



**THERESA CHANG**  
**HARRIS COUNTY DISTRICT CLERK**

September 28, 2007


KATHRYN KASE  
ATTORNEY FOR APPLICANT  
412 MAIN, SUITE 1150  
HOUSTON, TX 77002

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 693143-B in the 351st District Court.

- State's Original Answer Filed
- Affidavit
- Court Order Dated
- Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.
- Proposed Findings of Fact and Order September 28, 2007
- Other

Sincerely,

  
Gwen Moore, Deputy  
Criminal Post Trial

Enclosure(s) –

CAUSE NUMBER 693143-B

EX PARTE

§ IN THE 351<sup>ST</sup> DISTRICT COURT

§ OF

DANIEL ANGEL PLATA,  
APPLICANT

§ HARRIS COUNTY, TEXAS

**F I L E D**  
District Clerk  
**SEP 28 2007**  
Time: \_\_\_\_\_  
Harris County, Texas  
By: \_\_\_\_\_ Deputy

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court, having considered the allegations contained in the instant Application for Writ of Habeas Corpus, all exhibits and testimony admitted at the November 2007 depositions in Mexico City, Mexico, all exhibits and testimony admitted at the December 2007 hearing, all subsequent documents admitted by the agreed order, the trial court records and appellate records, and Respondent's Answer and its Supplemental Answer and exhibits submitted therewith, makes the following findings of fact and conclusions of law regarding Applicant Daniel Angel Plata's allegation that he is a person with mental retardation:

**I.**

**FINDINGS OF FACT**

**A. PROCEDURAL HISTORY**

1. The Applicant, Daniel Angel Plata, was formally charged by way of indictment on July 28, 1995, in the 351<sup>st</sup> District Court in Harris County, Texas, with the offense of capital murder. [S.F. Vol. 1:11<sup>1</sup>]

2. Due to Mr. Plata's status as an indigent person, two lawyers were appointed to represent Mr. Plata: Ricardo Rodriguez and Jonathan Munier.

<sup>1</sup> "S.F." refers to the Statement of Facts from Mr. Plata's trial.

*27/1/08  
R/12/1/07*

3. Mr. Plata pleaded guilty to capital murder before a jury on October 14, 1996, at the close of the state's case. [S.F. Vol. 27:172-92]

4. Mr. Plata was assessed the death penalty by a jury on October 18, 1996. [S.F. Vol. 1:210]

5. The Texas Court of Criminal Appeals affirmed Mr. Plata's conviction and sentence in an unpublished decision dated July 6, 1998. *Plata v. State*, Cause No. 72,639, at \*2 (Tex. Crim. App. 1998) (unpublished). A petition for writ of certiorari was not filed in the United States Supreme Court.

6. On or about July 31, 1998, Mr. Plata's state petition for writ of habeas corpus was filed with the trial court and the Court of Criminal Appeals. *Ex parte Daniel Angel Plata*, No. 69,749-01 (Tex. Crim. App. 2002) (unpublished). The trial court entered findings of fact and conclusions of law and denied relief on June 27, 2000. *Id.* The Court of Criminal Appeals affirmed the denial of relief on October 4, 2000, in another unpublished order. *Id.* A petition for writ of certiorari was not filed in the United States Supreme Court.

7. On June 18, 2003, Mr. Plata filed a successor application for writ of habeas corpus in the 351<sup>st</sup> District Court in Harris County, Texas, and in the Texas Court of Criminal Appeals, and asserted that it would violate the Eighth Amendment to the United States Constitution to execute Mr. Plata because he is mentally retarded; and that his death sentence violated the Sixth Amendment under *Atkins* and *Ring*, because the jury's verdict did not include a determination of an essential element of capital murder: that Mr. Plata is not mentally retarded. [Application for Post-Conviction Writ of Habeas Corpus, *Ex parte Daniel Angel Plata*, Cause No. 693143-B (Tex. Crim. App. & 351<sup>st</sup> Dist. Ct. – June 18, 2003)]

8. On September 24, 2004, the Court of Criminal Appeals entered an order finding that the ground of Mr. Plata's application asserting that he is a person with mental retardation satisfied the requirements of section 5 of article 11.071 of the TEXAS CODE OF CRIMINAL PROCEDURE. The Court did not so find with regard to the ground asserting that Mr. Plata's death sentence violated the Sixth Amendment under *Atkins* and *Ring*, because the jury's verdict did not include a determination of an essential element of capital murder: that Mr. Plata is not mentally retarded. Order, *Ex parte Plata*, No. 46,749-02 (Tex. Crim. App. – Sept. 24, 2004) (unpublished). The Court referred Mr. Plata's mental retardation claim to the trial court for determination. *Id.*

9. On March 24, 2005, Mr. Plata filed a separate application for writ of habeas corpus under Cause No. 693143-C with the Court of Criminal Appeals pursuant to section 5 of article 11.071 of the TEXAS CODE OF CRIMINAL PROCEDURE. That application concerns the Vienna Convention on Consular Relations and is not before this Court.

10. On March 28, 2005, the Respondent filed an Answer under Cause No. 693143-B to Mr. Plata's application for a writ of habeas corpus asserting that he is a person with mental retardation. Respondent filed a Supplemental Answer under Cause No. 693143-B to Mr. Plata's application on March 16, 2006.

11. On November 16 and 17, 2006, Mr. Plata held depositions in Mexico City in the instant matter pursuant to this Court's Order and articles 39.02 and 39.04 of the TEXAS CODE OF CRIMINAL PROCEDURE. Respondent, the court reporter, and Harris County translators were present by telephone. The following witnesses were brought from Michoacan, Mexico, and deposed on behalf of Mr. Plata: Luis Felipe Lopez Zapien, Jorge Sosa, Maria Eleazar Herrera

Solis, Irma Chavez Serrano, Estela Cedillo Diaz, Jose Cornejo Gutierrez, Lucila Estrada Mondagon. None of these witnesses have testified in any previous proceeding in this case.

12. On December 11, 12, 13, 14, 18 and 20, 2006, the trial court conducted an evidentiary hearing on Mr. Plata's claim of mental retardation. Both parties called witnesses and submitted evidentiary affidavits in support.

13. Upon the agreement of the parties and the Court on December 20, 2006, the parties submitted rebuttal and sur-rebuttal evidence by affidavit to the Court.

#### **B. THE GUIDING LEGAL STANDARD**

14. In determining whether Mr. Plata has mental retardation, the Court has been guided by the clinical definitions of mental retardation developed by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"). Each organization recognizes 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 18. AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9<sup>th</sup> ed. 1992); APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4<sup>th</sup> ed. 2000).

15. In *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), the 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 HEALTH & SAFETY CODE §§ 591.003(13) & (16)). The Court then applied that definition in determining whether the applicant presented sufficient evidence of mental retardation.

16. Each component of the definition of mental retardation requires additional explanation. The first requirement is that the consensus among mental health professionals is that the requirement of significantly subaverage general intellectual functioning is satisfied by a full-scale IQ of 70 or below.

17. Next, with respect to adaptive functioning, the AAMR and APA definitions require that the limitations in adaptive functioning encompass at least two of the following areas: communication, self-care, home living, social skills (APA describes this as “social/interpersonal skills”), community use (APA describes this as “use of community resources”), self-direction, health and safety (APA describes “health” and “safety” as two distinct domains), functional academics, leisure, and work.

18. Third, with respect to the requirement that the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of 18, it is not required that there be a diagnosis of mental retardation before the person’s eighteenth birthday. Rather, it is necessary only that the limitations in adaptive functioning be apparent before the age of 18, that IQ testing sometime during the person’s life reliably establish an IQ of 75 or below,<sup>2</sup> and that

---

<sup>2</sup> The consensus among mental health professionals is that a full-scale IQ of 70 or below satisfies the requirement of significant limitations in intellectual functioning. IQ tests are considered not to be perfectly accurate, however, because of “variations in test performance, examiner’s behavior, or other undetermined factors.” 2002 AAMR MANUAL, at 57. 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 scores 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”).

there be no intervening reason, such as a traumatic head injury, for the person's IQ to have diminished since the age of eighteen.

19. Finally, it must be noted that since the Texas Legislature adopted the AAMR definition of mental retardation, the AAMR has modified its definition. The modified definition retains the same three criteria but has changed significantly the description of adaptive functioning. The new definition is set forth in the Tenth Edition of the AAMR's manual, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (2002)* ["2002 AAMR MANUAL"]:

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

20. The 2002 AAMR MANUAL provides examples of "representative skills" in each area. Representative conceptual skills are "language, reading and writing, money concepts, and self-direction." *Id.* at 82. Representative social skills are "interpersonal, responsibility, self-esteem, gullibility, naivete, follows rules, obeys laws, avoids victimization." *Id.* Representative practical skills are "activities of daily living, instrumental activities of daily living, occupational skills, and maintains safe environments." *Id.*

21. The Court has relied on both the 9<sup>th</sup> and 10<sup>th</sup> editions of the AAMR definition of mental retardation and the APA's definition of mental retardation to determine whether Mr. Plata has mental retardation.

### **C. THE DETERMINATION OF MR. PLATA'S INTELLECTUAL FUNCTIONING**

22. Mr. Plata's IQ scores establish that he has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning.

23. From 2002 through 2006, Mr. Plata completed a total of five tests of intellectual ability administered by licensed professional psychologists. Two of these tests were full-scale measures of IQ and two were tests of nonverbal intelligence. On all five instruments, Mr. Plata obtained scores that show his intellect to be that of a person with mental retardation. Moreover, although Mr. Plata's obtained full scale score on the Wechsler Adult Intelligence Scale-III from 2005 must be disregarded due to fatal errors in George Carl Denkowski, Ph.D.'s administration and scoring of that instrument, Mr. Plata's remaining scores place his intellect in the range of a person with mental retardation.

24. On May 29, 2003, Antolin M. Llorente, Ph.D., who held an active license as a psychologist in the State of Texas, administered two tests to assess Mr. Plata's intellectual functioning: the test of Nonverbal Intelligence-Second Edition (TONI-2) and the Wechsler Abbreviated Scale of Intelligence (WASI). Both tests provide validity to subsequent test scores that place Mr. Plata in the range of persons with mental retardation. Mr. Plata obtained a full scale score of 71 on the TONI-2 and, in addition, Mr. Plata obtained the following scores on the WASI:

Verbal IQ Score:	65
Performance IQ Score:	69
Full Scale IQ Score:	65

[Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 2, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

25. On March 21 and 22, 2006, at the Harris County Jail, the state's expert witness, George Carl Denkowski, Ph.D., evaluated Mr. Plata and administered the WAIS-III and the Comprehensive Test of Nonverbal Intelligence (C-TONI). Mr. Plata obtained a 61 on the C-TONI and Dr. Denkowski reported that Mr. Plata obtained the following scores on the WAIS-III:



Verbal IQ Score: 72  
Performance IQ Score: 73  
Full Scale IQ Score: 70

[Affidavit of George Carl Denkowski, Ph.D., attached as Exhibit C to Respondent's Amended Answer, No. 693143-B; H.T. Vol. 17:Def. Exh. 97.<sup>3</sup>] In fact, Dr. Denkowski's scoring of the WAIS-III was incorrect and, upon re-scoring of the test by expert Jack M. Fletcher, Ph.D., it was revealed that Mr. Plata actually obtained a lower full-scale IQ:

Verbal IQ Score: 70  
Performance IQ Score: 73  
Full Scale IQ Score: 69

[Affidavit of Jack M. Fletcher, Ph.D., at ¶15 & Appendix I (filed Jan. 5, 2007)]

26. On October 30, 2006, at the Polunsky Unit of the Texas Department of Criminal Justice, Susana A. Rosin, Ph.D., a licensed psychologist in the State of Texas, administered the WAIS-III to Mr. Plata. She also administered the verbal subtests of the Escala Wechsler de Inteligencia para Adultos-III (Edicion Moderna, 1997), also known as the "Spanish WAIS-III." Mr. Plata obtained a 70 on the Verbal subtest of the Spanish WAIS-III, and he obtained the following scores on the WAIS-III:

Verbal IQ Score: 66  
Performance IQ Score: 69  
Full Scale IQ Score: 65

[H.T. Vol. 16: Def. Exh. 75]

27. Mr. Plata's full scale score of 65 on the WAIS-III administered by Dr. Rosin is reliable and credible for the purposes of determining that he has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning because Dr.

Rosin tested Mr. Plata for effort and because she also evaluated his intellectual ability in his native language, which is Spanish. [H.T. Vol. 16: Def. Exh. 75]

28. The WAIS-III score obtained by Dr. Rosin, the WASI and TONI-2 score obtained by Dr. Llorente and the C-TONI score obtained by Dr. Denkowski placing him in the mentally retarded range are reliable indicators of Mr. Plata's functioning. [H.T. Vol. 2: 106-11]

29. There is no indication Mr. Plata's full scale IQ score on the WAIS-III was artificially depressed due to malingering. Dr. Rosin administered the Test of Memory Malingering (TOMM) to Mr. Plata ensure that he was not malingering, which is also known as faking poor performance. The TOMM is administered in three rounds. Individuals prone to malingering are expected to score lower on the third round, but Mr. Plata scored better on each round of the TOMM. He obtained a correct score of 33 on the first trial, a correct score of 37 on the second trial and a correct score of 42 on the third trial, which was administered approximately fifteen minutes after the second trial. Thus, Mr. Plata did not exhibit any indication that he was malingering while being assessed by Dr. Rosin. [H.T. Vol. 16: Def. Exh. 75]

30. There is no evidence that bilingualism depressed Mr. Plata's WAIS-III score. The Verbal IQ score of 70 that Mr. Plata attained on the Spanish WAIS-III administered by Dr. Rosin also lends credibility and reliability to his WAIS-III score because the Spanish WAIS-III score demonstrated that his intellect is limited whether he is evaluated in English or Spanish. [H.T. Vol. 16: Def. Exh. 75] Dr. Rosin has been licensed as a psychologist in the state of Texas since June 1985. She received her Ph.D. in psychology from Miami University in Oxford, Ohio, in

---

<sup>3</sup> "H.T." refers to the transcript of proceedings in this habeas case. The reporter's record denotes the Applicant's exhibits "Defendant's Exhibits" and they will be referred to as "Def.

1984. From 1983 to 1985, she was a post-doctoral fellow in clinical psychology at the Texas Children's Hospital and the Baylor College of Medicine in Houston. From 1986 to 1987, she was a staff psychologist in the Student Counseling Center at the University of Texas Health Science Center. She has been in private practice since September 1984 and her practice has regularly included evaluations for mental retardation in both a clinical, and forensic, capacity. While a post-doctoral fellow, she published psychological research in peer-reviewed publications. Because she is a native of Cuba and is fluent in the Spanish language, Dr. Rosin is frequently called upon to evaluate Spanish-speaking individuals. She also has served as a presenter at a psychological conference in Mexico and she frequently lectures on mental retardation in death penalty cases. [H.T. Vol. 16: Def. Exh. 75] Dr. Rosin has conducted hundreds of evaluations over the past 21 years and has been accepted as an expert on the issue of mental retardation in capital cases. *See, e.g., Ex parte Matamoros*, Cause No. 693410-B (263<sup>rd</sup> Dist. Ct., Harris County 2006).

31. Dr. Rosin was well suited to administer the Verbal subtest of the Spanish WAIS-III to Mr. Plata because she is a native Spanish speaker and, as a result of more than 20 years of clinical practice in Houston, is well versed in Mexican culture. Additionally, she routinely conducts clinical assessments of Spanish-speaking clients. [H.T. Vol. 16: Def. Exh. 75]

32. Although the Spanish WAIS-III was normed in a predominantly Mexican and Central/South American population and the WAIS-III was normed on the U.S. population, Dr. Rosin found that Mr. Plata's Spanish WAIS-III Verbal subtest scores to be very close to his obtained WAIS-III Verbal IQ of 66. Moreover, his score on the Verbal subtest of the Spanish WAIS III put him in the 2<sup>nd</sup> percentile of all test takers. She further observed that the content of

---

Exh." throughout.

his answers in both languages was similarly poor, thus lending weight to the conclusion that Mr. Plata's deficits are a result of "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning, and not because he has a poor command of the English language. [H.T. Vol. 16: Def. Exh. 75]

33. Mr. Plata's test scores from the 2003 assessment by Dr. Llorente lend further weight and reliability to the WAIS-III score of 65 that Mr. Plata scored during Dr. Rosin's assessment. [H.T. Vol. 2:104-11]

34. Dr. Llorente is a practicing neuropsychologist who is bilingual in Spanish. He has evaluated a number of defendants for mental retardation. In some of those cases, he has found capital defendants to not have mental retardation. [H.T. Vol. 2:38-39, 74-75] He also regularly evaluates adults for retardation in his positions as Director of Neuropsychology at the Mount Washington Pediatric Hospital in Baltimore, MD, and as Associate Clinical Professor in the Department of Pediatrics and Psychology at the University of Maryland School of Medical. He has designed intelligence tests and, because he is a native of South America, he is able to assess individuals in both English and Spanish. He received a Ph.D. in clinical psychology with specialization in child neuropsychology from Oklahoma State University in 1993. He held a post-doctoral fellowship in psychiatry and bio-behavioral sciences at the University of California School of Medicine in Los Angeles from 1993 to 1995. From 1992 to 1993, he held a Residency in Psychology at the Johns Hopkins University School of Medicine in Baltimore, MD. He has published more than 27 articles in peer-reviewed journals, and has contributed chapters and other writings on neuropsychology and mental illness in adults to more than 20 books. His publications include literature on cross-cultural issues in psychology, and he has presented psychological papers to psychological professionals in the United States, Mexico and Venezuela.

