IN THE 355th JUDICIAL DISTRICT COURT
OF HOOD COUNTY, TEXAS
and
IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

EX PARTE BOBBY WAYNE WOODS, APPLICANT	)	WRIT NO. 44,856-03

APPLICATION FOR POSTCONVICTION WRIT OF HABEAS CORPUS

or, in the alternative,

SUGGESTION THAT THE COURT, ON ITS OWN MOTION, RECONSIDER ITS APRIL 27, 2005 DENIAL OF RELIEF OF MR. WOODS' INITIAL APPLICATION RAISING A CLAIM THAT MR. WOODS IS A PERSON WITH MENTAL RETARDATION

BOBBY WAYNE WOODS IS SCHEDULED TO BE EXECUTED ON THURSDAY, OCTOBER 23, 2008.

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Applicant Bobby Wayne Woods asks this Court to issue a writ of habeas corpus and grant him relief from his unconstitutional conviction and sentence of death. Counsel for Mr. Woods contends that he is mentally retarded and that his execution would violate *Atkins v. Virginia*, 536 U.S. 304 (2002). Accordingly, this Court should stay his execution, currently scheduled for October 23, 2008, and remand the case to the trial court for an evidentiary hearing.

This is the second time this matter – whether Mr. Woods is a person with mental retardation – is before this Court. In the previous proceeding, Mr. Woods was represented by counsel who holds the dubious distinction of being one of only two

attorneys removed by this Court from the list of qualified 11.071 counsel because of the poor quality of representation he provided death sentenced inmates and the lack of integrity he exhibited in both state and federal courts. That attorney failed, in the previous proceedings in Mr. Woods' case, to conduct the investigation and preparation necessary to enable these courts to make a reliable determination as to whether Mr. Woods is a person with mental retardation. Recent investigation has revealed new evidence – including an IQ score of 60 obtained during the developmental period, information and affidavits regarding Mr. Woods' adaptive deficits (an investigation that has never before been conducted), and an expert opinion presenting the impact of this new evidence - that compel recognition that Mr. Woods' execution would be an egregious violation of the Eighth Amendment under *Atkins v. Virginia.*

PROCEDURAL HISTORY

Mr. Woods was tried by a jury and convicted of capital murder in the 33rd District Court of Llano County Texas on May 21, 1998. At the punishment phase of trial, the jury returned answers to special issues submitted under Tex. Code Crim. Proc. art. 37.071 requiring imposition of the death penalty.

On June 14, 2000, the Texas Court of Criminal Appeals (TCCA) affirmed the conviction and death sentence. *Woods v. State*, No. 73,136 (Tex. Crim. App. 2000). The U.S. Supreme Court subsequently denied *certiorari*. *Woods v. Texas*, 531 U.S. 1155 (2001).

Richard Alley was appointed to represent Mr. Woods in his state habeas proceedings. The petition filed did not include an *Atkins* claim. On September 13, 2000, the TCCA denied state habeas relief. *Ex parte Woods*, No. 44,856-01 (Tex.Crim.App. 2000).

On December 11, 2000, Mr. Woods filed a federal habeas petition in the U.S. District Court for the Northern District of Texas. The matter was transferred to the Western District (where Llano county lies), which subsequently denied Mr. Woods' federal petition for a writ of habeas corpus.

On September 24, 2002 the U.S. Court of Appeals, 5th Circuit denied Mr. Woods' request for a certificate of appealability (COA). *Woods v. Cockrell*, 307 F.3d 353 (5th Cir. 2002).

After the United States' Supreme Court's decision in *Atkins*, Mr. Woods filed a successor petition for state habeas relief in the TCCA. The petition raised two issues for review, including an *Atkins* claim. On May 21, 2003 the TCCA remanded the *Atkins* claim to the state trial court and dismissed the second claim as an abuse of the writ.

On remand, the state trial court conducted an evidentiary hearing. On conclusion of that hearing, the parties submitted Proposed Findings of Fact and Conclusions of Law, and the trial court adopted the proposed findings of the State recommending, that relief be denied. The TCCA adopted those same findings and conclusions and denied relief on April 27, 2005.

Subsequently, the 5th Circuit granted Mr. Woods permission to file a successive federal habeas petition on the issue of "whether Woods is mentally retarded and therefore ineligible for the death penalty according to *Atkins*." *In re Woods*, 155 Fed. Appx. 132, 136 (5th Cir. 2005).

The U.S. District Court for the Western District of Texas denied Mr. Woods' successive habeas petition on May 16, 2006. Upon examination of the merits of Mr. Woods' *Atkins* claim, the district court found that Mr. Woods failed to meet his burden of proving, by clear and convincing evidence, that the state court's finding was incorrect.

After denying relief, however, the district court granted Mr. Woods a COA on his claim, concluding that the state court record contained evidence that might allow some jurists to conclude that Mr. Woods is mentally retarded.

The 5th Circuit ultimately affirmed the denial, holding that the state court's conclusion that Mr. Woods failed to show by a preponderance of the evidence that he was mentally retarded was not contrary to *Atkins*. *Woods v. Quarterman*, 62 Fed. Appx. 556 (5th Cir. 2007).

Mr. Woods was scheduled for execution on January 17, 2008, at the time of the Supreme Court's grant of the petition for a writ of certiorari in *Baze v. Rees*, challenging the use of lethal injection. Mr. Woods obtained a stay of his execution based on the pendency of *Baze*. On September 10, 2008, the TCCA dismissed Mr. Woods' state court litigation raising the question of the legality of lethal injection.

On September 16, 2008, the Hood County trial court scheduled Mr. Woods for execution on October 23, 2008. Undersigned counsel was not made aware of the scheduled execution date until September 21, 2008.

Mr. Woods is scheduled to be executed on Thursday, October 23, 2008.

MR. WOODS IS A PERSON WITH MENTAL RETARDATION

I. *Atkins v. Virginia*

On June 20, 2002, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. The Court concluded that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (internal quotation marks omitted). The Court rested its conclusion on two grounds.

First, the Court noted that, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. Second, the Court found that "their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants." *Id.* The Court specifically listed the kinds of impairments that reduce the moral culpability of mentally retarded offenders. The mentally retarded suffer diminished capacities to: (1) understand and process information; (2) communicate; (3) abstract from mistakes and learn from experience; (4) engage in logical reasoning; (5) control impulses; and (6) understand the reactions of others. *Id.* at 318. The Court explained that:

> There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability. *Id.*

Due to these impairments, the *Atkins* Court found that executing the mentally retarded would not advance the retributive and deterrent purposes of capital punishment. *Id.*

Retribution in the capital context had been limited to ensuring that "only the most deserving of execution are put to death." *Id.* at 319. Because the "just deserts" rationale necessarily depends on the culpability of the offender, the most extreme punishment was deemed excessive due to the "lesser culpability of the mentally retarded offender." *Id.* Since capital punishment can serve as a deterrent only when a crime is the result of premeditation and deliberation, no deterrence interests are served. *Id.* This type of calculus, the Court noted, is at the "opposite end of the spectrum" from the behavior of the mentally retarded because of their cognitive and behavioral impairments. *Id.* at 319-20.

The second justification *Atkins* espoused for a categorical rule exempting mentally retarded offenders from execution also stemmed from their disabilities. The Court recognized that "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" enhanced the risk that they would be sentenced to death despite evidence that might call for a less severe penalty. *Id.* at 320. The Court explained that:

> Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an

> unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.

Id. at 320-21.

The Court also opined that, due to the impairments of mentally retarded individuals, a host of factors – from the increased risk of false confessions, difficulties in communicating with counsel, and their lesser ability due to limited communication skill to effectively testify on their own behalf or express remorse – created, "in the aggregate," an unacceptable "risk of wrongful executions" for mentally retarded defendants. *Id.* at 321. In short, the Court held that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislatures that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal," and thus the Constitution "places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* (internal quotation marks omitted).

II. The Standard for Determining Mental Retardation

The American Association on Mental Retardation ("AAMR") defines mental retardation as: (1) subaverage general intellectual functioning (i.e., an IQ of approximately 70 to 75 or below) existing concurrently with (2) related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (3) onset before the age of eighteen. American

Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter "1992 AAMR Manual"]. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") employs a definition that is nearly identical to the one set out in the 1992 AAMR Manual.[1] The Supreme Court has expressly relied on the 1992 AAMR Manual's three-prong definition of mental retardation. *Atkins*, 122 S. Ct. at 2245.

In late May 2002, the AAMR released the latest version of its manual. Mental retardation is redefined as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002) [hereinafter "2002 AAMR Manual"].

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[1] The DSM-IV defines mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4TH ed., text rev. 2000) ("DSM-IV"); *see Atkins,* 536 U.S. at 308 n.3 (setting out American Psychiatric Association's definition with approval).

The intellectual functioning of any individual with mental retardation will fall within the lowest three percent of the entire population. *See Atkins,* 536 U.S. at 308 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition"); *but see* DSM-IV at 46 ("The prevalence rate of Mental Retardation has been estimated at approximately 1%"). Thus, the first prerequisite for a diagnosis of mental retardation is severely impaired cognitive functioning.

The second requirement serves to confirm the reality of the psychometric measurement of the individual's severe impairment. The impairment must be observed to have "real-world" effects on the individual's life functioning. As the Supreme Court has noted, all people with mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). The requirement of real, identifiable disabling consequences in the individual's life – of reduced ability to "cope with common life demands," DSM-IV 42 – assures that the diagnosis applies only to persons with an actual, functional disability. *See* 1992 AAMR Manual at 38. The impairment in intellectual ability must have an actual impact on everyday functioning. *See id.* at 74 (noting that "most adaptive behavior instruments measure the skill level a person typically displays when responding to challenges in his or her environment") (internal quotation marks omitted).

III. Mr. Woods is a Person with Mental Retardation

Credible, compelling evidence demonstrates that Mr. Woods is mentally retarded. The evidence shows that: (1) taking into account the standard error of measurement and the Flynn Effect, his IQ measures 70 or below; (2) he has significant limitations in his adaptive functioning; and (3) he manifested these diagnostic features before the age of 18. Dr. Ollie J. Seay, an expert in the field of mental retardation, has provided an affidavit stating that Mr. Woods meets the criteria for mental retardation. *See* Ex. 1.

A. Evidence of Significant Limitations in Intellectual Functioning

Mr. Woods has received the following results from intelligence tests taken during his childhood and adulthood:

1972		California Short Form (1st grade; 7 y.o.)	FS 86
1972		WISC (1st grade; 7 y.o.)	FS 80
1975		WISC (4th grade; 10 y.o.)	FS 78
1980		SFTAA (short form) (7th grade; 15 y.o.)	FS 60
		*(*This test / score was not available to previous experts)*	
1997	(Pita)	WAIS-III (pre-trial; 32 y.o.)	FS 70
1998	(Gilhousen)	WAIS-R short form (2 of 11 subtests) (33 y.o.)	FS 83
2004	(Schmitt)	WAIS-III (pre-hearing; 39 y.o.)	FS 68

However, any competent expert will quickly relay that these test scores must be understood not only as a consistent whole, but also in the context of the quality, nature, and age of each test administered.

Dr. Seay's affidavit provides this analysis. To begin, she states the principle:

> A range of scores this broad creates tension requiring closer inspection. A closer examination of the tests administered and the scores obtained reconciles the disparities

and provides a clearer picture of Mr. Woods' intellectual functioning, and the degree of his deficits.

Next, she examines the validity of the scores resulting from tests administered to Mr. Woods during his adulthood.

