

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE
DIVISION V

BYRON BLACK,)
Petitioner,)
)
vs.) No. 88-S-1479
) Death Penalty Case
STATE OF TENNESSEE,)
Respondent.)



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**MOTION TO DECLARE PETITIONER INTELLECTUALLY DISABLED
PURSUANT TO TENN. CODE ANN. § 39-13-203**

Comes now, Byron Lewis Black, by and through counsel, and moves this Court, pursuant to Tenn. Code Ann. § 39-13-203, to declare that Mr. Black is intellectually disabled and ineligible for execution. This is Mr. Black's first motion brought pursuant to Tenn. Code Ann. § 39-13-203(g)(1).

I. Facts

A jury convicted Mr. Black of the 1988 killings of Angela Clay, Latoya Clay, and Lakeisha Clay. *State v. Black*, 815 S.W.2d 166, 170 (Tenn. 1991). Mr. Black received consecutive life sentences for the murders of Angela and Latoya Clay. *Id.* He received a sentence of death for the murder of Lakeisha Clay. *Id.* On automatic appeal to the Tennessee Supreme Court, his convictions and sentences were affirmed. *Id.* Collateral appeals were unsuccessful. *See Black v. Carpenter*, 866 F.3d 734, 736 (6th Cir. 2017); *Black v. Bell*, 664 F.3d 81, 84 (6th Cir. 2011); *Black v. State*, No. 01C01-

9709-CR-00422, 1999 WL 195299, at *1 (Tenn. Crim. App. Apr. 8, 1999), *perm. app denied*, Sept. 13, 1999.

Dr. Daniel Martell, an expert psychologist,¹ administered the Wechsler Adult Intelligence Scale-IV, the current “gold standard” for IQ testing in 2019. Ex. 1, Martell Report, at 7. This test revealed a full-scale score of 67, which is categorized as “extremely low” and “places Mr. Black squarely in the range of Intellectual Disability.” *Id.* Mr. Black’s results on his recent testing with Dr. Martell are consistent with prior individualized IQ testing, which resulted in properly adjusted scores of between 53 and 71. *Id.* at 13.² Mr. Black’s scores on the Wide Range Achievement Test show “academic difficulties that he had during his school years have endured into adulthood.” *Id.* at 8. Mr. Black’s achievement in the subjects of reading and math place him at the grade school level. *Id.* Mr. Black also exhibits deficits in memory and language functioning consistent with intellectual disability. *Id.* at 8–9.

Dr. Martell defines confabulation as “a pathological process of repeatedly inserting words that were not on the list into his memory, resulting in contaminated recall.” Ex. 1, at 9. Mr. Black’s “confabulation score placed him at the bottom 0.7

¹ Dr. Martell served as the state’s expert in *Atkins v. Virginia* and has testified as an expert in dozens of intellectual disability cases as an expert for the prosecution and the defense. Ex 1, at 2. Dr. Martell was the Davidson County District Attorney General’s expert in the Paul Reid case. *State v. Reid*, 213 S.W.3d 792, 809 (Tenn. 2006).

² Two administrations of the WAIS-R resulted in adjusted FSIQ scores of 69 and then 71, while the WAIS-III resulted in a 67, and the Stanford-Binet-5th Ed resulted in a 53. Ex. 1, Martell Report, at 13, n. 3.

percentile for people of his age and education. In other words, he confabulated more than 99.3% of others of his background.” *Id.* Similarly, Mr. Black’s “word-finding ability is more impaired than over 99.9% of others of his age or education.” *Id.* These results are consistent with the findings of numerous other experts. *See id.* at 12–14.

Mr. Black also suffers from deficits in adaptive function. Experts divide an individual’s adaptive function into the three broad domains of conceptual, social, and practical adaptation. *Id.* at 15–23. Although a diagnosis of intellectual disability only requires a finding of deficits in one domain, Dr. Martell concluded that Mr. Black suffers from deficits in all three domains. *Id.*

The conceptual domain involves skills in language, reading, writing, math, reasoning, knowledge, memory, and self-direction. *Id.* at 15. Dr. Martell concluded that Mr. Black has significant impairments in this domain. *Id.* He reached this conclusion based on his own assessment, testing performed by multiple experts over the past decades, Mr. Black’s significant struggles in school, and the real world observations of family, teachers and friends. *Id.* at 16–18. His childhood friend, Rossi Turner, described Mr. Black’s inability to learn childhood games: he never “seemed to catch on” in Tisket-a-Tasket, and he was usually the first one eliminated in “Red Light, Green Light.” “Things that others could do so easily were difficult for him.” *Id.* at 18. Years later, after his two-week capital trial concluded and while the jury was deliberating his sentence, he asked his attorney, “Do I get to testify now?” Experiences like this led his attorney to conclude: “It was clear to me that Byron had not understood what had occurred in the proceedings” and “he had no clue about what

had been going on.” *Id.* at 17. Mr. Black’s high school football coach for three seasons, Al Dennis, has previously discussed Mr. Black’s deficits and impaired memory, which significantly limited his ability to play football. Coach Dennis stated that Mr. Black was unable to learn and remember plays. *Id.* at 19.

The social domain refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, gullibility and vulnerability to manipulation, and similar capacities. *Id.* at 18. Dr. Martell found deficits in this domain based on Mr. Black’s overfamiliarity with strangers, lack of boundaries, and inability to abide by social cues regarding personal space. *Id.* at 18–19. Mr. Black’s trial attorney said he “almost constantly wore a big childlike smile on his face, a smile which was often out of place, given the circumstances [of a death penalty trial] . . . Also, when talking, he would get close-in to my face, not in a threatening way, but in a socially inappropriate way.” *Id.* at 19. *Id.* Numerous individuals have characterized Mr. Black’s demeanor as childlike or acting in a manner inconsistent with his age. *See, e.g., id.* at 18–19.

The practical domain centers on self-management in areas such as personal care, job responsibilities, money management, recreation, and organizing school and work tasks. *Id.* at 20. Dr. Martell concluded that Mr. Black had deficits in this domain as established by objective testing of functioning, and based on reports from family members and friends about his limitations. *Id.* at 20–23. Dr. Daniel Grant administered the Independent Living Scales (ILS) to Mr. Black, which revealed deficits in money management, managing home and transportation, health and

safety. *Id.* at 20–21. Dr. Stephen Greenspan conducted testing on Mr. Black directly, and, using multiple reporters, concluded Mr. Black exhibited impairments in all three adaptive domains. *Id.* at 21.

