IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CHASTAIN MONTGOMERY, SR., Defendant.	)	No. 2:11-cr-20044-JPM-1

ORDER DENYING MOTION FOR PRETRIAL DETERMINATION OF MENTAL RETARDATION

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Before the Court is the Motion for Pretrial Determination of Mental Retardation of Defendant Chastain Montgomery, Sr. ("Defendant"), filed June 21, 2013. (ECF No. 175.) Related to the question of Defendant's mental capacity, Defendant also has pending a Motion to Suppress, filed September 26, 2012.[1] (ECF No. 76.) The United States of America (the "Government") responded in opposition to the Motion to Suppress on October 10, 2012. (ECF No. 80.)

On December 11, 2012, the Court granted Defendant's unopposed Motion to Bifurcate Evidentiary Hearing of Motion to Suppress (ECF Nos. 104, 106) and ordered that separate hearings be held for the factual and mental-health portions of Defendant's Motion to Suppress. (ECF No. 108.) The factual portion of the hearing was held on December 12–14, 2012. (See ECF Nos. 110-12.) On March 15, 2013, the Government filed a Notice of Intent to Seek the Death Penalty. (ECF No. 133.) The hearing on the expert evidence addressing Defendant's mental health for the purposes of Defendant's Motion to Suppress (ECF No. 76) and Defendant's Motion for Pretrial Determination of

[1] As part of Defendant's argument for suppression hinges on this Court's determination of his mental ability, the Court will first decide whether Defendant is mentally retarded/intellectually disabled so as to preclude his execution. Defendant's Motion to Suppress will be decided in a separate Order.

Mental Retardation (ECF No. 175) was held on September 30–October 22, 2013, and rebuttal testimony was presented on November 12–13, 2013. (See Minute Entries for Sept. 30-Oct. 22, 2013, ECF Nos. 238, 242, 244, 247, 249, 252, 255, 256, 261, 262, 264, 269, 270, 273, 276; Minute Entries for Nov. 12-13, 2013, ECF Nos. 287, 288.)

The Court allowed post-hearing briefing. (See ECF No. 298.) On December 6, 2013, Defendant filed a Post-Hearing Memorandum in Support of Relief Pursuant to Atkins v. Virginia[2] and 18 U.S.C. § 3596 and for Suppression of Defendant's Pretrial Statements. (ECF No. 307.) On December 20, 2013, the Government timely filed a Response. (ECF No. 308.)

For the reasons stated below, Defendant's Motion for Pretrial Determination of Mental Retardation (ECF No. 175) is DENIED.

I. BACKGROUND

On February 24, 2011, the Government filed a six-count Indictment against Defendant. (ECF No. 1.) On May 31, 2012, the Government filed a seven-count Superseding Indictment alleging the following facts and charges against Defendant. (ECF No. 49.)

The first six Counts allege crimes committed on October 18, 2010, and that Defendant was aided and abetted by his son,

[2] 536 U.S. 304 (2002).

Chastain Montgomery, Jr. ("CJ"), who is now deceased. (Id. at 1-6.) Counts One and Two charge Defendant, pursuant to 18 U.S.C. § 1114(1) and 18 U.S.C. § 2, with the murders of Paula Robinson and Judy Spray, employees of the United States Postal Service. (Id. at 1-2.)

Count Three charges Defendant with the robbery of Paula Robinson and Judy Spray of the United States' money while using a dangerous weapon in violation of 18 U.S.C. § 2114(a) and 18 U.S.C. § 2. (Id. at 3.) Count Four charges Defendant with the use of a firearm while perpetrating the crime of violence alleged in Count Three in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2. (Id. at 4.) Counts Five and Six charge Defendant with the murder of Paula Robinson and Judy Spray while committing the crime alleged in Count Four in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2. (Id. at 5-6.)

Count Seven charges Defendant with conspiring from August 30, 2010, to February 14, 2011, with his son to rob United States Postal Service employees having custody of money and property of the United States in violation of 18 U.S.C. § 2114(a) and to rob banks and credit unions in violation of 18 U.S.C. § 2113(a). (Id. at 7.) This conspiracy is charged as a violation of 18 U.S.C. § 371. (Id. at 10.)

In support of Count Seven, the following facts are alleged in the Superseding Indictment. On August 30, 2010, Defendant

purchased a Smith & Wesson .40 caliber semiautomatic pistol in Nashville, Tennessee, and, on October 15, 2010, Defendant purchased a Ruger 9mm semiautomatic pistol in Nashville, Tennessee. (Id. at 7.) Defendant provided his son with the Ruger 9mm pistol. (Id. at 8.)

On October 18, 2010, Defendant and his son robbed the United States Post Office in Henning, Tennessee. (Id.) "[U]sing the Smith & Wesson .40 caliber pistol," Defendant "shot and killed United States Postal employee Paula Robinson inside the United States Post Office in Henning, Tennessee." (Id.) "[U]sing the Ruger 9mm pistol provided to him by [Defendant]," Defendant's son "shot and killed United States Postal Service employee Judy Spray inside the United States Post Office in Henning, Tennessee." (Id.)

On October 26, 2010, Defendant and his son stole a Nissan Frontier pickup truck in Smyrna, Tennessee. (Id. at 9.) On October 29, 2010, Defendant and his son "robbed at gunpoint the Southeast Financial Credit Union in Lavergne [sic], Tennessee," and used the stolen Nissan Frontier pickup truck as a getaway vehicle. (Id.)

On November 29, 2010, Defendant and his son stole a Chevrolet Venture minivan in La Vergne, Tennessee. (Id.) On November 29, 2010, Defendant and his son "robbed at gunpoint the

Mid-South Bank, Smyrna, Tennessee," and used the stolen Chevrolet Venture minivan as the getaway vehicle. (Id.)

On February 11, 2011, Defendant sent a text message to his son stating, "We need to discuss an escape route." (Id.) On February 14, 2011, Defendant's son "stole at gunpoint a Chevrolet pickup truck from a person in Nashville, Tennessee" (id.) and "drove in the stolen Chevrolet pickup truck from Nashville, Tennessee[,] to Mason, Tennessee" (id. at 9-10). "On February 14, 2011, [Defendant's son] fired shots at police officers in Mason, Tennessee." (Id.) Defendant's son was shot and killed by police. (Tr. Dec. 12, 2012, ECF No. 117, at 22:17-23:16.)

II. LEGAL STANDARD

A. Atkins Claims and the Burden of Proof

The Federal Death Penalty Act ("FDPA") forbids the execution of individuals with mental retardation/intellectual disability ("MR/ID").[3] See 18 U.S.C. § 3596(c). In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court declared the execution of persons with MR/ID a violation of the Eighth Amendment's ban on cruel and unusual punishments, stating, "it is fair to say that a national consensus has

[3] According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V"), "intellectual disability is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013) [hereinafter "DSM-V"].

developed against it." Id. at 316; see also U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The Court held that such executions violate "the evolving standards of decency that mark the progress of a maturing society," from which the Eighth Amendment draws its meaning.[4] Atkins, 536 U.S. at 311-12, 321 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted).

The Supreme Court in Atkins noted that "[t]o the extent there is a serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." Id. at 317. Moreover, the Court indicated that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." Id. "[W]hether an individual is mentally retarded 'is a question of fact, and not a mixed question of law and fact.'" United States v. Wilson, 922 F. Supp. 2d 334, 342 (E.D.N.Y. 2013) (quoting Clark v. Quarterman, 457 F.3d 441, 444 (5th Cir. 2006)).

[4] The Supreme Court categorically banned the death penalty as applied to individuals with MR/ID for two additional reasons. First, the Court noted "a serious question" as to whether the deterrent or retributive justifications for the death penalty apply "to mentally retarded offenders." Atkins, 536 U.S. at 318-19 (citation omitted). Second, the Court stated that persons with MR/ID "in the aggregate face a special risk of wrongful execution" because their reduced mental capacity increases the possibility of false confessions and hinders their ability to assist counsel, provide mitigation evidence, or testify on their own behalf. Id. at 320-21.

Neither the FDPA nor Atkins provides procedural or substantive rules for determining who qualifies as having MR/ID. See Atkins, 536 U.S. at 317 (delegating this task to the states). In Atkins, however, the Supreme Court referenced the clinical definitions of MR/ID propounded by the American Association on Mental Retardation's ("AAMR," now the American Association on Intellectual and Developmental Disabilities, or "AAIDD")) Manual and the American Psychological Association's ("APA") DSM-IV (now DSM-V). See id. at 308 n.3. These clinical definitions of MR/ID "require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." Id. at 318.

Significantly, "Atkins did not hold that federal courts are bound to apply the mental retardation definitions of the particular states in which they are located, nor does the FDPA contain any such mandate. Federal courts that have decided cases involving both Atkins and FDPA claims have taken inconsistent approaches" as to whether federal courts will apply their forum state's law, clinical definitions, or both. Wilson, 922 F. Supp. 2d at 338 (collecting cases). Under Tennessee law, the criteria for MR/ID are indistinguishable from those present in clinical definitions. Compare Tenn. Code Ann. § 39-13-203(a)(1)-(3) (2010), with AAIDD, Intellectual Disability:

Definition, Classification, and Systems of Supports 27 (11th ed. 2010) ("AAIDD Manual"), and DSM-V at 33. Moreover, most federal courts have relied upon the clinical definitions of MR/ID in deciding Atkins cases. See, e.g., Wilson, 922 F. Supp. 2d at 339; United States v. Salad, No. 2:11cr34, 2013 WL 3776418, at *1-2 (E.D. Va. July 15, 2013); United States v. Candelario-Santana, 916 F. Supp. 2d 191, 193-94 (D.P.R. 2013); United States v. Davis, 611 F. Supp. 2d 472, 475-76 (D. Md. 2009). Accordingly, the Court will rely upon clinical definitions of MR/ID in deciding this matter.

The clinical literature informs, but does not bind, the Court. See Wilson, 922 F. Supp. 2d at 339; United States v. Bourgeois, No. C-02-CR-216, 2011 WL 1930684, at *23-24 (S.D. Tex. May 19, 2011). Atkins did not delegate "to the scientific community the finding of whether an individual is mentally retarded." Ortiz v. United States, 664 F.3d 1151, 1168 (8th Cir. 2011). Rather, Atkins permits "courts to exercise their own judgments as to the definition of mental retardation, even if those judgments diverged from those of leading psychologists." Wilson, 922 F. Supp. 2d at 339. Thus, it is incumbent upon the Court to examine the relevant clinical definitions and come to a conclusion as to which of the dueling experts in this case has the more persuasive position.

Defendant concedes (see ECF No. 307 at 2), and the weight of federal court authority dictates, that he has the burden of proving by a preponderance of the evidence that he meets each of the three prongs of the tripartite MR/ID definition. See Salad, 2013 WL 3776418, at *1; United States v. Hardy, 762 F. Supp. 2d 849, 852 (E.D. La. 2010); United States v. Sablan, 461 F. Supp. 2d 1239, 1242-43 (D. Colo. 2006). Moreover, resolving an Atkins claim before trial is appropriate. See Candelario-Santana, 916 F. Supp. 2d at 193 & n.6.

B. Clinical Definitions of MR/ID

The Court will rely on the two clinical definitions of MR/ID promulgated by the AAIDD and the APA - the eleventh edition of the AAIDD Manual, and the DSM-V – as they are the most current iterations of the authoritative sources in the field, they were operative at the time of this hearing and briefing, and the parties do not dispute their application (see ECF No. 307 at 1; ECF No. 308 at 5 n.1).[5] Although Atkins cited two prior versions of the AAIDD Manual and the DSM, federal courts have routinely and sensibly made reference to the most updated literature in the field. See, e.g., Wilson,

[5] Moreover, the two definitions are not in conflict with each other. See United States v. Nelson, 419 F. Supp. 2d 891, 895 (E.D. La. 2006) (stating that "the definitions do not appear to conflict."). Therefore, the Court will reference them interchangeably. The Court will also, where applicable, reference the AAIDD's User's Guide, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2012) ("AAIDD User's Guide") (Hr'g Ex. 452).

922 F. Supp. 2d at 339-41 (electing to cite the newest edition of the AAIDD Manual over the Government's arguments to the contrary).

According to the DSM-V:

> Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
>
> C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-V at 33.

On IQ testing, "[i]ndividuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5)." Id. at 37. The DSM-V states that MR/ID "has an overall general population prevalence of approximately 1%." Id.

at 38. Moreover, "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. . . . Thus, clinical judgment is needed in interpreting the results of IQ tests." Id. at 37; AAIDD User's Guide at 9 ("Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data.")

The AAIDD Manual similarly states: "Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AAIDD Manual at 5. Deficits in intellectual functioning are established by "an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." Id. at 27. Deficits in adaptive functioning are measured by:

> performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without [MR/ID] that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills.

Id. The purpose of the third prong – that the disability emerged before age eighteen – "is to distinguish ID from other forms of disability that may occur later in life. . . . Thus, disability does not necessarily have to have been formally identified, but it must have originated during the developmental period." Id.

Each of the three prongs of the MR/ID definition must be met in order for a person to be positively diagnosed. See O'Neal v. Bagley, No. 11-3449, 2013 WL 6726904, at *9 (6th Cir. Dec. 23, 2013) ("the failure to satisfy any of the three criteria is enough to sink an Atkins claim."); Candelario-Santana, 916 F. Supp. 2d at 194; Wilson, 922 F. Supp. 2d at 342. Moreover, the Court must be satisfied that Defendant was mentally retarded/intellectually disabled at the time of the crime. See Holladay v. Allen, 555 F.3d 1346, 1353 (11th Cir. 2009) ("Though the factors state that the problems had to have manifested themselves before the defendant reached the age of eighteen, it is implicit that the problems also existed at the time of the crime." (internal quotation marks omitted)). In other words, the Court must examine whether Defendant had intellectual and adaptive functioning deficits "both before and after age eighteen." Salad, 2013 WL 3776418, at *2.

III. THE EVIDENTIARY HEARING

A. Witnesses

At the hearing, the Court heard testimony from seven expert witnesses: five for Defendant - Dr. Mark Barry Siegert ("Dr. Siegert"), Dr. Daniel J. Reschly ("Dr. Reschly"), Dr. George W. Woods, Jr. ("Dr. Woods"), Dr. Stacey Wood ("Dr. Wood"), and Dr. Marc. J. Tassé ("Dr. Tassé")[6] – and two for the Government – Dr. Bernice A. Marcopulos ("Dr. Marcopulos") and Dr. Michael Welner ("Dr. Welner").

Defendant's first expert, Dr. Siegert, is a clinical and forensic psychologist licensed in New York and New Jersey.[7] (Tr. Sept. 30, 2013, ECF No. 288, at 18:13-19, 19:11.) Dr. Siegert received his Ph.D. from the University of Tennessee, did his postdoctoral training at Harvard Medical School, and has administered between four and five-thousand intelligence tests throughout his career. (Id. at 19:4-9; 20:1-5; 21:3-5; 22:13-19.) The Court accepted Dr. Siegert as a person with specialized knowledge in the areas of clinical and forensic psychology.[8] (Id. at 27:10-21.)

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[6] Drs. Wood and Tassé testified in rebuttal.

[7] Dr. Siegert testified that "[a] clinical psychologist is someone who really studies the issues that most of us would call mental health per se," while "[f]orensic psychology is applying psychological knowledge to legal issues. . . ." (Tr. Sept. 30, 2013, ECF No. 288, at 19:15-21.) He testified that about forty percent of his practice is clinical, and about sixty percent of his practice is forensic. (Id. at 22:1-2.)

[8] Dr. Siegert's curriculum vitae was marked and admitted as Exhibit 92 of this hearing. (Tr. Sept. 30, 2013, ECF No. 288, at 27:2-9; Hr'g Ex. 92.)

Defendant's second expert, Dr. Reschly, is a school psychologist licensed in Iowa and Arizona, is currently a Professor at Vanderbilt University's Peabody College, and has taught courses on assessment of MR/ID for forty-three years. (Tr. Oct. 4, 2013, ECF No. 303, at 1068:25-1069:10; 1069:17-1071:2.) Dr. Reschly has advised the Social Security Administration on its criteria for determining MR/ID. (Id. at 1072:5-19.) He has authored more than 100 published articles, books, reports, and policy papers, and is a member of several professional organizations, including the APA and its Division 33 (developmental disabilities). (Id. at 1071:21-23; 1073:25-1074:10; 1075:6-9.) The Court accepted Dr. Reschly as a person with specialized knowledge in the areas of school psychology and intellectual disability.[9] (Id. at 1077:6-19.)

Defendant's third expert, Dr. George W. Woods, Jr., is a physician specializing in neuropsychiatry, with board certification in psychiatry from the American Board of Psychiatry and Neurology. (Tr. Oct. 8, 2013, ECF No. 253, at 472:18-473:5; 488:2-12.) Dr. Woods testified that approximately fifteen percent of his practice involves persons with MR/ID (about fifteen to eighteen individuals) and that his forensic work constitutes approximately seventy percent of his practice.

[9] Dr. Reschly's most current curriculum vitae was marked and admitted as Exhibit 113 of this hearing. (Tr. Oct. 7, 2013, ECF No. 250, at 27:24-28:4; 29:1-18; Hr'g Ex. 113.)

(Id. at 508:6-7, 518:24-519:1.) Dr. Woods has published articles related to MR/ID and risk awareness, and maintains faculty appointments at the Morehouse School of Medicine and the University of California, Berkeley, School of Law. (Id. at 513:12-514:6; 515:11-15; 516:2-6.) The Court accepted Dr. Woods as a person with specialized knowledge in the areas of neuropsychiatry and intellectual disability.[10] (Id. at 521:12-24.)

The Government's first expert, Dr. Marcopulos, is a licensed and board-certified clinical neuropsychologist, a professor of psychology at James Madison University, and a clinical professor at the University of Virginia.[11] (Tr. Oct. 15, 2013, ECF No. 266, at 936:1-5; 940:19-25.) She has taught intelligence testing at the University of Virginia since 1992. (Id. at 943:9-13.) Dr. Marcopulos was the director of the neuropsychology laboratory at Western State Hospital in Staunton, Virginia, for over twenty years, where she conducted approximately two hundred MR/ID assessments. (Id. at 937:14-18; 945:2-12.) She is a member of several professional organizations, including the APA, and oversees the creation of

[10] Dr. Woods's curriculum vitae was marked and admitted as Exhibit 204 of this hearing. (Tr. Oct. 8, 2013, ECF No. 253, at 473:20-474:1; Hr'g Ex. 204.)
[11] Dr. Marcopulos testified that clinical neuropsychologists "are typically clinical psychologists who have additional training, typically two years post-doctoral training and supervised supervision and additional study on the brain. They administer a series of tests, specialized tests which show [the] relationship between brain functioning and behavior." (Tr. Oct. 15, 2013, ECF No. 266, at 937:2-9.)

board certification examinations for the American Board of Clinical Neuropsychology. (Id. at 939:14-940:8; 942:5-23.) The Court accepted Dr. Marcopulos as a person with specialized knowledge in the area of clinical neuropsychology.[12] (Id. at 947:19-948:1.)

The Government's second expert, Dr. Welner, is a board-certified psychiatrist and forensic psychiatrist licensed to practice in New York and Hawaii. (Tr. Oct. 17, 2013, ECF No. 271, at 1466:12-15; 1467:16-21; 1469:20-22.) He was a full-time physician at Bellevue Hospital in New York, which is a psychiatric-correctional facility, where he evaluated and treated persons with MR/ID. (Id. at 1469:23-1472:21; 1476:23-1477:5.) He is the owner and chairman of The Forensic Panel, a private, peer-reviewed consultation practice. (Id. at 1479:22-1481:18.) Dr. Welner has examined approximately thirty people with MR/ID in the forensic setting and half of those cases were in the Atkins context. (Id. at 1484:8-18.) The Court accepted Dr. Welner as a person with specialized knowledge in the area of forensic psychology.[13] (Id. at 1491:3-25.)

Defendant's fourth expert, Dr. Stacey Wood, testified on rebuttal. She received a master's and Ph.D. in clinical

[12] Dr. Marcopulos's curriculum vitae was marked and admitted as Exhibit 268 of this hearing. (Tr. Oct. 15, 2013, ECF No. 266, at 948:6-949:21; Hr'g Ex. 268.)
[13] Dr. Welner's curriculum vitae was marked and admitted as Exhibit 432 of this hearing. (Tr. Oct. 17, 2013, ECF No. 271, at 1488:21-1489:7; Hr'g Ex. 432.)

neuropsychology from the University of Houston and completed a postdoctoral fellowship in neuropsychology at UCLA. (Tr. Nov. 12, 2013, ECF No. 305, at 10:15-19.) Dr. Wood is a tenured professor of psychology at Scripps College. (Id. at 11:19-21.) She is a licensed clinical psychologist in California and Indiana. (Id. at 11:6-8.) She has given hundreds of IQ tests and her role in Atkins cases is typically limited to analyzing prong one (intellectual functioning). (Id. at 15:5-16:9.) Dr. Wood had testified in federal court one time prior to this matter, in a competency hearing. (Id. at 21:12-16.) She has been involved with "[a]round 50" publications. (Id. at 24:1-3.) The Court accepted Dr. Wood as a person with specialized knowledge in the area of clinical neuropsychology.[14] (Id. at 25:11-19.)

Defendant's final expert, Dr. Tassé, testified on rebuttal. Dr. Tassé is a professor of psychology at the Ohio State University, as well as the director of the Nisonger Center, a federally-funded university center for excellence in developmental disabilities. (Tr. Nov. 13, 2013, ECF No. 306, at 220:11-13; 222:2-17.) Dr. Tassé received his Ph.D. in psychology from the University of Quebec at Montreal and his doctoral dissertation on adaptive behavior assessment won the AAMR's dissertation award. (Id. at 220:18-221:19.) He has

[14] Dr. Wood's curriculum vitae was marked and admitted as Exhibit 450 of this hearing. (Tr. Nov. 12, 2013, ECF No. 305, at 25:25-27:11; Hr'g Ex. 450.)

worked with hundreds of persons with intellectual disabilities, and has published "95 to 100 publications . . . [in] peer reviewed journal articles, books, [and] book chapters in the area of intellectual disability and autism." (Id. at 227:15-21; 230:3-8.) He has testified in court regarding MR/ID determinations eight or nine times, each time as a defense witness. (Id. at 334:15-24.) The Court accepted Dr. Tassé as a person with specialized knowledge in the area of intellectual disability.[15] (Id. at 238:25-239:3.)

Each of these experts submitted written reports to the Court, all of which were admitted as exhibits at the hearing. (See Hr'g Exs. 107 (Dr. Reschly), 108 (Dr. Siegert), 119 (Dr. Marcopulos), 206 (Dr. Woods), 248 (Dr. Wood), 433 (Dr. Welner), 455 (Dr. Tassé).) The Government's experts – Drs. Welner and Marcopulos - collaborated on a rebuttal report, which was also admitted as an exhibit at the hearing. (See Hr'g Ex. 133.)

The Court also heard testimony from twenty-three lay witnesses, including Defendant's family members, teachers, supervisors, and co-workers, as well as investigators and correctional staff. Lay witnesses testifying for Defendant

[15] The Court sustained the Government's objection to Dr. Tassé being qualified as a person with specialized knowledge in the area of clinical psychology because it was unclear when and where Dr. Tassé last practiced as a clinical psychologist. (Tr. Nov. 13, 2013, ECF No. 306, at 237:15-238:24.) Dr. Tassé's curriculum vitae was marked and admitted as Exhibit 453 of this hearing. (Id. at 239:18-240:8; Hr'g Ex. 453.)

included: Lois Montgomery (Defendant's mother); Chrystal Montgomery Barrow (Defendant's sister); Jackie Gullett (teacher); Erlin Ellena Gooch Reid (teacher); Barbara Vaughan (teacher); Linda Jennings (teacher); Melissa Montgomery (Defendant's wife); Robert Bell (supervisor); Roderick Scott (supervisor); Darlene Scott (supervisor); Frederick Estes (co-worker); Michael Farrish (co-worker); Special Agent Jason Wilkerson (Tennessee Bureau of Investigation); Kristine Keeves (La Vergne Police Department); and Adrian Montgomery (Defendant's brother), on rebuttal.[16] Lay witnesses testifying for the Government included: Lolie Jones, Jr. (supervisor); Thomas Driver (supervisor); Richard Pierce (case manager); Robert Rainey (correctional counselor); Ron Rickard (Defendant's boxing coach); Angela Peel (Defendant's girlfriend); U.S. Marshal Seth Bruce; and U.S. Postal Inspector Susan Link.

B. Credibility Determinations

One of the crucial functions of the Court in deciding an Atkins claim is to determine the credibility of the witnesses presented at the evidentiary hearing. E.g., Nelson, 419 F. Supp. 2d at 903 (determining the credibility of expert witness testimony in the Atkins context); see Davis, 611 F. Supp. 2d at 491 (considering "the relative credibility of

[16] Adrian Montgomery testified in rebuttal. To avoid confusion with Defendant, the Court will refer to Adrian Montgomery, where applicable, as "Mr. Adrian Montgomery."

the experts in this case"); Candelario-Santana, 916 F. Supp. 2d at 211 ("Because of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians' judgment and credibility.")

Having reviewed each of the expert's qualifications, reports, testimony, and demeanor at the hearing, the Court now turns to its credibility determinations. Overall, the Court finds the reports and testimony of the Government's experts – Drs. Marcopulos and Welner - to be more thorough, internally consistent, persuasive, and thus, credible.

1. Primary Examiners

a. Dr. Siegert

The Court finds Dr. Siegert's testimony, particularly his IQ testing, credible. Dr. Siegert is qualified to administer and interpret intelligence testing and has administered roughly four or five-thousand psychological tests throughout his career. (See Tr. Sept. 30, 2013, ECF No. 288, at 22:13-19.)

Forty percent of Dr. Siegert's practice is clinical. Sixty percent is forensic. Dr. Siegert has testified "close to 50/50" for prosecutors and defendants (id. at 22:1-2; 23:23-24:7); however, none of the cases for which Dr. Siegert was retained by

prosecutors involved MR/ID. "They were all sexual assault cases, they're Megan's Law cases." (Id. at 111:19-24.) Dr. Siegert has no experience in a forensic hospital or prison setting. (Id. at 113:5-10.)

The Court has two misgivings as to Dr. Siegert's curriculum vitae. First, none of the four publications Dr. Siegert lists on his CV involve research or scientific studies, and Dr. Siegert was unclear about whether any of them were peer reviewed. (Id. at 112:14-113:4; Hr'g Ex. 92 at 10-11.) Second, when asked on cross-examination whether his position as a "Clinical Instructor" at Harvard Medical School from 1983 to 1988 was a volunteer position as opposed to a bona fide faculty appointment, Dr. Siegert was equivocal: "it's technical[ly] a faculty appointment, I believe, when one is an intern at Harvard. . . . I'm not remembering clearly, I'm sorry, I'm getting a little older right now. . . ."[17] (Tr. Sept. 30, 2013, ECF No. 288, at 108:3-24; Hr'g Ex. 92 at 1.)

Dr. Siegert also provided some testimony that lacked a scientific basis. For example, he testified that vocational classes are where "many people who are intellectually challenged end up" and, when pressed for a scientific basis as to the statement, stated that "much of this is based on a career of having worked with people in schools." (Tr. Sept. 30, 2013, ECF

[17] Dr. Siegert is sixty years old. (Tr. Sept. 30, 2013, ECF No. 288, at 108:25-109:1.)

No. 288, at 128:1-16.) Dr. Siegert conceded that he has never worked in high school settings or secondary education, has not been trained as a counselor, and has taken no courses in education. (Id. at 128:18-129:10.)

Notwithstanding these problems with Dr. Siegert's credibility, the Court credits Dr. Siegert's opinions as to Defendant's intelligence testing because of his experience administering four to five-thousand psychological tests.

b. Dr. Reschly

The Court finds Dr. Reschly's testimony and conclusions in this matter unreliable and substantially lacking in credibility. Dr. Reschly's evaluation and affirmative diagnosis of MR/ID in Defendant's case were cursory in many respects.

The most glaring problem with Dr. Reschly's diagnosis is that he made it without first meeting and interacting with Defendant. (See Tr. Oct. 8, 2013, ECF No. 254, at 416:25-417:5.) Dr. Reschly began working on this case on June 3, 2013, and submitted his report positively diagnosing Defendant with MR/ID less than two weeks later, on June 14, 2013. (Tr. Oct. 7, 2013, ECF No. 251, at 139:18-140:24; Hr'g Ex. 107.) Dr. Reschly cited the time constraint of the Court's June 14, 2013, deadline for the submission of expert reports to explain his failure to

meet with Defendant prior to his diagnosis.[18] (Tr. Oct. 8, 2013, ECF No. 254, at 418:6-13.)

This does not explain Dr. Reschly's failure to watch the videotaped interviews conducted by Drs. Marcopulos and Welner (Hr'g Exs. 251, 348), which were provided to him months before the hearing, his failure to watch Defendant's videotaped interrogations, or his failure to listen to Defendant's recorded jail calls to Fred Estes prior to the hearing. (Tr. Oct. 8, 2013, ECF No. 254, at 271:12-272:10; 289:23-291:5; 323:22-324:9.) Nor does it justify the absence in Dr. Reschly's report of an explanation for his failure to meet with Defendant or its potential impact on his findings, in contravention of the APA's Specialty Guidelines for Forensic Psychology:

> Forensic practitioners seek to make reasonable efforts to obtain such information or data, and they document their efforts to obtain it. When it is not possible or feasible to examine individuals about whom they are offering an opinion, forensic practitioners strive to make clear the impact of such limitations on the reliability and validity of their professional products, opinions, or testimony.

(APA, Specialty Guidelines for Forensic Psychology 9.03 (emphasis added) (Hr'g Ex. 449).) Based on the sources of information listed in his report (see Hr'g Ex. 107 at 05101-

[18] The Court set the June 14, 2013, deadline for disclosing expert reports to the Government at a status conference on March 8, 2013 (see ECF No. 132), and Dr. Reschly was not contacted by Defendant's lawyers until May 2013 (see Tr. Oct. 4, 2013, ECF No. 303, at 1077:22-24.) The Court granted Defendant's motion to extend the June 14, 2013, deadline by a week at a hearing held on that date. (See ECF No. 173.)

05104), Dr. Reschly diagnosed Defendant before ever having heard him speak, observed his disposition, or seen for himself how he communicates with others.[19]

Dr. Tassé asserted that a clinical interview is "not essential" to make a determination of MR/ID, pointing out that many persons "cannot participate in an interview because of ability or language." (Tr. Nov. 13, 2013, ECF No. 306, at 293:20-294:12.) No such limitations prevented Dr. Reschly from evaluating Defendant in person in this case; in fact, Dr. Reschly conducted an in-person interview of Defendant in September 2013.[20] (Tr. Oct. 7, 2013, ECF No. 251, at 141:23-142:7; Hr'g Ex. 201.)

The Court agrees with Dr. Welner (see infra Part III.B.1.d) that appropriate cases for a diagnosis to be made without an in-person evaluation involve neurologically impaired individuals, individuals who cannot speak or who refuse to speak, and post-mortem evaluations; "otherwise the ethical guidelines are pretty

[19] Defendant's post-hearing brief asserts that "[y]ou cannot determine if someone is MR/ID by just talking to them." (ECF No. 307 at 20.) While that is certainly true, the complete lack of an interview with the person being diagnosed must be adequately explained. Dr. Reschly did not do this.

[20] Dr. Reschly included findings from his interview of Defendant and Defendant's mother in his addendum report, which was submitted on September 28, 2013, two days before the hearing in this case began. (Tr. Oct. 7, 2013, ECF No. 251, at 142:11-19; Hr'g Ex. 457.) The caveat in Dr. Reschly's report that he "intended to collect additional information, and would consider that information after it was collected" does little to rectify the basic problem, as the interpretation of any post-diagnosis information Dr. Reschly collected would be subject to confirmation bias. (Tr. Oct. 8, 2013, ECF No. 254, at 417:24-25; Hr'g Ex. 107 ¶ 65 ("these opinions and comments are subject to modification based upon my review of additional case material.").)

clear that you have to interview." (Tr. Oct. 21, 2013, ECF No. 272, at 1602:3-25.) Even the AAIDD User's Guide (co-authored by Dr. Tassé) states that "[c]linical judgment should not be thought of as justification for abbreviated evaluation, . . . a substitute for insufficiently explored questions, [or] an excuse for incomplete or missing data. . . ."[21] AAIDD User's Guide at 9.

Dr. Reschly's credibility is also called into question by the numerous errors and misleading statements in his written report and testimony. Firstly, Dr. Reschly's report incorrectly states that Defendant's sister, Chrystal Montgomery Barrow, "had significant daily contact with [Defendant] . . . that lasted over several years, including working with [Defendant] for a time at a corrections facility in west Tennessee." (Hr'g Ex. 107 ¶ 67; see also Tr. Oct. 8, 2013, ECF No. 254, at 274:2-275:13.) Secondly, Dr. Reschly's report repeats Chrystal Montgomery Barrow's inaccurate statement that Defendant "seemed unaware that he had to file a written request to see a psychiatrist or to file a grievance, something he certainly should have known from his experience as a correctional officer for nearly 30 years." (Hr'g Ex. 107 ¶ 121; see also Tr. Oct. 8,

[21] Although Defendant asserts that "there is nothing significant from Dr. Welner's interview in assessing MR/ID" (ECF No. 307 at 20), one of Defendant's own experts, Dr. Woods, testified regarding evidence of mild MR/ID he gleaned from Dr. Welner's interview. (See generally Tr. Oct. 10, 2013, ECF No. 259, at 681:24-708:11; Hr'g Ex. 252.)

2013, ECF No. 254, at 357:2-22.) In fact, Defendant filed frequent grievances and sick call requests, for everything from a sore throat to a spider bite, while incarcerated. (Tr. Oct. 8, 2013, ECF No. 254, at 357:23-362:22; Hr'g Ex. 182.)

Thirdly, in a paragraph in his report entitled "Safety and Health Care," Dr. Reschly wrote, "[l]ess information exists in this area than several others." (Hr'g Ex. 107 ¶ 118; see also Tr. Oct. 8, 2013, ECF No. 254, at 354:24-355:6.) Yet Dr. Reschly had to concede that Defendant's medical records (Hr'g Ex. 181), to which Dr. Reschly had access when he wrote his report, indicate that Defendant visited his internist dozens of times over a five-year period seeking treatment for various ailments. (Tr. Oct. 8, 2013, ECF No. 254, at 355:11-356:19.) When asked "[d]id you really go through" Defendant's medical records, Dr. Reschly testified that he "perused them." (Tr. Oct. 8, 2013, ECF No. 254, at 356:21-23.) Finally, Dr. Reschly wrote that Chrystal Montgomery Barrow was "pretty sure" Defendant could tell time on an analog clock on her Vineland inventory (Hr'g Ex. 115 at 05139), yet in his report he wrote, "Both Chrystal and Melissa reported that [Defendant] could tell time with a digital watch, but were uncertain that he understood an analog watch." (Hr'g Ex. 107 ¶ 85; see also Tr. Oct. 8, 2013, ECF No. 254, at 382:25-383:8.)

Dr. Reschly also appeared clearly predisposed at times, and that predisposition appeared to affect his professional judgment. For example, Dr. Reschly initially refused to accept that Defendant's 1996 performance evaluation rating was "exceptional" because a misspelled written comment said he was doing an "acceptional [sic]" job (Hr'g Ex. 147 at 00482); Dr. Reschly took this to mean that the evaluation "might be something about acceptable. . . . It's impossible to tell." In other words, Dr. Reschly had trouble conceding obvious points, and was attempting to find fault where there was little objective basis with which to do so. (Tr. Oct. 7, 2013, ECF No. 251, at 218:2-219:2.) In another portion of his testimony, Dr. Reschly testified that a comment on one of Defendant's performance evaluations that Defendant was "to[o] young to evaluate at this time" (Hr'g Ex. 148 at 00492) was "almost nonsensical," when it clearly meant that Defendant had not been in the position long enough to evaluate. (Tr. Oct. 7, 2013, ECF No. 251, at 227:10-228:1.)

Other courts have recently raised similar concerns about Dr. Reschly's dismissiveness "due to his personal lack of knowledge of a phrase, unsubstantiated belief that the statements were either untrue or impossible, or personal moral opinion." (See Chase v. State, No. 13, 941-CR, slip op. at 21 (Cir. Ct. Copiah Cnty., Miss. May 8, 2013) (ECF No. 308-1 at

21).) The Circuit Court of Copiah County, Mississippi, cited the following example (highlighted in the Government's post-hearing brief):

> For instance, Chase stated that he hit his head on the basketball rim at 12 or 13, which Dr. Reschly assigned as a deficit because it was implausible. However, Dr. Reschly did not ask whether the goal was regulation height, or lower, or if the children were using a trampoline. Reschley's [sic] belief that dunking at that age is entirely impossible was not shown to be grounded in science, but his personal beliefs.

(Id.)

Finally, the Court was troubled by the glibness of some of Dr. Reschly's answers to questions at the hearing. The most poignant example occurred when Dr. Reschly asserted that although it is not typical for persons with mild MR/ID to go to college, he has seen it happen, specifically among scholarship athletes at Iowa State University and the University of Arizona.[22] (Tr. Oct. 7, 2013, ECF No. 251, at 163:1-15.) Dr. Reschly did not elaborate regarding the basis for his statement that the persons he has encountered in college who meet the intellectual criteria for mild MR/ID have all been scholarship athletes. (See id. at 163:25-164:7.) Thus, the Court cannot be sure whether Dr. Reschly performed an individual analysis of these athletes, or whether he casually assigned mild

[22] On cross-examination, Dr. Reschly testified that he is not aware of any other persons with mild MR/ID besides scholarship athletes attending college for an academic, rather than social, purpose. (Tr. Oct. 7, 2013, ECF No. 251, at 197:6-199:11.)

MR/ID to persons who may not meet the requisite diagnostic criteria.

In conclusion, Dr. Reschly's testimony and conclusions are unreliable. The Court assigns little weight to them in light of the fact that they were often hasty, overstated, or simply incorrect. The Court has no doubt that Dr. Reschly is an accomplished academic and well-qualified to opine on issues of adaptive behavior and MR/ID; his methods and conclusions in this particular case, however, lack credibility.

c. Dr. Marcopulos

The Court finds Dr. Marcopulos's testimony and conclusions highly credible. Dr. Marcopulos's work as both a practitioner and an academic underscores the range of her experience. She worked in a leadership position at a psychiatric hospital in Virginia for more than twenty years (where she conducted hundreds of MR/ID evaluations) and has been a university professor since the early 1990s. (Tr. Oct. 15, 2013, ECF No. 266, at 937:14-943:13.) Not only is Dr. Marcopulos board certified as a clinical neuropsychologist, but she is also the chief examiner overseeing the creation of board certification examinations for the American Board of Clinical Neuropsychology. (Id. at 939:14-942:25.)

The Court is also convinced that Dr. Marcopulos is an unbiased witness. She has worked on approximately twenty death

penalty cases in Virginia and has been retained in those cases exclusively by defendants; the instant case is the first time she has been retained by the prosecution in a death penalty inquiry. (Id. at 950:23-952:16.) She has worked three times as a primary examiner for The Forensic Panel, with her work being peer-reviewed by two independent individuals each time. (Id. at 953:6-25; 955:13-15.) Moreover, she has published a number of articles in peer reviewed scientific journals, and has been the editor of two books. (Id. at 956:6-20; Hr'g Ex. 268 at 4-5.)

Dr. Marcopulos delivered a persuasive argument for why the Vineland Adaptive Behavior Scales ("VABS") administered by Dr. Reschly in this matter are unreliable based on their discrepant scores and retrospective application, and thus, why the Court must examine other sources of evidence to consider Defendant's adaptive functioning. (See infra Part IV.B.2.) She also effectively impeached Dr. Woods's scholarly references and description of neuropsychological testing and the location of various functions within the brain. (See Tr. Oct. 15, 2013, ECF No. 265, at 1146:23-1148:21; Tr. Oct. 8, 2013, ECF No. 253, at 497:22-498:3 (Dr. Woods: "I'm not an expert in neuro-imaging, nor am I an expert in neuropsychological testing.").) For one, Dr. Woods does not administer neuropsychological testing himself. (Tr. Oct. 15, 2013, ECF No. 265, at 1147:19-1148:2.) Moreover, according to Dr. Marcopulos, Dr. Woods's tendency to

draw one-to-one relationships between neuropsychological test performances and function in particular parts of the brain is outdated: "we don't really interpret tests as measuring specific brain areas, the brain is much more complex than that, and the test[s] measure multiple different functions." (Tr. Oct. 15, 2013, ECF No. 265, at 1148:11-14.) She cited the Montreal Cognitive Assessment ("MOCA") clock-drawing test as one example of Dr. Woods administering inappropriate assessment tools, stating that the MOCA is "usually used for assessing dementia. . . . [I]t's certainly not a test used to diagnos[e] intellectual disability." (Id. at 1151:23-1152:6.)

The Court also finds Dr. Marcopulos's thoroughness and transparency reassuring. Dr. Marcopulos met with Defendant (for approximately twenty hours) before reaching a conclusion as to MR/ID. (Tr. Oct. 15, 2013, ECF No. 266, at 975:19-976:9.) Moreover, Dr. Marcopulos provided both a videotape and a transcript of her clinical interview with Defendant. (See Hr'g Exs. 348, 349.)

Defendant's post-hearing brief faults Dr. Marcopulos for relying on "non-intelligence testing," like the Otis-Lennon and the Armed Services Vocational Aptitude Battery ("ASVAB"), in reaching her prong-one conclusion. (See ECF No. 307 at 6.) Dr. Marcopulos provided logical, scientifically defensible reasons for doing so, however, citing the high correlation

between achievement testing and IQ and the importance of considering a wide range of material. (See Tr. Oct. 15, 2013, ECF No. 265, at 1070:16-22; Hr'g Ex. 361.) Defendant also asserts that Dr. Marcopulos selectively reported data in her report. For example, on page thirty-six of her report, she writes:

> Numerous tests administered in the past, as well as this evaluation reveal performance in the low average to borderline range.
>
> a. Otis Lennon = 82
> b. VIQ = 79
> c. ASVAB 1989 = 84-85 (AFQT)
> d. Verbal skills in the low average range (80 on the PPVT-4, EVT-2)
> e. Premorbid estimate of IQ = 79

(Hr'g Ex. 119 at 00036; see also ECF No. 307 at 6.) Again, regardless of the Court's disagreement with Dr. Marcopulos as to prong one (see infra Part IV.A.5), she provided a defensible explanation for this, stating that Defendant's highest performances suggest "at least a minimum of what he could do," and that "when someone scores higher, the higher points in a test battery, . . . unless the person is a very, very good guesser or they're cheating, they are not going to score higher than their ability or not much higher than their ability." (Tr. Oct. 15, 2013, ECF No. 265, at 1142:1-1145:18; Tr. Oct. 16, 2013, ECF No. 267, at 1458:1-10; see also AAIDD Manual at 47 (in intellectual functioning analysis, "best or maximal performance is assessed.").)

Thus, the Court credits Dr. Marcopulos as a witness.

d. Dr. Welner

While not persuasive on every point, the Court finds Dr. Welner's presentation credible on the central issues before the Court.

