



**CHRIS DANIEL**  
**HARRIS COUNTY DISTRICT CLERK**

January 9, 2013

KENNETH S. "GATOR" DUNN  
ATTORNEY FOR APPLICANT  
594 SAWDUST RD., STE. 332  
THE WOODLANDS, TX 77380

To Whom It May Concern:

Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, please find enclosed copies of the documents indicated below concerning the Post Conviction Writ filed in cause number 713189-B in the 176th District Court.

- ☐ State's Original Answer Filed ,
- ☐ Affidavit ,
- ☐ Court Order Dated ,
- ☐ Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.
- ☐ Respondent's Proposed Findings of Fact and Order ,
- ☒ Other

Sincerely,

  
Brenda McNeit, Deputy  
Criminal Post Trial

Enclosure(s) – Applicant Eric Dewayne Cathey's Proposed Findings Of Fact And Conclusions Of Law And Table Of Authorities In Support Of Proposed Findings Of Fact And Conclusions Of Law Filed By Applicant Cathey

IN THE 176TH JUDICIAL DISTRICT COURT  
OF HARRIS COUNTY, TEXAS

EX PARTE ERIC DEWAYNE CATHEY,

Applicant.

TRIAL NO. 713189-B  
CCA NO. WR-55,160-02

Time: \_\_\_\_\_  
By: \_\_\_\_\_  
Harris County, Texas  
Deputy

**FILED**  
Chris Daniel  
District Clerk  
FEB 21 2011

**APPLICANT ERIC DEWAYNE CATHEY'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

K.S. "Gator" Dunn  
State Bar No. 00789266  
101 W. Philipps Street, Suite 113  
Conroe, Texas 77301  
Telephone: (281) 362-7156  
Facsimile: (936) 321-8643

Layne E. Kruse  
State Bar No. 11742550  
Brett Young  
State Bar No. 24042203  
Adam Bernhard  
State Bar No. 24069373  
Sumera Khan  
State Bar No. 24064319  
FULBRIGHT & JAWORSKI L.L.P.  
1301 McKinney, Suite 5100  
Houston, Texas 77010  
Telephone: (713) 651-5151  
Facsimile: (713) 651-5246

*Counsel for Eric Dewayne Cathey*

27/1989  
13/1988  
55617697.5

## Table of Contents

FINDINGS OF FACT.....	2
I. Procedural History .....	2
II. The Evidentiary Hearing.....	3
III. The Legal Standard .....	5
A. Three Prongs of Mental Retardation.....	6
B. Additional Guidance by the AAIDD Manual .....	8
IV. The Flynn Effect .....	8
A. The Flynn Effect is a scientifically valid and real phenomenon.....	9
B. The Flynn Effect results in about 0.3 points inflation per year. ....	17
C. Scores on intelligence tests should be corrected for the Flynn Effect. ....	21
D. Correction for norm obsolescence is separate than the application of the standard error of measurement.....	27
E. The Flynn Effect is applied by clinical practitioners to individual test results and is also accepted outside the criminal justice system.....	29
1. Application of the Flynn Effect in determining disability in the school system.....	30
2. Application of the Flynn Effect in determining eligibility for Social Security disability benefits.....	33
F. The known error rate of the Flynn Effect. ....	34
V. Prong One: “Significantly Subaverage” General Intellectual Functioning .....	36
A. IQ Test Administered by Dr. Yohman in 1996.....	36
1. Applying the Flynn Effect and the standard error of measurement.....	37
2. Reliability of Dr. Yohman’s Score .....	37
B. IQ Test Administered by the TDCJ .....	39
VI. Prong Two: Significant Limitations in Adaptive Behavior .....	40
A. Dr. Fletcher’s Adaptive Behavior Assessment .....	43
B. Conceptual Skill Area.....	48

C.	Social Skill Area .....	57
D.	Practical Skill Area .....	61
E.	Testimony and Records from the TDCJ .....	64
VII.	Prong Three: Onset Before the Age of Eighteen .....	67
VIII.	Other Evidence Indicative of Mental Retardation ( <i>Ex Parte Briseno</i> Factors) .....	67
IX.	Risk Factors for Mental Retardation.....	70
A.	Biomedical Risk Factors .....	71
B.	Social Risk Factors .....	72
C.	Behavioral Risk Factors.....	73
D.	Educational Risk Factors .....	74
X.	Determination Concerning Mental Retardation.....	74
CONCLUSIONS OF LAW .....		75

IN THE 176TH JUDICIAL DISTRICT COURT  
OF HARRIS COUNTY, TEXAS

EX PARTE ERIC DEWAYNE CATHEY,

Applicant.

§  
§  
§  
§  
§

TRIAL NO. 713189-B  
CCA NO. WR-55,161-02

**APPLICANT ERIC DEWAYNE CATHEY'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On November 18, 2008, the Court of Criminal Appeals remanded this cause to the Court for a hearing on Applicant Eric DeWayne Cathey's ("Mr. Cathey") claim in his Application for Post-Conviction Writ of Habeas Corpus. In this claim, Mr. Cathey alleged that he is a person of mental retardation<sup>1</sup> and thus entitled to habeas relief under the requirements of the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of defendants with mental retardation violates the Eighth Amendment to the U.S. Constitution. Mr. Cathey also alleged that his execution would violate his due process rights unless he was afforded a full and fair hearing on his claim of mental retardation.

This Court held an evidentiary hearing to determine whether Mr. Cathey is a person of mental retardation and also for evaluating evidence concerning the following four issues presented by the Texas Court of Criminal Appeals:

- (1) the scientific validity and reliability of the 'Flynn Effect;'
- (2) whether clinical practitioners who are ordinarily called upon to diagnose mental retardation for purposes outside of the criminal justice system use and apply the 'Flynn Effect' to I.Q. test results when making their particularized diagnoses of mental retardation;

---

<sup>1</sup> The term mental retardation is replaced by the term intellectual disability in the American Association on Intellectual and Developmental Disability Manual, *INTELLECTUAL DISABILITY: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORT* (11th ed. 2010) ("AAIDD Manual"). For ease of reference, however, the term mental retardation will be used.

(3) whether the application of the ‘Flynn Effect’ to individual test results is generally accepted scientific procedure in the pertinent professional community outside of the criminal justice system; and

(4) the known or potential ‘error rate’ of the ‘Flynn Effect’ as it applies to a specific I.Q. test result.

*Ex Parte Cathey*, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam) (unpublished).

After reviewing the testimony of witnesses and the evidence presented at the hearing, the Court finds that Mr. Cathey has proven by a preponderance of the evidence that he is a person with mental retardation and also finds that the Flynn Effect is a scientifically valid and real phenomenon that should be applied to intellectual functioning test scores in death penalty cases to correct for norm obsolescence, and issues these Findings of Fact and Conclusions of Law in support.

## **FINDINGS OF FACT**

### **I. Procedural History**

1. Applicant Eric DeWayne Cathey (“Mr. Cathey”) was convicted of capital murder in the 176th Criminal District Court of Harris County, Texas in Cause No. 713189 on March 12, 1997, and sentenced to death on March 14, 1997.

2. On March 20, 1997, Mr. Cathey filed a notice of appeal to the Texas Court of Criminal Appeals. The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on April 21, 1999. *Cathey v. State*, 992 S.W.2d 460 (Tex. Crim. App. 1999).

3. On September 16, 1999, Mr. Cathey filed a review petition to the Supreme Court. The Supreme Court denied Mr. Cathey’s petition for writ of certiorari on January 10, 2000. *Cathey v. Texas*, 528 U.S. 1082 (2000).

4. On March 15, 1999, Mr. Cathey filed an application for state post-conviction relief under Tex. Code Crim. Proc., art. 11.071. The Court of Criminal Appeals denied the application on April 2, 2003. *Ex Parte Cathey*, Writ. No. 55,161-01 (Tex. Crim. App. Apr. 2, 2003) (unpublished).

5. On April 2, 2004, Mr. Cathey filed his federal habeas petition in the United States District Court for the Southern District of Texas under 28 U.S.C. § 2254. The district court denied habeas relief on December 23, 2004.

6. On May 5, 2005, Mr. Cathey filed an application for certificate of appealability to the Fifth Circuit. The Fifth Circuit denied Mr. Cathey's application on April 7, 2006. *Cathey v. Dretke*, 174 Fed. App'x 841 (5th Cir. 2006).

7. On November 17, 2008, Mr. Cathey filed an Application for Postconviction Writ of Habeas Corpus and Motion for Stay of Execution under Tex. Code Crim. Proc., art. 11.071. By order dated November 18, 2008, the Court of Criminal Appeals granted Mr. Cathey's motion to stay and remanded the writ to the 176th Criminal District Court, Harris County, Texas for a hearing on Mr. Cathey's claims. *Ex Parte Cathey*, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam) (unpublished). As a part of the factual inquiry on the issue of mental retardation, the Court of Criminal Appeals required the trial court to evaluate evidence concerning the Flynn Effect. *Id.*

## **II. The Evidentiary Hearing**

8. On January 25-29, 2010, this Court conducted an evidentiary hearing to determine whether Mr. Cathey is a person of mental retardation and also to address the four issues specific to the application of the Flynn Effect mandated for review by the Texas Court of Criminal Appeals. Mr. Cathey appeared in person and through his counsel of record.

9. Mr. Cathey presented live testimony from the following experts:

- a. James Robert Flynn, Ph.D., the discoverer of and world-renowned expert on the scientific phenomenon known as the Flynn Effect;
- b. Jack M. Fletcher, Ph.D., an expert clinical neuropsychologist with specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities; and
- c. Alan Steven Kaufman, Ph.D., an expert psychologist and a top scholar on the development and interpretation of intelligence tests.

Mr. Cathey presented testimony by affidavit<sup>2</sup> from the following people:

- a. Greg Olley, Ph.D., an expert psychologist and chair of the Division 33 American Psychological Association Committee on Mental Retardation (DX 47)<sup>3</sup>;
- b. Charlotte Ross, Mr. Cathey's older sister (DX 42);
- c. Robert Charles Mr. Cathey, Jr., Mr. Cathey's brother (DX 43);
- d. Noella Bryant, Mr. Cathey's former wife (DX 44);
- e. Celecia Baker, Mr. Cathey's younger sister (DX 45);
- f. Faryion Wardrip, an inmate at the Polunsky Unit (DX 50); and
- g. Ronald Hamilton, an inmate at the Polunsky Unit (DX 51).

10. The State presented live testimony from the following:

- a. Timothy Proctor, Ph.D., an expert forensic psychologist;

---

<sup>2</sup> The Court admitted the affidavits as exhibits during the evidentiary hearing. "The Court of Criminal Appeals will defer to the trial court's findings of fact even when those findings are based on affidavits rather than live testimony." *Ex parte Thompson*, 153 S.W.3d 416, 418 (Tex. Crim. App. 2005).

<sup>3</sup> "DX" refers to exhibits admitted by the Applicant at the evidentiary hearing. "SX" refers to exhibits admitted by the State at the evidentiary hearing. "H.T." refers to the transcript taken at the evidentiary hearing.

b. Leigh Hagan, Ph.D., an expert psychologist who offered opinion only on the validity of the Flynn Effect and not on whether Mr. Cathey is a person of mental retardation;

c. Don Cohen, an investigator employed by the Harris County District Attorney's office for post-conviction writs;

d. Captain Steven Bryant, a captain at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division;

e. Leah Madison, a correctional officer at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division; and

f. William Cook, a correctional officer at the Polunsky Unit, Texas Department of Criminal Justice Correctional Institution Division.

11. Mr. Cathey presented and the Court admitted a total of 59 exhibits. The State presented and the Court admitted a total of 21 exhibits.

### **III. The Legal Standard**

12. Following the decision of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that it is "cruel and unusual" to execute the mentally retarded, the Courts of this and other states have grappled with the appropriate procedures and standards by which this straightforward declaration of constitutional principle is to be applied. In Texas, the procedure is for the Court, without a jury, to consider appropriate evidence, including affidavits, and for the applicant to prove by a preponderance of the evidence that he is a person of mental retardation. The preponderance of the evidence means proof "by the greater weight and degree of credible evidence." *Compton v. Henrie*, 363 S.W.2d 179, 182 (Tex. 1963).

13. In determining whether Mr. Cathey is a person of mental retardation, the Court has been guided by the scientific and clinical definitions of mental retardation developed by the

American Association on Mental Retardation (“AAMR”), now the American Association on Intellectual and Developmental Disabilities (“AAIDD”), and the American Psychiatric Association (“APA”). Both organizations recognize that mental retardation is a disability characterized by (1) “significantly subaverage” general intellectual functioning, (2) accompanied by “related” (AAMR) or “significant” (APA) limitations in adaptive functioning, (3) the onset of which occurs prior to the age of eighteen. [DX 4, AAIDD Manual and DX 5, American Psychological Association, DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS (“DSM-IV”) (1994)].

14. In *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), the Texas Court of Criminal Appeals noted that Texas had adopted the “AAMR three-part definition of mental retardation” in the “Persons With Mental Retardation Act,” citing *Ex parte Tennard*, 960 S.W.2d 57, 60 (Tex. Crim. App. 1997) and Texas Health & Safety Code §§ 591.003(13) & (16). The Court then applied that definition in determining whether the applicant presented sufficient evidence of mental retardation.

**A. Three Prongs of Mental Retardation**

15. Each component of the definition of mental retardation requires additional explanation. First, the consensus among mental health professionals and the AAIDD manual is that the requirement of significantly subaverage general intellectual functioning is satisfied by “an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments’ strengths and limitations.”<sup>4</sup> [DX 4, AAIDD Manual at 27]. The AAIDD Manual also states that

---

<sup>4</sup> The AAIDD does not intend for a fixed cutoff point to be established for diagnosing a person with mental retardation. [DX 4, AAIDD Manual at 39-40]. The diagnosis is “intended to reflect a clinical judgment rather than an actuarial determination.” *Id.* The AAIDD Manual explains

“[a]n IQ score should be reported with confidence intervals rather than a single score. [DX 4, AAIDD Manual at 40]. The DSM-IV recognizes that “there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument.” [DX 5, DSM-IV at 39].

16. Next, with respect to adaptive functioning, the AAIDD Manual recognizes deficits in adaptive behavior as “performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without [intellectual disability] that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.” [DX 4, AAIDD Manual at 43].

17. Third, with respect to the requirement that the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of eighteen, it is not required that there be a diagnosis of mental retardation before the person’s eighteenth birthday. [DX 4, AAIDD Manual at 27-28]. Rather, it is necessary only that the limitations in adaptive functioning be apparent before the age of eighteen, that IQ testing sometime during the person’s life reliably establish an IQ of 75 or below, and that there be no intervening reason, such as a

---

that “it is important to use a range as reflected in the test’s standard error of measurement” because of variations in test performance, examiner’s behavior, or other undetermined factors. [DX 4, AAIDD Manual]. Accordingly, a “standard error of measurement” must be taken into account in interpreting the IQ score obtained on any test. *Id.* The standard error of measurement is the range of IQ score of plus or minus five points within which there is a high level of confidence that a person’s “true” IQ resides. *Id.* Thus, obtained IQ scores up to 75 can satisfy the first component of the definition of mental retardation, for the true IQ score of a person who obtains a score of 75 is within the range of 70-80. *See Atkins v. Virginia*, 536 U.S. at 309 (“an IQ between 70 and 75 or lower...is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition”).

traumatic head injury, for the person's IQ to have diminished since the age of eighteen. [DX 4, AAIDD Manual at 32].

**B. Additional Guidance by the AAIDD Manual**

18. Both the Supreme Court and the Texas Court of Criminal Appeals have applied the definition of mental retardation as set forth by the AAIDD, formerly known as the American Association on Mental Retardation. *See Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002); *Ex parte Briseno*, 135 S.W.3d at 7. The AAIDD Manual definition of mental retardation focuses on the presence of adaptive behaviors before the age of 18:

Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

[DX 4, AAIDD Manual at 6]; *see also Ex Parte Briseno* at 6-8. The AAIDD Manual also lists the following five assumptions "which are essential to the application of the definition":

*Assumption 1*: "Limitations in present functioning must be considered within the context of community environments typical of the individual's peers and culture."

*Assumption 2*: "Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors."

*Assumption 3*: "Within an individual, limitations often coexist with strengths."

*Assumption 4*: "An important purpose of describing limitations is to develop a profile of needed supports."

*Assumption 5*: "With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve."

[DX 4, AAIDD Manual at 7].

**IV. The Flynn Effect**

19. The Flynn Effect is a scientifically valid and reliable phenomenon. It is applied by clinical practitioners in the diagnosis of mental retardation and is used by practitioners outside the criminal justice system to correct for norm obsolescence. The Flynn Effect should be applied to individual test results to account for norm obsolescence and is a generally accepted scientific

procedure. The Flynn Effect is sufficiently precise to make corrections to individual IQ scores because it has a known error rate.

**A. The Flynn Effect is a scientifically valid and real phenomenon.**

20. All of the experts presented by the State and the Applicant recognized the Flynn Effect as a real phenomenon. The existence of the Flynn Effect, therefore, is uncontested.

