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[PP. 3501-4000]

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

(Capital PCR: 2005-CP-18-1368)

The Honorable Doyet A. Early, III, Circuit Court Judge **S.C. Supreme Court**
Appellate Case No. 2014-000387

Kenneth Simmons, #5066,

Respondent/Petitioner,

v.

State of South Carolina,

Petitioner/Respondent.

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STATE’S EXHIBIT #18a (CD 1 OF 2) [VIDEO DEPOSITION]

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

court of competent jurisdiction in the county in which the conviction took place . . . The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing . . . The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. See S.C. Code §17-27-80.

Petitioner has been denied the right to argue for himself that Ring, Apprendi, and Atkins read together logically entitle him a jury determination of whether or not he is mentally retarded. If a jury determines that Petitioner is mentally retarded, he cannot be executed under Atkins.

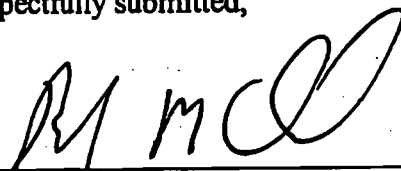
More specifically, Petitioner requested the right to argue before the South Carolina Supreme Court that the proper remedy in his case, if his murder conviction was not reversed, which it now has not been, was for the court to remand for a new sentencing hearing. This sentencing hearing, before a jury, would include the right to a jury determination of whether he was mentally retarded. If the jury found, seemingly by special verdict form under Franklin v. Maynard, that Petitioner was mentally retarded, the judge would impose a life sentence.

The summary statement in Franklin v. Maynard that all defendants sentenced to death before Atkins, where mental retardation was an issue, have an effective remedy in post-conviction relief, does not provide Petitioner his individual right to argue otherwise. Petitioner's case was pending direct appeal when Atkins was decided and he should be granted that right. Petitioner respectfully submits his case should be remanded to the South Carolina Supreme Court for reconsideration of the Atkins issue if this Court does not retain jurisdiction upon the granting of certiorari. See Tennard v. Dretke, 124 S.Ct. 2562 (2004).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,



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ATTORNEY FOR PETITIONER.

November 8, 2004

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-

KENNETH SIMMONS,

PETITIONER,

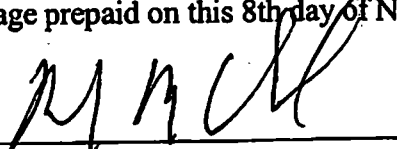
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari, appendix, and the motion for leave to proceed in forma pauperis in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 8th day of November, 2004.


ROBERT M. DUDEK
Assistant Appellate Defender

SWORN TO BEFORE me this 8th day
of November, 2004.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 13, 2007

IN THE SUPREME COURT OF THE UNITED STATES**October Term, 2004**

No. 04 -

KENNETH SIMMONS,**PETITIONER,****v.****STATE OF SOUTH CAROLINA,****RESPONDENT.**

A P P E N D I X

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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State,

Respondent,

v.

Kenneth Simmons,

Appellant.

Appeal from Dorchester County
Rodney A. Peebles, Circuit Court Judge

Opinion No. 25838
Heard April 6, 2004 - Filed June 14, 2004

AFFIRMED IN PART; REVERSED IN PART

Assistant Appellate Defenders Robert M. Dudek and Eleanor Duffy Cleary, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Walter M. Bailey, of Summerville, for respondent.

ACTING JUSTICE KITTREDGE: Kenneth Simmons was convicted of murder, first degree burglary, armed robbery, and first degree criminal sexual conduct. He was sentenced to death and given consecutive

sentences of life and two thirty-year terms on the remaining charges. We reverse the conviction and sentence for armed robbery, but otherwise affirm Simmons' convictions and sentences.

FACTS

On September 1, 1996, the battered body of an eighty-nine-year-old female, whom we will refer to as Ms. B,¹ was found bound and gagged on the kitchen floor of her home in Summerville. She had been raped, severely beaten, and strangled.

The crime went unsolved for more than a year until December 1997 when Simmons, who was incarcerated on other charges, confessed to the killing. He said he smoked crack and drank beer at a club before riding his bicycle home in the early morning hours on the day of the murder. Simmons saw Ms. B in her yard feeding her chickens and followed her into her house. Simmons pushed her and demanded money. Ms. B fell to the floor and hit her head. Simmons then hit her with a stick he had picked up on the back porch. He described the stick as being about two feet long and an inch and a half or two inches in diameter. Simmons raped Ms. B. She was "half and half" alive when he fled the scene.

The State's pathologist testified Ms. B died from blunt trauma and manual strangulation. She had multiple rib fractures caused by stomping or slamming, severe head trauma, and severe vaginal lacerations from the insertion of an object such as a stick or finger. She had semen in her vagina and also in her mouth. DNA testing indicated the semen taken from Ms. B's body was consistent with Simmons' DNA.

The jury found aggravating circumstances of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary, and sentenced Simmons to death.

¹We elect not to identify the victim by name.

ISSUES

1. Did the State violate Doyle v. Ohio?
2. Was a juror improperly dismissed after the trial had begun?
3. Did the trial judge err in refusing to charge robbery as a lesser-included offense of armed robbery?
4. Was rebuttal evidence improperly excluded in the penalty phase?

DISCUSSION

1. Doyle v. Ohio

Because the State's case rested largely on Simmons' confession, the defense strategy during the guilt phase was to introduce expert testimony that Simmons was not mentally capable of understanding and waiving his Miranda² rights.

Dr. Jeffrey Vidic, a psychologist at the William S. Hall Institute,³ along with Dr. Thomas Behrman, a psychiatrist also employed at the Hall Institute, attempted to evaluate Simmons for competency on November 23, 1998. Drs. Vidic and Behrman testified as defense witnesses. Dr. Vidic was not satisfied Simmons possessed the ability to comprehend his Miranda warnings and therefore the competency exam could not proceed as planned. Dr. Vidic stated he could not formulate an opinion to a reasonable degree of certainty whether Simmons actually understood his rights or whether he was "malingering an inability to understand his rights." Dr. Behrman's testimony

² Miranda v. Arizona, 384 U.S. 436 (1966).

³ The William S. Hall Institute is the primary educational and research facility for the South Carolina Department of Mental Health.

lent further support to Simmons' position, for he stated, based on his November 23 observations, that Simmons was not "able to explain his rights . . . in a sufficient or meaningful fashion." Dr. Behrman specifically opined that on November 23 Simmons "lacked the ability to waive his rights for the purpose of the evaluation."

On cross-examination, Dr. Vidic testified over Simmons' objection that immediately after the aborted November 23 competency exam, he left a note for his intern, Ms. Skaggs, asking her to administer psychological tests to Simmons during a lunch break. The psychological testing requested by Dr. Vidic did not involve the facts of the case. Simmons refused to cooperate with the testing administered by Ms. Skaggs, invoking his "right" to speak with his lawyer. The State elicited this testimony in response to Simmons' position that he lacked the ability to understand and exercise the Miranda warnings and rights.

On appeal, Simmons argues the trial court erred in allowing the prosecutor's cross-examination in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986). We disagree.

Doyle holds that the Due Process Clause prohibits the government from commenting on an accused's post-Miranda silence. Doyle rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." South Dakota v. Neville, 459 U.S. 553, 565 (1983). This same concept of fundamental unfairness prohibits the government from using a defendant's post-Miranda silence as proof of sanity to overcome an insanity defense. Wainwright v. Greenfield, *supra*; see also State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986).

Doyle does not, however, create a per se rule requiring exclusion from evidence of a defendant's post-arrest, post-Miranda silence in all circumstances. As the Doyle court recognized:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an

exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. at 619, n.11.

In Anderson v. Charles, 447 U.S. 404 (1980), the Court further clarified Doyle:

Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

447 U.S. at 408. Other courts have found the Supreme Court's holding in Charles is not limited to situations involving inconsistent statements. See Splunge v Parke, 160 F.3d 369 (7th Cir. 1998) (initial silence used to show police scrupulously honored defendant's rights); Allen v. State, 686 N.E.2d 760 (Ind. 1997) (refusal to give written statement after oral statement used to show rights respected); Commonwealth v. Waite, 665 N.E.2d 982 (Mass. 1996) (reassertion of silence used to show context in which questioning ended); State v. Correia, 707 A.2d 1245 (R.I. 1998) (same).

The underpinnings of Doyle, and the need for its application, are diminished where a defendant waives his right to silence. Here, Simmons did not remain silent "as to the subject matter of his statements." Simmons, following a waiver of his Miranda rights, confessed to the murder of Ms. B in December 1997. Following the lone invocation of his right to remain silent in the context of the November 23, 1998, competency evaluation, Simmons again waived his Miranda rights and cooperated with a January 1999

evaluation. In this regard, in response to the defense strategy centered on Simmons' purported inability to comprehend the Miranda warnings, the State's targeted and narrow use of Simmons' recognition and exercise of his "right" to speak with counsel did not breach the implied assurance contained in Miranda. Simmons asserted his right to silence only in the context of the November 23 psychological examination. The limited evidence of Simmons' silence in this context was not "designed to draw meaning from silence" regarding the substantive crime and therefore does not violate Doyle. Charles, 447 U.S. at 409.

This case is distinguishable from Greenfield. In Greenfield the evidence of the defendant's silence was used as substantive evidence of guilt in the prosecution's case-in-chief because the defendant pled not guilty by reason of insanity. Here, the evidence of Simmons' silence was not offered as substantive evidence of guilt but as evidence of malingering to rebut his claim that he was incapable of understanding his Miranda rights.

We thus conclude the State's use of evidence of Simmons' silence did not violate the fundamental fairness standard of Doyle.

2. Dismissal of juror

After jury selection, the trial judge informed the jury about sequestration and repeatedly admonished the jury not to discuss the case with anyone. Contact by jurors with family members, by telephone or otherwise, was to be monitored by the SLED team in charge of security and sequestration.

Before the end of the guilt phase, information regarding Juror C was brought to the court's attention. The trial judge noted for the record:

Captain Polk of SLED received a call from the wife of [Juror C] at which time the lady revealed to him that she was very concerned because she realized that the sister of the defendant, Kenneth Simmons, lived across the street from a piece of property that they owned on Congress Street in the Town of

Summerville. And in the event that the jury returned a verdict of guilty or imposed the death penalty and they were going to build on a vacant lot across the street from the defendant's sister that it would perhaps cause consternation, fear, concern, or whatever.

The trial judge asked Captain Polk to call Juror C's wife but Captain Polk was unable to immediately contact her.

Meanwhile, the trial judge received a note from Juror C stating:

Your honor, I have realized that I know a possible relative of the defendant, Kenneth Simmons, and asked earlier in the week if I knew relatives of the accused, I truthfully answered no. After the trial started, I saw a woman I recognized sitting behind Kenneth Simmons. I now realize the woman in the audience was, I believe, a Mrs. Louise that lives opposite a vacant lot I own in the Town of Summerville on Congress Street. In the future my wife and I intend to build on this lot our primary residence. I have upon occasion been cordial with Mrs. Louise and say hello to her while I am on or about my property. Knowing Mrs. Louise will not influence my decision-making ability regarding the guilt or innocence of Kenneth Simmons. If the trial proceeds to the penalty stage, none of the above will influence my decision-making ability regarding life imprisonment or the death penalty as outlined in the pre-trial questionnaire. I felt it was my duty as a juror to inform you of the above and to continue to serve you in any capacity you see fit.

Captain Polk then spoke with Juror C's wife. She told Captain Polk she had talked with her husband about Simmons' sister and stated she was upset, fearful, and "really concerned." Although Juror C's note was written after

the improper conversation, the note contained no reference to the conversation.

The State then moved to excuse Juror C. Simmons requested that the trial judge first question Juror C about the conversation with his wife. The trial judge questioned Juror C in chambers. Juror C confirmed that he and his wife had discussed the personal effect of a verdict in the case. The trial judge explained to Juror C that because he and his wife had discussed the case, he would be excused from the case. As a result of the "improper communication" between Juror C and his wife, Juror C was excused.

On appeal, Simmons contends the trial court erred in dismissing Juror C since the juror indicated he could maintain his impartiality. We disagree. Simmons cites Greer v. Neville, 21 S.C.L. (3 Hill) 262 (1837), for the proposition that once the jury has been sworn, the trial court cannot discharge a qualified juror without legal cause absent the consent of both parties. In Greer, a juror was removed after being seated solely on the basis of counsel's assertion that the juror was biased against counsel and would not do his client justice. There was no evidence to support counsel's bald assertion, and our court of appeals found the excusal of the juror arbitrary.

The court of appeals distinguished Greer in the case of Boland v. Greenville and Columbia R.R. Co., 46 S.C.L. (12 Rich.) 368 (1859), wherein a juror, who was the local coroner, was dismissed during trial because he was needed to investigate a homicide. The court noted it is within the trial court's discretion to substitute an alternate juror where there is a legal necessity or there is disclosed during trial a disqualifying interest of a juror. *Id.*

In this case, the record indicates Juror C discussed the case with his wife, including the personal effect of a possible verdict, against the trial judge's express admonition not to do so. We hold the trial judge acted within his discretion in excusing Juror C for the juror's unauthorized communication with his wife.⁴

⁴ We emphasize this is not a case where a juror was removed for concealing information during voir dire. This juror's self-proclaimed impartiality is therefore not dispositive. Cf. State v. Stone, 350 S.C. 442, 567

3. Robbery as a lesser-included offense

Upon the State's objection, the trial court refused Simmons' request to charge robbery as a lesser-included offense of armed robbery ruling that "[w]hile it's a true proposition of law . . . it's not applicable to the uncontradicted facts." Simmons contends this was error because the evidence indicates the only weapons involved were fists and a stick, and whether either of these qualifies as a "deadly weapon" is a question of fact for the jury. The State argues that since the victim died as a result of wounds inflicted by fists or a stick, these are "deadly weapons" as a matter of law.

South Carolina Code Ann. § 16-11-330(A) (Supp. 2003) defines armed robbery in pertinent part as "robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon." (emphasis added). Whether an object has been used as a deadly weapon depends upon the facts and circumstances of each case. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (murder);⁵ *see also* State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (fist may be deadly weapon for purposes of armed robbery). Despite the egregious facts of this case, we adhere to the rule in Davis and hold that whether the robbery was perpetrated with a deadly weapon was a question of fact for the jury.

Although the trial court charged the jury that it was to determine whether a deadly weapon was used, the court refused to give the jury the option of convicting Simmons of the lesser offense of robbery. This was error. We therefore reverse Simmons' conviction and sentence for armed robbery. *See* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (trial judge must charge lesser-included offense if there is any evidence from which it can be inferred the defendant committed lesser rather than greater offense).

S.E.2d 244 (2002) (error to remove juror for innocently concealing information where juror indicated her impartiality was not affected).

⁵ *Overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (failure to give King charge not reversible error).

The real impetus in Simmons' challenge to the failure to charge the lesser-included offense is to invalidate the jury's finding of armed robbery as an aggravating factor, and ultimately, invalidate the sentence of death. While we agree that the error requires us to vacate the invalid aggravator of armed robbery, the error does not warrant reversal of the death sentence. Succinctly stated, we find Simmons' death sentence is supported by other valid aggravators.

In Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court held that in states such as ours where aggravating and mitigating factors are not weighed "pursuant to any special standard," a death sentence may be upheld even where one aggravator has been invalidated if there is a valid aggravator remaining.⁶ As the Court later explained in Tuggle v. Netherland, 516 U.S. 10, 13 (1995), Zant was "predicated on the fact that even after elimination of the invalid aggravator, the death sentence rested on firm ground." To the contrary, in Tuggle, an aggravator was invalidated because the defendant was precluded from developing rebuttal evidence relevant in the penalty phase. The Court concluded the evidentiary error could have affected the jury's

⁶ Zant involved Georgia's death penalty statute. Georgia's statutory approach requires the factfinder to consider applicable aggravating and mitigating circumstances, without regard to "any special standard." Id. at 873. In weighing "aggravating and mitigating circumstances against each other," the Georgia statutory scheme is not "governed by any specific standards." Id. at 875. Under Georgia law, the factfinder retains "absolute discretion" to impose a life sentence, notwithstanding the presence of an aggravating circumstance. Id. at 871. South Carolina's statutory scheme is in accord, and we find the reasoning of Zant persuasive. See S.C. Code Ann. § 16-3-20(B) (2003) (if statutory aggravating circumstance found, defendant sentenced to either death or life imprisonment); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (jury may recommend life imprisonment for any reason or no reason at all); State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993) (under our capital sentencing scheme, jury does not "weigh" aggravating circumstances; the failure of one aggravating circumstance does not require reversal where there remains a valid aggravator).

consideration of the death sentence even though another aggravator was found. We are confronted with no such evidentiary preclusion.

Here, the jury affirmatively found independent aggravators of criminal sexual conduct, kidnapping, burglary, and physical torture, in addition to armed robbery. There was no error in the admission or exclusion of evidence in the penalty phase. We conclude the invalidation of the armed robbery aggravator does not impact the validity of the other aggravators found by the jury in this case, and we reject Simmons' challenge to his death sentence.

4. Rebuttal evidence in penalty phase

In the penalty phase, the State presented victim impact evidence from the victim's family and friends stating how they were negatively affected by the victim's death. During the defense case, Simmons' cousin, Calvin Linning, testified about positive features of Simmons' character. Linning then stated:

It's awfully hard for me to be up here today because I'm certainly nervous because we know [the victim] personally. I grew up in the Church of God in Summerville and [the victim] and my family was real close. We would take her to the State Youth Convention year after year. My brother is the one that taught her how to drive. And my niece was really close to [the victim]. She had a real close relationship with her. And it was real painful when we discovered about her -

At this point, the State objected to Linning's testimony regarding "his personal feelings about what occurred." The objection was sustained. Linning finished his testimony by asking the jury to give Simmons a life sentence rather than death.

Simmons contends it was a due process violation for the trial court to disallow Linning's testimony that Simmons' family suffered because of the victim's death. We disagree.

First, this argument was not raised at trial and no proffer was made as to what Linning's testimony would have been had he been allowed to continue. This issue therefore is not preserved for review. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (to be preserved for appellate review, issue must be raised and ruled upon in the trial court). In any event, there was no error.

In Payne v. Tennessee, 501 U.S. 808 (1991), the Supreme Court ruled victim impact evidence is admissible to show the victim's uniqueness as an individual human being and the specific harm committed by the defendant in murdering the victim. This evidence is relevant for the jury to meaningfully assess the defendant's moral culpability and blameworthiness. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997). Here, the impact of the victim's death on Simmons' family is not relevant rebuttal to the evidence of Simmons' moral culpability shown by the victim impact testimony. We find no due process violation.

CONCLUSION

Pursuant to S.C. Code Ann. § 16-3-25(C)(2003), we find the death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor; the evidence supports the jury's findings of aggravating circumstances; and the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. See State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000); State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996). We reverse Simmons' conviction and sentence for armed robbery and affirm his remaining convictions and sentences.

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.



The Supreme Court of South Carolina

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Columbia, SC 29201

Re: State v. Simmons, Kenneth

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John W. Waller, Jr. J.

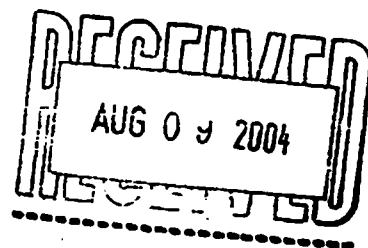
s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

s/ John W. Kittredge J.

August 9, 2004.”

The remittitur is today being forwarded to the lower court.



Assistant Appellate Defender Robert M. Dudek
Page Two
August 9, 2004

Very truly yours,

A handwritten signature in cursive script, reading "Brenda J. Sherry".

CHIEF DEPUTY CLERK

BFS/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 9, 2004

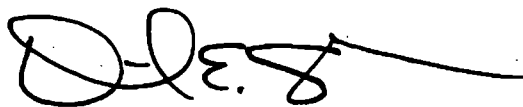
✓ Assistant Appellate Defender Robert M. Dudek
Assistant Appellate Defender Eleanor Duffy Cleary
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: State v. Simmons, Kenneth

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,


CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Walter M. Bailey, Jr.



The Supreme Court of South Carolina

The State,

Respondent,

v.

Kenneth Simmons,

Appellant.

ORDER

Petitioner was convicted of murder, first degree burglary, armed robbery, and first degree criminal sexual conduct, and he was sentenced to death. This Court affirmed his convictions and sentences. State v. Simmons, ___ S.C. ___, 599 S.E.2d 448 (2004). The petition for rehearing was denied on July 15, 2004.

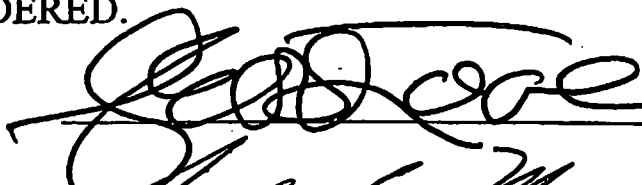
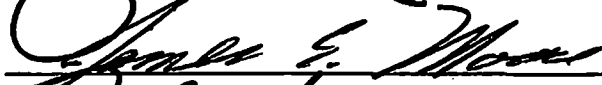
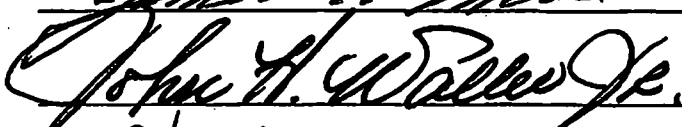
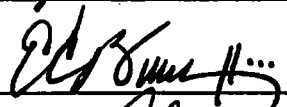
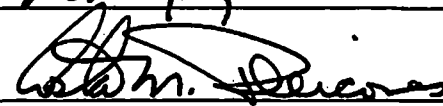
Petitioner now requests a ninety day stay of execution in which to file a petition for a writ of certiorari in the United States Supreme Court.¹ The State, by way of return, concedes a stay of execution is appropriate under In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

Because petitioner intends to raise to the United States Supreme Court a federal question that is preserved for review, we grant the petition for

¹ An execution notice has not been issued.

stay of execution. Id. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases, supra.

IT IS SO ORDERED.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

September 9, 2004

COPY

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

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SC SUPREME COURT

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

APPELLANT

PETITION FOR REHEARING

Opinion No. 25838

Filed June 14, 2004

Appellant respectfully requests the Court to rehear this case pursuant to Rule 221(a), SCACR. This Court affirmed appellant's convictions for murder, first degree burglary, armed robbery, and first degree criminal sexual conduct, as well as his death sentence.

Appellant requests rehearing because this Court held that "the limited evidence of Simmons' silence in this context [involving his understanding of Miranda¹ warnings] was not 'designed to draw meaning from silence' regarding the substantive crime and therefore does not violate Doyle. Charles, 447 U.S. at 409.²" State v. Kenneth Simmons, Op. No. 25838 at page 6 (filed June 14, 2004).

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² Anderson v. Charles, 447 U.S. 404 (1980) and Doyle v. Ohio, 426 U.S. 610 (1976).

This Court then noted cases from other jurisdictions where limited exceptions – for very limited purposes – to references to a defendant's invocation of his right to silence or to counsel were allowed where the defendant first chose to speak with the police. See Anderson v. Charles, 447 U.S. 404 (1980); Splunge v. Parke, 160 F.3d 369 (7th Cir. 1998); Allen v. State, 686 N.E.2d 760 (Ind. 1997); Commonwealth v. Waite, 665 N.E.2d 982 (Mass. 1996); State v. Correia, 707 A.2d 1245 R.I. 1998). State v. Kenneth Simmons, Op. No. 25838 at page 5 (filed June 14, 2004).

The *sine qua non* of a Doyle violation is the government's use of the defendant's silence against him. Greer v. Miller, 483 U.S. 756, 763 (1987). The question in this case therefore was whether appellant's invocation of his right to silence and counsel was used against him. Appellant continues to strongly maintain, and therefore requests rehearing, because his invocation of Miranda rights was used against him in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986).

The jury's overall assessment of appellant credibility and culpability in this case cannot be viewed in a vacuum. The import of the invocation of rights testimony went far beyond appellant's understanding of his Miranda rights. It was a shot across the bow at defense evidence appellant was mentally retarded, and it directly impacted upon that mitigating circumstance.³ See Brief of Appellant at 5. This totality of the circumstances assessment of appellant's mental condition and abilities concern is also made apparent by the judge's *in camera* references to the fact appellant had obtained a driver's license, and had managed to make his way through Summerville High School

³ This case was held in abeyance following Atkins v. Virginia, ___ U.S. ___, 122 S. Ct. 2242 (2002), while this Court decided the state court implications of that case in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). Appellant was a party to that action in the original jurisdiction of this Court. Following Franklin v. Maynard appellant renewed his motion to be allowed supplemental briefing – which had earlier been denied without prejudice – on the issue of how evidence of appellant's mental retardation should be considered. This Court denied that motion.

where he was a star football player. See Wainwright v. Greenfield, 474 U.S. 284, 294-295, n. 11. (1986)

Respectfully, this is an unusual and different case from those relied upon by this Court to affirm. Appellant spoke and cooperated with the evaluators while his attorney, Jerry Theos, was present. It was only after Theos left, and Ms. Skaggs wanted appellant to participate while she administered tests to him that appellant told Skaggs that he "didn't have to answer questions, that he wanted to talk to Mr. Theos, first; that he had a right to talk to Mr. Theos before he answered any questions." R. 1705, l. 5 – 1711, l. 20.

In the context of this record, the use of appellant's invocation of his right to silence, and to confer with his attorney after Theos had left the evaluation had the impermissible effect of showing appellant was "hiding behind his attorney" because he did not want to give "the real" appellant away. R. 1693, l. 21 – 1694, l. 12; R. 1705, l. 5 – 1711, l. 20. The clear import of this invocation of rights testimony was that appellant had something to hide, and that he was misleading the doctors. Why should the jury accept the defense case under these circumstances? That was what is prohibited by Doyle v. Ohio, 426 U.S. 610 (1976), and appellant respectfully maintains there is not any meaningful distinction between this case and Wainwright v. Greenfield, 474 U.S. 284 (1986).

This was a pre-Atkins v. Virginia, ___ U.S. ___, 122 S. Ct. 2242 (2002) case. However, as stated, evidence that appellant was a liar and was attempting to mislead the state's actors -- because he invoked his rights -- cannot be neatly separated out from the rest of the determinations the jury had to make in this case. This evidence directly impacted on the mental retardation mitigating circumstance, and the jury's overall assessment of appellant. Further, the state had its evidence that appellant was malingering at times, and the Skaggs invocation of rights testimony was gratuitous and unnecessary. R. 1727, l. 13 – 1728, l. 1.

This is also not a case where appellant chose to speak with the authorities, and where the Doyle prohibition should not apply. Appellant at the relevant time only chose to speak with the state's doctors in the presence of his attorney, and he invoked his right to silence and to counsel in his absence.

The use of appellant's invocation of his right to counsel after Theos left to return to Charleston against appellant at trial breached the implicit promise in Miranda that appellant's reliance upon his right to silence and to confer with his attorney would not be used against him. See Doyle v. Ohio, 426 U.S. 610 (1976). The fact that appellant was comfortable speaking in the presence of his attorney, but invoked his right to silence and to counsel after his attorney left the evaluation is one other important factor that separates this case from those relied upon by this Court.

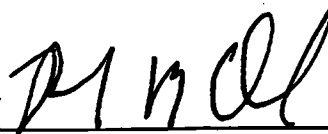
Appellant recognizes the case law which holds that where a defendant chooses to speak with the authorities, but then invokes his rights under Miranda, the fact that the defendant terminated questioning, can be stated in normal testimony – if necessary – without calling undue attention to that fact. Rowan v. Owens, 752 F.2d 1186, 1190 (7th Cir. 1984). However, the fact a defendant invoked his right to silence after starting to speak with the authorities can most often be done through the use of “well framed questions” without the need to “comment on silence.” Wainwright v. Greenfield, 474 U.S. at 295. It easily could have here without reference to appellant invoking his Miranda rights and refusing to cooperate.

Since this case is controlled by Doyle v. Ohio and Wainwright v. Greenfield, *supra*, and the limited exceptions cases are inapplicable here, appellant respectfully requests that this Court reconsider its holding.

Finally, and importantly, appellant's invocation of his right to silence when Ms. Skaggs attempted to administer psychological testing was only collaterally relevant to the jury's

determination of whether appellant's confession was intelligently and voluntarily tendered.⁴ However, Dr. Vidic's testimony before the jury that appellant invoked his right to silence and to speak with his attorney had the devastatingly prejudicial impermissible effect prohibited by Doyle v. Ohio and Wainwright v. Greenfield. Rehearing should be granted in this case.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

Attorney for Appellant

This 15th day of July, 2004

⁴ The real test was whether appellant's will was overcome when he gave the inculpatory statement. That determination is made based upon a totality of circumstances. See State v. Myers, ___ S.C. ___, 596 S.E.2d 488, 492-493 (2004).

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

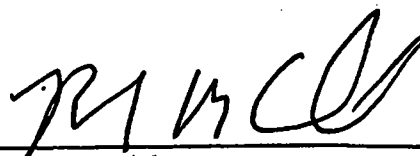
V.

KENNETH SIMMONS,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 15th day of July, 2004.



Robert M. Dudek
Assistant Appellate Defender

Attorney for Attorney

SUBSCRIBED AND SWORN TO before me
this 15th day of July, 2004.


Notary Public for South Carolina

My Commission Expires: February 3, 2005

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

PETITIONER

MOTION TO ALLOW SUPPLEMENTAL BRIEFING
IN LIGHT OF *ATKINS V. VIRGINIA*

COPY

SC SUPREME COURT

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A Dorchester County jury found petitioner guilty of the offenses of murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping, and armed robbery. On March 22, 1999, the jury recommended petitioner be sentenced to death. The Honorable Rodney Peeples then sentenced petitioner to death for murder, life imprisonment for burglary in the first degree; thirty years imprisonment for armed robbery and thirty years imprisonment for criminal sexual conduct in the first degree. His case is scheduled to be argued before this Court during its September, 2002 term.

After the filing of briefs in this case, on June 20, 2002, the United States Supreme Court held that the execution of a mentally retarded defendant was cruel and unusual punishment

prohibited by the Eighth Amendment to the United States Constitution. Atkins v. Virginia, 122 S.Ct. 2242 (2002).

During pre-trial hearings to determine petitioner's competency to stand trial and the voluntariness of his statements to the police, evidence of petitioner's mental retardation was introduced. Chief Psychologist Leslie Sandler of the Department of Disabilities and Special Needs testified school records showed petitioner had an IQ of 69 at age 9.8. R. 2618, l. 22 – 2619, l. 24; r. 2657, l. 22 – 2659, l. 1.

Dr. Charles Saylor testified during the trial that petitioner's full scale IQ of 69 classified him as "functioning in the lower one percent of the overall population," and stated petitioner was not malingering in pre-trial testing. R. 1604, l. 16 – 1609, 10. However, Sandler testified before the jury that he thought petitioner was malingering at times. R. 1727, l. 13 – 1728, l. 1.

Dr. John Foxworth, a psychiatrist who graduated from the Citadel, evaluated petitioner; and he testified in the presence of the jury. R. 1493, l. 15 - 1494, l. 11. Dr. Foxworth said petitioner was very easily led and had trouble understanding concepts. Dr. Foxworth opined that petitioner "was mentally retarded." R. 1517, l. 17 - 1521, l. 20.

Mental retardation is typically used to describe people with an IQ of 50 to 70, and at times higher. Atkins, 112 S.Ct. at 2245 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 42-43 (4th ed. 2000)).

The record in this case also reveals that petitioner's life skills were lacking. He was unable to maintain a job or a permanent residence. Although he was socially promoted out of high school, his mental retardation manifested itself before the age of eighteen. The trial judge also instructed the jury that it could consider petitioner's mental retardation at the time of the

crime as a statutory mitigating circumstance. R. 2382, ll. 1-8; See S.C Code §16-3-20(C)(b)(10).

The United States Supreme Court noted that "mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial:

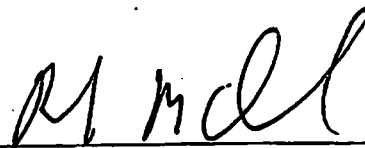
however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id. at 2250.

Petitioner is a party to the Ellis Franklin et al. v. Maynard et al. petition for writ of certiorari filed in the original jurisdiction of this Court that requests that this Court set the procedures and guidelines, pursuant to *Atkins v. Virginia*, on how to determine if a defendant is mentally retarded, and consequently ineligible for the death penalty. Petitioner is the sole party to that suit with a case pending on direct appeal. Understanding that oral argument is set at the September, 2002 term of this Court, and understanding the issue of mental retardation will have to be heard in a lower court, petitioner respectfully requests an expedited briefing schedule on this issue in light of the June 20, 2002 decision in Akins v. Virginia.

WHEREFORE, counsel for petitioner would respectfully request that this Court allow the parties be file supplemental briefs, on an expedited schedule ordered by this Court, on the issue of how petitioner's mental retardation should be determined in the lower court pursuant to Atkins v. Virginia, supra.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

Attorney for Petitioner

This 26th day of July 2002

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peebles, Circuit Court Judge

THE STATE,

RESPONDENT,

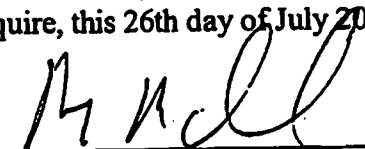
V.

KENNETH SIMMONS,

PETITIONER.

CERTIFICATE OF SERVICE

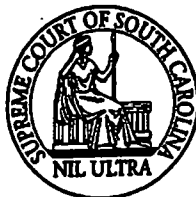
The undersigned attorney hereby certifies that a true copy of the motion to allow supplemental briefing in light of *Atkins v. Virginia* in the above-referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 26th day of July 2002.


Robert M. Dudek
Assistant Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 26th day of July 2002.


Sandra R. Wise (L.S.)
Notary Public for South CarolinaMy Commission Expires: February 3, 2005



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 19, 2002

Assistant Appellate Defender Robert M. Dudek
✓ Assistant Appellate Defender Eleanor Duffy Cleary
Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, SC 29201

Re: State v. Simmons, Kenneth

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

By copy of this letter and order, we are advising all interested parties of the action by the Court.

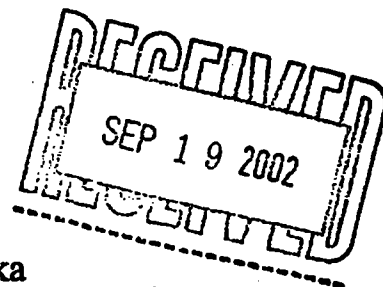
Very truly yours,


CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Walter M. Bailey, Jr.



The Supreme Court of South Carolina

3534

The State,

Respondent,

v.

Kenneth Simmons,

Appellant.

ORDER

Appellant asks this Court to allow the parties to file supplemental briefs addressing the question of how petitioner's mental retardation should be determined pursuant to Atkins v. Virginia, ___ U.S. ___, 1222 S.Ct. 2242, ___ L.Ed.2d ___ (2002). The State opposes the request.

This matter is stayed pending a decision in Franklin v. Maynard.

The motion to allow supplemental briefing is denied without prejudice to appellant's right to renew the motion following the decision in Franklin v. Maynard.

IT IS SO ORDERED.

 C. J.
 J.
 J.
 J.
 J.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Ellis Franklin, Ricky George,
Larry Hall, Herman Hughes,
Johnny Pearson, Ted Powers,
Kenneth Simmons, et al., Petitioners,

v.

Gary Maynard, Director, South
Carolina Department of
Corrections, and Charles M.
Condon, Attorney General of
South Carolina, Respondents.

ORIGINAL JURISDICTION

Opinion No. 25747

Heard February 4, 2003 - Filed November 3, 2003

John H. Blume, of Ithaca, New York; Robert M.
Dudek, Robert Edward Lominack, Elizabeth Fielding
Pringle, Keir M. Weyble, Jeffrey P. Bloom, Diana L.
Holt, Teresa L. Norris, all of Columbia; and David P.
Voison, of Jackson, Mississippi, for petitioners.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh, and
Assistant Deputy Attorney General Donald J.
Zelenka, all of Columbia, for respondents.

PER CURIAM: The United States Supreme Court (USSC), in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), held the execution of a mentally retarded person is cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. The USSC noted that “[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.” *Id.* at 317, 122 S.Ct. at 2250. The USSC left “the task of developing appropriate ways to enforce the constitutional restrictions upon [the] execution of sentences” to the states. *Id.* Therefore, the state of South Carolina has the obligation to establish procedures for possible capital cases where the defendant is allegedly mentally retarded.

Petitioners, all either death-sentenced inmates or capital defendants, filed this petition for a writ of certiorari in our original jurisdiction requesting we establish procedures implementing the Atkins decision.¹

ISSUES

- I. What is the definition of mental retardation?
- II. What is the procedure for making the mental retardation determination in post-Atkins cases?
- III. What is the procedure for cases where the defendant was sentenced to death prior to Atkins?

¹The legislature is presently considering a Bill defining mental retardation and establishing procedures for implementing the Atkins decision.

DISCUSSION

I

We find it inappropriate to create a definition of mental retardation different from the one already established by the legislature in S.C. Code Ann. § 16-3-20 (C)(b)(10) (2003) (mental retardation is a statutory mitigating circumstance).² Section 16-3-20(C)(b)(10) defines mental retardation as: “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” Altering this definition is a matter for the legislature.

II

Regarding the procedures to be used in making the mental retardation determination in post-Atkins cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. *Cf. State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998)³ (defendant bears burden of proving incompetence by preponderance of evidence); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998)⁴ (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is *not* mentally retarded and the jury finds the defendant guilty of the capital

²S.C. Code Ann. § 44-20-30(11) (2002) (under the South Carolina Mental Retardation Act) and § 44-26-10(11) (2002) (under the Act dealing with the rights of mental retardation clients) define mental retardation the same as § 16-3-20(C)(b)(10).

³*Cert. denied*, 525 U.S. 1150, 119 S.Ct. 1051 (1999).

⁴*Cert. denied*, 525 U.S. 1077, 119 S.Ct. 816 (1999).

charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. *See* S.C. Code Ann. § 16-3-20(C)(b)(10) (2003).⁵ If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

III

While petitioners argue we should establish procedures for cases where the defendant was sentenced to death prior to Atkins,⁶ such procedures already exist.

A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law.⁷ *See* S.C. Code Ann. §§ 17-27-20(a) and -160 (2003). As with other PCR claims, the applicant must show he or she is mentally retarded by a preponderance of the evidence. *See, e.g., Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993) (competency for execution). If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

⁵The jury will not be informed of the prior proceedings or the trial judge's findings concerning the defendant's claim of mental retardation.

⁶Atkins has retroactive application. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989).

⁷An applicant is not barred from raising the mental retardation issue in a second PCR application. *See* S.C. Code Ann. § 17-27-45(B) (2003) (when court whose decisions are binding upon this Court holds United States Constitution imposes upon state criminal proceedings substantive standard not previously recognized or right not in existence at time of state court trial, and if standard or right is intended to be applied retroactively, PCR application may be filed); Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (successive PCR application allowed where applicant could not have raised issue in previous application).

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

APPELLANT

PETITION TO ALLOW SUPPLEMENTAL
BRIEFING IN LIGHT OF FRANKLIN V. MAYNARD

Appellant filed his initial brief of appellant on August 10, 2001, from his convictions for murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping and armed robbery, and his sentence of death. On June 20, 2002, the United States Supreme Court decided Atkins v. Virginia, 536 U.S.304, 122 S.Ct. 2242 (2002), which held the execution of a mentally retarded defendant was cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

On July 26, 2002, appellant filed a motion to allow supplemental briefing in light of Atkins v. Virginia. On September 19, 2002 this Court issued an order denying the motion without prejudice to appellant's right to renew the motion following the decision in Franklin v. Maynard.

Appellant was a party-petitioner in Franklin v. Maynard. The order also held this case in abeyance pending a decision in Franklin v. Maynard.

This Court decided Franklin v. Maynard, Op. No. 25747, 2003 WL 22475599 (S.C.), on November 3, 2003, and therefore appellant's time to renew his motion to allow supplemental briefing is now ripe.

In Franklin v. Maynard, this Court held, inter alia, that a defendant, such as appellant, who had been sentenced to death prior to Atkins v. Virginia, 536 U.S.304, 122 S.Ct. 2242 (2002), and "who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law." This Court wrote that the burden on the defendant in PCR was to prove by a preponderance of the evidence that he was mentally retarded.

The petitioners had argued in Franklin v. Maynard, that where the defendant's mental retardation was disputed at trial, such as here, the "appropriate remedy would include a mental retardation determination and, if necessary, a new sentencing hearing." Brief of petitioners at 21. "[S]ince a mentally retarded defendant is not eligible for the death penalty, the ultimate decision must be made by the jury. Thus the only remedy consistent with both Atkins and Ring¹ is for a new, properly instructed jury to decide both the defendant's eligibility for the death penalty, as well as its appropriateness, in light of all the relevant evidence." Brief of petitioners at 22.

During pre-trial hearings to determine appellant's competency to stand trial and the voluntariness of his statements to the police, evidence of appellant's mental retardation was introduced. Chief Psychologist Leslie Sandler of the Department of Disabilities and Special Needs testified school records showed appellant had an IQ of 69 at age 9.8. R. 2618, l. 22 – 2619, l. 24; r.

2657, l. 22 – 2659, l. 1.

Dr. John Foxworth, a psychiatrist who graduated from the Citadel, evaluated petitioner, and he testified in the presence of the jury. R. 1493, l. 15 - 1494, l. 11. Dr. Foxworth said petitioner was very easily led and had trouble understanding concepts. Dr. Foxworth opined that petitioner "was mentally retarded." R. 1517, l. 17 - 1521, l. 20.

Dr. Charles Saylor testified during the trial that petitioner's full scale IQ of 69 classified him as "functioning in the lower one percent of the overall population," and stated petitioner was not malingering in pre-trial testing. R. 1604, l. 16 – 1609, 10. However, Sandler testified before the jury that he thought petitioner was malingering at times. R. 1727, l. 13 – 1728, l. 1.

The trial judge charged the jury the statutory mitigating circumstance "that the defendant had mental retardation at the time of the crime. And mental retardation means significantly sub-average general intellectual functioning existing concurrently with deficits and (sic) [in] adaptive behavior and manifested during the development[al] (sic) period." R. 2382, ll. 1-8. See S.C. Code §16-3-20(C)(b)(10). This Court in Franklin v. Maynard held that altering this definition of mental retardation was a matter for the legislature.

In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), the Court held that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be unanimously made by the jury beyond a reasonable doubt. "All facts essential to the imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be made by the jury beyond a reasonable doubt." (Scalia, J. concurring). 122 S.Ct. at 2440 (2002).

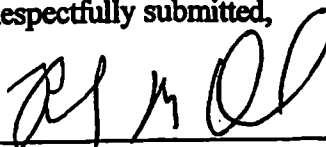
¹ Ring v. Arizona, 536 U.S.584, 122 S.Ct. 2428 (2002).

The petitioners in Franklin v. Maynard argued that "while Ring dealt specifically with statutory aggravating circumstances, it included "factfinding[s] necessary to . . . put [a defendant] to death. *Id.* At 2443. As set forth previously, Atkins held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. In Apprendi² / Ring parlance, a mentally retarded defendant is now constitutionally ineligible for the death penalty. 122 S.Ct. at 2252. Since mental retardation is now a factual issue upon which a defendant's eligibility for death turns, "that fact . . . must be found by a jury beyond a reasonable doubt. Ring, 122 S.Ct. at 2439." Brief of petitioners at 11.

Appellant is on direct and mandatory appeal of his conviction and death sentence to this Court. Appellant will be denied the benefit of Atkins v. Virginia and Ring v. Arizona if his sole remedy is to raise the issue of his ineligibility for the death penalty because of his mental retardation before a judge only in post-conviction relief. Appellant respectfully submits his remedy for resolution of the mentally retarded issue should be a new sentencing trial in the event this Court does not grant him a new trial based on his other direct appeal issues. Regardless, since the issue of mental retardation was raised at trial as a matter in mitigation, prior to the decision in Atkins v. Virginia, petitioner respectfully requests leave to brief the proper resolution of the matter during his direct appeal to this Court.

Wherefore, undersigned counsel would therefore respectfully request that this Court allow supplemental briefing in light of Franklin v. Maynard based upon Atkins v. Virginia and Ring v. Arizona since all three cases were decided following appellant's trial and the filing of the initial brief of appellant in this case.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender
Attorney for Appellant

This 12th day of December, 2003

² Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000).

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Honorable Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

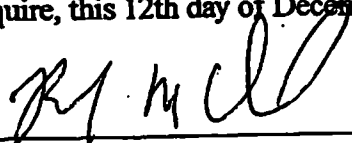
V.

KENNETH SIMMONS,

APPELLANT.

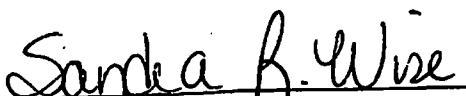
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition to Allow Supplemental Briefing in light of Franklin v. Maynard in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 12th day of December, 2003.


Robert M. Dudek
Assistant Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2003.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: February 3, 2005



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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January 28, 2004

✓ Assistant Appellate Defender Robert M. Dudek
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: State v. Simmons, Kenneth

Dear Counsel:

The following Order has been endorsed on your Petition to Allow Supplemental Briefing in Light of Franklin v. Maynard in the above entitled case on appeal.

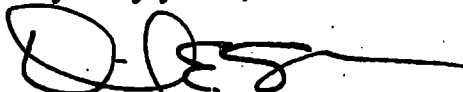
"Petition denied.

s/ Jean H. Toal C.J.
For the Court

January 28, 2004."

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,


CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-7210

KENNETH SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

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Capital Case**PETITIONER'S QUESTIONS PRESENTED**

1.

Whether Petitioner's right to due process was violated under the holdings of Wainwright v. Greenfield, 474 U.S. 284 (1986), and Doyle v. Ohio, 426 U.S. 610 (1976), where the state used the invocation of Petitioner's right to counsel during a competency evaluation to purportedly prove he understood his Miranda warnings at the time he gave an earlier confession?

2.

Whether the issue of Petitioner's mental retardation should be remanded to the South Carolina Supreme Court for reconsideration in light of the intervening cases of Atkins v. Virginia, 536 U.S. 304 (2002), and Ring v. Arizona, 536 U.S. 584 (2002), since the South Carolina Supreme Court twice refused to allow Petitioner to brief this issue on direct appeal, and the South Carolina procedure adopted following Atkins provides for a judge only determination of mental retardation for defendants sentenced prior to Atkins?

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-7210

KENNETH SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

The State of South Carolina makes a Brief in Opposition to the Petition for Writ of Certiorari made by Kenneth Simmons to review the decision of the South Carolina Supreme Court. Respondent submits that the Petition must be denied.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming Petitioner's murder conviction and death sentence is reported as State v. Kenneth Simmons, Opinion Number 25837, 599 S.E.2d 448 (filed June 14, 2004), and is reprinted in the Appendix to this Petition at pages 1-12. The denial of the petition for rehearing is unreported.

JURISDICTION

The final judgment of the South Carolina Supreme Court was entered on November 9, 2004. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense." U.S. Const.Amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which provides in pertinent part, "Excessive bails shall not be required... nor cruel and unusual punishment inflicted." U.S. Const.Amend. VIII.

This case further involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "[N]o state shall ... deprive any person of life, liberty, or property without due process of law..." U.S. Const.Amend. XIV.

RESPONDENT'S STATEMENT OF THE CASE

a. Court Proceedings

The Petitioner, Kenneth Simmons, was indicted at the January 19, 1998 term of the Dorchester County Court of General Sessions for murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping and armed robbery. The charges arose from the September 1, 1996 assault upon Lilly Bell Boyd. The state served a notice of intent to seek the death penalty.

Jerry N. Theos of Charleston and James A. Bell were appointed to represent the Petitioner. The case began at trial on February 22, 1999 before the Honorable Rodney A.

Peeples, Presiding Judge. The matter was prosecuted by First Circuit Solicitor Walter M. Bailey and Deputy Solicitor Harrison Bell. On February 28, 1999, the jury found the Petitioner guilty of each offense.

The penalty phase began on March 1, 1999. After hearing evidence in aggravation and mitigation, the jury was instructed on determining the existence of the following statutory aggravating circumstances:

1. Criminal sexual conduct
2. Kidnapping
3. Armed robbery
4. Physical torture
5. Burglary

The jury was advised to consider the following statutory mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (4) the age or mentality of the defendant at the time of the crime... There was a fifth statutory mitigating circumstance on the second sheet, and it is that the defendant had mental retardation at the time of the crime. And mental retardation means significantly sub-average general intellectual functioning existing concurrently with deficits and adaptive behavior and manifested during the development period.

R. p. 2382-2383. The trial judge also instructed the jury to consider the following mitigating circumstances:

1. The defendant would not poses a danger if his life is spared but incarcerated.
2. The defendant's long term addiction to

alcohol and drugs.

3. The defendant's intoxication at the time of the crime.

R. p. 2382. On March 2, 1999, the jury found the existence of each aggravating factor. The jury unanimously recommended a sentence of death. R. p. 2454-58. On that date, Judge Peeples sentenced Simmons to death for murder, no sentence on kidnapping, life sentence on burglary first degree, thirty (30) years on armed robbery consecutive, and thirty (30) years on criminal sexual conduct in the first degree, consecutive. Post trial motions were heard. On April 1, 1999 Judge Peeples entered an order denying a motion to set aside the sentence. R.p.3225.

The Petitioner made an appeal to the South Carolina Supreme Court. In the appeal, he was represented by current counsel, Robert Dudek and Eleanor Duffy Cleary of the South Carolina Office of Appellate Defense. Pertinent to this appeal, the Petitioner raised in the appeal the following questions:

1. Whether the judge erred by admitting evidence appellant invoked his right to counsel when the state wanted to administer psychological tests, since this violated *Doyle v. Ohio*, and even if the evidence was relevant it should also have been excluded since its unduly prejudicial effect outweighed its probative value?
2. Whether the judge abused his discretion by dismissing juror Campeau near the close of the guilt phase where the judge correctly ruled juror Campeau had not done anything improper, and where the juror's note unequivocally stated the fact that one of appellants relatives lived near property he owned would not affect his impartiality, since there was no cause to discharge this juror, and the judge's ruling unfairly granted the state an extra peremptory challenge?
3. Whether the judge erred by refusing to charge the lesser-included offense of robbery where the only "weapon" involved was a stick or appellant's hands, since this evidence did not constitute armed robbery as a matter of law, and there was evidence from which the jury could have convicted appellant of robbery?
4. Whether the judge erred by ruling irrelevant the testimony of appellant's first cousin, Calvin Linning, Sr., during the penalty stage that he, and appellant's

family, also found the victim's death "real painful", since members of appellant's family knew the victim, and the defense had the right to meet victim impact evidence once it was offered by the state?

Initial Brief of Appellant, p. 1-2. On May 7, 2002, the Final Brief of Appellant was filed raising these same issues.

On July 26, 2002, the Petitioner made a "*Motion to allow supplemental briefing in light of Atkins v. Virginia.*" The Respondents made a Return in opposition on August 26, 2002. In the return, the Respondents asserted that *Atkins*-type mental retardation issue was either raised or preserved in the "issues presented" in the Final Brief of Appellant, that the trial counsel had neither raised nor preserved any issue related to whether the petitioner was mentally retarded and whether it precluded a death sentence, in addition to other assertions. *Respondents Response to Motion to Allow Supplemental Briefing in light of Atkins v. Virginia*.p. 1-9. The motion was denied on September 10, 2002, without prejudice to appellant's right to renew the motion following the decision in *Franklin v. Maynard*, a petition for certiorari from a series of individuals requesting procedures to be developed in light of *Atkins*. However, the South Carolina Supreme Court also stayed the appeal pending the *Franklin* decision.

The South Carolina Supreme Court on November 3, 2003, entered a decision in Franklin v. Maynard, 356 S.C.276, 588 S.E.2d 604 (2003). On December 11, 2003, the Petitioner renewed his petition to allow supplemental briefing in light of *Franklin*. The petition was denied January 28, 2004.

Oral argument was heard on April 6, 2004. On June 14, 2004, the South Carolina Supreme Court entered its opinion affirming in part and reversing in part. State v. Kenneth Simmons, 360 S.C. 33, 599 S.E.2d 448 (SCSCT June 14, 2004). The state court reversed the

conviction and sentence for armed robbery, but otherwise affirmed Simmons' convictions and sentences. A petition for rehearing was filed July 15, 2004. Rehearing was denied by the South Carolina Supreme Court on August 9, 2004.

The petition for writ of certiorari was filed on November 8, 2004 and docketed on November 15, 2004. The Brief in Opposition is being filed on December 15, 2004.

b. Factual Summary

On Sunday, September 1, 1996, between 5 a.m. and 6 a.m., Kenneth Simmons came upon 89 year old Lilly Bell Boyd who was out feeding chickens at her home after he had spent a night doing drugs when he was riding home on his bicycle. He went into the back of her house and as he was coming back out of the house he caught her and pushed her back inside. He asked her for money and she went and got it. She brought a brown envelop with money and he grabbed it and pushed her and she hit her head. He then beat her with a two foot long stick that he found on the porch. Simmons then raped her on her kitchen floor. He tied her hands and feet together. He continued to beat her, resulting in 14 broken ribs. She died as a result of blunt head trauma and manual strangulation.

DNA matching the Petitioner was found in a vaginal sample from the victim. After initially denying knowledge, the Petitioner gave two taped confessions to the crimes.

The victim was found by her sister, Virginia Wilson, after she failed to attend church that Sunday. She was found on the kitchen floor bound and gagged and savagely beaten.

Simmons, a detainee at the Richland County Detention Center, had initially reported that he knew something about the murder of a woman in Summerville. On December 5, 1997, he initially told police that a guy named Shorty killed Mrs. Boyd and that Shorty had planted

Simmons' semen in Mrs. Boyd. Later, he gave the taped interviews on December 5 and December 9, 1997 confessing that he acted alone in the murder, rape, and robbery of Lilly Bell Boyd.

REASONS WHY CERTIORARI SHOULD BE DENIED

- I. Certiorari is not warranted where the South Carolina Supreme Court properly concluded that the trial was fundamentally fair and that trial court did not err in allowing rebutting testimony that the Petitioner during a mental health evaluation invoked his Miranda rights and requested counsel when the Petitioner opened the door to the admission of this evidence when he asserted that Simmons lacked the mental competency to understand and waive his Miranda rights reasonably applying this Court's precedent in Anderson v. Charles, 447 U.S. 404 (1980) and Doyle v. Ohio, 426 U.S. 610 (1976). (Question One)

In this certiorari proceeding, Simmons contends that he invoked his right to silence and right to counsel during a mental competency evaluation and the later use of the statements made in the evaluation was in violation of Doyle v. Ohio, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986). The South Carolina Supreme Court in rejecting the argument that the use of evidence occurring at the evaluation was improper concluded under Doyle and Anderson v. Charles, 447 U.S. 404 (1980) that the state's limited use of evidence of Simmons silence did not violate the fundamental fairness of Doyle and distinguished Greenfield. Respondents submit that the state court's analysis was a reasonable interpretation of this Court's precedent and certiorari relief is not warranted.

HOW THIS ISSUE WAS RAISED BELOW

The Petitioner throughout the entire proceedings in an attempt to suppress his confessions sought to prove that he could not waive his Miranda rights thereby rendering his statement to the police inadmissible. Contested issues were whether he was mentally retarded, possessed the

ability to understand his Miranda warnings, his propensity to be easily led, and malingerer. The trial judge initially ruled the confessions were admissible. R.p. 2932-33.

The record reveals that, pursuant to court order, Simmons was evaluated at William S. Hall Institute for competency to stand trial and criminal responsibility. R. 3163 (order), R. 3166-69 (report). During these proceedings Simmons was read his Miranda rights and evaluated on his understanding by the court examiners. R. p. 1639, 1657. During the evaluation, the evaluators questioned Simmons about his understanding of his right to remain silent and right to have an attorney present. R. p. 1710-11. At one point the evaluation was discontinued by Dr. Behrmann who opined that he did not have the ability to waive his rights at that time. R. p. 1634, 1650. Counsel Theos was present at those meetings. R. p. 1693-94, 1710.

An hour later, Dr. Jeffrey Vidic asked an intern, Monica Skaggs, to complete some testing on Simmons. It was reported that Simmons "told me that he didn't have to answer questions, that he wanted to talk to Mr. Theos, first, that he had a right to talk to Mr. Theos before he answered any questions." R. p. 1705, ll. 5-11. During the next interview, Simmons sufficiently stated an understanding of his rights to the examiners. R. p. 1650-51.

a.) How the Issue Was Raised at Trial

The prosecution sought to admit the fact that during the court-ordered mental health evaluation, Simmons told Skaggs that he did not wish to do psychological testing and was invoking his right not to answer questions until he spoke with his lawyer. R. p. 1691, ll. 18-24. The prosecution contended that this was relevant as a "graphic example, not only of Mr. Simmons...understanding his Miranda rights, but actually exercising them during this time. He contended that the mandates of Doyle v. Ohio, 426 U.S. 610 (1976) were not invoked because

the "door had been opened" on whether or not Simmons could comprehend Miranda rights.

Counsel Theos objected, asserting that he denied his Fifth Amendment right to silence and have counsel present. R. p. 1693, ll. 4-13.

Dr. Vidic clarified for the court that the psychological testing that he asked his intern to do did not concern the alleged facts of the case. R. p. 1695, l. 20 - p. 1696, l. 6.

Solicitor Bailey noted that the initial defense witness testified that Simmons did not understand the meaning of the word "right." R. p. 1696, ll. 18-21. See Dr. Foxworth R. p. 1531-35.¹ The prosecution noted this information was in direct contravention of what Dr. Foxworth testified and demonstrates that he understands. R. p. 1697, ll. 1-7.

Counsel Theos further made an initial hearsay objection that he later withdrew. R. p. 1697, 1862-63.

The prosecution further asserted that he should be entitled to question the experts about these matters since it was material reasonably relied upon by the experts. R. p. 1698.

Judge Peeples concluded that the evidence was admissible under SCRE Rule 403 as relevant evidence and SCRE Rule 703. R. p. 1698, ll. 15-21. As stated above, this information was developed on cross-examination of Dr. Vidic.

The prosecution further used the evidence in its closing argument on whether Simmons could understand and waive his Miranda rights. R. p. 1966, ll. 6-19.

Consistent with South Carolina law, the trial judge instructed the jury on its role in determining the admission of the confessions. R. p. 1966, ll. 6-19. In his charge to the jury, the

¹ Dr. Foxworth opined that, to a reasonable degree of medical certainty Simmons is not capable of reading his Miranda warnings and comprehending the meaning of the rights. R. p. 1535, ll. 10-14.

trial judge stated:

you may further consider the ability of the defendant to understand and comprehend the Miranda warnings and whether or not he knowingly and voluntarily gave up his rights....[Y]ou must consider the totality of the circumstances such as intelligence, education, experience, and ability to comprehend the meaning and effect of the statement. You must determine if the defendant in this case had the ability or capacity to comprehend the meaning and effect of waiving his constitutional rights...I instruct you, Ladies and Gentlemen, that decision can be made intelligently with an understanding of the consequences without the decision itself being a wise one.

R. p. 2073, l. 17 - p. 2074, l. 17.

b) How the Issue Was Decided on Appeal.

In the Final Brief of Appellant, Simmons asserted that trial judge had erred in admitting the testimony. In rejecting the claim, the South Carolina Supreme Court held as follows:

1. Doyle v. Ohio

Because the State's case rested largely on Simmons' confession, the defense strategy during the guilt phase was to introduce expert testimony that Simmons was not mentally capable of understanding and waiving his Miranda [2] rights.

Dr. Jeffrey Vidic, a psychologist at the William S. Hall Institute, [3] along with Dr. Thomas Behrman, a psychiatrist also employed at the Hall Institute, attempted to evaluate Simmons for competency on November 23, 1998. Drs. Vidic and Behrman testified as defense witnesses. Dr. Vidic was not satisfied Simmons possessed the ability to comprehend his Miranda warnings and therefore the competency exam could not proceed as planned. Dr. Vidic stated he could not formulate an opinion to a reasonable degree of certainty whether Simmons actually understood his rights or whether he was "malingering an inability to understand his rights." Dr. Behrman's testimony lent further support to Simmons' position, for he stated, based on his November 23 observations, that Simmons was not "able to explain his rights . . . in a sufficient or meaningful fashion." Dr. Behrman specifically opined that on November 23 Simmons "lacked the ability to waive his rights for the purpose of the evaluation."

On cross-examination, Dr. Vidic testified over Simmons' objection that

immediately after the aborted November 23 competency exam, he left a note for his intern, Ms. Skaggs, asking her to administer psychological tests to Simmons during a lunch break. The psychological testing requested by Dr. Vidic did not involve the facts of the case. Simmons refused to cooperate with the testing administered by Ms. Skaggs, invoking his "right" to speak with his lawyer. The State elicited this testimony in response to Simmons' position that he lacked the ability to understand and exercise the Miranda warnings and rights.

On appeal, Simmons argues the trial court erred in allowing the prosecutor's cross-examination in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986). We disagree.

Doyle holds that the Due Process Clause prohibits the government from commenting on an accused's post-Miranda silence. Doyle rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." South Dakota v. Neville, 459 U.S. 553, 565 (1983). This same concept of fundamental unfairness prohibits the government from using a defendant's post-Miranda silence as proof of sanity to overcome an insanity defense. Wainwright v. Greenfield, *supra*; see also State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986).

Doyle does not, however, create a per se rule requiring exclusion from evidence of a defendant's post-arrest, post-Miranda silence in all circumstances. As the Doyle court recognized:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. at 619, n.11.

In Anderson v. Charles, 447 U.S. 404 (1980), the Court further clarified Doyle:

Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

447 U.S. at 408. Other courts have found the Supreme Court's holding in Charles is not limited to situations involving inconsistent statements. See Splunge v Parke, 160 F.3d 369 (7th Cir. 1998) (initial silence used to show police scrupulously honored defendant's rights); Allen v. State, 686 N.E.2d 760 (Ind. 1997) (refusal to give written statement after oral statement used to show rights respected); Commonwealth v. Waite, 665 N.E.2d 982 (Mass. 1996) (reassertion of silence

used to show context in which questioning ended); State v. Correia, 707 A.2d 1245 (R.I. 1998) (same).

The underpinnings of Doyle, and the need for its application, are diminished where a defendant waives his right to silence. Here, Simmons did not remain silent "as to the subject matter of his statements." Simmons, following a waiver of his Miranda rights, confessed to the murder of Ms. B in December 1997.

Following the lone invocation of his right to remain silent in the context of the November 23, 1998, competency evaluation, Simmons again waived his Miranda rights and cooperated with a January 1999 evaluation. In this regard, in response to the defense strategy centered on Simmons' purported inability to comprehend the Miranda warnings, the State's targeted and narrow use of Simmons' recognition and exercise of his "right" to speak with counsel did not breach the implied assurance contained in Miranda. Simmons asserted his right to silence only in the context of the November 23 psychological examination. The limited evidence of Simmons' silence in this context was not "designed to draw meaning from silence" regarding the substantive crime and therefore does not violate Doyle. Charles, 447 U.S. at 409.

This case is distinguishable from Greenfield. In Greenfield the evidence of the defendant's silence was used as substantive evidence of guilt in the prosecution's case-in-chief because the defendant pled not guilty by reason of insanity. Here, the evidence of Simmons' silence was not offered as substantive evidence of guilt but as evidence of malingering to rebut his claim that he was incapable of understanding his Miranda rights.

We thus conclude the State's use of evidence of Simmons' silence did not violate the fundamental fairness standard of Doyle.

Simmons, *supra*.

C.) Law/Analysis

The Petitioner contended throughout the trial that he lacked mental capacity to understand his Miranda rights. In the defense case, Simmons introduced evidence that from his own experts that he was incapable of comprehending his Miranda warnings to support his theory that the jury should not consider his statements based upon the Miranda waivers. Once the defense had "opened the door" to the factual issue of whether the Petitioner could comprehend the Miranda warnings, the prosecution was entitled to pursue the factual issue on whether Simmons could

comprehend Miranda warnings. The trial judge did not abuse his discretion in allowing the admission of the evidence.

The defense guilt phase evidence plainly reveals that they strategically opened the door. Dr. Michael Foxworth, a psychiatrist, testified that Simmons gave an opinion that Simmons "did not really comprehend the right to remain silent." R.p. 1522. He further opined that Simmons "does not really comprehend the fact that he has the ability to exercise a prerogative to stop questioning whenever he wants to and not answer certain questions selectively." R.p. 1534, 21-25. He further stated that Simmons "was not capable of reading (the Miranda warnings) himself and comprehending them." R.p. 1535, l. 10-13. Also R.p. 1536, 17-p. 1537, l. 15. Dr. Thomas Behrmann, a state psychiatrist, testified as a defense witness that he was concerned that Simmons lacked the ability to waive his rights when he had an evaluation on November 23, 1998. R.p. 1640-41. Dr. Randy Waid, a defense witness, testified that he also had an opinion on whether Simmons could comprehend his Miranda warnings and opined "he does not have the capacity to fully understand his Miranda rights primarily based on capacity, knowing or intelligent reasons. R.p. 1789, l. 5-17. Also, R.p. 1790-91.

"[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct.App.1999); see also State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984)(holding where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially). A party cannot complain of prejudice

from the admission of evidence if he opened the door to its admission. Beam, 336 S.C. at 52, 518 S.E.2d at 301; see also State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991)(concluding where Petitioner opened door to evidence, he cannot later complain of prejudice from its admission).

Here, the prosecution was aware of evidence that factually disputed the predicate that the defense was trying to establish which was that Simmons was incapable of invoking his rights to silence and an attorney because Simmons had expressly done so at the William S. Hall evaluation revealing his ability to both comprehend the rights and act upon those rights. As the prosecutor so eloquently described to the judge: "I think to allow it to stand like that when he has actually demonstrated he understands the meaning of a right that he would perpetrate a fraud on the court." R.p. 1697, 6-7. The testimony he used was that the intern was told by Simmons that he had "the right I don't have to answer no questions until I talk to Mr. Theos." R.p. 1705. This evidence factually contradicted the "opinion" of Dr. Foxworth about whether he could understand a "right" and invoke his rights. Plainly, this evidence was relevant to the issue at hand. It was not being used to penalize his silence or invocation. It was used merely to address the narrow forensic question that was at issue - his ability to comprehend Miranda warnings - an issue for the jury to consider and resolve.

Respondents recognize that it is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Such comments may not be made either directly or indirectly. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980). In particular, the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented

by an attorney. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (due process clause of Fourteenth Amendment is violated when a state prosecutor seeks to impeach defendants' exculpatory story, told for the first time at the trial, by cross-examining them about their post-arrest silence after receiving the Miranda warnings); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (Fifth and Fourteenth Amendments forbid comment by the prosecution on the accused's silence or failure to testify, as well as instructions by the court that such silence is evidence of guilt); State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988) (holding that prosecutor's indirect reference to defendant's silence and indirect comments on defendant's exercise of his rights to counsel and jury trial violated defendant's due process rights and were reversible error in murder and kidnaping trial); State v. Hawkins, 292 S.C. 418, 423, 357 S.E.2d 10, 13 (1987) (reversing conviction where prosecutor improperly commented upon defendant's failure to testify and explaining that such a comment essentially is a comment upon defendant's right to remain silent); State v. Woods, 282 S.C. 18, 20, 316 S.E.2d 673, 674 (1984) (reversing conviction where solicitor improperly introduced evidence that defendant had exercised his right to remain silent); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct.App.1998) (reversing conviction because solicitor's cross-examination of defendant, during which she repeatedly questioned defendant as to why he had not told his version of events until the day of trial, was improper in that the questions clearly referenced his post-Miranda silence).

These principles are rooted in due process and the belief that justice is best served when a trial is fundamentally fair. See Brecht v. Abrahamson, 507 U.S. 619, 629, 113 S.Ct. 1710, 1717, 123 L.Ed.2d 353, 367 (1993); Wainwright v. Greenfield, 474 U.S. 284, 291, 106 S.Ct. 634, 638, 88 L.Ed.2d 623, 630 (1986); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

(1966). The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions. Such an inference is constitutionally impermissible because the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

In a direct appeal, the admission of comments or evidence of the defendant's exercise of a constitutional right is a "trial error" subject to harmless error analysis. State v. Pickens, 320 S.C. 528, 530-31, 466 S.E.2d 364, 367 (1996); see also Arizona v. Fulminante, 499 U.S. 279, 306-10, 111 S.Ct. 1246, 1263-65, 113 L.Ed.2d 302, 329-32 (1991) (a "trial error" occurs during the presentation of case to jury and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial; these are distinguished from structural defects in the constitution of the trial mechanism, which defy harmless error analysis).

The Supreme Court of South Carolina had consistently recognized the significance of Doyle, and has stated, "[a]n accused has the right to remain silent and the exercise of that right cannot be used against him. The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." State v. Smith, 290 S.C. 393, 394-95, 350 S.E.2d 923, 924 (1986); State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996) (It is a violation of due process for the State to permit comment on a defendant's post-arrest silence since the giving of Miranda warnings might induce silence by implicitly assuring a defendant his silence will not be used against him.).

However, courts have held that there are certain times that it is appropriate to hear evidence about this matter. United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (where defendant's counsel in closing argument stated the Government had not allowed defendant to explain his side of the story, the prosecutor's comment that the defendant "could have taken the stand and explained it to you" did not violate defendant's right against self-incrimination because the prosecutor's reference to the defendant's opportunity to testify was a fair response to a claim made by defendant's counsel). See also, Milburn v. Commonwealth, 788 S.W.2d 253, 258 (Ky. 1989) (by "open[ing] the door," defense counsel "should have seen the objectionable comment coming"); Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980) (cross-examination of witness in which prosecutor brought out inconsistency of defendant's direct testimony and statements made to police after Miranda warning not Doyle violation, because defendant chose to speak after receiving Miranda warning); Noland v. French, 134 F.3d 208, 216-17 (4th Cir. 1998) (prosecutor's elicitation from police officers that defendant understood Miranda rights and exercised them was not reversible error because trial testimony only made passing reference to Miranda rights, prosecutor did not exploit defendant's exercise of Miranda rights, and prosecutor did not suggest that defendant's invocation of Miranda rights rebutted evidence of insanity); U.S. v. Reveles, 190 F.3d 678, 684 (5th Cir. 1999) (prosecutor's comment on defendant's post-arrest silence after defendant tried to convince jury that he cooperated with investigators was not reversible error because Doyle does not tie hands of prosecutor who attempts to rebut statements by showing lack of cooperation)

Further, Doyle does not prohibit prosecutors from commenting on a defendant's post-arrest silence for all purposes. The Court in Doyle gave one example of one such

permissible purpose:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf. United States v. Fairchild, 505 F.2d 1378, 1383 (C.A.5 1975).

Doyle, 426 U.S. at 619 n. 11, 96 S.Ct. 2240. In Fairchild, which was cited with some approval by the Supreme Court, we held that a prosecutor may question a defendant about his post-arrest silence for the purpose of rebutting the impression that he cooperated with law enforcement authorities. See Fairchild, 505 F.2d at 1383; see also Chapman v. United States, 547 F.2d 1240, 1243 n. 6 (5th Cir.1977) (stating that Fairchild "clearly survive[s] Doyle"). A review of the trial transcript shows that the government's inquiries into Willie's post-arrest silence were for the purpose of rebutting his claim that he stood ready to cooperate all along. When a defendant attempts to convince a jury that he was of a cooperative spirit, Doyle does not tie the hands of prosecutors who attempt to rebut this presentation by pointing to a lack of cooperation.

The Petitioner's reliance on Wainwright v. Greenfield, 474 U.S. 284 (1986) is misplaced. In addition to Noland, *supra*, other circuits have held that mere mention of a defendant's exercise of Miranda rights is not *per se* prohibited; rather, a Greenfield violation depends on "the particular use to which the post-arrest silence is being put." Lindgren v. Lane, 925 F.2d 198, 202 (7th Cir.1991); see also Jones v. Stotts, 59 F.3d 143, 146 (10th Cir.1995) (holding that "it is the prosecutor's exploitation of a defendant's exercise of his right to silence which is prohibited"); United States v. Stubbs, 944 F.2d 828, 835 (11th Cir.1991) (finding no Greenfield violation "when the government does not specifically and expressly attempt to use ... the improper

comment to impeach the defendant"). Greenfield "does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor." Lindgren, 925 F.2d at 202. Here, its use by the prosecution was not to rebut a defense of insanity that was forbidden in Greenfield, but to reveal that he could comprehend his Miranda rights. The Petitioner's analysis ignores the use to which the prosecution was using the evidence - not to prove guilt; not to defeat a claim of not guilty by reason of insanity, but to challenge the defense presentation of whether he could comprehend his rights. This issue was raised by the defense, not the prosecution and they were entitled to challenge it by the evidence. The trial judge properly allowed its use in these discrete circumstances.

For the reasons set forth above, certiorari should be denied as to question one.

II. Certiorari is not warranted where the Petitioner's claim that he was entitled to a specific jury determination of the factual existence of mental retardation was not preserved for this Court's review because no request for this procedure was made before the trial court and the Petitioner did not timely preserve the claim before the South Carolina Supreme Court in this proceeding by raising the issue in the "issues presented" in the Initial Brief of Appellant.

In his petition before this Court, Simmons asserts that he was deprived of the right to argue in the direct appeal that he was entitled to a jury determination, in the future, of the issue of mental retardation based upon Atkins v. Virginia, 536 U.S. 304, 321 (2002) and Ring v. Arizona, 536 U.S. 584 (2002). The Petitioner complains that the Court's opinion in Franklin, et al. v. Maynard, 588 S.E.2d 604 (2003) affords a similarly situated capital defendant only a judge-only determination of the existence of mental retardation in a state PCR setting rather than a jury determination. As stated below, there was never any request at trial for a specific determination by a jury of the existence of mental retardation and the issue was not preserved in the direct appeal by including it in the "issues presented" in the Initial Brief of Appellant as required by state procedural law. Certiorari is not warranted.

1. The Issue Was Not Preserved For The Court's Review In The Initial Brief of Appellant.

Respondents respectfully submit that this issue is not preserved for this Court's review in this action. The record reveals the following issues were preserved and perfected to the South Carolina Supreme Court by briefing while Atkins was pending in the United States Supreme Court:

1. Whether the judge erred by admitting evidence appellant invoked his right to counsel when the state wanted to administer psychological tests, since this violated Doyle v. Ohio, and even if the evidence was relevant it should also have been excluded since its unduly prejudicial effect outweighed its probative value?

2. Whether the judge abused his discretion by dismissing juror Campeau near the close of the guilt phase where the judge correctly ruled juror Campeau had not done anything improper, and where the juror's note unequivocally stated the fact that one of appellants relatives lived near property he owned would not affect his impartiality, since there was no cause to discharge this juror, and the judge's ruling unfairly granted the state an extra peremptory challenge?
3. Whether the judge erred by refusing to charge the lesser-included offense of robbery where the only "weapon" involved was a stick or appellant's hands, since this evidence did not constitute armed robbery as a matter of law, and there was evidence from which the jury could have convicted appellant of robbery?
4. Whether the judge erred by ruling irrelevant the testimony of appellant's first cousin, Calvin Linning, Sr., during the penalty stage that he, and appellant's family, also found the victim's death "real painful", since members of appellant's family knew the victim, and the defense had the right to meet victim impact evidence once it was offered by the state?

None of the issues properly raised before the Court in the direct appeal concerning the propriety of sentencing the Petitioner based upon his alleged intellectual deficits not that a jury was required to make such a finding. Implicitly, the lower court denied the request for supplemental briefing to raise a new issues because it was not preserved nor appropriate in this litigation.

