

**IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE**

GARY SUTTON	)	
	)	No. E1997-00196-SC-DDT-DD
Petitioner,	)	
	)	Trial Court. No.: C-28405
v.	)	
	)	
STATE OF TENNESSEE,	)	
	)	CAPITAL CASE
Respondent.	)	Execution: December 3, 2026

**MOTION TO STAY GARY SUTTON’S EXECUTION PENDING
INTELLECTUAL DISABILITY LITIGATION**

Gary Wayne Sutton, through counsel and pursuant to Tennessee Supreme Court Rule 12(4)(e), moves this Court to stay his execution set for December 3, 2026. Mr. Sutton is actively litigating a colorable claim of intellectual disability which presents a likelihood of success and, if proven by a preponderance of the evidence, renders him ineligible to be executed. Because there is insufficient time to fully resolve Mr. Sutton’s claim prior to December 3, only a stay of execution can ensure Mr. Sutton’s rights to open courts, heightened due process of law, and freedom from cruel and unusual punishment as guaranteed to him by the Tennessee and United States Constitutions. U.S. Const. art. IV § 2; U.S. Const. amends. V, VIII, XIV; Tenn. Const. art. I §§ 8, 16, 17.

As explained in detail below, Mr. Sutton’s claim, timely filed pursuant to the intellectual disability statute as amended in 2021, is supported with a diagnosis of intellectual disability by two highly

qualified experts in the field of intellectual disability. On the other hand, although the State disputes Mr. Sutton’s claim, its expert fails to reach an opinion as to whether Mr. Sutton has an intellectual disability. The Circuit Court of Blount County¹ found that Mr. Sutton stated a colorable claim of intellectual disability and that his claim has not been previously determined. The previously determined issue is before this Court on the State’s Tennessee Rule of Appellate Procedure 10 (“Rule 10”) application. But Mr. Sutton has a likelihood of success on that issue because there was never a hearing on intellectual disability, as the ID court correctly found. As such, Mr. Sutton is entitled to present proof of his intellectual disability for the first time at a merits hearing and an appeal as of right, if necessary.

As of yet, no Tennessee court has examined on the merits a contested claim under the intellectual disability law as revised in 2021,² a revision which updated the definition of intellectual disability to

¹ For clarity, going forward “ID court” will be used to reference the court hearing Mr. Sutton’s pending petition that he is ineligible to be executed due to an intellectual disability. “Trial court” will be used to reference the original court where Mr. Sutton was tried and convicted of the capital crime.

² Both Pervis Payne and Michael Sample brought claims based on the revised statute, but neither was contested. The State conceded Pervis Payne has an intellectual disability. *Payne v. State*, 721 S.W.3d 204, 209 (Tenn. 2025). Michael Sample also received a merits determination via a settlement. Stacy Jacobson, *Inmate Convicted in 1981 Memphis Murder Moved off Death Row*, WREG Investigators (May 4, 2023), [Inmate convicted in 1981 Memphis murder moved off death row](#) (last visited Sept. 21, 2026).

comport with the medical field’s current understanding of intellectual disability.³ Mr. Sutton’s hearing will involve testimony from experts opining on his intelligence quotient; intelligence tests and scoring; and detailed information through records, lay witnesses, and experts regarding Mr. Sutton’s multiple adaptive deficits throughout his developmental period.

Presumably, either Mr. Sutton or the State will appeal the ID court’s findings. The proof is expected to be lengthy, and intellectual disability law is highly complex. There is insufficient time for the ID court to hear evidence and issue a reasoned decision and for the appellate courts to conduct adequate review. As such, Mr. Sutton has an untenable timeline to litigate his intellectual disability claim where, based on the expected proof at the hearing, there is a likelihood of success on the merits.

As this Court has made abundantly clear, “Tennessee has no business executing people with intellectual disabilities.” *Payne v. State*, 493 S.W.3d 478, 486 (Tenn. 2016) (quoting *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012)). In response to this Court’s call, the Tennessee General

³ During Senate Floor Session on S.B. 1349, Republican Senator Todd Gardenhire advised the Senate that “because the U.S. Supreme Court, and the Tennessee Supreme Court also agree, that the Tennessee law must rely on updated medical standards as provided by manuals like DSM-5 and AAIDD-11 and not outdated and inaccurate measures such as a single IQ score, the requirement for a specific I.Q. score has been removed from this legislation.” Hearing on S.B. 1349, Senate Floor Discussion, at 1:33:33–:58, https://tnga.granicus.com/player/clip/24758?view_id=610&redirect=true (last visited Sept. 17, 2026).

Assembly finally amended the intellectual disability statute in 2021 to allow people like Mr. Sutton to litigate colorable claims of intellectual disability for the first time. It is therefore imperative that this Court vacate Mr. Sutton’s December 3 execution date so that he has adequate time to establish his ineligibility to be executed and not be killed by the State in violation of state and federal constitutions.

STANDARD FOR GRANTING A STAY

This Court authorizes stays of execution pending resolution of collateral litigation in state court if the person under death sentence “can prove a likelihood of success on the merits of that [collateral] claim.” Tenn. Sup. Ct. R. 12(4)(E). This standard does not require a “significant possibility of success[,]” but merely a likelihood of success.⁴ A likelihood of success on the merits requires “more than a mere possibility of success.” *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp. II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)). However, “it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and

⁴ This Court amended the rule, effective July 1, 2015, after rejecting a proposal to change the language to “a significant possibility of success on the merits” in collateral litigation. The Tennessee Bar Association (TBA) opposed imposing the burden of demonstrating a “significant” possibility as a “potential deviation of the long established ‘heightened due process standards involved in capital cases,’” citing *State v. Smith*, 357 S.W.3d 322, 346 (Tenn. 2011). Comment of the TBA, filed January 20, 2015, at 2. The TBA urged the Court to continue applying heightened due process standards by exercising “discretion on a case by case basis regarding stays sought pending collateral litigation so as to allow the record to fully develop.” *Id.* at 3.

doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics*, 119 F.3d at 402 (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

Moreover, this Court’s standard, premised on principles of constitutional adjudication and procedural fairness, coexists with the application of heightened due process principles and the heightened reliability required in capital cases. *See Smith v. State*, 357 S.W.3d 322, 346 (Tenn. 2011); *Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) (“[W]e must be mindful that a death sentence is final, irrevocable, and qualitatively different than any other form or level of punishment.”) (internal quotations and citations omitted). As such, this Court has consistently required that constitutional challenges be considered with a fully developed record. *See Smith*, 357 S.W.3d at 346 (quoting *State v. Cazes*, 875 S.W.2d 263, 260 (Tenn. 1994)) (internal quotations omitted).