Mr. Black’s family members noted that he was never able to live independently. *Id.* at 21. He never did laundry, cooked, or cleaned. *Id.* at 20–21. His former wife noted that the couple lived with Mr. Black’s mother for the duration of the marriage. *Id.* at 20. Neighbors that lived next to Mr. Black in childhood noted that he struggled to remember and complete his chores. *Id.* at 21–22. His siblings noted he did not read, did not have a checking account, and was incapable of basic monetary calculations. *Id.* at 20–23.

Based upon clinical examination, historical records, and lay informants Dr. Martell concluded that “Mr. Black exhibits significant deficits or impairments in all three domains of adaptive functioning (Conceptual, Social and Practical).” *Id.* at 24. These conclusions are consistent with prior experts that evaluated Mr. Black. *Id.* at 21.

Dr. Martell concluded that Mr. Black’s condition manifested prior to the age of 18. *Id.* at 24. Dr. Martell noted that that this conclusion was supported by observations of numerous lay informants from Mr. Black’s childhood as well as his clinical assessments. *Id.* That is, Mr. Black’s impairments and adaptive deficits were clearly obvious by the time he was held back in the second grade. His friend, Rossi Turner, described Mr. Black’s inability to play basic childhood games in his younger years, while his football coach, Al Dennis, described an inability to learn football plays

over three years of high school. Family, friends, educators, and his football coach all describe socially inappropriate behavior throughout Mr. Black's youth.

Based upon his evaluation of each of the criteria, Dr. Martell concluded that Mr. Black is intellectually disabled and thus ineligible to be executed. *Id.*

II. Legal Standard

a. Standard for intellectual disability

Under the governing law, Mr. Black must demonstrate by a preponderance of the evidence that he suffers from 1) significantly subaverage intellectual functioning; 2) deficits in adaptive behavior; and 3) that this condition manifested during the developmental period. Tenn. Code Ann. § 39-13-203(a) (2021); *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002).

“The essential feature” of intellectual disability “is significantly subaverage general intellectual functioning.” *Atkins*, 536 U.S. 309 n.3. Generally, an individual with an IQ test score that is approximately two standard deviations below the mean is considered intellectually disabled. *Hall v. Florida*, 572 U.S. 701, 711 (2014). As a result, a score of approximately 70 or below constitutes intellectual disability. *Id.* But “[t]he professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range.” *Id.* at 712. Every IQ test has a standard error of measurement (SEM). *Id.* at 713. “A test’s SEM is a statistical fact, a reflection of the inherent imprecision of the test itself.” *Id.* This statistical fact led the Supreme Court to conclude unequivocally that “[i]ntellectual disability is a condition, not a number.” *Id.* at 723. Caselaw also

recognizes the “Flynn Effect” that “refers to the observed phenomenon that I.Q. test scores tend to increase over time. Thus, the most current versions of a test should be used at all times and, when older versions of the test are used, the scores must be correspondingly adjusted downward.” *Coleman v. State*, 341 S.W.3d 221, 242 n.55 (Tenn. 2011). The failure of courts to account for the SEM in evaluating intellectual disability is constitutional error. *Brumfield v. Cain*, 576 U.S. 305, 316 (2015).

The legislature recently amended this prong of the intellectual disability statute to bring it into compliance with constitutional mandates. Previously, the statute stipulated that significantly subaverage general intellectual function must be “evidenced by a functional intelligence quotient (IQ) of seventy (70) or below.” Tenn. Code Ann. § 39-13-203(a)(1) (2020). The legislature expressly amended this statute to permit courts to apply the SEM, the Flynn effect, the use of clinical judgment, and to directly reject “bright-line” cutoffs previously applied by Tennessee courts. Tenn. Code Ann. § 39-13-203(a)(1) (2021). The legislature replaced the old unconstitutional language with language that comports with constitutional standards, using “significantly subaverage general intellectual functioning” and eliminating any reference to test scores. *Id.*

“Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and performed by people in their everyday lives.” American Association of Intellectual and Developmental Disabilities (AAIDD), *Intellectual Disability* 29 (12th ed. 2021). “[T]he medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.” *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017)

(*Moore I*) (emphasis original). As such, courts must not rely on an individual’s relative adaptive strengths as such an approach has “no grounding in prevailing medical practice, and because they invite[] ‘lay perceptions of intellectual disability’ and ‘lay stereotypes’ to guide assessment of intellectual disability.” *Moore v. Texas*, 139 S. Ct. 666, 669 (2019) (*Moore II*) (quoting *Moore I*, 137 S. Ct. at 1051).³

Finally, an individual must demonstrate that the intellectual disability manifested in the developmental period.⁴ “[T]he age of onset element of *Atkins* claims requires a retrospective analysis of the individual’s childhood capacity that may be years or . . . even decades removed from the time of trial.” *Smith v. Ryan*, 813 F.3d 1175, 1200 (9th Cir. 2016). Accordingly, the presence of an IQ score from the developmental period is not required and courts and experts may utilize retrospective analysis of the individual’s capacity during the developmental period. *See, e.g., Brumfield*, 576 U.S. at 323 (inferring manifestation in the developmental period due to the petitioner’s low birth weight).

III. Application of the law to the facts

“To recite the facts in this case is essentially to decide it.” *Ackerman v. United States Dep’t of Agric.*, 995 F.3d 528, 529 (6th Cir. 2021). The facts recited above

³ The new statute has left this criteria unchanged. *Compare* Tenn. Code Ann. § 39-13-203(a)(2) (2021) with Tenn. Code Ann. § 39-13-203(a)(2) (2020).

⁴ Tenn. Code Ann. § 39-13-203(a)(3) specifies the condition must manifest “during the developmental period, or by eighteen (18) years of age.” Although the developmental period may in fact extend beyond age 18, this distinction is not relevant in this case as Mr. Black’s condition manifested well prior to the age of 18.

demonstrate that Mr. Black is intellectually disabled and categorically ineligible for the death penalty.