The results of the most recent evaluation of Mr. Woods, completed by Dr. Schmitt on September 20, 2004, clearly place Mr. Woods' intellectual functioning within the range of mental retardation according to the AAMR definition. On the Wechsler Adult Intelligence Scale, 3rd Edition (WAIS-III) (the WAIS-III and the Stanford-Binet are generally accepted as the most accurate measurement instruments in use today), he obtained a Verbal IQ of 63, a performance IQ of 80, and a Full Scale IQ of 68. It is the Full Scale IQ that is the best indicator of overall functioning, according to the author of the test, David Wechsler.

When Mr. Woods was evaluated by Dr. Pita in 1997, using the same instrument, he obtained a Full Scale IQ of 70. Dr. Pita classified this as within the Borderline to Extremely Low Range of Overall Intellectual Functioning. However, given that the standard deviation for the WAIS-III is 15, the obtained score of 70 is exactly 2 standard deviations below the age group mean for the test, placing his intellectual functioning within the range of Mild Mental Retardation.

When Mr. Woods was placed on Death Row in 1998, Dr. Michael Gilhousen administered 2 subtests, or a "short form" of the Wechsler Adult Intelligence Scale-Revised (WAIS-R), despite the fact that the latest revision of this Wechsler scale, the WAIS-III, had been in use for 3 years, and the WAIS-R was thus outdated.

Moreover, a short form of an otherwise valid test is not a generally valid measure of intellectual functioning. . . "Wechsler himself presented one of the most cogent criticisms of the brief form . . . The individual reliabilities of some subtests are low so that reliance on half the items or only a few subtests to draw conclusions is inadvisable." In addition, Wechsler states in the WAIS-R Manual, "It is inadvisable to undertake prorating a Verbal score if it is based on fewer than four five Verbal tests, or a Performance score if it is based on fewer than four Performance tests. If either the Verbal or Performance score is based on too few tests and is not prorated, the Full Scale score should not be computed."

> Zimmerman, Grune, and Stratton go on to state that "a brief test is at best a rough screening device . . ." They point out that there is a "chance of serious error in calculating an IQ from a brief form. . . ." As a result, Dr. Gilhousen's test results should carry far less weight, if considered at all.[1]

Thus, of the tests administered to Mr. Woods as an adult, the only two intelligence test scores that can be considered reliable are those obtained by Dr. Schmitt (full scale IQ of 68) and Dr. Pita (full scale IQ of 70).

Most important are the scores obtained from tests administered to Mr. Woods during his childhood, or before he reached the age of 18. There are four such known scores:

1972	California Short Form (1st grade; 7 y.o.)	FS 86
1972	WISC (1st grade; 7 y.o.)	FS 80
1975	WISC (4th grade; 10 y.o.)	FS 78
1980	SFTAA (short form) (7th grade; 15 y.o.)	FS 60

The last of these – the full scale IQ score of 60 obtained in 1980 – was not discovered by Mr. Woods' previous counsel, and was thus not before the District Court considering Mr. Woods' initial *Atkins* claim.

In looking at these important pre-18 scores, it is crucial to understand that the two most reliable tests, the WISC tests administered in 1972 and 1975, resulted from a test

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[1] Dr. Gilhousen himself has admitted to the inadequacies of short form tests for clinical diagnostic purposes. *See* Exhibit 24 (Excerpts of Dr. Gilhousen testimony in *Eldridge v. Johnson*). He also has acknowledged that he is not the one who administers the short form tests, and that he has testified regarding the results of his short form testing in four cases – including Mr. Woods' – and did not find any of those four death row inmates to be persons with mental retardation. *Id.*

(the WISC, last normed in 1947/48) that was, respectively, *25 and 28 years out of date.* As any competent psychologist will report, test scores obtained through such an antiquated test *must* be adjusted for what we now know of as the Flynn Effect. Once that is done, the 1972 and 1975 scores are properly understood as full scale IQ scores of 72 and 69. The newly discovered SFTAA score of 60 – while not as reliable as the WISC – is crucial to placing the earlier California short form test in perspective. When considered all together, it becomes clear that Mr. Woods' intellectual deficits fall within the range of persons with mental retardation. *See* Exhibit 1.

1. The Flynn Effect

> The Flynn Effect was discovered by James Flynn, an American professor who was the first to document the fact that IQ scores increase over time. The Flynn Effect describes the phenomenon that different IQ tests using the same instrument will result in increased scores the farther in time the test is given from the time it was last "normed" for the general population – or, more generally, that the intelligence of the population increases over time.
>
> The AAIDD (formerly the AAMR) has issued guidelines recommending that the Flynn Effect be taken into account when undertaking retrospective analyses. The User's Guide to the 2002 AAMR Manual states:
>
> > The following guidelines for clinicians are important in retrospective diagnoses and complement those guidelines presented in the next section regarding situations in which formal assessment is less than optimal: . . . 4. Recognize the "Flynn Effect.". . . In cases where a test with aging norms is used, a correction for the age of the norms is warranted.

Exhibit 1, ¶ 16-17.

The Flynn effect very specifically mandates the manner and rate at which scores must be adjusted when outdated tests are used to measure intelligence. As Dr. Seay articulates and calculates:

> [T]he WISC test was last normed in 1947 /48 – decades before it was used to test Mr. Woods in the 1970's. To correct for the Flynn Effect, or IQ gains over time, Mr. Woods' scores must be adjusted down at the rate of .30 points per year from the time the test was normed until the test was administered. It is particularly important to adjust for the Flynn Effect when, as here, there is such a dramatic lapse of time between norming and administration.
>
> Thus, when Mr. Woods first took the WISC in 1972, it had been 24.5 years since the test was normed. Application of the Flynn Effect (24.5 years X .30 = 7.35) to the Full Scale IQ score he obtained at that time (80 – 7.35 = 72.65) results in a Full Scale IQ of 73. When the WISC was administered again to Mr. Woods in 1975, it had been 27.5 years since it was normed. Taking into account the Flynn Effect (27.5 years X .30 = 8.25), Mr. Woods' Full Scale IQ score becomes 70 (78 – 8.25 = 69.75). These scores fall within the standard error of measurement of +/- 5 points recognized by the 1992 AAMR classification and the American Psychiatric Association's 2000 Diagnostic and Statistical Manual, 4th Edition (DSM-IV) and are within the range of Mild Mental Retardation.
>
> This calculation is conservative. We now know that Flynn's empirical research has demonstrated that the average obtained by any given group on the Wechsler scales has historically increased by approximately 0.33 points per year. Inserting that figure into the above calculations, Mr. Woods 1972 WISC score is reduced to a Full Scale IQ of 72, and his 1975 WISC score is reduced to a Full Scale IQ of 69.

Exhibit 1, ¶ 27-29.

2. Understanding the short form scores

Two other scores were obtained during Mr. Woods' developmental period: an IQ score of 86 on the California Short Form, and an IQ score of 60 on the SFTAA. The California short form is a group administered test. The SFTAA, or Short Form Test of

Academic Aptitude (SFTAA), was also a short form test. Dr. Seay explains the difference in the results of those two tests:

> The disparity between these two short form tests can be understood both by the fact that short form tests are generally unreliable . . . and the fact that IQ scores from group tests are not as stable as IQ scores obtained on individually administered tests, particularly at younger ages. It has been reported that, even when scores on a test are seen as showing a high degree of stability, the scores of a few test takers will show great changes. Scores on group tests in the primary grades should only be interpreted as general indicators of a child's present ability. Thus, if Mr. Woods' development did not keep pace with his peers, his measured intellectual functioning could have been assessed as lower than his peers as he got older and was evaluated on group tests.

Exhibit 1, ¶ 32. Thus, the SFTAA 60 IQ score serves to both balance the score obtained on the California short form test, and to put both the scores and the fallibility of short form tests in perspective. Once the scores are adjusted for the Flynn Effect, it is the WISC test results that must be primarily credited.

Mr. Woods' academic record during his developmental period is also crucial to consider in understanding his intellectual deficits. He was in special education throughout his school career. Even in this modified learning environment, he received failing or near failing grades in all subjects except physical education and citizenship.

> He was described by his elementary school teachers as a "slow learner" and "inattentive" (often the case with children who have mental retardation and cannot understand the lessons, and are thus faulted for not paying attention). In terms of percentile rank, his standing is consistently ranked in the bottom 10% (of special education students), and often in the bottom 5%. In the 7th grade, his overall grade equivalency was 2.8. Dr. Pita found that in 1997, when Mr. Woods was 32 years old, he was functioning at the first grade level in spelling, and the second grade level in reading and arithmetic.

Exhibit 1, ¶ 33. *See also* Exhibit 13 (school records). As Dr. Seay concludes: "This academic record is highly consistent with a person who has significant intellectual deficits." Exhibit 1, ¶ 33. Thus, Mr. Woods' educational record confirms Dr. Seay's understanding of Mr. Woods' IQ scores, both during his developmental and adult periods.

Once the scores are properly understood, Mr. Woods' intellectual deficits undoubtedly fall within the range of persons with mental retardation.

> Taking all of the above into account, removing the scores resulting from short form tests, and adjusting the WISC scores for the Flynn Effect, valid, accurately scored results for Mr. Woods' intellectual functioning are as follows:
>
> | | | | |
> |---|---|---|---|
> | 1972 | | WISC (1st grade; 7 y.o.) | FS 72/73 |
> | 1975 | | WISC (4th grade; 10 y.o.) | FS 69/70 |
> | 1997 | (Pita) | WAIS-III (pre-trial; 32 y.o.) | FS 70 |
> | 2004 | (Schmitt) | WAIS-III (pre-hearing; 39 y.o.) | FS 68 |
>
> The consistency among these scores underscores the accuracy of the analysis, and comports with the scientific literature. It also confirms that Mr. Woods' intellectual functioning is at least two standard deviations below the mean, is significantly subaverage, and represents significant limitations in intellectual functioning.

Exhibit 1, ¶ 32-33.

B. Evidence of Significant Limitations in Adaptive Behavior

The 2002 AAMR Manual describes adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." 2002 AAMR Manual at 73. In assessing deficits in adaptive behavior, the 2002 AAMR Manual stresses that "[l]imitations in adaptive

behavior affect both daily life and the ability to respond to life changes and environmental demands." *Id.* at 91.

The 1992 AAMR Manual and the DSM-IV defined adaptive behavior by focusing on ten specific adaptive skills: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The 2002 AAMR Manual shifts to three broader domains of adaptive behavior: conceptual, social, and practical skills. The ten skill areas listed in the 1992 AAMR and the DSM-IV definitions can be conceptually linked to one or more of the three domains found in the 2002 AAMR definition of mental retardation. Mr. Woods has adaptive deficits in each of the three domains of adaptive behavior.

1. Conceptual Adaptive Skills

The representative skills found in the conceptual domain of adaptive behavior include the use of language, reading and writing, money concepts, and self-direction. The comparable skills in the 1992 AAMR Manual and the DSM-IV are functional academics, communication, and self-direction.

a. Deficits in Functional Academics

The record reveals that Mr. Woods has significant deficits in functional academics, including reading and writing, and arithmetic. He performed very poorly in school throughout his academic career. *See* Exhibit 13; Exhibit 1 at ¶ 31. Among other special education students, Mr. Woods was consistently ranked in the bottom 10%. *Id.* When he

was 32 years old, he was functioning at the first grade level for spelling, and the second grade level in reading and arithmetic. *See* Exhibit 22 (report of Dr. Pita).

b. Deficits in Self-Direction

Self-direction is another adaptive behavior included in the conceptual domain. It encompasses a broad range of adaptive skills needed for learning, abstract thinking, setting and achieving goals, and exercising control over and channeling one's emotions. Mr. Woods has serious deficits in all these areas.