PROCEDURAL HISTORY

On May 10, 2022, Mr. Sutton filed an intellectual disability petition pursuant to the then recently amended Tennessee Code Annotated Section 39–13–203 as well as the Tennessee and the United States Constitutions.⁵ That same day, the ID court ruled Mr. Sutton’s petition stated a colorable claim and ordered the District Attorney (“DA”), then representing the State, to answer whether the claim had been previously determined. On July 11, 2022, the DA filed its response arguing the issue

⁵ Mr. Sutton filed a motion to supplement that petition with Dr. Mark Cunningham’s report on May 5, 2023. Appx. 1, Motion to Supplement ID Petition.

had been previously adjudicated on its merits. Mr. Sutton rebutted that argument in a timely reply.

The Tennessee Attorney General and Reporter (“AG”) filed a notice of appearance based on amendments made to the Post-Conviction Procedure Act that came into effect on April 28, 2023. The parties litigated the AG’s representation of the State in this matter, and the ID court denied Mr. Sutton’s request to disqualify the AG on August 14, 2025. With the ID Court’s approval, Mr. Sutton filed Tennessee Rule of Appellate Procedure 9 application (“Rule 9”) to appeal this issue to the Court of Criminal Appeals on November 20, 2025.

On September 30, 2025, this Court scheduled Mr. Sutton’s execution for December 3, 2026. From the setting of his execution date, Mr. Sutton has diligently pursued having the ID court hear his intellectual disability claim. On December 1, 2025, the AG moved to dismiss Mr. Sutton’s intellectual disability claim asserting it had been previously determined. Mr. Sutton responded on December 22, 2025. During a hearing on the motion to dismiss on January 8, 2026, trial counsel John Goergen testified that he and co-counsel F.D. Gibson knew they could not raise an intellectual disability claim because the bright line rule that existed at that time required an individual to have an I.Q. score of 70 or less. Mr. Sutton did not qualify under that bright line rule. Instead, Mr. Goergen testified that trial counsel attempted to have Mr. Sutton’s I.Q. tested while intoxicated to establish a *mens rea* or diminished capacity defense to first degree premeditated murder. The trial court denied that motion.

The ID court denied the AG’s motion to dismiss, finding trial counsel had abandoned attempts to establish Mr. Sutton’s ineligibility to be executed due to an I.Q. score of 76. Instead, based on the records and trial counsel’s testimony, the ID court held trial counsel pursued a defense theory that Mr. Sutton lacked the requisite *mens rea* at the time of the offense—not that he was intellectually disabled. *See* Appx. 2, January 16, 2026 ID Court Order Denying State’s Motion to Dismiss. As such, it concluded Mr. Sutton did not have a full and fair hearing on his ineligibility to be executed due to his intellectual disability. *Id.*⁶

The AG applied to the Court of Criminal Appeals for extraordinary review of the previously determined issue pursuant to Tennessee Rule of Appellate Procedure 10 (“Rule 10”) on January 26, 2026. The AG requested expedited review and summary dismissal of Mr. Sutton’s intellectual disability claim. On Thursday January 29, 2026, the Court of Criminal Appeals ordered Mr. Sutton to provide an expedited answer no later than the following Monday, February 2, 2026, giving Mr. Sutton just four days to respond. Under exceptionally difficult conditions,⁷ Mr. Sutton timely responded. Aside from the four-day response time imposed on Mr. Sutton, nothing else about the State’s application was expedited.

⁶ Contrary to the AG’s claim, the only full and fair pre-trial hearing that was heard by the trial court was whether psychological evaluation could be readministered while Mr. Sutton was intoxicated, not whether he was intellectually disabled.

⁷ The response was drafted during the immediate aftermath of the historic ice storm that left part of the legal team displaced and without power.

While both the Rule 9 and Rule 10 applications were pending, the intellectual disability hearing was set for May 26, 2026.⁸ On May 19, 2026, a day after the AG filed two twenty-plus year-old opinions as supplemental authority,⁹ the Court of Criminal Appeals stayed the proceedings without a decision on the Rule 10 itself. The next day, it also ordered a stay *sua sponte* based on the pending Rule 9. Mr. Sutton immediately filed a motion to lift the stay on May 20, which the AG opposed on the same day. The appellate court denied the motion. Additional hearing dates—June 9–11 and June 23–25—were also canceled as Mr. Sutton continued to await the appellate court’s action on the pending Rule 10 or Rule 9 applications.

The Court of Criminal Appeals denied Mr. Sutton’s Rule 9 motion and lifted the stay on July 27, 2026. On August 4, after more than six months, the Court of Criminal Appeals denied the State’s Rule 10 motion and lifted the stay of the ID court proceedings. *See Sutton v. State*, No. E2026-00107-CCA-R10-PD, slip op. at 10 (Tenn. Crim. App. Aug. 4, 2026). Mr. Sutton’s intellectual disability merits hearing would have been concluded over a month prior to the denial of the State’s Rule 10 application if it were not for the stay of proceedings.

⁸ Nine days were originally scheduled for the trifurcated hearing due to the extent of the proof Mr. Sutton anticipates offering.

⁹ The two opinions the State supplemented, *Holton v. State*, 201 S.W.3d 626 (Tenn. 2006) and *Reid v. State*, No. M2005-02398-SC-S10-PD (Tenn. Nov. 29, 2005), pertained to verification requirements for post-conviction petitions brought under the Tennessee Post-Conviction Procedure Act. Neither had any relevance to Mr. Sutton’s intellectual disability claim or any issue the AG raised below.

On the same day as the Rule 10 denial, Mr. Sutton contacted the ID court and the State to schedule the merits hearing. Based on the availability of the ID court and counsel, the evidentiary hearing was scheduled for October 5–9, 2026 with two provisional dates scheduled for October 29th and November 5th.

On August 14, 2026, pursuant to Rule 10, the State sought extraordinary and expedited review by this Court on the previously determined issue and requested a summary dismissal of Mr. Sutton’s intellectual disability claim. Mr. Sutton opposed the State’s Rule 10, on August 19, 2026, and moved this Court to affirm the ID court’s well-reasoned order and the appellate court’s determination that the State’s arguments do not meet the extraordinary review standard.