21. James Flynn, Ph.D. is the foremost expert on IQ norm obsolescence over time, also known as “the Flynn Effect.”<sup>5</sup> Dr. Flynn is currently an emeritus professor and lecturer at the University of Otago in New Zealand. He attended the University of Chicago where he received his bachelor’s, master’s, and doctoral degrees in political science. Before joining the University of Otago faculty, Dr. Flynn taught psychology at Cornell University and created a research project based on his work. Dr. Flynn has been a distinguished visiting speaker at the universities of Cornell, Chicago, Harvard, and Princeton where he lectured on his research in intelligence and IQ testing. Dr. Flynn was a visiting scholar at the Sage Foundation in 2008 and 2009 and was a visiting scholar at the Hoover Institution at Stanford. Dr. Flynn has been profiled by the Scientific American. [DX 21, Profile of James Flynn, “Flynn’s Effects,” SCIENTIFIC AMERICAN 37 (2000)]. In 2007, the International Society For Intelligence Research recognized Dr. Flynn as being the most distinguished researcher in the area of intelligence. The New Zealand Psychological Society honored Dr. Flynn as its first honorary fellow for life, and the University of Otago awarded him an honorary doctorate of science. Dr. Flynn is one of two distinguished associates of the Psychometrics Center at Cambridge, which sought Dr. Flynn’s expertise in designing its IQ tests. Dr. Flynn delivered the keynote address at the American

---

<sup>5</sup> Dr. Flynn explained that although the Flynn Effect is named after him, the use of the term was coined in 1994 by authors Richard Herrnstein and Charles Murray in their book, *The Bell Curve*. Dr. Flynn had been studying the Flynn Effect beginning 1983 and labeled it in his research as “IQ gains over time due to norm obsolescence.” [H.T. Vol. 4: 31].

Psychological Association's symposium on the Flynn Effect at Emory University in 1996 and at Cambridge University in 2006, leading to his 2007 book with Cambridge University Press, *WHAT IS INTELLIGENCE?* [DX 6, James R. Flynn, *WHAT IS INTELLIGENCE?* (2009)]. Dr. Flynn has published 67 articles in peer-reviewed journals, with roughly 50 publications addressing the topic of IQ. He has contributed to Sternberg's *THE ENCYCLOPEDIA OF INTELLIGENCE*, the *CAMBRIDGE HANDBOOK OF INTELLIGENCE*, and the *OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY*. [H.T. Vol. 4: 31-38].

22. Dr. Flynn authored "The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False over the Approximately True," published in the journal *Applied Neuropsychology*. [DX 18, James R. Flynn, "The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False over the Approximately True," 16 *Applied Neuropsychology* 98-104 (2009)]. In this article, the results of Dr. Flynn's comparative study of individually administered tests from 1972 to the present were released. After administering tests with obsolete norms, alongside tests with current norms, and comparing the results, Dr. Flynn observed that there are significant IQ gains over time. Dr. Flynn's comparison of these tests was scientific and valid and included a sound method for translating tests having different scales, such as the Stanford-Binet and the Wechsler, so that overall changes in scores over time could be accurately quantified. [H.T. Vol. 4: 53, 55-56, 58, 60].

23. Dr. Flynn also conducted a study with psychologist Lawrence F. Weiss, Ph.D., the senior psychologist in psychometrics at Psychological Corporation, who is responsible for standardizing and norming the Wechsler and other intelligence tests. Dr. Flynn and Dr. Weiss co-authored an article addressing the Flynn Effect titled "American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress," published in the *International Journal of Testing*.

[DX 19, James R. Flynn & Lawrence G. Weiss, "American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress," 7(2) *Int'l Journal of Testing* 209-224 (2007)]. Dr. Weiss collaborated with Dr. Flynn and recognized the Flynn Effect in this article, acknowledging that IQ test norms become obsolete over time. Specifically, Dr. Weiss found that American IQ gains have occurred at a rate of 0.3 points per year from 1932 to 2002. [H.T. Vol. 4: 61-62].

24. Dr. Flynn testified that when a test administrator administers to the same group of subjects a recently normed IQ test and a less recently normed test, subjects will make relatively better scores on the older test and worse scores on the new test. [H.T. Vol. 4: 18]. This posed a conundrum because the recognized theory of intelligence is that IQ is static. Upon reaching majority, an individual IQ does not improve over time. [DX 4, AAIDD Manual at 28]. The Flynn Effect has been so well accepted by the scientific community that as a result, test-makers now update their intelligence tests more frequently. [H.T. Vol. 4: 49, 82]. Applying the Flynn Effect to individual test results is accepted as a valid scientific procedure. [H.T. Vol. 4: 74].

25. Dr. Flynn testified that administering a test with outdated norms is comparable to measuring a person's height with a shrunken measuring tape, resulting in a readout that the person is 6'0" tall when the person is actually 5'6" tall. [H.T. Vol. 4: 47].

26. Dr. Flynn concluded that the Flynn Effect is a scientifically valid, reliable, and observable fact. The scientific community has accepted that IQ inflation is a real phenomenon. [H.T. Vol. 4: 43, 47-48, 50-51, 74].

27. Alan Steven Kaufman, Ph.D. is one of the top scholars in the United States today on the development and interpretation of IQ tests. Dr. Kaufman is a clinical professor of psychology at the Yale University School of Medicine in the Yale Child Studies Center and has been associated with Yale since 1997. Dr. Kaufman also is an academic research psychologist

specializing in areas of educational and school psychology and is specifically trained in test development, interpretation, and research. Dr. Kaufman holds a bachelor's degree from the University of Pennsylvania, a master's degree from Columbia University, and a doctorate degree in psychology from Columbia University with a specialty of measurement research and statistics. Before joining the faculty at Yale University, Dr. Kaufman held the position of professor at the University of Georgia, the University of Alabama, and the California School of Professional Psychology. Dr. Kaufman has written more than twenty books and holds a patent for a test device related to testing the ability to process information visually on the subtest called Magic Window. Dr. Kaufman has authored over 150 articles that have been published in peer-reviewed journals. Most of these articles relate to the interpretation of intelligence tests, the structure and properties of intelligence tests, and neuropsychological tests and their application in general. Dr. Kaufman has authored 14 IQ tests and has worked in test development since 1968 when he took a position at the Psychological Corporation, which publishes the Wechsler tests. [H.T. Vol. 6: 7-10, 12].

28. Dr. Kaufman has extensive experience creating, developing, and standardizing IQ tests. Dr. Kaufman worked closely with David Wechsler, Ph.D. from 1970-1974 to revise the Wechsler Intelligence Scale for Children ("WISC") and re-standardize the test to get a new normative sample. Dr. Kaufman was also in charge of supervising the Weschler Intelligence Scale for Children-Revised ("WISC-R") which was published in 1974. Dr. Kaufman has written about 12 books about the Wechsler exams. [H.T. Vol. 6: 10-11].

29. One such book, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE [DX 10, Elizabeth Lichtenberger & Alan Kaufman, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE (3d ed. 2006)], devotes a section to the Flynn Effect that summarizes the research by Dr. Flynn

and others in the field, research within the United States, research cross-cultural in nature, and integrates the findings. Dr. Kaufman has also independently, and around the same time as Dr. Flynn's earlier research, researched norm obsolescence as well. Dr. Kaufman's research provides persuasive evidence that the Flynn Effect is scientifically reliable. The Flynn Effect is repeatable within the United States at an average rate of three points per decade, plus or minus a small margin, from preschool children to old-age, and it has also been found for different levels of ability and using different tests and tasks both verbal and nonverbal as well as working memory. The Flynn Effect is a reliable and valid scientific finding that has been true for quite some time. [H.T. Vol. 6: 16-17].

30. Dr. Kaufman's book, IQ TESTING 101, [DX 7, Alan Kaufman, IQ TESTING 101 (2009)] published in 2009, was written as a primer to understand the important concepts related to IQ tests. IQ TESTING 101 discusses the malleability of IQ and the newly realized fact that it is not static or constant but is constantly changing over time in accord with the Flynn Effect. Dr. Kaufman also discusses the use of IQ tests in the public domain, including a discussion of the Flynn Effect in relation to *Atkins* cases. [H.T. Vol. 6: 17-18].

31. In his other publication, ESSENTIALS OF WAIS-IV ASSESSMENT, Dr. Kaufman recognizes the Flynn Effect as "well-known," describing that "a person's standard scores on an old test, with outdated, norms (e.g., the WAIS-III), will tend to be spuriously high. [DX 8, Elizabeth Lichtenberger & Alan Kaufman, ESSENTIALS OF WAIS-IV ASSESSMENT 33 (2009)].

32. Dr. Kaufman testified that based on scientific research, the Flynn Effect is scientifically valid and reliable in the United States. [H.T. Vol. 6: 38, 40].

33. Jack Fletcher, Ph.D. is a full professor in the Department of Psychology at the University of Houston. For the past thirty years he has completed research on children and

adults with developmental disabilities. He received a degree in clinical psychology from the University of Florida in 1978, is a licensed psychologist in the State of Texas, and is board certified as a clinical neuropsychologist by the American Academy of Clinical Neuropsychology and American Board of Professional Psychology. At the University of Houston he teaches courses on the assessment of adults and children, including those with developmental disabilities. He also teaches advanced courses on intellectual and neuropsychological assessment. He routinely conducts assessment for mental retardation and other developmental disabilities in children and adults. He has worked with the government's Social Security Administration as well as schools in the Houston Independent School District to evaluate intellectual functioning. He has specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities. He served on the President's Commission on Special Education, a commission that was charged by the President to review the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, in preparation for its reauthorization. Dr. Fletcher has published 200 articles in peer-reviewed journals. [H.T. Vol. 5: 7, 8, 10-13].

34. Dr. Fletcher testified that the Flynn Effect is a widely recognized discovery. He stated that the Flynn Effect is the phenomenon identified by increased scores on IQ tests where people perform at higher levels. [H.T. Vol. 5: 21].

35. Dr. Fletcher observed that the Flynn Effect is universal, and although people disagree about what causes it, nobody disputes whether it is real or not. [H.T. Vol. 5: 43]. He testified that "The Flynn Effect is a real and novel discovery. It is widely accepted around the world as an explanation for why IQ scores change over time." [H.T. Vol. 5: 77].

36. Timothy Proctor, Ph.D. is a private practitioner in forensic psychology in Dallas, Texas. Dr. Proctor received a bachelor's degree in psychology from Texas A&M University and

a doctorate degree from the University of Texas Southwestern Medical Center. He also completed a post-doctoral fellowship in forensic psychology at the University of Southern California, Institute of Psychiatry, Law, and Behavioral Science and completed post-doctoral training in psychopharmacology. Dr. Proctor is board certified in forensic psychology. [H.T. Vol. 6: 77]. Dr. Proctor is not board certified in neuropsychology. Dr. Proctor devotes about one or two percent of his time attending to patients, and most of his practice relates to assessing applicants for disability benefits and assessing applicants in the civil and criminal justice system. He has not published any articles on the Flynn Effect or on mental retardation. [H.T. Vol. 7: 68-72].

37. Dr. Proctor, who was called by the State, testified that the Flynn Effect is real and that there are recognizable IQ gains over time. [H.T. Vol. 7: 43]. Dr. Proctor agrees with the Applicant's experts that it is the best practice to recognize the Flynn Effect. [H.T. Vol. 7:61]. Dr. Proctor further agrees with the WAIS-III/WMS III TECHNICAL MANUAL in that there is a real phenomenon of IQ inflation over time and that an examinee's IQ score will generally be higher when outdated norms are used. [H.T. Vol. 7:54].

38. Leigh Hagan, Ph.D. is a solo practitioner of clinical and forensic psychology in Virginia. He is licensed as a clinical psychologist in Virginia. Dr. Hagan received an undergraduate master's degree from the University of Virginia and a doctorate degree in counseling psychology from the University of Missouri at Columbia. He completed his post-doctoral training in Georgia. Dr. Hagan is a diplomate of the American Board of Forensic Psychology. He conducts evaluations for a number of forensic purposes. About 90%-95% of people he evaluates have a matter before the justice system. [Vol. 7: 104-109]. Dr. Hagan has testified 50 times in the last four years in *Atkins* cases, admitting that he has not found or testified

that any death row inmate was a person of mental retardation. Dr. Hagan also conceded that he had prepared and provided the State's counsel with an outline of topics she should address with him. [Vol. 7: 138-139].

39. Dr. Hagan, who was called by the State, agreed that there is a "genuine statistical observation" known as the Flynn Effect. [H.T. Vol. 7: 118]. He also acknowledged that in the WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL, published by those who develop the Wechsler tests, the manual states that a group that scored 100 on the Wechsler Adult Intelligence Scale-III ("WAIS-III") was expected to score between 96 and 98 on the Wechsler Adult Intelligence Scale -IV ("WAIS-IV"). [H.T. Vol. 7: 142]. This is unequivocal acknowledgement of the practical impact of the Flynn Effect.

40. Manuals guiding the determination of mental retardation also recognize the Flynn Effect as a real phenomenon.

41. The WAIS-III/WMS-III TECHNICAL MANUAL is authoritative and reliable. This manual recognizes the Flynn Effect and explains that "average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual's performance relative to the expected scores in his or her own age group." [DX 13, WAIS-III/WMS-III TECHNICAL MANUAL (3d ed. 1997)] For example, "if the mean of the U.S. population on the WAIS-R was 100 in 1981, the inflation might cause it to be about 105 in 1997." *Id.* This increase corresponds to applying the Flynn Effect's 0.3 points inflation per year over the sixteen year period, and the conclusion of this manual is that because of the Flynn Effect, if an outdated test is given, an individual's IQ score will be inflated. This application is a correction for the obsolescence of the norms. [H.T. Vol. 4: 43, 45-46; H.T. Vol. 6: 31].

42. The 2010 AAIDD Manual is authoritative and also supports the Flynn Effect, stating that “in cases where a test with aging norms is used a correction for the age of the norms is warranted.” [H.T. Vol. 4: 73-74]. The AAIDD Manual devotes an entire page and section to the Flynn Effect, recognizing it as an increase in IQ scores over time:

The Flynn Effect refers to the observation that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time. Flynn (1987) reported that this effect was also observed in samples from other countries.

[DX 4 at 37].

43. The Court finds that the Flynn Effect is a scientifically valid and real phenomenon.

**B. The Flynn Effect results in about 0.3 points inflation per year.**

44. It is uncontested that the experts testifying on behalf of the State and the Applicant recognized that the Flynn Effect results in about 0.3 points inflation per year or 3 points per decade.

45. Dr. Flynn testified that analysis of independently verifiable data establishes that during the World War I era, the IQ inflation rate was about 0.4 points per year, between WWI and 1972 about 0.33 points, with IQ inflation for the current generation at about 0.3 points per year. [H.T. Vol. 4: 4, 44]. IQ test data from the 1970s to the present shows that IQ gains occur at about 0.30 points per year. [H.T. Vol. 4: 41, 44, 52, 62, 66-70, 105]. Dr. Flynn stated that psychologists who submit their studies to peer-reviewed journals and correct IQ scores for the Flynn Effect in the amount of 0.3 points per year are more often published, whereas those who submit articles to peer-reviewed journals articles and do not correct obsolete IQ tests for the Flynn Effect will not have their articles published. [H.T. Vol. 4, p. 101-102, 111]. For Wechsler

tests, the 0.3 points per year average gain is consistently within the margin of error for such a number. [H.T. Vol. 4: 69-70].

46. Dr. Flynn's book, WHAT IS INTELLIGENCE?, includes a Figure AIII, with the following caption that provides further reliable support for the 0.3 point inflation per year: "Using the WISC to test whether the IQ gains of American children have been relatively uniform (about 0.30 points per year) between 1947 and 2002, and whether that has been true at all IQ levels. The three IQ levels I have chosen are 125-140 (high), 90-115 (average), and 55-80 (low). At each level, the broken line represents a gain of exactly 0.30 points per year. The solid lines show how little actual rates of gain have deviated from that value." [DX 6, James R. Flynn., WHAT IS INTELLIGENCE? (2009)].

47. Dr. Kaufman, Dr. Fletcher, and Dr. Proctor unequivocally agreed with Dr. Flynn, testifying that the Flynn Effect is roughly three points per decade or 0.3 points per year. [H.T. Vol. 6: 19; H.T. Vol. 5: 25; H.T. Vol. 6: 102-103]. Even Dr. Hagan was forced to concede that after analyzing all the available data on the Flynn Effect, including an analysis of only the Wechsler tests, the rate of gain fits tightly around 0.3 points per year. [H.T. Vol. 7: 144]. The precision of the Flynn Effect correction is supported by the preponderance of expert testimony in this case.

48. Manuals guiding the determination of mental retardation also recognize that the Flynn Effect results in about 0.3 points inflation per year. The AAIDD Manual, which applies to all intelligence tests, finds that obsolete norms may create a problem with identifying people as having intellectual disability. [DX 4]. The AAIDD Manual specifically instructs testers to recognize the Flynn Effect in the amount of 0.33 points per year. [H.T. Vol. 4: 132].

49. As long ago as 1997, even test makers recognized correction for the Flynn Effect. The WAIS-III Technical Manual<sup>6</sup> recognizes that there is a real phenomenon of IQ inflation over time and explains that data suggests the inflation rate is 0.3 of a point per year. [H.T. Vol. 4: 48-49]. The manual states:

**Updating of Norms.** Because there is a real phenomenon of IQ-score inflation over time, norms of a test of intellectual functioning should be updated regularly (Flynn, 1984, 1987; Matarazzo, 1972). Data suggest that an examinee's IQ score will generally be higher when outdated rather than current norms are used. **The inflation rate of IQ scores is about 0.3 point each year.**

[DX 13 at 8-9] (emphasis added).

