IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| BYRON BLACK,<br>Petitioner, | ) | |
| | ) | No. 88-S-1479 |
| v. | ) | Capital Case |
| STATE OF TENNESSEE,<br>Respondent. | ) | |

**STATE'S RESPONSE REGARDING PETITIONER'S MOTION FOR A DETERMINATION OF INTELLECTUAL DISABILITY**

Petitioner Byron Black has filed a motion to be declared intellectually disabled pursuant to Tenn. Code Ann. § 39-13-203(g), which provides:

> (1) A defendant who has been sentenced to the death penalty prior to the effective date of this act and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.
>
> (2) A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits.

Subsection (g) went into effect on May 11, 2021, and Petitioner filed his motion on June 3, 2021. In an order filed February 22, 2022, this Court noted that Respondent had yet to respond to Petitioner's motion and that Petitioner had not addressed the second prong of the statute. The Court directed the parties to file briefs addressing the application of Tenn. Code Ann. § 39-13-203(g)(2) to the issue of whether Petitioner's intellectual-disability claim had been previously adjudicated on the merits. As outlined below, Respondent respectfully submits that, pursuant to section 39-13-203, the issue of whether Petitioner has an intellectual disability has not been

previously adjudicated on the merits under the new statutory standard. Therefore, further proceedings are warranted, and the Court should consider the issue of Petitioner's intellectual disability.

The basis for the Court's question regarding whether there has been a previous adjudication of Petitioner's intellectual-disability claim is the 2004 hearing and order on the issue of what was then characterized as his "mental retardation."[1] As developed below, based on the authority of the Tennessee Supreme Court regarding issue preclusion, the issue addressed by this Court in Petitioner's 2004 hearing is *not* the same issue raised in the petition currently before the Court. As such, pursuant to Tenn. Code Ann. § 39-13-203(g)(2), the issue of Petitioner's intellectual disability has not been previously adjudicated on the merits.

In *Reid ex rel. Martiniano v. State,* 396 S.W.3d 478 (Tenn. 2013), the Tennessee Supreme Court addressed whether a previous court's competency ruling precluded a subsequent court from addressing the issue of competency. Our Supreme Court affirmed the Court of Criminal Appeals' opinion[2] that none of the requirements of the various preclusion doctrines had been satisfied and also adopted its reasoning. *Id.* at 516. Particularly relevant to the issue raised in Petitioner's motion to be declared intellectually disabled, our intermediate appellate court, in addressing the preclusion doctrine of collateral estoppel, observed:

> Reid commonly refers to the "issue" of his competency in his briefs before this Court. Although the ultimate question to be decided in these cases is whether Reid is competent, the *legal* issues in the state post-conviction cases and the federal court actions are different.

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[1] Memorandum and Order, *Byron Lewis Black v. State of Tennessee,* No. 88-S-1479 (Post Conviction), Fifth Circuit Court, Davidson County, Tennessee (May 6, 2004) (Hereafter, "Order" or "2004 order.")

[2] *Reid v. State,* Nos. M2009-0360-CCA-R3-PD, M2009-00360-CCA-R3-PD, M2009-01557-CCA-R3-PD, 2011 WL 3444171 (Tenn. Crim. App. Aug. 8, 2011).

*Reid v. State*, 2011 WL 3444171, at *30 (emphasis in original).

The court further noted that, "[t]he doctrine of collateral estoppel requires that the issue to be precluded in the present case is identical, not merely similar, to the issue decided in the earlier action." *Id.* (citing *Beaty v. McGraw*, 15 S.W.3d 819, 827 (Tenn. Ct. App. 1998)).

On the question of the issue presented by Petitioner as to his intellectual disability in his June 3, 2021 petition versus the issue adjudicated by this Court in 2004, a few passages from the Court's 2004 order are illustrative of the differences between them. Initially, the first sentence of the order's analysis highlights the precise issue before the court: "Obviously the definition of mental retardation must be determined in order to decide this case."[3] (Order at 4.)

