

**Petition to President Donald J. Trump for Executive
Clemency
and Commutation of Death Sentences
On Behalf of Corey Johnson**

December 20, 2020

“In 2002, this Court ruled that the Eighth Amendment prohibited the execution of persons with intellectual disability.”

***Hall v. Florida*, 572 U.S. 701, 707 (2014)**

“Corey Johnson is clearly a person with intellectual disability based on my review of extensive prior records and evaluations, my evaluation of him, and my application of the criteria for intellectual disability established by authoritative national and international authorities.”

Daniel J. Reschly, Ph.D. (8/26/16)

“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”

***Roper v. Simmons*, 543 U.S. 551, 553 (2005)**

President Trump, Corey Johnson¹ respectfully requests that you grant him executive clemency and commute his death sentences to life without the possibility of parole. Clemency is the constitutional, lawful, just, and fair decision for Corey Johnson for many reasons. Corey Johnson is intellectually disabled and cannot constitutionally be executed.² Yet no jury and no

¹ Mr. Johnson’s actual first name is “Corey” but it was misspelled as “Cory” in his indictment, in various pleadings filed before the United States Court of Appeals for the Fourth Circuit, and in subsequent decisions following his convictions. Mr. Johnson is using the correct spelling of his name in this Clemency Petition.

² During Corey Johnson’s childhood and at the time of his capital trial, intellectual disability was commonly known as “mental retardation.” The two phrases are synonymous and describe the same significant impairments. However, the current accepted term is “intellectual disability” and that phrase will be used in this Clemency Petition except where there is a direct quote and in the section discussing the stigma of the “mental retardation” label.

trial court has ever held a hearing to examine the compelling evidence that proves his intellectual disability. No appellate court has ever reviewed a lower court ruling based on the comprehensive evidence that now exists, evidence showing Mr. Johnson is categorically ineligible for the death penalty.³ Corey Johnson is also not asking to escape the consequences of his actions. His only request is that his death sentences, barred by any modern norms of decency and justice, be commuted to life without the possibility of parole. Mr. Johnson is asking the President to intervene and prevent his unconstitutional and arbitrary execution.

I. Overview

Corey Johnson remained in the second grade for three years, and also repeated the third and fourth grades. When asked his birthday at age eight, while in second grade, he thought it was in March, though he was actually born in November. When he was 13 years old, he could barely write his own name. And while he knew there were 12 months in the year, he could recite them only up to August. Corey was not able to tell time or perform arithmetic beyond a third-grade level. At age 18, a high school teacher concluded that Corey could never pass the competency exams required to graduate. When he was in his early 20s, achievement testing measured his grade-equivalent levels no higher than second grade in reading and writing. When he was last tested at age 45, Mr. Johnson was still at an elementary school level.

As an adolescent and teenager, Corey functioned like a younger child—he struggled to prepare snacks for himself, wet his bed (until he was 12), and could not be trusted to roam school

³ On December 14, 2020, Mr. Johnson filed a motion setting forth proof that he is intellectually disabled and that his execution must, therefore, not be carried out. Mot. Pursuant to 28 U.S.C. § 2255 Raising Claim of Ineligibility to Be Executed Under 18 U.S.C. § 3596(c), *United States v. Johnson*, No. 3:92CR68 (DJN) (E.D. Va. Dec. 14, 2020), ECF No. 86. As of the date of this Petition, the Government has not yet responded to Mr. Johnson's motion, but it is highly likely that the Government will oppose his motion on procedural grounds despite the persuasive evidence that Mr. Johnson is a person of intellectual disability.

halls without getting lost or go to the store and receive correct change. A social worker from his residential placement reported that when he was 13, Corey was “frightened” of other children and “isolated” from them. He was never able to make his way alone through any but the most familiar streets even up to the time of his arrest in this case. He has never managed to live on his own.

* * *

Significant developments in the scientific understanding of intellectual disability, medical standards, and diagnostic tools used in the evaluation of intellectual disability provide evidence of Corey Johnson’s condition that were unavailable to him in his prior proceedings. Specifically, evidence shows that Mr. Johnson meets the three criteria established in current clinical definitions of intellectual disability. *First*, his IQ scores of 72, 75, 65, and 73 (corrected under clinically accepted standards) from tests taken when he was eight, 12, 16, and 23, respectively, fall within the presumptive range for intellectual disability. Even *uncorrected* (though legal and medicine standards demand they all should be corrected), two of Mr. Johnson’s scores are within the requisite intellectual disability range. *Second*, contemporaneous childhood records, expert evaluations by three nationally renowned experts in intellectual disability, a standardized assessment tool, and statements from more than two dozen family members, friends, teachers, mental health professionals, and others who have known him show significant limitations in his adaptive functioning. Despite his efforts, Corey utterly failed in school. At 13, he could not read single-syllable short vowel words or name the sounds of the short vowels or count money.⁴

⁴ Ex. 49 at 2 (Leona Klerer, Mount Pleasant Cottage School Screening Upon Admission, Feb. 22, 1982 (“2/22/82 Klerer - Screening Upon Admission”)); Ex. 26 ¶ 40 (Affidavit of Minnie Hodges (Corey’s maternal aunt), Apr. 30, 2011 (“4/30/11 Aff. of M. Hodges”)).

Growing up, he was “easily influenced” and “lacked the ability to understand the consequences that his actions could have.”⁵ He was not trusted to travel alone and could not prepare a basic sandwich.⁶ *Third*, these intellectual and adaptive impairments existed well before his 18th birthday. This evidence, particularly when assessed in light of current medical and legal standards that were also previously unavailable to Corey Johnson (and unavailable to the court during his sentencing hearing), leaves no doubt that he is intellectually disabled and that his execution is contrary to clear federal law and violates the Constitution.

“A sentence of death shall not be carried out upon a person who is mentally retarded.”

18 U.S.C. § 3596(c)

No jury or court has yet made a determination about Corey Johnson’s intellectual disability based on the full array of extensive evidence that proves his categorical ineligibility for execution. In fact, at Mr. Johnson’s capital sentencing hearing in 1993, his defense team told the jury that Corey Johnson was *not* intellectually disabled and *never* asked the jury or the court to decide if he was, although we now know that his intellectual disability actually makes him statutorily ineligible for the federal death penalty. The defense team did not thoroughly investigate Corey Johnson’s life, obtain critical records from his childhood or conduct important interviews that, considered together, demonstrate his intellectual disability and the reasons he was never properly diagnosed prior to his trial and conviction. *Corey Johnson’s current counsel are not aware of any other federal death penalty case in which counsel have never had a single opportunity at which they could present evidence that their client meets the diagnostic criteria for intellectual disability.*

⁵ Ex. 34 ¶¶ 16, 20 (Affidavit of Odette Noble (social worker at Elmhurst), Dec. 1, 2011 (“12/1/11 Aff. of O. Noble)).

⁶ Ex. 2 at 34 (Report of J. Gregory Olley, Ph.D., Aug. 24, 2016 (“Olley Report”)); Ex. 26 ¶ 38 (4/30/11 Aff. of M. Hodges).

There are several reasons why Corey Johnson did not present evidence of his intellectual disability in previous legal proceedings, even though he is intellectually disabled. First, during his childhood, New York City area schools were under significant pressure not to label urban Black students as intellectually disabled. They often avoided applying that label even when it was the most appropriate classification, as in Corey's case. For well-intentioned reasons, race inadvertently played a role in the failure to classify Corey as child with intellectual disability at the time.

Moreover, living in a chaotic environment with no stability, constantly moving between numerous homes and schools depending on his mother's drug habits and romantic interests, Corey was never under consistent and continuous parental or educational/social services care. Because of his mother's transient lifestyle and constant disruption during his childhood, critical records containing evidence supporting his current diagnosis of intellectual disability did not follow Corey from place to place, contributing to the failure to reach a proper diagnosis for his significant impairments. Rather, we now know that Corey was misdiagnosed as severely learning disabled based on flawed and incomplete information, a mistaken label that stuck with him and misled later evaluators.

Second, once charged with capital crimes, his lawyers did not retain a mitigation expert specialist (which was the norm then and is the norm today⁷), and thus did not to find records

⁷ The American Bar Association ("ABA") Guidelines provide that a mitigation specialist is a necessary requirement to meet the standard of care for capital cases. *See* ABA Guidelines 4.1(A); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (recognizing that in assessing whether counsel's performance is deficient, prevailing norms of practice as reflected in the American Bar Association standards are "guides to determining what is reasonable"). The ABA Guidelines provide that in order for counsel to be effective they must utilize the assistance of a mitigation specialist. The ABA guidelines further state that the collection of mitigation records is not just a ministerial job but should be performed by individuals with specialized knowledge in "identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during

critical to assessing his significant impairments, and key witnesses who could vividly describe examples corroborating those records. Instead, his attorneys tasked the psychologist they retained—who was not an expert in intellectual disability—to take the lead in gathering the mitigation evidence, and he conducted his limited investigation mainly by telephone.

Finally, the science of intellectual disability has progressed significantly since Mr. Johnson’s 1993 trial in crucial ways. The evolution in the medical standards and diagnostic tools used to assess intellectual disability has brought into sharp focus the overwhelming evidence that existed, but was more difficult to discern then, that Corey Johnson is intellectually disabled.

Beyond the essential evidence of intellectual disability that it lacked, the jury that decided his case did not learn first-hand from witnesses involved in Corey Johnson’s life about the most extreme trauma he endured as a child and did not hear testimony about the effect that these traumatic events have on an individual that is already struggling with intellectual disability. Corey was physically abused by his mother’s violent, heroin-addicted boyfriend and helplessly watched that man abuse his mom. Corey’s drug-addicted mother, in turn, frequently beat him and hurled cruel insults at him (such as belittling him for his intellectual impairments). Corey was uprooted constantly moving almost a dozen times and attending ten schools before he turned 13. His mother, who was emotionally cold and narcissistic, finally abandoned Corey to the social service system and to residential placements at age 13 so she could focus on her own desires. Corey was sent home from his last placement at age 18 without any supports in place, despite a tragically prophetic case note (written by a social worker just months before he was sent home) questioning Corey’s ability to survive given his mother’s values and lifestyle. Corey

developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma.” ABA Guidelines 5.1.

never returned to the program; instead, he soon joined a drug group in New Jersey. After leaders of that group were arrested, he moved with remnants of the group to Richmond, Virginia. The Richmond group soon engaged in the violence that ultimately led to the murders for which Mr. Johnson was convicted and sentenced to die. Scientific research shows that the kind of deprivation and trauma experienced by children like Corey Johnson are risk factors for intellectual disability and for an array of physical and mental health problems throughout life.

The arbitrary nature of the death sentences in Corey Johnson's case is illustrated by the fate of an equally culpable co-defendant, Vernon Lance Thomas. Thomas was involved in many of the same violent acts for which Mr. Johnson was convicted and sentenced to death, including four murders. The Government filed a death notice against Thomas too, but withdrew its death notice on the eve of trial and sought only life sentences for Thomas. While it is impossible for Corey Johnson's counsel to know why the Government withdrew its notice, the decision was announced shortly after Thomas' lawyers provided evidence that Thomas was intellectually disabled; Thomas is serving life without parole today. Corey Johnson's IQ is in the same general range as Thomas' and the documented evidence of Corey Johnson's extraordinary deficiencies in life functioning are far more extensive than Thomas' reported impairments.

Corey Johnson's death sentences are also marred by this nation's legacy of racial disparities and the uncomfortable reality of unconscious racial bias. Beyond the role that race played in the failure to diagnose him with intellectual disability when he was a child, arguments made during Mr. Johnson's trial exacerbated implicit racial bias and the prevalent societal fear of violent Black offenders. Such arguments were made to a jury that did not reflect the demographics of the community where his crimes occurred.

By this Petition, Corey Johnson is *not* seeking to avoid responsibility for the murders and other violent acts for which he has been convicted. He knows he inflicted irreparable suffering on his victims and their families, and accepts full responsibility for the seven lives he took and the three other victims he wounded. He has expressed his remorse to counsel again and again. After the jury's verdict and right before the trial court officially sentenced him to death, Corey Johnson told the victims' families that he was sorry for their loss. He went on to urge a middle school class that watched the sentencing hearing to avoid all criminal activity and learn from his terrible actions.

Corey Johnson poses no danger to anyone in prison. He has never gotten into fights or possessed a weapon while in prison. He has been a model inmate for the past 20 years with only an extremely minor misstep in 2002 for using a staff bathroom without permission. Mr. Johnson has taken several art and exercise courses while incarcerated and has been persistently studying, but unfortunately in vain, studying to achieve the one goal that he set for himself in prison, to obtain his General Equivalency Diploma ("GED"), which his disability has made impossible for him.

Corey Johnson suffers from all of the impairments identified by the Supreme Court in *Atkins v. Virginia*⁸ that undergird why the Court held that the death penalty cannot be applied to people with intellectual disability.

Because of their impairments, however, by definition [the intellectually disabled] 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.

⁸ 536 U.S. 304 (2002).

Atkins, 536 U.S. at 318. Yet no court has yet ruled upon the extensive and persuasive evidence proving that the Constitution and a federal statute bar Corey Johnson’s execution. Now, procedural barriers could preclude consideration of such evidence, which could leave executive clemency as the only option remaining to Corey Johnson to prevent his execution.

“In my opinion, Corey Johnson has intellectual disability that originated during his childhood and has persisted into adulthood.”

J. Gregory Olley, Ph.D. (8/24/16)

In addition, less than a week before submitting this Petition, Mr. Johnson began experiencing symptoms of COVID-19 and, on Friday, December 18, 2020, just two days before filing this Petition, Mr. Johnson and counsel were informed that he has tested positive for COVID-19.⁹ Mr. Johnson’s disturbing diagnosis came on the heels of revelations earlier in the week that another federal inmate with an execution date—scheduled for the day after Mr. Johnson’s execution—also tested positive for COVID-19, and reports that additional federal death row inmates held in the same unit tested positive last week as well. Mr. Johnson implores the President not to proceed with his execution less than a month after his diagnosis with this life-threatening disease, one that causes damage to the lungs and severely impairs their functioning, particularly given the Eighth Amendment implications of proceeding with his execution under circumstances that likely will exacerbate the cruel and unusual nature of that penalty. As a person whose intellectual disability categorically prohibits his execution, Mr. Johnson respectfully requests that the President exercise his authority to commute his death sentences to life in prison without the possibility of parole for the reasons presented below.

⁹ Ex. 7 Email from BOP lawyer Alexis McGee to Donald Salzman, Dec. 18, 2020.

II. Corey Johnson is Intellectually Disabled

Overwhelming evidence establishes that Corey Johnson is intellectually disabled and ineligible for the death penalty. Multiple IQ tests administered to him when he was a child and young adult and other contemporaneous records created during his childhood, adolescence, and young adulthood contain evidence proving Corey Johnson's intellectual disability. Those records are corroborated by statements from more than two dozen family members, friends, teachers, mental health professionals, and others who have known Corey Johnson and witnessed his profound limitations. Further, this evidence is confirmed by adaptive behavior instruments administered to three people who knew Corey Johnson well during his childhood and whose standardized scores place him solidly in the intellectual disability range for adaptive functioning.¹⁰

Three of the nation's most experienced and well-regarded psychologists with expertise in intellectual disability—Daniel J. Reschly, Ph.D.; J. Gregory Olley, Ph.D.; and Gary N. Siperstein, Ph.D.—comprehensively evaluated Corey Johnson applying modern medical standards and have concluded that he is intellectually disabled and that his intellectual disability originated when he was a child. All three have had more than 40-year-long careers as researchers and clinicians focused on the diagnosis of intellectual disability in children and adults. These experts each independently concluded that records created and evaluations done during Corey's childhood and other information developed since then show overwhelmingly that he has intellectual disability. Their comprehensive evaluations are attached as Exhibits 1, 2 and 3.

¹⁰ *Infra* at pp. 24-25.

Daniel J. Reschly, Ph.D., a psychologist who is both an expert in intellectual disability and learning disabilities and was chosen by the National Academy of Science to draft guidelines for the diagnosis of intellectual disability for the Social Security Administration,¹¹ found that Mr. Johnson “is by definition and classification criteria a person with intellectual disabilities.”¹² Dr. Reschly’s report explains why Corey Johnson is not “learning disabled,” despite receiving the learning disabled classification as a child and despite being diagnosed as learning disabled (and not intellectually disabled) by Dewey Cornell, the defense psychologist who testified at Mr. Johnson’s capital sentencing hearing.

