

APPENDIX

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Neuropsychological Consultation and Record Review

August 1, 2024

Joshua Reiss
Assistant District Attorney
Harris County District Attorney's Office
1201 Franklin Street, Ste. 600
Houston, TX 77002

Re: Arthur Lee Burton

Dear ADA Reiss,

This letter is a summary of my review of the materials I received regarding the above-named inmate in the Texas Department of Criminal Justice regarding evidence relevant to a possible Atkins hearing for Intellectual Disability (ID). By way of a brief history, Mr. Burton was arrested on 8/8/1997 for the murder and attempted rape of a young woman on 7/29/1997. He was sentenced to death on 6/19/1998 and admitted to the TDCJ on 9/16/1998. He is scheduled for execution on August 7, 2024. The Defense has asserted that Mr. Burton suffers from Intellectual Disability.

Records Reviewed

- Letter from Professor Ashley Guajardo, PhD (Associate Professor [Lecturing] in the Division of Games, University of Utah) regarding Dungeons & Dragons literature found in Mr. Burton's cell.
- Letter from Professor Richard Zraick, PhD, CCC-SLP (School of Communication Sciences and Disorders, University of South Florida) on the readability of four documents that the defendant read and four documents that the defendant authored.
- TDCJ Library Loan History to Mr. Burton from 5/18/16 to 1/6/22
- TDCJ Mental Health Records 3/22/18 – 5/12/24
- Mr. Burton's requests for medical care 6/6/18 – 4/25/22
- Medical Records 2014 – 2024
- Summary of Educational Records and Standardized Test Results 1976 – 1990
- Mail/email to/from Mr. Burton 5/2/24 – 6/26/24
- Contents of cell search 5/23/24
- TDCJ Records
- Disciplinary Records TDCJ
- Forensic Neuropsychological Evaluation by Jonathan DeRight, PhD, ABPP-CN dated 7/29/24
- Letter from Sara Boyd, PhD, ABPP dated 7/29/24
- Unsworn declaration of Marcia Alexander dated 7/13/24
- Unsworn declaration of Cassandra Green dated 7/25/24
- Unsworn declaration of Fannie Burton dated 7/20/24
- Unsworn declaration of Michael Burton dated 7/22/24

- Unsworn declaration of Cheryl Douglas dated 7/21/24
- Affidavit of Felisha Batte dated 7/18/2000
- Affidavit of Arthur Burton, Sr. dated 7/17/2000
- Affidavit of Fannie Burton dated 7/19/2000
- Affidavit of Steven Drizin dated 7/29/24
- Unsworn declaration of Scott Sasser dated 7/12/24
- Subsequent Application for Post-Conviction Writ of Habeas Corpus – Claims for Relief (“Mr. Burton’s execution would violate the eight and fourteenth amendments because he is intellectually disabled.”)

Diagnostic Criteria for Intellectual Disability

The diagnostic criteria for ID are well outlined in the Diagnostic and Statistical Manual of Mental Disorders - Fifth Edition - Text Revision (DSM-5-TR),¹ which is the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) initially published in its first version over 70 years ago. The DSM is the most widely accepted classification system of mental disorders used in the United States with associated criteria designed to facilitate reliable diagnosis of mental illnesses. However, the American Association on Intellectual and Developmental Disabilities² (AAIDD) also provides guidance on the assessment and diagnosis of ID, which overlaps considerably with DSM standards, but the DSM criteria remain the gold standard in establishing a diagnosis of ID.

The following three criteria must be met for the diagnosis of intellectual disability according to the DSM-5-TR:

A. Deficits in *intellectual functions and general mental abilities* that involve reasoning, problem solving, planning, abstract thinking, judgment, academic learning, verbal comprehension, and practical understanding. According to the DSM-5-TR, “Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally \pm 5 points).”