50. Several publications on intelligence and intelligence scores recognize that the Flynn Effect results in inflation of 0.3 points per year:

- Alan Kaufman, IQ TESTING 101 203 (2009) ("After 10 years, the norms for an IQ test are 3 points out of date, and after two decades the outdatedness reaches a hefty 6 points.") [DX 7];
- Elizabeth Lichtenberger & Alan Kaufman, ESSENTIALS OF WAIS-IV ASSESSMENT 33-34 (2009) ("Overall, the Flynn Effect has shown that, on average, American children and adults have increased their scores on intelligence tests at the rate of 3 points per decade...") [DX 8];
- Elizabeth Lichtenberger & Alan Kaufman, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE 39 (3d ed. 2006) ("As impressive as the three-point gain per decade for people in the United States has seemed to readers of Flynn's (1984) article, the

---

<sup>6</sup> The most updated Wechsler test is the Wechsler Adult Intelligence Scale-IV ("WAIS-IV"), published in 2008. However, it is significant that even older test manuals, including the WAIS-III which was published pre-*Atkins*, recognized the Flynn Effect. Additionally, silence of the WAIS-IV technical manual on correction for the Flynn Effect is no evidence that scores should not be corrected for norm obsolescence when an old test is used. It is not a surprise that a manual published for a new test does not mention the Flynn Effect because such a correction is only needed when older intelligence tests are used. However, even the technical manual for the WAIS-IV provides a conversion table that shows the impact of norm obsolescence. As stated in a recent article, "Clearly publishers have acknowledged the [Flynn Effect] by renorming tests more frequently and providing validity studies and conversion tables. A publisher should not be expected to address every use of the test." Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment* 469 (2010).

United States has outgained only two of the nations studied by Flynn (1987)...”) [DX 10];

- James R. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect,” 12 *Psychology, Public Policy, and Law* 184 (2006) (“It recommends deducting 0.3 IQ points per year from the scores of defendants for every year that passed between the date when the test was normed and the date when the test was taken.”) [DX 17];
- James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert* Motions Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009) (“The bold highlights comparisons where either a later form of the WISC has been used to check an earlier form of the WISC or a later form of the WAIS has been used to check an earlier form of the WAIS. These show rates of gain averaging at about 0.3 points per year with admirable consistency.”) [DX 18];
- James R. Flynn & Lawrence G. Weiss, “American IQ Gains from 1932 to 2002: The WISC Subtests and Educational Progress,” 7(2) *Int’l Journal of Testing* 217 (2007) (“Taking the midpoint of the most recent estimates, the WISC gives a gain of 0.318 points for the period between 1948 and 2002 with little variation.”) [DX 19];
- James R. Flynn, “The Mean IQ of Americans: Massive Gains 1932 to 1978,” 95(1) *Psychological Bulletin* 32 (1984) (“If we select out the eight combinations with the largest number of subjects, they evidence rates of gain whose consistency is quite remarkable, ranging from .250 points per year to .440 points, with a median of .332.”) [DX 24];
- Alan S. Kaufman, “Looking Through Flynn’s Rose-Colored Scientific Spectacles,” 28(5) *Journal of Psychoeducational Assessment* 494 (2010) (citing research conducted by Tomoe Kanaya & Stephen J. Ceci) (“The bulk of evidence suggests that the Flynn Effect is at least three points per decade for IQs in the range associated with mental retardation.”);
- Alan S. Kaufman & Lawrence G. Weiss, “Guest Editors’ Introduction to the Special Issue of JPA on the Flynn Effect,” 28(5) *Journal of Psychoeducational Assessment* 379 (2010) (“IQ gains from one generation to the next have occurred on a world-wide basis, with the American gain being three points per decade.”).

51. The Court finds that the Flynn Effect results in about 0.3 points inflation per year and that the rate of gain is sufficiently precise to be relied upon and applied by this Court.

C. Scores on intelligence tests should be corrected for the Flynn Effect.

52. It is proper procedure to apply and correct intelligence scores based on the Flynn Effect because of norm obsolescence. This is supported by the AAIDD Manual, credible experts in this case, a survey of psychological practitioners, the scientific literature, and other courts.

53. In *Atkins* cases, the determination of IQ score is of ultimate importance and every method improving accuracy must be used. [H.T. Vol. 4: 93-94]. The AAIDD Manual and the User's Guide to the AAIDD affirm that "best practices require recognition of a potential Flynn Effect when older intelligence tests are used in the assessment or interpretation of an IQ score. [DX 4, AAIDD Manual and DX 12, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT (10th ed. 2007) ("User's Guide:"). As stated by the User's Guide:

The main recommendation resulting from this work [regarding the Flynn Effect] is that all intellectual assessment must use a reliable and appropriate individually administered intelligence test. In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. **In cases where a test with aging norms is used, a correction for the age of the norms is warranted.**

[DX 12, User's Guide at 20-21] (emphasis added). The AAIDD Manual is the leading guide for those giving intelligence tests. It is the product of years of preparation and review for leading practitioners in the field, rather than one company that publishes and sells a certain intelligence test. Earlier versions of this manual are cited in *Atkins* and *Briseno*. See, e.g. *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) (applying the definition of mental retardation used by the American Association of Mental Retardation, predecessor to the AAIDD).

54. The WAIS-III Technical Manual also recognizes the need to correct scores for the Flynn Effect:

Regardless of the reasons for these changes in test performance, periodic updating of the norms is essential; otherwise, **average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual's performance** relative to the expected scores in his or her own age group.

[DX 13, WAIS III/WMS-III TECHNICAL MANUAL at 9] (emphasis added).

55. Dr. Flynn, in his article "Tethering the Elephant" also describes that "Failure to adjust the scores [for the Flynn Effect] is to take flight from reality." [DX 17, James R. Flynn, "Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, 12 *Psychology, Public Policy, and Law* 170 (2006)]. Dr. Flynn advocates correcting scores by the following: "for every year between the year when a person took a test and the year when the test was normed, deduct 0.3 IQ points from the IQ score." [DX 18, James R. Flynn, "The WAIS-III and WAIS-IV: *Daubert* Motions Favor the Certainly False Over the Approximately True," 16 *Applied Neuropsychology*, 100 (2009)].

56. Dr. Kaufman supports the AAIDD Manual's scientific opinion that it is good practice to apply the Flynn Effect in instances where one is not able to use a recently normed test. [H.T. Vol. 6: 23].

57. Applying the Flynn Effect to an individual test score to correct for norm obsolescence is a method for ensuring that the individual is evaluated against an accurate normative basis. [H.T. Vol. 6: 31]. Dr. Fletcher testified that it is probably an error to conceptually think about the Flynn Effect as an adjustment of an individual IQ score. The Flynn Effect is actually a correction of the normative base, the denominator, the ruler against which the attained score is compared, and as such, a practitioner does not adjust the score itself but rather corrects the normative basis against which the score is compared because that normative base has shifted. [H.T. Vol. 5: 78-79].

58. Dr. Proctor testified that it is important for him to follow the procedures of the IQ test manuals, and he relies on them. [H.T. Vol. 6: 161, H.T. Vol. 7:37-38]. Dr. Proctor agreed with the WAIS-III Technical Manual that if test administrators give a test with outdated norms, then the resulting IQ score could be deceptively high. [H.T. Vol. 7:43]. If future test manuals advise practitioners to apply the Flynn Effect, Dr. Proctor would do so. [H.T. Vol. 7:41]. Dr. Proctor testified he understands that it is generally accepted practice to update norms and that one should not just “accept” an IQ score with an eighteen-year-old normative basis. [H.T. Vol. 7:56]. Indeed, Dr. Proctor also testified that one of the principal reasons why IQ tests are re-normed is because of the Flynn Effect. [H.T. Vol. 7: 21].

59. Dr. Proctor’s support for his opinion that it is inappropriate to take the Flynn Effect into account when calculating IQ scores is not persuasive. Dr. Proctor testified that the Flynn Effect is somehow encompassed by the standard error of measurement but also conceded that there is no support in the literature for this opinion. He has not authored any articles on the subject let alone on mental retardation. [H.T. Vol. 7: 63, 39, 40, 58, 59].

60. Dr. Greg Olley, chair of the division 33 American Psychological Association Committee on mental retardation and the death penalty, conducted a study in the spring of 2008 of a targeted population to obtain information about the current forensic practices of psychologists. [DX 47]. Dr. Olley sent a survey to approximately fifty educators and forensic psychologists who were nominated by his Committee based on their experience in mental retardation and forensic psychology. Dr. Olley received thirty-five responses. Dr. Hagan testified that he himself participated in the Olley survey. [H.T. Vol. 7: 167]. Eighty-five percent of the respondents were psychologists. When asked whether the Flynn Effect is a real occurrence, 91.2% responded yes. Dr. Hagan testified that he would have answered yes to this

question. [H.T. Vol. 7: 169]. When asked whether correcting an obtained IQ score would be justified to account for the Flynn Effect, 87.5% responded yes. [DX 47]. The Court finds Dr. Olley's survey reliable evidence that correction for the Flynn Effect is recognized and accepted by practicing forensic psychologists in the area of mental retardation.

61. Dr. Hagan also conducted a survey in 2007 and found that applying the Flynn Effect was not the proper and trusted convention and custom in psychology. [H.T. Vol. 7: 120, SX 20]. Dr. Hagan surveyed twenty-eight directors of doctoral training programs approved by the American Psychological Association and board-certified school psychologists. [SX 20]. The survey relied on recognition of fourteen texts, four of which were authored by Dr. Kaufman, who testified that he advocates correction for the Flynn Effect. [H.T. Vol. 7: 158]. The survey did not include manuals such as the AAIDD, which have explicitly recommended correcting IQ scores for norm obsolescence. The survey also did not consider whether and how many of the respondents had evaluated convicted criminals, and Dr. Hagan conceded that the school psychologists included in his survey typically do evaluations in the education system only, having no experience with *Atkins* claims and applicants. [H.T. Vol. 7: 160]. Dr. Hagan also admitted that the directors of clinical training programs he surveyed received their training and education far before the Flynn Effect was discovered. [H.T. Vol. 7: 167]. The Court finds Dr. Hagan's findings unpersuasive because the sample of practitioners he surveyed lacked the expertise and proper knowledge to address recognition of the Flynn Effect in *Atkins* cases.

62. The Court finds that correction of IQ test scores for norm obsolescence is warranted. By way of example, the Court finds the hypothetical presented on cross-examination to State's expert, Dr. Hagan, convincing. Dr. Hagan was asked to assume that two identical brothers, Joe and Jerry, have identical intellectual functioning. Joe took an intelligence test on

January 1 of any given year, and Jerry took an intelligence test similar in content on February 1 of the same year, a month later. In the intervening time period, a new IQ test was published so Jerry took a new test with new norms. Both Joe and Jerry answered 50 questions correct. Joe scored a 73, and Jerry scored a 70, although both took the same test with the same items. Dr. Hagan argued that the difference in scores was due to Jerry taking a different measure and denied that the difference in scores resulted from obsolete norms. [H.T. Vol. 7: 147-148]. The Court disagrees and finds that obsolete norms may account for difference in IQ scores as presented by this example.

63. Several experts in the field of mental retardation have published articles that advocate application of the Flynn Effect to correct for norm obsolescence:

- Stephen Greenspan, “Issues in the Use of the ‘Flynn Effect’ to Adjust Scores When Diagnosing MR,” 31(3) *Psychology in Mental Retardation and Developmental Disabilities* (2006) (“Given that mild [mental retardation] is still a somewhat-inadequately defined category, it is important to err in very close cases on the side of being overly inclusive, especially given the potentially fatal consequences of a false negative diagnostic conclusion. Use of the Flynn Effect is a useful, and valid, method for increasing the likelihood that a psychologist will correctly diagnose [mental retardation] in someone deserving of that label.”) [DX 26];
- James R. Flynn, “The WAIS-III and WAIS-IV: *Daubert* Motions Favor the Certainly False Over the Approximately True,” 16 *Applied Neuropsychology*, 100 (2009) (“I advocate adjusting WISC and Wechsler Adult Intelligence Scale (WAIS) scores as follows: for every year between the year when a person took a test and the year when the test was normed, deduct 0.3 IQ points from the IQ score.”) [DX 18];
- James R. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, 12 *Psychology, Public Policy, and Law* 174-75 (2006) (“Failure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery...”) [DX 17];
- John H. Blume, Sheri Lynn Johnson & Christopher Seeds, “Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,” 18 *Cornell J. L. & Pub. Pol’y* 689, 711-714 (2009) (“Due to the Flynn effect, IQ scores must be adjusted to take into account when the IQ test was taken in relation to when the test was re-normed. As with the practice effect, failure to take the Flynn effect into account results in an artificially high IQ score.”) [DX 15];

- Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, “IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions,” 28(5) *Journal of Psychoeducational Assessment* 469 (2010) (“IQ test scores should be corrected for high-stakes decisions in which a test with older norms is invoked as evidentiary support in the decision-making process. This could include not only Atkins cases involving capital offenses and the death penalty but also intellectual disability (ID) decisions involving social security eligibility or special education where eligibility hinges on a specific score or range of scores.”);
- Cecil R. Reynolds, John Niland, John E. Wright, and Michael Rosenn, “Failure to Apply the Flynn Correction in Death Penalty Litigation: Standard Practice of Today Maybe, but Certainly Malpractice of Tomorrow,” 28(5) *Journal of Psychoeducational Assessment* 477 (2010) (“As a generally accepted scientific theory that could potentially make the difference between a constitutional and unconstitutional execution, the [Flynn Effect] must be applied in the legal context.”).

64. Courts across several jurisdictions have also recognized and approved of correction for the Flynn Effect in evaluating intelligence scores in death penalty cases:

- *Ex Parte Sosa*, No. W2-7729A (81st/218th Judicial District, Atascosa County, Texas, Feb. 10, 2011) (entering findings of fact and conclusions of law that recognize the Flynn Effect, stating that “[i]n the United States, the average IQ of the population increases .3 points per year, or 3 points every 10 years.”);
- *Thomas v. Allen*, No. 09-12869, 2010 U.S. App. LEXIS 10836, \*1, \*8 (11th Cir. May 27, 2010) (stating that the Flynn Effect is a well-supported, “empirically proven statistical fact,” tested through peer review and recognized and accepted by professional communities and holding that a court must account for the Flynn Effect when determining whether an IQ score falls within the mental retardation range and that a court should not view a raw, unadjusted IQ score as precisely measuring true);
- *Holladay v. Allen*, 555 F.3d 1346, 1358 (11th Cir. 2009) (“Moreover, all of the scores were on the WAIS tests, which may have reflected elevated scores because of the Flynn Effect.”);
- *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (finding district court erred when it failed to consider the validity of defendant’s Flynn Effect evidence and ordering that Flynn Effect evidence be considered on remand);
- *United States v. Davis*, 611 F. Supp. 2d 472, 485-88 (E.D. Md. 2009) (“[T]he Court finds the defendant’s Flynn Effect evidence both relevant and persuasive, and will,

as it should, consider the Flynn-adjusted scores in its evaluation of the defendant's intellectual functioning.");

- *Wiley v. Epps*, 668 F. Supp. 2d 848, 894-95 (N.D. Miss. 2009) (taking into consideration the obsolescence of test norms in weighing the evidence on intellectual functioning);
- *People v. Superior Court of Tulare County*, 155 P.3d 259, 263 n. 4 (Cal. 2007) (recognizing that "[t]he Flynn effect is the observed tendency of mean scores on a given IQ test to increase slowly over time.");
- *United States v. Parker*, 65 M.J. 626, 629 (N.M. Ct. Crim. App. 2007) (finding that the Flynn Effect is to be considered when evaluating a defendant's IQ);
- *Williams v. Campbell*, No. 04-0681-WS-C, 2007 U.S. Dist. LEXIS 27050 (S.D. Ala. Apr. 11, 2007) (holding that the Flynn Effect could potentially render IQ scores unreliable);
- *Green v. Johnson*, 431 F. Supp. 2d 601, 610 (E.D. Va. 2006) (stating that evaluation of mental retardation purposes requires considerations other than whether the score of above or below 70, including consideration of the Flynn Effect).

65. The Court finds that correcting intelligence scores for the Flynn Effect is proper procedure, supported by peer-reviewed scientific literature, other courts, and by a preponderance of the expert testimony and evidence presented to this Court.

**D. Correction for norm obsolescence is separate than the application of the standard error of measurement.**

66. IQ scores, separate and apart from the Flynn Effect, must account for measurement error. All psychometric tests, even when they are reliable, like the Wechsler test, have a small amount of measurement error that is typically expressed in terms of standard errors of measurement. [H.T. Vol. 5: 47]. Dr. Fletcher testified that the standard error of measurement is based on an index of variability around each person's average score. The error must be standardized to get the standard deviation, and the standard error of measurement is computed by the standard deviation and the square root of the sample size. [H.T. Vol. 5:48]. Generally, two standard measurement errors are used to create a 95 percent confidence interval, equating to

about five points. The convention is to express this as a range that is five points on either side, plus or minus. *Id.*

67. The State's experts' conclusion that the standard error of measurement already accounts for the Flynn Effect is incorrect. Correction for the Flynn Effect applies to the norms of tests. The standard error of measurement applies to the observed test score and is a statistical analysis. Even if the scores increase, there is no effect on the standard deviation of the test (usually fifteen points) and has no effect on the standard error of measurement because the entire distribution of test scores shifts and are higher than when originally normed. Thus, applying the convention that indicates an average IQ is 100 and two standard deviations below the mean indicates significantly subaverage IQ, would require scores of 103 and 73 on a ten year old test, 106 and 76 on a 20 year old test, and so on to show mental retardation. Dr. Fletcher testified that the Flynn Effect cannot possibly be part of the standard error of measurement, and Dr. Proctor could not cite to any authority to support his contrary conclusion. [H.T. Vol. 7: 202].