In preparation for the originally scheduled ID hearing, on May 18, 2026, Mr. Sutton filed a motion in limine to exclude part of the State’s expert, Dr. Thomas Schacht’s report.¹⁰ Appx. at 3, Petitioner’s Motion in Limine to Exclude Portions of Dr. Thomas Schacht’s Testimony and Report Concerning Certain Opinions. The State opposed the motion *in limine* on September 3, 2016. Appx. 4, State of Tennessee’s Response Opposing Sutton’s Motion in Limine. Mr. Sutton then filed a timely reply. Appx. 5, Petitioner’s Reply to State’s Response To Petitioner’s Motion *in Limine*. That motion is currently pending before the ID court. On September 14, 2026, this Court granted the State’s Rule 10 application

¹⁰ Mr. Sutton argues three portions of Dr. Schacht’s report should be excluded because those portions are outside Dr. Schacht’s expertise, irrelevant, and outside the medical community’s diagnostic and scientific framework.

and stayed the October evidentiary hearing. *Sutton v. State*, No. E2026-00107-SC-R10-PD, slip op. at 1 (Tenn. Sept. 14, 2026).

ARGUMENT

This Court first held the Tennessee Constitution prohibited the execution of intellectually disabled persons in 2001. *See Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001). The United States Supreme Court concluded the same thing one year later in *Atkins v. Virginia*, 536 U.S. 304 (2002). Both *Van Tran* and *Atkins* progeny have upheld that constitutional right in the twenty-plus years since. As this Court knows, intellectual functioning is a broad and complex construct. AAIDD-12, at 25. As such, the AAIDD and the DSM must inform the court’s analysis on intellectual disability. *See Moore v. Texas*, 586 U.S. 133, 135 (2019) (“*Moore II*”) (utilizing the DSM-5 to explain what a court must determine “to make a finding of intellectual disability”) (quoting DSM-5, at 37–38); *Coleman v. State*, 341 S.W.3d 221, 244 (Tenn. 2011) (quoting the “current definition of intellectual disability as adopted by AAIDD”).

Medical diagnosis includes clinical judgement and multiple sources of the individual’s intellectual and adaptive functioning. AAIDD-12, at 28–29. “[P]ersons with intellectual disabilities have a wide spectrum of disabilities and abilities.” *Coleman*, 341 S.W.3d at 231. This “heterogeneous population rang[es] from persons who are totally dependent to persons who are nearly independent.” *Id.* The complexity of this heterogenous group makes it almost impossible for a court to

determine if the legal definition of intellectual disability has been met without expert testimony. *See id.* at 241.¹¹

I. Mr. Sutton’s intellectual disability claim has a likelihood of success.

There is significant evidence that Mr. Sutton is ineligible for execution due to his intellectual disability. To succeed on a claim of intellectual disability, Mr. Sutton must show by preponderance of evidence that 1) he has “significantly subaverage intellectual functioning” and 2) “deficits in adaptive behavior” that 3) manifested before he turned eighteen. Tenn. Code Ann. § 39–13–203(a); *Coleman*, 341 S.W.3d at 233 (citing Tenn. Code Ann. § 39–13–203(c)).¹² His burden

¹¹ A full-scale I.Q. (“FSIQ”) score obtained from an individualized administration of psychometrically robust comprehensive measure of intelligence is one part of the diagnosis. AAIDD-12, at 28–29. Understanding I.Q. scores requires a base understanding in psychometric principles and statistics; therefore, they are not interpretable by lay persons. *See Coleman*, 341 S.W.3d at 241. Since an I.Q. score is imprecise, *Hall v. Florida*, 572 U.S. 701, 723, (2014), both the DSM-5-TR and the AAIDD-12 stipulate that it is essential for the clinician to consider all sources of measurement error when interpreting test results, *see* AAIDD-12, at 35–36; DSM-5-TR, at 41; *Coleman*, 341 S.W.3d at 242. When there are multiple I.Q. scores, like there are here, the analysis becomes even more complicated. *See Hall v. Florida*, 572 U.S. 701, 714 (2014). Given the opportunity, Mr. Sutton has the experts to explain these details to the ID court.

¹² As a preliminary matter, Mr. Sutton does not provide arguments on the likelihood of success of the previously determined matter currently before this Court in the Rule 10 appeal, as this Court has specifically ordered it does not require any additional briefing on the issue. *Sutton v. State*, No. E2026-00107-SC-R10-PD, slip op. at 1 (Tenn. Sept. 14, 2026). Instead, he asks this Court to take judicial notice of his Answer to the

of proof is to show these facts by a preponderance of the evidence. The preponderance standard “simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.” *In re Winship*, 397 U.S. 358, 371–372 (1970); *see also In re S.J.*, 387 S.W.3d 576, 587 (Tenn. Ct. App. 2012) (explaining preponderance of the evidence standard requires the truth of the facts presented be “merely more probable than not” compared to the clear and convincing standard that requires a “high probability.”). In fact, Mr. Sutton has already prevailed in making a colorable claim showing on his ID claim.

Accordingly, to obtain the stay of execution, Mr. Sutton must show more than a mere possibility that he is intellectually disabled, meaning he must raise “questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics*, 119 F.3d at 402 (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). The records in the case, including detailed opinions of two experts who found Mr. Sutton has an intellectual disability and the State’s expert’s report which does not opine on whether Mr. Sutton has an intellectual disability, certainly establishes this likelihood. Appx. 6, Dr. Cunningham’s Report, at 60; Appx. 7, Dr. Stinson’s Report, at 9.

State’s Rule 10 application in that same case and incorporates the arguments therein, filed on August 19, 2026. The arguments within his Rule 10 Answer also satisfy the likelihood of success standard. If this Court disagrees, Mr. Sutton is ready to submit additional arguments related to the likelihood of success of the previously determined issue.

A. Mr. Sutton has significantly subaverage intellectual functioning.

Two experts, both board certified in forensic psychology and one board certified in clinical psychology, have found that Mr. Sutton has significantly subaverage intellectual functioning. Their opinions and clinical judgments are based on Mr. Sutton's corrected I.Q. scores, his school records, and neuropsychological testing. Accompanying their findings of significantly subaverage intellectual functioning, Mr. Sutton's experts explain in detail how they analyzed Mr. Sutton's test performances within the medical field's acceptable standards, including application of the Flynn Effect ("FE") and standard error of measurement ("SEM").¹³ *Coleman*, 341 S.W.3d at 233 ("[E]xperts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields."); *Moore v. Texas*, 581 U.S. 1, 14 (2017) ("*Moore I*") (relying on the "most recent . . . versions of the leading diagnostic manuals").¹⁴

¹³ Individuals with an intellectual disability "have scores approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points)." DSM-5 TR, at 38; *see also Coleman*, 341 S.W.3d at 245. This range indicates where an individual's intelligence may land 95% of the time.