It does not appear that the trial counsel below raise the particular constitutional claim that Simmons is now asserting that a jury determination was required on the existence of mental retardation based upon the Federal Constitution. The record reveals that the Petitioner's counsel moved after the sentencing verdict to have a life sentence imposed because "there is no question that the Defendant suffers from a diminished mental capacity. As such, the imposition of the death penalty would constitute cruel and unusual punishment in violation of the Eighth Amendment." App.p. 3223-3224. The Honorable Rodney A. Peeples denied relief on this issue. App.p. 3228. Judge Peeples noted the defense had introduced conflicting expert testimony as to the defendant's mentality. There was testimony that the defendant was either mildly mentally

retarded, that mental retardation was suspected , but could not be diagnosed, that the defendant was not mentally retarded but was in the borderline range or that the defendant was not initially mentally retarded, but functioned at the diminished level due to chronic use of alcohol and drugs. App.p. 3223. Judge Peeples noted that in light of this conflicting evidence that he gave a series of mitigating circumstance instructions. App.p. 3228. However, in light of Penry v. Lynaugh, 492 U.S. 302 (1984), State v. Middleton, 368 S.E.2d 457 (S.C. 1988) and State v. Jones, 378 S.E.2d 594 (1989), he denied the new sentencing request. App.p. 3228-3229.

The Petitioner did not appeal this issue to this Court and consideration at this time is not appropriate. First, we must submit that the evidence, albeit conflicting, is that Simmons is not mentally retarded. In the guilt phase of the trial, the defense also put into evidence information used in mitigation. Dr. Michael Foxworth, a psychiatrist, opined that he was mentally retarded basically with a history of drug and alcohol abuse. R. p. 1521-23. He opined that he suffered from an "alcohol related persisting dementia which includes amnesia." R. p. 1526-27. Clinical psychologist Barton Saylor testified Simmons functioned at a "mentally deficient" range. R. p. 1606. He also felt he was deficient in his understanding of Miranda. R. p. 1608. Dr. Thomas Behrmann, a psychiatrist, opined he had "poly-substance dependance, a *provisional* diagnosis of mental retardation. R. p. 1673-76. Dr. Jeffrey Vidic, a clinical psychologist, opined that Simmons did not try to malingering on the intelligence tests. R. p. 1688.

However, Dr. Leslie Sandler, a psychological examiner from the Department of Disabilities and Special Needs and expert on mental retardation, opined that Simmons tested above the mental retardation level and did not show deficits in adaptive behavior. R. p. 1739. She opined that he was not mentally retarded. R. p. 1740. Further, she opined he was not being

truthful about his inability to comprehend Miranda warnings. R. p. 1743. Dr. Randy Waid opined that Simmons had diminished mental capacity due to his poly-substance abuse lifestyle. R. p. 1879-81, 1883.

The evidence presented by the Simmons is that he did not suffer from mental retardation but from intellectual deficits due to polysubstance abuse. The only witness qualified by training as an expert in the area of mental retardation, Dr. Sandler found neither prong for mental retardation as a matter of South Carolina law existed. R.p. 1724-26, 1739.² Dr. Sandler found him to be a high school graduate, earned two letters in football, had a drivers license, drove a car by himself, had a "remarkable number of signs that we were able to determine had indicated an absence of mental retardation" or an onset before the age of 18. Id. She opined his verbal score was 70, performance was 82 and a full scale of 75, which is in the mid-range of intellectual functioning and did not find deficits or impairments in adaptive functioning prior to age 18. R.p. 1739-40. She opined he was not mentally retarded. R.p. 1740.

Respondents submit that only the issues preserved in this appeal under the South Carolina Rules of Appellate Procedure should be addressed at this time and forthwith.³ Since the issue raised in the post-trial motion was abandoned in the direct appeal by not including it in the issues

²Section 44-20-30 (11): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Section 44-26-10(11): "'Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

³The Petitioner appears to assert that his mere request for supplemental briefing after Atkins which was denied should allow him to raise these issues before this Court de novo. However, he fails to recognize that the claims were not specifically raised at trial or in the appellate issues to preserve in this action his ability to raise that matter.

presented, it would be inappropriate for this issue to be raised in this certiorari action. Under SCACR Rule 208(b)(1)(B),⁴ ordinarily, no point will be considered which is not set forth in the statement of issues. Accord, Calhoun v. Calhoun, 339 S.C. 96, 102, 529 S.E.2d 14, 17 (2000). The Petitioner seeks not only to re-open the appeal to address an issue not plainly raised below- a determination of mental retardation - but essentially seeks to re-open the trial by requesting for the first time a jury should have made that determination - something never asked at trial and clearly not raised in the "issues presented" below.

The problem with the approach by the Petitioner before this court is his complaint with Franklin v. Maynard that it deprives him of a jury determination of mental retardation - something he never asked for at trial. In Franklin, a case in which the Petitioner was a party, the South Carolina Supreme Court held:

While petitioners argue we should establish procedures for cases where the defendant was sentenced to death prior to Atkins, [FN6] such procedures already exist.

FN6. Atkins has retroactive application. See Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law. [FN7] See S.C.Code Ann. §§ 17-27- 20(a) and -160 (2003). As with other PCR claims, the applicant must show he or she is

⁴South Carolina Appellate Court Rule, Rule 208(b)(1)(B) states in pertinent part: "(B) Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." See, Sullivan Co., Inc. v. New Swirl, Inc. 313 S.C. 34, 437 S.E.2d 30 (1993) (A broad general statement of issues made by an appellant may be disregarded by the appellate court pursuant to Rule 207(b)(1)(B), SCACR.)

mentally retarded by a preponderance of the evidence. See, e.g., Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (competency for execution). If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

Franklin. et al, supra. At 279-280. It cannot be contended that Simmons would be without a remedy to litigate the issue of his mental retardation in the future and implicitly whether his trial counsel was ineffective in failing to request a specific jury determination of the claim. The Respondents recognize that Atkins v. Virginia, supra., which announced that executing mentally retarded defendants violates the Eighth Amendment prohibition against "cruel and usual punishment." and also recognize that Atkins is the type of decision that has retroactive effect. See Penry v. Lynaugh, 492 U.S. 302 (1989). However, we would note that success is unlikely on the jury issue because cases addressing the issue of whether the federal constitution requires a jury determination of mental retardation have rejected that requirement. Recently in United States v. Webster, 2004 WL 2796054 (5th Cir. Dec. 7, 2004), the court concluded that Ring does not require a jury determination of the absence of mental retardation since it is not an element of capital murder. Also Winston v. Commonwealth, 604 S.E. 2d 21 (VA. 2004) (jury decision not required under constitution), State v. Williams, 831 So.2d 835, 860 (La.2002) (same). See, e.g. In re Johnson, 334 F.3d 403, 404-405 (5th Cir. 2003)("[T]he absence of mental retardation is not an element of the sentence any more than sanity is an element of an offense."); Walton v. Johnson, 269 F. Supp. 2d 692, 698 n. 3 (W.D. Va. 2003). Respondents are further advised that Idaho, Illinois, Nebraska, New Mexico, Nevada, New York, North Dakota, South Dakota, Tennessee, Utah and Washington all have judge only consideration of mental retardation. There is no requirement that this court enter the fray on an unpreserved constitutional claim under Ring

at this time. Certiorari is not warranted.

CONCLUSION

For all the foregoing reason, certiorari should be denied.

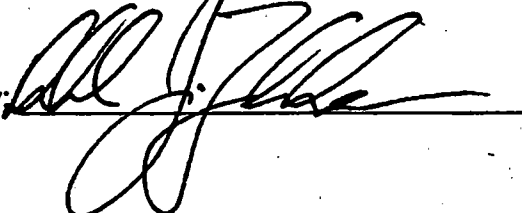
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

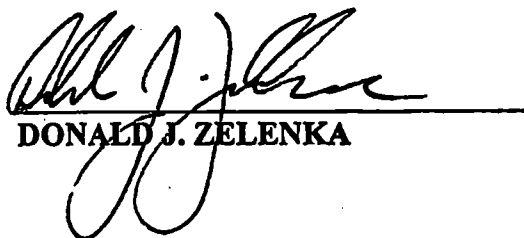
ATTORNEYS FOR RESPONDENT

By: 

December 15, 2004

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina* in the foregoing action by depositing two (2) copies in the United States mail, postage prepaid, to Robert M. Dudek, Assistant Appellate Defender, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201 this 15th day of December, 2004.



DONALD J. ZELENKA

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

3581

ATTORNEY GENERAL'S OFFICE

RECEIVED

1-28-05

ADMINISTRATIVE INSTRUCTIONS

William K. Suter
Clerk of the Court

(202) 479-3011 COPIES MADE

ROUTE TO

ORDER: TRANSCRIPT

PEN RECORDS CLERK RECORDS

OTHER:

January 24, 2005

Mr. Donald John Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Kenneth Simmons
v. South Carolina
No. 04-7210

Dear Mr. Zelenka:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

ATTORNEY GENERAL'S OFFICE

RECEIVED

1-28-05

STATE OF SOUTH CAROLINA

ADMINISTRATIVE INSTRUCTIONS

IN THE SUPREME COURT FILE _____ OPEN _____ END

_____ HAVE _____ COPIES MADE

Appeal from Dorchester County ROUTE TO _____

_____ ORDER: _____ TRANSCRIPT

Rodney A. Peeples, Circuit Court Judge _____

_____ CLERK RECORDS

OTHER: _____

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

PETITIONER.

 PETITION FOR STAY OF EXECUTION

Counsel for Kenneth Simmons petitions this Court for a stay of execution to allow him to file an application for post-conviction relief in the Dorchester County Court of Common Pleas.

I.

This Court affirmed petitioner's murder conviction and death sentence, and reversed is armed robbery conviction in State v. Kenneth Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004).

II.

Petitioner filed a petition for rehearing on July 15, 2004. This Court denied rehearing on August 9, 2004.

III.

A petition for writ of certiorari to the United States Supreme Court, *Kenneth Simmons v. South Carolina*, No. 04-7210 was then filed on November 8, 2004. The Court denied certiorari in its order dated January 24, 2005. In accord with In re STAYS OF EXECUTION IN CAPITAL CASES, 321 S.C. 544, 471 S.E.2d 140 (1996), a request for a stay of execution from this Court so that petitioner can pursue state post-conviction relief is now proper.

IV.

Petitioner intends to raise numerous grounds of ineffective assistance of counsel in post-conviction relief. These include: (1) Was defense counsel ineffective for failing to proffer the testimony of petitioner's cousin, Calvin Linning, during the penalty stage of the trial, since that failure caused the mitigation and rebuttal issue to be procedurally defaulted before this Court and procedurally defaulted as an issue in the United States Supreme Court?; (2) Was defense counsel ineffective for failing to also argue to the trial court that Calvin Linning's testimony was admissible to show petitioner's family also suffered because of their close relationship with the victim, and they wanted mercy for petitioner, since this failure procedurally defaulted the issue before this Court and in the United States Supreme Court?; 3) Was defense counsel ineffective for failing to attend or be available to advise petitioner's throughout his competency evaluation where that failure led to the state obtaining devastating impeachment evidence against petitioner because petitioner did not understand the insignificance of the testing the state was requesting that he undertake without counsel, and his refusal to participate in that testing was used to supposedly show he was

malingering?; 4) Was defense counsel ineffective for failing to argue, and obtain expert testimony to explain to the jury that petitioner's mental retardation strongly affected his demeanor during the trial, and that petitioner's flat affect should not be interpreted as a lack of remorse?; 5) Was defense counsel ineffective for failing to present available mitigating evidence about petitioner's deprived background?; 6) Was defense counsel ineffective for failing to argue that the stick found in the victim's yard was not a deadly weapon, and that petitioner did not come to the victim's house armed and intending to harm anyone, and that petitioner was surprised by the victim being home at the time? In addition, petitioner intends to raise the issue in post-conviction that his execution is barred as cruel and unusual punishment under the Eighth Amendment to the United States Constitution since he is mentally retarded.

This list is not exhaustive, but merely is offered to show that numerous issues of ineffective assistance of counsel exist in this case that are now ripe.

V.

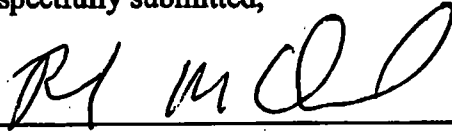
Present counsel cannot take a position on the issue of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel to determine.

VI.

Based on the above, petitioner requests a stay of execution from this Court so that he can pursue his state court post-conviction relief action. Counsel does not make this request for purposes of delay.

WHEREFORE, counsel for Kenneth Simmons requests a stay of execution from the denial of certiorari in the United States Supreme Court so that he can file an application for post-conviction relief in the Dorchester County Court of General Sessions upon the grounds of ineffective assistance of counsel.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

Attorney for Petitioner.

January 27, 2005

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Rodney A. Peeples, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH SIMMONS,

PETITIONER.

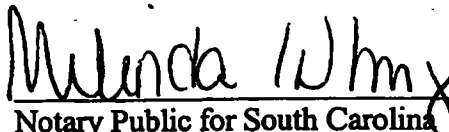
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 27th day of January, 2005.



ROBERT M. DUDEK
Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 27th day of January, 2005.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Dorchester County
Rodney A. Peeples, Circuit Court Judge**

THE STATE,

Respondent,

v.

KENNETH SIMMONS,

Appellant.

**RETURN TO PETITION FOR A STAY OF EXECUTION TO PURSUE STATE
POSTCONVICTION RELIEF**

Ms

The Respondent, through undersigned counsel, hereby make a Return to the Petition for a Stay of Execution received on January 28, 2005 to allow him to file an application for state postconviction relief in Dorchester. The direct appeal was affirmed in part and reversed in part on June 14, 2004 in State v. Kenneth Simmons, Opinion Number 25837, 599 S.E.2d 448 (filed June 14, 2004). A timely petition for rehearing was filed on July 15, 2004 and denied on August 9, 2004. A timely petition for writ of certiorari from this Court was filed in the United States Supreme Court on November 8, 2004. Certiorari was denied in the Court on January 24, 2005. Simmons v. South Carolina, 04-7210, - U.S. -, 2005 West 126835 (Jan. 24, 2005). Respondents do not oppose the stay request pursuant to the mandates of this Court in In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

Respondents will show this Court the following reasons:

I.

In his petition, he asserts that he intends to pursue state postconviction relief alleging claims of ineffective assistance of counsel based upon the following:

- 
1. Was defense counsel ineffective for failing to proffer the testimony of petitioner's cousin, Calvin Linning, during the penalty stage of the trial, since the failure caused the mitigation and rebuttal issues to be procedurally defaulted before this Court and procedurally defaulted as an issue in the United States Supreme Court?
 2. Was defense counsel ineffective for failing to also argue to the trial court that Calvin Linning's testimony was admissible to show petitioner's family also suffered because of their close relationship with the victim, and they wanted mercy for the petitioner, since this failure procedurally defaulted the issue before this Court and the United States Supreme Court?;
 3. Was defense counsel ineffective for failing to attend or be available to advise petitioner throughout his competency evaluation where that failure led to the state obtaining devastating evidence against petitioner because petitioner did not understand the insignificance of the testing the state was requesting that he undertake without counsel, and his refusal to participate in that testing was used to supposedly show he was malingering?;
 4. Was defense counsel ineffective for failing to argue, and obtain expert testimony to explain to the jury that petitioner's mental retardation strongly affected his demeanor during trial, and that petitioner's flat affect should not be interpreted as a lack of remorse?;

5. Was defense counsel ineffective for failing to present available mitigating evidence about petitioner's deprived background?;
6. Was defense counsel ineffective for failing to argue that the stick found in the victim's yard was not a deadly weapon, and that the petitioner did not come to the victim's house armed and intending to harm anyone, and that petitioner was surprised by the victim being home at that time?
7. His execution is barred as cruel and unusual punishment under the Eighth Amendment since he is mentally retarded.

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Petition, p. 2-3.

In this Court's written order in In Re Stays on April 8, 1996, this Court stated as follows:

If the defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief. [If the general nature of the issues are appropriate for post-conviction relief], this Court will assign a circuit judge to the case and issue a stay of execution.

In Re Stays, 321 S.C. 546 [bracketed portion not included in published order]. Respondents submit that the issue intended to be raised, under the prior precedent of this Court are of "*the general nature of issues appropriate for post-conviction relief*," and the entry of the stay would be appropriate. However, Respondents submit that under a Strickland v. Washington, 466 U.S. 668 (1984) and Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) analysis, the Petitioner cannot satisfy his burden of proof.

Therefore, Respondents do not oppose the granting of a stay to allow the assignment of a state post-conviction relief judge, appointment of two (2) qualified counsel pursuant to § 17-27-

160 to allow a filing of an application for post-conviction relief within sixty (60) days by the
Petitioner.

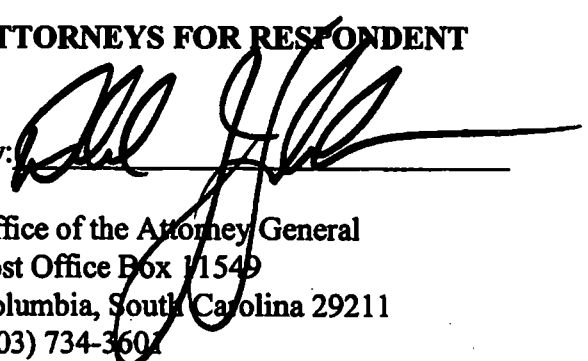
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3601


January 31, 2005

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Dorchester County
Rodney A. Peebles, Circuit Court Judge**

THE STATE,

Respondent,

v.

KENNETH SIMMONS,

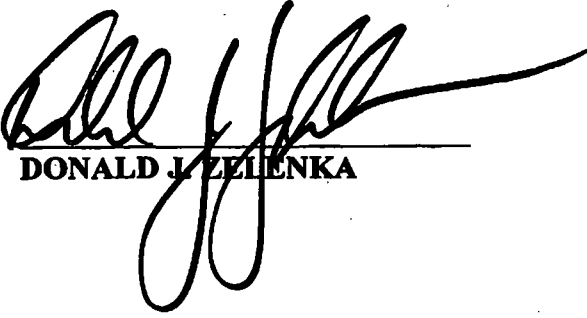
Appellant.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, Counsel for the Respondent, certify that I have served Respondent's *Return to Petition for Stay of Execution* by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
Assistant Appellate Defender
South Carolina Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, South Carolina 29201

This 31st day of January 2005.



DONALD J. ZELENA

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kenneth Simmons,

Petitioner.

ORDER

In State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004), this Court reversed petitioner's armed robbery conviction, but affirmed his convictions for murder, first degree burglary, and first degree criminal sexual conduct, and his death sentence. The United States Supreme Court denied certiorari on January 24, 2005. Simmons v. South Carolina, Op. No. 04-7210 (U.S. Sup .Ct. filed January 24, 2005)(2005 WL 126835).

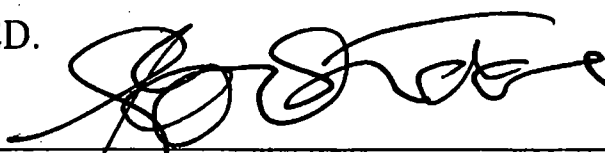
Petitioner now seeks a stay of execution so that he can pursue post-conviction relief. As required by In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), petitioner has set forth six allegations of ineffective assistance of counsel which he intends to raise in his application for post-conviction relief. He also intends to argue that his execution is barred as cruel and unusual punishment under the Eighth

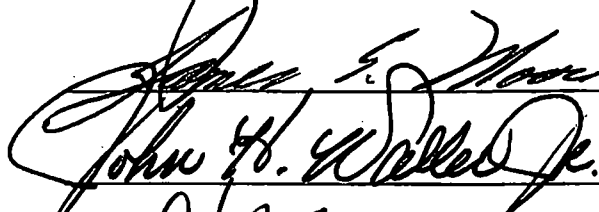
Amendment because he is mentally retarded. Because petitioner's claims are appropriate for post-conviction relief, he is entitled to a stay of execution.

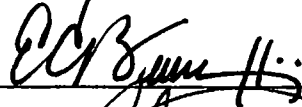
Petitioner's request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases, supra.

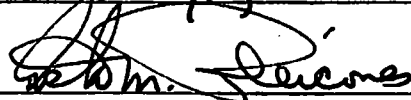
The Honorable Doyet A. Early, III, is hereby assigned to the post-conviction relief action petitioner intends to file. Judge Early shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled. Judge Early shall conduct a hearing on petitioner's desires regarding counsel within thirty days of the post-conviction relief action being filed.

IT IS SO ORDERED.


C. J.


J.


J.


J.

Columbia, South Carolina

February 2, 2005

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

KENNETH SIMMONS,

Petitioner,

VS.

THE STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

ORDER APPOINTING COUNSEL

FILED
BAMBERG COUNTY
2005 APR 22 PM 12:12
JAMES P. HERS
CLERK OF COURT
BAMBERG, SC

msc
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This matter is before the Court regarding the appointment of counsel for the Petitioner, Kenneth Simmons, regarding his potential application for Post Conviction Relief. It appears that Mr. Simmons has exhausted his avenues regarding appellate relief. Mr. Simmons was tried before the Honorable Rodney A. Peebles, was convicted of murder, first degree burglary, armed robbery, and first degree criminal sexual conduct and was sentenced to death. The Supreme Court of South Carolina affirmed the convictions and sentence in an opinion dated June 14, 2004.¹ Mr. Simmons then petitioned for certiorari before the United States Supreme Court, and said petition was denied on January 24, 2005.

This Court convened a hearing on February 23, 2005, at the Bamberg County Courthouse in Bamberg, South Carolina. Present were the Petitioner, Mr. John H.

¹ See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (SC 2004).

A TRUE COPY

Attest *J. B. Hiers*
CLERK OF COURT
BAMBERG COUNTY, SC

Blume, III, of the Richland County Bar, Mr. William McGuire of the Charleston County Bar, and Ms. Melody Brown of the South Carolina Attorney General's Office.

ME
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This Court found that Mr. Blume is duly qualified to be appointed as counsel in this matter as he meets the standards set out in South Carolina Code Section 17-27-160. While Ms. Brown stipulated to Mr. Blume being qualified pursuant to the above referenced statute, the Court also found Mr. Blume to be qualified as he has represented in excess of thirty (30) defendants having been sentenced to death and such representation being at either the post conviction or appellate stage. Code Section 17-27-160 requires that one of the two attorneys appointed as counsel to the petitioner meet the standards set out in the statute and Mr. Blume is hereby appointed as such counsel to Mr. Simmons at this Post Conviction Relief stage.²

The Court found that Mr. William McGuire has practiced almost exclusively in the area of criminal defense for the last eight (8) years. His experience in the practice of criminal law has involved representing numerous defendants having been indicted for felony charges including murder. Mr. McGuire has also been counsel of record in two (2) death penalty cases at the trial level, and has been counsel of record in a murder case at

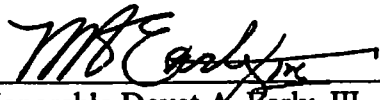
² South Carolina Code Section 17-27-160 provides in relevant part:

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

the Post Conviction Relief stage. Mr. McGuire is also hereby appointed as counsel to Mr. Simmons at this Post Conviction Relief stage.

Based on the foregoing, The Court finds Mr. Blume and Mr. McGuire to be appropriately appointed as counsel to Mr. Simmons at the Post Conviction Relief stage, and hereby orders them appointed as such.

IT IS SO ORDERED.


The Honorable Doyet A. Early, III
Resident Judge, Second Judicial Circuit


Barnesburg, South Carolina

March 17, 2005

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

KENNETH SIMMONS,)

Applicant,)

v.)

GARY MAYNARD, Commissioner,
South Carolina Dept. of Corrections)

Respondent.)

IN THE COURT OF COMMON PLEAS
03-CP-18-1192MOTION TO PERMIT APPLICANT
TO SEEK FUNDING BY *EX PARTE*
PROCEEDINGSCERTIFIED COPY
JUL 26 2005 10:55**I. Introduction.**

Applicant, Kenneth Simmons, moves this Court to hear his request for funds for investigative and expert services in an *ex parte* proceeding. This motion is in response to Assistant Attorney General Melody Brown's objection at the appointment hearing and in her letter dated March 8, 2005 to *ex parte* requests for funding, based on the language contained in footnote one of *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996). The legal bases for this motion are set forth below.

II. S.C. Code § 17-27-160 Authorizes Ex Parte Proceedings.

South Carolina's capital post-conviction procedure is set forth in S.C. Code § 17-27-160. This section authorizes counsel to be funded in the same manner as provided by S.C. Code § 16-3-26. Effective representation in capital post-conviction proceedings includes employing investigative and expert services. The plain terms of the statute support this conclusion. Section 17-27-160 incorporates all of § 16-3-26 by specific reference, except for subsection (I) that is expressly excluded.¹ Section 16-3-26(C)(1) provides:

¹ Subsection (I) provides that only attorneys who are residents and licensed to practice in South Carolina may be appointed by the Court and compensated with funds appropriated to the Death Penalty Trial Fund.

Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from funds available to the office of indigent defense, of fees and expenses not to exceed twenty thousand dollars as the court shall deem appropriate. Payment of such fees and expenses may be ordered in cases where the defendant is an indigent represented by court-appointed, private counsel or the public defender.

Thus, the statutes clearly establish that an *ex parte* hearing is the proper procedure for a capital post-conviction applicant's funding requests. This *ex parte* request must be heard *in camera* in order to protect the equal protection rights of the indigent inmate on death row as compared to a death-sentenced inmate who had the means to employ investigators and experts. *Ex Parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994).

Because § 17-27-160 incorporates all of the funding provisions of § 16-23-26, including the provisions for funding investigative, expert and other services, the Court should allow Mr. Simmons to request funds for investigative and expert services in an *ex parte* and *in camera* proceeding. To do otherwise would constitute a significant departure from the time-tested, well established procedure in South Carolina. To undersigned counsel's knowledge, no court has ever ruled that the relevant statutes provide anything other than that the defendant may apply for fees and expenses in an *ex parte* and *in camera* hearing.

III. The Attorney General Incorrectly Relies on *Thames* as Persuasive Authority.

The State relies on footnote one of *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996), to support the State's position that Mr. Simmons is not entitled to an *ex parte* proceeding.² *Thames*

² Footnote one reads as follows:

When a defendant requests expert services for a criminal trial, the request is determined by the judge in *ex parte* proceedings. S.C. Code Ann. § 16-3-26(C) and § 17-3-50(F) (Supp. 1995); *Ex parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings. Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same

is not dispositive. First, footnote one of *Thames* is *dicta*. In *Thames* the non-capital post-conviction applicant did not seek *ex parte* review of her request for expert services. Neither *Thames* nor the State raised the *ex parte* issue on appeal. Accordingly, a non-capital, post-conviction applicant's right to *ex parte* application for funding has never been considered by the South Carolina Supreme Court in a contested, adversarial proceeding. Second, *Thames* dealt with non-capital proceedings. This is a capital case and, as set forth above, these proceedings are controlled by a different statutory provision and are treated differently than non-capital proceedings. Finally, the facts in *Thames* arose prior to the enactment of § 17-27-160.³ Thus, even if an argument existed for applying the language in footnote one to a capital post-conviction proceeding at the time of *Thames*, the subsequent enactment of § 17-27-160 specifically authorizing *ex parte* proceedings in capital cases in the manner provided by § 16-2-26 eliminates any ambiguity about *Thames*' inapplicability to capital cases.

IV. The Protections Provided to Capital PCR Applicants are Guaranteed by the Fourteenth Amendment Requirements of Due Process and Equal Protection.

The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (pointing to parole and probation as examples of state-created rights to which there was no "constitutional or inherent right" but which had been accorded protection under the Due Process Clause); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding prisoner's interest as a result of the State having

hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate.

³ *Thames* was submitted to the Supreme Court on May 15, 1996, and decided on December 2, 1996. Section 17-27-160 became effective on June 18, 1996.

created the right to good time credit "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty.'").

In determining whether a state has created a liberty interest subject to protection under the Due Process Clause, the Court looks to the nature of the interest at stake. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). "This has meant that to obtain a protectable right 'a person clearly must have more than an abstract need or desire for it . . . He must, instead, have a legitimate claim of entitlement to it.'" *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quoting *Roth*, 408 U.S. at 577). In *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), the Supreme Court explained that:

A State creates a liberty interest by establishing "substantive predicates" to govern official decision making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

Id. at 462 (citation omitted); see also *Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994).

Furthermore, judicial pronouncements by the Supreme Court of the United States and of South Carolina make clear that the nature of the right to *ex parte* proceedings to seek expert and investigative services is such that it merits protection under the Due Process Clause. See *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (holding due process entitles an indigent defendant to the appointment of an expert to assist in his defense whenever "the defendant is able to make an *ex parte* threshold showing" of the need for assistance); *Ex Parte Lexington County*, 314 S.C. 220, 226-27, 442 S.E.2d 589, 593 (1994) (declaring that when the "clear and unambiguous statutory mandate is that the hearing be conducted *ex parte*," the state or county "does not have standing to participate in the hearing.").

Here, Mr. Simmons has much more than an abstract need or desire for *ex parte* proceedings. The statutes give him a clear claim of entitlement thereto. Mr. Simmons maintains

that the proper procedure is that set forth in S.C. Code § 17-3-50(B). That section, on its face, requires *ex parte* proceedings when applicants seek the "services of investigators and other experts [that] may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *McFarland*, 512 U.S. at 855. Because South Carolina chose to accord a right to *ex parte* proceedings to seek expert services in post-conviction proceedings challenging a death sentence, "due process protections are necessary 'to insure the state-created right is not arbitrarily abrogated.'" *Vitek*, 445 U.S. at 488-89 (quoting *Wolff*, 418 U.S. at 557).

Due process and equal protection concerns are also implicated when a person is denied fundamental fairness by the state or treated differently than others based only on indigence:

'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

Ross, 417 U.S. at 609. These concerns are heightened in this capital post-conviction process. See *Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999) ("Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.").

"[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (cites omitted).⁴ This promise of "an adequate opportunity," however, vanishes if the state, with its nearly unlimited resources to investigate Applicant's case at all phases of litigation,

⁴ Under *Ake*, a defendant is entitled to expert assistance when he is "able to make an *ex parte* threshold showing to the trial court" that such assistance is necessary. 470 U.S. at 82. *Ake* presumed the *ex parte* nature of this showing.

see *Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (S.C. 1992)⁵, likewise has access to privileged information only because of Simmons' indigency. As the South Carolina Supreme Court has explained:

Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigents defendant, then the process becomes invidiously discriminatory and violative of equal protection.

Ex parte Lexington County, 314 S.C. at 228, 442 S.E.2d at 594.

Although *Lexington County* and *Ake* address the rights of defendants at trial to *ex parte* proceedings, there is little question that equal protection and due process rights extend to post-conviction proceedings. See *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (refusal to provide transcript of state habeas corpus proceeding denied equal protection of the laws); *Lane v. Brown*, 372 U.S. 477 (1963) (prevention of right to appeal a denial of a writ of error *coram nobis* due to indigency denied equal protection). Indeed, the United States Supreme Court has explicitly held that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny the prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. at 709.

Here, allowing the State a voice in the amount and types of funding available to the defense would violate due process when the state, as Respondent, clearly has an interest in prohibiting Mr. Simmons access to expert and investigative services that could lead to success in these proceedings. Due Process is also violated because Mr. Simmons would not be similarly accorded the opportunity to be heard about the amounts and types of expert and investigative

⁵ In *Bailey*, the court contrasted the resource constraints faced by defense counsel with those of the "publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement," as well as access to "dramatic technological advances" and other experts. 309 S.C. at 460, 424 S.E.2d at 506.

services sought by the State. Moreover, allowing the State to be heard would also violate equal protection because a non-indigent PCR applicant would not be similarly restricted.

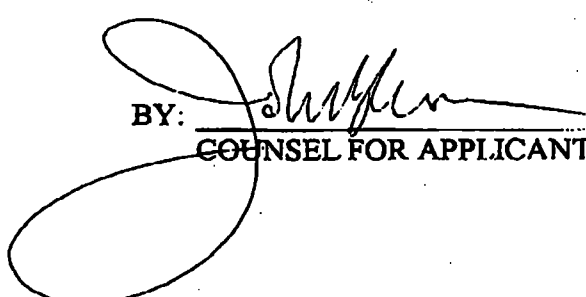
V. Conclusion.

For all these reasons, Mr. Simmons requests this Court to allow him to proceed in the manner in which all other capital post-conviction inmates have proceeded since the enactment of § 17-27-160.

Respectfully submitted,

JOHN H. BLUME
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112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

WILLIAM S. MCGUIRE
171 Church Street
Suite 160
Charleston, SC 29401
(843) 720-3735

BY: 

COUNSEL FOR APPLICANT

May 4, 2005.

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Kenneth Simmons,)
Applicant,)
v.)
Gary Maynard, Commissioner,)
South Carolina Dept. of)
Corrections,)
Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No.: 2003-CP-18-1192

RETURN TO MOTION TO PERMIT
APPLICANT TO SEEK FUNDING
BY *EX PARTE* PROCEEDINGS

CERTIFIED COPY
AUG 12 AM 9:43
Clerk of Court
DORCHESTER COUNTY

Applicant, Kenneth Simmons, through appointed counsel, moves this Court by way of a written motion filed May 13, 2005, for an order allowing Applicant to seek funding by *ex parte* proceedings. Respondent makes this return submitted at the hearing on August 10, 2005.

Procedural History

On February 2, 2005, the Supreme Court of South Carolina issued a stay of execution, upon Applicant's motion, after completion of Applicant's direct appeal, in order for Applicant to pursue post-conviction relief. The Honorable Doyet A. Early, III, ("the PCR judge") was assigned exclusive jurisdiction. The PCR judge convened a hearing on February 23, 2005, in Bamberg, in order to ascertain Applicant's wishes concerning appointment of counsel to aid in the post-conviction relief process. After Applicant expressed a desire for counsel, the PCR judge appointed John H. Blume, Esquire, and William S. McGuire, Esquire. (See Order of Appointment, March 14, 2005). After appointment, Respondent objected to any and all *ex parte* communication in any context. The PCR judge ordered that no *ex parte* communication would be received, but allowed counsel the opportunity to make a motion for *ex parte* communication if counsel believed such communication

was necessary. On May 13, 2005, Applicant filed a "Motion to Permit Applicant to Seek Funding by *Ex Parte* Proceedings." Respondent was noticed of the motion on July 26, 2005.¹ Respondent now submits this Return.

Discussion

Respondent again submits that *ex parte* communication would not be appropriate in this context, and relies on the prohibition against same as shown in Rule 501 SCACR, Code of Judicial Conduct, Canon 3 (7), and Rule 407, SCACR, Rule 3.5. Canon 3 (7)(a) restricts exceptions to *ex parte* communication to matters "that do not deal with substantive matters or issues on the merits..." However, Canon 3 (7)(e) allows a judge to "initiate or consider any *ex parte* communications when expressly authorized by law to do so." (emphasis added). Similarly, Rule 3.5 prohibits a lawyer from *ex parte* except where permitted by law. Respondent submits S.C. Code § 17-27-160 does not expressly authorize *ex parte* funding request. Respondent notes that the commentary to the canon section refers to *ex parte* funding matters for capital defendants pursuant to S.C. Code § 16-3-26 as an example of express authorization, while there is no notation to any *ex parte* funding request either in a capital or non-capital post-conviction relief action. Applicant is not entitled to *ex parte* communications in regard to funding.

Applicant submits three theories to avoid the reference prohibition: (1) S.C. Code § 17-27-160 authorizes *ex parte* funding requests; (2) *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996) does not support an assertion *ex parte* funding requests are not prohibited in post-conviction relief actions; and (3) Due Process and Equal Protection mandate the allowance of *ex parte* proceedings

¹ Undersigned counsel for Respondent has caused a review of her document records and has no indication of receipt of this document. Respondent called and requested a fax copy on July 26, 2005, which was received the same day. Therefore, response to the motion was delayed.

in this context. Respondent submits Applicant's arguments are without merit.

Section 17-27-160 Does Not Expressly Authorize Ex Parte Funding Requests.

Applicant argues that S.C. Code § 17-27-160 authorizes *ex parte* proceedings in regard to funding request. (Motion, p. 1). He claims, "Section 17-27-160 incorporates all of § 16-3-26 by specific reference, except for subsection (I) that is expressly excluded." (Motion, p. 1). This is wholly inconsistent with the plain language of Section 17-27-160 (B), which restricts incorporation of the language of Section 16-3-26, to those matters governing appointment and compensation of counsel, "Counsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel...."² Clearly, not all of Section 16-3-26 was incorporated by reference. In fact, Section 16-23-26 (A) deals exclusively with trial matters, including the sending of the notice of intent to seek the death penalty. At any rate, implicit in Applicant's argument is the concession that *ex parte* funding requests are not expressly authorized by Section 17-27-160; therefore, the *ex communication* he requests is not authorized by law, and he is not entitled to same.

Thames v. State Advises the Bench and Bar Regarding Ex Parte Funding Requests in Post-conviction Relief Actions

In *Thames v. State*, 325 S.C. 9, 11, n. 1, 478 S.E.2d 682, 682, n.1 (1996), the Supreme Court of South Carolina, by footnote, expressed that statutory provisions allowing *ex parte* motions for expert services in criminal trials are not applicable to post-conviction relief actions. Applicant argues that the footnote is *dicta*; that the case was not a capital case; and the case was decided before the enactment of Section 17-27-160; therefore, the case should not be considered persuasive

² Respondent notes that compensation rates and limits for capital and non-capital cases differ. See S.C. Code §§ 16-3-26 and 17-3-50.

authority. (Motion, p. 3). Respondent relies on the footnote so strongly, even though *dicta*, because the language is so clearly presented.³ The footnote does not form a basis of thought from which to extrapolate a theory barring *ex parte* funding motions. Rather, the note shows that the Court considered the *ex parte* provision applying to the trial level only. Of course, this is most clearly supported by the omission of specific authorization of *ex parte* funding requests in Section 17-27-160, but also by reference to the fact that a post-conviction relief action is a civil proceeding. It is not a criminal trial. Criminal trial guarantees are not applicable. There is a totally different posture in this proceeding than in a criminal trial. For instance, through discovery, Respondent is able to obtain testing information, witness statements, and all manner of investigatory information that would simply not be available in a criminal prosecution. This distinction cannot be lost in discussion of the *ex parte* funding provision. As to Applicant's argument that *Thames* should be disregarded because it is not a capital case, Respondent simply notes that the footnote specifically references capital cases. As to Applicant's last assertion that Section 17-27-160 was enacted after *Thames* was decided, Respondent reasons that there were, of course, capital post-conviction relief actions prior to the enactment of the Section 17-27-160. Nothing about the character of the action in regard to *ex parte* funding requests was changed with the adoption of Section 17-27-160; rather, the section deals specifically with qualification and adequate funding levels for PCR counsel in capital cases. See *Tucker v. Catoe*, 221 F.3d 600, 603-605 (4th Cir. 2000). Applicant's arguments to the contrary are without merit.

³ Respondent notes that other courts have similarly ruled that *ex parte* funding proceedings were not applicable to non-trial settings. See *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (1998)(Ky. 1998)(no support to have *ex parte* funding in post-conviction case, *Ake v. Oklahoma*, 470 U.S. 68 (1985) distinguished); *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000)(no right in competency to be executed proceedings to seek *ex parte* funding or hearing).

Due Process and Equal Protection

As mentioned in the preceding section, this is a civil action. Therefore, the guarantees associated with the criminal trials are not applicable. Applicant's assertion that his indigent status affects the fairness of the proceedings misses the mark. First, in this civil proceeding, capital cases are granted full discovery rights. S.C. Code § 17-27-150 (B). Respondent will be entitled to answers to interrogatories, or requests to produce reports, regarding expert witnesses and witness statements. *See generally* Rules 26, 33 and 34, SCRCF. This is not the case in trial preparation for a criminal prosecution. Moreover, Applicant has already been found guilty. This is not a forum for re-litigating guilt, but for exploration for possible error. *See Murray v. Giarratano*, 492 U.S. 1, 13 (1989) ("A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment.") (J. Connor, concurring); *Davis v. State*, 912 S.W.2d 689, 695 (Tenn. 1995), *quoting Ross v. Moffitt*, 417 U.S. 600, 616 (1974) ("Once the process goes beyond the trial and direct appeal as of right stage, the state has no duty to 'duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction.'") Applicant is constrained to admit that he must base his asserted "entitlement" to *ex parte* funding request on cases referencing the criminal trial. (Motion, p. 6). Applicant's reliance is misplaced as these cases are simply not applicable to this setting. The same confidentiality concerns and imbalance in the release of information in the trial setting has no place in post-trial collateral actions. For instance, the Fourth Circuit, reviewing a habeas case where *ex parte* funding was requested in discovery, rejected the notion that *ex parte* proceedings were necessary to "level the playing field." *In re Pruett*, 133 F.3d 275, 281 (4th Cir. 1997). The Court noted, "Non-indigent petitioners have no advantage over indigent petitioners, at least with regard to

confidentiality, when it comes to conducting discovery. Indigent and non-indigent alike must file their discovery motions beforehand, serve notice on the nonmoving party, and convince the judge that there is good cause for the request. There is no authority to proceed otherwise.” *Id.* Similarly, there is no disadvantage here. Though our statutes grant discovery in capital post-conviction relief actions without request, the discovery is reciprocal. Reciprocity ensures fairness in the process. *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). However, and this is the point that appears to have been overlooked in Applicant’s discussion, the breach in fairness actually rests with Applicant’s request to exclude Respondent from his presentation of facts to the judge. In these proceedings the judge is the fact finder. Allowing unfettered access of one party to make initial presentations of factual basis for causes of actions is pure prohibited *ex parte* communication. By its nature, *ex parte* communication gives advantage to the communicating party, “... the court or tribunal hears only one side of the controversy... it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.” *Ex parte Lexington County*, 314 S.C. 220, 226, 442 S.E.2d 589, 593 (1994), quoting *Black’s Law Dictionary*, 297 (5th ed. 1983). It is important that each side is aware of whatever factual basis is being presented to the judge. Moreover, if Applicant’s request is reasonable, and soundly based on a factual basis, there is no cause to fear the participation of the State in the funding request. (See Motion, p. 6, “Respondent, clearly has an interest in prohibiting Mr. Simmons access to expert and investigative services that could lead to success in these proceedings.”) The ability to obtain funding is obviously provided by the State. The State does not seek to restrict the ability. The State does request the ability to know what facts Applicant is presenting to the fact finder prior to the ultimate resolution of the action, and correct or supplement any fact of record. Again, if the request is reasonable and

soundly based in fact, there is no cause to fear an open hearing on the request. In regard to Applicant's assertion that he would not be privy to State's experts and investigations, he again overlooks the importance of discovery in this action. Applicant already has the same discovery rights as Respondent. Lastly, as to his assertion that a non-indigent PCR applicant would not be similarly restricted, again, he overlooks completely that capital PCR applicants are allowed the full measure of discovery automatically by statute. The discovery rules, complete with notice to opposing counsel, are applicable to each party. There is no imbalance. Applicant's argument to the contrary should be rejected.

Conclusion

Based on the foregoing, Respondent submits Applicant's motion should be denied.

Respectfully submitted,

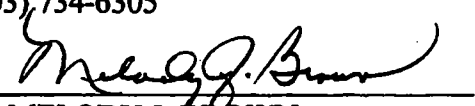
HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: 

MELODY J. BROWN

ATTORNEYS FOR RESPONDENTS

August 10, 2005.

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

KENNETH SIMMONS

Applicant,

v.

JON OZMINT, Commissioner
of Department of Corrections.*Respondent.*

IN THE COURT OF COMMON PLEAS

Case No.: 03-CP-18-1192

APPLICATION FOR
POST-CONVICTION RELIEF

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Dorchester County Court of General Sessions.
3. Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 98-GS-18-0075
 - (b) Burglary: 98-GS-18-0076
 - (c) Armed Robbery: 98-GS-18-0077
 - (d) Criminal Sexual Conduct: 98-GS-18-0078
 - (e) Kidnapping: 98-GS-18-0079
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on March 2, 1999 as follows:
 - (1) Murder: Death
 - (2) Burglary: Life imprisonment
 - (3) Armed Robbery: 30 years
 - (4) Criminal Sexual Conduct: 30 years
 - (5) Kidnapping: Not applicable see 6-3-20 and 6-3-910
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.

8. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.
 - (ii) The United States Supreme Court.
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence for armed robbery overturned; remaining convictions and sentences affirmed.
 - (ii) Petition for Writ of Certiorari denied.
- (c) The date of each result:
 - (i) Convictions and sentences affirmed on June 14, 2004;
 - (ii) Petition for Writ of Certiorari denied on January 24, 2005.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004).
 - (ii) *Simmons v. South Carolina*, 125 S.Ct. 1068 (Jan. 24, 2005).
9. Not applicable.

GROUND FOR RELIEF WITH SUPPORTING FACTS

- 10(a) *Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during voir dire.*
- 11(a) Applicant's trial counsel failed to conduct an appropriate and reasonable voir dire to identify jurors who were biased or who were predisposed to find applicant guilty and/or sentence applicant to death and to rehabilitate jurors who possessed legally appropriate scruples against capital punishment. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 US 510 (2003); *Rompilla v. Beard*, 125 S.Ct. 2456, 2005 WL1421390 (June 20, 2005).
- 10(b) *Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during the guilt- or- innocence phase of the trial.*
- 11(b) Applicant's trial counsel failed to present evidence and make appropriate objections challenging the relevance and significance of the DNA evidence presented by the prosecution. Trial counsel also failed to conduct a reasonable investigation which would have resulted in the discovery of other evidence relevant to a reliable determination of applicant's guilt-or-innocence. *Williams*,

Supra; Wiggins, Supra; Rompilla, Supra.

- 10(c) *Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during the sentencing phase of the trial.*
- 11(c) *Applicant's trial counsel failed to conduct a reasonable investigation into all available sources of mitigation. Counsel also failed to present evidence in mitigation of punishment including, but not limited to, evidence supporting applicant's mental retardation, brain damage, mental illness and evidence of applicant's social history, and adaptaility to confinement. Williams, supra; Wiggins, supra; Rompilla, supra.*
- 10(d) *Applicant's death sentence violates the Eighth Amendment to the United States Constitution due to the fact that he is mentally retarded.*
- 11(d) *Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. Atkins v. Virginia, 536 U.S. 306, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); Franklin v. Maynard, 356 SC 276, 588 SE.2d 604 (2003).*
- 10(e) *Applicant's death sentence violates the Eighth Amendment to the United States Constitution and/or the corresponding provisions of the South Carolina Constitution due to the fact that he has significantly subaverage intellectual functioning existing concurrently with deficits in adaptive functioning.*
- 11(e) *The ground for relief states the relevant facts.*
12.
 - (a) *Applicant has not filed any petition in State Court.*
 - (b) *Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.*
 - (c) *No other petitions were filed.*
 - (d) *No other petitions, motions or applications in this or any other court.*
13. *Not applicable.*
14. *None of the grounds set forth in (10) has been previously presented to this or any other Court, State or Federal.*
15. *Not Applicable.*

16. These grounds rely on additional facts outside the record which was before the previous courts.
17. Applicant was previously represented by counsel.
18. Applicant was represented at trial by Jerry N. Theos, of Uricchio Howe Krell Jacobson, Toporek & Theos, P.A., P.O. Box 399, Charleston, South Carolina 29402-0399, and by James A. Bell, of Bell & Witherspoon, 216 North Parler Avenue, St. George, South Carolina 29477.

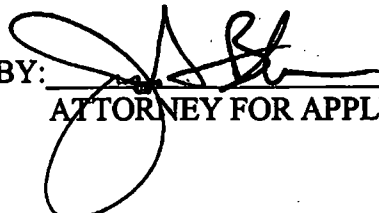
On direct appeal applicant was represented by Robert M. Dudek and Eleanor Duffy Cleary of the South Carolina Office of Appellate Defense, 1122 Lady Street, Columbia, South Carolina 29201.

19. Applicant seeks relief from his convictions and sentences.
20. Applicant is not under sentence from any other court.

Respectfully submitted,

JOHN H. BLUME
SHERI L. JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

WILLIAM S. MCGUIRE
Law Office of William S. McGuire
171 Church Street, Suite 160
Charleston, SC 29401

BY: 
ATTORNEY FOR APPLICANT

August 29, 2005.

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

VERIFICATION

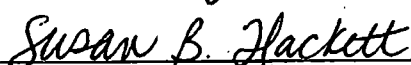
I, Kenneth Simmons, sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the convictions and sentence attacked in this application; and that the matters and allegations therein set forth are true.



KENNETH SIMMONS

SWORN to and subscribed before me this

19th day of Aug., 2005.



Notary Public for State of South Carolina

My Commission Expires: Sept 22, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF
 COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Kenneth Simmons, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

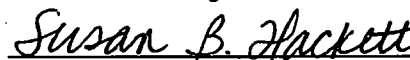
(2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefore.



 KENNETH SIMMONS
 APPLICANT

SWORN to and subscribed before me this

19th day of Aug., 2005.



 Notary Public for State of South Carolina

My Commission Expires: Sept. 22, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
)
 Applicant,)

C/A No.: 2005-CP-18-1368

v.)

ORDER DENYING MOTION TO PERMIT
 APPLICANT TO SEEK FUNDING
 BY *EX PARTE* PROCEEDINGS

Gary Maynard, Commissioner,)
 South Carolina Dept. of)
 Corrections,)

Respondent.)
)

DAE
#1

This matter is before me by way of Applicant's Motion to Permit Applicant to Seek Funding by *Ex Parte* Proceedings, filed May 13, 2005, with the Dorchester County Clerk of Court. A hearing on the motion was held on August 10, 2005, in the Bamberg County Courthouse. Applicant was present, and represented by counsel, John H. Blume, Esquire, and William S. McGuire, Esquire. Melody J. Brown, Assistant Attorney General, represented Respondent. Ms. Brown submitted a return at the hearing that was accepted by the Court and subsequently filed with the Dorchester Clerk of Court.¹ After reviewing the motion, return, and the arguments presented at the hearing, I deny Applicant's motion.

¹ The Court noted at the hearing that it did not receive a copy of the motion, and was unaware the motion was pending until counsel for Applicant requested a ruling by way of a letter dated July 25, 2005. Counsel for Respondent advised that she was not aware of the motion until the Court made a scheduling call for the hearing. In an effort to avoid any other lapse in action upon a motion, this Court specifically requested at the hearing, and again advises all counsel, that counsel must send copies of all documents filed with the Dorchester County Clerk of Court directly to the undersigned judge's chambers. Counsel is also cautioned to ensure that opposing counsel is properly served.

Procedural History

A Dorchester County jury convicted Applicant of murder, first degree burglary, armed robbery, and first degree criminal sexual conduct. Applicant was sentenced to death. The Supreme Court of South Carolina reversed the armed robbery conviction but affirmed the remaining convictions and the death sentence. *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004). After completion of the direct appeal process, Applicant moved for a stay in order to pursue post-conviction relief. On February 2, 2005, the Supreme Court of South Carolina issued a stay of execution, and the undersigned was assigned exclusive and continuing jurisdiction over the matter. This Court convened a hearing on February 23, 2005, in Bamberg, in order to ascertain Applicant's wishes concerning appointment of counsel to aid in the post-conviction relief process. After Applicant expressed a desire for counsel, the Court appointed John H. Blume, Esquire, and William S. McGuire, Esquire. (See Order of Appointment, March 14, 2005). Counsel for Respondent, Melody J. Brown, Assistant Attorney General, was also present at the appointment hearing. After the Court appointed PCR counsel, counsel for Respondent objected to any and all *ex parte* communication in any context. This Court ordered that no *ex parte* communication would be received, but allowed counsel for Applicant the opportunity to make a motion for *ex parte* communication if counsel believed such communication was necessary. On May 13, 2005, Applicant filed the referenced "Motion to Permit Applicant to Seek Funding by *Ex Parte* Proceedings," which I deny in this order.

Discussion

Rule 501, SCACR, Code of Judicial Conduct, Canon 3 (7)(a), restricts exceptions to the prohibition against *ex parte* communication to matters "that do not deal with substantive matters or issues on the merits...." Canon 3 (7)(e), however, allows a judge to "initiate or consider any

ex parte communications when *expressly* authorized by law to do so.” (emphasis added). Similarly, Rule 407, SCACR, Rules of Professional Conduct, Rule 3.5, prohibits a lawyer from *ex parte* communication except where permitted by law. Applicant argues that S.C. Code § 17-27-160 expressly authorizes *ex parte* funding requests, and concludes that the *ex parte* communication he requests is not merely permissible under the rules, it is mandated by statute. (Motion, pp. 1, 2 and 4). This Court disagrees.

Section 17-27-160 does not expressly authorize *ex parte* funding requests. In support of his position to the contrary, Applicant argues, “Section 17-27-160 incorporates all of § 16-3-26 by specific reference, except for subsection (I) that is expressly excluded.” (Motion, p. 1). A review of the various subsections of Section 16-3-26 shows that one part, Paragraph (C)(1), provides for *ex parte* funding requests for a criminal defendant facing trial. It is apparently this portion of Section 16-3-26 Applicant contends should be incorporated. However, the plain language of Section 17-27-160 (B), restricts incorporation of the language of Section 16-3-26 to those matters governing appointment and compensation of counsel, referring to “the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F),” and, further providing that “[c]ounsel appointed in these cases shall be compensated from the funding provided in Section 16-3-26 in the same manner and rate as appointed trial counsel, provided that Section 16-3-26(I) shall not apply to counsel appointed in post-conviction relief proceedings.”² There is no reference to Section 16-3-26 (C)’s provision for *ex parte* funding requests, nor is there any

² Section 16-3-26 (I), reads as follows: “Notwithstanding another provision of law, only attorneys who are licensed to practice in this State and residents of this State may be appointed by the Court and compensated with funds appropriated to the Death Penalty Trial Fund in the Office of Indigent Defense. This proviso shall not pertain to any case in which couns[e]l has been appointed on the effective date of this Act.” The Court notes that Paragraph (I) clearly addresses counsel requirements and funding, the subject matter of the incorporated provision, and was logically referenced in regard to adoption of a provision that squarely addresses those concerns.

language that otherwise establishes a right for a PCR applicant to have funding requests heard in *ex parte* proceedings. This Court concludes that Section 17-27-160 (B) clearly incorporates only those provisions going to counsel qualification and funding. See *Ex parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994) ("When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning.")

 This Court finds *Thames v. State*, 325 S.C. 9, 478 S.E.2d 682 (1996), extremely instructive. In *Thames*, the Supreme Court of South Carolina, by footnote, expressed that statutory provisions allowing *ex parte* motions for expert services in criminal trials are not applicable to post-conviction relief actions. 325 S.C. at 11, n.1, 478 S.E.2d at 682, n.1. Applicant argues that the footnote is *dicta*; that the case was not a capital case; and the case was decided before the enactment of Section 17-27-160; therefore, the case should not be considered persuasive authority. (Motion, p. 3). Though not an explicit part of the ruling in *Thames*, the referenced language clearly denotes the lack of authority for *ex parte* funding requests, and specifically references capital PCR proceedings. This express rationale and applicability should not be casually disregarded. Applicant's assertion that Section 17-27-160 was enacted after *Thames* was decided, therefore the *Thames* rationale is not applicable under the current statutes, is rejected. Nothing about the character of the action, and, specifically, nothing involving *ex parte* funding requests, was changed, altered or amended with the adoption of Section 17-27-160; rather, as reasoned above, the specific portion of the statute at issue, Section 17-27-160 (B), deals with enhanced qualification and adequate funding levels for PCR counsel in capital cases. There is no authority for *ex parte* funding requests based on the plain language of the statute, and, as *Thames* notes, the statutes allowing *ex parte* funding requests are clearly written to cover

only a defendant at trial. Therefore, it is this Court's opinion that *Thames* is applicable to capital PCR actions, and its logic and application of statutory construction is correctly applied to the current matter.

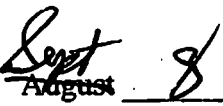
 Lastly, the Court rejects Applicant's arguments regarding Due Process and Equal Protection. Applicant essentially asserts that his indigent status affects the fairness of the proceedings, causing him to reveal information on his experts and witnesses to Respondent when Respondent does not have to reveal same. He also asserts there will be a disparity of treatment between indigent and non-indigent PCR applicants if the Court denies *ex parte* funding requests. (Motion, pp. 3-7). This Court disagrees. This is a civil proceeding. Applicant's reliance on cases referencing Due Process and Equal Protection arguments supporting the use of *ex parte* funding requests in the criminal trial setting is misplaced. Civil litigants are in an entirely different posture than parties in a criminal prosecution, and the disclosure of information is governed by different rules. In this civil action, capital PCR cases are granted full discovery rights by statute. S.C. Code § 17-27-150 (B). This is a marked difference from the criminal trial. Applicant's assertion that he would not be entitled to information regarding Respondent's experts and investigations is rejected. Applicant overlooks the importance of discovery in this action. Moreover, the fact that both parties are bound by the discovery rules requirements ensures fairness in the process. *See Wardius v. Oregon*, 412 U.S. 470, 475 (1973)(reciprocity ensures fundamental fairness). Similarly, there is no disparity in treatment between indigent and non-indigent applicants. "Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection." *Ex parte Lexington County*, 314 S.C. at 228, 442 S.E.2d at 594. There is no such one-sidedness in this process. All capital PCR

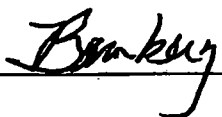
applicants are allowed the full measure of discovery, and all capital PCR applicants, without regard to indigent status, are held to the requirements of the discovery rules. The flow of information is different in this civil proceeding. Each party will be required to disclose information through the discovery process. Applicant's argument to the contrary is rejected.

THEREFORE, based on the foregoing, Applicant's Motion to Permit Applicant to Seek Funding by *Ex Parte* Proceedings is DENIED.



Doyet A. Early, III, Presiding Judge
Second Judicial Circuit


_____, 2005.


_____, South Carolina.

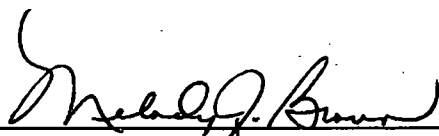
CERTIFICATE OF SERVICE

I, Melody J. Brown, certify that I have served the Order Denying Motion to Permit Applicant to Seek Funding by *Ex Parte* Proceedings in the foregoing by depositing copies in the United States mail to the following:

**John H. Blume, III, Esquire
Post Office Box 11744
Columbia, South Carolina 29211**

**William S. McGuire
Savage & Savage
15 Prioleau Street
Charleston, South Carolina 29401**

This 13th day of September, 2005.



MELODY J. BROWN
Attorney for Respondent

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF DORCHESTER)

05-CP-18-1368)

KENNETH SIMMONS, SK 5066,)

Applicant,)

REQUEST FOR RECONSIDERATION
OF APPLICANT'S MOTION TO SEEK
FUNDING BY *EX PARTE*

v.)

PROCEEDINGS/OR, IN THE
ALTERNATIVE, MOTION TO ALTER
OR AMEND THE JUDGMENTGARY MAYNARD, Commissioner,
South Carolina Dept. of Corrections)

Respondent.)

I. Introduction.

Applicant, Kenneth Simmons, moved by written motion filed May 13, 2005, for an order allowing him to seek funding in *ex parte* proceedings. Respondent opposed this motion in a return submitted on August 10, 2005. This Court convened a hearing on August 10, 2005, in Bamberg, South Carolina, and issued a letter on August 15, 2005 indicating the Court's intent to deny Mr. Simmons' request. Mr. Simmons respectfully requests the Court to reconsider this decision. The basis for this request is set forth below.

II. S.C. Code § 17-27-160 Expressly Authorizes Ex Parte Proceedings.

Mr. Simmons asserts that the plain language of S.C. Code § 17-27-160 expressly authorizes *ex parte* communications in the context of capital post-conviction cases. Section 17-27-160 clearly provides that counsel appointed in post-conviction cases "shall be compensated from the funding provided in Section 16-3-26 in the same *manner* and rate as appointed trial counsel" (emphasis added). According to § 16-3-26(C)(1), the appropriate manner of payment for investigative and expert services is upon a finding by the court in *ex parte* proceedings that the services are reasonably necessary. Thus, there can be no question that requests for funding

for investigative, expert and other services in post-conviction cases must be heard in *ex parte* proceedings in accordance with § 16-3-26(C)(1) as incorporated into § 17-27-160.

Moreover, § 17-27-160 specifically excludes subsection (I) of § 16-3-26, which prohibits the appointment and compensation of out-of-state attorneys in capital trials. There is no reference, however, to any exclusion of the requirement contained in § 16-3-26(C)(1) that funding requests be heard by the Court in *ex parte* proceedings. This is further evidence that the plain language of the statute clearly incorporates the *ex parte* provision of § 16-3-26(C)(1). “When terms which are contained in a statute are clear and unambiguous, the courts are required to apply them according to their literal meaning.” *Ex Parte Lexington County*, 314 S.C. 220, 225, 442 S.E.2d 589, 592 (1994). “The terms of a statute are to be given their plain and ordinary meaning without employing subtle or forced construction.” *Id.* Again, to the undersigned counsel’s knowledge, no court since the enactment of § 17-27-160 has applied the statute to preclude an *ex parte* funding request in a capital, post-conviction proceeding.¹

The footnote in *Thames v. State*, 325 S.C. 9, 11, n.1, 478 S.E.2d 682, 682, n.1 (1996), is not applicable to this issue. Mr. Simmons reiterates that the language in *Thames* is *dicta* in a non-capital case. The *Thames* Court held that a post-conviction relief judge did not abuse his discretion in denying a non-capital petitioner’s request for payment of psychiatrist fees after she had already been examined by two psychiatrists prior to her guilty plea. *Thames*, 478 S.E.2d at 683. Whether such a request should be conducted *ex parte* was not an issue raised by either party in the case. Furthermore, the footnote in *Thames* makes no reference to § 17-26-160 because it was decided before the statute which controls capital post-conviction proceedings was

¹ See attachment: “PCR-Cases Where Applicant Has Been Permitted to Proceed *Ex Parte* in Relation to Funding Issues.”

enacted. Rather, the footnote refers to the specific language of S.C. Code 1967 § 17-3-50(B), which is no longer in effect.

III. Ex Parte Proceedings are Required by Due Process and Equal Protection

Mr. Simmons submits that denial of his request for an *ex parte* hearing will infringe upon his constitutional rights. Respondent erroneously suggests that because this is a civil action, the Fourteenth Amendment Requirements of Due Process and Equal Protection do not apply. (Return, p. 5). Respondent quotes *Murray v. Giarratano*, 492 U.S. 1 (1989) and *Ross v. Moffitt*, 417 U.S. 600 (1974). Both cases hold that the Federal Constitutional protections of Due Process and Equal Protection do not *require* that a state provide counsel in capital post-conviction proceedings. *See Ross*, 417 U.S. at 618-19; *Murray*, 492 U.S. at 12. That is not the issue here. South Carolina has already chosen to provide counsel to indigent post-conviction defendants. Further, South Carolina has, by § 17-26-160, provided that funding requests for expert and investigative services from such defendants be conducted *ex parte*. Thus, the issue is whether, once the State has elected to provide a statutory right to *ex parte* proceedings, this Court may constitutionally abridge that entitlement. Mr. Simmons asserts that this Court may not depart from the plain language of § 17-26-160 because such a departure would violate his constitutional right to Due Process and Equal Protection.

First, allowing the State to participate in the funding request would violate Due Process by providing the State with strategic information that it would not otherwise be entitled to. Second, this result would be particularly unfair given that the State is not similarly required to make these types of disclosures to Mr. Simmons. Third, Mr. Simmons would have to reveal this information to the State only because he is indigent, in violation of Equal Protection.

IV. The State is Not Entitled to Participate in Mr. Simmons' Funding Request by the Rules of Discovery.

Respondent argues that there is no imbalance in allowing the State to participate in Mr. Simmons' funding request, while Mr. Simmons is not afforded the same opportunity, because of reciprocal discovery rights. (Return, p. 6, "Reciprocity ensures fairness in the process." and p. 7, "Applicant already has the same discovery rights as Respondent."). This assertion is inaccurate. By Respondent's own admission, the rules of discovery will provide access to "answers to interrogatories, or requests to produce reports, regarding expert witnesses and witness statements," (Return, p. 5) – not to strategic information about what expert or investigative services Mr. Simmons is considering before it is even known whether these services will bear fruit. Furthermore, in order to apply for funding for investigative and expert services, it may well be necessary to disclose information protected by the attorney-client and work-product privileges. Obviously, the rules of discovery do not entitle the State to such information. Likewise, the rules of discovery do not permit Mr. Simmons to know which expert and investigative services the State is contemplating before the hearing and how much funding Respondent plans to allocate to such services.

Moreover, Mr. Simmons would be required to reveal this information to the State solely because of his indigent status. In the case of funding requests, *ex parte* procedures are needed to "simply level the playing field between petitioners able to purchase (and thereby not disclose to the opposing side) the usual litigation services – experts, investigators, subpoena-servers – and those forced to request payment of these services from the court." *In re Pruett*, 133 F.3d 275, 279 (4th Cir. 1997). The rules of discovery do not alleviate the fundamental unfairness between the State and Mr. Simmons should this Court allow the State to participate in the funding request,

nor do they entitle the State to privileged information simply because Mr. Simmons is an indigent petitioner.

V. Conclusion.

For the reasons stated above, in addition to those stated in Mr. Simmons' motion filed May 13, 2005, Mr. Simmons requests this Court to reconsider its decision stated in its letter dated August 15, 2005, and allow him to proceed *ex parte* in his request for expert, investigative and other services.

Respectfully submitted,

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BY: 
COUNSEL FOR APPLICANT 

September 14, 2005.

ATTACHMENT

PCR-CASES WHERE APPLICANT HAS BEEN PERMITTED TO PROCEED EX PARTE IN RELATION TO FUNDING ISSUES		
APPLICANT	COUNTY/JUDGE	CASE NO.
JAMES MICHAEL CHARPING	Lexington/Judge JC Nicholson Jr.	99-CP-32-2316
ROBERT CONYERS	Clarendon/Judge Howard P. King	97-CP-14-506
DONNEY COUNCIL	Aiken/Judge James Barber	00-CP-02-187
TOMMY LEE DAVIS	Greenwood/Judge James W. Johnson	93-CP-24-415 03-CP-24-812
EDWARD LEE ELMORE	Greenwood/Judge Ernest Kinard	90-CP-24-1004
JOSEPH GARDNER	Dorchester/Judge James Lockemy	98-CP-18-453
LARRY HALL	Pickens/Judge Larry Patterson	95-CP-39-158
BOBBY LEE HOLMES	York County/Judge James Lockemy	96-CP-46-966
TITUS HUGGINS	Horry/Judge John M. Milling	00-CP26-1446
HERMAN HUGHES	Calhoun/Judge Paula Thomas	98-CP-07-101
MARREECE HUGHES	York/Judges Paul Short and Judge Paul Burch	00-CP-46-2051
RICHARD CHARLES JOHNSON	Jasper/Judge Gerald Smoak	92-CP-27-235
ROGER DALE JOHNSON	Calhoun/Judge Diane Goodstein	00-CP-09-206
THEODORE KELLY	Spartanburg/Judge Larry Patterson	99-CP-42-1174
ROBERT NANCE	Florence/Judge Tom Ervin	96-CP-21-921
JAMES REED	Charleston/Judge Victor Rawl	99-CP-10-2242
ERNEST RIDDLE	Cherokee/Judge Derham Cole	01-CP-29-1030
CALVIN SHULER	Dorchester/Judge David Pieper	01-CP-18-1434
KEITH SIMPSON	Spartanburg/Judge John C. Hayes	97-CP-42-1911
SAMMIE STOKES	Orangeburg/Judge L. Casey Manning	01-CP-38-1240
JAMES TUCKER	Sumter/Judge Dwayne Dennis	97-CP-43-545
JAMES TUCKER	Calhoun/Judge Markley Dennis	99-CP-09-147
BUD VON DOHLEN	Berkeley/Judge Henry McKellar	96-CP-08-19113
LUKE WILLIAMS	Edgefield/Judge Marc H. Westbrook	02-CP-19-012
JAMIE WILSON	Greenwood/Judge James Johnson	93-CP-24-037 04-CP-24-759

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

KENNETH SIMMONS)

Applicant,)

V.)

GARY MAYNDARD,)

Commissioner, South Carolina)

Department of Corrections.)

Respondent.)

IN THE COURT OF COMMON PLEAS

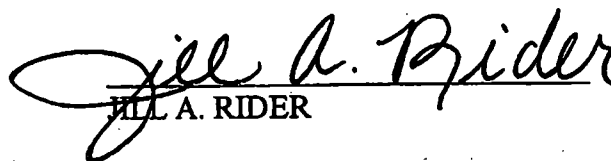
05-CP-18-1368

CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of applicant's Request for Reconsideration of Applicant's Motion to seek Funding by *Ex Parte* Proceedings/or, in the Alternative, Motion to Alter or Amend the Judgment in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Melody Brown
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 14th day of September, 2005, in Columbia, South Carolina.


JILL A. RIDER

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons, 5066)
Applicant,)

C/A No.: 2005-CP-18-1368

v.)

Gary Maynard, Commissioner,)
South Carolina Dept. of)
Corrections,)
Respondent.)

RETURN TO INITIAL APPLICATION
FOR POST-CONVICTION RELIEF;
MOTION TO DISMISS; MOTION FOR
A MORE DEFINITE STATEMENT; AND
MOTION FOR STATUS CONFERENCE

2005 NOV -8 AM 9:20
CERTIFIED COPY
CLERK OF COURT
DORCHESTER COUNTY

Respondent, above-named, through undersigned counsel, hereby makes a return to the application for post-conviction relief dated August 29, 2005, and received by Respondent on September 6, 2005. Pursuant to the Supreme Court of South Carolina's order of February 2, 2005, the Honorable Doyet A. ("Jack") Early, III, has continuing and exclusive jurisdiction over the proceedings in this capital post-conviction relief action regardless of assignment. Applicant is represented by court appointed counsel, John H. Blume, Esquire, 112 Myron Taylor Hall, Ithaca, New York, 14853, and William S. McGuire, Esquire, 171 Church Street, Suite 160, Charleston, South Carolina, 29401. Pursuant to the provision of S.C. Code § 17-27-160 (B) and (C), Respondent makes its return to the application¹, and requests the Court schedule a status conference within thirty (30) days of the filing of the return.

In making this Return, the Motion to Dismiss, and the Motion for a More Definite Statement, Respondent would respectfully show this Court the following.

¹ Counsel for Respondent requested one thirty-day extension on October 6, 2005, in which to make the return. Applicant lodged no objection to the request.

Procedural History

Applicant, Kenneth Simmons, Inmate #5066, is currently a safekeeper at the Lieber Correctional Institution pursuant to orders of commitment of the Dorchester County Clerk of Court. He was indicted at the January 19, 1998 term of the Dorchester County Court of General Sessions for murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping and armed robbery. The charges arose from the September 1, 1996 assault upon Lilly Bell Boyd. The state served a notice of intent to seek the death penalty. Jerry N. Theos, Esquire, and James A. Bell, Esquire, were appointed to represent Applicant. The charges were called to trial on February 22, 1999, and a jury trial was held before the Honorable Rodney A. Peeples, Circuit Court Judge. The matter was prosecuted by First Circuit Solicitor Walter M. Bailey and Deputy Solicitor Harrison Bell. On February 28, 1999, the jury found the Applicant guilty of each offense.

The penalty phase began on March 1, 1999. After hearing evidence in aggravation and mitigation, the jury was instructed on determining the existence of the following statutory aggravating circumstances:

1. Criminal sexual conduct
2. Kidnapping
3. Armed robbery
4. Physical torture
5. Burglary

The jury was advised to consider the following statutory mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (4) the

age or mentality of the defendant at the time of the crime... There was a fifth statutory mitigating circumstance on the second sheet, and it is that the defendant had mental retardation at the time of the crime. And mental retardation means significantly sub-average general intellectual functioning existing concurrently with deficits and adaptive behavior and manifested during the development period.

(R. p. 2382-83).

The trial judge also instructed the jury to consider the following mitigating circumstances:

1. The defendant would not poses a danger if his life is spared but incarcerated.
2. The defendant's long term addiction to alcohol and drugs.
3. The defendant's intoxication at the time of the crime.

(R. p. 2382).

On March 2, 1999, the jury found the existence of each aggravating factor. The jury unanimously recommended a sentence of death. (R. p. 2454-58). On that same date, Judge Peeples sentenced Applicant to death for murder, imposed no sentence on kidnapping due to statutory restrictions, life sentence on burglary first degree, thirty (30) years on armed robbery consecutive, and thirty (30) years on criminal sexual conduct in the first degree, consecutive.

Applicant moved after sentencing to have a life sentence imposed because "there is no question that the Defendant suffers from a diminished mental capacity. As such, the imposition of the death penalty would constitute cruel and unusual punishment in violation of the Eighth Amendment." (App.p. 3223-24). The Honorable Rodney A. Peeples denied relief on this issue. (App.p. 3228). Judge Peeples noted the defense had introduced conflicting expert testimony as to the defendant's mentality. There was testimony that the defendant was either mildly mentally

retarded, that mental retardation was suspected, but could not be diagnosed, that the defendant was not mentally retarded but was in the borderline range or that the defendant was not initially mentally retarded, but functioned at the diminished level due to chronic use of alcohol and drugs. (App.p. 3228). Judge Peebles also noted that in light of this conflicting evidence that he gave a series of mitigating circumstance instructions. *Id.* Applicant filed a timely notice of intent to appeal.

Robert M. Dudek and Eleanor Duffy Cleary, Assistant Appellate Defenders of the South Carolina Office of Appellate Defense, represented Applicant on appeal. On May 7, 2002, appellate counsel filed a Final Brief of Appellant in the Supreme Court of South Carolina, and raised the following issues on direct appeal:

1.

Whether the judge erred by admitting evidence appellant invoked his right to counsel when the state wanted to administer psychological tests, since this violated *Doyle v. Ohio*, and even if the evidence was relevant it should also have been excluded since its unduly prejudicial effect outweighed its probative value?

2.

Whether the judge abused his discretion by dismissing juror Campeau near the close of the guilt phase where the judge correctly ruled juror Campeau had not done anything improper, and where the juror's note unequivocally stated the fact that one of appellant's relatives lived near property he owned would not affect his impartiality, since there was no cause to discharge this juror, and the judge's ruling unfairly granted the state an extra peremptory challenge?

3.

Whether the judge erred by refusing to charge the lesser-included offense of robbery where the only "weapon" involved was a stick or appellant's hands,

since this evidence did not constitute armed robbery as a matter of law, and there was evidence from which the jury could have convicted appellant of robbery?

4.

Whether the judge erred by ruling irrelevant the testimony of appellant's first cousin, Calvin Linning, Sr., during the penalty stage that he, and appellant's family, also found the victim's death "real painful," since members of appellant's family knew the victim, and the defense had the right to meet victim impact evidence once it was offered by the state?

Final Brief of Appellant, pp. 1-2.

Respondent filed its final brief on May 7, 2002. On July 26, 2002, Applicant made a "*Motion to Allow Supplemental Briefing in Light of Atkins v. Virginia*." Respondent made its return opposing the motion on August 26, 2002. The motion was denied on September 10, 2002, without prejudice to appellant's right to renew the motion following the decision in *Franklin v. Maynard*, a petition for certiorari from a series of death sentenced individuals requesting procedures to be developed in light of *Atkins*. However, as Applicant was also participating in the *Franklin* joint petition, the South Carolina Supreme Court stayed his direct appeal pending the *Franklin* decision. On November 3, 2003, the Supreme Court of South Carolina entered a decision in *Franklin v. Maynard*, 356 S.C.276, 588 S.E.2d 604 (2003). On December 11, 2003, Applicant petitioned to allow supplemental briefing in light of *Franklin*. His petition was denied January 28, 2004.

