

IN THE SUPREME COURT OF MISSOURI

STATE EX REL)

ANDREW LYONS)

Petitioner)

v.)

Case # SC 88625)

LARRY CRAWFORD and)

JEREMIAH NIXON)

Respondents)

PETITION FOR WRIT OF MANDAMUS

PETITIONER'S BRIEF

FILED

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JURISDICTIONAL STATEMENT

In this case, in 1996, Petitioner Andrew Lyons, hereinafter referred to as “Mr. Lyons”, was tried by jury and convicted in connection with the September 1992 killings of Mr. Lyons’ estranged girlfriend, Bridgette Harris, Ms. Harris’ mother, Evelyn Sparks, and Mr. Lyons’ infant son, Dontay Harris. *State v. Lyons*, 951 S.W.2d 584, 588 (Mo.banc 1997). The jury recommended a sentence of death for the murder Bridgett Harris, and of seven years for the involuntary manslaughter of Dontay Harris, but could not agree upon punishment for the murder of Evelyn Sparks. *State v. Lyons*, supra. The Circuit Court ultimately imposed sentences of death against Mr. Lyons for the murder of Bridgette Harris and for the murder of Evelyn Sparks. *State v. Lyons*, supra. In 1997, on direct appeal, this Court affirmed those convictions and sentences. *State v. Lyons*, supra.

A Rule 29.15 Petition for post-conviction relief was brought in 1997 on behalf of Mr. Lyons in the Circuit Court of Missouri, Thirty-Third Judicial Circuit, under case number CV397-866CC. That Court denied relief upon that petition, and this Court affirmed that result in 2001 in *Lyons v. State*, 39 S.W.3d 32 (Mo.banc

2001).

In 2007, in keeping with its holding in *State v. Whitfield*, 107 S.W.3d 253, (Mo.banc 2003), and in light of the non-unanimous jury verdict with respect to the sentence of death imposed for the murder of Evelyn Sparks, this Court sustained Mr. Lyons' motion to recall the mandate, and resented Mr. Lyons to life imprisonment without release for that offense.

In 2007, pursuant to the holding of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 311-317 (2002), and the holding of this Court in *In re Competency of Parkus*, 219 S.W.3d 250 (Mo.banc 2007), Mr. Lyons brought a petition for writ of mandamus, alleging that the sentence of death imposed on him should be set aside because he is mentally retarded. In light of the fact that Mr. Lyons' direct and post-conviction challenges to his convictions and sentences predated *Atkins v. Virginia*, Mr. Lyons is entitled to so challenge his sentences of death, as violative of the principles set forth in *Atkins v. Virginia*, via the means of petition for writ of mandamus to this Court. *In re Competency of Parkus*, 254. Because this case involves a sentence of death, and mandamus regarding a decision of this Court, this Court has jurisdiction pursuant to Article V, Section 3 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

History of the Case

In 1996, under Scott County, Missouri case number CR395-7F, Petitioner Andrew Lyons was tried by jury and convicted in connection with the September 1992 killings of Mr. Lyons' estranged girlfriend, Bridgette Harris, Ms. Harris' mother, Evelyn Sparks, and Mr. Lyons' infant son, Dontay Harris. *State v. Lyons*, 951 S.W.2d 584, 588 (Mo.banc 1997). The jury recommended a sentence of death for the murder Bridgett Harris, and of seven years for the involuntary manslaughter of Dontay Harris, but could not agree upon punishment for the murder of Evelyn Sparks. *State v. Lyons*, supra. The Trial Court ultimately imposed sentences of death against Mr. Lyons for the murder of Bridgette Harris and for the murder of Evelyn Sparks, and a sentence of seven years for the manslaughter of Dontay Harris. *State v. Lyons*, supra. This Court affirmed those convictions and sentences in 1997. *State v. Lyons*, supra.

A little more than a year ago, in keeping with its holding in *State v. Whitfield*, 107 S.W.3d 253, (Mo.banc 2003), and in light of the non-unanimous jury verdict with respect to the sentence of death imposed for the murder of Evelyn Sparks, this Court sustained Mr. Lyons' motion to recall the mandate, and

resentenced Mr. Lyons to life imprisonment without release for that offense. Other petitions by Mr. Lyons for state and Federal post-conviction relief have been unsuccessful. *Lyons v. State*, 39 S.W.3d 32 (Mo.banc 2001); *State v. Lyons*, 129 S.W.3d 873 (Mo.banc 2004); *Lyons v. Luebbers*, 403 F.3d 585 (8th Cir. 2005).

In 2007, pursuant to the holding of this Court in *In re Competency of Parkus*, 219 S.W.3d 250 (Mo.banc 2007), Mr. Lyons brought a petition for writ of mandamus, alleging that the sentence of death imposed on him should be set aside because he is mentally retarded. On November 2, 2007, this Court appointed a Special Master, the Honorable Michael Burton, Circuit Judge, 21st Judicial Circuit, to take evidence and to make findings of fact and conclusions of law on the issue of whether Mr. Lyons is mentally retarded as defined in Section 565.030.6 RSMO, and to report that evidence, and those findings and conclusions, to this Court.

Summary of the Record made before the Special Master

On July 1 and 2, 2008, the parties appeared before the Special Master, and presented testimony and other evidence. Particularly, the Special Master received testimony from witnesses Beth Davis-Kerry, William Swift, David Lyons, Dr. Robert Fucetola, Ph.D., and Dr. Jeffrey Kline, Ph.D. A transcript of those proceedings has been prepared, and has been supplied to this Court by the Special Master.

The Special Master also received the following exhibits, all of which have also been supplied to this Court by the Master.

Exhibits for Petitioner

- 101 June 21, 2008 deposition of James Lyons (Mr. Lyons' brother)
- 102 August 30, 2007 letter from Cape Girardeau, Missouri School District regarding Andrew Lyons school records
- 103 June 23, 2002 report by Dr. John Wisner, M.D.
- 104 September 10, 2002 report by Dr. Warren Wheelock, Ed.D.
- 105 2002 report by Dr. Dennis Cowan, Ed.D.
- 106 1998 report by Dr. Dennis Cowan, Ed.D.
- 107 2007 report by Dr. Robert Fucetola, Ph.D.
- 108 Curriculum Vitae for Dr. Robert Fucetola, Ph.D.
- 109 Bell Curve demonstrative exhibit
- 110 Graph of IQ testing results
- 111 Excerpts from Diagnostic and Statistical Manual, Fourth Edition, providing definitions of mental retardation
- 112 Scales of Independent Behavior answer sheets for test given by Dr. Fucetola to Rose DePree (Mr. Lyons' sister)
- 113 Scales of Independent Behavior answer sheets for test given by Dr.

Fucetola to David Lyons (Mr. Lyons' brother)

114 Scales of Independent Behavior answer sheets for test given by Dr.

Fucetola to James Lyons (Mr. Lyons' brother)

115 Independent Living Scales answer sheets for test given by Dr. Fucetola
to Mr. Lyons

116 Excerpt from WAIS III technical manual providing information
regarding IQ score inflation

117 Firearm Transaction Record

Exhibits for Respondent

A. May 31, 1994 report by Dr. William Holcomb, Ph.D.

B. November 12, 1993 review of competency to stand trial by Dr. William
Holcomb, Ph.D.

C. November 8, 1993 report by Dr. William Holcomb, Ph.D.

D. November 23, 1992 competency evaluation report by Dr. Bruce Harry, M.D.

E. March 11, 1993 letter from Mark Schmitz, M.S.

F. December 12, 1994 report of Dr. Phillip Johnson, Ph.D.

G. Transcript of pretrial proceedings conducted February 23, 1995

H. September 20, 1992 Miranda waiver form

I. September 20, 1992 rights waiver form

- J. September 20, 1992 transcript of police interrogation of Andrew Lyons
- K. September 19, 1992 transcript of Andrew Lyons telephone phone call
- L. June 18, 1999 deposition of Dr. Dennis Cowan, Ph.D.
- M. April 23, 1999 deposition of Dr. Mark Altomari, Ph.D.
- N. April 23, 1999 deposition of Dr. Bruce Harry, M.D.
- O. April 23, 1999 deposition of Dr. William Holcomb, Ph.D.
- P. July 13, 1999 deposition of Dr. Alice Vleitstra, Ph.D.
- Q. May 4, 1999 deposition of Mary Carter (Mr. Lyons' sister)
- R. April 11, 1996 deposition of Mary Lyons (Mr. Lyons' mother)
- S. May 4, 1999 deposition of Rose DePree (Mr. Lyons' sister)
- T. 141 pages of records from Fulton State Hospital, prepared April 21, 1999,
containing reports regarding Mr. Lyons course of treatment during 1992
through and 1995
- U. May 4, 1999 deposition of Lilly Foster
- V. Item marked "Petitioner's Exhibit CT 18, consisting of miscellaneous letters,
reports, and Court orders
- W. Presentence Investigation Report filed September 13, 1996
- X. Item Marked "Deposition Exhibit 6" dated "4/23/99" consisting of
background information pertaining to Mr. Lyons

Y. August 11, 1999 affidavit of Richard L. Weiner, Ph.D. pertaining to jury selection issues

Z. 2002 Report by Dr. Dennis Cowan, Ed.D. (this item duplicates Petitioner's Exhibit)

AA. 1998 report of testing by Dr. Dennis Cowan, Ed.D.

BB. March 15, 1998 Report by Dr. Mark Altomari, Ph.D.

CC. 2007 Report by Dr. Robert Fucetola, Ph.D. (this item duplicates Petitioner's Exhibit)

DD. Curriculum Vitae of Dr. Bruce Harry, M.D.

EE. August 30, 2007 letter from Cape Girardeau, Missouri School District regarding Andrew Lyons school records (this item duplicates Petitioner's Exhibit 102)

FF. June 2, 2008 report by Dr. Jeffrey Kline, Ph.D.

GG. Trial Transcript for proceedings April 23-26, 1996

HH. Police Reports from the original homicide investigation

Finally, by agreement of the parties, the Special Master received the depositions of Dr. Bruce Harry, M.D. and Dr. William Holcomb, Ph.D. conducted on August 6, 2008. Those two items have also been provided to this Court by the Special Master.

Summary of the evidence presented on pertinent issues

1. General Information pertaining to Mr. Lyons prior to age 18

Mr. Lyons was born in the State of Mississippi on September 21, 1957 (Exhibit 101, p. 6; Exhibit 102, p. 3; Exhibit C, p. 1; Exhibit D, p. 1). Mr. Lyons is the son of James and Mary Lyons, has an older half-sibling Eugene, four older full siblings, Lillie, Mary, David, and James, and four younger half-siblings, Rose, Sola, Alice and Jerry (Exhibit GG, p. 925; Hearing Tr. 51). One of Mr. Lyons' older siblings, C.W., drowned at age 13 just prior to Mr. Lyons' birth (Exhibit U, p. 14; Hearing Tr. 55). Mr. Lyons' parents moved to southeast Missouri when Mr. Lyons' was a young child, and shortly thereafter, Mr. Lyons' father abandoned the family (Hearing Tr. 51-52; Exhibit 101, p. 7; Exhibit GG, p. 941). Because Mr. Lyons' mother was the sole provider for the family, working at low wage jobs such as sharecropping and housekeeping, the family was poor (Hearing Tr. 52; Exhibit 101, p. 7). Also, because Mr. Lyons' mother was the sole provider for the family, much of the childhood care for Mr. Lyons fell to his older siblings (Exhibit GG, p. 963; Hearing Tr. 53, 60).

Mr. Lyons was described by his mother and siblings as a sad child, crying "all the time", often inconsolably (Exhibit R, p. 10, 13-15; Hearing Tr. 58; Exhibit U, p. 15; Exhibit GG, p. 964). Mr. Lyons' sadness as an infant was attributed by

family members to Mr. Lyons taking on the sadness of his mother, who went into a deep depression over the drowning death of her son, C.W., which occurred during the latter stages of her pregnancy with Mr. Lyons (Exhibit R, p. 11-13; Exhibit U, p. 14-15; Hearing Tr. 58). Mr. Lyons' was also described by his mother and siblings as a shy child, with no friends other than family (Exhibit R, p. 25; Exhibit 101, p. 11-12; Hearing Tr. 67-68). Mr. Lyons seemed to his mother and siblings as different from, and slower than, other children (Exhibit R, p. 23; Exhibit 101, p. 11; Hearing Tr. 60-61, 67, 88-89). Particularly, Mr. Lyons was described by his older brothers as having difficulties reaching developmental milestones, and learning tasks such as riding a bicycle and driving a car, though Mr. Lyons did eventually learn to do both (Hearing Tr. 60-61, 88-89; Exhibit 101, p 13-14, 27-28, 58-59). Mr. Lyons' mother and siblings additionally described a suicide attempt by Mr. Lyons at age 12 (Exhibit R, p. 18-21; Exhibit Q, p. 12; Exhibit S, p. 8). Though the family believed Mr. Lyons had mental problems, Mr. Lyons received no psychiatric treatment as a child because of the lack of ability of the family to pay for such treatment (Exhibit 101, p. 7; Hearing Tr. 53-54).

As a child, Mr. Lyons would often break out in welts, and his mother would treat this condition by spreading corn meal on his skin (Exhibit R, p. 36-37). Mr. Lyons also suffered a broken leg as child, and his family arranged for treatment of

that for him (Exhibit R, p. 24; Exhibit 101, p. 49).

2. Information pertaining to Mr. Lyons' education

Only sparse records about Mr. Lyons' educational background are available (Exhibit 102).¹ The Cape Girardeau School District has provided 6 pages pertaining to the calendar years 1973, 1974, 1975 and 1976. Only the pages pertaining to the year 1973 contain any academic performance information, showing failing or incomplete grades in all subjects (Exhibit 102, p. 3), and standardized educational testing results from March of 1973, with a composite score in the fourth percentile (Exhibit 102, p. 2). The Cape Girardeau School District has also provided its explanation regarding its lack of records, the fact that it has a policy to destroy records after five years (Exhibit 102, p. 1).

Various of Mr. Lyons' family members, including his Mother, Mary Lyons (Exhibit R, p. 23), his brother David Lyons (Exhibit GG, p. 938-939; Hearing Tr. 65), his brother James Lyons (Exhibit 101, p. 15-17), his sister, Lillie Foster (Exhibit U, p. 16), and his sister Rose Depree (Exhibit S, p. 6)., confirmed that Mr. Lyons attended Cape Girardeau School District schools, and was in a special education classes. These family members also described Mr. Lyons regularly becoming upset, ill, and vomiting on his bus trips to school, requiring consistent

¹ As noted above, this exhibit is duplicated by Respondent's Exhibit EE.

packing of changes of clothing to deal with the regular vomiting episodes (Exhibit R, p. 21-22; Exhibit GG, p. 939-940; Hearing Tr. 66; Exhibit U, p. 16). Mr. Lyons' brothers also testified that Mr. Lyons was and is illiterate (Hearing Tr. 67; Exhibit 101, p. 16).

3. General information pertaining to Mr. Lyons during adulthood and prior to September 21, 1992

Mr. Lyons' family members generally described Mr. Lyons' as an adult as a "wanderer", with no life goals, who could not get his life together (Hearing Tr. 73; Exhibit 101, p. 28; Exhibit GG, p. 944, 972). Though he lived much of his adult life in Cape Girardeau, Mr. Lyons also lived for two periods of time with his father in Detroit, Michigan, and lived for periods of time with his brother David in St. Louis, with his brother James in Southern California, and with relatives in Chicago, Illinois (Exhibit GG, p. 945; Hearing Tr. 70-71, 73, 83-85, 93-94; Exhibit 101, p. 36). Mr. Lyons made these trips to other cities with the help of his mother, brothers, and other family members (Hearing Tr. 70-71, 85; Exhibit GG, p. 31). Mr. Lyons would each time return to Cape Girardeau, where he would live, much of the time, with his mother (Hearing Tr. 72, 73; Exhibit U, p. 21). Mr. Lyons also, at different times, lived in Cape Girardeau with Jenny Adams (nicknamed Tootie), with whom he fathered four children (Exhibit Q, p. 15; Exhibit R, p. 52, 54; Exhibit

S, p. 13), and then off and on, in the early 1990's, with Bridgette Harris, with whom he fathered Dontay Harris. (Exhibit U, p. 21; Exhibit GG, p. 412).

Mr. Lyons has worked in a variety of low-skill jobs, obtaining each job through the assistance of family members (Hearing Tr. 69). Mr. Lyons' first job was as a dishwasher at the Howard Johnson's restaurant in Cape Girardeau (Exhibit 101, p. 18-19; Exhibit GG, p. 599). Mr. Lyons' brother James worked at the restaurant, and secured the job for Mr. Lyons, and even filled out Mr. Lyons' application for him; Mr. Lyons worked there for about three years, and left the employment at the same time that James left (Exhibit 101, p. 18-19, 22). Mr. Lyons obtained a job in Detroit through intervention of a cousin (Hearing Tr. 71). Through intervention of another cousin, Mr. Lyons obtained a job in Chicago making pallets (Hearing Tr. 71). When Mr. Lyons was living in St. Louis with his brother David, David found a cleaning job for Mr. Lyons, and filled out the application for Mr. Lyons (Hearing Tr. 70). When Mr. Lyons was living in California with his brother James, James found a cleaning job for Mr. Lyons, and filled out the application for Mr. Lyons to secure the job (Exhibit 101, p. 25-26). Many of these jobs only lasted a matter of months, and Mr. Lyons was unemployed for extended periods of time (Hearing Tr. 97-98). At the time that the incident occurred which gave rise to the charges in this case, Mr. Lyons had been working

for Service Master in Cape Girardeau for the preceding three years cleaning buildings; this was a job which Mr. Lyons obtained through intervention of another cousin (Exhibit R, p. 72; Hearing Tr. 72). Mr. Lyons' supervisor during August and September of 1992, though having only once weekly contact with Mr. Lyons, praised Mr. Lyons as one of his best cleaners, who was very detail oriented, reliable, punctual and jovial (Exhibit GG, p. 658-660).

According to family members, Mr. Lyons' cleaning jobs came naturally to him; Mr. Lyons was described by family members as a person who was obsessed with cleaning, would be up all hours of the night cleaning, and would clean an area even after others had already cleaned (Hearing Tr. 62; Exhibit 101, p. 20-21; Exhibit Q, p. 18; Exhibit R, p. 28; Exhibit GG, p. 967-968). Family members also described how Mr. Lyons would regularly assist his family members with cleaning and household chores (Exhibit R, p. 28-29; Exhibit GG, p. 928; Exhibit 101, p. 26). Mr. Lyons' mother also touted her son's ability to keep his son Dontay bathed and clean (Exhibit R, p. 41).

Mr. Lyons was also described as able to cook for himself, even insisting on making his own food, though his cooking often consisted of no more than making baloney sandwiches (Hearing Tr. 63; Exhibit 101, p. 20-21; Exhibit R, p. 31, 44).

Family members also relayed that, during the months when Mr. Lyons'

father was dying cancer, Mr. Lyons stayed with him, and cooked and cleaned for him (Exhibit R, p. 31-32; Exhibit GG, p. 945; Hearing Tr. 84, 95).

Mr. Lyons owned and drove car and a truck (Exhibit HH, Vehicle Inventory Sheets).

As to contact with law enforcement prior to September 21, 1992, Mr. Lyons had only two municipal court convictions for driving without a license (Exhibit W, p. 2).

While Mr. Lyons had relations with three different women to the extent that he fathered many children, those relationships with those women were described as “rocky” and “off and on” (Exhibit Q, p. 15; Exhibit R, p. 52, 54; Exhibit S, p. 13; Exhibit U, p. 21; Exhibit GG, p. 880-886). Mr. Lyons was described as desiring to have custody of these children, but being unable to identify and take the necessary steps to obtain custody of the children (Exhibit R, p. 54-59; Exhibit GG, p. 758, 880-886, 932, 972).

Mr. Lyons has been described as living alone only once. This occurred after custody of the children, fathered by Mr. Lyons with Ms. Adams, had been taken away (Exhibit S, p. 14-15). In that instance, described by his sister Rose, Mr. Lyons was discovered by his family living by himself for several months in a vacant house owned by his brother Eugene, in which utilities had been turned off

(Exhibit S, p. 14-15; Exhibit GG, p. 898-899). According to Rose' report, Mr. Lyons behavior "got just totally strange" in that he would not leave that house, he stopped cleaning himself or his environment, and he acted as though he did not know family (Exhibit S, p. 14-15; Exhibit GG, p. 898-899). Other than that time, Mr. Lyons always lived with other people, who took care of things like paying the household bills, living with either his mother or a girlfriend while in Cape Girardeau, and living with relatives in Detroit, Chicago, St. Louis and California (Hearing Tr. 72; Exhibit 101, p. 25-26).

Mr. Lyons and his family members also described suicide attempts by Mr. Lyons during adulthood, some involving taking overdoses of pills, another involving an attempt to jump off a bridge, another involving a gun (Exhibit S, p. 8; Exhibit GG, p. 896-898, 958-959).

4. Facts of the underlying case

This Court has already made findings of fact with respect to the homicides. Rather than repeating those facts here, reference will be made to that account at *State v. Lyons*, 951 S.W.2d 584, 587-588 (Mo.banc 1997).

There are additional facts pertaining to the time before and after the homicides, not mentioned in this Court's account, which also bear noting.

The Mossburg shotgun used during the homicides was purchased by Mr.

Lyons on June 6, 1992, a little more than three months prior to the date on which the homicides occurred (Exhibit GG, p. 474). According to the salesperson, Mr. Lyons had originally purchased a different shotgun, but was dissatisfied with that one, and returned to the store and ultimately chose the Mossburg (Exhibit GG, p. 475). There was a firearm transaction record completed (Exhibit 117). The salesperson did not specifically describe how the form was filled out, instead indicating that his general practice was “(t)hey fill out the top part of it and I will get their driver’s license and identify who the person is buying the firearm, and then I will fill out the firearm purchase form and sign it the same time he signs it.” (Exhibit GG, p. 427). The sales person never explained how much of the form was encompassed by what he called “the top part of it” (Exhibit GG, p. 427).

When Bridgette moved away from Mr. Lyons, and home with her mother, Mr. Lyons moved back in with his mother (Exhibit R, p. 74-75). Mr. Lyons’ mother indicated that, in the days leading up to the homicides, Mr. Lyons could not sleep (Exhibit R, p. 75). At that same time, Mr. Lyons’ mother was preparing to leave for a trip to Mississippi, and tried unsuccessfully to arrange for someone to stay with Mr. Lyons while she was gone (Exhibit R, p. 74-75). The night before the homicides, Mr. Lyons called his sister Lillie, saying that his head hurt and that they, Bridgette and her family, would not leave him alone; Lillie indicated that, while she

tried to talk to Mr. Lyons about this, she did not go to her mother's house to stay with him (Exhibit GG, p. 973-974). That same evening, Mr. Lyons also called police, complaining about the problems he was having with Bridgette and her family (Exhibit K).

Less than a day after Mr. Lyons was arrested, he attempted suicide, and was transported to the Biggs unit at the Fulton State Hospital for evaluation (Exhibit D).

5. Pretrial mental health expert evaluations and testimony

In response to the Trial Court's order to evaluate Mr. Lyons' competence to proceed to trial, Department of Mental Health psychiatrist Dr. Bruce Harry, M.D. determined that Mr. Lyons was not competent to stand trial, diagnosing that Mr. Lyons then, and for all of his life, had the mental disease of severe major depression with psychotic features and dysthymia (Exhibit D, p. 1, 7-9; Harry Deposition, p. 9). Dr. Harry was very concerned that Mr. Lyons might commit suicide, and recommended that Mr. Lyons be hospitalized so as to protect him from himself and to treat his condition (Exhibit D, p. 9-10; Dr. Harry Deposition, p. 30-31). The Trial Court suspended the proceedings against Mr. Lyons, and committed him to the Department of Mental Health for treatment (Exhibit A, p. 1; Exhibit G, p. 89)

After Mr. Lyons had been hospitalized for about a year and a half, Department of Mental Health psychologist Dr. William Holcomb, Ph.D. re-

evaluated Mr. Lyons in May of 1994 (Exhibit A, p. 1). Dr. Holcomb found that while Mr. Lyons “continues to suffer from major depression”, he should be found “minimally competent” to proceed to trial, and recommended that the Trial Court find Mr. Lyons competent to proceed to trial, but order that Mr. Lyons remain hospitalized pending further legal proceedings (Exhibit A, p. 4-5).