Dr. Welner's credentials are impressive. He is board certified in four areas: disaster medicine, psychopharmacology, psychiatry, and forensic psychiatry. (Tr. Oct. 17, 2013, ECF No. 271, at 1467:16-21.) He worked at Bellevue Hospital in New York (a hybrid psychiatric-correctional facility) from 1992 to 1997, evaluating and treating persons with MR/ID and conducting competency-to-stand-trial evaluations. (Id. at 1469:23-1472:21; 1476:23-1477:5; Hr'g Ex. 432 at 2.) This experience in a prison-like environment with the MR/ID population equips Dr. Welner with a unique and highly relevant perspective in this proceeding, which concerns a career correctional officer. Dr. Welner also held a faculty appointment at the New York University Medical School for twenty years. (Tr. Oct. 17, 2013, ECF No. 271, at 1487:21-1488:4; Hr'g Ex. 432 at 1.)

Dr. Welner's history of forensic work demonstrates his ability to be objective. He has conducted evaluations in approximately ten to twelve Atkins cases (although this is the first time he has testified in one), and he has consulted for both prosecutors and defendants (although in capital cases, he

has been more involved in consulting with prosecutors). (Tr. Oct. 17, 2013, ECF No. 271, at 1483:8-14; 1484:8-18; Tr. Oct. 21, 2013, ECF No. 275, at 1664:21-1665:1.) Of the Atkins-related cases Dr. Welner has worked on, he has positively diagnosed a person with mild MR/ID in two cases: (1) Commonwealth v. Marrero, No. CP-25-CR-0000645-1994 (Ct. Com. Pl., Erie Cnty., Pa. Jan. 8, 2009)[23], and (2) Penry v. Johnson, 532 U.S. 782 (2001). (Tr. Oct. 21, 2013, ECF No. 275, at 1665:2-6.)

Dr. Welner's cross-examination raised some potential concerns as to his objectivity. For example, a 1998 article authored by Dr. Welner entitled, "The Dog Ate My Integrity," contains a passage suggesting that, in one case in which Dr. Welner participated, he "was drawn into an adversarial mentality a forensic scientist should never have." (Hr'g Ex. 441.) In a 2001 article, entitled "Lose Brain, Save Life," Dr. Welner asserted that Atkins would lead to many people who do not meet the DSM-V criteria advancing meritless claims as follows:

> Attention Death Row: Button up your shirt to the top, get those coke bottle glasses on the internet,

[23] The docket sheet for the Marrero case indicating that Marrero's death sentence was rescinded and replaced with a life sentence is available at http://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-25-CR-0000645-1994, at 21. See also Order, Marrero v. Horn, No. 2:00-cv-02155-DWA, ECF No. 36 (W.D. Pa. Jan. 23, 2009) (noting that Marrero was resentenced "to life imprisonment in the Court of Common Pleas, Erie County on January 8, 2009").

> you know, the ones with the black frames, and get a dorky haircut from Officer Bob. Retardation is in. In the continuing battleground over the death penalty, the ability to appear retarded has emerged as the most powerful weapon in the new psychiatric mitigation arsenal. The impact threatens the credibility of American neuropsychology.

(Hr'g Ex. 442; see also Tr. Oct. 21, 2013, ECF No. 275, at 1701:1-1703:25.)

Despite these strongly worded writings, the Court is satisfied that Dr. Welner's forensic background, as well as his thorough examination in this case, make him an objective witness. Like Dr. Marcopulos, the Court finds Dr. Welner meticulous and transparent. Dr. Welner has devoted hundreds of hours to this case, personally met with Defendant for several hours, and provided both a videotape and transcript of his interview for the Court's review. (Tr. Oct. 21, 2013, ECF No. 275, at 1656:24-1657:25, 1669:6-9; Hr'g Exs. 251, 252.)

Defendant's post-hearing brief cites two reported cases, State v. Cheever, 284 P.3d 1007 (Kan. 2012), and State v. Vandeweaghe, 799 A.2d 1 (N.J. Super. Ct. App. Div. 2002), for the assertion that Dr. Welner testifies in a manner that "other courts have warned is very questionable." (ECF No. 307 at 19; Hr'g Exs. 443-44.) Having reviewed each case, the Court finds this characterization to be an overstatement. Firstly, neither case involves an Atkins determination. Secondly, in Cheever, the court simply held that "the admission of Welner's testimony

violated Cheever's Fifth Amendment privilege against compelled self-incrimination."[24] 284 P.3d at 1026. While the court stated that Dr. Welner's testimony "virtually put words into Cheever's mouth," it also noted that Dr. Welner's testimony had "powerful content" and that his "qualifications were significantly more impressive than [the defense expert's]." Id. at 1027 (citation and internal quotation marks omitted). Finally, in Vandeweaghe, the court made no comments regarding Dr. Welner's method of examination; instead, it found that the admission of Dr. Welner's testimony was "extremely prejudicial" because it relied on hearsay. 799 A.2d at 11. Thus, the Court is not persuaded that Dr. Welner has proven himself to be an unreliable witness in the past, and will not discredit his opinions on that basis.

Defendant also asserts that Dr. Welner would not concede even obvious points such as, for example, that persons with mild MR/ID have no distinctive appearance. (ECF No. 307 at 19-20; see also Tr. Oct. 21, 2013, ECF No. 275, at 1699:15-1700:9.) Dr. Welner's responses involved more nuance than Defendant's argument suggests. In the passage cited in Defendant's brief, Dr. Welner states that adaptive behavior deficits, particularly in self-care, can make it obvious that a person has mild MR/ID

[24] In a recent opinion, the U.S. Supreme Court unanimously reversed the Kansas Supreme Court's decision to bar Dr. Welner's testimony under the Fifth Amendment. See Kansas v. Cheever, 134 S. Ct. 596, 602 (2013).

and that, "[i]f you strip all of that away, it is conceivable for some individuals to have no remarkable quality if they do not have adaptive deficits . . . which would reflect upon their carriage and presentation in the outside world." (Tr. Oct. 21, 2013, ECF No. 275, at 1700:2-9.) According to the clinical literature, Dr. Welner also accurately testified that persons with deficits in the social domain of adaptive behavior often behave in a manner that is noticeable to others. (See Tr. Oct. 21, 2013, ECF No. 272, at 1566:3-11; DSM-V at 34 (noting that social domain "difficulties are noticed by peers in social situations.").)

Defendant claims Dr. Welner's testimony "put[] forth distractions" and nothing in Dr. Welner's interview is significant in assessing whether Defendant has MR/ID. (ECF No. 307 at 20.) This is an overstatement. Interviewing Defendant and relying on his school, work, medical, and other records is especially necessary in this case because standardized adaptive behavior instruments cannot be employed for lack of reliable informants. (See infra Part IV.B.2.) Moreover, Dr. Welner's interview of Defendant contains relevant examples of adaptive behavior that illuminate whether Defendant suffers from significant deficits. One significant example involves Defendant's communication with drug dealers and prostitutes at a Motel 6 security job, which contains a quite

sophisticated understanding of an under-the-table arrangement between the hotel and the patrons:

> Dr. Welner: Did you talk to the drug dealers and reach some kind of an understanding with them about how there wouldn't be any trouble?
>
> [Defendant]: Yeah, I tell 'em, I said, "Management, they don't care about you all being here, they just want you to be out of sight. Out of sight, out of mind." So they was always in their rooms, doing what they do. And management knew about it. And like I said, Motel 6 is the client, so anything they want to let go on, they going to let go on. They knew what they had in their rooms, they didn't care.

(Hr'g Ex. 252 at 04582.) Dr. Welner described this as a "situation in which there's sort of an informal preference, but [Defendant is] expected to handle the situation. And he had the cognitive flexibility to basically say, well, if there is no complaint, here is how we will handle it this way, we will just keep them behind closed doors." (Tr. Oct. 21, 2013, ECF No. 272, at 1580:13-25.) The Court finds these and other examples from Dr. Welner's clinical interview enlightening, even in light of the potential for unreliable self-reporting. See AAIDD Manual at 51-52.

Defendant also raises questions about The Forensic Panel's peer review process, citing Order, United States v. Shields, No. 2:04-cr-20254-BBD-2, ECF No. 557, at 7 n.3, 12-13 (W.D. Tenn. May 11, 2009), which found that the peer review

conducted by The Forensic Panel's experts in that case was not "consistent with the generally accepted understanding of that term" and was motivated by financial gain. The Court is satisfied that the peer review conducted by the Government's experts in this case served a useful function. Dr. Welner adequately explained that the compensation system for peer reviewers encourages thorough review; that the peer reviewers are divided up based on their areas of expertise to critique the primary examiner's work; and that the system "doesn't tolerate passivity, and people are expected to demonstrate that they've earned a seat at the table." (Tr. Oct. 17, 2013, ECF No. 271, at 1494:18-1496:8; Tr. Oct. 21, 2013, ECF No. 275, at 1685:1-7.)

The Court notes that Dr. Welner sometimes gave indirect answers and strayed from the question-and-answer format of the Atkins hearing. (See, e.g., Tr. Oct. 17, 2013, ECF No. 271, at 1477:3-1478:25.) On balance, however, his testimony was well-informed and enlightening. The Court thus finds Dr. Welner to be a credible witness.

2. Reviewers

a. Dr. Woods

The Court finds that Dr. George W. Woods, Jr.'s testimony and conclusions lack credibility in several respects.

Although Dr. Woods is the only board-certified expert proffered by Defendant (see Tr. Oct. 8, 2013, ECF No. 253, at

488:2-12), in capital cases, Dr. Woods works "exclusively for the defense." (Id. at 519:12-15.) He has been involved in nine or ten Atkins hearings in the past seven or eight years. (Id. at 519:19-23; see also Tr. Oct. 10, 2013, ECF No. 260, at 791:25-792:17; Wilson, 922 F. Supp. 2d at 336.)

The fact that irreparably damages Dr. Woods's credibility is that he relied completely on Dr. Reschly's adaptive functioning conclusions in confirming Defendant's positive diagnosis of MR/ID. (See Tr. Oct. 10, 2013, ECF No. 260, at 785:6-9.) For the reasons discussed above, see supra Part III.B.1.b, this reliance undermines the credibility of Dr. Woods's conclusions.

Dr. Woods agreed with Dr. Reschly's conclusions despite the fact that Dr. Reschly made his diagnosis without first meeting Defendant. Dr. Woods would not say that Dr. Reschly's report "is flawed, . . . because I think his conclusions are accurate, so I can't really say it's flawed, but I can say that, if at all possible, it's always better to sit with someone." (Id. at 786:12-18.) Dr. Woods conceded that Dr. Reschly did not look at all the information that was available to him in this matter before making his conclusions as to Defendant. (Id. at 798:21-799:1.)

Dr. Woods's report states: "To utilize clinical judgment as the basis for making the determination of mental retardation,

the supporting documentation must be extensive, with first-hand knowledge of the person and his environments." (Hr'g Ex. 206 at 05263.) In this case, Dr. Woods did meet with Defendant – twice (on April 18 and May 30, 2013) – before submitting his report on June 20, 2013. (Tr. Oct. 10, 2013, ECF No. 260, at 793:6-25.) Yet Dr. Woods did not personally conduct any collateral interviews because he "felt that Dr. Reschly's interviews were more than sufficient." (Id. at 801:24-802:15.) He also conceded that Dr. Reschly's report contained erroneous information about Chrystal Montgomery Barrow. (Id. at 801:9-23.) Thus, Dr. Woods's reliance on Dr. Reschly's incomplete analysis necessarily leads the Court to question Dr. Woods's findings.

Dr. Woods's report and testimony also raised concerns for the Court. Firstly, Dr. Woods's report admits that his "examination of [Defendant] . . . is not exhaustive, due to time constraints." (Hr'g Ex. 206 at 05263.) On the next page of his report, Dr. Woods makes a factual error as to Defendant's background, stating, "[Defendant's] father died in a fishing accident when he was thirteen years old." (Hr'g Ex. 206 at 05264.) On cross-examination, Dr. Woods admitted that Defendant was actually fourteen years old when his father died and that it would be important to have this fact correct given that Defendant's first IQ testing was conducted at the age of

fourteen. (See Tr. Oct. 10, 2013, ECF No. 260, at 843:12-844:25.)

Secondly, Dr. Woods also testified that prong one of the MR/ID criteria can be established by a low IQ score alone. (See Tr. Oct. 10, 2013, ECF No. 259, at 629:3-11.) This testimony simplifies both the clinical literature and federal precedents, which indicate that IQ testing is not perfect and that the prong-one analysis also requires clinical judgment. (See DSM-V at 37; Wilson, 922 F. Supp. 2d at 343-44.) Thirdly, Dr. Woods remarked that the following exchange in Defendant's interview with Dr. Welner did not "rise to the level of skillful redirection" by Defendant (Tr. Oct. 10, 2013, ECF No. 259, at 703:13-18):

> Dr. Welner: What were you good at? What aspects of the job do you think you did best?
> [Defendant]: In every aspect of it. I was good as a – I had communication skills, and I had good fighting skills too, when it came to it. So . . .
> Dr. Welner: When you say good communication skills, how did that play itself out in your world, can you give me an example of how –
> [Defendant]: Yeah, I knew how [to] communicate with individuals. Just like you, if you had to be able to communicate with your clients. If you don't, then your clients – you ain't going to have too many clients, are you? Are you?

(Id. at 700:2-15; Hr'g Ex. 252 at 04487-04488.) According to Dr. Woods, Defendant's response had "nothing real abstract about

it," and "was probably completely on queue." (Tr. Oct. 10, 2013, ECF No. 259, at 701:9-25 (emphasis added).) Dr. Woods hedged his answer, which was directly at odds with the fact that Defendant did redirect the conversation back to Dr. Welner in this particular exchange.

Dr. Woods's testimony referencing quotes from Defendant's interview with Dr. Welner as examples of his impairment (see generally id. at 686:3-708:11) is also at odds with Defendant's post-hearing brief, which states that "there is nothing significant from Dr. Welner's interview in assessing MR/ID." (ECF No. 307 at 20 (citing Dr. Tassé's testimony).) Dr. Woods found numerous examples in the interview relevant to his determination, including that Defendant inappropriately used the term "my better half" to refer to himself and not his spouse. (See Tr. Oct. 10, 2013, ECF No. 259, at 686:8-694:8.)

Finally, Dr. Marcopulos persuasively undermined the credibility of Dr. Woods's findings by criticizing the drawing of one-to-one correlations between test performances and particular areas of the brain as "an outdated form of looking at the brain." (Tr. Oct. 15, 2013, ECF No. 265, at 1150:25-1151:16.)

In light of the above-referenced problems with Dr. Woods's report and testimony, the Court discounts Dr. Woods's testimony.

b. Dr. Wood

The Court finds Dr. Stacey Wood to be a credible witness. Dr. Wood is especially qualified to opine as to prong one of the MR/ID criteria, which she did in this case. She has administered hundreds of IQ tests, of which "40 to 60 would fall in the category of consistent with [MR/ID]." (Tr. Nov. 12, 2013, ECF No. 305, at 15:5-16:9.) Dr. Wood has testified in state court approximately twenty-six times and in federal court one time (a competency hearing). (Id. at 21:7-16.) Dr. Wood has testified for both prosecutors and defendants, although in her two capital cases, she testified for defendants. (Id. at 22:1-3; 116:21-25.) This case is the first time Dr. Wood has testified in an Atkins proceeding. (Id. at 117:14-16.)

There are some slight areas for concern as to Dr. Wood's credibility. For example, Dr. Wood is not board certified in clinical neuropsychology or forensic psychology. (See id. at 94:18-22.) Moreover, none of Dr. Wood's publications involve MR/ID. (See id. at 100:25-101:2; Hr'g Ex. 450 at 5-8.) Dr. Wood also defended the validity of Defendant's scores on Dr. Parr's WISC-R administration, which the Court finds unreliable. (See Tr. Nov. 12, 2013, ECF No. 305, at 86:1-18; see also infra Part IV.A.2.a.) On balance, however, the Court finds Dr. Wood's testimony and report credible.

c. Dr. Tassé

The Court finds that Dr. Tassé's credibility was damaged in many respects. Dr. Tassé is not a board-certified psychologist and has no formal training in forensic psychology. (Tr. Nov. 13, 2013, ECF No. 306, at 329:8-20.) He is licensed to practice clinically in North Carolina, but has not done so for at least the past seven years. (Id. at 329:21-25.) A large portion of his current position at the Ohio State University involves administrative work. (Id. at 328:3-7.) The rest of Dr. Tassé's practice involves consulting, testifying, presenting at conferences, and conducting trainings. (Id. at 330:1-23.) He has testified approximately eight or nine times regarding MR/ID, each time as a defense witness. (Id. at 334:15-335:2.) Of the numerous presentations Dr. Tassé has made in the area of MR/ID, all of them have been to defense lawyers. (Id. at 343:24-344:3.)

Like Dr. Woods, the most significant issue with the reliability of Dr. Tassé's findings is that he relies on Dr. Reschly's adaptive functioning analysis. (See id. at 382:15-20.) When asked on cross-examination whether he knew about Defendant's numerous medical records (Hr'g Ex. 181), Dr. Tassé could not recall reviewing them. (Tr. Nov. 13, 2013, ECF No. 306, at 426:24-427:23.) As with Dr. Reschly, this answer raises concerns for the Court as to the thoroughness of

Dr. Tassé's review. (Cf. Hr'g Ex. 107 ¶ 118 (incorrectly noting that "[l]ess information exists in [the area of safety and healthcare] than several others.").) Dr. Tassé nevertheless stood by the thoroughness of Dr. Reschly's report even after he recognized that Dr. Reschly had not met with Defendant and had not explained in his report why he had not met with Defendant (contrary to the ethical rules for psychologists). (Tr. Nov. 13, 2013, ECF No. 306, at 390:7-391:19.) Dr. Tassé conceded that "it would be better practice to meet with the person." (Id. at 386:14-22.)

Dr. Tassé's testimony raised several other concerns for the Court. Firstly, Dr. Tassé testified that clinical interviews are "not that helpful" in light of unreliability of self-reporting, which "is susceptible to masking or exaggerating." (Id. at 294:24-295:14.) Dr. Tassé then testified that standardized measures of adaptive behavior like the VABS involve no subjectivity, even though the reliability of such instruments depends entirely upon the informants providing accurate, unbiased information. (Compare id. at 303:21-304:4; 422:2-10 with id. at 423:13-24.) Dr. Tassé's own scholarship recognizes the potential bias and subjectivity inherent in standardized adaptive behavior instruments: "a parent might want to underreport adaptive skills to intentionally lower their loved one's adaptive behavior performance in order to increase the

likelihood of a diagnosis of mental retardation and result in a reprieve of the death penalty." (Id. at 424:3-425:3; Marc J. Tassé, Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases, 16 Applied Neuropsychology 114 (2009) (Hr'g Ex. 453 at 9).)

Secondly, Dr. Tassé testified on both direct and cross-examination that Dr. Walker's and Dr. Reschly's discrepant VABS results "seemed consistent between both evaluators of the people they interviewed," and that the scores were "comparable." (Tr. Nov. 13, 2013, ECF No. 306, at 309:14-20; 425:23-426:5.) As the Court discusses infra Part IV.B.2, this is simply incorrect and undermines the Court's confidence in Dr. Tassé's ability to objectively review the evidence in this case.

Thirdly, the Court finds peculiar Dr. Tassé's strong insistence that Ruth Luckasson, a lawyer and special education professor who is a co-author of the AAIDD Manual and has attended presentations with Dr. Tassé, would be qualified to make a clinical diagnosis of MR/ID. (Id. at 352:9-353:12.) Finally, the Court finds Dr. Tassé's testimony that he does not "know much about" Dr. Mark Cunningham (id. at 367:14-17) disingenuous in light of the fact that Dr. Tassé attended a presentation with him in 2006 (see Hr'g Ex. 458), collaborated on the Shannon Shields case with him in 2009, co-authored an article with him in 2010, and is currently working on a book

chapter with him (see Tr. Nov. 13, 2013, ECF No. 306, at 363:4-21; 364:10-14; 372:5-20). In fact, in the Shannon Shields case, Dr. Tassé submitted his report agreeing with Dr. Cunningham's diagnosis of MR/ID in October 2008, before Dr. Cunningham rendered his opinion in November 2008. (See id. at 373:8-377:8.) Dr. Tassé testified that this was possible because Dr. Cunningham "had told me . . . that that was his opinion." (Id. at 373:20-21.)

Dr. Tassé nevertheless insisted that, in spite of all this collaboration, he did not know the extent of Dr. Cunningham's forensic work and testimony in death penalty cases. (See id. at 367:8-370:14; United States v. Lawrence, 735 F.3d 385, 435-36 (6th Cir. 2013) (noting that Dr. Cunningham has "testified in 110 capital cases, always for the defense," and that Dr. Cunningham was fairly characterized as a "professional witness") (Hr'g Ex. 460 at 60).) Dr. Tassé's lack of candor severely undermines his credibility in the instant case.

In light of the foregoing, the Court must discount Dr. Tassé's testimony.

3. Relevant Lay Witness Credibility Issues

The Court also finds problems with the credibility of the following relevant lay witnesses.

a. Lois Montgomery (Mother)

On September 30 and October 1, 2013, Defendant called his mother, Mrs. Lois Montgomery, to testify. (See Tr. Sept. 30, 2013, ECF No. 288, at 156:17-19.) At times during the hearing, Defendant's mother gave testimony that was either contradictory to other evidence in the record or internally inconsistent. This undermines Mrs. Lois Montgomery's credibility.

Mrs. Lois Montgomery testified that Defendant "can't back up a car" and that Defendant once backed a moving truck onto a neighbor's lawn. (Tr. Oct. 1, 2013, ECF No. 289, at 218:2-7.) Defendant's mother helped Defendant purchase a new Pontiac Trans Am after he graduated high school, however, leading to the inference that Defendant's driving skills were not as limited as she suggested. (See id. at 235:18-236:1.) Moreover, the record demonstrates that Defendant successfully completed tasks that required him to drive a vehicle at his various jobs. (See Tr. Oct. 2, 2013, ECF No. 290, at 635:11-636:8; Tr. Oct. 11, 2013, ECF No. 284, at 239:5-15; Hr'g Ex. 252 at 04533-04534.)

Mrs. Lois Montgomery testified that, even when Defendant was an adult, she was "concerned" about Defendant "being able to function by himself or whatever." (Tr. Oct. 1, 2013, ECF No. 289, at 257:1-7.) She also testified, however, that it was partly her decision to send Defendant to college. (Id. at 239:16-22.) Defendant lived on his own at college for a year

after his first-semester roommate transferred. (Tr. Oct. 7, 2013, ECF No. 251, at 161:7-18; Hr'g Ex. 252 at 04609-04610.)

Defendant's mother also testified that, when Defendant was a junior in high school, he went to a different school "a few feet from the regular high school . . . called On the Hill because it was on a hill, and it was for slow learners that was having problems with their grades, whatever." (Tr. Oct. 1, 2013, ECF No. 289, at 238:18-239:3.) According to Linda Jennings, Defendant's former teacher, the "Vocational Advancement Program" ("VAP") "was a program that was affectionately known as on the hill. That was for severely mentally retarded students. We did not have special education classes as such. The students who were probably more severe in their mental competencies were placed there." (Tr. Oct. 2, 2013, ECF No. 290, at 511:24-512:11.) There was another program, taught by Mr. John Todd, called the "Vocational Improvement Program" ("VIP") for students who were "vocationally oriented, not particularly interested in pursuing an academic career. . . . These students were taught their academics at a different level, most business oriented or more vocationally oriented." (Id. at 513:14-514:6.) The VIP was available only to juniors and seniors. (Id. at 514:7-13.) Contrary to Mrs. Lois Montgomery's testimony, Defendant participated in the VIP during his junior and senior years (see id. at 479:5-480:3),

not the VAP, which was geared toward severely mentally retarded students.

The Court finds that Mrs. Lois Montgomery's testimony, understandably, was both internally inconsistent and incorrect in material respects. Coupled with the Court's observation of the witness while testifying and her interest in the outcome of the proceedings, her testimony must be considered with more caution than that of a disinterested witness.

b. Chrystal Montgomery Barrow (Sister)

On October 1, 2013, Defendant called his sister, Chrystal Montgomery Barrow, to testify. (Tr. Oct. 1, 2013, ECF No. 289, at 283:1-6.) Like Mrs. Lois Montgomery, Defendant's sister also gave some testimony that was either contradictory to evidence that was believable or internally inconsistent.

For example, Mrs. Barrow testified that, when her mother needed something from the store, she would send Mrs. Barrow: "I don't remember her ever sending [Defendant] to the store." (Id. at 307:24-308:2.) Defendant's mother testified, however, that she "could send any" of her children to the store, and that when she sent Defendant, "[h]e always brought the right change back home." (Id. at 197:22-198:7.)

Mrs. Barrow also testified that Defendant struggled with basic tasks like buttoning his shirt: "he never seemed to put the buttons in the right place, and so I would sometimes, you

know, rebutton his shirt for him." (Id. at 285:13-17.) She testified that she was worried about Defendant's ability to live on his own. (Id. at 380:8-14.) When asked whether she had concerns about Defendant doing well in college, however, she replied, "I thought that he probably would." (Id. at 408:7-11.) This reply undermines Mrs. Barrow's credibility as to Defendant's independent-living deficits.

When asked about her grades at Tennessee State University, Mrs. Barrow testified, "I made some As, Bs, I made a F and I could have made – I think I withdrawed from a class." (Id. at 352:17-20.) Mrs. Barrow's college transcript, however, reflects that she only earned one "A" and one "B," with three "F" grades. (See Hr'g Ex. 93.)

Again, the Court does not fault a family member for wanting to help her brother. The Court finds that Mrs. Barrow's testimony was, however, misleading or inaccurate in material respects. Applying the criteria suggested in Sixth Circuit Model Jury Instruction 1.07,[25] Mrs. Barrow's testimony must be considered with caution and appropriately discounted.

c. Melissa Montgomery (Wife)

On October 2-3, 2013, Defendant called his wife, Melissa Montgomery, to testify. (Tr. Oct. 2, 2013, ECF No. 290, at 557:15-16.) Like Defendant's mother and sister, Mrs. Melissa

[25] See infra note 104 and accompanying text.

Montgomery testified in a manner that was, at times, contrary to the evidence in the record or internally inconsistent.

Regarding Defendant's relationship with his son, CJ, Mrs. Melissa Montgomery testified that "it was like Defendant wanted to be more of a friend to [CJ] versus . . . making those hard decisions and tell him no, you ain't going to do it or, you know, I don't care if you get mad or whatever, you ain't going to do it." (Id. at 602:4-603:9.) On cross-examination, however, she testified that she "let [CJ] go live there [with Defendant] because [CJ] wouldn't follow my instruction. He wouldn't behave in school, and because [Defendant] had a close relationship with him that maybe [CJ] would take instruction from [Defendant], because he wasn't taking it from me. . . ." (Id. at 649:14-23.) She sent CJ to live with Defendant after the couple's separation in 2009 even though she described the house Defendant lived in as "like a disaster area, I mean stuff strung everywhere, dishes, cups and stuff sitting in there, just – old food left on them, stuff all over the table." (Id. at 588:23-589:1.)

Mrs. Melissa Montgomery testified that she would not "really let [Defendant] drive up the street and run and go get nothing because I know he will get lost." (Id. at 584:11-13.) On cross-examination, she testified that Defendant drove himself to part-time security jobs around Nashville and would escort

inmates at the halfway house in Jackson, Tennessee, to their jobs and to recreational activities. (Id. at 635:4-636:4.)

Defendant's wife also testified that she separated from Defendant and filed for child support in 1997. (Id. at 622:4-10.) She testified that the garnishment against Defendant's wages for child support was lifted on June 5, 2001. (Id. at 622:15-23.) Despite the fact that the child support order was in effect for four years, Mrs. Melissa Montgomery testified, "when I filed, we did break up, but we got back together. We weren't separated hardly any time." (Id. at 623:1-9.) Mrs. Melissa Montgomery's answers regarding where she and Defendant were living at the time she filed for child support were evasive. (See generally id. at 625:13-627:15.) She testified that she could not remember what caused her to separate from Defendant and seek child support. (Id. at 629:18-21; 630:4-6.)

The Court notes that the witness and Defendant remain married. (Id. at 559:22-23.) Both suffered a tragic loss with the death of their son, Chastain Montgomery, Jr. Defendant continues to write to his wife and there was testimony that she calls or visits him weekly. (See Tr. Oct. 11, 2013, ECF No. 284, at 280:11-16; Hr'g Ex. 411.) Understandably, there are material discrepancies in her testimony, and her testimony must be considered with more caution and discounted appropriately.

d. Adrian Montgomery (Brother)

On November 12, 2013, Defendant called Adrian Montgomery, his brother, to offer rebuttal testimony. (Tr. Nov. 12, 2013, ECF No. 305, at 181:12-17.) There, however, appear to be material discrepancies between Mr. Adrian Montgomery's testimony and a February 7, 2012, Memorandum of Interview of Adrian Montgomery by Postal Inspector Dwight Jones and Assistant U.S. Attorney Lorraine Craig.

The Memorandum of Interview states:

> Adrian described [Defendant as] a quiet child who didn't bother anybody. He described [Defendant's] childhood as average. He stated [Defendant] had no problems in school such as suspensions, etc. He said that growing up [Defendant] used to box, and that he also played baseball and pick-up basketball.

(Hr'g Ex. 186 at 1.) On cross-examination, however, Adrian Montgomery denied that he told the Government Defendant's childhood was average. (Tr. Nov. 12, 2013, ECF No. 305, at 200:16-22.) He testified, "No, y'all was asking me about how was [Defendant] as far as working at the prison and all that type of stuff, I said . . . as far as not having any problems or anything like that or being in trouble, I said he was normal." (Id. at 202:9-14.) Adrian Montgomery also testified that he did not remember talking to the Government at all about Defendant's childhood:

Gov't:	Okay. And of course, we asked you about growing up and everything, didn't we?
Adrian Montgomery:	No.
Gov't:	We didn't? We didn't ask you about how [Defendant] was, that he used to box and play baseball and pickup basketball, you don't remember telling us that?
Adrian Montgomery:	No.
Gov't:	So are you denying you said these things?
Adrian Montgomery:	I don't remember it. I don't remember saying that about his childhood. We never did get in a conversation about his childhood.

(Id. at 202:18-203:3.)

The Memorandum of Interview also states that Adrian Montgomery "attempted to bail his brother out of jail." (Hr'g Ex. 186 at 3.) At the hearing, however, Adrian Montgomery testified that he did not tell the Government he attempted to bail Defendant out: "No, I said my mom attempted to try to bail him out." (Tr. Nov. 12, 2013, ECF No. 305, at 203:24-204:7.)

Based on observation of the witness as he testified, it appeared that Adrian Montgomery's memory, even of relatively recent events, is either quite limited or inaccurate. For example, no one contests that Defendant boxed and played recreational sports in high school. It is likely that those subjects were covered in his interview with the Postal Inspector and Assistant United States Attorney. Again, the desire of Adrian Montgomery to provide testimony perceived to be helpful

to his brother is understandable. The Court, however, must discount his rebuttal testimony as materially discredited.

e. Linda Jennings (Teacher)

On October 2, 2013, Defendant called Linda Jennings, a former teacher at Ripley High School, to testify. (See Tr. Oct. 2, 2013, ECF No. 290, at 510:20-21.) The Court notes Ms. Jennings's testimony that most students who took agriculture or vocational classes at Ripley High School "were not your A students." (Id. at 535:19-536:2.) This testimony illustrates not only Ms. Jennings's apparent bias, but also a proposition that appears to be grounded more in supposition than objective analysis.[26] Moreover, Ms. Jennings offered the following unsupported testimony that Defendant's participation in Future Farmers of America ("FFA") in high school was mandatory as part of the agriculture program: "it was required for agriculture students [] to join FFA. . . . Their sponsors probably told them that it . . . was part of the curriculum to participate in [FFA] projects." (Tr. Oct. 2, 2013, ECF No. 290, at 543:1-10.) Ms. Jennings also incorrectly testified that the notation "FFA-3" in the yearbook underneath Defendant's name indicates that

[26] Upon review of the Ripley High School yearbook, the Court notes that at least one student, Ricky Lee Nelson, whose majors were "Agriculture, Ag. Mechanics, [and] Auto Mechanics," was active not only in Future Farmers of America, but also the Beta Club. (See Hr'g Ex. 96 at 114.) Beta Club is described in Ripley High School's 1982 yearbook as an "academic organization . . . made up of students with an 85 or above in 6 subjects, or a 90 or above average in 5 subjects," and membership in the club is described as "not only a nice priviledge [sic], but a great honor as well." (Id. at 22.)

"he participated for three years." (Id. at 552:15-20; Hr'g Ex. 96 at 113.) It is plain to the Court that the "FFA-3" notation means Defendant participated in FFA during his third (junior) year in high school.

It should be noted that Ms. Jennings provided useful testimony regarding the VAP and VIP programs (Tr. Oct. 2, 2013, ECF No. 290, at 467:1-3) and the distinction between the two programs (id. at 467:4-468:6).

f. Michael Farrish (Co-worker)

Defendant called Michael Farrish, a co-worker at the Lois M. DeBerry Special Needs Facility ("DSNF"), on October 4, 2013. (See Tr. Oct. 4, 2013, ECF No. 303, at 1032:14-20.) The Court highlights Mr. Farrish's testimony that Defendant could be manipulated by the inmates at DSNF because it is contrary to what every other person who worked with Defendant at DSNF reported.[27] (Compare id. at 1054:3-5 (Mr. Farrish testifying

[27] Mr. Farrish's testimony that Defendant could be manipulated by inmates at DSNF drew the following outburst from Defendant:

> Defendant: Hey, man, you stop bull shitting up there at the table, dog. I'm listening to you, right? That's bull shit, man.
> The Court: We're going to take a break.
> Defendant: If I was outside, I kill your bitch ass, boy.
> Mr. Scholl: Whoa, whoa, whoa.
> The Clerk: All rise.
> Defendant: I kill your bitch ass. Boy, you're a sucker. If I was on the street, I kill your bitch ass, boy. Real bitch, boy. You're a real bitch.

(Tr. Oct. 4, 2013, ECF No. 303, at 1054:5-16.) After Defendant's outburst toward Mr. Farrish, the Court took a brief recess. (Id. at 1054:17.) The Court was advised that Defendant had not been fed lunch during the lunch

that Defendant could be manipulated by inmates), with Tr. Oct. 3, 2013, ECF No. 291, at 858:16-25 (Mr. Bell denying that Defendant could be manipulated), 896:4-6 (Mr. Scott denying the same, and Tr. Oct. 4, 2013, ECF No. 303, at 1008:7-16 (Mr. Estes testifying that Defendant was not a follower).)

Mr. Farrish also testified that, in 2013, he was terminated as an employee with the Tennessee Department of Corrections for gross misconduct after he was found to have used excessive force with a restrained inmate by kicking him several times in the head. (Tr. Oct. 4, 2013, ECF No. 303, at 1061:19-1062:16.) Mr. Farrish's credibility was seriously impeached, and the Court is unable to give any weight to his testimony.

C. Defendant's Background[28]

Defendant was born to Fred and Lois Montgomery in Ripley, Tennessee, on December 28, 1963. (Hr'g Ex. 349 at 04381; Hr'g Ex. 119 at 00005.) His younger siblings are Adrian Montgomery (two years younger) and Chrystal Montgomery Barrow (five years younger). (Tr. Sept. 30, 2013, ECF No. 288, at 156:17-19; 157:13-21; see also Hr'g Ex. 349 at 04381.) His father and

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break on October 4, 2013. (Id. at 1054:18-21.) The Court warned Defendant about maintaining courtroom decorum. (Id. at 1054:22-1055:25.)

[28] As the record in this case is voluminous, the Court will not summarize the oral and documentary evidence adduced at the hearing. Instead, the Court provides relevant background information in this section. A fuller discussion of the facts adduced at the hearing appears throughout the prong-one and prong-two analyses. See infra Parts IV.A, IV.B.

grandfather[29] ran a plumbing business, and his mother worked in various teaching and government jobs. (Hr'g Ex. 349 at 04382; Tr. Sept. 30, 2013, ECF No. 288, at 159:7-160:24.)

Defendant was raised in Henning, Tennessee. (Hr'g Ex. 349 at 04380.) As a child, Defendant played sports with neighborhood children, including baseball, basketball, and football. (Tr. Oct. 1, 2013, ECF No. 289, at 403:11-24.) He also played with several of his cousins. (Id. at 260:15-261:7.) As a teenager, Defendant had girlfriends. (Id. at 261:22-262:7.)

Defendant's mother reported that Defendant was slower than his younger siblings to master basic tasks like getting dressed, grooming, and cleaning the house. (See Tr. Oct. 1, 2013, ECF No. 289, at 203:1-16; 204:23-205:11.) Defendant received his driver's license after his younger brother Adrian Montgomery. (Id. at 198:11-199:3.)

Defendant attended Lauderdale County Schools for elementary, middle, and high school. (See Hr'g Ex. 103.) Defendant was in the lowest of three "ability groups" in grade school based on his performance on the Stanford Achievement Test. (See Tr. Oct. 2, 2013, ECF No. 290, at 423:10-424:15.)

In January 1978, Defendant's father died in a boating accident when Defendant was fourteen years old. (Hr'g Ex. 349

[29] Defendant's grandfather at some point served as mayor of Henning, Tennessee. (See Hr'g Ex. 349 at 04380.)

at 04384; see also Tr. Oct. 1, 2013, ECF No. 289, at 262:8-14.) Defendant reacted strongly to his father's death. For example, Defendant's mother once found Defendant sleeping outside on the ground during the winter following his father's death. (Tr. Oct. 1, 2013, ECF No. 289, at 200:25-201:21; 262:8-263:17; see also Tr. Sept. 30, 2013, ECF No. 288, at 94:13-95:7.) Because of concerns for Defendant that arose after his father's death, on August 14, 1978 (age fourteen), Defendant underwent a psychological evaluation by Dr. Robert Parr. (See Hr'g Ex. 118.) Dr. Parr determined that Defendant, who scored a 79 Verbal IQ and a 46 Performance IQ on a WISC-R IQ test administration, was "functioning within the mild mental retardation range of psychometric intelligence."[30] (Id. at 03628-03629.)

Halfway through Defendant's junior year in high school, he was placed into the Vocational Improvement Program at Ripley High School, a program focusing on vocational skills. (Tr. Oct. 2, 2013, ECF No. 290, at 466:4-13; 479:5-480:3; 513:14-514:6.) Defendant was never held back a grade and graduated from Ripley High School in 1982. (See Hr'g Ex. 103.) Defendant graduated 195th out of 245 students in his high school class. (See id.) Defendant then enrolled at the University of Tennessee at Martin, where he attended for three semesters.

[30] Dr. Parr was interviewed by the U.S. Postal Inspectors but did not testify. (See Hr'g Ex. 325.)

(Hr'g Ex. 116 at 01525; see also Tr. Oct. 1, 2013, ECF No. 289, at 239:16-22.) Defendant lived with a roommate during his first semester and then on his own for the remaining year he spent at UT-Martin. (Tr. Oct. 7, 2013, ECF No. 251, at 161:7-18; Hr'g Ex. 252 at 04609-04610.) Defendant dropped out UT-Martin after receiving several failing grades and being placed on academic suspension. (See Hr'g Ex. 116 at 01525; see also Tr. Oct. 1, 2013, ECF No. 289, at 239:21-240:3.)

Defendant lived at his mother's house after he left college in 1984. (Tr. Oct. 1, 2013, ECF No. 289, at 240:4-6; 242:5-11; see also Hr'g Ex. 116 at 01525.) During this time, Defendant worked at a Siegel-Roberts plant operating a forklift. (See Tr. Oct. 1, 2013, ECF No. 289, at 240:7-12; 372:20-373:5; see also Tr. Nov. 12, 2013, ECF No. 305, at 181:25-183:6.) In 1989, Defendant began working as a correctional officer for the Tennessee Department of Corrections at the West Tennessee High Security Prison in Henning, Tennessee. (See Tr. Oct. 2, 2013, ECF No. 290, at 613:2-21.)

On September 30, 1991, Defendant married Melissa Montgomery. (Id. at 613:21-23.) Defendant moved into his wife's duplex in Ripley, Tennessee. (Id. at 618:16-22.) Melissa Montgomery had one son from a different father at the time she married Defendant. (Id. at 616:4-9.) Chastain and Melissa Montgomery had a son, Chastain, Jr., on June 13, 1992

(id. at 619:6-8), and a daughter, Mecalen, on February 8, 1993 (id. at 619:24-620:1; see also Hr'g Ex. 285 at 01558).

In 1993, Defendant had an extramarital affair with Angela Peel, who was a seventeen-year-old junior at Ripley High School. (Tr. Oct. 16, 2013, ECF No. 285, at 342:1-343:4.) Defendant separated from his wife in 1997 for an unknown period of time, during which he paid child support. (Tr. Oct. 2, 2013, ECF No. 290, at 622:7-10; 623:1-10; 626:9-627:7.)

In 1993, Defendant, his wife, and his children moved to Jackson, Tennessee. (Id. at 563:17-19.) Defendant began working as a youth services officer at a halfway house in Jackson. (Id. at 563:25-565:20) Defendant also worked at the U.S. Post Office in Henning under a cleaning and lawn care agreement from June 25, 1994, until June 21, 1996. (See Hr'g Ex. 274; see also Tr. Oct. 1, 2013, ECF No. 289, at 240:13-15.)

Defendant remained in Jackson until 2000, when he and his family relocated to La Vergne, Tennessee. (Tr. Oct. 2, 2013, ECF No. 290, at 566:4-6.) In 2000, Defendant began working at Riverbend Maximum Security Institution in Nashville. (Id. at 566:7-12.) Defendant also worked at the Tennessee Prison for Women. (Tr. Oct. 3, 2013, ECF No. 291, at 908:4-9.)

In 2002, Defendant began working at the Lois M. DeBerry Special Needs Facility in Nashville, where he worked until the time of his arrest in 2011. (See Tr. Oct. 4, 2013, ECF No. 303,

at 934:21-24; Tr. Oct. 8, 2013, ECF No. 254, at 340:13-14.) Defendant worked a significant amount of overtime during his time at DSNF. (See Tr. Oct 2, 2013, ECF No. 290, at 632:3-14; Hr'g Ex. 138.) He also worked several part-time jobs, including jobs at J.C. Penney, Securitas (Motel 6 security), and the Nashville Convention Center (security). (See Tr. Oct. 2, 2013, ECF No. 290, at 632:18-633:21.)

IV. ANALYSIS

A. Prong One: Deficits in Intellectual Functioning

The Court first determines whether Defendant meets the first prong of the MR/ID definition, i.e., whether Defendant has significantly subaverage intellectual functioning. See AAIDD Manual at 41; DSM-V at 37.

1. Measuring Intellectual Functioning

a. The WISC-R/WAIS-IV

"Assessing intelligence, even with the aid of standardized instruments, is an inexact science." Salad, 2013 WL 3776418, at *3 (citing AAIDD Manual at 31). Both the AAIDD Manual and the DSM-V define prong one with reference to IQ testing. Compare AAIDD Manual at 31 ("The 'significant limitations in intellectual functioning' criterion for a diagnosis of intellectual disability is an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific instruments and the

instruments' strengths and limitations."), with DSM-V at 37 ("Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence."). "In the Atkins context, the court must examine the reliability and validity of IQ scores, and consider the credibility of witnesses that proffer expert opinions on those scores." Salad, 2013 WL 3776418, at *3.