The Supreme Court of South Carolina heard oral argument on the direct appeal issues on April 6, 2004. On June 14, 2004, the Court entered an opinion that reversed only the conviction and sentence for armed robbery, and affirmed the remaining convictions and sentences. *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004). Applicant filed a petition for rehearing on July 15, 2004, which

was denied on August 9, 2004.

Applicant filed a petition for writ of certiorari in the United States Supreme Court on November 8, 2004, and presented the following questions for consideration:

1.

Whether Petitioner's right to due process was violated under the holdings of *Wainwright v. Greenfield*, 474 U.S. 284 (1986), and *Doyle v. Ohio*, 426 U.S. 610 (1976), where the state used the invocation of Petitioner's right to counsel during a competency evaluation to purportedly prove he understood his Miranda warnings at the time he gave an earlier confession?

2.

Whether the issue of Petitioner's mental retardation should be remanded to the South Carolina Supreme Court for reconsideration in light of the intervening cases of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ring v. Arizona*, 536 U.S. 584 (2002), since the South Carolina Supreme Court twice refused to allow Petitioner to brief this issue on direct appeal, and the South Carolina procedure adopted following *Atkins* provides for a judge only determination of mental retardation for defendants sentenced prior to *Atkins*?

(Cert. Pet., p. 1).

Respondent made filed its Brief in Opposition on December 15, 2004. The Supreme Court of the United States denied the petition on January 24, 2005.

This action now follows.

Respondent's Statement of Facts

On Sunday, September 1, 1996, between 5 a.m. and 6 a.m., Applicant, after having spent a night doing drugs, was riding home on his bicycle and came upon 89 year old Lilly Bell Boyd who

was out feeding chickens at her home. He went to the back of her house. As the victim was coming back out of the house, Applicant caught her, and pushed her back inside. He asked her for money and she went and got it. She brought a brown envelop with money and he grabbed it and pushed her and she hit her head. He then beat her with a two foot long stick that he found on the porch. Simmons then raped her on her kitchen floor. He tied her hands and feet together. He continued to beat her, resulting in 14 broken ribs. She died as a result of blunt head trauma and manual strangulation. The victim's sister, Virginia Wilson, found the victim after the victim failed to attend church that Sunday. The victim was on the kitchen floor, bound and gagged, and savagely beaten.

Applicant, while a detainee at the Richland County Detention Center, initially reported that he knew something about the murder of a woman in Summerville. On December 5, 1997, he also initially told police that a guy named Shorty killed Mrs. Boyd, and that Shorty had planted Applicant's semen in Mrs. Boyd. Later, Applicant gave taped interviews on December 5 and December 9, 1997 confessing that he acted alone in the murder, rape, and robbery of Lilly Bell Boyd. DNA matching Applicant was found in a vaginal swab sample from the victim.

Attachments to the Return, and incorporated by reference, are the following relevant documents:

1. Record on Appeal (Vols. 1 through 7);
2. Final Brief of Appellant;
3. Final Brief of Respondent;
4. Motion to Allow Supplemental Briefing in Light of *Atkins v. Virginia*;
5. Respondents Response to Motion to Allow Supplemental Briefing in Light of *Atkins v. Virginia*;

6. Order Denying Motion to Allow Supplemental Briefing in Light of *Atkins v. Virginia*;
7. Petition for Writ of Certiorari (*Franklin, et al*);
8. Respondent's Response to Petition for Writ of Certiorari (*Franklin, et al*);.
9. Petition to Allow Supplemental Briefing in Light of Franklin v. Maynard;
10. Order Denying Petition to Allow Supplemental Briefing in Light of Franklin v. Maynard;
11. *State v. Simmons*, Opinion No. 25838 (S.C.Sup.Ct. Filed June 14, 2004).²

Allegations in the Initial Application

In his application for post-conviction relief, Applicant makes the following allegations and purported supporting facts:

- 10(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during voir dire.
- 11(a) Applicant's trial counsel failed to conduct an appropriate and reasonable voir dire to identify jurors who were biased or who were predisposed to find applicant guilty and/or sentence applicant to death and to rehabilitate jurors who possessed legally appropriate scruples against capital punishment. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 US 510 (2003); *Rompilla v. Beard*, 125 S.Ct. 2456, 2005 WL1421390 (June 20, 2005).

² Reported at 360 S.C. 33, 599 S.E.2d 448 (2004).

- 10(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during the guilt-or-innocence phase of the trial.
- 11(b) Applicant's trial counsel failed to present evidence and make appropriate objections challenging the relevance and significance of the DNA evidence presented by the prosecution. Trial counsel also failed to conduct a reasonable investigation which would have resulted in the discovery of other evidence relevant to a reliable determination of applicant's guilt-or-innocence. *Williams, Supra; Wiggins, Supra; Rompilla, Supra.*
- 10(c) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during the sentencing phase of the trial.
- 11(c) Applicant's trial counsel failed to conduct a reasonable investigation into all available sources of mitigation. Counsel also failed to present evidence in mitigation of punishment including, but not limited to, evidence supporting applicant's mental retardation, brain damage, mental illness and evidence of applicant's social history, and adaptability to confinement. *Williams, supra; Wiggins, supra; Rompilla, supra.*
- 10(d) Applicant's death sentence violates the Eighth Amendment to the United States Constitution due to the fact that he is mentally retarded.
- 11(d) Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002); *Franklin v. Maynard*, 356 SC 276, 588 SE.2d 604 (2003).

10(e) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and/or the corresponding provisions of the South Carolina Constitution due to the fact that he has significantly subaverage intellectual functioning existing concurrently with deficits in adaptive functioning.

11(e) The ground for relief states the relevant facts.

(July 1, 2005 Application, p. 3).

Discussion

Applicant's Allegations "a," "b," and "c" allege ineffective assistance of trial counsel. The statement of supporting facts specific to each allegation is insufficient to allow Respondent to make a proper fact specific response to the allegations; therefore, these allegations have not been properly presented and a proper response is not possible. Allegation "d" shows an issue presented pursuant to *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), and appears to be properly before the Court. Allegation "e" is not properly before the Court as it presents an issue which should have been raised in direct appeal. Each allegation will be addressed separately below:

General Law of Ineffective Assistance of Counsel.

In order to show ineffective assistance of trial counsel, an applicant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* See also *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement." *Strickland*, 466 U.S. at 690.

- 10(e) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and/or the corresponding provisions of the South Carolina Constitution due to the fact that he has significantly subaverage intellectual functioning existing concurrently with deficits in adaptive functioning.

- 11(e) The ground for relief states the relevant facts.

(July 1, 2005 Application, p. 3).

Discussion

Applicant's Allegations "a," "b," and "c" allege ineffective assistance of trial counsel. The statement of supporting facts specific to each allegation is insufficient to allow Respondent to make a proper fact specific response to the allegations; therefore, these allegations have not been properly presented and a proper response is not possible. Allegation "d" shows an issue presented pursuant to *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), and appears to be properly before the Court. Allegation "e" is not properly before the Court as it presents an issue which should have been raised in direct appeal. Each allegation will be addressed separately below:

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"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" under the prevailing norms. *Id.* An applicant claiming error bears the burden of showing counsel's conduct did not constitute reasonable assistance. *Id.*

Applicant's Ground 10 (a): Voir Dire Allegation

Applicant has failed to identify any act or failure on counsel's part that would indicate a valid ineffective assistance of counsel claim in regard to *voir dire*. This failure to present a clear factual basis in the Application prevents Respondent from adequately responding to the allegation. Pursuant to Rule 12(e), SCRCP, Respondent moves this Court for a more definite statement to be made in a timely manner, or, in the alternative, to strike the allegation because it is vague and ambiguous. Respondent cannot be expected to reasonably respond to the broad claim without a precise statement as to what error counsel is alleged to have made. Respondent, therefore, so moves.

Even so, Respondent also asserts that the records before this Court show that trial counsel performed well within the range of competency expected of one who practices criminal law in this State in regard to the extensive jury qualification and selection process afforded defendants in capital trials. (*See generally* Vol. 1 and 2, jury qualification and selection). Therefore, based on the record, Respondent denies any general allegation of ineffective assistance of trial counsel regarding *voir dire*.

Applicant's Ground 10(b): DNA evidence

Applicant has failed to identify any act or failure on counsel's part that would indicate a valid ineffective assistance of counsel claim in regard to the DNA evidence in this case. This failure to present a clear factual basis in the Application prevents Respondent from adequately responding to the allegation. Pursuant to Rule 12(e), SCRCP, Respondent moves this Court for a more definite statement to be made in a timely manner, or, in the alternative, to strike the allegation because it is vague and ambiguous. Respondent cannot be expected to reasonably respond to the broad claim without a precise statement as to what error counsel is alleged to have made. Respondent, therefore, so moves.

Even so, Respondent also asserts that the records before this Court show that trial counsel performed well within the range of competency expected of one who practices criminal law in the circuit courts of this State in regard to challenging the DNA evidence presented. The State presented evidence that a DNA profile taken from semen collected from the victim's vagina matched Applicant's DNA profile. (See R. pp. 1459-73). Counsel cross-examined the state's experts regarding the specific results of the DNA testing and challenged the positive nature of the finding. (R. pp. 1471-73; 1482-85). Therefore, based on the record, Respondent denies any general allegation of ineffective assistance of trial counsel regarding the challenge to the DNA evidence.

To the extent the allegation may be read to encompass an allegation of failure to conduct a reasonable investigation to discover evidence not related to DNA, Respondent notes a complete failure in factual basis to support the claim, and likewise, moves for a more definite statement, or, in the alternative, to strike the allegation. Based on the record, however, Respondent denies any general allegation of ineffective assistance of trial counsel.

Applicant's Ground 10(c): Mitigation Evidence Investigation and Presentation

Applicant has failed to identify any act or failure on counsel's part that would indicate a valid ineffective assistance of counsel claim in regard to mitigation evidence. This failure to present a clear factual basis in the Application prevents Respondent from adequately responding to the allegation. Pursuant to Rule 12(e), SCRPC, Respondent moves this Court for a more definite statement to be made in a timely manner, or, in the alternative, to strike the allegation because it is vague and ambiguous. Respondent cannot be expected to reasonably respond to the broad claim without a precise statement as to what error counsel is alleged to have made. Respondent, therefore, so moves.

Even so, the record shows that a case in mitigation was not only investigated, but also considered and actually presented. The record first shows that counsel presented a defense in the guilt-innocence phase, and introduced evidence of Applicant's mental condition. (*See generally* R. pp. 1526; 1606; 1675; 1690). That evidence was specifically adopted into the guilt phase. (R. p. 2198). The record also shows that counsel presented family and friends in the penalty phase to testify on Applicant's behalf. (*See generally* R. pp. 2200-01 [counsel's introduction to calling Calvin Linning; Charlie Wilson; Gene Simmons; Annette Geddis; Sandra Franklin; Robin Schmeiding; Doris Russell]). Therefore, based on the record, Respondent denies any general allegation of ineffective assistance of trial counsel regarding mitigation evidence in the penalty phase.

Applicant's Ground 10(d): Mental Retardation Claim

Though Respondent submits that Applicant will not be able to carry his burden of proof in light of the record before this Court, this allegation probably raises questions of fact and law that need to be addressed at an evidentiary hearing. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247

(1983).

In pressing a claim of mental retardation, "the applicant must show he or she is mentally retarded by a preponderance of the evidence." *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). "Mental retardation" is defined by statute as "'significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.'" *Franklin*, 356 S.C. at 278-79, 588 S.E.2d at 605-06, *quoting* S.C. Code § 16-3-20(C)(b)(10). There is some evidence in the record that initially suggested the possibility of mental retardation; however, the defense experts either did not opine on mental retardation or opined that Applicant did not suffer from mental retardation. Therefore, the record supports that Applicant will not be able to carry his burden of proof.

Dr. John Michael Foxworth, an expert in general and forensic psychiatry, testified Applicant suffered from "an alcohol related persisting dementia," but did not testify Applicant suffered from mental retardation. (R. p. 1526-30). Charles Barton Saylor, a forensic psychologist, testified Applicant functioned in a "mentally deficient range," but also testified that he was not asked to look for a diagnosis of mental retardation. (R. pp. 1606; 1620-21). Dr. Thomas William Behrmann, a forensic psychiatrist with William S. Hall, testified that he did not diagnose him with any "mental illness or defect that would have prevented him ... from waiving his rights," in regard to the voluntary nature of Applicant's statements. (R. p. 1652). Dr. Behrmann also noted in his report, based solely on IQ scores, that mental retardation could be suspected. (R. p. 1675). Jeffrey Vidic, a clinical psychologist with William S. Hall, testified that Applicant tested in "the intellectually deficient range" and such deficiency was part of "the three diagnostic criteria" required for a diagnosis of mental retardation. (R. p. 1690). Leslie N. Sandler, a psychological examiner with the

Department of Disabilities and Special Needs, testified that he concluded, from his testing and evaluation, that Applicant was not mentally retarded. (R. p. 1740). Lastly, Lewis Randolph Waid, an expert in clinical and forensic psychology, and neuropsychology, testified, definitively, to an absence of mental retardation. (R. pp. 1882, 1897).

Therefore, based on *Franklin, supra*, and the foregoing recitation of facts, it appears this allegation raises questions of fact and law that need to be addressed at an evidentiary hearing. *Sharper, supra*.

Applicant's Ground 10(e): Eighth Amendment Claim

Pursuant to S.C. Code § 17-27-70 (1976), and Rule 56, SCRPC, Respondent moves for summary judgment on this particular issue as the allegation fails to state a claim upon which relief may be granted. Rule 12(b)(6), SCRPC ("failure to state facts to constitute a cause of action"). "A petitioner may allege constitutional violations in PCR proceedings, see S.C.Code Ann. § 17-27-20(a)(1) (1976), *unless the issue could have been raised by direct appeal*. See *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975); S.C.Code Ann. § 17-27-20(b) (1976)." *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998)(emphasis added). This claim is an issue that could have been raised by direct appeal; therefore, the issue is barred from review in this action. Respondent, therefore, so moves for summary dismissal.

To the extent the issue may be read as a challenge to the States' definition of mental retardation, that issue must also be summarily dismissed. Federal law specifically left to the states the task of developing definitions and procedural safeguards to comply with its decision banning the execution of mentally retarded defendants. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). This state set such procedural safeguards in *Franklin*. Moreover, this state recognized its current definition of

mental retardation reflected in S.C. Code 16-3-20(C)(b)(10), as controlling. *Id.* Applicant was a party to the *Franklin* action. Therefore, the claim, in as much as it may be interpreted as a challenge to the state's definition, must be dismissed under *res judicata* and the statutory provision of S.C. Code 17-27-90 (1976), that provides, in relevant part, that "[a]ny ground finally adjudicated... in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application...." Respondent, therefore, so moves for summary dismissal.

Denial of All Other Allegations

Each and every allegation, or portion of allegation, not specifically addressed, qualified or denied in this pleading, is denied.

Conclusion

WHEREFORE, Respondent having made its return to the initial application for post-conviction relief, Respondent respectfully requests:

- (1) that the Court grant Respondent's motion for a more definite statement and order Applicant to timely serve and file an Amended Application for Post-Conviction Relief specifying all grounds for relief with particularity;
- (2) that the Court grant Respondent's motion for summary judgment and dismiss Applicant's Allegation 10(e), Eighth Amendment Claim as there is no genuine issue of material fact to necessitate an evidentiary hearing, and the allegation should be dismissed as a matter of law; and,
- (3) that the Court grant Respondent's request to schedule a status conference on or before December 7, 2005, as indicated by statutory provision upon the filing of this return. S.C. Code § 17-27-160 (C) ("Not later than thirty days after the filing of

the state's return, the judge shall convene a status conference to schedule a hearing on the merits of the application for post-conviction relief. The hearing must be scheduled within one hundred eighty days from the date of the status conference, unless good cause is shown to justify a continuance.")

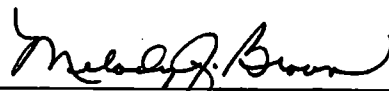
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

By: 
MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina.

November 7, 2005.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)

Applicant,)

v.)

Gary Maynard, Commissioner,)
 South Carolina Dept. of)
 Corrections,)

Respondent.)

Case No. 2003-CP-18-1192

CERTIFICATE OF SERVICE

CERTIFIED COPY
 2005 NOV - 8 AM 9:20
Christy Blackman
 CLERK OF COURT
 DORCHESTER COUNTY

The undersigned certifies that on the 7th day of November, 2005, a copy of *Respondent's Return to Initial Application for Post-Conviction Relief; Motion to Dismiss; Motion for a More Definite Statement; and Motion for Status Conference*, was served on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

William S. McGuire, Esquire
 171 Church Street, Suite 160
 Charleston, South Carolina 29401

This 7th day of November, 2005.

Melody J. Brown
 MELODY J. BROWN
 ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
)
 Applicant,)

Case No. 2003-CP-18-1192

v.)

Gary Maynard, Commissioner,)
 South Carolina Dept. of)
 Corrections,)

CERTIFICATE OF SERVICE

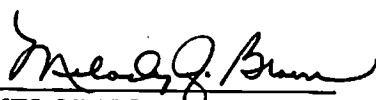
Respondent.)
)
)

CERTIFIED COPY
 2005 NOV -8 AM 9:20
 Clerk of Court
 DORCHESTER COUNTY

The undersigned certifies that on the 7th day of November, 2005, a copy of *Respondent's Return to Initial Application for Post-Conviction Relief; Motion to Dismiss; Motion for a More Definite Statement; and Motion for Status Conference*, was served on counsel for Applicant by hand delivery as follows:

John H. Blume, III, Esquire
 1247 Sumter Street
 Columbia, South Carolina 29201

This 7th day of November, 2005.


 MELODY J. BROWN
 ATTORNEY FOR RESPONDENT

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

JUDGMENT IN A CIVIL CASE
2005CP1801368

KENNETH SIMMONS #5066

GARY MAYNARD, ET AL

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE

- ☐ JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND A VERDICT RENDERED.
- ☐ DECISION BY THE COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION RENDERED.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ RULE 12b, SCRPC; ☐ RULE 41a SCRPC (VOL NONSUIT); ☐ RULE 43k, SCRPC (SETTLED) ☐ OTHER
- ☐ ACTION STRICKEN (CHECK REASON): ☐ RULE 40(j) SCRPC; ☐ BANKRUPTCY ☐ BINDING ARBITRATION, SUBJECT TO RIGHT TO RESTORE TO CONFIRM VACATE OR MODIFY ARBITRATION AWARD; ☐ OTHER _____

IT IS ORDERED AND ADJUDGED: ☒ See Attached order; ☐ Statement of Judgment by the court.

DATED AT ST. GEORGE, S.C THIS 10TH DAY OF FEBRUARY, 2006.

Cheryl Graham
CHERYL GRAHAM
CLERK OF COURT

THIS JUDGMENT WAS ENTERED ON THE 10th DAY OF Feb, 2006
AND A COPY WAS MAILED FIRST CLASS THIS 10th DAY OF Feb
2006 TO ATTORNEY OF RECORD OR TO PARTIES WHEN APPEARING PRO SE
AS FOLLOWS:
JOHN BLUME

MELODY BROWN
ASST ATTY GENERAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NUMBER: 2005-CP-18-1368

Kenneth Simmons,)
)
 Applicant,)
)
 v.)
)
 Gary Maynard, Commissioner,)
 South Carolina Department of)
 Corrections,)
)
 Respondent.)
 _____)

ORDER

BACKGROUND

A Dorchester County jury convicted Applicant of murder, first degree burglary, armed robbery, and first degree criminal sexual conduct. Applicant was sentenced to death. The Supreme Court of South Carolina reversed the armed robbery conviction but affirmed the remaining convictions and the death sentence. *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004). After completion of the direct appeal process, Applicant moved for a stay in order to pursue post-conviction relief. On February 2, 2005, the Supreme Court of South Carolina issued a stay of execution, and the undersigned was assigned exclusive and continuing jurisdiction over the matter. This Court convened a hearing on February 23, 2005, in Bamberg, in order to ascertain Applicant's wishes concerning appointment of counsel to aid in the post-conviction relief process. After Applicant expressed a desire for counsel, the Court appointed John H. Blume, Esquire, and William S. McGuire, Esquire. (See Order of Appointment, March 14, 2005). Counsel for Respondent, Melody J. Brown, Assistant Attorney General, was also present at the appointment hearing. After the Court appointed PCR counsel, counsel for Respondent

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objected to any and all *ex parte* communication in any context. This Court ordered that no *ex parte* communication would be received, but allowed counsel for Applicant the opportunity to make a motion for *ex parte* communication if counsel believed such communication was necessary. On May 13, 2005, Applicant filed the referenced "Motion to Permit Applicant to Seek Funding by *Ex Parte* Proceedings."

A hearing on the motion was held on August 10, 2005, in the Bamberg County Courthouse. Applicant was present, and represented by counsel, John H. Blume, Esquire, and William S. McGuire, Esquire. Melody J. Brown, Assistant Attorney General, represented Respondent. Ms. Brown submitted a return at the hearing that was accepted by the Court and subsequently filed with the Dorchester Clerk of Court.¹ After reviewing the motion, return, and the arguments presented at the hearing, I denied the Applicant's Motion.

This matter is now before me by way of Applicant's Motion to Reconsider my previous Order Denying Applicant's *Ex Parte* Request for Funds for Expert, Investigative, and Other Services. After carefully considering all arguments of counsel and reviewing orders of other circuit court judges in South Carolina on the subject, my previous Order is hereby amended and the Applicant's Motion is Denied in Part and Granted in Part.

¹ The Court noted at the hearing that it did not receive a copy of the motion, and was unaware the motion was pending until counsel for Applicant requested a ruling by way of a letter dated July 25, 2005. Counsel for Respondent advised that she was not aware of the motion until the Court made a scheduling call for the hearing. In an effort to avoid any other lapse in action upon a motion, this Court specifically requested at the hearing, and again advises all counsel, that counsel must send copies of all documents filed with the Dorchester County Clerk of Court directly to the undersigned judge's chambers. Counsel is also cautioned to ensure that opposing counsel is properly served.

DISCUSSION

That part of my previous Order disallowing *ex parte* communications shall remain in effect. Rule 501, SCACR, Code of Judicial Conduct, Canon 3 (7)(a), restricts exceptions to the prohibition against *ex parte* communication to matters "that do not deal with substantive matters or issues on the merits...." Canon 3 (7)(e), however, allows a judge to "initiate or consider any *ex parte* communications when *expressly* authorized by law to do so." (emphasis added).

I find that the procedure outlined in *State v. Row*, 955 P.2d 1082 (Idaho), *cert. denied*, 119 S.Ct. 415 (1998), provides a proper method for addressing the Applicant's funding request. Therefore, Applicant shall proceed as follows: (1) if Applicant wishes to seek authorization to expend funds pursuant to *S.C. Code Ann.* §17-27-160, he may submit an application for funds under seal to the court; (2) Applicant shall simultaneously with the filing of the funding request notify opposing counsel that a funding request has been submitted to the Court under seal; Applicant, however, is not required to disclose to opposing counsel the nature or contents of his submission to the Court; (3) the Court will then review the request for funds and conduct any necessary proceedings; the Court will then enter an appropriate Order under seal; (4) Respondents shall be notified that the Court entered an Order granting or denying a request for funding, but Respondents shall receive no further information.

Since the State will receive notice that a funding request has been submitted, the procedure is not strictly *ex parte*.² This procedure will additionally preserve the record for proper appellate review. The procedure further addresses Applicant's legitimate interest in preventing disclosure of material and information protected by the attorney-client privilege and

² In *Ex Parte Lexington County*, 442 S.E.2d 589, 593 (S.C. 1994), the Supreme Court defined *ex parte* as a "judicial proceeding...taken...for the benefit of one party only, and without notice to, or contestation by, and person adversely interested." (quoting *Black's Law Dictionary* 297 (5th ed. 1983) (emphasis added).

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work-product doctrine. And finally, the State is not unfairly prejudiced, for it may pursue authorized discovery in this civil matter.

THEREFORE, based on the foregoing, Applicant's Motion to Permit Applicant to Seek Funding by *Ex Parte* Proceedings is DENIED.



Doyet A. Early, III
Circuit Court Judge
Second Judicial Circuit

February 3, 2006

Bamberg, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
)
 Applicant,)

Case No. 2005-CP-18-1368

v.)

Gary Maynard, Commissioner,)
 South Carolina Department of)
 Corrections,)

CERTIFICATE OF SERVICE

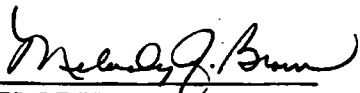
Respondent.)
)
)

The undersigned certifies that on the 8th day of February, 2006, a copy of the *Order* dated February 3, 2006, was served on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

William S. McGuire, Esquire
 171 Church Street, Suite 160
 Charleston, South Carolina 29401

John H. Blume, III, Esquire
 1247 Sumter Street
 Columbia, South Carolina 29201

This 8th day of February, 2006.


 MELODY J. BROWN
 ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF DORCHESTER)

Kenneth Simmons, SK 5066)
)
 Applicant,) C/A No.: 2005-CP-18-1368
)
 v.)
)
 John Ozmint, Commissioner,)
 S.C. Department of Corrections,)
)
 Respondent.)
)

Applicant's Motion To Compel Discovery From Respondent

Pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, S.C. Code § 17-27-150(B), the South Carolina Rules of Civil Procedure, and other applicable federal and state law, Applicant Kenneth Simmons, a death-sentenced inmate in capital post-conviction proceedings, requests this Court to compel production of withheld materials. The factual and legal bases for this motion are set forth below.

I. Introduction

On February 2, 2005, the Supreme Court of South Carolina issued a stay of execution to allow Mr. Simmons to pursue post-conviction relief. On March 14, 2005, the undersigned counsel were appointed to represent Mr. Simmons in the post-conviction relief process. Mr. Simmons filed an application for post-conviction relief on August 29, 2005.

On October 24, 2006, Mr. Simmons served his Initial Request For Production on Respondent, requiring production of documents on November 24, 2006. *See Attachment A.* On November 22, 2006, Respondent served a Response to Applicant's Initial Request For Production.

See Attachment B (hereafter "Response"). Respondent objected to each of Mr. Simmons' requests. Respondent provided a single document to Mr. Simmons, totaling six pages.

II. Respondent Is A Party To This Action

Respondent objects to each of Mr. Simmons' requests on the bases that the Attorney General is not a party to this action and that the requests are improperly directed to a non-party. First, Mr. Simmons simply does not understand what Respondent means by asserting that the Attorney General is not a party to this action. The Attorney General is South Carolina's "chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." S.C. CONST. Art. V § 24. The Attorney General "[r]epresents the State when defendants file for Post Conviction Relief and when they appeal their convictions." South Carolina Attorney General Office Overview, <http://www.scattorneygeneral.com/office/index.php>. The Attorney General's office has acted on behalf of the State since these proceedings began. If the Attorney General is not a party to this action, Mr. Simmons respectfully requests direction as to whom he should address all future pleadings.

III. Respondent Retains Custody And/Or Control Over the Items Requested

Respondent asserts that it does not have custody or control over the files of the First Circuit Solicitor's Office, the files of any outside investigative agency, or the actual exhibits used at trial. Mr. Simmons asserts that, although the Attorney General may not have actual possession of every item listed in his requests, the Attorney General nonetheless retains custody and/or control over these items and can easily obtain them, as the State's chief prosecuting officer, by simply instructing whoever currently possesses the items to produce them. To the extent that Respondent is arguing that the requested documents and other items are potentially available through other sources, Mr. Simmons asserts that this is irrelevant to Respondent's obligation to comply with the Initial Request

for Production. Further, Respondent has failed to describe specifically what items Respondent is withholding on this basis so that Mr. Simmons may properly contest the claim that they are available from other sources. Respondent is in the best position to know where the documents and other items requested are located – not Mr. Simmons. Respondent attempts to invert the burden of identification and production of the documents on Mr. Simmons. This is erroneous and unreasonable: "It is difficult to imagine how plaintiffs, who generally will not know what is in confidential police files, could satisfy a court who demanded that they prove the negative, i.e., that there were no practicable alternative routes to the same information." *Kelly v. City of San Jose*, 114 F.R.D. 653, 667 (N.D. Cal. 1987).

IV. Respondent Has Failed to Comply With the Rules of Civil Procedure

Respondent objects to Mr. Simmons' requests numbers one, two, six, seven, and ten through thirteen by asserting that Mr. Simmons has already received any non-privileged documents in the possession of the First Circuit Solicitor. First, this assertion is inaccurate. Mr. Simmons has not received any documents or any other items from the Solicitor's office. Moreover, Mr. Simmons did not make a Freedom of Information Act request and the First Circuit Solicitor's office has not advised Mr. Simmons' counsel that it "denie[s] the applicability of the Act." *Response at 2*. Mr. Simmons' counsel did make an informal request by telephone and was granted permission to review portions of the file at the Solicitor's Office for a short period of time. No copies of any of the documents were provided by the Solicitor, nor was access afforded to Mr. Simmons' counsel to make copies of the documents themselves. Moreover, no representation was made to Mr. Simmons' counsel that the documents available for review in any way represented the entire file nor that certain documents were being withheld on the basis of privilege.

To the extent that Respondent now asserts that Mr. Simmons' has been afforded access to "all *non-privileged* file contents," Respondent has failed to comply with the Rules of Civil Procedure. Rule 26(b)(2), SCRCP, mandates that a party withholding information on the basis of privilege "shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *See Samples v. Mitchell*, 329 S.C. 105, 111, 495 S.E.2d 213, 216 (Ct. App. 1997). Mr. Simmons requests that Respondent be compelled to produce a privilege log setting forth each document or other item not produced, the location of the document, and a description of the nature of the privilege asserted.

V. The Record on Appeal Does Not Satisfy Mr. Simmons' Initial Request For Production.

Respondent objects to Mr. Simmons' requests numbers three through seven, ten, eleven, thirteen and fourteen on the basis that they are duplicative and burdensome because Mr. Simmons has already received the record on appeal. Mr. Simmons' Initial Request for Production is not limited to the record on appeal and any materials outside the scope of the record are relevant and discoverable. Mr. Simmons is entitled to "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" even if "the information sought will be inadmissible at the trial," so long as it "appears reasonably calculated to lead to the discovery of inadmissible evidence." Rule 26(b)(1), SCRCP.

Information outside the record is necessary to evaluate a number of potential claims in this proceeding. For example, extra-record facts are relevant to an evaluation of potential claims of prosecutorial misconduct such as the withholding of exculpatory or impeachment evidence, *Brady v. Maryland*, 373 U.S. 83, 86-87 (1967), or the use of false evidence at trial. *Napue v. Illinois*, 360 U.S. 264, 269, 271-72 (1959). Extra-record facts are also necessary for evaluating the effectiveness

of defense counsel. The evaluation of whether counsel was ineffective is inextricably tied to "the facts of the particular case, . . . in light of all the circumstances," *Strickland v. Washington*, 466 U.S. 668, 690 (1984), and the evaluation of whether counsel's deficient conduct prejudiced defendant turns on "the totality of the evidence" that was before the judge and jury, *id.* at 695-96. Information held by the State is essential to evaluating what evidence was presented at trial, and what evidence was not.

VI. Mr. Simmons Does Not Have The Burden of Specifically Identifying Each Item Requested.

Respondent objects to each of Mr. Simmons' requests on the grounds that they are "vague." Respondent further objects to Request Number Two on the basis that it "fail[s] to identify which case files need to be reviewed" and because Mr. Simmons "fails to show how the requested documents would be relevant in this action where there is no allegation involving the propriety of the determination of whether to seek the death penalty." *Response at 3.* Respondent objects to request number three because it fails to name the agency or person and the service that agency or person rendered to the State in the course of the investigation of the crime at issue in this case. *Response at 4.* Similarly, Respondent objects to request numbers seven and eight because they fail to identify the specific documents on which the results or reports of scientific, physical and proficiency testing may be located. *Response at 7.* Respondent also objects to requests numbers ten, eleven, twelve and thirteen because they fail to identify potential witnesses and the specific documents on which their statements may be located, specific items of potentially exculpatory evidence, and the specific documents on which information about other possible suspects to the crime may be located. *Response at 8-11.*

Mr. Simmons does not have the burden of specifically identifying each particular document or other discoverable item. If Mr. Simmons already knew the specific details about each of his

requests, he would not need to obtain discovery concerning them. Mr. Simmons cannot be expected to know specific details about information solely in the possession of the State. Further, Mr. Simmons is not obligated to "show how the specific items would be relevant" to claims he has not yet asserted because he has not been provided with discoverable materials on that issue. Respondents objections based on vagueness and relevancy are without merit.

Moreover, regardless of the scope of the discovery rules, the State has an affirmative duty, pursuant to *Brady* and its progeny, to disclose any exculpatory, material information. *See also Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432-35 (1995). The State is obligated to disclose all exculpatory information even in post-conviction proceedings. *See Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992).

The State's duty to disclose also applies to the penalty phase. *See Brady, supra; Chaney v. Brown*, 730 F.2d 1334, 1339, 1353-54, 1357-59 & n.33 (10th Cir. 1984). Thus, information at all relevant to rebuttal of the State's case in aggravation or punishment, *see Gardner v. Florida*, 430 U.S. 349, 358-62 (1977) (plurality opinion), statutory mitigating circumstances, *see Lockett v. Ohio*, 438 U.S. 586, 604-08 (1978) (plurality opinion), and any potential non-statutory mitigating circumstances, *see Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (unanimous decision), must be disclosed. In addition, the State must disclose information that could be used to impeach a witness testifying against Mr. Simmons. *See Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

The duty to disclose also applies to all members of the "prosecution team," including all law enforcement officers and law enforcement agencies that were involved in any way in the case. *Kyles v. Whitley*, 514 U.S. at 437 (noting that the prosecution has the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

Finally, the State's duty to disclose exculpatory information extends even to information that is otherwise inadmissible. *Cf.* Rule 26(b)(1), SCRPC.

The State may not use general objections of relevancy and vagueness to circumvent its obligations. At a minimum, therefore, the State must disclose all information in satisfaction of its affirmative duties to disclose exculpatory information.

VII. Conclusion

For all of the foregoing reasons, Mr. Simmons requests that this Court compel disclosure of all material requested by the Initial Request For Production.

Respectfully submitted,

WILLIAM S. MCGUIRE
225 Peachtree Street NE
Suite 900
Atlanta, GA 30303

JOHN H. BLUME
SHERI LYNN JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

By: John H. Blume
(9K)

December 12, 2006

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

KENNETH SIMMONS)

Applicant,)

V.)

GARY MAYNDARD,)

Commissioner, South Carolina)

Department of Corrections.)

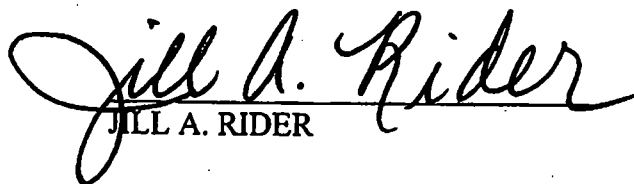
Respondent.)IN THE COURT OF COMMON PLEAS
05-CP-18-1368

CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the respondent one (1) copy of Applicant's Motion to Compel Discovery From Respondent in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Melody Brown
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 12th day of December, 2006, in Columbia, South Carolina.


JILL A. RIDER

ATTACHMENT A

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF DORCHESTER)

Case No.: 05-CP-18-1368)

KENNETH SIMMONS, SK 5066)

Applicant,)APPLICANT'S INITIAL REQUEST
FOR PRODUCTION)

v.)

JON OZMINT Commissioner,)

S.C. Department of Corrections)

Respondent.)

PLEASE TAKE NOTICE that the applicant, Kenneth Simmons, by and through his undersigned attorneys, respectfully requests that the Attorney General produce, within 30 days, all documents within the Attorney General's possession, custody or control requested herein, in accordance with the definitions and instructions.

PLEASE TAKE FURTHER NOTICE that Applicant reserves the right to serve supplemental and additional requests for production of documents as needed.

Instructions

1. Scope of Request for Production. This request for production shall cover all documents and tangible objects in the Attorney General's possession, custody or control, whether located at the Attorney General's office, the offices of the Attorney General's predecessors/successors or assigns, the offices of any agents of the Attorney General, or at any other place. If any such document or tangible item was, but is no longer, in the Attorney General's possession or subject to the Attorney General's control, or in existence, describe the document or tangible object, including, where applicable, its date, author(s), recipient(s), and

contents, state whether it (1) is missing or lost; (2) has been destroyed; (3) has been transferred, voluntarily or involuntarily, to others; or (4) has been disposed of in some other manner.

2. Organization of Production. The documents and tangible objects shall be produced as they kept in the usual course of business or organized and labeled to correspond to the Applicant's numbered request.

3. Supplemental Responses. These discovery request shall be deemed continuing and to require amended and supplemental answers to the extent required by South Carolina Rule of Civil Procedure 26(e).

Definitions

A. "Document" means (a) all written or graphic matter of any kind or character, however produced or reproduced; (b) all electronically or magnetically recorded or stored matter of any kind or character, however produced or reproduced; and, (c) all other items of any kind or character that constitute the recording of any information or thing by words, image or sound, or the storage of the same in any retrievable way, by any means of communication, representation or data retention. The term "document" includes, without limitation, all communications, correspondence, letters, memoranda, notes, charts, tables, spreadsheets, reports, compendia, compilations, books, monographs, abstracts, summaries, diaries, calendars, planners, schedules, digests, ledgers, logs, lists, and all other recordings of information, images or sounds on paper, of any kind or description whatsoever (including without limitation drafts of any of these items). Any document bearing any notation, marking or writing of any kind different from original shall be treated as a separate original document. The term "document" also includes, without limitation, all magnetic disks, compact disks, magnetic tapes, magnetic cards, hard disks, floppy disks, CD-ROM disks, phonograph records, cassette tapes, reel-to-reel tapes, and all other

electronically, magnetically or digitally recorded information, in any form (including, without limitation, e-mail). The term "document" also includes, without limitation, all memory media of any kind whatsoever, and all other non-paper forms of recorded or memorialized data, words, information, images or sounds.

B. "Tangible Object" means all items of any kind that are in any way subject to visual inspection or auditory examination or reproduction.

C. "Communication" means any correspondence, contact, gesture, discussion, and/or electronic connection or exchange, including e-mails and retrievable voice mails, between any two or more persons, including, but not limited to, documents, telephone conversations, electronic communications, face-to-face conversations, meetings and conferences.

D. "Person" means all individual entities of whatever description, including, without limitation individuals, government entities, offices, or officials.

E. "Regarding" means discussing, mentioning, identifying, referring to, or relating to in any way.

F. Unless otherwise defined, all words contained in the Requests should be construed in accordance with their ordinary meanings in the English language. "Relating to" and "concerning" mean constituting, comprising, containing, setting forth, showing, disclosing, describing, explaining, summarizing or referring to, supporting, contradicting, proving, disproving, or tending to prove or disprove, directly or indirectly, in whole or in part, and should be given the broadest possible scope consistent with the discovery rules contained in the South Carolina Rules of Civil Procedure. These terms should be construed to apply not only to the events to which they refer directly, but also to all meetings, discussions, contacts and other communications concerning those events.

H. The singular shall include the plural, and the plural shall include the singular; the words "and" and "or" shall be construed conjunctively or disjunctively to make the request inclusive rather than exclusive; "and" shall include "or" and "or" shall include "and"; "any" shall include "all" and "all" shall include "any."

Requests for Production

Applicant request that the attorney general produce the following documents and tangible items pursuant to the instructions set forth above:

1. The solicitor's entire file related to the prosecution of Applicant for murder, armed robbery, first degree burglary, criminal sexual conduct, and kidnapping on March 2, 1999 in Dorchester County.
2. Any document concerning the solicitor's office policy, or the solicitor's personal policies, on when and how the decision is made to seek death in a particular case, including, but not limited to any statistical data kept about how often death is sought buy they solicitor's office. Copies of all notices of intent to seek the death penalty issued by the solicitor's office since January 1, 1995. South Carolina Rules of Civil Procedure. These terms should be construed to apply not only to the events to which they refer directly, but also to all meetings, discussions, contacts and other communications concerning those events.
3. All documents concerning the investigation of the murder of, Lilly Bell Boyd, including, but not limited to, police reports and supplemental reports of any and all involved agencies, entities, or persons hired or used by these agencies or who have rendered services to any of these agencies whether paid or not, as regards this case in any way whatsoever.
4. Any written or recorded statements made by Applicant.
5. A copy of Applicant's prior criminal record.

6. All documents concerning any results or reports of physical or mental examinations of Applicant.

7. All documents concerning any results or reports of any scientific or physical tests or experiments conducted on any item of evidence or any other object in connection with Applicant's case in any way including, but not limited to, polygraph examinations, fingerprint comparisons, DNA analysis and serological evidence.

8. Documents concerning any and all proficiency testing conducted in regards to compliance standards in place by any state agency or any independent expert who conducted any type or degree of analysis or testing of any physical evidence in any way related to this matter.

9. Documents concerning any and all compliance standards by any licensing or accreditation board or committee applicable to any person or agency described in the paragraph immediately preceding this one.

10. All written or recorded statements made by any witness or potential witness in connection with Applicant's case in any way.

11. The names and addresses of any witnesses who have given written or oral statements or information concerning Applicant's case in any way.

12. Any other information or evidence that tends to indicate the innocence of the Applicant, or that tends to mitigate any punishment.

13. All documents concerning the investigation into any other possible suspects in the death of Lilly Bell Boyd.

14. The names and addresses of any person within the chain of custody for any item gathered at the scene of the crime, from the applicant himself, or otherwise in connection with

Applicant's case in any way.

Respectfully submitted,

WILLIAM S. MCGUIRE
225 Peachtree Street NE
Suite 900
Atlanta, GA 30303

JOHN H. BLUME
SHERI LYNN JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14857
(607) 255-1030

By: John H. Blume
JR

October 24, 2006.

ATTACHMENT B

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons, 5066)

Applicant,)

C/A No.: 2005-CP-18-1368

v.)

Jon Ozmint, Commissioner,)
 of Department of Corrections,)

RESPONSE TO APPLICANT'S
 INITIAL REQUEST FOR PRODUCTION

Respondent.)

TO: John H. Blume, Esquire, Post Office Box 11744, Columbia, South Carolina 29211; and,
 William S. McGuire, Esquire, 225 Peachtree Street, N.E., Suite 900, South Tower,
 Atlanta, Georgia 3030-1727.

Pursuant to Rule 34(b), SCRCPP, Respondent, Jon Ozmint, as Director of the South Carolina
 Department of Corrections, through undersigned counsel, hereby makes a written response to
 Applicant's First Request for Production of Documents, served October 24, 2006:

*Request 1: The solicitor's entire file related to the prosecution of
 Applicant for murder, armed robbery, first degree burglary, criminal
 sexual conduct, and kidnapping on March 2, 1999 in Dorchester
 County.*

To the extent Applicant's request is directed to the Attorney General's Office, Respondent
 objects as the Attorney General is a not a party to the action. Rule 34(a), SCRCPP (requests may be
 served on a party to the action). Even so, undersigned counsel advises opposing counsel that the
 Attorney General's Office does not have custody or control of the files of the First Circuit Solicitor's
 Office. Moreover, Respondent, Jon Ozmint, as director of the South Carolina Department of
 Corrections, does not have custody or control of the files of the First Circuit Solicitor's Office.

However, undersigned counsel was advised by the First Circuit Solicitor's Office that a Freedom of Information Act request was made by counsel for Applicant to the office requesting access and or copies of the file. Undersigned counsel was further advised that, though the office denied the applicability of the Act, all non-privileged file contents nevertheless were provided for review and copying within the office. Upon information and belief, counsel for Applicant, or his designee, has already been afforded access to all non-privileged file contents.

Request 2: Any document concerning the solicitor's office policy, or the solicitor's personal policies, on when and how the decision is made to seek death in a particular case, including, but not limited to any statistical data kept about how often death is sought [...by the...] solicitor's office. Copies of all notices of intent to seek the death penalty issued by the solicitor's office since January 1, 1995. South Carolina Rules of Civil Procedure. These terms should be construed to apply not only to the events to which they refer directly, but also to all meetings, discussions, contacts and other communications concerning those events.

Again, to the extent Applicant's request is directed to the Attorney General, undersigned counsel objects and asserts the request is improperly directed to a non-party. Rule 34, SCRCPP. Even so, as noted above, the Attorney General does not have custody or control of the records of the First Circuit Solicitor's Office. Moreover, Respondent Ozmint does not have custody or control of the records of the First Circuit Solicitor's Office. However, as noted in the response to the first request, the solicitor's office has apparently made all non-privileged file contents available to counsel for Applicant in regard to the solicitor's office file concerning the prosecution that is the subject of this post-conviction relief challenge. Additionally, undersigned counsel has been advised by the First Circuit Solicitor's Office that the office does not have a written policy concerning decisions on whether to seek the death penalty in those cases which are death penalty eligible, thus, upon information and belief, undersigned counsel asserts that no policy document exists. To the extent

Applicant seeks copies of notices of intent to seek the death penalty, or notes of meetings, discussions, contacts or other communications concerning same, since January 1, 1995, Respondent objects to the request as vague, failing to identify which case files need to be reviewed and failing to define the scope or depth of treatment of communication in regard to seeking documentation of meetings, discussions, contacts, communications in regard to specific cases. Rule 34, SCRCRCP. ("The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity"). Additionally, Respondent objects as Applicant fails to show how the requested documents would be relevant in this action where there is no allegation involving the propriety of the determination of whether to seek the death penalty. Rule 26, SCRCRCP. ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"). Respondent would also reserve the right to claim privilege should Applicant submit a revised specific request for certain communications, documents, and or work product that would be subject to privilege exemptions.

Request 3: All documents concerning the investigation of the murder of, Lilly Bell Boyd, including, but not limited to, police reports and supplemental reports of any and all involved agencies, entities, or persons hired or used by these agencies or who have rendered services to any of these agencies whether paid or not, as regards this case in any way whatsoever.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again objects and asserts the request is improperly directed to a non-party. Rule 34, SCRCRCP. Even so, and to the extent the request refers to reports admitted and or discussed at trial, the Attorney General has previously provided a copy of the seven volume Record on Appeal as an attachment to the return served November 7, 2005. The trial transcript is included in the record. Applicant's request for the same voluminous document is unnecessary and unduly burdensome. To the extent

the request refers to documents in the possession of the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint have custody or control over the files of the First Circuit Solicitor's Office. Respondent again notes that, upon information and belief, Applicant has already been given access to all non-privileged documents in the office file. (See Response to Request 1). Moreover, neither the Attorney General nor Respondent Ozmint have custody or control of the files of any outside investigative agency. Respondent also asserts, and preserves, an objection to the vague nature of this request which fails to name any agency or person or even any particular avenue of investigation or service rendered.

Request 4: Any written or recorded statements made by Applicant.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again objects and asserts the request is improperly directed to a non-party. Rule 34, SCRCP. Respondent reasons the statements Applicant references in this request would be pre-trial statements, and frames the response based on that assumption, having no specific condition to the contrary. To the extent the request seeks statements in possession of the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint have custody or control over the First Circuit Solicitor's Office files. Even so, as asserted in the response to the first request, Applicant's counsel has had access to all non-privileged documents in the solicitor's file regarding Applicant's prosecution. Moreover, neither the Attorney General nor Respondent Ozmint would have custody or control over the files of other agencies. To the extent the request references statements entered and or discussed at trial, the Record on Appeal was previously provided to opposing counsel with a copy of the Return served November 7, 2005. The trial transcript is included in the record. Applicant's request for the same voluminous document is unnecessary and unduly burdensome.

Moreover, exhibits entered at the trial would be in the custody and control of the Dorchester Clerk of Court, not the Attorney General or Respondent Ozmint. Respondent also asserts, and preserves, an objection to the vague nature of this request which fails to define "statement" or in any way limit context or subject matter or time frame.

Request 5: A copy of Applicant's prior criminal record.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again objects and asserts the request is improperly directed to a non-party. Rule 34, SCRCPP. Even so, the Attorney General has previously provided Applicant a copy of the Record on Appeal with the return served November 7, 2005, which reflects that Applicant's record was admitted and published in the penalty phase of the trial. (R. pp. 2150-51). Therefore, to the extent the request is for information previously provided to Applicant in this action, the request is unduly burdensome and unnecessary. To the extent Applicant wishes to view the original exhibit, the exhibit would be in the custody and control of the Dorchester County Clerk of Court and not the Attorney General or Respondent Ozmint.

Request 6: All documents concerning any results or reports of physical or mental examination of Applicant.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again objects and asserts the request is improperly directed to a non-party. Rule 34, SCRCPP. To the extent the request seeks reports in possession of the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint has custody or control over the First Circuit Solicitor's files. Even so, Respondent notes, as asserted above, Applicant's counsel has had access to all non-privileged documents in the solicitor's file. To the extent the request seeks reports in possession of other agencies, neither the Attorney General nor Respondent would have custody or control over the

files of other agencies. To the extent the request references reports entered and or discussed at trial, Respondent notes the Record on Appeal was previously provided to opposing counsel with a copy of the Return served November 7, 2005. The trial transcript is included in the record. To the extent this request is for documents previously provided to Applicant in this action, the request is unnecessary and unduly burdensome. Any actual exhibits would be in the custody and control of the Dorchester County Clerk of Court and not the Attorney General or Respondent Ozmint. Respondent is, however, providing a copy of a February 10, 1999, report, apparently generated by the Department of Disabilities and Special Needs, which is discussed in great detail by both parties in the penalty phase, (R. pp. 1712-46), that does not appear to have been entered as an exhibit. This copy appears in the Attorney General's file; however, undersigned counsel makes no representation to the authenticity, completeness, or origins of the copy. Respondent also asserts, and preserves, an objection to the vague nature of this request which fails to define "statement" or in any way limit context or subject matter or time frame.

Request 7: All documents concerning any results or reports of any scientific or physical tests or experiments conducted on any item of evidence or any other object in connection with Applicant's case in any way including, but not limited to, polygraph examinations, fingerprint comparisons, DNA analysis and serological evidence.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again asserts the request is improperly directed to a non-party. Rule 34, SCRCP. To the extent the request refers to documents referenced at trial, a copy of the trial transcript was provided in the Record on Appeal previously served with the return on November 7, 2005, thus, the request is unnecessary and unduly burdensome. To the extent this request seeks to review the actual exhibits admitted at trial, the exhibits would be in the custody and control of the Clerk of Court for

Dorchester County and not the Attorney General or Respondent Ozmint. To the extent the request seeks documents from the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint have custody or control over the First Circuit Solicitor's files. Further, as outlined in the response to the first request, Applicant's counsel has been afforded access to all non-privileged portions of the file. To the extent the request seeks documents from agencies other than the Attorney General or the Department of Corrections, neither the Attorney General nor Respondent Ozmint would have custody and control of records from other agencies. Respondent also asserts and preserves an objection to this request as vague as Applicant failed to define what document or object is specifically sought by this request, or even confine his request for documents to a specific kind of testing, specific evidence to be tested, or to a specific agency.

Request 8: Documents concerning any and all proficiency testing conducted in regards to compliance standards in place by any state agency or any independent expert who conducted any type or degree of analysis or testing of any physical evidence in any way related to this matter.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again asserts the request is improperly directed to a non-party. Rule 34, SCRPC. To the extent the request seeks reports from agencies other than the Attorney General or the Department of Corrections, neither the Attorney General nor Respondent Ozmint would have custody or control of records from other agencies. Respondent also asserts and preserves an objection to this request as vague as Applicant failed to define what agency, or which person or test, to which such documents would be connected.

Request 9: Documents concerning any and all compliance standards by any licensing or accreditation board or committee applicable to any person or agency described in the paragraph immediately preceding this one.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again asserts the request is improperly directed to a non-party. Rule 34, SCRCF. To the extent the request seeks reports from agencies other than the Attorney General or the Department of Corrections, neither the Attorney General nor Respondent Ozmint would have custody or control of records from other agencies. Respondent also asserts and preserves an objection to this request as vague as Applicant failed to define what agency, or which person or test, to which such documents would be connected.

Request 10: All written or recorded statements made by any witness or potential witness or oral statements or information concerning Applicant's case in any way.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again objects and asserts the request is improperly directed to a non-party. Rule 34, SCRCF. To the extent the request seeks statements in possession of the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint have custody or control over the First Circuit Solicitor's files. Further, Respondent notes, as asserted above, Applicant's counsel has had access to all non-privileged documents in the solicitor's file. To the extent the request seeks statements in possession of other agencies, neither the Attorney General or Respondent Ozmint would have custody or control over the files of other agencies. To the extent the request references statements entered and or discussed at trial, the Record on Appeal was previously provided to opposing counsel with a copy of the Return served November 7, 2005. The trial transcript is included in the record. Applicant's request for the same voluminous document previously provided in this action is

unnecessary and unduly burdensome. Moreover, exhibits entered at the trial would be in the custody and control of the Dorchester County Clerk of Court and not the Attorney General or Respondent Ozmint. Respondent also asserts, and preserves, an objection to the vague nature of this request which fails to define "statement" or in any way limit context or subject matter or time frame, nor does Applicant identify witnesses or potential witnesses, or even a specific line of investigation for reference.

Request 11: The names and addresses of any witnesses who have given written or oral statements or information concerning Applicant's case in any way.

Respondent first objects as this is not a proper request for production of specific documents. Rule 34, SCRCF. Compare Rule 33, SCRCF. (discovery provision for interrogatories). Even so, to the extent Applicant's request for information is directed to the Attorney General's Office, undersigned counsel again asserts the request is improperly directed to a non-party. Rule 34, SCRCF. To the extent the request refers to witnesses and or statements that may be referenced in the trial transcript, the Record on Appeal was previously provided with the Return filed November 7, 2005. The trial transcript is part of the Record of Appeal. This request is unnecessary and unduly burdensome as it refers to documents previously provided to Applicant in this action. To the extent the request seeks statements from the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint have custody or control over the First Circuit Solicitor's files. Further, as outlined in the response to the first request, Applicant's counsel has been afforded access to all non-privileged portions of the file. To the extent the request seeks information from agencies other than the Attorney General or the Department of Corrections, neither the Attorney General nor Respondent Ozmint would have custody or control of records from other agencies. Respondent also asserts and

preserves an objection to this request as vague given that Applicant failed to define what content or subject matter of statements he seeks, or even the investigating agency or person, or line of inquiry for reference.

Request 12: Any other information or evidence that tends to indicate the innocence of the Applicant, or that tends to mitigate any punishment.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again asserts the request is improperly directed to a non-party. Rule 34, SCRCP. To the extent the request refers to information that may be referenced in the trial transcript, the request is unnecessary and unduly burdensome as the trial transcript is included in the Record on Appeal previously served upon Applicant on November 7, 2005. To the extent the request seeks documents from the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint have custody or control over the First Circuit Solicitor's files. Further, as outlined in the response to the first request, Applicant's counsel has been afforded access to all non-privileged portions of the file. To the extent the request seeks documents from agencies other than the Attorney General or the Department of Corrections, neither the Attorney General or Respondent Ozmint would have custody or control of records from other agencies. Respondent also asserts and preserves an objection to this request as vague as Applicant failed to define with specificity what document or object is sought.

Request 13: All documents concerning the investigation into any other possible suspects in the death of Lilly Bell Boyd.

To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again asserts the request is improperly directed to a non-party. Rule 34, SCRCP. To the extent the request refers to reports that may be referenced in the trial transcript, the request is unnecessary and unduly burdensome as the trial transcript is included in the Record on Appeal

previously served upon Applicant on November 7, 2005. To the extent the request seeks documents from the First Circuit Solicitor's Office, neither the Attorney General nor Respondent Ozmint have custody or control of the First Circuit Solicitor's file. Further, as outlined in the response to the first request, Applicant's counsel has been afforded access to all non-privileged portions of the file. To the extent the request seeks documents from agencies other than the Attorney General or the Department of Corrections, neither the Attorney General nor Respondent Ozmint would have custody or control of records from other agencies. To the extent Applicant seeks documents or items entered as exhibits during trial, such documents or items would be in the custody and control of the Clerk of Court for Dorchester County. Respondent also asserts and preserves an objection to this request as vague as Applicant failed to define with specificity what document or object is sought.

Request 14: The names and addresses of any person within the chain of custody for any item gathered at the scene of the crime, from the applicant himself, or otherwise in connection with Applicant's case in any way.

Respondent first objects as this is not a proper request for production of specific documents. Rule 34, SCRPC. Compare Rule 33, SCRPC. (discovery provision for interrogatories). To the extent Applicant's request is directed to the Attorney General's Office, undersigned counsel again asserts the request is improperly directed to a non-party. Rule 34, SCRPC. To the extent the request refers to reports that may be referenced in the trial transcript, the request is unnecessary and unduly burdensome as the trial transcript is included in the Record on Appeal previously served upon Applicant on November 7, 2005. To the extent the request seeks documents from agencies other than the Attorney General or the Department of Corrections, neither the Attorney General nor Respondent Ozmint would have custody or control of records from other agencies. Respondent also asserts and preserves an objection to this request as vague as Applicant failed to define what agency,

what object or item or line of investigation or which person, would be the subject of the requested information and or documents.

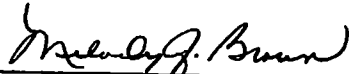
HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

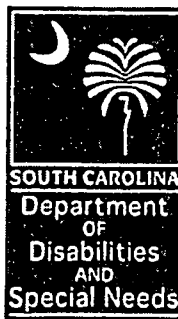
MELODY J. BROWN
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-5624

By: 
MELODY J. BROWN

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina.
November 22, 2005.



nley J. Butkus, Ph.D.
State Director
Robert W. Barfield
Deputy State Director
Administration
Brent H. Koyle, Ph.D.
Deputy State Director
Services and Supports

COMMISSIO
William E. Wa
Chair
Kitty S. Mescl
Vice Chair
Judy P. Ful
Secret
Melvin L. Burton
Emilie A. Tow
Cary H. Hall

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Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

Forensic Psychological Competency Evaluation

Name: Kenneth Simmons
Date of birth: [REDACTED]
Age: 37 years, 11 months
County: Dorchester

Dates of evaluation: 28 January 1999
2 February 1999
4 February 1999
9 February 1999
Date of report: 10 February 1999

Examiners: Leslie N. Sandler, Ed.D. Lead Psychologist
SC Department of Disabilities and Special Needs [SC DDSN]
Thomas McAbee, Ph.D., Secondary Psychologist
SC Department of Disabilities and Special Needs [SC DDSN]

Statement of non-confidentiality: Mr. Simmons was notified orally and in writing at the outset of each evaluation session of the lack of confidentiality with respect to the content of the interview and his responses during the evaluation. He was informed as to the recipients of copies of the evaluation results, as well as to the possibility that the examiners might be called to testify regarding the evaluation.

Purpose of evaluation: This evaluation was conducted pursuant to an order by Judge Rodney A. Peebles of the Court of General Sessions of the First Judicial Circuit dated 14 January 1999. The order requested that Mr. Simmons be evaluated to determine his competency to stand trial, his criminal responsibility pursuant to the M'Naghten test for his actions on or about 1 September 1996, and if found responsible, his capacity to conform his actions to the requirements of law. The initial order for an evaluation was made upon motion of Walter Bailey, Esq., Solicitor.

Charges: Mr. Simmons is charged with Murder, Armed Robbery, Kidnapping, Criminal Sexual Conduct, and Burglary.

Summary of evaluation results: Opined within reasonable scientific certainty.

Presence of mental retardation: No
Competency to stand trial: Yes
Criminal responsibility: Yes
Capacity to conform: Yes

Evaluation procedures:

- ✓ Competence Assessment for Standing Trial for Defendants with Mental Retardation [CAST-MR]
- ✓ Personal History Checklist for Adults
- Trail Making Test, Parts A and B
- ✓ Wechsler Adult Intelligence Scale-Revised [WAIS-R]-
- Vineland Adaptive Behavior Scale (attempted)

COASTAL REGION
Regional Office - Phone: 843/832-5560
Coastal Center - Phone: 843/873-5750
9995 Jamison Road, Ladson, SC 29456

MIDLANDS REGION
Regional Office - Phone: 803/935-7655
Midlands Center - Phone: 803/935-7500
8301 Farrow Road, Columbia, SC 29203

PEE DEE REGION
Regional Office - Phone: 843/664-2601
Pee Dee Center - Phone: 843/664-2600
PO Box 3209, Florence, SC 29502-3209

PIEDMONT REGION
Regional Office - Phone: 864/833-51
Whitten Center - Phone: 864/833-27
PO Box 239, Clinton, SC 29325

Interviews with Mr. Simmons on 28 January 1999 (approximately two hours), 2 February 1999 (approximately two hours), 4 February 1999 (approximately two hours), and 9 February 1999 (approximately two hours).

Interviews with Dorchester County Detention Center correctional officers Sidney Jackson and Emmet McKinney on 9 February 1999.

Telephone inquiries to SC Department of Education; Summerville High School (guidance office and athletic office); Alston Middle School; Dorchester School District Two Office of Special Services; SC Department of Public Safety (Driver Records and Driver Improvement offices).

Review of available records: Summerville Police Department incident reports dated 1 September 1996, Summerville Police Department voluntary statement forms dated 1 September 1996, 2 September 1996, 22 August 1997, 13 November 1997, 5 December 1997, 10 December 1997; 12 December 1997; Audio tapes and transcripts of State Law Enforcement Division interview dated 5 December 1997; Arrest warrants dated 8 December 1997; Indictments for Criminal Sexual Conduct-First Degree, Burglary in the First Degree, Murder, Kidnapping, and Armed Robbery; Order for Competency Evaluation dated 22 January 1998 and 10 September 1998, South Carolina Department of Mental Health hospital records, psychological test results, and forensic evaluation dated 8 January 1999; Psychological testing dated 15 May 1998; Transcripts of Court-Appointed Examination/Evaluation of Kenneth Simmons at Hall Psychiatric Institute dated 1 December 1998 and 8 January 1999; Dorchester County public school records, South Carolina Department of Public Safety driver records.

Relevant history: Kenneth Simmons is a 37-year-old, ambulatory, African-American male. The available records do not describe a history of significant childhood developmental delays. His records do not reveal him ever receiving any type of special education services. Though he repeated the eleventh grade and took some remedial courses for high school credit, he graduated from Summerville High School in 1980 after earning 18 units of high school credit. During his junior and senior years in high school, he played an important position (defensive end) on his varsity football team, earning two letters.

His high school transcript reveals that he attained a grade of B in ninth grade basic English, C in tenth grade basic English, B in eleventh grade remedial English, C in English language arts when he repeated the eleventh grade, and A in remedial English during the twelfth grade. Standardized achievement testing in April 1978 (during the eleventh grade) revealed that he had attained grade equivalent scores of fifth grade in reading, fourth grade, six months in language, and fourth grade, seven months in arithmetic/mathematics. (The name of the achievement test was not given, but it may have been the Comprehensive Test of Basic Skills.) His abilities are also revealed by his passing the state driver's license test in October 1979.

Mr. Simmons is married and reports having two sons by his wife and a third son by a girl friend. He reports previously working in "construction," including "carpenter work" and "brick layer" (his words).

Mr. Simmons acknowledges long-term use of alcohol, marijuana, and cocaine. The South Carolina Department of Mental Health [DMH] forensic evaluation dated 8 January 1999 reports diagnoses of Polysubstance Dependence, Mild Mental Retardation (provisional), peptic ulcer disease by history, and migraine headaches by history. During our first evaluation (on 28 January 1999), Mr. Simmons acknowledged having frequent headaches and blood in his stools. He wore eyeglasses during the third evaluation (on 4 February 1999) but not on the first two evaluations (although he had them in his pocket).

Additional pertinent information: Interviews and conversation with Correctional Officers Sidney Jackson and Emmet McKinney on 9 February 1999 were quite significant. Officer

Jackson related that Mr. Simmons was very different in his demeanor (he was not as alert and intelligent) while he was in the evaluation as opposed to the Correctional Facility in Dorchester. Mr. Simmons is said to lead Bible reading discussions with other inmates, play a card game called "spades," play chess with a notable degree of expertise, and has had to be directed to refrain from being the "jailhouse lawyer" (giving other inmates legal advice). Officer McKinney reports that Mr. Simmons writes letters regularly, plays the card game of "rummy," and after the initial evaluation session at Coastal Center (28 January 1999) Mr. Simmons stated, "They ask me stupid questions; I gave them stupid answers."

Prior psychological testing results: The William S. Hall Psychiatric Institute forensic evaluation dated 8 January 1999 noted that Mr. Simmons "has consistently scored in the high 60's on two different examinations of intellectual functioning" and concluded with diagnostic impressions of Mild mental retardation (provisional). One examination on 15 May 1998 with the Wechsler Adult Intelligence Scale-Revised [WAIS-R] reported scores of Verbal IQ 66, Performance IQ 75, and Full Scale IQ 69, in the significantly subaverage range of intellectual functioning. The second examination on 1 December 1998 with the Wechsler Adult Intelligence Scale-Third edition [WAIS-III] reported scores of Verbal IQ 65, Performance IQ 74, and Full Scale IQ 66, in the significantly subaverage range of intellectual functioning. No adaptive behavior assessments were reported.

No individualized school psychological evaluations were in the available records, and no record of him ever being referred for an individualized school psychological evaluation was found in the available school records. His school records did note that he had received group administered ability tests during elementary school: At age seven, he obtained an "IQ" score of 94 on the Primary Abilities Test. At age nine, he obtained an "IQ" score of 104 on the Primary Abilities Test and 69 on the Short Form Test of Academic Aptitude.

Current psychological testing: In an administration of the Wechsler Adult Intelligence Scale-Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full Scale IQ of 75 is in the mid-range of the Borderline Intelligence Classification (IQ scores of 70 to 79). The fact his Performance IQ score was 12 points higher than his Verbal IQ score is significant. One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the Low Average intelligence classification (IQ scores of 80 to 89) as revealed in the Performance IQ, and intentionally suppressed by Mr. Simmons' tendency to malingering. His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores were in the Object Assembly test (scaled score of 10; the 50th percentile), Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank). Notable responses (an answer which is often found in offender populations who are malingering) included the following: his answer in the Information sub-test that the colors of the flag were "red, blue, white, and yellow"; and in the Picture Completion Test in which he said that he failed to see anything missing in a playing card and a water pitcher in which the pitcher was tilted but no liquid was coming out.

The Trail-Making Test Parts A and B were administered as a screening instrument for the detection of brain dysfunction. He completed Part A in 162 seconds and Part B in 300 seconds. His scores were both elevated, yet showed no errors, reflecting the examiner's impression that Mr. Simmons was intentionally producing exaggerated slow responses (as he did in the WAIS-R Digit Symbol sub-test).

The CAST-MR was also administered; however the results were not available in time for the report composition.

He can write his first and last name legibly in cursive. He knew the current day of week and approximate date (for example, he wrote "2-3-99" for 2-4-99). He correctly knew that he was in the city of "Summerville" in "Dorchester County" and the state of "South Carolina." He knew that the purpose of his office visit was "to answer questions about court." He was oriented to person, place, time, and situation. He also knew that three years was a longer period of time than eleven months.

He was active, alert, polite, and suspiciously guarded. He displayed appropriate behavior (remaining seated, not interrupting, not raising his voice) during the entire interview. He could maintain his attention and concentration to the examiners' questions. He answered most questions logically with relevant and coherent information, giving both abstract and concrete answers. He could speak in short phrases or simple but complete sentences, and most of his words were understandable. His hearing appeared adequate for the evaluation.

He acknowledged appetite and sleep disturbances, explaining that his stomach hurts sometimes. He stated that he had gained and then lost weight while in jail. He described his mood as "okay" but "tired." During each session he reported bilateral headaches but no dizziness, nausea, or emesis. He acknowledged past suicidal thoughts or intentions but was "not sure" about them now and "don't know" the last time he had suicidal thoughts or intentions. When asked about any homicidal thoughts or intentions, he replied, "For what?" During the first evaluation, he reported hearing "birds hollering," but during the third evaluation the following week, he stated that he had not heard birds hollering for "three weeks." He did not appear to be distracted by internal or external stimuli during the four evaluations. His insight was limited.

He demonstrated the ability to recall some detailed information from remote and recent memory. For example, he stated that he played "defense" on his high school football team, proudly recalling the teams' win-lost record for the years that he played ("13 and 1" and "14 and 0").

Malingering was observed more or less in each session. Malingering is the intentional production of false or grossly exaggerated psychological symptoms or intellectual deficits for apparent secondary gain, such as evading criminal prosecution. Some of his responses seemed exaggerated or distorted in a self-protective or self-serving fashion, as is sometimes encountered

during competency-to-stand-trial evaluations. His clinical presentation during the four evaluations appeared to be substantially lower than what would be expected from a high school graduate and also appeared to be substantially lower than his vocabulary and other skills as revealed in his 1997 oral and written statements to the police. Furthermore, he sometimes gave inconsistent answers across our four evaluations or gave incorrect answers that closely approximate the correct answers, which is commonly seen during malingering.

Presence of mental retardation: The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, [APA DSM-IV] specifies the following three criteria for a diagnosis of mental retardation: significantly subaverage intellectual functioning with concurrent deficits or impairments in present adaptive functioning with onset before age 18 years. The available records do not report a history of significant developmental delays or of him ever receiving services for mental retardation or a related disability. While Mr. Simmons did repeat the eleventh grade and take remedial courses for high school credit, his records do not report that he received any special education services, including any services for learning, educable, or trainable mental disabilities. He graduated from high school, played varsity football, passed the South Carolina driver's license test, and drove a car by himself (per Mr. Simmons report). The preponderance of the available information does not suggest significant intellectual or adaptive deficits before age 18 years, and therefore, a diagnosis of mental retardation cannot be made.

It should be noted that competency to stand trial opinions are based on the defendant's ability to meet the Dusky standard and are not automatically determined by a defendant's diagnosis or intellectual abilities.

Competency evaluation: At the beginning of each evaluation, he read a written statement of his legal rights, needing frequent assistance for polysyllabic words such as *examination*, *specific*, and *participate* and for simple, one-syllable words. He explained that the right to remain silent meant "shut up" or "be quiet." When asked if the right to remain silent meant that he had to answer the examiners' questions if he did not want to answer, he said incorrectly "I guess" or "[I] don't know." Even though one examiner explained the meaning of the right to remain silent in simple terms several times, he persisted in saying statements such as "I've got to answer." or "If you ask [me] a question, I answer it." and did not (or would not) indicate his understanding of the right to remain silent by his verbal statements to the examiners. One examiner also explained several times in simple terms that he had the right to talk with his attorney about the evaluation. When asked if he wanted to talk with his attorney, he sometimes shook his head negatively but more often just answered the question with a question, replying "Ask him what?" (One of his attorneys, Mr. Jerry Theos, attended each evaluation, either sitting in the examining room or remaining outside the door, and was available to answer Mr. Simmons' questions.)

The competency evaluation consisted of assessing his initial ability to meet the Dusky standards, teaching him about the trial process and its participants, and then reassessing his ability to meet the Dusky standards after being taught.

He knew the name of his attorney ("Mr. Theos," or more often he just said, "Mr. Jerry."). He understood that his attorney was trying to help him and indicated that he could talk candidly with him about the charges. However, when asked if he could trust and work with his attorney, he replied, "I don't know." Not initially but after education, he reasoned that he could "ask Mr. Theos" if he heard words or statements in court that he did not understand.

During the third evaluation, he explained that he is charged with "murder," which means "kill them," and with "armed robbery," which means "take something from somebody" with "a gun." During the fourth evaluation, he stated that he is charged with "murder," which he again explained as meaning "kill them," "burglary," which means "break into somebody's house," and "rape," which means "take advantage of them" or "have sex with them." (He also said that he was charged with shoplifting, for which he reportedly was previously arrested in Richland

County.) He acknowledged that the charges could result in serious consequences, including the "death penalty" or "go[ing] to jail for rest of [my] life."

He defined the meaning of guilty as "did it" and "send you to prison." He defined the meaning of not guilty as "ain't did it." He explained the meaning of innocent as "find not guilty." He said that he wanted to be found not guilty on the current charges. He explained that plea bargain means plead guilty and "tell them what happened" in order to receive "a less[er] sentence."

In a picture of a courtroom, he could identify most trial participants. He stated that a jury consists of "twelve" persons who "listen to people" and "see if they [are] guilty or not." He knew that in a courtroom the prosecutor or solicitor would be working against him in order to find him "guilty" and "send me to prison." Not initially but after education, he reasoned that if the solicitor asked him a question that he did not understand, he could "don't say nothing (sic)" and "ask Mr. Theos" for help.

He explained the role of a witness as "tell what they know." Not initially but after education, he indicated his understanding that he could testify at his trial but could not be made to testify against his will. He defined evidence as "somebody know you did something and they can prove [it]." He could give examples of evidence and witnesses in a hypothetical crime. Not initially but after education, he acknowledged his understanding that he could "tell Mr. Jerry" if he believed that a witness told a lie about him.

Not initially but after education, he knew that he was charged with a "felony," which was more serious than a misdemeanor.

Criminal responsibility: Based on retroactive speculation and the results of the examination, it seems unlikely that his level of cognitive functioning would have interfered with his ability to differentiate moral and legal right from moral and legal wrong on the date of the alleged offense.

Capacity to conform: Based on retroactive speculation and the results of the examination, it seems unlikely that his level of cognitive functioning would have interfered with his ability to conform his conduct to the requirements of the law on the dates of the alleged offense. ✓

Conclusions and limitations: Based upon the integration of all available records and the clinical impressions from the examination, and within reasonable scientific certainty, it is recommended to the court that Mr. Simmons be found competent to stand trial at this time. It seems unlikely that his level of cognitive functioning would have interfered with his ability to differentiate moral and legal right from moral and legal wrong or with his ability to conform his conduct to the requirements of the law on the date of the alleged offense.

Possible limitations that were considered included the number of available records about him, the amount of information that can be obtained from four office visits, each lasting about two hours, and the possible "practice effects" from the prior administration of the WAIS-R in May 1998 and the WAIS-III in December 1998. However, in spite of these potential limitations, we believe that the conclusions of this evaluation are valid and reliable.



Leslie Sandler, Ed.D.
Lead examiner
Forensic psychologist

10 Feb 1999
Date signed



Thomas McAbee, Ph.D.
Secondary examiner
Psychologist IV

10 Feb 99
Date signed

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons, 5066)

C/A No.: 2005-CP-18-1368

Applicant,)

v.)

CERTIFICATE OF SERVICE

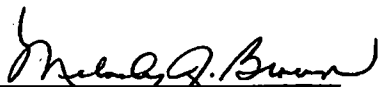
Jon Ozmint, Commissioner,)
 of Department of Corrections,)

Respondent.)

The undersigned certifies that on the 22ND day of November, 2006, she served Respondent's *Response to Applicant's Initial Request for Production*, on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

John H. Blume, Esquire
 Post Office Box 11744
 Columbia, South Carolina 29211

William S. McGuire, Esquire
 225 Peachtree Street, N.E., Suite 900, South Tower
 Atlanta, Georgia 3030-1727.


 MELODY J. BROWN
 ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons, 5066)

Applicant,)

v.)

Jon Ozmint, Commissioner,)
of Department of Corrections,)

Respondent.)

C/A No.: 2005-CP-18-1366

RESPONSE TO APPLICANT'S
MOTION TO COMPEL DISCOVERY
FROM RESPONDENT

CLERK OF COURT
DORCHESTER COUNTY

Christy Simmons

2006 DEC 27 AM 11:30

CERTIFIED COPY

On December 14, 2006, counsel for Respondent received a copy of "Applicant's Motion to Compel Discovery From Respondent," dated December 12, 2006. Respondent submits the allegations and arguments made in support of the motion are without merit, and the motion should be denied. In support of this position, Respondent would respectfully show the Court:

1. As an initial matter, undersigned counsel was not consulted before counsel for Applicant filed the motion to compel, and counsel for Applicant did not attempt, at all, to resolve the matter prior to the filing of the motion. See Rule 11 (a), SCRCP. It is counsel's duty to consult before filing, and counsel for Applicant utterly failed to do so. Moreover, the motion is without merit.

