

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION**

**MILTON MATHIS,
Petitioner,**

v.

**NATHANIEL QUARTERMAN, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION
Respondent.**

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CIVIL ACTION NO.

**PETITION
FOR WRIT OF HABEAS CORPUS**

THIS IS A DEATH PENALTY CASE

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Petitioner Milton Wuzael Mathis asks this Court to issue a writ of habeas corpus and grant him relief from his unconstitutional death sentence. Because he is mentally retarded, his execution would violate the Eighth and Fourteenth Amendments to the United States Constitution, *Atkins v. Virginia*, 536 U.S. 304 (2002), and he is entitled to federal habeas relief.

PROCEDURAL HISTORY

Mr. Mathis was tried by a jury and convicted of capital murder in the 268th District Court of Fort Bend County, Texas. Clerk's Record Vol 2, 202. The jury then returned answers to special issues submitted under Tex. Code Crim. Proc. art. 37.071 which required imposition of the death penalty. Clerk's Record Vol 2, 219-20. On September 21, 1999, the trial court entered the judgment and sentence of death. On February 13, 2002, the Court of Criminal Appeals affirmed the conviction and death sentence in *Mathis v. State*, 67 S.W.3d 918 (Tex.Crim.App. 2002).

Mr. Mathis filed his first application for writ of habeas corpus on February 6, 2001. The trial court entered findings of fact and conclusions of law, recommending denial of relief, and the Court of Criminal Appeals denied relief on April 3, 2002.

Mr. Stephen Doggett and Mr. Winston Cochran were appointed by the federal district court to represent Mr. Mathis in federal habeas corpus proceedings. Order Granting Motion for Appointment of Counsel, *Mathis v. Dretke*, No. 03-cv-01138 (S.D. Tx. 4/29/02). On April 3, 2003, Mr. Mathis filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. *Id.* On June 20, 2003, while the federal proceeding was pending, Mr. Mathis filed a second state application for writ of habeas corpus in the trial court and the Court of Criminal Appeals raising an *Atkins* claim.¹ Shortly thereafter, the Court of Criminal Appeals ordered briefing in another subsequent habeas case proceeding, *Ex parte Soffar*, WR-29,980-02, on whether the two forum rule, also known as the *Powers* doctrine, should be modified to permit consideration of the merits of a subsequent writ if the federal court stayed its parallel proceedings. On February 11, 2004, the Court of Criminal Appeals modified its two forum rule to permit consideration of a subsequent application provided the federal court stayed all proceedings related to the same case or same matter. *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004). On March 3, 2004, the Court of Criminal Appeals dismissed Mr. Mathis' *Atkins* application under *Soffar* because he had not shown that the federal court had stayed its proceedings.

On February 2, 2004, before the *Soffar* decision, the federal district court denied Mr. Mathis' federal habeas petition. After the *Soffar* decision and before the state application was dismissed, Mr. Mathis filed in the federal court a motion for new trial and a motion for abatement of the federal proceedings pending the completion of the state court successor application based on *Atkins*. *Mathis v. Dretke*, 03-cv-01138 (S.D. Tex.) (Docket Entry #19, filed

¹ Under the "two-forum rule" in effect at that time, the Court of Criminal Appeals was required to dismiss a successive habeas application if a proceeding related to the same case or matter was pending in a federal court. See *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972).

February 17, 2004). Shortly thereafter, on March 11, 2004, the federal district court denied the motion for abatement based on the erroneous conclusion that Texas law no longer precluded consideration of a subsequent application during the pendency of federal proceedings related to the same case or matter. *Id.* at Docket Entry #20.

Mr. Mathis appealed the federal district court's decision. While the appeal was pending, the trial judge scheduled Mr. Mathis' execution for April 20, 2005. Mr. Mathis filed a motion for stay of execution in the Fifth Circuit and also asked the federal court to stay the appellate proceedings so that he could pursue his *Atkins* claim in state court. On March 11, 2005, this Court refused to stay the proceedings and denied the appeal. *Mathis v. Dretke*, No. 04-70015 (5th Cir. Mar. 11, 2005). Rehearing was denied on April 8, 2005.

The Texas Court of Criminal Appeals granted a stay and remanded the case for further proceedings on April 19, 2005. A hearing was held in the district court in September 2005 and the district court entered findings of fact recommending a denial of Mr Mathis's claim in January of 2006. On September 20, 2006, the CCA adopted the trial court's recommendation and denied relief to Mr. Mathis.

JURISDICTION

Because Mr. Mathis was convicted and sentenced to death by a jury in the 268th District Court, Fort Bend County, Texas, this Court properly exercises its habeas jurisdiction over this matter pursuant to 28 U.S.C. § 2241(d).