J. Gregory Olley, Ph.D., a clinical psychologist and professor emeritus at the University of North Carolina, who has a 40-year career as a researcher and clinician focused on the diagnosis of intellectual disability in children and adults, reviewed Corey Johnson’s juvenile record, conducted more than two dozen interviews of key individuals in Corey Johnson’s life, and concluded that “the evidence for Corey Johnson’s intellectual disability diagnosis is strong and deep.”¹³

And Gary N. Siperstein, Ph.D., a psychologist and the founder and director of the Center for Social Development and Education at the University of Massachusetts Boston, who, among other things, has served as associate editor of the *American Journal of Mental Retardation* and editor of the Research Monograph Series of the American Association on Mental Retardation, reviewed the full record and “unequivocally conclude[d] that Corey Johnson meets all three

¹¹ National Research Council (US) Committee on Disability Determination for Mental Retardation, *Mental Retardation: Determining Eligibility for Social Security Benefits* Daniel J. Reschly et al. (2002).

¹² Ex. 1 at 45 (Report of Daniel J. Reschly, Ph.D., Aug. 26, 2016 (“Reschly Report”)).

¹³ Ex. 2 at 11 (Olley Report).

prongs of the most recent definition of Intellectual Disability” (set forth by the American Psychiatric Association or “APA” and the American Association on Intellectual and Developmental Disability or “AAIDD”).¹⁴

A. Criteria for Intellectual Disability

Under prevailing medical standards, a finding of intellectual disability consists of three criteria: (1) significant limitations in intellectual functioning/subaverage intellectual functioning, (2) significant limitations in adaptive functioning; and (3) the onset of those significant impairments before the age of 18.¹⁵

First, to be considered intellectually disabled, a person must have significant limitations in cognitive ability, called “intellectual functioning.” Cognitive limitations are demonstrated by IQ tests—an IQ of approximately 75 or below falls within the presumptive range for intellectual disability.¹⁶ Second, the individual must also demonstrate significant limitations in behavior in everyday life, known as “adaptive functioning.” Finally, both the significant intellectual functioning and behavioral functioning limitations reflected in the individual’s everyday life must have existed when the person was a child, known as the developmental period.

It is important to note that at the time of Corey Johnson’s trial, a frequent practice was to consider these three components in a sequential process, thus often precluding assessment of the individual’s adaptive behavior if the individual being assessed had an IQ score of even one point

¹⁴ Ex. 3 at 7 (Letter from Gary N. Siperstein, Ph.D. to Counsel for Corey Johnson, Dec. 19, 2016 (“Siperstein Letter”).

¹⁵ Robert L. Schallock, et al., American Association on Intellectual and Developmental Disabilities (AAIDD), *Intellectual Disability: Definition, Classification, and System of Supports* (11th Ed. 2010) (“Classification Manual” or “AAIDD-11”); American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders* (5th Ed. 2013) (“DSM-5”).

¹⁶ See Classification Manual; see also *Hall*, 572 U.S. at 719.

higher than the conventional cut-off of 75. This approach has been overwhelmingly rejected by the current scientific community as resulting in incorrect diagnoses.¹⁷ Instead, it is now generally acknowledged that even in cases where a person has an IQ score above 75, a diagnosis of intellectual disability can still be made if the individual demonstrates severe adaptive behavior deficits during the developmental period.¹⁸

Further, one of the most common misconceptions about intellectual disability is that all people with intellectual disability fit rigid, antiquated parameters of individuals wholly incapable of performing even simple tasks or developing meaningful relationships. However, there is a range of levels of severity of intellectual disability. Many people with intellectual disability can function in society, hold simple jobs, maintain relationships, and sometimes live independently, but they require significant support in order to function properly in society. The overall functioning of the majority (i.e., approximately 85%) of persons with intellectual disability falls in what was historically been defined as the “mild” range of intellectual disability.¹⁹ This group of the intellectually disabled (those who are not the severely impaired), can have relative strengths that co-exist with their significant impairments.²⁰ Intellectual disability evaluations focus on the individuals’ limitations, not their relative strengths, because it is the impairments that characterize and define an intellectual disability diagnosis. Laypeople will often hold unfounded beliefs and misconceptions concerning the functioning abilities of persons who fall

¹⁷ *Hall*, 572 U.S. at 701-02.

¹⁸ *Id.* at 702.

¹⁹ See Marc J. Tassé & John H. Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies*, p. 6 (Praeger 2018).

²⁰ Classification Manual at 47; Robert L. Schallock et al., AAIDD, *User’s Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* (2012) (“User’s Guide”).

within the “mild” range of intellectual disability that are based on stereotypes and are at odds with scientific facts about intellectual disability, including believing that people with intellectual disability cannot accomplish complex tasks, cannot have romantic relationships, cannot acquire work, or are completely incompetent.²¹ Most capital defendants found to have intellectual disability fall in the upper range of functioning along the spectrum of the intellectually disabled, as do Corey Johnson and other men who, unlike him, had counsel who presented evidence of their intellectual disabilities and were found ineligible for the death penalty.²²

B. Corey Johnson Clearly Meets the Criteria for Intellectual Disability and His Limitations Were Present During the Developmental Period of His Life

1. Corey Johnson’s intellectual functioning limitations

Corey Johnson satisfies the first criterion of intellectual disability with four valid and reliable Full Scale IQ scores within the presumptive range for intellectual disability. As explained above, an IQ of approximately 75 or below²³ falls within the presumptive range for

²¹ See *supra* note 18, Marc J. Tassé & John H. Blume, pp. 7-8 (discussing a study conducted in 2012 finding that a plurality of the subjects, 890 college students, illustrated many of these common misconceptions regarding being able to identify people who are intellectually disabled).

²² Approximately 80 to 85 percent of people with intellectual disability fall within the mild range, with IQs between approximately 50 and 75. User’s Guide at 27; Martha E. Snell & Ruth Luckasson et al., AAIDD, *Characteristics and Needs of People With Intellectual Disability Who Have Higher IQs*, Vol. 47 *Intell. and Developmental Disabilities* 220, 220 (June 2009). Very few reported *Atkins* cases involve defendants with IQs lower than that range.

²³ A score of 75 represents an IQ that is two standard deviations below the population mean and accounts for the typical five-point standard error of measurement (“SEM”). Ex. 1 at 6, 11-12 (Reschly Report); see also *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017) (“[T]he [SEM] is ‘a statistical fact, a reflection of the inherent imprecision of the test itself.’ . . . [T]his imprecision in the testing instrument ‘means that an individual’s score is best understood as a range of scores on either side of the recorded score’” within which the individual’s true score must be understood to lie. (citations omitted)). Moreover, the modern scientific understanding as expressed by the leading professional medical organizations make clear that IQ is not a fixed score but instead a range and thus, an IQ score slightly above 75 is not necessarily dispositive. A person with IQ test scores above 75 can be classified as intellectually disabled if they demonstrated particularly significant impairments in adaptive functioning during childhood. Older intellectual disability definitions define the mild level of intellectual functioning, the first component of an intellectual disability diagnosis, as IQ scores in the range of 55 to 75, which represents an IQ that is

intellectual disability because it takes into account the SEM.²⁴ Gold standard IQ tests for children, given to Corey Johnson when he was eight, 12, and 16 years old, when properly analyzed and corrected, are solidly consistent with his having intellectual disability. The IQ test given to Corey Johnson by Dewey Cornell when Corey Johnson was 23-years-old —when properly corrected—produced an IQ score of 73, likewise consistent with intellectual disability.²⁵

Proper analysis of Corey Johnson’s IQ scores must both take into account and correct for the “Flynn effect,” which is a validated scientific phenomena that recognizes that IQ tests administered years after such tests were originally developed produce measurably inflated scores.²⁶ Specifically, the Flynn effect establishes that IQ scores across populations rise at a constant rate over time after the test was developed and normed by testing on large numbers of people. Hundreds of studies have proven that an IQ test will overstate a person’s actual IQ by a

two standard deviations below the population mean and adjusted to account for the five-point SEM. *See id.* While a person with IQ test scores above 75 can be classified as intellectually disabled, it is universally accepted that a person with a score of 75 or below meets the subaverage intellectual functioning criteria.

²⁴ *See supra* n.22.

²⁵ Corey Johnson was given two other IQ tests at ages 10 and 13 which were significantly flawed. Ex. 1 at 15-20 (Reschly Report); Ex. 2 at 3-4, 12-15 (Olley Report). One of those outlier IQ tests was 30 years old and was so culturally outdated that it had been replaced by a significantly revised version five years *before* it was given to Corey Johnson. The other was distorted and inflated because it came on the heels of and just four months after Corey Johnson was given the exact same IQ test. *See infra* p. 48 for a discussion of this phenomena, known as the “practice effect”; *see also* Classification Manual at 37-39. Based on established standards, Dr. Reschly and Dr. Olley have concluded that these two outlier tests are unreliable and invalid and should be given little if any weight in deciding whether Corey Johnson has intellectual disability. Ex. 1 at 15-20 (Reschly Report); Ex. 2 at 3-4, 12-15 (Olley Report).

²⁶ Both the APA and the AAIDD recognize the problem with using IQ tests with outdated norms and the legitimacy of the Flynn effect. Moreover, the AAIDD expressly states that IQ results produced by older tests with outdated norms should be corrected for the Flynn effect. Classification Manual at 37; AAIDD User’s Guide at 23; DSM-5 at 37. *See also* Lisa Trahan, Karla K. Stuebing & Jack M. Fletcher et al., Nat’l Institutes of Health, *The Flynn Effect: A Meta-Analysis*, Vol. 140, No. 5, Psychological Bulletin 1332-1360 (2014) (a meta-analysis of almost 300 studies conducted world-wide that verified the slow, steady, and measurable rise in IQ test results across populations over time).

specifically measurable amount (approximately .3 points per year or 3 points over ten years) for every year after the IQ test was normed. The “Flynn effect” did not gain the widespread support of the psychiatric community until well after Corey’s sentencing. In fact, the American Association on Mental Retardation (“AAMR”), which later became the AAIDD, did not mention the Flynn Effect in its 9th Edition Manual, which was published in 1992 and relied upon by Dr. Cornell at Corey’s sentencing hearing.^{27 28}

Four of Mr. Johnson’s IQ tests, when corrected for the Flynn Effect, demonstrate that he has subaverage intellectual

Chart 1: Corey Johnson’s Reliable IQ Tests				
IQ Test	Year	Age	Uncorrected IQ Score	Flynn Corrected IQ Score
WISC-R	1977	8	73	72
WISC-R	1981	12	78	75
WISC-R	1985	16	69	65
WAIS-R	1992	23	77	73

functioning.²⁹ While only one qualifying score is sufficient, *two* of Corey’s IQ scores fall within the requisite range—even without correction for the Flynn Effect. In 1977, when he was eight,

²⁷ It was not until 2006, that the AAIDD published the 10th Edition User Guide directing clinicians to account for the Flynn Effect, which appears to be the first AAIDD/AAMR publication explicitly recognizing the Flynn Effect. Robert L. Schalock, et al., eds., *User’s Guide: Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2006).

²⁸ It is worth noting that the military justice system has also adopted the AAIDD definition of intellectual disability and has expressly stated that “standardized IQ scores scaled by the SEM and the Flynn effect will be considered.” *United States v. Parker*, 65 M.J. 626, 629 (2007).

²⁹ Only one such score would be sufficient under *Hall v. Florida*, 572 U.S. 701 (2014), where the Supreme Court rejected a “rigid rule” that foreclosed further examination of cognitive functioning when an individual has met the threshold on one valid and reliable IQ test because such a rule “creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.” *Id.* at 704. Once a defendant establishes an IQ score of 75 or below, the sentencing court must consider the adaptive functioning prong of the intellectual disability test. When applying *Hall v. Florida*, the court in *United States v. Wilson*, 170 F. Supp. 3d 347 (E.D.N.Y. 2016) ruled that a federal inmate who had taken nine IQ tests between the ages of six and 30, with full-scale scores ranging from 70 to 84 (seven of which were higher than 75) met the cognitive function prong requirements for significantly subaverage intellectual functioning because one test was reasonably reliable and below the threshold.

his uncorrected IQ score was 73 (72 when corrected for the Flynn Effect).³⁰ In 1985, when he was 16, his uncorrected IQ score was 69 (65 when corrected for the Flynn Effect).³¹ Two additional scores with correction for the Flynn Effect also fall within the presumptive subaverage intellectual functioning range: a corrected score of 75 (at age 12) and a corrected score of 73 (at age 23).³²

Based on their analysis of all of Corey's IQ scores, Dr. Reschly, Dr. Olley and Dr. Siperstein independently conclude that Corey Johnson meets the intellectual functioning prong of the intellectual disability criteria. They all agree that Corey's IQ tests show a person with significant intellectual functioning limitations. *See* Ex. 1 at 3 (Reschly Report) ("Corey Johnson's reliable IQ scores were consistently two standard deviations below the mean. This satisfies the intellectual functioning prong."); Ex. 2 at 15 (Olley Report) ("Corey Johnson meets the intellectual functioning prong of the intellectual disability framework, because his IQ test results show significant limitations in his intellectual functioning before the age of 18."); Ex. 3 at 4 (Siperstein Letter) ("[B]ased on my 50 years of work in the field of intellectual disability, the conclusions Dr. Reschly draws concerning Corey Johnson's intellectual functioning are irrefutable.").

³⁰ Ex. 42 at 1 (F.A. Figurelli, M.D., School Psychologist, Psychological Examination Record, Mar. 25, 1977 ("3/25/77 Figurelli – Psychological Exam")).

³¹ Ex. 63 at 1 (Kenneth Barish, Ph.D., Psychologist, Pleasantville Cottage School Psychological Evaluation, Apr. 15, 1985 ("4/15/85 Barish - Psychological Eval.")).

³² Ex. 47 at 2 (Ernest H. Adams, Staff Psychologist, Psychodiagnostic Evaluation, Dec. 11, 1981 ("12/11/81 Adams Psychodiagnostic Eval."); Ex. 6 at 12 (Excerpt of Cornell Mitigation Information and Report), Feb. 1, 1993.

Corey Johnson’s impairments are comparable to those of numerous other federal capital defendants spared from the death penalty due to their intellectual disability.³³ Corey Johnson’s IQ scores are similar to the Flynn corrected IQ scores for three of those defendants, depicted in Chart 2;³⁴ federal courts in these three cases granted the capital defendants’ *Atkins* claims and

Chart 2: Flynn Corrected IQ Scores of Federal Death Penalty Defendants Whose Atkins Claims Were Granted			
Paul Hardy (2010)	Earl Davis (2009)	Antun Lewis (2010)	Farad Roland (2017)
67	66	67	68
	73	72	72
	62		69
	70		74

found them ineligible for the death penalty due to their intellectual disability after applying the Flynn effect.³⁵ Indeed, the federal death penalty defendants in the six cases in the IQ chart, like Corey Johnson, presented a range of IQ scores mostly in the 70s. Unfortunately, this presentation was

never made on Corey’s behalf at trial or in his §2255 proceedings.

³³ See Ex. 8 (Corey Johnson’s IQ Scores Compared to IQ Scores of Federal Death Penalty Defendants Found Intellectually Disabled After Contested Atkins Hearings (“IQ chart”). The IQ chart does not include other federal defendants for whom the Government did not authorize seeking the death penalty or in whose cases the Government withdrew its death notice based on IQ scores similar to Corey Johnson’s IQ scores; see also Death Penalty Information Center, *Defendants Whose Sentences Have Been Reduced Because of a Finding of “Mental Retardation” since Atkins v. Virginia (2002)* (July 19, 2012), <http://www.deathpenaltyinfo.org/node/2395>.

³⁴ In the three other cases in the IQ chart, the court recognized the Flynn effect as a valid phenomenon and granted *Atkins* relief but did not actually correct IQ scores for the Flynn effect. See *United States v. Nelson*, 419 F. Supp. 2d, 891, 896-97 (E.D. La. 2006); *United States v. Shields*, No. 2009 WL 10714661, 9 (W.D. Tenn. May 11, 2009); *United States v. Smith*, 790 F. Supp. 2d 482 (E.D. La. 2011).