2. Applicant makes several complaints concerning the objections made in Respondent's response to his first request for production of documents. First, Applicant complains that the objection the request was directed to a non-party was incorrect, and argues, "Respondent is A Party to This Action." (Motion, p. 2). Respondent agrees that Respondent is a party to the action. See generally *Black's Law Dictionary* (8th ed. 2004)(defining party as "[o]ne by or against whom a lawsuit is brought <a party to the lawsuit>". For purposes of res judicata, a party to a lawsuit is a

person who has been named as a party...). However, Respondent, according to the action instituted by Applicant, is Jon Ozmint, in his capacity as Commissioner of the South Carolina Department of Corrections ("SCDC"). Applicant has not named the Attorney General as a party, nor has he properly named the State of South Carolina. See Rule 71.1(c), SCRCP ("The caption in all post-conviction relief actions shall read: *Full Name and Prison number (if any) of Applicant v. State of South Carolina.*")(emphasis in original). Therefore, contrary to Applicant's multiple assertions, the Attorney General is not a party to the action. Applicant correctly notes that the Attorney General's Office does represent Respondent in this action as the Attorney General's Office generally handles post-conviction relief actions.¹ Applicant has properly served the responding attorney in the Attorney General's Office as counsel of record. See Rule 5 (b)(1) ("Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."). To the extent Applicant requests guidance as to whether he may continue to serve undersigned counsel, (Motion, p. 2), it would appear the rules would continue to allow service on counsel of record.

3. Applicant next asserts "Respondent Retains Custody And/Or Control over the Items Requested." (Motion, p. 2). As explained in the preceding paragraph, the Respondent in this action is Jon Ozmint in his capacity as Commissioner of SCDC. Yet, Applicant contends not only that the Attorney General is the Respondent, but also seeks, not Respondent Ozmint's records, but records of the First Circuit Solicitor's Office, the Dorchester County Clerk of Court Office, and various

¹ More specifically, the Capital Litigation Section of the Attorney General's Office handles death penalty related collateral litigation. Respondent also notes, however, that nothing prevents the individual solicitors from handling post-conviction relief actions. The statutes for capital and non-capital post-conviction relief proceedings direct that the solicitor be given a copy of the application as well the Attorney General. See S.C. Code §§ 17-27-40 and 17-27-160.

unnamed investigators and/or investigative agencies. (Motion, p. 2-3 and Attachment "A"). Applicant further asserts the Attorney General has custody or control of the requested items, or may instruct whoever has control to release same. (Motion, p. 2). Implicit in his argument is the concession that the Attorney General does not have custody or control over all the documents requested. Importantly, the Attorney General has not instructed any office or individual not to release materials in connection with the trial or this litigation. To the extent the motion implies same, it is strictly denied. Moreover, it appears that Applicant, in the request for production and the instant motion to compel, has taken the position that the Attorney General controlled the prosecution, but that is directly contrary to the trial records showing the First Circuit Solicitor prosecuted the case, and directly contrary to the solicitors' well-established and long recognized "strong measure of independence":

Although the Attorney General is designated the chief prosecuting officer and has 'authority to supervise the prosecution of all criminal cases in courts of record', the fact remains that the solicitors are elected in this State by the people and maintain a strong measure of independence. While he has the authority to supervise the prosecution of all criminal cases, it is a fact of common knowledge that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors in their respective circuits except in unusual cases or when the solicitors call upon the Attorney General for assistance.

State ex rel. McLeod v. Snipes, 266 S.C. 415, 420, 223 S.E.2d 853, 855 (1976).

See also State v. Addis, 257 S.C. 482, 487, 186 S.E.2d 415, 417 (1972) ("In every criminal prosecution the responsibility for the conduct of the trial is upon the solicitor and he must and does have full control of the State's case.").

Because the First Circuit Solicitor's Office prosecuted the case, the First Circuit Solicitor's Office would have custody and control over the trial records. To the extent Applicant continues to

insist the Attorney General maintains the files from the First Circuit Solicitor's Office, he is simply incorrect. Even so, it should be noted that the First Circuit Solicitor's Office has been contacted and has cooperated fully with Applicant's request for document review.

4. To the extent Applicant asserts he has not received information directly from the First Circuit Solicitor's Office, (Motion, p. 3), such assertion is not supported by the facts. Counsel asserts he never made a Freedom of Information Act request to the First Circuit Solicitor's Office, and, consequently, has not been advised the office denies applicability of the act. (Motion, p. 3). Attached, and incorporated by reference, are copies of counsel's May 2, 2006 letter to the First Circuit Solicitor referencing a "Freedom of Information Act Request" and the June 9, 2006 letter from B. Harrison Bell, Jr., Senior Assistant Solicitor, in response, questioning the applicability of the Act, but allowing inspection and noting "an open file policy." The request was made, and the goal of the request was met in having been granted access to the file(s). Applicant's claim to the contrary is wholly without merit. Moreover, Applicant's Freedom of Information Act request is a concession that not only does he understand that the solicitor's office retains their own files, but also that he has, in fact, relied upon that knowledge. Otherwise, the request for release of information must be considered, under Applicant's current position, to have been, at best, misdirected, with full advantage taken of the benefit received. Upon information and belief, counsel's designee actually reviewed the files prior to Respondent's response to the request for production. (See Motion, Attachment "B," pp. 1-2). In sum, not only was the request made to the solicitor's office, which Applicant apparently actually believes is the proper entity to make the request of (which it is), the files have already been reviewed. Applicant has no basis, indeed no need, to seek to compel release of documents that have already been made available to him.

5. Applicant next asserts that Respondent has failed to comply with the discovery rules in that Respondent references in his response to Applicant's request for production of documents that all "non-privileged" materials from the First Circuit Solicitor's Office has been provided, but failed to describe the nature of the materials withheld. (Motion, p. 4). Respondent Ozmint is not asserting privilege, as the right to assert the privilege necessary remains with the solicitor's office. *See In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 352 (4th Cir. 1994)("Initially, the party asserting a privilege bears the burden of establishing that privilege."); *In re Doe*, 662 F.2d 1073, 1077 (4th Cir. 1981)("an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation, even if they have been reduced to writing."). *See also McLeod, supra, Addis, supra* (regarding independence of the solicitor). Undersigned counsel reiterates that the solicitor's office maintains their own files and the Attorney General has never been given custody or control of said file. To the extent the request is directed to the solicitor's office, and upon information and belief after consultation, Respondent submits the solicitor's office has separated several pages of work product from the files offered for review which was not disclosed during that review. Undersigned counsel has neither seen nor reviewed the materials withheld. Again, the privilege is the solicitor's to assert. *In re Grand Jury Proceedings, supra*. However, because the solicitor's office has cooperated fully and fairly with the request, and with the ongoing litigation, the solicitor's office will make the undisclosed items available for the judge's review during the January 5, 2006⁷ hearing so that he may make a ruling on the applicability of the work product privilege. *Doe v. Ward Firm, P.A.*, 353 S.C. 509, 516 n.4, 579 S.E.2d 303, 306 n.4 (2003)(privilege must be asserted and presiding judge determines whether material are subject to privilege). *See also In the*

Mater of Anonymous Member of the South Carolina Bar, 346 S.C. 177, 189 n.8, 552 S.E.2d 10, 16 n.8 (2001)(acknowledging work product privilege as legitimate object to deposition question); Rule 26 (b)(1), SCRCP (in general, parties may obtain discovery of any relevant non-privileged matter); Rule 26(b)(5), SCRCP (individual seeking release of trial preparation materials must show a “substantial need of the materials” and that the items are not otherwise available, and, even then, “the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”); Rule 45(c)(3)(A)(iii), SCRCP (the court shall quash a subpoena directed to a non-party if the subpoena requires disclosure of privileged matter); Rule 5 (a)(2), SCRCrimP (internal prosecution document made by attorney for prosecution not subject to disclosure in criminal case). As previously discussed, upon information and belief, all non-privileged documents have previously been disclosed. (See also Motion, Attachment “B”).

6. Applicant next asserts the appellate documents provided in the return and referenced in the response were not sufficient. (Motion, p. 4). Again, there is a disconnect in understanding. Applicant specifically requested documents from the Attorney General. (Motion, Attachment “A,” p. 1). He apparently, and mistakenly, now contends that the solicitor’s file is a part of those records. They are not. The Attorney General did not prosecute Applicant, but did represent the State on appeal. See S.C. Code § 1-7-40 (Attorney General to represent State before the Supreme Court and Court of Appeals). *Egrot*, the Attorney General’s file contains only appellate documents. The Attorney General, though not a party to this action, released the appellate documents regarding the prosecution in response to Applicant’s request, including one document (a mental health report) discussed in the record, but apparently not introduced, and not a part of the previously provided

record on appeal. (See Motion, p. 2 and Attachment "B," p. 5-6). In short, the Attorney General, though not a party, *did* comply with the request for documents. Like the solicitor's office, undersigned counsel has an open file policy. If counsel wishes to review the actual appellate file, counsel need only contact undersigned counsel and arrange a mutually convenient time to meet in her office in Columbia. Undersigned counsel notes, by its very nature, the appellate process is limited to matters of record. See Rule 210, SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Therefore, Applicant's extensive argument on "extra-record facts" has little applicability in this context, (See Motion, pp. 4-5), and his search for "extra-record facts" is not likely to find result in a review of the appeal file. Nonetheless, undersigned counsel has no objection to the request.

7. Applicant also apparently objects to the assertion of vagueness in response to his requests. (See Motion, pp. 5-7). Respondent maintains the referenced requests are impermissibly vague, many do not even identify the individuals or agencies, much less reasonably specific records held by either. (See Motion, Attachment "A"). However, undersigned counsel will be prepared at the January 5, 2007 hearing to accept a listing of individuals Applicant wishes to depose, and any request for records, and will make her schedule available to set dates for such depositions and document review. See generally Rule 34 (c), SCRCE ("A person not a party may be compelled to produce documents or things or submit to an inspection only as provided in Rule 45 "); Rule 45, SCRCF (setting out subpoena process for non-party to appear at deposition with or without records). Neither Respondent nor undersigned counsel is attempting to limit or block access to records. Respondent and undersigned counsel simply need to know who Applicant wishes to speak with and what records he wishes to review. Undersigned counsel will work diligently with Applicant to

expedite review in whatever way she can. Further, Respondent agrees to expedite scheduling of any additional depositions requested by Applicant after the initial depositions. However, without reasonably specific requests (at the very least the name of the investigator or name of the agency which would retain the files sought), neither Respondent nor undersigned counsel can aid in expediting the process. It is Applicant's responsibility to "describe each item and category with reasonable particularity" in his requests for production of documents. Rule 34 (b), SCRPC.

THEREFORE, based on the foregoing, Respondent submits the motion to compel is without merit and should be denied. Both Respondent Ozmint, and undersigned counsel, have fully and fairly cooperated in discovery and continue to cooperate in discovery. Undersigned counsel does respectfully request the Court hear the First Circuit Solicitor's Office assertion of privilege and review the materials reserved and withheld as privileged, and make a ruling on whether the documents may be protected by privilege or order the disclosure of same.

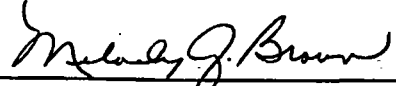
Respectfully submitted,

HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
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By: 

MELODY J. BROWN

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina.
December 21, 2006.



Cornell Law School

3701

12th messg
5/15/06
9:40 am

May 2, 2006

803
765
1044

David Pascoe, Esquire
First Circuit Solicitors Office
P.O. Box 604
St. Matthews, SC 29135

Re: *Freedom of Information Act Request*

Dear Mr. Pascoe:

I represent Kenneth Simmons, in connection with his state post-conviction relief proceedings. I am writing, pursuant to the Freedom of Information Act, S.C. Code § 30-4-10 through 110, to request that you provide any and all information in the possession of the First Circuit Solicitor's Office regarding the investigation and prosecution of Mr. Simmons, and the events surrounding the death of Lilly Bell Boyd on or about September 1, 1996. (Indictment numbers: 98-GS-18-0075; 98-GS-18-0076; 98-GS-18-0077; 98-GS-18-0078; 98-GS-18-0079).

Specifically, I request all information in your custody, care, or control that in any way relates to the investigation surrounding the death of Lilly Bell Boyd and/or in any way relates to the prosecution of Mr. Simmons. This request includes all correspondence with the Dorchester County Sheriff's Department, the Summerville Police Department, the South Carolina Attorney General's Office, and any other state or federal agency regarding these matters. This request further includes all information, files, notes or any other documentation relating to forensic analyses performed in connection with these investigations, including, but not limited to, ballistics, fingerprint, and DNA analyses. Lastly, this request includes all photographs which relate in any way to the investigations referenced above.

The release of this information from your agency will not reveal the identities of any informants, is not a premature release of information to be used in a prospective law enforcement action, will not disclose investigatory techniques, and will not endanger the life, health, or property of any person.

As you know, the FOIA allows you to reduce or waive search and/or copying fees when release of the requested information would be "in the public interest." At a minimum, the FOIA mandates, "[t]he records must be furnished at the lowest possible cost to the person requesting the records." S.C. Code §30-4-30. Because Mr. Simmons is an indigent death-sentenced inmate, I request that you waive the fees. If you determine otherwise, please submit a bill to me.

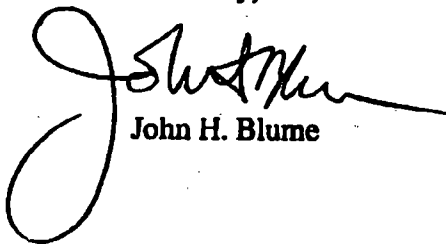
The public interest requires confidence in the judicial system that operates in the public's

David Pascoe
May 10, 2006
Page 2

name and on its behalf. The United States Constitution requires "heightened scrutiny" in the review of death sentences. The public interest includes oversight of governmental functions. *National Ass'n of Atomic Veterans v. Director, Defense Nuclear Agency*, 583 F.Supp. 1483 (D.C. 1984). To ensure public confidence in Mr. Simmons' sentence of death it is necessary to fully explore all information and issues, both direct and incidental, surrounding the events which resulted in its imposition. Therefore, the public interest is served by a full and complete examination of all aspects of the crime and the appropriateness of the sentence. I therefore request that you comply with this request as soon as practicable.

If I can provide any additional information or materials in order to expedite the processing of this request, please do not hesitate to contact me.

Sincerely,



John H. Blume

cc: William McGuire

The State of South Carolina

OFFICE OF SOLICITOR
First Judicial Circuit



DAVID M. PASCOE
Solicitor

140 North Main Street
Suite 102
Summerville, SC 29483
(843) 871-2640
FAX (843) 871-2643
PTI (843) 873-7842

101 Ridge Street
Dorchester County Courthouse
St. George, SC 29477
(843) 832-0150
FAX (843) 832-0155

Courthouse, Amalia Street
Post Office Box 1525
Orangeburg, SC 29116
(803) 533-6252
FAX (803) 533-6004
PTI (803) 533-6137

102 Courthouse Drive
Suite 111
St. Matthews, SC 29135
(803) 874-1978
FAX (803) 874-1242

June 9, 2006

John H. Blume
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853-4901

Re: Freedom of Information Request

Dear Mr. Blume:

I have been handed your letter of May 2, 2006 since I am somewhat familiar with the Kenneth Simmons case. We have no problem with you or your designee coming to our office in Summerville to inspect and/or copy what you need, other than work product, from our files. We have 10 notebooks and 2 boxes of paperwork that you or your designee can look through. We have always had an open file policy. While I am not sure if the Freedom of Information Act, Sections 30-4-10 through 30-4-110, Code of Laws of South Carolina, 1976, as amended, applies since there is ongoing litigation in this matter, that becomes a non-issue since we are complying with the mandate of Section 30-4-30. The only thing that I ask is that you or designee call and set up a mutually convenient time to do this so that I can make sure all of our materials have been gathered. If there is anything else I can do in this matter, please do not hesitate to contact me.

Sincerely,

B. Harrison Bell, Jr.
Senior Assistant Solicitor
First Judicial Circuit

BHB

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF DORCHESTER)

Kenneth Simmons, 5066) C/A No.: 2005-CP-18-1368
)
 Applicant,)
)
 v.)
)

CERTIFICATE OF SERVICE

Jon Ozmint, Commissioner,
 of Department of Corrections,)
)
 Respondent.)
)

The undersigned certifies that on the 21st day of December, 2006, she served Respondent's *Response to Applicant's Motion to Compel Discovery From Respondent*, on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

John H. Blume, Esquire
 Post Office Box 11744
 Columbia, South Carolina 29211

William S. McGuire, Esquire
 225 Peachtree Street, N.E.
 Suite 900, South Tower
 Atlanta, Georgia 30303-1727


 MELODY J. BROWN
 ATTORNEY FOR RESPONDENT

FILED-RECORDED
2007 JAN 18 PM 12:51
CLERK OF COURT
DORCHESTER COUNTYSTATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,

Applicant,

C/A No.: 2005-CP-18-1368

v.

Jon Ozmint, Commissioner,
of Department of Corrections,

Respondent.

ORDER DENYING MOTION TO COMPEL
DISCOVERY FROM RESPONDENTCERTIFIED COPY
2007 JAN 19 PM 12:24
CLERK OF COURT
DORCHESTER COUNTY

WTE

This matter is before me by way of Applicant's Motion to Compel Discovery from Respondent, dated and served December 12, 2006. Respondent filed a response dated and served December 21, 2006. A hearing was held on the motion on January 5, 2007, at the Bamberg County Courthouse. Applicant was present and represented by counsel, John H. Blume, Esquire, and William S. McGuire, Esquire. Respondent was represented by Assistant Attorney General Melody J. Brown. Also present, on behalf of the First Circuit Solicitor's Office, was B. Harrison Bell, Jr., Senior Assistant Solicitor. After a review of the motion and response, and after hearing the arguments presented at the hearing, this Court makes the following findings and conclusions:

Applicant essentially argues that the Attorney General should disclose the records of other agencies when the records are requested through the discovery process. Applicant concedes that the Attorney General does not have physical custody of the records sought, but maintains the Attorney General has the authority to direct disclosure. The Attorney General submits that individual agencies, including the First Circuit Solicitor's Office, maintain an independence from the Attorney General's Office, and may have privilege or confidentiality

objections that must be asserted by the party retaining the privilege or charged with maintaining confidentiality; therefore, it is necessary to have the individual agencies retain such records and assert such privilege or objections as necessitated by the circumstances. *See generally In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 352 (4th Cir. 1994) ("the party asserting a privilege bears the burden of establishing that privilege"). This Court agrees. The agencies must, however, comply with the requests for documents, and if privilege or confidentiality is asserted, the documents at issue should be separated, itemized, and a hearing requested for the Court to review the documents withheld under the claim of privilege or confidentiality to determine if such claim prevents disclosure of the documents. *Doe v. Ward Firm, P.A.*, 353 S.C. 509, 516 n.4, 579 S.E.2d 303, 306 n.4 (2003) (presiding judge determines whether material is subject to privilege). The Court will adhere to the process outlined in this order for all subsequent issues involving release of records from other agencies.

First Circuit Solicitor's Office Records

Applicant essentially alleged in the motion to compel, Motion, [unnumbered] pp. 3 and 4, and at the hearing, that he was entitled to review the entire file of the First Circuit Solicitor's Office records and questioned whether all materials had been released for review. It was determined at the hearing that the First Circuit Solicitor's Office had previously complied with Applicant's request for documents, and made all documents available for his review except for a package of documents over which it claimed work product privilege. Senior Assistant Solicitor B. Harrison Bell, Jr., presented the Court with the withheld documents. During a break in the proceedings of January 5, 2007, this Court reviewed the documents. The documents which this Court did not consider protected were released and reviewed by opposing counsel at the hearing. The solicitor's personal trial notes were not released and remain privileged. *See In re Doe*, 662

F.2d 1073, 1077 (4th Cir. 1981)("an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation, even if they have been reduced to writing."). Therefore, this Court finds all non-privileged records have been provided to Applicant, and the motion to compel in regard to these documents is now moot.

Other Records

Counsel for Applicant advised at the hearing that he would also seek, or is in the process of seeking, documents from the investigative agencies involved. However, there is no assertion of privilege or indication of non-compliance to prompt a hearing at this time in regard to any other agency. This Court will, however, convene a hearing upon request of either party to review compliance with document requests or the claim of privilege or confidentiality from any other agency as needed.

THEREFORE, based on the foregoing, Applicant's Motion to Compel Discovery from Respondent, to the extent that it requests the Attorney General to release all documents from other agencies, is DENIED. The above referenced procedure shall be followed in regard to document requests made in the instant action.

IT IS SO ORDERED.


D.A. Early, III, Presiding Judge
Second Judicial Circuit

January 11, 2007.
Bamberg, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
Applicant,)
v.)

Case No. 2005-CP-18-1368
(Capital PCR)

Jon Ozmint, Commissioner,)
of Department of Corrections,)
Respondent.)

CERTIFICATE OF SERVICE

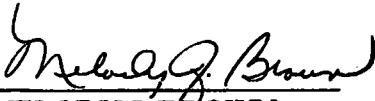
FILED-RECORDED
2007 JAN 18 PM 12:50
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

The undersigned certifies that on January 17, 2007, she served a copy of the ***Order Denying Motion to Compel Discovery from Respondent***, dated January 11, 2007, on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

John H. Blume, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

William S. McGuire, Esquire
225 Peachtree Street, N.E.
Suite 900, South Tower
Atlanta, Georgia 30303-1727

This 17th day of January, 2007.


MELODY J. BROWN
ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
Case No.: 05-CP-18-1368

Kenneth Simmons, SK 5066)

Applicant,)

v.)

John Ozmint, Commissioner,)

S.C. Department of Corrections,)

Respondent.)

MOTION TO SUBSTITUTE COUNSEL

Pursuant to SCRCP 11(c), Applicant Kenneth Simmons, by undersigned counsel, respectfully requests that the Court substitute Emily C. Paavola as counsel of record in his post-conviction proceedings in place of William S. McGuire, who earlier moved to be relieved as counsel for Mr. Simmons. In support of this motion, counsel would apprise this Court of the following relevant facts:

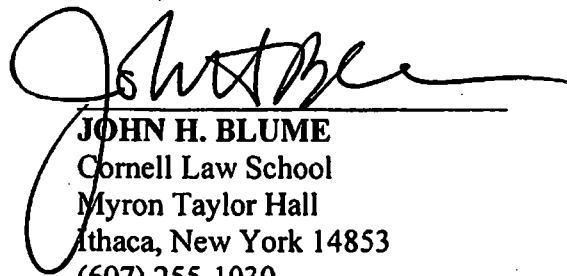
1. Emily C. Paavola is an attorney with Baker & Daniels LLP in Indianapolis, Indiana, and she is a member in good standing of the Bars of the State of Indiana and the State of New York. She is admitted to practice before the Indiana Supreme Court. Ms. Paavola has not been disciplined or sanctioned by any Bar of which she is a member.

2. Ms. Paavola is a recent graduate of Cornell University Law School and has completed a post-graduate fellowship at the Cornell Death Penalty Project, assisting in representing capital defendants in post-conviction cases. Ms. Paavola worked on Mr. Simmons' case during her fellowship at the Cornell Death Penalty Project. She is familiar with the record and facts of this case.

3. Ms. Paavola was recently admitted *pro hac vice* as counsel in another capital post-conviction relief proceeding in Cherokee County, South Carolina, Binney v. Ozmint, C.A. No. 06-CP-11-223.

4. Undersigned counsel believes that the appointment of Ms. Paavola to represent the applicant in this action will be cost efficient, serve the ends of justice in this State and would be consistent with SCACR Rule 404.

Respectfully submitted,



JOHN H. BLUME
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

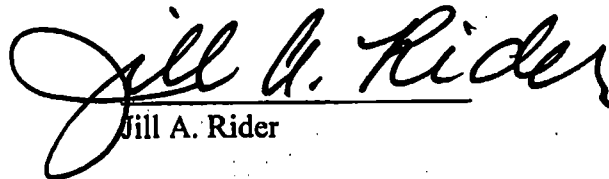
STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
KENNETH SIMMONS,)
)
Applicant,)
)
v.)
)
JON OZMINT Commissioner,)
S.C. Department of Corrections)
Respondent.)

IN THE COURT OF COMMON PLEAS
Case No.: 05-CP-18-1368

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Applicant's Motion to Substitute Counsel was served by first class United States mail, postage prepaid, this 18th day of January, 2007, upon the following:

Melody Brown
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons, 5066)

Applicant,)

v.)

Jon Ozmint, Commissioner,
of Department of Corrections,)

Respondent.)

C/A No.: 2005-CP-18-1368

RESPONSE TO APPLICANT'S
MOTION TO SUBSTITUTE COUNSEL

CLERK OF COURT
DORCHESTER COUNTY

2007 JAN 29 PM 12:17

CEMENTED COPY

On January 22, 2007, counsel for Respondent received a copy of Applicant's "Motion to Substitute Counsel." Respondent submits the following in response to the motion:

1. Respondent takes no position on the motion *provided*, as a condition precedent to the appointment, Emily C. Paavola, complete the required admission process as set out in Rule 404, South Carolina Appellate Court Rules, before engaging in the practice of law in this State.
2. Respondent takes no position on Ms. Paavola's qualification for appointment.
3. Respondent takes the position that Applicant is personally in agreement with the requested substitution of counsel absent specific objection to same.

Respectfully submitted,

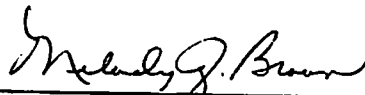
HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

By: 
MELODY J. BROWN

ATTORNEYS FOR RESPONDENT

January 26, 2007.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
Applicant,)
v.)
Jon Ozmint, Commissioner,)
of Department of Corrections,)
Respondent.)

Case No. 2005-CP-18-1368
(Capital PCR)

CERTIFICATE OF SERVICE

CLERK OF COURT
DORCHESTER COUNTY

Cheryl Harrison

2007 JAN 29 PM 12:11

CERTIFIED COPY

The undersigned certifies that on January 26, 2007, she served a copy of the *Response to Applicant's Motion to Substitute Counsel*, dated January 26, 2007, on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

John H. Blume, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

William S. McGuire, Esquire
225 Peachtree Street, N.E.
Suite 900, South Tower
Atlanta, Georgia 30303-1727

This 26th day of January, 2007.

Melody J. Brown
MELODY J. BROWN
ATTORNEY FOR RESPONDENT

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

JUDGMENT IN A CIVIL CASE
2005CP1801368

Kenneth Simmons, #5066

State of S.C.

CLERK OF COURT
COUNTY OF DORCHESTER
JUN 11 2007 11:01 AM
COPY

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE

()

JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND A VERDICT RENDERED.

☒ ()

DECISION BY THE COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION RENDERED.

()

ACTION DISMISSED (CHECK REASON): () RULE 12b, SCRPC; () RULE 41a, SCRPC (VOL NONSUIT); () RULE 43k, SCRPC (SETTLED) () OTHER

()

ACTION STRICKEN (CHECK REASON): () RULE 40(j) SCRPC; () BANKRUPTCY () BINDING ARBITRATION, SUBJECT TO RIGHT TO RESTORE TO CONFIRM VACATE OR MODIFY ARBITRATION AWARD; () OTHER _____

IT IS ORDERED AND ADJUDGED: ☒ See Attached order; () Statement of Judgment by the court.

☒ Order Relieving Counsel, filed May 23, 2007

Dated at St. George, this 23rd day of may, 2007.

Cheryl Graham

CHERYL GRAHAM
CLERK OF COURT

BY: Carolyn Ayer, Deputy Civil Court Coordinator

Carolyn Ayer

THIS JUDGMENT WAS ENTERED ON THE 23rd DAY OF may, 2007
AND A COPY WAS MAILED FIRST CLASS THIS 23rd DAY OF may
2007 TO ATTORNEY OF RECORD OR TO PARTIES WHEN APPEARING PRO SE
AS FOLLOWS:

John Blume
William McGuire

Melody Brown

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
)

Applicant,)
)

v.)
)

Jon Ozmint, Commissioner,)
 of Department of Corrections,)
)

Respondent.)
)
 _____)

C/A No.: 2005-CP-18-1368
 (Capital PCR)

ORDER RELIEVING COUNSEL

This matter is before me by way of Respondent's motion to determine if opposing counsel may continue representation when opposing counsel has been identified as a fact witness. A hearing was held on the motion on April 5, 2007, at the Bamberg County Courthouse. Applicant was present and represented by counsel, John H. Blume, Esquire.¹ Respondent was represented by Assistant Attorney General Melody J. Brown. After consideration of the arguments and case law presented at the hearing, this Court finds Mr. Blume is a necessary fact witness, and that he should be relieved of appointment. This Court's factual findings and its conclusions in this matter are more fully set out as follows:

Summary of the Evidence and Argument Presented at the Hearing

Respondent introduced time records that reflect trial counsel, Jerry N. Theos, Esq., contacted Mr. Blume specifically about a mental retardation expert. The records reflect an entry on October 27, 1998, for a 30 minute conversation with Mr. Blume about a "mental retardation

¹ William S. McGuire, Esq., was initially appointed along with Mr. Blume in this case. Mr. McGuire was not present at the hearing as he has previously moved to be relieved from appointment due to his relocation to the State of Georgia. An order substituting counsel has not yet been signed.

expert,” and another entry on January 19, 1999, again for a 45 minute conversation with Mr. Blume about “mental retardation experts.” (Court Exhibit 1). Respondent noted that Applicant has alleged counsel was ineffective in that he “failed to conduct a reasonable investigation into all available sources of mitigation,” specifically including the failure “to present evidence in mitigation of punishment” as to “applicant’s mental retardation, brain damage, mental illness” among other things. (Application, p. 3). Respondent argued that, upon information and belief, Mr. Blume suggested a specific expert, a Dr. Denis Keyes from Charleston, and that Mr. Theos and Mr. Blume had discussions concerning Dr. Keyes. Moreover, Dr. Keyes was consulted in preparation of the case, (See Court Exhibit 1, pp. 26, 28, 29, 31, 33, 35, 36), but was not called as a witness during the trial.

 Mr. Blume candidly conceded he was contacted and discussed a mental retardation expert with Mr. Theos. Mr. Blume further candidly conceded that he recommended and discussed Dr. Keyes. Mr. Blume maintained, however, that his discussions regarding Dr. Keyes were “general” in nature. In support of his assertion, Mr. Blume presented an affidavit from Mr. Theos. That affidavit confirms not only that Mr. Theos and Mr. Blume did discuss a mental retardation expert, but offers that Mr. Theos and Mr. Blume discussed *voir dire* issues.² (Court Exhibit 2). The affidavit also reflects that the “conversations were not substantive in nature.” (Court Exhibit 2).

Respondent relies primarily on Rule 3.7, Rule 407, SCACR, Rules of Professional Conduct, that provides:

² This Court notes that Applicant has also alleged that counsel was ineffective in that he “failed to conduct an appropriate and reasonable *voir dire*” of the jurors in the instant case. (Application, p. 2).

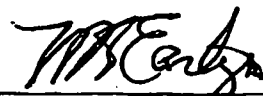
- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in this case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

 Respondent also relies on *Collins Entertainment, Inc., v. White*, 363 S.C. 546, 611 S.E.2d 262 (Ct.App. 2005), wherein the Court of Appeals upheld a ruling relieving counsel under Rule 3.7 after reviewing the provisions of the rule in light of the facts of the case. The Court specifically noted that "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." 363 S.C. at 564, 611 S.E.2d at 271, quoting *State v. Capps*, 276 S.C. 59, 65, 275 S.E.2d 872, 875 (1981). Respondent also presented for consideration the case of *State v. Sanders*, 341 S.C. 386, 389-91, 534 S.E.2d 696, 697-98 (2000), which quotes Rule 3.7, that "a lawyer 'shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness,'" and requires an evidentiary hearing to determine disqualification.

In light of the above facts, and after review of the offered case law, this Court agrees with Respondent that Mr. Blume is a necessary fact witness in this case, based on the allegations presently pending before this Court, and out of an abundance of caution will grant the motion to

have Mr. Blume disqualified and hereby relieves Mr. Blume of his appointment. Substitute counsel shall be appointed.

IT IS SO ORDERED.



D.A. Early, III, Presiding Judge
Second Judicial Circuit

May 14, 2007.
Bamberg, South Carolina.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
Kenneth Simmons,	)	
	)	
Applicant,	)	Case No. 2005-CP-18-1368
	)	(Capital PCR)
v.	)	
	)	
Jon Ozmint, Commissioner,	)	CERTIFICATE OF SERVICE
of Department of Corrections,	)	
	)	
Respondent.	)	
	)	

The undersigned certifies that on May 21, 2007, she served a copy of the *Order Relieving Counsel*, dated May 14, 2007, on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

John H. Blume, Esquire
Post Office Box 11744
Columbia, South Carolina 29211

William S. McGuire, Esquire
225 Peachtree Street, N.E.
Suite 900, South Tower
Atlanta, Georgia 30303-1727

This 21st day of May, 2007.


MELODY J. BROWN
ATTORNEY FOR RESPONDENT

FILED COPY
2007 JUN -5 AM 10:40

W. E. Earty, III
CLERK OF COURT
FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS, APPOINTMENT OF COUNSEL**

**JUDGMENT IN A CIVIL CASE
2005CP1801368**

Kenneth Simmons, #5068

State of S.C.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE

()

JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND A VERDICT RENDERED.

☒

DECISION BY THE COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION RENDERED.

()

ACTION DISMISSED (CHECK REASON): () RULE 12b, SCRPC; () RULE 41a SCRPC (VOL NONSUIT); () RULE 43k, SCRPC (SETTLED) () OTHER

()

ACTION STRICKEN (CHECK REASON): () RULE 40(j) SCRPC; () BANKRUPTCY () BINDING ARBITRATION, SUBJECT TO RIGHT TO RESTORE TO CONFIRM VACATE OR MODIFY ARBITRATION AWARD; () OTHER

IT IS ORDERED AND ADJUDGED: () See Attached order; () Statement of Judgment by the court. ☒ It is Ordered that James M. Merton, P.O. Box 707, Rock Hill, S.C. 29731 and H. Wayne Floyd, P. O. Box 3972, W. Columbia, S.C. 29171-3972, is hereby appointed to represent the above named Applicant.

Dated at Beaufort, S.C. This 4th day of June, 2007.

D. A. Earty, III
D. A. Earty, III, Presiding Judge

THIS JUDGMENT WAS ENTERED ON THE 5th DAY OF June, 2007 AND A COPY WAS MAILED FIRST CLASS THIS 5th DAY OF June, 2007 TO ATTORNEYS OF RECORD OR TO PARTIES WHEN APPEARING PRO SE AS FOLLOWS:

James Merton
H. Wayne Floyd

Melody Brown
Asst. Atty. General

John Blume
for d Copy
6-5-07

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
Applicant,)

C/A No.: 2005-CP-18-1368

v.)

John Ozmint, Commissioner,)
S.C. Department of Corrections,)
Respondent.)

Motion To Substitute Counsel

Pursuant to SCRCP 11(b), Applicant Kenneth Simmons, by undersigned counsel, respectfully requests that the Court substitute Emily C. Paavola as counsel of record in his post-conviction proceedings in place of Wayne Floyd, who consents to be relieved as counsel. In support of this motion, counsel would apprise this Court of the following relevant facts:

1. Wayne Floyd believes it would be in Kenneth Simmons' best interest to substitute Emily C. Paavola as post-conviction counsel because she is more familiar with the case and has more time available to devote to the case at this point, and he consents to be relieved as counsel for Mr. Simmons.

2. Emily C. Paavola recently accepted the position of Director of the Center for Capital Litigation and moved to Columbia, South Carolina. She is a member in good standing of the Bars of the State of Indiana and the State of New York. She is admitted to practice before the Indiana Supreme Court. Ms. Paavola has not been disciplined or sanctioned by any Bar of which she is a member.

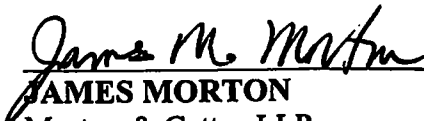
3. Ms. Paavola has a pre-existing positive relationship with Mr. Simmons. She is a graduate of Cornell University Law School and completed a post-graduate fellowship at the Cornell Death Penalty Project, assisting in representing capital defendants in post-conviction cases. Ms. Paavola worked on Mr. Simmons' case during her fellowship at the Cornell Death Penalty Project. She is familiar with the record and facts of this case.

4. Ms. Paavola was recently admitted *pro hac vice* as counsel in another capital post-conviction relief proceeding in Cherokee County, Binney v. Ozmint, C.A. No. 06-CP-11-223. She is willing to complete the required admission process as set out in Rule 404, South Carolina Appellate Court Rules, in order to be appointed *pro hac vice* in Mr. Simmons' case.

5. Undersigned counsel believes that the appointment of Ms. Paavola to represent the applicant in this action will serve the ends of justice in this State and would be consistent with SCACR Rule 404.

6. Undersigned counsel has conferred with counsel for the State and is authorized to represent that the State does not oppose this motion.

Respectfully submitted,


JAMES MORTON
Morton & Gettys LLP
334 Oakland Avenue
Post Office Box 707
Rock Hill, SC 29731

CERTIFICATE OF SERVICE

I certify that on July 21, 2008, a copy of the foregoing was served upon the following

counsel by United States mail, postage prepaid:

HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-5624


James Morton

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
)
 Applicant,)
)
 v.)
)
 John Ozmint, Commissioner,)
 S.C. Department of Corrections,)
)
 Respondent.)

C/A No.: 2005-CP-18-1368

ORDER GRANTING SUBSTITUTION OF COUNSEL

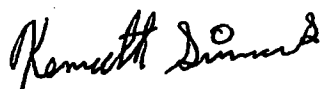
This matter comes before the Court upon Applicant's motion to substitute Emily C. Paavola as counsel in place of Wayne Floyd. This Court finds that Mr. Floyd consents to be relieved of his duties in this matter. This Court further finds that Ms. Paavola has been admitted *pro hac vice* as counsel in another pending capital post-conviction relief proceeding in this state, that she is familiar with the facts and circumstances of Applicant's case, and that her appointment as counsel would serve the ends of justice.

IT IS THEREFORE ORDERED that Wayne Floyd is relieved as counsel and Emily C. Paavola is substituted as counsel for Applicant and is hereby admitted to participate in this action.

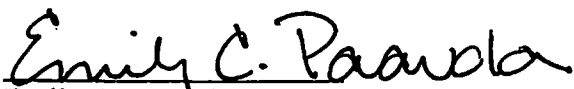
AND IT IS SO ORDERED.

 J. Doyet A. Early, III, Circuit Judge

 DATE



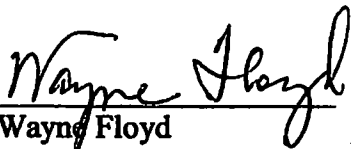
Kenneth Simmons



Emily C. Paavola



James Morton



Wayne Floyd

DISTRIBUTION TO:

HENRY DARGAN MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General
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JAMES MORTON
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WAYNE FLOYD
Wayne Floyd Law Offices
1611 Augusta Road
West Columbia, SC 29169

EMILY C. PAAVOLA
The Center for Capital Litigation
Post Office Box 11311
Columbia, SC 29211

MORTON & GETTYS
ATTORNEYS AT LAW

3728

JAMES M. MORTON
JOHN P. GETTYS, JR.
MICHAEL B. SMITH †

JOSHUA B. VANN
SHANNON M. LANDO
ELIZABETH S. OWEN
TRENT M. GRISSOM •

Certified Family Court Mediator †
Licensed in NC only •

July 23, 2008

Melody Brown, Esq.
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29277

Dear Melody:

Thank you for discussing with me the prospect of substituting Emily Paavola as counsel to replace Wayne Floyd in the Kenneth Simmons case.

You were correct in remembering that Emily had previously, tentatively, been approved for appointment pending her application for pro hac vice status. The Judge had indicated that he would sign the order appointing her as soon as her application for pro hac vice was approved by the Supreme Court. As I understand, the pro hac vice application had been approved and Emily had paid her fee.

Secondly, Emily assures me that she has not discussed with John Blume the issues regarding his advice to Jerry Theos about the mental retardation expert.

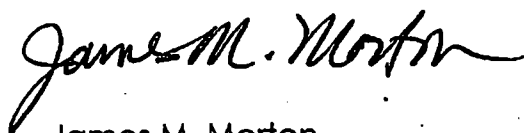
Thank you for your consideration on this matter. Emily lives and works in Columbia now and will be taking the bar in February. She remains however, an attorney in good standing in Indiana and New York so we could go ahead and have Judge Early sign the Pro Hac Order.

Again, thanks for your understanding. Knowing how busy Wayne has been I hope this will benefit all concerned.

Sincerely,

ROCK HILL OFFICE
334 Oakland Avenue
PO Box 707
Rock Hill, SC 29731
office 803.366.3388
fax 803.324.3768

INDIAN LAND OFFICE
7580 Charlotte Highway
Highway 521, Suite 700
Fort Mill, SC 29707
office 803.548.5646
fax 803.547.4044

A handwritten signature in black ink, reading "James M. Morton". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

James M. Morton
Attorney at Law

cc: Emily Paavola

MORTON & GETTYS

ATTORNEYS AT LAW

JAMES M. MORTON
JOHN P. GETTYS, JR.
MICHAEL B. SMITH †

JOSHUA B. VANN
SHANNON M. LANDO
ELIZABETH S. OWEN
TRENT M. GRISSOM

Certified Family Court Mediator |
Licensed in NC only

August 14, 2008

The Hon. D.A. Early, III
Judge of Second Judicial Circuit
Post Office Box 90
Bamberg, South Carolina 29003

Re: Case No.: 2005CP1801368

Dear Judge Early:

Enclosed please find a Motion to Substitute Counsel for Kenneth Simmons for your review. I have also included a Proposed Order. I have also enclosed a letter I sent to Melody Brown explaining Ms. Paavola's situation. Melody indicated to me that the Attorney General has a policy of not consenting to changes in counsel, that they felt that decision was strictly within the purview of the Court and therefore her consent signature is not included. She did indicate that she did not have any objection to the change of counsel. Please call me should you have any questions. Thank you for your time.

Sincerely,


James M. Morton
Attorney at Law

ROCK HILL OFFICE
334 Oakland Avenue
PO Box 707
Rock Hill, SC 29731
office 803.366.3388
fax 803.324.3768

cc: Emily Paavola
Melody Brown
Wayne Floyd

INDIAN LAND OFFICE
7580 Charlotte Highway
Highway 521, Suite 700
Fort Mill, SC 29707
office 803.548.5646
fax 803.547.4044

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 05-CP-18-1368
KENNETH SIMMONS	)	
<i>Applicant,</i>	)	FIRST AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
<i>Respondent.</i>	)	

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Dorchester County Court of General Sessions.
3. Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 98-GS-18-0075
 - (b) Burglary: 98-GS-18-0076
 - (c) Armed Robbery: 98-GS-18-0077
 - (d) Criminal Sexual Conduct: 98-GS-18-0078
 - (e) Kidnapping: 98-GS-18-0079
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on March 2, 1999 as follows:
 - (1) Murder: Death
 - (2) Burglary: Life imprisonment
 - (3) Armed Robbery: 30 years
 - (4) Criminal Sexual Conduct: 30 years
 - (5) Kidnapping: Not applicable. See 6-3-20 and 6-3-910
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.

8. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.
 - (ii) The United States Supreme Court.
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence for armed robbery overturned; remaining convictions and sentences affirmed.
 - (ii) Petition for Writ of Certiorari denied.
- (c) The date of each result:
 - (i) Convictions and sentences affirmed on June 14, 2004;
 - (ii) Petition for Writ of Certiorari denied on January 24, 2005.
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004).
 - (ii) *Simmons v. South Carolina*, 125 S.Ct. 1068 (Jan. 24, 2005).
9. Not applicable.

GROUND FOR RELIEF WITH SUPPORTING FACTS

- 10 & 11(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt-or innocence phase of his capital trial when trial counsel: (1) failed to make appropriate objections challenging the relevance and significance of the state's DNA evidence and failed to effectively cross-examine the state's DNA witnesses or otherwise expose flaws in the DNA testimony; (2) failed to retain a false confession expert; and, (3) failed to investigate, discover and present evidence that the state's witness, Leslie Sandler, had previously admitted in a court of law that he falsely purported to make a conclusive diagnosis of a former patient on the basis of various standardized tests, including the Wechsler Adult Intelligence Scale, when he had not fully administered those tests, nor did he record the results of those tests. Moreover, counsel failed to discover and present evidence that Leslie Sandler falsely stated his credentials during testimony at a sworn deposition and during an arbitration hearing. *See Strickland v. Washington*, 466 U.S. 668 (1994); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).
- 10 & 11(b) Applicant was denied the right to the effective assistance of counsel

guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the sentencing phase of his capital trial when trial counsel: (1) failed to present evidence of Applicant's adaptability to confinement; and, (2) failed to object to the State's improper statements in closing argument. *See Strickland v. Washington*, 466 U.S. 668 (1994); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

- 10 & 11(c) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded. Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).
- 10 & 11(d) Applicant was denied due process of law and a fundamentally fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution, when: (1) the State presented false, misleading, inaccurate and unreliable DNA evidence and failed to disclose relevant, impeachment and other favorable and material evidence; and, (2) the State failed to disclose relevant and material impeachment evidence related to its witness, Leslie Sandler. *See Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Darden v. Wainwright*, 477 U.S. 168 (1986).
12. (a) Applicant has not filed any petition in State Court.
 (b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
 (c) No other petitions were filed.
 (d) No other petitions, motions or applications in this or any other court.
13. Not applicable.
14. None of the grounds set forth in (10) has been previously presented to this or any other Court, State or Federal.
15. Not Applicable.
16. These grounds rely on additional facts outside the record which was before the previous

courts.

17. Applicant was previously represented by counsel.
18. Applicant was represented at trial by Jerry N. Theos, of Uricchio Howe Krell Jacobson, Toporek & Theos, P.A., P.O. Box 399, Charleston, South Carolina 29402-0399, and by James A. Bell, of Bell & Witherspoon, 216 North Parler Avenue, St. George, South Carolina 29477.

On direct appeal applicant was represented by Robert M. Dudek and Eleanor Duffy Cleary of the South Carolina Office of Appellate Defense, 1122 Lady Street, Columbia, South Carolina 29201.

19. Applicant seeks relief from his convictions and sentences.
20. Applicant is not under sentence from any other court.

Respectfully submitted,

EMILY C. PAAVOLA

The Center For Capital Litigation
P.O. Box 11311
Columbia, South Carolina 29211

JAMES MORTON

Morton & Gettys LLP
334 Oakland Avenue
P.O. Box 707
Rock Hill, South Carolina 29731

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

December 21, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

KENNETH SIMMONS,
Applicant,

v.

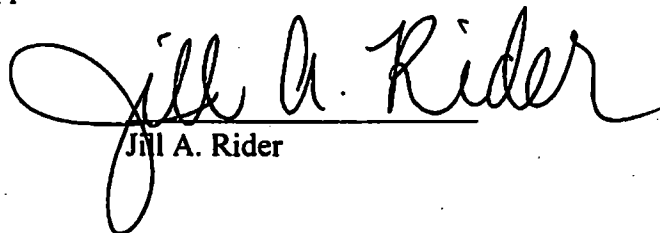
GARY MAYNARD, COMMISSIONER,
S.C. Department of Corrections
Respondent.

IN THE COURT OF COMMON PLEAS
Case No.: 05-CP-18-1368

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing First Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 21st day of December, 2009, upon the following:

Melody Brown
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

KENNETH SIMMONS

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 05-CP-18-1368

NOTICE OF INTENT TO RELY UPON
AFFIDAVITS AND OTHER
DOCUMENTARY EVIDENCE

Applicant, Kenneth Simmons, hereby informs both the Court and opposing counsel that he intends to offer proof in support of his post-conviction relief claims through affidavits of certain defense witnesses in lieu of direct examination of those witnesses at trial. Applicant also intends to introduce a certified copy of the transcript of record in *Commonwealth of Pennsylvania, State Board of Psychology v. Leslie N. Sandler*. In support of this notification, applicant apprizes this Court of the following relevant facts:

1. Applicant, Kenneth Simmons, is an indigent, death-sentenced inmate in South Carolina. He was convicted and sentenced to death in Dorchester County. *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004), *cert. denied*, 125 S.Ct. 1068 (Jan. 24, 2005). He is currently seeking post-conviction relief.

2. In support of his application for post-conviction relief, applicant intends to rely upon affidavits and other documentary evidence provided by certain defense witnesses in lieu of conducting direct examination of those witnesses at trial. This procedure is authorized pursuant to S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, “[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court may

receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." Furthermore, this procedure has been used in numerous capital post-conviction cases, *see, e.g., Herman Lee Hughes v. Michael Moore*, 98-CP-09-101 (Calhoun Common Pleas); *Joseph M. L. Gardner v. Michael Moore*, 98-CP-18-453 (Dorchester County); *Keith L. Simpson v. Michael Moore*, 97-CP-42-1911 (Spartanburg County). The South Carolina Supreme Court has specifically approved this process: *Simpson v. Moore*, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006) (finding that the PCR court did not err in allowing the applicant to introduce over forty depositions and approximately twenty-two affidavits into evidence in lieu of live testimony); *see also, Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982).

3. Moreover, this process is in no way prejudicial to the State's case. By employing this procedure, applicant seeks to expedite the hearing and eliminate the need for live testimony – or at least direct testimony – from a number of relatively minor witnesses. The Attorney General will, in fact, have an improved opportunity to see the witnesses' direct testimony and make an informed decision about whether to cross-examine those witnesses than if the witnesses were called for direct examination at the evidentiary hearing.

4. Undersigned counsel have previously provided counsel for respondent with photocopies of all of the affidavits they currently intend to admit. Applicant hereby provides both counsel for the respondent and the court with copies of all of the affidavits presently in his possession that he intends to admit, as well as a certified copy of the transcript of record in *Commonwealth of Pennsylvania, State Board of Psychology v. Leslie N. Sandler*, attached cumulatively hereto as Attachment A.

5. Applicant believes that at least one additional affidavit from Dr. Richard Leo will be

filed in the next seven to ten days. Dr. Leo has previously been disclosed to respondent as an expert witness. Dr. Leo is an expert on false confessions who resides in San Francisco, California. To save additional time and costs, applicant submits that should respondent wish to cross-examine Dr. Leo, he is willing to do so via videotaped deposition, perhaps sometime after the currently scheduled in-court portion of the evidentiary hearing.

6. Of course, applicant acknowledges that the Attorney General has the prerogative to call any or all witnesses who have provided affidavits or other documentary evidence for purposes of cross-examination. Whether to do so is completely within the Attorney General's discretion.

WHEREFORE, applicant requests that the Court accept the affidavits and other documentary evidence provided by certain defense witnesses in lieu of a direct examination of those witnesses at trial.

Respectfully submitted,

EMILY C. PAAVOLA

The Center For Capital Litigation
P.O. Box 11311
Columbia, South Carolina 29211

JAMES MORTON

Morton & Gettys LLP
334 Oakland Avenue
P.O. Box 707
Rock Hill, South Carolina 29731

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

January 14, 2010

ATTACHMENT A

STATE OF SOUTH CAROLINA

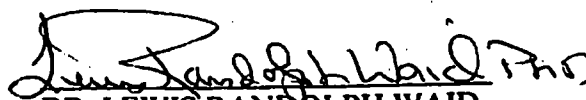
COUNTY OF Charleston

AFFIDAVIT

Dr. Lewis Randolph Waid, Ph.D., who appeared personally before me, affirms and states the following:

1. I am a licensed clinical psychologist. My office address is 1459 Stuart Engals Blvd., Mt. Pleasant, South Carolina.
2. I testified as an expert witness for the defense at the trial in *State v. Kenneth Simmons* in Dorchester County in 1999.
3. I evaluated Mr. Simmons regarding his competency to stand trial; his ability to understand his *Miranda* rights; and other potential mitigating factors.
4. I was not asked to determine whether or not Mr. Simmons met diagnostic criteria for mental retardation. Furthermore, I did not have all of the materials available to me that I would require for an evaluation of mental retardation per standards of current practice. For example, I did not have access to a complete social history or have family members and teachers available for interview. I did not formally assess Mr. Simmons' adaptive behavior functioning.
5. I conducted my evaluation of Mr. Simmons prior to the Supreme Court's decision in *Atkins v. Virginia*. Thus, distinguishing between mental retardation, borderline intellectual functioning or brain damage due to injury or drug use did not have the same legal significance that it has today. Given what I was asked to do – assess whether Mr. Simmons could comprehend and thus make a knowing and intelligent waiver of the *Miranda* rights – the important issue was Mr. Simmons' cognitive deficits, not determining whether he had mental retardation.
6. It was for these reasons that I did not make a formal assessment of Mr. Simmons' deficits in adaptive functioning or whether his significantly sub-average intellectual functioning manifested itself during the developmental period.

Further affiant sayeth naught.


DR. LEWIS RANDOLPH WAID

Sworn to and subscribed before me

This 18 day of December, 2009

Janet A. Gaddy
Notary Public for the State of South Carolina
My commission expires: 2011

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

AFFIDAVIT

Mr. Bo Parks, who appeared personally before me, affirms and states the following:

1. My name is Bo Parks. My address is [REDACTED]

2. I was a former teammate of Kenneth Simmons's on the Summerville High School football team.

3. I remember one time at a game Kenneth had a sore throat and drank a whole bottle of cough syrup because he thought that the more he took, the faster he would get better.

Further affiant sayeth naught.


BO PARKS

Sworn to and subscribed before me

This 26th day of June, 2009


Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

AFFIDAVIT

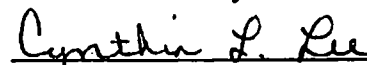
Ms. Paula Walsh, who appeared personally before me, affirms and states the following:

1. My name is Paula Walsh. I am employed at Summerville High School.
2. I testified as the records custodian at Kenneth Simmons's trial. I brought his school records to court.
3. I viewed my role as simply to take the records to the court. I do not have expertise in interpreting the records.
4. I was not aware that the IQ test scores on the school records were various group tests rather than individually administered IQ exams.

Further affiant sayeth naught.


PAULA WALSH

Sworn to and subscribed before me
This 11th day of June, 2009


Notary Public for the State of South Carolina
My commission expires: 3/9/2017



STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

)
)
)

AFFIDAVIT

Ms. Robyn Beach Schmeiding, who appeared personally before me, affirms and states the following:

1. My name is Robyn Beach Schmeiding. My address is [REDACTED]
2. I attended Alston Middle School with Kenneth Simmons. I was also friends and classmates with him in high school. I later reconnected with Kenneth when I was a volunteer at the Palmetto House Homeless Shelter.
3. Everyone in high school liked Kenneth because he was so simple that there was no reason not to like him. In fact, I always thought it would be very easy for someone to take advantage of him. Kenneth was very protective of girls and would help out with projects like the homecoming float.
4. In fact, I would have Kenneth do yard work for me and even left him alone with my baby once while I ran out to pick up lunch for him. I trusted Kenneth completely and knew she would be safe with him. I would not have asked Kenneth to do anything complicated like feed or bathe my daughter because I knew that he would not be able to do those tasks.
5. At the Palmetto House, Kenneth would do yard work and other basic chores. Kenneth was willing to work, but I do not remember him ever holding a steady job.
6. Kenneth was not a football star. He was just big and strong. I think he played a simple defensive position.
7. The other players on the football team were protective of Kenneth and looked out for him and liked him.
8. Kenneth was not bright and I believe that he did not get the help he needed while growing up. I believe that he fell through the cracks.
9. I have received at least one letter from Kenneth while he has been in prison. It was very difficult to read. The spelling was bad and the language was not fluent.

Further affiant sayeth naught.

Robyn Beach Schmieding
ROBYN BEACH SCHMEIDING

Sworn to and subscribed before me
This 11th day of June, 2009

Gill A. Kidor
Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA

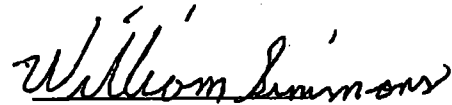
COUNTY OF DORCHESTER

AFFIDAVIT

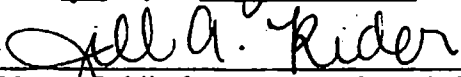
Mr. Jack Simmons, who appeared personally before me, affirms and states the following:

1. My name is William ("Jack") Simmons. My address is [REDACTED]
2. I am currently retired from my position at Coca Cola where I ran a forklift, put up advertisement signs, stacked bottles, and cleaned the large steel mixing tanks.
3. I am the older brother of Kenneth Simmons and moved out of the family house in 1962 when Kenneth was a baby.
4. I recall that my siblings were born at home by a midwife. I remember one incident in particular where Kenneth's mother, Anna Simmons, went to the hospital to deliver a child, but was turned away because our family did not have any insurance.
5. When Kenneth lived at home after the other siblings moved out, our father, Eugene Simmons, or our sister Annette would do the cooking.
6. Kenneth worked a lot of odd jobs. A friend of Kenneth's named Charlie Wilson would have work to do and would stop by the house to pick Kenneth up to help. I do not remember Kenneth ever having a single steady job or formally applying for one.
7. I have never seen Kenneth drive a car and am unaware that Kenneth has ever possessed a driver's license. I cannot imagine that Kenneth could own a car titled in his name.

Further affiant sayeth naught.


JACK SIMMONS

Sworn to and subscribed before me
This 1st day of June, 2009


Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA)

AFFIDAVIT

COUNTY OF DORCHESTER)

Mr. Lagare Simmons, who appeared personally before me, affirms and states the following:

1. My name is Legare Simmons. ^{LS work} My address is 387 South Railway Avenue, Ridgeville, South Carolina.
2. I am Kenneth Simmons's older brother. I grew up with him on [REDACTED]
3. All of my siblings were born at home with a midwife.
4. Kenneth did some work with our brother, Michael Simmons, doing masonry work. Kenneth mixed mortar and worked as a laborer. Kenneth did not have any jobs that required complex tasks.
5. After ^{his} ~~our~~ mother died and our father became ill, several of our aunts came over to take care of Kenneth and Annette every day. Either our aunts or Annette did the cooking. I have never seen Kenneth cook anything. Our father was ill at home for approximately one month before he died.

Further affiant sayeth naught.

Legare Simmons
LEGARE SIMMONS

Sworn to and subscribed before me
This 1st day of June, 2009

Jill A. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA)

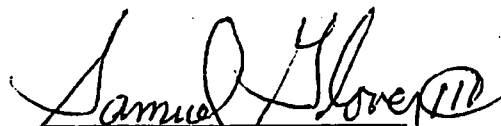
COUNTY OF DORCHESTER)

AFFIDAVIT

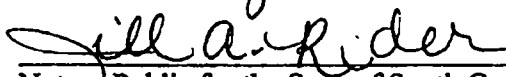
Mr. Sam Glover, who appeared personally before me, affirms and states the following:

1. My name is Sam Glover. My address is [REDACTED]
[REDACTED]
2. ~~I am a brick mason.~~ ^{sub-contractor, brick work S&T} I employed Kenneth Simmons as a laborer. Kenneth worked for me after school and on weekends.
3. I did not require a formal application for Kenneth to work for me. I knew his family and we grew up in the same area. I am approximately 10 years older than Kenneth. Kenneth was quiet and well-behaved. He came from a good family.
4. When Kenneth worked for me, he did tasks like loading and unloading a wheelbarrow full of bricks and shoveling mortar.
5. Kenneth was not a brick mason. He did not lay bricks. Some of my employees would take initiative to learn new and more complicated tasks, but Kenneth was not like that. He was willing to work hard, but he did not take on the more complicated work.

Further affiant sayeth naught.


SAM GLOVER

Sworn to and subscribed before me
This 11th day of June, 2009


Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

AFFIDAVIT

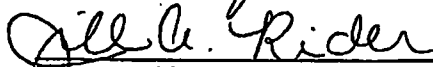
Mrs. Doris Russell, who appeared personally before me, affirms and states the following:

1. My name is Doris Russell. My address is [REDACTED]
2. I was ^{former manager} ~~a volunteer~~ at the Palmetto House, which provides shelter and food for Summerville's homeless, during the time that Kenneth Simmons came to the shelter beginning in 1990.
3. I knew Kenneth from before he came to the Palmetto House because he used to date a girl that lived across the street from me. Kenneth often did work inside of my house, such as painting, or yard work. I often left Kenneth alone to work inside of my house and when I returned nothing would be out of place.
4. Kenneth also used to help out at Palmetto House, such as mopping floors, putting out garbage, and doing other simple tasks.
5. Kenneth could not do tasks without getting careful directions. For example, I could not tell him to measure a wall, but I could tell him where to place things on the wall.
6. Kenneth was passed along in school because he was a football player.
7. Kenneth has always been helpful and caring of others. When he was younger he helped to take care of his mother when she was sick. The only thing Kenneth has of his father is his father's coat. When Kenneth was sentenced to death he asked me to keep his father's coat for him, which I still have in my closet.
8. Kenneth has written me from jail. His spelling and writing is very poor. He generally seems to write the same phrases over and over again.
9. I allow Kenneth to call me once a week. When he calls he talks to me about his health problems and his Bible Study class. Kenneth goes to Bible Study to listen to other people read from the Bible.

Further affiant sayeth naught.


DORIS RUSSELL

Sworn to and subscribed before me
This 2nd day of June, 2009


Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF

Ms. Margaret Halstead, who appeared personally before me, affirms and states the following:

1. My name is Margaret Halstead. My address is [REDACTED] *mtt*
2. I ~~previously~~ *mtt* worked for the Palmetto House in Summerville.
3. During my course of employment, I encountered Kenneth Simmons when he visited the Palmetto House. The original site of Palmetto House was on Palmetto Street in an area called the Hill, where drugs predominated and gunshots were heard.
4. Kenneth had stomach, teeth and eye problems while visiting the Palmetto House.
5. He helped others and often helped with heavy lifting and other manual tasks. He was skilled at painting, but could not perform undirected tasks. He could complete tasks if very simple instructions were given to him, for example, being told to stack the blue tiles against the red wall.
6. I never felt uncomfortable around Kenneth. He would often tell others not to speak disrespectfully or swear in front of me.
7. Kenneth had Felix Ross and Angie B as friends, who were mean and violent.
8. I have received letters from Kenneth from prison. His writing was very poor and childlike.

Further affiant sayeth naught.

Margaret Halstead
MARGARET HALSTEAD

Sworn to and subscribed before me
This 2nd day of June, 2009.

Jill A. Rider
Notary Public for the State of South Carolina
My commission expires: 6-19-16

STATE OF SOUTH CAROLINA)

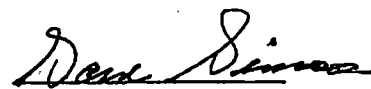
COUNTY OF DORCHESTER)

AFFIDAVIT

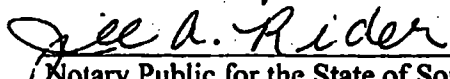
Mr. Gene Simmons, who appeared personally before me, affirms and states the following:

1. I am an older brother of Kenneth Simmons.
2. Before I left Summerville to join the military, I helped Kenneth get a job with Charlie Wilson doing general construction and contract work.
3. No application or formal training was necessary to work for Charlie. Jobs were obtained through word of mouth. Generally kids in the neighborhood would just jump on Charlie's truck when they needed to work and would do whatever small jobs were necessary on the construction site. I asked Charlie to hire Kenneth.
4. Kenneth helped work to build an addition on my house. His duties consisted of nailing boards and other very simple tasks.
5. To my knowledge, Kenneth has never done any complex carpentry or brick masonry work. All of his jobs have been working as a laborer.
6. Kenneth lived in a small building on my property for a little while, but I asked him to move out as Kenneth could not take care of the place. For example, he would leave the doors and windows open in winter time when he was not at home.

Further affiant sayeth naught.


GENE SIMMONS

Sworn to and subscribed before me
This 2nd day of June, 2007 ~~2009~~


Notary Public for the State of South Carolina
My commission expires: 10-19-16

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
Applicant,)

C/A No.: 2005-CP-18-1368

v.)

John Ozmint, Commissioner,)
S.C. Department of Corrections,)
Respondent.)

AFFIDAVIT OF LINDA SHWEC

Comes now the undersigned who makes the following statement, under oath, and before the undersigned Notary Public who is authorized by law to hear and accept oaths, and based upon her own personal knowledge of the facts averred herein states as follows:

1. My name is Linda Shwec. I am employed by Dorchester County Adult Education. My office telephone number is 843-873-7372.
2. I have been a special education teacher for over thirty years. I have a degree in special education from Baptist College. I earned a masters degree at the Citadel in learning disabilities. I have also completed some post-graduate training related to my field.
3. From 1978 to 1980, I taught eleventh and twelfth grade Remedial English to Kenneth Simmons at Summerville High School. Kenneth was also in my Resource Period class those years as part of the Resource Program ("Resource"). Resource was a special education program.
4. At the time that Kenneth Simmons was in school at Summerville High School, the school had two types of special education programs. There was a self-contained special

education program for severely disabled students – for example, those who needed assistance with feeding themselves or those with Downs Syndrome. The Resource Program was another type of special education program. Students who were placed in Resource were "mainstreamed," meaning that they were in certain remedial level classes, and then came to the Resource Class to work on basic skills and to get extra help with their coursework.

5. In order to be placed in the Resource Program, a student had to be individually tested by a psychologist who determined whether or not the student qualified for Resource. Students were usually tested if either a teacher or a parent requested the testing.

6. At the beginning of the 1978 school year, Kenneth Simmons was failing remedial English with Jan Hilton. Ms. Hilton was a teacher that would recognize learning disabled students and do something about it, whereas other teachers would just try to help out kids like Kenneth by passing them along. Teachers would often try to help kids who were struggling by allowing them to do extra work or come in for extra help, rather than give them a bad grade or refer them to special education.

7. Sometimes, in the case of special education students who were not performing well in class, teachers would allow the student to take a test over or do extra work to meet minimum requirements. Occasionally this was because the athletic coach requested it.

8. Kenneth was sweet and did not have any behavioral problems, so many teachers may have overlooked his academic deficiencies, but Ms. Hilton was particularly diligent about recognizing students with difficulties and getting help for them. Her teaching style was conducive to anyone succeeding if they were capable, but Kenneth was nonetheless failing her class. After the first quarter of the 1978/1979 school year, Kenneth was placed in the Resource Program and moved to my English class.

9. The results of psychological testing for special education are stored at Special Services. I have checked with Special Services to see if they retained any records about Kenneth Simmons, but those records have been destroyed.

10. Kenneth was able to carry out basic skills like feeding and clothing himself without assistance and complete simple academic tasks. He was not a candidate for the self-contained special education program, but he definitely belonged in Resource.

11. I did not see Kenneth have any close friends in Resource, but he was somewhat able to adapt socially. He was on the football team. He was a good follower, but he could never be a team leader. He was very shy. He seemed to try hard at his school work.

12. At the time that Kenneth Simmons was in high school, there were approximately thirty students a year in the Resource Program.

13. Kenneth earned an "A" in my class because I set individual goals that allowed my students to succeed. I did not set them up for failure, and anyone who tried could earn an "A." I individualized the curriculum for each student. The goal was to make sure that they graduated and improved basic academic skills.

14. I helped Kenneth with all of his subjects, but his greatest weaknesses were with reading and reading comprehension. Kenneth would bring his homework or class work to me, and I would help him read it or read it to him. He especially needed help reading assignments in Science and History. Some of Kenneth's teachers would allow him to bring his tests to me, and I would read and explain the test to him. I had to paraphrase and re-word questions for him so that he could comprehend. Kenneth could read more than he could comprehend.

15. With Kenneth, I used books at a reading level C. Level C materials contained short paragraphs and sentences composed of simple words. There was a lot of repetition. The

level C materials were written at a fourth or fifth grade level. I had to go over and over the material in these books with Kenneth.

16. It is somewhat unusual for a student not to be identified for special education until the eleventh grade. However, in Kenneth's case, I think he was not identified earlier because, as I have described above, he was easy to get along with, and he did try in school. I think a lot of teachers would have wanted to help him by passing him. It is also possible that some teachers would have ignored Kenneth. Some teachers did not want to work with handicapped students

17. I have reviewed and am familiar with Kenneth Simmons's school records. A copy of those records is attached to this affidavit as Exhibit A.

18. The terms "Basic" and "General" used on Kenneth's transcript both indicate remedial courses. At that time, Summerville High School had three categories of courses: college prep, general studies, and remedial. In certain subjects, the general course was the lowest level. For example, "general" was the lowest level for science and math. "Remedial" was the lowest level for English. There were also some courses called "Basic," which were the same as a remedial level. For example, Kenneth had U.S. History Basic with Betsy McAmis. That course was created for students who could not grasp the material in the General U.S. History course. I specifically remember that Ms. McAmis took the General course book and rewrote it for her Basic level students because they could not comprehend the material in the General textbook, and there was no textbook available at a lower level.

19. Other courses did not have different levels. For example, classes like Social Studies, Physical Education, Home Economics, Civics, and Driver's Education had only one basic level for everyone who took those subjects.

20. Summerville schools also sometimes categorized classes as Level 1, 2 or 3. Level 3 was the remedial level.

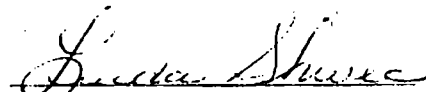
21. Starting in the seventh grade when different levels of classes were available, Kenneth was in the lowest level available in every class he had.

22. Kenneth's school records purport to contain "IQ scores" in some of the elementary school years. For example, his records state that in the first grade his IQ was 94, in the third grade his IQ was 104, and in the fourth grade his IQ was 69. These scores are transferred to the individual years' records from a separate page of Kenneth's school records, which is marked "Primary Mental Abilities." This record shows that the actual tests from which these scores are derived were the SRA Primary Mental Abilities Test ("SRA PMA") and the Short Form Test of Academic Aptitude ("SFTAA"). These tests are not true IQ tests. They were not individually administered by a psychologist. Rather, these were group standardized tests given to all elementary school students.

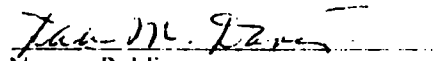
23. Kenneth Simmons' performance in school is consistent with the abilities of a person with mental retardation. For example, in the eleventh grade, Kenneth's school records show that he was testing at a fifth grade reading level and at the 4.7 level in math. Kenneth also performed poorly in a number of very simple courses. He failed Driver's Education and had to retake the class. He also failed Consumer Education and got an "F" in the first semester of Personal Health. These were very easy courses for most students. Consumer Education was basically about how to function in the world -- how to make change, shop for groceries, and be a good consumer. Personal Health covered basic health, safety, and nutrition. The topics were pretty much just common sense kinds of things.

24. Kenneth ultimately earned his high school diploma, but at that time, anyone could get a diploma as long as they attended and passed the required number of classes. Summerville did not give different types of diplomas for Resource students at that time. There is no doubt in my mind that Kenneth would be unable to earn his high school diploma by today's standards.

25. When Kenneth graduated from high school, he did not have sufficient job skills or adequate academic skills. He was a follower, and he desperately needed structure. Without structure, I can see how Kenneth might end up into drugs or other trouble. I wish that Kenneth could have benefited from some of the adult special education resources we have today such as Goodwill Industries, Vocational Rehabilitation, or Department of Disabilities and Special Needs, but they were not available at that time.