CLAIM FOR RELIEF

I. **BECAUSE MR. MATHIS IS MENTALLY RETARDED, HIS EXECUTION WOULD VIOLATE THE RULE SET FORTH BY *ATKINS V. VIRGINIA*.**

A. ***Atkins v. Virginia* Establishes Mr. Mathis' Mental Retardation as a Ground For Habeas Relief.**

Reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the

Supreme Court concluded that “the Constitution places a substantive restriction on the State’s power to take the life of a mentally retarded offender.” *Atkins*, 536 U.S. at 321 (internal quotation marks omitted). The Court declined to impose a uniform definition of mental retardation, and instead left to the states the task of defining retardation and implementing suitable procedures to adjudicate *Atkins* claims. *See id.* at 317. In footnotes 3 and 22 the Court noted that although it did not endorse a particular statutory formulation of mental retardation, each state’s standard must generally embody the three clinical criteria shared by the American Association on Mental Retardation (“AAMR”) and American Psychiatric Association (“APA”) definitions of that condition. *See id.* at 309 n.3 (setting forth the AAMR and APA definitions); *id.* at 317 n.22 (“The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in [footnote] 3 . . .”).

B. A Person is Mentally Retarded if He Has Intellectual Impairment and Adaptive Deficits That Developed Before Age 18.

Atkins does not require states to use a specific definition of retardation, but it does require that any definition contain three clinical elements: (1) significantly subaverage intellectual functioning (“intellectual impairment”), (2) significant limitations in adaptive skills (“adaptive deficits”), and (3) onset of those conditions prior to age 18 (“developmental onset”). 536 U.S. at 318 (“[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.”) (emphasis added). Most clinical formulations differ only with respect to what conditions satisfy the second, adaptive deficits criterion. *See, e.g., id.* at 308 n.3 (describing the differences is the AAMR and APA diagnoses of adaptive deficits).

The AAMR promulgated nationally recognized clinical definitions of mental retardation

in 1992 and again in 2002. *See* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (10th ed. 2002) (hereinafter “2002 AAMR Manual” or “2002 Manual”); AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) (hereinafter, “1992 AAMR Manual” or “1992 Manual”). According to the more recent AAMR definition, a diagnosis of mental retardation requires: (1) significantly subaverage general intellectual functioning (*i.e.*, an IQ of approximately 70 to 75 or below); (2) the presence of “significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical skills” (“adaptive deficits”); and (3) the condition’s onset prior to the age of 18. 2002 Manual at 1.

The APA employs a definition that is nearly identical to the one set forth in the 1992 AAMR Manual, and one that differs from the 2002 AAMR Manual only in the technical manner in which adaptive deficits are defined. *Compare* APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000) (“DSM-IV”) (requiring adaptive deficits in at least two of eleven specified skill areas), *with* 2002 AAMR Manual at 1 (requiring significant deficits in at least one of three major skill “domains”), *and* 1992 AAMR Manual at 1 (requiring deficits in one of ten specified skill areas).

C. Mr. Mathis is Mentally Retarded.

The only experts to testify in Mr. Mathis’s state postconviction proceedings were Dr. Gilda Kessner, a Texas licensed psychologist with many years experience doing forensic evaluations, *see* Exhibit 1 (Kessner CV) and Dr. James Patton, an adjunct professor in the Special Education Department of the University of Texas who, in addition to many years of working with persons with mild mental retardation, is the author of myriad articles, treatises and textbooks on mental retardation. *See* Exhibit 2 (Patton CV). The state presented no expert evidence at all.

To evaluate Mr. Mathis, Dr. Kessner personally administered five different standardized tests, including the Wechsler Adult Intelligence Scale, Third Edition (“WAIS-III”), the Wide Range Achievement Test – 3rd ed. (“WRAT-3”), the Kaufman Functional Academic Skills Test (“KFAST”), the Mini Mental State Examination (“MMSE”), and the Rey 15-Item Memory Test (“RMT”). S.H. 7: 8.

She also considered prior intelligence testing and scoring completed in 1991 and 2000, analyzed his high school and other school records, interviewed Mr. Mathis for a full day at the Fort Bend County jail, reviewed affidavits, and obtained first-person testimony regarding all three APA/AAMR clinical criteria. Dr. Kessner concluded that Mr. Mathis was mentally retarded. S. H. 7:118.

Dr. Patton explained to the court the features of mild mental retardation and how mildly mentally retarded individuals could live largely independent and functional lives. S.H. 2:94-98. Dr. Patton also reviewed a videotaped interview of Mr. Mathis and Mr. Mathis’ trial testimony and found nothing in what he reviewed that would be inconsistent with a diagnosis of retardation. S.H. 2: 130.

1. Mr. Mathis’ Significant Intellectual Impairment Has Been Confirmed by the Most Reliable IQ Testing.

The first clinical criterion asks whether Mr. Mathis has significantly subaverage intellectual functioning. To be considered mentally retarded, a person’s cognitive abilities must be roughly two standard deviations below the population average, as measured by standardized intelligence tests. *See* DSM-IV at 41; 1992 AAMR Manual at 5. A person with an IQ of 70 to 75 or lower will satisfy this criterion and will fall in the bottom 3% of intellectual functioning among the general population. *See Atkins*, 536 U.S. at 309 n.5 (citing 2 KAPLAN & SADOCK’S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000)).