Dr. Martell's conclusion that Mr. Black's IQ is 67 places him solidly in the intellectually disabled range. Ex. 1, at 7. Dr. Martell also noted additional evidence of Mr. Black's significantly subaverage intellectual functioning. For example, Mr. Black's academic achievement tests indicate a significant disability, with his performance in all subjects being significantly subaverage. *Id.* at 8. He also suffers from significant deficits in his memory and processing time, both indicative of intellectual disability. *Id.* Prior intelligence testing has produced Full-Scale IQ scores falling between 53 and 71, which provides further compelling evidence that Mr. Black has significantly subaverage intellectual functioning. *Id.* at 12–14.

Dr. Martell concluded that based upon his clinical assessment and information gathered from lay informants and records that Mr. Black suffers from deficits in adaptive functioning across the conceptual, social, and practical domains. *Id.* at 15–23. As Dr. Martell summarized:

Mr. Black exhibits significant deficits or impairments in all three domains of adaptive functioning (Conceptual, Social and Practical), at the level of "Mild" to "Moderate" severity. His adaptive impairments are clearly related to his underlying cognitive limitations. There is substantial "convergent validity" from anecdotal, contemporaneous, and empirical data sources supporting the conclusion that Mr. Black functions adaptively in the range of Intellectual Disability, which meets the second diagnostic prong.

Id. at 24.

Finally, Dr. Martell's expert opinion is that Mr. Black's condition manifested prior to the age of 18. *Id.* at 24. This opinion is confirmed by reports from Mr. Black's family, teachers, and friends who reported numerous examples of deficits that Mr. Black exhibited from a young age. *Id.*

Collectively these conclusions led Dr. Martell to conclude that "it is my opinion that Byron Black meets all of the criteria for a diagnosis of Intellectual Disability pursuant to *Atkins v. Virginia*." *Id.* at 25. As such, Mr. Black has made a "colorable claim" that he is intellectually disabled and his death sentence must be set aside and be resentenced pursuant to the applicable law. Tenn. Code Ann. § 39-13-203(g)(1).

IV. Prayer for Relief

For the foregoing reasons, Mr. Black requests that the Court:

1. Order a hearing to determine whether Mr. Black is intellectually disabled and ineligible for execution.
2. Declare Mr. Black intellectually disabled and set aside his death sentence.
3. Order a new sentencing hearing.
4. Enter any and all other orders that justice requires.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF TENNESSEE

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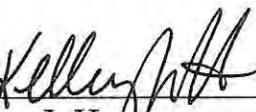
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BY: 
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition was sent to the Office of the District Attorney General, 226 2nd Avenue North, Suite 500, Washington Square, Nashville, Tennessee 37201-1649, this the 4th day of June, 2021.

BY: 
Kelley J. Henry

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BY ELECTRONIC MAIL

August 25, 2020

Kelley J. Henry
Supervisory Asst. Federal Public Defender
810 Broadway, Suite 200
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RE: Byron Black Examination

Dear Ms. Henry,

I am writing to share the findings and opinions from my examination and testing of Mr. Black, and review of the case materials you have provided pursuant to the above captioned matter.

Referral Question

You have asked that I examine and test Mr. Black in order to provide the Court with opinions regarding whether he meets the diagnostic criteria for Intellectual Disability pursuant to *Atkins v. Virginia*.

Summary of Opinions

Based on my examination, interviews, and review of the materials that I have been provided, I have reached the following opinions to a reasonable degree of psychological certainty:

(1) Mr. Black has significantly subaverage intellectual functioning based on valid, objective test scores that fall within the range of Intellectual Disability.

(2) Mr. Black exhibits significant deficits or impairments in all three domains of adaptive functioning (Conceptual, Social and Practical) at the level of "Mild" to "Moderate" severity.

(3) Mr. Black's intellectual and adaptive deficits originated in the developmental period.

(4) Mr. Black meets all of the criteria for Intellectual Disability pursuant to *Atkins v. Virginia*.

Qualifications of Examiner

I was an expert witness for the Government in *Atkins v. Virginia*, and I have since consulted on dozens of *Atkins*-related cases for both prosecutors and defense attorneys throughout the country.

I received a Bachelor's Degree in psychology with honors from Washington and Jefferson College (1980), a Master's Degree in psychology from the University of Virginia (1985), and a Ph.D. in clinical psychology from the University of Virginia (1989). I completed my clinical psychology internship specializing in forensic psychology at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center in New York City (1986-1987), and was awarded a Post-Doctoral Fellowship in Forensic Psychology, also at New York University Medical Center, Bellevue Hospital, and Kirby Forensic Psychiatric Center during which I specialized in forensic neuropsychology (1987-1988).

I am Board Certified in Forensic Psychology by the American Board of Forensic Psychology of the American Board of Professional Psychology, Diplomate Number 5620. I am a Fellow of the American Academy of Forensic Psychology; a Fellow and Past-President of the American Academy of Forensic Sciences; and a Fellow of the National Academy of Neuropsychology. I am licensed as a clinical psychologist by the State of California, License Number PSY15694.

I am also licensed as a clinical psychologist by the State of New York, License Number 011106.

I am currently an Assistant Clinical Professor of Psychiatry and Biobehavioral Sciences at the Semel Institute for Neuroscience and Human Behavior and the Resnick Neuropsychiatric Hospital of the David Geffen School of Medicine at UCLA. From 1992 to 1996 I was a Clinical Assistant Professor in the Department of Psychiatry at New York University School of Medicine.

I have authored over 100 publications and presentations at professional meetings, with a research emphasis on forensic issues involving forensic neuropsychological assessment, mental disorders, brain damage, intellectual disability, elder capacities, and violent criminal behavior.

I have been admitted to testify as an expert witness in more than two hundred cases, including testimony in both criminal and civil matters in federal and state courts throughout the United States. I have consulted and testified for both prosecutors and defense attorneys in criminal cases, as well as plaintiffs and defense attorneys in civil matters.

Basis for Opinions

Scope of Examination and Informed Consent

I personally examined Mr. Black December 10 and 11, 2019 in a quiet, private room at the Riverbend Correctional Institution for a total of approximately seven (7) hours. Comfort breaks were taken as needed.

He was advised that I had been retained by your office, of the limits on confidentiality in this forensic context, and of the lack of any treating relationship between us. Mr. Black was able to provide his informed consent to participate with this understanding.