68. Dr. Flynn described the norming of tests to measuring height with a measuring tape. He stated that each test has a reference group that sets the norms and is a tape measure. The measuring tape tells a person whether an individual is of average height, meaning having an intelligence score of 100, or whether a person is a bit above average, having an intelligence score of 115, or whether a person is below average. The norm is "the tape measure for actually giving the IQ scores." [H.T. Vol. 4: 44-46]. Dr. Flynn also explained that if an older test is used, the score may be deceptive. For example, he explained that if a person left a tape measure out in the rain, it may shrink. If the same tape measure was used after it became obsolete, the height that was measured would be incorrect. [H.T. Vol. 4: 47].

69. Also supportive, the AAIDD Manual discusses the Flynn Effect and the standard error of measurement as two separate issues in two separate sections. [H.T. Vol. 7: 204]. The AAIDD Manual, on page 37, recognizes the Flynn Effect as an “observation that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time. [DX 4, AAIDD Manual at 37]. On the other hand, the AAIDD Manual, on page 36, states the standard error of measurement “is used to quantify [a] variability and provide a stated statistical confidence interval within which the person’s true score falls.” [DX 4, AAIDD Manual at 36].

70. The Court finds that application of the Flynn Effect is separate than an adjustment for the standard error of measurement.

**E. The Flynn Effect is applied by clinical practitioners to individual test results and is also accepted outside the criminal justice system.**

71. Practitioners outside the criminal justice system apply the Flynn Effect. [H.T. Vol. 6: 39]. Dr. Fletcher testified that practitioners who are experts in the area of mental retardation consider and apply the Flynn Effect in determining whether individuals are eligible for Social Security benefits or special education in the school system. [H.T. Vol. 5: 21].

72. The red book, the User’s Guide, [DX 12], applies to clinical practitioners and is an attempt to make it clear to clinical practitioners how they should apply the AAIDD Manual. [H.T. Vol. 5:25]. The User’s Guide advocates the practice of correcting for aging norms by applying the Flynn Effect. [DX 12, User’s Guide at 20-21]. In a list of guidelines for clinical practitioners, the guide specifically instructs clinical practitioners to make a correction for the age of the norms:

The main recommendation resulting from this work is that all intellectual assessments must use a reliable and appropriate individually administered intelligence test. In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. **In cases**

**where a test with aging norms is used, a correction for the age of the norms is warranted....Thus the clinician needs to use the most current version of an individually administered test of intelligence and take into consideration the Flynn Effect as well as the standard error of measurement when estimating an individual's true IQ score.**

*Id.* (emphasis added)

73. Applying the Flynn Effect to correct for norm obsolescence, including to individual test results, is generally accepted scientific procedure in the pertinent professional community outside the criminal justice system, which includes psychologists, clinical school psychologists, neuropsychologists, researchers, and test consumers. [H.T. Vol. 6: 39].

74. Dr. Fletcher testified that “you will find people discussing the Flynn Effect in estimating it 0.3 points per year in virtually any major textbook or treatise on intellectual assessment.” [H.T. Vol. 5: 27].

1. **Application of the Flynn Effect in determining disability in the school system**

75. One of the categories and eligibility criterion under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, is mental retardation. The IDEA is a federal special education law that applies to all fifty states in terms of determination of disability. Under the IDEA, mental retardation is analyzed using a three-pronged definition, similar to that set out in the AAIDD Manual. Dr. Fletcher testified that there are several examples of where the states implement the IDEA and consider the problem of using obsolete norms and the misdiagnosis of mental retardation because of inflated scores. [H.T. Vol. 5: 33]. The federal statutes, however, do not specify any criteria to be used. The states take what Congress passes and then translate that into standards. Dr. Fletcher testified that the federal statutes would not discuss the Flynn Effect, but in practice, it is a consideration. [H.T. Vol. 7: 206].

76. Dr. Fletcher testified that special education benefits in schools depend on correction for the Flynn Effect. Practitioners recognize that obsolescence of old norms is an issue. The Weschler Intelligence Scale for Children-Revised (“WISC-R”), for example, for a time, gave inflated scores, and as a consequence, children who might have received special education benefits when assessed with the WISC-R, would not receive them. Obsolescence is particularly an issue in schools because school districts cannot always afford to purchase the newest and latest versions of an IQ test. [H.T. Vol. 5: 34]. It is proper for school districts that use outdated IQ tests to correct scores in accordance with the Flynn Effect. [H.T. Vol. 6: 26].

77. Dr. Fletcher elaborated that when he served on the President’s Commission for Special Education, the Commission would hold hearings on the costs of assessment. The cost of administering tests to determine whether or not a child was eligible for special education benefits ranged from \$800 to \$8,000 and the average was about \$4,500 per child. A kit for the Wechsler, for example, costs over \$1,000 with the hard case, and a school must then buy manuals and response booklets. [DX 36, Price Sheet for Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and DX 37, Price Sheet for Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV); H.T. Vol. 5: 38].

78. Concerns about costs of purchasing new intelligence tests are also voiced in peer-reviewed journals. For instance, in the article, “Are All IQ Scores Created Equal? The Differential Costs of IQ Cutoff Scores for At-Risk Children,” authors Tomoe Kanaya, Ph.D. and Stephen J. Ceci, Ph.D. write “Replacing old IQ norms with new (more accurate) norms, however, is an expensive and slow process. Faced with a cost of approximately \$1,000 per testing kit and the need to purchase many such kits, school districts can adopt a new IQ norm as quickly as their budgets allow.” [DX 27, Tomoe Kanaya and Stephen J. Ceci, “Are All IQ

Scores Created Equal? The Differential Costs of IQ Cutoff Scores for At-Risk Children,” 1(1) *Child Development Perspectives* 52 (2007)]. The recommendation of these authors was that there be a correction for obsolete norms by school systems. *Id.*

79. In a commentary to the article authored by Tomoe Kanaya and Stephen J. Ceci, Keith Widaman, in his article “Stalking the Roving IQ Score Cutoff: A Commentary on Kanaya and Ceci (2007)” agreed that the Flynn Effect is a proper correction in the education system:

If Flynn-effect adjustments can dampen improper score fluctuations due to aging norms and thereby smooth out the proportions of students receiving IQs of 70 or below, I think adjustments should be used; in fact, it would be inappropriate <sup>not</sup> to do so. This “quick fix” is admittedly imperfect and should be monitored by continuing research to ensure that it has no unintended negative consequences. **Nonetheless, use of Flynn-effect adjustments, however imperfect, is likely to have fewer negative consequences than would the failure to use such adjustments.**

[DX 32, Keith Widaman, “Stalking the Roving IQ Score Cutoff: A Commentary on Kanaya and Ceci (2007)” *Child Development Perspectives* 57 (2007)] (emphasis added).

80. Drs. Kanaya and Ceci reasserted their position very recently in a 2010 article by stating that “IQ scores play a major role in determining the educational experiences and opportunities provided to a child (and the costs incurred by the schools to implement these special education services) throughout his or her school years.” Stephen J. Ceci and Tomoe Kanaya, “‘Apples and Oranges Are Both Round’: Furthering the Discussion on the Flynn Effect,” 28(5) *Journal of Psychoeducational Assessment* 441, 444 (2010) (stating there is a higher likelihood for the Flynn Effect to have an impact on a child’s special education diagnosis).

81. Dr. Kaufman concurred in his testimony. He explained that during one of his lectures at Yale University, a school psychologist who attended the lecture commented that his school district has had a money freeze for years where updated versions of the different

intelligence tests are not available. Dr. Kaufman responded that the psychologist should use the best test available, but if the only test available is an outdated one, then correction for the Flynn Effect should be made at three points per decade. [H.T. Vol. 6: 27].

82. The Court finds application of the Flynn Effect in determining special education benefits persuasive evidence that clinical practitioners use the Flynn Effect outside of the criminal justice system.

2. **Application of the Flynn Effect in determining eligibility for Social Security disability benefits**

83. The Flynn Effect is recognized by the United States government. In the Social Security benefits guide, MENTAL RETARDATION, DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS, prepared by the Committee on Disability Determination for Mental Retardation [DX 11], authors advise and discuss the Flynn Effect:

Research suggests that **intelligence in the entire population increases at a rate of approximately 3 IQ points per decade**, which approximates the standard error of measurement for most comprehensive intelligence tests. Thus, tests with norms older than 10 to 12 years will tend to produce **inflated scores** and could **result in the denial of benefits to significant numbers of individuals** who would be eligible for them if more recent norms had been used. Disability examiners who use tests with outdated norms may be **systematically if unintentionally denying benefits** to those who are legally entitled to them. **The examiners also risk losing their licenses for ethical violations of the their professional codes.**

[DX 11, National Research Council, MENTAL RETARDATION, DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS (2002) at 123 (emphasis added); H.T. Vol. 5: 30].

84. Dr. Fletcher testified he has applied the Flynn Effect in determining whether individuals have mental retardation and therefore qualify for benefits through the Social Security Administration. For example, he administered an IQ test to an individual, and after determining that his IQ was in the range associated with mental retardation, he also administered an adaptive behavior assessment. Dr. Fletcher further examined the individual's school records, and the

records indicated there were difficulties, although the individual was not in special education for mental retardation but for behavior problems. The IQ test that was given, the Wechsler Intelligence Scale for Children-Revised ("WISC-R"), was about fourteen or fifteen years old, and Dr. Fletcher testified that under these circumstances, he applied the Flynn Effect. [H.T. Vol. 5: 28-29].

85. Dr. Proctor agreed that when determining Social Security benefits, if intelligence tests with older norms are administered, a significant number of individuals will be denied benefits who would otherwise be eligible because of "inflated" scores. [H.T. Vol. 7: 70]. Once again, this is agreement by the State's own experts that the Flynn Effect cannot be ignored.

86. The Court finds application of the Flynn Effect in determining Social Security benefits persuasive evidence that clinical practitioners use the Flynn Effect outside of the criminal justice system.

**F. The known error rate of the Flynn Effect.**

87. In their professional opinions, both Dr. Flynn and Dr. Kaufman viewed error rates associated with correcting individual scores as a misunderstanding of the application of the Flynn Effect. Correcting for the Flynn Effect is not a question of modifying individual scores; instead, it is a question of adjusting the normative basis of the test, which has been altered by the rise overall in intelligence scores of about three points per decade. Therefore, the need to reflect accurately the individual's test score is a need to understand how the norms have changed. [H. T. Vol. 6: 41-42]. For instance, an average IQ score when the test is normed is 100, but the average will be 103 a decade later because of norm obsolescence. Correcting the individual score when a test with aging norms is used corrects for norm obsolescence. Otherwise, standards for the determination of mental retardation would have to increase by three points each decade.

In the example given above, the score associated with mental retardation on a ten year old test would be 73.

88. On the issue of error rate at the evidentiary hearing, Dr. Fletcher presented assessments completed by his research team, which were later published, Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment*, 494 (2010), that showed that across Wechsler/Binet tests, the measurement error associated with the Flynn Effect of three points per decade is plus or minus one on either side of that confidence interval. [H.T. Vol. 5: 46].

89. Dr. Fletcher testified that this error rate is minimal given that the average norm obsolescence is consistently found to be about 0.3 points per year accounting for different ages, ability levels, and even different types of tests such as Wechsler, Binet, or Kaufman. [H.T. Vol. 6: 42]. The amount of variability around the average amount of change is small given the size of the mean difference. It is generally larger at lower levels of IQ so 0.3 points per year is a conservative estimate.

90. Dr. Fletcher's published study and related testimony demonstrated that the 95% confidence intervals for the Flynn Effect using the 14 studies identified by Dr. Flynn as contemporary comparisons of Wechsler and Binet scales is 2.50 to 3.09, with a weighted mean of 2.80, close to Flynn's unweighted average of 2.99. Dr. Fletcher testified and concluded in his article that the error rate is roughly plus or minus one point per decade, which is sufficiently precise for a correction for the Flynn Effect. Jack M. Fletcher, Karla K. Stuebing, and Lisa C. Hughes, "IQ Scores Should be Corrected for the Flynn Effect in High-Stakes Decisions," 28(5) *Journal of Psychoeducational Assessment*, 494 (2010).

91. Dr. Fletcher's opinion was also based on the WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL. [DX 14, David Wechsler, WAIS-IV TECHNICAL AND INTERPRETIVE MANUAL 77 (4d ed. 2008), Table 5.6]. The creators of the manual gave both the WAIS-III and WAIS-IV to about 240 people. The ranges included on Table 5.6 in the manual were 95 percent confidence intervals updated for examinees administered both tests in counterbalanced order. Dr. Fletcher testified that the scores were corrected by three points plus or minus one on either side of the confidence interval. [H.T. Vol. 5: 45-47].

92. The State's expert Dr. Hagan agreed that there is a known or potential error rate for the Flynn Effect. [H.T. Vol. 7: 118]. Dr. Proctor made no mention of the error rate. Because the State did not provide further evidence or any explanation as to the error rate, the Court finds the State's evidence lacking and unsubstantiated and finds Dr. Fletcher's testimony credible.

93. The Court finds that there is a known error rate for the Flynn Effect of 0.1 per year and that the proposed correction of 0.3 points per year is sufficiently precise to be applied.

**V. Prong One: "Significantly Subaverage" General Intellectual Functioning**

94. Mr. Cathey's IQ score establishes that he has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning.

**A. IQ Test Administered by Dr. Yohman in 1996**

95. Dr. J. Robert Yohman, a licensed Texas psychologist with specialty certification in clinical neuropsychology, administered the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") to Mr. Cathey on December 26, 1996. Mr. Cathey's scaled score on that test was a 77. [DX 40]. Dr. Yohman made no correction to Mr. Cathey's score for the Flynn Effect. If the Flynn Effect is taken into account, along with the standard error of measurement, Mr. Cathey's true IQ score falls within the range necessary for diagnosing mental retardation.

**1. Applying the Flynn Effect and the standard error of measurement**

96. To apply the Flynn Effect to Mr. Cathey's score of 77, Dr. Fletcher testified that an estimate of the age of the normative sample must first be calculated. The WAIS-R, administered by Dr. Yohman in 1996, was normed in 1978. At the time it was administered to Mr. Cathey, the norms for the WAIS-R were eighteen years old. Dr. Fletcher stated that to apply the Flynn Effect in this case, a practitioner must multiply 0.3 by eighteen, which is 5.4 points. Correcting the full-scale score of 77 for the Flynn Effect results in a score of 71.6. [H.T. Vol. 5: 43].

97. Dr. Proctor conceded that there is some inflation in Mr. Cathey's score of 77 and that the Flynn Effect has had an impact on the score. [H.T. Vol. 7: 29]. Dr. Proctor also submitted that were he asked to correct the score of 77 for the Flynn Effect, he would multiply 0.3 by eighteen years for a correction of 5.4 points, computing the score to a 71.6, the same procedure and result testified to by Dr. Fletcher. [H.T. Vol. 7:64].

98. Dr. Fletcher testified that the standard error of measurement must be applied to the score of 71.6, calculating a range of 66.6 to 76.6, after accounting for the five points of measurement error. [H.T. Vol. 5: 49].

99. The Court finds that this range and score, corrected for the Flynn Effect and the standard error of measurement, is within the range of mental retardation, as defined by authoritative treatises. [DX 4, AAIDD Manual and DX 5, DSM-IV].

**2. Reliability of Dr. Yohman's Score**

100. Mr. Cathey's full scale score of 77 on the WAIS-R administered by Dr. Yohman is reliable and credible for the purpose of determining that Mr. Cathey has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual

functioning. Dr. Yohman is a licensed psychologist in Texas with specialty certification in clinical neuropsychology and is a diplomate of the American Board of Professional Psychology and American Board of Clinical Neuropsychology. He has been licensed to practice in the state of Texas since 1998. [DX 40]. Dr. Yohman administered the WAIS-R in the Harris County jail under acceptable conditions. [DX 48, Trial Transcript, Vol. 23: 16]. The Court finds Dr. Yohman was qualified to administer the intelligence test and that the test was scored correctly.

101. Because Dr. Yohman's score is reliable and based on sound methodology, the Court finds there was no need to retest Mr. Cathey for purposes of the evidentiary hearing. The State had opportunity and good reason to administer an IQ test to Mr. Cathey in 1996, and it failed to do so. Additionally, the State was given the right to fully cross-examine Dr. Yohman and his testing methodology at the punishment phase of Mr. Cathey's trial, and it has not ever questioned or objected to the validity of the test, Dr. Yohman's qualifications, or Mr. Cathey's score of 77. Because Mr. Cathey's experts relied on Dr. Yohman's score during the evidentiary hearing and did not present testimony based on a new intelligence test, retesting was not necessary.<sup>7</sup> See *Lagrone v. State*, 942 S.W.2d 602, 610-11 (Tex. Crim. App. 1997) (holding that when the defense intends to produce expert testimony, "trial courts may order defendants to submit to an *independent, state-sponsored* psychiatric exam...") (emphasis added).

102. Dr. Fletcher testified that examining Mr. Cathey with another IQ test would not add to his ability to identify him with or without mental retardation. [H.T. Vol. 5: 112-113]. Dr.

---

<sup>7</sup> The State should be collaterally stopped from objecting now to Dr. Yohman's testing and score because it failed to object on these grounds at Mr. Cathey's trial. The issue of cognitive disability was placed before the jury during the punishment phase of trial, and the State had ample reason, at that time, to request testing of Mr. Cathey. Any retesting of Mr. Cathey now raises issues under the Fifth and Sixth Amendments, as well as the Fourteenth Amendment, that protect a defendant from the State's effort to interrogate him without his consent. *Fields v. State*, 627 S.W.2d 714, 718 (Tex. Crim. App. 1982).

Fletcher stated that his opinion of mental retardation is valid and reliable regardless of the fact that he did not interview or retest Mr. Cathey. [H.T. Vol. 5: 88]. Although the Psychologist Licensing Act includes a provision on the need to examine an individual before rendering an opinion on mental retardation, Dr. Fletcher testified it was understood that he did not examine Mr. Cathey and that it was not necessary for his conclusion given the circumstances. [H.T. Vol. 5: 86-88].