¹⁴ *Moore I* relied upon the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") and the American Association of Intellectual and Developmental Disorders' 11th version ("AAIDD-11"). The most current diagnostic manuals today are the DSM-5 Text Revision ("DSM-5 TR") and an AAIDD 12th edition ("AAIDD-12").

“Both the APA¹⁵ and the AAIDD emphasize that IQ test scores cannot stand alone’ and ‘must be considered alongside other data that inform a clinician’s assessment both of intellectual functioning and the other diagnostic criteria.” *Hamm v. Smith*, 608 U.S. 278, 296 (2026) (Sotomayor, J. concurring) (internal citations omitted). In other words, for prong one, the analysis starts with the I.Q. test but does not end there.

Mr. Sutton’s prior I.Q. scores were derived from an assortment of instruments, some of which were narrowband screening instruments or group administered tests. “Invalid scores may result from the use of brief intelligence screening tests or group tests.” DSM-5-TR, at 38. Due to that concern and the gravity of determining intellectual disability in a capital case, the medical standard practice is to use individually administered, well-normed, comprehensive instruments, like the Weschler scales, that produce a full-scale I.Q. score (“FSIQ”). *See id.*; AAIDD-11, at 41; *Howell v. State*, 2011 WL 2420378, *16–17 (Tenn. Crim. App. 2011) (affirming the lower court’s minimal weight given to a score produced by a screening test administered in group setting and another score produced by a narrow band test because neither provided a FSIQ score).

Mr. Sutton has three FSIQ scores produced from two different versions of the Weschler scales—the WAIS-R administered in 1993 and 1994 and the WAIS-III administered in 2003. However, intellectual functioning “cannot be ascertained based only on raw I.Q. test scores.” *Coleman*, 341 S.W.3d at 248. Using clinical judgment, a psychologist will

¹⁵ APA, the American Psychiatric Association, produces the DSM versions.

consider when the test was administered and any inherent errors in those tests, including norm obsolescence, SEM, and test-specific identified concerns.

Norm obsolescence, also known as the Flynn Effect (“FE”),¹⁶ “refers to the observed phenomenon that I.Q. test scores tend to increase over time.” *Coleman*, 341 S.W.3d at 242 n.55 (citing AAIDD-11, at 37). “A test's standard error of measurement reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.” *Moore I*, 581 U.S. at 14. Some tests also have specific issues professionals are required to consider. *See* AAIDD-11, at 38. Both WAIS-R and WAIS-III, for example, are known to over-inflate lower end scores. Appx. 6, at 14–15. As such, it is customary practice to reduce the WAIS-R score by approximately 4–5 points and the WAIS-III by 2.34 points. *Id.* at 13–15; Appx. 7, at 7. These types of adjustments may be considered by the courts because they are standard in the field. *See Coleman*, 341 S.W.3d at 242. A “score of 65–75 (70 ± 5)” indicates the individual has significantly subaverage intellectual functioning. DSM-5-TR, at 38.

¹⁶ To correct the FE, an expert must know when the specific test was first normed and when it was administered. The difference between those two dates is then multiplied by .3 to determine the number of points required to correct the FSIQ score. *See* Appx. 6, at 20. It is standard practice in the field to reduce the FSIQ by the FE when an older version of a test was administered long after it was originally normed. *See* AAIDD, 2021; DSM-5 TR, at 38); *Coleman*, 341 S.W.3d at 242 (acknowledging experts may utilize practices relevant in their field when evaluating I.Q. scores).

The two experts, mutually independent and at different times, analyzed and corrected Mr. Sutton’s FSIQ scores using the FE and SEM. See Appx. 6, at 1215; Appx. 7, at 4.¹⁷ Dr. Cunningham’s corrected scores based on the best practices in his field and the medical diagnostic framework are as follows:¹⁸

Year	Test	FSIQ	Corrected FSIQ	95% Confidence Interval
1993	WAIS-R	76	67	62–72
1994	WAIS-R	77	67	62–72
2003	WAIS-III	79	74	70–79

Appx. 6, at 12–15.

To help the ID court interpret Mr. Sutton’s multiple scores, Dr. Cunningham provided a composite score. “Indeed, a prominent psychology expert whom [the United States Supreme] Court cited in *Hall* suggests that the composite-score method is appropriate for estimating the “true” IQ of someone “facing the death penalty.” *Hamm*, 608 U.S. at 322 (Alito, J., dissenting) (citing W. Schneider, *Can’t Decide Which IQ Is Best? Make a Composite Score* (Jan. 13, 2012)

¹⁷ Dr. Stinson does not apply FE to the 1993 test in his report because the actual test was not identified; however, he will agree with Dr. Cunningham on direct examination that the WAIS-R was most likely the test given in 1993. A full record, inclusive of all evidence and arguments expected in his evidentiary hearing, is required to determine Mr. Sutton’s ineligibility to be executed.

¹⁸ Dr. Cunningham corrected for both the FE as well as lower range inflation. Appx. 6, at 12–15.

[\(https://assessingpsyche.wordpress.com/2013/12/29/cant-decide-which-iq-is-best-make-a-composite-score/\)](https://assessingpsyche.wordpress.com/2013/12/29/cant-decide-which-iq-is-best-make-a-composite-score/).

Utilizing Dr. Schneider's statistical formula, Mr. Sutton's composite score from the three FSIQ scores is 70.62 with a 95% confidence interval of 65.41–75.83. Appx. 6, at 15–16. Because Mr. Sutton's composite score range and his historical "score range[s] fall below 70," courts "have to move on to consider [his] adaptive functioning." *Moore I*, 581 U.S. at 14.

As the medical field and courts require, Mr. Sutton's experts did not move on to prong two solely based on the FSIQ scores. Instead, they took a holistic approach in evaluating Mr. Sutton's significant subaverage intellectual functioning. *See Hamm*, 608 U.S. at 293 (Sotomayor, J., concurring) (acknowledging "the holistic method of reviewing multiple IQ scores is consistent with th[e United State Supreme] Court's precedents [and] the medical community's diagnostic framework"). Mr. Sutton's school records align with his FSIQ scores and further support the existence of him meeting prong one. *See* Appx. 8, Gary Sutton's Sevier County School Records.