Materials Reviewed

I have reviewed the following background materials provided by your office:

- Deposition of Dr. Gur 03/19/2004
- Quantitative Structural Brain Imaging Consultation Draft 03/17/2004
- Declaration of Dr. Gur 11/15/2001
- Quantitative Functional Brain Imaging Consultation Draft 02/29/2004
- Report of Dr. Pamela Auble
- Report of Dr. Patti VanEys
- Report of Dr. Gillian Blair
- Report of Dr. Kenneth Anchor

- Declaration Of Marc Tasse
- Declaration of Stephen Greenspan
- Declaration of Daniel Grant, 11/16/2001
- Affidavit of Dr. Dan Grant
- Dr. Albert Globus 11/14/2001
- Declaration of Ross Alderman
- Declaration of Connie Westfall
- Declaration of Rossi Turner
- Declaration of Freda Black Whitney
- Declaration of Melba Black Corley
- RMSI Records
- VUMC Records-Byron
- Height and Weight Chart
- VUMC Brain imaging studies

Tests and Procedures Administered

During my examination I administered a battery of intellectual and neuropsychological tests and procedures including:

- Behavioral Observations and Mental Status Examination
- Structured Neuropsychological Interview
- Rey's 15 Items
- Test of Memory Malingering
- ACS Word Choice Malingering Test
- Wechsler Adult Intelligence Scale-IV
- Wechsler Memory Scale-IV
- California Verbal Learning Test-II
- Wide Range Achievement Test-IV
- Trail Making Test, Parts A and B
- Boston Naming Test
- Tests of Verbal Fluency (F-A-S and Animal Naming Test)
- d2 Test of Attention
- Delis-Kaplan Executive Function System
 - Color-Word Interference Test
- Wisconsin Card Sort
- Halstead Categories Test
- Luria's Tests of Graphomotor Sequencing and Inhibition
- Luria's Tests of Motor Sequencing and Control
- Hooper Visual Organization Test
- Line Bi-Section Test
- Adaptive Functioning History and Clinical Interview

Background Information

Mr. Black's case, background, and family history have been extensively discussed elsewhere in the case materials, and will not be reiterated in detail here. Rather, information provided by him and others relevant to a determination of his intellectual and adaptive functioning will be presented below.

Examination Findings

Behavioral Observations and Mental Status Examination

Byron Black is a 63-year-old African American man who presented for testing dressed in a gray sweatshirt under light yellow, prison-issued scrubs. He was rolled into the examination room sitting on a small desk chair as he can only walk very short distances. He had short wavy hair that was combed back, and a mustache although he was otherwise was clean-shaven. He wore glasses.

Upon my first meeting him and throughout both days of the examination he had a very outgoing and overly-familiar way of interacting with me that was indicative of disinhibited social judgment. However, he was very cooperative and effortful throughout the examination and testing.

He was well oriented to the world around him, knowing who he was, where he was, and the approximate date and time.

His speech was produced at a normal rate and volume with clear articulation and a normal quantity of output.

His thoughts were expressed in a coherent and logical fashion, although he had a tendency randomly to go into tangential details unrelated to the topic at hand. This is a problem with self-monitoring and goal-directed thinking known as tangentiality.

Emotionally his observable affect was constricted in range and intensity and this presentation remains stable over both days of examination and testing. His underlying mood was inferred to be euthymic. His insight was fair.

He described his appetite as, "pretty good," but he said that his weight goes, "up and down," as a consequence of his diabetes. He also described his sleep as, "pretty good." He stated that he gets along with no changes in his interpersonal relationships or activities recently.

When asked how he's been doing emotionally he reported, "I guess OK." He then stated that he has health concerns that trouble him, as he has a painful broken hip that cannot be repaired due to his heart condition.

Mr. Black has a complicated history of serious medical problems, including prostate cancer surgery with complications due to accidentally cutting into his bladder, diabetes, congestive heart failure, hypertension, and a degenerative bone disease that has caused him to break his right hip.

He is unable to undergo surgery to repair his broken hip due to his fragile heart condition and 25% ejection fraction, so he is confined to a rolling desk chair and can only ambulate very short distances. He indicated that his physician has warned him that his other hip is also degenerated and also at imminent risk for fracture.

He reported that he was diagnosed with "prostrate" [sic] cancer in 2019. He had a PSA of 9.7 which, "made my heart start getting weak." He reported that during his cancer surgery they accidentally cut into his bladder and as a result he has two catheters.

He also stated that he was diagnosed with diabetes in 2017, and that he is had shortness of breath and a heart condition, "for a few years now, since 2017 I think. I only had 25% heartbeat." He reported that he had three stents placed in his heart in September of 2018, and also had a hernia operation the same year.

Neurocognitive Testing Results

Data Validity

In any high-stakes forensic examination such as this one, it is imperative to determine whether the individual being tested is putting forth their best effort, and to rule-out malingering. Therefore, a part of my examination I administered a variety of both free-standing and

embedded measures of effort and malingering to test the validity of Mr. Black's test findings.

He "passed" with a valid performance on each of these tests, including:

- (1) the Rey 15 Item Malingering Test,
- (2) the Test of Memory Malingering,
- (3) Reliable Digit Span,
- (4) the ACS Word Choice Test, and
- (5) the Forced-Choice Trial of the CVLT-II.

This level of performance indicates that he was putting forth his best effort, and the test results obtained can be relied upon as valid indicators of his current level on intellectual and cognitive functioning.

Intelligence (IQ) Testing

I administered the Wechsler Adult Intelligence Scale -IV to Mr. Black, the current gold-standard for IQ testing in the United States. He obtained a Full-Scale IQ of 67, which is a significantly subaverage score, falling more than two standard-deviations below the mean in the "Extremely Low" range, and places him squarely in the range of Intellectual Disability. There was no significant "scatter" between his subtest scores, indicating that his limited cognitive abilities are evenly developed, with no areas of particular strength or relative weakness.

His WAIS-IV IQ scores are summarized in the table below:

Composite Score Summary

Scale	Sum of Scaled Scores	Composite Score	Percentile Rank	95% Confidence Interval	Qualitative Description
Verbal Comprehension	15	VCI 72	3	67-79	Borderline
Perceptual Reasoning	17	PRI 75	5	70-82	Borderline
Working Memory	9	WMI 69	2	64-78	Extremely Low
Processing Speed	9	PSI 71	3	66-82	Borderline
Full Scale	50	FSIQ 67	1	64-72	Extremely Low
General Ability	32	GAI 71	3	67-77	Borderline

Confidence Intervals are based on the Overall Average SEMs. Values reported in the SEM column are based on the examinee's age.