103. Further, Dr. Kaufman, an expert in IQ testing and methodology, whose testimony was not rebutted by the State, testified that IQ test norms are not appropriately applicable to individuals whom have been incarcerated for as many years as ten, twelve, or fourteen years because the normative sample does not include a person who has been incarcerated for that long. Makers of IQ tests do not include incarcerated individuals in their sampling for determining norms. Therefore, Dr. Kaufman testified that it would not be proper procedure to test an inmate, like Mr. Cathey, unless no other test was available. Further, Dr. Kaufman stated that because intelligence tests are not accurate when administered to inmates who have been incarcerated for several years, it is best practice to rely on a valid IQ score obtained before the inmate was on death row for nearly fourteen years. [H.T. Vol. 6: 35-37]. Here, Dr. Yohman's administration of the WAIS-R to Cathey, after he was imprisoned only for a few months, was accurate, and the Court finds the full-scale score of 77 reliable, before a Flynn Effect correction.

**B. IQ Test Administered by the TDCJ**

104. Mr. Cathey's tests scores from the intake assessment at the Polunsky Unit lend further weight and reliability to the determination that Mr. Cathey meets the first prong of mental retardation. [DX 57, Texas Department of Criminal Justice ("TDCJ") Service Investigation Worksheet].

105. A 1998 Service Investigation Worksheet included in the TDCJ records indicated Mr. Cathey had an “EA score below 5 and an IQ below 73.” [DX 57, TDCJ Service Investigation Worksheet; H.T. Vol. 8:63]. Captain Bryant, captain at the Polunsky Unit where Mr. Cathey is housed, testified that inmates undergo a psychological assessment at intake. He verified that the official TDCJ record in Mr. Cathey’s file and in the State’s own records indicated that Mr. Cathey had an IQ below 73. [H.T. Vol. 8:63].

106. The State learned of this test score for the first time at the evidentiary hearing, and this pre-*Atkins* IQ score, although found in the records the State produced, was not provided to or relied on by its experts. [H.T. Vol. 8: 92-93].

107. Dr. Yohman’s score, corrected for the Flynn Effect, is lent further weight and reliability by the TDCJ finding independently that Mr. Cathey had an “EA score below 5 and an IQ below 73.”

**VI. Prong Two: Significant Limitations in Adaptive Behavior**

108. According to the AAIDD Manual, “[s]ignificant limitations in adaptive behavior are established through the use of standardized measures and, like intellectual functioning, significant *limitations in adaptive behavior* are operationally defined as performance that is appropriately two standard deviations below the population average on one of the three adaptive skills domains of conceptual, social, or practical.” [DX 4, AAIDD Manual at 47]. Adaptive behavior measures what a person actually does on a habitual everyday basis and not what they are capable of doing. [H.T. Vol. 7: 185]. The DSM-IV recognizes that people with mild mental retardation, “[b]y their late teens...can acquire academic skills up to approximately the sixth grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance...” [DX 5 at 41].

The focus of an adaptive behavior assessment, therefore, is “on documenting the individual’s deficits, not his strengths,” [DX 29, J. Gregory Olley, “Knowledge and Experience Required for Experts in Atkins Cases,” 16 *Applied Neuropsychology* 135-140 (2009)], and the “focus in evaluations and ultimately adjudications under the adaptive prong must remain focused on the individual’s limitations, rather than any skills he or she may also possess.” [DX 16, James Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2003)].

109. Dr. Fletcher described the three major domains: conceptual, social, and practical. A person meets the definition of mental retardation for the adaptive behavior prong if there is a deficiency in one of these areas or if the composite score across the three areas is deficient. [H.T. Vol. 5: 52].

110. There are standardized measures that are commonly used, including the Vineland Adaptive Behavior Scales (“Vineland”), the Adaptive Behavior Scales (ABS), the Scales of Independent Behavior, the Comprehensive Test of Adaptive Behavior-Revised, and the Adaptive Behavior Assessment System-II (ABAS). The AAIDD Manual advises that an administrator should obtain information regarding the individual’s adaptive behavior “from a person or persons who know the individual well. Generally, individuals who act as respondents should be very familiar with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times. Very often, these respondents are parents, older siblings, other family members, teachers, employers, and friends.” [DX 4, AAIDD Manual at 47].

111. Dr. Fletcher testified that practitioners generally do not, and should not, assess criminal behavior as part of the criterion for an adaptive behavior problem. He described

incarceration as “a highly structured and very atypical social situation.” Criminal behavior and facts of the underlying crime are not used to identify adaptive behavior weaknesses because this is evidence of maladaptive behavior, and adaptive behavior and maladaptive behavior are entirely different phenomenon. [H.T. Vol. 5: 74-75]. Dr. Proctor agreed with Dr. Fletcher that adaptive behavior and maladaptive behavior are separate and distinct concepts. [H.T. Vol. 7:244].

112. Marc Tasse, Ph.D., an expert on the assessment of adaptive behavior, in an article titled “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” published in the peer-reviewed journal *Applied Neuropsychology*, also recommends that correctional officers not be interviewed as respondents for adaptive behavior assessment:

**Correctional officers and other prison personnel should probably never be sought as respondents** to provide information regarding the adaptive behavior of an individual that they’ve observed in a prison setting. The only extreme circumstance when one might consider interviewing a member of the prison personnel regarding an inmate’s adaptive behavior would be if there is absolutely no one alive who can provide any information regarding the individual’s functioning prior to incarceration.

[DX 31, Marc J. Tasse., “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” 16 *Applied Neuropsychology* 114 (Mar. 2009)] (emphasis added).

113. Greg Olley, Ph.D., an expert psychologist and chair of the Division 33 American Psychological Association Committee on Mental Retardation, confirms in his article:

Typical community functioning is difficult to assess in an individual who is incarcerated; the essential information is the individual’s performance in the community before incarceration—not behavior in the structured environment of a jail or prison where a person with mental retardation may function quite well. Therefore, **observation of the defendant’s prison functioning and reports by correctional officers do not provide the necessary information** for a valid diagnosis.

[DX 29, J. Gregory Olley, “Knowledge and Experience Required for Experts in *Atkins* Cases,” 16 *Applied Neuropsychology* 137 (2009)] (emphasis added).

114. Dr. Proctor agreed that an adaptive behavioral assessment should occur in the context of the individuals’ typical community environment and that prison adaptive behavior is not valid for assessing adaptive ability in the free world. [H.T. Vol. 7: 102]. He also agreed with the statement that “[t]he evidence for adaptive behavior strengths or deficits must illustrate typical community functioning.” [H.T. Vol. 6: 231, DX 30, Daniel J. Rechsly, *Documenting the Developmental Origins of Mild Mental Retardation*, *Applied Neuropsychology* 16, 124-134 (2009)]. Dr. Proctor has not published peer-reviewed literature on the subject. [H.T. Vol. 6: 234].

115. Dr. Proctor agreed that “the sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real life consequences, and that the presence of confirming deficits must be the diagnostician’s focus.” [H.T. Vol. 6: 212-214].

**A. Dr. Fletcher’s Adaptive Behavior Assessment**

116. Dr. Fletcher used the Vineland test procedure to analyze adaptive behavior. He testified that the Vineland is a standardized procedure, and he used a form of the Vineland that represents a semi-structured interview. The Vineland is an appropriate assessment identified in the AAIDD Manual and also recognized and accepted by courts<sup>8</sup> in this jurisdiction. To

---

<sup>8</sup> See, e.g., *Wiley v. Epps*, 625 F.3d 199, 217 (5th Cir. 2010) (recognizing that “the authors of the Vineland test expressly state that retrospective interviews to obtain information about a subject’s behavior at an earlier stage is permissible in certain circumstances, including when the subject is in a restricted environment, *such as a prison*, and there is a question about the subject’s adaptive functioning before coming to that environment”); *Chester v. Quarterman*, No. 5:05-cv-29, 2008 U.S. Dist. LEXIS 34936, at \*5 (E. D. Tex. Apr. 28, 2008) (stating the Vineland test is “an accepted instrument for measuring limitations in adaptive behavior”).

minimize bias of the answers he received from his respondents, Dr. Fletcher used an interview form rather than a checklist. [H.T. Vol. 5: 60-61]. This form generates a set of scores from which Dr. Fletcher then compared the scores to normative tables. [H.T. Vol. 5: 54-55]. Dr. Fletcher has administered hundreds of Vineland tests, followed proper protocol, and has used retrospective assessments in the past. [H.T. Vol. 7: 190]. He did not record his conversations with the respondents but took notes on the forms because he has become very familiar with the protocol through his practice. [H.T. Vol. 5: 131].

117. Dr. Fletcher testified that when administering adaptive behavior assessments, practitioners look for limitations that make it difficult for a person to function independently in society. He explained that people with mental retardation have strengths in certain areas and can do things like learn to drive cars, work, and get married but that the purpose of an assessment is to focus on the weaknesses. [H.T. Vol. 5: 51].

118. In determining who to interview, Dr. Fletcher looked for people who knew Mr. Cathey best during his developmental period and prior to incarceration. Mr. Cathey's parents are deceased, but his older sister was in the home until she left at the age of eighteen and when Mr. Cathey was twelve or thirteen. Mr. Cathey married in his teens, and Ms. Bryant was also a suitable respondent. [H.T. Vol. 5: 55-56]. Although "a retrospective adaptive behavior assessment can be challenging," literature confirms that it is "often considered as the only viable option when the assessed individual is incarcerated. Interviewing a respondent while asking them to recall a time prior to the individual's incarceration is the proposed means of capturing the individual's typical adaptive behavior in the community and establishing a retrospective diagnosis." [DX 31, Marc J. Tasse, "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 120 (Mar. 2009)]; see DX

29A, J. Gregory Olley and Ann W. Cox, "Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-III," in ADAPTIVE BEHAVIOR ASSESSMENT-II: CLINICAL USE AND INTERPRETATION 381, 387 (Thomas Oakland and Patti L. Harrison eds. 2009) ("Thus, the focus should be on the proper use of all available assessment methods and sources of information. With the best available information in hand, the expert can exercise clinical judgment to reach a conclusion.")].

119. Dr. Fletcher also followed guidelines laid out by Dr. Mark Tasse for the conduct of retrospective assessment when he performed the Vineland exams. Dr. Tasse recommends that a practitioner very carefully define the time period in which the interview will occur and then conduct the interview and establish with the respondent what that time period is going to be. [DX 31, Marc J. Tasse., "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 114 (Mar. 2009)].

120. Dr. Fletcher contacted the developer of the Vineland, Dr. Sara Sparrow, and asked her if she felt that retrospective interviews were appropriate and also whether telephone interviews were appropriate. Dr. Sparrow responded that both methods were sound. She indicated there was no difference in conducting a face-to-face as comparable to telephone interview as a result of one of her prior studies. [H.T. Vol. 5: 57-58].

121. The Court finds Dr. Fletcher's use of the Vineland appropriate.

122. Using the Vineland, Dr. Fletcher interviewed Mr. Cathey's older sister, Charlotte Ross, and former wife, Noaella Bryant, to learn about Mr. Cathey's childhood, family history, and development. Dr. Fletcher reviewed all materials provided to him, including the trial transcript, affidavits from family members, which he found consistent with his independent assessment, the school records, and formal assessments, through the Vineland, of Mr. Cathey's

former wife, Noaella Bryant, and older sister, Charlotte Ross. [ H.T. Vol. 5: 53]. He did not review the offense report, the guilt-innocence testimony, the punishment testimony, prison records, commissary records, or prison correspondence because he found these records irrelevant to adaptive behavior assessment and not indicative of Mr. Cathey's adaptive behavior before the age of eighteen [H.T. Vol. 5: 97-98]. Dr. Fletcher did not examine or interview Mr. Cathey because outside sources provide a more reliable basis for assessment than the individual himself, who may as a result of socialization, or a desire to please, over or underestimate his abilities.<sup>9</sup> [DX 4, AAIDD Manual at 51]. Dr. Fletcher's decision is confirmed by Dr. Tasse, who in one of his articles, states that "as many researchers have documented numerous times, individuals with low IQ may not always be reliable self-reporters." [DX 31, Marc J. Tasse., "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases," 16 *Applied Neuropsychology* 114 (Mar. 2009)].

123. Dr. Proctor testified that Dr. Fletcher's adaptive behavior assessment used the best possible information. Authoritative sources in the field of forensic psychology instruct those assessing adaptive behavior to either use a standardized measurement device or to collect information from other sources. [H.T. Vol. 6: 178]. The best and most reliable informants are those who are around the person the most, including teachers, spouses, and family members. [H.T. Vol. 6: 184]. Dr. Fletcher interviewed people who had most opportunity to interact with Mr. Cathey. [H.T. Vol. 6: 238]. Dr. Proctor, on the other hand, reviewed only records and did not conduct any interviews.

---

<sup>9</sup> During his testimony at the punishment phase of trial, Dr. Yohman testified that Mr. Cathey, in response to the personality tests Dr. Yohman administered, was "portraying himself in a better light probably than is likely to be found on objective evidence...He wanted to look good." [DX 48, Trial Transcript, Vol. 23: 35].

124. Dr. Fletcher interviewed Mr. Cathey's older sister, Charlotte Ross, and his notes and observations in the form of the Vineland are admitted as an exhibit. [DX 39, Vineland-II Adaptive Behavior Scales Test of Charlotte Ross (January 22, 2010)]. In discussing what Dr. Fletcher characterized as conceptual skills, Ms. Ross said she would have to repeat things to Mr. Cathey and could not leave him to do anything. Mr. Cathey was easily distracted and would believe anything he was told. He did not talk very much, talked in a monotone, rarely initiated conversation, and was probably at a sixth grade reading ability. [H.T. Vol. 5: 60-61]. In discussing what Dr. Fletcher described as practical skills, Ms. Ross said Mr. Cathey needed help with lots of things, and she would have to watch him or things would not get done. He never used tools. He knew coin denominations but did not have much experience with money. [H.T. Vol. 5: 61]. In discussing what Dr. Fletcher described as social skills, Ms. Ross explained that Mr. Cathey did not play sports, was not very expressive, could play simple games but not complex ones, and was teased frequently by other children. [H.T. Vol. 5: 63]. Based on his interview with Ms. Ross, Dr. Fletcher computed the adaptive behavior composite score as 66, which he testified is at the first percentile. Mr. Cathey received a score of 66 in socialization, a 68 in daily living skills, and a 69 in communication, scores the Court finds indicative of mental retardation. [H.T. Vol. 5, p. 63].

125. Dr. Fletcher also interviewed Mr. Cathey's former wife, Ms. Noella Bryant, who married Mr. Cathey when he was a teenager but then divorced him a few years later. [DX 38, Vineland-II Adaptive Behavior Scales Test of Noella Bryant (January 22, 2010)]. Ms. Bryant told Dr. Fletcher that Mr. Cathey would not talk with her or communicate very much, he was not very cooperative, and she could not trust him to watch any of the children. [H.T. Vol. 5: 65]. Dr. Fletcher computed the adaptive behavior composite as 59, which is at the less than the first

percentile for his age. Mr. Cathey had a standard score of 61 in communication, 61 in daily living, and 60 in socialization, scores the Court finds consistent with the presence of mental retardation. [H.T. Vol. 5: 66].

126. The interviews of Ms. Ross and Ms. Bryant corroborated the affidavits Dr. Fletcher reviewed, and Dr. Fletcher found the affidavits from Mr. Cathey's family members reliable evidence. [H.T. Vol. 5: 98]. Dr. Proctor, by contrast, did not consider the affidavits nor attempt to interview the family members, although he had full opportunity to do so. [H.T. Vol. 6: 214, 223]. The Court finds the affidavits submitted by Mr. Cathey's family members reliable and indicative of adaptive behavior deficits.

127. From the Houston Independent School District records, Dr. Fletcher learned that Mr. Cathey had serious academic problems, that he had failed the ninth grade, and that he had dropped out of school. [DX 41, Houston Independent School Records]. He also read the trial transcript of Mr. Cathey's teacher's testimony who characterized him as seriously behind in middle school. [H.T. Vol. 5: 72]. Dr. Fletcher found the records consistent with his assessment that Mr. Cathey has adaptive behavior deficits.

128. The Court credits Dr. Fletcher's clinical judgments and the evidence he relied upon to make his clinical judgment, as well as his determination that Mr. Cathey has significant deficits in adaptive functioning in the conceptual, social, and practical domains that place him approximately two standard deviations below the mean in adaptive functioning.

**B. Conceptual Skill Area**

129. The Court finds that Mr. Cathey has the following deficits in the conceptual skill area:

130. Language. Mr. Cathey's family, who witnessed him growing up and who have intimate personal knowledge of his abilities, remember his difficulties expressing himself. His younger brother, Robert Charles Cathey, Jr., in an affidavit [DX 43, Affidavit of Robert Charles Cathey, Jr.], remembers Mr. Cathey's communication problems very clearly:

Eric had problems expressing himself and didn't speak often. He talked with me more than anybody else. I would understand what he was trying to say even when the words didn't make perfect sense. He felt most comfortable talking when he was doing something he understood, like playing basketball. He always used simple sentences and words.

Eric didn't have the confidence to verbally confront people because he didn't feel that he would get it right. He would get frustrated when he couldn't find the right words or when people didn't understand what he was saying. Sometimes when Eric got into trouble with other kids, I would step in because I was much better at talking to people than he was. He was physically strong but he was not good at verbal arguments.

Eric was not very good at talking about his emotions and reacted physically instead. On several occasions, he punched holes in the wall because he was upset and frustrated. I remember this happening both in his childhood and during his marriage to Noaella.

