

VOLUME FOUR OF ELEVEN
[PP. 1501-2000]

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
(Capital PCR: 2005-CP-18-1368)
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2014-000387

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JUN 13 2014

S.C. Supreme Court

Kenneth Simmons, #5066,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

APPENDIX

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STATE'S EXHIBIT #18b (CD 2 OF 2) [VIDEO DEPOSITION]**

JOHN MICHAEL FOXWORTH - DIRECT/MR. THEOS

1 SUPERVISE THEM THROUGH THAT; YOU KNOW, GETTING THE
2 INFORMATION AND PROCESSING THE INFORMATION. AND
3 THEN ALSO I WAS RESPONSIBLE FOR DEVELOPING THE
4 CURRICULUM WHICH ADDRESSED THOSE ISSUES THAT A
5 PSYCHIATRIST HAS TO LEARN IN ORDER TO BE A
6 COMPETENT GENERAL PSYCHIATRIST.

7 Q. NOW, FOLLOWING YOUR EMPLOYMENT AT THE HALL
8 INSTITUTE, WILL YOU TELL US WHAT YOU DID?

9 A. IN 1979 I WAS RECRUITED AND MOVED TO RICHLAND
10 MEMORIAL HOSPITAL WHICH AT THE TIME WAS THE LARGEST
11 GENERAL HOSPITAL IN THE STATE OF SOUTH CAROLINA.
12 AND IT IS A GENERAL MEDICAL FACILITY WHICH COVERS
13 EVERYTHING FROM PEDIATRICS, OBSTETRICS, SURGERY,
14 TRAUMA, EMERGENCY MEDICINE. AND I MOVED THERE TO
15 EXPAND MY WORK IN MEDICAL EDUCATION. SO INSTEAD OF
16 SUPERVISING A ONE RESIDENCY PROGRAM IN GENERAL
17 PSYCHIATRY, I MOVED ON TO A POSITION WHERE I WAS
18 ABLE TO BEGIN TO SUPERVISE RESIDENCY PROGRAMS IN
19 OTHER FIELDS AS WELL. AND I HAD DOUBLE BOARDED
20 MYSELF SO THAT I WAS CERTIFIED IN FAMILY PRACTICE
21 AND PSYCHIATRY IN ORDER TO FACILITATE THAT GETTING
22 INTO A BROADER RESPONSIBILITY OF MEDICAL
23 EDUCATION. AND I WAS ABLE TO BECOME INVOLVED AND
24 WORK WITH THE UNIVERSITY OF SOUTH CAROLINA AS IT
25 DEVELOPED A NEW MEDICAL SCHOOL. AND ALSO AT THAT

JOHN MICHAEL FOXWORTH - DIRECT/MR. THEOS

1 TIME WE BEGAN TO DEVELOP PROGRAMS WITH THE MEDICAL
2 UNIVERSITY OF SOUTH CAROLINA WHERE THEY ACTUALLY
3 WROTE A STUDENTS TO COLUMBIA FOR THEIR PSYCHIATRIC
4 TRAINING. AND I REMAINED THERE FROM 1979 UNTIL THE
5 END OF 1984. AND IN JANUARY OF 1980 -- WELL,
6 ACTUALLY A LITTLE BIT BEFORE JANUARY OF 1985 I
7 STARTED SEEING SOME PATIENTS IN CHARLESTON. SO I
8 HAD MOVED MY FAMILY TO CHARLESTON. SO I HAD MOVED
9 MY FAMILY TO CHARLESTON I THINK IN DECEMBER OF
10 '83. IN THE YEAR OF '84 I COMMUTED BETWEEN
11 CHARLESTON AND COLUMBIA.

12 Q. NOW, WHILE YOU WERE AT RICHLAND MEMORIAL HOSPITAL,
13 DID YOU CONTINUE TO CONDUCT PSYCHIATRIC
14 EVALUATIONS?

15 A. YES, SIR.

16 Q. NOW WHEN YOU MOVED YOUR PRACTICE, OR WHEN YOU
17 RELOCATED TO CHARLESTON, TELL US ABOUT YOUR WORK AT
18 THAT POINT.

19 A. WHEN I CAME TO CHARLESTON, I OPENED A PRACTICE OF
20 GENERAL PSYCHIATRY. AND AT THAT TIME IN JANUARY OF
21 1985 I ALSO ACCEPTED A POSITION AS MEDICAL DIRECTOR
22 OF THE DRUG AND ALCOHOL TREATMENT PROGRAM AT THE
23 BAKER HOSPITAL WHICH IS NOW KNOWN AS ROPER NORTH
24 HOSPITAL. AND I CONTINUED AS MEDICAL DIRECTOR OF
25 THAT TREATMENT PROGRAM FOR DRUG AND ALCOHOL

1 PATIENTS UNTIL I THINK THE FALL OF 1990. IN 1986 I
2 ALSO BECAME AT THE SAME TIME I WAS STILL AT THE
3 BAKER HOSPITAL, MEDICAL DIRECTOR OF SOUTHERN PINES
4 HOSPITAL WHICH IS A PSYCHIATRIC HOSPITAL RIGHT NEXT
5 DOOR TO BAKER HOSPITAL. AND I WAS WITH THE
6 SOUTHERN PINES HOSPITAL THROUGH -- WELL, THE
7 SOUTHERN PINES HOSPITAL WAS ACQUIRED BY CHARTER
8 MEDICAL CORPORATION AND BECAME CHARTER HOSPITAL OF
9 CHARLESTON. AND I REMAINED AS MEDICAL DIRECTOR
10 THERE UNTIL I THINK THE END OF FEBRUARY, 1995. AND
11 AFTER THAT I BEGAN FOCUSING EXCLUSIVELY ON MY
12 PRIVATE PRACTICE. THROUGHOUT ALL THE YEARS I'VE
13 BEEN IN CHARLESTON, I MAINTAIN A PRIVATE OFFICE; MY
14 RURAL HOSPITAL WHERE I'M IN A POSITION OF BEING A
15 CONTRACTOR WHERE I PROVIDED SERVICES AND CAME TO
16 THE HOSPITAL SO MANY HOURS EVERY DAY. BUT THEN I
17 ALSO HAD AN OFFICE AT ALL TIMES DURING THAT PERIOD.

18 Q. SO FROM 1984 THROUGH THE PRESENT DATE, HAVE YOU
19 CONTINUED TO CONDUCT BOTH GENERAL PSYCHIATRIC
20 EVALUATIONS AND FORENSIC PSYCHIATRIC EVALUATIONS?

21 A. YES, I HAVE. IN FACT IN RECENT YEARS SINCE I LEFT
22 THE POSITION AT THE CHARTER HOSPITAL IN 1995 AND
23 RECENT YEARS, I'VE KIND OF INTENSIFIED MY EFFORT IN
24 THIS FIELD BECAUSE MY INTEREST -- OF COURSE MY
25 CAREER HAS BEEN ONE -- YOU MIGHT HAVE NOTED THAT MY

JOHN MICHAEL FOXWORTH - DIRECT/MR. THEOS

1 CAREER HAS BEEN ONE I'VE KIND OF -- I DID MEDICAL
2 EDUCATION FOR ABOUT TEN YEARS AND DID A VARIETY OF
3 THINGS AND WROTE GRANTS AND DEVELOPED PROGRAMS AND
4 THINGS LIKE THAT. I WORKED FOR A WHILE WITH THE
5 STATE E.M.S. PROGRAM IN DEVELOPING THE ORIGINAL
6 EMERGENCY MEDICINE SERVICES PROGRAMS IN SOUTH
7 CAROLINA WITH THE DEPARTMENT OF DHEC. AND THEN
8 I'VE WORKED AT -- LIKE I SAY A MILITARY HOSPITAL.
9 I'VE WORKED AT A COUNTY HOSPITAL. I'VE WORKED IN A
10 STATE FACILITY, AT HALL INSTITUTE. I'VE WORKED IN
11 PRIVATELY OWNED FACILITIES. I'VE WORKED IN
12 NON-PROFIT FOUNDATIONAL FACILITIES. AND I'VE DONE
13 THIS KIND OF PURPOSELY AS MY CAREER HAS PROGRESSED;
14 YOU KNOW, FOUND OTHER AREAS THAT I WANTED TO PURSUE
15 BECAUSE I WAS INTERESTED IN LEARNING NEW AREAS IN
16 MY FIELD.

17 Q. DURING THAT TIME -- AND I THINK YOU TESTIFIED
18 EARLIER -- BUT DURING THAT TIME, WERE YOU EVER
19 QUALIFIED AS AN EXPERT IN THE FIELD OF GENERAL AND
20 FORENSIC PSYCHIATRY THROUGH YOUR ENTIRE CAREER?

21 A. THROUGH MY ENTIRE CAREER WHICH IS SINCE I ENTERED
22 THIS IN '69; THIS IS THIRTY YEARS THIS YEAR. IN
23 THE PAST THIRTY YEARS I HAVE BEEN QUALIFIED
24 NUMEROUS TIMES. I CAN'T EVEN BEGIN TO TELL YOU HOW
25 MANY BECAUSE IT BEGINS, LIKE I SAY, WAY BACK

JOHN MICHAEL FOXWORTH - CROSS/MR. THEOS

1 THROUGH THE ARMY AND THROUGH MY YEARS IN COLUMBIA,
2 IN MEDICAL EDUCATION, AND THEN HERE IN CHARLESTON
3 IN THE LOW COUNTY AREA.

4 MR. THEOS: YOUR HONOR, AT THIS TIME
5 WE WOULD OFFER DR. FOXWORTH AS AN EXPERT IN THE
6 FIELDS OF GENERAL PSYCHIATRY AND FORENSIC
7 PSYCHIATRY.

8 THE COURT: WOULD YOU LIKE TO
9 CROSS-EXAMINE HIM, SIR?

10 MR. BAILEY: YES, SIR, YOUR HONOR.

11 THE COURT: YOU MAY DO SO.

12 EXAMINATION

13 BY MR. BAILEY:

14 Q. DR. FOXWORTH, WHAT'S THE DIFFERENCE IN GENERAL
15 PSYCHIATRY AND FORENSIC PSYCHIATRY?

16 A. WELL, YOU MIGHT SAY THAT FORENSIC PSYCHIATRY IS
17 ACTUALLY A PART OF GENERAL PSYCHIATRY. I MEAN,
18 WHEN YOU STUDY GENERAL PSYCHIATRY, YOU STUDY ALL OF
19 THE AREAS WHICH I HAVE MENTIONED. YOU STUDY CHILD
20 PSYCHIATRY, ADOLESCENT PSYCHIATRY, ADULT
21 PSYCHIATRY, GERIATRICS PSYCHIATRY. YOU STUDY
22 FORENSIC PSYCHIATRY. YOU STUDY ADDICTION
23 PSYCHIATRY. IT'S REALLY -- IF YOU PICK UP A
24 TEXTBOOK OF GENERAL PSYCHIATRY, YOU'RE GOING TO
25 FIND SOMEWHERE IN THERE A CHAPTER ON FORENSIC

JOHN MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 PSYCHIATRY.

2 Q. SORT OF LIKE ANOTHER GENERAL PRACTITIONER IN THE
3 MEDICAL FIELD?

4 A. A GENERAL PSYCHIATRIST WOULD BE LIKE A GENERAL
5 PRACTITIONER PROBABLY IN THE MEDICAL FIELD. YOU
6 COULD ROUGHLY SAY THAT.

7 Q. ALL RIGHT. WHAT'S FORENSIC PSYCHIATRY?

8 A. WELL, A FORENSIC PSYCHIATRIST WHICH IS A TERM WHICH
9 HAS REALLY COME INTO BEING ONLY IN RESEARCH YEARS
10 THAT I'VE BECOME FAMILIAR WITH BECAUSE WHAT'S
11 HAPPENED IS THERE ARE PHYSICIANS IN THE FIELD OF
12 PSYCHIATRY WHO HAVE BEGUN TO SPECIALIZE AND DO
13 FORENSIC WORK EXCLUSIVELY. IN OTHER WORDS, THERE
14 ARE PHYSICIANS OUT THERE NOW WHO DON'T HAVE A
15 PRACTICE OF, SAY, HOSPITAL OR OFFICE PSYCHIATRY.
16 WHAT THEY DO IN THEIR FIELD OF PSYCHIATRY IS DO
17 EXCLUSIVELY EVALUATION WORK WHETHER IT BE PRIVATELY
18 OR INDEPENDENTLY OR SOMETIMES AS A PART OF A SYSTEM
19 LIKE THE DEPARTMENT OF MENTAL HEALTH, YOU KNOW,
20 WHERE FREQUENTLY A STATE HOSPITAL WILL HAVE A
21 FORENSIC UNIT. AND THE DOCTORS THERE, THEIR ROLES
22 ARE MUCH MORE TO EVALUATE THOSE PATIENTS IN TERMS
23 OF LEGAL ISSUES THAN IT IS TO EVALUATE THEM IN
24 TERMS OF TREATING THEM FOR THEIR ILLNESS.

25 Q. ALL RIGHT, SIR. SO YOU'RE GEARED AS A GENERAL

JOHN MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 PSYCHIATRIST TOWARDS TREATMENT AND A FORENSIC
2 PSYCHIATRIST IS GEARED TOWARDS THE RELATIONSHIP
3 BETWEEN THE PERSON'S MENTAL STATE AND LEGAL
4 ISSUES. WOULD THAT BE AN ACCURATE SUMMARY?

5 A. WELL, IT'S VERY HARD TO SEPARATE THEM BECAUSE
6 ANYONE WHO DOES GENERAL PSYCHIATRY FOR A CAREER IS
7 GOING TO WIND UP DOING A LOT OF FORENSIC
8 PSYCHIATRY. THAT'S JUST THE WAY OF IT BASICALLY.
9 AND I THINK THE PEOPLE WHO CALL THEMSELVES FORENSIC
10 PSYCHIATRISTS ARE BASICALLY PEOPLE WHO PRETTY MUCH
11 LIMIT THEMSELVES TO THAT WHICH IS SORT OF THE PATH
12 I'M TAKING BASICALLY BECAUSE I BASICALLY HAVE
13 BEEN. YOU KNOW, GETTING AWAY FROM THE DATA THEY
14 PRACTICE OF OFFICE AND HOSPITAL PSYCHIATRY BECAUSE
15 I ACTUALLY CLOSED MY OFFICE PRACTICE LAST YEAR IN
16 PREPARATION TO BE ABLE TO DO THIS AS MY PRIMARY
17 FOCUS.

18 Q. ALL RIGHT, SIR. ARE YOU A BOARD CERTIFIED FORENSIC
19 PSYCHOLOGIST?

20 A. I'M CERTIFIED IN GENERAL PSYCHIATRY. I'M NOT EVEN
21 SURE. I THINK I MAY BE. I'M NOT SURE ABOUT THE --
22 I GET THINGS IN THE MAIL ALL THE TIME OFFERING ME
23 TO SEND IN A CERTAIN AMOUNT OF MONEY AND SO FORTH
24 AND BECOME CERTIFIED. AND THEN I HAD A FRIEND OF
25 MINE TELL ME YOU REALLY OUGHT TO DO THAT BECAUSE IT

JOHN MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 HELPS YOU WHEN YOU GO TO COURT; IT IMPRESSES PEOPLE
2 BASICALLY. BUT I DON'T NEED ANY MORE CERTIFICATION
3 I THINK THAN MY ORIGINAL CERTIFICATION. WHAT I TRY
4 TO DO IS FOCUS ON THE EDUCATIONAL ASPECTS AND
5 DEVELOPING MY KNOWLEDGE BASE RATHER THAN GETTING
6 PIECES OF PAPER OR CERTIFICATES.

7 Q. LET ME ASK YOU AGAIN, DOCTOR. ARE YOU BOARD
8 CERTIFIED IN FORENSIC PSYCHIATRY; YES OR NO?

9 A. I'M NOT SURE THERE'S SUCH A THING, SIR.

10 Q. YOU'VE NEVER HEARD OF SOMEBODY WHO IS BOARD
11 CERTIFIED?

12 A. I KNOW THERE'S A THING IN THE MAIL WHICH I GET
13 WHICH HAS OFFERED ME THE CHANCE TO PAY A CERTAIN
14 AMOUNT OF MONEY AND FILL OUT AN APPLICATION AND GET
15 A CERTIFICATE AND IF I DO IT BY A CERTAIN DATE, I
16 GET TO WAIVE THE EXAM OR SOMETHING LIKE THAT. IT'S
17 A PERIODICAL. BUT I'M NOT SURE THAT THAT IS A
18 BOARD THAT IS RECOGNIZED. I DON'T THINK IT IS, IN
19 FACT, A BOARD THAT IS RECOGNIZED BY THE A.M.A.

20 Q. ALL RIGHT, SIR. AND OF THE TIMES THAT YOU
21 TESTIFIED AS AN EXPERT WITNESS, HOW MANY TIMES HAVE
22 YOU BEEN QUALIFIED AS AN EXPERT IN FORENSIC
23 PSYCHIATRY AS OPPOSED TO GENERAL PSYCHIATRY?

24 A. AS AN EXPERT IN FORENSIC PSYCHIATRY?

25 Q. YES, SIR.

1 A. WHAT WOULD YOU CONSIDER QUALIFIED? YOU MEAN,
2 SOMEONE ACTUALLY SAYS TO YOU---

3 THE COURT: QUALIFIED IN COURT
4 PROCEEDINGS, DOCTOR.

5 DR. FOXWORTH: OH, I'VE BEEN
6 QUALIFIED IN COURT PROCEEDINGS---

7 THE COURT: AS A FORENSIC
8 PSYCHIATRIST; THAT WAS HIS QUESTION.

9 A. AS A FORENSIC PSYCHIATRIST?

10 Q. YES, SIR.

11 A. I DON'T KNOW THAT I'VE BEEN QUALIFIED AS A FORENSIC
12 PSYCHIATRIST BECAUSE I'VE BEEN QUALIFIED TO DO
13 FORENSIC WORK, BUT THAT'S NOT A LABEL THAT I THINK
14 IS APPLICABLE.

15 Q. DOCTOR, YOU'VE NEVER HEARD OF A FORENSIC
16 PSYCHIATRIST?

17 A. I'VE HEARD OF DOCTORS WHO CALL THEMSELVES FORENSIC
18 PSYCHIATRISTS.

19 Q. AND THERE ARE BOARDS---

20 A. AND I'VE HEARD OF FORENSIC PSYCHIATRY.

21 Q. AND THERE ARE BOARDS THAT CERTIFY THESE PEOPLE AS
22 EXPERTS, AS HAVING AN EXPERT---

23 A. I DON'T KNOW THAT THERE IS---

24 Q. CAN I FINISH?

25 A. I DON'T KNOW THAT THERE ARE---

JOHN MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 Q. I'LL LET YOU FINISH IF YOU'LL LET ME FINISH. ARE
2 THERE BOARDS, RECOGNIZED BOARDS, THAT TEST AND
3 CERTIFY PEOPLE IN THE SPECIALTY OF FORENSIC
4 PSYCHIATRY, DOCTOR?

5 A. THERE IS AN ORGANIZATION AS I'VE TOLD YOU WHICH I
6 GET PERIODICALLY MAILING LISTS FROM AND SO FORTH,
7 BUT IT IS NOT AN A.M.A. TYPE BOARD OF MEDICAL
8 SPECIALTIES. THERE IS SOMETHING CALLED A BOARD OF
9 MEDICAL SPECIALTIES WHICH RECOGNIZES THE OFFICIAL
10 BOARDS AND SO FORTH. I DON'T KNOW THAT THERE IS AN
11 ACCREDITATION OF FORENSIC PSYCHIATRY, A BOARD THAT
12 ACCREDITS THAT.

13 Q. SO, I DON'T WANT TO BEAT THIS THING TO DEATH,
14 DOCTOR. YOU'RE NOT BOARD CERTIFIED IN FORENSIC
15 PSYCHIATRY, AND YOU'VE NEVER BEEN QUALIFIED AS A
16 WITNESS IN FORENSIC PSYCHIATRY; IS THAT CORRECT?

17 A. WELL, I'M NOT SURE IF I HAVE BEEN QUALIFIED AS A
18 WITNESS IN FORENSIC PSYCHIATRY OR NOT. I'M NOT
19 REALLY SURE. I'M NOT REALLY SURE ABOUT THAT.

20 Q. THANK YOU, SIR.

21 MR. BAILEY: YOUR HONOR, I HAVE
22 NOTHING FURTHER.

23 THE COURT: ALL RIGHT. YOU MAY
24 PROCEED, MR. THEOS.

25 MR. THEOS: YOUR HONOR, AGAIN WE

JOHN MICHAEL FOXWORTH - DIRECT/MR. THEOS

WOULD OFFER DR. FOXWORTH AS AN EXPERT IN THE FIELD
OF GENERAL AND FORENSIC PSYCHIATRY.

THE COURT: YOU MAY PROCEED

CONTINUED DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. FOXWORTH, DID YOU HAVE AN OPPORTUNITY TO
EXAMINE KENNETH SIMMONS?

A. YES, SIR, I DID.

Q. NOW, CAN YOU TELL US WHEN YOU EXAMINED MR. SIMMONS?

A. I EXAMINED MR. SIMMONS INITIALLY ON JUNE THE 17TH
OF 1998 AND THEN SUBSEQUENTLY ON AUGUST THE 28TH, I
THINK, OF 1998. AND THEN THE LAST TIME I EXAMINED
HIM WAS ON JANUARY THE 27TH OF 1999.

Q. CAN YOU TELL US APPROXIMATELY HOW LONG YOU SPENT
WITH HIM DURING EACH EXAMINATION?

A. I THINK THE FIRST EXAMINATION WAS AROUND TWO HOURS
AND FIFTEEN MINUTES. THE SECOND EXAMINATION WAS
AROUND TWO-AND-A-HALF HOURS. AND THE THIRD
EXAMINATION WAS AROUND TWO-AND-A-HALF HOURS. SO I
WOULD TOTAL THAT TO BE SOMEWHERE BETWEEN SEVEN
HOURS AND SEVEN HOURS AND FIFTEEN MINUTES.

Q. CAN YOU TELL US WHAT YOUR EXAMINATION CONSISTED OF?

A. WELL, MY INITIAL EXAMINATION WAS THE TRADITIONAL
STRUCTURED PSYCHIATRIC EXAMINATION, YOU KNOW, WHERE
YOU APPROACH A PERSON AND ASK THEM, YOU KNOW,

JOHN MICHAEL FOXWORTH - RE-DIRECT/MR. THEOS

1 ESSENTIALLY "WHAT ARE YOU HERE FOR;" AND THEN ASK
2 THEM TO EXPLAIN TO YOU THE CIRCUMSTANCES THAT
3 THEY'RE IN; AND THEN YOU GO THROUGH SORT OF AN
4 OUTLINE WHERE YOU LOOK AT THEIR PAST MEDICAL
5 HISTORY AND THE MEDICATIONS THEY'RE TAKING AND THE
6 ALLERGIES, ANY ILLNESSES, ANY OPERATIONS,
7 SURGERIES, PAST INJURIES, AND SO FORTH; AND THE
8 COMPETENCE OF MEDICAL HISTORY AND SO FORTH. AND
9 THEN YOU BASICALLY DO A MENTAL STATUS EXAM WHICH IS
10 SORT OF TO TRY TO ASSESS THE RANGE OF THEIR
11 FUNCTIONING OF THE MENTAL STATUS AT THAT TIME THAT
12 YOU'RE SEEING THEM. AND THEN YOU USUALLY DO A KIND
13 OF A DIFFERENTIAL DIAGNOSIS EVALUATION WHICH MEANS
14 SINCE IT'S IN YOUR INITIAL EVALUATION, YOU DO THE
15 SORT OF BASIC LISTING OF WHAT YOU THINK THE
16 PROBABLE AND KIND OF ORDER OF LIKELIHOOD PROBABLY
17 DIAGNOSES IF IN FACT YOU THINK THEY ARE MENTALLY
18 ILL.

19 Q. NOW, DID YOU REVIEW ANY RECORDS OF MR. SIMMONS
20 EITHER PRIOR TO THOSE EXAMINATIONS OR THROUGHOUT
21 THE COURSE OF THE EXAMINATION?

22 A. YES, SIR. I RECEIVED SOME RECORDS BEFORE THE
23 INITIAL EXAMINATION. I RECEIVED SOME RECORDS I
24 THINK AFTER THAT, BEFORE THE AUGUST EXAMINATION. I
25 RECEIVED SOME RECORDS AFTER THAT. AND I HAVE

JOHN MICHAEL FOXWORTH - RE-DIRECT/MR. THEOS

1 RECEIVED SOME RECORDS SINCE MY JANUARY THE 27TH
2 EXAMINATION.

3 Q. CAN YOU TELL US; DID YOU REVIEW SCHOOL RECORDS?

4 A. YES, SIR.

5 Q. DID YOU REVIEW HIS MEDICAL RECORDS?

6 A. THOSE THAT I HAD, SIR.

7 Q. DID YOU REVIEW HOSPITAL RECORDS?

8 A. I HAD SOME OF THOSE, SIR.

9 Q. DID YOU REVIEW ANY MENTAL HEALTH RECORDS THAT HAD
10 BEEN MADE OF HIM?

11 A. THERE WAS ONE RECORD OF KIND OF AN INTAKE OF WHERE
12 HE WENT FOR SOME COUNSELING, I THINK, THAT DID NOT
13 FOLLOW THROUGH. IT WAS LIKE A ONE VISIT THING, I
14 THINK.

15 Q. DID YOU REVIEW AT SOME POINT THE HALL INSTITUTE
16 RECORDS OF MR. SIMMONS?

17 A. YES, SIR, I DID.

18 Q. DID YOU REVIEW THE STATEMENT THAT MR. SIMMONS GAVE
19 TO THE POLICE, BOTH THE TRANSCRIPT OF THOSE
20 STATEMENTS AND THE RECORDINGS OF THOSE STATEMENTS?

21 A. YES, SIR, I DID. I REVIEWED THE RECORDINGS OF TWO
22 STATEMENTS; BUT I RECEIVED TRANSCRIPTS OF THREE
23 STATEMENTS; TWO ON DECEMBER THE FIFTH OF 1997 AND
24 ONE ON DECEMBER THE NINTH OF 1997.

25 Q. DID YOU -- INCLUDED IN YOUR EXAMINATION, DID YOU

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1 TEST MR. SIMMONS' GENERAL KNOWLEDGE?

2 A. YES, SIR. IN FACT ON MY SECOND EVALUATION -- MY
3 INITIAL EVALUATION THAT I TOLD YOU WE DO A
4 DIFFERENTIAL DIAGNOSIS, WE TRY TO ASSESS IS THERE
5 SOME PROBLEM HERE FROM A MENTAL STANDPOINT. AND
6 THEN SINCE I IDENTIFIED THAT I FELT THAT IT WAS
7 VERY PROBABLY A SERIOUS PROBLEM FROM A MENTAL
8 STANDPOINT, ON MY SECOND EXAMINATION I WOULD HAVE
9 FOCUSED ON THAT TO TRY TO GET SOME REALLY CLEAR
10 INDICATION OF HOW SIGNIFICANT A PROBLEM THERE WAS.

11 Q. DID YOU ALSO DURING THE COURSE OF YOUR EXAMINATIONS
12 ASSESS MR. SIMMONS' MEMORY?

13 A. YES, I DID.

14 Q. AND WHAT ASSESSMENT DID YOU MAKE OF HIS MEMORY?

15 A. WELL, WE USUALLY ASSESS MEMORY IN DIFFERENT
16 SPHERES. WE USUALLY ASSESS MEMORY IN TERMS OF
17 IMMEDIATE RECALL. IN OTHER WORDS, IF I GIVE YOU
18 SOME INFORMATION RIGHT NOW AND YOU GIVE IT RIGHT
19 BACK TO ME, WE ASSESS IT IN TERMS OF SHORT SPAN
20 WHICH IS LIKE MAYBE FIVE MINUTES RECALL. AND THEN
21 WE ASSESS WHAT WE CALL REMOTE MEMORY. AND THAT IS
22 THINGS THAT HAPPEN, YOU KNOW, ANYWHERE FROM DAYS TO
23 WEEKS TO MONTHS TO YEARS AGO. SO I ASSESSED IT IN
24 ALL OF THOSE SPHERES.

25 Q. WHAT CONCLUSIONS DID YOU DRAW RELATED TO THOSE

1 DIFFERENT SORTS OF MEMORY?

2 A. WELL, MEMORY FUNCTION INVOLVES LEARNING. IN OTHER
3 WORDS, MEMORY IS BASICALLY THREE THINGS. YOU KNOW,
4 YOU HAVE TO REGISTER SOMETHING. YOU HAVE TO RETAIN
5 IT. AND THEN YOU HAVE TO RECALL IT WHICH IS LIKE
6 PULLING IT BACK OUT OF THE FILE. SO WHEN YOU TALK
7 ABOUT MEMORY, YOU'RE REALLY TALKING ABOUT MINI
8 LEARNING. YOU'RE LEARNING SOMETHING; THEN STORING
9 IT; AND BEING ABLE TO RECALL IT. AND INITIALLY I
10 REALIZED THAT HAD HE HAD DIFFICULTY JUST IN GIVING
11 ME ACCOUNTS OF THINGS WHICH ARE FAIRLY RECENT SORT
12 OF THINGS HE PROBABLY SHOULD HAVE HAD A BETTER
13 UNDERSTANDING OF AND SO FORTH.

14 Q. CAN YOU CITE ANY SPECIFIC EXAMPLES?

15 A. WELL, IN THE REMOTE SPHERE THERE WERE THINGS THAT I
16 ASKED HIM ABOUT THAT HAPPENED IN THE PAST FEW YEARS
17 THAT HE WASN'T REALLY CLEAR ON. AND THERE WERE
18 THINGS THAT I CERTAINLY WOULD HAVE REMEMBERED, AND
19 I THINK YOU AND ALL OF US WOULD. AND, OF COURSE,
20 THAT'S JUST A PHENOMENA; IT'S A FINDING. THEN YOU
21 HAVE TO TRY TO UNDERSTAND WHY WHICH IS YOU HAVE TO
22 LOOK AT OTHER ASPECTS OF HIS MENTAL LIFE WHICH WE
23 CAN GO TO IF YOU'D LIKE. BUT IN THE INITIAL THING,
24 I REALIZED THAT HE WAS NOT ABLE OR HAD NOT RETAINED
25 CERTAIN THINGS THAT I THOUGHT WOULD BE VERY EASY

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1 FOR THE AVERAGE PERSON TO RETAIN. AND IN TERMS OF
2 THE MORE RECENT FUNCTIONS WHICH IS LIKE IMMEDIATE
3 RECALL OR FIVE MINUTES, SAY, RECALL I REALIZED
4 THERE AGAIN HE WAS NOT ABLE TO REGISTER, RETAIN,
5 AND RECALL THINGS WHICH SHOULD HAVE BEEN VERY EASY
6 PERHAPS FOR HIM TO DO OVER A SPAN OF SAY FIVE
7 MINUTES. I'M NOT SAYING HE WASN'T ABLE TO. HE
8 DID. SOME THINGS I RECALL. BUT SOMETIMES WHAT WE
9 DO WHEN WE TEST PEOPLE'S MEMORIES, WE'LL ASK THEM
10 TO -- WE'LL TELL THEM A LITTLE STORY AND ASK THEM
11 TO GIVE IT BACK TO US IN A FEW MINUTES. OR
12 SOMETIMES WE DO SOMETHING LIKE GIVE THEM AN ADDRESS
13 AND ASK THEM TO GIVE IT BACK IN FIVE MINUTES.
14 PROBABLY THE SIMPLEST THING TO DO IS GIVE THEM
15 THREE THINGS THAT ARE COLORED AND SAY "IN FIVE
16 MINUTES I'M GOING TO ASK YOU SOMETHING ABOUT THAT."
17 AND WHAT I USUALLY DO IS I SAY RED BOOK, YELLOW
18 PENCIL, BLUE CHEVROLET; IN FIVE MINUTES I WANT YOU
19 TO TELL ME THOSE THINGS. AND THEN I USUALLY GO
20 OVER THEM AGAIN BECAUSE I SAY "I WANT TO BE SURE
21 YOU'VE REGISTERED IT; SO TELL ME NOW WHAT I JUST
22 SAID; RED BOOK, YELLOW PENCIL, BLUE CHEVROLET."
23 IT'S SO BASIC. AND HE WAS ABLE IN A FIVE MINUTE
24 SPAN TO RECALL, NOT THE CHEVROLET PART WHICH
25 FREQUENTLY PEOPLE MISS. BUT HE GAVE ME THE BOOK,

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1 THE PENCIL, THE CAR. BUT HE KIND OF MIXED UP THE
2 COLORS. I THINK HE GOT ONE OF COLORS RIGHT, AND HE
3 MIXED UP THE COLORS ON THE OTHER TWO. SO I
4 REALIZED HE HAD SOME PROBLEMS, AND THAT WAS SORT OF
5 CONSISTENT THROUGHOUT HIS EXAM THAT, YOU KNOW, IT
6 WAS CLEAR TO ME THAT WHEN I TRIED TO INTRODUCE
7 SOMETHING NEW, HE DIDN'T RETAIN IT. HE JUST WAS
8 NOT ABSORBING NEW DATA BASICALLY. AND THEN IN MY
9 THIRD EXAM IN JANUARY, I WENT MUCH MORE EXTENSIVELY
10 INTO HIS UNDERSTANDING OF SOME THINGS AND THEN AT
11 TIMES EVEN TRIED TO PRESENT SOME INFORMATION TO HIM
12 TO SEE FOR MYSELF IF HE COULD RETAIN IT OVER A FEW
13 MINUTES AND GIVE IT BACK TO ME. AND THERE AGAIN,
14 ONLY VERY, VERY BASIC THINGS COULD HE RETAIN. IF
15 IT WAS AN ABSTRACT THING, IT WAS VERY, VERY
16 DIFFICULT IF NOT IMPOSSIBLE.

17 Q. DID MR. SIMMONS HAVE ANY DIFFICULTY UNDERSTANDING
18 YOUR QUESTIONS IN THOSE VARIOUS EXAMINATIONS?

19 A. I'LL TELL YOU; IT'S HARD TO TELL IF HE HAD
20 DIFFICULTY OR NOT BECAUSE HE HAS A STYLE OF AT
21 TIMES PACIFYING YOU. IN OTHER WORDS HE'LL AGREE
22 WHEN YOU DON'T THINK HE REALLY UNDERSTANDS UNLESS
23 YOU PRESS HIM TO TELL YOU WHAT IT IS. HE TENDS TO
24 WANT TO AGREE WITH JUST ABOUT ANYTHING HE THINKS
25 THAT YOU WANT HIM TO SAY OR TO AGREE WITH

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1 BASICALLY. I MEAN, HE IS VERY EASILY LED; LET ME
2 PUT IT THAT WAY. BUT HE WOULD AT TIMES -- AND I
3 NOTICED THIS ON SOME OF THE OTHER EXAMINATIONS THAT
4 I REVIEWED THE TRANSCRIPTS AND THE TAPES, TOO. BUT
5 A FEW TIMES HE WOULD TRY TO CLARIFY. HE WANTED TO
6 PARTICIPATE AND COOPERATE. SO HE WOULD TRY TO
7 CLARIFY. THERE'S A PLACE, FOR EXAMPLE, IN -- THERE
8 WAS A LADY AT THE HALL INSTITUTE, I BELIEVE,
9 SCAGGS, WHO ADMINISTERED SOME TESTING ON DECEMBER
10 THE FIRST OF '98; AND THERE WAS A PLACE ON THAT
11 WHERE SHE ASKED HIM, YOU KNOW, WHY IS IT A GOOD
12 IDEA TO HAVE CHILD LABOR LAWS. AND I NOTICED HE
13 DIDN'T UNDERSTAND THAT. IT WAS RIGHT OVER HIS
14 HEAD. BUT HE ASKED "WHAT ARE CHILD LABOR LAWS?"
15 HE WOULD TRY TO GET MORE INFORMATION SO THAT HE
16 COULD THEN GIVE YOU AN ANSWER AS CORRECT AS HE
17 COULD BE.

18 Q. DID HE HAVE ANY DIFFICULTY IN THESE THREE
19 EVALUATIONS AND EXAMINATIONS IN FORMULATING
20 APPROPRIATE RESPONSES TO YOUR QUESTIONS?

21 A. WELL, IF YOU READ THE TRANSCRIPT, MOST OF THE
22 EXAMINATIONS -- I THINK YOU'D BE STRUCK BY THE FACT
23 THAT HIS RESPONSES TEND TO BE BRIEF. THEY'RE NOT
24 ELABORATE. I MEAN, HE REALLY DOESN'T GIVE MUCH
25 EXPLANATION BASICALLY. IN FACT THERE'S A TENDENCY

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1 AS YOU READ THESE THINGS, YOU SENSE THAT WHAT HE'S
2 TRYING TO DO IS TO GET THROUGH IT, AND HE WANTS TO
3 BE ACCOMMODATING AS HE GETS THROUGH IT.

4 THE COURT: EXCUSE ME, GENTLEMEN;
5 APPROACH THE SIDE BAR.

6 (AT THIS TIME, BENCH CONFERENCE IS HELD.)

7 THE COURT: THANK YOU.

8 Q. CAN YOU GIVE US A -- AND I MAY HAVE MISSED IT. CAN
9 YOU GIVE US ANY---

10 A. YOU WERE ASKING ME ABOUT HIS COMPREHENDING
11 QUESTIONS. HE SEEMED CONFUSED AT TIMES, I THINK.
12 UNQUESTIONABLY, YOU KNOW, TO ME. I MEAN, IT'S LIKE
13 SOMETIMES HIS RESPONSES WOULD BE LIKE TANGENTIAL.
14 YOU KNOW, THEY WOULDN'T HIT THE MARK. SO YOU GET
15 AN IDEA; HE GOT SOME OF THE GIST OF WHAT YOU'RE
16 ASKING, BUT HE'S NOT REAL CLEAR ON IT. AND HE'S
17 TRYING TO BE AS DIRECT AS POSSIBLE BUT ALWAYS WITH
18 A SENSE THAT HE -- IN FACT THERE ARE TIMES WHEN HE
19 WOULD ALMOST ASK YOU TO GIVE HIM THE ANSWER. HE'D
20 BE LIKE, YOU KNOW, COACH ME A LITTLE BIT, YOU KNOW;
21 WHAT DO YOU WANT ME TO SAY HERE, KIND OF THING.
22 AND ALSO THERE WERE TIMES WHEN HE'D BE ALMOST LIKE
23 HE COULDN'T DEFINE SOMETHING, BUT HE COULD REPEAT
24 WHAT YOU SAID. LIKE I ASKED HIM IN TERMS OF
25 INQUIRING ABOUT HIS UNDERSTANDING OF THE CHARGES

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1 AGAINST HIM. I ASKED HIM ABOUT WHAT IS MURDER
2 BASICALLY; WHAT IS DEATH, AND SO FORTH. AND HIS
3 EXPLANATION OF DEAD IS "WELL, DEAD IS DEAD." WELL,
4 I HAD TO PRESS HIM; "NO, I NEED TO KNOW WHAT THAT
5 MEANS" SO TO SPEAK AND SO FORTH.

6 Q. DID HE EVER USE ANY WRONG WORDS WHEN RESPONDING TO
7 YOUR QUESTIONS OR EXPLAINING THINGS?

8 A. WRONG WORDS?

9 Q. WORDS THAT WERE INAPPROPRIATE OR OFF THE MARK?

10 A. MY RECOLLECTION -- I'M TRYING TO THINK OF A
11 SPECIFIC INCIDENT. MY RECOLLECTION IS THERE WERE
12 TIMES. AND I THINK I KNOW WHAT YOU'RE SAYING
13 BASICALLY, SORT OF INDICATE THAT HE DIDN'T
14 COMPREHEND THE TRUE MEANING OF WHAT YOU'RE SAYING.
15 YOU KNOW, I THINK THERE WERE THOSE TIMES, BUT I
16 CAN'T THINK OF A SPECIFIC EXAMPLE RIGHT AT THIS
17 MOMENT.

18 Q. WAS HE ABLE TO UNDERSTAND CONCEPTS?

19 MR. BAILEY: YOUR HONOR, I'M GOING
20 TO OBJECT TO THE FORM OF THE QUESTION WHETHER HE
21 WAS ABLE TO UNDERSTAND IT. I THINK THE DOCTOR CAN
22 SAY IN HIS OPINION WAS HE ABLE TO.

23 MR. THEOS: I'LL REPHRASE IT.

24 THE COURT: SUSTAINED.

25 Q. DOCTOR, IN YOUR OPINION WAS HE ABLE TO UNDERSTAND

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1 THE CONCEPT THAT YOU POSED TO HIM?

2 A. SOME; SOME; BUT USUALLY VERY CONCRETE THINGS. I
3 MEAN, I ASKED HIM ABOUT THINGS LIKE, YOU KNOW, THE
4 DIFFERENCE BETWEEN RIGHT AND WRONG AND THINGS LIKE
5 THAT AND SO FORTH. AND, I MEAN, THAT'S A CONCEPT,
6 YOU KNOW, BECAUSE RIGHT MEANS A LOT OF DIFFERENT
7 THINGS. AND IF I ASKED HIM WHAT DOES RIGHT MEAN;
8 WELL, TO HIM RIGHT MEANS RIGHT AS TO A RIGHT. IT
9 MEANS LIKE THE RIGHT WAY TO DO SOMETHING. IN OTHER
10 WORDS, IT'S CONCRETE. IF YOU'RE TALKING ABOUT
11 DOING SOMETHING RIGHT, HE UNDERSTANDS RIGHT. BUT
12 RIGHT AS A SORT OF AN ABSTRACT, A MORAL CONCEPT,
13 FOR EXAMPLE, IS VERY DIFFICULT FOR HIM BASICALLY.
14 HIS OPERATIONAL CONCEPTS ARE GENERALLY MUCH MORE AT
15 A CONCRETE LEVEL BASICALLY.

16 Q. FOLLOWING YOUR EXAMINATIONS OF SIMMONS, DID YOU
17 ARRIVE AT A DIAGNOSIS?

18 A. WELL, FOLLOWING MY INITIAL EXAMINATION OF HIM IN
19 JUNE, I THINK THE FIRST THING I WAS IMPRESSED WAS
20 THAT I FELT HE WAS MENTALLY RETARDED BASICALLY;
21 MEANING BY THAT I DID NOT FEEL LIKE HE FUNCTIONED
22 AT AN AVERAGE FUNCTIONAL LEVEL OF INTELLIGENCE.
23 AND THAT WAS MY INITIAL IMPRESSION. AND ON
24 SUBSEQUENT EXAMINATIONS, OF COURSE, I EXPLORED THAT
25 TO TRY TO GET AN IDEA OF HOW HE WAS DYSFUNCTIONING,

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1 IF HE WAS DYSFUNCTIONING. I ALSO BEGAN TO LOOK AT
2 HIS HISTORY AND, OF COURSE, THE SUBSTANCE ABUSE
3 BECAUSE IT WAS CLEAR TO ME THAT HE GAVE A HISTORY
4 OF HAVING GONE TO HIGH SCHOOL, FINISHED HIGH
5 SCHOOL, AND I WASN'T SEEING SOMEBODY WHO IN MY
6 OPINION WAS AT ALL FUNCTIONING AT THE LEVEL OF A
7 HIGH SCHOOL GRADUATE BASICALLY. AND IF YOU TAKE IT
8 AS A GIVEN THAT HE ACTUALLY HAD A AMASSED THE
9 ABILITY TO THINK AND CONCEPTUALIZE AND REMEMBER AND
10 COMMUNICATE WHAT IS REQUIRED OF A HIGH SCHOOL
11 GRADUATE, IF YOU TAKE THAT AS A GIVEN THAT HE ONCE
12 HAD THAT, THEN HOW DO YOU EXPLAIN WHAT YOU'RE
13 SEEING BASICALLY? WELL, IN THIS CASE, IT'S AN
14 OBVIOUS, I THINK. I MEAN, THE MAN STARTED USING
15 SUBSTANCES, ALCOHOL INITIALLY, VERY EARLY IN LIFE
16 FAIRLY EXTENSIVELY, I THINK, STARTING AROUND 1978
17 AND HE HAD ABOUT A TWENTY YEAR HISTORY OF IT AND SO
18 FORTH. OVER THE LAST FEW YEARS THE HISTORY WAS,
19 YOU KNOW, VERY SIGNIFICANT. I MEAN, WE'RE TALKING
20 -- OH, I THINK HE TOLD ME AT ONE POINT THAT HE
21 WOULD BUY A HALF GALLON OF LIQUOR EVERY TWO TO
22 THREE DAYS. AND THAT TENDED TO GO ALONG WITH ONE
23 OF THE OTHER EXAMINERS I THINK THAT HE TOLD HE
24 COULD CONSUME ABOUT A QUART A DAY. BUT AT THE SAME
25 TIME HE ALSO DRANK BEER AND HE DRANK BEER UP TO A

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1 CASE A NIGHT. AT THE SAME TIME STARTING AROUND
2 1980 OR 1981, HE WAS ALSO USING SOME COCAINE ON A
3 FAIRLY REGULAR BASIS, SOME MARIJUANA ALSO, AND
4 SPORADICALLY OTHER THINGS. BUT JUST THE ALCOHOL
5 HISTORY ALONE. I MEAN, LIKE I SAID EARLIER, I'VE
6 WORKED FOR YEARS IN AN ALCOHOL RECOVERY TREATMENT
7 CENTER. I'M USED TO SEEING PEOPLE WALKING OFF THE
8 STREET WHO HAVE BEEN DRINKING A QUART OF LIQUOR A
9 DAY. IT'S INFALLIBLE TO ME. I DON'T KNOW HOW THEY
10 DO IT. BUT, ANYWAY, I'M USED TO SEEING THAT. AND
11 I'M USED TO SEEING THE TYPE OF MENTAL FUNCTION THEY
12 EXHIBIT WHEN THEY HAVE BEEN DRINKING SAY UP TO A
13 QUART A DAY. SO I COULD TELL BY THAT AND MY OWN
14 EXPERIENCE THAT IF THIS IS WHAT HE WAS CONSUMING IN
15 RECENT YEARS THAT THAT WAS AN OBVIOUS EXPLANATION
16 TO ME WHY HE HAD PROBABLY DETERIORATED SOME OF HIS
17 FUNCTIONING. AND, IN FACT, HE TENDED TO AGREE WITH
18 THAT. I ASKED HIM ABOUT HIS WRITING AND THINGS
19 LIKE THAT; AND HE SAID HE COULD WRITE SOME. AND I
20 ASKED HIM ABOUT HOW HE WAS DOING; AND HE SAID IT
21 WAS NOT AS WELL AS WHEN HE LEFT HIGH SCHOOL. AND I
22 SUSPECT THAT IS PROBABLY TRUE; PART OF WHICH HE'S
23 HAD A LIFESTYLE WHERE I DON'T THINK HE'S DONE A LOT
24 OF THAT SORT OF THING. BUT CLEARLY THERE SEEMED TO
25 BE, LOOKING AT A PATTERN, THERE HAD TO BE SOME

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1 OTHER EXPLANATION. SO THAT BRINGS INTO CALL THE
2 DIAGNOSIS OF WHAT WE CALL ALCOHOL RELATED
3 PERSISTING DEMENTIA. OF COURSE DEMENTIA IS THE
4 LOSS OF MENTAL FUNCTIONS BASICALLY. AND YOU CAN
5 HAVE AN ALCOHOL INTOXICATION DELIRIUM OR SOMETHING
6 LIKE THAT WHERE YOU LOSE COGNIZANT FUNCTIONS,
7 MENTAL FUNCTIONS AND IT BE ONLY TEMPORARY BECAUSE
8 WHEN I WAS WORKING IN THE TREATMENT CENTER, I WOULD
9 SEE PEOPLE WHO WOULD COME IN DRINKING A QUART A DAY
10 IF THEY HAD BEEN EATING WELL AND IF THEY'RE FAIRLY
11 HEALTHY, THEN SOMETIMES WITHIN A WEEK OR TWO WEEKS
12 OR THREE WEEKS YOU'D BEGIN TO SEE SOME RETURN OF
13 COGNITIVE FUNCTIONS. THEY'D START TO REGAIN SOME
14 THINGS. THEY'D BE ABLE TO LEARN MATERIALS. WE'D
15 BE SITTING IN CLASS, AND WE'D BE TALKING ABOUT
16 PRINCIPLES, RECOVERY PRINCIPLES; AND THEY COULD
17 RETAIN IT. BUT SOMETIMES THAT WOULDN'T HAPPEN FOR
18 SEVERAL WEEKS AFTER THEY'D GET IN. SO WHAT TENDS
19 TO HAPPEN IS, WHEN YOU SEE SOMEBODY OFF THE STREET
20 WHO HAS JUST BEEN DRINKING, YOU KNOW, MY HYPOTHESIS
21 BASICALLY IS THERE ARE THREE KINDS OF CELLS WHEN
22 YOU SEE SOMEBODY HAS BEEN DRINKING HEAVILY FOR A
23 LONG TIME. THEY'RE ARE CELLS IN THE BRAIN THAT ARE
24 ALREADY DEAD, AND THEY'RE NOT COMING BACK. THEY'RE
25 THE CELLS IN THE BRAIN THAT ARE VERY INJURED AND

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1 ARE DYING AND THEY'RE ON THE BORDERLINE, AND SOME
2 MAY AND SOME MAY NOT. IF YOU START TO DO THE RIGHT
3 THINGS AND THE RIGHT NUTRITION, AND SO FORTH; AND
4 THEN THEY'RE CELLS THAT ARE PROBABLY GOING TO BE
5 SURVIVORS AND GET THROUGH IT. AND THAT'S WHAT YOU
6 TEND TO SEE IT FUNCTIONALLY AS YOU SEE PEOPLE IN
7 RECOVERY CENTERS; THAT AS THEY DETOXIFY, THEY
8 GRADUALLY BEGIN TO REGAIN FUNCTIONS, PARTICULARLY
9 WHAT WE CALL CORTICAL FUNCTIONS. NOW, CORTICAL
10 FUNCTIONS ARE WHAT WE CALL HIGHER MENTAL FUNCTIONS
11 THAT ARE REALLY CONDUCTED IN THE CORTICAL LAYERS OR
12 THE OUTER LAYERS OF THE BRAIN. THE THING THAT
13 MAKES US ALL HUMAN HERE ARE THE CORTICAL
14 HEMISPHERES, THE SPHERE OR THE CORTEX OF THE BRAIN.
15 IT'S THE PART OF THE BRAIN THAT'S REALLY MASSIVELY
16 EXPANDED OVER, SAY, THE LAST TWO OR THREE MILLION
17 YEARS OF PRIMATE DEVELOPMENT IN HUMAN BEINGS. AND
18 WHAT YOU SEE IS THAT WHEN ALCOHOL IS CONSUMED ON A
19 REGULAR BASIS IT DAMAGES MOSTLY THE CORTICAL LAYERS
20 OF THE BRAIN. IRONICALLY THE NEWEST LEVELS OF THE
21 BRAIN ARE ILLUSIONARY (PHONETICALLY SPELLED). THE
22 NEWEST LEVELS OF THE BRAINS AND THE PARTS THAT
23 STORE THE MOST HIGHEST MENTAL FUNCTIONS IN HUMAN
24 BEINGS ARE PARTS OF THE BRAIN THAT ARE AFFECTED BY
25 THE LOWEST LEVELS OF ALCOHOL. WHEN YOU GET DOWN TO

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1 THE MADURA OBLONGATA WHERE YOUR RESPIRATORY CENTER
2 AND YOUR CARDIAC CENTER AND THE PARTS THAT CONTROL
3 THE RHYTHM OF YOUR HEART, THINGS LIKE THAT, IT
4 TAKES FIVE OR SIX MILLIGRAMS PER BLOOD
5 CONCENTRATION OF ALCOHOL TO REALLY SHUT THOSE
6 THINGS DOWN. BUT YOU CAN SHUT DOWN CORTICAL
7 FUNCTIONS WITH 100, 200 MILLIGRAMS PERCENT. SO I
8 FELT LIKE THE EXPLANATION WAS OBVIOUS HERE THAT
9 THIS MAN HAD LOST FUNCTION. SO I DO BELIEVE THAT
10 HE HAS AN ALCOHOL RELATED PERSISTING DEMENTIA. NOW
11 THERE'S ALSO A DIAGNOSIS CALLED ALCOHOL RELATED
12 PERSISTING AMNESTIC DISORDER WHICH MEANS LOSS OF
13 MEMORY WHICH WOULD APPLY IN THIS CASE IF THAT WAS
14 ALL HE HAD. IF ALL HE HAD WAS THE AMNESIA FROM HIS
15 DRINKING DAYS BASICALLY, I THINK THAT WOULD BE THE
16 APPROPRIATE DIAGNOSIS. BUT THE DEMENTIA DIAGNOSIS
17 I THINK IS MORE APPROPRIATE BECAUSE HE DOESN'T HAVE
18 JUST THE AMNESIA. THE DEMENTIA DIAGNOSIS INCLUDES
19 THE LOSS OF MEMORY AND THE LOSS OF SOME OTHER
20 FUNCTIONS. MOST SPECIFICALLY HE HAS A LOSS OF WHAT
21 WE CALL EXECUTIVE FUNCTIONS. EXECUTIVE FUNCTIONS
22 ARE THE ABILITY TO PLAN, THE ABILITY TO ORGANIZE,
23 THE ABILITY TO SEQUENCE THINGS, TO PUT THINGS IN
24 ORDER AND KEEP THEM STRAIGHT BASICALLY, AND THE
25 ABILITY TO UNDERSTAND THE ABSTRACT CONCEPTS. THOSE

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1 ARE THE FUNCTIONS WHICH HE'S MISSING AT THIS
2 POINT. NOW, IF HE HAD THEM AT ONE TIME, THE
3 OBVIOUS EXPLANATION TO ME IS THE ALCOHOL RELATED
4 PERSISTING DEMENTIA. THOSE WERE THE DIAGNOSES
5 WHICH I FELT WERE APPROPRIATE AT THIS TIME WHEN I
6 SAW HIM. RETROSPECTIVELY, THERE IS NO QUESTION IN
7 MY MIND THAT WITH HIS HISTORY---

8 MR. BAILEY: YOUR HONOR, I OBJECT TO
9 HIM CHARACTERIZING "NO QUESTION IN MY MIND." I
10 THINK HE CAN SAY WITHIN A DEGREE OF MEDICAL
11 CERTAINTY BUT NOT TO ANYTHING ABSOLUTE. HE WASN'T
12 THERE. HE DOESN'T KNOW WHAT HAPPENED.

13 THE COURT: YOU'RE CORRECT.

14 Q. TO A REASONABLE DEGREE OF MEDICAL CERTAINTY?

15 A. TO THE PRESENT DIAGNOSIS?

16 Q. NO. YOU WERE GETTING READY TO SAY SOMETHING THAT
17 WAS OBJECTED TO. LET ME ASK YOU THESE QUESTIONS:
18 DID YOU HAVE AN OPPORTUNITY TO DISCUSS WITH MR.
19 SIMMONS AND TO REVIEW HIS LEGAL RIGHTS, HIS MIRANDA
20 RIGHTS?

21 A. WELL, ON MY THIRD EXAMINATION IN JANUARY, JANUARY
22 THE 27TH, I FOCUSED ON THOSE ISSUES BECAUSE I HAD
23 ALREADY READ SOME MATERIAL FROM THE HALL INSTITUTE
24 AND SO FORTH. SO I WANTED TO KIND OF SEE IF WHAT I
25 GOT COMPARED TO WHAT THEY GOT AT THE HALL INSTITUTE

1 BECAUSE---

2 Q. LET ME STOP YOU FOR A SECOND, DOCTOR. IN
3 FORMULATING YOUR DIAGNOSIS RELATED TO YOUR FIRST
4 EXAMINATION AND THROUGHOUT, DID YOU HAVE AN
5 OPPORTUNITY TO REVIEW VARIOUS I.Q. TESTS?

6 A. I ACTUALLY RECEIVED SOME TEST MATERIAL, AND I
7 RECEIVED SOME RESULTS OF TEST MATERIAL, AND I
8 RECEIVED SOME REPORTS OF TEST MATERIAL.

9 Q. WERE THOSE TEST RESULTS IN THE REPORTS CONSISTENT
10 WITH YOUR DIAGNOSIS?

11 A. GENERALLY YES BECAUSE I THINK THE LOWEST REPORTS
12 TALKED ABOUT AN I.Q. OF 66, AND THE HIGHEST REPORT
13 I THINK WAS ONE FROM THE DEPARTMENT OF DISABILITIES
14 AND SPECIAL NEEDS. THEY TALK ABOUT AN I.Q. OF 75.
15 SO THE RANGE WAS IN THERE SOMEWHERE BETWEEN 66 AND
16 THEN 75 IN THE VARIOUS REPORTS THAT I SAW. AND
17 THAT WAS RIGHT IN THE PICTURE WHERE I HAD IN MY
18 MIND PLACED HIM AS HIS PROBABLE LEVEL OF MENTAL
19 FUNCTIONING. NOW THE THING ABOUT I.Q.S IS THAT A
20 LOT OF PEOPLE IN THIS FIELD TRY TO SIMPLIFY IT; IF
21 YOU HAVE A CERTAIN I.Q. YOU'RE MENTALLY RETARDED.
22 NOT THAT EASY, OKAY? THE WHOLE THING ABOUT I.Q.S
23 HAS CHANGED. LET ME GIVE YOU AN EXAMPLE. THE
24 FIRST DIAGNOSTIC AND STATISTICAL MANUAL WAS
25 PUBLISHED BY THE AMERICAN PSYCHIATRIC ASSOCIATION

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1 LISTING ALL THE DIAGNOSES AND THE CRITERIA FOR
2 THOSE DIAGNOSES. THE FIRST ONE CAME OUT -- I THINK
3 THEY STARTED PUBLISHING IT IN 1952. AND IT RAN
4 THROUGH AROUND 1968. OKAY; IN THAT FIRST MANUAL
5 THEY LISTED, NOT MENTAL RETARDATION, BUT MENTAL
6 DEFICIENCY; THE SAME THING, OKAY? THEY LISTED
7 THREE CATEGORIES. THE FIRST CATEGORY WAS MILD
8 MENTAL DEFICIENCY. OKAY, THE I.Q. RANGE FOR MILD
9 MENTAL DEFICIENCY AT THAT TIME WAS 70 TO 85, OKAY?
10 THE MODERATE RANGE OF MENTAL DEFICIENCY WAS 50 TO
11 70. AND THE SEVERE RANGE WAS BELOW 50. SO UP
12 UNTIL AROUND 1968 WE SAID THAT PEOPLE UP TO AN I.Q.
13 OF 85 TO BE MENTALLY RETARDED. NOW, WHAT THEN
14 HAPPENED IN LATER YEARS IS THEY CREATED A CATEGORY
15 CALLED BORDERLINE BECAUSE WHAT THEY FOUND WAS THERE
16 WERE A LOT OF PEOPLE WHO WERE IN THE LOW EIGHTIES
17 OR HIGH SEVENTIES OR SOMETHING LIKE THAT WHO COULD
18 ACTUALLY MARRY, HOLD JOBS, FUNCTION INDEPENDENTLY
19 WITH PROPER EDUCATION AND HEALTH AND SO FORTH. AND
20 SO THEN THEY SAID WELL, THESE PEOPLE WHO CAN
21 FUNCTION NORMAL IN SOCIETY, LET'S NOT CALL THEM
22 MENTALLY RETARDED. SO THEY DEVELOPED A STATUS
23 CALLED BORDERLINE FOR THAT RANGE. WELL, NOW, THE
24 TENDENCY TODAY IS TO DO AWAY WITH THAT CATEGORY AND
25 NOT EVEN TALK BECAUSE THEY FEEL LIKE, I THINK, THAT

1 THAT'S STILL STIGMATIZING, YOU KNOW, SOMEHOW. AND
2 WHY HAVE A LABEL BORDERLINE IF IN FACT YOU'RE OUT
3 THERE, YOU KNOW, EARNING A WAGE, DOING A JOB, AND
4 LIVING WITH A FAMILY AND SO FORTH. EVEN THOUGH YOU
5 MIGHT NOT GIVE THEM AN ABSTRACT THING OR THINK AT
6 ALL OR PLAN, OR MAYBE YOUR SPOUSE HAS TO BALANCE
7 THE CHECKBOOK AND PAY THE TAXES AND DO ALL THAT.
8 BUT AT LEAST IF YOU CAN FUNCTION, LET'S NOT HAVE
9 THAT LABEL. SO THE TENDENCY HAS BEEN TO LOWER THAT
10 RANGE. BUT THE POINT I THINK IS REAL IMPORTANT IS
11 THE I.Q. SCORE IS NOT WHAT MAKES THE DIAGNOSIS OF
12 MENTAL RETARDATION, REALLY. THERE'S AN ARTICLE BY
13 A GENTLEMAN IN COLUMBIA, A MR. JOHN H. BLOOME,
14 WHERE HE STATES IN HIS ARTICLE---

15 MR. BAILEY: OBJECTION.

16 THE COURT: YES, SIR; I SUSTAIN THE
17 OBJECTION.

18 Q. LET'S GO BACK TO YOUR CONVERSATION FROM YOUR
19 EXAMINATIONS WITH MR. SIMMONS IN YOUR THIRD
20 EXAMINATION RELATED TO HIS ABILITY TO UNDERSTAND
21 HIS LEGAL RIGHTS.

22 A. WELL, I WOULD ASK HIM QUESTIONS LIKE, YOU KNOW,
23 TELL ME WHAT A RIGHT IS. AND HE WOULD GIVE ME
24 ANSWERS LIKE "WELL, A RIGHT IS WHEN YOU DO
25 SOMETHING RIGHT," YOU KNOW. AND I WOULD ASK HIM

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1 WELL, NO, THAT'S NOT WHAT I MEAN; IN THE LEGAL
2 SENSE IN THE COURTROOM WHAT IS A RIGHT? AND HE
3 DIDN'T REALLY SEEM TO UNDERSTAND. SO I ASKED HIM
4 "DO YOU HAVE ANY RIGHTS?" IN OTHER WORDS, IT IS
5 INTERESTING BECAUSE HE HAD BEEN SCHOOLED SO MUCH
6 THROUGH THE STATE HOSPITAL AND EVERYTHING THAT HE
7 CAME UP WITH ONE. HE SAID HE HAD A RIGHT TO ASK
8 QUESTIONS. AND THAT'S PART OF THE PROCESS, YOU
9 KNOW, OBVIOUSLY; BUT I'M NOT SURE THAT HE HAS THE
10 RIGHT TO DO THAT. BUT, ANYWAY, HE WAS TRYING -- I
11 COULD TELL HE WAS TRYING TO COME UP WITH SOMETHING
12 AND THAT HE WAS BEGINNING TO GET THE IDEA. BUT THE
13 PROBLEM IS THAT I DIDN'T FEEL LIKE HE REALLY
14 UNDERSTOOD THAT A RIGHT IS AN ENTITLEMENT; YOU
15 KNOW, THAT ABSTRACT CONCEPT, YOU'RE ENTITLED TO
16 CERTAIN WAYS. I MEAN WHEN YOU HAVE A RIGHT, YOU
17 DONE HAVE SOMETHING TANGIBLY, BUT YOU HAVE AN
18 ENTITLEMENT, YOU KNOW. I DIDN'T THINK HE REALLY
19 GRASPED THAT BASICALLY. SO WHEN I WENT BACK AND
20 LOOKED AT THE EXAMINATION OF THE HALL INSTITUTE,
21 THE SECOND EXAMINATION WHICH THEY DID ON JANUARY
22 THE EIGHTH, YOU KNOW, THEY KEPT ASKING HIM; YOU
23 KNOW, THEY WERE TELLING HIM, "YOU HAVE THE RIGHT TO
24 REMAIN SILENT; WHAT DOES THAT MEAN?" AND HE WOULD
25 SAY "IT MEANS BE QUIET." WHY DOES HE THINK THAT

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1 MEANS BE QUITE? WELL, THEN I REALIZED IT'S VERY
2 SIMPLE, ACTUALLY. THE PIECE OF THAT SENTENCE "YOU
3 HAVE THE RIGHT TO REMAIN SILENT" THAT HE DIDN'T
4 UNDERSTAND WAS THE RIGHT. ALL HE GOT WAS "YOU HAVE
5 TO REMAIN SILENT" BECAUSE HE DIDN'T REALLY
6 UNDERSTAND THE CONCEPT OF THE RIGHT. SO HE HEARD
7 REMAIN SILENT. SO HE SAID "OKAY." BUT WHAT HE
8 DIDN'T GET FROM THAT IS THAT MEANS THAT YOU CAN
9 STAY SILENT IF YOU WANT TO. THERE'S AN EXECUTIVE,
10 VOLITIONAL THING. YOU CAN CHOOSE TO, AND SO
11 FORTH. AND, SO, IF YOU'RE GOING TO ASK HIM; "OKAY,
12 I'M GOING TO ASK SOME QUESTIONS AND YOU DON'T HAVE
13 TO ANSWER THEM;" AND IT WAS OVER AND OVER AGAIN --
14 NOT JUST IN MY EXAMS BUT ALSO THE STATE HOSPITAL'S
15 -- THAT HE WOULD SAY "YES" BECAUSE THAT'S WHAT YOU
16 HAVE TO DO WHEN SOMEBODY ASKS YOU A QUESTION; YOU
17 HAVE TO GIVE AN ANSWER, YOU KNOW; IN A LEGAL
18 SITUATION, YOU HAVE TO GIVE AN ANSWER. IT WAS
19 CLEAR TO ME BOTH IN THE STATE HOSPITAL RECORDS AND
20 ON MY EXAM---

21 MR. BAILEY: OBJECTION, YOUR HONOR.

22 AGAIN HE'S CHARACTERIZING WHAT'S CLEAR TO HIM. HE
23 CAN SAY WHAT HE BELIEVES TO A REASONABLE DEGREE OF
24 MEDICAL CERTAINTY, I BELIEVE IS WHAT THE STANDARD
25 IS.

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THE COURT: SUSTAINED.

Q. LET ME ASK YOU THE QUESTION. DO YOU HAVE AN
OPINION BASED UPON YOUR EDUCATION, TRAINING, AND
EXPERIENCE TO A REASONABLE DEGREE OF MEDICAL
CERTAINTY WHETHER OR NOT MR. SIMMONS UNDERSTANDS
THE CONCEPT OF HIS RIGHT TO REMAIN SILENT?

A. IN MY OPINION, TO A REASONABLE DEGREE OF MEDICAL
CERTAINTY, THAT AT THE TIME OF MY EXAMINATIONS THAT
MR. SIMMONS DID NOT REALLY COMPREHEND THE CONCEPT
OF HIS RIGHT TO REMAIN SILENT.

Q. NOW, DO YOU HAVE AN OPINION TO A REASONABLE DEGREE
OF MEDICAL CERTAINTY AS TO WHETHER OR NOT MR.
SIMMONS COMPREHENDS THE CONCEPT THAT ANY STATEMENT
THAT HE MIGHT MAKE COULD BE USED AGAINST HIM IN A
COURT OF LAW? DO YOU HAVE AN OPINION AS TO THAT?

A. IN MY OPINION TO A REASONABLE DEGREE OF MEDICAL
CERTAINTY, I THINK MR. SIMMONS ASSUMED THAT
ANYTHING WOULD BE USED AGAINST HIM IN A COURT OF
LAW.

Q. DO YOU HAVE AN OPINION AGAIN TO A REASONABLE DEGREE
OF MEDICAL CERTAINTY AS TO WHETHER OR NOT MR.
SIMMONS UNDERSTANDS THE CONCEPT THAT HE HAS A RIGHT
TO HAVE AN ATTORNEY PRESENT WHENEVER HE'S BEING
QUESTIONED?

A. I DIDN'T FOCUS ON THAT QUITE AS MUCH AS THE HALL

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1 INSTITUTE EXAM. BUT IF I COULD DRAW FROM THEIR
2 EXAM AND FORMULATE MY OPINION, IN MY OPINION TO A
3 REASONABLE DEGREE OF MEDICAL CERTAINTY, HE IS NOT
4 REAL CLEAR ON THAT FACT THAT HE HAS THE RIGHT TO
5 HAVE AN ATTORNEY. THERE ARE TIMES WHEN I THINK --
6 HE WOULD PROBABLY SAY THAT BACK TO YOU. IF YOU
7 SAID TO HIM "YOU HAVE A RIGHT;" HE'D PROBABLY SAY
8 "I HAVE A RIGHT TO HAVE AN ATTORNEY." BUT DID HE
9 REALLY COMPREHEND THAT IN AN ABILITY TO EXERCISE
10 IT; NO. I MEAN, IF YOU BROUGHT HIM IN THIS MORNING
11 AND YOU DIDN'T SHOW UP, I DON'T THINK HE WOULD SAY
12 "WAIT A MINUTE, I'M NOT GOING ON UNTIL MY ATTORNEY
13 GETS HERE."

14 Q. DO YOU HAVE AN OPINION, AGAIN TO A REASONABLE
15 DEGREE OF MEDICAL CERTAINTY WHETHER OR NOT MR.
16 SIMMONS COMPREHENDS THE CONCEPT THAT HE HAS A RIGHT
17 TO STOP ANSWERING QUESTIONS WHEN HE'S BEING
18 INTERVIEWED AND ASK FOR AN ATTORNEY?

19 A. YES, SIR, I HAVE OPINION.

20 Q. WHAT IS THAT?

21 A. IN MY OPINION TO A REASONABLE DEGREE OF MEDICAL
22 CERTAINTY, HE DOES NOT REALLY COMPREHEND THE FACT
23 THAT HE HAS THE ABILITY TO EXERCISE A PREROGATIVE
24 TO STOP QUESTIONING WHENEVER HE WANTS AND NOT
25 ANSWER CERTAIN QUESTIONS SELECTIVELY.

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1 Q. DO YOU HAVE AN OPINION AGAIN TO A REASONABLE DEGREE
2 OF MEDICAL CERTAINTY AS TO WHETHER OR NOT MR.
3 SIMMONS IS CAPABLE OF READING HIS MIRANDA RIGHTS,
4 MIRANDA RIGHTS, MIRANDA WARNINGS?

5 A. READ THEM?

6 Q. READ THEM; JUST READ THE WORDS.

7 A. THE PHYSICAL ACTS OF READING THEM AND COMPREHENDING
8 THEM. I HAVE AN OPINION; YES.

9 Q. WHAT IS THAT OPINION?

10 A. IN MY OPINION, TO A REASONABLE DEGREE OF MEDICAL
11 CERTAINTY, HE IS NOT CAPABLE OF READING THEM
12 HIMSELF AND COMPREHENDING THE MEANING OF THOSE
13 RIGHTS.

14 Q. WHAT IS THAT OPINION BASED UPON?

15 A. IT'S BASED ON BOTH MY EXAMINATIONS AND THE VARIOUS
16 EXAMINATIONS OF OTHERS, MOST ESPECIALLY THE HALL
17 INSTITUTE EXAMS, YOU KNOW, WHERE IT WAS CLEAR THAT
18 EVEN PRESENTING THEM TO HIM, HE COULDN'T COMPREHEND
19 THEM. BUT I ACTUALLY PERSONALLY HAD HIM READ SOME
20 WORDS. I PRESENTED HIM WITH SOME WORDS, YOU KNOW,
21 WORDS PERTINENT TO THIS SITUATION, WORDS LIKE
22 JUDGE, JURY, GUILTY, INNOCENT, VERDICT; THINGS LIKE
23 THAT. I ASKED HIM TO READ SOME OF THOSE WORDS.
24 AND THOSE WORDS IN GENERAL HE STRUGGLED WITH
25 BASICALLY.

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1 Q. LET ME ASK YOU THIS: CAN HE PHYSICALLY READ THOSE
2 MORE COMPLEX WORDS?

3 A. I THINK THAT---

4 MR. BAILEY: YOUR HONOR, I OBJECT TO
5 HIM ASKING HIM WHAT HE CAN DO AND NOT ASKING HIS
6 OPINION TO A REASONABLE DEGREE OF MEDICAL
7 CERTAINTY.

8 THE COURT: SUSTAINED.

9 Q. TO A REASONABLE DEGREE OF MEDICAL CERTAINTY WAS HE
10 CAPABLE OF THE PHYSICAL ACT OF READING COMPLEX
11 WORDS OR POLYSYLLABIC WORDS, WORDS WITH MORE THAN
12 ONE SYLLABLE?

13 A. SOME WORDS. SOME WORDS. I MEAN, JUDGE TO HIM WAS
14 JUICE. JURY WAS JULIE. INNOCENT WAS ENTER.
15 VERDICT -- I THINK I HAD -- SOME WORDS HE COULDN'T
16 COMPREHEND.

17 Q. NOW DO YOU HAVE AN OPINION BASED ON A REASONABLE
18 DEGREE OF MEDICAL CERTAINTY AS TO WHETHER OR NOT
19 MR. SIMMONS WAS CAPABLE OF COMPREHENDING HIS
20 MIRANDA WARNINGS IN DECEMBER OF 1997 AT THE TIME
21 THESE STATEMENTS WERE GIVEN?

22 A. YES, I DO HAVE AN OPINION.

23 Q. WHAT IS THAT OPINION?

24 A. WELL, MY OPINION TO A REASONABLE DEGREE OF MEDICAL
25 CERTAINTY IS THAT AT THE TIME OF READING HIS

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1 MIRANDA WARNINGS TO HIM, I GUESS -- WAS THAT IN
2 DECEMBER OF 1997?

3 Q. YES, SIR.

4 A. THAT HE WAS NOT BECAUSE IN FACT MY UNDERSTANDING IS
5 THAT HE HAD BEEN USING DRUGS AND ALCOHOL ALMOST
6 RIGHT UP TO THAT POINT WHEN HE WAS INCARCERATED FOR
7 SHOPLIFTING. AND MY GUESS IS THAT HIS MENTAL
8 FUNCTION AT THE TIME---

9 MR. BAILEY: OBJECTION TO HIS GUESS,
10 YOUR HONOR.

11 THE COURT: YES, SIR.

12 A. I THINK IT'S WITH A REASONABLE DEGREE OF MEDICAL
13 CERTAINTY THAT HIS FUNCTION AT THAT TIME WAS
14 PROBABLY FAR WORSE THAN WHEN I SAW HIM THIS PAST
15 YEAR AND THIS PAST JANUARY.

16 Q. NOW, DO YOU HAVE AN OPINION THAT YOU CAN STATE TO
17 A REASONABLE DEGREE OF MEDICAL CERTAINTY AS TO THE
18 RELIABILITY OF ANY STATEMENT THAT HE WOULD HAVE
19 GIVEN, THESE STATEMENTS THAT HE WOULD HAVE GIVEN IN
20 DECEMBER OF 1997?

21 A. YES, I DO.

22 Q. WHAT IS THAT OPINION?

23 A. MY OPINION TO A REASONABLE DEGREE OF MEDICAL
24 CERTAINTY IS THAT HIS STATEMENTS, YOU KNOW, TAKEN
25 IN 1997 -- AGAIN, LET'S PUT IT THIS WAY: AND HE

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1 PROBABLY SAID SOME THINGS -- AND IF YOU ASKED HIM
2 LIKE "ARE YOU FEELING OKAY;" HE WOULD SAY, "FINE"
3 OR SOMETHING. BUT I WOULD THINK THAT AT THAT TIME
4 ANY STATEMENT THAT HAD ANY AMOUNT OF -- A GREAT
5 AMOUNT OF DETAIL -- THAT WOULD CALL FOR AN ANALYSIS
6 ON HIS PART OF PAST DATA AND EVENTS AND SO FORTH,
7 WOULD NOT HAVE BEEN RELIABLE.

8 Q. BUT AGAIN, WHAT IS THAT OPINION BASED UPON?

9 A. WELL, IT'S BASED ON A LOT OF THINGS. IT'S BASED
10 ON, YOU KNOW, MOSTLY MY PERSONAL EXPERIENCE IN
11 EXAMINING HIM AND UNDERSTANDING HOW HE OPERATES
12 BECAUSE I THINK THE FIRST THING -- NOT HIS, I
13 THINK, OBVIOUS MENTAL DIFFICULTIES IN TERMS OF, YOU
14 KNOW, RETARDATION OR DEFICIENCY OR WHATEVER; BUT
15 THE FIRST THING THAT REALLY STANDS OUT TO ME THAT
16 BRINGS INTO QUESTION THE RELIABILITY OF WHAT MR.
17 SIMMONS SAYS IS VERY OBVIOUS HE WANTS TO PLEASE; HE
18 WANTS TO BE ACCOMMODATING AND WANTS TO GO ALONG
19 WITH WHATEVER IT IS THAT YOU THINK HE WANTS YOU TO
20 SAY BASICALLY. HE HAS MANY, MANY CHARACTERISTICS
21 WHICH ARE ABSOLUTELY CONSISTENT WITH MENTAL
22 RETARDATION DIAGNOSIS; AND ONE OF THEM IS HIS WANT
23 TO BE OBLIGING. I THINK HE'S EASILY LED,
24 BASICALLY. HE LOOKS FOR CLUES AS TO WHAT IT IS YOU
25 WANT HIM TO SAY. AND THE THING I WAS REALLY STRUCK

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1 BY IN EXAMINING HIM IS HIS ALMOST TOTAL LACK OF
2 DEFENSIVENESS. I MEAN, I DON'T THINK HE'S
3 SELF-PROTECTIVE AT ALL BASICALLY. I MEAN, HE'S THE
4 OPPOSITE OF DEFENSIVE. I THINK HE'S SUBMISSIVE.
5 YOU KNOW, HE WANTS YOU TO SMILE AT HIM. HE WANTS
6 YOU TO SHOW HIM THAT HE'S DOING OKAY, THAT HE'S
7 DOING WHAT YOU WANT HIM TO DO, AND SO FORTH. AND
8 THAT WAS DIFFICULT BECAUSE THAT'S NOT WHAT I WANT.
9 I WANT HIM TO SEE IF HE CAN FIND CERTAIN
10 INFORMATION FOR ME IN HIS MIND AND REPRODUCE IT FOR
11 ME, BASICALLY.

12 Q. WHAT IS MALINGERING IN THE CONTEXT OF PSYCHIATRY?

13 A. WELL, MALINGERING CAN BE IN THE CONTEXT OF REALLY
14 ANY FIELD OF MEDICINE. BUT MALINGERING IN GENERAL;
15 IN GENERAL THE TERM MEANS THE PRODUCTION OR
16 EXAGGERATION OF OR THE FEIGNING, I SHOULD SAY, OF
17 SYMPTOMS SO AS TO APPEAR ILL OR SOMETHING OF THAT
18 NATURE FOR SOME GAIN IN RETURN FOR IT; LIKE PEOPLE
19 TAKING CARE OF YOU OR SOMETHING LIKE THAT. THAT'S
20 GENERALLY HOW THE TERM MALINGERING IS REFERRED TO
21 IN MEDICINE IS WHEN PEOPLE COMPLAIN OF SOMETHING
22 WHICH IS NOT REAL OR EXAGGERATE SOME COMPLAINT
23 WHICH ACTUALLY MAY BE THAT THEY ARE HAVING -- IN
24 ORDER TO GET MORE ATTENTION OR MORE TREATMENT OR
25 WHATEVER.

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1 Q. NOW, DO YOU HAVE AN OPINION THAT YOU CAN STATE TO A
2 REASONABLE DEGREE OF MEDICAL CERTAINTY AS TO
3 WHETHER OR NOT MR. SIMMONS DURING YOUR EXAMINATION
4 AND DURING THE VARIOUS EXAMINATIONS WHICH YOU
5 UTILIZED ADDITIONALLY IN FORMULATING YOUR OPINION
6 REGARDING WHETHER OR NOT MR. SIMMONS WAS
7 MALINGERING?

8 A. I DO HAVE AN OPINION.

9 Q. WHAT IS THAT OPINION?

10 A. IN ANY OPINION TO A REASONABLE DEGREE OF MEDICAL
11 CERTAINTY IS THAT I FOUND NO EVIDENCE OF HIS
12 MALINGERING BASICALLY.

13 Q. WHAT IS THAT OPINION THAT MR. SIMMONS WAS NOT
14 MALINGERING BASED UPON?

15 A. WELL, I'M IN THE INFORMATION GATHERING BUSINESS,
16 YOU KNOW. I MEAN, WHENEVER YOU SEE A PATIENT IN
17 ANY SETTING THE FIRST THING YOU DO IS YOU TAKE A
18 HISTORY OR A CHIEF COMPLAINT FROM THEM AND THEY
19 TELL YOU WHAT'S WRONG. AND YOU WANT TO BE SURE
20 THAT WHATEVER THE PROBLEM IS YOU CORRECTLY IDENTIFY
21 IT BECAUSE THEN THE TREATMENT HAS TO BE
22 SPECIFICALLY TAILORED TO THAT PROBLEM. SO ANY
23 PHYSICIAN'S LIFE REVOLVES AROUND AN ACCURATE
24 ASSESSMENT OF THE DATA THAT IS PRESENTED TO HIM OR
25 HER. NOW, DO PEOPLE ALWAYS PRESENT TELLING YOU NOT

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1 ONLY WHAT'S WRONG WITH THEM CORRECTLY, BUT IN THE
2 DEGREE THAT IS WRONG WITH THEM? ABSOLUTELY NOT. I
3 PROBABLY DON'T EITHER. YOU KNOW, IF I'M HURTING
4 REALLY BAD, I WANT SOME HELP. BUT I THINK THAT'S
5 HUMAN NATURE BASICALLY. AND WHAT THE PHYSICIAN HAS
6 TO DO IS BE ABLE TO UNDERSTAND THE HUMAN CONDITION
7 AND GET TO THE CORE OF THE ISSUE BASICALLY. NOW, I
8 DON'T EVEN THINK OF IT AS -- WHEN PEOPLE TELL ME
9 SOMETHING THAT'S NOT TRUE OR SOMETHING, I DON'T
10 EVEN THINK OF IT AS A LIE, BASICALLY. I JUST THINK
11 IT'S HUMAN NATURE BASICALLY.

12 Q. LET'S DO THIS SO WE DON'T GET TOO FAR AFIELD.
13 LET'S FOCUS ON THE BASIS OF YOUR OPINION OF MR.
14 SIMMONS THAT'S NOT MALINGERING.

15 A. OKAY.

16 Q. AND PLEASE TELL US WHAT THAT IS BASED UPON.

17 A. OKAY. THAT WAS EXACTLY WHAT MY STATEMENT WAS.
18 THERE ARE THINGS THAT YOU HAVE TO LOOK AT AS YOU'RE
19 EXAMINING A PATIENT, OR A CLIENT, OR WHATEVER.
20 THERE ARE THINGS THAT YOU HAVE TO LOOK AT. YOU'RE
21 NOT JUST TAKING THE INFORMATION THAT THEY'RE GIVING
22 YOU, THE WORDS AND THE MEANING OF THOSE WORDS. BUT
23 THERE ARE THINGS YOU HAVE TO LOOK AT. YOU'RE NOT
24 JUST TAKING THE INFORMATION THAT THEY'RE GIVING
25 YOU, THE WORDS AND THE MEANING OF THOSE WORDS; BUT

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1 THERE ARE THINGS YOU HAVE TO LOOK AT. YOU HAVE TO
2 LOOK AT THESE ISSUES: ARE THEY BEING EVASIVE? ARE
3 THEY SKIRTING AROUND AVOIDING CERTAIN ISSUES? ARE
4 THEY EXAGGERATING? ARE THEY OVERSTATING CERTAIN
5 THINGS BASICALLY? ARE THEY CONTRADICTING
6 THEMSELVES AT TIMES? ARE THEY PRODUCING A PICTURE
7 WHICH IS KIND OF CONFUSING; DO THEY FIT TOGETHER?
8 OKAY. ARE THERE INCONSISTENCIES? AND YOU HAVE TO
9 LISTEN TO THESE VERY CAREFULLY. INCONSISTENCIES IS
10 WHAT THEY'RE CALLED. OKAY. ARE THERE SLIPS; ARE
11 THERE TIMES WHEN THEY SAY SOMETHING THEY DIDN'T
12 MEAN TO SAY? SO YOU HAVE TO LISTEN VERY CAREFULLY
13 FOR THOSE THEMES THAT ARE GOING THROUGH WHAT
14 THEY'RE TELLING YOU. AT THE SAME TIME YOU HAVE TO
15 WATCH THEM VERY CAREFULLY. YOU HAVE TO WATCH FOR
16 FACIAL EXPRESSIONS; FOR EXAMPLE IF YOU ASK SOMEBODY
17 A QUESTION WHICH IS SENSITIVE AND THEY DON'T REALLY
18 WANT TO ANSWER THAT QUESTION, YOU KNOW. AND IF
19 THEY SAY "I DON'T UNDERSTAND;" OKAY; DID YOU JUST
20 HEAR THOSE WORDS "I DON'T UNDERSTAND," OR DID YOU
21 SEE SOME EVIDENCE OTHER THAN THAT THEY DON'T
22 UNDERSTAND? NOW, WHAT? WHAT WOULD THAT BE? WELL
23 US HUMAN BEINGS HAVE AN EXPRESSION CALLED
24 PERPLEXITY. YOU KNOW, PERPLEXITY IS WHEN YOU ROLL
25 YOUR BROW, AND YOU'RE LIKE TRYING TO GET IT, AND

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1 YOU DON'T GET IT. AND MOST PEOPLE WHO ARE
2 PREVARICATORS ARE NOT SKILLED ENOUGH AT IT THAT
3 THEY CAN GET THE WHOLE ACT DOWN; THAT THEY CAN GIVE
4 YOU THE FALSE WORDS AND ALSO THE FALSE EXPRESSIONS
5 AND THE FALSE BEHAVIOR AND THE FALSE MANNERISMS AND
6 EVERYTHING. SO WHILE YOU'RE LISTENING TO WHAT
7 THEY'RE SAYING, AND LISTEN TO THESE INCONSISTENCIES
8 AND SO FORTH, YOU'RE LOOKING AT BASICALLY FACIAL
9 EXPRESSIONS; YOU'RE LOOKING AT THEIR POSTURE;
10 YOU'RE LOOKING AT THE QUALITY OF THEIR VOICE, THE
11 TONE OF THEIR VOICE, AND SO FORTH, AND YOU'RE
12 LOOKING AT THEIR BEHAVIOR. DO THEY LOOK NERVOUS?
13 IF THEY'RE NERVOUS, WHAT ARE THEY NERVOUS ABOUT?
14 ARE THEY NERVOUS BECAUSE WHAT THEY'RE TELLING YOU
15 IS NOT TRUE? BUT YOU LOOK AT ARE THEY NERVOUS AND
16 SO FORTH. NOW, THEN THERE'S SOME SPECIAL
17 CIRCUMSTANCES THAT YOU CAN LOOK AT; HOW DO THEY
18 OPERATE UNDER THESE CIRCUMSTANCES? WHEN YOU'RE
19 ASKING ABOUT SOMETHING WHICH IS LIKE -- WELL, WHEN
20 YOU WERE IN HIGH SCHOOL, DID YOU PLAY BALL, AND SO
21 FORTH? I MEAN, HOW DO THEY OPERATE? DO THEY
22 OPERATE AND SOUND THE SAME WAY THAT WHEN YOU'RE
23 ASKING THEM SOMETHING THEY'RE REAL SENSITIVE TO THE
24 CASE? OR IS THERE A DIFFERENCE IN THE QUALITY OF
25 HOW THEY CONDUCT OR RESPOND TO YOU, AND SO FORTH.

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1 THEN YOU LISTEN TO WHAT THEY SAY OVER TIME BECAUSE
2 IF PEOPLE MALINGER, THEY USUALLY TRIP THEMSELVES
3 UP. PEOPLE ALWAYS TELL ON THEMSELVES. I MEAN, IN
4 MY WORLD THERE'S NO SUCH THING AS A SECRET. PEOPLE
5 ALWAYS TELL ON THEMSELVES. SO YOU LISTEN TO THEM
6 OVER TIME BECAUSE THERE ARE VERY FEW PEOPLE THAT
7 TELL YOU SOMETHING AND SAY SIX MONTHS LATER TELL
8 YOU EXACTLY THE SAME THING AND HAVE A BIG
9 FABRICATION BASICALLY UNLESS THEY WROTE IT DOWN AND
10 MADE NOTES AS THEY WERE TELLING YOU, YOU KNOW.
11 OKAY? THEN YOU HAVE TO LOOK ABOUT YOUR MANNERISMS;
12 NOT ONLY LOOK AT THE PERSON; YOU HAVE TO LOOK AT
13 YOURSELF. ARE YOU DOING SOMETHING WHICH IS MAKING
14 THAT PERSON APPEAR TO BE MALINGERING. NOW, THIS IS
15 VERY REAL. A LOT OF INEXPERIENCED EXAMINERS I
16 THINK STEP RIGHT UP ABOUT IT. IF YOU GO INTO A
17 SITUATION, FOR EXAMPLE, AND YOU'VE ALREADY
18 CONCLUDED IN YOUR MIND THAT YOU THINK SOMEBODY IS A
19 MALINGERER, OKAY? SO YOU'VE ALREADY GOT A
20 CONCLUSION. NOW, WHAT YOU'RE DOING IS YOU'RE
21 LOOKING FOR DATA TO CONFIRM YOUR CONCLUSION. WELL,
22 USUALLY WHAT WILL HAPPEN IS A PERSON WILL USUALLY
23 PICK UP ON THAT. THEY'LL GET DEFENSIVE. NOW, THE
24 PROBLEM IS THAT THEY GET DEFENSIVE AND START BEING
25 A LITTLE EVASIVE AND SO FORTH, YOU'LL TAKE THAT AS

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1 CONFIRMATION; AH-HAH! THERE IT IS! BUT THAT'S JUST
2 ONE OF THE THINGS YOU HAVE TO LOOK AT YOU HAVE TO
3 LOOK AT YOUR MANNER---

4 Q. LET ME STOP YOU FOR A SECOND. DID YOU FIND ANY
5 EVIDENCE THAT MR. SIMMONS WAS MALINGERING?

6 A. AS I SAID A FEW MINUTE AGO, I DID NOT FIND THE
7 EVIDENCE OF MALINGERING. AND THE OTHER THING I WAS
8 GOING TO SAY IS THE LAST THING THAT YOU HAVE TO
9 CONSIDER IS YOUR OWN GUT LEVEL. BASICALLY, YOU
10 HAVE PEOPLE---

11 MR. BAILEY: JUDGE---

12 THE COURT: SUSTAINED.

13 Q. DR. FOXWORTH, YOU TOLD US WHAT YOUR DIAGNOSIS WAS
14 ON YOUR FIRST EXAMINATION. HOW DID THAT COMPARE TO
15 YOUR DIAGNOSIS OF THE SECOND AND THIRD
16 EXAMINATIONS? IS IT THE SAME, OR DID IT---

17 A. WELL, NO. MY DIAGNOSIS ON THE FIRST EXAMINATION
18 WAS THAT -- AGAIN, THE FIRST EXAMINATION IS NOT A
19 DIAGNOSES. IT'S A DIAGNOSTIC IMPRESSION. IT'S
20 YOUR INITIAL IMPRESSION. MY IMPRESSION WAS -- IT'S
21 NOT A DIAGNOSIS, NOW -- WAS THAT THIS YOUNG MAN WAS
22 MENTALLY RETARDED. THAT DIAGNOSIS THEN WAS --
23 EVIDENCE WAS ADDED TO THAT CONSIDERATION IN MY MIND
24 BY WHAT I READ IN MY SUBSEQUENT EXAMINATIONS GOING
25 THROUGH READING, WRITING, BASIC INFORMATION, YOU

JOHN MICHAEL FOXWORTH - RE-DIRECT/MR. THEOS

1 KNOW, NUMBERS, CALCULATIONS, MATH. ALL THOSE
2 THINGS I DID WITH HIM TO TRY TO FIND THE DATA; FIND
3 THE EVIDENCE WHICH WOULD SUPPORT OR REFUTE THAT
4 DIAGNOSIS SO THAT BY THE COMPLETION OF MY
5 EVALUATION IN JANUARY, MY IMPRESSION WAS THAT YES,
6 HE WAS MENTALLY RETARDED; THAT HE BASICALLY ALSO
7 HAS A ALCOHOL RELATED PERSISTING DEMENTIA
8 BASICALLY; AND LASTLY I THINK AT TIMES HE APPEARED
9 TO ME TO BE DEPRESSED. BUT THAT'S NOT SOMETHING
10 THAT I WANT TO REALLY FOCUS ON BECAUSE THE MAN IS
11 INCARCERATED. HE'S NOT GETTING OUT TO EXERCISE ON
12 A DAILY BASIS AND THINGS LIKE THAT FROM WHAT I
13 UNDERSTAND.

14 MR. THEOS: ONE SECOND, JUDGE.

15 Q. MR. FOXWORTH, ANSWER ANY QUESTIONS THAT MR. BAILEY
16 MAY HAVE FOR YOU, PLEASE.

17 MR. BAILEY: YOUR HONOR, I EXPECT MY
18 CROSS-EXAMINATION IS GOING TO BE A LITTLE MORE
19 LENGTHY THAN I THOUGHT. COULD WE TAKE A BRIEF
20 BREAK BEFORE I START?

21 THE COURT: ALL RIGHT. MADAM
22 FORELADY, LADIES AND GENTLEMEN; I'M GOING TO EXCUSE
23 YOU TO GO TO YOUR ROOM TO POWDER YOUR NOSE, STRETCH
24 YOUR LEGS.

25 (AT THIS TIME, JURY RETIRES TO JURY ROOM.)

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 THE COURT: ALL RIGHT, GENTLEMEN.

2 LET ME KNOW WHEN YOU'RE READY, PLEASE.

3 (BRIEF RECESS.)

4 - - - - -

5 (AT THIS TIME JURY RETURNS TO OPEN COURT.)

6 THE COURT: MR. THEOS, HAD YOU
7 CONCLUDED YOUR EXAMINATION?

8 MR. THEOS: YES, SIR.

9 THE COURT: ALL RIGHT, SIR. YOU MAY
10 CROSS.

11 MR. BAILEY: THANK YOU, YOUR HONOR.

12 CROSS-EXAMINATION

13 BY MR. BAILEY:

14 Q. DR. FOXWORTH, I'M CERTAIN THAT THE EXTENSIVE
15 EVALUATION YOU DID ON MR. SIMMONS, YOU PREPARED A
16 REPORT; IS THAT CORRECT?

17 A. NO, SIR.

18 Q. YOU DID NOT?

19 A. NO, SIR.

20 Q. YOU'VE GOT NOTES TO REFLECT THE TESTING AND THE
21 DIFFERENTIAL MEMORY TESTS AND ALL THAT?

22 A. YES, I DO.

23 Q. ALL RIGHT, SIR. DO YOU HAVE THOSE WITH YOU?

24 A. YES, I DO.

25 Q. ALL RIGHT, SIR. COULD I TAKE A LOOK AT THEM?

MICHAEL FOXWORTH - CROSS/MR. BAILEY

- 1 A. SURE. THESE ARE THE NOTES THAT I MADE IN MY FACE
2 TO FACE CONTACTS.
- 3 Q. ALL RIGHT, SIR. DO THOSE NOTES INCLUDE THE RESULTS
4 OF THE EXAMINATION THAT YOU TESTIFIED YOU GAVE TO
5 MR. SIMMONS IN REGARD TO THE MEMORY TESTS AND THAT
6 SORT OF THING?
- 7 A. THEY'RE RIGHT HERE; YES, SIR.
- 8 Q. ALL RIGHT, SIR. HAVE YOU PROVIDED MR. THEOS WITH A
9 COPY OF THOSE NOTES?
- 10 A. YES. HE HAS THESE.
- 11 Q. DR. FOXWORTH, HOW MUCH ARE YOU GETTING PAID FOR
12 BEING RETAINED AS AN EXPERT WITNESS IN THIS CASE?
- 13 A. WELL, NOTHING SO FAR.
- 14 Q. DO YOU HAVE AN AGREEMENT FOR COMPENSATION?
- 15 A. WELL, WHEN I WAS ASKED IF I WOULD PARTICIPATE, I
16 STATED A FIGURE THAT I WOULD LIKE TO BE PAID; YES.
17 AND I HOPE I WILL BE.
- 18 Q. OKAY. WHAT IS IT?
- 19 A. TWO HUNDRED DOLLARS AN HOUR.
- 20 Q. ALL RIGHT. HOW MANY HOURS HAVE YOU PUT INTO THIS
21 SO FAR? YOU SAID YOU HAD SEVEN HOURS AND FIFTEEN
22 MINUTES WITH MR. SIMMONS?
- 23 A. WITH HIM PERSONALLY. NOW, I'VE HAD FAR MORE THAN
24 THAT SO FAR INVOLVED IN THE PROCESS OF REVIEWING
25 THE OTHER EXAMINATIONS AND SO FORTH.

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 Q. THE OTHER EXAMINATIONS MEANING AT THE HALL
2 INSTITUTE?

3 A. WELL, EVERYTHING; THE SCHOOL RECORDS, THE PAST
4 MEDICAL RECORDS, THE EXAMINATIONS AT THE HALL
5 INSTITUTE, THE STATEMENTS THAT HE MADE. I HAVE
6 FOUR AUDIO TAPES THAT I REVIEWED. TWO OF THOSE
7 WERE ON THE TESTING AT THE HALL INSTITUTE ON THE
8 FIRST OF DECEMBER.

9 Q. I DON'T MEAN ALL THAT; BUT JUST HOW MANY HOURS HAVE
10 YOU GOT IN THIS THING SO FAR?

11 A. I DON'T KNOW.

12 Q. YOU'VE GOT TO KNOW WHAT YOU GET PAID. JUST TELL
13 ME---

14 A. RIGHT. AND I'LL HAVE TO FIGURE THAT UP WHEN THE
15 TIME COMES.

16 Q. OKAY.

17 A. BECAUSE I KEEP A LOG.

18 THE COURT: COULD YOU GIVE HIM AN
19 ESTIMATE, DOCTOR?

20 DR. FOXWORTH: I COULD BE OFF BY AS
21 MUCH AS TEN OR FIFTEEN. I DON'T KNOW. I'D HAVE TO
22 ADD THEM UP. LET'S SEE. IT COULD BE AS HIGH AS 50
23 OR 60 HOURS BY NOW. I DON'T KNOW. I WOULD HAVE TO
24 FIGURE IT UP.

25 Q. OUT OF THAT 50 OR 60 HOURS, SEVEN HOURS OR

1 THEREABOUTS WAS ACTUALLY SPENT FACE TO FACE WITH
2 MR. SIMMONS; IS THAT CORRECT?

3 A. THAT'S CORRECT.

4 Q. ALL RIGHT, SIR. AND THE OTHER PART OF THAT IS
5 READING STUFF OTHER PEOPLE DID?

6 A. WELL, NOT ALL JUST THAT. ALSO I HAD AN OCCASION
7 WHEN I MET WITH OTHERS WHO, YOU KNOW, WERE
8 REVIEWING SOME OF THESE RECORDS OR WHO HAD PRODUCED
9 SOME OF THESE RECORDS, SOME OF THE MATERIALS THAT
10 WERE PRODUCED.

11 Q. DOCTOR, THESE AMERICAN RIGHTS, THEY'RE NOT ROCKET
12 SCIENCE STUFF, ARE THEY? I MEAN, THEY'RE DESIGNED
13 FOR LAW ENFORCEMENT OFFICERS TO GIVE THESE RIGHTS
14 TO PEOPLE THAT MAY BE IN DIFFERENT STATES OF
15 INTOXICATION AND DIFFERENT LEVELS OF INTELLIGENCE?
16 IT'S SIMPLE COMMON, EVERY DAY STUFF, ISN'T IT?

17 A. THE LANGUAGE FROM THE AVERAGE PERSON APPEARS TO BE
18 SIMPLE AND STRAIGHT-FORWARD.

19 Q. WHAT EDUCATIONAL LEVEL WOULD YOU THINK SOMEBODY
20 WOULD NEED TO ATTAIN IN ORDER TO UNDERSTAND A LAW
21 ENFORCEMENT OFFICER, SAY, AND "YOU HAVE A RIGHT TO
22 BE SILENT?" HOW FAR HAVE YOU GOT TO GO IN SCHOOL
23 TO COMPREHEND THAT, DOCTOR?

24 A. I'D SAY HE'D PROBABLY HAVE TO HAVE AN UPPER
25 ELEMENTARY EDUCATION BECAUSE IT REQUIRES THE

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 ABSTRACT CONCEPT OF A RIGHT. THE WHOLE THING IS
2 ABOUT RIGHTS; AND THE CONCEPT OF RIGHT IS AN
3 ABSTRACT CONCEPT.

4 Q. SO UPPER ELEMENTARY TO SIXTH OR SEVENTH GRADE;
5 FIFTH OR SIXTH GRADE?

6 A. NO, I WOULD THINK PROBABLY SEVENTH OR EIGHTH,
7 SOMETHING LIKE THAT. I'M NOT AN EXPERT IN THAT. I
8 THINK YOU'D HAVE TO---

9 Q. YOU'RE NOT AN EXPERT? I'M SORRY.

10 A. IN THAT SUBJECT OF EDUCATIONAL ATTAINMENT AND WHAT
11 LEVELS OF SCHOOL A PERSON SHOULD BE ABLE TO READ
12 CERTAIN CONCEPTS. YOU NEED TO GET AN EDUCATOR.

13 Q. WELL, I DON'T HAVE AN EDUCATOR UP HERE, SO I'M
14 GOING TO HAVE TO ASK YOU, DOCTOR. IF YOU CAN'T
15 ANSWER IT, JUST TELL ME YOU CAN'T ANSWER IT. ALL
16 I'M TRYING TO FIND OUT IS HOW FAR ALONG
17 EDUCATIONALLY, DEVELOPMENTALLY, DO YOU THINK
18 SOMEBODY HAS TO GET BEFORE THEY CAN UNDERSTAND IF I
19 WAS TO TELL THIS YOUNG LADY HERE "YOU DON'T HAVE TO
20 TALK TO ME." HOW SMART DOES SHE HAVE TO BE TO
21 FIGURE THAT OUT?

22 A. YOU DIDN'T SAY RIGHT; YOU SAID YOU DON'T HAVE TO
23 TALK TO ME.

24 Q. WELL, YOU---

25 A. YOU ELIMINATED THE MOST DIFFICULT PART OF THE

1 PROPOSITION.

2 Q. OKAY. YOU HAVE A RIGHT TO REMAIN SILENT. HOW
3 SMART HAVE YOU GOT TO BE TO UNDERSTAND WHAT THAT
4 MEANS?

5 A. I WOULD THINK SHE WOULD HAVE TO AT LEAST BE IN THE
6 RANGE OF -- I'D SAY UPPER ELEMENTARY. THAT'S ABOUT
7 AS CLOSE AS I CAN PINPOINT IT IN MY OPINION.

8 Q. SO WHAT YOU'RE TELLING US AND THIS JURY HERE IS
9 THAT IF SOMEBODY TELLS MR. SIMMONS "YOU DON'T HAVE
10 TO SAY ANYTHING." HE WOULD UNDERSTAND THAT. BUT IF
11 ON THE OTHER HAND YOU SAY "YOU HAVE THE RIGHT TO
12 REMAIN SILENT," THAT'S GOING TO THROW HIM? HE'LL
13 SCRATCH HIS HEAD THERE AND SAY "WHAT'S THAT FELLOW
14 SAYING?"

15 A. THAT'S MORE DIFFICULT COMMUNICATION.

16 Q. THAT'S WHAT YOUR TESTIMONY IS?

17 A. YES, SIR.

18 Q. I SHOW YOU STATE'S ELEVEN WHICH IS ONE OF THE THREE
19 OR FOUR MIRANDA FORMS. LET ME GET YOU TO REFER TO
20 THAT IF YOU WOULD, DOCTOR (WITNESS REVIEWS
21 DOCUMENT.) I JUST WANT TO MAKE SURE I UNDERSTAND
22 WHAT YOU'RE TELLING THIS JURY. ARE YOU SAYING THAT
23 BACK IN DECEMBER OF 1997 WHEN KENNETH MEARS SAID
24 "BEFORE WE ASK YOU ANY QUESTIONS, YOU MUST
25 UNDERSTAND YOUR RIGHTS;" ARE YOU TELLING THIS JURY

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1 THAT IN YOUR PROFESSIONAL OPINION KENNETH SIMMONS
2 DREW A BLANK ON THAT ONE; DIDN'T HAVE ANY IDEA WHAT
3 KENNETH MEARS WAS WAS SAYING?

4 A. I DON'T THINK HE UNDERSTANDS THE CONSENT OF RIGHTS
5 AS ENTITLEMENTS OR PRIVILEGES.

6 Q. HOW ABOUT THE SECOND ONE? THIS IS A REAL BRAIN
7 TWISTER HERE; "YOU HAVE THE RIGHT TO REMAIN
8 SILENT." IF HE SAID IT IN THAT WAY, YOU'RE TELLING
9 THIS JURY THAT KENNETH SIMMONS DID NOT UNDERSTAND
10 THAT?

11 A. I THINK HE UNDERSTANDS THAT IN A LIMITED WAY. AND
12 I THINK WHAT HE UNDERSTANDS THAT TO MEAN IS YOU
13 HAVE TO REMAIN SILENT BECAUSE I ASKED HIM WHAT
14 RIGHT MEANT.

15 Q. NO, SIR; I'M NOT ASKING YOU WHAT YOU ASKED HIM.
16 I'M ASKING YOU WHAT YOUR TESTIMONY IS AS TO WHAT
17 YOU CLAIM HE UNDERSTOOD IN YOUR OPINION?

18 A. OKAY.

19 Q. ALL RIGHT, SIR. THAT NEXT ONE THERE "ANYTHING YOU
20 SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF
21 LAW." IN YOUR OPINION DID HE HAVE THE ABILITY TO
22 UNDERSTAND THAT?

23 A. I THINK HE UNDERSTANDS IT FUNDAMENTALLY; YES.

24 Q. OKAY. SO THAT'S AN EASIER ONE THAN THE RIGHT TO
25 REMAIN SILENT?

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 A. RIGHT.

2 Q. OKAY. "YOU HAVE THE RIGHT THE TALK TO A LAWYER FOR
3 ADVICE BEFORE WE ASK YOU ANY QUESTIONS." YOU'RE
4 SAYING HE CAN'T UNDERSTAND THAT?

5 A. I THINK HE WOULD HEAR "YOU HAVE TO TALK TO A LAWYER
6 FOR ADVICE BEFORE WE ASK ANY QUESTIONS." I THINK
7 THAT'S PROBABLY WHAT HE WOULD HEAR RATHER THAN JUST
8 TO COMPREHEND -- HE'S GOT A PREROGATIVE HERE; HE
9 CAN SAY YES OR NO.

10 Q. "AND TO HAVE YOU PRESENT WITH HIM WITH YOU DURING
11 QUESTIONING." DID HE UNDERSTAND THAT?

12 A. I THINK HE UNDERSTOOD THAT HE COULD HAVE HIS
13 LAWYER WITH HIM.

14 Q. OKAY.

15 A. I DON'T THINK HE UNDERSTOOD HIS EXECUTIVE
16 AUTHORITY, THOUGH, TO HOLD THE PROCEEDING UP ON
17 THAT.

18 Q. THAT ISN'T PART OF THE MIRANDA RIGHTS, IS IT, THE
19 AUTHORITY TO HOLD UP THE PROCEEDINGS?

20 A. YOU ASKED ME WHAT HE UNDERSTOOD OF THAT. I'M
21 TELLING YOU WHAT HE UNDERSTOOD IT IN A LIMITED WAY
22 WHAT HE UNDERSTOOD.

23 Q. ALL RIGHT. "IF YOU HAVE NO MONEY FOR LAWYER'S
24 FEES, THE COURT WILL APPOINT ONE TO REPRESENT YOU
25 WITHOUT COST TO YOU IF YOU WISH." ARE YOU SAYING

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1 HE DIDN'T UNDERSTAND THAT?

2 A. I THINK HE PROBABLY UNDERSTOOD THAT.

3 Q. OKAY. "IF YOU DECIDE TO ANSWER QUESTIONS NOW
4 WITHOUT A LAWYER PRESENT, YOU STILL HAVE THE RIGHT
5 TO STOP ANSWERING QUESTIONS AT ANY TIME." YOU'RE
6 SAYING HE COULDN'T UNDERSTAND THAT?

7 A. I THINK THAT HE PROBABLY GOT PART OF THAT, BUT
8 AGAIN, THE RIGHT THING.

9 Q. "YOU ALSO HAVE THE RIGHT TO STOP ANSWERING
10 QUESTIONS AT ANY TIME UNTIL YOU TALK TO A LAWYER."
11 DID HE UNDERSTAND THAT IN YOUR OPINION, SIR?

12 A. I THINK HE PROBABLY FUNDAMENTALLY UNDERSTOOD THAT.
13 THE RIGHT PART IS WHERE HE PROBABLY WASN'T CLEAR.

14 Q. AS I UNDERSTAND IT, HE DOESN'T UNDERSTAND THE
15 CONCEPTS "YOU HAVE RIGHTS?"

16 A. I THINK AFTER MULTIPLE SCHOOLINGS, WHEN I FINALLY
17 SAW HIM IN JANUARY AND I ASKED HIM DID HE HAVE A
18 RIGHT; HE SAID HE COULD ASK QUESTIONS. AND THAT'S
19 THE CLOSEST I THINK I CAME TO ANY KNOWLEDGE ON HIS
20 PART OF A CONCEPT OF ENTITLEMENT; THAT WORD MEANING
21 AN ENTITLEMENT.

22 Q. NOW, DOCTOR, YOU SAID THAT A LOT MORE TIME WAS
23 SPENT IN REVIEWING MATERIAL THAN ACTUALLY TALKING
24 TO MR. SIMMONS; IS THAT CORRECT?

25 A. YES, SIR.

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1 Q. BECAUSE YOU CAN'T OPERATE IN A VACUUM. THE MORE
2 MATERIAL THAT YOU'VE GOT RELATING TO WHAT THE STATE
3 ALLEGES OCCURRED, AND THE MORE MATERIAL YOU'VE GOT
4 ABOUT HIS BACKGROUND AND EDUCATION, FAMILY LIFE,
5 THAT KIND OF THING, THE BETTER DIAGNOSIS YOU CAN
6 REACH; IS THAT CORRECT?

7 A. YES, SIR. THAT'S FUNDAMENTALLY AS MUCH INFORMATION
8 AS YOU CAN GET.

9 Q. ALL RIGHT, SIR. WHAT INFORMATION DID YOU SEEK FROM
10 THE POLICE DEPARTMENT?

11 A. WHAT INFORMATION DID I SEEK FROM THE POLICE
12 DEPARTMENT?

13 Q. YES, SIR.

14 A. WELL, I WAS ABLE TO READ THE RECORDS OF THE VARIOUS
15 CHARGES AGAINST HIM. AND I WAS ABLE TO READ THE
16 STATEMENTS. THERE WERE THE TWO TAPES OF THE TWO
17 STATEMENTS THAT WERE MADE ON THE FIFTH OF DECEMBER
18 OF 1997. AND THEN THE THIRD STATEMENT ON DECEMBER
19 THE NINTH THERE WAS NO TAPE. BUT I HAD THE
20 TRANSCRIPT OF THAT. SO I READ ALL THREE
21 TRANSCRIPTS AND THE TWO TAPES I LISTENED TO.

22 Q. YOU DID NOT LISTEN TO THE THIRD TAPE?

23 A. I DID NOT GET THE THIRD TAPE. I HAD THE TRANSCRIPT
24 OF DECEMBER THE NINTH STATEMENT BUT THAT'S ALL.

25 Q. WHEN YOU WENT OVER THE EDUCATIONAL RECORDS, THE

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1 SCHOOL RECORDS; DID YOU NOTE THAT MR. SIMMONS OVER
2 HERE WHO YOU CONTEND CAN'T UNDERSTAND HIS MIRANDA
3 RIGHTS GRADUATED FROM SUMMERVILLE WITH EIGHTEEN
4 UNITS?

5 A. THAT'S WHAT I HAVE IN THE RECORDS.

6 Q. THAT'S THE KIND OF STUFF THAT YOU USED TO BASE YOUR
7 DECISION ON; RIGHT?

8 A. WELL, SEE; I DON'T KNOW WHAT THAT MEANS.

9 Q. YOU DON'T KNOW WHAT GRADUATES FROM HIGH SCHOOL
10 MEANS, DOCTOR?

11 A. NO; I DON'T KNOW WHAT ATTAINMENT LEVEL MEANS. I
12 KNOW WHAT GRADUATION MEANS, BUT I DON'T KNOW THAT
13 THAT CONVEYS A CERTAIN GUARANTEED ATTAINMENT LEVEL
14 ON HIS PART.

15 Q. THAT ISN'T MY QUESTION, DOCTOR. I'M ASKING YOU IF
16 YOU REVIEWED THE RECORDS AND WHETHER OR NOT PART OF
17 THOSE RECORDS INCLUDED A TRANSCRIPT FROM THE SCHOOL
18 SHOWING THAT THIS MAN GRADUATED FROM HIGH SCHOOL
19 WITH EIGHTEEN UNITS?

20 A. I SAW THAT IN THE RECORDS THAT HE HAD GRADUATED
21 FROM HIGH SCHOOL IN THIRTEEN YEARS.

22 Q. SO IF HE FAILED ONE YEAR, HE WAS ONE YEAR BEHIND
23 SCHEDULE; RIGHT?

24 A. THAT'S WHAT I UNDERSTAND.

25 Q. HE WAS EIGHTEEN OR NINETEEN WHEN HE GRADUATED?

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1 A. NINETEEN, I BELIEVE.

2 Q. ALL RIGHT, SIR. AND DID YOU ALSO SEE THAT HE MADE
3 AN A IN REMEDIAL ENGLISH IN THE ELEVENTH GRADE?

4 A. I WENT THROUGH ALL OF THOSE GRADES.

5 Q. ALL RIGHT, SIR. THERE WERE ALSO TEST SCORES IN
6 THERE, WEREN'T THERE DOCTOR?

7 A. TEST SCORES?

8 Q. YES, SIR.

9 A. WHAT ARE YOU REFERRING TO?

10 Q. I.Q. TEST SCORES.

11 A. YES, SIR; THERE WERE SOME I.Q. TEST SCORES.

12 Q. WHAT'S A NORMAL I.Q.?

13 A. WELL, A NORMAL I.Q. FOR THE AVERAGE PERSON IS
14 PROBABLY SOMEWHERE BETWEEN 90 AND 110. THAT'S
15 ABOUT AVERAGE.

16 Q. ALL RIGHT, SIR. AND WHEN MR. SIMMONS WAS IN THE
17 THIRD GRADE, HIS SCHOOL RECORDS REFLECT AN I.Q. OF
18 104, DID THEY NOT?

19 A. THERE IS A PLACE IN THERE WHERE HE REPORTED AN I.Q.
20 OF 104. I SAW THAT.

21 Q. ALL RIGHT. THERE'S ANOTHER PLACE WHERE -- THAT'S
22 ABOVE AVERAGE, RIGHT; IF YOU'RE JUST GOING BY A
23 TEST SCORE?

24 A. IF YOU'RE JUST GOING BY A TEST SCORE?

25 Q. YES, SIR?

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1 A. THAT WOULD PUT YOU IN THE AVERAGE PROBABLY.

2 Q. OKAY. HOW ABOUT 94 IN THE FIRST GRADE?

3 A. THAT WOULD PROBABLY PUT YOU BASICALLY JUST THE
4 BOTTOM OF THE AVERAGE ALTHOUGH IT'S QUESTIONABLE
5 HOW RELIABLE THAT WOULD BE AT THAT YOUNG AGE.

6 Q. OKAY. MENTAL RETARDATION. YOU'VE GOT TO HAVE
7 THREE THINGS TOGETHER, ALL THREE OF THEM TO
8 DIAGNOSE SOMEBODY AS BEING MENTALLY RETARDED UNDER
9 THE DSM-IV, DON'T YOU?