The GAI is an optional composite summary score that is less sensitive to the influence of working memory and processing speed. Because working memory and processing speed are vital to a comprehensive evaluation of cognitive ability, it should be noted that the GAI does not have the breadth of construct coverage as the FSIQ.

Academic Achievement Testing

Testing with the Wide Range Achievement Test-IV showed that the academic difficulties that he had during his school years have endured into adulthood. Academically, he repeated the second grade which is an early indication of his cognitive limitations, and struggled in school.

Results from my testing indicate that his academic skills fall at the bottom 2nd percentile for Math, and the bottom 4th percentile overall for Reading:

	National Percentile	Grade Equivalent
Word Reading	4	5.1
Sentence Comprehension	5	7.0
Spelling	21	8.9
Math	2	3.5
Reading Composite	4	n/a

Attention and Speed of Information Processing

Mr. Black exhibited mild impairment on a test of his visual attention and speed of information processing (Trails A). These deficits were also seen as mild-to-moderate impairments on the Symbol Search and Coding subtests of the WAIS-IV.

Memory Testing

On the Wechsler Memory Scale-IV, Mr. Black exhibited significantly impaired memory functioning, both Verbal and Visual memory, as well as Immediate and Delayed memory, placing his scores at a level commensurate with his Intellectually Disabled IQ. His subscale scores are summarized in the table below:

WMS-IV Alternate Index Score Summary

Index	Sum of Scaled Scores	Index Score	Percentile Rank	Confidence Interval	SEM	Qualitative Description
Immediate Memory (LMVR)	9	69	2	64-80	4.5	Extremely Low
Delayed Memory (LMVR)	10	70	2	65-79	3.67	Borderline
Auditory Memory (LM)	9	71	3	66-81	4.5	Borderline
Visual Memory (VR)	10	73	4	69-79	2.12	Borderline

WMS-IV Alternate Indexes derived using Logical Memory and Visual Reproduction (LMVR).
Confidence Intervals reported at the 95% Level of Confidence.

A similar pattern of impaired memory was seen on the California Verbal Learning Test-II, which tests his ability to learn a list of words over multiple trials, and repeat them back after a distractor list and delay periods. Here, Mr. Black was able to learn some of the list of words after multiple trials, but had difficulty recalling them after a short delay period.

Learning the original list of words also significantly interfered with his ability to learn a second list, a phenomenon called "proactive interference." His score was two standard deviations below the mean and in the bottom two percent of people of his age and education.

He also had an abnormal tendency to confabulate – a pathological process of repeatedly inserting words that were not on the list into his memory, resulting in contaminated recall. His confabulation score placed him at the bottom 0.7 percentile for people of his age and education. In other words, he confabulated more than 99.3% of others of his background.

Finally, after a 20-minute delay period, he had enormous difficulty distinguishing the words he had been asked to learn from a list of unrelated words. His score here was five standard deviations below average, placing him below 1 in 10,000 others of his age and education.

Language Functioning

His language functioning is significantly impaired, with clinical evidence of expressive aphasia including severe impairment in his language functioning characterized by frank anomia (an inability to find words for things); and impaired semantic verbal fluency (e.g., the ability to name things in categories such as animals). He also exhibited clinical evidence of paraphasia, for example saying "prostrate" when he meant prostate.

His score on the Boston Naming Test, which evaluates his ability to find the words for common objects, was 5.6 standard deviations below expectation for his age, and 3.3 standard deviations below expectation for his level of education. His word-finding ability is more impaired than over 99.9% of others of his age or education.

Frontal Lobe - Executive Functioning

Testing of Mr. Black's frontal lobe or higher-level "executive" mental functions revealed multiple deficit areas involving the following cognitive abilities:

- (a) divided attention,
- (b) multitasking,
- (c) abstract problem-solving,
- (d) defective self-monitoring resulting in severe confabulation,
- (e) evidence of multimodal perseveration (a pathological repetition of behavior without awareness, seen in both graphomotor and problem-solving abilities).

His performance on the Wisconsin Card Sort (a test of visual abstract problem solving) revealed a tendency to perseverate in seeking to generate problem-solving ideas. His score on the Halstead Category test, which measures abstract reasoning and the higher-order cognitive skills needed for problem solving and learning from mistakes was also impaired.

Mild grapho-motor perseveration was seen on a test where he was required to write a line of alternating m's and n's, where his ability to switch smoothly and effectively was impaired.

Finally, he demonstrated severe impairment on a test of his ability to switch effectively between competing stimuli (Trails B), again indicating difficulty with set-switching and multitasking. He repeatedly lost track of what he was supposed to be doing and needed external redirection to get back on track.

Visual Perception and Organization

Tests of Mr. Black's visual perception and organization skills (Hooper Visual Organization Test) were indicative of moderate impairment in his visual organization and processing skills. He scored lower than 91% of others of his age and education on this test.

Evidence Regarding Intellectual Disability

The DSM-5 defines Intellectual Disability (ID) as a neurodevelopmental disorder that begins in childhood and is characterized by intellectual difficulties as well as difficulties in conceptual, social, and practical areas of living. The DSM-5 diagnosis of ID requires the satisfaction of three criteria:

1. Deficits and intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment academic learning and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing;
2. Deficits in adaptive functioning that result in failure to meet developmental in socio cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community; and
3. Onset of intellectual and adaptive deficits during the developmental period.

The DSM-5 definition of ID encourages a more comprehensive view of the individual than was true under the fourth edition, DSM-IV. More importance is placed clinical judgment with regard the presence of adaptive deficits, and less emphasis is placed on bright-line IQ cutoff scores. The DSM-5 has also placed significantly more emphasis on adaptive functioning and the performance of usual life skills as the hallmark indicia of intellectual disability.

Diagnostic Criterion A: IQ and Neuropsychological Test History

The DSM-5 includes the following discussion with regard to evaluating Criterion A:

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working

memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficiency. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately 2 standard deviations or more below the population mean, including a margin for measurement error (generally +5 points).

* * * *

Factors that may affect his scores include practice effects and the "Flynn effect" (overly high scores due to out-of-date test norms).

* * * *

Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning.