Expert witnesses for both Defendant and the Government described the Wechsler family of IQ tests – including the Wechsler Intelligence Scale for Children, Revised ("WISC-R") and the Wechsler Adult Intelligence Scale, Fourth Edition ("WAIS-IV") – as the "gold standard" in intelligence testing. (See, e.g., Tr. Oct. 4, 2013, ECF No. 303, at 1084:9-22; Tr. Oct. 15, 2013, ECF No. 266, at 965:13-19; Tr. Oct. 15, 2013, ECF No. 265, at 1131:14-1132:3.) Federal courts typically rely on Wechsler IQ test scores in making prong-one determinations. See Wilson, 922 F. Supp. 2d at 344 (describing the Wechsler tests as "[t]he most widely accepted IQ tests in the United States.").

The WISC-R is an older test designed specifically for children and has a slightly different format than the WAIS-IV. The test measures two separate subscale IQ scores – the "Verbal IQ" and the "Performance IQ" - which are then aggregated into a "Full Scale IQ." (Tr. Sept. 30, 2013, ECF No. 288, at 47:1-10;

see also David Wechsler, Manual for the Wechsler Intelligence Scale for Children – Revised 8 (1974) (Hr'g Ex. 451).) The WAIS-IV, by contrast, measures four indices: the Verbal Comprehension Index ("VCI"); the Perceptual Reasoning Index ("PRI"); the Working Memory Index ("WMI"); and the Processing Speed Index ("PSI"). (Tr. Sept. 30, 2013, ECF No. 288, at 39:5-15.) These four indices are aggregated into a "Full Scale IQ." (Id.)

The Full Scale IQ score "is the best approximation of an individual's overall cognitive functioning." Davis, 611 F. Supp. 2d at 485. According to Dr. Reschly, "[t]he full scale is a better representative of the general factor of ability, and that's regarded as the best indicator of intellectual disability." (Tr. Oct. 7, 2013, ECF No. 250, at 44:1-3.) The AAIDD Manual also emphasizes reliance on "a global (general factor) IQ as a measure of intellectual functioning." AAIDD Manual at 41. The mean IQ on the WAIS-IV is 100, with a standard deviation of fifteen points, and mild MR/ID is defined as "approximately two standard deviations below the mean, plus or minus five points," i.e., 65 to 75. (Tr. Sept. 30, 2013, ECF No. 288, at 34:4-24.)

Accordingly, the Court will place significant weight on Defendant's Full Scale IQ scores on the WISC-R and WAIS-IV. See AAIDD User's Guide at 10 (urging clinicians to "[u]se

individually administered, standardized instrument(s) that yield a measure of general intellectual functioning."). IQ scores alone, however, are not dispositive of a person's intelligence; "[r]ather, one needs to use clinical judgment in interpreting the obtained score. . . ."[31] AAIDD Manual at 35.

b. The Standard Error of Measurement

One factor that must be considered in the interpretation of a person's IQ score is the "standard error of measurement" ("SEM"). According to the AAIDD, IQ scores are "subject to variability as a function of a number of potential sources of error, including variations in test performance, examiner's behavior, cooperation of test taker, and other personal and environmental factors. Thus, variation in scores may or may not represent the individual's actual or true level of intellectual functioning." AAIDD Manual at 36. The AAIDD also states:

> For well-standardized measures of general intellectual functioning, the standard error of measurement is approximately 3 to 5 points. As reported in the respective test's standardization manual, the test's standard error of measurement can be used to establish a statistical confidence interval around the obtained score. From the properties of the normal curve, a range of confidence can be established with parameters of at least one standard error of

[31] The AAIDD Manual defines clinical judgment as follows: "a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data. It is based on the clinician's explicit training, direct experience with those with whom he or she is working, and specific knowledge of the person and the person's environment. Clinical judgment is characterized by its being (a) systematic (i.e., organized, sequential, and logical), (b) formal (i.e., explicit and reasoned), and (c) transparent (i.e., apparent and communicated clearly)." AAIDD Manual, at 86.

> measurement (i.e., scores of about 66 to 74, 66% probability) or parameters of two standard error of measurement (i.e., scores of about 62 to 78, 95% probability).

Id. The DSM-V indicates that the SEM is generally five points. DSM-V at 37.

According to Dr. Siegert, taking the SEM into account, "someone with an IQ of 70 . . . is statistically no different than 75 or 65." (Tr. Sept. 30, 2013, ECF No. 288, at 34:18-19.) Moreover, Dr. Woods testified that because the SEM is five points, an IQ of up to 75 still qualifies under the first prong of the definition of MR/ID. (Tr. Oct. 8, 2013, ECF No. 253, at 536:7-537:1.)

c. The Flynn Effect

"The Flynn Effect is a phenomenon named for James R. Flynn, who discovered that the population's mean IQ score rises over time, by about a third of a point each year. According to Flynn, if an individual's test score is measured against a mean of a population sample from prior years, then that individual's score will be inflated in varying degrees (depending on how long ago the sample was first employed)." Candelario-Santana, 916 F. Supp. 2d at 207. Both the DSM-V and the AAIDD make reference to the "Flynn Effect" as an important consideration in examining IQ scores. See, e.g., AAIDD Manual at 37 ("best practices require recognition of a potential Flynn Effect when

older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score."). Flynn suggests a downward departure of IQ scores by 0.3 points per year based on when the IQ test was administered relative to when the IQ test's norms were produced. James R. Flynn, Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, 12 Psychol., Pub. Policy, & L. 170, 172-74 (2006) ("Naturally, judges want to know whether defendants were actually two standard deviations below their peers at the time they were tested and not how they rank against a group selected at some random date in the past.")

Several federal courts have recently examined the Flynn Effect, and many have declined to apply it. See Candelario-Santana, 916 F. Supp. 2d at 207-208 (collecting cases). According to the expert testimony presented at the hearing, the Flynn Effect is inapposite in Defendant's case because all of Defendant's Full Scale IQ scores are within the range of mild MR/ID, regardless of a Flynn correction. (Tr. Sept. 30, 2013, ECF No. 288, at 41:14-42:2; Tr. Oct. 9, 2013, ECF No. 257, at 593:15-22.) Given that Defendant's recent WAIS-IV administrations utilized relatively recent norms (2006), any adjustment for the Flynn Effect would not meaningfully change the Court's prong-one analysis. (See Tr. Oct. 7, 2013, ECF

No. 250, at 49:12-24; Hr'g Ex. 107 at 05108.) The Court, therefore, will not apply the Flynn Effect in this case.

d. The Practice Effect

"The practice effect refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument." AAIDD Manual at 38. According to the AAIDD, "established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence." Id. The practice effect "diminishes significantly (although perhaps without disappearing entirely) as the length of time between test administrations increases." Wilson, 922 F. Supp. 2d at 354.

According to Dr. Woods, the practice effect "is the idea that over time a person, if they are exposed to the same type of testing, their scores may go up." (Tr. Oct. 9, 2013, ECF No. 257, at 592:18-22.) Dr. Woods testified that at least six months should elapse between administrations of the same IQ test to the same person. (Id. at 592:23-593:5.) He emphasized, as he did in reference to the Flynn Effect, that even in light of the modest increase in Defendant's Full Scale IQ scores from 2012 to 2013, all of the scores are within the range of mild MR/ID. (Id. at 591:9-16.) As the practice effect does not significantly bear on the prong-one question in this case, the

Court need not address a downward departure of Defendant's IQ scores on this basis.

e. Effort Testing

The Court must also consider whether Defendant was exerting inadequate effort or malingering (intentionally diminishing or enhancing symptoms) during his IQ testing. See Nelson, 419 F. Supp. 2d at 902. Experts for both Defendant and the Government indicated that effort testing is an important component of accurately measuring a person's IQ. (Tr. Oct. 9, 2013, ECF No. 258, at 600:20-601:3; Tr. Oct. 15, 2013, ECF No. 265, at 1114:3-21.) Dr. Marcopulos's report states that "[t]esting for performance validity is considered to be an essential part of a neuropsychological assessment, particularly in forensic settings." (Hr'g Ex. 119 at 00023.)

On cross-examination, Dr. Marcopulos testified that she "did not assume [Defendant] would be malingering or not malingering," but that the secondary gain of avoiding the death penalty "did raise the possibility to me and say to me that I needed to investigate that thoroughly." (Tr. Oct. 15, 2013, ECF No. 304, at 1209:14-1210:3.) She testified that, with intellectual testing, "[t]here's always a possibility of the test not being a valid reflection of the person's cognitive strengths and weaknesses," and that effort tests "should be given in all examinations, whether there's a clear motive,

potential motive for secondary gain or not because we do need to know that our tests are valid." (Id. at 1210:4-15.)

The Court will, therefore, consider Defendant's performance on effort testing in order to assess the validity of his measures of intellectual functioning and to determine whether he meets prong one of the MR/ID definition.

2. Defendant's IQ Test Performance

Defendant has taken three admissible IQ tests within the Wechsler family throughout his lifetime.[32] Dr. Robert Parr administered Defendant the WISC-R on August 14, 1978. (See Hr'g Ex. 118.) Dr. Marcopulos administered a WAIS-IV to Defendant on November 12, 2012, and Dr. Siegert administered another WAIS-IV to Defendant on May 21, 2013. (See Hr'g Ex. 88.) Defendant's scores on all three tests are summarized in the following table (with the Full Scale IQs in boldface and underlined):

	8/14/78 Age 14 Parr		11/12/12 Age 48 Marcopulos		5/21/13 Age 49 Siegert	
Indices or IQ	Scaled Score	Percentile	Scaled Score	Percentile	Scaled Score	Percentile
Verbal IQ	79	8	---	---	---	---
VCI	---	---	70	2	76	5
WMI	---	---	74	4	74	4
Performance IQ	46	< 0.1	---	---	---	---
PRI	---	1	65	1	75	5
PSI	---	---	Error in admin.	---	62	1

[32] Dr. James S. Walker administered a fourth WAIS-IV to Defendant in January of 2012, but his report and conclusions are inadmissible for the purposes of the Court's Atkins determination. (See ECF No. 128.)

	8/14/78 Age 14 Parr		11/12/12 Age 48 Marcopulos		5/21/13 Age 49 Siegert	
Indices or IQ	Scaled Score	Percentile	Scaled Score	Percentile	Scaled Score	Percentile
Full Scale IQ	**61**	**< 1**	**64**	**1**	**67**	**1**
General Ability	---	---	64	1	73	4

(Hr'g Ex. 88.) In other words, Defendant's Full Scale IQ scores of 61 (1978), 64 (2012), and 67 (2013) on three different individually administered IQ tests all fall within the range of mild MR/ID. (See Tr. Sept. 30, 2013, ECF No. 288, at 84:7-15; see also DSM-V at 37.)

The Government's experts take the position that Defendant's IQ test performance is not a true reflection of his intellectual functioning. Although Defendant's IQ scores are reliable in that they are all within the sixties range across multiple administrations of the WAIS-IV, Dr. Marcopulos testified that they are "not a valid reflection of [Defendant's] true cognitive functioning . . . based upon multiple pieces of information, . . . school records, standardized scores, other testing, his work performance, . . . that my opinion is that [Defendant] functions in the borderline range." (Tr. Oct. 16, 2013, ECF No. 267, at 1448:1-15.)

Defendant's experts assert that the validity of Defendant's IQ scores is underscored by their consistency. According to Dr. Woods:

> When you [] look at these scores they are remarkably consistent. They – even when you look at the scores that – from 2012 and 2013 where you think there may be some practice effect, particularly the last two, you don't see much practice effect, all of them are within the – once they are Flynn corrected – are all within the 59 to 65 range. Un-Flynned they are within the 61 to 71 range.

(Tr. Oct. 9, 2013, ECF No. 257, at 591:9-16.) Dr. Reschly echoed this sentiment, testifying that, "applying the principle of convergent validity, when multiple sources of information show good consistency, one has greater confidence in the determination that this person . . . meets the intellectual functioning prong of intellectual disability." (Tr. Oct. 7, 2013, ECF No. 251, at 121:22-122:1.)

The Court examines Defendant's IQ testing below.

a. Dr. Parr's WISC-R (1978)

Dr. Marcopulos testified that Dr. Parr's 1978 WISC-R Full Scale IQ score of 61 is particularly unreliable in light of the thirty-three point differential between Defendant's Verbal IQ (79) and Performance IQ (46). (See Hr'g Ex. 118.) Dr. Parr's reported results are summarized in the following table from Dr. Marcopulos's report (with the Full Scale IQ in boldface and underlined):

Information	6 (low average)	Picture Completion	1 (severely impaired)
Similarities	6 (low average)	Picture Arrangement	3 (moderately impaired)
Arithmetic	6 (low average)	Block Design	2 (moderate to severely impaired)
Comprehension	9 (average)	Object Assembly	2 (moderate to severely impaired)
Vocabulary	6 (low average)	Coding	2 (moderate to severely impaired)
VIQ	79		
PIQ	46		
FSIQ	**61**		

(Hr'g Ex. 119 at 00016.)

Dr. Marcopulos explained:

> There was a dramatic and extremely unusual split. . . . 79 is the borderline range. The performance IQ is a 46, which doesn't make any sense. If I had access to the original data, that would be extremely helpful to try to understand why there would be such a dramatic 33 point difference between verbal IQ and performance IQ. It looked to me like that [Defendant] didn't even try to answer any of those tests. You know, . . . I think the lowest score that you can get is maybe a 45, I mean, it sounds like [Defendant] just got zeros on everything.

(Tr. Oct. 15, 2013, ECF No. 265, at 1088:2-21.) Moreover, according to the technical manual of the WAIS-IV, at the low levels of IQ (sixties and seventies), subtest scores on the Wechsler tests do not typically vary: "The prevalence of large and unusual discrepancies between verbal and non-verbal composite scores has been shown to decrease with decreasing

levels of ability. . . ." (Tr. Oct. 15, 2013, ECF No. 266, at 1043:6-1045:14.)

Dr. Marcopulos further asserted that Dr. Parr should not have reported a Full Scale IQ score in light of such highly discrepant verbal and performance IQ scores:

> [I]f there is a discrepancy of 23 points or more between the index scores, . . . you don't report the Full Scale IQ score because it is not supposed to be meaningful, it is not clinical[ly] meaningful because it is just a statistical average that doesn't really reflect what's going on.
>
> And if this was a child that I was assessing or I had received this report, I would most definitely want to get down to the bottom of why there was such a large discrepancy because it's very unusual, extremely unusual to see that. It means there's something wrong, probably something wrong with the test, was it mis-scored or did [Defendant] just sit there [with] his arms folded during . . . those subtests comprised the PIQ.

(Id. at 1089:7-24.) She testified that such a discrepancy could even suggest that Defendant had motor problems, paralysis, a stroke, or a brain injury such that he could not manipulate blocks or complete puzzles.[33] (Id. at 1090:3-1091:3.) According to the technical manual in effect for the WISC-R at the time of the 1978 administration, "a difference of 15 points or more [between Verbal and Performance IQ scores] is important and calls for further investigation." (Hr'g Ex. 451, David

[33] Recent CAT scans and MRIs of Defendant's brain demonstrated, however, that "[Defendant's] brain looked normal." (Tr. Oct. 15, 2013, ECF No. 265, at 1095:3-12; Hr'g Ex. 271.)

Wechsler, Manual for the Wechsler Intelligence Scale for Children – Revised 34 (1974).)

When asked on cross-examination why her report emphasizes Defendant's Verbal IQ score of 79 from Dr. Parr's report and not his Performance IQ score of 46 (see Hr'g Ex. 119 at 00036), Dr. Marcopulos stated, "because it didn't make sense to me. It was, as I said, clinically and statistically extremely unusual. . . . I didn't think it was a valid score." (Tr. Oct. 16, 2013, ECF No. 304, at 1282:1-16.) She also argued that Defendant's later performances on the performance aspects of the WAIS-IV are "nowhere near a 46. . . . It just really is an outlier. . . ." (Id. at 1285:9-23; see also Hr'g Ex. 88 (showing Defendant's PRI scores of 65 and 75 on his 2012 and 2013 WAIS-IV administrations, and a PSI score of 62 in 2013).)

Dr. Marcopulos also suggested that Defendant's performance on the 1978 WISC-R administration could have been affected by his father's death eight months prior. (See Tr. Oct. 15, 2013, ECF No. 265, at 1090:3-1091:3; 1095:13-1096:23; see also Hooks v. State, 126 P.3d 636, 640 (Okla. Crim. App. 2005) (noting defendant's IQ scores that "were obtained after [defendant] suffered the trauma of an accident and his father's death, which could have caused him to test lower than his actual intellectual level.").) She testified that depression can have a negative impact on cognitive test performance. (Id. at 1096:3-1098:14;

Hr'g Ex. 358, Brian L. Brooks, et al., Identifying Cognitive Problems in Children and Adolescents with Depression Using Computerized Neuropsychological Testing, 17 Applied Neuropsychology 37, 41 (2010) ("children and adolescents with depression have problems with reduced processing speed, memory for verbal information, and set shifting, impulsivity, and inhibition during tests of executive functioning.").)

Defendant's experts argue that Dr. Parr's testing is valid in light of the fact that Defendant's "full scale IQ has stayed stable over 35 years." (Tr. Sept. 30, 2013, ECF No. 288, at 77:13-17.) According to Dr. Siegert, it is not unusual for someone like Defendant to develop in perceptual skills (explaining the increase in his performance IQ scores over time), while "reach[ing] a plateau" in areas of relative strength, like verbal skills, social norms, and rote learning. (Id. at 75:1-14; 77:25-78:2.) Dr. Siegert failed to provide a scientific basis for this position, however, and conceded that highly discrepant subtest scores can render a Full Scale IQ score invalid. (Id. at 101:12-14; 107:3-10.)

Dr. Siegert also argued that, although it is possible for depression to affect IQ test performance, Defendant's father's death is "unlikely to have played any role at all" in light of the fact that Defendant received similar Full Scale IQ scores thirty-five years after Dr. Parr's testing. (Id. at 51:11-23;

95:18-22.) He conceded that Defendant had a "[v]ery strong reaction" to his father's death, reporting that he was depressed, slept outside, began fighting in school, and still thinks about it to this day. (Id. at 94:13-95:7.)

Dr. Woods emphasized that Dr. Parr's report positively comments on Defendant's motivation during the testing:

> [Defendant] gave every indication of being well motivated throughout the psychological evaluation and he was very cooperative in relating to the examiner. He impressed the examiner as being quite insecure[,] however, and demonstrated a great deal of dependency on positive feedback from the examiner; he was extremely responsive to reinforcement. Without occasional reinforcement, he tended to become less motivated and on difficult items he often sought structure over and beyond that allowed by the standardization of the test administered.

(Hr'g Ex. 118 at 03628; see also Tr. Oct. 10, 2013, ECF No. 260, at 736:12-14.)

The Court finds Defendant's Full Scale IQ score on Dr. Parr's 1978 WISC-R statistically meaningless; given the discrepancy between the two subscale scores, it is simply a numerical average and not a reflection of Defendant's actual IQ. In his post-hearing briefing, Defendant concedes that the discrepancy between the subscale scores renders the Full Scale IQ statistically unreliable. (ECF No. 307 at 3 ("Due to the significant discrepancy in the subsections of Dr. Parr's testing the full scale score is not statistically reliable and therefore, both subsection scores are more appropriate for

consideration and analysis of [Defendant's] youthful intelligence.").) Defendant's subscale scores provide some evidence of his intellectual functioning at age fourteen, although without the raw data underlying Dr. Parr's report, the Court cannot definitively determine why Defendant's Performance IQ score was so low. Moreover, in a September 11, 2012, interview with U.S. Postal Inspectors Susan Link and Marc Ewing, Dr. Parr himself questioned the credibility of the score. (Hr'g Ex. 325 at 02879.)

Accordingly, the Court assigns no weight to Defendant's 1978 WISC-R Full Scale IQ score of 61.

b. Dr. Marcopulos's WAIS-IV (2012)

Dr. Marcopulos administered Defendant a WAIS-IV test on November 9, 2012. (Tr. Oct. 15, 2013, ECF No. 265, at 1131:14-1132:3.) Although she testified that she typically begins a battery of tests with the WAIS-IV, she did not administer Defendant the WAIS-IV until the second day of testing.[34] (Tr. Oct. 15, 2013, ECF No. 304, at 1235:18-1236:23; 1239:16-25.) She reported that Defendant received a Full Scale IQ score of 64. (Tr. Oct. 15, 2013, ECF No. 265, at 1132:4-18.)

[34] On cross-examination, Dr. Marcopulos testified that she did not begin with the WAIS-IV in Defendant's case because of interruptions on the first day leading to a late start: "you want to administer the entire WAIS-IV in one day, you don't want to break it up if you can help it." (Tr. Oct. 16, 2013, ECF No. 267, at 1367:22-1368:12.)

On cross-examination, Dr. Marcopulos indicated that she incorrectly administered the symbol search subtest of the WAIS-IV by starting Defendant on the wrong page of the booklet, leading her to substitute a different subtest: "I substituted the cancellation subtests which is allowed [in the] instructions given in the WAIS manual, and so [Defendant] completed the cancellation test, and then that was used to compute the score." (Tr. Oct. 16, 2013, ECF No. 267, at 1365:25-1366:21.) She further testified that all of Defendant's Full Scale IQ scores are within the range of MR/ID. (Id. at 1384:1-1385:2.)

In spite of Defendant's Full Scale IQ of 64, Dr. Marcopulos nevertheless opined that Defendant's intellectual "skills do not consistently fall below the second percentile on a normal curve, you know, his functioning more accurately can be characterized in the borderline, upper borderline range on all of those." (Tr. Oct. 15, 2013, ECF No. 265, at 1182:8-12.)

c. Dr. Siegert's WAIS-IV (2013)

Dr. Siegert administered another WAIS-IV IQ test to Defendant on May 21, 2013, at the West Tennessee Detention Facility in Mason, Tennessee. (Tr. Sept. 30, 2013, ECF No. 288, at 35:23-36:1.) Defendant's performance on Dr. Siegert's IQ test is represented in Exhibit 87, which contains the following chart:

SCALE	COMPOSITE SCORE	PERCENTILE RANK	95% CONFIDENCE INTERVAL[35]
VCI	76	5	71-83
PRI	75	5	70-82
WMI	74	4	69-82
PSI	62	4	57-74
FULL SCALE IQ	**67**	**1**	**64-72**
(Flynn) Corrected IQ	65		

(Hr'g Ex. 87.)

According to Dr. Siegert, the consistency of Defendant's IQ scores – all of which are below 70 – over a thirty-five year period is strong evidence that they are an accurate representation of Defendant's impaired intellectual functioning. (Tr. Sept. 30, 2013, ECF No. 288, at 49:23-25 ("[F]or [Defendant] to get the same scores over 35 years very strongly argues that this is an accurate IQ.").) Dr. Siegert testified that Defendant's modest increase in full scale IQ scores over time is attributable to the "practice effect," which is when, after multiple administrations of the same test, the test "becomes familiar, . . . so we see scores increase." (Id. at 50:6-18; see also AAIDD Manual at 38 ("The practice effect

[35] Dr. Siegert testified that the 95 percent confidence interval "is a way statistically to say that we're 95 percent confident the person's real score no matter [the] sort of . . . mood, the distractions in a room, et cetera will fall somewhere within that range." (Tr. Sept. 30, 2013, ECF No. 288, at 40:1-7.) In other words, with 95 percent certainty, Defendant's 2013 WAIS-IV score is between 64 and 72, within the mild MR/ID range.

refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument.").)

Dr. Siegert opined that all three of Defendant's admissible IQ scores are valid representations of Defendant's IQ. (Tr. Sept. 30, 2013, ECF No. 288, at 83:9-84:1.)

3. Defendant's Effort and Malingering Test Performance

a. Dr. Siegert's Effort Testing

Dr. Siegert administered the Test of Memory Malingering ("TOMM") to Defendant on May 21, 2013, in order to assess Defendant's effort during the WAIS-IV. (Tr. Sept. 30, 2013, ECF No. 288, at 29:22-24.) He chose the TOMM because it is "one of the better tests that has been established for the mentally retarded in terms of capturing good effort versus inadequate effort."[36] (Id. at 30:9-13; see also id. at 57:17-22.)

Dr. Siegert testified that, during the administration of the first portion of the TOMM, a correctional officer came into the room and interrupted the test, "there was a tremendous amount of noise and activity" in the hallway, and Defendant "was quite distracted." (Id. at 36:12-37:8.) On cross-examination, Dr. Siegert testified that the noise in the hallway "made it a much harder test . . . because in the first feedback section,

[36] According to Dr. Wood, the TOMM "is a forced choice test . . . where you're presented with two pictures and have to name the picture that you saw before. Fifty pictures are shown, and then there's 50 test trials. During that time, a person is given feedback, that answer is correct, that answer is not correct." (Tr. Nov. 12, 2013, ECF No. 305, at 89:21-90:1.)

[Defendant] had missed a lot, and he did not have the benefit of seeing those." (Id. at 117:17-23.) Dr. Siegert testified that, in the second section of the TOMM (on which Dr. Siegert provided no feedback), Defendant "was able to get 49 out of 50, which actually shows . . . a lack of malingering, good effort."[37] (Id. at 117:23-118:2; see Hr'g Ex. 111 (TOMM raw data).)

b. Dr. Marcopulos's Effort Testing

Dr. Marcopulos conducted an in-person evaluation (a clinical interview and testing) of Defendant on November 8-9, 2012, and November 20, 2012, and spent approximately twenty face-to-face hours with Defendant, with "a lot of interruptions." (Tr. Oct. 15, 2013, ECF No. 266, at 975:19-976:9.) Dr. Marcopulos described Defendant's demeanor during the testing as follows:

> [Defendant] was extremely guarded, kind of a – just a guarded sort of suspicious individual. I could tell he was very, very careful. I felt like he was observing me very carefully and really watching what I was doing. He asked questions. He was not entirely cooperative with the evaluation. We started off with an interview. He tended to give, you know, rather short terse answers, and I think after about 45 minutes, he cut it off and said I'm not doing this anymore. Of course, that is his right, and I encouraged him to continue, but he declined. I know

[37] Dr. Marcopulos testified that Dr. Siegert improperly administered the TOMM according to his own report's description that he did not provide feedback on the second trial of the TOMM. (Tr. Oct. 15, 2013, ECF No. 265, at 1134:14-1135:1; Hr'g Ex. 108 at 05052-05053.) On rebuttal, Dr. Wood clarified that this actually made the TOMM a more difficult test, and Defendant nonetheless passed: "[U]sually feedback is helpful. It reduces the risk of malingering, because people can see you're paying attention, and [Defendant], though, had a clear pass there too even without the feedback. . . . [I]f anything, it made it more difficult." (Tr. Nov. 12, 2013, ECF No. 305, at 90:7-15.)

> he spoke with his attorney, he came in here in the court at some point as well, some time during that day, I believe, or perhaps it was the next day. So he was intermittently cooperative and engaged with the procedure.

(Id. at 976:10-25.) She testified that Defendant understood Dr. Marcopulos's questions: "I didn't have to simplify test instructions, simplify questions very much, repeat things very much. [Defendant] seemed to understand what I was saying." (Id. at 977:1-5.)

Dr. Marcopulos testified that, "in terms of [Defendant's] ability to carry on a conversation, to be aware of his environment, to be responding, be . . . quick on the uptake and so forth, he appeared fine to me. He appeared normal." (Id. at 977:13-16.) She described Defendant as "hyper alert, hypervigilant, like casing the joint, . . . he wouldn't miss anything." (Id. at 977:17-22.) According to Dr. Marcopulos, Defendant asked good questions that demonstrated "he was pretty with it," including, "How can you tell if I'm doing my best?" (Id. at 977:23-978:6.) She testified that Defendant made jokes and that her rapport with him improved over the course of the three days. (Id. at 978:7-25.)

Regarding her interview of Defendant, Dr. Marcopulos testified that "there were certain material that was absolutely off limits, and [Defendant] said that. Anything to do with family, it was off limits, it's none of your business, I'm not

talking about it. . . . [S]o I did as much of the interview as I could. . . .” (Id. at 979:20-980:4.)

On cross-examination, Dr. Marcopulos testified that she and Dr. Welner administered Defendant ten independent and embedded measures to test effort, and that he failed three. (Tr. Oct. 16, 2013, ECF No. 304, at 1268:11-1270:14.) The relevant effort tests, dates of administration (where known), and results are listed in the following chart (derived from Exhibit 397 and the expert reports):

Test	Date of Administration	Pass/Fail
WMT	11/20/2012[38]	Fail
CVLT-II	11/20/2012	Pass
PAI	11/20/2012[39]	Pass
Rey 15 Item	11/08/2012[40]	Pass
VSVT	11/09/2012	Pass
Dot Counting Test	11/20/2012	Fail
MMPI-2	11/27/2012[41]	Pass
TOMM	11/08/2012	Pass
WMS-III (Reliable Digit Span)	11/08/2012	Pass
Enhanced Reliable Digit Span (embedded within the WAIS-IV)	11/09/2012	Fail

[38] Although the raw data from the WMT is undated, both Dr. Marcopulos’s and Dr. Wood’s reports indicate that the test was administered on November 20, 2012. (See Hr’g Ex. 119 at 00024; Hr’g Ex. 248 at 05342; Hr’g Ex. 397.)
[39] On cross-examination, Dr. Marcopulos testified that the PAI was scored on November 21, and administered on November 20, 2012, but that the PAI booklet is undated. (Tr. Oct. 16, 2013, ECF No. 304, at 1241:20-1242:19; 1246:2-20; Hr’g Exs. 378, 397.) Based on the PAI answer sheet filled out by Defendant (Hr’g Ex. 388), it appears that the PAI was administered on November 20, 2012. (See Tr. Oct. 16, 2013, ECF No. 304, at 1249:17-1250:2.)
[40] Although Exhibit 397 indicates the Rey 15 Item Test was administered on November 9, 2012, both Dr. Marcopulos’s and Dr. Wood’s report indicate it was administered on November 8, 2012. (See Hr’g Ex. 119 at 00023; Hr’g Ex. 248 at 05342; Hr’g Ex. 397.)
[41] The MMPI-2 was administered by Dr. Welner on November 27, 2012. (See Hr’g Ex. 119 at 00031; Hr’g Ex. 397.)

(See Hr'g Exs. 119, 248, 397.)

Firstly, on November 8, 2012, Defendant passed the Rey 15 Item Recognition Test, which is solely an effort test. (Tr. Oct. 16, 2013, ECF No. 304, at 1261:7-14; see also United States v. Jiménez-Benceví, 934 F. Supp. 2d 360, 367-69 (D.P.R. 2013) (discussing the Rey 15 Item Test).) The cut-off score for suspect effort on this test is less than 20, and Defendant scored a 21. (See Hr'g Ex. 392.)

Secondly, on November 8, 2012, Defendant passed the TOMM, which is entirely a test of effort. (Tr. Oct. 16, 2013, ECF No. 304, at 1266:7-18.) Thirdly, also on November 8, 2012, Defendant passed the embedded indices of effort (Reliable Digit Span) within the Wechsler Memory Scale, Third Edition ("WMS-III"), as Defendant's "performance was within the acceptable range."[42] (Id. at 1266:19-1267:13.) Dr. Marcopulos testified that Defendant's performance on the logic memory subtest of the WMS-III, which required him to recall details of a story after a half-hour delay, fell "far below normative expectations." (Tr. Oct. 15, 2013, ECF No. 265, at 1128:25-1129:22; Hr'g Ex. 376.)

Fourthly, on November 9, 2012 (the date Defendant took the WAIS-IV), Defendant passed the Victoria Symptom Validity Test

[42] On cross-examination, Dr. Marcopulos testified that although there is a newer edition of the Wechsler Memory Scale, she administered the third edition because "the WMS-IV is not as sensitive to some memory impairments as the WMS-III for African-American individuals." (Tr. Oct. 16, 2013, ECF No. 267, at 1405:2-24.)

("VSVT"), which is also solely an effort test. (Tr. Oct. 16, 2013, ECF No. 304, at 1261:15-21.) The VSVT is a computer-administered performance validity test, and required Defendant to press the space key upon seeing a particular stimulus; Dr. Marcopulos reported that although Defendant was "kind of slow to respond," he "performed accurately." (Tr. Oct. 15, 2013, ECF No. 265, at 1128:2-10.) The VSVT score report reflects that Defendant obtained a raw score of 45/48, indicating valid effort.[43] (Hr'g Ex. 394 at 2.) Fifthly, also on November 9, 2012, Defendant failed the Enhanced Reliable Digit Span, an embedded effort measure within the WAIS-IV. (Tr. Oct. 16, 2013, ECF No. 304, at 1270:11-21; Hr'g Ex. 119 at 00023-00024.)

Sixthly, on November 20, 2012, Defendant failed the Word Memory Test ("WMT"), which is solely an effort test. (Tr. Oct. 16, 2013, ECF No. 304, at 1258:1-9.) The WMT contains a list of forty pairs of words the examiner reads to the examinee twice, after which the examinee gives an immediate recall, and a delayed recall after thirty minutes. (See Hr'g Ex. 393.) The raw data indicates that Defendant only consistently recalled sixty percent of the words in the WMT. (See id.) According to

[43] The interpretive guide to the VSVT results underscores the importance of assessing effort: "The clinician is strongly encouraged to employ additional measures to assess effort and motivation whenever the client's VSVT performance raises concerns about the level of effort expended during an evaluation." (Hr'g Ex. 394 at 1.)

Dr. Marcopulos, this was a failing effort that undermines the validity of Defendant's performance. (Tr. Oct. 15, 2013, ECF No. 265, at 1131:10-13.)

Seventhly, also on November 20, 2012, Defendant passed the embedded performance validity measures within the California Verbal Learning Test, Second Edition ("CVLT-II"). (Tr. Oct. 16, 2013, ECF No. 304, at 1258:13-25.) Defendant's performance on the CVLT-II itself, however, was poor. The CVLT-II tests auditory verbal learning and memory by having the examinee recall a list of sixteen words out loud five times after various time delays, and Defendant performed extremely poorly: "[Defendant] got maybe three words across all five trials and, frankly, it was just an unbelievable performance because someone who is that impaired in memory, they're usually in a nursing home, I mean, they literally usually can't remember one thing from the next."[44] (Tr. Oct. 15, 2013, ECF No. 265, at 1119:4-12.)

Eighthly, Dr. Marcopulos testified that although the Personality Assessment Inventory ("PAI") is not an effort test, it has indicators of symptom validity, and that Defendant passed

[44] On cross-examination, Dr. Marcopulos testified that although Defendant passed the embedded effort measure on the CVLT-II, which she described as "very simple," he failed the other portions of the test, which "involved effort, [and] involved [Defendant] having to state pieces of information that he was hearing . . . over five trials and I had the impression that he wasn't trying at all. He gave three words and it's like I don't know anymore, that's it." (Tr. Oct. 16, 2013, ECF No. 267, at 1409:6-24.)

(meaning his responses were interpretable) on November 20, 2012. (Tr. Oct. 16, 2013, ECF No. 304, at 1259:1-1260:3.) The PAI contains 344 questions (e.g., "I'm a very sociable person") the examinee must answer with a response of "false," "slightly true," "mainly true," or "very true." (Hr'g Exs. 378, 388.)

Ninthly, Dr. Marcopulos administered Defendant the Dot Counting Test, which is a performance validity test that is "potentially valid with an intellectual[ly] disabled population," on November 20, 2012. (Tr. Oct. 15, 2013, ECF No. 265, at 1119:21-1120:2.) According to Dr. Marcopulos, Defendant failed the Dot Counting Test, meaning that normative data "suggested that [Defendant] wasn't putting forth his best effort on that test."[45] (Tr. Oct. 16, 2013, ECF No. 304, at 1262:12-24.)

Finally, on November 27, 2012, Dr. Welner administered, and Defendant passed, the embedded symptom validity measures within the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2"). (Id. at 1264:10-24; see also Hardy, 762 F. Supp. 2d at 870-71 (examining the MMPI-2).) The MMPI-2 is a personality test assessing depression, schizophrenia, anxiety, and other

[45] Dr. Marcopulos testified on cross-examination that although she scored Defendant's Dot Counting Test results using data for the learning disabled population, the Dot Counting Test can "be used with individuals with intellectual disability." (Tr. Oct. 16, 2013, ECF No. 304, at 1263:2-1264:9.) Dr. Wood asserted on rebuttal that using norms for the learning disabled population was inappropriate; that general population norms should have been used; and that up to seventy percent of persons with MR/ID fail the Dot Counting Test, making it inappropriate for use among the MR/ID population. (Tr. Nov. 12, 2013, ECF No. 305, at 126:2-130:17.)

psychopathic disorders. (Oct. 15, 2013, ECF No. 265, at 1121:17-25.) According to Dr. Marcopulos, Defendant "did not show any significant elevations" that would suggest psychopathology and that, although the MMPI-2 requires an eighth-grade reading level, Defendant completed the test without any problems. (Id. at 1122:1-14.)

Dr. Siegert identified two problems with Dr. Marcopulos's effort testing. First, Dr. Siegert testified that people with IQ scores of 70 and below "normally fail over 40 percent of symptom validity tests." (Tr. Sept. 30, 2013, ECF No. 288, at 53:24-54:5.) Second, he testified that it was problematic for Dr. Marcopulos to administer so many effort measures to Defendant because, "even in people of normal intelligence, when you give them multiple symptom validity tests, if you give 8, 9, 10, you would expect them to fail one or two simply by . . . throwing so many similar measures at them." (Id. at 54:10-14.) In Dr. Siegert's opinion, the number of effort tests Dr. Marcopulos administered diminished the probative value of Defendant's performance on them. (Id. at 54:14-15.) According to Dr. Siegert, "one could argue if you gave [Defendant] nine symptom validity tests that he should fail roughly two, which is what happened." (Id. at 54:16-20.)

Dr. Woods echoed the argument that that administering multiple effort tests can be problematic: "the concern of

multiple effort testing is that over time they become cumulative; and if a person like in this case passes seven and doesn't pass the other two, what does that really mean in terms of their effort?"[46] (Tr. Oct. 9, 2013, ECF No. 258, at 608:5-10.) According to Dr. Woods, Defendant displayed adequate effort on Dr. Marcopulos's effort testing. (Tr. Oct. 10, 2013, ECF No. 259, at 619:18-23.) Dr. Stacey Wood also noted, on rebuttal, that multiple effort testing of one examinee can be problematic: "It's recommended that clinicians use multiple methods, especially . . . across a long testing session, but what the research is showing is that after three or four tests, there's very little increase in sensitivity, but you begin to incur the risk of poor specificity and an increased risk of false-positives with each additional test." (Tr. Nov. 12, 2013, ECF No. 305, at 51:25-52:5.)

c. Conclusions as to Defendant's Effort and/or Malingering

The Government's expert, Dr. Marcopulos, "felt like that [Defendant's] testing reflected more limited engagement, just not trying all the time. I couldn't tell whether he was out and out malingering." (Tr. Oct. 15, 2013, ECF No. 265, at 1154:10-

[46] In support of this assertion, Dr. Woods cited a 2012 article by Erin Bigler entitled "Symptom Validity Testing, Effort, and Neuropsychological Assessment," in the Journal of the International Neuropsychological Society. (See Tr. Oct. 9, 2013, ECF No. 258, at 605:20-606:12; Hr'g Ex. 206 at 05285.) The Government objected to the citation as inadequately specific, which the Court sustained. (Tr. Oct. 9, 2013, ECF No. 258, at 604:24-605:4; 606:13-607:25.)

21.) In other words, given her opinion that Defendant failed three of the effort tests she administered, Dr. Marcopulos "basically couldn't trust the test results showing . . . very low scores and impairment." (Id. at 1154:22-1155:5.)

Experts for Defendant assert that the sheer number of effort measures Dr. Marcopulos administered to Defendant increases the risk that false positive results as to malingering were obtained. (See, e.g., Tr. Nov. 12, 2013, ECF No. 305, at 50:22-51:2; see also Lena Berthelson, et al., False positive diagnosis of malingering due to the use of multiple effort tests, 27 Brain Injury 909, 916 (2013) (concluding that false positive rates for effort tests increase significantly as the number of measures administered increases).) Dr. Wood asserted that Defendant's failing performance on the WMT on November 20, 2012, has no bearing on his effort on the WAIS-IV eleven days earlier. (See Tr. Nov. 12, 2013, ECF No. 305, at 54:17-55:13.) She further asserted that the Enhanced Reliable Digit Span embedded measure Defendant failed on November 9, 2012, is inappropriate to use in a low-IQ population because "it has a high rate of false-positives in low IQ individuals." (Id. at 49:7-16; 55:14-21.)

The Court finds that Defendant's 2012 and 2013 WAIS-IV IQ scores are not invalid due to low effort or malingering.

Defendant has satisfied his burden of proving by a preponderance of the evidence that these IQ scores are valid.

Firstly, the Government's experts were unable to conclude that Defendant was malingering. (Tr. Oct. 15, 2013, ECF No. 265, at 1154:10-21.) Secondly, Defendant passed the majority of the effort tests administered to him across the relevant testing dates, lending support to the proposition that Defendant's failing efforts on November 9 and November 20, 2012, may be false-positives. (See Tr. Nov. 12, 2013, ECF No. 305, at 51:25-52:5.) Thirdly, Defendant's failed WMT and Dot Counting Tests on November 20, 2012, have no bearing on whether Defendant exhibited adequate effort on the WAIS-IV administered on November 9, 2012, eleven days earlier. On November 9, 2012, Defendant passed one effort measure (the VSVT), and failed another (the Enhanced Reliable Digit Span), which has questionable sensitivity among low-IQ individuals. (See id. at 49:7-16.)

Defendant also exhibited adequate effort on May 21, 2013, the day he took the WAIS-IV administered by Dr. Siegert. On that day, Defendant passed the TOMM – a pure test of effort – even after Dr. Siegert administered it in a manner that made it more difficult to complete (without feedback). (See id. at 89:9-17; Hr'g Ex. 111.)

Accordingly, the Court will not discount Defendant's 2012 and 2013 WAIS-IV scores on account of poor effort or malingering.

4. Other Sources of Defendant's Intellectual Functioning

Both the DSM-V and the AAIDD Manual emphasize the necessity of assessing prong one through the use of standardized, individually administered intelligence tests. See DSM-V at 33 ("Deficits in intellectual functions, . . . confirmed by both clinical assessment and individualized, standardized intelligence testing."); AAIDD Manual at 41 ("we will continue to rely on . . . IQ as a measure of intellectual functioning. Subaverage intellectual functioning, defined as approximately two or more standard deviations below the mean of an individually administered, standardized instrument, is a necessary but insufficient criterion to establish a diagnosis of ID."). Federal courts unanimously focus on standardized IQ testing in making prong-one determinations. See Hardy, 762 F. Supp. 2d at 856; Wilson, 922 F. Supp. 2d at 343-44; Salad, 2013 WL 3776418, at *3; United States v. Smith, 790 F. Supp. 2d 482, 489-90 (E.D. La. 2011).