³⁵ See *United States v. Roland*, 281 F. Supp. 3d 470, 503 (D.N.J. 2017); *United States v. Hardy*, 762 F. Supp. 2d 849, 857 (E.D. La. 2010); *United States v. Davis*, 611 F. Supp. 2d 472, 477-78 (D. Md. 2009); *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901, at *8-9 (N.D. Ohio Dec. 23, 2010). The cases in Chart 2 are also found in the IQ chart, which includes three other federal death penalty defendants who were granted *Atkins* relief by the courts and spared from the death penalty due to intellectual disability.

2. Corey Johnson’s adaptive functioning limitations

Records created during Corey Johnson’s childhood and adolescence document that Corey Johnson’s intellectual disability profoundly impaired his everyday functioning as a child, adolescent, and young adult—the second prong of the intellectual disability diagnosis.³⁶ Corey’s deficits were documented in contemporaneous records created during his childhood and adolescence. These deficits are further corroborated by interviews with several dozen people who knew Corey Johnson and by standardized assessments administered to three people who knew him very well. Much of this critical evidence was never found by Mr. Johnson’s lawyers before his current clemency counsel.

A significant impairment in everyday life functioning in one or more areas (called “domains”) forms the basis for the second prong of an intellectual disability diagnosis. These domains involve impairments in conceptual functioning, social functioning, and/or practical functioning. An individual must demonstrate significant impairments in only *one* of the three adaptive functioning areas to support an intellectual disability diagnosis.³⁷ Moreover, legal and medical standards recognize that within any individual, strengths co-exist with weaknesses; thus, a relative strength in one domain does not serve as a

“[c]ouldn't perform third grade work. Being retained in second No concept of number facts, low comprehension. No reading skills. Unable to retain sight vocabulary.”

Cheryl Spillane (3/18/77)

³⁶ The examples noted in this Clemency Petition are just a small sample of the numerous adaptive functioning impairments documented in the contemporaneous records and corroborated by interviews conducted by mitigation experts for Corey Johnson’s current clemency counsel. See Ex 2 at 15-40 (Olley Report).

³⁷ See DSM-5 at 38; Classification Manual at 43 (significant impairment in adaptive functioning can separately be demonstrated by showing an overall score of approximately two standard deviations below the mean on a standardized measure of adaptive functioning).

counterweight to an established deficit. *Moore*, 137 S. Ct. at 1050. In *Moore*, the Supreme Court emphasized that

the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. *E.g.*, AAIDD-11 at 47 (“significant limitations in conceptual, social or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills.”); DSM–5, at 33, 38 (inquiry should focus on “[d]eficits in adaptive functioning”; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits).

137 S. Ct. at 1050 (alterations in original). Persuasive evidence shows that Corey Johnson is significantly impaired in all three domains.

Critical to assessing his functioning in the cognitive domain, Corey Johnson utterly failed academically at every school level due to his intellectual disability. As soon as he began school, records show that he could not learn, and Corey repeated several grades, including second grade three times, and, as he got older, he fell further and further behind.³⁸ When Corey was seven, “he had a lot of difficulty” writing his name, and “he had difficulty saying the alphabet but recognized letters . . . was unable to give his birth date but knew his age . . . [and] had no idea what month it [was] but knew the day.”³⁹ At age eight, Corey had “no concept of number facts, no reading skills, [could not] retain sight vocabulary words,” and “had difficulty saying the alphabet.”⁴⁰ Two years later, at age ten, Corey was referred to the Committee on the Handicapped for “school failure” and, after testing, was placed in Special Education classes.⁴¹

³⁸ Ex. 4 at 35 (Debra Nelson, Mitigation Report, Sept. 27, 2016 (“Nelson Report”)); Ex. 2 at 18-19 (Olley Report); Ex. 44 at 2 (Committee on the Handicapped, Referral to the Committee on the Handicapped, Feb. 26, 1979).

³⁹ Ex. 42 at 1 (3/25/77 Figurelli – Psychological Exam); Ex. 41 at 3 (Cheryl Spillane, Learning Consultant, Bureau of Pupil Personnel Services, Jersey City Public Schools, Learning Consultant Evaluation to Child Study Team, Mar. 18, 1977 (“3/18/77 Spillane - Learning Consultant Evaluation”)).

⁴⁰ Ex. 40 at 1 (Gregory F. Judge, School Social Worker, Social History, Mar. 4, 1977); Ex. 41 at 3 (3/18/77 Spillane - Learning Consultant Evaluation)

⁴¹ Ex. 45 at 1, 4 (Committee on the Handicapped Records, May 21, 1979); Ex. 2 at 19-20 (Olley Report).

When he was 13, his mother abandoned him to the foster-care system and Corey was placed in a residential facility, which conducted a comprehensive assessment of him that showed that Corey had made almost no progress in learning since he was seven.⁴² He was barely able to write his own name and “could recite the months of year in sequence only up to Aug[ust,]” “was unable to read single syllable short vowel words in isolation[,]” and “did not know the sounds of g and c . . . was not sure of the consonant sound of m and y, [and] did not know the rule of silent e.”⁴³ Corey’s reading and comprehension was on the “second grade level,” Corey was only able to tell time on the hour, and could not multiply by three, divide a single digit by two, or read numbers of more than four digits.⁴⁴ Corey’s reading teacher, Leona Klerer, states that her evaluation 30 years earlier showed that Corey had “a significant deficit in his abilities.”⁴⁵

When Corey was 14 years old, he was given a brief verbal intelligence test and received an IQ score of 74, which corresponded to a mental age of nine and was consistent with intellectual disability.⁴⁶ Four months later, Corey was given comprehensive testing to measure his academic achievement: “Corey obtained a Reading Score at the 1st percentile . . . , a Spelling Score at the 1st percentile . . . and an Arithmetic Score at the 2nd percentile”⁴⁷ And the next

⁴² The residential facility was the Pleasantville Cottage School Program. When Corey turned 16, he was transferred to a group home called Elmhurst Boys’ Residence.

⁴³ Ex. 49 at 2 (2/22/82 Klerer - Screening Upon Admission).

⁴⁴ *Id.* at 1-3.

⁴⁵ Ex. 32 ¶ 6 (Declaration of Leona Klerer (reading teacher at Mount Pleasant Cottage School), June 3, 2011).

⁴⁶ The Peabody Picture Vocabulary Test is an untimed test that provides a quick estimate of verbal ability and scholastic aptitude. Ex. 54 at 2 (Adele Janow, Speech Teacher, Mount Pleasant Cottage School, Speech Report, Nov. 17, 1982).

⁴⁷ Ex. 56 at 2 (Ken Barish, Ph.D., Psychologist, Pleasantville Cottage School, Psychological and Educational Evaluation, Apr. 29, 1983 (“4/29/83 Barish - Psychological and Education Eval.”)).

year, when he was 15, Corey's academic year was classified as "ungraded" and his assessment once again notes that he "never progressed beyond the 2nd grade reading level."⁴⁸

Corey remained at Pleasantville until he was age 16 and only left for the Elmhurst group home because he had essentially aged out of Pleasantville. Corey's Pleasantville records are filled with notes describing his attitude toward school and learning as "motivated" and "ambitious," even while at times he expressed frustration because he felt "stupid" and "dumb."⁴⁹ Nevertheless, no matter what education strategies the professionals who worked with Corey

"progress in his class has been very, very, very slow almost to the point where one might feel that he is not learning."

Gayle Turnquest (2/9/83) (Ex 55)

Johnson used and despite his dedicated efforts, he simply failed to learn. When he was 14, a psychiatrist concluded: "he needs very Special Education [sic], and I know of no methods to suggest to remediate his defects,

beyond a great deal of individual attention and drill."⁵⁰

Many long-term Pleasantville staff have remarked that, while a significant number of the children at Pleasantville were educationally challenged, Corey was the slowest and most impaired student they ever encountered there. Ann Harding, a Pleasantville staff member for 22

⁴⁸ Ex. 59 at 1 (Gerard Maier, Social Worker, Pleasantville Cottage School, Current Assessment, Sept. 4, 1984)

⁴⁹ See Ex. 50 at 3 (Cary Gallaudet, Psy.D., Pleasantville Cottage School, Psychological Evaluation, Feb. 23, 1982); Ex. 48 at 3 (Sundar Collimuttam, M.D., Psychiatrist, Pleasantville Diagnostic Center, Psychiatric Evaluation, Feb. 22, 1982 ("2/22/82 Collimuttam - Psychiatric Eval.)); Ex. 51 at 3-4 (Amira Offer, Caseworker, Pleasantville Diagnostic Center, Psychosocial Summary, Mar. 15, 1982 ("3/15/82 Offer - Psychosocial Summary")); Ex. 56 at 1 (4/29/83 Barish - Psychological and Education Eval.); Ex. 57 at 1 (John B. Stadler, M.D., Clinical Director, Pleasantville Cottage School, Psychiatric Evaluation, Aug. 26, 1983 ("8/26/83 - Stadler Psychiatric Eval.)); Ex. 61 at 4 (Christine Aaron, MSW Intern, Jewish Child Care Association of New York, Pleasantville Cottage School, Visitation Plan, Dec. 12, 1984 ("12/12/84 Aaron - Visitation Plan")); Ex. 65 at 1 (Richard Benedict, Teacher, Mt. Pleasant Cottage School Report 1984-1985); see also Ex. 58 (Lynn Polstein, Jewish Child Care Association of New York, Pleasantville Cottage School, Change in Permanency Plan, Apr. 13, 1984 ("4/13/84 Polstein - Change in Permanency Plan")).

⁵⁰ Ex. 57 at 2 (8/26/83 - Stadler Psychiatric Eval.).

years said: “I do not remember anyone else at Pleasantville who was similarly slow intellectually.”⁵¹ Dr. Kenneth Barish, a Pleasantville psychologist who evaluated Corey twice in three years, recalled: “Nearly 30 years after I met and evaluated him, Corey still stands out in my mind due to his profound impairment in learning. . . . Corey’s deficit in phonological processing remains the most profound impairment of this kind I have encountered in three decades of clinical practice.”⁵² Dr. Barish even considered Corey’s deficit “[s]o profound that [he has] used it over the past 30 years as a teaching example in [his] classes.”⁵³

When Corey was 16 and a half, he was transferred to the Elmhurst group home in Queens, New York to prepare him to live on his own, since living with his mother was not considered a good option for him. Corey was enrolled in remedial, special education, and vocational classes at Newtown High School but failed academically there as well; at age 18 in 1987, Corey’s last Newtown High School report card showed him failing remedial math, remedial reading, and remedial writing.⁵⁴ Corey was functionally illiterate when he dropped out of high school and his math skills were only marginally higher. When Mr. Johnson was 24, Dr. Cornell administered the Test of Written Language and the Woodcock-Johnson Test of Achievement-Revised, which measures both language and math skills. Mr. Johnson scored

⁵¹ Ex. 24 ¶ 6 (Declaration of Ann Harding (staff member at Pleasantville Cottage School), Nov. 21, 2011 (“11/21/11 Decl. of A. Harding”)).

⁵² Ex. 15 ¶¶ 8-9 Declaration of Kenneth Barish, Ph.D. (staff psychologist at Pleasantville Cottage School), July 22, 2014 (“7/22/14 Decl. of K. Barish”)).

⁵³ *See id.* at 11.

⁵⁴ Corey’s high school teacher reported to his caseworker that Corey was never expected to graduate from Newtown High School because he could not pass the high school literacy test. Ex. 70 at 3 (Odette Noble, Social Worker, Jewish Child Care Association of New York, Elmhurst Boys Residence, UCR Plan Amendment: Form D Trial Discharge, Feb. 23, 1987 (“2/23/87 Noble - Form D Final Discharge”)).

grade-level equivalents between second and sixth grades.⁵⁵ As Dr. Cornell testified, achievement test scores at the sixth-grade level or below are consistent with intellectual disability.⁵⁶

Corey Johnson’s ability to communicate and understand conversations has been compromised throughout his life:

He has often had to rely upon simple language or slang to communicate with others, and those who have known him have limited their conversations with him to basic, concrete language. But even so, they report that he often did not grasp what was being said to him.⁵⁷

In addition, Corey’s poor judgment, planning, and problem-solving skills have been starkly evident throughout his life.⁵⁸ Corey’s cousin, Priscilla Hodges, recalls that as a young teenager, he performed reckless acts—like riding his bike through traffic across a busy street and roller-skating down a steep hill—simply on a dare by his peers.⁵⁹

⁵⁵ Ex. 2 at 21 (Olley Report); Ex. 6 at 14-17 (Excerpt of Cornell Mitigation Information and Report).

⁵⁶ Ex. 75 (Trial Tr., 3693, *United States v. Tipton*, No. 92CR68 (E.D. Va. Feb. 10, 1993) (“2/10/93 Trial Tr.”)) (“We now know that a mildly retarded person can be educated up to about the sixth-grade level.”).

⁵⁷ Ex. 2 at 18 (Olley Report); *see also* Ex. 21 ¶ 13 (Affidavit of Courtney Daniels (Corey’s lifelong friend), May 21, 2011) (“Corey spoke with a lisp and had difficulty communicating.”); Ex. 25 ¶ 7 (Affidavit of Sonya Hilton (Corey’s former girlfriend), June 15, 2011). (“If Corey was in the room with four other people, it was clear that Corey was not on the same intellectual level as the other people and had difficulty keeping up with the conversation. For example, if the group was talking about the weather, Corey would abruptly talk about a race car show”).

⁵⁸ Ex. 2 at 25-27, 32 (Olley Report).

⁵⁹ Ex. 27 ¶¶ 16, 17 (Affidavit of Priscilla Hodges (Corey’s cousin), Apr. 30, 2011 (“4/30/11 Aff. of P. Hodges”)) (“[W]hen Corey was also a young teen, Corey’s ‘friends’ told him to ride his bike across a busy two-way street in the middle of traffic. I warned Corey not to do it, but he did it anyway. He made it across but was nearly hit by a car. The driver had to slam on his brakes to avoid hitting Corey.”); ¶ 16 (describing an incident wherein Corey was persuaded by peers to roller skate down “an incredibly steep hill, an act that no one else would attempt”).

“Corey does not have friends, he appears frightened of children and does not like any physical contact with them.”

Amira Offer (3/15/82)

As for the social domain, Corey was socially awkward and was described by teachers and professionals in elementary and middle schools as “isolated,” “frightened” and, consistently, a child with “poor peer relations.”⁶⁰ Dr. Olley concluded that Corey was “a solitary, fearful child who had few friends and felt most comfortable playing by himself or with younger children.”⁶¹ And, as he got older, “Corey had real problems in understanding how to interact with his peers and adults and marked difficulty in understanding social cues and norms.”⁶²

When he was 12, a social worker said he “relates like a younger child and appears limited.”⁶³ As a teenager and young adult, he was socially passive—present, but never initiating conversation and activities and simply going along with whatever the group he was with decided. Corey was a “poor social decisionmaker” who could be “easily influenced into doing what his peers wanted him to do.”⁶⁴ He “lacked the ability to understand the consequences that his actions could have.”⁶⁵ A member of the Pleasantville staff acknowledged that “Corey was probably taken advantage of by the other students occasionally.”⁶⁶ At Elmhurst, people also

⁶⁰ Ex. 53 at 2-3 (Gloria Caro, Caseworker, Pleasantville Cottage School, Initial Conference, Current Assessment and Transfer Summary, June 9, 1982); Ex. 43 at 1 (Eleanor Glantz, Social Worker, Case Service, Dec. 11, 1978).

⁶¹ Ex. 2 at 27 (Olley Report).

⁶² *Id.* at 28.

⁶³ Ex. 51 at 3 (3/15/82 Offer - Psychosocial Summary).

⁶⁴ Ex. 34 ¶ 20 (12/1/11 Aff. of O. Noble); *see also* Ex. 75 (2/10/93 Trial Tr. 3694:22-3695:4).

⁶⁵ Ex. 34 ¶ 16 (12/1/11 Aff. of O. Noble).