131. Mr. Cathey's older sister, Charlotte Ross, confirms and similarly recounts Mr. Cathey's communicative deficits [DX 42, Affidavit of Charlotte Ross]:

When we were growing up, Eric was always very quiet. If you talked to him he would talk back but he would never initiate conversations. If Eric did ever speak, what he said would be short and straight to the point. I never heard him use long words. He would usually go without instead of asking for anything. If it wasn't provided for him, he wouldn't ask for it.

132. Even Mr. Cathey's younger sibling, Celecia Baker, states that Mr. Cathey had difficulties expressing himself [DX 45, Affidavit of Celecia Baker]:

As a child, Eric was slower than the rest of us and didn't catch onto things quickly. I don't think he understood lots of the things that people said to him. I remember always having to repeat myself. Sometimes he would drift off and wander off to play by himself.

133. Money, time, and number concepts. Mr. Cathey failed to manage his money. His older sister recounts that “Eric never had a bank account for his earnings to go in. He gave all his money and earnings to Noaella and she paid all the bills.” [DX 42, Affidavit of Charlotte Ross].

134. The fact that Mr. Cathey was provided commissary money and used it to make purchases while on death row does not contradict this finding. Even at Polunsky, Mr. Cathey was unable to manage the \$85 he was given every two weeks. [H.T. Vol. 8: 70]. Mr. Cathey spent over his spending limit on several purchases. [DX 59, Commissary Purchase Receipts; H.T. Vol. 8: 70-71]. Additionally, there is evidence and a declaration from an inmate, Mr. Faryion Wardrip, that Mr. Cathey was assisted on several occasions in totaling and managing his purchases. [DX 50, Declaration of Faryion Wardrip].

135. Reading and writing. Mr. Cathey’s school records indicate limited functioning in reading and writing. It is clear that he performed poorly in school and on standardized tests during his academic career, failed ninth grade, and dropped out the following year. [DX 41, Houston Independent School District Records]. In the seventh grade, Mr. Cathey received D’s in math, history, and science. The next year he scored below 70 percent in history, science, and one semester of typing, and received D’s in English, language arts, reading, math, and one semester of typing. In his first year of high school, he failed one semester of English and Spanish. He did not score higher than a 72 in any subject. [DX 41, Houston Independent School Records]. Experts in adaptive behavior assessment recognize that “[g]rading standards vary from school to school. Information on the grades earned by other students in the same education settings can be enlightening. It is important to understand the grading standards in a specific school context.” [DX 30, Daniel J. Rechsly, “Documenting the Developmental Origins of Mild Mental

Retardation,” 16 *Applied Neuropsychology*, 129 (2009)]. Important then, although Dr. Fletcher has worked with the Houston Independent School District and is familiar with Ryan Middle School and Yates High School, Dr. Proctor, who practices and lives in Dallas, Texas, admitted that he has no similar knowledge of the schooling system. [H.T. Vol. 6: 257]. The Court finds Dr. Fletcher’s opinion on Mr. Cathey’s school records reliable.

136. Mr. Cathey’s standardized test scores also show objective evidence of functional academic impairment. In the spring semester of his ninth grade year, Mr. Cathey’s Metropolitan Achievement Test (“MAT”) scores were 5.6 grade level in math, 5.7 grade level in spelling, 5.4 grade level in language, 6.9 grade level in science, 5.9 or 6.9 (difficult to read) grade level in social studies, 5.7 grade level in research skills, 7.1 grade level in total reading, 6.0 grade level in total math, 5.6 grade level in total language, 6.3 grade level in total basic battery, and 6.5 grade level in total comprehensive battery. Mr. Cathey underperformed by multiple grade levels. [DX 41, Houston Independent School Records].

137. At the punishment phase of his trial, Mr. Cathey’s teacher at Ryan Middle School, Ms. Anne Smith, testified that on grade placement tests for high school, “[o]n the math test, [Mr. Cathey] functioned basically in the 30th/40th percentile. He passed all three sections of the math, the reading, and writing of the Teams Test, but he was still seriously below grade level.” [DX 48, Trial Transcript, Vol. 22: 235].

138. Although Mr. Cathey passed the TEAMS test in the ninth grade, this is no indication that he is not mentally retarded. Dr. Fletcher testified the TEAMS test is an achievement test and that even people with mental retardation can pass the TEAMS test. TEAMS is a minimal standards test that was dropped by the State in 1989 and replaced by the TAKS and TAAS tests that test basic competency. [H.T. Vol. 7: 183]. The TEAMS test was

widely criticized for its failure to accurately measure achievement relative to state standards. [H.T. Vol. 5: 158].

139. Although Mr. Cathey's older sister Charlotte Ross testified at trial that Mr. Cathey was a good student, in speaking to Dr. Fletcher, she explained that this meant he was well-behaved and did not get any detentions. [H.T. Vol. 5: 120]. Ms. Ross also testified at trial that Mr. Cathey was a "nerd" but this meant he would read comic books, including Spiderman. Dr. Fletcher testified that Spiderman was not a graphic and intricate novel when Mr. Cathey read it during his childhood and that reading of such comic books, even today, is consistent with mental retardation. [H.T. Vol. 5: 121, 161].

140. The fact that Mr. Cathey was not placed in special education classes because of a disability is still consistent with a finding of mental retardation. Literature in the area of mental retardation supports that "[s]chool diagnoses of [mental retardation] have become increasingly rare over the last 30 years...Schools increasingly become reluctant to diagnose [mental retardation] even with persons who were clearly eligible on relevant criteria." [DX 30, Daniel J. Rechsly, "Documenting the Developmental Origins of Mild Mental Retardation," 16 *Applied Neuropsychology* 128 (2009)].

141. Dr. Yohman administered to Mr. Cathey a series of achievement tests, including the Wide Range Achievement Test-Revised ("WRAT-R") and the Woodcock Johnson-Revised. [DX 49, Additional Score Sheets Provided by Dr. Yohman]. On the WRAT-R, Mr. Cathey's score indicated he is in the fourth percentile for spelling and in the eighth percentile for letter-word identification and passage comprehension.<sup>10</sup> *Id.* Dr. Yohman also concluded from a series

---

<sup>10</sup> At the punishment phase of Mr. Cathey's trial, Dr. Yohman testified that Mr. Cathey "may possibly have a learning disorder which we'd call a learning disorder not otherwise specified, which means he has impairment in a variety of academic areas which certainly led to poor

of memory tests that Mr. Cathey was “moderately deficient at about the second percentile level.” [DX 48, Trial Transcript, Vol. 23: 21]. The Court finds these results are consistent with and indicative of deficits in conceptual skills.

142. Additionally, Dr. Yohman administered to Mr. Cathey a Categories Test and the California Verbal Learning Test (“CVLT”), tests that are not intelligence tests, like the WAIS-R, but that are most related to IQ. [H.T. Vol. 7: 192; DX 49, Additional Score Sheets Provided by Dr. Yohman]. Dr. Fletcher testified that the Categories Test is a concept formation test that has different trials in which a person has to do problem solving. On this test, Mr. Cathey obtained a percentile score at the eighth percentile. [H.T. Vol. 7: 193]. Dr. Fletcher testified that the CVLT is a verbal memory test and is designed to examine a person’s ability to organize and encode information. On the CVLT, Mr. Cathey received a T score of 26. Dr. Fletcher testified that a T score has a mean of 50 and a standard deviation of 10. A score of 26 is about two and a half standard deviations below average, putting Mr. Cathey below the second percentile. [H.T. Vol. 7: 192-193]. The Court finds these results consistent with Mr. Cathey’s deficits in conceptual and memory skills.

143. Dr. Yohman also administered to Mr. Cathey the Minnesota Multiphasic Personality Inventory (“MMPI”), which Dr. Fletcher testified is not a neuropsychological test but is a personality questionnaire. [H.T. Vol. 7: 195]. Dr. Fletcher stated the MMPI is not a reading test, and contrary to Dr. Proctor’s opinion, the MMPI’s test manual and publisher, Pearson, advises that the average reading level for the test is a fifth grade level. [H.T. Vol. 7: 195-196]. Dr. Fletcher further testified, to which Dr. Proctor conceded, that the MMPI does not require a

---

academic achievement, but not particularly in one area enough of a deficiency to warrant a selective learning disorder in that area. In other words, he was borderline to mildly deficient in most academic areas.” [DX 48, Trial Transcript, Vol. 23: 20].

full reading of all its items. *Id.* Dr. Yohman's reports also indicate that he administered to Mr. Cathey a Trail Test, which Dr. Fletcher testified requires no abstraction or judgment but is a vocabulary-based test. [H.T. Vol. 7:198]. Dr. Fletcher, unlike Dr. Proctor, is a board certified neuropsychologist, and in his opinion, the scores Mr. Cathey received on these tests are consistent with mental retardation.<sup>11</sup> This Court finds Dr. Fletcher's opinions reliable.

144. The fact that Mr. Cathey's signature appears on letters and TDCJ forms does not prove that he did not have adaptive deficits before age 18 and does not show that he is without deficits today. Captain Bryant admitted that he had not personally seen Mr. Cathey fill out TDCJ forms. [H.T. Vol. 8: 65]. Further, the following grievance forms, admitted through Applicant's Exhibit 53<sup>12</sup>, included notations indicating that Mr. Cathey received help<sup>13</sup> in completing TDCJ Offender Grievance Forms:

- TDCJ Offender Grievance Form, received November 2, 2009, including notation "assisted by";
- TDCJ Offender Grievance Form, received April 8, 2009, including notation "This Complaint was assisted by and with the help of Offender";

---

<sup>11</sup> Dr. Fletcher testified that although the tests, besides the WAIS-R, that Dr. Yohman administered to Mr. Cathey are neuropsychological tests, and not intelligence tests, the Flynn Effect also effects these scores. [H.T. Vol. 7: 198]. Dr. Fletcher stated that articles, such as the one admitted into evidence titled "The Flynn Effect and its Relevance to Neuropsychology," explains to neuropsychologists the relevance of the Flynn Effect and how the phenomenon of norm obsolescence affects neuropsychological assessments. *Id.* [DX 52, Merrill Hiscock, The Flynn Effect and its Relevance to Neuropsychology," 29(5) *Journal of Clinical and Experimental Neuropsychology* (2007)].

<sup>12</sup> Applicant's Exhibit 53 includes an affidavit from counsel for Applicant, clarifying that the grievance forms were received after she submitted an open records request to the TDCJ. The records were included in Mr. Cathey's offender's file, but the State had not received a copy of the same through their subpoena to the TDCJ.

<sup>13</sup> The names of the people, mostly offenders, who assisted Mr. Cathey were redacted.

- TDCJ Offender Grievance Form, received March 5, 2009, including notation “This was assisted by offender”; and
- TDCJ Offender Grievance Form, received February 13, 2009, including notation “Assisted by Offender.”

145. Several of the TDCJ forms, with Mr. Cathey’s name and information, were also filled out in different handwritings, which confirms the finding that Mr. Cathey received help from other people. [DX 58, TDCJ Visitor Forms; H.T. Vol. 8: 67]. From State’s Exhibit 15, but entered as Applicant’s Exhibit 58, the following visitor change forms, verified by Captain Bryant, were written in different script:

- TDCJ Visitor Change Form, dated April 30, 1997;
- TDCJ Visitor Change Form, dated July 20, 1998;
- TDCJ Visitor Change Form, dated May 27, 1998; and
- TDCJ Visitor Change Form, dated June 22, 2005.

Leah Madison, a correctional officer at the Polunsky Unit, admitted she did not personally see Mr. Cathey writing the romantic letter he allegedly gave her that also caused Mr. Cathey disciplinary problems. [H.T. Vol. 8: 82]. Dr. Proctor testified that one of the poems in Mr. Cathey’s letters was plagiarized, and he also acknowledged that some of the material in the letters was copied directly from the internet. [H.T. Vol. 6: 140, H.T. Vol. 7: 271]. Dr. Proctor did not see Mr. Cathey write the letters, and he did not interview anyone who had seen Mr. Cathey write the letters. [H.T. Vol. 6: 268]. Although Mr. Cathey spells at the fourth percentile level, although his full-scale IQ score was 77 even without correcting for the Flynn Effect, although Dr. Proctor has never seen Mr. Cathey use a dictionary, although Dr. Proctor would not expect someone who spells at a fourth percentile level to be able to spell the word “renaissance”

found in Mr. Cathey's letters, which Dr. Proctor admitted not being able to spell, Dr. Proctor testified that he believes it is likely that Mr. Cathey wrote the letters. [H.T. Vol. 7:31]. If, however, Mr. Cathey did not write the letters or the grievance forms, Dr. Proctor stated that his opinions on mental retardation would change. [H.T. Vol. 6: 252].

146. There is evidence that inmates in neighboring cells assisted Mr. Cathey in writing letters. [DX 50, Declaration of Faryion Wardrip and DX 51, Declaration of Ronald Hamilton]. Mr. Wardrip, for example, verified that he lived next to Mr. Cathey at the Polunsky Unit, read to Mr. Cathey his letters, and helped Mr. Cathey write letters that related to political topics, which Mr. Cathey would then copy and mail. [DX 50, Declaration of Faryion Wardrip]. Mr. Hamilton provided confirming statements, affirming in his declaration that he read to Mr. Cathey his letters and helped Mr. Cathey write letters that related to romantic topics, which Mr. Cathey would then copy and mail. [DX 51, Declaration of Ronald Hamilton]. Dr. Fletcher confirmed that adult men with learning disabilities often ask other men for help writing romantic letters. [H.T. Vol. 7: 182]. Dr. Proctor was not aware that Mr. Cathey was assisted by neighboring inmates, but he conceded that this fact would impact his assessment of Mr. Cathey's writing skills. [H. T. Vol. 6: 275].

147. Dr. Fletcher testified that he believed Mr. Cathey could not have authored the letters included in the prison records on his own. [H.T. Vol. 7: 175]. He stated that it was not possible for someone who was spelling and writing at a fifth grade level to write the letters that were described, unless there was some intensive intervention program. [H.T. Vol. 7: 182]. There is no program for death row inmates that could accelerate development of an individual whose spelling is in the fourth percentile. *Id.*

148. Dr. Proctor agreed with the DSM-IV and admitted that individuals with mild mental retardation can acquire academic skills up the sixth grade level by their late teens. [H.T. Vol. 7: 86-87]. To a certain extent, people with mild mental retardation are educable, teachable, trainable, and can improve their writing skills with rote practice. [H.T. Vol. 6: 225]. However, this does not account for the level of sophistication of Mr. Cathey's letters from death row where there are no special educational programs.

149. The Court finds the letters with Mr. Cathey's signatures are not reliable evidence regarding mental retardation.

**C. Social Skill Area**

150. The Court finds that Mr. Cathey has the following deficits in the social skill area:

151. Gullibility and naiveté. On cross examination at the punishment phase of Mr. Cathey's trial, Dr. Yohman testified that Mr. Cathey is "a follower, who is very unsophisticated, who has limited intellectual resources, and who is going to gravitate to whoever will give him attention and affection, who is going to be easily manipulated." [DX 48, Trial Transcript, Vol. 23:35].

152. Dr. Yohman's testimony comports with history provided by Mr. Cathey's sisters and brother:

When Eric was young, other kids would tell him to do things and he would just agree. On one occasion, a group of kids convinced Eric to egg a car and he did. Another time, one of our cousins persuaded Eric to throw rocks at cars from a bridge. Eric wouldn't put up any kind of fight. I think he was trying to fit in and didn't want to be called chicken. When he got older, Eric started to be persuaded to stay out late and not tell people where he was going. [DX 42, Affidavit of Charlotte Ross].

Because Eric was slower, he was easily manipulated by others. He always wanted other people's approval and would do anything to please them. He always followed the lead of others and rarely made decisions for himself. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

Eric didn't have a group of friends when he was young, so when he started to make friends as an adult he was very loyal and wanted to impress them. A lot of his friends used him and played on his weakness. They would get Eric to do favors for them, such as lending them money. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

Eric wasn't very popular. He used to keep to himself. He had problems expressing himself. Eric was never a leader. He always followed. He told me that he just wanted to fit in. [DX 44, Affidavit of Celecia Baker].

153. Even the capital offense for which Mr. Cathey was found guilty did not demonstrate forethought, planning, or complex execution of purpose on his part. To the contrary, the facts indicate and provide evidence of Mr. Cathey's deficits and gullibility. Dr. Proctor admitted, for example, that Mr. Cathey did not plan the kidnapping, was not a passenger of the car that was surveying the victim, did not drive either car involved in committing the crime, and did not ask any questions of the victim. [H.T. Vol. 7: 17].

154. The facts of the alleged escape attempt made by five inmates at the Ellis Unit, including Mr. Cathey, are also consistent with mental retardation. Dr. Proctor submitted that it is possible that Mr. Cathey was asked to participate in the escape attempt because he is gullible, and Dr. Proctor also conceded that Mr. Cathey did not plan the escape. [H.T. Vol. 7: 13-14]. There is no evidence in the affidavits of Mr. Cathey's family members that indicated any leadership characteristics. [H.T. Vol. 7: 15]. It is also dispositive that Mr. Cathey was unsuccessful in his escape attempt and that he was caught by prison officials at the top of a second fence surrounding the Ellis Unit.

155. Self-esteem. Mr. Cathey's adaptive deficits caused him to suffer a further impairment of his self-esteem. Mr. Cathey's brother explains that "Eric always felt that he wasn't as good as everybody else. He was often very hurt about the way other kids treated him and was upset that he didn't have many friends." [DX 43, Affidavit of Robert Charles Cathey, Jr.].