His school grades reflect a child struggling to learn. In second grade, he received mostly Ds, and in third through fifth grades, he received mostly Cs and only one A in physical education during fifth grade. *Id.* at 2. He repeated sixth grade. *Id.* During his first attempt at sixth grade, no grades were documented for Mr. Sutton's efforts. *Id.* In his second attempt, he received three Fs, two D minuses, and one C. *Id.*

Importantly, Mr. Sutton took a Stanford Achievement Test in September 1977, during his second attempt at sixth grade. *Id.* at 9. During this time Mr. Sutton was twelve years old, and his aged peer group was in seventh grade. The areas of testing included the following:

- Vocabulary
- Reading comprehension
- Word study skills
- Math computation
- Math application
- Listening comprehension
- Total reading
- Total Auditory

Id. In every area, Mr. Sutton was defined as below average and functioning at the equivalent of a child in first, second, or third grade. *Id.* The only exception to this was an average classification with an equivalent to fourth grade for “math application.” *Id.* Since Mr. Sutton should have been in seventh grade at twelve years old, these results show a significant substandard intellectual functioning equivalent to a child who would be somewhere between six and eight years old.

On this same test, Mr. Sutton’s documented percentile ranking in 1977 was within the first percentile for reading comprehension; the second percentile for vocabulary, math computation, and total reading; and the third percentile for word study skills, listening comprehension, and total auditory.¹⁹ Appx. 8, at 9. The highest percentile Mr. Sutton

¹⁹ The percentile ranking compared him to eleven-year-olds who had just started sixth grade. If his scores were compared to his actual peer group—twelve-year-olds who were just starting seventh grade—Mr. Sutton’s percentile rankings would have been even lower. Appx. 6, at 39.

reached was the fourth for math application. In other words, in all tested areas, 95% of the eleven-year-old children beginning sixth grade were functioning higher than Mr. Sutton when he was twelve years old.

Even though Mr. Sutton did not achieve passable grades in his second year of sixth grade, he was promoted to eighth grade. Mr. Sutton effectively dropped out of school at that point with 133 days absent and straight Fs. Appx. 8, at 1.

When Mr. Sutton was evaluated by Dr. Eric Engum after he was arrested on the capital charge, Dr. Engum also reviewed the school records. Dr. Engum classified Mr. Sutton's performance as "essentially in the retarded range." See Appx. 9, Dr. Engum's Report, at 3.²⁰ Mr. Sutton's "deficits, magnified by the absence of any further academic or special remediation, persist to the present." *Id.* at 4.

"Neuropsychological assessment reflects a clinically and scientifically sound methodology for identifying and measuring deficits in intellectual functioning." Appx. 6, at 27. Dr. Engum's neuropsychological assessments in 1995 showed Mr. Sutton has significant deficits in expressive language including an inability to produce opposites for simple words like "first, much, follow, never, over, soon, below, and fear." *Id.* at 28 (internal quotations omitted). Additionally, Mr. Sutton's verbal memory quotient was only in the fifth percentile. *Id.* He also had gross retardation in thought processes. *Id.* The results from Dr. Engum's assessment were the most recent to Mr. Sutton

²⁰ Dr. Engum was retained by trial counsel to testify at sentencing on potential mitigators. Appx. 9, at 1–2.

reaching developmental maturity and therefore a more accurate reflection of his intellectual functioning prior to eighteen than the assessments administered later. *Id.* at 29. These results, when considered with his I.Q. scores and school records, indicate Mr. Sutton has significantly subaverage intellectual functioning.

Smith is instructive on whether Mr. Sutton has a likelihood of proving prong one of his intellectual disability claim. *See Smith*, 357 S.W.3d at 322. This Court reversed the post-conviction court’s ruling that Smith did not prove prong one, which at that time required an I.Q. of 70 or below. *Id.* at 354–55. Smith presented evidence of the following FSIQ scores:

Year	Test	FSIQ	Corrected FSIQ	95% Confidence Interval
1975	WISC	80	71.6	68.6–74.6
1989	WAIS-R	75	72	69–75
2001	WAIS-III	77	Not reported	Not reported
2002	WAIS-III	65	Not reported	Not reported

Id. at 250–53. Because the post-conviction court in *Smith* did not consider the SEM, this Court reversed for a new intellectual disability hearing. *Id.* at 354.

Smith’s FSIQ scores are consistent with Mr. Sutton’s. Both have high seventy raw scores, and both fall below and above 70 when FE and SEM are applied. Like Mr. Sutton, Smith also had very low academic tests. *Keen*, 398 S.W.3d at 606 (citing *Smith*, 357 S.W.3d at 250–53)).

Since this Court reversed the lower court’s refusal to find prong one in *Smith*, it is more than a mere possibility that the ID court in this case will find Mr. Sutton has proven prong one after hearing his full evidence at an evidentiary hearing. This is particularly true because, unlike Smith, Mr. Sutton does not have to meet the bright line rule of an I.Q. of 70 or below.

Given the expert opinions on test scores, school performance, and neuropsychological assessments, Mr. Sutton raised questions going to the merits serious and substantial enough to make them a fair ground for litigation; therefore, he has more than demonstrated a likelihood of success on proving prong one.

B. Mr. Sutton has significant adaptive deficits in the conceptual domain and adaptive deficits in the social and practical domains.

Mr. Sutton must also prove by a preponderance of the evidence deficits in one of the three adaptive functioning domains—conceptual,²¹ social,²² and practical²³—to prevail. *See Moore II*, 586 U.S. at 136. Both

²¹ The conceptual domain includes academic functioning in reading, language, and writing, as well as money, time and number concepts, and self-direction. Appx. 6 at 41.

²² The social domain includes interpersonal skills, social responsibility, self-esteem, gullibility, naivete, following rules, avoiding victimization, and social problem-solving. Appx. 6 at 46.

²³ The practical domain includes daily living functioning including personal care, occupational skills, use of money, safety, health care, and transportation without support. Appx. 6 at 48.

Drs. Cunningham and Stinson base their conclusions regarding Mr. Sutton’s adaptive deficits on school records and his prior standardized assessments. Dr. Cunningham also interviewed Mr. Sutton and several informed observers who knew Mr. Sutton during his developmental period. *See* DSM-5-TR, at 42; AAIDD 11th Ed., at 47–48. Both experts conclude Mr. Sutton has adaptive deficits in all three domains, although primarily in the conceptual domain.