⁶⁶ Ex. 24 ¶ 11 (11/21/11 Decl. of A. Harding).

knew him “as someone who could be convinced to do what you asked him to do.”⁶⁷ A child care worker at Elmhurst recalled that “Corey would often not express his opinion and chose to remain quiet” and “would generally go along with what others wanted to do.”⁶⁸ Looking back, Odette Noble, a social worker at Elmhurst who worked weekly with Corey for almost two years when he was ages 16 to 18, describes Corey’s social impairments as follows:

Corey did not have a good ‘read’ of situations or other people. He was not very sensitive to social cues. He had difficulty ‘learning the rules of the game’ and understanding who was in charge.⁶⁹

Overall, teachers, caseworkers, family, and friends consistently described Corey as being easily manipulated and victimized by others, including peers and his mother and brother.⁷⁰ They also described him as a follower, not a leader, someone desperate to be accepted by peers who was willing to do anything he was told, regardless of the consequences.⁷¹

On the practical domain, Corey Johnson has significant limitations in all areas within the practical domain, including (1) personal and self-care; (2) community use, travel, and transportation; (3) health and safety; (4) home living; and (5) work. His practical impairments

⁶⁷ Ex. 37 ¶ 13 (Affidavit of David Washington (childcare worker at Elmhurst), Mar. 1, 2012 (“3/1/12 Aff. of D. Washington”)).

⁶⁸ *Id.* at 8, 12.

⁶⁹ Ex. 34 ¶ 18 (12/1/11 Aff. of O. Noble).

⁷⁰ Ex. 26 ¶ 44 (4/30/11 Aff. of M. Hodges) (Other people took advantage of him, such as taking his lunch money. People found it easy to take advantage of him all throughout his childhood and teen years. He wouldn’t understand others but didn’t want to look bad, so other children easily tricked and manipulated him.); Ex. 31 ¶ 39 (Affidavit of Antionette Daniels Joseph (the best friend of Corey’s mother and Corey’s godmother), May 21, 2011) (“5/21/11 Aff. of A. Joseph”) (“[P]eople took advantage of [Corey] because he would readily give his money away.”).

⁷¹ Ex. 2 at 31 (Olley Report); Ex. 33 ¶ 14 (Affidavit of Gerald Lefkowitz (unit administrator at Pleasantville Cottage Center), Dec. 5, 2011) (“Corey was more easily influenced than the other children at the Cottage and was a follower.”); *see also* Ex. 16 ¶ 12 (Affidavit of Richard Benedict (special education teacher at Pleasantville Cottage School), Dec. 5, 2011 (“12/5/11 Aff. of R. Benedict”)); Ex. 28 ¶ 11 (Affidavit of Queenie Hodges (Corey’s cousin), Apr. 30, 2011 (“4/30/11 Aff. of Q. Hodges”)); Ex. 27 ¶ 15 (4/30/11 Aff. of P. Hodges).

are consistently reflected in contemporaneous records created during his childhood, achievement testing results, anecdotes described during interviews with people who knew him during his childhood, and test results from an instrument administered to three people who knew Corey well as a child and adolescent. Those who know him have observed that he did not have the capacity to take care of himself.

Records show that Corey wet and soiled his bed until he was about 12 years old.⁷² Corey also neglected his teeth, and had dental problems.⁷³ When he was living in Trenton, NJ, as a young adult, people who visited him described his home as “filthy,” “old, dark, and dirty.”⁷⁴ Mr. Johnson also had difficulties with transportation and travel. As a child, he was not trusted to travel alone, and he relied on others to get around. As a child, caregivers asked Corey’s *younger* half-brother, Robert, to lead Corey around when they went out together.⁷⁵ His individualized education plan from Pleasantville notes, “Corey needs travel training until he is familiar with route and new neighborhood.”⁷⁶ Richard Benedict, Corey’s teacher when he was 16-17, reported that the Pleasantville staff “assigned an aide to accompany Corey to the bathroom and waited outside when Corey was using it. Previously, when no aide was assigned to do so, Corey would

⁷² See Ex. 2 at 34 (Olley Report); Ex. 26 ¶ 36 (4/30/11 Aff. of M. Hodges); Ex. 27 ¶ 9 (4/30/11 Aff. of P. Hodges); Ex. 28 ¶ 9 (4/30/11 Aff. of Q. Hodges); Ex. 75 (2/10/93 Trial Tr. 3576).

⁷³ Ex. 2 at 34 (Olley Report); Ex. 46 at 1 (Washington Heights-West Harlem Community Mental Health Center, Child Assessment Evaluation Summary, Dec. 9, 1981) (noting Corey’s dental cavities and gingivitis).

⁷⁴ Ex. 30 ¶ 70 (Affidavit of Robert Johnson (Corey’s half-brother), June 29, 2011 (“6/29/11 Aff. of R. Johnson”).

⁷⁵ Ex. 2 at 34 (Olley Report).

⁷⁶ Ex. 66 at 7 (Board of Education of the City of New York, Individualized Education Plan – Phase 1, July 1, 1985); Ex. 2 at 36 (Olley Report).

get lost on his way back to our class and wander into other classrooms.”⁷⁷ Corey never obtained a driver’s license or owned a car; as an adult, he mostly relied on cabs for transit.⁷⁸

Corey’s social worker at Elmhurst, Ms. Noble “doubted that Corey was equipped to make it on his own”⁷⁹ and Corey’s aunt remembers his inability to do simple tasks to take care of himself. For example, “[a]t age 10–13, he couldn’t prepare a meal or even a simple sandwich. By age 15, he only improved a little in that he didn’t make as much of a mess when preparing simple meals. I didn’t give him much to do because he couldn’t do it.”⁸⁰ When Corey was 18 and living with Ann and Robert Butler, Ms. Butler noted, “he was still like a little boy. He could not have taken care of himself on his own.”⁸¹

Both Pleasantville and Elmhurst recognized these limitations and established goals for him such as, “Corey will use opportunities offered him to learn independent living skills,” and “Corey will learn how to handle money so that he can shop for himself.”⁸² There are no indications in the records that Corey ever achieved these goals.

⁷⁷ Ex. 16 ¶ 17 (12/5/11 Aff. of R. Benedict).

⁷⁸ Ex. 2 at 34 (Olley Report).

⁷⁹ Ex. 34 ¶ 38 (12/1/11 Aff. of O. Noble).

⁸⁰ Ex. 26 ¶ 38 (4/30/11 Aff. of M. Hodges).

⁸¹ Ex. 2 at 38 (Olley Report).

⁸² Ex. 58 at 2 (4/13/84 Polstein - Change in Permanency Plan); *see also* Ex. 61 at 8 (12/12/84 Aaron - Visitation Plan) (setting the same goals); Ex. 64 at 9 (Gerard Maier, MSW, Pleasantville Cottage School, Discharge/Transfer Plan, May 28, 1985 (“5/28/85 Maier - Discharge/Transfer Plan”)) (same); Ex. 67 at 6 (Odette Noble, Social Worker, Jewish Child Care Association of New York, Elmhurst Boys Residence, UCR Reassessment and Service Plan Review 6 Month, Nov. 21, 1985) (same); Ex. 69 at 7 (Odette Noble, Social Worker, Jewish Child Care Association of New York, Elmhurst Boys Residence, UCR Reassessment and Service Plan Review 6 Month, June 28, 1986 (“6/28/86 Noble - Service Plan Review 6 Month”)) (same).

It is telling that toward the end of his residential placement, professionals recognized that returning to his mother was not in Corey’s best interests, and they worked with him to focus on

“He’s the kind of kid who I don’t think could make it on his own – pay his rent, etc. Some people should stay in a protected setting all of their lives.”

Odette Noble (12/11/11)

independent living skills. But Corey was not able to develop independent living skills, nor did he possess the judgment to ensure his safety. According to family and friends, Corey never lived alone and always lived with girlfriends or more savvy peers.⁸³

Further, because of his inability to develop elementary and fundamental skills, Corey Johnson was not able to maintain a job and he thus has a very limited work history. While at Pleasantville, he had a couple of summer jobs doing manual labor, which he could not maintain.⁸⁴ His family and friends did not recall that he ever held a job.⁸⁵ At trial, Dr. Cornell concluded: “Self care . . . work, the ability to maintain a job, to have good work habits, to use the kind of common sense you need to hold a job, all of those are possible areas where his functioning is not at a normal level.”⁸⁶

In addition to reviewing records and interviewing family, friends, teachers, professionals and others who knew Mr. Johnson well (steps his trial and habeas lawyers failed to do), Dr. Olley administered a detailed standardized adaptive behavior questionnaire, called the ABAS-II, to three people who Dr. Olley determined knew Corey Johnson well enough to rate him: Corey’s aunt, Minnie Hodges; his godmother, Antoinette Joseph; and his teacher, Richard Benedict, who

⁸³ Ex. 2 at 38 (Olley Report); *see also* Ex. 34 ¶ 38 (12/1/11 Aff. of O. Noble).

⁸⁴ Ex. 2 at 39 (Olley Report).

⁸⁵ *Id.*; Ex. 64 at 6 (5/28/85 Maier - Discharge/Transfer Plan) (“[Corey] work[ed] for a few weeks in a grocery store. He was not able to maintain this, an indication of how much work needs to be done in this area.”).

⁸⁶ Ex. 75 (2/10/93 Trial Tr. 3691).

worked closely with Corey for several years during his residential placement at Pleasantville. They each rated him on an array of everyday life skills and situations during his childhood and adolescence.

Like scores on an IQ test, a score of 75 or below on the ABAS-II demonstrates significant impairments in adaptive functioning, and is consistent with intellectual disability. The responses from Ms. Joseph (which produced a score of 60 corresponding to the lowest 0.4% of the population), Ms. Hodges (a 64 score placing him in the lowest 1%), and Mr. Benedict (a 74 score corresponding to the lowest 4%)⁸⁷ all placed him below 75, which is in the significantly impaired range.⁸⁸ The ABAS-II results are consistent with and corroborate the voluminous evidence found in contemporaneous records created before Corey turned 18 and by interviews with many people who knew him, and leave no doubt about his intellectual disability.⁸⁹

ABAS-II RATERS	CONCEPTUAL DOMAIN SCORES
Antionette Joseph	63
Minnie Hodges	57
Richard Benedict	74

⁸⁷ Mr. Benedict's higher score presumably is because he knew Corey only in a highly structured residential environment. The APA expressly recognizes that adaptive functioning may be more difficult to assess in controlled settings with significant supports (like residential placements or jails and prisons). DSM-5 at 38.

⁸⁸ All three noted areas where Corey Johnson had strengths as well as areas where he has significant weaknesses, and their ratings of Corey Johnson's abilities and weaknesses were consistent with the descriptions they gave to Dr. Olley during interviews before he administered the standardized assessment to them. Their responses were also consistent with the limitations documented in the records Dr. Olley reviewed and in the interviews he did with other family, friends, and professionals who knew Corey well. In short, nothing in their responses suggested that they were trying to paint Corey Johnson as more limited than he was or to make Corey Johnson look worse, a charge often leveled in litigation against family members who are also the most likely reporters on an individual's early deficits.

⁸⁹ Ex. 2 at 40 (Olley Report).

III. Corey Johnson’s Childhood Was Abusive, Chaotic, and Transient⁹⁰

Corey Johnson’s formative years were characterized by poverty, dislocation, and abuse. The array of childhood traumas that Corey suffered, briefly summarized below, are well-documented risk factors for intellectual disability and have been long known to damage social and psychological development.

A. Corey’s Parents Battled Drug Addictions

Corey was raised by a cocaine-addicted single mother, Emma Johnson, who was 17 at the time she gave birth to him. Emma had a second son, Corey’s half-brother Robert (whose father is Robert Butler, Sr.) who was born two years after Corey.

Emma’s sister, Minnie Hodges, remembers Emma snorting powder cocaine when Corey was still an infant and says her sister’s drug abuse deepened after her second son was born.

Emma’s drug addiction became significantly worse as soon as Robert was born, and continued to get progressively worse as her two sons were growing up.⁹¹

Emma’s heavy drug use, later including crack cocaine, was obvious to her best friend, Antoinette Joseph, Corey’s godmother, and to many others, including Corey and his brother Robert. Emma’s drug addiction interfered with her ability to hold a regular job, and she alternated between periods of employment and welfare throughout her life. Emma died of a drug overdose in 1995 at age 45.

“After she and Robert Butler separated . . . I would frequently see Emma with large quantities of drugs on her person, leading me to believe that she was a drug dealer. She was keeping company with drug dealers, hustlers, and pimps during this time.”

Antoinette Joseph (5/21/11)

⁹⁰ Unless specifically noted, the facts contained in this section are documented in Debra Nelson’s Mitigation Report, which has detailed citations to its sources of information. Ex. 4 (Nelson Report).

⁹¹ Ex. 26 ¶ 14 (4/30/11 Aff. of M. Hodges).

Corey's father, James Sykes, was a teenaged gang member who was in prison on a robbery charge when Corey was born. Sykes, who was a heroin addict, says he visited Corey and Emma when Corey was about 18 months old, during a brief time in between prison sentences. But Emma did not tell Corey that Sykes was his father until much later.

With Sykes in prison, Emma began dating Robert Butler, and then later moved in with him. Corey thought that Robert Butler was his father (not only his brother Robert's father) until Corey turned about 11 years old, when James Sykes appeared and Corey learned the truth. But Sykes failed to take responsibility for raising his son and was never a father figure to Corey.

B. Corey Was Raised in Homes Marred by Domestic Violence

Corey's childhood was scarred by Emma's volatile and abusive relationships with a series of men. Bobby Koger, a heroin addict with whom Emma and her children lived for at least four years, was the most violent of Emma's boyfriends. Koger was once arrested for trying to set fire to Emma's apartment.⁹² Koger abused Emma and her children. Emma reported to psychiatrists and social workers that Koger abused both of her children and once expressed her fear, because of Koger's violence, that "Corey [would be] at risk were he to return home" from a residential placement.⁹³ Corey's Aunt Minnie Hodges and Corey's father saw bruises on Corey from Koger's abuse, and Corey told his aunt that Koger was "very mean" to him and told a psychiatrist "I hate him [Koger]."⁹⁴ Koger's abuse traumatized Corey—soon after Corey entered the Pleasantville residential facility after four years of living with Koger, Corey's childcare

⁹² Ex. 60 (L. Larrecq, City of New York Human Resources Administration, History Sheet, Nov. 20, 1984).

⁹³ Ex. 52 at 10 (Gloria Caro, Pleasantville Cottage School, Visitation Plan, May 21, 1982); Ex. 48 at 1-2 (2/22/82 Collimuttam - Psychiatric Eval.); Ex. 51 at 1-3 (3/15/82 Offer - Psychosocial Summary).

⁹⁴ Ex. 26 ¶ 26 (4/30/11 Aff. of M. Hodges); Ex. 36 ¶¶ 41-46 (Declaration of James Sykes, Jr. (Corey's father), May. 17, 2011) (describing Koger's veiled threat to kill Corey); Ex. 48 at 2 (2/22/82 Collimuttam - Psychiatric Eval.).

“Mrs. Johnson stated that her home environment has been unstable and chaotic since she started living with Mr. Krager [sic] Corey and his brother witnessed many fights and arguments between Mrs. Johnson and Mr. Krager [sic].”

Amira Offer (3/15/82)

caseworker noted: “The male staff seem to frighten him. He doesn’t like physical contact. He feels most people are trying to hurt him. He doesn’t trust most adults.”⁹⁵

Emma also physically and emotionally abused both of her sons. But family members say that Corey was the primary target of her vitriol and physical and emotional abuse, and several witnessed her beating

Corey.⁹⁶ Some of her abuse against Corey was fueled by Corey’s inability to learn.

I saw Emma hit and smack Corey many times . . . [o]ne time, Emma and Corey separately told me that she had beaten Corey with her high heel shoe because he either got left back in school or failed in school.⁹⁷

Emma told Antoinette Joseph, Corey’s godmother, more than once that she was going to kill both Corey and Robert “because they were getting on her nerves.”⁹⁸ Emma’s threats concerned Corey’s godmother so much that she told Emma to bring the children to her house. Ms. Joseph took Corey in for about six months after Emma beat Corey with her high heel shoe, at which point even Emma “realized that she was out of control.”⁹⁹ Emma was frequently emotionally abusive and cruel toward Corey, criticizing his intelligence, yelling at Corey that his younger brother was “better than him,” and telling others in front of Corey that she wanted to

⁹⁵ Ex. 72 at 1 (Janet Valentine, Child Care Worker, Pleasantville Diagnostic Center, Outline for Cottage Report).

⁹⁶ Ex. 29 ¶¶ 22-24 (Declaration of Esther Johnson (Corey’s maternal grandmother), Apr. 30, 2011); Ex. 19 ¶¶ 29-30 (Declaration of Robert Butler (father of Corey’s half-brother), Dec. 17, 2011 (“12/17/11 Decl. of R. Butler”)); Ex. 26 ¶ 23 (4/30/11 Aff. of M. Hodges); Ex. 31 ¶¶ 44-50 (5/21/11 Aff. of A. Joseph).