The order continued by looking to the now-obsolete twenty-five-year-old definition of mental retardation:

> The applicable criteria are those presently set forth by statute: (1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in adaptive behavior; and (3) mental retardation manifested during the developmental period, or by eighteen (18) years of age. *See* Tenn. Code Ann. § 39-13-203 (1997).

(Order at 5.)

After establishing the issue to be decided in the 2004 order by settling on the then-prevailing definition of mental retardation, the Court analyzed the findings of the various experts as to Petitioner's mental retardation or lack thereof. (*Id.* at 11-21.) Throughout these findings are many references to and emphasis placed on Petitioner's performance on various IQ tests.[4] And

[3] The mere fact that the antiquated terminology of "mental retardation" was in effect the time is at least a harbinger that the issue to be determined now—Petitioner's intellectual disability—is not the same issue decided by the 2004 order.

[4] Significantly, the section of the order immediately following the summaries of findings is entitled, "I.Q." and begins by noting that, "[t]he first criteria to be explored is whether the petitioner

the last expert whose findings are outlined in the Order are those of Dr. Susan Vaught[5] who concluded: "In my professional opinion, Byron Black does not meet criteria established in section 39-13-203 for diagnosis of mental retardation." (Order at 21.) Because the criteria in section 39-13-203 for determining intellectual disability have changed, the issue adjudicated in 2004 is not the same issue presented in Petitioner's 2021 motion.

As noted by Petitioner, under the governing statutory law now in effect, to establish an intellectual disability, Petitioner must demonstrate 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). This is a different legal standard from the one that existed in the previous iteration of section 39-13-203, which the Court applied in 2004 to find that Petitioner did not meet that standard of mental retardation. "Different legal standards as applied to the same set of facts create different issues." *Reid,* 2011 WL 3444171, at *30 (quoting *Beaty,* 15 S.W.3d at 827); *see also State ex rel. Cihlar v. Crawford,* 39 S.W.3d 172, 179 (Tenn. Ct. App. 2000) ("The relitigation of an issue of law between the same two parties is not precluded when a new determination is warranted in order to take account of an intervening change in the applicable law or to avoid the inequitable administration of the law.") (citations omitted). Therefore, the issue presented by Petitioner in the motion currently before the Court is a different issue than the one it determined in 2004. Because the issues are not the same, the law pertaining to issue preclusion as decided by the Tennessee Supreme Court requires

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had a significantly sub-average general intelligence quotient (I.Q.) of seventy (70) or below." (Order at 21.)

[5] As recently submitted to the Court by Petitioner, based in part on the changes in the legal criteria for intellectual disability, Dr. Vaught has reconsidered her position on Petitioner's intellectual disability—further demonstrating that the issue determined by the Court in 2004 is not the same issue before presently before it.

Respondent to acknowledge that Tenn. Code Ann. § 39-13-203(g)(2) does *not* operate to preclude Petitioner from filing and seeking a determination on the issue of his intellectual disability pursuant to Tenn. Code Ann. § 39-13-203(g)(1).

Moreover, as detailed below, two (2) experts, historically relied on in capital cases in determining issues of intellectually disability and competency, have now determined that Petitioner meets the criteria for intellectual disability required by Tenn. Code Ann. § 39-13-203(a) (2021), the State must also stipulate that Petitioner would be found intellectually disabled.

Dr. Daniel A. Martel, Ph.D., has routinely been relied on by the State of Tennessee in various stages of capital prosecutions to challenge claims regarding competency and/or intellectual disability. *Coe v. State*, 17 S.W.3d 193, 204-05 (Tenn. 2000); *State v. Reid*, 91 S.W.3d 247, 270-271 (Tenn. 2002); *State v. Reid*, 213 S.W.3d 792, 809-810 (Tenn. 2006). As the Court is aware[6], Dr. Martel has examined Petitioner and found that Petitioner meets all the criteria for a diagnosis of intellectually disability required by Tenn. Code Ann. § 39-13-203(a) (2021).