He currently is licensed to practice psychology in Maryland and California. His California license is dormant. He was licensed in Texas until 2005, but relinquished the license as a result of having relocated to Maryland. He has no disciplinary history in Texas. And he has been accepted as an expert witness on mental retardation by other courts. [H.T. Vol. 2:28-36; H.T. Vol. 15: Def. Exh. 60]

35. Dr. Llorente found no evidence that Mr. Plata was faking intellectual impairment. Before administering the WASI, Dr. Llorente administered several validity assessments in order to determine whether Mr. Plata was feigning “symptom exaggeration and/or response bias.” [Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 4, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] The results of the validity assessments showed that Mr. Plata “was being straightforward in his response to test items.” [*Id.*]

36. The validity assessments also supported the conclusion that Mr. Plata suffers from intellectual impairment. Mr. Plata’s performance – and, specifically, his perseveration on one test and his inadequate memory recall on another – “was marked by an output sometimes seen individuals with dampened intellect.” [Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 4, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

37. Not only was Mr. Plata unable to perform on an age-appropriate basis on the Block Design or Matrix Reasoning portions of the WASI, he also exhibited significant inability to perform on an age-appropriate basis on a number of other assessments made by Dr. Llorente. For example, Mr. Plata fell within the borderline range for his age when screened for attention and concentration. He performed no better than the low average range when tested for confrontational naming abilities in English and Spanish. And, he was found to be in the moderately deficient range when his visual spatial and perceptual organization skills were

compared to persons ranging from 16 to 49 years old. He also scored in the impaired range on testing designed to measure executive (frontal systems) skills functioning. [Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 5-7, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

38. Also significant was the family that Mr. Plata drew as part of the Kinetic Family Drawing assessment. As Dr. Llorente reported, Mr. Plata “drew stick figures. Although not always the case, *these types of drawings are sometimes seen in immature adults with altered levels of cognition*, as stick figures are appropriate outputs for children not mature adults.” [Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 8 [emphasis added], to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

39. Like Dr. Rosin, Dr. Llorente also determined that Mr. Plata’s bilingualism did not depress his IQ scores. Dr. Llorente found that Mr. Plata’s performance on the TONI-2 demonstrated that he was intellectually impaired regardless of whether he was tested in English or in his native language of Spanish. The score of 71 that Mr. Plata obtained on the TONI-2 placed Mr. Plata in the range of persons with mental retardation and is statistically consistent with his WASI and WAIS-III scores. [H.T. Vol. 2: 106-11; Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 8, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

40. Dr. Llorente also administered the Ravens Standard Progressive Matrices, which has published norms for Hispanics in the United States. On this instrument Mr. Plata obtained a score within the Deficient range (1<sup>st</sup> percentile) when compared to his same age peers and within the Deficient-to-Borderline (3<sup>rd</sup> percentile) range when compared to individuals with 0-6 years of

education. [Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 8-9, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

41. Mr. Plata's full scale score of 65 on the WAIS-III administered by Dr. Rosin correlates with the full scale score of 65 that Mr. Plata achieved on the WASI administered by Dr. Llorente. [H.T. Vol. 2:103-04] Studies investigating the degree of association between IQ scores on the WASI and on the WAIS-III have shown a correlation of .92 between a four subtest administration of the WASI and the WAIS-III full scale IQ score. [H.T. Vol. 2:104-05] Additionally, to the extent WASI scores tend to diverge from WAIS-III scores, WASI scores tend to err on the side of over-estimating IQ. [H.T. Vol. 2:104] Thus, the fact that Mr. Plata's WAIS-III and WASI scores were identical lend further weight to the conclusion that Mr. Plata's IQ test scores demonstrate that he has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning. [H.T. Vol. 2:101; Affidavit of Jack M. Fletcher, Ph.D., at ¶29 (filed Jan. 5, 2007)]

42. If a confidence interval with a standard error of measurement of three to five points is established around the mental retardation cut point of 70 (65-75 for IQ; 67-73 for adaptive behavior), Mr. Plata does not have a single score on the measure of IQ or adaptive behavior that is outside of this confidence interval. Multiple assessments that are consistent should be appropriately weighted in determining whether a person meets diagnostic criteria for mental retardation. [Affidavit of Jack M. Fletcher, Ph.D., at ¶29 (filed Jan. 5, 2007)]

43. Dr. Denkowski's Assessment. No evidentiary weight is accorded to the full scale score of 70 that Mr. Plata obtained in Dr. Denkowski's administration of the WAIS-III because Dr. Denkowski invalidated the norms of the test by committing errors in administration and scoring. Nor is any evidentiary weight accorded to the "estimated" IQ score of 77 that Dr.

Denkowski also provided because Dr. Denkowski's purported reasons for estimating Mr. Plata's IQ is not supported by the test data or the science of psychological assessment. [H.T. Vol. 3:41; Affidavit of Jack M. Fletcher, Ph.D., at ¶¶12 -19 (filed Jan. 5, 2007)]

44. Language Proficiency. Mr. Plata is a native of Angao, Michoacan, Mexico and is a native Spanish speaker who also speaks English. The correct procedure for assessing intelligence in a person who is bilingual is to first assess their language proficiency in both languages. [H.T. Vol. 2:28-29:Affidavit of Jack M. Fletcher, Ph.D., at ¶8 (filed Jan. 5, 2007)]

45. Assessments for language proficiency are performed because tests should generally be administered in the test-taker's most proficient language, unless proficiency in the less-proficient language is part of the assessment. [Affidavit of Jack M. Fletcher, Ph.D., at ¶8 (filed Jan. 5, 2007)]

46. Dr. Denkowski's assertion that he did not believe that an assessment of language proficiency was necessary is unpersuasive. At the time that Dr. Denkowski evaluated Mr. Plata, it was evident in the case record that Mr. Plata was a native Spanish speaker who also spoke some English. Without assessing Mr. Plata's proficiency in both languages, Dr. Denkowski could not determine whether his assessments of Mr. Plata's intelligence or adaptive behavior were adequate. [Affidavit of Jack M. Fletcher, Ph.D., at ¶¶8-9 (filed Jan. 5, 2007)]

47. Unlike Drs. Rosin and Llorente, Dr. Denkowski is not proficient in Spanish and cannot determine language proficiency in Spanish. Dr. Denkowski could not assess the extent to which Mr. Plata's responses were affected by a failure to understand the item in English or generate an appropriate response in English. Consequently, Dr. Denkowski was not and is not



qualified to evaluate Mr. Plata for mental retardation.<sup>4</sup> [Affidavit of Jack M. Fletcher, Ph.D., at ¶11 (filed Jan. 5, 2007)]

48. Estimation of IQ Score. Dr. Denkowski's assertion that discrepancies in Mr. Plata's subtest scores support the use of clinical judgment to estimate a higher IQ score than Mr. Plata obtained on the WAIS-III is not supported by the subtest patterns, Dr. Denkowski's scoring, or by the science of psychological testing. First, it is not generally accepted practice within the field of psychological assessment to obtain an IQ score, declare it invalid, and then estimate an IQ score. Second, Dr. Denkowski's estimate does not have an appropriate scientific basis, Mr. Plata's subtest profile does not justify use of clinical judgment to raise the obtained score, and Dr. Denkowski is not versed at all in Spanish language or Mexican culture to justify use of clinical judgment in this case. Therefore, no evidentiary weight can be accorded to the estimated IQ score of 77 that Dr. Denkowski seeks to assign to Mr. Plata. [Affidavit of Jack M. Fletcher, Ph.D., at ¶¶10-19 (filed Jan. 5, 2007)]

49. Dr. Denkowski's estimate is invalid because it rests on his erroneous conclusion that Mr. Plata obtained a score of 70 on the WAIS-III. As University of Houston Distinguished

---

<sup>4</sup> Dr. Denkowski's lack of qualifications to evaluate a bilingual individual are evident in his statement at the hearing that, had he decided that an assessment of language proficiency was necessary, he would have employed an interpreter. The use of a Spanish speaking interpreter is inconsistent with generally accepted standards for licensed psychologists. As noted neuropsychologist Muriel Lezak has written, ". . .when not fluent in the patient's language, ethical practice should lead the neuropsychologist to refer the patient to a colleague who is fluent in the patient's language or to collaborate with a bilingual clinician. . ." Lezak, Howieson & Loring, NEUROPSYCHOLOGICAL ASSESSMENT 314 (2004). Moreover, testing standards established by the American Educational Research Association, the American Psychological Association and the National Council on Measurement in Education state that any attempt to translate a test should be done with extreme caution and only when an adequately translated version of a test or a suitable nonverbal test are not available. THE STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 95 (AERA 2004).

Professor Jack M. Fletcher, Ph.D., has shown, the full-scale score of 70 that Dr. Denkowski reported for Mr. Plata on the WAIS-III is wrong. Dr. Denkowski committed scoring errors with regard to the following subtests: Vocabulary (Item 13), Similarities (Item 12), and Comprehension (Items 8 and 12). On each of these items Dr. Denkowski scored more liberally than would be permitted by the WAIS-III guidelines. The effect of these scoring errors is to reduce Mr. Plata's Verbal IQ to 70, the Verbal Comprehension Index to 72, and the Full Scale IQ to 69. These changes reflect carelessness on Dr. Denkowski's part and significantly increase the probability the Mr. Plata's WAIS-III scores are below the cut point associated with mental retardation. [Affidavit of Jack M. Fletcher, Ph.D., at ¶15 (filed Jan. 5, 2007)]

50. Dr. Fletcher is a full professor in the Department of Psychology at the University of Houston. For the past 25 years he has completed research on children and adults with developmental disabilities with a focus on the development of reading language and other cognitive skills. 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, 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. These courses include intelligence, adaptive behavior, and neuropsychological assessments. He routinely conducts assessment for mental retardation and other developmental disabilities in children and adults. He has specific expertise in classification and measurement issues pertaining to the diagnosis of people with disabilities. He is a member of the International Neuropsychological Society, the American Psychological Association, Association for Psychological Science, Council for Exceptional Children, International Reading Association, Learning Disabilities Association of

America, and the International Dyslexia Association. He is President-Elect of the International Neuropsychological Society, and a Fellow of Division 12 (Clinical Psychology) and 40 (Clinical Neuropsychology) of the American Psychological Association. He served on and chaired the Mental Retardation/Development Disabilities review committee at the National Institute of Child Health and Human Development. He served on the President's Commission on Special Education and the National Research Council Committee on Scientific Principles in Education Research. He has published two books and more than 200 articles usually involving children and adults with a variety of disabilities, including classification and definition, cognitive and neurological correlates, assessment, and intervention. Dr. Fletcher reviewed Dr. Denkowski's affidavit regarding his evaluation of Daniel Plata, reviewed the protocols for his administration of the Wechsler Adult Intelligence Scale-III (WAIS-III) and the Adaptive Behavior Assessment Scale (ABAS) to Mr. Plata. He was also present for all of Dr. Denkowski's testimony in this matter in the 351<sup>st</sup> District Court. [Affidavit of Jack M. Fletcher, Ph.D., at ¶¶1-7 (filed Jan. 5, 2007)]

51. Dr. Denkowski committed additional errors in test administration and scoring the WAIS-III. [H.T. Vol. 3:12 & 41] When administering the Comprehension subtest of the WAIS-III to Mr. Plata, Dr. Denkowski failed to correctly read two questions to Mr. Plata. [H.T. Vol. 3:14 & 17-18; H.T. Vol. 16: Def. Exhs. 78 & 79] The WAIS-III requires that test questions be read as written. [H.T. Vol. 3:18-19, 21 & 23]

52. Dr. Denkowski also violated the "reverse rule" when administering the Comprehension subtest of the WAIS-III. The reverse rule changes the order of the subtest questions when an examinee scores very low on introductory questions. Mr. Plata scored very low on the introductory questions, but Dr. Denkowski never applied the reverse rule. [H.T. Vol.

3:22-23; H.T. Vol. 16: Def. Exh. 80] When the WAIS-III exam are not read as written or when the reverse rule is not followed where required, the norms of the test are violated and the test results cannot be relied upon. [H.T. Vol. 3:18-19, 21 & 23; H.T. Vol. 16: Def. Exh. 77]

53. Dr. Denkowski also committed errors in scoring the Vocabulary subtest on the WAIS-III. [H.T. Vol. 3:24-25; H.T. Vol. 16: Def. Exhs. 83 & 84] He gave Mr. Plata too many points for his answers to the question, "What does winter mean?" [H.T. Vol. 3:27-28]

54. These errors in scoring and administration show sloppiness on Dr. Denkowski's part and demonstrate that his methods are not reliable scientifically. [H.T. Vol. 3:12 & 41]

55. Nor does clinical judgment allow Dr. Denkowski to disregard Mr. Plata's obtained full scale IQ score of 69. The exercise of clinical judgment requires a reasoned and consistent application of scientific principles based on specific indications from the data. While it can be appropriate for psychologists to use clinical judgment when there are questions about the quality of assessment data available for an evaluation, the reasons that led Dr. Denkowski to apply clinical judgment to the intelligence tests that he administered are not appropriately established in his report or in his testimony. [Affidavit of Jack M. Fletcher, Ph.D., at ¶12 (filed Jan. 5, 2007)]

56. Although Dr. Denkowski asserted that Mr. Plata's low scores on Digit Span and Arithmetic reflect anxiety and poor academic achievement, it is equally possible that Mr. Plata's performance on these subtests were reduced by poor working memory or poor numerical. Moreover, Dr. Denkowski's assertion that anxiety and poor academic achievement reduced Mr. Plata's IQ score is unverified because Dr. Denkowski did not administer the Letter-Number Sequencing subtests. This is a supplemental subtest that along with Digit Span and Arithmetic makes up the Working Memory index of the WAIS-III. Because Dr. Denkowski did not

administer this subtest, his claim that anxiety and poor academic achievement was the cause of Mr. Plata's low IQ scores is scientifically unsupported and must be disregarded. [Affidavit of Jack M. Fletcher, Ph.D., at ¶13 (filed Jan. 5, 2007)]

57. The interpretations that Dr. Denkowski makes of the differences in Digit Span and Arithmetic relative to other verbal subtests, or Block Design, Picture Arrangement, and Matrix Reasoning to one another, are not supported because the scores are not significantly different and do not support the application of clinical judgment. Mr. Plata has essentially a flat profile. Even if anxiety and depression were considered major factors in his performance, these indications of his state of being at the time of the examination are the source of the measurement error associated with the WAIS-III and have already been accounted for in the standard error of measurement. [Affidavit of Jack M. Fletcher, Ph.D., at ¶13 (filed Jan. 5, 2007)]

58. There also is no scientific basis for Dr. Denkowski's assertion that the six-point difference between Mr. Plata's Verbal Comprehension Index score of 76 and his Full Scale IQ score of 70 is significant. This comparison is not scientifically appropriate and, if it were, a six-point discrepancy is not considered to be statistically significant. None of the hypotheses that a clinician would examine that would lead to the application of clinical judgment are present in this protocol. Therefore, this six-point difference also provides no basis for Dr. Denkowski's application of clinical judgment to estimate that Mr. Plata's full scale IQ score is a 77. [Affidavit of Jack M. Fletcher, Ph.D., at ¶14 (filed Jan. 5, 2007)]

59. Nor is there any basis for Dr. Denkowski's assertion that cultural and linguistic factors support estimating Mr. Plata's full scale IQ score to be a 77. If cultural and linguistic factors were an issue Mr. Plata would have demonstrated a significantly higher performance IQ

than Verbal IQ. This was not the case. [Affidavit of Jack M. Fletcher, Ph.D., at ¶16 (filed Jan. 5, 2007)]