Mr. Mathis scored a full-scale 64 on the WAIS-III IQ test administered by Dr. Kessner. S.H. 7: 43. The WAIS-III is a collection of several sub-tests that measure verbal intelligence, “performance” intelligence, and a verbal-performance composite that is called the “full scale” IQ. The full scale IQ is the most reliable measurement for mental retardation because it is deemed the best measure of human intelligence. 2002 AAMR Manual at 51, 55-56. The Supreme Court considers the WAIS-III examination to be “the standard instrument in the United States for assessing intellectual functioning.” *Atkins*, 536 U.S. at 309 n.5. In habeas proceedings, the WAIS-III is considered the “gold standard, i.e., the most reliable test to determine [a petitioner’s] IQ.” *See Rivera v. Dretke*, No. B-03-139, 2006 WL 870927, at *24 (S.D. Tex. Mar. 31, 2006).

Prior testing confirms the reliability of Mr. Mathis’ WAIS-III score. Testing conducted in 2000—before the United States Supreme Court decision in *Atkins*—by Texas Department of Criminal Justice (“TDCJ”) psychologist Dr. Gilhousen resulted in a full-scale IQ score of 62. S.H. 7: 78-79. Dr. Gilhousen’s testing results are consistent with Dr. Kessner’s but Gilhousen could not make a definitive diagnosis of mental retardation without further information regarding Mr. Mathis’ adaptive deficits. S.H. 7: 81.

In 1991, at the age of 12, Mr. Mathis obtained a score of 79 on a Wechsler Intelligence Scale for Children, Revised (“WISC-R”). *Id.* at 67. This obtained score is outside the range of the mental retardation intellectual functioning prong and appears to be inconsistent with Mathis’ other IQ scores reflecting scores in the mid-60’s. The obtained score, however, must be adjusted for the Flynn Effect, a scientifically recognized phenomenon in which people are observed to perform better on IQ tests over time as the norm for the test ages. The Flynn Effect, as a general principle, suggests that scores rise approximately .3 per year. S.H. 7:224. This .3 rise, however,

is an average based upon various tests and a wide range of tested subjects. In Mr. Mathis' case, Dr. Kessner was able to be much more specific. Relying on a validity study that was conducted with respect to the WISC-R in 1991 (the same year Mr. Mathis took the test) and cited in the 2002 AAMR Manual, Dr. Kessner testified that his obtained score would actually correspond to a true score of about 70. S.H. 7: 74-76; 221. *See also* 2002 AAMR Manual at 61.

The confidence intervals and margin of error for all three tests indicate that Mr. Mathis' IQ is in the range of mild mental retardation. Based on the statistically derived confidence intervals for the WAIS-III, Dr. Kessner's testing demonstrated a 95% probability that Mr. Mathis' IQ falls between 61 and 69. S.H. 7: 43. Accounting for the standard error of measurement (generally accepted to be +-5 points), Mr. Mathis' 1979 testing places his IQ between 65 and 75 and his prior prison testing reveals an IQ between 57 and 67. S.H. 7: 77-78. Because the range of scores on all three tests overlapped (i.e. the range between 65-67), Dr. Kessner testified that this consistency demonstrated higher confidence in the results of the testing. 7 RR 82.

2. Mr. Mathis has Adaptive Deficits Indicative of Mental Retardation.

The second criterion requires that a person's intellectual impairment be accompanied by adaptive deficits. The requirement that a person be unable to "cope with common life demands" restricts the class of mentally retarded persons to those whose disability subjects them to tangible adaptive limitations. *See* 1992 AAMR Manual at 5, 38; DSM-IV at 42. According to the 2002 AAMR Manual, the significant limitations in adaptive functioning are expressed in "conceptual, social, and practical adaptive [domains]." 2002 AAMR Manual at 73.

The APA's list of skills for conducting the adaptive deficits inquiry is almost identical to that contained in the 1992 AAMR Manual. The DSM-IV definition requires that any mentally retarded person have limitations in at least two of eleven skill areas: communication, self-care,

home living, social/interpersonal skills, use of community resources, self-direction, health, safety, functional academics, leisure, and work. DSM-IV, at 41. The definition of adaptive deficits in the 1992 AAMR Manual is almost identical, requiring limitations in at least two of ten skill areas: communication, functional academics, self-direction, academics, social skills, leisure, self-care, home living, community use, health and safety, and work. 1992 Manual at 1.

The 2002 Manual revised the AAMR framework for conducting the adaptive deficits inquiry. It requires that, for an individual to be considered mentally retarded, his adaptive deficits must be “significant.” 2002 Manual at 1. “Significance” can be established by the presence of limitations in one of the three specified domains – conceptual, social, or practical. *Id.* at 74, 77-78. The 2002 Manual delineates “representative skills” in each of these three adaptive domains, and each of the ten skills from the 1992 Manual fits within at least one 2002 domain. *See* 2002 AAMR Manual, Table 5.2. Often times a mentally retarded individual will have strengths in one aspect of a domain for which he experiences a net limitation. *Id.* at 8.