As previously noted, Dr. Susan Redmond-Vaught, Ph.D., was one of the State's experts relied on by the Court in its 2004 Order to determine that Petitioner did not meet the criteria for mental retardation pursuant to the now-obsolete iteration of Tenn. Code Ann. § 39-13-203. (2004 Order at 18-21.) In light of the 2021 changes to Tenn. Code Ann. § 39-13-203(a)—as well as newly available documentation, changes in the standards of care, and changes in diagnostic criteria—Dr. Vaught has recently reconsidered her opinion on the question of Petitioner's intellectually disability. Contrary to her former opinion that he did not meet the then-existing

[6] Martel report of August 25, 2020, attached to Petitioner's June 3, 2021 Motion. (Also attached here as Attachment 1.)

statutory criteria for mental retardation, Dr. Vaught is now of the opinion that Petitioner "does meet criteria established in the 2021 changes to § 39-13-203 for diagnosis of intellectual disability."[7] This finding is in step with similar results in at least one other jurisdiction of the State since the updating of Tenn. Code Ann. § 39-13-203, where the mental health experts concluded that a petitioner would meet the criteria for a diagnosis of intellectual disability. See *Pervis Tyrone Payne v. State of Tennessee*, Nos. 87-04409, 87-04410, 30th Judicial District Criminal Court, *State's Notice of Withdrawal of Request for Hearing* (November 18, 2021); *Order Vacating Capital Sentences* (November 23, 2021). (See Attachment 3.)

Because these experts have concluded Petitioner does, in fact, meet the criteria for a diagnosis of intellectual disability, the State stipulates that Petitioner would be found intellectually disabled were a hearing to be conducted.

The State has met with the victims' family members and explained the change in the law and the reports of Dr. Martel from 2020 and Dr. Vaught from 2022. These family members still want Mr. Black executed. However, under current law and the medical reports before the Court, the State concedes that the Petitioner's capital sentence should be commuted to one of life in prison, consecutive to his other sentences.

Respectfully submitted,

GLENN R. FUNK
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[7] Vaught report of February 28, 2022. See Attachment 2.

**CERTIFICATE OF SERVICE**

I certify that a true and exact copy of the foregoing Response was served by U.S. Mail, postage paid, to the Office of the Federal Public Defender for the Middle District of Tennessee, 810 Broadway, Suite 200, Nashville, TN 37203, and to:

Ms. Kelley Henry, Ms. Amy Harwell, Mr. Marshall Jensen, and Mr. Richard Tennent
Office of the Federal Public Defender, by email to the following addresses:
Kelley_Henry@fd.org Amy_Harwell@fd.org Marshall_Jensen@fd.org and Richard_Tennent@fd.org

Pursuant to this Court's Administrative Order, this Response has been submitted for filing to the attention of Mr. Nicholas Kiefer, Courts Director for State Trial Courts, Office of the Criminal Court Clerk, 20th Judicial District, Nashville, TN, by email to: nkiefer@jisnashville.gov

All on this the 9 day of March, 2022.

GLENN R. FUNK
District Attorney General

cc: The Honorable Walter C. Kurtz at kurtzjudge@gmail.com
Mr. Jason Steinle at jason.steinle@tncourts.gov

# ATTACHMENT 1

# Daniel A. Martell, Ph.D., A.B.P.P.
## Forensic Psychology and Neuropsychology

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BY ELECTRONIC MAIL

August 25, 2020

Kelley J. Henry
Supervisory Asst. Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203

**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 indictors 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 significant 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 that 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 sematic 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 declaration[2]) that has repeatedly shown his IQ to be significantly

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[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 sematic 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

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[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.

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[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:

- 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."

- 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:

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[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

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[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:

- Socially, he his 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.

- 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 findings 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.