As a child and young adult, Mr. Woods had difficulty initiating and finishing tasks on a schedule, and generally needed a lot of guidance. Exhibit 9 (Williamson Aff. ¶ 9). Observers noted that Mr. Woods seemed to be in his own world, and was not really aware of his surroundings. Exhibit 10 (Koci Aff. ¶ 5). Whenever he was given chores to do, he was easily distracted before completing the task at hand. *Id.* For instance, if he was asked to take out the trash, he would stop at the door and get sidetracked by the birds outside, and someone would have to remind him that he was supposed to be taking out the trash. *Id.*

In addition to being easily sidetracked, Mr. Woods had trouble learning and following directions verbally. Whether someone was giving him directions to a particular location or explaining how to do something, such as replacing a spark plug, he could not follow multiple-step directions. Exhibit 8 (Hollis Harkcom Aff. ¶ 5, 6). Rather, Mr. Woods could only follow very simple directions. His grandfather never gave him chores

to do, precisely because it was difficult for Mr. Woods to understand and complete tasks. Exhibit 4 (Tommy Woods Aff. ¶ 5).

Woods also had difficulty grasping the concept of punishment, and the concept that actions have consequences. He would do something wrong, get caught, and then go right back and do it again, and would not understand why he then got in trouble. One example of his inability to understand his mistakes after punishment was when he repeatedly dipped into his brother's savings, which his brother kept under his bed. Exhibit 5 (Shirley Woods Aff. ¶ 16). When his brother found out, he would chase Mr. Woods down the street and put him in a headlock. His brother would scare him enough that he would say that he would not do it again. However, soon after, Mr. Woods would be back in the box, taking his brother's money. *Id.*

c. Deficits with the Use of Language

Woods had difficulty pronouncing certain words and letters. Even though he had speech therapy throughout his time in school, he was unable to correctly pronounce his T's until middle school. Exhibit 3 (Allen Aff. ¶ 5). He also had difficulty communicating with or explaining himself to others. Exhibit 4 (Tommy Woods Aff. ¶ 13). He could physically show someone else how to do something, but could not explain his thoughts verbally. *Id.* His grasp of the English language was comparable to a child, and therefore he had difficulty communicating on anything but the most basic concepts. Exhibit 10 (Koci Aff. ¶ 3, ¶ 6).

d. Deficits in Reading and Writing

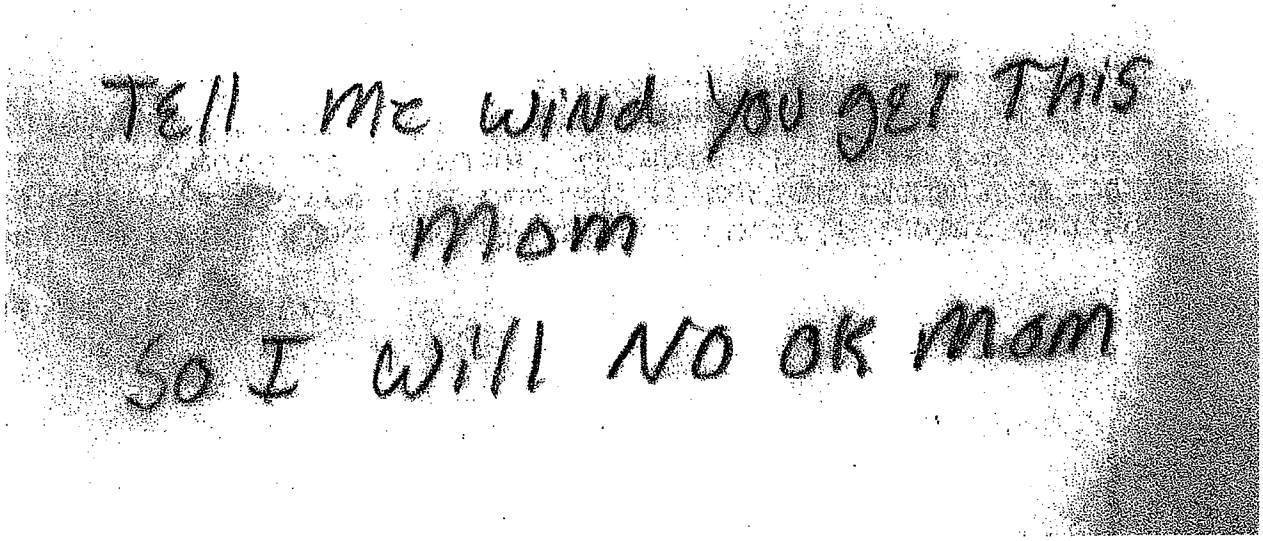
Mr. Woods has significant deficits in reading and writing. He performed very poorly in school – even in special education – throughout his academic career. Exhibit 1, ¶ 31; Exhibit 13. In the first grade, Mr. Woods passed all of his classes, but ended the year with three D grades. In second grade, he failed one class and received five D grades. In third grade he passed all of his classes, but ended the year with four D grades. In fourth grade, he failed one class and received fifteen D grades. In fifth grade, he passed all of his classes, but ended the year with 11 Ds. In the sixth grade, Mr. Woods received one F and one D grade. In seventh grade, his final year of schooling, he received twenty-four F grades and eight D grades. *See* Exhibit 13.

Many of Mr. Woods' family members and friends, who spent time with him during his developmental years, stated that he was a very slow learner who had difficulty with his classes and homework. *See e.g.* Exhibit 3 (Allen Aff. ¶ 4). He steadily fell behind in school each year, even in relation to the other children in his special education classes. *Id.* His sister, Tammy, did most of his homework, and Mr. Woods eventually dropped out of school after the seventh grade because he had trouble keeping up with the curriculum. Exhibit 6 (Stephens Aff. ¶ 3). People tried to teach him how to spell or read, but he never grasped what they were teaching him. Exhibit 10 (Koci Aff ¶ 7). His school peers teased him for being "stupid" and "retarded." Exhibit 3 (Allen Aff. ¶ 5).

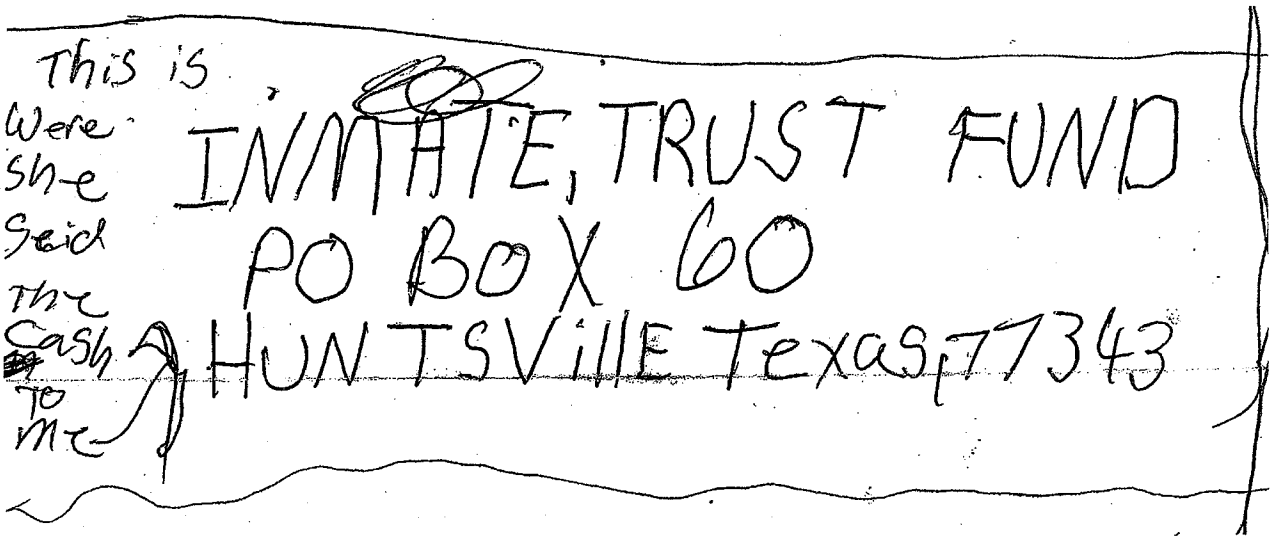
Mr. Woods left school as a young teenager without ever learning how to really

read or write. Exhibit 5(Shirley Woods Aff. ¶ 13). Dr. Pita, in his report, scored 32-year-old Mr. Woods' reading level at a 1st or 2nd grade level. Exhibit 22. Even before going to prison, Mr. Woods could only remember how to write his name by memorizing the shapes of letters and redrawing them. Exhibit 8 (Hollis Harkcom Aff. ¶ 4). This is the same way he learned how to get to certain places, through repetition of seeing certain street names, not by reading the signs. Exhibit 3 (Allen Aff. ¶ 5). His step-brother, Tommy, was surprised to find out that Mr. Woods was writing in prison, because, "before he went in, he really couldn't write at all." (Tommy Woods Aff. ¶ 15). Tommy initially thought that one of the other inmates was writing the letters for Mr. Woods, and he wanted to thank that person for helping his brother. *Id.* Later he found out from Mr. Woods that in order to write letters in prison, Mr. Woods kept a list of words in his cell. He would ask someone else how to spell words and then he would write them down to later copy in his letters. *Id.*

The following letters, written by Mr. Woods from prison (before *Atkins* came down and thus before there was any reason to "fake" his inabilities), speak volumes. On a letter from Richard Alley, which Mr. Woods forwarded to his "mother" (grandmother and adopted mother), Ruby Woods, he wrote the following note:



In another letter written to Ms. Woods, in which he was asking her to send money to his trust fund at the Ellis Unit, Mr. Woods wrote:



See Exhibit 14. Mr. Woods' deficits in this arena – to this day – are self evident.

e. Deficits with Money Concepts

Mr. Woods was never capable of taking care of his own finances. When he was living with his grandmother or aunt, he would give them his paycheck and they would use

it to pay the bills. Exhibit 3 (Allen Aff. ¶ 13). When he lived with a girlfriend, they would also take over the role of managing his household finances. *Id.*

Mr. Woods had difficulty even with simple money concepts, such as making correct change. He might know that something cost less than ten dollars, but he would not know whether he was given the correct change. *Id.* ¶ 10. When he went to the store, he would not know what his money could buy, so he would take a long time at the store deciding what to get, even though someone had given him a list. Exhibit 10 (Koci Aff. ¶ 9). Dr. Schmidt explained:

> Woods would not necessarily know if he were getting the correct change, if he paid for $10.50 worth of gasoline with a $20 bill. He could add and subtract numbers, but when it comes to dealing with fractions or dealing with smaller denominations and subtracting those from a whole number, he would have a great difficulty and would be unable to perform that mathematical act most of the time.

Habeas hearing record, Vol. 2, p. 58.

In addition, Mr. Woods had no concept of saving. Once in Florida, he bought his girlfriend a $300 dog. Exhibit 4 (Tommy Woods Aff. ¶ 17). He used all of his money to buy it for her, just because she had mentioned that she wanted the dog. *Id.* According to his uncle,

> Either he had money or he didn't have money. He didn't know how to save and plan ahead. When he had money, he'd go ahead and buy a brand new TV. Then the next week when he was out of money, he'd go pawn the TV to get the money he needed. And he was always doing that.

Exhibit 8 (Hollis Harkcom Aff. ¶ 9).

It is clear that Mr. Woods conceptual adaptive skills were significantly impaired.

See also Exhibit 1, ¶ 46-48.