Mr. Mathis exhibits significant limitations in each of the three 2002 AAMR domains and in at least six of the APA/1992 AAMR skill areas (communication, self-care, social/interpersonal skills, functional academics, leisure, and work). Relying on Mr. Mathis’ school records, affidavits of and interviews with persons who knew Mr. Mathis during the developmental period, interviews with professionals who had observed him, and observations during an interview, Dr. Kessner conducted a comprehensive analysis of Mr. Mathis’ adaptive deficits.

a. **Mr. Mathis’ Conceptual Deficits**

i. **Lifelong poor academic performance**

Mr. Mathis has exhibited consistently poor academic performance throughout his life. In elementary school, Mr. Mathis flunked the first grade, was placed in resource classes in second

or third grade, and flunked the fifth grade but was placed in sixth grade because of prior failures and an apparent concern for his age. Exhibit 3 (Windsor School Records). By the time he got to middle school, Mr. Mathis was placed in special education classes starting in the 8th grade. Exhibit 4 (Middle School records). Nevertheless, he flunked the 9th grade, and dropped out of school mid-way through his second year of 9th grade.

Adults in Mr. Mathis' life realized that his chronic difficulties in school stemmed from an inability to understand and/or to master simple academic skills such as reading, writing, and math. His mother, who was reluctant to recognize her son's disability, was often told that her son's problems were serious, and tried to help her son learn basic academic skills:

Milton had a hard time in school. He failed first grade, and he was in resource classes starting in second or third grade. Milton's reading skills were always bad. All through school his handwriting was terrible. I used to try to teach him, but it was hard for him. If he had to write something that was a couple of paragraphs long, he couldn't do it. Even simple math was hard for him. I don't think Milton could count to a hundred.

Exhibit 5 (Affidavit of Lucille Taylor).

Mr. Mathis mother again reiterated her concerns about her son's academic performance in hearing testimony. She said that in comparison to her other children, Mr. Mathis was "slower in learning simple stuff like math". S.H. 7:46.

Other adults in Mr. Mathis' life similarly observed an inability to perform simple academic tasks that other children, even much younger, mastered quite easily. Mr. Mathis' aunt recalled:

Milton was not as smart as other kids. My daughter was brighter than he was, and she was seven years younger. My daughter could catch on to things a lot faster than Milton could, even simple things, like adding and subtracting and reading and spelling. When they would be doing homework together, my daughter and other kids could get it but Milton couldn't. I would see him try to read sometimes when he was a teenager, and he was like a beginner. He couldn't write or spell simple things that other kids could. He would get very frustrated sometimes, throw his homework on the floor, because he was trying but he just couldn't get it. I don't think there's any way Milton could count to a

hundred, maybe to twenty without error.

Exhibit 6 (Affidavit of Mable Smith).

A family friend of Mr. Mathis' mother recalled similar academic difficulties: Milton had a hard time with his homework. I know that he was held back in the first grade and I think several times after that. I also know that his mother would place him in the next grade, even when he wasn't ready to move on. Milton and his brothers used to be at my house a lot, and I would try to help him with his homework, but I just didn't have the patience. It took him so much longer than it took my boys, and he had trouble reading even simple words. When he would read out loud, he would skip words that he didn't know, and it would all come out not making sense, and he would get frustrated. If you gave Milton a couple of paragraphs to read, he couldn't do it, no way, not even when he was an older teen. I used to try to get him to do better, I told him I would buy him some Jordans that he wanted – tennis shoes that all the kids want – and I would have too. I told him he had to get his grades up, and he really tried. He would show me homework that he did and got back, but I would tell him he had to wait until his report card came out, he had to pass, but he just couldn't do it. My children's daddy, my husband at the time, he had a lot more patience than either me or Lucille, he would sit with him and go over everything and spend the time that Milton needed. It took him a lot longer to learn.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4: 41-42.

ii. Inability to manage or count money

Mr. Mathis' academic deficits affected his ability to manage, and even to count, money.

From the time Milton Mathis was a young teenager, he got jobs outside the home. It was through one of these job experiences that Lucille Taylor, Mr. Mathis' mother, first realized that he was unable to count money:

When Milton was in his teenage years, he got different jobs to try to help out. He worked for a barbeque stand called Jones Barbeque for a guy named Curtis. Curtis is the one who first told me that Milton couldn't count change, and I didn't believe it at first. He said that he had watched him with customers, and he didn't know how much change to give back. Curtis said that he would still let Milton work there, but he couldn't be left alone, and he couldn't deal with the money. So Milton made the sandwiches. After I realized that, I tried to teach him, and he could tell you what a quarter or a dime or a dollar was, but when it came to figuring out how much money to give someone for something, it was hard for him. So I was more careful after that. If he went to get a soda, I counted out the change for him so he wouldn't get beat out of his money. When Milton got paid

at work, he would bring me his check and say it was for me. I would tell him it was for him, and I would go with him to cash the check. He didn't have a checking account, and couldn't manage money. One of us would go with him a lot of times to buy clothes or whatever it was he wanted. If he was going on his own to buy something, I would have him ask how much it was, then I would give him the right amount of money. When I gave him money from his check, I would tell him how much it was, I would tell him "here's twenty dollars," so he would know what he had and wouldn't get beat out of his money.