The Government's experts nevertheless reference numerous other sources for the conclusion that Defendant's intellectual functioning is in the borderline range, including achievement test performance, vocational aptitude testing, and school

performance. The Court addresses each of them below, declining to assign them dispositive weight in the prong-one analysis over Defendant's individually administered IQ tests.

a. Otis-Lennon Test of Mental Ability

Defendant has taken numerous achievement tests throughout his life, including the Otis-Lennon Test of Mental Ability, which Dr. Siegert described as a "broadly grouped test[] that . . . was a way to sit a whole bunch of students down and come up with what they hope was a rough estimate of the students' IQ." (Tr. Sept. 30, 2013, ECF No. 288, at 42:9-19.) Defendant received a "DIQ," or Deviation IQ score, of 82 on the Otis-Lennon, when he was eight years old (second grade). (Tr. Oct. 15, 2013, ECF No. 265, at 1076:6-20; 1078:3-13.) Dr. Marcopulos described the Otis-Lennon as a screening test, and stated that Defendant's DIQ placed him "in the low average range." (Id.)

Dr. Marcopulos cited a mid-1970s study by Theron M. Covin, who published an article studying a biracial sample of children in Alabama and demonstrating that the WISC-R and the Otis-Lennon tests "correlated very highly." (Id. at 1078:14-1079:9; Theron M. Covin, Comparison of Otis-Lennon Mental Ability Test, Elementary 1 Level and WISC-R IQs Among Suspected Mental Retardates, 38 Psychol. Reps. 403 (1976) (Hr'g Ex. 398).) The article states:

> The present results suggest that the IQs on the Otis-Lennon I are somewhat comparable to the WISC-R IQs for mentally retarded children. . . .
>
> The present results are not to be interpreted as suggesting that the Otis-Lennon I can be used in the place of the WISC-R in assessing the mental ability of children under consideration for placement in special education, especially not for Negro children.

(Hr'g Ex. 398 at 405; see also Tr. Oct. 16, 2013, ECF No. 267, at 1350:8-21.)

According to Dr. Marcopulos, the Otis-Lennon test "tended to underestimate the IQ of African-American children," or in other words, "it would actually suggest a lower IQ than the WISC-R would have." (Tr. Oct. 15, 2013, ECF No. 265, at 1079:9-14.) Thus, she asserted, Otis-Lennon IQs and WISC-R IQs are only "somewhat" comparable because "African-American children tended to get higher IQ's on the WISC-R compared to the Otis-Lennon." (Tr. Oct. 16, 2013, ECF No. 267, at 1350:22-1351:3.)

Dr. Siegert and other defense experts disagreed. Drs. Siegert, Reschly, and Woods all asserted that achievement tests are not a good indication of a person's IQ and that they should not be used to make a prong-one determination of MR/ID. (Tr. Sept. 30, 2013, ECF No. 288, at 64:12-14; Tr. Oct. 10, 2013, ECF No. 259, at 620:9-11; Tr. Oct. 7, 2013, ECF No. 251, at 155:10-25.) According to Dr. Woods, "[t]he Otis-Lennon would be much more limited in its testing of the performance component. . . . [I]t doesn't give you the . . . broad array of

functioning that one would see in a . . . more standardized test." (Tr. Oct. 10, 2013, ECF No. 259, at 621:13-21.)

Dr. Siegert testified that even if the correlation between achievement tests and the WAIS-IV is high (like .75), "the range of what they predict from IQ to achievement test is actually very weak." (Tr. Sept. 30, 2013, ECF No. 288, at 64:16-21.) Dr. Siegert's assertion is echoed in an article by Dr. Kevin McGrew, one of the authors of the Woodcock-Johnson III achievement test, which states that a person with an IQ score in the mild MR/ID range could obtain achievement test scores from a range of 60 to 96: "[achievement] standard scores (based on a psychometrically sound individually measured [achievement] test) can be significantly higher than an individual's IQ score, due to the less than perfect correlation between IQ and [achievement]."[47] (Id. at 64:22-65:1, 65:11-21, 67:24-68:2; Hr'g Ex. 90 at 3.) According to Dr. Siegert, Otis-Lennon scores are "not meaningfully" correlated to a Full Scale IQ score, but they are "[i]n some fashion" related to Defendant's relative strength in tests of verbal IQ. (Tr. Sept. 30, 2013, ECF No. 288, at 122:8-22.)

Dr. Marcopulos disagreed with Dr. Siegert's testimony that Defendant's Otis-Lennon scores are invalid: "the Otis-Lennon is

[47] On cross-examination, Dr. Siegert testified that these articles were taken from Dr. McGrew's blog located at "www[.]atkinsmrdeathpenalty.com." (Tr. Sept. 30, 2013, ECF No. 288, at 88:10-24.)

used to predict academic achievement. And it is entirely valid for that. And from what I can see that is what it was used for in [Defendant's] school. . . . So it is valid, there is nothing invalid about that the way it was reported." (Tr. Oct. 15, 2013, ECF No. 265, at 1080:13-1081:4.)

While Defendant's Otis-Lennon testing may be valid for the limited purpose for which it was administered in 1972 (see Hr'g Ex. 103), that does not persuade the Court that Defendant's score of 82 on the Otis-Lennon diminishes the significance of his far lower scores on a more widely accepted and psychometrically valid instrument like the WAIS-IV. Both DSM-V and the AAIDD Manual emphasize focusing on individually-administered, standardized, broad tests of IQ. See DSM-V at 33; AAIDD Manual at 41. The Otis-Lennon is a group-administered test that is given in the school setting as a screening measure and focuses primarily on verbal skills. The Covin article cited by Dr. Marcopulos cautions against reliance on the Otis-Lennon in place of the WISC-R. (See Hr'g Ex. 398 at 405.)

Moreover, federal courts have also recognized that the Otis-Lennon test is an improper tool to assess intellectual functioning under prong one. See, e.g., Hines v. Thaler, 456 F. App'x 357, 367-70 (5th Cir. 2011) (upholding a state-court determination of deficits in intellectual functioning, which included a finding that the "Otis-Lennon is a brief,

group-administered, verbal IQ test used as a screening tool, not a tool for diagnosing mental retardation," and that "more weight should be placed on individually administered tests, [where] the administrator focuses attention on the test-taker." (internal quotation marks omitted)). Accordingly, the Court finds Defendant's performance on the Otis-Lennon irrelevant to the prong-one determination. It is, however, relevant to a determination of Defendant's adaptive functioning in the conceptual domain, which includes language, reading, and writing skills. (See AAIDD Manual at 44; see also infra Part IV.B.3.)

b. Woodcock-Johnson III Achievement Test

Dr. Marcopulos also cites Defendant's Woodcock-Johnson III Achievement Test results for the proposition that his IQ scores underestimate his true intelligence. She administered Defendant the Woodcock-Johnson III, which tests what people have learned in school, on November 20, 2012. (See Tr. Oct. 15, 2013, ECF No. 265, at 1135:18-1136:1; Hr'g Ex. 380.) The following chart in Dr. Marcopulos's report summarizes Defendant's Woodcock-Johnson III performance, which was all in the "borderline" range or higher:

Woodcock Johnson Tests of Achievement – 3rd Edition (WJ-III)			
	Age Norms: 48-11		
Clusters	**Standard Score**	**Percentile**	**Qualitative Range**
Oral Language	74	4	Borderline
Total Achievement	81	11	Low Average
Broad Reading	82	12	Low Average
Broad Math	79	8	Borderline
Broad Written Language	86	17	Low Average
Math Calculation Skills	93	32	Average
Written Expression	82	11	Low Average
Academic Skills	89	23	Low Average
Academic Fluency	81	10	Low Average
Academic Application	78	7	Borderline
Letter-Word Identification	88	22	Low Average
Reading Fluency	80	9	Low Average
Story Recall	87	19	Low Average
Understanding Directions	75	5	Borderline
Calculation	91	28	Average
Math Fluency	97	43	Average
Spelling	90	26	Average
Writing Fluency	79	8	Borderline
Passage Comprehension	83	12	Low Average
Applied Problems	72	3	Borderline
Writing Samples	90	25	Average
Story Recall-Delayed	100	49	Average

(Hr'g Ex. 119 at 00028; Hr'g Ex. 380.)[48]

According to Dr. Marcopulos, the Woodcock-Johnson III has a very high correlation with IQ scores. (Tr. Oct. 15, 2013, ECF No. 265, at 1136:6-1138:11; see also Scott Barry Kaufman, et al., Are cognitive g and academic achievement g one and the same

[48] The mean score on the Woodcock-Johnson III is a 100, with a standard deviation of fifteen points. (Tr. Oct. 7, 2013, ECF No. 250, at 68:10-18.)

g? An exploration on the Woodcock-Johnson and Kaufman tests, 40 Intelligence 123, 124 (2012) ("Research has shown that IQ and achievement test scores have yielded correlation coefficients that usually range from the mid-.60s to mid-.70s and sometimes reach the mid-.80s." (citations omitted)) (Hr'g Ex. 361).)[49]

Dr. Marcopulos asserted that Defendant's achievement test scores at the borderline level or above are impervious to cheating or guessing and suggest "at least a minimum of what he could do."[50] (Tr. Oct. 15, 2013, ECF No. 265, at 1142:1-1145:18.) According to Dr. Marcopulos, "it is kind of hard to score above a person's functional ability. And I saw many tests that show that [a] more accurate estimate of [Defendant's] IQ would be in the borderline range." (Tr. Oct. 16, 2013, ECF No. 267, at 1428:9-13; see also AAIDD Manual at 47 (in intellectual functioning analysis, "best or maximal performance is assessed.").)

Similar to the Otis-Lennon, Defendant's experts argued that achievement tests are not mirror images of IQ testing; according to Dr. Reschly, "[a]chievement tests generally attempt to assess the results of past learning, whereas . . . tests of general

[49] The article states that "[r]esearch has shown a moderate to strong relation between general cognitive ability (g) and school grades, ranging from 0.40 to 0.70." (Hr'g Ex. 361 at 123; see also Tr. Oct. 15, 2013, ECF No. 265, at 1140:16-23.)

[50] Dr. Marcopulos testified that her reports highlight Defendant's highest scores because "when someone scores higher, the higher points in a test battery, . . . unless the person is a very, very good guesser or they're cheating, they are not going to score higher than their ability or not much higher than their ability." (Tr. Oct. 16, 2013, ECF No. 267, at 1458:1-16.)

intellectual functioning attempt to assess . . . the individual's overall learning in a variety of contexts. . . ." (Tr. Oct. 7, 2013, ECF No. 250, at 70:10-18.) In other words, "[a]chievement and intellectual functioning test results are related, but they are not interchangeable." (Id. at 70:20-22.)

Dr. Wood also highlighted the "significant variability" between the Woodcock-Johnson III – "an achievement test primarily assessing school-based learning skills" - and more psychometrically valid measures of intellectual functioning like the WAIS-IV. (Tr. Nov. 12, 2013, ECF No. 305, at 66:13-14; 176:13-16.) Moreover, Dr. Wood noted that eleven of the twelve Woodcock-Johnson III subtests focus in on verbal skills which, according to Defendant's WAIS-IV subtest performances, are among Defendant's relative strengths. (Id. at 59:16-21.) For that reason, the Woodcock-Johnson III is not a substitute for the WAIS-IV: "for prong one, I stick with the gold standard, the WAIS-IV for my opinion regarding general intellectual functioning, and I find the Woodcock-Johnson can provide better information related to . . . conceptual abilities." (Id. at 71:13-17.)

Thus, like the Otis-Lennon, the Court finds Defendant's Woodcock-Johnson III scores irrelevant to the prong-one analysis. They are relevant, however, in the adaptive functioning analysis, particularly related to the conceptual

skills domain. (See AAIDD Manual at 44; see also infra Part IV.B.3.)

c. Armed Services Vocational Aptitude Battery ("ASVAB")

Dr. Marcopulos further cited Defendant's performances on the Armed Forces Qualification Test ("AFQT"), which is derived from the ASVAB, as evidence that his intellectual functioning is not significantly impaired. (Tr. Oct. 15, 2013, ECF No. 265, at 1099:12-21.) She asserted that AFQT has many components of the WAIS-IV, and that "some researchers use the AFQT as a proxy for intelligence."[51] (Id. at 1100:25-1101:1.) According to Dr. Marcopulos, the AFQT is "not the same thing [as an IQ test], but it correlates and it does have components that are similar to IQ scores." (Id. at 1108:15-20; see also Michael L. Macklin, et al., Lower Precombat Intelligence Is a Risk Factor for Posttraumatic Stress Disorder, 66 J. of Consulting & Clinical Psychol. 323, 324 (1998) ("the AFQT is one of the better measures of general intelligence") (Hr'g Ex. 461).)

Defendant took the AFQT in 1981 and again in 1989. (Id. at 1099:21-23.) Defendant received a score in the fifth percentile in 1981 (Hr'g Ex. 346), making him ineligible for the armed

[51] Exhibit 359, the "ASVAB Technical Bulletin No. 4, P&P-ASVAB Forms 23-27" (March 2009, Revised May 2012), was marked and admitted into evidence. (Tr. Oct. 15, 2013, ECF No. 265, at 1102:7-1105:9; Hr'g Ex. 359.) The bulletin describes the function of the AFQT as follows: "The AFQT, developed from four ASVAB subtests, remains the measure used for determining enlistment eligibility." (Hr'g Ex. 359 at 2.)

services, but he took another version in 1989 (Hr'g Ex. 288), scoring within the fifteenth percentile and rendering him eligible for the service. (Tr. Oct. 15, 2013, ECF No. 265, at 1106:4-11.)

Defendant's experts argued that his performance on the AFQT is a poor proxy for an IQ score; according to Dr. Siegert, "it does not capture the full scale." (Tr. Sept. 30, 2013, ECF No. 288, at 70:24-71:12.) Specifically, the AFQT contains "all verbal material, all given in these group administrations, and it just captures a few of the verbal skills," similar to achievement tests. (Id. at 71:9-15.) Dr. Woods echoed this statement, adding that because the AFQT is "given by armed services personnel rather than trained psychologists," any correlations between the AFQT/ASVAB and tests like the WAIS-IV are not valid and cannot be used to assess intellectual functioning. (Tr. Oct. 10, 2013, ECF No. 259, at 622:15-623:5.)

For the same reasons the Court rejected Defendant's Otis-Lennon and Woodcock-Johnson III results as an indicator of his prong-one deficiencies, the Court similarly rejects the AFQT/ASVAB. As a group-administered, paper-and-pencil test of aptitude administered by military personnel, the AFQT/ASVAB simply does not meet the rigorous psychometric testing requirements of the clinical definitions of MR/ID widely applied in federal courts. See Hines, 456 F. App'x at 367-70 (upholding

a state court's refusal to credit group-administered tests in the prong-one analysis). The AFQT/ASVAB is relevant, however, to a determination of Defendant's conceptual skills within the adaptive functioning prong. (See AAIDD Manual at 44; see also infra Part IV.B.3.)

d. School Records/Performance

Dr. Marcopulos also stressed Defendant's performance in school as evidence of his borderline intellectual functioning, noting that "about the highest correlation that we have in the field of psychology is the correlation between IQ tests and school achievement." (Tr. Oct. 15, 2013, ECF No. 265, at 1070:16-22.) She asserted that Defendant's school record is a significant indicator that Defendant fails prong one of the MR/ID definition because it reflects performance beyond what she would expect a person with MR/ID to attain: "I wouldn't have expected [Defendant's] grades to be as solid, you know, not high grades but, you know, solid grades, B's and C's. And I would have expected [Defendant] to be held back, I would have expected to see maybe resource for every year."[52] (Id. at 1073:10-24; Hr'g Ex. 103.)

[52] Defendant's permanent school record only indicates "Resource" once, while Defendant was in the fifth grade. Defendant's record reflects mostly B and C grades, with a few Ds, and "there is no indication that [Defendant] was ever diagnosed with a learning disability or attentional disorder, was matriculated into special education, or was retained in any grade." (Hr'g Ex. 103; Hr'g Ex. 119 at 00006.)

Dr. Marcopulos asserted that Defendant's Stanford Achievement Test scores during grade school reflected variability and inconsistency across grades such that they are unreliable measures of his ability. For example, "in grade two, [Defendant] was paragraph meaning at the second grade level, so unless he had a brain injury or something, why would it decline in third grade to the first 1.6 grade level? That just makes me wonder if [Defendant] was engaged in the testing. . . ." (Tr. Oct. 16, 2013, ECF No. 304, at 1295:20-1296:25; Hr'g Ex. 103; Hr'g Ex. 119 at 00007.) Her report states that Defendant was in the eighteenth percentile in English and the tenth percentile in math on his tenth grade Stanford Achievement Test (Tr. Oct. 16, 2013, ECF No. 304, at 1298:16-21; Hr'g Ex. 119 at 00008), but omits that Defendant scored in the first percentile in reading (see Hr'g Ex. 103): "I think that was a mistake, accidental omission. I certainly didn't select those." (Tr. Oct. 16, 2013, ECF No. 304, at 1299:2-24.) Moreover, Defendant passed only the spelling portion of the Tennessee state proficiency tests, but was nonetheless awarded a high school diploma. (Id. at 1300:8-1302:25.)

Dr. Marcopulos also placed emphasis on Defendant's class rank of 195 out of 245 students: "20 percent of his class performed more poorly than [Defendant]. . . . [I]f 20 percent of a graduating high school class could possibly meet diagnostic

criteria for intellectual disability, I think the Center for Disease Control would be very interested in Lauderdale County." (Tr. Oct. 15, 2013, ECF No. 265, at 1073:25-1075:3.)

Dr. Marcopulos noted that Defendant went to the University of Tennessee at Martin ("UT-Martin"), that he was apparently admitted on a conditional basis (on lower academic standards), that he had a low ACT score (8), and that he "flunked out" of college. (Tr. Oct. 16, 2013, ECF No. 304, at 1313:4-1316:15.) She testified that she is not aware of "any university that admits individuals [with] mental retardation or intellectual disability. . . . That wouldn't be right to admit a student with that level of disability, they would, of course, not be successful in a university setting." (Id. at 1317:7-23.)

Conversely, Dr. Woods interpreted Defendant's school records (Exhibit 103) to confirm Defendant's deficits in prong one. Defendant had problems with word meaning even at an early age; on a test of word meaning, Defendant was able to get simple word associations, like "[o]ne who is rich is not poor," but as they got more complex, he would get them wrong, for example, "[a] person who visits your house is your enemy." (Tr. Oct. 10, 2013, ECF No. 260, at 740:1-21; Hr'g Ex. 103.) Similarly, Defendant's third-grade scores on the Stanford Achievement Test in paragraph meaning were in the "zero percentile rank." (Tr. Oct. 10, 2013, ECF No. 260, at 742:12-25; Hr'g Ex. 103.)

Dr. Woods noted the diagnostic importance of spotting these difficulties at an early age, and emphasized that in Defendant's case, "[i]t didn't just happen in the testing in 2013." (Tr. Oct. 10, 2013, ECF No. 260, at 741:8-11.)

Dr. Reschly emphasized that although Dr. Marcopulos described Defendant's grades favorably, Defendant was in the lowest ability grouping in grade school, "so in terms of a low ability group, [Defendant] was perhaps a C student." (Tr. Oct. 7, 2013, ECF No. 250, at 56:4-13; see also Tr. Oct. 2, 2013, ECF No. 290, at 423:23-424:15; Hr'g Ex. 103.)

For the same reasons the Court is not factoring in Defendant's Otis-Lennon and Woodcock-Johnson III test results at this stage, the Court will not consider Defendant's academic achievement in its prong-one analysis. The DSM-V states that "[c]ritical components" of intellectual functioning "include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy" – all of which are measured by the WAIS-IV. DSM-V at 37. Defendant's academic achievement is a relevant factor in the adaptive functioning (conceptual domain) inquiry. It should not be employed by the Court to find that Defendant has not met his burden of proof as to intellectual functioning deficits when the Court has two valid IQ test results on instruments

sanctioned by the authoritative clinical literature at its disposal.

5. Conclusion as to Intellectual Functioning

In conclusion, the Court concludes that Defendant has satisfied his burden of proving that he more likely than not suffers from significantly subaverage intellectual functioning. See AAIDD Manual at 41.

Dr. Marcopulos summed up her reasons for rejecting Defendant's 2012 and 2013 WAIS-IV IQ scores as not true reflections of his intelligence as follows:

> Number one, . . . these three tests were administered after [Defendant] was indicted for murder and was facing the death penalty. And so these were administered, you know, in corrections institution[s] as part of a pretrial evaluation.
>
> So under those circumstances we always have to be concerned about possible malingering. Certainly there's secondary gain there for showing that you are in the intellectually disabled range, and then, therefore, can avoid the death penalty.
>
> The other reason why I don't feel it's reflective is, again, based on my evaluation of showing inconsistent effort in engagement in the testing. Plus an IQ of 61 or 64 in no way reflects the kind of life that [Defendant] has been living his adult life.
>
> His success as a corrections office[r], a very dangerous skilled occupation, involves very sharp judgments, attention to safety, and so forth, and, you know, just his – his independent living, you know, having a family, being a father, financially, just – just looking at the whole picture just doesn't add up.

(Tr. Oct. 15, 2013, ECF No. 265, at 1132:19-1133:23.) The Court rejects each of them. Given the potential secondary gain to be had from poor IQ test performance, it is important to assess

whether Defendant was malingering. See Wiley v. Epps, 625 F.3d 199, 213 (5th Cir. 2010) ("A defendant must also prove through appropriate testing that he is not malingering."). It is conjecture to posit that Defendant's WAIS-IV results are deliberately and artificially low due to malingering. Dr. Marcopulos could not determine whether the testing showed malingering. (Tr. Oct. 15, 2013, ECF No. 265, at 1154:10-21.) Moreover, Defendant has satisfied his burden of showing that it is more likely than not that he was demonstrating adequate effort on the days he was administered an individualized, standardized IQ measure, and he passed most of the effort tests he was given. (See supra Part IV.A.3.c.)

Finally, the Court rejects Dr. Marcopulos's argument that Defendant's IQ test performance is inconsistent with the manner in which Defendant lived his life. Even if that is true, the Court must determine whether the first prong, significantly subaverage intellectual functioning, is satisfied independent of prongs two and three. See Wilson, 922 F. Supp. 2d at 355-57 ("where a legal test contains multiple necessary prerequisites, a greater showing of one prong cannot overcome a deficient showing in the other. . . . Because the law is clear that mental retardation contains three necessary elements, the court must determine if these elements are independently satisfied.") Dr. Tassé provided the following accurate rebuttal testimony to

this effect: "[Y]ou want to establish whether the person is presenting significant deficits in both intellectual functioning and adaptive behavior, and those are assessed separately and independently and in different manners." (Tr. Nov. 13, 2013, ECF No. 306, at 255:6-15.)

While the Court acknowledges that it is not bound by the definitions enumerated in the AAIDD Manual and the DSM-V, and must rely on both "clinical judgment" and its own judgment in the prong-one analysis, the Court limits this judgment to assessing the validity of Defendant's performance on the "gold standard" Wechsler tests. See Hooks, 689 F.3d at 1168 (10th Cir. 2012) (noting that a "clinical standard is not a constitutional command"). Defendant's recent, consistent IQ scores of 64 and 67 place him comfortably within the range of mild MR/ID, or "two standard deviations or more below the population mean." DSM-V at 37. The Court will not stray from the parameters referenced in Atkins by considering, out of place, group-administered tests that were not designed to measure the "general factor" of intelligence that undergirds prong one. See Atkins, 536 U.S. at 308 n.3; AAIDD Manual at 41.

Thus, Defendant has satisfied prong one of the MR/ID criteria, significantly subaverage intellectual functioning. The Court now turns to prong two: significant limitations in adaptive behavior.

B. Prong Two: Deficits in Adaptive Functioning

Adaptive behavior refers to "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." AAIDD User's Guide at 2. According to the DSM-V, adaptive functioning refers "to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." (DSM-V at 37; see also Tr. Oct. 4, 2013, ECF No. 303, at 1088:23-1089:8.) The Court first discusses the proper methods of measuring adaptive behavior according to clinical literature and federal precedent, and then turns to an analysis of Defendant's adaptive functioning.

1. Measuring Adaptive Functioning

a. General Principles

Both the AAIDD Manual and the DSM-V break adaptive functioning up into three domains: (1) conceptual, (2) social, and (3) practical. See AAIDD Manual at 44; DSM-V at 37. Federal courts have routinely focused on this tripartite definition in making determinations as to adaptive functioning, and the Court will do the same in this case. See, e.g., Candelario-Santana, 916 F. Supp. 2d at 210-11; Smith, 790 F. Supp. 2d at 484-85.

Firstly, the conceptual domain of adaptive functioning involves a person's grasp of "language; reading and writing; and money, time, and number concepts." AAIDD Manual at 44. According to the DSM-V, conceptual skills encompass the following: "competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others." (DSM-V at 37; see also Tr. Oct. 7, 2013, ECF No. 250, at 54:12-17.) In persons with mild MR/ID, significant limitations in the conceptual domain of adaptive behavior manifest themselves in the following ways:

> For school-age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. In adults, abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (e.g., reading, money management), are impaired. There is a somewhat concrete approach to problems and solutions compared with age-mates.

DSM-V at 34.

Secondly, the social skills domain of adaptive functioning incorporates "interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." AAIDD Manual at 44. The DSM-V expands on this slightly: "[t]he social domain involves awareness of others'

thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others." DSM-V at 37. Persons with mild MR/ID may have the following problems:

> Compared with typically developing age-mates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in age-appropriate fashion; these difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations; social judgment is immature for age, and the person is at risk of being manipulated by others (gullibility).

DSM-V at 34.

Finally, the Court must assess the following in the practical skills domain of adaptive behavior: "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." AAIDD Manual at 44. According to the DSM-V, the practical skills domain "involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others." DSM-V at 37. The DSM-V expounds on the kinds of practical skill deficits that manifest themselves in persons with MR/ID:

> The individual may function age-appropriately in personal care. Individuals need some support with complex daily living tasks in comparison to peers. In adulthood, supports typically involve grocery shopping, transportation, home and child-care organizing, nutritious food preparation, and banking and money management. Recreational skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support. In adulthood, competitive employment is often seen in jobs that do not emphasize conceptual skills. Individuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently. Support is typically needed to raise a family.

DSM-V at 34.

The task of analyzing adaptive functioning involves more subjectivity than the prong-one analysis. See Wiley, 625 F.3d at 217 ("adaptive functioning historically has been assessed on the inherently subjective bases of interviews, observations, and professional judgment." (internal quotation marks omitted)). Federal courts have described adaptive functioning as a "broader category, and more amorphous, than intellectual functioning. Because of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians' judgment and credibility." Candelario-Santana, 916 F. Supp. 2d at 211-12 (citations and internal quotation marks omitted); see also Hardy,

762 F. Supp. 2d at 879 ("The definition of this prong is less settled than that for intellectual functioning.").

According to the authoritative clinical literature, adaptive functioning should be assessed, where possible, by using standardized adaptive behavior scales. See AAIDD Manual at 43 ("significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities."); DSM-V at 37 ("[a]daptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures.").[53] A qualifying score on a standardized adaptive behavior scale will be "approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills." AAIDD Manual at 43. Where standardized assessment tools cannot be used or are unreliable, however, the Court must consider other sources of information, including

[53] The AAIDD User's Guide provides further guidance as to the proper usage of standardized adaptive behavior scales: "Use trained professional interviewers and respondents who: (a) understand the principles of adaptive behavior (such as the fact that it is typical behavior not maximal behavior), (b) use age peers who live in the community as the comparison group, (c) know the individual being assessed very well, and (d) have had the opportunity to observe the person on a daily or weekly basis across multiple environments." AAIDD User's Guide at 10. Moreover, neuropsychological testing can illuminate adaptive behavior deficits: "The interpretation of an adaptive behavior score should include . . . the potential influence of specific sensory, motor, or communication limitations. . . ." Id. at 11.

"school records, medical records, and previous psychological evaluations; or interviews with individuals who know the person and have had the opportunity to observe the person in the community." AAIDD Manual at 48.

The Government urges the Court to consider the following factors set forth in Ex parte Briseno, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004), in making its adaptive functioning determination:

- Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

(See ECF No. 308 at 34 n.2.) The Court finds the approach of other federal courts that have adhered mainly to the language found in the clinical literature, as opposed to the Briseno factors, more appropriate. Although "some of these six factors

are logical considerations in evaluating a defendant's adaptive behavior limitations" and are "consistent with the clinical definitions cited in Atkins," some of the factors "track the Atkins criteria less closely." Candelario-Santana, 916 F. Supp. 2d at 212.

The Court also notes the AAIDD Manual's statement that "adaptive skill limitations often coexist with strengths." AAIDD Manual at 45. This does not mean the Court is precluded from assigning weight to evidence of Defendant's strengths. See Hooks, 689 F.3d at 1172 (holding that the state court's "consideration of evidence of [the defendant's] strengths was not contrary to or an unreasonable application of Atkins." (internal quotation marks omitted)). Moreover, "evidence of a strength in a particular area of adaptive functioning necessarily shows that the defendant does not have a weakness in that particular area." Clark, 457 F.3d at 447.

b. Consideration of Defendant's Criminal and Post-Incarceration Adaptive Behavior

Defendant's post-hearing brief asserts that Dr. Welner has "no supporting authority" for his references to Defendant's "criminal behavior and prison behavior," and thus that the Court should not rely on them. (ECF No. 307 at 18.) Dr. Tassé (a co-author of the AAIDD User's Guide) asserted on rebuttal that the sophistication of Defendant's criminal behavior should not be

considered because, "by definition, criminal behavior is a deficit of adaptive behavior." (Tr. Nov. 13, 2013, ECF No. 306, at 261:5-20.) He further argued that post-incarceration adaptive behavior should not be considered because "prison life [is] an artificial environment." (Id. at 257:23-258:4; see also DSM-V at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.").)

Not all of Defendant's experts were in agreement as to this point. Dr. Reschly, for example, testified that the facts of the crime can "have moderate impact on decisions about adaptive behavior" and in an Atkins hearing in the Eastern District of Virginia, that "all relevant information," including the facts of the crime, should be considered. (Tr. Oct. 7, 2013, ECF No. 251, at 149:3-5; 150:9-23; 151:3-14; see Green v. Johnson, No. CIVA 2:05CV340, 2006 WL 3746138, at *35 (E.D. Va. Dec. 15, 2006) (Report and Recommendation), adopted as modified, No. 2:05cv340, 2007 WL 951686, at *1 (E.D. Va. Mar. 26, 2007).)

Dr. Tassé's argument finds some support in federal case law. See Davis, 611 F. Supp. 2d at 493-94 (declining to assign weight to defendant's jail calls as indicative of adaptive functioning); Salad, 2013 WL 3776418 at *17 (assigning "little weight" to defendant's post-incarceration functioning). For

example, courts have decided that correctional officers who interact with an examinee after his incarceration would certainly be inappropriate respondents for a standardized adaptive behavior scale. See Smith, 790 F. Supp. 2d at 517-18 (noting that prison environments are highly structured and that correctional officers are "not trained to make assessments of adaptive behavior."); AAIDD Manual at 47 ("Generally, individuals who act as respondents should be very familiar with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times.").[54] The fact that post-incarceration observers of Defendant's adaptive behavior would be inadequate reporters for a standardized adaptive behavior scale does not mean that all information regarding Defendant's post-incarceration behavior should be ignored entirely.

Dr. Welner disagrees with the statements in the AAIDD User's Guide instructing examiners not to consider past criminal behavior in their assessment of adaptive functioning. (Tr.

[54] The Smith court further asserted that because persons with MR/ID can learn skills they did not have prior to age eighteen, correctional officers' accounts of adaptive behavior are problematic because "seeing strengths at 55 or older[] does not mean that relevant deficits were not present during the developmental period." 790 F. Supp. 2d at 518-19. The Court will consider information from the correctional officers who testified for the Government, even though it does not provide a picture of Defendant's adaptive behavior across his entire life, because the Court must be satisfied that Defendant was MR/ID at the time of the crime. Holladay, 555 F.3d at 1353. In other words, the Court must consider evidence of Defendant's present adaptive functioning after age eighteen, regardless of whether it speaks to Defendant's limitations during the developmental period. See Salad, 2013 WL 3776418, at *2.

Oct. 22, 2013, ECF No. 278, at 1794:1-24.) According to Dr. Welner, "the essence of an ethical practice of forensic psychiatry is that you don't pick and choose your data. You rely on all available sources of data, . . . the idea of just ignoring behavior altogether is something that has no foundation in the practice of forensic psychiatry." (Id. at 1795:2-11.) He further testified that he disagrees with the User's Guide's statement that diagnosis of MR/ID is not based on a person's street smarts, behavior in jail, or criminal adaptive functioning. (Id. at 1795:22-1796:3.)

Other federal courts have followed Dr. Welner's approach and have analyzed criminal behavior and post-incarceration behavior in the adaptive functioning inquiry. See, e.g., Clark, 457 F.3d at 446-48. In Clark, the court stated that its "review of the evidence of [the defendant's] behavior in prison casts serious doubts on his claims of adaptive limitation," citing the defendant's handwritten maintenance requests, puzzles, and grievances. Id. at 447. The Clark court's reliance on post-incarceration behavior was appropriate in light of its upholding of a state-court determination that the standardized adaptive behavior assessments in the case were unreliable. See id. ("The court found that the test was unreliable because it relied on Clark's self-reporting of his adaptive limitations coupled only with his ex-wife's memories about what he could and could not do

at age 25. . . . [I]t did not account for the incentive of Clark and his ex-wife to misreport Clark's adaptive skills[,] . . . Clark's prior employment[,] and the written materials he produced during prison. . . .").

Tennessee state courts have also analyzed criminal conduct in determining whether a person has significant deficits in adaptive functioning. See Howell v. State, No. W2009-02426-CCA-R3-PD, 2011 WL 2420378, at *17 (Tenn. Crim. App. June 14, 2011); Van Tran v. State, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, at *25 (Tenn. Crim. App. Nov. 9, 2006) ("In the legal setting, the court must not become so entangled with the opinions of psychiatric experts that we lose sight of the nature of the criminal offense itself. We must also not turn a blind eye to the defendant's ability to use society to better his needs.").

The Court finds the latter approach more appropriate and, therefore, declines to follow rigidly the AAIDD User's Guide's admonition that "[t]he diagnosis of ID is not based on the person's 'street smarts', behavior in jail or prison, or 'criminal adaptive functioning.'" AAIDD User's Guide at 20. To be sure, post-incarceration adaptive functioning must be assessed in light of its potentially limited probative value, but the Court will not completely disregard Defendant's criminal and post-incarceration behavior that may lend support one way or another to Defendant's adaptive functioning profile. Especially

where standardized adaptive behavior scales cannot be employed (see infra Part IV.B.2), the Court is hesitant to disregard potentially relevant information completely. AAIDD Manual at 48 ("If a standardized assessment measure cannot be used (e.g., if the assessment cannot be reliably administered per the test's recommended administrative procedures or if there are no reliable respondents to provide adaptive behavior information regarding the assessed person), other sources of adaptive behavior information can be used.").

2. Defendant's Vineland Adaptive Behavior Scales ("VABS")

One of the most widely used standardized scales of adaptive behavior is the VABS, which provides three sub-scores in the domains of communication, daily living skills, and social skills, as well as a composite score that is a combination of the domain scores. (Tr. Oct. 4, 2013, ECF No. 303, at 1112:11-18.) The VABS is scored on a standard score scale with a mean score of 100 and a standard deviation of fifteen, based on a set of general population norms applicable to persons with and without MR/ID. (Tr. Oct. 7, 2013, ECF No. 250, at 82:6-13.) The reliability of the VABS, which is administered in a conversational format where the examiner circles the informant's answers on a survey form, depends upon the informants providing accurate and reliable information. (Tr. Oct. 8, 2013, ECF No. 254, at 367:16-368:21.)

Dr. Reschly administered a VABS to Defendant's sister, Chrystal Montgomery Barrow, on June 8, 2013 (Hr'g Ex. 115A); and another to Defendant's wife, Melissa Montgomery, on June 9, 2013 (Hr'g Ex. 114A). Although Dr. Walker's VABS results are inadmissible for the purposes of this proceeding (see ECF No. 128), they can be considered for impeachment purposes.[55] Dr. Walker administered the VABS to Defendant's mother, Lois Montgomery, on June 12, 2012 (Hr'g Ex. 345 at 03630); another to Defendant's sister, Chrystal Montgomery Barrow, on August 2, 2012 (Hr'g Ex. 345 at 03680); and another to Defendant's wife, Melissa Montgomery, on August 3, 2012 (Hr'g Ex. 345 at 03697). The VABS results from all administrations are summarized in the following chart ("W" represents Dr. Walker, "R" represents Dr. Reschly):

	Overall		ADL		Communication		Social	
	W	R	W	R	W	R	W	R
Wife	59	55	63	59	60	44	59	65
Sister	63	61	52	65	83	51	59	71
Mother	73	---	61	---	75	---	89	---

(Hr'g Ex. 357; see also Tr. Oct. 15, 2013, ECF No. 266, at 1049:2-13.)

Dr. Reschly conceded that Defendant's VABS scores could be skewed because the informants he chose are close family members, and Defendant is facing the possibility of the death penalty.

[55] (See generally Tr. Sept. 30, 2013, ECF No. 288, at 11:6-15:2.)

Tr. Oct. 8, 2013, ECF No. 254, at 369:6-12.) He also noted that there is no test for malingering built into the VABS; instead, the examiner must "evaluate the truthfulness of the reports." (Id. at 369:13-17.) Dr. Reschly did not administer a VABS to Defendant's brother, Adrian Montgomery, although he admitted that he probably would have been a good source of information. (Id. at 370:12-24.) Moreover, Dr. Reschly did not administer Defendant's mother, Lois Montgomery, a VABS, citing her "spe[ech] production challenges." (Id. at 375:21-376:5.)

Dr. Marcopulos stated several reasons for her position that the VABS scores in this case are unreliable. Firstly, she argued that the Vineland scales were not designed to be used retrospectively:

> It was not designed to be used that way. I saw that the defense, Dr. Reschly, used it that way, and so did Dr. Walker. I believe Dr. Reschly referenced Sara Sparrow, the author of the Vineland as his authoritative source on why this is correct and permissible. I did look at the manual, and nowhere in the manual did it say that you could do retrospective analysis and, of course, this means that instead of asking about the individual's current functioning, you know, how would, you know, how does [Defendant] get ready in the morning, and then you would get information about his ability to take care of his personal hygiene and clothing and so forth. I believe it was asked, you know, how did [Defendant] do when he was a child or how did he do when he was [age] 20 or something. Our memory for retrospective events is very, very poor, very unreliable. Furthermore, the standardization sample that was used, used the standard administration which was to ask about current behavior, so there's no normative data in this manual to compare with that type of administration. It's

> called a non-standardizing administration review, thus you can't really use the norms in the table that's provided in the book.

(Tr. Oct. 15, 2013, ECF No. 266, at 1036:2-24.)

Federal courts, including the Sixth Circuit, have recognized the problems inherent in analyzing adaptive behavior retrospectively. See Murphy v. Ohio, 551 F.3d 485, 509 (6th Cir. 2009) ("Dr. Everington's evaluation of Murphy's adaptive skills is unreliable. Though Dr. Everington identified skill deficits she found to be indicative of mental retardation – Murphy's inability to maintain the household or do chores around the house – this information was culled from third parties' assessments of Murphy's abilities twenty-five years earlier."); Clark, 457 F.3d at 447 (upholding state court's decision to discredit an adaptive behavior assessment "administered at age 34 which attempted to retroactively determine [the defendant's] abilities at age 25."). Dr. Marcopulos testified that recall of self-referent information like classmate names, teacher names, street names, and grades declines over time (see Hr'g Ex. 356); "[Y]ou can imagine how much it would be even worse if you were asked information about somebody else that doesn't even concern you." (Tr. Oct. 15, 2013, ECF No. 266, at 1037:5-1038:20).

Secondly, Dr. Marcopulos emphasized the inconsistency of Defendant's highly discrepant VABS scores. (Id. at 1050:17-24.)

For example, in Dr. Walker's VABS, Defendant's wife rated Defendant with a score of 60 in communication (impaired), while his sister rated him with a score of 83 (low average). (Id. at 1051:1-17.) Meanwhile, Dr. Reschly reported much lower scores: Defendant's wife rated him with a score of 44 in communication, sixteen points lower than her prior rating in Dr. Walker's VABS, and Defendant's sister rated him with a score of 51 in communication, thirty-two points lower than her prior rating. (See Hr'g Ex. 357.) Dr. Marcopulos described these discrepancies as "kind of random" and "very dramatic." (Tr. Oct. 15, 2013, ECF No. 266, at 1052:14-21.) Someone with a score of 44 in communication would be in the "moderate to severe range of mental retardation. These are people who are institutionalized, need 24-hour care, probably somebody who would have a communication level of maybe a two-year old." (Id. at 1053:5-12.) In Dr. Marcopulos's estimation, these Vineland "scores are not reliable, and I don't feel that I can trust them as being reliable indices of [Defendant's] adaptive functioning because they are not reliable within the person, they're not reliable across the persons, and the test was administered in an unstandardized way using retrospective data." (Id. at 1052:23-1053:4.)

The manner in which Dr. Reschly's VABS were administered is another reason for skepticism as to the reliability of the

results. For example, Dr. Reschly administered Melissa Montgomery the VABS at a Starbucks location in Smyrna, Tennessee, although he stated that "[t]he corner that we were in was indeed quiet and private."[56] (Tr. Oct. 8, 2013, ECF No. 254, at 391:7-25.) Dr. Reschly also confirmed at the hearing that defense attorney Susan Marcus, Esq., was present at the Starbucks during the administration of the VABS to Melissa Montgomery. (Id. at 392:1-5.) Although Dr. Reschly assured the Court that the ethical guidelines for psychologists are silent regarding third-party observers and adaptive behavior inventories, and that Ms. Marcus did not participate in the VABS sessions "in any way," there cannot help but be serious concern about the possible effect of third-party influence on VABS results.[57] (Id. at 392:19-25; Tr. Oct. 8, 2013, ECF No. 253, at 460:4-7.) Moreover, the Court notes that on Dr. Reschly's original VABS record booklet for Melissa Montgomery, in the space next to "Does the individual [being examined] have any disabling conditions?," Dr. Reschly wrote "ID [intellectual disability]." (See Hr'g Ex. 114A.) This adds to the Court's

[56] According to Dr. Reschly, administering a VABS requires that "you go some place where both individuals can be heard easily and in which there's not undue distractions. So in [Dr. Reschly's] judgment, the situation was adequate." (Tr. Oct. 8, 2013, ECF No. 254, at 393:1-6.)

[57] In an August 9, 2012, letter, Dr. Walker wrote to Defendant's mother as follows: "the lawyers are trying to establish the fact of [Defendant's] mental limitations." (Hr'g Ex. 187; see also Tr. Oct. 8, 2013, ECF No. 254, at 376:25-377:23.) Dr. Marcopulos asserted that this kind of third-party influence is not "a good idea if you want to get honest, unvarnished truthful reporting." (Tr. Oct. 15, 2013, ECF No. 266, at 1034:19-1035:12.)

doubt about whether Dr. Reschly approached these VABS administrations with an open mind, rather than preconceived notions as to how he planned to diagnose Defendant.[58]

The Court agrees with Dr. Marcopulos and, therefore, will assign no weight to Dr. Reschly's VABS scores. Dr. Reschly asked Chrystal Montgomery Barrow to recall details of Defendant's functioning during his twenties - nearly thirty years ago. The Court cannot rely on Mrs. Barrow's scores as an indicator that it is more likely than not Defendant had adaptive behavior deficits, especially in light of the fact that Mrs. Barrow's scores deviated over thirty points from one test administration to the next. Although Melissa Montgomery's scores do not suffer from the pitfalls of retrospective unreliability (see Hr'g Ex. 107 ¶ 67), they nevertheless are

[58] The Government's post-hearing brief (ECF No. 308 at 26) highlights a May 6, 2013, opinion from the Circuit Court of Copiah County, Mississippi, which also raised concerns as to the reliability of Dr. Reschly's analysis:

> This Court is not persuaded by Dr. Reschly's findings in the area of adaptive functioning, as many of his opinions did not appear to have a substantial scientific basis, but rather were personal opinions which did not necessarily show the deficit assigned to them, and could readily be interpreted differently. Dr. Reschly's report and testimony appeared [to] lack scientific objectivity as to adaptive functioning. His report does not indicate any particular method of questioning the interviewees so as to obtain reliable, unbiased information. He appeared to have accepted anything he was told by informants, without critical analysis. In fact, he [testified] that he believed the interviewees were telling the truth and had no reason to lie to him.