2. Social Adaptive Skills

The 2002 AAMR Manual lists the representative skills in the social domain as interpersonal, responsibility, self-esteem, gullibility, naiveté, the ability to follow rules, obey laws, and avoid victimization. 2002 AAMR Manual at 82. Mr. Woods exhibits deficits in all sub-categories.

a. Deficits in Interpersonal Relationships

Mr. Woods always had a difficult time making his own friends. His circle of friends consisted of those people that befriended his brother Tommy, or his cousin Jody. Exhibit 3 (Allen Aff. ¶ 12); Exhibit 4 (Tommy Woods Aff. ¶ 14). He never had his own set of friends. Exhibit 6 (Stephens Aff. ¶ 4), in part because he was perceived as "slow."

> Bobby got picked on a lot at school because he was slow. Thomas would stick up for him. I do not remember Bobby having other friends besides Thomas and me. Bobby tried to hang out with Thomas and me as much as possible. Bobby would feel left out if we did not take him with us.

Exhibit 11 (Craig Ingram Aff. ¶ 3). He was socially awkward at school and was a bit of a loner. Exhibit 12 (Koretta Ingram Aff. ¶ 2). He would sometimes talk to himself and say things like, "I don't know why they don't like me." Exhibit 11 (Craig Ingram Aff. ¶ 5).

b. Responsibility

Mr. Woods was incapable of taking on adult responsibility. If his grandmother or

aunt were not looking after him, his girlfriend would have to take care of him. Exhibit 3 (Allen Aff. ¶ 13). According to Adele Williamson, his supervisor when he worked at the Waffle House:

> Bobby wasn't capable of being or acting like an adult. He always acted like a child, and as a teenger, I felt that Bobby had reached his maximum and was not going to mature intellectually anymore.

Exhibit 9 (Williamson Aff. ¶ 6).

In addition to not being able to take on adult responsibilities, he could not take on responsibilities that parents expect their children to be responsible for, such as household chores. Exhibit 3 (Allen Aff. ¶ 8). When asked to do something, Mr. Woods would usually get confused as to what to do; it was often faster for the adult taking care of him to just do it herself. *Id.*

At times, Mr. Woods would attempt to babysit for his family. He occasionally helped his aunt entertain his cousin, Bubba, who was severely mentally retarded. *Id.* at 9. Mr. Woods would play with Bubba like a child, but he was never able to discipline, teach, or look after him. *Id.* Once when he took care of his cousin's children, she came back to find her daughter wandering three blocks from the house and her son crying at home. *Id.* He got along with children because he could drop down to their level, not because he was an adult figure to them. Exhibit 8 (Hollis Harkcom Aff. ¶ 10).

c. Gullibility/Naiveté/Victimization

Gullibility, naiveté, and victimization are dimensions of social behavior that often

fit together. People with mental retardation often have difficulty being in charge of a group or being the person who must see that a task is accomplished. They are more often seen as followers than as leaders and are easily influenced by others.

Mr. Woods was never a leader; he was always the follower. Exhibit 6 (Stephens Aff. ¶ 7). He just did what people told him to do. *Id.* This characteristic was so ingrained in his day-to-day life that he was unable to be self-sufficient or independent. Exhibit 4 (Tommy Woods Aff. ¶ 6). Rather, he would just follow someone else. *Id.* For years he followed his cousin Jody, and later, he would rely on girlfriends to take care of him. *Id.* His cousin, Jody, could talk him into doing almost anything. Exhibit 11 (Craig Ingram Aff. ¶ 6). Once, he and Jody took a family car and drove off toward California, planning to go to Jody's uncle's place. Exhibit 4 (Tommy Woods Aff. ¶ 12). They broke down in Arizona. *Id.* Their grandmother had to send someone to bring them back. *Id.* In this case, as in many others, Jody came up with the plan, and Woods went along for the ride. *Id.*

Tommy and his friends also often played tricks on Mr. Woods and talked him into doing things that had the potential of getting him into trouble. Exhibit 11 (Craig Ingram Aff. ¶ 4). In addition to his family, his "friends" and classmates would play similar jokes on him, because he was known for being easily pressured into doing anything. Exhibit 3 (Allen Aff. ¶ 12). He never thought through the consequences and blindly trusted everyone. *Id.*

d. Self-Esteem

Mr. Woods' lack of effort in finding jobs stemmed from his lack of confidence in his ability to learn occupational skills. Exhibit 12 (Koretta Ingram Aff. ¶ 4). In addition to not being able to find jobs, he lacked the confidence and commitment to retain jobs. For example, he was once in Boy Scouts as a child, but he quit soon after joining, as he had a hard time conforming to the Boy Scout culture and was unable to achieve merit badges. Exhibit 4 (Tommy Woods Aff. ¶ 16). This is corroborated by Dr. Pita's report, where he indicates that Mr. Woods "suffers from a low sense of self-worth. He evaluates his own personal worth negatively. He compares himself unfavorably to others . . . he is aware that he's less capable than many others." Habeas Hearing Vol. 2, p.73.

e. Inability to Follow Rules

Mr. Woods never understood the rules of games. Exhibit 4 (Tommy Woods Aff. ¶ 9). When he was little, Mr. Woods and his brother joined a baseball team. *Id.* He never grasped the concept of the game and spent most of the time on the bench. *Id.* When he was placed in the outfield, he just stood there and did not know what to do. *Id.*

3. Practical Adaptive Skills

Representative skills in the practical domain include activities of daily living, instrumental activities of daily living, occupational skills, and maintenance of a safe environment. Mr. Woods exhibits significant deficiencies in this area as well.

a. Deficits in Activities of Daily Living

Mr. Woods relied on his grandmother and/or aunt to help him with many basic life activities. They would have to tell him when to get ready for bed and when to go to sleep. Exhibit 4 (Tommy Woods Aff. ¶ 6). His grandmother dressed him until he was ten or eleven years old. *Id.* When he lived with his brother in Florida, his brother would have to call him in at night to come inside for bed. Id. ¶ 14. Mr. Woods was eighteen years old at the time. *Id.*

There was never a period of time when Mr. Woods lived by himself. Exhibit 3 (Allen Aff. ¶ 2). He always lived with his grandmother, aunt, brother, friends, or girlfriends – all of whom would take the role of caring for him. He had difficulty completing even basic daily tasks, such as cooking for himself, Exhibit 5 (Shirley Woods Aff. ¶ 5), cleaning, Exhibit 3(Allen Aff. ¶ 8), shopping for clothing (his grandmother would have to check his sock drawer to see if he needed more socks and if so, she would purchase socks for him), Exhibit 5 (Shirley Woods Aff. ¶ 4), doing the laundry (when he lived with Schwana, Mr. Woods brought her children's clothing to his grandmother's place for her to clean) (*Id.* ¶ 6), and taking telephone messages for others (*Id.* ¶ 15). While living with his aunt, Mr. Woods would help her in the kitchen by cutting vegetables or bringing things to her. Exhibit 3 (Allen Aff. ¶ 7). This is how he eventually learned how to cook basic meals, a skill he used as a short-order cook at various restaurants. *Id.* However, when he lived with his grandmother, she did all the cooking, without any help from Mr. Woods. *Id.*

Mr. Woods also had trouble handling emergency situations. His sister in law recounted an example:

> Bobby loved to fish. One time, when Julia, Bobby, and my son went fishing, Julia got a catfish spine stuck in her arm. Somehow it happened while Julia was trying to pull the hook out of the catfish. Well, Bobby brought everyone back to Thomas' house, and, laughing, showed Thomas Julia's arm. Thomas had to tell Bobby, "alright boy, let's take her to the hospital now to get that out." Without Thomas, Bobby wouldn't have known what to do to help Julia. Bobby ran to Thomas all the time for help fixing his problems.

Exhibit 5 (Shirley Woods Aff. ¶ 12).

b. Deficits in Occupational Skills

Mr. Woods had difficulty finding and retaining jobs. The jobs he found (or others found for him) all involved menial tasks: janitorial duties, short-order cook at fast food restaurants, cooking and washing dishes at schools, and logging and roofing with his brother. Exhibit 4 (Tommy Woods Aff. ¶ 11). When he worked at the Waffle House performing janitorial duties, his manager would always have him work alongside someone, because she did not think he could handle the work on his own. Exhibit 9 (Williamson Aff. ¶4). At times he would serve tables there, but he would never take down the order – someone would tell him what food to bring out to what table. *Id.* During his time as a logger and roofer, Mr. Woods could not master the skills the job required, such as operating the skidder. *Id.* The one job he attempted that involved more difficult tasks was short lived – a few days into the job he was injured and his aunt made him quit. Exhibit 3 (Allen Aff. ¶ 14).

Mr. Woods never found any of his jobs himself. According to his sister-in-law, when he was living with one girlfriend, she would pull down a paper and say, "okay, we need money for cigarettes and things so its time you got a job." She would find the places for him to apply, and he would follow her lead. Exhibit 3 (Shirley Woods Aff. ¶ 9). Similarly, either his grandmother, aunt, brother, or previous girlfriends found his other jobs.

Mr. Woods was not even able to get to work on time without the help of others. Someone would have to remind him to go to work almost every day, Exhibit 5 (Shirley Woods Aff. ¶ 8), and for a long time his grandmother had to drive him to and from work, as he did not have a driver's license. Exhibit 9 (Williamson Aff. ¶ 5).

c. Deficits in Assessing Risks

Mr. Woods had a difficult time assessing risks and taking precautions to minimize or avoid them. On one occasion, he burned his arm for no particular reason. Exhibit 4 (Tommy Woods Aff. ¶ 10). His sister-in-law details additional examples:

> Bobby was just like a big kid. One day, when we were living in Florida, I was driving down the highway in my truck. Bobby was walking along the highway and lay down on the highway in front of my car. I honked and yelled at him to move, but he wouldn't get up. Finally, I got out of my car and yanked him up. He was just laughing and laughing. There were five to six cars coming down that road at all times, but he really had no idea how dangerous it was. He thought he was just playing a joke.

Exhibit 5 (Shirley Woods Aff. at ¶ 11; 14).

The existing evidence provides ample evidence to show that Mr. Woods has

significant limitations in his adaptive behaviors. These limitations exist in every domain (the AAMR only requires deficits in one domain in order to qualify as a person with mental retardation). Mr. Woods easily meets this prong of the definition.

C. Risk Factors

The 2002 AAMR Manual identifies four main categories of risk factors for mental retardation that can occur at the prenatal, perinatal, or postnatal stage of development. See 2002 AAMR Manual at 127 (Table 8.1). In practical terms, it means that any individual with mental retardation not only has a measurable and substantial disability now, but that he also had it during childhood and adolescence, significantly reducing the ability to learn and gain an understanding of the world during life's formative years. The four categories of risk factors that may interact to cause mental retardation are: (1) biomedical: factors that relate to biological processes, such as genetic disorders or nutrition; (2) social: factors that relate to social and family interaction, such as stimulation and adult responsiveness; (3) behavioral: factors that relate to potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse; and (4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills. *Id.* at 126; Exhibit 1 at ¶ 53-55.

Mr. Woods' social history includes numerous risk factors that are recognized as contributing to mental retardation:

(1) a family history of low cognitive functioning and mental retardation;

(2) lack of family support, including physical, psychological and social;

(3) lack of stimulating environment; and

(4) nomadic existence and lack of educational opportunities.

Mr. Woods' mother was an alcoholic who drank heavily before, after, and through most of her pregnancy. Exhibit 3 (Allen Aff. ¶ 3). When he was still an infant, his mother left him to live with his grandmother, who adopted him as her son. When he was not living with his grandmother, Mr. Woods shifted between living with his mother's younger sister, his brother, or friends of the family. Throughout his life, up until he was sentenced, Mr. Woods constantly moved between these homes. During his seventh grade year, he attended at least three different schools over the course of one year.