- Of note, intelligence test scores and other scores from standardized tests of mental abilities that fall two standard deviations or more below the population mean are the equivalent of falling at the 2nd percentile or lower, which means that an individual has scored at a level that is equal to or higher than only 2% of the population who would have taken this test. The converse is also true that a score at the 2nd percentile is exceeded by 98% of the general population.
- The DSM-5-TR also notes that “IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and master practical tasks. Thus, clinical judgment is important in interpreting the results of IQ tests and using them as the sole criteria for the diagnosis of an intellectual developmental disorder is insufficient.”

B. “Deficits in *adaptive functioning* that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility.” According to DSM-5-TR, adaptive functioning involves three domains but impairment in at least one domain, :

- *Conceptual (academic) domain* – “involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others.”

¹ American Psychiatric Association (2022). *Diagnostic and Statistical Manual of Mental Disorders - Fifth Edition - Text Revision (DSM-5-TR)*. Washington, DC.

² Schalock, R.L., Luckasson, R., & Tasse, M.J. (2021). *Intellectual disability: Definition, diagnosis, classification, and systems of supports* (12th ed). American Association on Intellectual and Developmental Disabilities.

- *Social domain* – “involves awareness of others’ thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others.”
- *Practical 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 tasks organization, among others.”

C. Onset of intellectual and adaptive deficits occurs during the development period (e.g., childhood and/or adolescence).

Evidence of Intellectual Functioning

A diagnosis of ID requires a deficit in intellectual functions and general mental abilities (e.g., reasoning, abstract thinking, academic learning, intelligence, etc.). The cutoff or severity of the deficit in this domain (Criterion A) for persons with ID “have scores of approximately two or more standard deviations below the population mean” or average although the DSM also notes that some persons may have scores “somewhat above” 65-75 but exhibit substantial adaptive deficits. Listed below is the evidence from the records that were pertinent to Mr. Burton’s intellectual and general mental abilities. When appropriate, test scores will be reported as percentiles that reflect Mr. Burton’s performance as falling at or above the percent of persons in the normative group against whom he is being compared. As noted previously, the 2nd percentile or lower correspond to two standard deviations or more below the normative mean/average, which is the approximate range where persons with ID generally fall.

- Dr. DeRight’s neuropsychological evaluation conducted on 7/9/24 when Mr. Burton was 54 years old revealed a full scale IQ of 77 (6th percentile or low average range; 100 is the mean and the standard deviation is 15), which Dr. DeRight indicated “indicates significant intellectual deficits and is consistent with a diagnosis of intellectual disability.” When the standard error of measurement (a quantitative statistical measure of score variability or error) was applied to Mr. Burton’s full scale IQ, it could be stated with 95% confidence that his “true” IQ falls between 73-82 (4th to 12th percentiles, respectively, or from below average to the low average range). In addition to Mr. Burton’s full scale IQ, the results of the Wechsler Adult Intelligence Scale-4 (WAIS-4) administered by Dr. DeRight also revealed four index or summary scores that ranged from the 27th percentile (Verbal Comprehension Index: average) to the 3rd percentile (Working Memory Index: below average). The 10 subtest scores on the WAIS-4 ranged from a low of the 5th percentile to the 37th percentile (average) on a measure of expressive vocabulary reflecting Mr. Burton’s learning and achievement. Even though a hard “red line” cutoff of scores needing to fall at or below the 2nd percentile on measures of intelligence for the diagnosis of ID is no longer considered appropriate, not one of Mr. Burton’s IQ test scores fell below the 5th percentile.
 - *The Flynn Effect*: Dr. DeRight raised the issue of the Flynn Effect (FE) and its effect on IQ test scores. The FE, first described by political scientist James Flynn in 1984, refers to the phenomenon in which IQ means have been shown to increase in the general population across time at the rate of approximately three points per decade since the intelligence test was normed. Thus, among other reasons, IQ tests need to be re-normed over time to compensate for this inflation of scores. Consequently, the argument goes, a person’s obtained IQ score will be artificially higher the longer it has been since the test that was administered was normed and thus IQ score points should be subtracted from an individual’s obtained score. In Mr. Burton’s case, Dr. DeRight indicated that given the length of time it has been since the WAIS-4 was normed, applying the FE to his full scale IQ would result in a score of 71.5 rather than 77.
 - The reasons for this general trend toward higher IQ test scores over time are not well agreed upon but may be related to trends in the population of improved nutrition, better

medical care, changes in family characteristics and dynamics, increased use of technology, and generally higher levels of education in the population, among others.