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgement, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.¹

Mr. Black's IQ and Neurocognitive Functioning

During my examination and testing, Mr. Black achieved a Full-Scale IQ score of 67, in the "Extremely Low" range of intellectual functioning. Mr. Black thus has significantly subaverage intellectual functioning that falls in the range of Intellectual Disability.

This finding is consistent with Mr. Black's history of past IQ testing, (which is described accurately and in detail by Dr. Marc Tasse in his declaration²) that has repeatedly shown his IQ to be significantly

¹ DSM-5, p. 37.

² 2008 Declaration of Marc Tasse, Ph.D., FAAIDD, p.13.

subaverage and in the range of Intellectual Disability using individually-administered, culturally-appropriate intelligence tests dating back to 1993. Four different examiners, using several different intelligence tests,³ all placed Mr. Black in the range of Intellectual Disability with his Flynn-adjusted Full-Scale IQ scores falling between 53 and 71. Dr. Stephen Greenspan also came to the same conclusions regarding this evidence of Intellectual Disability in his 03/13/2008 declaration.⁴

During my examination, I also did additional neurocognitive testing to look at Mr. Black's capacity for reasoning, problem-solving, planning, abstract thinking, academic learning, and learning from experience. The results of that testing revealed clinically significant and significantly subaverage functioning in the following areas:

- (1) significant memory impairment at a level commensurate with his Intellectually Disabled IQ score;
- (2) extreme confabulation (abnormal intrusions of extraneous, irrelevant, and incorrect information into his recall);
- (3) Severe deficit in attention
- (4) severe impairment in his language functioning characterized by frank anomia (an inability to find words for things) and impaired semantic verbal fluency (e.g., the ability to name things in categories such as animals);
- (5) impaired visual organization processing; and
- (6) deficits in his frontal lobe/executive abilities including:
 - divided attention,
 - multitasking,
 - abstract problem-solving, and

³ Including the Wechsler Adult Intelligence Scale – Revised in 1993 by Dr. Blair (FSIQ=69) and again in 1997 by Dr. Auble (FSIQ = 71); the Wechsler Adult Intelligence Scale – III in 1995 by Dr. van Eys (FSIQ= 67); and the Stanford-Binet 5th Edition in 1986 by Dr. Grant (FSIQ=53).

⁴ Declaration of Stephen Greenspan, Ph.D., 03/13/2008, p. 13-14.

- evidence of multimodal perseveration (a pathological repetition of behavior without awareness, seen in both graphomotor and problem-solving abilities).

Dr. Daniel H. Grant, who examined and neuropsychologically tested Mr. Black in October of 2001, noted that in addition to his significantly subaverage intellectual functioning, Mr. Black had significant neuropsychological impairments in the areas of:

- (1) verbal memory;
- (2) listening comprehension and oral expression;
- (3) receptive and expressive vocabulary; and
- (4) deficits in functional academic skills including reading comprehension and arithmetic skills.⁵

Dr. Pamela Auble, who examined and neuropsychologically tested Mr. Grant in February and March of 1997 found no evidence of poor effort or malingering, and significant neurocognitive deficits involving:

- (1) attention;
- (2) memory;
- (3) word-finding;
- (4) manual dexterity; and
- (5) executive abilities including abstract problem solving and multi-tasking.⁶

These findings are consistent with the structural and functional neuroimaging findings reported by Dr. Gur in 2001 (MRI scan) and 2004 (PET scan).

The findings from the neuropsychological testing provide additional evidence of neurocognitive deficits that indicate and support a finding of significantly subaverage intellectual functioning.

⁵ Dr. Grant's 11/16/2001 declaration, p. 6-7.

⁶ Report of Pamela Auble, Ph.D., 3/5/1997.

Conclusion Regarding Mr. Black's Intellectual Functioning

It is my opinion that Mr. Black meets Criterion A based on test scores that place him within the range for a diagnosis of intellectual disability. Mr. Black's impaired performance on the neuropsychological testing administered during this examination in conjunction with his current and prior IQ testing provides clear evidence of substantial impairment in intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding; as well as critical components that include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficiency.

Diagnostic Criterion B: Significant Deficits or Impairments in Adaptive Functioning

The second major prong of the Intellectual Disability diagnosis requires evidence of impairment in Adaptive Functioning. *Global* impairment in adaptive functioning is not required for the diagnosis of Intellectual Disability. It is typical for adaptive strengths to co-exist with weaknesses in this population. However, the diagnosis itself is made based on the identification of adaptive weakness areas alone. Both the DSM-5 and American Association on Intellectual and Developmental Disabilities (AAIDD) criteria require impairment in just one broad domain of functioning (i.e., Conceptual, Practical, or Social).

THE CONCEPTUAL DOMAIN

The **conceptual domain** involves skills in language, reading, writing, math, reasoning, knowledge, memory, and self-direction.

In this domain, there is both empirical and anecdotal evidence that Mr. Black has significant impairments that cluster in three broad areas, including:

- (1) functional academic skills:
- (2) language skills; and
- (3) concept formation and self-direction.

Examples of Mr. Black's Conceptual Domain impairments include the following:

- o Academically, he repeated the second grade which is an early indication of his cognitive limitations, and struggled in school.

During my examination I asked Mr. Black about his school experience. He did not know why he had to repeat the 2nd grade but he did state, "I did not understand some things."

- o Findings from my neurocognitive testing indicate that his academic skills fall at the bottom 2nd percentile for Math, and the bottom 4th percentile for Reading.

During my examination when I asked Mr. Black about his school experience, he reported being socially awkward. "I mostly stayed to myself. I'm a quiet person." Then out of the blue he stated, "We have communion here every Sunday."

Rossi Turner grew up with Byron Black, lived on the same street, and attended the same school. She shared the following observations regarding his abilities as a child in her declaration:

I am two years younger than Byron Black. Byron had to repeat the 2nd grade so I was one grade behind him.

[When playing] a Tisket a Tasket, ... Byron never seemed to catch on when the bag was dropped behind him. One of the other children would have to yell at him, "Byron, look behind you."

When we played red light, green light ... Byron would get put out all the time. He was generally the first one out.

Even in marbles, Byron wasn't good. He was not too well coordinated.⁷

Dr. Daniel H. Grant, who examined and neuropsychologically tested Mr. Black in October of 2001, noted that in addition to his significantly subaverage intellectual functioning, Mr. Black had significant neuropsychological impairments in the areas of:

⁷ Declaration of Rossi Turner, 3/15/2008, p.1-4.