Overall, Mr. Woods grew up in an unstable environment, where people came and left his life. His mother did not play a significant role in his life, and when she was around, her behavior was destructive. The only father figures he had were his grandmother's various husbands, or his Aunt's husbands. He was moved from house to house, all with different people living at these homes at different times.

Moreover, a striking number of Mr. Woods' extended family have mental retardation – many at the severe level – or mental illness. Mr. Woods' aunt, Julia

Harkcom, has learning disabilities and is often described as "slow." Her two sons, Mr. Woods' cousins, were placed in special education, and although fully grown, still live at home. Exhibit 7 (Julia Harkcom Aff.); Exhibit 8 (Hollis Harkcom Aff). Mr. Woods' cousin, Tammy Stephens, has bipolar disorder, and her daughter Athena has been diagnosed with severe mental retardation. Exhibit 6 (Stephens Aff.). Another cousin, James Jr. ("Bubba"), has severe mental retardation, and has had to be institutionalized. Exhibit 3 (Allen Aff.). One of Mr. Woods' great aunts had severe mental retardation and was placed in an institution at a young age, where she died. Another great aunt was considered "slow," and had five children, three of whom have severe mental retardation and are also institutionalized. The remaining two also have mental retardation, though to a lesser degree.

All of these risk factors confirm what the evidence outlined above makes clear: Mr. Woods is a person with mental retardation.

Conclusion

Mr. Woods' has significant intellectual and adaptive deficits, all of which were clearly manifest in the developmental period. The evidence presented herein conveys by clear and convincing evidence that Mr. Woods is a person with mental retardation.

THE PRIOR DETERMINATION THAT MR. WOODS IS NOT A PERSON WITH MENTAL RETARDATION WAS DICTATED BY THE POOR PERFORMANCE OF MR. WOODS' APPOINTED 11.071 ATTORNEY

I. Mr. Alley's Representation of Mr. Woods was Deficient Throughout the Habeas Proceedings in State and Federal Court.

Travis Richard Alley was appointed to represent Mr. Woods in his state habeas proceedings on September 24, 1998. The petition for a writ of habeas corpus he filed raised 28 issues, of which only 2 are – arguably – non-record claims. At least 17 of the issues raised directly mirror issues raised in the direct appeal brief.[2] After the state court denial, Mr. Alley was appointed to represent Mr. Woods in federal court, where he raised precisely the same issues that he raised in state court. He initially filed in the Northern District of Texas, but the case was eventually transferred to the Western District because of the change of venue from Hood to Llano County at the time of trial.[3] For the work Mr. Alley did in the Northern District, he was paid $6187.50, for 60.6 hours of work, 43.4 of which were claimed to be for legal research and writing.[4] In August of 2001, the federal district court entered a show cause order, requiring Mr. Alley to show cause why no response had been filed to Respondent's Motion for Summary Judgment, or to a letter from the clerk inquiring about Mr. Alley's admission to the Western District.

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[2] Before drafting his writ, Alley wrote to appellate counsel requesting access to her file generally, and a copy of her brief on direct appeal specifically.

[3] It was precisely during this time that Mr. Alley was being reprimanded in the federal district court for the Northern District for his actions in the LaGrone matter. *See infra*. The federal court nonetheless let Mr. Alley remain on Mr. Woods' case.

[4] CJA 30 Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel, Woods v. TDCJ Director (N.D. Tex. Mar. 10, 2003) ($:00-CV-1563-A)

In March 2003, Mr. Alley filed a successive habeas petition in state court, asserting an *Atkins* and a *Ring* claim. Of the 86-page petition, the entire argument addressing the *Atkins* claim spans three and one half pages. The CCA authorized Mr. Woods to proceed on his *Atkins* claim, and remanded the matter to the trial court.

In September 2004 the 355th District Court of Hood County held an evidentiary hearing on Mr. Woods' *Atkins* claim. Mr. Alley presented one witness: Dr. Richard Schmitt. Dr. Schmitt administered a full IQ test to Mr. Woods, but – entirely unguided by counsel – failed to do more than talk to one witness regarding Mr. Woods' adaptive deficits. The state presented school records including scores from multiple examinations, prison records, affidavits from former employers and coworkers, a report from Dr. John M. Pita, and testimony from numerous witnesses and two experts.

Following the evidentiary hearing in Hood County on the *Atkins* claim, each side was required to submit proposed findings of fact and conclusions of law (FFCL). The State's FFCL included 68 total findings, comprising 25 total pages (which the Court ultimately adopted), while Mr. Alley's proposed FFCL included 26 findings, and was three and one half pages long.[5] Despite their mention during the hearing, none of Mr. Alley's proposed findings of fact related specific factors evidencing the onset of Mr. Woods' sub-average intellectual functioning prior to age eighteen. Nor did the findings of

[5] Compare State's Proposed Findings of Fact and Conclusions of Law, *Ex parte Woods*, No. W-7487-2 (355th Dist. Ct., Oct. 22, 2004) with Applicant's Proposed Findings of Fact and Conclusions of Law, *Ex parte Woods*, No. W-7487-2 (355th Dist. Ct., Oct. 22, 2004).

fact cite specific examples of deficits in Mr. Woods' adaptive functioning that were likewise related during the evidentiary hearing.

Mr. Alley's deficient conduct continued in the appeal of Mr. Woods' *Atkins* claim to the federal courts. Despite clear deadlines set by the United States District Court for the Western District for the filing of the Motion for Authorization in the United States Court of Appeals for the Fifth Circuit and the filing of the federal successive petition, Mr. Alley missed both deadlines. One month after the filing deadlines had passed, on September 16, 2005, Judge Sparks consequently entered an order to show cause for want of prosecution and for failure to comply with the orders of the court, requiring Mr. Alley to show cause within ten days why Mr. Woods' habeas action should not be dismissed. Order to Show Cause, *Woods v. Dretke*, No. A:05-CA-354-SS (W.D. Tex. Sep. 16, 2005). Responding to that order on September 26, 2005, Mr. Alley claimed that while he was working on the petition for authorization, Hurricane Katrina struck New Orleans, and made filing impossible as the court had refused to review any non-emergency filings. *See* Motion to Modify Filing Deadlines and Response to Court's September 16, 2005 Order, *Woods v. Dretke*, No. A:05-CA-354-SS at 1-3 (W.D. Tex. Sep. 26, 2005). Hurricane Katrina did not make landfall in Louisiana until August 29th, 2005, two weeks after the petition itself was due in the Western District of Texas.[6]

II. The Prior Determination that Mr. Woods is Not a Person with Mental

[6] National Oceanic and Atmospheric Administration – Hurricane Katrina, http://www.katrina.noaa.gov (last visited Oct. 20, 2008).

Retardation was Dictated by the Poor Performance of Rick Alley, Mr. Woods' Appointed Habeas Attorney.

Mr. Alley failed in all respects to adequately represent Mr. Woods in his Atkins proceedings. While he hired an expert, he did nothing to facilitate that expert's work. Thus, he did not collect or convey to Dr. Schmitt all available records, missing a crucial full scale IQ score of 60, from the developmental period, which undersigned counsel was able to obtain by requesting same from one of the schools Mr. Woods attended. *See* Exhibit 15. Mr. Alley failed to hire an investigator or mitigation specialist, or to do any of the investigation intrinsic to a full exploration of Mr. Woods' adaptive deficits. Any failings by Dr. Schmitt in not doing such an investigation must be placed at Mr. Alley's feet. Undersigned counsel was able to gather numerous affidavits from friends, family and co-workers detailing the ample evidence of Mr. Woods' adaptive deficits in his developmental years. *See* Exhibits 3-12. Any one of those witnesses would have been happy to talk with Mr. Alley or one of his designees, had they been asked. *Id.*

Moreover, Mr. Alley had clearly failed to familiarize himself with concepts intrinsic to understanding persons with mental retardation, and the diagnosis of same. Thus, despite the fact that the Court queried Dr. Schmitt about the meaning of the Flynn Effect, Mr. Alley never brought that central concept to bear on the two most crucial IQ scores presented at the hearing: the scores of 80 and 78 obtained when Mr. Woods was in

the 1st and 4th grades, respectively.[7] Thus, the Court relied on testimony by Dr. Pita, who testified that, given, among other things, the 78 and 80 IQ scores, he had seen no evidence to support a diagnosis of mental retardation. *See* State's Proposed Findings of Fact and Conclusions of Law, *Ex parte Woods*, No. W-7487-2 at 10 (355th Dist. Ct., Oct. 22, 2004) (Hereinafter FFCL) at 11.

If Mr. Alley had been familiar with the Flynn Effect, and had discussed same, and the impact on Mr. Woods' scores, he could have made clear to the court that those scores were obtained using an antiquated test, and that a proper understanding of the inflated nature of the scores, and application of the Flynn Effect, would have brought them down to scores of 69 and 72 – well within the range of intellectual deficits of persons who are mentally retarded. *See* Exhibit 1 at 26-29. With that understanding, Dr. Pita's testimony would have been far less credible.

These failings were central to the findings and conclusions of the District Court rejecting Mr. Woods' *Atkins* claim. The Court pointed repeatedly to the dearth of pre-18 IQ scores reflecting significant intellectual deficits. The Court also pointed repeatedly to the state's evidence of adequate functioning, such as Mr. Woods' allegedly passing grades. *Id.* at 12. In the absence of information to the contrary, the Court had no choice

[7] In later pleadings in the federal court *Atkins* litigation, Mr. Alley attempts to brief the Flynn Effect – but gets it all wrong. First, he conflates the Flynn Effect and the Practice Effect (which are, in fact, disparate concepts), and in attempting to apply the Flynn Effect, he does so exactly backwards, thereby raising Mr. Woods' scores instead of lowering them. *See* Pet. for COA at 11 (2006); Sec. 2254 Successor Petition at 113 (2005).

but to credit the state's witnesses and the IQ scores on their face.

The District also Court relied on the results of a short form IQ evaluation done by Dr. Michael Gilhousen, indicating that Woods' IQ was above 70. *Id.* at 13. If Mr. Alley had been properly prepared, he would have cross examined Dr. Gilhousen on the inadequacies, general and specific, of short form testing, and the specific short form test used by Dr. Gilhousen. *See*, e.g., Exhibit 1 at ¶ 23-25.

Finally, it is crucial to understand and reconcile IQ scores over a period of time and within the context of other factors, such as educational records, to facilitate an evaluation of what scores can and should be relied upon, and what scores must be discounted. *See* Exhibit 1, ¶ 18-37. Mr. Alley entirely failed to do this, to Mr. Woods' detriment.

The District Court also relied on a number of misconceptions and misimpressions about people with mental retardation, and their capabilities. Thus, the court found dispositive remarks from Woods' teachers that Woods was an "inattentive" student, who did not "work to potential," and could "do better!" FFCL at 12. The court looked to Woods' activity in prison to dispel the notion that Woods could not read or write. It relied heavily on testimony regarding Woods' activity at the prison library, finding evidence of Woods' having checked out more than 115 novels in 2 years, dispositive of Woods' ability to read. *Id.* at 13. The court likewise relied upon the frequency Woods was observed

reading and writing in his jail cell, as well as his attendance at GED classes, to bolster that finding. *Id.* at 13-14. These conclusions are unsupported and reflect assumptions and misimpressions about people who are mentally retarded. *See* Exhibit 1 at ¶ 33; 56-57. If Mr. Alley had been properly prepared for Mr. Woods' hearing, he could have disabused the Court of these misconceptions.