Mr. Sutton’s experts followed the intellectual disability field’s standards and protocols by specifically focusing on Mr. Sutton’s deficits rather than strengths, and by only evaluating his functioning in his community rather than the controlled prison environment. *See* Appx. 6, at 32–34; *Moore II*, 586 U.S. at 136 (citing *Moore I*, 581 U.S. at 15 and DSM-5 at 38). Courts have “repeatedly relied upon expert analysis of adaptive behavior or functioning predicated upon definitions advanced within the relevant medical and psychological community and authoritative texts . . . in determining whether the second prong has been satisfied.” *Coleman*, 341 S.W.3d at 233.

Mr. Sutton has *significant* deficits, although he is only required to show “deficits” under Tennessee Code Annotated Section 39–13–203(a)(2), in the conceptual domain. He demonstrates this through standardized assessments, school records, and knowledgeable informers’ observations.

The standardized assessments given to Mr. Sutton after he was incarcerated provide insight into his functioning in the conceptual domain as they highlight Mr. Sutton’s continued deficits in language, reading, and writing. *See* Appx. 6 at 37. In 1993, when Mr. Sutton was

twenty-eight years old, the Wide Range Achievement Test administered by the Department of Corrections indicated his word reading was equivalent to grade 6.5 (an eleven- or twelve-year-old child), spelling was equivalent to fourth grade (a nine- or ten-year-old child), and math computation was equivalent to fifth grade (a ten- or eleven-year-old child). *Id.* This shows little learning by Mr. Sutton in the sixteen years since he took the Stanford Achievement test at twelve years old. Ability to learn is one of the skills assessed in the conceptual domain.

Both assessments administered by Drs. Eric Engum in 1995 and Pamela Auble in 2004 show Mr. Sutton's functioning in the impaired range when asked to name common objects. For example, he was unable to identify a flipper, compass, or escalator. Appx. 9, at 7; Appx. 10, Dr. Auble's Report, at 11. The Peabody Individual Achievement Test Revised, administered in 1995, showed Mr. Sutton's lowest functioning at a second-grade level for written language and his highest at a 5.5-grade level for reading comprehension. Sutton's lowest functioning at a second grade level for written language and his highest at a grade 5.5 for reading comprehension. Appx. 6, at 38.

As a result of his assessment, Dr. Engum described Mr. Sutton as having substantial impairments in verbal and language processing. Appx. 9, at 14. On the four most sensitive measures of brain dysfunction, Mr. Sutton scored "clearly within the brain damaged range in each instance." *Id.* at 6.

These conceptual domain deficits shown through standardized assessments are mirrored in his school records at a much younger age. When Mr. Sutton was twelve years old and in sixth grade because he

failed to advance to seventh grade, his school records show significant underperformance for his aged peer group. Appx. 8, at 9; Appx. 6 at 39; *see also Van Tran v. Colson*, 764 F.3d 594, 616 (6th Cir. 2014) (finding Van Tran had deficits in academic functioning as one reason he proved prong two). His best score was in the tenth percentile, an equivalent to fourth grade in total reading, but his worst score was in reading comprehension at only the second percentile, an equivalent to the third grade. In other words, ninety percent of the eleven-year-old sixth grade students read better, and ninety-eight percent of those same students understood their reading better than Mr. Sutton did when Mr. Sutton was a year older than them. The standardized assessment results and school records illustrate Mr. Sutton’s deficits in the conceptual domain.

The individuals interviewed by Dr. Cunningham support the standardized assessment results indicating Mr. Sutton had deficits in written language, communication, and reading. Appx. 6, at 41–45; *see also Smith*, 357 S.W.3d at 353 (noting Smith “suffer[ed] from pervasive language and communication difficulties” as part of the reason the lower court found he proved prong two). None of Mr. Sutton’s family observed him reading. Appx. 6, at 41–42. Instead of reading the words, he would point at pictures and ask clarifying questions about what he thought he saw. *Id.* at 42. Mr. Sutton was slower to process and understand information and often required others to break down an explanation. *Id.* at 41. When he was old enough to go to the bathroom by himself when in a public location, he did not understand the male and female signs on the

respective doors. *Id.* Afraid to use the wrong bathroom, he waited until another man went into the men’s room. *Id.*

As a child, Mr. Sutton could only perform tasks that required him to remember one or two instructions at a time. *Id.* Anything more complex would require him to check back in with the adult who provided the instruction to understand what he was supposed to do next. *Id.* Mr. Sutton also could not pronounce words like “adventure” or “understand.” *Id.* at 43. When attempting to read homework, he had to go very slowly and ask for assistance with the bigger words he did not understand. *Id.* It was unclear to his observers whether he comprehended what he was able to read. *Id.* at 42–43.

Not only did Mr. Sutton have deficits in reading and comprehension as a child, but also in his writing. He spelled phonetically, wrote run-on sentences, and was unable to use proper punctuation that would have been age appropriate. *Id.* at 42.

When he was a teenager applying for jobs or a driver’s license, others would have to fill out those application forms. *Id.* at 43. During this time frame he was unable to understand how trees produced maple syrup even though it was repeatedly explained to him. *Id.* at 41. Based on Mr. Sutton’s standardized assessments and his knowledgeable observers, it is more likely than not that he has shown *significant* deficits in the conceptual domain.

He also has deficits in the social domain as shown by his inability to make friends, his gullibility and naivete, and his inability to carry on social conversations. Appx. 6, at 46–47. Mr. Sutton was described as a

follower and manipulated by his maternal uncle, who was fourteen years older. Appx. 6 at 47. His uncle pulled Mr. Sutton out of school and influenced him to drink alcohol. *Id.* Mr. Sutton was susceptible to his uncle's attention due to his deficits in the social domain.

Finally, his deficits in the practical domain are shown through informant's observations that he did not take care of his health, could not use a map, and could not independently handle his finances. *Id.* at 48–57. Mr. Sutton never used a toothbrush until he was twelve years old. *Id.* at 48. By age nineteen, his upper teeth rotted and were replaced with dentures due to neglect.²⁴ *Id.* Mr. Sutton never had a bank account and required support from others to fulfill all his financial obligations. *Id.* at 52. Mr. Sutton failed the driving test on his first try and the second time he had to have the test read out loud to him. *Id.* at 53. If he drove anywhere new, he required navigation support from someone else in the car because he could not understand road maps. *Id.* at 52.

