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Forensic & Clinical Psychology

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FORENSIC PSYCHOLOGICAL REPORT

LEON WINSTON

Re: Evaluation of Claim of Mental Retardation

November 3, 2008

I, Leigh D. Hagan, Ph.D., declare under penalty of perjury as follows:

I. Qualifications

A. Qualifications: Clinical & Forensic Psychology

1. License

I am a psychologist licensed and qualified to practice clinical psychology in the Commonwealth of Virginia. I received my Bachelor's Degree in Psychology from the University of Virginia in 1975 and a Master's Degree in Counseling from the same university in 1976. I took a PhD in Psychology from the University of Missouri-Columbia in 1981.

2. Board Certification

I was Board Certified in Forensic Psychology by the American Board of Forensic Psychology, a specialty board of the American Board of Professional Psychology in 1995.

3. Professional Practice

a. I have practiced clinical and forensic psychology since 1982 and have evaluated and reviewed records in over 3500 cases either in litigation or under the scrutiny of regulatory or administrative agencies of the government. I have served as an expert in numerous state courts and in the Fourth Federal District as a court-appointed expert, by consent of the parties, for the Commonwealth and for defense. See the attached Curriculum Vitae and Testimony History.

b. It was my privilege to serve as a forensic psychology consultant to the Juvenile Trial Competence Workgroup of the General Assembly's Commission on Youth. This group's product resulted in Virginia's first-ever statutory definition of juvenile trial competence (§16.1-356).

B. Specialized training, approved by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services

1. Training completed at the Institute for Law, Psychiatry and Public Policy (ILPPP) at the University of Virginia

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- a. Capital Defendant Sentencing
- b. Advanced Forensic Evaluation
- c. Sex Offender Evaluation
- d. Basic Forensic Evaluation
2. Training I delivered at ILPPP
 - a. Hagan, L.D. (June 9, 2003). Evaluation of Possible Mental Retardation in Forensic Settings. *In* Bonnie, R., Snell, M. & Hagan, L.D. Implementation of the *Atkins* Decision. Adult Advanced Forensic Evaluation Training
 - b. Hagan, L. D. (December 4, 1998; January 28, 1998; April 16, 1999; August 27, 1999; November 5, 1999). Restoration of Incompetent Juvenile Defendants. *In* Basic Juvenile Evaluation Training.
 - c. Hagan, L. D. (June 1996) Capital Evaluation Issues.
- C. Qualifications: Mental Retardation (MR)
 1. Lead author in Hagan, L.D., Drogin, E.Y. & Guilmette, T.J. (in press). Adjusting IQ scores for the "Flynn Effect": Consistent with the standard of practice? *Professional Psychology: Research and Practice*.
 2. In 2002 it was my privilege to serve as the Clinical Chair of the Clinical Advisory Group to Virginia Crime Sentencing Commission Subcommittee concerning development of a definition of MR after *Atkins*.
 3. Skill in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior
 - a. Consultative Examiner (CE) for Virginia Department of Disability Determination Services (DDS) - I have personally evaluated hundreds of claims of disability, including MR claims with adults and children.
 - b. Medical Consultant to Disability Determination Services – As an in-house consultant to Virginia DDS I reviewed over 3000 claims of disability, including MR for adult and child claims. The reviews addressed
 - i. the sufficiency of the medical evidence of record (MER),
 - ii. whether the assessment of intellectual functioning included administration of at least one standardized measure generally accepted by the field of psychological testing and was appropriate for administration to the particular claimant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. The review also considered whether the testing of intellectual functioning had been carried out in conformity with accepted professional practice, and whether the assessment included information from multiple sources.
 - iii. The reviews I conducted also took into consideration the sufficiency of the MER with respect to adaptive behavior including whether the assessment was based on multiple sources of information, including

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clinical interview, psychological testing and educational, correctional and vocational records.

- iv. The reviews I conducted for all claims of MR also took into account the age of onset.
 - c. Peer Review & Quality Assurance – All of the evaluations I personally conducted and the reviews I conducted as a Medical Consultant were subject to peer review by other clinical psychologists and psychiatrists trained in the adjudication of disability claims including MR. My work was also subject to review by the Quality Assurance unit of DDS, the Hearing Officer and the Administrative Law Judge for SSA.
- 4. At the request of DDS, I presented continuing education at a professional forum of peers on the Wechsler Adult Intelligence Scale for Adults, Revised Edition (WAIS-R).
 - 5. Special Education Evaluations, including MR
 - a. From 1976-78 I shared responsibility for new and triennial re-evaluations of school special education students, including MR determinations, for all schools in Northampton and Accomack Counties and Cape Charles, Va.
 - b. In the mid-1980's I evaluated students newly referred for special education and performed triennial re-evaluations for special education students, including MR students, under a one-year contract for Colonial Heights (Va.) Schools.
 - c. I evaluated significantly challenged students at the Diagnostic and Prescriptive Center for the City of Richmond (Va.) Public Schools for special education purposes, including IQ testing.
 - 6. As the Director of Psychology Training at McGuire VA Medical Center, I trained and supervised doctoral interns in the administration, scoring and interpretation of IQ tests, primarily the Wechsler scale.
 - 7. In the vast majority of the trial level capital evaluations in which I have been appointed, I have either personally administered or reviewed intellectual functioning testing including the administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. The testing of intellectual functioning was carried out in conformity with accepted professional practice.
 - 8. I have published a paper in the peer-reviewed scientific literature on the subject of ethical practice of neuropsychological testing in the forensic arena. I co-authored a paper on the subject of narrative descriptive labels of cognitive test scores when offered for consideration in court.

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9. Continuing Education Presentations Delivered

I have presented advanced training to other mental health professionals in the areas of forensic psychology, MR after *Atkins*, professional practice, ethics, assessment including child abuse, children's medical records, and practice standards. A current list of continuing education presented is incorporated within the attached CV.

D. Qualifications: Assessment of Adaptive Functioning

1. I have reviewed more than 3,000 disability claims for DDS, including my rating of Residual Functional Capacity (RFC) with special attention to:
 - a. understanding & memory,
 - b. sustain concentration & persistence,
 - c. social interaction, and
 - d. adaptability.
2. I also have conducted hundreds of in-person DDS consultative exams for a wide range of claims of mental disorders, all of which included a rating of activities of daily living.
3. As a consultant to John Randolph Medical Center Work Hardening Program, I had responsibility for in-person assessments of psychological conditions that might impair successful Work Hardening for injured workers.
4. I have been privately retained as a forensic psychologist to evaluate appeals of disability denials to SSA. This work included in-person evaluations and RFC ratings.
5. Additionally, I have served as a retained expert for plaintiffs and defendants in civil claims of damages including impairments to residual cognitive capacity, adaptive functioning and capacity for work-like behavior.
6. In all instances above, I considered the claim of impairment relative to objective signs and symptoms and assessed factors that could undermine reliability of the data such as motivation, malingering, symptom magnification, insufficiency of source materials for the evaluation, and other considerations.

II. Reason for Report, Scope of Employment & Issues

A. Reason for Report

My reason for detailing the above aspects of my practice in this report is to inform the court as to the basis for my familiarity with what is usual and customary practice in forensic psychology nationally and in Virginia. I am not speaking for the ABPP, AAFB, VCU, or any other entity.

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B. Scope of Employment

I have been retained by the Office of the Attorney General of the Commonwealth of Virginia. I have been asked to consult in this matter and to prepare this report. I am being compensated at the rate of \$300 per hour for my work.

C. Issues

1. address the psychometric, psychological and forensic psychological considerations relevant to the behavioral scientific evidence and source materials in this case,
2. evaluate the available source materials and records in light of Mr. Winston's claim of mental retardation, and
3. opine to a reasonable degree of psychological certainty as to whether the preponderance of the behavioral science evidence and available source materials and records satisfy Virginia's statutory criteria for MR under § 19.2-264.3:1.1.

III. Source Materials Reviewed by Evaluator

In preparing this report, I relied upon the following sources.

A. Records

1. Legal
 - a. Lynchburg documents (redacted)
 - b. Summary of Leon Winston's criminal history
 - c. Transcripts of all court proceedings
 - d. VSC Order dismissing state habeas petition
 - e. VSC direct appeal opinion
 - f. Exhibits 1-4 (inc. Miranda form, 4/25/02)
 - g. Habeas Appendix Volumes I, II, & III
 - h. Mitigation records index
 - i. Proffer to Commonwealth's Attorney (video & transcript)
 - j. Statement to police
 - k. Witness & Exhibit Letter
 - l. Memorandum of Law in Support of MTD
 - m. Amended Petition (11/16/07)
 - n. Order granting MR hearing
 - o. DMV Cover Sheet re: Freddie Lester Jackson
 - p. Police report, "Trial Without Lawyer" form, "Appointment of a Lawyer" form & Sentencing Order re: Eluding (2002)

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- q. Dr. Evan Nelson's mitigation file material from capital trial
- 2. DOC
 - a. Central File
 - b. Medical combined file
 - c. Sussex I Additional Property – Purchasing Records
 - d. Sussex I Property-Grievance-Complaint Records
 - e. Warden's Memorandum on effect of *Green*
 - f. blank Commissary forms
 - g. Books (sample) defendant ordered, read or possessed in DOC
 - h. Request Form (medical administrator)
- 3. Educational, Medical, Social & Psychological
 - a. E-mail re: Connie
 - b. Screenshots from Black Expressions website
 - c. Fairfax Social Services records binder with functional capacity ratings for communication skills and personal adjustment
 - d. Dr. McClintock's neurological consultation of defendant (9/19/95)
 - e. New Dominion records inc. Tool Check Out Competencies (9/27/94)
 - f. Poplar Springs' records inc.
 - i. defendant's statement re: snitches (12/5/95)
 - ii. psychological evaluation by Donna D. Elder, Ph.D. (9/15/95)
 - g. ABAS II Adult Form (ages 16-89) (blank)
 - h. Defendant's permission for Dr. Hagan to release information (10/23/08)
 - i. Three letters written by Defendant while incarcerated
 - i. "Hey what's up, Grandma?" (9/16/03)
 - ii. "Dear Family" (1/23/07)
 - iii. "Hi Kathy" (7/8/08)
- 4. Defense Experts
 - a. Discovery from Berger file (7/16/08) (VCRRC)
 - b. Discovery from Drewry file (7/16/08) combined (VCRRC)
 - c. Material relied upon by Susan D. Rich, M.D., MPH
 - d. Dr. Rich's notes & report
 - e. File from Evan Nelson, Ph.D.