Linda Shwec, Affiant

Sworn to and subscribed before
me this 26th day of Nov, 2008


Notary Public

My commission expires: 10-16-10

EXHIBIT A

5 Lu Ruanh Asimb Primary Mendut Ab. Indro -

NAME																							
DATE	GRADE	INTELLIGENCE TEST RECORD	FORM	SCORE	GRADE MED.	GRADE NORM.	CHRON. AGE	MENTAL AGE	I.Q.	% FILE	OTHER DATE	EXTRA CURRICULAR ACTIVITIES											
27-68	1B	S.R.R. P.M.A	1B	93		1-7	7.1		94														
7-70	3A	S.R.A P.M.A	2-4	130		3.6	9.1		104	45		ACTIVITY											
1-70	4I	SFTAA					9.8		69			BAND											
												C705?											
SIMMONS K RE=115372 FORM/LEV 54 GRADE 11 DATE 04/78												READING VOC. COM. TOT. 242 SPE. MEC. EXP. 243 LANGUAGE TOT. 243 CHRON. AGE 11.8 MENTAL AGE 11.8 I.Q. 104			ARITHMETIC TOT. 242 CHRON. AGE 11.8 MENTAL AGE 11.8 I.Q. 104			MATH TOT. 242 CHRON. AGE 11.8 MENTAL AGE 11.8 I.Q. 104			REF. SCI. SS TOT. 242 CHRON. AGE 11.8 MENTAL AGE 11.8 I.Q. 104		
DATE	GRADE	ACHIEVEMENT TEST RECORD	FORM	SCORE	GRADE MED.	GRADE NORM.	CHRON. AGE	MENTAL AGE	I.Q.	% FILE	ANNUAL	SCHOOL PAPER											
20-68	1B	Metropolitan Ach. Test	A			1.6	7.1		19														
17-69	1B	S.R.A	C	94		1.7	9.1		11			TRACK											
16-70	3A	S.R.A Achievement	C	103		3.6	9.0	1.9	9			BASEBALL											
10/71	4I	S.R.A	C			10.2	3.2		77			BASKETBALL											
1-72	5G	S.R.A	C			5.8	10.7	3.3	02			FOOTBALL											
MMONS KENNETH 2 04 673 C GRN 06 08 09 07 06 04 08 06 20 08 11 24 16 06																							
READING VOCAL COMPS TOTAL 2.7 1.7 2.0 334 271 288 10 7 17 4 1 1																							
LANGUAGE VOCAL COMPS TOTAL 1.8 1.8 1.7 1.8 3.9 2.1 1.9 2.9 2.0 2.5 3.3 2.9 323 335 317 291 371 301 273 322 250 326 378 359 5 7 20 32 20 6 3 29 78 5 11 9 4 3 2 1 19 3 1 3 1 4 10 7																							
ARITHMETIC/MATHEMATICS COMPS TOTAL 2.9 2.0 2.5 3.3 2.9 322 250 326 378 359 5 11 9 4 10 7																							
REFR SCI. S. 5 11 9 4 10 7																							
HONOR SOCIETY CODE																							
PARTICIPATION A - PRESIDENT B - OTHER OFFICERS																							
EVALUATION OF PERSONAL AND SOCIAL ASSETS COOPERATION COURTESY DEPENDABILITY INDUSTRIOUSNESS INITIATIVE LEADERSHIP EMOTIONAL MATURITY PERSONAL APPEARANCE SELF CONTROL HONESTY PERSISTENCE SERVICE TO SCHOOL																							

3761

SUMMERVILLE JUNIOR HIGH SCHOOL RECORD
SUMMERVILLE, SOUTH CAROLINA

Name Simmons Kenneth Date of Birth [REDACTED]
Residence [REDACTED] Middle Summerville Place of Birth Summerville, S.C.
Phone No. [REDACTED] Date Entered 8/73 School Last Attended Alston Elementary
Parent or Guardian Mr. Eugene Simmons

SEVENTH GRADE

Subject	1st Qtr	2nd Qtr	Mid term avg.	3rd Qtr	4th Qtr	Term Avg	Yr. Av.	Units	Subject Teacher	Remarks:
3 English	50	52	51	69	73	71	62		Stewart	Promoted
3 Math	82	88	85	70	70	71	78		Massa	
3 Science	75	60	68	78	72	75	72		Krahnwitz	
Sup. St.	50	50	50	50	30	40	45		Taylor	
P.E.	S	U	S-S	S	S	S	S		Mohrhead	
Chorus	U	60	F	S	S	S	S-		McFadden	
Days Absent	3	5		1	1		10		Year's Average	
Days Tardy									Cumulative Average	
Home-Room Teacher									Cum. Units to Date	

EIGHTH GRADE 74-75

Subject	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Term Avg.	Yr. Av.	Units	Subject Teacher	Remarks:
Eng.	72	82	77	93	80	81		Lerious	PROMOTED
Math.	96	95	96	87	80	90		Holt	
Sci.	70	68	69	52	73	66		Brown	
Sp. H.	80	78	79	77	77	78		Hunt	
P.E.	44	5-	5-			5-		Cuba	
Home Ec.			4/5	5-	5-	5-		Mayer	
Days Absent	2	2						Year's Average	
Days Tardy								Cumulative Average	
Home-Room Teacher	C. C. Keeler							Cum. Units to Date	

79-80 GRADE

Subject	1st Qtr	2nd Qtr	Mid Term Avg.	3rd Qtr	4th Qtr	Term Avg	Yr. Av.	Units	Subject Teacher	Remarks:
Gen. Eng.	A ¹	B ¹	A ²	B ¹	A ³	A ¹	A ³	1	YARBOROUGH	✓ 0.8222
Gen Sci	F ²	B ¹	D ³	C ³	B ¹	B ⁴	C ⁷	1	KINARD	
Per. Health	F ⁰	F ³	F ³	C ¹	C ⁴	C ²	C ⁴	1	DRAWAY	
Days Absent	1	1	2	1	0	1	3		Year's Average	
Days Tardy							27		Cumulative Average	
Home-Room Teacher	M. Tallon						12-0	18	Cum. Units to Date	

GRADE.[illegible]

A 93-100
B 85-92
C 77-84
D 70-76
F 0-69 FAILING
(EFFECTIVE 1970-80)

SUMMERVILLE HIGH SCH
SUMMERVILLE, SOUTH C

RECORD

Name	<i>Simmons</i>	<i>Kenneth</i>	Date of Birth	[REDACTED]
Residence	[REDACTED]	<i>S. ville, S.C.</i>	Place of Birth	<i>Sumner, S.C.</i>
Phone No.	[REDACTED]	Date Entered	<i>8/73</i>	School Last Attended
Parent or Guardian	<i>Mr. Eugene Simmons</i>			

NINTH GRADE 75-76

Subject	1st Qtr	2nd Qtr	Mid term avg.	3rd Qtr	4th Qtr	Term Avg	Yr. Av.	Units	Subject Teacher	Remarks:
Basic English	B ⁰	C ³	B	B ⁴	B ³	B	B ¹⁰	1	Johnson	
Gen. Math I-20	B ³	B ⁰	B	D ³	B ²	C	B	1	Greene	
Gen. Science 10	D ⁰	F ³	D	F ⁵	F ⁴	F	F ¹²	0	Royce	
W. Gen. I.	F ³	F ³	F					0	Lindsay	
W. Gen. II				F ³	E ¹	F		1/2	Lindsay	
Boys PE I	B ³	E ³	D	B ⁵	C ⁴	C	D ⁹	1	Maudlin	
Days Absent	0	1	1	3	3	6	7		Year's Average	
Days Tardy	0	0	0	0	0				Cumulative Average	
Home-Room Teacher	M. Stace								Cum. Units to Date 3 1/2	

TENTH GRADE

Subject	1st Qtr	2nd Qtr	Mid term Avg.	3rd Qtr	4th Qtr	Term Avg	Yr. Av.	Units	Subject Teacher	Remarks:
Basic Eng	B ¹	B ³	B	B ²⁰	D ¹⁰	C	C ²⁴	1	Lewis	
Math II-III	A ¹	B ¹	B	C ³	D ⁴	D	C ⁹	1	Kelly	
Phy. Sci. 15	F ³	F ⁴	F	F	F ⁵	F	F ⁷⁷	0	McMillan	
Art I 410	C ⁰	F ²	D	D ⁰	A ²	C	C ⁴	1	Squibb	
Domestic Ed.	F	F	F					0	Flores	
10th EL	55	77	—	—	—	A	—	1 1/2		
Days Absent	1	2		5	8			3 1/2		
Days Tardy									Year's Average	
Home-Room Teacher	N. Daniels								Cumulative Average	
									Cum. Units to Date	7

ELEVENTH GRADE 77-78

Subject	1st Qtr	2nd Qtr	Mid term avg.	3rd Qtr	4th Qtr	Term Avg	Yr. Av.	Units	Subject Teacher	Remarks:
Rem. Eng	A ⁰	C ¹	B ¹	B ³	C ⁸	C	B ¹²	1	Yarbrough	
USH B	C ⁰	F ⁰	E ⁰	B ²	F ¹³	C	D ⁸	1	McAmis	
Hum. Ser.	—	—	—	F ⁵	F ⁹	F ⁸	—	0	Rice	
Sm. Eng	C ¹	B ¹	C ²	C ⁷	C ⁸	C	C ¹⁷	2	Powell's	DTC
P. E	—	—	—	B ¹	B ³	B ⁴	—	1/2	Druidy	
Days Absent	0	0	0	2	2			4 1/2	Year's Average	
Days Tardy									Cumulative Average	
Home-Room Teacher	M. Smalls								Cum. Units to Date	11 1/2

~~THIRTEENTH~~ 178-79

Subject	1st Qtr	2nd Qtr	Mid term Exam	3rd Qtr	4th Qtr	Term Avg	Yr. Av.	Units	Subject Teacher
Eng ~~101~~	4	A	D	A	A	A	C	1	Hilton + Shreve
Gen Sci 15	D	F	F	4	F	F	F	no unit	Bennett - 30
World I: II	4	~~with care~~							Waring
Smalling II	C	C	C	C	C	C	C	2	Powell DVC
Civics II				D	F	E		1/2	Edwards
Days Absent	0	7		4	3			3 1/2	Year's Average
Days Tardy									Cumulative Average
Home-Room Teacher								13	Cum. Units to Date

Remarks: *misses son*

0.692

Remarks: *meds seen*

0.6923

ELEMENTARY SCHOOL RECORD
SUMMERVILLE, SOUTH CAROLINA

Name	<u>Simmons</u>	<u>Reddeth</u>	Date of Birth	<u>[REDACTED]</u>
Residence	<u>[REDACTED]</u>	Middle	Place of Birth	<u>Summerville</u>
Phone No.	<u>[REDACTED]</u>	Date Entered	School Last Attended	
Parent or Guardian	<u>Mr. & Mrs. Eugene Simmons</u>			

GRADE _____ YEAR _____

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic													
Reading													
													Basic Rdg. Bks. & Test Rtg.
Days Absent													Reading Av. Ach.
Days Tardy													Arith. Av. Ach.
Home-Room Teacher													Overall Ach.

Promoted to _____

Placed in _____

1st GRADE 1969-70 YEAR

Age: 7 yrs. 1 mos.

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic		4	5		5	5	5	5		5	5	1	
Reading		11	5		5	5	5	5		5	5	1	
Writing		5	5		5	5	5	5		5	5		Basic Rdg. Bks. & Test Rgs.
Social Studies		5	5		5	5	5	5		5	5		
Science						5	5	5		5	5		
Effort		4											
Conduct		5											
Days Absent	0	0	0		0	2	2	6		10	10		Reading Av. Ach. 1.6
Days Present	30	30	30		90	28	28	24		80	170		Arith. Av. Ach. 1.3
Home-Room Teacher	Miss Dolores Singleton												Overall Ach. 1.4

Promoted to 2nd

Placed in

213 GRADE ~~181-19~~ YEAR

Age: 8

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic	S	G	G	G	S	S	S	S	G	S	S	B	
Reading	U	U	S	S	S	U	U	U	U	U	U	C	
Science	G	S	S	S	S	S	S	S	S	S	S	C	Basic Rdg. Bks. & Test Rtg.
English	S	S	S	S	S	S	U	S	S	S	S	C	
Spelling	U	U	S	S	S	U	S	S	U	U	S	C	
So. Studies	U	U	S	S	S	S	U	S	S	S	S	C	
Days Absent	1	0	2		2	0	1	2		3	6		Reading Av. Ach. 1-9
Days Tardy	29	30	28		88	30	29	28		87	174		Arith. Av. Ach. 1-7
Home-Room Teacher Miss R. Frasier													Overall Ach. 1-7

Promoted to 5th
Placed In

3A GRADE 6 9-70 YEAR

Age 9-

I. Q. 104

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic	75	80			77	80	85			82	74	2L	
Reading ^{1st} ~~1st~~	75	67			71	80	85			77	74	3L	
Language	70	75			73	75	85			80	76		Basic Rdg. Bks. & Test Rtg.
Spelling	68	60			64	70	75			72	68		
Soc. Studies	65	72			70	72	75			73	71		
Science	65	60			63	70	75			72	67		
Days Absent	1	2			3	1	1			2	5		Reading Av. Ach. 1-1
Days ^{Present} ~~Absent~~	44	43			87	44	44			88	175		Arith. Av. Ach. 2-4
Home-Room Teacher	Miss N. L. Currier												Overall Ach. 1-9

Promoted to 4th
 Placed in _____

Histon

ELEMENTARY SCHOOL RECORD

SUMMERVILLE, SOUTH CAROLINA

Name Simmmons Kenneth

Date of Birth

Residence

Middle

Place of Birth

Phone No.

Date Entered

School Last Attended

Parent or Guardian

41 GRADE 21-22 YEAR

AGE: 9-8

I.Q. 69

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic	72	80	76			85		79		82	79	Low	Long
Reading	57	60	55			65		65		65	60	Low	Causey
Spelling	50	70	60			78		78		78	79		Basic Rdg. Bks. & Test Rtg.
English	50	50	50			65		60		63	57		Readers' Digest 2
Social St.	50	60	55			65		65		65	60		
Health	55	65	60										
Science						60		60		60	60		
Writing	C	B	C			C		C		C	C		Reading Av. Ach. 3.1
Days Absent	0	0	0			0		1		1	1		Arith. Av. Ach. 3.7
Days Tardy													Overall Ach. 3.2
Home-Room Teacher <u>ANN Long</u>													

56 GRADE 21-22 YEAR

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic	86	91			88		91	80		86	87	Low	Hartnett
Reading	75	70			73		74	65		70	72	Low	Stevens
Long. Dict.	82	78			80		87	88		88	84		Basic Rdg. Bks. & Test Rtg.
Science	89	85			89		72	79		76	83		
Acc. Studies	70	74			73		78	84		81	77		
HAPE	5	5			5		5	5		5	5		
Citizenship	B	B					C	C			C		
Days Absent	1	0			1		0	0		0	1		Reading Av. Ach. 3.1
Days Tardy	44	45			89		45	45		90	119		Arith. Av. Ach. 3.9
Home-Room Teacher <u>C. Krister</u>													

6 GRADE 22-23 YEAR

Age 11-8

I.Q. 69

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic	87	71			66	81	88	81		85	85		Project Wilson
Reading	41	81			84	82	80	81		81	74		Wright
Eng.	60	50			55	50	50			50	50		Basic Rdg. Bks. & Test Rtg.
Spelling	50	50			50	50	50			50	50		
Science	70	60			65	60	50			55	57		
Health	45	45			45	45	45			45	45		
Days Absent	1	0			1	3	0			3	4		Reading Av. Ach. 4.6
Days Tardy													Arith. Av. Ach. 4.2
Home-Room Teacher													
Overall Ach. 4.1													

GRADE YEAR

Subject	1	2	3	Ex.	Sem. Av.	4	5	6	Ex.	Sem. Av.	Yr. Av.	Grp.	Subject Teacher
Arithmetic													
Reading													
													Basic Rdg. Bks. & Test Rtg.
Days Absent													Reading Av. Ach.
Days Tardy													Arith. Av. Ach.
Overall Ach.													

Promoted to
Placed in
Retained in

CTB[®] INDIVIDUAL TEST RECORD

22

COMPREHENSIVE TEST IF BASIC SKILL

CTB

SIMMONS KENNE		NAME	TEACHER		LONG	DATE OF TESTING		10	70
SPANN		SCHOOL	GRADE		4.1	1821-213			
SUMMERVILLE		CITY	LEVEL		Q2				

AREA - Test	RS	AGE	DIFFERENCE	NATL. AVERAGE	NATIONAL PERCENTILE																						
READING Vocabulary	8	2.3	2.1	9	1	2	3	10	20	30	40	50	60	70	80	90	95	98	99								
READING Comprehension	9	2.0	2.1	7			1	XXXXX																			
TOTAL Reading	17	1.9	2.0	6				XXXXX																			
LANGUAGE Mechanics	6	2.9	2.3	21					XXXXXXX																		
LANGUAGE Expression	8	2.5	2.0	17					XXXXXXX																		
LANGUAGE Spelling	4	1.9	2.6	15			XXXXXX																				
TOTAL Language	18	2.3	2.2	8			XXXXX																				
ARITHMETIC Computation	19	3.3	3.0	18					XXXXXX																		
ARITHMETIC Concepts	9	3.0	2.3	22					XXXXXX																		
ARITHMETIC Applications	4	2.6	2.2	16					XXXXXX																		
TOTAL Arithmetic	28	3.0	2.7	14					XXXXX																		
TOTAL BATTERY	63	2.5	2.4	6			XX																				
STUDY SKILLS Reference Materials	5	3.0	2.2	23					XXXXXXXX																		
STUDY SKILLS Graphic Materials	8	2.9	2.3	19					XXXXXX																		
TOTAL Study Skills	13	2.8	2.3	18					XXXXXX																		

READING Vocabulary

A. RECOGNITION AND / OR APPLICATION OF TECHNIQUES		
Vocabulary		
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901	902	903
90		

PLEASE FILL IN THIS INFORMATION FOR MY CLASS RECORDS

1. Child's Name Kenneth Simmons
2. Child's Age: Month Day Year
3. Child's Address
4. Telephone Number
5. Father's Name Mr Eugene Simmons
Grade Completed in School 5 grade
6. Mother's Name Mrs Anna Simmons
Grade Completed in School 7 grade
7. Number of Children in Family 8 Boys 3 Girls 5
8. Your Family Doctor Dr James
9. Please give your employer, the place and name of person,
company or Contractor you work for. Father George Miller Country Club
Mother NONE

10. If you or your husband are not employed, please check whether you are one:

Social Security Veteran Welfare

Navy Yard Shop No. Serial No.

Charleston Air Force Base Serial No.

Branch , or Government Job

THANK YOU KINDLY FOR THE ABOVE INFORMATION

TEACHER M. L. Cwong
GRADE 3A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)

Applicant,)

C/A No.: 2005-CP-18-1368

v.)

John Ozmint, Commissioner,)

S.C. Department of Corrections,)

Respondent.)

AFFIDAVIT OF ROBERT POLK

Comes now the undersigned who makes the following statement, under oath, and before the undersigned Notary Public who is authorized by law to hear and accept oaths, and based upon his own personal knowledge of the facts averred herein states as follows:

1. My name is Robert Polk. My office address and telephone number are:
 Summerville High School Guidance Office, 500 Greenwave Blvd., Summerville, S.C., 843-873-6460.

2. I have worked for the Summerville school district since 1976. I worked in the Guidance Office at Summerville High School when Kenneth Simmons was a student there.

3. Any student who was placed in a special education program would have been individually tested prior to the placement. Students were not placed in special education based on the standardized tests given to all students before entering high school. Even if a student scored very low on standardized tests, these tests were not used for special education placement.

4. A student would be tested for special education under one of the following three circumstances: (1) a parent requested the testing; (2) a teacher requested the testing; or (3) the student requested the testing. After a request for special education was made, the student was tested for vision and hearing difficulties to make sure that the student had no difficulties in these

areas, and then individually tested by a psychologist to see if the student qualified for placement in special education. The tests used at that time were the WISC-R, the WAIS, and the PIATT or "Bender."

5. Summerville High School does not retain records on psychological testing for special education. Those records are kept by Psych Services. I personally contacted Psych Services to see if they had retained any records about Kenneth Simmons and discovered that all of the records from that period of time have been destroyed.

6. I have reviewed and am familiar with Kenneth Simmons's school records. Kenneth's transcript indicates that his courses in high school were either "remedial," "basic," or "general" courses. These terms were all used to designate remedial level courses; the terms simply varied by subject. Kenneth was also placed in Linda Schwec's class. Ms. Schwec was the Resource Program teacher. The Resource Program was a special education program. Based upon my review of his transcript and my knowledge of the programs at that time, Kenneth's records indicate that he was clearly impaired because he was failing some of his remedial courses even with Resource Program help.

7. Most teachers at Summerville High School at that time were willing to pass students, especially athletes, as long as they were quiet and cooperative and putting forth their best efforts. Although it was not an official policy in those days, it was common practice to give athletes with special needs some priority in terms of helping them get through school.

Robert Polk
Robert Polk, Affiant

Sworn to and subscribed before
me this 20th day of March, 2008.

Linda M. Davis
Notary Public
My commission expires: 10/26/10

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

Kenneth Simmons,)
)
 Applicant,)

C/A No.: 2005-CP-18-1368

v.)

John Ozmint, Commissioner,)
 S.C. Department of Corrections,)
)
 Respondent.)

AFFIDAVIT OF WILLIAM LONG

Comes now the undersigned who makes the following statement, under oath, and before the undersigned Notary Public who is authorized by law to hear and accept oaths, and based upon his own personal knowledge of the facts averred herein states as follows:

1. My name is William Long. I was formerly a football coach at Summerville High School. Kenneth Simmons was a football player on my team. My current office address and telephone number are: 2801 W. 5th North Street, Summerville, S.C., 842-873-0371.
2. Kenneth Simmons was extremely slow.
3. He was an average football player. He played a defensive position that did not require significant intellectual abilities. It was more repetition than anything else.
4. Kenneth was never a disciplinary problem on the football team.

William Long
 William Long, Affiant

Sworn to and subscribed before
 me this 30th day of March, 2008.

John M. Ozmint
 Notary Public
 My commission expires: 12/31/10

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF

Betty Profit, who appeared personally before me, affirms and states the following:

1. I was a Sixth Grade Middle School Teacher at Summerville High School.
2. I have no personal recollection of Kenneth Simmons.
3. Reviewing Kenneth's school records and report card, I notice that Kenneth tested at a fourth grade level when he was in the sixth grade.
4. The term "placed" on Kenneth's elementary school report cards is not synonymous with "passed." "Placed" was a form of social promotion.
5. Based on Kenneth's report card, he did not "pass" any grade in middle school. He was instead "placed" forward in each grade level.

Further affiant sayeth naught.

Betty Profit
BETTY PROFIT

Sworn to and subscribed before me
This 13th day of April, 2007.

Dwight A Glass
Notary Public for the State of South Carolina
My commission expires: 2-10-2010

89

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS.

Commonwealth of Pennsylvania, :
State Board of Psychology :

vs. :

Leslie N. Sandler :

Docket #846301646

30th December 2009

STIPULATION AND ORDER

Ronald D. Walker
PROTHONOTARY

IT IS HEREBY STIPULATED by the parties to the above-entitled matter that the following is true:

1. The State Board of Psychologist Examiners (Board) is a departmental administrative commission of the Department of State, organized under the provisions of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §51 et seq.
2. Respondent, Leslie N. Sandler, is a licensed psychologist in the Commonwealth of Pennsylvania, holding License Number PS-002303-L, issued March 26, 1976.
3. Respondent has been duly advised of his right to an administrative hearing, to be represented by Counsel, to present witnesses and testimony and to cross-examine witnesses and to challenge evidence presented by the Commonwealth, and to present legal arguments by means of a brief before the Board and to take an appeal from any decision adverse to his right to continue to be licensed as a psychologist in the Commonwealth of Pennsylvania.
4. On November 4, 1986, an Administrative Complaint and Order to Show Cause was filed with the Board against Respondent,

File Number 84-PS-1646. The Administrative Complaint was based on complaints filed in 1984 by two psychologists employed by State Farm Insurance Company in a fee dispute in 1982 between State Farm and its insured, Respondent's patient. For a year prior to that, the Commonwealth's former prosecuting attorney and Respondent's former attorney negotiated to resolve this matter.

5. On January 29, 1987, an Amended Administrative Complaint was filed against Respondent, File Number 84-PS-1646.

6. These Administrative Complaints alleged and the Respondent admits that the following facts are true:

a. On or about September 9, 1981, Respondent undertook treatment of a patient (Patient) pursuant to which he assessed the need for, and then initiated, neuropsychological testing.

b. Respondent, in the course of his treatment of Patient, administered various standardized tests, including the Wechler Adult Intelligence Scale, the Rorschach Test, the Bender-Gestalt Test and the Halsted-Reitan Battery of Tests.

c. However, Respondent did not administer these tests fully, nor did he record all of the results of these tests, and he purported to make conclusive diagnoses based on these tests, without indicating any limitations on the reliability and validity of his conclusions.

d. On November 22, 1982, Respondent testified at deposition in the case of Danzig v. State Farm Mutual Insurance Co., filed to No. 486 of 1982 in the Court of Common Pleas of Philadelphia County.

e. On April 13, 1983, Respondent testified at an arbitration hearing in the above-named case.

f. At deposition, Respondent made the following statements with regard to his credentials and training in the field of psychology, which statements were inaccurate as shown, respectively, as follows:

(1) Respondent stated that he was "Board eligible" for membership under the American Board of Forensic Psychology (ABFP).

(2) There is no category defined by the ABFP as "Board eligible."

(3) Respondent stated that he "absolutely (had) done everything that anybody could do to be a diplomate in the field of forensic psychology."

(4) Respondent, at the time of deposition, had not yet submitted an acceptable work sample to the ABFP, which is a prerequisite to oral examination before the ABFP to obtain status.

(5) Respondent stated that he had obtained his doctorate in an APA - approved program.

(6) Respondent's doctoral program was not APA approved at the time he completed it.

7. Based on the facts admitted at Paragraphs 6a - f(1)-(6) above, Respondent neither admits nor denies that his license to practice as a psychologist is subject to disciplinary action under the Pennsylvania Psychologists Practice Act, Act of March 23, 1972, P.L. 136, No. 52, 63 P.S. § 1208(4)

by and through a violation of that Act, but agrees to the PROBATION of his license for a period of one year according to the following terms and conditions:

a. Respondent shall undergo supervision in professional ethics and monitoring in psychological assessment according to the following terms and conditions:

- (1) Max L. Fogel shall act as supervisor and monitor.
- (2) All supervisory sessions shall take place in the offices of Supervisor, or at a location mutually agreed upon by Supervisor and Respondent.
- (3) Supervisory sessions shall last for a one hour period and shall take place on a twice monthly basis. The required frequency of supervisory sessions may be reassessed after two (2) months of supervision, and may thereupon be altered, subject to the Board's approval, upon good cause shown in writing by the Supervisor. However, in no case shall supervisory sessions be reduced to less than once per month.
- (4) Respondent shall assume all costs related to supervision, including Supervisor's hourly fee, which shall be set at \$140.00.
- (5) Supervisor shall report quarterly to the Board, in writing, detailing Respondent's progress.
- (6) Supervisor shall also submit a final report to the Board, at the end of the Probationary period, as to

whether supervision of Respondent is no longer necessary. If such report does not conclude that Respondent may practice psychology without supervision, such report shall automatically provide cause for the further Probation of Respondent's license, according to the terms set forth above, for an additional one-year period.

b. Respondent shall not perform neuropsychological assessments, beyond those routine psychological tests administered by all licensed psychologists which may be construed to be part of a neuropsychological assessment as well.

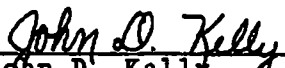
c. Respondent shall not perform neuropsychological services as a non-specialist until such time as he should appear before the Board for an informal conference to determine whether he is competent to practice neuropsychology at a level commensurate with licensed psychologists who do not specialize or restrict their practice to neuropsychology.

d. Respondent shall not advertise himself to the public as a neuropsychologist, until such time as he should appear before the Board for an informal conference to determine whether he is competent to practice neuropsychology as a specialty.

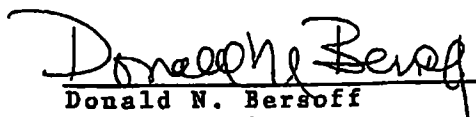
e. Respondent shall allow the Board through the Supervisor to have access to his billing and patient records, with names eradicated, to ensure Respondent's compliance with Paragraphs 7b, c and d above. The patient records to be examined shall be those of patients treated by Respondent from the date of approval of this Stipulation to the date of

termination of this Order. Should Respondent provide, pursuant to this paragraph, records indicating that Respondent may be practicing neuropsychology, such records will be evaluated, prior to any formal prosecution based thereon, to determine whether such records reveal a case methodology conducted in a comprehensively neuropsychological framework. Respondent shall provide to the Board copies of these records, patient identification eradicated as appropriate, should Supervisor indicate his belief that Respondent is practicing in violation of this paragraph.

8. The parties understand that this agreement is between the Commonwealth and Respondent only, and is to have no legal effect unless and until the Board issues an Order adopting the aforementioned sanction, and the Office of General Counsel approves the contents of this agreement and the Board's Order as to legality.


John D. Kelly
Attorney for the Commonwealth


Leslie N. Sandler
Respondent


Donald N. Bersoff
Respondent's Attorney

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

Commonwealth of Pennsylvania, :
State Board of Psychology :

vs. :

Docket #846301646

Leslie N. Sandler :

ORDER

AND NOW, this 11th day of April, 1989, upon consideration of the within Stipulation, and more specifically, upon the admissions made by Respondent of acts which may constitute violations of the Psychologists Practice Act (Act), Act of March 23, 1972, P.L. 136, No. 52, 63 P.S. §1208(4), the State Board of Psychology hereby ORDERS that the license issued to Respondent, Leslie N. Sandler, be placed on PROBATION for a period of one year according to the following terms and conditions:

1. Respondent shall undergo supervision in professional ethics and monitoring in psychological assessment according to the following terms and conditions:

- a. Max L. Fogel shall act as supervisor and monitor.
- b. All supervisory sessions shall take place in the offices of Supervisor, or at a location mutually agreed upon by Supervisor and Respondent.
- c. Supervisory sessions shall last for a one hour period and shall take place on a twice monthly basis. The required frequency of supervisory sessions may be reassessed after two (2) months of supervision, and may thereupon be

altered, subject to the Board's approval, upon good cause shown in writing by the Supervisor. However, in no case shall supervisory session be reduced to less than once per month.

d. Respondent shall assume all costs related to supervision, including Supervisor's hourly fee, which shall be set at \$140.00.

e. Supervisor shall report quarterly to the Board, in writing, detailing Respondent's progress.

f. Supervisor shall also submit a final report to the Board, at the end of the Probationary period, as to whether supervision of Respondent is no longer necessary. If such report does not conclude that Respondent may practice psychology without supervision, such report shall automatically provide cause for the further Probation of Respondent's license, according to the terms set forth above, for an additional one-year period.

2. Respondent shall not perform neuropsychological assessments, beyond those routine psychological tests administered by all licensed psychologists which may be construed to be part of a neuropsychological assessment as well.

3. Respondent shall not perform neuropsychological services as a non-specialist until such time as he should appear before the Board for an informal conference to determine whether he is competent to practice neuropsychology at a level commensurate with licensed psychologists who do not specialize or restrict their practice to neuropsychology.

4. Respondent shall not hold himself out to the public as a

neuropsychologist, until such time as he should appear before the Board for an informal conference to determine whether he is competent to practice neuropsychology.

5. Respondent shall allow the Board through the Supervisor to have access to his billing and patient records, for confidential inspection, to ensure Respondent's compliance with Paragraphs 2, 3 and 4 above. Should Respondent provide, pursuant to this paragraph, records indicating that Respondent may be practicing neuropsychology, such records will be evaluated, prior to any formal prosecution based thereon, to determine whether such records reveal a case methodology conducted in a comprehensively neuropsychological framework. Respondent shall provide to the Board copies of these records, patient identification eradicated as appropriate, should Supervisor indicate his belief that Respondent is practicing in violation of this paragraph.

This ORDER shall take effect thirty (30) days from the above-noted date.

BY ORDER

BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS


George L. Shevlin
Commissioner

STATE BOARD OF PSYCHOLOGY


Patricia M. Bricklin, Ph.D.
Chairperson

WAIVER

Please read each statement carefully and then put your initials in the space indicated.

LNS

I understand that I have the right to an administrative hearing in which to answer the charges brought against me.

LNS

I understand that I have the right to be represented by an attorney at the hearing.

LNS

I understand that I have the right to testify on my behalf at the hearing.

LNS

I understand that I have the right to present witnesses and testimony on my behalf at the hearing.

LNS

I understand that I have the right to cross-examine the prosecution's witnesses, and to appeal any adverse decision by the Board to an appellate court.

LNS

I understand that this Stipulation and Order is to have no legal effect unless and until the Board issues an Order adopting the recommended action and the Office of General Counsel approves the contents as to its legality.

With full understanding of the consequences, I hereby waive and relinquish my rights described above, in order to enter into this Stipulation and Order, Docket No. 84 63 01646.



Leslie N. Sandler
Respondent

DATE:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

Commonwealth of Pennsylvania, :
State Board of Psychology :

vs. :

Docket #846301646

Leslie N. Sandler :

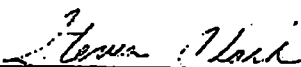
AFFIDAVIT

Leslie N. Sandler, being duly sworn according to law, now
deposes and says that the facts set forth in the foregoing
Stipulation and Order are true and correct to the best of his
knowledge, information and belief.

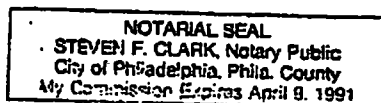


Leslie N. Sandler
Respondent

Sworn to and subscribed
before me this 5 day
of December, 1988.



(Notary)



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF DORCHESTER)

Case No.: 05-CP-18-1368)

KENNETH SIMMONS,)

Applicant,)

CERTIFICATE OF SERVICE)

v.)

SOUTH CAROLINA,)

Respondent.)

The undersigned certifies that a copy of the foregoing Notice of Intent to Rely Upon Affidavits and Other Documentary Evidence was served by first class United States mail, postage prepaid, this 14th day of January, 2010, upon the following:

Donald Zelenka
 Assistant Attorney General
 P.O. Box 11549
 Columbia, SC 29211

Emily C. Paavola
 Emily C. Paavola

ATTORNEY GENERAL'S OFFICE
RECEIVED 7-22-10

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

KENNETH SIMMONS)

Applicant,)

v.)

STATE OF SOUTH CAROLINA)

Respondent.)

ADMINISTRATIVE INSTRUCTIONS
2125 FILE OPEN END
IN THE COURT OF COMMON PLEAS
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Case No. 05-CP-18-1368
ROUTE TO
ORDER: TRANSCRIPT
APPLICANT'S PRE-TRIAL BRIEF RECORDS
OTHER:

Applicant, Kenneth Simmons, by and through undersigned counsel, submits his Pre-Trial Brief pursuant to SCRCP 16 (c) as follows:

I. PRE-TRIAL MATTERS

A. COUNSEL

Applicant is represented by James Morton of the firm of Morton & Gettys LLP, 334 Oakland Avenue, Rock Hill, SC 29731, and Emily C. Paavola of the Death Penalty Resource & Defense Center (formerly The Center For Capital Litigation), P.O. Box 11311, Columbia, SC 29211.

Respondent is represented by the Office of the Attorney General, Donald Zelenka, Assistant Deputy Attorney General, P.O. Box 11549, Columbia, SC 29211.

B. MOTIONS AND OTHER FILINGS

On January 14, 2010, applicant filed a Notice of Intent to Rely Upon Affidavits and Other Documentary Evidence. On January 19, 2010, applicant filed the Affidavit of Dr. Richard Leo and a series of newspaper articles which are referenced in Dr. Leo's affidavit. Applicant seeks to expedite the hearing in this matter and keep costs to the indigent defense system to a minimum by relying on affidavits and other documentary evidence, a procedure that is permitted under S.C. Code § 17-27-

80, and specifically approved of by the South Carolina Supreme Court. *Simpson v. Moore*, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006); *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982). Moreover, this procedure has been used in numerous capital post-conviction cases. See, e.g., *Kamel Evans v. State*, 06-CP-23-7719 (Greenville County); *Rodger Dale Johnson v. State*, 00-CP-09-206 (Calhoun County); *Herman Lee Hughes v. Michael Moore*, 98-CP-09-101 (Calhoun County); *Joseph M. L. Gardner v. Michael Moore*, 98-CP-18-453 (Dorchester County); *Keith L. Simpson v. Michael Moore*, 97-CP-42-1911 (Spartanburg County). Applicant expects to file one additional affidavit, from Ms. Floy Shuler of the Dorchester County School System, in the immediate future. Applicant is not aware of any other pre-trial filings.

C. DISCOVERY

To applicant's knowledge, all discovery has been completed in this matter.

II. STATEMENT OF FACTS

A. PROCEDURAL HISTORY

Applicant is an indigent, death-sentenced inmate. He was found guilty of murder, armed robbery, first degree burglary, first degree criminal sexual conduct, and kidnapping, and was sentenced to death by a Dorchester County jury on March 2, 1999. The Supreme Court of South Carolina reversed the armed robbery conviction but affirmed the remaining convictions and death sentence. *State v. Simmons*, 599 S.E.2d 448 (2004). After completion of the direct appeal process, Applicant moved for a stay of his execution in order to pursue post-conviction relief. On February 2, 2005, the Supreme Court of South Carolina issued a stay of execution.

Applicant filed his Application for Post-Conviction Relief (the "Application") on September 2, 2005. After applicant's original post-conviction counsel were both relieved of their appointments,

this Court appointed Mr. James Morton and Mr. Wayne Floyd as substitute counsel on June 5, 2007.

Ms. Emily Paavola was later substituted as counsel in place of Mr. Floyd. The Application was amended on December 21, 2009.

This case was tried by former Solicitor Walter M. Bailey acting as lead counsel, and Assistant Solicitor Harrison Bell as second chair. Jerry N. Theos, Esquire, of Charleston and James A. Bell, of St. George, were counsel for Applicant.

B. THE STATE'S EVIDENCE AT TRIAL

The testimony offered at trial established that the victim, Ms. Lilly Bell Boyd, was an elderly African-American woman who lived alone. She was last seen alive in her yard on Saturday, August 31, 1996, at approximately 3:30 p.m. She was found murdered in her home the following Sunday afternoon. She had been beaten, strangled, and sexually assaulted. The Summerville Police Department investigated for approximately one year, but was unable to solve the crime. In August of 1997, the State Law Enforcement Division ("SLED") formed a task force to solve the crime.

Shortly after the task force was formed, Applicant was arrested in Columbia for shoplifting two steaks from a local grocery store. While in jail on those charges, the State alleges that Applicant initiated contact with law enforcement officers, resulting in a series of interrogations. Over the course of several days, applicant told task force members of his involvement in a number of crimes, all later determined to be fictional, before ultimately giving a statement confessing to the Boyd murder.

In addition to Applicant's statement, the State relied on DNA testimony as evidence of his guilt. Specifically, the State presented testimony by two experts from Lifecodes Corporation – Ms. Lauren Crane and Dr. Michael L. Baird. Lifecodes was a private, for-profit biotechnology company

located in Stanford, Connecticut. Ms. Crane was employed at Lifecodes as a forensic analyst, and Dr. Baird was her supervisor. Ms. Crane testified that she analyzed vaginal swabs taken from the body of Ms. Lily Bell Boyd, and found that they contained a mixture of sperm as well as the victim's own DNA. Although Ms. Crane attempted to separate the sperm from the other cells contained in the vaginal swabs, she was not able to separate them, leaving a mixture of the victim's DNA and the perpetrator's DNA taken from the vaginal swabs. Finally, Ms. Crane testified that she received a known sample of Kenneth Simmons' blood and compared it to the DNA found on the vaginal swabs. She stated that Mr. Simmons' blood was tested at nine different locations and the result was that he could not be excluded as a contributor to the mixture of DNA taken from the vaginal swabs.

Dr. Michael Baird then gave testimony concerning the statistical probability of a coincidental DNA match. Specifically, Dr. Baird's statistical testimony in this case was as follows:

Q: What percentage of the Caucasian population would be excluded as the donor of that semen in the male fragment of the vaginal swab taken at Lilly Bell Boyd's autopsy?

A: Well, virtually all of the Caucasian population would be excluded as contributing. We generally represent this frequency as a number, not a percentage. So the frequency of occurrence really represents how often you would see that particular combined profile in the Caucasian population, which is one in over one billion two hundred eighty million, two hundred forty-nine thousand nine hundred and sixteen.

Q: So to ask that question in a different way perhaps, doctor, using that chart; what is the probability of a randomly chosen person unrelated to Kenneth Simmons having the same genetic profile as to the genetic profile found in the semen from the vaginal swab taken from the autopsy?

A: Well, again, it is extremely rare...

Q: All right, sir. And the one in one billion, two hundred and eighty million, two hundred forty-nine thousand, nine hundred and sixteen; is that correct?

A: Yes, sir.

Q: All right, sir. If you'd get the chart for the Black data base, please. Dr. Baird, using that chart, please explain the probability of a randomly chosen person unrelated to Kenneth Simmons having that same genetic profile, the genetic profile found in the semen on this chart, the vaginal swabs taken from the autopsy.

A: There are nine different generic (sic.) tests done in this case. In the Black population it's about one in eight million people. In other words, one person in eight million would have that profile that we see in Mr. Simmons.

Q: All right. And you also see that same profile in the male fragment of the vaginal swab?

A: Right; in the vaginal swab is a DNA profile consistent with Mr. Simmons being a contributor as well as the victim.

Q: Thank you.

(Trial Transcript pp. 1480-82).

The DNA testimony, along with Mr. Simmons' alleged confession, constituted the entirety of the State's case for guilt. The solicitor told the jury in his opening statement:

The State's case consists basically of Kenneth Simmons' confession, statements that are on tape that he gave Kenny Mears. And it also consists of DNA evidence. You'll also hear that an effort was made at the crime scene to take fingerprints, to identify footprints and that kind of thing. And there will be no fingerprint evidence that matches up with Kenneth Simmons. There will be no footwear that matches up with him. We're looking at confessions and DNA.

(Trial Transcript p. 1042).

With regard to the DNA evidence, the solicitor told the jury that the State's witnesses would testify that "nine out of nine locations on DNA molecules that they compared with the semen in that vaginal swab matched the DNA from Kenneth Simmons' blood. And there will be testimony about the statistical significance of that DNA match." (Trial Transcript p. 1041). In closing argument, the solicitor similarly summarized the DNA evidence:

DNA is never going to be able to tell you with one hundred percent certainty this is the person who's semen is found here based on DNA match because they can't possibly look at each DNA allele. They did nine of them in this particular case. All they can do is say whether or not a person is excluded from that DNA profile or not excluded. Then they can do statistical probabilities of how often that particular profile exists in the population. And that's what these people testified to. . . . So Kenneth Simmons is not excluded as a donor of that DNA. He's not excluded in the frequency of occurrence in the Black population is one of 8,029,316.

(Trial Transcript pp. 2005 and 2012).

C. THE DEFENSE EVIDENCE AT TRIAL

The defense attempted to attack Mr. Simmons' confession statements by calling a series of experts who testified that he could not make a valid waiver of his *Miranda* rights, and that his statements were otherwise unreliable because of his low intellectual functioning. Some of these witnesses stated that they believed Mr. Simmons' low level of functioning was due to Mental Retardation, while others attributed it to different causes, but all of the defense experts agreed that Mr. Simmons' was unable to make a knowing, intelligent and voluntary waiver of his *Miranda* rights. Defense attorney, Jerry Theos, summarized the defense theory for the jury in his opening remarks:

You'll hear some testimony about whether or not [Kenneth Simmons] is mentally retarded. And there will be some conflict in that testimony. And that really isn't the issue whether or not he's mentally retarded. I think you'll probably hear some experts, some doctors, say he is. And you might hear some that say they're not quite sure whether he is. And you might hear some doctors that say "we don't think he is." The issue will not be whether or not he's mentally retarded. The issue will be his capacity, his mental capacity; what is it? What are his limitations?

(Trial Transcript pp. 1052-53). In addition to their own experts, the defense also called four State experts to testify, none of whom found that Mr. Simmons was unable to comprehend and validly waive his *Miranda* rights.

III. ISSUES IN THIS PROCEEDING

The Application for Post-Conviction Relief contains a number of claims for relief, including ineffective assistance of counsel, but the evidence offered at the hearing will primarily focus on two primary claims: (1) that Kenneth Simmons is exempt from the death penalty under *Atkins v. Virginia*, 536 U.S. 306 (2002), because he is a person with mental retardation; and, (2) that the DNA evidence offered at Mr. Simmons trial was – in several respects – false, misleading, incomplete and incorrect.

A. DNA CLAIM

As explained in the statement of facts above, testimony from the State's witnesses at trial indicated that the DNA evidence provided a definitive identification of Mr. Simmons as the source of the semen found in the vaginal sample taken from the body of the victim in this case. The evidence and testimony offered before the Court at applicant's PCR hearing will demonstrate that this conclusion is patently false for a myriad of reasons. Applicant will highlight only a few of them in this brief.

First, Lifecodes failed to disclose exculpatory evidence. Applicant, through undersigned counsel, obtained a copy of the Lifecodes case file that was disclosed to applicant's trial attorney, Jerry Theos. Subsequently, applicant's counsel also obtained a second copy of the Lifecodes case file directly from the records custodian at Orchid Cellmark (Lifecodes' successor entity), as well as high quality scanned images of the DNA testing gels. Documents from the second copy and the

scanned images show that Lifecodes failed to disclose the results of a test conducted on January 23, 1998, that would appear to exclude Mr. Simmons as a contributor to the sample taken from the vaginal swab. Moreover, a careful review of the file shows that the page in the Lifecodes laboratory notebook where the results of the January 23rd test would most likely have been recorded is missing.

Second, even if Mr. Simmons cannot be excluded as a possible source of the semen in the vaginal swab, Dr. Baird's testimony about the probability of this purported "match" being a mere coincidence was grossly, unfairly and egregiously misleading. When correctly calculated, the statistical probabilities of a coincidental match are not 1 in 1 Billion in the Caucasian population and 1 in 8 Million in the Black population, as Dr. Baird reported; rather, the probability of a coincidental match is 1 in 178 in the Caucasian population and 1 in 508 in the Black population. In other words, Dr. Baird's testimony falsely conveyed that it was unlikely that anyone else in the state of South Carolina, other than Kenneth Simmons, would be included as a possible contributor to the DNA from the vaginal swab. Based on the correct numbers, however, it is clear that thousands of other men in the state would match the DNA in the vaginal swab as well.

Third, Lifecodes' analysis of the DNA evidence relied on a number of erroneous assumptions – one such assumption was that there could be only a single male contributor the sample taken from the vaginal swab. The scientific evidence in this case provides no basis for determining whether the semen came from one man or from two or more men. The erroneous assumption of a single contributor falsely skewed Dr. Baird's statistical calculations in a way that was prejudicial to Kenneth Simmons, but it also caused the mistaken exclusion of multiple other suspects. At trial, the jury was never told that Lifecodes tested and excluded approximately twenty-six (26) other men as possible suspects before the lab tested Kenneth Simmons' blood sample. Nine (9) of these twenty-

six men, however, were erroneously excluded based on the assumption of a single contributor to the sample. If the possibility of two male contributors is considered, nine of these men cannot properly be excluded as potential contributors. In fact, among the twenty-six other suspects who gave DNA samples, there are three pairs who, in combination with the victim, could fully account for all of the observed alleles on the vaginal swab. The jury was never told that twenty-six other men were tested and that some of them could have been contributors to the DNA found in the vaginal swab.

The report of Dr. William Thompson, attached here as Exhibit A, explains these issues in greater detail, as well as several other problems with the DNA testimony as it was presented at Applicant's trial.

B. MENTAL RETARDATION CLAIM

Three years after Mr. Simmons was sentenced to death, the United States Supreme Court determined that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation. *Atkins*, 536 U.S. at 321. In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the South Carolina Supreme Court established the procedure for determining whether a defendant is mentally retarded, and therefore, ineligible for the death penalty. With regard to cases where the defendant was sentenced to death prior to *Atkins* – as is the situation here – the Court held:

A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law. As with other PCR claims, the applicant must show he or she is mentally retarded by a preponderance of the evidence. If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

Id. at 280, 588 S.E.2d at 606. The state supreme court also held that the applicable definition of mental retardation is found in the current death penalty statute, which defines mental retardation as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” *Id.* at 278-79, 588 S.E.2d at 605 (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)).

The *Atkins* court cited two professional organizations for their definitions of mental retardation – the American Association on Mental Retardation (AAMR), which is now known as the American Association on Intellectual and Developmental Disabilities (AAIDD) [hereafter, AAIDD], and the American Psychiatric Association – and noted that their definitions were “similar.” 536 U.S. at 308 n.3. The AAIDD defines mental retardation as “substantial limitations in present functioning, [which] is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, 5 (AAMR, 10th ed. 2002); *see also*, *Atkins*, 536 U.S. at 309 n.3. The American Psychiatric Association’s definition is essentially identical.¹ *See, e.g., United States v. Davis*, 2009 WL 1117401 (D. Md. 2009) (explaining that a number of courts have applied the two definitions as identical).

¹ The American Psychiatric Association’s definition of mental retardation states:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 (Criterion C).

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 4-1 (4th ed., text rev. 2000)

Thus, the definition of mental retardation consists of three prongs: (1) subaverage intellectual functioning; (2) limitations in adaptive functioning; and, (3) a manifestation of these attributes before age 18.

The evidence before the Court via affidavit, in conjunction with additional evidence to be presented at the evidentiary hearing, will demonstrate that Mr. Simmons meets all three prongs of the above definition and that he is therefore exempt from the death penalty in accordance with *Atkins*.

IV. LEGAL AUTHORITIES

This action has been brought pursuant to S.C. Code Ann. § 17-27-10 to 120, the South Carolina Uniform Post-Conviction Procedure Act. Issues raised include ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), the withholding of exculpatory, material evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), violations of the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution, *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), and violations of the Due Process clauses of the State and Federal Constitutions, as well as the Sixth, Eighth and Fourteenth Amendments to the State and Federal Constitutions, *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); *Darden v. Wainwright*, 477 U.S. 168 (1986).

V. WITNESSES

Applicant will submit testimony of the following witnesses via affidavit:

- Dr. Lewis Randolph Waid
- Bo Parks

(hereafter DSM-IV-TR).

- Paula Walsh
- Robyn Beach Schmeiding
- Jack Simmons
- Lagare Simmons
- Sam Glover
- Doris Russell
- Margaret Halstead
- Gene Simmons
- Linda Shwec
- Robert Polk
- William Long
- Betty Profit
- Dr. Richard Leo
- Floy Shuler

Applicant anticipates calling the following witnesses at trial:

- Marjorie Hammock
- Dr. Marc Tasse
- James Aiken
- Dr. Steve Lambert

VI. EXHIBITS

Applicant anticipates a minimal list of exhibits, which he will produce at trial. In addition, Dr. Marc Tasse will prepare a slide presentation that he would like to use for demonstrative purposes

during his testimony. Applicant will disclose a copy of this presentation to Respondent as soon as it becomes available.

Respectfully submitted,

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
P.O. Box 11311
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JAMES MORTON

Morton & Gettys LLP
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P.O. Box 707
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BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

January 21, 2010

EXHIBIT A

Review of DNA Evidence in *State of South Carolina v. Kenneth Simmons*

William C. Thompson, J.D., Ph.D.
Department of Criminology, Law & Society
University of California
Irvine, CA 92697
Email: William.Thompson@uci.edu

Overview

The DNA evidence that incriminated Kenneth Simmons was presented to the jury by two experts from Lifecodes Corporation—Mrs. Lauren Crane and Dr. Michael L. Baird. Dr. Baird presented the key testimony concerning the statistical probability of a coincidental DNA match. I have reviewed the scientific testimony in the case as well as Lifecodes' formal reports and copies of Lifecodes' laboratory notebook. As part of this review, I independently computed the random match probabilities using standard methods. Based on this review, I find that Dr. Baird's statistical testimony was incorrect, irrelevant, incomplete, and highly misleading.

Dr. Baird's testimony indicated that the DNA evidence provided a nearly definitive identification of Mr. Simmons as the source of the semen found in a vaginal sample taken from the murder victim in this case. The underlying scientific findings fail to support this conclusion for several reasons.

First, Lifecodes failed to disclose potentially exculpatory findings. My review of the laboratory records suggests that Lifecodes performed two STR DNA typing tests on Kenneth Simmons' reference sample, and obtained *two different DNA profiles from the same sample*. Whether Mr. Simmons is "included" or "excluded" as a possible source of the DNA in the vaginal sample should logically depend on which of the two profiles is correct—hence, the existence of two different reference profiles is potentially exculpatory, but it was never reported. Lifecodes reported the results of the second test, but not the first. In the laboratory notes that were disclosed to Kenneth Simmons' trial lawyer and appellate counsel, there appears to be a missing page at the point in the notebook where the results of the first STR test would have been documented.

Second, even if Mr. Simmons cannot be excluded as a possible source of the semen in the vaginal sample, the probability of this "match" being a mere coincidence is far higher than the jury was led to believe. In other words, Dr. Baird's testimony greatly exaggerated the value of the DNA evidence against Mr. Simmons. Dr. Baird's error was egregious; it would be obvious to any qualified expert who reviewed the evidence in this case that Dr. Baird's statistical testimony was misleading and inappropriate. This is not a matter on which qualified experts might differ. Qualified experts on forensic DNA statistics will unanimously agree that Dr. Baird's testimony in this case was irresponsible and grossly unfair to the defendant.

My review of laboratory records from Lifecodes Corporation also revealed a third serious problem—the mistaken exclusion of nine other suspects as possible contributors to the semen found in the vaginal swab. The laboratory records show that Lifecodes tested and “excluded” 26 other suspects before finding a “match” to Kenneth Simmons. In making those determinations, however, Lifecodes was assuming that the semen in the vaginal swab came from a single assailant. Lifecodes apparently failed to consider the possibility that the semen could have been left by two (or more) men. For example, the semen could have been from two assailants, or from one assailant and one earlier consensual partner of the victim. All 26 of the other suspects are excluded if one assumes the semen came from a single man, but *nine of the 26 men cannot be excluded if the semen came from two (or more) men*. The scientific evidence in the case provides no basis for determining whether the semen came from one man or from two or more men. Consequently, Lifecodes was mistaken when it determined that the nine men were “excluded” as possible contributors to the semen sample.

In fact, it is noteworthy that among the nine men who cannot be excluded are three different pairs who could, in combination with the victim, account fully for the observed genetic markers in the vaginal swab. In other words, the DNA evidence in this case can be explained as readily and as completely by the theory that the victim had sexual intercourse with various combinations of two men (from among those men who were tested as suspects before Kenneth Simmons was tested) as by the theory that the victim had sexual intercourse solely with Kenneth Simmons. The jury in this case was told only about the DNA test that incriminated Kenneth Simmons and apparently knew nothing about the testing of other suspects.

Inconsistent Typing of Kenneth Simmons' Reference Sample

Lifecodes conducted several rounds of DNA testing in this case. In an initial round of testing, the laboratory used a commercial test kit known as the *PM-DQA1 test*. This test examines DNA at six different genetic loci (locations on the human genome). The names of the loci examined by this test are LDLR, GYPA, HBGG, D7S8, GC and DQA1. As I will discuss below, Lifecodes relied on the results of the *PM-DQA1 test* to exclude 26 other suspects and include Kenneth Simmons as a possible contributor to the DNA in the vaginal sample.

After linking Simmons to the crime with the *PM-DQA1 test*, the laboratory tested some key samples again using a newer test, known as the *CTT triplex*. This newer test examines three genetic loci that are known as STR's (short tandem repeats). The names of these loci are CSF1PO, TPOX, and TH01.

Lifecodes ran an initial STR test comparing Kenneth Simmons' DNA profile to the profile of DNA from the vaginal samples on January 23, 1998. There is no written documentation of the results of this test in the laboratory notes that were disclosed to Mr. Simmons' trial lawyer Mr. Theos, nor in the copy that was disclosed to his appellate lawyer, Ms. Paavola. Lifecodes issued no report on this test, and the experts from Lifecodes did not mention this test in their testimony. I became aware of these test results only recently when Ms. Paavola requested and received from Orchid Cellmark (the successor company to Lifecodes) high quality scanned images of the STR

gels in Lifecodes' case file. One of these images (File name: "56381j.pdf") is dated January 23, 1998 and appears to show the (previously undisclosed) results of the first round of STR testing.

Figure 1 shows the relevant portion of this gel image. Close examination of this gel indicates that Mr. Simmons' DNA banding pattern (in the lane labeled 68555) does not match the DNA banding pattern of the vaginal samples. There is no indication in the laboratory notebook of how Lifecodes interpreted this test—that is, what alleles Lifecodes assigned to each sample. I believe any reasonable expert who examined this test result would assign alleles as follows:

Results of January 23, 1998 CTT Triplex STR Test

	Locus		
	CSF1PO	TPOX	THO1
Simmons Reference 68555	9,11	10,11	7,8
Vaginal Swab Male 56386	10,12	9	8
Vaginal Swab Female 56386	10,12	9	8
Vaginal Swab Female 56384	--	--	--

Based on this set of alleles, most forensic experts would conclude either that Mr. Simmons was excluded as a possible source of the DNA in the vaginal sample (if they thought there was sufficient male DNA to be detected) or that the test produced no useful information about the male contributors to the sample (if they thought there was insufficient male DNA to be detected). While it may be arguable whether these results, by themselves, should be deemed to exclude Mr. Simmons, I believe no reasonable expert could find that these test results incriminated him.

I see no reason for Lifecodes to disregard the results of this first STR test. It appears that the controls incorporated in the test performed properly. The positive control produced the expected profile and the negative control, as expected, produced no result. If Lifecodes had a good reason for disregarding this test, then the analysis leading to that important decision should have been documented in the laboratory notes and disclosed in the laboratory reports. Failure to mention such inconsistent findings that raise concerns about the accuracy of a test is not acceptable practice in forensic science.

Lifecodes ran the CTT triplex again on January 29, 1998. The existence of this test is documented in the laboratory notes that were disclosed to the defense, but these laboratory notes are incomplete. There is no indication in the laboratory notes of how Lifecodes interpreted the test—that is, what alleles they assigned to each sample. A photocopy of the STR gel was included in the laboratory notes but is impossible to interpret due to its poor quality. The scanned images recently obtained by Ms. Paavola provide a better indication of the test results. The best quality image is the file named "56381h.pdf." The relevant portion is reproduced in Figure 2.

Based on the results shown in Figure 2, I believe a reasonable DNA expert would assign alleles as follows:

Results of January 29, 1998 CTT Triplex STR Test

	Locus		
	CSF1PO	TPOX	TH01
Victim Reference Sample 56389	10,12	9	8
Simmons Reference 68555	10,12	10,11	7,8
Vaginal Swab Male 56386	10,12	9	8
Vaginal Swab Female 56386	10,12	9	8
Vaginal Swab Female 56386	10,12	9	8

There are two important aspects of these results. First, *the DNA profile developed from Mr. Simmons' reference sample on January 29, 1998 does not match the profile developed from the same reference sample on January 23, 1999.* The difference arises at only one of the three loci in the triplex—CSF1PO, which is the lowest of the three loci shown in the figures. Needless to say, the inconsistent typing of Mr. Simmons' reference sample is a problem. It raises serious concerns about the reliability of Lifecodes' test procedure—concerns that should have been documented and discussed in the laboratory notes. To ignore or cover up such a problem is not acceptable practice in forensic science.

Second, the results do not incriminate Mr. Simmons. The alleles that were detected in the vaginal samples can be accounted for entirely by the victim's DNA. Based on the test results, it is not clear that any alleles of male contributors were detected. Extremely faint bands can be seen in a number of the gel lanes, but these could be the result of technical artifacts such as "slippage" (stutter) or background "noise" in the system. Some of these faint bands correspond to Mr. Simmons' alleles but many do not. Most forensic DNA analysts would not regard these faint bands as reliable data. Hence, it is impossible to draw any reliable conclusion from these results about whether Mr. Simmons could or could not have been a contributor. I believe that most reasonable DNA analysts would conclude that, with respect to Mr. Simmons, this test should have been deemed inconclusive. Yet Dr. Baird relied heavily on this test when computing the statistics that were used to characterize the strength of the DNA evidence against Mr. Simmons.

The Missing Page in the Laboratory Notebook

I have reviewed two copies of Lifecodes' laboratory notes in this case. One copy was disclosed to appellate lawyer Emily Paavola and bears Bates stamp numbers that were added by Paavola's

staff. (In the comments that follow, I will use the Bates numbers to reference notebook pages). A second copy came from the files of the trial lawyer, Mr. Theos. My understanding is that these notes were disclosed to Mr. Theos before or during the trial. Although the order of some pages differs, the two sets of laboratory notes appear to be the same. The copy from Mr. Theos is of slightly higher quality, however, in that it shows page numbers from Lifecodes' laboratory notebook, while Ms. Paavola's copy does not. Examination of Lifecodes' page numbers is important because it appears that a crucial page is missing.

The following chart shows the laboratory notes in which Lifecodes documented its testing with the CTT triplex. The notes are identified by date, heading (i.e., page title), Lifecodes' notebook page number, and the Bates stamp number.

Date	Page Heading	Notebook Page Number	Bates Stamp Number
1/15/98	Amplify for CTT Promega STRs	33	150
1/16/98	Run product gel	34	151
1/27/98	Conc[entrate] sample 56386	36	152
1/29/98	Re. run STR gel CTT Promega Kit Gel results	37	153

As can be seen, there are no laboratory notes concerning the first STR gel that was run on January 23, 1998. (A portion of this gel is shown in Figure 1). This is the gel that produced a profile for Mr. Simmons that is inconsistent with the profile that Lifecodes reported for him. I believe that the results of this gel were documented on page 35 of Lifecodes' laboratory notebook. This page of the laboratory notebook was not disclosed to Mr. Simmons' lawyers.

Dr. Baird's Misleading Statistical Testimony

Dr. Baird testified that Kenneth Simmons was "not excluded" as a possible contributor to DNA found in the vaginal swab (TR 1474, Lines 21-22). He testified further that the genetic characteristics found in the vaginal swab were "consistent with it being a mixture of the victim as well as Mr. Simmons" (TR 1474, Lines 23-25).

In order to assess testimony of this type, it is necessary for the jury to know the likelihood that the non-exclusion of Mr. Simmons could arise through chance or coincidence. Consequently, it is standard practice, in cases of this type, for the DNA expert to provide statistics that reflect the probability of a coincidental non-exclusion. These statistics are often called *random match probabilities (RMPs)* because they reflect the probability that the test would fail to exclude a randomly chosen person from various reference populations (e.g., Caucasians, Blacks,

Hispanics). These statistics are essential if the jury is to correctly gauge the value of the DNA evidence. Obviously the evidence is a lot stronger for proving the defendant was the source if the random match probability is one in a billion than if it is one in three.

Dr. Baird's statistical testimony in this case was as follows:

Q: (Prosecutor): What percentage of the Caucasian population would be excluded as the donor of that semen in the male fragment of the vaginal swab taken at [the victim's] autopsy?

A: (Dr. Baird): Well, virtually all of the Caucasian population would be excluded as contributing. We generally represent this frequency as a number, not a percentage. So the frequency of occurrence really represents how often you would see that particular combined profile in the Caucasian population, which is one in over one billion two hundred eighty million, two hundred forty-nine thousand nine hundred and sixteen.

Q: So to ask that question in a different way perhaps, doctor, using that chart; what is the probability of a randomly chosen person unrelated to Kenneth Simmons having the same genetic profile as to the genetic profile found in the semen from the vaginal swab taken from the autopsy?

A: Well, again, it is extremely rare...

Q: All right, sir. And the one in one billion, two hundred and eighty million, two hundred forty-nine thousand, nine hundred and sixteen; is that correct?

A: Yes, sir.

Q: All right, sir. If you'd get the chart for the Black data base, please. Dr. Baird, using that chart, please explain the probability of a randomly chosen person unrelated to Kenneth Simmons having that same genetic profile, the genetic profile found in the semen on this chart, the vaginal swabs taken from the autopsy.

A: There are nine different generic (sic.) tests done in this case. In the Black population it's about one in eight million people. In other words, one person in eight million would have that profile that we see in Mr. Simmons.

Q: All right. And you also see that same profile in the male fragment of the vaginal swab?

A: Right; in the vaginal swab is a DNA profile consistent with Mr. Simmons being a contributor as well as the victim.

Q: Thank you.

(TR 1480-82)

Based on this testimony, I believe any reasonable juror would conclude that the random match probability was extremely low: less than one chance in 1.2 billion for Caucasians and less than one chance in eight million for Blacks. Consequently, the jurors undoubtedly viewed the DNA evidence in this case as highly probative—a nearly definitive identification of Mr. Simmons as the source of the semen. As I will now explain, however, this impression is incorrect. The random match probabilities in this case, when computed correctly, are far higher than Dr. Baird reported, which means that the DNA evidence in this case was far less definitive than Dr. Baird's testimony indicated. As I will explain below, the numbers that Dr. Baird presented answered

different questions than the prosecutor asked. The prosecutor quite properly asked Dr. Baird about the probability the test would fail to exclude a randomly chosen person as a possible source of DNA *in the vaginal sample*. Dr. Baird responded incorrectly by providing the probability a randomly chosen person would have a DNA profile *identical to Kenneth Simmons*'. Because the probability of a random match to the vaginal sample was far higher than the probability of a random match to Mr. Simmons, Dr. Baird's statistics conveyed an exaggerated impression of the strength of the DNA evidence.

Dr. Baird Presented Single-Source Statistics Rather Than Mixture Statistics

The proper method for computing random match probabilities varies depending on the nature of the evidentiary sample. When the evidentiary sample is a single-source sample (containing DNA from a single person) there typically is only one DNA profile that will "match" the evidence—all other profiles will be "excluded." Hence, the random match probability in a single-source case is simply the frequency (in relevant reference populations) of the single matching profile. By contrast, when the evidentiary sample is a mixture (as was true in this case), there typically are many different DNA profiles that cannot be excluded as possible components of the mixture. Consequently, the random match probability for a mixture case is the sum of the frequencies of *all* of the non-excluded profiles.

One of Dr. Baird's errors was that he presented single-source statistics rather than mixture statistics. The statistics that he presented to the jury reflected the probability that a randomly chosen Caucasian or Black would have a DNA profile identical to Kenneth Simmon's profile. These statistics were inappropriate for assessing the strength of the DNA evidence in this case because Kenneth Simmon's profile was just one of many profiles that a male contributor to the vaginal DNA might have had. For a juror evaluating DNA evidence in this case, the relevant statistic is the probability that a random person would match (i.e., not be excluded as a contributor to) the DNA in the vaginal swab, not the probability a random person would have the same DNA profile as Mr. Simmons.

A review of the DNA test results in this case illustrates the distinction between single-source statistics and mixture statistics and shows why Dr. Baird's statistics were irrelevant and misleading. Table 1 shows the alleles (genetic characteristics) that Lifecodes' DNA tests detected in the vaginal swab from the victim (first row of data) along with the genotypes found in reference samples from the victim (second row) and from Kenneth Simmons (third row). The tests examined nine different genetic loci (locations on the human genome); the table shows the results for each sample at each locus, as reflected in Lifecodes' formal reports and laboratory notebook. Row four of the table shows random match probabilities for each locus computed according to the incorrect (single-source) method relied upon by Dr. Baird; row six of the table shows random match probabilities computed according to the correct method for mixtures.

The first column in the table shows the results for a genetic locus called LDLR. At this locus there are two possible alleles that a person might have, labeled "A" and "B." Each person inherits two of these alleles (one from each parent), hence there are three possible genotypes that a person might have: AA, AB, and BB. As the table shows, alleles A and B were both detected in the vaginal swab. The victim had genotype AB and Kenneth Simmons had genotype BB.

Based on the findings for this locus, Kenneth Simmons cannot be excluded as a possible contributor to the DNA in the vaginal swab because a combination of the victim's genotype, AB, and Simmons' genotype, BB, would produce the exact results found in the vaginal swab—alleles A and B. But let us consider, for a moment, the statistical significance of this finding. Although Kenneth Simmons cannot be excluded based on the findings for this locus, neither could anyone else in the human population be excluded. There are three possible genotypes that a person could have at this locus—AA, AB, and BB. Any of these genotypes, in combination with the victim's genotype, would produce the exact results found in the vaginal swab, so at this locus no human being in the entire world can be excluded. As a matter of basic logic, the fact that Kenneth Simmons was not excluded means nothing because *no one can be excluded*. Hence, the correct random match probabilities for this locus are not the ones that Dr. Baird assigned to it—.2992 for Caucasians and .6022 for Blacks. These probabilities reflect the probability that a randomly chosen person would have the same genotype as Kenneth Simmons which, as discussed, is irrelevant. The correct RMP is 1.0, which reflects the reality that no one can be excluded at this locus—everyone matches.

As Table 1 illustrates, the same problem occurred at locus GYPA (second column of data). At this locus there are again two possible alleles, "A" and "B," and three possible genotypes: AA, AB and BB. The victim and Kenneth Simmons both have genotype AB, and alleles A and B were detected in the vaginal swab. Again, Kenneth Simmons cannot be excluded because his genotype, in combination with the genotype of the victim, would produce the exact results detected in the vaginal swab. However, all of the other possible genotypes that anyone could have at this locus would also produce the exact results that were detected. So, once again, this is a locus that can exclude no one. The correct random match probability for this locus is therefore 1.0. The RMPs that Dr. Baird incorrectly assigned this locus when he computed the statistics that he presented to the jury were .4859 for Caucasians and .4991 for Blacks.

Locus HBGG (third column of data) is the first locus at which *any* potential suspects can be excluded. At this locus there are three possible alleles, labeled "A," "B," and "C." There are six possible genotypes: AA, BB, CC, AB, AC, and BC. Kenneth Simmons cannot be excluded because his genotype, AC, in combination with the victim's genotype, AC, could account for the alleles detected in the vaginal swab: A and C. Men with genotypes BB, AB, and BC would be excluded at this locus because no B allele was detected. Men with genotypes AA, AC and CC cannot be excluded. In his statistical computations, Dr. Baird assumed that the random match probability at this locus was .0066 for Caucasians and .3012 for Blacks, because these are the frequencies in the respective populations of people who have Kenneth Simmons' genotype, AC. Dr. Baird's statistics understated the true probability of a coincidental non-exclusion because they ignored the fact that the non-excluded group also includes men with genotypes AA and CC.

The fallacy of Dr. Baird's approach is perhaps best illustrated by analogy. Imagine that forensic evidence proves that the perpetrator of a crime had either red hair, black hair or brown hair, but not blond hair. And suppose that a suspect is "included" as a possible perpetrator because he has red hair. Under Dr. Baird's approach, one would gauge the significance of this evidence by focusing on the rarity of red hair. Simple logic suggests, to the contrary, that the rareness of red hair is irrelevant given that a suspect would also have been "included" if he had black or brown

hair. It is the overall probability of inclusion/exclusion, rather than the frequency or rarity of a particular suspect's characteristics, that determines the probative value of the evidence.

For locus D7S8 and locus DQA1 there were problems similar to the problem at locus HBGG. At shown in Table 1, at each locus Dr. Baird's RMPs reflect the probability that a randomly chosen Caucasian or Black would have the same genotype as Kenneth Simmons, but Simmons' genotype was not the only genotype that would have produced a non-exclusion. Hence, Dr. Baird's statistics understated the probability of a coincidental non-exclusion at these loci as well. Locus GC is the only locus at which Kenneth Simmons' genotype is the only genotype that, in combination with the victim's genotype, can account for the alleles found in the vaginal swab. For locus GC only, Dr. Baird's single-source statistics and the mixture statistics are the same.

The necessity of using different methods for statistical computation in single-source and mixture cases is universally recognized and was well-accepted at the time when Dr. Baird testified. Reports issued by the National Research Council in 1992 and in 1996 both discussed the appropriate method for statistical computation in DNA mixture cases. It is clear that Dr. Baird was familiar with the 1996 National Research Council Report because he mailed a copy of one of the chapters from this report to the prosecutor before the trial, suggesting that the prosecutor read it as "background information about forensic DNA analysis in preparation for trial..." (Letter from Michael L. Baird to Walter M. Bailey, Jr., February 4, 1999; Bates stamp 235). It is difficult to believe that Dr. Baird did not know the proper method for statistical calculations in mixture cases.

There is no question that Dr. Baird's statistics were inappropriate and wrong. This is not a matter on which reasonable experts could differ. In my opinion, no competent DNA expert anywhere in the world would agree with Dr. Baird's statistical method or support his statistical testimony. The few instances I know of in which DNA analysts have presented single-source statistics in place of mixture statistics have widely been considered scandalous—the most prominent example being the scientific misconduct discovered in the Houston Police Department Crime Laboratory in 2003.

By presenting incorrect statistics, Dr. Baird gave incorrect answers to questions that the prosecutor repeatedly put to him. The prosecutor asked about the percentage of the Caucasian and Black populations that would have been excluded (and not excluded) by the DNA tests as a source of the semen found in the vaginal sample. This is the very question that mixture statistics are designed to answer. The prosecutor's questions on this particular issue were appropriate and were well designed to elicit the statistical information that a reasonable juror would need in order to evaluate the non-exclusion of Mr. Simmons. Dr. Baird responded to these questions by providing statistics about the frequency among Caucasians and among Blacks of people who have a DNA profile identical to Kenneth Simmons' profile. He made no effort to explain that Simmons profile was not the only profile that would "match" the vaginal swab and that the probability of a random match to the mixed sample was far higher than the probability of a random match to Simmon's profile. As a result, while Dr. Baird appeared to be answering the prosecutor's questions, he was providing statistics that greatly exaggerated the value of the DNA evidence against Mr. Simmons.

Dr. Baird's Match Probabilities Were Based, In Part, on Loci Where It is Not Clear that a Match Occurred

A second problem with Dr. Baird's statistics is that he computed random match probabilities for loci where it is not clear that a match occurred. The statistics that Dr. Baird presented to the jury were based in part on data from the three STR loci—CSF1PO, TPOX, and THO1. According to a report that Lifecodes issued on February 2, 1998, the laboratory tested Mr. Simmons' reference sample and determined his genotypes for these three loci. *But there is no laboratory report that indicates that alleles corresponding with Mr. Simmons' alleles were found in the vaginal sample. Nor does the laboratory notebook indicate that alleles matching Mr. Simmons were found in the vaginal sample.* As discussed in a previous section of this report, a scanned copy of the gel image (see Figure 2) appears to show alleles in the vaginal swab that are consistent with the genotype of the victim, but it *does not show any other alleles that match those of Mr. Simmons.* It is possible that Dr. Baird thought he saw extremely faint bands corresponding to Mr. Simmons' alleles in the gel shown in Figure 2, but as mentioned above, there is no documentation of such a finding in the laboratory notebook, nor is such a finding mentioned in any report. In other words, the evidence I have reviewed provides no support for the conclusion that the DNA found in the vaginal sample corresponds to Mr. Simmons' DNA profile.

The February 2, 1998 laboratory report lists the frequencies, among Caucasians and Blacks, of Mr. Simmon's genotypes at each of these three loci. Dr. Baird appears to have relied on these genotype frequency estimates when computing the statistics that he presented to the jury. This is an obvious and egregious error that unfairly slanted the statistics against Mr. Simmons. It makes no sense to compute the probability of a random match when there is no evidence that a match occurred.

Even if we assume (in the absence of documentation and photographic evidence) that there were faint bands corresponding to Mr. Simmons' alleles in the vaginal swab, Dr. Baird's statistics for these loci are still incorrect. As with the other loci, his statistics for these three loci reflect single-source match probabilities—that is, the probability that a randomly chosen person would match Mr. Simmon's genotypes. Because the vaginal sample is a mixture, the correct random match probability would be significantly higher than the probabilities Dr. Baird used in his calculations. It is impossible to determine how much higher that correct numbers would be, however, without knowing exactly what alleles Lifecodes assigned to the vaginal sample.

What Are the Correct Statistical Estimates for this Case?

To compute random match probabilities in this case, one must begin by making an assumption about the number of male contributors to the DNA found in the vaginal swab. If there was a single male contributor, then the calculation is straightforward—one simply multiplies the random match probabilities for each locus shown in Table 1, Row 6. For the six loci at which it is clear that Kenneth Simmons "matches" the vaginal swab—i.e., he cannot be excluded as the male contributor—the random match probability is approximately 1 in 178 for Caucasians and 1 in 508 for Blacks.

These numbers are far more modest than the frequencies Dr. Baird presented to the jury. Based on Dr. Baird's statistics the jurors could reasonably have concluded that it is unlikely that anyone else in the state of South Carolina, other than Kenneth Simmons, would be included as a possible contributor to the DNA in the vaginal swab. Based on the correct numbers, it is clear that thousands of other men in the state would match the DNA in the vaginal swab as well as Mr. Simmons did.

The numbers for the six matching loci become even more favorable to Mr. Simmons if we assume there might have been two male contributors to the semen found in the vaginal swab. Based on the DNA test results, it is clear that there was at least one male contributor, but the results do not rule out the possibility of more than one male contributor. For example, the semen might have come from two assailants who raped the victim. Alternatively, the semen could have come from one prior consensual partner of the victim and from an assailant who raped her. The percentage of the male population that would be included as one of two (or more) male contributors is far higher than the percentage that could be included as the sole male contributor. Among Caucasians, approximately one man in four could be included as one of two or more male contributors to the DNA in the vaginal swab; among African-Americans the comparable number would be one in three. These numbers assume that the DNA profile of the other contributor, when combined with the first contributor and the victim, would account fully for the observed results.

Many forensic experts prefer to use statistics known as likelihood ratios to characterize the value of a DNA match in a case of this type. Likelihood ratios can be computed to show how much more likely the observed test results would be if Kenneth Simmons was a contributor than if a random person (from a particular reference population) was a contributor. Likelihood ratios can be computed under the assumption of one male contributor and under the assumption of two male contributors.

In the case of a single male contributor, we can ask how much more likely it would be to obtain the observed results for the vaginal sample if the contributors were the victim and Kenneth Simmons than if the contributors were the victim and an unknown man unrelated to Kenneth Simmons. The likelihood ratio would be 178 if we assume the unknown man was a Caucasian and 508 if we assume the unknown man was Black. In the case of two male contributors, the numbers are more favorable to Mr. Simmons. We can ask how much more likely it would be to obtain the observed results for the vaginal sample if the contributors were the victim, Kenneth Simmons and an unknown man than if the contributors were the victim and two unknown men. Under the assumption of two male contributors, both unrelated to Mr. Simmons, the likelihood ratio would be approximately 51 if the two unknown men were both Black, and slightly higher if one were Black and the other were Caucasian. This analysis indicates that the DNA evidence has probative value for incriminating Simmons, but far less value than was indicated by Dr. Baird's testimony.

Another issue that Dr. Baird's testimony failed to consider is the possibility that the male DNA in the vaginal sample came from a relative of Kenneth Simmons. The jury was never told that the probability of a random match to a relative is far higher than the probability of a random match to an unrelated person. For example, there is 1 chance in 11 that a brother of Kenneth

Simmons would have a DNA profile that, in combination with the victim's DNA profile, could account fully for the reported test results on the vaginal sample. For a half-brother or uncle of Mr. Simmons, the chances of such a match are 1 in 101. The high probability of a match to a relative is vital to consider in this case because Mr. Simmons reportedly has an extraordinary number of close relatives. Based on genealogy data I received from Mr. Simmon's lawyer, it appears that Simmons has two full brothers and five half-brothers among a total of 18 siblings. The number of siblings, uncles, cousins etc. in this very large family is sufficient to make it virtually certain that there are men, among Mr. Simmon's relatives, whose genetic characteristics could account for the observed test results in this case as well as Kenneth Simmons did. The jury was not informed of this fact.