156. Charlotte Ross, Mr. Cathey's older sister, confirms and recounts first-hand experience with Mr. Cathey's low self-esteem [DX 42, Affidavit of Charlotte Ross]:

Eric got upset very easily. He never talked about his emotions, but I used to find him crying. He used to get really frustrated when we were doing something that Eric couldn't do as well as us. For example, I was a tomboy when I was young and used to be better than him at football. This really upset him. He always looked to us siblings for reassurance and to tell him that things would be okay, especially when he got picked on or told off by his father.

157. Avoiding being victimized. Mr. Cathey was not able to avoid being a victim during his childhood. He was often bullied by other children, as described by his older sister:

Some kids picked on him at school once, and instead of fighting back or getting a teacher, he jumped out of a second story window and ran away. On another occasion, Eric was at the public pool and some older guys picked on him and he got a beating. He didn't fight back. [DX 42, Affidavit of Charlotte Ross].

158. Other children took advantage of his impaired functioning, as described by his brother:

Eric was often teased by other kids because they thought he was "weird" and because he was tall and skinny. Eric found it difficult to avoid fights because he always reacted to teasing and could never shrug off insults. Kids in the neighborhood knew how to wind him up and enjoyed provoking him. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

159. Interpersonal relations. Mr. Cathey was severely impaired in terms of interpersonal relationships. Although Mr. Cathey quit school early and married Ms. Bryant after she became pregnant with his child, Ms. Bryant divorced and left him for someone else. [DX 48, Vol. 23: 27]. Even Ms. Bryant recounted Mr. Cathey's limited functioning in the context of married life [DX 44, Affidavit of Noaella Bryant]:

What Eric thought was really funny annoyed me. He used to jump out at me when it was dark and when I was in the house and thought I was alone. I would tell him that he was scaring me, but he laughed and kept doing it. Eric didn't understand why it wasn't funny. We fought a lot about this.

160. Mr. Cathey's older sister also remembers her brother's interpersonal difficulties

[DX 42, Affidavit of Charlotte Ross]:

I never knew Eric to have any friends. The only friends that he had were mine and his other sister's and brother's friends. Sometimes, when our friends came around, they would think he was weird at the beginning because he was tall, lanky, and never said anything. He would be quiet and stay in his own space.

161. Mr. Cathey's brother confirms and also provides further evidence of Mr. Cathey's impaired adaptive functioning [DX 43, Affidavit of Robert Charles Cathey, Jr.]:

Eric was not very social and did not speak to many people. When family friends and relatives visited the house, he did not want to be around them and wandered off on his own. He would often ignore visitors when they spoke to him.

Eric was often teased by other kids because they thought he was "weird" and because he was tall and skinny. Eric found it difficult to avoid fights because he always reacted to the teasing and could never shrug off insults. Kids in the neighborhood knew how to wind him up and enjoyed provoking him.

Eric always felt that he wasn't as good as everybody else. He was often very hurt about the way other kids treated him and was upset that he didn't have many friends.

162. Dr. Walter Quijano, a licensed clinical psychologist who testified at the punishment phase of Mr. Cathey's trial, administered to Mr. Cathey a Mallon Clinical Inventory on February 28, 1997 and testified at trial that Mr. Cathey has a dependent and compulsive type of personality. [DX 48, Trial Transcript, Vol. 23:42]. Dr. Quijano described these personality types as follows:

The dependent personality is one that uses the relationship to hang on to their relationship. Their relationship is not reciprocal like most normal relationships are, but the dependent person ingratiate, holds, does things for the other person not because the relationship is reciprocal but because you want to hold on to that relationship. So, you are bound to do things that you don't otherwise want to do or to do humiliating things to purchase that relationship.

The compulsive is similar except that the trick used by the compulsive is to keep the distance, to not express true feelings, not express true opinions, less he displeases the other person and so he would appear very compliant with rules,

regulations, will do everything properly, cross the t's and dot the i's, not because it's rewarding for him, but again because he wants that relationship to continue.

[DX 48, Trial Transcript, Vol. 23:42-43]. The Court finds these personality traits consistent with mental retardation.

163. Dr. Proctor testified that he did not know if Mr. Cathey was good at making friends, and there is no evidence from the trial transcript that Mr. Cathey had this characteristic. The affidavits of Mr. Cathey's family members indicated Mr. Cathey was shy and did not make friends. Dr. Proctor admitted that this fact, if true, would indicate a deficit in social adaptive behavior. [H.T. Vol. 6: 207].

164. The fact that Mr. Cathey married and had children is still consistent with mental retardation. Not only did Mr. Cathey's wife divorce him and state she did not trust him with the children, Dr. Fletcher testified that even people with mental retardation get married. [H.T. Vol. 5: 51].

**D. Practical Skill Area**

165. The Court finds that Mr. Cathey has the following deficits in the practical skill area:

166. Activities of daily living. Mr. Cathey's ability to take care of his daily activities was significantly impaired by his mental retardation. Mr. Cathey's older sister, Charlotte Ross, verified that he was very dependent on others and unable to manage the simplest activities:

Eric could never do the washing or the cooking. I would always do that. He never helped me with chores around the house unless I asked him. I would always have to tell him what to do. He would never do anything like that on his own initiative. Sometimes, I would make the cleaning and washing up into a game, so that he would help me. I taught him how to use the microwave and how to clean around the house. [DX 42, Affidavit of Charlotte Ross].

167. As confirmed by Mr. Cathey's family, even with direction, Mr. Cathey was unable to manage his home life and marriage:

When he first moved in with me, he could hardly do anything around the house. I had to tell him how to wash clothes and cook. I remember he didn't even know how to flip a hamburger patty. I had to show him how to do everything. I often left notes for him around the house, so that he would remember to do chores and things for the kids, but he often didn't finish the chores that I left for him. Eric also didn't know how to fix anything around the house. I always had to call someone out to fix things. [DX 44, Affidavit of Noaella Bryant].

One time I went over to see Eric at their apartment. Noaella had post-it notes all over the place telling him what to do and when to do it. The walls were completely yellow with post-it notes, but he did not finish what she told him to do. I noticed that the house was still very messy though. It was horrible in there. There were food and clothes everywhere. [DX 42, Affidavit of Charlotte Ross].

168. Dr. Proctor testified that people with mild mental retardation can master practical skills, can be aware of their pending execution, can be aware of the need to buy things, can ask for other people for money, can ask other people for help, and can be aware of future court hearings. [H.T. Vol. 6: 277]. Dr. Proctor agreed that it would be unsound and unreliable expert methodology to conclude that a person did not have adaptive behavioral deficits by pointing to his strengths. [H.T. Vol. 6: 213]. To rely on the fact that a person does not have adaptive behavioral deficits by focusing on their strengths is a position that is unsupported in peer-reviewed literature. [H.T. Vol. 6:214].

169. Use of safety. Mr. Cathey was significantly impaired in assessing risks and taking precautions. His sister and brother both recount several occasions when Mr. Cathey injured himself because of his failure to assess risk:

On one occasion, we were chasing each other around a wall. Eric hit his head so hard it knocked him down, but he got up and started running and laughing again. He ran into the wall and hit his head again, busting it open this time, but again just got up and carried on running. This continued until we had to stop him and tell him that he was hurt. [DX 42, Affidavit of Charlotte Ross].

Eric was just not aware of risk. If what he was doing involved risks, he never made sure that he was safe. He wouldn't think to do anything if he got hurt, we would have to tell him to or do it for him. Eric got injured a lot. When he was 8 or 9, he cracked his head swinging on a clothes line. Once, he got spooked by a bug on the wall and fell off and bumped his head. Another time, at the age of 8, Eric fell off a merry-go-round and bumped his head so hard he passed out. Around the same age, he broke his arm swinging on some monkey bars. [DX 42, Affidavit of Charlotte Ross].

If anything was out of place in the house, we would immediately think it was Eric. For example, if there was blood on the walls, we would check Eric's head and see if there was a bruise. A saying developed in our house that it was just "typical Eric." [DX 42, Affidavit of Charlotte Ross].

Eric was especially accident-prone as a child and often tripped over things. When he was 9 or 10 years old, he fell off the porch and injured his head. I remember my mother and the rest of the family saying that Eric had "lost his mind" because of his dazed behavior after the accident. I also remember him breaking his arm in Emancipation Park. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

170. The incident in which Mr. Cathey fell from the monkey bars required surgery and a three-day hospital stay. [DX 46, Harris County Hospital District Medical Records].

171. Occupational skills. Mr. Cathey had difficulty obtaining and keeping a steady job. His former wife explains Mr. Cathey's impaired occupational skills [DX 44, Affidavit of Noaella Bryant]:

Our son Eric was born in 1989. Eric had to get a job to bring in the income. I had to look for jobs for Eric because he didn't look himself. He used to tell me that he didn't think that he could get a good job because he didn't have any skills. He had never learned any trades. He sat at home for a long time with no work. I told him that he had to get a job so that we could pay for rent. Eric eventually got a job as a security guard. He worked by himself at night, five nights a week. The only thing that he told me about the job was that he had a flashlight, and he might be getting a permit to carry a gun. Eric was fired from the job because he didn't wait to be relieved by the person who came to take over his shift.

172. Mr. Cathey's older sister also confirmed Mr. Cathey's impairment in occupational skills [DX 42, Affidavit of Charlotte Ross]:

When Eric was still living at home, my husband and I got Eric to come to work with us. We felt like we needed to help him out. We never gave him any

responsibility though, because Eric would mess it up. Eric would never have gotten stressed if we gave him any responsibility. He was so used to being told what to do. I always felt like he needed this guidance, because he couldn't cope with things by himself.

173. At the punishment phase of Mr. Cathey's trial, Mr. Luke Ezech, Ms. Charlotte Ross's former husband, testified that Mr. Cathey worked with him at his battery shop for two years. [DX 48, Trial Transcript, Vol. 22: 242-244]. Mr. Ezech stated that his business related to the reconditioning of car batteries and that he taught Mr. Cathey to check dead batteries and also asked him to watch the shop for him while he was away. *Id.* Dr. Proctor conceded that the work Mr. Cathey performed at the battery shop was work a person with mental retardation can perform. [H.T. Vol. 6: 227-228]. Although Dr. Proctor used evidence of Mr. Cathey's occupational skills to evaluate whether Mr. Cathey had adaptive behavior deficits, Dr. Proctor also admitted that he did not know how long Mr. Cathey held jobs, information that is important to his own evaluation. [H.T. Vol. 6: 226].

174. The fact that Mr. Cathey worked, although he was terminated, is consistent with mental retardation. Dr. Fletcher testified that even people with mental retardation are able to work and learn to replicate specific tasks, like the tasks Mr. Cathey performed at the battery shop. [H.T. Vol. 5: 51]. In his interview of Ms. Bryant, Dr. Fletcher also learned that when Mr. Cathey did find a job, often he could not keep it. [H.T. Vol. 5: 159].

**E. Testimony and Records from the TDCJ**

175. During the evidentiary hearing to determine whether Mr. Cathey meets the diagnostic criteria for mental retardation, the State called several Texas Department of Criminal Justice ("TDCJ") correctional officers and officials. The State also admitted records from the TDCJ as evidence. The Court finds that the environment in which the correctional officers and officials observed Mr. Cathey is not indicative of typical community functioning. All inmates

are housed in their cells twenty-three hours a day. The prison officials tell inmates when to shower, recreate, and eat. The prison system also supplies all necessities to inmates. [H.T. Vol. 8: 69].

176. Dr. Proctor agreed that prison guards are typically not used for evaluating adaptive behavior because their interaction with the assessed individual is too limited. [H.T. Vol. 6: 185]. Dr. Proctor--the State's only witness to offer an opinion on whether Mr. Cathey is a person with mental retardation--admitted that he did not use, interview, or rely on any communication with any prison guard or official for his opinions that Mr. Cathey is not mentally retarded. [H.T. Vol. 6: 241]. He also admitted that "the fact that an individual possesses one or more skills that might be thought by some laypersons as inconsistent with the diagnosis of mental retardation cannot be taken as disqualifying." [H.T. Vol. 6: 212].

177. Although testimony from the State indicated Mr. Cathey had several books in his cell, Captain Bryant testified that he had not seen Mr. Cathey read a book. [H.T. Vol. 8: 63]. There is also evidence that inmates could easily pass, borrow, and share books through a "4-inch-by-4 inch hole at the bottom of the door..." [H.T. Vol. 8: 65]. Captain Bryant stated he had seen some rather large items such as small paperback books fit through the gaps, *id.*, and Leah Madison testified that inmates would pass papers, reading materials, and almost anything they are asked to pass. [H.T. Vol. 8: 81]. Dr. Fletcher also indicated that people with mental retardation try to impress others and make them think they know a lot more than they really do. Having books like *The Echelon Vendetta* [SX 21, State Inventory of Mr. Cathey's Cell], *Tactics* and *Strategy of Chess* [SX 21, State Inventory of Mr. Cathey's Cell], and *The Looking Glass* [SX 21, State Inventory of Mr. Cathey's Cell], in one's cell when one has a history of reading deficits, as Mr. Cathey has, is consistent with Dr. Fletcher's testimony. [H.T. Vol. 7: 191].

Further, Mr. Faryion Wardrip, who lived next to Mr. Cathey at the Polunsky Unit, provided a declaration that Mr. Cathey would hold books for him and for another inmate in his cell and that very often, inmates would trade books and even letters through the gaps in the cell doors. [DX 50, Declaration of Faryion Wardrip].

178. Similarly, although testimony from the State indicated Mr. Cathey had a chess board, Captain Bryant testified he had not seen Mr. Cathey play chess. [H.T. Vol. 8: 65]. Investigator Don Cohn admitted that he did not see any chess pieces in Mr. Cathey's cell. [H.T. Vol. 8: 21]. Dr. Proctor admitted that he and others had made assumptions that Mr. Cathey had been playing chess, when without evidence of Mr. Cathey even having chess pieces, he could have been playing checkers. [H.T. Vol. 7:97]. Further, Mr. Faryion Wardrip, who lived next to Mr. Cathey at the Polunsky Unit, provided in a declaration that Mr. Cathey did not play chess and only had a chess board because he wanted to trade it with another inmate. [DX 50, Declaration of Faryion Wardrip]. Although Leah Madison stated she had seen Mr. Cathey play chess, [H.T. Vol. 8: 77], her testimony is inconsistent with the overwhelming testimony and evidence that Mr. Cathey did not play chess. Ms. Madison did not testify as to how long Mr. Cathey played chess, how often he played chess, or whether the pieces being used were actually chess pieces.

179. The fact that Mr. Cathey has an internet profile is no evidence that Mr. Cathey is not a person with mental retardation. [SX 13, Internet Profile of Eric DeWayne Cathey]. Dr. Proctor admitted that inmates do not have access to the internet and that someone else must have posted the profile in Mr. Cathey's name. [H.T. Vol. 6: 278].

180. The State presented evidence of visitor records, including documentation of visits made to Mr. Cathey by his attorneys and clergy. [SX 15, TDCJ records]. The State stated on

record that use of the visitor records was solely to show what changes had been made to Mr. Cathey's visitor list, also stating the visitor records were received as part of the entire TDCJ file. [H.T. Vol. 6: 167]. The Court finds that these records are irrelevant to the issue of whether Mr. Cathey is mentally retarded.

## **VII. Prong Three: Onset Before the Age of Eighteen**

181. There is credible and reliable evidence that Mr. Cathey suffered from significant deficits in intellectual and adaptive functioning before the age of 18. Although the limitation in his functioning was not formally documented before the age of 18, all risk factors commonly associated with mental retardation were present prior to Mr. Cathey turning 18. No evidence was presented at the evidentiary hearing that established an intervening cause after the age of 18 that could account for Mr. Cathey's limitations in intellectual and adaptive functioning.

182. The Court finds that Mr. Cathey exhibited significantly subaverage general intellectual functioning concurrent with deficits in adaptive behavior that originated before the age of 18.

## **VIII. Other Evidence Indicative of Mental Retardation (*Ex Parte Briseno* Factors)**

183. In *Ex Parte Briseno*, the court provided a short list of other evidentiary factors that a factfinder "*might* also focus" on when weighing evidence of mental retardation: (a) did those who knew the person best during the developmental stage think he was mentally retarded, and if so, act accordingly; (b) has the person formulated plans and carried them through or is his conduct impulsive; (c) does his conduct show leadership or does it show that he is led around by others; (d) is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable; (e) does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject; (f) can the person hide

facts or lie effectively in his own or others' interests; and (g) putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of the offense require forethought, planning, and complex execution of purpose. 135 S.W.3d at 8.

184. The Court finds that these factors serve only as mere guides and are suggestions of the court. Indeed, the so-called "*Briseno* factors" are not advocated by the AAIDD Manual and weaken and obscure the constitutional determination of mental retardation that is required. [DX 15, John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 711-714 (2009)]. A recent article, defining a section on *Briseno* as "The Glass Half-Full Perspective," provides further insight:

The *Briseno* factors present an **array of divergences** from the clinical definitions in applying *Atkins*. For one, as the court's statement indicates, *Briseno* erroneously pits mental retardation against disorders in an either-or dichotomy. Further, the factors by turns adhere to stereotype or label...and focus solely on adaptive strengths...Even the factors that do point to traits that "occur with sufficient frequency to warrant certain limited generalizations...fail to address significant qualifications to these generalizations...**Overall, the *Briseno* factors narrow the scope of relevant behaviors to a limited group of questions from a universe of possibilities, and as such fail to fully address all skill areas set out in the clinical definitions...**Thus, a factfinder applying all the factors will not necessarily have assessed the full possibility of adaptive deficits, and cannot therefore rule out the possibility of significant limitations in adaptive functioning.