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- f. Notes and report from Dan Reschly, Ph.D. inc.
 - i. ABAS II Teacher Form (ages 5-21) by Denise King, 14 years after she taught him
 - ii. ABAS II Parent Form (ages 5-21) by Kathy Hartka, guardian, rating performed retrospectively
- 5. All other Bates stamped records.
- 6. I relied upon the legal and professional documents cited herein, including those cited in the footnotes of this report.
- B. Direct observation of and interview with Mr. Winston at Sussex I State Penitentiary (SISP) (10/23/08)
- C. My education, continuing education, training, and experience

IV. Behavioral Science Foundation for Assessment of MR

A. Behavioral Science Terminology Relevant to the Issues

The following terminology and concepts are relevant to the discussion of psychometric, psychological and forensic psychological issues related to the behavioral scientific evidence and source materials in this case.

- 1. Forensic Psychology “is the application of the science and profession of psychology to questions and issues relating to law and the legal system.”¹ When evaluating an issue before the court, the forensic psychologist begins with the law and applies scientific findings to the legal question. In Mr. Winston’s case Va. §19.2-264.3:1.1 defines the legal question.
- 2. Norm group – Reference group upon which the statistical parameters of a test were developed. A particular evaluatee’s test score is interpreted in light of the data for the comparison (norm) group. “Norming is the weakest link in standardized testing.”² It is inappropriate to use a particular test for a specific individual if the norm group did not sufficiently include other people similarly situated.
- 3. Data – “The term test data refers to raw and scale scores, client/patient responses to test questions or stimuli, and psychologists’ notes and recordings concerning client/patient statements and behavior during an examination.”³
- 4. Reliability - Refers to the consistency of an observation or data point. Reliability is a necessary but not sufficient condition for establishing Validity.

¹ American Board of Forensic Psychology (2008). Retrieved Nov. 2, 2008 from <http://www.abfp.com>.

² Stanley, J. & Hopkins, K. (1972). Educational and Psychological Measurement and Evaluation, 5th ed., Englewood Cliffs, New Jersey: Prentice-Hall, Inc.

³ APA Code of Conduct §9.04(a)

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5. True Score – A theoretical concept never obtainable in practice. An error-free score; usually defined as the average of the scores that would be obtained if a specified examinee were to take the same test an infinite number of times (assuming no learning).⁴
6. Error Variance – Refers to any factor that tends to exert a varying or changeable influence on a set of test scores. Error Variance refers to an adverse effect on the reliability of the test. It represents “noise” rather than true “signal” within the data.
7. Standard Error of Measurement (SEM) – A statistical technique for estimating the probable range of values that is indicated by an obtained score.⁵ This is a way of standardizing the error of measurement which is theoretically known to exist for any obtained score. The SEM is a standard deviation of those theoretical errors of measurement that are inherent in all standardized tests.
8. Validity – Refers to the extent to which a test actually measures something meaningful (construct validity), is constructed as to represent faithfully the universe of possible tasks that could theoretically be tested (content validity), and is related to performance outside the testing situation (criterion-related validity). Validity is sometimes referred to “accuracy”, “true score”, and “truthfulness.”
9. Credibility - Refers to the believability that one assigns to a witness’ statement. A judgment about credibility is a subjective reality. It is an individual decision that is not necessarily based on the reliability or consistency but rather on its apparent plausibility. Credibility and reliability can be orthogonal (distinct) dimensions. Reports that are highly reliable (and accurate) may be judged as not very credible. Conversely, inaccurate reports are sometimes judged as highly credible.
10. Criterion Validity – Reflects the degree to which test results correlate in the predicted direction with external criteria sometimes referred to as “predictive validity” or “empirical validity.”
11. Ecological Validity – Refers to the functional and predictive relationship between an evaluatee’s performance on a set of neuropsychological tests and that person’s behavior in a variety of real world settings (e.g., home, work, school, community, etc.)⁶ After dealing with the issues of accuracy and error, the next consideration is whether or not the test score data are actually helpful in understanding a person’s capacity and adaptive functioning with the demands of everyday life.

⁴ Lyman, H. (1971). Test Scores and What They Mean. 2nd Ed. Prentice Hall, Inc. Englewood Cliff, NJ.

⁵ Miller, D. (1972). Interpreting Test Scores. John Wiley & Sons, Inc.

⁶ Sbordone, R. (1996). Ecological Validity: Some Critical Issues for the Neuropsychologist. In R. J. Sbordone & C. J. Long (Eds), The Ecological Validity of Neuropsychological Testing (pp.15-41). Orlando: G.R./St. Lucie Press

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12. Incremental Utility – Refers to the degree to which a test score adds new information and understanding not already available from existing data. Incremental utility is not an issue of accuracy. It is a function of the extent to which the test data lead to new and useful understanding.
13. Malingering - intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs. Under some circumstances, Malingering may represent adaptive behavior-for example, feigning illness while a captive of the enemy during wartime. Malingering should be strongly suspected in a medicolegal context of presentation (e.g., the person is referred by an attorney to the clinician for examination) or if there is a marked discrepancy between the person's claimed stress or disability and the objective findings or in the presence of antisocial features.
14. Symptom Magnification – overstatement of self-report or presentation intended to give the appearance of greater impairment than is warranted by objective observation or measurement. Symptom magnification is related to Malingering but differs in that it is the overstatement or presentation of symptoms that have some objective basis.
15. Bias in Scientific Method – a threat to scientific methodology characterized by the holding of affirmative a priori beliefs about the occurrence or nonoccurrence of certain events or conditions and, as a result, direct an evaluation or report of findings that are consistent with these prior beliefs
16. Prejudice in Scientific Method - a threat to scientific methodology characterized by the holding of negative a priori beliefs about the occurrence or nonoccurrence of certain events or conditions and, as a result, direct an evaluation or report of findings that are consistent with these prior beliefs
17. Premature Closure in Scientific Method - a threat to scientific methodology characterized by ceasing investigation upon the discovery of evidence that satisfies prior held beliefs even though additional evidence is available that potentially challenges those beliefs
18. Selective Attention to Evidence in Scientific Method - a threat to scientific methodology characterized by attending to those observations that tend to support a priori beliefs, underweighting the observations that challenge those beliefs, or diminishing the significance of observations that support a competing explanation
19. Single Hypothesis Testing in Scientific Method - a threat to scientific methodology characterized by entertaining only one explanation for a host of observations rather than considering a range of explanations, including those explanations that might prove disadvantageous to the observer's preferred explanation
20. Practice Effect - refers to gains in scores on exams that occur when a person is retested on the same instrument or tested more than once on very similar

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measures. These gains are due to the experience of having taken the exam previously; they occur even when the examinee was not given specific or general feedback on exam items. The gain in scores does not reflect growth or other improvement on the skills being assessed

21. Feedback Effect – refers to gains in test scores occurring as a result of providing the person with specific or general feedback information about the accuracy of their performance
22. Correlation – refers to the “tendency for two (or occasionally more) variables to change values concomitantly. Note: Evidence of correlation is not evidence of causation.”⁷
23. Causation - refers to “the fact of being the cause of something produced or of happening. The act in which an effect is produced.”⁸
24. Executive Functioning – The ability to organize one’s self, plan and coordinate a course of action, follow-through on tasks and activities, and modify one’s approach based on changing conditions in the environment.

B. Nature of Psychometric Assessment

1. Hypotheses are not determinative – Psychological tests, including IQ tests, are not determinative of any clinical, forensic or legal issue. The data generate hypotheses which have to be examined in light of multiple sources of information (e.g., records, observations, collateral informants). The score from a particular test must also be considered in light of possible sources of error.
2. Scores are based on a combination of true variance and error variance
 - a. True variance
 - i. True score – This is a theoretical concept which is never attainable. It refers to the “accurate” score.
 - ii. Expected variability – Some variability is expected and does not result from invalidating
 - (a) Standard error of measurement – A statistical method to standardize the statistical impact of various sources of error.
 - (b) Confidence intervals - The upper and lower limits of the range within which the true score can be expected to fall. It is often expressed in terms of degrees of confidence (e.g., 90%, 95%).

⁷ Lyman, H. (1971).

⁸ Black’s Law Dictionary, 6th Ed. (1990). p. 221

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- b. Error variance – There are several sources of error that contribute distortion (static) that obfuscate the True Score (signal).
 - i. Test-based sources of error
 - (a) Inappropriate norm (comparison) group⁹¹⁰
 - (b) Increases in average IQ scores over time¹¹
 - (i) Statistical observation of test norms over time shows a rise in average IQ scores for large groups of people. This observation was first ventured by James Flynn, a political scientist (hence, “Flynn effect.” As time passes after the publication of the restandardization of an IQ test, average scores tend to rise. Some research show the opposite effect: average scores decrease, depending on the test and the population of evaluatees. This is not necessarily an indication that people are getting smarter or less capable. It is simply a statistical observation about the performance of large groups of people on the same instrument at two sample occasions years apart.

