.

34. Social Adaptive Skills – includes areas such as interpersonal skills, responsibility, self-esteem, gullibility, naiveté, following rules, obeying laws, and avoiding victimization:

- Carl was described as a follower – not a leader by both Oscar Davenport and Hayward Peterson.
- A number of people indicated that Carl could easily be taken advantage of. His mother and Wayne Blanford mentioned that his girlfriend, Carmen, took his money. Wayne indicated that they would go to lunch after Carl was paid and he would not have any money. George Blue shared three examples of his gullibility: Carl could be talked into sneaking out of his house; anyone could come up to Carl and, if asked, would give up something he had; at the club, he would keep giving up his money. Oscar Davenport said that he was easily manipulated – for example, “he would do about anything” if offered money. He also indicated that Carl was vulnerable. Wayne Blanford said that Carl’s brothers would take advantage of him – “they could get anything they wanted

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from him.” Wayne indicated that Carl was coaxed by his girlfriend to ask for more money from Wayne because “he was not being paid enough.”

- Carl could not follow rules that were imposed on him. Oscar Davenport said that “he had issues at school.” His brother, George, remembered times when Carl would sneak out of the house at night.
- Controlling anger was an issue for Carl. Oscar Davenport indicated that this was a big problem for Carl. Hayward Peterson and Wayne Blanford stated that he had a temper – Wayne said that Carl would sometimes “get an attitude” at work when he couldn’t do something or was corrected for something he had done improperly. George Blue indicated that, when Carl got angry, he would leave home and come back hours later; however, he might punch the wall or a tree.

35. Practical Adaptive Skills – includes areas such as self-care, home living, use of the community, health, safety, and work:

- According to Oscar Davenport, Carl could not take care of himself – “Carl probably could not ever have lived by himself.”
- Carl would wear the same clothes for long periods of time. Carl indicated that he did this. His brother, George said that he “could wear the same clothes for a week as a child. Mom would have to tell him to change his clothes or get cleaned up.” Wayne Blanford remembered that he would often smell because he still had on the same clothes and had not washed.
- Doing laundry did not come easily to Carl. This activity was part of his duties when growing up. Carl related a story when he used bleach improperly when he was doing the laundry and the clothes came back a different color. His mom said that it took awhile for Carl to learn how to do laundry.
- Cooking was also difficult for Carl. His mom said that he could not cook. Carl said he could cook some basic items like eggs; however, he had great difficulty with cooking something like chicken. He said that when he tried to fry chicken, it was “bloody on the inside and burnt on the outside.” On another occasion, he tried to bake chicken. He forgot to put water in the pan and the chicken burned, filling the house with smoke. His mom told him to stay out of the kitchen.
- Carl indicated that, when he used public transportation, he would end up often in the wrong places because he did not understand the various routes. On one occasion, he wanted to go to Bryan but ended up in College Station. He said that he would end up walking instead of taking transportation.

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- When shopping for groceries or clothes, Carl would give his wife money and let her select the items and pay for them.
- Carl had a number of jobs over the years. All of them were low skilled jobs that did not require sophisticate training or background. Both Carl and his mom remarked that he did not know how to complete a job application. Carl said that, on one occasion, he could not complete the application because he did not know what it was asking -- so, he took it to his mom. Most of the work that Carl did lasted over time but the work was seasonal and irregular (ranch work, washing cars). Most of the time, he got the work he did because he of a personal connection. On one occasion, his stepfather, Londell, Sr., took all of his sons, except Carl to work with him.
- The only jobs that Carl did for Wayne Blanford on his ranch required minimal thinking skills – e.g., cutting brush, building fences, clearing fence line. Wayne indicated that Carl had a good work ethic and wanted to do a good job. However, Carl was not able to take on more sophisticated jobs. For example, Wayne wanted Carl to use a backhoe – a job that requires a more complicated skill set. Wayne began to train him on how to use this machine; however, he never was able to master this equipment and Wayne had to take him off this job. Another example that highlights Carl’s inability to handle more sophisticated work involved building a roof. Wayne indicated that Carl could not understand and measure the slope of a roof.