Exhibit 5 (Affidavit of Lucille Taylor)

Geneva Parker, a close family friend, similarly tried to teach Mr. Mathis simple money skills:

He couldn't count change either. I used to tease him and tell him that he couldn't get an ice cream cone unless he could count out the change, and as soon as you got anything more complicated than two quarters, as soon as you added in dimes and nickels, he couldn't count it out. And he was 14, 15 years old. I tried to teach him too, but he just couldn't understand it.

Exhibit 7 (Affidavit of Geneva Parker); *see also* SH 4:43.

Patience Smith, the mother of Mr. Mathis' daughter Treasure, worked with Mr. Mathis at the Astrodome in Houston. Ms. Smith also noticed serious problems with Mr. Mathis' ability to count and manage money, as required by the job:

When he [Mr. Mathis] went to count money at the end of the night, he would come up short and they told him that this could not continue. He could not understand why he kept on coming up short, he said that he was counting the money. He asked me to stay close to him in order to help him with the money counting.

S.H. 4:82.

iii. ***Receptive and expressive language deficits***

Adults in Mr. Mathis' life uniformly commented on Mr. Mathis' apparent inability to understand direction without repetition. Adults described Mr. Mathis as different from other children in the sense that adults had to repeat directions to him, and most believed that he was not understanding or remembering what had been said. According to Milton Mathis's mother:

Milton was forgetful. If I told him to clean his room or take his lunch, he would tell me later he forgot, and I think a lot of the times he did forget. If I sent him somewhere with a message, he would often forget, so I would sometimes give him notes with my messages. He tried to play football, but I think he got kicked off the team for not following directions.

Exhibit 6 (Affidavit of Lucille Taylor)

Geneva Parker similarly recalled:

When Milton was 14 or 15 years old, his Momma lived a couple of street over from me. His Momma would send him over with a message for me, and he would get inside and start to tell me, but then he would realize he forgot what he was supposed to tell me. So he would go back to get the message again, and come back, and even then sometimes he would forget. His mom got so she would write me a note, and send it to me in his pockets, and then call me to tell me to remind him to give it to me. We would laugh about his forgetfulness.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4: 46.

His aunts recall that he would forget simple things, like the name of the corner store. His maternal Aunt Mable recalled:

Around the house, when Milton had to clean up, he was sloppy. Often if you told him to do something you had to tell him more than one time, you had to repeat and repeat with Milton, and honestly, a lot of the time it seemed like he didn't get it.

Exhibit 6 (Affidavit of Mable Smith).

Mr. Mathis' ex-girlfriend, Patience Smith remembered Mr. Mathis' difficulties when attending a graduation ceremony at the George R. Brown Convention Center in Houston. Despite being instructed how to find Ms. Smith, Mr. Mathis was unable to find his seats. When asked by Ms. Smith why he had not asked an attendant for directions, he replied that he had not thought of it. Moreover, Ms. Smith expressed amazement that he failed to realize that the ticket he held gave the seat location he sought:

The ceremony was about an hour to an hour and a half. He waited outside the whole time I was there. He has a ticket showing where we were supposed to be sitting but he still could not find us. S.H. 4:74.

William Bryant, another friend during adolescence, testified that Mr. Mathis had problems remembering how to saddle a horse, despite repeated instructions from Mr. Bryant:

He would forget to put a blanket under the saddle, so everyday I had to show him how to saddle up, but I mostly did it for him. It was quicker that way. It was not rocket science. It sometimes made me angry when I thought he was just playing about, but then I realized that he was being serious and was having serious problems with it.

S.H. 5: 15-18.

Mr. Mathis also had problems with expressive language skills and came across as stand-offish and soft-spoken as a teenager:

He couldn't talk very well, you'd ask him something, like why we wasn't playing with the other kids, and he shrug and kind of slur the words, I-dunno, and you couldn't get him to talk and express himself. He would stand and fidget, rubbing his fingers back and forth.

Exhibit 7 (Affidavit of Geneva Parker).

b. Mr. Mathis' limitations in practical living skills.