Once the test is restandardized (renormed) the average (mean) is statistically reset to a score of 100. The gain in IQ scores in the years post-test publication, depends on the measure that is used (Raven’s Progressive Matrices had the greatest increase over 30 years)¹² and the type of cognitive task being measured. Intelligence needed for thinking on one’s feet, abstract reasoning and problem-solving skills showed greater variability than accumulated knowledge such as vocabulary, arithmetic and general fund of information. IQ tests, such as the Wechsler scales, that draw from both fluid and crystallized intelligence are not as influenced by the increase in scores over time as are other measures such as the Raven’s. Further, the degree of variability of IQ scores over time depends upon the range in which the score fell relative to the normal distribution (bell curve of scores). The Flynn effect is well documented for scores

⁹ Ethical Principles of Psychologists & Code of Conduct, (December 2002), American Psychologist. 1066-1073. (hereafter: APA Code of Conduct)

¹⁰ American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education (1999). Standards for Educational and Psychological Testing. American Educational Research Association: Washington, D.C.

¹¹ Flynn, J.R. (1984). The Mean IQ of Americans: Massive Gains, 1931-1978. Psychological Bulletin. 29-51.

¹² Kanaya, T., Scullin, M. & Ceci, S. (2003). The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society via Mental Retardation Diagnoses. American Psychologist. 778-790.

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falling in the average range, but less is known about the impact of this statistical observation in the borderline and mental retardation range of IQ scores.

(ii.) Summary of Flynn effect research relevant to Mr. Winston's case:

- there appears to be a statistical shift in the average IQ score over time,
- there is no data to indicate that the change in the average IQ score for large groups of people over time in any way corresponds to an increase or decrease in adaptive functioning including practical reasoning, social skills and conceptual abilities,
- the extent of the variability over time is a function of the particular IQ test being employed with the Wechsler scales being less affected than the Raven's,
- the extent of the change in average IQ scores for large groups of people depends on the cognitive task being measured by the test, with crystallized intelligence (e.g., accumulated knowledge, arithmetic and general fund of information) demonstrating less of a shift over time than fluid intelligence (e.g., thinking on one's feet, abstract reasoning and problem solving skills),
- because the statistical analyses have focused primarily on average IQ scores, the data do not as clearly address scores in the borderline and MR ranges,
- the statistical observation is based on the averages of large groups of people and may not hold true in the same level of specificity for a particular individual,
- when considering the particular IQ score of an individual, there are other potentially more significant sources of variation over time including the standard error of measure, confidence intervals, feedback effect, performance motivation, and coexisting psychological factors that are well known to affect performance on IQ tests (e.g., history of substance abuse and depression).

The literature on this statistical observation appears in well recognized and authoritative scientific journals. The psychologists and social scientists who have raised the issue do not represent the broad spectrum of psychologists who use IQ tests day in and day out (e.g.,

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general practitioners of clinical psychology and school psychologists). Instead, the issue has been brought to attention by those with interests to MR and social policy.

There is no indication that this observation has been incorporated into mainstream actual practice of psychological test interpretation and report writing amongst the vast majority of practitioners who employ IQ test scores as a matter of routine in their daily practice.¹³ Adjusting scores based on the Flynn observation has not made its way into generally accepted practice.

- (iii) Adjustment of IQ scores based on this statistical observation is not the generally accepted practice in individual (particularized) reports from IQ scores from neuropsychologists, psychologists, or school psychologists.¹⁴

ii. Evaluatee-based sources of error

- (a) Other psychological conditions may affect test performance. These include, but are not limited to, mood issues (such as indifference, poor motivation, anxiousness and depression), attentional deficiencies (e.g., distractibility with or without hyperactivity), accumulated as well as short-term effects of substance abuse including stimulants, exposure to greater risk associated with criminal lifestyle, nutritional factors associated with lifestyle and institutional diet and other incentives (e.g., scoring high to test out of self-contained special education and avoiding have to ride to school in a special bus; scoring low in order to avoid the death penalty).
- (b) Prior experience with IQ testing itself can influence scores.
 - (i) The practice effect does not necessarily give an evaluatee specific cues to enhance subsequent test performance, even on identical or similar tests. The practice effect may create generalized familiarity with the test environment and a broad, but not specific, anticipation of the types of challenges posed by the testing. The practice effect is distinct from the feedback effect.

¹³ Dr. Scullin testified in federal court that of the 5,000 special education longitudinal cases he collected for Kanaya, et al. (2003), only six mentioned the Flynn effect and none adjusted earned IQ scores based on it (Scullin, M. (Oct. 31, 2006b). Testimony in *Green v. Johnson*. No. 02:05-cv-340 USDC ED of Va. Norfolk Div.)

¹⁴ Hagan, L.D., Drogin, E.Y. & Guilmette, T.J. (in press). Adjusting IQ scores for the "Flynn Effect": Consistent with the standard of practice? *Professional Psychology: Research and Practice*.

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- (ii) The feedback effect can enhance subsequent test performance in specific ways if the evaluatee has been given accurate and detailed information about prior performance. For example, on the Wechsler Information subtests, an evaluatee might later benefit from being told who Catherine the Great was or if he was given feedback as to the accuracy of his answer to any other question. However, the psychologist's Code of Conduct and Standards for Users of Educational and Psychologist Tests state a clear prohibition against giving specific feedback or engaging in any practice that would undermine the validity of psychological testing. If the psychologist practices according to the Code of Conduct and relevant standards, the evaluatee does not get feedback about performance on specific items. Feedback about the overall IQ scores is not related to what is commonly known as the feedback effect. Knowing one's score does not facilitate performance on subsequent testing.
 - (c) Deception, malingering, impression management, and reduced effort, in some instances, introduce more profound error resulting in strategically low IQ scores. Malingering must be considered in any case involving a referral by an attorney or the presence of an Antisocial Personality Disorder, or a marked discrepancy between the person's claimed disability and objective findings.¹⁵ Mr. Winston admitted that he did not use minimal effort on testing. He has clearly demonstrated antisocial behaviors and now claims MR.
- iii. Evaluator-based sources of error
 - (a) Variations from the standardized test administration per the test manual can introduce potential error. This might include such error as using abbreviated versions of the test, skipping certain items and simply failing to follow the instructions.
 - (b) Error can also be made in scoring the evaluatee's responses. For example, some of the Wechsler verbal subtests call for an element of judgment because the scoring guide does not include the universe of scoring examples. While reasonable psychologists may disagree on the scoring of a few points, it is less likely that there would be a wide variation of IQ scores across psychologists. Sometimes, there are simple arithmetic errors when adding up raw score points. Absent Mr. Winston's

¹⁵ Diagnostic and Statistical Manual of Mental Disorders-4th Edition (1994). American Psychiatric Association. Washington DC.

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full IQ test protocols, it is difficult to confirm that the tests were administered and scored accurately.

- (c) Score interpretation is the process of assigning narrative meaning to numerical data. In a forensic case, such as Mr. Winston's, the psychologist begins with the relevant legal definition of MR. Here, it is §19.2-264.3:1.1. It is error to rely on other definitions.¹⁶
- (d) It is important to consider the context in which the data has been collected. The average prison inmate has an average IQ one standard deviation below the mean. Amongst prison inmates, 15% score below 75 on the WAIS-R. Statistics from the U.S. Department of Education indicate that 65% of inmates are illiterate. A 1994 Arizona study found that 85% of the incarcerated population did not graduate from high school. Within the same population, 70% have no skill or trade education. The average inmate probably has a learning disability, has never held a steady job, has abuse substances, came from a dysfunctional home with a history of abuse, and has not gotten beyond the 10th grade.¹⁷ Mr. Winston is very similar to, not atypical of, the general prison population.

3. Ecological Validity and Incremental Utility

After dealing with the issues of accuracy and error, the next consideration is whether or not the test score data are actually helpful in understanding a person's capacity and adaptive functioning with the demands of everyday life.

In order to assess an individuals' functioning in everyday life, the psychologist should gather information about the setting in which the person functions presently.

"Many health and rehabilitation professionals, not to mention attorneys, have naively assumed that a brain-injured patient's cognitive and behavioral impairments can be determined simply by comparing the patient's neuropsychological test scores to normative standards. Unfortunately, the performance of patients during neuropsychological testing is frequent confounded by a variety of complex factors, which often go unrecognized."¹⁸

¹⁶ Guilmette, T.J., Hagan, L., & Giuliano, A.J. (2005, October). The use of descriptive labels in reporting neuropsychological test scores: Forensic implications. Poster presentation made at the annual meeting of the National Academy of Neuropsychology, Tampa, FL.

¹⁷ LoPinto, B. How Schools in Prison Help Inmates and Society: A Need for Prison Education. (http://adulted.about.com/cs/prisoneducation/a/prison_ed_p.htm). Retrieved: 9/22/05.

¹⁸ Sbordone, R. & Guilmette, T. (1999). Ecological Validity: Prediction of Everyday and Vocational Functioning in Neuropsychological test Data. In J. Sweet (Ed.), Forensic Neuropsychology: Fundamentals and Practice (pp. 227-254). LISSE, the Netherlands: Swets & Zeitlinger Publishers. (reprinted in I. Schultz & D. Brady (Eds) (2003). Psychological Injuries at Trial. Chicago, IL: American Bar Association. p. 231.