- Even though as a general trend IQ scores do seem to increase over time, although in some countries IQ scores seem to be decreasing (“negative Flynn Effect”) these trends are based on averages in the population at large and not on specific individuals or individuals from different subgroups of the population such as age of the examinee, where the score falls on the distribution, and the changes of the test itself from re-standardization.³ It is also unknown how the FE might be applied to an incarcerated population and whether the FE is larger, smaller, or not at all applicable to individuals who have been under the stress of incarceration for almost half their lives as is the case with Mr. Burton.
 - There is no standard error of measurement for the FE that can be applied to a score with a known and predictable confidence interval, unlike scores from the WAIS-4 that have a probability estimate of where a person’s “true” score falls relative to their obtained score. Consequently, the magnitude of the FE on any specific individual’s IQ test score is unknown and incalculable, which means that the error rate cannot be determined. Although DSM-5-TR states that the FE “may affect test scores,” it does not require its use. In addition, application of the FE among clinicians in their routine clinical work and in establishing standards for disability, special education, or participation in gifted programs is not the standard or custom of practice. The administration and scoring manual of the WAIS-4 does not instruct the examiner to alter the full scale IQ based on the FE. These issues raise questions about whether the application of the FE meets Daubert standards regarding the known error rate of a procedure or the Frye standard of general acceptance. For these reasons, in my opinion, it is inappropriate to apply the FE to Mr. Burton’s test scores.
- Dr. DeRight also administered a number of other neuropsychological and cognitive-related tests to Mr. Burton, which ranged from exceptionally low (less than 2nd percentile) to average (above the 25th percentile). One of Mr. Burton’s highest scores was on the Reynolds Intellectual Screening Test-2 (RIST-2) on which Mr. Burton’s performance on a subtest assessing crystallized or accumulated knowledge, was equal to or better than 69% of his peers. Of note, the RIST-2 is made up of just two subtests, the other of which Mr. Burton scored at only the 2nd percentile, but also includes an index score that was not listed among Dr. DeRight’s results, which likely would have fallen somewhere between those two percentiles. Overall, I counted 43 different neuropsychological or cognitive test scores from Dr. DeRight’s battery. Six of the 43 fell below the 2nd percentile, suggestive of ID but two of those tests measured Mr. Burton’s bill payment and map reading capabilities, neither of which I suspect he has had any use for during the 26 years of his incarceration. The remaining 37 test scores fell above the 2nd percentile or from the below average to average range.
 - Records indicate that Mr. Burton underwent a psychological evaluation by Dr. Edward Friedman in July 2010 at which time Mr. Burton obtained a full scale IQ of 84 (14th percentile, low average range), which is inconsistent with ID. Defense dismissed this finding because Dr. Friedman administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) to Mr. Burton in the presence of his lawyer and a correctional officer. Dr. DeRight correctly identified that third-party observers to psychological and neuropsychological testing can affect test performance. However, third-party observers tend to

³Hagan, L.D., Drogin, E.Y. & Guilmette, T.J. (2008). Adjusting IQ scores for the Flynn Effect: Consistent with the standard of practice? *Professional Psychology: Research and Practice*, 39, 619-625. Hagan, L.D., Drogin, E.Y., & Guilmette, T.J. (2010). IQ scores should not be adjusted for the Flynn effect in capital punishment cases. *Journal of Psychoeducational Assessment*, 28, 474-476. Hagan, L.D., Drogin, E.Y., & Guilmette, T.J. (2010). Science rather than advocacy when reporting IQ scores. *Professional Psychology: Research and Practice*. 41, 420-423.