In October of 1994, Dr. Phillip Johnson, Ph.D. evaluated Mr. Lyons on behalf of defense counsel (Exhibit GG, p. 908; Exhibit F, p. 1). Dr. Johnson reported a diagnosis like that of Dr. Harry and Dr. Holcomb, severe major depression with psychotic features and dysthymic disorder (Exhibit F, p. 12). Dr. Johnson, however, disagreed with Dr. Holcomb, and found that Mr. Lyons still lacked competence to proceed to trial (Exhibit F, p. 12-13). On February 23, 1995, the Trial Court heard testimony from Dr. Holcomb and Dr. Johnson, decided that Mr. Lyons was competent to proceed to trial, and ordered the proceedings resumed (Exhibit G).

During the trial penalty phase, Dr. Johnson again testified, this time as a mitigation specialist, chronicling Mr. Lyons’ life history (Exhibit GG, p. 855-901). Dr. Johnson also testified about Mr. Lyons’ diagnosis of major depression, and indicated that, while Mr. Lyons was “legally sane” at the time of the crimes, the condition diminished Mr. Lyons’ ability to think rationally and increased his anger

(Exhibit GG, p. 901-904).

6. Mental evaluations conducted during state post-conviction proceedings²

In state post-conviction proceedings, the claim was made that trial counsel were ineffective for not learning that the Doctors who treated Mr. Lyons at the State Hospital believed that, at the time of the offenses, Mr. Lyons suffered diminished capacity as a result of the mental illness of major depression, and was not capable of forming the specific intent of deliberation. *Lyons v. State*, 39 S.W.3d 32, 36 (Mo.banc 2001). Dr. Harry and Dr. Holcomb, as well as another of Mr. Lyons' treating psychologists at Fulton, Dr. Mark Altomari, Ph.D., were asked for, and ventured opinions to this effect (Exhibit N, p. 83, 87; Exhibit O, p. 60, 83, 87; Exhibit M, p. 53-54, 63, 68-70; Exhibit BB, p. 14).

Another claim raised in state post-conviction proceedings was that trial counsel were ineffective for not developing neuropsychological testing evidence so that such evidence could support expert psychological and medical opinions of

² Counsel for Respondents also provided to the Special Master Exhibit Y, the Affidavit of Dr. Richard Wiener, Ph.D., detailing research which Dr. Wiener conducted with respect to the penalty phase instructions used in Mr. Lyons' case. Respondents never indicate what bearing this information has on the issues before the Special Master or this Court.

diminished capacity. *Lyons v. State*, supra. Dr. Dennis Cowan, Ed.D. was the neuropsychologist who was enlisted to conduct this testing (Exhibit L, p. 6-7).³

Lyons v. State, supra. From the results of his neuropsychological testing, Dr. Cowan concluded that Mr. Lyons had frontal lobe brain damage, causing him mild to moderate functional impairment (Exhibit L, p. 20, 32-34, 56-57; Exhibit 106, p. 3-4, 5-6; Exhibit AA).

Yet another claim raised in state post-conviction proceedings was that trial counsel were ineffective for not developing and presenting findings by a child developmental expert regarding the adverse impact upon on Mr. Lyons own development caused by the multiple, untoward aspects of his environment. *Lyons v. State*, 40. Dr. Alice Vlietstra, Ph.D. was the child developmental expert who was called upon to venture opinions in these regards (Exhibit P, p. 5-8). Following an established list of factors deemed critical to successful childhood development, Dr. Vlietstra described how various stressors adversely impacted upon Mr. Lyons' development in these established factor areas, and how problems in childhood development impacted upon Mr. Lyons during his adult life (Exhibit P, p. 12-64).

7. Mental evaluations conducted in 2001 and 2002

³ It should be noted that Dr. Cowan has died, and therefore could not be called to witness at the hearing before the Special Master (Hearing Tr. 218).

In Mr. Lyons' Federal Habeas action, brought pursuant to 28 U.S.C. 2254, it was challenged that Mr. Lyons was forced to trial while mentally incompetent to proceed. *Lyons v. Luebbers*, 403 F.3d 585, 592 (8th Cir. 2005). The Eighth Circuit found that the claim could not surmount two limitations on relief imposed by 28 U.S.C. 2254. First, because the issue about incompetence to proceed to trial had not been raised in state courts upon direct appeal or upon state post-conviction proceedings, the Eighth Circuit found that the issue had been procedurally defaulted, and thus could not be considered under 28 U.S.C. 2254. *Lyons v. Luebbers*, 592-593.⁴ Second, the Eighth Circuit found that, per the limitations imposed by 28 U.S.C. 2254, the only evidence of Mr. Lyons incompetency which could be considered at the Federal Habeas stage of the case was the evidence which

⁴ This Court found that the issue about Mr. Lyons' competence at time of trial was defaulted under State law as well, because the issue had not been raised on direct appeal, because post-conviction counsel had not challenged as ineffective assistance the failure of direct appeal counsel to raise the competence-at-trial issue, because ineffective assistance of post-conviction counsel is not a reviewable claim, and because the Court's *nunc pro tunc* power did not extend to reopening of post-conviction proceedings for the purpose of reviving the defaulted incompetency issue. *State v. Lyons*, 129 S.W.3d 873, 874 (Mo.banc 2004).

was actually presented to the Trial Court; the Eighth Circuit further found that, taking into account only the evidence presented to the Trial Court, and in light of the requirement of 28 U.S.C. 2254 that the Trial Court's determination be presumed correct, the evidence presented to the Trial Court did not undermine that presumption of correctness, and thus the finding of competence by the Trial Court could not be overturned by a Federal Habeas Court. *Lyons v. Luebbers*, 593-594.

Part of the information presented to, but not considered by, the Federal Courts was the opinion of Dr. John Wisner, M.D., a Board Certified Psychiatrist and Professor of Psychiatry at the University of Kansas Medical Center, who conducted an evaluation of Mr. Lyons beginning in 2001, culminating in the writing of a report in 2002 (Exhibit 103, p. 1, 9). Dr. Wisner diagnosed Mr. Lyons as suffering from Major Depression, recurrent and chronic, with psychosis, and mild to moderate intellectual impairment (Exhibit 103, p. 5). Dr. Wisner found that, as a result of Mr. Lyons' mental illnesses, at the time of Mr. Lyons trial, and through the time of Mr. Lyons' appellate and post-conviction proceedings, Mr. Lyons was not competent to understand the proceedings against him or assist in his defense (Exhibit 103, p. 7). Dr. Wisner further opined that the medications which were administered to Mr. Lyons during these times, while dealing with Mr. Lyons' suicidal tendencies, actually made his incompetency worse, decreasing Mr. Lyons'

understanding of the proceedings against him and decreasing Mr. Lyons ability to assist with his defense (Exhibit 103, p. 7). Dr. Wisner also made recommendations about changes in Mr. Lyons' medication regime (Exhibit 103, p. 8-9).

Dr. Dennis Cowan, Ed.D. also conducted a re-evaluation of Mr. Lyons in 2002, this time specifically looking at the issue of Mr. Lyons' competence to proceed to trial (Exhibit 105, p. 1). Dr. Cowan met again with Mr. Lyons and administered a series of tests (Exhibit 105, p. 6-23). Dr. Cowan compared the results on the tests completed in 1998 with the results on the tests completed in 2002, and found his conclusions about brain damage, particularly to the frontal lobe, with mild to moderate impairment, to be supported by both groups of tests (Exhibit 105, p. 23-24, 26-27). Dr. Cowan found that Mr. Lyons was suffering from mild mental retardation, and at the times of his trial and through the time of the 2002 evaluation lacked the capacity to understand the proceedings against him and assist in his defense (Exhibit 105, p. 30). Dr. Cowan found that Mr. Lyons' impairments/dysfunction were longstanding (Exhibit 105, p. 31).

8. Educational Testing by Dr. Warren Wheelock, Ed.D.

In September of 2002, Dr. Warren Wheelock, Ed.D. conducted testing and evaluation to assess Mr. Lyons' literacy (Exhibit 104, p. 1). From his testing, Dr. Wheelock found that Mr. Lyons is "functionally illiterate", with reading ability "on

a first grade level”, with comprehension of material read to him “on a fourth grade level”, with general vocabulary knowledge “in the extremely low range of intellectual capacity”, and with “an associative learning disability” causing an inability to associate sounds with symbols (Exhibit 104, p. 3-4). Dr. Wheelock concluded that these testing results were consistent with Mr. Lyons being mildly mentally retarded (Exhibit 104, p. 4).

9. IQ testing results

In 1992, as a part of the Department of Mental Health evaluation of Mr. Lyons’ competence to stand trial, Mr. Lyons’ IQ was tested using the WAIS-R, and Mr. Lyons scored a full scale IQ of 84 (Exhibit D, p. 6; Dr. Harry Deposition, p. 18). The psychometrist who conducted the test observed, during administration of the test, that Mr. Lyons twice requested to discontinue testing, leading the psychometrist to speculate that Mr. Lyons’ IQ score might underrepresent his true IQ (Exhibit D, p. 6; Dr. Harry Deposition, p. 23-27). However, Mr. Lyons did complete this test, and gave no indications of malingering in the taking of the tests which were administered (Exhibit D, p. 6; Dr. Harry Deposition, p. 23-27).

In 1994, as part of his evaluation, Dr. Phillip Johnson, Ph.D., the defense-retained expert, administered to Mr. Lyons the Shipley Institute of Living Scales test (Exhibit F, p. 12; Exhibit GG, p. 867-868). The Shipley Institute of Living

Scales test is not an IQ test, but rather is a screening test, used to estimate IQ (Hearing Tr. 327). On that test, Dr. Johnson obtained two different estimated IQ scores, a WAIS estimated IQ of 79 and a WAIS-R estimated IQ of 64 (Exhibit F, p. 12; Exhibit GG, p. 868). Dr. Johnson indicated that Mr. Lyons “was not a terribly bright individual” (Exhibit GG, p. 869). Dr. Johnson posited that, while Mr. Lyons tried as hard as he could on the tests, he “probably wasn’t scoring as well as he could” owing to his depression (Exhibit GG, p. 869). Dr. Johnson opined that depression can have an impact upon IQ test performance (Exhibit GG, p. 869). Dr. Johnson ventured that “a more accurate estimated score (without depression) would fall in the low average to average range, i.e., 85 to 100” (Exhibit F, p. 12).

In 1998, during state postconviction proceedings, Dr. Dennis Cowan, Ed.D. also administered IQ testing to Mr. Lyons, particularly the WAIS-R, and Mr. Lyons then scored a full scale IQ of 81 (Exhibit L, p. 27-28; Exhibit 106, p. 4). Four years later, in 2002, Dr. Cowan administered to Mr. Lyons a different IQ test, the WAIS-III, and on that test, Mr. Lyons scored a full scale IQ of 67 (Exhibit 105, p. 11).

In 2007, Dr. Robert Fucetola, Ph.D. administered the WAIS-III, and Mr. Lyons scored a full scale IQ of 61 (Hearing Tr. 138-139).

10. Evaluation of Dr. Robert Fucetola, Ph.D.

Dr. Robert Fucetola, Ph.D., the expert for Mr. Lyons on the question of

mental retardation, is a licensed psychologist, Board Certified in clinical neuropsychology, who is an Associate Professor of psychology at Washington University, and is on the clinical staff of Barnes Jewish Hospital (Hearing Tr. 100, 102). Dr. Fucetola explained that his evaluation consisted of interviewing and testing of Mr. Lyons, interviewing and testing of three of Mr. Lyons' siblings, David, James and Rose, and review of records, including all of the items received by the Special Master at the time of hearing, as well as all of the medical records pertaining to Mr. Lyons from the Fulton State Hospital and the Potosi Correctional Center, and all raw data from previous testings of Mr. Lyons (Hearing Tr. 107-109; Exhibit 107, p. 1-2).

Answering the ultimate question put to him, Dr. Fucetola concluded, to a reasonable degree of scientific certainty, that Mr. Lyons suffers from mild mental retardation, and has for all of his life (Hearing Tr. 138). Dr. Fucetola also noted the consensus of all experts who have evaluated Mr. Lyons since his arrest in 1992, including those treating him currently at Potosi Correctional Center, that Mr. Lyons suffers as well from lifelong major depression with psychotic features (Hearing Tr. 110, 112). Dr. Fucetola indicated that he too concurs with that additional diagnosis (Hearing Tr. 114).

Dr. Fucetola explained that the psychological definition of mental retardation

which he used, from the Diagnostic and Statistical Manual (hereinafter referred to as “DSM-IV”), corresponds to the legal definition of mental retardation contained in Section 565.030.6 RSMO, both requiring deficits in real world adaptive functioning coupled with intellectual disabilities, with these disabilities being present from early in life (Hearing Tr. 115-116, 125-126, 129; Exhibit 111). Dr. Fucetola explained that, while major leaders in the field are urging de-emphasis of the IQ criteria for mental retardation in favor of more emphasis on adaptive functioning deficits, and while trends are in that direction, the current consensus of the experts is to assess mental retardation by equally weighing IQ and adaptive functioning factors (Hearing Tr. 125-126, 129; Exhibit 111).

Dr. Fucetola further noted that, while Section 565.030.6 RSMO does not establish an IQ score cutoff for finding of mental retardation, and while the notion of having an IQ cutoff for mental retardation is fading, the DSM-IV does have such a cutoff, permitting mental retardation to be diagnosed for IQ scores up to 75 (Hearing Tr. 122, 129, 130-131, 335-336; Exhibit 111). Dr. Fucetola also explained that the DSM-IV subdivides mental retardation into subcategories of mild, moderate, severe and profound based upon IQ scores (Hearing Tr. 116). The mild mental retardation category includes those with scores of 75 down to 50 (Hearing Tr. 116; Exhibit 111, p. 2). Dr. Fucetola said that, outside of an academic

setting, it is very hard to distinguish one with mild mental retardation from one who is normal, since two out of three of those with mild mental retardation work, though usually in unskilled labor, they marry, they have children, and they generally function below level of visible (Hearing Tr. 117). Dr. Fucetola said that those with mild mental retardation show up because they are more isolated, and require significant amounts of support from families (Hearing Tr. 118). Dr. Fucetola further explained that those with moderate mental retardation function at the level of second grader, while those with severe and profound mental retardation almost always require institutionalization (Hearing Tr. 118-119; Exhibit 111, p. 3).

Dr. Fucetola said that the proper professional approach to diagnosis regarding mental retardation, and the approach which he took, is to test the person for IQ and for adaptive skills, and to search available records for information relevant to the inquiry (Hearing Tr. 119).

Dr. Fucetola noted that, for children today, answering the question about onset prior to age 18 would be much simpler because one would expect to find childhood IQ testing scores, not only in school records, but also in the records of medical and psychological professionals (Hearing Tr. 132). On the other hand, the academic history records pertaining to Mr. Lyons were sparse (Hearing Tr. 131), and because of the impoverishment of Mr. Lyons' family, there had been no

tracking of Mr. Lyons condition by the medical community (Hearing Tr. 134-135).

Dr. Fucetola indicated that such circumstances are not unusual, and the procedure in such situations is to conduct testing contemporary to the evaluation, to examine what records from childhood exist, to look to collateral sources, primarily family members who observed the person during earlier phases of life, and to then determine if the historical information which exists, and the anecdotal information from family, fit with the results of the current testing (Hearing Tr. 134-136).

Dr. Fucetola reported that he administered the WAIS-III IQ test to Mr. Lyons as part of a battery of tests, and that on the WAIS-III Mr. Lyons received a full scale score of 61, putting him firmly into the mental retardation range (Hearing Tr. 138-139). Dr. Fucetola noted certain deficits in Mr. Lyons which showed up in particular parts of other test results, with tests of attention in the severely impaired range (Hearing Tr. 140), with problems in reciting numbers and months backward (Hearing Tr. 140-142), with executive functions testing showing mild to moderate impairment (Hearing Tr. 144), with verbal abilities scores being very low (Hearing Tr. 146-147), with visiospatial abilities in the mild to moderate impairment range (Hearing Tr. 150-151), with short term memory showing impairment (151-152), and with academic functioning being assessed in the first to third grade range (Hearing Tr. 152-153). Dr. Fucetola indicated that, in assessing Mr. Lyons' IQ and

other testing scores, he took into account Mr. Lyons' impoverished upbringing and his incarceration since 1992 (Hearing Tr. 148-149). Dr. Fucetola also indicated that he concluded that Mr. Lyons did not malingering in the taking of the testing since Mr. Lyons was given three separate symptom validity tests, and the results on all of those tests were in valid range (Hearing Tr. 158-159),

Dr. Fucetola indicated that the existing school records, with failing and incomplete grades, and very low achievement scores, are consistent with the IQ testing which he performed and with the diagnosis of mental retardation (Hearing Tr. 131, 153-154, 350; Exhibit 102). Dr. Fucetola also indicated that the accounts of family members about Mr. Lyons being in special education classes throughout his schooling, and about Mr. Lyons being illiterate, were also consistent with Mr. Lyons' low IQ score and the diagnosis of mental retardation (Hearing Tr. 154, 187). Dr. Fucetola found independent confirmation for the conclusion about Mr. Lyons' illiteracy in the educational testing, and findings about illiteracy, by Dr. Warren Wheelock, Ed.D. (Hearing Tr. 156-157; Exhibit 104).

Dr. Fucetola noted that IQ testing done in 2002 by Dr. Dennis Cowan yielded a score of 67 which, like the score of 61 which Dr. Fucetola obtained, was well within the mentally retarded range (Hearing Tr. 217-218). Dr. Fucetola also acknowledged that there had been earlier, valid IQ tests given to Mr. Lyons, in

1992 by the Department of Mental Health, and in 1998 by Dr. Cowan, on which scores of 84 and 81 respectively had been reported (Hearing Tr. 196-197, 217). However, Dr. Fucetola indicated that he did not believe that these scores in 1992 and 1998 undercut his diagnosis of mental retardation (Hearing Tr. 196).

Dr. Fucetola noted that the 1992 IQ score of 84 is already a low score, though not as low as the score of 75 suggested as a cutoff for mental retardation in the DSM-IV (Hearing Tr. 212). Dr. Fucetola also explained that generally, though a person cannot volitionally get a higher IQ score than he is capable, scores can sometimes come out higher than they should be (Hearing Tr. 324). As concerned the 1992 IQ score, Dr. Fucetola explained that there were two reasons to think that, though the test score of 84 was a valid one, that score did not accurately reflect Mr. Lyons' capabilities (Hearing Tr. 315-317, 351-354).

The first reason was the coincidence that the 1992 test was conducted in October, about a month after Mr. Lyons turned 35 (Hearing Tr. 197). This caused Mr. Lyons to receive an IQ score correction for age which he would not have received had the test been administered just a month earlier (Hearing Tr. 198). Had Mr. Lyons taken the test just a month earlier and answered similarly, he would not have received the age correction, and his score would have been 78 instead of 84 (Hearing Tr. 198).

The second reason involved the phenomenon referred to as “IQ score inflation”, also called the “Flynn effect” (so named for one of the scientists who has studied the phenomenon) (Hearing Tr. 200, 202). Dr. Fucetola explained that, in studies dating back to the 1970’s, scientists, including Flynn, have found that overall IQ scores increase at a rate of 0.3 points per year, (Hearing Tr. 203). However, even though the test makers themselves recognize the existence of the Flynn effect, this inflation is not accounted when an IQ score is reported after testing, requiring a correction to be done to account for the IQ inflation over the time since the normative data was created (Hearing Tr. 202-203; Exhibit 116). If the Flynn effect correction is applied to the 1992, non-age-corrected score of 78, the score becomes 74.7, within the score range for mental retardation in the DSM-IV (Hearing Tr. 202).

Dr. Fucetola acknowledged that the IQ test makers, while recognizing the existence of IQ score inflation, do not specifically set up a protocol for correcting for the Flynn effect, and therefore are at least neutral on the subject of whether such a correction should be made (Hearing Tr. 379; Exhibit 116). Dr. Fucetola explained that the Flynn effect correction must be made lest IQ test results become warped over the years, and therefore not an accurate indication of a person’s true potential (Hearing Tr. 380). Dr. Fucetola also acknowledged that he is aware of,

and has spoken to, one scientist who, while conceding the existence IQ inflation, has questioned whether it is common practice to correct IQ scores to reflect that inflation (Hearing Tr. 207-208). Dr. Fucetola reported that the article in this regard has not yet been published, and the scientist has refused to provide a copy of the article, and thus the article cannot yet be scrutinized for its own validity (Hearing Tr. 207-208). For his part, Dr. Fucetola indicated that the existence of and correction for the Flynn effect enjoys general acceptance in the scientific community, and has even been recognized in previous court cases (Hearing Tr. 207-208, 345-346, 381).

Dr. Fucetola also noted that the psychometrist who conducted the 1992 testing made notes in the test booklet that Mr. Lyons had twice asked to discontinue the testing, and that therefore the test results might underestimate Mr. Lyons' true ability (Hearing Tr. 212; Exhibit D, p. 6). Dr. Fucetola said he found no scientifically valid reason to think the 1992 test underestimated Mr. Lyons' IQ because Mr. Lyons finished the test when urged to do so, earned points on the test after the juncture at which he wanted to discontinue, and was found by the supervising doctors to have not malingered in his test taking (Hearing Tr. 213-215; Exhibit D, p. 6).

As concerned the 1998 IQ testing for which there was an IQ score of 81,

there were two reasons why Dr. Fucetola did not consider that test result inconsistent with his finding of mental retardation. First, when the Flynn correction was applied, the score came down to 75.9, within 0.9 points of the mental retardation cutoff (Hearing Tr. 218). In addition, Dr. Fucetola indicated, there needed to be taken into account that, in 1998, Dr. Cowan used the WAIS-R, whereas, when Dr. Cowan tested in 2002, and obtained the score of 67, he used the newer, WAIS-III, the same test used by Dr. Fucetola in his 2007 testing (Hearing Tr. 354-355). Dr. Fucetola noted that, when the new WAIS-III test was created, some of the WAIS-R subtests were removed because those subtests were found to not correlate with intelligence (Hearing Tr. 355). As it turned out, one of the WAIS-R subtests which was removed from the WAIS-III as not truly indicative of intelligence was the subtest on which Mr. Lyons received his best score in the 1998 testing (Hearing Tr. 331, 355). On the other hand, all of the scores on subtests common to the 1998 and 2002 tests were very similar, and low (Hearing Tr. 330).

Dr. Fucetola rejected the notion that the 1992 or 1998 test results should be given more significance because they were earlier in time, and therefore closer to the time that Mr. Lyons was age 18, noting that, according to the scientific literature, all tests administered in adulthood would be expected to have equal validity (Hearing Tr. 209-210). Moreover, it would be scientifically invalid to

concentrate on the 1992 and 1998 scores, and not take into account 2002 and 2007 scores, especially when even the 1992 and 1998 scores are in the subaverage range; rather, it was more appropriate to Flynn correct, and average the scores, and that average is 67, within the mentally retarded range (Hearing Tr. 219-221, 223; Exhibit 110).

Dr. Fucetola also rejected any concerns that the 2002 and 2007 test scores were lower because Mr. Lyons may have malingered, pointing out that such concerns were rebutted by the results of validity tests which were conducted, and by Mr. Lyons good scores on certain of the subtests (Hearing Tr. 217, 225-226). Dr. Fucetola also highlighted the fact that, in general, Mr. Lyons did not try to overstate his problems, but to the contrary tried regularly to underestimate them, tending to paint a picture of himself as being more capable than he is (Hearing Tr. 226-228).

Dr. Fucetola also noted that, while Dr. Cowan, in his 2002 report, had diagnosed mental retardation, Dr. Cowan had also raised the possibility that dementia might explain Mr. Lyons' lower 2002 IQ scores (Hearing Tr. 224). Dr. Fucetola indicated that now, with the passage of time, dementia can be ruled out for two reasons: first, Mr. Lyons' medical records from Potosi Correctional Center do not indicate the presence of the condition, and second, the sorts of conditions which could have accounted for dementia in 2002, when Dr. Cowan did his testing, would

have, five to six years later, rendered Mr. Lyons either non-communicative or dead, and neither of those things happened (Hearing Tr. 224-225, 330).