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Everyday skills encompass a broad range of diverse demands such as bathing, dressing, grooming, communication, transportation and other issues. Investigators have acknowledged that the correlations between neuropsychological measures and everyday functioning have been quite modest in light of 20 years of research. Such tests have only a modest ability to predict everyday functioning.¹⁹ These measures cannot be properly used in isolation. In the Adaptive Functioning section of this Declaration, I will show the substantiated discrepancy between informants' very low test rating of Mr. Winston's adaptive functioning versus his actual functional capacity in and out of prison.

"In addition, it is also important to bear in mind the distinction between a test being used as a diagnostic measure of some clinical syndrome or disorder versus a test being used to predict everyday skills. In the former, neuropsychological measures are used routinely and are usually quite helpful at identifying differences between clinical groups or between clinical and normal subjects. Predicting performance outside of a neuropsychology lab, however, is a different matter. Thus, tests can be diagnostically useful, but still not correlate significantly with everyday life. This realization has been borne out in connection with predictions of driving abilities, memory functioning, executive functioning and problem solving."²⁰

- a. Driving ability – Cognitive measures do not correlate substantially with predictions of driving ability. Far more helpful is a detailed understanding of the person's previous driving/accident history, pattern and extent of substance abuse, and psychiatric factors that may contribute to accident risk assessment more so than performance on psychomotor tasks. Psychologists making predictions about driving ability, as a function of adaptive behavior, need to incorporate these elements of history into their predictions formula. Mr. Winston's only problem driving was getting caught breaking the law and not having a license because he never took the DMV test.
- b. Memory functioning – "The issue of how well memory tests predict everyday memory functioning has not, until recently, received much attention from researchers. Parenthetically, this has been true in the field of neuropsychology as a whole, which may explain, in part, why the relationship between test scores and everyday functioning is so modest. One formal, but elementary, method for assessing patients' everyday memory skills is to simply ask them."²¹ I asked Mr. Winston about a wide

¹⁹ See also: Guilmette, T. & Kestner, M. (1996). The Prediction of Vocational Functioning from Neuropsychological Data. In R. Sbordone & C. Long (Eds) Ecological Validity of Neuropsychological Testing. Delray Beach, FL: GR Press/St. Lucie

²⁰ Sbordone, R. & Guilmette, T. (1999). p. 234.

²¹ Sbordone, R. & Guilmette, T. (1999). p. 235.

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range of events and subject matter. He claimed no memory loss. His recall of many details (e.g., books, TV, family, etc.) found corroboration in other source materials.

- c. Executive functioning & problem solving – Executive functioning refers to the ability to organize one’s self, plan and coordinate a course of action, follow-through on tasks and activities, and modify one’s approach based on changing conditions in the environment. “However, in spite of a wide variety of tests that neuropsychologists may use to assess executive functions, there is little systematic research that has established the ecological validity of these measures in predicting ‘real world’ abilities. The difficulties associated with assessing executive functions in the laboratory or office and relating them to everyday competence are the same as those found with predicting vocational abilities.”²² Mr. Winston demonstrated reasoning, planning and judgment in many of his criminal activities.
- d. Summary of ecological validity findings – “Research currently suggests that there is no one specific neuropsychological measure that can accurately predict all everyday skills for all persons . . . in short, it is not enough to rely solely on the patient’s neuropsychological test performance in predicting everyday competence. The behavioral domains are too complex and our understanding of everyday skills too elementary. It is important that we seek convergent and consistent sources of information in order to increase our understanding and ability to predict an individual patient’s everyday competencies. This is particularly true within a forensic context when all assumptions are subject to challenge under cross-examination . . . research also suggests that assessment can likely be more predictive if the tasks used during testing closely match or simulate everyday abilities.”²³ When the actual facts and circumstances of Mr. Winston’s life are examined directly rather than through the filters of 11-14 years of by-gone recollection from a teacher or social worker, it is clear that Mr. Winston did not demonstrate significant limitations in adaptive behavior as defined by §19.2-264.3:1.1.

²² Sbordone, R. & Guilmette, T. (1999). p. 237.

²³ Sbordone, R. & Guilmette, T. (1999). p. 239.

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V. Assessment of Mr. Winston's Adaptive Behavior

A. Assessment Methods

1. Consistent with Va. § 19.2-264.3:1.1 (B) 2, I relied on multiple sources of information, including an interview with Mr. Winston, review of collateral interview summaries by Dr. Evan Nelson who was the appointed to assist trial counsel, numerous reports of psychological testing including IQ scores as well as my review of educational and correctional records in addition to all the source listed above in III. Source Materials Reviewed by Evaluator.
2. When evaluating this particular inmate's adaptive functioning, it was not feasible to rely on a standardized measure generally accepted by the field of psychological testing such as the Adaptive Behavior Assessment System, 2nd Edition (ABAS-II) for several reasons.
 - a. First, the practice standards and the Code of Conduct require that examiners not depart for the instructions for test administration which are found in the test manual. "Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques."²⁴ (9.02a).

The Standards for Educational and Psychological Testing provides criteria for testing practices and the effects of test use.²⁵ Standards 5.1 and 5.2 require the test administrator to carefully follow the standardized procedures and score the measure according to the test manual without departing from the publisher's instructions.
 - b. Second, no standardized measure of adaptive behavior exists for identifying MR normed on death row inmates.
 - c. Third, a retrospective assessment of adaptive behavior using the standardized measure for persons who have not lived in the community at large for seven years is not sound practice.
 - d. Dr. Reschly used the ABAS-II. While I agree, in part, with Dr. Reschly's description of the ABAS-II (Reschly report, p. 18, para 60), he omitted a critical factor which renders this measure inappropriate for use in this case. The ABAS-II rates the frequency with which the individual performs the behavior without help, when it is needed.²⁶ Dr. Reschly selected Denise King (Mr. Winston's lead teacher) to complete the

²⁴ APA Code of Conduct, 9.02a

²⁵ American Educational Research Association, American Psychological Association, & National Council on Measurement in Education. (1999). *Standards for educational and psychological testing*. American Educational Research Association: Washington, D.C.

²⁶ ABAS-II (form) Directions (2003), p. 2

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Teacher Form Ages 5-21 and Kathy Hartka (social worker/guardian 1994-97) to complete the Parent Form Age 5-21. However, the manual for this instrument²⁷ indicates, for this particular form, “respondents may include parents or other primary-care providers who are living with the child and are familiar with his or her daily activities. This could include grandparents, aunts or uncles, adult siblings, foster parents, and care providers from home living units in residential facilities.” Neither Ms. Hartka nor Ms. King meets these requirements.

This problem is not a mere nuance. The publisher of the ABAS-II Manual thought it important enough to include the requirement that “careful selection of respondents is critical for obtaining valid ratings. Professional users should follow these guidelines when they are evaluating the qualifications of the respondent and his or her knowledge of the individual.”²⁸

When completing the “Student Information” data at the top of the ABAS-II form, someone indicated “MR co-morbid LD/ED.” This is misleading, because the MR diagnosis was never reliably and consistently established.

Some of Ms. King’s ratings are highly improbable. For example, she rated Mr. Winston as “not able” which specifically means that individual “cannot perform the activity or behavior described.”²⁹ She rated Mr. Winston as unable to perform the following activities: use sentence with a noun or verb, follow teacher’s verbal instructions when undertaking tasks or activities such as classroom project or new game, takes turns during conversation with people, state his/her own phone number. Similarly improbable ratings of complete inability appear in the Community Use section. Again, bear in mind “unable” refers to capacity. A person may be able to perform certain functions, but simply elects not to by choice or because someone else naturally performs those functions for him even if he is capable or because those tasks are irrelevant to his life circumstances. Nonetheless, Ms. King’s ratings for Community Use, Functional Academics and other domains are improbable. Those include the rating for complete inability to locate birthdates on a calendar, reading and following instructions for an activity, using the scale to weigh objects (he was drug dealer), read school lunch menu, follows favorite interest, reads important documents, brings supplies to school, organizes activities without help of others, asks for help when necessary, and seeks help from supervisor as needed. It is also remarkable that Ms. King guessed on only six of the more than 152 competencies after more than 14 years of no contact with Mr. Winston.

²⁷ Harrison, P. L. & Oakland, T. (2003). *Adaptive Behavior Assessment System II Manual (2nd Ed.)*. San Antonio, TX: Harcourt Assessments, Psychological Corporation.

²⁸ ABAS-II Manual (2003), p. 15

²⁹ ABAS-II Manual (2003), p. 17

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- e. The same faults appear in Ms. Hartka's ABAS-II. In 2008, Dr. Reschly had Ms. Kathy Hartka, Social Worker, complete the ABAS-II based on her recollection from 11-14 years ago. In so doing, Dr. Reschly applied the 2003 ABAS-II adaptive norms to the culture, resource, lifestyle and options in existence more than a decade earlier when Ms. Hartka was Mr. Winston's guardian (1994-97). There have been substantial societal and resource changes in the interim. Examples include the proliferation of cell phones, pagers, computers, internet access, caller ID, speed dial, texting and other technological assistive advances that have an impact on human information storage, retrieval and organization as well as communication patterns based on technological devices. It is simply not sound practice to use a current measuring device to gauge adaptive functioning based on a social worker's ability to recall information 11-14 years earlier based on out of date circumstances and standards.

Ms. Hartka completed the Parent Form even though she did not meet the criteria. She did not live with him when he was 15 years old, the age for which her ratings applied. She guessed on 11 of the items.

Completing this measure retrospectively based on recollection of over a decade ago when Mr. Winston was still a minor is not consistent with the test manual instructions. All forms of the ABAS-II require that the respondent have "recent contact (e.g., during the past 1-2 months)."³⁰ The retrospective analysis is not sound practice. It is not generally accepted.