negatively affect test taker performance by lowering their scores rather than improving them.⁴ Thus, it is theoretically possible that Mr. Burton could have obtained a higher score if he were tested without being observed. Defense also criticized Dr. Friedman because he administered the WAIS-R (published in 1981) rather than the more recently published WAIS-III (published in 1997) citing obsolescent norms and harkening the Flynn Effect asserting that Mr. Burton's IQ score would most certainly have been lower had he been tested with a newer version of the Wechsler intelligence test although, as indicated above, the magnitude of his alleged lower score cannot be reliably predicted. Last, Defense also asserted that "the WAIS-R has specifically been critiqued for an insufficient number of 'floor' items that could more accurately and reliably assess intellectual function at the lower end of the measured range."

However, the WAIS-III administration and scoring manual states that, "although many improvements were made and a substantial number of new items added, the major features of the WAIS-R were kept intact in the WAIS-III. More than 68% (113 of the 165 items) of the WAIS-R items (not including the Digit Symbol subtest) were retained in either the original or a slightly modified form" (p. 18).

- Standardized educational/achievement tests assessing reading, math, social studies, science, language arts, and reference materials were administered to Mr. Burton in April 1981 (grade 4). In comparison to national samples of 4th graders, Mr. Burton's test scores ranged from the 16th percentile (one standard deviation below the mean) in reading to the 61st percentile (approximately 1/3 of a standard deviation *above* the mean) in social studies. The composite of his scores fell at the 18th percentile and the average percentile rank of Mr. Burton's performance on standardized educational testing across all six subtests was 32, far above the 2nd percentile, in comparison to a national sample of other 4th grade students, which falls within the average range.
 - Defense generally dismissed these achievement test findings because at the time of the assessment, Mr. Burton was 11 years old and in grade 4 when many 11-year-olds are in grade 6, yet he scored below the fourth grade level, let alone the 6th grade equivalent, in five of the six areas assessed. Defense seemed to suggest that Mr. Burton's test scores were even lower than they appeared because according to his age he "should" have been in grade 6 (he repeated grade 2) and thus should have been compared to sixth-graders rather than fourth-graders. However, knowledge and abilities obtained in elementary school are based on grade and not age. His age is essentially irrelevant to what he should know and what he should be able to do because he had only four years of elementary school education and not six. It would be unfair to presume that he would have abilities and knowledge equivalent to fifth and sixth graders only being in grade 4. Thus, comparing Mr. Burton to a national sample of fourth-graders is appropriate regardless of his age. In addition, grade equivalents are very imprecise as they can obviously be affected by multiple factors, including the caliber of the school, the training of teachers, the financial support of the school from the community, and the overall curriculum. For example, the resources and teacher to student ratio of a school in a wealthy suburb would likely be quite different from a school in a less affluent area. Educational outcomes and student achievement would also likely be quite different based on those factors.
 - Of note, it is likely that Mr. Burton had a reading disability, which is unrelated to intelligence, but which put him at a significant disadvantage in taking standardized educational testing as these tests are administered in a way that requires a student to read all the questions in each section. Thus, students with reading issues often underperform on these types of educational tests.
- Mr. Burton repeated grades 2 and 8, the former likely due to reading problems, and also attended special education classes, based on the unsworn declaration of Scott Sasser (school counselor at Crossett High School) but which grades or subjects he attended these classes in is unclear and there was no specific

⁴ Glen, T., Barisa, M., Ready, R., Peck, E., & Spencer, T.R. (2021). Update on third party observers in neuropsychological evaluation: an intraorganizational position paper. *The Clinical Neuropsychologist*, 35, 1107-1116.