10 A. YES, SIR.

11 Q. FIRST ONE IS THE TEST SCORE; RIGHT?

12 A. YES.

13 Q. ONE OF THEM IS THAT THE ONSET HAS TO BE PRIOR TO
14 THE AGE OF EIGHTEEN; IS THAT CORRECT?

15 A. THE ONSET OF THE ADAPTIVE DYSFUNCTIONS HAS TO BE
16 BEFORE THE AGE OF EIGHTEEN. AND FROM OTHER RECORDS
17 I REVIEWED, I THINK IT WAS STATED IN SOUTH CAROLINA
18 IT'S TWENTY-TWO.

19 Q. I'M ASKING YOU ABOUT THE D.S.M.

20 A. D.S.M.---

21 Q. YOU DON'T WAKE UP ONE MORNING MENTALLY RETARDED
22 WHEN YOU'RE IN YOUR THIRTIES, DO YOU?

23 A. NO; IT'S A DEVELOPMENTAL THING. IT'S DURING THE
24 DEVELOPMENTAL YEARS.

25 Q. BUT YOU CANNOT DIAGNOSE MENTAL RETARDATION UNLESS

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1 THAT CONDITION COMMENCES PRIOR TO THE AGE OF
2 EIGHTEEN, CAN YOU DOCTOR? I'VE SEEN THE D.S.M.---

3 A. THAT'S THE CRITERIA OF ADAPTIVE DYSFUNCTIONS TO
4 HAVE BEGUN BEFORE THE AGE OF EIGHTEEN.

5 Q. ALL RIGHT, SIR. AND THE ADAPTIVE DYSFUNCTIONS
6 WOULD BE THE THIRD ELEMENT, RIGHT? THE ONSET PRIOR
7 TO EIGHTEEN; SUBSTANDARD SCORE GENERALLY BELOW
8 SEVENTY. AND YOU ALSO HAVE TO HAVE -- LET'S MAKE
9 SURE WE GET IT RIGHT HERE -- DEFICITS OR
10 IMPAIRMENTS AND PRESENT ADAPTIVE FUNCTIONS; IS THAT
11 CORRECT?

12 A. DEFICIT IMPAIRMENTS OR PRESENT ADAPTIVE FUNCTIONS
13 DEVELOPING OR BEGINNING BEFORE THE AGE OF EIGHTEEN.

14 Q. YOU HAVE TO HAVE ALL THREE? YOU CAN'T JUST LOOK AT
15 YOUR TEST SCORES?

16 A. WELL, THERE'S A QUESTION ABOUT THAT BECAUSE IN SOME
17 OF THE LITERATURE, I MEAN YOU'LL FIND REFERENCES TO
18 -- YOU CAN HAVE SCORES ABOVE SEVENTY IF OTHER
19 THINGS, YOU KNOW, OUTWEIGH THEM IN THE EYES OF THE
20 EXAMINER.

21 Q. DO YOU DISAGREE WITH ME, DOCTOR, THAT DSM-IV WHICH
22 YOU'VE CITED IN YOUR DIRECT TESTIMONY STATES THAT
23 THE DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION IS
24 NUMBER ONE, SIGNIFICANTLY SUBAVERAGE INTELLECTUAL
25 FUNCTIONING, AN I.Q. OF APPROXIMATELY SEVENTY OR

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1 BELOW ON THE I.Q. TEST? ISN'T THAT WHAT IT SAYS?

2 A. THAT'S WHAT IT SAYS.

3 Q. AND YOU DON'T ACCEPT THAT?

4 A. WELL, IF YOU'LL READ TEXTBOOKS, THEY'LL TELL YOU
5 THAT THIS IS NOT HARD SCIENCE. AS I TOLD YOU
6 EARLIER, OVER THE YEARS THERE HAVE BEEN DIFFERENCES
7 BETWEEN THE AMERICAN PSYCHIATRIC ASSOCIATION
8 SYSTEMS MANUAL, THE WORLD HEALTH ORGANIZATION
9 INTERNATIONAL CLASSIFICATION OF DISEASES. THERE'S
10 ALSO AN ORGANIZATION CALLED THE AMERICAN
11 ASSOCIATION OF MENTAL DEFICIENCY WHICH HAS HAD --
12 IF YOU'LL LOOK BACK IN HISTORY, THOSE NUMBERS HAVE
13 DIFFERED OVER THE YEARS BETWEEN THOSE. SO WHAT I'M
14 SAYING TO THE JURY; THIS IS NOT HARD SCIENCE.
15 YOU'D HAVE TO LOOK AT THE PERSON. AND YOU HAVE TO
16 ASK YOURSELF IS THIS PERSON FUNCTIONING WITHIN AN
17 AVERAGE RANGE OF FUNCTION BASICALLY. NOW IN THIS
18 CASE THERE WASN'T ANY QUESTION IN MY MIND BECAUSE
19 EVEN HIS I.Q. SCORES WERE DOWN THERE.

20 Q. DOCTOR -- AND I APOLOGIZE IF YOU THINK I'M TRYING
21 TO BE CUTE WITH YOU. I'M TRYING TO GET A STRAIGHT
22 ANSWER.

23 A. I REALIZE THAT.

24 Q. THIS IS A DSM-IV; RIGHT?

25 A. YES, SIR.

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1 Q. THAT SETS OUT THE DIAGNOSTIC AND STATISTICAL MANUAL
2 OF MENTAL DISORDERS; IS THAT CORRECT?

3 A. YES, SIR.

4 Q. AND THAT'S PREPARED BY THE AMERICAN PSYCHIATRIC
5 ASSOCIATION THAT YOU BELONG TO?

6 A. YES, SIR.

7 Q. ALL RIGHT, SIR. AND EVERY PSYCHIATRIST OR CLINICAL
8 PSYCHOLOGIST THAT YOU KNOW OF PROBABLY HAS THIS
9 BOOK, DON'T THEY?

10 A. I WOULD ASSUME SO.

11 Q. THAT'S SORT OF LIKE THE BIBLE?

12 A. I THINK IT IS A STANDARD BOOK OF REFERENCE NOW.

13 Q. ALL RIGHT, SIR. AND IT HAS DIAGNOSTIC CRITERIA FOR
14 WHATEVER MENTAL DISORDER YOU COULD THINK OF
15 INCLUDING MENTAL RETARDATION, DOES IT NOT?

16 A. YES, SIR.

17 Q. DOES THIS BOOK, OR DOES THIS BOOK NOT, HAVE THREE
18 DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION WHICH
19 HAVE TO CONCUR CONCURRENTLY, THAT BEING SUBAVERAGE
20 INTELLIGENCE AS INDICATED ON AN I.Q. TEST GENERALLY
21 BELOW 70 ONSET BEFORE THE AGE OF EIGHTEEN, AND ALSO
22 THE THIRD ONE BEING DEFICITS OR IMPAIRMENTS AND
23 ADAPTIVE FUNCTIONS? CAN YOU ANSWER THAT YES OR NO?

24 A. I'VE ANSWERED THAT ALREADY, SIR.

25 MR. THEOS: YOUR HONOR, I WOULD

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1 OBJECT TO THE QUESTION. HE HAS ANSWERED THAT. THE
2 QUESTION HAS BEEN ASKED AND ANSWERED A COUPLE OF
3 TIMES.

4 THE COURT: I'M GOING TO ALLOW IT.

5 Q. ALL RIGHT, SIR. WHEN WE'RE TALKING ABOUT DEFICITS
6 AND ADAPTIVE FUNCTIONING, WE'RE TALKING ABOUT THE
7 STANDARDS EXPECTED FOR SOMEBODY'S AGE ACCORDING TO
8 THE DSM?

9 A. BASICALLY SOMEBODY'S ABILITY TO---

10 Q. SO WE'RE LOOKING AT SOMEBODY'S ABILITY TO CARE FOR
11 THEMSELVES, HOLD DOWN A JOB, TAKE CARE OF THEIR
12 PERSONAL HYGIENE, AND THAT TYPE OF THING?

13 A. RIGHT. COMMUNICATE EFFECTIVELY.

14 Q. OKAY.

15 A. MAKE JUDGMENTS OF PERSONAL CARE, RESPOND
16 APPROPRIATELY TO OTHERS IN SITUATIONS.

17 Q. ALL RIGHT, SIR. NOW YOU'RE AWARE ALSO FROM THE
18 HISTORY YOU GOT IN PREPARATION FOR YOUR TESTIMONY
19 THAT WHEN KENNETH SIMMONS WAS IN HIGH SCHOOL HE
20 PLAYED FOOTBALL FOR A COUPLE OF YEARS, DEFENSIVE
21 END; DID YOU KNOW THAT?

22 A. WELL, IN THE RECORDS I SAW THREE DIFFERENT
23 POSITIONS.

24 Q. WHICH ONE?

25 A. BASICALLY I THINK THAT IN ONE OF THE RECORDS HE

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1 SAID HE PLAYED DEFENSIVE END; AND IN ANOTHER RECORD
2 IT SAID THAT HE PLAYED DEFENSIVE LINEBACKER; AND IN
3 ANOTHER RECORD IT SAID HE PLAYED PUNT RECEIVER.

4 Q. ALL RIGHT, SIR. SO HE WENT TO HIGH SCHOOL,
5 PARTICIPATED IN EXTRA CURRICULAR ACTIVITIES,
6 GRADUATED, AND GOT MARRIED, DIDN'T HE?

7 A. YES, SIR; THAT'S WHAT I UNDERSTAND; YES.

8 Q. HAD A COUPLE OF CHILDREN?

9 A. YES, SIR.

10 Q. AND HE WORKED AS A CARPENTER FRAMER FOR ROUGHLY TEN
11 YEARS AFTER HIGH SCHOOL STEADILY?

12 A. I DON'T KNOW THAT. MY UNDERSTANDING IS HE HAD
13 NUMEROUS JOBS.

14 Q. OKAY. BUT HE WORKED PRIMARILY AS A FRAMER
15 CARPENTER?

16 A. I HAVE HEARD THAT HE WORKED FOR A LANDSCAPING
17 COMPANY. AND I THINK I HEARD SOMETHING ABOUT
18 INITIALLY HE STARTED OUT WORKING AT AN
19 EXTERMINATING COMPANY OR SOMETHING LIKE THAT. BUT
20 I UNDERSTAND HE HAD NUMEROUS JOBS. BUT IF YOU ASK
21 HIM, I THINK HE WOULD SAY THAT HIS---

22 Q. WELL, I'M ASKING YOU RIGHT NOW.

23 A. HIS TRADE WAS---

24 Q. BASED ON THE INFORMATION YOU HAD, DID HE WORK IN
25 THE CONSTRUCTION TRADE?

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1 A. HE WOULD SAY THAT IT WAS IN CONSTRUCTION; YES.

2 Q. OKAY.

3 A. NO; NOT JUST CARPENTRY. I THINK THAT HE SAID, AS I
4 RECALL -- AND MAYBE IT'S FROM THE RECORD THAT HE
5 DID SOMETHING WITH BRICK MASONRY ALSO. BUT HE HAD
6 VARIOUS FUNCTIONS IN THE CONSTRUCTION FIELD. BUT
7 I'M NOT SURE HE HAD AN AREA OF EXPERTISE.

8 Q. DOCTOR, THAT REQUIRES SOME INTELLIGENCE, DOESN'T
9 IT, TO DO BRICK MASONRY AND CONSTRUCTION? YOU'VE
10 EITHER GOT TO VISUALIZE THAT STRUCTURE OR READ A
11 BLUEPRINT OR KNOW HOW TO CUT THE BOARDS, HOW TO
12 MEASURE THEM?

13 A. THAT'S NOT SOMETHING YOU CAN ASSUME, SIR. IF
14 YOU'VE EVER BEEN ON A CONSTRUCTION JOB, IF YOU'VE
15 HAD A HOUSE BUILT, YOU'LL KNOW THAT THOSE PEOPLE DO
16 NOTHING MORE THAN CARRY BOARDS FROM THE STACK TO
17 THE CARPENTERS WHO PUT THEM IN PLACE.

18 Q. OKAY. BUT IF HE WAS A CARPENTER, THAT WOULD
19 INDICATE SOME LEVEL OF INTELLIGENCE, WOULD IT NOT,
20 ASSUMING THAT?

21 A. BY THIS YOU MEAN FUNCTION INDEPENDENTLY IN TERMS OF
22 DOING CONSTRUCTION WORK.

23 Q. I'M NOT SAYING HE BUILT A HOUSE BY HIMSELF. I'M
24 SAYING AS PART OF THE FRAMING PART, YOU GO OUT
25 THERE AND CUT BOARDS AND MAKE PRESSES AND THEY

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 FRAME OUT A HOUSE?

2 A. RIGHT.

3 Q. WOULDN'T THAT TAKE SOME INTELLIGENCE?

4 A. WELL, WE ALL HAVE SOME INTELLIGENCE; YES. HOW MUCH
5 ARE YOU TALKING ABOUT?

6 Q. ENOUGH INTELLIGENCE TO UNDERSTAND SIMPLE ENGLISH
7 LIKE YOU HAVE THE RIGHT TO BE QUIET.

8 A. WELL, CAN SOMEBODY THAT'S MENTALLY RETARDED DO
9 CONSTRUCTION WORK? YES, SIR.

10 Q. I'M GOING TO HAVE TO ASK YOU THE QUESTIONS, DOCTOR,
11 AND YOU ANSWER THEM, OKAY?

12 A. YES, SIR.

13 Q. AND BELIEVE ME, I'M NOT TRYING TO BE SMART WITH
14 YOU. I'M JUST TRYING TO GET ANSWERS TO MY
15 QUESTIONS BECAUSE THIS JURY WANTS TO KNOW WHAT
16 YOU'RE TESTIFYING TO.

17 A. I FEEL LIKE YOU'RE TRYING TO MAKE ME SAY SOMETHING,
18 YOU KNOW.

19 Q. NO, SIR. I'M JUST TRYING TO GET YOU TO ANSWER MY
20 QUESTIONS. IF YOU CAN'T ANSWER THEM, OR IF I ASK
21 IT THE WRONG WAY, PLEASE TELL ME AND I'LL TRY TO
22 REPHRASE IT; OKAY?

23 A. OKAY.

24 Q. ALL RIGHT, SIR. SO BASED ON THAT HE HAD A WORK
25 HISTORY, MARRIED, HAD A FAMILY, HOME WITH CHILDREN,

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 HIGH SCHOOL GRADUATE. HE ALSO WAS ABLE TO GET A
2 DRIVER'S LICENSE, WASN'T HE? DID YOU KNOW THAT?

3 A. HE TOLD ME THAT HE WAS ABLE TO GET A DRIVER'S
4 LICENSE AFTER EIGHT OR NINE TRIES WITH PEOPLE
5 READING THE TEST TO HIM.

6 Q. BUT HE GOT A DRIVER'S LICENSE?

7 A. AFTER THAT MANY TRIES, THAT'S MY UNDERSTANDING.

8 Q. ALL RIGHT. AND HE DROVE A CAR, I ASSUME, IF HE HAD
9 A LICENSE, DID HE NOT?

10 A. THAT'S WHAT I UNDERSTAND.

11 Q. OKAY. DOCTOR, YOU WOULD YOU TELL ME, PLEASE, IN
12 YOUR NOTES OR WHATEVER WHAT THE DEFICITS OF
13 ADAPTIVE FUNCTIONING YOU'RE COGNIZANT OF THAT
14 OCCURRED BEFORE THE AGE OF EIGHTEEN?

15 A. WELL, BASICALLY THERE IS SOCIAL HISTORY ALSO THAT I
16 REVIEWED. AND IT'S CLEAR THAT THIS GENTLEMAN WAS
17 NOT VERY INTERACTIVE ON A SOCIAL LEVEL TO FUNCTION
18 VERY WELL; THAT HE WAS BASICALLY A FOLLOWER EASILY
19 LED; DIDN'T CONCEIVE AND DEVELOP PLANS ON HIS OWN,
20 AND SO FORTH. AND THOSE ARE THE THINGS THAT I
21 WOULD PUT HIM IN WHAT'S CALLED EXECUTIVE
22 FUNCTIONING THAT HE WAS DEFICIT IN.

23 Q. ACCORDING TO THE TRANSCRIPTS YOU READ, HE WASN'T
24 FOLLOWING ANYBODY ON SEPTEMBER THE FIRST, 1996, WAS
25 HE?

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 A. ON SEPTEMBER THE FIRST?

2 Q. YES.

3 A. HE WASN'T FOLLOWING?

4 Q. WAS HE WITH SOMEBODY ELSE ACCORDING TO THE
5 TRANSCRIPT YOU READ?

6 A. ON SEPTEMBER THE FIRST---

7 Q. WHEN LILLY BELL BOYD WAS MURDERED IN SUMMERVILLE?

8 A. YES, SIR. YOU ASKED ME WAS HE FOLLOWING SOMEBODY
9 ELSE.

10 Q. YES, SIR. OR DO THOSE TRANSCRIPTS INDICATE HE WAS
11 BY HIMSELF?

12 A. (NO RESPONSE.)

13 Q. I'M TALKING ABOUT MR. SIMMONS' STATEMENTS THAT YOU
14 READ WHEN YOU HEARD---

15 A. RIGHT. I TRIED TO FIND OUT FROM HIM ABOUT HIS
16 SITUATION IN THAT TIME FRAME, AND THE MOST I COULD
17 GET FROM HIM THAT HE COULD RECALL WAS THAT HE HAD
18 BEEN AT SOME KIND OF CLUB HE THINKS, AND THAT HE
19 HAD GONE HOME WITH---

20 Q. I'M NOT ASKING YOU FOR ANY HEARSAY AT THIS POINT
21 AND TIME. I'M JUST ASKING YOU IF ACCORDING TO
22 THOSE TRANSCRIPTS HE WAS FOLLOWING SOMEBODY.

23 A. I DON'T KNOW WHAT YOU MEAN BY FOLLOWING SOMEBODY.

24 Q. IF YOU DON'T UNDERSTAND THAT, I'LL WITHDRAW THE
25 QUESTION, DOCTOR. I APOLOGIZE. LET ME SWITCH

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 AROUND A LITTLE BIT HERE, DOCTOR. IF I FEEL LIKE
2 I'VE GOT SOME KIND OF PSYCHIATRIC PROBLEM AND I
3 NEED TO GET A PSYCHIATRIST SUCH AS YOURSELF, IT'S
4 TO MY BEST INTEREST TO PRESENT MY PROBLEMS TO YOU
5 AS HONESTLY AS I CAN SO THAT I CAN GET SOME HELP
6 AND SOME TREATMENT; IS THAT CORRECT? IT WOULDN'T
7 DO ME ANY GOOD TO LIE TO YOU OR TO MISREPRESENT MY
8 SITUATION?

9 A. IT CALLS FOR JUDGMENT---

10 Q. BECAUSE IF YOU DIDN'T KNOW MY SITUATION, THEN YOU
11 COULDN'T HELP ME OUT, COULD YOU?

12 A. NO, I PROBABLY COULDN'T.

13 Q. ALL RIGHT, SIR. ON THE OTHER END, I'M CHARGED WITH
14 CAPITAL MURDER, AND I'M GOING TO BE EVALUATED IN
15 CONJUNCTION WITH A CRIMINAL TRIAL IN WHICH THE
16 STATE IS SEEKING THE DEATH PENALTY. I HAVE EVERY
17 REASON IN THE WORLD TO MALINGER MY SYMPTOMS TO YOU;
18 DO I NOT?

19 A. WELL---

20 Q. LET ME ASK YOU ANOTHER WAY. CAN YOU THINK OF
21 ANYBODY ELSE IN ANY GREATER POSITION TO HAVE A
22 REASON TO MALINGER MENTAL RETARDATION THAN KENNETH
23 SIMMONS DOES AT THIS TIME?

24 A. CAN I THINK OF ANYBODY THAT HAS ANY GREATER --
25 THERE ARE PROBABLY PEOPLE IN THE WORLD

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 HYPOTHETICALLY WHO WOULD HAVE A GREATER REASON TO
2 DO THAT. YES; I CAN SEE THAT.

3 Q. HE'S UP THERE NEAR THE TOP, ISN'T HE, AS FAR AS A
4 REASON TO MALINGER?

5 A. YOU KNOW, IF HE WERE LOOKING AND UNDERSTOOD THE
6 SITUATION, CLEARLY I THINK HE PROBABLY WOULD HAVE
7 AN IDEA THAT THAT MIGHT BE A REASONABLE THING TO
8 DO. BUT THAT CALLS FOR JUDGMENT.

9 Q. YOU LISTENED TO THE FIRST TWO CASES IN THEIR
10 ENTIRETY AND YOU HAVE TRANSCRIPTS IN ALL THREE
11 CASES; IS THAT CORRECT, DOCTOR?

12 A. YES, SIR.

13 Q. ALL RIGHT, SIR. AND YOU HAVE REVIEWED THE HOSPITAL
14 RECORDS FROM WILLIAM S. HALL INSTITUTE?

15 A. YES, SIR.

16 Q. AND YOU HAVE REVIEWED THE MEDICAL RECORDS ALSO,
17 HAVE YOU NOT?

18 A. I HAD SOME MEDICAL RECORDS. I HAD A RECORD ON HIM
19 FROM CHARLESTON MEMORIAL HOSPITAL. I THINK I HAD
20 SOME RECORDS ALSO FROM TRIDENT.

21 Q. ALL RIGHT, SIR. DID YOU NOTE IN THE MEDICAL
22 RECORDS THAT HE HAD AN E.B.G. AND AN M.R.I. AND
23 THEY FOUND NO PROBLEM THERE?

24 A. I THINK I RECALL REFERENCES TO THESE THINGS; YES,
25 SIR.

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 Q. ALL RIGHT, SIR. DID YOU READ ALL OF THE HALL
2 RECORDS INCLUDING THE NURSE'S NOTES AND THAT TYPE
3 OF THING?

4 A. YES, I DID.

5 Q. DID YOU READ IT FROM COVER TO COVER?

6 A. YES, SIR.

7 Q. DID YOU FIND DIFFERENT PLACES IN THOSE RECORDS,
8 DOCTOR, ABOUT MR. SIMMONS PLAYING CARDS WITH OTHER
9 PEOPLE AT THE HOSPITAL?

10 A. I DON'T RECALL THAT.

11 Q. YOU DON'T RECALL THAT?

12 A. I DON'T RECALL THAT; NO, SIR.

13 Q. AND DO YOU RECALL A NURSE SEEING HIM READING THE
14 NEWSPAPER IN THE MORNING?

15 A. I DON'T RECALL THAT PRECISELY BECAUSE IN MY MIND
16 I'VE COME ACROSS A COUPLE OF THINGS, AND ONE WAS IN
17 A TRANSCRIPT OF A PROCEEDING OF A DR. SANDLER WITH
18 HIM. THERE WERE SOME REFERENCES IN THERE, OR
19 REPORT I GUESS, FROM DR. SANDLER, SOME REFERENCES
20 THERE DOING CERTAIN THINGS. BUT I DON'T RECALL
21 THAT PRECISELY FROM THE HALL INSTITUTE THING. I
22 MEAN, I DON'T MEMORIZE EVERY SINGLE NURSE'S NOTE IN
23 ITS ENTIRETY. I TRY TO GET AN OVERVIEW OF WHAT'S
24 GOING ON.

25 Q. ALL RIGHT, SIR. AND YOU DIDN'T BY ANY CHANCE LOOK

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 AT THAT TRANSCRIPT OF SOME TESTIMONY TO A PRIOR
2 HEARING BY SOME CORRECTIONAL OFFICERS AND OTHER
3 WITNESSES IN REGARD TO SOME MENTAL HEALTH ISSUES,
4 DID YOU?

5 A. I THINK I HAVE THAT TRANSCRIPT THAT YOU HAVE THERE,
6 AND I BELIEVE THE ONLY ONE THAT I HAD TIME TO READ
7 WAS THE MATERIAL OF A DR. SANDLER.

8 Q. OKAY. DID YOU READ ANYTHING FROM THE CORRECTIONAL
9 OFFICERS? I THINK THERE WAS AN OFFICER JACKSON;
10 OFFICER MCKINNEY?

11 A. NO, SIR. IN DR. SANDLER'S REPORT THERE WERE SOME
12 REFERENCES TO THAT, BUT I DID NOT READ THEIR
13 TESTIMONY.

14 Q. AND, DR. SANDLER'S REPORT IS PART OF WHAT YOU USE
15 TO FORM THE BASIS OF YOUR TESTIMONY HERE TODAY?

16 A. IT WAS ONE OF THE THINGS I REVIEWED; YES, SIR.

17 Q. ALL RIGHT, SIR. DID YOU NOTE IN THAT REPORT THAT
18 THERE WAS SOME INDICATION THAT MR. SIMMONS HAD BEEN
19 READING U.S.A. TODAY AND HAD BEEN READING
20 NEWSPAPERS OVER AT THE JAIL?

21 A. WELL, IT WOULDN'T SURPRISE ME IF HE PICKED UP A
22 MAGAZINE OR A NEWSPAPER.

23 Q. CAN YOU GIVE ME A YES OR NO ANSWER?

24 A. I HAVE NO IDEA WHETHER HE'S READING IT OR NOT, SIR.

25 Q. I DIDN'T ASK YOU WHETHER HE IS READING IT. I ASKED

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 YOU IF YOU HAD READ THAT IN THE REPORT WHICH YOU
2 USED TO FORM PARTIALLY THE BASIS FOR YOUR TESTIMONY
3 HERE TODAY?

4 A. I THINK I MADE REFERENCE TO DR. SANDLER'S REPORT;
5 EITHER DR. SANDLER OR DR. MCABEE, I BELIEVE, WHO
6 HAD A REPORT THAT MAY HAVE MADE REFERENCES TO
7 THINGS THAT HE WAS DOING HERE. I DID READ THOSE
8 THINGS.

9 Q. OKAY. DID THAT ALSO INCLUDE CHECKING OUT BOOKS
10 FROM THE LIBRARY?

11 A. I CAME ACROSS THAT INFORMATION SOMEWHERE ALSO.

12 Q. AND HOW ABOUT ORDERING JET MAGAZINE FROM THE
13 COMMISSARY?

14 A. YES, SIR. I LATER HEARD THAT HE HAD DONE THOSE
15 THINGS FOR A FELLOW INMATE BECAUSE SINCE THERE'S A
16 LIMIT ON THE NUMBER OF BOOKS YOU CAN CHECK OUT; HE
17 HAD CHECKED OUT SOME BOOKS FOR SOMEBODY ELSE. SO I
18 DON'T KNOW WHAT THAT MEANS. WHAT I'M SAYING IS
19 WHEN I GET A PIECE OF DATA AND I HAVE NOTHING TO
20 HOOK IT ONTO TO KNOW WHAT IT MEANS OR TO UNDERSTAND
21 OR TO COMPREHEND IT, I DON'T MAKE AN ASSUMPTION
22 ABOUT IT. I ELIMINATE IT.

23 Q. LET ME ASK YOU A HYPOTHETICAL, DOCTOR. IF WE WERE
24 TO ASSUME THAT MR. SIMMONS IS GETTING BOOKS FROM
25 THE LIBRARY TO READ HIMSELF OR THAT HE CAN READ

MICHAEL FOXWORTH - CROSS/MR. BAILEY

- 1 NEWSPAPERS, OR THAT HE'S READING THE BIBLE, THAT
2 HE'S READING U.S.A. TODAY, AND HE'S READING JET
3 MAGAZINE; WOULD THAT INDICATE SOME DEGREE OF
4 ACADEMIC ACHIEVEMENT? DO YOU THINK THAT THAT WOULD
5 BE INCONSISTENT IN YOUR OPINION THAT---
- 6 A. WELL, YOU CAN ASSUME---
- 7 Q. I'M NOT FINISHED. IT WOULD BE INCONSISTENT WITH
8 SOMEBODY THAT COULDN'T UNDERSTAND BASIC MIRANDA
9 RIGHTS?
- 10 A. WELL, YOU KNOW, I MEAN YOU CAN READ THINGS AT ALL
11 DIFFERENT LEVELS OF COMPREHENSION. SO I THINK
12 YOU'D HAVE TO DEFINE THAT BETTER FOR ME TO RESPOND
13 TO THE QUESTION.
- 14 Q. NOW, YOU GAVE SOME WRITTEN TESTS TO TEST MR.
15 SIMMONS' MEMORY; IS THAT RIGHT?
- 16 A. WRITTEN?
- 17 Q. YES, SIR.
- 18 A. NO; THESE WERE FACE TO FACE TESTS.
- 19 Q. WERE THESE TO TEST SHORT TERM MEMORY OR LONG-TERM
20 MEMORY?
- 21 A. ALL OF THOSE BASICALLY.
- 22 Q. AND IN YOUR OPINION WHAT WAS HIS LONG-TERM MEMORY
23 LIKE?
- 24 A. WELL, HIS LONG-TERM MEMORY WAS POOR, YOU KNOW,
25 GENERALLY BECAUSE THERE WERE JUST PERIODS OF TIME

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 THAT HE JUST CANNOT ACCOUNT FOR BASICALLY -- OTHER
2 THAN TO SAY THAT, YOU KNOW, HE WAS GOING TO THE
3 CLUB AND DOING DRUGS OR I THINK ALCOHOL OR
4 SOMETHING LIKE THAT. HE COULDN'T GIVE YOU MUCH
5 SPECIFIC ABOUT DAYS' EVENTS AND LIFE STYLES AND
6 THINGS OF THAT NATURE.

7 Q. WHEN YOU'RE TALKING LONG-TERM, HOW LONG ARE YOU
8 TALKING ABOUT?

9 A. WELL, LONG-TERM FOR ME IS ANYTHING FROM DAYS TO
10 WEEKS TO MONTHS TO YEARS BACK. IT'S A REMOTE -- I
11 DON'T THINK I USED THE WORD LONG-TERM. I WOULD
12 CALL IT A REMOTE MEMORY.

13 Q. OKAY. WELL, DO YOU CONSIDER THE PERIOD OF TIME
14 BETWEEN SEPTEMBER THE FIRST, 1996 AND DECEMBER OF
15 1997 A LONG PERIOD; LONG-TERM?

16 A. THAT WAS SEPTEMBER THE FIRST, 1996?

17 Q. UNTIL DECEMBER OF 1997. YOU'RE TALKING ABOUT THE
18 ABILITY TO REMEMBER FROM ONE POINT OR ANOTHER. IS
19 THAT LONG-TERM?

20 A. YES; MOST CERTAINLY. THAT'S WELL OVER A YEAR.

21 Q. ALL RIGHT. DOCTOR, WHAT I WANT TO DO IS HAND YOU
22 THESE TRANSCRIPTS THAT YOU'VE ALREADY READ AND
23 CORRECT AS THEY'RE STATE'S SEVENTEEN, EIGHTEEN, AND
24 NINETEEN. (WITNESS REVIEWS DOCUMENT.) AND YOU'VE
25 READ THOSE, AND THE JURY HAS READ THOSE ALSO,

1 DOCTOR. ARE YOU FAMILIAR WITH THOSE?

2 A. YES, SIR.

3 Q. YOU WOULD AGREE WITH ME THAT THE FIRST TRANSCRIPT
4 IS DATED DECEMBER THE FIFTH, 1997; IS THAT
5 CORRECT? TAKE A LOOK AT IT. (WITNESS REVIEWS
6 DOCUMENT.)

7 A. YES, SIR.

8 Q. CAN YOU TURN TO PAGE FIVE? (WITNESS COMPLIES.)

9 A. OKAY.

10 Q. DO YOU SEE THE LINE THERE WHERE IT SAYS "I TRIED TO
11 UNTIE HER, AND I RUN TO THE TELEPHONE?"

12 A. WHERE ON THE PAGE?

13 Q. AT THE VERY TOP LINE, PAGE FIVE?

14 A. THE TOP LINE?

15 Q. THAT'S RIGHT.

16 A. I TRIED TO UNTIE HER; YES, SIR.

17 Q. SO WOULD THAT INDICATE TO YOU THAT ON DECEMBER THE
18 FIFTH, 1997, KENNETH SIMMONS REMEMBERED THAT LILLY
19 BELL BOYD WAS TIED UP?

20 A. WOULD THAT INDICATE TO ME THAT IT WOULD?

21 MR. THEOS: YOUR HONOR, I HAVE TO
22 OBJECT. I THINK THAT'S AN IMPROPER QUESTION.

23 THE COURT: OVERRULED.

24 A. DID HE REMEMBER THAT SHE WAS TIED UP?

25 Q. IS THAT WHAT HE SAID?

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 A. OR DID HE REMEMBER THAT HE WAS TOLD THAT SHE WAS
2 TIED UP?

3 Q. KENNETH SIMMONS IN THIS STATEMENT, DOCTOR -- AGAIN,
4 I APOLOGIZE IF YOU THINK I'M TRYING TO BE WISE WITH
5 WITH YOU OR ANYTHING. I'M JUST TRYING TO ASK THESE
6 QUESTIONS IN AS SIMPLE MANNER AS I CAN. IF YOU
7 DON'T UNDERSTAND IT, I'LL TRY TO REPEAT IT. IF
8 WE'RE LOOKING AT A TRANSCRIPT, AN INTERVIEW BETWEEN
9 KENNETH SIMMONS AND KENNETH MEARS THAT YOU HAVE
10 READ. THE DATE ON THAT TRANSCRIPT IS DECEMBER THE
11 FIFTH, 1997.

12 A. ALL RIGHT.

13 Q. THEY'RE TALKING ABOUT EVENTS THAT OCCURRED ON
14 SEPTEMBER THE FIRST, 1996?

15 A. OKAY.

16 Q. WE'RE TALKING ABOUT KENNETH SIMMONS' MEMORY. AND
17 I'M SIMPLY ASKING YOU IF THAT INDICATES THAT
18 KENNETH SIMMONS REMEMBERED THAT MRS. BOYD WAS TIED
19 UP OVER A YEAR PRIOR TO THE TIME HE'S RELATING THAT
20 TO YOU---

21 A. THAT WOULD SUGGEST THAT HE RECALLED THAT FROM SOME
22 SOURCE. I DON'T KNOW WHAT THE SOURCE IS.

23 Q. I DIDN'T ASK YOU THAT, DOCTOR. IF YOU COULD,
24 PLEASE, JUST ANSWER MY QUESTIONS.

25 A. ALL RIGHT.

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 Q. DOWN AT THE VERY BOTTOM LINE OF THAT SAME PAGE.

2 A. OKAY.

3 Q. SHE WAS IN THE KITCHEN LAYING ON THE FLOOR AND
4 TIED. DO YOU SEE THAT?

5 A. YES, SIR.

6 Q. THE NEXT PAGE; KENNETH MEARS SAYS "HOW WERE HER
7 HANDS TIED?" KENNETH SIMMONS SAYS "HANDS TIED IN
8 THE BACK." THEN KENNETH MEARS; "IN THE BACK?" DO
9 YOU SEE THAT?

10 A. YES, SIR.

11 Q. ALL RIGHT, SIR. NOW IN THE MATERIAL THAT YOU
12 OBTAINED TO PREPARE FOR YOUR TESTIMONY HERE, DID
13 YOU GET POLICE REPORTS AND ALL THAT WHICH IN FACT
14 INDICATED THAT MRS. BOYD'S HANDS WERE TIED IN THE
15 BACK, DIDN'T YOU?

16 A. I GOT THE POLICE REPORTS. I IMAGE THAT'S IN
17 THERE. I WOULD TAKE YOUR WORD FOR IT THAT IT
18 INDICATES THAT.

19 Q. SO IF YOU TAKE MY WORD THAT HER HANDS WERE -- IF
20 THAT'S THE TESTIMONY THAT HER HANDS WERE TIED IN
21 THE BACK, WOULD THAT SHOW THAT ON DECEMBER THE
22 FIFTH, 1997, KENNETH SIMMONS WAS ACCURATELY
23 RECALLING INFORMATION THAT WAS OVER A YEAR OLD?

24 A. NO, SIR.

25 Q. WELL, I'LL ASK YOU TO EXPLAIN THAT TO ME, DOCTOR.

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 A. WELL, BECAUSE I SPECIFICALLY ASKED HIM THAT
2 QUESTION. AND I HAVE IT IN MY NOTES, IN FACT, WHEN
3 I ASKED HIM ABOUT THOSE ISSUES---

4 Q. I'M NOT ASKING FOR HEARSAY.

5 A. I UNDERSTAND.

6 Q. ALL RIGHT, SIR.

7 A. I'M SAYING THAT MR. SIMMONS TOLD ME THAT HE TOLD
8 THE SLED OFFICER THAT HE TIED THE HANDS IN THE
9 FRONT. AND HE TOLD ME THE SLED OFFICER CORRECTED
10 HIM AND SAID, "NO, YOU TIED THEM IN THE BACK."
11 THAT'S WHAT HE TOLD ME.

12 Q. OKAY. AND YOU READ AND HEARD THAT TAPE, DID YOU
13 NOT?

14 A. YES, SIR.

15 Q. WAS THAT INFORMATION ON THE TAPE?

16 A. IT WAS NOT ON THE TAPE AS FAR AS I CAN SEE.

17 Q. ALL RIGHT, SIR. AND WHAT YOU'RE TELLING US NOW IS
18 MR. SIMMONS TOLD YOU HE HAD TIED HER HANDS IN THE
19 FRONT?

20 A. HE TOLD ME THAT HE SAID INITIALLY THAT HE TIED THE
21 HANDS IN THE FRONT AND WAS CORRECTED BY THE SLED
22 OFFICER WHO HE SAID TOLD HIM, NO THEY WERE TIED IN
23 THE BACK.

24 Q. OKAY. DO YOU SEE DOWN THERE THE NEXT COUPLE OF
25 LINES; KENNY MEARS -- WAIT FOR THE TRAIN TO GO BY.

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 (WITNESS REVIEWS DOCUMENT.) RIGHT BELOW THAT KENNY
2 MEARS SAYS "OKAY, WAS SHE SHOT, BEATEN, OR WHAT?"
3 AND HE'S GOT "BRUISES; HE BEAT HER WITH A
4 BLACKJACK. SO HE IS INDICATING THAT THE VICTIM WAS
5 BRUISED OR BEATEN; IS THAT RIGHT?

6 A. HE'S INDICATING THAT.

7 Q. ALL RIGHT, SIR. ALL RIGHT, TURN TO PAGE SEVEN,
8 SIR. (WITNESS COMPLIES.) HAVE YOU GOT THAT? ABOUT
9 SEVEN LINES DOWN, SEE WHERE MR. MEARS SAYS "HOW DID
10 YOU GET IN THE HOUSE?" MR. SIMMONS SAYS "I WENT IN
11 THE HOUSE." MR. MEARS SAYS "YES; WHAT DOOR?" MR.
12 SIMMONS "OPENED THE BACK DOOR." SO HE REMEMBERS
13 WHAT DOOR HE ENTERED THE HOUSE, IS THAT CORRECT,
14 ACCORDING TO THIS STATEMENT OVER A YEAR LATER?

15 A. WELL, HE'S TELLING A STORY. I DON'T KNOW WHETHER
16 HE'S REMEMBERING THAT FROM A FACTUAL EVENT OR NOT.

17 Q. OKAY. WELL, IF THE EVIDENCE ADDUCED IN THIS TRIAL
18 INDICATED THE FRONT DOOR WAS LOCKED, THEN HE WOULD
19 HAVE HAD TO GO TO THE BACK DOOR AND GET IN; WOULD
20 HE NOT?

21 A. THAT WOULD BE CORRECT.

22 Q. ALL RIGHT. HOW ABOUT PAGE EIGHT, ALMOST HALFWAY
23 DOWN? (WITNESS REVIEWS DOCUMENT.) KENNY MEARS SAYS
24 "WHAT SIDE OF THE HOUSE DID YOU GO IN?" AND HE
25 SAYS, "I WENT TO THE FRONT DOOR BUT IT WAS LOCKED."

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 A. THE FRONT DOOR WAS LOCKED; YES.

2 Q. IF THE EVIDENCE INDICATED THE FRONT DOOR WAS IN
3 FACT LOCKED, THAT WOULD BE ACCURATE INFORMATION
4 THAT MR. SIMMONS IS RELATING A YEAR LATER; RIGHT?

5 A. YES, SIR.

6 Q. OKAY. HOW ABOUT PAGE NINE? (WITNESS EXAMINES
7 DOCUMENT.) SEE WHERE MR. SIMMONS SAYS "IN THE
8 KITCHEN PART, IT WAS IN; SHE WAS IN THE KITCHEN;
9 KENNY MEARS "SHE WAS IN THE KITCHEN?" MR. SIMMONS
10 "YES, SIR." NOW, DO YOU KNOW FROM YOUR REVIEW OF
11 THIS CASE IN PREPARATION FOR YOUR TESTIMONY THAT
12 MRS. BOYD'S BODY WAS IN FACT FOUND IN THE KITCHEN?

13 A. I'M SURE IT'S IN THAT POLICE REPORT. I DIDN'T KEEP
14 THAT IN MY MIND.

15 Q. ALL RIGHT, SIR. I'LL TAKE YOUR WORD FOR IT. BUT
16 SO THAT RECOLLECTION THAT MRS. BOYD WAS IN THE
17 KITCHEN IS ACCURATELY STATED OVER A YEAR AFTER THE
18 EVENT; IS THAT CORRECT?

19 A. IF THAT'S THE FACT OF IT; YES.

20 Q. ALL RIGHT, SIR. PAGE TEN; ABOUT 2/3 OF THE WAY
21 DOWN. KENNY MEARS SAYS "HAVE YOU EVER GONE TO MRS.
22 BOYD'S HOUSE BEFORE?" ANSWER: "NO, SIR." KENNY
23 MEARS "YOU'VE NEVER BEEN THERE BEFORE?" KENNY
24 MEARS "NOT FOR ANYTHING?" MR. SIMMONS "NO, SIR."
25 THAT WOULD INDICATE THAT MR. SIMMONS RECALLED NEVER

1 BEING IN THAT HOUSE ON ANY OTHER OCCASION BESIDES
2 THAT WEEKEND; IS THAT CORRECT?

3 A. THAT WOULD INDICATE IT.

4 Q. SO HE WOULD HAVE NO WAY OF KNOWING THE LAYOUT OF
5 THE HOUSE UNLESS HE WAS THERE THAT WEEKEND AS FAR
6 AS---

7 A. SEE, I DON'T KNOW ABOUT THAT BECAUSE HE WOULD HAVE
8 OTHER WAYS OF KNOWING THE LAYOUT OF THE HOUSE AND
9 ALSO THE CRIME SCENE. HE WOULD HAVE WAYS OF
10 KNOWING THAT OTHER THAN HAD HE BEEN THERE.

11 Q. HOWEVER HE GAINED THAT INFORMATION, HE REMEMBERED
12 IT OVER A YEAR LATER, DID HE NOT?

13 A. HE MAY HAVE BEEN COACHED EVEN, I DON'T KNOW.

14 Q. WE'RE NOT TALKING ABOUT MAYBE. WE'RE TALKING ABOUT
15 THE FACTS.

16 A. WELL, WHAT I'M SAYING IS I DON'T KNOW IF HE
17 REMEMBERED A YEAR-AND-A-HALF LATER. I KNOW HE
18 REMEMBERED IT AT THE TIME HE GAVE HIS STATEMENT
19 ACCORDING TO THE TRANSCRIPT.

20 Q. OKAY. HE'S RELATING AGAIN THE EVENTS THAT OCCURRED
21 OVER A YEAR-AND-A-HALF AGO; IS THAT RIGHT?

22 A. HE'S RELAYING A VERSION OF EVENTS THAT HAPPENED
23 OVER A YEAR-AND-A-HALF AGO. I DON'T KNOW IF IT'S
24 SUBSTANTIATED OR NOT.

25 Q. LOOK AT THAT NEXT TAPE, THE SECOND TAPE OF DECEMBER

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 THE FIFTH, THE ONE THAT SAYS 8:26 P.M; PAGE SIX.

2 (WITNESS REVIEWS DOCUMENT.)

3 A. ALL RIGHT.

4 Q. LET'S TURN TO PAGE FIVE FIRST DOWN AT THE BOTTOM.

5 KENNY MEARS SAYS "WHERE DID THIS TAKE PLACE?" MR.

6 SIMMONS SAYS, "IT TOOK PLACE RIGHT THERE WHEN I WAS

7 COMING OUT THE BACK DOOR." MR. MEARS, "IS THAT

8 NEAR THE LIVING ROOM OR THE KITCHEN?" MR. SIMMONS

9 SAYS "THE KITCHEN, SIR." KENNY MEARS SAYS, "WHO

10 TIED HER HANDS?" AND SIMMONS SAYS "I TIED HER

11 HANDS, SIR." AGAIN, THAT'S MR. SIMMONS' RECALLING

12 EVENTS OVER A YEAR IN THE PAST THAT THIS OCCURRED

13 IN THE KITCHEN, THAT HER HANDS WERE TIED, AND HE

14 TIED HER HANDS; IS THAT CORRECT?

15 A. I DISAGREE THAT IT'S A LEADING QUESTION; WHO TIED

16 HER HANDS. I MEAN---

17 Q. WHO TIED HER HANDS IS A LEADING QUESTION?

18 A. OF COURSE. I MEAN, HE DIDN'T ASK WERE HER HANDS

19 TIED OR ANYTHING LIKE THAT. HE ASKED WHO TIED HER

20 HANDS; THE ASSUMPTION ALREADY MADE.

21 Q. THEN HE SAID "I TIED HER HANDS;" IS THAT CORRECT?

22 A. THAT'S WHAT IT SAYS; RIGHT.

23 Q. LOOK AT THE LAST TAPE. YOU DIDN'T LISTEN TO THIS

24 BUT YOU READ IT.

25 A. I READ THE TRANSCRIPT.

1 Q. ALL RIGHT, SIR. PAGE TWO. (WITNESS REVIEWS
2 DOCUMENT.)

3 A. OKAY.

4 Q. DOWN AT THE BOTTOM?

5 A. OKAY.

6 Q. DO YOU SEE WHERE MR. SIMMONS SAID "YES, I WENT TO
7 THE FRONT DOOR." MR. MEARS SAID, "YOU WENT TO THE
8 FRONT DOOR?" MR. SIMMONS "YEAH." KENNY MEARS;
9 "WHAT DID YOU DO AT THE FRONT DOOR?" MR. SIMMONS
10 SAYS "THE DOOR WAS LOCKED." AND AGAIN, THAT'S MR.
11 SIMMONS RELATING EVENTS OVER A YEAR AGO. YOU
12 WOULDN'T DISPUTE THE EVIDENCE TO BEAR THAT OUT?
13 BECAUSE THAT IS WHAT HAPPENED.

14 A. RIGHT. IT WAS OVER A YEAR SINCE THAT ALLEGEDLY
15 OCCURRED. AND HE'S GIVING A VERSION OF A
16 RECOLLECTION OF THAT.

17 Q. OKAY. DID YOU READ THE AUTOPSY REPORT?

18 A. I DON'T THINK SO. I DON'T THINK I DID.

19 Q. NOW LOOKING ON PAGE FOUR, ABOUT TWELVE LINES FROM
20 THE TOP. (WITNESS REVIEWS DOCUMENT.)

21 A. YES, SIR.

22 Q. DO YOU SEE WHERE KENNY SAYS "DID YOU HIT HER WITH
23 YOUR FIST?"

24 A. YES, SIR.

25 Q. AND THE ANSWER WAS "NO, SIR; THE ONLY THING I KNOW

MICHAEL FOXWORTH - CROSS/MR. BAILEY

- 1 IS THAT SHE HIT HER HEAD. MR. MEARS SAID "THAT WAS
2 THE BACK OF HER HEAD OR THE FRONT?" MR. SIMMONS
3 SAID "SIDE OF THE HEAD." KENNY MEARS SAID "SIDE OF
4 THE HEAD?" SIMMONS SAYS "YES, SIR." NOW IF THE
5 AUTOPSY REPORT INDICATED THAT SHE WAS STRUCK IN THE
6 SIDE OF THE HEAD, WOULD THAT INDICATE THAT KENNETH
7 SIMMONS WAS RELATING ACCURATE INFORMATION OVER A
8 YEAR LATER?
- 9 A. WELL, IT'S VERY VAGUE. IT DOESN'T SAY WHICH SIDE
10 BASICALLY. I MEAN, THAT WOULD HAVE PINNED IT
11 DOWN. BUT, YES, HE APPARENTLY IS---
- 12 Q. LET'S TRY THIS ONE, THEN: HOW ABOUT PAGE SEVEN?
- 13 A. OKAY.
- 14 Q. I'M ALMOST FINISHED WITH THIS, DOCTOR. I KNOW
15 YOU'RE TIRED, BUT ABOUT TWELVE OR FIFTEEN LINES
16 DOWN.
- 17 A. ALL RIGHT.
- 18 Q. SEE WHERE KENNY MEARS SAYS "WHERE DID YOU GET THE
19 STOCKING THAT YOU TIED HER UP WITH?"
- 20 A. YES, SIR.
- 21 Q. "IT WAS ON THE PORCH."
- 22 A. ALL RIGHT.
- 23 Q. AND IF THERE WAS A STOCKING IN EVIDENCE THAT'S
24 FOUND RIGHT BEHIND HER HANDS, WOULDN'T THAT
25 INDICATE THAT KENNETH SIMMONS WAS RELATING ACCURATE

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 INFORMATION A YEAR LATER?

2 A. WHEN I READ THAT, AGAIN IT STRUCK ME THAT RATHER
3 THAN ASK THE QUESTION "WHAT DID YOU TIE HER WITH;"
4 THE INFORMATION WAS INTRODUCED AND GIVEN TO HIM --
5 THE STOCKING. AND, YOU KNOW, AS I UNDERSTAND
6 KENNETH, YOU CAN GET THE ANSWER YOU WANT. I MEAN,
7 IF YOU SAY YOU DID THIS WITH SUCH AND SUCH, HE'D
8 AGREE WITH IT BASICALLY. SO, I MEAN, I COULDN'T
9 ATTACH MUCH SIGNIFICANCE TO THAT BASICALLY. I
10 MEAN, IT WAS PRESENTED THAT WAY.

11 Q. OKAY. HOW ABOUT PAGE EIGHT ABOUT TWELVE LINES TO
12 THE BOTTOM.

13 A. OKAY.

14 Q. MR. MEARS SAYS "WHERE DID SHE GIVE YOU THE MONEY
15 AT; DOWN THE HALLWAY, IN THE BEDROOM, OR IN THE
16 KITCHEN?" AND MR. SIMMONS SAYS "IN BETWEEN THE
17 KITCHEN AND THE HALLWAY WHEN I PUSHED HER."

18 A. OKAY.

19 Q. IF THE EVIDENCE INDICATED THAT THE HALLWAY DID OPEN
20 INTO THE KITCHEN, WOULDN'T THAT INDICATE THAT HE
21 WAS ACTUALLY RECALLING THE LAYOUT IN THAT HOUSE?

22 A. WELL, HE'S ACTUALLY RECOUNTING, YOU KNOW, OR
23 INFORMATION HE GOT FROM SOMEWHERE; YES.

24 Q. PAGE NINE; ABOUT THE FIFTH LINE. (WITNESS EXAMINES
25 DOCUMENT.)

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 A. OKAY.

2 Q. MR. MEARS; "AFTER YOU RAPED HER, YOU TIED HER UP?"

3 MR. SIMMONS "YES, SIR." KENNY MEARS SAYS "WHAT?"

4 MR. SIMMONS SAYS "I GUESS A STOCKING?"

5 A. YES. IT'S NOT VERY CONCLUSIVE "I GUESS A
6 STOCKING."

7 Q. UNLESS YOU FIND A STOCKING THERE; RIGHT?

8 A. RIGHT.

9 Q. NOW, DOCTOR, AFTER GOING THROUGH ALL THAT, ARE YOU
10 STILL TELLING US THAT MR. SIMMONS HAS A DEFICIT
11 LONG-TERM MEMORY?

12 A. THAT WOULD NOT SUGGEST THAT HE DOESN'T.

13 Q. IF YOU COULD GIVE ME A YES OR NO, THEN PLEASE
14 EXPLAIN IT.

15 A. I'M MAINTAINING THAT; YES, SIR.

16 Q. ALL RIGHT. I BELIEVE YOU TESTIFIED AT ONE POINT
17 THAT WHEN YOU TALKED TO MR. SIMMONS, HE WAS UNABLE
18 TO GIVE AN ELABORATE RESPONSE; THAT HE WAS KIND OF
19 SHORT, TRYING TO PLEASE; DIDN'T VOLUNTEER BY JUST
20 KIND OF RESPONDING AND---

21 A. FOR THE MOST PART; YES, SIR.

22 Q. ALL RIGHT, SIR. THE FIRST TAPE THAT YOU LISTENED
23 TO AND THAT YOU READ, THIS STORY ABOUT SHORTY AND
24 BRENDA STEVENSON AND HIM HAVING SEX WITH HER WITH A
25 CONDOM ON THE THURSDAY BEFORE THE MURDER TOOK

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 PLACE, AND SHE RETAINED THAT SEMEN IN THE CONDOM.
2 AND THEN SHE GOT WITH SHORTY, AND SHORTY KILLED
3 MRS. BOYD AND PLANTED THAT SEMEN IN MRS. BOYD TO
4 FRAME HIM BECAUSE OF A TWENTY THOUSAND DOLLAR DRUG
5 DEAL AND GOING UP TO TRAVELERS REST AND TWO OTHER
6 GUYS WITH BMWs, A MONTE CARLO, AND KILLING SHORTY
7 AND ALL THAT KIND OF STUFF. THAT'S A PRETTY
8 ELABORATE STORY, ISN'T IT?

9 A. YES, SIR.

10 Q. OKAY. IT WOULD TAKE SOME IMAGINATION TO COME UP
11 WITH SOMETHING LIKE THAT, WOULDN'T IT?

12 A. WHOEVER CAME UP WITH IT.

13 Q. WELL, IT CAME OUT OF MR. SIMMONS' MOUTH, DID IT
14 NOT?

15 A. YES, SIR.

16 Q. SO WHEREVER IT CAME FROM, HE HAD THE ABILITY TO
17 RECALL IT, DID HE NOT?

18 A. YES, SIR.

19 Q. ALL RIGHT. DID YOU AT ONE POINT SAY THAT HE HAD
20 DIFFICULTY IN UNDERSTANDING THE CONCEPT BETWEEN
21 RIGHT AND WRONG?

22 A. I WORKED HARD -- I GIVE A LOT OF EVALUATION ON THAT
23 WHOLE IDEA OF RIGHT AND WRONG BECAUSE I WAS REALLY
24 TRYING TO FIND OUT -- I MEAN, I KNEW HE WAS
25 STRUGGLING WITH IT, AND I WANTED TO FIND OUT

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 EXACTLY WHERE IT PANNED OUT THAT HE UNDERSTOOD THE
2 CONCEPT, BASICALLY. BECAUSE IF ASK HIM WHAT RIGHT
3 IS, IT'S LIKE DOING THINGS RIGHT THE WAY THEY'RE
4 SUPPOSED TO BE DONE. IF YOU REALLY PRESS HIM ON
5 IT, BASICALLY, HE HAS A GREAT DEAL OF DIFFICULTY,
6 YOU KNOW, IDENTIFYING THE KIND OF ABSTRACT CONCEPT
7 OF RIGHT EITHER IN A MORAL OR LEGAL SENSE.

8 Q. LET ME GET YOU FOR ONE FINAL TIME TO GO BACK TO THE
9 TRANSCRIPT HERE. AND THIS IS GOING TO BE THE
10 SECOND ONE, DECEMBER THE FIFTH AT 8:26 P.M. DO YOU
11 HAVE THAT IN FRONT OF YOU?

12 A. YES, SIR. DECEMBER THE FIFTH? WHICH PAGE?

13 Q. THREE. (WITNESS REVIEWS DOCUMENT.) ABOUT THE
14 TENTH LINE FROM THE BOTTOM. MR. SIMMONS SAYS "YES;
15 SHE HAD DONE GIVE ME THE ENVELOPE; SHE DONE DROPPED
16 THE ENVELOPE WHEN I HIT HER; AND I PICKED UP THE
17 TELEPHONE READY TO DIAL A NUMBER, PUT THE TELEPHONE
18 BACK DOWN?"

19 A. WAIT A MINUTE! THIS IS PAGE---

20 Q. THREE.

21 A. THREE? HOW FAR FROM THE BOTTOM?

22 Q. ABOUT TEN LINES. (WITNESS REVIEWS DOCUMENT.)

23 A. LET ME MAKE SURE I'VE GOT THE RIGHT ONE. YES, SIR.

24 Q. OKAY. DO YOU SEE WHERE I'M TALKING ABOUT "YES; SHE
25 HAD DONE GIVE ME THE ENVELOPE; SHE DONE DROPPED THE

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 ENVELOPE WHEN I HIT HER; I PICKED UP THE TELEPHONE
2 TO DIAL A NUMBER, AND PUT THE TELEPHONE BACK DOWN."
3 MR. MEARS SAYS "DIALED WHICH NUMBER?" SIMMONS; "I
4 WAS DIALING 911 AND PUT THE TELEPHONE BACK DOWN."
5 MEARS: "WHY WERE YOU GOING TO DIAL 911?" SIMMONS:
6 "I REALIZED WHAT I HAD DID. I KNOW I JUST MADE A
7 MISTAKE, THE BIGGEST MISTAKE OF MY LIFE." NOW,
8 DOCTOR, DOESN'T THAT INDICATE TO YOU THAT MR.
9 SIMMONS KNOWS THAT THAT WAS WRONG?

10 A. CERTAINLY AT THE TIME OF THIS HE RECOGNIZED THAT HE
11 SHOULD NOT HAVE DONE THAT BASICALLY. WHETHER HE
12 UNDERSTANDS IT IN A MORAL CONTEXT OR NOT, I DON'T
13 KNOW. I MEAN, PEOPLE WHO ARE RETARDED, YOU CAN
14 TRAIN THEM THAT CERTAIN THINGS THEY DON'T DO AND
15 CERTAIN THINGS THEY DO DO; AND THEY WILL NOT DO
16 THOSE THINGS IF THEY'RE TRAINED WELL ENOUGH. IT
17 DOESN'T MEAN THAT THEY STILL UNDERSTAND THAT IN A
18 MORAL CONTEXT, THAT THEY DON'T DO IT BECAUSE IT'S
19 WRONG, SOMETIMES THEY DON'T DO IT BECAUSE THEY WILL
20 BE PUNISHED IF THEY DO IT AS OPPOSED TO NOT DOING
21 IT BECAUSE IT'S MORALLY WRONG. SEE, THAT'S WHAT'S
22 TRICKY ABOUT THIS IS THAT YOU AND I ARE EVALUATING
23 THIS THROUGH OUR EYES RATHER THAN---

24 Q. JUST SO WE'RE NOT CONFUSED ABOUT IT, DOCTOR, LET ME
25 JUST ASK YOU OUTRIGHT; ARE YOU TELLING THIS JURY

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 THAT KENNETH SIMMONS DOES NOT KNOW THAT IT'S WRONG
2 TO RAPE AND BEAT AND STRANGLE AND MURDER AN 89 YEAR
3 OLD WOMAN?

4 A. NO, I'M NOT TELLING YOU THAT.

5 Q. HE DOES KNOW THAT?

6 A. I THINK HE KNOWS THOSE THINGS ARE WRONG.

7 Q. YOU KNOW HE KNOWS THAT?

8 A. I FEEL CONFIDENT OF THAT. BUT I'M NOT SURE THE
9 WRONG WHETHER HE KNOWS IT IN THE CONTEXT OF IT'S
10 WRONG BECAUSE OTHER PEOPLE WOULD BE ANGRY OR
11 THEY'LL PUNISH YOU OR THEY'LL DO SOMETHING OR
12 WHETHER HE KNOWS IT IN THE CONTEXT THAT IT'S WRONG
13 OR THAT IT'S MORALLY WRONG. BUT I AGREE WITH YOU.
14 I THINK THAT HE KNOWS THAT THOSE THINGS DONE TO
15 ANOTHER PERSON WOULD BE WRONG BASICALLY. HE'S GOT
16 SOME FUZZY THINKING, I THINK, AROUND THE ISSUES OF
17 WHAT YOU'RE FEELING ABOUT THE PERSON IS, TOO,
18 BASICALLY. I MEAN, YOU KNOW, WHEN I ASKED HIM FOR
19 EXAMPLE ABOUT MURDER, WHAT IS MURDER, BASICALLY.
20 WELL, HIS IDEA IS MURDER IS WHEN YOU HURT
21 SOMEBODY. I SAID, "TELL ME MORE; WHAT DO YOU MEAN
22 BY THAT?" AND HE SAID SOMETHING LIKE, "I GUESS
23 WHEN YOU DON'T LIKE THEM." WELL, I DON'T
24 UNDERSTAND THAT. IT DOESN'T MAKE SENSE TO ME, BUT
25 IT MAKES SENSE TO HIM APPARENTLY.

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 Q. ARE YOU SAYING THAT THIS HIGH SCHOOL GRADUATE WITH
2 A WORK HISTORY, MARRIED, TWO KIDS IN PRIVATE LIFE,
3 DOESN'T UNDERSTAND THAT MURDER MEANS TO KILL
4 SOMEBODY?

5 A. I THINK HE KNOWS THAT MURDER MEANS TO KILL
6 SOMEBODY. I'M NOT SURE HE KNOWS WHAT KILL PEOPLE
7 DEAD ACTUALLY MEANS. I PRESSED HIM ON THAT ISSUE
8 TO TRY TO GET IT OUT OF HIM. HE UNDERSTANDS THAT
9 CONCEPT OF DEATH AND FINALITY, AND SO FORTH. HE'S
10 GOT SOME GAPS THERE IS WHAT I'M SAYING BASICALLY.

11 Q. ALL RIGHT. DOCTOR, YOU TESTIFIED THAT HE HAD SOME
12 DEFICIT IN HIS ABILITY TO PLAN AND ORGANIZE AND PUT
13 THINGS IN SEQUENCE?

14 A. I DON'T THINK THERE IS ANY QUESTION ABOUT THAT.

15 Q. DID YOU READ THE TRANSCRIPT -- AND I WON'T GO
16 THROUGH IT ITEM BY ITEM. BUT DO YOU REMEMBER MR.
17 MEARS ASKING HIM WHAT'S THE SEQUENCE OF WHAT
18 HAPPENED; AND HE TOLD HIM THE ORDER IN WHICH
19 EVERYTHING HAPPENED A YEAR LATER; FIRST THE
20 ROBBERY, THEN THE BEATING, THEN THE RAPING, THEN
21 SHE WAS TIED UP WHEN SHE WAS STILL ALIVE; THE
22 SEQUENCE? DO YOU REMEMBER THAT?

23 A. HE TOLD A STORY THAT HAD A SEQUENCE TO IT. DOES
24 THAT MEAN THAT HE CAN SEQUENCE EVENTS IN HIS OWN
25 PERSONAL ORGANIZATION? I DON'T KNOW.

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 Q. OKAY.

2 A. I KNOW HE CAN TELL A STORY.

3 Q. ALL RIGHT. WELL, IN THE TRANSCRIPT THAT HE GAVE TO
4 KENNY MEARS, DOESN'T THAT INDICATE THAT HE WAS
5 ENGAGING IN PURPOSEFUL GOAL DIRECTIVE ACTIVITIES?
6 HE WANTED MONEY FOR CRACK?

7 A. WHICH TRANSCRIPT ARE YOU TALKING ABOUT?

8 Q. THE SECOND TRANSCRIPT OF DECEMBER THE FIFTH AND THE
9 TRANSCRIPT OF DECEMBER THE NINTH; THOSE TWO.

10 A. BECAUSE THERE'S A BIG DIFFERENCE BETWEEN THE
11 TRANSCRIPTS.

12 Q. I UNDERSTAND THAT. I'M TALKING ABOUT NUMBER TWO ON
13 DECEMBER THE FIFTH AND DECEMBER THE NINTH. AS FAR
14 AS HIS ABILITY TO ENGAGE IN PURPOSEFUL GOAL
15 DIRECTIVE ACTIVITY; DID HE NOT RELATE THAT HE
16 WANTED CRACK COCAINE; HE HAD NO MONEY; THAT HE GOT
17 UP EARLY IN THE MORNING, RODE HIS BICYCLE TO A
18 LOCATION WHERE HE KNEW AN ELDERLY WOMAN LIVED BY
19 HERSELF; THAT HE PARKED THAT BICYCLE BY THE
20 RAILROAD TRACKS, WENT AROUND IN THE DARK TO THE
21 BACK DOOR BECAUSE THE FRONT DOOR WAS LOCKED AND
22 WAITED FOR HER TO COME OUT BECAUSE HE THOUGHT SHE
23 HAD MONEY AND HIS MOTIVE WAS TO ROB HER. IS THAT
24 WHAT HE SAID?

25 A. WELL, I HAVE A LOT MORE PROBLEMS WITH THE SECOND

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 AND THIRD TRANSCRIPTS FROM THE FIRST BECAUSE
2 THERE'S A LOT OF LEADING IN THAT. AND THERE ARE
3 WERE A LOT OF LOOSE ENDS. AND I THINK THERE WAS A
4 LOT OF SUGGESTION OF ISSUES THAT WERE BROUGHT UP BY
5 THE INVESTIGATOR THAT WERE BASICALLY LOOSE ENDS HE
6 COULDN'T ACCOUNT FOR BASICALLY. THE FIRST
7 TRANSCRIPT TO ME IS FAIRLY COHERENT, FAIRLY
8 CONSISTENT, AND FAIRLY DETAILED ACTUALLY BASICALLY.
9 IN FACT, THE FIRST TRANSCRIPT IS IN LENGTH MORE
10 THAN TWICE AS LONG AS THE NEXT TWO.

11 Q. DOCTOR, I DIDN'T ASK YOU HOW LONG THE TRANSCRIPT
12 WAS. PLEASE TRY TO CONFINE YOURSELF TO ANSWERING
13 MY QUESTIONS AND EXPLAIN THOSE ANSWERS.

14 A. OKAY.

15 Q. ALL RIGHT, SIR. ALL I'M ASKING YOU IS WHETHER OR
16 NOT HIS ACCOUNT OF HAVING A MOTIVE, NOT A GOOD
17 MOTIVE, BUT WANTING MONEY TO BUY CRACK AND WAKING
18 UP AND KNOWING WHERE MRS. BOYD LIVED, HAVING SEEN
19 HER BEFORE, KNOWING SHE WAS AN ELDERLY WOMAN,
20 RIDING HIS BIKE OUT THERE IN THE EARLY MORNING
21 HOURS, GOING AROUND TO THE BACK DOOR IN THE DARK
22 WITH THE SPECIFIC PURPOSE OF GETTING MONEY FOR
23 CRACK AND WAITING UNTIL SHE CAME OUT AND PUSHING
24 HER BACK IN; DOESN'T THAT SHOW SOME CONSCIOUS GOAL
25 DIRECTIVE, MOTIVATED ACTIVITY ON THE PART OF

MICHAEL FOXWORTH - CROSS/MR. BAILEY

1 KENNETH SIMMONS, THE FACT HE DID THAT?

2 A. NOT NECESSARILY. IF IT HAPPENED, IT COULD EASILY
3 BE A SPONTANEOUS DEVELOPMENTAL ACTIVITY BASICALLY.
4 IT DOESN'T TO ME DEMONSTRATE THAT THE MAN SAT DOWN,
5 MADE A PLAN, WENT OUT, DID THIS AND THIS AND THIS
6 AND THIS AND THIS. I MEAN, IF YOU COULD
7 DEMONSTRATE THE FACT THESE THINGS DID ACTUALLY
8 OCCUR IN THAT FASHION, IT STILL DOESN'T MEAN THAT
9 HE WAS ABLE TO FABRICATE A PLAN. IN FACT, IF IT
10 WERE A PLAN, OBVIOUSLY IT WENT VERY, VERY BADLY; SO
11 IT WASN'T MUCH OF A PLAN.

12 Q. I AGREE WITH THAT.

13 A. IF IT WERE, OKAY? BUT THAT'S A HYPOTHETICAL AS FAR
14 AS I'M CONCERNED BECAUSE IF I LOOK AT THAT
15 INTERVIEW, MUCH OF IT I THINK WAS LED I MEAN,
16 ISSUES WERE BROUGHT UP---

17 Q. I DIDN'T ASK YOU YOUR CHARACTERIZATION OF WHETHER
18 THE INTERVIEW WAS LED, DOCTOR. I'M ASKING YOU IF
19 THE STORY THAT HE RELATED TO KENNY MEARS THAT'S IN
20 EVIDENCE IN THIS CASE, WHETHER YOU BELIEVE IT'S
21 TRUE OR NOT; DOES IT INDICATE PURPOSEFUL PLAN, GOAL
22 DIRECTIVE, ACTIVITY? IN OTHER WORDS, HE PICKED A
23 VULNERABLE VICTIM IN A LOCATION WHERE IT WAS DARK,
24 AND NOBODY ELSE WAS THERE, AND THAT HE THOUGHT SHE
25 HAD MONEY, AND HE WANTED THAT MONEY, AND HE WENT

1 OUT THERE, AND HE TOOK IT ACCORDING TO WHAT HE
2 SAID; IS THAT CORRECT?

3 A. IT DOES NOT NECESSARILY INDICATE THAT TO ME.

4 Q. I'M ALMOST FINISHED HERE, DOCTOR. AS FAR AS YOUR
5 TESTIMONY ABOUT HIS LACK OF DEFENSIVENESS, AND HE
6 WAS NOT SELF-PROTECTIVE, ISN'T THAT WHAT THIS WHOLE
7 SHORTY STORY WAS ABOUT, THAT KENNETH SIMMONS KNEW
8 ENOUGH ABOUT DNA TO KNOW HE'D BE IN TROUBLE IF HIS
9 SEMEN WAS FOUND IN MRS. BOYD AND THAT HE FABRICATED
10 THE STORY ABOUT HOW HIS SEMEN GOT IN THERE?

11 A. I DON'T KNOW THAT HE FABRICATED THAT STORY.

12 Q. ALL RIGHT.

13 A. I KNOW THAT HE TOLD THAT STORY.

14 Q. HE TOLD THE STORY, DIDN'T HE?

15 A. RIGHT. I DON'T KNOW THAT HE FABRICATED THAT STORY.

16 Q. WOULD THAT INDICATE SOME SELF-PROTECTIVE BEHAVIOR?

17 A. WELL, IT'S SOME VERY STRANGE BEHAVIOR IF YOU GO TO
18 COLUMBIA TO CONFESS TO SOMETHING AND IMPLICATE
19 YOURSELF. THAT'S NOT VERY SELF-PROTECTIVE, SIR.

20 Q. HE DIDN'T IMPLICATE HIMSELF IN THE MURDER OF MRS.
21 BOYD INITIALLY. HE IMPLICATED HIMSELF IN THE
22 MURDER OF THIS GUY, SHORTY; RIGHT, SIR?

23 A. YES, SIR.

24 Q. AND HE GAVE A REASON FOR IT?

25 A. (NO RESPONSE.)

MICHAEL FOXWORTH - RE-DIRECT/MR. THEOS

1 Q. LET ME ASK YOU ONE OTHER QUESTION, DOCTOR; AND THIS
2 IS JUST FOR CLARIFICATION. NOW, I'VE TRIED TO TAKE
3 ACCURATE NOTES HERE. BUT DID YOU TESTIFY THAT WHEN
4 PEOPLE SAY SOMETHING THAT'S NOT TRUE, I DON'T
5 CONSIDER THEM LYING?

6 A. WHAT I SAID?

7 Q. YES, SIR.

8 A. I SOMETHING YOU COULD TAKE THAT WAY. I DON'T
9 ALWAYS CLASSIFY IT AS LYING WHEN SOMEONE
10 EXAGGERATES A SYMPTOM OR SOMETHING LIKE THAT. THE
11 QUESTION WAS ABOUT MALINGERING, I THINK. AND I
12 SAID I DON'T NECESSARILY CALL IT LYING IF SOMEBODY
13 EXAGGERATES A SYMPTOM OR SOMETHING LIKE THAT
14 BECAUSE IT'S SO HUMAN NATURE BASICALLY.

15 Q. HAVE YOU EVER IN THE COURSE OF YOUR WORK AT THE
16 HALL INSTITUTE HAD OCCASION TO READ MIRANDA RIGHTS
17 TO A PATIENT?

18 A. PERSONALLY THAT'S NOT MY RULE; NO.

19 Q. SO THAT WOULD BE A NO?

20 A. NO, I HAVEN'T.

21 Q. THANK YOU. THAT'S ALL I HAVE.

22 THE COURT: ANYTHING ON RE-DIRECT,
23 PLEASE?

24 MR. THEOS: YES, SIR.

25 RE-DIRECT EXAMINATION

MICHAEL FOXWORTH - RE-CROSS/MR. THEOS

BY MR. THEOS:

Q. DR. FOXWORTH, MR. BAILEY ASKED YOU ABOUT SCHOOL RECORDS. I'M GOING TO SHOW YOU THOSE SAME SCHOOL RECORDS.

THE COURT: EXHIBIT NUMBER?

MR. THEOS: YOUR HONOR, IT WAS NOT MARKED.

Q. I'M GOING TO SHOW YOU THOSE SCHOOL RECORDS THAT MR. BAILEY PREVIOUSLY SHOWED YOU.

MR. BAILEY: YOUR HONOR, I'LL OFFER THAT IF HE'S GOING TO BE REFERRING TO IT.

MR. THEOS: ALL RIGHT.

THE COURT: ALL RIGHT. STATE'S NUMBER WITHOUT OBJECTION?

THE COURT REPORTER: STATE'S NUMBER THIRTY.

THE COURT: ALLOW THE LADY TO MARK IT, PLEASE. STATE'S NUMBER THIRTY WITHOUT OBJECTION.

STATE'S EXHIBIT NO. 30

ADMITTED AS EVIDENCE

Q. I'M GOING TO REFER YOUR ATTENTION TO WHAT'S NOW BEEN MARKED AS STATE'S EXHIBIT THIRTY. CAN YOU PLEASE IDENTIFY THE TWO I.Q. SCORES---

A. OKAY.

MICHAEL FOXWORTH - RE-CROSS/MR. THEOS

1 Q. LET ME FINISH ASKING THE QUESTION, PLEASE.

2 IDENTIFY THE TWO I.Q. SCORES FOR THE FOURTH GRADE
3 AND THE SIXTH GRADE.

4 A. OKAY.

5 Q. THE FOURTH GRADE IS AT THE TOP.

6 A. OKAY. IN THE FOURTH GRADE, 1970-1971, HE WAS AGE
7 NINE YEARS, EIGHT MONTHS, I THINK THAT MEANS; AND
8 HIS I.Q. SCORE WAS 69.

9 Q. ALL RIGHT.

10 A. IN THE FOURTH GRADE.

11 Q. OKAY. AND THEN THE SIXTH GRADE?

12 A. IN THE SIXTH GRADE, IN THE YEAR '72-'73, HE WAS
13 THEN ELEVEN YEARS EIGHT MONTHS, I THINK THAT MEANS;
14 AND HIS I.Q. AGAIN WAS 69.

15 Q. OKAY.

16 MR. THEOS: NO OTHER QUESTIONS, YOUR
17 HONOR.

18 THE COURT: ALL RIGHT. STEP DOWN.
19 NEXT WITNESS, PLEASE.

20 MR. THEOS: WE WOULD CALL DR. BARTON
21 SAYLOR.

22 - - - - -

23 WHEREUPON,

24 CHARLES BARTON SAYLOR, WHO AFTER BEING
25 FIRST DULY SWORN TO TELL THE TRUTH,

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. SAYLOR, WOULD YOU PLEASE STATE WHAT YOUR
PROFESSION IS?

A. I'M A LICENSED CLINICAL PSYCHOLOGIST, A BOARD
CERTIFIED FORENSIC PSYCHOLOGIST.

Q. TELL US WHAT YOUR EDUCATIONAL BACKGROUND IS,
PLEASE.

A. I RECEIVED MY PH.D. IN CLINICAL PSYCHOLOGY FROM
TEXAS TECH UNIVERSITY IN 1982. I RECEIVED MY
LICENSE IN THE STATE OF SOUTH CAROLINA IN 1983.
I'VE BEEN LICENSED HERE, AND THIS IS THE ONLY STATE
THAT I'VE EVER PRACTICED IN.

Q. ARE YOU PRESENTLY IN PRACTICE?

A. YES, I AM. I'M IN PRIVATE PRACTICE IN MT.
PLEASANT.

Q. CAN YOU TELL ME WHAT THAT PRACTICE HAS INCLUDED
OVER THE YEARS, PLEASE?

A. WELL, OVER THE YEARS IT'S INCLUDED A VARIETY OF
CLINICAL PSYCHOLOGY TASKS RANGING FROM WORKING ON
SOME RESEARCH PROJECTS, SOME TEACHING. IN THE LAST
TEN YEARS, MY PRACTICE HAS CONCENTRATED PRETTY
EXCLUSIVELY ON FORENSIC CONSULTATION IN FAMILY
COURT PRIMARILY; ALSO SOME IN CIVIL COURT AND IN

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

1 CRIMINAL COURT ON CONSULTATION OF VARIOUS MATTERS
2 OF CONCERN TO ATTORNEYS AND THE CLIENTS THEY
3 REPRESENT.

4 Q. DO YOU ALSO TEACH; HOLD ANY TEACHING POSITIONS?

5 A. YES. I'M ON THE FACULTY, ADJUNCT FACULTY, AT THE
6 COLLEGE OF CHARLESTON AND THE CITADEL. I'M
7 TEACHING A COURSE AT THE CITADEL RIGHT NOW.

8 Q. DO YOU HAVE ANY ADDITIONAL EDUCATION AND TRAINING
9 SINCE GRADUATION FROM MEDICAL SCHOOL?

10 A. FROM THE PH.D. PROGRAM IN CLINICAL PSYCHOLOGY; NOT
11 NOT MEDICAL SCHOOL. WE HAVE ONGOING CONTINUING
12 EDUCATION REQUIREMENTS FOR MAINTAINING A LICENSE.
13 THE MOST SIGNIFICANT POST DOCTORAL EDUCATION THAT I
14 DID WAS TO COMPLETE THE DIPLOMATE IN FORENSIC
15 PSYCHOLOGY WHICH REQUIRED 200 HOURS OF POST
16 DOCTORATE SUPERVISION IN FORENSIC PSYCHOLOGY; A
17 SERIES OF EXAMS AND SUBMISSION OF WORK SAMPLES, AND
18 DEMONSTRATION OF COMPETENCE ON DIFFERENT MEASURES
19 BY THE AMERICAN BOARD OF PROFESSIONAL PSYCHOLOGY.

20 Q. HAVE YOU EVER BEEN QUALIFIED IN STATE COURTS OF
21 SOUTH CAROLINA AS AN EXPERT IN THE FIELD OF
22 FORENSIC PSYCHOLOGY?

23 A. YES, I HAVE.

24 Q. APPROXIMATELY HOW MANY TIMES IN THE VARIOUS COURTS
25 OF THIS STATE?

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

1 A. PROBABLY OVER 300 TIMES.

2 MR. THEOS: YOUR HONOR, AT THIS TIME
3 I WOULD OFFER DR. SAYLOR AS AN EXPERT IN THE FIELD
4 OF FORENSIC PSYCHOLOGY.

5 MR. BAILEY: NO QUESTIONS AT THIS
6 TIME, YOUR HONOR.

7 THE COURT: THANK YOU. PROCEED,
8 BY MR. THEOS:

9 Q. DR. SAYLOR, DID YOU HAVE AN OPPORTUNITY TO CONDUCT
10 AN EXAMINATION OF KENNETH SIMMONS?

11 A. YES, SIR.

12 Q. CAN YOU TELL US WHEN YOU CONDUCTED THAT EXAMINATION
13 OR THOSE EXAMINATIONS, PLEASE?

14 A. WELL, THE FIRST TIME I MET WITH HIM WAS UP HERE AT
15 THE JAIL IN MAY OF LAST YEAR. THE SECOND TIME WAS
16 ABOUT A MONTH AGO AT THE COASTAL CENTER IN LADSON.

17 Q. ALL RIGHT. CAN YOU TELL US GENERALLY WHAT YOUR
18 EXAMINATION CONSISTED OF ON THE FIRST DAY?

19 A. ON THE FIRST DATE, IT WAS ADMINISTRATION OF SOME
20 TESTS TO DETERMINE MR. SIMMONS' CURRENT
21 INTELLECTUAL FUNCTIONING, AND INTERVIEWED TO GET
22 SOME HISTORICAL INFORMATION FROM HIM.

23 Q. AND DURING THE SECOND EXAMINATION?

24 A. THE SECOND EXAMINATION CONCENTRATED ON HIS CAPACITY
25 TO WAIVE HIS MIRANDA RIGHTS.

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

1 Q. NOW, WITH RESPECT TO THE FIRST EXAMINATION, DID YOU
2 HAVE AN OPPORTUNITY BEFORE THAT EXAMINATION TO
3 REVIEW ANY RECORDS PERTAINING TO MR. SIMMONS AND
4 HIS BACKGROUND?

5 A. YES.

6 Q. CAN YOU TELL US WHAT RECORDS YOU REVIEWED PRIOR TO
7 THAT EXAMINATION?

8 A. I DON'T RECALL. I CAN'T REMEMBER THE SEQUENCE.
9 I'VE GOT A BIG STACK OF RECORDS ON HIM. I DON'T
10 REMEMBER WHICH I HAD AT THAT TIME.

11 Q. CAN YOU TELL US WHICH RECORDS YOU HAVE REVIEWED
12 RELATED TO MR. SIMMONS, GENERALLY?

13 A. WELL HIS SCHOOL TRANSCRIPTS FROM ELEMENTARY SCHOOL
14 UP THROUGH HIGH SCHOOL; SOME PREVIOUS EVALUATIONS
15 PERFORMED ON HIM WHILE HE WAS AT THE STATE
16 HOSPITAL; SOME MEDICAL RECORDS FROM, I BELIEVE,
17 M.U.S.C. AND ALSO NORTH TRIDENT HOSPITAL;
18 TRANSCRIPTS OF THE CONFESSIONS THAT WERE REFERRED
19 TO IN THE PREVIOUS WITNESS' TESTIMONY; A SOCIAL
20 HISTORY THAT WAS PREPARED BY A SOCIAL WORKER.
21 THERE MAY HAVE BEEN MORE. I DON'T KNOW IF I'M
22 LEAVING ANYTHING OUT. I'VE ALSO REVIEWED SOME
23 TRANSCRIPTS OF TESTIMONY IN PREVIOUS HEARINGS.
24 Q. NOW, LET ME BACK UP FOR ONE SECOND. THE TESTIMONY
25 THAT YOU HAVE PRESENTED IN THESE VARIOUS COURTS;

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

1 HAVE THEY BEEN FOR BOTH THE STATE AND DEFENSE
2 COUNSEL?

3 A. YES.

4 Q. YOU HAVE BEEN QUALIFIED AS AN EXPERT IN THESE
5 COURTS ON BEHALF OF BOTH?

6 A. YES, SIR.

7 Q. NOW, DID YOU TAKE A HISTORY FROM MR. SIMMONS WHEN
8 YOU CONDUCTED YOUR EXAMINATIONS?

9 A. YES.

10 Q. WAS THAT HISTORY CONSISTENT WITH THOSE THINGS THAT
11 YOU WERE ABLE TO REVIEW RELATED TO HIS BACKGROUND?

12 A. YES, SIR.

13 Q. DID YOU CONDUCT IN YOUR FIRST EXAMINATION ANY
14 TESTS?

15 A. YES.

16 Q. WHAT TESTS DID YOU CONDUCT?

17 A. I GAVE HIM A WEXLER ADULT INTELLIGENCE SCALE AND A
18 WIDE RANGE ACHIEVEMENT TEST.

19 Q. CAN YOU TELL US WHAT THOSE TESTS ARE, PLEASE?

20 A. THE WEXLER ADULT INTELLIGENCE SCALE IS UP UNTIL --
21 THIS WAS THE WAIS-R THAT THE SECOND REVISION OF
22 THAT INSTRUMENT. SINCE THAT TIME THE THIRD
23 REVISION OF THE INSTRUMENT HAS BECOME PRETTY
24 WIDESPREAD AVAILABLE. BUT IT'S KIND OF MAIN TEST
25 USED FOR TESTING INTELLECTUAL LEVEL OF ADULTS;

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PRETTY MUCH THE WORKHORSE OF THE INDUSTRY FOR
DETERMINING AN INDIVIDUAL'S INTELLECTUAL LEVEL.

Q. DID YOU GIVE MR. SIMMONS THAT TEST?

A. YES.

Q. AND WHAT WAS THE RESULT OF THAT TEST?

A. IF I CAN REFER TO A COPY OF MY OWN---

Q. YES, SIR. (WITNESS EXAMINES DOCUMENT.)

A. HE ATTAINED A VERBAL I.Q. OF 66; A PERFORMANCE I.Q.
OF 75, AND A FULL SCALE I.Q. OF 69.

Q. WHAT DOES THAT MEAN? IN LAY TERMS WHAT DOES THAT
MEAN?

A. THE FULL SCALE I.Q. OF 69 WOULD CLASSIFY HIM AS
FUNCTIONING IN THE LOWER ONE PERCENT OF THE
POPULATION OVERALL. HIS LANGUAGE AND COMMUNICATION
SKILLS AND VERBAL REASONING WERE SOMEWHAT WEAKER
THAN NON-VERBAL KIND OF PERCEPTUAL MOTOR SKILLS.

Q. YOU SAID YOU CONDUCTED ANOTHER TEST?

A. ALSO AN ACHIEVEMENT TEST WHICH IS BASICALLY A
SCREENING TEST TO ASSESS MASTERY OF FUNDAMENTAL
ACADEMIC CONCEPTS AND OPERATIONS THAT YOU WOULD BE
EXPECTED TO LEARN IN SCHOOL. AND ON THAT TEST---

Q. BEFORE YOU TELL US WHAT THE RESULTS OF THAT TEST
WAS; WHAT IS THE PURPOSE OF THAT TEST?

A. TO DETERMINE AN INDIVIDUAL'S MASTERY OF FUNDAMENTAL
ACADEMIC CONCEPTS AND OPERATIONS.

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

1 Q. OKAY. WHAT WERE THE RESULTS OF THAT TEST?

2 A. ON READING RECOGNITION HE OBTAINED A STANDARD SCORE
3 EQUIVALENT OF 53 WHICH IS APPROXIMATELY ABOUT THE
4 SECOND GRADE LEVEL BELOW THE FIRST PERCENTILE.
5 SPELLING STANDARD SCORE EQUIVALENT OF 47, REALLY
6 OUT OF A LOW FIRST GRADE LEVEL, AGAIN BELOW THE
7 FIRST PERCENTILE; AND ARITHMETIC, STANDARD SCORE
8 EQUIVALENT OF SIXTY AT ABOUT THE THIRD GRADE LEVEL.

9 Q. BASED UPON THAT, DO YOU HAVE AN OPINION THAT YOU
10 CAN STATE TO A REASONABLE DEGREE OF SCIENTIFIC
11 CERTAINTY AS TO WHAT THIS FUNCTIONING LEVEL IS?

12 A. WELL, AT THAT TIME THAT I MET WITH HIM, HIS
13 PERFORMANCE ON THAT TEST MEASURE WOULD INDICATE
14 THAT HE WAS FUNCTIONING IN THE MENTALLY DEFICIENT
15 RANGE.

16 Q. CAN YOU EQUATE THAT TO A LEVEL OF FUNCTIONING WITH
17 HIS SCHOOL GRADE? FIRST GRADE; SECOND GRADE; FIFTH
18 GRADE?

19 A. I'M NOT SURE THAT I COULD DO THAT IN A MEANINGFUL
20 WAY.

21 Q. CAN YOU EQUATE THAT TO A FUNCTIONAL LEVEL
22 EQUIVALENCY TO A CERTAIN AGE?

23 A. I DON'T BELIEVE I COULD QUANTIFY IT IN THAT
24 MANNER. BUT, AGAIN, IT WOULD BE IN THE LOWEST, YOU
25 KNOW, ONE PERCENT OF INDIVIDUALS HIS AGE AND

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

1 SIGNIFICANTLY BELOW THE FUNCTIONING OF AN AVERAGE
2 PERSON HIS AGE.

3 Q. WHAT DOES THAT INDICATE? WHAT IS THAT AN
4 INDICATION OF?

5 A. HE'S LIKELY TO BE VERY SLOW; HE'S LIKELY TO HAVE
6 LIMITED PROBLEM SOLVING SKILLS RELATIVE TO OTHER
7 PEERS. HE'S LIKELY TO HAVE DIFFICULTY PROBABLY
8 LEARNING TASKS AT THE RATE THAT OTHERS WOULD BE
9 ABLE TO LEARN THEM THAT WERE NOT IMPAIRED.

10 Q. NOW, IN YOUR EXAMINATION OF HIM A MONTH OR SO AGO,
11 DID YOU CONDUCT ANY ADDITIONAL TESTS?

12 A. YES.

13 Q. WHAT TESTS DID YOU CONDUCT?

14 A. I GAVE HIM A COMPETENCY TO WAIVE MIRANDA.

15 Q. TELL US WHAT THAT TEST CONSISTS OF.

16 A. IT CONSISTS OF PRESENTING THE FOUR COMPONENTS OF
17 THE MIRANDA WARNING TO A SUBJECT; FIRST ASKING HIM
18 TO READ THEM, AND THEN TO COMMUNICATE HIS
19 UNDERSTANDING OF WHAT THEY MEAN.

20 Q. IS THIS A TEST THAT YOU PREVIOUSLY CONDUCTED ON
21 OTHER INDIVIDUALS?

22 A. YES.

23 Q. HOW MANY TIMES WOULD YOU SAY YOU'VE CONDUCTED THAT
24 TEST THROUGH YOUR CAREER?

25 A. PROBABLY ABOUT TWELVE TIMES.

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

1 Q. NOW, CAN YOU TELL US WHAT THE RESULTS OF THAT TEST
2 WERE, PLEASE?

3 A. IT INDICATED THAT HE WAS DEFICIENT IN HIS
4 UNDERSTANDING OF THE CONCEPTS IN THE MIRANDA
5 WARNINGS.

6 Q. CAN YOU EXPLAIN WHY IN YOUR OPINION HE WAS
7 DEFICIENT?

8 A. WELL, I THINK THERE'S PROBABLY TWO MAIN ROOTS TO
9 THE TRUNK. THE FIRST IS JUST HIS OVERALL LIMITED
10 INTELLECTUAL ABILITY THAT HAVE BEEN MEASURED BY A
11 COUPLE OF DIFFERENT EXAMINERS PUTTING HIM IN
12 BORDERLINE DEFICIENT RANGE. THE SECOND, AND
13 PROBABLY WHAT SEEMED TO BE THE BIGGER AREA OF
14 SPECIFIC DEFICIT, WAS HIS INABILITY TO APPRECIATE
15 THE INTENDED FUNCTION OF THE RIGHTS IN TERMS OF NOT
16 RECOGNIZING THE ADVERSARIAL QUALITY OF THE
17 INTERROGATION PROCESS, HIS NOT APPRECIATING THE
18 FACT THAT IT IS AN ABSOLUTE RIGHT. IT'S NOT
19 DEPENDENT ON ANY OTHER CIRCUMSTANCES; AND A LIMITED
20 APPRECIATION AND AWARENESS OF THE ADVERSARIAL
21 PROCESS IN HIS RIGHT TO PROTECT HIMSELF BY REFUSING
22 TO YIELD INFORMATION THAT COULD BE INCRIMINATING.

23 Q. NOW, WHAT IS MALINGERING?

24 A. MALINGERING WOULD BE A SUBJECT'S INTENTIONAL EFFORT
25 TO PRESENT HIMSELF AS MORE DISABLED, MORE

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1 DISTURBED, MORE PSYCHIATRICALY IMPAIRED THAN HE OR
2 SHE ACTUALLY IS.

3 Q. DID YOU FIND ANY EVIDENCE OF MALINGERING FROM MR.
4 SIMMONS WHEN YOU CONDUCTED THESE AREAS OF
5 EXAMINATION?

6 A. NO.

7 Q. DO YOU HAVE AN OPINION THAT YOU CAN STATE TO
8 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
9 WHETHER OR NOT MR. SIMMONS WAS MALINGERING?

10 A. IT WOULD BE MY OPINION THAT HE WAS NOT MALINGERING.

11 Q. WHAT IS THAT OPINION BASED UPON, PLEASE?

12 A. IT IS BASED UPON THE CONSISTENCY OF HIS RESPONSES
13 TO DIFFERENT TEST MATERIALS ACROSS VARIOUS
14 SETTINGS. IT WOULD BE BASED ON THE LACK OF A
15 PATTERN OF FAILED RESPONSES ON SOME OF THE ITEMS
16 WHICH I DID NOT ADMINISTER BUT WERE VIEWED THAT
17 WERE ADMINISTERED BY OTHER EXAMINERS WHERE MOST
18 TYPICALLY AND INTENTIONALLY FEIGNING SUBJECT WILL
19 TEST POORLY. IN FACT MR. SIMMONS' TEST SCORES
20 IMPROVED OVER THE TIMES HE WAS EXAMINED BY
21 DIFFERENT EXAMINERS. I THINK MAYBE MINE WAS THE
22 FIRST IN MAY OF LAST YEAR.

23 Q. NOW, DO YOU HAVE AN OPINION THAT YOU CAN STATE TO A
24 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
25 WHETHER OR NOT MR. SIMMONS COMPREHENDS THE CONCEPT

CHARLES BARTON SAYLOR - DIRECT/MR. THEOS

OF THE RIGHT TO REMAIN SILENT?

A. I WOULD NOT WANT TO ADDRESS THAT AS AN ULTIMATE
ISSUE. WHAT I CAN SAY IS THAT HE HAS CONSISTENTLY
DISPLAYED SIGNIFICANT DEFICITS IN HIS ABILITY TO
MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS
RIGHTS.

Q. AGAIN, WHAT DID YOU BASE THAT OPINION ON?

A. IN THE DIFFERENT SETTINGS THAT HE'S BEEN EXAMINED,
HE'S NEVER INDICATED THAT HE UNDERSTOOD THE
INTENDED FUNCTION OF THE RIGHTS; THAT HE COULD
AVOID SELF-INCRIMINATION; THAT IT WOULD BE IN HIS
BEST INTEREST TO DO SO. IT SEEMS AS IF HE HAD A
PERCEPTION THAT IF THE POLICE ASK YOU A QUESTION.
IT'S KIND OF LIKE IF YOUR MOM OR YOUR DAD ASK YOU A
QUESTION, YOU'D BETTER ANSWER IT FOR A LOT OF
REASONS; MAYBE BECAUSE THEY'LL BE HARDER ON IF YOU
DON'T ANSWER IT. AND A LOT OF PEOPLE GROW UP THAT
WAY; YOU DON'T GET IN AS MUCH TROUBLE IF YOU SAY
SOMETHING. MAYBE THINKING THAT THIS WILL MAKE THIS
THING GO AWAY THAT IT WILL ALL BE OVER. MAYBE IF I
TELL THEM SOMETHING, THEY WON'T BE MAD AT ME. I
DON'T KNOW. BUT CLEARLY HE'S NEVER BEEN ABLE TO
VERBALIZE AN UNDERSTANDING OF WHAT THESE RIGHTS
MEAN AND WHAT THEY MEAN TO HIM.

Q. DO YOU HAVE AN OPINION THAT YOU CAN STATE TO A

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1 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
2 WHETHER OR NOT MR. SIMMONS HAD THE CAPACITY TO
3 COMPREHEND HIS MIRANDA WARNINGS IN DECEMBER OF 1997
4 AT THE TIME THAT THESE STATEMENTS WERE GIVEN?

5 A. HE HAS NOT DISPLAYED THAT CAPACITY IN ANY
6 EVALUATION SINCE THAT TIME. EXTRAPOLATING FROM
7 THAT DATE TO BACKWARDS, IT WOULD STAND TO REASON
8 THAT HE DID NOT AT THAT TIME.

9 Q. DR. SAYLOR, PLEASE ANSWER ANY QUESTIONS MR. BAILEY
10 MIGHT HAVE FOR YOU.

11 A. YES, SIR.

12 CROSS-EXAMINATION

13 BY MR. BAILEY:

14 Q. DOCTOR, LET ME ASK YOU JUST A COUPLE OF QUESTIONS
15 NOT DEALING SPECIFICALLY WITH MR. SIMMONS, BUT JUST
16 IN THE ABSTRACT. AND I ASKED THESE SAME QUESTIONS
17 TO OTHER WITNESS WHO JUST TESTIFIED. IF I FEEL
18 LIKE I'M MENTALLY ILL AND I COME TO YOU FOR HELP,
19 WOULD IT BE IN MY BEST INTEREST TO PRESENT MY
20 PROBLEMS TO YOU AS HONESTLY AS I COULD SO THAT YOU
21 CAN PROPERLY DIAGNOSE MY SITUATION AND GIVE ME THE
22 HELP I'M ASKING FOR?

23 A. YES.

24 Q. IN AN OFFICE SETTING WHEN YOU HAVE A PATIENT COMING
25 IN OR FLYING, OR WHATEVER Y'ALL CALL THEM, THAT'S

CHARLES BARTON SAYLOR - CROSS/MR. BAILEY

1 WHAT YOU WOULD HOPE FOR; IS IT NOT?

2 A. YES.

3 Q. ON THE OTHER HAND, SOMEBODY WHO IS FACING CAPITAL
4 MURDER CHARGES AND IS SENT BY THEIR LAWYER TO A
5 PSYCHOLOGIST OR PSYCHIATRIST, WOULD HAVE A VERY,
6 VERY HIGH DEGREE OF MOTIVATION TO MALINGER THE
7 SYMPTOMS OF MENTAL RETARDATION OR MENTAL ILLNESS;
8 WOULD THEY NOT?

9 A. YES.

10 Q. ALL RIGHT, SIR. AND THAT'S THE SITUATION MR.
11 SIMMONS IS IN; IS THAT CORRECT?

12 A. YES.

13 Q. HE DIDN'T COME TO YOU AS A PATIENT TRYING TO GET
14 HELP FOR SOME MENTAL PROBLEM THAT HE THOUGHT HE
15 HAD. HE WAS SENT BY HIS LAWYERS; IS THAT CORRECT?

16 A. CORRECT.

17 Q. ALL RIGHT, SIR.

18 A. ACTUALLY I WAS SENT TO HIM.

19 Q. YES, SIR. NOW, LET ME ASK YOU A COUPLE OF
20 QUESTIONS ABOUT THE TESTS THAT YOU ADMINISTERED.
21 AND BEFORE I ASK YOU THAT; IF I'M TAKING AN I.Q.
22 TEST, AND LET'S SAY MY REAL I.Q. IS ABOUT 80, AND I
23 WANTED TO TRY TO FAKE IT TO MAKE IT LOOK LIKE I WAS
24 SMARTER. IS THERE ANY THAT SOMEBODY WITH AN 80
25 I.Q. COULD SCORE 100?

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1 A. THE ONLY WAY THAT I CAN THINK OF THAT YOU COULD DO
2 THAT WOULD HAVE BEEN TO HAVE GOTTEN SOMEBODY TO
3 GIVE YOU THE ANSWERS.

4 Q. OKAY. BUT ANSWER THAT, IF I'M JUST WANTING TO
5 PRESENT MYSELF AS SMARTER THAN I REALLY AM, COULD I
6 DO THAT?

7 A. I DON'T THINK SO.

8 Q. ON THE OTHER HAND, IF MY I.Q. IS 100, AND I WANT TO
9 PRESENT MYSELF AS BEING 80, MALINGER STUPIDER THAN
10 I AM; YOU CAN DO THAT, CAN'T YOU?

11 A. YES.

12 Q. SO YOU CAN GO DOWN BUT NOT UP ABOVE YOUR I.Q.
13 LEVEL?

14 A. CORRECT.

15 Q. NOW THE WAIS-R -- IS IT THE WAIS-III OR THE WAIS-R?

16 A. THE WAIS-R.

17 Q. AND THE WAIS-III IS THE NEWER VERSION OF THAT?

18 A. CORRECT.

19 Q. WHY DID YOU PICK THE WAIS-R INSTEAD OF THE
20 WAIS-III?

21 A. I DIDN'T OWN A WAIS-III AT THAT TIME.

22 Q. OKAY. AND IS THERE ANY MEASUREMENT OF MALINGERING
23 IN THE WAIS-R ITSELF?

24 A. NO.

25 Q. ALL RIGHT, SIR. SO SOMEBODY TAKING THE WAIS-R THAT

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1 YOU GAVE, THAT I.Q. TEST, THERE WOULD BE NO WAY OF
2 JUST LOOKING AT THOSE TEST ANSWERS AND DETERMINING
3 WHETHER OR NOT THAT PERSON IS TRYING TO PULL ONE
4 OVER ON YOU?

5 A. (NO RESPONSE.)

6 Q. LET ME REPEAT MY QUESTION. I'M NOT TALKING ABOUT
7 HIS PRESENT DAY DECISION. BUT IF YOU JUST HAVE
8 SOMEBODY COME IN THERE AND YOU DON'T INTERVIEW
9 THEM, AND YOU PUT THE TEST IN FRONT OF THEM AND
10 YOU'RE READING THAT SCORE; THERE'S NO ABILITY IN
11 TAKING THE TEST AND---

12 A. THAT'S CORRECT. THERE'S NO SORT OF VALIDITY SCALE
13 OR ANYTHING LIKE THAT.

14 Q. THE OTHER TEST THAT YOU GAVE -- WHAT'S THAT; THE
15 WIDE RANGE ACHIEVEMENT TEST?

16 A. YES.

17 Q. SAME QUESTION WITH THAT. IS THERE ANY BUILT IN WAY
18 TO TELL IF SOMEBODY IS MALINGERING OR FAKING
19 SYMPTOMS ON THAT TEST?

20 A. NO.

21 Q. ALL RIGHT, SIR. AND THERE ARE SOME TESTS, THE
22 SAIRS (PHONETICALLY SPELLED) TEST?

23 A. YES.

24 Q. HAVE YOU EVER HEARD OF THAT?

25 A. YES. IT'S A STRUCTURED INTERVIEW TEST.

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1 Q. DID YOU GIVE HIM THAT?

2 A. NO.

3 Q. THAT'S THE TEST THAT IS DESIGNED TO
4 DETERMINE WHETHER OR NOT SOMEBODY IS
5 MALINGERING?

6 A. INTENTIONALLY PRODUCE SOME FEIGNING SYMPTOMS; YES.

7 Q. ALL RIGHT, SIR. AND DOESN'T THE DSM-IV SAY THAT
8 THE POSSIBILITY OF MALINGERING SHOULD ALWAYS BE
9 CONSIDERED?

10 A. YES.

11 Q. DID YOU GIVE HIM ANY TEST AT ALL TO DETERMINE
12 WHETHER OR NOT HE WAS POSSIBLY MALINGERING THESE
13 TESTS?

14 A. NO.

15 Q. BUT THERE ARE TESTS THAT COULD BE GIVEN; IS THAT
16 CORRECT?

17 A. YES.

18 Q. THE MATERIAL THAT YOU HAD; DID THAT INCLUDE THE
19 SCHOOL RECORDS; IS THAT CORRECT?

20 A. YES.

21 Q. ALL RIGHT, SIR. AND ON THE SCHOOL RECORDS AT ONE
22 POINT THEY HAVE HIM WITH AN I.Q. OF 104. AND THAT
23 IS ABOVE NORMAL, IS IT NOT?

24 A. WELL, IT'S AVERAGE; YES.

25 Q. OKAY. ISN'T 100 AVERAGE?

1 A. YES.

2 Q. OKAY. SO 104 WOULD BE ABOVE AVERAGE?

3 A. WELL, THERE'S SOMETHING CALLED AN ERROR OF
4 MEASUREMENT. WE CALL THAT AVERAGE; YES.

5 Q. ALL RIGHT, SIR. AND IN THE HIGH NINETIES I THINK
6 IS ANOTHER ONE?

7 A. YES.

8 Q. AND I THINK MR. THEOS ASKED YOU ON A COUPLE OF
9 OCCASIONS HE SCORED A 69?

10 A. I DON'T THINK MR. THEOS ASKED ABOUT THAT. BUT THAT
11 IS THE CASE.

12 Q. I BELIEVE HE ASKED THE OTHER DOCTOR. WERE YOU HERE
13 WHEN HE ASKED HIM THAT?

14 A. YES.

15 Q. ALL RIGHT. AND JUST FOR THE SAKE OF ARGUMENT,
16 ASSUMING THAT THESE TESTS WERE ADMINISTERED
17 PROPERLY AND THEY WERE -- THE PERSON WAS PUTTING
18 FORTH WHATEVER EFFORTS THEY WANTED TO PUT FORTH;
19 WOULD SOMEBODY WITH A 69 I.Q. SCORE 104 OR
20 IN THE HIGH NINETIES ON AN I.Q. TEST, GENERALLY
21 SPEAKING?

22 A. NO, NOT GENERALLY SPEAKING.

23 Q. ALL RIGHT, SIR. WOULD SOMEBODY THAT HAD AN I.Q. OF
24 104 OR IN THE HIGH NINETIES, IF THEY WANTED TO, HAD
25 A BAD DAY, SICK JUST, DIDN'T FEEL LIKE MESSING WITH

1 IT, DO A 69?

2 A. YES.

3 Q. NOW, THE HISTORY YOU GOT FROM MR. SIMMONS AND ABOUT
4 MR. SIMMONS INDICATED HE WAS A HIGH SCHOOL
5 GRADUATE; IS THAT CORRECT?

6 A. YES.

7 Q. ALL RIGHT, SIR. AND DID IT INDICATE TO YOU THAT HE
8 GOT A REGULAR HIGH SCHOOL DIPLOMA?

9 A. HE DID.

10 Q. ALL RIGHT. NOT A SPECIAL ED DIPLOMA OR A
11 CERTIFICATE?

12 A. CORRECT.

13 Q. ALL RIGHT, SIR. AND HAVE YOU EVER HAD AN OCCASION
14 WHERE SOMEBODY WHO IS MENTALLY RETARDED GOT A
15 REGULAR HIGH SCHOOL DIPLOMA?

16 A. YES.

17 Q. IS IT UNUSUAL?

18 A. YES.

19 Q. HOW MANY PEOPLE HAVE YOU EVER DEALT WITH THAT HAD A
20 HIGH SCHOOL DIPLOMA? NOT A SPECIAL ED OR
21 CERTIFICATE OF COMPLETION BUT EARNED A HIGH SCHOOL
22 DIPLOMA AND HAD A WORK HISTORY SUCH AS MR. SIMMONS
23 HAS? WOULD YOU HAVE FOUND THEM TO BE MENTALLY
24 RETARDED?

25 A. I REALLY COULDN'T GIVE YOU AN EXACT NUMBER ON THAT,

1 MR. BAILEY. IT'S NOT AN INSIGNIFICANT NUMBER. I
2 MEAN, YOU KNOW, IT'S KIND OF A SAD STATE OF
3 AFFAIRS, BUT IT DOES HAPPEN. AND I THINK -- YOU
4 KNOW, DEXTER MANLEY GRADUATED FROM OKLAHOMA STATE
5 AND COULDN'T EVEN READ.

6 Q. ALL RIGHT.

7 A. OF COURSE THAT WAS OKLAHOMA STATE.

8 Q. OKAY. WE'LL LEAVE THAT, THEN. DID YOU LISTEN TO
9 THE TAPES?

10 A. NOT ALL OF THEM.

11 Q. WHICH ONE DID YOU LISTEN TO?

12 A. I LISTENED TO THE FIRST PARTS OF TWO -- TWO
13 CONFESSION TAPES. I LISTENED TO SOME PARTS OF THE
14 ADMINISTRATION OF THE EVALUATION---

15 Q. I'M TALKING ABOUT THE CONFESSION THAT WERE GOING
16 BACK TO 1997. AND YOU LISTENED TO THE PARTS IN
17 WHICH MR. MEARS GAVE THE MIRANDA RIGHTS TO MR.
18 SIMMONS?

19 A. CORRECT.

20 Q. AND IN YOUR OPINION DID MR. MEARS ADEQUATELY
21 EXPLAIN THOSE MIRANDA RIGHTS?

22 A. IT APPEARED TO ME THAT HE DID.

23 Q. DID IT APPEAR FROM LISTENING TO MR. SIMMONS'
24 RESPONSES ON THE TAPE THAT HE APPEARED TO
25 UNDERSTAND WHAT HE WAS SAYING?

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1 A. THAT I COULDN'T DETERMINE. HE SAID THAT HE DID.
2 THAT'S WHERE IF SOMEONE MIGHT HAVE JUST SUSPECTED
3 FOR SOME REASON THAT HE DIDN'T. JUST SAY, "OKAY,
4 MR. SIMMONS, YOU SAID YES YOU UNDERSTAND IT, BUT I
5 WANT TO MAKE SURE. CAN YOU TELL IT BACK TO ME;
6 CAN YOU EXPLAIN TO ME WHAT IT MEANT?" EVERY
7 TIME I ASKED HIM TO DO THAT, HE COULDN'T DO IT.
8 SO, I DON'T KNOW. HE SAID HE UNDERSTOOD
9 THEM.

10 Q. OKAY. BUT HE SAID TO YOU THAT HE COULDN'T DO IT;
11 HE COULDN'T UNDERSTAND IT; RIGHT?

12 A. NO. HE NEVER SAID THAT. I JUST ASKED HIM TO
13 EXPLAIN IT, AND HE COULDN'T EXPLAIN IT.

14 Q. HE COULDN'T OR -- HE PRESENTED HIMSELF AS NOT BEING
15 ABLE TO EXPLAIN IT?

16 A. HE WAS UNABLE TO EXPLAIN IT.

17 Q. OKAY. ASSUMING THAT HE WAS NOT MALINGERING HIS
18 PRESENTATION TO YOU; IS THAT CORRECT?

19 A. CORRECT.

20 Q. OKAY. AND YOUR ENTIRE TESTIMONY IS PREDICATED ON
21 YOUR ASSUMPTION THAT MR. SIMMONS WAS NOT
22 MALINGERING HIS PRESENTATION TO YOU; IS THAT
23 CORRECT?

24 A. CORRECT.

25 Q. NOW, LISTENING TO THE TAPE. YOU READ THE

1 TRANSCRIPT AND LISTENED TO THE TAPE, DIDN'T
2 YOU?

3 A. I'VE NOT LISTENED TO THE WHOLE TAPE, BUT I'VE READ
4 THE WHOLE TRANSCRIPT.

5 Q. DID YOU JUST LISTEN TO THE PART ABOUT THE MIRANDA
6 RIGHTS?

7 A. YES.

8 Q. YOU DIDN'T LISTEN TO THE ENTIRE TAPE?

9 A. NO.

10 Q. IF THAT TAPE INDICATED A GIVEN FLOW OF
11 CONVERSATION, OR IF IT INDICATED INSTANCES WHERE
12 MR. SIMMONS CORRECTED KENNY MEARS WHO WAS
13 INTERVIEWING HIM AND PROVIDED DETAILS AND NAMES AND
14 MEMORY OF ADDRESSES AND PHONE NUMBERS, THAT TYPE
15 INFORMATION, WOULD THAT HAVE HELPED YOU ANY TO BE
16 ABLE TO DETERMINE WHETHER OR NOT HE WAS ACTUALLY
17 RETARDED?

18 A. NO.

19 Q. HEARING SOMEBODY, THEIR VOCABULARY, THEIR RATE OF
20 SPEECH, JUST THE FLOW OF SPEECH WOULDN'T GIVE YOU
21 ANY CLUE TO WHETHER OR NOT THAT PERSON WAS SMART OR
22 NOT SMART?

23 A. THAT WASN'T REALLY WHAT I WAS LOOKING AT WHETHER HE
24 WAS RETARDED OR NOT. BUT, NO; I DON'T THINK SO.
25 THAT WOULD BE A DIFFERENT DIMENSION FROM HIS

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1 CAPACITY TO WAIVE HIS RIGHTS.

2 Q. AND I'M NOT ASKING ABOUT WAIVING RIGHTS, NOW. I'M
3 JUST ASKING JUST IN GENERAL; CAN YOU TELL WHEN
4 YOU'RE SPEAKING TO SOMEBODY IF THEY'VE GOT GOOD
5 SENSE OR WHETHER THEY DON'T?

6 A. (NO RESPONSE.)

7 Q. IT'S NOT A SCIENTIFIC QUESTION.

8 A. I'D LIKE TO THINK I CAN DO THAT.

9 Q. IF YOU'RE TALKING TO SOMEBODY WHO'S GOT A PH.D. OR
10 SOMEBODY LIKE THAT, THEN HE WOULD SPEAK IN A
11 DIFFERENT MANNER THAN SOMEBODY THAT MIGHT BE OUT
12 DIGGING A DITCH SOMEWHERE?

13 A. THAT'S HARD TO SAY; BUT SHOULD GET SOME IDEA OF
14 PEOPLE'S ABILITY TO MAKE CONVERSATION.

15 Q. BY LISTENING TO THEM?

16 A. YES.

17 Q. OKAY. JUST USING YOUR EVERY DAY, COMMON SENSE?

18 A. CORRECT.

19 Q. NOW, YOU DIDN'T ACTUALLY DIAGNOSE MR. SIMMONS AS
20 BEING MENTALLY RETARDED, DID YOU?

21 A. NO.

22 Q. WHY IS THAT?

23 A. I DON'T KNOW WHETHER HE IS OR HE'S NOT.

24 THAT WASN'T REALLY A DIAGNOSTIC QUESTION FOR
25 ME.

CHARLES BARTON SAYLOR - CROSS/MR. BAILEY

1 Q. WOULD N'T WHETHER OR NOT HE'S RETARDED OR NOT HAVE A
2 BEARING ON WHETHER OR NOT HE WAS INTELLIGENT ENOUGH
3 TO UNDERSTAND MIRANDA WARNINGS?

4 A. YES.

5 Q. WOULD A RETARDED PERSON BE MORE LIKELY NOT TO
6 UNDERSTAND MIRANDA RIGHTS THAN A PERSON WITH AN
7 AVERAGE I.Q.?

8 A. IN GENERAL, YES.

9 Q. OKAY. SO, I'M JUST TRYING TO UNDERSTAND WHY YOU
10 DIDN'T TRY TO DETERMINE IF HE WAS RETARDED. CAN
11 YOU HELP ME OUT?

12 A. I HAVEN'T ALREADY ANSWERED THAT?

13 Q. NO, SIR.

14 A. OKAY. THEN MAYBE YOU COULD RESTATE IT.

15 Q. I THOUGHT YOU TOLD ME YOU DID NOT TRY TO DIAGNOSE
16 WHETHER OR NOT HE WAS RETARDED?

17 A. CORRECT.

18 Q. OKAY. YOU WEREN'T ASKED TO DO THAT?

19 A. NO.

20 Q. OKAY. WOULD THAT HAVE NOT BEEN AN IMPORTANT PIECE
21 OF INFORMATION FOR YOU TO KNOW IN TRYING TO REACH A
22 DECISION ABOUT WHETHER HE WAS INTELLIGENT ENOUGH TO
23 WAIVE HIS MIRANDA RIGHTS BECAUSE I.Q. IS
24 INTELLIGENCE QUOTA; RIGHT?

25 A. YES. WE DID DETERMINE HIS I.Q.

CHARLES BARTON SAYLOR - CROSS/MR. BAILEY

- 1 Q. OKAY. ALL RIGHT. BUT YOU'VE GOT TO LOOK AT MORE
2 THAN I.Q. TO TELL IF SOMEBODY IS MENTALLY RETARDED;
3 RIGHT?
- 4 A. YES.
- 5 Q. AND YOU'VE NOT LOOKED AT THOSE OTHER FACTORS, THAT
6 BEING THE ONSET AGE FOR O.A.T. (PHONETICALLY
7 SPELLED) AND THE ADAPTIVE FUNCTIONS?
- 8 A. I DID.
- 9 Q. DID YOU FIND ANY DEFICITS IN HIS ADAPTIVE FUNCTION
10 PRIOR TO THE AGE OF EIGHTEEN, HIS ABILITY TO ATTEND
11 SCHOOL WITH HIS PEERS, PARTICIPATE IN
12 EXTRACURRICULAR ACTIVITIES LIKE FOOTBALL, TO DATE
13 THE GIRLS, AND TO BRUSH HIS TEETH; DO THOSE KIND OF
14 THINGS THAT YOU DO IN SOCIETY?
- 15 A. NO.
- 16 Q. AND THAT'S ONE OF THE CRITERIA THAT YOU'VE GOT TO
17 FIND TO CLASSIFY SOMEBODY AS BEING MENTALLY
18 RETARDED; IS IT NOT?
- 19 A. I BELIEVE THAT IT IS; YES.
- 20 Q. AND I'VE GOT THE D.S.F. IF YOU NEED TO LOOK AT IT.
- 21 A. IF YOU WANT ME TO LOOK AT IT, I WILL.
- 22 Q. OKAY. (WITNESS REVIEWS DOCUMENT.)
- 23 A. IS THAT A QUESTION?
- 24 Q. YES. I WANTED TO GET YOU TO LOOK AT IT FIRST.
- 25 A. OH, OKAY. WHAT WOULD YOU LIKE FOR ME TO LOOK AT?