Dr. Fucetola also ruled out there having been any other medical condition accounting for Mr. Lyons 2002 and 2007 IQ scores, indicating that in his review of the Potosi Correctional Center Medical records, he found no condition reported which would explain such a thing (Hearing Tr.222-223, 358-359).

Dr. Fucetola also addressed that, while depression, like that suffered by Mr. Lyons, can sometimes impact upon certain IQ subtests, he found no such subtest score suppression in Mr. Lyons' test scores; Dr. Fucetola also noted that IQ test scores, as a whole, are resilient against the effects of depression (Hearing Tr. 242, 326-327). Dr. Fucetola further noted that it would be logically and scientifically impossible to argue that depression had selectively lowered the test scores in 2002 and 2007 when Mr. Lyons had been suffering from that affliction all of his life, and certainly during the times of all testing, not only 2002 and 2007, but also 1992 and 1998 (Hearing Tr. 243).

Finally, Dr. Fucetola considered the question of whether Mr. Lyons' lower test scores could be explained by a learning disability (Hearing Tr. 240). Dr. Fucetola explained that, in Mr. Lyons' case, use of the term "learning disability", as an alternative to, rather than a part of, mental retardation was inapt (Hearing Tr.

240-241). A “learning disability”, by definition, would cause performance below IQ only on certain subtests, whereas, with Mr. Lyons, his lowered subtests were consistent with his low IQ, and with other subtests (Hearing Tr. 240-241).

Dr. Fucetola also addressed the testing conducted in 1994 by Dr. Phillip Johnson, Ph.D., and Dr. Johnson’s conclusion that Mr. Lyons’ IQ should have been estimated to be in the low normal range, 85 to 100 (Hearing Tr. 371-374; Exhibit F, p. 12). Dr. Fucetola indicated that Dr. Johnson’s suggestion is wrong for several reasons. First, as Dr. Johnson himself admitted, he did not give Mr. Lyons an IQ test, but rather administered a quick test giving IQ estimates only (Hearing Tr. 371-372; Exhibit GG, p. 867-868). Moreover, Dr. Johnson’s own estimate for the WAIS-R was 64, in the mentally retarded range, and contrary to Dr. Johnson’s speculation (Hearing Tr. 371-372). Finally, the part of Dr. Johnson’s test upon which he apparently relied, the part that yielded an estimated IQ of 79, was for the older WAIS test, which was normed in the 1950’s; had Dr. Johnson’s estimate on the WAIS proved correct on full testing, the Flynn correction for that test, accounting for the norming of the test in the 1950’s, would have yielded a corrected score near the 64 level on the estimated WAIS-R, and within the mentally retarded range (Hearing Tr. 373-374).

Dr. Fucetola indicated that, as a part of his assessment of Mr. Lyons adaptive

functioning, he administered to Mr. Lyons the Independent Living Skills (hereinafter referred to as “ILS”) standardized test (Hearing Tr. 160), and administered to Mr. Lyons’ sister Rose and his brothers David and James the Scales of Independent Behavior (hereinafter referred to as “SIB-R”) standardized test (Hearing Tr. 169). Dr. Fucetola explained that he followed standard protocol in his giving of the ILS to Mr. Lyons, and the SIB-R to Rose, and that therefore the standardized, percentile scores generated by comparison of those raw scores to norms were valid for those tests (Hearing Tr. 160, 170). Dr. Fucetola indicated that, for the SIB-R tests administered to David and James, he varied the protocol, and asked for retrospective impressions of Mr. Lyons’ capabilities as a child (Hearing Tr. 170-171). Dr. Fucetola noted the complaints made by Dr. Kline, Respondents’ expert, about his use of this retrospective procedure in the tests given to David and James (Hearing Tr. 244-247). Dr. Fucetola explained that it was certainly correct that, since the normative data for the SIB-R test was generated for the test-taker giving current rather than retrospective impressions, the retrospective SIB-R tests given to David and James could not be used for generating percentile scores, and thus he did not use the tests for that purpose (Hearing Tr. 171, 244-247). Dr. Fucetola said that he did use the tests for an important, approved purpose, as a means to gather information about Mr. Lyons’ childhood behavior from his

brothers (Hearing Tr. 171; 244-247).

Dr. Fucetola further explained that the raw data generated by the answers on all four tests, the ILS given to Mr. Lyons and the SIB-R given to Rose, David and James, provided good information about Mr. Lyons' capabilities and incapacabilities for consideration by professionals and lay persons alike, and that a Court could itself simply review those answers and get very important impressions for itself about Mr. Lyons (Hearing Tr. 365-367). Dr. Fucetola specifically indicated that this would be an authorized use of that data (Hearing Tr. 367). A copy of the test booklet from each of these tests was identified by Dr. Fucetola, and was received into evidence before the Special Master, particularly Exhibit 112, the test booklet for Rose DePree's answers on SIB-R test, Exhibit 113, the test booklet for answers from David Lyons on the SIB-R test, Exhibit 114 the test booklet for answers from James Lyons on the SIB-R test, and Exhibit 115 the test booklet for answers from Andrew Lyons on the ILS test (Hearing Tr. 363-365).

Dr. Fucetola indicated that, on the ILS, Mr. Lyons' standardized score was in the first percentile (Hearing Tr. 161). The test consisted of 70 questions, covering areas of memory and orientation, money, home and transportation management, health and safety and social adjustment (Exhibit 115, p. 2). Dr. Fucetola highlighted certain of the tasks which posed particular problems for Mr. Lyons, for

instance addressing an envelope, dialing a phone, and reading a map (Hearing Tr. 164; Exhibit 115, p. 5). Dr. Fucetola also noted other problem responses by Mr. Lyons, showing his inabilities in home and money management, and particularly Mr. Lyons' acknowledged need for family support to manage his money, to pay bills, and to handle his other affairs (Hearing Tr. 289-291; Exhibit 115, p. 3-4). Dr. Fucetola said that, in the giving of this test to Mr. Lyons, he needed to account for Mr. Lyons' impoverished background, educational failures and lengthy incarceration as possible reasons for difficulty with particular test items (Hearing Tr. 161-162). Dr. Fucetola indicated that even taking such things into account, Mr. Lyons' problems, evidenced by test results, could not be explained by impoverished social background or lack of educational attainment, but instead demonstrated problems with complex, real-world tasks (Hearing Tr. 162).

Dr. Fucetola explained that, in administering the SIB-R to Rose, he inquired of Rose about Mr. Lyons' functioning as an adult, prior to arrest (Hearing Tr. 172). Dr. Fucetola said that questions concerned everyday adaptive functioning like personal care, toileting, dressing, toileting, communication, home management, money management, and motor skills (Hearing Tr. 172). On the test, Rose reported that while Mr. Lyons possessed basic abilities such as saying hello, shaking hands at introduction, and asking to pass food at table, Mr. Lyons had problems with

somewhat more complex tasks such as looking up a phone number, and dialing phone number (Hearing Tr. 174; Exhibit 113, p. 6). Rose indicated that she would have to find phone numbers for Mr. Lyons, and that Mr. Lyons could not find information for himself (Hearing Tr. 174; Exhibit 113, p. 6, 15, 17). While Rose rated as good Mr. Lyons' basic grooming skills, she rated very low Mr. Lyons' performance of adaptive tasks, money related tasks, and tasks requiring reading and writing (Hearing Tr. 175-176; Exhibit 113, p. 7-11). Rose specifically described Mr. Lyons' inability to independently seek and find employment, always having "kin" getting jobs for him (Hearing Tr. 176; Exhibit 113, p. 16).

Dr. Fucetola said that, in David's answers, Mr. Lyons was described as having childhood developmental delays in physical tasks like tying shoes and riding a bicycle (Hearing Tr. 182-183; Exhibit 113, p. 3). Dr. Fucetola mentioned that, in the responses of all three siblings, there was a common theme about Mr. Lyons as a child and as an adult, that while in some respects Mr. Lyons' performance in certain aspects of life was good, it was not independent functioning, because Mr. Lyons was dependent on family support in order to reach his level of performance (Hearing Tr. 178). Thus, while Mr. Lyons, for instance, could do basic grooming, he did not know how to take temperature for a fever, did not know how to check in with a doctor, could not read, could not find locations with a map, could not money

manage, and could not obtain knowledge for dealing with the world, and needed help from family to successfully complete any such tasks (Hearing Tr. 179-180; Exhibit 112, p. 12, 15, 17; Exhibit 113, p. 3; Exhibit 114, p. 3). Family members, said Dr. Fucetola, also described in Mr. Lyons as having a high level of gullibility, being easily tricked and manipulated (Hearing Tr. 181).

Dr. Fucetola said that he checked the validity of the answers he received from Rose, David and James by comparing their answer to answers given by family members in prior proceedings, and found nothing inconsistent; rather, for the most part, the kinds of issues about which Dr. Fucetola questioned had not been raised in the questions posed to family members in prior proceedings (Hearing Tr. 184-186). Dr. Fucetola said that, in looking at the record made at Mr. Lyons' trial, he found that questions about Mr. Lyons' functioning, of the sort which needed to be asked to gain information about retardation, had never been asked (Hearing Tr. 168). Dr. Fucetola specifically noted, and took issue with, the assertion made by Dr. Kline in his report that there was inconsistency between trial and hearing descriptions of Andrew by siblings (Hearing Tr. 247). Dr. Fucetola indicated that Dr. Kline was making an apples to oranges comparison, since different questions were posed in earlier testimony from those which Dr. Fucetola asked, related to mental retardation issues (Hearing Tr. 247). Dr. Fucetola also indicated that he took care to interview

the siblings separately, but found that, despite the separate interviews, there was still a common thread in the accounts of all three siblings about Mr. Lyons' abilities in some areas and disabilities in other areas (Hearing Tr. 247-248). Dr. Fucetola said that the siblings could be considered particularly good historians in this case because they had to be caretakers of Mr. Lyons in light of the poverty of family and the mother's needing to work to support the family (Hearing Tr. 167).

Taking all of the information he gathered, Dr. Fucetola indicated that he found in Mr. Lyons continual and extensive deficits related to mental retardation in most of the adaptive behaviors enumerated under the statute (Hearing Tr. 187-188). Dr. Fucetola also noted, generally, that the key was whether Mr. Lyons could independently function in these various areas, and that Mr. Lyons' need for significant support in many of these areas demonstrated his significant functioning deficits (Hearing Tr. 187-188).

Dr. Fucetola found such deficits in communication, supporting his position by first noting that, because of his illiteracy, Mr. Lyons cannot communicate or receive communication in writing (Hearing Tr. 187). Dr. Fucetola further supported his position by noting Mr. Lyons' deficits in verbal communication (Hearing Tr. 187-188). Dr. Fucetola observed that, while Mr. Lyons can verbally communicate on a simple level, stringing sentences together, and following simple, verbal

directions, he cannot verbally communicate on a higher level in which multiple issues are needing to be addressed at once, and therefore he cannot engage in discourse, and he cannot advocate for himself (Hearing Tr. 187-188).

Dr. Fucetola did find some, but not as significant, deficits in the area of self-care; Dr. Fucetola noted that, by and large that Mr. Lyons was, with some exceptions, such as not independently accessing medical care, fairly independent in this aspect of functioning (Hearing Tr. 188).

In the area of home living, Dr. Fucetola found significant deficits (Hearing Tr. 189). Dr. Fucetola acknowledged that Mr. Lyons could do certain home living tasks for himself, like preparing his own food and cleaning (Hearing Tr. 189). However, Dr. Fucetola noted that even Mr. Lyons' greatest strength, his ability to clean, was problematic, in that it was obsessive, and got in the way of his doing other, necessary activities (Hearing Tr. 189). Moreover, as Mr. Lyons himself acknowledged, and as his siblings confirmed, Mr. Lyons was incapable of handling the money management aspects of home living, like paying the bills (Hearing Tr. 189; Exhibit 115, p. 4; Exhibit 112, p. 15). Also, the ILS testing showed Mr. Lyons' inability to address and solve the normal sorts of problems which could be expected to arise in a home (Hearing Tr. 189; Exhibit 115, p.4).

In the area of social skills, Dr. Fucetola found problems, though he

acknowledged they were not as great as in other areas (Hearing Tr. 190). Dr. Fucetola noted that Mr. Lyons was capable of basic human interactions (Hearing Tr. 190). However, Dr. Fucetola noted, Mr. Lyons' incapacabilities showed up in more complex interactions, and were most obvious in his failures in male/female relationships (Hearing Tr. 190).

In the area of community use, Dr. Fucetola believed there were profound deficits (Hearing Tr. 191). Dr. Fucetola noted Mr. Lyons' very poor performance in this category on the ILS testing, demonstrating his inability, even with help and coaching on the answers given by Dr. Fucetola (Hearing Tr. 191). On this subject, Dr. Fucetola acknowledged that there were indications in the record about Mr. Lyons owning automobiles; however, Dr. Fucetola did not find those facts alone significant because there was no indication that Mr. Lyons had himself actually titled, licensed or paid taxes on those automobiles (Hearing Tr. 374-375). Dr. Fucetola also acknowledged information in the record about Mr. Lyons purchasing a shotgun, including the filling out of some portions of an application for that shotgun; however, Dr. Fucetola did not find those facts significant since the record did not demonstrate that Mr. Lyons had filled out anything but the most simplistic portions of the form at the direction of the seller (Hearing Tr. 308; Exhibit GG, p. 475-476; Exhibit 117). Dr. Fucetola additionally acknowledged that Mr. Lyons had

approached a Judge in an effort to find out how to gain custody of his child; Dr. Fucetola indicated that this effort by Mr. Lyons actually demonstrated his disability in not knowing that simply approaching a Judge and asking questions was an ineffectual way of handling the matter (Hearing Tr. 248-249; Exhibit GG, p. 758). And, Dr. Fucetola acknowledged that Mr. Lyons had traveled to Detroit to visit and care for his father; but, Dr. Fucetola observed that, in light of the assistance which Mr. Lyons required in completing these tasks, the examples demonstrated both abilities and disabilities (Hearing Tr. 250-251).

In the area of self-direction, Dr. Fucetola found there to be clear evidence of deficit, and a total inability by Mr. Lyons to develop a vision for his future (Hearing Tr. 192). Dr. Fucetola noted that studies show that retarded persons will commonly have the very simplistic goal of just staying employed in order to meet the desires to be productive and to please bosses; this, however, is structure supplied by others, and not by self-direction (Hearing Tr. 192-193). Dr. Fucetola noted that, according to family reports, Mr. Lyons would regularly leave or lose jobs, be directionless, and return to his mother's house for her to take care of him (Hearing Tr. 193).

In the area of health and safety, Dr. Fucetola pointed to Mr. Lyons' significant deficits demonstrated in the ILS testing, showing that Mr. Lyons could not and did not take necessary steps to preserve his own health and did not know

how to deal with emergency and common health situations (Hearing Tr. 193; Exhibit 115, p. 6-7; Exhibit 112, p. 12).

In the area of functional academics, Dr. Fucetola noted the clear evidence of significant deficits coming from what educational records there are, as well as the testing done showing Mr. Lyons' deficits (Hearing Tr. 193-194; Exhibit 104).

In the area of leisure, Dr. Fucetola noted that, while there are significant deficits, those are milder than in other areas (Hearing Tr. 194). Dr. Fucetola noted, on the plus side, that Mr. Lyons formed relationships, and even heterosexual relationships; however, Dr. Fucetola noted on the minus side that those relationships were generally with those of limited intelligence and with older adults, and that Mr. Lyons never really developed relationships with peers (Hearing Tr. 194). Also, Mr. Lyons never played sports or developed any extracurricular interest or hobbies in school or in the community, and generally stayed to himself (Hearing Tr. 194).

In the area of work, Dr. Fucetola acknowledged that, on the surface, Mr. Lyons did work, did come into the jobs on time, did know what to do, and did his tasks (Hearing Tr. 195). Dr. Fucetola noted, however, that there were still significant deficits in that Mr. Lyons could not obtain and hold work independently, and accomplished what he did only with significant support from family members

(Hearing Tr. 195).

Dr. Fucetola noted that his findings of both mental retardation and major depression were consistent with the findings in 2002 by Dr. Cowan and also by University of Kansas Medical Center psychiatrist Dr. John Wisner, M.D. (Hearing Tr. 229-230). Dr. Fucetola generally explained why it was not surprising that no findings of mental retardation had been made by the psychiatrist and psychologists who had evaluated Mr. Lyons prior to 2002; the explanation was that these Doctors had been called upon to address the narrow questions of competency to stand trial and competency at the time of the offenses, and therefore had not had occasion to address directly the very different question regarding mental retardation (Hearing Tr. 111-112, 114-115). Dr. Fucetola was not permitted to testify regarding the information which he garnered directly from Dr. Harry and Dr. Holcomb in these regards; instead, the parties were permitted to develop such information through depositions of the two Doctors (Hearing Tr. 230-240).

11. Evaluation of Dr. Jeffrey Kline, Ph.D.

The expert for Respondents, Dr. Jeffrey Kline, Ph.D., is a licensed psychologist, who is in the private practice of forensic psychology, and is also employed at the Fulton State Hospital (Hearing Tr. 387). Dr. Kline indicated that, since 2003, his full time work has involved Court ordered evaluations pertaining to

competency to stand trial and competency at time of offense under Chapter 552 RSMO, as well as risk assessments, conditional and unconditional release evaluations, and sexual predator evaluations (Hearing Tr. 391, 453). Dr. Kline acknowledged that he is not a treating psychologist, is not a neuropsychologist, and is not Board Certified (Hearing Tr. 453, 560-561, 570).

Dr. Kline indicated that he was called upon to evaluate Mr. Lyons on the question of mental retardation, and in the process reviewed the exhibits which the Court received, and also interviewed Mr. Lyons for two and one-half hours (Hearing Tr. 394-412). Dr. Kline said that he did not conduct his own standardized testing of Mr. Lyons, believing that further testing would not shed any more light on the matter (Hearing Tr. 416-417). Dr. Kline indicated that, in his personal meeting with Mr. Lyons, he found Mr. Lyons to be pleasant, cooperative, and open to answering questions, but also, sad, depressed, quiet and suffering from auditory hallucinations (Hearing Tr. 411-413). Dr. Kline indicated his finding that Mr. Lyons suffers from ongoing major depression, dating back to his childhood (Hearing Tr. 414, 488-489). Dr. Kline also indicated his belief that Mr. Lyons does not meet the criteria for the presence of mental retardation prior to age 18 (Hearing Tr. 419).

Dr. Kline explained his understanding of the criteria for mental retardation as

being demonstration of significantly subaverage intelligence and significant deficits in adaptive functioning (Hearing Tr. 419).

Dr. Kline said that he did not see any evidence that Mr. Lyons had significantly subaverage intellectual functioning at age of 18 (Hearing Tr. 420, 450). Dr. Kline indicated that he looked at the IQ testing done, in 1992 by the Department of Mental Health, in 1998 and 2002 by Dr. Cowan, and in 2007 by Dr. Fucetola (Hearing Tr. 421). Dr. Kline indicated that, while he looked at the abbreviated test of intellectual functioning done by Dr. Phillip Johnson,⁵ he did not believe it appropriate to rely upon Dr. Johnson's testing results since Dr. Johnson did not conduct full IQ testing of Mr. Lyons (Hearing Tr. 550). Dr. Kline said that he had reviewed the raw data from all testing, including the testing done by Dr. Fucetola in 2007, and found no problems in the administration of any of the testing, and found that all testing was done within proper standards (Hearing Tr. 454-456).

Dr. Kline admitted that there is no question but that Mr. Lyons' 2002 and 2007 testing scores are in the mildly mentally retarded range (Hearing Tr. 457).

⁵ While Dr. Kline testified that the testing by Dr. Johnson occurred in 1996, the record actually reflects that, while Dr. Johnson's trial testimony about his testing occurred in 1996 (Exhibit GG, p. 867-868), Dr. Johnson's testing was actually administered in 1994 (Exhibit F, p. 1, 12).

And, Dr. Kline said that he is not questioning that Mr. Lyons' IQ was accurately measured in those tests (Hearing Tr. 542).

Dr. Kline did question whether the lower scores in 2002 and 2007 might be explained by Mr. Lyons' depression since, in Dr. Kline's opinion, severe depression can influence a person's scores on an IQ test, since depression can interfere with the person's concentration, motivation and focusing, which interference can, in turn, artificially suppress scores (Hearing Tr. 422). However, when confronted with Dr. Fucetola's contrary opinions on the subject, and when asked to come forward with learned studies supporting his position about suppression of IQ scores occurring due to depression, Dr. Kline did not do so, though he claimed he could do so if asked by the Court (Hearing Tr. 483-484, 487). Dr. Kline also admitted that Mr. Lyons' depression would have been present, not only at the times of Mr. Lyons' IQ tests in 2002 and 2007, but at the times of all of the IQ tests taken by Mr. Lyons, including 1992 and 1998 (Hearing Tr. 489-490).

Dr. Kline also noted that Dr. Cowan, in his 2002 report, had mentioned dementia as a possible explanation for the drop in scores between Mr. Lyons 1998 and 2002 IQ testing (Hearing Tr. 481). However, Dr. Kline admitted that Dr. Cowan in that same 2002 report also posed an alternative explanation, and actually diagnosed, Mr. Lyons being mildly mentally retarded (Hearing Tr. 481, 569). Dr.

Kline also admitted that, after evaluating Mr. Lyons in 2008 himself, he did not diagnose Mr. Lyons as having dementia, and found no indications of dementia in the records pertaining to Mr. Lyons (Hearing Tr. 481-482, 548).

Dr. Kline indicated that he would not expect the drop in IQ from the 1992 score of 84 to the 2007 score of 61 without some severe disorder (Hearing Tr. 554). However, Dr. Kline also admitted that he found no reported symptom in the medical records pertaining to Mr. Lyons which could support the notion that some other medical condition, like stroke or head injury or something else, might account for the lower 2002 and 2007 IQ scores (Hearing Tr. 483-484, 547).

Dr. Kline also expressed reservations about the 2007 IQ score, particularly when it is Flynn corrected to 55, because Dr. Kline gleaned from his personal experience that persons with 55-60 IQ are unable to act independently, and are completely dependent on other individuals (Hearing Tr. 540).

Ultimately, Dr. Kline said that “2007 is an interesting data point and I don’t know why he scored lower, but the important fact is he scored higher in 1992” (Hearing Tr. 532-533).

As concerned the 1992 testing, Dr. Kline expressed his opinion that the scores on that test, and the scores on the test done in 1998, because they occurred closer in time to when Mr. Lyons was 18, were “probably closer to accuracy to his

(Mr. Lyons') intellectual functioning prior to the age of 18", and showed the "upper ceiling"⁶ of Mr. Lyons abilities during those times, (Hearing Tr. 421). However, Dr. Kline admitted that he knows of no research to support his position about placement of increased reliance upon those IQ tests administered during adulthood, but closer in time to age 18 (Hearing Tr. 479-480).

Dr. Kline indicated that his belief that the 1992 test comes closest to measuring Mr. Lyons' intellectual functioning is also based upon his notion that a person "cannot fake smart"(Hearing Tr. 537-538). Dr. Kline explained that, in taking intelligence tests, while it is easy for the test taker to not give answers he/she knows, and thereby deliberately lower his/her score, that person cannot deliberately give answers he/she does not know, and thereby increase the score (Hearing Tr. 427). Thus, according to Dr. Kline, if there is no administration error, and no cheating, there is no way for a person to score higher than their capabilities on an IQ test (Hearing Tr. 427).

⁶ While noting that the psychometrist giving the 1992 IQ test speculated that that test might have underestimated Mr. Lyons' ability, Dr. Kline opined, contrary to the speculation, that the score of 84 was the "upper limit" of Mr. Lyons' intelligence, and observed that, contrary to the speculation, in the testing since 1992, Mr. Lyons had never had a test result higher than 84 (Hearing Tr. 535).