⁹⁷ Ex. 26 ¶¶ 23-24 (4/30/11 Aff. of M. Hodges).

⁹⁸ Ex. 31 ¶ 48 (5/21/11 Aff. Of A. Joseph).

⁹⁹ Ex. 31 ¶ 46 (5/21/11 Aff. Of A. Joseph).

“get rid of” her children.¹⁰⁰ When Corey wet or soiled his sheets, he hid them from his mother to avoid her beatings. When she discovered his accidents, Emma refused to wash the dirty sheets, leaving Corey to sleep on sheets soiled with urine and feces.¹⁰¹

Emma’s neglect was as damaging as her abuse. She left drug paraphernalia around the house where her kids could see it, and got high with friends while Corey and his brother were also in their apartment. While partying, Emma played loud music late into the night, making it impossible for the children to sleep.¹⁰² Throughout Corey’s childhood, she would drop him and his brother off with friends or family, supposedly to watch for a few hours or for the day but would not return for days or even longer. Emma’s sister Minnie worried frequently that the children would not have enough food to eat in their apartment because of Emma’s neglect.¹⁰³

C. Corey Moved Constantly and Attended Numerous Schools

Emma’s numerous and often abusive boyfriends led Emma and her children to move repeatedly. By the time Corey was 12, Corey had lived in about a dozen different places in Brooklyn; Manhattan; Jersey City, New Jersey; Queens; and then Harlem. At times, Corey lived apart from his mother—once with his maternal grandfather for a few months and once with Antoinette Joseph for about six months. Yet despite concerns held by multiple family members about Emma’s treatment of her children, no one in the family ever intervened to permanently ensure that Corey and his brother were safe; after brief periods away from her, these relatives sent Corey back to his mother.

¹⁰⁰ Ex. 31 ¶¶ 36, 44-50 (5/21/11 Aff. of A. Joseph).

¹⁰¹ Priscilla Hodges saw that Corey wet his bed when he was as old as ten. Ex. 27 ¶ 9 (4/30/11 Aff. of P. Hodges); *see also* Ex. 31 ¶¶ 42-43 (5/21/11 Aff. of A. Joseph).

¹⁰² Ex. 19 ¶ 14 (12/17/11 Decl. of R. Butler); Ex. 26 ¶ 19 (4/30/11 Aff. of M. Hodges).

¹⁰³ Ex. 26 ¶ 27 (4/30/11 Aff. of M. Hodges).

The constant moves and disruption meant that Corey attended numerous schools—although some records are missing, existing records show that Corey attended at least six different elementary schools before he finished second grade and at least ten schools by the time he was 13. Throughout his school career, Corey utterly failed to learn.

D. Emma Abandoned Corey to the Foster Care System, Where His Life Skills Deficits Were Diagnosed as Extraordinary

When Corey was 13, Emma decided she no longer wished to care for her sons and voluntarily placed them into foster care. Corey was placed in long-term residential placement at the Pleasantville Cottage School in upstate New York. His mother repeatedly told social services workers then and in the following years that her motivation for placing Corey in the foster care system was to focus on her own needs, feelings she did not hide from Corey.

Emma's emotional abuse and disinterest in addressing Corey's needs were obvious to case workers who worked with Corey. Emma would cancel Corey's weekend home visits or lobby to reduce them, and fell out of contact with Corey for stretches of time. Contemporaneous records from Corey's residential placements described her as "a narcissistic and self-focused woman" who showed a "lack of empathy and sensitivity toward Corey,"¹⁰⁴ and who was only "surfacely involved with Corey," "elusive," and "impossible to engage."¹⁰⁵ Corey (perhaps unconsciously) revealed the emotional damage his mother's abuse and neglect caused him when he responded to a psychiatrist's question during an early Pleasantville evaluation: "If he got lost

¹⁰⁴ Ex. 58 (4/13/84 Polstein - Change in Permanency Plan).

¹⁰⁵ Ex. 62 at 2 (Christine Aaron, MSW Intern, Pleasantville Cottage School, Current Assessment, Mar. 10, 1985); Ex. 69 at 1 (6/28/86 Noble - Service Plan Review 6 Month); Ex. 71 at E3 (Odette Noble, Social Worker, Jewish Child Care Association of New York, Elmhurst Boys Residence, UCR Plan Amendment: Form E Final Discharge, Mar. 26, 1987 ("3/26/87 Noble - Form E Final Discharge")).

in a forest he did not know who would come looking for him.”¹⁰⁶ Dr. Ernest, who administered diagnostic tests to Corey in 1981, explained the effect that Emma’s dismissive stance had on Corey, who was 13 years old at the time of Dr. Ernest’s evaluation: “Corey presently fears his mother will abandon him, which exacerbates his negative self-image and low self-esteem. He feels a lack of nurturance, support, and feels the circumstances in his life are out of his control, which increases his anxiety and depression.”¹⁰⁷

When Corey was 16 and a half, he was transferred to the Elmhurst group home in Queens, New York to try to prepare him to live on his own, since he had essentially aged out of Pleasantville and because living with his mother was not considered a good option for him. When

“Comparing the Atkins definition of mental retardation, Corey fits that definition, like a hand in a glove.”

Ernest Adams, 07/27/2011

Corey was 17 and residing at Elmhurst, he and two other Elmhurst residents got into trouble. All three boys were charged with robbing a paycheck from another teenager and Corey was later sentenced to 20 days at Rikers Island as a youthful offender. After returning, Corey began to have trouble following Elmhurst’s rules and became more frustrated with his lack of academic progress. Even before his Rikers Island experience, Ms. Noble had documented her grave concerns about his mother’s impact on Corey and his future:

I suspect that Corey will be at risk when it comes time to leave us and the security that we have provided him all this time . . . [which] is necessary if he is going to be able to survive in the community and make constructive choices and not perpetuate the same patterns that he learned from his mother.¹⁰⁸

¹⁰⁶ Ex. 48 at 2 (2/22/82 Collimuttam - Psychiatric Eval.).

¹⁰⁷ Ex. 47 at 1 (12/11/81 Adams Psychodiagnostic Eval.); *see also* Ex. 14 Affidavit of Ernest Adams, Ph.D., (staff psychologist at Council’s Center for Problems of Living), July 27, 2011 (“Comparing the Atkins definition of mental retardation, Corey fits that definition, like a hand in a glove.”).

¹⁰⁸ Ex. 68 at 2 (Odette Noble, Social Worker, Jewish Child Care Association of New York, Elmhurst Boys Residence, Three-Month Conference Note, Feb. 20, 1986).

The intense and sustained efforts to teach Corey independent living skills failed. In January, June, and December 1986, Elmhurst records listed among the *goals* for Corey who was 17 years old at the time: “Corey will learn how to handle money so that he can shop for himself Caseworker, houseparents [sic] and teachers will help Corey learn enough simple arithmetic that he will be able to figure out correct change.”¹⁰⁹ But Corey never achieved even these simple goals.

In February 1987, Elmhurst staff’s concerns about Corey’s attitude peaked when he refused to participate in a group discussion and exhibited disrespectful behavior toward staff. Staff told Corey (now 18) to leave Elmhurst for a short, 10-day period. Some staff felt they clearly communicated to Corey that he should go home to his mother’s house, use the 10 days to consider how to improve his attitude and behavior, and then return to Elmhurst. But another staff member had doubts at the time whether Corey understood that he was welcome to return.¹¹⁰ Over the next few weeks, staff wrote to Emma and Corey urging them to contact Elmhurst but never received any reply.¹¹¹ Shortly after that, the Department of Social Services closed Corey’s case and discharged him from the foster care system permanently.¹¹²

Corey Johnson left Elmhurst and returned to his mother’s Brooklyn apartment without any support network or structure in place and with severely impaired life skills. After leaving

¹⁰⁹ Ex. 69 at 7 (6/28/86 Noble - Service Plan Review 6 Month).

¹¹⁰ Ex. 37 ¶ 16 (3/1/12 Aff. of D. Washington).

¹¹¹ The records do not show whether Corey ever read the letter. Corey’s description of what happened years later suggests he did not understand that he could come back to the program but wanted to do so. Ex. 5 at 7 (Report of Richard G. Dudley, Jr., M.D., Aug. 22, 2016 (“Dudley Report”).

¹¹² See Ex. 70 (2/23/87 Noble - Form D Final Discharge); Ex. 71 (3/26/87 Noble - Form E Final Discharge).

Elmhurst, Corey's high school attendance dropped significantly. He was suspended from school a week before the school year ended.¹¹³

It is well established in the psychiatry field that, even when considered individually, many of the traumatic conditions and experiences that Corey Johnson faced as a child have severe and damaging impact on child and adolescent development.¹¹⁴ His numerous severe traumatic conditions and experiences in childhood—his mother's drug use, her neglect, the abuse she and her boyfriends inflicted upon Corey, and his constant moves, school changes, and other disruptions—significantly harmed his development as he grew to adulthood. They are also significant risk factors for intellectual disability.¹¹⁵

IV. Corey Johnson's Involvement in the Crimes that Led to his Death Sentences

A. Corey Johnson Slipped into Drug Dealing

Robert Johnson returned home from his residential placement long before Corey left Elmhurst. Robert reports that he (Robert) began selling drugs when he was about 13. Even though Robert was younger, Corey looked up to and emulated his brother, and soon Corey wanted to sell drugs, too. Robert reports that Corey had problems figuring out how much money he was owed in exchange for the drugs he sold. Once, Robert gave Corey drugs to sell—50 vials of crack to sell for \$5 each—but Corey returned with only \$50, not the expected \$250. After that, Robert would not give Corey drugs to sell.¹¹⁶

¹¹³ Corey's school career ended one week before the last day of school, due to a foolish act—squirting a teacher with a fire extinguisher. Ex. 75 (2/10/93 Trial Tr. 3621:21-24).

¹¹⁴ See Steven E. Mock & Susan M. Arai, *Childhood Trauma and Chronic Illness in Adulthood: Mental Health and Socioeconomic Status as Explanatory Factors and Buffers*, 1 *Frontiers in Psychol.*, at 3-4 (Jan. 31, 2011); see also Ex. 5 at 2 (Dudley Report).

¹¹⁵ AAIDD Classification Manual at 60, Table 6.1; DSM-5 at 39.

¹¹⁶ Ex. 30 ¶¶ 47, 57-62 (6/29/11 Aff. of R. Johnson).

In September 1987, when he was 18, Corey was charged with a robbery. In June 1988, Corey pled guilty and spent a year in jail at Rikers Island.

In 1989, Corey Johnson joined a group of men he knew from his Brooklyn neighborhood who were selling drugs in Trenton, New Jersey, led by brothers Darnell and Darold Brown. Vernon Lance Thomas was part of this Trenton group. The leaders recognized that Mr. Johnson was slow and his role in the Trenton group was very limited:

“Corey . . . sold drugs, but he never did so on his own. Corey’s assignments . . . never required much. He had to be told what to do. Corey did not refuse to do something once asked. Even if he did not seem to want to do something, he would do it.”

Darnell Brown (10/14/11)

Corey did not appear capable of making decisions on his own Corey also seemed incapable of taking any initiative on his own in other aspects of his life.

* * *

Corey comprised the lowest level of the worker/follower group. He and Vernon Lance Thomas, who we called “V” and was also at a low level, were the quietest guys in the group. Compared to Corey, V was more likely to try to analyze something. But, as with Corey, V had to be told what to do.¹¹⁷

Richard Tipton was also part of the group in Trenton but the Browns viewed him much differently than Mr. Johnson. Tipton was “active, hyper, and rowdy . . . very loud “ and “considerably more intelligent than Corey.”¹¹⁸ Corey Johnson viewed the Trenton group as his

¹¹⁷ Ex. 17 ¶¶ 10-13 (Affidavit of Darnell Brown (acquaintance in Trenton, NJ), Oct. 14, 2011 (“10/14/11 Aff. of Darnell Brown”)); Ex. 18 ¶ 11 (Affidavit of Darold Brown (acquaintance in Trenton, NJ), June 15, 2011 (“6/15/11 Aff. of Darold Brown”)) (“Corey was not capable of giving instructions to others. He would let others make decisions and go along with what someone else was doing just to please the other person”); *id.* ¶ 30 (“Vernon Lance Thomas . . . was very similar to Corey, just a hair above Corey in all of his capabilities.”).

¹¹⁸ Ex. 18 ¶¶ 30-33 (6/15/11 Aff. of Darold Brown).

surrogate family: “Corey considered our group to be his family and was very protective of the group.”¹¹⁹

B. Tipton, Thomas, and Corey Johnson Relocated to Richmond After the Trenton Group Leaders Were Arrested

In 1991, police raided a home where the members of the Trenton drug group were staying, and its leaders and many other members were arrested. Corey Johnson, Thomas, and Tipton were not at the house during the raid, and they were not arrested. Tipton suggested to the remnants of the Trenton group who were not in jail that they move to Richmond, Virginia, where Tipton had ties and where he said they could make “big money” selling drugs. Mr. Johnson soon followed Tipton to Richmond, and Tipton connected them there with James Roane, who lived in Richmond and whom Tipton previously knew.¹²⁰

Numerous trial witnesses described Tipton as the leader of the Richmond group. After the group started selling drugs in Richmond areas that other dealers had staked out, the Richmond group soon became embroiled in territorial disputes. The Richmond group resorted to extreme violence: within two months in early 1992, the group committed numerous murders and seriously wounded several other people. In February 1992, the police began arresting the Richmond group, and Mr. Johnson was arrested in June 1992. Tipton, Roane, and Corey Johnson were charged in federal court with multiple drug conspiracy and RICO counts as leaders

¹¹⁹ Ex. 18 ¶ 17 (6/15/11 Aff. of Darold Brown); *id.* ¶ 12 (“Corey was a follower. Corey would go along with anything anyone in the family — our group — would say. If, hypothetically, you would say to Corey ‘let’s rob a bank,’ Corey would be there with you. He wouldn’t analyze whether it was a good idea. Corey’s view was that he’d do anything for the people he considered his family.”); *see also* Ex. 17 ¶ 8 (10/14/11 Aff. of Darnell Brown). Prosecution witnesses during Corey Johnson’s death penalty trial confirmed that members of the group were like “cousins” and he viewed them as his family.

¹²⁰ Ex. 73 (Trial Tr. 921:12-922:01, *United States v. Tipton*, No. 92CR68 (E.D. Va. Jan. 15, 1993) (“1/15/93 Trial Tr.”)).

of a Continuing Criminal Enterprise (CCE). They were also charged with committing ten capital murders and other violence in pursuit of their drug operation, and the Government sought the death penalty against the three of them and against Thomas (until it later withdrew the notice against Thomas). Mr. Johnson was later convicted of committing seven murders and wounding three other people in five separate incidents.¹²¹

While in no way excusing his actions, it is important to understand that Corey Johnson viewed the Richmond group as his surrogate family, just as his similar feelings toward the Trenton group had made him extremely “protective” toward them.¹²² That description of him is consistent with a recent psychiatric evaluation describing him as highly dependent on and desperate to follow the lead of others, and unable to cope with complex problems that required judgment in order to extricate himself.¹²³

V. Corey Johnson’s Defense Did Not Develop Comprehensive Mitigation Evidence

Corey Johnson’s trial was one of the first federal death penalty trials since the reinstatement of the death penalty by the Supreme Court in 1976.¹²⁴ At the time, courts had limited experience with intellectual disability claims. Except for two professionals who worked at Pleasantville and Elmhurst respectively, who offered brief testimony during Corey Johnson’s capital sentencing hearing, jurors did not learn first-hand, from witnesses who knew him

¹²¹ Two of the murder victims were rival drug dealers shot to death, one of whom had allegedly threatened Corey. Another murder victim was shot after he got into a personal dispute with Roane over a woman. One murder victim who owed a drug debt to the group and two bystanders were shot and killed in a separate incident. The last murder victims were a person whom the group believed to be a police informant and another bystander who were both shot and killed, and two women who were present in the car and were also shot and injured during that crime.

¹²² The Government charged the Trenton and Richmond drug activities as a single conspiracy.

¹²³ Ex. 5 at 12 (Dudley Report).