(Chase v. State, No. 13, 941-CR, slip op. at 20-21 (Cir. Ct. Copiah Cnty., Miss. May 8, 2013) (ECF No. 308-1 at PageID 7247-7248).) Dr. Reschly has made similar assertions in this case that VABS informants like Melissa Montgomery seemed to be credible. (See Tr. Oct. 8, 2013, ECF No. 254, at 392:9-18; see also supra Part III.B.1.b.)

noticeably discrepant from one test administration to another (see Hr'g Ex. 357). Aside from Dr. Reschly's assurances, the Court also has no way of knowing whether these informants were exaggerating. The Court finds Dr. Reschly's assurances insufficient. (See supra Part III.B.1.b.)

In conclusion, there are no reliable standardized adaptive behavior assessments available to the Court in this matter. Cf. Jiménez-Benceví, 934 F. Supp. 2d at 372 (criticizing a "fundamentally unreliable" VABS administration to the defendant's sister, who "had a clear incentive to provide answers that were helpful to her brother" and derived from memories that "were at least ten years old, raising doubts about their reliability."). Experts for the Government did not administer adaptive behavior scales, citing a lack of available, knowledgeable informants.[59] The Court must, therefore, examine the record for other evidence of Defendant's adaptive behavior deficits. (See Tr. Oct. 15, 2013, ECF No. 266, at 1030:24-1031:2; AAIDD Manual at 48.) In doing so, the Court is guided by the principle of "convergent validity," i.e., "consistent themes. . . . You want to look at all the pieces of evidence

[59] Dr. Marcopulos testified that she was unable to administer an adaptive behavior scale because respondents who knew Defendant well enough were unavailable to her. (Tr. Oct. 15, 2013, ECF No. 266, at 1029:23-1030:24.) She attempted to administer a Survey of Independent Behavior, Revised ("SIB-R") to Defendant's co-worker, Donzaleigh Garner, but Ms. Garner "didn't have the contact, level of contact with [Defendant] to be able to answer the questions." (Tr. Oct. 16, 2013, ECF No. 267, at 1424:13-1425:18.) According to Dr. Marcopulos, the SIB-R is "less susceptible to bias" than the VABS. (Id. at 1456:3-13.)

and try to come up with the most coherent explanation for the patterns that you see in the history." (Tr. Oct. 15, 2013, ECF No. 266, at 1040:18-1041:4.)

3. Conceptual Skills

According to the AAIDD Manual and the DSM-V, the conceptual skills domain of adaptive behavior involves language skills, reading and writing ability, understanding of money, time, and number concepts, and acquisition of practical knowledge, problem solving, and judgment in novel situations. See AAIDD Manual at 44; DSM-V at 37. The AAIDD suggests that persons with mild MR/ID are likely to have the following significant limitations in the conceptual skills domain:

- Impaired, inconsistent, or immature quality of independent planning, problem solving, or thinking abstractly
- Limited ability to generate possible solutions and/or choose a good solution when confronted with a complex problem or situation
- Difficulty comprehending or using effectively complex ideas or symbols such as time and mathematical functions
- Difficulty effectively communicating complex thoughts or ideas
- Difficulty in self-direction as reflected in limited ability to independently arrange or plan future life activities such as advanced job training

- Difficulty anticipating cause and effect, understanding and planning for consequences, and using logic to understand the world

AAIDD User's Guide at 14-15. The Court examines the evidence as to each conceptual skill area below.

a. Language Skills

Defendant has not carried his burden of proving by a preponderance of the evidence that he suffers from significant language skill deficits.

Defendant's academic achievement testing and IQ testing demonstrate that one of his relative strengths is his verbal ability. For example, on his November 20, 2012, Woodcock-Johnson III results, Defendant obtained scores of 74 (borderline) in oral language and 86 (low average) in broad written language. (See Hr'g Ex. 119 at 00028; Hr'g Ex. 380.) At the age of fourteen, Defendant received a Verbal IQ score of 79 on the WISC-R, which is also within the borderline range. (See Hr'g Ex. 118 at 03628.)

According to Dr. Marcopulos, Defendant obtained scores in the low average range on vocabulary testing she administered to him:

> [Defendant's] receptive vocabulary (his ability to understand the meaning of words in conversational speech) was in the low average range compared with same age adults (PPVT-4 Standard Score = 80, Percentile Rank = 9, Age Equivalent = 14.1 years, Grade Equivalent = 8.3). His expressive vocabulary (his ability to use words accurately in conversational

> speech) was also in the low average range (EVT-2 Standard Score = 80, Percentile Rank = 9, Age Equivalent = 12.2 years, Grade Equivalent = 6.5). In summary, his language skills are [] in the low average range compared with same age adults.

(Hr'g Ex. 119 at 00030.)

Defendant's achievement test records in grade school indicate that he was below grade level on most subjects each year, including language. (See Tr. Oct. 7, 2013, ECF No. 250, at 61:11-17; Hr'g Exs. 103, 119 at 00007-00008.) Defendant's grade school achievement test scores, however, are inconsistent. For example, in the second grade, Defendant's language score on the Stanford Achievement Test was in the sixteenth percentile; in the third grade, Defendant's score dropped to below the first percentile; and in the fourth grade, Defendant's score rose to the twelfth percentile. (See Hr'g Ex. 103.) Even Defendant's spelling scores, which were generally his highest, were subject to inexplicable fluctuation; in third grade, Defendant's spelling score was in the fortieth percentile; by the fifth grade, it had dropped to the second percentile; and by the ninth grade, it had risen to the seventy-forth percentile. (See id.)

Defendant's recent interview with Dr. Welner also demonstrated that he has a more sophisticated set of language skills than one would expect from a person with mild MR/ID (i.e., "approximately 1%" of the general population). See DSM-V at 38; AAIDD User's Guide at 14 (stating that persons with

significant deficits in conceptual skills will have "[d]ifficulty effectively communicating complex thoughts or ideas"). Defendant had no trouble conversing about complex topics and understands the gravity of his legal situation. In his interview with Dr. Welner, Defendant expressed caution about discussing his previous interrogation after he recognized that Dr. Welner is "working for the prosecution." (Hr'g Ex. 252 at 04705.) Defendant stated, "I'm going to keep that between me and my attorney," and recognized the potential consequences of this hearing: "I mean they're trying to kill me doc. They're trying to kill me. They want the death penalty. . . . I mean I know you've got a job to do but I got to protect my rights." (Id. at 04706-04707.)

Thus, the Court finds that Defendant's academic record, 1978 Verbal IQ, and recent vocabulary testing preclude a finding that he has significant deficits in his language skills. Cf. Davis, 611 F. Supp. 2d at 502 (finding that the defendant had "severe language problems" and had been "functionally illiterate for many years"); Van Tran, 2006 WL 3327828, at *21 (noting that "the Petitioner's score on an expressive vocabulary test [was] the lowest score that the norms would go to" (internal quotation marks omitted)).

b. Reading and Writing Ability

Defendant has also failed to prove by a preponderance of the evidence that he suffers from significant adaptive deficits in the area of reading and writing.

Again, Defendant's reading and writing ability is one of his strengths. (See Tr. Oct. 10, 2013, ECF No. 260, at 757:19-25.) On Dr. Marcopulos's November 20, 2012, administration of the Woodcock-Johnson III, Defendant received the following relevant scores: 82 in broad reading (low average); 86 in broad written language (low average); 82 in written expression (low average); 88 in letter-word identification (low average); 80 in reading fluency (low average); 87 in story recall (low average); 90 in spelling (average); 79 in writing fluency (borderline); passage comprehension (low average); 90 in writing samples (average); and 100 in delayed story recall (average). (See Hr'g Ex. 119 at 00028; Hr'g Ex. 380.) In other words, on every relevant measure of reading and writing ability, Defendant performed at least at the borderline level and above.

According to Ms. Gullett, Defendant was in the lowest level ability group in school based on his achievement test results. (Tr. Oct. 2, 2013, ECF No. 290, at 423:18-424:15.) Defendant's grade school achievement test scores in the areas of reading and writing were inconsistent. Defendant's paragraph meaning score on his second grade Stanford Achievement Test was at the twenty-

second percentile, but in the third grade, it dropped to below the first percentile. (See Hr'g Ex. 103; Tr. Oct. 2, 2013, ECF No. 290, at 429:17-23.) Similarly, Defendant's word knowledge score at the eleventh percentile in the fifth grade dropped to the second percentile in the sixth grade. (See Hr'g Ex. 103.)

Multiple pieces of evidence demonstrate that Defendant can read at least at a seventh-grade level. Firstly, Dr. Parr's 1978 report states: "The Wide Range Achievement Test shows [Defendant] to be reading at the 7.4 grade level (at a percentile rank of 25), and spelling at the 6.2 grade level, which is at about the fourteenth percentile." (Hr'g Ex. 118 at 03628.) Secondly, the Miranda warnings Defendant read out loud during his videotaped confessions are written at a seventh-grade level according to readability analysis conducted by Dr. Welner. (Tr. Oct. 8, 2013, ECF No. 254, at 406:19-407:3; Hr'g Ex. 440.) Finally, Dr. Marcopulos testified that Defendant was able to complete the MMPI-2, which requires an eighth-grade reading ability, without issue. (Tr. Oct. 15, 2013, ECF No. 265, at 1122:1-14.)

Dr. Reschly testified that Defendant "was regarded as ordering more books from Barnes & Noble than most other inmates." (Tr. Oct. 7, 2013, ECF No. 250, at 71:2-7.) Dr. Reschly's report states, however, that "what [Defendant] reads is questionable regarding quality and reading level."

(Hr'g Ex. 107 ¶ 81.) In order to receive books while incarcerated, Defendant had to fill out order forms and make a commissary withdrawal. According to Mr. Pierce, Defendant was able to complete this process properly, and he "definitely ordered more books . . . than the normal inmate. . . . [M]aybe sometimes two or three books a month." (Tr. Oct. 11, 2013, ECF No. 284, at 273:23-275:12.)

Dr. Reschly conducted readability analysis of one of Defendant's books, The Prada Plan 3: Green-Eyed Monster, concluding that the book "is regarded as easy reading" and estimated at a reading level of "fourth grade, sixth month of school."[60] (Tr. Oct. 7, 2013, ECF No. 250, at 72:6-10; 74:10-19; 75:3-7; Hr'g Ex. 120.) This does not demonstrate that Defendant has significant deficits in his reading ability. The evidence was that even USA Today is written at a fifth-grade level. (See Tr. Nov. 13, 2013, ECF No. 306, at 275:9-15.) It is more probative that Defendant can read books like One Prayer Away,

[60] Dr. Reschly testified that the Flesch Kincaid Readability Analysis is available online at www.read-able.com and is also incorporated into the Microsoft Word software. (Tr. Oct. 7, 2013, ECF No. 250, at 72:3-5; 72:24-73:6.) Dr. Reschly's readability analysis cites a Wikipedia definition of "urban fiction" as follows:

> Urban fiction, also known as street lit, is a literary genre set, as the name implies, in a city landscape; however, the genre is as much defined by the socio-economic realities and culture of its characters as the urban setting. The tone for urban fiction is usually dark, focusing on the underside of city living. Profanity, sex, and violence are usually explicit, with the writer not shying away from or watering-down the material.

(Hr'g Ex. 120 at 9.)

which Dr. Welner's readability analysis indicates is written at the 7.8 grade level. (Tr. Oct. 21, 2013, ECF No. 275, at 1645:1-13; Hr'g Ex. 440.) This is especially true in light of testimony from Dr. Reschly that persons with mild MR/ID "generally function at the sixth grade level or below."[61] (Tr. Oct. 4, 2013, ECF No. 303, at 1111:24-1112:1.)

Defendant's La Vergne Public Library records indicate that, between 2008 and 2010, he checked out the following books: The Struggle for Black Equality, 1954–1992, Hate Crime: The Story of a Dragging in Jasper, Texas, and The Black Laws: Race and the Legal Process in Early Ohio. (Tr. Oct. 8, 2013, ECF No. 254, at 285:2-25; Hr'g Ex. 161 at 02615.) Regardless of whether Defendant read them himself, the record is replete with evidence that Defendant has reading ability beyond the level of a person with mild MR/ID.

There is also ample evidence in the record demonstrating Defendant's writing abilities. Firstly, Exhibit 330 contains a copy of a letter from Defendant to inmate Michael Johnson requesting information regarding "how to make a shank out of one of the trays. I got one over here, I am going to make a move

[61] Dr. Tassé's report echoed the statement that most persons with mild MR/ID can achieve a sixth-grade reading level: "many adults with mild intellectual disability can learn to read and write at a 6th grade reading level." (Hr'g Ex. 455 at 6.)

when an opportunties [sic] arrived at that courthouse."[62] (Hr'g Ex. 330 at 03223.) Secondly, Exhibits 407-17 are copies of writings on yellow legal pad paper recovered from Defendant's cell on September 14, 2012. The writings request titles of the U.S. Code and criminal procedure rules, contain case law quotes, contain letters to Defendant's family, and contain commissary calculations.[63] (Tr. Oct. 8, 2013, ECF No. 254, at 402:8-419:25; Hr'g Exs. 407-17.)

Finally, Defendant earned "C" grades and six hours of college credit in "Core English I" and "Core English II" during his time at UT-Martin.[64] (Hr'g Ex. 116 at 01525.) According to Dr. Welner, although a person with mild MR/ID can obtain a high school diploma, obtaining college credits would be "harder . . . to fathom." (Tr. Oct. 22, 2013, ECF No. 278, at 1784:5-11; 1787:4-8.) Citing the National Transitional Longitudinal Study-2 ("NLTS-2," Hr'g Ex. 456 at 19), Dr. Tassé testified that some persons with mild MR/ID can and do attend four-year colleges. (Tr. Nov. 13, 2013, ECF No. 306, at 282:18-284:1.) According to the NLTS-2, however, very few (fewer than thirty out of 12,000)

[62] The United States Postal Service Forensic Laboratory confirmed that Exhibit 330 contains Defendant's handwriting. (Hr'g Ex. 330 at 03228-03229.)
[63] On cross-examination, Mr. Bruce testified that he does not know who wrote the letters and other documents found in Defendant's cell, only that they were found in Defendant's cell. (Tr. Oct. 17, 2013, ECF No. 286, at 447:6-450:6.)
[64] Defendant's post-hearing brief incorrectly states that Defendant "was only successful in earning college credits in physical education courses." (See ECF No. 307 at 13.)

persons with MR/ID ever earn college credits. (Tr. Nov. 13, 2013, ECF No. 306, at 436:10-21; 441:5-13; Hr'g Ex. 464 at 45.)

Defendant has not proven by a preponderance of the evidence that he has significant adaptive functioning limitations in the area of reading and writing skills.

c. Understanding of Money, Time, and Number Concepts

Defendant has not shown by a preponderance of the evidence that his understanding of money, time, and number concepts constitutes a significant limitation in adaptive functioning.

According to Dr. Reschly, Defendant's "ability to handle and understand money was impaired." (Tr. Oct. 7, 2013, ECF No. 250, at 75:19-20.) Dr. Reschly focused on the portion of Dr. Welner's interview in which Defendant "was asked to subtract 7 from 100 progressively, so 100 minus 7 is 93, 93 minus 7 is 86, et cetera; and [Defendant] was unable to do that." (Id. at 75:21-24; Hr'g Ex. 252 at 04484-04486.)

Despite this example, the record demonstrates Defendant's grasp of money concepts in many ways. For example, Mr. Pierce testified that Defendant was able to fill out forms to receive commissary items and appropriately maintained his commissary balance while incarcerated. (Tr. Oct. 11, 2013, ECF No. 284, at 288:21-292:3.) According to Mr. Pierce, Defendant ordered commissary items "on a weekly basis," and he "was always really good at [] being able to know that he had money on his books and

know that he couldn't spend more than the allowed amount or spend more than what he had in his account."[65] (Id. at 276:12-277:2.)

Moreover, Defendant had a checking account in his own name at First Tennessee Bank, removed his wife from the account at various times, and wrote checks on the account. (See Tr. Oct. 8, 2013, ECF No. 254, at 312:17-313:5; Hr'g Exs. 171-76.) He also had a savings account at Southeast Financial Credit Union and several credit cards. (Tr. Oct. 8, 2013, ECF No. 254, at 316:19-22; Tr. Oct. 17, 2013, ECF No. 286, at 497:1-11; Hr'g Exs. 423-25.)

Defendant further displayed his ability to grasp money concepts with regard to his mortgage payments. According to Inspector Link, payments ceased being made on Defendant and Melissa Montgomery's Bank of America mortgage on June 1, 2010. (Tr. Oct. 17, 2013, ECF No. 286, at 487:21-488:2.) Defendant's Bank of America records indicate that he filed a hardship affidavit with the bank, checking a box that reads, "[m]y monthly debt payments are excessive and I am overextended with my creditors," and adding the following handwritten comment: "My wife and I are separted [sic], my wife move out 6 month ago." (Hr'g Ex. 273 at 02110; see also Tr. Oct. 17, 2013, ECF No. 286, at 488:5-489:3.)

[65] Exhibits 415 and 416 contain copies of arithmetic calculations recovered from Defendant's cell. (See Hr'g Exs. 415-16.)

Finally, Defendant has no problem grasping time concepts. Melissa Montgomery testified that Defendant wore both analog and digital watches. (Tr. Oct. 2, 2013, ECF No. 290, at 598:2-6.) She testified that Defendant can tell time on an analog clock. (Id. at 598:7-10.)

Thus, Defendant has not demonstrated to the Court by a preponderance of the evidence that he has significant deficits in understanding money, time, and number concepts. Cf. Hardy, 762 F. Supp. 2d at 887 (noting that the defendant relied on a third party "to make all of his personal purchases.").

d. Acquisition of Practical Knowledge, Problem Solving, and Judgment in Novel Situations

Defendant has failed to demonstrate to the Court by a preponderance of the evidence that he has significant limitations in his ability to acquire practical knowledge, solve problems, or apply judgment in novel situations. To the contrary, Defendant's work history contains numerous examples of Defendant's ability to think creatively when faced with job challenges.

For example, according to Mr. Driver's April 2007 evaluation of Defendant's job performance at the DeBerry Special Needs Facility:

> CO CHAST[A]IN MONTGOMERY HAS ONE OF THE MOST TAXING AND STRESSFUL POSITIONS THAT CAN BE ASSIGNED AT [DSNF]. HE MAINTAINS A HIGH WORK STANDARD THAT FEW CAN COPY. HIS DEALINGS WITH INMATES AND STAFF ON A

> ROUTINE BASIS HELP TO KEEP ORDER AND DISCIPLINE ON THE MAX UNIT THAT HE IS ASSIGNED. HE FOLLOWS ALL INSTRUCTIONS AND ACCEPTS CHANGES IN PROCEDURE WITHOUT COMPLAINT. HE MAKES REGULAR SUGGESTIONS ALONG THE CHAIN OF COMMAND THAT HELPS ENSURE THE SAFETY AND SECURITY OF THE POD. ONE SUGGESTION COMES TO MIND THAT CHANGED A MANNER OF ESCORTING INMATES IN THE AREA THAT RAISED OUR SECURITY LEVEL IN A WAY THAT WAS A BOON TO ALL. CO MONTGOMERY HAS EASILY EARNED THE RATING OF "EXCEPTIONAL" DURING THIS EVALUATION CYCLE.
>
> CPL. THOMAS DRIVER

(Tr. Oct. 11, 2013, ECF No. 284, at 239:24-240:19; Hr'g Ex. 156 at 00595.) Driver explained that Defendant suggested a new policy for handcuffing inmates to escort them throughout the units: "[W]e used to handcuff guys in the front. But their hands were still available to do and move around. So [Defendant] made the suggestion that we handcuff them behind their back. So now we had better control of the inmate. . . ." (Tr. Oct. 11, 2013, ECF No. 284, at 240:20-241:8.) On cross-examination, Driver testified that before Defendant's suggested change in policy to handcuff inmates behind the back, "[t]he policy did not specify" a method for handcuffing. (Id. at 253:16-254:6.)

Defendant's job working security at Motel 6 is also illustrative of his problem solving skills in complex situations. Defendant was responsible for mollifying Motel 6 by keeping drug dealers and prostitutes at the hotel (to maintain their business), but inside their rooms (to avoid running off law-abiding customers). (See Tr. Oct. 21, 2013, ECF No. 272, at

1578:21-1579:24.) As the Court noted supra Part III.B.1.d, Defendant's ability to handle this task by talking to the drug dealers and prostitutes demonstrates a sophisticated understanding of a complex situation and critical communication skills. (See id. at 1579:19-24; 1580:13-25.) According to Dr. Welner, Defendant handled this "unstructured environment" with "cognitive flexibility" by adopting a "don't shoot the messenger" approach. (Id. at 1580:13-25; Tr. Oct. 22, 2013, ECF No. 278, at 1830:6-1831:2.)

Dr. Welner testified that Defendant disliked his Nashville Convention Center security position because the lack of set rules as to admission into the Convention Center meant that, no matter what Defendant did, either Defendant's boss or the customer would be upset: "he said you can't win." (Tr. Oct. 21, 2013, ECF No. 272, at 1581:12-1582:22.) Dr. Welner testified that Defendant's problem with the Convention Center was the no-win situation, not having to deal with clients, because Defendant "dealt with clients at Motel 6." (Tr. Oct. 22, 2013, ECF No. 278, at 1826:5-20.)

Although Defendant's mother testified that Defendant "was reluctant to try new things or new tasks," like riding a bike or driving a go-cart (see Tr. Oct. 1, 2013, ECF No. 289, at 217:14-15), the Court is not convinced by a preponderance of the evidence that these examples rise to the level of significant

limitations in this area. (See AAIDD Manual at 43 (noting that adaptive behavior limitations must be significant); Tr. Oct. 15, 2013, ECF No. 266, at 963:24-964:3; 1058:11-23 (Dr. Marcopulos: MR/ID is a "pervasive developmental disorder," which should yield "multiple, multiple examples, some big, some small of that person not functioning like their peers and needing more help").)

e. Conclusion as to Conceptual Skills

While Defendant presented evidence suggesting that certain of his conceptual adaptive skills are below average, he has not satisfied his burden of proving by a preponderance of the evidence that his limitations are significant. His language, reading, and writing skills are too developed for the Court to deem them "significant limitations in adaptive behavior," as required by the clinical literature. Defendant has also displayed an adequate grasp of money, time, and number concepts throughout his lifetime. Finally, the record supports Defendant's ability to think abstractly in novel situations, especially in the occupational context. Cf. AAIDD User's Guide at 14 (stating that persons with significant limitations in conceptual skills will have "[l]imited ability to generate possible solutions and/or choose a good solution when confronted with a complex problem or situation").

4. Social Skills

The social skills domain of adaptive functioning involves interpersonal communication skills and friendship abilities, social responsibility, self-esteem, gullibility (avoiding being victimized), and naïveté, following rules and obeying laws, and social judgment and social problem solving. See AAIDD Manual at 44; DSM-V at 37. Persons with mild MR/ID are expected to manifest the following significant limitations in the conceptual skills domain:

- Impaired social judgment and learning from experiences, especially concerning interactions with other people
- Impaired ability to understand and follow rules and laws in complex situations
- Difficulties in working effectively with others toward group problem solving and decision making
- Inflexible and concrete thinking and acting during complex social problems
- Increased vulnerability and victimization, especially concerning who can be trusted, whom to follow, and what circumstances are safe
- Inadequate social responding, social judgment, and self-direction
- Tendency to deny or minimize the disability to their detriment
- Inappropriate desire to please authority figures based on limited understanding of situation
- Gullibility, naïveté, and suggestibility in interactions with others

AAIDD User's Guide at 15. The Court examines the evidence as to each social skill area below.

a. Interpersonal Communication Skills and Friendship Abilities

The Court finds that Defendant has not shown by preponderant evidence that his interpersonal communication skills and friendship abilities constitute significant limitations in his adaptive functioning.

According to Mrs. Lois Montgomery, Defendant "was slow on communication. He didn't talk much to people outside the family." (Tr. Oct. 1, 2013, ECF No. 289, at 194:19-22.) Defendant's mother testified that Defendant was shy around people outside his family, and "observed most of the time, he observed them." (Id. at 195:13-18.) Defendant would only engage in conversations after a period of observation. (Id. at 195:21-196:1.) Moreover, Defendant did not like to be teased, and would not tease back. (Id. at 196:24-197:6.) Mrs. Barrow testified that Defendant took teasing and joking from his cousins too seriously, and that Defendant would go for periods of up to a week or two without speaking to his family. (Id. at 291:5-8; 291:17-292:13.)

Defendant did not communicate much with his mother: "I had to ask the questions, and he would answer them with a short answer. Yes or no, I don't know. No real[] conversation

between us like that, no." (Id. at 206:9-15.) She testified that, when he was at work, Defendant "didn't talk with anybody or anything, just in and out. I didn't never see him socialize with nobody at work the whole time I was there. I just saw him when I was coming off and he was coming in, and he didn't talk to none of his co-workers." (Id. at 241:19-24.)

Defendant's wife also described him as "an introverted type of person, . . . we didn't really have people over. We didn't really just go over to other people's homes or . . . engage with other couples and functions and stuff, we didn't really do that." (Tr. Oct. 2, 2013, ECF No. 290, at 586:9-14.) She testified:

> [Defendant] never was a big talker anyway. You know, during the course of our marriage, you know, it was an issue. We would go, you know, sometimes, . . . it may be a week that we don't even talk, I mean unless it's something that you got to say, . . . and again we had been married for a long time, and by the time, you know, it was getting to the point that I actually left. You know, we had went like a month not even saying nothing.
>
> . . . .
>
> And ultimately before I left, I mean we had went like, a two-month stint, unless it was something that was a dire thing, not talking.

(Id. at 587:1-21.) Mrs. Melissa Montgomery testified that Defendant was never a good communicator – "he always struggled with communicating his feelings and stuff." (Id. at 588:9-11.)

Defendant's work supervisor, Robert Bell, also testified as to Defendant's communication deficits. He testified that Defendant's written communication skills were poor. (Tr. Oct. 3, 2013, ECF No. 291, at 764:21-23.) According to Mr. Bell, Defendant "was always quiet. He was never real talkative with me as a supervisor. If issues were to arise, you had to . . . ask the questions on is this what happened, did this go on to get a response." (Id. at 764:12-16.) He testified that Defendant "communicated, in my opinion, language being used, probably eighth grade level." (Id. at 765:5-6.) On cross-examination, Bell testified that despite his direct testimony that Defendant had poor communication skills (id. at 819:3-7), his 2004 job performance evaluation reflects that Defendant received a rating of "exceptional" under the communication criterion. (Id. at 819:8-19; Hr'g Ex. 99 at 00831.) He testified that some officers got bad reports, that he has given some, and that people have been terminated based on poor evaluations. (Tr. Oct. 3, 2013, ECF No. 291, at 851:22-852:2.) Bell testified that if Defendant had performed poorly, he would have reported it. (Id. at 852:3-6.)

Despite these descriptions of Defendant's inability to communicate, however, there is plenty of evidence in the record that Defendant could and did communicate and maintain intimate social relationships. For example, Fred Estes, Defendant's co-

worker at DSNF, described himself as a very good friend of Defendant's. (Tr. Oct. 4, 2013, ECF No. 303, at 999:14-23.) Mr. Estes testified that he and Defendant would speak on the phone late at night and that Defendant had "somewhat" of a good sense of humor. (Id. at 999:24-1000:11.)

Estes and Defendant went out together on two occasions, once to a restaurant, and another time to a club in downtown Nashville. (Id. at 963:20-24; 1000:25-1001:3.) According to Estes, Defendant "was a role model, he g[a]ve me advice, and just basically, you know, like if I was needing someone to talk to or something, he was there for me." (Id. at 964:6-10.) Regarding the advice he received from Defendant, Estes testified:

> I mean it was very simple, you know, just like if I had a question or if I needed some advice like at home or something, you know, [Defendant] just tell me something real simple, which helped me out a lot. Basically like, you know, if I be like, man, you know, I ain't never really had a father figure when I was coming up, and he was like, you know, you can't let that bring you down. You still got to live your life, just something very simple, you know.
>
> . . . .
>
> [I]t was real meaningful to me.

(Id. at 964:11-22.) Estes testified that he thought Defendant was a caring person. (Id. at 964:23-24.) On cross-examination, Estes testified that he "loved [Defendant]." (Id. at 1000:12-13.)

The closeness of Defendant's relationship with Estes is underscored by his two phone calls to Estes following his arrest. (Id. at 1023:16-24.) Estes received the calls while he was in new corporal training with Corporal McClenton in Tullahoma, Tennessee. (Id. at 1026:21-1027:7.) Corporal McClenton was "another co-worker . . . that [Defendant] talked to." (Id. at 1024:12; 1026:21-22.) Estes testified that he recognized the voices on two telephone calls played in open court from Exhibit 104. One call was on February 17, 2011, and another on February 19, 2011.[66] (Id. at 1026:1-22; 1028:16-1029:12; Hr'g Ex. 104.)

Estes testified that he recognized his voice, Defendant's voice, and Corporal McClenton's voice on the call from February 17, 2011. (Tr. Oct. 4, 2013, ECF No. 303, at 1026:14-25; Hr'g Ex. 104.) On the call, Estes informs Defendant that he plans to visit him in jail to put money on Defendant's books, and asks Defendant if he needs Estes to do anything for him. (Hr'g Ex. 104 at 01:48.) Defendant informs Estes that his son was killed, and says, "I'm looking at so much shit, uh, it's crucial right now." (Id. at 02:16.)

Defendant tells Estes on the call that he cannot talk on the phone because the conversation is recorded. (Id. at 02:48.)

[66] The disc containing the phone calls was marked and admitted into evidence as Exhibit 104. (Tr. Oct. 4, 2013, ECF No. 303, at 1027:13-21; Hr'g Ex. 104.)

Defendant also tells Estes that he is facing charges, and that "it's real crucial . . . they're trying to put some murders on me and shit." (Id. at 04:06.) Defendant tells Estes that he did not confess to the murders. (Id. at 04:26.)

On the call, Corporal McClenton tells Defendant to keep things to himself, and tell the police to go out and look for the perpetrator of the murders. (Id. at 09:00.) Estes tells Defendant that he considers Defendant like a brother or like a father, and assures him, "I'm here, homeboy." (Id. at 14:19, 14:49.) This call and Estes's testimony demonstrate to the Court a level of fondness and mutual admiration that belies a finding that Defendant has significant deficits in his ability to communicate and form friendships.

On February 20, 2011, Defendant placed another call from jail to a co-worker, Joyce Walker. (Tr. Oct. 17, 2013, ECF No. 286, at 505:4-507:7; Hr'g Ex. 426.) On the call, Ms. Walker offers to help Defendant's mother, wife, and children and says, "I love you 'til death do us part." (See Hr'g Ex. 426 at 03:32.) Again, these communications display a fondness that speaks to Defendant's ability to cultivate intimate friendships. According to Dr. Welner, it is significant that Defendant expresses warmth to Ms. Walker on the call and then gets upset about a supposed friend lying to him, "so there's a certain management of relationships that is going on in that discussion.

That, in my professional opinion, is . . . intelligent." (Tr. Oct. 21, 2013, ECF No. 272, at 1609:5-25.)

Similarly, Dr. Welner testified that Defendant's communication problems as described by Melissa Montgomery do not reflect Defendant's inability to communicate given his interactions with inmates and co-workers: "the level of intimacy of [Defendant's] conversations with [one] of his co-workers, Donzaleigh Garner, was such that they were talking three to four times a day." (Tr. Oct. 21, 2013, ECF No. 272, at 1588:13-25; Hr'g Ex. 189 at 02832 ("[Ms. Garner] described herself and [Defendant] as really good friends who talked on the phone three or four times a day.").)

Defendant's job as a correctional officer required him to use communication skills. According to Mr. Driver, when inmates would attempt to harm themselves, "usually we talked with them. Most [of] the time it was attention seeking behavior. In a lot of cases they didn't know any better, but you try to monitor what access they had to thing[s] that they could harm themselves with, like plastic forks and spoons." (Tr. Oct. 11, 2013, ECF No. 284, at 226:9-19.) Driver further testified that inmates would sometimes try to harm other inmates:

> Yes. Sometimes they were allowed out in groups just to see how they could act socially with each other. Because the idea is to move them on to another level. And if they can't get along with other people,

> then they really didn't need to be around other people.
>
> So in some cases it would be minor squabbles and one would try to assault another, and so you had to be on top of that and keep them separated from each other.

(Id. at 227:1-10.)

According to Dr. Welner, during his interview of Defendant, Defendant was "well related in a sense that I could communicate with him as someone who would respond to nuances the way folks with certain psychiatric diagnoses cannot." (Tr. Oct. 17, 2013, ECF No. 271, at 1515:17-20.) He testified that the interview involved "give and take," that Defendant was likeable and polite, and that Defendant was vigilant – "in a moment if he has a discomfort, he will shut something down, and he was comfortable in setting those boundaries and being forceful when he felt that he needed to be." (Id. at 1515:23-1516:24.) Dr. Welner testified that he spoke with Defendant as he "would speak to a peer. . . . [Defendant's] vocabulary was certainly adequate. . . . His speech was not pressured, which is something that you might see in some psychiatric syndromes." (Id. at 1525:22-1526:8.) He testified that Defendant's "speech was not loud, it was of a normal volume. It was of a normal rate, and in terms of his thoughts, they proceeded in sequence." (Id. at 1526:9-11.) He testified that Defendant sometimes spoke in great depth and detail, and was at other times "cautious and

guarded, especially if he wasn't clear where the discussion was going." (Id. at 1526:16-19.) Dr. Welner testified that Defendant also expressed an interest in political topics and showed a sense of humor, which is a sign of enhanced intellect. (Id. at 1530:6-1531:20.)

Defendant's post-incarceration behavior provides further evidence of Defendant's communication skills. Firstly, Richard Pierce observed Defendant lending books to other inmates and "then when they out on the rec. yard or whatever, they would discuss what they had read and talk about the books, those kinds of things." (Tr. Oct. 11, 2013, ECF No. 284, at 278:19-25.) Secondly, according to Dr. Welner, Defendant's letter to his sister recovered from his cell (Hr'g Ex. 417) demonstrates his ability "to engage in an emotional communication . . . in a sensitive way to be able to bring her close to him." (Tr. Oct. 21, 2013, ECF No. 272, at 1591:7-22; Hr'g Ex. 417.) He testified that Defendant's letter to his daughter (Hr'g Ex. 409) takes on a different, paternal tone, as does his letter to his wife (Hr'g Ex. 411), and that all three of these letters demonstrate Defendant's "expressing to each of them in ways that are unique to the relationship of why they're important to him." (Tr. Oct. 21, 2013, ECF No. 272, at 1592:3-1593:13; Hr'g Exs. 409, 411, 417.) Finally, Dr. Welner testified that Defendant's letter to inmate Michael Johnson (Hr'g Ex. 330) is

"an impressive example" of Defendant's ability to adapt into a "certain subpopulation of inmates to whom he could develop social relationships with." (Tr. Oct. 21, 2013, ECF No. 272, at 1594:7-20; Hr'g Ex. 330.)

In conclusion, the Court finds that Defendant has not shown by a preponderance of the evidence that he suffers from significant deficits in his interpersonal skills and friendship abilities. Dr. Reschly conceded that Defendant had girlfriends as a teenager, took part in a boxing club, joined the Future Farmers of America, got married, had children, and had friends at work, including Fred Estes, Debra Moody, and Donzaleigh Garner.[67] (Tr. Oct. 8, 2013, ECF No. 254, at 322:22-323:21; 324:10-16.) In light of the significant evidence to the contrary, the Court cannot find it more likely than not that Defendant suffers from significant deficits in this area.

b. Social Responsibility

Defendant has not shown by a preponderance of the evidence that his deficits in the social responsibility area are significant.

According to Dr. Reschly, the social responsibility element of adaptive functioning "is described in the AAIDD manual as having to do with one's interactions with the community and with

[67] Dr. Reschly made the unsupported assertion that Defendant "was not in any kind of activities that were highly valued by the adolescent culture in schools; and the boxing, of course, was not part of the school program." (Tr. Oct. 7, 2013, ECF No. 251, at 158:23-159:1.)

others within a community context." (Tr. Oct. 7, 2013, ECF No. 250, at 86:9-11.) He testified that, with regard to community expectations, "[Defendant] was unusually . . . dependent on other persons to assist with his performance." (Id. at 86:11-14.) Dr. Reschly testified, for example, that Defendant "did not make his own car payment, his mother did that up until he was age 27."[68] (Id. at 86:14-15.)

Regarding Defendant's purchase of a home at 140 Wolverine Trail in La Vergne, Tennessee, Dr. Reschly testified that he interviewed both Defendant and Melissa Montgomery, and that "both said that we were involved. But [Melissa] Montgomery took the leadership in finding the house and arranging for the mortgage, et cetera, and that [Defendant] accompanied her at key times when it came to signing documents." (Id. at 87:23-88:10.) According to Dr. Reschly, "it appeared that [Melissa] Montgomery was the person that was primarily responsible for" making major decisions regarding the family's finances. (Id. at 89:2-6.)

There is substantial evidence to demonstrate that Defendant was a socially responsible person who did not suffer from significant limitations. For example, Defendant retained H&R Block to prepare his taxes in 2009. (See Tr. Oct. 8, 2013, ECF

[68] Dr. Reschly's testimony that Defendant did not pay his own car payment was contrary to Lois Montgomery's testimony. (See Tr. Oct. 1, 2013, ECF No. 289, at 197:16-17 ("[Defendant] paid his bills pretty good when he was at home, but at summer time, he got behind on his car note.").) Defendant's sister, Chrystal Montgomery Barrow, did testify that Defendant's mother paid his car note. (See id. at 308:3-8.)

No. 254, at 329:8-331:1; Hr'g Ex. 180 at 2724.) Dr. Reschly conceded that Defendant's paying his taxes throughout his career, attempting to pay his bills, and maintaining a steady job for more than twenty years demonstrate his social responsibility. (Tr. Oct. 8, 2013, ECF No. 254, at 331:7-17.) The Court is not convinced by Dr. Reschly's argument that Defendant's "social responsibility was often prompted and supported, and once Melissa Montgomery left him, things deteriorated very significantly and [Defendant] committed serious crimes" that are "evidence of violations of norms for social responsibility." (Id. at 331:21-332:12.) The defense experts cannot logically cite Defendant's criminal activity as evidence of social responsibility deficits while refusing to acknowledge it as evidence of Defendant's conceptual abilities. (See Tr. Nov. 13, 2013, ECF No. 306, at 261:5-20.)

Moreover, Dr. Reschly conceded that Defendant stayed with his wife through domestic disputes and that, ultimately, it was actually Melissa Montgomery who left Defendant, not the other way around. (Tr. Oct. 8, 2013, ECF No. 254, at 328:18-329:4.) According to Melissa Montgomery, the couple separated in 1997 for a brief period, during which time she filed for child support and had Defendant's wages garnished. (Tr. Oct. 2, 2013, ECF No. 290, at 622:7-23.) Defendant paid child support until June 5, 2001, when the garnishment was lifted and the child

support order was dismissed. (Id.) Mrs. Melissa Montgomery testified that even though Defendant's wages were garnished from 1997 to 2001, the couple stayed together – "when I filed, we did break up, but we got back together. We weren't separated hardly any time." (Id. at 623:1-10.) She testified that she could not remember where she lived at the time she filed for child support, nor where Defendant went for the brief period they were separated. (Id. at 626:9-627:7.) Mrs. Melissa Montgomery was not aware Defendant had removed her from his bank account in 1997. (Id. at 623:16-24.) Defendant's mother testified that Defendant borrowed money from her before he left home, but that he paid it back, which is yet another indication that Defendant understood his responsibility to satisfy his debts. (Tr. Oct. 1, 2013, ECF No. 289, at 270:12-20.)

Defendant's parenting skills also illustrate that he does not suffer from significant limitations in social responsibility. Although Defendant's wife testified that he was so close with his son, CJ, that "it was like [Defendant] was more like being a friend" than a parent (see Tr. Oct. 2, 2013, ECF No. 290, at 601:14-22), she nevertheless sent CJ to live with Defendant following the couple's separation (see id. at 649:14-24.) Defendant's wife admitted that she sent CJ to live with Defendant because she thought "maybe [CJ] would take instruction from [Defendant], because he wasn't taking it from

me, and then also to help [Defendant]." (Id. at 649:19-24.)

Mrs. Melissa Montgomery explained:

> I just felt like [CJ] wasn't going to listen to me. I was more structured, you know, and I felt . . . that he was closer to his dad, and maybe his dad, he would listen closer to what he would say, and so I talked to [Defendant] and I told him how I was going to have to bring him back over there, and I brought him back over there, and that's how it happened, that's how he went back.

(Id. at 599:23-600:6.)

In light of this evidence, the Court is not convinced by a preponderance of the evidence that Defendant's alleged parenting deficits demonstrate his significant limitations in social responsibility. Dr. Welner's testimony concisely illustrates that Defendant's parenting precludes a finding that he lacks social responsibility skills:

> [Defendant] followed [his mother's] directives about getting [CJ] back in school. According to [Defendant], his son went back to school and got a GED, that he was imploring his son to get a job. According to [Defendant], he was checking his son's job applications to see if they were filled out correctly. According to [Memoranda of Interviews] that I was provided of interviews with school, when [CJ] was getting in trouble at school, unfailingly [Defendant] would come to school for meetings with the school officials, again, notwithstanding any work responsibilities he had. [Defendant] would drive [his daughter] to her doctors' appointments, he would go to visit the doctor, not every time, but there was a relationship there. He was picking [his daughter] up from school, he was sharing his car according to his own input with his son for when his son would go to school and he would go to work. So [Defendant] was very responsible about trying to help his children. He was also making sure that they were – that his son

> was fed, and contributing money to the home in another aspect of his parental responsibilities for having to provide. Getting a life insurance policy for his son even at a young age, getting a 401(k).[69] So these are the kinds of things that one does[,] not just as a matter of investment, but as a matter of attending to responsibilities for one's children, which [Defendant] made clear to me and which was consistent with his record.

(Tr. Oct. 21, 2013, ECF No. 272, at 1586:2-25.)

Thus, the Court finds that Defendant has failed to prove by a preponderance of the evidence that he suffers from significant limitations in social responsibility.

c. Self-Esteem, Gullibility (Avoiding Being Victimized), and Naïveté

Defendant has failed to prove by a preponderance of the evidence that he suffers from significant limitations in self-esteem, gullibility, avoiding being victimized, or naïveté.