On the other hand, Dr. Kline admitted that the 1992 IQ score of 84 is still a low score (Hearing Tr. 531), and that there is no scientific literature justifying the use of the word “smart” to describe such a score (Hearing Tr. 539). Dr. Kline also admitted that there were other reasons, including sheer luck, which could account for a person achieving a higher IQ score (Hearing Tr. 558). Also, Dr. Kline indicated that he was aware that Mr. Lyons took the 1992 test just a month after he turned 35, and that an age correction made Mr. Lyons’ score higher than it would have been if the test had been taken just a month earlier; however, Dr. Kline did not attribute any significance to those facts (Hearing Tr. 458-459, 536).

Dr. Kline also acknowledged that there is no question but that IQ inflation occurs (Hearing Tr. 468), and that “the Flynn effect itself is well known and talked about at length in the literature” (Hearing Tr. 425). Dr. Kline questioned the true rate of that IQ inflation, indicating that he believes he has seen in his reading a correction factor as low as 0.17 per year discussed in the papers; however, Dr. Kline admitted that the 0.17 figure he saw may have related only to a particular part of the test, that the makers of the WAIS-III IQ test advance 0.3 as the correction factor, that the 0.3 correction factor appears in reference research materials dating back to 1972, and that he knows of no research indicating that there should be used a different correction factor than the 0.3 factor used by Flynn (Hearing Tr. 467-

468). But, Dr. Kline indicated that he has not seen literature that the diagnostic utility of IQ scores is improved by use of the Flynn effect correction (Hearing Tr. 477). Dr. Kline noted that there is a scientific paper, in which the author expresses the opinion that, though IQ inflation is a recognized phenomenon, there has not yet developed a routine, or specific procedures, or recommendations for adjusting IQ scores based on that IQ inflation (Hearing Tr. 425-426). Dr. Kline admitted that this paper to which he referred has not actually been published, that he has not actually seen this paper, and that he therefore does not know details about the study such as the identities, number and locations of persons surveyed (Hearing Tr. 473, 475).

On the question of adaptive functioning, Dr. Kline indicated that a professional looks for answers in reports from the patient himself and from family members (Hearing Tr. 428).

Dr. Kline indicated his belief that Mr. Lyons does not have significant deficits in communication as an adaptive behavior (Hearing Tr. 428-429). Dr. Kline acknowledged that Mr. Lyons can only understand what is read to him at a fourth grade level, and has “significant deficits in his abilities to communicate in writing” (Hearing Tr. 429, 444). Dr. Kline, however, attributed these deficits, not to mental retardation, but to an independent learning disability, as well as

nervousness and anxiousness (Hearing Tr. 429, 430). Dr. Kline noted Mr. Lyons' self-report that overall, in general communication, Mr. Lyons does well in work environments and in family environments, and gets his needs met (Hearing Tr. 429-430).

In the category of self-care, Dr. Kline indicated his belief that, while Mr. Lyons was unable to care for himself at certain times of his life when he was severely depressed, Mr. Lyons generally demonstrated "impeccable" hygiene, and was even "obsessive" in his desire to maintain household and personal cleanliness (Hearing Tr. 432). Dr. Kline was not concerned about Mr. Lyons not showing an ability to seek medical care for himself since there were not a lot of records about Mr. Lyons having medical needs that required meeting (Hearing Tr. 433). Dr. Kline also expressed his understanding that, when Mr. Lyons' father was dying of cancer, Mr. Lyons obtained medical appointments for the father (Hearing Tr. 433).

As for home living, Dr. Kline found no deficits, positing that Mr. Lyons was an obsessive cleaner, cooked for himself, and prepared meals for his children (Hearing Tr. 433-435). However, Dr. Kline had to admit that his source of knowledge about Mr. Lyons' meal preparations for himself came from Mr. Lyons' mother, who in turn indicated that Mr. Lyons' meals often consisted of nothing more than baloney sandwiches (Hearing Tr. 512; Exhibit R, p. 31, 44). Dr. Kline

also had to admit that he had no source, independent from Mr. Lyons' own account, that Mr. Lyons was ever actually regularly preparing meals for his children, and that Mr. Lyons was often estranged from his girlfriends, making impossible Mr. Lyons' preparation of meals for the children at those times (Hearing Tr. 510-511). Dr. Kline also inferred that, since Mr. Lyons had automobiles, Mr. Lyons was able to pay for those vehicles, secure legal title to those vehicles, and pay property taxes on those vehicles (Hearing Tr. 435). However, Dr. Kline had to admit that Mr. Lyons having cars titled in his name did not necessarily mean that those cars were purchased or registered by Mr. Lyons, or that Mr. Lyons had paid his taxes, and Dr. Kline further admitted he had no evidence to those effects (Hearing Tr. 510). Dr. Kline was also confronted with the account from Mr. Lyons' siblings that Mr. Lyons had never lived independently, staying either with family or with girlfriends, that Mr. Lyons had never taken on the responsibility of paying household bills, with those duties always being performed by Mr. Lyons' mother, Mr. Lyons girlfriends, or with help from other family members; Dr. Kline indicated that that information from family members did not change his opinions expressed in this category (Hearing Tr. 499-500).

In the category of social skills, Dr. Kline acknowledged that Mr. Lyons was described anxious as a child, with vomiting and other problems on school bus rides

to school (Hearing Tr. 435-436). Dr. Kline also acknowledged that Mr. Lyons was described as a shy and socially withdrawn child (Hearing Tr. 435). However, in finding Mr. Lyons as not having sufficient deficits in this category, Dr. Kline pointed to the fact that Mr. Lyons had, beginning in his teen years, developed relationships with three different women, including living with them (Hearing Tr. 436). Dr. Kline did admit that these relationships with these three women were at best off and on (Hearing Tr. 519-520). Dr. Kline also noted, on the positive side of social skills, trial testimony from Mr. Lyons' work supervisor, indicating that Mr. Lyons was affable, a good worker, and able to communicate adequately and socialize adequately on the job (Hearing Tr. 436-437).

Dr. Kline believed that Mr. Lyons was able to use community resources (Hearing Tr. 437). Dr. Kline noted Mr. Lyons' self-report about being able to find jobs by looking through the want ads, and using family members to help him make contacts to inquire about the jobs (Hearing Tr. 437). Dr. Kline also noted Mr. Lyons relocating to Detroit, Chicago and California, and finding work and places to live after those relocations (Hearing Tr. 437-438). While Dr. Kline acknowledged Mr. Lyons' need for use of family help in obtaining jobs and in traveling, Dr. Kline did not see Mr. Lyons' need for that help as being inconsistent with his finding about Mr. Lyons' ability to access and use community resources (Hearing Tr. 438).

Dr. Kline also expressed his belief that Mr. Lyons had at times shown his community access abilities by taking steps to try to gain custody of his children and bring about the investigation about neglect of his children by contacting welfare officials and law enforcement (Hearing Tr. 438). Dr. Kline did not see as problematic that the only step that Mr. Lyons had taken was posing questions to a Judge, not involved with his matter, seeing as logical the connection which Mr. Lyons had made between the Judge's recognized role, and the questions which Mr. Lyons wanted answered (Hearing Tr. 521-523). Dr. Kline also saw as positive Mr. Lyons' efforts to get a house to keep the three children from a previous relationship, even though those efforts came too late in the process to save custody, and in any event were unsuccessful (Hearing Tr. 524). Dr. Kline also pointed to Mr. Lyons' ability to fill out parts of an application to obtain a shotgun (Hearing Tr. 491-492; Exhibit 117). However, Dr. Kline had to acknowledge that the parts of the application which were filled out were rather simplistic (Hearing Tr. 494).

Dr. Kline pointed to Mr. Lyons' goals to remain employed, to be self-sufficient and to provide for his children as indications that Mr. Lyons had self-direction (Hearing Tr. 439-440). However, when confronted with testimony by family members that Mr. Lyons was directionless, Dr. Kline admitted that "my characterization of his self direction was very simplistic" (Hearing Tr. 525-526).

Dr. Kline said he found nothing in the records to show that Mr. Lyons had any difficulties in accessing health care when it was needed (Hearing Tr. 441). However, Dr. Kline had to admit that, at the only times that Mr. Lyons had received medical care, he had to have family help in accessing that care (Hearing Tr. 502). Dr. Kline could give no example of Mr. Lyons ever accessing health care for himself (Hearing Tr. 502-503). Dr. Kline also saw as indicative of Mr. Lyons' capability in safety his having worked in a "factory job" (Hearing Tr. 441-442). However, Dr. Kline had to acknowledge that the job which he was describing as a "factory job" was actually making pallets (Hearing Tr. 526-527). Dr. Kline also said that he found safety in the fact that Mr. Lyons had discontinued drug use at an early age (Hearing Tr. 441-442).

In the arena of academics, Dr. Kline acknowledged that Mr. Lyons has shown clear deficiencies (Hearing Tr. 442, 444, 527). Dr. Kline noted specifically Mr. Lyons' low composite score on the Iowa basic skills test given in 1973 (Hearing Tr. 442; Exhibit 102, p. 3). Dr. Kline also specifically noted Dr. Wheelock's findings that Mr. Lyons is functionally illiterate, understanding spoken language only at a fourth grade level, reading on a first grade level, and unable to write (Hearing Tr. 444, Exhibit 104). However, Dr. Kline believed that, while Mr. Lyons had always utilized school services to the best of his ability, Mr. Lyons was

unable to take advantage of those services, not due to mental retardation, but due to his anxiousness and a learning disability, particularly a processing disorder; Dr. Kline indicated that he found support for these positions from the reports by Dr. Wheelock and Dr. Cowan (Hearing Tr. 444-445, 513, 552-553).

Dr. Kline indicated that Mr. Lyons did not show deficits in leisure, in that he did take his children to the park, he had relationships with women, and since he worked a lot, he did not have time for leisure, (Hearing Tr. 446).

Dr. Kline also indicated that in the area of work, Mr. Lyons had self-reported that he was regularly employed and rarely unemployed (Hearing Tr. 446-447). Dr. Kline specifically noted his understanding of the testimony of Mr. Lyons' supervisor at Service Master, describing Mr. Lyons as an excellent employee, and a crew chief, upon whom the supervisor could always rely (Hearing Tr. 447). Dr. Kline again indicated the facts that all of Mr. Lyons' jobs were found for him by family members and that all of Mr. Lyons' job applications were filled out by family members did not, in Dr. Kline's estimation, amount to significant deficits in Mr. Lyons' adaptive behavior (Hearing Tr. 490-491, 495). Besides, said Dr. Kline, even if the family obtained the job for Mr. Lyons, Mr. Lyons was the person who actually maintained the job (Hearing Tr. 506). Dr. Kline acknowledged that the supervisor who testified about Mr. Lyons had only known Mr. Lyons for about a

month, and therefore was only testifying about that short period of time (Hearing Tr. 506). Dr. Kline also acknowledged that there actually was no testimony Mr. Lyons was ever a “crew chief”, but rather the indications were that Mr. Lyons was merely a co-worker on a cleaning crew (Hearing Tr. 496-497). Dr. Kline said that he did not take into account the information from Mr. Lyons’ family about Mr. Lyons not holding jobs because that account was inconsistent with the account which Mr. Lyons gave and was not specific enough (Hearing Tr. 505, 509). However, Dr. Kline acknowledged that, in Mr. Lyons’ self-report, he also did not provide specific information regarding his account about steady employment (Hearing Tr. 509).

Dr. Kline indicated that he looked at the answers on SIB-R tests given by Rose, James and David, and that those answers do not change his opinions (Hearing Tr. 570). Dr. Kline questioned reliance upon the SIB-R testing used retrospectively with David and James Lyons (Hearing Tr. 448). But, Dr. Kline clarified that it is not inappropriate to use the SIB-R to ask questions about someone’s actions in the past, and that only use of the numbers generated by comparing answers to normative data would create problems (Hearing Tr. 448-449). Dr. Kline also cautioned that it is important to distinguish between what a person did versus what the person is capable of doing (Hearing Tr. 450).

Dr. Kline also acknowledged that in the self-reports given by Mr. Lyons upon which Dr. Kline relied, Mr. Lyons could have been overestimating his capabilities (Hearing Tr. 503-504).

Counsel for Mr. Lyons posed to Dr. Kline a hypothetical question about whether his opinion would change if, in addition to the evidence he received, he was also provided an IQ score prior to age 18 of 70 (Hearing Tr. 545-546). Dr. Kline indicated that such additional data “would be very challenging” and “would have a strong possibility of changing (his) answer” (Hearing Tr. 546). Dr. Kline indicated that his problem would be that “I still run into the problem of how does he score the 84” (Hearing Tr. 546).

12. Deposition of Dr. Harry

In his deposition, taken in August of 2008, Dr. Bruce Harry, M.D. explained that he is a Board Certified Forensic Psychiatrist, has been employed for the last fifteen years doing forensic evaluations at the Fulton State Hospital, and is currently the medical director of the Biggs Forensic Center at the Fulton State Hospital, working both with patients and on court ordered evaluations (Harry Deposition, p. 6-8). Dr. Harry acknowledged that he is the psychiatrist who conducted the initial competency evaluation of Mr. Lyons in 1992, and then, in 1999, was called upon to evaluate Mr. Lyons’ competency to deliberate at the time of his offenses (Harry

Deposition, p. 8-10).

Dr. Harry indicated that, at the time of the 1992 evaluation, he diagnosed Mr. Lyons as suffering from longstanding⁷ major depression and that Mr. Lyons was, at the time, very impaired by the disease manifestations of psychosis, hallucinations, and severe slowing of thinking and speech (Harry Deposition, p. 8-9, 27). Dr. Harry indicated that, at that time, his major concerns were the problems created by Mr. Lyons' depression, including the real possibility that Mr. Lyons would kill himself (Hearing Tr. 30).

Dr. Harry acknowledged that he did not also diagnose Mr. Lyons as suffering from mental retardation (Harry Deposition, p. 16). However, Dr. Harry cautioned that his lack of a diagnosis in that regard should not be read as a finding that Mr. Lyons did not suffer from mental retardation (Harry Deposition, p. 31). Rather, as Dr. Harry put it, because he was having to deal at that time with Mr. Lyons's severe depression and suicidal tendencies, resolving the question of mental retardation was the furthest thing from his mind (Hearing Tr. 30-31). Dr. Harry acknowledged that mental retardation is a mental disease or defect (Harry Deposition Tr. 16). However, as Dr. Harry saw things, Mr. Lyons was presenting depression, and he

⁷ Dr. Harry defined "longstanding" to mean for as long as Mr. Lyons could remember (Harry Deposition, p. 27).

(Dr. Harry) could not tell at the time if there was anything else (Harry Deposition, p. 22). Also, Dr. Harry indicated that many of the symptoms of mental retardation would be the same as those in major depression (Hearing Tr. 29).

Dr. Harry indicated that he had available to him the IQ score of 84 generated by testing done at the time (Harry Deposition, p. 18). Dr. Harry indicated that he also had the input from his psychometrist about Mr. Lyons wanting to stop testing, and about the psychometrist's thoughts that the testing might underestimate Mr. Lyons' IQ; Dr. Harry said that he considered the comments of the psychometrist to only be background information from a bachelor's or master's level test giver, with no independent scientific validity or utility (Hearing Tr. 24-27). Dr. Harry said that he did not order further testing of Mr. Lyons because he felt that testing would simply not be accurate (Hearing Tr. 21). Dr. Harry particularly noted the possibility of a person producing a score higher on his test than his true IQ (Harry Deposition, p. 21). Ultimately, Dr. Harry explained that, even with the information he had, he still did not have the background information about Mr. Lyons necessary to reach a conclusion, one way or the other, about mental retardation (Hearing Tr. 12). Dr. Harry indicated that he did not request any information from defense attorneys (Harry Deposition, p. 24). Dr. Harry also acknowledged that he did not put in his diagnosis a "rule out" mention about mental retardation (Harry Deposition, p. 21-

22). However, Dr. Harry said his lack of mention of mental retardation in any fashion owed to the fact that he did not believe he was in a position to make a determination on mental retardation one way or the other (Harry Deposition, p. 12, 31).

13. Deposition testimony of Dr. Holcomb

Dr. William Holcomb, Ph.D. also testified in deposition in August of 2008 (Holcomb Deposition, p. 1). Dr. Holcomb indicated that he is a Board Certified forensic psychologist, currently employed as director for forensic studies at Alliant International University in California (Holcomb Deposition, p. 5-6). Dr. Holcomb said he was worked for the Missouri Department of Mental Health for many years, and at one time was the superintendent for the Fulton State Hospital (Holcomb Deposition, p. 6). Dr. Holcomb indicated that, at the time that he worked with Mr. Lyons, he was a contract psychologist, working with persons who had been found not competent to proceed to trial (Hearing Tr. 6-7). Dr. Holcomb reiterated his findings, made in 1994, that Mr. Lyons suffered from lifelong major depression and was only marginally competent to proceed to trial (Holcomb Deposition, p. 8-9). Dr. Holcomb also acknowledged that, in 1999, he was also called upon to consider Mr. Lyons' competence to deliberate at the time of the offense (Holcomb Deposition, p. 13). Dr. Holcomb said that, when he was called upon to evaluate

Mr. Lyons, he did not address the question of whether Mr. Lyons was also mentally retarded, because he was not provided the information necessary to make a determination, one way or the other, on that subject (Holcomb Deposition, p. 12-13). Dr. Holcomb said that he did not seek any additional records pertaining to Mr. Lyons (Holcomb Deposition, p. 26). Dr. Holcomb also said that, though mental retardation is a mental disease or defect, mild mental retardation generally is not a serious enough condition to impact upon competency evaluations, and therefore would not have entered his consideration in his evaluations (Holcomb Deposition, p. 18-19, 26-28). Therefore, said Dr. Holcomb, his silence on the issue of mental retardation should not be seen as him either ruling out or ruling in mental retardation (Holcomb Deposition, p. 14, 29).

14. Testimony of prior defense counsel

At the hearing before the Special Master, two of Mr. Lyons' former defense attorneys testified, particularly Beth Kerry, one of the trial attorneys, and William Swift, one of the post-conviction proceedings attorneys (Hearing Tr. 18-19, 39-40).

Ms. Kerry described her contacts with Mr. Lyons as pleasant, but not very interactive (Hearing Tr. 22). Ms. Kerry indicated that, try as she might to explain concepts to and elicit information from Mr. Lyons, and despite what she felt were Mr. Lyons' best efforts, the endeavors were fruitless, save for Mr. Lyons providing

basic contact information for his family (Hearing Tr. 23, 25, 29, 32). Ms. Kerry said, at trial, Mr. Lyons “sat there like a lump”, not providing input, not asking anything except to use the restroom (Hearing Tr. 25, 36). Ms. Kerry indicated that her impression was that Mr. Lyons simply could not get his head around the process (Hearing Tr. 35).

Mr. Swift gave similar descriptions about his interactions with Mr. Lyons, indicating that, despite his best efforts to explain, in simplistic terms, concepts to Mr. Lyons, and despite his impression of Mr. Lyons giving his best efforts and cooperation, Mr. Swift saw no indication of understanding from Mr. Lyons, and received nothing of help from him (Hearing Tr. 41-43, 48, 49).

Findings, Conclusions and Response to Exceptions by the Special Master

In his report to this Court, the Special Master began by summarizing the prior proceedings pertaining to Mr. Lyons case (Master’s Report, p. 1-2), as well as the law applicable to consideration of Mr. Lyons’ claim regarding his mental retardation (Master’s Report, p. 2-3). The Master then took up, one by one, the issues critical to determining whether Mr. Lyons met his burden of proving his claim of mental retardation.

The Master began with consideration of Dr. Fucetola’s report and testimony (Master’s Report, p. 3-4). The Master noted not only Dr. Fucetola’s qualifications,

but also the “holistic” approach taken by Dr. Fucetola, as distinguished from other, prior mental evaluations of Mr. Lyons, as a better means to address the questions, pertinent to a determination upon the issue of mental retardation, regarding Mr. Lyons’ ability and potential to function in everyday society (Master’s Report, p. 3-4). The Master also noted that not only did the prior competency evaluations conducted by the Department of Mental Health not rule out mental retardation, the doctors who conducted those evaluations, after reviewing Dr. Fucetola’s report, found nothing in that report inconsistent with their earlier findings (Master’s Report, p. 5).

Going on to address the question regarding subaverage intelligence, the Master noted the support for Dr. Fucetola’s conclusion of mental retardation which came from his own 2007 IQ testing of Mr. Lyons, and the score of 61 which was measured, a score clearly within the mentally retarded range (Master’s Report, p. 4-5). The Master also noted the further support for the mental retardation conclusion provided by the test score of 67 (also clearly within the mentally retarded range) obtained in 2002 through the testing of Dr. Dennis Cowan (Master’s Report, p. 4-5). The Master then focused on the 1992 test score of 84 and the 1998 test score of 81 which “at first glance” might appear to “completely contrast” with later test scores (Master’s Report, p. 5). The Master found that Dr. Fucetola offered

plausible explanations for the higher scores on the earlier tests, including the giving of an age correction, the lack of accounting for IQ inflation (called the “Flynn effect”), and the possibility of the intercession of “sheer luck” in Mr. Lyons’ test answering (Master’s Report, p. 5-7). The Master also observed, but found problematic, the contrary opinions offered by Respondents’ expert, Dr. Kline (Master’s Report, p. 6). The Master found that Dr. Kline could not give a plausible reason why the 2007 and 2002 test results should be questioned; Dr. Kline conceded that the tests were properly administered; Dr. Kline conceded what Dr. Fucetola and Dr. Cowan had proven through their testing, that Mr. Lyons had not malingered in taking the tests; while Dr. Kline posited that dementia might explain the lowering of IQ scores, he had to concede that he found no indication of dementia in Mr. Lyons medical records or in his own evaluation of Mr. Lyons; and while Dr. Kline suggested that Mr. Lyons’ depression might explain his later, lower test scores, this explanation failed to account Mr. Lyons’ clearly having suffered from the same depression condition at the time of the 1992 and 1998 testings as well (Master’s Report, p. 6-8). The Master also noted that, while Dr. Kline wished to rely primarily on the 1992 and 1998 testing results, he gave no published authority for dismissing Flynn effect as he did, he admitted that the research establishes IQ inflation, and he admitted the possibility that sheer luck could have

played a part in increasing Mr. Lyons' scores (Master's Report, p. 7). From all of this, the Master found, by a preponderance of the evidence, that the 2007 and 2002 test scores should be taken at face value, that while the 1992 and 1998 test scores should not be disregarded, those scores should be adjusted in the fashions suggested by Dr. Fucetola, and that more weight should be given to the 2007 and 2002 scores, especially in light of Dr. Kline's acceptance of the validity of those scores (Master's Report, p. 8).

The Master then looked in detail at the evidence presented pertaining to Mr. Lyons functional limitations (Master's Report, p. 9-16). While the Master found significant limitations in many, if not most of the functional areas, he found particularly compelling the evidence of deficits in two areas, communication and functional academics (Master's Report, p. 9-16). This led the Master to conclude, as did Dr. Fucetola, that Mr. Lyons is mildly mentally retarded, and that Mr. Lyons' argued capabilities were merely the "cloak of competence", giving a false appearance of capability fostered by Mr. Lyons being supplied an inordinate amount of family support (Master's Report, p. 16).

Finally, the Master found that, in light of the evidence from the limited available records, considered together with the testimony from family members, proof by a preponderance of the evidence had been provided that the onset of the

deficits occurred prior to age 18 (Master's Report, p. 16).

Respondents filed exceptions to the Master's Report in which they essentially reargued certain of the facts and contended that the Master failed to find that Mr. Lyons' functional deficits were related to his significantly subaverage intelligence. In his response, the Master once again explained his rejection of Respondents' factual arguments, specifically noting for Respondents the pertinent, fatal concessions made by their own expert which ran counter to their arguments (Master's Response to Exceptions, p. 1-2). The Master also further clarified his findings that Mr. Lyons' functional deficits relate to his significantly subaverage intellectual functioning (Master's Response to Exceptions, p. 2).

POINT RELIED ON

This Court should set aside Mr. Lyons' sentence of death and instead impose a sentence of life imprisonment without release because said action of the Court is required by the dictates of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 10 of the Constitution of the State of Missouri in that, as found by this Court's Special Master, Mr. Lyons has demonstrated, by a preponderance of the evidence, that he is mentally retarded as that term is defined by the Supreme Court in *Atkins v. Virginia* and by the Missouri

legislature in Section 565.010.6 RSMO, and is therefore ineligible for the death penalty.