3. Per Va. § 19.2-264.3:1.1 (B) 2, the examiner uses "at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible". In Mr. Winston's case there is no feasible standardized measure. The statute further directs that "in reaching a clinical judgment regarding whether the inmate exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate." In this case, the weight is close to zero.

B. Conceptual Skills

1. Opinion – I offer the following opinions to a reasonable degree of psychological certainty.
 - a. Mr. Winston presently possesses and historically has possessed below average conceptual skills.
 - b. Mr. Winston's conceptual limitations did not significantly impair his capacity to adapt to the requirements of life including transportation, use of communication technology, planning, scheming, dealing with

³⁰ ABAS-II Manual (2003), p. 15

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reasonably foreseeable contingencies, self advocacy, self-protective mechanisms, and selective portrayal of facts and circumstances.

2. Bases for Opinions

- a. Mr. Winston did not, at any time, raise the issue of incompetence (to stand trial, to testify, to waive rights, to plead, to testify).
- b. Mr. Winston demonstrated conceptual skills in the form of self-advocacy and self-protection in his efforts to avoid detection in the eluding charge. In advance, he memorized his uncle's identity including birthdate, in the event he was caught driving without a license. When caught he deployed his plan and scheme to avoid detection, knowing that he could be cited for a probation violation if caught.
- c. From this examiner's direct observation, Mr. Winston has demonstrated a vocabulary and use of euphemism reflecting conceptual skills.
- d. The records further reflect his capacity to, not only understand his rights, but to actuate those rights to protect his legal interest.
- e. During his interview with me, Mr. Winston evidenced sufficient conceptual grasp of his rights and the boundaries of our conversation and took the initiative to direct my inquiries away from any facts and circumstances relevant to his conduct in the index charge.
- f. He had sufficient grasp of the television reception options in his prison cell. He explained to me how the basic cable connection works and the channels available. He also demonstrated for me how, with another inmate's suggestion, he was able to improvise a special antenna so he could receive other channels over the air that were not available on cable. This required a grasp of a concept of the difference between cable and antenna reception and the options available over the air. I will explain how he actually accomplished this in the description of Practical Adaptive Behavior below.
- g. He understood the concept of how one's attire and presentation impact the audience he wants to influence. He described how people of his demographic from urban areas choose name brand clothes that go together. He described that in Lynchburg, by contrast, others in his demographic dress in jeans and t-shirts. This is not a mere superficiality. It reflects Mr. Winston's conceptual understanding about group identity and differentiating between those who belong to a group and those who do not. This is important to him in navigating through certain social circles both in his Northern Virginia/D.C./Maryland area and other groups when he was operating with drug dealers in Lynchburg away from his home turf.
- h. He also evidenced a conceptual grasp of the social benefits of attire when operating out of town. He explained specifically that women can spot a well-dressed man as being from out of town. He explained how this played to his interests. He advised that women who see the same or similar local guys over and over again by virtue of their attire, become

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bored and look for someone different. By dressing differently, he stood out and was successful in catching the eye of a woman who developed a romantic interest in him. She invited him to move in and they developed a relationship, including a sexualized relationship. He advised that if he looked like everyone else from Lynchburg, he probably would have been lost in the crowd and would not have gotten her attention.

- i. He understood the concept of risk and benefits of present moment decisions. For example, he clarified why he took the gun charge for a friend. Mr. Winston explained that he was a juvenile and the shooter was an adult with a record. He knew that the shooter would get a much more severe sentence in adult court having been previously convicted. As a juvenile, Mr. Winston knew that he would get an easier sentence. The shooter offered Mr. Winston a car and a motorcycle upon release. He then delivered on that promise. Mr. Winston's explanation stands in contrast with Dr. Reschly's conclusion that Mr. Winston is naïve and gullible and just goes along with others to gain acceptance. By his own description, Mr. Winston undertook a risk-benefit analysis in which he had to weigh and consider the personal cost of loss of liberty against the probability of his friend following through on the promise. Mr. Winston advised that he did get the car and a motorcycle upon release. In his estimate, his risk-benefit analysis was accurate.

Interestingly, when I read to Mr. Winston, the section of Dr. Reschly's report regarding "self-esteem, gullibility, and naiveté" (Reschly report, p. 31), I paused and asked him if he knew what "gullible" meant. Without hesitating, he answered to the effect, "take advantage of." He disagreed with Dr. Reschly on point.

- j. In the Social Skills section below, I will respond to Dr. Reschly's views about the Cloak of Competence.

C. Social Skills

1. Opinion – I offer the following opinions to a reasonable degree of psychological certainty.
 - a. Mr. Winston presently demonstrates and historically demonstrated deficiencies in adaptive social skills.
 - b. Mr. Winston's social skill deficits were not of an order of magnitude to impair his capacity to engage others in a relationship of his choosing, to communicate his needs and interest to others, to anticipate how other people might react to what he communicated through words and behavior, to anticipate what others might do in response to what Mr. Winston communicated. He demonstrated no significant impairment in the mechanisms necessary for communicating thoughts, ideas and plans through verbal and written means in person and by phone.

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2. Bases for Opinions

- a. While Mr. Winston clearly has some antisocial qualities, these do not arise from limitations in social skills. They reflect his choice of styles when relating to people.
- b. Mr. Winston was comfortable striking up a relationship with a woman in Lynchburg shortly after his arrival. He moved in with her and continued in that relationship until he was incarcerated.
- c. The defendant built a social network around drug dealing. He knew the social hierarchy in the drug-dealing world including the high-end drug dealers, street corner dealers, and very young small time entry-level dealers. He also knew of the local snitch whose cooperation with law enforcement potentially threatened Mr. Winston's liberty.
- d. He knew how to dress to create an impression in the drug-dealing community.
- e. He maintained friendships and alliances that enabled him to stay involved in the drug trade, provided access to cash and formed a personal protection safety net. For example, he participated in the alliance with the adult shooter from the drive-by incident in which Mr. Winston pled guilty in exchange for a car and motorcycle. The social network extended to Lynchburg to where he traveled because one of his social and drug-dealing allies needed help.
- f. He learned at an early age the advantage of setting up his own alliances in order to get needs met. This was a necessity because his mother and grandmother were locked up from time to time and his biological father was not a reliable figure. The defendant quickly learned the value of asserting his own interest as well as the value of quid pro quo relationships. He learned that he was his own best advocate and that he should not assume trust and honor in others because other people operated with the same self-advocacy interest. This was the case in his family and community prior to incarceration and during his time in jail and prison.
- g. While in prison, he maintains his own list for visitors and phone calls. He knows the phone numbers for several people. He has written letters to family and advocates, but does not write personal letters as often because he is now aware that those communications are not private.
- h. He has made useful social connections with other prisoners and has benefited from the knowledge they shared with him. He knows how to communicate through the cell-to-cell air vents and by sharing property (e.g., books) with other prisoners during their one hour of recreation.
- i. He learned the names, and more importantly, the personalities of the correctional officers (CO). From my direct observation, he is on a name basis with some of the COs, knows their favorite NFL teams and enjoys spirited banter with them about the upcoming football games.
- j. During pretrial incarceration, he had sufficient social awareness to ask for a transfer to a more favorable housing arrangement. He also understood

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that the institution declined his request because the place to which he sought transfer housed persons who might have been enemies.

- k. The records do not reflect any finding that Mr. Winston was ever not competent to stand trial for lack of ability to communicate with counsel or for any other reason.
- l. Dr. Reschly cites Edgerton 1993.³¹ It might benefit the court to know that Edgerton's book refers to "ex-patients" and the research is exclusively comprised of former residents of the Pacific State Hospital (PSH). On average, the males in the study cohort resided at PSH for 6935 days (19 years). Edgerton's book describes how PSH helped the patient aggrandize himself and build self-esteem. The staff's specific intention was to make each patient feel that he was not as limited as the other patients and perhaps did not belong in the hospital. They helped residents develop friendly peer groups within the hospital setting and encouraged self-esteem and provided assurance that the individual was not actually MR. As a result, the mentally retarded residents were led to think that the hospitalization was a mistake and that they were not MR. Consequently, some of them did not embrace MR as part of their identity. They went about their lives forwarding the impression of success and denying their MR status. In this way, the hospital helped ex-patients "explain-away" any deficits to themselves and others by saying they simply did not get the skills they needed while they were institutionalized.
- m. It might also help the court to know a little bit more about the individuals in Edgerton's study. The updated sample (1993) consisted of 48 individuals from PSH. Their IQs ranged from 47-84. This sample has very little to do with Mr. Winston. He was never institutionalized for MR, substance abuse or mental disorder of any kind. The average inpatient stay for this sample was 19 years. Mr. Winston never produced a Full Scale IQ score more than two standard deviations below the mean. Of the 48 former patients Edgerton sample, 34 (71%) had IQs more than two standard deviations below the mean. Eight (17%) were 80 or higher. Persons scoring that high would not meet the IQ score prong of Virginia's statutory definition for capital sentencing purposes.
- n. Mr. Winston's competence is not a mere cloaking device. Of course, he, like everyone else, has wanted to forward an image of himself that would help him achieve his goal. He knew how to win favor with females. He knew how to display bravado in connection with his drug dealing affiliations. He knew the value of displaying loyalty to those who might serve his self-protective interest. He knew how to lie when he took the blame for the gun charge in order to get a car and motorcycle in exchange. He knew well in advance how to engage in deceit and deception by giving his uncle's identifying information when stopped by the police. He knew

³¹ Edgerton, R.B. (1993). *The Cloak of competence: Stigma in the lives of the mentally retarded* (Revised and Updated). Berkeley, CA: University of California Press, p. xix

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to follow through with that fake identity in the early phase of the legal proceedings in the eluding charge. He did this intentionally because he knew that he had two years suspended time over his head which could be reinstated on a show cause for the probation violation in light of the new eluding charge. Through his letters, he has shown social awareness by engaging other people on his behalf. In his dealings with the COs, he has demonstrated sufficient social savvy to remain on good terms with those who are literally the gatekeepers in his day-to-day life. This is all evidence that Mr. Winston is socially aware and can put that awareness to use in an instrumental fashion to achieve his social objective in the context of his family, community, criminal endeavors and his incarceration. This is not evidence of a cloak. It is behavioral evidence of his intentional and selective use of his social skill.