Analysis of Findings on Adaptive Functioning

36. This section provides a discussion of the information/data that was gathered in during the assessment of Mr. Blue’s levels of adaptive functioning, as presented in the previous section. The key findings related to each of the major sources of information are highlighted and reviewed.
37. School History and Records: Mr. Blue’s school history and records provide a number of facts that contribute to an understanding of Mr. Blue’s levels of adaptive functioning.
 - Over the course of Mr. Blue’s school career, he received various forms of “special education.”
 - Mr. Blue continued to have significant difficulties with the academic demands of school, as evidenced by his grades and performance on state-required tests.
 - When at the middle school level, Mr. Blue was in classes for lower ability students. These classes, as described by his former teacher, were designed so that students like Mr. Blue could achieve minimal levels of success – e.g., be able to obtain and maintain a “C” grade.
38. Interview Data (Informal Assessment): Qualitative data that were generated from the interviews with family members and others who knew Mr. Blue substantiate

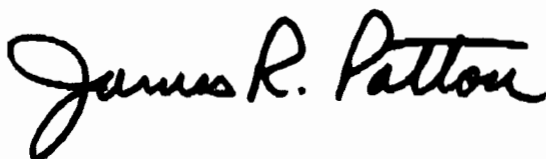
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the fact that Mr. Blue had significant problems across all three adaptive skill areas (conceptual, social, and practical). From an analysis of the responses provided by family members and other individuals (friends, former teacher, former employer) and documented in the previous section of this affidavit, major adaptive problems were noted by all of those interviewed. The responses that were obtained indicate that Mr. Blue's adaptive functioning deviates from what is expected of individuals of a similar age and background in a number of key areas. Ultimately, Mr. Blue's deficits have had a major impact on his everyday functioning.

Professional Opinion

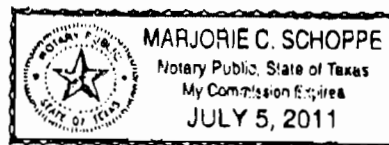
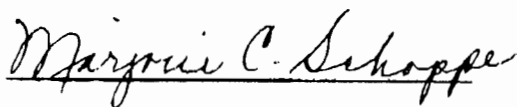
39. In my professional opinion, based on a review of the records and the results of the qualitative data obtained through the interviews with Mr. Blue's family and former teachers, Mr. Blue demonstrated *significant* limitations in adaptive functioning prior to and after age 18. The information obtained and reviewed shows that Mr. Blue displayed significant problems in adaptive functioning in all three of the major areas of adaptive behavior: conceptual, social, and practical.

Respectfully submitted,



James R. Patton, Ed.D.

BEFORE ME, THE UNDERSIGNED OFFICIAL, personally appeared JAMES R. PATTON, who, after being sworn upon his oath, deposed and stated that the above and foregoing report is true and correct to the best of his knowledge. SWORN TO, BEFORE ME, on this the 23rd day of October, 2008.



Notary Public in and for
THE STATE OF TEXAS

my commission expires: 7-5-11

Footnotes:

1. Ellis, J. W. (2003). Mental retardation and the death penalty: A guide to legislative issues. *Mental and Physical Disability Law Reporter*, 27(1) 11-24.
2. Luckasson, R. et al. (2002). *Mental retardation: Definition, classification, and systems of support (10th ed.)*. Washington, DC: American Association on Mental Retardation, p. 14.
3. American Psychiatric Association (2000). *Diagnostic and statistical manual of mental disorders (4th ed., Text revision)*. Washington: Author, p. 42.
4. Luckasson, R. et al. (2002). *Mental retardation: Definition, classification, and systems of support (10th ed.)*. Washington, DC: American Association on Mental Retardation, pp. 73-74.