Finally, the District Court relied on Dr. Pita's various tests and their results in making its determination about whether Mr. Woods was a person with mental retardation. FFCL at 13-14. As the Court understood it, the results of the mental status examinations administered in 2003 and 2004 indicated that Woods' intelligence level, as well as his adaptive skills, were at a normal level. *Id.* at 13. However, those tests, and the results obtained, were gravely misunderstood. *See* Exhibit 1 at ¶ 40-44. Properly understood, with knowledge about the nature of the test and the population used for norming the same, the test results relied upon by the Court in fact do not undermine a finding that Mr. Woods is a person with mental retardation. If Mr. Alley had conducted a proper preparation and investigation, and an actual adaptive deficit work up been undertaken, Dr. Pita's results would have been quickly discredited. *See* Exhibits 3-12; Exhibit 1 at ¶ 46-54.

It was incumbent upon Mr. Alley to understand the evidence presented and the doctrines inherent to an understanding of mental retardation and its diagnosis. Mr.

Alley's failings infected every aspect of Mr. Woods' prior proceedings. But for those failings, there is a reasonable possibility that the District Court would have understood the true nature of Mr. Woods' disability, that Mr. Woods' intellectual and adaptive deficits fall within the range of persons with mental retardation and thus exempt from the death penalty.

THIS COURT HAS JURISDICTION TO HEAR MR. WOODS' *ATKINS* CLAIM

This Court may authorize consideration of the merits of Mr. Woods' *Atkins* claim pursuant to any of four independent jurisdictional bases.

I. Based on the extraordinary and unique circumstances of this case, this Court should reconsider on its own motion the finding that Mr. Woods does not have mental retardation; the failure to do so will result in the execution of a prisoner who is constitutionally exempt from the death penalty.

Mr. Woods respectfully suggests that this Court reconsider the denial of his second application for habeas corpus relief. Mr. Woods has come forward with compelling evidence that he has mental retardation and is thus ineligible for the death penalty. Two equally cogent but independent rationales necessitate reconsideration of Mr. Woods' prior application.

First, this Court has already determined that the lawyer who handled Mr. Woods' prior habeas proceeding is not qualified for appointment in 11.071 cases and has taken the extraordinary step of removing the lawyer against his will from the list of court-approved 11.071 counsel. The lawyer's lack of competence to handle capital habeas proceedings,

which also led to censure in federal court, was manifest in Mr. Woods' case and led to a fatally incomplete presentation of Mr. Woods' claims that his mental retardation renders him ineligible for the death penalty. Mr. Woods has come forward with the evidence prior counsel failed to seek, including a childhood I.Q. score of 60 and numerous witnesses who attest to Mr. Woods' deficits in adaptive functioning. Critically, all of this evidence predates Mr. Woods' eighteenth birthday. Moreover, it was precisely the absence of this type of evidence that led the courts to conclude that Mr. Woods does not have mental retardation. In short, the lawyer's incompetence infected every aspect of the *Atkins* determination and deprived the courts of evidence critical to reliably determining whether Mr. Woods is ineligible for execution.

Second, and alternatively, the United States Constitution mandates that states implement *Atkins* in a manner that comports with the Sixth, Eighth, and Fourteenth Amendments. States can only comply with this constitutional imperative by providing defendants with at least one meaningful opportunity to develop and present evidence that they are exempt from capital punishment. The State of Texas, of course, is in compliance with these constitutional requirements in cases tried after *Atkins* because it provides every capital defendant with effective representation or a remedy when effective representation is withheld. However, the State of Texas has yet to implement any post-conviction proceedings beyond 11.071 for safeguarding against the execution of the mentally retarded. While Texas' failure to respond to *Atkins* may not run afoul of the constitution

in every 11.071 case, it did here when Mr. Woods was saddled with a lawyer who failed to adequately investigate and present evidence that Mr. Woods has mental retardation. Thus, this Court should reconsider Mr. Woods' case on its own motion to prevent the State of Texas from executing Mr. Woods in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Woods will address in turn each independent rationale for reconsidering his prior habeas corpus application.

A. A majority of this Court has acknowledged that the Court may, upon its own motion, reopen and reconsider an Article 11.071 proceeding if court-appointed counsel was incompetent; the extraordinarily unique and compelling circumstances of Mr. Woods' case necessitate reconsideration.

1. This Court has jurisdiction to reopen, at its discretion, the prior 11.071 proceedings.

This Court may, at its discretion, reconsider the disposition of a prior application for a writ of habeas corpus filed pursuant to Article 11.071. *See Ex parte Hood*, ___ S.W.3d ___, 2008 WL 4151666, at *2 (Tex. Crim. App. Sept. 9, 2008) (unpublished) (reconsidering this Court's disposition of Mr. Hood's second subsequent application for habeas corpus relief); *Ex parte Hathorn*, AP-75,917 (Tex. Crim. App. May 14, 2008) (*per curiam*) (unpublished) (reconsidering, on Court's own motion, applicant's previously rejected *Penry* claim); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008) ("reconsidering, on [the Court's] own initiative, a claim raised in an initial post-

conviction application for writ of habeas corpus in a capital murder case, but rejected by [the] Court" in a previous order).

The *Moreno* Court unanimously found that Article 11.071 imposed no bar to reconsideration of capital habeas corpus cases:

> A rule authorizing this Court to reconsider its disposition of a post-conviction writ in a death-penalty case does not in any way establish a new or separate procedure for applications for writ of habeas corpus in death-penalty cases in contravention of Section 1 of Article 11.07. We find no language in the balance of Article 11.071 that either allows or prohibits this Court's reconsideration of our initial disposition of a capital writ on our own motion or expressly or implicitly prescribes temporal limitations on any such reconsideration.

Id. at 427. The Court cautioned, however, that reconsideration was only appropriate in "compelling" or "extraordinary" circumstances. *Id.* at 428-29.[8] Prior decisions of this Court impel the conclusion that the circumstances of this case are sufficiently

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[8] Presiding Judge Keller signed onto the majority opinion but also clarified the limitations she would impose on motions for reconsideration:

> At a minimum, two conditions should be present. First, the reconsideration must indeed involve a claim that was originally raised in the application. Second, an indisputable mistake of fact or law that the reconsideration seeks to rectify must have been made by this Court. If this Court, for example, through no fault of the applicant, overlooks a critical fact or legal claim that is in the habeas application and upon which relief should have been granted, reconsideration is an appropriate vehicle by which to correct that mistake.

Ex parte Moreno, 245 S.W.3d at 431-32 (Keller, P.J., concurring). As Mr. Woods demonstrates, both conditions are satisfied in the instant proceedings. Mr. Woods raised his claim in a prior application. Second, numerous critical facts were omitted from the prior proceedings through no fault of Mr. Woods. Mr. Woods, an indisputably mentally impaired individual, was represented by an incompetent attorney who failed investigate and present evidence critical to accurately deciding whether Mr. Woods has mental retardation. The absence of the critical evidence – which is only now before the Court for the

extraordinary and compelling.

2. Prior decisions of this Court make clear that attorney incompetence, coupled with a presentation of the facts or claims that would have been presented by competent counsel, are grounds for the equitable relief Mr. Woods seeks.

On at least two prior occasions, this Court has addressed requests from death-sentenced applicants for equitable relief from a prior judgment. In *Ex parte Rojas*, 2003 WL 1825617 (Tex. Crim. App. Feb. 12, 2003) (unpublished), after the applicant's initial application for writ of habeas corpus was denied and counsel missed the federal statute of limitations for seeking federal habeas corpus relief, the applicant filed a "Motion to Protect Applicant's Right to Federal Habeas Review." "That motion sought a stay of execution, appointment of new state habeas counsel, and a reopening of state habeas proceedings for the purpose of resetting federal habeas timetables." *Id.* at *5 (Keller, P.J., concurring, joined by Keasler, J.).

Three Judges of this Court dissented from the Court's decision to deny a stay of execution and refusal to file and set the cause for review. *Id.* at 1 (Price, J., filed a dissenting statement, joined by Johnson and Holcomb, JJ.). The dissent first noted the significant evidence that appointed counsel may not have been competent to be appointed in an 11.071 case:

> The facts of which the Court should have been aware when it appointed habeas counsel show that counsel was not competent to represent the

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first time – figured prominently in the prior to decision to deny relief.

> applicant in this case. The attorney we appointed to represent the applicant had received two probated suspensions from the State Bar of Texas. Two weeks after his appointment, he received another probated suspension. He was under treatment for bipolar disorder, which he admits affected his representation of the applicant and was the cause of the omissions that gave rise to his suspensions

Id. at *2. The dissent also explained that habeas counsel failed carry out his statutory duties to investigate Mr. Rojas' case, but instead merely filed record-based, direct appeal-type claims that were all non-cognizable in 11.071 proceedings. *Id.* "The argument section of [Mr. Rojas'] application took up only five pages with no subject headings separating the claims." *Id.* Although the dissenters stopped short of reaching the question of whether Mr. Rojas was entitled to a new round of habeas litigation, they indicated that the equities weighed in favor of further review of the case: "This Court approved habeas counsel's application to be on the list of capital habeas counsel. The Court appointed habeas counsel in the applicant's case. [] In this case, we had no way to be certain that there were no cognizable and meritorious claims." *Id.* at *5 (footnote omitted).

The two concurring judges found Mr. Rojas' motion to be flawed in several key regards. First, they rejected the assertion that Mr. Rojas' appointed lawyer was not competent to be appointed in 11.071 proceedings. *Id.* at *6 (Keller, P.J., concurring). Second, the concurring judges found there was no jurisdiction to enter a stay of execution because the motion to reopen the proceedings was without merit:

> Moreover, this Court's authority to grant a stay of an inferior court's order is derived from Art. V, Sec.5 of the Texas Constitution. If warranted, a stay will be granted to protect this Court's jurisdiction or enforce a judgment of this Court. [] In the instant case, granting applicant a stay of execution would not have protected this Court's jurisdiction or enforced a judgment of the Court. We had no authority to grant a motion for stay of execution that was premised upon a groundless motion to reopen proceedings.

Id. Finally, the concurrence found the equities lacking: "Nor are the equities in applicant's favor. Applicant made no effort to plead a recognized exception or equitable tolling in the federal habeas proceeding. Moreover, there has been no suggestion that viable cognizable grounds existed which counsel failed to raise in this Court." *Id.*[9]

The issue of an equitable remedy for the deprivation of competent counsel came before this Court again in *Ex parte Granados*, No. WR-51,135-01, slip op. (Tex. Crim. App. Jan. 10, 2007) (unpublished). In *Granados*, the Court unanimously denied the applicant's "Motion to Vacate Judgment, For Appointment of Competent State Post-Conviction Counsel and For Time to Prepare and File a Meaningful Application for Post-Conviction Writ of Habeas Corpus[,] Alternatively Suggestion for Rehearing on the Court's Own Motion to Address and Provide Remedy for Deficient Representation." *Id.* at n.1. First, the Court held that Mr. Granados was not entitled to a stay of execution

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[9] The concurrence also rejected any implication by the dissent that the actual performance of Mr. Rojas' counsel was relevant to the question of the lawyer's competence, relying on *Ex Parte Graves*, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002). *Id.* at 6. However, the dissenters' discussion of the lawyers actions – including the failure to investigate extra-record claims or comply with the provision that requires that counsel timely move an applicant's case into federal court – could fairly be read as demonstrating that counsel was ignorant of the mandatory duties of 11.071 counsel and thus not competent when appointed.

because he failed to show he was reasonably likely to prevail on the merits of his motion. *Id.* at 2-3. Second, as in *Rojas*, Mr. Granados failed to raise any challenge to his conviction or sentence. *Id.* The Court noted that Mr. Granados' new counsel had represented him in federal court and had raised one new claim in addition to the two raised by state habeas counsel. Thus, the Court reasoned, had there been other new claims available to Mr. Granados, counsel would have raised them. *Id.* at 3-4.