D. Practical Adaptive Skills

1. Opinion – I offer the following opinions to a reasonable degree of psychological certainty.
 - a. The totality of the source materials shows that Mr. Winston had some limitations in practical adaptive skills.
 - b. His limitations for practical adaptive skills were not significantly substandard for his peer group and chosen lifestyle.
 - c. His practical adaptive skills were stronger than his conceptual and social skills. Although his choices were occasionally self-defeating, they were choices nonetheless based on his personal priorities.
 - d. His failure to escape detection in his criminal activities is not determinative of significantly deficient adaptive skills.
2. Bases for Opinions
 - a. Mr. Winston exercised practical adaptive skill when trying to elude the police because he reasonably anticipated the consequence of getting caught.
 - b. He consistent demonstrated the practical skill of memorizing his uncle's identity and in impersonating his uncle when arrested in Lynchburg. He memorized his uncle's birth date and other information in advance having anticipated the need to conceal his identity.
 - c. Mr. Winston advised that he learned to drive a car at age 7 while sitting in his uncle's lap. He routinely drove dirt bikes and four-wheelers as a youngster. He "rented" cars from crack addicts so he and his friend could drive to clubs as early as age 14. He never needed driver's education to build this skill set.
 - d. He advised he routinely used a chainsaw and ax to help build a log structure when he served on a crew at New Dominion, at age 12-13 years old with other delinquents as part of the curriculum at a group home.

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They cut trees and personally hauled logs away. He cut off the branches and notched the log for construction. There were no reports of accidents or injuries. His work ended because he ran away.

- e. He used to serve as a lookout for his grandmother when she would take him to stores so she could steal. He knew how to position himself and remain alert for those who might catch his grandmother. This was a matter of routine for him.
- f. He learned how to use firearms. He could distinguish one type of pistol from another. There is no report he ever injured himself or caused an accidental discharge. He also knew the firearms were illegal so he concealed them. He also knew to get rid of them when they could be used as evidence.
- g. Although he did not grow up in Lynchburg, he learned how to get around town while visiting there.
- h. He knew about other drug dealers in Lynchburg, their territories, who was working certain street corners, and other practical matters pertinent to the drug marketing and sales. He had no difficulty calculating the street value of drugs, including the use of fractions to calculate values.
- i. Mr. Winston also knew that drug dealers do not generally use traceable bank accounts. Although Dr. Reschly opined that the absence of a banking history reflected an impairment in adaptive functioning, it was actually far more practical for Mr. Winston to operate on a cash basis to avoid detection and taxes and to maintain financial fluidity. He advised that he had possessed up to \$10,000 on a particular occasion.
- j. Mr. Winston's self-report contradicts Dr. Reschly's statement that "Mr. Winston never had a job" (Dr. Reschly report, p. 33). On 10/23/08, Mr. Winston described several jobs. He used to help his friend (Nate) whose father had an asphalt business with 17 dump trucks. Nate had his own truck with which he scheduled deliveries and other work. Occasionally, Mr. Winston would ride around with Nate if the regular driver was not available. Mr. Winston and Nate would smoke marijuana and spread some asphalt. This was sporadic work for which he was paid \$500 a day every couple of months. He also cut fallen trees and timber with a chainsaw on Nate's father's land. The pay depended on production, but averaged \$80 per cord. They would smoke marijuana and drink at the jobsite. He operated a chainsaw and log splitter without accident or injury. The use of drugs and alcohol made for a longer day at the jobsite, but Mr. Winston estimated that it only took him about one hour to cut a cord of wood. Had he not been using drugs and alcohol, he would have been grossing \$80 per hour.

Drug dealing was his main source of revenue. He developed knowledge, skill and ability in that line of work. He knew the different participants in the distribution chain. He knew the competitors. He knew the risks attendant to that work. He knew who his allies were. He understood the pricing and the importance of working on a cash basis. He moved fluidly

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from one geographic market (Northern Virginia, DC, Maryland) to another (Lynchburg). There was no report of difficulty obtaining product or customers or tools of the trade (e.g., hand gun, false identity, cell phone).

- l. Mr. Winston completed DOC forms to purchase CDs from "Music by Mail," "M&P Sale," and "Bottom Beat Records." He bought books and a membership from "Black Expressions" and wrote out an order form for tapes. There was no indication that he overdrew his account.
- m. He also filled out the "Add/Drop Property Form" to add all of the new CDs he received to his property list.
- n. On 3/4/07, he filed an inquiry in his own writing: "I would like to know if my CD order from Bottom Beat dated 2/12/07 has been forwarded to the business office. Because I put my order for books from Black Expressions the same day and I got a receipt from the check being cut on 2/22/07 for the books." This reflects practical adaptive functioning conducting his business affairs within DOC.
- o. He also filled out a Commissary Form, which involved marking down item codes, bubbling in the matching numbers using the scantron form and indicating the quantity of each item he requested. This represents practical adaptive functioning.
- p. On 12/16/06, while in DOC, Mr. Winston had a Disciplinary Offense Report for allowing water to overrun his cell and flow off the top tier. On 2/23/07, he signed the Inmate Discipline form indicating that he did not wish to appear the disciplinary hearing. On 10/23/08, I reviewed the form with him and asked about the practical judgment underpinning this decision to waive his right to appear at the hearing. He advised that this was the only charge he had and that he consulted with his attorney before deciding not to appeal.
- q. On 7/29/05, he was written up for "sending food to an inmate on A Pod throw (sic) a fishing line." This represented adaptive functioning on his part.
- r. On 10/23/08, he demonstrated for me how he calculated the cost of his order for the Virginia Holiday 2008 Package Program. Herein, he ordered 12 units of bacon at \$3.50 each, 9 units of chicken breast at \$4.05 each and 9 units of shredded beef at \$3.20 each. Without the aid of a calculator or any other device, he showed how he multiplied the unit cost per the number of units for each of the three items. He then added up the list extension cost of each item.

From unrefreshed memory, he advised of the terms and conditions of the order including the deadline, maximum amount and shipping cost. He then flipped the form over to the backside and accurately read the particulars out loud to me. Upon realizing that his original estimate was off by \$7.25, he advised that the vendor would simply delete a number of items sufficient to bring the order total down to \$100 or less.

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- s. He demonstrated practical adaptive knowledge with respect to proper use of the Personal Property Order Form. Using this form, he ordered his television and headset.
- t. He demonstrated accurate use of the Virginia DOC Commissary Form. This is the bubble-in sheet through which he routinely orders commissary products. He showed how to properly transfer the item code from the master list which he keeps in his cell. He also showed how to indicate the proper quantity of each item. He explained not only how to order the items, but the maximum quantity permissible per order. All of this was from unrefreshed memory. He accurately demonstrated how to order 10 packages of M&Ms (item # 4001) from the regular Commissary Order Form.
- u. He explained how his family sends a money order with the amount applied to his balance. He also explained how he pays for book and CD orders. Advised that he receives monthly statements which reflects deposits and purchases against his account. He conducts all transactions on an abstract credit basis without benefit of tangible currency.
- v. Mr. Winston advised how he uses the phone system in DOC. He recalled that new inmates receive a packet of information along with an individual explanation. He knew that the phone numbers had to be on his call list. He freely recalled his grandmother's home phone number. He advised that he follows the computer prompts (e.g., "push 1 for English"). He knew to dial 0 plus the area code plus the phone number and his inmate number which he had memorized. He knew the calls were collect and limited to 15 minutes. He also recalled some of the other people on his call list (stepfather, Michael Jordan; mother of his two children, Mary Powell; attorney; uncle Freddie Jackson). He knew he was limited to 15 people on the list. He advised he has committed all of the phone numbers to memory and no longer needs a "cheat sheet" to refresh his recollection.
- w. I brought some of the books that were on his list of reading materials. At least one he immediately recognized by the cover (Forever a Hustler's Wife). He recalled ordering it from an outside vendor. Another inmate had shown him how to process payments. He read page 107 from that book and recalled the plot line and the ending of the story.
He recognized another book (Casanegra), but recalled he had not read it. He did not order it. It came automatically from a book club because he had not made a selection in time. He passed the book to another inmate. He understood he had to send in an order form to the book club in order to either place an order or to withdraw from the club.
He also recognized and read "A Gangster's Girl." He recalled this was from an outside vendor rather than the DOC library or an inmate loan. He recalled the story was about a female hustler trying to get a better life. She was involved with a drug dealer, but got killed in the end. She was greedy and trying to set up the drug dealer.