reference to special education placement or an individualized educational plan (IEP) on his transcripts. He graduated from high school with a basic diploma which apparently was the easiest path to graduation in his high school. His GPA was 2.1 (C range – approximately 73-76%) and with a class rank of 108/211, which is the middle of his class although again he was reportedly accorded special circumstances due to his educational abilities. However, high school performance or performance in any grade, is influenced by a host of non-intellectual abilities such as effort, motivation to perform well, family support and socioeconomic circumstances, peer group, absenteeism, legal issues, possible substance use and other factors. Records indicate that while in school and living at home, Mr. Burton's family suffered from the effects of domestic violence, poverty, and frequent moves to live with extended family members. It would be hard to imagine how these factors could not have affected Mr. Burton's academic performance.

- Upon being admitted to TDCJ in 1998, correctional psychologist, M. Gilhousen, PhD, wrote in his report of 9/16/98 that Mr. Burton's "intelligence, insight, and judgment appear to be average."
- A mental health services note from 3/3/2000 revealed that there was "no documented history of mental health treatment...mental impairment...no current mental health needs identified."
- Twenty-three TDCJ mental health records from 3/22/18-5/12/24 that I reviewed all revealed that Mr. Burton had no diagnosable mental illness. He was always described as oriented and aware of his surroundings. In 11 of those 23 records, a notation was made that referred to his intelligence, which in every case was estimated to be "average."
- I reviewed a number of emails sent or received by Mr. Burton between 5/6/24 and 6/26/24. There were approximately 10 people with whom he communicated during that time. He sent 33 emails in that time frame. Although there were occasional errors in spelling and punctuation, in my opinion, his emails were well organized, coherent, and insightful. He included poems that he had written, made historical and literary references, and exhibited awareness of current events. A few samples of his emails are listed below:
 - Email dated 5/2/24: "I was given an execution date yesterday for August 7, 2024. As I watched and listened to the court proceedings on zoom. It was strange to see how normal things seemed. How our society has come to this point to make the execution of a person seem normal and official. Is this normal in a civilized society? The judge read that the state will use a chemical or chemicals injected into my body until dead. Not her exact words, but you get the point. Lethal injection is what officials call a "humane" way to execute someone. But the truth of the matter is, "humane people" don't do "inhumane" things."
 - Email dated 5/15/24: "I've read a number of books straight through over the years. I finished the Peter May book. That's my eighth book this year. I'm going to reread this book by Charles R. Saunders "Dossouye" it's fantasy. It sounds like you all have a really nice community there. The church sounds like it really helps the community. That not always the case these days. The U.S also sends orphans out on their own when they turn 18. Now that the court overturned Roe. Many states run by Republicans want to take away a woman's right to choose if she wants to have a child. There are thousands of children in this country that people won't adopt. Yet these Republican's law makers want to force women to have more children."
 - Email dated 6/26/24: "Your grandfather was a Native American U.S. soldier. There was a group of Native American soldiers who sent messages to U.S. allies in their native language that the Germans never figured out in WWII. I think they called them "Spirit Talkers" I had a grandfather who fought in WWII. There is a lot of generational trauma in many African American families...Most of the creation stories of different cultures have male and female creators. Or a creator with both male and female aspects. Men have been trying to do away with the power of females for centuries."