60. The lack of discrepancy between Mr. Plata's scores on multi-factorial and culture-reduced IQ tests. In 2003, he obtained a score of 71 on the TONI-2 score and an education adjusted score on Raven's Progressive Matrices of 72. He obtained a WAIS-III from Dr. Denkowski in 2005 of 70 (actual IQ of 69), with a verbal IQ of 72 (actual 70) and a Performance IQ of 73. He had a Verbal Comprehension Index of 76 (actual 72) and a Perceptual Organization score of 74. Dr. Denkowski also obtained a score of 61 on the C-TONI. In 2005, Mr. Plata had a score of 65 on the WAIS-III. None of these scores are discrepant. All of these scores are within or below the confidence interval associated with mental retardation (65-75). According to the data cited in Dr. Denkowski's own affidavit Mr. Plata has never obtained a score on a multi-factorial or a culture reduced IQ test of 77. When there are multiple assessments that are in the confidence interval and when three tests show scores that are at or below the cut point for mental retardation, the probability that an examinee's true score on an IQ test is outside the range associated with mental retardation is extraordinarily low. Because Mr. Plata's IQ scores all fall within the same range (65 – 75), there is no basis for estimating Mr. Plata's IQ at 77. [Affidavit of Jack M. Fletcher, Ph.D., at ¶18 (filed Jan. 5, 2007)]

61. It is not generally accepted practice within the field of psychological assessment to obtain an IQ score, declare it invalid, and then estimate an IQ score with numbers. The procedures utilized by Dr. Denkowski have not been subjected to peer-review and no publications support this practice. There is no method for establishing the error rate. This approach does not meet the standards of practice in the field of psychology. [Affidavit of Jack M. Fletcher, Ph.D., at ¶19 (filed Jan. 5, 2007)]

62. Dr. Denkowski's application of clinical judgment in the assessment of IQ is poorly grounded in terms of methodology, need, and application. There are no discrepancies in Mr. Plata's obtained intelligence scores that would signal a need for adjustment. In dismissing the obtained scores, Dr. Denkowski has ignored the science on intellectual assessment. He does not consistently characterize the factors in Mr. Plata's cultural/linguistic background and experience for which adjustments should be made. The correct application of clinical judgment is based on the data that is generated by the actual assessment that informs not only the need to apply clinical judgment because of score discrepancies, but also the basis for its application – not the use of the data to inform the need for and application of clinical judgment. There are over 50 years of research comparing clinical and statistical decision making in psychology, medicine, and other disciplines. This literature shows consistently that statistical decisions are more reliable than clinical judgments and that the best results are obtained when clinicians make use of data, statistics and research, and do not simply ignore and dismiss data as Dr. Denkowski has done. [Affidavit of Jack M. Fletcher, Ph.D., at ¶28 (filed Jan. 5, 2007)]

63. WAIS-R administered by TDCJ. No evidentiary weight is accorded to the score of 83 derived from the Texas Department of Criminal Justice's administration of a short-form version of the Wechsler Adult Intelligence Scale-Revised (WAIS-R) to Mr. Plata in June 16, 1997. Other than a nearly illegible clinic note in Mr. Plata's TDCJ medical records, no raw data for this test was provided for evaluation by any of the psychological experts in this case, nor was any information produced regarding the conditions under which this test was administered, whether Mr. Plata was supervised while taking the test, whether the two- or four-subtest version was administered, and whether the test itself was the most current edition of the Wechsler Adult Intelligence Scale. Accordingly, the purported score of 83 from the WAIS-R is neither reliable

nor credible and, as even Dr. Denkowski has recognized, no evidentiary weight can be ascribed to it. [Affidavit of George Carl Denkowski, at 16, attached to Respondent's Supplemental Answer, No. 693143-B (Mar. 16, 2006)]

64. IQ Estimate by Jerome Banks Brown, Ph.D. Nor is any evidentiary weight accorded to the wholly non-scientific estimate of Mr. Plata's intelligence made by Jerome Banks Brown, Ph.D., during the punishment phase of Mr. Plata's trial. At that time and in response to cross-examination by the prosecution, Dr. Brown estimated Mr. Plata's IQ at "85 to 90." [S.F. Vol. 33:189] Dr. Brown's estimate did not rest on a formal measure of Mr. Plata's intelligence. Instead, Dr. Brown estimated Mr. Plata's IQ based on the "B scale" from the 16 Personality Factor Test. [Affidavit of Jerome Banks Brown, Ph.D., ¶4, attached as Exhibit 12 to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B; Affidavit of Antolin M. Llorente, ¶¶10-11, attached as Exhibit 13 to Applicant's Response to Respondent's Motion to Dismiss Subsequent Application for Postconviction Writ of Habeas Corpus (filed Aug. 19, 2004)] Because the personality test is not a formal, standardized measure of intelligence, it cannot be relied upon to estimate intelligence. [Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 2, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

65. Additionally, Dr. Brown did not supervise Mr. Plata in taking the test, nor did he ascertain whether Mr. Plata was able to read on the level required by the test. Dr. Brown left the 16 Personality Factor Test with Mr. Plata, who was then housed in the Harris County Jail, and told him to complete it in his cell. [S.F. Vol. 32:172] Dr. Brown also did not assess Mr. Plata's reading ability before giving him the test to complete. [Affidavit of Jerome Banks Brown, Ph.D., ¶3, attached as Exhibit 12 to Application for Post-Conviction Writ of Habeas Corpus, Cause No.



693143-B] As a result of these lapses in scientific method, Dr. Brown's 1996 estimate of Mr. Plata's intelligence is neither reliable nor credible.

**B. THE ASSESSMENT OF MR. PLATA'S ADAPTIVE BEHAVIOR**

66. According to the AAMR, limitations in adaptive behavior can and should be determined by using standardized tests that are normed on the general population, which includes people with and without mental retardation. A "significant" limitation is established by a score of two standard deviations below the mean in one of the three adaptive-behavior skill areas described in the 2002 edition of the AAMR MANUAL. [2002 AAMR MANUAL at 78 & 82; H.T. Vol. 3:49]

67. There are many respected standardized measures that are commonly used, including the Vineland Adaptive Behavior Scales, the AAMR Adaptive Behavior Scales (ABS), the Scales of Independent Behavior, the Comprehensive Test of Adaptive Behavior-Revised, and the Adaptive Behavior Assessment System-II (ABAS). Typically, these measures require the clinician to interview a parent, teacher, or direct-service provider of the individual being assessed. The interviewees should be well acquainted with the individual's behavior over an extended period of time and in multiple settings. Observations, interviews, and other assessment methods that gather information about adaptive behavior may complement standardized measures but ordinarily should not replace them. [2002 AAMR MANUAL at 84; H.T. Vol. 2:53-55]

68. However, diagnosing mental retardation will often require applying clinical judgment if earlier information is lacking or incomplete, if the individual's adaptive behavior cannot be assessed using standardized scales in his current environment, or if determining whether the onset was prior to age eighteen in an adult. Such is the situation here. Clinical

judgment is based on training, experience with others who are mentally retarded, and familiarity with the individual and his cultural environment. Dr. Llorente has that familiarity because, like Mr. Plata, he is a native Spanish speaker and has experience with the cultural environment in Mexico and the Hispanic community here. [2002 AAMR MANUAL at 94 & 95; H.T. Vol. 2:38]

69. Dr. Llorente assessed Mr. Plata by interviewing him for several hours, by interviewing his family members, by administering a battery of tests, and by reviewing a more extensive array of records than Dr. Denkowski. Dr. Llorente testified that there are several scales that can be used to measure a person's adaptive functioning, including the Vineland Adaptive Behavior Scales, but these scales were designed to assess adaptive behavior at the time they are administered, not retrospectively. Accordingly, as the AAMR recognizes may be necessary, Dr. Llorente appropriately applied his clinical judgment rather than adaptive scales to assess Mr. Plata's adaptive behavior prior to age eighteen. [2002 AAMR MANUAL at 94 & 95; H.T. Vol. 2:76-77; H.T. Vol. 16:Def. Exh. 66]

70. The Court finds Dr. Llorente's testimony and assessment regarding Mr. Plata's adaptive deficits more credible than Dr. Denkowski's testimony and assessment. Dr. Llorente not only spent several hours interviewing Mr. Plata, but he also interviewed Mr. Plata's family members and friends to learn about Mr. Plata's childhood, family history, and development. Dr. Denkowski, by contrast, limited himself to records provided by the Respondent and relied extensively on his own assessment of Mr. Plata. Dr. Denkowski's assessment of Mr. Plata on the Adaptive Behavior Assessment System-II (ABAS-II) improperly relied on Mr. Plata's self report and, as Dr. Fletcher has detailed, was scored in an improper and unscientific manner. [Affidavit of Jack M. Fletcher, Ph.D., at ¶¶20-29 (filed Jan. 5, 2007); H.T. Vol. 3:41; H.T. Vol. 16:Def. Exh. 66]

71. The Court credits Dr. Llorente's clinical judgments and the evidence he relied upon to make clinical judgment, as well as his determination that Mr. Plata has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning. [H.T. Vol. 2:124-25] The Court also finds as follows:

1. **The first adaptive behavior skill area is conceptual.**

72. Mr. Plata has the following deficits in the conceptual area:

73. Language. Mr. Plata exhibited difficulties in communication even in his native language of Spanish and, later, after he learned to speak English. He was late in acquiring the ability to speak as a child, and was further delayed in learning to speak in full sentences. [H.T. Vol. 14:54, ¶46]

74. As a youngster, he would mispronounce words in Spanish and continue his mispronunciations despite being corrected by family members. Reported his mother:

Many times, Daniel had problems pronouncing words, even though we would correct him and tell him the right pronunciation. Among his mispronunciations were "guerguenza" instead of "verguenza" (meaning "shame"), "niobia" instead of "novia" (meaning "girlfriend"), and "para bultos" instead of "para adultos" (meaning "for adults").

[Floresbinda Estrada Affidavit, ¶20, attached as Exhibit 4, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] Celia Hernandez, Mr. Plata's grandmother, who also spent a great deal of time with Mr. Plata when he was a child in Angao observed Mr. Plata's language issues:

[H]e would try to say "mi mama Celia" (my mother Celia) but he could not pronounce it properly, it would come out "ni'ama Celia." He pronounced the word "verguenza" (shame) as "guerguenza". He said "vergudilla" (dagger) instead of "verdugilla". His speech was very unclear until he was about 10 years old.

[H.T. Vol.14:Def. Exh.54, ¶33]

75. And even after age 10, Mr. Plata continued to have problems with language. Later testing revealed that he had significant problems with English, even though by the time of the testing he had lived and attended school in the Houston area for five years. [Daniel Plata Educational Records, attached as Exhibit 3 (Secondary ESL Data Sheet and IDEA Oral Language Proficiency Test II), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

76. Retired HPD officer Ponsiano Ramirez spent time with Mr. Plata when he was an adolescent and observed that he had great difficulty in understanding information. Mr. Ramirez recalled that when Mr. Plata did not understand a topic of conversation, he would walk away while the speaker was still speaking. He also would get upset when people used words he couldn't understand. [H.T. Vol.17:Def. Exh.90, ¶6-8]

77. Mr. Plata's difficulties with communication extended to his own discussions. Mr. Ramirez recalled that, even when Mr. Plata was speaking, he would lose track of his topic. He would flip from one subject to a totally different subject right in the middle of his own statement. [H.T. Vol.17:Def. Exh.90, ¶6-8]

78. Both Ponsiano Ramirez and his son, Charles Ramirez, noticed that Mr. Plata had difficulty pronouncing words. Sometimes Mr. Plata's speech was so difficult to understand and his pronunciation of words so unclear that Ponsiano Ramirez believed Mr. Plata had never learned how to use certain words correctly. [H.T. Vol.17:Def. Exh.89, ¶6 & Def. Exh.90, ¶6-8]

79. Ponsiano Ramirez does not believe that Mr. Plata's communications difficulties arose from drug use. As a police officer, he was trained to detect when a person was drunk or

high, and he never detected evidence that Mr. Plata was drunk or high when he was speaking to Mr. Ramirez. [H.T. Vol.17:Def. Exh.90, ¶6-8]

80. Artemio Espinosa, who supervised Mr. Plata at Luby's, also observed that he did not speak like other boys his own age. When Mr. Plata spoke, it appeared to Mr. Espinosa as if that required a lot of effort. [H.T. Vol 3: 11]

81. Reading and writing. Mr. Plata's mother, stepfather, and a family friend observed him to have great trouble with learning in general and reading in particular.

82. Teacher Estela Cedillo Diaz tried to teach Mr. Plata to read in the second grade in Angao, but was not successful. [H.T. Vol 16: Def. Exh. 86, at 126]

83. Mr. Plata was required to repeat the second grade in Angao because he did not know how to read. Schoolteacher Jorge Aguilar Sosa recalls that when Mr. Plata's reading skills remained poor even after he repeated second grade. [H.T. Vol 16: Def. Exh. 86, at 59]

84. According to Mr. Plata's stepfather, Nereo Estrada, "During the years that Daniel was in school, he struggled with learning. In those years, I rarely saw him with a book and I knew he had trouble reading." [Nereo Estrada Affidavit, ¶5, attached as Exhibit 5, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] Reyes P. Morales, a family friend who met Mr. Plata when Mr. Plata was 11 years old, said: "When I first met Daniel, I noticed that he could not read well. He could read slowly, but he would miss a lot of the words. I never noticed that his reading improved." [Reyes P. Morales Affidavit, ¶4, attached as Exhibit 6, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] According to Mr. Plata's mother, the children at Watkins Middle School called Mr. Plata "stupid" because of his learning problems. [Exhibit 4, ¶19, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

85. When he was 15 years old, Mr. Plata was enrolled in an English-as-a-Second-Language class at Langham Creek High School. His teacher, Patricia Lopes, reports that the class was not a "reading class," but she did assign exercises that required students to read in class. Based on the reading that Teacher Lopes observed Mr. Plata doing in class, she would estimate that his reading level was perhaps at the second or third grade level, or possibly even lower. [H.T. Vol.14:Def. Exh. 51, ¶6]

86. High school peers observed Mr. Plata's reading difficulties. Charles Ramirez remembers that, when Mr. Plata was in high school, he was looking at a magazine about low-rider cars and trying to read aloud from it. His reading was so terrible that Charles Ramirez thought Mr. Plata should not have been admitted to high school. [H.T. Vol.17:Def. Exh.89, ¶7]

87. Dr. Llorente found that Mr. Plata has trouble reading in English and Spanish. He evaluated Mr. Plata's reading, reading fluency and reading understanding in English on the Woodcock-Johnson - Third Edition - Test of Achievement (WJIII). The WJIII is the preferred test for evaluating reading because it evaluates fluency, speed and comprehension and, in this, is a better test than the Wide Range Achievement Test (WRAT). [H.T. Vol. 3:39-40]

88. Dr. Llorente found that, when Mr. Plata's reading abilities in English were tested, he performed at a third-grade level in all three areas, which placed him in the lowest percentile for his age group. Mr. Plata's reading skill in Spanish (assessed on the Woodcock-Munoz Language Survey, Spanish Form) was slightly higher: at the fifth grade level, which still placed him in the lowest percentile for his age group. Given that persons with mental retardation usually cannot read beyond the sixth grade level, Mr. Plata's reading levels in English and Spanish support a finding that he has retardation. [H.T. Vol. 3:39-40]

89. The fact that Mr. Plata has written letters to family members and friends and may have filled out TDCJ forms from his prison cell does not prove that he is without deficits in writing today. The letters obtained by Respondent are rife with grammar, punctuation, and spelling errors. For example:

- In a letter to Carol Savole dated February 20, 2005, Mr. Plata wrote: “Death row have 6 Buildings, each has 84 cells and they’re usually Full. **2 of those Buildings have been already Searched.**” He also wrote: “I see You got a little Angry For the way I was Treated when I had my lights in the cell messed up” and “I hope You are not offended because I ask You. **I don’t asking this kind of things** because I don’t want my penpals to think that I only care about their money, and is really not that.”
- In a latter to Sally Kingston dated June 21, 2006, Mr. Plata wrote: “my problem with this guy, is that he disrespect me more than 2 times. I try to be really patient because **I don’t want to Dificult my case more than what it is;**” and “**I bend my weist and Yesterday I woke up a little sort From my lower back.** But I could move around.”
- To Pascale Koukou he wrote: “Well, thank you for telling me to Feel Free to tell you anything I need... **I’m having my ups and Downs at this moments,** but I think I can manage For now. **But if things get worst,** I’ll tell you – okay?!”
- To Marina Schouten, he wrote on July 16, 2006: “See, this the worst part of beeing locked up not knowing what’s going on and beeing worried ETC.” He also wrote, “**Right now I’m too busy in Some drawings For my lawyer and my Family.**” And he wrote, “**in a way it is something From another world From the outside world. But well maybe Im the only one who See it that way,** and is not Normal?!”
- To Marina Schouten, in a letter dated August 5, 2006, he wrote: “it’s not very hot in Texas at this moment. **Some day we all gonna cooked.** hahaha ( Just kidding)” and “I’m glad to know you like spicy Food. **mexican Food is a lot Delicius with a spicy Taste.**”
- On August 7, 2006, in a letter to Marina Scouten he wrote: “Thank you. You really Surprise me with another Birthday wishes (the letter) I got the Birthday card, I think I mention that in one of the letter that I wrote to you last week. Again, thank you my Friend.” He also wrote: “**my neighbor got a little upset because I made him Feel really old. but his not angry at me.** he helps me a lot when Im having a hard Time putting writing Sentences together. So he helps me correct that.”