*Id.* (emphasis added). Dr. Fletcher testified that even though the *Briseno* opinion was issued by the Texas Court of Criminal Appeals in 2004, the standard did not take into account the 2002 edition of what was then the AAMR standards. *Ex Parte Briseno* also makes recommendations that are not accepted practice in the field of psychology for diagnosing mental retardation. [H.T. Vol. 7: 209]. This Court finds that the factors advocated in *Ex Parte Briseno* are not binding and that these factors have guided but not formed its opinion on whether Mr. Cathey is a person with mental retardation.

185. Even if the Court found the *Briseno* factors were binding and dispositive, an analysis of these factors supports the finding that Mr. Cathey is a person with mental retardation.

186. It is irrelevant that no fact witness for Mr. Cathey at the punishment phase of his trial testified that Mr. Cathey had mental retardation. The fact witnesses were not asked this question directly, which is not a surprise given that in 1997 when Mr. Cathey was tried, mental retardation was not a bar to the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

187. There is no evidence that Mr. Cathey formulated plans and carried them through. In fact, Dr. Yohman, at the punishment phase of Mr. Cathey's trial, testified that he administered tests related to Mr. Cathey's ability to organize or plan and that Mr. Cathey was very "poor" at these tests and took "kind of a random approach" to performing tasks. [DX 48, Trial Transcript, Vol. 23: 23].

188. There is no evidence that Mr. Cathey ever ~~lead~~ anyone in anything. There is no evidence in the affidavits of Mr. Cathey's family members, for instance, that indicated any leadership characteristics. [H.T. Vol. 7: 15]. On cross examination at the punishment phase of Mr. Cathey's trial, Dr. Yohman testified that Mr. Cathey is "a follower, who is very unsophisticated, who has limited intellectual resources, and who is going to gravitate to whoever will give him attention and affection, who is going to be easily manipulated." [DX 48, Trial Transcript, Vol. 23:35]. Mr. Cathey's family members provided affidavits confirming the same:

- "When Eric was young, other kids would tell him to do things and he would just agree." [DX 42, Affidavit of Charlotte Ross];
- "He always followed the lead of others and rarely made decisions for himself." [DX 43, Affidavit of Robert Charles Cathey, Jr.];

- “Eric was never a leader. He always followed. He told me that he just wanted to fit in.” [DX 44, Affidavit of Celecia Baker].

189. *Briseno* also asks whether conduct in response to external stimuli is rational and appropriate, regardless of whether it is socially acceptable, and whether a person can lie effectively in his own or other interests. There is no evidence that Mr. Cathey could do either. [add]

190. Even the capital offense for which Mr. Cathey was found guilty did not demonstrate forethought, planning, or complex execution of purpose on his part. Dr. Proctor admitted, for example, that Mr. Cathey did not plan the kidnapping, was not a passenger of the car that was surveying the victim, did not drive either car involved in committing the crime, and did not ask any questions of the victim. [H.T. Vol. 7: 17]. Courts have affirmed that impulsive crimes are not the sort of crimes that require forethought and planning. *Carr v. State*, No. 71,634 (Tex. Crim. App. May 17, 1995) (unpublished), *Ex parte Carr*, No. AP-75,627 (Tex. Crim. App. Feb. 28, 2007) (unpublished) (finding Carr to have mental retardation even though he shot a pregnant 16-year-old in the forehead while robbing a convenience store); *Modden v. State*, 721 S.W.2d 859, 860 (Tex. Crim. App. 1986), *Ex parte Modden*, 147 S.W.3d 293, 307 (Tex. Crim. App. 2004) (finding Modden to have mental retardation even though he stabbed a convenience store clerk 16 times in the face and neck in the course of a robbery).

#### **IX. Risk Factors for Mental Retardation**

191. The AAIDD Manual sets forth risk factors commonly associated with mental retardation. The four categories of risk factors are: (1) biomedical: factors that relate to biologic processes; (2) social: factors that relate to social and family interaction; (3) behavioral: factors that relate to potentially causal behaviors; and (4) educational: factors that relate to the

availability of educational supports that promote mental development and the development of adaptive skills. [DX 4, AAIDD Manual at 60]. Mental retardation often reflects the cumulative or interactive effects of multiple risk factors.

192. The AAIDD Manual highlights that the etiology of mental retardation may facilitate diagnosis. The AAIDD Manual states that “All relevant risk factors are identified, including those that are thought to be most important (such as trisomy 21 or Down syndrome) as well as those that are thought to be less important (such as social deprivation or lack of timely educational intervention). The presence of interactions between risk factors are then evaluated and described. Etiological diagnosis and classification thus consists of a comprehensive list of all of the risk factors and interactions among risk factors for which the available data provide sufficient evidence.” [DX 4, AAIDD Manual at 68].

193. Because of correlation between risk factors and mental retardation, it is relevant to this Court to determine whether Mr. Cathey’s history contains any of the risk factors for mental retardation identified by the AAIDD Manual. There is ample evidence from the family history witnesses that establish Mr. Cathey was exposed to all risk factors commonly associated with mental retardation. The presence of these risk factors lends further weight to the diagnosis of mental retardation in this case.

**A. Biomedical Risk Factors**

194. Traumatic brain injury is a risk factor included within the biomedical category. [DX 4, AAIDD Manual, Table 6.1 at 60]. Mr. Cathey presents numerous occasions of serious head trauma during his childhood. At age two, Mr. Cathey “allegedly fell & struck edge of table,” according to hospital records. [DX 46, Harris County Hospital District Medical Records].

His older sister Charlotte Ross recounts other head injuries for with Mr. Cathey did not receive medical attention [DX 42, Affidavit of Charlotte Ross]:

On one occasion...Eric hit his head so hard [on a wall] it knocked him down...He ran into the wall and hit his head again, busting it open this time.

Once, he got spooked by a bug on the wall and fell off and bumped his head. Another time, at the age of 8, Eric fell off a merry-go-round and bumped his head so hard he passed out.

195. Mr. Cathey's younger brother confirms and recalls two more serious blows to the head [DX 43, Affidavit of Robert Charles Cathey, Jr.]:

When he was 9 or 10 years old, he fell off the porch and injured his head. I remember my mother and the rest of the family saying that Eric had "lost his mind" because of his dazed behavior after the accident.

[W]hen Eric was 15 or 16,...[he was hit] in the face with a vase...The vase smashed, leaving him with a scar down his face.

196. Mr. Cathey's younger sister remembers "He must have busted his head open at least twice but I can't remember his exact age." [DX 45, Affidavit of Celecia Baker].

**B. Social Risk Factors**

197. An impaired child-giver and adult non-responsiveness are risk factors included within the social category of risk factors for mental retardation. [DX 4, AAIDD Manual, Table 6.1 at 60]. Mr. Cathey's mother showed signs of impairment: "When I first started going with Eric, I thought his family was very weird. Their house was completely out of the order. It was disgusting. Everything was completely chaotic. Eric's mother seemed very slow." [DX 44, Affidavit of Noaella Bryant].

198. Mr. Cathey's mother was also non-responsive: "Eric sometimes told me that he felt left out and different from Robert, my older sister Charlotte, and me. He often said that our mother didn't like him as much and that she treated him differently." [DX 45, Affidavit of

Celecia Baker]. Mr. Cathey's older sister also had to call the ambulance when he broke his arm, rather than his own parents. [DX 42, Affidavit of Charlotte Ross].

199. During the punishment phase of Mr. Cathey's trial, Mr. Cathey's mother, Ms. Willie Lee Cathey, testified that her husband, Mr. Cathey's father, sold drugs, used drugs, and drank wine and beer in the home. When he would drink, Mr. Cathey's father would become mean and violent and would "get his gun" after the children and Ms. Cathey. [DX 48, Trial Transcript, Vol. 23: 87].

**C. Behavioral Risk Factors**

200. Child abuse and neglect, domestic violence, and social deprivation are included within the behavioral category of risk factors for mental retardation. [DX 4, AAIDD Manual, Table 6.1 at 60]. As attested to by his family members, Mr. Cathey was exposed to extraordinary levels of violence and neglect once his father began dealing drugs from home:

While we were growing up, our father was a drug dealer...There was drug-dealing, drug use, and prostitution in our house. The house could be chaotic with people firing guns and shouting and cursing. Eric and I and our sister Lisa would run and hide in the bedroom. One time, we climbed out of the bedroom window to hide in the yard. [DX 43, Affidavit of Robert Charles Cathey, Jr.].

201. At the punishment phase of Mr. Cathey's trial, Mr. Cathey's older sister, Ms. Charlotte Ross, testified about the violent, chaotic, and abusive environment in the home. [DX 48, Trial Transcript, Vol. 22: 202-206] (testifying that Mr. Cathey's father was a drug dealer, their home was robbed twice, and the children would constantly be yelled at by their parents). Ms. Ross also testified that neither she nor her siblings would discuss the robberies because it was a "taboo" in the house. [DX 48, Trial Transcript, Vol. 22: 207].

202. During the punishment phase of his trial, Mr. Cathey's mother, Ms. Willie Lee Cathey, confirmed and testified that Mr. Cathey's father sold drugs for many years from the

house. [DX 48, Trial Transcript, Vol. 23: 83]. Ms. Cathey also testified that her husband, Mr. Cathey's father, was robbed twice in the house at gunpoint, and during one occasion, the entire family hid underneath a table. [DX 48, Trial Transcript, Vol. 23: 83-86].

**D. Educational Risk Factors**

203. Impaired parenting and inadequate family support leads to educational risk factors. [DX 4, AAIDD Manual, Table 6.1 at 60].

204. The affidavits of Mr. Cathey's family members indicate there was inadequate family support in the household. "There was drug-dealing, drug use, and prostitution in our house. The house could be chaotic with people firing guns and shouting and cursing." [DX 43, Affidavit of Robert Charles Cathey, Jr.].

**X. Determination Concerning Mental Retardation**

205. Mr. Cathey is a person with mental retardation. His full scale obtained score of 77 on the WAIS-R, administered by Dr. Yohman, without correction for the Flynn Effect, demonstrates that his intellect is firmly in the range of mild mental retardation, as recognized by the AAIDD Manual. With correction for the Flynn Effect, Mr. Cathey's score on the WAIS-R is a 71.6, and after applying the standard error of measurement, his corrected score falls within the range of mental retardation. The finding of mental retardation is further supported by Dr. Fletcher's determination that Mr. Cathey has significant deficits in adaptive functioning in the conceptual, social, and practical realms that place him more than two standard deviations below the mean in adaptive functioning. Taking into account all of this evidence, Mr. Cathey meets the diagnostic criteria for mental retardation. [H.T. Vol. 3:57].

## **CONCLUSIONS OF LAW**

206. The preponderance of the evidence establishes that Mr. Cathey has significantly subaverage general intellectual functioning.

207. The preponderance of the evidence shows that Mr. Cathey suffers from significant deficits in adaptive behavior.

208. The preponderance of the evidence shows that Mr. Cathey exhibited significantly subaverage general intellectual functioning concurrent with deficits in adaptive behavior that originated before the age of 18.

209. The preponderance of the evidence shows several risk factors for mental retardation present in Mr. Cathey's history.

210. The preponderance of the evidence shows that Mr. Cathey is a person with mental retardation. Accordingly, under the holdings of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), he cannot be put to death. His death sentence must be modified to a sentence of life imprisonment.

211. The Flynn Effect is a scientifically valid and reliable phenomenon applied to correct for norm obsolescence.

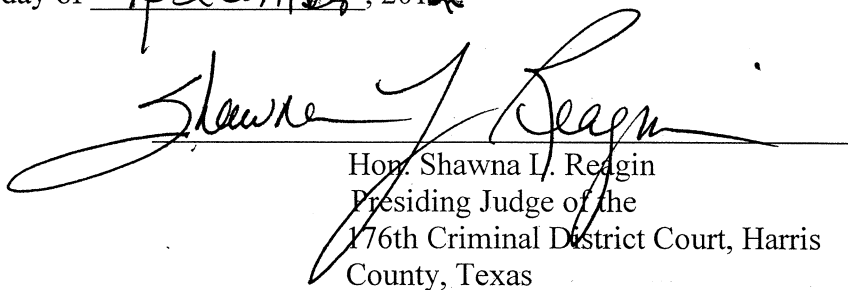
212. The Flynn Effect is used by clinical practitioners in the diagnosis of mental retardation and is used by practitioners outside the criminal justice system to correct for norm obsolescence.

213. The Flynn Effect should be applied to individual test results to correct for norm obsolescence when a test with aging norms is used, and it is a generally accepted scientific procedure.

214. The Flynn Effect has a known or potential error rate sufficiently precise to be applied.

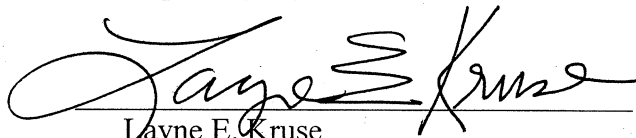
215. Any findings of fact determined to be conclusions of law shall be such, and any conclusion of law determined to be a finding of fact shall be so.

SIGNED this 31 day of December, 2012

  
Hon. Shawna L. Reagin  
Presiding Judge of the  
176th Criminal District Court, Harris  
County, Texas

Respectfully Submitted,

K.S. "Gator" Dunn  
Attorney at Law  
State Bar No. 00789266  
101 W. Philipps Street, Suite 113  
Conroe, Texas 77301  
Telephone: (936) 760-3300  
Mailing Address:  
594 Sawdust Road, Suite 332  
The Woodlands, Texas 77380  
Telephone: (281) 362-7156  
Telecopier: (936) 321-8643

A handwritten signature in black ink, appearing to read "Layne E. Kruse", written over a horizontal line.

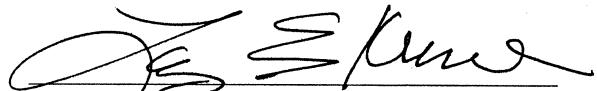
Layne E. Kruse  
State Bar No. 11742550  
Brett Young  
State Bar No. 24042203  
Adam Bernhard  
State Bar No. 24069373  
Sumera Khan  
State Bar No. 24064319  
FULBRIGHT & JAWORSKI L.L.P.  
1301 McKinney, Suite 5100  
Houston, Texas 77010-3095  
Telephone: (713) 651-5151  
Telecopier: (713) 651-5246

*Counsel for Eric Dewayne Cathey*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of February, 2011, copies of these Proposed Findings of Fact and Conclusions of Law was served by certified mail on the Respondent at the following addresses:

Roe Wilson, Esq.  
Office of the Harris County District Attorney  
1201 Fannin, Suite 600  
Houston, Texas 77002

  
Layne E. Kruse

**CAUSE NO. 713189-B**

**EX PARTE**

) (

**IN THE DISTRICT COURT**

) (

**HARRIS COUNTY, TEXAS**

**ERIC DEWAYNE CATHEY,  
Applicant**

) (

**176<sup>TH</sup> DISTRICT COURT**

**ORDER**

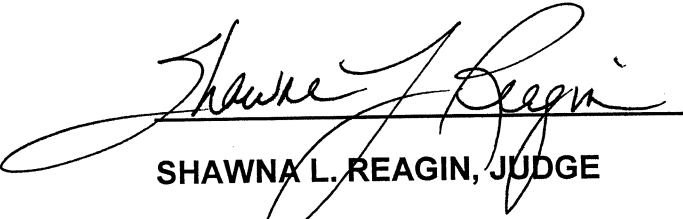
The Clerk is hereby **ORDERED** to prepare a transcript of all papers in Cause No. 713189-B and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. All of the Applicant's pleadings filed in Cause No. 713189-B, including his Application for Writ of Habeas Corpus;
2. All of the Respondent's pleadings filed in Cause No. 713189-B, including the Respondent's Original Answer and Supplemental Answer;
3. All affidavits and exhibits filed in Cause No. 713189-B;
4. This Court's findings of fact, conclusions of law and order recommending relief in Cause No. 713189-B;
5. Any Proposed Findings of Fact and Conclusions of Law submitted by either the Applicant or the Respondent in Cause No. 713189-B;
6. The reporter's record of the writ hearing held January 22-26, 2010, in Cause No. 713189-B; and
7. The indictment, judgment, sentence, docket sheet and appellate record in Cause No. 713189, unless they previously have been forwarded to the Court of Criminal Appeals.

The Clerk is further **ORDERED** to send a copy of the Court's findings of fact and conclusions of law, including its order, to Applicant's counsel: Layne Kruse, Fulbright & Jaworski, 1301 McKinney, Suite 1500, Houston, Texas 77010 and to Respondent: Roe Wilson, Harris County District Attorney's Office, 1201 Franklin, Suite 600, Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE APPLICANT'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 713189-B.

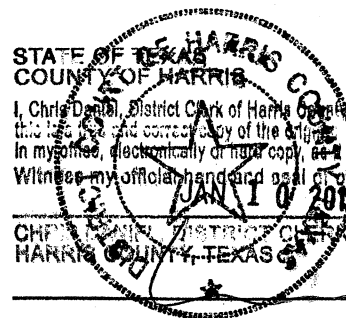
SIGNED this 31<sup>ST</sup> day of December, 2012.

A handwritten signature in black ink, reading "Shawna L. Reagin", is written over a horizontal line.

SHAWNA L. REAGIN, JUDGE

176<sup>TH</sup> DISTRICT COURT

HARRIS COUNTY, TEXAS



STATE OF TEXAS  
COUNTY OF HARRIS

I, Chris Daniels, District Clerk of Harris County, Texas, certify that  
this is a true and correct copy of the original record filed and or recorded  
in my office, electronically or hard copy, as it appears on this date.  
Witness my official hand and seal of office this

CHRIS DANIELS, DISTRICT CLERK  
HARRIS COUNTY, TEXAS

Deputy