Atkins v. Virginia, 536 U.S. 304, 311-317 (2002)

In re Competency of Parkus, 219 S.W.3d 250 (Mo.banc 2007)

State v. White, 885 N.E.2d 905 (Ohio 2007)

Section 565.030.6 RSMO (2001)

ARGUMENT

Applicable Law

In 2001, the Missouri Legislature exempted from the death penalty those who are found, by a preponderance of the evidence, to be mentally retarded.

Sections 565.030.4(1) RSMO (2001). Under Section 565.030.6 RSMO (2001), mental retardation is defined as follows:

As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics,

leisure and work, which conditions are manifested and documented before eighteen years of age.

The Legislature made that provision applicable only to cases filed after August 28, 2001. Section 565.030.7 RSMO (2001).

In 2002, the United States Supreme Court determined that imposition of the death penalty against a person who is mentally retarded is always violative of the Eighth Amendment prohibition against cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304, 311-317, 321 (2002). The Court found that, though mentally retarded persons are able to know the difference between right and wrong, and are competent to stand trial, their disabilities still diminish their personal culpability, those disabilities particularly including impairments in understanding and processing information, in communicating, in abstracting from mistakes and learning from experience, in engaging in logical reasoning, in controlling impulses and in understanding the reactions of others. *Atkins v. Virginia*, 318. The Court reasoned that, because the culpability of the average murderer has been found to be insufficient to justify imposition of the death penalty, and because the death penalty is reserved only for those who murdered with a consciousness of guilt more depraved than that of just any murderer, the mentally retarded person, with his inherent incapacities, “surely does not merit that form of retribution”. *Atkins v.*

Virginia, 319. The Court also found an evolving national consensus against execution of the mentally retarded, as evidenced by legislative enactments to that effect from Congress and from a majority of states which permit capital punishment, including Missouri. *Atkins v. Virginia*, 314-315. The Supreme Court acknowledged that “(n)ot all people who claim to be mentally retarded will be so impaired as to fall within the range about whom there is a national consensus.” *Atkins v. Virginia*, 317. Thus, the Court left it to the States to develop processes for making the determination as to whether a particular defendant is mentally retarded, and is therefore ineligible for the death penalty. *Atkins v. Virginia*, 317. The Court did, however, provide its own, rough definition of mental retardation as requiring a showing of “subaverage intelligence” and also “significant limitations in adaptive skills such as communication, self-care and self-direction that became manifest before age 18.” *Atkins v. Virginia*, 318.

In keeping with the holding in *Atkins v. Virginia*, and in the absence of a state statute dealing with death penalty cases which involve crimes committed prior to August 28, 2001, this Court has established, for those pre-August 28, 2001 death penalty cases, “...a bright line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in Section 565.030.6, shall not be subject to the death penalty.” *Johnson v. State*, 102 S.W.3d 535, 540

(Mo.banc 2003); *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo.banc 2007). If, in such a case, the question of mental retardation is disputed, a Special Master is appointed to develop a record and recommendations for this Court. *In re Competency of Parkus*, supra. If, upon its own review of that record, this Court finds that the defendant is mentally retarded, it will recall its mandate, and resentence the defendant to life imprisonment without possibility of probation, parole or release except upon act of the governor. *In re Competency of Parkus*, supra.

As the Special Master found, Mr. Lyons' proved his significantly subaverage intellectual functioning by a preponderance of the evidence

1. Comparison of the four IQ test scores to the cutoff score for mental retardation

As the Special Master has indicated, answering the question about Mr. Lyons' intellectual functioning was made somewhat complicated because the IQ tests which have been given to Mr. Lyons in adulthood have yielded scores of 84, 81, 67 and 61 (Exhibit D, p. 6; Exhibit L, p. 27-28; Exhibit 105, p. 11; Hearing Tr. 138-139).

It should be noted that Section 565.030.6 does not set an IQ cutoff for mental retardation. Moreover, as Dr. Fucetola, the expert for Petitioner, pointed out, there are trends among mental health professionals against use of an IQ cutoff for

diagnosis of mental retardation (Hearing Tr. 125-126).

Nevertheless, as agreed by both Dr. Fucetola, and Dr. Kline, the expert for Respondents, the current consensus in the mental health field, as set forth in the DSM-IV, is that a finding of significantly subaverage intellectual functioning should be supported by IQ scoring of 75 or below (Hearing Tr. 122, 129, 130-131, 335-336, 419; Exhibit 111). This Court has previously so found. *Goodwin v. State*, 191 S.W.3d 20, 43 (Mo.banc 2006).

The complicating factor is that two of the adulthood IQ testing scores are clearly within the recognized range for mental retardation, two of the scores are somewhat above that range, and the two experts differ on how that information should be interpreted. The question which consequently has arisen, put simply, is which scores accurately reflect Mr. Lyons' IQ, the two within the range of mental retardation or the two slightly higher. As the Special Master found, the preponderance of the evidence shows that the lower scores, well within the range for mental retardation, more accurately reflect Mr. Lyons' true IQ.

2. For many reasons, the 1992 test score of 84 cannot be taken at face value, and therefore cannot exclude the finding of mental retardation

As the Special Master found, while Dr. Fucetola did not question the validity of the 1992 test, or the score of 84 calculated, he did point to facts which counsel

against reliance upon that score in making a negative determination regarding mental retardation (Hearing Tr. 315-317, 351-354; Report of the Special Master, p. 7).

First, there is the coincidence that the test was given about a month after Mr. Lyons turned 35 (Hearing Tr. 197). Because he had just turned 35, Mr. Lyons received a score adjustment for age, which adjustment yielded the reported score of 84 (Hearing Tr. 198). Had Mr. Lyons taken the test and recorded the same answers just a month earlier, he would not have received the score adjustment for age, and would have, instead, received a score of 78 (Hearing Tr. 198).

As an aside, it should be noted that Counsel for Respondent argued with Dr. Fucetola, during cross-examination, over Dr. Fucetola's hypothetical about Mr. Lyons taking the test a month earlier, characterizing the hypothetical as an "alternative universe" (Hearing Tr. 382). In Respondents' exceptions to the Report of the Special Master, similar arguments are made, wherein it is claimed that the findings of the Special Master "assume facts not in evidence and in science" and "assume the veracity of untrue facts" and are thereby "bizarre" (Respondents' Exceptions, p. 3). However, in making their arguments, Respondents seem to go out of their way to deliberately miss the point made by Dr. Fucetola. Dr. Fucetola's hypothetical, and his reasoning about it, is supported by the logical premise that it is

not a much a of a stretch to assume that a mere 30 days difference would not much change the answers made on an IQ test (Hearing Tr. 382). If one finds, as the Special Master did, that making that assumption is reasonable, the consequence of that assumption is that, if Mr. Lyons had taken the test a month earlier, and answered the questions the same, he would have received the lower IQ score of 78 in the hypothetical situation. That circumstance devalues the significance of the score of 84 which was reported for the 1992 IQ testing (Report of the Special Master, p. 7).

Second, there is the impact of IQ inflation. Again, the term IQ inflation, also called the Flynn effect, describes the fact that each year, IQ test scores for the population as a whole increase by 0.3 points (Hearing Tr. 200-203, 425, 468). As both Dr. Fucetola and Dr. Kline agreed, this phenomenon has for decades been recognized and studied by scientists, even causing the IQ test makers themselves to acknowledge the presence of the phenomenon (Hearing Tr. 200-203, 425, 468; Exhibit 116). Dr. Fucetola indicated that use of the Flynn effect correction is scientifically valid and accepted (Hearing Tr. 202, 380-381). The Flynn effect correction has even been recognized as appropriate in other Court proceedings. *Walker v. True*, 399 F.3d 315, 322-323 (4th Cir. 2005); *People v. Superior Court*, 155 P.3d 259, 263 (Ca. 2007). For Mr. Lyons' 1992 IQ score, if the Flynn effect

correction is applied to the non-age corrected score of 78, the score becomes 74.7, within the range for mental retardation (Hearing Tr. 202).

While the Special Master expressed some reservations over blanket acceptance of Flynn effect corrections (Report of the Special Master, p. 5), he naturally saw that, in the case of Mr. Lyons' 1992 test score of 84, the Flynn effect phenomenon calls into serious question the reliability of that reported score (Report of the Special Master, p. 7). Consequently, as the Special Master found, it is difficult to understand Dr. Kline's questions over the appropriateness of using the Flynn correction as a diagnostic tool when Dr. Kline agrees that IQ inflation occurs, when Dr. Kline agrees about the general acceptance of the IQ inflation, and when Dr. Kline acknowledges that even the test makers themselves have written in their own materials about the existence of IQ inflation (Hearing Tr. 425, 468, 477; Report of the Special Master, p. 7). Dr. Kline points to the lack of a specific IQ test protocol for making such a correction (Hearing Tr. 426). However, this point about the lack of a protocol from those test makers seems to ignore the fact that the test makers themselves have acknowledged the IQ inflation phenomenon in their own materials, and have even provided in those materials the suitable correction factor of 0.3 points per year to account for that inflation (Exhibit 116; Report of the Special Master, p. 7). As Dr. Fucetola put it, when the test materials are taken as a

whole, they indicate, at the very least, that the test makers are neutral on the question of IQ inflation correction (Hearing Tr. 379; Exhibit 116).

Also, as the Master noted, it is problematic that Dr. Kline could find no published studies upon which to base his questions about IQ inflation correction, instead relying upon his interview with an author of a paper on the subject which is not yet in print (Hearing Tr. 425-426, 473, 475; Report of the Special Master, p. 7). Dr. Fucetola has indicated that he too spoke with the same author (Hearing Tr. 207-208). However, this author refused to provide a copy of his paper for analysis and criticism by Dr. Fucetola and this Court (Hearing Tr. 207-208, 473, 475). Dr. Fucetola noted the obvious, that reliance upon anecdotes from a secret, unpublished paper is wholly inappropriate (Hearing Tr. 207-208).

Finally, as the Special Master noted, a certain portion of the higher 1992 IQ score could be attributed to sheer luck, Mr. Lyons simply guessing right on a certain number of questions (Master's Report, p. 7). This undercuts Dr. Kline's notion that the higher 1992 IQ score of 84 should be relied upon because a test taker "cannot fake smart" (Hearing Tr. 537-538). When he made that statement, Dr. Kline almost immediately acknowledged that his use of the word "smart" may have been misplaced, and confirmed that the score of 84 is a low score (Hearing Tr. 539). Still, Dr. Kline's point was that, generally speaking, there should be no way for a

person to score higher on a test than his capabilities allow (Hearing Tr. 427).

However, later in his testimony, Dr. Kline had to allow that, even by sheer chance, a person could actually guess right on certain questions, and thereby score higher than his capabilities on an IQ test (Hearing Tr. 558). Dr. Fucetola made the same point in his testimony, and Dr. Harry, the psychiatrist who coordinated the 1992 evaluation process, made the same point in his deposition (Hearing Tr. 324; Harry Deposition, p. 21).

Therefore, there are three strong reasons to find that the 1992 IQ test score of 84 cannot be taken at face value.

3. There are reasons why the 1998 test score cannot be taken at face value, and therefore cannot exclude the finding of mental retardation

The 1998 test score of 81, when corrected for IQ inflation, becomes 75.9, just above the 75 cutoff for mental retardation (Hearing Tr. 218). That alone could be seen as reason enough to not use the 1998 score to exclude a finding of mental retardation.

But there is an anomaly about the 1998 test, detected by Dr. Fucetola, which further undercuts reliance upon it for a negative finding about mental retardation. This anomaly was not mentioned by the Special Master in his report. Dr. Fucetola noted that the WAIS-III is the test used by Dr. Cowan in 2002 to produce the IQ

score of 67, and by Dr. Fucetola himself in 2007, which rendered the IQ score of 61 (Hearing Tr. 354-355). On the other hand, the previous version of that test, the WAIS-R, was used in the 1992 and 1998 tests (Hearing Tr. 354-355). Dr. Fucetola explained that, in creating the WAIS-III, the test makers dropped certain of the subtests from the WAIS-R which were found to not sufficiently correlate to IQ (Hearing Tr. 355). Dr. Fucetola also explained that, on the 1998 WAIS-R test, Mr. Lyons' highest score was on one of the subtests which was dropped from the WAIS-III as not really indicative of intelligence (Hearing Tr. 331, 355). Dr. Fucetola also explained that, on the subtests which were common to both the 1998 WAIS-R test and the 2002 WAIS-III test given to Mr. Lyons, Mr. Lyons scored very similarly, and lowly, on those subtests on both tests (Hearing Tr. 330). These facts lead to the conclusion that the 1998 test, with Mr. Lyons scoring highly on a subtest which was found to not be indicative of intelligence, must be considered suspect when compared to the lower score in 2002 on the WAIS-III.

4. There is no reason to give greater credit to earlier scores simply because they were given earlier in time

Dr. Kline has expressed his opinion that, since the 1992 and 1998 IQ tests occurred earlier in time, and consequently at a time closer to when Mr. Lyons turned 18, that fact about timing alone, irrespective of other facts, is one reason for

crediting those earlier scores more than the scores yielded later (Hearing Tr. 421). However, Dr. Kline conceded that he was unable to cite to any studies related to IQ testing which would support his position (Hearing 479-480). Moreover, Dr. Kline further conceded that it is expected that IQ scores would remain fairly constant over the years (Hearing Tr. 459). If one assumes this latter point about the constancy of IQ scores to be true, it would seem, logically, that no particular test iteration should be considered more worthy than another. That is essentially what Dr. Fucetola said, indicating that there was no scientific basis, and no support in the scientific literature, for claiming that, in choosing between IQ tests given in adulthood, the one earlier in time should be elevated in significance over the others given later (Hearing Tr. 209-210).

Dr. Kline endeavored to explain his reasoning behind his opinion by analogizing to the retrospective analysis of mental illness symptoms with relation to competency at the time of an offense. Dr. Kline used the example of testing for psychopathology, and said that since a psychopathological condition can come and go, the presence or absence of that condition in a post-crime evaluation cannot be determinative of the presence or absence of that condition at the time of the offense; rather testing results closer to the time of the offense, if available, would yield better information on the question about the presence or absence of the

psychopathology at the time of the offense (Hearing Tr. 555-556). Dr. Kline relied upon this reasoning to support his more global conclusion, which he wished to apply to this case, that older data should be weighed more heavily because it is closer in time to age 18 (Hearing Tr. 557).

One problem with Dr. Kline's analogy is that, unlike the psychopathological condition in his example, which he indicates will come and go, mental retardation is generally thought of as a lifelong condition, with no such waxing and waning.

More importantly, if one considers Dr. Kline's analogy critically, one discovers that timing is not the only critical element. There is also made an inherent assumption about another critical element: that the earlier testing in this case definitively demonstrated the presence or absence of the questioned condition. Dr. Kline obviously believes that the 84 IQ score can be taken at face value to definitively eliminate consideration of mental retardation. For the reasons already noted above, it is clear that the 84 IQ score cannot be taken at face value.

Moreover, even Dr. Kline himself admitted that the 84 IQ score, though not meeting the 75 IQ cutoff for mental retardation, is still a very low score (Hearing Tr. 531). In fact, this Court itself has seen fit to sustain a petition for post-conviction relief, and remand for retrial on the question of punishment, a case in which proof of mental retardation involved an IQ score of 84. *Johnson v. State*,

102 S.W.3d 535, 539 (Mo.banc 2003). Therefore, Dr. Kline's analogy is clearly inapt.

For all of these reasons, it would be inappropriate to give more credence to the earlier IQ scores strictly because of their timing.

5. There have been no questions raised over the validity of the 2002 and 2007 test scores, which are clearly within the range of mental retardation

As the Special Master observed, unlike the occurrence of problems, as described above, pertaining to 1992 and 1998 tests, there have been no issues of concern raised about the 2002 and 2007 tests (Master's Report, p. 6). In fact, Dr. Kline conceded that the 2002 and 2007 tests were correctly administered and scored, and accurately assessed Mr. Lyons' IQ at the times those tests were given (Hearing Tr. 454-456, 542). In addition, as the Special Master found, no one even hinted that Mr. Lyons may have malingered in his test taking (Master's Report, p. 7-8). Dr. Fucetola directly addressed that question, indicating that, in order to control for malingering, both he and Dr. Cowan conducted symptom validity testing as part of their test packages, and both he and Dr. Cowan determined from those validity tests that Mr. Lyons achieved good scores on those tests, demonstrating lack of malingering (Hearing Tr. 217, 225-226). Moreover, Dr. Fucetola noted that, in general, Mr. Lyons did not tend to exaggerate his mental retardation, but rather

tended to paint a rosier picture of himself (Hearing Tr. 226-228). Therefore, there is no evidence to support a notion that malingering would have impacted upon the 2002 and 2007 testing results. And, as the Special Master noted, there is no question that the 67 score on the 2002 test and the 61 score on the 2007 test are both within the proper range for diagnosis of mental retardation (Hearing Tr. 138-139, 217-218, 457; Exhibit 111; Master's Report, p. 4-5).

6. There is no data to support speculation that the 2002 and 2007 test scores were caused by factors other than lifelong mental retardation

Dr. Kline did express his concern that the 2002 and 2007 scores, though accurately obtained in valid testing, might be products, not of lifelong mental retardation, but of some other, intervening cause (Hearing Tr. 554). Dr. Kline identified such possible causes to be depression, dementia or some medical condition, such as stroke or head injury (Hearing Tr. 422, 481, 483-484). The Special Master rightly found that there is no evidence to justify those purported concerns (Master's Report, p. 6-7).

Every mental health expert who has evaluated Mr. Lyons, including the two who testified before the Special Master, has found that Mr. Lyons has suffered, all of his life, from depression (Exhibit A, p. 4-5; Exhibit D, p. 1, 7-9; Exhibit 103, p. 5; Hearing Tr. 110, 112, 114, 414, 487-489). The question is whether that

condition can be used to explain why the test scores in 2002 and 2007 were lower than those in 1992 and 1998. Dr. Kline contended that depression can suppress IQ scores (Hearing Tr. 422). However, Dr. Kline did not bring forth any scientific literature to support his position, though he contended he could if ordered to do so (Hearing Tr. 483-484, 484). Dr. Fucetola, on the other hand, indicated that overall IQ scores are “resilient” against the effects of depression (Hearing Tr. 242, 326-327). Dr. Fucetola also indicated that, while it is true that certain IQ subtests can be impacted by depression, he saw no such impact in those subtests for Mr. Lyons (Hearing Tr. 242, 326-327). Dr. Fucetola also pointed out the logical problem in Dr. Kline’s argument: that Mr. Lyons’ depression could not be used to explain the lowering of scores from 2002 to 2007 alone because the depression was lifelong, and therefore in play during all of the IQ test iterations (Hearing Tr. 243). For these reasons advanced by Dr. Fucetola, the Special Master rightly found no reason to think that the 2002 or 2007 scores were adversely impacted by Mr. Lyons’ depression (Master’s Report, p. 7).

Dr. Kline also brought up the question of whether dementia could be an explanation for the 2002 and 2007 scores. Dr. Kline noted, correctly, that in 2002, though Dr. Cowan diagnosed Mr. Lyons with mental retardation, he also raised the possibility that the difference between Mr. Lyons 1998 and 2002 IQ scores could be

explained by a dementia (Hearing Tr. 481, 569). However, Dr. Kline acknowledged that he himself did not diagnose Mr. Lyons with dementia, and saw no signs of dementia when he evaluated Mr. Lyons (Hearing Tr. 481-482, 548). For his part, Dr. Fucetola said that dementia can be ruled out for two reasons: first, there are no medical records indicating presence of such a condition, second, had such a dementia condition been present in 2002, at the time Dr. Cowan was evaluating Mr. Lyons, that condition would have, by now, either killed Mr. Lyons or rendered him unable to communicate, and neither of those things have happened (Hearing Tr. 224-225, 230). In light of these facts, the Special Master rightly found no reason to believe that a dementia existed so as to impact the 2002 and 2007 test scores (Master's Report, p. 7).

Dr. Kline also wondered whether some other medical condition, such as stroke or head injury, could have impacted upon Mr. Lyons to cause the 2002 and 2007 test scores (Hearing Tr. 483-484, 554). However, Dr. Kline admitted that he found nothing in Mr. Lyons' medical records to support such speculation (Hearing Tr. 483-484, 547). Dr. Fucetola also said he examined Mr. Lyons' medical records, and found no reported medical condition which could have impacted on Mr. Lyons' testing in 2002 and 2007 (Hearing Tr. 222-223, 358-359). Therefore, as the Special Master found, there is no reason to believe that a medical condition of the sort

postulated by Dr. Kline impacted on Mr. Lyons' testing in 2002 and 2007 (Master's Report, p. 7).

It is worth noting that, when confronted with the lack of evidence to support his concerns about the 2007 testing, Dr. Kline said that "2007 is an interesting data point and I don't know why he scored lower, but the important fact is he scored higher in 1992" (Hearing Tr. 532-533). This statement must be seen as a concession by Dr. Kline that he can identify no reasons to question the 2007 testing. The statement also demonstrates, once again, that Dr. Kline's position is dependent upon taking, at face value, the score of 84 in 1992, and essentially ignoring the other test scores. Dr. Fucetola has indicated that it would be a scientifically invalid approach to essentially ignore the later testing and concentrate on only one test (Hearing Tr. 219-221, 223; Exhibit 110).

7. The available evidence from childhood is consistent with the finding of mental retardation

Some educational records have survived destruction (Exhibit 102). Those records include very low standardized testing scores from March of 1973, when Mr. Lyons would have been fifteen years of age (Exhibit 102, p. 2). Grades from that same year were all failing or incomplete (Exhibit 102, p. 3). In addition to this minimal information provided by records, there has also been presented testimony

and other evidence from Mr. Lyons and his family members about his schooling, including his early placement in special education, his consistently vomiting on the bus on the way to school, and his inabilities to read and write (Exhibit R, p. 21-23; Exhibit GG, p. 938-940; Hearing Tr. 65-67; Exhibit 101, p. 15-17; Exhibit U, p. 16; Exhibit S, p. 6). Mr. Lyons' illiteracy has been confirmed in testing by Dr. Warren Wheelock, Ed.D. (Exhibit 104). Both Dr. Fucetola and Dr. Kline found all of this information to be reliable, accepted the information as correct and used this information in reaching their respective conclusions (Hearing Tr. 131, 153-154, 156-157, 187, 350, 513, 517, 56).

Dr. Fucetola indicated that in a situation like this, in which there are no IQ test scores surviving from childhood, it is important to be able to compare IQ testing scores from adulthood with the available information about childhood educational performance, to see if those accounts jibe with the adulthood IQ scores (Hearing Tr. 134-136). Dr. Fucetola said that the educational problems for Mr. Lyons described in the existing records by Mr. Lyons and his family members, and by the literacy testing done by Dr. Wheelock, were all consistent with the diagnosis of mental retardation with onset prior to age 18 (Hearing Tr. 131, 153-154, 156-157, 350).