[H.T. Vol. 13: State's Exh. 32 (emphasis added)]

90. Further, there is evidence that inmates in neighboring cells have assisted Mr. Plata in writing correspondence and filling out TDCJ forms. [H.T. Vol.14:Def. Exh.52, ¶¶7-13] Moreover, as TDCJ Major Melodye Nelson conceded, the crude "telephone system" rigged by other inmates in the cells on Mr. Plata's death row unit would have allowed him to contact other inmates for writing assistance. [H.T. Vol. 5:229]

91. Academics in general. When Mr. Plata attended the first three years of school in Angao, Michoacan, Mexico. His first grade teacher, Maria Eleazar Herrera Solis, recalls that Mr. Plata had one of the lowest grade averages in the school. He was always one of the last students to turn in his homework, had difficulty comprehending, and was one of the worst students in the first grade. As a result, he barely passed the first grade. [H.T. Vol 16: Def. Exh. 86, at 83 & 84]

92. In the second grade, Mr. Plata did not learn mathematics, the month and the days of the calendar, or how to tell the time. When he was asked to tell the time, teacher Estela Cedillo Diaz recalls that Mr. Plata would cry because he could not learn how to read the face of a clock. [H.T. Vol 16: Def. Exh. 86, at 126]

93. Teacher Jorge Aguilar Sosa recalls that, when Mr. Plata repeated the second grade in Angao, he was unable to learn to pronounce letters, vowels, and syllables. Mr. Plata showed effort as a student, but he seemed to Teacher Sosa to lack the same learning ability as the other schoolchildren. [H.T. Vol 16: Def. Exh. 86, at 60]

94. Mr. Plata also exhibited deficits in functional academic skills from the time that he first entered the school system in Texas. Although Mr. Plata had had three years of schooling



in Angao, Mexico, when he entered the Houston Independent School District in 1986 at the age of 10 years, he was placed in the first grade. [Exhibit 4, ¶18, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] He repeated first grade in HISD as well as second grade. [Exhibit 3 (Flor Estrada responses to General Information Survey) , to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

95. Despite being held back twice and having attended U.S. schools for five years, Mr. Plata at age 15 still placed in the bottom second percentile for reading and the bottom fifth percentile for language arts. [Exhibit 3 (Secondary ESL Data Sheet) , to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] Testing also revealed that the 15-year-old Mr. Plata was unable to identify a square, tell the days of the week, form complete sentences, or state plural forms of words. [Exhibit 3 (IDEA Oral Language Proficiency Test II) , to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] In language proficiency, Mr. Plata was able to reach only the second of six levels. [*Id.*] Later that same year, due to Mr. Plata's inability to meet grade requirements, Watkins Junior High School socially promoted him from eighth to ninth grade. [Exhibit 3 (June 1991 letter), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

96. Maria Lucio, who taught Mr. Plata for two years in a Sunday School class after he arrived in Houston, recalled that he could not speak as spontaneously as other children. He took noticeable time to formulate a response and he spoke slowly and deliberately. When the church put on "dramas" for Christmas and Easter, Mrs. Lucio's students would sign songs. She noticed that Mr. Plata had to work much harder than other children his own age to learn the songs. Overall, she observed that Mr. Plata was much slower mentally than the other children who were his age. [H.T. Vol.14:Def. Exh.57, ¶¶5 & 9]

97. Patricia Lopes, who taught Mr. Plata when he was 15 years old and in her English-as-a-Second-Language (“ESL”) class at Langham Creek High School, recalled that he could not communicate very well in her class, even though by that time Mr. Plata had been in the United States for five years. He not only was limited in his ability to speak English, but he also was limited in Spanish. Teacher Lopes believed that Mr. Plata’s poor communications skills were due to more than having learned English as a second language. [H.T. Vol.14:Def. Exh.51, ¶5]

98. The ESL assignments during the time that Mr. Plata was Ms. Lopes’ student focused on teaching English vocabulary, grammar, verb tenses, etc. Ms. Lopes would have the students write out sentences and paragraphs in English. She recalled that Mr. Plata was incapable of writing a single sentence completely and accurately. [H.T. Vol.14:Def. Exh. 51, ¶7]

99. Patricia Vasquez, who rode the school bus with Mr. Plata after he was enrolled at Watkins Junior High School recalled that he had great difficulty comprehending new concepts. Mr. Plata required repeated explanations and many examples before he could acquire new knowledge. He also had real problems doing his math homework and Ms. Vasquez observed a friend, Jose Hernandez, doing Mr. Plata’s math homework for him on more than one occasion on the school bus. [H.T. Vol.14:Def. Exh.56, ¶¶4 & 6]

100. It also is significant that, when Mr. Plata was 16 years old and in the ninth grade, the Alternative Learning Center (“ALC”) at the Barker Cypress Independent School District urged the assistant principals at Langham Creek High School to have him tested for learning disabilities. In a document headlined “NEEDS TO BE TESTED \*” and “UNSUCCESSFUL”, ALC administrator Terry Rizzo wrote:

We have studied Daniel's academic behaviors and discussed his history w/Spec. Ed. Dept. *We believe Daniel may be LD* [learning disabled] or VA; *he is extremely low*. It took us a while to determine whether it was his language or not. I have been told that June Phillips needs to be called & referral process begun + he'll be tested in Spanish. My CLA/Sp Ed teacher could be the referring teacher if you desire.

[Exhibit 3 (Alternative Learning Center document dated 1-21-92) [emphasis added], to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] No such testing was ever performed.

101. Administrator Rizzo testified the referral of Mr. Plata for school district testing was not done lightly. There had to be specific reasons for the referral, such as those noted on the referral form. [H.T. Vol.4:37]

102. The notations on the referral form signify that the ALC staff felt that Mr. Plata's performance was not that of a student in regular education. Mr. Plata's performance was described as "extremely low". The notation regarding the time it took to determine his difficulties refers to the fact he was an English-as-a-Second-Language student, but the ALC decided that the language issue was not the cause of his difficulties. [H.T. Vol.4:40]

103. The notation that the ALC staff believed Mr. Plata might be LD and VA signify how serious the ALC staff believed his learning difficulties. LD signified learning disabled and VA meant vocational academic, which is a type of life skills course. Students placed in VA, according to Ms. Rizzo, have a very low level of ability. [H.T. Vol.4:39]

104. Also significant is the reference to "Spec. Ed." That meant that the ALC staff contacted the special education department in the Cypress Fairbanks Independent School District to determine if Mr. Plata had any history with them. This contact would not have occurred had the ALC staff believed he was capable of being educated in a regular classroom. [H.T. Vol.4:75]

105. There is no evidence that the academic behaviors that caught the ALC teachers' attention were due to Mr. Plata's laziness or skipping school as he had only two absences the entire time he was at the ALC. Nor did the ALC teachers believe his problems were due to language. There also is no evidence that his difficulties at the ALC were caused by drugs. Rather, the ALC teachers were convinced that Mr. Plata had real problems that required testing to be sorted out. [H.T. Vol.4:38]

106. A review of Mr. Plata's academic record demonstrates his lack of functional academic skills. In seventh grade, he failed every course but Physical Education. [Exhibit 3 (Revere Middle School transcript), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] In eighth grade, he failed Mathematics and Comparative Literature. [Exhibit 3 (Watkins Junior High School report card), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] In ninth grade, he received one passing score during one six-week period in Physical Education, but otherwise failed every course. [Exhibit 3 (Langham Creek High School transcript), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B].

107. Mr. Plata's life-long difficulties with learning demonstrate that these difficulties stem from an intellectual disability. It is not credible to assert that Mr. Plata chose not to learn. The record is clear that, as a child, he tried to learn, but did not have the same abilities in school as other children. And even his teachers in high school perceived him as lacking intellectual ability. [H.T. Vol. 4:38]

108. Money concepts. As a child in Angao, Mr. Plata differed from other children in that he did not learn how to count money or recognize bill denominations. His maternal grandmother, Celia Hernandez, recalls that he never could understand how much money she was

giving him to run errands to the market. In this, he was different from other children his age. [H.T. Vo. 14:Def. Exh. 54, ¶32]

109. Later, when he came to the United States and held jobs as a teenager, he gave his earnings to his mother to manage. He never asked her to help him open a bank account. [H.T. Vol.5:106; H.T. Vol. 2:125]

110. Francisco Hernandez recalls that he and Mr. Plata were paid in cash for their construction work. When they were paid, Mr. Plata was able to count only large bills, such as twenty-dollar bills and fifty-dollar bills. [H.T. Vol 3: 222]

**2. The second adaptive behavior skill area is social.**

111. Gullibility and naivete. Mr. Plata displayed an unusual amount of naivete and gullibility, even as a child, and these conditions persisted into his adolescence.

112. Marianela Estrada recalls that when Mr. Plata was 6 or 7 years old, he would be sent to the mill in Angao to sell “bolis” – which were little balls of shaved ice in a bag with flavored syrup and sugar – for money. Mr. Plata not only was bad at selling the bolis, but many times other children would take the bolis from him without paying for them. [H.T. Vol.17:Def. Exh.88, ¶16]

113. Mr. Plata’s naivete as a child was such that he did not understand when someone was exaggerating. When Francisco Hernandez and Daniel Plata were about 7 years old, Mr. Plata’s maternal grandmother, Celia Hernandez, was trying to persuade the boys to eat soup. She told them it was “sopa de burros” – donkey soup – and that, if they ate it, they would grow strong. After Mr. Plata ate the soup, he hit the wall with his fist because he believed he had immediately grown strong from eating the soup. Instead, he had hurt his fist and began crying. [H.T. Vol 3: 216-217]

114. Those who knew Mr. Plata in high school recalled that he would believe anything he was told. [H.T. Vol. 14: Def. Exh. 56, ¶4] He once jumped fully clothed in the dirty waters of a bayou merely because he was dared to do so. Mr. Plata was known as “Loco” because he was always doing crazy things like that. [H.T. Vol. 14:Def. Exh. 55, ¶7]

115. Interpersonal relations. As a child in Angao, Mr. Plata would become extremely introverted after his father had beaten him. He would become very quiet and withdrawn. [H.T. Vol. 16:Def. Exh. 86-A, at 8] This carried over to his interpersonal relations in school. As his two second grade teachers, Jose Aguilar Sosa and Estela Cedillo Diaz, separately recalled, Mr. Plata was withdrawn and isolated himself from the other children in school. [H.T. Vol. 16:Def. Exh. 86, at 58-60 & 129-30] Teacher Cedillo stated that when Mr. Plata was a 7-year-old, she would speak to him and he wouldn’t respond to her. Speaking in Spanish, Teacher Cedillo described Mr. Plata at that time as *ido*, a term that the Spanish translator commented would translate to “He was gone” or, more idiomatically, “He was out of it.” [H.T. Vol. 16:Def. Exh. 86, at 140-41]

116. Mr. Plata remained isolated and withdrawn as a 15-year-old in Houston. Teacher Patricia Lopes recalls that he was not sociable in terms of talking to other kids in the class. When Mr. Plata was not doing work in class, he just sat back in his chair doing nothing. He did not spend the time talking or interacting with other students. During those times when he did not show up to class, there did not seem to be a single student who could be asked about his whereabouts. [H.T. Vol.14:Def. Exh. 51, ¶10]

117. In groups, Mr. Plata was widely considered by those who knew him to be a follower, not a leader. [H.T. Vol. 14:Def. Exh. 55, ¶7] He also was a target for teasing due to his diminished intellect. Ponsiano Ramirez remembered that Mr. Plata’s peers teased him as a

result of the dumb things he would say or the things he could not understand. [H.T. Vol.17:Def. Exh.90, ¶¶10-11]

118. Even when he was in high school, Mr. Plata was perceived as socially immature. Charles Ramirez remembers that his actions made him seem like a child and that Mr. Plata was frequently teased because of the way he acted. [H.T. Vol.17:Def. Exh.89, ¶9]

119. In high school, Mr. Plata also differed from other boys his age in that he never had a girlfriend. [H.T. Vol. 14:Def. Exh. 56, ¶4; H.T. Vol.17: Def. Exh.89, ¶12 & Def. Exh.90, ¶¶10-11]

120. Mr. Plata also was socially isolated on the job. Francisco Hernandez recalls that the other workers on the construction site would make fun of Mr. Plata because he could not learn how to do more than menial tasks. When he was teased, Mr. Plata would become upset and would withdraw. [H.T. Vol 3: 223-224]

121. The same social isolation occurred when Mr. Plata worked at Luby's. Artemio Espinosa recalls that Mr. Plata seemed to distance himself from his co-workers. [H.T. Vol 3: 14] When the other workers at Luby's would sit down for a meal, Mr. Plata would eat on his own, even when invited to sit with the other workers. [H.T. Vol 3: 14-15]

122. Self-esteem. When Mr. Plata and his brothers attended Maria Lucio's Sunday school class after arriving in Houston, she perceived Mr. Plata and his brothers as more timid than some of the other kids. They seemed to lack self-confidence. If Maria Lucio posed a question to the group, they would not volunteer to answer; Maria Lucio had to ask questions directly to them if she wanted them to speak. [H.T. Vol.14:Def. Exh.57, ¶3]

123. Later, when Mr. Plata was an adolescent, Ponsiano Ramirez perceived that Mr. Plata did not have much self-confidence. [H.T. Vol.17:Def. Exh.90, ¶11]

124. Following rules. Mr. Plata had difficulties following rules, whether they were the rules of games or rules of social behavior. This, too, is an adaptive deficit.

125. As a child in Angao, he was unable to play the games that other children his age played because he could not understand the rules [H.T. Vol 16: Def. Exh. 86-A, at 9 & 60]

126. Mr. Plata's inability to follow the rules of games continued after he moved to the United States. As his cousin Carlos Contreras recalled, Mr. Plata could never remember the rules of games he played with others, whether the games were soccer or football. [H.T. Vol. 14: Def. Exh. 53, ¶¶21-23] He also couldn't remember the rules for basketball. [H.T. Vol. 14: Def. Exh. 55, ¶¶5 & 6]

127. It was in school that Mr. Plata's limitations in social behavior also were made clear. When he entered the ninth grade at Langham Creek High School, he began to have great problems conforming to school behavior rules. According to his school records, within the first week of school Mr. Plata's English-as-a-Second teacher was conferencing with him about not working during class. [Exhibit 3, (Langham Creek High School transcript), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] By the end of the first month of school, he was chronically absent and later in the semester was sent to the Alternative Learning Center as a result of "chronic misbehavior". [*Id.*]

128. And, when he was imprisoned on death row at the Texas Department of Criminal Justice, Mr. Plata still had trouble understanding the rules. Correctional officer Mark McGaughey testified that Mr. Plata would seek permission to do something that was explicitly against the rules on Death Row: to take a magazine or a commissary item to recreation so it could be passed to another inmate. [H.T. Vol. 5:240] Officer McGaughey said Mr. Plata asked to break this particular rule at least three separate times, even though it should have been obvious



that no correctional officer would assist an inmate in breaking the institution's rules. [H.T. Vol. 5:246-470]

**3. The third adaptive behavior skill area is practical.**

129. Activities of daily living – practical skills. Mr. Plata's adaptive limitations extended to practical skills and were evident in his inability to run errands for his grandmother as a child in Angao, as other children his age were able to do. Maternal grandmother Celia Hernandez recalls that if, for example, she sent him for lard, he would lose the money. If she sent him for peppers, he would bring back tomatoes. [H.T. Vol. 14: Def. Exh. 54, ¶31]

130. When he was given chores, such as watering the donkeys, his aunt Marianela Estrada recalls that he would become distracted and forget what he was meant to be doing. [H.T. Vol.17:Def. Exh.88, P18-20]

131. Mr. Plata also had great difficulties in telling, and understanding the passage of, time. According to his stepfather, Mr. Plata could not tell time with an analog watch; instead, he had to rely on a digital watch to tell time. [Exhibit 4, ¶6, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] Nereo Estrada also noted that, when Mr. Plata lived at home, he did not know the sequence of the months of the year and had difficulty identifying the current month. [*Id.*, ¶7]

132. Mr. Plata's mother did not notice his problems with identifying the months of the year until he was incarcerated at the Harris County Jail in the present case. [Exhibit 4, ¶21, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] However, the findings of the IDEA Oral Language Proficiency Test II – which determined that the 15-year-old Mr. Plata was unable to tell the days of the week – demonstrate that Mr. Plata's problems with

understanding units of time date from the developmental period. [Exhibit 3, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

133. Activities of daily living – driving. Mr. Plata seems never to have had a driver's license and seems to have relied on family and friends to get to work. His mother tried to teach him to drive, but found him to be a nervous driver who could not drive well. [H.T. Vol. 5:102-03 & 106] Ponsiano Ramirez observed him driving on the streets of their small subdivision, but said Mr. Plata was a poor driver because he would grind the gears, causing the vehicle to jerk. [H.T. Vol.17:Def. Exh.90, ¶14]

134. Activities of daily living – sports. When his peers played sports, Mr. Plata was always the last person to be picked for the team. Nasario Vasquez recalled that Mr. Plata was chosen as a player only because his peers did not want to hurt his feelings. His skills were so poor that, in basketball, for example, if he was passed the ball he would just start running down the court. He had no grasp of the rules regarding "traveling" or "double dribbling." He would run down the court and throw up a crazy shot with no co-ordination. If he did get a basket, his peers would laugh that one of his crazy shots had actually gone in. [H.T. Vol.14:Def. Exh.55, ¶5]

135. Lack of coordination. Throughout the developmental period, Mr. Plata also was known for his lack of bodily coordination. Those who played soccer with him after his family moved to northwest Houston recalled that he was so uncoordinated that he would kick the other players instead of the ball. [H.T. Vol. 14: Def. Exh. 56, ¶21]

136. His lack of coordination extended to driving. Ponsiano Ramirez recalled seeing Mr. Plata drive time to time in the North Glen subdivision and thought of him as a poor driver because he would grind the gears, causing the vehicle to jerk. [H.T. Vol.17:Def. Exh.90, ¶14]

137. Instrumental activities of daily living – personal hygiene. There were many easy things which Daniel Plata would forget or not do well. When Daniel was as old as 5, he still did not know how to clean himself after he went to the bathroom. In Angao, people would use leaves instead of toilet paper, but Daniel never remembered to use the leaves. His aunt, Marianela Estrada, recalls that he would wipe himself with his fingers and then drag his fingers in the dirt to clean them off. [H.T. Vol.17:Def. Exh.88, ¶21]

138. Occupational skills. Mr. Plata's deficits in practical skills extended to the work environment, where he was consigned to a series of low-level jobs because he lacked the ability for more complicated work.