A final statistical wrinkle in this case concerns the fact that Lifecodes tested 26 other men before finding one man, Kenneth Simmons, whose DNA profile could, in combination with the victim's DNA, account for the alleles found in the vaginal sample. Testing multiple suspects increases the probability of incriminating an innocent person. As more people are tested, the probability of finding an innocent person who just happens to "match" will increase. This increase in the probability of a coincidental incrimination is not reflected in standard random match probabilities nor in the other DNA statistics discussed above. Suppose, for example, that the random match probability is one in 100. If a single innocent person is tested, then the probability of a coincidental incrimination is only 1 in 100. If two innocent people are tested, the likelihood of coincidentally incriminating at least one of them is about 2 in 100. If 27 innocent people are tested, the probability of falsely incriminating at least one of them jumps to more than 1 in 4.

Under the assumption of a single male contributor, the random match probabilities in this case (for the six loci where a match was reported) were 1 in 178 for Caucasians and 1 in 508 for Blacks. Based on these numbers, if Lifecodes tested 27 innocent Caucasians who were unrelated to the perpetrator, the probability of falsely incriminating one or more of them would be about 0.14 (fourteen percent). If Lifecodes tested 27 innocent Blacks who were unrelated to the perpetrator, the probability of falsely incriminating one or more of them would be about 0.05 (five percent). The jury in this case was not informed that Lifecodes tested 26 other suspects before incriminating Kenneth Simmons, hence it is unlikely that they appreciated or took into account this factor when assessing the DNA evidence.

In summary, when viewed in light of a comprehensive and accurate statistical analysis, it appears that the value of the DNA evidence from incriminating Mr. Simmons was rather modest. He certainly could have been the source of the male DNA found in the vaginal swab, but many other men (either singly or in pairs) could also have accounted for it. The impression created by Dr. Baird's testimony of a nearly unique identification is plainly false.

The Mistaken Exclusion of Other Suspects

As mentioned previously, before it tested Kenneth Simmons, Lifecodes tested DNA samples from twenty-six other men. These other suspects were tested at six genetic loci: LDLR, GYPA, HBGG, D7S8, GC and DQA1. Based on the results from these six loci, Lifecodes determined that all 26 men were "excluded" as the male contributor to the DNA found in the vaginal sample. When it made the determination that the men were "excluded," however, Lifecodes was apparently assuming that the DNA found in the vaginal swab came from only two people—the victim and the assailant. Lifecodes apparently failed to consider the possibility that there were two male contributors, even though that possibility cannot be ruled out by the DNA test results. If we assume there were two male contributors, then nine of the 26 men cannot be ruled out as possible contributors.

Table 2 shows the alleles (genetic characteristics) found in the vaginal sample along with the DNA profile of the victim and the profiles of the 26 men, with each man identified by Lifecodes' sample number. Seventeen of the men (those labeled "excluded" in the far right column) are ruled out as contributors because they have genetic characteristic that were not detected in the DNA from the vaginal swab. In my opinion, nine of the 26 men (those labeled "included") should not have been excluded because all of their genetic characteristics were detected in the vaginal sample. These men are all possible contributors *if* the vaginal swab contained DNA of a third person besides the victim and themselves. Lifecodes "excluded" these men because their individual profiles, in combination with the victim's profile, could not account for all of the alleles found in the vaginal swab.

The reason that Lifecodes "excluded" man number 56822, for example, was apparently that he (and the victim) lack allele B at locus D7S8 and allele C at locus GC. If one assumes that there was one and only one contributor, other than the victim, then man number 56822 could not be that contributor. On the other hand, if one assumes there could be a third contributor, it is not possible to exclude 56822 because the "missing" alleles could be from the third person. Notice, for example, that man 56828 happens to have both the B allele at D7S8 and the C allele at locus GC. Indeed, although Lifecodes "excluded" both 56822 and 56828, the two of them, in combination with the victim, can account for all of the alleles found in the vaginal sample. In other words, the observed evidence is entirely consistent with the theory that the vaginal DNA came from 56822 and 56828, along with the victim.

It is easy to imagine scenarios under which there could be three contributors to the DNA found in the vaginal sample. Perhaps the victim had a consensual sexual partner before being raped and killed by a single assailant. Alternatively, she might have been raped and killed by two assailants. Among the men who were tested as possible suspects there are three pairs who, in combination with the victim, could account for all of the observed alleles: 56822 and 56828; 59714 and 56828; and 59717 and 56828. For the other "included" men to be contributors, we must posit an unknown third person who supplied the missing alleles.

The jurors were never told that other men were tested as possible suspects before Kenneth Simmons was tested. Nor were the jurors told that some of these men, in combination with each other, or with unknown individuals, could have been contributors to the DNA found in the

vaginal swab. In my opinion it was a mistake for Lifecodes to exclude these men because there is no scientific basis for concluding the DNA came from the victim and only one male contributor. Because the theory of two contributors (besides the victim) cannot be ruled out scientifically, it should have been taken seriously when determining "inclusions" and "exclusions."

My Qualifications

I am a professor and former Chair of the Department of Criminology, Law & Society at the University of California, Irvine (UCI). I am also a member of the California Bar. I have been studying forensic DNA evidence since 1988 and have published over 40 articles on the subject. My articles have appeared in scientific journals (e.g., *Genetica*, *Journal of Forensic Sciences*) as well as legal publications. I hold the title of Senior Research and Development Scientist at Forensic Bioinformatics, a company that specializes in the analysis and re-analysis of electronic data and computer files generated in forensic DNA testing. I frequently conduct workshops and training sessions on the evaluation and presentation of forensic DNA evidence. I served as Reporter for the American Bar Association Standards Committee Study Group on DNA Evidence, and on the ABA Task Force on Biological Evidence. I am currently a member of the California Crime Laboratory Review Task Force, which was established by the California State Legislature to review and improve the delivery of forensic science services in California. I have delivered invited addresses on the evaluation of forensic DNA evidence, and statistical assessment of DNA evidence, at professional conferences sponsored by a number of scientific organizations, including the International Society of Forensic Inference and Statistics, the National Institute of Justice, the Association of Forensic DNA Analysts and Administrators (AFDAA), the California Association of Criminalists (CAC), the International Association of Forensic Science, and the Australia/New Zealand Forensic Science Society. I frequently attend and participate in scientific meetings related to forensic DNA testing. I have participated in a number of workshops and training programs on forensic DNA evidence, and specifically on systems for automated analysis of STRs. I have consulted with police departments, a state coroner, innocence projects, news organizations and a number of lawyers on the interpretation of DNA evidence. I have reviewed and evaluated DNA tests in more than 100 cases.

Respectfully submitted,

William C. Thompson

William C. Thompson

January 4, 2010

Figure 1: January 23, 1998 results of *CTT Triplex* comparing DNA Profile of Kenneth Simmons (68555) with Male Fraction of Vaginal Swab (56386) and Female Fractions of Vaginal Swab (56384 female and 56386 female).

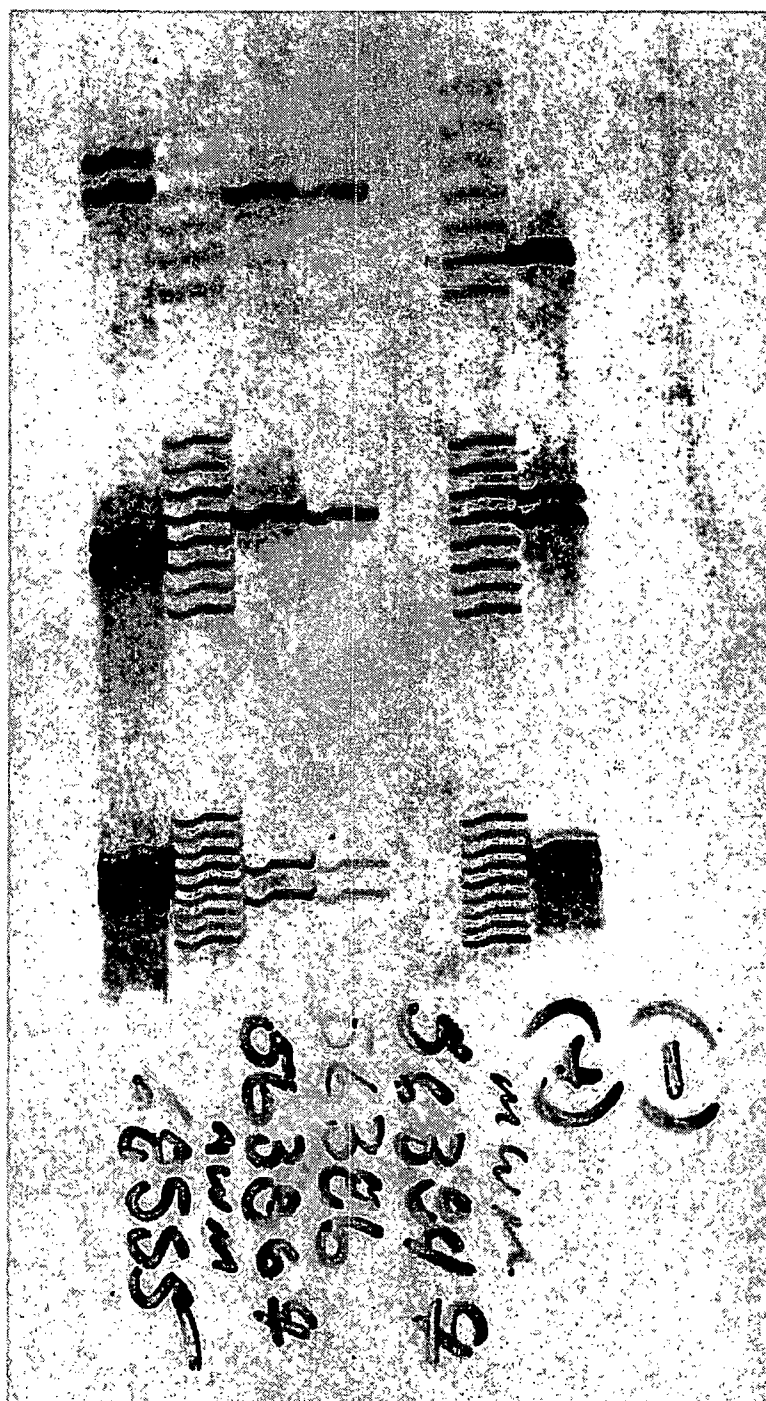


Figure 2: January 29, 1998 results of *CTT Triplex* comparing DNA Profile of victim (56389) and Kenneth Simmons (68555) with Male Fraction of Vaginal Swab (56386) and Female Fraction of Vaginal Swab (56386 female)

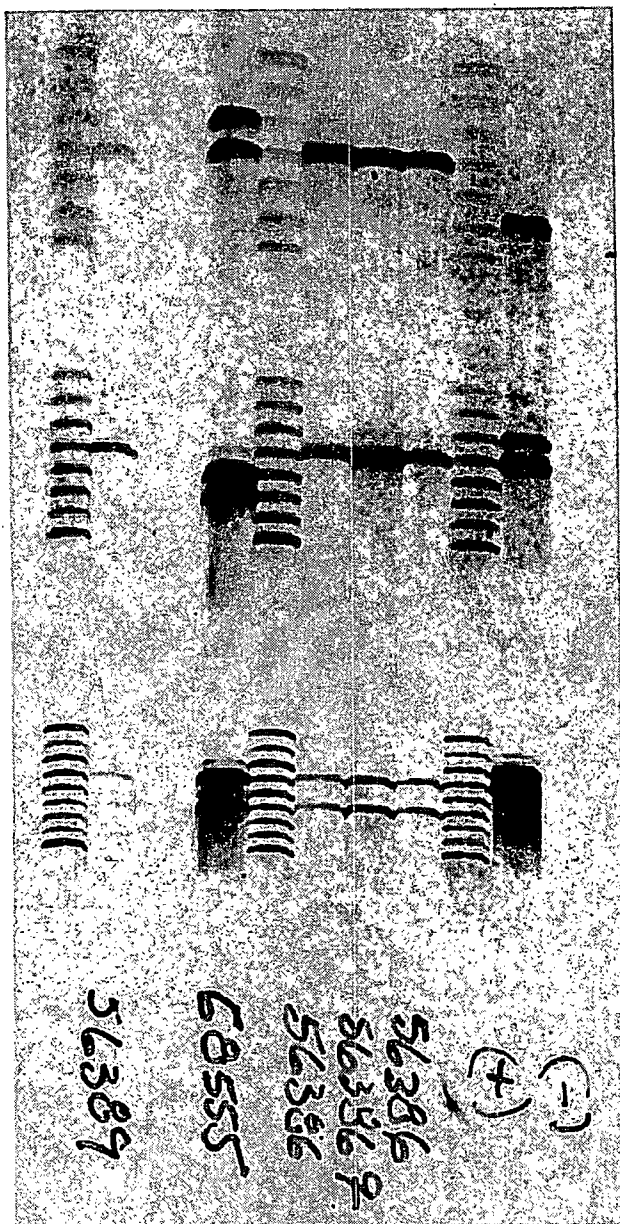


**Table 2: DNA Profiles of Other Suspects Who Were "Excluded" by Lifecodes
(*South Carolina v. Kenneth Simmons*)**

SAMPLE	Locus						Included or Excluded as One of Two Possible Contributors (Besides Victim)
	LDLR	GYP A	HBGG	D7S8	GC	DQA1	
Vaginal Swab Alleles	AB	AB	AC	A(B)	B(AC)	1.1,2,*,4.2/4.3	
Victim	AB	AB	AC	AA	BB	2, 4.2/4.3	
62761	AB	AA	CC	AB	AB	1.3, 4.1	Excluded
56822	AB	BB	AC	AA	AB	1.1,1.2	Included
56823	BB	AA	AC	AB	BB	1.1,2	Included
56824	AB	AA	AC	AB	CC	1.1,4.1	Excluded
56825	AB	BB	AB	AB	BB	1.2,2	Excluded
56826	AB	AB	BC	AA	BB	1.2,4.2/4.3	Excluded
56827	AB	BB	AB	AB	BB	1.2,4.1	Excluded
56828	BB	BB	AC	AB	BC	1.1,1.2	Included
58666	BB	AB	BB	AA	BB	1.2,2	Excluded
58667	BB	BB	BC	BB	BC	1.1,1.2	Excluded
58668	AB	AB	AB	AA	BC	1.2,3	Excluded
58669	BB	AB	AA	AA	BB	1.1,1.1	Included
59712	BB	AB	CC	AA	BB	4.1,4.2/4.3	Excluded
59713	BB	AA	AA	AB	BB	3,4.2/4.3	Excluded
59714	AB	AB	AC	AB	AB	1.2,1.2	Included
59715	AB	AB	AC	BB	BB	2,4.1	Excluded
59716	BB	AB	AB	AB	BB	1.1,1.1	Excluded
59717	--	--	--	--	AB	--	Included
61584	BB	BB	CC	AB	BB	4.1,4.1	Excluded
61585	AB	AB	AC	AA	BB	2,4.2/4.3	Included
63637	BB	AB	AC	AB	BB	1.2,1.2	Included
63638	AA	AA	BB	AB	CC	1.3,4.1	Excluded
63639	AB	AA	AA	AB	BB	4.1,4.1	Excluded
64983	BB	AA	AC	AB	BB	1.2,1.2	Included
64984	BB	AB	AC	AB	BC	4.1,4.1	Excluded
64985	BB	AB	AA	AA	BB	1.2,4.1	Excluded

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

KENNETH SIMMONS,)

Applicant,)

v.)

GARY MAYNARD, COMMISSIONER,)

S.C. Department of Corrections)

Respondent.)

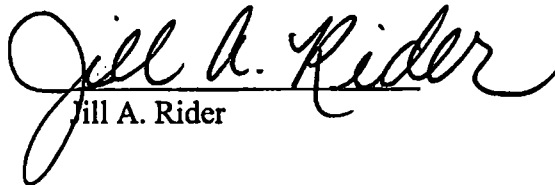
IN THE COURT OF COMMON PLEAS

Case No.: 05-CP-18-1368

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Applicant's Pre-Trial Brief was served by first class United States mail, postage prepaid, this 21st day of January, 2010, upon the following:

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Jill A. Rider

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
)

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL CIRCUIT
2005-CP-18-1368

KENNETH SIMMONS,)
)
APPELLANT,)
)

PCR HEARING

VERSUS)
)
)

STATE OF SOUTH CAROLINA,)
)
RESPONDENT.)

FEBRUARY 1-4, 2010
ORANGEBURG, SOUTH CAROLINA

B E F O R E: THE HONORABLE DOYET A. EARLY III

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1 **THE COURT:** MISTER MORTON, ARE YOU READY TO PROCEED?

2 **MR. MORTON:** YES, SIR. THANK YOU VERY MUCH, YOUR HONOR. MY
3 NAME IS JIM MORTON AND WE ARE HERE FOR THE APPLICANT, MISTER
4 KENNETH SIMMONS, ALONG WITH ME IS MS. EMILY PAAVOLA, MISTER BOYD
5 YOUNG WHO WILL BE ASSISTING US. AND, OF COURSE, WITH THE ATTORNEY
6 GENERAL'S OFFICE IS, I THINK, MISTER ZELENKA AND MISTER MABRY. IS
7 THAT CORRECT?

8 **MR. ZELENKA:** THAT'S CORRECT.

9 **MR. MORTON:** YOUR HONOR, I THINK THAT WE HAVE SPOKEN —

10 **THE COURT:** BEFORE YOU GET STARTED, LET ME JUST FIND OUT WHO
11 ALL THE PLAYERS ARE. SIR, YOU ARE?

12 **DR. TASSE:** MY NAME IS DOCTOR MARK TASSE. I'M A PSYCHOLOGIST.

13 **THE COURT:** THANK YOU. MA'AM?

14 **MS. HAMMOCK:** MARJORIE HAMMOCK, I'M A SOCIAL WORKER.

15 **THE COURT:** MA'AM?

16 **MS. WOFFORD:** AMY WOFFORD. I'M THE VICTIM'S ADVOCATE WITH THE
17 ATTORNEY GENERAL'S OFFICE.

18 **MR. YOUNG:** SHE'S OUR VICTIM'S ADVOCATE, YOUR HONOR.

19 **THE COURT:** THANK YOU. JUST MAKING SURE I KNOW EVERYBODY.
20 MISTER MORTON.

21 **MR. MORTON:** THANK YOU, JUDGE. I THINK WE HAVE SPOKEN WITH THE
22 ATTORNEY GENERAL AND WITHOUT OBJECTION HAVE PRE-MARKED AND
23 PRESENTED AS EXHIBITS, AFFIDAVITS REGARDING THE MENTAL
24 RETARDATION ISSUE, WHICH WILL BE OUR FIRST ISSUE AND OUR FIRST
25 WITNESS. IS THAT CORRECT, MISTER ZELENKA?

1 **MR. ZELENKA:** YES.

2 **THE COURT:** WITHOUT OBJECTION?

3 **MR. ZELENKA:** WITHOUT OBJECTION.

4 **THE COURT:** VERY WELL. AND THESE ARE THE SAME AFFIDAVITS THAT
5 WERE SENT TO ME EARLIER AND YOU WILL IDENTIFY THEM FOR THE
6 RECORD, I ASSUME?

7 **MR. MORTON:** YES, SIR, YOUR HONOR.

8 **MR. ZELENKA:** YOU WILL GO THROUGH AND IDENTIFY THEM?

9 **MR. MORTON:** YES, SIR. SHE WILL. MS. PAAVOLA IS GOING TO DO
10 THAT.

11 **THE COURT:** ALL RIGHT. LET'S DO THAT NOW. IF YOU WOULD, JUST
12 IDENTIFY WHAT WE'RE PUTTING IN THE RECORD.

13 **MS. PAAVOLA:** SURE. AFFICANT'S EXHIBIT #1 IS THE CERTIFIED
14 RECORDS REGARDING DOCTOR LESLIE SANDLER. HE TESTIFIED ON BEHALF
15 OF THE DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS.

16 AND THEN WE'VE MARKED AS APPLICANT'S EXHIBIT #2, THE
17 COLLECTION OF AFFIDAVITS THAT WERE FILED WITH OUR PRE-TRIAL BRIEF
18 AND SUBSEQUENTLY. THERE'S THE AFFIDAVIT OF BETTY PROFIT, THE
19 AFFIDAVIT OF WILLIAM LONG, THE AFFIDAVIT OF LINDA SHWEC, THE
20 AFFIDAVIT OF ROBERT POLK, THE AFFIDAVIT OF JEAN SIMMONS, THE
21 AFFIDAVIT OF MARGARET HOLSTEAD, THE AFFIDAVIT OF MRS. DORIS
22 RUSSELL, THE AFFIDAVIT OF MISTER SAM GLOVER, THE AFFIDAVIT OF JACK
23 SIMMONS, AN AFFIDAVIT FROM LEGREE SIMMONS, AN AFFIDAVIT FROM MS.
24 ROBIN BEACH SMIDEN, AN AFFIDAVIT FROM PAULA WALSH, AN AFFIDAVIT
25 FROM MISTER BILL PARKS, AN AFFIDAVIT FROM DOCTOR LEWIS RANDOLPH

1 WAID AND THE AFFIDAVIT OF DOCTOR RICHARD LEO AND THE AFFIDAVIT OF
2 MS. FLOY SHULER.

3 (WHEREUPON, THE CERTIFIED RECORDS OF DR. SANDLER ARE
4 ENTERED AS AFFIANT'S EXHIBIT #1 AND AFFIDAVITS AS LISTED ABOVE ARE
5 ENTERED INTO EVIDENCE AS AFFIANT'S EXHIBIT #2 BY STIPULATION)

6 **MR. ZELENKA:** YOUR HONOR, WITH RESPECT TO DOCTOR LEO'S
7 AFFIDAVIT, WE'VE AGREED TO DO HIS DEPOSITION. HE IS LOCATED OUT OF
8 STATE AND AS PART OF THEIR MOTION THEY SOUGHT TO ADMIT THE
9 AFFIDAVIT IN LIEU OF THE LIVE TESTIMONY. AFTER DISCUSSIONS WITH
10 THEM, WE DO WANT TO EXAMINE DOCTOR LEO. WE UNDERSTAND UNDER
11 SIMPSON, THAT IT'S YOUR HONOR'S DISCRETION AS TO THE ADMISSION OF
12 THOSE AFFIDAVITS, BUT SINCE WE WILL BE DOING HIS DEPOSITION, WE
13 WOULD LOOK TO THE COURT AT THIS TIME AS TO HOW THEY WANT TO
14 PROCEED WITH DOCTOR LEO'S PARTICULAR AFFIDAVIT.

15 **THE COURT:** WELL, I ASSUME YOU'RE JUST GOING TO DO A DEPOSITION
16 WITH HIM AND SO I WILL ACCEPT THE DEPOSITION. IF I NEED TO REFER TO
17 THE AFFIDAVIT -- I'VE ALREADY READ IT.

18 **MR. MORTON:** WELL, I UNDERSTAND THAT YOUR HONOR.

19 **THE COURT:** HE'S THE CONFESSION EXPERT?

20 **MR. MORTON:** YES, SIR.

21 **THE COURT:** I'LL ALLOW THE RECORD TO REMAIN OPEN FOR THE *DE*
22 *BENE ESSE* DEPOSITION OF DOCTOR LEO TO BE USED IN LIEU OF TESTIMONY
23 FOR TRIAL AND IF I NEED TO, I WILL CONSIDER THE AFFIDAVIT AS WELL AND
24 OBVIOUSLY YOU CAN USE THE AFFIDAVIT TO CROSS EXAMINE AT THE *DE*
25 *BENNE ESSE* DEPOSITION.

DIRECT EXAMINATION OF MARJORIE HAMMOCK BY MS. PAAVOLA

1 MR. ZELENKA: ALL RIGHT. THANK YOU, YOUR HONOR.

2 THE COURT: ALL RIGHT. YOU MAY PROCEED.

3 MS. PAAVOLA: WE CALL MS. MARJORIE HAMMOCK.

4 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, MS. MARJORIE
5 HAMMOCK TESTIFIED AS FOLLOWS:)

6 CLERK OF COURT: PLEASE HAVE A SEAT AND STATE YOUR NAME FOR
7 THE COURT REPORTER, PLEASE.

8 MR. HAMMOCK: MY NAME IS MARJORIE HAMMOCK.

9 THE COURT: WOULD YOU SPELL THAT LAST NAME, PLEASE?

10 MS. HAMMOCK: H-A-M-M-O-C-K.

11 THE COURT: O-C-K. YOUR WITNESS.

12 DIRECT EXAMINATION OF MARJORIE HAMMOCK BY MS. PAAVOLA:

13 Q GOOD MORNING, MS. HAMMOCK.

14 A GOOD MORNING.

15 Q WOULD YOU PLEASE TELL THE COURT HOW YOU ARE CURRENTLY
16 EMPLOYED.

17 A I'M AN ASSISTANT PROFESSOR AT BENEDICT COLLEGE IN COLUMBIA,
18 SOUTH CAROLINA IN THE SOCIAL WORK DEPARTMENT.

19 Q AND WHAT ARE YOUR RESPONSIBILITIES THERE?

20 A I TEACH SEVERAL CLASSES IN THE SOCIAL WORK DEPARTMENT AND I
21 ALSO SUPERVISE STUDENTS WHO ARE DOING THEIR FIELD PLACEMENT
22 OR INTERNSHIP.

23 Q COULD YOU PLEASE EXPLAIN YOUR EDUCATIONAL HISTORY FOR THE
24 COURT.

25 A I HAVE A BACHELOR AND A MASTERS DEGREE IN SOCIAL WORK FROM

1 HOWARD UNIVERSITY IN WASHINGTON, D.C. AND I HAVE COMPLETED
2 COURSE WORK TOWARDS A Ph.D., ALTHOUGH NOT COMPLETE, AT THE
3 UNIVERSITY OF SOUTH CAROLINA.

4 Q AND ARE YOU LICENSED AS A SOCIAL WORKER?

5 A I'M LICENSED AT THE INDEPENDENT LEVEL IN COLUMBIA, SOUTH
6 CAROLINA.

7 Q AND WHAT DOES THAT MEAN, THE INDEPENDENT LEVEL?

8 A THAT MEANS THAT I CAN PRACTICE INDEPENDENTLY WITHOUT
9 SUPERVISION AND THAT I CAN DO CLINICAL WORK, OR DIRECT WORK
10 WITH CLIENTS, WITH INDIVIDUALS, WITH GROUPS.

11 Q IS THERE A HIGHER LEVEL?

12 A THAT'S THE HIGHEST LEVEL IN THIS STATE.

13 Q ARE YOU A MEMBER OF ANY PROFESSIONAL OR ACADEMIC GROUPS?

14 A I BELONG TO THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE
15 COUNCIL ON SOCIAL WORK EDUCATION, THE CLINICAL SOCIAL
16 WORKERS OF SOUTH CAROLINA, THE ASSOCIATION OF BLACK SOCIAL
17 WORKERS AND THE BACCALAUREATE SOCIAL WORK DIRECTORS
18 PROGRAM.

19 Q COULD YOU PLEASE DESCRIBE YOUR PRIOR WORK EXPERIENCE.

20 A I'VE SERVED AS THE CHIEF OF SOCIAL WORK SERVICES WITH THE
21 DEPARTMENT OF CORRECTIONS. I ALSO SERVED AS A MENTAL HEALTH
22 CONSULTANT IN THAT AGENCY. I HAVE WORKED WITH CHILDREN AND
23 FAMILIES IN CHILD WELFARE AGENCIES. I WORKED FOR HEAD START
24 AS A TRAINER AND AS THE DIRECTOR OF THE SOCIAL WORK PROGRAM
25 IN THE STATE OF NEW YORK. IT'S BEEN A LONG TIME. THAT'S ABOUT

1 IT. THAT SUMMARIZES IT FAIRLY WELL.

2 Q DOES ANY OF YOUR PRIOR WORK EXPERIENCE INVOLVE DEALING WITH
3 INDIVIDUALS THAT HAVE MENTAL RETARDATION?

4 A YES.

5 Q CAN YOU DESCRIBE THAT FOR US, PLEASE.

6 A WELL, PARTICULARLY, IN WORKING IN A CHILD WELFARE AGENCY, YOU
7 COME INTO CONTACT WITH A VARIETY OF CHILDREN AND THEIR
8 FAMILIES AND SO I'VE HAD THE EXPERIENCE OF BEING INVOLVED IN
9 THE ASSESSMENT AND THE PLACEMENT OF CHILDREN WHO WERE
10 DIAGNOSED AS MENTALLY RETARDED. AND THEN IN THE DEPARTMENT
11 OF CORRECTIONS, WE HAD A SPECIAL UNIT FOR THOSE, FOR PEOPLE
12 GENERALLY, WHO HAD DISABILITIES AND THAT INCLUDED SOME
13 PEOPLE WITH MENTAL RETARDATION AND I DIDN'T WORK DIRECTLY
14 WITH THEM, BUT I SUPERVISED THE STAFF THAT DID.

15 Q HAVE YOU TESTIFIED PREVIOUSLY IN COURT?

16 A YES. I HAVE.

17 Q HOW MANY TIMES HAVE YOU GIVEN TESTIMONY?

18 A THAT'S NINETEEN TIMES, ACTUALLY, THAT I'VE TESTIFIED.

19 Q AND HAVE YOU CONSULTED ON OTHER CASES WHERE YOU HAVE NOT
20 GIVEN TESTIMONY?

21 A YES. APPROXIMATELY TWENTY-TWO TO TWENTY-THREE TIMES.

22 Q AND IN SOME OF THOSE CASES, DID THOSE CASES INVOLVE A
23 QUESTION ABOUT MENTAL RETARDATION?

24 A YES. IT DID.

25 Q HOW MANY OF THOSE CASES INVOLVED ---

1 A AT LEAST TWO THAT I CAN RECALL WHERE THE ISSUE OF MENTAL
2 RETARDATION WAS RAISED AND ANOTHER CASE THAT ACTUALLY WAS
3 A MENTAL RETARDATION CASE AND I TESTIFIED IN THAT IN TERMS OF
4 THE ADAPTIVE FUNCTIONING OF THAT INDIVIDUAL.

5 Q AND WHEN WAS THAT?

6 A THIS IS A GUESS, BUT I WOULD SAY 2004 OR 2005.

7 Q WHAT IS A CLINICAL SOCIAL WORKER?

8 A A CLINICAL SOCIAL WORKER IS A MENTAL HEALTH PROFESSIONAL WHO
9 PRACTICES AT THE MASTER'S LEVEL IN EDUCATION, TRAINING AND
10 EXPERIENCE. THEY CONDUCT BIOPSYCHOSOCIAL ASSESSMENTS FOR
11 COURTS AND OTHER ENTITIES. THEY PROVIDE DIAGNOSIS AND
12 TREATMENT FOR EMOTIONAL MENTAL HEALTH AND OTHER DISORDERS.
13 THEY WORK WITH FAMILIES AND GROUPS AND THEY CONSULT AT MANY
14 LEVELS.

15 Q AND IS ANOTHER WORD FOR BIOPSYCHOSOCIAL ASSESSMENT A
16 SOCIAL HISTORY?

17 A A SOCIAL HISTORY.

18 Q CAN YOU EXPLAIN A LITTLE BIT MORE ABOUT WHAT A SOCIAL HISTORY
19 IS?

20 A IT'S COLLECTING INFORMATION ON AN INDIVIDUAL, IN SOME INSTANCES
21 A FAMILY, WITH ALL OF THE ISSUES THAT CONFRONT THEM; THE
22 SOCIAL FACTORS AND THEIR EXPERIENCES, THE BIOLOGICAL, THE
23 DEVELOPMENTAL FACTORS AND THEIR EXPERIENCES AND THE SOCIAL,
24 VERY SPECIFICALLY TAKING A LOOK AT THE IMPACT OF THE
25 ENVIRONMENT ON THE INDIVIDUAL CLIENT FAMILY.

DIRECT EXAMINATION OF MARJORIE HAMMOCK BY MS. PAAVOLA

1 Q AND HAVE YOU COMPLETED SOCIAL HISTORIES BEFORE IN OTHER
2 CASES?

3 A YES. I HAVE.

4 Q AND YOU'VE TESTIFIED TO THEM IN SOME OF THESE OTHER CASES?

5 A YES. I HAVE.

6 MS. PAAVOLA: YOUR HONOR, AT THIS TIME, I MOVE TO QUALIFY

7 MS. HAMMOCK AS AN EXPERT IN CLINICAL SOCIAL WORK.

8 THE COURT: DOES THE STATE WISH TO CROSS EXAMINE ON

9 QUALIFICATIONS?

10 MR. ZELENKA: NO OBJECTION, YOUR HONOR.

11 THE COURT: I'LL ALLOW HER TO RENDER OPINION TESTIMONY AS

12 AN EXPERT IN THIS FIELD.

13 Q MS. HAMMOCK, I'D LIKE TO SHOW YOU WHAT'S BEEN MARKED

14 APPLICANT'S EXHIBIT #3.

15 A YES.

16 Q DO YOU RECOGNIZE THAT AS A COPY OF YOUR C-V?

17 A YES. I DO.

18 Q AND DOES IT CONTAIN MOST OF THE INFORMATION THAT WE'VE JUST

19 DISCUSSED?

20 A YES. IT DOES.

21 MS. PAAVOLA: YOUR HONOR, I MOVE TO ADMIT APPLICANT'S #3.

22 THE COURT: ANY OBJECTION?

23 MR. ZELENKA: NO OBJECTION.

24 THE COURT: ADMITTED.

25 (WHEREUPON, MS. HAMMOCK'S CURRICULUM VITAE IS ENTERED INTO

1 EVIDENCE AS APPLICANT'S EXHIBIT #3, WITHOUT OBJECTION)

2 Q MS. HAMMOCK, CAN YOU EXPLAIN WHAT YOU WERE ASKED TO DO IN
3 THIS PARTICULAR CASE?

4 A I WAS ASKED TO DO A BIOPSYCHOSOCIAL HISTORY OR SOCIAL
5 HISTORY ON THIS CLIENT AND TO EXAMINE THE FACTORS THAT MIGHT
6 CONTRIBUTE TO A DIAGNOSIS OF MENTAL RETARDATION AND ALSO TO
7 RENDER HIS FUNCTIONING LEVEL.

8 Q AND IN COMPLETING THAT TASK, DID YOU REVIEW A NUMBER OF
9 MATERIALS?

10 A YES. I DID.

11 Q COULD YOU PLEASE DESCRIBE WHAT MATERIALS YOU WERE USING?

12 A I, OF COURSE, LOOKED AT WHAT SCHOOL INFORMATION WE HAD ON
13 THE CLIENT AND SOME MEMBERS OF HIS FAMILY. I TOOK A LOOK AT
14 THE TESTIMONY AND REPORTS, SUMMARY REPORTS, FROM THE
15 ORIGINAL TRIAL. I READ THE RECORDS OF PSYCHOLOGISTS AND
16 PSYCHIATRISTS WHO HAD ACTUALLY EXAMINED OR HAD BEEN
17 INVOLVED IN EXAMINATION. I READ THE REPORTS OF TEACHERS. I
18 TOOK A LOOK AT THE ACTUAL RECORDED STATEMENTS THAT MISTER
19 SIMMONS MADE, INCLUDING THE HANDWRITTEN STATEMENTS. I TOOK
20 A LOOK AT THE REPORT OF DOCTOR ALEX MORTON AND THAT OF
21 DOCTOR SANDLER AND MCABEE. I LOOKED AT A GENOGRAM THAT HAD
22 BEEN DEVELOPED. AS I MENTIONED, THE SCHOOL RECORDS. SOME
23 MEDICAL RECORDS, THOUGH VERY SLIGHT. SOCIAL SECURITY
24 EARNINGS RECORDS OF KENNETH SIMMONS. THE DEPARTMENT OF
25 MOTOR VEHICLE RECORDS OF MISTER SIMMONS AND THE

DIRECT EXAMINATION OF MARJORIE HAMMOCK BY MS. PAAVOLA

1 DORCHESTER ALCOHOL AND DRUG RECORDS. THERE WAS ALSO A
2 REPORT BY DOCTOR JAMES ZENGER ON READING, WRITING AND
3 GRADE EQUIVALENCY AT WHICH HE DISCUSSED HIS READABILITY
4 LEVEL. THERE ARE MORE.

5 Q DID YOU REVIEW A REPORT FROM DOCTOR SUSAN KNIGHT?

6 A YES. I DID.

7 Q AND THEN, DID YOU ALSO REVIEW ALL THE AFFIDAVITS THAT WERE
8 ADMITTED JUST PRIOR TO YOUR TESTIMONY?

9 A YES. I DID.

10 Q DID YOU CONDUCT A NUMBER OF INTERVIEWS?

11 A YES. I INTERVIEWED FAMILY MEMBERS, SOME TEACHERS, AND
12 FRIENDS.

13 Q CAN YOU GIVE US A ROUGH ESTIMATE OF HOW MANY PEOPLE YOU
14 INTERVIEWED?

15 A WELL, IT'S ABOUT TWELVE.

16 Q ALL RIGHT. I'D LIKE TO SHOW YOU WHAT HAS BEEN MARKED AS
17 APPLICANT'S EXHIBIT #4. I'D LIKE TO ASK YOU IF YOU'VE SEEN THAT
18 DOCUMENT BEFORE.

19 A YES. THIS IS A GENOGRAM OF KENNETH SIMMONS' FAMILY.

20 Q AND DID YOU PREPARE THAT GENOGRAM?

21 A IT WAS ACTUALLY PREPARED FOR ME BUT I DID, IN FACT, PERUSE IT
22 AND DETERMINED THAT THIS IS THE INFORMATION THAT JIVED ALSO
23 WITH WHAT I GOT FROM FAMILY MEMBERS.

24 **MS. PAAVOLA:** YOUR HONOR, I WOULD MOVE TO ADMIT APPLICANTS
25 EXHIBIT #4, WHICH IS THE GENOGRAM.

1 THE COURT: ANY OBJECTION?

2 MR. ZELENKA: FOR PURPOSES OF THIS HEARING, WE DON'T HAVE ANY
3 OBJECTION.

4 THE COURT: WITHOUT OBJECTION.

5 (WHEREUPON, A GENOGRAM IS ENTERED INTO EVIDENCE AS
6 APPLICANT'S EXHIBIT #4 WITHOUT OBJECTION)

7 Q MS. HAMMOCK, COULD YOU DESCRIBE KENNETH SIMMONS'
8 BACKGROUND, FAMILY BACKGROUND AND HISTORY FOR US, PLEASE?

9 A MISTER SIMMONS GREW UP IN THE SUMMERVILLE AREA OF SOUTH
10 CAROLINA. HE LIVED WITH HIS MOTHER AND FATHER AND WAS
11 PART OF A FAMILY, ACTUALLY, OF NINETEEN, BUT HE ACTUALLY
12 GREW UP WITH EIGHT MEMBERS OF THE FAMILY. THEY LIVED IN A
13 THREE-ROOM, FOUR-ROOM SHACK, AS IT WAS DESCRIBED,
14 SHOT-GUN. NO RUNNING WATER. NO HEAT, OTHER THAN A
15 STOVE. NO INDOOR PLUMBING AND, AS I SAID, NO WATER. THERE
16 WAS A WELL IN THE BACK AS DESCRIBED BY MISTER SIMMONS
17 AND HIS SIBLINGS AND THAT WAS THEIR LIVING CONDITION WHICH
18 WAS -- AND THEY WERE ALSO ACTUALLY IN THREE BEDROOMS.
19 THERE WAS A BOYS' ROOM, A GIRLS' ROOM AND THE PARENT'S
20 ROOM. SO, AGAIN, THAT WAS THEIR CIRCUMSTANCES AND THEY
21 HAVE VERY, VERY LIMITED MEANS. THE FAMILY WAS VERY CLOSE.
22 THEY WERE HIGHLY STRUCTURED. THE FATHER, IN FACT,
23 ENFORCED ALL OF THE RULES FROM SUNUP TO SUNDOWN. HE
24 WAS VERY STRICT WITH THE CHILDREN AND WITH THE FAMILY.
25 EVERYBODY HAD TASKS AND CHORES. THEY WORKED THE FARM,

1 AS IT WERE, THEIR OWN LAND AS WELL AS LEASED LAND THAT
2 WAS CLOSE BY FOR COTTON, BUT THEY ALSO RAISED MOST OF
3 THEIR VEGETABLES. THEY HAD A PIG, CHICKENS. THERE WAS
4 ANOTHER ANIMAL, IT ESCAPES ME NOW. BUT AGAIN, THERE -- IT
5 WAS A FARM AND A VERY BASIC EXISTENCE. EVERYONE HAD TO
6 BE AT HOME AT A CERTAIN TIME AND VIOLATION OF THIS WAS
7 TREATED FAIRLY SEVERELY IN TERMS OF PUNISHMENT, WHICH
8 ACTUALLY WAS NOT AT THE HANDS OF THE FATHER BUT AT THE
9 MOTHER, BUT THEY KNEW THAT THEY HAD TO ADHERE TO HIS
10 RULES AND HIS REGULATIONS. THEY GOT UP AT THE SAME TIME
11 EVERY MORNING. THEY PREPARED AND ATE THEIR MEALS
12 TOGETHER. THEY SAID PRAYER EVERY NIGHT AND IT WAS, IN
13 FACT, A VERY RESTRICTED EXPERIENCE FOR MOST OF THEM,
14 WHICH IS WHAT THEY SHARE NOW IN TERMS OF JUST HOW STRICT
15 IT WAS.

16 Q CAN YOU TOUCH BRIEFLY ON SOME OF THE MAJOR LIFE EVENTS IN
17 KEN'S HISTORY, HIS LIFE HISTORY?

18 A AS I SAID, HE WAS A PART OF THIS FAMILY. HE WAS SECOND TO
19 THE YOUNGEST. AND SO, AGAIN, THERE WERE ALWAYS SIBLINGS
20 AROUND HIM ASSISTING HIM AND PREPARING HIM. HE'S VERY,
21 VERY DEVOTED TO HIS MOTHER AND SO FOR KEN, PROBABLY ONE
22 OF THE FIRST, ONE OF THE EARLIEST EVENTS THAT WAS PRETTY
23 TRAUMATIC FOR HIM WAS THE LOSS OF HIS MOTHER WHEN HE
24 WAS IN HIS LATE TEENS AND HE HAD HAD A MAJOR ROLE IN
25 TAKING CARE OF HER, SO IT WAS EVEN MORE CRUCIAL TO HIM

1 THAT HE LOST HER. AND THE SECOND ONE, THEN, WOULD BE THE
2 LOSS OF HIS FATHER. THEY WERE REALLY MESHED, IN TERMS OF
3 THEIR INVOLVEMENT WITH EACH OTHER AND THEY WERE THE
4 SOURCE OF HIS FUNCTIONING IN MANY WAYS.

5 Q DID YOU COLLECT ANY INFORMATION ABOUT KENNETH'S DRUG
6 AND ALCOHOL USE?

7 A ACCORDING TO SELF-REPORT AS WELL AS OTHER SIBLINGS, IT
8 APPEARS THAT HE STARTED EXPERIMENTING WITH ALCOHOL
9 WHEN HE WAS ABOUT SEVENTEEN YEARS OLD AND HE, IN FACT --
10 AND THAT ESCALATES AND THAT GETS TO BE A REAL SERIOUS
11 ISSUE IN HIS EARLY TEENS, BUT HE STARTED VERY YOUNG
12 ACTUALLY DRINKING, ACTUALLY, WITH ONE OF HIS RELATIVES.

13 Q OKAY. AND I THINK YOU SAID HIS DRINKING ESCALATED?

14 A YES.

15 Q WHEN DID THAT HAPPEN?

16 A OKAY. THAT HAPPENS AFTER -- IT APPEARS, ACCORDING TO ALL
17 THE REPORTS THAT THAT HAPPENS AFTER HIS MOTHER PASSES
18 AND HE, IN FACT -- THE DRINKING INCREASES AND HE THEN IS
19 INTRODUCED TO COCAINE USE.

20 Q YOU SAID EARLIER YOU WERE ASKED TO LOOK INTO THE ISSUE OF
21 ADAPTIVE FUNCTIONING?

22 A THAT'S CORRECT.

23 Q COULD YOU PLEASE EXPLAIN WHAT ADAPTIVE FUNCTIONING
24 MEANS?

25 A THAT'S AN ACCUMULATION OF TASKS AND RITUALS THAT WE ALL

1 LEARN HOW TO DO IN ORDER TO FUNCTION. THERE ARE WAYS IN
2 WHICH WE CAN, IN FACT, MEET OUR BASIC NEEDS THROUGH
3 BEING ABLE TO ACCOMPLISH SOME TASKS AND SOME FUNCTIONS.

4 Q OKAY. AND HOW DO YOU GO ABOUT ASSESSING ADAPTIVE
5 FUNCTIONING?

6 A WELL AGAIN, THERE IS, IN FACT, A STRUCTURE THAT'S SET UP AND
7 I WOULD USE THE DIAGNOSTIC STATISTICAL MANUAL AND THEIR
8 DEFINITION AND THE FACT THAT THEY HAVE IDENTIFIED ADAPTIVE
9 FUNCTIONING AND THE THINGS THAT ARE INCLUDED IN THAT
10 WOULD BE; YOUR BASIC ACADEMIC SKILLS, YOUR HOME LIVING,
11 SOCIAL AND INTERPERSONAL SKILLS, THE USE OF COMMUNITY
12 RESOURCES, SELF-DIRECTION, COMMUNITY, WORK, LEISURE,
13 SELF-CARE, HEALTH, SAFETY AND IT REALLY SIMPLY DETERMINES
14 HOW EFFECTIVELY AN INDIVIDUAL COPEES AND WHAT SKILLS HE OR
15 SHE NEEDS TO USE.

16 Q AND THAT LIST THAT YOU ARE PROVIDING TO US, YOU SAID THAT
17 IS FROM THE DIAGNOSTIC AND STATISTICAL MANUAL?

18 A THAT'S CORRECT.

19 Q IS THAT ALSO CALLED THE DSM-IV?

20 A THAT'S RIGHT.

21 Q AND SO YOU ARE USING THIS FOR YOUR FRAMEWORK FOR MAKING
22 YOUR ASSESSMENT.

23 A YES.

24 Q HOW MANY AREAS OUT OF THE TEN OR ELEVEN THAT YOU LISTED
25 ARE NECESSARY?

1 A AT LEAST TWO.

2 Q FOR?

3 A TO DETERMINE THAT THERE IS SOME DEFICIT IN ADAPTIVE
4 FUNCTIONING.

5 Q ALL RIGHT. AND DID YOU MAKE AN ASSESSMENT AS TO WHETHER
6 OR NOT KENNETH SIMMONS HAS DEFICITS IN ANY OF THESE TEN
7 AREAS?

8 A YES. I DID.

9 Q AND WHAT DID YOU FIND?

10 A I FOUND THAT THE MOST SIGNIFICANT DEFICITS OCCUR IN HIS
11 FUNCTIONAL AND ACADEMIC SKILLS AND I USED SCHOOL
12 RECORDS AND REPORTS OF FAMILY MEMBERS AND TEACHERS TO
13 DETERMINE THAT HE EXHIBITED SOME VERY SERIOUS LIMITATIONS
14 FROM FIRST GRADE ON. HIS READING SCORES WERE
15 CONSISTENTLY LOW THROUGHOUT HIS ACADEMIC CAREER. HE
16 HAS SOME GRADES THAT APPEAR THAT HE IS FUNCTIONING ON
17 GRADE LEVEL, BUT MOST OF THE STANDARDIZED TESTS AND THE
18 GRADES ARE LOW, PARTICULARLY IN READING AND SPELLING.

19 Q ALL RIGHT. AND I'LL COME BACK TO THAT IN A MINUTE, BUT ARE
20 THERE ANY OTHER AREAS WHERE YOU FOUND DEFICITS?

21 A YES. I IDENTIFIED ALSO HIS ABILITY TO LIVE ON HIS OWN. HE DID
22 NOT MAKE GOOD ADJUSTMENTS LIVING AS AN ADULT AFTER HE
23 MOVED OUT OF HIS FAMILY'S HOME AND AFTER BOTH PARENTS, OF
24 COURSE, HAD PASSED. HE WAS NEVER ABLE TO LIVE ANY LONG
25 PERIODS OF TIME ON HIS OWN AND FROM WHAT WE CAN

1 DETERMINE, HE REALLY, ACTUALLY PAID RENT ON ONLY ONE
2 OCCASION. HE MARRIES AND HE IS TAKEN CARE OF LITERALLY BY
3 HIS WIFE AND THEN THEY MOVE BACK INTO THE FAMILY'S HOME,
4 THIS IS BEFORE DAD DIES, AND TAKES CARE OF HIM. BUT THEN,
5 THEY BREAK UP AND HE LARGELY IS ON HIS OWN. I COULD
6 IDENTIFY AT LEAST NINE DIFFERENT SITES WHERE HE LIVED.
7 ONLY ONE OF THOSE APPEARS TO BE SOMETHING THAT HE
8 ACTUALLY RENTED. AT ONE POINT, HE'S ALSO LIVING WITH HIS
9 BROTHER, LIVING ON HIS BROTHER'S PROPERTY, EXCUSE ME. BUT
10 HIS BROTHER HAS TO ASK HIM TO LEAVE BECAUSE HE WAS
11 UNABLE TO REALLY TAKE CARE OF THE PROPERTY PROPERLY. HE
12 HAD -- HE LEFT DOORS AND WINDOWS OPEN AND THAT
13 CONCERNED, THIS IS HIS BROTHER GENE. HE SPENT SOME TIME
14 AT HALFWAY HOUSES, BOTH IN THIS STATE AND FLORIDA. HE
15 USED A PLACE CALLED PALMETTO PLACE, A HALFWAY HOUSE,
16 LARGELY TO SECURE HIS MEALS. HE WAS A REGULAR THERE
17 OVER A PERIOD OF TIME, BUT HE WAS NOT ABLE TO MAINTAIN
18 HIMSELF ON HIS OWN.

19 Q ALL RIGHT. SO, THAT WAS THE CATEGORY OF HOME LIVING THAT
20 YOU WERE JUST DESCRIBING?

21 A UH-HUH. UH-HUH.

22 Q ARE THERE ANY OTHER CATEGORIES WHERE YOU FOUND
23 DEFICITS?

24 A YES. I THINK THAT THE WORK WAS ANOTHER SIGNIFICANT AREA,
25 HIS WORK HISTORY. HE DOES, IN FACT, FINISH HIGH SCHOOL AND

1 STARTS WORKING IMMEDIATELY THEREAFTER. JUST TO GO BACK
2 A LITTLE BIT, THE WORK AND THE CHORES IN THE SIMMONS
3 FAMILY WERE AN ABSOLUTE. EVERYBODY HAD A DAILY TASK OF
4 WASHING, GETTING WATER FOR THE MORNING, STARTING THE
5 FIRE, CLEANING, COOKING, THOSE KINDS OF THINGS, AND THEN
6 THEY HAD TO TAKE CARE OF THE ANIMALS. SO, HE HAD HIS ROLE
7 IN THAT FAMILY, BUT IT DOESN'T SEEM TO SUSTAIN ITSELF WHEN
8 HE MOVES OUT ON HIS OWN AND HE COULD NOT DO UNDIRECTED
9 TASKS. AND THERE WAS A STRONG NETWORK OF FAMILY AND
10 FRIENDS AROUND HIM WHO COULD FIND DIFFERENT THINGS FOR
11 HIM TO DO AND BE PAID, BUT IT DIDN'T SUSTAIN ITSELF. HE
12 WOULD LEAVE ONE JOB AND GO TO ANOTHER ON A FAIRLY
13 REGULAR BASIS. HE HAD -- HE WORKED IN SETTINGS WHERE THEY
14 WERE LAYING BRICKS OR FIXING ROOFS. HE WAS IN A TREE
15 CUTTING KIND OF BUSINESS AND HE COULD DO SOME BASIC
16 TASKS LIKE MOP FLOORS AND CLEAN WINDOWS, BUT AGAIN,
17 NOTHING SEEMS TO SUSTAIN ITSELF.

18 Q DID YOU COLLECT ANY INFORMATION ON HOW HE SECURED
19 EMPLOYMENT ACTIVITIES THAT HE DID HAVE?

20 A LARGELY THROUGH THAT NETWORK OF FAMILY AND FRIENDS
21 THAT I MENTIONED AND HE ALSO WOULD DO PICK-UP WORK. THAT
22 IS, SIMPLY GO TO SITES WHERE FOLKS MIGHT RIDE BY LOOKING
23 FOR WORKERS. THE INITIAL JOB, THOUGH, HE EVIDENTLY -- WITH
24 THE TREE COMPANY, HE EVIDENTLY DID HAVE A LEAD FROM
25 SOMEONE WHO HAD REFERRED HIM AND THAT'S HOW MOST OF

1 HIS THINGS CAME ABOUT. HE WORKED WITH FAMILY MEMBERS,
2 EVEN ON THEIR OWN PROPERTIES. HE WORKED, AS I SAID, AT THE
3 HALFWAY HOUSE. HE MADE HIMSELF USEFUL BY DOING CHORES.
4 HE APPEARED TO LIKE TO DO WHAT HE DID, BUT IT JUST DIDN'T
5 LAST LONG.

6 Q DID YOU FIND ANY INFORMATION TO INDICATE THAT HE EVER
7 FORMERLY APPLIED FOR A JOB?

8 A HUH-UH. (SHAKES HEAD)

9 Q EVER FILLED OUT A JOB APPLICATION?

10 A NOT TO MY KNOWLEDGE. NO.

11 Q THERE WAS SOME TESTIMONY THAT YOU REVIEWED AT TRIAL
12 ABOUT SOME OF THE TASKS THAT HE DID IN VARIOUS JOBS.

13 A HE, FOR INSTANCE, IN THE BRICK LAYING, MASONRY KINDS OF
14 JOBS, HE WOULD BE CONSIDERED THE ROLLER. HE WOULD ROLL
15 THE WHEELBARROW FROM ONE SIDE TO THE OTHER OR HE
16 WOULD STACK BRICKS. WHEN HE WAS WORKING FOR THE TREE
17 COMPANY, HE, AGAIN, WAS GIVEN THE TASK OF COLLECTING THE
18 DEBRIS AND THEN ORGANIZING IT SO IT COULD BE CARRIED AWAY.

19 Q THERE WAS ALSO SOME INDICATION THAT HE WORKED FOR A
20 CARPENTER.

21 A YES.

22 Q WHAT KINDS OF TASKS DID HE DO?

23 A AND AGAIN, HE HAD THE ROLE AND THE RESPONSIBILITY OF
24 CARRYING THE MATERIALS FROM ONE SIDE TO THE OTHER OR TO
25 THE SITE.

1 Q DID YOU DISCUSS WITH ANYONE THAT YOU INTERVIEWED
2 WHETHER HE WAS ABLE TO DO MORE COMPLICATED TASKS LIKE
3 MEASURING?

4 A ACCORDING TO HIS BROTHER AND ACCORDING TO A RELATIVE
5 WHO HIRED HIM, OR A FAMILY FRIEND, THAT HE HAD TO -- HE WAS
6 LIMITED TO THE MOST BASIC TASKS. HE COULD NOT WORK
7 INDEPENDENTLY WITHOUT DIRECTION. THE PEOPLE AT PALMETTO
8 PLACE SAID THAT THEY HAD TO GIVE HIM VERY SPECIFIC
9 DIRECTIONS. MEASUREMENTS SEEM TO BE A PROBLEM IN BOTH
10 THAT SETTING AND THE BRICK LAYING SETTING. THAT WAS NOT
11 SOMETHING HE COULD DO WELL.

12 Q ALL RIGHT. SO, THAT CATEGORY THAT YOU WERE JUST
13 DESCRIBING IS THE WORK CATEGORY?

14 A YES.

15 Q AND I BELIEVE YOU HAVE ALREADY DISCUSSED FUNCTIONAL
16 ACADEMICS AND HOME LIVING?

17 A CORRECT.

18 Q ARE THERE ANY OTHER AREAS WHERE YOU FOUND HE HAS
19 DEFICITS?

20 A WELL, IN THE SOCIAL INTERPERSONAL SKILLS AREAS. HE IS CITED
21 AND MANY OF HIS FAMILY MEMBERS SAY HOW NICE HE WAS.
22 MOST PEOPLE SAID THAT. HE WAS CONSIDERED NICE IN SCHOOL.
23 HE WAS RELATIVELY COOPERATIVE AND CHARMING AND
24 FRIENDLY. HE WAS A FAVORITE OF HIS MOTHER'S BECAUSE HE --
25 AND SHE HAD BEEN VERY ILL AND CONFINED TO A WHEELCHAIR

1 BECAUSE OF DIABETES AND HIS SIBLINGS SAY THAT HE COULD
2 MAKE HER LAUGH AND SO HE DID THAT. SO, HE HAD THE ABILITY
3 TO BE CHARMING AND ATTRACT PEOPLE, BUT HE DID NOT HAVE AN
4 ON-GOING SIGNIFICANT RELATIONSHIP OTHER THAN HANGING OUT
5 AT THE CORNER AND STUFF. HIS WIFE COMPLAINS THAT SHE HAD
6 TO INITIATE ALL OF THE CONVERSATION, THAT THEY COULD
7 NEVER JUST SIT AND CHAT. AND THERE ARE AT LEAST TWO
8 SISTERS WHO TALK ABOUT A VERY SERIOUS, SERIOUS STUTTER
9 AND HOW LIMITED HE WAS BECAUSE HE WAS EMBARRASSED BY
10 HIS STUTTER WHEN HE WAS YOUNGER. HE HAS OBVIOUSLY
11 GROWN OUT OF THAT, BUT AGAIN, THAT PLAYED A PART IN HIS
12 WITHDRAWAL AND HIS REMAINING ALOOF FROM OTHERS. SO,
13 WHILE AS I SAID, THERE WAS THIS EXTERIOR OF PLEASANTRY AND
14 CHARMINGNESS, HE WAS EVIDENTLY QUITE WITHDRAWN IN MANY
15 INSTANCES.

16 Q ALL RIGHT. AND YOU MAY HAVE ALREADY TOUCHED ON THIS
17 AREA, BUT DID YOU MAKE AN ASSESSMENT ABOUT HIS ABILITY IN
18 THE AREA OF SELF-DIRECTION?

19 A YEAH. WE TOOK A LOOK AT THAT A LITTLE BIT. THERE WAS
20 NUMEROUS REPORTS ABOUT THE FACT THAT, IN ALL OF THE
21 CATEGORIES, WORK, SCHOOL, THAT HE NEEDED A GREAT DEAL OF
22 SELF-DIRECTION AND HE HAD TO RELY ON OTHERS IN TERMS OF
23 WHERE TO LIVE, HOW TO LIVE, HOW TO MAINTAIN A
24 RELATIONSHIP, IT WAS DIRECTED NOT FROM HIM BUT TO HIM.

25 Q DID YOU FIND ANY INFORMATION RELEVANT TO THE CATEGORY OF

1 USE OF COMMUNITY RESOURCES?

2 A YES. VERY LIMITED USE OF COMMUNITY RESOURCES. THERE'S
3 NO EVIDENCE OF -- AS A MATTER OF FACT IT WAS ONE OF HIS
4 SISTERS WHO HAD TO ASSIST HIM IN GETTING A FORMAL
5 IDENTIFICATION SINCE HE WAS NO LONGER -- HE WAS ABLE TO
6 GET A LICENSE BUT HE LOST IT. HE WAS NO LONGER ABLE TO
7 DRIVE. "PERMANENT SUSPENSION" WAS THE LANGUAGE. SO HE
8 HAD TO -- AND HE RELIED ON HIS SISTER TO HELP HIM GET AN I.D.
9 AND SO THAT HE WOULD HAVE IT IN HIS JOB HUNTING
10 ENDEAVORS, BUT THERE'S NO EVIDENCE OF VOC. REHAB OR JOB
11 TRAINING. HE WAS MANDATED TO ATTEND ALCOHOL AND DRUG
12 AND SO THAT IS SOMETHING THAT HE DID DO, BUT HE REALLY DID
13 NOT INITIATE THAT.

14 Q ALL RIGHT. NOW, I WANT TO BACK UP AND GO BACK TO THE
15 ACADEMIC SKILLS AREA. YOU TOUCHED ON THAT, BUT COULD YOU
16 DESCRIBE IN MORE DETAIL, HIS PERFORMANCE IN SCHOOL.
17 SPECIFICALLY, HE WAS PLACED IN THE RESOURCE PROGRAM.
18 COULD YOU TELL US MORE ABOUT THAT?

19 A BY THE TIME HE GOT TO HIGH SCHOOL. IN ELEMENTARY SCHOOL
20 AND IN WHAT I GUESS IS NOW KNOWN AS MIDDLE SCHOOL, WHILE
21 THE DEFICITS WERE NOTED, THERE WASN'T A SPECIFIC PLAN FOR
22 HIM. HOWEVER, HE GETS TO HIGH SCHOOL AND HE IS IDENTIFIED
23 AS SOMEBODY WHO IS PERFORMING AT A VERY LOW LEVEL AND A
24 TEACHER ACTUALLY RECOMMENDED HIM TO THE RESOURCE
25 WHICH MEANT THAT HE SPENT AT LEAST AN HOUR WITH A

1 RESOURCE TEACHER TO SUPPORT HIS ATTEMPTS TO DO HIS
2 WORK, BUT HE'S ALSO PLACED IN ENGLISH, MATH AND SCIENCE,
3 LEVEL THREE CLASSES, AS THEY'RE CALLED, WHICH IS THE FAIRLY
4 LOWEST FUNCTIONING IN THAT SCHOOL AND EVEN HIS WORLD
5 HISTORY CLASS IS -- AND THESE, BY THE WAY, ARE ALL REQUIRED
6 CLASSES FOR GRADUATION, BUT THEY'VE CREATED THEM SO
7 THAT MANY MORE STUDENTS CAN ACTUALLY COMPLETE THEM TO
8 GRADUATE, WHICH IS WHAT HAPPENED TO HIM.

9 Q AND YOU INTERVIEWED SOME TEACHERS. IS THAT RIGHT?

10 A YES.

11 Q DID YOU INTERVIEW HIS RESOURCE TEACHER?

12 A I INTERVIEWED BOTH HIS RESOURCE TEACHER AND THE PERSON
13 WHO REFERRED HIM TO ANOTHER TEACHER AND I INTERVIEWED
14 HER BY PHONE. I DID NOT MEET WITH HER PERSONALLY, BUT SHE
15 DESCRIBED THE PROCESS BY WHICH HE FINALLY RECEIVED SOME
16 HELP WITHIN THE SCHOOL AND THE FACT THAT ACTUALLY HIS
17 PERFORMANCE HAD BEEN BROUGHT TO HER ATTENTION AND SHE
18 SAW TO IT THAT HE BE PLACED IN THAT RESOURCE AND ACTUALLY
19 THAT THE CLASSES THAT HE WAS ASSIGNED TO WOULD REFLECT
20 HIS LIMITED ABILITY.

21 Q AND WHAT'S YOUR UNDERSTANDING OF HOW -- HOW DO YOU GET
22 PLACED IN THE RESOURCE PROGRAM?

23 A WELL, THERE ARE WAYS IN WHICH YOU CAN BE IDENTIFIED. IT'S A
24 PARENT REPORT, I MEAN, REQUEST, A TEACHER REQUEST FOR
25 THE STUDENT HIMSELF, AND IN THIS INSTANCE IT WAS THE

1 TEACHER.

2 Q DID YOU ALSO COLLECT SOME INFORMATION ABOUT HIS SIBLING'S
3 SCHOOL PERFORMANCES?

4 A YES. HE HAS AT LEAST TWO SIBLINGS WHO WERE PLACED. ONE
5 WHO WAS IN SPECIAL ED, THAT'S HIS SISTER, AND THEN HIS
6 BROTHER WHO CAME TO THE ATTENTION OF THE SCHOOL, BUT
7 THE PLACEMENT NEVER ACTUALLY MATERIALIZED. BUT THROUGH
8 THOSE SCHOOL RECORDS YOU CAN FIND COMMENTS ABOUT HIS
9 POOR PERFORMANCE.

10 Q CAN YOU EXPLAIN -- WHAT IS THE ROLE OF THE RESOURCE
11 PROGRAM IN THE SCHOOL SYSTEM?

12 A TO AUGMENT THE ACADEMIC EXPERIENCE AND PROVIDE SPECIAL
13 HELP TO THOSE PEOPLE WHO MIGHT HAVE CHALLENGES OR
14 LIMITATIONS IN TERMS OF THEIR WORK. AND AGAIN, THERE IS
15 SOME HISTORY IN THIS IN THAT DIAGNOSING SOMEONE WITH
16 MENTAL RETARDATION IS LOOKED UPON VERY CAREFULLY AND SO
17 THEY WANT TO MAKE SURE THAT THOSE STUDENTS WHO ARE NOT
18 PERFORMING WELL MAY NOT NECESSARILY BE LABELED M-R AND
19 PLACED IN THOSE CLASSES. IN THOSE DAYS, FROM WHAT I CAN
20 GATHER FROM THE TEACHERS, THAT WAS ONE OF THE
21 RESTRICTED CLASSROOMS WITH PEOPLE WHO HAD SOME FAIRLY
22 PROFOUND LIMITATIONS.

23 Q WAS THE RESOURCE PROGRAM A SPECIAL EDUCATION PROGRAM?

24 A IN SOME INSTANCES, YES.

25 Q ALL RIGHT. NOW, I WANT TO TOUCH JUST FINALLY ON, YOU'VE

1 TALKED IN GENERAL TERMS ABOUT THESE DIFFERENT AREAS, IS IT
2 FAIR TO SAY YOU'VE IDENTIFIED FIVE AREAS WHERE YOU BELIEVE
3 THERE ARE DEFICITS?

4 A THREE VERY ABSOLUTES. THE FIFTH ONE IS ---

5 Q WHICH ONE IS THE FIFTH ONE?

6 A WELL, THE FIFTH ONE WOULD -- ACTUALLY, I HAVEN'T EVEN
7 TALKED ABOUT IT. IT'S HEALTH AND SAFETY.

8 Q ALL RIGHT.

9 A AND I SIMPLY-- I'M SORRY-- I FOCUSED ON THE ALCOHOL AND
10 DRUG USE WHICH BECOMES A VERY SEVERE PROBLEM FOR OUR
11 CLIENT AND THE HEAVY USE OF COCAINE INCLUDING A HISTORY
12 OF BLACKOUTS AND AT LEAST ONE HOSPITALIZATION FOR AN
13 OVERDOSE THAT I IDENTIFIED. HIS SELECTION OF FRIENDS WAS
14 NOT TO HIS BENEFIT. HIS SURROUNDINGS WERE NOT SAFE. AND
15 HE JUST DISPLAYED SOME LACK OF INTEREST IN PROMOTING HIS
16 OWN HEALTH.

17 Q ALL RIGHT. SO, HEALTH AND SAFETY WERE INCLUDED AS WELL AS
18 WORK, SELF-DIRECTION, COMMUNICATION, FUNCTIONAL
19 ACADEMICS AND HOME LIVING?

20 A HOME LIVING.

21 Q NOW, SOME OF THIS INFORMATION -- WHAT PARTS OF THIS
22 INFORMATION DID YOU GATHER THAT SPECIFICALLY RELATE TO
23 HIS FUNCTIONING, PRE-EIGHTEEN?

24 A PRE-EIGHTEEN? THE ACADEMIC INFORMATION IS VERY CLEAR.
25 GRADES ONE THROUGH TWELVE, THROUGH EIGHTEEN IN FACT,

1 YOU CAN INDICATE THAT THE HEALTH AND SAFETY PIECE, THE
2 DRINKING DOES BEGIN WHEN HE'S SEVENTEEN. IT'S RIGHT ON
3 THE LINE, BUT IT'S THERE. THERE IS EVIDENCE THAT HIS
4 FUNCTIONING WAS LIMITED, AS NOTICED BY HIS FAMILY MEMBERS,
5 BUT THAT THE STRICT CONTROLS SORT OF MINIMIZED THAT BUT
6 ONCE HE IS NO LONGER UNDER THAT CONTROL, HE'S NOT ABLE
7 TO FUNCTION AS WELL.

8 Q ALL RIGHT. AND WERE HIS FAMILY MEMBERS ABLE TO TELL YOU
9 ABOUT HOW HE FUNCTIONED PRE-EIGHTEEN IN COMPARISON TO
10 OTHER KIDS IN THEIR FAMILY?

11 A THEY USED TERMS LIKE, "YOU KNOW, HE GOT ALONG, HE GOT
12 ALONG WITH US BUT WE KNEW HE WAS SLOW. WE KNEW THAT HE
13 COULDN'T FUNCTION AS WELL AS THE OTHER CHILDREN DID." ONE
14 BROTHER PARTICULARLY, GENE, TALKED ABOUT THE FACT THAT
15 HE UNDERSTOOD HIS LEVEL OF FUNCTIONING IN SCHOOL, HE
16 UNDERSTOOD THE REPORT CARD. SO, EVEN THOUGH SOME OF
17 THOSE GRADES APPEAR TO BE GOOD GRADES, HE UNDERSTOOD
18 THAT HE WAS PLACED IN THE LOWEST LEVEL OF FUNCTIONING
19 AND SO HE SPEAKS TO THAT. AND AGAIN, THERE IS NOT VERY
20 MUCH TO TELL, BUT THEIR COMMENTS, THE SIBLINGS THAT I
21 TALKED TO WERE ALMOST UNIFIED IN THE WAY IN WHICH THEY
22 SAID, "WELL, WE KNEW HE WAS KIND OF SLOW. WE KNEW THAT
23 HE HAD SOME PROBLEMS."

24 Q ALL RIGHT. AND YOU MENTIONED THE STUTTERING. WAS THAT
25 SOMETHING THAT OCCURRED PRE-EIGHTEEN AS WELL?

1 A YES. IT DID.

2 Q DO YOU HAVE ANYTHING ELSE IN YOUR ASSESSMENT OF THESE
3 AREAS THAT YOU FIND SIGNIFICANT?

4 A WELL, ONE OF THE THINGS - IN FACT, HIS DEMEANOR, HIS CHARM
5 WAS ALMOST A DEFICIT IN THAT IT KEPT HIM FROM GETTING THE
6 KIND OF ATTENTION AND CARE THAT HE NEEDED BECAUSE HE
7 SEEMED -- AND THEREFORE, PEOPLE MINIMIZED HIS WEAKNESSES
8 BECAUSE HE WAS POLITE, HE WAS GOOD-HEARTED AND THAT
9 SOMETIMES IS A PROBLEM, PARTICULARLY IN SCHOOL WHERE THE
10 DEMANDING STUDENTS SEEM TO GET MORE ATTENTION THAN
11 SOMEONE LIKE HIM.

12 Q ALL RIGHT. THANK YOU MS. HAMMOCK.

13 THE COURT: MS. HAMMOCK, WERE THERE ANY STANDARDIZED
14 TESTS THAT YOU WERE ABLE TO REVIEW? ANY I.Q. TESTS? ANY OTHER
15 TESTS ADMINISTERED BY THE SCHOOLS?

16 MS. HAMMOCK: ACHIEVEMENT TESTS.

17 THE COURT: BEFORE AGE EIGHTEEN?

18 MS. HAMMOCK: YES. AND THEY ALL INDICATED -- AND THE
19 MEASUREMENT THERE IS THE PERCENTILE IN THE NATION WHERE HE
20 FALLS IN THAT AND HE WAS BELOW 50% IN EVERY TEST, PARTICULARLY
21 THE ENGLISH AND THE READING.

22 THE COURT: HERE'S A SRA TEST GIVING A 77% PERCENTILE.
23 LOOKS PRETTY HIGH.

24 MS. HAMMOCK: GRADE?

25 THE COURT: I DON'T KNOW IF I CAN READ THESE AS WELL AS YOU.

1 **MS. HAMMOCK:** SECOND GRADE?

2 **THE COURT:** IT LOOKS LIKE SEVENTY-FOUR, SEVENTY-FIVE,
3 EIGHTH GRADE, MAYBE NINTH GRADE.

4 **MS. HAMMOCK:** OKAY. THAT WAS UNUSUAL, THOUGH.

5 **THE COURT:** ALL RIGHT. ANY QUESTIONS ON CROSS?

6 **MR. ZELENKA:** YES, YOUR HONOR.

7 **CROSS EXAMINATION OF MARJORIE HAMMOCK BY MISTER ZELENKA**

8 Q DOCTOR HAMMOCK --

9 A MS. HAMMOCK.

10 Q MS. HAMMOCK. EXCUSE ME.

11 **THE COURT:** NOT QUITE A DOCTOR YET.

12 **MR. ZELENKA:** I APOLOGIZE.

13 Q DID YOU DO A WRITTEN REPORT?

14 A NO. I DID NOT.

15 Q WHY DIDN'T YOU DO A WRITTEN REPORT?

16 A I'VE NEVER BEEN ASKED TO DO ONE BEFORE.

17 Q YOU'VE NEVER BEEN ASKED TO DO A WRITTEN REPORT AS A
18 SOCIAL WORKER?

19 A OH, YOU MEAN FOR THESE CASES?

20 Q YES.

21 A NO. I HAVE NOT.

22 Q BUT IN YOUR USUAL PRACTICE, DON'T SOCIAL WORKERS PREPARE
23 REPORTS?

24 A IT DEPENDS. SOMETIMES WE DO. SOMETIMES WE GIVE IT
25 VERBALLY. USUALLY MY TESTIMONY IS THE REPORT, THE

1 WRITTEN REPORT.

2 Q IN REVIEWING THE ACADEMIC RECORDS, WHEN WAS THE
3 DEFENDANT FIRST KIND OF CONSIDERED FOR PLACEMENT IN A
4 CLASS RATHER THAN ROUTINE PLACEMENT IN CLASSES IN
5 SUMMERVILLE?

6 A IN HIGH SCHOOL.

7 Q IN HIGH SCHOOL?

8 A YES.

9 Q AND THAT WAS IN THE ELEVENTH GRADE. WASN'T IT?

10 A RIGHT.

11 THE COURT: HOLD ON JUST A SECOND. I SEE HERE AT AGE NINE,
12 AN I.Q. SCORE OF 69 AND THEN WE GO TO FIFTH GRADE, I.Q. 104.
13 WHERE ARE THESE I.Q. SCORES COMING FROM? ANOTHER I.Q. OF 94.
14 ANOTHER I.Q. FROM THE THIRD GRADE OF 104.

15 MS. HAMMOCK: THESE ARE GROUP ADMINISTERED TESTS THAT
16 OCCURRED IN MANY SCHOOLS THAT ARE CHALLENGED SOMEWHAT IN
17 TERMS OF BEING ACTUAL I.Q. SCORES.

18 THE COURT: BUT YOU HAD NO ACCESS TO THOSE AND THERE WAS
19 NO REASON -- DID YOU HAVE ANY REASON TO VOUCH FOR THE VALIDITY
20 OF THEM?

21 MS. HAMMOCK: WELL, THEY ARE GROUP ADMINISTERED AND
22 THERE IS SOME QUESTION ABOUT THAT VALIDITY.

23 THE COURT: ALL RIGHT. I'M SORRY.

24 MR. ZELENKA: THANK YOU, YOUR HONOR.

25 Q IN FACT, THAT WAS AN AREA I WAS ABOUT TO GO TO. THOSE

1 GROUP ADMINISTERED TESTS, HOWEVER, DID NOT IDENTIFY THE
2 DEFENDANT FOR SPECIAL PLACEMENT IN OTHER CLASSES AT
3 THAT TIME. IS THAT NOT CORRECT?

4 A APPARENTLY NOT.

5 Q AND THE FACT THAT A TEST WAS GROUP ADMINISTERED DOESN'T
6 MEAN THAT IT WAS UNRELIABLE OR UNUSED BY THOSE IN THE
7 ACADEMIC COMMUNITY TO MAKE THOSE SORTS OF DECISIONS.
8 ISN'T THAT CORRECT?