- (1) verbal memory;
- (2) listening comprehension and oral expression;
- (3) receptive and expressive vocabulary; and
- (4) deficits in functional academic skills including reading comprehension and arithmetic skills.⁸

Dr. Pamela Auble, who examined and neuropsychologically tested Mr. Grant in February and March of 1997 found no evidence of poor effort or malingering, and significant neurocognitive deficits involving:

- (1) attention;
- (2) memory;
- (3) word-finding;
- (4) manual dexterity; and
- (5) executive abilities including abstract problem solving and multi-tasking.⁹

Ross Alderman, who was Mr. Black's attorney during his capital murder trial, declared as follows:

during our interactions with Byron Black, Byron completely could not focus on the case. ... An example of just how out of touch Byron was with what was going on in the trial is when after the jury went out to deliberate on the issue of sentence, Byron asked me, "Do I get to testify now?" It was clear to me that Byron had not understood what had occurred in the proceedings. I believe that he had no clue about what had been going on for the past two weeks. He lacked the ability to process what had been occurring.¹⁰

Conclusion Regarding Adaptive Impairment in the Conceptual Domain

The Diagnostic and Statistical Manual of Mental Disorders-5th Edition characterizes the various severity levels for adaptive impairments seen

⁸ Dr. Grant's 11/16/2001 declaration, p. 6-7.

⁹ Report of Pamela Auble, Ph.D., 3/5/1997.

¹⁰ Declaration of Ross Alderman, Esq., 11/14/2001, p.1-2.

in Intellectual Disability. Based on the evidence summarized above, Mr. Black's level of functioning is best captured by the DSM-5 description of "mild" severity in the **conceptual domain**:

For preschool children, there may be no obvious conceptual differences. For school age children and adults, there are difficulties in learning academic skills involved in reading, writing, or arithmetic, time, or money, with support needed in one or more areas to meet age – related expectations. In adults, abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (e.g., reading, money management), are impaired. There is a somewhat concrete approach to problems and solutions compared with age-mates.¹¹

THE SOCIAL DOMAIN

The **social domain** refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, gullibility and vulnerability to manipulation, and similar capacities.

Mr. Black's record reflects deficits in his Social Domain functioning. Examples of his social domain impairments include:

- o Socially, he is overly-familiar with strangers and has problems with boundaries and personal space. He is very outgoing, overly friendly, and relates in a somewhat child-like manner as if he has known you for a long time even when you first meet him, waving and expressing affection. His attorney at trial observed this as well.
- o A childhood friend described him as not having many close friends. He was unable to "catch on" to the rules of simple childhood games like Tisket-a-Tasket, Red Light-Green Light, or marbles. He was described as finding things that others could do easily to be too difficult for him. He was also described as having memory problems during childhood, and difficulty keeping track of time, and needing support from others to function effectively in his daily life.

¹¹ DSM-V, p. 34.

- o His high school football coach, Al Harris, described him as unable to learn and remember plays.

Rossi Turner grew up with Byron Black, lived on the same street, and attended the same school. She shared the following observations regarding his abilities as a child in her declaration:

Looking back on it, Byron was different. Things that others could do so easily were difficult for him. And, Byron smiled a lot, but it looked off key. ...

Although Byron had a lot of cousins and a pretty big family, he didn't have many close friends. Byron would occasionally make small talk with people, but not often.

[When playing] a Tisket a Tasket, ... Byron never seemed to catch on when the bag was dropped behind him. One of the other children would have to yell at him, "Byron, look behind you."

When we played red light, green light ... Byron would get put out all the time. He was generally the first one out.

Even in marbles, Byron wasn't good. He was not too well coordinated.¹²

Ross Alderman, who was Mr. Black's attorney during his capital murder trial, declared as follows:

Byron almost constantly wore a big childlike smile on his face, a smile which was often out of place, given the circumstances. ... Also, when talking, he would get close-in to my face, not in a threatening way, but in a socially inappropriate way.¹³

Conclusion Regarding Adaptive Impairment in the Social Domain

The Diagnostic and Statistical Manual of Mental Disorders - 5th Edition (DSM-5) characterizes the various severity levels for adaptive impairments seen in Intellectual Disability. Based on the evidence

¹² Declaration of Rossi Turner, 3/15/2008, p.1-4.

¹³ Declaration of Ross Alderman, Esq., 11/14/2001, p.1.

summarized above, Mr. Black's level of functioning is best captured by the DSM-5 descriptions for "Mild" severity in the **social domain**.

Mild impairment in the social domain is described as follows:

Compared with typically developing age-mates, the individual is immature and social interactions. For example, there may be difficulty in accurately perceiving peers' social cues.

Communication, conversation, and language are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in an age-appropriate fashion; these difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations; social judgment is immature for their age, and the person is at risk of being manipulated by others (gullibility).¹⁴

THE PRACTICAL DOMAIN

The **practical domain** centers on self-management in areas such as personal care, job responsibilities, money management, recreation, and organizing school and work tasks.

The records also establish impairment in Mr. Black's Practical Domain functioning, including:

- o His younger brother reported that he did not read, did not cook, and would repeat things over and over (perseveration). He is described as never living independently, and not having a checking account.
- o Interviews with Lynette Childs Black who was briefly married to him, indicated that he was never able to live independently and that they lived with his mother when they got married. She described him as "childish" and reliant on his family members for support.

There has also been objective testing of his adaptive functioning that supports a finding of deficits in these domains, including:

- o Dr. Grant administered the Independent Living Scales (ILS) and obtained impaired scores reflecting deficits in

¹⁴ DSM-5, p. 35.

Mr. Black's practical adaptive skills involving money management, managing home and transportation, health, and safety.

- o Dr. Greenspan administered the Street Skills Survival Questionnaire (SSSQ) and obtained similar evidence of impairment in Mr. Black's Practical functional abilities, including independent living skills.
- o Dr. Greenspan also did a retrospective administration of the Vineland Adaptive Behavior Scales—Second Edition (Vineland-2) with multiple reporters which while not a standardized way of using the test, did obtain highly convergent findings across reporters indicating overall impairment in Mr. Black's functional abilities in all three diagnostic domains.