139. Reyes P. Morales, a neighbor with whom Mr. Plata had worked at age 17 as a helper on construction jobs, said that Mr. Plata did not last long as a helper because he kept forgetting his work instructions.

For example, Daniel would be told to spread fiberglass or paint something for a pool and if you didn't stand right there with him, he would forget what he was supposed to do. When you pointed out that he was not doing the job or he [was] doing it wrong, he would say, "I'm sorry," but he would be frustrated that he could not remember. It wasn't that Daniel lacked ability; he lacked mentality.

[Exhibit 6, ¶6, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

Other workers called him "Daniel Loco" because he could not remember how to complete work projects. [*Id.*, ¶7] Additionally, at least one teacher at Langham Creek High School also referred to Mr. Plata as "El Loco." [Exhibit 3 (Discipline Referral dated 2-10-92), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

140. Francisco Hernandez worked in construction with Daniel Plata when they were 17 years old. Mr. Plata's job consisted of cleaning, dumping garbage, and installing sheet metal. [H.T. Vol 3: 218-219] The company tried to teach Daniel Plata more complicated work, such as

how to cut wood, but he could not learn how to operate the hacksaw. [H.T. Vol 3: 219] Mr. Plata also could not learn how to measure wood, despite his coworkers' efforts to teach him. [H.T. Vol 3: 220]

141. Mr. Plata also could not learn to distinguish between the different sizes of wood planks. Coworkers sought to teach him the difference between sizes by showing the planks to him. Later, when Mr. Plata was sent to get the wood, he invariably would bring back the wrong-sized plank. [H.T. Vol 3:220]

142. Mr. Plata had difficulty in learning more complicated tasks on the construction site even though he went to work every day. Mr. Plata wanted to learn to earn more money, but he could not because he was limited to performing low-level tasks, rather than more highly skilled and highly paid jobs. [H.T. Vol 3:221-22]

143. Later, in connection with his own construction framing business, Francisco Hernandez employed Mr. Plata to clean and to dump trash. Mr. Hernandez perceived Mr. Plata as a good worker because he was punctual and would perform his assigned tasks, but he did not assign Mr. Plata more complicated tasks because Mr. Hernandez knew from having worked with Mr. Plata before that he was not capable of learning other jobs. [H.T. Vol 3: 225-27]

144. Artenio Espinosa supervised Mr. Plata when he worked at the Luby's at Willbrook Mall around 1994-95. When Mr. Plata began work at Luby's, attempts were made to train him to do different types of work, but his ability to learn was limited. [H.T. Vol 4: 6]

145. Mr. Plata was trained to work in the kitchen, but he could not perform the work. For example, he would put products in the walk-in refrigerators in the wrong place. He was unable to use the dishwasher for washing plates. Eventually, his supervisors decided that Mr. Plata was incapable of working in the kitchen. [H.T. Vol 3: 7]

146. Mr. Plata was then moved to cleaning tables, which was the least complicated and lowest of all jobs at Luby's. [H.T. Vol 3: 8] Even in this job, Mr. Plata had problems. He was slow, would knock over plates, and he could not put the plates and utensils in the appropriate places on the tables. [H.T. Vol 3: 9-10]

147. Mr. Plata had difficulty with other job demands at Luby's, one of which was the process for clocking in and out of work. Each worker had a unique number that had to be recorded at the start of the shift. Mr. Plata would forget his individual number about half of the time and be unable to clock in or out. He also would forget to wear his name tag. [H.T. Vol 3: 11-13]

148. When Mr. Plata was 18 or 19, he and Charles Ramirez and Juan Morales applied for jobs as security guards. The application required them to take a simple quiz with basic math and reading questions. Mr. Plata was very disappointed that he could not pass the test. He spoke to Ponsiano Ramirez about his disappointment and cried, but Mr. Ramirez felt that the truth was that Mr. Plata was not capable of being a security officer. [H.T. Vol.17:Def. Exh.89, ¶11 & Def. Exh.90, ¶15]

149. Mr. Plata also acted impulsively on the job. Francisco Hernandez recalled that, when he and Mr. Plata were working construction, Mr. Plata became upset at how little he had been paid. He spoke to the boss, who said he was unhappy with the quality of Mr. Plata's work and told Mr. Plata that if he didn't like the pay, he could leave. Mr. Plata left and afterwards was unable to find another job, even for poor pay. [H.T. Vol 3: 224-25]

150. Maintaining safe environments. Mr. Plata was not able to maintain a safe environment, which also is an adaptive deficit. When he was a teenager, his mother kept a gun for protection. Although his mother had hidden the gun, Mr. Plata found it and took it out to

play with it. He ended up shooting himself and requiring medical attention. [S.F. Vol. 31:136-37]

151. Living independently. There is no evidence that Mr. Plata was able to live independently of his family, even though he earned money through menial jobs. Even after he left school, he continued to live with his family and rely on his mother to feed and clothe him. This inability to live independently also is an adaptive deficit. [H.T. Vol. 2:128]

**4. Dr. Denkowski's Adaptive Functioning Assessment**

152. The adaptive functioning assessments conducted by Dr. Denkowski are unreliable and have no evidentiary weight. His methods do not comport with the principles in the field of psychology and do not comport with ethical guidelines as set out by the psychological community. [Affidavit of Jack M. Fletcher, Ph.D., at ¶¶20-29 (filed Jan. 5, 2007); H.T. Vol. 2:11-12]

153. There is no basis for Dr. Denkowski's use of the Adaptive Behavior Assessment System (ABAS) as a self reported instrument with a person functioning at Mr. Plata's level. If the ABAS were intended for individuals with Mr. Plata's level of functioning it would have reliability and validity tables for self reporting by individuals with mental retardation, Alzheimer's disease, and other neuropsychological disorders, just as it has reliability and validity tables for all populations when administered by querying other respondents. There are no such tables as individuals at Mr. Plata's overall level of functioning are not reliable informants. [Affidavit of Jack M. Fletcher, Ph.D., at ¶20 (filed Jan. 5, 2007); H.T. Vol. 2:120-21]

154. Nor is Dr. Denkowski's assertion that his method is approved by the developer of the ABAS, Patti Harrison, Ph.D., persuasive. Dr. Denkowski did not provide the developer of the ABAS, Dr. Patti Harrison, with sufficient context to determine the appropriateness of the

ABAS as a self reported instrument. He also misstated the language comprehension levels required to complete the ABAS. The ABAS was developed to have a readability level at the fifth grade, but an independent review by noted assessment expert Jerome Sattler found a seventh grade reading level is required overall, on each form. [Affidavit of Jack M. Fletcher, Ph.D., at ¶20 (filed Jan. 5, 2007)]

155. Several items on ABAS require a high level of comprehension. It is obvious that Mr. Plata would have difficulty understanding the ABAS items, especially in light of the low IQ scores on all of his intelligence tests. There was no evidence in Dr. Denkowski's affidavit or testimony to support the conclusion that Mr. Plata is a "high functioning person." [Affidavit of Jack M. Fletcher, Ph.D., at ¶20 (filed Jan. 5, 2007); H.T. Vol. 12:121-22]

156. Dr. Denkowski's failure to use multiple respondents. Dr. Denkowski misrepresented the intent of the ABAS manual when he indicated that the use of multiple respondents is optional. Rather, the manual states that "whenever possible, professional users should obtain ratings from multiple respondents." It is standard practice in the assessment of adaptive behavior of low functioning people to use responders as opposed to self report. The AAMR MANUAL specifically states that "Those who use most current adaptive behavior scales to gather information about typical behavior rely primarily upon the recording of information obtained from a third person who is familiar with the individual being assessed." Therefore, the use of a self reported instrument for adaptive behavior with an individual who has Mr. Plata's level of functioning is not proper. [2002 AAMR MANUAL 85; Affidavit of Jack M. Fletcher, Ph.D., at ¶21 (filed Jan. 5, 2007); H.T. Vol. 2:123-24]

157. Dr. Denkowski's adjustments to the obtained ABAS scores. Even if the self report was valid, Dr. Denkowski's adjustment procedures are not legitimate practices. His

interview with Mr. Plata obtained an initial score of 61. He then made adjustments based on culture, lifestyle and opportunity, which moved Mr. Plata's score upwards to a corrected score of 70, not the 71 that resulted from an addition error. Dr. Denkowski then applied clinical judgment again and dismissed the obtained score of 70. Dr. Denkowski's adjusted scores are not accepted practice in the field of psychological assessment, regardless of Dr. Harrison's advice, which was provided without sufficient context. [Affidavit of Jack M. Fletcher, Ph.D., at ¶22 (filed Jan. 5, 2007)]

158. Dr. Denkowski's application of clinical judgment in assessing adaptive behavior is not systematic. At different times in his affidavit and testimony, Dr. Denkowski characterized Mr. Plata as belonging to a specific cultural group characterized by immigration from Mexico, poor acculturation to U.S. schools, and problems with language and education; as a member of an anti social, drug-using subgroup; and in his analysis of the pen pal letters, a caring linguistically facile individual with poor mechanical skills. These descriptions are inconsistent and do not reflect the systematic, principled application of clinical judgment. [Affidavit of Jack M. Fletcher, Ph.D., at ¶23 (filed Jan. 5, 2007); H.T. Vol. 2:120]

159. Nowhere but in the testimony of Dr. Denkowski is there a psychologist or a text that proposes the use of clinical judgment based on a psychologist's admittedly low familiarity with the Mexican culture, assumptions about the quality of the examinee's writing, much less his altering of scores. [Affidavit of Jack M. Fletcher, Ph.D., at ¶23 (filed Jan. 5, 2007)]

160. Dr. Denkowski's use of maladaptive (which would include criminal activities) behavior to assess adaptive behavior is scientifically inappropriate. The purpose of assessing adaptive behavior is to identify fundamental limitations in the capacity to carry out everyday activities in conceptual, social, and practical domains. It is an assessment of weaknesses, not



strengths, and many individuals with mental retardation show strengths in one or more area of adaptive behavior. The presence of antisocial behavior can not be construed as adaptive to the person or society. [Affidavit of Jack M. Fletcher, Ph.D., at ¶23 (filed Jan. 5, 2007); H.T. Vol. 2:116-17]

161. Even with Dr. Denkowski's changing of Mr. Plata's answers to answers with a higher point value, Mr. Plata's adaptive behavior score was still 70, which placed him in the range of an individual with mental retardation. Dr. Denkowski misused "clinical judgment" in order to elevate Mr. Plata's ABAS score. [Affidavit of Jack M. Fletcher, Ph.D., at ¶23 (filed Jan. 5, 2007)]

162. Administration of the ABAS vs. ABAS-II. Dr. Denkowski is unpersuasive in dismissing the need to use the most current form of the ABAS, the ABAS-II, even though the prior test evaluated 10 skill areas, while the current test evaluates impairment in conceptual, social, and practical domains. The 2002 AAMR MANUAL now indicates that a person should be considered impaired in adaptive behavior if the composite or any of the 3 scores in the conceptual, social, and practical domains are within the competence level associated with mental retardation. [Affidavit of Jack M. Fletcher, Ph.D., at ¶24 (filed Jan. 5, 2007); H.T. Vol. 3:49-50]

163. When Mr. Plata's score on the ABAS are reviewed it is clear he has two significant weaknesses (functional academics, health and safety) and no strengths, so that all of his domains are largely consistent with the overall score. When Mr. Plata's ABAS scores are aligned with the ABAS-II domains, it is evident that Mr. Plata has an adaptive behavior composite score (GAC) of 70. He also scored 70 in the conceptual domain. His scores of 75 in the social domain and 74 in the practical domain are within the confidence interval for mental retardation. He clearly meets the 2002 AAMR MANUAL criteria even with the adjustments. This

obviates Dr. Denkowski's attempt to show that Mr. Plata does not meet 2 out of the 10 requirements in the 1992 AAMR. MANUAL. [Affidavit of Jack M. Fletcher, Ph.D., at ¶25 (filed Jan. 5, 2007); H.T. Vol. 2:49]

164. The science of psychological assessments requires psychologists to use the most up-to-date versions of test and diagnostic criteria. Dr. Denkowski had an obligation to use the ABAS-II and to use the most current diagnostic criteria. Dr. Denkowski failed to fulfill this obligation. Accordingly, the "adjusted" ABAS score of 71 that Dr. Denkowski accords Mr. Plata carries no evidentiary weight. [Affidavit of Jack M. Fletcher, Ph.D., at ¶26 (filed Jan. 5, 2007)]

165. Dr. Denkowski's application of clinical judgment in the assessment of adaptive behavior is poorly grounded in terms of methodology, need, and application. There are no discrepancies in Mr. Plata's obtained adaptive behavior scores that would signal a need for adjustment. In dismissing the obtained scores, Dr. Denkowski has ignored the science on adaptive behavior assessment. He does not consistently characterize the factors in Mr. Plata's cultural/linguistic background and experience for which adjustments should be made. The correct application of clinical judgment is based on the data that is generated by the actual assessment that informs not only the need to apply clinical judgment because of score discrepancies, but also the basis for its application – not the use of the data to inform the need for and application of clinical judgment. There are over 50 years of research comparing clinical and statistical decision making in psychology, medicine, and other disciplines. This literature shows consistently that statistical decisions are more reliable than clinical judgments and that the best results are obtained when clinicians make use of data, statistics and research, and do not simply ignore and dismiss data as Dr. Denkowski has done. [Affidavit of Jack M. Fletcher, Ph.D., at ¶28 (filed Jan. 5, 2007); H.T. Vol. 2:121]

**5. Correctional Officers' Testimony**

166. During the evidentiary hearing to determine whether Mr. Plata meets the diagnostic criteria of mental retardation, the State called two Texas Department of Criminal Justice (TDCJ) correctional officers to testify about Mr. Plata's functioning. Both officers, Major Melodye Nelson and Mark McGaughey, are assigned to the Polunsky Unit of TDCJ, where death row is currently housed, but neither has had sustained contact with Mr. Plata. [H.T. Vol. 5:227-29]

167. If Major Nelson actually observed Mr. Plata's functioning on death row, it was not evident in the testimony elicited by Respondent, who asked her to exhaustively explain documents in Mr. Plata's TDCJ file. Major Nelson conceded that she never saw Mr. Plata fill out any of the forms archived in his file at TDCJ, nor had she ever seen him play chess or use an analog watch. [H.T. Vol. 5:227-29]

168. Mr. McGaughey's contact with Mr. Plata also was limited to working on the same pod in which Mr. Plata was housed for "almost a year" at some point in 2004 or 2005. [H.T. Vol. 5:235] Mr. McGaughey testified that, in the short period of time that he was assigned to Mr. Plata's pod, he was a compliant inmate who followed orders and did not cause trouble for the guards. The officer further testified that Mr. Plata was able to communicate his needs and that he understood directives. [H.T. Vol. 5:236-40]

169. The fact that Mr. Plata possesses some communication skills, i.e., that he can express basic ideas and understand orders given by prison guards, does not preclude a diagnosis of mental retardation.