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- x. He knew it was cheaper to buy cut tobacco rather than manufactured cigarettes. He advised that the bag would produce more than 200 cigarettes if he rolled his own. This compared to \$4.23 for 20 Newports or Marlboros.
- y. He learned from another inmate how to fashion an antenna from headphones purchased through the commissary. This is evidence of practical adaptive functioning already described above in the Conceptual Skills section above.
- z. He knew the radio stations by call number and format.
- aa. He evidenced sufficient practical adaptive behavior with respect to requesting medical attention. He knew to ask the CO for a request form. He showed me the form and indicated which box he would check ("medical administrator"). He took the initiative for a dental cleaning because he was concerned smoking cigarettes and drinking coffee stained his teeth. Otherwise, he has not felt a need for a medical appointment, but he knew how to request the form, fill it out and route it to the proper person.
- bb. His informal job as one of two barbers on the pod. This also reflects practical adaptive behavior. He learned to cut hair from his uncle (Troy Winston). He got this job because he went to the Lieutenant and asked for work.
- cc. Mr. Winston displayed practical skill when he persuaded DOC to change his meal plan. He saw another inmate getting Salisbury steak, barbeque chicken and other items more attractive than ordinary. He made inquiries to find out how to get the preferred diet. He learned that claiming a certain religious orientation would be instrumental. He said he had been brought in to the Nation of Islam by CO Fisher at Fairfax Adult Detention Center. Mr. Winston advised "I'm not a 100% sold (on Islam)," but he believes in a monotheistic system, but has not settled on one particular system. He read the Koran and learned that males should exercise certain hygienic practice as part of that faith. He put in for a change of diet and got what he asked for.
- dd. It was also practical on Mr. Winston's part to give his uncle's identification and forge his name to avoid being brought back on a show cause for prior suspended time having been stopped for the eluding.
- ee. One reason the ABAS-II is inappropriate in this case is evident in the "Self Care" section of that instrument. The most difficult item is "gets haircut." Not only does he get his haircut, he cuts other people's hair using electric clippers. In the "Community Use" section, one of the more difficult items is "budgets money to cover expenses for at least one week." He has handled his commissary funds adequately for several years.

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VI. Assessment of Mr. Winston's Intellectual Functioning

A. Opinion – I offer the following opinions to a reasonable degree of psychological certainty.

1. The data available support a theory of differential learning ability, and Borderline Full Scale IQ test scores
2. The Wechsler Full Scale IQ scores during this interval did not fall two standard deviations below the average.
3. The standard error of measure (SEM) cannot be used to adjust Mr. Winston's IQ test scores solely in one direction.
4. Adjusting Mr. Winston's scores based on the statistical observation that scores increase over time (Flynn effect) is not a generally accepted practice.

B. Bases for Opinions

1. Below is a table of the IQ scores available in the record and as reported by Dr. Reschly (Dr. Reschly report, p. 15, table 1). All of Mr. Winston's Wechsler scales have a mean of 100 and a standard deviation of 15. None of the scores meet Virginia's statutory definition of two standard deviations below the mean.

<u>Test Date</u>	<u>Test</u>	<u>Age</u>	<u>FSIQ</u>	<u>Two S.D. Below Mean</u>
1987	WISC-R	7	77	No
1990	WISC-R	10	73	No
1995	WISC-III	15	76	No

2. The statistical and conceptual underpinnings of the SEM require that it be considered in both directions. There is no reason particularized to Mr. Winston that would justify adjusting his test scores in only one direction based on the SEM while ignoring equal justification for adjustment in the opposite direction.
3. The statistical phenomenon which Flynn observed pertains to large groups of people. There is no information to indicate that Mr. Winston was included in any of the studies of the statistical phenomenon.
4. The statistical observation that IQ scores change over time is based on the average score. There is not sufficient scientific evidence to show that the scores in the lower end of the distribution are affected to the same extent as scores in the center of the distribution except in one study that seems to have departed from accepted practices for defining IQ score ranges.³²

³² Kenaya, Scullin & Ceci (2003).

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5. It is not the standard of practice to subtracted earned IQ points based on the Flynn effect (FE).³³ I and two other researchers conducted two nationwide surveys on point. One sample included Directors of Training from doctoral psychology programs approved by the American Psychological Association. That survey showed that professors charged with responsibility of training new psychologists do not accept as general practice adjustment to earned IQ scores based on the Flynn effect.

Our second national survey included all School Psychologists who are Board certified by the American Board of Professional Psychology. This was not a sample; it included all Board certified School Psychologists. We chose School Psychologists because they routinely administer, interpret and report on IQ test scores. They also routinely review archival test data when making determinations about MR and other conditions. The survey data showed compelling evidence that adjusting IQ scores, either with current IQ scores or archival IQs, is not generally accepted and is not standard of practice.

We also surveyed IQ test manuals, contemporary textbooks on IQ testing, federally regulated IQ testing protocols and various sources of legal and ethical guidance. The review of all those sources confirmed in each instance that adjusting earned IQ scores based on the Flynn effect does not comport with prevailing standards of psychological practice.

In fact, one of Dr. Reschly's own publications which he cited and relied upon in Mr. Winston's case³⁴ makes several references to the Flynn effect and includes several recommendations for determining eligibility for Social Security benefits when MR is at issue. Noteworthy is the fact that adjusting earned IQ scores based on the Flynn effect was not one of Dr. Reschly's recommendations in this 2002 publication.

The American Association on Intellectual and Developmental Disabilities' (AAIDD; formerly AAMR) mission statement makes clear this is an advocacy organization. "AAIDD promotes progressive policies, sound research, effective practices and human rights for people with intellectual and developmental disabilities." The organization's 13 principles make clear that it achieves its mission by advocating, expanding, influencing, promoting, aiding, increasing, advancing, cultivating, and enhancing the interest of individuals with intellectual and developmental disabilities. Absent from the AAIDD's 13 principles are scientific research or forensic practices.

³³ Hagan, L.D., Drogin, E.Y. & Guilmette, T.J. (in press). Adjusting IQ scores for the "Flynn Effect": Consistent with the standard of practice? *Professional Psychology: Research and Practice*.

³⁴ Reschly, D. J., Myers, T. G. & Hartel, C. R. (Eds.) (2002). Mental retardation: Determining eligibility for social security benefits. Washington D.C.: National Academy Press.

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This organization's User's Guide³⁵ is the only publication I have encountered that specifically recommends adjusting IQ scores for the Flynn effect. One notes that this advocacy organization acknowledges that its proposal to adjust scores is a "recommendation"³⁶ and is not offered as a standard of practice nor a procedure generally accepted in the field.

In contrast is a peer-reviewed scientific publication that concludes "evaluators must also be aware that there is no agreed-upon method for how diagnostic conclusions should be influenced by the Flynn effect."³⁷ The generally accepted practice is to consider the Flynn effect and to address it in narrative form, but not to subtract IQ points that the individual has earned. The other corrective measure which is generally accepted and supported by all authorities for standards of practice holds that "norms for a test of intellectual functioning should be updated regularly."³⁸

Dr. Reschly's report (p. 1, table 1) shows that he adjusted the mean IQ scores for the norm reference group and then compared Mr. Winston's earned scores against the adjusted mean. This is not an acceptable standard of practice. My two national surveys cited above posed this question to Directors of Psychology training and Board certified School Psychologists. We also surveyed all of the relevant federal programs, peer reviewed scientific literature and ethical standards. None endorse the practice of adjusting group means based on the Flynn effect. Even those who advocate this statistical manipulation in capital sentencing concede that Dr. Reschly's strategy of adjusting mean scores introduces significant complications for calculating the standard deviation and other essential statistics.³⁹

6. Several factors contribute to error in IQ testing. "Faking good" (intentionally engaging in deceit to earn higher scores than is merited) is impossible. A person simply cannot score higher than their native capacity.
7. Several factors can suppress scores. Those issues include other mental conditions such as depression, thought disorder, inattentiveness, poor test taking

³⁵ Schalock, R. L., Buntix, W., Borthwick-Duffy, S., Luckasson, R., Snell, M., Tassé, R. J. & Wehmeyer, M. (2007). User's Guide: Mental retardation definition, classification and systems of support, 10th edition. American Association on Intellectual and Developmental Disabilities. Washington D.C.: AAIDD.

³⁶ Schalock et al. (2007, p. 20)

³⁷ Young, B., Boccaccini, M. T., Conroy, M. A., & Lawson, K. (2007). Four practical and conceptual assessment issues that evaluators should address in capital case mental retardation evaluations. *Professional Psychology: Research and Practice*, 38, 169-178.

³⁸ Wechsler, D. (2002). Technical Manual (updated) for the Wechsler Adult Intelligence Scale, 3rd ed. and Wechsler Memory Scale, 3rd ed. (2002). San Antonio: The psychological Corporation. p. 9.

³⁹ Scullin, M. (Oct. 31, 2006b). Testimony in *Green v. Johnson*. No. 02:05-cv-340 USDC Ed of Va. Norfolk Division

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attitude or the effects of prescriptions or drugs of abuse. Mr. Winston advised that he abused drugs and alcohol. He also advised that he was often bored and disinterested in test taking and would offer answers without effort. One notes that the poor test-taking attitude, inattentiveness and effects of drugs or alcohol would only suppress the scores. If those influences were removed and Mr. Winston produced his maximal capability, his scores would likely be higher. At worst, they would be no lower than what he actually earned.

8. Drs. Guilmette, Giuliani and I also published a peer-reviewed paper addressing the confusion that arises when psychologists attached narrative descriptive labels (e.g., impaired, borderline, average, etc.) to numerical test scores (FSIQ, 73, 76, 77).⁴⁰ Our national survey of Board certified neuropsychologists showed that psychologists are least consistent in labeling data toward the lower end of the normal distribution (bell curve).

When preparing reports in response to legal questions, the psychologist should use the legal definitions. In Mr. Winston's case, the relevant definition is §19.2-264.3:1.1. It references "two standard deviations below the mean." Any reference to other sources (e.g., DSM-IV-TR, AAIDD, SSA) are irrelevant. The statute certainly does not call for two standard deviations below a mean adjusted for the Flynn effect. It simply is inappropriate and departs from the standard of practice to adjust mean scores or an individual's obtained scores in light of the Flynn effect. It is equally inappropriate to subtract IQ points for the standard error of measure because this statistic, by definition, must be considered bi-directionally (+/-).