According to Dr. Reschly, "persons in lower education tracks specifically have challenges with . . . lower self-esteem because children compare their score with each other." (Tr. Oct. 7, 2013, ECF No. 250, at 84:22-25.) He further testified that Defendant's trait of keeping to himself is indicative of gullibility because it is "a way to guard against being exploited." (Tr. Oct. 8, 2013, ECF No. 254, at 333:14-21.)

[69] Exhibit 177 is a November 2006 form indicating Defendant's participation in a 401(k) plan, in which Defendant authorizes a $40 per pay period deduction from his compensation as a before-tax contribution, and lists his son, CJ, and his daughter, Mecalen, as primary beneficiaries. (Tr. Oct. 8, 2013, ECF No. 254, at 318:3-319:13; Hr'g Ex. 177.) Moreover, Defendant listed his children as beneficiaries on his Southeast Financial Credit Union account. (See Tr. Oct. 17, 2013, ECF No. 286, at 491:23-492:1; 494:20-495:12; Hr'g Ex. 285 at 01558.)

Defendant's sister testified that Defendant had girlfriends growing up who manipulated him into buying them things and using his vehicle. (Tr. Oct. 1, 2013, ECF No. 289, at 292:14-25.)

Dr. Reschly highlighted the testimony of Ms. Erlin Gooch, who made the following observations about Defendant:

> The impression that I had and vivid in memory still, was that of a young man, a child, really, because you're talking about a primary child, approximately eight or so that required a lot of prompts, more prompts than other children. His fears, even to come from one class setting down to the hall, down the hall to another setting. He was slow in his movements, motor movements. If you were to observe him on the playground, you could also observe there was just a – that his coordination was just not as – and I hate to use the word normal, but there was some coordination problems.

(Tr. Oct. 2, 2013, ECF No. 290, at 448:14-25.) According to Ms. Gooch, when Defendant received prompts, he would respond and did not express defiant behavior. (Id. at 449:17-19.) She stated that Defendant "was definitely not assertive or aggressive in his behavior, but he was more of a loner type person. You just did not get the feel that he was fitting into a group. . . ."[70] (Id. at 450:6-9.) A handwritten note on Defendant's eleventh grade report card, apparently written by his VIP teacher, Mr. Todd, says "Mrs. Montgomery – I am very

[70] Ms. Gooch was not one of Defendant's teachers. (Tr. Oct. 2, 2013, ECF No. 290, at 455:25-456:1.)

pleased with Chastain's progress both academically and socially."[71] (Hr'g Ex. 95.)

Dr. Reschly testified that Defendant "did not excel in sports or academics, was not apparently very much involved with music. . . . [Defendant] did not excel at anything that was particularly important to other persons within the school setting." (Tr. Oct. 7, 2013, ECF No. 250, at 85:4-8.) He also relied on Ms. Gullett's testimony that "many children received social promotions at that time, at least in the elementary schools in Lauderdale County, and that the social promotions were predicated at least in part on trying to maintain the child's self-esteem." (Id. at 85:9-14.)

The Court is not persuaded that the evidence Defendant presented establishes that he significantly lacked self-esteem or was gullible or naïve. Every credible witness who spoke to the issue at the hearing, as well as the documentary evidence in this case, confirmed that Defendant was not gullible and could not be "pushed around" or manipulated. Mr. Scott testified that, unlike many other officers, Defendant "could not be manipulated." (Tr. Oct. 3, 2013, ECF No. 291, at 896:4-6.) He testified that "[i]f there was some sort of game [the inmates] wanted to play, they would choose somebody else," and that

[71] A handwritten note on Defendant's personality grades from first through eighth grade in his permanent school record states: "[Defendant] is very timid. He has to be encouraged or boosted to do his best, but I feel he can and will be a good student. (1971)" (Hr'g Ex. 103.)

Defendant "was not weak." (Id. at 896:11-12; 907:24-908:3.) Ms. Scott added that Defendant was "someone who could stand up for himself and was not a pushover." (Tr. Oct. 4, 2013, ECF No. 303, at 954:12-20; see also Hr'g Ex. 191 at 02826 (Interview with Ricky Nixon).) According to Mr. Estes, Defendant was "more of a leader than a follower;" he stated "[Defendant] was not a pushover or easily led." (Hr'g Ex. 190 at 02844; see also Tr. Oct. 8, 2013, ECF No. 254, at 388:9-21; Tr. Oct. 4, 2013, ECF No. 303, at 1008:1-16.)

Another co-worker, Donzaleigh Garner, who described herself as a good friend of Defendant's who spoke with him on the phone three or four times a day, reported that Defendant "was not easily influenced; that he 'could hold his own' and was the kind of guy that 'had your back.'" (Hr'g Ex. 189 at 02833; see also Tr. Oct. 8, 2013, ECF No. 254, at 387:7-17.) The only person who suggested that Defendant could be manipulated on the job was Michael Farrish (see Tr. Oct. 4, 2013, ECF No. 303, at 1054:3-5), and the Court found Mr. Farrish completely lacking in credibility (see supra Part III.B.3.b).

The Court also considers Angela Peel's testimony as indicative that Defendant did not have significant limitations as to his self-esteem. Ms. Peel testified that she and Defendant had a relationship when Defendant was in his twenties; Defendant liked to go out to the clubs; and that Defendant would

pay for Ms. Peel's food and drinks. (Tr. Oct. 16, 2013, ECF No. 285, at 346:12-347:16.) She testified that Defendant liked music and would sing, dance, and drink alcohol. (Id. at 347:18-348:3.) She testified that "a lot of times we couldn't even carry on a conversation because [Defendant] was so quiet, . . . but once he started drinking, he would get a little bolder. . . . Like he would get louder with the singing." (Id. at 348:4-12.) The relationship ended when Defendant's wife found out about it. (Id. at 349:9-350:15.)

Additionally, the testimony of Ron Rickard, Defendant's boxing coach and the former Sheriff of Lauderdale County, provides useful information. Mr. Rickard testified that Defendant regularly participated on the boxing team in Ripley, Tennessee, for at least one season, attending practices three nights per week. (Tr. Oct. 16, 2013, ECF No. 285, at 321:2-15.) Defendant also traveled with the team by himself to participate in bouts on weekends. (Id. at 322:4-324:1.) Rickard testified that Defendant was "just like any other young man that wanted to box," and that he did not recall anyone picking on him or singling him out. (Id. at 324:7-17.)

In light of the foregoing, the Court finds that Defendant did not suffer from significant limitations in the area of self-esteem, gullibility, and naïveté.

d. Following Rules and Obeying Laws

The Court finds that Defendant has not shown by a preponderance of the evidence that he had significant limitations in his ability to follow rules and obey laws.

Although Dr. Reschly stated that Defendant's criminal behavior is indicative of his adaptive deficits (Tr. Oct. 8, 2013, ECF No. 254, at 331:21-332:12), Dr. Marcopulos emphasized that adaptive functioning analysis focuses on what the person being diagnosed "usually" or "routinely" does. (Tr. Oct. 15, 2013, ECF No. 266, at 1059:1-18; see also AAIDD Manual at 47.) The evidence in this case amply demonstrates that Defendant has a long history of following rules and obeying laws.

Mr. Driver completed an April 30, 2007, job performance evaluation for Defendant. (See Tr. Oct. 11, 2013, ECF No. 284, at 233:20-234:25; Hr'g Ex. 156.) Defendant's evaluation rating is "exceptional" in all categories. (Tr. Oct. 11, 2013, ECF No. 284, at 235:14-236:1; Hr'g Ex. 156 at 00587.) Driver testified that, under the category of "supervision of inmates/students," he commented:

> CO MONTGOMERY IS ONE OF THE PRIMARY STAFF MEMBERS THAT IS USED TO TRAIN NEW EMPLOYEES. HE MAKES A POINT OF TEACHING CORRECTLY AND ACCORDING TO TDOC POLICY. THE POST HE WORKS REQUIRES A CO THAT IS SECURITY MINDED WITH AN ATTENTION TO DETAIL. CO MONTGOMERY FILLS THE BILL IN THIS REGARD.

(Hr'g Ex. 156 at 00592 (emphasis added); see also Tr. Oct. 11, 2013, ECF No. 284, at 237:23-238:7.) Driver testified that supervision of inmates/students "is one of the more important standards that [Defendant] could have been judged by." (Tr. Oct. 11, 2013, ECF No. 284, at 238:8-9.) He further testified that:

> New employees come in, we don't just turn them loose to work, they have to have someone work with them to kind of guide them, show them the ropes.
> And I always utilized [Defendant], I would use him quicker than I would several – just about everybody else because he would train them correctly.
> And then I would debrief the guys later on. Well, what did you learn, what did [Defendant] tell you. And it was always appropriate and they always learned something from working with Montgomery.

(Id. at 238:10-19.)

Other people who worked with Defendant also attested to his ability to follow rules and policies on the job. Mr. Estes testified that Defendant usually was not late for work. (Tr. Oct. 4, 2013, ECF No. 303, at 1015:23-25.) He testified that, on one occasion, Defendant did not show up for work due to hospitalization, but that Defendant "came back to work with his documentation and stuff like that." (Id. at 1015:25-1016:7.) Mr. Bell described Defendant as "meticulous in following procedure," and that Defendant consistently followed his "post orders."[72] (Tr. Oct. 3, 2013, ECF No. 291, at 765:7-11; 826:4-

[72] According to Mr. Scott, post orders are "individual sets of orders that gives employees pretty much an overview of what they're supposed to do and

23.) Defendant's performance evaluations over more than twenty years demonstrate that he had no problem adapting to the rules he was required to follow at various corrections positions. (See generally Hr'g Exs. 98-101, 140-58, 286.)

Dr. Reschly conceded that, in a more than twenty-year career, Defendant had very few disciplinary infractions. (See Tr. Oct. 7, 2013, ECF No. 251, at 195:19-196:2.) In fact, a March 22, 2001, letter to Defendant from the Commissioner of the Tennessee Department of Corrections reads, in relevant part:

> At your request a Level IV Grievance Hearing was conducted at Riverbend Maximum Security Institution regarding your ten (10) day suspension.
>
> I have carefully reviewed all the information presented by the hearing officer and have determined that Officer Michael Robinson and inmate William Collins got into a verbal confrontation. Officer Robinson tried to obtain the keys (to the outside recreation yard for maximum custody) from another officer in an attempt to enter the secure yard with inmate Collins. He did not obtain the keys. You stated you talked to Officer Robinson and calmed him down. You further stated that after talking to him, you felt he was under control and did not see a need to report anything to your supervisor.
>
> Taking into consideration that your personnel file reflects that you are a twelve (12) year employee with an exceptional performance evaluation with no prior disciplinary action, I am rescinding the ten (10) day suspension and issuing a written warning. This letter will serve as the written warning.

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whatever position they hold." (Tr. Oct. 3, 2013, ECF No. 291, at 881:20-22.) He testified that there is "a set of post orders for officers working housing unit, there's a set of orders for yard officers, a set of post orders for mobile patrol. Pretty much every position within the security ranking, there's a set of post orders. Sort of marching orders, so to speak." (Id. at 881:22-882:2.)

(Hr'g Ex. 139 at 00646 (emphasis added); see also Tr. Oct. 7, 2013, ECF No. 251, at 200:19-204:1.)

As the Court already noted, Defendant also followed the law by paying his taxes. (See Hr'g Ex. 180.) The Court finds that Defendant has not demonstrated by a preponderance of the evidence that he has significant limitations in his ability to follow rules and obey the law.

e. Social Judgment and Social Problem Solving

Defendant has failed to show by a preponderance of the evidence that he has significant limitations in the area of social judgment and social problem solving. According to Dr. Reschly, "social problem solving typically involves trying to deal with issues that come up and understanding the motives and interests of other persons as well as being able to look at one's own . . . behavior in relation to the problem situation." (Tr. Oct. 7, 2013, ECF No. 250, at 93:16-20.)

Defendant's wife testified that Defendant "struggled with maybe the intent of some things, like we were in a family function, and people would get to joking, you know, it was just all in fun, and then he will take it the wrong way." (Tr. Oct. 2, 2013, ECF No. 290, at 596:22-597:2.) She testified that Defendant "really didn't understand it because it was just everybody was just laughing, poking fun." (Id. at 597:13-15.)

Mr. Estes testified that Defendant engaged in numerous peculiar behaviors that speak to his social judgment abilities. For example, Estes testified that Defendant "would have on his uniform, and he would have on another set of clothes up under it." (Tr. Oct. 4, 2013, ECF No. 303, at 965:13-15.) Estes testified that Defendant wore an extra set of clothes under his uniform because he was once in a prison riot, and "I guess they made them take their clothes off or something, and ever since then, [Defendant] said he will be prepared next time." (Id. at 965:18-22.) He added that Defendant "always used to let people walk in front of him, he won't let anybody walk behind him or get so close to him." (Id. at 966:7-8.) Estes testified that Defendant told him, "you know I don't like nobody behind me, you know, people can choke you out if they get behind you." (Id. at 966:12-15.)

Estes testified that Defendant was "very loud." (Id. at 966:16-17.) If Defendant was standing at "the far end of the parking lot, you know, if [Defendant] sees me, he spot me, he's going to let it be known that he see [sic] me. [Defendant] will go to busting out hollering and stuff, and everybody will stop what they're doing and look back at him." (Id. at 966:18-23.) According to Estes, Defendant was inappropriately loud even in personal space, to an embarrassing degree. (Id. at 967:2-13.) He further testified that Defendant had a temper and "just let a

lot of stuff build up in him, but I never seen him release it." (Id. at 1018:8-20.)

According to Mr. Bell, Defendant's dress at work was "always an issue."[73] (Tr. Oct. 3, 2013, ECF No. 291, at 762:12-14.) Defendant "would come in, his uniform was wrinkled, pockets unsecured, boots rarely seem polished. He always looked scruffy." (Id. at 763:3-7.) Bell testified that Defendant's shirt "wasn't dirty, but it would be wrinkled as [if] it was at the bottom of the hamper and he pulled it out and put it on." (Id. at 763:12-15.) Bell discussed Defendant's dress with him "[o]n a pretty regular basis," although he admitted that Defendant's sloppy dress did not keep him from performing his job. (Id. at 764:2-7.) Bell conceded that Defendant's 2004 job performance evaluation reflects that he consistently "[d]resses and grooms according to applicable departmental policies, and appropriately for the work to be performed." (Hr'g Ex. 99 at 00830; see also Tr. Oct. 3, 2013, ECF No. 291, at 817:25-818:10.) According to Dr. Reschly, Defendant "really never seemed to understand the concerns his supervisors expressed about his dress, and [Defendant] did not seem to be able to talk that over with anybody, rather he attributed that to others out

[73] According to Mr. Jones, the uniform of a correctional officer at DSNF "consisted of a gray shirt, . . . charcoal gray or really dark BDU type pants. They were required to wear either black shoes, black boots or – for comfort, a solid black tennis shoe." (Tr. Oct. 11, 2013, ECF No. 294, at 42:15-24.) He testified that guns were not allowed on the units. (Id. at 42:25-43:2.)

to get him or being unfair toward him." (Tr. Oct. 7, 2013, ECF No. 250, at 93:21-25.)

There is, however, also substantial evidence that Defendant's deficits in social judgment were not significant. According to Drs. Woods and Welner, risk awareness is an important consideration in the analysis of a person's level of social judgment. (Tr. Oct. 17, 2013, ECF No. 271, at 1531:21-1532:2; 1548:17-18.) Dr. Welner asserts that Defendant's corrections experience demonstrates "his competencies and how he manages risks," which are confirmed in Defendant's "supervisors and other colleagues' appraisals of those abilities." (Id. at 1549:4-16.) He testified that Defendant's ability to empathize with inmates and "see things from the other side of the stick" reflects adaptive skills that are absent in persons with mild MR/ID. (Id. at 1551:2-19; Hr'g Ex. 252 at 04488.) He further testified that Defendant's discomfort working with partners who were scared demonstrates his ability to scrutinize his peers' behavior and assess risk to himself. (Tr. Oct. 21, 2013, ECF No. 272, at 1565:23-1566:17; Hr'g Ex. 252 at 04504.)

Dr. Welner emphasized that the one instance in which Defendant lost his temper and walked off the job "didn't define him" based on the lenient response of his superiors: "What more defined [Defendant] was a history of unremarkable behavior in

dealing with things by communicating as opposed to an outburst." (Tr. Oct. 21, 2013, ECF No. 272, at 1567:5-15.)

Mr. Scott's testimony underscored Dr. Welner's point. Mr. Scott testified that he spoke with Defendant about his reactive posture toward the inmates, and that he instructed Defendant, "if there was a situation . . . that was critical or one that might involve the use of force, to contact me." (Tr. Oct. 3, 2013, ECF No. 291, at 892:2-17.) He testified, "I don't think [Defendant] necessarily agreed with my strategies, but he did agree that when these situations occurred, he would contact me." (Id. at 892:18-24.) This demonstrates Defendant's ability to apply social problem solving and adapt beyond his initial instincts.[74]

Moreover, Dr. Welner asserted that Defendant's December 23, 2010, disciplinary hearing recording (Hr'g Ex. 267) demonstrates Defendant's cognitive flexibility in that he gives multiple explanations for his absences from work: "[Defendant] was advocating for himself. He was aware of the regulations. He employed them and changed them over the course of the proceeding. . . ." (Tr. Oct. 21, 2013, ECF No. 275, at 1628:2-

[74] In his interview with Dr. Welner, Defendant stated that he broke up fights between inmates, but stopped doing so on the advice of a co-worker: "after I got home, I thought about it, it made sense, you know, for really, in that situation, both of 'em could have jumped on me, right?" (Hr'g Ex. 252 at 04494.) Defendant stated, "[w]hen they told me that, I thought about it, and it was kind of hard for me to do, but I had learned to just do it like that, do it like he was telling me." (Id.)

21; Hr'g Ex. 267.) Additionally, as the Court discussed above (see supra Part III.B.1.d), Defendant's Motel 6 security job demonstrates Defendant's cognitive flexibility in handling the competing interests of his employer and its customers effectively in a potentially dangerous situation. (See Tr. Oct. 21, 2013, ECF No. 272, at 1580:13-1581:11.)

The record contains a number of other examples of Defendant's unimpaired social judgment. Firstly, Dr. Welner testified that Defendant made difficult tasks "sound very easy," for example, "getting somebody to take medicine who resists the idea of taking medicine with the implied threat that you can't come out if you don't take your medicine." (Id. at 1568:11-25; Hr'g Ex. 252 at 04538-04540.) Secondly, he testified that Defendant's strategy of working a difficult unit with a high turnover rate in order to capitalize on overtime opportunities "reflected upon [Defendant] from an adaptive standpoint as not only employing good judgment but attentive to money considerations and life management." (Tr. Oct. 21, 2013, ECF No. 272, at 1571:7-20.)

Thirdly, Dr. Welner testified that Defendant's videotaped confessions demonstrate that he is "keenly aware not only of his Miranda rights but other issues as they relate to rights afforded him right down . . . to his workplace and what he is entitled to if he gets arrested." (Tr. Oct. 21, 2013, ECF

No. 275, at 1627:6-12.) Fourthly, in his interview with Dr. Welner, Defendant initially laughed at the subject of mental retardation, but "when it was clear from my inquiry that I was taking it seriously, he very quickly pivoted. . . . There's speed to [Defendant's] intellect, . . . he recognized it might be relevant." (Id. at 1627:18-24.)

Finally, Defendant left his position at the Wilder Youth Development Center ("WYDC") in May of 2000 to accept a position at Riverbend Maximum Security Institution in Nashville. (Tr. Oct. 7, 2013, ECF No. 251, at 184:25-185:4.) On April 17, 2000, Defendant submitted the following resignation letter to WYDC:

> To: Wilder Youth Development Center Personell [sic]
> From: Chastain Montgomery, Children Service Officer
> Subject: Resignation
> Date: 4-17-2000
>
> I am resigning my position as Children Service Officer effective date 5-1-2000 I will be transfering [sic] to Riverbend Maxium [sic] Security Prision [sic] in Nashville. I regret having to leave, but I did enjoy working at Wilder Youth Developmental Center.
>
> Thank [sic] for giving me the opportunity to work at WYDC.
>
> Chastain Montgomery

(Hr'g Ex. 137 at 01089; see also Tr. Oct. 7, 2013, ECF No. 251, at 185:5-187:6.)

The Court finds this to be an example of Defendant's social judgment abilities. Not only did Defendant give appropriate

notice of his resignation, he also demonstrated an understanding of social graces. In light of the foregoing evidence, the Court finds that Defendant has not carried his burden of proving by a preponderance of the evidence that he has significant limitations in social judgment or social problem solving.

f. Conclusion as to Social Skills

Defendant's lay and expert witnesses presented evidence that Defendant was a quiet person who kept to himself and had trouble understanding social relationship or maintaining friendships outside of his immediate family. (See, e.g., Tr. Oct. 11, 2013, ECF No. 263, at 910:14-16.) The Court finds that this narrative is contrary to the weight of the evidence presented in this case. Defendant demonstrated awareness of others' thoughts and feelings through his interactions with the inmates at his job, and also showed a clear understanding of Dr. Welner's role as a prosecution witness during his interview with him. His communicative abilities do not suggest that he is a person with mild MR/ID. Cf. Wiley, 625 F.3d at 219-20 (noting that, at the age of eighteen, the defendant "had the communication skills of someone six to nine years old," "could not be given verbal directions," and scored lower than the first percentile on the EVT).

Defendant cultivated numerous friendships and maintained an intimate, extramarital romantic relationship. He paid child

support, his mortgage, and his taxes, and participated in a 401(k) plan. Moreover, the evidence is compelling that Defendant, unlike most persons with mild MR/ID, was neither naïve nor gullible. Cf. DSM-V at 34 ("There is limited understanding of risk in social situations; social judgment is immature for age, and the person is at risk of being manipulated by others (gullibility)."); Hardy, 762 F. Supp. 2d at 889 (emphasizing that "many people used [the defendant], took a lot of his kindness and . . . just walked over him." (internal quotation marks omitted)).

The Court finds that Defendant has failed to demonstrate by a preponderance of the evidence that he suffers from significant limitations in the social domain of adaptive functioning.

5. Practical Skills

In the practical skills domain, the Court must examine activities of daily living and personal care, occupational skills and job responsibilities, use of money and money management, safety and health care, travel and transportation, recreation, self management of behavior, schedules, and routines/school and work task organization, and use of the telephone. See AAIDD Manual at 44; DSM-V at 37. According to Dr. Woods, the practical domain includes money-handling skills, "being able to work, . . . being able to fix things, being able to clothe one's self, [and] being able to get medical care

appropriately." (Tr. Oct. 10, 2013, ECF No. 260, at 757:12-18.) The following significant limitations in the practical skills domain are likely to surface among persons with mild MR/ID:

- Limitations in activities of daily living such as arranging steady groceries and proper sleeping arrangements, meal planning, keeping appointments, and maintaining one's medication regime

- Limitations in occupational skills such as obtaining a steady job that covers expenses, meeting work competencies, getting along with coworkers and managers, handling job conflict appropriately, maintaining high quality work under pressure

- Limitations in use of money and property such as giving "loans" to people who do not pay back, signing away property or rights, making purchases inconsistent with his/her budget/means

- Limitations in maintaining a safe environment related to one's children and self, household cleaning products, food storage, medicine/drugs, or using caution around and protecting others from electricity, vehicles, and machines

AAIDD User's Guide at 15-16. The Court examines the evidence as to each practical skill area below.

a. Activities of Daily Living and Personal Care

Defendant has failed to carry his burden of proving by a preponderance of the evidence that he suffers from significant deficits in carrying out activities of daily living and personal care.

Several of Defendant's family members testified that he struggled with activities of daily living throughout his life.

Defendant's mother testified that her children had household chores including taking out the garbage, cleaning their rooms, and mowing the yard, and that it "took [Defendant] a while to learn how to do them like it was supposed to be done." (Tr. Oct. 1, 2013, ECF No. 289, at 191:11-19.) She testified that Defendant "did fair" in terms of cleaning the house, but that she had to remind Defendant often about chores "and tell him how they were supposed to be done." (Id. at 192:16-21; 204:10-13.)

According to Defendant's mother, Defendant had problems dressing himself, including "[n]ot matching his clothes." (Id. at 192:3.) She testified that when Defendant was young, he could not button his shirts, but "[w]hen he got a little older, he got it together." (Id. at 192:8-9.) She further testified that it "was an everyday thing, I talked to [Defendant] about it when he's dressing. I would tell him what to do and how to do it and how to match stuff, how to match his clothes and lace his shoes." (Id. at 203:10-13.)

Defendant's sister also testified that he "had difficulties with dressing, grooming, combing his hair, . . . brushing his teeth and keeping, you know, his hygiene, ears." (Id. at 284:22-24.) She testified that Defendant would only partially comb his hair, that he would not brush his teeth properly, and that he had ear wax in his ear, and that Defendant's mother would get onto him about these things. (Id. at 284:24-285:12.)

She further testified that Defendant "wouldn't put the belt loop the way it was supposed to be, and he would leave his pants . . . unzipped a lot of times, and his shoes would be untied a lot." (Id. at 285:17-20.)

According to Mrs. Barrow, when Defendant tried to do chores, "[h]e didn't finish the task, and my mother would really get on him about not finishing the task." (Id. at 286:7-8.) She testified that the various chores Defendant could not do satisfactorily were not hard things to do, and that she and Adrian could do them. (Id. at 287:13-22.) She testified that Defendant's mother "would become very frustrated," and would "call[] [Defendant] dumb and ignorant." (Id. at 287:25-288:3.) Barrow testified that Defendant could not make his bed, although he tried, and that she would make it for him in order to "keep him from being fussed at" by their mother. (Id. at 286:16-17.) Barrow testified that Defendant would leave spots in the yard when he mowed and could not complete the job up to his mother's standards. (Id. at 289:14-21.) Barrow also testified that she could not recall her mother ever sending Defendant to the store to retrieve items.[75] (Id. at 308:1-2.)

Barrow testified that, on one occasion following the death of Defendant's father, Defendant used a shower curtain instead

[75] This testimony was inconsistent with the testimony of Defendant's mother, who testified that she would send Defendant to the grocery store with a list of items to retrieve. (Tr. Oct. 1, 2013, ECF No. 289, at 197:25-198:1.)

of toilet tissue to wipe himself after going to the bathroom. (Id. at 294:8-9.) She testified that Defendant's mother was furious on this occasion.[76] (Id. at 294:10-11.)

Barrow testified that Defendant was still living at home with his mother when "he was maybe 25," even though Barrow was living in an apartment in Henning. (Id. at 312:3-18.) Barrow testified that, during this time, she and Defendant would go out together. (Id. at 312:13-14.) She testified that on the occasions the two of them would go out together, she would help Defendant get dressed. (Id. at 312:19-23.) She testified that Defendant could not adequately pick or match an outfit, and that he would throw nice outfits "over to the side" and lose clothes. (Id. at 313:1-8.) On cross-examination, Barrow testified that she did not know whether anyone assisted Defendant with the essentials of living by himself on campus and that she did not recall ever visiting Defendant at UT-Martin, nor whether her mother visited him. (Id. at 346:12-16; 351:3-8.)

Defendant's wife testified that she was unaware of Defendant's daily living deficits when she married him because she had not lived with him before they got married. (Tr. Oct. 2, 2013, ECF No. 290, at 573:20-574:4.) Regarding Defendant's struggles with everyday living tasks during the marriage, Defendant's wife testified:

[76] Defendant's mother did not corroborate this story at any point during her testimony.

> [M]aybe going to take care of some errands, running some errands for me, he would struggle in that area. Doing things around the house, just, for instance, maybe like if say the curtain fell down or the blinds fell down, trying to put those things back up. Maybe he was struggling trying to nail a nail into the wall to maybe put the curtain rod up. Just, you know – if it was something cooking – like if it was just like, say, bake a chicken, put it on the pan and put it off in the oven, but if it was something that, you know, where there was actually a recipe where he had to go through it, he couldn't do those kinds of things.

(Oct. 2, 2013, ECF No. 290, at 574:5-18.)

Mrs. Melissa Montgomery testified that Defendant would routinely forget to do errands. (Id. at 575:1-11.) She testified that Defendant's lawn care was haphazard, that she would have to remind him to cut certain spots, and that the family eventually hired someone to cut the yard. (Id. at 576:6-17.) She testified that she would not let Defendant wash clothes because "he might put the bleach in on the colors and fade some of the stuff, so . . . I would just focus on trying to take care of those things." (Id. at 577:4-6.) She testified that Defendant "sometimes" could not complete a specific task even if given specific instruction. (Id. at 577:7-9.)

Defendant's wife testified that Defendant struggled with cleaning the house. (Id. at 577:24-578:1.) She testified:

> Just for an example, just say cleaning the bathroom or whatnot, you know, it will be half clean. I come in there and fuss a little bit, yeah, you know, and relay that he missed this, go back and scour up under the toilet bowl or whatnot, or you didn't get back behind, you know, where the bowl is, you didn't get behind

> that there, you know, you didn't sweep that, you need to mop it and those types of things.

(Id. at 578:1-8.) According to Mrs. Melissa Montgomery, Defendant performed best in consistent situations – "if he's doing it consistently, for the most part, he will do it appropriately." (Id. at 578:9-12.) On cross-examination, Defendant's wife testified that she did not obtain the phrase "activities of daily life" from one of the psychologists working with the defense, rather, that the term "is something that you use when you work as a [certified nursing assistant], it's something that is used in the prison system, so that has been something that has been in my vocabulary for a long time." (Tr. Oct. 3, 2013, ECF No. 291, at 727:12-22.)

Defendant's supervisors and co-workers also offered testimony as to his appearance, specifically, his uniform. Mr. Scott testified that Defendant did not have "the best kept uniform." (Id. at 894:20-21.) He testified that Defendant's uniform was "slovenly" – in other words, it was "[w]rinkled, maybe dirty, [and] not presentable." (Id. at 894:22-895:1.) He testified that he spoke with Defendant about his uniform and that he thought "[Defendant] chose not to change it." (Id. at 895:2-7.) Similarly, Mr. Bell testified that, in 2003 and 2004, he discussed Defendant's dress with him "[o]n a pretty regular

basis," but that Defendant's sloppy dress did not keep him from performing his job. (Id. at 764:2-7.)

Defendant's co-worker, Mr. Estes, testified that, since he first met Defendant at DSNF in 2009, Defendant's clothes "weren't the best." (Tr. Oct. 4, 2013, ECF No. 303, at 967:19-20.) He testified that Defendant's clothes had "stains, need to be ironed, and basically it just like he got them out of the trunk, like he got it out of the trunk of his car. Pants was big on him, and shirt, shirt was big on him." (Id. at 967:21-25.) To Estes, it appeared as though Defendant "had been dusting with his T-shirt." (Id. at 968:4-8.)

Estes testified that everybody at the prison noticed Defendant's sloppy appearance. (Id. at 968:21-22.) He testified that Captain Jones spoke with Defendant about his clothes, and that this upset Defendant "because [Defendant] thought Captain Jones was picking with him because he was the only captain that said something to [Defendant] about his clothes." (Id. at 968:23-969:5.) According to Estes, Defendant had been dressing sloppily for some time before a supervisor talked with Defendant about it. (Id. at 969:12-14.) Estes testified that Defendant's car was also "real messy," and that Exhibit 102, a photo of the trunk of the car, is an accurate depiction of how Mr. Estes remembers it: "full, packed with all

type of clothes and bags and shoes and all type of stuff, trash." (Id. at 970:22-24; 982:7-19; Hr'g Ex. 102.)

Defendant has presented a significant amount of testimony that his dress was sloppy, that his car was disorganized, and that his housekeeping skills were subpar. The question the Court must answer, however, is whether Defendant's activities of daily living were significantly limited. (See Order, Shields, No. 2:04-cr-20254-BBD-2, ECF No. 557, at 26 ("To find that an adaptive deficit exists, it must be determined that the problems with that area are appreciable and significant. Simply having some minimal level of impairment will not suffice." (citations omitted)); see also AAIDD Manual at 43.) To that end, the Court has already determined that the standardized adaptive behavior assessment scores reported by Dr. Reschly are not reliable.[77] (See supra Part IV.B.2.) Thus, the Court cannot determine whether Defendant's scores in activities of daily living fall two standard deviations below the population mean, as the Court determined in the intellectual functioning analysis. The Court, therefore, is left with the more subjective task of determining the weight to assign to the testimony. That testimony comes in part from individuals, particularly in the case of family

[77] Regarding activities of daily living, the Court again notes that there is inconsistency among the sub-scores reported by Dr. Walker and Dr. Reschly. On Dr. Walker's VABS, Chrystal Montgomery's rating of Defendant's activities of daily living was a 52. On Dr. Reschly's VABS, her rating of defendant's activities of daily living rose thirteen points to 65. (See Hr'g Ex. 357.)

members, who have understandable reasons to slant their testimony and as to whom their testimony has been demonstrated in cross-examination to be less than reliable.[78]

Moreover, there is objective information within the record that substantially undermines Defendant's argument that he suffers from significant limitations in his activities of daily living. Firstly, Defendant's numerous annual Tennessee Department of Corrections performance evaluations spanning more than twenty years indicate that, for the majority of his career, Defendant's supervisors rated his appearance in a manner that suggests it was not a significant problem.[79] The following table illustrates Defendant's performance evaluation scores on the relevant metrics:

Date of Evaluation	Personal Conduct/Work Habits Rating	"Dresses and grooms according to applicable departmental policies, and appropriately for the work to be performed" Rating	Citation
3/22/1990	Good	Most of the time	Hr'g Ex. 140 at 00388-00391
8/22/1990	Superior	Most of the time	Hr'g Ex. 141 at 00400-00403

[78] (See Tr. Nov. 13, 2013, ECF No. 306, at 424:3-425:3.)

[79] Robert Bell testified that performance evaluations at DSNF were inflated: "Anybody that's done evaluations understands yes, they are inflated. If you had an officer that performed their duties and did their duties well, would their overall evaluation be inflated? Honestly, yes, sir, it would be." (Tr. Oct. 3, 2013, ECF No. 291, at 851:17-21.) This does not mean that Defendant's performance evaluations have no probative value. The record is clear that a poorly performing employee would be reported as such. (See id. at 851:25-852:6.)

Date of Evaluation	Personal Conduct/Work Habits Rating	"Dresses and grooms according to applicable departmental policies, and appropriately for the work to be performed" Rating	Citation
8/25/1991	Exceptional	Consistently	Hr'g Ex. 142 at 00412-00415
9/25/1992	Exceptional	Consistently	Hr'g Ex. 143 at 00424-00427
9/2/1993	Exceptional	Consistently	Hr'g Ex. 144 at 00436-00439
10/4/1994	Exceptional	Consistently	Hr'g Ex. 145 at 00449-00452
4/24/1996	Superior	Consistently	Hr'g Ex. 146 at 00461-00464
10/29/1996	Superior	Most of the time	Hr'g Ex. 147 at 00472-00475
10/14/1997	Superior	Consistently	Hr'g Ex. 148 at 00484-00487
7/12/1999[80]	Exceptional	Consistently	Hr'g Ex. 149 at 00496-00499
3/7/2001	Exceptional	Consistently	Hr'g Ex. 150 at 00511-00514
4/2/2002	Exceptional	Consistently	Hr'g Ex. 151 at 00523-00526
4/15/2003	Exceptional	Consistently	Hr'g Ex. 101 at 00864-00867
4/10/2004	Exceptional	Consistently	Hr'g Ex. 98 at 00548-00551

[80] The July 12, 1999, evaluation indicates that Defendant was on emergency leave for an injury. (See Hr'g Ex. 149 at 00498.)

Date of Evaluation	Personal Conduct/Work Habits Rating	"Dresses and grooms according to applicable departmental policies, and appropriately for the work to be performed" Rating	Citation
4/5/2005	Exceptional	Consistently	Hr'g Ex. 154 at 00561-00564
4/18/2006[81]	Superior	Most of the time	Hr'g Ex. 100 at 00791-00794
4/30/2007	Exceptional	Consistently	Hr'g Ex. 156 at 00587-00589
4/15/2008[82]	Good	No rating	Hr'g Ex. 157 at 00597-00600
2/12/2010	Exceptional	Consistently	Hr'g Ex. 158 at 00610-00613

(See Hr'g Exs. 98-101, 140-58.) Thus, except for two evaluations in 1990, one in 1996, and one in 2006, Defendant received favorable ratings regarding his uniform. Mr. Bell confirmed that some officers received poor ratings and that people have been terminated for poor evaluations. (Tr. Oct. 3, 2013, ECF No. 291, at 851:22-852:2.) Bell testified that if Defendant had performed poorly, he would have reported it. (Id. at 852:3-6.)

[81] Defendant's April 18, 2006, evaluation contains the following comment: "Officer [M]ontgomery as we have discussed through your interims your uniforms are in need of attention. The majority of the time they look as you just pulled them from a drawer and put them on. Just a few minutes of your time would correct this." (Hr'g Ex. 100 at 00704.)

[82] Defendant disagreed with his April 15, 2008, evaluation. (See Hr'g Ex. 157 at 00597.)

Secondly, the only evidence of Defendant being disciplined for inappropriate attire at work occurred on October 19, 2010 – one day after the murders at the Henning Post Office. (Tr. Oct. 4, 2013, ECF No. 303, at 950:2-9; 950:17-20.) Dr. Reschly testified that, on October 18, 2010, "[Defendant] and his son went to Henning, Tennessee[,] where they committed the murders," and that Defendant drove back to Nashville the same day to meet Dr. Farooque for a 4:00 p.m. appointment, at which Dr. Farooque described Defendant as "cool, calm and collected." (Tr. Oct. 8, 2013, ECF No. 254, at 348:4-349:2; see also Hr'g Ex. 315 at 02756 ("[Defendant] is calm, attentive, communicative, casually groomed, normal weight, and relaxed.").) Defendant's ability to maintain this appointment (on the same day he is accused of committing murder) is further evidence of his lack of significant deficits in the daily living skills area. See AAIDD User's Guide at 15 (noting that persons with significant limitations in the practical skills domain will have trouble "keeping appointments, and maintaining one's medication regime").

Mr. Jones, Defendant's supervisor, testified that Defendant was a good correctional officer with no issues until the work attire incident on October 19, 2010:

> [Defendant] reported to work in what I felt to be an unkept condition. His uniform wasn't up to standard, he just – it was almost like he pulled his clothes out

> from under the back seat or in the trunk and put them on and came to work. His hair wasn't under a cap, wasn't neat. He started to just not come, not call, not show.

(Tr. Oct. 11, 2013, ECF No. 294, at 60:14-61:2.) The fact that Defendant received no write-ups for his appearance until October 19, 2010, the day after a robbery-murder roundtrip from Nashville to Henning, Tennessee, is objective evidence that Defendant's appearance was not a significant limitation in his adaptive functioning.

Thirdly, Defendant's "personality profile" from his permanent school record (Hr'g Ex. 103) lists his grades in attitude, courtesy, cooperation, devotion to ideals, emotional stability, industry, reliability, acceptance by group, thrift, and appearance, from first through eighth grade. Defendant received "B" grades regarding his appearance every year except the fifth grade, when he received a "B+." (See Hr'g Ex. 103.)

The Court notes that Ms. Peel testified that Defendant was "a nice flashy dresser" and that he wore clothes that could not be bought in Henning, Tennessee. (Tr. Oct. 16, 2013, ECF No. 285, at 348:19-349:8.) On cross-examination, she testified that Defendant wore "high quality fashion as far as the clothes and his shoes and stuff like that," including expensive NBA sports apparel. (Id. at 372:11-22.) Defendant engaged in his extramarital affair with Ms. Peel while he was still with

Melissa Montgomery. There is no indication that Defendant's wife or anyone else aided Defendant as his benefactor by helping him get dressed for romantic liaisons with another woman.

Moreover, regarding the appearance of Defendant's car (see, e.g., Hr'g Exs. 25, 102) Defendant has not persuaded the Court by a preponderance of the evidence that it is indicative of a significant limitation in activities of daily living. Melissa Montgomery testified that, because Defendant worked so much overtime,[83] she sometimes did not get to see him all day long. (Tr. Oct. 2, 2013, ECF No. 290, at 638:8-16.) Under these circumstances, it stands to reason that Defendant's car would be the place where Defendant stored spare clothes and ate meals in transit between jobs. (See id. at 638:17-25.)

In conclusion, the Court places more weight on the documentary evidence (which was created contemporaneously and is more objective) of Defendant's daily living abilities than the conflicting oral testimony, which is subject to bias, exaggeration and, as to Defendant's childhood functioning, imperfect memory. The Court finds that Defendant has not proven by a preponderance of the evidence that his activities of daily living were significantly limited.

[83] Defendant worked as many as 145 overtime hours in one pay period in August 2009. (See Hr'g Ex. 138 at 04363.)

b. Occupational Skills and Job Responsibilities

Defendant has failed to prove by a preponderance of the evidence that he has significantly limited occupational skills.

Defendant has consistently worked at various jobs since his adolescent years. His mother testified that, when he was living at home, he worked at Siegel Roberts, a "plant where they made car parts." (Tr. Oct. 1, 2013, ECF No. 289, at 240:9-12.) According to Adrian Montgomery, Defendant was not fast enough physically to work on the assembly line at this plant, so he drove a forklift. (Tr. Nov. 12, 2013, ECF No. 305, at 197:3-16.) Defendant's mother testified that Defendant worked for the "Postal Service, as a custodian part-time." (Tr. Oct. 1, 2013, ECF No. 289, at 240:13-15; see also Hr'g Ex. 274.)

Mrs. Lois Montgomery further testified that Defendant "worked at the Penal Farm for more than two decades." (Tr. Oct. 1, 2013, ECF No. 289, at 240:15-16.) The first penitentiary in which Defendant worked was the West Tennessee High Security Facility in Henning, Tennessee. (Id. at 240:19-21.) Defendant's mother also worked at this facility, and she testified that she "felt [Defendant] could do the job . . . because it was a routine job, and he didn't seem to have problems with a job that was routine." (Id. at 241:1-6.)

Defendant's wife testified that, in 1993, she helped Defendant obtain a job as a Youth Service Officer ("YSO") at a

halfway house when the couple moved to Jackson, Tennessee. (See Tr. Oct. 2, 2013, ECF No. 290, at 563:17-564:15.) She testified that the job of a YSO involved observing juveniles "do their chores and mak[ing] sure they're doing things within compliance of the guidelines of that facility." (Id. at 565:6-20.) She testified that the YSO job was very similar to the job as a correctional officer. (Id. at 565:21-566:3.) Exhibit 256 describes the duties of a YSO as follows:

> The essential functions of the job of a youth service officer require physical or mental exertion involving driving passenger vehicles, operating communication radios, walking, running, climbing stairs and ladders, standing, lifting, pulling, balancing, bending, stooping, application of physical and mechanical restraints upon students, transportation of students, carrying, pulling or dragging of students, disarming students, cardiopulmonary resuscitation of students, verbal calming of students, counseling students, disciplining students, managing students, guarding/securing students, counting students, monitoring students, shake-downs and searches of students and student facilities, general observation for security compliance, riot prevention and management, hostage response and intervention. A Youth Service Officer must be able to perform the essential job functions of the position, including responding in a physical way to inmate riots, unrest and fires, without creating a significant risk of endangering the YSO's health and safety, the safety of other YSO's or of the general public. Youth Service Officers will be tested/evaluated to determine if they continue to have the ability to perform the essential job functions every two years.