170. THE DIAGNOSTIC AND STATISTICAL MANUAL ON MENTAL DISORDERS (DSM-IV-TR), published by the American Psychiatric Association and recognized as an authority by the

experts in the case, provides the following description regarding individuals whose IQ fall within the same range as Mr. Plata's, ". . . People with this level of mental retardation [IQ level 50-55 to approximately 70] typically develop social and communication skills during the preschool years (ages 0-5 years) . . . and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth grade level." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL-DISORDERS TEXT REVISION 42, 43 (4<sup>th</sup> ed. 2000). At no time during the hearing did Officer McGaughey describe Mr. Plata's skills as beyond those of a sixth grader.

171. Furthermore, some of the testimony provided by Officer McGaughey is simply not instructive as to Mr. Plata functioning. For example, Officer McGaughey testified at the evidentiary hearing that he had witnessed Mr. Plata "reading" books and magazines. H.T. Vol. 5:244. Officer McGaughey, however, acknowledged that what he saw was Mr. Plata turning the pages of a magazine or a book; he never heard Mr. Plata reading aloud. H.T. Vol. 5:244.

172. Major Nelson testified that a chess set was among the items listed on Mr. Plata's property list. She testified, however, that she had never observed him playing chess. [H.T. Vol. 5:227-29] And, if Officer McGaughey ever saw Mr. Plata playing chess, he never mentioned it.

173. In addition, the environment in which Officer McGaughey observed Mr. Plata is severely restrictive. As such, Officer McGaughey did not have the opportunity to assess Mr. Plata's ability to function in society. As noted previously, Mr. Plata is housed at the Polunsky Unit of TDCJ. All inmates under a sentence of death are housed in their cells twenty-three hours a day. The prison does not allow inmates to handle money. In addition, prison officials tell inmates when to shower, recreate, and eat. The prison system also supplies all necessities

(soap, toilet paper, cleaning powder, tooth brushes, towels, hand rags, underwear, socks, jumpers, blankets, and sheets) to inmates like Mr. Plata. Nor are inmates responsible for their own laundry. [H.T. Vol. 3:120 & Affidavit of Antolin M. Llorente, attached as Exhibit 1, at 9, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] Thus, the Court finds Officer McGaughey's lay assessment of Mr. Plata's functioning to be unpersuasive.

174. That Mr. Plata is docile, submissive, and follows orders under such restrictive conditions does not rule out a diagnosis of mental retardation. This Court agrees.

#### **C. ONSET DURING THE DEVELOPMENTAL PERIOD.**

175. There is ample of evidence that Mr. Plata suffered from significant deficits in adaptive functioning – the outward manifestations of a significant limitation in intellectual functioning – before the age of 18. Although the limitation in his intellectual functioning was not formally documented until after his 18<sup>th</sup> birthday, all risk factors commonly associated with mental retardation were present prior to Mr. Plata's 18<sup>th</sup> birthday. Moreover, no evidence was presented that established an intervening cause after the age of 18 that could account for Mr. Plata's substandard intellectual functioning. As noted above, the adaptive behavior deficits were certainly apparent in Mr. Plata before the age of 18.

#### **D. RISK FACTORS FOR MENTAL RETARDATION**

176. The 10<sup>th</sup> edition of the AAMR manual sets forth risk factors commonly associated with mental retardation. [2002 AAMR MANUAL 123-41] The four categories of risk factors are: (1) biomedical: factors that relate to biologic processes, such as genetic disorders or nutrition; (2) social: factors that relate to social and family interaction, such as stimulation and adult responsiveness; (3) behavioral: factors that relate to potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse; and (4) educational: factors that

relate to the availability of educational supports that promote mental development and the development of adaptive skills. [*Id.* at 126]

177. While the presence of risk factors does not guarantee that an individual has mental retardation, studies show that as many as 50 percent of the populations of individuals with mental retardation have more than one causal risk factor. Further, mental retardation often reflects the cumulative or interactive effects of multiple risk factors. [*Id.* at 125] As the 2002 AAMR MANUAL emphasizes, “the impairment of functioning that is present when an individual meets the criteria for a diagnosis of mental retardation usually reflects the presence of several risk factors that interact over time.” [*Id.*]

178. Due to the correlation between risk factors and mental retardation, it is relevant and material to determine whether Mr. Plata’s history contains any of the risk factors for retardation identified by the AAMR. Copious evidence from the family history witnesses in this case establishes that Mr. Plata was exposed to all four categories of risk factors commonly associated with mental retardation. The presence of these risk factors lends further weight to the diagnosis of retardation in his case. [H.T. Vol. 2:63; H.T. Vol. 16:Def. Exh. 76; *infra*, ¶¶179 - 264]

**1. Biomedical Risk Factors**

179. From trauma at birth to three relatives within two degrees of consanguinity who suffer from mental retardation, Mr. Plata possesses significant biomedical risk factors for mental retardation. These risk factors suggest that his retardation is organic in origin.

180. Biomedical factors can include trauma during pregnancy and birth. [2002 AAMR MANUAL, Table 8.1, at 127; *see also* DSM-IV-TR 46 (noting that pregnancy-related trauma can predispose an individual to mental retardation)] Mr. Plata suffered both.

181. Prenatal trauma. Mr. Plata's mother reports that her then-husband, Isidro Plata, beat her while she was pregnant with Mr. Plata and, once during that pregnancy, hit her in the stomach. [H.T. Vol. 14:Def. Exh. 54, ¶19; Exhibit 4, ¶11, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

182. Birth injury. Mr. Plata's birth was extremely difficult. When his mother arrived at the health center, she was in the second stage of labor, but the baby was not in the proper position. Dr. Lopez performed Kristellar maneuvers to push the baby into position. [H.T. Vol 16: Def. Exh. 86, at 14]

183. When Mr. Plata finally was born, the umbilical cord was twice wrapped around his neck. He was born completely flaccid and purple. He was not breathing, which caused hypoxia. [H.T. Vol 16: Def. Exh. 86, at 14-15]

184. The medical clinic in San Lucas did not have the sophisticated medical equipment that U.S. hospitals utilize for babies born with hypoxia. Dr. Lopez is aware of how U.S. hospitals resuscitate newborns with hypoxia because his granddaughter was born with the umbilical cord wrapped around her neck. Dr. Lopez was in the delivery room when his granddaughter was delivered at L.B.J. Hospital in Houston, and saw the doctors use a variety of equipment and drugs – including antibiotics, a heart monitor, thermal blankets and intravenous glucose – to assist the newborn breathe and recover from the birth. All Dr. Lopez had to use in San Lucas to resuscitate Mr. Plata was his hands. There was no heart monitor, IV equipment or other necessary medical equipment to treat a newborn in Mr. Plata's condition. [H.T. Vol 16: Def. Exh. 86, at 14-15, 44-45 & 46]

185. Dr. Lopez found that phlegm had built up in Mr. Plata's throat. He placed him face down and extracted the fluid and the phlegm, and then gave him mouth-to-mouth

resuscitation. and he went approximately three minutes without breathing. [H.T. Vol 16: Def. Exh. 86, at 14-15]

186. One indicator of the severity of the birth injury suffered by Mr. Plata is the fact that his APGAR score was no more than a two or three. The APGAR is a method for evaluating the health of newborns at birth. A score below 3 is critically low, and indicates the baby is almost dying. [H.T. Vol 16: Def. Exh. 86, at 15, 35 & 46]

187. Birth injuries, such as these suffered by Mr. Plata, also are a biomedical risk factor for retardation. [2002 AAMR MANUAL, Table 8.1, at 127].

188. Neonatal disorders. Later, Mr. Plata suffered from cerebral paralysis and Guillain-Barre Syndrome.<sup>5</sup> . [Dr. Luis Felipe Lopez Zapien Affidavit, attached as Exhibit 7, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

189. The paralysis set in when Mr. Plata was living with his paternal grandmother, Cuca Serrano. After Floresbinda Estrada sent money from the United States, Cuca Serrano took him to a doctor in the nearest big city, Huetamo, Michoacan. This doctor was known as, "Margarita the Chemist." Dr. Margarita provided medicines that had to be taken by injection. The injections were given to Mr. Plata by his maternal grandmother, Celia Hernandez. Eventually, Mr. Plata recovered from this paralysis. [H.T. Vol.17:Def. Exh.88, ¶14; H.T. Vol.14:Def. Exh.54, ¶27]

190. Traumatic brain injury is another risk factor included within the biomedical category. [2002 AAMR MANUAL, Table 8.1, at 127; *see also* DSM-IV-TR 45-46 ("[h]ead

---

<sup>5</sup> Guillain-Barre Syndrome is an auto-immune disorder of unknown cause that involves degeneration of the myelin of the peripheral nerves. National Institute of Neurological Disorders and Stroke Guillain-Barre Syndrome Page, <http://www.ninds.nih.gov/disorders/gbs/gbs.htm> (last visited Feb. 27, 2007).



trauma may result in Mental Retardation”)] According to his mother, Mr. Plata often fell and hit his head as a child. “When he was seven months old, we were in Mexico City and Daniel fell off the bed, hit his head, and turned purple. I did not seek medical treatment because I did not know any better,” she reports. [Exhibit 4, ¶7, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

191. At another time when he was 7 years old, Mr. Plata arrived at school in Angao bleeding from his head. When she inquired, teacher Estela Cedillo Diaz found that Mr. Plata was bleeding because Isidro Plata had thrown rocks at his head. Teacher Cedillo described Mr. Plata’s head as “busted. . .open.” Mr. Plata did not receive medical treatment for this head injury, teacher Cedillo said, “because there was none.” [H.T. Vol. 16: Def. Exh. 85, at 123]

192. Post-natal malnutrition also constitutes another biomedical risk factor. [2002 AAMR MANUAL, Table 8.1, at 127]. Malnutrition was common in Angao. [H.T. Vol 16: Def. Exh. 86, at 17] When Floresbinda Estrada was in labor with Mr. Plata and presented herself at the medical clinic in San Lucas, Dr. Lopez could see that she was malnourished. [H.T. Vol 16: Def. Exh. 86, at 15]

193. Mr. Plata’s birth weight was very low – approximately 5 lbs. – due to the malnourishment of his mother. [H.T. Vol 16: Def. Exh. 86, at 15] He was so weak that he didn’t have the strength to nurse. [H.T. Vol. 16:Def. Exh. 86, at 45]

194. People in Angao knew that Mr. Plata’s family did not have a lot to eat. Jose Cornejo Gutierrez, who is related by marriage to Mrs. Estrada, recalled that Mr. Plata’s family subsisted on beans, chili and tortillas. [H.T. Vol 16: Def. Exh. 86-A, at 15]

195. Malnutrition likely accounts for why Mr. Plata was, in the words of his mother, “sickly and very, very thin” in his early childhood. [Exhibit 4, ¶6, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

196. Seizure disorders. The 2002 AAMR MANUAL includes seizure disorders within the biomedical category of risk factors for mental retardation. At birth, Mr. Plata suffered convulsions. [Exhibit 7, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

197. Chromosomal or genetic disorders also fall into the biomedical category of risk factors. [2002 AAMR MANUAL, Table 8.1 at 127] Consequently, the AAMR states that it is important to identify “relatives who were affected by conditions that may be associated with mental retardation...or who were diagnosed with mental retardation.” [*Id.* at 130] Mental disability – and, especially, mental retardation – runs like a dark thread through both sides of Mr. Plata’s family. A brother, two maternal aunts, and a first cousin on his father’s side have been diagnosed as having mental retardation. [H.T. Vol. 5:89-91 & 95-96; H.T. Vol. 14: Def. Exh. 54; H.T. Vol. 16: Def. Exh. 86, at 132; H.T. Vol. 16: Def. Exh. 86-A, at 27 & 73-77; H.T. Vol. 17: Def. Exhs. 92-96] Additionally, eight other members of his extended family have had intellectual difficulties that family members believe were caused by retardation. [H.T. Vol. 5:95-97, H.T. Vol. 14: Def. Exh. 54, ¶¶5, 7-8; H.T. Vol. 16: Def. Exh. 86A, at 20; H.T. Vol. 17:Def. Exhs. 95 & 96]

198. Significantly, Mr. Plata has three relatives – a brother and two maternal aunts – who are mentally retarded. [Jesus Plata Educational Records, attached as Exhibit 8; Report of Luis A. Valdes, Ph.D. re: Rosalba Estrada, attached as Exhibit 9; Report of Luis A. Valdes,

Ph.D. re: Celianel Estrada, attached as Exhibit 10, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B; H.T. Vol. 5:89-91; H.T. Vol. 17:Def. Exhs. 95 & 96]

199. Jesus Plata, who is Mr. Plata's younger brother, had a full scale IQ score of 72 on the Wechsler Intelligence Scale for Children III (WISC III) at the age of 13. This score put Jesus Plata in the range of the mentally retarded. Along with data documenting "significant emotional/behavior deficits" as well as in reading and mathematics, this IQ score was among the reasons that Jesus Plata was placed in special education classes until he left high school in 2002 at age 19. [Jesus Plata Educational Records, attached as Exhibit 8 to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B; H.T. Vol. 5:89; H.T. Vol. 17:Def. Exh. 92]

200. Mr. Plata's maternal aunt, Rosalba Estrada, has been diagnosed as moderately mentally retarded by licensed clinical psychologist, Luis A. Valdes, Ph.D. [Exhibit 9 (Report re: Rosalba Estrada) and Exhibit 11 (Luis A. Valdes, Ph.D. Curriculum Vitae) to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

201. According to Dr. Valdes, Rosalba Estrada is a "severely limited individual" who exhibits "a severely underdeveloped capacity to reason and problem-solve." [Exhibit 9, at 2 & 3 to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

202. When Rosealba Estrada was asked by Dr. Valdes to draw her family, she could not. [Exhibit 9, at 3, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] She could not complete any of the arithmetic, reading or spelling subtests of the Wide Range Achievement Test, and her score of less than 60 placed her in the bottom one percentile on the Test of Non-Verbal Intelligence-3 (TONI-3). [*Id.* at 2-3] Concluded Dr. Valdes:

She consistently scored in the moderate mentally retarded range across tests. She has no reading, writing or arithmetic skills. Reports from her sisters indicated that she has very few independent daily living skills. She must be prompted and provided for in all areas adaptive functioning. Her verbal receptive and expressive skills are severely limited to simple words or phrases.

[*Id.* at 3]

203. Celianel Estrada, Rosalba and Floresbinda's 26-year-old sister, has been diagnosed by Dr. Valdes as mildly mentally retarded. [Exhibit 10, at 3, and Exhibit 9, at 2 & 3 to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B; H.T. Vol. 17:Def. Exh. 94] Dr. Valdes observed that Celianel Estrada's "fund of knowledge was well below average." [Exhibit 10, at 2, and Exhibit 9, at 2 & 3 to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] When he asked her to sign her name, she wrote five letters "in primitive fashion, two of which are not part of her name." [*Id.* ] She also asked Dr. Valdes if his evaluation would involve opening her head. [*Id.*]

204. In intelligence testing, Celianel Estrada scored in the mildly mentally retarded range. [Exhibit 10, at 2, and Exhibit 9, at 2 & 3 to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] Although her TONI-3 score placed her in the bottom one percentile, she scored higher than her sister on the Peabody Picture Vocabulary Test (TVIP/PPVT) and she was able to complete some of the spelling and arithmetic questions on the Wide Range Achievement Test-3. [*Id.* at 3] Concluded Dr. Valdes:

The present evaluation shows that Celianel is functioning in the Mild Mentally Retarded range. She consistently scored in the mentally retarded range across tests. She has severely limited academic skills. Her verbal receptive and expressive skills are relatively strong but also in the retarded range.