- In this same email, Mr. Burton included a poem he had written titled “False Reality.” “All my life I hide behind fear. I was a hostage to something that was not there. I built my foundation on unstable ground. I wasn’t surprised when it all came crashing down. This hell I forged with my own two hands. An invisible prison inside a man. Trapped by my own thoughts in an inescapable cell. Dying a little each day in my man made hell.”
- A quantitative readability analysis by Dr. Zraick from the University of Central Florida found that the emails that Mr. Burton wrote were consistent with a 5th to 7th grade reading level. The Django Fortunato passage that he wrote was consistent with a 7th – 8th grade reading level and reflected higher complexity than his emails, “sophisticated vocabulary, and complex sentence structure.” Of note, Dr. Zraick reported that the reading grade level of English-speaking adults in the United States is between the 7th and 8th grade.
- Mr. Burton appears to be a very prolific reader, which is generally not a characteristic of persons with ID. From 5/18/16 to 1/6/22, the prison library loaned 124 books to him. In a cell search conducted in May 2024, Mr. Burton had lists of books that he had purportedly read each year from 2015 to 2021. The total number of books listed over those seven years was 302. The titles reflected popular literature, fantasy novels, fiction, historical texts, and NY Times bestsellers. Some of the authors he referenced included Harper Lee, Aldous Huxley, Stephen King, John Irving, J.D. Vance, Ray Bradbury, James Lee Burke, and Michelle Obama.
 - Dr. Zraick’s quantitative readability analysis of the books read by Mr. Burton generally fell between the 7th to 9th grade reading level suggesting that he is able to comprehend moderately complex to significantly higher complex passages and that he is able to “understand highly sophisticated narrative texts.”
- Among the other items found in Mr. Burton’s cell were quotes from Frederick Douglas, Thoreau, and Gandhi. He also had multiple guidebooks for Dungeons and Dragons, which according to Professor Ashley Guarjardo indicated that Mr. Burton participated in the game as a player and as a dungeon master where he had to use “reasoning, abstract problem solving, storytelling, math, improvisation, art, and cartography to craft adventures for other players.” Last, illustrations from the book, “Sea Witch & The Scorpion,” were also found in his cell. This is a book written by Jen Rogers with illustrations by “L. Burton.” The illustrations apparently were drawn by Mr. Burton. Although I am not an expert in this area, they appeared professionally drawn with imagination and creativity.

Evidence of Adaptive Functioning

A deficit in adaptive functioning (Criterion B) is also necessary for a diagnosis of ID. As noted above, the DSM-5-TR lists three broad adaptive functioning domains, which will be reviewed in the bullet points further below.

Both the DSM and the AAIDD manual encourage the assessment of adaptive functioning using psychometrically sound and standardized measures that can provide objective and quantitative evidence of adaptive behaviors. A score on such a measure that is approximately two standard deviations below a normative mean would be consistent with ID. However, the DSM recognizes that this may be difficult to do in a controlled setting such as a prison. Regardless, Dr. DeRight had Mr. Burton’s mother complete the Vineland Adaptive Behavior Scales – Third Edition (VABS-3), a structured and standardized measure of adaptive functioning, *as she remembered* (emphasis mine) him when he was 20 years old when he moved to Texas, 34 years ago. Those results, according to Dr. DeRight, revealed scores that were “typical for an individual with intellectual disability.” However, there are three significant concerns about those findings. The first is that this violates the standardization procedure for the administration and interpretation of the VABS-3. The test manual stipulates that the respondent must be “very knowledgeable about the examinee’s everyday behavior” as this is critical to

obtaining valid results. The instructions go on to read that, “this means that the respondent must currently have *frequent and extended contact with the examinee*” (emphasis mine) and that “it is usually quite challenging to obtain a valid test from a respondent who does not live with the examinee or provide care at the examinee’s residence” (p. 16 Vineland-3 Manual). Another significant issue is that the Vineland does not contain any embedded symptom validity measure that can identify when a respondent may be providing embellished or exaggerated descriptions, which could be natural to do even on an implicit level given the high stakes involved with this procedure. Last, trying to recall specific behaviors from 34 years ago is fraught with problems of reliability and the imprecision of long-term memories.⁵ Thus, in my opinion, the Vineland results are invalid and uninterpretable.

There are certainly legitimate problems with trying to assess adaptive behavior in prison but there are also significant problems with asking for the recollections of friends and family from 20-30 years ago. Memories can become distorted and biased. Also, cultural, ethnic, and geographic norms from the 1990s in the rural south may have placed different demands and expectations on young men than those from today. Consequently, it is important to evaluate the recollections of others from decades ago with caution.