1 Q. THE THREE DIAGNOSTIC CRITERIA.

2 A. OKAY. A, B, AND C?

3 Q. YES. AND AM I CORRECT IN READING THAT THAT YOU
4 CANNOT -- NOBODY CAN LEGITIMATELY DIAGNOSE MENTAL
5 RETARDATION UNLESS ALL THREE OF THOSE CRITERIA
6 ARE MET; A SCORE OF A LOW 70 ON THE I.Q. TEST, THE
7 ONSET AT THE AGE OF EIGHTEEN, AND THE ADAPTIVE
8 FUNCTIONS DIFFICULTIES AT YOUR AGE AND
9 CULTURE?

10 A. DO YOU WANT ME TO READ THEM?

11 Q. NO. AM I CORRECT OR OFF BASE? DO YOU HAVE TO HAVE
12 ALL THREE OF THOSE THINGS TO DIAGNOSE MENTAL
13 RETARDATION?

14 A. IT LOOKS TO ME LIKE YOU DO.

15 Q. ALL RIGHT, SIR. AND YOU'RE FAMILIAR WITH THAT
16 BOOK, AND THAT'S AN ACCEPTED BOOK BY THE AMERICAN
17 PSYCHIATRIC ASSOCIATION?

18 A. YES, I THINK IT IS. I'M A PSYCHOLOGIST, BUT IT IS
19 ACCEPTED BY OURS; YES.

20 Q. DO YOU HAVE ONE IN YOUR OFFICE?

21 A. I DO.

22 Q. DO YOU REFER TO IT FROM TIME TO TIME?

23 A. YES.

24 Q. OKAY. DOCTOR, I'M GOING TO GO BACK TO THE TAPE
25 AGAIN. I KNOW YOU DIDN'T READ IT, BUT YOU SAID

CHARLES BARTON SAYLOR - CROSS/MR. BAILEY

1 THAT---

2 A. BUT I DID READ IT. I DIDN'T LISTEN TO IT.

3 Q. I'M SORRY; YOU LISTENED TO IT. I BEG YOUR PARDON.
4 YOU SAID HIS LANGUAGE AND COMMUNICATION SKILLS WERE
5 WEAK WHEN HE PRESENTED HIMSELF TO YOU?

6 A. HE TESTED LOW ON THE VERBAL I.Q. SCORE.

7 Q. WHAT ABOUT JUST IN TALKING TO HIM LIKE WE'RE
8 TALKING NOW. DID YOU HAVE ANY CONVERSATION WITH
9 HIM LIKE "HEY, DID YOU WATCH THE BALL GAME LAST
10 NIGHT; HOW ABOUT BILL CLINTON AND MONICA LEWINSKY?"
11 DID YOU HAVE ANY KIND OF CONVERSATION LIKE THAT
12 WITH HIM?

13 A. AS A MATTER OF FACT, I DID THAT VERY THING. NOT
14 ABOUT THE PRESIDENT, BUT ABOUT THE SUPER BOWL AND
15 THINGS LIKE THAT.

16 Q. ALL RIGHT. AND DID HE KNOW WHO WAS PLAYING IN THE
17 SUPER BOWL?

18 A. HE DID.

19 Q. DID HE HAVE A FAVORITE?

20 A. HE DID.

21 Q. SO WAS THERE ANY DIFFICULTY OF COMMUNICATION SKILLS
22 ABOUT THE SUPER BOWL, ABOUT SOMETHING HE WAS
23 INTERESTED IN?

24 A. WELL, NO.

25 Q. AGAIN ON THESE ACHIEVEMENT TESTS WITH THE GRADE

1 LEVEL, SECOND GRADE LEVEL, AND ALL THAT; THOSE CAN
2 BE MALINGERING; IS THAT CORRECT?

3 A. THAT'S CORRECT.

4 Q. THERE'S NO WAY WITHIN THAT TEST THAT YOU DETECTED
5 MALINGERING?

6 A. NO.

7 Q. IF SOMEBODY IS SICK, DON'T FEEL GOOD---

8 A. I GUESS WHAT I'M SAYING IS THERE'S NO SORT OF
9 AUTOMATIC THINGS. THERE'S NO VALIDITY SKILLS.
10 SOMETIMES I THINK YOU CAN SAY THIS JUST DOESN'T FIT
11 UP, OR THIS SEEMS EXTREME. BUT THERE'S SORT OF NO
12 ONE INDICATOR THAT RINGS THE BELL.

13 Q. BEAR WITH ME ONE SECOND, PLEASE.

14 A. YES, SIR.

15 Q. DOCTOR, I DON'T THINK I HAVE ANYTHING ELSE,
16 REALLY. BUT I JUST WANT TO -- I THINK I ASKED YOU
17 THIS BEFORE, BUT I'M NOT SURE IT'S CLEAR IN THE
18 RECORD. BUT YOUR ENTIRE TESTIMONY IS PREDICATED ON
19 YOUR ASSUMPTION THAT KENNETH SIMMONS WAS NOT
20 MALINGERING IN HIS PRESENTATION TO YOU AS FAR AS
21 HIS INTELLECTUAL COMPETENCY; IS THAT CORRECT?

22 A. AS NEAR AS I CAN REMEMBER EVERY RESPONSE THAT I'VE
23 GIVEN IN RESPONSE TO DIRECT AND CROSS HAS BEEN
24 BASED ON THAT ASSUMPTION.

25 Q. THANK YOU, YOU SIR. THAT'S ALL I HAVE.

CHARLES BARTON SAYLOR - RE-DIRECT/MR. THEOS

1 THE COURT: ANYTHING ON RE-DIRECT,
2 PLEASE?

3 MR. THEOS: YES, SIR.

4 RE-DIRECT EXAMINATION

5 BY MR. THEOS:

6 Q. DR. SAYLOR, MR. BAILEY ASKED YOU CERTAIN QUESTIONS
7 ABOUT YOUR ABILITY OR TO MR. SIMMONS' ABILITY TO
8 COMMUNICATE WITH YOU, AND YOU REFERENCED THE SUPER
9 BOWL CONVERSATION. DID MR. SIMMONS HAVE ANY
10 DIFFICULTY EITHER IN THAT CONVERSATION OR OTHER
11 CONVERSATIONS---

12 MR. BAILEY: OBJECTION; LEADING,
13 YOUR HONOR.

14 THE COURT: LET HIM FINISH THE
15 QUESTION.

16 MR. BAILEY: YES, SIR.

17 Q. IN COMMUNICATING WITH YOU?

18 A. MR. SIMMONS WAS VERY, KIND OF CHILD-LIKE,
19 SIMPLISTIC; WAS NOT A CONVERSATION ABOUT THE SUPER
20 BOWL LIKE YOU AND I WOULD HAVE HAD OR MR. BAILEY
21 AND I WOULD HAVE HAD, I GUESS.

22 Q. CAN YOU EXPLAIN THAT ANSWER?

23 A. WELL, HE DID KNOW THAT ATLANTA WAS PLAYING IN THE
24 SUPER BOWL AND THAT ATLANTA WAS HIS FAVORITE TEAM.
25 HE DIDN'T KNOW ANY PLAYERS FOR ATLANTA.

CHARLES BARTON SAYLOR - RE-DIRECT/MR. THEOS

1 Q. IN ANY OTHER INSTANCES, DID YOU HAVE ANY DIFFICULTY
2 COMMUNICATING WITH HIM?

3 A. JUST ABOUT ALL THE TIME I HAD DIFFICULTY
4 COMMUNICATING WITH MR. SIMMONS. HE WAS VERY
5 CONCRETE, VERY SLOW; KIND OF DIDN'T UNDERSTAND
6 THINGS; HAD TO HAVE THEM EXPLAINED AND REPEATED
7 SEVERAL TIMES.

8 Q. NOW, MR. BAILEY ASKED YOU THE LAST QUESTION ABOUT
9 THIS ISSUE OF MALINGERING AND WHETHER OR NOT YOUR
10 TESTIMONY WAS BASED ON THAT ASSUMPTION. MY
11 QUESTION TO YOU IS: AND YOU STATED YOU DID NOT
12 CONDUCT ANY TESTS YOURSELF?

13 A. CORRECT.

14 Q. MY QUESTION TO YOU IS: DID YOU REVIEW TEST RESULTS
15 OF OTHERS RELATED TO THE ISSUE OF MALINGERING?

16 A. YES.

17 Q. ALL RIGHT. DID YOU FORMULATE -- DID YOU FORMULATE
18 YOUR OPINION THAT YOU STATED EARLIER THAT TO A
19 REASONABLE DEGREE OF MEDICAL CERTAINTY HE WAS NOT
20 MALINGERING?

21 MR. BAILEY: YOUR HONOR, I OBJECT TO
22 THAT ON WHETHER OR NOT HE WAS MALINGERING ON OTHER
23 OCCASIONS. THAT WOULD CERTAINLY HAVE NO BEARING ON
24 WHETHER OR NOT HE WAS MALINGERING ON THIS OCCASION.

25 THE COURT: SUSTAINED.

CHARLES BARTON SAYLOR - RE-DIRECT/MR. THEOS

1 Q. DR. SAYLOR, WHAT IS YOUR OPINION TO A REASONABLE
2 DEGREE OF MEDICAL CERTAINTY OR SCIENTIFIC CERTAINTY
3 AS TO WHETHER OR NOT MR. SIMMONS IS MALINGERING?

4 MR. BAILEY: YOUR HONOR, HE SAID
5 MALINGERING. I'M NOT SURE WHAT TIME FRAME HE'S
6 TALKING ABOUT; WHETHER HE'S TALKING ABOUT---

7 THE COURT: AND YOU FELLOWS HAVE
8 GOTTEN AWAY FROM THE STANDARD OF MOST PROBABLY; THE
9 SUPREME COURT MANDATE FOR EXPERTS THAT TESTIFY ON
10 OPINIONS.

11 MR. THEOS: NO FURTHER QUESTIONS,
12 YOUR HONOR.

13 THE COURT: THANK YOU. ANYTHING
14 FURTHER?

15 MR. BAILEY: NOTHING FURTHER, YOUR
16 HONOR.

17 THE COURT: ALL RIGHT. STEP DOWN,
18 PLEASE. ALL RIGHT, LADIES AND GENTLEMEN, WE'RE
19 GOING TO TAKE A FEW MINUTES RECESS. I HOPE Y'ALL
20 ATE A GOOD BREAKFAST THIS MORNING. WE'LL GO A
21 LITTLE BIT LONGER BEFORE WE BREAK FOR LUNCH IF WE
22 MAY UNLESS Y'ALL WOULD LIKE TO GO TO LUNCH NOW. IF
23 Y'ALL WOULD LIKE TO GO TO LUNCH NOW, I HAVE NO
24 PROBLEM WITH THAT. LET ME SEND YOU TO YOUR ROOM
25 AND Y'ALL GET COMFORTABLE; AND YOU'LL GO TO LUNCH

CHARLES BARTON SAYLOR - RE-DIRECT/MR. THEOS

1 NOW. AND IT'S FIVE AFTER TWELVE. WE'LL RECESS
2 UNTIL 1:30, THEN. SO Y'ALL ARE EXCUSED TO GO TO
3 YOUR ROOM. WHEN ALL FIFTEEN OF Y'ALL ARE READY TO
4 GO, PLEASE INDICATE TO THE BAILIFFS.

5 (AT THIS TIME JURY IS EXCUSED FOR LUNCH.)

6 THE COURT: ALL RIGHT. IS THERE
7 ANYTHING FOR THE RECORD, PLEASE, THAT YOU WISH TO
8 PUT ON THE RECORD OR SHARE WITH THE COURT IN THE
9 ABSENCE OF THE JURY AT THIS TIME?

10 MR. BAILEY: NOT AT THIS TIME, YOUR
11 HONOR.

12 MR. THEOS: NO, SIR.

13 THE COURT: ANY ADDITIONAL REQUESTS
14 TO CHARGE AT THIS TIME? I'LL GIVE YOU MORE
15 OPPORTUNITIES. I JUST WANT TO STUDY AS IT GOES
16 ALONG.

17 MR. BAILEY: NOT AT THIS TIME,
18 JUDGE.

19 MR. THEOS: NO, SIR.

20 THE COURT: ALL RIGHT. LET ME SEE
21 THE LAWYERS IN CHAMBERS, AND LET ME TALK TO YOU
22 ABOUT -- BRING YOUR WITNESS LIST WITH YOU, PLEASE.
23 SO COURT WILL BE IN RECESS, LADIES AND GENTLEMEN,
24 UNTIL 1:30.

25 (LUNCH RECESS.)

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

THE COURT: MR. THEOS, SHALL WE PROCEED?

MR. THEOS: YES, SIR, YOUR HONOR.

THE COURT: SOLICITOR, ARE YOU

READY?

MR. BAILEY: THE STATE'S READY, YOUR

HONOR.

THE COURT: BRING THE JURY IN.

(AT THIS TIME JURY RETURNS TO OPEN COURT.)

THE COURT: HOPE YOU HAD A PLEASANT
LUNCH, LADIES AND GENTLEMEN. AT THIS TIME WE WILL
PROCEED WITH OTHER AND FURTHER TESTIMONY. PLEASE
GIVE YOUR CAREFUL ATTENTION. YOU MAY CALL YOUR
NEXT WITNESS, SIR.

MR. THEOS: YES, SIR. WE WOULD CALL
DR. BEHRMANN.

THE COURT: COME AROUND, PLEASE, DR.
BEHRMANN.

WHEREUPON,

THOMAS WILLIAM BEHRMANN, WHO AFTER BEING
FIRST DULY SWORN TO TELL THE TRUTH,
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. BEHRMANN, WHERE ARE YOU PRESENTLY EMPLOYED?

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 A. I'M CURRENTLY EMPLOYED AT WILLIAM S. HALL
2 PSYCHIATRIC INSTITUTE IN THE FORENSIC DIVISION.

3 Q. IS THAT WITH THE STATE HOSPITAL?

4 A. WELL, ACTUALLY HALL INSTITUTE IS A SEPARATE
5 FACILITY, BUT IT SHARES THE SAME GROUNDS WITH THE
6 STATE HOSPITAL.

7 Q. WHAT IS YOUR PROFESSION?

8 A. I AM A PSYCHIATRIST.

9 Q. CAN YOU BRIEFLY DESCRIBE YOUR EDUCATIONAL
10 BACKGROUND, PLEASE?

11 A. YES. I RECEIVED A BACHELOR OF SCIENCE DEGREE FROM
12 THE UNIVERSITY OF MICHIGAN IN 1969. I RECEIVED AN
13 M.D. DEGREE ALSO FROM THE UNIVERSITY OF MICHIGAN
14 MEDICAL SCHOOL IN 1973. I INITIALLY TRAINED IN
15 SURGERY AT ST. JOSEPH MERCY HOSPITAL IN ANN ARBOR,
16 MICHIGAN, AND FINISHED THAT TRAINING IN 1977. I
17 MOVED TO NEWBERRY, SOUTH CAROLINA, AND OPENED A
18 PRIVATE PRACTICE OF GENERAL SURGERY AND RETIRED
19 FROM THAT IN 1988 AT WHICH TIME I THEN ENTERED THE
20 GENERAL PSYCHIATRIC TRAINING PROGRAM AT WILLIAM S.
21 HALL PSYCHIATRIC INSTITUTE AND COMPLETED THAT IN
22 1991. I THEN DID A ONE YEAR POST GRADUATE
23 FELLOWSHIP IN FORENSIC PSYCHIATRY AND COMPLETED
24 THAT IN 1992.

25 Q. AND YOU HAVE BEEN EMPLOYED WITH THE FORENSIC

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 DIVISION OF THE HALL INSTITUTE SINCE THAT
2 TIME?

3 A. I WAS EMPLOYED FOR ONE YEAR BY THE UNIVERSITY OF
4 SOUTH CAROLINA MEDICAL SCHOOL, BUT BASICALLY DOING
5 THE SAME WORK; AND THEN IN '93 SWITCHED OVER TO
6 HALL INSTITUTE.

7 Q. HAVE YOU EVER BEEN QUALIFIED IN ANY COURT OF ANY
8 STATE IN THE FIELD OF FORENSIC PSYCHIATRY?

9 A. YES, I HAVE.

10 Q. APPROXIMATELY HOW MANY TIMES?

11 A. MORE THAN 100 TIMES.

12 MR. THEOS: YOUR HONOR, AT THIS TIME
13 I WOULD OFFER DR. BEHRMANN AS AN EXPERT IN THE
14 FIELD OF FORENSIC PSYCHIATRY.

15 MR. BAILEY: WITHOUT OBJECTION, YOUR
16 HONOR.

17 THE COURT: THANK YOU. PROCEED.

18 Q. DR. BEHRMANN, WOULD YOU SAY THAT MOST OF YOUR
19 EVALUATIONS ARE CONDUCTED ON BEHALF OF THE STATE?

20 A. WELL, ACTUALLY OUR EVALUATIONS ARE CONDUCTED ON THE
21 BASIS OF A COURT ORDER THAT WE RECEIVE FROM THE
22 COURT; AND THE ORDER CAN BE REQUESTED BY EITHER THE
23 STATE OR FROM THE DEFENSE.

24 Q. WOULD IT BE FAIR TO SAY THAT GENERALLY, OR
25 PRIMARILY, YOU'RE CALLED TO TESTIFY BY THE STATE OR

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 THE SOLICITOR'S OFFICES THROUGHOUT THE STATE?

2 A. WE'RE PROBABLY CALLED MORE FREQUENTLY BY THE STATE
3 THAN BY THE DEFENSE; YES.

4 MR. THEOS: YOUR HONOR, PURSUANT TO
5 RULE 611, SINCE DR. BEHRMANN IS A WITNESS WHO IS
6 IDENTIFIED WITH THE STATE IN THIS CASE, MAY I BE
7 ALLOWED TO LEAD THE WITNESS, PLEASE?

8 THE COURT: ALL RIGHT, SIR.

9 Q. DR. BEHRMANN, DID YOU HAVE AN OPPORTUNITY TO
10 EXAMINE KENNETH SIMMONS?

11 A. YES, I DID.

12 Q. CAN YOU TELL ME WHEN YOU FIRST EXAMINED HIM,
13 PLEASE?

14 A. I SAW MR. SIMMONS FOR THE PURPOSE OF A FORENSIC
15 STAFFING INTERVIEW DURING WHICH WE WOULD INTERVIEW
16 HIM WITH REGARD TO THE ISSUES THAT HAVE BEEN RAISED
17 IN THE COURT ORDER. AND THE FIRST OCCASION WAS ON
18 NOVEMBER THE 23RD OF 1998. I SAW HIM AGAIN FOR A
19 SECOND SIMILAR INTERVIEW ON JANUARY THE EIGHTH OF
20 1999.

21 Q. DID YOU BRING YOUR RECORDS WITH YOU?

22 A. YES, I DID.

23 Q. CAN YOU TELL US WHEN MR. SIMMONS FIRST ARRIVED AT
24 THE STATE HOSPITAL?

25 A. MR. SIMMONS WAS ADMITTED TO THE HOSPITAL, IT LOOKS

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 LIKE EITHER NOVEMBER THE 16TH OR 18TH. LET ME JUST
2 CHECK FOR A MINUTE. (WITNESS EXAMINES DOCUMENT.)
3 NOVEMBER THE 16TH, 1998.

4 Q. AND CAN YOU TELL ME BETWEEN THAT TIME AND THE TIME
5 OF YOUR INITIAL EXAMINATION ON NOVEMBER THE 23RD
6 WHAT WAS DONE WITH MR. SIMMONS?

7 A. MR. SIMMONS UNDERWENT A MEDICAL AND PSYCHIATRIC
8 EVALUATION WHICH IS TYPICAL OF OTHER PATIENTS WHO
9 ARE ADMITTED FOR THE SAME PURPOSE THAT MR. SIMMONS
10 WAS ADMITTED, NAMELY AN EVALUATION ON A SERIOUS
11 CHARGE. AND THIS INCLUDES SEVERAL DIFFERENT
12 THINGS. IT INCLUDES OBTAINING A MEDICAL AND
13 PSYCHIATRIC HISTORY OF PHYSICAL EXAMINATION. WE
14 OBTAINED A SOCIAL HISTORY. WE OBTAINED SEVERAL
15 MEDICAL TESTS WHICH WOULD INCLUDE A NUMBER OF BLOOD
16 TESTS AND URINE TESTS. WE OBTAINED SOME MORE
17 SPECIALIZED TESTS INCLUDING AN M.R.I. OF HIS HEAD
18 WHICH IS AN IMAGING STUDY THAT LOOKS AT THE
19 STRUCTURE OF THE BRAIN TO DETERMINE WHETHER OR NOT
20 THERE ARE ANY ABNORMALITIES THERE. WE HAVE AN
21 ELECTROENCEPHALOGRAM OR E.E.G. PERFORMED WHICH
22 LOOKS AT THE ELECTRICAL ACTIVITY ON THE SURFACE OF
23 THE HEAD. AND THAT'S COMMONLY USED TO DIAGNOSE
24 SEIZURE DISORDERS LIKE EPILEPSY. HE WOULD BE SEEN
25 BY A NEUROLOGIST WHO IS A SPECIALIST IN THE FIELD

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 OF DIAGNOSIS AND TREATMENT OF DISEASES OF THE BRAIN
2 AND PERIPHERAL NERVOUS SYSTEM. AND HE WOULD ALSO
3 UNDERGO A BATTERY OF PSYCHOLOGICAL TESTS. AND ALL
4 OF THIS TESTING AND DATA GATHERING WOULD BE
5 PRELIMINARY TO ACTUALLY THE INTERVIEWS WHERE WE SIT
6 DOWN AND DISCUSS THE LEGAL ISSUES WITH HIM.

7 Q. SO WERE ALL THOSE THINGS DONE PRIOR TO YOUR FIRST
8 EXAMINATION OF NOVEMBER THE 23RD OF 1998?

9 A. I BELIEVE THEY WERE; YES.

10 Q. WAS HE ALSO SEEN BY A SOCIAL WORKER OR A SORT OF
11 CASE HISTORY WORKER?

12 A. YES. ORDINARILY WHEN SOMEONE IS ADMITTED TO THE
13 HOSPITAL, ONE OF OUR SOCIAL WORKERS WILL BE
14 ASSIGNED TO THE CASE. THE SOCIAL WORKER WILL
15 ACTUALLY MEET WITH THE PATIENT AND INTRODUCE
16 THEMSELVES, INTERVIEW THE PATIENT TO SOME DEGREE,
17 AND MAKE THEMSELVES AVAILABLE TO HELP THE PATIENT
18 SHOULD THEY NEED TO CONTACT THEIR ATTORNEY OR
19 FAMILY; THAT SORT OF THING.

20 Q. ARE THERE ALSO INDIVIDUALS WITHIN THE HALL
21 INSTITUTE THAT ACT IN A TRAINING OR EDUCATIONAL
22 CAPACITY WITH THE PATIENTS THERE?

23 A. YES. HALL INSTITUTE IS THE PRIMARY EDUCATIONAL AND
24 RESEARCH FACILITY FOR THE SOUTH CAROLINA DEPARTMENT
25 OF MENTAL HEALTH. AND IN THAT REGARD WE HAVE A

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 NUMBER OF TRAINEES WHO ARE OPERATING WITHIN THE
2 INSTITUTE AT ANY GIVEN TIME. AND IN MR. SIMMONS'
3 PARTICULAR CASE, HE WOULD HAVE HAD MEETINGS WITH
4 MEDICAL STUDENTS, PSYCHIATRIC RESIDENTS, PSYCHOLOGY
5 RESIDENTS, AND POSSIBLY SOCIAL WORK INTERNS.

6 Q. NOW IS THERE ALSO A -- I ASKED YOU IF THERE WERE
7 GROUPS THAT PROVIDED SOME FORM OF EDUCATION OR
8 TRAINING FOR THE PATIENTS?

9 A. YES.

10 Q. WAS THAT DONE IN MR. SIMMONS' CASE?

11 A. YES. THERE ARE DIFFERENT GROUPS THAT WE HAVE THAT
12 ARE EITHER EDUCATIONAL OR THERAPEUTIC IN NATURE;
13 AND MR. SIMMONS HAD BEEN ASSIGNED TO, FIRST OF ALL,
14 THE COMPETENCY EDUCATION GROUP WHICH IS A GROUP
15 THAT DISCUSSES AND TRIES TO EDUCATE THE PATIENTS
16 ABOUT COURT RELATED ISSUES. AND WHAT THIS WOULD
17 CONSIST OF IS; FIRST OF ALL THERE'S A HANDBOOK THAT
18 IS SUPPLIED TO THE PATIENT IN FAIRLY
19 STRAIGHTFORWARD LANGUAGE THAT I THINK IS WRITTEN IN
20 ABOUT THE FOURTH GRADE LEVEL, DISCUSSES THE
21 COURTROOM, THE VARIOUS PEOPLE WHO WORK AND FUNCTION
22 WITHIN THE COURTROOM, AND OTHER ISSUES THAT ARE
23 RELATED TO COMPETENCY, SUCH THINGS AS THE
24 UNDERSTANDING OF PLEAS AND PLEA BARGAINING
25 ARRANGEMENTS, SENTENCING, AND THAT SORT OF THING.

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 SO THAT'S ONE EDUCATIONAL GROUP THAT MANY OF THE
2 PATIENTS WHO ARE ADMITTED FOR THE PURPOSE OF
3 EVALUATION WILL BE ENROLLED IN. THERE ARE OTHER
4 GROUPS THAT HAVE TO DO WITH ALCOHOL AND DRUG USE
5 WHICH IS A COMMON ISSUE WITH MANY OF OUR PATIENTS.
6 ONE OF THESE IS AN ALCOHOL ANONYMOUS GROUP WHICH IS
7 A GROUP THAT LOOKS AT WAYS OF TRYING TO DEAL WITH
8 SUBSTANCE USE AND AVOID IT IN THE FUTURE. THERE'S
9 ALSO A DRUG AND ALCOHOL EDUCATION GROUP THAT LOOKS
10 AT THE SAME ISSUES FROM MORE OF AN EDUCATIONAL
11 BASIS.

12 Q. NOW WAS MR. SIMMONS EXPOSED TO THESE GROUPS AND
13 WITH HIS TRAINING BOTH PRIOR TO THE NOVEMBER THE
14 23RD EVALUATION AND FOLLOWING IT?

15 A. I DON'T THINK THERE'S ANY DOCUMENTATION TO MY
16 RECOLLECTION THAT HE ACTUALLY ATTENDED THE
17 COMPETENCY GROUP PRIOR TO THE NOVEMBER MEETING.

18 Q. WOULD IT BE FAIR TO SAY THEN FROM NOVEMBER -- AGAIN
19 REFER TO YOUR NOTES; AND I WOULD DIRECT YOU TO THE
20 TREATMENT PLANNING NOTES. WOULD IT BE FAIR TO SAY
21 THAT FROM THE DATE FOLLOWING THAT FIRST EVALUATION
22 THAT MR. SIMMONS WAS EXPOSED TO THIS TRAINING AND
23 EDUCATION?

24 A. YES, I BELIEVE HE WAS.

25 Q. NOW, DID YOU CONDUCT THE EXAMINATION ON NOVEMBER

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 THE 23RD WITH DR. VIDIC?

2 A. CORRECT.

3 Q. AND DR. VIDIC, I KNOW, IS IN THE COURTROOM. BUT IS
4 HE ALSO A PSYCHOLOGIST OR A PSYCHIATRIST?

5 A. DR. VIDIC IS A PH.D. LEVEL PSYCHOLOGIST WHO WORKS
6 IN THE FORENSIC UNIT.

7 Q. SO THE TWO OF YOU CONDUCTED THIS EXAMINATION?

8 A. CORRECT.

9 Q. NOW IN THAT EXAMINATION WAS MR. SIMMONS ABLE TO
10 READ HIS RIGHTS? WERE THEY READ TO HIM?

11 A. HE INDICATED TO ME THAT HE DID NOT FEEL THAT HE
12 WOULD BE ABLE TO READ HIS RIGHTS, AND SO I READ
13 THEM TO HIM.

14 Q. DID YOU ATTEMPT TO HAVE HIM READ HIS RIGHTS TO YOU?

15 A. I THINK NOT. I THINK THAT WHAT I DID WAS THAT AT
16 THE OUTSET, TO THE BEST OF MY RECOLLECTION, I ASKED
17 HIM IF HE WAS ABLE TO READ, AND TYPICALLY WHAT I
18 WILL DO IS IF A PERSON INDICATES THAT THEY HAVE
19 SOME DIFFICULTY READING OR THAT THEY'RE UNABLE TO
20 READ THAT I WILL NORMALLY ASK THEM TO FOLLOW ALONG
21 ON THE FORM THAT WE HAVE THAT CONTAINS THEIR RIGHTS
22 AS I READ IT TO THEM.

23 Q. PLEASE FEEL FREE WHEN I'M ASKING YOU THESE
24 QUESTIONS RELATED TO NOVEMBER THE 23RD TO REFER TO
25 EITHER YOUR REPORT OR YOUR NOTES.

THOMAS WILLIAM BEHRMANN - DIRECT/MR. BAILEY

1 A. OKAY.

2 Q. AND I'M SPECIFICALLY AT THIS TIME LOOKING AT YOUR
3 REPORT.

4 A. AT THE REPORT. (WITNESS EXAMINES DOCUMENT.) IT'S
5 STATED HERE IN THE REPORT THAT THE PATIENT WAS
6 UNABLE TO READ HIS RIGHTS, SO THEY WERE READ TO
7 HIM.

8 Q. OKAY. NOW DID YOU REVIEW MR. SIMMONS' MIRANDA
9 RIGHTS WITH HIM?

10 A. YES, I DID.

11 Q. WAS MR. SIMMONS -- AND YOU DID MORE THAN JUST READ
12 HIM HIS RIGHTS AND ASK HIM IF HE UNDERSTOOD THEM?

13 A. THAT'S CORRECT.

14 Q. WHICH WOULD HAVE CALLED FOR A YES OR NO RESPONSE;
15 CORRECT?

16 A. CORRECT.

17 Q. YOU ASKED HIM TO EXPLAIN THOSE RIGHTS?

18 A. RIGHT.

19 Q. WAS HE ABLE TO EXPLAIN HIS RIGHTS TO YOU IN A
20 SUFFICIENT OR MEANINGFUL FASHION?

21 A. NOT TO MY SATISFACTION; NO.

22 Q. AND AT THAT TIME DID YOU FEEL THAT MR. SIMMONS
23 LACKED THE ABILITY TO WAIVE HIS RIGHTS FOR THE
24 PURPOSES OF THAT EVALUATION?

25 A. WELL, I WAS CONCERNED THAT HE LACKED THE ABILITY TO

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1 WAIVE HIS RIGHTS. ORDINARILY SOMETIMES WHAT WE'LL
2 DO IS THAT WHEN WE GET A PATIENT WHO HAS DIFFICULTY
3 WITH THEIR RIGHTS INITIALLY, WE WILL ADDRESS THE
4 COMPETENCY ISSUES AND THEN GO BACK AND REVISIT THE
5 RIGHTS PRIOR TO MOVING INTO THE SECOND HALF OF THE
6 EXAMINATION WHICH DEALS WITH OTHER ISSUES. IN MR.
7 SIMMONS' CASE, WE DID NOT GET TO THAT POINT. SO I
8 HAD CONCERN AT THAT POINT THAT HE DID NOT
9 UNDERSTAND HIS RIGHTS.

10 Q. AND I'M AGAIN SPECIFICALLY REFERRING TO THAT SAME
11 PARAGRAPH OF YOUR REPORT---

12 A. RIGHT.

13 Q. --WHEREIN YOU STATED THAT THE PATIENT LACKED THE
14 ABILITY TO WAIVE HIS RIGHTS FOR THE PURPOSE OF THE
15 EVALUATION?

16 A. THAT IS CORRECT.

17 Q. THAT WAS YOUR OPINION AT THE TIME?

18 A. THAT'S WHAT I STATED.

19 Q. NOW AT THAT TIME DID HE DISPLAY ANY UNUSUAL
20 PROCESS?

21 A. WELL, INITIALLY WHEN WE STARTED OUR QUESTIONING HIM
22 ABOUT THE USUAL COMPETENCY ISSUES WHICH WOULD BE
23 SUCH THINGS AS UNDERSTANDING OF HIS CHARGES AND
24 PENALTIES HE MAY FACE IF FOUND GUILTY AND THE ROLES
25 OF VARIOUS COURT OFFICERS SUCH AS THE DEFENSE

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1 ATTORNEY AND THE SOLICITOR AND THE JUDGE, IT BECAME
2 APPARENT TO ME, OR I BEGAN TO STRONGLY SUSPECT,
3 THAT HE WAS NOT MAKING HIS BEST EFFORT IN TERMS OF
4 ANSWERING THESE QUESTIONS IN A FORTHRIGHT MANNER.
5 AND I REVIEWED THE RECORD, AND I SAW WHERE THE
6 NURSING STAFF HAD DOCUMENTED THAT, WHEN HE HAD BEEN
7 ASKED ABOUT THOSE THINGS, THAT HE HAD BEEN ABLE TO
8 EXPLAIN THEM.

9 Q. WITH RESPECT TO THE COMPETENCE?

10 A. WITH RESPECT TO THE COMPETENCE ISSUES; THAT'S
11 CORRECT.

12 Q. THE COMPETENCY ISSUES?

13 A. RIGHT.

14 Q. AND THE UNDERSTANDING OF COURT PENALTY, FUNCTIONS
15 OF THE COURT, AND VARIOUS PERSONNEL?

16 A. RIGHT; RIGHT. AND SO I CONFRONTED HIM ABOUT THAT
17 AND STATED THAT I DIDN'T UNDERSTAND WHY HE HAD BEEN
18 ABLE TO TALK ABOUT THOSE THINGS AT THAT TIME BUT
19 WAS HAVING DIFFICULTY TALKING ABOUT THEM IN THIS
20 SETTING.

21 Q. SO DID HE AS YOU STATED DISPLAY DISORGANIZATION OF
22 HIS THOUGHT PROCESS?

23 A. TOWARDS THE END OF THE EVALUATION, HE DID. HE MADE
24 A BETTER EFFORT AFTER WE HAD THAT DISCUSSION AND
25 WAS MORE FORTHCOMING IN HIS RESPONSES TO OUR

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1 QUESTIONS. BUT TOWARDS THE END OF THE EVALUATION
2 WITH RESPECT TO THE COMPETENCY ISSUES, HE DISPLAYED
3 SOME DIFFICULTY STAYING ON TRACK. IN OTHER WORDS,
4 WE WOULD ASK HIM QUESTIONS ABOUT A CERTAIN THING,
5 AND HE MAY WELL GO OFF INTO TALKING ABOUT SOMETHING
6 UNRELATED. AND IT BECAME MORE AND MORE DIFFICULT
7 TO KEEP HIM ACTUALLY ON TASK WITH THE EVALUATION
8 PROCESS.

9 Q. NOW, AS A RESULT OF THIS WHICH YOU'VE DETERMINED TO
10 BE A DISORGANIZATION OF HIS THOUGHT PROCESS AND
11 BECAUSE OF HIS INABILITY TO COMPREHEND AND
12 ADEQUATELY WAIVE HIS MIRANDA RIGHTS, WAS THE
13 EXAMINATION TERMINATED?

14 A. YES.

15 Q. AT THAT TIME WAS IT DETERMINED THAT IT WAS
16 NECESSARY TO CONDUCT SOME ADDITIONAL TESTING TO
17 ADDRESS THE ISSUE OF POTENTIAL MALINGERING AND THE
18 ISSUE SURROUNDING HIS I.Q.?

19 A. YES. WE HAD A DISCUSSION AT THAT TIME ABOUT WHAT
20 WAS GOING ON, AND CONCERNS WERE RAISED ABOUT THE
21 POTENTIAL FORM OF MALINGERING AND ALSO WHETHER OR
22 NOT THE INITIAL INFORMATION THAT WE HAD WITH
23 RESPECT TO HIS LEVEL OF INTELLECTUAL FUNCTIONING,
24 IN OTHER WORDS HIS I.Q. SCORE, ARE ACCURATE. SO IT
25 WAS AGREED THAT WE WOULD OBTAIN MORE PSYCHOLOGICAL

1 TESTING TO ADDRESS THOSE ISSUES AND RECONVENE AT A
2 LATER DATE.

3 Q. NOW, IS IT TRUE THAT AT THAT TIME THE PSYCHOLOGICAL
4 TESTING THAT YOU HAD RELATED TO HIS I.Q. WAS THAT
5 WHICH DR. SAYLOR PREVIOUSLY TESTIFIED ABOUT?

6 A. I BELIEVE THAT'S CORRECT; YES, SIR.

7 Q. NOW, DID YOU IN FACT CONDUCT ADDITIONAL
8 PSYCHOLOGICAL TESTING RELATED TO THE ISSUE OF
9 MALINGERING?

10 A. I BELIEVE SO.

11 Q. DID YOU ALSO CONDUCT FULL SCALE I.Q. TESTS IN ORDER
12 TO VERIFY MR. SIMMONS' I.Q.?

13 A. YES. MR. SIMMONS UNDERWENT ON ADDITIONAL I.Q.
14 TEST.

15 Q. WHAT WERE THE RESULTS? LET ME BACK UP. WHAT
16 PSYCHOLOGICAL TESTING WAS PERFORMED IN ORDER TO
17 ADDRESS THE ISSUE OF MALINGERING?

18 A. I'M NOT SURE IF I HAVE THAT IN THESE RECORDS.
19 (WITNESS REVIEWS DOCUMENT.) I KNOW THAT WHEN WE HAD
20 SPOKEN AT THE TIME OF THE EVALUATION WE HAD TALKED
21 ABOUT SOME TESTS. BUT SUBSEQUENT TO THAT THERE MAY
22 HAVE BEEN SOME CHANGE. AND I'M NOT ABSOLUTELY
23 CERTAIN WHICH TESTS WERE ADMINISTERED TO HIM,
24 ALTHOUGH DR. VIDIC COULD PROBABLY ANSWER THAT
25 QUESTION. I KNOW THAT HE DID RECEIVE A WAIS-III IN

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1 TERMS OF HIS INTELLECTUAL FUNCTIONING; YES, SIR.

2 Q. NOW, WITH RESPECT TO THE TEST FOR MALINGERING,
3 ALTHOUGH YOU MAY NOT RECALL THE SPECIFIC TESTS THAT
4 WERE CONDUCTED, ISN'T IT TRUE THAT THE RESULTS OF
5 THAT TEST INDICATED THAT MR. SIMMONS WAS NOT
6 MALINGERING?

7 A. YES. MY UNDERSTANDING IN THE REPORT THAT I
8 RECEIVED FROM DR. VIDIC WAS, AT LEAST AS FAR AS THE
9 TEST WENT AND THE RESULTS OF THE TEST, THAT THEY
10 DID NOT INDICATE THAT MR. SIMMONS WAS MALINGERING.

11 Q. AND CAN YOU TELL US WHAT THE RESULTS OF THE I.Q.
12 TESTS WERE?

13 A. THE I.Q. TESTS WAS IN THE SAME GENERAL VICINITY IN
14 THAT HE SCORED IN THE HIGH SIXTIES. AND I BELIEVE
15 HIS FULL SCALE I.Q. WAS EITHER 66 OR 68.

16 Q. AND THAT WOULD BE CONSISTENT, WOULD IT NOT, WITH
17 DR. SAYLOR'S I.Q. TEST?

18 A. THAT'S BASICALLY IN THE SAME RANGE; YES.

19 Q. NOW, AS A RESULT OF -- DID YOU FORMULATE A
20 DIAGNOSES AT THAT POINT, OR DID YOU WAIT TO
21 FORMULATE YOUR DIAGNOSES UNTIL AFTER THE JANUARY
22 THE EIGHTH EXAMINATION?

23 A. WE FORMULATED THE DIAGNOSES AFTER THE SECOND
24 EVALUATION.

25 Q. NOW, YOU AGAIN EVALUATED MR. SIMMONS ON JANUARY THE

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1 EIGHTH; IS THAT CORRECT?

2 A. THAT IS CORRECT.

3 Q. BEFORE WE GET TO THAT POINT, HOWEVER; IF I COULD
4 ASK YOU TO LOOK AT THE TREATMENT PLANNING NOTES.

5 A. YES, SIR. (WITNESS REVIEWS DOCUMENT.)

6 Q. WOULD THESE BE THE NOTES THAT WERE MADE AND THE
7 RECORDS THAT WERE KEPT IN CONJUNCTION WITH THIS
8 TRAINING GROUP, OR TRAINING PERSONS, THAT WOULD
9 MEET WITH MR. SIMMONS AND DISCUSS VARIOUS LEGAL
10 ISSUES AND OTHER THINGS WITH HIM?

11 A. NO. WHAT THE TREATMENT PLAN IS IS AN
12 INDIVIDUALIZED PLAN FOR EACH PATIENT WHO IS
13 ADMITTED TO THE HOSPITAL THAT IDENTIFIES ISSUES
14 THAT ARE GOING TO BE ADDRESSED WITH THE PATIENT
15 DURING THEIR HOSPITAL STAY. AND THEN IT ALSO
16 OUTLINES THE INTERVENTIONS THAT ARE GOING TO BE
17 ATTEMPTED TO DEAL WITH THE PROBLEMS OR ISSUES THAT
18 WERE IDENTIFIED ON THE PLAN. AND THEN ON A WEEKLY
19 BASIS THE PATIENT WILL HAVE WHAT'S CALLED A
20 TREATMENT TEAM UPDATE WHICH TRIES TO DOCUMENT HOW
21 THE PATIENT IS PROGRESSING WITH THEIR TREATMENT
22 PLAN OVER THE COURSE OF THEIR HOSPITALIZATION.
23 Q. AND SOME OF THE ISSUES THAT WOULD BE ADDRESSED
24 WOULD BE THOSE SAME ISSUES THAT WOULD BE DEALT WITH
25 IN YOUR EXAMINATIONS; CORRECT?

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1 A. YES. IN MR. SIMMONS' CASE IN PARTICULAR.

2 Q. AND ALSO WITHIN THESE NOTES WOULD BE A RECORD OF
3 MR. SIMMONS' PROGRESS DURING THIS TIME FRAME AS
4 WELL; CORRECT?

5 A. IN A GENERAL SENSE; YES.

6 Q. NOW, IF I COULD DIRECT YOUR ATTENTION TO THE INJURY
7 OF 11/24/98?

8 A. CORRECT.

9 Q. IS IT NOT TRUE THAT MR. SIMMONS CONTINUED ON
10 11/24/98 TO HAVE DIFFICULTY UNDERSTANDING HIS
11 MIRANDA RIGHTS?

12 A. YES. THAT IS WHAT IS DOCUMENTED HERE.

13 Q. AND THIS IS DOCUMENTED BY WHOM?

14 A. CARLOS TOREZ, A SOCIAL WORKER WITH MR. SIMMONS'
15 CASE, WROTE THIS NOTE.

16 Q. THERE ARE SOME OTHER SIGNATURES?

17 A. YES. JULIA TRICE IS THE RESIDENT WHO WAS WORKING
18 ON MR. SIMMONS' CASE. SHE WAS THE ASSIGNED
19 RESIDENT PHYSICIAN. AND MELISSA HESS WAS THE
20 MEDICAL STUDENT.

21 Q. I DIRECT YOU TO THE NEXT PAGE WHICH IS DECEMBER
22 ONE, '98?

23 A. CORRECT.

24 Q. DID MR. SIMMONS CONTINUE TO HAVE DIFFICULTY
25 UNDERSTANDING HIS MIRANDA RIGHTS?

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1 A. CORRECT.

2 Q. AGAIN, THIS PROGRESS IS RECORDED BY WHOM?

3 A. WELL, THE MEDICAL STUDENT, MELISSA HESS, WROTE THIS
4 NOTE.

5 Q. AND THE OTHER SIGNATURES WOULD BE THE SAME AS---

6 A. BASICALLY THE SAME, ALTHOUGH JUDY MCKAY WAS THE
7 RESIDENT WHO SIGNED THIS NOTE. SHE WAS COVERING
8 FOR DR. TRICE ON THAT PARTICULAR DAY.

9 Q. ALL RIGHT. I DIRECT YOU TO THE NEXT PAGE WHICH IS
10 THE ENTRY OF 12/08/98.

11 A. CORRECT.

12 Q. WOULD YOU READ THE ENTRY BEGINNING WITH THE SECOND
13 LINE; WITH "HE UNDERSTANDS?"

14 A. YES. IT STATES "HE UNDERSTANDS THE BASIC ROLES OF
15 COURT OFFICERS, BUT DOES NOT SEEM TO CURRENTLY
16 GRASP THE MORE COMPLICATED ISSUES. THE EVALUATION
17 STILL NEEDS TO BE COMPLETED."

18 Q. AND AGAIN THIS ENTRY IS BY WHOM?

19 A. I BELIEVE THIS WAS WRITTEN BY DR. TRICE.

20 Q. BEAR WITH ME ONE SECOND.

21 A. YES, SIR.

22 Q. AND THE ENTRY SEVERAL PAGES LATER, 12/04/98?

23 A. IS THIS A PROGRESS NOTE?

24 Q. NO. THIS WOULD BE THE -- IT'S -- THE HEADING IS
25 "SUPPLEMENTAL DISCIPLINARY PROGRESS NOTES."

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1 A. YES; THAT'S A PROGRESS NOTE. THE DATE IS 12/04?

2 Q. YES. DOES IT NOT STATE THAT MR. SIMMONS DOES NOT
3 HAVE A GOOD UNDERSTANDING OF MORE COMPLEX ISSUES
4 WHICH WOULD BE THE FOURTH AND FIFTH LINES DOWN?

5 (WITNESS EXAMINES DOCUMENT.)

6 A. THAT'S CORRECT. THIS IS A NURSING NOTE WRITTEN BY
7 MARY ERVIN THAT STATES THAT WHEN SHE TALKED TO HIM
8 THAT HE WAS ABLE TO ANSWER QUESTIONS REGARDING THE
9 ROLES OF COURT OFFICIALS BUT DOES NOT HAVE A GOOD
10 UNDERSTANDING OF THE MORE COMPLEX ISSUES.

11 Q. NOW, WHEN WAS MR. SIMMONS RELEASED FROM THE HALL
12 INSTITUTE?

13 A. HE WAS DISCHARGED ON DECEMBER THE EIGHTEENTH.

14 Q. AND THEN HE WAS RETURNED ON JANUARY THE EIGHTH FOR
15 THE EVALUATION?

16 A. THAT IS CORRECT.

17 Q. BUT FROM THE TIME THAT HE WAS ADMITTED INTO THE
18 HALL INSTITUTE AND THEN MORE SPECIFICALLY FROM
19 NOVEMBER THE 24TH OF 1998 THROUGH HIS RELEASE DATE,
20 WOULD IT BE FAIR TO SAY THAT HE WAS CONSISTENT IN
21 HIS FAILURE TO COMPREHEND COMPLEX ISSUES AND IN HIS
22 FAILURE TO COMPREHEND HIS MIRANDA WARNINGS?

23 A. WELL, THE DOCUMENTATION DURING THAT PERIOD OF TIME
24 WAS THAT HE HAD DIFFICULTY UNDERSTANDING HIS
25 MIRANDA WARNINGS. THE OTHER ISSUES WERE THAT WHILE

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1 HE WAS ABLE TO UNDERSTAND THE ISSUES OF ROLES OF
2 VARIOUS COURT OFFICIALS AND THAT SORT OF THING THAT
3 OTHER ISSUES WERE DIFFICULT FOR HIM TO GRASP.

4 Q. AND THAT WOULD BE CONSISTENT WITH WHAT YOU
5 EXPERIENCED WITH MR. SIMMONS ON NOVEMBER THE 23RD,
6 THE DATE OF YOUR FIRST EVALUATION; CORRECT?

7 A. THAT IS CORRECT.

8 Q. NOW, DO YOU HAVE AN OPINION THAT YOU CAN STATE WITH
9 A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
10 HIS ABILITY ON NOVEMBER THE 23RD OF 1998 TO
11 KNOWINGLY AND INTELLIGENTLY WAIVE HIS MIRANDA
12 RIGHTS?

13 A. GIVEN THE INFORMATION THAT WE HAD ON THAT DATE, IT
14 WAS MY OPINION THAT HE DID NOT HAVE THAT ABILITY AT
15 THAT TIME.

16 Q. NOW, YOU SAW MR. SIMMONS AGAIN ON JANUARY THE
17 EIGHTH. CAN YOU TELL ME WHAT THAT EXAMINATION
18 ENTAILED, PLEASE?

19 A. ALL RIGHT. THIS WAS A SIMILAR EXAMINATION TO THE
20 ONE THAT HAD BEEN ATTEMPTED PREVIOUSLY AND WAS
21 TAKING PLACE AFTER THE ADDITIONAL TESTING THAT WE
22 HAD TALKED ABOUT HAD BEEN PERFORMED. AND IT WAS
23 DELAYED UNTIL THAT DATE SIMPLY TO FIND A DATE THAT
24 EVERYBODY COULD BE PRESENT AT THE SAME TIME. AT
25 THAT TIME WHEN WE INTERVIEWED MR. SIMMONS AND

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1 REVIEWED HIS MIRANDA RIGHTS WITH HIM, HE DISPLAYED
2 A MUCH BETTER UNDERSTANDING OF HIS RIGHTS. IT WAS
3 A SIGNIFICANTLY BETTER PERFORMANCE THAT HE GAVE ON
4 THE SECOND INTERVIEW THAN HE DID AT THE FIRST; AND
5 IT WAS GOOD ENOUGH THAT I FELT THAT HE DID POSSESS
6 AN UNDERSTANDING OF HIS RIGHTS AT THAT TIME AND
7 ASKED HIM TO SIGN A WAIVER OF RELEASE OF HIS RIGHTS
8 FOR THE PURPOSE OF THE EVALUATION.

9 Q. FOR THE PURPOSES OF THAT EVALUATION?

10 A. RIGHT; FOR THE PURPOSE OF THAT EVALUATION.

11 Q. CAN YOU TELL US APPROXIMATELY HOW LONG IT TOOK TO
12 GO THROUGH THOSE MIRANDA RIGHTS ON JANUARY THE
13 EIGHTH BEFORE YOU WERE SATISFIED THAT HE HAD A
14 SUFFICIENT ABILITY TO COMPREHEND THOSE RIGHTS FOR
15 PURPOSES OF THAT EVALUATION?

16 A. I WOULD GUESS MAYBE TWENTY MINUTES OR SO.

17 Q. DO YOU HAVE AN OPINION THAT YOU CAN STATE TO A
18 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
19 WHETHER MR. SIMMONS WOULD HAVE BEEN CAPABLE OF
20 MAKING A KNOWING AND INTELLIGENT WAIVER OF HIS
21 MIRANDA RIGHTS IN DECEMBER OF 1997?

22 A. WELL, THAT'S A DIFFICULT ISSUE TO ADDRESS. AND THE
23 THING THAT MAKES IT DIFFICULT IS FIRST OF ALL I
24 WASN'T THERE AT THE TIME. SO EVERYTHING WOULD HAVE
25 TO BE THROUGH SECONDHAND INFORMATION. THE ONLY

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1 THING THAT I CAN SAY ABOUT THAT IS THAT GIVEN THE
2 FINDINGS THAT WE HAD AT OUR EVALUATION, I CANNOT
3 IDENTIFY A MENTAL PROBLEM, A MENTAL ILLNESS OR
4 DEFECT THAT WOULD HAVE PREVENTED HIM ON THAT DATE
5 FROM WAIVING HIS RIGHTS.

6 Q. OKAY.

7 A. BUT THAT DOESN'T ADDRESS ANYTHING ELSE THAT MAY
8 HAVE BEEN GOING ON WITH HIM.

9 Q. DID YOU HAVE AN OPPORTUNITY TO REVIEW THE
10 TRANSCRIPTS FROM THE STATEMENTS THAT WERE TAKEN
11 FROM MR. SIMMONS IN DECEMBER?

12 A. YES, I DID.

13 Q. OF '97?

14 A. YES.

15 Q. AND IN THOSE TRANSCRIPTS, IS IT NOT TRUE THAT MR.
16 SIMMONS WAS NEVER ASKED TO EXPLAIN HIS
17 UNDERSTANDING OF THOSE RIGHTS?

18 A. THAT'S CORRECT. HE WAS MERELY ASKED IF HE
19 UNDERSTOOD THEM.

20 Q. AND IS IT NOT TRUE THAT IN ORDER TO PROPERLY
21 DETERMINE AND ASSESS AN INDIVIDUAL'S UNDERSTANDING,
22 IN PARTICULAR MR. SIMMONS, IT WOULD BE MORE
23 APPROPRIATE TO ASK HIM TO EXPLAIN WHAT THAT
24 UNDERSTANDING IS?

25 A. WELL, THAT'S OUR USUAL STANDARD OF OPERATING IN THE

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

1 FORENSIC UNIT IS THAT WE'LL ASK PATIENTS TO STATE
2 THEIR RIGHTS IN THEIR OWN TERMS.

3 Q. AND THAT WAS NEVER ASKED OF MR. SIMMONS IN DECEMBER
4 OF '97; CORRECT?

5 A. NO; NOT TO MY KNOWLEDGE.

6 MR. THEOS: YOUR HONOR, I BEG THE
7 COURT'S INDULGENCE FOR A MINUTE.

8 THE COURT: ALL RIGHT, SIR.

9 MR. THEOS: NO FURTHER QUESTIONS.

10 THE COURT: CROSS?

11 CROSS-EXAMINATION

12 BY MR. BAILEY:

13 Q. DR. BEHRMANN, IN REGARD TO YOUR QUALIFICATIONS,
14 YOU'RE A FORENSIC PSYCHIATRIST WITH AN M.D.; IS
15 THAT CORRECT?

16 A. THAT IS CORRECT.

17 Q. ALL RIGHT, SIR. AND WHAT DOES IT MEAN TO BE BOARD
18 CERTIFIED AS A FORENSIC PSYCHIATRIST?

19 A. BOARD CERTIFICATION REQUIRES THAT YOU TAKE AN
20 EXAMINATION THAT DEMONSTRATES A CERTAIN BASIC
21 UNDERSTANDING OF CONCEPTS AND A BASIC KNOWLEDGE
22 BASE IN THAT AREA.

23 Q. ALL RIGHT, SIR. AND ARE YOU BOARD CERTIFIED?

24 A. YES, I AM.

25 Q. ALL RIGHT, SIR. NOW, AS PART OF THE PROCESS WHEN

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1 SOMEBODY IS GIVEN A COMPETENCY EVALUATION WHICH YOU
2 DID PURSUANT TO AN ORDER OF THIS COURT; IS A PART
3 OF THAT PROCESS TO GIVE MIRANDA RIGHTS TO THESE
4 PEOPLE THAT ARE CHARGED WITH DIFFERENT OFFENSES?

5 A. YES, IT IS.

6 Q. AND YOU DO THAT IN EVERY CASE?

7 A. CORRECT.

8 Q. WITH A COURT ORDERED EVALUATION?

9 A. YES.

10 Q. LET ME ASK YOU ONE OTHER QUESTION BY WAY OF JUST
11 BACKGROUND HERE. MR. THEOS ASKED YOU IF YOU WORKED
12 FOR THE STATE, AND YOU SAID THAT YOU DID; IS THAT
13 CORRECT?

14 A. WELL, I WORK FOR THE SOUTH CAROLINA DEPARTMENT OF
15 MENTAL HEALTH.

16 Q. ALL RIGHT, SIR.

17 A. I'M A STATE EMPLOYEE.

18 Q. YOU WORK FOR THE PROSECUTION?

19 A. NO; I DO NOT WORK FOR THE PROSECUTION.

20 Q. YOU WORK PURSUANT TO AN ORDER FROM THE COURT; IS
21 THAT CORRECT?

22 A. THAT IS CORRECT.

23 Q. ALL RIGHT, SIR. NOW, AS I UNDERSTAND YOUR RESPONSE
24 TO MR. THEOS' QUESTIONS AS FAR AS THE INITIAL
25 CONTACT THAT Y'ALL HAD IN LATE 1998; HE ARRIVED AT

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1 THE HOSPITAL NOVEMBER THE 16TH OR NOVEMBER 17TH,
2 SOMEWHERE IN THAT TIME FRAME?

3 A. RIGHT.

4 Q. AND HE WAS GIVEN SOME MEDICAL TESTS?

5 A. CORRECT.

6 Q. AND ARE ALL THESE THINGS THAT YOU TAKE INTO
7 CONSIDERATION TO FORM YOUR DIAGNOSIS; ALL THAT'S
8 DONE BEFORE YOU DO YOUR INTERVIEW. DO YOU TAKE ALL
9 THAT INTO CONSIDERATION?

10 A. YES. WE REVIEW ALL OF THAT INFORMATION.

11 Q. AND THAT'S WHY THIS INFORMATION IS GATHERED; IS
12 THAT CORRECT?

13 A. THAT IS CORRECT.

14 Q. TO GET A FULL PICTURE OF A PERSON?

15 A. THAT'S CORRECT.

16 Q. ALL RIGHT, SIR. YOU GOT A PSYCHIATRIC HISTORY; IS
17 THAT CORRECT?

18 A. CORRECT.

19 Q. OKAY. AND DID YOU FIND ANY HISTORY OF ANY KIND OF
20 PSYCHIATRIC TREATMENT?

21 A. THERE WAS NO HISTORY OF PSYCHIATRIC TREATMENT THAT
22 WE WERE AWARE OF.

23 Q. WAS THERE ANY HISTORY THAT YOU WERE AWARE OF OF ANY
24 SPECIAL EDUCATION OR ANY TREATMENT AT THE COASTAL
25 CENTER OR ANYTHING OF THAT NATURE?

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1 A. WE DID NOT HAVE THAT AT THE TIME OF THE EVALUATION.

2 Q. ALL RIGHT, SIR. NOW THE MEDICAL TESTS INCLUDED I
3 THINK YOU SAID AN M.R.I. WHICH WOULD DETECT
4 ABNORMALITIES OF THE BRAIN?

5 A. THAT'S CORRECT.

6 Q. WHAT WERE THE RESULTS OF THAT M.R.I. TEST?

7 A. THE EXAMINATION WAS INTERPRETED AS NORMAL.

8 Q. ALL RIGHT, SIR. AND THE E.E.G. WHICH WERE TESTS
9 FOR ANY TYPE OF SEIZURE DISORDER. WHAT WERE THE
10 RESULTS OF THAT TEST?

11 A. THAT WAS ALSO INTERPRETED AS NORMAL.

12 Q. AND THE NEUROLOGIST THAT EXAMINED MR. SIMMONS FOR
13 ANY DISEASE OF THE BRAIN; WHAT WERE THE RESULTS OF
14 THAT EVALUATION?

15 A. IT WAS A HISTORY OF HEADACHES THAT WAS COMMENTED
16 ON, BUT NO OTHER REMARKABLE ABNORMALITY. AND HE
17 RECOMMENDED AN IMAGING STUDY OF THE HEAD WHICH WAS
18 ALREADY BEING PERFORMED.

19 Q. ALL RIGHT, SIR. SO BASED ON ALL THE MEDICAL
20 TESTING THAT YOU HAD, DID YOU FIND ANY KIND OF A
21 MEDICAL DISORDER THAT COULD IN ANY WAY AFFECT HIS
22 THINKING?

23 A. WE DIDN'T FIND ANY MEDICAL DISORDER THAT WE FELT
24 WOULD AFFECT HIS THINKING. HE DID HAVE A SLIGHTLY
25 DISTORTED THYROID FUNCTION WHICH IS THE ONE MEDICAL

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1 PROBLEM THAT COULD POSSIBLY IMPACT HIS THINKING
2 THAT WE DISCOVERED; HOWEVER, THAT WAS NOT FELT TO
3 BE OF ANY SIGNIFICANCE.

4 Q. ALL RIGHT, SIR. AS I READ MY NOTES HERE, WHEN YOU
5 ATTEMPTED TO ADVISE MR. SIMMONS OF HIS MIRANDA
6 RIGHTS AS YOU'RE REQUIRED TO DO WITH ANY SUSPECT OR
7 PERSON CHARGED WHO IS TAKEN THERE FOR A COURT
8 ORDERED EVALUATION, MR. SIMMONS INDICATED TO YOU
9 THAT HE COULD NOT READ; IS THAT CORRECT?

10 A. YES; THAT'S CORRECT.

11 Q. ALL RIGHT, SIR. NOW AS PART OF THE MATERIAL THAT
12 YOU OBTAINED---

13 MR. BAILEY: EXCUSE ME A MINUTE,
14 YOUR HONOR, WHILE I TRY TO FIND SOMETHING.

15 THE COURT: YES, SIR.

16 Q. LET ME HAND YOU WHAT'S BEEN MARKED STATE'S 29
17 THAT'S BEEN IDENTIFIED AS A TWO PAGE STATEMENT
18 WRITTEN BY MR. SIMMONS. AT SOME POINT IN TIME DID
19 YOU OBTAIN THAT STATEMENT?

20 A. YES, WE DID.

21 Q. AS FAR AS THE MEDICAL RECORDS?

22 A. THAT'S CORRECT.

23 Q. ALL RIGHT, SIR. AND ASSUMING THAT MR. SIMMONS
24 WROTE THAT, WOULD YOU STATE WHETHER OR NOT THE
25 INFORMATION HE GAVE YOU THAT HE COULD NOT READ WAS

1 A LIE?

2 A. WELL, THIS WOULD -- WRITING THIS SORT OF STATEMENT
3 IN MY OPINION WOULD BE INCONSISTENT WITH BEING
4 UNABLE TO READ.

5 Q. ALL RIGHT, SIR. AND THERE'S ALSO A SHORT NOTE
6 WHICH IS STATE'S TEN WHICH HAS BEEN TESTIFIED AS
7 BEING WRITTEN BY MR. SIMMONS. DOES THAT ALSO
8 INDICATE THAT HE CAN WRITE?

9 A. ONCE AGAIN, IF THIS WAS IN FACT WRITTEN BY MR.
10 SIMMONS, THAT WOULD IN MY MIND BE INCONSISTENT WITH
11 HIS BEING UNABLE TO READ.

12 Q. ALL RIGHT, SIR. AND IS IT POSSIBLE IN YOUR OPINION
13 TO BE ABLE TO WRITE ENGLISH BUT NOT BE ABLE TO
14 READ?

15 A. I'M NOT AWARE OF THAT.

16 Q. ALL RIGHT, SIR. SO AFTER MR. SIMMONS TOLD YOU HE
17 COULD NOT READ, THEN YOU READ THE RIGHTS TO HIM; IS
18 THAT CORRECT?

19 A. THAT IS CORRECT.

20 Q. AND HIS PRESENTATION TO YOU INDICATED TO YOU THAT
21 HE DID NOT UNDERSTAND WHAT YOU WERE SAYING?

22 A. HE DID NOT DEMONSTRATE ANY SIGNIFICANT
23 UNDERSTANDING OF THE RIGHTS AS THEY WERE PRESENTED
24 TO HIM.

25 Q. ALL RIGHT, SIR. AND THAT'S BASED ON HIS

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1 PRESENTATION TO YOU?

2 A. THAT'S CORRECT.

3 Q. OKAY. AND YOU HAVE NO WAY OF OPENING HIS BRAIN TO
4 DECIDE WHETHER OR NOT HE ACTUALLY DID UNDERSTAND
5 IT? ALL YOU CAN DO IS REACT TO WHAT HE'S TELLING
6 YOU; TRUE?

7 A. THAT IS CORRECT.

8 Q. ALL RIGHT, SIR. AND YOU DEAL PRIMARILY WITH PEOPLE
9 THAT ARE FACING COURT CHARGES; IS THAT CORRECT?

10 A. THAT'S TRUE.

11 Q. ALL RIGHT, SIR. AS OPPOSED TO SOMEBODY LIKE IN
12 PRIVATE PRACTICE THAT HAVE AN OFFICE WHERE PEOPLE
13 WHO HAVE PROBLEMS COME AND SEE THEM?

14 A. I PERSONALLY AM NOT TERRIBLY INVOLVED IN THAT
15 ACTIVITY.

16 Q. ALL RIGHT, SIR. BUT COULD YOU STATE WHETHER OR NOT
17 THE PEOPLE THAT HAVE BEEN SENT PURSUANT TO A COURT
18 ORDER FOR EVALUATION FACING CRIMINAL CHARGES HAVE A
19 REASON TO MALINGER?

20 A. IN MY OPINION THEY FREQUENTLY DO.

21 Q. THEY FREQUENTLY HAVE A REASON, OR THEY FREQUENTLY
22 DO MALINGER?

23 A. THEY FREQUENTLY HAVE A REASON.

24 Q. DO THEY FREQUENTLY MALINGER OR ATTEMPT TO MALINGER
25 MENTAL DISORDERS OR PSYCHIATRIC SYMPTOMS WHEN THEY

1 COME IN FOR AN EVALUATION?

2 A. WE SEE MANY PATIENTS WHOM WE FEEL ARE MALINGERING.

3 Q. WOULD YOU STATE WHETHER OR NOT AT ANY POINT IN TIME
4 DID YOU FEEL THAT MR. SIMMONS WAS MALINGERING?

5 A. I CERTAINLY HAD CONCERNS IN THAT REGARD BECAUSE OF
6 INCONSISTENCIES IN HIS PRESENTATION.

7 Q. SPECIFICALLY WHAT INCONSISTENCIES ARE YOU TALKING
8 ABOUT?

9 A. WELL, I HAD OBSERVED MR. SIMMONS INFORMALLY IN THE
10 WARD, AND IT SEEMED LIKE HE INTERACTED FREELY IN
11 THE WARD. I WAS AWARE THAT HE WAS DOING WORK
12 ASSIGNMENTS, WORK DETAILS ON THE WARD, WHICH
13 ACTUALLY IS KIND OF A REWARD. IT'S GENERALLY GIVEN
14 THE TO PATIENTS WHO ARE FUNCTIONING BETTER ON THE
15 WARD RATHER THAN THOSE WHO ARE NOT. I WAS AWARE
16 AND ACTUALLY SAW HIM SITTING AT THE TABLES PLAYING
17 CARDS AND ENGAGED IN PLAYING PING-PONG. HE SEEMED
18 TO BE PRETTY ACTIVE AND NORMALLY ACTIVE AND
19 INTERACTIVE ON THE WARD. I HAD ALSO READ NURSING
20 NOTES THAT INDICATED THAT HE FREQUENTLY PLAYED
21 CARDS WITH OTHER PATIENTS AND WITH STAFF AND
22 PARTICIPATED IN ACTIVITY THERAPY DOING THINGS LIKE
23 PLAYING BOARD GAMES AND THAT SORT OF THING. SO IT
24 APPEARED THAT HIS LEVEL OF FUNCTION ON OUR HOSPITAL
25 WARD WAS FAIRLY GOOD. HE ALSO WAS NOT A MANAGEMENT

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

1 PROBLEM. HE ADHERED TO THE RULES OF THE
2 INSTITUTION. SO HE WAS COGNIZANT OF THOSE AND WAS
3 ABLE TO FOLLOW THOSE RULES WITHOUT ANY DIFFICULTY.

4 Q. ALL RIGHT, SIR. ARE PATIENTS THERE OBSERVED ON THE
5 WARD WHEN THEY DON'T KNOW THEY'RE BEING OBSERVED?

6 A. FREQUENTLY.

7 Q. IS THAT PART OF THE PROCESS OF THE EVALUATION?

8 A. YES, IT IS.

9 Q. DID HE PRESENT HIMSELF DIFFERENTLY WHEN HE DIDN'T
10 KNOW SOMEBODY WAS LOOKING AT HIM THAN HE DID WHEN
11 YOU WERE IN THERE PERFORMING THE INTERVIEW?

12 A. WELL, IT APPEARED THAT HIS DEMEANOR ON THE WARD WAS
13 SOMEWHAT DIFFERENT THAN IT WAS WHEN WE HAD HIM IN
14 THE INTERVIEW ROOM. FOR INSTANCE, HE, AS I SAY,
15 WAS PRETTY INTERACTIVE. HE WAS ENGAGED IN
16 ACTIVITIES THAT USUALLY REQUIRE A CERTAIN AMOUNT OF
17 INTELLECTUAL FUNCTIONING. AND THAT, OF COURSE,
18 RAISES THE QUESTION WHEN THAT'S SEEN AS TO JUST
19 WHAT THE EXPLANATION FOR THAT IS.

20 Q. ALL RIGHT, SIR. AS FAR AS ACTUALLY ADMINISTERING
21 THE TEST, THE WAIS-III AND THE OTHER TESTS THAT
22 WERE ADMINISTERED, A PSYCHIATRIST DOES NOT DO THAT,
23 DO THEY?

24 A. NO, THEY DO NOT.

25 Q. THE PSYCHOLOGIST DOES THOSE TESTS AND INTERPRETS

1 THOSE TESTS AND FEEDS THAT INFORMATION TO YOU; AND
2 THAT HELPS FORM THE BASIS OF YOUR OPINION?

3 A. THAT IS CORRECT.

4 Q. SO IF WE WANTED TO TALK ABOUT THE SPECIFICS OF A
5 PARTICULAR TEST OF MR. SIMMONS, WE'D NEED TO TALK
6 TO DR. VIDIC INSTEAD OF YOU?

7 A. THAT'S CORRECT.

8 Q. MR. THEOS ASKED YOU ABOUT SOME OF THE ENTRIES IN
9 THE RECORD. AND I BELIEVE YOU SAID THAT ALL THESE
10 ENTRIES OF RECORD WERE MADE FOR THE PURPOSE OF
11 ASSISTING Y'ALL IN MAKING YOUR DIAGNOSIS OR
12 EVALUATION?

13 A. YES. THEY DOCUMENT THE PROGRESS OF THE PATIENT
14 THROUGH THE COURSE OF HOSPITALIZATION AND ALSO
15 RECORD OBSERVATIONS OF THE PATIENT WHILE THEY'RE
16 THERE.

17 Q. BEAR WITH ME FOR ONE SECOND, PLEASE.

18 A. YES, SIR.

19 Q. PART OF THE RECORD IS CALLED PHYSICIAN'S HISTORY
20 AND PHYSICAL. DO YOU HAVE THAT PART?

21 A. YES.

22 Q. ALL RIGHT, SIR. AND ON -- I BELIEVE THE PAGE THERE
23 THAT STARTS OFF WITH MEDICATIONS; AND UNDERNEATH
24 THAT IT'S GOT BRIEF SOCIAL, FAMILY, CULTURAL AND
25 DEVELOPMENTAL HISTORY?

1 A. RIGHT.

2 Q. DO YOU HAVE THAT PAGE?

3 A. YES, SIR.

4 Q. WOULD YOU READ THAT PARAGRAPH INTO THE RECORD,
5 PLEASE?

6 A. THIS IS ENTITLED "BRIEF SOCIAL, FAMILY, CULTURAL
7 DEVELOPMENTAL HISTORY." HE FINISHED HIGH SCHOOL;
8 HE MARRIED IN 1982; BECAME SEPARATED IN 1988 AND
9 DIVORCED IN 1997; HE HAS TWO BOYS AGES ELEVEN AND
10 FIFTEEN; HE HAS BEEN ABLE TO SEE THEM ONCE SINCE
11 GOING TO JAIL; HE WORKED IN BRICK MASONRY,
12 CARPENTRY, AND LANDSCAPING. HE ALSO SOLD DRUGS. HE
13 ADMITTED TO HAVING TROUBLE HOLDING A JOB DUE TO HIS
14 SUBSTANCE ABUSE.

15 Q. ALL RIGHT. AND IS THERE A PAGE A FEW PAGES LATER
16 THAT STARTS OFF WITH MENTAL STATUS EXAMINATION?

17 A. YES, SIR.

18 Q. AND UP AT THE TOP THERE AS FAR AS APPEARANCE; DOES
19 IT STATE "WELL KEPT; APPEARS STATED AGE?"

20 A. CORRECT.

21 Q. AND UNDER ATTITUDE "NOT VERY COOPERATIVE DUE TO
22 STRESS DUE TO HEADACHES?"

23 A. CORRECT.

24 Q. DISTRACTED, POOR EFFORT DURING INITIAL INTERVIEW?

25 A. THAT'S ALSO CORRECT.

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

- 1 Q. ALL RIGHT, SIR. DOWN NEAR 2/3 OF THE WAY DOWN
2 UNDER MEMORY, "IMMEDIATE RECENT REMOTE IN HOW
3 TESTED?" DO YOU SEE THAT?
- 4 A. YES, I DO.
- 5 Q. ALL RIGHT. WHAT DOES THAT SAY THERE?
- 6 A. IT SAYS HIS IMMEDIATE MEMORY WAS -- RECALLED THREE
7 OUT OF THREE ITEMS THAT WERE GIVEN TO HIM. HIS
8 RECENT MEMORY WAS TWO OF THREE ITEMS PRESENTED; AND
9 REMOTE MEMORY WAS ZERO OF THREE ITEMS.
- 10 Q. ON THE NURSING ASSESSMENTS; DO YOU HAVE THAT?
- 11 A. YES.
- 12 Q. AND THAT'S BY NURSE ALSTON, I BELIEVE?
- 13 A. CORRECT.
- 14 Q. ALL RIGHT. DOES THAT INDICATE THAT MR. SIMMONS HAS
15 A TWELFTH GRADE EDUCATION AND HIS OCCUPATION IS A
16 CARPENTER?
- 17 A. CORRECT.
- 18 Q. AND ON THE NURSING ASSESSMENT WHERE IT'S GOT THE
19 PAGE ABOUT THE NURSING, PHYSICAL ASSESSMENT, AND
20 REVIEW OF SYSTEMS. DO YOU SEE THAT?
- 21 A. I HAVE THAT.
- 22 Q. ALL RIGHT, SIR. AND DOES IT INDICATE THAT MR.
23 SIMMONS WEARS READING GLASSES?
- 24 A. THAT IS CORRECT.
- 25 Q. AND DO YOU SEE ANY NEED FOR SOMEONE THAT DOESN'T

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

1 READ TO WEAR READING GLASSES?

2 A. NOT USUALLY.

3 Q. A COUPLE OF PAGES OVER WHERE IT STARTS OFF WITH
4 LEARNING NEEDS ASSESSMENT. (WITNESS REVIEWS
5 DOCUMENT.)

6 A. I HAVE THAT.

7 Q. ALL RIGHT, SIR. IS THAT INDICATING HE COMPLETED
8 THE TWELFTH GRADE? AND THERE'S A BLOCK THERE WHERE
9 YOU CHECK ABLE TO READ. IS YES OR NO CHECKED?

10 A. IT'S CHECKED YES.

11 Q. AND ABLE TO WRITE IS YES OR NO CHECKED?

12 A. ALSO CHECKED YES.

13 Q. AND THEN OUT TO THE SIDE IT'S GOT "A LITTLE;" IS
14 THAT CORRECT?

15 A. THAT IS CORRECT.

16 Q. NOW IN THE SOCIAL WORK ASSESSMENT THAT MR. TORRES
17 FILLED OUT; MR. THEOS ASKED YOU A COUPLE OF
18 QUESTIONS ABOUT THAT ONE?

19 A. CORRECT.

20 Q. ON THE SECOND PAGE OF THAT SOCIAL WORK ASSESSMENT
21 UP AT THE TOP THERE WHERE IT'S GOT HISTORY THE
22 PROBLEM?

23 A. YES, SIR.

24 Q. COULD YOU READ THAT? LET ME JUST READ THAT, AND
25 SEE IF YOU CAN AGREE THIS IS WHAT IT SAYS. PATIENT

1 AGAIN USING CRACK ABOUT FIVE OR SIX OR SEVEN YEARS
2 AGO; AND SINCE THEN THE PATIENT HAS NOT BEEN ABLE
3 TO WORK STEADILY OR GAINFULLY; IS THAT CORRECT?

4 A. I'M HAVING TROUBLE FINDING IT. IT'S ON THE SECOND
5 PAGE.

6 Q. IT SHOULD BE ON THE SECOND PAGE OF MR. TORRES'---

7 A. OKAY; I'VE GOT IT. PARDON ME.

8 Q. AFTER HISTORY OF PROBLEMS.

9 A. ALL RIGHT. IT SAYS "THE PATIENT BEGAN USING CRACK
10 ABOUT FIVE, SIX, OR SEVEN YEARS AGO, AND SINCE THEN
11 PATIENT HAS NOT BEEN ABLE TO WORK STEADILY OR
12 GAINFULLY."

13 Q. ALL RIGHT, SIR. AND DOES IT ALSO INDICATE UNDER
14 PRIOR PSYCHIATRIC HOSPITALIZATIONS "NO OUTPATIENT
15 TREATMENT?"

16 A. CORRECT.

17 Q. AND HE'S ON NO PSYCHIATRIC MEDICATION?

18 A. CORRECT.

19 Q. A COUPLE OF PAGES OVER THERE; PAGE TWENTY ON THAT
20 ASSESSMENT?

21 A. UH-HUH (INDICATING YES.)

22 Q. DOWN AT THE MIDDLE THERE. AND BY THE WAY, THESE
23 FORMS ARE FILLED OUT BY THE SOCIAL WORKER WHILE
24 HE'S INTERVIEWING THE PERSON THAT SHOWS UP THERE;
25 IS THAT CORRECT?

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

1 A. NOW, THESE ARE FILLED OUT FROM A COLLATERAL SOURCE.

2 Q. OKAY.

3 A. TYPICALLY THE SOCIAL WORKER WILL ATTEMPT TO CONTACT
4 A FAMILY MEMBER TO GET AN INDEPENDENT HISTORY.
5 THEY MAY ALSO IF THE PERSON HAS BEEN INCARCERATED
6 CONTACT PEOPLE IN THE JAIL. IF THEY'VE BEEN A
7 MENTAL HEALTH CENTER CLIENT, THEY MAY TRY TO
8 CONTACT THE MENTAL HEALTH CENTER TO GET INFORMATION
9 FROM THEM AS WELL.

10 Q. ALL RIGHT, SIR. AND UP AT THE TOP OF THAT IT SAYS
11 "THE PATIENT INTERACTS WELL WITH OTHER CHILDREN
12 THEIR AGE DURING EARLY DEVELOPMENT;" AND HE'S GOT
13 YES BY THAT?

14 A. YES, SIR.

15 Q. AND BELOW THAT DOES IT HAVE "NO ABUSE OF ANY KIND
16 FROM WHAT THE PATIENT RELATED?"

17 A. THAT IS CORRECT.

18 Q. AND THE NEXT ONE THERE IS A HISTORY OF DIFFERENT
19 THINGS. ONE OF THEM IS HEAD TRAUMA; IS THAT
20 CHECKED YES OR NO?

21 A. THAT'S CHECKED NO.

22 Q. SEIZURES?

23 A. NO.

24 Q. SURGERY?

25 A. NO.

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

1 Q. RETARDATION?

2 A. NO.

3 Q. AS FAR AS INITIAL ADJUSTMENTS TO SCHOOL, WHAT DOES
4 IT SAY THERE?

5 A. NO PROBLEMS WITH ADJUSTMENT REPORTED.

6 Q. DOWN AT THE BOTTOM ON GENERAL SCHOOL PERFORMANCE;
7 WHAT DOES IT SAY THERE?

8 A. IT SAYS THAT HIS BROTHER RELATED THAT THE PATIENT
9 WAS IN REGULAR CLASSES; DID ALL RIGHT ACADEMICALLY;
10 PARTICIPATED IN HIGH SCHOOL FOOTBALL; REPEATED NO
11 GRADES; HAD NO SUSPENSIONS OR EXPULSIONS; AND
12 COMPLETED THE TWELFTH GRADE.

13 Q. NOW, DR. BEHRMANN, DID YOU FIND THAT HISTORY OF
14 EXTRA CURRICULAR ACTIVITIES GETS ALONG WELL WITH
15 PEERS, GRADUATED FROM HIGH SCHOOL, NO SPECIAL ED;
16 DID YOU FIND THAT UNUSUAL FOR A PERSON WHO
17 PROFESSED NOT TO BE ABLE TO UNDERSTAND SOMETHING AS
18 SIMPLE AS MIRANDA RIGHTS?

19 A. THAT WOULD BE UNUSUAL IN MY OPINION.

20 Q. ON PAGE 21 DOWN AT THE BOTTOM ABOUT THE MARRIAGE
21 RELATIONSHIP; WOULD YOU READ THAT, PLEASE?

22 A. JUST A MOMENT. (WITNESS REVIEWS DOCUMENT.) "THE
23 PATIENT'S MARRIAGE LASTED ABOUT EIGHT OR NINE YEARS
24 AND SEEMED TO BE A GOOD ONE UNTIL THE PATIENT BEGAN
25 USING CRACK. PATIENT'S CRACK USE WAS THE REASON

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

1 FOR THE MARRIAGE TO END."

2 Q. NEXT PAGE ON 22 DOWN AT THE MIDDLE UNDER EMPLOYMENT
3 HISTORY. (WITNESS REVIEWS DOCUMENT.) DOES THAT
4 STATE "PATIENT WORKS STEADILY, GAINFUL SINCE
5 FINISHED HIGH SCHOOL UNTIL ABOUT THE AGE OF
6 THIRTY?"

7 A. THAT'S CORRECT.

8 Q. PAGE 24 WHERE IT LISTS THE PATIENT'S STRENGTH.
9 DOES THAT LIST EMPLOYABLE WORK SKILLS?

10 A. YES.

11 Q. FAMILY SUPPORT AND EDUCATION?

12 A. YES.

13 Q. AND UNDER ASSESSMENT SUMMARY, DOES THAT STATE "NO
14 CURRENT PSYCHIATRIC HISTORY IS REPORTED ON THE
15 PATIENT'S PART?"

16 A. THAT IS CORRECT.

17 Q. PATIENT'S DECLINE IN FUNCTIONING APPEARS TO BE
18 AGAIN AROUND THE TIME PATIENT BEGAN USING CRACK?

19 A. THAT'S ALSO CORRECT.

20 Q. AND IS THIS AN ACTIVITY THERAPY ASSESSMENT THERE?

21 A. YES, THERE IS.

22 Q. ALL RIGHT, SIR. AND THAT INDICATES WHAT THE
23 PATIENT ENJOYS DOING; IS THAT CORRECT?

24 A. THAT'S CORRECT.

25 Q. DOES THAT INDICATE THAT MR. SIMMONS STATED THAT HE

1 ENJOYED SPORTS, EXERCISE, AND OUTSIDE ACTIVITIES?

2 A. CORRECT.

3 Q. TABLE GAMES, MOVIES, AND TELEVISION?

4 A. CORRECT.

5 Q. MUSIC?

6 A. CORRECT.

7 Q. VISITING FRIENDS?

8 A. THAT'S CORRECT.

9 Q. PROGRESS NOTES NOVEMBER 29, 1998? (WITNESS REVIEWS
10 DOCUMENT.)

11 A. ALL RIGHT.

12 Q. DOES THAT INDICATE HE'S PLAYING SPADES WITH HIS
13 PEERS AND STAFF?

14 A. THAT IS CORRECT.

15 Q. THE INTERDISCIPLINARY PROGRESS NOTES OF DECEMBER
16 THE FOURTH, 1998?

17 A. YES, SIR.

18 Q. EXCUSE ME; DECEMBER THE SIXTH; DOWN AT THE BOTTOM
19 OF THAT PAGE. (WITNESS REVIEWS DOCUMENT.)

20 A. OKAY.

21 Q. DOES IT SAY THAT MR. SIMMONS WAS OBSERVED PLAYING
22 CARDS, WATCHING T.V., LISTENING TO THE RADIO; ALSO
23 OBSERVED READING THE NEWSPAPER?

24 A. THAT IS CORRECT.

25 Q. ALL RIGHT, SIR. AND IS READING THE NEWSPAPER

THOMAS WILLIAM BEHRMANN - CROSS/MR. BAILEY

1 INCONSISTENT WITH HIS PROFESSED INABILITY TO READ
2 MIRANDA RIGHTS WHEN YOU FIRST SAW HIM?

3 A. WELL, IN MY OPINION IT WOULD BE INCONSISTENT WITH
4 HIS STATED INABILITY TO READ.

5 Q. ALL RIGHT, SIR. SO THIS WOULD BE ONE OF THE
6 OCCASIONS WHERE HE WOULD BE ON THE WARD NOT KNOWING
7 HE WAS BEING WATCHED?

8 A. PROBABLY SO.

9 Q. THE INTERDISCIPLINARY PROGRESS NOTES FROM DECEMBER
10 THE ELEVENTH, 1998 UP AT THE TOP; DO YOU SEE THAT?

11 A. (WITNESS REVIEWS DOCUMENT.) ALL RIGHT.

12 Q. DOES THAT SAY DOWN AT THE LAST LINE THERE "PATIENT
13 KNOWLEDGEABLE OF LEGAL ISSUES?"

14 A. THAT'S CORRECT.

15 Q. MR. THEOS ASKED YOU IF YOU HAD AN OPINION TO A
16 REASONABLE DEGREE OF MEDICAL CERTAINTY WITH RESPECT
17 TO WHETHER OR NOT WHEN YOU FIRST SAW MR. SIMMONS
18 AND GAVE HIM HIS MIRANDA RIGHTS AND HE PROFESSED TO
19 YOU THAT HE COULDN'T READ WHETHER YOU HAD AN
20 OPINION AS TO WHETHER OR NOT HE COULD UNDERSTAND
21 HIS MIRANDA RIGHTS. YOU STATED AT THAT TIME YOU
22 DID NOT FEEL THAT HE HAD THE ABILITY?

23 A. YES; BASED ON HIS PERFORMANCE IN THAT PARTICULAR
24 SETTING, I COULD NOT SAY WITH CERTAINTY THAT HE
25 UNDERSTOOD HIS MIRANDA RIGHTS.

1 Q. AT THAT POINT AND TIME?

2 A. CORRECT.

3 Q. IN LATE 1998?

4 A. YES.

5 Q. AND SINCE THAT TIME HAVE YOU HAD THE OPPORTUNITY TO
6 REVIEW THE FILE AND TO OBTAIN ADDITIONAL
7 INFORMATION?

8 A. YES.

9 Q. AND DO YOU STILL BEAR THAT OPINION?

10 A. WELL, IT CERTAINLY WOULD RAISE THE QUESTION OF
11 WHETHER OR NOT HE UNDERSTOOD HIS RIGHTS AT THAT
12 TIME OR NOT. AS I'VE ALREADY MENTIONED,
13 MALINGERING WAS RAISED AS AN ISSUE; HOWEVER, I HAVE
14 NO ABSOLUTE OBJECTIVE EVIDENCE OTHER THAN
15 INCONSISTENCY IN HIS PERFORMANCE BASED ON THE WORK
16 THAT WE DID TO STATE CATEGORICALLY THAT HE WAS
17 MALINGERING IN THAT SESSION. BUT CERTAINLY IT IS A
18 SIGNIFICANT QUESTION.

19 Q. ALL RIGHT, SIR. AND I BELIEVE YOU TESTIFIED IN
20 RESPONSE TO MR. THEOS' LAST QUESTION WHEN HE ASKED
21 YOU TO SPECULATE ON HIS MENTAL CONDITION BACK IN
22 DECEMBER, 1997, THAT YOU FOUND NOTHING IN TESTING
23 THAT YOU DID AT ALL THAT ANY CONDITION, ANY MENTAL
24 CONDITION, WOULD HAVE PREVENTED HIM FROM
25 UNDERSTANDING HIS RIGHTS BACK IN DECEMBER OF 1997;

THOMAS WILLIAM BEHRMANN - RE-DIRECT/MR. THEOS

1 IS THAT CORRECT?

2 A. THAT IS CORRECT.

3 Q. THANK YOU. THAT'S ALL I HAVE.

4 THE COURT: ANYTHING ON RE-DIRECT,
5 PLEASE?

6 MR. THEOS: YES, SIR.

7 RE-DIRECT EXAMINATION

8 BY MR. THEOS:

9 Q. DR. BEHRMANN, AS A RESULT OF ALL OF YOUR
10 EXAMINATIONS, ABOUT THE ONE OF NOVEMBER THE 23RD
11 AND JANUARY THE EIGHTH, DID YOU ARRIVE AT A
12 DIAGNOSIS OF MR. SIMMONS?

13 A. YES, SIR, WE DID.

14 Q. IF SO, WHAT WAS THAT DIAGNOSIS, PLEASE?

15 A. THE DIAGNOSIS THAT WE STATED ON OUR REPORT WERE
16 DIAGNOSES OF POLY-SUBSTANCE DEPENDANCE AND A
17 PROVISIONAL DIAGNOSIS OF MILD MENTAL RETARDATION.

18 Q. THANK YOU.

19 MR. BAILEY: YOUR HONOR, MAY I ASK
20 HIM A COUPLE MORE QUESTIONS?

21 THE COURT: CERTAINLY.

22 RE-CROSS EXAMINATION

23 BY MR. BAILEY:

24 Q. DR. BEHRMANN, AS FAR AS THE PROVISIONAL DIAGNOSIS
25 OF MENTAL RETARDATION, WHY WAS THAT A PROVISIONAL

1 DIAGNOSIS?

2 A. THAT WAS MADE ON THE BASIS OF HIS SCORES ON THE
3 I.Q. TESTING REALIZING THAT THERE WERE OTHER ISSUES
4 THAT NEEDED TO BE ADDRESSED BEFORE THE DIAGNOSIS OF
5 MENTAL RETARDATION COULD BE MADE WITH CERTAINTY.
6 OUR SITUATION IS WHEN WE'RE DOING THESE EVALUATIONS
7 BY STATUTE, IF THERE IS AN INDICATION OF MENTAL
8 RETARDATION, THEN THE PATIENT NEEDS TO BE REFERRED
9 TO THE DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS
10 FOR THAT EVALUATION. AND I LEFT THAT DIAGNOSIS TO
11 THEM.

12 Q. SO YOUR AGENCY IS PROHIBITED BY LAW FROM GIVING A
13 DIAGNOSIS OF MENTAL RETARDATION. DID YOU FIND
14 INDICATIONS OF THAT THAT WOULD GO TO THE DEPARTMENT
15 OF DISABILITIES AND SPECIAL NEEDS?

16 A. WE CAN MAKE THE DIAGNOSIS. BUT WHEN IT'S A CLOSE
17 CALL; IN OTHER WORDS, WHEN PEOPLE'S I.Q. SCORES ARE
18 REALLY SORT OF AT THE BREAK POINT FOR POTENTIAL
19 MENTAL RETARDATION, WE WILL GENERALLY DEFER TO THE
20 DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS. IF
21 THEY HAVE A VERY LOW I.Q. SCORE AND THERE'S NO
22 QUESTION, THEN THERE'S NOTHING THAT NECESSARILY
23 PROHIBITS US FROM MAKING THAT DIAGNOSIS.

24 Q. YOU DIDN'T ACTUALLY MAKE THE FINAL DIAGNOSIS OF
25 MENTAL RETARDATION, DID YOU?

THOMAS WILLIAM BEHRMANN - RE-CROSS/MR. BAILEY

1 A. NO, I DID NOT. PROVISIONAL DIAGNOSIS WAS MY FINAL
2 DIAGNOSIS.

3 Q. ALL RIGHT, SIR. AND THAT WAS BASED STRICTLY ON THE
4 I.Q. SCORES; IS THAT CORRECT?

5 A. THAT'S CORRECT.

6 Q. CAN YOU LEGITIMATELY DIAGNOSE MENTAL RETARDATION ON
7 TEST SCORES ALONE?

8 A. IN MY OPINION AND TO MY UNDERSTANDING, NO YOU
9 CANNOT.

10 Q. ALL RIGHT, SIR. AND DID Y'ALL CONSIDER THE OTHER
11 TWO FACTORS, THE ONSET BEFORE THE AGE OF EIGHTEEN
12 AND THE SIGNIFICANT HISTORY, ADAPTIVE DIFFICULTIES?

13 A. YES. I HAD CONSIDERED THOSE. BUT, ONCE AGAIN, IN
14 DISCUSSIONS ABOUT THAT I REALIZED THAT HIS LEVEL OF
15 ADAPTIVE FUNCTIONING MAY REPRESENT A PROBLEM IN
16 TERMS OF HIS BEING DIAGNOSED WITH MENTAL
17 RETARDATION.

18 Q. ALL RIGHT, SIR. SO IT WOULD NOT FIT THE CRITERIA
19 FOR MENTAL RETARDATION?

20 A. NO.

21 Q. ALL RIGHT, SIR. FOR THAT REASON, YOU DID NOT,
22 COULD NOT, DIAGNOSE MENTAL RETARDATION?

23 A. YES. THAT'S THE REASON I DID NOT DIAGNOSE MENTAL
24 RETARDATION.

25 Q. SO HE WAS SENT TO AN AGENCY THAT IS CHARGED BY LAW

1 WITH MAKING THAT DIAGNOSIS?

2 A. CORRECT.

3 Q. THAT BEING THE DEPARTMENT OF DISABILITIES AND
4 SPECIAL NEEDS?

5 A. THAT'S CORRECT.

6 Q. THAT DEAL WITH MENTALLY RETARDED CITIZENS; CORRECT?

7 A. THAT IS CORRECT.

8 Q. THANK YOU, SIR.

9 THE COURT: ANYTHING FURTHER,
10 PLEASE?

11 MR. THEOS: NOTHING.

12 THE COURT: ALL RIGHT, DOCTOR, YOU
13 MAY STEP DOWN. THANK YOU, SIR. NEXT WITNESS,
14 GENTLEMEN.

15 MR. THEOS: YOUR HONOR, WE WOULD
16 CALL DR. VIDIC.

17 THE COURT: COME AROUND, PLEASE, DR.
18 VIDIC.

19 - - - - -

20 WHEREUPON,

21 JEFFREY VIDIC, M.D., WHO AFTER BEING
22 FIRST DULY SWORN TO TELL THE TRUTH,
23 TESTIFIED AS FOLLOWS:

24 DIRECT EXAMINATION

25 BY MR. THEOS:

JEFFREY VIDIC - DIRECT/MR. THEOS

1 Q. DR. VIDIC, WHERE ARE YOU PRESENTLY EMPLOYED?

2 A. AT THE WILLIAM S. HALL PSYCHIATRIC INSTITUTE IN
3 COLUMBIA, SOUTH CAROLINA.

4 Q. IN WHAT CAPACITY ARE YOU EMPLOYED THERE?

5 A. I AM A CLINICAL PSYCHOLOGIST.

6 Q. AND AS DR. BEHRMANN STATED EARLIER, THIS IS A --
7 YOU'RE EMPLOYED BY THE STATE DEPARTMENT OF MENTAL
8 HEALTH?

9 A. YES, SIR. I'M A FULL-TIME EMPLOYEE OF THE STATE
10 DEPARTMENT OF MENTAL HEALTH.

11 Q. NOW, YOU CONDUCT EVALUATIONS WITH THE STATE
12 HOSPITAL AND FOR THE STATE HOSPITAL?

13 A. I CONDUCT EVALUATIONS FOR THE HALL INSTITUTE IN THE
14 FORENSIC DIVISION.

15 Q. ALONG WITH DR. BEHRMANN?

16 A. YES, SIR.

17 Q. AND THOSE EVALUATIONS ARE PRIMARILY FOR COMPETENCY
18 AND -- COMPETENCY MENTAL HEALTH AND CRIMINAL
19 RESPONSIBILITY EVALUATIONS?

20 A. YES, SIR.

21 Q. AND YOU'VE CONDUCTED -- YOU'VE BEEN QUALIFIED AS AN
22 EXPERT IN THE STATE OF SOUTH CAROLINA TO TESTIFY IN
23 THE FIELD OF FORENSIC PSYCHOLOGY?

24 A. YES, I HAVE.

25

MR. THEOS: YOUR HONOR, AT THIS

1 TIME, WE WOULD OFFER DR. VIDIC AS AN EXPERT IN THE
2 FIELD OF FORENSIC PSYCHOLOGY.

3 MR. BAILEY: WITHOUT OBJECTION, YOUR
4 HONOR.

5 THE COURT: FORENSIC WHAT?

6 MR. THEOS: PSYCHOLOGY.

7 THE COURT: ALL RIGHT. PROCEED.

8 MR. THEOS: YOUR HONOR, ALSO AGAIN
9 PURSUANT TO RULE 611, WE WOULD ASKED TO BE ALLOWED
10 TO LEAD DR. VIDIC IF HE'S A WITNESS IDENTIFIED WITH
11 THE STATE. I BELIEVE THAT'S WITHOUT OBJECTION.

12 THE COURT: I DON'T KNOW THAT THAT
13 SHOWING HAS BEEN MADE; BUT I DON'T MIND YOU LEADING
14 HIM. JUST GET TO THE BOTTOM LINE.

15 BY MR. THEOS:

16 Q. DR. VIDIC, DID YOU EXAMINE MR. SIMMONS ON NOVEMBER
17 THE 23RD OF 1998 ALONG WITH DR. BEHRMANN?

18 A. YES, SIR, I DID.

19 Q. ISN'T IT TRUE THAT MR. SIMMONS WAS UNABLE TO READ
20 HIS RIGHTS ON THAT DAY?

21 A. YES, SIR. HE TOLD US THAT HE COULD NOT READ.

22 Q. AND DID YOU NOT TRY TO HAVE HIM READ THOSE RIGHTS
23 BACK TO YOU?

24 A. I BELIEVE -- LET ME CONSULT MY PERSONAL NOTES
25 HERE. (WITNESS EXAMINES DOCUMENT.) DR. BEHRMANN

JEFFREY VIDIC - DIRECT/MR. THEOS

1 ASKED MR. SIMMONS IF HE COULD READ, AND MR. SIMMONS
2 INDICATED AT THAT TIME NO. AND SO DR. BEHRMANN
3 TURNED THE FORM AROUND AND SAID "ALL RIGHT; I'LL
4 READ THEM FOR YOU AND HAVE YOU FOLLOW ALONG."

5 Q. THOSE RIGHTS WERE READ TO MR. SIMMONS?

6 A. YES, SIR, THEY WERE.

7 Q. BUT THEY WERE NOT DONE IN THE FASHION -- DID YOU
8 HAVE AN OPPORTUNITY TO REVIEW THE TRANSCRIPT OF THE
9 STATEMENTS THAT WERE TAKEN FROM MR. SIMMONS IN
10 DECEMBER OF 1997?

11 A. YES, SIR.

12 Q. DR. BEHRMANN'S ADVISEMENT OF THOSE MIRANDA RIGHTS
13 WERE NOT DONE IN THE SAME FASHION AS THEY WERE AT
14 THAT TIME IN THAT MR. SIMMONS WAS NOT ASKED A
15 QUESTION THAT CALLED FOR A YES OR NO RESPONSE; IS
16 THAT CORRECT?

17 A. THAT'S CORRECT.

18 Q. IN FACT DR. BEHRMANN ASKED MR. SIMMONS TO EXPLAIN
19 WHAT HIS UNDERSTANDING OF THOSE RIGHTS WAS;
20 CORRECT?

21 A. YES, SIR.

22 Q. AS HE WENT THROUGH EACH SPECIFIC RIGHT?

23 A. YES, SIR. THAT'S OUR STANDARD OPERATING PROCEDURE
24 THERE.

25 Q. AND THE REASON YOU DO THAT IS TO MAKE SURE THAT THE

1 PERSON THAT YOU'RE ADVISING OF THOSE RIGHTS REALLY
2 DOES HAVE A FULL APPRECIATION AND UNDERSTANDING OF
3 THOSE RIGHTS; CORRECT?

4 A. YES, SIR.

5 Q. BECAUSE WITHOUT THAT, YOU WOULD NOT PROCEED?

6 A. WE WOULD NOT PROCEED IF THE PERSON COULD NOT
7 VERBALIZE SOME BASIC UNDERSTANDING OF THEIR MIRANDA
8 RIGHTS.

9 Q. AS A RESULT OF MR. SIMMONS' INABILITY TO
10 SUFFICIENTLY EXPLAIN THOSE RIGHTS ON NOVEMBER THE
11 23RD, THE EXAMINATION WAS TERMINATED, CORRECT?

12 A. WE WENT AHEAD AND DID SOME COMPETENCY QUESTIONS
13 WITH HIM DURING THAT TIME BECAUSE AT THAT POINT I
14 THINK THAT, AT LEAST IN MY MIND, THERE WAS SOME
15 QUESTION AS TO WHETHER OR NOT HE DID NOT UNDERSTAND
16 HIS MIRANDA RIGHTS. AND AGAIN WE SOMETIMES WILL
17 PROCEED WITH THE COMPETENCY QUESTION SINCE THOSE
18 ARE FAIRLY STRAIGHT-FORWARD QUESTIONS THAT WE CAN
19 ASK OF OUR CLIENT.

20 Q. SO YOU PROCEEDED WITH THE COMPETENCY QUESTIONS AT
21 THAT TIME?

22 A. YES.

23 Q. AND THEN WENT BACK TO THE MIRANDA WARNINGS TO
24 DETERMINE WHETHER OR NOT AT THAT POINT IN TIME HE
25 MIGHT HAVE A BETTER OR A CLEARER UNDERSTANDING OF

1 THOSE RIGHTS; CORRECT?

2 A. TO THE BEST OF MY KNOWLEDGE, THAT WAS THE WAY IT
3 HAPPENED; YES, SIR.

4 Q. AND THAT WAS DONE, AND MR. SIMMONS AGAIN WAS UNABLE
5 TO COMPREHEND HIS MIRANDA WARNINGS TO YOURS AND DR.
6 BEHRMANN'S SATISFACTION?

7 A. THAT'S CORRECT.

8 Q. HE WAS THUS UNABLE TO MAKE A KNOWING AND
9 INTELLIGENT WAIVER OF HIS MIRANDA WARNINGS AT THAT
10 TIME; CORRECT?

11 MR. BAILEY: OBJECTION, YOUR HONOR.
12 HE'S NOT ASKING TO A REASONABLE DEGREE OF
13 SCIENTIFIC CERTAINTY.

14 THE COURT: ALL. RIGHT YOU'RE GOING
15 TO HAVE TO COUCH IT IN THE PROPER ORDER.

16 Q. AT THAT TIME BECAUSE OF HIS INABILITY TO ADEQUATELY
17 WAIVE HIS MIRANDA RIGHTS, THE EXAMINATION WAS
18 TERMINATED; IS THAT CORRECT?

19 A. THE EXAMINATION WAS TERMINATED BECAUSE AT THAT
20 POINT DR. BEHRMANN AND MYSELF COULD NOT FORMULATE
21 AN OPINION TO EITHER OF OUR SATISFACTIONS TO A
22 REASONABLE DEGREE OF CERTAINTY WHETHER OR NOT MR.
23 SIMMONS ACTUALLY DIDN'T UNDERSTAND HIS RIGHTS OR
24 WHETHER HE WAS MALINGERING AN INABILITY TO
25 UNDERSTAND HIS RIGHTS. AND SINCE WE COULDN'T MAKE

1 A SATISFACTORY DETERMINATION AT THAT POINT, WE
2 DECIDED NOT TO PROCEED ANY FURTHER UNTIL WE HAD
3 DONE SOME FURTHER TESTING.

4 Q. HAVE YOU REVIEWED THE REPORT OF WHAT WAS GENERATED
5 AS A RESULT OF THE NOVEMBER 23RD AND JANUARY THE
6 EIGHTH INTERVIEWS WITH MR. SIMMONS?

7 A. YES, SIR.

8 Q. AND DID YOU PLAY A HAND IN OFFERING THAT REPORT?

9 A. GENERALLY THE WAY THAT WE DO IT IS THAT DR.
10 BEHRMANN OR DR. MILLING, OR WHOEVER THE
11 PSYCHIATRIST IS THAT'S DOING THE EVALUATION WITH
12 ME; WE WILL SIT DOWN. WE WILL DISCUSS WHAT WE
13 FOUND IN OUR STAFFING INTERVIEW, OUR FORMAL
14 INTERVIEW WHERE WE ASK ALL THE QUESTIONS. WE
15 DISCUSS THE PSYCHOLOGICAL TEST RESULTS. WE KIND OF
16 LOOK AT ALL THE INFORMATION WE HAVE AND THEN AGREE
17 AS TO THINGS LIKE DIAGNOSES AND WHETHER OR NOT WE
18 FEEL THE PERSON IS COMPETENT; WHETHER OR NOT
19 THEY'RE CRIMINALLY RESPONSIBLE; AND THEN A REPORT
20 GETS GENERATED.

21 Q. OKAY. DID YOU NOT CONCUR WITH BOTH THE CONTENTS
22 AND THE CONCLUSIONS RENDERED IN THAT REPORT WITH
23 DR. BEHRMANN?

24 A. YES, SIR, I DID.

25 Q. DO YOU HAVE THAT REPORT IN FRONT OF YOU?

JEFFREY VIDIC - DIRECT/MR. THEOS

1 A. IT'S RIGHT HERE IN THIS RECORD.

2 Q. IF YOU WOULD PULL IT OUT, PLEASE.

3 A. YES, SIR.

4 Q. IF YOU WOULD REFER TO PAGE ONE OF THE BODY OF THE
5 REPORT; THE SAME THING AS THE DIAGNOSIS WAS ON, AND
6 REFER TO THE LAST SENTENCE. WOULD YOU PLEASE READ
7 THAT SENTENCE?

8 A. ARE YOU READING THE---

9 Q. I'M SORRY. I'M ON THE---

10 A. IS THAT WHAT YOU'RE REFERRING TO; THE FINDING
11 SUMMARY?

12 Q. NO; I'M REFERRING TO---

13 A. FORENSIC OUTPATIENT EVALUATION. (WITNESS REVIEWS
14 DOCUMENT.)

15 Q. DO YOU HAVE THAT?

16 A. IT MAY BE IN THE OUTPATIENT CHART.

17 Q. WELL, I'LL LET YOU -- IF YOU COULD REFER -- AND
18 PLEASE READ ALOUD TO THE JURY THE LAST SENTENCE
19 THAT I BELIEVE GOES ON TO THE NEXT PAGE.

20 A. "THE PATIENT WAS NOT INTERVIEWED ABOUT ISSUES
21 RELATED TO THE CIRCUMSTANCES SURROUNDING THE
22 INCIDENT AT THAT TIME BECAUSE HE DISPLAYED SOME
23 DISORGANIZATION OF HIS THOUGHT PROCESSES AND
24 BECAUSE OF HIS INABILITY TO ADEQUATELY WAIVE HIS
25 MIRANDA RIGHTS."

Q. SO AGAIN AT THAT TIME THE CONCLUSION THAT YOU REACHED, YOU AND DR. BEHRMANN REACHED, WAS THAT WAS HE WAS UNABLE TO ADEQUATELY WAIVE HIS MIRANDA RIGHTS; CORRECT?

A. NO, THAT'S NOT CORRECT.

Q. SO THIS REPORT IS INACCURATE?

A. NO. THE CONCLUSION THAT WE REACHED AT THAT POINT IS THAT HE HAD NOT ADEQUATELY DEMONSTRATED TO OUR SATISFACTION AND UNDERSTANDING OF HIS MIRANDA RIGHTS. HOWEVER THE REASON FOR THAT WAS UNCLEAR. AND SINCE WE ALWAYS IN MOST CASES IN FORENSIC SETTINGS THE POSSIBILITY OF MALINGERING IS THERE, WE DECIDED THAT WE NEEDED MORE INFORMATION BEFORE WE COULD ADDRESS THOSE ISSUES.

Q. DUE TO THE POSSIBILITY OF THE EXISTENCE OF MALINGERING, WERE ADDITIONAL TESTS CONDUCTED ON MR. SIMMONS?

A. YES, SIR, THEY WERE.

Q. AND ALSO ADDITIONAL TESTS WERE CONDUCTED, ADDITIONAL I.Q. TESTS, IN ORDER TO COMPARE TO DR. SAYLOR'S I.Q. TEST RESULT SCORES?

A. YES, SIR.

Q. AND WAS IT NOT AS A RESULT OF THOSE TESTS RELATED TO MALINGERING; WAS IT NOT DETERMINED THAT BASED UPON THOSE RESULTS THAT MR. SIMMONS WAS NOT

1 MALINGERING?

2 A. NO; THAT'S NOT CORRECT.

3 Q. REFER TO THIS REPORT.

4 A. YES, SIR.

5 THE COURT: ALL RIGHT. YOU NEED TO
6 PUT IN THE RECORD WHICH REPORT SHE'S SPEAKING OF.

7 MR. THEOS: YES, SIR. THIS IS THE
8 REPORT---

9 THE COURT: IS THAT THE DISABILITIES
10 AND SPECIAL NEEDS REPORT?

11 MR. THEOS: NO, SIR. THIS IS THE
12 REPORT OF DR. BEHRMANN OF THE HALL INSTITUTE, A
13 REPORT OF FINDING, MENTAL CAPACITY.

14 THE COURT: FORENSIC UNIT OUTPATIENT
15 EVALUATION?

16 MR. THEOS: YES, SIR.

17 THE COURT: THAT'S NOT IN EVIDENCE?

18 MR. THEOS: NO, SIR; IT'S NOT IN
19 EVIDENCE.

20 THE COURT: OKAY. GO AHEAD. WHAT
21 PAGE? WHAT LINE?

22 BY MR. THEOS:

23 Q. I'M REFERRING YOU TO PAGE THREE. THE TOP PORTION
24 OF THAT PARAGRAPH, DOES IT NOT STATE THAT MR.
25 SIMMONS RECEIVED SOME ADDITIONAL TESTING FOR

JEFFREY VIDIC - DIRECT/MR. THEOS

1 PURPOSES OF DETERMINING WHETHER OR NOT HE IS
2 MALINGERING?

3 A. IT SAYS IT WAS FELT THAT THE PATIENT'S PRESENTATION
4 DID NOT REPRESENT A MALINGERED PRESENTATION OF
5 MENTAL ILLNESS OR MENTAL DEFECT. AND THAT IS A
6 CORRECT STATEMENT.

7 Q. DOESN'T THAT MEAN THAT IT WAS DETERMINED AS A
8 RESULT OF THOSE TESTS THAT MR. SIMMONS WAS NOT
9 MALINGERING?

10 A. NO, SIR.

11 Q. THAT'S NOT WHAT THAT MEANS?

12 A. THAT'S NOT WHAT THAT MEANS. IF I MAY EXPLAIN?
13 WHAT THAT MEANS IS THAT ON FORMAL TESTING MR.
14 SIMMONS DID NOT DISPLAY -- LET ME GO THROUGH THE
15 TESTS ONE AT A TIME IF YOU WOULD LIKE. ON THE
16 WEXLER ADULT INTELLIGENCE SCALE HIS SCORES WERE
17 WITHIN WHAT WE CALL THE STANDARD ERROR OF
18 MEASUREMENT. IN OTHER WORDS YOU EXPECT THAT
19 PEOPLE'S SCORES WILL VARY SOMEWHAT. HIS SCORES
20 WERE WELL WITHIN THAT STANDARD ERROR OF
21 MEASUREMENT. AND IT WAS MY OPINION THAT HE WAS NOT
22 MALINGERING HIS INTELLECTUAL DEFICITS AT THAT TIME.

23 Q. OKAY.

24 A. IT WOULD BE VERY DIFFICULT FOR A PERSON TO MALINGER
25 AND OVER-REPEATED, ESPECIALLY THE WAIS-R IS A

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1 DIFFERENT TEST THAN THE WAIS-III. THERE ARE
2 DIFFERENT SUB-TESTS NOW ON IT. IT WOULD BE REAL
3 HARD FOR A PERSON WITH NO PRIOR KNOWLEDGE TO GET
4 SCORES WITHIN TWO OR THREE POINTS OF ONE ANOTHER,
5 ESPECIALLY GIVEN THAT THESE ARE NOW TWO SEPARATE
6 TESTS. SOME OF THE TEST ITEMS ARE THE SAME. A LOT
7 OF THE TESTS ITEMS ARE DIFFERENT. SO I DID NOT
8 FEEL THAT HE WAS MALINGERING HIS LEVEL OF
9 INTELLECTUAL FUNCTIONING. WE GAVE HIM A TEST OF
10 MEMORY MALINGERING, SPECIFIC SHORT TERM MEMORY IN
11 MALINGERING. ON THAT HE DID NOT SHOW EVIDENCE OF
12 FALSIFYING HIS INABILITY TO RECALL INFORMATION.
13 AND AS A MATTER OF FACT HE WAS ABLE TO SCORE WITHIN
14 A FAIRLY NORMAL RANGE OF MEMORY WHICH INDICATES TO
15 ME THAT HE HAS A FAIRLY GOOD SHORT TERM MEMORY. WE
16 ALSO GAVE HIM WHAT'S CALLED A RAYS-FIFTEEN ITEM
17 TEST (PHONETICALLY SPELLED) WHICH IS A VERY SIMPLE
18 TEST. THE PERSON IS ASKED TO LOOK AT A PIECE OF
19 PAPER THAT HAS SOME NUMBERS AND SYMBOLS AND LETTERS
20 ON IT. THEY MEMORIZE THAT FOR TEN SECONDS, AND
21 THEY REPRODUCE IT. IT HAS FIFTEEN ITEMS. AND HE
22 WAS ABLE TO GET TWELVE OF THOSE CORRECT WHICH
23 INDICATED AGAIN THAT ON FORMAL TESTING MR. SIMMONS
24 DID NOT SHOW EVIDENCE OF TRYING TO MALINGER EITHER
25 MENTAL RETARDATION OR AN INABILITY TO REMEMBER

JEFFREY VIDIC - DIRECT/MR. THEOS

1 THINGS. AND I AM VERY COMFORTABLE WITH STATING MY
2 OPINION TO A REASONABLE DEGREE OF CERTAINTY IS THAT
3 HE DID NOT TRY TO MALINGER MENTAL RETARDATION OR
4 MEMORY DEFICITS.

5 Q. THANK YOU. NOW, WITH RESPECT TO I.Q. SCORES, WOULD
6 YOU STATE TO A REASONABLE DEGREE OF SCIENTIFIC
7 CERTAINTY THAT HE WAS ALSO NOT MALINGERING WHEN HE
8 TOOK YOUR I.Q. TEST?

9 A. THERE WAS NO EVIDENCE THAT HE WAS MALINGERING WHEN
10 HE TOOK THE I.Q. TEST. I TAKE HIS SCORES THAT HE
11 GOT ON THE WAIS-III, ESPECIALLY WHEN I COMPARE THEM
12 TO THE OTHER I.Q. TESTS THAT HE'S BEEN GIVEN TO BE
13 VALID REPRESENTATION THAT HE FUNCTIONS IN THE HIGH
14 SIXTIES TO LOW SEVENTIES.

15 Q. WHAT WAS THE SCORE OF THAT TEST ON THE WAIS-III?

16 A. LET ME REFRESH MY MEMORY. (WITNESS REVIEWS
17 DOCUMENT.) ON THE WAIS-III WHICH WAS GIVEN TO HIM
18 AT OUR FACILITY, THAT IS THE MOST UP-TO-DATE
19 VERSION OF THE ADULT INTELLIGENCE SCALE. HE HAD A
20 VERBAL I.Q. OF 65; A PERFORMANCE I.Q. OF 74, AND A
21 FULL SCALE OF 66.

22 Q. WHAT IS THE SIGNIFICANCE OF THE THREE DIFFERENT
23 SCORES? WHAT DOES FULL SCALE MEAN? IS THAT AN
24 AVERAGE OF THE TWO?