9 A BUT THERE HAS TO BE -- NOT HAS TO BE. THERE SHOULD BE AN
10 INDIVIDUALLY ADMINISTERED I.Q. TEST ON SOME OF THE
11 STANDARDS TO THEN MOVE THEM TO THE NOTION THAT THERE IS
12 SOMETHING WRONG AND THERE NEEDS TO BE A SPECIAL
13 PLACEMENT. I THINK THAT WE COULD ACTUALLY SEE THAT
14 PROCESS WITH HIS SISTER, ANNETTE.

15 Q OKAY. BUT HE WASN'T IDENTIFIED AT THAT EARLY STAGE BASED
16 UPON THESE GROUP TESTINGS TO EVEN GET THAT
17 INDIVIDUALIZED I.Q. TEST. THAT'S THE NEXT STEP. ISN'T IT?

18 A THAT'S CORRECT.

19 Q SO, THOSE TEACHERS, THROUGH THE AGE OF ELEVEN AND HE
20 FLUNKED THE ELEVENTH GRADE --EXCUSE ME, NOT THE AGE OF
21 ELEVEN, GRADE ELEVEN. THAT'S WHEN HE WAS IDENTIFIED, AT
22 THAT LATE STAGE. IS THAT NOT CORRECT?

23 A THAT'S CORRECT. WELL, LET ME SAY THIS. THERE ARE OTHER
24 INDICES ON HERE. FOR INSTANCE, WITH SOME OF THESE GRADES,
25 IN THE FIRST, SECOND AND THIRD GRADES, YOU SEE THE READING

1 LEVELS AND HE IS NOT AT GRADE LEVEL.

2 Q BUT HE'S CLOSE TO GRADE LEVEL. ISN'T THAT CORRECT?

3 A WELL, IN THE FIRST GRADE HE'S ONE POINT -- IN THE FIRST
4 GRADE, HE'S 1.6, HIS READING AVERAGE. IN THE SECOND GRADE,
5 HE'S 1.8 READING AVERAGE AND IN THE THIRD GRADE, HE'S 1.1.

6 Q OKAY. AND WHERE IS HE IN THE FOURTH GRADE? IS THAT
7 REFLECTED ON THAT OR NOT?

8 A LET ME SEE. THERE ARE SOME PLACES WHERE YOU DON'T
9 ACTUALLY SEE A READING LEVEL, BUT YOU DO HAVE THE
10 AVERAGES, PARTICULARLY IN READING. (WITNESS LOOKS
11 THROUGH PAPERS) THERE ARE SOME PERSONS IN THE SCHOOL
12 SYSTEM WHO, AS I SAID, WILL QUESTION THOSE SCORES IF THEY
13 ARE REALLY I.Q. SCORES AND THE I.Q. SCORES THAT YOU
14 MENTIONED, JUDGE, THE 94, THE 104, THE 69, THE 104, ONE OF THE
15 TEACHERS ACTUALLY EXPLAINED TO ME THAT THESE WERE
16 STANDARDIZED TESTS AND THEY ACTUALLY WERE A PART OF THE
17 SRA PRIMARY MENTAL ABILITIES TESTS IN THE SHORT FORM OF
18 THE ACADEMIC APTITUDE AND WHILE I AGREE WITH YOU THAT
19 THAT SHOULD HAVE TRIGGERED IT, IT OBVIOUSLY DID NOT.

20 Q EVEN THE 104?

21 A EVIDENTLY.

22 Q YOU WOULD THINK THE 104 WOULD BE SOMETHING THAT WOULD
23 IDENTIFY HIM AS NEEDING TO GO TO REMEDIAL CLASSES.

24 A WELL, THERE'S ALSO A 69 ON THERE.

25 THE COURT: HOW ABOUT THE 104, THOUGH. HE ASKED ABOUT

1 THE 104.

2 MS. HAMMOCK: IT'S RIGHT THERE ON THE BORDERLINE, I THINK.
3 AND AGAIN, GIVEN WHAT THE CLIMATE HAS BEEN IN CERTAIN SCHOOLS
4 IN TERMS OF REFERRING, AND THIS CERTAINLY IS NOT SCIENTIFIC, BUT
5 THERE'S -- I MEAN, YOU REALLY HAVE TO DEMONSTRATE THAT
6 SOMEBODY IS IN TROUBLE AND THE DIFFERENCE BETWEEN WHAT
7 HAPPENED TO ANNETTE AND WHAT HAPPENED TO OUR CLIENT IS
8 REALLY QUITE INTERESTING BECAUSE SHE DID TRIGGER AND THERE
9 WAS AN ALERT AND SHE WAS TESTED AND SHE WAS PLACED.

10 THE COURT: WELL, WHAT WAS HER I.Q.?

11 MS. HAMMOCK: SIXTY....

12 THE COURT: WAS IT LOWER THAN HIS? HIGHER? THE SAME?

13 MS. HAMMOCK: LOWER AND HIGHER AT DIFFERENT POINTS, BUT
14 WHAT TRIGGERED IT WAS A 69 IF I'M NOT MISTAKEN. I DON'T HAVE HER
15 RECORDS WITH ME.

16 Q OKAY. MS. HAMMOCK, YOU WOULD AGREE THAT A PART OF TEST
17 TAKING IS BASED UPON THE INDIVIDUAL TEST TAKER'S DESIRE TO
18 DO GOOD. CORRECT?

19 A YES.

20 Q OKAY. AND ONE OF THE REASONS THAT YOU LOOK AT
21 INDIVIDUALIZED TESTING IS BECAUSE THE EXAMINER THEN CAN
22 IDENTIFY THAT PARTICULAR TEST TAKER AND DETERMINE
23 WHETHER, IN FACT, THE INDIVIDUAL IS REALLY TRYING. ISN'T THAT
24 ALSO CORRECT?

25 A CAN BE.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

1 Q BUT THAT'S ONE OF THE MAJOR REASONS WHY INDIVIDUALIZED
2 TESTING OVER GROUP TESTING IS A PREFERRED MODEL FOR
3 DETERMINING I.Q. ISN'T THAT CORRECT?

4 A YES.

5 Q YET YOU WOULD ALSO AGREE THAT WHEN AN INDIVIDUAL TESTS
6 HIGH OR HIGHER, THAT SUGGESTS THAT LEVEL OF FUNCTIONING,
7 AT LEAST. ISN'T THAT CORRECT?

8 A IT CAN.

9 Q WELL, NOT, IT CAN. IT DOES. ISN'T THAT CORRECT?

10 A I SAY IT CAN. I DON'T THINK IT'S ABSOLUTE.

11 Q OKAY. BUT GO AWAY FROM MISTER SIMMONS. AN INDIVIDUAL
12 WHO TAKES AN I.Q. TEST AND HE HITS THAT LEVEL OF 100, IT
13 SHOWS THAT HIS I.Q. IS AT LEAST AT THAT LEVEL. ISN'T THAT
14 CORRECT?

15 A WELL, I GUESS THERE ARE PEOPLE WHO WOULD CHALLENGE
16 THAT BECAUSE ALL KINDS OF FACTORS GO INTO HOW WELL THEY
17 DO, BOTH UP AND DOWN.

18 Q SO, ARE YOU SAYING THAT, FOR EXAMPLE, AN INDIVIDUAL WHO
19 HAS AN I.Q. LEVEL OF 100, COULD ACTUALLY MEET THE GENERAL
20 DEFINITION OF MENTAL RETARDATION?

21 **MS. PAAVOLA:** YOUR HONOR, WE HAVEN'T ASKED MS. HAMMOCK
22 TO GIVE AN OPINION ON KENNETH SIMMONS' I.Q. SCORE. I THINK THIS IS
23 MORE APPROPRIATE FOR ---

24 **THE COURT:** ON WHO'S I.Q.?

25 **MS. PAAVOLA:** MISTER SIMMONS' I.Q.

1 **THE COURT:** YES. BUT YOU'VE ASKED HER TO GIVE OPINIONS
2 REGARDING MENTAL RETARDATION AND ONE OF THE THINGS I HAVE TO
3 LOOK AT IS LIMITATIONS AND ADAPTIVE FUNCTIONING AND THE
4 MANIFESTATION OF THESE ATTRIBUTES BEFORE AGE EIGHTEEN.

5 **MS. PAAVOLA:** RIGHT.

6 **THE COURT:** AND YOU INTRODUCE THEN, TOO, THE DIRECT
7 ACADEMIC PERFORMANCES AND ANALYSIS OF THAT, I WOULD ASSUME
8 THAT AN ANALYSIS WOULD HAVE TO INCLUDE HIS I.Q. TEST SCORES
9 THAT KEEP POPPING UP IN THE SCHOOL RECORDS AND SO I AM GOING
10 TO OVERRULE YOUR OBJECTION. HOLD ON A SECOND. WERE YOU ABLE
11 TO MAKE THE OBJECTION IN FULL TO PROTECT THE RECORD?

12 **MS. PAAVOLA:** YES. WELL, OUR OBJECTION IS THAT WE ASKED
13 HER TO RENDER AN OPINION ON DEFICITS AND ADAPTIVE FUNCTIONING
14 WHICH IS PRONG TWO AND HE'S ASKING HER FOR AN ASSESSMENT ON
15 PRONG ONE, WHICH IS THE I.Q. SCORE AND THAT ISN'T WHAT SHE'S
16 GIVEN AN OPINION ON.

17 **THE COURT:** WELL, OVERRULED. I WILL ALLOW SOME
18 QUESTIONING ON I.Q. BECAUSE IT'S GOT ME INTERESTED IN THAT
19 PARTICULAR ASPECT OF IT AND HOW WE TRY TO BALANCE ALL THESE
20 OUT.

21 **Q** YOU WOULD AGREE THEN, THAT AN INDIVIDUAL WHO TESTS ON AN
22 I.Q. TEST OF 100, WOULD LIKELY NOT BE MENTALLY RETARDED AS
23 DEFINED OR RELIED UPON BY YOU IN THE DSM-IV OF
24 APPROXIMATELY 70. IS THAT CORRECT?

25 **A** WELL, AGAIN, THERE ARE SO MANY CHALLENGES TO THAT. I HEAR

1 WHAT YOU ARE SAYING. I DO. BUT I HAVE SOME QUESTION
2 ABOUT, AGAIN, WHAT THAT NUMBER REALLY REFLECTS AND I
3 WASN'T ASKED TO REALLY GO FOR THAT, BUT I DID LOOK AT
4 THOSE FLUCTUATIONS IN SCORES. OF COURSE, THAT PEAKED MY
5 INTEREST.

6 Q BUT THERE IS EVIDENCE IN HIS SCHOOL RECORD THAT HE WAS
7 TAKING A NON-INDIVIDUALIZED TESTING UTILIZED BY THE SCHOOL
8 FOR PURPOSES TO DETERMINE HIS INTELLIGENCE LEVEL.

9 A TO DETERMINE HIS PLACEMENT IN MOST INSTANCES.

10 Q TO DETERMINE HIS PLACEMENT AS A SCREENING TOOL,
11 CORRECTLY, BECAUSE THAT IS THE ROLE OF EDUCATION, BUT IT
12 DOESN'T DENY ---

13 A IT DOESN'T NECESSARILY MEAN THAT IT IS DETERMINING THE I.Q.

14 Q CORRECT. CORRECT.

15 A IT'S DETERMINING PLACEMENT. AND THAT'S HOW THEY ARE
16 USUALLY USED, FROM MY UNDERSTANDING.

17 Q AND WHEN IT WAS USED IN THIS SETTING, BEFORE THE AGE OF
18 EIGHTEEN, IT WAS DETERMINED BY THOSE INDIVIDUALS WHO
19 WERE RELYING UPON THAT INFORMATION, THAT HE DID NOT
20 REQUIRE AT THE TIME THOSE TESTS WERE TAKEN, THAT SPECIAL
21 PLACEMENT. ISN'T THAT CORRECT?

22 A IN THIS INSTANCE. YES. THAT'S EXACTLY WHAT HAPPENED.
23 HOWEVER, IT DIDN'T HAPPEN WITH HIS SISTER.

24 Q OKAY. I'M NOT ASKING YOU ABOUT HIS SISTER, I'M ASKING YOU
25 ABOUT HIM.

1 A WELL, AND THE ONLY REASON WHY I BROUGHT THAT UP WAS
2 THAT IT WAS THE SAME SYSTEM.

3 THE COURT: THE SAME WHAT?

4 MS. HAMMOCK: SYSTEM. EDUCATIONAL SYSTEM.

5 Q AND IF YOU LOOK AT HIS GRADE LEVELS: GRADE NINE, "D" IN
6 ENGLISH FOR THE YEAR, "B" IN MATH FOR THE YEAR, "F" IN
7 SCIENCE. CORRECT?

8 A I HAVEN'T FOUND IT YET. HOLD ON A MINUTE, PLEASE. UH-HUH,
9 I'VE GOT IT NOW.

10 Q ISN'T THAT CORRECT?

11 A YES.

12 Q TENTH GRADE: "C" IN ENGLISH, "C" IN MATH, "F" IN SCIENCE, "C" IN
13 ART.

14 THE COURT: WHICH YEAR ARE YOU?

15 MR. ZELENKA: TENTH GRADE. GRADE TEN, 1976-77.

16 Q IS THAT CORRECT?

17 A YES, IT'S HERE. THAT'S WHAT IS HERE.

18 Q WELL, THAT'S WHAT HE GOT. ISN'T IT?

19 A THAT'S WHAT I'M SAYING. THAT'S WHAT I'M READING.

20 Q OKAY. GRADE ELEVEN, 1977-78: REMEDIAL ENGLISH, "B".
21 U.S. HISTORY, "B", HE RECEIVED A "D" FOR THE YEAR. IN ENGLISH,
22 HE RECEIVED A "C". CORRECT?

23 A FOR THE YEAR, THE ELEVENTH GRADE? FIRST ELEVENTH OR
24 SECOND?

25 Q FIRST ELEVENTH.

- 1 A OKAY. "B", "D", "C" AND "F" IN HUMAN SEXUALITY, I GUESS THAT IS.
- 2 Q OKAY. AND THEN GRADE ELEVEN, THE SECOND: "C", "F", AND A "C"
- 3 IN REMEDIAL ENGLISH. CORRECT?
- 4 A THAT'S WHAT'S LISTED HERE. I WAS GIVEN THE EXPLANATION
- 5 ABOUT THE LEVEL OF THOSE CLASSES, ALL OF THEM.
- 6 Q OKAY.
- 7 A OKAY. AND THOSE THREE WERE ---
- 8 Q AND THOSE CLASSES ---
- 9 A --- LEVEL THREE.
- 10 Q BUT WERE THOSE CLASSES THE MOST REMEDIAL CLASSES
- 11 OFFERED BY SUMMERVILLE HIGH SCHOOL TO THOSE WHO ARE IN
- 12 NEED OF SPECIAL EDUCATION?
- 13 A IN THIS CATEGORY. THOSE WERE NOT THE ONES WHO WERE IN
- 14 THE DISCREET CLASSROOM WITH THE SPECIAL NEEDS, BUT THIS
- 15 WAS FOR THIS GROUP.
- 16 Q SO, THERE WAS A ---
- 17 A ACCORDING TO WHAT WAS EXPLAINED TO ME.
- 18 Q SO, THERE IS A CLASS THAT'S LOWER THAN THIS AT SUMMERVILLE
- 19 HIGH SCHOOL FOR THOSE WHO ARE FOUND TO BE IN THE MOST
- 20 NEED?
- 21 A AND THOSE ARE THE ONES WHO ARE SEVERELY DISABLED,
- 22 ACCORDING TO WHAT I WAS TOLD.
- 23 Q THE REALLY DISABLED WERE IN THAT?
- 24 A DOWNS SYNDROME, CEREBRAL PALSY, SOME OTHERS LIKE THAT.
- 25 THAT'S WHAT WAS EXPLAINED TO ME, HOW THEY FIGURED THAT

1 OUT.

2 Q OKAY. AND THERE WERE AT LEAST THIRTY OTHERS IN THIS
3 CLASS?

4 A TO MY KNOWLEDGE -- I DON'T REALLY KNOW THAT.

5 Q THE CLASS THAT MISTER SIMMONS WAS IN.

6 A I DON'T KNOW THAT NUMBER. I'M SORRY. I DIDN'T INQUIRE, BUT I
7 WOULD ASSUME.

8 Q IS EVERYBODY IN THAT CLASS MENTALLY RETARDED?

9 A I DON'T KNOW.

10 Q YOU DON'T KNOW? BECAUSE IT'S NOT NECESSARY. ISN'T THAT
11 CORRECT?

12 A I DON'T KNOW.

13 Q WELL, I THOUGHT YOU WERE ASSESSING HIS ACADEMIC
14 PERFORMANCE.

15 A HIS ACADEMIC PERFORMANCE. I DID NOT ASK NOR WAS I TOLD
16 WHAT WAS THE LEVEL OF FUNCTIONING OF THE PEOPLE IN THE
17 CLASS.

18 Q OKAY. BUT IN THAT LEVEL OF FUNCTIONING OF PEOPLE IN THE
19 CLASS, HE WAS AVERAGE OR ABOVE WITH THOSE PARTICULAR
20 GRADES. ISN'T THAT ALSO CORRECT?

21 A I CAN ASSUME THAT, BUT I DON'T KNOW THAT FACTUALLY. I MEAN,
22 I WOULD ASSUME THERE IS ALSO A RANGE IN THAT CLASS.

23 Q BUT HIS GRADES, WHICH YOU WERE ASSESSING --

24 A UH-HUH.

25 Q -- SUGGESTS THAT HE WAS AVERAGE OR ABOVE FOR THAT

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

- 1 CLASS.
- 2 A AND I WAS TOLD THAT THESE WERE SPECIFIC STUDENTS WITH
- 3 SPECIFIC NEEDS WHO HAD BEEN ASSIGNED TO THIS CLASS. YES.
- 4 Q OKAY. AND WHEN WERE YOU TOLD THIS?
- 5 A I GUESS ABOUT A MONTH AGO, SPEAKING, OR EVEN LONGER THAN
- 6 THAT, BACK IN THE FALL WHEN I ACTUALLY SPOKE TO THIS
- 7 TEACHER, MS. SMITH.
- 8 Q OKAY. AND THESE WERE TEACHERS WHO KNEW THE DEFENDANT
- 9 HAD BEEN SENTENCED TO DEATH. CORRECT?
- 10 A YES. I'M SURE THEY DID.
- 11 Q YET, THEY ALSO SAID THEY FOUND THE INDIVIDUAL CHARMING
- 12 WHILE THEY HAD HIM IN THEIR CLASSROOMS. CORRECT?
- 13 A YES.
- 14 Q FRIENDLY?
- 15 A YES.
- 16 Q A POSITIVE INDIVIDUAL ---
- 17 A I DIDN'T SAY THAT.
- 18 Q --- AND BY POSITIVE, WASN'T A TROUBLE MAKER.
- 19 A THAT'S CORRECT.
- 20 Q ESSENTIALLY, THAT THEY LIKED THIS INDIVIDUAL. ISN'T THAT
- 21 CORRECT?
- 22 A THEY DIDN'T MAKE THAT STATEMENT TO ME.
- 23 Q DID YOU GET THE IMPRESSION THEY WERE TRYING TO HELP HIM?
- 24 A OH, YES.
- 25 Q YOU DID?

1 A THAT WAS THEIR CHARGE FOR ALL OF THEIR STUDENTS.

2 Q BUT THEIR CHARGE WAS TO HELP HIM AT THE TIME ALSO THAT
3 YOU INTERVIEWED THEM. ISN'T THAT CORRECT?

4 A I WOULDN'T KNOW.

5 Q YOU WOULDN'T? YOU WOULDN'T KNOW THAT?

6 A NO, I WOULDN'T KNOW THAT.

7 Q YOU DIDN'T?

8 A THEY WERE COOPERATIVE, IF THAT'S WHAT YOU'RE SAYING. I
9 DON'T THINK IT WAS -- THEY SIMPLY WERE GIVING ME THE
10 INFORMATION ABOUT THIS SETTING. THAT'S WHAT I WAS ASKING
11 FOR.

12 Q OKAY.

13 A AND IT WAS SPECIFIC TO OUR CLIENT.

14 Q AGAIN, LET'S GO TO THE ACHIEVEMENT TEST THAT HE TOOK, ON
15 THAT PAGE. DO YOU HAVE THAT PAGE IN FRONT OF YOU?

16 THE COURT: OF THAT PAGE BEING, WHAT?

17 A WHAT'S THAT PAGE? THIS?

18 Q WELL IT'S ON THE -- GO OVER TO THE NEXT PAGE.

19 A I KNOW WHAT YOU'RE LOOKING FOR. OKAY. I'VE GOT IT.

20 THE COURT: WILL Y'ALL TELL ME WHAT YOU'RE LOOKING AT?

21 MR. ZELENKA: I'M LOOKING AT THE LINDA SHWEC AFFIDAVIT AND IT
22 WOULD BE PAGE TWO OF EXHIBIT #A ON THAT AFFIDAVIT. IT'S BEEN
23 INTRODUCED.

24 THE COURT: LET ME SEE?

25 (MISTER ZELENKA SHOWS DOCUMENT TO THE JUDGE)

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

- 1 **MR. ZELENKA:** I'M SORRY JUDGE. THAT'S IT.
- 2 A IS THIS WHAT YOU ARE LOOKING AT?
- 3 Q YES.
- 4 A I WANTED TO MAKE SURE. OKAY.
- 5 **THE COURT:** NOW, WHAT'S THE QUESTION?
- 6 Q THE METROPOLITAN ACHIEVEMENT TEST, FORM "A". THE DATE
- 7 TAKEN IS 1968. HE'S IN FIRST GRADE AT THAT TIME. IS THAT
- 8 CORRECT?
- 9 A YES.
- 10 Q AND AT THAT TIME, HIS CHRONOLOGICAL AGE WAS SEVEN? AND
- 11 GRADE NORM WAS 1.6? IS THAT CORRECT?
- 12 A THAT'S WHAT'S DOWN HERE. YES.
- 13 Q WHAT DOES THAT MEAN TO YOU IN MAKING YOUR ASSESSMENT
- 14 OF HIS ACADEMIC ACHIEVEMENT AT THAT STAGE?
- 15 A GRADE NORM, 1.6, WHICH IS FIRST GRADE. CHRONOLOGICAL AGE
- 16 WAS ACCURATE. THAT'S WHAT AGE HE WAS, BUT THEN I ALSO
- 17 LOOK AT THE PERCENTILE RANGE AND THAT'S 19.
- 18 Q AND WHAT DOES THAT MEAN?
- 19 A THAT'S PRETTY LOW FUNCTIONING.
- 20 Q PRETTY LOW FUNCTIONING?
- 21 A UH-HUH.
- 22 Q NINETEEN PERCENT?
- 23 A YES.
- 24 Q OKAY.
- 25 A OF ALL THE PEOPLE REPORTEDLY TESTED.

1 Q OKAY.

2 THE COURT: THAT MEANS 81% ARE BETTER?

3 MS. HAMMOCK: THAT'S CORRECT.

4 Q OKAY. WHAT'S THE PERCENTAGE OF INDIVIDUALS WHO ARE
5 MENTALLY RETARDED IN DORCHESTER COUNTY OR IN THE STATE
6 OF SOUTH CAROLINA?

7 A I DON'T KNOW.

8 Q IS IT NINETEEN PERCENT?

9 A I DON'T KNOW.

10 Q IS IT FIVE PERCENT? YOU DON'T KNOW?

11 A I DON'T KNOW.

12 Q YOU HAVE NO IDEA? SO, IN MAKING THAT ASSESSMENT, THE FACT
13 THAT HE'S IN THE NINETEENTH PERCENTILE, YOU DON'T HAVE ANY
14 IDEA WHERE THAT FITS WITH INDIVIDUALS WHO ARE THEN
15 DETERMINED TO BE MENTALLY RETARDED. IS THAT CORRECT?

16 A THAT REFLECTS THE NATIONAL NORM IS WHAT I'VE BEEN TOLD,
17 AND THAT'S WHAT I USED.

18 THE COURT: MA'AM, DO YOU KNOW WHAT THE METROPOLITAN
19 ACHIEVEMENT TEST TRIES TO OBTAIN?

20 MS. HAMMOCK: EXCUSE ME?

21 THE COURT: WHAT IS IT FOR? WHAT ARE YOU MEASURING ON
22 THAT?

23 MS. HAMMOCK: AGAIN, IT'S REALLY MEASURING, IT SAYS
24 ACHIEVEMENT, BUT IT'S REALLY MEASURING FUNCTIONING LEVEL FOR
25 PLACEMENT PURPOSES FROM MY UNDERSTANDING.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENSKA

- 1 Q OKAY. IN 1969, THE SRA, DO YOU KNOW WHAT THAT IS?
- 2 A JUST IN TERMS OF HOW IT'S DESCRIBED. IT'S ANOTHER
- 3 ACHIEVEMENT TEST, BROADLY BASED, UNIVERSALLY GIVEN.
- 4 Q ON THAT ONE, HE ACHIEVED A SCORE OF 94?
- 5 A YES.
- 6 Q AND THAT PLACED HIM IN THE ELEVENTH PERCENTILE?
- 7 A YES.
- 8 Q 1970, THE SRA ACHIEVEMENT TEST, 103?
- 9 A UH-HUH.
- 10 Q 3.6 GRADE NORM? RIGHT?
- 11 A 3 POINT ---
- 12 Q CHRONOLOGICAL AGE, NINE YEARS OLD?
- 13 A UH-HUH. YES.
- 14 Q AND WHAT DOES G-E MEAN?
- 15 A I DON'T SEE THAT.
- 16 Q THE COLUMN NEXT TO CHRONOLOGICAL AGE.
- 17 A YOU HAVE A G-E?
- 18 Q YES. IF I MAY. (MISTER ZELENSKA INDICATES ON DOCUMENT)
- 19 A MENTAL AGE?
- 20 Q DO YOU KNOW WHAT IT MEANS?
- 21 A NO. I DON'T. I THOUGHT IT WAS, IT'S -- USUALLY THE MENTAL AGE
- 22 IS IN THERE. I DON'T KNOW.
- 23 THE COURT: IF YOU LOOK ALL THE WAY TO THE TOP OF THE
- 24 COLUMN, IT DOES SAY MENTAL AGE.
- 25 A I'M JUST USED TO THAT BEING THERE, BUT I DON'T KNOW WHAT

1 THAT MEANS. I DIDN'T NOTICE IT.

2 Q NOW, IF YOU GO TO THE TOP, THE SRA, PMA, THAT WAS TAKEN
3 ALSO IN THE FIRST GRADE, THAT ALSO HAS AN I.Q. OF 94.
4 CORRECT?

5 A NINETY-FOUR?

6 Q YES. IT DOES. DOESN'T IT?

7 A WHAT DID YOU JUST ASK?

8 Q THIS ONE RIGHT HERE. (INDICATING ON MS. HAMMOCKS
9 DOCUMENT)

10 A THIS ONE RIGHT HERE. I'M SORRY. I DIDN'T SEE IT.

11 Q IT SHOWS THE I.Q. OF 94 THERE. DOESN'T IT?

12 A YES. 94, 104, 69. THE SAME ONES THAT WE LOOKED AT BEFORE.

13 Q IN 1970, IT SHOWS THE I.Q. OF 104. DOESN'T IT?

14 A YES.

15 Q AND HIS PERCENTILE RANK AT THAT AGE IS WHAT? FORTY-FIVE
16 PERCENT?

17 A YES. UNDER FIFTY.

18 Q WHICH MEANS HIS I.Q. LEVEL AS TESTED AT THAT TIME IS HIGHER
19 THAN FORTY-FIVE PERCENT OR EQUAL TO FORTY-FIVE PERCENT
20 OF THE POPULATION. ISN'T THAT CORRECT?

21 A STILL UNDER FIFTY. YES.

22 Q AND CERTAINLY, FORTY-FIVE PERCENT OF THE POPULATION IN
23 DORCHESTER COUNTY OR SOUTH CAROLINA OR THE UNITED
24 STATES IS NOT MENTALLY RETARDED. IS IT?

25 A I DON'T KNOW.

1 **THE COURT:** WELL, MA'AM, IF YOU LOOK RIGHT ON DOWN BELOW
2 THAT, THERE'S ANOTHER 1970 DATE. DO YOU KNOW WHAT THAT IS
3 MISTER ZELENKA? UNDER 4-I, S-F-T-A-A?

4 **MR. ZELENKA:** F-S-T-A-A?

5 **THE COURT:** DO YOU KNOW THE DATES OF THOSE TWO TESTS?
6 3-A AND 4-I.

7 **MS. HAMMOCK:** IT SAYS SEVENTY, BUT THE ACTUAL DAY IS
8 BLOCKED OUT.

9 **MR. ZELENKA:** AS IS MINE.

10 **THE COURT:** AND THEN THAT I.Q. SCORE IS A 69. IS THAT
11 CORRECT?

12 **MS. HAMMOCK:** YES. THAT'S CORRECT.

13 **THE COURT:** THERE'S A RANGE OF 94, 104 AND THEN BACK DOWN
14 TO 69?

15 **MS. HAMMOCK:** YES.

16 **THE COURT:** CAN YOU EXPLAIN WHY THERE IS SUCH A LARGE
17 RANGE?

18 **MS. HAMMOCK:** NO, I CANNOT, OTHER THAN TO SAY THAT HAS
19 BEEN NOTED AS ONE OF THE LIMITATIONS OF THESE KINDS OF TESTS
20 BEING USED AS I.Q. EXAMS.

21 Q AND IT MAY REFLECT ON THE INDIVIDUAL'S WILLINGNESS TO TAKE
22 THE TEST AND DESIRE TO PERFORM WELL. ISN'T THAT CORRECT?

23 A I HAVE NO IDEA ABOUT THAT. I SIMPLY CANNOT SAY.

24 Q BUT THAT IS A FACTOR USUALLY ---

25 A THAT CAN ---

1 Q --- IN A GREAT DISPARITY ---

2 A --- THAT CAN BE A FACTOR.

3 Q AND WHAT ARE OTHER FACTORS? THE ---

4 A THE CLIMATE, HEALTH.

5 Q --- HEALTH AT THAT TIME? THE INDIVIDUAL COULD BE SICK ON THAT
6 PARTICULAR DAY.

7 A THAT'S RIGHT.

8 Q CORRECT? COULD LACK SLEEP ON THAT PARTICULAR DAY. CORRECT?

9 A COULD BE. THAT COULD BE A FACTOR.

10 Q COULD SIMPLY NOT BE PAYING ATTENTION. CORRECT?

11 A CORRECT.

12 Q AND IN SOME SITUATIONS, STRESS MAYBE BECAUSE HE MAY HAVE TO
13 GO TO THE RESTROOM OR SOMETHING DURING THIS TEST. ISN'T THAT
14 CORRECT?

15 A CAN BE. I'M SURE ALL OF THOSE FACTORS CAN BE CONSIDERED.

16 Q AND ANOTHER FACTOR IS, SIMPLY DIDN'T CARE. CORRECT?

17 A IT CAN BE ANOTHER ONE OF THOSE FACTORS. THERE ARE A MYRIAD
18 OF THEM.

19 Q NOW, THE DEFENDANT ALSO DID OTHER THINGS AT SCHOOL. ISN'T
20 THAT CORRECT?

21 A YES.

22 Q WHAT INFORMATION DID YOU HAVE AS FAR AS HIS EXTRACURRICULAR
23 ACTIVITIES THAT HE PARTICIPATED IN AT SCHOOL?

24 A WELL, THE MOST NOTABLE ONE IS THAT HE PLAYED ON THE FOOTBALL
25 TEAM WHEN HE WAS IN HIGH SCHOOL.

1 Q AND HOW LONG DID HE PLAY ON THE FOOTBALL TEAM?

2 A EVIDENTLY, HIS CAREER THERE, FROM HIS SOPHOMORE -- PART OF HIS
3 SOPHOMORE YEAR, I THINK, IS WHEN I SEE ACTUAL INFORMATION THAT
4 HE WAS ON THE TEAM.

5 Q OKAY. AND THAT FOOTBALL TEAM IS AT SUMMERVILLE HIGH SCHOOL?

6 A CORRECT.

7 Q AND DID HE RECEIVE LETTERS ON THAT TEAM?

8 A YES.

9 Q AND DID HE MAINTAIN GRADES THAT HE COULD CONTINUE TO
10 PARTICIPATE ON THE FOOTBALL TEAM?

11 A ACCORDING TO THE PAPERWORK, YES. IT DOES SEEM THAT HE
12 MAINTAINED GRADES. THERE'S CONSIDERABLE SPECULATION ABOUT
13 THAT, BOTH FROM TEACHERS ---

14 Q WHAT DO YOU MEAN SPECULATION?

15 A ABOUT WHY HE WAS GRADED WELL.

16 Q AND THESE WERE THE TEACHERS THAT GRADED HIM WELL?

17 A NO. THESE ARE THE TEACHERS WHO I TALKED TO, WHETHER OR NOT
18 THEY ACTUALLY PROVIDED THE GRADE. WHAT THEY IMPLIED WAS
19 THAT FOOTBALL PLAYERS OFTEN GOT SOME PREFERENCE IN TERMS
20 OF GRADES TO MAINTAIN THEIR ELIGIBILITY AND EVEN THAT WASN'T
21 RIGIDLY ENFORCED AT THE TIME ACCORDING TO SOME OF THE THINGS
22 THAT I READ BY COACHES AND THINGS LIKE THAT.

23 Q BUT THERE IS NO EVIDENCE THAT MISTER SIMMONS RECEIVED
24 PREFERENCE IN HIS GRADES BECAUSE HE WAS A FOOTBALL PLAYER.
25 IS THERE?

1 A THERE'S NO EVIDENCE. THERE'S SPECULATION.

2 Q BUT THAT SPECULATION GOES TO ALL INDIVIDUALS WHO PLAYED
3 FOOTBALL AT SUMMERVILLE HIGH SCHOOL. IS THAT CORRECT?

4 A WELL, I GUESS THE TEACHERS WERE TALKING ABOUT HIM
5 SPECIFICALLY. THAT'S WHEN THEY SHARED THAT WITH ME.

6 Q DID ANY OF THOSE TEACHERS SAY, "I GAVE HIM THAT GRADE BECAUSE
7 HE WAS A FOOTBALL PLAYER SO THAT HE COULD CONTINUE PLAYING
8 FOOTBALL?

9 A NO.

10 Q DID ANY OF THOSE TEACHERS SAY, "I GAVE HIM THAT GRADE RATHER
11 THAN THE GRADE HE DESERVED BECAUSE HE WAS A FOOTBALL
12 PLAYER."

13 A NO.

14 Q OKAY. SO, THOSE GRADES AT THE TIME THEY WERE GIVEN, BEFORE
15 MISTER SIMMONS HAD COMMITTED THIS HEINOUS CRIME, WERE VALID
16 IN THOSE TEACHERS EYES AND IN THE SCHOOL SYSTEM'S EYES. IS
17 THAT NOT CORRECT?

18 A NO. AS A MATTER OF FACT, THEY WEREN'T VALID IN ALL OF THE
19 TEACHERS' EYES. EVEN THOUGH THEY DIDN'T GIVE THE GRADES,
20 THEY SAID THAT THERE WAS LEEWAY, PARTICULARLY FOR FOOTBALL
21 PLAYERS.

22 Q BUT THEY DON'T KNOW OF ANY GRADE ON THESE GRADE REPORTS
23 THAT IS NOT AN ACCURATE REFLECTION OF WHAT HE EARNED. IS
24 THAT CORRECT?

25 A NO. THEY DID NOT.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

1 Q OKAY.

2 A THEY DID NOT SPECIFICALLY SAY A GRADE ON HERE WAS FALSE.

3 Q YET, IN MAKING YOUR ASSESSMENT OF LOW ACADEMIC
4 PERFORMANCE, THAT PRONG OF DSM-IV'S ADAPTIVE BEHAVIOR,
5 YOU'VE ASSUMED THAT HE DIDN'T EARN THESE GRADES. ISN'T THAT
6 CORRECT?

7 A I DIDN'T ASSUME, BUT I WAS IN FACT, GIVEN INFORMATION FROM MORE
8 THAN ONE SOURCE THAT THAT WOULD BE SOMETHING THAT WOULD
9 BE QUESTIONED.

10 Q OKAY.

11 A BASED ON HIS PERFORMANCE, IN GENERAL.

12 Q OKAY.

13 THE COURT: MISTER ZELENKA, LET ME SEE Y'ALL FOR A SECOND.

14 (BRIEF BENCH CONFERENCE OFF THE RECORD)

15 THE COURT: ARE YOU AT A STOPPING POINT?

16 MR. ZELENKA: YES, WE CAN STOP.

17 THE COURT: MA'AM, YOU ARE RIGHT IN THE MIDDLE OF YOUR
18 TESTIMONY. I WILL ASK THAT YOU NOT DISCUSS IT WITH ANYONE. WE'VE
19 GOT TO BREAK BECAUSE OF LIMITATIONS ON SPACE UP HERE THIS
20 MORNING. WE'VE GOT TO TAKE ABOUT A THIRTY MINUTE BREAK FOR THE
21 MASTER TO CONDUCT HIS SALES AND THEN ONCE THEY COMPETE THAT, WE
22 WILL START RIGHT BACK UP. WHO'S IN CHARGE OF THE DEFENDANT? S-C-D-
23 C? MISTER MORTON, DO Y'ALL NEED HIM AVAILABLE?

24 MR. MORTON: NO, SIR.

25 THE COURT: MAKE SURE HE HAS ACCESS TO THE RESTROOM

1 FACILITIES, ET CETERA. THANK YOU. Y'ALL DON'T GO FAR. AS SOON AS
2 THEY FINISH THE SALE, WE WILL START RIGHT BACK UP.

3 (BREAK AT 10:51 A.M.)

4 CONTINUED DIRECT EXAMINATION OF MS. HAMMOCK BY MR. ZELENKA

5 Q MS. HAMMOCK, YOU NOTED IN YOUR DIRECT TESTIMONY THAT WHEN
6 THE DEFENDANT WAS IN THE ELEVENTH GRADE, THAT'S WHEN THE
7 SCHOOL SYSTEM SEEMED TO PICK UP ON WHAT YOU ASSERT WAS HIS
8 LACKING ACADEMIC ACHIEVEMENT LEVEL. IS THAT CORRECT?

9 A YES.

10 Q AND WAS THAT 1978?

11 A YES.

12 Q AND WHAT ELSE HAPPENED IN 1978 BASED UPON YOUR
13 UNDERSTANDING OF HIS SOCIAL HISTORY? DO YOU KNOW?

14 A LET'S SEE. WHERE IS THAT DATE? (LOOKING AT DOCUMENTS)

15 Q WELL, LET ME BACK UP.

16 A ANNA DECEASED.

17 Q PARDON ME?

18 A ANNA DECEASED.

19 Q ANNA DECEASED. AND YOU NOTED THAT THAT WAS A PIVOTAL
20 MOMENT IN HIS LIFE, THE DEATH OF HIS MOTHER. CORRECT?

21 A UH-HUH.

22 Q FROM DIABETES. ISN'T THAT TRUE?

23 A YES.

24 Q AND AT THE TIME THAT SHE DIED, WASN'T MISTER SIMMONS ONE OF
25 THE CARETAKERS?

1 A YES. HE WAS.

2 Q AND DIDN'T THE FACT THAT HE LOST HIS MOTHER AFFECT HIM BOTH
3 EMOTIONALLY AND STRUCTURALLY WITHIN THE HOME ENVIRONMENT A
4 GREAT DEAL?

5 A YES.

6 Q NOW, PRIOR TO HER DEATH, AS HER CARETAKER, WHAT FUNCTIONS
7 DID THE DEFENDANT DO FOR HIS MOTHER?

8 A HE HELPED TO FEED HER.

9 Q HE HELPED TO FEED HER.

10 A HE CHANGED HER.

11 Q HELPED MAKE HER CLEAN.

12 A UH-HUH.

13 Q OKAY. WHAT OTHER THINGS DID HE DO FOR HER?

14 A HE TRIED TO CHEER HER UP, MAKE HER FEEL BETTER.

15 Q OKAY. SO, HE SHARED WITH HER SOCIALLY AND EMOTIONALLY.

16 CORRECT?

17 A YES.

18 Q AND HE TOOK CARE OF HER DAILY NEEDS.

19 A YES.

20 Q FED HER, CLEANED HER. DID HE ALSO MAKE SURE THAT SHE TOOK
21 HER DRUGS?

22 A I SUPPOSE SO. I DIDN'T DISCUSS THAT WITH HIM.

23 Q OKAY. AND THAT WAS WHEN HE WAS SEVENTEEN OR BELOW?

24 A THAT'S CORRECT.

25 Q AND AFTER -- SHE WAS CONFINED TO A WHEELCHAIR AT THAT TIME.

1 ISN'T THAT CORRECT?

2 A THAT IS CORRECT.

3 Q SHE WAS TOO WEAK TO CARE FOR HERSELF.

4 A YES. THAT'S THE WAY IT WAS DESCRIBED.

5 Q SO, IT RESTED UPON HIM AND HIS SISTER ANNETTE, WHO WAS THE
6 OTHER CHILD LEFT IN THE HOME. CORRECT?

7 A THOSE TWO, PLUS THE OTHERS SUPPORTED THEM.

8 Q BUT THOSE TWO PRIMARILY.

9 A THEY WERE DOMICILES THERE. YES.

10 Q OKAY. HAVE YOU READ JEFF YUNGMAN'S REPORT? I DIDN'T HEAR
11 THAT LISTED.

12 A I DON'T REMEMBER THAT.

13 Q YOU DIDN'T?

14 A NO. I DON'T KNOW IF I DID OR NOT.

15 Q WERE YOU AWARE THAT JEFF YUNGMAN WAS THE SOCIAL WORKER
16 RETAINED BY MISTER THEOS AT THE ---

17 A YES. I DID READ THAT ---

18 Q --- TIME OF THE TRIAL?

19 A I DID READ THAT. YES.

20 Q DID HIS SOCIAL HISTORY?

21 A YES.

22 Q NOW, HE DIDN'T TESTIFY AT THE TRIAL. DID HE?

23 A NO. NOT TO MY KNOWLEDGE.

24 Q NOW, UP UNTIL THE TIME OF HIS MOTHER'S DEATH, DID THE
25 DEFENDANT USE ALCOHOL OR DRUGS?

1 A IT'S SPECULATED THAT HE DID. HE CLAIMS HE STARTED WHEN HE WAS
2 AGE SEVENTEEN. I DON'T KNOW WHERE IN THE MOTHER'S DEATH
3 THAT ACTUALLY -- THAT PERIOD OF TIME.

4 Q OKAY.

5 A BECAUSE I CAN'T REMEMBER THE MONTH THAT SHE DIED.

6 Q IS IT ON YOUR GENOGRAM?

7 A NO. NOT THE MONTH.

8 Q OKAY. JUST THE YEAR.

9 A UH-HUH.

10 Q AND WHAT YEAR IS REFLECTED ON THE GENOGRAM THAT YOU
11 INTRODUCED?

12 A 1978 WAS -- WELL, SHE WAS BORN IN 1918 AND SHE DIED IN 1978.

13 Q OKAY. AND SHE DIED OF COMPLICATIONS FROM HER DIABETES?

14 A THAT'S WHAT WAS REPORTED.

15 Q NOW, IT WAS ALSO REPORTED THAT HE STARTED DOING MARIJUANA IN
16 1978?

17 A THE ALCOHOL IN 1978 WAS REPORTED. I'M NOT SURE IF THEY ARE
18 SIMULTANEOUS OR NOT. THEY ARE BOTH INTRODUCED IN '78, BUT I'M
19 NOT SURE IF THEY ARE TOGETHER.

20 Q DID YOU HAVE ANY DISCUSSIONS WITH ANYBODY THAT -- ABOUT THE
21 DEFENDANT HANGING OUT AT THE TASTEE FREEZE ---

22 A I'VE SEEN THAT ---

23 Q IN 1978?

24 A --- IN RECORDS.

25 Q YOU SAW THAT IN RECORDS?

1 A YES.

2 Q AND HE WOULD HANG OUT THERE AFTER SCHOOL DRINKING
3 THUNDERBIRDS AND SMOKING REEFERS? DOES THAT RING A BELL?

4 A YES. IT DOES.

5 Q OKAY. BUT EVEN THOUGH HE WAS EMOTIONALLY STRAINED, BASED
6 UPON THE LOSS OF HIS MOTHER AT THAT TIME. EVEN THOUGH HE
7 WAS REGULARLY SMOKING MARIJUANA AND DRINKING ALCOHOL
8 DURING THAT TIME, HE WAS STILL ABLE TO GRADUATE FROM HIGH
9 SCHOOL. ISN'T THAT CORRECT?

10 MS. PAAVOLA: YOUR HONOR, I DON'T BELIEVE SHE'S TESTIFIED THAT
11 HE WAS REGULARLY SMOKING MARIJUANA AT THAT TIME.

12 THE COURT: OVERRULED. HE'S ON CROSS.

13 Q HE WAS ABLE TO GRADUATE FROM HIGH SCHOOL AFTER THAT. ISN'T
14 THAT CORRECT?

15 A I DON'T KNOW ABOUT THE FREQUENCY AND THE SEVERITY OF THE
16 ALCOHOL AND THE MARIJUANA USE AT THAT TIME.

17 Q OKAY.

18 THE COURT: BUT DID HE GRADUATE FROM HIGH SCHOOL?

19 MS. HAMMOCK: HE DID GRADUATE FROM HIGH SCHOOL.

20 THE COURT: WAS THERE A CLASS RANKING, WHERE HE WAS RANKED?

21 MS. HAMMOCK: YES. THERE IS.

22 THE COURT: WHERE WAS HE RANKED?

23 MS. HAMMOCK: LET'S SEE. 531 OUT OF 615.

24 Q 531 OUT OF 615?

25 A NUMBER IN CLASS, 615. RANK IN CLASS, 531.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELEKA

1 Q OKAY. SO, HOW MANY PEOPLE IN HIS GRADUATING CLASS WERE
2 BELOW HIM?

3 A DO THE MATH. I DON'T KNOW.

4 Q ABOUT SEVENTY-ISH? EIGHTY-FOUR. MY MATH WHIZ AT COUNSEL
5 TABLE HELPED ME OUT, HELPED OUT THE OLD SENIOR CITIZEN AND
6 THAT WOULD BE ME. NOW, ALSO IN 1978, IN ADDITION TO PLAYING
7 FOOTBALL, CARING FOR HIS MOTHER UNTIL HER DEATH, GOING TO
8 CLASSES, HE ALSO MET HIS GIRLFRIEND, FUTURE WIFE. DIDN'T HE?

9 A ACTUALLY, HE MET HER THE YEAR BEFORE. THEY MET THE YEAR
10 BEFORE.

11 Q OKAY. THAT WAS 19....

12 A SEVENTY-SEVEN.

13 Q SEVENTY-SEVEN. OKAY. SO, HE BEGAN THAT RELATIONSHIP, THAT
14 SOCIAL RELATIONSHIP BEFORE THE AGE OF EIGHTEEN. CORRECT?

15 A CORRECT.

16 Q WAS IT A VIOLENT RELATIONSHIP AT THAT TIME, BEFORE THE AGE OF
17 EIGHTEEN? OR WHAT DO YOU KNOW ABOUT THAT?

18 A I DO KNOW THAT THERE WAS SOME ABUSE DURING THAT --

19 Q WAS THERE ABUSE AT THAT PARTICULAR TIME?

20 A THAT'S ACCORDING TO VAL. YES.

21 Q AND WHEN DID THAT ABUSE OCCUR AND WHAT WAS THE ABUSE?

22 A THAT THERE WAS SOME PHYSICAL -- THERE WAS AN ATTEMPT TO
23 CONTROL HER MOVEMENTS AND SO HE WOULD SOMETIMES NOT LET
24 HER LEAVE THE HOUSE OR GO SOMEPLACE WITHOUT HIM.

25 Q EXPLAIN THAT TO ME. I'M NOT -- I DON'T UNDERSTAND THAT.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENSKA

- 1 A HE WOULD KEEP HER FROM LEAVING HIM.
- 2 Q PHYSICALLY HOLD ON TO HER?
- 3 A YES.
- 4 Q SO SHE WOULDN'T WALK OUT OF THE DOOR?
- 5 A RIGHT.
- 6 Q DURING DISCUSSIONS, ARGUMENTS?
- 7 A ARGUMENTS.
- 8 Q AND THIS WAS AT HIS HOUSE IN FRONT OF HIS MOTHER AND OTHER
- 9 WITNESSES?
- 10 A NOT NECESSARILY. I DON'T KNOW.
- 11 Q WHO WITNESSED THIS?
- 12 A IT WAS TOLD TO ME BY BOTH PARTIES.
- 13 Q BY BOTH PARTIES MEANING KENNETH AND...
- 14 A AND VALERIE.
- 15 Q AND PARTICULARLY, WHAT DID KENNETH SAY WAS GOING ON?
- 16 A THAT HE, IN FACT, HAD TRIED TO CONTROL HER.
- 17 Q WHILE THEY WERE STILL IN HIGH SCHOOL?
- 18 A YES.
- 19 Q BEFORE THE MARRIAGE?
- 20 A YES.
- 21 Q AND WHAT DID SHE SAY?
- 22 A THE SAME, ESSENTIALLY.
- 23 Q AND SHE STAYED IN THAT RELATIONSHIP AND SUBSEQUENTLY
- 24 MARRIED HIM. IS THAT CORRECT?
- 25 A YES.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

1 Q WAS THAT EVER REPORTED TO THE POLICE?

2 A TO MY KNOWLEDGE, NO.

3 THE COURT: MISTER ZELENKA, WHILE YOU ARE AT A STOPPING POINT,
4 LET ME ASK HER, HIS G-P-R WAS 0.8222. I ASSUME THAT WAS AT THE TIME OF
5 GRADUATION?

6 MS. HAMMOCK: YES. THAT WAS MY ASSUMPTION. I DIDN'T VERIFY
7 THAT.

8 THE COURT: I WONDER WHAT THEIR NUMERICAL SCALE WAS?

9 MS. HAMMOCK: I DIDN'T ASK. I REALLY JUST NOTICED IT RECENTLY. I
10 WAS CURIOUS ABOUT THAT.

11 Q NOW, DID HE HAVE ANY INVOLVEMENT WITH LAW ENFORCEMENT
12 BEFORE THE AGE OF EIGHTEEN?

13 A NO.

14 Q AFTER HE GRADUATED FROM HIGH SCHOOL, HE TOOK ANOTHER JOB.
15 DIDN'T HE? OR HE TOOK A JOB.

16 A HE TOOK A JOB.

17 Q AND WHAT WAS THAT JOB?

18 A IT WAS WITH A TREE CUTTING FIRM, THAT WAS HIS FIRST ONE TO MY
19 KNOWLEDGE.

20 Q DID HE ALSO WORK FOR A PEST CONTROL COMPANY?

21 A THAT WAS THE FIRST. YOU'RE RIGHT. IT WAS THE PEST CONTROL AND
22 THEN THE TREE.

23 Q OKAY. AND WHAT DID HE DO AT THE PEST CONTROL COMPANY?

24 A HE WALKED AROUND AND HELPED TO EXTERMINATE.

25 Q OKAY. AND —

1 A HE ACCOMPANIED THE EXTERMINATOR CARRYING MATERIALS.

2 Q OKAY. AND HOW LONG DID HE WORK AT THAT JOB?

3 A I'M NOT QUITE SURE. IT WAS A SHORT PERIOD OF TIME.

4 Q AND WHEN HE WAS WORKING THAT JOB, WHERE DID HE LIVE?

5 A AT THAT POINT, I THINK HE LIVED WITH VALERIE. I'M NOT QUITE SURE
6 ABOUT THE TIME TABLE ON THAT. THE MOTHER DIES -- NO, HE'S STILL
7 IN THE HOUSE. HE'S STILL IN THE HOUSE. I'M SORRY. HE'S STILL IN
8 THE HOUSE.

9 Q AND VALERIE IS HIS FUTURE WIFE.

10 A YES.

11 Q VALERIE SIMMONS.

12 A YES.

13 Q AND DID YOU READ HER TESTIMONY?

14 A I DID.

15 Q AND DID YOU RELY UPON HER TESTIMONY IN MAKING YOUR
16 ASSESSMENT?

17 A I RELIED ALSO ON THE INTERVIEW.

18 Q OKAY. DID THEY GET MARRIED BEFORE SHE MOVED INTO THE FAMILY
19 HOME?

20 A THEY MARRIED AND SHE -- HE IS IN AND OUT OF HER HOUSE WITH HER
21 MOTHER. THEN THEY MARRY, AS I RECALL AND THEY ARE IN A UNIT
22 TOGETHER FOR A BRIEF PERIOD OF TIME BEFORE THEY THEN MOVED
23 TO BE AND CARE FOR THE FATHER. THAT'S MY UNDERSTANDING OF
24 THE SEQUENCE.

25 Q OKAY. AND MISTER SIMMONS DIED IN 1982. CORRECT?

- 1 A YES.
- 2 Q AND HE DIED OF LIVER FAILURE. IS THAT CORRECT?
- 3 A I SEE LIVER/KIDNEY.
- 4 Q OKAY. LIVER AND KIDNEY FAILURE. AND AGAIN, THE SON KENNETH
- 5 WAS RESPONSIBLE FOR CARE TAKING FOR HIS FATHER AT THAT TIME.
- 6 CORRECT?
- 7 A HE WAS THERE. HE WAS PRINCIPLE, BUT HE HAD SUPPORT FROM HIS
- 8 BROTHERS AND SISTERS.
- 9 Q YEAH, BUT HE WAS THE ONLY ONE IN THE HOUSE. RIGHT?
- 10 A HE WAS IN THE HOUSE AT THAT POINT. YES.
- 11 Q WHO ELSE WAS IN THE HOUSE HELPING, LIVING WITH THEM?
- 12 A NOT LIVING. HE WAS THERE LIVING.
- 13 Q WAS HIS FATHER MOBILE?
- 14 A NOT AT THE VERY END. HE WAS BEDRIDDEN. THAT WAS DESCRIBED
- 15 TO ME. HE HAD BEEN HOSPITALIZED AND THEN HE WAS BROUGHT
- 16 BACK HOME AND THAT WAS WHEN HE WAS BEDRIDDEN.
- 17 Q DID HE HAVE TO TAKE MEDICINE AT THAT TIME?
- 18 A YES.
- 19 Q AND WAS THAT MEDICINE PROVIDED, DISPENSED BY KENNETH?
- 20 A I DON'T KNOW.
- 21 Q YOU DIDN'T ASK HIM?
- 22 A I DIDN'T ASK HIM.
- 23 Q SINCE NOBODY ELSE WAS IN THE HOUSE, PRESUMABLY IT WAS
- 24 COMING FROM HIM.
- 25 A WELL, THE OTHER SIBLINGS WERE ALSO IN AND OUT QUITE

1 FREQUENTLY.

2 Q HOW FREQUENTLY? DAILY?

3 A SOME DAILY. SOME ---

4 Q WHICH ONES DAILY?

5 A WHEN GENE GETS BACK -- LET'S SEE, GENE WAS ONE, BUT THERE WAS
6 ALSO -- HELPED HIM COOK. I THINK IT WAS JACK.

7 Q OKAY. IN YOUR ASSESSMENT, DID THEY EVER TELL YOU THAT THEY
8 GAVE THE DRUGS TO THE FATHER?

9 A NO. THEY DIDN'T.

10 Q OKAY.

11 A BUT I DIDN'T ASK.

12 Q OKAY. NOW, VALERIE AND KENNETH GOT MARRIED IN 1982. CORRECT?

13 A YES.

14 Q AND AT THAT TIME KENNETH WAS STILL INVOLVED IN DRUGS.
15 CORRECT?

16 A STILL INVOLVED IN DRUGS. OBVIOUSLY, HE WAS USING AT THAT
17 POINT. I DON'T KNOW THE EXTENT.

18 Q WHY, OBVIOUSLY?

19 A WELL, WE'VE ESTABLISHED THAT HE STARTED THE USE OF ALCOHOL,
20 WHICH IS A DRUG, WHEN HE WAS SEVENTEEN. I HAVE NO
21 INFORMATION THAT SAYS HE STOPPED.

22 Q OKAY. AND AT SOME POINT, HIS DRINKING AND DRUG USE BECAME
23 NOTICEABLE TO OTHERS. CORRECT?

24 A YES.

25 Q AND THEN HE MOVED FROM MARIJUANA TO CRACK COCAINE DURING

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

- 1 THAT TIME PERIOD. ISN'T THAT CORRECT?
- 2 A I SEE COCAINE LISTED. I DON'T SEE THE CRACK AT THAT POINT.
- 3 Q BUT AGAIN, YOU HAVEN'T LOOKED AT JEFF YUNGMAN'S SOCIAL
- 4 HISTORY. HAVE YOU?
- 5 A YES. I DID.
- 6 Q OH, YOU DID?
- 7 A YEAH. I SAID I DID. I'M SORRY. I THOUGHT YOU UNDERSTOOD.
- 8 Q WELL, IF YOU DID, PAGE FOUR OF THAT SOCIAL HISTORY, FOURTH
- 9 PARAGRAPH. SEE IF THAT REFRESHES YOUR RECOLLECTION. (HANDS
- 10 MS. HAMMOCK A DOCUMENT)
- 11 A OKAY. AND VERY SPECIFICALLY AFTER THE DEATH OF MISTER
- 12 SIMMONS. THAT'S WHAT I REMEMBER EVERYBODY TELLING ME,
- 13 THAT'S WHEN IT EXACERBATED, WHEN THE DRUG USE INCREASED.
- 14 Q AND HE BEGAN USING CRACK COCAINE.
- 15 A OKAY.
- 16 Q OKAY? I MEAN ---
- 17 A NO. I DON'T KNOW.
- 18 Q OKAY.
- 19 A I KNOW THE COCAINE, BUT I DON'T KNOW THE CRACK.
- 20 Q OKAY. AND DURING THAT TIME PERIOD, HIS EMPLOYMENT, HE
- 21 STARTED WORKING WITH A FIBERGLASS FIRM? IS THAT CORRECT?
- 22 A YES.
- 23 Q AND WHAT DID HE DO AT THE FIBERGLASS FIRM?
- 24 A MOVED THINGS. SORTED. THERE WERE, AS I RECALL THE
- 25 DESCRIPTION, LARGE PIECES OF, I GUESS, FIBERGLASS THAT HAD TO

- 1 BE MOVED FROM PLACE TO PLACE.
- 2 Q LARGE PIECES OF FIBERGLASS THAT WERE HEAVY?
- 3 A I WOULD ASSUME SO.
- 4 Q LEFT THERE AND WENT TO WORK FOR A BRICK MASON.
- 5 A YES.
- 6 Q A CARPENTER. CORRECT?
- 7 A YES.
- 8 Q AND THEN FINALLY, WITH THE TREE SERVICE.
- 9 A YES.
- 10 Q IS THAT THE ORDER AS YOU UNDERSTAND IT?
- 11 A I THINK SO. I'M NOT SURE. I THOUGHT THE TREE SERVICE WAS
- 12 EARLIER.
- 13 Q OKAY. IN 1983, THEN, THE DEFENDANT, HAVING BEEN MARRIED
- 14 ALREADY, HE HAD HIS FIRST SON. CORRECT?
- 15 A YES.
- 16 Q AND THEN HE HAD ANOTHER SON. CORRECT?
- 17 A YES.
- 18 Q AND THEY WERE LIVING TOGETHER AS A FAMILY UNIT. CORRECT?
- 19 A YES.
- 20 Q AND CONTINUED UNTIL 1988. THE MARRIAGE CONTINUED, THAT BEGAN
- 21 IN 1982, UNTIL 1988. ISN'T THAT CORRECT?
- 22 A THEY WERE SEPARATED FOR PERIODS OF TIME DURING THAT TIME.
- 23 THEY DIDN'T LIVE TOGETHER UNTIL 1988. THAT'S NOT MY
- 24 UNDERSTANDING.
- 25 Q WHAT'S YOUR UNDERSTANDING?

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELEKA

- 1 A THAT THEY FILED FOR DIVORCE IN 1988, BUT THEY WERE ALREADY
2 SEPARATED.
- 3 Q OKAY. SO, MISTER YUNGMAN'S SOCIAL HISTORY THAT YOU REVIEWED
4 AND RELIED UPON, PARAGRAPH FOUR, LET ME ASK YOU TO READ THAT.
5 IS THAT CORRECT OR INCORRECT BASED UPON YOUR SOCIAL HISTORY
6 ASSESSMENT? (MR. ZELEKA HANDS WITNESS DOCUMENT)
- 7 A I READ THIS AND I DO HAVE ANOTHER DATE IN TERMS OF THE
8 SEPARATION. I THINK THAT THERE WERE TIMES WHEN SHE LEFT. I
9 THINK THAT'S THE INFORMATION THAT SHE GAVE TO ME, BUT THAT
10 PROBABLY IS THE FORMAL, ACTUAL PIECING OF THEIR LIVING
11 TOGETHER.
- 12 Q THAT INFORMATION WAS, THE SEPARATION OCCURRED IN 1988 BASED
13 UPON HIS FAILURE TO GET DRUG AND ALCOHOL TREATMENT.
14 CORRECT?
- 15 A THAT WAS ONE OF THE THINGS. YES.
- 16 Q RIGHT. AND HE HAD ANOTHER CHILD ONE YEAR BEFORE THAT WITH
17 VALERIE IN 1987 WITHIN THE MARRIAGE WHILE IT STILL EXISTED.
18 CORRECT?
- 19 A SECOND CHILD WAS BORN WHEN?
- 20 Q 1987? ANTONIO?
- 21 A OKAY. ALL RIGHT. YES.
- 22 Q IS THAT CORRECT?
- 23 A YES.
- 24 Q AND THAT'S YOUR INFORMATION, TOO. THOSE SERIES OF JOBS THAT
25 HE HAD, THEY WERE BASICALLY COMMON LABORER JOBS. CORRECT?

1 A THAT'S MY UNDERSTANDING. YES.

2 Q HE WASN'T A SUPERVISOR ON THE SITE. HE WASN'T THE PRIMARY
3 WORKER ON THE SITE, BUT HE WAS A COMMON LABORER.

4 A YES.

5 Q CORRECT? DID YOU GET ANY INFORMATION THAT HE HAD
6 ATTENDANCE PROBLEMS ON THESE JOBS?

7 A YES.

8 Q YOU DID?

9 A YES.

10 Q IS THAT WHY HE LOST THOSE JOBS?

11 A THAT'S MY UNDERSTANDING, BUT I DIDN'T TALK TO ANY OF THE
12 PEOPLE.

13 Q OKAY. AND WAS THAT ATTENDANCE PROBLEM DIRECTLY RELATED,
14 BASED UPON YOUR SOCIAL HISTORY, TO DRUG AND ALCOHOL
15 PROBLEMS?

16 A THAT'S MY UNDERSTANDING. YES.

17 Q SO, IT WAS BASED ON HIS DRUG AND ALCOHOL PROBLEMS, NOT UPON
18 HIS FAILURE TO KNOW TO GO TO WORK, HIS FAILURE TO UNDERSTAND
19 THAT HE NEEDED TO GET A JOB FOR MONEY. ISN'T THAT CORRECT?

20 A IT'S MY UNDERSTANDING THAT HE UNDERSTOOD HE NEEDED TO GO TO
21 WORK TO GET A JOB TO GET MONEY.

22 Q OKAY. AND SIMILARLY, IN HIS HIGH SCHOOL RECORDS, DID HE HAVE
23 ATTENDANCE PROBLEMS?

24 A NO.

25 Q HE DID NOT?

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENSKA

1 A NOT UNTIL -- I'M CONFUSING HIM WITH LEGARE NOW. NO, HE DID NOT
2 HAVE A SIGNIFICANT ATTENDANCE PROBLEM. THERE'S ONE YEAR
3 THERE WHERE IT SPIKES, BUT IT WASN'T AS SIGNIFICANT AS OTHERS
4 I'VE SEEN.

5 Q BUT HE WASN'T HAVING ATTENDANCE PROBLEMS WHILE HE WAS
6 LIVING AT HOME --

7 A NO, I --

8 Q -- CARING FOR HIS MOTHER, WHO WAS AN INVALID, WHEELCHAIR
9 BOUND.

10 A DADDY'S RULES STILL PREVAILED, THAT YOU HAD TO GO TO SCHOOL.
11 THEY MADE THAT CLEAR TO ME.

12 Q AND HE WENT TO SCHOOL.

13 A UH-HUH.

14 Q HE UNDERSTOOD THE RULES, FOLLOWED THE RULES AND COMPLIED
15 WITH THE RULES. CORRECT?

16 A AS LONG AS HE HAD THAT STRUCTURE. YES.

17 Q NOW, IN 1988, THE DEFENDANT'S LIFE AFTER THE SEPARATION FROM
18 HIS WIFE, THEN SPIRALED INTO ONE PRIMARILY OF DRUG AND
19 ALCOHOL ABUSE. ISN'T THAT CORRECT?

20 A THAT'S MY UNDERSTANDING. YES

21 Q AND THAT WAS THE FOCUS OF HIS LIFE AT THAT TIME. WASN'T IT?

22 A THAT'S WHAT I UNDERSTAND. YES.

23 Q IT WASN'T WORK. HE WASN'T TRYING TO GET AHEAD. IT WAS THE
24 DRUGS AND ALCOHOL. CORRECT?

25 A YES.

1 Q IN 1992, WAS HE INVOLVED IN AN ASSAULT?

2 A I DON'T REMEMBER.

3 Q DO YOU REMEMBER ANYTHING WHEN HE WAS HIT WITH BRASS
4 KNUCKLES AND HIS TEETH WERE KNOCKED OUT?

5 A YES. BUT THE DATE I DIDN'T REMEMBER.

6 Q AND WHERE DID YOU GET THAT INFORMATION FROM? DO YOU
7 REMEMBER?

8 A I REVIEWED -- I THINK I REVIEWED ARREST RECORDS.

9 Q OKAY. HE WAS ARRESTED WHEN HE HAD HIS TEETH KNOCKED OUT?

10 A I'M NOT SURE. (WITNESS LOOKS THROUGH DOCUMENTS)

11 Q YOU JUST DON'T RECALL?

12 A HMM?

13 Q YOU JUST DON'T RECALL?

14 A I DON'T RECALL. I'M LOOKING FOR IT NOW. I DO REMEMBER THE
15 INCIDENT, I DON'T REMEMBER THE DATE.

16 Q I DIDN'T MEAN TO CUT YOU OFF. I'M SORRY. WHAT IS THAT DOCUMENT
17 THAT YOU'RE LOOKING AT?

18 A IT'S MY TIME TABLE.

19 Q YOUR TIME TABLE. IS THAT LIKE A REPORT?

20 A NO. IT'S NOT A REPORT. IT'S A TIME TABLE. AT LEAST I DON'T THINK
21 IT'S A REPORT. I'VE NEVER HEARD IT CALLED A REPORT BEFORE, BUT I
22 DID MAKE LOTS OF NOTES FOR MYSELF AS YOU CAN SEE. I HAVE A
23 JULY 12, 1990 DATE --

24 Q AND WHAT OCCURRED --

25 A -- AS AN ARREST.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

- 1 Q AND WHAT WAS THAT ARREST FOR?
- 2 A THAT WAS FOR OPERATING AN UNINSURED VEHICLE AND DRIVING
- 3 UNDER A SUSPENDED LICENSE.
- 4 Q OKAY. WE'LL GET TO THAT.
- 5 A OKAY.
- 6 Q BUT DO YOU SEE ANYTHING ABOUT ---
- 7 A NO. I DON'T.
- 8 Q OKAY. NOW, THE -- WE'LL GO RIGHT TO IT. NOW, THE DEFENDANT DID
- 9 HAVE A DRIVER'S LICENSE. ISN'T THAT CORRECT?
- 10 A YES. HE DID.
- 11 Q HE PASSED THE DRIVER'S TEST?
- 12 A AFTER FOUR OR FIVE ATTEMPTS. YES.
- 13 Q BUT HE DID PASS THE TEST?
- 14 A YES. HE DID.
- 15 Q WHAT YEAR DID HE PASS THE TEST?
- 16 A IT WAS IN HIS SENIOR YEAR IN HIGH SCHOOL WITH THE ASSISTANCE OF
- 17 A DRIVER'S EDUCATION COURSE, WHICH HE FAILED.
- 18 THE COURT: HE FAILED OR MADE AN "A" IN IT?
- 19 MS. HAMMOCK: HE FAILED IT, THEN MADE AN "A" ACCORDING TO THE --
- 20 AND THEN HE ATTEMPTS, ACCORDING TO HIS FAMILY MEMBERS,
- 21 REPEATEDLY, UNTIL HE ACTUALLY PASSES AND GETS HIS LICENSE.
- 22 Q BUT HE DID GET HIS DRIVER'S LICENSE.
- 23 A YES.
- 24 Q AND HE DID ULTIMATELY GET AN "A" IN DRIVER'S ED?
- 25 A YES.

1 Q AND HE POSSESSED THAT DRIVER'S LICENSE. DIDN'T HE?

2 A HE POSSESSED?

3 Q HE POSSESSED IT. HE UTILIZED IT.

4 A YES.

5 Q WHAT WERE THE REASONS THAT HIS DRIVER'S LICENSE WAS
6 SUSPENDED?

7 A OPERATING AN UNINSURED VEHICLE AND DRIVING UNDER A
8 SUSPENDED LICENSE.

9 Q NO, YOU DIDN'T UNDERSTAND MY QUESTION.

10 A I'M SORRY.

11 Q WHY WAS HIS DRIVER'S LICENSE SUSPENDED?

12 A I THOUGHT IT WAS BECAUSE HE WAS UNINSURED, HE WAS DRIVING
13 UNINSURED. THAT WAS THE LANGUAGE THAT I THOUGHT.

14 Q OKAY. YOU DON'T KNOW WHY HIS DRIVER'S LICENSE WAS SUSPENDED
15 UNLESS IT WAS FOR DRIVING AN UNINSURED VEHICLE. IS THAT
16 CORRECT?

17 A THAT'S CORRECT.

18 Q YOU JUST DON'T KNOW.

19 A I DON'T KNOW.

20 Q ALL RIGHT. AND HOW LONG HAD HE BEEN DRIVING?

21 A HE REPORTS THAT HE WAS DRIVING BEFORE HE WAS LICENSED.

22 Q AND HOW MANY DRIVING ACCIDENTS DID HE HAVE?

23 A I KNOW OF ONLY ONE THAT HE REPORTS, BUT I DON'T KNOW IF HE
24 ACTUALLY WAS CHARGED WITH THAT.

25 A AND WHEN DID THAT HAPPEN AND HOW DID THAT HAPPEN IN HIS SELF

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

- 1 REPORT TO YOU?
- 2 A HE WAS DRIVING VALERIE'S CAR SO IT WOULD HAVE TO BE AFTER THE
- 3 TIME THAT THEY GOT MARRIED, BUT I DON'T KNOW THE DETAILS.
- 4 Q SO, IT WOULD BE AFTER 1982?
- 5 A YES.
- 6 Q SO, HE'D BEEN DRIVING AT LEAST FOUR YEARS AT THAT TIME?
- 7 A I CAN'T SAY THAT.
- 8 Q AND WHAT CAUSED THE ACCIDENT?
- 9 A I DON'T KNOW.
- 10 Q BUT AT LEAST FOR FOUR YEARS, HE WAS ABLE TO FOLLOW TRAFFIC
- 11 LAWS, FOLLOW TRAFFIC SIGNALS. CORRECT?
- 12 A I GUESS, IF HE HAD ACCESS TO A CAR. YES.
- 13 Q FOLLOWED DIRECTIONS, ABLE TO GET FROM HERE TO THERE, WHERE
- 14 HE WANTED TO GO. CORRECT?
- 15 A I CAN'T MAKE THAT ASSUMPTION. I DON'T KNOW.
- 16 Q OH, YOU DIDN'T ASK?
- 17 A BECAUSE I DON'T KNOW -- NO. I GUESS I DIDN'T. I DIDN'T ASK HIM
- 18 WHETHER OR NOT HE COULD FOLLOW LAWS AND GET TO POINT "A"
- 19 AND "B" AND IF HE HAD DIFFICULTY WITH THAT. I DID NOT ASK.
- 20 Q BUT SINCE HE POSSESSED A LICENSE FOR THAT PERIOD OF TIME AND
- 21 YOU KNOW HE WAS DRIVING, AS FAR AS YOU KNOW HE WAS ABLE TO
- 22 DO THAT IN MAKING YOUR ASSESSMENT ON ONE OF THE ADAPTED
- 23 BEHAVIORS ---
- 24 A ONE OF THE THINGS THAT I DON'T KNOW IS IF HE WAS ACTUALLY
- 25 DRIVING AFTER HE GOT HIS LICENSE. I JUST DON'T KNOW THAT,

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

1 BECAUSE I DON'T KNOW IF HE HAD ACCESS TO AN AUTOMOBILE UNTIL
2 HE HAD ACCESS TO VALERIE'S.

3 Q AND HE HAD ACCESS TO VALERIE IN 1978.

4 A HE DIDN'T HAVE A CAR INITIALLY.

5 Q THEN I DON'T KNOW WHAT YOU MEAN, ACCESS TO VALERIE.

6 A ACCESS TO VALERIE'S CAR.

7 Q OKAY. SO, HIS FATHER DIDN'T HAVE A CAR?

8 A NOT TO MY KNOWLEDGE. THEY WALKED TO CHURCH. THAT WAS PART
9 OF THE HISTORY THAT I'VE OBTAINED, THAT THAT WAS AN ONGOING
10 REGULAR EFFORT.

11 Q OKAY. BUT THEN HE LOST HIS DRIVER'S LICENSE AND HE WAS RIDING
12 HIS BICYCLE AROUND FROM AREA TO AREA. CORRECT?

13 A ACCORDING TO THE REPORTS. YES.

14 Q OKAY. AND IN RIDING HIS BICYCLE, HE HAD TO KNOW HOW TO GET
15 FROM HERE TO THERE. CORRECT?

16 A THAT'S POSSIBLE. YES.

17 Q POSSIBLE?

18 A IT'S POSSIBLE THAT HE HAD WAYS TO FIND OUT HOW TO GET THERE. I
19 DID NOT ASK.

20 Q IN ASSESSING HIS ADAPTIVE BEHAVIOR, YOU DIDN'T ASK HOW HE GOT
21 FROM ONE PLACE TO ANOTHER ---

22 A I DID ASK IF HE COULD RIDE A BIKE BECAUSE THAT IS A STANDARD
23 QUESTION AND HE SAID THAT HE TRAVELED AROUND THE COMMUNITY
24 ON HIS BICYCLE.

25 Q HOW DID HE GET TO THE PALMETTO HOUSE?

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENKA

- 1 A YOU MEAN, PHYSICALLY, HOW DID HE GET THERE?
- 2 Q YES.
- 3 A I ASSUME THAT HE -- WELL, I DON'T KNOW. I DON'T KNOW.
- 4 Q OKAY. AND WHAT WAS THE REASON HE WENT TO THE PALMETTO
- 5 HOUSE?
- 6 A TO EAT.
- 7 Q TO WHAT?
- 8 A TO EAT.
- 9 Q TO EAT?
- 10 A HE WENT THERE FOR MEALS IS WHAT I WAS TOLD, PRINCIPALLY, AND
- 11 OVER A PERIOD OF TIME.
- 12 Q OKAY. WHY DID HE GO THERE FOR MEALS AS OPPOSED TO COOKING
- 13 FOR HIMSELF OR OTHERWISE?
- 14 A WELL, THEY SAY THAT HE HAD VERY LIMITED SKILLS IN THAT AREA.
- 15 Q BUT HE KNEW OF A LOCATION WHERE HE COULD FIND FOOD AND FOOD
- 16 WOULD BE PROVIDED AND HE WOULD GO THERE REGULARLY.
- 17 A YES. I THINK I MENTIONED THAT AS BEING ONE OF THOSE AREAS
- 18 WHERE HE HAD SHOWN SOME SKILL, IN USING RESOURCES.
- 19 Q OKAY. WELL, HE DIDN'T STARVE. DID HE?
- 20 A EVIDENTLY NOT.
- 21 Q AND HE KNEW -- WAS HE EVER MALNOURISHED?
- 22 A NOT TO MY KNOWLEDGE, BUT I WOULD HAVE NO WAY OF KNOWING
- 23 THAT. I MEAN, THERE ARE NO MEDICAL RECORDS THAT WOULD
- 24 INDICATE THAT.
- 25 Q WHEN HE WENT TO THE PALMETTO HOUSE, HE WAS NON-VIOLENT.