Below are the three adaptive domains described in the DSM-5-TR and evidence for each. Of note, Dr. DeRight reported that Mr. Burton exhibited a deficit in all three domains of adaptive capabilities.

- Conceptual
 - Dr. DeRight reported that Mr. Burton exhibited limitations with conceptual abilities (e.g., deficits in writing, arithmetic, memory, and reasoning). More specifically, he referred to difficulties that Mr. Burton had in school as evidenced by special education placement for at least some grades or classes, liking comic books, not following multiple step recipes, and being poor with directions.
 - As noted previously, Mr. Burton appears to be a frequent reader, is aware of current events, writes cogent and coherent emails, and appears to play Dungeons and Dragons at a high level. His intellectual interests appear broad, and he appears to exhibit a fairly high degree of conceptual thinking ability.
 - Quantitative readability data established by Dr. Zraick revealed that Mr. Burton can produce “moderately complex written content and comprehend highly sophisticated texts.” His overall writing and reading abilities fall generally at or higher than the average U.S. citizen, which is inconsistent with ID.
 - It is unclear how meaningful it is that Mr. Burton did not follow multi-step recipes without knowing how many of his peer group were cooking three course meals.
 - Neuropsychological test results revealed variable memory functioning with scores ranging from below average to average, but never below the 2nd percentile. For example, his rate of learning of a 15-item word list read to him five times (Rey Auditory Verbal Learning Test) fell at the 38th percentile or the average range. His long-term memory for both his general vocabulary and fund of factual information about the world were also average.
 - Measures of reasoning ability were generally average to only low average. For example, the similarities subtest of the WAIS-4, a measure of abstract verbal reasoning, was equal to or better than 25% of the normal population who would take this test. His understanding of social norms and practical knowledge (Comprehension subtest of the WAIS-4) fell at the 16th percentile. The Delis-Kaplan Executive Function System (D-KEFS) Word Context Subtest, which, per the test manual, measures deductive reasoning and flexibility of thinking, fell at the 37th percentile. The

⁵ Salekin, K.L., Neal, T.M.S., & Hedge, K.A. (2018). Validity, interrater reliability, and measures of adaptive behavior: Concerns regarding the probative versus prejudicial value. *Psychology, Public Policy, and Law*, 24, 24-35.

D-KEFS 20 Questions Test, which requires the ability to formulate abstract yes/no questions, the ability to perceive various categories and subcategories represented by different objects, and to incorporate examiner feedback into subsequent responding, fell at the 16th percentile (low average range).