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[11] DSM-V, p. 34.

- 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

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[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:

- 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.
- 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:

- 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.

- 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.

- 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

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[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]

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[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.

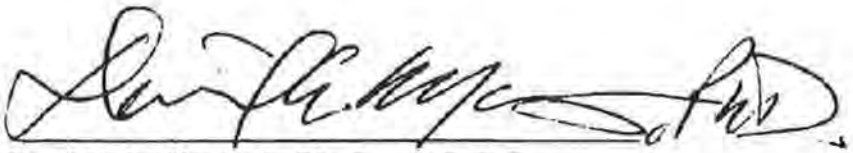
### Opinion with Regard to Age of Onset

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,



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

# ATTACHMENT 2

February 28, 2022

Kelley Henry
Supervisory APPD, Capital Habeas Unit
810 Broadway Suite 200
Nashville, TN 37203

Re: Byron Black, Intellectual Disability Determination

**REASON FOR OPINION**

I was retained by attorney Kelley Henry, accompanied by Coordinating Investigator Ben Leonard, from the Office of the Federal Public Defender in Nashville, to reconsider my May, 2003 opinion on the question of intellectual disability for Byron Black. Specifically, Ms. Henry asked me to review additional documentation now available in this case, and to consider changes in Tennessee law, standards of care, and diagnostic criteria that have occurred since I rendered the original opinion. As was the case in 2003, I have completed this task exclusively by review of records, and have not, at any time, personally evaluated Mr. Black. Now, as in 2003, I will not be offering a diagnosis, but instead commenting on whether or not there is sufficient evidence to suggest that Mr. Black's functioning meets the three prongs necessary to consider a diagnosis of intellectual disability.

**QUALIFICATIONS**

I obtained my Bachelor of Arts Degree in Psychology and English from the University of Mississippi (1985). While working my way through undergraduate school, my primary job was as a direct care staff member for North Mississippi Retardation Center, now renamed North Mississippi Regional Center. Following undergraduate school, I obtained my Master's Degree in Clinical Psychology and Intellectual and Developmental Disabilities Research (then called Mental Retardation Research) in 1989, and my Doctoral Degree in Clinical Psychology and Intellectual and Developmental Disabilities Research (then called Mental Retardation Research) from Vanderbilt University in 1991. To fund my graduate studies, I was awarded a Kennedy Center Traineeship in Intellectual and Developmental Disabilities (then called Mental Retardation).

I pursued my clinical internship at Temple University Health Sciences Center in Philadelphia, PA, where I split my time between Clinical Psychology and Neuropsychology (1991). On internship, my training in intellectual and developmental disabilities often came to bear, and I frequently assessed clients who were both mentally ill and developmentally disabled. I then pursued a fellowship In Clinical Neuropsychology, also at Temple (1992). Once more, I frequently assessed persons with developmental disability. I worked as a behavioral specialist for persons with developmental disability, contracted with the State of Pennsylvania 8 hours a week for nine months during this two year period, and worked 15 hours per week as-a unit psychologist for a private Intellectual and Developmental Disabilities program for seven months.

Following fellowship, I maintained a clinical practice as well as a specialty practice in neuropsychology. As a part of that specialty practice, I saw difficult to manage patients for the State of Tennessee for approximately twenty years. I assumed my current position at Western State Hospital in Kentucky in 2008, and during the last 13-14 years, I have continued to assess, consult, and contract to see individuals with intellectual and developmental disability. I would estimate I have performed over 3000 assessments of such individuals since licensure in 1991-1992, in addition to consulting with programs who serve people with intellectual and developmental disabilities, speaking at conferences, and providing local and state level trainings in this area.

I am licensed in Kentucky and Tennessee, and I routinely testify in the State of Kentucky on matters of civil and criminal competence, with many of those cases involving persons with intellectual or developmental disability.