The representative skills in the **practical** domain include activities of daily living (eating, transfer/mobility, toileting, dressing), instrumental activities of daily living (meal preparation, housekeeping, transportation, taking medication, money management, telephone use), occupational skills, and maintaining safe environments. The comparable skills areas in the APA manual are self-care, home living, use of community resources, health, leisure, work, and safety. Mr. Mathis displayed marked deficits in several of these categories.

i. Inappropriate dress

Mr. Mathis dressed oddly, piling on multiple layers of pants, shirts, underwear, and socks. His shirts were often buttoned askew, and the clothes he selected were often wrong for the season. His aunts recall his odd dress:

Milton would wear double clothes. When he would get dressed, he would put on double pants, double shirts, sometimes he would wear three. It would be hot outside, and he would have on long-sleeve shirts. Sometime he would wear double socks. He would go into to get dressed and he would just keep putting clothes on. If you asked him, "Milton, why you got on so many clothes, you think you're going to be cold?" He wouldn't know. It was like he would get dressed and put too many clothes on and he didn't know why. He would put on his shirt backwards, or with button-down shirts he would button them wrong, and if you said to him, "Milton, your shirt is buttoned wrong," he would say it wasn't. He would double-clothes even when he was older, 13, 14 years old, but his mom, Lucille, would get on him and make him take off some of his clothes.

Exhibit 8 (Affidavit of Ruby Faye Mathis)

His Aunt Mable similarly recalled:

As far as dressing and taking care of himself, Milton didn't know when it was hot or when it was cold, when it was winter and when it was summer. You would see him wear a coat when it was hot, or long sleeves, he didn't seem to know.

Exhibit 6 (Affidavit of Mable Smith).

Geneva Parker, a close family friend, described it as follows:

Milton is just different from other kids his age, and other kids could tell he was different and they teased him a lot. They teased him because he looked different. When Milton was a teenager he had this habit of wearing layers of clothes, and so he would have T-shirts and extra shirts and extra shorts sticking out all over the place, and his shirts would be buttoned crooked, so kids teased him about that.

Exhibit 7 (Affidavit of Geneva Parker); S.H. 4:38-39

His mother noted that:

Once he started to dress himself, he would dress with many layers which was odd. He would put lots of layers on regardless of the season.

S.H. 3:53.

His mother also found that as a child, Mr. Mathis would continually wear the same clothes, even after he had soiled them:

He wore the hat and boots everyday – as long as he could wear them. It was difficult to get him not to wear those clothes. When you would get it off him, he would go back and put it on again, even after he had urinated in them.

S.H. 3:48.

George Moseley, a close friend of Mr. Mathis was equally aware of his peculiar dressing habits:

He dressed unusually; he would wear the same flannel jacket everyday. He wore it in the summertime and we used to tease him over it.

S.H. 3:140.

ii. ***Poor hygiene and toileting skills***

Poor hygiene and late toileting skills are also indicators of impaired cognitive skills. Mr. Mathis displayed deficits in both areas. His mother described the following age-inappropriate behavior:

Milton didn't stop sucking his thumb, even when he was in his late teens. As a teenager, I had trouble getting him to bathe properly. He would go into the bathroom and run the water, but he wouldn't really clean himself or use soap. My friend Geneva used to always call him Pissy Little Milton, all his life she called him that, she probably still does.

Exhibit 5 (Affidavit of Lucille Taylor).

Geneva Parker described similar habits:

Milton was a stinky kid, and he was like that well into his teen-age years. I called him Pissy Milton, because that's how he smelled. You could smell it a mile away. Even as an older boy and young teen-ager, he was wearing a couple of pairs of underwear and I think he was doing that because he wasn't always making it to the bathroom.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4:47.

His Aunt Ruby Faye recalled similar delays in toileting and hygiene skills:

It took a long time for Milton to be potty-trained, then even as a boy he would wet himself. Sometimes he'd be running to the bathroom and he was already wet. Then you had to get on him to change and wash up, otherwise he would just walk around wet.

Exhibit 8 (Affidavit of Ruby Faye Mathis).

Mr. Mathis' Aunt Mable described poor hygiene as well:

He also was not good at keeping himself clean. He didn't bathe often enough, and when he did he would half clean himself.

Exhibit 6 (Affidavit of Mable Smith).

Mr. Mathis' high school girlfriend recalls that "he did smell sometimes but I was too embarrassed to say anything". S.H. 4:97. George Moseley also remembered that Mr. Mathis was "dirty. He used to smell of pee when he was 17 years old". S.H. 3:141. "[T]he pee smell didn't stop when he was 14 or 15, it continued until the time I was working with him at Kiddie Land. S.H. 4:15.

iii. *Difficulty getting around*

Difficulty with transportation is an instrumental activity of daily living cited by the AAMR as an adaptive deficit symptomatic of mental retardation. Milton Mathis had trouble getting around, and family members were accustomed to taking special care to help him.