¹²⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

throughout all stages of his life, about most of the robust mitigation evidence that was available, including evidence that would have shown that he was intellectually disabled and ineligible for the death penalty and graphic evidence of the most extreme abuse he suffered.¹²⁵ Although Corey Johnson’s defense team presented evidence in mitigation, which included some information about his difficult and tumultuous childhood and his mental impairments, the defense informed the jury, in both opening and closing arguments, that Corey Johnson was *not* intellectually disabled and that jurors would not be asked to make such a determination.¹²⁶

A. Corey Johnson’s Lawyers Did Not Retain an Investigator or Mitigation Specialist

Corey Johnson’s trial team did not retain a defense investigator or conduct a robust independent investigation into the facts or witnesses related to the Government’s guilt-phase case. Corey Johnson’s lawyers also did not hire a mitigation specialist to conduct a comprehensive investigation into his background.¹²⁷ As Russell Stetler, an expert in the standards for capital defense representation, explains in his declaration, the Supreme Court held in *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003), that, in a 1989 trial, Wiggins’s lawyers had violated his constitutional rights and provided ineffective assistance of counsel when they limited the scope of their investigation and search for mitigation evidence, failed to follow up on mitigating information about Wiggins’ background in records counsel did possess, and failed to

¹²⁵ It is worth noting that although Corey Johnson’s two appointed lawyers, Craig Cooley and John McGarvey, had litigated state capital trials, neither had ever handled a federal death penalty case.

¹²⁶ Ex. 75 (2/10/93 Trial Tr. 3547); Ex. 76 (Trial Tr. 3921, *United States v. Tipton*, No. 92CR68 (E.D. Va. Feb. 12, 1993) (“2/12/93 Trial Tr.”)).

¹²⁷ Ex. 20 ¶ 12 (Affidavit of Craig S. Cooley (appointed counsel in 1992), Sept. 20, 2016 (“9/20/16 Aff. of C. Cooley”)). Contrast with standard in capital cases requiring use of mitigation specialist. Ex. 35 ¶¶ 17, 20, 24-30 (Declaration of Russell Stetler (expert in the standards for capital defense representation), Sept. 14, 2016 (“9/14/16 Decl. of R. Stetler”)).

obtain a social history report, even though counsel retained a psychologist to evaluate Wiggins.¹²⁸

In his case, no one from Mr. Johnson’s defense team traveled to New York, where he lived almost exclusively from birth until he was eighteen, nor did they go to New Jersey, where he had spent a short time as a child and several years as an adult before relocating in Richmond. Corey Johnson’s defense attorneys did not speak to any of his family members other than his mother.¹²⁹ Nor did they interview his friends or former drug associates. No one from the defense team conducted a comprehensive, exhaustive search for records from Corey Johnson’s childhood.¹³⁰ And Mr. Johnson’s defense lawyers did not retain a psychiatrist to conduct an evaluation of Mr. Johnson’s psychiatric development in order to present information on how the extreme trauma he suffered impaired his development.¹³¹

¹²⁸ The *Wiggins* court cited to standards for capital defense representation by the American Bar Association in its decision. See also *Sears v. Upton*, 561 U.S. 945, 955 (2010) (“We certainly have never held that counsel’s effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.”) (emphasis omitted); *Williams v. Taylor*, 529 U.S. 362, 396, 398 (2000) (in a 1986 capital trial, “the graphic description of Williams’ childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally retarded,’ might well have influenced the jury’s appraisal of his moral culpability,” holding that the omission of this evidence clearly demonstrated “that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background” (citations omitted)); see also *Rompilla v. Beard*, 545 U.S. 374, 385 (2005); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam).

¹²⁹ Ex. 20 ¶¶ 14-15 (9/20/16 Aff. Of C. Cooley). A records assistant who helped Mr. Johnson’s lawyers find phone numbers for witnesses apparently spoke briefly with Corey’s aunt and his grandmother. But she did not ask them the detailed questions about Corey’s childhood or about his mother, Emma Johnson, necessary to develop critical mitigating evidence. Dr. Cornell never spoke with either of these family members or any others except for Corey Johnson’s mother. Contrast with standards in capital cases requiring multi-generational family interviews. Ex. 35 ¶¶ 3-4 (9/14/16 Decl. of R. Stetler).

¹³⁰ Ex. 20 ¶¶ 14-15 (9/20/16 Aff. of C. Cooley). Contrast with standards in capital cases requiring exhaustive search for contemporaneous records related to the client’s life. Ex. 35 ¶¶ 25-27 (9/14/16 Decl. of R. Stetler).

¹³¹ Contrast with Ex. 5 (Dudley Report).

The Corey Johnson defense team delegated the mitigation investigation entirely to Dr. Cornell.¹³² This deviated from the widely accepted practice of retaining mitigation specialists who have specialized training in conducting comprehensive mitigation investigations.¹³³ Unlike trained mitigation specialists, who travel to the places where the person being assessed lived, Dr. Cornell conducted his mitigation investigation without leaving Virginia, mostly from his office in Charlottesville, Virginia.¹³⁴ Dr. Cornell interviewed Mr. Johnson's mother only once for two hours. He also spoke by phone with five staff members from Corey's residential placements in upstate New York and in Queens.¹³⁵ Dr. Cornell's narrow mitigation investigation is in sharp contrast with and pales in comparison to a comprehensive mitigation investigation, requiring hundreds of hours, which is the standard for a capital case and that should be performed by a mitigation specialist researching, interviewing, and weaving together a client's life history.¹³⁶

Dr. Cornell and the defense lawyers never spoke with any of Corey Johnson's family, other than his mother, nor any neighborhood friends, some of whom had known him since birth, nor anyone in the Trenton drug group about his intellectual limitations.¹³⁷ Had they interviewed this group of about 20 people, they would have heard time and again that Mr. Johnson was a

¹³² Ex. 20 ¶ 13 (9/20/16 Aff. of C. Cooley).

¹³³ Ex. 35 ¶¶ 17, 20, 24-30 (9/14/16 Decl. of R. Stetler).

¹³⁴ "Witnesses should always be interviewed in person. The information needed in mitigation is simply not disclosed to strangers over the telephone. Full disclosure comes only in person with great patience, no matter how skilled the interviewer." Ex. 35 ¶ 30 (9/14/16 Decl. of R. Stetler); *see also id.* ¶¶ 31-32.

¹³⁵ Ex. 20 ¶¶ 14-15 (9/20/16 Aff. of C. Cooley).

¹³⁶ Ex. 35 ¶ 29 (9/14/16 Decl. of R. Stetler); *see also* Am. Bar Ass'n., *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 689 (2008) (supplement to the Am. Bar Ass'n., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (Oct. 20, 2003)).

¹³⁷ Ex. 35 ¶ 41 (9/14/16 Decl. of R. Stetler) (highlighting importance of interviewing family, friends, and others who knew client in order to complete a comprehensive adaptive behavior assessment as part of an intellectual disability evaluation).

follower, not a leader, and would have been able to present testimony to rebut the Government's evidence and raise compelling doubts about whether he was capable of competently planning, organizing, and leading others. And they would have been able to introduce graphic, first-hand testimony, about his across-the-board limitations.

Corey Johnson's mother, with whom they did speak, painted an inaccurate picture, sugar-coating her own shortcomings in raising him, failing to acknowledge either the abuse that she and some of her boyfriends inflicted on him or her severe neglect of him. So while the defense team learned from Pleasantville and Elmhurst professionals and records that Mr. Johnson had severe childhood learning problems and came from a dysfunctional family, their impression of his daily living came almost exclusively from those residential placements, highly structured programs that provided tremendous supports to Corey that masked the extent of his severe and pervasive impairments.

Through the assistance of mitigation specialists, Corey Johnson's current defense team years later readily found missing school and mental health records, including previously unknown IQ tests and vivid descriptions of his impaired life functioning. They also interviewed more than two dozen witnesses (mainly family members and close friends) who shared graphic information about Mr. Johnson's trauma-filled childhood and his wide array of everyday life impairments; many of these witnesses were later interviewed by Dr. Olley and Dr. Dudley as part of their evaluations.¹³⁸

Finally, the jury did not hear direct testimony from any family members or friends during Mr. Johnson's sentencing hearing that could have humanized him and provided "the personal

¹³⁸ See Ex. 5 (Dudley Report); Ex. 2 Olley Report.

stories that [would have helped] to ‘reestablish him as a member of the human community.’”¹³⁹ Instead, they only heard from Dr. Cornell and two staff members from Corey Johnson’s residential placements; “experts and other professionals . . . have an important role to play in a sentencing proceeding, but they cannot take the place of [those] who will feel the impact of the client’s execution.”¹⁴⁰

B. Corey Johnson’s Trial Team Did not Retain an Expert in Intellectual Disability

In 1992, when they began their representation and before they obtained any records related to his background, Mr. Johnson’s trial lawyers retained Dr. Cornell as a psychologist to assist with three tasks as part of a standard mental health evaluation, specifically asking him to: (1) determine whether Mr. Johnson was competent to stand trial; (2) determine if he was criminally responsible for his crimes (i.e., did he have a potential insanity defense?); and (3) gather, analyze, and prepare potential mitigation evidence for a capital sentencing hearing.¹⁴¹ Dr. Cornell was and is a well-regarded forensic psychologist. But, unlike Dr. Reschly, Dr. Olley, and Dr. Siperstein, each of whom has over 40 years’ experience devoted to the intellectual disability field, Dr. Cornell had not dedicated his career to focusing on individuals with

¹³⁹ Ex. 35 ¶ 37 (9/14/16 Decl. of R. Stetler) (quoting Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 Hofstra L. Rev. 835, 880 (2008)).

¹⁴⁰ Ex. 35 ¶ 37 (9/14/16 Decl. of R. Stetler).

¹⁴¹ Ex. 20 ¶ 9 (9/20/16 Aff. of C. Cooley). Dr. Cornell met with Mr. Johnson three separate times and spent about 15 hours with him, including administering psychological testing. In total, Dr. Cornell spent just over 60 hours gathering and reviewing information and records, interviewing witnesses, evaluating Corey Johnson (including administering testing), preparing his report, and preparing for and testifying at trial. At Dr. Cornell’s recommendation, the defense also retained a neuropsychologist to test Corey Johnson to determine if he had any organic brain damage.

intellectual disability—by regularly assessing and diagnosing countless individuals with intellectual disability and via research and publications dedicated to that subject.¹⁴²

C. The Defense Erroneously Told the Jury that Sentenced Corey Johnson to Death that Corey Johnson is Not Intellectually Disabled

Because of all the factors detailed above, we now know that Dr. Cornell erroneously concluded, after an incomplete evaluation grounded in outdated medical standards, that Mr. Johnson was *not* intellectually disabled. Both he and Mr. Johnson’s lawyers then told the jury at the sentencing hearing that Corey Johnson was not intellectually disabled. But, as a child, Corey was and, as an adult, Mr. Johnson is intellectually disabled. This was a pivotal problem because the federal death penalty statute under which Corey Johnson was prosecuted expressly barred the imposition of the death penalty for defendants who were intellectually disabled.

1. The defense team had incomplete records for Corey Johnson and failed to realize the distorting “practice effect” upon one of his IQ tests

A key reason why Mr. Johnson’s capital sentencing hearing went off the rails was that the defense team did not diligently pursue (and failed to find) key facts and available childhood records that they needed to accurately assess his intellectual impairments.¹⁴³ Those records show that Dr. Cornell and others had not recognized a fundamental flaw in one IQ test that was relied upon and formed the basis for the incorrect conclusion that Mr. Johnson was learning disabled rather than intellectually disabled. That 1982 IQ test, given to Corey when he was 13 at his initial Pleasantville evaluation (and then considered in all of his subsequent evaluations), had

¹⁴² See Ex. 9 (Summary of Anticipated Services, *United States v. Johnson*, No. 92CR68 (E.D. Va. 1992) (attaching Mr. Cornell’s Curriculum Vitae)). At trial, Dr. Cornell did not testify that he had any specialized expertise in intellectual disability.

¹⁴³ They wrote letters to agencies seeking records but did not follow-up in a diligent way and failed to obtain records found by Mr. Johnson’s current defense team.

been artificially elevated and distorted by a proven IQ testing phenomena known as the “practice effect.”¹⁴⁴

When Corey was 12 and 13, he was given the same IQ test (the WISC-R) four months apart. Dr. Cary Gallaudet, who administered the second of these IQ tests at Pleasantville in February 1982, was not aware that Corey had been given the identical IQ test by Dr. Ernest Adams in Manhattan in October 1981. Dr. Gallaudet thus did not realize that her IQ test results were artificially skewed and fatally flawed by the “practice effect” that elevated Corey’s IQ score above the accepted range for intellectual disability, and she erroneously concluded that Corey had a learning disability. Dr. Gallaudet has said more recently that if she had known that Dr. Adams had recently given Corey the WISC-R test, she would not have given that same IQ test to Corey.¹⁴⁵

Corey’s subsequent evaluations at Pleasantville were directly influenced by Dr. Gallaudet’s distorted results. Three years later, in 1985, Dr. Barish tested Corey’s IQ and obtained an IQ score of 69 that is well within the range for a diagnosis of intellectual disability. Dr. Barish—also unaware of the Adams test and the severe practice effect that skewed the Gallaudet testing—was puzzled by the difference between his IQ results and Dr. Gallaudet’s results. Focusing on the decline in both Corey’s verbal and performance IQ scores (the two

¹⁴⁴ The practice effect, consistent with common sense and proven by science, refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument. Research has proven that practice effects profoundly inflate IQ scores, particularly when the same test is administered within a short period of time. Dr. Reschly explains in his report that four months is considered by experts to be an extremely short interval and that repeating the same test within that short duration can significantly inflate the subsequent test score. Ex. 1 at 12-13 (Reschly Report); *see also* AAIDD-11 Manual at 38-39; Matthew Calamia, Kristian Markan & Daniel Tranel, *Scoring Higher the Second Time Around: Meta-Analyses of Practice Effects in Neuropsychological Assessment*, 26 *The Clinical Neuropsychologist*, 543 (2012).

¹⁴⁵ Ex. 22 ¶¶ 13-15 (Declaration of Cary Gallaudet, Ph.D. (psychologist at Pleasantville diagnostic Center), Mar. 19, 2012).

components of an IQ test), Dr. Barish wrote: “This decline in I.Q. scores is difficult to account for.” Oblivious to the sequence of the earlier testing that led to the large practice effect, Dr. Barish reached the same flawed conclusion as Gallaudet, reporting again that Corey had “severe learning disabilities.”¹⁴⁶ Decades later, Dr. Barish has attested that he likely would have diagnosed Corey Johnson with intellectual disability if he had known at the time about the practice effect on the Gallaudet scores.¹⁴⁷ Dr. Barish recalls that Corey Johnson stands out as one of the most impaired students he ever encountered at Pleasantville.

Dr. Cornell’s evaluation and conclusion that Mr. Johnson is learning disabled was flawed for the same reason. He was only aware of two prior IQ tests when he evaluated Mr. Johnson—Dr. Gallaudet’s 1982 inflated IQ test and Dr. Barish’s 1985 IQ test, which is solidly consistent with intellectual disability—and he did not know that Gallaudet’s results were distorted by the practice effect. Dr. Cornell was also unaware that at age eight, Corey was given an IQ test by Dr. Figurelli and got a score of 73 (without correcting for the Flynn effect, which was unknown then), a score consistent with intellectual disability. Dr. Reschly, an expert in both learning disability and intellectually disability, has concluded based on complete records and current scientific understanding that Mr. Johnson is intellectually disabled and is not learning disabled.¹⁴⁸

¹⁴⁶ Ex. 63 at 1 (4/15/85 Barish - Psychological Eval.).

¹⁴⁷ In his declaration, Dr. Barish explains that he is not an expert in distinguishing learning disability from intellectual disability, which is why he qualified his statement that he “might” have diagnosed Corey Johnson as intellectually disabled had he known in 1985 of the practice effect distortion upon Dr. Gallaudet’s IQ test results. Ex. 15 ¶¶ 19-20 (7/22/14 Decl. of K. Barish).

¹⁴⁸ Ex. 1 at 32-44 (Reschly Report).