25 A. YES, SIR. WHAT IT IS IS -- INTELLIGENCE SCALES

JEFFREY VIDIC - DIRECT/MR. THEOS

1 LOOK AT TWO THINGS. BASICALLY THE VERBAL SCALES
2 LOOK AT LEARNED INFORMATION THAT PEOPLE ACQUIRE
3 WHEN THEY GO TO SCHOOL; THINGS SUCH AS INFORMATION,
4 WHAT ARE THE COLORS OF THE AMERICAN FLAG. THEY
5 LOOK AT VERBAL ABSTRACTION SCALES; HOW ARE AN
6 ORANGE AND AN APPLE ALIKE, SOME BASIC MATH
7 PROBLEMS, THINGS OF THAT NATURE. PERFORMANCE ITEMS
8 ON THE OTHER HAND LOOK AT A PERSON'S ABILITY TO BE
9 GIVEN A BRAND NEW UNIQUE SITUATION. IT KIND OF
10 LOOKS AT YOUR COMMON SENSE PROBLEM SOLVING SKILLS;
11 HERE'S SOME DIFFERENT COLORED BLOCKS, HERE'S A
12 PICTURE; PUT THESE BLOCKS TOGETHER TO LOOK LIKE
13 THIS. GIVE THEM A SERIES OF PICTURES OF PEOPLE
14 DOING THINGS OR AN ACTION TAKING PLACE. CAN YOU
15 PUT THESE CARDS IN THE ORDER SO THAT THEY MAKE
16 SENSE AND TELL A LITTLE STORY. ANOTHER ONE LOOKS
17 AT THE ABILITY TO LOOK AT MATRIXES -- IT'S CALLED
18 MATRIX REASONING, DIFFERENT DESIGNS, DIFFERENT
19 COLORS. IT CHANGES FROM PICTURE; NOW WHAT WOULD
20 THE NEXT LOGICAL SEQUENCE. THEN YOU COMBINE THOSE
21 INTO A PERSON'S, WHAT'S CALLED FULL-SCALE I.Q. SO
22 YOU LOOK AT SORT OF -- VERBAL REALLY LOOKS AT
23 ACHIEVEMENT. HOW WELL YOU DID IN SCHOOL CAN REALLY
24 AFFECT THAT. PERFORMANCE REALLY IS A BETTER
25 INDICATOR OF IT. IF I GIVE THIS PERSON A NEW

1 UNIQUE PROBLEM, HOW WELL CAN THEY SOLVE IT.

2 Q. WHAT IS THE SIGNIFICANCE OF HIS FINAL SCORE, THE
3 FINAL FULL SCALE SCORE?

4 A. HIS FULL SCALE SCORE FALLS IN WHAT'S CALLED THE
5 INTELLECTUALLY DEFICIENT RANGE. IT'S DOWN AROUND
6 THE LOWER TWO PERCENT OF THE POPULATION IF YOU LOOK
7 AT A NORMAL CURVE.

8 Q. WE'VE HEARD THE TERM MENTAL RETARDATION THROWN
9 ABOUT. HOW DOES CORRELATE WITH MENTAL RETARDATION,
10 IF IT DOES?

11 A. THAT WOULD BE ONE OF THE THREE SCORES THAT A PERSON
12 WOULD HAVE TO -- THAT WOULD BE ONE OF THE THREE
13 DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION THAT YOU
14 WOULD HAVE A SCORE IN THAT INTELLECTUALLY DEFICIENT
15 RANGE.

16 MR. THEOS: ONE SECOND, YOUR HONOR.

17 THE COURT: ALL RIGHT, SIR.

18 MR. THEOS: I'VE FINISHED, JUDGE.

19 THE COURT: MR. BAILEY; DO YOU THINK
20 YOUR CROSS IS FIFTEEN OR THIRTY MINUTES?

21 MR. BAILEY: FIFTEEN, JUDGE.

22 THE COURT: IT DOESN'T MATTER. I
23 MEAN, I'LL GIVE YOU FORTY-FIVE IF YOU NEED IT.

24 MR. BAILEY: I DO HAVE A BRIEF
25 MATTER OF LAW I'D LIKE TO TAKE UP BEFORE I

JEFFREY VIDIC - DIRECT/MR. THEOS

1 CROSS-EXAMINE.

2 THE COURT: WELL, THAT ANSWERS MY
3 QUESTION. LET ME SEE IF MR. THEOS IS CONCLUDED.

4 MR. THEOS: I'VE FINISHED, YOUR
5 HONOR.

6 THE COURT: ALL RIGHT. MADAM
7 FORELADY, AND LADIES AND GENTLEMEN. I'M GOING TO
8 EXCUSE YOU AT THIS TIME TO GO TO YOUR ROOM. IT
9 WILL PROBABLY BE ABOUT FIFTEEN MINUTES. SO RELAX.
10 (AT THIS TIME JURY RETIRES TO JURY ROOM FOR BRIEF
11 RECESS.)

12 THE COURT: YES, SIR, MR. BAILEY?

13 MR. BAILEY: YOUR HONOR, THE BLAIR
14 HEARING, THERE WAS SOME -- OF COURSE THE JURY
15 WASN'T PRESENT; WASN'T EVEN FORMED AT THAT TIME.
16 AND THE BLAIR HEARING, WHEN DR. VIDIC WAS
17 TESTIFYING, HE GAVE SOME TESTIMONY TO THE EFFECT
18 THAT MONICA SKAGGS WHO WAS AN INTERN, I BELIEVE, AT
19 THE HALL INSTITUTE, WORKING UNDER DR. VIDIC'S
20 AUSPICES, WENT TO THE WARD AND ATTEMPTED TO TEST
21 MR. SIMMONS. AND AT THAT TIME HE TOLD HER HE DID
22 NOT WISH TO DO ANY PSYCHOLOGICAL TESTING; THAT HE
23 WAS INVOKING HIS RIGHT NOT TO ANSWER ANY QUESTIONS
24 UNTIL HE COULD SPEAK WITH YOU FIRST.

25 THE COURT: UNTIL HE CONFERRED WITH

JEFFREY VIDIC - DIRECT/MR. THEOS

1 AN ATTORNEY. THAT'S THE LANGUAGE I WROTE DOWN.

2 MR. BAILEY: UNTIL HE COULD SPEAK
3 WITH YOU REFERRING TO MR. THEOS. YOUR HONOR, OF
4 COURSE THAT IS A GRAPHIC EXAMPLE OF MR. SIMMONS,
5 NOT ONLY UNDERSTANDING HIS MIRANDA RIGHTS BUT
6 ACTUALLY EXERCISING THOSE MIRANDA RIGHTS DURING A
7 CRUCIAL PERIOD OF TIME.

8 THE COURT: YES, SIR.

9 MR. BAILEY: I DON'T THINK THIS IS
10 DOYLE VS. OHIO (PHONETICALLY SPELLED) BECAUSE THE
11 DOOR HAS BEEN OPENED TO WHETHER OR NOT HE COULD
12 COMPREHEND MIRANDA RIGHTS. AND THIS IS DIRECTLY ON
13 POINT THERE. AND OF COURSE DOYLE WOULD APPLY IF
14 SOMEBODY REMAINED SILENT OR IF WE HAVE THIS
15 STATEMENT IN EVIDENCE. BUT I JUST WANTED TO -- I
16 INTEND TO ASK HIM THAT QUESTION. AND I ASSUME MR.
17 THEOS MAY OBJECT TO IT. AND I'D LIKE YOUR HONOR TO
18 CONSIDER RULING ON IT OUT OF THE PRESENCE OF THE
19 JURY.

20 THE COURT: THANK YOU FOR YOUR
21 COURTESY IN BRINGING IT TO THE ATTENTION OF THE
22 COURT. ALL RIGHT. YOU'VE HEARD WHAT HIS INTENDED
23 PROFFER AND OFFER WILL BE, MR. THEOS.

24 MR. THEOS: YES, SIR.

25 THE COURT: ANY OBJECTION?

JEFFREY VIDIC - DIRECT/MR. THEOS

1 MR. THEOS: YES, SIR, WE WOULD
2 OBJECT.

3 THE COURT: STATE YOUR GROUNDS.

4 MR. THEOS: WE DO THINK THAT IT
5 WOULD DENY MR. SIMMONS HIS FIFTH AMENDMENT RIGHT TO
6 SILENCE AND A RIGHT TO HIS EFFECTIVE REPRESENTATION
7 -- A RIGHT TO HIS EIGHTH AMENDMENT RIGHT TO
8 COUNSEL. YOUR HONOR, HE INVOKED HIS RIGHT NOT TO
9 SPEAK. HE INVOKED HIS RIGHT TO HAVE HIS ATTORNEY
10 PRESENT. AND TO HAVE THAT USED AGAINST HIM WOULD
11 CERTAINLY BE INAPPROPRIATE. WE WOULD ARGUE THAT
12 THE STATE NOT BE ALLOWED TO ELICIT THAT TESTIMONY
13 FROM DR. VIDIC.

14 THE COURT: WERE YOU AT THE STATE
15 HOSPITAL OR THE HALL INSTITUTE DURING THIS
16 EXAMINATION?

17 MR. THEOS: YOUR HONOR, I WAS
18 THERE---

19 THE COURT: ON THE TIME, DATE, AND
20 PLACE IN QUESTION?

21 MR. THEOS: NO, SIR. I WAS NOT
22 THERE DURING THE TIME THAT DR. VIDIC WOULD TESTIFY
23 THIS TOOK PLACE. I WAS PRESENT FOR THE NOVEMBER
24 23RD EXAMINATION. AND THEN I LEFT. THIS WAS
25 NOT---

1 MR. BAILEY: THAT IS NOVEMBER THE
2 23RD, YOUR HONOR, ACCORDING TO THE TRANSCRIPT.

3 MR. THEOS: I WAS GONE, YOUR HONOR.
4 IN FACT DR. VIDIC CALLED ME THAT AFTERNOON WHEN
5 THIS HAPPENED IN CHARLESTON AFTER THE FACT. THEY
6 ATTEMPTED TO EXAMINE MR. SIMMONS FURTHER BY
7 AGREEMENT. WE HAD AGREED TO THIS ADDITIONAL
8 EVALUATION, YOUR HONOR. AND MR. SIMMONS INVOKED
9 THAT RIGHT. I DON'T KNOW THE EXACT TIMING. BUT I
10 KNOW WHEN I GOT BACK FROM MY OFFICE IN CHARLESTON,
11 I BELIEVE I SPOKE WITH DR. VIDIC AT THAT POINT. I
12 THINK DR. VIDIC WOULD CONFIRM THAT, YOUR HONOR.

13 DR. VIDIC: WE BROKE FOR LUNCH; AND
14 THEN I HAD LEFT THE PERSON A NOTE TO PLEASE GO DOWN
15 AND SEE HIM WHEN I GOT BACK FROM LUNCH. AND IT WAS
16 AROUND FIFTEEN OR TWENTY MINUTES AFTER ONE, SHE
17 CAME BACK AND SAID THAT HE HAD REFUSED TO---

18 THE COURT: THAT WAS AN INTERN, MRS.
19 SKAGGS?

20 DR. VIDIC: YES, SIR.

21 THE COURT: WHAT WAS SHE QUESTIONING
22 HIM ABOUT?

23 DR. VIDIC: I HAD ASKED HER, YOUR
24 HONOR -- AS A MATTER OF FACT I HAVE A COPY OF THE
25 NOTE RIGHT HERE. SHE WAS GOING TO GO DO THE

JEFFREY VIDIC - DIRECT/MR. THEOS

1 PSYCHOLOGICAL TESTING.

2 THE COURT: AND SO---

3 DR. VIDIC: HERE YOU ARE, YOUR
4 HONOR.

5 THE COURT: EXCUSE ME. I'D RATHER
6 YOU SHOW IT TO THEM.

7 DR. VIDIC: THAT'S THE NOTE THAT I
8 LEFT FOR HER INSTRUCTING HER WHAT TO DO.

9 THE COURT: SO, GENTLEMAN, THE
10 REQUEST -- AND IT WAS ABOUT TO TAKE PLACE -- DID
11 NOT PERTAIN TO THE ALLEGED DEFENSES FOR WHICH HE
12 WAS CHARGED; CORRECT?

13 MR. BAILEY: THAT'S CORRECT, YOUR
14 HONOR.

15 THE COURT: I CAN'T HEAR YOU, MR.
16 THEOS. THE PSYCHOLOGICAL TESTING?

17 MR. THEOS: I'M SORRY, YOUR HONOR.
18 I DIDN'T FOLLOW THAT QUESTION.

19 THE COURT: WELL, MY QUESTION WAS
20 THE NATURE OF THE TEST, THE PSYCHOLOGICAL TEST,
21 THAT WAS TO BE GIVEN TO MR. SIMMONS, KENNETH
22 SIMMONS -- ON NOVEMBER THE 23RD YOU SAID, DR.
23 VIDIC?

24 DR. VIDIC: YES, SIR.

25 THE COURT: DID NOT PERTAIN TO ANY

1 OF THE ALLEGED FACTS OF THE CHARGES FOR WHICH HE IS
2 BEING TRIED FOR, ANY CRIMINAL OFFENSE. HE WASN'T
3 GOING TO BE QUESTIONED BY MRS. SKAGGS ABOUT ANY
4 ISSUE OF THE CHARGES, OR HISTORY OF THE CHARGES?

5 MR. THEOS: THAT'S CORRECT, YOUR
6 HONOR, BASED ON WHAT DR. VIDIC HAD SAID.

7 THE COURT: WELL YOU'VE SEEN HIS
8 NOTE, MR. THEOS; AND YOU'VE HEARD WHAT HE SAID. I
9 MEAN, WHAT ELSE DO YOU WANT; A TABLET OF STONE? I
10 MEAN, THERE IT IS.

11 MR. THEOS: THAT'S WHAT I---

12 THE COURT: I MEAN, EITHER IT IS OR
13 IT ISN'T; AND LOOK AT IT IF YOU DON'T BELIEVE IT
14 IS.

15 MR. THEOS: THAT'S FINE.

16 THE COURT: ALL RIGHT. GO AHEAD,
17 GENTLEMEN.

18 MR. BAILEY: YOUR HONOR, OF COURSE
19 MR. THEOS' FIRST WITNESS GOT UP HERE AND TOLD THIS
20 JURY THAT MR. SIMMONS DIDN'T UNDERSTAND THE MEANING
21 OF THE WORD "RIGHT." THAT IF I SAID YOU'VE GOT A
22 RIGHT NOT TO SAY ANYTHING, HE WOULD NOT UNDERSTAND
23 WHAT THE WORD "RIGHT" MEANT. BUT YET HE TELLS MRS.
24 SKAGGS, ACCORDING TO THE TRANSCRIPT; AT THAT TIME
25 HE TOLD HER THAT HE DID NOT WISH TO DO ANY

JEFFREY VIDIC - DIRECT/MR. THEOS

1 PSYCHOLOGICAL TESTING; THAT HE WAS INVOKING HIS
2 RIGHT TO NOT ANSWER. THAT'S A DIRECT CONTRAVENTION
3 OF WHAT THIS FIRST GUY HAS REPRESENTED TO THIS
4 JURY. AND I THINK TO ALLOW IT TO STAND LIKE THAT
5 WHEN HE HAS ACTUALLY DEMONSTRATED HE UNDERSTANDS
6 THE MEANING OF A RIGHT THAT HE WOULD PERPETRATE A
7 FRAUD ON THE COURT, YOUR HONOR.

8 THE COURT: ALL RIGHT. ANYTHING
9 FURTHER, MR. THEOS?

10 MR. THEOS: YES, SIR, YOUR HONOR.
11 MR. SIMMONS DID NOT MAKE ANY STATEMENT TO DR.
12 VIDIC. IT WOULD THEREFORE BE HEARSAY REGARDLESS OF
13 WHAT MR. SIMMONS MAY HAVE SAID TO SOMEBODY ELSE
14 THAT IS UNRELATED TO THE CHARGES. MRS. SKAGGS
15 WOULD HAVE TO COME IN HERE AND TESTIFY, YOUR HONOR,
16 NOT DR. VIDIC SINCE HE DIDN'T HEAR ANYTHING. I
17 HAVE NO WAY OF CROSS-EXAMINING DR. VIDIC ON WHAT
18 MR. SIMMONS PURPORTEDLY SAID.

19 MR. BAILEY: YOUR HONOR, ALL OF THIS
20 MATERIAL IN THE FILE IS STUFF THAT THESE EXPERTS
21 ARE USING TO FORM THE BASIS OF THEIR OPINION. AND
22 WE'VE GONE -- BOTH SIDES HAVE GONE THROUGH THE FILE
23 AND ASKED ABOUT MR. TORRES AND THE NURSE AND
24 EVERYBODY ELSE. AND I THINK WE'RE DEALING WITH THE
25 EXERTS. AND THEY'RE ENTITLED TO BE ASKED ABOUT THE

JEFFREY VIDIC - DIRECT/MR. THEOS

1 THINGS THEY BASE THEIR EXPERT OPINION ON UNDER THE
2 RULES BASICALLY. BEAR WITH ME A SECOND, PLEASE,
3 YOUR HONOR.

4 THE COURT: 703.

5 MR. BAILEY: 703? IF IT'S A TYPE
6 REASONABLY RELIED BY EXPERTS IN A PARTICULAR FIELD
7 WOULD FORM OPINIONS OR INFERENCES UPON THE SUBJECT
8 AND IN FACT MAY NOT BE ADMISSIBLE IN EVIDENCE.

9 THE COURT: ANYTHING FURTHER FROM
10 THE STATE?

11 MR. BAILEY: NO, SIR, YOUR HONOR.

12 THE COURT: ANYTHING FURTHER FROM
13 THE DEFENSE?

14 MR. THEOS: NOTHING, YOUR HONOR.

15 THE COURT: ALL RIGHT, GENTLEMEN. I
16 RULE THAT IT IS ADMISSIBLE BASED UNDER, NOT ONLY
17 RULE 703 BUT ALSO THAT RULE 403 THAT THE RELEVANCY
18 OF THE EVIDENCE WOULD OUTWEIGH ANY POSSIBLE
19 PREJUDICE THERETO. SO DO Y'ALL WANT TO TAKE ABOUT
20 A TEN MINUTE RECESS, GENTLEMEN? YOU CAN STEP DOWN,
21 DOCTOR.

22 DR. VIDIC: THANK YOU.

23 (BRIEF RECESS.)
24 - - - - -

25 THE COURT: ANYTHING FOR THE

JEFFREY VIDIC - CROSS/MR. BAILEY

1 RECORD?

2 MR. BAILEY: NO, SIR.

3 THE COURT: ALL RIGHT. BRING THE
4 JURY IN.

5 (AT THIS TIME JURY RETURNS TO OPEN COURT.)

6 THE COURT: ALL RIGHT GENTLEMAN,
7 SHALL WE PROCEED AT THIS TIME? I BELIEVE IT WAS
8 CROSS-EXAMINATION. DID YOU WANT ANYTHING FURTHER
9 BEFORE WE PROCEED WITH CROSS?

10 MR. THEOS: NO, SIR.

11 THE COURT: ALL RIGHT. PROCEED,
12 PLEASE.

13 CROSS-EXAMINATION

14 BY MR. BAILEY:

15 Q. DR. VIDIC, ARE YOU EXPERIENCED, OR HAVE YOU HAD
16 EXPERIENCE WITH THE PHENOMENON OF MALINGERING WHEN
17 PEOPLE COME TO YOU AT THE HALL INSTITUTE?

18 A. YES, SIR, I HAVE.

19 Q. HAVE YOU HAD ANY OTHER EXPERIENCE WITH MALINGERING?

20 A. YES, SIR, I HAVE.

21 Q. IS THAT SOMETHING THAT SOMEBODY IN YOUR FIELD HAS
22 TO CONTEND WITH?

23 A. ANY TIME THAT YOU'RE DEALING WITH POSSIBLE
24 SECONDARY GAIN, IS WHAT WE CALL IT. BEING
25 SOMETHING LIKE AVOIDING RESPONSIBILITY, AVOIDING

1 CRIMINAL PROSECUTION; YOU CERTAINLY SEE THIS A LOT
2 IN PERSONAL INJURY CASES. YOU CERTAINLY SEE IT A
3 LOT IN PEOPLE THAT ARE APPLYING FOR DISABILITY
4 BENEFITS. AND, SO, IF THERE'S A SECONDARY GAIN,
5 THEN IT'S ONE OF THE THINGS THAT MAKES YOU THINK
6 ABOUT POSSIBLE MALINGERING.

7 Q. ALL RIGHT, SIR. AND IN YOUR OPINION IS THERE ANY
8 POSSIBLE SECONDARY GAIN FOR MR. SIMMONS TO MALINGER
9 MENTAL RETARDATION OR THE DEGREE OF INTELLIGENCE
10 HE HAS?

11 A. I DON'T THINK THAT THERE'S A REASON FOR HIM TO
12 MALINGER THAT SPECIFICALLY.

13 Q. ALL RIGHT, SIR. AND WHAT TRAINING OR EXPERIENCE
14 HAVE YOU HAD IN MALINGERING?

15 A. I, OF COURSE, HAVE DONE A LOT OF WORK HERE AT THE
16 HALL INSTITUTE DURING COMPETENCY AND CRIMINAL
17 RESPONSIBILITY EVALUATIONS. I'VE DONE
18 APPROXIMATELY 500 TO 600 OF THEM. I'VE ALSO WORKED
19 AT PATTON STATE HOSPITAL IN CALIFORNIA FOR EIGHTEEN
20 MONTHS BACK IN THE LATE 1980S. THAT WAS ON A
21 COMPETENCY TO STAND TRIAL, A COMPETENCY RESTORATION
22 UNIT WHERE PEOPLE HAD BEEN FOUND INCOMPETENT TO
23 STAND TRIAL, AND WE HAD TO DO THERAPY AND TRAINING
24 WITH THEM AND EDUCATION WITH THEM TO TRY TO RESTORE
25 THEM TO COMPETENCY. AND WE OFTEN HAD TO DO TESTING

JEFFREY VIDIC - CROSS/MR. BAILEY

1 AND DO OBSERVATIONS AND RULE OUT QUESTIONS OF
2 MALINGERING. IN ADDITION I SERVE AS AN EXPERT
3 WITNESS, AS A MEDICAL EXPERT FOR THE SOCIAL
4 SECURITY ADMINISTRATION. I TESTIFY IN FRONT OF
5 ADMINISTRATIVE LAW JUDGES WHEN PEOPLE ARE APPEALING
6 DENIALS OF THEIR SOCIAL SECURITY CASES. AND MANY
7 TIMES I'M ASKED BY THOSE ADMINISTRATIVE LAW JUDGES
8 TO COME IN TO REVIEW THE TESTIMONY OR TO LISTEN TO
9 TESTIMONY FROM THE CLAIMANT AND ALSO REVIEW ALL OF
10 THEIR RECORDS REGARDING THEIR PSYCHOLOGICAL
11 IMPAIRMENTS AND THEN OFFER AN EXPERT OPINION TO THE
12 JUDGE AS TO WHETHER OR NOT I THINK THAT PERSON
13 ACTUALLY HAS A MENTAL ILLNESS OR WHETHER THEY'RE
14 MALINGERING, OR BOTH. PEOPLE CAN HAVE MENTAL
15 ILLNESS AND MALINGER AT THE SAME TIME AND MAKE IT
16 TRY TO SEEM WORSE THAN IT REALLY IS. SO IT'S NOT
17 REALLY AN EITHER/OR QUESTION.

18 Q. AND TO MAKE CAN SURE WE'VE GOT THESE DATES RIGHT,
19 THE DATE THAT PURSUANT TO THE COURT ORDER MR.
20 SIMMONS WAS BROUGHT TO THE HALL INSTITUTE
21 INITIALLY; WHEN WAS THAT?

22 A. THE INITIAL EVALUATION THAT WE DID WAS ON NOVEMBER
23 THE 23RD.

24 Q. ALL RIGHT, SIR. WAS THAT THE OCCASION ON THAT DATE
25 WHEN DR. BEHRMANN ATTEMPTED TO ADVISE MR. SIMMONS

1 OF HIS MIRANDA RIGHTS?

2 A. THAT'S CORRECT. WE ASKED MR. SIMMONS -- DR.
3 BEHRMANN ASKED MR. SIMMONS IF HE COULD READ. MR.
4 SIMMONS SAID NO. AND DR. BEHRMANN THEN READ EACH
5 ONE OF HIS MIRANDA RIGHTS AND ASKED MR. SIMMONS TO
6 EXPLAIN EACH RIGHT IN HIS OWN WORDS.

7 Q. ALL RIGHT, SIR. AND YOU TESTIFIED PREVIOUSLY THAT
8 MR. SIMMONS INDICATED IN SOME MANNER THAT HE
9 COULDN'T UNDERSTAND HIS MIRANDA RIGHTS; IS THAT
10 CORRECT?

11 A. THAT'S CORRECT.

12 Q. ALL RIGHT, SIR. AND IN THAT INITIAL PRESENTATION,
13 IS THERE ANY WAY FOR YOU TO KNOW WHETHER OR NOT HE
14 REALLY CAN'T UNDERSTAND OR WHETHER HE'S
15 MALINGERING?

16 A. NO, SIR, THERE'S NOT.

17 Q. ALL RIGHT, SIR. SO WHAT DID Y'ALL DECIDE TO DO AT
18 THAT POINT?

19 A. WHAT WE DECIDED TO DO AT THAT POINT WAS TO
20 ADMINISTER SOME ADDITIONAL PSYCHOLOGICAL TESTING.

21 Q. ALL RIGHT, SIR. AND WOULD YOU STATE WHETHER OR NOT
22 THERE'S AN INTERN THAT WAS EMPLOYED AT THAT TIME
23 THAT ASSISTED YOU IN THE TESTING ENDEAVOR?

24 A. YES, SIR.

25 Q. WHAT WAS HER NAME?

JEFFREY VIDIC - CROSS/MR. BAILEY

1 A. HER NAME IS MONICA SKAGGS.

2 Q. ALL RIGHT. AND WOULD YOU STATE WHETHER OR NOT YOU
3 GAVE MRS. SKAGGS ANY INSTRUCTIONS IN REGARD TO
4 TESTING?

5 A. YES, SIR. WHEN WE GOT DONE WITH OUR EVALUATION, IT
6 WAS RIGHT AROUND LUNCHTIME. IT WAS ACTUALLY INTO
7 THE LUNCH HOUR. I LEFT A HANDWRITTEN NOTE FOR MRS.
8 SKAGGS DATED 11/23/98. I ASKED HER TO PLEASE GO
9 DOWN TO WARD 174 AND GIVE SOME PSYCHOLOGICAL TESTS
10 TO MR. SIMMONS.

11 Q. THOSE ARE THE TESTS YOU PREVIOUSLY TESTIFIED ABOUT?

12 A. ACTUALLY AT THAT TIME I ASKED HER TO DO SOME TESTS
13 TWO OF WHICH SHE ENDED UP GIVING, AND TWO OF WHICH
14 SHE ENDED UP NOT GIVING. WE SUBSTITUTED THE WEXLER
15 ADULT INTELLIGENCE SCALE FOR THE MEMORY -- WEXLER
16 MEMORY SCALE -- AND THE STRUCTURED INTERVIEW OF
17 REPORTED SYMPTOMS.

18 Q. ALL RIGHT, SIR. NOW, WHEN YOU GET AN INTERN TO
19 ASSIST YOU IN DOING THESE PSYCHIATRIC TESTS AND
20 THEY REPORT BACK TO YOU ON THEIR EFFORTS TO GET
21 THAT PERSON TO DO THE TEST, IS THE INFORMATION THEY
22 GIVE YOU THE TYPE OF INFORMATION THAT YOU RELY UPON
23 AND THAT OTHER PEOPLE IN YOUR FIELD RELY UPON TO
24 FORM OPINIONS OR INFERENCES TO REACH YOUR
25 CONCLUSIONS OR OPINIONS?

JEFFREY VIDIC - CROSS/MR. BAILEY

- 1 A. YES, SIR. WE'RE A TRAINING SITE, AND AS SUCH ONE
2 OF OUR DUTIES AS A TEACHING PSYCHOLOGIST AT THE
3 HALL INSTITUTE IS TO SUPERVISE INTERNS WHEN THEY
4 COME INTO THE PROGRAM. WE WATCH THEM ADMINISTER
5 ALL OF THE PSYCHOLOGICAL TESTS SEVERAL TIMES. WE
6 CLERK THE SCORING. WE MAKE SURE THAT THEY ARE
7 DOING A CORRECT JOB OF READING THE INSTRUCTIONS
8 PROPERLY, GIVING A STANDARDIZED ADMINISTRATION
9 PROPERLY. AND WE ALSO CHECK THE SCORING TO MAKE
10 SURE THAT THEY'RE SCORING IT PROPERLY. AND MRS.
11 SKAGGS DEMONSTRATED AN EXCELLENT ABILITY TO DO THAT
12 WHEN SHE FIRST GOT THERE. SO SHE DOES VERY GOOD
13 WORK.
- 14 Q. NOW, WHEN YOU ASKED MRS. SKAGGS TO GIVE THESE TESTS
15 TO MR. SIMMONS, WAS THAT BEFORE OR AFTER MR.
16 SIMMONS HAD TOLD YOU THAT HE COULD NOT UNDERSTAND
17 THE MIRANDA RIGHTS AND COULD NOT READ MIRANDA
18 RIGHTS?
- 19 A. THAT WAS AFTER.
- 20 Q. THE SAME DAY BUT AFTERWARDS;' IS THAT CORRECT?
- 21 A. YES, SIR.
- 22 Q. ALL RIGHT, SIR. AND WHAT, IF ANYTHING, OCCURRED
23 WHEN MRS. SKAGGS WENT TO TRY TO GIVE THOSE TESTS TO
24 MR. SIMMONS?
- 25 A. WHEN I RETURNED FROM LUNCH MRS. SKAGGS -- HER

JEFFREY VIDIC - CROSS/MR. BAILEY

1 OFFICE IS RIGHT ACROSS FROM MINE DOWN A HALLWAY.

2 Q. BY THE WAY, IF YOU NEED TO REFER TO YOUR NOTES OR
3 ANYTHING TO SPECIFICALLY RECALL, PLEASE FEEL FREE
4 TO DO SO.

5 A. I RECALL THAT SHE -- I ASKED HER "DID YOU GO SEE
6 MR. SIMMONS?" AND SHE SAID YES. AND I SAID, "AND
7 WHY ARE YOU NOT DOWN THERE TESTING HIM?" AND SHE
8 SAID, "HE TOLD ME THAT HE DIDN'T HAVE TO ANSWER ANY
9 QUESTIONS, THAT HE WANTED TO TALK TO MR. THEOS
10 FIRST; THAT HE HAD A RIGHT TO TALK TO MR. THEOS
11 BEFORE HE ANSWERED ANY QUESTIONS."

12 Q. OKAY. AND TO THE BEST OF YOUR RECOLLECTION, MRS.
13 SKAGGS ADVISED YOU THAT MR. SIMMONS TOLD YOU THAT
14 HE HAD THE RIGHT NOT TO ANSWER ANY QUESTIONS?

15 A. YES, SIR. TO THE BEST OF MY RECOLLECTION, HE TOLD
16 HER "I HAVE THE RIGHT; I DON'T HAVE TO ANSWER NO
17 QUESTIONS UNTIL I TALK TO MR. THEOS."

18 Q. ALL RIGHT, SIR. AND THE WORD "RIGHT" WAS REPORTED
19 TO YOU AS BEING UTTERED BY MR. SIMMONS AND NOT MRS.
20 SKAGGS?

21 A. YES, SIR.

22 Q. SHE REPORTED THAT TO YOU?

23 A. SHE REPORTED THAT TO ME.

24 Q. ALL RIGHT. DR. VIDIC, MR. THEOS HAD ASKED YOU SOME
25 QUESTIONS, AND YOU WERE RESPONDING TO SOME TESTS

JEFFREY VIDIC - CROSS/MR. BAILEY

1 THAT YOU GAVE HIM, I.Q. TESTS AND SO FORTH. AND
2 YOU TESTIFIED THAT BASED ON THOSE SPECIFICS TESTS
3 YOU GAVE HIM, YOU DID NOT FEEL LIKE MR. SIMMONS WAS
4 MALINGERING ON THOSE TESTS; IS THAT CORRECT?

5 A. THAT'S CORRECT.

6 Q. HOW DID THOSE TESTS RESULTS COMPARE WITH HIS
7 PRESENTATION AND HIS REPRESENTATION TO YOU IN
8 REGARD TO WHETHER OR NOT HE COULD COMPREHEND
9 MIRANDA RIGHTS?

10 A. I WOULD SAY BASED ON THE RESULTS OF THE
11 PSYCHOLOGICAL TESTING THAT WE GAVE HIM AND THE
12 PSYCHOLOGICAL TESTING THAT OTHER PSYCHOLOGISTS HAVE
13 GIVEN HIM, HIS INABILITY TO UNDERSTAND HIS MIRANDA
14 RIGHTS IS VERY INCONSISTENT WITH THE RESULTS OF
15 THAT TESTING.

16 Q. ALL RIGHT, SIR. AND DO YOU HAVE AN OPINION TO A
17 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
18 WHETHER SOMEBODY, ASSUMING THAT THE I.Q. TEST THAT
19 YOU GAVE HIM WHICH AGAIN, WHAT WAS THE FULL SCALE
20 I.Q.?

21 A. FULL SCALE I.Q. ON THE WAIS-III WAS A 66.

22 Q. A 66? DO YOU HAVE AN OPINION TO A REASONABLE
23 DEGREE OF SCIENTIFIC CERTAINTY AS TO WHAT SOMEBODY
24 WITH AN I.Q. AT THAT LEVEL WOULD HAVE THE ABILITY
25 TO COMPREHEND SUCH THINGS AS MIRANDA RIGHTS?

JEFFREY VIDIC - CROSS/MR. BAILEY

1 A. MY OPINION, BASED ON THE AGAIN FIVE OR SIX HUNDRED
2 EVALUATIONS THAT I'VE DONE AND THE NUMBER OF PEOPLE
3 THAT I HAVE SEEN WITH I.Q.S IN THAT RANGE, THAT IT
4 IS MOST OFTEN THE CASE THAT A PERSON CAN UNDERSTAND
5 THEIR RIGHTS, AND ESPECIALLY CAN UNDERSTAND THEM
6 WHEN YOU DO SOME VERY BRIEF EDUCATION. IF YOU TELL
7 THEM THE RIGHT TO REMAIN SILENT MEANS THAT YOU CAN
8 BE QUIET, YOU DON'T HAVE TO ANSWER. IT'S THE RARE
9 PERSON WITH AN I.Q. OF 66 WHO CAN'T GRASP THAT AND
10 THEN EXPLAIN IT THAT WAY TO ME.

11 Q. OKAY. AND IN YOUR CONTACT WITH MR. SIMMONS, DID
12 YOU BECOME AWARE OF HIS ABILITY TO UNDERSTAND
13 THINGS WHICH WERE MORE COMPLICATED THAN MIRANDA
14 RIGHTS?

15 A. YES.

16 Q. ALL RIGHT. COULD YOU GIVE US AN EXAMPLE OF THAT?

17 A. HE'S ABLE TO DEFINE THE WORD COMPASSION ON THE I.Q.
18 TEST AS FEELING SORRY FOR SOMEONE ELSE. THAT'S A
19 PRETTY HIGH LEVEL ABSTRACT THAT YOU'RE ABLE TO FEEL
20 EMOTIONS FOR ANOTHER PERSON. THAT'S A PRETTY
21 ABSTRACT LEVEL OF THINKING. AGAIN HIS -- MANY OF
22 HIS RESPONSES TO THE I.Q. TEST QUESTIONS INDICATE
23 THAT HE'S ABLE TO UNDERSTAND WORDS AT LEAST AT A
24 JUNIOR HIGH LEVEL IF NOT HIGHER. AND ALSO I
25 LISTENED TO THE TAPES. I LISTENED TO THE

JEFFREY VIDIC - CROSS/MR. BAILEY

1 RECORDINGS AND READ THE TRANSCRIPTS OF HIS TWO
2 CONFESSIONS. AND MY OPINION IS THAT BASED ON THE
3 WAY HE WAS ABLE TO CONVERSE AND THE WORDS THAT HE
4 WAS USING, THAT THAT WOULD AGAIN BE EXTREMELY
5 INCONSISTENT WITH A PERSON WHO IS NOT ABLE TO
6 UNDERSTAND WHAT "YOU HAVE THE RIGHT TO REMAIN
7 SILENT" MEANS.

8 Q. ALL RIGHT, SIR. SO IT'S YOUR OPINION TO A
9 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY THAT ON
10 DECEMBER THE FIFTH AND DECEMBER THE NINTH, BASED ON
11 EVERYTHING THAT YOU'VE LEARNED IN THIS CASE
12 INCLUDING LISTENING TO THE ACTUAL TAPED INTERVIEW,
13 THAT HE HAD THE ABILITY TO UNDERSTAND AND
14 COMPREHEND HIS MIRANDA RIGHTS ON THOSE TWO DAYS?

15 A. MY OPINION TO A REASONABLE DEGREE OF CERTAINTY --
16 AND AGAIN, NOT HAVING BEEN THERE -- BUT ABSENT ANY
17 EVIDENCE THAT HE HAS A MENTAL DISORDER OR DEFECT
18 THAT WOULD RULE THAT OUT, I WOULD HAVE TO SAY THAT
19 MY OPINION WOULD BE HE COULD HAVE UNDERSTOOD HIS
20 RIGHTS THAT DAY.

21 Q. ALL RIGHT, SIR. AND DID Y'ALL -- WHEN I SAY Y'ALL,
22 I MEAN THE HALL INSTITUTE -- DID YOU DIAGNOSE ANY
23 TYPE OF MENTAL DISORDER OR CONDITION THAT WOULD
24 HAVE IN ANY WAY IMPAIRED HIS ABILITY TO UNDERSTAND
25 AND COMPREHEND HIS MIRANDA RIGHTS IN DECEMBER OF

JEFFREY VIDIC - RE-DIRECT/MR. THEOS

1 1997?

2 A. NO, SIR, WE DID NOT.

3 MR. BAILEY: YOUR HONOR, I BELIEVE
4 THAT'S ALL I HAVE OF DR. VIDIC.

5 THE COURT: ANYTHING ON RE-DIRECT?

6 MR. THEOS: YES, SIR.

7 RE-DIRECT EXAMINATION

8 BY MR. THEOS:

9 Q. DR. VIDIC, WITH EDUCATION SOMEONE WITH AN I.Q. OF
10 THE UPPER SIXTIES MIGHT BE ABLE TO COMPREHEND THEIR
11 MIRANDA WARNINGS; IS THAT CORRECT -- WITH
12 EDUCATION?

13 A. A LOT OF THEM DON'T NEED IT. SOME DO. BUT
14 EDUCATION BEING VERY BRIEFLY RE-STATING IT IN
15 SIMPLER WORDS.

16 Q. AND IN ORDER TO INSURE THAT THAT PERSON WITH THAT
17 I.Q. IN THAT RANGE DOES IN FACT UNDERSTAND,
18 WOULDN'T IT BE PRUDENT OR APPROPRIATE TO HAVE THAT
19 INDIVIDUAL EXPLAIN TO YOU WHAT THOSE CONCEPTS MEAN?

20 A. THAT'S WHY THAT'S OUR STANDARD OPERATING
21 PROCEDURE. WE DO THAT REGARDLESS OF WHAT WE THINK
22 THE PERSON'S I.Q. IS. WHEN WE READ THEM THEIR
23 RIGHTS, WE ASK THEM TO TELL US IN THEIR OWN WORDS
24 WHAT THEY MEAN.

25 Q. THAT WAS NOT DONE ON DECEMBER THE FIFTH OR DECEMBER

JEFFREY VIDIC - RE-DIRECT/MR. THEOS

1 THE NINTH OF 1997, WAS IT?

2 A. ACCORDING OF THE TRANSCRIPTS THAT I'VE READ, NO.

3 Q. NOW, WITH RESPECT TO MR. SIMMONS' CONVERSATION WITH
4 MRS. SKAGGS ON NOVEMBER THE 23RD, NOVEMBER THE
5 23RD EVALUATION, I AND MR. BELL WERE PRESENT; IS
6 THAT CORRECT?

7 A. THAT'S CORRECT.

8 Q. AND THE NOVEMBER THE 23RD EVALUATION LASTED FOR
9 APPROXIMATELY TWO TO THREE HOURS; IS THAT FAIR TO
10 SAY?

11 A. IT WAS AROUND TWO HOURS. I THINK WE GOT STARTED A
12 LITTLE AFTER TEN O'CLOCK, AND AGAIN WE FINISHED UP
13 OUR DISCUSSIONS AND BROKE FOR LUNCH A LITTLE AFTER
14 TWELVE.

15 Q. AND IN ADDITION TO PERFORMING THE EVALUATION, YOU
16 AND DR. BEHRMANN WERE ATTEMPTING TO EDUCATE MR.
17 SIMMONS RELATED TO ISSUES OF COMPETENCY AND
18 UNDERSTANDING OF HIS MIRANDA WARNINGS; ISN'T THAT
19 CORRECT?

20 A. THAT'S CORRECT.

21 Q. IN FACT YOU AND DOCTOR BEHRMANN EXPLAINED OVER AND
22 OVER AND OVER AGAIN WHAT EACH OF THOSE CONCEPTS
23 MEANT, THE RIGHT TO REMAIN SILENT, THE RIGHT TO
24 HAVE AN ATTORNEY PRESENT, AND SO FORTH; DID YOU
25 NOT?

JEFFREY VIDIC - RE-DIRECT/MR. THEOS

1 A. WE DID.

2 Q. AND MRS. SKAGGS SPOKE WITH MR. SIMMONS WITHIN
3 APPROXIMATELY FIFTEEN MINUTES OF THAT, OF THE
4 CONCLUSION?

5 A. I WOULD THINK IT WOULD BE CLOSER TO ABOUT 45
6 MINUTES. AS I SAY, WE BROKE FOR LUNCH. I WROTE
7 THIS NOTE. WHEN I WALKED OUT THE DOOR AROUND
8 12:15; WHEN I RETURNED FROM LUNCH APPROXIMATELY AN
9 HOUR LATER, MRS. SKAGGS HAD ALREADY BEEN DOWN TO
10 WARD 174. SHE HAD ATTEMPTED TO SEE MR. SIMMONS,
11 AND MR. SIMMONS HAD TOLD HER THAT HE DID NOT WISH
12 TO PARTICIPATE IN THE TESTING OR ANSWER ANY
13 QUESTIONS UNLESS YOU WERE PRESENT.

14 Q. SO WITHIN AN HOUR OF -- A TWO TO THREE HOUR SESSION
15 IN WHICH MR. SIMMONS WAS REPEATEDLY EDUCATED
16 REGARDING HIS RIGHTS WITH HIS ATTORNEYS PRESENT,
17 WITHIN AN HOUR AFTER THAT CONCLUDED, MR. SIMMONS
18 STATED HE DID NOT WANT TO TALK WITH MRS. SKAGGS
19 UNTIL I WAS CONFERRED WITH; IS THAT CORRECT?

20 A. THAT'S CORRECT.

21 Q. NO OTHER QUESTIONS.

22 MR. BAILEY: NOTHING FURTHER, YOUR
23 HONOR.

24 THE COURT: THANK YOU, SIR. STEP
25 DOWN. NEXT WITNESS, PLEASE.

MR. THEOS: DR. SANDLER.

- - - - -

WHEREUPON,

LESLIE N. SANDLER, M.D., WHO AFTER BEING
FIRST DULY SWORN TO TELL THE TRUTH,
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. SANDLER, WHERE ARE YOU EMPLOYED?

A. IN COLUMBIA WITH THE DEPARTMENT OF DISABILITIES AND
SPECIAL NEEDS.

Q. AND CAN YOU TELL US WHAT THAT IS; WHAT SORT OF
AGENCY THAT IS?

A. THAT IS AN AGENCY WHOSE MISSION IS TO ASSIST THOSE
WITH MENTAL RETARDATION, AUTISM, HEAD INJURY, AND
OTHER TYPES OF SPECIAL NEEDS, AND TO PROVIDE CARE
FOR THEM.

Q. I'M SORRY. I DIDN'T HEAR THAT.

A. CARE.

Q. WHAT IS YOUR POSITION AT THE DEPARTMENT OF
DISABILITIES AND SPECIAL NEEDS?

A. STATE LEVEL PSYCHOLOGICAL EXAMINER.

Q. CAN YOU BRIEFLY OUTLINE FOR US YOUR EDUCATIONAL
BACKGROUND?

A. MY EDUCATIONAL BACKGROUND INCLUDES A BACHELOR'S,

LESLIE SANDLER - DIRECT/MR. THEOS

1 MASTER'S, AND DOCTORATE AT TEMPLE UNIVERSITY. I
2 COMPLETED A CLINICAL PSYCHOLOGICAL INTERNSHIP AT
3 PHILADELPHIA GENERAL HOSPITAL IN 1970 TO '71. FROM
4 1971 TO '72, I WAS A CLINICAL INSTRUCTOR IN
5 PSYCHIATRY AND PSYCHOLOGICAL CONSULTANT TO THE
6 TEMPLE UNIVERSITY MEDICAL SCHOOL DEPARTMENT OF
7 PSYCHIATRY COMMUNITY MENTAL HEALTH CENTER. FROM
8 '72 TO '76, I WAS THE DIRECTOR OF A PRIVATE
9 METHADONE TREATMENT AND DETOXIFICATION CENTER IN
10 PHILADELPHIA. FROM 1976 TO 1996 I WAS IN FULL-TIME
11 SOLO FORENSIC PRIVATE PRACTICE IN THE PHILADELPHIA
12 AREA. I CAME TO JACKSONVILLE, FLORIDA IN 1996 TO
13 1998 AS CHIEF PSYCHOLOGIST WITH THE DEPARTMENT OF
14 CORRECTIONS FOR THE NORTH FLORIDA RECEPTION CENTER
15 WHERE I WAS HEAD OF INTAKE FOR ALL OF THE INMATES
16 GOING THROUGH THE NORTH FLORIDA CORRECTIONAL
17 SYSTEM, SUPERVISED APPROXIMATELY EIGHT TO TEN
18 PSYCHOLOGISTS, AND THEN HAD THE PRIVILEGE OF BEING
19 OFFERED A POSITION HERE IN SOUTH CAROLINA WHICH I
20 ASSUMED ON MARCH THE 17TH, 1998.

21 Q. DO YOU CONDUCT EVALUATIONS FOR THE DEPARTMENT OF
22 DISABILITIES AND SPECIAL NEEDS?

23 A. YES, SIR.

24 Q. AND THAT IS A STATE AGENCY?

25 A. IT IS, SIR.

LESLIE SANDLER - DIRECT/MR. THEOS

1 Q. AND DO YOU APPEAR IN COURTS THROUGHOUT THE STATE OF
2 SOUTH CAROLINA TO TESTIFY ON BEHALF OF THE STATE
3 PRIMARILY IN CASES RELATED TO THOSE EVALUATIONS?

4 A. I APPEAR ON BEHALF OF THE DEPARTMENT OF
5 DISABILITIES AND SPECIAL NEEDS IN MATTERS WHICH ARE
6 ORDERED BY THE COURTS IN THE VARIOUS AREAS OF THE
7 STATE.

8 Q. AND IS THAT, AS IT TURNS OUT, PRIMARILY ON BEHALF
9 OF THE STATE AND PROSECUTION IN CRIMINAL MATTERS?

10 A. I HAVEN'T KEPT SCORE.

11 MR. THEOS: YOUR HONOR, I WOULD ASK
12 PURSUANT TO RULE 611 TO BE ALLOWED TO LEAD DR.
13 SANDLER IN THAT HE IS ASSOCIATED WITH THE STATE AND
14 SOLICITOR'S OFFICE, MR. BAILEY INCLUDED.

15 THE COURT: ALL RIGHT, SIR.

16 MR. BAILEY: YOUR HONOR, JUST FOR
17 THE RECORD; HE IS ASSOCIATED WITH THE STATE BUT NOT
18 THE SOLICITOR'S OFFICE.

19 THE COURT: YES, SIR.

20 Q. NOW DR. SANDLER, DID YOU EXAMINE KENNETH SIMMONS?

21 A. YES, SIR.

22 Q. CAN YOU TELL ME ON WHAT DATE YOU EXAMINED KENNETH
23 SIMMONS?

24 A. MAY I REFER TO MY NOTES, SIR?

25 Q. CERTAINLY. (WITNESS REVIEWS DOCUMENT.)

LESLIE SANDLER - DIRECT/MR. THEOS

1 A. JANUARY THE 28TH 1999; FEBRUARY THE SECOND, 1999;
2 FEBRUARY THE FOURTH, 1999; FEBRUARY THE NINTH,
3 1999.

4 Q. AND CAN YOU TELL ME APPROXIMATELY HOW LONG EACH OF
5 THOSE EXAMINATIONS LASTED?

6 A. APPROXIMATELY TWO HOURS, SIR.

7 Q. NOW IF WE COULD GO TO THE FIRST EXAMINATION DATE?

8 A. YES, SIR.

9 Q. THAT WOULD BE JANUARY THE 28TH OF '99?

10 A. YES, SIR.

11 Q. CAN YOU TELL ME HOW LONG IT TOOK FOR YOU TO GO
12 THROUGH THE MIRANDA FORMS WITH MR. SIMMONS?

13 A. I DON'T HAVE THAT RECORDED IN MY NOTES, SIR. I
14 THINK IT TOOK PROBABLY ABOUT A HALF HOUR OR FORTY
15 MINUTES.

16 Q. AND THE REASON IT TOOK THAT LONG WAS BECAUSE MR.
17 SIMMONS WAS UNABLE THE ARTICULATE A SUFFICIENT
18 UNDERSTANDING OF THOSE RIGHTS TO YOUR SATISFACTION?

19 A. THAT IS NOT CORRECT, SIR. IT WAS EITHER UNWILLING
20 OR UNABLE.

21 Q. ONE POSSIBILITY IS HE WAS UNWILLING?

22 A. INDEED, SIR.

23 Q. ANOTHER POSSIBILITY IS THAT HE WAS UNABLE?

24 A. INDEED, SIR.

25 Q. DID YOU FORMULATE AN OPINION AT THAT TIME AS TO

1 WHICH OF THOSE POSSIBILITIES WAS MORE LIKELY AT
2 THAT TIME?

3 A. AT THAT TIME I DON'T THINK IT WAS ADDRESSED PER SE
4 AS WE WERE JUST STARTING OUT THE EVALUATION;
5 HOWEVER, IT SEEMED QUITE UNUSUAL AMONGST THE
6 INDIVIDUALS THAT DR. MCABEE AND I HAVE EXAMINED WHO
7 ARE SERIOUSLY AND PROFOUNDLY MENTALLY RETARDED AND
8 INCOMPETENT TO STAND TRIAL THAT IT WOULD TAKE AS
9 LONG AS IT DID.

10 Q. NOW, WAS MR. SIMMONS ASKED TO ATTEMPT TO READ THOSE
11 RIGHTS?

12 A. YES, SIR.

13 Q. OKAY. AND MR. SIMMONS WAS UNABLE TO READ THOSE
14 RIGHTS, CORRECT?

15 A. NOT NECESSARILY, SIR. MR. SIMMONS FUMLED
16 AROUND WITH THEM, AND EITHER WAS UNWILLING OR
17 UNABLE.

18 Q. HE DID NOT READ THOSE RIGHTS AS SOMEBODY WOULD READ
19 A NORMAL DOCUMENT, NORMAL SENTENCE; CORRECT?

20 A. THAT IS CORRECT, SIR.

21 Q. HE HAD DIFFICULTY WITH THOSE WORDS THAT HAD MORE
22 THAN ONE SYLLABLE BUT WAS ABLE TO READ THOSE
23 WORDS THAT WERE SINGLE SYLLABLE WORDS; IS THAT
24 CORRECT?

25 A. GENERALLY CORRECT; I BELIEVE SO, SIR.

1 Q. DID DR. MCABEE ASSIST HIM IN GETTING THROUGH THOSE
2 RIGHTS?

3 A. HE DID INDEED, SIR.

4 Q. AND AT THE CONCLUSION OF THOSE RIGHTS, THAT THIRTY
5 SOMETHING MINUTES THAT IT TOOK TO GET THROUGH THOSE
6 RIGHTS, DID YOU AND DR. MCABEE PROCEED WITH THE
7 EVALUATION?

8 A. WE DID, SIR.

9 Q. AS A RESULT OF THAT EVALUATION, DID YOU FORMULATE
10 AN OPINION YOU CAN STATE TO A REASONABLE DEGREE OF
11 SCIENTIFIC CERTAINTY AS TO WHETHER OR NOT MR.
12 SIMMONS WAS CAPABLE AT THAT TIME ON THAT DAY,
13 JANUARY THE 28TH OF 1999, OF MAKING A KNOWING AND
14 INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS?

15 A. THE DECISION THAT YOU'RE ASKING ME ABOUT REQUIRED
16 NO LESS THAN FOUR SESSIONS OF APPROXIMATELY TWO
17 HOURS EACH. EACH OF THE SESSIONS AND ALL OF THE
18 INFORMATION LED TO THAT DETERMINATION, SIR.

19 Q. OF THE FIRST DAY, HOWEVER, YOU WERE UNABLE TO REACH
20 A CONCLUSION; IS THAT CORRECT?

21 A. I WOULD NOT CHARACTERIZE IT AS UNABLE. I WOULD SAY
22 IT WOULD HAVE BEEN PREMATURE, SIR.

23 Q. NOW ON THAT DATE, OR UP UNTIL THAT DATE, HAD YOU
24 REVIEWED RECORDS PERTAINING TO MR. SIMMONS?

25 A. YES, SIR.

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1 Q. THOSE RECORDS WOULD HAVE INCLUDED SCHOOL RECORDS?

2 A. YES, SIR.

3 Q. MEDICAL RECORDS?

4 A. YES, SIR.

5 Q. HOSPITAL RECORDS?

6 A. YES, SIR. AND TAPES.

7 Q. MENTAL HEALTH RECORDS; LIMITED MENTAL HEALTH
8 RECORDS?

9 A. WELL, ARE YOU TALKING ABOUT THE FIRST TIME, MR.
10 THEOS?

11 Q. YES; ON JANUARY THE 28TH.

12 A. I BELIEVE SO, SIR, BUT I DON'T HAVE A FIRM
13 RECOLLECTION OF EXACTLY WHAT WE HAD AND EXACTLY
14 WHAT WE DIDN'T.

15 Q. AND YOU HAD ALSO REVIEWED THE INFORMATION THAT HAD
16 BEEN PROVIDED BY THE SOLICITOR'S OFFICE TO YOU?

17 A. BY THE SOLICITOR'S OFFICE AND BY YOUR OFFICE, I
18 BELIEVE, SIR.

19 Q. THE POLICE REPORTS?

20 A. YES, SIR.

21 Q. THE STATEMENTS THAT MR. SIMMONS HAD GIVEN, VARIOUS
22 STATEMENTS; CORRECT?

23 A. THAT IS CORRECT, SIR.

24 Q. TAPED RECORDINGS OF THOSE STATEMENTS?

25 A. THAT IS CORRECT, SIR.

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- 1 Q. THE RECORDS FROM THE HALL INSTITUTE, DR. BEHRMANN
2 AND VIDIC, THEIR RECORDS?
- 3 A. I DON'T HONESTLY RECALL WHETHER WE HAD ALL OF THAT
4 THE FIRST TIME; BUT WE CERTAINLY HAVE HAD THAT AS
5 WE WENT THROUGH THE PROCESS, SIR.
- 6 Q. DR. SAYLOR'S I.Q. TEST?
- 7 A. NO. I DON'T THINK WE HAD THAT.
- 8 Q. DR. VIDIC'S I.Q. TEST?
- 9 A. I HONESTLY DON'T RECALL EXACTLY WHEN WE GOT EACH
10 PIECE OF INFORMATION. I CERTAINLY DID SEE THE I.Q.
11 TEST THAT WAS ULTIMATELY DONE BY HALL INSTITUTE AND
12 ALLEGEDLY DONE BY DR. SAYLOR, ALTHOUGH I SAW NO
13 SIGNATURE ON HIS -- NO SIGNATURE TO INDICATE THAT
14 HE DID IT.
- 15 Q. BUT YOU ULTIMATELY REVIEWED THAT TEST RESULT AS
16 WELL; CORRECT?
- 17 A. INDEED I DID, SIR.
- 18 Q. NOW YOU SAW HIM AGAIN THE SECOND TIME ON WHAT DATE?
- 19 A. FEBRUARY THE SECOND, SIR.
- 20 Q. AND DID YOU AGAIN GO THROUGH, YOU AND DR. MCABEE,
21 GO THROUGH THE MIRANDA WARNINGS ON THAT DATE?
- 22 A. YES, SIR.
- 23 Q. AND AGAIN DID IT TAKE APPROXIMATELY THE SAME AMOUNT
24 OF TIME; APPROXIMATELY THIRTY MINUTES?
- 25 A. I'VE NEVER TIMED IT, SIR. I DON'T KNOW. IT MIGHT

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1 HAVE BEEN LESS THAN THAT. I DON'T REMEMBER.

2 Q. WOULD IT BE FAIR TO SAY THAT EACH OF THE FOUR TIMES
3 THAT YOU MET WITH MR. SIMMONS, IT TOOK
4 APPROXIMATELY THE SAME PERIOD OF TIME TO GO THROUGH
5 THOSE MIRANDA WARNINGS?

6 A. NO; IT TOOK LESS TIME, I THINK. AND HE SEEMED TO
7 GET BETTER RESULTS EACH TIME.

8 Q. DID HE EVER VERBALIZE TO YOUR SATISFACTION AND
9 EXPLAIN TO YOUR SATISFACTION AN UNDERSTANDING OF
10 THOSE RIGHTS?

11 A. WELL, WHEN YOU SAY TO MY SATISFACTION, SIR; MY
12 SATISFACTION IS IN AN ORDER FROM THE HONORABLE
13 COURT TO PERFORM A DUSKY EVALUATION, THE MIRANDA
14 RIGHTS -- I'M NOT A LAW ENFORCEMENT OFFICER,
15 OBVIOUSLY, AND I'M NOT ARRESTING HIM. AS FAR AS
16 THE MIRANDA RIGHTS ARE CONCERNED, I'M NOT
17 TREMENDOUSLY INTERESTED IN WHETHER HE CAN
18 UNDERSTAND HIS MIRANDA RIGHTS OR NOT. I'M NOT
19 ASKING HIM TO DO ANYTHING THAT WOULD INCRIMINATE
20 HIM. SO WHETHER HE UNDERSTANDS THEM OR NOT IS NOT
21 THE CENTRAL ISSUE OF MY JOB.

22 Q. DID HE VERBALIZE AN UNDERSTANDING OF THOSE MIRANDA
23 RIGHTS WHEN ASKED TO EXPLAIN THEM?

24 A. MR. SIMMONS' VERBALIZATIONS WERE VAGUE AND APPEARED
25 ARTIFICIALLY INCONCLUSIVE. HE WOULD FREQUENTLY SAY

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1 "WELL, WHATEVER." AND WE WOULD EXPLAIN THINGS TO
2 HIM. DR. MCABEE WAS VERY PATIENT IN EXPLAINING
3 THINGS TO HIM. AND WE THEN CAME TO THE DECISION
4 THAT THIS WAS SOMETHING THAT WAS AN ISSUE THAT WAS
5 NOT THE MAJOR FOCUS OF OUR COURT ORDER AND
6 THEREFORE NOT A PRIMARY IMPORTANCE THAT WE WERE
7 GOING TO ATTEND TO.

8 Q. WERE YOU ABLE AT THE CONCLUSION OF THE SECOND
9 EVALUATION TO MAKE A DETERMINATION AS TO WHETHER OR
10 NOT MR. SIMMONS, TO A REASONABLE DEGREE OF
11 SCIENTIFIC CERTAINTY, WAS CAPABLE OF COMPREHENDING
12 HIS MIRANDA RIGHTS?

13 A. I WOULD RESPOND THE SAME WAY I DID ON YOUR LAST
14 QUESTION, NAMELY THAT THAT WAS NOT A PURPOSE THAT
15 WE WERE THERE FOR. WE WERE THERE TO DETERMINE
16 WHETHER HE WAS COMPETENT TO COOPERATE WITH HIS
17 ATTORNEY AND TO KNOW THE CHARGES THAT HE WAS BEING
18 CHARGED WITH WHICH IS THE DUSKY STANDARD FROM THE
19 DUSKY VS. UNITED STATES STANDARD. THAT WAS OUR
20 JOB. THAT WAS THE COURT ORDER. WE USED THE
21 MIRANDA RIGHTS PRIOR TO THAT TO GET AN IMPRESSION
22 AS TO WHETHER THE INDIVIDUAL THAT WE'RE TALKING TO
23 HAS A GENERAL IDEA OF WHAT'S GOING ON. WHETHER
24 THEY CAN READ, AND WHETHER THEY'RE GOING TO RESPOND
25 IN A REASONABLY CANDID SPONTANEOUS FASHION. IN

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1 THIS CASE WE WEREN'T REALLY CLEAR THAT MR. SIMMONS
2 WAS RESPONDING IN A CANDID AND SPONTANEOUS
3 FASHION. IT DIDN'T REALLY SEEM LIKE IT TO US.
4 AND, THEREFORE, IT WAS NOT A FOCUS OF OUR
5 INVESTIGATION.

6 Q. ISN'T IT TRUE THAT MR. SIMMONS, BOTH IN THE FIRST
7 EVALUATION AND THE SECOND EVALUATION, HAD
8 DIFFICULTY IN COMMUNICATING WITH BOTH YOU AND DR.
9 MCABEE IN A MEANINGFUL FASHION?

10 A. I WOULD NOT CHARACTERIZE THAT AS YOU'RE DOING,
11 SIR. I WOULD CHARACTERIZE THE COMMUNICATION AS
12 UNMOTIVATED. AND THERE WAS CERTAINLY A QUESTION IN
13 MY MIND AS TO WHETHER WE WERE BEING DEALT WITH OR
14 COMMUNICATED WITH IN A CANDID AND SPONTANEOUS WAY
15 AS OPPOSED TO A WAY OF APPEARING LESS INTELLIGENT
16 AND LESS COMMUNICATIVE THAN HE TRULY WAS.

17 Q. SO THIS WOULD HAVE CONTINUED ON YOUR OPINION
18 RELATED TO HIS COMMUNICATIONS WITH YOU. WOULD THAT
19 HAVE CONTINUED ON THROUGH THE THIRD AND THE FOURTH
20 INTERVIEWS AS WELL?

21 A. BASED ON REASONABLE SCIENTIFIC CERTAINTY, THAT WAS
22 MY IMPRESSION; HOWEVER, TOWARDS THE FOURTH SESSION
23 HE SEEMED TO BE MORE SPONTANEOUS. AND BY
24 SPONTANEOUS, I USE THAT TERM THAT WHEN YOU ASK
25 SOMEBODY A QUESTION THEY RESPOND DIRECTLY AS I

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1 HEARD HE DID ON THE TAPES OF HIS ALIBIS AND HIS
2 QUESTIONING. THERE WERE -- THE MODE OF RESPONSE
3 WAS "WHAT DID YOU SAY?" THEN HE DID THIS; "YES,
4 SIR; I DID THAT." THERE WAS A CERTAIN SENSE OF
5 RHYTHM. THERE WAS A CERTAIN SENSE OF
6 ARTICULATENESS BEING ABLE TO RESPOND AS IF THERE
7 WAS SOMEBODY WHO WITHIN REASONABLE NORMAL RESULTS
8 WOULD BE COMMUNICATING. AND WE DIDN'T HAVE THAT
9 FROM MR. SIMMONS WHEN WE WERE ATTEMPTING TO EXAM
10 HIM, SIR.

11 Q. DID MR. SIMMONS EVER INDICATE TO YOU OR TO DR.
12 MCABEE -- DID HE VERBALLY COMMUNICATE TO YOU AND
13 DR. MCABEE THAT HE UNDERSTOOD HIS MIRANDA RIGHTS
14 AFTER YOU REVIEWED THEM WITH HIM ON EACH OF THESE
15 OCCASIONS?

16 A. HE WOULD SAY THINGS LIKE "YES; OKAY; WHATEVER."
17 AND CONSIDERING THE FACT THAT WE HAD A HISTORY THAT
18 WAS TOTALLY DEVOID OF ANY SIGN OF MENTAL
19 RETARDATION, WE THOUGHT THAT THAT WAS A PRETTY
20 CLEAR INDICATION THAT IT WAS GOOD ENOUGH TO GO ON;
21 AND AGAIN, SINCE WE WERE NOT DOING AN EVALUATION
22 FOR ANYTHING OTHER THAN THE DUSKY STANDARD, SIR.

23 Q. DID YOU REACH A CONCLUSION WHEN YOU FINISHED YOUR
24 FOURTH EVALUATION AS TO MR. SIMMONS' MENTAL
25 CAPACITY? AND IF SO, CAN YOU TELL US WHAT THAT

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1 CONCLUSION WAS? AND AGAIN THIS IS TO A REASONABLE
2 DEGREE OF SCIENTIFIC CERTAINTY.

3 MR. BAILEY: OBJECTION, YOUR HONOR;
4 MENTAL CAPACITY TO WHAT? I'M NOT SURE I UNDERSTAND
5 THE QUESTION.

6 THE COURT: REPHRASE THE QUESTION,
7 PLEASE.

8 Q. DID YOU REACH A CONCLUSION THAT YOU CAN STATE TO A
9 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
10 WHETHER OR NOT MR. SIMMONS WAS CAPABLE OF
11 COMPREHENDING HIS MIRANDA WARNINGS AT THE
12 CONCLUSION OF YOUR FOURTH EVALUATION?

13 A. I WILL REPEAT, SIR WITH THE GREATEST RESPECT, THAT
14 IT WAS NOT MY JOB TO EXAMINE HIM FOR COMPLIANCE
15 WITH HIS MIRANDA WARNINGS. IF YOU'RE ASKING ME DID
16 I GET AN I.Q. SCORE AND DID I FEEL THAT THAT WAS
17 RELIABLE AND VALID; THE ANSWER IS YES.

18 Q. TELL ME, DOCTOR; OTHER THAN YOUR TESTS THAT YOU
19 CONDUCTED ON MR. SIMMONS, WHAT OTHER FACTORS DID
20 YOU RELY UPON, OR WHAT OTHER SOURCES DID YOU RELY
21 UPON IN FORMULATING YOUR OPINION?

22 A. HISTORY INDICATING THAT HE WAS A GRADUATE OF
23 SUMMERVILLE HIGH SCHOOL; WON TWO LETTERS IN
24 FOOTBALL FOR A TEAM THAT I'M TOLD IS QUITE
25 PROMINENT; WHILE HE REPEATED THE ELEVENTH GRADE, HE

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1 FAILED ENGLISH ONCE BUT THEN HAD A REMEDIAL COURSE
2 AND GOT AN A IN IT. AS I'VE BEEN TOLD REMEDIAL
3 COURSES ARE NOT INDICATIVE OF MENTAL RETARDATION.
4 AND I BELIEVE, SIR, THAT GIVEN THE HISTORY, GIVEN
5 THE COMPETENCY GROUPS THAT HE ATTENDED AT HALL,
6 GIVEN THE ABSENCE OF PATHOLOGICAL OR SIGNS OF
7 ILLNESS IN A MAGNETIC RESONANCE IMAGING OF HIS
8 BRAIN AND ELECTROENCEPHALOGRAPHIC READING OF HIS
9 BRAIN; GIVEN ALL OF THESE FACTORS, GIVEN THE FACT
10 THAT HE HAD A DRIVER'S LICENSE, DROVE A CAR BY
11 HIMSELF AS HE REPORTED. AND PERHAPS I'M MISSING A
12 COUPLE; BUT THERE WAS A REMARKABLE AMOUNT OF SIGNS
13 THAT WE WERE ABLE TO DETERMINE THAT INDICATED AN
14 ABSENCE OF MENTAL RETARDATION, AN ABSENCE OF
15 ADAPTIVE FUNCTIONING. THE ONSET BEFORE AGE
16 EIGHTEEN WHICH YOU'VE HEARD FROM VARIOUS PEOPLE WHO
17 HAVE -- VARIOUS EXPERTS WHO HAVE BEEN BEFORE ME
18 TODAY -- IS NECESSARY BEFORE EIGHTEEN, HE SEEMED TO
19 HAVE BEEN DOING FINE. THESE THINGS LED ME TO THE
20 DETERMINATION THAT MR. SIMMONS WAS ABLE TO
21 UNDERSTAND AND COMPREHEND HIS ABILITY TO WORK WITH
22 HIS ATTORNEY AND THE CHARGES AGAINST HIM WHICH HE
23 EXPLAINED TO US IN ONE OF OUR TESTS.

24 Q. THERE HAVE BEEN SOME DISCUSSIONS ABOUT MR. SIMMONS'
25 WORK HISTORY. WHEN YOU QUESTIONED MR. SIMMONS

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1 RELATED TO HIS WORK HISTORY, WAS IT NOT CLEAR THAT
2 MR. SIMMONS WAS NOT A CARPENTER BUT WAS A GOPHER,
3 SO TO SPEAK, FOR A CONSTRUCTION OUTFIT PERFORMING
4 MENIAL TASKS ONLY?

5 A. YOU WERE THERE, MR. THEOS. AND I'M SURE YOU'LL
6 RECOLLECT THAT I ASKED MR. SIMMONS WHAT TYPE OF
7 CARPENTRY WORK HE DID SINCE IN FACT THE -- WOULD
8 YOU REPEAT THE QUESTION, SIR? YOU ASKED THE
9 QUESTION ABOUT HIS CARPENTRY. IT OCCURRED TO ME
10 THAT IF INDEED HE WAS BEING A CARPENTER, THERE
11 WOULD BE SOME COMPUTATIONS AND MEASURING AND THINGS
12 OF THAT NATURE THAT HE WOULD BE DOING. SINCE IT
13 SEEMED TO ME THAT THERE WAS A LIKELIHOOD THAT HE
14 WAS ABLE TO DO MORE THAN HE WAS LETTING ON, I ASKED
15 HIM WHO MEASURED THE BOARDS, WHO DID THE
16 MEASUREMENTS, WHO TOLD YOU WHAT TO CUT, AND HOW DID
17 YOU DO THOSE; WHAT TYPE OF RULER DID YOU USE; HOW
18 MANY INCHES WAS IT? AND HE MAINTAINED THAT HE
19 DIDN'T DO ANY OF THAT; HE JUST MOVED ONE THING TO
20 ANOTHER. IF YOU'RE SAYING, MR. THEOS, AS I
21 CONVINCED OF THAT; NO, SIR, I WAS NOT. HE ALSO
22 TALKED ABOUT MASONRY.

23 Q. DID HE NOT STATE WHEN YOU DISCUSSED BRICK MASONRY
24 WHETHER HE ACTED AS A ROLLER?

25 A. INDEED, SIR.

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1 Q. MEANING, AND AS HE EXPLAINED IT, A ROLLER THAT
2 WOULD ROLL THE MORTAR IN A WHEELBARROW OR ROLL THE
3 BRICKS IN A WHEELBARROW TO THE MASON WHO ACTUALLY
4 PERFORMED THE WORK?

5 A. THAT IS TRUE, SIR.

6 Q. NOW, YOU WERE ABOUT TO SAY, OR YOU MAY HAVE SAID,
7 THAT YOU SUSPECTED HE WAS NOT BEING COMPLETELY
8 TRUTHFUL WITH YOU. MY QUESTION TO YOU IS: YOUR
9 CONCLUSIONS RELATED TO WHETHER OR NOT MR. SIMMONS
10 WAS BEING CANDID, OR BASED UPON YOUR ASSUMPTION
11 THAT HE WAS, OR IS, MALINGERING; IS THAT NOT TRUE?

12 A. THAT IS CORRECT, SIR.

13 Q. AND IN FACT ALL OF YOUR CONCLUSIONS RELATED TO MR.
14 SIMMONS AND HIS MENTAL CAPACITY TO COMPREHEND THOSE
15 LEGAL CONCEPTS THAT YOU DID EXAMINE HIM AND
16 EVALUATE HIM HINGED ON YOUR ASSUMPTION THAT HE IS
17 MALINGERING; IS THAT CORRECT?

18 A. THAT IS NOT CORRECT, SIR. AS I'VE EXPLAINED
19 PREVIOUSLY IN A FORMER HEARING IN THIS COURT, ONE
20 DOESN'T MALINGER ALL THE TIME. ONE MALINGERS WHEN
21 YOU HAVE A CHANCE OR WHEN YOU FEEL LIKE YOU CAN GET
22 AWAY WITH IT. AND SO THERE WERE SOME TIMES IN MY
23 OPINION THAT MR. SIMMONS WAS ANSWERING CANDIDLY.
24 THERE WERE OTHER TIMES IN MY OPINION, WITHIN
25 REASONABLE SCIENTIFIC CERTAINTY THAT HE WAS PULLING

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1 OUR LEG.

2 Q. NOW, ONE OF THE OTHER FACTORS THAT YOU CONSIDERED
3 WAS INFORMATION THAT YOU RECEIVED FROM SOME
4 CORRECTIONAL OFFICERS HERE AT THE DORCHESTER COUNTY
5 DETENTION CENTER; IS THAT CORRECT?

6 A. THAT IS CORRECT, SIR. WHENEVER I DO AN EVALUATION,
7 AFTER WORKING IN THE CORRECTIONS FIELD, I ALWAYS
8 INQUIRE OF THE TRANSPORTATION OFFICERS WHETHER THE
9 EVALUATION THAT THEY OFTEN WITNESS IS CONSISTENT
10 WITH WHAT THEY'VE OBSERVED AT THE CORRECTIONAL
11 FACILITY TO TRY AND GET ANOTHER RELIABLE ESTIMATE
12 OF WHETHER I'M SEEING SOMETHING THAT'S ACCURATE OR
13 NOT.

14 Q. AND THAT WAS ONE OF THE FACTORS THAT YOU TOOK INTO
15 CONSIDERATION RELATED TO THE ISSUE OF MALINGERING;
16 CORRECT?

17 A. INCORRECT, SIR. AS I MENTIONED IN OUR PREVIOUS
18 HEARING, THAT WAS NOT A FACTOR THAT I CONSIDERED AS
19 PROMINENT. IT COULD HAVE BEEN A CONTRIBUTING
20 FACTOR.

21 Q. WELL, YOU LISTED IT IN YOUR REPORT OF FEBRUARY TEN,
22 1999?

23 A. AS A FURTHER PERTINENT FEATURE; THAT'S CORRECT,
24 SIR. BUT IT WAS NOT ONE OF THE FACTORS THAT I MADE
25 MY DECISION BASED ON. IT WAS MERELY COLLATERAL

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1 INFORMATION FROM TRUSTED INFORMANTS WHO ARE SWORN
2 TO WORK FOR THE STATE AND TELL THE TRUTH AND WHOSE
3 TRUTH I BELIEVED.

4 Q. AND AT THE TIME THAT YOU PREPARED THE REPORT AND
5 CITED THE VARIOUS INFORMATION THAT YOU HAD RECEIVED
6 FROM THESE CORRECTIONAL OFFICERS, YOU WERE UNDER
7 THE IMPRESSION THAT MR. SIMMONS HAD BEEN SEEN
8 ACTUALLY READING MAGAZINES; CORRECT?

9 A. THAT IS CORRECT, SIR.

10 Q. AND YOU WERE UNDER THE IMPRESSION THAT MR.
11 SIMMONS HAD BEEN SEEN PLAYING CHESS; IS THAT
12 CORRECT?

13 A. THAT IS CORRECT. IT WAS LATER STATED THAT THE
14 CORRECTIONAL OFFICER SAW HIM PLAYING CHECKERS, AND
15 IT WASN'T CHESS. AND, SO, I STAND CORRECTED ON
16 THAT POINT.

17 Q. AND IN FACT, YOU NOTED IN YOUR REPORT THAT MR.
18 SIMMONS WAS A SKILLED CHESS PLAYER AT THAT?

19 A. ONLY AS INFORMATION BASED ON HEARSAY FROM THE
20 GENTLEMAN WHO TOLD IT TO ME. I DID NOT BASE MY
21 OPINION ON THAT FACTOR, SIR.

22 Q. I UNDERSTAND. BUT YOU LATER LEARNED THAT IT WAS
23 CHECKERS?

24 A. INDEED SO, SIR.

25 Q. AND ADDITIONALLY YOU CITED IN YOUR REPORT THAT MR.

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1 SIMMONS WAS LEADING A BIBLE DISCUSSION GROUP. AND
2 SINCE THEN YOU'VE FOUND OUT THAT HE WAS SITTING IN
3 A BIBLE DISCUSSION GROUP; CORRECT?

4 A. HE WAS INVOLVED IN A BIBLE DISCUSSION GROUP
5 ON A DAILY BASIS WITH SOME OTHER INMATES; YES,
6 SIR.

7 Q. IS THAT WHAT YOUR TESTIMONY IS; THAT HE WAS
8 INVOLVED IN A BIBLE DISCUSSION GROUP ON A DAILY
9 BASIS WITH INMATES?

10 A. TO THE BEST OF MY KNOWLEDGE, SIR. AND I WOULD
11 DEFER TO THE GENTLEMEN WHO WORKED WITH HIM AND WHO
12 I BELIEVE ARE IN THIS COURTROOM. IF I'M MISTAKEN,
13 I APOLOGIZE.

14 Q. NOW WITH RESPECT -- AND I WILL GO BACK TO THE LAST
15 TIME WITH RESPECT TO THESE MIRANDA WARNINGS; ISN'T
16 IT TRUE THAT IT WAS ONLY AFTER EDUCATION BY YOU AND
17 DR. MCABEE THAT MR. SIMMONS WAS ABLE TO GRASP THOSE
18 CONCEPTS?

19 A. AGAIN, SIR, WITH THE UTMOST RESPECT; MY OPINION IS
20 THAT MR. SIMMONS WAS LIKELY ABLE TO AND CHOSE NOT
21 TO.

22 Q. DID YOU NOT REPORT THAT INITIALLY MR. SIMMONS DID
23 NOT UNDERSTAND ANY OF THESE BASIC CONCEPTS? IT WAS
24 ONLY AFTER EDUCATION THAT HE WAS ABLE TO DO SO? IS
25 THAT NOT CONTAINED IN YOUR REPORT?

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1 A. IF YOU WOULD BE SO KIND AS TO REFER ME TO
2 THAT SPOT, I'D BE HAPPY TO COMMENT ON IT,
3 SIR.

4 Q. YES, SIR. REFER TO THE TOP OF THE EVALUATION, PAGE
5 FIVE IN YOUR REPORT DATED 10 FEBRUARY, '99.

6 A. AND WHERE ARE YOU, SIR?

7 Q. WELL, THE FIRST REFERENCE TO TEACHING WOULD BE ON
8 THE SECOND FULL PARAGRAPH OF THAT PORTION AT THE
9 TOP OF THE EVALUATION. (WITNESS EXAMINES
10 DOCUMENT.)

11 A. I'M SORRY, MR. THEOS. IF YOU'D BE SO A KIND AS TO
12 TELL ME EXACTLY WHAT YOU'RE LOOKING FOR, I'LL BE
13 MORE THAN HAPPY TO COOPERATE, SIR.

14 Q. LOOK DOWN BELOW THAT PARAGRAPH, THE PARAGRAPH THAT
15 STARTS WITH "HE KNEW THE NAME OF HIS ATTORNEY."
16 (WITNESS EXAMINES DOCUMENT.)

17 A. YES, SIR.

18 Q. THEN AT THE BOTTOM OF THAT PARAGRAPH, NOT INITIALLY
19 BUT AFTER EDUCATION, HE REASONED THAT HE COULD ASK
20 MR. THEOS IF HE HEARD WORDS AND STATEMENTS IN COURT
21 THAT HE DID NOT UNDERSTAND. THAT IS STATED IN YOUR
22 REPORT, CORRECT?

23 A. THAT IS STATED IN MY REPORT. AND THAT IS A CORRECT
24 RESTATEMENT OF THE TEXT OF THAT REPORT WHICH I
25 WOULD BE HOPEFUL I COULD EXPAND UPON.

1 Q. WITH RESPECT -- IF Y'ALL TURN TO PAGE SIX---

2 MR. BAILEY: YOUR HONOR, I BELIEVE
3 HE SAID HE WANTED TO EXPAND UPON THAT.

4 THE COURT: HE DID SAY "HOPEFULLY
5 UPON WHICH I WOULD LIKE TO EXPAND UPON." I HEARD
6 HIM.

7 DR. SANDLER: THANK YOU, YOUR HONOR.

8 THE COURT: YOU'RE WELCOME.

9 DR. SANDLER: THANK YOU, MR.
10 SOLICITOR.

11 A. NOT INITIALLY, BUT AFTER EDUCATION; HE REASONED
12 THAT HE COULD QUOTE "ASK MR. THEOS IF HE HEARD
13 WORDS OR STATEMENTS IN COURT THAT HE DID NOT
14 UNDERSTAND." THE COMMUNICATION THAT I MAKE OUT OF
15 THIS STATEMENT IS THAT NOT INITIALLY, BUT AFTER
16 EDUCATION HE REASONED THAT HE COULD ASK MR. THEOS.
17 IT GOES BACK TO THE QUESTION, MR. THEOS, AS TO
18 WHETHER HE WAS UNABLE OR UNWILLING TO DO SO. MY
19 IMPRESSION IS THAT HE MAY HAVE BEEN UNWILLING TO DO
20 SO AND UNWILLING TO REASON ABOUT THAT.

21 Q. BUT, AGAIN, HE MIGHT HAVE BEEN UNWILLING OR UNABLE?

22 A. THAT IS CORRECT, SIR.

23 Q. YOUR CONCLUSION WAS THAT HE WAS UNWILLING?

24 A. WITHIN REASONABLE SCIENTIFIC CERTAINTY, I FEEL VERY
25 STRONGLY THAT HE WAS UNWILLING.

1 Q. AND AGAIN THAT'S BASED ON YOUR CONCLUSION AGAIN
2 THAT HE WAS MALINGERING?

3 A. NO. THAT IS BASED ON THE FACT THAT I'VE BEEN A
4 PSYCHOLOGIST FOR TWENTY-FIVE YEARS; DEALT WITH AN
5 AWFUL LOT OF FOLKS; HAD A LOT OF TRAINING; SAW A
6 LOT OF RECORDS; SAT DOWN WITH THIS MAN FOR NINE
7 HOURS; AND THAT'S MY FEELING. AND THAT'S MY
8 THOUGHT ABOUT IT.

9 Q. IF YOU TURN TO PAGE SIX, PLEASE. (WITNESS
10 COMPLIES.) WHEN DISCUSSING THE SECOND FULL
11 PARAGRAPH. AGAIN AT THE BOTTOM OF THAT PARAGRAPH;
12 NOT INITIALLY, BUT AFTER EDUCATION, MR. SIMMONS WAS
13 ABLE TO REASON. AGAIN MY QUESTION IS THERE WAS A
14 CONCEPT PERTAINING TO LEGAL PROCEDURES. MR.
15 SIMMONS DIDN'T COMPREHEND INITIALLY THAT HE HAD TO
16 BE EDUCATED ON; CORRECT?

17 A. INCORRECT. I REPEAT AGAIN, THIS IS AN ISSUE WHERE
18 IT COULD HAVE BEEN UNABLE; IT COULD HAVE BEEN
19 UNWILLING. THIS TEXT, SIR, I RESPECTFULLY SUBMIT
20 TO THE JURY WAS ONE THAT WAS PREPARED WITHIN 24
21 HOURS. THIS IS A SIX PAGE REPORT THAT DOCTOR
22 MCABEE AND I WROTE IN A 24 HOUR PERIOD. WE TRIED
23 TO GET AS MUCH AS WE COULD TOGETHER. THERE MAY
24 HAVE BEEN SOME PHRASES THAT WE MIGHT HAVE CHANGED A
25 LITTLE IF WE HAD A LITTLE MORE TIME. WE WERE UNDER

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1 THE PRESSURE OF TIME TO GET THIS TOGETHER. HIS
2 HONOR WANTED IT AT 3:30. AT 3:00, I BELIEVE, AS
3 WELL HE SHOULD HAVE HAD IT. AND WE TRIED LIKE
4 CRAZY TO GET IT DONE. MAYBE SOME OF THE PHRASING
5 IS NOT WHAT WE WOULD IDEALLY LIKED TO HAVE HAD.
6 AND I HOPE THAT THIS IS AN OPPORTUNITY TO CLARIFY
7 THAT.

8 Q. BUT THAT IS INDEED WHAT IT SAYS; CORRECT? WHAT YOU
9 READ IS WHAT IT SAYS?

10 A. IS WHAT IT SAYS?

11 Q. IS WHAT IT STATES? WHAT YOU READ IS IN FACT WHAT
12 IS---

13 A. WHAT IS STATED IN THIS REPORT; THAT IS CORRECT,
14 SIR.

15 Q. AND THREE MORE TIMES WITHOUT GOING INTO EACH ONE
16 SPECIFICALLY, SIR. BUT THREE MORE TIMES INTO THE
17 NEXT THREE PARAGRAPHS. AGAIN, HE WAS UNABLE TO
18 COMPREHEND CERTAIN LEGAL CONCEPTS INITIALLY, BUT
19 AFTER EDUCATION HE WAS ABLE TO COMPREHEND THEM;
20 CORRECT?

21 A. NO. IF YOU'RE ASKING IS THAT CORRECT; WHAT IT SAYS
22 YEAH; BUT IF YOU'RE ASKING ME WHAT MY OPINION IS
23 BASED ON REASONABLE SCIENTIFIC CERTAINTY AS AN
24 EXPERT AS A PRACTICING PSYCHOLOGIST OF TWENTY-FIVE
25 YEARS; I'M TELLING YOU THIS REPORT WAS THE BEST WE

LESLIE SANDLER - CROSS/MR. BAILEY

1 COULD DO. AND I DON'T WISH TO HAVE THE LADIES AND
2 GENTLEMEN OF THE JURY BELIEVE THAT THIS IS
3 SOMETHING THAT WAS THE RESULT OF STUDIED TIME AS WE
4 WISH WE COULD HAVE HAD TO PUT IT TOGETHER IN A
5 PERFECT WAY. IT WAS THE BEST WE COULD DO IN 24
6 HOURS.

7 Q. SO YOUR TESTIMONY TODAY IS DIFFERENT THAN WHAT IS
8 REFLECTED IN THE REPORT; CORRECT?

9 A. MY TESTIMONY TODAY, SIR, IS AN AMPLIFICATION OF A
10 REPORT THAT WAS DONE ATTEMPTING TO MEET A TIME
11 LIMIT, SIR.

12 Q. NO OTHER QUESTIONS.

13 MR. BAILEY: IF IT PLEASE THE COURT?

14 THE COURT: CROSS?

15 MR. THEOS: YOUR HONOR, BEFORE MR.
16 BAILEY GETS STARTED, DR. VIDIC IS HERE BUT HAS
17 ASKED TO BE EXCUSED.

18 MR. BAILEY: THAT'S FINE.

19 THE COURT: WITHOUT OBJECTION,
20 GENTLEMEN. SAFE TRAVELS. THANK YOU FOR BEING WITH
21 US.

22 CROSS-EXAMINATION

23 BY MR. BAILEY:

24 Q. DR. SANDLER, YOU WORK FOR THE DEPARTMENT OF
25 DISABILITIES AND SPECIAL NEEDS; IS THAT CORRECT,

1 SIR?

2 A. THAT IS CORRECT, SIR.

3 Q. ALL RIGHT, SIR. AND THAT'S FORMERLY THE DEPARTMENT
4 OF MENTAL RETARDATION, I BELIEVE?

5 A. I BELIEVE SO, SIR.

6 Q. ALL RIGHT, SIR. AND THAT IS THE STATE AGENCY THAT
7 IS SET UP BY THE GOVERNMENT TO CARE FOR MENTALLY
8 RETARDED INDIVIDUALS; IS THAT CORRECT?

9 A. YES, SIR.

10 Q. AND THEY OPERATE IN THAT FACILITY AT THE COASTAL
11 CENTER IN LADSON AND SOME OTHER FACILITIES
12 THROUGHOUT THE STATE?

13 A. THAT IS CORRECT, SIR. IN EACH OF THE FOUR REGIONS,
14 WE ARE RESPONSIBLE FOR THE SUPERVISION, STAFFING,
15 AND THE OPERATIONS WITHIN A SERIES OF REGIONAL
16 BOARDS AND LOCAL BOARDS AND OTHER BUREAUCRATIC --
17 A SYSTEM OF IT. BUT A CENTRAL OFFICE IN
18 COLUMBIA IS WHERE THE SUPERVISION TAKES PLACE,
19 SIR.

20 Q. ALL RIGHT, SIR. AND AS FAR AS THE HIERARCHY, THE
21 PEOPLE, NOT THE BUREAUCRATS, BUT THE PEOPLE THAT DO
22 THE ACTUAL PSYCHOLOGICAL WORK; WHAT'S YOUR POSITION
23 THERE?

24 A. I'M CONSIDERED THE EXPERT IN THE DEPARTMENT, SIR.

25 Q. ALL RIGHT, SIR.

LESLIE SANDLER - CROSS/MR. BAILEY

1 A. AND THE CHIEF PSYCHOLOGIST FOR ALL FORENSIC
2 ACTIVITIES DEALING WITH MENTAL RETARDATION, AUTISM,
3 HEAD INJURY, AND OTHER SPECIAL NEEDS OF THE STATE
4 OF SOUTH CAROLINA.

5 Q. ALL RIGHT, SIR. AND UNDER STATE LAW, IF A PERSON
6 IS SENT TO THE DEPARTMENT OF MENTAL HEALTH FOR AN
7 EVALUATION AND THEY MAKE A PROVISIONAL DIAGNOSIS
8 THAT THAT PERSON MAY BE RETARDED, THEN ARE THEY
9 SENT TO YOUR AGENCY FOR AN EVALUATION?

10 A. YES, SIR.

11 Q. IS THAT WHAT OCCURRED WITH RESPECT TO MR. SIMMONS
12 OVER HERE?

13 A. I BELIEVE IT IS, SIR.

14 Q. ALL RIGHT, SIR. AND YOU PERSONALLY AS HEAD OF THE
15 ENTIRE AGENCY PARTICIPATED IN THIS EVALUATION ALONG
16 WITH DR. MCABEE; IS THAT CORRECT?

17 A. THAT IS CORRECT, SIR.

18 Q. ALL RIGHT. NOW I BELIEVE YOU TESTIFIED THAT YOU
19 HAD READ ALL OF THE TRANSCRIPTS OF DECEMBER THE
20 FIFTH AND THE NINTH; IS THAT CORRECT?

21 A. READ AN AWFUL LOT, MR. BAILEY; YES, SIR. I BELIEVE
22 THAT THE TRANSCRIPTS YOU'RE REFERRING TO ARE THE
23 ONES WHICH WERE IN QUESTION; THE ONES THAT WERE THE
24 CONFESSIONS AND THE ALIBIS.

25 Q. THAT'S CORRECT.

LESLIE SANDLER - CROSS/MR. BAILEY

1 A. YES, SIR.

2 Q. AND THERE WERE TAPES. DID YOU LISTEN THROUGH THE
3 TAPES?

4 A. YES; I SURE DID; REPEATEDLY.

5 Q. ALL RIGHT, SIR. NOW YOU TESTIFIED PREVIOUSLY, AND
6 AS WAS BROUGHT OUT BEFORE, THERE ARE THREE CRITERIA
7 THAT ARE USED TO DIAGNOSE MENTAL RETARDATION; THE
8 I.Q. TEST BEING ONE; IS THAT CORRECT?

9 A. THAT IS CORRECT; AN INDIVIDUALLY ADMINISTERED I.Q.
10 TEST.

11 Q. ALL RIGHT, SIR. AND DID YOUR AGENCY ADMINISTER AN
12 I.Q. TEST TO MR. SIMMONS?

13 A. I DID, SIR; PERSONALLY.

14 Q. ALL RIGHT, SIR. AND WHAT WAS THAT I.Q. TEST? WHAT
15 TYPE OF TEST WAS IT?

16 A. THAT TEST WAS THE WEXLER ADULT INTELLIGENCE SCALE
17 REVISED.

18 Q. ALL RIGHT, SIR. AND YOU MAY HAVE TESTIFIED TO THIS
19 PREVIOUSLY. BUT WHAT TEST RESULTS DID YOU GET FROM
20 MR. SIMMONS ON THAT TEST?

21 A. ON FEBRUARY THE NINTH, 1999, HE OBTAINED THE
22 FOLLOWING I.Q. SCORES. AS MY LEARNED COLLEAGUE,
23 DR. VIDIC MENTIONED, THERE ARE BASICALLY THREE
24 SCORES; THE VERBAL WHICH RELATES A GREAT DEAL TO
25 INTELLIGENCE THAT IS LEARNED IN SCHOOL PERFORMANCE

LESLIE SANDLER - CROSS/MR. BAILEY

1 WHICH HAS A LOT TO DO WITH VISUAL AND TEMPORAL AND
2 SPATIAL PERFORMANCE, THINGS THAT YOU CAN DO WITH
3 YOUR HANDS, AS OPPOSED TO LANGUAGE ARTS AND A FULL
4 SCALE. UPON MY EVALUATION, THE VERBAL WAS 70. THE
5 PERFORMANCE WAS 82, AND THE FULL SCALE WAS 75. A
6 FULL SCALE OF 75 I.Q. IS IN THE MID RANGE OF A
7 BORDERLINE INTELLIGENCE CLASSIFICATION WHICH
8 REPRESENTS SCORES OF 70 TO 79.

9 Q. ALL RIGHT, SIR. SO BASED ON THAT TEST SCORE ALONE,
10 WOULD THAT INDICATE THAT MR. SIMMONS WAS AT
11 THE MENTALLY RETARDED LEVEL OR ABOVE THAT
12 LEVEL?

13 A. IT WOULD INDICATE, SIR, THAT HE WAS ABOVE THAT
14 LEVEL.

15 Q. ALL RIGHT, SIR. AND WOULD YOU STATE WHETHER OR NOT
16 IN GOING OVER ALL THESE RECORDS THAT YOU HAD, THE
17 INFORMATION THAT YOU HAD AS FAR AS HIS SCHOOL
18 CAREER, WORK CAREER, MARRIAGE AND THAT TYPE OF
19 STUFF, THE RELATIONSHIP TO HIS PEERS, HIS ABILITY
20 TO CARE FOR HIMSELF, GROOM HIMSELF, AND TO BE
21 GAINFULLY EMPLOYED; DID YOU FIND ANY EVIDENCE AT
22 ALL OF ANY DEFICITS OR IMPAIRMENTS IN ADAPTIVE
23 FUNCTIONING?

24 A. I DID NOT, SIR.

25 Q. DID YOU FIND ANY INDICATION OF AN ONSET OF MENTAL

1 RETARDATION PRIOR TO THE AGE OF EIGHTEEN?

2 A. I DID NOT, SIR.

3 Q. SO OUT OF THE THREE CRITERIA FOR DIAGNOSING MENTAL
4 RETARDATION, DID YOU FIND ANY ONE OF THEM TO BE
5 PRESENT?

6 A. I DID NOT, SIR.

7 Q. IN YOUR OPINION TO A REASONABLE DEGREE OF
8 SCIENTIFIC CERTAINTY, IS KENNETH SIMMONS MENTALLY
9 RETARDED?

10 A. HE IS NOT, SIR.

11 Q. ALL RIGHT. NOW, DID YOU FIND ANYTHING DURING YOUR
12 EVALUATION OF MR. SIMMONS THAT IN YOUR OPINION, TO
13 A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY, WOULD
14 HAVE PREVENTED HIM FROM COMPREHENDING HIS MIRANDA
15 RIGHTS AS YOU'VE HEARD GIVEN TO HIM BY AGENT
16 KENNY MEARS ON THREE OCCASIONS, TWICE ON
17 DECEMBER THE FIFTH, 1997, AND ONE ON DECEMBER THE
18 NINTH?

19 A. I MOST RESPECTFULLY WOULD PREFACE MY COMMENTS, MR.
20 SOLICITOR, TO THE EXTENT THAT AS YOU KNOW WE WERE
21 ONLY ORDERED TO LOOK AT DUSKY; AND THAT WAS THE
22 MAJORITY OF OUR FOCUS.

23 Q. RIGHT.

24 A. SO WE WERE NOT EXAMINING HIM FOR HIS MIRANDA RIGHT
25 ABILITY. WITH THAT PREFACE, IF YOU'D REPEAT YOUR

1 QUESTION, I'D BE HAPPY TO SPECULATE AND TO GIVE MY
2 OPINION WITHIN A REASONABLE DEGREE OF SCIENTIFIC
3 CERTAINTY.

4 MR. THEOS: YOUR HONOR, I'M GOING TO
5 OBJECT.

6 THE COURT: USE OF SEMANTICS. HE'S
7 NOT ALLOWED TO SPECULATE. HE'S AWARE OF THAT.

8 DR. SANDLER: THANK YOU, YOUR HONOR.

9 Q. DOCTOR, MY QUESTION IS PREDICATED TO A REASONABLE
10 DEGREE OF SCIENTIFIC CERTAINTY.

11 A. REASONABLE DEGREE OF SCIENTIFIC CERTAINTY.

12 Q. IF YOU CAN ANSWER IT TO A REASONABLE DEGREE OF
13 SCIENTIFIC CERTAINTY, PLEASE DO SO. IF YOU CAN'T,
14 THEN TELL ME.

15 A. OF COURSE, SIR.

16 Q. MY QUESTION IS WHETHER OR NOT, BEARING IN MIND --
17 LET ME BACK UP HERE. BEARING IN MIND THAT THAT WAS
18 NOT THE FOCUS OF YOUR EVALUATION.

19 A. INDEED, SIR.

20 Q. YOU DID CONDUCT SEVERAL LENGTHY INTERVIEWS WITH MR.
21 SIMMONS?

22 A. FOUR.

23 Q. YOU ADMINISTERED VARIOUS TESTS INCLUDING AN I.Q.
24 TEST TO HIM?

25 A. I DID, SIR.

LESLIE SANDLER - CROSS/MR. BAILEY

1 Q. AND YOU CONFERRED WITH CORRECTIONAL OFFICERS; IS
2 THAT CORRECT?

3 A. I DID, SIR.

4 Q. YOU LOOKED AT SCHOOL RECORDS?

5 A. YES, SIR.

6 Q. YOU LISTENED TO ALL THREE OF THE TAPES?

7 A. YES, SIR.

8 Q. YOU READ VARIOUS AUTOPSY REPORTS, POLICE REPORTS?

9 A. YES, SIR.

10 Q. AND OTHER INCIDENT REPORTS?

11 A. INDEED, SIR.

12 Q. ABOUT THIS INCIDENT. MY QUESTION IS WHETHER OR NOT
13 DURING THE COURSE OF YOUR EVALUATION, ALTHOUGH IT
14 WAS FOR ANOTHER PURPOSE, OF KENNETH SIMMONS?

15 A. YES, SIR.

16 Q. DID YOU FIND ANY MENTAL CONDITION OR DISORDER,
17 INCLUDING BUT NOT LIMITED TO, MENTAL RETARDATION
18 WHICH WOULD IN YOUR OPINION PREVENT HIM FROM BEING
19 ABLE TO UNDERSTAND MIRANDA RIGHTS IN DECEMBER OF
20 1997?

21 A. I DID NOT, SIR.

22 Q. AND THAT IS TO A REASONABLE DEGREE OF SCIENTIFIC
23 CERTAINTY; IS THAT CORRECT?

24 A. THAT IS CORRECT, SIR.

25 Q. ALL RIGHT, SIR. AND AGAIN, JUST TO MAKE SURE I

1 UNDERSTAND WHAT YOU'RE SAYING; AS FAR AS MR.
2 SIMMONS' PRESENTATION TO YOU, THE EXPRESSION, OR
3 HIS EXPRESSED INABILITY BE ABLE TO EITHER READ OR
4 UNDERSTAND HIS MIRANDA RIGHTS. DO YOU HAVE AN
5 OPINION OF WHETHER OR NOT HE WAS BEING TRUTHFUL TO
6 YOU IN THAT PRESENTATION?

7 A. I DO, SIR.

8 Q. WHAT IS THAT OPINION TO A REASONABLE DEGREE OF
9 SCIENTIFIC CERTAINTY?

10 A. TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY, IT
11 IS MY IMPRESSION THAT MR. SIMMONS WAS NOT BEING
12 TRUTHFUL, CANDID, ABOUT HIS ABILITY TO UNDERSTAND
13 HIS MIRANDA RIGHTS, SIR.

14 Q. AND WOULD YOU STATE WHETHER OR NOT IN YOUR OPINION
15 HE WAS MALINGERING?

16 A. IN MY OPINION WITHIN REASONABLE SCIENTIFIC
17 CERTAINTY, HE WAS MALINGERING AT VARIOUS TIMES
18 THROUGHOUT THE EVALUATION, SIR.

19 Q. IF YOU COULD BEAR WITH ME ONE SECOND, DOCTOR.

20 A. YES, SIR.

21 Q. IN RESPONSE TO ONE OF MR. THEOS' QUESTIONS, I
22 BELIEVE YOU SAID THAT MR. SIMMONS WAS ARTIFICIALLY
23 INCONCLUSIVE WHEN HE RESPONDED TO SOME QUESTIONS
24 ABOUT MIRANDA?

25 A. YES, SIR.

LESLIE SANDLER - CROSS/MR. BAILEY

1 Q. WOULD YOU EXPLAIN WHAT YOU MEAN BY THAT?

2 A. DR. MCABEE -- WE ARE REQUIRED BY STATUTE IN THE
3 DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS TO
4 ALWAYS EXAMINE INDIVIDUALS IN PAIRS. THAT IS THERE
5 ARE ALWAYS TWO PSYCHOLOGISTS. AND NO MATTER
6 WHETHER YOU'RE A PSYCH ONE, TWO, THREE, FOUR, OR
7 THE HEAD AS I AM, WE ALWAYS DO IT TOGETHER. THERE
8 ARE ALWAYS TWO WHO DO IT. IN THIS CASE DR. MCABEE
9 HAS MANY YEARS OF WORKING EXCLUSIVELY WITH MENTALLY
10 RETARDED INDIVIDUALS. AND HE TOOK GREAT PAINS AND
11 A GREAT DEAL OF PATIENCE TO TRY TO EXPLAIN THINGS
12 TO MR. SIMMONS. AND THE RESULT WAS THAT HE WAS
13 NOT ANSWERING HONESTLY WITHIN AN APPARENT
14 REASONABLE AND SCIENTIFIC CERTAINTY TO MY
15 SATISFACTION.

16 Q. ALL RIGHT.

17 A. IN TERMS OF THE ARTIFICIALITY, AFTER DR. MCABEE
18 WOULD VERY PATIENTLY AND SLOWLY EXPLAIN THINGS TO
19 HIM, MR. SIMMONS WOULD CHARACTERISTICALLY THROW UP
20 HIS SHOULDERS, SHRUG AND SAY "WHATEVER" AS IF IT
21 DIDN'T MATTER TO HIM AND HE WASN'T GOING TO PROCEED
22 IN FURTHER UNDERSTANDING.

23 Q. ALL RIGHT, SIR. AND DOCTOR, I'M NOT GOING TO BEAT
24 THIS THING TO DEATH; BUT A COUPLE MORE QUESTIONS
25 HERE.

LESLIE SANDLER - CROSS/MR. BAILEY

1 A. OF COURSE, SIR.

2 Q. YOU TESTIFIED ABOUT LISTENING TO MR. SIMMONS' VOICE
3 ON THE TAPE WITH MR. MEARS, THE WAY THEY
4 COMMUNICATED, TALKED BACK AND FORTH?

5 A. YES, SIR.

6 Q. THE CADENCE; THE FLOW OF THE CONVERSATION---

7 A. RHYTHM.

8 Q. --AND ALL THAT?

9 A. YES, SIR.

10 Q. HOW DID THAT COMPARE IN CONTRAST WITH YOUR
11 COMMUNICATIONS WITH MR. SIMMONS ON THE THREE OR
12 FOUR OCCASIONS YOU SAW HIM AT THE MENTAL HEALTH
13 CENTER?

14 A. DURING THE FOUR OCCASIONS THAT I SAW HIM, MR.
15 SOLICITOR, HIS COMMUNICATION WAS TREMENDOUSLY AND
16 DRAMATICALLY DIFFERENT. INSTEAD OF SPEAKING AS IN
17 A CONVERSATIONAL FASHION WITH RELATIVELY LOW
18 LATENCY OF RESPONSE; THAT IS HE RESPONDED QUICKLY
19 AND ACCURATELY AND COGENTLY AND ARTICULATELY. WHEN
20 HE WAS WITH US, HE WAS VAGUE AND HE WOULD
21 CHARACTERISTICALLY GRIMACE, WRINKLE UP HIS NOSE,
22 FURROW HIS BROW, LOOK AROUND. AND IT WAS AS IF
23 IT WAS SOMETHING THAT HE WAS IN FACT ACTING
24 UPON AS OPPOSED TO RESPONDING IN A CANDID
25 FASHION.

1 Q. THANK YOU, DOCTOR. THAT'S ALL I HAVE AT THIS
2 TIME.

3 THE COURT: ANYTHING ON RE-DIRECT,
4 PLEASE?

5 MR. THEOS: ONE SECOND, YOUR HONOR.
6 NO QUESTIONS, YOUR HONOR.

7 THE COURT: THANK YOU. STEP DOWN,
8 PLEASE, SIR.

9 DR. SANDLER: THANK YOU, YOUR HONOR.

10 THE COURT: ANY OBJECTION TO THIS
11 GENTLEMAN BEING EXCUSED?

12 MR. BAILEY: NO, SIR. WE MAY WANT
13 TO RECALL HIM LATER, BUT WE WILL CALL HIM BACK IF
14 WE HAVE TO.

15 MR. THEOS: I DON'T HAVE ANY
16 OBJECTION TO HIM BEING EXCUSED, YOUR HONOR.

17 THE COURT: ALL RIGHT. LADIES AND
18 GENTLEMEN, WE STARTED BACK AT 3:32. IT'S NOT TIME
19 FOR A RECESS. CALL YOUR NEXT WITNESS.

20 MR. THEOS: YOUR HONOR, WE WOULD
21 CALL DR. WAID.

22 THE COURT: COME AROUND, PLEASE, DR.
23 WAID. PUT YOUR LEFT HAND ON THE BIBLE AND RAISE
24 YOUR RIGHT.
25

LEWIS RANDOLPH WAID - DIRECT/MR. THEOS

WHEREUPON,

LEWIS RANDOLPH WAID, WHO AFTER BEING
FIRST DULY SWORN TO TELL THE TRUTH,
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. WAID, WOULD YOU PLEASE STATE WHAT YOUR
PROFESSION IS?

A. YES; I'M A CLINICAL PSYCHOLOGIST. I'M ASSOCIATE
PROFESSOR, CLINICAL ASSOCIATE PROFESSOR, IN THE
DEPARTMENT OF PSYCHIATRY AND NEUROLOGY AT THE
MEDICAL UNIVERSITY OF SOUTH CAROLINA.

Q. CAN YOU BRIEFLY TELL US WHAT YOUR EDUCATIONAL
BACKGROUND IS?

A. I GOT A BACHELOR'S DEGREE IN PSYCHOLOGY FROM TEMPLE
UNIVERSITY IN PHILADELPHIA. I GOT A MASTER'S
DEGREE IN PSYCHOLOGY FROM THE UNIVERSITY OF
RICHMOND IN RICHMOND, VIRGINIA. AND I WENT ON AND
COMPLETED MY PH.D IN CLINICAL PSYCHOLOGY AT THE
UNIVERSITY OF NORTH TEXAS INCLUDING AN INTERNSHIP
HERE IN CHARLESTON AT THE MEDICAL UNIVERSITY OF
SOUTH CAROLINA.

Q. CAN YOU TELL ME IF YOU HAVE ANY AREAS OF SPECIALTY?

A. I JOINED THE FACULTY; CAME BACK TO CHARLESTON IN
1982 AND WAS IN THE DEPARTMENT OF PSYCHIATRY.

LEWIS RANDOLPH WAID - DIRECT/MR. THEOS

1 WHILE I'M A CLINICAL PSYCHOLOGIST, MY SPECIALTY HAS
2 BEEN IN NEUROPSYCHOLOGY WHICH IS THE SUB-SPECIALTY
3 IN WHICH I WORK IN THE AREA OF UNDERSTANDING
4 BEHAVIOR AND ASSESSING PEOPLE WHO SUFFER FROM
5 PATHOLOGIES THAT AFFECT THE BRAIN; CLOSED HEAD
6 INJURY, ALZHEIMERS, DEMENTIA, MULTIPLE SCLEROSIS,
7 INCLUDING TOXIC AGENTS LIKE COCAINE AND SUBSTANCE
8 ABUSE. ULTIMATELY I HAVE A JOINT APPOINTMENT IN
9 PSYCHIATRY AS WELL AS NEUROLOGY BECAUSE OF THE WAY
10 THAT MY WORK BLENDS ACROSS BOTH OF THOSE. AND I
11 DEVELOPED AND BECAME DIRECTOR OF THE ASSESSMENT
12 CENTER IN 1989 WHICH WAS A FREE STANDING CLINIC
13 THAT HAD CLINICS IN VARIOUS PLACES THROUGHOUT THE
14 ENTIRE UNIVERSITY; MEMORIES DISORDERS CLINIC,
15 PSYCHIATRIC, AS WELL AS COURT-ORDERED FORENSIC
16 WORK. AND I HAVE BEEN SERVING IN THAT CAPACITY UP
17 THROUGH LAST YEAR WHERE I'VE JUST NOW CONTINUED IN
18 MY RESEARCH IN TEACHING AND HAVE SET UP AN
19 INDEPENDENT PRACTICE.

20 Q. DO YOU HAVE ANY ADDITIONAL EDUCATION OR TRAINING
21 THAT'S OF SIGNIFICANCE?

22 A. I HAVE OVER 200 PLUS HOURS IN FORENSIC PREDICTION
23 OF VIOLENCE, ASSESSMENT OF CRIMINAL COMPETENCIES,
24 AND SO FORTH; HAVE COMPLETED AND BEEN APPROVED TO
25 MOVE AHEAD ON MY WORKING SAMPLES FOR THE DIPLOMATE

LEWIS RANDOLPH WAID - DIRECT/MR. THEOS

1 FROM THE AMERICAN BOARD OF FORENSIC PSYCHOLOGY. I
2 HAVE OVER 300 HOURS OF CONTINUING ED AS IS
3 NECESSARY IN NEUROPSYCHOLOGY. I'VE PRESENTED
4 EXTENSIVELY. I'VE PUBLISHED EXTENSIVELY. AND I
5 HAVE TWO ONGOING GRANTS RIGHT NOW STILL AT THE
6 MEDICAL UNIVERSITY WHICH I MAINTAIN AS PART OF MY
7 CAPACITIES THERE AS A CLINICAL ASSOCIATE PROFESSOR
8 IN PSYCHIATRY AND NEUROLOGY.

9 Q. NOW, DID YOU HAVE AN OPPORTUNITY -- HAVE YOU EVER
10 BEEN QUALIFIED AS AN EXPERT TO TESTIFY IN ANY
11 COURTS IN THIS STATE?

12 A. I HAVE BEEN QUALIFIED AS AN EXPERT IN BOTH CRIMINAL
13 AND CIVIL CASES SINCE 1983. I HAVE BEEN QUALIFIED
14 IN FEDERAL COURTS IN THIS STATE AND NEIGHBORING
15 STATES AS WELL AS MILITARY COURTS IN THIS STATE AND
16 IN NORTH CAROLINA ALSO.

17 Q. AND IN WHAT FIELDS OF EXPERTISE HAVE YOU BEEN
18 QUALIFIED TO TESTIFY AS AN EXPERT WITNESS?

19 A. EXPERTISE GENERALLY AS A CLINICAL PSYCHOLOGIST.
20 I'VE BEEN APPROVED TO DO NEUROPSYCHOLOGICAL WORK,
21 OBVIOUSLY IN PERSONAL INJURY AS WELL AS CRIMINAL
22 COMPETENCY WORK, INSANITY, DEATH MITIGATION, AND
23 COMPETENCY TO STAND TRIAL.

24 Q. HAVE YOU ALSO BEEN QUALIFIED IN THE FIELD OF
25 FORENSIC PSYCHOLOGY?

LEWIS RANDOLPH WAID - DIRECT/MR. THEOS

1 A. IN THE MATTERS AS IT RELATED TO BEING A CLINICAL
2 PSYCHOLOGIST AND DETERMINING COMPETENCIES OR NOT
3 GUILTY FOR REASON OF INSANITY AND DEATH MITIGATION;
4 YES, SIR.

5 Q. HOW MANY TIMES APPROXIMATELY HAVE YOU BEEN
6 QUALIFIED IN THOSE THREE AREAS?

7 A. SINCE JANUARY OF 1998 I'VE BEEN QUALIFIED AS AN
8 EXPERT IN FIFTEEN TRIALS THIS PAST YEAR IN CRIMINAL
9 COMPETENCY TO STAND TRIAL AND THESE SORTS OF
10 THINGS. I RECENTLY DID A---

11 Q. THAT WOULD BE IN THE AREA OF FORENSIC PSYCHOLOGY?

12 A. YES, SIR; AND IN THE AREAS OF COMPETENCY TO STAND
13 TRIAL OR TO UNDERSTAND ONE'S MIRANDA RIGHTS.

14 Q. HOW MANY TIMES WOULD YOU ESTIMATE YOU'VE BEEN
15 QUALIFIED IN THE AREA OF NEUROPSYCHOLOGY?

16 A. OH, ABOUT FIFTY TIMES A YEAR, AT LEAST IN
17 DEPOSITION. MOST OF THE PERSONAL INJURY IS
18 RESOLVED BEFORE COURTROOM. I GENERALLY ONLY END UP
19 IN THE COURTROOM ABOUT FIVE TO SEVEN TIMES.

20 Q. AND IN THE AREA OF CLINICAL PSYCHOLOGY? HOW MANY
21 TIMES WOULD YOU ESTIMATE THAT YOU'VE BEEN QUALIFIED
22 AS AN EXPERT?

23 A. I'VE ALWAYS BEEN QUALIFIED IN ALL OF THOSE BECAUSE
24 THAT'S WHAT I'M LICENSED AS, A CLINICAL
25 PSYCHOLOGIST.

LEWIS RANDOLPH WAID - EXAMINATION BY MR. BAILEY

1 MR. THEOS: YOUR HONOR, AT THIS TIME
2 WE WOULD OFFER DR. WAID AS AN EXPERT IN THE FIELDS
3 OF CLINICAL PSYCHOLOGY, THE FIELD OF
4 NEUROPSYCHOLOGY, AND THE FIELD OF FORENSIC.

5 THE COURT: ALL RIGHT. MR. BAILEY;
6 CROSS?

7 MR. BAILEY: A COUPLE OF QUESTIONS,
8 PLEASE, YOUR HONOR.

9 THE COURT: SURE.

10 EXAMINATION

11 BY MR. BAILEY:

12 Q. DR. WAID, ARE YOU BOARD CERTIFIED IN ANY OTHER
13 FIELDS?

14 A. NO, I'M NOT IN THE AMERICAN BOARD OF PROFESSIONAL
15 PSYCHOLOGY. I'M A FELLOW OF THE AMERICAN BOARD OF
16 FORENSIC EXAMINERS WHICH IS JUST A REVIEW OF YOUR
17 TRAINING AS WELL AS YOUR EXPERIENCE. I'M NOW
18 COMPLETING MY BOARD IN THE AMERICAN BOARD OF
19 PROFESSIONAL PSYCHOLOGY WHICH IS A DIFFERENT BOARD.