8. Dr. Kline's anecdotal observations, about the generalized incapacities of those

with IQ scores as low as Mr. Lyons' Flynn-corrected 2007 score, are contrary to common experience as related in the reported cases

Dr. Kline also expressed a concern about reliance upon Mr. Lyons' 2007, since if it was Flynn corrected, it would be 55; Dr. Kline described his personal experience⁸ with persons with IQ scores in the 55-60 range, indicating that the persons he encountered with IQ's in that range, unlike Mr. Lyons, "do not function at all" and are "extremely dependent on other individuals" (Hearing Tr. 540-541). Even if one accepts that Dr. Kline's is truthful in describing his personal experiences with the persons with whom he dealt, there are any number of reported cases, beginning with the *Atkins* case itself, in which persons with tested IQ's in the 55-60 range do function, by engaging in criminal conduct. See *Atkins v. Virginia*, 308-309 (IQ of 59 in robbery/kidnapping/murder case); *United States v. Santa*, 2008 WL 2065560, *3 (E.D.N.Y. 2008) (IQ of 58 in a drug sale case for defendant with a lengthy history of drug sales); *Morris v. Dretke*, 413 F.3d 484, 489 (5th Cir. 2005) and *Morris v. State*, 940 S.W.2d 610, 613-614 (Tex.Cr.App. 1996) (IQ of 53

⁸ Dr. Kline testified that there was a "research basis" for his position, but did not provide that in his testimony, indicating that he did not "have it all memorized" (Hearing Tr. 541). Since the hearing, Dr. Kline and Respondents have failed to provide any materials to support this contention by Dr. Kline.

in a robbery/murder case); *Neal v. State*, 873 So.2d 1010, 1011-1012 (Miss. 2004) (IQ of 54 in a kidnapping/murder case); *People v. Ary*, 13 Cal.Rptr.3d 482, 484, 487 (Cal.App. 2004) (IQ scores of 45, 58 and 59 in a robbery/carjacking/murder case); *Holladay v. Campbell*, 463 F.Supp2d 1324, 1326, 1342 (N.D.Al. 2006) (IQ scores of 49, 55, 56 and 58 in a multiple murder case); *State v. White*, 709 N.E.2d 140, 145 (Ohio 1999) and *State v. White*, 885 N.E.2d 905, 908 (Ohio 2007) (IQ of 52 in a case remarkably similar to this one in which an employed defendant, estranged from his girlfriend, used a shotgun to kill his girlfriend's mother, and attempted to kill the girlfriend's new boyfriend); *State v. Turner*, 936 So.2d 89, 96 (La. 2006) (reporting various criminal cases in which IQ's ranged from 47 to 62).

These cases clearly demonstrate that, contrary to Dr. Kline's experience, there are many persons who can function with the sort of low IQ attributed to Mr. Lyons by Flynn correction of his 2007 testing.

Limitations in adaptive behavior

1. Overview

In order for there to be a finding of mental retardation, the law requires proof of both significantly subaverage intellectual functioning, and also "continual extensive related deficits and limitations in two or more adaptive behaviors", with

the onset of all deficits occurring prior to age 18. *In re Competency of Parkus*, 255. The Special Master found, as required by law, that Mr. Lyons suffers, in at least two and arguably several more adaptive behaviors, from continual extensive deficits and limitations related to his subaverage intellectual functioning (Master's Report, p. 9-17). There is substantial support for those findings in the facts presented to the Special Master and in the applicable law. With all due respect to the Special Master, there is also sufficiently strong support for favorable findings with respect to additional adaptive behaviors about which the Master did not make such findings. Support for all of these positions will be detailed below.

2. When adaptive behaviors are looked at, it must be remembered that a person with mental retardation may well have capabilities, but still meet the criteria for mental retardation because of significant limitations upon independent behavior

The United States Supreme Court has used the adjective "significant" to describe the sorts of limitations on adaptive behavior which must be found. *Atkins v. Virginia*, 318. The term "significant limitations" was borrowed from the definition of mental retardation set forth in the DSM-IV (Exhibit 110, p. 1). Mr. Lyons clearly has such deficits in multiple behaviors, as will be detailed below.

That is not to say that Mr. Lyons is totally incapable. There certainly are some persons with mental retardation whose limitations are more extreme than

those experienced by Mr. Lyons. Persons who can only function on the level of a second grader are considered, by the DSM-IV, to be moderately mentally retarded, while those whose mental retardation is so great that they must be institutionalized are termed as severely or profoundly mentally retarded (Hearing Tr. 118-119; Exhibit 111, p. 3).

However, total incapability is not the standard for mental retardation of the sort contemplated under Section 565.030.6 and *Atkins*. As the United States Supreme Court explained in *Atkins*, the mentally retarded person who qualifies for exemption from the death penalty due to mental retardation will still be capable of meeting basic criminal competency tests, like understanding the difference between right and wrong and understanding the proceedings against him and being able to assist with his defense. *Atkins v. Virginia*, 318. Still, such a person with mental retardation should be exempted from the death penalty because, though capable on some levels, he lacks the sort of deeper understanding which must be found in order for the death penalty to be a Constitutionally permissible punishment. *Atkins v. Virginia*, supra.

Persons with IQ scores below 75, and down to 50, are described in the DSM-IV as suffering from “mild” mental retardation (Exhibit 110, p. 2-3). These persons have capabilities, and will in many circumstances appear normal because they will

be able to do things such as work and earn a living, so long as they are in low skill jobs (Hearing Tr. 117; Exhibit 111, p. 3). Thus, as the Ohio Supreme Court has put it, it is important for a Court assessing mental retardation to “...focus on those adaptive skills the person lacks, not on those he possesses.” *State v. White*, 885 N.E.2d 905, 914 (Ohio 2007). Such an approach is in keeping with the definition of mental retardation in Section 565.030.6.

Also, it is important to realize that part of the reason that the mentally retarded person may appear normal on the surface is because he is receiving significant amounts of support to achieve (Hearing Tr. 117; Exhibit 111, p. 3). On the other hand, as the Ohio Supreme Court has put it, “(a)adaptive skills are those skills that one applies to the everyday demands of independent (emphasis added) living, such as taking care of oneself and interacting with others.” *State v. White*, 908. Because independence is a key component in assessing adaptive skills, standardized tests for those adaptive skills are called the “Independent Living Scales” (emphasis added) and the “Scales of Independent Behaviors” (emphasis added) (Exhibits 112, 113, 114, 115). Thus, the need for support in a skill area, and the concomitant lack of independence shown by the need for that support, must be considered to be a deficiency in that adaptive skill set (Exhibit 111, p. 3; Hearing Tr. 118).

The Special Master expressed his clear understanding of these principles of law, referring to mental retardation, in the same fashion as did Dr. Fucetola, as the “cloak of competence” giving a false appearance of capability fostered by the retarded person, like Mr. Lyons, being supplied an inordinate amount of family support (Master’s Report, p. 16).

3. Standardized testing scores generally demonstrate Mr. Lyons’ functional incapacities

Dr. Fucetola administered the Independent Living Scales (ILS) standardized test to Mr. Lyons, and the Scales of Independent Behavior (SIB-R) standardized test to three of Mr. Lyons’ siblings (Hearing Tr. 160, 169). Dr. Fucetola and Dr. Kline agreed that standardized scores from the tests given to Mr. Lyons and to his sister Rose were valid (Hearing Tr. 171, 244-247, 365-367, 448-449). About the two SIB-R tests given to Mr. Lyons’ two brothers, Dr. Fucetola and Dr. Kline agreed that standardized scores generated from those tests could not be used because the tests were conducted to obtain retrospective impressions by the brothers about Mr. Lyons as a child, while the test is normed for the giving of contemporaneous impressions (Hearing Tr. 171, 244-247, 448). Dr. Fucetola also addressed concerns raised upon cross-examination about scores being influenced by Mr. Lyons’ impoverished social background, lack of educational attainment, or

prolonged incarceration, indicating that the answers demonstrated problems, not with background, but in dealing with complex, real-world tasks (Hearing Tr. 162).

Significant information, then, comes from the standardized scores of the tests given to Mr. Lyons and to his sister Rose. Mr. Lyons's comprehensive standardized score on the ILS, across all adaptive behaviors, was in the first percentile (Hearing Tr. 161). On the age equivalent scales on the SIB-R for Rose, with the exception of higher scores for domestic skills and dressing, Mr. Lyons was placed, across all adaptive behaviors, at an age equivalents ranging from a 6 year old to a 13 year old (Exhibit 112, p. 1).

4. It is appropriate, in considering the questions about functioning, to look at raw data from the standardized tests and testimony provided by family members

Both Dr. Fucetola and Dr. Kline agreed that consideration by the Court of the raw questions and answers obtained on all four of the standardized tests would be appropriate and helpful (Hearing Tr. 171, 244-247, 365-367, 448-449). In addition to the raw data from the standardized tests, family input about Mr. Lyons has been presented through the testimony of his brother David, and through the depositions and trial testimony of his mother, his brother James, and his sisters Lillie, Mary and Rose (Hearing Tr. 50-98; Exhibits 101, Q, R, S, U, GG). Both experts indicated that they reviewed and relied upon the information from these witnesses (Hearing

Tr. 107-109, 394-412; Exhibit 107, p. 1-2; Exhibit FF, p. 1-2).

However, Respondents have raised general questions about whether the accounts of family members about Mr. Lyons are consistent with one another regarding Mr. Lyons' deficiencies. Those general questions were addressed by Dr. Fucetola, who indicated that there were no inconsistencies in answers, but rather, during trial and state post-conviction proceedings, witnesses were simply not asked the sorts of questions which Dr. Fucetola posed regarding mental retardation, which explains why those sorts of answers are not found in the records from earlier in the proceedings (Hearing Tr. 168, 184-186, 247). The Special Master alluded to the same thing, indicating that the evaluation conducted by Dr. Fucetola was more in-depth, and was more directed to the specific issues of mental retardation, as compared with prior competency evaluations and proceedings (Master's Report, p. 3,5). In addition, it should be noted that the approach taken by Dr. Fucetola, administering the standardized tests separately to each person, avoided possible collaboration on answers, and thus makes the data collected in that testing more robust (Hearing Tr. 247-248). Also, as Dr. Fucetola indicated, Mr. Lyons' older siblings could be depended upon as very good historians since much of Mr. Lyons' childhood care fell on their shoulders (Hearing Tr. 167). Therefore, not only are there not any inconsistencies in the family accounts about Mr. Lyons, those

accounts are very much worthy of credit and consideration.

5. As the Special Master found, there can be no question that Mr. Lyons has profound and obvious limitations in two areas, functional academics and communication

The Special Master noted that some of Mr. Lyons' most obvious limitations are found in the area of functional academics (Master's Report, p. 14-15). The only surviving school records show failing grades and extremely low standardized test scores (Exhibit 102; Master's Report, p. 14-15). Literacy testing shows that Mr. Lyons cannot write, can read only on a first grade level, and can understand what is read to him only on a fourth grade level (Exhibit 104; Master's Report, p. 15). All family members accounted that Mr. Lyons was in special education classes, had profound difficulties in school, and is illiterate (Exhibit 101, p. 15-17; Exhibit R, p. 21-23; Exhibit S, p. 6; Exhibit U, p. 16; Exhibit GG, p. 938-940; Hearing Tr. 55-56).

As the Special Master found, much of this same evidence from school records, from literacy testing and from family testimony demonstrated Mr. Lyons' extreme deficits in communication (Master's Report, p. 8-9). Dr. Fucetola has further detailed Mr. Lyons' communication weaknesses, that while Mr. Lyons can verbally communicate on a simple level, stringing sentences together, and following

simple, verbal directions, he cannot verbally communicate on a higher level in which multiple issues are needing to be addressed at once, and therefore he cannot engage in discourse, and he cannot advocate for himself (Hearing Tr. 187-188).

Dr. Kline has taken the position that, while Mr. Lyons certainly experienced significant problems in school, and certainly was and is illiterate, those circumstances should be attributed, not to mental retardation, but to a learning disability which is unrelated to mental retardation; Dr. Kline further contends that his position is supported by the findings by Dr. Cowan and Dr. Wheelock (Hearing Tr. 444-445, 513, 552-553).

To test Dr. Kline's position, one must first determine whether that position is actually supported in the reports by Dr. Wheelock and Dr. Cowan. In his report, Dr. Wheelock indicated that Mr. Lyons appeared to have "an associative learning disability", and went on to explain what he meant by that term (Exhibit 104, p. 4). However, Dr. Wheelock never indicated that this associative learning disability was distinct from Mr. Lyons' mental retardation; rather, Dr. Wheelock noted Dr. Cowan's diagnosis of mental retardation, and incorporated all of his own findings into that mental retardation context (Exhibit 104, p. 4). The only mention of the term "learning disability" in Dr. Cowan's report occurs when he quotes, verbatim, a portion of Dr. Wheelock's report (Exhibit 105, p. 2). Dr. Cowan's diagnosis was

mental retardation, with no mention of a “learning disability” (Exhibit 105, p. 30).

Therefore, there is no support for Dr. Kline’s position to be found in the reports of Dr. Wheelock and Dr. Cowan, Dr. Kline’s opinions to the contrary notwithstanding.

Dr. Fucetola also raised another concern with Dr. Kline’s use of the term “learning disability”, as an alternative to, rather than a part of, mental retardation (Hearing Tr. 240-241). Dr. Fucetola said that such a stand-alone “learning disability”, by definition, would be expected to cause scores on certain IQ test subtests related to that disability which were significantly lower than scores on other subtests, and lower than the overall IQ score (Hearing Tr. 240-241). Dr. Fucetola explained that Mr. Lyons condition did not fall into that category because, while Mr. Lyons’ scores were low on the subtests related to the disability, those lower scores were consistent with lower scores on other subtests, and were consistent with Mr. Lyons overall low IQ (Hearing Tr. 240-241).

In light of all of this information, it is clear that if Mr. Lyons has a learning disability, as contended by Dr. Kline, it is associated with, and not independent from, his mental retardation.

6. As the Special Master also found, Mr. Lyons has extensive related deficits in community use

The Special Master’s findings in this regard cut to the heart of the matter, that

there is “scant evidence” that Mr. Lyons ever used the community, and what evidence of community use there is demonstrates that Mr. Lyons used the community only as much as his family helped him to do so (Master’s Report, p. 12-13). Mr. Lyons’ significant limitations in the area of community use come out clearly in his standardized testing (Exhibit 115, p. 3-6). Dr. Fucetola explained that Mr. Lyons could not answer basic questions about dealing successfully in the community, even when coached (Hearing Tr. 191). As well, family members indicated that Mr. Lyons was very dependent upon them to intercede for him in his interactions with community services (Hearing Tr. 174; Exhibit 113, p. 6, 15, 17).

Though it was advanced that Mr. Lyons ownership of his vehicles might demonstrate ability in community use, there was no evidence that Mr. Lyons had, himself, done the things that might show community use, such as titling, licensing and paying taxes for the vehicles (Hearing Tr. 374-375, 435, 510).

Though it was advanced that Mr. Lyons’ purchase of a shotgun might demonstrate ability in community use, that actually showed little more than his limited ability to purchase items for himself, and to fill out rather simplistic portions of a registration form (Hearing Tr. 308; Exhibit GG, p. 475-476; Exhibit 117).

It was also contended that Mr. Lyons’ act of approaching a Judge with questions about out how to gain custody of one of his children, and Mr. Lyons’

failed efforts to obtain a house to save custody of others of his children, showed community use (Hearing Tr. 438, 524; Exhibit GG, p. 758). Dr. Fucetola explained that these ineffectual efforts more tended to prove Mr. Lyons' disability, since they showed that Mr. Lyons' inability to understand how to take effective steps in furtherance of his desire for custody (Hearing Tr. 248-249; Exhibit GG, p. 758).

It was additionally contended that Mr. Lyons demonstrated community use capabilities by traveling to Detroit, Chicago, St. Louis, and Southern California, and by finding work in those places after arrival (Hearing Tr. 437-438). However, once again, Mr. Lyons was able to accomplish these tasks only because he received large amounts of support from family in making the travel and in finding the jobs (Exhibit 101, p. 18-19, 22, 25-26; Exhibit GG, p. 599; Hearing Tr. 69-72, 250-251, 438; Exhibit R, p. 72; Exhibit 113, p. 16). Moreover, Mr. Lyons' ILS testing showed his inability to independently make travel and job arrangements (Exhibit 115, p. 5).

For these reasons, the Special Master was correct in finding, by a preponderance of the evidence, that Mr. Lyons has a continual extensive deficit related to mental retardation in the area of community use (Master's Report, p. 12-13)

7. As the Master also found, Mr. Lyons has significant related deficits in leisure

Once again, the Master noted the complete lack of leisure in Mr. Lyons' life as proof of his deficits in this area (Master's Report, p. 15). In the area of leisure, as observed by Dr. Fucetola, there is no indication that Mr. Lyons ever did things like playing sports or developing any extracurricular interest or hobbies in school or in the community (Hearing Tr. 194). The most that Dr. Kline could advance by way of leisure activities by Mr. Lyons were his taking his children to the park and his development of relationships with women (Hearing Tr. 446). However, as the Master noted, it is difficult to find that Mr. Lyons' three relationships with women, consisting primarily of fathering children, to be positive (Master's Report, p. 12).

8. As the Special Master also noted, Mr. Lyons has some significant limitations in social skills

As already noted above, Mr. Lyons began life with limited social skills, was shy and was without the ability to make friends (Exhibit R, p. 25; Exhibit 101, p. 11-12; Hearing Tr. 67-68). However, Mr. Lyons later came to the point of making some friends, as evidenced by testimony elicited at Mr. Lyons' jury trial (Exhibit GG, p. 637, 646). *State v. Lyons*, 587-588. It has also been pointed out that Mr. Lyons was able to at least begin relationships with three different women (Hearing Tr. 436). However, that story has a significant downside, in that the relationships

were rocky, and resulted in births of numerous children, who were eventually taken away by authorities (Hearing 519-520). It was also contended that Mr. Lyons would somehow socialize on the job (Hearing Tr. 436-437). However, when the testimony of Mr. Lyons' supervisor is thoroughly reviewed, nothing is found therein to support that contention, other than Mr. Lyons speaking once a week with the supervisor over the time span of just over a month (Exhibit GG, p. 658-663).

Dr. Fucetola said that Mr. Lyons' incapacities in this area appeared in more complex interactions, such as the failed relationships with his girlfriends (Hearing Tr. 190).

In light of this evidence, the Special Master found that Mr. Lyons had significant limitations in this area, noting that "it is very unlikely that he (Mr. Lyons) had the social skills to foster any relationships" (Master's Report, p. 12). As a consequence, this Court should find that Mr. Lyons has continual extensive related deficits in the area of social skills.

9. Mr. Lyons has significant limitations in the area of independent home living, despite the Master's findings that these limitations are not as extensive as required by the law

On the surface, the category of home living might seem to be an area of strength for Mr. Lyons in light of his penchant for cleaning, and his abilities to cook

for himself and his children⁹ (Hearing Tr. 189, 433-435). However, the only time that Mr. Lyons ever lived alone, he lived in squalor in a vacant house (Exhibit S, p. 14-15; Exhibit GG, p. 898-899). At all other times, Mr. Lyons lived with family members or a girlfriend (Hearing Tr. 72; Exhibit 101, p. 25-26). This was because Mr. Lyons could not handle the money management aspects of home living, like paying the bills (Hearing Tr. 189; Exhibit 115, p. 4; Exhibit 112, p. 15).¹⁰ In addition, Mr. Lyons' answers on the ILS testing showed his inability to address and solve the normal sorts of problems which could be expected to arise in a home

⁹It may be a stretch to say Mr. Lyons abilities were very great in these regards. Mr. Lyons' meals for himself often consisted only of baloney sandwiches (Hearing Tr. 512; Exhibit R, p. 31, 44). Also, in light of his off-and-on living arrangements with his girlfriends, his self report to Dr. Kline about regularly making meals for his children is likely somewhat of an exaggeration (Hearing Tr. 510-511).

¹⁰Dr. Kline initially speculated that Mr. Lyons' ownership of automobiles might demonstrate his abilities to handle finances related to those vehicles, like paying for them, securing legal title, and paying property taxes (Hearing Tr. 435). However, Dr. Kline realized and admitted that he had nothing more than ownership papers on the automobiles, and nothing to show that Mr. Lyons actually did any money-management-related things to obtain and maintain them (Hearing Tr. 510).

(Hearing Tr. 189; Exhibit 115, p. 4).

The Special Master, while noting Mr. Lyons' obvious deficits in this regard, questioned whether those deficits were significant enough to meet the threshold required under Section 565.030.6 RSMO, but noted that these deficits are consistent with deficits which Mr. Lyons suffers in other areas (Master's Report, p. 11-12). With all due respect to the Special Master, Mr. Lyons would urge that this Court find, as did Dr. Fucetola, that the deficits in this area are continual, extensive, and related to Mr. Lyons' substandard intelligence.

10. Mr. Lyons has significant limitations in work because he requires significant supports in obtaining employment

Again, on the surface, it would seem that work is an area of strength for Mr. Lyons, in that he has had numerous jobs, and even maintained his most recent job for some three years (Exhibit 101, p. 18-19, 25-26; Exhibit GG, p. 599; Hearing Tr. 70-72; Exhibit R, p. 72). Therefore, the Special Master found that, since Mr. Lyons was able to get himself to his jobs and perform the necessary tasks, Mr. Lyons did not demonstrate a continual extensive related deficit or limitation in this area (Master's Report, p. 16). However, it should still be noted that all of those jobs were low-skill, mostly cleaning jobs, and all jobs were obtained only through the intervention of "kin", family members, finding the jobs, and filling out applications

for the obtaining of the jobs (Exhibit 101, p. 18-19, 22, 25-26; Exhibit GG, p. 599; Hearing Tr. 69-72; Exhibit R, p. 72; Exhibit 113, p. 16). That Mr. Lyons left most all of these jobs in connection with his moves from place to place highlights that whatever steady employment he might have had was dependent upon the intervention of family to obtain new jobs for him. Because of Mr. Lyons' dependence upon family in obtaining jobs, this Court should find, as did Dr. Fucelola, that Mr. Lyons has a continual extensive deficit related to mental retardation in the area of work.

11. Mr. Lyons has major limitations in self-direction

Dr. Kline indicated that Mr. Lyons had what Dr. Kline described as the "very simplistic" goals of maintaining employment, being self-sufficient, and providing for his children (Hearing Tr. 439-440, 525-526). The Special Master tended to agree that the making of these "small decisions" demonstrated sufficient self-direction to preclude a finding in favor of Mr. Lyons in this area (Master's Report, p. 13). However, this Court should consider Dr. Fucetola's opinions in this regard, that such expression and following of simplistic goals demonstrate, not self-direction, but rather a desire to have structure imposed from the outside (Hearing Tr. 192-193). This Court should also consider the impressions of Mr. Lyons' family members, that Mr. Lyons was directionless, a wanderer with no life goals,

who could not get his life together (Hearing Tr. 73; Exhibit 101, p. 28; Exhibit GG, p. 944, 972). That point seems confirmed by the various moves, across states and across the country made by Mr. Lyons (Hearing Tr. 193). For these reasons, this Court should find, by a preponderance of the evidence, that Mr. Lyons has a continual extensive deficit related to mental retardation in the area of self-direction.

12. Mr. Lyons has significant limitations in health and safety

On this subject, the Special Master found that there was little evidence to support the finding of a deficit, in that Mr. Lyons did not appear to need health care (explaining his lack of actually seeking out health care), was not shown to disobey doctor's orders, and was shown to act to help with his ailing father's health needs by moving to Detroit (Master's Findings, p. 13-14). These were some of the same points made by Dr. Kline in this regard (Hearing Tr. 441).

With profound respect to the Special Master, it still must be noted that the ILS testing administered to Mr. Lyons clearly showed that, had Mr. Lyons actually needed health care, he would have been incapable of taking necessary steps to preserve his own health, and would have lacked the understanding to deal with emergency and common health situations (Hearing Tr. 193; Exhibit 115, p. 6-7). Mr. Lyons' incapacities in these regards were confirmed by family (Exhibit 112, p. 12). Moreover, as Dr. Kline admitted, in the instances in which Mr. Lyons

received care, he had no independent capability, in that his family had to help him to access that care (Hearing Tr. 502). And, though Mr. Lyons did travel to Detroit to help his father, as the Master notes, he required significant family help in making that move (Hearing Tr. 70-73, 85; Exhibit GG, p. 31).

In the area of safety, Dr. Kline saw as significant Mr. Lyons supposedly having a “factory job” (Hearing Tr. 441-442). However, as it turned out, the “factory job” only involved making pallets (Hearing Tr. 526-527). Dr. Kline did not explain why having a job making pallets would make a person more capable at safety. And, once again, as noted above, the ILS testing demonstrated, to the contrary, that Mr. Lyons does not understand how to handle safety and emergency situations.

Dr. Kline also said that he found safety in the fact that Mr. Lyons had discontinued drug use at an early age (Hearing Tr. 441-442). While that step avoided some future problems for Mr. Lyons, it simply does not prove his capabilities in the area of safety.

For these reasons, this Court should find, by a preponderance of the evidence, that Mr. Lyons has continual extensive deficits related to mental retardation in the areas of health and safety.