**RECORDS REVIEWED**

At the request of the above-noted attorney, I have reviewed the following documents:

| | |
|---|---|
| 12/13/2021 | Supplemental Report (Daniel A. Martell, Ph.D., A.B.P.P.) |
| 06/04/2021 | Motion to Declare Petitioner Intellectually Disabled Pursuant to Tennessee Code Annotated §39-13-203 |
| 08/25/2020 | Psychological Report (Daniel A. Martell, Ph.D., A.B.P.P.) |
| 07/20/2019 | Revised Declaration of Stephen Greenspan, Ph.D. |
| 03/15/2008 | Declaration of Melba Black Corley |
| 03/13/2008 | Declaration of Stephen Greenspan, Ph.D. |
| 03/08/2008 | Declaration of Marc J. Tassé, Ph.D., FAAIDD |
| 03/15/2008 | Declaration of Rossi Turner |
| 11/15/2001 | Declaration of Ruben Gur, Ph.D. |
| 11/04/2001 | Declaration of Ross Alderman, Esq. |

Of particular note, all but two of these documents were completed five or more years after my initial review of records for Mr. Black. Additionally, scientific knowledge, clinical practice and diagnostic standards based on that science, and terminology related to developmental and intellectual disabilities have evolved considerably in the nearly two decades since I last reviewed this case, which does have bearing on the opinion I will offer.

Using the above-referenced data, I considered the criteria necessary for diagnosis of intellectual disability, according to Tennessee's most recent 2021 iteration of § 39-13-203.

**I. SIGNIFICANTLY SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING.**

This aspect of the diagnosis of intellectual disability has undergone transformative change across methods of scientific consideration, clinical practice, and diagnostic criteria since 2003. Clinical studies, standard of practice, and now Tennessee state law reject the use of "bright-line" standards. It has always been established clinical practice to consider standard error of measurement, and this standard

of practice has now been codified in Tennessee. Additionally, the numerical criteria have been removed from both the DSM-5 definition of intellectual disability and legal requirements for the use of the diagnosis in the State of Tennessee. DSM-5-TR, due to be released March 18, 2022, continues this practice. Taken as a whole, these changes in standard of practice and diagnosis give considerable flexibility in the clinical interpretation of IQ scores from individually-administered tests, and arbitrary "cut-offs" no longer apply.

As noted in Dr. Greenspan's revised 2019 declaration, he reviewed measures of intellectual capacity completed on Mr. Black in 1993, 1997, and 2001 (March, and November x 2), across a span of 8 years, reporting, "All of the full-scale IQ tests cluster around or below an IQ of 69." He accurately noted that the lower score of 57 on the Stanford-Binet is not an outlier, but consistent with the fact that this measure routinely produces lower scores than the Wechsler series. To this we can add Dr. Martell's 2020 findings, where Mr. Black again achieved a full-scale IQ of 67 on the WAIS-IV, with no subtest scatter. Dr. Martell also conducted a robust evaluation for malingering, and noted that results indicated that Mr. Black appeared to be putting forth his best effort, and that results could be considered to be a valid estimate of Mr. Black's intellectual and cognitive functioning. Additionally, using the multiple data points now available and spanning 12 or more years of measurement, progressive cognitive decline can be ruled out as alternative explanations for test findings.

My clinical opinion in 2022, as in 2003, is that Mr. Black has consistently tested in the Mild Range of Intellectual Disability as an adult, and continues to do so. I believe that he meets this criteria for the diagnosis of intellectual disability, and that the findings of practitioners who have directly assessed his intelligence should continue to be given considerable weight. Further, using current standards of science and practice, as well as historical standards of science and practice, if there are previous assessments in which clinicians did not appropriately consider standard error of measurement in interpretation of testing results, these should not be given weight.