20 Q. AND IS THAT A BOARD FOR CLINICAL PSYCHOLOGY,
21 NEUROPSYCHOLOGY OR FORENSIC PSYCHOLOGY?

22 A. THAT'S IN FORENSIC PSYCHOLOGY AND NEUROPSYCHOLOGY
23 ARE THE TWO THAT I'M COMPLETING.

24 Q. BUT YOU HAVE NOT COMPLETED THOSE YET?

25 A. I HAVE NOT COMPLETED THOSE BASED ON THE AMERICAN

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 BOARD OF PROFESSIONAL PSYCHOLOGY; THAT IS CORRECT.

2 Q. AND DID YOU SAY YOU TESTIFIED FIFTEEN TIMES IN
3 GENERAL SESSIONS COURT?

4 A. YES; SINCE JANUARY ONE OF LAST YEAR OF 1998.

5 Q. HOW MANY OF THOSE CASES DID YOU TESTIFY FOR THE
6 PROSECUTION?

7 A. ACTUALLY THEY'RE ABOUT 50/50 ON THOSE BECAUSE
8 BASICALLY PUBLIC DEFENDER'S OFFICE AS WELL AS THE
9 COURT ORDERED THROUGH THE M.U.; THEY'VE BEEN COURT
10 ORDERED TO THE MEDICAL UNIVERSITY; AND THE MEDICAL
11 UNIVERSITY HAS BASICALLY CONTRACTED WITH ME TO DO
12 THOSE IN THE PAST YEAR.

13 Q. ALL RIGHT.

14 MR. BAILEY: YOUR HONOR, I BELIEVE
15 THAT'S ALL I HAVE AS FAR AS QUALIFICATION.

16 THE COURT: THANK YOU. YOU MAY
17 PROCEED.

18 CONTINUED DIRECT EXAMINATION

19 BY MR. THEOS:

20 Q. DR. WAID, DID YOU HAVE AN OPPORTUNITY TO EXAMINE
21 KENNETH SIMMONS?

22 A. YES. I DID HAVE THE OPPORTUNITY TO EXAMINE MR.
23 SIMMONS AS WELL AS TO WORK LIKE MY COLLEAGUES AT
24 HALL INSTITUTE WITH A VARIETY OF OTHER
25 PROFESSIONALS WHO HAVE BEEN EVALUATING HIM. I

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 PERSONALLY SAW HIM HERE AT THE DORCHESTER COUNTY
2 PRISON FOR THE FIRST TIME ON FEBRUARY THE THIRD OF
3 1999 OF THIS MONTH. I HAD CONSULTATION MEETINGS
4 WITH THE OTHER PROFESSIONALS ON FEBRUARY THE FOURTH
5 AND FEBRUARY THE FIFTH AND RETURNED FOR SOME
6 EXTENSIVE NEUROPSYCHOLOGICAL TESTING ON FEBRUARY
7 THE TENTH OF 1999 AND SINCE THEN HAVE HAD FURTHER
8 CONSULTATIONS WITH MY COLLEAGUES WHO HAVE BEEN
9 INVOLVED ALSO IN EVALUATING MR. SIMMONS.

10 Q. DID YOU REVIEW ANY RECORDS PRIOR TO SEEING MR.
11 SIMMONS?

12 A. AGAIN, YES I DID. I HAVE REVIEWED AND SUBSEQUENTLY
13 REVIEWED EVEN MORE RECORDS, OBVIOUSLY. I'VE
14 REVIEWED LITERALLY ALL THE RECORDS THAT I THINK ARE
15 OBTAINABLE IN THIS CASE INCLUDING DEPOSITIONS, ALL
16 THE EVALUATIONS THAT HAVE BEEN COMPLETED BY MY
17 COLLEAGUES AT THE DEPARTMENT OF DISABILITIES AND
18 SPECIAL NEEDS, THE PREVIOUS INTELLECTUAL TESTING
19 THAT WAS DONE AT THE HALL INSTITUTE WITH DR. VIDIC
20 AND THE EXAMINATION BY DR. BEHRMANN, EDUCATIONAL
21 RECORDS FROM BOTH HIS MIDDLE SCHOOL, JUNIOR HIGH
22 SCHOOL, AND HIGH SCHOOL; THE POLICE REPORTS
23 INCLUDING THE INCIDENT AND SUPPLEMENTAL REPORTS,
24 THE TAPED INTERVIEWS OF THE CONFESSION AS WELL AS A
25 COPY OF HIS CONFESSION; THE REPORT BY DR. BEHRMANN

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 ON THE MENTAL CAPACITY AND THE MEDICAL RECORDS
2 ASSOCIATED WITH HIS STAY AT HALL. AND I'VE
3 REVIEWED THE DEPOSITION OF ALL THE INDIVIDUALS
4 DURING THE HEARING PROCESS THAT INCLUDED PAULA
5 WALSCH, JAN HILTON, PATRICIA JOHNSON, SIDNEY
6 JACKSON, EMMETT MCKINNEY, LESLIE SANDLER, DR.
7 SANDLER, DR. MCABEE, DR. BERHMANN, AND DR. VIDIC.
8 ALSO I'VE REVIEWED THE TEST RESULTS THAT WERE DONE
9 BY DR. KEY WHO IS A SCHOOL PSYCHOLOGIST WHO IS
10 INVOLVED IN EVALUATING HIM ALSO; A SOCIAL HISTORY
11 EVALUATION BY MR. YOUNGMAN WHO'S A SOCIAL WORKER; A
12 PRELIMINARY REPORT DONE BY MY COLLEAGUE, ALEX
13 HORTON, WHO'S A DOCTOR OF PHARMACY AT THE MEDICAL
14 UNIVERSITY, AND SOME PREVIOUS POLICE REPORTS THAT
15 HAD TO DO WITH DOMESTIC VIOLENCE AND A REFERRAL
16 FORM ON A SUBSTANCE ABUSE TREATMENT THAT HE HAD
17 EARLIER IN HIS LIFE. THOSE CONSTITUTED, I BELIEVE,
18 THE RECORDS THAT I REVIEWED IN DETAIL REGARDING
19 THIS INDIVIDUAL.

20 Q. NOW, CAN YOU TELL US WHAT YOU DID IN EACH
21 EVALUATION, IN EACH EXAMINATION?

22 A. WELL, OBVIOUSLY THE FIRST TIME I SAW HIM, I KIND OF
23 INTERVIEWED HIM TO TRY TO GET A SENSE AND A RAPPORT
24 WITH HIM AND CONCENTRATED ON TWO QUESTIONS IN MY
25 INITIAL INTERVIEW WHICH WAS THE COMPETENCY ISSUE AS

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 WELL AS THE CRIMINAL COMPETENCY REGARDING THE
2 MIRANDA RIGHTS. THEY'RE VERY DIFFERENT QUESTIONS,
3 ACTUALLY, WHEN YOU GET RIGHT DOWN TO IT.
4 COMPETENCY IS ONE THAT HAS TO DO WITH WHERE HE'S AT
5 NOW AND WHETHER OR NOT WE CAN GET HIM TO THE POINT
6 OF BEING COMPETENCY. MIRANDA RIGHTS ARE DIFFICULT
7 BECAUSE A CONFESSION IS MADE SOME TIME BACK. BUT
8 AS YOU'VE HEARD FROM MY OTHER COLLEAGUES, ONE OF
9 THE WAYS THAT WE TRY TO EVALUATE UNDERSTANDING THE
10 MIRANDA RIGHTS IS TO SEE IF THEY UNDERSTAND THEM
11 TODAY. HOW WELL THAT REALLY TRANSLATES INTO HOW HE
12 UNDERSTOOD THEM IN DECEMBER OF '97 IS DIFFICULT.
13 AND WHAT YOU TRY TO DO IS TRY TO RETROSPECTIVELY GO
14 BACK AND UNDERSTAND HIS THINKING AS BEST HE CAN
15 TELL YOU, OR A CLIENT CAN TELL YOU, BACK TO THOSE
16 DATES; BUT I FOUND THAT WAS NOT A USEFUL STRATEGY
17 BECAUSE OF HIS INABILITY TO RECALL THAT
18 INFORMATION. SO I STATED THAT TRYING TO UNDERSTAND
19 IF HE COULD UNDERSTAND HIS MIRANDA RIGHTS NOW.
20 THAT'S HOW I SPENT THE FIRST TIME THAT I WORKED
21 WITH HIM. AND AFTER CONSULTATION WITH MY FELLOW
22 COLLEAGUES AND DISCUSSING OUR FINDINGS, WE HAD
23 DECIDED TO GO AHEAD AND PROCEED WITH SOME EXTENSIVE
24 NEUROPSYCHOLOGICAL TESTING WHICH IS DIFFERENT FROM
25 THE TYPE OF TESTING THAT'S BEEN DONE UP TO THIS

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 POINT. I BELIEVE ONLY DR. SANDLER USED ONE
2 INSTRUMENT THAT WOULD REALLY BE REFERRED TO AS A
3 NEUROCYTE (PHONETICALLY SPELLED), THE TRAIL-MAKING
4 TEST. THESE ARE A BATTERY OF TESTS THAT ARE MUCH
5 MORE SENSITIVE AT ACTUALLY MEASURING BRAIN BEHAVIOR
6 FUNCTIONS; HOW WELL THAT BRAIN IS ACTUALLY
7 OPERATING RIGHT THERE, NOT BEING INFLUENCED AS
8 HEAVILY BY ONE'S EDUCATIONAL BACKGROUND. SO WE
9 MEASURE LANGUAGE FUNCTIONS, ATTENTION,
10 CONCENTRATION, LEARNING AND MEMORY, THE ABILITY TO
11 TAKE IN INFORMATION NOW, LEARN IT, RETAIN IT,
12 RECALL IT, AND VISUAL SPATIAL SKILLS, ABILITY TO
13 JUST COPY OBJECTS AS WELL AS HIGHER REASONING,
14 PROBLEM SOLVING, AND WHAT WE CALL EXECUTIVE
15 FUNCTIONS THAT ARE KIND OF UP HERE IN THE FRONTAL
16 LOBE, ABILITY TO KIND OF BE ABLE TO START AND STOP
17 BEHAVIOR, REASON, HAVE AN AWARENESS FOR ONESELF AND
18 ONE'S ENVIRONMENT. I ALSO COMPLEMENTED THAT WITH
19 THE CONCERN ABOUT MALINGERING WHICH IS OBVIOUSLY
20 ONE THAT ONE SHOULD HAVE IN A CASE THAT INVOLVES
21 ANY SECONDARY GAIN; AND OBVIOUSLY A MURDER CHARGE
22 IS CLEARLY ONE WHERE THERE CAN BE A GAIN FOR WHY
23 SOMEBODY WOULD WANT TO BE CONSCIOUSLY FAKING BAD,
24 OR MISREPRESENTING THEMSELVES. AND I ADMINISTERED
25 ALSO LIKE SOME OF MY COLLEAGUES A MALINGERING

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 TEST. IT'S NOTHING REAL FUZZY ABOUT THIS. THESE
2 HAVEN'T BEEN EXPLAINED TO THE JURY. BUT THESE
3 THINGS LOOK LIKE REAL TESTS. BUT THE ACTUAL
4 PROBABILITY OF ALL OF THESE, OF BEING RIGHT OR
5 WRONG, IS 50 PERCENT. SO WHILE THE CLIENT THINKS
6 YOU MIGHT BE TESTING THEIR MEMORY, IN ESSENCE THEY
7 COULD BE BRAIN DEAD. IT WOULD BE LIKE FLIPPING A
8 COIN; THEY SHOULD GET 50 PERCENT RIGHT ON RECALL.

9 MR. BAILEY: YOUR HONOR, I BEG YOUR
10 PARDON. CAN WE APPROACH BRIEFLY?

11 THE COURT: CERTAINLY.

12 (AT THIS TIME, BENCH CONFERENCE IS HELD.)

13 THE COURT: ALL RIGHT, MADAM
14 FORELADY, LADIES AND GENTLEMEN, I'M GOING TO HAVE
15 TO SEND YOU TO YOUR ROOM, PLEASE. THERE SHOULD BE
16 COFFEE OR WHATEVER. AND WE'RE GOING TO WORK A
17 LITTLE LONGER TODAY BECAUSE YOU ATE GOOD BARBECUE
18 FOR LUNCH.

19 (AT THIS TIME JURY RETIRES TO JURY ROOM.)

20 THE COURT: ALL RIGHT. ON THE
21 RECORD, PLEASE. THE JURY IS OUTSIDE. THEY'RE GONE
22 TO THEIR ROOM. I'LL BE GLAD TO HEAR FROM YOU, MR.
23 SOLICITOR.

24 MR. BAILEY: YOUR HONOR, I HAD ASKED
25 AT THE SIDE BAR, AND FOR THE RECORD, I HAVE SERVED

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 PURSUANT TO RULE FIVE ON MR. THEOS BACK IN JANUARY
2 OF LAST YEAR.

3 THE COURT: JANUARY OF '98?

4 MR. BAILEY: YES, SIR. IN EXCESS OF
5 A YEAR AGO. AND OF COURSE I ASKED FOR RESULTS OF
6 ANY SCIENTIFIC TESTS OR EXPERIMENTS. I DID GET A
7 COPY OF SOME TEST RESULTS FROM DR. SAYLOR. AND I
8 THINK DR. MCABEE HAS SOME SCORES ON SOME TESTS.
9 BUT AS FAR AS THIS GENTLEMAN HERE, I HAVEN'T GOTTEN
10 ANY PAPERWORK ON IT. HE'S JUST TESTIFIED ABOUT
11 EXTENSIVE NEUROLOPSYCHOLOGICAL TESTING THAT HE'S
12 DONE; HE SAID A BATTERY OF TESTS AND SOME OTHER
13 TESTS RELATED TO MALINGERING. AND I DON'T HAVE ANY
14 OF THAT. AND I THINK IT'S SOMETHING THAT I'M
15 ENTITLED TO UNDER RULE FIVE SO I CAN PREPARE THE
16 APPROPRIATE CROSS-EXAMINATION. AND I WOULD ASK
17 YOUR HONOR JUST FOR THE RECORD THAT IF HE DOES HAVE
18 THESE TEST RESULTS AND THEY HAVEN'T BEEN PROVIDED
19 TO ME TO STRIKE HIS TESTIMONY.

20 THE COURT: ALL RIGHT. DR. WAID,
21 WERE YOU ASKED TO RENDER A WRITTEN REPORT ON ANY
22 PHASE OF YOUR TESTING?

23 DR. WAID: NO, SIR.

24 THE COURT: WERE YOU ASKED NOT TO
25 RENDER A WRITTEN REPORT?

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

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DR. WAID: NO, SIR.

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THE COURT: AND WHEN HAVE THESE TEST RESULTS BEEN AVAILABLE?

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DR. WAID: I DIDN'T DO THE TEST UNTIL FEBRUARY THE TENTH IS WHEN THEY DECIDED TO PROCEED WITH THE NEUROPSYCHIATRIC TESTING, AND I CAME UP TO THE DORCHESTER COUNTY JAIL ON FEBRUARY THE TENTH.

THE COURT: SO WOULD THE TEST RESULTS HAVE BEEN AVAILABLE AT THE CONCLUSION OF THE TESTS THAT DAY, OR IS IT NECESSARY TO HAVE IT INTERPOLATED OR QUANTIFIED OR SOMETHING ELSE AT A DIFFERENT VENUE?

DR. WAID: WELL, SOME OF THEM ARE COMPUTER SCORED; SO IT DOES TAKE US, I WOULD SAY, A COUPLE OF DAYS.

THE COURT: SO IT'S BEEN AVAILABLE SINCE FEBRUARY TWELVE? IS THAT REASONABLE?

DR. WAID: I WOULD SAY THE WEEKEND; THAT WAS THE VALENTINE'S WEEKEND. I WOULD SAY BY SUNDAY WE WERE DONE SCORING.

THE COURT: FEBRUARY THE FIFTEENTH?

DR. WAID: THE FIFTEENTH WOULD HAVE BEEN---

THE COURT: THEY WERE AVAILABLE

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 SINCE THAT TIME?

2 DR. WAID: YES, SIR. I MEAN, IN THE
3 BROUGHT DATA FORM. I HAVEN'T EVER REALLY---

4 THE COURT: AND MR. THEOS HASN'T
5 ASKED TO SEE THOSE OR DISCUSS THEM WITH YOU?

6 DR. WAID: NO. WE HAD A JOINT
7 MEETING THE FOLLOWING FRIDAY; AND THAT WAS THE
8 FIRST TIME I PROVIDED TO THE TEAM---

9 THE COURT: FRIDAY OF LAST WEEK?

10 DR. WAID: YES, SIR; LAST WEEK.

11 THE COURT: WHICH WOULD HAVE BEEN
12 THE TWENTIETH?

13 DR. WAID: YES, SIR. I ACTUALLY
14 WENT ON VACATION UNTIL SATURDAY. BUT, YES, THAT'S
15 WHEN -- NOVEMBER THE NINETEENTH---

16 THE COURT: SO THAT ACTUALLY WOULD
17 HAVE BEEN THE NINETEENTH?

18 DR. WAID: THE NINETEENTH; YES, SIR.
19 I DON'T THINK WE DECIDED TO EVEN DO THE TESTING
20 UNTIL WE HAD A CONFERENCE MEETING BETWEEN US ALL
21 AND THOUGHT MAYBE IT WOULD HAVE BEEN USEFUL TO
22 PROCEED. BUT I DIDN'T GET BROUGHT INTO THE CASE
23 UNTIL THE END OF JANUARY.

24 THE COURT: AND AS I MENTIONED AT
25 THE SIDE BAR TO MR. THEOS; TO REMIND HIM THAT HE IS

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 FORMALLY GIVEN THE SOLICITOR NOTICE; AND HE'S NOT
2 INTERPOSING A DEFENSE OF NOT GUILTY BY REASON OF
3 INSANITY OR GUILTY BUT MENTALLY ILL. SO I TRUST
4 THAT YOUR TESTIMONY IS NOT GOING INTO THOSE?

5 DR. WAID: IN FACT MY TESTIMONY IS
6 THAT ACTUALLY THAT I DON'T FIND ANYTHING IN THE
7 NEUROPSYCH THAT I DIDN'T ALREADY KNOW FROM
8 REVIEWING EVERYBODY ELSE'S TEST RESULTS QUITE
9 FRANKLY. THERE'S REALLY NOTHING NEW HERE. BUT I
10 DID DO MY OWN MALINGERING TEST WHICH WAS CONSISTENT
11 WITH EVERYBODY ELSE'S MALINGERING TEST.

12 THE COURT: ALL RIGHT. SO FOR THE
13 RECORD, MR. THEOS, ANY COMMENTS?

14 MR. THEOS: YOUR HONOR, I DON'T
15 THINK I CAN ADD ANYTHING TO WHAT DR. WAID HAS SAID
16 EXCEPT WHAT I DID SAY AT THE SIDE BAR, AND THAT IS
17 I'VE PROVIDED MR. BAILEY WITH THE NAMES OF ALL OF
18 THE EXPERTS THAT WE INTENDED ON CALLING. AND AS I
19 RECEIVED REPORTS OR TESTS DATA, I TURNED THEM OVER
20 TO MR. BAILEY. BUT SPECIFICALLY -- AND I DON'T
21 THINK I WAS REQUIRED UNDER THE RULES -- BUT
22 SPECIFICALLY I GAVE HIM EVERYBODY'S NAME AND
23 CONTACTED ALL OF THEM, INCLUDING DR. WAID, AND SAID
24 EXPECT A TELEPHONE CALL FROM MR. BAILEY; SPEAK WITH
25 HIM, TALK WITH HIM FREELY.

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THE COURT: DID YOU TELL MR. BAILEY
IT WAS ALL RIGHT FOR HIM TO CALL YOUR EXPERTS AND
TALK TO THEM?

MR. THEOS: YOUR HONOR, I DIDN'T
TELL HIM IT WASN'T OKAY. AND I---

THE COURT: THAT WASN'T MY QUESTION,
MR. THEOS. DID YOU SPECIFICALLY TELL MR. BAILEY
YOU WERE PLANNING ON USING JOE SIX PACK AS AN
EXPERT AND THAT YOU HAD NO OBJECTION TO HIS
DISCUSSING HIS TESTIMONY WITH HIM ON THE TELEPHONE
PRIOR TO TRIAL? THAT'S MY QUESTION.

MR. THEOS: I DIDN'T, YOUR HONOR.

THE COURT: YOU DIDN'T? WELL, THAT
ANSWERS MY QUESTION. GO AHEAD.

MR. THEOS: I DON'T THINK -- YOUR
HONOR, I DIDN'T TELL HIM NOT TO SPEAK WITH HIM.
THAT'S WHY I GAVE HIM THE LIST.

THE COURT: I DIDN'T ASK YOU IF YOU
TOLD HIM NOT TO SPEAK TO YOU. YOU'RE TALKING
LAWYER TALK NOW. TALK UP TO ME. GO AHEAD. WHAT
ELSE DO YOU WANT TO TELL ME?

MR. THEOS: YOUR HONOR, THAT'S THE
REASON I GAVE HIM THE LIST SO THAT HE WOULD KNOW
WHO THEY WERE SO HE COULD CONTACT THEM AS HE
PLEASED. MR. BAILEY DIDN'T TELL ME THAT I COULD OR

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 COULD NOT SPEAK WITH HIS EXPERT. AND I CONTACTED
2 ALL OF THEM FREELY, AND THEY ALL SPOKE WITH ME. I
3 THINK IT'S INCUMBENT ON THE ATTORNEYS WHEN THEY'VE
4 GOT THE NAMES OF THOSE PEOPLE TO CONTACT THEM.
5 THERE'S SURELY NOTHING THAT PROHIBITS THAT.

6 THE COURT: WELL, IT'S JUST
7 UNFORTUNATE THAT THESE TESTS WEREN'T CONDUCTED
8 MONTHS AGO. THERE WAS AN ORDER FOR THE STATE
9 HOSPITAL EXAMINATION IN JANUARY OF '98. BUT IT
10 WASN'T DONE UNTIL DECEMBER OF '98. AND THEN
11 EVERYBODY WAS UNDER THE GUN TO GET THEIR REPORTS
12 DONE. AND THE FACT IS AS MR. BAILEY, THE SOLICITOR
13 MENTIONED AT THE SIDE BAR, AND I'M NOT CONCLUDING
14 THAT HE'S BEING SANDBAGGED; BUT A TRIAL IS A SEARCH
15 FOR THE TRUTH. AND IT'S JUST -- WHILE THERE'S NO
16 FORMAL DISCOVERY IN CRIMINAL CASES, THERE ARE
17 CERTAIN RULES THAT YOU'LL SERVE ON EACH OTHER SUCH
18 AS IF YOU INTEND TO USE ALIBI AS A DEFENSE, YOU'VE
19 GOT TO GIVE THEM THE NAMES OF WITNESSES. THAT
20 MEANS WHEN YOU GET UP IN OPENING STATEMENTS, YOU
21 DON'T TALK ABOUT AN ALIBI THAT MY MAN WASN'T THERE
22 AND DIDN'T DO IT BECAUSE YOU DIDN'T SERVE THAT
23 DEFENSE NOTICE ON HIM. BUT I'M GOING TO TAKE A
24 RECESS AT THIS TIME; AND I'M GOING TO ALLOW -- AS
25 YOU'VE SAID, MR. THEOS, YOU DON'T HAVE ANY

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 OBJECTION TO THE SOLICITOR TALKING TO THIS WITNESS
2 AND LOOKING AT THE REPORT BECAUSE IN FAIRNESS TO
3 THE STATE, JUST LIKE IN FAIRNESS TO YOU, IF THE
4 SOLICITOR CAME UP WITH A CROSSWORD PUZZLE IN
5 ANTARCTICA LANGUAGE, IF SUCH A THING EXISTS, YOU
6 SHOULD HAVE AMPLE OPPORTUNITY AND ADVANCED NOTICE
7 OF THAT SO THAT YOU COULD OBTAIN TO GET SOMEONE WHO
8 SPEAKS ANTARCTICA LANGUAGE AN OPPORTUNITY TO LOOK
9 AT THE RESULTS AND TO BE ABLE TO TESTIFY ON BEHALF
10 OF THE DEFENDANT, NOT JUST TO HAVE TESTIMONY FROM
11 THE STATE. AND THE SAME THING -- I DON'T KNOW IF
12 MR. BAILEY, THE SOLICITOR, NEEDS AN EXPERT ON THIS
13 MATTER OR WOULD HAVE TIME TO FIND ONE ON FRIDAY
14 AFTERNOON AT SIX O'CLOCK. WE'LL TAKE A RECESS.
15 AND Y'ALL LET ME KNOW WHEN YOU'RE READY.

16 MR. THEOS: YOUR HONOR, CAN I STATE
17 ONE LAST THING FOR THE RECORD? MR. BAILEY GAVE TO
18 ME THE -- I BELIEVE IT WAS ON MONDAY, OR IT MAY
19 HAVE BEEN TUESDAY OR WEDNESDAY -- AN EXHIBIT THAT'S
20 BEEN INTRODUCED RELATED TO A FOOTPRINT; TOLD ME I
21 BELIEVE FRIDAY BEFORE THE TRIAL STARTED THAT HE WAS
22 GOING TO HAVE AN ANALYSIS DONE ON THE FOOTPRINTS
23 THAT MR. DERRICK TESTIFIED TO. AND I WAS NOT
24 PROVIDED ANY REPORT. I WASN'T PROVIDED ANYTHING
25 RELATED TO IT.

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 THE COURT: IS IT IN ANY WAY
2 DETRIMENTAL TO YOUR CLIENT?

3 MR. THEOS: I THINK IT WAS, YOUR
4 HONOR.

5 THE COURT: YOU DO?

6 MR. THEOS: YES, SIR. SOMETHING
7 THAT I WASN'T ON NOTICE OF.

8 THE COURT: I'M SURE IF THE SHOE HAD
9 FIT, I'M SURE YOU WOULD HAVE HOLLERED. ALL RIGHT.
10 WE'LL TAKE A RECESS. LET ME KNOW WHEN YOU'RE
11 READY, FELLOWS. PLEASE COOPERATE WITH THE
12 SOLICITOR AND MAKE AVAILABLE AND TALK TO HIM AND
13 SHOW HIM WHATEVER. PLAY FAIR.

14 (BRIEF RECESS.)

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16 (AT THIS TIME JURY RETURNS TO OPEN COURT.)

17 THE COURT: LADIES AND GENTLEMEN,
18 MAY I PLEASE SHARE SOME INFORMATION WITH YOU? THAT
19 IS WE'RE UNCERTAIN AT THIS MOMENT HOW MUCH OTHER
20 AND FURTHER TESTIMONY THERE WILL BE. AT LUNCH TIME
21 I CONFERRED WITH THE ATTORNEYS, AND IT WAS
22 ANTICIPATED THAT POTENTIALLY THE TESTIMONY COULD BE
23 COMPLETED TONIGHT; IF NOT MID-MORNING TOMORROW. I
24 REPEAT TO YOU AGAIN, IT'S NOT THE SPEED AT WHICH
25 SOMETHING IS DONE BUT THE QUALITY. SO PLEASE DO

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 NOT IMPLY THAT ANYONE IS TRYING TO RUSH YOU OR RUSH
2 THE LAWYERS OR RUSH ANYONE ELSE. BUT I DO ALWAYS
3 HAVE FOREMOST IN MY THOUGHTS THE FACT THAT FIFTEEN
4 OF YOU, LADIES AND GENTLEMEN, ARE AWAY FROM YOUR
5 FAMILIES AND YOUR HOME AND BUSINESSES AND OTHER
6 INTERESTS THAT YOU HAVE. AT THIS TIME I AM GOING
7 TO EXCUSE YOU FOR THE EVENING. CAPTAIN BUTCH POLK
8 HAS MADE ARRANGEMENTS FOR YOU TO EAT AT OSCAR'S.
9 I'VE NOT BEEN THERE, BUT I UNDERSTAND IT IS A
10 DECENT FACILITY. AND I HOPE Y'ALL EAT WELL AND
11 ENJOY IT. AND WE'RE GOING TO STAY HERE -- IT MIGHT
12 BE ONE HOUR; IT MIGHT BE THREE HOURS. WE'VE GOT A
13 LOT OF THINGS TO DISCUSS AND TO RESOLVE THAT DO NOT
14 IN ANY WAY AFFECT YOU LADIES AND GENTLEMEN. BUT TO
15 TRY AND GIVE YOU A PREVIEW BECAUSE WE HAD DISCUSSED
16 EARLIER IN THE WEEK RELATIVE TO WHAT WE WOULD DO ON
17 SUNDAY. IT'S ANTICIPATED AT THIS TIME THAT SOME
18 TIME TOMORROW -- I DON'T KNOW IF IT WILL BE TEN,
19 ELEVEN, TWELVE, ONE, TWO O'CLOCK THAT WE WILL
20 CONCLUDE THE TESTIMONY. THEN WE WILL GO INTO THE
21 CLOSING ARGUMENTS AND THE CHARGE ON THE GUILT PHASE
22 OF THE TRIAL. AGAIN, PLEASE, I EMPHASIZE TO YOU,
23 DO NOT INFER ANYTHING FROM ANY COMMENTS THAT I MAKE
24 AS TO WHAT YOUR VERDICT SHOULD BE IN THE GUILT
25 PHASE. THERE WILL BE A 24 HOUR WAITING PERIOD

1 BETWEEN THE GUILT PHASE AND THE PENALTY PHASE. BUT
2 WE WILL WORK ON SUNDAY; BUT THAT COULD BE THE 24
3 HOUR WAITING PERIOD. AND THEN AGAIN, THERE MAY NOT
4 BE A NEED FOR A 24 HOUR WAITING PERIOD. I HOPE
5 I'VE EXPLAINED TO YOU ADEQUATELY WHERE WE STAND AT
6 THIS TIME. AND AGAIN, PLEASE DON'T BE OFFENDED BY
7 ANY DELAYS. IT'S NOT INTENTIONAL ON ANYBODY'S
8 PART. EVERYONE IS WORKING TOGETHER TRYING TO
9 PERFORM THE ASSIGNED TASKS AS THEY SHOULD. AND WE
10 JUST ASK FOR YOUR CONTINUED UNDERSTANDING,
11 INDULGENCE, PATIENCE, AND COOPERATION. AND I CAN'T
12 TELL YOU RIGHT NOW WHAT TIME WE'RE GOING TO START
13 COURT IN THE MORNING. BUT LT. BUSTER EDWARDS IS
14 GOING -- I WAS GOING TO PUT Y'ALL IN CHARGE. BUT
15 THE LIEUTENANT IS GOING TO BE IN CHARGE. IN ANY
16 EVENT, IT DOESN'T MATTER. BEFORE Y'ALL LEAVE THE
17 RESTAURANT, HAVE -- I WILL BE AT THIS NUMBER; AND
18 TAKE THAT NUMBER DOWN. AND IT DOESN'T MATTER IF
19 IT'S NINE O'CLOCK, TEN O'CLOCK, 10:30; I'LL BE AT
20 THIS NUMBER WORKING. AND AT THAT TIME I'LL BE ABLE
21 TO TELL YOU WHAT TIME WE'RE GOING TO ASK YOU TO
22 HAVE THE JURY HERE IN THE MORNING BECAUSE THEY KNOW
23 BEFORE THEY GO TO BED TONIGHT WHAT TIME THEY'RE
24 EXPECTED TO BE AT WORK TODAY. SO IF YOU'RE ABLE TO
25 TELL US BEFORE YOU LEAVE THE OSCAR'S, OR AT LEAST

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 BY THE TIME YOU GET BACK FROM OSCAR'S TO THE
2 HOLIDAY INN THAT -- I THINK THAT WOULD BE HELPFUL
3 FOR THE JURY TO BE INFORMED OF WHAT TIME WE WILL
4 NEED THEM TOMORROW. SO, NOT REGARDING THE TRIAL;
5 BUT ARE THERE ANY QUESTIONS THAT YOU HAVE ABOUT THE
6 LOGISTICS OR--- (JUROR STANDS.) YES, SIR?

7 THE JUROR: I UNDERSTAND THAT THE
8 ALTERNATES AREN'T SUPPOSED TO BE IN THE ROOM WITH
9 THE OTHER JURORS; CORRECT?

10 THE COURT: THE THREE ALTERNATES
11 WILL NOT BE REQUIRED OR ALLOWED TO ENTER INTO THE
12 FINAL DELIBERATIONS UNLESS I'VE HAD TO EXCUSE ONE
13 OF MY REGULAR TWELVE FOR ANY EMERGENCY REASON,
14 BUSINESS, PERSONAL, PROFESSIONAL, OR ANY OTHER
15 REASON. IF SO YOU WOULD BE THE FIRST ALTERNATE.
16 MY SIGN PAINTER WOULD BE THE SECOND; AND THE THIRD
17 ALTERNATE WOULD BE THE THIRD. BUT WHEN THE JURY
18 COMMENCES THEIR DELIBERATIONS, YOU CONTINUE TO BE
19 SEQUESTERED. AND THEN IF WE GO INTO A PENALTY
20 PHASE, YOU TWO OR THREE WOULD STILL -- HOWEVER MANY
21 OTHERS THERE MAY BE -- WOULD STILL BE ALTERNATES
22 AND IRRESPECTIVE GIVE CAREFUL ATTENTION TO THE
23 TESTIMONY IN THE EVENT THAT YOU WERE CALLED UPON TO
24 SERVE AS A REGULAR MEMBER OF THE TWELVE PERSON JURY
25 ON ANY OF THE DELIBERATIONS FOR THE PENALTY PHASE

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 IF WE GET TO THAT. AND EVEN DURING THE
2 DELIBERATIONS ON THE PENALTY PHASE, YOU'LL STILL BE
3 SEQUESTERED AND REMAIN WITH US. SO YOU'RE IN FOR A
4 LONG HAUL.

5 THE JUROR: WELL, DURING THE
6 DELIBERATIONS, ARE WE GOING TO BE ABLE TO SIT IN
7 THE SAME ROOM?

8 THE COURT: NO, SIR. YOU WILL NOT
9 BE ALLOWED UNLESS YOU BECOME ONE OF THE CHOSEN
10 TWELVE, OKAY?

11 THE JUROR: OKAY.

12 THE COURT: SO NOTHING FURTHER,
13 LADIES AND GENTLEMEN. PLEASE HAVE A NICE EVENING.
14 AND I'LL REMIND YOU AGAIN; YOU'RE UNDER THE
15 CONTINUING ADMONITION NOT TO EXPOSE YOURSELF TO
16 ANYTHING ABOUT THE CASE, ALLOW ANYONE TO TALK TO
17 YOU ABOUT IT, OR INFLUENCE YOU IN ANY WAY. THANK
18 YOU. HAVE A PLEASANT EVENING. I WISH I COULD JOIN
19 YOU.

20 (AT THIS TIME, JURY RETIRES TO JURY ROOM.)

21 THE COURT: ALL RIGHT, IS DR. WAID
22 PRESENT?

23 MR. THEOS: HE'S BACK IN THE
24 SOLICITOR'S OFFICE.

25 THE COURT: DO YOU WANT TO TELL HIM

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 TO COME ON IN?

2 MR. THEOS: YES, SIR.

3 THE COURT: MR. SOLICITOR, I'VE
4 DISCUSSED AT THE SIDE BAR AND IN CHAMBERS WITH YOU
5 GENTLEMEN, AND THE SOUTH CAROLINA RULES OF CRIMINAL
6 PROCEDURE MORE SPECIFICALLY 5-B(2) PROVIDES THE
7 DEFENDANT ON REQUEST OF THE PROSECUTION SHALL
8 PERMIT THE PROSECUTION TO INSPECT AND COPY ANY
9 RESULTS; ALL REPORTS, AS I UNDERSTAND IT, DR. WAID;
10 THERE HAVE BEEN NO WRITTEN REPORTS IN THIS CASE?

11 DR. WAID: NO, SIR.

12 THE COURT: AND THE RESULTS; YOU DO
13 HAVE THOSE WITH YOU?

14 DR. WAID: YES, SIR.

15 THE COURT: AND YOU'VE COMPLETED THE
16 LAST OF THOSE REPORTS ON FRIDAY OF LAST WEEK?

17 DR. WAID: YES, SIR. THE TESTS
18 WOULD HAVE BEEN ALL SCORED UP BY THE MEETING WE HAD
19 FRIDAY A WEEK AGO WHICH WAS THAT WEEK OF -- THE
20 FIFTEENTH WAS MONDAY. THE TWENTIETH WE HAD A
21 MEETING. I WENT OUT OF TOWN THE FOLLOWING WEEK.
22 SO I HAD THOSE PRESENTED TO THE TEAM. I HAD THEM
23 SCORED BEFORE THEN. BUT WE HAD A MEETING AMONGST
24 OUR TEAM OF EXPERTS ON THE TWENTIETH, I BELIEVE.

25 THE COURT: WHEN WAS SATURDAY; ON

1 THE NINETEENTH?

2 DR. WAID: YES.

3 THE COURT: AND THEN.

4 DR. WAID: I HAD TO GO OUT OF TOWN.

5 THE COURT: MR. THEOS WAS AWARE YOU
6 WERE GOING OUT OF TOWN ON VACATION TO TENNESSEE?

7 DR. WAID: YES, SIR.

8 THE COURT: DID YOU COMPLETE YOUR
9 VACATION?

10 DR. WAID: NO, SIR. BUT I'LL TALK
11 TO MY WIFE.

12 THE COURT: WERE YOU GOING BACK TO
13 TENNESSEE?

14 DR. WAID: NO, SIR. WE CAME BACK
15 EARLY. BUT THAT'S OKAY. IF I GET HOME FOR DINNER
16 TONIGHT, SHE'LL BE HAPPY.

17 THE COURT: NOW, WE CAN'T PROMISE
18 YOU THAT. THE REPORTS OF PHYSICAL, MENTAL
19 EXAMINATIONS AND OF SCIENTIFIC TESTS OR EXPERIMENTS
20 MADE IN CONNECTION WITH THE PARTICULAR CASE OR
21 COPIES THEREOF WITHIN THE POSSESSION OR CONTROL OF
22 THE DEFENDANT WHICH THE DEFENDANT INTENDS IN
23 INTRODUCE AS EVIDENCE IN CHIEF AT THE TRIAL OR
24 WHICH IS PREPARED BY A WITNESS WHO THE DEFENDANT
25 INTENDS TO CALL AT TRIAL WHEN THE RESULTS OF THE

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 REPORT RELATE TO HIS TESTIMONY. AND THAT IS THE
2 BASIS OF YOUR OBJECTION TO THIS WITNESS' TESTIMONY?

3 MR. BAILEY: YES, YOUR HONOR.

4 THE COURT: AND AS I MENTIONED IN
5 CHAMBERS, GENTLEMEN, IN REGARD TO THE -- THE
6 BECAUSE THE GENTLEMAN HAS ALREADY TESTIFIED ABOUT
7 HE'S CONFERRED WITH CERTAIN COLLEAGUES. I DON'T
8 KNOW WHETHER THAT'S OF THE STATE OR THE DEFENDANT,
9 EITHER OR BOTH; BUT CERTAINLY THE MIRANDA WARNING
10 SITUATION AND THE ABILITY TO KNOWINGLY AND
11 VOLUNTARILY WAIVE THOSE CONSTITUTIONAL RIGHTS --
12 THAT HAS BEEN AN ISSUE AS HAS THE MENTAL
13 RETARDATION.

14 MR. BAILEY: YES, SIR.

15 THE COURT: BUT AS TO WHETHER OR NOT
16 THERE WERE OTHER TESTS THAT HAVE A BEARING ON THAT
17 THAT WERE NOT BROUGHT TO YOUR ATTENTION BY WAY OF
18 THE RESULTS; THAT'S WHY THE COURT HAS CONCLUDED
19 THAT WE WOULD EXCUSE THE JURY FOR THIS EVENING
20 ALTHOUGH THIS COURT HAD HIGH HOPES THAT WE WOULD
21 COMPLETE THE TESTIMONY TODAY. AND AS THE RECORD
22 WILL REFLECT, I INDICATED TO THE JURY THAT IT WAS
23 UNCERTAIN AS TO WHETHER THERE WOULD BE OR WOULD NOT
24 BE FURTHER OTHER TESTIMONY. AND WE DON'T EVEN KNOW
25 AT THIS STAGE WHAT TIME WE SHOULD HAVE THE JURY

LEWIS RANDOLPH WAID - CONT'D DIRECT/MR. THEOS

1 REPORT TOMORROW. AND YOU HAD INDICATED FURTHER
2 THAT YOU HAD DR. SANDLER; AND HE'S PRESENT AND HAS
3 CONFERRED WITH YOU IN YOUR ROOM THERE WITH DR.
4 WAID. AND HE INDICATED THAT PERHAPS IN FOUR TO SIX
5 HOURS HE COULD REVIEW IT TO UNDERSTAND IT. BUT YOU
6 HAD INDICATED YOU DIDN'T KNOW IF YOU COULD CONTACT
7 AN EXPERT TO CHALLENGE THIS EXPERT OR WHETHER YOU
8 HAD AN OPPORTUNITY TO UNDERSTAND IT BETWEEN NOW AND
9 IN THE MORNING.

10 MR. BAILEY: YOUR HONOR, OF COURSE I
11 WOULDN'T HAVE A CHANCE AT THIS POINT TO GET ANYBODY
12 THAT ISN'T ALREADY INVOLVED IN THE CASE; AND I WAS
13 GOING TO ASK DR. SANDLER TO LOOK AT IT. HE ADVISES
14 ME THAT IT WOULD TAKE ROUGHLY FOUR HOURS TO GO
15 THROUGH THE TEST RESULTS. THERE ARE SOME THIRTEEN
16 TO FIFTEEN TESTS AS I UNDERSTAND IT. BUT BEFORE HE
17 COULD REALLY PUT IT ALL TOGETHER AND KIND OF
18 COLLATE IT, IT WOULD BE LIKE 24 HOURS IF THAT'S ALL
19 HE DID. HE'S NODDING HIS HEAD OVER HERE.

20 THE COURT: AND YOU GENTLEMEN
21 UNDERSTAND, OF COURSE, IF THIS WERE A PRODUCTS
22 LIABILITY OF A MEDICAL MALPRACTICE CASE OR WHATEVER
23 OF A COMPLEX NATURE; IF THE JURY WERE NOT
24 SEQUESTERED, IT WOULD BE SIMPLE ENOUGH THAT WE
25 WOULD JUST RECESS UNTIL MONDAY OR TUESDAY TO GIVE

1 YOU THE OPPORTUNITY TO GET UP TO SPEED OR
2 WHATEVER. BUT WITH THAT SEQUESTERED JURY, I JUST
3 DON'T FEEL THAT WE CAN DO THAT AT THIS TIME,
4 GENTLEMEN. AND I HOPE YOU UNDERSTAND THAT.

5 MR. BAILEY: YOUR HONOR, I
6 UNDERSTAND AND AGREE THAT I THINK IT WOULD
7 PREJUDICE THE STATE'S CASE IF THE JURY WAS
8 SEQUESTERED FOR TWO DAYS. I MEAN, I THINK THEY
9 WOULD GET---

10 THE COURT: WHY WOULD IT PREJUDICE
11 YOUR CASE ANY MORE THAN THE DEFENSE? IT MIGHT
12 PREJUDICE EITHER OR BOTH OF YOU; BUT I DON'T KNOW
13 WHY IT WOULD PREJUDICE YOU MORE THAN THE DEFENSE.

14 MR. BAILEY: I DON'T KNOW WHAT THE
15 RESULT WOULD BE. BUT I KNOW THEY WOULD BE ANGRY
16 AND THAT'S CERTAINLY A GOOD REASON FOR---

17 THE COURT: YOU DIDN'T SEE THE MOVIE
18 "TWELVE ANGRY MEN?" OR MAYBE YOU DID SEE IT.
19 WELL, LET'S QUIT TALKING AND GET THE TRAIN ON THE
20 TRACK. AND THIS TIME, MR. WITNESS, YOU'RE UNDER
21 OATH. AND WE'LL PROCEED WITH A PROFFER OUTSIDE THE
22 PRESENCE OF THE JURY, PLEASE. YOU MAY PROCEED.

23 (THE FOLLOWING TAKES PLACE OUT OF THE PRESENCE OF THE
24 JURY.)
25

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WHEREUPON,

RANDY WAID, M.D., WHO BEING PREVIOUSLY
SWORN TO TELL THE TRUTH, TESTIFIED AS
FOLLOWS:

DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. WAID, I BELIEVE WE LEFT OFF WITH THE---

A. I WAS EXPLAINING MY TEST; BUT I WAS EXPLAINING THAT
I ALSO GAVE ONE MALINGERING TEST. AND I WAS
EXPLAINING TO THE JURY PRINCIPLES BEHIND ALL OF THE
MALINGERING TESTS INCLUDING THE ONE THAT I GIVE.

Q. DID YOU -- I DON'T KNOW THAT WE DISCUSSED -- I'VE
SORT OF FORGOTTEN WHAT WE DISCUSSED OR WHETHER WE
DIFFERENTIATED BETWEEN THE FIRST AND SECOND
EXAMINATION OR WHETHER WE DIFFERENTIATED.

THE COURT: WELL, JUST START AT THE
BEGINNING. THAT WAY YOU WON'T OVERLOOK ANYTHING.
ALL WE'VE GOT IS TIME LIKE A HOG ON ICE; HE CAN'T
GO ANYWHERE. GO AHEAD.

BY MR. THEOS:

Q. DID YOU FORMULATE ANY OPINIONS TO A REASONABLE
DEGREE OF SCIENTIFIC CERTAINTY ABOUT MR. SIMMONS'
ABILITY TO COMPREHEND HIS MIRANDA WARNINGS AND TO
MAKE A KNOWING AND VOLUNTARY WAIVER AFTER YOUR
FIRST EVALUATION, AS A RESULT OF YOUR FIRST

1 EVALUATION?

2 A. YES; I DID MAKE THAT OPINION -- NOT AFTER MY FIRST
3 EVALUATION BUT CERTAINLY AFTER MY OBTAINING MY TEST
4 RESULTS FROM THE NEUROPSYCHOLOGICAL TESTING IN
5 CONJUNCTION WITH ALL THE OTHER TEST RESULTS THAT
6 HAD BEEN PROVIDED BY THE OTHER EXPERTS FROM THE
7 DIFFERENT FACILITIES THAT HAD BEEN INVOLVED IN
8 EVALUATING THIS MAN.

9 THE COURT: I'M SORRY. MR.
10 SOLICITOR, HAVE YOU HAD THE OPPORTUNITY TO
11 CROSS-EXAMINE? YOU HAVEN'T OFFERED HIM AN EXPERT
12 YET.

13 MR. BAILEY: YOUR HONOR, HE HASN'T.
14 BUT JUST FOR THE PURPOSE OF -- SINCE THE JURY IS
15 OUT, I HAVE NO QUESTIONS WITH REGARD TO HIS
16 EXPERTISE.

17 THE COURT: ALL RIGHT.

18 MR. THEOS: YOUR HONOR, I WOULD
19 RESPECTFULLY POINT OUT THAT WE DID OFFER HIM AS AN
20 EXPERT; AND MR. BAILEY DID QUESTION HIM.

21 THE COURT: CLINICAL PSYCHOLOGIST,
22 NEUROPSYCHOLOGIST, FORENSIC PSYCHOLOGIST?

23 MR. THEOS: YES, SIR.

24 THE COURT: YOU WEREN'T HERE WHEN
25 THAT OTHER DOCTOR TESTIFIED THAT HE HAD NEVER HEARD

1 OF A FORENSIC PSYCHOLOGIST?

2 DR. WAID: I WASN'T HERE.

3 THE COURT: YOU WEREN'T?

4 DR. WAID: NO, SIR.

5 THE COURT: I DIDN'T KNOW IF THAT
6 WAS ONE OF THE COLLEAGUES YOU HAD CONFERRED WITH.
7 WE'LL FIND OUT. GO AHEAD.

8 A. BASICALLY AFTER DOING THAT, MY CONCLUSION IS THAT
9 THIS MAN DOES HAVE NEUROLOGY COGNITIVE IMPAIRMENTS
10 WHICH WOULD BE DEFICITS IN HIS ABILITY TO ATTEND,
11 CONCENTRATE, AND PERFORM LEARNING AND MEMORY AND
12 HIGHER REASONING FUNCTIONS; THAT THOSE ARE THE
13 BASES FOR COMPROMISING HIS ABILITY TO FULLY
14 UNDERSTAND AND COMPREHEND THE PRINCIPLES INVOLVED
15 IN HIS MIRANDA RIGHTS IF THAT'S WHERE YOU WANT TO
16 JUMP TO AT THIS POINT; THAT THAT WAS A CONCLUSION
17 BASED AFTER THE TOTALITY OF MY EVALUATION INCLUDING
18 THE REVIEW OF EXTENSIVE TESTING AND RECORDS
19 PROVIDED TO ME.

20 Q. NOW, WHAT DID YOU CONCLUDE AS A RESULT OF YOUR
21 EXAMINATIONS AND IN REVIEW OF ALL THESE RECORDS
22 AGAIN TO A REASONABLE DEGREE OF SCIENTIFIC
23 CERTAINTY AS TO MR. SIMMONS' MENTAL CAPACITY?

24 A. HIS MENTAL CAPACITY IS DIMINISHED. HE HAS REQUIRED
25 NEURO-COGNITIVE IMPAIRMENTS. THOSE, I BELIEVE, ARE

1 NOT DUE TO A DEVELOPMENTAL PROCESS CALLED MENTAL
2 RETARDATION. BUT THE FACT THAT HE HAS LOST
3 INTELLECTUAL ABILITIES DUE TO A LIFE-STYLE THAT IS
4 INVOLVED, POLY-SUBSTANCE DEPENDANCE AND ABUSE AND
5 OTHER POTENTIAL CAUSAL FACTORS THAT HAVE HURT HIS
6 BRAIN; THAT HAS RESULTED IN DIMINISHED CAPACITY.
7 HE WASN'T ALWAYS AT THAT LEVEL AND DO NOT BELIEVE
8 HE SUFFERED FROM MENTAL RETARDATION BUT BELIEVE HIS
9 INTELLECT IS IN THE BORDERLINE TO INTELLECTUALLY
10 DEFICIENT RANGE AND THAT HIS ABILITY TO DO OTHER
11 SORTS OF NEURO-COGNITIVE TESTS THAT MEASURE
12 ATTENTION, CONCENTRATION, MEMORY, LEARNING, AND A
13 HIGHER REASON ARE SIMILARLY IN THE LOWER TWO TO
14 THIRTY PERCENTILE AND HIS PERFORMANCE ON THOSE. SO
15 THAT WAS MY OPINION BASED ON THE EVALUATION.

16 Q. WITHOUT GOING INTO THE SPECIFIC TESTS AND THE TEST
17 RESULTS, WERE YOUR TESTS RESULTS CONSISTENT OR
18 INCONSISTENT WITH THOSE CONDUCTED BY DR. SANDLER,
19 MCABEE, AND THE OTHER DOCTORS WHO HAVE TESTIFIED?

20 A. THERE'S NOTHING NEW HERE.

21 THE COURT: NOW, HE HASN'T HEARD ALL
22 THE OTHER DOCTORS TESTIFY, HAS HE?

23 Q. DID YOU HEAR DR.---

24 THE COURT: FOXWORTH; START WITH
25 HIM.

1 DR. WAID: YEAH; I HEARD THAT.

2 THE COURT: OH, YOU HEARD HIS
3 TESTIMONY?

4 DR. WAID: YES, SIR.

5 THE COURT: BECAUSE, I MEAN, HIS
6 QUESTION WAS THAT YOU DIDN'T DISAGREE WITH ANY OF
7 THESE COLLEAGUES. AND YOU CAN'T AGREE WITH ALL OF
8 THEM WITHOUT DISAGREEING WITH DR.---

9 A. WELL, LET ME SAY THIS RIGHT NOW. BASICALLY MY TEST
10 RESULTS ARE CONSISTENT WITH THE PSYCHOLOGICAL,
11 INTELLECTUAL, AND NEURO-COGNITIVE TESTS THAT HAVE
12 BEEN ADMINISTERED. DR. FOXWORTH DID NOT ADMINISTER
13 ANY OF THOSE AS SOME OF MY OTHER COLLEAGUES WHO
14 HAVE TESTIFIED DID NOT. SPECIFICALLY THAT WOULD BE
15 DR. VIDIC, DR. SANDLER, DR. SAYLOR, AS WELL AS DR.
16 KEYS WHO HAS NOT TESTIFIED; BUT I HAVE REVIEWED HIS
17 TEST RESULTS, TOO. SO THERE HAVE BEEN FOUR OR FIVE
18 DIFFERENT INDIVIDUALS. ALL THE TEST RESULTS
19 SUGGEST THAT THIS MAN IS IN THE LOWER COUPLE OF
20 PERCENTILES IN HIS PERFORMANCE OF TESTS. NOW SOME
21 OF HIS TESTS ON MY NEURO-COGNITIVE TEST BATTERY
22 WERE NORMAL BECAUSE WE WOULDN'T CONSIDER THEM AND
23 WOULDN'T EXPECT THEM TO BE IMPAIRED BECAUSE THEY'RE
24 MEASURED IN VERY SIMPLE, DISCREET ABILITIES THAT
25 WOULDN'T BE CONSISTENT WITH THOSE INTELLECTUAL

1 DEFICITS WE'RE TALKING ABOUT. BUT ALL MY RESULTS
2 ARE CONSISTENT WITH WHAT WE'VE TALKED ABOUT. THIS
3 IS A VERY LOW FUNCTIONING INDIVIDUAL FROM AN
4 INTELLECTUAL NEURO-COGNITIVE POINT OF VIEW.

5 Q. WHAT PERCENTILE WOULD YOU PLACE HIM IN?

6 A. I WOULD PLACE HIM IN THE LOWER TWO PERCENTILE.
7 NINETY-EIGHT PERCENT OF THE PEOPLE WHO ARE OF HIS
8 AGE AND EDUCATIONAL HISTORY, CONSIDERING HE HAD
9 TWELVE YEARS OF COMPLETED EDUCATION, WOULD
10 OUT-PERFORM HIM ON A VARIETY OF THESE TESTS; NOT
11 ALL OF THEM BUT THOSE WHO MEASURE HIGHER
12 FUNCTIONING, LEARNING AND MEMORY, AND INTELLECTUAL
13 ABILITIES AS WELL AS ACADEMIC ACHIEVEMENT LEVELS.

14 Q. CAN YOU EQUATE THAT FUNCTIONING LEVEL TO A GRADE
15 EQUIVALENCY?

16 A. WELL---

17 Q. AND/OR AN AGE EQUIVALENCY?

18 A. WELL, THE EASIEST ONE THERE IS THE EDUCATIONAL
19 SKILLS. I THINK THE OTHER ONES FALL IN LINE. BUT
20 I THINK WHEN YOU'RE LOOKING AT THAT, THIS MAN IS
21 KIND OF LIKE A SECOND OR THIRD GRADER, SEVEN OR
22 EIGHT YEARS OLD, AND HIS ABILITIES, PARTICULARLY AS
23 THEY RELATE TO EDUCATIONAL SKILLS, READING,
24 WRITING, AND SPELLING, HAS BEEN SET BY THE WIDE
25 RANGE ACHIEVEMENT TESTS ADMINISTERED BY SEVERAL

1 COLLEAGUES AS WELL AS THE COG JOHNSON BY DR. KEYS.
2 AND THE I.Q. WOULD PLACE HIM IN ABOUT THAT SAME
3 LEVEL AS IT RELATES TO SOME DEFINITION OF MENTAL
4 AGE QUOTA.

5 Q. NOW HOW DO YOU RECONCILE YOUR OPINION RELATED TO
6 HIS DIMINISHED MENTAL CAPACITY WITH THE FACT THAT
7 HE GRADUATED FROM HIGH SCHOOL, PLAYED FOOTBALL, AND
8 GOT MARRIED?

9 THE COURT: GOT A HIGHWAY DEPARTMENT
10 DRIVER'S LICENSE, TOO.

11 Q. A DRIVER'S LICENSE?

12 THE COURT: HE LETTERED TWO YEARS IN
13 FOOTBALL.

14 A. MR. SIMMONS WAS NOT AN INTELLECTUAL GIANT BY ANY
15 MEANS IN SCHOOL. EARLY ON SOME OF HIS I.Q. TESTS
16 CAME IN QUITE LOW, THOUGH THERE HAS BEEN A COUPLE,
17 IF THEY'RE VALID, THAT HAVE BEEN FUNCTIONING HIGHER
18 THAN THE AVERAGE RANGE. BUT IF YOU LOOK AT HIS
19 ACADEMIC ACHIEVEMENT, HE, FROM THE FIRST GRADE ON,
20 WAS FALLING BEHIND AND BEHIND. HE WAS ABLE TO GET
21 THROUGH BECAUSE HE WAS NOT OF THE INTELLECTUAL
22 DEFICIENCY AS HE IS NOW. HE HAS DIMINISHED SINCE
23 HIGH SCHOOL. AND THAT'S AN ACQUIRED
24 NEURO-COGNITIVE IMPAIRMENT IN MY OPINION RELATED TO
25 HIS LIFE-STYLE THAT HAS INVOLVED POLY-SUBSTANCE

1 ABUSE AND DEPENDENCE AFFECTING THE ABILITY FOR HIM
2 TO BE AS BRIGHT, INTELLECTUAL, AND USE HIS BRAIN
3 BASE CAPACITIES AS WELL AS HE MIGHT HAVE EVEN IN
4 HIGH SCHOOL. SO RIGHT OFF THE BAT, ONE OF THE POOR
5 PREDICTORS FROM OUTCOME, FROM ANY TYPE OF
6 NEUROLOGICAL INJURY OR PROCESS, IS WHERE YOUR I.Q.
7 WAS. THE LOWER YOUR I.Q., THE MORE THAT PROCESS
8 INCLUDING TOXINS LIKE COCAINE AND SUBSTANCE AFFECT
9 YOU. HIGH I.Q. SERVES TO PROTECT YOU FROM THE
10 DEFICITS THAT MIGHT COME FROM THOSE TYPE OF
11 THINGS. HE WAS LOW AVERAGE IN MY OPINION AT BEST,
12 NOT MENTALLY RETARDED. AND I DO BELIEVE THE YEARS
13 ASSOCIATED WITH HIS ABUSE AS WELL AS POTENTIAL
14 BLOWS TO THE HEAD FROM HIS LIFE-STYLE HAS
15 CONTRIBUTED TO THE DIMINISHED LEVEL OF FUNCTIONING
16 HE NOW HAS.

17 Q. WHEN YOU SAY POLY-SUBSTANCE ABUSE, DO YOU INCLUDE
18 IN THAT ALCOHOL ABUSE?

19 A. ABSOLUTELY. I WOULD INCLUDE THAT EVEN MORE SO THAN
20 COCAINE FROM THE RESEARCH BASIS THOUGH THERE IS
21 COMPELLING RESEARCH DATA THAT SUGGESTS COCAINE IS
22 NOT GOOD FOR YOUR HEAD. BUT CLEARLY THE LEVEL OF
23 ALCOHOL ABUSE THAT HE HAS HAD IN HIS LIFE UP TO A
24 QUART A DAY OF DRINKING WOULD, EVEN AT HIS AGE,
25 CONTRIBUTE TO DIMINISHED FUNCTIONING.

1 THE COURT: DOCTOR, WE DON'T HAVE
2 THE JURY PRESENT. SO FEEL FREE TO INTERRUPT. YOU
3 MENTIONED POTENTIAL BLOWS TO HIS HEAD?

4 DR. WAID: YES, SIR.

5 THE COURT: I HAVEN'T HEARD ANY
6 EVIDENCE IN FIVE DAYS ABOUT POTENTIAL BLOWS TO HIS
7 HEAD. CAN YOU SHARE THAT WITH ME?

8 DR. WAID: YES, SIR. BASICALLY IN
9 ALCOHOL ABUSE FACILITIES AND ALCOHOL ABUSERS,
10 THAT'S WHY I USE THE WORD "LIFE-STYLE." OFTEN
11 THESE PEOPLE SUFFER BLOWS OR CONCUSSIONS AT A HIGH
12 RATE THAT WILL RARELY END UP IN A HOSPITAL
13 SETTING. MULTIPLE CONCUSSIONS ARE A COMMON
14 CORRELATE OF IT. I HAVE NOT HAD ANY DOCUMENTATION
15 OTHER THAN ONE TIME WHEN HE HAD HIS TEETH KNOCKED
16 OUT IN A PHYSICAL ALTERCATION. THE OTHER ONE I
17 REALLY SHOULD SAY ABOUT THE INCIDENT SINCE HE DID
18 HAVE ONE DRUG OVERDOSE, TOO, WHICH I WOULD CONSIDER
19 AN INCIDENT HIGH POTENTIAL TO AFFECT HIS BRAIN.

20 THE COURT: BUT DO YOU HAVE ANY
21 EVIDENCE THAT THERE HAS BEEN OTHER THAN WHEN HE
22 LOST ONE TOOTH -- TWO TEETH?

23 DR. WAID: NO, SIR. I DO NOT HAVE
24 ANY OTHER REPORT OF A HEAD INJURY. I'M SORRY. I
25 STAND CORRECTED.

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THE COURT: AND WHEN WAS THE DRUG
OVERDOSE?

DR. WAID: UH---

THE COURT: WE HAVEN'T HAD ANY
TESTIMONY ABOUT THAT. AND WHEN WAS THE BLOW TO HIS
HEAD WHEN HE LOST HOW MANY TEETH?

DR. WAID: I THOUGHT IT WAS SEVERAL
TEETH. THE PSYCHOSOCIAL HISTORY REVIEWED BY THE
SOCIAL WORKER HAS THOSE IN HIS REPORT THAT WE'VE
DISCUSSED.

THE COURT: WHICH SOCIAL WORKER?

DR. WAID: UH---

THE COURT: TAKE YOUR TIME TO LOOK
AT THESE REPORTS. I'M NOT TRYING TO HURRY YOU.

DR. WAID: MR. YOUNGMAN WHO IS A
LICENSED SOCIAL WORKER WHO HAS DONE A PSYCHOSOCIAL
HISTORY EVALUATION.

THE COURT: AND YOU HAVE HIS
REPORT?

DR. WAID: YES, I DO.

THE COURT: AND WHAT'S THE DATE OF
IT?

DR. WAID: FEBRUARY THE EIGHTH,
1999.

THE COURT: AND HAVE YOU HAD THE

1 BENEFIT OF THAT REPORT, MR. THEOS?

2 MR. THEOS: YOUR HONOR, THAT'S OUR
3 MITIGATION EXPERT. AND DR. WAID, THAT'S NOT
4 SOMETHING THAT YOU CAN CONSIDER FOR PURPOSES OF
5 THIS TESTIMONY. BUT, YOUR HONOR, I WILL SAY THAT
6 MR. SIMMONS DID REPRESENT TO DR. SANDLER AND MCABEE
7 EITHER TWO OR THREE BLOWS TO THE HEAD AND TWO
8 EFFORTS TO COMMIT SUICIDE, ONE BY WAY OF DRUG
9 OVERDOSE. SO THAT INFORMATION WAS RELATED TO, I
10 BELIEVE, DR. BEHRMANN AND DR. VIDIC AS WELL, TO ALL
11 FOUR OF THE STATE'S DOCTORS BY MR. SIMMONS.

12 THE COURT: WELL, YOU WERE THERE; I
13 WASN'T. SO I WOULD HAVE NO WAY OF KNOWING THAT.

14 MR. THEOS: I WASN'T IN THREE OF THE
15 MEETINGS WITH THE DEPARTMENT OF DISABILITIES.

16 THE COURT: ALL RIGHT, SIR. SO
17 YOU'RE UNDER NO COMPULSION TO SHARE REPORTS ON
18 MITIGATION; IS THAT CORRECT?

19 MR. BAILEY: YOUR HONOR, I THINK
20 RULE FIVE DOESN'T DIFFERENTIATE BETWEEN WHAT PHASE
21 IT IS.

22 MR. THEOS: YOUR HONOR, THE REPORT
23 OF THE SOCIAL HISTORY EXPERTS THAT ARE PUTTING
24 TOGETHER OUR MITIGATION WITNESSES IS WORK PRODUCT.
25 IT'S NOT SOMETHING THAT WE PLAN ON INTRODUCING.

1 AND I DON'T BELIEVE I'M UNDER THE COMPULSION OF THE
2 COURT OR THE RULES---

3 MR. BAILEY: I'LL WITHDRAW THE
4 OBJECTION TO IT AS LONG AS HE DOESN'T USE THAT IN
5 THE GUILT PHASE.

6 THE COURT: PROCEED.

7 MR. THEOS: I THINK THE JUDGE ASKED
8 YOU THE LAST QUESTION.

9 A. WELL, I WAS ALSO AWARE OF DR. SANDLER'S REPORT
10 TALKING ABOUT SOME SUICIDE ATTEMPTS AND DRUG
11 OVERDOSE. BUT I HAD SPECIFICALLY USED THE
12 PSYCHOSOCIAL HISTORY AS ONE OF THE TIMES, BUT I'LL
13 LEAVE IT AT THAT.

14 Q. AND I THINK ALSO IN HIS STATEMENT TO DR. BEHRMANN
15 AND VIDIC THAT INFORMATION WAS GATHERED FROM MR.
16 SIMMONS AT THAT PARTICULAR TIME AS WELL?

17 A. I'M AWARE OF THAT. THERE WAS NO SPECIFIC
18 UNDERSTANDING IN THE HOSPITAL CHART OF HEAD INJURY,
19 THOUGH, WHERE IT WAS PRINTED AS NEGATIVE.

20 Q. NOW, HOW DOES THIS---

21 THE COURT: EXCUSE ME. MR. BAILEY,
22 IF IT WILL HELP YOU, WHY DON'T YOU PULL UP A CHAIR
23 AND JUST LET DR. SANDLER SIT BY YOU? IF YOU'D
24 LIKE, I'LL BE HAPPY TO INSTRUCT HIM TO.

25 MR. BAILEY: OKAY.

1 THE COURT: I SAY THAT TRYING TO BE
2 HELPFUL SO WE CAN GET TO THE BOTTOM LINE. JUST SIT
3 THERE BY HIM; AND Y'ALL CAN CONFER AS YOU GO. AND,
4 DOCTOR, I REALIZE YOU'VE GOT A LOT OF REPORTS AND
5 RECORDS. TAKE YOUR TIME. I MEAN, REALLY, WE'RE
6 NOT TRYING TO FLUSTER YOU OR UNNERVE YOU OR GET YOU
7 CONFUSED IN ANY WAY BECAUSE I REALIZE YOU DON'T
8 HAVE A NICE INDEXED NOTEBOOK WITH ALL THAT IN IT.

9 BY MR. THEOS:

10 Q. DR. WAID, AS A RESULT OF THE EXAMINATIONS YOU
11 CONDUCTED AND THE REVIEW OF ALL THE RECORDS THAT
12 YOU HAD RELATED TO MR. SIMMONS, DID YOU MAKE A
13 DIAGNOSIS RELATED TO HIS MENTAL CONDITION?

14 A. YES. I BELIEVE THAT THE AXIS ONE OR THE
15 PSYCHIATRIC DIAGNOSIS THAT HAS BEEN OFFERED, I
16 WOULD AGREE WITH THAT BY HISTORY HE HAS A
17 POLY-SUBSTANCE ABUSE DEPENDENCE, ABUSE OR
18 DEPENDENCE PROBLEM. OBVIOUSLY SINCE HE'S BEEN IN
19 JAIL THAT HAS NOT BEEN AN ONGOING PROBLEM. THAT'S
20 BY HISTORY. TWO; I WOULD ALSO ASSESS HIM AS HAVING
21 A LOSS OF INTELLECTUAL ABILITIES, DEMENTIA
22 SECONDARY TO HIS HISTORY OF SUBSTANCE ABUSE.

23 Q. AND ALCOHOL ABUSE?

24 A. THAT'S WHAT I MEAN, ALCOHOL ABUSE.

25 Q. YOU'RE INCLUDING ALCOHOL?

1 A. YES, SIR. I USE THAT; POLY-SUBSTANCE WITH ALCOHOL
2 DEFINITELY BEING A PRIMARY CANDIDATE.

3 THE COURT: DID YOU SAY A DIMINISHED
4 CAPACITY?

5 DR. WAID: YES, SIR. WE CALL IT
6 DEMENTIA MEANING THAT SOMEBODY HAS LOST
7 INTELLECTUAL ABILITY FROM A PREVIOUS HIGHER STATE
8 DUE TO, IN THIS CASE, A POLY-SUBSTANCE---

9 THE COURT: POLY-SUBSTANCE; ALCOHOL
10 AND DRUGS?

11 DR. WAID: YES, SIR.

12 Q. NOW IN LAY TERMS, WHAT IMPACT DOES THAT HAVE ON AN
13 INDIVIDUAL?

14 A. WHAT IT HAS IS IT MEANS THAT THEY DON'T FUNCTION AS
15 WELL INTELLECTUALLY; THAT THEY'RE LIKELY TO HAVE
16 LEARNING AND MEMORY IMPAIRMENTS; IMPAIRMENTS IN
17 HIGHER REASONING SKILLS. AND THOSE ARE ALL
18 RELATIVE TO A PREVIOUS HIGHER STATE OF FUNCTIONING.
19 THAT MIGHT HAVE BEEN ON BOARD EITHER PRE-ACCIDENT
20 OR PRE -- A PROCESS THAT WOULD HAVE AFFECTED THEIR
21 BRAIN. AND, SO, MY POINT IS I BELIEVE HE HAS
22 ACTUALLY LOST THE ABILITY FROM HIS HIGH SCHOOL DAYS
23 COMPARED TO HIS CURRENT ADULTHOOD FUNCTIONING AND
24 THOSE AREAS OF FUNCTIONING I JUST OUTLINED FOR YOU.

25 Q. NOW, DO YOU HAVE AN OPINION THAT YOU CAN STATE TO A

1 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
2 WHETHER KENNETH SIMMONS IS PRESENTLY ABLE TO MAKE A
3 KNOWING AND INTELLIGENT WAIVER OF HIS MIRANDA
4 RIGHTS?

5 A. IN MY OPINION, IN REVIEW OF BOTH MY EVALUATION OF
6 HIS ABILITY TO DO SO CURRENTLY, AS WELL AS
7 REVIEWING OTHER EVALUATIONS BY DR. SAYLOR, IT IS MY
8 OPINION THAT HE DOES NOT HAVE THE CAPACITY TO FULLY
9 UNDERSTAND HIS MIRANDA RIGHTS PRIMARILY BASED ON
10 CAPACITY, KNOWING, OR INTELLIGENT REASONS. I DON'T
11 THINK THERE WAS ANY VOLUNTARY OR COERCIVE PROCESS
12 THAT AFFECTED HIM IN HIS CONFESSION, MAYBE. I
13 SIMPLY DON'T THINK THAT HE HAS A RATIONAL CHOICE
14 BASED UPON THE APPRECIATION, THE CONSEQUENCES OF
15 HIS DECISION. AND THAT'S MAINLY DEPICTED FROM MY
16 EVALUATION OF HIS UNDERSTANDING OF MIRANDA RIGHTS
17 AND HIS CURRENT STATE. WHEN I TRIED TO DO A
18 RETROSPECTIVE ANALYSIS OF WHAT HIS THINKING WAS AT
19 THE TIME WHEN HE MADE IT IN DECEMBER, THOUGH HE'S
20 CERTAINLY BEEN GIVEN SOME TEACHING SINCE THAT TIME,
21 I COULD NOT GET REAL DISCERNIBLE INFORMATION TO
22 REALLY TRACK HIS THINKING AT THAT TIME.

23 THE COURT: ARE YOU TALKING ABOUT
24 DECEMBER OF '97 OR DECEMBER OF '98?

25 DR. WAID: DECEMBER OF '97 AT THE

1 TIME OF THE -- WHEN I TRIED TO GO BACK AND
2 RETROSPECTIVELY ASK HIM WHAT HE WAS THINKING WHEN
3 HE DID ALL OF THAT---

4 THE COURT: SO THE HALL INSTITUTE IS
5 WHERE YOU EXAMINED HIM IN DECEMBER OF '98. THAT'S
6 WHY I ASKED YOU THAT.

7 DR. WAID: NO. MY POINT IS YOU HAVE
8 TWO WAYS TO GO; YOU ASSESS IT CURRENTLY; AND HE'S
9 HAD THAT DONE. AND HE'S ALSO BEEN GIVEN SOME
10 INSTRUCTION ABOUT IT. BUT THAT MIGHT NOT BE AS
11 RELEVANT IF ONE COULD GO BACK AND ASCERTAIN REALLY
12 WHAT HE WAS THINKING WHEN HE MADE THE CONFESSION.
13 SO I WILL TELL YOU I DIDN'T HAVE ACCESS BECAUSE I
14 DON'T FIND HIM COMPETENTLY ABLE TO GIVE ME
15 INFORMATION ABOUT HIS THINKING THAT DAY.

16 Q. DO YOU HAVE AN OPINION THAT YOU CAN STATE TO A
17 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO
18 WHETHER OR NOT MR. SIMMONS WOULD HAVE BEEN CAPABLE
19 OF COMPREHENDING HIS MIRANDA WARNINGS IN DECEMBER
20 OF 1997 AND THEREBY MAKE A KNOWING AND INTELLIGENT
21 WAIVER OF THOSE WARNINGS?

22 A. I DO NOT HAVE AN ACCURATE UNDERSTANDING OF THINKING
23 THAT DAY FROM THE RETROSPECTIVE OF QUESTIONING OR
24 ANALYSIS OF HIS THINKING. BUT I WOULD INDICATE TO
25 YOU THAT I BELIEVE THE AGENTS INVOLVED THAT HAVE

1 CAUSED HIM TO HAVE SOME INTELLECTUAL AND
2 NEURO-COGNITIVE IMPAIRMENTS WERE PRESENT THAT DAY;
3 MORE LIKELY EVEN AFFECTED HIM NEGATIVELY BECAUSE
4 THERE IS A TENDENCY TO IMPROVE ONCE YOU ABSTAIN
5 FROM SUBSTANCE USAGE WHICH HAS HAPPENED IN THIS
6 CASE MAINLY OUT OF HIM BEING PLACED IN JAIL. AND
7 THEREFORE I WOULD TELL YOU THAT MY ASSESSMENT WAS
8 THAT HE WOULD NOT HAVE HAD A BETTER CAPACITY THEN
9 TO UNDERSTAND HIS MIRANDA RIGHTS COMPARED TO
10 TODAY. IF ANYTHING IT WOULD HAVE BEEN A WORSE
11 CAPACITY TO UNDERSTAND HIS MIRANDA THEN.

12 Q. WHAT WOULD YOUR ASSESSMENT BE TO A REASONABLE
13 DEGREE OF SCIENTIFIC CERTAINTY?

14 A. I DO BELIEVE THAT IS TO A REASONABLE DEGREE OF
15 SCIENTIFIC CERTAINTY.

16 THE COURT: MOST PROBABLY THAN NOT?

17 DR. WAID: MOST PROBABLY THAN NOT;
18 YES, SIR.

19 MR. THEOS: THAT WOULD BE IT, YOUR
20 HONOR.

21 THE COURT: ALL RIGHT, MR. BAILEY;
22 YOU MAY CROSS.

23 MR. BAILEY: THANK YOU, YOUR HONOR.

24 CROSS-EXAMINATION

25 BY MR. BAILEY:

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 Q. DOCTOR, HOW MANY NEUROPSYCHOLOGICAL TESTS DID YOU
2 HAVE TO ADMINISTER IN ORDER TO REACH YOUR
3 CONCLUSION YOU'VE EXPRESSED HERE TODAY?

4 A. NEUROPSYCHOLOGICAL TESTS WHICH IS A PART OF
5 ANYTHING REACHED IN MY CONCLUSION; THEY JUST ADDED
6 MORE ELEMENTS OF AN UNDERSTANDING OF HIS
7 INTELLECTUAL FUNCTIONING THAT WAS AMPLY DEPICTED BY
8 PREVIOUS TESTING. SO I'M NOT SURE THAT THE TWO --
9 THAT YOUR POINT IS MADE. I DIDN'T HAVE TO GIVE
10 THIRTEEN TESTS TO COME TO THE CONCLUSIONS THAT I
11 DID. THOSE THIRTEEN TESTS GIVE ME ADDED DATA THAT
12 I BELIEVE WAS ALREADY PRESENT IN THE PREVIOUS
13 INTELLECTUAL TESTS AND THE ACADEMIC ACHIEVEMENT
14 TESTS THAT WERE ADMINISTERED.

15 Q. DID THE TESTS THAT YOU GAVE GIVE YOU ANY ADDITIONAL
16 INFORMATION OVER AND ABOVE WHAT THE OTHER EXPERTS
17 HAD WHEN THEY TESTIFIED? IN OTHER WORDS, DO YOU
18 HAVE ANY NEW TEST DATA THAT THEY DIDN'T HAVE THAT'S
19 FORMING THE BASIS FOR YOUR OPINION?

20 A. YES, SIR, MR. BAILEY. THE NEURO-COGNITIVE TESTS
21 ARE SELECTIVE TESTS THAT MEASURE THE SIMPLEST
22 SKILLS ALL THE WAY UP TO THE HIGHEST LEVEL OF
23 REASONING AND PROBLEM SOLVING SKILLS. THEY ARE
24 MORE SENSITIVE TESTS TO POTENTIAL DYSFUNCTIONING IN
25 TERMS OF BRAIN BEHAVIORAL RELATIONSHIPS. THE GOOD

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 THING ABOUT THEM IS THERE ARE A NUMBER OF THEM.
2 AND EVEN WITH NEUROPATHOLOGY ON BOARD, WE WOULD
3 EXPECT SOME TO BE NORMAL AND CONSISTENT WITH THE
4 PROFILE EXPECTED FROM THAT NEUROPATHOLOGY AND SOME
5 TO BE SENSITIVE TO THE PRESENCE OF COGNITIVE
6 DIFFICULTIES OR NEUROPATHOLOGY. UNLIKE I.Q. TESTS
7 AND ACADEMIC ACHIEVEMENT TESTS, THEY'RE MUCH MORE
8 EFFECTED BY THE HISTORY OF ONE'S EDUCATIONAL
9 ATTAINMENT. AND SO THESE TESTS ARE A LITTLE LESS
10 BIASED BY THAT BACKGROUND INFORMATION. IT ALSO
11 ALLOWED ME TO MORE AMPLY UNDERSTAND WHETHER A
12 PERSON IS GIVING ME GOOD EFFORTS OR POOR EFFORTS OR
13 POTENTIAL MALINGERING BECAUSE IF SOMEBODY WERE TO
14 COME IN AND BE IMPAIRED ON ALL THE TESTS I GAVE, IT
15 WOULD NOT BE CONSISTENT WITH THE PROFILE EXPECTED
16 IN THEIR TEST PERFORMANCE BASED ON THE IDEA OF
17 WHAT'S WRONG WITH THEIR BRAIN. SO THEY'RE VERY
18 GOOD IN DELINEATING THAT MORE SO THAN THE I.Q. AND
19 ACADEMIC ACHIEVEMENT TESTS UNLESS CONFOUNDED BY
20 ONE'S HISTORY OF EDUCATIONAL ATTAINMENT.

21 Q. I'M NOT GOING TO PURPORT THAT I UNDERSTAND HALF OF
22 THAT. BUT LET ME ASK YOU SOMETHING ELSE. HOW MANY
23 TESTS DID YOU GIVE THAT WERE NOT GIVEN PREVIOUSLY
24 BY OTHER PEOPLE THAT HAVE TESTIFIED HERE?

25 A. I DO BELIEVE THAT THE ONLY TEST THAT I GAVE THAT

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 WAS PREVIOUSLY ADMINISTERED BY ANY OF MY FELLOW
2 EXPERTS WAS THE TRAIL MAKING TEST. OTHERWISE I
3 BELIEVE A MINI-MENTAL STATE EXAM OR SOME TYPE OF
4 MENTAL STATUS EXAM HAS BEEN GIVEN ALSO. OTHERWISE
5 I WOULD SEE ABOUT ELEVEN TESTS BEING ADMINISTERED.

6 Q. ELEVEN TESTS?

7 A. YES.

8 THE COURT: EXCLUDING THE TRAIL
9 MAKING?

10 DR. WAID: NO. THAT WAS ALREADY
11 EXCLUDING TWO THAT MIGHT HAVE BEEN GIVEN BEFORE.

12 THE COURT: SO ABOUT ELEVEN NEW
13 ONES?

14 DR. WAID: ELEVEN NEW ONES; YES,
15 SIR.

16 Q. AND HOW LONG DID IT TAKE YOU TO GIVE THESE TESTS TO
17 MR. SIMMONS?

18 A. WE WERE THERE FOR ABOUT FOUR HOURS. SO I WOULD SAY
19 THOSE ELEVEN TOOK THREE HOURS AND A HALF.

20 Q. ARE THESE TESTS -- THEY'RE ALL GRADED, AND THEY'RE
21 ALL PAPER AND PENCIL TESTS? I MEAN, IT ISN'T LIKE
22 I SAY CAR OR BOAT OR BOOK AND THEN 35 MINUTES ASK
23 HIM TO REPEAT IT BACK? THERE'S A RECORD MADE OF
24 IT; RIGHT?

25 A. YES, SIR. I HAVE A SCORING CRITERIA. I MEAN, I

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 HAVE THE SCORES. BUT THEY'RE -- SOME OF THEM ARE
2 JUST IS THE ABILITY THERE OR NOT. FOR EXAMPLE, ON
3 THE CENTURY PERCEPTUAL EXAM, I JUST WANT TO MAKE
4 SURE HE CAN HEAR, SEE, AND TOUCH WITHOUT MAKING
5 ERRORS BECAUSE I'VE GOT TO RULE THAT OUT BEFORE I
6 GO HIGHER UP IN TERMS OF UNDERSTANDING BRAIN
7 FUNCTION.

8 Q. ALL RIGHT, SIR. YOU SAID THAT YOU AGREED WITH THE
9 TESTING OF SOME OF THE PRIOR WITNESSES?

10 A. YES.

11 Q. AND ALL THE PRIOR WITNESSES EITHER SAID THAT MR.
12 SIMMONS WAS NOT MENTALLY RETARDED OR THAT HE WAS
13 MENTALLY RETARDED. YOU'RE NOT SAYING EITHER ONE OF
14 THOSE, ARE YOU?

15 A. MENTAL RETARDATION IS THE WRONG TERM. THEY HAD
16 SAID INTELLECTUAL DEFICIENCY. MENTAL RETARDATION
17 IS BASED ON THE THREE CRITERIA THAT YOU'VE AMPLY
18 POINTED OUT TODAY. (1) THAT THE INTELLECTUAL
19 DEFICIENCY IS THERE; (2) THAT IT WAS PRESENT IN THE
20 DEVELOPMENTAL PROCESS PRIOR TO AGE EIGHTEEN; AND
21 (3) THAT ALONG WITH THAT IS A SOCIAL ADAPTIVE SKILL
22 IMPAIRMENT, TOO. I DO NOT BELIEVE HIS HISTORY OR
23 PREVIOUS TESTING DONE IN HIS EDUCATIONAL UPBRINGING
24 IS CONSISTENT WITH MENTAL RETARDATION, NOR WHAT HE
25 DID IN HIGH SCHOOL. I DON'T BELIEVE THAT'S AN

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 APPROPRIATE DIAGNOSIS BASED ON THE DSM-IV
2 CRITERIA. I DO BELIEVE HE'S INTELLECTUALLY
3 DEFICIENT TODAY AND THAT HE WAS INTELLECTUALLY
4 DEFICIENT IN 1997. AND THAT IS ALSO BEING MEASURED
5 BY MY COLLEAGUES WHO HAVE ALSO RECORDED THAT
6 INTELLECTUAL DEFICIENCY.

7 Q. THAT IS BASED ON WHAT YOU GOT FROM THESE OTHER
8 EXPERTS PLUS THE ELEVEN NEW TESTS THAT YOU DID; IS
9 THAT CORRECT?

10 A. YES, SIR.

11 Q. ALL RIGHT. SIR. NOW DO THESE TESTS THAT YOU'VE
12 DONE, THESE NEWER PSYCHOLOGICAL TESTS, PURPORT TO
13 SHOW OR DEMONSTRATE SOME TYPE OF ORGANIC BRAIN
14 DAMAGE? IS THAT WHAT THEY'RE SUPPOSED TO DO?

15 A. THEY CAN BE MORE SENSITIVE TO IT. BUT ORGANIC
16 BRAIN DAMAGE WILL ALSO SHOW UP ON A WEXLER ADULT
17 INTELLIGENCE SCALE III OR REVISED ALSO.

18 Q. ARE YOU SURE OF THAT?

19 A. I'M ABSOLUTELY SURE ABOUT IT.

20 Q. HOW MANY OF THE ELEVEN TESTS THAT YOU DID
21 ADMINISTER WOULD PURPORT TO SHOW SOME KIND OF
22 ORGANIC BRAIN DAMAGE EITHER FROM A DRUG OVERDOSE,
23 DRUG ABUSE, A BLOW TO THE HEAD, SOMETHING OF THAT
24 NATURE; SOMETHING ORGANICALLY, PHYSICALLY WRONG
25 WITH THE BRAIN?

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 A. THEY SHOW NEUROPSYCHOLOGICAL IMPAIRMENT WHICH MAY
2 OR MAY NOT BE CORRELATED TO ORGANIC BRAIN DAMAGE.
3 ONE HAS TO DO A LITTLE BIT MORE WORK TO UNDERSTAND
4 WHAT THE ORGANIC BRAIN DAMAGE MIGHT BE.

5 Q. ARE YOU PREPARED TO TESTIFY THERE IS ANY ORGANIC
6 BRAIN DAMAGE TO A REASONABLE DEGREE OF SCIENTIFIC
7 CERTAINTY IN MR. SIMMONS?

8 THE COURT: MOST PROBABLY THAN NOT.
9 YOU KEEP LEAVING THAT OUT.

10 MR. BAILEY: I APOLOGIZE.

11 A. YES. I'M PREPARED TO TESTIFY THAT HE HAS
12 NEURO-COGNITIVE IMPAIRMENTS DUE TO BRAIN DAMAGE
13 THAT'S BEEN SUSTAINED DUE TO HIS POLY-SUBSTANCE
14 DEPENDENCE AND ABUSE.

15 Q. WHAT ABOUT THE ALLEGED BLOW TO THE HEAD, CONTUSION,
16 OR WHATEVER?

17 A. I DON'T HAVE DOCUMENTATION THAT WOULD INDICATE A
18 HEAD INJURY. SO I'LL HAVE TO LEAVE THAT ALONE.

19 Q. WHAT TESTS DID YOU PERFORM DO YOU CONTEND WOULD
20 INDICATE THAT THERE WAS ORGANIC BRAIN DAMAGE DUE TO
21 HIS INGESTION OF COCAINE, ALCOHOL, OR BOTH?

22 A. HIS IMPAIRMENT ON ATTENTION, CONCENTRATION,
23 LEARNING, AND MEMORY.

24 Q. I'M ASKING YOU WHAT TESTS, DOCTOR; WHAT TESTS THAT
25 YOU HAVE RESULTS FROM HAVE RESULTS TO INDICATE THAT

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 HIS BRAIN HAS BEEN DAMAGED, SOME DEAD CELLS, OR
2 WHATEVER?

3 A. OKAY. WELL, AGAIN, HE HAS AN IMPAIRED PERFORMANCE
4 ON A PROCESSING SPEED TEST CALLED THE STROOP TEST.

5 Q. ALL RIGHT.

6 A. WHICH BY THE WAY IS CONSISTENT WITH HIS POOR
7 PERFORMANCE ON THE DIGIT SYMBOL TEST OF THE WAIS
8 THAT HAVE BEEN SUPPLIED. HE WAS IMPAIRED ON THE
9 WISCONSIN CARD SORTING TEST.

10 Q. WHAT IS A WISCONSIN CARD SORTING TEST?

11 A. IT'S THE ABILITY TO METHODICALLY GENERATE
12 HYPOTHESIS TO A POSSIBLE NOVEL PROBLEM SOLVING
13 SITUATION TO DISCERN AND COME UP WITH THE RIGHT
14 HYPOTHESIS AND TO USE IT REPETITIVELY TO GET THE
15 ANSWER CORRECT. AND THEN WE SHIFT. SO WE HAVE TO
16 FIGURE OUT WHERE WE SHIFTED, WHAT NEW SOLUTIONS
17 THAT WE'VE OFFERED HIM.

18 Q. HOW DO YOU KNOW IF HIS INABILITY TO PERFORM WELL ON
19 THAT TEST IS CAUSED BY SOME KIND OF ORGANIC BRAIN
20 DAMAGE OR IF IT'S JUST BY BEING STUPID?

21 A. OH, I DO BELIEVE THAT STUPIDITY IS CERTAINLY
22 SOMETHING THAT ONE HAS TO CONSIDER HERE. BUT ONE
23 OF THE COMPELLING THINGS THAT YOU'VE OFFERED THAT I
24 BELIEVE THE RECORD DOES SUPPORT IS THAT HE'S NOT
25 SIMPLY DEVELOPMENTALLY DELAYED OR STUPID. THAT

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 TEST CAN BE MORE SENSITIVE TO ONE'S INTELLECTUAL
2 LEVEL AND COULD BE CONFOUNDED BY THAT. AGAIN, WHAT
3 I TRY TO DO IS NORM IT AS BEST WE CAN BASED ON HIS
4 AGE AND EDUCATIONAL LEVEL OF HAVING COMPLETED
5 TWELVE YEARS OF EDUCATION.

6 Q. I'M NOT SURE YOU ANSWERED MY QUESTIONS. IS THERE
7 ANY WAY THAT YOU CAN TELL FROM THIS TEST -- AND
8 I'VE GIVEN THIS TEST WHATEVER YOU WANT TO CALL IT,
9 TEST A, B, C, OR WHATEVER -- DUE TO THE RESULT I
10 GOT FROM THIS TEST, I CAN STATE TO A REASONABLE
11 DEGREE OF SCIENTIFIC CERTAINTY THAT MOST PROBABLY
12 THIS PERSON HAS A DAMAGED BRAIN AS OPPOSED TO
13 SAYING THAT MOST PROBABLY THIS GUY WAS JUST BORN
14 THAT WAY AND IS NOT QUITE AS BRIGHT AS THE REST OF
15 US?

16 A. NO. THE TESTS PERFORMANCE IN AND OF THEMSELVES
17 WITHOUT UNDERSTANDING THE HISTORY AND SOME PREVIOUS
18 PERFORMANCES ON AN EDUCATION AND EDUCATIONAL
19 HISTORY AND PREVIOUS I.Q. TESTS THAT HAVE BEEN
20 OFFERED IN THIS CASE; ALL OF THAT WOULD COME IN TO
21 MAKING AN ASSUMPTION ABOUT WHAT THE DEFICIT
22 PERFORMANCE IS ABOUT.

23 Q. NOW, DO YOU HAVE ANY HISTORY, ANY
24 NEUROPSYCHOLOGICAL TESTS, SIMILAR TO WHAT YOU
25 PERFORMED THAT WERE PERFORMED AT SOME TIME IN THE

1 PAST THAT WOULD GIVE YOU A BENCH MARK OR A STARTING
2 PLACE FOR A COMPARISON?

3 A. I'VE ONLY REVIEWED---

4 Q. DO YOU FOLLOW WHAT I'M SAYING?

5 A. YES. I'VE ONLY REVIEWED STANDARDIZED TESTING.

6 THAT WAS DONE IN THE EDUCATIONAL SYSTEM AS WELL AS
7 THOSE REPORTS OF THE I.Q.S THAT WERE DONE ON THE
8 EDUCATIONAL TRANSCRIPTS. THOSE ARE THE ONLY FORMAL
9 TESTS THAT WE COULD USE TO MAKE SOME COMPARATIVE
10 BASIS.

11 Q. ALL RIGHT. SOME PEOPLE DRINK A LOT OF ALCOHOL FOR
12 WHATEVER REASON AND IT JUST DOESN'T BOTHER THEM.

13 A. THAT IS CORRECT.

14 Q. AND OTHER PEOPLE CAN DRINK HALF THAT AMOUNT AND
15 THEY GET OFF THE BOTTLE; AND EVEN WHEN THEY'RE NOT
16 DRINKING THEY ACT LIKE THEY DON'T HAVE IT ALL; IS
17 THAT CORRECT?

18 A. THAT IS CORRECT. SOME PEOPLE MYSTERIOUSLY SHOW A
19 LOT MORE NEURO-COGNITIVE IMPAIRMENT WITH ALCOHOL
20 USE THAN OTHERS. WE'RE TRYING TO DISCERN THAT
21 LITERATURE NOW. BUT THAT IS CORRECT; SOME PEOPLE
22 CAN DRINK A LOT FOR A LOT OF YEARS.

23 Q. AGAIN, HOW DO YOU KNOW THAT MR. SIMMONS DOESN'T
24 JUST HAVE A GREAT CAPACITY TO CONSUME A LOT OF
25 ALCOHOL WITHOUT DOING ANY BRAIN DAMAGE; THAT HE

1 WASN'T JUST BORN A LITTLE BIT STUPID?

2 A. UM---

3 Q. IF YOU HAVE NO PRIOR TESTS SIMILAR TO THE TESTS YOU
4 DID TO COMPARE IT WITH?

5 A. AGAIN, I DO ONLY HAVE THE PRIOR TESTS THAT WE'VE
6 TALKED ABOUT. THAT'S THE BEST WE CAN DO IN HERE.
7 AND HE DID COMPLETE HIGH SCHOOL. THAT'S WHAT WE'RE
8 UTILIZING. AND BASICALLY I BELIEVE THERE'S BEEN A
9 DETRIMENTAL PATTERN SINCE THEN. AND I THINK YOUR
10 POINT IS WELL MADE IN THE SENSE OF -- I DON'T HAVE
11 ANY OTHER SPECIFIC FACTORS FROM HIM THAT WOULD HELP
12 ME UNDERSTAND THAT BEYOND THE FACT THAT THERE TENDS
13 TO HAVE BEEN A DEFINITE LOSS FROM WHAT WE WOULD
14 HAVE PREDICTED FROM HIS PERFORMANCE, HIGH SCHOOL
15 EDUCATION, AND PREVIOUS I.Q. TESTS.

16 Q. DOCTOR, YOU SAID IN YOUR OPINION THAT HE DOESN'T
17 HAVE THE PRESENT ABILITY TO WAIVE HIS MIRANDA; IS
18 THAT CORRECT?

19 A. THAT HAD TO DO WITH QUESTIONS SPECIFICALLY ABOUT
20 MIRANDA. HE NEVER HAS SYSTEMATICALLY FROM MY
21 QUESTIONING SHOWN THAT UNDERSTANDING.

22 Q. YOU'RE SAYING THAT HE DOESN'T UNDERSTAND THE
23 MIRANDA RIGHTS AS GIVEN TO HIM, OR THAT HE DOESN'T
24 INTELLIGENTLY WAIVE THOSE RIGHTS AFTER THEY BEEN
25 GIVEN TO HIM? THAT IS TWO DIFFERENT REASONS.

1 A. I'VE HAD DIFFICULTY FOR HIM TO VERBALLY ESTABLISH,
2 AS OTHER DOCTORS HAVE, THAT HIS UNDERSTANDING OF
3 THE MIRANDA RIGHTS IN MY QUESTIONING OF HIM JUST
4 LIKE THEY DID. I COULDN'T DO ANYTHING MORE. I
5 DIDN'T GIVE A FORMAL TEST LIKE DR. SAYLOR. BUT I
6 TRIED TO GET APPRECIATION FOR HIS UNDERSTANDING OF
7 THE MIRANDA RIGHTS IN MY QUESTIONING OF HIM IN
8 INTERVIEW.

9 Q. DID IT STRIKE YOU UNUSUAL, DOCTOR, THAT BASED ON
10 RECORDS, EVERETT HOWARD GAVE HIM HIS MIRANDA RIGHTS
11 ON THREE OCCASIONS. KENNY MEARS GAVE HIM HIS
12 MIRANDA RIGHTS ON FOUR OCCASIONS, ALL WITHIN A
13 WEEK?

14 A. YES.

15 Q. HE THEN WENT TO HALL INSTITUTE IN NOVEMBER, I
16 BELIEVE, OF 1998. AND HE WAS GIVEN HIS MIRANDA
17 RIGHTS REPEATEDLY OVER AND OVER AND OVER AGAIN BY
18 DR. BEHRMANN AND DR. VIDIC. HE WENT TO A
19 COMPETENCY GROUP TO TRY TO EDUCATE HIM TO HIS
20 MIRANDA RIGHTS AND ALL THAT AND ACTUALLY CLASSES IN
21 MIRANDA. AND THEN HE WENT BACK OUT THERE, AND THEY
22 TALKED TO HIM AGAIN. AND THEN IN JANUARY THEY
23 EVALUATED HIM AGAIN; AND AGAIN THEY DRILLED THIS
24 INTO HIS HEAD; THEY PATIENTLY SAT THERE AND SAID
25 "YOU HAVE A RIGHT TO REMAIN SILENT;" AND "WHAT

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1 DOES THAT MEAN?" AND THEY WENT ON AND ON WITH HIM.
2 THEN THEY CARRIED HIM TO THE DEPARTMENT OF
3 DISABILITIES AND SPECIAL NEEDS WHICH DR. MCABEE AND
4 DR. SANDLER WERE THERE. AND THEY SAT DOWN ON FOUR
5 OCCASIONS AND WENT OVER THE MIRANDA RIGHTS WITH
6 HIM. ARE THEY THAT HARD WHERE AFTER ALL THAT IT'S
7 YOUR OPINION HERE UNDER OATH THAT HE COULD NOT
8 UNDERSTAND SOMETHING LIKE "YOU HAVE THE RIGHT TO
9 REMAIN SILENT?"

10 A. I BELIEVE HE DID SHOW SOME GAIN FROM THAT
11 TRAINING. I BELIEVE THAT WAS DOCUMENTED IN DR.
12 SANDLER'S OWN REPORT OVER THE FOUR OCCASIONS HE SAW
13 HIM AS WELL AS DR. BEHRMANN BETWEEN THE DECEMBER OR
14 NOVEMBER TO JANUARY. I BELIEVE THIS MAN HAS SHOWN
15 GAIN. HE SHOWED SOME PRACTICE EFFECT ON I.Q. HE'S
16 NOT TOTALLY INCAPABLE OF LEARNING. THIS IS NOT A
17 BLACK OR WHITE ISSUE, ALL OR NONE. HE HAS SHOWN
18 SOME GAIN. I THINK ALL OF THAT RAISES THE QUESTION
19 EVEN MORE SO ABOUT HOW MUCH HE COULD UNDERSTAND HIS
20 MIRANDA RIGHTS WITHOUT THAT TRAINING BACK IN
21 DECEMBER OF 1997.

22 Q. BUT MY QUESTION AND YOUR ANSWER WAS WHETHER OR NOT
23 HE COULD PRESENTLY -- WAS PRESENTLY ABLE TO
24 UNDERSTAND HIS MIRANDA RIGHTS?

25 A. MY PRESENCE HAD TO DO WITH MY EVALUATION.

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1 Q. THIS WAS AFTER ALL THIS STUFF YOU TALKED ABOUT;
2 RIGHT?

3 A. YES, SIR; FEBRUARY THE THIRD. NOW, I BELIEVE IN
4 ESSENCE IT DOESN'T STICK WITH HIM ACROSS TIME.

5 Q. HE FORGETS?

6 A. YES.

7 Q. WERE YOU PRESENT IN COURT WHEN DR. VIDIC TESTIFIED?

8 A. YES, I WAS HERE WHEN DR. VIDIC TESTIFIED.

9 Q. FOR ALL OF HIS TESTIMONY?

10 A. YES, SIR.

11 Q. AND DID YOU HEAR HIS TESTIMONY ABOUT NOVEMBER THE
12 23RD, THE FIRST DAY HE WAS TAKEN TO THE HALL
13 INSTITUTE?

14 A. YES, SIR.

15 Q. AND PROFESSED THAT HE COULD NOT READ?

16 A. THAT'S CORRECT.

17 Q. AND WHEN HIS MIRANDA RIGHTS WERE READ TO HIM, HE
18 PROFESSED HE DIDN'T UNDERSTAND THOSE RIGHTS?

19 A. YES; I HEARD THAT TESTIMONY.

20 Q. OKAY. AND THEN LATER ON AN INTERN WENT DOWN THERE
21 TO GIVE HIM SOME TESTS. AND HE SAID, "I'M GOING TO
22 EXERCISE MY RIGHTS; I WANT TO TALK TO MY LAWYER?"

23 A. RIGHT.

24 Q. IF THAT HAPPENED, DOCTOR, ISN'T THAT INDICATIVE
25 THAT HE DID IN FACT NOT ONLY UNDERSTAND HIS MIRANDA

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1 RIGHTS BUT EXERCISED THEM?

2 A. I DO BELIEVE TWO ISSUES WHICH REMAIN THERE. ONE IS
3 HE DOES GAIN; AND I THINK HE CAN REPEAT SOMETHING
4 HE LEARNS IN A SHORT PERIOD OF TIME WHICH HE DID.
5 AND, TWO, I DO NOT BELIEVE JUST SIMPLY THAT
6 STATEMENT ALONE ESTABLISHES A FULL UNDERSTANDING OF
7 HIS MIRANDA RIGHTS.

8 Q. OKAY. IF I WAS TO GO OVER THERE AND GIVE MR.
9 SIMMONS HIS MIRANDA RIGHTS RIGHT NOW, HOW LONG
10 WOULD HE RETAIN IT?

11 A. I THINK HE COULD RETAIN IT UP THIRTY MINUTES OR
12 FORTY-FIVE MINUTES, UP TO AN HOUR. I DON'T KNOW IF
13 HE'LL KNOW THEM TOMORROW.

14 Q. ALL RIGHT, SIR. NOW, HAVE YOU LISTENED TO THE
15 TAPES OF THE INTERVIEW WITH KENNY MEARS?

16 A. I READ THE INTERVIEWS. I LISTENED TO ONLY ONE
17 TAPE. I ONLY HAD ONE. APPARENTLY THERE'S MORE
18 THAN ONE. BUT I LISTENED TO ONE.

19 Q. WELL, IF THE INTERVIEW PROCEEDED IMMEDIATELY AFTER
20 THE MIRANDA RIGHTS AND THE TAPE LASTED SAY TEN
21 MINUTES; THAT'S WITHIN YOUR TIME PARAMETERS WHERE
22 HE WOULD BE ABLE TO RETAIN HIS MIRANDA RIGHTS; IS
23 THAT CORRECT?

24 A. YES, SIR.

25 Q. OKAY.

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1 A. YOU'RE TALKING ABOUT HIS CONFESSIONAL TAPE?

2 Q. YES.

3 A. YES. MY PROBLEM WITH THE CONFESSIONAL TAPE HAS
4 ALREADY BEEN SYSTEMATICALLY POINTED OUT THAT
5 BECAUSE OPEN-ENDED QUESTIONS WERE NOT ASKED, IT WAS
6 NEVER ESTABLISHED THAT HE HAD THAT UNDERSTANDING.
7 AND THEREFORE TO RETAIN SOMETHING HE MIGHT NOT HAVE
8 HAD WAS NEVER ESTABLISHED. WHEN YOU HAVE
9 FUNCTIONALLY ILLITERATE PEOPLE OFTEN -- AND IT'S
10 PRESCRIBED IN THE LITERATURE -- YOU SHOULD REALLY
11 GET A FAIR UNDERSTANDING FROM OPEN-ENDED QUESTIONS
12 THAT THEY'RE UNDERSTANDING, NOT SIMPLY WHETHER THEY
13 SAY YES OR NO TO QUESTIONS.

14 Q. YOU MEAN A POLICE OFFICER OUT TO SAY "DO YOU
15 UNDERSTAND YOU'VE GOT THE RIGHT TO A LAWYER?" AND
16 THEN SAY "ALL RIGHT; TELL ME WHAT THAT MEANS TO
17 YOU?"

18 A. YES. THAT IS THE APPROPRIATE WAY TO INTERVENE AND
19 FIND YOU WHAT SOMEBODY IS REALLY UNDERSTANDING.

20 Q. WELL, I DON'T WANT TO BELABOR THIS THING TOO MUCH;
21 BUT I THOUGHT THAT WHAT YOU SAID WAS IF I WENT OVER
22 THERE AND TOLD MR. SIMMONS HE HAD A RIGHT TO A
23 LAWYER, HE WOULD UNDERSTAND THAT AND WOULD RETAIN
24 THAT KNOWLEDGE FOR ABOUT AN HOUR?

25 A. MY POINT TO YOU IS YOU WOULD FIRST NEED TO

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1 ESTABLISH THAT SOME LEARNING HAS OCCURRED TO
2 ESTABLISH THAT IT CAN BE RETAINED. WHAT HAPPENED
3 IN DECEMBER WAS THERE WAS NO BASE-LINE THAT
4 LEARNING HAD OCCURRED; THEREFORE, THERE'S A TOTAL
5 GUESS AS TO WHETHER WE HAVE IT INTO THE COMPUTER
6 THEREFORE FOR IT TO BE RETAINED AT SOME POINT
7 LATER. YOU HAVE TO ESTABLISH THAT LEARNING HAS
8 OCCURRED. SO MY POINT IS UNLESS YOU'VE ESTABLISHED
9 THAT SOME IMMEDIATE LEARNING HAS OCCURRED,
10 FORGETFULNESS DOWN THE ROAD MIGHT BE DUE TO THE
11 FACT THAT IT NEVER GOT IN THE COMPUTER, MUCH LESS
12 MAYBE DECAYED FROM THE HEARD DISC, SO TO SPEAK. IT
13 JUST WASN'T ESTABLISHED THAT HE HAD LEARNED IT, NOR
14 WAS IT RIGOROUS IN TRYING TO TEACH HIM BY GOING
15 OVER IT SEVERAL TIMES AND GETTING HIM TO VERBALIZE
16 SOME UNDERSTANDING OF IT AS IT WAS DONE AT THE
17 STATE HOSPITAL AND AT THE HALL INSTITUTE. THOSE
18 ARE VERY DIFFERENT WAYS OF PROCEEDING IN THAT
19 EVALUATION, ONE IN WHICH MORE LEARNING WILL OCCUR
20 AT THE HALL INSTITUTE ALLOWING FOR MORE RETENTION
21 TO OCCUR.

22 Q. LET'S ASSUME HE HAD NO LEARNING, OKAY?

23 A. OKAY.

24 Q. HE HAD NO EDUCATION IN MIRANDA. HE HADN'T BEEN TO
25 MIRANDA SCHOOL YET?

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 A. YES, SIR.

2 Q. HE'S JUST IN THE JAIL THERE. AND A LAW ENFORCEMENT
3 OFFICER SAYS THAT TO HIM "YOU HAVE THE RIGHT TO
4 REMAIN SILENT." WHAT IS IT ABOUT THAT INCREDIBLY
5 COMPLEX QUESTION THAT HE COULDN'T UNDERSTAND?

6 A. AGAIN, I'M NOT REDUCING MIRANDA JUST TO YOUR RIGHT
7 TO REMAIN SILENT. MIRANDA INVOLVES EVEN AN
8 APPRECIATION OF THE CONSEQUENCES OF NOT REMAINING
9 SILENT AND HOW THAT MIGHT BE ADDRESSED.

10 Q. I'M GOING TO GET TO THAT IN A MINUTE. BUT I'M
11 TRYING TO BREAK IT DOWN. IF A LAW ENFORCEMENT
12 OFFICER ASKS THESE QUESTIONS SEPARATELY; AND HE
13 SAYS "I'M GOING TO GIVE YOU YOUR RIGHTS; YOU HAVE
14 THE RIGHT TO REMAIN SILENT." WHAT IS COMPLICATED
15 ABOUT THAT? WHAT IS SO DIFFICULT THAT ANYBODY
16 COULDN'T UNDERSTAND THAT?

17 A. I'M NOT SURE THAT THERE IS SOMETHING VERY DIFFICULT
18 ABOUT JUST SIMPLY BEING ABLE TO READ BACK THE RIGHT
19 TO REMAIN SILENT.

20 Q. IN YOUR OPINION COULD HE UNDERSTAND "YOU HAVE THE
21 RIGHT TO REMAIN SILENT?"

22 A. I DON'T HAVE ANY OPINION. I WOULD LIKE TO HEAR
23 THAT HE UNDERSTOOD WHAT RIGHT TO REMAIN SILENT
24 WAS. I JUST DON'T HAVE THAT INFORMATION. SO I
25 DON'T HAVE AN OPINION.

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 Q. YOU DO NOT HAVE AN OPINION AS TO WHETHER OR NOT HE
2 COULD HAVE UNDERSTOOD "YOU HAVE THE RIGHT TO REMAIN
3 SILENT" IN DECEMBER OF 1997?

4 A. I'M SORRY. CAN YOU REPEAT THE QUESTION?

5 Q. I'M JUST TRYING TO UNDERSTAND WHAT I THINK YOU
6 SAID. I THOUGHT THAT YOU SAID YOU DID NOT HAVE AN
7 OPINION ON WHETHER OR NOT HE COULD UNDERSTAND "YOU
8 HAVE THE READ TO REMAIN SILENT" IN DECEMBER OF
9 1997?

10 A. MY POINT, IF I MIGHT, IN DECEMBER OF 1997 WAS THAT
11 HE HAD BEEN WORKED ON, AND I'VE EVALUATED HIM
12 MYSELF IN TERMS OF HIS UNDERSTANDING OF HIS RIGHTS
13 NOW. I ONLY SAID THAT I THOUGHT MORE FACTORS WERE
14 INVOLVED IN DECEMBER OF 1997 THAT WOULD HAVE
15 INTERFERED WITH HIS RIGHT. I WOULD HAVE LIKED TO
16 HAVE GOTTEN THAT INFORMATION FROM HIM. BUT I WAS
17 UNABLE TO DO THAT. SO THAT WAS MY OPINION BASED ON
18 DECEMBER OF 1997.

19 Q. OKAY. I'M STILL NOT GETTING -- I'LL MAKE IT AS
20 SIMPLE AS I CAN.

21 A. OKAY.

22 Q. DO YOU HAVE AN OPINION RIGHT NOW TO A REASONABLE
23 DEGREE OF SCIENTIFIC CERTAINTY, MOST PROBABLY,
24 WHETHER OR NOT ON DECEMBER THE FIFTH, 1997, THAT
25 SOMEONE, SAY KENNY MEARS, SAYS TO MR. SIMMONS "YOU

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 HAVE THE RIGHT TO REMAIN SILENT;" DO HAVE AN
2 OPINION ON WHETHER OR NOT HE COULD UNDERSTAND THAT?

3 A. I---

4 THE COURT: IN DECEMBER OF '97?

5 A. AGAIN, BASED ON WHETHER OR NOT HE COULD FEED BACK
6 THAT HE HAS A RIGHT TO REMAIN SILENT, I THINK HE
7 COULD PROBABLY REPEAT THOSE WORDS BACK. THAT DOES
8 NOT SHOW ME THAT HE HAS AN APPRECIATION FOR WHAT
9 THAT MEANS AND THE CONSEQUENCES OF NOT REMAINING.
10 YOU'VE KIND OF REDUCED IT TO "CAN HE REPEAT THAT
11 FIVE WORDS."

12 Q. NO; I DIDN'T ASK YOU THAT, SIR.

13 A. YES; I DO HAVE AN OPINION WHETHER HE COULD
14 APPRECIATE HIS MIRANDA RIGHTS IN 1997. MY OPINION
15 WAS THAT HE COULD NOT.

16 Q. AND I'M TRYING TO FIND OUT FROM YOU, DOCTOR, WHAT
17 PORTION OF THE MIRANDA RIGHTS. AND THERE ARE
18 SEVERAL RIGHTS HERE?

19 A. YES, SIR.

20 Q. IN YOUR OPINION, LOOKING RETROSPECTIVELY BACK TO
21 DECEMBER OF 1997, IF HE COULD NOT UNDERSTAND -- LET
22 ME TRY ONE MORE TIME. AND AGAIN, I'M NOT TRYING TO
23 BE CUTE WITH.

24 A. OKAY.

25 Q. DO YOU HAVE AN OPINION TO A REASONABLE DEGREE OF

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 SCIENTIFIC CERTAINTY WHETHER OR NOT ON DECEMBER THE
2 FIFTH, 1997, IF SOMEONE SAYS TO MR. SIMMONS "YOU
3 HAVE THE RIGHT TO REMAIN SILENT" WHETHER OR NOT HE
4 COULD UNDERSTAND WHAT THAT MEANT? IF YOU'D GIVE ME
5 A YES OR NO AND THEN EXPLAIN IT.

6 A. AND, NO. AGAIN MY OPINION IS HE DOES NOT BECAUSE I
7 AM NOT CONVINCED HE UNDERSTANDS THE CONCEPT OF
8 RIGHT.

9 Q. HOW ABOUT THIS ONE, DOCTOR? SAME QUESTION.

10 A. SURE.

11 Q. QUOTE: "ANYTHING YOU SAY CAN AND WILL BE USED
12 AGAINST YOU IN A COURT OF LAW." IT DOESN'T HAVE
13 THE WORD "RIGHT" IN IT. DID HE UNDERSTAND THAT?

14 A. I'M NOT SURE I HAVE AN OPINION ON THAT LINE.

15 Q. WELL, IF YOU'RE NOT SURE YOU HAVE AN OPINION, THEN
16 YOU WOULD NOT HAVE AN OPINION; RIGHT?

17 A. THAT'S TRUE.

18 Q. OKAY.

19 A. ON THAT SPECIFIC LINE.

20 Q. ALL RIGHT. NOW, THE SAME QUESTION. THIS HAS THAT
21 HARD WORD "RIGHT" IN IT. BUT I'M GOING TO ASK YOU
22 ANYWAY. "YOU HAVE THE RIGHT TO TALK TO YOUR LAWYER
23 FOR ADVICE BEFORE WE ASK YOU ANY QUESTIONS AND TO
24 HAVE HIM OR HER PRESENT WITH YOU DURING ANY
25 QUESTIONING." NOW, RETROSPECTIVELY BACK ON

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 DECEMBER THE FIFTH, IN YOUR OPINION TO A REASONABLE
2 DEGREE OF SCIENTIFIC CERTAINTY DID HE UNDERSTAND
3 THAT?

4 A. IN MY OPINION RETROSPECTIVELY, BASED ON THE FACT --
5 HE UNDERSTOOD THAT WHEN I ASSESSED HIM AT THIS
6 TIME.

7 Q. I'M NOT TALKING---

8 A. THEREFORE I WOULD ASSUME THAT HE COULD UNDERSTAND
9 IT IN '97.

10 Q. OKAY. NOW, HOW ABOUT THIS BRAIN TWISTER, DOCTOR:
11 "IF YOU HAVE NO MONEY FOR LAWYER'S FEES, THE COURT
12 WILL APPOINT ONE TO REPRESENT YOU WITHOUT COST TO
13 YOU IF YOU WISH."

14 A. I BELIEVE HE COULD UNDERSTAND THAT A LAWYER WOULD
15 BE APPOINTED TO HIM.

16 Q. ALL RIGHT, SIR. AND "IF YOU DECIDE TO ANSWER
17 QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU WILL
18 STILL HAVE A RIGHT TO STOP ANSWERING QUESTIONS AT
19 ANY TIME."

20 A. NO; I DO NOT BELIEVE HE UNDERSTOOD THAT.

21 Q. "YOU ALSO HAVE THE RIGHT TO STOP ANSWERING
22 QUESTIONS AT ANY TIME UNTIL YOU TALK WITH A
23 LAWYER?"

24 A. NO; I DON'T BELIEVE HE UNDERSTOOD THAT.

25 Q. HOW ABOUT "I'VE READ THIS STATEMENT OF MY RIGHTS

1 AND UNDERSTAND WHAT MY RIGHTS ARE?"

2 A. NO; I DON'T BELIEVE HE UNDERSTOOD THAT.

3 Q. OKAY. IS THERE A TEST THAT YOU'RE FAMILIAR WITH
4 CALLED A BRISSE (PHONETICALLY SPELLED) TEST FOR
5 UNDERSTANDING RIGHTS?