(Hr'g Ex. 256 at 01093.) Dr. Woods conceded that there are things described in these job duties that are not routine and that there is no question Defendant worked with juveniles in

this job setting. (Tr. Oct. 11, 2013, ECF No. 263, at 875:15-876:2.)

Defendant's wife testified that she lived with Defendant in Jackson from 1993 until 2000, when the family moved to La Vergne, Tennessee. (Tr. Oct. 2, 2013, ECF No. 290, at 566:4-6.) She testified that when the family moved to La Vergne, Defendant began working at Riverbend Maximum Security Institution in Nashville. (Id. at 566:7-12.) Regarding the job duties of a correctional officer at Riverbend in 2000 and 2001, Mr. Jones testified:

> In unit 1, again, it was a maximum security unit, so those duties haven't changed, they are still required to – they're locked down 23 hours a day. There are inmate workers that are from unit 1 who are out cleaning the pods, and a pod is a housing area, or cleaning the center core of the unit. There are inmates who serve meals, there's a small kitchenette within the unit. The officers are required to monitor them, to monitor the inmates that are working in the pods. They're required to monitor the visitation that goes on. They're required to escort inmates from cell to recreation area.

(Tr. Oct. 11, 2013, ECF No. 294, at 56:8-20.) He testified that a small group of inmates at Riverbend were allowed outside of their cells for work, but that the remainder of the inmates were locked down twenty-three hours per day. (Id. at 57:5-8.)

Mrs. Melissa Montgomery testified that Defendant worked part-time jobs during his time at Riverbend, including a seasonal job at a J.C. Penney catalog center. (Tr. Oct. 2,

2013, ECF No. 290, at 566:24-567:6.) She testified that Defendant struggled at the J.C. Penney job because it required him to "be able to communicate with the customers, engage them, be able to determine their needs, also be able to provide up sales and those types of things, and he kind of struggled in those areas." (Id. at 567:7-12.)

Defendant left Riverbend to work at the Tennessee Prison for Women from 2001 to 2002. (Tr. Oct. 7, 2013, ECF No. 251, at 188:12-21.) According to Mr. Jones, the duties of an officer at the Tennessee Prison for Women are the same as those at Riverbend: "the responsibility of the officer is to monitor the inmate movement, monitor the inmates [to make sure the inmates] are not harming themselves or harming or anyone else, monitoring their movement across the yard, their movement in the dining room, movement in the work area, that's it." (Tr. Oct. 11, 2013, ECF No. 294, at 57:9-19.) He testified that not all of the inmates at the Tennessee Prison for Women were locked down twenty-three hours per day, and that male correctional officers had to be careful not to find themselves in compromising situations. (See id. at 57:20-58:10.)

In 2002, Defendant began working at DeBerry Special Needs Facility in Nashville, where he worked until the time of his arrest in February 2011. (Tr. Oct. 7, 2013, ECF No. 251, at 189:4-12.) At the time of Defendant's arrest, he was still a

correctional officer in good standing at DSNF. (Id. at 189:13-17.) According to Dr. Reschly, DSNF is a serious prison that houses inmates with severe psychiatric problems.[84] (Id. at 189:18-190:1; 190:21-22.)

Defendant worked regular second jobs while working full-time at DSNF. (Id. at 190:23-191:4.) For example, Defendant worked for a security company called Securitas, successfully providing security for Motel 6 motels in dangerous sections of Nashville.[85] (Id. at 191:5-12; 192:4-20.) Defendant also provided security at the Metro Nashville Convention Center. (Id. at 192:21-23.) Dr. Reschly testified that Defendant worked these part-time jobs while also working a significant amount of overtime at his full-time job as a correctional officer at DSNF.[86] (Id. at 193:11-14.)

According to Mr. Jones, correctional officers at DSNF "interact with the inmates, they try to solve the problems for some of the inmates that they may have. . . . The correctional

[84] On cross-examination, Dr. Reschly testified that he has been to DSNF one time to evaluate a client, although he inaccurately testified that the prison is located in northeast Nashville. (Tr. Oct. 7, 2013, ECF No. 251, at 190:6-20; see also Hr'g Ex. 159 (indicating that DSNF is in northwest Nashville).)

[85] Dr. Reschly testified that he has "seen plenty of examples" of private companies hiring people with mild MR/ID to provide their security. (Tr. Oct. 7, 2013, ECF No. 251, at 191:13-22.) When asked for examples of companies who hire people with mild MR/ID to provide security, Dr. Reschly cited a "[b]oyhood associate . . . , Alan Bane," who Dr. Reschly testified was hired by "a private manufacturer that produced I'm going to call[] them tricked-out vans in Indiana." (Id. at 191:23-192:3.)

[86] On cross-examination, Dr. Reschly testified that Exhibit 138, Defendant's overtime records from the Tennessee Department of Corrections from 2007 through 2011, corroborate the fact that Defendant regularly worked a significant amount of overtime at DeBerry Special Needs. (Tr. Oct. 7, 2013, ECF No. 251, at 193:15-195:15; Hr'g Ex. 138.)

officers themselves work with the inmates every day, . . . they're there eight hours a day or longer with the inmates on a one-on-one basis sometimes." (Tr. Oct. 11, 2013, ECF No. 294, at 10:21-11:2.) He testified that all of the units at DSNF are dangerous. (Id. at 27:1-8.) Jones testified that units 7C, 7D, and 7F housed suicidal inmates, and that it was the correctional officer's duty to monitor the inmates: "The officers were required to go by the rooms, just look in, check to see if the inmate is not hanging, not trying to beat his head against the wall, not doing anything, basically, just check on the inmate, make sure he's okay." (Id. at 20:24-21:13.) He testified that officers can be assigned to work on any unit, although each officer has a specific post assignment. (Id. at 45:4-12.)

Regarding the job of a correctional officer at DSNF, Jones testified that "[t]here is some routine to it, but there are no two days that are alike in a prison." (Id. at 27:9-12.) He testified that the following qualities would make for a good correctional officer at DSNF's building seven: "a willingness to learn, somebody who is not easily manipulated, somebody who is able to communicate with the inmates as well as with the mental health staff, the medical staff and the other security staff. Those qualities are needed in a unit, especially in a unit like building 7." (Id. at 28:3-9.) He testified that DSNF

is "a stressful place," which contributes to a high turnover rate for newly hired officers. (Id. at 58:16-21.)

Jones testified that there are four main tasks for a correctional officer at DSNF: distribution of food, distribution of medicines, recreation, and showering. (Tr. Oct. 11, 2013, ECF No. 284, at 169:13-23.) He testified that although correctional officers are not counselors, they "talk to inmates all the time. And sometimes in talking to them you are able to solve a lot of their problems, whatever it is." (Id. at 170:16-21.)

Jones testified that the duties of a correctional officer include serving meals and escorting the nurse through the unit during the distribution of medicines. (Tr. Oct. 11, 2013, ECF No. 294, at 28:10-29:5.) Jones testified that the correctional officer must open the "food pass" in the door and ensure the nurse's safety as he or she distributes the medicine, and also must communicate any medical problems an inmate is having to the nurse. (Id. at 29:6-13.) He testified that correctional officers shackle and handcuff inmates and escort them to the top of the building to be placed in the exercise pens. (Id. at 29:22-30:6.) He testified that the handcuffs and shackles must be placed on the inmates in a certain way to prevent their ability to escape them, and that when inmates are "bickering" with each other, "[y]ou may put them out on the rec yard at the

same time, but not right next to each other." (Id. at 30:8-31:5.)

Jones testified that officers have to make rounds in the unit to ensure that inmates are not harming themselves and that it is the duty of correctional officers to relay any information to the mental health staff. (Id. at 31:13-32:1.) He testified that correctional officers also must make regular counts throughout the day: "you have to make sure, again, you're looking at a live breathing body, you're not looking at a dummy in the bed make up as if it were a person." (Id. at 32:2-11.) Jones testified that correctional officers are responsible for taking the inmates to the showers and keeping records of who showered, who ate breakfast, and so on. (Id. at 32:19-33:3.) He testified that when inmates are being escorted to recreation or showers, it is standard policy to have two officers per inmate. (Id. at 33:19-34:2.) He testified that correctional officers must handle various forms, including inmate grievance forms and information request forms.[87] (Id. at 38:1-8.)

Jones testified that if an officer needs to report information to mental health professionals, he or she can call them directly or send them an e-mail via the Tennessee Offender Management Information System ("TOMIS"). (Tr. Oct. 11, 2013,

[87] On cross-examination, Mr. Jones testified that it is the officer's job to ensure the forms make it from the inmate's cell into the mailbox at unit 7D. (Tr. Oct. 11, 2013, ECF No. 284, at 199:3-200:14.)

ECF No. 294, at 40:6-11.) He testified that TOMIS is "an in-house or departmental computer system that has every inmate that has ever served time in the State of Tennessee. . . . Every employee . . . has a TOMIS ID where they're able to communicate with each other. . . ."[88] (Id. at 40:12-19.) He testified that officers must keep records in a ledger book when nurses and other personnel come onto and leave the unit. (Id. at 41:3-19.) According to Jones, officers had to monitor inmates who would come onto the units to clean, and that as many as two at a time could be cleaning a particular unit. (Id. at 46:1-47:1.) Jones testified that a correctional officer's job involves "a lot" of juggling of people; "it's an eight-hour shift and the officer is moving about seven." (Id. at 47:10-13.)

DSNF officers must participate in forty hours of annual training. (Tr. Oct. 3, 2013, ECF No. 291, at 765:20-24.) Officers also must pass firearms and first aid training, which have tests. (Id. at 766:18-767:2.) Defendant's 2003 and 2004 firearms qualifications cards indicate that he passed this required training. (See Hr'g Ex. 401 at 04148, 04152.)

Officers at DSNF face considerable safety risks. According to Jones, DSNF houses "inmates who again are known for throwing feces, known for being self-mutilators. We have inmates who have communicable diseases, so those risks are there. Inmates

[88] According to Mr. Bell, Defendant could navigate through and use the TOMIS system. (Tr. Oct. 3, 2013, ECF No. 291, at 843:12-15.)

who are known to be assaultive toward staff and assaultive toward other inmates, those risks are there as well." (Tr. Oct. 11, 2013, ECF No. 294, at 51:21-52:1.) He testified that an officer is at risk of physical contact with inmates "[a]ny time the door is open, [and] any time the food pass is open." (Id. at 53:4-8.)

According to Jones, the job of a correctional officer at DSNF is stressful. (Id. at 52:2-3.) He testified that "you never know what's going to happen from one minute to the next. Again, it's not like getting in your car and turning your radio on, it's every minute you're trying to figure out what's happening next." (Id. at 52:5-8.) He testified that "it is up to the officers in the unit" to determine whether an inmate should be let out of his cell and that "[y]ou don't want to let an inmate out of the cell who is having an off day." (Id. at 52:25-53:3.) On redirect examination, Jones testified that although it is policy to have two officers present to escort an inmate, two officers are not always enough to subdue a shackled inmate. (Tr. Oct. 11, 2013, ECF No. 284, at 214:3-15.)

Defendant's experts assert that someone with mild MR/ID could perform Defendant's job at DSNF. According to Dr. Reschly, Defendant was able to work as a correctional officer because the job was "quite routine. . . . [T]he same behaviors were required pretty much day after day, and it was

rare that some significant exception occurred to that." (Tr. Oct. 7, 2013, ECF No. 250, at 90:21-91:2.) Dr. Reschly testified that, in his interview of Defendant, Defendant said there was nothing hard about his job as a correctional officer, and that "[Defendant] just kind of shrugged and said it was all easy." (Id. at 91:10-13.) Dr. Reschly stresses that the dangerousness of Defendant's job as a correctional officer would impact the ability of a person with mild MR/ID to perform it "[o]nly to the extent that a significant amount of decision-making would be required frequently," but that Defendant's job was routine.[89] (Id. at 92:4-8.)

Witnesses for both the Government and Defendant conclusively established that Defendant had no significant limitations as to his occupational skills. According to Mr. Bell, Defendant "was a good unit officer, I could rely on him to follow the routine and do as he was instructed." (Tr. Oct. 3, 2013, ECF No. 291, at 761:25-762:2.) He testified that Defendant "was at work on time, on schedule and worked additional hours, I never knew him to be late." (Id. at 830:13-

[89] Dr. Tassé echoes Dr. Reschly's argument that the dangerousness of Defendant's job has no bearing on the adaptive functioning inquiry. He asserts, citing persons with mild MR/ID who work in factories with heavy machinery, that "how a job is structured or organized would help mitigate dangerousness." (Tr. Nov. 13, 2013, ECF No. 306, at 310:1-9.) The Court finds that this analogy does not apply in the instant case because, while heavy machinery can be dangerous, working as a correctional officer at DSNF involves the handling of people, some with significant mental issues and violent tendencies. (See Tr. Oct. 3, 2013, ECF No. 291, at 907:8-18; 909:8-16.)

14.) He further testified that most people do not last in building seven at DSNF and agreed that "most officers can't do an exceptional job like [Defendant]." (Id. at 841:6-14.)

Mr. Driver testified that Defendant "was one of the more outstanding individuals I ever worked with." (Tr. Oct. 11, 2013, ECF No. 284, at 231:3-7.) Driver described his impressions of Defendant as follows:

> [T]here wasn't any problem or situation that [Defendant] couldn't handle himself. [Defendant] took care of all of the items that came up. . . . [N]o one had any [complaints]. The staff that worked with [Defendant] loved to work with him. The inmates that were up there did not complaint about [Defendant] whatsoever.

(Id. at 231:10-15.) He testified that "not everyone was as good as [Defendant] was, no, under no circumstances." (Id. at 232:1-8.) He testified that other officers were not as good as Defendant because "they wouldn't put the effort in that [Defendant] did." (Id. at 232:9-12.) Driver testified that:

> [Defendant] made an effort to be good. He made an effort to be outstanding and to take care of everyone that needed any kind of personal care.
>
> [Defendant] made sure that no one went two or three days without a shower, that everyone got a chance to eat their meals, that everyone got a chance to get recreation as scheduled.
>
> If they had a doctor's appointment, [Defendant] made them available, he made that person available to go.
>
> If they needed to see the dentist, [Defendant] let me know, hey, this guy needs to see the dentist, he has a toothache.
>
> The man had – wanted to talk with the chaplain, hey, he wants to talk with the chaplain, can you

> contact the chaplain's office and see if they can send him a bible up here or something.
>
> I was very pleased with [Defendant's] work.

(Id. at 232:12-233:4.) Moreover, when Defendant worked overtime, he was subject to assignment to a building other than the one to which he was normally assigned, including buildings where inmates are not locked down twenty-three hours per day: "Unit 3, Unit[] 4, Unit 5, Unit 6, the health center, Building 15 where guys would be out walking around." (Id. at 244:24-245:12.)

Mr. Scott added that he never saw any mental disability in Defendant that would endanger the inmates or staff at DeBerry Special Needs. (Tr. Oct. 3, 2013, ECF No. 291, at 912:14-20.) Scott testified that Defendant's worst fault as a correctional officer was his sloppy dress. (Id. at 914:3-5.) According to Dr. Welner, it is significant that none of the mental health professionals with whom Defendant interacted at DSNF ever assessed Defendant as being slow. (Tr. Oct. 17, 2013, ECF No. 271, at 1542:1-14.) He testified that:

> It is very difficult to contemplate how [Defendant] with all of his exposures . . . could go 20 plus years without anyone coming forward and saying, hey this guy is retarded, or what's the matter with this guy, and there's nothing in his record that reflects anyone coming forward . . . and saying I don't want to work with this guy because he is immature, because his emotions are inappropriate, and again, that speaks to the literature in mental retardation about how it is recognized in others. A person may not have an appearance of mental retardation, but as DSM-V notes

> in the adaptive skills, that peers notice that you relate in an immature and inappropriate regulation of emotions with others.

(Id. at 1539:17-1540:6; see also DSM-V at 34 ("There may be difficulties regulating emotion and behavior in age-appropriate fashion; these difficulties are noticed by peers in social situations.").)

Defendant's one notable occupational infraction involves a December 23, 2010, disciplinary hearing. At that hearing, he offered explanations for certain days when he was late or missed work, and accepted responsibility for other dates when he was late or absent. (See Tr. Oct. 11, 2013, ECF No. 294, 63:12-13; 66:1-3; Hr'g Ex. 267.) At the hearing, the committee reprimanded Defendant for failing to call in, but recommended only a two-day suspension based on Defendant's twenty-one years of exemplary performance. (See Hr'g Ex. 267 at 35:34.) Mr. Jones testified that, after the disciplinary hearing, Defendant had no more attendance problems at DSNF. (Tr. Oct. 11, 2013, ECF No. 284, at 152:13-17.)

The Court finds that Dr. Welner's analysis of the evidence as to Defendant's occupational skills is compelling. According to Dr. Welner:

> the elephant in the room of the case is a 20 plus year history of someone working in a range of corrections environments with varying degrees of complexity, but all the way up to the highest area of risk and social, interpersonal and functional and intellectual

> challenge within the correction system, and working with a variety of populations, to a different degree of isolation, whether he's working with someone or working by himself; and to have succeeded to the degree that [Defendant] has, that he has had a very successful career in the Department of Corrections.

(Tr. Oct. 17, 2013, ECF No. 271, at 1538:21-1539:10.)

By all accounts, Defendant's work history constitutes a record of competence and success in a challenging environment. One of his supervisors described him as the principal employee used to train new officers and detailed his innovative suggestion for a Tennessee Department of Corrections policy change. (See Hr'g Ex. 156 at 00592, 00595; cf. O'Neal, No. 11-3449, 2013 WL 6726904, at *12 (criticizing a state-court determination that a defendant lacked adaptive deficits when confronted with a work history "riddled with absenteeism and tardiness.").) Dr. Tassé testified that he has "never come across a correctional officer with an intellectual disability." (Tr. Nov. 13, 2013, ECF No. 306, at 299:22-23.) This is not surprising in light of the range of skills required of a correctional officer, as well as the risks inherent in the job.[90] A finding that a correctional officer who worked successfully

[90] Dr. Tassé cites the NLTS-2 study in support of his assertion that approximately seventy-six percent of persons with mild MR/ID are employed at some point after high school. (See Tr. Nov. 13, 2013, ECF No. 306, at 284:10-17; Hr'g Ex. 456.) There are, however, no persons with mild MR/ID reported in the "protective service occupations." (See Tr. Nov. 13, 2013, ECF No. 306, at 439:14-23; Hr'g Ex. 463.) Dr. Tassé's reference to a pastry chef at a Kroger grocery store as an example of the ability of persons with mild MR/ID to maintain long-term employment is simply insufficient to explain Defendant's ability to function effectively in a volatile environment like DSNF. (See Tr. Nov. 13, 2013, ECF No. 306, at 300:16-21.)

for over twenty years, including work with some of Tennessee's most violent criminals, is mildly mentally retarded/intellectually disabled based on the limitations of his occupational skills would stand in sharp contrast to the overwhelming evidence to the contrary.

Defendant has not proven by a preponderance of the evidence that he suffers from significant limitations as to his occupational skills. Cf. Davis, 611 F. Supp. 2d at 504 (noting that the defendant "has extremely limited experience with competitive employment.").

c. Use of Money and Money Management

Defendant has not demonstrated by a preponderance of the evidence that he suffers from significant limitations as to his use of money and money management.

According to Defendant's mother, Defendant was careless with money and would leave it lying around the house: "[a] lot of change would be on [Defendant's] chest, just laying around, a lot of change." (Tr. Oct. 1, 2013, ECF No. 289, at 197:18-21.) She testified that Defendant "paid his bills pretty good when he was at home, but at summer time, he got behind on his car note." (Id. at 197:16-17.) She testified that "[Defendant] could go to the store and pick up a few items." (Id. at 197:25-198:1.) According to Mrs. Lois Montgomery, it became more complicated for Defendant "[i]f it was several items, a lot of items, maybe

seven or eight items." (Id. at 198:3-4.) She testified that Defendant "always brought the right change back home." (Id. at 198:5-7.)

Defendant's sister testified that, as a child, Defendant "didn't deal with money," and that coins "would drop out of his pocket, and you can just follow the trail, because they drop out of his pocket." (Id. at 307:15-19.) She testified that during Defendant's teenage years and his twenties, he had a car note, but that his mother paid it. (Id. at 308:3-8.) Mrs. Barrow testified that, in his twenties, her brother "needed help with paying his bills. My mother paid the bills, and he was lo[o]se with money[,] he would drop money out of his pocket." (Id. at 342:10-12.)

Defendant's wife testified that when the couple was first married, they created a joint bank account. (Tr. Oct. 2, 2013, ECF No. 290, at 567:13-19.) She testified that the account would often be overdrawn due to bounced checks and overdrawn debit cards and that Defendant was responsible for these problems. (Id. at 567:19-568:4.) Mrs. Melissa Montgomery testified that Defendant bounced checks throughout their relationship, "[e]ven till I left." (Id. at 568:18-19.) She testified that because of Defendant's struggles with finances, she separated the couple's bank accounts. (Id. at 568:20-22.)

Furthermore, Mrs. Melissa Montgomery testified that controlling the finances was her responsibility. (Id. at 568:23-569:5.) She testified that Defendant would give her half the money, in cash, required to pay the mortgage and other bills, and that she would ensure the payments were made on time. (Id. at 569:6-570:5.) She testified that during this time, Defendant still struggled with finances and would use his debit card without adequate funds. (Id. at 570:6-12.) Defendant's wife elaborated on Defendant's struggles with money: "as far as handling it, he would lose it at times, because I would find it. Sometimes it was a treat to find and, you know, he didn't always pay his bills, the few things he did on time." (Id. at 570:13-17.) She testified that Defendant "couldn't do any budgeting, that was mostly my job. The only thing he really would pay would be his car note." (Id. at 570:21-25.)

Mrs. Melissa Montgomery testified that Defendant received loans and credit lines, including one from Dell. (Id. at 570:25-571:2.) She testified that Defendant struggled with these accounts as well and that the accounts fell behind. (Id. at 571:11-15.) She testified that, after the couple separated, Defendant fell behind on the mortgage payments. (Id. at 605:2-6.)

Defendant's experts asserted that Defendant relied on his wife to handle his finances. Dr. Woods testified that Defendant

was able to write checks and have a bank account, but that his wife "wrote most of the checks, she paid the bills," and that Defendant's wife also handled the process of buying a house. (Tr. Oct. 10, 2013, ECF No. 259, at 654:13-656:10.) Dr. Reschly added his opinion that Melissa Montgomery was a "benefactor" and that she did all the planning and financial paperwork leading up to the couple's acquisition of a home. (Tr. Oct. 8, 2013, ECF No. 254, at 304:3-7.) As the Court discusses infra Part IV.B.6, Mrs. Melissa Montgomery's own lack of financial management skills undermines this argument.

Moreover, the Government has the stronger argument that Defendant has not satisfied his burden to prove that he suffered from significant limitations in his ability to use and manage money. Dr. Reschly testified that both Defendant and Melissa Montgomery had credit scores in the 600s in 2007 when they bought their house. In April of 2007, Defendant's credit score was 617, and Melissa Montgomery's credit score was 618. (Id. at 304:15-306:5; Hr'g Ex. 168 at 01953.) Exhibit 169 indicates that in December of 2009, after the couple's purchase of a home (led by Defendant's wife), Mrs. Melissa Montgomery's credit score was 468, and Defendant's credit score was 431. (Tr. Oct. 8, 2013, ECF No. 254, at 306:17-307:8; Hr'g Ex. 169 at 01903.) Dr. Reschly testified that, like many other people in the sub-prime mortgage era, the Montgomerys borrowed more money

than they could handle, including buying a $169,000 house with no money down and borrowing $5,000 from the builder. (Tr. Oct. 8, 2013, ECF No. 254, at 307:10-308:11.)

On cross-examination, Dr. Reschly testified that Melissa Montgomery made the kind of deal "that led to the demise of the financial system." (Id. at 308:7-11.) He testified that, after Melissa Montgomery and Defendant split up, she counted on Defendant to pay his half of the mortgage payment each month and that, eventually, she moved out into an apartment and stopped paying her portion of the mortgage. (Id. at 308:15-309:1.) He testified that although Melissa Montgomery declared bankruptcy, Defendant never did. (Id. at 309:5-9.) Dr. Reschly testified that Defendant tried to keep the mortgage payments current for a few months following Mrs. Melissa Montgomery's departure, and that he contacted the mortgage company to file a hardship affidavit (Hr'g Ex. 170) on January 15, 2010, stating as follows: "My wife and I are separted [sic], my wife move out 6 month ago." (Id. at 309:14-311:25; Hr'g Ex. 170 at 02110.)

On cross-examination, Dr. Reschly testified that paragraph eighty-seven of his report states, "[Melissa Montgomery] monitored checking and credit card account[s], wrote checks to pay bills, and made nearly all everyday decisions about money." (Hr'g Ex. 107 ¶ 87; see also Tr. Oct. 8, 2013, ECF No. 254, at 312:6-16.) Dr. Reschly did not dispute that Defendant had a

bank account in his own name; that he at various times added and removed his wife's name from the account; and that he wrote checks. (Tr. Oct. 8, 2013, ECF No. 254, at 312:17-313:5.) Dr. Reschly testified that Exhibits 171–176 contain a collection of checks Defendant wrote on his First Tennessee Bank account to various recipients. (Id. at 313:10-316:17; Hr'g Exs. 171–76.) Dr. Reschly testified that Defendant also had a savings account at the Southeast Financial Credit Union. (Tr. Oct. 8, 2013, ECF No. 254, at 316:19-22.)

All of Defendant's problems making credit card payments surfaced after 2009, i.e., after the couple's separation. (See Tr. Oct. 17, 2013, ECF No. 297, at 104:7-18; see also Hr'g Ex. 425.) Moreover, Defendant obtained all of his credit cards either in 2007 or 2008, after he and his wife bought a home. (Id. at 110:5-15.) Defendant had two credit cards through HSBC, one through Credit One, and another through Capital One, and most of them were applied for and received in the spring of 2008. (Tr. Oct. 17, 2013, ECF No. 286, at 497:1-11; see also Hr'g Exs. 423-24.)

The foregoing evidence does not establish that it is more likely than not that Defendant consistently suffered from significant limitations as to his use of money and money management skills. (See Tr. Oct. 15, 2013, ECF No. 266, at 963:24-964:3, 1058:11-23 (noting that MR/ID is "pervasive" and

cannot be diagnosed based on "isolated incident[s] here or there.").) Moreover, Defendant's financial struggles were only significant following the couple's acquisition of a home and subsequent separation. Defendant's hardship affidavit (see Hr'g Ex. 170 at 02110) is persuasive evidence that he had the acumen, if not the means, required to handle financial challenges independently. Cf. Wiley, 625 F.3d at 220 (noting that the defendant "relied on his grandmother and then his wife to handle his money.").

There are other examples in the record of Defendant's financial problem-solving ability. On September 4, 2003, Defendant submitted a typewritten and signed document to his bank in which he requested to be removed from direct deposit temporarily, stating: "Due to unforeseen circumstances, I've experienced some financial problems which has resulted in my checking account being closed. I am requesting that my direct deposit information to be [sic] deleted from the system until I'm able to obtain a new account."[91] (Hr'g Ex. 178 at 01242; see also Tr. Oct. 8, 2013, ECF No. 254, at 319:15-320:20.)

On balance, Defendant has failed to demonstrate by a preponderance of the credible evidence that money management was a consistent significant adaptive limitation for him. Defendant

[91] Dr. Reschly speculated that Defendant might not have prepared this document because he was told by Melissa Montgomery that Defendant "had few, if any, keyboard skills." (Tr. Oct. 8, 2013, ECF No. 254, at 320:11-15.)

has not demonstrated his "[r]educed success . . . in obtaining markers of independent economics (e.g., employment, credit cards, checking accounts, driver's license)" – "markers" that the clinical literature suggests will surface in persons with mild MR/ID. AAIDD Manual at 154.

d. Safety and Health Care

Defendant has failed to carry his burden of proving by a preponderance of the evidence that he suffers from significant limitations in the area of safety and health care.

Both Defendant's sister and Defendant's wife testified that the condition of Defendant's house deteriorated following his separation from his wife in 2009. Mrs. Barrow testified that, after the separation, she and her mother were "[w]orried about how [Defendant] was taking care of himself. . . ." (Tr. Oct. 1, 2013, ECF No. 289, at 322:11-12.) She testified that, in 2010, the family planned to have Christmas dinner gathering at Defendant's house. (Id. at 322:11-17.) Barrow visited Defendant's home with her husband prior to the anticipated Christmas gathering to "make sure we had everything in place," and discovered that the house was "filthy. It was unlivable." (Id. at 322:18-323:8.) She called Defendant's mother after seeing his home and told her the following about its condition: "that we won't be having Christmas dinner there, and she said

was it that bad, and I said yeah, it was worse probably than what you can imagine." (Id. at 329:1-3.)

Defendant's wife added that, after the couple separated in May 2009, she moved into an apartment. (Tr. Oct. 1, 2013, ECF No. 290, at 588:12-19.) She testified that the apartment did not have a washer and dryer, so she would "go back to the house and wash." (Id. at 588:20-23.) She testified that when she went back to wash clothes, "the house would be like a disaster area, I mean stuff strung everywhere, dishes, cups and stuff sitting in there, just – old food left on them, stuff all over the table." (Id. at 588:23-589:1.) Regarding the condition of the home, she testified as follows:

> Clothes all over the floor, the furniture, you know, all out of place, stuff just strowed [sic] all over the place, I mean clothes and dirty – I don't know, dirty or clean clothes, I don't know what they were, but all over the floor. The kitchen had dirty dishes piled up, old pots and – where you try to – it looked like they would try to fix something, all rotted in the pot. . . . Just stuff in the bathroom like the toiletries and stuff just strowed [sic] everywhere, and hair care stuff, everywhere. The commode just corroded. It just horrible, just horrible.

(Id. at 590:1-12.)

Mrs. Melissa Montgomery testified that she would try to get the first floor of the house clean when she came over to wash clothes. (Id. at 591:24-592:2.) She testified that she "tried to really not go upstairs," because she "knew it was probably even worse than that, and I just didn't – I just didn't want to

go up there." (Id. at 593:13-14, 594:15-17.) She testified that she is neat and orderly, and that she never kept the house in this condition. (Id. at 592:17-23.) On cross-examination, Defendant's wife testified that, when she left Defendant, she and the children moved out of the house while Defendant was at work and that Defendant came home to find them gone. (Tr. Oct. 3, 2013, ECF No. 291, at 709:18-25.) According to Mrs. Melissa Montgomery, during this time, her son was having legal problems and her daughter was seriously ill – "it was a stressful time, yes." (Id. at 710:1-15.)

Defendant's wife also testified that, once she obtained her own washer and dryer, she stopped cleaning the house at 140 Wolverine Trail when she was there. (Id. at 715:15-25.) She testified that she sent her son to live at the house fully aware of its poor condition. (Id. at 717:2-12.) Not only did Mrs. Melissa Montgomery send her son to live with Defendant, she also testified at Defendant's March 2011 detention hearing before this Court that she would go and "stay the night" at 140 Wolverine Trail even after the separation. (Id. at 726:20-727:6; see also Hr'g Ex. 97.) She testified that she and her daughter would stay overnight at the house despite its supposedly filthy condition. (Tr. Oct. 3, 2013, ECF No. 291, at 727:7-11.)

Mrs. Melissa Montgomery testified that photographs of the house taken during the execution of a search warrant (see Hr'g Exs. 121–32, 208–40) accurately represented how the house was maintained by Defendant. She testified that the condition of the house in the photos "was a little bit worser [sic], but primarily, yeah. And that was – I mean even after I – right after I left." (Tr. Oct. 3, 2013, ECF No. 291, at 738:20-25.) She testified that she could not remember the precise date she last visited the 140 Wolverine Trail residence. (Id. at 739:10-17.)

Ms. Keeves, the "crime scene tech" on the scene at the search of Defendant's residence on February 14, 2011, took photos of the house prior to the search by the police. (Tr. Oct. 9, 2013, ECF No. 283, at 69:11-70:3.) Keeves testified that officers made entry into Defendant's residence at "around nine p.m." (Id. at 70:4-6.) She testified that the purpose of taking pictures is "[t]o kind of set the scene and show what the house was like when we got there before anything is moved or taken or evidence collected." (Id. at 70:17-21.)

On cross-examination, Keeves testified that, during the initial clearing of Defendant's residence, there could have been items moved from their initial position and she would not have known what they were. (Id. at 123:17-124:1.) She testified that she did not know whether officers moved the mattresses

depicted in the photographs she took. (Id. at 124:2-5.) Keeves testified that she pulled out some drawers to photograph their contents. (Id. at 124:13-15.) Regarding items with evidentiary value that she photographed, Keeves testified that, "[n]ormally, I like to photograph it where it was found, but sometimes an officer will move it and say, hey, I found this. And I will photograph it if he's laid it on a bed. . . ." (Id. at 125:1-8.)

Regarding the layout of Defendant's residence, Keeves testified that "the main living area was downstairs and the bedrooms were upstairs." (Id. at 72:9-13.) She testified that there were four bedrooms upstairs. (Id. at 94:14-19.) She testified that the house was "messy. There [were] a lot of items on the floor, clothing, just random cups." (Id. at 72:14-20.) Keeves testified that Defendant's residence did not smell. (Id. at 72:23-24.)

Keeves identified the following exhibits as photographs that she took and testified that they represented various areas of Defendant's residence prior to the search: Exhibit 209 (front door looking into the living room); Exhibits 210–12 (living room); Exhibit 213 (kitchen)[92]; Exhibit 214 (dining area); Exhibit 215–16 (garage); Exhibit 218 (laundry room); and

[92] Ms. Keeves testified that Exhibit 238 is another photograph she took of the kitchen, and that it depicts the kitchen as it appeared prior to the search of the residence. (Tr. Oct. 9, 2013, ECF No. 283, at 95:22-96:11; Hr'g Ex. 238.)

Exhibit 219 (stairwell). (Id. at 73:21-77:7; Hr'g Exs. 209, 210–12, 213, 214, 215–16, 218, 219.) Keeves testified that Exhibit 224 is a photograph depicting the hallway at the top of the stairwell at Defendant's residence, and that the picture accurately represents how the hallway appeared prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 77:14-78:3; Hr'g Ex. 224.)

Keeves testified that she took pictures of the bathrooms at Defendant's residence. (Tr. Oct. 9, 2013, ECF No. 283, at 78:5-8.) She testified that Exhibit 127 is a photograph depicting the upstairs bathroom at Defendant's residence prior to the search. (Id. at 78:10-79:9; Hr'g Ex. 127.) She testified that there is a plunger right next to the toilet. (Tr. Oct. 9, 2013, ECF No. 283, at 127:1-11; Hr'g Ex. 127.)

She testified that Exhibit 126 is a photograph depicting the other bathroom prior to the search, and that she is not aware of any of the officers using the toilet. (Tr. Oct. 9, 2013, ECF No. 283, at 79:20-80:20; Hr'g Ex. 126.) Keeves testified that Exhibit 126 is the "bedroom 1" bathroom (see Hr'g Ex. 246), that there is a bucket, plunger, and toilet brush in the photo, that she did not try to flush the toilet, and that she did not know whether someone was attempting to fix the toilet. (Tr. Oct. 9, 2013, ECF No. 283, at 125:23-126:25; Hr'g Ex. 126.)

Keeves testified that Exhibits 121–25 are photographs from the same upstairs bedroom that were taken prior to the search, and that they depict the bedroom as it appeared prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 81:10-85:21; Hr'g Exs. 121–25.) She testified that Exhibit 225 is another photograph of the same bedroom from a different angle, and that it was taken prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 85:23-86:15; Hr'g Ex. 225.) She further testified that Exhibit 226 is a photograph of a bed that is slightly moved to make the items underneath it visible and that the photo was taken prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 86:17-87:11; Hr'g Ex. 226.) She testified that the photo depicts multiple food items in the bedroom, but that she did not know how long the food items had been there. (Tr. Oct. 9, 2013, ECF No. 283, at 127:14-128:10.)

Keeves testified that Exhibit 227 is a photograph of one of the bedrooms as it appeared prior to the search, but that it depicts a clipboard, notepad, and pencils on top of a dresser that were placed there by the police; "they started sketching at that point. They weren't moving anything, they were just sketching out the floor plan of the house." (Tr. Oct. 9, 2013, ECF No. 283, at 87:17-88:25; Hr'g Ex. 227.) Keeves further testified that Exhibits 228–30 are photographs of the upstairs bedrooms that depict the bedrooms as they appeared prior to the

search. (Tr. Oct. 9, 2013, ECF No. 283, at 89:2-91:4; Hr'g Exs. 228–30.)

Keeves testified that Exhibit 231 is a photograph of one of the bathrooms that she took prior to the search of Defendant's residence. (Tr. Oct. 9, 2013, ECF No. 283, at 91:6-92:3; Hr'g Ex. 231.) She testified that Exhibit 232 is a photograph that gives a wider view of the same bathroom, which she took prior to the search of the home. (Tr. Oct. 9, 2013, ECF No. 283, at 92:5-18; Hr'g Ex. 232.)

Keeves testified that Exhibit 233 is a photograph she took from the doorway looking into another upstairs bedroom and that the photo depicts how the bedroom appeared prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 92:20-93:10; Hr'g Ex. 233.) She testified that Exhibits 234 and 235 are also photos of the same room and that they depict how the bedroom appeared prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 93:12-94:12; Hr'g Exs. 234–35.)

Keeves testified that Exhibit 236 is a photograph of one of the other bedrooms and that it depicts how the bedroom appeared prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 94:20-95:4; Hr'g Ex. 236.) She testified that Exhibit 237 depicts the closet of one of the bedrooms as it appeared prior to the search. (Tr. Oct. 9, 2013, ECF No. 283, at 95:6-18; Hr'g Ex. 237.) She further testified that Exhibit 239 is a

photograph she took of the coffee table in the living room prior to the search of the home. (Tr. Oct. 9, 2013, ECF No. 283, at 96:13-97:14; Hr'g Ex. 239.) Keeves testified that Exhibit 240 is a photograph of the first bedroom she photographed, and that the photo depicts how the room looked prior to the search of the residence. (Tr. Oct. 9, 2013, ECF No. 283, at 97:20-100:1; Hr'g Ex. 240.)

The Court finds that the photographs of Defendant's home are of limited probative value in terms of demonstrating that Defendant suffered from pervasive, significant limitations in his ability to maintain a safe living environment. Firstly, the photographs were taken after the clearing of the house. It is conceded that some items were moved, damaged, or knocked over during the entry and clearing process. (See Tr. Oct. 9, 2013, ECF No. 283, at 22:13-25; 25:4-26:9; 30:16-31:18; Hr'g Ex. 212.) Secondly, certain items, like beds and drawers, were moved in order to take photographs. Thirdly, evidence in the record indicates that Defendant's son was also living at the house periodically during this time period, which makes it unclear whether the condition of the house is attributable to Defendant.[93] (See Tr. Oct. 2, 2013, ECF No. 290, at 600:21-

[93] Thus, the Court cannot assign dispositive weight to Dr. Reschly's emphasis on the photograph marked as Exhibit 127. He testified that mold "appears to be adhering to the tub near the floor about the middle of the tub," consistent with Mrs. Barrow's description of Defendant's home as "nasty." (Tr. Oct. 7, 2013, ECF No. 250, at 101:20-102:21; Hr'g Ex. 127.)

601:13.) Finally, and most significantly, the photographic evidence of Defendant's home is indicative only of its condition during a brief period, including the period of time in which Defendant and his son appear to have been engaged in the commission of a series of crimes. The photographs, while troubling, are not evidence of a pervasive inability to maintain a safe environment on his own.

Moreover, there is evidence in the record that Defendant lived on his own at various points throughout his life. Dr. Woods testified that Defendant lived independently on the UT-Martin campus for a year after his roommate transferred to another university. (Tr. Oct. 10, 2013, ECF No. 260, at 853:24-854:9.) Defendant separated from his wife for an undisclosed period of time in 1997, during which he lived separately and paid child support. (Tr. Oct. 2, 2013, ECF No. 290, at 622:7-10; 623:1-10; 626:9-627:7.) There is no evidence that, during these time periods, which were not marked by legal and financial troubles and criminal activity, Defendant was unable to maintain a safe living environment. That Defendant performed well at a risk-laden job where he was responsible for the lives and safety of the inmates he supervised is further evidence of his ability to maintain his safety. (See Tr. Oct. 11, 2013, ECF No. 294, at 48:4-6; 52:2-8.)

Regarding Defendant's health care, the evidence shows that Defendant does not suffer from significant limitations in that area. See DSM-V at 34 ("Individuals [with mild MR/ID] generally need support to make health care decisions. . . ."). Defendant's medical records support his ability to advocate for his health on his own behalf. For example, Defendant's Stonecrest Medical Center records indicate that, in September of 2009, he complained about working a lot of doubles, not eating regularly, and having a lot of headaches. (Tr. Oct. 17, 2013, ECF No. 297, at 105:8-106:21; Hr'g Ex. 429 at 03449.) Dr. Reschly conceded that Defendant went to see his internist, Dr. Heather Rowe, dozens of times over a four or five-year period for spider bites, impotence, moles, and pain in his extremities. (Tr. Oct. 8, 2013, ECF No. 254, at 355:11-356:3; see generally Hr'g Ex. 181.)

Dr. Woods testified that Defendant's medical records indicate he made multiple visits to Dr. Rowe for a condition called hemangioma, which involved a collection of blood in his thigh due to improperly developed blood vessels. (Tr. Oct. 10, 2013, ECF No. 260, at 773:8-17.) Dr. Woods testified that although there is nothing medically that can be done about the condition, "what we see over time is that [Defendant] repeatedly would go in to see Dr. Rowe about this condition that really could not be changed and could not be treated." (Id. at 773:19-

22.) According to Dr. Woods, "when we talk about the practical aspect, it's not just getting care, it's often going in and getting care and perhaps not understanding what the medical issue is really about."[94] (Id. at 773:22-25.)

Regarding Defendant's benign hemangioma on his leg, Dr. Welner testified that Defendant "only followed up because it grew and it had changed which is an appropriate course of action for a medical consumer to take." (Tr. Oct. 21, 2013, ECF No. 275, at 1619:14-19; see also Hr'g Ex. 181 at 03240.) Dr. Welner testified that Defendant "demonstrated responsibility for his own medical needs and follow-up." (Tr. Oct. 21, 2013, ECF No. 275, at 1619:1-5.)

The Court finds that the conclusion reached by Dr. Welner is the conclusion supported by the greater weight of the evidence.

Defendant also has advocated for his health while incarcerated. Richard Pierce testified that, in order to receive medical care at the West Tennessee Detention Facility, Defendant would have to "fill out a sick call slip, just a standard slip that every inmate fil[l]s out." (Tr. Oct. 11, 2013, ECF No. 284, at 280:17-21.) Defendant could request a sick call slip either from Pierce or from a correctional officer. (Id. at 281:1-3.)

[94] Dr. Woods conceded that he "feel[s] less strongly about the medical part." (Tr. Oct. 10, 2013, ECF No. 260, at 774:19-22.)