## II. DEFICITS IN ADAPTIVE BEHAVIOR

Just as with intellectual capacity, a diagnosis of intellectual disability no longer relies on a specific cut-off score with respect to formal measurement of adaptive capacity. Additionally, since my 2003 report, Mr. Black's adaptive capacity has been formally measured at different points in time, and in my clinical opinion, definitively measured by Dr. Greenspan in 2008 (with reiteration of findings in 2019), in both his evaluation of Mr. Black's self-report, and his use of retrospective averaging of multiple sources to obtain a valid Vineland-2 profile. All subtest scores and the Composite score were consistent with intellectual capacity scores.

In the intervening time from 2003 record review, more information has been brought forth about his general functioning in society as a child, teen, and young adult, based on reports of family, friends, and trained educators, that reflects "real world" functioning was not adequate or age-appropriate. Additional evaluation of academic testing records has also ensued, and convincing evidence put forth that Mr. Black never developed any academic or functional living skills beyond the level of a primary or middle-school student. His job and driving skills were noted not to have exceeded those achieved by many persons with Mild Intellectual Disability, and reports indicated that his adaptive issues were more capacity-based (developmental) than choice-based (criminal behavior/personality disorder). He appeared to make genuine effort to learn and to comply, per these reports, and was not failing in these

areas because he simply preferred to focus on his own needs/not meet demands of job, family, and society.

With the addition of Dr. Greenspan's findings, the changes in diagnostic and interpretive criteria (especially the move away from numerical cutoffs), the consistency of Mr. Black's scores over time, and the additional information now available about his real-world functioning, my 2022 opinion differs from my 2003 opinion in that I believe the preponderance of data in Mr. Black's record shows that he does meet the diagnostic criteria of developmentally-based adaptive deficits.

**III. THIS CONDITION MANIFESTED DURING THE DEVELOPMENTAL PERIOD.**

On this criteria, considerably more information was available in the record than I had in 2003. Specifically, the following data points stand out as most relevant:

**Melba Corley (Sister)**

"Byron didn't mature like he should have."

"His entire life, Byron never lived on his own"

Ms. Corley discussed the fact that even though Mr. Black married, he and his wife lived with either her family members or his, seemingly because they needed assistance with adult living skills.

**Rossi Turner (Childhood Friend)**

"He was not too well coordinated."

"Because Byron couldn't remember things, folks would have to repeat things to him especially if it was a direction."

Mr. Turner noted that Mr. Black could not grasp the basic rules and procedures for typical children's games, and gave multiple examples. His description of Mr. Black's personality and these events suggested that Mr. Black was not oppositional, but forgetful, and that he had significant difficulty learning and remembering steps and tasks. Mr. Black did not improve in these skills with practice, or with age. Additionally, Mr. Black tended to smile in a child-like fashion, even when this was not appropriate, which continues in present time.

**Dr. Gur**

"Byron Black was exposed to neurotoxins in utero and as a small child...Mr. Black's mother drank throughout pregnancy...high risk for lead poisoning and likely exposed to lead."

Dr. Gur noted that Mr. Black had pediatric iron deficiency anemia. This is a known risk factor for intellectual disability.

"Mr. Black has been an avid football player at varsity level and has suffered several head injuries..." When Dr. Gur completed these studies, little was in the literature about post-concussive syndromes or the toll of repeated blows to the head related to playing football, even as a child or teen/young adult. Literature now abounds on Chronic Traumatic Encephalopathy, which would be a consideration for Mr. Black, and also would have occurred in the now more flexible developmental period (prior to the age of 22 years). This more than any other specific factor may account for the "islands of preserved functioning" seen across testing, where Mr. Black performs better than expected in some areas, but significantly worse in skills associated with bilateral frontal regions.

Dr. Gur's findings also included abnormalities of the Corpus Callosum (midbrain) on MRI, suggestive of what was then called Fetal Alcohol Effects, but now based on Mr. Black's childhood presentation, would more currently be labeled alcohol-related neurodevelopmental disorder (ARND).