6 A. BRISSE?

7 Q. YES, SIR.

8 A. YES, SIR; TOM BRISSE.

9 Q. DID YOU GIVE HIM THAT TEST?

10 A. NO, I DID NOT.

11 Q. AND THAT TEST IS SPECIFICALLY DESIGNED TO DETERMINE
12 WHETHER OR NOT SOMEBODY CAN UNDERSTAND MIRANDA
13 RIGHTS?

14 A. IT IS ONE OF THE MIRANDA RIGHTS TESTS. THAT'S THE
15 ONE DR. BARTON SAYLOR GAVE.

16 Q. OKAY. AND YOU DIDN'T GIVE IT TO HIM; DR. SAYLOR
17 GAVE IT TO HIM?

18 A. YES. I BASICALLY WAS WORKING IN A LEGAL WAY.

19 Q. IN RESPONSE TO MR. THEOS' QUESTIONS ABOUT YOUR
20 RECORDS GOING BACK TO DECEMBER THE FIFTH OF '97;
21 DID YOU SAY SOMETHING TO THE EFFECT THAT THERE WAS
22 NO ACCURATE WAY TO GO BACK AND MAKE AN OPINION ON
23 THAT? DO YOU RECALL SAYING SOMETHING LIKE THAT?

24 A. THE EVALUATION OF MIRANDA RIGHTS HAS SOME
25 DIFFICULTIES OBVIOUSLY INVOLVED IN IT. AND WHAT I

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 HAD INDICATED IN MY OWN WORK WAS THAT ONE OF THE
2 WAYS THAT YOU PROCEED IS TO TRY TO EVALUATE THE
3 CLIENT IN THE PRESENT DAY. COMPETENCY TO HAVE MADE
4 A CONFESSION ALWAYS IMPLIES SOME RETROSPECTIVE
5 ANALYSIS. SO ALL I COULD DO IS SEE HOW WELL HE
6 COULD DO WITH THE DEFINITION AND APPLICATION TODAY
7 AS THE OTHER DOCTORS DID. I DID FIND A STEP BY
8 STEP INTERROGATION OF HIM ABOUT WHAT WAS GOING ON;
9 THE TIME HE WENT THROUGH THE CONFESSION. THAT GOT
10 ME NO PLACE WITH HIM. I DID NOT GET ANY CREDIBLE
11 COMPETENT RESPONSES TO THAT INQUIRY.

12 Q. OKAY. DO BRAIN CELLS REGENERATE? ALCOHOL KILLS
13 OFF BRAIN CELLS, AND THEY COME BACK?

14 A. NO. WHAT HAPPENS IS YOU HAVE SLIGHT DEHYDRATION
15 EFFECT THAT SHOWS UP SOMETIMES AS ATROPHY UNDER THE
16 SCAN. BUT ACTUAL BRAIN CELLS THAT MIGHT BE HURT BY
17 TOXINS DO NOT REGENERATE. YOU MAY HAVE AN IMPROVED
18 LOOK ON THE CAT SCAN, THOUGH; BUT THAT HAS SINCE
19 BEEN DISCOVERED TO BE DUE TO A REHYDRATION EFFECT
20 RATHER THAN BRAIN CELL RECOVERY.

21 Q. IF WE WERE TO ASSUME THAT MR. SIMMONS HAD NO DRUGS
22 OR NO ALCOHOL SINCE HE GOT INCARCERATED BACK I
23 THINK IN NOVEMBER OF 1997 UP UNTIL THE PRESENT
24 TIME; WOULD YOU ASSUME THAT WHATEVER BRAIN DAMAGE
25 HE HAD WOULD HAVE STOPPED WHEN HE GOT OFF ALCOHOL

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 AND DRUGS?

2 A. THE LITERATURE ON RECOVERY FROM THAT HAS TO DO WITH
3 HOW MUCH DEFICIT THERE MIGHT BE ON BOARD. THERE IS
4 AN IMPROVEMENT DURING THE FIRST SIX MONTHS OF
5 ABSTINENCE WHICH DOES SHOW UP ON NEUROPSYCHOLOGICAL
6 TESTING. GENERALLY IT'S NOT VIEWED AS A RETURNED
7 PREMORBID LEVEL OF FUNCTIONING, BUT YOU DO SHOW
8 SOME ACUTE RECOVERY BECAUSE YOU'RE GETTING AWAY
9 FROM THE ACUTE TOXIC AFFECT THAT CAN EFFECT BRAIN
10 FUNCTIONING.

11 Q. DID YOU DO A SPEECH SOUND PERCEPTION TEST?

12 A. I DID.

13 Q. WHAT KIND OF TEST IS THAT?

14 A. IT'S A LANGUAGE TEST, AUDITORY DISCRIMINATION TEST,
15 WHERE YOU MATCH PHONONS, THESE WORDS TO FOUR
16 POTENTIAL WORDS THAT MIGHT HAVE THE SAME MEANING
17 LIKE FEETS, ZEETS, AND SO FORTH. AND YOU HAVE TO
18 MATCH THE WORD THAT THEY HEAR ON THE AUDIO TAPE TO
19 THAT.

20 Q. WHAT IS THAT SUPPOSE TO SHOW?

21 A. WELL, I TELL YOU IN SOMEBODY WITH HIS KIND OF
22 EDUCATIONAL BACKGROUND AND LANGUAGE BACKGROUND, IT
23 REALLY WOULDN'T BE A GREAT TEST. IT JUST REALLY
24 MEASURES AS WE NOW KNOW FROM THE HALLSTAN RATE
25 STANDARD BATTERY, IT REALLY MEASURES KIND OF

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1 AUDITORY DISCRIMINATION, PHONEMIC DISCRIMINATION,
2 LANGUAGE DISCRIMINATION. YOU'VE GOT TO BE ABLE TO
3 TEND TO CONCENTRATE OVER A LONG PERIOD OF TIME,
4 TOO.

5 Q. AT ONE POINT I THINK IN RESPONSE TO MR. THEOS'
6 QUESTIONS, YOU SAID THAT YOU DIDN'T THINK THAT HE
7 COULD MAKE A RATIONAL CHOICE OF CONSEQUENCES OF
8 SPEAKING TO LAW ENFORCEMENT; IS THAT CORRECT, OR
9 ARE MY NOTES WRONG?

10 A. I THINK MY UNDERSTANDING OF THAT WAS UNDER MIRANDA,
11 YOU KNOW, REALLY APPRECIATING THE CONSEQUENCES OF
12 HIS DECISION TO PROVIDE A CONFESSION WAS WHAT I WAS
13 TALKING ABOUT.

14 Q. SIR, DID YOU READ ALL THREE TRANSCRIPTS?

15 A. YES, SIR.

16 Q. ALL RIGHT, SIR. AND ON THE SECOND DECEMBER FIFTH
17 TRANSCRIPT, DO YOU REMEMBER MR. MEARS SAYING ON
18 PAGE NINE "DO YOU KNOW WHAT COULD HAPPEN TO YOU?"
19 "YES, SIR." "WHAT?" "I COULD GET THE DEATH
20 PENALTY, LOCKED UP FOREVER AS LONG AS I GOT MY SOUL
21 RIGHT, YOU KNOW, THAT'S ALL I GOT LEAVE TO COME
22 HOME." WOULDN'T THAT INDICATE THAT HE DID
23 UNDERSTAND THE POSSIBLE CONSEQUENCES HE WAS FACING?
24 A. THAT WOULD INDICATE THAT HE CERTAINLY UNDERSTOOD
25 SOME POTENTIAL PENALTIES THAT WOULD COME FROM THIS;

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 YES, SIR.

2 Q. AGAIN ON THE---

3 A. I THINK I'M TALKING MORE THE ACTUAL DAMNING ASPECTS
4 OF MAKING A CONFESSION AS IT MIGHT RELATE TO HIS
5 ABILITY TO BE FOUND GUILTY OR NOT GUILTY BY PUTTING
6 THE BURDEN ON THE COURT TO PROVE HIS GUILT. I
7 THINK THOSE ARE MUCH MORE COMPLEX ISSUES THAN
8 SIMPLY AROUND ALMOST A COMPETENCY ISSUE OF
9 UNDERSTANDING THE POTENTIAL PENALTIES.

10 THE COURT: YOU SAID THE BURDEN IS
11 ON THE STATE; NOT THE COURT.

12 DR. WAID: ON THE STATE; I'M SORRY.

13 THE COURT: THANK YOU.

14 Q. YOU SAID IT'S NOT REAL SMART TO CONFESS BECAUSE YOU
15 CAN GET YOURSELF IN TROUBLE?

16 A. WELL, LET'S FACE IT. IT'S NOT THE SMARTEST MOVE
17 FROM A POINT OF VIEW OF SELF-PROTECTIVENESS. BUT
18 THAT'S WHAT I'M TALKING ABOUT WHEN I MEAN A MORE
19 SUBTLE AND MORE INTELLIGENT APPRECIATION OF THE
20 CONSEQUENCES OF MAKING A CONFESSION.

21 Q. YOU WOULD AGREE THAT YOU CAN DO SOMETHING KNOWINGLY
22 AND VOLUNTARILY WITHOUT NECESSARILY DOING A SMART
23 THING?

24 A. YES, SIR.

25 Q. SELF-REPRESENTATION?

1 A. IT'S VERY POSSIBLE; YES, SIR.

2 Q. DO YOU HAVE AN IMPAIRMENT INDEX FOR THE DEFENDANT?

3 A. I DIDN'T GIVE THE FULL HALLSTAN-REITAN, SO I DID
4 NOT DETECT AN IMPAIRMENT INDEX. THAT BASICALLY WAS
5 A PERCENTAGE OF TESTS FROM THAT PARTICULAR BATTERY
6 OF TESTS THAT WOULD FALL IN THE BRAIN DAMAGED RANGE
7 OR NEURO-COGNITIVELY IMPAIRED RANGE. AND IT'S AN
8 OLD STYLE OF USING THOSE PARTICULAR TESTS.

9 Q. HOW ABOUT THE SECOR-RHYTHM (PHONETICALLY SPELLED)
10 TEST?

11 A. IT WOULD HAVE BEEN A BETTER TEST TO GIVE FOR HIM
12 BECAUSE IT'S RHYTHM AND SOUND. BUT I DO NOT
13 BELIEVE WE GAVE THAT ONE. AND I'M NOT REALLY SURE
14 WHY NOT. IT'S A RHYTHMIC SOUND. IT HAS LESS
15 LANGUAGE INVOLVED WITH IT. I WOULD AGREED THAT IT
16 WOULD HAVE BEEN A GOOD TEST.

17 Q. HOW ABOUT THE APHASIS SCREENING TEST?

18 A. THE APHASIA SCREENING TEST; YES.

19 Q. DID YOU GIVE HIM THAT?

20 A. YES.

21 Q. GEORGIA COMPETENCY TEST?

22 A. YES. I GAVE HIM THAT SCREENING TEST AS I WAS
23 EXPLORING WITH HIM COMPETENCY ISSUES.

24 Q. THE BEHAVIOR CONTROL SCALE?

25 A. YES, SIR. THAT'S A FORMAL TEST THAT HAS TO DO WITH

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1 SEQUENCING AND INHIBITING FINE MOTOR MOVEMENTS
2 ACCORDING TO A PLAN.

3 Q. THE PHONETIC DRAWING TEST?

4 A. YES; WE GAVE HIM SOME PHONETIC DRAWING TESTS.

5 Q. THE C.V.L.T.?

6 A. THE CALIFORNIA VERBAL LEARNING TEST IS A REPETITIVE
7 WORD LIST LEARNING TEST.

8 Q. AND HOW ABOUT THE T.M.C. TEST?

9 A. THAT'S THE TRAILMAKING TEST.

10 Q. M.M.S.T.?

11 A. THAT'S A MINI-MENTAL STATE EXAM.

12 Q. AND ARE ALL THESE NEUROPSYCHOLOGICAL TESTS THAT
13 I'VE JUST MENTIONED?

14 A. WELL, I MEAN THEY ALL MEASURE SOME ASPECT OF
15 NEURO-COGNITIVE FUNCTIONING. I WOULDN'T CONSIDER
16 THE MINI-MENTAL STATE EXAM A REALLY GREAT
17 NEURO-COGNITIVE TEST BY ANY MEANS. IT REALLY JUST
18 GETS THAT MENTAL STATUS AND ORIENTATION AND SIMPLE
19 ABILITY TO RETAIN INFORMATION INTO NAME, SIMPLE
20 NAMING TASKS, AND TO FOLLOW A THREE-PART COMMAND.
21 IT'S REALLY A BEDSIDE SCREENING TEST FOR
22 NEUROLOGICAL DYSFUNCTION. IT CAN MAKE MANY ERRORS
23 BECAUSE OF FALSE POSITIVES OR FALSE NEGATIVES.

24 Q. YOU DID NOT DO A FULL BATTERY OF NEUROPSYCHOLOGICAL
25 TESTS, DID YOU?

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1 A. YES. THESE ARE FULL BATTERY. THEY REPRESENT THE
2 AREAS OF FUNCTIONING. I COULD NOT GET ALL THE
3 FORMAL HALLSTAN-REITAN TESTS.

4 Q. I'M GETTING A LITTLE BIT CONFUSED. I'M GOING TO
5 BACK UP A LITTLE BIT. AND I'M ALMOST THROUGH,
6 DOCTOR. BUT AS FAR AS WHAT YOUR OPINIONS ARE THAT
7 YOU TESTIFIED TO IN FRONT OF THE JURY; AS FAR AS
8 ANY ORGANIC BRAIN DAMAGE. ARE YOU GOING TO TESTIFY
9 THAT YOU HAVE ANY OPINION IN REGARD TO ORGANIC
10 BRAIN DAMAGE CAUSED BY A BLOW TO THE HEAD OR THE
11 MOUTH?

12 A. WHAT I WAS GOING TO TESTIFY TO WAS THAT HE HAS
13 ACQUIRED NEURO-COGNITIVE IMPAIRMENT MEASURED BY A
14 NEUROPSYCHOLOGIST WITH MY HYPOTHESIS BEING THAT
15 IT'S DUE TO POLY-SUBSTANCE ABUSE AND DEPENDENCE,
16 NOT TO DEVELOPMENTAL MENTAL RETARDATION. I WAS
17 DISTINGUISHING THAT HE HAS GONE DOWNHILL IN HIS
18 ABILITIES. AND I BELIEVE THAT IS CORRELATED AND
19 SUPPORTED BY RESEARCH THAT HIS POLY-SUBSTANCE ABUSE
20 AND DEPENDENCE COULD BE THE CAUSAL FACTOR. SINCE I
21 DON'T HAVE CONFIRMATION OF A SPECIFIC HEAD INJURY
22 RESULTING IN THE LOSS OF CONSCIOUSNESS, I WILL NOT
23 TESTIFY TO THAT.

24 Q. DOES COCAINE DESTROY BRAIN CELLS THE WAY ALCOHOL
25 DOES?

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 A. DOES COCAINE DESTROY BRAIN CELLS THE WAY ALCOHOL
2 DOES?

3 Q. YES, SIR. DO YOU HAVE AN OPINION OF WHETHER OR NOT
4 FROM THIS ALLEGED BRAIN DAMAGE WHETHER IT COULD BE
5 CAUSED BY COCAINE?

6 A. THE PROBLEM IS THE DESTROYING OF BRAIN CELLS. THAT
7 PATHWAY MAY NOT BE EXACTLY WHAT HAPPENS. WE DO
8 KNOW THAT CHRONIC COCAINE ABUSE CAN CAUSE
9 NEURO-COGNITIVE IMPAIRMENTS PARTICULARLY AFFECTING
10 EXECUTIVE FUNCTIONING AND SPEED OF PROCESSING. THE
11 MECHANISM FOR COCAINE APPEARS TO BE DIFFERENCE THAN
12 ALCOHOL AND LESS WELL UNDERSTOOD AT THIS POINT IN
13 THE RESEARCH. ALSO IT SEEMS TO MORE LIKELY EFFECT
14 THE AFRICAN-AMERICANS FROM A VASCULAR POINT OF VIEW
15 IN TERMS OF SOME POTENTIAL CHANGE OR ISCHEMIA WHICH
16 WOULD BE AFFECTING THE VASCULAR FEEDS AND CAUSING
17 CELLS OR THE CAPILLARIES TO BREAK AND POP. AND
18 THAT SEEMS TO BE MORE OF THE MECHANISM INVOLVED IN
19 COCAINE USAGE RATHER THAN ALCOHOL IN TERMS OF ITS
20 DIFFUSE AFFECT AND ATROPHY ON THE BRAIN WHICH MEANS
21 THE SHRINKING OF THE BRAIN TISSUE UNTIL THE CELLS
22 DIE.

23 Q. SO, DOCTOR, WHAT YOU'RE SAYING IS HE'S NOT RETARDED
24 BECAUSE HE WASN'T RETARDED IN SCHOOL. BUT HE'S NOT
25 FUNCTIONING AT THE LEVEL THAT YOU WOULD EXPECT AT

1 THE PRESENT TIME. AND BY HISTORY HE'S DONE A LOT
2 OF DRUGS AND THAT YOU'RE ATTRIBUTING HIS DECLINE IN
3 MENTAL FUNCTIONING TO THE POLY-SUBSTANCE ABUSE; IS
4 THAT CORRECT?

5 A. YES, SIR. IT'S CONSISTENT WITH THAT FOUND IN SUCH
6 INDIVIDUALS. AND I ATTRIBUTE THAT TO HIM; YES.

7 Q. THERE'S NO TEST, NO X-RAY, NO END E.E.G., NO
8 M.R.I., NO CAT SCAN, NOTHING OF THAT NATURE WHERE
9 YOU COULD PHYSICALLY SHOW A JURY HERE'S A NORMAL
10 BRAIN AND HERE'S KENNETH SIMMONS' BRAIN?

11 A. THE M.R.I. AND THE E.E.G. WERE NORMAL; DO NOT SHOW
12 EVIDENCE OF STRUCTURAL DAMAGE TO THE BRAIN. BUT I
13 ALSO WOULD TELL YOU THAT IS OFTEN THE CASE IN THIS
14 AGE GROUP WITH THIS TYPE OF USE PATTERN EVEN THOUGH
15 THEY DO HAVE NEURO-COGNITIVE IMPAIRMENTS ON BOARD.

16 Q. AREN'T THERE SOME TESTS THAT CAN SHOW STRUCTURAL
17 DAMAGE? ISN'T THERE A TEST?

18 A. AS WELL -- WE TALKED ABOUT IN THE OTHER ROOM; YES.
19 WE DON'T HAVE A TEST UNFORTUNATELY IN THIS STATE. A
20 BETTER TEST MIGHT HAVE BEEN A SPEC SCAN WHICH
21 MEASURES THE METABOLIC ACTIVITY OF THE BRAIN WHICH
22 MIGHT HAVE BEEN USEFUL. NO; WE DIDN'T GET IT DONE;
23 A NEURO SPEC SCAN.

24 Q. SO YOU'RE GOING TO GIVE AN OPINION ON BRAIN DAMAGE
25 BASED ON THE RESULTS OF A BATTERY OF TESTS THAT YOU

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1 DID BASICALLY?

2 A. A NEURO-COGNITIVE IMPAIRMENT; AND IT DECLINED FROM
3 PREVIOUS MEASURED INTELLIGENCE.

4 Q. WHEN YOU SAY NEURO-COGNITIVE IMPAIRMENT, ARE YOU
5 TALKING ABOUT SOME DAMAGE TO THE BRAIN, SOME
6 PHYSICAL DAMAGE TO THE BRAIN, DEAD CELLS OR
7 WHATEVER?

8 A. WELL, I'M REALLY TALKING BEHAVIORALLY. I'M
9 MEASURING THAT TO BEHAVIORAL LEVEL. I AM. IT'S
10 MORE HYPOTHESIZED THAT THE POLY-SUBSTANCE ABUSE AND
11 DEPENDENCE IS DOING IT. IT CANNOT BE CONFIRMED.
12 IT'S LIKE ALZHEIMERS. YOU CAN'T CONFIRM IT EITHER.
13 BUT NEURO-COGNITIVE MEASURES SENSIBLY MEASURED THAT
14 DISEASE PROCESS UNTIL IT GETS GOING WELL INTO THE
15 PROCESS.

16 Q. DID YOU DEPEND ON ANY RESEARCH THAT YOU'VE DONE?

17 A. PARDON ME?

18 Q. DID YOU READ ANY PEER REVIEW ARTICLES TO GET
19 PREPARED FOR YOUR TESTIMONY?

20 A. YES. WELL, I MEAN, I HAVE READ THE AREA OF COCAINE
21 ABUSE AND HAVE CONDUCTED RESEARCH PUBLISHED ON
22 COCAINE ABUSE AND ALSO ALCOHOL ABUSE. AND I HAVE
23 REVIEWED THOSE ARTICLES EXTENSIVELY. I HAVE ONE
24 ARTICLE HERE ON THE NEUROPSYCHIATRY OF COCAINE
25 ABUSE WITHIN THE GROUP OF ARTICLES THAT I HAVE ON

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1 HAND RIGHT NOW.

2 Q. ALL RIGHT, SIR. AND YOU CAN MAKE THAT AVAILABLE TO
3 ME LATER?

4 A. I'D BE HAPPY TO MAKE THAT AVAILABLE TO YOU.

5 MR. BAILEY: YOUR HONOR, INDULGE ME
6 ONE SECOND, PLEASE.

7 THE COURT: I WANT TO ASK YOU A
8 QUESTION, DOCTOR. I UNDERSTAND THESE VARIOUS TESTS
9 THAT YOU HAVE GIVEN WHICH CONTRIBUTES TO YOUR
10 ABILITY TO MAKE AN OPINION AND A DIAGNOSIS. BUT
11 OTHER THAN THE HISTORY OF POLY-SUBSTANCE ABUSE AND
12 OBVIOUSLY DR. BEHRMANN'S REPORT STATES ON THE AXIS
13 ONE THIS POLY-SUBSTANCE ABUSE. SO IS THERE
14 ANYTHING, ANY TEST THAT YOU CAN GIVE OR THAT YOU
15 DID GIVE, THAT CONFIRMS OR VERIFIES THAT HIS
16 CURRENT CONDITION IS AS IT IS IN YOUR OPINION
17 BECAUSE OF THE POLY-SUBSTANCE ABUSE? IS THERE ANY
18 TEST, ANYTHING OTHER THAN THE HISTORY?

19 DR. WAID: THE ONLY THING I WOULD
20 ELABORATE ON, OTHER THAN THE PROFILE OF HIS DEFICIT
21 PATTERN IS CONSISTENT WITH THAT OF PLAYING ON SUCH
22 ABUSE PATTERNS. BUT I HAVE NO HARD EVIDENCE
23 SUPPORTING THE BRAIN DAMAGE FROM A STRUCTURAL POINT
24 OF VIEW.

25 THE COURT: I UNDERSTOOD THAT. BUT,

LEWIS RANDOLPH WAID - CROSS/MR. BAILEY

1 I MEAN, IN ORDER TO QUANTIFY AND ARRIVE AT THE
2 BOTTOM LINE OF HIS CONDITION; IT IS AS IT IS TODAY,
3 AND YOU ATTRIBUTE THAT TO POLY-SUBSTANCE ABUSE?

4 DR. WAID: YES, SIR.

5 THE COURT: AND THAT PERHAPS IT'S
6 EVEN BETTER NOW THAN IT WAS IN DECEMBER OF '97 WHEN
7 HE GAVE THESE THREE ORAL STATEMENTS AND RECORDING.
8 IS THERE ANYTHING OTHER THAN THE HISTORY THAT YOU
9 HAVE CONCRETE TANGIBLE, I CAN PUT MY HANDS ON?

10 DR. WAID: NO, SIR; OTHER THAN
11 BUILDING A MODEL BASED ON THAT PREVIOUS HISTORY AND
12 EDUCATIONAL LEVEL AND PREVIOUS TESTS. WE USE THAT
13 TO PROVIDE A MODEL. AND THE CURRENT ACROSS THE
14 BOARD LOOKS LIKE A DEFICIT PATTERN. BUT THAT IS IT
15 IN THIS CASE. I DO NOT HAVE ANY OTHER HARD
16 EVIDENCE OF ORGANIC DAMAGE BASED ON M.R.I. OR
17 E.E.G. OR ANYTHING LIKE THAT, STRUCTURAL DAMAGE.

18 THE COURT: YOU WEREN'T INVOLVED
19 WITH THE PROJECT SOLICITOR CONDON HAD WITH THE
20 MOTHERS AND THE COKE BABIES, WERE YOU?

21 DR. WAID: I WAS A SUBJECT ONLY TO A
22 LOOSE ASSOCIATION WITH THE PEOPLE WHO WERE INVOLVED
23 IN IT. BUT I AM NOT INVOLVED WITH THAT ONE.

24 THE COURT: THAT WASN'T YOUR CUP OF
25 TEA?

LEWIS RANDOLPH WAID - RE-DIRECT/MR. THEOS

DR. WAID: NO, IT WASN'T.

THE COURT: I UNDERSTAND.

DR. WAID: IT WASN'T AT ALL.

THE COURT: ALL RIGHT, MR. BAILEY.

ANYTHING FURTHER?

MR. BAILEY: NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT. ANYTHING ON
RE-DIRECT, PLEASE, MR. THEOS?

MR. THEOS: YES, SIR; BRIEFLY.

RE-DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. WAID, ONE THING MR. BAILEY ASKED YOU THAT I DID
NOT IS WHETHER YOU HAVE AN OPINION THAT YOU CAN
STATE TO A REASONABLE DEGREE OF SCIENTIFIC
CERTAINTY AND MOST PROBABLY WHETHER OR NOT MR.
SIMMONS WAS MALINGERING DURING ANY OF YOUR TESTING
OR DURING THOSE RECORDS, DURING THE TESTING AND
EXAMINATIONS THAT YOU REVIEWED?

A. IT IS MY OPINION -- AND THIS I HAVE A LOT MORE
OPINION ON -- THAT THERE IS NO SYSTEMATIC HARD
EVIDENCE THAT HE'S MALINGERING. QUITE FRANKLY
EVERYBODY HAS GONE FOR IT. WE'VE GIVEN HARD TESTS
TO MEASURE IT. NONE OF THE MALINGERING TESTS CAME
OUT THAT WAY BY ALL THE COLLEAGUES INVOLVED. HE'S
NOT INCONSISTENT IN PERFORMANCE ACROSS DIFFERENT

LEWIS RANDOLPH WAID - RE-DIRECT/MR. THEOS

1 COLLEAGUES MEASURING HIM. HE SHOWS NO INTRA-TEST
2 SCATTER. AND THAT COMPELLING EVIDENCE AS WELL AS
3 THE WAY THE PROFILE MATCHES UP TO THE HYPOTHESIZED
4 CAUSE OF HIS PROBLEM IN MY CASE SUGGESTS TO ME THAT
5 HE IS NOT MALINGERING. AND THAT WOULD BE MY
6 OPINION.

7 THE COURT: DID YOU GIVE HIM A
8 MALINGERING TEST?

9 DR. WAID: YES, I DID. I GAVE HIM
10 WHAT I CONSIDER FROM THE RESEARCH POINT OF VIEW ONE
11 OF THE BEST ONES IN ASSESSING MALINGERING
12 PARTICULARLY AS IT RELATES TO NEURO-COGNITIVE
13 IMPAIRMENT.

14 THE COURT: WHICH IS?

15 DR. WAID: THE PORTLAND DIGIT
16 RECOGNITION TEST.

17 THE COURT: PORTLAND DIGIT
18 RECOGNITION.

19 DR. WAID: ALL OF THESE TESTS, YOUR
20 HONOR, BASICALLY LOOK LIKE THEY'RE MEMORY
21 TESTS OR ATTENTION TESTS. BUT YOUR PROBABILITY OF
22 BEING RIGHT OR WRONG, EVEN IF YOU'RE BRAIN DEAD IN
23 50 PERCENT. SO WHEN YOU BEAT THE ODDS IN THE
24 DIRECTION THAT FAVORS LESS THAN 50 PERCENT BEING
25 RIGHT, IT MEANS YOU'RE WORKING AT IT. YOU'RE

LEWIS RANDOLPH WAID - RE-DIRECT/MR. THEOS

1 CONSCIOUSLY FAKING BECAUSE YOU'RE SMART TO BEAT
2 ODDS IN THE NEGATIVE DIRECTION. SO IF I GIVE YOU
3 FIFTY SAMPLES OF WHERE EVERY TIME BEING RIGHT ON
4 THE RECALL -- AND THE SAME ONE THE STATE USED --
5 YOU WOULD EXPECT 25 THAT THE PERSON WASN'T TRYING
6 IF IT WAS JUST RANDOM. IF SOMEBODY ONLY GETS
7 THIRTEEN OUT OF FIFTY RIGHT, THEY'RE BEATING IT IN
8 THE NEGATIVE DIRECTION MEANING THEY'RE CONSCIOUSLY
9 TRYING TO BE WRONG. AND ALL OF THESE TESTS OF THE
10 SIMULATION ARE BASED ON THAT SORT OF PRINCIPLE THAT
11 YOU'RE BEATING ODDS EVEN IF YOU'RE BRAIN DEAD.
12 EVEN IF YOU'RE JUST FLIPPING A COIN, YOU'LL GET 50
13 PERCENT RIGHT. SO THE MORE TRIALS YOU GIVE AND THE
14 MORE TESTS, YOU KIND OF SUGGEST THAT---

15 THE COURT: IT SHOWS NEGATIVE.

16 DR. WAID: WHEN THEY DO THAT, YOU
17 KNOW, IT DOESN'T FIT. TRAUMATIC BRAIN INJURY WILL
18 GET ABOUT TWO-THIRDS RIGHT, FOR EXAMPLE. I MEAN
19 SERIOUS BRAIN DAMAGE WHERE YOU HAVE M.R.I.S SHOWING
20 DAMAGE; THOSE PEOPLE DON'T EVEN DO 50 PERCENT.
21 THEY'LL DO, YOU KNOW, 66 OR 70 PERCENT RIGHT, YOU
22 KNOW, IN THESE TYPES OF TESTS. SO IT'S REALLY
23 BASED ON THOSE KIND OF PRINCIPLES THAT WE ALREADY
24 CONTROL THE ODDS OF BEING RIGHT OR WRONG. AND WHEN
25 YOU BEAT THOSE ODDS IN THE NEGATIVE DIRECTION

LEWIS RANDOLPH WAID - RE-DIRECT/MR. THEOS

1 LOOKING MORE DAMAGE THAN YOU SHOULD, IT CLEARLY
2 CREATES A HYPOTHESIS THAT NEEDS TO BE FURTHER
3 EXPLORED ABOUT MALINGERING. SO THESE ARE SOME OF
4 THE TESTS THAT ARE OUT THERE.

5 THE COURT: GO AHEAD, MR. THEOS.

6 MR. THEOS: THAT'S IT, YOUR HONOR.

7 THE COURT: ANYTHING ELSE, MR.

8 BAILEY?

9 MR. BAILEY: NO OTHER QUESTIONS,
10 YOUR HONOR.

11 THE COURT: ALL RIGHT. I'LL BE GLAD
12 TO HEAR FROM YOU GENTLEMEN. ANY OBJECTION TO DR.
13 WAID STEPPING DOWN?

14 MR. BAILEY: NO, SIR.

15 MR. THEOS: NO, SIR.

16 THE COURT: YOU MAY BE MORE
17 COMFORTABLE ON THE BENCH.

18 MR. BAILEY: YOUR HONOR, I WOULD
19 STILL CONTEND---

20 THE COURT: WELL, LET'S TAKE A FIVE
21 MINUTE RECESS.

22 (BRIEF RECESS.)

23 - - - - -

24 THE COURT: ALL RIGHT, MR.
25 SOLICITOR. PLEASE STATE IN THE RECORD YOUR

1 POSITION RELATIVE TO YOUR OBJECTION TO DR. WAID,
2 YOUR CLINICAL PSYCHOLOGIST, ETC. TESTIFYING.

3 MR. BAILEY: YOUR HONOR, I'VE KIND
4 OF GOT A CHOICE HERE. I'M CONCERNED ABOUT A P.C.R.
5 IF HE DOES NOT TESTIFY AND IF ADDITIONAL TIME IF
6 GIVEN TO DR. SANDLER TO REVIEW THE FILE, THEN I'M
7 CONCERNED ABOUT THE IMPACT IT WOULD HAVE ON THE
8 JURY. SO I'D YOU PREFER TO JUST GO AHEAD AND LET
9 HIM TESTIFY. I HAD JUST ASKED THE DOCTOR IF WE
10 COULD HAVE HIS FILE SO DR. SANDLER COULD REVIEW
11 THAT. AND HE DOESN'T WANT TO RELEASE THE ORIGINAL
12 FILE.

13 THE COURT: WELL, THAT'S NO PROBLEM.
14 DR. WAID, I DIRECT YOU TO STAY HERE AS LATE TONIGHT
15 AS THE SOLICITOR DEEMS IT NECESSARY FOR YOU TO BE
16 HERE AND AS LONG AS YOU NEED TO REVIEW THE FILE.

17 MR. BAILEY: THANK YOU, YOUR HONOR.

18 THE COURT: ALL RIGHT. ANYTHING
19 FROM THE DEFENDANT, PLEASE, ON THAT ISSUE?

20 MR. THEOS: NO, SIR.

21 THE COURT: WELL, I'M GOING TO MAKE
22 ONE STATEMENT, AND I WON'T REPEAT IT AGAIN IN THE
23 RECORD. BUT I WOULD JUST ENCOURAGE THE ATTORNEYS
24 TO COMPLY WITH THE RULE FIVE BECAUSE ALL OF THIS
25 SHOULD HAVE BEEN AVOIDED, COULD HAVE BEEN AVOIDED,

MOTIONS

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1 AND WAS NOT. AND IT'S MOST UNFORTUNATE FOR ALL
2 CONCERNED, AND I HOPE IT DOESN'T EVER HAPPEN AGAIN
3 IN ANY CASE WHETHER I'M INVOLVED WITH IT OR NOT.
4 ALL RIGHT, SIR. WE'LL CONVENE COURT, LADIES AND
5 GENTLEMEN, AT NINE. IS THAT SUITABLE?

6 MR. BAILEY: YES, SIR.

7 MR. THEOS: YES, SIR.

8 THE COURT: NINE IN THE MORNING. SO
9 BUTCH, YOU'RE GOING TO -- CAPTAIN POLK, YOU'RE
10 GOING TO NOTIFY AGENT EDWARDS WHO'S AT DINNER WITH
11 THE JURY TO HAVE THE JURY HERE AT NINE. I WANT THE
12 LAWYERS HERE AT A QUARTER 'TIL NINE IN CASE THERE'S
13 ANYTHING TO PUT ON THE RECORD. SO HOPEFULLY WE CAN
14 START PROMPTLY AT NINE WHICH WE HAVEN'T BEEN ABLE
15 TO DO YET. SO AT THIS TIME WE NEED TO TAKE UP THE
16 MATTER, GENTLEMEN, RELATIVE TO JUROR NUMBER 50. HE
17 WAS THE ELEVENTH JUROR SEATED OF THE FIRST TWELVE.
18 THE JUROR'S NAME IS CHRISTOPHER P. CAMPEAU,
19 C-A-M-P-E-A-U. ANYONE PRESENT FROM THE NEWS MEDIA
20 OR OTHERWISE BECAUSE I WOULD ASK THOSE PRESENT IN
21 THE COURTROOM NOT TO SHARE THIS INFORMATION WITH
22 ANYONE BECAUSE I HAVEN'T HAD AN OPPORTUNITY TO HAVE
23 MR. CAMPEAU HIMSELF APPEAR. HE'S WITH THE OTHER
24 JURORS, AND IT JUST WOULDN'T BE KOSHER FOR HIM OR A
25 MEMBER OF HIS FAMILY TO READ ABOUT SOMETHING THAT

1 HE DOESN'T KNOW ABOUT YET. DO YOU THINK WE NEED AN
2 IN CAMERA HEARING ON THIS, GENTLEMEN?

3 MR. THEOS: I THINK WE PROBABLY DO.

4 THE COURT: DO YOU THINK WE NEED TO
5 CLEAR THE COURTROOM OTHER THAN THE OFFICERS OF THE
6 COURT?

7 MR. BAILEY: I DON'T SEE ANYBODY IN
8 HERE, A REPORTER OR ANYBODY LIKE THAT.

9 THE COURT: YES, SIR. I DON'T WANT
10 PEOPLE IN HERE TALKING TO REPORTERS ABOUT IT. AND
11 I KNOW OFFICERS OF THE COURT AREN'T. I DON'T HAVE
12 ANY CONTROL OVER THE OTHERS.

13 MR. THEOS: I THINK THE ONLY OTHER
14 PEOPLE HERE, YOUR HONOR, WOULD BE THE EXPERTS.

15 THE COURT: I JUST ASK EACH OF YOU,
16 PLEASE, NOT TO DISCUSS THIS WITH ANYONE, PERIOD,
17 PLEASE. IT WAS BROUGHT TO THE ATTENTION OF THE
18 COURT BY THE CAPTAIN IN CHARGE OF THE DETAIL THAT
19 ON WEDNESDAY WHICH WAS THE 24TH OF FEBRUARY THAT
20 CAPTAIN POLK OF SLED RECEIVED A CALL FROM THE WIFE
21 OF MR. CAMPEAU AT WHICH TIME THE LADY REVEALED TO
22 HIM THAT SHE WAS VERY CONCERNED BECAUSE SHE
23 REALIZED THAT THE SISTER OF THE DEFENDANT, KENNETH
24 SIMMONS, LIVED ACROSS THE STREET FROM A PIECE OF
25 PROPERTY THAT THEY OWNED ON [REDACTED] [REDACTED] IN THE

1 TOWN OF SUMMERVILLE. AND IN THE EVENT THAT THE
2 JURY RETURNED A VERDICT OF GUILTY OR IMPOSED THE
3 DEATH PENALTY AND THEY WERE GOING TO BUILD ON A
4 VACANT LOT ACROSS FROM THE STREET FROM THE
5 DEFENDANT'S SISTER THAT IT WOULD PERHAPS CAUSE
6 CONSTERNATION, FEAR, CONCERN, OR WHATEVER. AND I
7 ASKED CAPTAIN POLK TO GET BACK IN TOUCH WITH THIS
8 LADY. AND HE TRIED ON WEDNESDAY AND ON THURSDAY
9 AND WAS UNABLE TO DO SO. AND THEN TODAY WHEN THE
10 JURY WENT OUT THIS AFTERNOON -- ABOUT FOUR O'CLOCK,
11 CAPTAIN POLK?

12 CAPTAIN POLK: YES, SIR.

13 THE COURT: --A NOTE WAS HANDED BY
14 JUROR NUMBER 50, MR. CAMPEAU WHICH CAPTAIN POLK
15 PROMPTLY BROUGHT TO ME. I READ IT. I CALLED THE
16 ATTORNEYS IN FOR THE STATE AND THE DEFENSE AND LET
17 THEM READ IT. AND NO DECISION WAS MADE AS TO WHAT
18 TO DO ABOUT THAT JUROR, WHETHER TO CONTINUE TO HAVE
19 HIM ON THE CASE BECAUSE THERE ARE THREE ALTERNATES
20 AVAILABLE, AND THE NOTE WILL BE MADE A PART AND
21 PARCEL OF THE RECORD. AND IT'S AS FOLLOWS:
22 THURSDAY, FEBRUARY THE 25TH, 1999 AT 11:40 P.M. --
23 SO THAT WOULD HAVE BEEN LAST EVENING THAT HE WROTE
24 THE NOTE. TO JUDGE PEEPLES; "YOUR HONOR, I HAVE
25 REALIZED THAT I KNOW A POSSIBLE RELATIVE OF THE

1 DEFENDANT, KENNETH SIMMONS, AND ASKED EARLIER IN
2 THE WEEK IF I KNEW RELATIVES OF THE ACCUSED, I
3 TRUTHFULLY ANSWERED NO. AFTER THE TRIAL STARTED, I
4 SAW A WOMAN I RECOGNIZED SITTING BEHIND KENNETH
5 SIMMONS. I NOW REALIZE THE WOMAN IN THE AUDIENCE
6 WAS, I BELIEVE, A MRS. LOUISE THAT LIVES OPPOSITE A
7 VACANT LOT I OWN IN THE TOWN OF SUMMERVILLE ON
8 [REDACTED] [REDACTED]. IN THE FUTURE MY WIFE AND I
9 INTENT TO BUILD ON THIS LOT, OUR PRIMARY
10 RESIDENCE. I HAVE UPON OCCASION BEEN CORDIAL WITH
11 MRS. LOUISE AND SAY HELLO TO HER WHILE I AM ON OR
12 ABOUT MY PROPERTY. KNOWING MRS. LOUISE WILL NOT
13 INFLUENCE MY DECISION-MAKING ABILITY REGARDING THE
14 GUILT OR INNOCENCE OF KENNETH SIMMONS. IF THE
15 TRIAL PROCEEDS TO THE PENALTY STAGE, NONE OF THE
16 ABOVE WILL INFLUENCE MY DECISION-MAKING ABILITY
17 REGARDING LIFE IMPRISONMENT OR THE DEATH PENALTY AS
18 OUTLINED IN THE PRE-TRIAL QUESTIONNAIRE. I FELT IT
19 WAS MY DUTY AS A JUROR TO INFORM YOU OF THE ABOVE
20 AND TO CONTINUE TO SERVE YOU IN ANY CAPACITY YOU
21 SEE FIT; RESPECTFULLY CHRISTOPHER P. CAMPEAU, JUROR
22 NUMBER FIFTY." NOW, CAPTAIN POLK, COME AROUND AND
23 BE SWORN IF YOU WILL.

24 - - - - -
25 WHEREUPON,

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 CAPTAIN BUTCH POLK, WHO AFTER BEING FIRST
2 DULY SWORN TO TELL THE TRUTH, TESTIFIED
3 AS FOLLOWS:

4 EXAMINATION

5 BY THE COURT:

6 Q. CAPTAIN POLK, JUST IN AN EFFORT TO SAVE TIME, I
7 DON'T MEAN TO SPEAK FOR YOU, AND YOU'RE WELCOME TO
8 START FROM THE BEGINNING ABOUT WHEN YOU RECEIVED A
9 CALL AND WHAT WAS SAID OR TO CORRECT ANY
10 MISSTATEMENT I MAY HAVE MADE. AND PLEASE FEEL FREE
11 TO DO THAT. BUT MORE PARTICULARLY, GENTLEMEN AND
12 LADIES, I ASKED CAPTAIN POLK THIS AFTERNOON TO
13 CONTINUE HIS EFFORTS TO TALK WITH THIS LADY BECAUSE
14 I WANTED TO KNOW IF THIS LADY HAD TALKED TO HER
15 HUSBAND ABOUT THE SITUATION AND IF HER HUSBAND WAS
16 AWARE THAT THE WIFE WAS UPSET. AND I WAS UNDER THE
17 OPINION PURSUANT TO THE DIRECTIVE THAT I GAVE TO
18 THE CLERK OF COURT TWO WEEKS AGO AND TOLD HER TO TO
19 HAVE TWENTY OR MORE COPIES OR MORE READY TO GIVE TO
20 THE JURORS. AND THIS INSTRUCTION -- IT'S NOT EVEN
21 DATED -- IT SAYS "INFORM YOUR FAMILY AND EMPLOYER
22 THAT YOU WILL BE UNABLE TO MAKE ANY DIRECT CONTACT
23 WITH THEM FOR THE DURATION OF THE TRIAL. HOWEVER
24 THE BAILIFF MAY BE ALLOWED TO PLACE CALLS FOR YOU
25 IN SPECIAL CIRCUMSTANCES. THE FOLLOWING TELEPHONE

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 NUMBERS SHOULD BE GIVEN TO YOUR FAMILY FOR USE IN
2 CASE OF EMERGENCY ONLY." "ONLY" IS IN LARGE BOLD
3 PRINT. MADAM COURT REPORTER, I'VE GIVEN YOU ONE OF
4 THESE LETTERS TO PUT IN THE RECORD. OR I GAVE IT
5 TO THE CLERK AND TOLD THE CLERK TO GIVE IT TO YOU.
6 SO MADAM CLERK, HAVE YOU GIVEN IT TO HER?

7 THE CLERK: I HAVE NOT. BUT WE DO
8 HAVE SOME PAPERS HERE IN THE BOX.

9 THE COURT: I KNOW. BUT, MA'AM,
10 WHEN I GAVE IT TO YOU, I SAID GIVE IT TO THE COURT
11 REPORTER; MAKE THIS A PART OF THE RECORD. THAT
12 DOESN'T MEAN PUTTING IT IN YOUR BOX. THAT MEANS
13 GIVING IT TO THE COURT REPORTER, LETTING HER MARK
14 IT AS A COURT'S EXHIBIT, AND IT'S PART OF THE
15 RECORD, THEN, PLEASE. AND THAT ONLY IS IN CAPITAL
16 BOLD PRINT. NO INFORMATION CONCERNING THE DURATION
17 OF THE TRIAL WILL BE AVAILABLE. YOUR FAMILY'S BEST
18 SOURCE OF INFORMATION WILL BE THE NEWS MEDIA, TWO
19 MEMBERS FOR THE DAY TIME CLERK OF COURT TO CALL;
20 ONE NIGHT TIME HOLIDAY INN. NOW, I WAS OF THE
21 VIEW, GENTLEMEN; AND Y'ALL WILL RECALL IN CHAMBERS
22 I GAVE YOU A FORM THAT IF WE CONCLUDED THIS SHOULD
23 BE A FAMILY OR CONJUGAL VISIT DURING THE 24 HOUR
24 PERIOD, IF WE GET TO THAT. AND ALL AGREED THAT TO
25 BE ON THE SAFE SIDE THERE WOULD BE NO VISITS BY THE

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 FAMILY. DO YOU AGREE, MR. SOLICITOR?

2 MR. BAILEY: YES, SIR.

3 THE COURT: MR. THEOS?

4 MR. THEOS: YES, SIR.

5 THE COURT: AND I REALIZE THAT

6 DIFFERENT JUDGES CONDUCT THEIR COURTS AND EXERCISE
7 THEIR DISCRETION IN A DIFFERENT MANNER. AND
8 CAPTAIN POLK, THIS IS NOT CASTING BLAME ON ANYBODY,
9 BUT APPARENTLY YOU WERE IN CHARGE OF THE DETAIL IN
10 NOVEMBER OF 1998 IN DORCHESTER COUNTY AT A DEATH
11 PENALTY TRIAL IN WHICH THE JURORS WERE ALLOWED TO
12 CALL IN AND TALK TO THE FAMILY WITH THE SLED AGENT
13 SITTING THERE, BUT YOU COULDN'T HEAR WHAT WAS SAID
14 ON THE OTHER PHONE, END OF THE PHONE; AND THEY
15 ALLOWED THE FAMILY TO COME VISIT; CORRECT?

16 CAPTAIN POLK: YES, SIR.

17 THE COURT: BUT I HAVE INSTRUCTED
18 YOU AT THIS TIME FOR YOU TO NOTIFY THE NUMBER TWO
19 MAN IN CHARGE OF THIS CONTINGENT OF SECURITY WHO IS
20 NOW DINING WITH THE JURORS TO TELL THEM THAT JUDGE
21 PEEPLES SAID, BECAUSE I DON'T WANT THEM TO BE
22 OFFENDED. IT'S ALL RIGHT IF THEY'RE OFFENDED AT
23 ME. THERE WILL BE NO FURTHER PHONE CALLS TO HOME
24 OR FROM HOME TO THEM EXCEPT IN A CASE OF AN EXTREME
25 EMERGENCY. AND YOU GENTLEMEN OR LADIES OF SLED,

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 Y'ALL HAVE TO USE YOUR DISCRETION. IF THERE'S
2 DOUBT IN YOUR MIND, YOU HAVE MY NUMBER AND ALL I'M
3 DOING IS CONCENTRATING ON THIS CASE 24 HOURS A
4 DAY. AND UNDER NO CIRCUMSTANCES WILL THERE BE ANY
5 FAMILY VISITS. AND THAT HAS BEEN THE RULE FROM THE
6 GET-GO, BUT IT WAS JUST NOT PROPERLY COMMUNICATED
7 DOWN THE LINE. AND SO IF YOU WOULD, PLEASE ADHERE
8 TO THAT. AND IF YOU WOULD, PLEASE OFFICER POLK,
9 TELL US OF YOUR EFFORTS TO CONTACT THIS LADY AND
10 THE CONTENTS OF THE CONVERSATION, PLEASE.

11 CAPTAIN POLK: I CALLED HER STARTING
12 THURSDAY AT HER HOME NUMBER AND GOT AN ANSWERING
13 MACHINE AND HER WORK NUMBER. AND WHEN I TALKED TO
14 THE JUDGE TODAY WHEN WE GOT THE LETTER, I TRIED
15 AGAIN, AND I GOT THE SAME THING. SO I HAD AN
16 EMERGENCY NUMBER. AND ONE WAS AREA CODE [REDACTED]; AND I
17 DIDN'T KNOW WHAT THAT WAS. SO I DIALED ANOTHER
18 NUMBER AND TALKED TO HER FATHER; AND HE SAID THAT
19 SHE HAD JUST LEFT THERE, AND SHE WAS GONE TO VISIT
20 SOMEBODY. AND SO I FINALLY TRACKED HER DOWN AT A
21 FRIEND'S HOUSE. AND SHE SAID SHE HAD TALKED TO HER
22 HUSBAND ABOUT THE SISTER, THE DEFENDANT, BEING
23 ACROSS THE STREET; NAMED LOUISE BROTHERS, I THINK
24 IS THE NAME SHE TOLD ME, AND SHE WAS CONCERNED
25 ABOUT IT THAT THEY'RE GOING TO BUILD A HOUSE ON

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 THAT LOT AND HAVING THE DEFENDANT'S SISTER LIVING
2 ACROSS THE STREET FROM THEM.

3 THE COURT: HOW CONCERNED WAS SHE,
4 OFFICER POLK?

5 CAPTAIN POLK: SHE SEEMED LIKE HE
6 SHE WAS REALLY CONCERNED ABOUT IT. SHE TALKS WITH
7 A LITTLE ACCENT. I DON'T THINK SHE'S FROM THIS
8 AREA.

9 THE COURT: WAS SHE UPSET?

10 CAPTAIN POLK: SHE SAID SHE WAS. I
11 ASKED HER, AND SHE SAID SHE WAS UPSET.

12 THE COURT: DID SHE EXPRESS FEAR?

13 CAPTAIN POLK: YES, SIR, SHE DID.

14 THE COURT: AND SHE SPOKE TO HER
15 HUSBAND LAST EVENING ABOUT THIS MATTER; IS THAT
16 RIGHT?

17 CAPTAIN POLK: I'VE GOT A RECORD OF
18 WHEN HE CALLED HOME. WE HAD THEM SIGN A THING WHEN
19 THEY CALLED HOME; AND I HAVEN'T LOOKED AT THAT --
20 IT'S AT THE MOTEL -- TO SEE HOW MANY TIMES HE
21 CALLED HER. NOW SHE NEVER CALLED HIM. HE HAD TO
22 CALL FROM OUR ROOM THAT WE HAD SET UP THERE.

23 THE COURT: AND THERE IS AN AGENT
24 PRESENT WHILE THEY'RE MAKING THE CALL TO MAKE SURE
25 THAT THE JUROR DOESN'T MENTION ANYTHING ABOUT THE

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 CASE. BUT YOU DON'T KNOW WHAT'S BEING SAID ON THE
2 OTHER SIDE?

3 CAPTAIN POLK: NO, SIR. YOU CAN'T
4 HEAR THE OTHER SIDE OF THE CONVERSATION.

5 THE COURT: ALL RIGHT, SIR. BUT YOU
6 UNDERSTAND THERE CAN BE NO FURTHER CALLS SUCH AS
7 THAT?

8 CAPTAIN POLK: YES, SIR. I WILL
9 TAKE CARE OF THAT RIGHT NOW.

10 THE COURT: ALL RIGHT, MR.
11 SOLICITOR, WOULD YOU LIKE TO QUESTION THIS WITNESS,
12 PLEASE?

13 MR. BAILEY: NO, SIR.

14 THE COURT: MR. THEOS, WOULD YOU
15 LIKE TO QUESTION THIS WITNESS?

16 MR. THEOS: YOUR HONOR, DO YOU KNOW
17 WHETHER THAT CONVERSATION TOOK PLACE BEFORE OR
18 AFTER THAT NOTE WAS WRITTEN BY THE JUROR?

19 MR. POLK: NO, SIR, SHE FIRST CALLED
20 US ON WEDNESDAY NIGHT RIGHT AFTER WE GOT THERE AND
21 LEFT A NUMBER FOR US TO CALL HER.

22 MR. THEOS: I UNDERSTAND THAT; BUT
23 THE CONVERSATION WITH THE JUROR AND HIS WIFE.

24 CAPTAIN POLK: IT HAD TO BE
25 WEDNESDAY NIGHT OR THURSDAY NIGHT.

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 MR. THEOS: WAS IT BEFORE OR AFTER
2 THE JUROR WROTE THAT LETTER?

3 CAPTAIN POLK: IT WOULD HAVE BEEN
4 BEFORE. I MEAN, THAT SAYS---

5 THE COURT: 11:47 P.M., THURSDAY,
6 FEBRUARY 25, 1999. SO I DON'T THINK Y'ALL ALLOWED
7 ANY CALLS AFTER 11:30 LAST NIGHT.

8 CAPTAIN POLK: NO, SIR. THEY TALKED
9 BEFORE HE WROTE THAT LETTER.

10 THE COURT: HE CAN CHECK THE LOG AND
11 REPORT BACK TO THE RECORD.

12 MR. THEOS: DO YOU FEEL FAIRLY
13 CERTAIN THAT IT WAS BEFORE THAT NOTE?

14 CAPTAIN POLK: YES, SIR.

15 MR. THEOS: THAT'S ALL THE QUESTIONS
16 I HAVE.

17 THE COURT: ALL RIGHT. MR. CLERK,
18 MAKE FIVE COPIES OF THAT. AND WE'LL FILE THE
19 ORIGINAL AS A COURT'S EXHIBIT. AND I'LL GIVE A
20 COPY, MR. SOLICITOR, TO YOU, A COPY TO MR. THEOS
21 FOR YOU FOR YOUR FILE. AND WHAT SAY THE STATE
22 RELATIVE TO RETAINING JUROR OR CONTINUING?

23 THE CLERK: YOUR HONOR, I HAVE A
24 STATEMENT TO MAKE ABOUT THAT CONVERSATION. MS.
25 FLORA FOOTMAN IN OUR OFFICE COUSIN CALLED HER

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 YESTERDAY MORNING VERY EARLY. HER COUSIN---

2 THE COURT: JUST A MINUTE,
3 GENTLEMEN. PLEASE, NOW; Y'ALL GO OUT IN THE HALL
4 AND TALK. EXCUSE ME, PLEASE. THANK YOU, MADAM
5 CLERK. YOU WERE TELLING ME THAT MS. FLORA FOOTMAN,
6 AN EMPLOYEE OF THE CLERK'S OFFICE, RECEIVED A CALL
7 FROM WHO?

8 THE CLERK: HER COUSIN. MS.
9 FOOTMAN'S COUSIN CALLED HER YESTERDAY MORNING VERY
10 EARLY. MS. FOOTMAN'S COUSIN IS A FRIEND OF MRS.
11 CAMPEAU. AND MRS. CAMPEAU TOLD HER COUSIN ABOUT
12 THE SITUATION. AND SHE CALLED MS. FOOTMAN WANTING
13 TO KNOW WHAT TO DO. MS. FOOTMAN'S RESPONSE TO HER
14 WAS TO CALL THE SLED AGENT. AND YESTERDAY MORNING
15 I PRESENTED THIS TO THE SLED AGENT, MR. POLK; AND
16 HE SAID THAT THE LADY DID CALL. I JUST WANTED TO
17 MAKE THAT KNOWN TO THE COURT.

18 THE COURT: AND I APPRECIATE KINDLY
19 YOU SHARING THAT WITH US. THANK YOU, MA'AM. AND
20 THIS LADY'S NAME IS?

21 THE CLERK: CHERYL GRAHAM.

22 THE COURT: AND SHE'S THE DEPUTY
23 CLERK OF COURT. ALL RIGHT, MR. BAILEY. WHAT SAYS
24 THE STATE?

25 MR. BAILEY: YOUR HONOR, THE STATE

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 WOULD MOVE TO EXCUSE MR. CAMPEAU AND PLACE THE NEXT
2 ALTERNATE IN LINE.

3 THE COURT: WHAT SAY THE DEFENSE?

4 MR. THEOS: YOUR HONOR, FOR PURPOSES
5 OF PROTECTING THE RECORD, BEFORE THE DEFENSE COULD
6 AGREE TO THAT WE WOULD ASK THAT THE COURT MAKE AN
7 INQUIRY FROM THE JUROR HIMSELF AS TO WHAT
8 CONVERSATION, IF ANY, TOOK PLACE; EXACTLY WHAT WAS
9 SAID FROM THE JUROR; AND THEN THE FINAL QUESTION TO
10 HIM, AGAIN BY THE COURT -- AND THIS CERTAINLY COULD
11 BE IN CAMERA -- WOULD BE RELATED TO WHAT, IF ANY,
12 IMPACT THAT MAY HAVE ON HIS ABILITY TO CONTINUE TO
13 SERVE AS A JUROR.

14 THE COURT: I THINK HE'S ANSWERED
15 THAT QUESTION BY WHAT HE'S PUT IN THE LETTER. AND
16 ONCE WE SINGLE HIM OUT TO QUESTION HIM, MR. THEOS,
17 I THINK YOU'RE CREATING A PROBLEM THERE IN AND OF
18 ITSELF. YOU'VE STATED YOUR POSITION.

19 MR. THEOS: YOUR HONOR, I DON'T KNOW
20 THAT THAT---

21 THE COURT: GO HAND THAT TO THE
22 COURT REPORTER TO MARK. AND GIVE A COPY OF THAT TO
23 EACH OF THE ATTORNEYS.

24 MR. THEOS: I DON'T KNOW THAT THAT
25 WOULD NECESSARILY BE THE CASE ESPECIALLY IN THE

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 LIGHT OF WHAT HE'S ALREADY WRITTEN. OBVIOUSLY HE
2 KNOWS HE'S BEEN SORT OF SINGLED OUT AND HAS WRITTEN
3 THIS TO YOU. SO I DON'T KNOW, BASED ON MR.
4 CAMPEAU'S RESPONSES TO THE QUESTIONS IN VOIR DIRE
5 THAT HIS OBVIOUS INTELLIGENCE AND ABILITY TO
6 ARTICULATE, KNOWING THAT HE'S ALREADY BEEN SORT OF
7 SINGLED OUT; I DON'T KNOW THAT THAT WOULD HAVE ANY
8 ADVERSE BEARING ON HIS ABILITY TO CONTINUE TO
9 PERFORM. ALSO I WOULD STATE FOR THE RECORD HE
10 KNOWS THE SISTER OF THE VICTIM IN THIS CASE AS
11 WELL. SO FOR ALL THOSE REASONS WE WOULD OBJECT
12 WITHOUT FURTHER INQUIRY BY THE COURT.

13 THE COURT: ALL RIGHT. NOTE HIS
14 OBJECTION, GENTLEMEN. THERE HAS BEEN IMPROPER
15 COMMUNICATION CONCERNING THIS CASE AND DISCUSSIONS
16 RELATIVE TO WHETHER THE MAN WAS FOUND GUILTY OR
17 RECEIVES LIFE IMPRISONMENT OR THE DEATH PENALTY
18 BETWEEN THIS MAN AND HIS LIFE; IT'S APPARENT FROM
19 WHAT'S HAPPENED; AND THAT JUROR CANNOT CONTINUE IN
20 THIS CASE. AND THE COURT WILL EXCUSE HIM IN THE
21 MORNING. AND WE'LL REPLACE HIM WITH THE FIRST
22 ALTERNATE. ALL RIGHT, THANK YOU CAPTAIN POLK. ALL
23 RIGHT, GENTLEMEN, ANYTHING ELSE FOR THE RECORD? WE
24 NEED TO GO IN CHAMBERS AND TALK ABOUT CHARGES.

25 MR. BAILEY: NOTHING FOR THE RECORD,

CAPTAIN BUTCH POLK - EXAM. BY THE COURT

1 YOUR HONOR.

2 THE COURT: ALL RIGHT, MR. THEOS.

3 EXPLAIN TO YOUR CLIENT HE'S NOT TO TALK TO ANY
4 MEMBER OF HIS FAMILY ABOUT THIS JUROR AND WHAT
5 TRANSPIRED IN THIS COURT. MAKE HIM UNDERSTAND
6 THAT.

7 MR. BELL: YES, SIR, YOUR HONOR.

8 (WHEREUPON AT 8:00 P.M. COURT WAS ADJOURNED.)
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1 SATURDAY, FEBRUARY 27, 1999

2 (THE FOLLOWING TAKES PLACE IN THE JUDGE'S CHAMBERS AND
3 OUT OF THE PRESENCE OF THE JURY.)

4 THE COURT: ALL RIGHT, MADAM COURT
5 REPORTER, LET THE RECORD REFLECT THAT WE ARE
6 ASSEMBLED IN CHAMBERS WITH THE DEFENDANT, KENNETH
7 SIMMONS, PRESENT WITH EACH OF HIS ATTORNEYS. THE
8 STATE HAS REPRESENTED AT THIS TIME IT IS NECESSARY
9 THAT WE HAVE A PROCEEDING RELATIVE TO THE JUROR,
10 MR. CHRISTOPHER CAMPEAU, AND BECAUSE THERE ARE
11 PEOPLE IN THE COURTROOM, AND I DO NOT WANT TO IN
12 ANY WAY EMBARRASS MR. CAMPEAU OR EMBARRASS ANYONE.
13 I THOUGHT IT BETTER THAT THIS MATTER BE HANDLED IN
14 CHAMBERS IN THE EVENT THAT IT MAY BE DISSEMINATED
15 BY OTHERS AND CAUSE SOME DIFFICULTIES. SO AT THIS
16 TIME LET'S BRING MR. CAMPEAU IN. (AT THIS TIME MR.
17 CAMPEAU, JUROR NUMBER 50, COMES INTO JUDGE'S
18 CHAMBERS.) MR. CAMPEAU, RODNEY PEEPLES; HOW ARE
19 YOU DOING?

20 MR. CAMPEAU: FINE; HOW ARE Y'ALL?

21 THE COURT: HAVE A SEAT IF YOU
22 WOULD, PLEASE. MR. CAMPEAU, IT WAS BROUGHT TO THE
23 ATTENTION OF THE COURT ON WEDNESDAY THAT YOUR WIFE
24 HAD CALLED TO SPEAK TO A SLED AGENT AND AT THAT
25 TIME HAD TOLD THE SLED AGENT, LT. POLK, AND A

1 RECORD WAS MADE OF THIS LAST EVENING IN THE
2 COURTROOM, THAT SHE REALIZED THAT THERE WAS A LOT
3 OF LAND ON WHICH Y'ALL INTENDED TO BUILD YOUR HOME
4 ACROSS THE STREET ON [REDACTED] [REDACTED] FROM THE
5 SISTER OF THE DEFENDANT. AND I TOLD THE SLED AGENT
6 AT THAT TIME TO CONTACT YOUR WIFE AND TO TELL HER
7 UNDER NO CIRCUMSTANCES SHOULD SHE DISCUSS THAT WITH
8 YOU OR WITH ANYONE ELSE IN ANY MANNER WHATSOEVER.
9 PLEASE LET ME PUT YOUR MIND AT EASE. NO ONE HAS
10 DONE ANYTHING WRONG. PLEASE UNDERSTAND THAT. LT.
11 POLK TRIED TO REACH YOUR WIFE ON WEDNESDAY AND THEN
12 AGAIN ON THURSDAY. AND I THINK MAYBE SHE HAD A
13 DENTAL APPOINTMENT OR HAD A DAY OFF; I'M NOT SURE.
14 THERE'S BEEN A MISUNDERSTANDING RELATIVE TO FAMILY
15 PHONE CALLS WITH JURORS. MY INSTRUCTIONS TO LT.
16 POLK IS THAT NO ONE IS TO CALL AND SPEAK TO ANY
17 MEMBER OF THE FAMILY, NOR WERE JURORS TO CALL TO
18 SPEAK TO ANYONE EXCEPT IN A CASE OF EMERGENCY, AND
19 THEN THE SLED AGENT WOULD MAKE THE CALL AND WOULD
20 DO THE TALKING. BUT APPARENTLY A PRIOR TRIAL THAT
21 WAS HELD HERE IN NOVEMBER AT THAT TIME THAT WAS
22 PERMITTED. AND IN THIS INSTANCE I'M TOLD BY THE
23 SLED AGENT THAT -- AS A MATTER OF FACT, WHY DON'T
24 YOU ASK LT. EDWARDS TO STEP IN HERE, PLEASE. I
25 JUST WANT TO EMPHASIZE TO HIM THE SITUATION. I'VE

1 REPEATED IT TO HIM LAST EVENING AND AGAIN THIS
2 MORNING. (AT THIS TIME LT. EDWARDS COMES INTO
3 JUDGE'S CHAMBERS.) THANK YOU, LT. EDWARDS. I JUST
4 THOUGHT IT WOULD BE HELPFUL IF YOU COULD BE PRIVY
5 TO WHAT'S BEING SAID NOW SINCE YOU'RE IN CHARGE OF
6 THIS DETAIL. I WAS JUST EXPLAINING TO MR. CAMPEAU
7 THAT THERE WAS A MISUNDERSTANDING ABOUT THE
8 COMMUNICATION BETWEEN FAMILY MEMBERS AND JURORS OR
9 JURORS AND FAMILY MEMBERS OF THE PRIOR TRIAL HERE
10 LAST NOVEMBER, I THINK IT WAS, IN A DEATH PENALTY
11 CASE, IT WAS PERMITTED. BUT AFTER DISCUSSING WITH
12 THE LAWYERS, THE COURT WAS OF THE VIEW THAT THAT
13 SHOULD NOT BE DONE. AND I'M NOT LOOKING FOR
14 FAULT. I'M NOT CRITICIZING ANYONE. AND I DON'T
15 KNOW THAT ANY "HARM" SO TO SPEAK HAS BEEN DONE.
16 BUT THEN LT. POLK WAS UNABLE TO REACH YOUR WIFE ON
17 WEDNESDAY OR ON THURSDAY. AND I ASSUMED THAT HE
18 TRIED AGAIN ON FRIDAY MORNING. BUT THEN YESTERDAY
19 AFTERNOON IT WAS THIS NOTE WHICH YOU HAD GIVEN TO
20 LT. POLK HE GAVE TO ME; I CALLED THE LAWYERS IN. I
21 SHARED A COPY OF THE NOTE WITH THE ATTORNEYS. AND
22 IT WAS DETERMINED AT THAT TIME THAT IN VIEW OF THE
23 FACT THAT YOUR WIFE WAS NOT TO TALK YOU AND YOU
24 WERE NOT TO TALK TO YOUR WIFE THAT PERHAPS WE WOULD
25 PROCEED ALONG AS NORMAL. IN ANY EVENT, THIS NOTE

1 THAT YOU SENT TO THE COURT IS DATED THURSDAY,
2 FEBRUARY 25, 1999. TODAY IS SATURDAY. BUT YOU
3 WROTE IT AT 11:47 P.M. AND I ASSUME YOU GAVE IT TO
4 LT. POLK ON THURSDAY MORNING.

5 MR. CAMPEAU: ACTUALLY IT WAS EITHER
6 AFTER OUR FIRST BREAK OR AFTER LUNCH. IT WASN'T
7 FIRST THING IN THE MORNING.

8 THE COURT: AND IT DOESN'T MATTER.
9 BUT IT PROBABLY WAS AFTER LUNCH BECAUSE HE GAVE IT
10 TO ME ABOUT THREE O'CLOCK ON THE AFTERNOON OF
11 FRIDAY. IN ANY EVENT, I INSTRUCTED LT. POLK TO
12 DOUBLE HIS EFFORTS TO TRY TO FIND YOUR WIFE AND
13 COMMUNICATE WITH HER ABOUT THE MATTER. AND HE
14 DID. THERE WERE SEVERAL MEMBERS HERE. AND HE
15 FINALLY FOUND THAT SHE WAS WITH FAMILY, OR THE
16 FAMILY TOLD HER THAT SHE WAS VISITING A FRIEND IN
17 LADSON -- I'M NOT SURE WHERE. BUT HE FINALLY
18 TALKED TO HER. AND YOUR WIFE WAS -- TO USE AGENT
19 POLK'S WORD -- VERY CONCERNED AND VERY UPSET ABOUT
20 THE MATTER AND RELATED TO LT. POLK THAT YOU AND
21 YOUR WIFE HAD HAD A CONVERSATION CONCERNING THIS;
22 IS THAT CORRECT?

23 MR. CAMPEAU: WE DID.

24 THE COURT: AND PLEASE, MR. CAMPEAU,
25 UNDERSTAND THAT NEITHER THIS COURT NOR ANY OF THE

1 ATTORNEYS NOR ANY OF THE SLED AGENTS NOR ANYONE
2 ELSE IS IMPLYING YOU'VE DONE ANYTHING WRONG BECAUSE
3 YOU HAVE NOT. BUT BECAUSE OF THE COMMUNICATION AND
4 YOU AND YOUR WIFE APPARENTLY DISCUSSED WHAT EFFECT
5 A VERDICT, OR WHATEVER, COULD HAVE ON THE POTENTIAL
6 OF Y'ALL IN THE FUTURE LIVING ACROSS THE STREET
7 FROM MR. CAMPEAU, THAT THAT HAS CAUSED GRAVE
8 CONCERN TO THE COURT. AND WHILE YOU STATE IN YOUR
9 LETTER, IN THIS LATER I'M MAKING A PART OF THE
10 RECORD, "KNOWING MRS. LOUISE WILL NOT INFLUENCE MY
11 DECISION-MAKING ABILITY REGARDING THE GUILT OR
12 INNOCENCE OF KENNETH SIMMONS, IF THE TRIAL PROCEEDS
13 TO THE PENALTY STAGE NONE OF THE ABOVE WILL
14 INFLUENCE MY DECISION-MAKING ABILITY REGARDING LIFE
15 IMPRISONMENT OR THE DEATH PENALTY AS OUTLINED IN
16 THE PRETRIAL QUESTIONNAIRE." AND YOU FELT THAT
17 YOU SHOULD NOTIFY THE COURT. AND I APPRECIATE YOUR
18 CANDOR. I APPRECIATE YOU SHARING THIS INFORMATION
19 WITH THE COURT. BUT REALLY IN AN EFFORT TO AVOID
20 YOU AND YOUR WIFE BEING PLACED IN A POTENTIALLY
21 DIFFICULT SITUATION FOR MONTHS OR YEARS TO COME,
22 THE COURT HAS CONCLUDED THAT SINCE WE DO HAVE THREE
23 ALTERNATE JURORS THAT IT WOULD BE IN THE BEST
24 INTEREST OF YOU AND YOUR WIFE THAT YOU NOT CONTINUE
25 AS A JUROR IN THIS CASE. SO MR. CAMPEAU, DO YOU

1 HAVE ANY QUESTIONS ABOUT ANYTHING THAT I HAVE
2 STATED?

3 MR. CAMPEAU: NO, SIR.

4 THE COURT: ANYTHING YOU WANT TO
5 ADD, SUBTRACT, OR COMMENT UPON?

6 MR. CAMPEAU: I GUESS I WISH I COULD
7 APOLOGIZE BECAUSE IF I HAD SEEN HER DURING THE
8 SELECTION, I WOULD HAVE SAID SOMETHING.

9 THE COURT: OH, PLEASE DON'T
10 APOLOGIZE. THERE'S NOTHING TO APOLOGIZE FOR. IN
11 THE COURTROOM YOU OBSERVED HER SITTING BEHIND THE
12 DEFENDANT, AND THAT'S NORMAL FOR A DEFENDANT'S
13 FAMILY TO BE IN AND ABOUT THE TRIAL OF THE CASE.
14 AND YOU ARE COMPLETELY INNOCENT IN THE MATTER. AND
15 PLEASE LAY ASIDE ANY CONCERN YOU HAVE ABOUT WHAT
16 YOU SHOULD OR SHOULD NOT HAVE DONE. YOU ARE A VERY
17 INTELLIGENT PERSON. I RECALL YOU CLEARLY FROM YOUR
18 VOIR DIRE. AND YOU'RE A CONSCIENTIOUS JUROR. AND
19 WE'RE DELIGHTED THAT YOU WOULD GIVE OF YOUR TIME
20 AND YOUR TALENTS AND BE AWAY FROM YOUR FAMILY AND
21 WORK. AND WE THANK YOU SO MUCH FOR THAT
22 WILLINGNESS. NOW MR. CAMPEAU, I INSTRUCT YOU TO
23 PLEASE DO NOT DISCUSS THIS CASE WITH ANYONE OR
24 ALLOW ANYONE TO DISCUSS IT WITH YOU OR IN YOUR
25 PRESENCE IN ANYWAY WHATSOEVER UNTIL THE CASE IS

1 COMPLETELY FINISHED. AND EVEN THEN, YOU DON'T HAVE
2 TO TALK TO ANYBODY ABOUT IT. THAT'S ENTIRELY UP TO
3 YOU. AND IF ANYONE SHOULD PERSIST IN TRYING TO
4 MAKE YOU TALK ABOUT IT WHEN YOU DO NOT DESIRE TO,
5 YOU TELL THEM ABSOLUTELY NOT, IF THAT BE YOUR VIEW;
6 AND THEN YOU CONTACT THE COURT AND I'LL SEE THAT
7 WHOEVER IT IS THAT IS ATTEMPTING TO FORCE YOU TO
8 TALK ABOUT IT, I CAN PUT A STOP TO THAT FOR
9 CERTAIN. BUT, AGAIN, IF YOU WISH TO DISCUSS IT
10 WITH ANYONE IN THE FUTURE, YOU'RE MORE THAN WELCOME
11 TO DO THAT. BUT DO YOU UNDERSTAND THAT UNTIL THE
12 VERDICT IS ARRIVED IN THIS CASE WHICH MAY END THE
13 CASE -- I DO NOT HAVE AN IDEA WHAT THE VERDICT WILL
14 BE -- OR IF THERE BE A PENALTY PHASE THAT THIS
15 ADMONITION OR DIRECTIVE OF THE COURT APPLIES TO YOU
16 UNTIL SUCH TIME AS THE FINAL VERDICT OF THE JURY IS
17 IN. DO YOU UNDERSTAND THAT?

18 MR. CAMPEAU: YES, I DO.

19 THE COURT: ALL RIGHT. SO I'M GOING
20 TO HAVE ONE OF THE SLED AGENTS TAKE YOU BACK TO
21 YOUR ROOM AND LET YOU CHECK OUT AND GET YOUR
22 CLOTHES. AND PLEASE TELL YOUR WIFE THAT SHE'S DONE
23 NOTHING WRONG. AND IF YOU'D LIKE FOR ME TO EXPLAIN
24 TO HER WHY WE HAD TO EXCUSE YOU FROM FURTHER
25 SERVICE, IT'S NOT BECAUSE YOU OR HER DID ANYTHING

1 WRONG BUT BECAUSE YOU HAD TO OBVIOUSLY TALK ABOUT
2 THE POTENTIAL VERDICTS IN THE CASE; DID YOU NOT?

3 MR. CAMPEAU: WELL, I'LL TELL YOU
4 WHAT WE SAID. I SAID WHEN I OUTLINED THE LETTER
5 THAT IT WOULDN'T EFFECT MY JUDGMENT. AND THEN I
6 DID SAY, YOU KNOW, WHATEVER THE SITUATION IS AFTER
7 WE BUILD THERE, WE'LL JUST HAVE TO LIVE WITH IT AT
8 THAT TIME. SO WE DID DISCUSS IT A LITTLE BIT.

9 THE COURT: BUT YOU UNDERSTAND I'M
10 TRYING TO PROTECT YOU---

11 MR. CAMPEAU: DEFINITELY.

12 THE COURT: --FROM GETTING INTO A
13 SITUATION BECAUSE I DON'T WANT YOU OR YOUR FAMILY
14 TO HAVE ANY CONCERNS ABOUT THE FUTURE IF YOU DECIDE
15 -- AND YOU'VE INDICATED THAT'S WHERE YOU PLAN, OR
16 YOUR WIFE DID, TO BUILD YOUR FUTURE HOME; IS THAT
17 CORRECT?

18 MR. CAMPEAU: THANK YOU.

19 THE COURT: AND SO AGAIN, LET ME PLEASE
20 THANK YOU; AND WE WISH YOU WELL.

21 MR. CAMPEAU: THANK YOU.

22 THE COURT: ALL RIGHT, GENTLEMEN.
23 ANY OBJECTIONS AS TO THE PROCEEDINGS HEREIN HAVING
24 BEEN CONDUCTED BY THE STATE?

25 MR. BAILEY: NO, SIR.

1 THE COURT: BY THE DEFENDANT?

2 MR. THEOS: NO, SIR.

3 THE COURT: ALL RIGHT, GENTLEMEN.

4 NOW, I NEED TO EXPLAIN THE RIGHT OF THE DEFENDANT
5 TO TAKE THE STAND OR NOT TO TAKE THE STAND. AND IS
6 THERE ANY OBJECTION TO THAT BEING DONE AT THIS
7 TIME, OR DO YOU PREFER TO DO IT -- I'M TRYING TO
8 AVOID HAVING TO SEND THE JURY IN AND OUT. WE'LL GO
9 IN THE COURTROOM TO DO IT, OF COURSE; BUT---

10 MR. THEOS: THAT'S FINE. ANY TIME.
11 WE CAN DO IT NOW.

12 THE COURT: ALL RIGHT. SHALL WE
13 PROCEED?

14 MR. BAILEY: WELL, WE NEED TO TALK A
15 SECOND MORE BEFORE WE GO BACK IN THERE.

16 THE COURT: LET'S CHAT IN HERE. GO
17 AHEAD, KATHI; SET UP IN THE COURTROOM.

18 -----

19 THE COURT: GOOD MORNING, LADIES;
20 GOOD MORNING, GENTLEMEN. ANYTHING FOR THE RECORD,
21 PLEASE BEFORE THE JURY IS BROUGHT IN?

22 MR. BAILEY: NOT FROM THE STATE,
23 YOUR HONOR.

24 THE COURT: FROM THE DEFENSE?

25 MR. THEOS: NOTHING, YOUR HONOR.

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 THE COURT: ALL RIGHT, GENTLEMEN;
2 WOULD THE DEFENSE COUNSEL WISH FOR THE COURT TO
3 INQUIRE OF THE DEFENDANT IF HE WISHES TO TAKE THE
4 WITNESS STAND OR HIS CONSTITUTIONAL RIGHTS IN THAT
5 REGARD?

6 MR. THEOS: YES, SIR.

7 THE COURT: ALL RIGHT. COME
8 FORWARD, PLEASE.

9 -----
10 WHEREUPON,

11 KENNETH SIMMONS, WHO AFTER BEING FIRST
12 DULY SWORN TO TELL THE TRUTH, TESTIFIED
13 AS FOLLOWS:

14 EXAMINATION

15 BY THE COURT:

16 Q. MR. KENNETH SIMMONS, HOW OLD ARE YOU?

17 A. TWENTY-EIGHT.

18 Q. AND, MR. SIMMONS, PLEASE UNDERSTAND THAT YOU AS
19 DOES EVERY DEFENDANT THAT COMES INTO THIS COURT;
20 YOU HAVE CERTAIN CONSTITUTIONAL RIGHTS AND
21 SAFEGUARDS. AND THERE ARE CERTAIN THINGS THAT MUST
22 BE DONE; FOR EXAMPLE IF YOU WANT A JURY TRIAL,
23 YOU'RE ENTITLED TO A JURY TRIAL. DO YOU UNDERSTAND
24 THAT?

25 A. YES.

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 Q. AND IF YOU CAN'T AFFORD A LAWYER, THE STATE WILL
2 APPOINT ONE TO REPRESENT YOU; AND YOU HAVE
3 APPOINTED LAWYERS; DO YOU UNDERSTAND THAT?

4 A. (DEFENDANT ANSWERS BY SHAKING OF HEAD.)

5 Q. YOU'RE GOING TO HAVE TO ANSWER YES OR NO; NOT
6 UH-HUH; EITHER YES OR NO, PLEASE.

7 A. YES.

8 Q. AND YOU HAVE THE RIGHT TO YOUR ACCUSERS, THE PEOPLE
9 THAT SAID YOU DID WRONG, SO THE STATE WOULD HAVE TO
10 PRESENT EVIDENCE AND TESTIMONY OF THAT; DO YOU
11 UNDERSTAND THAT?

12 A. YES, SIR.

13 Q. AND YOU HAVE A PRIVILEGE, A FIFTH AMENDMENT
14 PRIVILEGE, AGAINST SELF-INCRIMINATION. BY THAT I
15 MEAN WHETHER OR NOT YOU TAKE THE WITNESS STAND TO
16 TESTIFY IS A MATTER FOR YOU TO DECIDE; DO YOU
17 UNDERSTAND THAT?

18 A. YES, SIR.

19 Q. AND IT'S NOT A DECISION TO BE MADE BY YOUR
20 LAWYERS. YOUR LAWYERS SHOULD ADVISE YOU, AND YOU
21 SHOULD TALK TO YOUR LAWYERS ABOUT THE MATTER. BUT
22 THAT'S A DECISION FOR YOUR LAWYERS TO MAKE -- FOR
23 YOU TO MAKE AFTER TALKING WITH YOUR LAWYERS; DO YOU
24 UNDERSTAND THAT?

25 A. YES.

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 Q. AND HAVE YOU HAD AMPLE OPPORTUNITY TO DISCUSS WITH
2 YOUR LAWYERS TO GET THEIR VIEW OF WHETHER OR NOT AS
3 A TRIAL STRATEGY YOU SHOULD TAKE THE STAND OR NOT?

4 A. YES, SIR.

5 Q. DO YOU NEED ANY MORE TIME TO TALK TO YOUR LAWYERS
6 ABOUT THAT MATTER?

7 A. NO, SIR.

8 Q. AND YOU UNDERSTAND THAT IF YOU DECIDE TO TAKE THE
9 WITNESS STAND, YOU'LL BE GIVEN ON OATH JUST LIKE
10 YOU WERE JUST NOW GIVEN AN OATH TO TELL THE TRUTH;
11 DO YOU UNDERSTAND THAT?

12 A. YES, SIR.

13 Q. AND THEN YOU WOULD BE SEATED ON THE WITNESS STAND,
14 AND YOUR LAWYERS WOULD ASK YOU QUESTIONS; AND YOU
15 WOULD GIVE THEM ANSWERS?

16 A. YES, SIR.

17 Q. AND THEN THE STATE REPRESENTED BY THE SOLICITOR --
18 HE'S THE PROSECUTOR, MR. BAILEY -- WOULD BE GIVEN
19 AN OPPORTUNITY TO QUESTION YOU ABOUT ANY MATTER
20 THAT WAS RELEVANT THAT TOUCHED UPON OR INVOLVED
21 THIS CASE; DO YOU UNDERSTAND THAT?

22 A. YES, SIR.

23 THE COURT: AND GENTLEMEN, DOES HE
24 HAVE A PRIOR CRIMINAL RECORD THAT OCCURRED WITHIN
25 THE PAST TEN YEARS FOR WHICH HE COULD HAVE BEEN IN

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 PRISON FOR MORE THAN ONE YEAR?

2 MR. BAILEY: YES, SIR; RECEIVING
3 STOLEN GOODS, YOUR HONOR.

4 THE COURT: WHAT YEAR? WHAT
5 PENALTY?

6 MR. BAILEY: YOUR HONOR, I COULD GET
7 THAT. IT WOULD TAKE ME A SECOND.

8 MR. THEOS: YOUR HONOR, IT'S BEEN
9 PRODUCED, YOUR HONOR; AND THAT'S CORRECT. IT IS
10 WITHIN THE LAST TEN YEARS.

11 Q. SO DO YOU HAVE A CRIMINAL RECORD IN THE LAST TEN
12 YEARS FOR RECEIVING STOLEN GOODS?

13 A. YES, SIR.

14 Q. WHAT WAS THE SENTENCE?

15 A. PROBATION.

16 Q. PROBATION?

17 A. YES, SIR.

18 Q. AND YOU SERVED NO JAIL TIME?

19 A. I WAS OVER THERE FOR 21 DAYS OVER THERE IN THE
20 JAIL.

21 Q. YOU WERE IN JAIL 21 DAYS?

22 THE COURT: BUT, GENTLEMEN, NOBODY
23 RECALLS WHAT THE SENTENCE WAS AS TO WHETHER --
24 RECEIVING; WAS THE VALUE OF THE GOODS OVER A
25 CERTAIN AMOUNT?

1 MR. BAILEY: YES, SIR. IT WAS A
2 GENERAL SESSIONS OFFENSE THAT WOULD HAVE CARRIED
3 OVER A YEAR, YOUR HONOR.

4 THE COURT: ALL RIGHT.

5 MR. BAILEY: A TELEVISION IF I'M NOT
6 MISTAKEN.

7 Q. SO IF YOU DID TAKE THE WITNESS STAND, AND IF THAT
8 WAS BROUGHT TO THE ATTENTION OF THE JURY AS
9 EVIDENCE, THE COURT WOULD INSTRUCT THE JURY THAT
10 EVIDENCE OF PRIOR CRIMES IS ADMISSIBLE INTO
11 EVIDENCE BECAUSE A JURY CAN CONSIDER THAT ON YOUR
12 CREDIBILITY OR YOUR BELIEVABILITY BUT NOT AS TO
13 YOUR GUILT OR INNOCENCE; DO YOU UNDERSTAND THAT?

14 A. YES, SIR.

15 Q. AND IF YOU DECIDED NOT TO TAKE THE WITNESS STAND,
16 AGAIN THAT BEING YOUR DECISION AND NOT THE DECISION
17 OF YOUR LAWYERS ALTHOUGH YOU SHOULD RECEIVE COUNSEL
18 FROM THEM. THEY'RE AVAILABLE TO YOU TO TALK TO YOU
19 ABOUT THAT DECISION. IF YOU DECIDED NOT TO TAKE
20 THE WITNESS STAND, THEN I WOULD INSTRUCT OR TELL
21 THE JURY THAT THE FACT THAT A DEFENDANT DOES NOT
22 TESTIFY IN HIS OWN BEHALF CANNOT AND MUST NOT BE
23 CONSIDERED AGAINST HIM UNDER ANY CIRCUMSTANCES OR
24 IN ANY MANNER WHATSOEVER. THE FAILURE OF ANY
25 DEFENDANT TO TAKE THE WITNESS STAND AND TESTIFY ON

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 HIS OWN BEHALF DOES NOT CREATE ANY INFERENCE FOR OR
2 AGAINST HIS GUILT OR INNOCENCE. THE JURY WOULD BE
3 INSTRUCTED THAT IT MUST NOT -- THE JURY MUST NOT --
4 PERMIT THAT FACT TO WEIGH IN THE SLIGHTEST DEGREE
5 AGAINST THE DEFENDANT, NOR SHOULD THIS FACT ENTER
6 INTO THE DISCUSSIONS OR LIBERATIONS OF THE JURY IN
7 ANY MANNER. THAT'S PRECISELY THE CHARGE OF THE LAW
8 THAT I WILL GIVE TO THE JURY. DO YOU UNDERSTAND
9 THAT?

10 A. YES, SIR.

11 Q. AND DO YOU HAVE ANY QUESTIONS ABOUT WHAT I'VE TOLD
12 YOU?

13 A. NO, SIR.

14 Q. DO YOU HAVE ANY QUESTIONS OF YOUR LAWYERS ABOUT
15 WHAT I'VE JUST TOLD YOU?

16 A. NO, SIR.

17 THE COURT: AND GENTLEMEN, I'M NOT
18 GOING TO ASK HIM WHETHER HE'S GOING TO TAKE THE
19 WITNESS STAND AT THIS TIME. I THINK HE CAN JUST
20 ADVISE WITH YOU AND THEN YOU CAN SHARE WITH THE
21 COURT HIS DECISION.

22 MR. THEOS: YOUR HONOR, OUR LAST
23 SCHEDULED WITNESS WAS DR. WAID. AND I WOULD JUST
24 ASK THAT HE'S HEARD WHAT YOU'VE SAID AND HE'S HEARD
25 WHAT WE'VE SAID. I WOULD ASK THAT MR. SIMMONS

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 THINK ABOUT IT; BE GIVEN THAT OPPORTUNITY DURING
2 THAT TESTIMONY TO THINK ABOUT IT AND TEN LET US
3 REPORT TO YOU AFTER DR. WAID'S TESTIMONY.

4 THE COURT: I HAVE NO PROBLEM WITH
5 THAT. AND I ASSUME, MR. THEOS, THAT YOU'VE
6 DISCUSSED WITH HIM WHETHER OR NOT HIS RIGHTS
7 RELATIVE TO TAKING THE WITNESS STAND, HOW LONG
8 AGO?

9 MR. THEOS: WE'VE BEEN DISCUSSING IT
10 THROUGHOUT, YOUR HONOR.

11 THE COURT THROUGHOUT?

12 MR. THEOS: YES, SIR.

13 THE COURT: DOES THAT MEAN
14 THROUGHOUT THE TRIAL OR SINCE YOU'VE BEEN
15 REPRESENTING HIM?

16 MR. THEOS: THROUGHOUT HIS
17 REPRESENTATION.

18 THE COURT: ALL RIGHT. SO THIS IS
19 NOT A NEW SUBJECT TO HIM, IN OTHER WORDS?

20 MR. THEOS: NO, SIR, IT'S NOT.

21 THE COURT: ALL RIGHT. THANK YOU.

22 MR. BAILEY: YOUR HONOR, JUST FOR
23 THE RECORD, HE ALSO HAS A SHOPLIFTING CONVICTION.
24 AND I THINK UNDER RULE 609 WE COULD IMPEACH HIM ON
25 THAT ALSO SINCE IT INVOLVES DISHONESTY EVEN THOUGH

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 IT DIDN'T CARRY OVER A YEAR.

2 THE COURT: ALL RIGHT, SIR. IS THAT
3 THE SHOPLIFTING FOR THE FOOD LINE, THE STEAKS?

4 MR. BAILEY: YES, SIR.

5 THE COURT: DO YOU KNOW WHAT THE
6 SENTENCE WAS? WAS IT A FIRST OFFENSE?

7 MR. BAILEY: IT WAS A FIRST OFFENSE,
8 YOUR HONOR. IT WAS A MAGISTRATE'S COURT OFFENSE.
9 BUT UNDER 609(A) IT SAYS THAT EVIDENCE THAT ANY
10 WITNESS BE CONVICTED OF A CRIME SHALL BE ADMITTED
11 IF IT INVOLVES DISHONESTY OR FALSE STATEMENT WITH
12 REGARD TO PUNISHMENT. WE WOULD CONTEND THAT
13 SHOPLIFTING WOULD INVOLVE DISHONESTY.

14 THE COURT: THANK YOU. ANYTHING
15 ELSE, GENTLEMEN?

16 MR. THEOS: NOT AT THIS TIME.

17 THE COURT: ALL RIGHT.

18 MR. BAILEY: YOUR HONOR, ONE OTHER
19 THING. AND I GUESS THIS COULD BE DONE EITHER
20 BEFORE THE JURY COMES IN OR AFTERWARDS. MR. THEOS
21 HAS INDICATED THAT HE'S WITHDRAWING THE OBJECTION
22 TO BE MADE TO DR. VIDIC'S TESTIMONY IN REGARDS TO
23 MRS. SKAGGS' CONVERSATION WITH THE DEFENDANT IN
24 REGARD TO HIS EXERCISING---

25 THE COURT: IS MRS. SKAGGS

1 AVAILABLE?

2 MR. BAILEY: NO, SIR; SHE IS NOT
3 BECAUSE MR. THEOS TOLD ME HE WAS GOING TO WITHDRAW
4 THAT OBJECTION WHICH WOULD ELIMINATE THE NECESSITY
5 OF HAVING TO CALL HER. SO BASED ON WHAT HE TOLD
6 ME, I CALLED HER OFFICE.

7 THE COURT: SHE WAS GOING TO BE
8 HERE?

9 MR. BAILEY: YES, SIR.

10 THE COURT: ALL RIGHT. WHAT DO YOU
11 SAY, MR. THEOS?

12 MR. THEOS: THAT'S CORRECT, YOUR
13 HONOR. WE ARE AT THIS TIME WITHDRAWING THAT
14 OBJECTION.

15 THE COURT: ALL RIGHT. THANK YOU.
16 ALL RIGHT. BRING THE JURY IN, PLEASE. GENTLEMEN,
17 BECAUSE OF THE KNEE SURGERY AND CRUTCHES, THE FIRST
18 ALTERNATE I'M JUST GOING TO LET REMAIN IN THAT
19 OUTSIDE CHAIR BECAUSE HE HAS HIS FOOT REST OR
20 WHATEVER THERE. DO YOU AGREE?

21 MR. BAILEY: YES, SIR.

22 MR. THEOS: YES, SIR.

23 (AT THIS TIME JURY RETURNS TO OPEN COURT.)

24 THE COURT: GOOD MORNING, MADAM
25 FORELADY AND LADIES AND GENTLEMEN OF THE JURY. MAY

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 I PLEASE THANK YOU FOR YOUR PUNCTUALITY? WE HAD
2 LEFT WORD WITH THE SECURITY DETAIL FOR YOU TO BE
3 HERE FOR NINE O'CLOCK COURT; AND YOU WERE HERE AT
4 8:25. YOU'VE BEEN HERE EARLY; AND I WOULD LIKE TO
5 HAVE STARTED EARLIER, BUT THERE WERE SOME OTHER
6 MATTERS THAT THE COURT NECESSARILY HAD TO ADDRESS.
7 WAS YOUR DINNER AT OSCAR'S -- I'VE NEVER VENTURED
8 THERE -- WAS IT GOOD?

9 THE JURY PANEL: YES, SIR.

10 THE COURT: AND I UNDERSTAND THAT
11 THERE'S A RESTAURANT NAMED GILLIGANS PERHAPS THAT
12 Y'ALL WANT TO DINE AT THIS EVENING?

13 THE JURY PANEL: YES, SIR.

14 THE COURT: AND WE'VE ASKED THE
15 BAILIFF OR THE SECURITY TO MAKE INQUIRY ABOUT THAT.
16 BUT Y'ALL UNDERSTAND WE CAN'T LET YOU EAT HIGH ON
17 THE HOG EVERY NIGHT. BUT WE'LL DO OUR BEST TO MEET
18 YOUR NEEDS. NOW, LADIES AND GENTLEMEN, LET ME
19 SHARE WITH YOU THAT JUROR CHRISTOPHER P. CAMPEAU,
20 JUROR NUMBER 50, HAS BEEN EXCUSED FROM FURTHER
21 SERVICE IN THIS CASE BECAUSE OF A PERSONAL MATTER.
22 IT'S NOT AN EXTREMELY SERIOUS PERSONAL MATTER.
23 PLEASE DON'T BE ALARMED IN ANY WAY. BUT HE HAS
24 BEEN EXCUSED FROM FURTHER SERVICE IN THIS CASE.
25 AND HE ASKED ME TO SHARE WITH YOU THAT HE WISHES

KENNETH SIMMONS - EXAMINATION BY THE COURT

1 ALL OF YOU WELL, THAT HE ENJOYED SERVING WITH YOU
2 ON THE JURY. SO AT THIS TIME, LADIES AND
3 GENTLEMEN, THE FIRST ALTERNATE, MR. RONALD D.
4 BOWLES, IS BEING PROMOTED TO NUMBER TWELVE OF THE
5 TWELVE, AND ALTERNATE THREE MOVES UP TO TWO AND TWO
6 MOVES UP TO ONE. AND GENTLEMAN, THE ATTORNEYS HAVE
7 ALL AGREED, MR. BOWLES, FOR YOU TO CONTINUE TO
8 REMAIN IN THE CHAIR WHERE YOU ARE BECAUSE OF YOUR
9 FOOT STOOL AND OTHER AMENITIES THAT YOU'VE BEEN
10 AFFORDED. SO IF YOU WOULD -- IF THAT SUITS YOU --
11 UNLESS YOU WANT TO MOVE.

12 MR. BOWLES: NO, SIR; I'M FINE RIGHT
13 HERE.

14 THE COURT: YOU'RE FINE WHERE YOU
15 ARE. SO VERY GOOD. THANK YOU. SO AT THIS TIME,
16 LADY AND GENTLEMEN, WE WILL PROCEED WITH OTHER AND
17 FURTHER TESTIMONY IN THE CASE. PLEASE GIVE YOUR
18 CAREFUL ATTENTION. THANK YOU. YOU MAY CALL YOUR
19 NEXT WITNESS.

20 MR. THEOS: YES, SIR, WE WOULD ASK
21 DR. WAID TO RETAKE THE STAND, PLEASE.

22 THE COURT: ALL RIGHT. DR. WAID,
23 YOU WERE SWORN ON YESTERDAY WERE SWORN ON
24 YESTERDAY. SO YOU'RE STILL UNDER OATH, PLEASE,
25 SIR.

RANDY WAID - DIRECT/MR. THEOS

DR. WAID: YES, SIR.

- - - - -

WHEREUPON,

RANDY WAID, M.D., WHO BEING PREVIOUSLY
SWORN TO TELL THE TRUTH, TESTIFIED AS
FOLLOWS:

DIRECT EXAMINATION

BY MR. THEOS:

Q. DR. WAID, IF WE COULD JUST PICK UP WHERE WE LEFT
OFF YESTERDAY, PLEASE. WHAT IS MALINGERING?

A. MALINGERING IS BASICALLY DEFINED AS THE CONSCIOUS
OR INTENTIONAL FALSIFYING OF YOUR PRESENTATION OR
YOUR PERFORMANCE FOR PURPOSES OF SECONDARY GAIN
WHICH MEANS POTENTIALLY YOU HAVE SOME ABSOLUTE
PAY-OFF FOR EITHER LOOKING WORSE OR IN SOME
OCCASIONS, OBVIOUSLY IN CUSTODY SUITS, LOOKING
BETTER THAN YOU MIGHT BE WITH REGARD TO SOME ASPECT
OR MEASURING SUCH AS PSYCHOLOGICAL FUNCTIONING OR
NEURO-COGNITIVE INTELLECTUAL FUNCTIONING. AND
THAT'S THE DEFINITION OF MALINGERING.

Q. ALL RIGHT. AND WHY IS IT IMPORTANT TO ASSESS FOR
MALINGERING?

A. OBVIOUSLY IN CASES OF ANY TYPE OF GAIN FOR LOOKING
WORSE OR BETTER, WE WANT TO HAVE A REALISTIC
UNDERSTANDING OF THE CLIENT WHERE THE PERSON WE'RE

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1 EVALUATING AND WANT TO SEPARATE THAT OUT FROM
2 POSSIBLE MINIMIZATION OR EXAGGERATION OF
3 DIFFICULTIES CLEARLY IN A CASE IN WHICH THERE'S
4 PERSONAL INJURY, WHERE MONEY CAN BE GAINED, OR IN A
5 CASE WHERE SOMEBODY IS FACING CRIMINAL CHARGES.
6 OBVIOUSLY TO GAIN IS OBVIOUS, AND A NEED TO ASSESS
7 AND DELIBERATE AND UNDERSTAND WHAT PART MIGHT BE
8 MALINGERING VERSUS WHAT'S REALISTIC BECAUSE IT'S
9 OBVIOUSLY INDICATED IN SUCH CASES.

10 Q. WAS IT IMPORTANT TO ASSESS MR. SIMMONS TO DETERMINE
11 WHETHER OR NOT HE WAS MALINGERING?

12 A. OBVIOUSLY. IT'S ONE OF THE CONCERNS THAT FELLOW
13 PSYCHOLOGISTS AND PSYCHIATRISTS WHO EVALUATED HIM
14 HAVE EXPRESSED. OBVIOUSLY A MURDER CHARGE AND
15 POTENTIAL RAMIFICATIONS OF A MURDER CHARGE ARE
16 VERY, VERY INTENSE. AND WE WANT TO MAKE SURE THAT
17 WE HAVE A REALISTIC UNDERSTANDING OF HIM.

18 Q. AND HOW DO YOU GO ABOUT ASSESSING MALINGERING; AND
19 HOW DID YOU GO ABOUT IT WITH MR. SIMMONS? IF YOU'D
20 JUST TAKE THOSE ONE AT A TIME.

21 A. MALINGERING IS -- REALLY A VARIETY OF DIFFERENT
22 INFORMATION SOURCES CAN COME INTO PLAY TO ALLOW YOU
23 TO MAKE A CERTAIN OBJECTIVE, A CLINICAL JUDGMENT,
24 ABOUT MALINGERING. ONE OF THOSE IS ESSENTIALLY
25 WHETHER OR NOT THE PRESENTATION AND EVALUATION OF

RANDY WAID - DIRECT/MR. THEOS

1 THE PATIENT MEDICALLY OR PSYCHIATRICALY FITS THE
2 KNOWN PROFILE. OBVIOUSLY IF SOMEBODY COMES IN AND
3 HAS A MEDICAL PROBLEM; SAY THEIR HANDS ARE
4 PARALYZED BUT WE KNOW MEDICALLY THAT KIND OF PALSY
5 JUST CAN'T HAPPEN BECAUSE OF THE WAY THE NERVES
6 ARE; IT DOESN'T FIT MEDICAL SENSE OF PROFILE. SO
7 THE CONSISTENCY OF THE PRESENTATION, ONE OF THE
8 WAYS THAT WAS MEASURED IN MR. SIMMONS' CASE IS THAT
9 THERE HAS BEEN A CONSISTENT SERIAL TESTING,
10 REPETITIVE TESTING, OF HIS INTELLECTUAL ABILITIES
11 BY DIFFERENT DOCTORS THAT HAVE BEEN INVOLVED IN THE
12 CASE. AND HE HAS CONSISTENTLY PERFORMED WITH ONE
13 ANOTHER WITH EVEN SOME PRACTICE EFFECT BY THE TIME
14 DR. SANDLER HAD COMPLETED HIS EVALUATION MEANING HE
15 SHOWED SOME GAIN. ANOTHER WAY THAT HE LOOKED AT
16 CONSISTENCY IS WITHIN THE TEST ITSELF, WHAT WE CALL
17 INTRA-TEST SCATTER. OBVIOUSLY I HAD DIFFICULTY,
18 AND IT GENERATES ONLY SOME CONCERNS, HYPOTHESIS
19 THAT I NEED TO RESOLVE. IF SOMEBODY CAN'T NAME
20 THAT BALL OR THE THREE COLORS OF THE AMERICAN FLAG
21 BUT LATER ON IN THAT SAME TEST PERHAPS COULD TELL
22 ME SOMETHING MUCH MORE DIFFICULT TO KIND OF SCATTER
23 WITHIN DOESN'T QUITE MAKE SENSE. AND IF YOU GET A
24 LOT OF THAT, THAT WOULD BE KIND OF AN INCONSISTENCY
25 THAT YOU WOULD HAVE TO TRY TO AGAIN UNDERSTAND.

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1 SOMETIMES IT CAN OCCUR AT SOME RATE. YOU JUST HAVE
2 TO UNDERSTAND THAT IT WASN'T THE CASE HERE.
3 OBVIOUSLY THERE WAS CONSISTENCY CROSS TESTS. AND
4 HE GENERALLY WAS QUITE DIMINISHED IN HIS ABILITY TO
5 DO CERTAIN THINGS. THERE WERE SOME VARIABILITIES
6 IN TEST PERFORMANCE, BUT THEY GENERALLY WERE
7 CONSISTENT ACROSS TESTS. SO YOU HAVE THAT.
8 OBVIOUSLY WHAT WE TRIED TO DO IS ALSO DEVELOP A
9 VARIETY OF DIFFERENT TESTS AS THEY RELATE BOTH TO
10 PSYCHOLOGICAL PRESENTATION THOUGH THAT WASN'T THE
11 CASE SO MUCH HERE BECAUSE THERE IS NO CONCERN ABOUT
12 PSYCHOSIS; BUT THERE HAVE BEEN CONCERNS ABOUT THIS
13 NEURO-COGNITIVE MEMORY ABILITIES. AND BOTH DR.
14 VIDIC AND DR. SANDLER AS WELL AS MYSELF
15 ADMINISTERED SOME TESTS THAT ARE SPECIFICALLY
16 DEVELOPED TO ASSESS FOR POTENTIAL FALSIFICATION OR
17 MALINGERING. AND THESE TESTS, GENERALLY THE ONES
18 USED, ARE BASED ON THE PRINCIPLE THAT THEY LOOK
19 LIKE A REAL NEUROPSYCHOLOGICAL OR COGNITIVE TEST.
20 YOU PUT THEM USUALLY IN THE BATTERY OF THE REAL
21 TESTS YOU'RE USING TO MEASURE INTELLECTUAL OR
22 ATTENTION CONCENTRATION SKILLS. AND OFTEN THEY'RE
23 BASED ON ADMINISTERING AN INSTRUMENT IN WHICH THE
24 POTENTIAL ANSWER LATER ON REALLY IS 50/50.

25 Q. LET ME STOP YOU FOR ONE SECOND, PLEASE.

RANDY WAID - DIRECT/MR. THEOS

1 A. SURE.

2 Q. WHAT IS NEUROPSYCHOLOGICAL TESTING?

3 A. WELL, NEUROPSYCHOLOGICAL TESTING IS JUST BEYOND
4 STRAIGHT I.Q., AND ACADEMIC ACHIEVEMENT TESTING ARE
5 SPECIFIC TESTS THAT MEASURE ABILITIES TO ATTEND,
6 CONCENTRATE, LEARN NEW INFORMATION, REMEMBER IT, DO
7 VISUAL, SPACIAL, AND HIGHER REASONING TESTS. AND
8 THESE ARE ADDED TYPES OF TESTS THAT I ADMINISTERED
9 WITH MR. SIMMONS. SO ONE OF THE MALINGERING TESTS
10 I ADMINISTERED LOOKS LIKE A MEMORY TEST WHERE HE
11 WAS GIVEN -- RECITED TO A NUMBER, A SERIES OF
12 NUMBERS AND THEN GIVEN A CARD, SHOWN A CARD, AND
13 ASKED TO TELL ME WHICH NUMBER I HAD GIVEN TO HIM.
14 SOME ARE EASY; SOME ARE HARD. BUT YOU CAN BE BRAIN
15 DEAD AND GET 50 PERCENT RIGHT. SO IF YOU GIVE
16 ENOUGH TRIALS; AND WE DO OVER EXTENDED PERIODS OF
17 DELAY, YOU WOULD EXPECT, EVEN IF IT WAS RANDOMLY
18 DONE FOR 50 PERCENT; LIKE FLIPPING A COIN; IF YOU
19 DO ENOUGH TRIALS. OBVIOUSLY WE'RE GOING TO BE VERY
20 CONCERNED ABOUT MALINGERING ON THESE TYPE OF TESTS
21 WHEN SOMEBODY BEATS CHANCE IN THE NEGATIVE
22 DIRECTION. LET'S SAY IF I GAVE YOU 150 TRIALS AND
23 YOU ONLY GOT FORTY RIGHT; BOY! THAT'S INTELLIGENT
24 BEHAVIOR. YOU'RE BEATING CHANCE IN A MANNER IN
25 WHICH IT MAKES YOU LOOK WORSE. SO THESE ARE THE

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1 PRINCIPLES INVOLVED IN THE DEVELOPMENT OF THESE
2 TYPES OF MALINGERING TESTS. AND THEY HAVE BEEN
3 GIVEN BY DR. VIDIC AND OTHERS INVOLVED IN HIS
4 EVALUATION INCLUDING MINE AND SIMPLY DID NOT --
5 THOSE TESTS DID NOT -- PUT HIM IN THE PERFORMANCE
6 RANGE OF A MALINGERER. YOU TAKE THAT TOGETHER.
7 THE FINAL THING YOU DO IS ULTIMATELY FROM A
8 NEURO-PSYCH TEST OR SOME OF THE TESTS THAT I GAVE
9 HIM, OVER A BRIEF PERIOD OF TIME; ESSENTIALLY THERE
10 ARE SOME TESTS YOU WOULD EXPECT HIM TO DO NORMAL ON
11 BECAUSE YOU REALLY WOULDN'T EXPECT THEM TO BE
12 NORMAL AND SOME TESTS THAT HE MIGHT BE IMPAIRED ON
13 THAT AGAIN WOULD BE CONSISTENT WITH THE PROFILE OF
14 EITHER LOW EDUCATIONAL INTELLECTUAL ATTAINMENT OR
15 SOME COGNITIVE DIFFICULTIES THAT HAVE COME ON BOARD
16 DUE TO OTHER REASONS. AND HIS PERFORMANCE ON THOSE
17 TESTS AGAIN WERE IN KEEPING. HE DID WELL ON
18 ESSENTIALLY THE TASKS THAT WE EXPECTED TO BE
19 NORMAL. AND HE LOOKED IMPAIRED ON PARTICULARLY
20 LEARNING AND MEMORY AND HIGHER REASON TESTS EVEN
21 MORE SO. TAKEN TOGETHER, YOU THEN PUT THAT
22 TOGETHER WITH SOME OF THE OTHER DOCTORS, AND MYSELF
23 INVOLVED, IN TERMS OF ECOLOGICAL EVIDENCE. THIS IS
24 A LITTLE BIT MORE---

25 Q. WHAT DOES THAT MEAN?

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1 A. WELL, IT'S A LITTLE MORE SUBJECTIVE, THE IDEA -- IF
2 I HAD SOMEBODY COMING IN WHO WAS COMPLAINING OF
3 PAIN AND PHYSICAL LIMITATIONS AFFECTING HIS RIGHT
4 LEG AND HE LIMPS INTO MY OFFICE, AND I DO THE
5 EVALUATION; AND THEN I LOOK OUT THE WINDOW AFTER HE
6 LEAVES, AND HE'S RUNNING DOWN THE STREET, I'VE GOT
7 SOME PROBLEMS WITH THAT. AND OBVIOUSLY THERE ARE
8 SOME CONCERNS ABOUT DOES THE REAL LIFE MATCH UP
9 WITH WHAT THE DEFICIT SHOULD BE. THESE ARE A
10 LITTLE BIT MORE SUBJECTIVE OBVIOUSLY BECAUSE IT'S
11 HARD TO KNOW EXACTLY IF THE BEHAVIOR REPRESENTS A
12 HIGHER LEVEL OF FUNCTIONING THAN WHAT YOU'RE
13 MEASURING. BUT OBVIOUSLY YOU DO SEE ECOLOGICAL
14 EVIDENCE. IF I HAD SOMEBODY WHO CLAIMS HE'S SO IN
15 PAIN OR SOME DYSFUNCTION AND YET I END UP GETTING A
16 VIDEO TAPE OF HIM DOING VERY HIGHLY DEMANDING WORK
17 IN HIS ENVIRONMENT, THAT'S THE KIND OF ECOLOGICAL
18 EVIDENCE YOU LOOK FOR. AND SO THESE
19 INCONSISTENCIES ALSO THEN RAISE QUESTIONS AROUND
20 THE SPECTRUM OF MALINGERING. IN MY CONTACTS WITH
21 HIM, I HAD NONE OF THAT. BUT OBVIOUSLY I DIDN'T
22 HAVE HIM ON A WARD OR ANYTHING LIKE THAT OR LIVE
23 WITH HIM IN THAT CAPACITY. BUT HE WAS CONSISTENT
24 THE TIMES I'VE SEEN HIM AND IN CONSULTATION WITH
25 THE COLLEAGUES THAT I WORK WITH, WE DIDN'T GET A

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1 LOT OF INCONSISTENT FACTS; BUT OBVIOUSLY I'VE
2 DEFERRED TO THE OTHER DOCTORS ON THEIR OWN OPINIONS
3 ON THAT.

4 Q. WHAT SORT OF NEUROPSYCHOLOGICAL TESTS DID YOU
5 CONDUCT?

6 A. I GAVE HIM A VARIETY OF TESTS. ONE OF THE THINGS I
7 WAS CONCERNED ABOUT IN REVIEWING THE EDUCATIONAL
8 RECORDS IS THAT HE HAD BEEN OFFERED A LOT OF
9 DIFFERENT INFORMATION. BUT THE LAST FORMAL TESTING
10 THAT'S ACTUALLY AVAILABLE IN THE RECORD FROM A
11 STANDARDIZED TESTING POINT OF VIEW IS WHEN HE
12 ENTERED SUMMERVILLE HIGH SCHOOL. AND THIS HAS KIND
13 OF BEEN LOOKED AT. AND YOU'VE HEARD A VARIETY OF
14 DIFFERENT I.Q. SCORES THAT RANGE FROM 104 TO 69.
15 AND ONE OF THE PROBLEMS THAT ALL OF US HAVE IS YOU
16 NEVER KNOW ON THOSE TYPE OF TESTING WHAT TESTS ARE
17 GIVEN SOMETIMES. ALSO WHETHER A PERSON SHOWS UP
18 AND HOW MOTIVATED THEY ARE AND IF THEY DO WELL,
19 ESPECIALLY WHEN THEY'RE GROUP TESTS. BUT AS HE
20 ENTERED AT AGE FIFTEEN INTO SUMMERVILLE, THE LAST
21 STANDARDIZED TEST PERFORMANCE HE HAD WAS THE S.R.A.
22 HIGH SCHOOL PLACEMENT TEST. THIS IS AN EDUCATIONAL
23 TEST. IT ASCERTAINED HIS GRADE LEVELS AND
24 PERCENTILES PER HIS AGE GROUP WHICH WOULD BE AT
25 THAT TIME AGE FIFTEEN. HE ENTERED THE NINTH

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1 GRADE. AND HIS FULL QUOTIENT ON THIS EDUCATIONAL
2 TEST, ACADEMIC ACHIEVEMENT TEST, THAT DOES HAVE A
3 CORRELATION WITH INTELLIGENCE WAS 89 FALLING AT A
4 25TH PERCENTILE. HIS READING SKILL WAS TENTH
5 PERCENTILE. AND HIS GRADE EQUIVALENT WAS FIVE
6 YEARS OR GRADE FIVE, THREE MONTHS. HE WAS BETTER
7 IN LANGUAGE ARTS WHERE HE HAD SCORED AT THE 26
8 PERCENTILE WHICH IS A GRADE EQUIVALENT OF SIX
9 YEARS, FIVE MONTHS. AND MATH HE WAS SIX PERCENTILE
10 WITH FIVE YEARS, EIGHT MONTHS. THE COMPOSITE OF
11 THOSE THREE EDUCATIONAL THINGS CAME IN AS A TWELFTH
12 PERCENTILE. AND SCIENCE WAS ALSO ASSESSED. HE WAS
13 FIFTH GRADE, SEVENTH MONTHS. SO OBVIOUSLY BY THE
14 TIME HE'S LEAVING THE EIGHTH GRADE, GOING TO THE
15 NINTH GRADE, WE HAVE A YOUNG MAN WHO'S
16 EDUCATIONALLY BEHIND TWO OR THREE YEARS; PROBABLY
17 ABOUT THREE YEARS HERE AND OBVIOUSLY NOT
18 FUNCTIONING IN THE AVERAGE RANGE EXPECTED FROM AT
19 LEAST AN EDUCATIONAL TEST FOR A NINTH GRADER.
20 HOWEVER, AGAIN IN AGREEMENT, THAT IS NOT THE TYPE
21 OF SCORES THAT WOULD BE ASSOCIATED WITH THE
22 INTELLECTUAL DEFICIENCY AFFORDED MENTALLY RETARDED
23 INDIVIDUALS EITHER. THEY WOULD BE FURTHER BEHIND
24 AND LESS EFFICIENT. SO ONE OF THE ISSUES WE KNEW
25 RIGHT OFF THE BAT WAS HE WASN'T AN INTELLECTUAL

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1 POWERHOUSE, BUT HE WASN'T MENTALLY RETARDED. AND
2 SO WE PICKED A BATTERY OF TESTS TO KIND OF FURTHER
3 UNDERSTAND HIS MODE OF COGNITIVE FUNCTIONING. SOME
4 OF THESE WERE QUITE SIMPLE, HAD TO DO WITH JUST
5 KNOWING THE DAY OF THE WEEK, BEING ABLE TO REPEAT
6 INFORMATION BACKWARDS, SPELL, RECITE, OR BEING ABLE
7 TO RECALL THREE WORDS AFTER A VERY BRIEF DELAY.
8 AND THAT'S CALLED THE MINI MENTAL STATE EXAM. IT'S
9 A MENTAL STATUS EXAM. ANOTHER ONE THAT WAS
10 RELATIVELY SIMPLE WAS CALLED THE DRAW CLOCK
11 PERCEPTUAL EXAMINATION. YOU TELL THE CLIENT "DRAW
12 A FACE OF THE CLOCK; PUT THE NUMBERS DOWN; AND PUT
13 IT ON THE APPROPRIATE TIME THAT I WANT YOU TO PUT
14 IT ON." THESE WERE FAIRLY SIMPLISTIC, AND HE DID
15 THEM FAIRLY WELL. WE GAVE HIM A CENTURY PERCEPTUAL
16 EXAM WHICH ESSENTIALLY MEASURES SOME ABILITY TO
17 MAKE APPROPRIATE DISCRIMINATIONS WITH REGARD TO
18 LITTLE AUDITORY TASKS OF UNDERSTANDING WHAT'S IN
19 HIS HANDS AND VISUAL PROCESSING. WE REPEATED THE
20 TRAIL-MAKING TEST WHICH HAD BEEN ADMINISTERED
21 PREVIOUSLY BY DR. SANDLER WHICH HAS TO DO WITH
22 BEING ABLE TO DRAW A LINE, ON THE FIRST PART OF THE
23 TEST ONE TO TWO, TWO TO THREE, AND THREE TO FOUR.
24 AND WE CONNECT THOSE CIRCLES AND SEE HOW FAST
25 SHOULD WE DO THAT. WE ALSO DID TRAIL-MAKING B

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1 WHICH MEANS YOU'VE GOT TO GO FROM ONE TO A, A TO
2 TWO, TWO TO B WHICH MEANS YOU HAVE TO SEQUENCE THAT
3 IN ORDER. WE GAVE HIM THE STROOP TEST WHICH IS
4 JUST A SPEED OR MENTAL PROCESSING TEST, HOW FAST
5 YOU CAN READ, WORDS, COLORS; AND THEN HOW FAST YOU
6 CAN READ THE WORD WHEN IT'S IN A DIFFERENT COLOR.
7 WE GAVE HIM SEVERAL TESTS THAT MEASURE THE ABILITY
8 TO LEARN NEW INFORMATION, RETAIN IT, AND RECALL IT
9 AFTER SOME PERIOD OF DELAY. THAT WAS CALLED THE
10 CALIFORNIA VERBAL LEARNING TEST AND A CONTINUOUS
11 VISUAL MEMORY TEST. WE GAVE HIM SOME TASKS THAT
12 INVOLVED JUST BEING ABLE TO COORDINATE THE
13 SEQUENCE, MOTOR MOVEMENTS. AND WE GAVE HIM A TASK
14 THAT INVOLVES JUDGMENT OF LINE; BEING ABLE TO MAKE
15 A FINE DISCRIMINATION OF LINES AND SPACE. AND WE
16 ALSO GAVE HIM AN AUDITORY DISCRIMINATION TEST AS
17 WELL AS A DRAWING TEST JUST TO DRAW A PERSON'S
18 HOUSE WHICH HE DOES VERY PRIMITIVELY. AND FINALLY
19 A PORTLAND DIGIT RECOGNITION TEST WHICH WAS THE
20 TEST I TOLD YOU ABOUT THAT TESTS SPECIFICALLY FOR
21 MALINGERING. WE JUST KIND OF PUT THOSE TESTS
22 TOGETHER TO SEE HOW HE WOULD DO, TO AMPLIFY ON THE
23 NUMEROUS INTELLECTUAL TESTS THAT ALREADY HAD BEEN
24 DONE AND SOME OF THE ACADEMIC ACHIEVEMENT TESTS
25 THAT HAD BEEN DONE FROM THE DOCTORS YOU'VE ALREADY

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1 HEARD FROM AS WELL AS DR. KEYS WHO YOU HAVEN'T
2 HEARD FROM YET.