Geneva Parker, who was a close family friend, noticed the care his family frequently took:

When Milton got older, in his teenage years, he had jobs off and on a lot, and his mother would lead him around. It was like she realized he needed the extra help, even though she wouldn't admit it. She would take him to and from work, and she would go with him to cash his check, and she would buy him stuff or count out the money he needed for stuff so he wouldn't get beat out of his money too often. I remember one time Milton coming home from the wrong direction from school. I think he was lost, but it was a long way from school to home, and they moved a lot. Usually his brother, Tyrone, would be with him and make sure than [sic] Milton got home all right. I don't remember Milton ever taking the bus, him [sic] mom led him around.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4: 53.

Aunt Ruby described Milton's difficulty getting around as well:

With most kids, if they went to see a friend or something, they could find their way home. With Milton, someone would usually have to go pick him up because he would get lost. Milton was forgetful too. If I would tell him, for example, the

name of the market near my house, King's Market, he would forget, and you would have to tell him over and over.

Exhibit 8 (Affidavit of Ruby Faye Mathis).

Patience Smith recalls similar problems with Mr. Mathis catching the bus to see her, this happening when Mr. Mathis was 17 years old. Ms. Smith says that Mr. Mathis missed the bus and got lost repeatedly:

The next time I asked him to catch the bus, I was more specific and gave him instructions on asking the driver to drop him off...this time he still didn't make it yet he called me and we worked out that he had go ton the wrong bus on the wrong side of the road.

S.H. 4:72.

As a result of Mr. Mathis' inability to travel by bus, Ms. Smith and Mr. Mathis relied on friends to give them rides.

William Bryant recalls Mr. Mathis' difficulties using public transportation:

...he would come over to mine to catch the bus. He couldn't stick his money in the slot because he tried to put it in the wrong one. He would then just get agitated about it and I would end up doing it for him.

S.H. 5:26.

iv. Occupational Skills

Mr. Mathis also was unable to perform effectively at work, another indication of mental retardation. Patience Smith recalled the difficulty he had in filling out an application form:

...Mathis filled out his part but when it came to the bit related to his past, he asked lots of questions. I got tired of answering his questions and so I filled it out myself. The questions were not hard.

S.H. 4:80.

Mr. Mathis' problems with basic money handling skills led Ms. Smith to constantly accompany Mr. Mathis at work in order to help him. As a result, the managers at the Astrodome

where they worked gave them both a verbal warning. S.H. 4:83. William Bryant also identified problems with Mr. Mathis' work ability. At one point, Mr. Bryant worked at "Kiddie Wonderland" with Mr. Mathis. Mr. Bryant worked with the horses and Mr. Mathis's job was with the automated rides. Mr. Bryant remembers:

On the Ferris Wheel, he had to load people according to weight. He did not always do this and just put people on the ride as they arrived. This caused the ride to not run properly.

S.H. 5:22.

Mr. Bryant testified that "they [the managers of the park] would move him within the park to jobs that were easier". S.H. 5:23. When Mr. Mathis would help Mr. Bryant with the horses, he caused safety concerns:

You were meant to keep the ponies and horses separate otherwise it could become dangerous. At times he would put them together.

S.H. 5:24.

c. Mr. Mathis' Limitations In Social Skills.

The representative skills in the **social** domain include interpersonal skills, responsibility, self-esteem, gullibility, naivete, following rules, obeying laws, and avoiding victimization. AAMR 2002, at 82. The comparable skill area in the APA manual is "social/interpersonal skills."

i. *Gullibility*

Mr. Mathis was often teased for being different, and it was easy for other kids to trick him. For example, Mr. Milton would be dared into forbidden behavior by other kids, then get into trouble for it:

[Kids] used to tell him, for example, I bet you can't get that object (it could be anything: a ball or flowerpot) out of the neighbor's yard. And he would go, and he would come back all happy, and then the kids would tell on him for taking

stuff that didn't belong to him.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4:51.

Extensive witness testimony from those close to Mr. Mathis supports the notion that he was unusually gullible. George Moseley remembers:

I did not think Milton was a smart guy because of the things we used to get Milton to do. We would get him to do stuff we wouldn't. For example, if we were trying to steal a dog, and I had seen the dog was aggressive, I would send him to the back and he would steal the dog whatever. I feel bad now for using him like that.

S.H. 3:130.

Mr. Mathis was also easily led by others. As mentioned, the other kids made him do things they did not themselves want to do. When George Moseley and Mr. Mathis were stealing dogs in partnership, Mr. Mathis only received about \$20 from the \$150-200 total amount received for a pit bull. S.H. 3:131, 132. He did not take issue with getting paid so little, despite performing a more dominant role in the theft: Mr. Mathis being sent "into the backyards and steal the dogs". S.H. 2:155. Mr. Mathis was also frequently "set up" by friends. For example, during an armed robbery Mr. Mathis was given the gun because the others knew that the person with the gun could get in more trouble. S.H. 3:166-168.

ii. Other children knew Milton Mathis was different.