**Dr. Greenspan**

In his original report, Dr. Greenspan addressed the group intelligence testing scores after additional exploration of direct reports from teachers, family, and schoolmates, noting "...It is very possible, indeed likely, that these tests (which even state experts testified are not appropriate for diagnosing MR) were administered in a non-standard manner that could have even involved teacher assistance."

He also pointed out, "Even so, it should be noted that the IQ criterion for diagnosing MR was mins 1 SD (full-scale score of 85) during the years 1961-1973, and that the 85 that Mr. Black obtained on the Otis-Lennon group IQ test could, thus have qualified him at that time."

He further provided a concise historical summary, noting, "Mr. Black never lived independently (lived with parents, even after marriage), never had a checkbook, never cooked, never washed his clothes, never did anything suggestive of adult status other than holding a job...and driving a car...high school football coach, Al Harris, who indicated that in over 30 years as a coach, Mr. Black stood out as especially slow...generally could not be used on offense for the reason that he could not learn the plays and was used on offense only when a highly simplified playbook was developed for his use."

In his revised declaration, Dr. Greenspan revisited his initial results using updated criteria from diagnostic manuals and standard of care guidelines for persons with intellectual disabilities, and these guidelines only reinforced and strengthened his original opinion.

**Changes In Standard of Practice and Diagnostic Criteria**

Adding to this additional information are changes in standard of practice and what is in common use in daily clinical care and diagnosis. In 2003, the Flynn Effect was a valid and robust research concept that was just beginning to make its way into clinical practice, and it was not yet in common usage by the preponderance of relevant practitioners. In the intervening 18-19 years, the Flynn Effect has been even more thoroughly researched and repeatedly validated, is now included in most testing manuals, and in short, in 2022, it is common and well-accepted scientific and clinical practice related to the measurement of IQ. As such, applying this correction to scores from older versions of tests, and older scores, in order to look at them through today's lens for clinical diagnosis, not only should be done, but must be done for accuracy's sake. This, coupled with the removal of strict number-based criteria,

changes the interpretation of Mr. Black's prior known scores, and places them squarely in the range of Mild Intellectual Disability.

Unlike many of the practitioners whose declarations are cited in this document, I am not a forensic psychologist, but a practicing clinician who works daily with individuals who have intellectual and developmental disabilities, in clinical treatment settings. My area of specialization is more clinical nuance than the crossroads between clinical and legal nuance. I routinely review cases and assist with developmental histories, and noting onset of deficits for the State of Kentucky. I can say with a strong degree of clinical certainty that the information I have delineated in this section would be sufficient to meet the onset criteria of the diagnosis of intellectual disability, and it would be sufficient to qualify someone for services for person with intellectual and developmental disabilities in Kentucky. In my more recent work in the State of Tennessee on clinical cases (2019/2020), the same would be true.

In summary, then, my 2022 opinion differs from my 2003 opinion in that I believe the preponderance of data in Mr. Black's record shows that based on current scientific knowledge and standards of clinical practice, Mr. Black does meet the onset criteria for the diagnosis of intellectual disability.

**GENERAL SUMMARY OF OPINION**

Based exclusively on review of extensive available records, in my professional opinion, Byron Black does meet criteria established in the 2021 changes to § 39-13-203 for diagnosis of intellectual disability. This represents a change in my 2003 opinion, based on new information in his record, the ability to review his performance at multiple points in time across multiple practitioners, changes in scientific knowledge and standards of practice, and changes in diagnostic criteria, which I have outlined in the body of this report.

Due to my opinion being based on records review alone, I am not formally applying any diagnosis for Mr. Black; however, all of the very qualified experts who have directly assessed his capacity also believe he meets these criteria, formally applied the diagnosis of intellectual disability, and have provided current, detailed, and valid clinical reasons for their opinions. Moreover, they have offered additional opinions that their findings remain valid under DSM-5, the upcoming DSM-4-TR, and changes in Tennessee law.

I hope this information is beneficial to you in moving forward with Mr. Black's case. Please let me know if I may be of additional assistance in this case.