Judge Johnson, joined by Judges Meyers and Price, issued a concurring statement, the thrust of which was to note that Mr. Granados' new counsel had ample opportunity to investigate the case and come forward with any new claims that should have been raised by the allegedly incompetent attorney, yet he failed to do so. *Ex parte Granados*, No. WR-51,135-01, slip op. (Tex. Crim. App. Jan. 10, 2007) (Johnson, J., concurring statement, joined by Meyers and Price, JJ.). The concurrence concluded by observing:

> Regardless, the justice system must still perform its constitutional and statutory duties to provide a full and fair opportunity to have relevant issues addressed and resolved. While to do less may not result in an injustice to a particular applicant, it has the potential to erode confidence in the justice system itself. Still, the pleadings before us do not provide a basis for granting relief.

Id. at 2.

While this Court's unpublished decisions are not binding precedent, *Rojas* and *Granados* provide persuasive guidance for assessing Mr. Woods' pleading. First, this Court made it clear that, at a minimum, an applicant seeking equitable relief from the

deprivation of competent counsel must show there is some potentially meritorious challenge to his conviction or sentence that was not presented by prior counsel. As recounted, *supra*, Mr. Woods has diligently collected the evidence – including documents, lay witness testimony, and expert testimony – that should have been presented by competent counsel, thus his case for equitable relief does not suffer from the primary deficiency identified in *Rojas* and *Granados*.

Second, as will be discussed below, while there is no reason to believe that Mr. Woods' appointed habeas lawyer was ever qualified to handle capital habeas cases, it is beyond dispute that he was not competent at the time he was appointed to handle Mr. Woods' *Atkins* claim.

Third, because Mr. Woods presents a compelling case that he is ineligible for execution, there is a reasonable chance he will prevail on the merits and a stay of execution is warranted.

Mr. Woods has already addressed the first and third factors, he will now review the evidence that requires a finding that Mr. Alley was not competent to handle Mr. Woods' capital habeas corpus litigation.

3. The appointment of a lawyer that this Court has recognized is not competent to handle capital habeas corpus cases undermined the integrity of the proceeding and, left unremedied, will result in the execution of a mentally retarded person who is innocent of the death penalty.

This Court has already determined that Richard Alley, Mr. Woods' appointed

lawyer, is not qualified to handle 11.071 cases and removed him – against his will – from the Court's list of approved counsel. Chuck Lindell, *Death Row Legal-Help Languishes*, Austin American-Statesman, June 9, 2007, at A01 (Mr. Alley was removed from this Court's list "against his will") (attached as Exhibit 16). By the time *Atkins* was decided in 2002, Mr. Alley had been "banned from practicing before his hometown federal court for one year after a magistrate's reprimand cited repeated unethical behavior and poor work on a death penalty appeal." *Id.* The federal findings, discussed *infra*, reveal a startling pattern of sub-par work immediately preceding Mr. Alley's appointment to represent Mr. Woods for purposes of his *Atkins* claim. Thus, the record in this case demonstrates that both this Court and a federal court have deemed Mr. Alley not qualified to handle capital habeas cases. The evidence of contemporaneous, capital habeas-specific censures alone – in the absence of any illness or other circumstance that impaired his capacity after Mr. Alley was first added to the Court's list – establishes that Mr. Alley was never at any time qualified to handle 11.071 cases. A pattern of conduct, before, during, and after Mr. Alley's representation in Mr. Woods' case, confirms this conclusion.

According to the State Bar of Texas, Mr. Alley was disciplined once in 1985 and again in 1992. *See* J. of Reprimand, Nos. 7A-103-8, 7A-188-84 (Grievance Committee for State Bar Dist. No. 7A, Mar. 6, 1985); J. of Reprimand, No. F0089200355 (Grievance Committee for State Bar Dist. No. 7A, Oct. 27, 1992) (attached as Exhibit 17). Mr. Alley was reprimanded for, among other things, knowingly using false evidence, knowingly

making false statements of fact, and counseling a client in conduct that the attorney knew to be illegal. Exhibit 17.

At the time that the U.S. District Court for the Northern District of Texas appointed Alley to represent Mr. Woods, that court was simultaneously investigating Mr. Alley's actions in another capital habeas case. *See* Findings, Conclusions, & Recommendations of the U.S. Magistrate Judge and Order of Discipline of Attorney Travis Richard Alley, *Lagrone v. Johnson*, No. 4:99-CV-521-X (N.D. Tex. Nov. 2, 2000) (attached as Exhibit 18). United States Magistrate Judge Bleil presided over the investigation into Mr. Alley's conduct in the *Lagrone* case.

Judge Bleil found that Mr. Alley knowingly made false and misleading statements, but for which he would not have been appointed as an attorney in the [*Lagrone*] case. Order of Discipline at 15 (Nov. 2, 2000). Mr. Alley also exhibited a pattern of inability to conduct litigation properly by failing to make timely and proper objections. *Id.* Furthermore, Mr. Alley made false statements to various courts and repeatedly engaged in a practice of unprofessional and unethical behavior. *Id.*

Judge Bleil noted that Mr. Alley seemed unable to litigate, specifically focusing on his inability to make proper objections. *See, e.g., Stephen Bruce Roberts v. Johnson*, No. 4:00CV-006-Y (N.D. Tex. May 17, 2000). For example that in *Roberts,* despite a direct recommendation from the Magistrate Judge to file objections or risk waiver due to time-bar, Mr. Alley filed no objections at that time. *Id.* The petition was ultimately dismissed

despite Mr. Alley's later objections, as the court could discern no reasonable strategy or advantage for failing to file an objection at the time recommended by the court. *Id.*

Judge Bleil also commented that the Northern District Court had previously "censured [Alley] for deficient objections." *See, e.g., Jeannie Gholson v. Johnson*, 4:99-CV-183-Y (N.D. Tex. June 29, 2000); *Bobby Joe Haney v. Johnson*, 4: 99-CV-450-E (N.D. Tex. July 14, 2000). In *Gholson*, Mr. Alley filed timely objections. Those objections were overruled, however, as the Judge observed that the text of the objections "was virtually identical to the supplemental memorandum that had been reviewed and considered in the magistrate judge's report." Likewise, in *Haney*, Mr. Alley's "objections" appeared to be simply a reiteration of his arguments previously presented in his legal briefs to the Magistrate Judge and to the state courts." *Bobby Joe Haney v. Johnson*, 4: 99-CV-450-E (N.D. Tex. July 14, 2000).

Judge Bleil also commented on the scope of Mr. Alley's lack of professionalism and unethical behavior. Order of Discipline at 11 (Nov. 2, 2000). He remarked that "Alley's reputation for sloppiness is not confined to the federal court system and has even achieved a level of abusiveness directed towards the courts and opposing counsel." *Id.* Judge Bleil then went on to comment that, "compounding doubts about Alley's professionalism is his intentional deception or lack of regard for the accuracy of the information he furnishes to the courts." *Id.*

"The (Lagrone) petition overall is poorly done," concluded Judge Bleil.

"Approximately half of it appears to have been pulled nearly verbatim and indiscriminately from the state court papers and other briefs and documents Alley has prepared or collected in the course of his legal practice." Order of Discipline at 12 (Nov. 2, 2000).

Though the district court rejected some of Judge Bleil's findings, it upheld the majority of them and imposed a one-year suspension against Mr. Alley.

Mr. Alley's pattern of simply recycling direct appeal claims in his state capital habeas cases earned him notoriety in the Texas media:

> Despite the stinging rebuke [in *Lagrone*], Alley remained available to handle similar death penalty appeals in state courts, submitting writs of habeas corpus that, like Lagrone's, contained large portions that were copied from other sources.
>
> Alley's 2005 writ for Cary Kerr, for example, was larded with 29 pages copied straight from Kerr's direct appeal, even though the Texas Court of Criminal Appeals cannot consider such claims on a writ.
>
> * * *
>
> Another 64 pages of Kerr's writ were taken from writs Alley had filed for other death row inmates, making almost no reference to Kerr or his trial.
>
> In total, the copied issues accounted for 75 percent of the writ's arguments.

Chuck Lindell, *New appeals, Old Arguments*, Austin American-Statesman, October 30, 2006, at A11. The Statesman article profiled other writs filed by Mr. Alley in 1999 (on behalf of Mr. Woods) and 2003 (on behalf of Dale Scheanette) in which Mr. Alley similarly recycled direct appeal claims and, in the Scheanette case, raised no issues

outside of the record.

And, as described *supra*, Mr. Alley's pattern of questionable conduct continued through the course of Mr. Woods' case, including is assertion in a court of law that Hurricane Katrina prevented him from complying with deadline that pre-dated the storm. Ultimately, the reasons for Mr. Alley's long-standing lack of diligence are irrelevant. What is clear is that Mr. Alley regularly failed to function as habeas counsel but instead filed large piles of recycled direct appeal claims. Presumably, this Court's conclusion that Mr. Alley is not qualified to handle 11.071 cases was driven by such behavior, and the record is clear that his lack of competency was well-established prior to his appointment to litigate Mr. Woods' *Atkins* claim.

The extraordinary circumstances in this case distinguish it from prior cases like *Rojas* and *Granados* in which prisoners simply alleged that their lawyer was incompetent – based on the length of the writ or the number of claims – but failed to come forward with facts or claims that should have been presented. Nor is it merely Mr. Woods' (or his current counsels') opinion that Mr. Alley is not qualified to handle cases of this nature. This Court has already found that to be true and removed Mr. Alley from the list. However, mere removal of an incompetent attorney from the list is not a sufficient to remedy when the attorney has left a prisoner in danger of being executed despite being

ineligible for the death penalty.[10] Mr. Woods has located numerous witnesses who have attested to Mr. Woods' deficits in adaptive functioning as well as a record showing that Mr. Woods' I.Q. was measured at 60 when he was fifteen years old. Mr. Alley failed to seek any of this vital information. Mr. Woods respectfully asks this Court to reconsider, on its own motion and after hearing all of the relevant evidence, the prior ruling on Mr. Woods' *Atkins* claim.

B. Alternatively, this Court should reopen the prior proceedings because the Sixth and Fourteenth Amendments compel the states to afford prisoners one constitutionally adequate opportunity to vindicate their Eighth Amendment rights pursuant to *Atkins*.

In *Atkins*, the Supreme Court left to the "[s]tate[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences. [*Ford v. Wainwright*, 477 U.S. 399], at 405, 416–417, 106 S.Ct. 2595." The *Atkins* prohibition applies with equal force to defendants charged with capital crimes and those prisoners already sentenced to death. It is therefore incumbent upon the states to develop both trial level and post-conviction procedures adequate to ensure that no prisoner with mental retardation is executed. Neither the Texas courts nor the legislature have developed procedures separate from Article 11.071 for protecting from execution

[10] To be clear, Mr. Woods is not asserting that ***every time*** a litigant is deprived of competent habeas counsel this Court must provide some form of relief. Here, Mr. Woods has come forward with incontrovertible evidence that his lawyer was incompetent, a demonstration that the lawyer's incompetence led to the omission of critical evidence, and that, in light of the

those mentally retarded prisoners who, like Mr. Woods, completed their initial state habeas proceedings prior to the Supreme Court's decision in *Atkins*. Article 11.071 is the only state court procedure available to such death row prisoners for enforcing *Atkins*. Accordingly, it must be applied in a way that ensures full due process protections to all death row prisoners who may be mentally retarded. Here it was not.