- Mental health notes did not reveal evidence of impaired judgment or decision-making.
- Social
 - Dr. DeRight also identified deficits in the social domain citing Mr. Burton's immature social interactions, communication problems, poor understanding of risk, and being easily manipulated.
 - Mr. Burton participates as a player and dungeon master in Dungeons and Dragons, a role-playing game that typically is played by 3-6 players. This clearly requires a set of social and recreational skills that are compatible with getting along with others.
 - There was consistent evidence of Mr. Burton being described as quiet, timid, and reserved. He was not the least bit outspoken or confrontational. He was also described as naïve and gullible, as well as respectful. In addition, Dr. DeRight described the results of a suggestibility scale that he administered that provided psychometric evidence of some of these characteristics. However, being suggestible is associated with but not a core or specific criterion for ID. There are untold numbers of people in our country who have been the victims of Ponzi schemes, illegitimate sweepstakes results, fraudulent salespeople, and other scams but would not be diagnosed with ID. In addition, Mr. Burton's quiet and shy demeanor can be due to multiple factors other than ID such as a dependent personality disorder, the effects of seeing the abuse exhibited by his father, or simply the nature of his character.
 - Mr. Burton's emails contain socially appropriate comments. He asks about others' well-being and interests. He respects boundaries and the limits of his relationships with whom he is communicating.
 - In the mental health notes that I reviewed, his interactions with mental health clinicians appeared appropriate to the circumstances.
 - Although described as quiet and shy in school, his brother indicated that he went out for the basketball team twice and a girlfriend in high school indicated that he started participating in boxing.
- Practical
 - Limitations with Mr. Burton's practical adaptive behaviors were also cited by Dr. DeRight. These included "limitations in complex daily living tasks such as grocery shopping or money management and maintaining only a minimal level of employment."
 - As noted previously, it is difficult to retrospectively appreciate the cultural expectations and demands on Mr. Burton in the 1990s regarding grocery shopping, cooking, and money management. Regardless, by all accounts, he sought out work on his own and was a good worker. He "made a good father," as noted by his mother. His mother did express the concern that he was "too young to be settling down so fast and having children. This made me concerned that he felt trapped and pressured into being a husband and father even though he wasn't ready for it." Interestingly, she did *not* describe being concerned in her unsworn declaration that her son was incapable of raising children, being a good father, or being able to provide for his family.
 - Mr. Burton's brother, Michael, in his unsworn declaration stated that "even when Arthur got his own car he would still ride to work with Arthur Senior" (Mr. Burton's father). If accurate that Mr. Burton owned a car, then it would stand to reason that he had a license and that he had saved his money to purchase a vehicle, reflecting planning and thoughtful money management. Again, if true, that would reflect a high degree of practical adaptive functioning. His brother, Michael, also stated that Arthur moved in with him and "began working for a cabinet company...It seemed to be going well with him for a while," but his father convinced him to come back to

work for him. He began working at the cabinet company after he first left his father's concrete business. How he got that job was not stated, but it could reflect that he took the initiative to seek and procure a position there.

- According to the records that I reviewed, there was no evidence cited that Mr. Burton was unable to care for himself or his living space in prison. He was always described by mental health professionals as "neat and clean" and that his grooming was "well kempt" or "normal." There was no report of being unhygienic either before or while in prison.
- In addition to the above, the mental health notes described, with just one exception, his cell as neat, clean, or normal.
- Under the subheading "Adaptive Functioning," the mental health notes described that he exhibited no skill deficit.
- Mr. Burton has exhibited the ability to take the initiative to request medical care when needed and to make independent health care decisions.
- Mr. Burton has made liberal use of the prison's book loaning procedures.
- A TDCJ Health Summary for Classification noted in 1998 and 2000 that Mr. Burton had no restrictions in housing, work, or transportation, which reflects an absence of practical limitations with adaptive functioning.

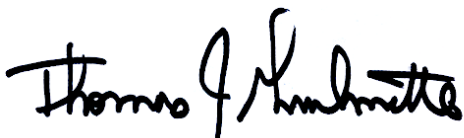
Evidence of ID During the Developmental Period

Mr. Burton was never diagnosed with ID at any time in his life or while in school. Although he likely had a reading disorder and struggled academically in school, standardized educational testing did not reveal evidence of a significant global deficit in all areas of study. He graduated with a basic diploma but still in the middle of his class with a C average. There was nothing in his educational or school records that confirmed the presence of ID.

Summary of Evidence for an Atkins Hearing

Qualitative and quantitative evidence are not consistent with the presence of intellectual disability. There is no evidence of ID from his school record or when evaluated by the TDCJ. I have not seen any mental health or other notations that Mr. Burton suffers from a significant deficit in intellectual or mental capabilities, or with his adaptive functioning. He has not needed any additional supports to function within the prison system. He looks after his own healthcare needs. He reads prodigiously with a comprehension level that is generally equal to the average U.S. citizen, maintains his self-care and living space properly, corresponds with others appropriately and with a relatively high degree integrative thinking, has apparently reached a proficient level of expertise with Dungeons and Dragons, and appears somewhat creative with poetry and illustrations.

In my opinion, based upon my training and experience, the available evidence is inconsistent with the DSM-5-TR criteria for intellectual disability.



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