Pierce testified that Defendant requested medical care during his time at the facility and that the first time Pierce spoke with Defendant following his initial classification, "[Defendant] had explained to me that he was having headaches and that he had filled out several sick call requests and he was . . . unhappy with the medical treatment that he had been receiving or the lack of." (Id. at 281:15-24.) Pierce testified that Defendant did not need any special help to function at the West Tennessee Detention Facility, and that some inmates do require special help. (Id. at 281:25-282:5.) Exhibit 182 confirms that Defendant submitted sick call requests for numerous ailments while incarcerated, including headaches, a sore throat, ankle pain, anemia, hearing voices, problems sleeping, spider bites, dizziness, constipation, and problems with vision. (See generally Hr'g Ex. 182; see also Tr. Oct. 8, 2013, ECF No. 254, at 357:23-362:22.)

In light of the record developed in this case, Defendant has not satisfied his burden of showing by a preponderance of the evidence that he has significant limitations in the areas of safety and health care.

e. Travel and Transportation

Defendant has failed to demonstrate by a preponderance of the evidence that he has significant limitations in the area of travel and transportation.

Defendant's mother testified that he struggled with driving. She testified that Defendant "can't back up a car" and that he would mix up the gas and brake pedals. (Tr. Oct. 1, 2013, ECF No. 289, at 218:2-3; 220:3-9.) She testified that it was "a little nerve racking" to ride in a car with Defendant. (Id. at 220:12-13.) She further testified that Defendant could not drive a standard shift and did not want to learn how; according to Mrs. Lois Montgomery, "[i]t was a little bit complicated for [Defendant] to drive a standard shift car . . . you have to know how to coordinate the gas and the clutch. That was difficult." (Id. at 220:14-23.)

Defendant's mother testified that Defendant picked her up from the Nashville airport on one occasion to drive her home to Henning and that, "about six miles or more from home, the car stopped." (Id. at 218:13-15.) She testified that a neighbor examined the car and told them it had run out of gas. (Id. at 218:25-219:7.) Mrs. Lois Montgomery testified that on another occasion, Defendant drove the wrong way onto an onramp on Interstate 40. (Id. at 221:1-7.)

Mrs. Lois Montgomery testified that, after Defendant graduated from high school, she helped him purchase a new Pontiac Trans Am.[95] (Id. at 235:18-236:1.) She testified that

[95] On cross-examination, Defendant's mother testified that she was not aware that the Trans Am is a powerful sports car and that, at the time Defendant received it, "he was 18 years old." (Tr. Oct. 1, 2013, ECF No. 289, at

other people in the community were "jealous because in my neighborhood, there were no young males or females that had nice cars." (Id. at 236:15-16.) She testified that Defendant let people in the neighborhood drive the car, including Defendant's girlfriend and his girlfriend's brother. (Id. at 236:18-237:2.) She testified that Defendant did not maintain the car well: "[i]t wasn't clean inside or outside. . . . It was so filthy on the inside until it smelled. He had wet towels in the trunk of his car where he had tried to wash his car and dry it . . . and they were sour, they [were] smelling." (Id. at 237:25-238:7.) The car was ultimately stolen and burned. (Id. at 236:2-3.)

Defendant's sister also testified that he was not a good driver. (Id. at 310:1-10.) She testified that it was scary to ride as a passenger with Defendant because "he wouldn't keep the wheels on the road, he swayed a lot." (Id. at 310:8-9.) She testified that Defendant was "always with somebody . . . when he went to new places."[96] (Id. at 311:13-14.)

Defendant's wife, Melissa Montgomery, testified that, early on in the marriage, "we used to go and take the cars to the carwash and wash them and all that stuff, but over time, that kind of declined with [Defendant's] car." (Tr. Oct. 2, 2013,

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272:7-16.) She testified that although she helped Defendant buy the Trans Am, "[Defendant] paid for the car." (Id. at 272:17-20.)

[96] On cross-examination, Mrs. Barrow testified that she was not surprised to learn that Defendant worked at a job that required him to drive a forklift. (Tr. Oct. 1, 2013, ECF No. 289, at 373:3-5.)

ECF No. 290, at 578:21-25.) She testified that Defendant would leave trash and old food in his car, and that it would mold and decay. (Id. at 579:1-12.) She testified that Defendant would temporarily clean the car when she would fuss at him about it, but "it still would be stuff in there . . . it still wasn't appropriate." (Id. at 579:15-23, 581:4-15.) She testified that Defendant would take his car to have the oil changed on his own, but that he did not do so regularly. (Id. at 582:10-19.) On cross-examination, Defendant's wife testified that she never looked in Defendant's car after their separation in 2009. (Tr. Oct. 3, 2013, ECF No. 291, at 712:19-21.) She testified that Defendant would keep a uniform he had to change into for a part-time job in his car and that he often ate in his car going from one job to another. (Id. at 713:7-18.)

Melissa Montgomery testified that when the family went on trips, she was responsible for planning them and for getting the hotel directions. (Tr. Oct. 2, 2013, ECF No. 290, at 581:16-23.) She testified that Defendant could follow directions in a vehicle if she was with him: "[i]f I wasn't with him, not so much." (Id. at 581:24-582:2.) She testified that Defendant was able to get to and from work because it was "something routine." (Id. at 583:1-5.) She testified that on unfamiliar routes, "I don't really let [Defendant] drive up the street and run and go

get nothing because I know he will get lost." (Id. at 584:5-13.)

On cross-examination, Mrs. Melissa Montgomery testified that Defendant drove himself to his regular job and part-time jobs and that he also picked his daughter up from school every day. (Id. at 634:10-21.) She testified that one of Defendant's jobs as a security guard involved driving to many different job locations – called "projects" – throughout Nashville. (Id. at 634:22-635:6.) According to Mrs. Melissa Montgomery, Defendant drove himself to these projects. (Id. at 635:7-10.) Furthermore, she testified that Defendant's job at the halfway house involved driving the inmates to their jobs, as well as to other recreational locations on the weekends, and that he never struggled with the job. (Id. at 635:11-636:8.)

Defendant's experts argued that his transportation abilities are significantly limited. Dr. Reschly testified that he had no specific knowledge about whether Defendant drove to Atlanta to visit his sister, or whether he took his son to an Amateur Athletic Union track meet in Baltimore, although he did read the transcript of Dr. Welner's interview with Defendant. (Tr. Oct. 7, 2013, ECF No. 251, at 249:22-250:6.) When asked whether he had read the portion of the transcript where Defendant told Dr. Welner he took his family to Louisville to the Muhammad Ali museum, Dr. Reschly offered the following

speculation: "I suspect Melissa drove. . . . I would also suspect that because [Defendant] clearly cannot read a map." (Id. at 250:7-14; see also Hr'g Ex. 252 at 04626.)

Regarding Defendant's inability to read a map, Dr. Reschly testified:

> [I]n my interview with [Defendant] I displayed a map of the State of Tennessee; allowed [Defendant] to inspect that map for a minute or two.
>
> Then – and then [Defendant] spontaneously said, "I found Nashville."
>
> I quizzed [Defendant] about Nashville.
>
> Next, I asked [Defendant] to trace the route he would take in traveling from Nashville to Henning, Tennessee, where his mother lived and his boyhood location; and [Defendant] was not able to do that. [Defendant] looked at the map awhile.
>
> And then [Defendant] said spontaneously, "I know how to get there. I take I-24 west and then I-40 west."
>
> So, then I asked [Defendant] if he could find other cities – Memphis, Chattanooga, Knoxville – and he was able to do so.[97]
>
> I then asked [Defendant], "If you were to return from Henning, Tennessee, to Nashville, what direction would you go?"
>
> And [Defendant] said, and I quote, "I don't do no directions."
>
> I asked [Defendant] if he could indicate the direction from the interstate, and [Defendant] again professed that he was not able to do directions.

(Tr. Oct. 7, 2013, ECF No. 251, at 114:24-115:19; see also Hr'g Ex. 105 at 68.) Dr. Reschly testified that he did not believe Defendant was faking his inability to read the map, although he

[97] On redirect examination, Dr. Reschly offered contrary testimony: "[Defendant] was not able to locate the other major cities in the state of Tennessee that I mentioned to him. . . ." (Tr. Oct. 8, 2013, ECF No. 253, at 466:9-13.)

did not videotape the exercise. (Tr. Oct. 7, 2013, ECF No. 251, at 252:3-21.)

The Court finds the evidence in the record of Defendant's lack of significant deficits in the travel and transportation area more persuasive. Firstly, for nearly ten years, Defendant navigated from his home in La Vergne, which is in Rutherford County, southeast of metro Nashville/Davidson County, to the DeBerry Special Needs Facility, which is in the northwestern corner of metro Nashville/Davidson County, a one-way trip of approximately thirty miles. (See Hr'g Ex. 159.) Secondly, Defendant's job at the halfway house in Jackson, Tennessee, required him to drive juveniles to various jobs and recreational locations, which he handled without incident.

Thirdly, Defendant received excellent job performance ratings during his time at DSNF in the category of "transportation duties." Mr. Driver reported the following on Defendant's April 30, 2007, evaluation:

> CO MONTGOMERY HAS BEEN ASSIGNED TO MAKE TRANSPORTATION "RUNS" ON SOME OCCASIONS DURING THIS CYCLE. HE HAS TAKEN THE LEAD IN ACCOMPLISHING THE ASSIGNMENT AND SHOWN AN EXAMPLE THAT OTHERS COULD WELL FOLLOW.

(Hr'g Ex. 156 at 00593; see also Tr. Oct. 11, 2013, ECF No. 284, at 238:20-239:4.) Driver explained this comment as follows:

> What this applied to was guys that had to leave the facility for doctor's appointments, lawyer appointments, court appearances, whatever was

> necessary. And [Defendant] had made some of those transportation runs where it's just him, another staff member and maybe the inmate. And that could be a serious situation and a dangerous situation. But they were all successful and without incidents.
>
> And so as . . . the policy states, when that happens in that manner, [Defendant] would receive the highest scores for that.

(Tr. Oct. 11, 2013, ECF No. 284, at 239:5-15.) He testified that Defendant would be armed during transportation runs. (Id. at 239:19-23.) Finally, Defendant was able to drive adequately during his extramarital affair. Ms. Peel testified that Defendant drove "a little faster than I like, but that's about it. . . . He always had a nice vehicle. We never had a wreck, we never run out of gas or nothing like that." (Tr. Oct. 16, 2013, ECF No. 285, at 352:13-23.)

On balance, Defendant has failed to prove by a preponderance of the credible evidence that he has significant limitations in his travel and transportation skills.

f. Recreation

Defendant has not shown by a preponderance of the evidence that he has significant limitations in the area of recreation. In persons with mild MR/ID, "[r]ecreation skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support." DSM-V at 34.

Defendant's sister testified that Defendant's mother placed him in boxing when he was around fifteen or sixteen years old.

(Tr. Oct. 1, 2013, ECF No. 289, at 309:7-14.) Mrs. Barrow testified that she remembers a particular fight that Defendant "[l]ost pretty bad." (Id. at 309:15-21.) She testified, "I think he gave up." (Id. at 309:22-23.)

Defendant's boxing coach, Ron Rickard, testified that:

> [Defendant] came to the gym just like every other young man and said "I would like to box." And, of course, we were always happy to have any young man come in and we would welcome, tell them what we expect, tell them what the boxing program was all about and then tell them what they need to do about getting into the exercise program, the practicing program as far as working on heavy bags and doing their road work and running, and also [sparring] in the ring.

(Tr. Oct. 16, 2013, ECF No. 285, at 318:19-319:5.) He testified that Defendant was about fifteen years old when he first came to the boxing club, and that he was by himself when he came to the gym. (Id. at 319:6-17.)

Rickard testified that Defendant appeared to understand his initial instructions about the boxing program because he would nod his head. (Id. at 320:9-14; 331:15-25.) He testified that Defendant was "just like any other young man that wanted to box," and that he did not recall anyone picking on him or singling him out.[98] (Id. at 324:7-17.) He testified that

[98] In an interview with the U.S. Postal Inspectors on November 29, 2012, Mr. Rickard stated that Defendant was a "strange little kid, quiet." (Hr'g Ex. 300 at 04357; see also Tr. Oct. 16, 2013, ECF No. 285, at 329:7-18.) He also stated that he "thought [Defendant] wanted to fit in but really didn't." (Hr'g Ex. 300 at 04358; see also Tr. Oct. 16, 2013, ECF No. 285, at 330:1-12.)

Defendant was very strong and muscular, and "[h]ad a little lack of stamina to him, as a lot of the kids do when they came in, but I'm not sure [Defendant] was involved in any other sports in high school, so boxing is what he wanted to get involved in." (Id. at 320:18-24.)

Rickard testified that Defendant came regularly during one season (from November until March or April), and that he regularly attended practices three nights a week. (Id. at 321:2-12.) Rickard testified that Defendant participated in boxing bouts: "I don't specifically remember where the bouts were at, but if [Defendant] came and practiced two or three nights a week and went through all of the grueling training and [sparring], he definitely would have traveled with us on the weekend." (Id. at 322:4-10.) Rickard testified that no parents ever traveled with the team to the bouts and that these weekend trips did not require parent permission slips. (Id. at 323:23-324:1; 327:10-13.) On redirect examination, Rickard testified that he never saw any indications that Defendant was mentally retarded or mentally slow. (Id. at 334:16-20.)

The record contains evidence of Defendant's normal recreation skills. For example, Dr. Reschly testified that, as a child, Defendant walked home from school, played basketball and football with the neighborhood children, played Little League baseball, and played with his cousins. (Tr. Oct. 7,

2013, ECF No. 251, at 156:25-157:17.) Moreover, Ms. Peel testified that Defendant liked to go out to the clubs and would pay for Ms. Peel's food and drinks. (Tr. Oct. 16, 2013, ECF No. 285, at 347:2-13.) She testified that Defendant liked music and would sing, dance, and drink alcohol. (Id. at 347:18-348:3.) Peel testified that, during their relationship, she and Defendant would go to the clubs "[j]ust about every weekend." (Id. at 374:14-19.) Mr. Estes also accompanied Defendant on one occasion to "a club [in] downtown Nashville called Grahams." (Tr. Oct. 4, 2013, ECF No. 303, at 1001:2-13.)

Defendant's interview with Dr. Welner also indicates that he engages in age-appropriate recreational activities without support. For example, in the interview, Defendant stated, "I like boxing. . . . I like Pretty Boy Floyd. I used to like Muhammad Ali and George Foreman, Kenny Norton." (Hr'g Ex. 252 at 04626.) Defendant stated that his favorite internet sites are "www.ESPN[.com,] www.NBA.com[,] [and] www.nfl.com." (Id. at 04619.) Defendant discussed recent professional football game results with Dr. Welner, transitioned from a discussion of Michael Vick as a football player to Michael Vick's dog-fighting conviction, and explained that the San Antonio Spurs are his favorite basketball team. (See id. at 04613-04620.) In the interview, Defendant also told Dr. Welner that he likes blues

music and frequented the BB King club in Nashville. (See id. at 04650-04651.)

In conclusion, the evidence does not establish that Defendant suffered from significant limitations in the area of recreation.

g. Self Management of Behavior, Schedules, and Routines/School and Work Task Organization

Defendant has not shown by a preponderance of the evidence that he was significantly limited in his ability to maintain a schedule and routine or complete work tasks.

According to Defendant's wife, Defendant worked a lot of overtime at DeBerry Special Needs Facility – as many as forty hours of overtime in a week.[99] (Tr. Oct. 2, 2013, ECF No. 290, at 632:3-14.) She testified that Defendant worked multiple part-time jobs while he worked full-time and overtime at DSNF, including jobs at J.C. Penney, Securitas, and the Nashville Convention Center. (Id. at 632:15-23.) Defendant consistently worked overtime and multiple jobs throughout the marriage. (Id. at 633:17-21.)

Defendant's supervisors and co-workers attested to his willingness to work a significant amount of overtime. Mr. Estes testified that Defendant worked a lot of overtime. (Tr. Oct. 4, 2013, ECF No. 303, at 1005:4-7.) He added that Defendant had to

[99] Defendant's Tennessee Department of Corrections overtime records reflect that, in the year 2009, Defendant worked 1,018.6 overtime hours. (See Hr'g Ex. 138 at 04363.)

pick his daughter up from school every day, such that when he would be asked to work overtime, "he will just tell them that he has to go pick his daughter up, but he will come back." (Id. at 1005:11-24; see also Tr. Oct. 4, 2013, ECF No. 303, at 930:11-15.)

Mr. Driver included the following comments on Defendant's April 30, 2007, performance evaluation:

> CO C. MONTGOMERY HAS MAINTAINED A [sic] EXTREMELY HIGH LEVEL IN THIS STANDARD. FOR A LENGTHY TIME NOW, CO MONTGOMERY HAS VOLUNTARILY COME TO WORK ON ONE OF HIS "OFF DAYS" TO ENSURE SHIFT COVERAGE. THE SHIFT CALDRE [sic] APPRECIATE HIS EFFORTS IN THIS REGARD.

(Hr'g Ex. 156 at 00588; see also Tr. Oct. 11, 2013, ECF No. 284, at 236:4-16.) According to Driver, Defendant prioritized tasks and completed job duties without delay. (See Tr. Oct. 11, 2013, ECF No. 284, at 237:5-20.)

Mr. Scott testified that it is common for correctional officers to forego promotion to corporal because there are more opportunities to work overtime as a correctional officer. (Tr. Oct. 3, 2013, ECF No. 291, at 911:14-23.) He testified that it is also common for correctional officers to avoid promotion because they do not want supervisory responsibilities. (Id. at 912:1-4.)

Dr. Reschly testified that Defendant's overtime history does not have "any special significance other than I would infer that [Defendant] was a good team player there and that he filled

in when asked to do so." (Tr. Oct. 8, 2013, ECF No. 253, at 440:14-20.) The Court disagrees. Defendant's consistent history of working overtime hours at DSNF, in addition to corresponding part-time work, is strong evidence of his ability to maintain a schedule.

Defendant's ability to maintain his schedule is also demonstrated by the fact that on the day he is alleged to have committed murder in Henning, Tennessee, he was able to drive back to Nashville in time for a 4:00 p.m. appointment with Dr. Farooque. (See Tr. Oct. 8, 2013, ECF No. 254, at 348:4-349:2; see also Hr'g Ex. 315 at 02756.)

In conclusion, Defendant has not proven by a preponderance of the evidence that he suffers from significant limitations in the area of schedules and routines. Cf. Davis, 611 F. Supp. 2d at 502 (finding "no evidence that [the defendant] has ever demonstrated the ability to budget or keep a daily schedule.").

h. Use of the Telephone

Defendant has failed to show by a preponderance of the evidence that he suffered from significant limitations in his ability to use the telephone.

According to Richard Pierce, West Tennessee Detention Facility Case Manager, Defendant filled out a form for phone and

visitation privileges.[100] (Tr. Oct. 11, 2013, ECF No. 284, at 271:1-13.) He testified that any time Defendant wanted to use the phone while incarcerated, "[h]e would fill out a request and submit the request form to me." (Id. at 271:14-24.) Pierce testified that Defendant had no trouble filling out these forms. (Id. at 272:2-4.)

The evidence also demonstrates that Defendant had no significant limitation in his ability to use the telephone prior to his incarceration. For example, Inspector Link testified that "six or seven cell phones were found inside [Defendant's] car." (Tr. Oct. 17, 2013, ECF No. 286, at 510:2-3.) Moreover, Adrian Montgomery testified that he spoke with his brother on the phone every week. (Tr. Nov. 12, 2013, ECF No. 305, at 207:7-9.) Defendant could also send text messages. At 2:38 a.m. on February 11, 2011, Defendant sent a text message to his son, which reads, "We need to discuss an escape route." (Hr'g Ex. 185; see also Tr. Oct. 8, 2013, ECF No. 254, at 366:20-367:14.)

Therefore, Defendant has failed to show by a preponderance of the evidence that he has significant limitations in his ability to use the telephone.

[100] On cross-examination, Mr. Pierce testified that if Defendant did not put a person's name on his visitation list (other than his attorneys), that person would not be able to see him. (Tr. Oct. 11, 2013, ECF No. 284, at 289:7-290:1.) He testified that the same rules apply to the phone list. (Id. at 290:2-4.)

i. Conclusion as to Practical Skills

Defendant's lay and expert witnesses presented evidence that Defendant struggled in the practical skills domain, particularly regarding his activities of daily living such as dressing, grooming, and maintaining a clean household. There are two basic problems with this position. Firstly, the objective, contemporaneously created evidence at the Court's disposal (e.g., Defendant's performance evaluations and grade-school personality profile) do not show by a preponderance of the evidence that Defendant's appearance was an ongoing, significant problem either in his childhood or as an adult. Secondly, Defendant's proficiency in the other areas of life that comprise the practical skills domain is well established. Therefore, the Court cannot find that Defendant's practical skills are significantly limited.

Defendant maintained his own checking and savings accounts, had a credit score in the 600s prior to assuming and falling behind on a home mortgage, sought medical care frequently, drove to multiple jobs throughout Nashville, picked his daughter up from school every day, and enjoyed professional sports and blues music. Most importantly, Defendant successfully maintained steady employment at a dangerous job (full-time, overtime, and part-time) for over twenty years. He was consistently rated as a "superior" or "exceptional" employee and was used to train new

employees. Moreover, Defendant's employment history distinguishes Defendant from most defendants as to whom courts have found mental retardation/intellectual disability. Cf. Hardy, 762 F. Supp. 2d at 891 (noting that the defendant "has difficulty learning new tasks, including vocational ones, which likely accounts for his being employed only once (and briefly)."); Davis, 611 F. Supp. 2d at 504 ("The defendant is 38 years old, but has extremely limited experience with competitive employment. He once worked . . . performing routine custodial duties, but left because he claimed he was unable to complete tasks that required reading, such as filling out forms.").

The AAIDD User's Guide states that persons with mild MR/ID are likely to have difficulties "obtaining a steady job that covers expenses, meeting work competencies, getting along with coworkers and managers, handling job conflict appropriately, [and] maintaining high quality work under pressure." AAIDD User's Guide at 15. Defendant did not have these problems. The Court finds that Defendant has not carried his burden of proving by a preponderance of the evidence that he has significant limitations in the practical skills domain.

6. "Benefactors" and Supports

Defendant's experts assert that Defendant depended on supports in order to function on a daily basis. Dr. Reschly

testified that "persons with mild intellectual disabilities are able to cope adequately in an environment if they have the assistance of a benefactor who either helps them or performs for them more complex kinds of duties or activities." (Tr. Oct. 4, 2013, ECF No. 303, at 1113:11-14.) He testified that benefactors assist "with practical everyday issues that come up that require a higher level of conceptual thought and reasoning." (Tr. Oct. 7, 2013, ECF No. 250, at 94:6-8.) Dr. Reschly further testified that he has "personally seen the effect of benefactors, . . . it is also described in the literature, and it has a profound impact on whether persons with mild intellectual disability can maintain their employment, can learn to be self-supporting, can be personally independent and socially responsible in the community." (Tr. Oct. 4, 2013, ECF No. 303, at 1113:15-20.) Dr. Reschly's report states:

> Benefactors often provide periodic assistance with obtaining a job, completing complex paperwork such as that associated with income tax and social security, meeting community responsibilities, and handling money. Absent a benefactor, most persons with mild MR-ID struggle and often fail with maintaining employment, handling money, avoiding exploitation, and conforming to social expectations and legal requirements. Benefactors typically are other family members (parents or siblings) who are more competent, or spouses, employers, neighbors, and, rarely, church officials.

(Hr'g Ex. 107 ¶ 52.)

Dr. Woods added that "supports really allow people with intellectual disability to function in the mainstream and to do things like work, drive, get married, go to school, and all of those things that are . . . a part of the mainstream." (Tr. Oct. 9, 2013, ECF No. 257, at 580:4-8.) He testified that "when supports are removed a person may be able to function over time, but you see that functioning starts to decrease. You see their ability to do things that with supports they were able to do pretty effectively, not do as well." (Id. at 580:15-20.)

According to Defendant's experts, Defendant relied on his mother, his sister, and his wife as benefactors, and when Defendant separated from his wife in 2009, it became evident that he cannot live independently. Dr. Reschly's report states:

> [Defendant's] mother Lois Montgomery and his sister Chrystal Montgomery were the people, called benefactors in the MR-ID literature, who guided and prompted his behavior up to age 28. After [Defendant] was married, Melissa Montgomery took over the benefactor role. [Defendant's] behavior with these supports was marginal adaptively, but not to the point that he would have been diagnosed as having significant adaptive behavior limitations. However, when Melissa left him in 2009, his everyday coping skills deteriorated significantly, displaying an inability to achieve personal independence and social responsibility in the community in the absence of significant daily intervention by someone who prompted and guided his behavior.

(Hr'g Ex. 107 ¶ 68.) Dr. Tassé echoed this argument, testifying that "[Defendant's] wife clearly was providing a lot of support . . . in the areas of home living and cooking and

getting him ready. . . . Managing bank accounts, paying bills and so forth." (Tr. Nov. 13, 2013, ECF No. 306, at 308:13-20.)

The Government's experts disagree. Dr. Welner's rebuttal report states:

> Dr. Woods has asserted that after his wife left him, [Defendant's] "coping skills deteriorated significantly." Dr. Reschly extends this theme by referring to Mrs. Montgomery as a "benefactor." Yet with them apart, [Defendant] continued to maintain his employment responsibilities, took on the material and emotional support of his now-fugitive son, and endeavored for many months to try to avert default on his financial obligations with his wife now out of the home.

(Hr'g Ex. 133 at 29.) The Government argues that, in many respects, Defendant acted as a benefactor for Melissa Montgomery. (See ECF No. 308 at 32 ("Melissa Montgomery, [Defendant's] wife, also cannot be termed as [his] 'benefactor' in life; he was, in fact, her benefactor. He, for example, paid her child support during the times they were separated, picked up their daughter at school despite working much overtime and a second job, took over with their teenage son when Melissa Montgomery could not handle him, and tried to deal with the consequences of Melissa Montgomery's bad financial decisions.").)

The Court finds that Defendant has not proven by a preponderance of the evidence that his adaptive functioning skills depended on the support of his mother, his sister, and

his wife as benefactors. The Court examines each person who is asserted to be a benefactor below.

a. Lois Montgomery (Mother)

Defendant has not shown by a preponderance of the evidence that his mother was his benefactor.

Mrs. Lois Montgomery testified that Defendant needed help getting dressed and had to be constantly reminded how to do chores, which he could not do well. (Tr. Oct. 1, 2013, ECF No. 289, at 192:3; 203:10-13; 204:10-13.) She testified that she could send Defendant "to the store [to] pick up a few items." (Id. at 197:25-198:1.) Moreover, Defendant "always brought the right change back home." (Id. at 198:5-7.) She testified that Defendant "paid his bills pretty good when he was at home, but at summer time, he got behind on his car note." (Id. at 197:16-17.) She further testified that Defendant did not maintain his car in a clean condition. (Id. at 237:25-238:7.)

There is considerable evidence, however, that Defendant did not need his mother to act as a benefactor in order to live independently. Firstly, regarding the Trans Am she helped him acquire, Defendant's mother clarified that Defendant "paid for the car" himself. (Id. at 272:17-20.) Secondly, while Defendant lived at his mother's house during his twenties, he maintained steady employment. (See id. at 240:4-24.) Mrs. Lois

Montgomery testified that she had no reservations about Defendant working at the prison in Henning, Tennessee, "because it was a routine job, and he didn't seem to have problems with a job that was routine." (Id. at 241:1-6.)

Thirdly, Mrs. Lois Montgomery testified that, after she received Dr. Parr's psychological report (see Hr'g Ex. 118), she put it away in a lockbox. (Tr. Oct. 1, 2013, ECF No. 289, at 233:9-14.) She testified that she did not follow up on the report because she did not know what to do: "I was waiting for some suggestions or . . . to hear from the school system. . . . No one contacted me. I didn't contact anybody else either."[101] (Id. at 233:22-234:2.) She testified that she did not know how to proceed to obtain help for Defendant despite the fact that she was a preschool teacher and spent fourteen years of her career working in the Head Start program, as well as three years working in Child Protective Services. (Id. at 267:22-268:21.) Mrs. Lois Montgomery's actions (and inaction) lead to the inference that she was not a benefactor and suggest that, in fact, she did not actually believe that Defendant could not function independently or succeed in a school setting.

Significantly, Defendant's mother had no reservations about his ability to handle daily living skills and schoolwork

[101] Dr. Parr's report states: "it is suggested that he be referred to the psychological services division of the school system for additional diagnostic data and program planning." (Hr'g Ex. 118 at 03629.)

independently when she sent Defendant to UT-Martin, where he lived on his own for a year. (See Tr. Oct. 7, 2013, ECF No. 251, at 161:12-18.) She testified that it was both her and Defendant's idea for Defendant to attend college at UT-Martin: "[w]e talked about it, Chastain and I." (Tr. Oct. 1, 2013, ECF No. 289, at 239:14-22.)

Therefore, Defendant has not shown by a preponderance of the evidence that he relied on his mother as a benefactor.

b. Chrystal Montgomery Barrow (Sister)

Defendant has failed to prove by a preponderance of the evidence that his sister was his benefactor.

There is little evidence to demonstrate that Mrs. Barrow was Defendant's benefactor. According to her testimony, she helped Defendant make his bed during his childhood because he could not do it properly. (Tr. Oct. 1, 2013, ECF No. 289, at 286:16-17.) She testified that, during Defendant's twenties, she and Defendant would go out together. (Id. at 312:3-14.) She testified that, on these occasions, she had to help Defendant get dressed because he could not properly match his clothes. (Id. at 312:19-313:8.)

The evidence that Mrs. Barrow was not Defendant's benefactor, however, is more convincing. Firstly, Barrow admitted that she has never helped Defendant with his finances. (Id. at 375:16-17.) Secondly, Barrow's own adaptive abilities

appear to be limited in certain respects. Like Defendant, Barrow also graduated within the bottom half of her high school class and earned a subaverage ACT score (11 compared to Defendant's score of 8).[102] (Id. at 337:24-338:4; 338:21-339:4.) Barrow also performed poorly in college, receiving failing grades in several remedial courses and earning two semester GPAs of 1.250 and 1.957. (Hr'g Ex. 93; see also Tr. Oct. 1, 2013, ECF No. 289, at 365:20-369:1; 369:11-23.) Moreover, Barrow has filed for bankruptcy in Tennessee and Georgia, and admitted that she has been careless with her finances. (Tr. Oct. 1, 2013, ECF No. 289, at 376:8-17.)

Defendant has not shown by a preponderance of the credible evidence that his sister was his benefactor.

c. Melissa Montgomery (Wife)

Finally, Defendant has not demonstrated by a preponderance of the evidence that his wife was his benefactor.

Defendant's family members testified that he relied upon his wife in order to achieve normal everyday functioning. Mrs. Barrow testified that Defendant's wife "kept things very clean and organized" and that, when Defendant moved in with her, "[h]e was doing great. He seemed to be happy. There was no

[102] There was evidence that Mrs. Barrow's ACT score (11) and Defendant's score (8) were comparable because of the change in scoring in the intervening years. (See Hr'g Ex. 427 at 5.) Mrs. Barrow also testified that although she received extra tutoring in grade school, no one ever suggested that she was slow. (Tr. Oct. 1, 2013, ECF No. 289, at 340:1-9.)

frustration look on his face." (Tr. Oct. 1, 2013, ECF No. 289, at 315:6-7; 319:21-25.) Defendant's wife testified that it was her job to manage the finances and pay the bills, and that Defendant gave her his half of the living expenses in cash. (Tr. Oct. 2, 2013, ECF No. 290, at 568:23-570:5.)

Mrs. Melissa Montgomery testified that Defendant regularly overdrew his debit card and bounced checks, which led her to separate the couple's joint bank account. (Id. at 567:16-568:22.) According to Melissa Montgomery, Defendant did not engage in budgeting and could only maintain his car note by himself. (Id. at 570:21-25.) She also testified that he struggled to run errands and complete household maintenance tasks, that he could not follow a recipe, that he could not properly maintain the lawn, and that he could not properly do laundry. (Id. at 574:5-18; 576:6-17; 577:4-6.)

The Court is not convinced that a preponderance of the evidence demonstrates that Defendant's wife was his benefactor. There are multiple reasons the Court finds that Defendant has not met his burden on this point. Firstly, the Government is correct that Defendant, in many ways, supported his wife's lifestyle. Defendant worked a considerable amount of overtime in order to contribute to the family's finances. (See Hr'g Ex. 138.) Despite Defendant's busy work schedule, he picked his daughter up from school every day. (Tr. Oct. 2, 2013, ECF

No. 290, at 633:15-21; 634:10-21.) He also assumed parental duties over CJ when his wife sent CJ to live with Defendant and contributed money to CJ's legal fees. (See id. at 598:18-20; 599:23-600:6; Tr. Oct. 3, 2013, ECF No. 291, at 707:17-25.)

Secondly, after the couple's 2009 separation, Defendant had to pay the mortgage on his own. (Tr. Oct. 3, 2013, ECF No. 291, at 694:8-15.) Defendant's wife testified that she and Defendant were struggling to pay the mortgage in 2008 when they were both contributing their incomes to it. (Id. at 694:16-25.) She testified that after the separation, she attempted to enter credit counseling, "and then with the house, eventually, I had to file bankruptcy." (Id. at 695:8-14.) Meanwhile, Defendant took steps to avoid losing the house and never filed for bankruptcy. (See Hr'g Ex. 273 at 02110; see also Tr. Oct. 8, 2013, ECF No. 254, at 309:5-9.)

Thirdly, the record demonstrates that Mrs. Melissa Montgomery's financial management skills were deficient, which undermines the argument that she kept Defendant's finances in order. Exhibit 273 contains a December 14, 2009, credit report reflecting that Defendant's wife had a total of twenty-one credit accounts and a credit score of 468. (Hr'g Ex. 273 at 01903; see also Tr. Oct. 3, 2013, ECF No. 291, at 696:5-10.) She testified that many of these accounts were loans or credit cards that were written off or canceled by the credit grantor

and that she was responsible for all of them being past due. (Tr. Oct. 3, 2013, ECF No. 291, at 696:11-702:5; Hr'g Ex. 273 at 1903-1908.)

Mrs. Melissa Montgomery's reliance on credit cards was not simply limited to post-separation hardship in 2009. On May 29, 2007, prior to the couple's separation, she had the following lines of credit in her name (with the type of account in parentheses under Creditor Name):

Borrower	Creditor Name	Balance	Payment
MELISSA MONTGOMERY	BK OF AMER (credit card)	1966.00	98.00
MELISSA MONTGOMERY	WFCB/BLAIR (store card)	496.00	25.00
MELISSA MONTGOMERY	CARECRD/GEMB (dental card)	942.00	29.00
MELISSA MONTGOMERY	FST PREMIER (credit card)	216.00	20.00
MELISSA MONTGOMERY	CRDT FIRST (loan or credit card)[103]	500.00	20.00
MELISSA MONTGOMERY	WFNNB/ROAMAN (store card)	269.00	10.00
MELISSA MONTGOMERY	PEPBOY/GEMB (credit card)	332.00	17.00
MELISSA MONTGOMERY	HSBC NV (credit card)	261.00	15.00
MELISSA MONTGOMERY	CAPITAL 1 BK (credit card)	442.00	15.00
MELISSA MONTGOMERY	TNB-TARGET (store card)	63.00	20.00
MELISSA MONTGOMERY	CIT/FHUT (store card)	224.00	16.00
MELISSA MONTGOMERY	AMERICREDIT (car note)	22432.00	538.00

[103] Mrs. Melissa Montgomery could not recall whether the Credit First account was a loan or a credit card. (Tr. Oct. 3, 2013, ECF No. 291, at 691:4-8.)

(Hr'g Ex. 273 at 02095-02097; see also Tr. Oct. 3, 2013, ECF No. 291, at 689:25-692:17.) Therefore, Mrs. Melissa Montgomery's financial history is not indicative of, in Dr. Reschly's words, a "more competent" benefactor. (See Hr'g Ex. 107 ¶ 52.)

Dr. Reschly testified that Defendant's wife handled all the planning and financial paperwork leading up to the couple's acquisition of a home. (See Tr. Oct. 8, 2013, ECF No. 254, at 304:3-7.) He had to concede, however, that Mrs. Melissa Montgomery's decision to obtain a $169,000 mortgage, while borrowing $5,000 from the builder for the down payment, was the kind of deal "that led to the demise of the financial system." (See id. at 308:5-14.)

Fourthly, as the Court explained supra Part IV.B.5.d regarding safety and health care, it is unclear whether the condition of Defendant's residence on the night it was searched in 2011 is solely attributable to Defendant or accurately reflects a persistent condition attributable to a mental disability. Finally, Defendant has not adequately explained how he was able to succeed at his job for so many years without a benefactor. No one walked Defendant through his job on a day-to-day basis; to the contrary, Mr. Driver testified that he did not have to visit Defendant's unit much because he was a good employee. (Tr. Oct. 11, 2013, ECF No. 284, at 246:17-24.)

Dr. Woods disagreed with Dr. Reschly on the point that Defendant had no benefactors at his job. (Tr. Oct. 11, 2013, ECF No. 263, at 899:20-24.) According to Dr. Woods, "the job was a benefactor, . . . the actual structure of the prison system itself and the responsibilities and the culture of doing things as a group and not individually were, in fact, the support system and the benefactors." (Id. at 899:11-19.) Dr. Woods does not account for the fact that Defendant worked significant overtime hours and that officers working overtime could be assigned to a building other than the one to which they are normally assigned. This includes buildings where inmates are not locked down twenty-three hours per day: "Unit 3, Unit[] 4, Unit 5, Unit 6, the health center, Building 15 where guys would be out walking around." (Tr. Oct. 11, 2013, ECF No. 284, at 244:24-245:12.) Mrs. Scott testified that Defendant never received complaints for his overtime work on these other units. (Tr. Oct. 4, 2013, ECF No. 303, at 933:2-12.)

The Court finds that Defendant and his wife contributed mutual support to one another. Defendant has not shown by a preponderance of the evidence that his wife was his "benefactor," as that term is defined by Defendant's experts (see Hr'g Ex. 107 ¶ 52).

7. Conclusion as to Adaptive Functioning

In conclusion, the Court finds that Defendant has failed to satisfy his burden of proving that he more likely than not suffers from significant limitations in adaptive behavior. See AAIDD Manual at 43. "Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." DSM-V at 38. Defendant has not shown that this is the case.

Defendant's experts and lay witnesses have highlighted several areas, most notably, Defendant's dress, as evidence that he satisfies prong two. Defendant's experts testified, however, that deficits in adaptive functioning must be significant, i.e., meaningful. (See Tr. Oct. 8, 2013, ECF No. 254, at 273:20-274:1 (Dr. Reschly); Tr. Nov. 13, 2013, ECF No. 306, at 260:14-23 (Dr. Tassé).) The weight of the evidence in this case establishes that Defendant's limitations in each of the relevant areas of adaptive functioning were not significant in light of his strengths in each area. See Clark, 457 F.3d at 447.

In Wiley v. Epps, the Fifth Circuit stated:

> The record shows that Wiley consistently relied on others for virtually all direction of his life and daily living, including finances, healthcare, and

> employment. Wiley relied on his grandmother and then his wife to handle his money. Although he was a hard worker, Wiley primarily worked manual labor jobs and relied on his in-laws to find him work. Wiley's grandmother stated that when Wiley's grandfather died, Wiley was unable to make basic decisions about the farm, and he instead sought advice from his grandfather's friends. He later sought help from his in-laws even after he and his wife separated. As a child, Wiley was slow to master hygiene, dressing, and toileting skills, and his older sister had to help teach him how to dress and groom. Wiley's grandmother bought his clothes and made selections for him when he was as old as fifteen, and then his wife took over that task when he moved in with her family. Although Wiley helped around the house with the trash and yard work, his grandmother and then his wife did all the cooking, cleaning, and laundering.

625 F.3d at 220.

Unlike Wiley, Defendant did not rely on others "for virtually all direction of his life." See id. Defendant's family members reported anecdotes of daily living to support their son's, brother's, and husband's[104] claim of mental

[104] Juries are routinely instructed that the relationship to a party be considered in determining the witnesses' credibility. Sixth Circuit Model Instruction Number 1.07 provides as follows:

> (1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.
> (2) Let me suggest some things for you to consider in evaluating each witness's testimony.
> (A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.
> (B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

retardation/intellectual disability. The desire of each of these persons to support Defendant's claim is understandable. The Court has determined, however, that Defendant's family members have given both internally inconsistent and conflicting testimony (see supra Part III.B.3) and that the standardized

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(C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

(D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

[(F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something (or failed to say or do something) at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.]

(G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

Pattern Criminal Jury Instructions for the Sixth Circuit, No. 1.07 (2013 ed. rev.) (emphasis added), available at http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/07_Chapter_1.pdf. A judge should consider the same factors in determining the credibility of each witness.

VABS scores derived from their responses are unreliable (see supra Part IV.B.2). Conversely, much reliable and objective evidence has been received which does not support Defendant's claim. Most significantly, Defendant has had no difficulty obtaining and keeping multiple jobs and successfully worked various corrections and security-related jobs with different levels of complexity over a period of over twenty years. The evidence in the case has shown that persons with mild mental retardation/intellectual disability are not successfully employed in the category of jobs at which Defendant maintained long-term employment. (See Hr'g Ex. 463.) As discussed throughout this opinion, objective, verifiable, and credible evidence supports the conclusion that Defendant lacks the significant adaptive functioning deficits required to meet prong two of the definition of mental retardation/intellectual disability.

In his rebuttal report, Dr. Welner writes, "It is the range and significance of evidence of his adaptive abilities that have been the basis of my opinion that [Defendant] is not retarded." (Hr'g Ex. 133 at 2.) The Court agrees. The Court's finds that Defendant has not satisfied his burden of proving that he is mentally retarded/intellectually disabled in that he has failed to prove by a preponderance of the evidence the facts necessary to establish prong two/significant deficits in adaptive

abilities as set out in Atkins v. Virginia, 536 U.S. 304, 318 (2002).

C. Prong Three: Onset Before Age Eighteen

The third prong of the MR/ID definition requires "[o]nset of intellectual and adaptive deficits during the developmental period." DSM-V at 33; see also AAIDD Manual at 5 ("This disability originates before age 18.").

The Sixth Circuit recently stated that "the failure to satisfy any one of the three criteria [of the MR/ID definition] is enough to sink an Atkins claim." O'Neal, 2013 WL 6726904, at *9. Defendant has failed to establish prong two by a preponderance of the evidence. (See supra Part IV.B.) Therefore, "there is no need for the court to address the other requirements of the definition." Wilson, 922 F. Supp. 2d at 368.

V. CONCLUSION

In Atkins, the U.S. Supreme Court stated:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

> Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their culpability.
>
> . . . .
>
> [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

536 U.S. at 318, 320. The weight of the evidence in this case establishes that Defendant does not suffer from the adaptive limitations described in Atkins that are required for the Court to find him mentally retarded/intellectually disabled.

For the foregoing reasons, Defendant's Motion for Pretrial Determination of Mental Retardation (ECF No. 175) is DENIED. The Government is, therefore, not precluded from seeking the death penalty as to Defendant. Whether it will be applied in Defendant's case is a question for the jury to determine at the appropriate time.

IT IS SO ORDERED, this 28th day of January, 2014.

/s/ Jon P. McCalla
JON P. McCALLA
U.S. DISTRICT COURT JUDGE