Due process requires more than merely providing a prisoner the right to file a successive petition that asserts the prisoner's ineligibility to be executed under *Atkins*. Due process demands that the state provide putatively mentally retarded prisoners a meaningful opportunity to challenge the constitutionality of their execution under *Atkins*. That requires the tools necessary to establish mental retardation, including the effective assistance of counsel.

Without effective counsel it will be virtually impossible for a mentally retarded prisoners to prepare and file the necessary pleadings and litigate a claim of mental retardation. Putting aside the obvious problem that mentally retarded prisoners will likely be incapable of litigating the merits of a mental retardation claim and the procedural issues inherent in successive post-conviction litigation, prisoners in Texas are all but precluded from obtaining the basic materials needed to raise an *Atkins* claim. Should counsel fail in the their basic duties to investigate the claim, prisoners cannot do the work

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evidence, Mr. Woods is ineligible for the death penalty. Few, if any, other prisoners will find themselves in facing such extraordinary circumstances.

themselves because they are routinely denied access to their own school, prison and other materials records that might prove their claim. *See* TEX. GOV'T CODE ANN. § 552.028(a)(1) (Vernon 2003).

The interest protected by *Atkins* is literally the right to life. It is the right to be free from exposure to a death sentence if one is mentally retarded. Under *Atkins*, a person who is mentally retarded is constitutionally ineligible to be sentenced to death, and those mentally retarded prisoners who were sentenced before *Atkins* may not be executed – ever. In the abstract, and for defendants whose trials antedate *Atkins*, this life interest arises before trial and it warrants the full panoply of due process protections required by the Eighth and Fourteenth Amendments, as well as the Sixth Amendment right to effective counsel.

Mr. Woods is in a position shared, if at all, only by a finite and very small number of capital defendants: those mentally retarded death row inmates whose trial, conviction, sentencing, and appeal all preceded the Supreme Court's recognition of their Eighth Amendment right to freedom from execution, and whose only avenue for vindicating their rights in post-conviction proceedings was thwarted by the appointment of counsel deemed not qualified to handle capital cases by the state and federal courts. As to such inmates, the protected life interest arose from the Supreme Court's pronouncement subsequent to trial. Thus, that life interest was not afforded any due process protection at trial. However, the process necessary to protect that right is not any less now than the process

required to protect a defendant's right to life and liberty at trial. That process has yet to be provided.

The Supreme Court's rationale for not extending the right to counsel to prisoners in post-conviction proceedings does not apply in the context of Mr. Woods' *Atkins* claim. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987). Mr. Woods' right to counsel in these proceedings is derived not from the nature of the post-conviction proceedings but from the nature of the life interest he seeks to assert which, in his case, was not terminated by virtue of the close of his trial. Unlike the petitioner in *Ford*, if Mr. Woods is mentally retarded, he is constitutionally ineligible not only for execution, but also for a death *sentence*. The substantive right at stake is thus a pre-sentencing right made retroactive to those persons who already sentenced to death. The State should not, based on nothing but the post-conviction posture of this case, have presumed that Mr. Woods is not mentally retarded, because the State had yet to establish its right to sentence Mr. Woods to death under the retroactive *Atkins* ruling. The State thus did not have the same interest in upholding Mr. Woods' death sentence as it would in a *Ford* situation, and fundamental fairness requires that the same procedural protections that would attach at pre-sentencing proceedings should be made available to Mr. Woods with respect to his *Atkins* challenge in these post-conviction proceedings. Particularly, Mr. Woods is entitled to the effective assistance of counsel. *Gideon v. Wainwright*, 371 U.S. 355 (1963).

Mr. Woods was denied counsel who would adequately investigate and present his

Atkins claim therefore he remains constitutionally entitled to one full and fair hearing of his claim and respectfully asks this Court to reconsider, on its own motion, its prior determination of his eligibility for the death penalty.

II. Pursuant to *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007), Mr. Woods has made a threshold showing of clear and convincing evidence that he is a person with mental retardation.

In the alternative, even if this Court declines to reopen the prior proceedings, Mr. Woods is entitled to proceed under *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007).

Following *Atkins*, numerous prisoners on Texas' death row who had previously filed at least one habeas application raised *Atkins* claims in successive applications. These successive applications were procedurally viable because they satisfied the Article 11.071 § 5(a)(1) gateway permitting consideration of claims predicated on a previously unavailable legal basis.

In *Blue*, the Court confronted a situation in which the applicant's first 11.071 application was filed well after *Atkins* but the claim was not alleged. When Mr. Blue sought to raise the issue in a successive application, the Court held that – having by-passed his first opportunity to litigate the issue – the Court would only remand the case to the trial court for further consideration if Mr. Blue could satisfy the 11.071 § 5(a)(3) innocence-of-the-death-penalty gateway. *Ex parte Blue*, 230 S.W.3d at 162. The Court held that Mr. Blue would be entitled to review his claims "at least so long as he alleges and presents, as

a part of his subsequent pleading, evidence of a sufficiently clear and convincing character that we could ultimately conclude, to that level of confidence, that no rational factfinder would fail to find he is in fact mentally retarded."[11] *Id.*

The Court explained that it did "not construe Section 5(a)(3), however, to require that the subsequent applicant must necessarily convince this Court by clear and convincing evidence, *at the threshold,* that no rational factfinder would fail to find he is mentally retarded." *Id.* (emphasis in the original). "[T]he applicant who can make a threshold presentation of evidence that, if true, would be *sufficient* to show by clear and convincing evidence that no rational factfinder would fail to find him mentally retarded will be allowed to proceed to the merits of his claim in a subsequent writ application." *Id.* at 163 (emphasis in the original) (footnote omitted).

Because Mr. Blue presented only tentative evidence demonstrating that he might have mental retardation, he did not satisfy his burden of pleading and the Court held that Mr. Blue could not make the requisite showing.

Mr. Woods has clearly satisfied the *Blue* threshold showing. Unlike Mr. Blue, Mr. Woods has presented evidence which, if true, establishes that he undoubtedly satisfies each of the diagnostic criteria for mental retardation. The expert testimony definitively

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[11] The fact that Mr. Woods has previously raised his *Atkins* claim is of no moment for purposes of § 5(a)(3). The abuse of the writ rule only bars consideration of same-claim successive applications pled under § 5(a)(1), *i.e.* claims predicated on previously unavailable factual or legal bases. The legislature omitted any such restriction from §§ (5)(a)(2-3).

concluding that Mr. Woods has mental retardation – supported by copious documentary and testimonial evidence – is a sufficient *threshold* showing that satisfies the *Blue* burden of pleading. Moreover, though the *Blue* Court noted that the State need not even respond because, at this stage of the review, the Court is concerned only with "the adequacy of the [applicant's] pleading," *id.*, Mr. Woods has exceeded his burden of pleading by presenting evidence and testimony that discredits the State's evidence.

Pursuant to *Blue*, this Court should stay Mr. Woods' scheduled execution and remand the cause for consideration of his *Atkins* claim.

III. Alternatively, this Court may and should set aside the 11.071 procedural requirements and allow Mr. Woods to litigate the merits of *Atkins* claim to avoid an unconstitutional outcome, *i.e.* the execution of a person with mental retardation.

This Court has expressly held that the procedural strictures of Article 11.071 are not jurisdictional and may be set aside in unique circumstances where the "statute cannot be constitutionally applied to require the dismissal of the application." *Ex Parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998). In other words, even if the statute requires the application of Section 5 to an application for habeas relief, this Court can set aside the procedural rule and address the merits of the claim if failing to do so would lead to an unconstitutional result.

Setting aside the rule of *Blue* is particularly appropriate here given the vastly different equities in Mr. Woods' case. The *Blue* Court held that a litigant who deliberately

by-passes the opportunity to raise his *Atkins* claim in his first habeas application will pay a price for his lack of diligence:

> But for an applicant such as Blue, who filed his initial writ application *after Atkins* and nevertheless failed to invoke the absolute constitutional prohibition against executing the mentally retarded in that initial writ, the decision whether to permit him to proceed will be purely a function of whether he can meet one of the other criteria of Article 11.071, Section 5 [].

Blue, 230 S.W.3d at 156 (footnote omitted). Similarly, the Court held that proceeding without state-funded counsel or resources "is the hurdle the Legislature has deemed appropriate for the subsequent applicant who has, for whatever reason, ***bypassed*** his opportunity to avail himself of the resources to which he would have been entitled had he raised the issue in an initial writ application, when it was factually and legally available to him." *Id.* at 167 (emphasis added).

In *Blue*, there was no allegation that Mr. Blue was deprived of competent habeas counsel or that any other state-imposed impediment thwarted his ability raise his *Atkins* claim. Mr. Blue simply failed to plead it in his initial application, a failure which – especially because he was represented by experienced counsel – raised the specter that Mr. Blue's lawyer did not believe the claim was valid or he was deliberately gaming the system.

In contrast, Mr. Woods did not bypass any of the resources and opportunities available to him. However, his one opportunity to litigate his ineligibility for the death penalty was essentially nullified because the lawyer approved by this Court for such

proceedings lacked the capacity to handle the litigation, and Mr. Woods' disability clearly prevented him from conducting his own investigation and litigation.

This Court has recognized that Mr. Woods' lawyer should not be handling capital habeas corpus cases and has removed him from the list of lawyers approved for such purposes. While the Court's corrective action will ensure that the appointment of Mr. Woods' former counsel will not deprive future death-sentenced prisoners of competent representation, failure to take further action will mean that the State of Texas will execute a man who is ineligible for the death penalty only because a lawyer who was unquestionably not competent to handle the matter was tasked with representing him. The infliction of death based on such a fundamentally unfair basis jeopardizes the integrity of Texas' capital punishment system and violates the Sixth, Eighth, and Fourteenth Amendments. If Article 11.071 is deemed to require this outcome, then it must yield to the constitution. *Ex parte Ramos*, 977 S.W.2d at 617.

CONCLUSION

Mr. Woods is mentally retarded and, therefore, ineligible for the death penalty under the Eighth Amendment. Following a stay of execution and an evidentiary hearing on this application, the Court should vacate Mr. Woods' death sentence and impose a life sentence.

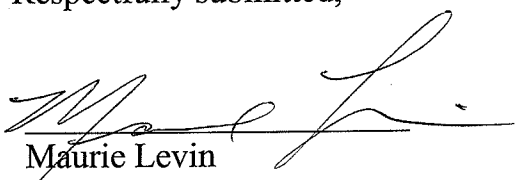
ACCORDINGLY, this Court should:

1. Stay Mr. Woods' execution scheduled for October 23, 2008;

2. Remand the claims to the trial court with instructions to conduct an evidentiary hearing; and

3. Grant such other relief as law and justice require.

Respectfully submitted,



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Counsel for Bobby Wayne Woods

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Maurie Levin, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.

2. I am the duly authorized attorney for Bobby Wayne Woods, having the authority to prepare and to verify Mr. Woods' Application for Post-Conviction Writ of Habeas Corpus.

3. I have prepared and have read the foregoing Application and Motion for Stay, and I believe all the allegations therein to be true and correct.

Maurie Levin

SUBSCRIBED AND SWORN TO BEFORE ME on October 21, 2008.

ANNA BORNE NOTARY PUBLIC STATE OF TEXAS EXPIRES 12-12-2009

Notary Public, State of Texas

My commission expires:

12-12-09

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2008, I served via email transmission and Federal Express priority overnight delivery a true and correct copy of the foregoing pleading, with attached exhibits, upon opposing counsel:

District Attorney Robert Christian
Hood County District Attorney's Office
1200 West Pearl Street
Granbury, TX 76048
rchristian@co.hood.tx.us

Maurie Levin