2. Both the science of intellectual disability evaluations and the acceptance of that science by courts have evolved since Corey Johnson's trial in crucial ways that impact his intellectual disability diagnosis

Since 1993, several key advances in the science of intellectual disability have become widely accepted and under modern scientific standards, Corey Johnson is unequivocally intellectually disabled. *Supra* at II. But federal courts reviewing *Atkins* claims of capital defendants have only accepted these developments more recently, just in the past few years. 536 U.S. 304.¹⁴⁹

As explained above, one of the most important changes in the science of intellectual disability relates to scientific recognition of the phenomenon known as the Flynn Effect, a testing phenomenon that causes IQ scores to inflate over time and requires scores to be corrected accordingly. *Supra* at pp. 15-17. Just as significant is the evolution of the understanding regarding how the three diagnostic components of intellectual disability relate to each other. Although at the time of Corey Johnson's trial, a frequent practice was to consider these three components in a sequential process, thus often precluding an assessment of the individual's adaptive behavior if the individual being assessed had even one IQ point higher than the conventional cut-off of 75.¹⁵⁰ Today, it is generally acknowledged that even in cases where a person has an IQ score above 75, a diagnosis of intellectual disability can still be made if the individual demonstrates severe adaptive behavior deficits during the developmental period.¹⁵¹

¹⁴⁹ The first reported federal death penalty case accepting the Flynn effect and correcting IQ scores from tests with aging norms was in 2009, in *United States v. Davis*, 611 F. Supp. 2d 472 (D. Md. 2009); *see also United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901 (N.D. Ohio Dec. 23, 2010); *United States v. Hardy*, 762 F. Supp. 2d 849 (E.D. La. 2010); *United States v. Smith*, 790 F. Supp. 2d 482 (E.D. La. 2011); *United States v. Shields*, No. 04-20254, 2009 WL 10714661 (W.D. Tenn. May 11, 2009).

¹⁵⁰ *Hall*, 572 U.S. at 701-02.

¹⁵¹ *Id.* at 702.

a. Had the Flynn effect been applied, Corey Johnson’s reliable IQ scores before his capital trial would have been 72, 75, 65, and 73, all consistent with intellectual disability

Dr. Cornell testified in 1993 that the IQ test he gave to Mr. Johnson was just outside the intellectual disability range. But modern science through the application of the Flynn effect makes crystal clear that Dr. Cornell’s IQ test is consistent with him being intellectually disabled. *Supra* at pp. 15-17. Moreover, his trial testimony shows that not correcting for the Flynn effect was dispositive in his conclusion that Corey Johnson was not intellectually disabled. Referring to the performance scale scores on the adult IQ test he administered to Mr. Johnson, Dr. Cornell testified: “Because these latter scores were higher, his overall IQ fell above the range of mental retardation, just above that range.”¹⁵²

*The IQ score I got was 77. If he had gotten a 75, he would be within the range that counts as mental retardation. . . . He was two points above that, which is a matter of one or two questions on an intelligence test that would make the difference there. (Emphasis added.)*¹⁵³

Twenty-one years after Corey Johnson’s sentencing, the Supreme Court rejected state mandated bright-line rules that excluded defendants with IQ test results above 70 from being found to be intellectually disabled in capital proceedings, holding that drawing rigid lines creates an unacceptable risk that persons with intellectual disability could be executed.¹⁵⁴ Dr. Cornell’s conclusion that Mr. Johnson’s IQ score of 77 left him just short of qualifying him for intellectual

¹⁵² Ex. 75 (2/10/93 Trial Tr. 3682:8-10) (Corey’s verbal IQ score, the other component of the Cornell IQ test, was within the intellectual disability range.).

¹⁵³ Ex. 75 (2/10/93 Trial Tr. 3692:9-15).

¹⁵⁴ *Hall*, 572 U.S. at 701, 702 (noting that IQ scores should not be viewed as a single fixed number but as a range, and holding that a state rule that did not account for standard error of measurement is unconstitutional).

disability is an analogous error and produced the same result—an intellectually disabled man at risk of execution.¹⁵⁵

b. IQ Tests have decreased in importance and adaptive functioning deficits have increased in importance in intellectual disability evaluations since Dr. Cornell evaluated Corey Johnson

When Dr. Cornell evaluated Corey Johnson in 1993, the first two prongs of an intellectual disability evaluation were seen as separate and independent steps. If an individual's intellectual functioning as measured by IQ testing did not fall within the intellectual disability range (generally 75 or below), most experts and certainly the courts ended the inquiry and the person was deemed not to be intellectually disabled.¹⁵⁶ That is not the predominant view today.¹⁵⁷ Even without correcting for the Flynn effect, intellectual disability experts today would not view an IQ score of 77 (using Dr. Cornell's uncorrected test result for Mr. Johnson) as ending the inquiry, but instead would look to the person's other IQ scores and to the person's adaptive functioning deficits to determine if he or she is intellectually disabled, and the Supreme Court has endorsed that approach.¹⁵⁸ If those deficits are convincingly strong, experts using their clinical judgment could properly conclude that the person's actual functioning is comparable to someone with lower IQ scores and could properly diagnose the person with intellectual

¹⁵⁵ The Flynn effect correction for the 1981 Adams IQ test of Corey Johnson—from 78 to 75—brings that test within the intellectual disability range as well. Thus, the four reliable IQ tests given to Corey Johnson are all consistent with intellectual disability.

¹⁵⁶ *Id.*

¹⁵⁷ DSM-5 at 37-38; *Hall*, 572 U.S. at 712 (“[T]he relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist.” (alteration in original) (citing Brief of Amici Curiae American Psychological Association et al. at 15-16 and DSM-5 at 37)).

¹⁵⁸ *See Hall*, 572 U.S. at 723-24.

disability.¹⁵⁹ Stressing this significant development, the DSM-5 states, “IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.”¹⁶⁰ Therefore, for a person who does not have even a single IQ score below 70 (or below 75 considering the standard error of measurement), a diagnosis of intellectual disability can still be made by a practitioner using his or her clinical judgment if, like here, the individual demonstrates severe adaptive behavior deficits during the developmental period.¹⁶¹

c. The adaptive functioning evidence presented at Corey Johnson’s trial shows his impairments were consistent with intellectual disability

The defense evidence presented during the sentencing phase of Corey Johnson’s trial made equally clear that Corey Johnson was severely impaired in his everyday social functioning and that all of his impairments originated during his childhood. In 1993, a person had to have significant impairments in life functioning in just two of ten categories to be considered intellectually disabled (assuming the other two prongs of the diagnostic criteria were met). The sentencing hearing evidence shows that Mr. Johnson was impaired in at least two areas.¹⁶²

¹⁵⁹ See generally DSM-5.

¹⁶⁰ DSM-5 at 37.

¹⁶¹ *Id.*

¹⁶² After Corey Johnson’s trial, both the AAIDD and the APA consolidated the previous system of ten different areas of adaptive functioning into three domains. A finding of significant impairment in just one of the three domains is now sufficient to support an intellectual disability diagnosis.

Based on the incomplete records he possessed and the limited interviews he conducted, Dr. Cornell nevertheless had enough information to conclude, and testified, that Corey Johnson had significant impairments in functional academics and communication. These two separate areas alone were sufficient to satisfy the second prong of the intellectual disability diagnosis. But Dr. Cornell's testimony went further. He also pointed to self-care, social skills, and work (specifically, the ability to maintain a job, have good work habits, and use common sense needed to hold a job) as possible areas where Corey Johnson's functionality was not at a normal level.

Dr. Olley interviewed 24 people who knew Corey Johnson well and administered the Adaptive Behavior Assessment System to three individuals who knew Corey Johnson very well in several community settings.¹⁶³ Dr. Olley concluded that the results of these three adaptive behavior ratings combined with information from many other sources demonstrate that "Corey Johnson had significant impairment in adaptive behavior beginning in his childhood."¹⁶⁴

D. Corey Johnson's Federal Habeas Lawyers Did Not Present Expert Testimony and Compelling Evidence Available at the Time to Support Corey Johnson's Habeas Challenge to his Death Sentences

After his conviction and death sentences were affirmed on appeal, Corey Johnson was assigned new lawyers to represent him on the preparation of a federal habeas petition pursuant to 28 U.S.C. § 2255. In both initial and supplementary pleadings, counsel asserted for the first time that their client was ineligible for a death sentence pursuant to 21 U.S.C. § 848(l) and 18 U.S.C. § 3596 because he was mentally retarded. In their pleadings, recognizing that Dr. Cornell had not taken into account the age of the IQ tests on which he had relied during his trial testimony, post-conviction counsel asserted that Dr. Cornell should have adjusted all of Corey Johnson's IQ

¹⁶³ Ex. 2 at 16-17 (Olley Report).

¹⁶⁴ *Id.* at 40.

scores using the Flynn Effect and that, had Dr. Cornell made these necessary adjustments, Corey Johnson's IQ scores would have fallen within the standard error of measurement diagnostic of mental retardation, and a full evaluation would not have been ruled out. To support these claims, habeas counsel produced no new evidence but instead submitted to the court three IQ test results which had been admitted into evidence at trial. Habeas counsel also submitted a single social services record, an excerpt from which was also admitted in evidence at trial, and had been addressed by Dr. Cornell in his testimony as well.

In light of the fact that Dr. Cornell did not adjust the IQ scores to account for the Flynn Effect, a now obvious deficiency on which his opinion hinged, counsel made relevant discovery requests during these post-conviction proceedings. They asked for information about the criteria the Department of Justice used to evaluate whether a defendant charged with a capital crime was intellectually disabled. They also sought to learn in what specific federal capital cases defendants had asserted their execution should be barred due to intellectual disability, and also requested all reports and memoranda specifically related to the application of the intellectual disability bar against the defendants in the case.

However, the district court denied the intellectual disability-related discovery requests as unnecessary, summarily resolving the question of whether Dr. Cornell's scoring should have been modified on the grounds that "[e]vidence at trial indicated that [Mr. Johnson's] I.Q. is 77, and he is therefore not mentally retarded . . . clearly Johnson cannot prevail on this claim in light of the evidence presented at trial."¹⁶⁵

¹⁶⁵ Ex. 11 at 12 (Memorandum Opinion, *Johnson v. Pruett*, No. 97CV895, 92CR68 (E.D. Va. May 3, 2000), ECF No. 803).

In light of the fact that no new evidence had been offered with respect to the issue of Corey Johnson's intellectual disability, the court granted the government's motion for summary judgment. Had habeas counsel introduced expert testimony about the Flynn Effect, as is now routinely done in cases, or if counsel had located the childhood IQ scores that Dr. Cornell was not aware of, the district court almost certainly would not have come to its conclusion, on the limited record before it, that Corey Johnson is not a person with intellectual disability.

VI. A Similarly Situated Co-Defendant, Vernon Lance Thomas, was Spared the Death Penalty Due to his Intellectual Disability

The failure of Corey Johnson's defense team to locate and properly analyze comprehensive and compelling evidence of his intellectual disability was pivotal and prejudicial to him. Before Mr. Johnson's trial for reasons due to the availability of codefendant Vernon Lace Thomas' counsel, his trial was severed from the trial of the other defendants. Shortly after Mr. Johnson was sentenced to death, Vernon Lance Thomas's lawyers submitted an expert report showing that Thomas had an IQ score of 71. The expert opinion that Thomas was intellectually disabled appears to be the reason that, not long afterward, the prosecution withdrew its previously filed notice of intention to seek the death penalty on the eve of Thomas' trial.

Mr. Johnson's intellectual disability evidence is much stronger than the evidence of Thomas' intellectual disability. Even without the current understanding of the Flynn effect, two of Corey Johnson's IQ tests were within the intellectual disability range—the 73 IQ score obtained by Dr. Figurelli when Corey was eight and the 69 IQ score obtained by Dr. Barish when Corey was 16. There is no statistical difference between Corey Johnson's IQ scores of 73 and 69 on the one hand, and Thomas' IQ score of 71 on the other, although Corey Johnson's 69 is obviously lower than Thomas' score. Moreover, the evidence of Corey's severe and global adaptive functioning impairments, as documented in his childhood records and described in

detail in Dr. Olley’s extensive report, is more expansive and persuasive than the much more sparse information contained in the seven page report prepared by Vernon Lance Thomas’ expert.¹⁶⁶

VII. The Role of Race in Corey Johnson’s Life and Death Sentences

The death penalty in America has always been marred by racial disparities in its application, and the federal death penalty is not immune to that troubling reality. Forty-two percent of the inmates on the federal death row are African American.¹⁶⁷ America’s troubled racial history and the damaging legacy that lingers due to past racial discrimination has played a significant, negative role in Corey Johnson’s life. In addition to the reality that Corey Johnson grew up in blighted urban neighborhoods riddled with extreme poverty and crime—a too-common vestige of a history of racial bias¹⁶⁸—there are at least two additional ways that Corey’s African-American race contributed to his death sentences.

A. The Stigma of the Mental Retardation and Pressure to Avoid that Label

Corey Johnson was never diagnosed as intellectually disabled during his childhood. Instead, Corey was repeatedly and incorrectly classified as a child as “severely learning disabled.” A learning disability is a specific diagnosis for an individual whose achievement in

¹⁶⁶ See Ex. 10 (Mot. to Have Def. Declared Mentally Retarded, *United States v. Thomas*, No. 3:92CR68 (E.D. Va. Apr. 15, 1993) (attaching, as Exhibits A and B respectively, Resume of Neuropsychological Evaluation Re: Vernon Thomas (April 9, 1993) and Curriculum Vitae of Henry L. Dee, Ph.D., P.A.)).

¹⁶⁷ <https://deathpenaltyinfo.org/death-row/overview/demographics>

¹⁶⁸ See, e.g., the writings of now deceased Judge A. Leon Higginbotham, Jr. of the United States Court of Appeals for the Third Circuit: *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney’s Defense and Justice Thurgood Marshall’s Condemnation of the Precept of Black Inferiority*, 17 *Cardozo L. Rev.* 1695 (1995); A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (Oxford Univ. Press 1996).

discrete areas is significantly below his or her intellectual ability. Someone with a learning disability has *unexpectedly* low achievement. Corey Johnson never displayed unexpectedly low achievement—his performance on achievement tests and his educational achievement on the one hand, and measures of his intellectual ability on the other—were both always significantly impaired. “Mr. Johnson’s record involving multiple measures of achievement and intellectual functioning revealed that his achievement was commensurate with his intellectual ability.”¹⁶⁹ Moreover, Dr. Reschly points out that “severe” learning disability has never had any educational meaning; instead, when the adjective “severe” was added (his records are riddled with that phrase), Dr. Reschly states it was often an euphemism for intellectual disability.¹⁷⁰

Dr. Reschly and Dr. Jay Gottlieb—another expert in the role of race in the significant increase and decrease, respectively, in diagnoses of learning disability and “mental retardation” in the 1960s, 1970s, and 1980s—explain that many intellectually disabled Black children like Corey were frequently improperly classified as learning disabled. At the time, there was great pressure on school officials and mental health experts not to stigmatize children, particularly urban Black children, with what many perceived as the pejorative label of “mental retardation.” Rather than tattoo children with the “mental retardation label,” educators, psychologists, and others chose the learning disability label—which carried less baggage, made little difference in the educational strategies and resources devoted to the children, and lessened the risk of costly litigation.¹⁷¹

¹⁶⁹ See Ex. 1 at 33 (Reschly Report).

¹⁷⁰ Ex. 1 at 39, 44 (Reschly Report).

¹⁷¹ See Ex. 23 ¶¶ 4-7 (Declaration of Jay Gottlieb, Ph.D., July 11, 2009 (“7/11/09 Decl. of J. Gottlieb”)). Dr. Gottlieb published research about special education in New York City and the role of race in the rise in learning disability and the fall in mental retardation classifications. Dr. Gottlieb’s declaration explains how expensive class action litigation beginning in the early 1970s and the concern over additional litigation contributed to a dramatic shift

Corey's utter, complete, and comprehensive academic failure, despite various strategies designed to help him learn, was obvious to his teachers and the mental health professionals working with him. His intellectual impairments were consistent with his academic failure, and manifested themselves in a wide array of cognitive, social, and practical impairments that were contemporaneously observed and documented during his childhood, yet he was not labeled with mental retardation.

When putting aside the factors above—the stigma of the label, the threat of litigation, based on my knowledge and experience I believe it is conceivable and likely that a child with Corey Johnson's IQ and achievement should have been diagnosed as [mentally retarded]. That said, given the above factors, the role of race and the concern about litigation, many children like Corey were instead classified as learning disabled.¹⁷²

There is little doubt that Corey's race played a role when, as a child, he was misdiagnosed as learning disabled. Later, when Mr. Johnson's life was on the line, his race played a role again, indirectly, when Dr. Cornell—relying in part on his previous, flawed learning disabled diagnoses—failed to find him intellectually disabled and ineligible for the death penalty.