Both as a teenager, and a child, Mr. Mathis was ostracized at times for being slow, for not understanding concepts and games, and for being "dumb." Mr. Mathis was acutely sensitive to this kind of criticism. Geneva Parker recalled Mr. Mathis' inability to join in activities with children, and his sensitivity to being teased:

He was also a loner -- like he would watch other kids playing a game or something, but he wouldn't join it, it was like he couldn't understand the way the game was played. Kids teased Milton for being dumb or stupid, and that really upset Milton badly. I caught one of my boys calling him dumb, and I told my boy

not to ever call him that again.

When Milton was a teen-ager, he seemed more behind than ever. He played child-like games and seemed kid-like. He was still sucking his thumb, I don't think he ever outgrew that. He was fascinated with puppies and stuff my boys weren't interested in when they were teens. He couldn't talk very well, you'd ask him something, like why we wasn't playing with the other kids, and he shrug and kind of slur the words, I-dunno, and you couldn't get him to talk and express himself. He would stand and fidget, rubbing his fingers back and forth.

Exhibit 7 (Affidavit of Geneva Parker).

Mr. Mathis' Aunt Ruby Faye remembered similar incidents:

You could see that Milton was slow because it would take a long time for him to put things together. Whatever he was doing, it would take longer. Like if he had blocks in front of him, it would take longer for him to put them together. Some of the kids would laugh at him because he was slow, and that would just make him freeze up. I would tell the other kids to leave him alone.

Exhibit 8 (Affidavit of Ruby Faye).

William Bryant, who first met Mr. Mathis between 10 and 15, says that, "Everybody used to treat Milton as an outsider. They used to say that he was retarded..." S.H. 5:27.

iii. *Mr. Mathis was Perceived by Adults as Retarded*

It was clear to many of the adults who were in regular contact with Mr. Mathis that he was not normal and that he was likely retarded. Several remember discussing the problem, worrying that Mr. Mathis would not be capable of taking care of himself as an adult, and pointing out the problems to Mr. Mathis' mother, who had difficulty admitting the severity of the problem:

I remember talking to my friends about Milton and saying, "that boy is retarded." But I wouldn't say that around him or his brothers. They would take up for him. And Milton would get teased for being dumb or being retarded, and that would make him cry. He would cry because he wanted to be smart like the other kids, and I would tell him he was smart, just like all the other children.

...

Milton was different than the rest of his brothers, and different from most kids. He was very slow. I would talk about it with my sisters sometimes. We used to

say to ourselves that this is a boy who will need help throughout his life, that he might not be able to live on his own.

Exhibit 5 (Affidavit of Lucille Taylor).

Mr. Mathis' Aunt Mable also tried to address the problem:

I used to tell Lucille that she needed to get him checked out, and she would say that there was nothing wrong with him. To avoid an argument, I would just leave it alone. I talked about it with my sisters, we thought he had a problem, that he needed help. But it's hard to see if it's your own kids. Me and my sisters thought Milton was retarded.

Exhibit 6 (Affidavit of Mable Smith).

Geneva Parker tried to encourage Mr. Mathis' mother to get apply for governmental aid:

Milton Mathis is a boy who always had a hard time. He has had problems all of his life, but his problems seemed to get worse in his teen-age years. I used to tell his mother, Lucille, that she could get a check from the government for that boy, because he was really slow. His Momma was in denial, sometimes she would laugh, or sometimes she would get mad and tell me that there was nothing wrong with her son.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4:52.

Lucille Taylor, Mr. Mathis' mother, remembers people pointing out the problem, encouraging her to seek help, but not being able to listen:

It was hard for me to see, but people who were around Milton a lot, like my mother, and my sisters, and my close friend Geneva Parker, used to tell me all the time that Milton had a problem, that they thought he was retarded, that he was too slow, that I should be getting disability benefits for that boy. My mom used to say, "I think that boy is retarded, I think there's something wrong with him," but I really didn't listen. As a mother, it was hard for me to see it. I used to get mad, and say that there was nothing wrong with my son.

Exhibit 5 (Affidavit of Lucille Taylor).

3. Mr. Mathis's Mental Retardation Was Evident Prior to Age 18.

The third clinical criterion requires that the condition have manifested itself during the person's developmental period, defined as prior to age 18. Mr. Mathis has demonstrated that his significant limitations manifested themselves before the age of eighteen.

PRAYER FOR RELIEF

WHEREFORE, Mr. Mathis prays that this Court:

1. Issue a writ of habeas corpus to have him brought before it, to the end that he may be relieved of his unconstitutional sentence of death;
2. Grant such other relief as law and justice require.

Respectfully submitted,

By: s/ Morris H Moon

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2007, a copy of this Petition For Writ of Habeas Corpus and accompanying Exhibits were served on the Respondent via U.S. Mail at the following address:

Ms. Laura Berins
Office of the Attorney General
Post Conviction Litigation Division
300 West 15th Street, St. 800
Austin, Texas 78711

s/ Morris H. Moon

Morris H. Moon

VERIFICATION

I, Morris H. Moon state that to the best of my knowledge and belief, the facts sets for in this Petition are true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2007.

s/ Morris H. Moon

Morris H. Moon