Susan Redmond-Vaught, Ph.D
Licensed Clinical Psychologist/HSP

# ATTACHMENT 3

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION I

| | | |
|---|---|---|
| PERVIS TYRONE PAYNE | * | |
| vs. | * | No. 87-04409; 87-04410 |
| STATE OF TENNESSEE | * | |

STATE'S NOTICE OF WITHDRAWAL OF REQUEST FOR HEARING

Comes now the State of Tennessee and withdraws its request for a hearing as to whether Petitioner is intellectually disabled.

To ensure due diligence, the State could not rely solely on the opinions of the defense experts and hired its own expert to evaluate Petitioner for intellectual disability. Pursuant to the Court's Order, the State's expert completed the evaluation and report on Wednesday, November 10, 2021. Our office has reviewed the report and met with the victims' family members.

After our review of the evidence, law, and expert opinions, the State stipulates the Petitioner would be found intellectually disabled. He should, therefore, be sentenced to two consecutive life terms for the convictions of murder in the first degree of Lacie Jo Christopher in indictment number 87-04409, and Charisse Christopher in indictment number 87-04410.

Respectfully submitted,

Asst. Dist. Atty. Steve Jones
BPR # 016764
201 Poplar, Suite 1101
Memphis, TN 38103
(901) 222-1484
Steve.Jones@scdag.com

**CERTIFICATE OF SERVICE**

I hereby certify a copy of this response has been sent by email and U.S. Mail to Kelley Henry, 810 Broadway, Suite 200, Nashville, TN 37203.

Steve Jones

**IN THE CRIMINAL COURT OF TENNESSSEE**
**FOR THE 30TH JUDICIAL DISTRICT, AT MEMPHIS**
**DIVISION I**

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| | | |
|---|---|---|
| PERVIS TYRONE PAYNE, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | NOS. 87-04409; 87-04410 |
| | ) | Capital Case |
| vs. | ) | Intellectual Disability Claim |
| | ) | T.C.A. § 39-13-203(g) |
| STATE OF TENNESSEE, | ) | |
| | ) | |
| Respondent. | ) | |

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## ORDER VACATING CAPITAL SENTENCES

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On November 23, 2021, this cause came to be heard on Petitioner's "Petition To Determine Ineligibility To Be Executed Pursuant To T.C.A. § 39-13-203."

Petitioner filed his petition on May 12, 2021, following the Tennessee legislature's amendment to T.C.A. § 39-13-203. The Petition is supported by two expert opinions concluding that Petitioner is intellectually disabled pursuant to Tennessee law as well as the decisions of the United States Supreme Court in *Atkins v. Viriginia*, 536 U.S. 304, 321 (2002); *Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S.Ct. 1039 (2017). Petitioner's expert opinions are supported by numerous exhibits and declarations.

The State requested an opportunity to conduct its own evaluation. On November 18, 2021, the State informed the Court that its evaluation is complete

and that the State stipulates that Mr. Payne would be found intellectually disabled should this Court conduct an evidentiary hearing. Accordingly, the State has withdrawn its request for a hearing on the Petition.

After review of the petition, exhibits, declarations, expert opinions, and stipulation of the State, the Court finds that Petitioner is a person with intellectual disability. As a result, his capital sentences in Case Nos. 87-04409 and 87-04410 must be vacated under the law.

The State maintains that the Court has no discretion and must sentence Mr. Payne to consecutive life sentences. Petitioner argues that Mr. Payne is entitled to concurrent life sentences. The Court will not resolve the issue of concurrent or consecutive sentencing at this time.

It is hereby ORDERED that the sentence of death in Case No. 87-04409 is VACATED. It is further ORDERED that the sentence of death in Case No. 87-04410 is VACATED. A sentencing hearing in this matter is scheduled for December 13, 2021.

SO ORDERED this 23 day of Nov, 2021.

Paula Skahan

Judge Paula Skahan