13. Though Mr. Lyons has some limitations in self care, this is one of his relative

areas of strength

The experts agreed that Mr. Lyons is fairly capable in the area of self care, with the exception of his not being able to independently access medical care (Hearing Tr. 188, 432-433). On the other hand Mr. Lyons' sister Rose accounted about his not caring for himself during the short time while he lived alone in the vacant house belonging to his brother (Exhibit S, p. 14-15; Exhibit GG, p. 898-899). The Special Master considered this evidence, and ultimately decided that, while the problematic behavior described by Rose certainly raises concerns in this area, there were not show sufficient deficits to meet the level anticipated under the statute (Master's Report, p. 11). Mr. Lyons agrees with, and does not dispute, this assessment.

Onset prior to age 18

The Master found that, in light of the testimony by family members and Dr. Fucetola, and in light of the limited records still in existence, it is clear that Mr. Lyons' mental retardation dates back to his childhood, well prior to age 18 (Master's Report, p. 16). As the Master has indicated, the school records, though "scant", still "speak for themselves" about the profound deficits suffered by Mr. Lyons during his childhood (Master's Report, p. 15; Exhibit 102). In addition, the family clearly testified that Mr. Lyons demonstrated in childhood his profound

deficits in multiple adaptive behaviors. Mr. Lyons cried inconsolably as a child (Exhibit R, p. 10, 13-15; Hearing Tr. 58; Exhibit U, p. 15; Exhibit GG, p. 964).

Mr. Lyons was a shy child, with no friends other than family (Exhibit R, p. 25; Exhibit 101, p. 11-12; Hearing Tr. 67-68). Mr. Lyons had profound difficulties with functional academics, leaving him illiterate (Exhibit 102, Exhibit 104). Mr. Lyons had profound difficulties in school, including in the social arena, with nearly daily vomiting (Exhibit R, p. 21-23; Exhibit GG, p. 938-940; Hearing Tr. 65-67; Exhibit 101, p. 15-17; Exhibit U, p. 16; Exhibit S, p. 6). Mr. Lyons was slow, with difficulties reaching developmental milestones (Exhibit R, p. 23; Exhibit 101, p. 11, 13-14, 27-28, 58-59; Hearing Tr. 60-61, 67, 88-89; Exhibit 113, p. 3). As a child, Mr. Lyons was never able to do things for himself, and was always dependent on family to take care of him (Hearing Tr. 53-54). While the other children would help doing sharecropping, Mr. Lyons was simply unable to do that work (Hearing Tr. 61-62). As a child, and then even as an adult, Mr. Lyons became able to do basic grooming, but needed family help to do things like taking his temperature for a fever, or getting him to a doctor, or reading written material to him, or helping him find locations on a map, or managing his money, or dealing with business matters (Hearing Tr. 179-180; Exhibit 112, p. 12, 15, 17; Exhibit 113, p. 3; Exhibit 114, p. 3). Mr. Lyons was also very gullible, being easily tricked and manipulated

(Hearing Tr. 181). This was solid evidence of onset, prior to age 18, of Mr. Lyons significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors.

There are strong reasons to believe that Dr. Kline's ultimate opinions are based on a definition of mental retardation different from that in the statute

In light of the testimony from both Doctor Fucetola and Dr. Kline, it is clear that both relied upon the same basic data in reaching their respective conclusions (Hearing Tr. 107-109, 394-412; Exhibit 107, p. 1-2; Exhibit FF, p. 1-2). Both Doctors also indicated that they reached their respective conclusions by following the requirements under the DSM-IV, which are like those under the statute, calling for consideration of both the question of significantly subaverage intelligence and also the question of significant adaptive skill functions limitations (Hearing Tr. 125-126, 129, 419; Exhibit 111).

However, with respect to the opinion offered by Dr. Kline, there is strong reason to believe that, contrary to his representation, his opinions about mental retardation were shaped largely, if not exclusively, by his perceptions about Mr. Lyons' IQ, and therefore he was not giving full consideration to all necessary issues as required under the law. Dr. Kline's contentions with regard to the significance, and even primacy, of the 1992 IQ score of 84 alone would amount to some

evidence for this point. There also came late in the proceedings before the Special Master testimony from Dr. Kline which confirms the point.

Near the end of his cross-examination, Counsel for Mr. Lyons posed to Dr. Kline a hypothetical question about whether his opinion would change if, in addition to the evidence he received, he was also provided an IQ score of 70 for Mr. Lyons, obtained prior to age 18 (Hearing Tr. 545-546). Dr. Kline indicated that such additional data “would be very challenging” and “would have a strong possibility of changing my answer” (Hearing Tr. 546). Dr. Kline indicated that his problem would be that “I still run into the problem of how does he score the 84” (Hearing Tr. 546).

On the surface, this answer appears to be a reasonable effort on the part of Dr. Kline to be open to changing his opinion based upon hypothetical, new evidence. The problem is that Dr. Kline, by that time, had already testified that he found that Mr. Lyons had no significant, mental-retardation-related deficits in adaptive behavior in any of the statutory categories (Hearing Tr. 428-447). If Dr. Kline was indeed convinced that Mr. Lyons had no significant adaptive behavior deficits, the information about a childhood IQ score of 70 should have made no difference to his opinion. That is so because, if Dr. Kline was following the definition of mental retardation under the statute and the DSM-IV, and if he truly

believed that there were no significant adaptive behavior deficits related to mental retardation, he should have said that the 70 IQ prior to age 18 made no difference.

There are only two possible reasons why Dr. Kline would say the hypothetical evidence of a 70 IQ prior to age 18 might change his opinion: either Dr. Kline was really concentrating only on IQ scores, and not really paying much attention to the issue of adaptive behavior deficits, or Dr. Kline actually believed, contrary to his testimony, that there may be mental-retardation-related significance to some of Mr. Lyons' adaptive behavior deficits. In either case, Dr. Kline was apparently following his own, personal notions regarding mental retardation, and not the dictates of the statute.

For these additional reasons, this Court should not rely upon Dr. Kline's ultimate conclusions.

Other issues raised by Respondents

There are additional points made by Respondents which need be addressed.

1. There are problems of factual, legal and even Constitutional dimension created by Respondents' new objections over Mr. Lyons supposedly not documenting the onset of his mental retardation prior to age 18

As a consequence of the Cape Girardeau School District record destruction policy (Exhibit 102, p. 1), there are no surviving records regarding Mr. Lyons

schooling prior to 1973, or regarding IQ testing of Mr. Lyons prior to age 18.

There is a similar lack of medical and mental health records, owing to the fact that Mr. Lyons never received such services in childhood, as poverty left his family unable to seek and obtain such services (Exhibit 101, p. 7; Hearing Tr. 53-54).

Respondents, in their exceptions, now wish to turn these unfortunate circumstances to their advantage by claiming that the Master erred in finding onset of mental retardation prior to age 18, not because there is not evidence aplenty to support the proposition, but because, in the opinion of the Respondents, Mr. Lyons did not come up with sufficient documentation, generated prior to age 18, to support the existence of his mental retardation (Respondents' Exceptions, p. 4-5). The Special Master rejected this argument, finding that the available records, though scant, still were sufficient to support the findings of mental retardation (Master's Response to Exceptions, p. 2).

It should be noted, at the outset, that if Respondents' contentions about the statute were held to be correct, the Statute would clearly violate Mr. Lyons' right to due process of law and to equal protection of the law in violation of the 14th Amendment to the Constitution of the United States and Article 1, Sections 10 and 18(a) of the Constitution of the State of Missouri. Essentially, that would mean that unilateral actions by state actors in destroying records, as well as Mr. Lyons'

poverty, would be acting to deny him relief that he would otherwise deserve based upon the other evidence in the case. However, as will be detailed below, this Court needs not even reach that issue.

Respondents' claim that two cases support their position, *Walton v. Johnson*, 440 F.3d 160 (4th Cir. 2006) and *Commonwealth v. Vandivner*, 962 A.2d 1170 (Pa. 2009). In fact, in both cases, the Courts specifically rejected the very notion advanced by Respondents. Rather, the peculiar facts in those cases, distinguishable from the facts in this case, brought the negative findings against those respective petitioners.

The Fourth Circuit made clear that its holding against Walton "...does not mean that a condemned inmate must submit a score of 70 or less from an IQ test taken before he turned 18." *Walton v. Johnson*, 177, fn. 20. This was a Virginia case, governed by Virginia law, requiring a showing of an IQ of 70 or below to establish mental retardation; Walton's claim failed because he came forward only with two, post-eighteen-years-of-age IQ scores, of 90 and 77, with no expert opinion supporting the contention that Walton was mentally retarded. *Walton v. Johnson*, 177-178. This case, of course, is plainly distinguishable from Mr. Lyons', wherein Dr. Fucetola offered his expert opinion of mental retardation, supported by testing and other evidence aplenty.

In upholding the trial court's rejection of Vandivner's mental retardation contention, the Pennsylvania Supreme Court specifically stated that "(t)he trial court did not hold, and we do not suggest, that objective IQ testing occurring prior to age eighteen is required to prove mental retardation." *Commonwealth v.*

Vandivner, 1187. Though Vandivner came forward with a post-eighteen-years-of-age IQ score of 66, the validity of that testing was called into serious question by evidence, not only that Vandivner had malingered in taking the test to get that low score, but also suffered post-eighteen-years-of-age medical conditions which could have acted to lower his IQ from what it would have been at age 18.

Commonwealth v. Vandivner, 1185. In addition, the trial court had also considered evidence about Vandivner's functional capabilities, being a commercial truck driver who had passed the commercial driver's license exam, having the ability to read and write, and performing well on mental status tests like subtracting by serial threes and spelling words backwards. *Commonwealth v. Vandivner*, 1185. Even at that, the main opinion in the case drew a scathing dissent, arguing vigorously for a finding of mental retardation. *Commonwealth v. Vandivner*, 1190-1193. Once again, Mr. Lyons' case is easily distinguishable from that of Mr. Vandivner on the facts. As noted already above, Mr. Lyons' IQ testing showed no hint of malingered and Mr. Lyons' records showed no evidence of after-18 medical

conditions which could have lowered Mr. Lyons' IQ testing results given after age 18. Also, unlike Mr. Vandivner, Mr. Lyons was illiterate, and incapable of performing even very simple test tasks, much less the sorts of more complicated test tasks upon which Mr. Vandivner excelled.

Respondents' insistence on production of documentation generated prior to age 18 might have moment if such records were necessary to make a valid assessment of Mr. Lyons pre-18 IQ. However, as Respondents know, such records are not necessary to make such an assessment. Dr. Kline, Respondents' own expert, along with Dr. Fucetola, testified before the Master that, though Mr. Lyons' pre-age-18 records were sparse, the statutorily required questions regarding mental retardation could still be answered even without such records. Hearing Tr. 134-136, 394-412, 517. In fact, both Dr. Kline and Dr. Fucetola went even further to offer that such evaluations often must be made without benefit of records because of the records destruction policies of governmental agencies like school districts. Hearing Tr. 134-136, 517.

Also, Respondents' point might be more arguable if there was any reason to think that Mr. Lyons was simply not coming forward with records which could be produced, and thereby might be hiding untoward information. To the contrary, it is clear that Mr. Lyons has come forward with all of the records which currently exist.

The reason that no more school records can be brought forth is because the school district chose to destroy almost all of its records (Exhibit 102). It is arguable that, for those in fortunate financial circumstances, childhood records of retardation might possibly be generated through medical and psychiatric visits. However, Mr. Lyons can produce no such records because Mr. Lyons was reared in rural Missouri poverty, in a family with no resources to seek professional help for anything but the most critical of emergencies (Exhibit 101, p. 7; Hearing Tr. 53-54). Under these circumstances, it is clear that all available records have been produced.

Respondents' position might also be more arguable if there was something in the existing records which was inconsistent with the diagnosis of mental retardation. To the contrary, as Dr. Fucetola noted, what records there are paint a picture of one incapable of succeeding at school, with single digit percentiles in achievement tests and failing grades in all classes (Hearing Tr. 131, 153-154, 350; Exhibit 102).

The evidence well supports the Master's conclusion that Mr. Lyons' mental retardation, and his related deficits, were "manifested and documented before eighteen years of age."

2. Respondents' own expert debunks their contention that Mr. Lyons failure in school owed to lack of effort

In their exceptions, Respondents also advance their notion that lack of effort on Mr. Lyons' part should be found the cause of his school failures (Respondents' Exceptions, p. 5). The problem with this contention is that has been disavowed by Respondents' own expert, Dr. Kline (Hearing Tr. 514-516).

3. There is nothing to support speculation by a psychometrist, as advanced by Respondents, that Mr. Lyons could have scored higher on the 1992 IQ test

The psychometrist who administered the 1992 test noted, at the time of his testing, that Mr. Lyons had requested to discontinue testing (Exhibit D, p. 6; Dr. Harry Deposition, p. 23-27). That led to the psychometrist speculating that Mr. Lyons' IQ might be even higher than the 1992 test indicated (Exhibit D, p. 6). However, Dr. Harry, the psychiatrist who coordinated that evaluation process, did not put much stock in the speculation, indicating that, while such anecdotal comments by psychometrists are encouraged, and were therefore recorded by him in his report, such comments have no independent scientific validity (Harry Deposition, p. 26-27). Dr. Harry also made clear that, despite Mr. Lyons' expressed desires to stop the testing, Mr. Lyons actually completed the IQ test and achieved points on the test after his request to discontinue, and further indicated that general findings were made that Mr. Lyons had not malingered in the 1992 test taking (Hearing Tr. 213-215; Exhibit D, p. 6). In addition, the best evidence

against the speculation is the fact that all subsequent IQ testing has yielded lower, not higher, scores. Finally, Respondents own expert, Dr. Kline, contrary to the psychometrist, described the 84 score as the “upper ceiling” of Mr. Lyons’ abilities (421)

Therefore, the psychometrist’s speculation should have no bearing on the conclusions to be drawn here.

4. This Court should find that nothing of value comes from the testing and conclusions offered by Dr. Phillip Johnson

One thing upon which Dr. Fucetola and Dr. Kline agreed is that they did not find it appropriate to rely upon the testing and conclusions offered by Dr. Phillip Johnson, the defense trial psychology expert (Hearing Tr. 371-374, 550). That was because Dr. Johnson did not conduct full IQ testing, but instead only administered abbreviated tests (Exhibit GG, p. 867-868). One of those tests actually gave an estimated IQ of 64, well within the mentally retarded range (Exhibit F, p. 12; Exhibit GG, p. 868). The other, higher estimated score, had it been corrected for IQ inflation, would have been in the same range as the 64 (Hearing Tr. 373-374). Contrary to these facts, Dr. Johnson speculated that Mr. Lyons’ IQ should be estimated in the range of 85-100 (Exhibit F, p. 12). Plainly, this speculation by Dr. Johnson was unsupported, and unsupportable, and should be disregarded

5. There is no significance in the lack of a mental retardation diagnosis by the Doctors who evaluated Mr. Lyons related to trial competency issues

In his report, Dr. Kline seemed to claim support for his ultimate conclusions from the lack of a mental retardation diagnosis in the reports of most of the professionals who evaluated Mr. Lyons before him (Exhibit FF, p. 16). Though Dr. Kline did not repeat this contention in his testimony, the first mention will be addressed here.

Mr. Lyons was evaluated, before his jury trial, by Dr. Bruce Harry, M.D., Dr. William Holcomb, Ph.D., and Dr. Phillip Johnson, Ph.D., was then evaluated, during State post-convictions proceedings, by Dr. Harry and Dr. Holcomb, and also by Dr. Mark Altomari, Ph.D., Dr. Alice Vlietstra and Dr. Dennis Cowan, Ed.D., and then was evaluated during Federal Habeas proceedings by Dr. Cowan, Dr. John Wisner, Ph.D. and Dr. Warren Wheelock, Ed.D. The evaluations of Dr. Fucetola and Dr. Kline then came during these proceedings. The diagnosis of mental retardation appears in the reports of Dr. Wisner and Dr. Wheelock, and in the second report by Dr. Cowan (See pages 27-29 above). There is no mention of mental retardation in the other reports (See pages 22-27 above). This latter fact is the one upon which Dr. Kline relied for support for his opinion. The point is not well taken for several reasons.

First, mental retardation is generally considered by the Courts to NOT be a condition affecting competency. *Atkins v. Virginia*, 318. Consequently, as Dr. Fucetola indicated, it was not surprising that no findings of mental retardation had been made by those professionals addressing questions of competency to stand trial and competency at the time of the offenses, in light of the narrow focus of their evaluations (Hearing Tr. 111-112, 114-115). That would have included all of the Doctors except Dr. Vlietstra (See pages 22-27 above). In Dr. Vlietstra's case, her evaluation concerned the even more narrow issue of whether Mr. Lyons met set criteria for child development problems. Thus, there would have been no reason for her to venture outside of that set format to address the issue of mental retardation.

In addition, Dr. Harry and Dr. Holcomb specifically explained the matter. Each indicated, as would be expected, that he did not believe that the question of mental retardation was germane in the context of the evaluation which he conducted (Harry Deposition, p. 12, 22, 30-31; Holcomb Deposition, p. 14, 18-19, 26-27, 29).

Also, each indicated that he did not, at the times of evaluations, have available to him the sort of background information necessary to reach a conclusions, one way or the other, about mental retardation (Harry Deposition, p. 12; Holcomb Deposition, p. 12-13). Each specifically cautioned that his report SHOULD NOT be read to be a finding, one way or the other, about mental retardation (Harry

Deposition, p. 12, 22, 30-31; Holcomb Deposition, p. 14, 18-19, 26-27, 29). And, as the Special Master noted in his Report, neither Doctor found anything in Dr. Fucetola's report inconsistent with his evaluation findings (Master's Report, p. 5).

For all of these reasons, there is no significance from the lack of mention of mental retardation in the reports of the professionals utilized in state trial and post-conviction proceedings.

6. No inference against the presence of mental retardation can or should be drawn from Mr. Lyons failure to raise the issue in prior proceedings

In his opening statement before the Special Master, Counsel for Respondents argued that it would be appropriate to draw an adverse inference against Mr. Lyons' claim of mental retardation due to the fact that Mr. Lyons did not raise the question of mental retardation until after his trial, direct appeal, and post-conviction challenges had failed (Hearing Tr. 16-17). That raises the question of whether it would be appropriate, or even lawful, to entertain an adverse inference against the presence of mental retardation based solely upon the fact that the issue was not raised in prior proceedings. For several reasons, the drawing of such an adverse inference would be neither logical nor lawful.

It should first be noted that the 2002 Supreme Court decision in *Atkins* came after the state trial and post-conviction proceedings in this case were concluded.

Thus, from a logical and a legal standpoint, it would have made no sense for the issue to have been raised in prior proceedings before the Courts of Missouri, which all came before the *Atkins* decision was handed down. Moreover, as noted in the section just preceding, none of the experts who had evaluated Mr. Lyons in the prior State Court proceedings, because of the narrow scope of their evaluations, had even considered the question of mental retardation. It should be further noted that the principles in *Atkins* have been given retroactive application by this Court, making irrelevant a petitioner's failure to have raised the matter previously. *In re Competency of Parkus*, supra.

For these reasons, it is neither logically or legally proper to draw the adverse inference invited by the State.

7. The facts of this crime provide no real assistance in solving the question of mental retardation

In Respondents' pleadings in this case, at page 16, there is made the argument that there may be facts from this case from which there could be inferences drawn contrary to the presence of mental retardation. Neither of the experts, who concluded on opposite sides of the subject of mental retardation, used any of the facts of the case as supporting his, respective, position. Moreover, as noted above, at page 97-98, there are reviewed a number of cases in which there

were findings of mental retardation involving those with an IQ in the 50's. In addition to those, there is the case of *Jackson v. State*, 963 So.2d 150, 153, 155, 157 (Ala. 2006) involving Jackson, who killed a store clerk with a shotgun in the course of a robbery, and who was found mentally retarded, and ineligible for death penalty, after scoring an IQ of 69 on one test, and an even higher score on another. There is also the case of *State v. Gumm*, 864 N.E.2d 133, 135, 138, 140 (Ohio App. 2006), a case involving an aggravated murder in which a finding of mental retardation was made after IQ scores in childhood of 70, 71, 73 and 79, and in adulthood of 61, 67 and 70.

After reviewing all of the cases, this Court should find that the facts in this case are no more complex, and in some aspects are less complex, than the facts in these other cases in which mental retardation has been found.

8. There is nothing in the record to support the contention that Mr. Lyons was as capable, in State post-conviction proceedings, as argued by Respondent

At page 15 of Respondents' pleading, it is argued that an inference should be drawn against mental retardation due to Mr. Lyons actively participating in his case by calculating time limits for his post-conviction petition, signing that petition, and filing it.

Respondents presented no evidence to support this allegation. The only


evidence received on the subject came from one of Mr. Lyons' post-conviction counsel, who detailed how little understanding that Mr. Lyons had concerning the proceedings and how little help Mr. Lyons was able to provide in those proceedings (Hearing Tr. 41-43, 48, 49).

Consequently, the evidence is to the contrary of any contention that Mr. Lyons did anything much more significant than signing his petition at the instance of his lawyers.

CONCLUSION

WHEREFORE, in light of the foregoing, Mr. Lyons prays that this Honorable Court follow the recommendation of the Special Master, and find that Mr. Lyons is mentally retarded per the dictates of Section 565.030.6 RSMO, and is therefore ineligible for the death penalty. Mr. Lyons further prays that this Court consequently set aside his sentence of death, and resentence Mr. Lyons to life imprisonment without possibility of probation, parole or release, except upon act of the Governor.

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that paper and electronic copies of the foregoing were served upon opposing counsel by mailing and e-mailing same to him this 28th day of July, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is compliant with Supreme Court Rule 84.06 in that it has been prepared in Microsoft Word, Times New Roman 14 font format, containing 30,293 words. A separate disk, containing an electronic copy of the brief, has been supplied.



FREDERICK A. DUCHARDT, JR.

IN THE SUPREME COURT OF MISSOURI

FILED

STATE EX REL. ANDREW LYONS)

Petitioner)

v.)

LARRY CRAWFORD and)

JEREMIAH NIXON)

Respondents)

DUPLICATE
OF FILING COPY

MAR 16 2009

IN OFFICE OF
CLERK SUPREME COURT

Case #88625

MAR 13 2009

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

REPORT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF SPECIAL MASTER

Pursuant to the Missouri Supreme Court's November 2, 2007 Order, Michael D. Burton, was appointed Special Master in the above captioned cause. In compliance with the Supreme Court's order, the Special Master conducted a hearing on July 1 and 2, 2008. Petitioner Andrew Lyons appeared in person and through his attorney, Frederick A. Duchardt, Jr. Respondents Larry Crawford and Jeremiah Nixon appeared by Assistant Attorney General Stephen D. Hawke. This matter was submitted to the Special Master in November, 2008, when both parties filed proposed findings of fact and conclusions of law. The Special Master consequently makes the following findings of fact and conclusions of law.

1. History of this Case

In 1996, Petitioner was convicted in connection with the September, 1992 killings of his estranged girlfriend, Bridgette Harris; Ms. Harris' mother, Evelyn Sparks; and Dontay Harris, the son of Petitioner and Ms. Harris. State v. Lyons, 951 S.W. 2d 584,

588 (Mo. banc 1997). The jury recommended a sentence of death for the murder of Ms. Harris and of seven years for the involuntary manslaughter of Dontay. Id. The jury could not agree upon a sentence for the murder of Ms. Sparks. Id. The trial court ultimately imposed sentences of death for both murders and a seven year sentence for the manslaughter. These verdicts and sentences were affirmed in 1997. Id.

The case took four years before reaching the trial stage because Petitioner was initially found to be incompetent to proceed to trial. In 1996, the trial court found that Petitioner was competent to proceed. The trial occurred shortly thereafter. Id.

Several efforts for post-conviction relief were attempted in state court. All of the motions addressed mental health issues. At least one federal petition for similar relief was filed as well. None of these efforts were successful. (Lyons v. State, 39 S.W. 2d 32 (Mo. banc 2001); State v. Lyons, 129 S.W. 3d 873 (Mo. banc 2004); Lyons v. Luebbers, 403 F. 3d 585 (8th Cir. 2005)).