9. Neuropsychological and cognitive scores, including IQ tests, are not reliably predictive of adaptive functioning and competencies in handling everyday demands. There is only a modest correlation between these test scores and actual performance in activities of daily life.⁴¹ Twenty years of research have supported this conclusion in connection with:
 - a. prediction of driving abilities,
 - b. prediction of memory functioning,
 - c. ecological assessment of executive functions and problem solving, and
 - d. predictions of everyday functioning.
10. More practical and predictive are assessments that simulate the actual behavior under scrutiny. In Mr. Winston's case, his own behavioral track record is illuminating of his ability to:
 - a. drive a car, dirt bike and 4-wheeler as well operate chain saw safely,
 - b. find a job, including illegal employment,

⁴⁰ Guilmette, T., Hagan, L. & Giuliano, A.J. (2008). Assigning qualitative descriptions to test scores In neuropsychology: Forensic implications. *The Clinical Neuropsychologist*, 22, 122-139.

⁴¹ Sbordone, R. & Guilmette, T. (1999).

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- c. use a wide range of communication devices (landline, cell phone, collect calls from DOC),
 - d. meet new people and strike up intimate relations with peers of the opposite sex), and
 - e. place orders from DOC for books, CDs, commissary and holiday specialty items while managing his credit balance.
- 11. Mr. Winston also demonstrated a capacity to assess his need for self-protection including disclosing and withholding information from people who are in a position to further his interests.
- 12. Mr. Winston also demonstrated his ability to adapt to new and unfamiliar environments and to identify and make use of resources in that environment in the furtherance of his own interests.
 - a. He moved to Lynchburg to help his friend.
 - b. He learned his way around Lynchburg.
 - c. He practically raised himself in the context of a chaotic criminal family of origin.
 - d. He sought out and maintained informal interim employment in DOC as a barber.

VII. Assessment of Mr. Winston's Developmental Origin

- A. Opinions – I offer the following opinions to a reasonable degree of psychological certainty.
 - 1. Having considered multiple sources of information generally accepted by the field of psychology, including psychological testing and other specific considerations, I formed the opinion that the totality of the behavioral science evidence does not indicate the onset of MR originating before the age of 18 years.
 - 2. The totality of the behavioral science evidence incontrovertibly establishes the onset of behavioral, social and information processing problems other than MR prior to the age of 18.
 - 3. The behavioral and social problems that had their origin in childhood continued well into Mr. Winston's adult years to the present time and those conditions adequately explain his social and behavioral maladjustment which is unrelated to MR.
 - 4. The entirety of the behavioral science evidence does not support a finding of MR at any age as defined by Code of Virginia §19.2-264.3:1.1.
 - 5. There is no sufficiently reliable or credible behavioral science evidence of onset of MR with respect to Mr. Winston at any age.
 - 6. The theories of causation of Mr. Winston's MR are speculative, post-hoc revisions of his history, and are contradicted by contemporaneous evidence.

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B. Bases for Opinions

1. I relied upon aforementioned specific data point and behavioral examples listed in:
 - a. Psychological testing
 - b. Educational evaluations
 - c. Social Service History
 - d. Medical Records
 - e. Parental or caregiver reports
 - f. Other collateral data
 - g. Mr. Winston's self-report
2. Virginia's statute requires a showing of all three prongs (IQ score, adaptive functioning, onset). Dr. Reschly seemed to misunderstand the statutory definition when he declared "the Virginia statute does not . . . indicate whether the observed limitations must be measurable in one, two, or all three domains" (Dr. Reschly's report, p. 10 .para 39). The statute clearly requires a showing of "significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills" (§19.2-264.3:1.1, underscore added). The conjunctive requires that Mr. Winston prove significant limitations on all three, a conclusion contradicted by the behavioral evidence.
3. Although Dr. Reschly commented at length about an MR etiology based on Fetal Alcohol Syndrome having relied on an affidavit by Dr. Susan Rich, the evidence is in controversy at best. She concluded he has "dysmorphic features" (Dr. Rich's Affidavit, 9/18/08, p. 5) in contrast to Dr. McClintock's neurological consultation reflecting "no dysmorphic features" (9/19/95, Bates 441). Dr. McClintock also found that Mr. Winston could "do simple calculations in his head without too much problem." He observed that the spotty educational progress may stem from the fact that "it does not sound like he has been in school consistently for quite some time" (Bates 441).
4. Prior IQ scores and above-cited examples of Mr. Winston's adaptive functioning past and present stand in opposition to the MR conclusion.
5. Although his developmental circumstances were problematic, there was no evidence particularized to Mr. Winston showing a causal link between the facts and circumstances of his history and the ultimate conclusion about the presence of MR.

VIII. Comment on Other Issues in Dr. Reschly's Report

- A. Opinions – I offer the following opinions to a reasonable degree of psychological certainty there are other findings in Dr. Reschly's report that depart from generally accepted practice or contradict the MR theory.

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B. Bases for Opinions

1. Dr. Reschly references certain achievement testing. Those measures are not IQ tests. They might reflect functional capacity, but the findings from those measures have to be tempered against what we know about sources of error. Specifically, Mr. Winston advised that he often times did not put forward much effort on tests. Elissa Scimecca, school psychologist, noted that some of the negative trend in the IQ scores "... is attributable to his difficulties maintaining attention, limited effort and problems in rapport ..." (Fairfax County Public Schools report of psychological evaluation, 10/25/90, p. 5). Further, in 1995, Dr. McClintock noticed that Mr. Winston had attendance problems. As a child, he could not be expected to learn much if he was not actually in school.
2. Dr. Reschly references low scores on the Flesch-Kincaid Reading measure based on his analysis of the three letters the defendant authored (Dr. Reschly report, p. 26, para 71). He applied the wrong measure. The Flesch-Kincaid index assesses reading difficulty based on sentence structure, word length, punctuation, and other factors. It has nothing to do with the ability to write a letter.
3. Dr. Reschly cited the fact the defendant never had a bank account as evidence of MR. This is inaccurate. The lack of a bank account was normative to the culture of his family. His mother did not have a bank account either. The grandmother stole for a living so it is unlikely she was in the mainstream of financial institutions. Mr. Winston also belonged to the drug-dealing culture that does not ordinarily use bank accounts.

1. IX. Restatement of Opinions

This examiner offers the following opinions to a reasonable degree of psychological certainty.

A. Adaptive Functioning

1. Conceptual Skill
 - a. Mr. Winston presently possesses and historically has possessed conceptual skills that are below average.
 - b. Mr. Winston's conceptual limitations did not significantly impair his capacity to adapt to the requirements of life including transportation, use of communication technology, planning, scheming, dealing with reasonably foreseeable contingencies, self advocacy, self-protective mechanisms, and selective portrayal of facts and circumstances.
2. Social Skill
 - a. Mr. Winston presently demonstrates and historically demonstrated deficiencies in adaptive social skills.

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- b. Mr. Winston's social skill deficits were not of an order of magnitude to impair his capacity to engage others in a relationship of his choosing, communicate his needs and interest to others, to anticipate how other people might react to what he communicated through words and behavior, to anticipate what others might do in response to what Mr. Winston communicated, nor has there been significant impairment in the mechanisms necessary for communicating thoughts, ideas and plans through verbal and written means in person and by phone.

3. Practical Skill

- a. The totality of the source materials show that Mr. Winston had some limitations in practical adaptive skills.
- b. His limitations for practical adaptive skills were not significantly substandard for his peer group and chosen lifestyle.
- c. His practical adaptive skills were stronger than his conceptual and social skills. Although his choices were not entirely successful, they were choices nonetheless based on his personal priorities.
- d. His failure to escape detection in his criminal activities, is not determinative of significantly deficient adaptive skills.

B. Intellectual functioning

- 1. The data available during Mr. Winston's childhood and school years support a theory of differential learning ability.
- 2. None of the Wechsler Full Scale IQ scores during this interval fell two standard deviations below the average.
- 3. Application of the standard error of measure (SEM) cannot be used to adjust Mr. Winston's IQ test scores solely in one direction.
- 4. Applying an adjustment to Mr. Winston's scores based on the statistical observation that scores increase over time is not a generally accepted practice.

C. Developmental origin

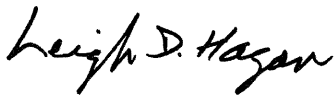
- 1. Having considered multiple sources of information generally accepted by the field of psychology, including psychological testing and other specific considerations, I formed the opinion that the totality of the behavioral science evidence does not indicate the onset of MR originating before the age of 18 years.
- 2. The behavioral and social problems that had their origin in childhood continued well into Mr. Winston's adult years to the present time and those conditions adequately explain his social and behavioral maladjustment which is unrelated to MR.

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3. The entirety of the behavioral science evidence does not support a finding of MR, at any age as defined by Code of Virginia §19.2-264.3:1.1, which is the only relevant standard for a forensic psychological evaluation in this case.
4. There is no sufficiently reliable or credible behavioral science evidence of onset of MR with respect to Mr. Winston at any age.
5. The theories of causation of Mr. Winston's MR are speculative, post-hoc revisions of his history, and are contradicted by evidence.

X. Attachments

- A. Evaluator's CV
- B. Evaluator's Testimony History

A handwritten signature in black ink that reads "Leigh D. Hagan". The signature is written in a cursive, flowing style.

Leigh D. Hagan, Ph.D.
Clinical Psychologist
Diplomate - Forensic, ABPP