[*Id.*]

205. Life history witnesses who know both Celianel Estrada and Mr. Plata have said that Mr. Plata's level of impairment is similar to that of Celianel Estrada. [H.T. Vol. 5:91; H.T. Vol. 16:Def. Exh. 86-A, at 27; H.T. Vol. 17:Def. Exh. 88, ¶22]

206. Brenda Tovar is a first cousin of Mr. Plata's who has retardation due to Down's Syndrome. She was in special education in elementary and high school in Los Angeles. [H.T. Vol. 5:95-96; H.T. Vol. 15:Def. Exh. 59; H.T. Vol. 17: Def. Exh. 87]

207. A number of family members on both sides of Mr. Plata's family tree also are believed to have (or have had, in the case of the deceased) retardation: Visita Anton, Marianela Estrada, Isidro Plata, Candelario Serrano, Rafaela Serrano, Evelia Chavez, Angel Herrera Plata and Elidoine Rojas. [H.T. Vol. 5:67, 95-96, 102, 104-05; H.T. Vol. 14: Def. Exh. 53, ¶7 & Def. Exh. 54, ¶¶5, 7-8; H.T. Vol. 16:Def. Exh. 86-A, at 73-77; H.T. Vol. 17:Def. Exhs. 95 & 96]

208. In addition, mental illness is found on both sides of Mr. Plata's family. Two members of his extended family – Tobias Chavez and Luis Chavez – have been diagnosed with schizophrenia. [H.T. Vol. 16:Def. Exh. 86, at 76, 98, 100, 133 & Def. Exh. 86-A, at 77] Saul Plata and Rafael Bernal have suspected mental illness. [H.T. Vol. 5:96; H.T. Vol. 17:Def. Exh. 54, ¶10; H.T. Vol. 16:Def. Exh. 86-A, at 73-77; H.T. Vol. 17: Def. Exhs. 95 & 96]

209. Family history witnesses also have identified Meliton Serrano and Assael Serrano as suffering from some sort of developmental disability. [H.T. Vol. 14:Def. Exh. 54, ¶9; H.T. Vol. 17: Def. Exhs. 95 & 96]

210. The incidence of mental disability within Mr. Plata's family suggests that genetic factors underlie his retardation. Moreover, the presence of so many people with retardation in Mr.

Plata's family heightens the likelihood that this risk factor, on its own or in combination with other risk factors, contributed to the causation of Mr. Plata's retardation.

**2. Social Risk Factors**

211. Poverty, lack of pre-natal care, an impaired child-caregiver, and pre-natal domestic violence are risk factors included within the social category of risk factors for mental retardation. [2002 AAMR MANUAL 126-27] All of these risk factors were present in Mr. Plata's young life.

212. No prenatal care. Mrs. Estrada did not receive prenatal care whatsoever when she was pregnant with Mr. Plata. She went to the medical clinic in San Lucas when she was in labor only because she was having trouble delivering Mr. Plata. [H.T. Vol 16:Def. Exh. 86, at 16]

213. Prenatal poverty. When Mr. Plata's mother was pregnant with him, Isidro Plata drank to excess and had no money to support himself and his pregnant wife. Celia Hernandez, Mr. Plata's maternal grandmother, reported that there was little food in her pregnant daughter's house – peppers and eggs or peppers with soup. Mrs. Hernandez sought to supplement her daughter's diet by inviting her to eat at the Hernandez home, but Floresbinda Estrada would not come for more than two meals per week because she was ashamed of her poverty. [H.T. Vol.14:Def. Exh.54, ¶18]

214. Prenatal domestic violence. Isidro Plata hit Floresbinda Estrada in the stomach during her pregnancy with Mr. Plata. [Exhibit 4, ¶11, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] Celia Hernandez would see Isidro Plata chasing the pregnant Floresbinda Estrada through Angao with a machete. She would run and try to avoid getting caught. Once, Celia Hernandez saw Isidro Plata beating the pregnant Floresbinda Estrada with a belt. The buckle left a mark on her stomach. [H.T. Vol.14:Def. Exh.54, ¶19]

215. Familial poverty in the postnatal period. Familial poverty in the post-natal period is a risk factor for retardation Mr. Plata and his family suffered poverty when they lived in Angao and when they lived in Houston.

216. According to Jorge Aguilar Sosa, one of Mr. Plata's second grade teachers, Angao was a very small town with extreme poverty when Mr. Plata was a child there. It was very dangerous because of trouble between families who lived in town and, at that time, this trouble was resolved with fist fights and bullets. [H.T. Vol 16: Def. Exh. 86, at 54]

217. Mr. Plata's family was among the poorest in town, a fact known to many people in Angao. [H.T. Vol 16: Def. Exh. 86, at 54; H.T. Vol.17:Def. Exh.88, ¶9]

218. One of the reasons for the family's poverty was due to Isidro Plata's drinking. According to Marianela Estrada, Mr. Plata's aunt, Isidro Plata drank so much that there was not sufficient money for his wife and children to eat. [H.T. Vol.17:Def. Exh.88, ¶9]

219. Mr. Plata's poverty was evident when he attended school. His teacher, Jorge Aguilar Sosa, remembers that his clothes were dirty and he was not bathed. In this, he was unlike the other poor children who were dressed in clean clothes. [H.T. Vol 16: Def. Exh. 86, at 58]

220. The house that Mr. Plata's family lived in did not have indoor plumbing, and it did not have a bathroom. [H.T. Vol 16: Def. Exh. 86, at 81; Def. Exh. 86-A, at 57] The floor was dirt and the "beds" they slept on were in fact mats made of string. [H.T. Vol 16: Def. Exh. 86-A, at 10 & 15; H.T. Vol. 14: Def. Exhs. 19-25]

221. Because Mr. Plata's family didn't have indoor plumbing, they used the ditch behind their house as a source of water. They also used the ditch as a toilet and a rubbish dump. When Mr. Plata's family didn't draw water from the ditch behind their house, they used a stream in the

village as a water source. This stream was used as a water source by livestock, who also would walk through the stream. [H.T. Vol 16: Def. Exh. 86-A, at 14, 16 & 67; H.T. Vol. 14: Def. Exhs. 26-28]

222. The poverty of Mr. Plata's family continued even after they arrived in the United States. Patricia Lopes, who taught English as a Second Language to Mr. Plata, believed that his family was very poor. They did not have a phone in their house and it seemed to Ms. Lopes that Mr. Plata's parents had too many children to care for. [H.T. Vol.14:Def. Exh. 51, ¶5]

223. Charles Ramirez, who lived near Mr. Plata's family in the North Glen subdivision in Houston recalled the subdivision as a pretty tough, and pretty poor, environment. Everyone in the neighborhood lived pretty modestly, but Charles Ramirez said Mr. Plata's family was even poorer than the other families. [H.T. Vol.17:Def. Exh.89, ¶4]

224. Charles Ramirez' recollection is reinforced by his father, retired Houston Police officer Ponsiano Ramirez, who recalled that Mr. Plata's family seemed much poorer than most other people in the neighborhood. Mr. Ramirez remembered that Mr. Plata's family never seemed to be able to afford new clothes; the ones Mr. Plata wore were old and ragged. Mr. Plata was teased a lot by other children because he always had to wear old clothes. [H.T. Vol.17:Def. Exh.90, ¶4]

225. Chronic illness in the family. Mr. Plata's family suffered from chronic illness in Angao due to the lack of clean water and the family's own poverty.

226. Because the family lacked access to purified water, Mr. Plata's family suffered severely from intestinal illness. [H.T. Vol 16: Def. Exh. 86-A, at 14, 16 & 67; H.T. Vol. 14: Def. Exhs. 26-28]



227. Angao was so poor that residents did not often take their children to the doctor for medical care. In Dr. Lopez' experience, when children got sick, parents would try home remedies. It was only when home remedies didn't work that the parents would bring their children in to the medical clinic in neighboring San Lucas for conventional medical treatment. [H.T. Vol 16: Def. Exh. 86, at 43]

228. Impaired child-caregiver. Impaired child caregivers also a risk factor for mental retardation. Mr. Plata was exposed to two during his formative years: his alcoholic, abusive father, Isidro Plata, and his paternal grandmother, Cuca Serrano.

229. Mr. Plata's father, Isidro, was known throughout Angao as a drunk who would beat up his whole family, including his son and his wife, when drunk. When Mr. Plata lived in Angao, Isidro Plata drank everyday and he would drink until he became drunk. [H.T. Vol 16: Def. Exh., at 86, 55 & 81; H.T. Vol 16: Def. Exh. 86-A, at 7; H.T. Vol.17:Def. Exh.88, ¶7]

230. When Mr. Plata's parents left him in the care of his maternal grandmother, Cuca Serrano, she treated him the same way Isidro Plata did – by beating him. [H.T. Vol 16: Def. Exh. 86-A, at 68] By all accounts, Cuca Serrano was not very maternal. When Isidro Plata was a boy, she beat him and then rented him out for work at the age of 10. [H.T. Vol.14:Def. Exh.54, ¶¶14-15]

231. Nor did Isidro Plata's alcoholism improve when he arrived in the United States. Carlos Contreras, a cousin of Mr. Plata, saw Isidro Plata drinking to excess on many occasions. On one occasion in Houston, Isidro Plata was so drunk that he began urinating in the yard outside the home Carlos Contreras shared with his mother. When Isidro Plata was told to go inside and use the bathroom, Isidro Plata became angry and started an argument. [H.T. Vol.14:Def. Exh.53, ¶¶21-23]

### **3. Behavioral Risk Factors**

232. Parental alcohol use, parental immaturity, domestic violence, and parental abandonment are included within the behavioral category of risk factors for mental retardation. [2002 AAMR MANUAL, Table 8.1 at 127]

233. Parental immaturity. Mrs. Estrada was only 19 years old when she got pregnant with Mr. Plata. Her immaturity was evident in that she never sought prenatal care while pregnant and stayed with Isidro Plata, even though he beat her while she was pregnant. [H.T. Vol.14:Def. Exh.54, ¶¶17-20] Meanwhile, Mr. Plata's father was an abusive alcoholic whose drinking destroyed his ability to support his family and who beat his wife from the moment they were married. [H.T. Vol 16: Def. Exh. 86-A, at 58; H.T. Vol. 14: Def. Exh. 54, ¶17-19]

234. Parental alcohol use. Throughout the time he was present in Mr. Plata's life, Isidro Plata was an alcoholic who regularly drank to excess, became violent, and expressed that violence against his wife and children.. [H.T. Vol 16: Def. Exh. 86, at 122; H.T. Vol. 14: Def. Exh. 54, ¶17-19]]

235. Family violence. In addition to being an alcoholic, Isidro Plata was well known to be violent towards Mr. Plata and his siblings. Isidro Plata's mistreatment of his family while drunk involved hitting them and chasing after them with weapons. Estela Cedillo Diaz recalled him chasing his wife and children, including Daniel Plata, with a large knife, over 12 inches in length. [H.T. Vol 16: Def. Exh. 86, at 122]

236. Jorge Aguilar Sosa recalls Isidro Plata becoming drunk and claiming he was a character from a legend called, "Kaliman." He would then chase his wife and his children with a machete, and it was obvious that he was trying to hurt them. When this happened, other residents

of Angao would hide Mrs. Estrada and her children from Isidro Plata. [H.T. Vol 16: Def. Exh. 86, at 55]

237. Lucila Estrada Mondragon witnessed Isidro Plata beating Mrs. Estrada many times. Later, Lucila Estrada Mondragon would see Mrs. Estrada with bruises on her body. Sometimes, Mrs. Estrada would hide at the home of Lucila Estrada Mondragon's parents. Isidro would arrive with a knife or with sticks, seeking to find his wife and beat her. [H.T. Vol 16:Def. Exh. 86-A, at 59]

238. Once, when both Mr. Plata and Francisco Hernandez lived in Angao, Mr. Plata sought to hide Mr. Hernandez's home after Isidro Plata had administered a beating. Mr. Plata had marks on his back and Mr. Hernandez hid him. Isidro Plata arrived at the house with a rope in his hand and wanted to know where his son was so that he could continue to beat him. [H.T. Vol 3: 214-215]

239. Mr. Plata also witnessed plenty of violence directed towards his mother. When the family lived in Angao, Isidro Plata would enter the house with a machete and threaten to kill Floresbinda Estrada. [Exhibit 4, ¶13, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B] "Daniel would pretend to be asleep, but he heard the threats. Daniel told me he had nightmares of me dying and I know that he suffered from many nightmares while he was a child," she reports. [*Id.*]

240. Isidro Plata also would beat his wife and threaten her with a knife in front of Mr. Plata, according to maternal grandmother Celia Hernandez. Isidro Plata threatened to kill his wife when she hid at her mother's house a television set that she had purchased. Another time, Isidro

Plata attacked his wife with a rubber strap and whipped her so hard it left a scar on her leg. [H.T. Vol.14:Def. Exh.54, ¶¶36-38]

241. According to Floresbinda Estrada, Isidro Plata hit Mr. Plata from the time he was a young child up until he was 10 years old. Mrs. Estrada believed that Isidro Plata focused his anger on Mr. Plata because he was the eldest child. Isidro Plata used his hands on Mr. Plata and a whip. Once, he even managed to injure Mr. Plata while threatening to kill his wife with a knife. Mr. Plata intervened on his mother's behalf and got cut on the hand. [Exhibit 4, ¶¶12-14, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

242. Once, Mr. Plata witnessed his father cruelly plucking the feathers of a rooster that was losing a cockfight. When Mr. Plata commented on his father's cruelty, Isidro Plata beat him in the face. [Exhibit 4, ¶16, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B; H.T. Vol. 14:Def. Exh. 54, ¶40]

243. Even after Floresbinda Estrada took her children to Houston to get away from Isidro Plata, he followed her there from Mexico. Then, he would get drunk and arrive at her apartment and demand to be let inside. Frequently, the apartment complex security guard would call the police. [Exhibit 4, ¶15, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

244. Also after Floresbinda Estrada moved to Houston with her children, Isidro Plata would browbeat Mr. Plata with demands that he not let his mother re-marry. [*Id.* ¶17]

245. Child abuse and neglect. Isidro Plata treated Mr. Plata in the same way he treated his wife – with beatings. Lucila Estrada Mondragon recalled that Mr. Plata would have marks from the beatings on his body and his back. Jorge Aguilar Sosa recalled seeing Isidro Plata beating Mr.

Plata so hard that it left marks on his feet and legs. After Mr. Plata was beaten by his father he would be very withdrawn and when he was spoken to, he reacted as if he could not comprehend what was being said to him. [H.T. Vol 16: Def. Exh. 86, at 82; H.T. Vol 16: Def. Exh. 86-A, at 59]

246. When Mr. Plata was seven years old, teacher Estela Cedillo Diaz recalls that Mr. Plata arrived at school with blood on his head. Mrs. Cedillo investigated the cause of the injury and determined that Mr. Plata's head was split open when Isidro Plata threw rocks at him. Mr. Plata did not receive any medical treatment, as there was none available. [H.T. Vol 16: Def. Exh. 86, at 123]

247. At one point when Mr. Plata was a child in Michoacan, his parents left him in the care of his maternal grandmother, Cuca Serrano. Lucila Estrada Mondragon and Marianela Estrada separately recalled that Cuca Serrano treated Daniel Plata the same way Isidro Plata did – by beating him. [H.T. Vol 16: Def. Exh. 86-A, at 68; H.T. Vol.17:Def. Exh.88, ¶13] Although Cuca Serrano's beatings of Mr. Plata seem to have been well known in Angao, no one appears to have taken steps to stop them.

248. Mr. Plata also was a neglected child. Teacher Maria Eleazar Herrera Solis recalls him regularly arriving at school looking very hungry. [H.T. Vol 16: Def. Exh. 86, at 82] Additionally, his teachers recall him wearing dirty, torn clothing and having no shoes on his feet, even though relatives would give him clothes to wear. Lucila Estrada Mondragon recalled that Mr. Plata's circumstances were different from those of other children in Angao because the other children were not bare foot, they were well groomed and well kept. [H.T. Vol 16: Def. Exh. 86-A, at 61]

249. Conditions for Mr. Plata did not improve when he was in the care of Cuca Serrano. In addition to beating him, she would not ensure that he went to school, nor did she concern herself with ensuring that he arrived at school on time or was fed. [H.T. Vol 16: Def. Exh. 86-A, at 70]

250. Drug use. Drug use also is a behavioral risk factor for mental retardation. Mr. Plata smoked crack, did cocaine and smoked marijuana in the developmental period, all of which increased the risk of retardation. [H.T. Vol. 14: Def. Exh. 53, ¶¶10, 13-14]

251. Social Deprivation. Social deprivation – including the lack of a nonviolent surrounding community – is a behavioral risk factor for mental retardation. This risk factor was present in Mr. Plata’s young life as a result of the violence that pervaded Angao when he was a child.