Since he grew up in poverty, he used his manual labor in exchange for money or objects at an early age. None of the tasks he performed required him to solve problems or follow complex directions. Appx. 6, at 54–55. For example, he provided basic supportive assistance on his

²⁴ Although Mr. Sutton could find no statistical data on the occurrence of dentures during childhood, the National Institute of Dental and Craniofacial Research gathered national data from 1999 to 2004. It separated people into age groups. Only 2.7% of people aged 35–49 had no remaining teeth. National Institute of Dental and Craniofacial Research, *Tooth Loss in Adults (aged 20–64)*, <https://www.nidcr.nih.gov/research/data-statistics/tooth-loss/adults> (last visited Sept. 18, 2026). Mr. Sutton was within that age group at the time of the study and was wearing full dentures.

grandfather's farm and later cut firewood and hauled scrap metal with his brother. *Id.* When he began working for people outside the family, it was again in manual labor jobs on constructions sites and in a lumber yard. *Id.* at 54–55.

The experts concluded that, based on Mr. Sutton's prior assessments and knowledgeable informers' observations, he had adaptive deficits in all three domains, although most pronounced in the conceptual domain. Mr. Sutton has shown a likelihood of success in proving that more likely than not he has adaptive deficits in at least one domain.

C. Mr. Sutton's intellectual disability manifested prior to his eighteenth birthday.

Mr. Sutton's school records, which include the Stanford Assessment, his I.Q. scores, and his knowledgeable informers all place his subaverage intelligence and adaptive deficits manifesting prior to his eighteenth birthday. The Stanford Assessment indicates Mr. Sutton was performing as a six- and eight-year-old child when he was 12.twelve. Mr. Sutton's composite I.Q. score of 70.62 with a 95% confidence interval of 65–75 indicates his intellectual functioning was within the intellectual disability range prior to his eighteenth birthday. *See* Appx. 6, at 15. His knowledgeable observers provide examples of his conceptual, social, and practical deficits as a child. Mr. Sutton required familial support to function adequately prior to his eighteenth birthday. Thus, it is likely that Mr. Sutton will be able to prove by a preponderance of evidence that he meets prong three.

Mr. Sutton has a wealth of evidence to show he has 1) significantly subaverage intellectual functioning and 2) adaptive deficits that 3) manifested prior to his eighteenth birthday. *See* Tenn. Code Ann. § 39–13–203(a). Two highly qualified experts opine on the complexity of intellectual disability assessments and, following current medical diagnostic standards, conclude Mr. Sutton meets the statutory definition. Appx. 6, at 60; Appx. 7, at 9. The State has not presented an expert that concludes otherwise. *See* Appx. 4, at 17. Without any evidence to the contrary, Mr. Sutton’s intellectual disability is more probable than its nonexistence. *See Van Tran*, 764 F.3d at 607 (holding the Tennessee trial court erred in refusing to accept the defense experts’ conclusions when the “State presented no testimony to contradict the conclusions of Van Tran’s experts, all of whom agreed that he suffered significant deficits in functional academics.”).

Mr. Sutton meets the likelihood of success standard under Rule 12(4)(e) and this Court should stay his execution to ensure the State does not execute a man ineligible for execution.

II. Without a stay of execution, Mr. Sutton’s access to courts, due process, and Eighth Amendment rights under both the Tennessee and United States Constitutions are violated because the two and a half months remaining before his pending execution is not enough time to litigate a claim that has a likelihood of success and would make Mr. Sutton ineligible for execution.

This Court should stay Mr. Sutton’s execution not only because he has a likelihood of succeeding on the merits, but also because—through no fault of his own—he cannot create a full record of his intellectual

disability claim before his pending execution date. “The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges . . . be considered in light of a fully developed record addressing the specific merits of the challenge.” *State v. West*, No. M1987–00130–SC–DPE–DD, slip op. at 3 (Tenn. Nov. 29, 2010). Under imminent threat of execution, Mr. Sutton has never litigated the merits of his ineligibility to be executed even though that claim has a likelihood of success. Without an evidentiary hearing, he is unable to develop a full record, which will include more evidence than is documented in the two expert reports. Mr. Sutton’s right to adjudicate his substantive constitutional claims on the merits outweighs the State’s interests in executing a death sentence. *See State v. Workman*, 41 S.W.3d 100, 103 (Tenn. 2001).

Mr. Sutton no longer has a scheduled hearing to make a robust record before his execution date—two and a half months away. Even if this Court lifts the stay prior to his execution date, he has no ability to present all his evidence, obtain a well-reasoned ruling, and either challenge or support that ruling on direct appeal prior to his scheduled execution. His inability to have his day in court on a colorable claim that has a likelihood of success is a violation of his access to open courts, heightened due process, and Eighth Amendment rights of both the Tennessee and United States Constitutions. U.S. Const. art. IV § 2; U.S. Const. amends. V, VIII, XIV; Tenn. Const. art. I §§ 8, 16, 17; *see also Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) (“The right to sue and defend in the courts is the alternative of force. In an organized

society it is the right conservative of all other rights, and lies at the foundation of orderly government.”).

To educate the ID court on how the decades-long binding precedent and the medical diagnostic framework apply to Mr. Sutton is an extensive undertaking and requires a several-day hearing with technical testimony from two different highly qualified experts. There are lengthy reports to detail as well as testimony from lay witnesses that knew Mr. Sutton when he was a child. The evidence includes complex expert testimony to explain how the medical diagnostic framework applies to Mr. Sutton’s history of multiple I.Q. scores, school records, neuropsychological assessments, and knowledgeable informant observations. The Tennessee and United States Constitutions require Mr. Sutton be able to present this evidence—which is likely to succeed—for the first time before his execution date.

Mr. Sutton has a state and federal constitutional right to access open courts. *Case v. Wilmington Trust, N.A.*, 703 S.W.3d 274, 286–87 (Tenn. 2024) (citing Tenn. Const. art. I § 17); *see also Christopher v. Harbury*, 536 U.S. 403 (2002) (acknowledging denial of access to courts claims where “systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time”). “This Court has found that the open courts provision provides a citizen ‘the right to have all questions touching his life, liberty or property heard, passed upon, and determined by the regular and constitutional courts of the State,’ and that ‘such right is inalienable.’” *Case*, 703 S.W.3d at 287 (quoting *Louisville & Nashville R.R. Co. v. Bate*, 80 Tenn. 573, 577 (1883)).

Mr. Sutton has not yet had his day in court on a question that touches his life. Yet, the balance of equities tips in Mr. Sutton's favor. See *Ramirez v. Collier*, 595 U.S. 411, 421 (2022) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). He has not “delayed unnecessarily in bringing the claim.” *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004) (acknowledging a “stay of execution is an equitable remedy”). None of the Rule 10 delays were Mr. Sutton's doing. He complied with the appellate court's four-day response turnaround even in the face of an unprecedented ice storm that left his counsel displaced and without power. He answered the State's second Rule 10 to this Court within five days without waiting for this Court's order to do so.