Dr. Daniel H. Grant, who examined and tested Mr. Black in October of 2001, noted in his declaration that:

It is important to note that Mr. Black never lived in dependently. He never did the laundry, cooked, cleaned the house or participated in the care of his son. Even when married he and his wife lived with relatives who cared for Mr. Black. He did not contribute financially to his family and his wife said he never had a bank account. He never contributed financially to the cost of housing or utilities.¹⁵

Rossi Turner, grew up with Byron Black, lived on the same street, and attended school. She shared the following observations regarding his abilities as a child in her declaration:

I remember his grandpa having to tell him time and time again to do his chores and how to do it the right way. Byron had to bring in kindling and coal. ... Byron wasn't lazy, he just had trouble remembering to do his chores.

Because Byron couldn't remember things folks would have to repeat things to him especially if it was a direction. I remember his sisters saying over and over, "Byron, I just told you to do

¹⁵ Declaration of Daniel H. Grant, Ed.D,12/24/2001, p. 7.

that." He had a thing about snapping his fingers and say [sic], "yeah, I forgot that," when someone reminded him.

Byron would forget and lose track of time. He would be told to get home at a certain time but he wouldn't remember and his grandpa would come and get him saying, "Byron, what did I tell you?" Byron would meekly say, "Yes, grandpa."¹⁶

Freda Black Whitney, who is Byron Black's younger sister by five years, shared the following observations in her declaration:

I have noticed that Byron repeats a lot of the same things over and over.

I never saw Byron read for pleasure.

I've never known Byron to cook. I don't think he knows how to cook.

While all of us left home and took care of ourselves and our families, Byron never did. Even when he was married he did not provide an independent residence for his family but continued to live with either our mother or father or with his wife's family. He didn't even have a checking account.¹⁷

Melba Black Corley, Byron Black's older sister by six years, provided the following observations in her declaration:

I did not see him just sitting around reading for fun. Although my sisters and I would use the mobile library that went to our school, I do not remember Byron using this library. He only read what he had to for school. Byron didn't mature like he should have.¹⁸

Investigator Connie Westfall interviewed **Lynette Childs Black**, who was briefly married to Byron Black, in April of 1997. She prepared a declaration that includes a memo documenting that interview, which notes:

...as a couple Lynette and Byron never had their own place. After divorcing they went their separate ways, ... Lynette characterized Byron as being quote childish, "he wanted to stay

¹⁶ Declaration of Rossi Turner, 3/15/2008, p.1-4.

¹⁷ Declaration of Freda Black Whitney, 3/16/2008, p. 1-2.

¹⁸ Declaration of Melba Black Corley, 3/15/2008, p.1-2.

up underneath his family.” That was the thing that broke them up.¹⁹

Conclusion Regarding Adaptive Impairment in the Practical Domain

The Diagnostic and Statistical Manual of Mental Disorders - 5th Edition (DSM-5) characterizes the various severity levels for adaptive impairments seen in Intellectual Disability. Based on the evidence summarized above, Mr. Black’s level of functioning is best captured by the DSM-5 descriptions of “Moderate” severity in the **practical domain**.

Moderate impairment in the practical domain is described as follows:

The individual can care for personal needs involving eating, dressing, elimination, and hygiene as an adult, although an extended period of teaching and time is needed for the individual to become independent in these areas, and reminders may be needed. Similarly, participation in all household tasks can be achieved by adulthood, although an extended period of teaching is needed, and ongoing support will typically occur for adult level performance. Independent employment in jobs that require a limited conceptual and communication skills can be achieved, but considerable support from coworkers, supervisors, and others as needed to manage social expectations, job complexities, and ancillary responsibilities such as scheduling, transportation, health benefits, and money management. A variety of recreational skills can be developed. This typically requires additional supports and learning opportunities over an extended period of time. Maladaptive behavior is present in a significant minority and causes social problems.²⁰

¹⁹ Westfall declaration attachment, p. 1.

²⁰ Ibid.

**Diagnostic Criterion C:
Onset of Intellectual and Adaptive Deficits During the
Developmental Period**

Both the record and my clinical examination make a clear and unequivocal case that the onset of Mr. Black's Intellectual Disability occurred during the developmental period.

Both the record and my clinical examination indicate that the onset of Mr. Black's Intellectual Disability occurred during the developmental period, thus meeting the third prong of the diagnostic criteria.

Summary of Opinions

Based on my examination, interviews, and review of the materials that I have been provided, I have reached the following opinions to a reasonable degree of psychological certainty.

Opinion with Regard to Intellectual Functioning

As noted above, it is my opinion that Mr. Black has significantly subaverage intellectual functioning based on valid, objective test scores within the range of intellectual disability.

Opinion with Regard to Impairments in Adaptive Functioning

Mr. Black exhibits significant deficits or impairments in all three domains of adaptive functioning (Conceptual, Social and Practical), at the level of "Mild" to "Moderate" severity. His adaptive impairments are clearly related to his underlying cognitive limitations. There is substantial "convergent validity" from anecdotal, contemporaneous, and empirical data sources supporting the conclusion that Mr. Black functions adaptively in the range of Intellectual Disability, which meets the second diagnostic prong.

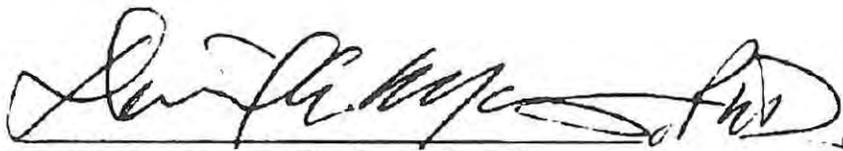
Opinion with Regard to Age of Onset

It is my opinion that Mr. Black's intellectual and adaptive deficits find their origin in the developmental period. The data discussed above clearly show that he was exhibiting impairments in conceptual, social, and practical adaptive abilities during his development prior to age 18.

Based on these findings, it is my opinion that Byron Black meets the all of the criteria for a diagnosis of Intellectual Disability pursuant to *Atkins v. Virginia*.

Thank you for the opportunity to evaluate this interesting case. If you have any questions, please feel free to contact me directly any time at (949) 230-7321.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel A. Martell', written over a horizontal line.

Daniel A. Martell, Ph.D., A.B.P.P.
Fellow, American Academy of Forensic Psychology
Fellow, National Academy of Neuropsychology
Fellow and Past President, American Academy of Forensic Sciences