252. When Mr. Plata was a child in Angao, it was a very violent place and murder was common. People resolved their problems with violence and there were many revenge killings. [H.T. Vol.17:Def. Exh.88, ¶¶4-6; H.T. Vol.14:Def. Exh.54, ¶42]

253. In Angao, there was an ongoing feud between two families called “Jaime” and “Estrada.” The feuding Estradas were not related to Mr. Plata’s family, but Mr. Plata’s aunt, Marianela Estrada, recalls that he was very fearful as a child that the Jaimes would confuse him as being a member of the other Estradas and kill him. [H.T. Vol.17:Def. Exh.88, ¶¶4-6]

254. Another time when Mr. Plata was a little boy in Angao, he came across a man who had been shot to death. When he ran to tell his maternal grandmother, Celia Hernandez, about it, she investigated and discovered that someone had shot a man in the head and left his body in the town plaza for everyone – including Mr. Plata – to see. [H.T. Vol.14:Def. Exh.54, ¶43]

255. The violence in Angao continued to affect Mr. Plata even after his mother took him to the United States. In 1991, Mr. Plata's maternal grandfather was shot to death at his home in Angao. Prior to the murder, Mr. Plata had had a close and affectionate relationship with his grandfather. [H.T. Vol.14:Def. Exh.54, ¶45]

**4. Educational Risk Factors**

256. Risk factors for mental retardation in the educational category include impaired parenting, inadequate special educational services, and inadequate family support. [2002 AAMR MANUAL, Table 8.1 at 127]

257. Parental cognitive disability without supports. Isidro Plata was widely believed to be intellectually impaired, in addition to being an alcoholic. [H.T. Vol. 5:67 & 104-05; H.T. Vol. 14: Def. Exh. 53, ¶7; H.T. Vol. 16:Def. Exh. 86-A, at 23]

258. Isidro Plata would do very stupid things, even when sober. Mr. Plata's aunt, Marianela Estrada, recalls a man in Angao dared Isidro Plata to put his hand in a fire; the man told Isidro that if he put his hand the fire, the man would put his head in. Although it was obvious to everyone else that the man was not serious, Isidro was so stupid that he put his hand in the flame and badly burned himself. [H.T. Vol.17:Def. Exh. 88, ¶11]

259. Yet, nowhere is there any indication that Isidro Plata received any sort of assistance for his intellectual limitations.

260. Lack of preparation for parenthood. It is evident that Mr. Plata's parents had no preparation for the rigors of parenthood. Floresbinda Estrada became pregnant at 19, even though Isidro Plata physically abused her from the moment they became married. She never sought prenatal care while pregnant and stayed with Isidro Plata, even though he beat her while she was

pregnant. [H.T. Vol.14:Def. Exh.54, ¶¶17-20] Meanwhile, Isidro Plata continued to drink, even with a child on the way, and did not in any way reduce his violently drunken behavior towards his wife and, later, Mr. Plata. [H.T. Vol 16: Def. Exh. 86-A, at 58; H.T. Vol. 14: Def. Exh. 54, ¶¶17-19]

261. Inadequate special education services. Although Mr. Plata had one of the lowest grade averages in first grade in Angao and had to repeat second grade, and even though at least one of his teachers, Jorge Aguilar Sosa, thought he was more deficient than the other students at the school, there were no special education services available when Mr. Plata was in school in Mexico. [H.T. Vol. 16:Def. Exh. 86, at 60 & 75]

262. Later, when he was brought to the United States, Mr. Plata failed nearly all of his courses over a three-year period and scored in the bottom second percentile in reading at age 15. Yet, he was not flagged for special services at Revere Middle School, Watkins Junior High School, and Langham Creek High School. Nor was he tested for learning disabilities, even though ALC officials in the Cypress-Fairbanks Independent School District determined that something other than his poor English skills were causing his educational problems and specifically recommended testing. [Exhibit 3 (Alternative Learning Center document dated 1-21-92), to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

263. It is not credible to suggest that Mr. Plata failed to receive the recommended testing because he was incorrigible. Jesus Plata exhibited many of the same behaviors as Mr. Plata in school. Jesus Plata's teachers observed that he "daydreams, shows a lack of interest and effort, is easily distracted, is disorganized" and that he demonstrated "off-task behavior, distractibility, attention-span [deficits]." These behaviors correctly suggested to Jesus Plata's teachers that he was in need of special education services, which he in fact received. It was not Mr. Plata's fault that the



educational system failed, first, to perceive that he was in need of testing and special services and, then, to follow up with appropriate testing once the need was finally perceived. [Exhibit 8, at 4 & 8, to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B]

264. Inadequate Family Support. The lack of family support in Mr. Plata's life is demonstrated by his family's inability to protect him from the violence of his father and to advocate for better educational services while he struggled in school. Repeatedly, Mr. Plata was left to fend for himself when he was faced with violence at the hands of Isidro Plata or Cuca Serrano, and no one family member ever inquired into why he was having so much trouble in school. Poverty, illiteracy and ignorance likely diminished the family's ability to advocate for Mr. Plata.

**E. OTHER EVIDENCE INDICATIVE OF MENTAL RETARDATION (*EX PARTE BRISENO* FACTORS)**

265. Those who knew Applicant Plata best during the developmental stage thought he was mentally retarded at that time and acted in accordance with that determination.

266. In the case of Mr. Plata, his family and his teachers thought he was mentally retarded. Two of his teachers in Mexico thought he had retardation, and held him back in school. They could do no more because there were no special education facilities in Angao or in the larger municipality of which it was a part. [H.T. Vol 2: 129-30; H.T. Vol. 16:Def. Exh. 86, at 60 & 75 H.T. Vol. 16:Def. Exh. 86-A, at 77]

267. A childhood friend, Patricia Vasquez, believed that Mr. Plata was in special education because he seemed to her to be mentally slow just like her brother, who was in special education. [H.T. Vol. 14: Def. Exh. 56, ¶¶4 & 7] Many others who knew Mr. Plata in his high school years also thought him to be mentally slow: Nasario Vasquez, Carlos Contreras, Charles

Ramirez and Ponciano Ramirez. [H.T. Vol. 14:Def. Exh. 55, ¶2 and Def. Exh. 53, ¶20; H.T. Vol. 17: Def. Exh. 89, ¶6 and Def. Exh. 90, ¶6 ]

268. And, there is inferential evidence that Mr. Plata's teachers in the United States believed he had retardation when the Alternative Learning Center in the Cypress-Fairbanks Independent School District referred him for educational testing with the notations that he appeared to be "low" and possibly suffered from a learning disability or needed vocational training. The school district never tested Mr. Plata, but that was not the fault of the ALC, which could only refer him for testing. However, it is reasonable to infer that the ALC had suggested testing with a view towards having Mr. Plata enrolled in special education. Retired Houston Police Officer Ponsiano Ramirez recalls Mr. Plata asking what special education was and disclosing that schoolteachers had suggested he might be placed in such classes. [H.T. Vol. 17: Def. Exh. 90, ¶13]

269. It is irrelevant that Mr. Plata's trial counsel, Ricardo Rodriguez, never thought that Mr. Plata suffered from mental retardation. There has been no showing whatsoever that Mr. Rodriguez possessed any specialized training or experience that would have enabled him to detect Mr. Plata's intellectual capacity from his conversations with him. Moreover, Mr. Rodriguez, by his own admission in an affidavit filed with this Court in 1999, never investigated Mr. Plata's childhood and schooling in Mexico – a fact that has been confirmed by the witnesses from Mexico. [H.T. Vol.14:Def. Exh.54, ¶52; H.T. Vol. 16:Def. Exh. 86, at 62-63, 87, 105, 133 & Def. Exh. 86-A, at 28 & 79] Had attorney Rodriguez investigated in Mexico, he would have met Mr. Plata's primary school teachers, two of whom believed he had retardation. [H.T. Vol. 16:Def. Exh. 86, at 60, 75 & 86] He also would have met witnesses who could have provided the Plata family history.

All of these witnesses would have been willing to have spoken to him about what they knew about Mr. Plata. [H.T. Vol. 16:Def. Exh. 86, at 63, 87, 133 & Def. Exh. 86-A, at 28 & 77]

270. Nor can it be said that Mr. Rodriguez's belief that Mr. Plata did not suffer from retardation had any basis in any psychological assessment performed by defense experts at trial. The record is clear that defense expert Jerome B. Brown, Ph.D. never performed any formal assessment of Mr. Plata's intellect. [Affidavit of Jerome Banks Brown, Ph.D., ¶4, attached as Exhibit 12 to Application for Post-Conviction Writ of Habeas Corpus, Cause No. 693143-B; Affidavit of Antolin M. Llorente, ¶¶10-11, attached as Exhibit 13 to Applicant's Response to Respondent's Motion to Dismiss Subsequent Application for Post conviction Writ of Habeas Corpus (filed Aug. 19, 2004)]

271. It is further irrelevant that no fact witness for the defense at the punishment phase of Mr. Plata's trial testified that he had retardation. The record shows that no one asked any of the fact witnesses whether they thought Mr. Plata had retardation, which is not surprising given that at the time Mr. Plata was tried, mental retardation was not an absolute bar to the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

272. Another *Briseno* question is whether an individual formulated plans and carried them through or whether his conduct was impulsive. Dr. Llorente found that there are many examples of Mr. Plata's impulsivity. These include his willingness to jump into dirty bayou water on a dare, and his impulsive behavior in quitting a menial job because the pay seemed low. [H.T. Vol 2: 130-31; H.T. Vol 3: 224-25; H.T. Vol. 14:Def. Exh. 55, ¶7]

273. *Briseno* also inquires into whether an individual shows leadership or is lead around by others. There is no evidence that Mr. Plata ever lead anyone in anything. He was picked last

for games, he performed the most menial tasks at work, and he never showed any leadership potential at school or church. Even when he was committing the robbery of the convenience store in this case, Mr. Plata was not the first into the store, but was following others. As Dr. Llorente has observed, this behavior is indicative of a follower rather than a leader. [H.T. Vol 2: 134] Dr. Brown also opined at Mr. Plata's trial that he was a follower, not a leader. [H.T. Vol 2:131; S.F. Vol. 33:164]

274. *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. Mr. Plata could do neither.

275. With regard to socially acceptable behavior, the record is clear that Mr. Plata was written up in school for behavioral violations, including failing to pass scissors appropriately in a class. As Mary Catchings, was the teacher who wrote Mr. Plata up for the violation, attests, Mr. Plata was not trying to wound anyone with the scissors; rather, he was engaging in horseplay when he tossed them to another student in an unsafe manner. [H.T. Vol. 14:Def. Exh. 50, ¶¶4 & 6] Similarly, ALC Principal Terry Rizzo recalled that Mr. Plata had been disciplined for violating ALC behavior rules. Mr. Plata's behavioral violations in school constituted lapses in socially acceptable behavior.

276. With regard to being able to lie effectively, it is notable that when Mr. Plata was asked in this Court at his trial, "What grades did you receive in school," he answered that he received "A's and B's". Yet, his school records were in evidence and they made clear that he had flunked almost all his subjects. It is irrational behavior for an individual to think that he can

misrepresent his grades at a capital murder trial and not have the prosecution confront him with his school records. [H.T. Vol 2:131-33; S. F. Vol. 31:204]

277. Nor can Mr. Plata respond coherently, rationally and on point to oral or written questions. When assessed by Dr. Llorente, Mr. Plata's answers would diverge from the topic which he was being asked to address. [H.T. Vol 2: 132-33] When Dr. Denkowski evaluated Mr. Plata, the transcript of that evaluation shows that Mr. Plata could not even provide a rational answer to Dr. Denkowski about why it was important to have a trial by a jury of one's peers:

- Dr. Denkowski: Why is it important to be tried by a jury of your peers?
- Daniel Plata: *Because the jury doesn't know nothing about the law. I mean that is exactly what it is, right?*
- Dr. Denkowski: What, I'm not sure that I understand what you mean.
- Daniel Plata: *I mean, if the jury was to know, to know about the law I mean, there were be no, all these sentences you know, people sentence to prison.*
- Dr. Denkowski: Okay, what is another reason why a person should have a trial by jury?
- Daniel Plata: *I, I ah, don't really know.*

[H.T. Vol. 14:Def. Exh. 49, at 114-15]

278. Even the capital offense for which Mr. Plata was found guilty did not demonstrate forethought, planning, or complex execution of purpose of purpose on his part. [H.T. Vol 2:134-35] As the Court of Criminal Appeals has noted in *Ex parte Briseno*, impulsive crimes like robbery – the underlying crime in this case – are not the sort of crimes that require foresight and planning. 135 S.W.3d 1, 17 n.70 (Tex. Crim. App. 2004).

279. Mr. Plata's conduct during the robbery reveals little insight or foresight. Indeed, had greater planning been involved, Mr. Plata likely would have engaged in counter-measures – such as wearing a disguise or a mask – to hide his face from the security camera whose videotape footage led directly to his arrest. [H.T. Vol 2: 134-35; H.T. Vol. 13:State Exh. 48]

280. In fact, the videotape of the crime reveals the impulsivity behind it. The videotape shows that, while Mr. Plata initially sought to hide his face from the camera by holding up his forearm, the camera angle was such that his face was not hidden as he moved through the store. Moreover, Mr. Plata soon dropped his forearm, thus allowing many minutes of unimpeded views of his face. [H.T. Vol. 13:State Exh. 48] Indeed, it was because Mr. Plata's face could be clearly seen on the videotape that an acquaintance was able to identify him for police, which led to his arrest. See Plata v. State, No. 72,639, at 3 (Tex. Crim. App. July 8, 1998) (unpublished).

Similarly unpersuasive is the claim that Mr. Plata engaged in “planning” when he sought to wipe his fingerprints from the doorframe of the convenience store following the shooting. The gesture further demonstrates Mr. Plata did not understand the futility of removing fingerprints when the proof of his crime had been captured by the video camera that monitored the store. Mr. Plata's accomplices seemed to have understood this; in contrast to Mr. Plata, none of the accomplices are seen on the videotape trying to wipe their prints from the scene after the shooting. [H.T. Vol. 13:State Exh. 48]

#### **G. DETERMINATION CONCERNING MENTAL RETARDATION**

281. Mr. Plata has mental retardation. His full scale obtained score of 65 on the WAIS-III administered by Dr. Rosin demonstrates that his intellect is firmly in the range of mild mental retardation, as recognized by the AAMR. Dr. Rosin's WAIS-III is reliable and credible because the WASI and TONI-2 scores obtained during Dr. Llorente's assessment of Mr. Plata and the C-


TONI score obtained during Dr. Denkowski's assessment that Mr. Plata also place Mr. Plata's intellect in the range of a person with mental retardation. [H.T. Vol. 2: 106-11] The finding of retardation is further supported by Dr. Llorente's determination that Mr. Plata has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning. [H.T. Vol. 2:124-25] Taking into account all of this evidence, Dr. Llorente has credibly opined that Mr. Plata meets the diagnostic criteria for mental retardation. [H.T. Vol. 3:57]

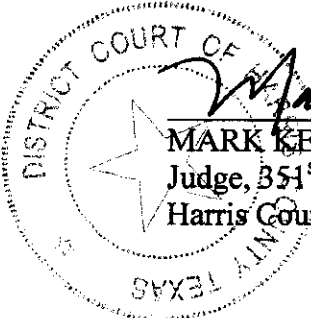
## II.

### CONCLUSION OF LAW

1. The preponderance of the evidence established that Mr. Plata has significantly subaverage general intellectual functioning.
2. The preponderance of the evidence shows that Mr. Plata suffers from significant deficits in adaptive behavior.
3. The preponderance of the evidence shows that Mr. Plata exhibited significantly subaverage general intellectual functioning concurrent with deficits in adaptive behavior that originated before the age of 18.
4. The preponderance of the evidence shows several risk factors for retardation present in Mr. Plata's history.
5. The preponderance of the evidence shows that Mr. Plata is a person with mild mental retardation
6. 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 28<sup>th</sup> day of September 2007.

  
MARK KENT ELLIS  
Judge, 351<sup>st</sup> Judicial District Court  
Harris County, Texas



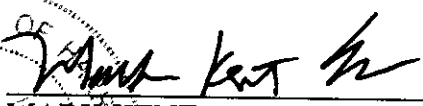




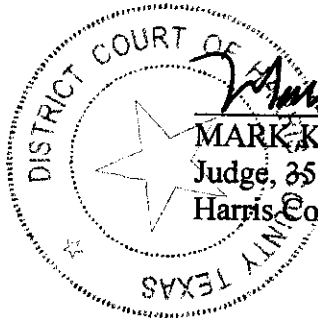
7. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 721568, unless they have been previously forwarded to the Court of Criminal Appeals.

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: Kathryn Kase, 412 Main, Suite 1150, Houston, Texas, 77002 and to Respondent: Ann Lee Dulevitz; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, TX 77002.

Signed this 28<sup>th</sup> day of September 2007.



MARK KENT ELLIS  
Judge, 35<sup>th</sup> Judicial District Court  
Harris County, Texas

The seal of the District Court of Harris County, Texas, is circular. It features a five-pointed star in the center. The words "DISTRICT COURT OF" are written along the top inner edge of the circle, and "HARRIS COUNTY TEXAS" is written along the bottom inner edge. The seal is partially obscured by the signature and the printed name of the judge.

STATE OF TEXAS  
COUNTY OF HARRIS

I, \_\_\_\_\_ District Clerk of Harris  
County, Texas, hereby certify that this is a true and  
correct copy of the \_\_\_\_\_ and or  
recorded in the \_\_\_\_\_ or hard  
copy as \_\_\_\_\_ on this date.  
Witness my official hand and seal of office  
this \_\_\_\_\_ SEP 20 2007 \_\_\_\_\_

\_\_\_\_\_, DISTRICT CLERK  
HARRIS COUNTY, TEXAS  
By S. MOORE Deputy