The appellate court took over six months to dispose the AG's expedited Rule 10 application by holding it did not meet the extraordinary review standard. See *Sutton v. State*, No. E2026-00107-CCA-R10-PD, slip op. at 10 (Tenn. Crim. App. Aug. 4, 2026). This Court has now granted that same Rule 10 and again stayed the proceedings to determine the merits of the previously determined issue. Even though the facts and law support the likelihood that this Court will affirm the ID court's well-reasoned opinion that Mr. Sutton has not previously adjudicated his intellectual disability claim, there will not be enough time to adjudicate that claim prior to the scheduled execution.

The wealth of evidence Mr. Sutton has accumulated for a full and fair adjudication on the merits will never be heard unless this Court vacates the existing execution date. As such, Mr. Sutton is at risk of being executed without having his day in court on a claim that has a likelihood of success and would make him ineligible for the death sentence.

Mr. Sutton’s state and federal due process rights also require a full and fair hearing on his inability to be executed due to his intellectual disability. U.S. Const. amend. XIV, § 1 (providing no State shall “deprive any person of life, liberty, or property, without due process of law”). “Due process, at its most basic level, means fundamental fairness and substantial justice.” *State v. White*, 362 S.W.3d 559, 566 (Tenn. 2012). This Court has “recognized that due process requires a defendant have ‘an opportunity to be heard at a meaningful time and in a meaningful manner.’” *Howell v. State*, 151 S.W.3d 450, 461 (Tenn. 2004) (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)). As a capital defendant, Mr. Sutton is entitled to heightened due process to ensure that Tennessee does not execute a person with intellectual disability. *See Smith*, 357 S.W.3d at 346; *Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) (“[W]e must be mindful that a death sentence is final, irrevocable, and qualitatively different than any other form or level of punishment.”) (internal quotations and citations omitted).²⁵ Mr. Sutton’s claim has a likelihood of success, and he has a right to present his evidence to that fact before the ID court. But without a stay of execution, he will not have the opportunity “to be heard at a meaningful time and in a meaningful

²⁵ Notably, in its Rule 10 application to this Court, the State remarks that, while it has a right to appeal following Mr. Sutton’s intellectual disability hearing, it describes this right as “practically dubious,” given the “short window between an October merits hearing and Sutton’s early December execution date.” *Sutton v. State*, R. 10 Appl., No. E2026-00107-SC-R10-PD, filed Aug. 14, 2026. With the current stay of proceedings in place, that right is now almost nonexistent.

manner” and will be executed without ever adjudicating his viable intellectual disability claim.

Finally, the Eighth Amendment prohibits cruel and unusual punishments. Both the Tennessee and United States Supreme Courts prohibit executing an intellectually disabled person as doing so would violate the Eighth Amendment. *See Moore I*, 581 U.S. at 12; *Van Tran*, 66 S.W.3d at 806. Without a stay and the appropriate timeline for Mr. Sutton’s intellectual disability claim to be fully decided, the State could execute a man on December 3, 2026 without the matter of his intellectual disability ever being adjudicated.

Therefore, to safeguard and uphold Mr. Sutton’s constitutional rights and because the equities are in his favor, this Court should stay the execution and allow the parties the appropriate time to litigate Mr. Sutton’s colorable intellectual disability claim that has a likelihood of success.

CONCLUSION

Mr. Sutton’s claim that the State is prohibited from executing him due to his intellectual disability has more than a mere possibility of being successful under the preponderance of evidence standard. *Coleman*, 341 S.W.3d at 234 (quoting *Atkins*, 536 U.S. at 321). This Court should stay Mr. Sutton’s execution pursuant to this Court’s Rule 12(4)(E), so that he can for the first time fully litigate his inability to be executed due to his intellectual disability as the Tennessee and United States constitutions require. U.S. Const. art. IV § 2; U.S. Const. amends. V, VIII, XIV; Tenn. Const. art. I §§ 8, 16, 17. To do otherwise violates Mr. Sutton’s open courts, heightened due process, and Eighth Amendment rights.

Respectfully submitted,

/s/ Cynthia Anderson

Cynthia Anderson, BPR #043323

Randall J. Spivey, BPR #021704

Johnna Henry, BPR #042111

Assistant Post-Conviction Defenders

Office of the Post-Conviction Defender

P.O. Box 281949

Nashville, TN 37228

(615) 741-9331 / (615) 741-9430 (fax)

AndersonC@tnpcdo.net

SpiveyR@tnpcdo.net

HenryJ@tnpcdo.net

Counsel for Gary Wayne Sutton

CERTIFICATE OF COMPLIANCE

I hereby certify that service of this pleading was rendered through the electronic filing system to Nicholas W. Spangler, Special Counsel, and Ronald L. Coleman, Assistant Attorney General, Office of the Attorney General and Reporter, on September 21, 2026.

/s/ Cynthia Anderson

Cynthia Anderson

CERTIFICATE OF COMPLIANCE WITH TENN. R. APP. P. 20B

Pursuant to Tennessee Rule of Appellate Procedure 20B, the undersigned counsel hereby certifies that this document complies with the formatting and privacy protection guidelines mandated by the Rule. All personal identifiers and confidential information—including but not limited to Social Security numbers, financial account numbers, names of minor children, dates of birth, and protected health information—have been omitted or redacted from this public filing. No unredacted version under seal is required because this document contained no material confidential information requiring redaction.

/s/ Cynthia Anderson

Cynthia Anderson

APPENDICES

1. Motion to supplement ID petition (05/05/23)
2. ID court Order Denying Motion to Dismiss ID Petition (01/16/26)
3. Petitioner's Motion *In Limine* to Exclude Portions of Dr. Thomas Schacht's Testimony and Report Concerning Certain Opinions (05/18/26)
4. State of Tennessee's Response Opposing Sutton's Motion in Limine (09/03/26)
5. Reply to Response Opposing Sutton's Motion in Limine (09/15/26)
6. Report of Dr. Mark Cunningham, Ph.D., ABPP
7. Report of Dr. Bob Stinson, Psy.D., J.D., LICDC-CS, ABPP
8. Gary Sutton's Sevier County School Records
9. Report of Dr. Eric Engum, Ph.D., J.D.
10. Report of Dr. Pam Auble, Ph.D., ABPP-CN