B. The Role of Racial Composition of the Jury and the Effect of Implicit Bias

Race also played another role in Corey Johnson's death penalty trial because his prosecution occurred during an era when there was a constant drumbeat by politicians and the media about dangerous Black super-predators and the scourge of drug violence plaguing inner cities. His death penalty case was brought toward the beginning of a period when numerous federal capital cases were brought against African Americans and other defendants of color who

toward mainstreaming special education students as much as possible to avoid stigma and provide improved opportunities to learn, and contributed to a dramatic decline in mental retardation diagnoses; *see also* Ex. 1 at 38-44 (Reschly Report).

¹⁷² Ex. 23 ¶ 11 (7/11/09 Decl. of J. Gottlieb).

were alleged gang members. In stark contrast, almost no federal death penalty charges have been brought against white members of the mafia or other organized crime groups despite non-capital murder prosecutions of defendants with ties to those organizations for committing multiple murders; one cooperating mafia witness admitted to committing more than 20 murders and yet capital charges were not brought against him.¹⁷³

Corey Johnson's crimes occurred in the City of Richmond. Yet his case was prosecuted in federal court rather than in the state circuit court in Richmond, a fact that impacted the racial makeup of his jury pool. The federal jury pool had significantly fewer African American members than their proportion in the majority African American population in Richmond. It drew both from urban Richmond and heavily from the majority white and more conservative surrounding suburbs.¹⁷⁴ The population of the jury pool for the federal court where Corey Johnson was prosecuted was 66 percent white and 29.7 percent Black. In contrast, in 2010, the population of the City of Richmond, where the murders in the Tipton, Roane, and Corey Johnson case occurred, was 52.2 percent Black and 44 percent white.¹⁷⁵

¹⁷³ Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DePaul L. Rev. 1615, 1637-38 (2004).

¹⁷⁴ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 Wash. L. Rev. 425, 454-57 (2010).

¹⁷⁵ The City of Richmond had an even higher concentration of African Americans in 1990 (three years before Corey Johnson's trial) than in 2010, with over 55 percent of the population black in 1990. See United States Census Bureau, *1990 Census of Population and Housing Public Law 94-171 Data (Official): Age by Race and Hispanic Origin*, <https://web.archive.org/web/20170120013701/https://censtats.census.gov/cgi-bin/pl94/pl94data.pl> (change "State" field to "Virginia" and click "Go" then change "County" field to "Richmond City" and click "Go"). Although the race of all of the jury pool members in Corey's case is not known, the race of most of them is known. Twenty-five of the 80 jurors whose race is known, or 31.25 percent, were African Americans while 68.75 percent were White (the race of the remaining 48 jurors of the total of 128 jurors in the pool could not be determined from existing records). Five of the 12 jurors who deliberated in Corey's case were black, which is 41.6 percent. That data show that the jury pool had approximately 15 percent fewer black members than the population of the City of Richmond as a whole.

Social science research has identified implicit racial bias—when racial attitudes and stereotypes affect people’s understanding, actions, and decisions in an unconscious manner—as a key reason why minority group dilution has a negative impact on capital deliberations.¹⁷⁶ In Corey Johnson’s case, the prosecution repeatedly referred to Corey Johnson’s supposed future dangerousness,¹⁷⁷ and made express statements about the need for deterrence.¹⁷⁸ Even more damaging, the prosecution suggested that Corey Johnson’s mitigation evidence showed that he lacked remorse, turning his intellectual impairment into an aggravating factor.¹⁷⁹ The Supreme Court’s holding in *Atkins* that the most common justifications for the death penalty—deterrence and retribution—do not apply to people with intellectual disability because of their diminished culpability, 536 U.S. at 321, sharply

“With respect to retribution—the interest in seeing that the offender gets his ‘just deserts’—the severity of the appropriate punishment necessarily depends on the culpability of the offender. . . . the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. . . . [E]xecuting the mentally retarded will not measurably further the goal of deterrence.”

Atkins, 536 U.S. at 319-320.

¹⁷⁶ See Cohen *supra* note 169, at 470-74; John Blume, Theodore Eisenberg & Stephen P. Garvey, *Lessons from the Capital Jury Project, in Beyond Repair? America’s Death Penalty* (Stephen P. Garvey ed., 2003); Theodore Eisenberg, Stephen Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277 (2001); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26 (2000).

¹⁷⁷ “[Corey Johnson] is, too, at this point, given his unfortunate youth, a killing machine.” Ex. 76 (2/12/93 Trial Tr. 3900:16-17).

¹⁷⁸ “[D]oes the death penalty verdict act as a deterrence? Ex. 74 (2/8/93 Trial Tr. 3333:24-25, *United States v. Tipton*, No. 92CR68 (E.D. Va. Feb. 8, 1993) (“2/8/93 Trial Tr.”)); “A sentence of life in the penitentiary by you will in essence tell them and other drug dealers that you can sell drugs and kill people and you will get punished no more severely . . . than if you sell drugs only. They deserve the maximum punishment” Ex. 76 (2/12/93 Trial Tr. 3903:15-23).

¹⁷⁹ “As to Mr. Cory [sic] Johnson, he, too, says ‘I’ve had a bad youth. I’ve got a learning disability. I should therefore be excused from blameworthiness for what I have done.’ You can’t do that, ladies and gentlemen.” Ex. 76 (2/12/93 Trial Tr. 3898:01-05).

demonstrates how wrong and harmful these arguments were in Corey Johnson’s case. The comments not only likely compounded the implicit bias and negative stereotypes about dangerous Black men that are, unfortunately, so widely held in our society, they also ran counter to the Supreme Court’s later holding that the intellectually disabled are so much less culpable due to their impairments that executing them is unconstitutional. Such emphasis on future dangerousness, deterrence, and lack of remorse when combined with inherent racial biases is corrupting because it diverts jurors’ attention away from a rational evaluation of culpability-based aggravating factors and from giving full consideration to mitigating circumstances.¹⁸⁰ Mr. Johnson nevertheless recognizes that the group in which he was involved committed a series of violent murders which had tragic consequences for their victims and their victims’ families. He has repeatedly expressed remorse to counsel consistent with the responsibility he acknowledged during his sentencing.

VIII. Corey Johnson Has Been a Model Inmate, Poses No Danger to Anyone in Prison, and Has Expressed Sincere Remorse

A. Corey Johnson’s Outstanding Prison History

Corey Johnson has been incarcerated for the past 28 years.¹⁸¹ During the overwhelming majority of that time and for nearly two decades, he has been a model inmate with a stellar record, following prison rules and doing what he was told to do by prison officials. He has

¹⁸⁰ Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 Am. J. Crim. L. 145, 168-71 (2008).

¹⁸¹ For the first approximately seven years of his incarceration after his arrest in 1992, both before and after his federal trial and sentencing, Corey Johnson was held in the custody of the Virginia Department of Corrections. Since 1999, Corey has been incarcerated on the federal death row in the United States Penitentiary in Terre Haute, Indiana.

avoided getting into altercations with other inmates, has engaged in absolutely no violence and has taken this time to self-reflect and improve himself in every way possible.

Senior Pastor Bobby H. West ministered to Mr. Johnson every other week for several years while Corey Johnson was held in Virginia after his sentencing and met with him about 100 times; he also traveled to Terre Haute, Indiana after Mr. Johnson was transferred to the Bureau of Prisons (BOP) and met with him five times and spoke with him another dozen times by phone. Unlike Tipton and Roane, whom Pastor West also knew, who were quick to anger and engage in confrontations with prison officials, Mr. Johnson “seemed to ‘go with the flow.’” Tipton and Roane were also “‘up’ on their legal cases,” while Corey Johnson “expressed no understanding of the status of his legal case” and “seemed considerably less intelligent than Roane or Tipton in the way he spoke.” Pastor West described Mr. Johnson as “less vocal and opinionated” than most inmates, “soft-spoken, quiet, and humble [and] seemed eager to please” During all the times he observed him, Corey Johnson appeared to get along with the other inmates and never got into any “disagreements with anyone.”¹⁸²

Mr. Johnson’s only misstep since 1997 within the BOP was when he was cited for using a staff restroom without permission in 2002 while working in the kitchen at USP Terre Haute.¹⁸³ Corey Johnson did have one rough patch during a two-year period starting 25 years ago, between the summer of 1995 and the summer of 1997, while at the Powhatan Correctional Center, a

¹⁸² Ex. 38 ¶¶ 6, 7, 9, 10 (Declaration of Bobby H. West (volunteer prison chaplain), Mar. 24, 2011). Sarah West, who is married to Pastor West, was a volunteer chaplain who also knew Tipton, Roane, and Mr. Johnson well at the same prisons. She describes Corey Johnson as “pleasant and eager for acceptance . . . [and] polite, respectable, and kind.” Ex. 39 ¶¶ 8-9 (Declaration of Sarah Jane Woodson West (volunteer prison chaplain), Mar. 24, 2011).

¹⁸³ Corey Johnson’s current counsel have obtained and reviewed his complete BOP records through 2020. These records show that he has not had any disciplinary infractions since 2002.

Virginia state prison, when he received some minor citations.¹⁸⁴ But it is not unusual for inmates, particularly when they are young and first dealing with the stress of a death sentence, to face a difficult adjustment period early on in their sentences.¹⁸⁵ Mr. Johnson's record clearly shows that, now 52 years old, he has adjusted well to prison with a perfect record spanning nearly two decades. His lack of any violent behavior in prison and his long period without any infractions is a strong demonstration that he does not pose a danger in prison.¹⁸⁶

In prison, Corey Johnson has held a number of very simple jobs and has received positive performance evaluations, both in the Virginia prisons and the federal BOP.¹⁸⁷ Mr. Johnson has taken numerous courses while incarcerated, including art and exercise courses, such as water color painting, crochet and yoga.¹⁸⁸ He has also diligently, although futilely, spent at least the

¹⁸⁴ Mr. Johnson received three citations for having unauthorized items (contraband) in his cell: (1) a stereo speaker and shoe polish; (2) earphones; and (3) a television with a power adaptor, an extension cord, an envelope with electronic components, ten magazines, and a bingo game. He was also cited five times over a 10-day period for failing to follow a new rule requiring inmates to place their empty food trays back in the food slot rather than on the floor of their cells. He received a citation for throwing a bar of soap at an officer, which missed, and another citation for spitting on an officer. He was cited for disrespecting an officer by making a crude remark. Finally, he was cited for lying or giving false information to an officer when he said he had ordered earphones for his television but the officer found he had failed to submit a canteen list.

¹⁸⁵ Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America's Other Death Penalty*, 88 *Prison Journal* 328, 330-331 (June 2008); Robert Johnson & Ania Dobrzanska, *Mature Coping Among Life-Sentenced Inmates: An Exploratory Study of Adjustment Dynamics*, *Corrections Compendium*, Nov./Dec. 2005, at 9, 36.

¹⁸⁶ In response to an inquiry by the court evaluating Mr. Johnson's motion under the First Step Act, the Government stated that it is not aware of "any prison infractions related to Johnson" or "any mental or substance abuse treatment." See Ex. 12 at 27 (Government's Opposition to Defendant's First Step Act Motion, *United States v. Johnson*, No. 92CR68 (E.D. Va. Sept. 23, 2020), ECF No. 58 ("9/23/20 Opposition")).

¹⁸⁷ Mr. Johnson's ability to adapt to life in prison is consistent with his diagnosis. Adaptive functioning can significantly improve in prison, as the "prison environment, by its very nature, is highly controlled and regimented. In comparison to life in the community, life in prison has fewer choices of daily activities, and . . . fewer adaptive behavior opportunities (e.g., functioning academics, health and safety, social interactions, home living skills, or community use." See *supra* note 18, Marc J. Tassé & John H. Blume, at 117.

¹⁸⁸ See Ex. 12 at 27 (9/23/20 Opposition) (stating that between 1999 and 2020, Mr. Johnson has taken art courses (water color, colored pencil, charcoal pencil, and crochet), exercise courses (yoga and abdominal techniques) and general education and vocational courses (GED self-study and other GED courses).

past 20 years studying to achieve the one goal that he set in the event he is to be executed, which is to obtain his GED. After decades of dedicated effort, Corey Johnson has not been able to pass the GED test, even though—year in and year out—his prison programming reviews note he works hard in the GED program and each year they set the coming December as the target for Mr. Johnson to obtain his GED.¹⁸⁹

B. Corey Johnson has Demonstrated Sincere Remorse

Corey Johnson is truly remorseful for the taking the lives of his victims and those he injured, and the awful pain and loss he caused for their families. This has been true from the time of trial and remains true today. At his sentencing, Mr. Johnson expressed his regret for his crimes and accepted responsibility.

I'm sorry for the great number of people who are dead, you know, and there is a lot on us, and I feel we are no angels.

Mr. Johnson also extemporaneously addressed a group of high school students who neither his counsel nor he had known would be present during his sentencing immediately before the judge imposed his death sentence. As his lead trial attorney, Craig Cooley, recalls: “In an extremely sincere, powerful, and moving moment, Mr. Johnson urged the high school [sic] students not to commit crimes in any way or make the mistakes he had in his life.”¹⁹⁰

All crimes, crimes is not good, period. All crimes, period, is not good. Being the fact that you are here, take a lesson to what's going on. I mean, you get old enough and realize that this is not the life that you are living. I am unfortunate that I never had nobody. That's no excuse And I would hope you discuss this. Because I would hate to see you all end up this way. I would hate to see you have kids in this way, because this is not right.¹⁹¹

¹⁸⁹ See Ex. 4 at 31 (Nelson Report).

¹⁹⁰ Ex. 20 ¶ 28 (9/20/16 Aff. of C. Cooley).

¹⁹¹ Ex. 77 (6/1/93 Sentencing Tr. 22:1-14, *United States v. Tipton*, No. 92CR68 (E.D. Va. June 1, 1993)).

IX. Conclusion

Even as it reinstated the death penalty after temporarily halting all executions, the Supreme Court recognized that “death is different” because of the danger that it will be administered arbitrarily and because of its finality.¹⁹² Corey Johnson’s case starkly embodies these dangers.

Corey Johnson’s execution would be arbitrary because the sentencing jury never heard the mountain of evidence proving his intellectual disability. Under modern scientific standards and jurisprudence, Corey Johnson is undoubtedly intellectually disabled and his sentences and execution are impermissible and unconstitutional. *Supra* at II. No court has ever held a hearing to decide whether Corey Johnson is intellectually disabled or considered the comprehensive evidence available now to decide whether his severe impairments prohibit his execution under the then existing federal statutory bar or the current constitutional bar after *Atkins*. 536 U.S. 304. His death sentences are also arbitrary because he faces death and his co-defendant, Vernon Lance Thomas does not, even though both are intellectually disabled.¹⁹³ Mr. Johnson’s execution would be arbitrary because race played a pernicious role in his early life and in his death sentences and because he poses absolutely no danger in prison and has proved himself to be a model inmate. Finally, Mr. Johnson’s recent diagnosis with COVID-19 constitutes the most recent compelling reason why the President should grant the relief he requests in this Petition.

Mr. Johnson sincerely regrets his actions and takes full responsibility for the severe consequences of his crimes for their victims and their families. Mr. Johnson expressed remorse

¹⁹² *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

¹⁹³ *Furman v. Georgia*, 408 U.S. 238, 293-94 (1972) (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. . . . No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.”).

for the crimes he committed at his sentencing. Over the years, since the undersigned counsel began their representation of him, he has repeated his expressions of remorse many times.

Although Mr. Johnson has filed a pending motion raising his ineligibility to be executed, it is likely that the Government will oppose this motion on procedural grounds, *supra* at 2, and therefore, the President will be the only individual able to rectify this injustice. President Trump, for all of these reasons and others discussed above and in the accompanying materials, we urge you to use your power to grant Corey Johnson clemency and to commute his death sentences to life in prison without any possibility of parole.

Respectfully submitted,



Donald P. Salzman
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, NW
Washington, DC 20005
(202) 371-7400
donald.salzman@skadden.com

Ronald J. Tabak
Skadden, Arps, Slate, Meagher & Flom, LLP
One Manhattan West
New York, New York 10001
(212) 735-2226
ronald.tabak@skadden.com

Thania Charmani
Skadden, Arps, Slate, Meagher & Flom, LLP
One Manhattan West
New York, New York 10001
(212) 735-3502
thania.charmani@skadden.com