In 2007, Petitioner filed a petition for a writ of mandamus, alleging that his death sentences should be set aside, pursuant to Atkins v. Virginia, 536 U.S. 304, 321 (2002). (The United States Supreme Court held in Atkins that a sentence of death for a mentally retarded individual violates the Eighth Amendment's prohibition against cruel and unusual punishment).

2. Missouri Supreme Court's guidance and directives

This Court established the procedure for post-Atkins claims of mental retardation for individuals who received the death penalty prior to the Atkins decision. A Master must be appointed whenever facts are disputed on the issue of whether a petitioner, who

has received a death sentence prior to 2001, is mentally retarded. In the Matter of the Competency of Parkus, 219 S.W. 3d 250, 254 (Mo. banc 2007). In such a proceeding, the petitioner has the burden of proving that he/she is mentally retarded. As this proceeding is civil in nature, the petitioner must demonstrate mental retardation by a preponderance of the evidence. Id.

Pursuant to Petitioner's writ, this Court appointed Michael D. Burton as Special Master. This Court specifically directed the Special Master to, inter alia, "... take the evidence on the issue joined, ... and to report the evidence taken, together with (his) findings of fact and conclusions of law on the issue of whether Petitioner is mentally retarded as defined in Section 565.030.6, R.S. Mo. 2000."

3. Definition of Mental Retardation

Section 565.030.6, R.S. Mo., states that mental retardation is a "condition involving substantial limitations in general functioning" characterized by:

- a) "significantly subaverage intellectual functioning" with
- b) "continual extensive related deficits and limitations in two or more adaptive behaviors ..."

These conditions must be "manifested and documented before eighteen years of age."

4. First requirement for mental retardation: "Significantly subaverage intellectual functioning"

Dr. Robert Fucetola, Ph.D., a licensed psychologist, who is board certified in neuropsychology and an assistant professor of psychology (at Washington University), testified on behalf of Petitioner as to whether or not Petitioner has significantly

subaverage intellectual functioning. In reaching his conclusion, Fucetola considered information that he had received from the extensive interviews and examination of the Petitioner. He also considered the numerous examinations of Petitioner that were conducted to determine his brain functioning since his incarceration in 1992.

Fucetola stressed that one cannot merely review the results of one examination in making a decision about intellectual functioning. He emphasized the need for a more holistic approach, one that involved consideration of a group of tests. Fucetola also considered the extensive court documents and the Missouri Dept. of Corrections records. Further, the neuropsychologist considered collateral sources – family members – who could describe the Petitioner's life prior to his incarceration.

Unlike many of the previous competency evaluations that were conducted, Fucetola focused on a broader scope: Petitioner's capabilities at functioning in society. Fucetola turned to an IQ test to assess Petitioner's "everyday functioning," by determining his abilities and potential.

In determining an individual's intellectual functioning, Dr. Fucetola -- as did Dr. Kline, Respondent's expert -- primarily focused on intelligent quotient scores. He cited the DSM-IV as authority for establishing guidelines for determining mental retardation. The DSM-IV allows for a diagnosis of mental retardation (mild) for IQ scores from 50 to 75. While Fucetola stressed that adaptive behaviors must also always be considered before making a diagnosis of mental retardation (akin to Section 565.030.6, R.S. Mo.), his tests determined that the Petitioner had an I.Q. test score of 61.

Fucetola spent a significant amount of his testimony explaining the I.Q. results of other tests that had been conducted of Petitioner since his arrest. In 2002, Dr. Dennis Cowan found that Petitioner's I.Q. was 67 -- a score not much different than that of

Fucetola's -- and within the "mild mental retardation" range. (Cowan described Petitioner's score as indicative of an "(e)xtrremely low range of intellectual functioning and found to be at the 1st percentile and inferior to 99 of 100 of his age-related peers.")

Other psychological tests were conducted over the years -- and many did not address the issue of mental retardation. Forensic psychiatrist Bruce Harry (in 1992 and 1999) and forensic psychologist William Holcomb (in 1994) determined issues relating to Petitioner's competency. In their depositions from last year, they indicated that, despite their findings that Petitioner was ultimately competent to proceed to trial, they had never addressed whether or not Petitioner was mentally retarded. Both doctors reviewed Fucetola's evaluation; they both indicated that there was absolutely nothing in his report that was inconsistent with their findings. Neither doctor ruled out mental retardation.

This Master has some concerns about two test results that were conducted by other psychologists in 1992 and in 1998. At first glance, the I.Q. test results - 84 and 81, respectively -- seem to completely contrast with the results of the tests given by Fucetola and Cowan. Fucetola, however, gives a plausible explanation for each result.

As to the 1992 result, Fucetola noted an obvious problem with strict adherence to the I.Q. testing guidelines. The guideline that Fucetola questioned was the seemingly arbitrary instruction to reduce the I.Q. score for all participants who were under the age of 35. Fucetola noted that Petitioner's score was unfairly elevated because, at the time of his 1992 test, he was 35 years and one month old. If Petitioner had taken the test one month earlier, his I.Q. score would have been 78. (Fucetola's adjustment is somewhat extreme -- he makes a full six-point reduction. This Master finds that a smaller reduction would be appropriate -- if at all.)

Fucetola also questioned the 1992 and 1998 results because of the testers' failure to factor in a reduction that is widely recognized by most mental health experts. This factor – the “Flynn Effect” – addresses the problem of “I.Q. inflation” over time. Fucetola testified to the widespread acceptance of this factor among the scientific community. Taking into account the “Flynn Effect,” Fucetola determined that the adjusted I.Q. test results from 1992 and 1998 should be 74.7 and 75.9, respectively. (This Master had some initial suspicions about the supposed acceptance of the “Flynn Effect.” Cowan mentioned Flynn – the namesake of the factor – in his report, but never adjusted his final I.Q. scores. During his testimony, Fucetola – who spent considerable time addressing the “Flynn Effect” – rarely referenced the “Flynn Effect” adjusted score of 55.7 given to Petitioner. Throughout his testimony, Fucetola referred to Petitioner’s I.Q. as 61. This Master suspects that Petitioner simply did not want to try to reconcile the higher 1992 and 1998 scores with the 55.7 score. Such reconciliation is an easier task with a 61 score...).

This Master closely scrutinized the testimony of Dr. Kline, who ultimately determined -- from his consideration of all previous tests (including Fucetola’s), reports and his own interview of Petitioner – that Petitioner was not mentally retarded. Kline opined that Petitioner’s I.Q. was best captured by the 1992 test (which found him to have a score of 84). This Master questions Kline’s opinion because – unlike Fucetola – he cannot explain the inconsistencies of the test results during the fifteen-year period since the 1992 test.

Kline can give no plausible reason why this Master should reject the recent I.Q. testing results. He does not question in any way whatsoever Fucetola’s testing methods, nor the way that the 2002 test was conducted. Further, he does not challenge any of these

test results. (This Master notes that the 1992 and 1998 tests were not scrutinized in the same manner as were the 2002 and 2007 tests...). Moreover, Kline cannot explain a cause for the marked decrease in the I.Q. results. He initially suggested dementia as a possible cause, but admitted that he saw no signs of dementia in his interview of Petitioner. He also never found a single medical record that suggested that Petitioner had dementia. (The Master notes that Dr. Cowan found that Petitioner had dementia. Both Fucetola and Kline agree, however, that if Petitioner had dementia in 2002, he would have had exhibited extreme symptoms of the disease in 2007, if he were alive at all ...). Kline also suggested a recent case of depression as being a possible explanation for the I.Q. decrease; but on cross examination, he admitted that Petitioner had suffered from depression since the date of his arrest. Indeed, in 1992, Dr. Harry addressed Petitioner's depression in great detail. Kline's attempts at explaining the higher scores in the earlier years were simply not persuasive.

Dr. Kline refused to apply the "Flynn Effect" to the 1992 and 1998 test results. He admitted his awareness of such a factoring approach. He gave no published authority for dismissing such a factor. Nonetheless, Kline agreed that much research in this area establishes I.Q. inflation. He admitted that the WAIS technical manual addresses the Flynn correction.

This Master finds Fucetola's explanations persuasive. While there is some limited inconsistency between Petitioner's results in the earlier tests – even with Fucetola's adjustments – and the 2007 Fucetola test, Petitioner has a more plausible explanation for much of the discrepancies. It is possible, as Fucetola suggests, that Petitioner guessed a few answers correctly in these earlier tests and because of "sheer luck," had some elevated scores. This Master notes that no one – including Kline – has

even suggested that Petitioner was malingering (which, if in fact were true, could explain why he received lower scores on the more recent tests). Both experts agree that Petitioner is far from sophisticated, unable to fool the testers (who had established many safeguards in their tests to ensure that such a problem does not occur).

The tests conducted by Fucetola found that Petitioner had severe impairment in such areas as attention, "learning and memory," academics and functional abilities. His spelling skills are at a first grade level; some of his math skills are at a second grade level. In the 50 neuropsychological tests (with percentile scores) that Fucetola conducted, Petitioner scored in the lowest 1% for 26 of the tests; he scored in the lowest 5% for 43 of the tests.

This Master finds that Petitioner has established by a preponderance of the evidence that the Petitioner has an I.Q. lower than 70. While this Master will not disregard the 1992 and 1998 results, it seems appropriate to adjust the scores in a manner closer to Fucetola's suggestions. (Given Kline's acceptance of the 2002 and 2007 test methodologies and results, this Master gives more weight to these two tests as more accurately reflecting Petitioner's intelligence). Taking all of the results into consideration, this court finds that Petitioner has established that his I.Q. falls within the range of 61 and 70 (even without any Flynn adjustment). Petitioner, therefore, has proven that he has significantly subaverage intellectual functioning.

5. Second requirement for mental retardation: "Continual extensive related deficits and limitations"

Section 565.030.6 further requires that, in order to make a finding of mental retardation, the court must determine that a "continual extensive related deficits and limitations in two or more adaptive behaviors" exists. The statute specifically suggests

certain adaptive behaviors that might be worth examining: "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work..."

Both parties' experts agreed that mentally retarded individuals could have extreme deficits and limitations in certain behaviors while evidencing no deficits and limitations whatsoever in other behaviors. Accordingly, as the aforementioned statute provides, the Petitioner need only establish that he has continual extensive related deficits and limitations in two adaptive behaviors.

This Master will now address each of these ten behaviors.

a. Communication

This Master is persuaded that Petitioner has continued extensive deficits and limitations in the area of communication. Dr. Fucetola noted Petitioner's inability to verbally communicate with him; he could not participate in a discourse about any matter of substance. Both of his prior attorneys – Beth Davis and William Swift – noted how difficult it was for them to prepare Petitioner's defense. He never engaged in meaningful conversation with them, not able to assist in his defense in anyway whatsoever. Their affidavits from a decade ago indicated their concern for Petitioner's general inability to understand basic information and explanations related to the case.

Petitioner's limited family history established Petitioner's deficits and limitations in the communication area. Dr. Fucetola's rating of Petitioner's behavior as described by Rose DePree (his half-sister) in "social communication" was "severely impaired" (in the lowest percentile for his age). Rose described Petitioner as a loner, who always kept to himself. Two of Petitioner's brothers,

David Lyons and James Lyons, described him as quiet and withdrawn. James described him as "... very shy ... Even as a small child, he played by himself a lot. He just didn't interact too much with other people." James recalled that Petitioner "never talked a lot ... that he was one of these people that when you did talk to him ... you didn't get much of an answer from him, but you would usually get a smile." James stated that "smiling would replace words for (Petitioner). He never really talked a lot ... (Petitioner) would kind of just smile at you and say one or two words." Petitioner's mother described him as "... just quiet. He kind of stay off by hisself (sic)."

One of Petitioner's sisters, Lillie Foster, described how extreme Petitioner's situation was. She recalled how he would regularly get nauseous whenever he would get ready for school. He did not like to associate with others.

Petitioner's written communication skills were even worse than his verbal communication skills. He is (and has always been) illiterate, unable to write, read and spell.

Petitioner clearly has "continual extensive related deficits and limitations" in communication.

b. Self-care

The evidence suggested that Petitioner had exhibited some deficits and limitations in the area of self-care. To some extent, he could provide the very basics for himself. He could make his own sandwiches (and arguably, even cook for himself.) Petitioner could not be counted on to attain medical care for himself. He rarely saw a doctor - and when he did, it was through the assistance of others.

Petitioner was unable to deal with his own finances. His brother James recalls how he had to assist Petitioner in paying his bills.

Several of Petitioner's siblings recalled how Petitioner lived in an abandoned house for a period of time. They recalled how he lived like "an animal," with no running water, electricity or plumbing.

Petitioner, however, also lived for a substantial period of time without significant problems. While the above concerns are noted, his ability to meet his basic needs suggests that he does not have the sort of self-care deficits and limitations that were intended to be recognized by the statute.

c. Home Living

The evidence indicated that Petitioner had kept a clean residence, evidencing few deficits and limitations in this limited area of home living. Petitioner, however, was obsessed with cleaning. His siblings consistently described how Petitioner would constantly clean his residence. Alice DePree recalls that he would vacuum his rugs three to four times a day. Another sister, Mary Carter, remembers occasions in which Petitioner would wake up in the middle of the night to clean. Lillie Foster recalls her brother bathing his children in the upstairs bathroom and showering them in the downstairs bathroom immediately thereafter.

As described in the previous section, there was some evidence presented that suggested that Petitioner had the ability to cook for himself. This Master heard little more than that he was able to make sandwiches. He could feed himself – but it is unclear whether he could do more than that.

Petitioner's home living was indeed bizarre and obsessive. Such behavior, however, does not necessarily establish deficits and limitations that were intended by Section 565.030.6. Such behavior certainly is consistent with the deficits and limitations that Petitioner has in other areas.

d. Social Skills

This Master has heard very little evidence as to Petitioner's social skills. While there is indeed evidence to support Petitioner's having several "girlfriends," there is very little evidence to support Petitioner's abilities to maintain relationships. Petitioner had numerous children, but surely the fact that he engaged in sexual activities measures very little as to his social skills.

Petitioner's family recalled that he had no friends throughout his childhood. He only interacted with family members. His mother recalled how he did not like to be around people; he "stayed away from the crowd."

This Master is unclear as to whether or not Petitioner has met his burden in establishing his deficits and limitations in this area. The problem relates to the definition of "social skills." Indeed, Petitioner had relationships with women. He perhaps had sufficient social skills to meet his various partners. Whether or not Petitioner did anything at all to maintain or develop these relationships is uncertain. Given the family's description of Petitioner, it is very unlikely that he had the social skills to foster any relationships.

e. Community Use

This Master is persuaded that Petitioner has continued deficits and limitations in the area of "community use." There is scant evidence that Petitioner in fact "used the community." Indeed, his half-sister, Rose DePree,

recalled how Petitioner was unable to access the community: he could not use the phone book (nor a dictionary or encyclopedia as well). Fucetola determined that he could not use a street map.

Petitioner's family members agree that Petitioner would have been lost without them. He only used the community as much as they assisted him in doing so.

f. Self Direction

Petitioner has presented testimony to support his position that he has had continued extensive deficits and limitations in the area of self direction. The evidence is clear that he has made few major decisions and/or accomplishments without his family's support. For example, Petitioner attained all of his jobs through the assistance of his family.

On the other hand, Petitioner had exhibited sufficient self-direction in his life, as seen in the small decisions he has made on a daily basis. He knew what he needed to do to keep a job and to maintain a household. He successfully achieved these goals, even though they involved little more than a series of minor tasks. Consequently, this Master is not persuaded that Petitioner has had continued extensive deficits and limitations in self-direction (as intended by the pertinent statute).

g. Health and Safety

Petitioner presented very little evidence to support an allegation of his having deficits or limitations in the area of health and safety. On the one hand, he did very little to maintain good health: there was evidence to suggest that Petitioner rarely went to the doctor or dentist. On the other hand, Petitioner did

not appear to have any major health problems that would have warranted medical attention. Moreover, there was no evidence to suggest that he disobeyed any doctor's orders.

Petitioner did take some significant measures to address the health of others. He moved to Detroit to care for his ailing father.

This Master does not find that Petitioner had significant deficits or limitations in this area.

h. Functional Academics

Petitioner has clearly demonstrated his deficits and limitations in the area of functional academics. The only records that exist from Petitioner's entire years of schooling are two single-page documents. (The Cape Girardeau School District has also included four additional pages – which merely state that Petitioner “dropped” his classes due to truancy. He was noted to be in the 10th grade for three consecutive school years. There is no documentation whatsoever of Petitioner's education prior to the fall of 1972).

The first document that was provided by the Petitioner's school district reflects his scores from the Iowa Basics Test (taken in March 1973). His composite score of “53” placed him in the bottom 2% of all 9th graders taking the test.

The second document contains grades from three semesters of high school. The documents state as follows:

1. For the Fall of 1972 (ending on January 19, 1973): one “F” and five “incompletes”;

2. For the Spring of 1972 (ending on June 1, 1973): two “Fs” and four “incompletes”;
3. For the second trimester of 1973 and 1974 (no ending date mentioned): four “Fs and one “incomplete”.

This report card document does not mention Petitioner’s first trimester grades for 1973-74 nor whether or not Petitioner took any measures to make up his failed and incomplete classes. This Master assumes that the school district merely moved Petitioner to the 10th grade despite his not passing a single class in the 9th grade.

Family members (Rose, James, David and Sister Lillie) recall that Petitioner had always been in Special Education classes. They remember his being in classes with mentally retarded children. They recall Petitioner’s being very slow at reading and mathematics. Rose recalled that Petitioner was nicknamed “Malcolm” after the Malcolm Bliss State Hospital (a “crazy hospital”).

These scant Cape Girardeau records speak for themselves. Many tests conducted since Petitioner’s incarceration corroborate the aforementioned limitations. In 2002, Dr. Warren Wheelock assessed Petitioner to be a “functional illiterate,” with a reading ability on a first grade level. Petitioner has clearly demonstrated extreme deficits and limitations in the area of functional academics.

i. Leisure

The evidence seemed to suggest that Petitioner had no hobbies and engaged in no recreational activities (other than cleaning). This Master is uncertain as to what the statute means when referring to deficits/limitations in this area. Petitioner’s having absolutely no “meaningful” leisure time whatsoever

would certainly seem to suffice as evidencing his having extreme deficits and limitations in this area.

j. Work

Petitioner introduced some evidence to support his contention that he had deficits and limitations in the area of employment. Several family members indicated that the family was responsible for getting Petitioner his various jobs. The issue in this inquiry does not merely center on Petitioner's ability to find employment, as Petitioner seems to suggest.

This Master finds that the Petitioner was able to maintain his employment for relatively lengthy periods of time. Accordingly, one can safely assume that Petitioner was able to both get to these jobs on time and perform the necessary tasks (as menial as they might have been).

Petitioner has not demonstrated that he has "continued extensive related deficits and limitations" in the work area.

k. Summary

This Master finds that Petitioner has proven by a preponderance of the evidence that he suffered from (and still does suffer from) "continual extensive related deficits and limitations" in at least two "adaptive behaviors." As indicated above, this Master finds such deficits and limitations are evident in, inter alia, communication and functional academics. Petitioner made sound arguments that he was deficient and limited in many of the other areas; Respondents made strong arguments as well. Both sides were limited due to the lengthy period of time that has elapsed – and due to the incredible absence of documentation that could have established more details about Petitioner's history.

This Master supports Fucetola's findings that Petitioner has mild mental retardation. The doctor describes such a condition to be "the cloak of competence." In other words, Petitioner can appear to function somewhat well in various situations – especially with family/peer support. Mildly mentally retarded individuals typically function at a sixth grade level or below in most activities (as opposed to those with moderate mental retardation who typically function at a second grade level).

6. Conditions that are "manifested and documented before eighteen years of age"

The above findings are not recent phenomena for Petitioner. His family recounts numerous stories from his childhood that demonstrate his significantly sub average intellectual functioning and his continual extensive related deficits and limitations in many different adaptive behaviors. The Cape Girardeau school records document his extremely limited functioning while he was in high school.

7. Conclusion

As stated above, Petitioner has met his burden of proof. First, he established by a preponderance of the evidence that he had significantly subaverage intellectual functioning – through Dr. Fucetola's evaluation (and his logical explanation of other evaluations). Second, Petitioner established that by a preponderance of the evidence that he had suffered continual extensive related deficits and limitations in at least two adaptive behaviors – most notably in communication and functional academics. Petitioner, therefore, is mentally retarded as defined in Section 565.030.6, R.S.Mo.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M D Burton", written over a horizontal line.

Michael D. Burton
Special Master

March 12, 2009

Cc: Frederick A. Duchardt, Jr.
Attorney for Petitioner

Stephen D. Hawke
Assistant Attorney General

IN THE SUPREME COURT OF MISSOURI

FILED

MAY 28 2009

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

STATE EX REL. ANDREW LYONS

Petitioner

v.

LARRY CRAWFORD and

JEREMIAH NIXON

Respondents

Case #88625

REPORT OF SPECIAL MASTER
(IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO MARCH 12, 2009 REPORT)

Pursuant to the Missouri Supreme Court's directives, this Special Master, on March 12, 2009, issued a report, findings of fact and conclusions of law on the issue of whether Petitioner, Andrew Lyons, is mentally retarded as defined in Section 565.030.6, R.S.Mo.2000. On April 15, 2009, Respondents filed exceptions to the report. On May 6, 2009, Petitioner filed his response. This Master finds as follows:

1. The methodology for the tests conducted by Dr. Fucetola, Petitioner's expert, in 2007, and Dr. Cowan in 2002, were not challenged in any way whatsoever by Respondents' expert, Dr. Kline. Both of these tests indicated that Petitioner is mildly mentally retarded, having significantly subaverage intellectual functioning.

2. Dr. Fucetola offered a consistent and credible explanation as to how Petitioner could have received test results in 1992 and 1998 that reflected slightly higher (i.e., arguably non-mentally retarded) I.Q. scores. He credibly addressed factors that accounted for the necessity of reducing these scores (e.g., the Flynn Effect, the seemingly arbitrary cause for increasing an I.Q. score when a participant attains the age of 35 years old, etc...). Respondents' suggestion that the

Flynn Effect is not widely accepted in the scientific community is unfounded.

3. Dr. Kline could not offer any plausible explanations for such apparent inconsistencies. Respondents suggested dementia, depression and malingering. During cross-examination, Kline conceded that the records do not support any of these possibilities – and indeed ultimately admitted that they most likely were not present.

4. After consideration of all of the testimony, this Master found, and still finds, that Petitioner has proven that he has an I.Q. score within the mentally retarded range, demonstrating his significantly subaverage intellectual functioning.

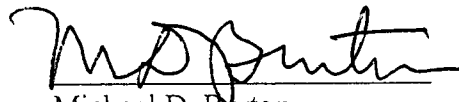
5. Respondents also maintain that this Master did not connect his findings of Petitioner's "continual extensive deficits and limitations" in certain behaviors to his significantly subaverage intellectual functioning. This Master repeatedly found there to be continual extensive **related** deficits and limitations – most notably in the areas of communication and functional academics (emphasis added). Looking at the statutory language, the only plausible term that "relates" to Petitioner's deficits and limitations is his "significantly subaverage intellectual functioning." Logic defies any other interpretation. However, if this Master did not artfully make the connection clear in his prior report, he wishes to do so now: Petitioner's continual extensive deficits and limitations stem from his significantly subaverage intellectual functioning.

6. Lastly, this Master finds that evidence of Petitioner's "significantly subaverage intellectual functioning" and "continual extensive related deficits and limitations" were manifested and documented before Petitioner turned eighteen years old. His family and his school records support this finding.

Conclusion

As stated before, Petitioner has met his burden of proof. First, he established by a preponderance of the evidence that he had significantly subaverage intellectual functioning – through Dr. Fucetola’s evaluation (and his logical explanation of other evaluations). Second, Petitioner established that, by a preponderance of the evidence, he had suffered continual extensive related deficits and limitations in at least two adaptive behaviors – most notably in communication and functional academics. These deficits and limitations were caused by his significantly subaverage intellectual functioning. All such functioning, deficits and limitations were manifested and documented before Petitioner’s eighteenth birthday. This Master reiterates that Petitioner, therefore, is mentally retarded as defined in Section 565.030.6, R.S.Mo.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. D. Burton", written over a horizontal line.

Michael D. Burton
Special Master

May 29, 2009

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Stephen D. Hawke
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