3 Q. AS A RESULT OF THOSE TESTS THAT WERE CONDUCTED, AND
4 AS TO THE RESULTS THAT YOU OBTAINED FROM THOSE
5 TESTS, WERE YOU ABLE TO ARRIVE AT AN OPINION TO A
6 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS WHAT
7 MR. SIMMONS' MENTAL CAPACITY IS?

8 A. YES. BASICALLY HIS PERFORMANCE ON THIS TEST WOULD
9 SUGGEST IN LINE WITH HIS POOR PERFORMANCE ON
10 INTELLECTUAL TESTS THAT HE HAS THE DIFFICULTIES IN
11 THE AREAS OF MENTAL PROCESSING SPEED. HE SLOWED IN
12 HIS THINKING. HIS ABILITY TO DO COMPLEX ATTENTION;
13 NOT SIMPLE THINGS. HE CAN SIT AND STAY FOCUSED
14 WITH YOU FOR QUITE SOME PERIOD OF TIME, BUT HIS
15 ABILITY TO KIND OF PROCESS MORE THAN ONE THING AT
16 THE SAME TIME. HE PERFORMED POORLY ON LEARNING AND
17 MEMORY TESTS, BUT FOR VERBAL INFORMATION AS WELL AS
18 VISUAL, AGAIN FALLING IN THOSE LOWER TWO, THREE,
19 AND FOUR PERCENTILE PERFORMANCE BASED ON HIS AGE
20 GROUP. HE MADE ERRORS IN HIS ABILITY TO MAKE FINE
21 DISCRIMINATIONS AND LINES AND SPACE, THOUGH HE
22 OBVIOUSLY GOT SOME OF THEM RIGHT. AND HE HAD
23 PARTICULAR DIFFICULTY WITH EXECUTIVE FUNCTIONING,
24 DISABILITY TO KIND OF SEQUENCE PLAN AND SOLVE
25 HIGHER REASONING TASKS WHICH WE HAD GIVEN HIM -- I

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1 DIDN'T NAME -- THE WISCONSIN. AND ONE THAT WE KIND
2 OF DISCONTINUED BECAUSE IT TOOK HIM SO LONG WHEN HE
3 WAS BLINDFOLDED TO TRY TO PLACE BLOCKS IN THE
4 APPROPRIATE SHAPE. SO GENERALLY WE JUST FOUND MORE
5 CONFIRMATION OF INTELLECTUAL PROFICIENCY AS WELL AS
6 WHAT I WOULD CALL THE ASSOCIATED SKILLS INVOLVED
7 WITH INTELLECT ATTENTION, CONCENTRATION, LEARNING,
8 MEMORY. THESE ARE MEASURED BY THE INTELLIGENCE
9 TESTS. BUT WHAT WE DO IS TRY TO SLUFF THESE OUT A
10 LITTLE BIT MORE AND MEASURE THEM MORE DISCREETLY
11 COMPARED TO THE INTELLIGENCE TEST WHICH OFTEN USES
12 A VARIETY OF THESE SKILLS ALL AT THE SAME TASK. SO
13 IT JUST AGAIN CONFIRMED WHAT HAS ALSO BEEN PROVIDED
14 BY THE EXPERTS INVOLVED IN THE CASE THAT THIS MAN
15 IS FUNCTIONING AT AN INTELLECTUAL DEFICIENT LEVEL.
16 ALSO IN MY OPINION FROM NEUROPSYCHOLOGY, WE GO BACK
17 AND WE TRY TO GET THE RECORDS THAT WE HAVE IN THIS
18 CASE AND TRY TO UNDERSTAND IS IT SOLELY AN ASPECT
19 OF ALWAYS BEING THAT WAY. AND AT LEAST BASED ON
20 SOME I.Q. SCORES YOU'VE HEARD WHERE IN THE FOURTH
21 GRADE HE'S SCORING AT 100 I.Q. AND IT WAS AMPLY
22 POINTED OUT THAT IT'S HARD TO DO THAT UNLESS YOU'VE
23 GOT FALSE ANSWERS WHICH WE DON'T KNOW THAT THAT
24 HAPPENED. OR THE S.R.A.T. TEST AT AGE FIFTEEN,
25 HE'S SHOWN A DECLINE. HE'S NOT FUNCTIONING EVEN AT

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1 THAT LEVEL REPRESENTATIVE TO HIS AGE GROUP FROM
2 THOSE HIGH SCHOOL DAYS. AND THAT SUGGESTED TO ME,
3 AT LEAST BASED ON NEURO-COGNITIVE TESTS
4 PERFORMANCES AND INTELLECTUAL PERFORMANCES AND
5 ACADEMIC ACHIEVEMENT PERFORMANCES ADMINISTERED BY A
6 VARIETY OF PSYCHOLOGISTS, THAT HE'S HAD A DECLINE.
7 HE HAS GONE DOWNWARD IN HIS INTELLECTUAL AND
8 NEURO-COGNITIVE ABILITIES SINCE HIS HIGH SCHOOL
9 YEARS.

10 Q. NOW, WHAT WOULD YOU ATTRIBUTE THAT DECLINE TO?

11 MR. BAILEY: OBJECTION.

12 Q. CAN YOU STATE TO A REASONABLE DEGREE OF SCIENTIFIC
13 CERTAINTY WHAT THAT DECLINE IS BASED UPON?

14 A. REVIEWING MR. SIMMONS' HISTORY OF POLY-SUBSTANCE
15 ABUSE DEPENDENCE, HIS TRACK RECORD FOR ALCOHOL AND
16 CRACK COCAINE USAGE, AND KNOWING THAT LITERATURE
17 INTIMATELY WELL HAVING BEEN UP TO DATE WITH IT AND
18 READING IT, I CERTAINLY HAVE IN MY OPINION AND A
19 CAUSAL FACTOR COULD BE HIS HISTORY AND CHRONIC USE
20 OF ALCOHOL IN CONJUNCTION WITH CRACK COCAINE IN
21 PARTICULAR. THAT IS DEFINITELY DOCUMENTED. I'M
22 CONCERNED ABOUT OTHER LIFE-STYLE THINGS SUCH AS
23 NUTRITION AND POTENTIAL OTHER POSSIBILITIES OF
24 INJURY. BUT THOSE ARE NOT DOCUMENTED. BUT CLEARLY
25 HIS YEARS OF CHRONIC ALCOHOL USAGE AND CHRONIC

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1 COCAINE USAGE ARE, AND THEY DO IN THE RESEARCH AS
2 WELL AS IN THE INDIVIDUALS THAT WE'VE SEEN FOR
3 FIFTEEN TO SEVENTEEN YEARS IN THIS AREA; HE HAS A
4 PATTERN DECLINE THAT WOULD BE ASSOCIATED AS A
5 CAUSAL FACTOR FOR WHY HE'S GONE DOWNHILL IN HIS
6 ABILITIES FROM A HIGHER STATE OF FUNCTIONING DURING
7 HIS ADOLESCENT YEARS.

8 Q. NOW, CAN YOU STATE TO A REASONABLE DEGREE OF
9 SCIENTIFIC CERTAINTY WHAT GRADE EQUIVALENCY MR.
10 SIMMONS IS FUNCTIONING AT OR WAS FUNCTIONING AT
11 WHEN YOU COMPLETED YOUR EVALUATIONS WITHIN THE LAST
12 MONTH OR SO?

13 A. GRADE EQUIVALENCY IS MOST ASSOCIATED WITH ACADEMIC
14 ACHIEVEMENT TESTS, THOUGH CLEARLY WHEN HE'S SCORING
15 IN THE LOWER ONE AND TWO PERCENTILE; ON THE OTHER
16 TESTS YOU CAN CERTAINLY UNDERSTAND IT. BUT THIS
17 MAN RANGES FROM A SECOND GRADE TO A FOURTH GRADE
18 EDUCATIONAL LEVEL ON HIS PERFORMANCE. AND THAT'S
19 THE KIND OF LEVEL THAT HE'S FUNCTIONING AT WITH
20 THOSE SKILLS AT THIS POINT.

21 Q. WHAT AGE GROUP WOULD THAT BE ASSOCIATED WITH?

22 A. GENERALLY SEVEN TO NINE. HE'S A LITTLE BIT
23 STRONGER IN SOME SKILLS.

24 Q. NOW, THERE'S BEEN SOME TALK OF WHETHER OR NOT --
25 AND YOU TOUCHED ON IT A MINUTE AGO -- BUT THERE'S

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1 BEEN SOME TALK AS TO WHETHER OR NOT MR. SIMMONS IS
2 MENTALLY RETARDED, WHETHER HE FITS THE STRICT
3 DEFINITION AS MR. BAILEY HAD POINTED OUT, AND SOME
4 OF THE OTHER WITNESSES HAVE POINTED OUT, IN THE
5 DSM-IV MANUAL?

6 A. RIGHT. NO. FROM A DSM-IV POINT OF VIEW, YOU'VE
7 HEARD FROM OTHER EXPERTS THAT BASICALLY MENTAL
8 RETARDATION IS A DEVELOPMENTALLY BASED DISORDER.
9 IT'S NOT ACQUIRED. YOU ARE BORN WITH IT
10 GENERALLY. IT EVOLVES DURING YOUR DEVELOPMENTAL
11 YEARS; AGE SIX, SEVEN, EIGHT, NINE. YOU DON'T
12 PROGRESS RIGHT. IT'S DISCERNIBLE THEN AND CLEARLY
13 DISCERNIBLE, AND HAS TO BE DISCERNIBLE BY
14 DEFINITION BEFORE AGE EIGHTEEN. THE EVIDENCE FROM
15 HIS SCHOOL RECORDS, PARTICULARLY IF THERE'S ANY
16 VALIDITY TO THE REPORT OF I.Q. TESTS IN NINETIES
17 AND HUNDREDS, CLEARLY CONTRAINDICATES THAT BEING AN
18 APPROPRIATE DIAGNOSIS FOR HIM. THE SECOND ISSUE IS
19 PSYCHOSOCIAL ADAPTATION. THIS IS LITERALLY THE
20 ABILITY TO CARE FOR YOURSELF AND GROOM AND HYGIENE.
21 AND OBVIOUSLY A YOUNG MAN WHO CAN GROOM AND
22 MAINTAIN HIS PERSONAL HYGIENE TO THE EXTENT TO BE
23 APPROPRIATE AND BE ON A FOOTBALL TEAM; THIS DOES
24 NOT FIT WITH THE HISTORY OF THE PERSON WHO WOULD
25 FIT THE DEFINITION AND CRITERIA FOR MENTAL

1 RETARDATION. HAVING THAT ALL OCCUR BEFORE THE AGE
2 EIGHTEEN WHICH IS THE THIRD CRITERIA DOES NOT FIT
3 THAT THAT'S THE APPROPRIATE DIAGNOSIS. HOWEVER,
4 MANY THINGS CAN HAPPEN TO US AFTER AGE EIGHTEEN
5 THAT CAN THEN RESULT IN INTELLECTUAL IMPAIRMENTS,
6 POOR PERFORMANCE IN I.Q. TESTS, AND TO A CERTAIN
7 EXTENT SOME LOSS OF, TO A CERTAIN EXTENT, SOME LOSS
8 OF EDUCATIONAL ABILITY. BUT EVEN TO MORE EXTENT
9 THE LOSS OF ATTENTION, CONCENTRATION, AND THESE
10 DISCREET THINGS. YOU CAN BE IN A CAR ACCIDENT.
11 YOU CAN SUFFER A DISEASE TO YOUR BRAIN. THESE ARE
12 ACQUIRED NEURO-COGNITIVE IMPAIRMENTS. THESE ARE
13 OTHER CAUSAL FACTORS. BLOWS TO THE HEAD AS WELL AS
14 TOXINS, TOXIC ABUSE. THE MOST DEFINITIVE ONE WE
15 UNDERSTAND IS ALCOHOL. WE UNDERSTAND OTHER
16 THINGS. CHEMICALS CAN DO THAT, TOO. SO OBVIOUSLY
17 I DON'T THINK IT'S MENTAL RETARDATION. I DO
18 BELIEVE THAT IN 1997 AS WELL AS NOW THIS IS AN
19 INTELLECTUALLY DEFICIENT INDIVIDUAL. BUT I DO NOT
20 BELIEVE THAT'S DUE TO MENTAL RETARDATION, AND
21 THAT'S NOT THE APPROPRIATE DIAGNOSIS.

22 Q. IN YOUR OPINION, AGAIN TO A REASONABLE DEGREE OF
23 SCIENTIFIC CERTAINTY, WHAT DO YOU ATTRIBUTE MR.
24 SIMMONS' DECLINE IN HIS MENTAL CAPACITY?

25 A. THE DECLINE IN HIS MENTAL CAPACITY IS VALIDLY

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1 DEPICTED, I BELIEVE, ACROSS NUMEROUS EXAMINERS
2 WOULD BE, AND IS, CONSISTENT WITH THE DECLINE OFTEN
3 ASSOCIATED WITH CHRONIC SUBSTANCE ABUSE, ALCOHOL
4 AND IN PARTICULAR, WITH CRACK COCAINE ALSO
5 CONTRIBUTING.

6 Q. NOW, DID YOU ASSESS AT ANY TIME MR. SIMMONS'
7 ABILITY TO COMPREHEND HIS MIRANDA WARNINGS?

8 A. ON FEBRUARY THE THIRD WHEN I WORKED WITH HIM, I
9 ASSESSED BOTH COMPETENCY ISSUES AS WELL AS MIRANDA
10 RIGHT ISSUES, PRIMARILY WITH THE MIRANDA IN TERMS
11 OF MY OWN ASSESSMENT OF HIS CURRENT UNDERSTANDING
12 OF THE DEFINITION AND THE APPLICATION OF THE
13 MIRANDA RIGHTS. IN ASSESSING MIRANDA RIGHTS, YOU
14 CAN DO THAT THROUGH CLINICAL INTERVIEW. OBVIOUSLY
15 THERE ARE SOME TOOLS LIKE DR. SAYLOR USED WHERE YOU
16 JUST ASK SPECIFIC QUESTIONS. I WAS WORKING WITH
17 DR. SAYLOR, AND HE HAD DONE THAT EXTENSIVELY. BUT
18 I ALSO INTERVIEWED HIM. AND I ALSO TRIED TO DO THE
19 SECOND PART WHICH WAS TO KIND OF DO A STEP BY STEP
20 INTERVIEW OR INTERROGATION, IF YOU WILL, OF HIS
21 THINKING OR HIS RECALL OF HIS THINKING DURING THE
22 MAKING OF THE CONFESSION AS WELL AS HIS
23 UNDERSTANDING OF THE CONSEQUENCES OF SIGNING THE
24 WAIVERS. THIS WAS NOT FRUITFUL. I COULD NOT GET
25 ANY RELIABLE RESPONSES, OR I DON'T BELIEVE HE'S A

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1 RELIABLE HISTORIAN OR RECALLING HIS THINKING AT
2 THAT TIME AND PROVED NOT USEFUL. MY UNDERSTANDING,
3 AS WAS CONSISTENT WITH WHAT'S BEEN REPORTED, AT
4 LEAST ON THE FIRST OCCASIONS OF INTERVIEWING BY
5 OTHER EXPERTS. I DID NOT WORK WITH MR. SIMMONS AND
6 TRY TO TRAIN HIM AND GIVE HIM MORE EDUCATION ABOUT
7 THESE RIGHTS. I DID NOT BELIEVE HE HAD AN
8 APPRECIATION, A KNOWING AND INTELLIGENCE
9 APPRECIATION FOR THE MIRANDA RIGHTS WHICH WOULD
10 INVOLVE BOTH THE ASPECTS OF THE CONSEQUENCES OF
11 WAIVING YOUR RIGHTS, THE IDEA THAT YOU CAN STOP ANY
12 TIME YOU WANTED TO. HE UNDERSTOOD THAT A LAWYER
13 COULD BE PRESENT IN SOME ASPECT OF THAT, BUT
14 PARTICULARLY THE RAMIFICATIONS OF MAKING A
15 CONFESSION AND SOME OTHER ASPECTS OF IT I DIDN'T
16 BELIEVE HE UNDERSTOOD, AT LEAST IN MY INQUIRY WITH
17 HIM. AGAIN, I DID THAT ON ONE OCCASION; DID NOT
18 TRY TO TRAIN HIM AND GO FURTHER WITH THAT AT THAT
19 TIME.

20 Q. HOW DO YOU RECONCILE YOUR FINDINGS WITH THE
21 INTERVIEWS CONDUCTED BY AGENT MEARS ON DECEMBER THE
22 FIFTH AND NINTH? LET ME ASK YOU THIS FIRST. DID
23 YOU HAVE A CHANCE TO READ THE TRANSCRIPTS OF THOSE
24 DEPOSITIONS AND LISTEN TO THE TAPE RECORDINGS?

25 A. YES. I LISTENED TO ONE TAPE RECORDING. BUT I READ

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- 1 THE TRANSCRIPTS IN TOTALITY.
- 2 Q. HOW DO YOU RECONCILE YOUR FINDINGS RELATED TO MR.
- 3 SIMMONS' INABILITY TO COMPREHEND THOSE WARNINGS
- 4 WITH THE RESPONSE THAT MR. SIMMONS GAVE WHEN BEING
- 5 QUESTIONED BY AGENT MEARS?
- 6 A. BASICALLY AS HAS BEEN AMPLY POINTED OUT BY OTHERS
- 7 INCLUDING THOSE FROM THE HALL INSTITUTE, THE
- 8 PROBLEM THAT I HAVE WITH WHAT HAPPENED TO MR. MEARS
- 9 IS SIMPLY YES AND NO ANSWERS, PARTICULARLY IN
- 10 INTELLECTUALLY DEFICIENT PEOPLE. IT DOESN'T ALLOW
- 11 YOU TO APPRECIATE WHETHER OR NOT THEY'RE HAVING AN
- 12 UNDERSTANDING. OFTEN THEY'LL RESPOND YES, YES,
- 13 YES; AND IF YOU DON'T ASK OPEN-ENDED QUESTIONS,
- 14 "WELL, WHAT DOES IT MEAN? WHAT DOES IT MEAN THAT
- 15 YOU CAN STOP ANY TIME THAT YOU WANT TO AND NOT TALK
- 16 FURTHER WITH YOU US?" YOU REALLY DON'T GET AN
- 17 UNDERSTANDING. AND THIS IS TRUE FOR A LOT OF
- 18 NEUROLOGICAL INJURED PATIENTS THAT I'VE WORKED WITH
- 19 OVER THE YEARS AND BRAIN INJURED PATIENTS. BUT
- 20 INTELLECTUALLY DEFICIENT; THAT'S EVEN MORE
- 21 NECESSARY. OR IF YOU CONSIDER A CLIENT
- 22 FUNCTIONALLY ILLITERATE, YOU SHOULD DO THAT. SO MY
- 23 POINT WAS THAT'S MY MAJOR PROBLEM WITH WHETHER OR
- 24 NOT THAT REPRESENTS ANY VALID UNDERSTANDING OF
- 25 WHETHER OR NOT MR. SIMMONS UNDERSTOOD HIS MIRANDA

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1 RIGHTS IN DECEMBER OF 1997.

2 Q. AS A RESULT OF YOUR TESTS THAT YOU CONDUCTED, AND
3 AS A RESULT OF THE REVIEW OF ALL THE RECORDS
4 PROVIDED FROM THE OTHER EVALUATING DOCTORS, WERE
5 YOU ABLE TO ARRIVE AT AN OPINION TO A REASONABLE
6 DEGREE OF SCIENTIFIC CERTAINTY AS TO WHETHER OR NOT
7 MR. SIMMONS WAS CAPABLE OF MAKING A KNOWING AND
8 INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS?

9 A. BASED ON MY EVALUATION, AS WELL AS MY REVIEW OF
10 OTHER EVALUATIONS, AND STEPPING BACK WITH THE IDEA
11 THAT THE INTELLECTUAL DEFICIENCIES, NEURO-COGNITIVE
12 DIFFICULTIES THAT WERE PRESENT IN OUR MEASUREMENT
13 AND THEIR MEASUREMENT, WERE LIKELY THAT THOSE
14 DEFICITS WERE PRESENT IN 1997 TO THE SAME DEGREE,
15 IF NOT WORSE, DUE TO THE CLOSER PROXIMITY TO HIS
16 ACUTE USAGE.

17 Q. BEFORE WE GET INTO 1997; AND I'M SPEAKING
18 SPECIFICALLY ABOUT YOUR OPINION AT THE PRESENT
19 TIME.

20 A. AT THE PRESENT TIME, MY OPINION WAS HE DID NOT
21 DEMONSTRATE IN MY EVALUATION AN UNDERSTANDING OF
22 HIS MIRANDA RIGHTS.

23 Q. AND, AGAIN, WHAT IS THAT OPINION BASED UPON?

24 A. BASED ON MY ASSESSMENT OF HIS UNDERSTANDING ON IT,
25 BASED ON CLINICAL INQUIRIES AND EVALUATION, AS WELL

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1 AS AT LEAST THE COLLABORATIVE EVALUATION BY DR.
2 BARTON SAYLOR WHO I WORKED WITH ON THIS CASE AS
3 WELL AS OUR MEASUREMENT OF HIS CAPACITIES WHICH
4 GIVES A CONTEXT FOR UNDERSTANDING THAT. BUT THAT
5 DOESN'T MEAN IN AND OF ITSELF. HE CAN UNDERSTAND.
6 I.Q. AND THINGS LIKE THAT ARE NOT USEFUL IN AND OF
7 THEMSELVES. THEY GIVE YOU A CONTEXT FOR
8 UNDERSTANDING WHY SOMEBODY MIGHT NOT, BUT CERTAINLY
9 YOU NEED TO GO IN AND SPECIFICALLY ASK AND TRY TO
10 ASCERTAIN THAT THROUGH INTERVIEW.

11 Q. NOW, HOW DOES THAT OPINION GIBE WITH THE RESULTS OF
12 THE OTHER EVALUATING PSYCHOLOGISTS AND
13 PSYCHIATRISTS?

14 A. I BELIEVE THAT THERE HAS BEEN DIFFICULTY ON THE
15 INITIAL EVALUATION BY THEM ALSO IN UNDERSTANDING
16 WHETHER HE CAN PROVIDE EVIDENCE THAT HE DOES
17 UNDERSTAND HIS MIRANDA RIGHTS. THEY OBVIOUSLY
18 WORKED WITH MR. SIMMONS FURTHER, TRIED TO EDUCATE
19 HIM, AND FURTHER INQUIRIES WHICH I DID NOT DO. SO
20 I THINK EVERYBODY WHO HAS SEEN HIM, AT LEAST THE
21 INITIAL PERIOD OF TIME, HAS HAD SOME CONCERN ABOUT
22 HIS ABILITY TO UNDERSTAND.

23 Q. NOW DO YOU HAVE AN OPINION YOU CAN STATE TO A
24 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY AS TO MR.
25 SIMMONS' ABILITY TO COMPREHEND HIS MIRANDA WARNINGS

RANDY WAID - CROSS/MR. BAILEY

1 AND THEREFORE MAKE A KNOWING AND INTELLIGENT WAIVER
2 OF THOSE RIGHTS IN DECEMBER OF 1997 WHEN THESE
3 STATEMENTS WERE TAKEN FROM HIM?

4 A. TO THE EXTENT THAT THE CURRENT INTELLECTUAL
5 DIFFICULTIES ARE VALIDLY CAUSAL FOR HIS PROBLEMS, I
6 WOULD CONSIDER THOSE ON BOARD IN 1997 AND THAT
7 LIKELY, IF ANYTHING, TO BE WORSE DUE TO THE
8 PROXIMITY TO HIS ACUTE USAGE OF HIS SUBSTANCES.
9 AND BASED OF THAT DATA, I WOULD VIEW IT UNLIKELY
10 THAT HE UNDERSTOOD HIS MIRANDA RIGHTS IN 1997. I
11 HAVE NO OTHER WAY OF MAKING THAT ASSESSMENT BECAUSE
12 I COULD NOT RETRIEVE SPECIFIC INFORMATION FROM HIM
13 REGARDING 1997 IN HIS THINKING THEN.

14 Q. OKAY. DO YOU HAVE AN OPINION THEREFORE, AGAIN TO A
15 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY, AS TO
16 WHETHER OR NOT MR. SIMMONS WAS CAPABLE IN 1997 OF
17 WAIVING THOSE MIRANDA RIGHTS?

18 MR. BAILEY: OBJECTION, YOUR HONOR.
19 THIS IS THE THIRD TIME HE'S ASKED THAT SAME
20 QUESTION, AND HE'S ANSWERED IT.

21 THE COURT: ALL RIGHT, THAT'S THE
22 LAST TIME I'LL LET HIM ASK IT. GO AHEAD.

23 A. IT'S MY OPINION THAT HE DID NOT IN 1997 UNDERSTAND
24 HIS MIRANDA RIGHTS.

25 Q. NO FURTHER QUESTIONS.

RANDY WAID - CROSS/MR. BAILEY

THE COURT: CROSS?

CROSS-EXAMINATION

BY MR. BAILEY:

Q. DOCTOR, YOU'RE AWARE THAT MR. SIMMONS HAS BEEN IN JAIL FOR A COUPLE OF WEEKS, SO WE WOULD ASSUME THAT HE WAS FREE OF ALCOHOL AND DRUGS TO THAT EXTENT; ARE YOU NOT?

A. YES, SIR.

Q. DOCTOR, YOU'RE NOT A PHYSICIAN, ARE YOU?

A. NO, I'M NOT A PHYSICIAN.

Q. YOU'RE NOT A NEUROSURGEON?

A. I AM NOT A NEUROSURGEON.

Q. ALL RIGHT. A NEUROSURGEON OPERATES ON THE BRAIN, DOESN'T HE?

A. HE DOES.

Q. ALL RIGHT, SIR. AND EVERYTHING THAT YOU'VE TESTIFIED TO, DOCTOR, IS PREDICATED OR BASED ON YOUR ASSUMPTION OR YOUR FEELING THAT MR. SIMMONS WAS NOT MALINGERING IN HIS PRESENTATION TO YOU; IS THAT CORRECT?

A. ONE OF THE IMPORTANT VARIABLES; NOT EVERYTHING. BUT I THINK THE IMPORTANT VARIABLE IS TO RULE OUT MALINGERING AS A CAUSAL FACTOR; YES, SIR.

Q. ALL RIGHT, SIR. AND IN YOUR MIND, YOU HAVE RULED THAT OUT; IS THAT CORRECT?

RANDY WAID - CROSS/MR. BAILEY

1 A. IN MY MIND, IN MY REVIEW OF THE OTHER DATA; YES, I
2 DO NOT BELIEVE HE IS MALINGERING.

3 Q. OKAY. AND IF YOU'RE WRONG ON THAT, THEN EVERYTHING
4 YOU'VE TESTIFIED TO JUST NOW WOULD BE WRONG; IS
5 THAT CORRECT?

6 A. IT MEANS MALINGERING COMES IN AS A POSSIBLE CAUSAL
7 FACTOR. HIS HISTORY OBVIOUSLY IS PREMORBID
8 FUNCTIONING. ALL THAT ARE FACTS TO THAT WE
9 ASCERTAIN, TOO.

10 Q. RIGHT. BUT YOUR OPINIONS ABOUT HIS ABILITY TO
11 COMPREHEND MIRANDA RIGHTS AT VARIOUS POINTS IN TIME
12 WOULD BE INACCURATE IF YOU ARE WRONG IN YOUR
13 OPINION THAT HE'S NOT MALINGERING; IS THAT CORRECT?

14 A. YES, SIR; POTENTIALLY; YES, SIR.

15 Q. ALL RIGHT, SIR. NOW, DOCTOR, LET ME ASK YOU A
16 LITTLE BIT ABOUT YOUR PRACTICE. WHAT DOES YOUR
17 PRACTICE PRIMARILY CONSIST OF?

18 A. ACTUALLY IT PRIMARILY CONSISTS OF THERAPY AND
19 EVALUATION OF ONGOING CLIENTS.

20 Q. ALL RIGHT, SIR. AND YOU'VE TESTIFIED NUMEROUS
21 TIMES IN PAST; IS THAT CORRECT?

22 A. YES, SIR.

23 Q. IN WHAT TYPE PROCEEDINGS?

24 A. WHAT TYPE WHAT; I'M SORRY?

25 Q. PROCEEDINGS?

RANDY WAID - CROSS/MR. BAILEY

1 A. CIVIL AS WELL AS CRIMINAL.

2 Q. WORKER'S COMP?

3 A. OH, YES, SIR.

4 Q. DO YOU TESTIFY A GOOD BIT IN WORKER'S COMP CASES?

5 A. I DO GET REFERRED WORKER'S COMP CASES FROM
6 NEUROSURGEONS AND PEOPLE THAT HAVE BEEN INJURED;
7 YES.

8 Q. ALL RIGHT, SIR. AND FROM LAWYERS ALSO?

9 A. WELL, WORKER'S COMP USUALLY COMES THROUGH THE
10 PHYSICIANS. LAWYERS ARE OFTEN INVOLVED IN THE
11 CASE, BUT IT COMES FROM THE PHYSICIAN.

12 Q. ALL RIGHT, SIR. AND WHAT PERCENTAGE OF YOUR
13 PRACTICE THAT'S OPPOSED TO TESTIFYING IN COURT AS
14 COMPARED TO SEEING PATIENTS OR CLIENTS? YOU'RE NOT
15 A PHYSICIAN, SO YOU DON'T HAVE A PATIENT BUT A
16 CLIENT?

17 A. WELL, YES. I MAINTAIN AN ACTIVE REGULAR CLINICAL
18 PRACTICE. I WOULD TELL YOU THAT -- I WOULD SAY
19 WHEN YOU CONSIDER WORKER'S COMP, I WOULD SAY IT'S
20 HARD TO GUESSTIMATE, BUT I WOULD SAY ABOUT 20 OR 30
21 PERCENT COMES IF YOU CONCLUDE WORKER'S COMP OR SOME
22 TYPE OF DISABILITY EVALUATION FOR SOCIAL SECURITY
23 OR SOMETHING LIKE THAT.

24 Q. OKAY. AND HAVE YOU TESTIFIED IN THE PAST FOR
25 MEMBERS OF MR. THEOS' LAW FIRM?

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1 A. I NEVER WORKED WITH MR. THEOS. ABOUT TEN YEARS AGO
2 I DID A CASE WITH HALL AND TOPOREK. I THINK I HAVE
3 BEEN ON THE OPPOSITE SIDE OF THEM; BUT I DON'T
4 BELIEVE I'VE DONE A LOT OF WORK FOR URECHIO'S FIRM.

5 Q. ALL RIGHT. NOW, DOCTOR, DID YOU PREPARE A WRITTEN
6 REPORT OF YOUR TESTS HERE?

7 A. NO, SIR, MR. BAILEY, I DID NOT.

8 Q. ALL RIGHT, SIR. I BELIEVE YOU TESTIFIED WHEN YOU
9 WENT THROUGH THIS LAUNDRY LIST OF DIFFERENT TESTS
10 THAT YOU ADMINISTERED TO MR. SIMMONS; YOU SAID YOU
11 PUT THE TEST TOGETHER; IS THAT CORRECT?

12 A. YES. BASICALLY THEY ARE A SAMPLING OF SOME OF THE
13 DOMAINS OF INTELLECTUAL FUNCTIONING.

14 Q. ALL RIGHT, SIR. AND ONE TEST -- YOU DID HOW MANY
15 TESTS NOW, YOURSELF?

16 A. THERE'S APPROXIMATELY ELEVEN OR TWELVE TESTS THAT
17 WERE ADMINISTERED.

18 Q. ALL RIGHT, SIR. AND WHEN DID YOU ADMINISTER THOSE
19 TESTS TO MR. SIMMONS?

20 A. SOME OF THEM WERE ADMINISTERED ON FEBRUARY THE
21 THIRD LIKE THE MENTAL STATUS -- NOT THE MENTAL
22 STATUS; THE GEORGIA COMPETENCY TEST. MOST OF THEM
23 WERE ADMINISTERED ON FEBRUARY THE TENTH.

24 Q. OF THIS YEAR?

25 A. YES, SIR.

RANDY WAID - CROSS/MR. BAILEY

1 Q. ALL RIGHT, SIR. WHEN WERE YOU RETAINED BY THE
2 DEFENSE?

3 A. THE VERY END OF JANUARY.

4 Q. NOW, YOU'VE GOT TO PUT ALL THIS STUFF TOGETHER,
5 DON'T YOU; ELEVEN OR TWELVE TESTS TO MAKE SOME KIND
6 OF COHESIVE OPINION?

7 A. BASICALLY NEURO-COGNITIVE MEASURES USUALLY YOU HAVE
8 A MODEL OF TRYING TO START FROM THE MOST DISCREET
9 ABILITIES AND THEN WORK UP TO HIGHER REASONS. SO
10 YOU HAVE SOME PATTERN OF TESTS THAT YOU WANT TO PUT
11 TOGETHER; YES, SIR.

12 Q. ALL RIGHT, SIR. AND YOU PREPARED A REPORT, DID YOU
13 NOT?

14 A. PARDON ME?

15 Q. YOU PREPARED A REPORT SUMMARIZING YOUR OPINIONS AND
16 CONCLUSIONS BASED ON THE TESTS THAT YOU HAD
17 ADMINISTERED?

18 A. NO, I DID NOT.

19 Q. WHY NOT?

20 A. I WAS NOT ASKED TO.

21 Q. IS THAT NORMAL PROCEDURE FOR AN EXPERT IN YOUR
22 FIELD WHO IS GOING TO TESTIFY IN COURT NOT TO
23 PREPARE A REPORT AHEAD OF TIME?

24 A. IN CIVIL MATTERS, THAT WOULD NOT BE NORMAL. I
25 ALWAYS PREPARE A REPORT IN CIVIL MATTERS BECAUSE

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1 THAT'S RELATED TO DAMAGES THAT WILL OFTEN RESULT TO
2 PERSONAL INJURY. IN CRIMINAL MATTERS I'VE OFTEN
3 NOT PREPARED A REPORT.

4 Q. ALL RIGHT, SIR. HAVE YOU TESTIFIED FOR THE
5 PROSECUTION IN THE PAST?

6 A. YES.

7 Q. IN CRIMINAL CASES?

8 A. YES.

9 Q. HAS ANY PROSECUTOR EVER ASKED YOU NOT TO PREPARE A
10 REPORT?

11 A. YES.

12 Q. YOU ARE AWARE THAT DR. SANDLER PREPARED A REPORT,
13 ARE YOU NOT?

14 A. I'VE HEARD DR. SANDLER HAD TO DO THAT IN A HURRY;
15 YES, SIR.

16 Q. YES, SIR. AND ALSO DR. BEHRMANN PREPARED A REPORT,
17 DIDN'T HE?

18 A. YES, SIR.

19 Q. ALL RIGHT, SIR. AND YOU HAD THOSE TO YOUR BENEFIT
20 TO HELP YOU WITH YOUR ANALYSIS?

21 A. YES, SIR, I DID.

22 Q. OKAY. TELL ME AGAIN WHY IT IS THAT YOU DIDN'T
23 PREPARE A WRITTEN REPORT.

24 A. I WAS CONSULTING WITH THE VARIETY OF COLLEAGUES.
25 WE DECIDED TO GO WITH THE TESTING. AND AT THAT

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1 POINT MY OPINIONS CAME BACK ON -- I THINK WE
2 DISCUSSED THE 19TH. WE REVIEWED THOSE TEST
3 RESULTS, AND COUNSEL NEVER ASKED ME TO PREPARE A
4 REPORT.

5 Q. OKAY. HAVE YOU EVER PREPARED A REPORT IN COURT,
6 CIVIL OR CRIMINAL, AND BEEN CROSS-EXAMINED ON THAT
7 REPORT?

8 A. HAVE I EVER PREPARED A REPORT AND THEN BEEN
9 CROSS-EXAMINED ON THE REPORT?

10 Q. YES, SIR.

11 A. YES.

12 Q. YOU WERE PRESENT WHEN DR. SANDLER WAS TESTIFYING,
13 WEREN'T YOU?

14 A. YES, SIR.

15 Q. AND MR. THEOS ASKED MR. SANDLER QUESTIONS ABOUT
16 WHAT WAS IN THAT REPORT, DIDN'T HE?

17 A. YES, SIR.

18 Q. ALL RIGHT, SIR. HAS THAT EVER HAPPENED TO YOU?

19 A. I'VE BEEN CROSS-EXAMINED NUMEROUS TIMES ON MY
20 REPORTS.

21 Q. IS THAT WHY YOU DIDN'T PREPARE A REPORT BECAUSE YOU
22 KNEW I WOULD HAVE TO CROSS-EXAMINE YOU ON IT?

23 A. NO; NOT AT ALL.

24 Q. TELL ME AGAIN SO I'LL UNDERSTAND WHY YOU DIDN'T
25 PREPARE A REPORT IN THIS CASE WHICH IS A MURDER

RANDY WAID - CROSS/MR. BAILEY

1 CASE WHERE WE'RE SEEKING THE DEATH PENALTY, BUT YOU
2 PREPARE REPORTS IN CIVIL CASES?

3 MR. THEOS: YOUR HONOR, I'M GOING TO
4 OBJECT. THAT QUESTION'S BEEN ASKED AND ANSWERED
5 TWICE.

6 THE COURT: LAST TIME.

7 A. BASICALLY I WAS WORKING WITH A GROUP OF COLLEAGUES
8 AND PROVIDING MY DATA BASE TO THEM. IT WASN'T
9 EVIDENT EVEN TO ME THAT I WOULD BE WITNESSING IN
10 THIS TRIAL AT THAT POINT. AND IT WAS NOT -- FROM A
11 TIME CONSTRAINT. OBVIOUSLY I HAD A TIME CONSTRAINT
12 JUST LIKE DR. SANDLER, I'M SURE, BECAUSE I DIDN'T
13 FINISH SCORING HIM ON THE TWELFTH. BUT I DID NOT
14 PREPARE A REPORT BECAUSE I HAD NOT FINISHED IN MY
15 OPINIONS AS THEY RELATED TO EVERYTHING ANYWAY, TOO.
16 SO ULTIMATELY I WAS NOT ASKED TO DO SO.

17 Q. HOW MUCH ARE YOU GETTING PAID FOR YOUR WORK HERE?

18 A. STANDARD \$125 IS WHAT I GET IN MY PRACTICE. AND
19 THAT'S WHAT I GET FOR MY TIME HERE.

20 Q. OKAY. AND HOW MUCH TIME HAVE YOU GOT IN THIS THING
21 SO FAR?

22 A. I SPENT TEN HOURS HERE YESTERDAY. AND I'M BACK ON
23 SOME HOURS TODAY. THERE'S BEEN FOUR HOURS -- I
24 THINK MAYBE EIGHT HOURS OF CONSULTATION WITH
25 COLLEAGUES, AND ABOUT UNDERSTAND SEVEN HOURS OF

- 1 CONTACT WITH THE CLIENT HIMSELF.
- 2 Q. ALL RIGHT, SIR. AND BASED ON ALL THAT, NO QUESTION
- 3 IN YOUR MIND THAT MR. SIMMONS WHO JUST SITS HERE IS
- 4 NOT MENTALLY RETARDED?
- 5 A. WELL, HE'S DEFINITELY NOT MEETING THE DIAGNOSTIC
- 6 CRITERIA FOR MENTAL RETARDATION; THAT'S CORRECT.
- 7 Q. ALL RIGHT. NOW AS FAR AS JUST MALINGERING IN
- 8 GENERAL, WOULD YOU AGREE WITH ME -- I KNOW YOUR
- 9 OPINION IS HE'S NOT MALINGERING. WOULD YOU AGREE
- 10 WITH ME THAT THERE'S PROBABLY NOT A PERSON ON THE
- 11 FACE OF THE EARTH THAT'S GOT A GREATER INCENTIVE TO
- 12 MALINGER THAN KENNETH SIMMONS AT THIS POINT AND
- 13 TIME?
- 14 A. I WOULD AGREE THAT HIS INCENTIVE IS GREAT.
- 15 Q. ALL RIGHT, SIR. YOU SAID YOU LISTENED TO ONE OF
- 16 THESE TAPES, ONE OF THREE TAPES AND THAT YOU READ
- 17 ALL THREE TRANSCRIPTS?
- 18 A. YES, SIR.
- 19 Q. WHICH TAPES DID YOU NOT LISTEN TO?
- 20 A. I BELIEVE I ONLY HEARD THE OPENING TAPE. THERE WAS
- 21 ANOTHER TAPE PROVIDED THAT WAS A TAPE OF THE
- 22 TESTING. BUT I ONLY HAD ONE TAPE. AND SO WHAT I
- 23 DID WAS READ THE TRANSCRIPTS INSTEAD. BUT I DID
- 24 LISTEN TO SOME OF THAT, IF NOT ALL THE FIRST TAPE
- 25 OF MR. MEARS.

RANDY WAID - CROSS/MR. BAILEY

1 Q. OKAY. MR. MEARS IS INVOLVED IN ALL THREE. BUT THE
2 FIRST TAPE WAS THIS BIZARRE STORY ABOUT SHORTY AND
3 THAT KIND OF STUFF. THAT'S THE ONE YOU LISTENED
4 TO?

5 A. YES, SIR. THE SHORTY STORY WAS BIZARRE. AND
6 THAT'S WHAT I RECALL LISTENING TO.

7 Q. ALL RIGHT, SIR.

8 A. I DID READ THE TRANSCRIPTS. THAT'S REALLY MORE OF
9 WHERE I STUDIED IT.

10 Q. DID MR. THEOS GIVE YOU THE TWO TAPES, THE TWO OTHER
11 TAPES IN WHICH MR. SIMMONS SAYS THAT SHORTY STORY
12 IS BOGUS? AND HE ADMITTED IN THOSE TAPES THAT HE
13 KILLED MRS. BOYD. DID YOU LISTEN TO THOSE -- OR
14 DID HE GIVE THEM TO YOU FIRST OF ALL?

15 A. I'M NOT AWARE THAT I HAD ANY MORE THAN ONE TAPE AS
16 I'VE ALREADY INDICATED TO YOU. I LISTENED TO
17 THAT. I DID READ THE TRANSCRIPTS AND KNOW THE
18 CONTENT OF WHAT YOU'RE SPEAKING TO. BUT I DIDN'T
19 HAVE ALL THOSE TAPES.

20 Q. DO YOU HAVE THEM NOW?

21 A. NO, I DO NOT.

22 Q. YOU'VE NEVER HEARD THEM?

23 A. THE SECOND OR THIRD TAPE YOU'RE TALKING ABOUT?

24 Q. THE TWO TAPES WHERE HE CONFESSED TO MURDERING THIS
25 LADY.

RANDY WAID - CROSS/MR. BAILEY

1 A. I HAVE ONLY REVIEWED THE TRANSCRIPTS, THE WRITTEN
2 TRANSCRIPTS.

3 Q. I THINK YOU TESTIFIED THAT ONE OF THE THINGS Y'ALL
4 LOOKED AT IS THE DIFFERENCE IN THE WAY SOMEBODY
5 MIGHT PRESENT THEMSELVES TO YOU AND HOW THEY SHOULD
6 PRESENT TELL THEMSELVES ON OTHER OCCASIONS?

7 A. I'M ABSOLUTELY AWARE OF THAT AND HOW OTHER EXPERTS
8 HAVE SPOKEN TO THAT; YES

9 Q. DIDN'T YOU THINK IT WOULD BE IMPORTANT FOR YOU TO
10 LISTEN TO KENNETH SIMMONS' OWN WORDS WHERE HE'S
11 CONFESSING TO A MURDER IN DETAILS INCLUDING
12 DESCRIBING WHAT HE DID, THE SEQUENCE THAT HE DID IT
13 IN, THE LAYOUT OF THE HOUSE, THE TIME OF DAY, HOW
14 HE GOT THERE, WHAT WEAPON HE USED, ALL THAT KIND OF
15 STUFF, TO TRY TO ASSESS WHETHER OR NOT HE WAS
16 PULLING YOUR LEG AS DR. SANDLER SAID?

17 A. I DID HAVE A SAMPLE OF THAT VERBAL BEHAVIOR THAT
18 WAS MENTIONED BY DR. SANDLER. I CAN'T SPEAK FOR
19 HOW HE PRESENTED HIMSELF TO DR. SANDLER. I DID NOT
20 HAVE A GREAT DIFFERENCE BETWEEN HIS PRESENTATION
21 THERE AND HIS VERBAL INFORMATION AS HE PRESENTED TO
22 ME IN THE JAILHOUSE WHEN I EVALUATED HIM. I CAN'T
23 SPEAK FOR HOW HE PRESENTS HIMSELF IN OTHER
24 LOCATIONS. I DIDN'T OBSERVE THAT. I HEARD THAT
25 THEY VIEWED THAT AS A DIFFERENCE. I DIDN'T VIEW IT

RANDY WAID - CROSS/MR. BAILEY

1 AS A SIGNIFICANCE DIFFERENCE FROM A VERBAL POINT OF
2 VIEW.

3 Q. OKAY. HE SPOKE TO YOU BASICALLY THE SAME WAY HE
4 SPOKE TO MR. MEARS ON THE FIRST PAGE?

5 A. I'VE HEARD A DESCRIPTION OF HOW HE SPOKE TO OTHER
6 INDIVIDUALS. HE WAS FAIRLY SPONTANEOUS AND
7 EXPRESSIVE WITH ME. AND I DIDN'T SEE A GREAT
8 DIFFERENCE BETWEEN THOSE TWO PRESENTATIONS.

9 Q. WHEN YOU SAY HE WAS SPONTANEOUS AND EXPRESSIVE TO
10 YOU; WHAT DO YOU MEAN BY THAT?

11 A. WELL, SOME PEOPLE HAVE DESCRIBED HIM -- THE OTHER
12 EXPERT -- AS NOT BEING SO. HE ENGAGED WITH US AND
13 PARTICIPATED WELL WITH US. AND WE DIDN'T HAVE ANY
14 TROUBLE GETTING HIM TO RESPOND TO OUR INQUIRIES.
15 AND THERE WASN'T ANY RESPONSE HESITANCY. THERE WAS
16 NO OTHER TYPE OF EXPRESSIVE LANGUAGE PROBLEMS. HE
17 IS LIMITED IN HIS VOCABULARY. BUT I DIDN'T -- AT
18 LEAST BASED ON MY PERCEPTION OF WHAT DR. SANDLER
19 AND OTHER PEOPLE ARE SAYING -- I DIDN'T HAVE THE
20 SAME PERCEPTION.

21 Q. SO ARE YOU SAYING THAT HE PRESENTED HIMSELF TO YOU
22 DIFFERENTLY THAN HE PRESENTED HIMSELF TO OTHER
23 PEOPLE THAT YOU'VE CONFERRED WITH?

24 A. I HAVE NO IDEA.

25 Q. I THOUGHT YOU JUST SAID THAT?

RANDY WAID - CROSS/MR. BAILEY

1 A. I HEARD THEM DESCRIBE IT. I DIDN'T OBSERVE HIS
2 PRESENTATION.

3 Q. I KNOW THAT. BUT YOU'RE BASING YOUR OPINION ON THE
4 TESTING YOU DID PLUS YOUR COLLABORATION WITH OTHER
5 DOCTORS, DR. SAYLOR AND ALL THOSE; AREN'T YOU?

6 A. YES.

7 Q. NOW, DID THEY TELL YOU THAT HE PRESENTED HIMSELF TO
8 THEM DIFFERENTLY THAN THE WAY HE PRESENTED HIMSELF
9 TO YOU BEING EXPRESSIVE AND SO FORTH?

10 A. I HAD NO PRESENTATION DIFFERENCE BETWEEN DR. SAYLOR
11 AND I. I WAS REFERRING TO DR. SANDLER'S VIEW ON
12 THAT. AND I CAN'T SPEAK FOR THAT DIFFERENCE. I
13 DON'T KNOW HOW HE MIGHT HAVE PRESENTED,
14 PARTICULARLY IN THE CONTEXT OF HALL OR WITH DR.
15 SANDLER WHEN THERE WAS SOME DIFFERENT TYPES OF
16 EVALUATIONS.

17 Q. WAS ONE OF THE EXPERTS YOU CONFERRED WITH DR.
18 FOXWORTH?

19 A. I DIDN'T CONFER WITH DR. FOXWORTH. HE WAS A PART
20 OF THE SIT-IN OF THE GROUP MEETINGS THAT WE HAD ON
21 TWO OCCASIONS.

22 Q. WHY DIDN'T YOU CONFER WITH HIM?

23 A. BECAUSE BASICALLY I WAS CONFERRING MORE WITH DR.
24 SAYLOR. IN THIS PARTICULAR CASE, THE LIMITED TIME
25 I HAD WITH IT, AS WELL AS DR. KEYS WHO HAD DONE

RANDY WAID - CROSS/MR. BAILEY

1 SOME TESTING THAT WAS MORE INFORMATIONAL FOR WHAT I
2 WAS DOING.

3 Q. ALL RIGHT, SIR. DID YOU DO A FULL BATTERY OF
4 NEUROPSYCHOLOGICAL TESTS?

5 A. BASICALLY THAT'S A DEFINITIONAL ASPECT OF WHAT YOU
6 MEAN BY FULL BATTERY. WE SAMPLE ALL THE DOMAINS OF
7 NEURO-COGNITIVE ABILITIES.

8 Q. ALL RIGHT, SIR. AND I BELIEVE YESTERDAY WHEN YOU
9 STARTED YOUR TESTIMONY, YOU GAVE ME SOME OF THE
10 TESTS THAT YOU HAVE GIVEN TO MR. SIMMONS. YOU GAVE
11 A LIST OF THE TESTS?

12 A. YES, SIR.

13 Q. DO YOU RECALL THAT?

14 A. YES, SIR.

15 Q. DO YOU REMEMBER ME ASKING YOU ABOUT THE APHASIA
16 TEST?

17 A. YES, SIR.

18 Q. IS THAT ONE OF THE TESTS THAT YOU GAVE HIM?

19 A. YES, IT WAS.

20 Q. DO YOU HAVE THE TEST RESULTS WITH YOU FROM THAT
21 TEST?

22 A. NO, I DON'T. I ONLY HAVE PART OF THAT WHICH I'VE
23 ALREADY GIVEN TO YOU THAT WE DID FROM THAT. THE
24 ACTUAL ANSWER SHEET IS BACK IN MY MT. PLEASANT
25 OFFICE. HE COULD NOT SPELL SOME THINGS, BUT I

RANDY WAID - CROSS/MR. BAILEY

1 CONSIDER THAT LONG-STANDING. BUT HE DID ALL RIGHT
2 ON THE REST OF THEM.

3 Q. ALL RIGHT. I WANT TO MAKE SURE I'M REAL CLEAR ON
4 THIS, DOCTOR. YOU'RE TESTIFYING THAT YOU GAVE THE
5 APHASIA SCREENING TEST TO MR. SIMMONS?

6 A. YES.

7 Q. ALL RIGHT, SIR. DO YOU HAVE THE TEST RESULTS WITH
8 YOU?

9 A. NO, I DO NOT. I SAID OTHER THAN SOME OF THE
10 DRAWINGS THAT COME FROM THE APHASIA SCREENING WHICH
11 WERE IN MY RECORDS. I HAD ONE ANSWER SHEET THAT I
12 DID THE CENTURY PERCEPTUAL EAM ON THE BACK THAT YOU
13 HAVE. THE FRONT IS EMPTY. BUT I HAVE ANOTHER FORM
14 THAT WE DID ON THE BACK OF MY OFFICE.

15 Q. YOU GAVE ME SOME PAPERS YESTERDAY WHICH ARE
16 PURPORTED TO BE YOUR FILE IN THIS CASE, DID YOU
17 NOT?

18 A. YES, SIR; BUT I INDICATED TO YOUR PEOPLE LAST NIGHT
19 THAT THEY DID NOT HAVE THE APHASIA SCREENING, OR
20 THE ACTUAL TIME SCORES OF THE T.P.T. TO YOUR
21 COLLEAGUE.

22 Q. WHICH COLLEAGUE WAS THAT?

23 A. RIGHT THERE. (INDICATING.)

24 MR. BAILEY: YOUR HONOR, BEAR WITH
25 ME A SECOND, PLEASE.

RANDY WAID - CROSS/MR. BAILEY

1 Q. DID YOU TELL HER YOU'D BRING IT WITH YOU TODAY?

2 A. I DO NOT RECALL DOING THAT. BUT I DID NOT HAVE A
3 CHANCE TO GET BY MY OFFICE TODAY. I'D BE HAPPY TO
4 TELL YOU EACH THING ABOUT THAT AND EACH ANSWER.

5 Q. IS THERE ANYTHING ELSE, ANY OTHER TESTS DOCTOR,
6 THAT YOU'VE DONE THAT YOU HAVE NOT PRODUCED AT THIS
7 POINT AND TIME?

8 A. THE SPEECH SOUNDS I THINK IS NOT IN THERE; BUT
9 WE'VE DISCONTINUED THAT BECAUSE I DIDN'T THINK HE
10 HAD THE LANGUAGE SKILLS TO DO THAT.

11 Q. SO SINCE HE DIDN'T DO WHAT YOU EXPECTED HIM TO DO
12 ON THAT TEST, YOU JUST DIDN'T BRING IT IN?

13 A. NO. BASICALLY THEY END UP IN A SEPARATE FOLDER
14 BECAUSE WE DIDN'T NORM THEM OUT BECAUSE WE
15 DISCONTINUED THE SPEECH SOUNDS.

16 Q. WHATEVER TESTS YOU GAVE HIM FOR MEMORY, HOW DID HE
17 DO ON THAT ONE?

18 A. THE MEMORY TESTS, THE CALIFORNIA VERBAL LEARNING
19 TEST? HE SCORED, WE CALL SCORE IN THE CALIFORNIA
20 VERBAL LEARNING TEST WHICH INVOLVES FIVE
21 ADMINISTRATIONS OF A SIXTEEN WORD LIST, RESULTED IN
22 A "T" SCORE OF SEVENTEEN FOR HIS AGE GROUP WHICH IS
23 APPROXIMATELY THREE STANDING DEVIATIONS BELOW THE
24 50 PERCENTILE WHICH IS OBVIOUSLY IN THE VERY LOW
25 PERCENTILE FOR HIM.

RANDY WAID - CROSS/MR. BAILEY

1 Q. IS THAT A TEST FOR SHORT TERM OR LONG TERM MEMORY?

2 A. IT'S A TEST OF -- WELL, IT DOES QUITE A FEW
3 THINGS, ACTUALLY; BUT IT'S MAINLY A TEST OF NEW
4 LEARNING, WHAT WE CALL ANTERIOR GRADE MEMORY. MOST
5 LAYMEN REFER TO THAT AS SHORT-TERM; YES.

6 Q. DID CAN GIVE HIM ANY TESTS FOR LONG-TERM MEMORY?

7 A. NO. THAT'S GENERALLY VERY DIFFICULT.

8 AUTOBIOGRAPHICAL MEMORY AND REMEMBERING THINGS FROM
9 THE PAST, IT'S VERY HARD TO MEASURE. WE ASKED
10 ABOUT THOSE THINGS. BUT LONG-TERM MEMORY USUALLY
11 MEANS MORE EXTENDED PERIOD OF TIME FROM THE PAST
12 HISTORICAL MEMORY.

13 Q. DOCTOR, I REALIZE YOU DIDN'T LISTEN TO THE LAST TWO
14 TAPES FOR WHATEVER REASON. BUT THE TAPES THAT YOU
15 DID LISTEN TO, WAS MR. SIMMONS' PRESENTATION IN
16 THAT TAPE CONSISTENT WITH YOUR OPINION THAT YOU
17 TESTIFIED TO ON DIRECT THAT MR. SIMMONS HAD
18 DIFFICULTY IN SEQUENCING EVENTS? IN OTHER WORDS
19 KNOWING THE ORDER THAT THINGS OCCURRED IN?

20 A. HE DID HAVE SOME DIFFICULTY WITH SEQUENTIAL
21 THINKING ON NEURO-COGNITIVE TESTS. I WOULD ALSO --
22 I'M NOT SURE I UNDERSTAND THE QUESTION IN TERMS OF
23 WHAT SPECIFIC INFORMATION DO YOU HAVE.

24 Q. WELL, I'M ASKING YOU WHETHER OR NOT WHEN YOU
25 LISTENED TO THE TAPE OF THIS SHORTY STORY, A LONG

RANDY WAID - CROSS/MR. BAILEY

1 INVOLVED BOGUS STORY THAT HE GAVE ON THE TAPE THAT
2 YOU LISTENED TO.

3 A. YES.

4 Q. I'M ASKING YOU WHETHER OR NOT THE SEQUENCING OF
5 EVENTS, HIS ABILITY TO RELATE COMPLICATED STORIES;
6 AND YOU WOULD AGREE WITH ME THAT'S A PRETTY BIZARRE
7 COMPLICATED INVOLVED SHORT STORY, REALLY; ISN'T IT?

8 A. MY RECALL OF IT WAS THAT IT WAS INDEED BIZARRE.

9 Q. ALL RIGHT, SIR. AND DID HE ANY HAVE ANY DIFFICULTY
10 AT THAT POINT AND TIME BACK ON DECEMBER THE FIFTH
11 IN TELLING THAT STORY IN A SEQUENCE?

12 A. NO. HE COULD TELL THE STORIES IN A SEQUENCE.

13 Q. OKAY. BUT THEN WHEN HE PRESENTED HIMSELF TO YOU
14 THIS YEAR, 1999, HE PRESENTED HIMSELF AS BEING
15 UNABLE TO SEQUENCE EVENTS?

16 A. WELL, THERE ARE TWO DIFFERENT ABILITIES YOU'RE
17 ASKING ME ABOUT. I HAVE TRAUMATIC BRAIN INJURY
18 CLIENTS WHO WILL PROVIDE ME A HISTORY. WHEN YOU
19 GET TO KNOW THE REAL HISTORY THEY'RE ACTUALLY
20 GIVING ME SEPTEMBER, AND THEN NEXT WILL BE
21 SOMETHING IN OCTOBER. BUT IT'S IN A SEQUENCE TO
22 FOLLOW A PLANNED SEQUENTIAL PROCESS THAT I'M
23 PUTTING IN FRONT OF THE CLIENT THAT'S VERY
24 DIFFERENT THAN THEM PROVIDING A SEQUENCE OF
25 BEHAVIORS. THOSE TWO ABILITIES DON'T MATCH UP.

RANDY WAID - CROSS/MR. BAILEY

1 Q. WHAT IS IT YOU'RE SAYING HE CAN'T DO?

2 A. HE HAS DIFFICULTIES WITH SOME SEQUENTIAL THINKING
3 AS IT RELATES TO PROCESSING, MULTIPLE THINGS AT THE
4 SAME TIME OR FOLLOWING A SEQUENTIAL PATTERN AND
5 RELATING TO MOTOR MOVEMENTS; AS WELL AS THE
6 TRAIL-MAKING TEST, PART B, THOUGH THAT PROBABLY IS
7 PARTIALLY RELATED TO HIS POOR LANGUAGE SKILLS.

8 Q. AND DID YOU ALSO TESTIFY THAT HE DID NOT UNDERSTAND
9 IN YOUR OPINION THE RAMIFICATIONS OF MAKING A
10 CONFESSION?

11 A. THE FULL RAMIFICATIONS, PARTICULARLY THE IMPACT IT
12 WOULD HAVE ON HIM IN DOING SO.

13 MR. BAILEY: YOUR HONOR, BEAR WITH
14 ME ONE SECOND, PLEASE.

15 Q. LET ME HAND YOU STATE'S EXHIBIT 17 WHICH I BELIEVE
16 IS THE ONE TAPE THAT YOU LISTENED TO. AND THIS IS
17 THE SHORTY TAPE, OKAY?

18 A. YES, SIR.

19 Q. I WANT TO CALL YOUR ATTENTION TO PAGE 27 DOWN AT
20 THE BOTTOM OF THE PAGE WHERE MR. MEARS IS ASKING
21 MR. SIMMONS "DO YOU KNOW WHAT CAN HAPPEN TO YOU?"
22 DO YOU SEE THAT?

23 A. YES, SIR.

24 Q. I'M GOING TO READ THAT, AND YOU FOLLOW ME ALONG
25 HERE; AND YOU TELL ME IF I MAKE A MISTAKE; OKAY,

RANDY WAID - CROSS/MR. BAILEY

1 DOCTOR?

2 A. OKAY.

3 Q. KENNY MEARS: "DO YOU KNOW WHAT CAN HAPPEN TO YOU?"

4 MR. SIMMONS: "YES, SIR." MR. MEARS SAYS "WHAT?"

5 MR. SIMMONS SAYS "DEATH PENALTY OR WHATEVER; LIFE
6 IN JAIL; YOU KNOW WHAT I MEAN." DO YOU SEE THAT?

7 A. YES, SIR.

8 Q. AND DOES THAT INDICATE THAT HE DOES UNDERSTAND THE
9 RAMIFICATIONS OF MAKING A CONFESSION OR DID AT THAT
10 POINT AND TIME?

11 A. WELL, ON THAT PARTICULAR QUESTION HE UNDERSTOOD THE
12 INSTANCE OF THE POSSIBLE PENALTIES HE COULD FACE;
13 YES, SIR.

14 Q. OKAY. SO TO ANSWER MY QUESTION, DOESN'T THAT PROVE
15 THAT ON DECEMBER THE FIFTH, 1997, MR. SIMMONS DID
16 UNDERSTAND THE RAMIFICATIONS OF MAKING A
17 CONFESSION?

18 A. IT PROVES TO ME HE UNDERSTOOD THAT HE COULD GET THE
19 DEATH PENALTY FOR A MURDER CASE.

20 Q. AND THAT'S ABOUT THE BIGGEST RAMIFICATION YOU CAN
21 GET, ISN'T IT?

22 A. IT'S CERTAINLY A BIG RAMIFICATION IN THIS CASE;
23 YES, SIR.

24 Q. ALL RIGHT, SIR. AND HOW DO SQUARE THAT WITH YOUR
25 TESTIMONY THAT HE CAN'T UNDERSTAND THE

RANDY WAID - CROSS/MR. BAILEY

1 RAMIFICATIONS OF MAKING A CONFESSION?

2 A. I TALKED TO HIM ABOUT THE FULL APPRECIATION OF
3 MAKING THAT CONFESSION AND THE SELF-DAMAGING
4 ASPECTS OF IT. IT'S JUST A LITTLE BIT MORE
5 INVOLVED IN TERMS OF THAT. AND WHEN YOU FIND
6 INTELLECTUALLY DEFICIENT PEOPLE WHERE EVEN STUDIES
7 HAVE BEEN CONDUCTED ON LOWER S.C.S. PEOPLE, THEY
8 REALLY DON'T HAVE AN ADEQUATE FULL COMPREHENSION OF
9 THE -- PARTICULARLY THE SELF-DESTRUCTIVE ASPECTS OF
10 MAKING CONFESSIONS.

11 Q. JUST A COUPLE MORE, DOCTOR. AGAIN YOU'RE NOT A
12 PHYSICIAN?

13 A. NO; I'M NOT A PHYSICIAN.

14 Q. YOU HAD AVAILABLE TO YOU AN M.R.I., DID YOU NOT?

15 A. YES, SIR.

16 Q. ALL RIGHT, SIR. AND YOU REVIEWED THAT?

17 A. YES, SIR.

18 Q. AND AN M.R.I. WOULD SHOW BRAIN ABNORMALITIES?

19 A. AN M.R.I. IS CAPABLE OF DETECTING CERTAIN BRAIN
20 ABNORMALITIES. AND WHEN IT DOES, IT IS CERTAINLY
21 DEFINITIVE FOR THOSE.

22 Q. BUT THE M.R.I. THAT YOU HAD ACCESS TO SHOWED NO
23 BRAIN ABNORMALITIES?

24 A. THE M.R.I. DID NOT SHOW ANY STRUCTURAL DAMAGE TO
25 THE BRAIN; THAT'S CORRECT.

RANDY WAID - CROSS/MR. BAILEY

1 Q. WHAT'S A TOMOGRAPHY?

2 A. POSITRON ADMISSION TOMOGRAPHY; IS THAT WHAT YOU'RE
3 REFERRING TO, MR. BAILEY?

4 Q. YES, SIR.

5 A. THAT MEASURES THE METABOLIC ACTIVITY OF THE BRAIN;
6 REALLY SPECIFICALLY THE GLUCOSE METABOLIC
7 ACTIVITY. THE PECK SCAN OR SPEC SCAN MEASURES
8 REALLY MORE BRAIN ACTIVITY CHANGES AS THEY RELATE
9 TO NEUROTRANSMITTER AND CERTAIN IMPORTANT
10 SUBSTANCES IN THE BRAIN; GLUCOSE METABOLISM. AND
11 THESE ARE FINER TECHNIQUES, CERTAINLY MORE RECENT
12 TECHNIQUES BEING DEVELOPED ALL THE TIME TO MEASURE
13 POTENTIAL BRAIN CHANGES ASSOCIATED WITH
14 NEUROPSYCHOLOGY.

15 Q. ALL RIGHT, SIR. AND YOU DIDN'T USE THAT TEST TO
16 DETERMINE WHETHER OR NOT THERE WERE ANY BRAIN
17 CHANGES IN MR. SIMMONS?

18 A. THEY'RE INCREDIBLY EXPENSIVE, AND WE DON'T HAVE ONE
19 IN THE STATE THAT WE THOUGHT A PECK SCAN WOULD HAVE
20 BEEN A VERY USEFUL STUDY ON HIS BRAIN.

21 Q. BUT THE ANSWER TO MY -- SO THE ANSWER IS NO? I
22 DIDN'T ASK YOU WHY.

23 A. WELL, I JUST WANTED TO MAKE SURE. I'D LOVE TO;
24 BUT, NO.

25 Q. ALL RIGHT. AND THERE WAS A NEUROLOGICAL ASSESSMENT

RANDY WAID - CROSS/MR. BAILEY

1 DONE AT THE HALL INSTITUTE BY A PHYSICIAN; IS THAT
2 CORRECT?

3 A. THERE WAS A BEDSIDE NEUROLOGICAL EXAMINATION DONE,
4 OR A NEUROLOGICAL EXAMINATION DONE OR A
5 NEUROLOGICAL EXAMINATION -- EXCUSE ME -- DONE.

6 Q. AND THAT WAS COMPLETELY NORMAL; IS THAT RIGHT?

7 A. YES, IT WAS.

8 Q. AND WAS THERE AN E.E.G. DONE?

9 A. YES, THERE WAS.

10 Q. YOU REVIEWED THAT?

11 A. YES.

12 Q. WHAT IS THAT SUPPOSED TO DO?

13 A. IT MADE SURE HIS ELECTRICAL ACTIVITY CHANGES
14 GENERALLY ASSOCIATED WITH SEIZURE OR EPILEPSY; WHEN
15 IT'S POSITIVE IT CERTAINLY MEANS SOMETHING BAD. IT
16 WAS NORMAL.

17 Q. HOW ABOUT A CAT SCAN? DID YOU DO A CAT SCAN OR
18 HAVE A CAT SCAN DONE?

19 A. I DON'T REMEMBER IF THEY DID AT HALL. I ONLY WAS
20 AVAILABLE TO THE M.R.I. WHICH A CAT SCAN AND M.R.I.
21 -- AN M.R.I., IF ANYTHING, MIGHT CAPTURE SOMETHING
22 MORE. BUT THEY BOTH MEASURE STRUCTURAL CHANGES. I
23 WASN'T AWARE OF THE CAT SCAN; I'M SORRY.

24 Q. YOU'RE NOT AWARE OF ANY TESTS, ANY PHYSICAL TESTS,
25 X-RAY, CAT SCANS, M.R.I., PET, E.E.G., ANY OF THESE

1 THINGS THAT A PHYSICIAN -- NOT A PSYCHOLOGIST --
2 BUT A PHYSICIAN WOULD USE TO DIAGNOSE BRAIN DAMAGE,
3 ARE YOU?

4 A. OH, THEY USE THOSE TO DIAGNOSE BRAIN DAMAGE. A
5 PHYSICIAN WOULD NOT TELL YOU THAT THOSE ARE THE
6 ONLY MEANS FOR DIAGNOSING BRAIN DAMAGE. IT'S WELL
7 DOCUMENTED THAT NORMAL M.R.I.S CAN OCCUR EVEN WITH
8 BRAIN DAMAGE. BUT THEY DEFINITELY ARE A PART OF
9 THE WORK-UP FOR ANY KIND OF NEURO-COGNITIVE OR
10 NEUROPATHOLOGY, AND THEY WERE NORMAL IN MR.
11 SIMMONS' CASE.

12 Q. ALL OF THEM?

13 A. YES, THEY WERE.

14 Q. SO YOU'RE NOT AWARE OF ANY OF THOSE KINDS OF TESTS
15 THAT SHOWED ANY BRAIN ABNORMALITIES?

16 A. THOSE TESTS THAT WERE CONDUCTED DID NOT SHOW A
17 BRAIN ABNORMALITY.

18 Q. YOUR TESTIMONY THAT HE'S LOST SOME BRAIN POWER IS
19 BASED ON HIS PERFORMANCE OF THE WRITTEN TESTS THAT
20 YOU GAVE HIM OVER A PERIOD OF HOW MANY HOURS?

21 A. WELL, AGAIN, ABOUT SEVEN HOURS OF CONTACT. I WOULD
22 SAY THE TESTS THEMSELVES TOOK ONLY ABOUT FOUR OR
23 FIVE HOURS IN CONJUNCTION WITH THE OTHER TESTS THAT
24 WERE DONE BY EVERYBODY ELSE.

25 Q. ALL RIGHT, SIR.

RANDY WAID - CROSS/MR. BAILEY

1 A. AND COMPARED TO, AGAIN, THE MODEL OF WHERE HE WAS
2 BASED ON TESTING THAT WAS DONE THROUGHOUT HIS
3 EDUCATIONAL YEARS AS WELL AS HIS HISTORY AND ALL
4 THE OTHER INFORMATION WE HAVE ABOUT HIM.

5 Q. BUT YOUR OPINION IS BASED ON NO MEDICAL EVIDENCE;
6 ASSUMPTION OF NOT MALINGERING; AND THESE ELEVEN
7 TESTS THAT YOU GAVE; IS THAT CORRECT?

8 A. AND WITH---

9 Q. AND CONFERRING WITH THESE OTHER PEOPLE THAT HAVE
10 TESTIFIED PREVIOUSLY IN THIS CASE?

11 A. THE ONLY THING I WOULD ARGUE ABOUT IS THERE IS
12 MEDICAL EVIDENCE THAT HE HAD A SUBSTANCE ABUSE
13 PROBLEM AND A POLYSUBSTANCE ABUSE DEPENDANCE AND
14 ABUSE PROBLEM.

15 Q. BUT NO MEDICAL EVIDENCE OF ANY PHYSICAL EFFECT OF
16 THAT ABUSE IS THERE, DOCTOR?

17 A. NOT CURRENTLY; NO, SIR.

18 Q. NOT CURRENTLY?

19 A. NO.

20 Q. NOT EVER?

21 A. HE'S HAD A HISTORY OF SOME TREATMENT FOR SUBSTANCE
22 ABUSE AND SUBSTANCE ABUSE RELATED PROBLEMS.

23 Q. OKAY. NOBODY OPERATED ON HIS BRAIN AND SAID
24 THERE'S A MILLION DEAD CELLS OVER HERE AND THE
25 FRONTAL LOBE IS BAD?

RANDY WAID - CROSS/MR. BAILEY

1 A. NO. UNFORTUNATELY, NO.

2 Q. THANK YOU. THAT'S ALL I HAVE AT THIS TIME.

3 THE COURT: ANYTHING ON RE-DIRECT,
4 PLEASE?

5 MR. THEOS: NO, SIR.

6 THE COURT: STEP DOWN. NEXT
7 WITNESS, GENTLEMEN.

8 MR. THEOS: YOUR HONOR, MIGHT WE
9 APPROACH?

10 THE COURT: YES, SIR.

11 (AT THIS TIME, BENCH CONFERENCE IS HELD.)

12 THE COURT: ALL RIGHT, LADIES AND
13 GENTLEMEN; LET ME PLEASE SEND YOU TO YOUR ROOM TO
14 POWDER YOUR NOSE AND STRETCH YOUR LEGS. BE
15 PATIENT. THANK YOU.

16 (AT THIS TIME JURY RETIRES TO JURY ROOM.)

17 THE COURT: MR. THEOS, DO YOU HAVE
18 ANY OTHER OR FURTHER WITNESSES?

19 MR. THEOS: NO, SIR, YOUR HONOR.

20 THE COURT: ALL RIGHT, MR. SIMMONS,
21 PLEASE STAND. (DEFENDANT COMPLIES.) MR. SIMMONS,
22 EARLIER THIS MORNING THE COURT HAD SHARED WITH YOU
23 INFORMATION RELATIVE TO YOUR DECISION AND YOUR
24 RIGHT TO TAKE THE WITNESS STAND OR NOT TO TAKE THE
25 WITNESS STAND. HAVE YOU HAD FULL OPPORTUNITY AND

MOTIONS

1915

1 TIME TO CONSIDER THAT?

2 MR. SIMMONS: YES, SIR.

3 THE COURT: DO YOU WISH TO CONSULT
4 OR CONFER OR DISCUSS WITH YOUR LAWYERS AT THIS TIME
5 IN PRIVATE YOUR DECISION?

6 MR. SIMMONS: NO, SIR.

7 THE COURT: HAVE YOU ARRIVED AT A
8 DECISION?

9 MR. SIMMONS: YES, SIR.

10 THE COURT: WHAT IS YOUR DECISION?

11 MR. SIMMONS: NOT TO TAKE THE STAND.

12 THE COURT: NOT TO TAKE THE STAND?

13 ALL RIGHT. BE SEATED, PLEASE. (DEFENDANT
14 COMPLIES.) SO, MR. SOLICITOR, DO YOU HAVE ANY
15 FURTHER WITNESSES?

16 MR. BAILEY: YOUR HONOR, I MAY HAVE
17 ONE OTHER ONE. IF I COULD HAVE A COUPLE OF MINUTES
18 TO TALK TO DR. SANDLER, AND I CAN LET YOU KNOW IN
19 ABOUT TWO MINUTES.

20 THE COURT: ALL RIGHT; PLEASE
21 BECAUSE IF YOU -- AND IT MATTERS NOT TO ME WHETHER
22 YOU OR THE DEFENSE HAVE OTHER WITNESSES. I JUST
23 NEED TO PLAN OUR SCHEDULE OR FURTHER PROCEEDINGS.
24 AND IF WE NEED TO HEAR MOTIONS; WE NEED TO REVIEW
25 THE CHARGES AND TO THEN PROCEED TO THE CLOSING

LESLIE N. SANDLER - DIRECT/MR. BAILEY

ARGUMENTS IF YOU DO NOT. BUT, AGAIN, I'M NOT
ENCOURAGING YOU ONE WAY OR THE OTHER. SO WE'LL
STAND AT EASE FOR ABOUT TEN MINUTES, PLEASE.

MR. BAILEY: THANK YOU, YOUR HONOR.
(BRIEF RECESS.)

- - - - -

THE COURT: ALL RIGHT. BRING THE
JURY IN, PLEASE.

(AT THIS TIME JURY RETURNS TO OPEN COURT.)

THE COURT: ALL RIGHT. YOU MAY
PROCEED WITH OTHER TESTIMONY, PLEASE.

MR. THEOS: YOUR HONOR, THE DEFENSE
RESTS.

THE COURT: THANK YOU, SIR.
SOLICITOR?

MR. BAILEY: YOUR HONOR, THE STATE
HAS ONE WITNESS IN REPLY.

THE COURT: ALL RIGHT. YOU MAY CALL
YOUR DOCTOR.

MR. BAILEY: DR. SANDLER.

THE COURT: ALL RIGHT, DR. SANDLER.
YOU'RE STILL UNDER OATH, PLEASE.

- - - - -

WHEREUPON,

DR. LESLIE N. SANDLER, WHO BEING

PREVIOUSLY SWORN TO TELL THE TRUTH,
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. BAILEY:

Q. DR. SANDLER, YESTERDAY WHEN YOU TESTIFIED YOU GAVE
US THE FULL BENEFIT OF SOME OF YOUR QUALIFICATIONS
AS AN EXPERT IN THE FIELD OF MENTAL RETARDATION; IS
THAT CORRECT?

A. THAT'S CORRECT, SIR.

Q. ALL RIGHT, SIR. AND WOULD YOU STATE WHETHER OR NOT
YOU HAVE ANY TRAINING AND EXPERTISE IN
NEUROPSYCHOLOGY?

A. I DO, SIR.

Q. DO YOU HAVE YOUR C.V. WITH YOU, DR. SANDLER?

A. I DO, SIR.

Q. ALL RIGHT, SIR. AND REFERRING TO THAT; PLEASE TELL
THE JURY WHAT EXPERTISE YOU HAVE DEVELOPED IN THE
AREA OF NEUROPSYCHOLOGY.

A. SINCE 1983 I'VE BEEN A MEMBER OF THE NATIONAL
ACADEMY OF NEUROPSYCHOLOGY. PRIOR TO THAT
CREDENTIAL, I'VE BEEN INVOLVED IN WORKSHOPS WITH
RALPH REITAN WHO HAS CREATED THE FIELD OF
NEUROPSYCHOLOGY.

Q. THIS MIGHT BE A GOOD TIME TO TELL THE JURY, DOCTOR,
WHAT NEUROPSYCHOLOGY IS.

LESLIE N. SANDLER - DIRECT/MR. BAILEY

1 A. OF COURSE. THANK YOU, MR. BAILEY.

2 NEUROPSYCHOLOGY, LADIES AND GENTLEMEN, IS A STUDY
3 OF BRAIN BEHAVIOR RELATIONSHIPS. IT'S THE STUDY OF
4 HOW ONE GOES BEYOND AN INTELLIGENCE SCORE BEYOND AN
5 I.Q. AND LOOKS AT CORRELATIONS BETWEEN BEHAVIOR,
6 THINGS THAT PEOPLE DO, AND THE INTEGRITY OF THE
7 BRAIN, THE WAY THE BRAIN IS WORKING OR FUNCTIONING.

8 Q. ALL RIGHT, SIR. DR. SANDLER, GO AHEAD AND
9 CONTINUE, PLEASE.

10 A. THANK YOU, SIR. THESE WORKSHOPS HAVE GENERALLY
11 BEEN TWENTY-FIVE HOURS TO A WEEK IN DURATION. THEY
12 HAVE INCLUDED WORKSHOPS IN HUMAN CLINICAL
13 NEUROPSYCHOLOGY, ADVANCED WORKSHOPS IN NEUROLOGICAL
14 INFERENCES, CLINICAL NEUROPSYCHOLOGICAL
15 APPLICATIONS WITH REITAN. IN ADDITION I'VE STUDIED
16 WITH ANLEYS CHRISTIANSON OF SCANDINAVIA IN TERMS OF
17 APPLYING THE TECHNIQUES TO OTHER FOLLOW-UP CARE IN
18 OTHER TYPES OF HEAD INJURIES AND OTHER TYPES OF
19 NEUROPSYCHOLOGICAL CONDITIONS. THE
20 INTERDISCIPLINARY APPROACH TO TREATING TRAUMATIC
21 HEAD INJURY, BRAIN LANGUAGE RELATIONSHIPS AND HEAD
22 TRAUMA, AND LEARNING DISABILITIES, HEAD INJURY AND
23 REHABILITATION WITH REITAN IN PHOENIX, MEDICAL
24 COLLEGE OF VIRGINIA IN REHABILITATION OF BRAIN
25 INJURED CHILD AND ADULT, THE IMPLICATIONS OF HEAD

LESLIE N. SANDLER - DIRECT/MR. BAILEY

1 TRAUMA IN DEVON, PENNSYLVANIA. THE PROCESS
2 APPROACH TO NEUROPSYCHOLOGICAL ASSESSMENT BY EITHER
3 TAPLAND; THE NEUROPSYCHOLOGICAL PROCESSES OF THE
4 NINETIES BY CHARLES GOLDEN. CHARLES GOLDEN AND
5 EDITH KAPLAN ARE TWO OF THE COUNTRY'S LEADING
6 NEUROPSYCHOLOGISTS TOGETHER WITH DR. RALPH REITAN.
7 NELSON BUTTERS WHO WAS THE NATIONALLY KNOWN EXPERT
8 IN DEMENTIA WHO HAS SINCE PASSED AWAY TRAGICALLY
9 FROM DEMENTIA HIMSELF. THE NEUROPSYCHOLOGIST AS AN
10 EXPERT WITNESS; CHILD NEUROPSYCHOLOGY IN LEARNING
11 DISABILITIES; THE VALIDITY OF AGE AND EDUCATIONAL
12 NORMS. THESE HAVE ALL BEEN WEEK-LONG SEMINARS WITH
13 DR. REITAN. MOST RECENTLY IN 1995 WITH DR. REITAN,
14 DR. WOLFSON; NEUROLOGICAL INFERENCES OF UNDERLYING
15 BRAIN DISORDERS. AND IN 1995 TOXIC BRAIN INJURY
16 NEUROTOXICOLOGY IN TERMS OF THE POSSIBLE CHEMICAL
17 INSULTS THAT CAN OCCUR TO THE BRAIN AT THE LEVEL OF
18 THE CEREBRAL HEMISPHERES. THE BRAIN IS A
19 REMARKABLE ORGAN AT DIFFERENT LEVELS. AT THE LOWER
20 LEVELS, IT ALLOWS US TO MOVE. AND IT ALLOWS US TO
21 HAVE LOWER BRAIN FUNCTIONS, AND THEN THERE ARE
22 HIGHER BRAIN FUNCTIONS. AND THESE HIGHER BRAIN
23 FUNCTIONS ARE PARTICULARLY SUBJECT TO SUBTLETIES OF
24 NEUROTOXICOLOGY IN TERMS OF WORK RELATED AGENTS
25 SUCH AS SOLVENTS AS WELL AS ALCOHOL AND SUBSTANCE

LESLIE N. SANDLER - DIRECT/MR. BAILEY

ABUSE.

Q. DOCTOR, DO YOU HAVE ANY CURRENT PROFICIENCY
DECISION CERTIFICATIONS IN THIS FIELD, IN
NEUROPSYCHOLOGY?

A. MY CURRENT PROFICIENCY CERTIFICATION WAS GRANTED
AND EARNED BY THE AMERICAN PSYCHOLOGICAL
ASSOCIATION COLLEGE OF PROFESSIONAL PSYCHOLOGY IN
1996 WHEN THE COLLEGE FIRST STARTED GRANTING
CERTIFICATES OF PROFICIENCY IN THE TREATMENT OF
ALCOHOL AND OTHER PSYCHOACTIVE SUBSTANCE ABUSE
DISORDERS. IN ADDITION I AM A DIPLOMATE IN THE
AMERICAN COLLEGE OF FORENSIC PSYCHOLOGY SINCE
1984. I'M A FELLOW OF THE AMERICAN COLLEGE OF
FORENSIC PSYCHOLOGY SINCE 1982. IN ADDITION I'M A
MEMBER AND FELLOW OF THE PENNSYLVANIA PSYCHOLOGICAL
ASSOCIATION SINCE 1976; NATIONAL ACADEMY OF
NEUROPSYCHOLOGISTS SINCE 1983; THE AMERICAN ORTHO
PSYCHIATRIC ASSOCIATION, A MEMBER SINCE 1982, A
FELLOW SINCE 1987; THE AMERICAN ACADEMY OF EXPERTS
AND TRAUMATIC STRESS; THE INTERNATIONAL ACADEMY OF
BEHAVIORAL MEDICINE COUNSELING AND PSYCHOTHERAPY
SINCE 1987 IN WHICH BODY I HAVE THE ACCREDITATION
AS A FELLOW AND A DIPLOMATE.

Q. ALL RIGHT. DOCTOR, HAVE YOU TESTIFIED AS AN EXPERT
IN THE PAST IN THE FIELD TO NEUROPSYCHOLOGY?

1 A. MANY TIMES, SIR.

2 MR. BAILEY: YOUR HONOR, I WOULD
3 TENDER DR. SANDLER AS AN EXPERT IN THE FIELD OF
4 NEUROPSYCHOLOGY.

5 THE COURT: WOULD YOU LIKE TO CROSS,
6 MR. THEOS?

7 MR. THEOS: YES, SIR.

8 EXAMINATION

9 BY MR. THEOS:

10 Q. DR. SANDLER, YOU'RE BOARD CERTIFIED IN THE FIELD OF
11 NEUROPSYCHOLOGY?

12 A. NO.

13 MR. THEOS: NO OTHER QUESTIONS, YOUR
14 HONOR.

15 THE COURT: ALL RIGHT. PROCEED.

16 MR. BAILEY: THANK YOU.

17 CONTINUED DIRECT EXAMINATION

18 BY MR. BAILEY:

19 Q. DOCTOR, WERE YOU PRESENT WHEN DR. WAID TESTIFIED
20 YESTERDAY AND AGAIN TODAY?

21 A. YES, SIR.

22 Q. AND AT THE CLOSE OF YESTERDAY'S TESTIMONY, DID YOU
23 GET A PACKAGE OF MATERIAL PURPORTED TO BE DR.
24 WAID'S FILE?

25 A. YES, SIR.

1 Q. ALL RIGHT, SIR. AND HAD YOU SEEN THAT MATERIAL
2 BEFORE?

3 A. NO, SIR.

4 Q. ALL RIGHT, SIR. APPROXIMATELY WHAT TIME DID YOU
5 GET THE MATERIAL?

6 A. APPROXIMATELY TEN O'CLOCK P.M.

7 Q. OKAY. AND WHAT, IF ANYTHING, DID YOU DO WITH IT?

8 A. I STUDIED IT FROM TEN TO ABOUT TWELVE; THEN WOKE UP
9 A LITTLE BEFORE FOUR, AND HAVE STUDIED IT FROM FOUR
10 THIS MORNING TO THE TIME WE LEFT COLUMBIA WHICH WAS
11 ABOUT 6:30.

12 Q. ALL RIGHT, SIR. AND JUST GENERICALLY WHAT DID THAT
13 FILE CONSIST OF? WHAT TYPE OF MATERIAL?

14 A. THE FILE CONSISTED -- WAS MOST CONSPICUOUS IN THE
15 ABSENCE OF NEUROPSYCHOLOGICAL DATA. THE FILE
16 CONSISTED OF SEVERAL PIECES OF TESTS DATA.
17 OMISSIONS INCLUDED THE APHASIA SCREENING TEST, THE
18 TACTILE PERFORMANCE TEST, AND THE SPEECH SOUNDS
19 PERCEPTION TEST WHICH INDEED ARE THE ONLY TESTS
20 THAT ARE REITAN APPROVED NEUROPSYCHOLOGICALLY
21 ADAPTED AND ACCEPTED TESTS TO DETERMINE
22 NEUROPSYCHOLOGICAL IMPAIRMENTS.

23 Q. ALL RIGHT, SIR. AND THE TESTS THAT WERE PERFORMED;
24 HOW WOULD YOU CHARACTERIZE THOSE TESTS BASED ON THE
25 FILE THAT YOU GOT FROM DR. WAID?

LESLIE N. SANDLER - CONT'D DIRECT/MR. BAILEY

1 A. TO ME, MR. BAILEY, I WOULD CHARACTERIZE THEM AS
2 SUPERFICIAL AND INCOMPLETE.

3 Q. ALL RIGHT, SIR. AND DO YOU HAVE AN OPINION TO A
4 REASONABLE DEGREE OF SCIENTIFIC CERTAINTY WHETHER
5 OR NOT THE TESTS THAT WERE ADMINISTERED BE
6 CONSIDERED A STANDARD BATTERY OF NEUROPSYCHOLOGICAL
7 TESTS?

8 A. YES, I DO, SIR.

9 Q. WHAT IS THAT OPINION?

10 A. IT IN NO WAY REPRESENTS A STANDARD BATTERY OF
11 NEUROPSYCHOLOGICAL TESTS THAT ANY NEUROPSYCHOLOGIST
12 IN THIS COUNTRY WOULD ACCEPT.

13 Q. ALL RIGHT, SIR. AND DO YOU HAVE AN OPINION TO A
14 REASONABLE DEGREE OF MEDICAL CERTAINTY WHETHER OR
15 NOT ANY LEGITIMATE OPINION WOULD BE DERIVED FROM
16 THE COMBINATION OF ALL THOSE TEST RESULTS THAT YOU
17 REVIEWED?

18 A. NOT FROM A NEUROPSYCHOLOGICAL POINT OF VIEW, SIR.

19 Q. THANK YOU, SIR. PLEASE ANSWER ANY QUESTIONS THE
20 DEFENDANT MAY HAVE FOR YOU.

21 THE COURT: CROSS?

22 MR. THEOS: WE DON'T HAVE ANY
23 QUESTIONS OF THIS WITNESS.

24 THE COURT: ALL RIGHT, SIR. STEP
25 DOWN, PLEASE.

MOTIONS

1 MR. BAILEY: NEXT WITNESS?

2 MR. BAILEY: YOUR HONOR, THAT'S ALL
3 WE HAVE.

4 THE COURT: ALL RIGHT. ANYTHING
5 FURTHER FROM MR. THEOS OR THE DEFENSE?

6 MR. THEOS: NO, SIR.

7 THE COURT: ALL RIGHT, MADAM
8 FORELADY, LADIES AND GENTLEMEN OF THE JURY; HERE WE
9 GO AHEAD SENDING YOU OUT. PLEASE IF Y'ALL WOULD
10 LIKE TO TAKE A WALK UP OR DOWN THE STREET, TELL THE
11 BAILIFF OF THAT. AND, LADIES AND GENTLEMEN, YOU
12 HAD INDICATED YOU DESIRE TO EAT AT GEORGIO'S? IT
13 IS NOW ELEVEN O'CLOCK. I NEED TO HEAR SOME MATTERS
14 ON THE RECORD. I NEED TO REVIEW THE CHARGES WITH
15 THE ATTORNEYS. I ANTICIPATE BY 11:30 THAT WE'LL BE
16 READY FOR CLOSING ARGUMENTS BY THE GENTLEMEN OR THE
17 DEFENDANT IF HE SO DESIRES IN THIS CASE. IT IS
18 ANTICIPATED THAT THOSE ARGUMENTS WILL TAKE ABOUT AN
19 HOUR FOR THE STATE AND AN HOUR FOR THE DEFENDANT,
20 ALBEIT I'M NOT LIMITING THEM TO THEIR TIME. ALL WE
21 CAN DO IS ESTIMATE IT THE BEST WE CAN.

22 WHAT WE HAD ANTICIPATED DOING WAS
23 WE HAVE FIFTEEN OR SO COPIES OF THE MENUS FROM
24 GEORGIO'S AND LETTING YOU ORDER AND HAVING THAT
25 BROUGHT IN AND ASKING YOU TO TRY AND TIME IT SO

MOTIONS

1 THAT IN THEIR COOKING AND PREPARING IT, IT WON'T BE
2 COLD; AND AT ABOUT 1:30 THEY WILL HAVE THE FOOD
3 HERE FOR YOU TO EAT. I DON'T WANT TO INTERRUPT OR
4 BREAK THE CHARGES SO TO SPEAK. I'D LIKE FOR YOU TO
5 HEAR BOTH CHARGES, AND THEN WE CAN RECESS FOR YOU
6 TO EAT YOUR FOOD. AND AFTER WE FINISH THAT, THE
7 COURT WILL INSTRUCT YOU AS TO THE LAW APPLICABLE TO
8 THE FACTS OF THE CASE AS YOU, LADIES AND GENTLEMEN,
9 MAY FIND THOSE FACTS TO BE. ONLY THEN WOULD YOU BE
10 ALLOWED TO DELIBERATE. I WILL INSTRUCT YOU WHEN TO
11 DO SO. I ANTICIPATE MY CHARGE WILL BE BETWEEN
12 TWENTY-FIVE AND THIRTY MINUTES. SO WE COULD EAT BY
13 1:30 IF YOU BROKE FOR LUNCH WHICH IS THIRTY OR
14 FORTY MINUTES OR LONGER; BY 2:30 BY 3:00 THAT Y'ALL
15 WOULD BE IN A POSTURE TO COMMENCE YOUR
16 DELIBERATIONS.

17 AGAIN DON'T LET ANYTHING I SAY IN
18 ANY WAY INDICATE THAT I'M TRYING TO HURRY YOU UP OR
19 I'M TRYING TO SLOW YOU DOWN. WE'RE JUST TRYING TO
20 KEEP THE RAILROAD MOVING AND MINIMIZE YOUR WAIT
21 TIME. BUT THERE ARE CERTAIN THINGS THAT HAVE TO BE
22 DONE IN COURT OUTSIDE OF YOUR PRESENCE THAT
23 NECESSARILY MEANS THAT THERE ARE TIMES WHEN YOU
24 HAVE TO WAIT. AND I WOULD SEEK YOUR INDULGENCE AND
25 ASK DO YOU UNDERSTAND THAT. SO DOES THAT SOUND

MOTIONS

1 REASONABLE? NOW, IF Y'ALL HAD RATHER WAIT UNTIL WE
2 EAT TO START THE ARGUMENTS, THEN WE'LL BREAK AND
3 GET FRESH AIR AND DRIVE TO GEORGIO'S; BUT THEN
4 YOU'D HAVE HAD TO ORDER; YOU HAVE TO WAIT FOR THEM
5 TO PREPARE IT; AND THAT MIGHT DELAY THINGS
6 FURTHER. AGAIN, I THINK IT'S BETTER TO BRING THE
7 FOOD IN. BUT IF YOU HAVE A DIFFERENT VIEW OR
8 THOUGHT, I'LL BE GLAD TO LISTEN TO THE REASONING OF
9 IT, MADAM FORELADY.

10 THE FORELADY: BRINGING IT IN IS
11 FINE.

12 THE COURT: DOES THAT SOUND OKAY?

13 THE FORELADY: YES, SIR.

14 THE COURT: AND WE STILL HAVE THE
15 POTENTIAL -- GALLIGER'S IS THE NAME OF THE PLACE?

16 THE BAILIFF: GILLIGAN'S.

17 THE COURT: GILLIGAN'S LIKE
18 GILLIGAN'S ISLAND?

19 THE BAILIFF: YES, SIR.

20 THE COURT: THERE'S A GILLEY'S IN
21 HOUSTON. THEY SAY THE GRILL DOESN'T CLOSE THERE
22 UNTIL TEN O'CLOCK. WE'LL JUST HAVE TO SEE HOW
23 THINGS UNFOLD AS TO THAT. BUT THAT IS THE SAME
24 POSSIBILITY FOR THE EVENING. SO WITH THAT, LET ME
25 PLEASE EXCUSE YOU TO GO TO YOUR ROOM. AND, AGAIN,

MOTIONS

1 I THINK IT'S GOING TO BE AT LEAST THIRTY MINUTES.
2 SO IF ALL OF YOU WANT TO WALK OUTSIDE, GO AHEAD.
3 (AT THIS TIME, JURY RETIRES TO JURY ROOM.)

4 THE COURT: A JUROR INQUIRES,
5 GENTLEMEN, IF HE COULDN'T HAVE THE BAILIFF GET SOME
6 MEDICINE FOR HIM. I TOLD HIM THAT WOULD BE TAKEN
7 CARE OF SOME TIME DURING THE DAY. ARE THERE ANY
8 MOTIONS, PLEASE, GENTLEMEN?

9 MR. BAILEY: NONE FROM THE STATE.

10 MR. THEOS: YES, SIR, YOUR HONOR.
11 AT THIS TIME THE DEFENSE WOULD RENEW ITS MOTIONS
12 FOR A DIRECTED VERDICT. AND, YOUR HONOR, WE WOULD
13 ARGUE AGAIN THAT BUT FOR THE ADMISSION OF THE
14 STATEMENTS OF MR. SIMMONS THAT WE OBJECTED TO AND
15 FILED A MOTION TO SUPPRESS THE ADMISSIBILITY OF,
16 THIS MATTER WOULD NOT BE BEFORE THE COURT MUCH LESS
17 BEFORE A JURY. AND WE WOULD ARGUE NONETHELESS THAT
18 EVEN IN LIGHT OF THOSE STATEMENTS AND THE LACK OF
19 EVIDENCE TO CORROBORATE THOSE STATEMENTS THAT IT
20 WOULD BE INAPPROPRIATE TO ALLOW THIS MATTER TO GO
21 TO THE JURY.

22 THE COURT: ALL RIGHT, SIR. DO YOU
23 WANT TO BE HEARD ON THAT, MR. BAILEY?

24 MR. BAILEY: YOUR HONOR, IF YOU
25 DESIRE FOR ME TO, I WILL.

MOTIONS

1

THE COURT: I DON'T.

2

MR. BAILEY: NO, SIR.

3

THE COURT: I WANT TO GIVE YOU THE

4

OPPORTUNITY.

5

MR. BAILEY: NO, SIR.

6

THE COURT: ALL RIGHT, MR. THEOS; I

7

RESPECTFULLY DENY YOUR MOTIONS. THE COURT STANDS

8

ON ITS PREVIOUS MOTIONS AS BEING CORRECT; AND THERE

9

IS EVIDENCE IN THE RECORD, DEPENDING ON WHO AND

10

WHAT THE JURY BELIEVES, THAT THEY MAY CONCLUDE THAT

11

THE STATE HAS PROVEN THE GUILT OF THE DEFENDANT

12

BEYOND A REASONABLE DOUBT. ON THE OTHER HAND, THE

13

JURY MAY WELL CONCLUDE HE'S NOT GUILTY. I EXPRESS

14

NO VIEW OF THAT BECAUSE I HAVE NO VIEW OF MY OWN.

15

SO I DENY YOUR MOTIONS. NOW, GENTLEMEN, AS YOU

16

KNOW THE STATUTE PROVIDES THAT IN CLOSING ARGUMENTS

17

THAT THE DEFENDANT'S COUNSEL AND THE DEFENDANT WILL

18

BE AFFORDED THE LAST ARGUMENT. SO AS WE DISCUSSED

19

IN CHAMBERS -- PLEASE CORRECT ME IF I MISSTATE

20

ANYTHING -- THE STATE WILL OPEN; THE DEFENSE WILL

21

CLOSE?

22

MR. BAILEY: YES, SIR.

23

THE COURT: DOES THE STATE WISH MORE

24

THAN ONE ARGUMENT?

25

MR. BAILEY: NO, SIR.

MOTIONS

1 THE COURT: AND DOES THE DEFENDANT
2 WISH TWO ARGUMENTS, THREE ARGUMENTS?

3 MR. THEOS: ONE ARGUMENT, YOUR
4 HONOR.

5 THE COURT: AND THAT WOULD BE YOU,
6 MR. THEOS?

7 MR. THEOS: THAT WOULD BE ME.

8 THE COURT: ALL RIGHT, MR. SIMMONS;
9 WOULD YOU STAND, PLEASE? (DEFENDANT COMPLIES.) MR.
10 SIMMONS, THE LAW IS SET FORTH BY THE LEGISLATURE ON
11 PROCEDURES TO BE USED IN A DEATH PENALTY CASE. DO
12 YOU UNDERSTAND THAT?

13 MR. SIMMONS: YES, SIR.

14 THE COURT: AND PART OF THAT LAW IS
15 THAT DURING THE CLOSING ARGUMENTS THAT THE
16 DEFENDANT AND HIS COUNSEL WOULD BE AFFORDED THE
17 OPPORTUNITY -- AND I'M REFERRING TO SECTION
18 16-3-20, SUB-PART B; THE STATE, THE DEFENDANT, AND
19 HIS COUNSEL ARE PERMITTED TO PRESENT ARGUMENTS.
20 AND I WANT TO AFFORD YOU THAT OPPORTUNITY TO ARGUE
21 IF YOU WISH. WOULD YOU LIKE TO MAKE A CLOSING
22 ARGUMENT TO THE JURY?

23 MR. SIMMONS: NO, SIR.

24 THE COURT: ALL RIGHT. THANK YOU.
25 SO, GENTLEMEN, IN REGARD TO THE REQUEST TO CHARGE

CHARGE CONFERENCE

1 -- AND MADAM COURT REPORTER, LET THE RECORD
2 REFLECT THAT THE LAWYERS VERY KINDLY LAST EVENING
3 MET WITH THE COURT FOR A SECOND TIME AND WHAT I
4 CALL A CHARGE CONFERENCE. AND GENTLEMEN, THESE MAY
5 NOT BE IN PRECISE ORDER. BUT PLEASE CRAVE
6 REFERENCE TO YOUR REQUEST SO THAT WE CAN MAKE SURE
7 THAT WE'RE IN AGREEMENT. THE COURT REVIEWED THE
8 FAILURE OF THE DEFENDANT TO TESTIFY CHARGE, AND
9 THAT WAS AGREED UPON. PLEASE AT THE TIME THAT I
10 MENTION IT, IF YOU DISAGREE I WOULD LIKE FOR YOU TO
11 GO AHEAD AND COMMENT AT THAT TIME RATHER THAN WAIT
12 UNTIL THE END. I THINK IT WILL KEEP A BETTER
13 RECORD FOR THE COURT REPORTER. STATE'S REQUEST TO
14 CHARGE NUMBER ONE WE AGREED UPON AS BEING CORRECT.
15 AS REGARDS THE DEFENDANT'S REQUEST NUMBER NINE, THE
16 FIRST PARAGRAPH REGARDING THE CORPUS DELICTI WAS
17 WITHDRAWN, AND THE COURT WILL CHARGE THE BALANCE OF
18 THAT THAT'S RELATIVE TO CONFESSION. AS REGARDS THE
19 STATE'S REQUEST NUMBER SIX, AS I UNDERSTAND IT YOU
20 OBJECTED TO THAT, MR. THEOS? THAT WAS HIS
21 DEFINITION OF MALICE; OR DO YOU AGREE TO THE
22 CORRECTNESS OF THAT LAW?

23 MR. THEOS: YOUR HONOR, WE'LL
24 WITHDRAW OUR OBJECTION.

25 THE COURT: ALL RIGHT. THAT IS

CHARGE CONFERENCE

1 WITHDRAWN. NOTE FOR THE RECORD. AND THE STATE'S
2 REQUEST NUMBER TWO, THAT'S STATE VS. KAMERINS ON
3 KIDNAPPING?

4 MR. THEOS: WE WOULD OBJECT TO THAT,
5 YOUR HONOR. I BELIEVE THAT HE STATED YOU HAD---

6 THE COURT: A GENERAL CHARGE.
7 BUT---

8 MR. THEOS: A GENERAL CHARGE. WE
9 FEEL THAT THAT IS MORE APPROPRIATE, MORE
10 SUFFICIENT, AND MORE ACCURATE.

11 THE COURT: ALL RIGHT. BUT I WILL
12 INCLUDE THE STATEMENT OF KIDNAPPING COMMENCES AND
13 ONE IS WRONGFULLY DEPRIVED OF HER FREEDOM AND
14 CONTINUES UNTIL FREEDOM IS RESTORED. I ASSUME
15 THAT'S THE PART YOU'RE OBJECTING TO?

16 MR. THEOS: YES, SIR.

17 THE COURT: ALL RIGHT. NOTE HIS
18 OBJECTION. AND, MA'AM, PLEASE THE COURT IS HERE TO
19 HOPEFULLY INSURE THAT THERE'S AN ACCURATE WHAT
20 RECORD. LET THESE OBJECTIONS OF THE STATE OR THE
21 DEFENDANT RUN THROUGHOUT. IT WILL BE UNNECESSARY
22 FOR YOU TO AGAIN ARTICULATE SPECIFIC OBJECTIONS OR
23 ANY REASONING OTHER THAN TO STATE THAT YOU RENEW
24 YOUR OBJECTIONS; THEY WILL BE CONTINUED. IS THAT
25 AGREEABLE?

1 MR. BAILEY: YES, SIR. STATE'S
2 REQUEST NUMBER THREE. THAT'S STATE VS. MUZON
3 (PHONETICALLY SPELLED) YOU MAY INFER MALICE BASED
4 ON SUCH EVIDENCE OF RECKLESSNESS AND WANTONNESS AS
5 INDICATED, DEPRAVITY OF MIND, OR DISREGARD OF HUMAN
6 LIFE NOTWITHSTANDING THE LACK OF ACTUAL INTENT TO
7 KILL OR INJURE ANOTHER. THE STATE STILL WANTS THAT
8 CHARGED?

9 MR. BAILEY: I STILL THINK IT A GOOD
10 CHARGE, YOUR HONOR.

11 THE COURT: WELL, IT'S A GOOD LAW
12 UNDER THE FACTS OF MUZON. BUT ARE YOU INDICATING
13 IN THE CHARGE THAT THERE WOULD BE A LACK OF ACTUAL
14 INTENT TO KILL OR INJURE ANOTHER?

15 MR. BAILEY: I THINK IT'S
16 CONCEIVABLE, YOUR HONOR, FOR THE JURY TO THINK THAT
17 HE BEAT HER AND TIED HER UP AND ALL THAT BUT DIDN'T
18 INTEND FOR DEATH TO ENSUE. I DON'T THINK IT'S
19 LIKELY; BUT I THINK IT WOULD BE A FACT QUESTION.

20 THE COURT: ALL RIGHT. AND THE
21 DEFENDANT OBJECTS TO THAT?

22 MR. THEOS: NO, SIR; WE'LL WITHDRAW
23 OUR OBJECTION.

24 THE COURT: THEY WITHDRAW THE
25 OBJECTION. ALL RIGHT; THE COURT WILL CHARGE IT.

CHARGE CONFERENCE

1 AND THE VICTOR VS. NEBRASKA, STATE'S REQUEST TO
2 CHARGE NUMBER FOUR. AS I UNDERSTAND THE DEFENDANT
3 OBJECTS TO THAT?

4 MR. THEOS: YES, SIR.

5 THE COURT: ALL RIGHT. THE COURT
6 SUSTAINS THE OBJECTION. AND THE COURT WILL NOT
7 CHARGE THAT. THE COURT'S CHARGE ON THE EXPERT. I
8 REVIEWED THAT WITH BOTH THE STATE AND THE
9 DEFENDANT, AND THERE WAS NO OBJECTION TO THAT. THE
10 VOLUNTARY INTOXICATION CHARGE. THE COURT REVIEWED
11 THAT WITH THE ATTORNEYS UNDER STATE VS. FURMAN
12 VAUGHN AND STATE VS. SCOTT; AND AS I UNDERSTAND IT
13 THE DEFENDANT OBJECTS TO THAT.

14 MR. THEOS: YES, SIR. IT OUR
15 POSITION, YOUR HONOR, AND CONTENTION THAT CERTAINLY
16 NO DEFENSE HAS BEEN OFFERED ALONG THOSE LINES. AND
17 AS YOU HAVE POINTED OUT IN CHAMBERS, THERE IS NO
18 SUCH DEFENSE. I FEEL, HOWEVER, THAT IT WOULD DRAW
19 INAPPROPRIATE ATTENTION TO MR. SIMMONS' STATEMENT,
20 AND THERE MAY BE AN INFERENCE DRAWN FROM THE FACT
21 THAT IT'S BEING CHARGED THAT THE COURT HAS PASSED
22 ON THE VORACITY AND/OR THE RELIABILITY OF THE
23 STATEMENT THAT'S BEEN OFFERED INTO EVIDENCE.

24 THE COURT: WELL, OF COURSE THE FACT
25 THAT THE COURT CHARGES ON ARMED ROBBERY,

CHARGE CONFERENCE

1 KIDNAPPING, OR BURGLARY FIRST OR C.S.C.; THAT COULD
2 BE INFERRED. UNDER YOUR LOGIC, THE COURT FEELS
3 THAT IT IS APPROPRIATE, AND THE COURT WILL CHARGE
4 IT. ON CONFESSION, THE COURT HAS REVIEWED ITS
5 CHARGE. THE STATE HAS NO OBJECTION. BUT AS I
6 UNDERSTAND IT, THE DEFENDANT OBJECTS.

7 MR. THEOS: YOUR HONOR---

8 THE COURT: IT'S THE SAME CHARGE
9 THAT I USED DURING MID-TRIAL. AND I WOULD REPEAT
10 IT.

11 MR. THEOS: WE DON'T NECESSARILY
12 OBJECT TO THAT BEING A CHARGE; HOWEVER, THE CHARGE
13 THAT WE PROPOSED I THINK IS MORE IN DEPTH AND MORE
14 DETAILED; AND WE WOULD ASK THAT YOU CONSIDER
15 CHARGING THAT.

16 THE COURT: WELL, PERHAPS I'LL
17 CHARGE SOME PARTS OF IT AND CHARGE WILL SPEAK FOR
18 ITSELF.

19 MR. THEOS: YES, SIR.

20 THE COURT: BUT THE REASON I'M
21 REVIEWING THIS WITH YOU, GENTLEMEN, IN SUCH DETAIL
22 IS BECAUSE YOU ARGUE AND THEN THE COURT CHARGES, I
23 FEEL YOU'RE ENTITLED TO KNOW WHAT I'M GOING TO
24 CHARGE SO THAT YOU WON'T ATTEMPT TO EXPRESS TO THE
25 JURY SOMETHING THAT MAY NOT BE CHARGED. AND THAT'S

CHARGE CONFERENCE

1 WHY I'M GOING OVER THAT AT THIS TIME. AND THE --
2 ALL RIGHT. THEN THE STATE'S REQUEST NUMBER FIVE
3 WHICH IS THE GRIPPON VS. STATE THREE OF TWO OPINION
4 OF OUR SUPREME COURT; AS I UNDERSTOOD IT, THE
5 DEFENDANT OBJECTED TO THAT?

6 MR. THEOS: YES, SIR.

7 THE COURT: AND THE COURT WILL NOTE
8 THE DEFENDANT'S OBJECTION AND WILL CHARGE THE
9 CIRCUMSTANTIAL EVIDENCE AS RECOMMENDED BY THAT 1997
10 OPINION. AND THEN, GENTLEMEN, AS TO THE BURGLARY
11 FIRST AND THE C.S.C. FIRST AND MURDER AND THE
12 KIDNAPPING OTHER THAN WHAT'S ALREADY BEEN COMMENTED
13 ON; THOSE WOULD BE WHAT I CALL THE STANDARD
14 CHARGES. BUT IN REGARD TO, LET'S LOOK AT THE
15 DEFENDANT'S REQUEST, PLEASE, GENTLEMEN.
16 DEFENDANT'S NUMBER ONE WITHDRAWN. NUMBER TWO
17 WITHDRAWN. UNDERSTANDING LADIES AND GENTLEMEN, FOR
18 EXAMPLE LIKE THE DEFENDANT TWO; THAT HAS IN IT
19 LANGUAGE ABOUT THE FAILURE OF THE DEFENDANT TO
20 TESTIFY DOES NOT CREATE ANY INFERENCE AGAINST HIM,
21 AND IT MUST NOT BE DISCUSSED IN THE JURY ROOM.
22 MANY OF THESE HAVE BEEN WITHDRAWN BECAUSE OF THE
23 COURT'S ASSURANCE THAT THE GENERAL CHARGE WILL
24 INCLUDE THAT WHICH YOU HAVE REQUESTED?

25 MR. THEOS: YES, SIR.

1 THE COURT: NUMBER THREE, THE COURT
2 WILL CHARGE. NUMBER FOUR IS A GENERAL CHARGE WHICH
3 CERTAINLY WILL BE INCLUDED IN THE GENERAL CHARGE ON
4 PRESUMPTION OF INNOCENCE. NUMBER FIVE, STATE VS.
5 MANNING, CAGE VS. LOUISIANA, REASONABLE DOUBT.
6 THAT WILL BE CHARGED. AND FEEL FREE NOW TO OBJECT
7 TO ANYTHING THAT I'M GOING OVER, GENTLEMEN, AS
8 WE'RE GOING ALONG TO TRY AND KEEP IT TOGETHER IN
9 THE RECORD. THE DEFENDANT'S NUMBER SIX. THAT'S A
10 REQUEST TO CHARGE ON THE CONFESSION. AND THE COURT
11 IS GOING TO CHARGE IN THAT REGARD. AND THE
12 DEFENDANT OBJECTS TO THAT. NUMBER SEVEN IS
13 WITHDRAWN. NUMBER EIGHT IS WITHDRAWN. AND NUMBER
14 TEN IS WITHDRAWN. ELEVEN; GENTLEMEN THAT HAS TO DO
15 WITH CIRCUMSTANTIAL EVIDENCE. AND AS I UNDERSTAND
16 IT, THE STATE OBJECTED TO GRIPPON BUT THE DEFENDANT
17 DID NOT. BUT PERHAPS I MISUNDERSTOOD. DID NOT.

18 MR. BAILEY: NO, SIR, I HAD ASKED
19 FOR GRIPPON.

20 THE COURT: ALL RIGHT. AND THE
21 DEFENDANT OBJECTS?

22 MR. THEOS: YES, SIR.

23 THE COURT: TO THE FAILURE TO CHARGE
24 DEFENDANT'S REQUEST NUMBER ELEVEN. AND SO LET THE
25 RECORD REFLECT THAT THE DEFENDANT DOES OBJECT, AND

CHARGE CONFERENCE

1 LET HIM BE PROTECTED IN THE RECORD. NUMBER TWELVE,
2 EXPERT TESTIMONY, IS WITHDRAWN BECAUSE THE COURT'S
3 EXPLAINED ITS CHARGE IN THAT. NUMBER THIRTEEN
4 WITHDRAWN. FOURTEEN WITHDRAWN. NUMBER FIFTEEN --
5 MR. SOLICITOR, AS I UNDERSTAND IT YOU HAD NO
6 OBJECTION TO THE -- WELL, AGAIN, THAT'S REPETITIVE,
7 GENTLEMEN, THE FIRST PARAGRAPH OF THAT. THE SECOND
8 PARAGRAPH "IT MUST NOT BE CONSIDERED BY YOU IN YOUR
9 DELIBERATIONS" BECAUSE WHILE I WILL REPEAT NUMEROUS
10 TIMES THE FACT THAT THE STATE'S BURDEN OF PROOF IS
11 BEYOND A REASONABLE DOUBT AND THE DEFENDANT IS
12 PRESUMED INNOCENT, I TRY TO AVOID REPETITION AS
13 MUCH AS I CAN. AND, OF COURSE, THE COURT'S CHARGE
14 SHOULD BE CONSIDERED AS A WHOLE. I'M NOT GOING TO
15 CHARGE NUMBER FIFTEEN BECAUSE I THINK THAT THAT'S
16 COVERED IN MY CHARGE. SO NOTE THE DEFENDANT'S
17 OBJECTION. SIXTEEN WITHDRAWN. SIXTEEN-A, THE
18 STATE OBJECTS TO THAT. AND THE COURT WILL SUSTAIN
19 THE OBJECTION OF THE STATE. WHILE IT'S A TRUE
20 PROPOSITION OF LAW THAT ROBBERY IS A LESSER
21 INCLUDED OFFENSE OF ARMED ROBBERY, IT'S NOT
22 APPLICABLE TO THE UNCONTRADICTED FACTS. AND THAT'S
23 WHY THE COURT IS NOT CHARGING IT. NUMBER SEVENTEEN
24 IS WITHDRAWN. EIGHTEEN IS WITHDRAWN. NINETEEN IS
25 WITHDRAWN. AGAIN, GENTLEMEN, THOSE ARE ARMED

CHARGE CONFERENCE

1 ROBBERIES, LARCENY. I HAVE TO EXPLAIN THOSE IN
2 ORDER TO GET TO EXPLAINING ARMED ROBBERY. TWENTY,
3 KIDNAPPING, IS WITHDRAWN. TWENTY-ONE IS WITHDRAWN.
4 TWENTY-TWO IS WITHDRAWN. TWENTY-THREE IS
5 WITHDRAWN. TWENTY-FOUR IS WITHDRAWN. TWENTY-FIVE
6 IS WITHDRAWN. TWENTY-SIX IS WITHDRAWN. AND THEN
7 GENTLEMEN THIRTY -- WELL, EXCUSE ME. THOSE ARE
8 CLIPPED TOGETHER. TWENTY-SIX IS STAPLED TOGETHER.
9 I HAD THAT IT WAS WITHDRAWN. TWENTY-SEVEN IS
10 WITHDRAWN. AND TWENTY-EIGHT IS WITHDRAWN. NUMBER
11 THIRTY IS WITHDRAWN. NUMBER THIRTY-ONE IS
12 WITHDRAWN. AND THEN GENTLEMEN AND MADAM COURT
13 REPORTER, FOR THE RECORD THERE WERE SOME OTHER
14 CHARGES SUBMITTED TO THE COURT; FOR EXAMPLE THE
15 STATE'S REQUEST SEVEN AND EIGHT HAVE TO DO WITH THE
16 PENALTY PHASE WHICH THE COURT MAY OR MAY NOT GET TO
17 DEPENDING ON THE VERDICT OF THE JURY. AND THE
18 DEFENDANT'S REQUEST NUMBER TWENTY-NINE AND
19 THIRTY-TWO ALSO HAS TO DO WITH THE PENALTY PHASE;
20 AND THOSE ARE NOT TO BE CONSIDERED AT THIS TIME.
21 AND GENTLEMEN, I ASSUME Y'ALL AGREE THAT IT'S
22 PROPER FOR THE COURT TO TELL THE JURY THAT, LADIES
23 AND GENTLEMEN, DURING THE GUILT PHASE NOW, PLEASE
24 DERIVE NO INFERENCE FROM WHAT I'M SAYING AS TO
25 WHETHER OR NOT THERE WILL BE A NECESSITY FOR A

CHARGE CONFERENCE

1 SENTENCING PHASE. BUT YOU'RE NOT TO CONSIDER
2 PUNISHMENT DURING THIS GUILT PHASE. DO YOU AGREE
3 WITH THAT, SOLICITOR?

4 MR. BAILEY: YES, SIR.

5 MR. THEOS: YES, SIR. YOUR HONOR,
6 IF I MIGHT NOTE FOR THE RECORD?

7 THE COURT: PLEASE.

8 MR. THEOS: YOU REFERRED TO THE
9 LESSER INCLUDED OFFENSE THAT WE HAD REQUESTED. AND
10 I DON'T THINK---

11 THE COURT: THAT'S THE NEXT THING
12 THAT I WAS COMING TO. BUT THANK YOU FOR BRINGING
13 THAT TO MY ATTENTION. MADAM COURT REPORTER, I HAD
14 INDICATED THAT I BELIEVE IT WAS SIXTEEN-A WAS THE
15 REQUEST FOR A LESSER OFFENSE. AND I DID REVIEW THE
16 COURT'S LESSER INCLUDED OFFENSE CHARGE WITH THE
17 GENTLEMEN OF THE BAR. BUT THE COURT IS OF THE
18 VIEW, AND THE STATE OBJECTED TO GIVING THE OPTION
19 OF A LESSER INCLUDED OFFENSE TO THE -- GET THE
20 ORIGINAL INDICTMENTS THERE FOR ME, MADAM CLERK. I
21 HAD GIVEN THEM TO YOU EARLIER IN THE WEEK AND ASKED
22 YOU TO KEEP THEM IN A DRAWER. LOOK-A-THERE; YOU'RE
23 A STEP AHEAD OF ME. THANK YOU. THE COURT WILL NOT
24 INSTRUCT THE JURY THAT THEY MAY CONSIDER ROBBERY OR
25 LARCENY AS A LESSER INCLUDED OF ARMED ROBBERY

CHARGE CONFERENCE

1 ALBEIT THEY ARE LESSER INCLUDED OFFENSES. BUT
2 UNDER THE EVIDENCE AND UNCONTRADICTED TESTIMONY,
3 THE COURT DOES NOT BELIEVE THOSE TO BE APPLICABLE.
4 AND GENTLEMEN, CAN YOU THINK OF ANYTHING ELSE
5 RELATIVE TO THE CHARGES, PLEASE?

6 MR. BAILEY: YOUR HONOR, I HAVE ONE
7 ADDITIONAL CHARGE THAT I JUST HAND WROTE; AND THIS
8 IS PROMPTED BY DR. WAID'S TESTIMONY. ALL OF THE
9 OTHER DEFENSE WITNESSES AS I RECALL IT KIND OF
10 HONED IN ON WHETHER OR NOT MR. SIMMONS COULD
11 UNDERSTAND HIS MIRANDA RIGHTS. HE WENT A LITTLE
12 BIT FURTHER THAN THAT AND EXPRESSED AN OPINION THAT
13 HE COULDN'T INTELLIGENTLY WAIVE THOSE RIGHTS WHICH
14 IS A DIFFERENT ISSUE ALL TOGETHER. AND I'M
15 CONCERNED FROM WHAT HE SAID IN SOME OF THE
16 QUESTIONING THERE THAT THE JURY MIGHT THINK THAT
17 WHEN YOU'RE TALKING ABOUT AN INTELLIGENT WAIVER IT
18 NECESSARILY MEANS A WISE DECISION WHICH IT DOES
19 NOT. AND I FASHIONED THE CHARGE BASED ON STATE VS.
20 BREWER AND STATE VS. REED WHICH DID NOT DEAL WITH
21 INTELLIGENTLY WAIVING A CONFESSION BUT
22 INTELLIGENTLY WAIVING THE RIGHT TO HAVE COUNSEL
23 PRESENT WHICH I THINK MIGHT TELL THE JURY WHAT THE
24 STAND IT IS FOR INTELLIGENT WAIVER.

25 THE COURT: ALL RIGHT. WHY DON'T

1 YOU PASS IT OVER TO COUNSEL AND LET HIM LOOK AT IT
2 IN? AND BEAR IN MIND, GENTLEMEN, THAT THE
3 CONFESSION CHARGE, I HAVE THE LANGUAGE IN THERE
4 THAT FURTHER INQUIRIES, IF HE DID MAKE IT WHERE IT
5 WAS MADE BY THE DEFENDANT VOLUNTARILY AND OF HIS
6 FREE WILL AND ACCORD WITHOUT ANY PROMISE OR HOPE OF
7 REWARD. THAT'S ONE INSTANCE WHERE VOLUNTARY -- IF
8 YOU DETERMINE ALLEGED CONFESSION WAS NOT THE FREE
9 AND VOLUNTARY WILLED EXPRESSION OF THE DEFENDANT,
10 THEN YOU SHOULD NOT CONSIDER IT AT ALL.

11 MR. BAILEY: YOUR HONOR, IF YOUR
12 CHARGE HAS NO REFERENCE TO INTELLIGENT WAIVER OF
13 IT, THEN I WOULD WITHDRAW THAT.

14 THE COURT: WELL, NO. I WANT YOU TO
15 PASS IT UP. I HAVEN'T LOOKED AT WHAT YOU HAVE---

16 MR. THEOS: YOUR HONOR, I BELIEVE
17 THAT ALL OF OUR WITNESSES TESTIFIED---

18 THE COURT: CAN YOU MAKE A QUICK
19 COPY OF THAT---

20 THE CLERK: YES, SIR.

21 THE COURT: --WHILE I'M LISTENING TO
22 MR. THEOS. EXCUSE ME, MR. THEOS. YOU WERE SAYING
23 THAT, PLEASE?

24 MR. THEOS: YES, SIR. I BELIEVE
25 THAT ALL OF OUR WITNESSES OFFERED AN OPINION THAT

CHARGE CONFERENCE

1 MR. SIMMONS DID NOT KNOWINGLY AND COULD NOT
2 KNOWINGLY AND INTELLIGENTLY WAIVE HIS MIRANDA
3 WARNINGS. THEY WENT BEYOND THAT AS WELL AND
4 OFFERED AN OPINION AS TO WHETHER OR NOT HE COULD
5 COMPREHEND HIS MIRANDA RIGHTS. BUT I BELIEVE I
6 ASKED THEM ALL THAT SAME QUESTION WHETHER OR NOT
7 THEY COULD SAY TO A REASONABLE DEGREE OF SCIENTIFIC
8 OR MEDICAL CERTAINTY THAT MR. SIMMONS WAS CAPABLE
9 OF MAKING A KNOWING AND INTELLIGENT WAIVER OF THOSE
10 RIGHTS; AND THAT WITHIN ONE OF THE CHARGES THAT I
11 GAVE YOU. AND MY UNDERSTANDING WAS THAT WAS GOING
12 TO BE A PART OF YOUR CHARGE BECAUSE CERTAINLY IT'S
13 ONE OF THE CRITERIA IN DETERMINING IN THE JURY'S
14 DETERMINATION AS TO THE CONSIDERATION OF THE
15 CONFESSION.

16 THE COURT: WHY DON'T WE MAKE THIS
17 STATE'S NUMBER NINE? I BELIEVE SEVEN AND EIGHT
18 WERE RESERVED FOR THE PENALTY PHASE; OR DID I --
19 YES; SEVEN AND EIGHT WERE FOR THE PENALTY PHASE.
20 SO THIS WOULD BE STATE'S NUMBER?

21 THE COURT REPORTER: NINE.

22 THE COURT: NINE? PLEASE WRITE THAT
23 ON YOUR NOTES. WELL, I'M CERTAINLY FAMILIAR WITH
24 STATE VS. BREWER, MR. THEOS, BECAUSE THAT WAS THE
25 LANGUAGE THE COURT USED WHEN I FOUND THE KNOWING

CHARGE CONFERENCE

1 AND VOLUNTARILY -- I RULED THAT MR. BREWER
2 UNDERSTOOD HIS RIGHT TO HAVE AN ATTORNEY APPOINTED
3 FOR HIM AND HIS RIGHT TO REPRESENT HIMSELF. BUT
4 BECAUSE OF THE SEVERITY AND IRREVERSIBILITY OF A
5 DEATH PENALTY CASE, I HELD THAT IT WASN'T PROPER
6 FOR HIM TO REPRESENT HIMSELF. AND THAT'S THE
7 LANGUAGE THE SUPREME COURT USED THAT THE DECISION
8 IS TO BE MADE INTELLIGENTLY WITH THE UNDERSTANDING
9 THAT THAT DECISION ITSELF BE A WISE ONE. AND STATE
10 VS. REED, OF COURSE, IS A PRO SE CASE WHERE JUDGE
11 HOWELL ALLOWED MR. REED AT HIS REQUEST TO REPRESENT
12 HIMSELF. SO DO YOU DISAGREE THAT THAT'S A CORRECT
13 PROPOSITION OF LAW, OR DO YOU CONTEND RATHER THAT
14 IT'S NOT APPLICABLE TO THE FACTS OF THIS CASE?

15 MR. THEOS: YOUR HONOR, WE WOULD
16 SIMPLY CONTEND THAT IT'S NOT APPLICABLE TO THE
17 FACTS OF THE CASE ALTHOUGH WE DO NOT ARGUE THAT IT
18 IS---

19 THE COURT: IT'S BEEN PRONOUNCED AS
20 A CORRECT PROPOSITION OF LAW WHICH YOU AND I AND
21 ALL OTHER LAWYERS ADHERE TO. ALL RIGHT; DEFENDANT
22 OBJECTS. THE COURT WILL CHARGE IT IN CONJUNCTION
23 WITH THE VOLUNTARINESS AND KNOWING AND INTELLIGENT
24 WAIVER OF HIS RIGHTS AND SO FORTH.

25 MR. THEOS: YES, SIR.

CHARGE CONFERENCE

1 THE COURT: SO GENTLEMEN, IT'S NOW
2 11:30. WE'VE UTILIZED OUR THIRTY MINUTE BREAK FOR
3 THE DISCUSSION OF THESE CHARGES. IS THERE ANYTHING
4 ELSE AS TO THE FORMS OF THE VERDICT BECAUSE THERE
5 ARE NOT LESSER INCLUDED OFFENSES BEING SUBMITTED TO
6 THE JURY. AND LET ME LET Y'ALL COME FORWARD. I
7 ASSUME THAT YOU'RE ALL FAMILIAR WITH THESE ORIGINAL
8 INDICTMENTS. AND SINCE THE CLERK HANDED THEM TO
9 ME, I'VE LOST THEM. NOW, MADAM COURT REPORTER,
10 WHAT THE COURT WILL DO AT THE CONCLUSION OF THE
11 TRIAL AND AFTER ANY POST-TRIAL MOTIONS,
12 IRRESPECTIVE OF WHAT THOSE MOTIONS MAY BE; I WILL
13 WAIT UNTIL THAT TIME TO GIVE THE REQUEST TO CHARGE
14 OF THE STATE AND THE DEFENDANT, WHETHER CHARGED OR
15 WHETHER OBJECTED TO OR WHETHER THE COURT DECLINED,
16 BECAUSE I NEED TO KEEP THOSE BEFORE ME FOR THE
17 PURPOSES OF GIVING FURTHER CONSIDERATION TO ANY
18 MOTIONS THAT MIGHT BE MADE RELATIVE THERETO, OKAY?
19 SO, GENTLEMEN, LET ME SHOW YOU NOW THAT WHAT I
20 WOULD SUGGEST THAT FOR EACH OF THESE, I WOULD JUST
21 UNDERLINE THE WORD "VERDICT;" AND I WOULD CHANGE
22 FOREMAN TO FORELADY; AND THEN I WOULD CIRCLE
23 UNANIMOUS VERDICT. AND IT WOULD BE EITHER GUILTY
24 OR EITHER NOT GUILTY. AND I'LL TELL THE JURY TO
25 PLEASE DERIVE NO INFERENCE IN THE ORDER IN WHICH

CHARGE CONFERENCE

1 THE FORMS OF VERDICT ARE WRITTEN BECAUSE VERY
2 OBVIOUSLY WHEN YOU WRITE TWO THINGS YOU HAVE TO
3 WRITE IT IN SOME ORDER. ANY OBJECTION TO THAT?

4 MR. BAILEY: NO, SIR.

5 MR. THEOS: NO, SIR.

6 THE COURT: DID Y'ALL WANT FOR ANY
7 REASON TO REVIEW THESE ORIGINAL INDICTMENTS? I'VE
8 NOT WRITTEN THOSE ON YET, BUT WE'LL TAKE A RECESS
9 BETWEEN THE ARGUMENT AND THE CHARGE. AND Y'ALL
10 WILL HAVE AN OPPORTUNITY TO REVIEW WHAT I'VE
11 WRITTEN ON THERE. BUT BEFORE I WROTE IT IN INK, I
12 WANTED Y'ALL TO KNOW WHAT I PLANNED ON WRITING. I
13 USUALLY PUT THEM IN THE ORDER WHICH I CHARGE THE
14 JURY AND EXPLAIN -- I USUALLY PUT THEM IN THE ORDER
15 IN WHICH I EXPLAIN THE ELEMENTS OF THE VARIOUS
16 CHARGES. AND PROBABLY WHAT I'LL DO IS JUST GO
17 CHRONOLOGICALLY ACCORDING TO THE NUMBERING; WE
18 START WITH 075, AND THAT'S MURDER. I WILL CHARGE
19 THAT FIRST. AND THEN THE SECOND; 076 IS BURGLARY
20 IN THE FIRST DEGREE; AND 077 IS ARMED ROBBERY; 078
21 IS CRIMINAL SEXUAL CONDUCT FIRST. AND 079 IS
22 KIDNAPPING. SO I'LL ATTEMPT TO ORGANIZE MY CHARGE
23 IN THAT MANNER AND TO EXPLAIN THE FORMS OF VERDICT
24 TO THE JURY. THEY'RE ALL GOING TO BE THE SAME.

25 MR. THEOS: YES, SIR.

1 THE COURT: SO GENTLEMEN, IS
2 ANYTHING FURTHER FOR THE RECORD BEFORE WE PROCEED,
3 PLEASE?

4 MR. BAILEY: NOT FROM THE STATE,
5 YOUR HONOR.

6 THE COURT: ALL RIGHT. WELL,
7 PERHAPS -- WOULD Y'ALL LIKE TO TAKE A RECESS TO
8 COLLECT YOUR THOUGHTS AND HAVE A CUP OF COFFEE OR
9 RELAX FOR A FEW MINUTES?

10 MR. BAILEY: YES, SIR.

11 THE COURT: HOW MUCH TIME WOULD YOU
12 LIKE?

13 MR. BAILEY: FIVE OR TEN MINUTES.

14 MR. THEOS: TEN MINUTES IS FINE.

15 THE COURT: WELL, LET'S TRY FOR TEN
16 MINUTES. AND Y'ALL TRY TO BE BACK. AND LET THE
17 DEFENDANT BE EXCUSED TO MAKE SURE THAT HE IS
18 COMFORTABLE. NOW LET HE REMIND THE BAILIFFS,
19 PLEASE, THAT THESE DOORS, ONCE WE START THE
20 ARGUMENTS, THEY ARE TO BE LOCKED, AND NO ONE -- NOT
21 SLED, NOT JUDGES, NOT ANYONE -- IS TO COME IN OR
22 OUT OF THE COURTROOM UNLESS I SEND MY LAW CLERK
23 AFTER SOMETHING WHICH I WILL CERTAINLY ATTEMPT NOT
24 TO BECAUSE THE CLOSING ARGUMENTS ARE IMPORTANT.
25 AND I DON'T WANT ANY DISTRACTIONS OF PEOPLE COMING

CHARGE CONFERENCE

1 IN AND OUT OF THE COURTROOM. SO ALL OF Y'ALL ARE
2 WELCOME TO STAY; BUT I JUST WANT YOU TO UNDERSTAND
3 THAT ONCE YOU LOCK THOSE DOORS UNLESS I ORDER THEM
4 UNLOCKED, THEY'RE SUPPOSED TO REMAIN LOCKED,
5 PLEASE. THANK YOU. SO POWDER YOUR NOSE NOW, IN
6 OTHER WORDS.

7 (BRIEF RECESS.)

8 - - - - -

9 THE COURT: ALL RIGHT. THE
10 DEFENDANT IS PRESENT. IS THERE ANYTHING FURTHER
11 BEFORE WE PROCEED, PLEASE, LADIES AND GENTLEMEN?

12 MR. BAILEY: NOT FROM THE STATE,
13 YOUR HONOR.

14 MR. THEOS: NO, SIR.

15 THE COURT: AND YOU GENTLEMEN;
16 AGAIN, I'M NOT GOING TO HOLD YOU TO A TIME LIMIT.
17 IF YOU WANT TWO HOURS OR MORE, I'LL BE GLAD TO
18 AFFORD YOU THAT. YOU HAD INDICATED YOU THOUGHT
19 APPROXIMATELY AN HOUR. BUT I'M NOT GOING TO BE
20 KEEPING TIME ON YOU. SO I TELL YOU THAT SO YOU CAN
21 FULLY COVER YOUR SITUATION. BUT, OF COURSE, I WANT
22 TO TRY TO AVOID BREAKING THE ARGUMENTS.

23 MR. BAILEY: YES, SIR.

24 THE COURT: SO I'VE ASKED THEM TO
25 TRY AND HAVE THE LUNCH HERE FOR US ABOUT A QUARTER

CHARGE CONFERENCE

1 'TIL TWO IS WHEN WE'D LIKE TO HAVE THE LUNCH. IF
2 HE ORDERS IT NOW, MA'AM -- I DON'T WANT THEM TO
3 COOK IT NOW -- I WANT IT STILL TO BE AS LONG AS IT
4 CAN BE.

5 (AT THIS TIME JURY RETURNS TO OPEN COURT.)
6

7 - - - - -

8 THE COURT: HAS EVERYBODY ON THE
9 JURY HAD AN OPPORTUNITY TO PLACE THEIR ORDER FOR
10 LUNCH FROM GEORGIO'S? (ALL JURORS ANSWER IN THE
11 AFFIRMATIVE.) NOW, LT. EDWARDS, IT'S NOW
12 APPROXIMATELY A QUARTER TO TWELVE. THE LAWYERS
13 ANTICIPATE ABOUT AN HOUR EACH OF ARGUING. IT COULD
14 BE SLIGHTLY LESS OR SLIGHTLY MORE. BUT I THINK THE
15 THING TO DO IS PLACE THE ORDER WITH THE
16 UNDERSTANDING THAT IT WILL BE PREPARED, ALLOW MAYBE
17 FIVE MINUTES FOR DELIVERY TO HERE FROM THE FACILITY
18 SO THAT IT WILL BE HERE ABOUT A QUARTER OF TWO AND
19 AS FRESH AS POSSIBLE. AND Y'ALL ARE GOING TO GET
20 SOME SWEET TEA AND UNSWEET TEA IN A LARGE CONTAINER
21 TO TRY TO AVOID BRINGING INDIVIDUAL ORDERS. IF YOU
22 WOULD PLEASE ATTEND TO THAT; AND I THANK YOU, SIR.

23 MADAM FORELADY AND LADIES AND
24 GENTLEMEN OF THE JURY; YOU'VE BEEN VERY PATIENT,
25 VERY ATTENTIVE, VERY COOPERATIVE ALL OF THIS WEEK
DURING THE VOIR DIRE AND AGAIN DURING THE TAKING

CHARGE CONFERENCE

1 AND LISTENING OF THE TESTIMONY. AT THIS STAGE OF
2 THE PROCEEDING YOU WILL HEAR THE FINAL CLOSING
3 ARGUMENTS OF THE ATTORNEYS. BUT LET ME EXPLAIN TO
4 YOU THE FACT THAT UNDER THE LAW OF SOUTH CAROLINA
5 WHERE THE STATE SEEKS THE DEATH PENALTY AS IT DOES
6 HERE, THE TRIAL IS A BIFURCATED OR TWO PART TRIAL.
7 AND PROBABLY EACH OF YOU REMEMBER THIS FROM THE
8 VOIR DIRE. BUT WE ARE NOW IN THE FIRST PHASE AT
9 WHICH TIME THE EVIDENCE AND TESTIMONY THAT HAS BEEN
10 HELD BEFORE YOU AS A JURY WHERE YOU WOULD BE CALLED
11 UPON TO DETERMINE THE GUILT OR THE INNOCENCE OF THE
12 DEFENDANT. NOW AT THE CONCLUSION OF THIS FIRST
13 TRIAL, SHOULD THE VERDICT BE GUILTY AS TO THE
14 MURDER -- AND I CERTAINLY MAKE NO RECOMMENDATION TO
15 YOU CONCERNING THAT VERDICT -- AND PLEASE DERIVE NO
16 INFERENCE THEREFROM. IF THE DEFENDANT IS CONVICTED
17 OF THE CRIME OF MURDER, THEN A SECOND PROCEEDING
18 WILL BE HELD AND THAT SECOND PROCEEDING IS A
19 SENTENCING PROCEEDING AT WHICH TIME EXTENUATING,
20 AGGRAVATING, OR MITIGATING CIRCUMSTANCES MAY BE
21 INTRODUCED INTO EVIDENCE AND CONSIDERED BY YOU, THE
22 JURY. SHOULD SUCH PROCEDURE BE NECESSARY, I WILL
23 FURTHER INSTRUCT YOU AT THAT TIME.

24 AND I REPEAT TO YOU TO PLEASE
25 DERIVE NO INFERENCE FROM WHAT I JUST TOLD YOU AS TO

CHARGE CONFERENCE

WHAT I INDICATE YOUR VERDICT SHOULD BE BECAUSE THAT
CERTAINLY IS NOT MY INTENT. THE PURPOSE OF MY
TELLING YOU THIS IS TO EMPHASIZE THAT YOU ARE NOT
TO CONSIDER PUNISHMENT OR SENTENCE IN THIS PHASE OF
THE CASE, AND YOU NECESSARILY WILL NOT HEAR ANY
COMMENT OR ARGUMENT OR REASON OR LOGIC BY THE
ATTORNEYS RELATIVE TO PUNISHMENT OR SENTENCE IN
THIS PHASE OF THE CASE. YOU ARE ONLY TO DETERMINE
THE INNOCENCE OR GUILT OF THE DEFENDANT BASED ON
THE EVIDENCE THAT HAS BEEN INTRODUCED IN THE TRIAL
OF THE CASE. LADIES AND GENTLEMEN, THESE CLOSING
ARGUMENTS ARE IMPORTANT. I HAVE EXPLAINED TO YOU
PREVIOUSLY THAT THE ARGUMENTS OF COUNSEL ARE NOT
TESTIMONY. THAT IS NOT EVIDENCE. BUT I WOULD
REQUEST OF YOU THAT YOU PLEASE GIVE VERY CAREFUL
AND GUARDED ATTENTION TO THE ARGUMENTS OF COUNSEL
FOR BOTH THE STATE AND THE DEFENDANT. THE STATE
WILL OPEN AND ARGUE; AND THEN THE DEFENSE WILL
CLOSE BY WAY OF THE FINAL ARGUMENT THAT THEY HAVE
IN THIS PHASE OF THE TRIAL. SO PLEASE, EACH OF
YOU, GIVE US YOUR CAREFUL ATTENTION. AND GENTLEMAN
I'VE INSTRUCTED THE JURY THEY'RE NOT ALLOWED TO
TAKE NOTES DURING THE CHARGE OF THE COURT. ANY
OBJECTION TO ANY NOTES BEING TAKEN DURING
ARGUMENT?

CLOSING ARGUMENT BY MR. BAILEY

1 MR. BAILEY: NO, SIR.

2 MR. THEOS: NO, SIR.

3 THE COURT: ALL RIGHT. THANK YOU.
4 YOU MAY PROCEED, PLEASE.

5 MR. BAILEY: THANK YOU, YOUR HONOR.

6 - - - - -
7 CLOSING ARGUMENT

8 BY MR. BAILEY

9 I WANT TO FIRST OF ALL THANK YOU FOR
10 YOUR ATTENTION AND YOUR PATIENCE THROUGHOUT THE
11 LAST COUPLE OF DAYS OF THIS TRIAL. I ASK YOU TO
12 CONTINUE TO PAY ATTENTION AS MY CLOSING STATEMENT
13 TO YOU SHOULD LAST ROUGHLY AN HOUR OR MAY GO OVER A
14 LITTLE BIT. BUT AS THE JUDGE TOLD YOU, SOMEBODY
15 HAS GOT TO GO FIRST AND SOMEBODY HAS GOT TO GO
16 LAST. SO WHATEVER I'VE GOT TO SAY, I'VE GOT TO GO
17 AHEAD AND SAY IT NOW. AND I'VE GOT TO MORE OR LESS
18 ANTICIPATE WHAT THE DEFENSE MAY TELL YOU. SO I'VE
19 GOT TO COVER THAT ALSO.

20 AS Y'ALL KNOW, AT THE END OF THIS
21 TRIAL JUDGE PEEPLES WILL INSTRUCT YOU ON WHAT THE
22 LAW IS. AND YOU'RE TO OF COURSE FOLLOW THE JUDGE'S
23 INSTRUCTIONS AND TAKE THE LAW AS HE GIVES IT TO
24 YOU. AND YOU ARE TO TAKE THE FACT AS YOU FIND
25 THOSE FACTS TO BE FROM THE WITNESS STAND. NOW AS

CLOSING ARGUMENT BY MR. BAILEY

1 PART OF WHAT I'M GOING TO TELL Y'ALL -- OF COURSE
2 I'M GOING TO HAVE TO REFER BACK TO THE FACTS AS
3 THEY CAME OUT FROM THE WITNESS STAND. WE HAD A LOT
4 OF TECHNICAL STUFF OF DNA AND PSYCHIATRISTS AND
5 PSYCHOLOGISTS; AND I'VE TRIED TO KEEP NOTES; AND I
6 TRY TO BE AS ACCURATE AS I CAN. BUT IF I
7 ACCIDENTLY MISSTATE SOMETHING, YOU REMEMBER IT
8 DIFFERENTLY. YOU GO BY YOUR MEMORIES AND NOT BY
9 WHAT I SAID. AND YOU DO HAVE THE ABILITY IF YOU
10 WANT TO HEAR TESTIMONY AGAIN IF YOU THINK THAT'S
11 NECESSARY OR IF THERE'S SOME DISPUTE OVER IT.

12 AS THE JUDGE TOLD YOU, YOUR DUTY AS
13 JURORS IS TO DECIDE THE TRUE FACTS FROM THAT
14 WITNESS STAND; NOT FROM STATEMENTS OF THE LAWYERS.
15 WHAT I'M SAYING TO YOU IS NOT EVIDENCE. MR. THEOS
16 MAKES A CLOSING STATEMENT. WHAT HE IS GOING TO SAY
17 IS NOT EVIDENCE. WHAT WE SAID IN THE OPENING
18 STATEMENTS IS NOT EVIDENCE, AND THERE'S A VERY GOOD
19 REASON FOR THAT. AND THAT'S DEMONSTRATED IN THIS
20 CASE. IN HIS OPENING STATEMENT MR. THEOS SAID THAT
21 THE EVIDENCE DOES NOT POINT TO KENNETH SIMMONS.
22 AND I'M QUOTING FROM MY NOTES "WE CONTEND KENNETH
23 SIMMONS WAS NOT THERE AND DID NOT DO THESE THINGS."

24 NOW, LADIES AND GENTLEMEN, THAT IS
25 NOT WHAT THE EVIDENCE SAID. THE EVIDENCE POINTED

CLOSING ARGUMENT BY MR. BAILEY

1 -- ALL THE EVIDENCE -- TOWARD ONE PERSON, AND THAT
2 WAS KENNETH SIMMONS. AND THAT EVIDENCE IS WHAT YOU
3 BASE YOUR DECISION ON; NOT WHAT THE LAWYERS ARE
4 TELLING YOU. HE ALSO SAID THAT MR. SIMMONS WAS THE
5 FUNCTIONAL EQUIVALENT OF A SEVEN YEAR OLD AND
6 FUNCTIONED TO THE SECOND GRADE LEVEL. WE KNOW FROM
7 THE EVIDENCE THAT THIS MAN IS A HIGH SCHOOL
8 GRADUATE, THAT HE PLAYED FOOTBALL, THAT HE HAD A
9 DRIVER'S LICENSE, THAT HE GOT MARRIED, THAT HE HAD
10 A WORK HISTORY, THAT HE'S ILLITERATE, THAT HE CAN
11 READ, THAT HE CAN WRITE. AND COMMON SENSE TELLS
12 YOU A SEVEN YEAR OLD COULDN'T DO THE THINGS THAT
13 HE'S ACCOMPLISHED IN HIS LIFE.

14 NOW, WHAT I'M GOING TO DO IS TO
15 REVIEW THE EVIDENCE WITH YOU, TO GO OVER IT WITH
16 YOU, TO TALK ABOUT THE EVIDENCE AND THE REASONABLE
17 INFERENCES THAT Y'ALL CAN DRAW FROM THAT EVIDENCE.
18 BEFORE I DO THAT, I WANT TO TALK TO YOU BRIEFLY
19 ABOUT THE BURDEN OF PROOF. AS THE PROSECUTOR, I
20 HAVE THE BURDEN OF PROOF IN THIS CASE. AND THAT
21 STANDARD OF PROOF THAT I HAVE TO MEET IS BEYOND A
22 REASONABLE DOUBT. AND WHEN WE'RE TALKING ABOUT
23 REASONABLE DOUBT, WE'RE TALKING ABOUT ANYTHING IN
24 THE TRIAL OF THE CASE WHICH IS A SEARCH FOR THE
25 TRUTH. YOU CAN'T GET AWAY FROM USING YOUR COMMON

CLOSING ARGUMENT BY MR. BAILEY

1 SENSE. DON'T LEAVE YOUR COMMON SENSE AT HOME.
2 BRING IT IN THE COURTROOM AS WE SAID BEFORE.

3 AS I SAID BEFORE, YOUR SWORN DUTY IS
4 TO BASE YOUR DECISION FROM THE CREDIBLE EVIDENCE
5 FROM THAT WITNESS STAND. I ACCEPT THE BURDEN OF
6 PROOF IN ANY CASE THAT I PROSECUTE. AND IN ANY
7 CASE THAT IS PROSECUTED BY ANY PROSECUTOR IN THIS
8 STATE, WE HAVE THAT BURDEN OF PROOF. AND IF THE
9 EVIDENCE ESTABLISHES GUILT BEYOND A REASONABLE
10 DOUBT AS TO EACH OF THESE INDICTMENTS, IT WOULD
11 THEN BE YOUR DUTY AS JURORS TO BRING BACK A VERDICT
12 OF GUILTY TO EACH ONE OF THESE INDICTMENTS.

13 AND THE JUDGE WILL TELL YOU WHAT A
14 REASONABLE DOUBT IS. HE'LL DEFINE IT TO YOU WHEN
15 HE GIVES YOU HIS INSTRUCTIONS. BUT A REASONABLE
16 DOUBT IS NOT SOME FANCIFUL OR IMAGINARY DOUBT.
17 HE'LL TELL YOU WHAT A REASONABLE DOUBT IS. AND THE
18 STATE IS NOT REQUIRED TO PROVE GUILT BEYOND ALL
19 POSSIBLE DOUBT BECAUSE THAT BURDEN COULD NEVER BE
20 MET. AND IT'S NOT BEYOND A SHADOW OF A DOUBT LIKE
21 YOU HEAR ABOUT ON TELEVISION. IT IS A REASONABLE
22 DOUBT, COMMON SENSE THING. IT'S NOT BASED ON
23 SPECULATION. IT'S NOT BASED ON LETTING YOUR
24 IMAGINATION RUN WILD WITH YOU. IT'S BASED ON THE
25 EVIDENCE FROM THAT TRIAL. IF THERE IS A REASONABLE

CLOSING ARGUMENT BY MR. BAILEY

1 DOUBT, IT WOULD HAVE TO ARISE FROM THAT EVIDENCE.
2 IT'S NOT ABOUT PLAYING THE WHAT IF GAME TO GO BACK
3 TO THE JURY ROOM AND SAY "WELL, WHAT IF THIS
4 HAPPENED; WHAT IF THAT HAPPENED;" IT'S GOT TO BE
5 BASED ON THE EVIDENCE THAT YOU HEARD, THE SWORN
6 TESTIMONY. AND IF CONSIDERING ALL THAT EVIDENCE
7 THE TWELVE OF YOU HAVE A REASONABLE DOUBT AS TO
8 KENNETH SIMMONS' GUILT TO ANY ONE OF THESE
9 INDICTMENTS OR ALL OF THEM, IT'S YOUR DUTY TO
10 ACQUIT HIM. BUT AS I SAID ON THE OTHER HAND. IF
11 YOU'RE USING YOUR COMMON SENSE, THERE IS NO
12 REASONABLE DOUBT AS TO HIS GUILT, IT IS EQUALLY
13 YOUR DUTY TO CONVICT.

14 AND WHEN WE TALK ABOUT REASONABLE
15 DOUBT, WE'RE TALKING ABOUT REASONABLE DOUBT AS TO
16 GUILT ON EACH OF THESE SEPARATE INDICTMENTS. YOU
17 MAY HAVE REASONABLE DOUBTS ABOUT DIFFERENT THINGS
18 THAT OCCURRED DURING THE TRIAL. BUT WHAT WE'RE
19 TALKING ABOUT, WHAT YOU HAVE TO DECIDE, IS TAKING
20 ALL THE EVIDENCE AS A WHOLE, ALL OF THE EVIDENCE,
21 DO I HAVE A REASONABLE DOUBT AS TO KENNETH SIMMONS'
22 GUILT OF THE CRIME OF MURDER? DO I HAVE A
23 REASONABLE DOUBT AS TO HIS GUILT, THE CRIME OF
24 ARMED ROBBERY; AND SO ON WITH ALL FIVE OF THESE
25 INDICTMENTS HE'S CHARGED WITH.

CLOSING ARGUMENT BY MR. BAILEY

1 AS I SAID, IF THERE IS NO REASONABLE
2 DOUBT, IT'S YOUR SWORN AS JURORS TO CONVICT. NOW,
3 ONE MORE THING ABOUT REASONABLE DOUBT.
4 DELIBERATION IS NOT REASONABLE DOUBT. YOUR SWORN
5 DUTY IS TO DELIBERATE AND GO BACK TO THE JURY ROOM
6 TO DISCUSS THE CASE AMONG YOURSELVES. THAT'S NOT A
7 REASONABLE DOUBT. THAT'S DOING YOUR DUTY,
8 DISCUSSING THE CASE WITH YOUR FELLOW JURORS IN AN
9 OPEN AND FREE MANNER.

10 NOW, BEFORE I GO INTO THE STATE'S
11 CASE, I WANT TO MENTION A COUPLE OF THINGS THAT THE
12 DEFENSE SEEMED TO BRING OUT IN THEIR
13 CROSS-EXAMINATION OF THE STATE'S WITNESSES. NUMBER
14 ONE IS THE FOOTPRINTS; AND THEY MADE SOME BIG DEAL
15 ABOUT THAT. DO YOU RECALL RON MANCHESTER, THE TOWN
16 EVIDENCE CUSTODIAN, PHOTOGRAPHED SEVERAL FOOTPRINTS
17 OUT IN THE SAND IN THE BACK OF MRS. BOYD'S YARD?
18 THEY APPEARED TO HIM TO BE TWO SEPARATE SHOES THAT
19 MADE THOSE FOOTPRINTS. ONE OF THEM HE SAID WAS
20 HIGH-TECH POLICE BOOTS. SO USING YOUR COMMON SENSE
21 AND THE INFERENCES FROM THE EVIDENCE, THERE WERE A
22 LOT OF POLICE OFFICERS THERE. SOME POLICE OFFICER
23 LEFT THAT IMPRESSION.

24 THERE WAS ANOTHER FOOTWEAR THAT WAS
25 NOT A POLICE SHOE. AND MR. MANCHESTER TOOK THIS

CLOSING ARGUMENT BY MR. BAILEY

1 PICTURE; AND Y'ALL RECALL THAT WAS SENT UP TO
2 SLED. STEVE DERRICK TESTIFIED ABOUT GETTING THESE
3 SHOES HERE THAT MR. MANCHESTER GOT OUT OF MRS.
4 BOYD'S HOUSE A WHILE BACK AND HE PHOTOGRAPHED THE
5 BOTTOM OF THOSE SHOES AND THEN MADE AN IMPRESSION
6 WITH THOSE SHOES. AND HE TOLD Y'ALL THAT THEY WERE
7 CONSISTENT. HE CAN'T SAY WITH 100 PERCENT
8 CERTAINTY THOSE ARE THE SAME SHOES BECAUSE WHOEVER
9 MANUFACTURED THOSE SHOES MIGHT HAVE MADE A THOUSAND
10 PAIRS LIKE THAT. BUT THEY'RE CONSISTENT IN ALL
11 RESPECTS WITH HER SHOES. SO COMMON SENSE TELLS YOU
12 THAT'S MRS. BOYD'S SHOES. THAT'S HER YARD. YOU
13 WOULD EXPECT HER FOOTPRINTS TO BE IN THE YARD.

14 NOW THEY ASKED ONE OF THE WITNESSES,
15 WASN'T SHE BAREFOOTED WHEN THEY FOUND HER. YES! I
16 MEAN, FOR ALL WE KNOW SHE COULD HAVE BEEN OUT IN
17 THE YARD THE PREVIOUS EVENING AND LEFT THOSE
18 FOOTPRINTS. IT'S HER YARD. FINGERPRINTS! AS I
19 SAID IN THE OPENING STATEMENT, I DON'T HAVE ANY
20 FINGERPRINT EVIDENCE AGAINST KENNETH SIMMONS. IN
21 HIS CONFESSION, HE SAID HE WAS THERE; AND HE ALSO
22 SAID HE USED THE TELEPHONE. AND HIS PRINTS WERE
23 NOT FOUND ON THAT TELEPHONE. BUT WE ALSO KNOW
24 VIRGINIA WILSON, MRS. BOYD'S SISTER, USED THAT
25 TELEPHONE. HER PRINTS WEREN'T FOUND THERE EITHER.

CLOSING ARGUMENT BY MR. BAILEY

1 SO THE FACT THAT YOUR PRINTS AREN'T ON SOMETHING
2 DOESN'T MEAN YOU DIDN'T TOUCH IT JUST LIKE MR.
3 DERRICK SAID, IT DEPENDS ON THE SURFACE, IT DEPENDS
4 ON THE CONDITION OF YOUR HANDS. YOU'RE NOT ALWAYS
5 GOING TO LEAVE A PRINT.

6 AND THERE WAS TESTIMONY THAT
7 TELEPHONE WAS DIRTY. AND THEY SAID THAT A DIRTY
8 SUBSTANCE LIKE THAT, OFTEN YOU WOULDN'T LEAVE A
9 FINGERPRINT AS YOU WOULD ON SOMETHING THAT'S CLEAN
10 AND SMOOTH. SO YOU DON'T ALWAYS LEAVE A PRINT.
11 AND WE HAVE -- YOU KNOW, THEY CHECKED OUT EVERYBODY
12 THEY COULD THINK OF THAT MIGHT HAVE USED THE
13 PHONE. THEY CHECKED OUT MRS. BLONDELLE SMITH WHO
14 WAS THERE WITH MRS. WILSON. THEY CHECKED MRS.
15 WILSON'S PRINTS. OFFICER NEALY, THE OTHER PEOPLE
16 THAT WERE LIKELY TO USE THE PHONE; AND THEY STILL
17 HAVE A PRINT THAT, YOU KNOW, PROBABLY DOESN'T MATCH
18 MR. SIMMONS AND IT DOESN'T MATCH ANYBODY ELSE THEY
19 KNOW ABOUT. BUT THERE'S NO WAY TO AGE A PRINT.
20 THAT PRINT COULD HAVE BEEN ON THERE A WEEK, A
21 MONTH. IT COULD HAVE BEEN PUT THERE BY SOME HOUSE
22 GUEST THAT WAS OVER AT MRS. BOYD'S HOUSE. WE DON'T
23 KNOW THAT. THAT'S ONE OF THE THINGS YOU MAY HAVE A
24 REASONABLE DOUBT ABOUT, WHOSE PRINT IS THAT. BUT
25 EVEN IF YOU'VE GOT A REASONABLE DOUBT AS TO WHOSE

CLOSING ARGUMENT BY MR. BAILEY

1 PRINT IT IS; AGAIN THAT DOESN'T EQUATE TO
2 REASONABLE DOUBT AS TO GUILT. MRS. BOYD LIVED
3 ALONE. SHE'S DEAD. THERE'S NO WAY THEY CAN KNOW
4 WHO LEFT THAT PRINT OR WHEN IT WAS LEFT.

5 LET ME TALK TO Y'ALL A FEW MINUTES
6 ABOUT THE DEFENSE CASE. AND WHAT I WANT TO DO IS
7 JUST KIND OF START BACKWARDS AND TALK ABOUT THE
8 DEFENSE CASE; THEN I'M GOING TO TALK ABOUT THE
9 STATE'S WITNESSES. EVERY SINGLE WITNESS THAT THE
10 DEFENSE PUT UP IN THIS CASE WAS A PSYCHOLOGIST OR
11 PSYCHIATRIST OF SOME DESCRIPTION; AND THEY WERE PUT
12 UP HERE TO TRY TO CONVINCE Y'ALL OF ONE THING; THAT
13 FOR WHATEVER REASON MENTAL RETARDATION, ACCORDING
14 TO MOST OF THEM, THAT KENNETH SIMMONS IS JUST NOT
15 BRIGHT ENOUGH, OR WAS NOT BRIGHT ENOUGH BACK IN
16 DECEMBER OF 1997, TO UNDERSTAND HIS MIRANDA
17 RIGHTS. AND WE ALL KNOW; WE'VE HEARD ABOUT MIRANDA
18 RIGHTS. YOU SEE IT ON TELEVISION. IT'S FIVE OR
19 SIX SIMPLE THINGS THAT THE POLICE TELL EVERY
20 DEFENDANT. YOU SEE IT ON DRAGNET. YOU SEE IT ON
21 EVERY POLICE PROGRAM. EVERYBODY IS FAMILIAR WITH
22 MIRANDA RIGHTS. IT'S NOT ROCKET SCIENCE. ITS
23 DESIGNED JUST TO ADVISE A PERSON OF THEIR RIGHTS;
24 TO BE SILENT; TO HAVE A LAWYER AND SO FORTH; REAL
25 SIMPLE STUFF. BUT THEIR WHOLE CASES THAT THIS HIGH

CLOSING ARGUMENT BY MR. BAILEY

1 SCHOOL GRADUATE COULDN'T UNDERSTAND HIS MIRANDA
2 RIGHTS, THEREFORE HE COULD NOT INTELLIGENTLY WAIVE
3 THOSE RIGHTS; AND THEREFORE Y'ALL SHOULD JUST
4 IGNORE THAT CONFESSION, THE TAPED CONFESSION IN ITS
5 ENTIRETY. THAT'S IT. THAT'S THE STATE'S CASE.

6 NOW, I SUBMIT TO YOU THAT IT IS BULL
7 IF IT'S GOING TO INSULT YOUR INTELLIGENCE. LET'S
8 LOOK AT THE DEFENSE WITNESSES THEY CALLED UP TO TRY
9 TO PROVE THIS POINT TO Y'ALL. FIRST OF ALL, YOU
10 HAD DR. MICHAEL FOXWORTH. HE WAS THEIR FIRST
11 WITNESS. AND DR. FOXWORTH IS WHAT I CALL A JUKEBOX
12 WITNESS. YOU PUT A QUARTER IN AND HE STARTS TO
13 SING. BUT DR. FOXWORTH CHARGES TWO HUNDRED DOLLARS
14 AN HOUR FOR HIS PERFORMANCE. HE DOESN'T CHARGE A
15 QUARTER. SO I WASN'T TRYING TO -- AND I APOLOGIZE
16 TO Y'ALL IF Y'ALL THOUGHT I WAS TRYING TO WISE OFF
17 AT HIM. PLEASE DON'T HOLD THAT AGAINST THE STATE.
18 BUT WHAT I WAS TRYING TO DO WAS TO GET A STRAIGHT
19 ANSWER OUT OF HIM, AND I COULD NOT DO IT. THE BEST
20 I COULD TELL FROM HIS TESTIMONY AND GOING BY MY
21 NOTES, DR. FOXWORTH IS SAYING THIS GUY IS MENTALLY
22 RETARDED, HE'S NOT CAPABLE OF UNDERSTANDING HIS
23 MIRANDA RIGHTS, AND HE'S NOT MALINGERING. AND WHAT
24 HE SAID WAS THAT SIMMONS DOESN'T UNDERSTAND WHAT
25 THE WORD "RIGHT" MEANS; LIKE "YOU HAVE A RIGHT TO

CLOSING ARGUMENT BY MR. BAILEY

1 REMAIN SILENT." I THINK I ASKED HIM -- MAYBE IT
2 WAS ONE OF THE OTHER GUYS -- BUT IF I ASKED MR.
3 SIMMONS "YOU DON'T HAVE TO SAY ANYTHING," HE WOULD
4 UNDERSTAND THAT. BUT IF I SAID "YOU HAVE A RIGHT
5 TO REMAIN SILENT" THAT THAT WORD "RIGHT" WOULDN'T
6 REGISTER WITH HIM. THAT WOULD THROW HIM OFF.

7 HE ALSO TESTIFIED THAT HE HAD MEMORY
8 IMPAIRMENT. HE HAD LONG-TERM AND SHORT-TERM MEMORY
9 IMPAIRMENT. BUT Y'ALL RECALL THE DETAIL OF THOSE
10 CONFESSIONS. HE REMEMBERED ALL THOSE FACTS AND
11 DETAILS THAT HE SAID OCCURRED OVER A YEAR AGO WHEN
12 HE TALKED TO KENNY MEARS. SO HERE'S THIS GUY
13 PRESENTING TO BE A PSYCHIATRIST, BUT HE CAN'T
14 REMEMBER THINGS. YET IN DECEMBER OF 1997 HE
15 REMEMBERS PAGE AFTER PAGE AFTER PAGE. I THINK IT
16 IS PROBABLY THIRTY OR FORTY PAGES HERE OF WHAT HE
17 SAYS OCCURRED OVER A YEAR AGO.

18 NEXT THEY HAD DR. BARTON SAYLOR WHO
19 SAYS HE DOESN'T FIND ANY EVIDENCE OF MALINGERING,
20 BUT HE DIDN'T GIVE ANY TESTS TO DETERMINE WHETHER
21 OR NOT THERE WAS MALINGERING. AND HE ALSO SAID
22 THAT MR. SIMMONS HAD DIFFICULTY UNDERSTANDING HIS
23 MIRANDA RIGHTS. ON CROSS-EXAMINATION DR. SAYLOR
24 SAYS HE'S GOT A HIGH DEGREE OF MOTIVATION TO
25 MALINGER. AND HE SAYS THAT -- I ASKED HIM ABOUT

CLOSING ARGUMENT BY MR. BAILEY

1 FAKING AN I.Q. TEST. AND HE SAYS "YOU CAN'T FAKE
2 HIGH, BUT YOU CAN FAKE LOW." IN OTHER WORDS, YOU
3 CAN'T PRESENT YOURSELF AS SMARTER THAN YOU ARE, BUT
4 YOU CAN PRESENT YOURSELF AS STUPIDER THAN YOU ARE.
5 AND HE SAID HE COULD DO THAT; AND THAT MAKES
6 SENSE. DR. SAYLOR SAID HE COULDN'T SAY WHETHER OR
7 NOT MR. SIMMONS WAS RETARDED OR NOT. HE DIDN'T
8 HAVE AN OPINION ON THAT. BUT HIS ENTIRE TESTIMONY
9 WAS PREDICATED ON HIS ASSUMING HIS BELIEF THAT MR.
10 SIMMONS WAS NOT MALINGERING.

11 YOU NEXT HAD DR. BEHRMANN WHO IS A
12 PSYCHIATRIST. HE'S AN M.D. FROM THE STATE HOSPITAL
13 IN COLUMBIA. AND WHAT DID DR. BEHRMANN SAY? HE
14 SAID MR. SIMMONS, NUMBER ONE, HAS GOT NO MEDICAL
15 PROBLEMS THAT WOULD INTERFERE WITH HIS THINKING
16 ABILITY; THAT THEY HAD AN DONE M.R.I., A BRAIN
17 TEST. IT WAS NORMAL. THEY DID AN E.E.G. THAT WAS
18 NORMAL. THEY DID A NEUROLOGICAL CONSULTATION BY A
19 PHYSICIAN, NOT A NEUROPSYCHOLOGIST, BUT A PHYSICIAN
20 WHO SPECIALIZES IN NEUROLOGICAL BRAIN STUFF. AND
21 HE SAYS THAT WAS NORMAL. SO ALL THE MEDICAL TESTS
22 ON MR. SIMMONS WERE NORMAL. AND WHAT DID MR.
23 SIMMONS THE FIRST DAY THEY WERE IN THERE IT WAS
24 NOVEMBER OF 1997 TO DO THE EVALUATION THAT WAS
25 ORDERED BY THIS COURT? THEY ASKED MR. SIMMONS TO

CLOSING ARGUMENT BY MR. BAILEY

1 READ HIS MIRANDA RIGHTS. AND MR. SIMMONS SAID "I
2 CAN'T READ THEM." SO THEY HAD TO READ THOSE RIGHTS
3 TO HIM. NOW, LADIES AND GENTLEMEN, WE KNOW FROM
4 THE EVIDENCE THAT WHEN KENNETH SIMMONS SAW DR.
5 BEHRMANN, HE COULDN'T READ HIS MIRANDA RIGHTS, HE
6 WAS LYING. SO Y'ALL HAVE IN EVIDENCE STATE'S TEN
7 WHICH IS A NOTE HE PASSED THROUGH THE CORRECTIONAL
8 OFFICER, EVERETTE HOWARD WITH THE RICHLAND COUNTY
9 DETENTION CENTER, IN HIS WRITING. AND WE'VE GOT A
10 TWO PAGE STATEMENT WHICH IS STATE'S NUMBER 29 THAT
11 HE GAVE KENNY MEARS. AND MR. MEARS HELPED HIM WITH
12 THE SPELLING. BUT I SUBMIT TO YOU THAT IF YOU CAN
13 WRITE, YOU CAN READ. SO KENNETH SIMMONS LIED TO
14 DR. BEHRMANN. WHEN YOU PRESENT YOURSELF TO A
15 PSYCHOLOGIST OR PSYCHIATRIST AND YOU LIE TO HIM AND
16 DUMB YOURSELF DOWN, THAT'S MALINGERING. THERE'S
17 ABSOLUTE PROOF HE MALINGERED.

18 DR. BEHRMANN SAID HE DIDN'T HAVE AN
19 OPINION ON WHETHER OR NOT HE COULD UNDERSTAND --
20 MR. SIMMONS COULD UNDERSTAND MIRANDA RIGHTS IN
21 DECEMBER OF 1997 BECAUSE HE WASN'T THERE. BUT HE
22 SAYS HE HAS NO MENTAL DISORDER OR DISEASE OR DEFECT
23 THAT WOULD HAVE PREVENTED HIM FROM BEING CAPABLE OF
24 UNDERSTANDING HIS MIRANDA RIGHTS IN DECEMBER OF
25 1997 WHEN KENNY MEARS GAVE THEM TO HIM. HE SAID HE

CLOSING ARGUMENT BY MR. BAILEY

1 WAS CONCERNED THAT SIMMONS WAS MALINGERING. HE
2 SAID THE RECORD THAT HE WENT THROUGH, THE HOSPITAL
3 RECORDS WITH A SOCIAL WORKER AND SOME NURSES THAT
4 THESE PEOPLE OBSERVE THESE GUYS. THEY'RE NOT DOING
5 A FORMAL INTERVIEW; THEY'RE JUST IN THE HALLWAY.
6 BUT THERE ARE OTHER PEOPLE THAT ARE THERE. THESE
7 PEOPLE SEE HIM PLAYING SPADES, READING THE
8 NEWSPAPERS, PLAYING BOARD GAMES, AND ACTING NORMAL;
9 AND THEN HE PRESENTS HIMSELF TO DR. BEHRMANN AS
10 SOMEBODY THAT'S REAL STUPID. AND HE SAID THAT
11 CONCERNED HIM.

12 HE ALSO SAID THERE'S NO HISTORY OF
13 MENTAL RETARDATION IN THE RECORD THAT HE HAD THAT
14 THEY GATHERED FOR MR. SIMMONS. AND HE SAYS IT'S
15 UNUSUAL FOR SOMEBODY WITH A HISTORY HE HAD NOT TO
16 BE ABLE TO UNDERSTAND SOMETHING AS BASIC AS YOUR
17 MIRANDA RIGHTS. AND HE SAID HE COULD NOT DIAGNOSE
18 MR. SIMMONS BEING MENTALLY RETARDED BECAUSE ALL
19 THEY HAD WAS ONE I.Q. TEST, AND THERE ARE TWO OTHER
20 THINGS YOU LOOK AT AT THE ONSET; AGE AND
21 DIFFICULTIES IN ADAPTIVE FUNCTIONING, GETTING ALONG
22 WITH SOCIETY AND BEING ABLE TO BRUSH YOUR TEETH AND
23 COMB YOUR HAIR AND TAKE A BATH AND GET A JOB AND
24 GET MARRIED, AND SO FORTH. SO HE SAID HE COULDN'T
25 DIAGNOSE. AND UNDER STATE LAW WHEN THE DEPARTMENT

CLOSING ARGUMENT BY MR. BAILEY

1 OF MENTAL HEALTH HAS A PROVISIONAL DIAGNOSES OR A
2 POSSIBILITY OF RETARDATION, THEY CAN'T DO THE FINAL
3 DIAGNOSIS. THEY'VE GOT TO SEND THEM TO THE
4 DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS WHICH
5 IS THE STATE AGENCY THAT'S CREATED BY THE
6 GOVERNMENT TO DEAL WITH PEOPLE THAT ARE MENTALLY
7 RETARDED. THAT'S WHAT THEY DO. THAT'S ALL THEY
8 DO.

9 DR. VIDIC TESTIFIED NEXT. HE WAS
10 ALSO AN EMPLOYEE AT THE HALL INSTITUTE. HE WAS A
11 PSYCHOLOGIST; AND HE SAID HIM IN HIS OPINION THAT
12 HE THOUGHT, YES, HE IS IN THE MENTALLY DEFICIENT
13 RANGE; BASED ON THE TEST THAT HE DIDN'T THINK HE
14 WAS MALINGERING THAT TEST, THAT HE WAS BELOW THE 70
15 I.Q. NOW, OF COURSE, HE CAN'T DIAGNOSE MENTAL
16 RETARDATION EITHER BECAUSE THE OTHER TWO FACTORS
17 WERE NOT PRESENT THERE. BUT HE SAID BASED ON THAT
18 TEST SCORE, YES, HE WAS BELOW THE RANGE, BELOW THE
19 CUT OF 70. BUT HE SAID MY OPINION, EVEN SOMEBODY
20 WITH THE I.Q. THAT WAS PRESENTED ON THAT TEST,
21 WHICH I THINK WAS IN THE HIGH SIXTIES WITH THAT
22 I.Q. COULD UNDERSTAND THEIR MIRANDA RIGHTS. AND HE
23 SAYS IN HIS OPINION MR. SIMMONS DID UNDERSTAND HIS
24 MIRANDA RIGHTS IN DECEMBER OF 1997.

25 NOW, THESE ARE WITNESSES THAT THE

CLOSING ARGUMENT BY MR. BAILEY.

1 DEFENSE CALLED. I DIDN'T CALL THESE PEOPLE UP.
2 MOST IMPORTANTLY, PROBABLY, IF WHAT DR. VIDIC AND
3 ANY OF THESE PEOPLE TOLD Y'ALL, WAS THAT THE SAME
4 DAY THAT MR. SIMMONS TOLD DOCTOR BEHRMANN "I CAN'T
5 READ, YOU'VE GOT TO READ THESE MIRANDA RIGHTS TO
6 ME;" AND DR. BEHRMANN SPOON-FED THESE RIGHTS AND
7 WENT OVER IT VERY SLOWLY AND PATIENTLY WITH HIM AND
8 TRIED TO READ IT TO HIM, AND MR. SIMMONS WAS
9 DRAWING A BLANK, HE CAN'T UNDERSTAND IT; SHORTLY
10 AFTER THAT -- I THINK THE TESTIMONY WAS ABOUT AN
11 HOUR LATER -- DR. VIDIC GETS HIS INTERN, MONICA
12 SKAGGS, TO GO DOWN THERE AND ASK MR. SIMMONS TO DO
13 SOME TESTS, SOME PSYCHOLOGICAL TESTS. AND
14 ACCORDING TO DR. VIDIC'S TESTIMONY, SIMMONS TELLS
15 MRS. SKAGGS THAT HE WANTS TO EXERCISE HIS RIGHT NOT
16 TO DO THAT, HE WANTS TO TALK TO HIS LAWYER. SO NOT
17 ONLY CAN HE UNDERSTAND HIS RIGHTS, HE'S ACTUALLY
18 EXERCISING THOSE RIGHTS ON THE FIRST DAY THAT HE
19 WAS THERE, BEFORE ANY KIND OF COMPETENCY CLASS OR
20 ANYTHING ELSE. HE IS DEMONSTRATING THAT HE NOT
21 ONLY UNDERSTANDS HIS MIRANDA RIGHTS BUT IS
22 EXERCISING THOSE MIRANDA RIGHTS. IT IS CLEAR ON
23 THE RECORD.

24 THE NEXT WITNESS WAS DR. SANDLER WHO
25 TESTIFIED. DR. SANDLER WAS THE HEAD PSYCHIATRIST

CLOSING ARGUMENT BY MR. BAILEY

1 WITH THE DEPARTMENT OF DISABILITIES AND SPECIAL
2 NEEDS; USED TO BE THE DEPARTMENT OF MENTAL
3 RETARDATION. AND, AGAIN, THEY'RE THE STATE AGENCY
4 THAT IS SET UP TO DEAL WITH RETARDED PEOPLE AND
5 NOTHING ELSE. HE'S THE HEAD PSYCHOLOGIST WITH THAT
6 AGENCY. HE PERSONALLY PARTICIPATED IN THIS
7 EVALUATION WITH MR. SIMMONS. AND HE SAID NOT ONE
8 OF THE THREE CRITERIA FOR MENTAL RETARDATION WAS
9 MET BY MR. SIMMONS. HE SAID -- AND I QUOTE HERE --
10 "FELT LIKE HE WAS PULLING MY LEG." ANOTHER WAY OF
11 SAYING MALINGERING. HE SAID IN HIS OPINION KENNETH
12 SIMMONS WAS ABLE TO UNDERSTAND HIS MIRANDA RIGHTS
13 IN DECEMBER OF 1997.

14 SO WHAT YOU HEARD YESTERDAY; THEIR
15 THEORY THAT HE'S MENTALLY RETARDED AND THEY'RE
16 TRYING TO PROVE TO Y'ALL THROUGH ALL THE WITNESSES
17 THAT IT'S PRETTY WELL SHOT. THEIR WITNESSES ARE
18 ALL OVER THE BOARD. AND DR. SANDLER WHO'S THE
19 EXPERT, I SUBMIT, IN THIS AREA SAYS HE DOESN'T EVEN
20 MEET ONE OF THE THREE CRITERIA FOR MENTAL
21 RETARDATION. AND EVEN ON THE TEST THEY GAVE HIM,
22 THE I.Q. TEST, HE SCORED ABOVE THE MENTALLY
23 RETARDED LEVEL. SO WHAT THEY DO, THEY SAY "WELL,
24 THIS AIN'T WORKING; WE CAN'T SHOW HE'S MENTALLY
25 RETARDED BECAUSE THEIR OWN WITNESSES ARE SAYING

CLOSING ARGUMENT BY MR. BAILEY

HE'S NOT.

SO THEY BRING DR. WAID IN HERE.
AND DR. WAID SAYS HE'S A NEUROPSYCHOLOGIST. HE'S
SOMETHING DIFFERENT THAN THESE OTHER
PSYCHOLOGISTS. AND DR. WAID SAYS "NO; THESE OTHER
GUYS ARE WRONG; HE'S NOT MENTALLY RETARDED. HE
STARTED OFF OKAY; SO THEN HE GOT ON ALL THESE
DRUGS. HE GOT ALCOHOL. HE DID A LOT OF CRACK, AND
IT DUMPED HIM DOWN." SO BY DECEMBER OF 1997, HIS
BRAIN WAS SO DAMAGED WITH ALL THESE DRUGS HE HAD
BEEN TAKING THAT HE WAS JUST KIND OF OUT OF IT. HE
COULDN'T UNDERSTAND HIS MIRANDA RIGHTS. HE JUST
KIND OF WALKED AROUND IN A DAZE.

NOW, I DON'T DISPUTE THE FACT THAT
IF YOU'RE DRINKING A QUART OF LIQUOR A DAY, IT'S
NOT GOING TO DO YOUR BRAIN ANY GOOD. AND I DON'T
DISPUTE THE FACT THAT IF YOU'RE DOING A WHOLE LOT
OF CRACK IT'S GOING -- LONG-TERM IT'S NOT GOING
MAKE YOU ANY SMARTER. AND I DON'T DISPUTE THE FACT
THAT KENNETH SIMMONS IS NOT TO BRIGHTEST GUY
AROUND. I WOULDN'T STAND UP HERE AND SAY THAT.
BUT THE MEDICAL TESTS, THE HARD MEDICAL TESTS; THE
M.R.I., THE E.E.G.; THERE'S NO EVIDENCE OF ANY
BRAIN DAMAGE; NONE! DR. WAID WAS UNABLE TO TELL
YOU THERE WAS ANY TEST AT ALL; THAT HARD MEDICAL

CLOSING ARGUMENT BY MR. BAILEY

1 TESTS, X-RAY, CAT-SCAN, M.R.I., THE TOMOGRAPHY; ANY
2 OF THIS STUFF THAT THEY CAN DO TO DETERMINE WHETHER
3 OR NOT YOU'VE GOT BRAIN DAMAGE. THEY EITHER DID
4 THE TEST AND THERE'S NOTHING WRONG OR DIDN'T DO THE
5 TEST. SO WHAT HE'S BASING HIS OPINION ON; NUMBER
6 ONE, AGAIN, ASSUMING HE'S NOT MALINGERING. AND
7 NUMBER TWO, SOME TESTS THAT HE GAVE OVER A PERIOD
8 OF ABOUT FOUR HOURS. THEN WE CALLED DR. SANDLER
9 BACK IN REPLY. HE TESTIFIED TO HIS QUALIFICATIONS
10 IN THAT AREA. AND HE SAID THE TESTS THAT DR. WAID
11 GAVE WERE JUST BOGUS; THAT YOU COULDN'T DRAW ANY
12 CONCLUSIONS FROM IT. THEY WERE THE WRONG TESTS.
13 THEY WEREN'T STANDARD RECOGNIZED TESTS.

14 NOW I THINK THE FIRST GUY WHO
15 TESTIFIED, THE FELLOW THAT WENT ON AND ON -- WHAT'S
16 HIS NAME? DR. FOXWORTH. DR. FOXWORTH -- AND I
17 THINK IT MIGHT HAVE BEEN DR. WAID WHO ALSO SAID
18 THAT WHERE HE'S HANGING UP -- AND I MENTIONED THIS
19 BEFORE -- IF I SAY TO HIM "YOU CAN BE QUIET," HE
20 WOULD UNDERSTAND THAT. BUT IF I SAID, "YOU'VE GOT
21 A RIGHT TO BE QUIET," THEN HE WOULDN'T UNDERSTAND
22 WHAT RIGHT MEANT. Y'ALL HAVE IN EVIDENCE STATE'S
23 17 WHICH IS A TRANSCRIPT OF THE FIRST TAPE THAT WAS
24 TAKEN ON DECEMBER THE FIFTH, 1997. AND ON PAGE TEN
25 OF THAT TAPE -- YOU'LL HAVE THIS IN THE JURY ROOM

CLOSING ARGUMENT BY MR. BAILEY

1 WITH YOU ALONG WITH THE OTHER EVIDENCE. KENNETH
2 SIMMONS IS QUESTIONED BY KENNY MEARS. THIS IS WHEN
3 HE'S GOT THIS STORY ABOUT SHORTY AND ALL THAT
4 BIZARRE STUFF. HE SAYS "I HATE TO SEE LIKE YOU DID
5 TO MRS. BOYD, BUT HE AIN'T HAD NO RIGHT DOING THAT
6 TO HER, AND HE AIN'T GOT NO RIGHT DOING IT TO
7 NOBODY." SO BACK IN DECEMBER, 1997, DESPITE WHAT
8 THESE EXPERTS ARE TELLING YOU ALL, KENNETH SIMMONS
9 DID UNDERSTAND WHAT THE WORD "RIGHT" MEANT BECAUSE
10 HE'S USING THAT IN THE PROPER CONTEXT TWO TIMES IN
11 ONE SENTENCE.

12 NOW, IF Y'ALL ARE CONFUSED BY THESE
13 PSYCHIATRISTS AND PSYCHOLOGISTS, DON'T FEEL BAD
14 ABOUT IT BECAUSE THEY DON'T EVEN AGREE AMONG
15 THEMSELVES. HE'S MENTALLY RETARDED; HE'S NOT
16 MENTALLY RETARDED; HE UNDERSTANDS; HE DOESN'T
17 UNDERSTAND. HE'D STARTING OFF OKAY, AND NOW HE'S
18 NOT. I MEAN THEY'RE ALL OVER THE BOARD ON THIS.
19 BUT YOU DON'T NEED TO WORRY ABOUT THAT BECAUSE
20 YOU'VE GOT SOMETHING THEY DON'T HAVE. YOU'VE GOT
21 COMMON SENSE. AND THAT'S BETTER THAN ANY DEGREE,
22 M.D., A PH.D., OR WHATEVER IS YOUR GOOD EVERY DAY
23 COMMON SENSE. AND I ASK YOU TO USE YOUR COMMON
24 SENSE. BASE YOUR DECISION ON WHAT YOU KNOW.

25 THIS MAN GRADUATED FROM HIGH

CLOSING ARGUMENT BY MR. BAILEY

1 SCHOOL IN SUMMERVILLE; PLAYED FOOTBALL; LETTERED A
2 COUPLE OF YEARS. HE GOT MARRIED; HAD A COUPLE OF
3 KIDS; GOT A DRIVER'S LICENSE; WENT TO WORK
4 ACCORDING TO THE PAPERWORK THAT THEY GOT FROM HIS
5 FAMILY MEMBERS OR FROM HIM AT THE HALL INSTITUTE.
6 HE WORKED STEADY; MARRIED; KIDS; NORMAL LIFE-STYLE
7 FOR ROUGHLY TEN YEARS UNTIL HE GOT ON THAT CRACK SO
8 BAD HIS LIFE FELL APART. HE CAN READ AND WRITE,
9 AND HE CAN TELL A TERRIFIC TALE HERE AS INDICATED
10 BY THAT FIRST THING. AND Y'ALL HEARD THAT TAPE.
11 Y'ALL HEARD THE COMMUNICATION, THE GIVE AND TAKE,
12 THE BACK AND FORTH. AND Y'ALL RUN INTO PEOPLE IN
13 YOUR LIFETIMES WHO ARE RETARDED. THEIR SPEECH
14 PATTERNS; THE WAY THEY TALK, THE WAY THEY RESPOND,
15 OR WHATEVER. THAT ISN'T PRESENT IN THAT TAPE OF
16 KENNY MEARS. IT JUST ISN'T THERE. Y'ALL HAVE
17 HEARD IT. IT JUST FLAT-OUT DOESN'T MAKE ANY SENSE
18 THAT THE VOICE YOU'RE HEARING ON THAT TAPE COULDN'T
19 UNDERSTAND MIRANDA RIGHTS.

20 NOW WHAT I'M GOING TO DO IS I'M
21 GOING TO GET MR. BELL OVER HERE TO PLAY PORTIONS --
22 THE FIRST PART OF ALL THREE TAPES -- THE PART JUST
23 WHERE MR. MEARS IS GIVING THE MIRANDA RIGHTS TO MR.
24 SIMMONS. I JUST WANT Y'ALL TO LISTEN FOR A MINUTE
25 TO THE EXTENT THAT MR. MEARS IS GOING TO TRY TO

CLOSING ARGUMENT BY MR. BAILEY

1 MAKE SURE KENNETH SIMMONS UNDERSTANDS HIS MIRANDA
2 RIGHTS AND HIS RESPONSES.

3 (AT THIS TIME PORTION OF TAPE IS PLAYED FOR JURY
4 AND IS AS FOLLOWS:)

5 MR. MEARS: "TODAY'S DATE IS
6 DECEMBER THE 5TH, 1997. THE TIME IS 12:50 P.M.
7 WITH ME AT THE RICHLAND COUNTY DETENTION CENTER IS
8 ANN REESE OF SLED. I'M KENNY MEARS OF SLED;
9 MAYBELLE HENDRICKS, ST. GEORGE P.D. WE HAVE BEFORE
10 US THAT WOULD LIKE TO GIVE US AN INTERVIEW, KENNETH
11 SIMMONS. NOW, MR. SIMMONS, BEFORE WE START, WE
12 WOULD LIKE TO READ YOU YOUR RIGHTS SO YOU CAN
13 UNDERSTAND EXACTLY. TODAY'S DATE IS DECEMBER THE
14 FIFTH, 1997. THE TIME IS 12:50 P.M. BEFORE WE ASK
15 YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR
16 RIGHTS. WE WANT YOU TO SPEAK UP SO WE CAN RECORD
17 YOU ON THE TAPE."

18 MR. SIMMONS: "YES, SIR."

19 MR. MEARS: "DO YOU UNDERSTAND THAT?
20 YOU HAVE THE RIGHT TO REMAIN SILENT; DO YOU
21 UNDERSTAND THAT?"

22 MR. SIMMONS: "YES, SIR."

23 MR. MEARS: "ANYTHING YOU SAY CAN
24 AND WILL BE USED AGAINST YOU IN A COURT OF LAW; DO
25 YOU UNDERSTAND THAT?"

CLOSING ARGUMENT BY MR. BAILEY

1 MR. SIMMONS: "YES, SIR."

2 MR. MEARS: "YOU HAVE THE RIGHT TO
3 TALK TO A LAWYER FOR ADVICE BEFORE WE ASK YOU ANY
4 QUESTIONS AND TO HAVE HIM OR HER PRESENT WITH YOU
5 DURING QUESTIONING. DO YOU UNDERSTAND THAT?"

6 MR. SIMMONS: "YES, SIR."

7 MR. MEARS: IF YOU HAVE NO MONEY FOR
8 A LAWYER'S FEE, THE COURT WILL APPOINT ONE TO
9 REPRESENT YOU WITHOUT COST TO YOU IF YOU WISH."

10 MR. SIMMONS: "YES, SIR."

11 MR. MEARS: "IF YOU DECIDE TO ANSWER
12 ANY QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU
13 WILL STILL HAVE THE RIGHT TO STOP ANSWERING
14 QUESTIONS AT ANY TIME. YOU ALSO HAVE THE RIGHT TO
15 STOP ANSWERING QUESTIONS AT ANY TIME UNTIL YOU TALK
16 TO A LAWYER."

17 MR. SIMMONS: "YES, SIR."

18 MR. MEARS: THEN IT SAYS "I HAVE
19 READ THIS STATEMENT OF MY RIGHTS AND I UNDERSTAND
20 WHAT MY RIGHTS ARE. DO YOU UNDERSTAND THAT?"

21 MR. SIMMONS: "YES, SIR."

22 MR. MEARS: "DO YOU UNDERSTAND
23 THAT?"

24 MR. SIMMONS: "YES, SIR."

25 MR. MEARS: "HAVE YOU BEEN READ YOUR

CLOSING ARGUMENT BY MR. BAILEY

RIGHTS BEFORE?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "OKAY."

MR. SIMMONS: "I MEAN, YES, SIR;
OKAY."

MR. MEARS: "WE ASK YOU TO SIGN THE
RIGHTS RIGHT THERE."

MR. SIMMONS: "UH-HUH; OKAY."

MR. MEARS: "AND AFTER YOU SIGN THAT
RIGHT UNDER THERE, IT SAYS 'WAIVER OF RIGHTS.'"

MR. SIMMONS: "UH-HUH."

MR. MEARS: "YOU CAN READ ALONG WITH
ME. IT SAYS "I AM WILLING TO MAKE A STATEMENT AND
ANSWER QUESTIONS. I DO NOT WANT A LAWYER AT THIS
TIME. I UNDERSTAND AND KNOW WHAT I AM DOING. NO
PROMISES OR THREATS HAVE BEEN MADE TO ME AND NO
PRESSURE OR COERCION OF ANY KIND HAS BEEN USED
AGAINST ME. DO YOU UNDERSTAND THAT?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "THIS MEANS THAT YOU ARE
WILLING TO TALK WITH US, AND YOU ASKED TO TALK TO
US?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "OKAY. IF YOU WOULD JUST
SIGN THOSE RIGHTS THERE FOR ME. OKAY. I STOPPED

CLOSING ARGUMENT BY MR. BAILEY

1 THE TAPE SO YOU COULD SIGN THIS HERE. THE TAPE IS
2 NOW STARTED AGAIN."

3 MR. SIMMONS: "YES, SIR."

4 MR. MEARS: "NOW YOUR RIGHTS HAVE
5 BEEN READ TO YOU, AND YOU FULLY UNDERSTAND YOUR
6 RIGHTS?"

7 MR. SIMMONS: "YES, SIR."

8 MR. MEARS: "OKAY. NOW WITH YOUR
9 RIGHTS AND EVERYTHING IN MIND, YOU ARE STILL
10 WILLING TO TALK WITH US?"

11 MR. SIMMONS: "YES, SIR."

12 MR. MEARS: "OKAY. WE UNDERSTAND
13 THAT YOU WANT TO TALK WITH US?"

14 MR. SIMMONS: "YES, SIR."

15 MR. MEARS: "I'M GOING TO JUST LET
16 YOU START OUT BY TELLING US WHAT YOU WANT TO TELL
17 US."

18 MR. BAILEY: THE SECOND TAPE; THE
19 NIGHT OF DECEMBER THE FIFTH.

20 (AT THIS TIME PORTION OF SECOND TAPE IS PLAYED FOR
21 THE JURY AND IS AS FOLLOWS:)

22 MR. MEARS: "I'M KENNY MEARS WITH
23 SLED. WITH ME I HAVE KENNETH SIMMONS. AND I'M
24 HERE QUESTIONING HIM ABOUT A MURDER THAT TOOK PLACE
25 IN SUMMERVILLE IN REFERENCE 1996. KENNETH, FIRST

CLOSING ARGUMENT BY MR. BAILEY

OF ALL I'M GOING TO READ YOU YOUR RIGHTS AGAIN."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "THIS IS THE SECOND
INTERVIEW TODAY."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "I INTERVIEWED YOU
EARLIER, AND I READ YOU YOUR RIGHTS; REMEMBER?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "OKAY. I'M GOING TO
READ YOU YOUR RIGHTS AGAIN."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "TODAY'S DATE IS
DECEMBER THE FIFTH, 1997. THE TIME IS 8:26 P.M.
FIRST OF ALL I'M EXPLAINING YOUR RIGHTS TO YOU.
BEFORE WE ASK YOU ANY QUESTIONS, YOU MUST
UNDERSTAND YOUR RIGHTS."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "YOU HAVE THE RIGHT TO
REMAIN SILENT."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "ANYTHING YOU SAY CAN
AND WILL BE USED AGAINST YOU IN A COURT OF LAW."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "YOU HAVE THE RIGHT TO
TALK TO A LAWYER FOR ADVICE BEFORE WE ASK YOU ANY

CLOSING ARGUMENT BY MR. BAILEY

QUESTIONS AND HAVE HIM OR HER PRESENT WITH YOU
DURING QUESTIONING."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "IF YOU HAVE NO MONEY
FOR A LAWYER'S FEE, THE COURT WILL APPOINT ONE TO
REPRESENT YOU WITHOUT COST TO YOU IF YOU WISH."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "IF YOU DECIDE TO ANSWER
ANY QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU
WILL STILL HAVE THE RIGHT TO STOP ANSWERING
QUESTIONS AT ANY TIME."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "YOU ALSO HAVE THE RIGHT
TO STOP ANSWERING QUESTIONS AT ANY TIME UNTIL YOU
TALK TO A LAWYER."

MR. SIMMONS: "YES, SIR."

MR. MEARS: AND IT ALSO STATES THAT
"I HAVE, WHICH IS MEANING YOU, HAVE READ THIS
STATEMENT OF MY RIGHTS, AND I UNDERSTAND WHAT MY
RIGHTS ARE?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "THESE ARE THE SAME
RIGHTS I READ TO YOU IN AN EARLIER INTERVIEW?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "DO YOU UNDERSTAND THESE

RIGHTS?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "THERE'S A PLACE
INDICATED RIGHT UNDER YOUR RIGHTS WHERE IT SAYS
SIGN. WELL, IT SAYS SIGN."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "I NEED YOU TO SIGN YOUR
NAME THERE IF YOU UNDERSTAND THESE RIGHTS AND
INITIAL EACH SENTENCE ON THE SIDE."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "OKAY. WHEN YOU FINISH
SIGNING ALL OF IT, JUST GO RIGHT AHEAD. WHEN YOU
FINISH SIGNING THAT, THERE'S ANOTHER SECTION RIGHT
ON THE BOTTOM THERE. IT'S CALLED WAIVER OF
RIGHTS. LET ME READ YOU YOUR WAIVER OF RIGHTS. I
AM WILLING TO MAKE A STATEMENT AND ANSWER
QUESTIONS. I DO NOT WANT A LAWYER AT THIS TIME.
I UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES
OR THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OR
COERCION OF ANY KIND HAS BEEN USED AGAINST ME.
THIS IS A WAIVER OF RIGHTS STATING YOU ARE WILLING
TO TALK WITH ME. IF YOU ARE WILLING TO TALK TO ME,
YOU NEED TO SIGN RIGHT THERE. ARE YOU WILLING TO
TALK WITH ME?"

MR. SIMMONS: "YES, SIR."

CLOSING ARGUMENT BY MR. BAILEY

1 MR. MEARS: "OKAY. DO YOU
2 UNDERSTAND THIS SECTION OF YOUR WAIVER OF RIGHTS?"

3 MR. SIMMONS: "YES, SIR."

4 MR. MEARS: "OKAY. ARE THERE ANY
5 QUESTIONS ABOUT THE WAIVER OF RIGHTS?"

6 MR. SIMMONS: "NO, SIR."

7 MR. MEARS: "NONE AT ALL?"

8 MR. SIMMONS: "NO, SIR."

9 MR. MEARS: ANY "ALL RIGHT. AND
10 YOU'RE WILLING TO TALK TO ME?"

11 MR. SIMMONS: "YES, SIR."

12 MR. BAILEY: DECEMBER THE NINTH.
13 (AT THIS TIME TAPE IS PLAYED FOR JURY AND IS AS
14 FOLLOWS:)

15 MR. MEARS: "I HAVE A COUPLE OF
16 OTHER QUESTIONS THAT I WOULD LIKE TO ASK YOU."

17 MR. SIMMONS: "YES, SIR."

18 MR. MEARS: "IF YOU'RE WILLING TO
19 ANSWER THEM."

20 MR. SIMMONS: "YES, SIR."

21 MR. MEARS: "AGAIN, I WILL ADVISE
22 YOU OF YOUR RIGHTS. YOUR RIGHTS HAVE BEEN READ TO
23 YOU TWICE BEFORE."

24 MR. SIMMONS: "YES, SIR."

25 MR. MEARS: "DO YOU STILL UNDERSTAND

CLOSING ARGUMENT BY MR. BAILEY

YOUR RIGHTS?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "DO YOU UNDERSTAND THAT
YOUR RIGHTS ARE STILL IN TACT?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AGAIN, HERE'S ANOTHER
RIGHTS FORM."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "YOU HAVE READ THEM
TWICE BEFORE."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "YOU CAN READ THEM OVER
AGAIN."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AND SIGN THIS ONE."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "GET TODAY'S DATE AND
ALL."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "ALL RIGHT. I'M GOING
TO CUT THE TAPE OFF FOR NOW UNTIL YOU READ OVER
YOUR RIGHTS AND THEN I'LL START THE TAPE BACK UP."

MR. SIMMONS: "YES, SIR."

MR. MEARS: "OKAY, NOW, KENNETH; I'M
GOING TO START THE TAPE BACK UP AGAIN."

CLOSING ARGUMENT BY MR. BAILEY

1 MR. SIMMONS: "YES, SIR."

2 MR. MEARS: "YOUR RIGHTS HAVE BEEN
3 READ TO YOU."

4 MR. SIMMONS: "YES, SIR."

5 MR. MEARS: "YOU HAVE SIGNED THE
6 RIGHTS, AND YOU HAVE INITIALED EACH ONE OF THEM ON
7 THE SIDE."

8 MR. SIMMONS: "YES, SIR."

9 MR. MEARS: "YOU STILL FULLY
10 UNDERSTAND YOUR RIGHTS?"

11 MR. SIMMONS: "YES, SIR."

12 MR. MEARS: "ANY QUESTIONS AT ALL
13 ABOUT YOUR RIGHTS?"

14 MR. SIMMONS: "NO, SIR."

15 BY MR. BAILEY

16 I SUBMIT TO YOU, LADIES AND
17 GENTLEMEN, THAT THERE'S NOT A WHOLE LOT ELSE CAN
18 EXPECT A POLICE OFFICER TO DO TO ADVISE SOMEBODY OF
19 THEIR RIGHTS. HE ALSO DURING THAT SAME -- BACK ON
20 DECEMBER THE FIFTH -- DETERMINED THAT HE HAD A
21 TWELFTH GRADE EDUCATION. SO HE HAD NO REASON TO
22 ASK HIM ANYTHING ELSE. HE HAD ALSO BEEN GIVEN THE
23 MIRANDA RIGHTS BY EVERETTE HOWARD AT THE DETENTION
24 CENTER ON DECEMBER THE SECOND, DECEMBER THE THIRD,
25 AND DECEMBER THE FOURTH. SO DURING THAT WEEK IN

CLOSING ARGUMENT BY MR. BAILEY

1 DECEMBER, SEVERAL TIMES HE WAS GIVEN MIRANDA RIGHTS
2 EITHER MR. HOWARD OR MR. MEARS. THEY WANT Y'ALL TO
3 BELIEVE HE COULDN'T UNDERSTAND THAT.

4 NOW JUDGE PEEPLES, AS I SAID, IS
5 GOING TO INSTRUCT YOU AT THE END OF THIS TRIAL IN
6 DETAIL EACH ONE OF THE ELEMENTS DUE TO THE OFFENSES
7 THAT THE STATE HAS BROUGHT AGAINST MR. SIMMONS.
8 AND WHAT I'M GOING TO DO IS TAKE EACH ONE THESE
9 INDICTMENTS, ONE AT A TIME. AND BEARING IN MIND
10 THAT JUDGE PEEPLES IS GOING TO GIVE YOU COMPLETE
11 INSTRUCTIONS AND DETAILED CHARGES, I'M GOING TO TRY
12 TO JUST PRESENT THEM TO YOU IN THE SIMPLEST WAY I
13 KNOW HOW. WHAT I WANT TO DO IS DISCUSS WHAT THESE
14 CHARGES MEAN. AND I WANT TO TALK ABOUT THE STATE'S
15 PROOF. AND THAT STATE'S PROOF IS TWO THINGS.
16 NUMBER ONE, EACH ONE OF THESE CRIMES WERE
17 COMMITTED; AND NUMBER TWO, THAT KENNETH SIMMONS,
18 AND ONLY KENNETH, COMMITTED.

19 THE FIRST ONE I'M GOING TO TALK TO
20 Y'ALL ABOUT IS ARMED ROBBERY. ARMED ROBBERY IS
21 STEALING FROM SOMEBODY, MONEY, PROPERTY, OR GOODS
22 OF SOMEBODY ELSE BY THE USE OF FORCE OR
23 INTIMIDATION WHILE YOU'RE ARMED WITH A DEADLY
24 WEAPON. NOW, WHAT CONSTITUTES A DEADLY WEAPON CAN
25 DEPEND ON THE FACTS AND CIRCUMSTANCES IN EACH

CLOSING ARGUMENT BY MR. BAILEY

1 CASE. THE JUDGE WILL INSTRUCT YOU ON THAT. THE
2 STATE ALLEGES IN THIS CASE THAT A STICK WOULD
3 CONSTITUTE A DEADLY WEAPON. AND THE JUDGE WILL
4 ALSO INSTRUCT YOU THAT DEPENDING ON THE FACTS OF
5 THE CASE, HANDS OR FISTS CAN BE A DEADLY WEAPON.
6 AND WE CONTEND THAT BOTH HANDS AND FISTS AND A
7 STICK WERE THE DEADLY WEAPONS THAT FACILITATED THIS
8 ARMED ROBBERY.

9 NOW THE STATE IS NEVER REQUIRED TO
10 PROVE MOTIVE IN ANY CASE. WE HAVE TO PROVE IT
11 HAPPENED. WE DON'T NEED TO PROVE WHY IT HAPPENED.
12 BUT THE EVIDENCE IS CLEAR IN THIS CASE. AND MOTIVE
13 IS ALWAYS RELEVANT. IT'S JUST NOT SOMETHING WE'VE
14 GOT TO PROVE. BUT THE EVIDENCE IS CLEAR BY KENNETH
15 SIMMONS' OWN ADMISSION TO KENNY MEARS THAT ROBBERY
16 WAS THE INITIAL MOTIVE FOR EVERYTHING THAT HAPPENED
17 ON SEPTEMBER THE FIRST, 1996, TO LILLY BELL BOYD
18 THAT BROUGHT ABOUT ALL THESE EVENTS THAT Y'ALL
19 HEARD ABOUT.

20 NOW WHAT I'M GOING TO DO IS PLAY
21 AGAIN PORTIONS OF THESE TAPES, THE CONFESSIONS BACK
22 IN DECEMBER, DECEMBER THE FIFTH AND DECEMBER THE
23 NINTH, IN WHICH AFTER HEARING THOSE RIGHTS AS Y'ALL
24 HAVE HEARD, KENNETH SIMMONS CLEARLY ADMITS HIS
25 GUILT OF ARMED ROBBERY. AND AS YOU LISTEN TO THIS

CLOSING ARGUMENT BY MR. BAILEY

1 PORTION OF IT, JUST PLEASE TRY TO BEAR IN MIND THE
2 ELEMENTS OF ARMED ROBBERY AND WHETHER OR NOT
3 KENNETH SIMMONS ADMITS ALL THE ELEMENTS OF ARMED
4 ROBBERY; THE STEALING OF GOODS OR PROPERTY OF
5 ANOTHER WITH THE ASSISTANCE OF A DEADLY WEAPON TO
6 INTIMIDATE OR TO FACILITATE THAT ROBBERY.
7 (AT THIS TIME TAPE IS PLAYED FOR JURY AND IS AS
8 FOLLOWS:)

9 MR. MEARS: "WHO WAS SMOKING CRACK
10 COCAINE?"

11 MR. SIMMONS: "ME AND A COUPLE OF
12 FELLOWS?"

13 MR. MEARS: "DO YOU KNOW THE
14 FELLOWS' NAMES."

15 MR. SIMMONS: "NO, SIR."

16 MR. MEARS: "YOU DON'T KNOW THEIR
17 NAMES?"

18 MR. SIMMONS: "NO, SIR." AND I LEFT
19 THERE."

20 MR. MEARS: "WHERE WERE YOU SMOKING
21 CRACK THAT NIGHT?"

22 MR. SIMMONS: "OUT TO THE CLUB. SHE
23 WAS COMING BACK IN THE KITCHEN; AND I PUSHED HER
24 BACK IN THE HOUSE."

25 MR. MEARS: "WHAT PART OF THE HOUSE

CLOSING ARGUMENT BY MR. BAILEY

1 WAS THIS IN?"

2 MR. SIMMONS: "IT WAS IN THE BACK
3 PORCH. I PUSHED HER BACK INSIDE IS HOUSE. AND I
4 ASKED HER TO GIVE ME THE MONEY. SHE GRABBED THE
5 MONEY AND START TO PULL BACK, AND I PUSH HER."

6 MR. MEARS: "WHAT DID SHE HAVE THE
7 MONEY IN?"

8 MR. SIMMONS: "IN AN ENVELOPE. AND
9 I PUSH HER AND SHE FALL AND HIT HER HEAD AND WAS
10 GETTING BACK UP. WHEN I WAS TRYING TO CATCH HER,
11 SHE WAS TRYING TO HOLD ON TO ME, AND I TRY TO HOLD
12 HER. SHE FALL. SHE WAS GETTING BACK UP, AND I HIT
13 HER WITH A STICK."

14 MR. MEARS: "WHAT KIND OF STICK DID
15 YOU HIT HER WITH?"

16 MR. SIMMONS: "A LITTLE PIECE -- A
17 LITTLE STICK OFF A TREE."

18 MR. MEARS: "DID YOU TAKE THAT STICK
19 INTO THE HOUSE WITH YOU?"

20 MR. SIMMONS: "NO; IT WAS ON THE
21 BACK PORCH. IT WAS SITTING ON THE BACK PORCH."

22 MR. MEARS: "HOW MANY TIMES DID YOU
23 HIT HER?"

24 MR. SIMMONS: "ALMOST TWO OR THREE
25 TIMES."

CLOSING ARGUMENT BY MR. BAILEY

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MR. MEARS: "WHERE DID YOU HIT HER
AT?"

MR. SIMMONS: "ON HER HEAD."

MR. MEARS: "THEN WHAT DID YOU DO?"

MR. SIMMONS: "AFTER THAT, I HAD SEX
WITH HER."

MR. MEARS: "WAS SHE STILL ALIVE AT
THAT TIME?"

MR. SIMMONS: "YES, SIR; SHE WAS
STILL LIVING AT THAT TIME."

MR. MEARS: "YOU HAD SEX WITH HER?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "OKAY."

MR. SIMMONS: "AND I LEFT, AND I WAS
REALLY LOST IN MY MIND."

MR. MEARS: "DID YOU GET ANY MONEY?"

MR. SIMMONS: "YEAH; SHE HAD DONE
GIVE ME THE ENVELOPE; SHE DONE DROPPED THE ENVELOPE
WHEN I HIT HER. AND I PICKED UP THE TELEPHONE
READY TO DIAL A NUMBER; PUT THE TELEPHONE BACK
DOWN."

MR. MEARS: "DIAL WHAT NUMBER?"

MR. SIMMONS: "I WAS DIALING 911;
AND PUT THE TELEPHONE BACK DOWN."

MR. MEARS: "WHY WERE YOU GOING TO

CLOSING ARGUMENT BY MR. BAILEY

1 DIAL 911?"

2 MR. SIMMONS: "I REALIZED WHAT I HAD
3 DID. I KNOW I HAD JUST MADE A MISTAKE, A BIG
4 MISTAKE."

5 MR. MEARS: "WHAT KIND OF WEAPON WAS
6 IT?"

7 MR. SIMMONS: "IT WAS STICK OUT THE
8 TREE."

9 MR. MEARS: "HOW MUCH MONEY DID YOU
10 GET FROM HER?"

11 MR. SIMMONS: "I DON'T KNOW, SIR.
12 TO BE HONEST I REALLY DON'T REMEMBER."

13 MR. MEARS: WHEN YOU WENT TO HER
14 HOUSE, WHAT WAS THE PURPOSE OF GOING THERE?"

15 MR. SIMMONS: "TO GET SOME MONEY
16 FROM HER."

17 MR. MEARS: "HOW WERE YOU GOING TO
18 GET THE MONEY FROM HER?"

19 MR. SIMMONS: "I WAS GOING TO ASK
20 HER FOR SOME MONEY."

21 MR. MEARS: "AND IF SHE DIDN'T GIVE
22 IT TO YOU, WHAT WERE YOU GOING TO DO?"

23 MR. SIMMONS: "ROB HER."

24 MR. MEARS: "SO SHE DIDN'T GIVE YOU
25 THE MONEY?"

CLOSING ARGUMENT BY MR. BAILEY

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MR. SIMMONS: "WELL, THE FIRST TIME SHE WASN'T GOING TO GIVE IT TO ME; THEN SHE GAVE IT TO ME."

MR. MEARS: "THEN WHY DID YOU HIT HER?"

MR. SIMMONS: "BECAUSE SHE PULLED BACK AND I PUSHED HER, JUST LIKE I SAID, SIR. LIKE I SAID, I WAS UNDER THE INFLUENCE OF ALCOHOL AND DRUGS; BEING HONEST."

MR. MEARS: "YOU DON'T KNOW HOW MUCH MONEY IT WAS?"

MR. SIMMONS: "NO, SIR; TO BE HONEST; NO."

MR. MEARS: "WHEN YOU WENT AROUND TO THE BACK, DID YOU SEE MRS. BOYD?"

MR. SIMMONS: "YES; SHE WAS COMING OUT THE BACK."

MR. MEARS: "SHE WAS COMING OUT THE BACK DOOR?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "DID SHE HAVE ANYTHING IN HER HAND?"

MR. SIMMONS: "SHE HAD A LITTLE CUP."

MR. MEARS: "A LITTLE CUP?"

CLOSING ARGUMENT BY MR. BAILEY

1 MR. SIMMONS: YES, SIR.

2 MR. MEARS: "AND THIS STICK THAT YOU
3 REFERRED TO THAT YOU GOT; DID YOU GET THE STICK OFF
4 THE TREE?"

5 MR. SIMMONS: "NO, SIR."

6 MR. MEARS: "WHERE DID YOU GET THE
7 STICK?"

8 MR. SIMMONS: "OFF THE BACK PORCH."

9 MR. MEARS: "DESCRIBE IT TO ME."

10 MR. SIMMONS: "IT WAS A LITTLE WOOD
11 STICK."

12 MR. MEARS: "A LITTLE WHAT?"

13 MR. SIMMONS: "A WOOD STICK."

14 MR. MEARS: "HOW LONG WAS IT IN
15 FEET?"

16 MR. SIMMONS: "ABOUT TWO FEET LONG."

17 MR. MEARS: "TWO FEET LONG?"

18 MR. SIMMONS: "YES, SIR."

19 MR. MEARS: "AND ABOUT WHAT SIZE IN
20 DIAMETER?"

21 MR. SIMMONS: "IT WAS JUST---"

22 MR. MEARS: "JUST INDICATE."

23 MR. SIMMONS: "YES, SIR; JUST -- I
24 MEAN."

25 MR. MEARS: "ABOUT WHAT SIZE; THIS

CLOSING ARGUMENT BY MR. BAILEY

SIZE?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "ARE YOU TALKING ABOUT
MAYBE AN INCH AND A HALF OR TWO INCHES IN
DIAMETER?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AND ABOUT TWO FEET
LONG?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "YOU DIDN'T GO INTO HER
HANDBAG OR NOTHING TO GET THAT OUT?"

MR. SIMMONS: "HUH-UH; SHE BRING
THAT TO ME, REMEMBER? REMEMBER I TELL YOU ON THE
TAPE, SHE BRING THE MONEY; I MEAN THE LITTLE---"

MR. MEARS: "WHERE DID SHE GET IT
FROM?"

MR. SIMMONS: "SIR, I DON'T KNOW.
SHE HAD TO GET IT OUT OF HER ROOM."

MR. MEARS: "YOU ASKED HER FOR IT?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AND SHE WENT INSIDE?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "DID YOU GO INSIDE WITH
HER?"

MR. SIMMONS: "I DIDN'T WENT THAT --"

CLOSING ARGUMENT BY MR. BAILEY

I WENT DOWN THE HALLWAY."

MR. MEARS: "AND SHE WENT IN THE
ROOM AND GOT IT?"

MR. SIMMONS: "HUM-HUM."

MR. MEARS: "AND BROUGHT IT BACK
OUT?"

MR. SIMMONS: "YES, SIR."

MR. BAILEY: "WHEN DID YOU PUSH HER
AGAINST THE STOVE OR PUSH HER ON THE FLOOR?"

MR. SIMMONS: "WELL, I WAS BACKING
UP COMING BACK UP. AND THEN WHEN I SNATCHED IT,
SHE SNATCHED BACK; AND I PUSHED HER, YOU KNOW.
THAT'S WHEN AND SHE HIT HEAD."

MR. MEARS: "THIS WAS BEFORE YOU
ASKED HER FOR THE MONEY OR AFTER YOU GOT THE
MONEY?"

MR. SIMMONS: "THAT WAS ALMOST AT
THE SAME TIME."

MR. MEARS: "ALL RIGHT. YOU ASKED
HER FOR THE MONEY. SHE WENT INSIDE IN HER ROOM?"

MR. SIMMONS: "UH-HUH."

MR. MEARS: "YOU WENT DOWN THE
HALLWAY WITH HER. SHE CAME BACK OUT?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AND THAT'S WHEN YOU

CLOSING ARGUMENT BY MR. BAILEY

PUSHED, OR YOU PUSHED HER FIRST AND THEN WENT
INSIDE?"

MR. SIMMONS: "YOU COULD SAY I PUSH
HER FIRST."

MR. MEARS: "YOU PUSHED HER FIRST?"

MR. SIMMONS: "YEAH; I COULD SAY
THAT."

MR. MEARS: "THEN YOU WENT INSIDE?"

MR. SIMMONS: "UH-HUH."

MR. MEARS: "AND SHE GOT THE MONEY?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AND GAVE IT TO YOU?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AND SHE CAME BACK OUT
AS FAR AS THE KITCHEN?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "AND THAT'S WHEN YOU HIT
HER WITH THE STICK?"

MR. SIMMONS: "YES, SIR."

MR. MEARS: "YOU HIT HER SEVERAL
TIMES?"

MR. SIMMONS: "YEAH; TWO OR THREE
TIMES."

MR. MEARS: "HOW DID YOU KNOW THAT
MRS. BOYD HAD SOME MONEY?"

CLOSING ARGUMENT BY MR. BAILEY

1 MR. SIMMONS: "IT WAS JUST A GUESS.
2 SIR.
3 MR. MEARS: "YOU PUSHED HER?"
4 MR. SIMMONS: "YES, SIR."
5 MR. MEARS: "ASKED HER FOR SOME
6 MONEY?"
7 MR. SIMMONS: "YES, SIR."
8 MR. MEARS: "THEN SHE WENT BACK
9 INSIDE THE HOUSE?"
10 MR. SIMMONS: "YES, SIR."
11 MR. MEARS: "DOWN THE HALLWAY TO A
12 BEDROOM?"
13 MR. SIMMONS: "YES, SIR."
14 MR. MEARS: "YOU FOLLOWED HER?"
15 MR. SIMMONS: "NOT ALL THE WAY."
16 MR. MEARS: "NOT ALL THE WAY?"
17 MR. SIMMONS: "NO, SIR."
18 MR. MEARS: "AND SHE CAME BACK OUT?"
19 MR. SIMMONS: "UH-HUH."
20 MR. MEARS: "WITH THE MONEY?"
21 MR. SIMMONS: "UH-HUH."
22 MR. MEARS: "GAVE YOU THE MONEY?"
23 MR. SIMMONS: "YES, SIR."
24 MR. MEARS: "WHAT WAS THE MONEY IN?"
25 MR. SIMMONS: "IT WAS A LITTLE BROWN

CLOSING ARGUMENT BY MR. BAILEY

1 ENVELOPE."

2 MR. MEARS: "A LITTLE BROWN

3 ENVELOPE?"

4 MR. SIMMONS: "YES, SIR."

5 MR. MEARS: "WHERE DID SHE GIVE YOU
6 THE MONEY AT; DOWN THE HALLWAY, IN THE BEDROOM, OR
7 IN THE KITCHEN?"

8 MR. SIMMONS: "IN BETWEEN THE
9 KITCHEN AND THE HALLWAY WHEN I PUSHED HER."

10 MR. MEARS: "OKAY. AFTER SHE GAVE
11 YOU THE MONEY, YOU PUSHED HER?"

12 MR. SIMMONS: "AND SHE HIT HER HEAD;
13 YES, SIR."

14 MR. MEARS: "AND SHE HIT HER HEAD?"

15 MR. SIMMONS: "YES, SIR."

16 MR. MEARS: "AND THAT'S WHEN YOU
17 BEAT HER WITH THE STICK?"

18 MR. SIMMONS: "I HIT HER; YES, SIR."

19 MR. MEARS: "DO YOU KNOW HOW MUCH
20 MONEY YOU GOT?"

21 MR. SIMMONS: "TO BE HONEST SIR; NO,
22 SIR."

23 MR. MEARS: "APPROXIMATELY HOW
24 MUCH?"

25 MR. SIMMONS: "TO BE HONEST, MAYBE A

1 HUNDRED AND SOMETHING, SIR."

2 MR. MEARS: "ABOUT A HUNDRED AND
3 SOMETHING?"

4 MR. SIMMONS: "YES, SIR."

5 BY MR. BAILEY

6 LADIES AND GENTLEMEN, YOU WILL
7 RECALL THAT I CALLED THE LADY FROM THE BANK,
8 WACHOVIA, THAT WAS FAMILIAR WITH MRS. BOYD. SHE
9 KNEW HER; SHE HAD AN ACCOUNT THERE FOR A LONG TIME.
10 SHE SAID IN 1996 WHEN SOMEBODY WITHDREW MONEY --
11 AND MRS. BOYD WITHDREW MONEY OUT OF THERE ABOUT
12 ONCE A MONTH -- THAT THEY GAVE THE PEOPLE THAT OVER
13 SIXTY, I THINK SHE SAID, THEIR MONEY IN A LITTLE
14 BROWN ENVELOPE. SHE DIDN'T SAY A LITTLE BROWN
15 ENVELOPE, BUT SHE SAID THIS TYPE OF ENVELOPE HERE.
16 AND KENNETH SIMMONS WAS TALKING ABOUT A LITTLE
17 BROWN ENVELOPE. SO THIS IS KIND OF CORROBORATING
18 OR BEARING OUT WHAT MR. SIMMONS WAS SAYING.

19 KIDNAPPING IS THE NEXT THING I WANT
20 TO TALK TO Y'ALL ABOUT. NOW, MOST PEOPLE THINK A
21 KIDNAPPING IS IF SOMEBODY GRABS SOMEBODY, TAKES
22 THEM OFF, HOLDS THEM FOR RANSOM; AND THAT'S
23 KIDNAPPING. THAT'S A FORM OF KIDNAPPING. THE
24 LEGAL DEFINITION FORM OF KIDNAPPING -- AND THE
25 JUDGE WILL INSTRUCT YOU ON THIS -- IS A LOT BROADER

CLOSING ARGUMENT BY MR. BAILEY

1 THAN THAT. KIDNAPPING IS THE UNLAWFUL SEIZURE,
2 CONFINING, OR CARRYING AWAY OF A PERSON. BASICALLY
3 IT IS FORCIBLY RESTRICTING YOUR FREEDOM OF
4 MOVEMENT. IT'S TAKING SOMEBODY WHERE THEY DON'T
5 WANT TO GO OR MAKING THEM STAY WHEN THEY WANT TO
6 LEAVE. IT'S A CONTINUING OFFENSE THAT STARTS WHEN
7 A PERSON IS DEPRIVED OF HIS LIBERTY. HE'S
8 RESTRICTED FROM WHERE HE WANTS TO GO. AND IT ENDS
9 WHEN THE PERSON IS RELEASED, OR IN THIS CASE WHEN A
10 PERSON IS KILLED. IT IS A CONTINUING OFFENSE.

11 YOU HAVE THE CLEAREST POSSIBLE
12 EXAMPLE IN THIS CASE OF KIDNAPPING THAT YOU COULD
13 IMAGINE WHEN SOMEBODY IS TIED UP, HANDS AND FEET,
14 DURING THE COMMISSION OF AN ARMED ROBBERY AND A
15 RAPE. AND YOU CAN RECALL FROM VIRGINIA WILSON'S
16 TESTIMONY WHEN SHE FIRST WENT IN THAT HOUSE AFTER
17 CHURCH THAT SUNDAY MORNING, OR AFTERNOON. SHE WENT
18 IN THE KITCHEN AND FOUND MRS. BOYD SORT OF ON HER
19 SIDE AND BACK IN THIS POSITION HERE. WE HAVE SOME
20 ROUGH SKETCHES OF HOW SHE WAS LAID OUT THERE; HANDS
21 BEHIND HER BACK, TIED UP WITH SOME STOCKING TYPE
22 MATERIAL. AND HER FEET WERE TIED TOGETHER. THERE
23 WAS SOMETHING OVER HER MOUTH, SHE SAID. SHE UNTIED
24 HER HANDS; TOOK THE BANDAGE, OR WHATEVER IT WAS,
25 OFF OF HER MOUTH AND TRIED TO UNTIE HER FEET.

CLOSING ARGUMENT BY MR. BAILEY

1 YOU'LL HAVE IN EVIDENCE THE HOSE AND
2 STOCKINGS THAT WAS FOUND RIGHT BEHIND MRS. BOYD'S
3 HANDS. AND YOU'VE GOT ALSO IN EVIDENCE -- THIS IS
4 STATE'S NUMBER SEVEN, THE ROPE THAT THE POLICE
5 OFFICERS TOOK OFF OF MRS. BOYD'S FEET WHERE SHE WAS
6 BOUND. SO WHEN YOU THINK ABOUT KIDNAPPING, IT
7 WOULD BE HARD TO GIVE A MORE ACCURATE SAMPLE OF
8 SOMEBODY BEING KIDNAPPED AND RESTRICTED OF THEIR
9 FREEDOM OF MOVEMENT. AND IT'S CLEAR FROM KENNETH
10 CONFESSION THAT FIRST OF ALL MRS. BOYD WAS
11 KIDNAPPED OUTSIDE OF THE HOUSE WHEN HE GOT OUT
12 THERE AND PUSHED HER BACK IN. THAT'S WHEN IT
13 STARTED. IT CONTINUED WITH HIM ORDERING HER TO GO
14 GET MONEY OUT OF THE BEDROOM. AND IT CONTINUED
15 WHILE HE RAPED HER ON THE KITCHEN FLOOR. AND IT
16 CONTINUED WHILE SHE WAS BOUND. BUT SHE DIED FROM
17 BEING BEATEN AND STRANGLED TO DEATH.

18 LET'S LISTEN TO THE TAPE, PORTIONS
19 OF THE TAPE. AND AGAIN I ASK YOU -- AND YOU'VE
20 HEARD ALL OF THESE TAPES EARLIER. BUT THINK OF THE
21 TRANSCRIPT HERE; AND THINK ABOUT THE ELEMENTS OF
22 KIDNAPPING.

23 (AT THIS TIME PORTION OF TAPES ARE PLAYED FOR JURY
24 AND IS AS FOLLOWS:)

25 MR. SIMMONS: "I WENT IN THE HOUSE

CLOSING ARGUMENT BY MR. BAILEY

1 AND CATCH HER COMING BACK OUTSIDE; PUSH HER BACK IN
2 THE HOUSE."

3 MR. MEARS: "YOU WENT IN THE HOUSE
4 BEHIND HER?"

5 MR. SIMMONS: "YES, SIR. SHE WAS
6 COMING BACK OUT OF THE KITCHEN; I PUSH HER BACK IN
7 THE HOUSE."

8 MR. MEARS: "WHAT PART OF THE HOUSE
9 WAS THIS IN?"

10 MR. SIMMONS: "IT WAS ON THE BACK
11 PORCH. AND I PUSHED HER BACK INSIDE THE HOUSE AND
12 ASKED HER TO GIVE ME THE MONEY. SHE GRABBED THE
13 MONEY AND STARTED PULLING BACK AND I PUSH HER."

14 MR. MEARS: "WHO TIED HER HANDS?"

15 MR. SIMMONS: "I TIED HER HANDS,
16 SIR."

17 MR. MEARS: "WHY DID YOU TIE HER
18 HANDS?"

19 MR. SIMMONS: "I JUST TIED HER
20 BECAUSE SHE WOULDN'T GET UP."

21 MR. MEARS: "WAS THIS BEFORE YOU
22 ROBBED HER, OR THIS IS AFTER YOU ROBBED HER?"

23 MR. SIMMONS: "THIS WAS AFTER."

24 MR. MEARS: "DID YOU TIE HER HANDS
25 BEFORE YOU RAPED HER, OR DID YOU TIE HER HANDS

CLOSING ARGUMENT BY MR. BAILEY

1 AFTER YOU RAPED HER?"

2 MR. SIMMONS: "AFTER."

3 MR. MEARS: "YOU RAPED HER AND THEN
4 TIED HER HANDS?"

5 MR. SIMMONS: "YES, SIR."

6 MR. MEARS: "WHY DID YOU TIE HER
7 HANDS?"

8 MR. SIMMONS: "SIR, I THOUGHT SHE
9 WAS GOING TO GET UP."

10 MR. MEARS: "YOU DIDN'T WANT HER TO
11 GET UP BEFORE YOU LEFT?"

12 MR. SIMMONS: "YES, SIR."

13 MR. MEARS: "DID YOU TIE A ROPE OR
14 ANYTHING AROUND HER NECK?"

15 MR. SIMMONS: "NO, SIR; I JUST TIED
16 HER HANDS."

17 MR. MEARS: "OKAY. LET ME SEE IF
18 I'VE GOT THE RIGHT SEQUENTIAL ORDER. YOU WENT TO
19 THE HOUSE."

20 MR. SIMMONS: "YES, SIR."

21 MR. MEARS: "SHE WAS COMING OUT THE
22 BACK DOOR?"

23 MR. SIMMONS: "YES, SIR."

24 MR. MEARS: "YOU PUSHED HER?"

25 MR. SIMMONS: "YES, SIR."

CLOSING ARGUMENT BY MR. BAILEY

1 MR. MEARS: "AND YOU ASKED FOR THE
2 MONEY?"

3 MR. SIMMONS: "YES, SIR."

4 MR. MEARS: THEN SHE WENT BACK
5 INSIDE THE HOUSE?"

6 MR. SIMMONS: "YES, SIR."

7 MR. MEARS: "DOWN THE HALLWAY TO A
8 BEDROOM?"

9 MR. SIMMONS: "YES, SIR."

10 MR. MEARS: "AND YOU FOLLOWED HER?"

11 MR. SIMMONS: "NOT ALL THE WAY."

12 MR. MEARS: "NOT ALL THE WAY?"

13 MR. SIMMONS: "YES, SIR."

14 MR. MEARS: "AND SHE CAME BACK OUT
15 WITH THE MONEY?"

16 MR. SIMMONS: "YES, SIR."

17 MR. MEARS: "GAVE YOU THE MONEY?"

18 MR. SIMMONS: "YES, SIR."

19 MR. MEARS: "WHAT WAS THE MONEY IN?"

20 MR. SIMMONS: "A LITTLE BROWN

21 ENVELOPE."

22 MR. MEARS: "A LITTLE BROWN

23 ENVELOPE?"

24 MR. SIMMONS: "YES, SIR."

25 MR. MEARS: "WHERE DID SHE GIVE YOU