- 1 CORRECT?
- 2 A OH, YES.
- 3 Q FOLLOWED THE RULES.
- 4 A YES.
- 5 Q HELPED THEM AROUND WITH CHORES.
- 6 A YES.
- 7 Q HE WAS WELL-LIKED.
- 8 A YES.
- 9 Q ABLE TO COMMUNICATE WITH THEM.
- 10 A YES.
- 11 Q NOW, HIS COMMUNICATION SKILLS. NO ONE EVER HAD A PROBLEM
- 12 UNDERSTANDING WHAT HE WANTED AND HE DIDN'T HAVE A PROBLEM
- 13 UNDERSTANDING WHAT OTHER PEOPLE WANTED OF HIM. DID HE? HE
- 14 WAS ABLE TO RATIONALLY COMMUNICATE WITH OTHERS. YOU DON'T
- 15 HAVE ANY INDICATION OF ANY DEFICITS IN THAT AREA. DO YOU?
- 16 A NOT ORAL COMMUNICATION. HIS WRITING WAS POOR. THERE ARE
- 17 SOME REPORTS THAT HE WAS WITHDRAWN AND ALOOF. HIS WIFE
- 18 TALKS ABOUT THE INABILITY TO MAINTAIN A CONVERSATION WITH HIM.
- 19 ONE OF THE TEACHERS ALSO INDICATES THAT HE DID NOT APPEAR TO
- 20 HAVE ANY FRIENDS OR PEOPLE THAT HE CONVERSED WITH IN THE
- 21 CLASSROOM, ALTHOUGH HE DID HAVE SOME FOOTBALL BUDDIES, SHE
- 22 SAID.
- 23 Q BUT HIS ---
- 24 A BUT --- I'M SORRY. GO AHEAD.
- 25 Q NO. FINISH.

1 A THE COMMUNICATION, HE WAS CONSIDERED A JOKESTER. HE WAS
2 CONSIDERED SOMEONE WHO LIKED TO MAKE PEOPLE LAUGH AND SO
3 HE ENGAGED PEOPLE AT THAT LEVEL.

4 Q OKAY. IN HIS WRITING SKILLS, HE WROTE HIS CONFESSION IN THIS
5 CASE. DIDN'T HE?

6 A YES. THAT'S WHAT I SEE.

7 Q AND THAT WAS IN HIS OWN HANDWRITING?

8 A YES.

9 Q WITH RESPECT TO SELF-CARE, YOU'VE ALREADY INDICATED THAT HE
10 WAS ABLE TO FIND A MANNER TO MAKE SURE THAT HE WAS FED.
11 CORRECT?

12 A YES.

13 Q NOT ONLY DID HE CARE FOR HIMSELF BEFORE THE AGE OF EIGHTEEN,
14 HE WAS ALSO CARING FOR HIS MOTHER. CORRECT?

15 A YES.

16 Q PROVIDING FOR HER HEALTH. CORRECT?

17 A YES.

18 Q HIS HOME LIVING SITUATION, DO YOU KNOW HOW HE KEPT HIS ROOM?
19 WAS IT CLEAN, DIRTY?

20 A WELL, HE SHARED A ROOM, BUT THEY WERE REPORTEDLY VERY NEAT.
21 THEY HAD TO BE. THAT WAS THE DEMAND.

22 Q BUT HE UNDERSTOOD THAT DEMAND.

23 A YES. HE DID.

24 Q AS MOST CHILDREN WOULD HAVE BEFORE THE AGE OF EIGHTEEN
25 THAT DEMAND TO KEEP THEIR ROOM NEAT, AND HE FOLLOWED THAT

1 DEMAND. ISN'T THAT CORRECT?

2 A YES.

3 Q HE UNDERSTOOD HOW TO USE THE BATHROOM. CORRECT?

4 A YES.

5 Q HOW TO WASH HIMSELF. CORRECT?

6 A YES.

7 Q HOW TO BRUSH HIS TEETH?

8 A HE WAS VERY WELL TRAINED IN ALL THOSE AREAS.

9 Q OKAY. AND HE FOLLOWED THROUGH WITH THAT BEFORE THE AGE OF
10 EIGHTEEN.

11 A YES.

12 Q WITH RESPECT TO HIS INTER-PERSONAL SKILLS, WE'VE ALREADY
13 TALKED ABOUT THAT. THE USE OF COMMUNITY RESOURCES ONSET
14 BEFORE THE AGE OF EIGHTEEN, HE WAS LIVING AT HOME. CORRECT?

15 A YES.

16 Q HE WAS GOING TO SCHOOL REGULARLY. CORRECT?

17 A YES.

18 Q AND HE WAS FOLLOWING THAT INFORMATION TO DO THAT.

19 A HE WAS DIRECTED TO DO SO. YES.

20 Q BEFORE THE AGE OF EIGHTEEN, WHAT OTHER USE OF COMMUNITY
21 RESOURCES, IN DOING YOUR DSM-IV TR RELIED UPON ASSESSMENT,
22 WHAT DID YOU LOOK AT?

23 A NORMALLY, I WOULD LOOK AT SOME OF THE SOCIAL OUTLETS,
24 COMMUNITY BASED PROGRAMS, CHURCH PROGRAMS PERHAPS.

25 Q DID HE GO TO CHURCH?

1 A HE WENT TO CHURCH. YES.

2 Q DID HE GO TO CHURCH REGULARLY?

3 A YES. HE DID.

4 Q AND WHY DID HE GO TO CHURCH REGULARLY?

5 A BECAUSE HIS FATHER SAID HE HAD TO ACCORDING TO ALL THE
6 SIBLINGS.

7 Q AND THEY --

8 A THEY ALL HAD TO GO REGULARLY.

9 Q SO, THERE WAS NO DEFICIT IN THAT RESOURCE.

10 A THAT WAS LIMITED TO THE SOLELY RELIGIOUS EXPERIENCE, FROM
11 WHAT I GATHER.

12 Q WHAT OTHER COMMUNITY RESOURCES OTHER THAN SCHOOL,
13 CHURCH, FOOTBALL WOULD AN INDIVIDUAL UNDER THE AGE OF
14 EIGHTEEN NORMALLY BE EXPOSED TO?

15 A WELL, THAT'S WHAT I WAS SAYING, THERE WOULD BE "Y"s, IF THEY
16 WERE AVAILABLE. THERE WOULD BE CHURCH ACTIVITIES THAT WOULD
17 BE OUTSIDE THE REALM OF THE ACTUAL SUNDAY MORNING SERVICE
18 OR BIBLE STUDY ON WEDNESDAY NIGHT. THAT THERE WOULD BE
19 ACTIVITIES FOR YOUNG PEOPLE THAT HE MIGHT PARTICIPATE IN.

20 Q OKAY.

21 A AND QUITE FRANKLY, THAT MIGHT NOT HAVE BEEN AVAILABLE TO HIM, I
22 UNDERSTAND.

23 Q BUT THE DEFENDANT WAS TRAINED, WELL MAYBE NOT TRAINED, BUT
24 HE LED BIBLE STUDIES, DIDN'T HE?

25 A HE WAS TRAINED TO LEAD BIBLE STUDIES. YES, HE WAS.

1 Q AND HE DID, IN FACT, LEAD THEM EVEN AFTER HIS ARREST FOR THIS
2 CRIME IN THE JAIL. IS THAT NOT ALSO CORRECT?

3 A THAT'S WHAT I'M TOLD. YES. WELL, THERE IS SOME QUESTION ABOUT
4 THE ACTUAL LEADERSHIP. HE'S WITH A GROUP. HE'S IN A GROUP.
5 THEY ARE ALL PARTICIPATING.

6 Q OKAY. BUT IT WAS SOMETHING THAT HE PICKED UP ON FROM THAT
7 EARLIER COMMUNITY RESOURCE. HE WAS THIRTY-EIGHT YEARS OLD
8 AT THE TIME OF HIS ARREST. THAT COMMUNITY RESOURCE, HE HAD
9 BEFORE THE AGE OF EIGHTEEN. IS THAT NOT TRUE?

10 A I KNOW HE WENT TO CHURCH. I'M NOT SURE ABOUT HIS LEADERSHIP
11 ROLE IN THAT CHURCH. I'VE NOT SEEN ANY EVIDENCE OF THAT.

12 Q NOW, AT SOME POINT IN TIME, HE BECAME INVOLVED IN THE CRIMINAL
13 JUSTICE SYSTEM. CORRECT?

14 A YES.

15 Q AND THAT FIRST ARREST, ACCORDING TO YOUR TIME TABLE,
16 PRIMARILY WAS THE STOLEN T.V. SET. IS THAT CORRECT?

17 A AFTER THE, AFTER THE DRIVING WITHOUT ---

18 Q DRIVING UNDER SUSPENSION AND ---

19 A BECAUSE OF LACK OF INSURANCE ON AN UNINSURED VEHICLE.

20 Q --- UNINSURED VEHICLE.

21 A YES.

22 Q OKAY. LET'S GO TO THE RECEIVING STOLEN GOODS.

23 A OKAY.

24 Q DID YOU TALK TO HIM ABOUT THAT?

25 A YES. ONLY BRIEFLY.

1 Q OKAY.

2 A WE WENT THROUGH THE ARREST.

3 Q OKAY. AND WHAT WAS HIS CIRCUMSTANCES ON RECEIVING THE
4 STOLEN GOODS, THE T.V. SET?

5 A WHAT WERE THE CIRCUMSTANCES? DO YOU MEAN WHAT WAS HIS
6 MOTIVATION?

7 Q OKAY. WHAT WAS HIS MOTIVATION?

8 A HE WANTED MONEY.

9 Q HE WANTED MONEY?

10 A UH-HUH.

11 Q AND WHY DID HE WANT MONEY?

12 A LARGELY BECAUSE OF DRUGS OR BECAUSE HE OWED MONEY, EVEN
13 TO HIS WIFE.

14 Q AND WHERE DID HE GET THE T.V. SET?

15 A I DON'T REMEMBER.

16 Q YOU DON'T REMEMBER, YOU DIDN'T ASK, OR YOU DON'T KNOW?

17 A I DON'T REMEMBER.

18 Q IS IT IN ANY OF YOUR WRITTEN REPORTS?

19 A I DON'T THINK SO. NO.

20 Q BECAUSE YOU DIDN'T ASK?

21 A I DON'T KNOW.

22 Q AND WHAT DOES YOUR TIME TABLE SHOW WAS HIS NEXT CRIMINAL
23 ACTIVITY?

24 A (WITNESS LOOKS THROUGH DOCUMENTS) 1992, HE'S ARRESTED FOR
25 FALSELY RENTING VIDEO TAPES UNDER THE NAME OF LEWIS PREATO

1 ON NOVEMBER 5, 1991, AND FAILING TO RETURN THEM. THAT'S MY
2 NEXT ONE.

3 Q OKAY. SO, AND THAT'S 1992?

4 A YES.

5 Q SO, IN 1992, HE WAS COMMITTING A FRAUD ESSENTIALLY TO ACQUIRE
6 GOODS FOR WHAT? FOR HIS OWN USE OR FOR SALE?

7 A FOR SALE.

8 Q OKAY. THAT IS WHAT MISTER SIMMONS TOLD YOU?

9 A THAT'S MY UNDERSTANDING. YES.

10 Q SO, HE RENTS GOODS, PLACES SOME SMALL FINANCIAL CONTRIBUTION
11 TO THE RENTING OF THOSE GOODS FROM A VIDEO PLACE. CORRECT?

12 A YES.

13 Q WITH THE INTENT TO PROFIT TO A GREATER MARGIN BY NOT
14 RETURNING THOSE PARTICULAR GOODS. CORRECT?

15 A I CAN SPECULATE TO THAT. I DID NOT TALK TO HIM IN DETAIL ABOUT
16 THIS.

17 Q AND THAT REQUIRES OR ENTAILS SOME PLANNING AND SOME
18 ULTIMATE GOAL. IS THAT NOT ALSO CORRECT?

19 A YES.

20 Q HE PLANS TO GET THE GOODS AT A LESSER PRICE WITHOUT ANY
21 INTENT TO RETURN THOSE GOODS. CORRECT?

22 A YES.

23 Q HE USES A FALSE IDENTITY SO IT WOULD HOPEFULLY NOT BE TRACED
24 BACK TO HIM. CORRECT?

25 A YES.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELENSKA

1 Q HE FOLLOWS THROUGH WITH THAT AND ACQUIRES THOSE
2 PARTICULAR GOODS. CORRECT?

3 A YES.

4 Q DID HE SEEK A BUYER FOR THOSE GOODS OR...

5 A I DON'T KNOW.

6 Q YOU DON'T KNOW HOW WELL HIS PLAN WAS CONTINUED. IS THAT
7 CORRECT?

8 A I DON'T KNOW.

9 Q WHAT'S YOUR NEXT CRIMINAL ACTIVITY THAT YOU SEE THE
10 DEFENDANT INVOLVED IN ON YOUR TIME TABLE?

11 A ARRESTED FOR A BURGLARY OF JEWELS, TOOLS, CLOTHES AND
12 ELECTRONICS, PLEADS GUILTY AND IS SENTENCED TO FIVE YEARS IN
13 THE STATE DEPARTMENT OF CORRECTIONS AND TWO YEARS OF
14 PROBATION.

15 Q OKAY. AND WHAT WAS HIS MOTIVATION FOR THAT PARTICULAR
16 CRIME?

17 A MONEY.

18 Q THAT'S WHAT HE SAYS?

19 A YES.

20 Q OKAY. AND WHAT IS THE MONEY TO BE USED FOR AFTER HE SELLS
21 THESE ITEMS?

22 A I -- IT WOULD BE A SPECULATION BECAUSE I DIDN'T ASK.

23 Q OKAY. BUT HE WASN'T TAKING THESE ITEMS FOR HIS OWN
24 PARTICULARIZED USE. HE HAD ANOTHER GOAL TAKING THE ITEMS,
25 MOVING THEM AROUND, TO HAVE A FURTHER SECONDARY GOAL OF

1 GETTING MORE MONEY, PRESUMABLY. CORRECT?

2 A IT WOULD BE A PRESUMPTION, YES, BECAUSE I DIDN'T ASK.

3 Q AND AT THAT TIME, AS YOU HAVE ALREADY TESTIFIED, HE WAS DEEPLY
4 INVOLVED IN THE USE OF DRUGS.

5 A THAT IS CORRECT.

6 Q WHAT IS YOUR NEXT CRIME?

7 A IT WAS SHOPLIFTING TWO FAMILY PACKS OF STEAKS FROM FOOD LION.

8 Q SHOPLIFTING FOOD. AND WHAT WAS HIS PURPOSE IN SHOPLIFTING
9 THE FOOD?

10 A I DON'T KNOW. I DIDN'T ASK.

11 Q YOU DON'T KNOW IF IT WAS TO FEED HIMSELF?

12 A I DON'T KNOW.

13 Q YOU JUST DIDN'T FOLLOW UP ON THAT AS TO WHY HE WOULD STEAL
14 TWO FROZEN STEAKS?

15 A I MAY HAVE MADE SOME PRESUMPTIONS, BUT I DIDN'T ASK AND SO I
16 CAN'T SAY, I CAN'T SPEAK TO THAT.

17 Q DID HE PURCHASE OTHER FOOD ON THAT DAY?

18 A I DON'T KNOW.

19 Q DO YOU KNOW IF HE HAD ENOUGH MONEY IN HIS POSSESSION TO PAY
20 FOR THE STEAKS?

21 A I DO NOT KNOW.

22 Q DO YOU KNOW IF HE TOOK THE STEAKS BECAUSE HE COULDN'T
23 AFFORD THEM FOR HIS OWN FUEL AS OPPOSED TO TRYING TO SELL
24 THEM FOR ANOTHER INDIVIDUAL?

25 A I DON'T KNOW.

CROSS EXAMINATION OF MARJORIE HAMMOCK BY MR. ZELEKA

1 Q WHAT'S HIS NEXT CRIME?

2 A SHORTLY THEREAFTER, HE GIVES A STATEMENT CONFESSING TO THE
3 BOYD MURDER. THAT'S DECEMBER 5, '97, BUT AFTER THAT THERE IS
4 ANOTHER ONE. (REFERS TO DOCUMENTS) I THOUGHT THERE WAS
5 ANOTHER ONE. MAYBE THE STEAKS WERE HIS LAST.

6 Q DID HE HAVE ANOTHER GIRLFRIEND?

7 A YES.

8 Q IS THERE A CRIME OF CRIMINAL DOMESTIC VIOLENCE?

9 A YES.

10 Q DID THAT CRIME OCCUR AFTER THE EVENT OF MS. BOYD'S DEATH?

11 A YES.

12 Q DID THAT CRIME OCCUR IN RICHLAND COUNTY?

13 A YES.

14 Q WAS HE ARRESTED FOR THAT CRIME?

15 A I DON'T KNOW. I THOUGHT HE WAS, BUT I DON'T SEE IT HERE. I MAY BE
16 OVERLOOKING IT. (LOOKS THROUGH DOCUMENTS) ACTUALLY, IT'S
17 BEFORE THE JEWELRY. IT'S JANUARY, 1997. JANUARY 1ST, TO BE
18 EXACT. ARRESTED FOR CRIMINAL DOMESTIC VIOLENCE FOR STRIKING
19 BARBARA JONES IN THE FACE. PLEADS GUILTY AND IS SENTENCED TO
20 THIRTY DAYS.

21 Q NOW, BASED UPON YOUR SELF REPORT AND OTHER INFORMATION YOU
22 RECEIVED AS RESPONDERS TO YOUR INQUIRIES, WHAT DID THE
23 DEFENDANT LIKE TO DO FOR FUN? AND I DON'T MEAN THE DRUGS AND
24 ALCOHOL. WHAT DID HE DO FOR LEISURE?

25 A HANG OUT WITH HIS BUDDIES, BUT HE WAS DOING DRUGS, ACCORDING

1 TO HIM AND ACCORDING TO THE OTHER REPORTERS.

2 Q BUT YOU ALSO SAW REPORTS THAT HE PLAYED CHESS, TOO, DIDN'T
3 YOU?

4 A YES.

5 THE COURT: PLAYED WHAT?

6 MR. ZELENKA: CHESS.

7 A AND THAT WAS CHALLENGED, ACTUALLY. THE OFFICER WHO
8 REPORTED THAT IN JAIL THEN SAID, "WELL, I DIDN'T SEE HIM. I SAW HIM
9 PLAYING CHECKERS." BUT THAT HE ASSUMED THAT HE ALSO PLAYED
10 CHESS. HIS WIFE SAYS THAT THE ONLY GAME THAT SHE KNEW THAT
11 HE PLAYED OCCASIONALLY WAS CHECKERS AND THE OTHER WAS A
12 GAME CALLED "TONK", A CARD GAME.

13 Q BUT THERE IS EVIDENCE IN HIS RECORD THAT HE DID, IN FACT, PLAY
14 CHESS. ISN'T THERE?

15 A I DID NOT CONFIRM THAT.

16 Q SO, YOU DIDN'T ASK THE DEFENDANT IF HE PLAYED CHESS?

17 A NO. I DID NOT.

18 Q YOU DIDN'T ASK ANY OF THE CURRENT GUARDS OR THE GUARDS AT
19 THE TIME WHETHER HE PLAYED CHESS.

20 A NO. I DIDN'T. I RELIED ON THE RECORD.

21 Q YOU RELIED ON THE RECORD, BUT THEN YOU ALSO DISAGREED WITH
22 THE RECORD. CORRECT?

23 A BASED ON WHAT I READ, THERE WAS A QUESTION ABOUT WHETHER
24 OR NOT HE ACTUALLY PLAYED CHESS.

25 Q SO, YOU ASSUME THAT HE COULDN'T PLAY CHESS?

1 A I DIDN'T MAKE AN ASSUMPTION.

2 Q WELL, YOU DIDN'T REPORT THAT. DID YOU?

3 A THAT HE COULDN'T PLAY CHESS?

4 Q UH-HUH. WHY DID YOU CHOOSE TO ASSUME THAT HE COULDN'T PLAY
5 CHESS?

6 A BECAUSE I SAW THE ISSUE RAISED IN PRINT ABOUT WHETHER OR NOT
7 IT WAS ACTUALLY, HE WAS ACTUALLY WITNESSED AS HAVING PLAYED
8 CHESS.

9 Q OKAY. SO. WHEN THERE'S AN ISSUE THAT MAY BE UNFAVORABLE TO
10 THE DEFENDANT, AND IT'S CHALLENGED, YOU REJECT THAT'S
11 EXISTENCE?

12 A THAT IS NOT ABSOLUTE TRUTH.

13 Q BUT IT WAS IN THIS CASE.

14 A WELL, AGAIN, I DIDN'T HAVE AN OPPORTUNITY TO DO THAT, TO
15 ACTUALLY CHALLENGE THE GAME. I LOOKED UP THE INFORMATION
16 AND I READ THAT AND I TOOK IT INTO CONSIDERATION. I AM NOT
17 SAYING HE DID NOT PLAY CHESS. I'M JUST SAYING THAT THERE IS
18 SOME QUESTION ABOUT THE EVIDENCE, ABOUT WHETHER OR NOT HE
19 ACTUALLY PLAYED
20 CHESS.

21 Q OKAY. AND YOU RECOGNIZE THAT HE LED BIBLE STUDIES. RIGHT?

22 A HE PARTICIPATED IN BIBLE STUDIES IS WHAT I HEAR.

23 Q WELL, HE CHECKED OUT BOOKS FROM THE JAIL AFTER HIS ARREST.

24 A AND THAT REPORT WAS CHALLENGED BECAUSE IT WAS SAID THAT HE
25 SAID, HE SAID IT IN WRITING – I DIDN'T HEAR THIS, HE DIDN'T SAY THIS

1 TO ME -- THAT HE WAS CHECKING THEM OUT FOR SOMEBODY ELSE
2 WHO DID NOT WANT TO BE OVER WHICH IS WHY HE HAD CHECKED OUT
3 THOSE BOOKS.

4 Q WAIT. LET ME MAKE SURE I UNDERSTAND THAT. HE'S IN THE JAIL.

5 A RIGHT.

6 Q AFTER HIS ARREST.

7 A YES.

8 Q WITH OTHER INMATES.

9 A YES.

10 Q HE MAKES A REQUEST FOR BOOKS.

11 A YES.

12 Q THAT REQUEST IS ALREADY PLACED INTO EVIDENCE IN THIS TRIAL.
13 CORRECT?

14 A YES.

15 Q AND YOU'RE SAYING THAT HE SAID ---

16 A NO. I READ IT. I DON'T KNOW WHO SAID IT.

17 Q OKAY.

18 A I READ IT THAT HE SAID THAT HE HAD CHECKED OUT THE BOOKS FOR
19 SOMEBODY ELSE.

20 Q YET HE WAS STILL TEACHING BIBLE STUDY. CORRECT?

21 A I THINK HE PARTICIPATES IN BIBLE STUDY.

22 Q PARTICIPATED IN BIBLE STUDY. THE BOOKS WERE RELATED TO THE
23 BIBLE STUDY. ISN'T THAT CORRECT?

24 A I DON'T KNOW THAT.

25 Q OKAY. (COURT'S INDULGENCE ONE MOMENT) GOING BACK TO

1 ACADEMIC ACHIEVEMENT, JUST TO BE CLEAR. THE COURSES THE
2 DEFENDANT TOOK IN SCHOOL ---

3 A IN HIGH SCHOOL?

4 Q IN HIGH SCHOOL. HE WAS NEVER DESIGNATED TO GO IN THE MOST
5 REMEDIAL PROGRAM THAT THAT HIGH SCHOOL HAS. IS THAT
6 CORRECT?

7 A NO.

8 Q SO, WHAT NORMALLY, TO LAY PEOPLE, WOULD BE SPECIAL EDUCATION
9 COURSES, HE WAS NOT WITHIN THOSE COURSES. WAS HE? HE WAS
10 IN REMEDIAL ---

11 A SPECIAL EDUCATION ENCOMPASSED IN THAT SCHOOL, FROM MY
12 UNDERSTANDING THE WHOLE RUBRIC OF CARE, THE LEVELS OF CARE
13 AND SO, IN FACT, IT WAS SEEN AS A SPECIAL FORM OF EDUCATION FOR
14 A TARGETED GROUP. THAT HE WAS NOT IN A CONTAINED CLASSROOM
15 WITH PEOPLE WITH MORE SERIOUS AND MORE OBSERVABLE
16 ILLNESSES, THEY WERE IN FACT SEPARATE, BUT HE WAS, IN FACT,
17 IDENTIFIED AS NEEDING SPECIAL EDUCATION.

18 Q HE WAS AT LEAST MAIN STREAMED WITH THE REST OF THE
19 POPULATION. ISN'T THAT CORRECT?

20 A HE WAS IN CLASSES WITH PEOPLE WHO HAD SOME OF THE SAME
21 LIMITATIONS AS HE DID ---

22 Q IN HIS CLASSES ---

23 A --- IN MOST OF THE CLASSES: IN ALL OF THE ENGLISH CLASSES, IN AT
24 LEAST TWO YEARS OF THE MATH, THERE WAS A VERY SPECIAL
25 HISTORY, AMERICAN HISTORY. THESE ARE ALL, BY THE WAY,

1 REQUIREMENTS FOR GRADUATION, SO THEY HAD TO MAKE
2 PROVISIONS FOR THESE STUDENTS AND WHEN I INQUIRED ABOUT
3 WHAT THE THREE MEANT, IT MEANT THAT THAT WAS THE LEVEL THAT
4 WAS CREATED FOR STUDENTS WHO NEEDED THOSE SPECIAL KINDS OF
5 SERVICES BUT WHO DID NOT NEED TO BE IN A CONTAINED ALL-DAY
6 CLASSROOM.

7 Q ALL RIGHT.

8 MR. ZELENKA: I DON'T BELIEVE I HAVE ANY OTHER QUESTIONS AT THIS
9 TIME, YOUR HONOR.

10 THE COURT: RE-DIRECT?

11 MS. PAAVOLA: YES, SIR.

12 RE-DIRECT EXAMINATION OF MS. HAMMOCK BY MS. PAAVOLA

13 Q MS. HAMMOCK, YOU WERE JUST ASKED SOME QUESTIONS ABOUT THE
14 SELF-CONTAINED, SPECIAL EDUCATION CLASS THAT KENNETH WAS
15 NOT IN. WHAT KIND OF STUDENTS WERE IN THAT CLASS?

16 A SERIOUS DOWNS SYNDROME, I'M TOLD. STUDENTS WITH CEREBRAL
17 PALSY, STUDENTS WHO HAD BEEN DIAGNOSED WITH MENTAL
18 RETARDATION AT A SERIOUS LEVEL, OTHER KINDS OF PHYSICAL
19 ENTITIES WHERE STUDENTS WERE NOT MOBILE, NECESSARILY.

20 THE COURT: WHAT DO YOU MEAN BY SERIOUS MENTAL
21 RETARDATION? THERE ARE TWO DIFFERENT KINDS?

22 MS. HAMMOCK: WELL, THERE ARE LEVELS AND I MEAN, THERE'S
23 THE TERM MILD AND THEN THERE ARE PEOPLE WHO ARE MORE
24 SERIOUSLY MENTALLY RETARDED. I'M NOT QUITE ACCURATE ON THE
25 TERMINOLOGY.

1 THE COURT: DID YOU FORM AN OPINION AS TO MISTER SIMMONS?

2 MS. HAMMOCK: DID I FORM AN OPINION?

3 THE COURT: YES, MA'AM.

4 MS. HAMMOCK: I USED THE INFORMATION THAT POINTED TO THE
5 FACT THAT HE WAS -- LET ME SEE AGAIN BECAUSE --

6 MS. PAAVOLA: WELL, TO BE CLEAR --

7 THE COURT: I'M ASKING A QUESTION. LET HER ANSWER.

8 MS. HAMMOCK: AS I SAID, I DON'T WANT TO NECESSARILY -- I'M
9 REPEATING WHAT I SEE. THAT SOME OF THE EXPERTS HAVE INDICATED
10 THAT HE WAS MILDLY RETARDED.

11 THE COURT: AND WHAT IS YOUR OPINION?

12 MS. HAMMOCK: THE EVIDENCE WOULD INDICATE THAT HE HAD
13 SOME RETARDATION.

14 THE COURT: SOME RETARDATION?

15 Q MS. HAMMOCK, WERE YOU ASKED TO MAKE A MENTAL
16 RETARDATION DIAGNOSIS IN THIS CASE?

17 A NO.

18 Q YOU WERE ASKED TO MAKE AN ASSESSMENT OF HIS DEFICIT IN
19 ADAPTIVE FUNCTIONING --

20 A CORRECT.

21 Q -- BASED ON HIS SOCIAL HISTORY?

22 A YES.

23 Q YOU WERE ASKED SOME QUESTIONS ABOUT THE SRA TESTS ON
24 THE SCHOOL REPORTS AND THE REPORTED I.Q. SCORES THAT
25 RESPONDED TO THEM. ARE YOU AN EXPERT IN I.Q. TESTS OR

1 ADMINISTRATIONS OF THOSE TESTS?

2 A NO. I AM NOT.

3 Q HAVE YOU EVER ADMINISTERED AN I.Q. TEST?

4 A NO. I HAVEN'T.

5 Q YOU DID COLLECT SOME INFORMATION ABOUT THE SRA TESTS.

6 A YES. I DID.

7 Q IS THAT CORRECT? DID YOU REVIEW AN AFFIDAVIT FROM
8 MS. FLOY SHULER FROM THE DEPARTMENT OF SPECIAL SERVICES
9 IN THE DORCHESTER SCHOOL SYSTEM?

10 A YES.

11 Q DO YOU RECALL THE PAGES THAT WERE ATTACHED TO HER
12 AFFIDAVIT THAT DESCRIBED THE PLACEMENT REQUIREMENTS FOR
13 THE RESOURCE PROGRAM?

14 A YES.

15 Q WHAT WAS REQUIRED TO BE PLACED IN THE RESOURCE
16 PROGRAM?

17 A THE REFERRALS, THE NATURE OF THE REFERRALS.

18 Q UH-HUH.

19 A AND I.Q. EXAMINATIONS, INDIVIDUALLY ADMINISTERED.

20 Q AND WAS THE SRA TEST LISTED AS AN I.Q. TEST THAT WAS
21 ACCEPTABLE AS AN I.Q. TEST FOR PLACEMENT?

22 A I DON'T REMEMBER.

23 THE COURT: WHAT'S THE NAME OF THE LADY YOU ARE REFERRING
24 TO?

25 MS. PAAVOLA: FLOY SHULER.

1 THE COURT: SHURER?

2 MS. PAAVOLA: SHULER.

3 THE COURT: HOW DO YOU SPELL THAT?

4 MS. PAAVOLA: S-H-U-L-E-R.

5 Q AND I'M SORRY, I MAY HAVE CUT YOU OFF. THE I.Q. TEST WAS
6 REQUIRED AND DO YOU RECALL WHAT ELSE WAS REQUIRED FOR
7 THE PLACEMENT IN THE RESOURCE PROGRAM?

8 A THE RECOMMENDATION.

9 Q NOW, YOU WERE ASKED SOME QUESTIONS ABOUT HOW KENNETH
10 SIMMONS WASN'T IDENTIFIED FOR PLACEMENT FOR THE
11 RESOURCE PROGRAM UNTIL THE ELEVENTH GRADE. BUT I JUST
12 WANT TO BE CLEAR, THAT WAS ALSO, THAT WAS BEFORE HE WAS
13 EIGHTEEN. IS THAT CORRECT?

14 A THAT IS CORRECT.

15 Q AND ALTHOUGH HE WASN'T PLACED INTO RESOURCE UNTIL THE
16 ELEVENTH GRADE, WAS HE IN LOWER LEVEL CLASSES BEFORE HE
17 WAS ACTUALLY PLACED IN RESOURCE CLASSES?

18 A IT'S MY UNDERSTANDING FROM LOOKING AT THIS INFORMATION
19 THAT THAT BEGINS IN THE TENTH GRADE --

20 Q OKAY.

21 A -- THE SPECIAL CATEGORY. AND I USE THE FACT THAT -- I'M
22 SORRY, THE SEVENTH GRADE THAT HE WAS PLACED IN SPECIAL
23 CLASSES. EXCUSE ME.

24 Q AND DID HE PASS EVERY GRADE PRIOR TO THIS PLACEMENT IN
25 RESOURCE IN THE ELEVENTH GRADE?

1 A NO. HE DID NOT.

2 Q WAS HE SOCIALLY PROMOTED TO SOME OF THOSE GRADES?

3 A THAT'S WHAT I CAN ASSUME. HE DIDN'T PASS ENGLISH IN THE
4 SEVENTH GRADE.

5 Q YOU WERE ASKED SOME QUESTIONS ABOUT HIS GRADES,
6 PARTICULARLY HIS GRADE IN HIS ENGLISH COURSES IN THE
7 ELEVENTH AND TWELFTH GRADES. THAT WAS AFTER HE WAS
8 PLACED IN RESOURCE. IS THAT CORRECT?

9 A YES.

10 Q AND DID YOU SPEAK WITH HIS RESOURCE TEACHER?

11 A YES. I SPOKE WITH HER.

12 Q WHAT DID SHE TELL YOU ABOUT HOW SHE WENT ABOUT
13 ASSIGNING GRADES TO STUDENTS?

14 A THAT SHE WOULD CREATE, ALMOST A ONE-ON-ONE FOR EACH
15 PERSON IN THE CLASS. THAT THEY WOULD HAVE INDIVIDUAL
16 GOALS AND THAT THEY WOULD WORK TO ACHIEVE AND MEET
17 THOSE GOALS. IN SOME INSTANCES, TAKING THE TEXTBOOK --
18 THIS IS FOR ANOTHER CLASS -- BUT TAKING THE TEXTBOOK AND
19 ACTUALLY RE-WRITING IT TO FIT THE NEEDS OF THOSE STUDENTS.

20 Q SO, IN THOSE CLASSES, DOES AN "A" -- WHAT DOES AN "A" MEAN
21 ACCORDING TO THE INFORMATION ---

22 A IT MEANS THAT THAT STUDENT HAS MET THE REQUIREMENTS AS
23 ESTABLISHED BY THAT TEACHER.

24 Q AND I THINK YOU TESTIFIED, KENNETH DID NOT HAVE A
25 DISCIPLINARY PROBLEM IN SCHOOL?

1 A NO.

2 Q AND HE ATTENDED CLASS?

3 A YES.

4 Q AND SO, DOES AN "A" IN THOSE CLASSES MEAN THAT HE IS AT THE
5 TOP OF THE CLASS AS COMPARED TO THE OTHER STUDENTS?

6 A NO. BECAUSE, AGAIN, THAT MEANT THAT HE MET THE CRITERIA
7 FOR HIS ACHIEVING AN "A". IT WAS ALMOST ON AN INDIVIDUAL
8 BASIS.

9 Q YOU TALKED A LITTLE BIT ABOUT HOW KEN PLAYED ON THE
10 FOOTBALL TEAM.

11 A YES.

12 Q DID YOU COLLECT ANY INFORMATION ABOUT WHAT, IF ANY, G-P-A
13 WAS REQUIRED TO REMAIN ON THE FOOTBALL TEAM?

14 A AT THAT TIME, ACCORDING TO THE TEACHERS AND EVEN MEMBERS
15 OF HIS FAMILY, THERE EVIDENTLY WAS NOT A REQUIREMENT SET.
16 THAT CAME LATER.

17 Q AND DID YOU SPEAK WITH SOME FOOTBALL PLAYERS AND
18 COACHES OR REVIEW THEIR AFFIDAVITS?

19 A I REVIEWED THE AFFIDAVITS OF A COUPLE OF COACHES, WHO
20 INDICATED THAT HE ASSUMED, OR ONE OF THEM SAID HE ASSUMED
21 THAT THERE WAS SOME LIMITATIONS IN TERMS OF HIS
22 FUNCTIONING.

23 Q DID YOU COLLECT INFORMATION ABOUT WHAT KINDS OF
24 ACTIVITIES HE PERFORMED FOR THE FOOTBALL TEAM?

25 A I DON'T REMEMBER THE -- IT WAS A BACK, IT WAS SOMETHING

- 1 BACK. I'M SORRY.
- 2 Q WAS HE THE QUARTERBACK?
- 3 A NO. HE WAS NOT.
- 4 Q CALLING THE SHOTS?
- 5 A HE WAS NOT THAT BACK.
- 6 Q YOU GAVE SOME TESTIMONY ABOUT KENNETH LIVING WITH HIS
- 7 MOTHER AND FATHER AND HELPING TO TAKE CARE OF THEM WHEN
- 8 THEY WERE ILL.
- 9 A YES.
- 10 Q DID HE DO THAT BY HIMSELF?
- 11 A NO. HE HAD SUPPORT FROM HIS SISTER WHO LIVED IN THE HOUSE
- 12 AS WELL AS THE OTHER SIBLINGS. THEY WERE IN THERE ON A
- 13 REGULAR BASIS.
- 14 Q OKAY. KENNETH DID RECEIVE A HIGH SCHOOL DIPLOMA.
- 15 A YES.
- 16 Q WHEN YOU SPOKE WITH HIS TEACHERS, WERE YOU ABLE TO
- 17 GATHER ANY INFORMATION ABOUT WHAT WAS REQUIRED TO
- 18 GRADUATE FROM HIGH SCHOOL AT THE TIME HE GRADUATED?
- 19 A THAT HE COMPLETE THE REQUIRED COURSES AS SET BY THE
- 20 STATE OF SOUTH CAROLINA.
- 21 Q DID HE HAVE EXIT TESTING LIKE WE HAVE TODAY?
- 22 A NO.
- 23 Q IN FACT, DID YOU SPEAK WITH SOME OF HIS TEACHERS ABOUT
- 24 WHETHER THEY BELIEVED HE COULD BE ABLE TO PASS THE EXIT
- 25 TESTING BY TODAY'S STANDARD?

1 A YES. I DID.

2 Q AND DO THEY?

3 A THEY SAID, "NO. HE WOULD NOT HAVE BEEN ABLE TO."

4 Q THERE WERE A FEW QUESTIONS ABOUT KENNETH OBTAINING A
5 DRIVER'S LICENSE. DO YOU -- HAVE YOU COLLECTED ANY
6 INFORMATION TO INDICATE THAT KENNETH EVER OWNED A CAR?

7 A I HAVEN'T SEEN ANY INFORMATION TO THAT.

8 Q DID YOU SPEAK OR REVIEW SOME AFFIDAVITS ABOUT HIS SIBLING'S
9 VIEWS ON HOW OFTEN HE DROVE?

10 A I DON'T REMEMBER.

11 Q HE PERFORMED SOME CHORES AT THE PALMETTO HOUSE WHEN
12 HE WAS GOING THERE.

13 A YES.

14 Q DID ANYONE THAT YOU SPOKE TO OR REVIEWED RECORDS
15 RELATED TO AT THE PALMETTO HOUSE SAY THAT HE TOOK
16 INITIATIVE WITH REGARD TO THOSE CHORES?

17 A HE WANTED TO BE HELPFUL. THEY WOULD SELECT THE CHORES
18 AND DIRECT HIM AND VERY SPECIFICALLY. IT'S SAID IT HAD TO BE
19 VERY SPECIFIC AND VERY DIRECTED AND THE EXAMPLE USED WAS
20 THAT IF SHE WANTED A PICTURE HUNG OR SOMETHING THAT HE
21 COULD NOT MEASURE AND PLACE IT CORRECTLY. SHE WOULD
22 HAVE TO DO THAT.

23 Q YOU GAVE SOME TESTIMONY ABOUT HOW YOU REVIEWED HIS
24 WRITTEN STATEMENT, THE TWO-PAGE WRITTEN STATEMENT WITH
25 REGARD TO THE BOYD MURDER. DO YOU RECALL ALSO REVIEWING

1 A REPORT FROM DOCTOR JAMES ZINGER?

2 A YES. I DO.

3 Q ON THE READABILITY LEVEL, THE GRADE LEVEL OF THAT REPORT?

4 A YES.

5 Q DO YOU RECALL WHAT GRADE LEVEL THAT WAS?

6 A IT WAS A 3.6? IT WAS A 3 POINT SOMETHING. IT WAS LOW. (LOOKS
7 THROUGH DOCUMENTS)

8 Q THAT'S FINE. ARE YOU LOOKING?

9 A I WAS LOOKING. IT'S OKAY.

10 Q OKAY. YOU TESTIFIED THAT HIS FAMILY STRUCTURE WAS RATHER
11 RIGID AND THERE WERE A LOT OF RULES IN PLACE AND HE WAS
12 ABLE TO FOLLOW THOSE RULES.

13 A YES.

14 Q BUT YOU ALSO INTERVIEWED MANY OF HIS SIBLINGS AND EVEN
15 WITHIN THAT STRUCTURE, DID THEY TALK ABOUT HIM BEING
16 DIFFERENT FROM THE OTHER SIBLINGS?

17 A YES.

18 Q YOU TALKED ABOUT EARLIER HE WAS MARRIED FOR A PERIOD OF
19 TIME, DID YOU COLLECT ANY INFORMATION ABOUT HOW THE
20 FINANCES WERE MANAGED IN THE MARRIAGE?

21 A VALERIE SAYS THAT SHE MANAGED ALL OF THE MONEY THAT CAME
22 IN AND, OF COURSE, SHE WAS THE EMPLOYED PERSON ON A
23 STEADY, REGULAR BASIS. THAT THERE WERE SOME ATTEMPTS
24 FOR HIM TO PAY THE LIGHT BILL AND WHAT SHE FOUND OUT IS
25 THAT SHE COULDN'T TRUST HIM TO DO ANY OF THAT AND THAT SHE

1 WOULDN'T BE NOTIFIED THAT HE HAD NOT PAID THE BILL UNTIL
2 THEY GOT THE DELINQUENT NOTICE SO THAT SHE DETERMINED
3 THAT SHE HAD TO HANDLE ALL OF THAT HERSELF.

4 Q DID THEY HAVE A CHECKING ACCOUNT?

5 A AT SOME POINT OR OTHER WHEN THEY FIRST GOT MARRIED, THEY
6 HAD A CHECKING ACCOUNT, BUT THEY DIDN'T USE IT MUCH. SHE
7 SAID THEY PAID ALMOST EVERYTHING IN CASH.

8 Q WHO OPENED THE CHECKING ACCOUNT?

9 A SHE DID, VALERIE.

10 Q WHOSE NAME WAS THE ACCOUNT TITLED IN?

11 A IT WAS HER NAME AS FAR AS I KNOW. SHE WASN'T EVEN CLEAR
12 ABOUT THAT, BUT SHE THOUGHT THAT IT WAS JUST IN HER NAME.

13 Q YOU WERE ASKED SOME QUESTIONS ABOUT SOME OF THESE
14 ARRESTS, RECEIVING STOLEN GOODS, NOT RETURNING THE
15 RENTALS, THAT SORT OF THING. YOU REVIEWED THE ARREST
16 RECORDS RELATED TO THIS.

17 A YES.

18 Q BUT DID YOU COLLECT ANY OTHER DETAILED INFORMATION WITH
19 REGARD TO THOSE?

20 A ABOUT THE ACTUAL ARREST?

21 Q UH-HUH.

22 A NO. I DID NOT.

23 Q SO, DO YOU HAVE ANY INFORMATION THAT INDICATES THAT HE
24 ACTED ALONE WHEN HE COMMITTED THOSE ACTS?

25 A I HAVE NO WAY OF KNOWING.

1 Q DO YOU KNOW IF HE PLANNED THEM HIMSELF? THAT HE PLANNED
2 THEM A LONG TIME IN ADVANCE? ANY OF THAT INFORMATION, DO
3 YOU HAVE IN —

4 A THAT WASN'T FORTHCOMING WHEN WE EVEN RAISED SOME OF
5 THOSE QUESTIONS.

6 Q YOU REVIEWED THE TRIAL TESTIMONY OF A VARIETY OF PEOPLE
7 WHO GAVE TESTIMONY AT TRIAL. IS THAT RIGHT?

8 A YES.

9 Q DO YOU RECALL REVIEWING THE TESTIMONY OF DOCTOR LESLIE
10 SANDLER?

11 A I REMEMBER THE NAME. I'M NOT QUITE SURE I REMEMBER
12 SPECIFICALLY WHAT THAT HAD, WHAT CAME OUT OF THAT. IT WAS
13 ONE OF THE —

14 Q YOU INDICATED THAT ---

15 A I'M SORRY. GO AHEAD.

16 Q YOU INDICATED YOU REMEMBER SEEING SOME REFERENCE IN THE
17 RECORD THAT HE MAY HAVE PLAYED CHESS OR LED A BIBLE
18 STUDY?

19 A YES.

20 Q DO YOU RECALL READING DOCTOR SANDLER LATER THAT HE WAS
21 MISTAKEN WITH REGARD TO BOTH OF THOSE INCIDENTS?

22 A NOW, I DO. BUT I HAD FORGOTTEN IT.

23 Q IN FACT, HE ATTENDED A BIBLE STUDY. IS THAT RIGHT?

24 A THAT'S RIGHT.

25 Q WAS HE A LEADER OF THAT BIBLE STUDY?

1 A NOT TO MY KNOWLEDGE.

2 Q WAS HE EVER DESCRIBED AS A LEADER BY ANYONE THAT YOU
3 EVER INTERVIEWED?

4 A NO.

5 Q THANK YOU.

6 THE COURT: ALL RIGHT. MS. HAMMOCK, YOU MAY STEP DOWN.
7 LADIES AND GENTLEMEN, IT'S A QUARTER TO ONE. DO YOU HAVE A
8 FIFTEEN MINUTE WITNESS SO WE CAN BREAK AT ONE?

9 MS. PAAVOLA: WE DO NOT HAVE ANY FIFTEEN MINUTE WITNESSES,
10 YOUR HONOR.

11 THE COURT: ALL RIGHT. HOW LONG DO YOU NEED FOR LUNCH? IS
12 AN HOUR-AND-A-HALF SUFFICIENT?

13 MS. PAAVOLA: YES. THAT SHOULD BE PLENTY.

14 THE COURT: THE STATE?

15 MR. ZELENKA: YES, THAT'S FINE.

16 THE COURT: S-C-D-C, IS THAT OKAY? TIME ENOUGH TO GET HIM
17 SOME LUNCH AND SO FORTH?

18 SCDC OFFICER: YES, SIR.

19 THE COURT: WE'LL START BACK AT 2:15 P.M.

20 (LUNCH BREAK AT 12:45 P.M.)

21 AFTERNOON - FEBRUARY 1, 2010

22 THE COURT: ALL RIGHT, MS. PAAVOLA.

23 MS. PAAVOLA: YOUR HONOR, WE CALL DOCTOR MARC TASSE.

24 THE COURT: COME AROUND. PLACE YOUR LEFT HAND ON THE
25 BIBLE AND RAISE YOUR RIGHT, PLEASE.

DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

1 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, MARK
2 TASSE TESTIFIED AS FOLLOWS:)

3 CLERK OF COURT: PLEASE TAKE A SEAT AND STATE YOUR NAME
4 FOR THE RECORD, SPELLING YOUR LAST.

5 DR. TASSE: MARC J. TASSE. MARC WITH A "C", THE LETTER "J",
6 T-A-S-S-E.

7 (DISCUSSION CONCERNING SETTING UP DR. TASSE'S POWERPOINT
8 PRESENTATION)

9 DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

10 Q DOCTOR TASSE, COULD YOU PLEASE TELL THE COURT HOW YOU
11 ARE CURRENTLY EMPLOYED.

12 A I'M THE DIRECTOR OF THE NISONGER CENTER. THAT'S
13 N-I-S-O-N-G-E-R, AT THE OHIO STATE UNIVERSITY. I'M ALSO A
14 PROFESSOR IN THE DEPARTMENT OF PSYCHOLOGY AND THE
15 DEPARTMENT OF PSYCHIATRY.

16 Q COULD EXPLAIN WHAT THE NISONGER CENTER IS?

17 A THE NISONGER CENTER IS A UNIVERSITY CENTER FOR
18 EXCELLENCE IN DEVELOPMENTAL DISABILITIES. WE HAVE A THREE-
19 PART MISSION: WE DO RESEARCH, WE OFFER CLINICAL SERVICES
20 AND WE DO TRAINING. WE TEACH INTERDISCIPLINARY
21 PROFESSIONALS HOW TO WORK WITH INDIVIDUALS WHO HAVE
22 DEVELOPMENTAL DISABILITIES, WHICH PROBABLY INCLUDES
23 PERSONS WITH MENTAL RETARDATION, AUTISM, CEREBRAL PALSY.

24 Q OKAY. AND COULD YOU EXPLAIN A LITTLE MORE ABOUT YOUR
25 SPECIFIC RESPONSIBILITIES?

1 A AS THE DIRECTOR OF THE CENTER, MY RESPONSIBILITIES ARE
2 LARGELY ADMINISTRATIVE. I MANAGE THE CENTER GRANTS AND I
3 SUPERVISE THE FACULTY. THE FACULTY REPORT TO ME,
4 ADMINISTRATIVELY. I ALSO HAVE MY OWN LINE OF RESEARCH. I
5 CONDUCT MY OWN RESEARCH IN THE AREA OF MENTAL
6 RETARDATION AND I OVERSEE THE BUDGETS OF THE CENTER AND
7 SUPPORT STAFF.

8 Q CAN YOU TELL US ABOUT YOUR EDUCATION?

9 A I HAVE A Ph.D. IN RESEARCH CLINICAL PSYCHOLOGY FROM THE
10 UNIVERSITY OF QUEBEC AT MONTREAL. AND MY DISSERTATION,
11 MY DOCTORAL DISSERTATION WAS IN THE AREA OF THE STUDY OF
12 ADAPTIVE BEHAVIOR IN PEOPLE WITH MENTAL RETARDATION.
13 AFTER MY Ph.D., I COMPLETED A POST-DOCTORAL FELLOWSHIP AT
14 THE OHIO STATE UNIVERSITY AT THE NISONGER CENTER, WHERE I
15 AM CURRENTLY EMPLOYED, IN 1994 AND 1995.

16 Q CAN YOU DESCRIBE YOUR PRIOR EMPLOYMENT?

17 A PRIOR TO MY EMPLOYMENT AT OSU, I WAS THE ASSOCIATE DIRECTOR
18 OF A CENTER SIMILAR TO THE CENTER AT OSU, AT THE UNIVERSITY OF
19 SOUTH FLORIDA, WHICH IS CALLED A *FLORIDA CENTER FOR INCLUSIVE*
20 *COMMUNITIES*. I WAS AT THE UNIVERSITY OF SOUTH FLORIDA FROM
21 2006 TO 2009. PRIOR TO THE UNIVERSITY OF SOUTH FLORIDA, I WAS
22 THE COMMUNITY EDUCATION DIRECTOR AT A CENTER CALLED *CENTER*
23 *FOR DEVELOPMENTAL LEARNING* AT THE UNIVERSITY OF NORTH
24 CAROLINA IN CHAPEL HILL FROM 1999 TO APPROXIMATELY 2006. AND
25 BEFORE THAT I WAS AN ASSISTANT PROFESSOR AT THE UNIVERSITY

DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

1 OF QUEBEC AT MONTREAL IN THE DEPARTMENT OF PSYCHOLOGY.

2 Q DID YOU HAVE TEACHING RESPONSIBILITIES IN YOUR PRIOR
3 EMPLOYMENT?

4 A YES. I'VE TAUGHT BOTH AT THE UNDERGRADUATE LEVEL AND THE
5 GRADUATE LEVEL. I'VE TAUGHT COURSES IN ASSESSMENT, MENTAL
6 RETARDATION, AND SO FORTH.

7 Q DOES PART OF YOUR TEACHING EXPERIENCE INCLUDE TEACHING
8 OTHER PEOPLE HOW TO ASSESS MENTAL RETARDATION?

9 A YES. BOTH. IN THE CLASSROOM, I'VE TAUGHT CLASSES ON USING
10 INSTRUMENTS SUCH AS INTELLIGENCE TESTS AND MEASURES TO
11 ASSESS DEVELOPMENTAL DISABILITIES AS WELL AS IN A CLINICAL
12 SETTING WHERE I'VE BEEN THE LEAD PSYCHOLOGIST IN CLINICS THAT
13 WERE PRIMARILY DIAGNOSTIC CLINICS.

14 Q ARE YOU A LICENSED PSYCHOLOGIST?

15 A I'M LICENSED IN THE STATE OF NORTH CAROLINA.

16 Q IS THERE A BOARD CERTIFICATION FOR MENTAL RETARDATION?

17 A NO. THERE IS NOT.

18 Q ARE YOU A MEMBER OF ANY PROFESSIONAL SOCIETIES?

19 A I'M A MEMBER OF THE AMERICAN ASSOCIATION ON INTELLECTUAL AND
20 DEVELOPMENTAL DISABILITIES. I'M ALSO A MEMBER OF THE AMERICAN
21 PSYCHOLOGICAL ASSOCIATION. WITHIN APA, I'M A MEMBER OF
22 DIVISION THIRTY-THREE, WHICH IS THE MENTAL RETARDATION
23 DIVISION. I'M ALSO A MEMBER OF THE NATIONAL ASSOCIATION FOR
24 THE DUALLY DIAGNOSED. THOSE ARE PROFESSIONALS WHO WORK
25 WITH PEOPLE WHO HAVE MENTAL RETARDATION AND CORE

1 OCCURRING PSYCHIATRIC PROBLEMS.

2 Q HAVE YOU SERVED ON ANY COMMITTEES WITHIN THOSE
3 ASSOCIATIONS YOU MENTIONED?

4 A YES. I HAVE CONTINUED TO SERVE, HAVE SERVED ABOUT SEVEN OR
5 EIGHT YEARS ON THE RESEARCH COMMITTEE AT THE NATIONAL
6 ASSOCIATION FOR THE DUALY DIAGNOSED. THROUGH AAIDD, THE
7 AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL
8 DISABILITIES, I'VE BEEN ON SEVERAL COMMITTEES. MOST RECENTLY,
9 THE COMMITTEE THAT IS CALLED THE TERMINOLOGY AND
10 CLASSIFICATION COMMITTEE, WHICH IS THE COMMITTEE THAT
11 PUBLISHES THE AAIDD TERMINOLOGY MANUAL WHICH IS THE MANUAL
12 IN WHICH THE AAIDD PRESENTS ITS DEFINITION AND DIAGNOSTIC
13 CRITERIA FOR MENTAL RETARDATION.

14 Q OKAY. AND WHEN YOU ARE REFERRING TO AAIDD, THAT IS WHAT WAS
15 PREVIOUSLY KNOWN AS THE AAMR?

16 A YES. SO, AAIDD, I BELIEVE IN APPROXIMATELY 2008, CHANGED ITS
17 NAME FROM THE AMERICAN ASSOCIATION ON MENTAL RETARDATION
18 TO THE AAIDD.

19 Q ALL RIGHT. AND COULD YOU DESCRIBE A LITTLE BIT OF YOUR
20 RESEARCH TO US?

21 A MY AREA OF RESEARCH. CURRENTLY I HAVE A GRANT TO DEVELOP
22 THE DIAGNOSTIC ADAPTIVE BEHAVIOR SKILL, WHICH IS A MEASURE
23 THAT ASSESSES ADAPTIVE BEHAVIOR IN PEOPLE WHO MAY OR MAY
24 NOT HAVE MENTAL RETARDATION AND IS USED PRIMARILY TO RULE IN
25 OR RULE OUT SIGNIFICANT DEFICITS IN ADAPTIVE BEHAVIOR. I'VE ALSO

1 DONE RESEARCH IN THE AREA OF EMPLOYMENT, SUPPORTIVE
2 EMPLOYMENT FOR ADULTS WHO HAVE MENTAL RETARDATION AND
3 SUPPORTING THEM IN STARTING SMALL BUSINESSES, WHICH IS
4 FUNDED BY THE U.S. DEPARTMENT OF LABOR. I'VE DONE RESEARCH IN
5 THE AREA AND HAVE PLANS IN THE AREA OF SEVERE PROBLEM
6 BEHAVIOR IN PEOPLE WHO HAVE MENTAL RETARDATION AND
7 CO-OCCURRING PSYCHIATRIC DISORDERS.

8 Q ALL RIGHT. HAVE YOU PUBLISHED ON THE TOPIC OF MENTAL
9 RETARDATION?

10 A YES. I HAVE ABOUT APPROXIMATELY SEVENTY, SEVENTY-FIVE PAPERS
11 RIGHT NOW AND MOST OF THOSE ARE IN THE AREA OF EITHER MENTAL
12 RETARDATION OR AUTISM.

13 Q AND SPECIFICALLY, ARE YOU AN AUTHOR OF THE RED BOOK, OR A
14 CO-AUTHOR?

15 A I'M A CO-AUTHOR OF WHAT IS REFERRED TO AS THE RED BOOK, WHICH
16 IS THE AAMR TERMINOLOGY AND CLASSIFICATION MANUAL.

17 Q CAN YOU DESCRIBE A LITTLE BIT MORE ABOUT WHAT ITS PURPOSE IS?

18 A YES. SO, THE AMERICAN ASSOCIATION, THE AAIDD IS THE OLDEST
19 INTERDISCIPLINARY PROFESSIONAL ORGANIZATION OF
20 PROFESSIONALS WORKING IN THE FIELD OF MENTAL RETARDATION. IT
21 HAS FOR THE PAST EIGHTY TO NINETY YEARS, PUBLISHED A MANUAL
22 THAT'S IN THE ELEVENTH EDITION WHERE IT PRESENTS FOR THE
23 FIELD, THE DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION. IT'S
24 OFTEN THE, IT'S SORT OF THE PARALLEL FOR THE DSM-IV.
25 HISTORICALLY, THE DSM-IV TR HAS ESSENTIALLY ADOPTED AAMR'S

1 DEFINITION AND INCLUDED IT IN ITS PROVISION WHEN IT ESTABLISHES
2 THE DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION. THERE ARE
3 HUNDREDS OF MENTAL DISORDERS IN THE DSM MANUAL. THE ONE
4 RELATED TO MENTAL RETARDATION IS TYPICALLY CONSISTENT WITH
5 THE AAMR DEFINITION.

6 Q CAN YOU EXPLAIN WHAT THE USERS GUIDE IS TO THE RED BOOK?

7 A THE USERS GUIDE IS A DOCUMENT WHERE I AND SEVERAL
8 COLLEAGUES PUBLISHED TO ASSIST CLINICIANS IN MAKING A
9 DIAGNOSIS, MAKING A RULING AND A DIAGNOSIS OF MENTAL
10 RETARDATION AND SO IT ADDRESSES THE ISSUES OF ASSESSMENT OF
11 INTELLIGENCE, ASSESSMENT OF ADAPTIVE BEHAVIOR, DETERMINATION
12 OF AGE OF ONSET. SO, HOW DOES A CLINICIAN GO ABOUT
13 EVALUATING THOSE THREE PRONGS OF THE DIAGNOSIS OR MAKING A
14 DIAGNOSIS OF MENTAL RETARDATION.

15 Q HAVE YOU WON ANY AWARDS FOR YOUR WORK IN THE AREA OF
16 MENTAL RETARDATION?

17 A MOST RECENTLY AAIDD HAS AWARDED ME WITH THEIR SERVICE
18 AWARD IN 2009 AND 2007. ESSENTIALLY, IT IS A RECOGNITION FOR
19 CONTRIBUTIONS TO THE FIELD OF MENTAL RETARDATION. I ALSO
20 RECEIVED A DISSERTATION AWARD FOR MY DOCTORAL DISSERTATION
21 FROM THE ACADEMY OF MENTAL RETARDATION BACK IN 1995.

22 Q CAN YOU GIVE US A ROUGH ESTIMATE OF HOW MANY CLIENTS OR
23 PATIENTS YOU'VE WORKED WITH THAT HAVE BEEN AFFECTED WITH
24 MENTAL RETARDATION?

25 A I'VE PROBABLY BEEN INVOLVED IN THE DIAGNOSIS OR THE

1 ASSESSMENT OF SEVERAL HUNDRED PEOPLE WITH MENTAL
2 RETARDATION EITHER THAT MAY HAVE HAD OR SUSPECTED OF HAVING
3 MENTAL RETARDATION.

4 Q HAVE YOU TESTIFIED PREVIOUSLY IN COURT?

5 A I'M NOT A FORENSIC PSYCHOLOGIST. THE ONLY TIME I'VE TESTIFIED IN
6 A COURTROOM HAS BEEN ON THE ISSUE OF MENTAL RETARDATION
7 AND I'VE DONE THAT MAYBE SEVEN OR EIGHT TIMES IN THE LAST FIVE
8 YEARS.

9 Q ALL RIGHT. AND DID YOU TESTIFY IN THE ATKINS' CASE?

10 A I WAS ONE OF THE EXPERTS IN THE DARYL ATKINS CASE AFTER IT HAD
11 GONE TO THE SUPREME COURT IN TWO THOUSAND, OR AFTER THE
12 SUPREME COURT HAD RULED. IN 2005 THE COMMONWEALTH OF
13 VIRGINIA HAD A HEARING TO DETERMINE WHETHER OR NOT DARYL
14 ATKINS DID, IN FACT, HAVE MENTAL RETARDATION OR NOT.

15 Q ALL RIGHT.

16 **MS. PAAVOLA:** YOUR HONOR, I WOULD MOVE AT THIS TIME TO QUALIFY
17 DOCTOR TASSE AS AN EXPERT IN MENTAL RETARDATION.

18 **THE COURT:** CROSS EXAMINATION AS TO HIS QUALIFICATIONS?

19 **MR. ZELENKA:** JUST A FEW. IN THE ATKINS' CASE, WAS MISTER ATKINS
20 FOUND TO BE MENTALLY RETARDED BY THE COURT?

21 **DR. TASSE:** CAN I EXPLAIN? THERE WAS A JURY HEARING IN 2005. THE
22 JURY FOUND THAT HE DID NOT HAVE MENTAL RETARDATION. MY
23 UNDERSTANDING IS THAT THE DEFENSE TEAM APPEALED THAT TO THE
24 SUPREME COURT OF VIRGINIA. THE VIRGINIA SUPREME COURT VACATED
25 THAT JURY'S DECISION AND SUBSEQUENT TO THAT, MY UNDERSTANDING IS

DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

1 THAT IT WAS SUPPOSED TO BE RE-TRIED OR THE HEARING WAS SUPPOSED
2 TO RE-OCCUR IN 2009, LAST YEAR, AND THERE WAS SOME ISSUE OF
3 PROSECUTORIAL MISCONDUCT AND THEN I THINK HE'S NO LONGER ON
4 DEATH ROW.

5 MR. ZELENKA: OKAY. WHAT OTHER CASES HAVE YOU TESTIFIED IN,
6 THE OTHER SEVEN CASES?

7 MR. TASSE: I TESTIFIED ONCE IN SOUTH CAROLINA IN THE JOHNNY
8 RINGO PEARSON CASE. I TESTIFIED IN A CASE IN ARIZONA, TWICE IN
9 GEORGIA, TWO CASES IN FLORIDA AND ONE IN THE FEDERAL COURT OF
10 TENNESSEE.

11 MR. ZELENKA: IN THE RINGO PEARSON CASE, DID YOU TESTIFY UPON
12 THE EXISTENCE OR NON-EXISTENCE OF MENTAL RETARDATION IN THAT
13 CASE?

14 DR. TASSE: I WAS A REBUTTAL WITNESS.

15 MR. ZELENKA: A REBUTTAL WITNESS FOR THE TECHNIQUES THAT
16 WERE USED?

17 DR. TASSE: CORRECT.

18 MR. ZELENKA: OKAY. BUT NOT AS TO THE ACTUAL ASSESSMENT?

19 DR. TASSE: IT WAS, THE QUESTIONS WERE RELATED TO I.Q.
20 ASSESSMENT, HAVING TO DO WITH WHETHER PERFORMANCE I.Q. WAS MORE
21 RELIABLE THAN VERBAL I.Q., BUT I DIDN'T OPINE REGARDING THE MENTAL
22 RETARDATION IN THAT CASE.

23 MR. ZELENKA: OKAY. AND IN THE -- WELL, I THINK THAT WILL BE MORE
24 APPROPRIATE FOR CROSS EXAMINATION. I HAVE NO FURTHER VOIR DIRE,
25 YOUR HONOR.

DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

1 **THE COURT:** ALL RIGHT. THANK YOU. I'LL ALLOW YOU TO TESTIFY AS
2 AN EXPERT IN THIS FIELD.

3 Q I'D LIKE TO SHOW YOU WHAT'S BEEN MARKED AS APPLICANT'S EXHIBIT
4 #5 AND ASK YOU IF THAT IS A COPY OF YOUR C-V.

5 A YES. IT IS.

6 **MS. PAAVOLA:** YOUR HONOR, I WOULD MOVE TO ADMIT EXHIBIT #5.

7 **THE COURT:** NUMBER #5, THE DOCTOR'S C-V. ANY OBJECTION?

8 **MR. ZELENKA:** NO OBJECTION.

9 (WHEREUPON, THE CURRICULUM VITAE OF DOCTOR TASSE IS
10 ENTERED INTO EVIDENCE AS AFFIANT'S EXHIBIT #5, WITHOUT OBJECTION)

11 Q DOCTOR TASSE, YOU REVIEWED A NUMBER OF MATERIALS IN THIS
12 CASE. COULD YOU DESCRIBE, BRIEFLY, WHAT KINDS OF MATERIALS
13 YOU REVIEWED?

14 A I REVIEWED SEVERAL FOLDERS OR FILES AND REPORTS OF PREVIOUS
15 PSYCHOLOGICAL EVALUATIONS INCLUDING: DOCTOR SAYLOR ---

16 **THE COURT:** I'M SORRY. DOCTOR WHO?

17 **DR. TASSE:** DOCTOR SAYLOR. S-A-Y-L-O-R.

18 **THE COURT:** AND WHEN WAS THAT ONE?

19 **DR. TASSE:** THE EVALUATION WAS DONE 05/15/1998.

20 **THE COURT:** AND WHO WAS DOCTOR SAYLOR?

21 **DR. TASSE:** HE WAS A PSYCHOLOGIST. I DON'T KNOW IF HE WAS
22 RETAINED BY THE DEFENSE OR THE PROSECUTION.

23 **THE COURT:** THANK YOU.

24 A DOCTORS BEHRMANN AND VIDIC.

25 **THE COURT:** V-E...

1 DR. TASSE: V-I-D-I-C. VIDIC.

2 THE COURT: HOW DO YOU SPELL BEHRMANN?

3 DR. TASSE: B-E-H-R-M-A-N-N.

4 THE COURT: WHEN WAS THAT ONE?

5 DR. TASSE: I THINK IT WAS DECEMBER AND JANUARY. DECEMBER OF
6 '98 AND JANUARY OF '99.

7 THE COURT: THANK YOU.

8 A THE NEXT ONE WAS A REPORT ON FILE FROM DOCTOR SANDLER AND
9 MCABEE. MCABEE IS M-C-A-B-E-E. AND THAT WAS AN EVALUATION
10 DONE 02/09/1999.

11 THE COURT: THAT WAS SANDLER?

12 DR. TASSE: SANDLER. S-A-N-D-L-E-R.

13 A THEN I REVIEWED A FILE FROM DOCTOR KEYES, AND HE CONDUCTED
14 HIS EVALUATION 02/05/1999. KEYES, K-E-Y-E-S. AND THEN I REVIEWED
15 A REPORT ON FILE BY DOCTOR KNIGHT, K-N-I-G-H-T, AND SHE DID AN
16 EVALUATION ON 12/10/2008. I ALSO REVIEWED SOME WRITING
17 ANALYSIS DONE BY DOCTOR ZENGER, Z-E-N-G-E-R. I ALSO REVIEWED
18 AFFIDAVITS THAT WERE PROVIDED TO ME, SCHOOL RECORDS, SOCIAL
19 SECURITY ADMINISTRATION RECORDS, DMV RECORDS, TRANSCRIPTS,
20 A GENOGRAM, A REPORT FROM SUBSTANCE ABUSE EVALUATION OR
21 CLINIC AND THOSE ARE THE RECORDS THAT I RELIED UPON, OR THOSE
22 ARE THE RECORDS THAT I REVIEWED AND I ALSO HAD TWO MEETINGS
23 WITH MS. HAMMOCK.

24 Q DID YOU CONDUCT AN INTERVIEW WITH KENNETH SIMMONS?

25 A I MET WITH HIM BRIEFLY ON JANUARY 20TH OR 21ST, 2010. THAT

1 MEETING WAS ABOUT AN HOUR OR AN HOUR-AND-A-HALF.

2 Q ALL RIGHT. DOCTOR TASSE, AT THIS POINT, I'D LIKE TO ASK YOU SOME
3 QUESTIONS ABOUT WHAT MENTAL RETARDATION IS AND HOW TO GO
4 ABOUT ASSESSING IT.

5 MS. PAAVOLA: IN LIEU OF HIS SLIDE PRESENTATION, YOUR HONOR,
6 COULD I HAND UP A PRINT OUT?

7 THE COURT: NO, MA'AM. EVEN THOUGH Y'ALL WERE VERY, VERY LATE.
8 WHERE'S THE PARALEGAL THAT'S GOING TO DO IT?

9 (A POWERPOINT PRESENTATION IS SET UP TO PROJECT ON A LARGE
10 SCREEN)

11 Q SO, DOCTOR TASSE, I WAS ASKING YOU IF YOU COULD EXPLAIN TO US
12 WHAT MENTAL RETARDATION IS AND HOW TO ASSESS IT.

13 A SO, THERE IS ESSENTIALLY TWO DIAGNOSTIC SYSTEMS THAT ARE
14 USED TO DIAGNOSE MENTAL RETARDATION. THERE IS THE DSM
15 MANUAL, WHICH HAS THREE PRONGS TO IT. THE FIRST PRONG IS, AND
16 THIS IS A QUOTE FROM THE MANUAL THE DSM: PRONG ONE IS
17 SIGNIFICANTLY SUB-AVERAGE INTELLECTUAL FUNCTIONING, WHICH IS
18 AN I.Q. OF APPROXIMATELY 70 OR BELOW ON AN INDIVIDUALLY
19 ADMINISTERED I.Q. TEST. PRONG TWO IS CONCURRENT DEFICITS OR
20 IMPAIRMENTS IN PRESENT ADAPTIVE FUNCTIONING AND THAT REFERS
21 TO THE PERSON'S EFFECTIVENESS IN MEETING THE STANDARDS
22 EXPECTED FOR HIS OR HER AGE BY HIS OR HER CULTURAL GROUPS,
23 AND SO DEFICITS IN AT LEAST TWO AREAS: COMMUNICATION,
24 SELF-CARE, HOME LIVING, SOCIAL/INTERPERSONAL SKILLS, USE OF
25 COMMUNITY RESOURCES, SELF-DIRECTION, FUNCTIONAL ACADEMIC

1 SKILLS, WORK, LEISURE, HEALTH AND SAFETY. THE THIRD PRONG
2 REFERS TO THE ONSET OF THESE DEFICITS MUST HAVE AN ONSET
3 BEFORE THE AGE OF EIGHTEEN, MUST ORIGINATE BEFORE THE AGE OF
4 EIGHTEEN.

5 THE COURT: WELL, DOCTOR, THAT'S BASICALLY WHAT THE SOUTH
6 CAROLINA CODE SAYS IT IS.

7 DR. TASSE: I WOULD HOPE SO, YOUR HONOR. I WOULD HOPE SO.

8 THE COURT: 16-3-20(C)(b)10 USES BASICALLY THE SAME LANGUAGE
9 WITH A FEW VARIATIONS.

10 Q AND THE OTHER DIAGNOSTIC MANUAL THAT PEOPLE REFER TO IS THE
11 AAMR MANUAL, WHICH ESSENTIALLY IS VIRTUALLY IDENTICAL TO THE
12 DSM WHICH REFERS TO MENTAL RETARDATION AS BEING
13 CATEGORIZED BY SIGNIFICANT LIMITATIONS IN INTELLECTUAL
14 FUNCTIONING AND ADAPTIVE BEHAVIOR AND THEY DEFINE ADAPTIVE
15 BEHAVIOR AS INCLUDING: CONCEPTUAL SKILLS, SOCIAL SKILLS AND
16 PRACTICAL ADAPTIVE SKILLS AND DEFICITS NEED TO BE IN AT LEAST
17 ONE OF THOSE THREE, OR A MEASURE OF OVERALL ADAPTIVE
18 BEHAVIOR. AND AGAIN, THE THIRD PRONG IS THE DISABILITY, THE
19 DEFICITS MUST ORIGINATE BEFORE AGE EIGHTEEN.

20 Q ALL RIGHT. AND ARE THERE SOME SPECIFIC CRITERIA FOR HOW TO
21 EVALUATE THIS TEST?

22 A SO, THERE ARE BASIC ASSUMPTIONS THAT ARE IMPORTANT. THESE
23 ASSUMPTIONS ARE THE ONES THAT AAMR PUTS FORTH, BUT THEY ARE
24 APPLICABLE FOR THE DSM EVALUATIONS OR ANY EVALUATION OF
25 MENTAL RETARDATION. IT'S IMPORTANT TO REMEMBER THE

1 ASSUMPTION THAT PRESENT FUNCTIONING MUST BE CONSIDERED
2 WITHIN THE CONTEXT OF THE PERSON'S COMMUNITY, SOCIETY IN
3 GENERAL, WHICH IS TYPICAL FOR THAT PERSON'S AGE, PEERS AND
4 CULTURE. A VALID ASSESSMENT MUST CONSIDER CULTURAL AND
5 LINGUISTIC DIVERSITY AS WELL AS DIFFERENCES IN COMMUNICATION,
6 MOTOR SENSORY ISSUES AND SO FORTH. THE THIRD ASSUMPTION IS
7 THAT EVERYBODY HAS STRENGTHS AND WEAKNESSES AND SO EVEN
8 THOUGH A PERSON HAS SIGNIFICANT DEFICITS IN ADAPTIVE BEHAVIOR,
9 IT'S NOT UNUSUAL AND QUITE COMMON WITH PEOPLE EVEN WITH
10 DEFICITS IN ADAPTIVE BEHAVIOR, TO HAVE STRENGTHS IN OTHER
11 AREAS AND THEN THE OTHER TWO ASSUMPTIONS ARE MORE
12 RELEVANT IN TERMS OF PLANNING AN ASSESSMENT FOR
13 INTERVENTION OR WHEN MAKING A DIAGNOSIS. AND THE FIFTH ONE
14 JUST REFERS TO, WITH APPROPRIATE SUPPORTS, EVEN PEOPLE WITH
15 MENTAL RETARDATION, FUNCTIONING SHOULD GENERALLY IMPROVE
16 AND SO THEY CAN LEARN, THEY CAN DEVELOP NEW SKILLS AND
17 ACQUIRE NEW KNOWLEDGE.

18 Q ALL RIGHT. AND I THINK YOU SAID THESE SAME ASSUMPTIONS WOULD
19 APPLY UNDER THE DSM DEFINITION AS WELL.

20 A YES. THEIR BASIC ASSUMPTIONS.

21 Q CAN YOU EXPLAIN IN A LITTLE MORE DETAIL, THE DIAGNOSTIC
22 CRITERIA FOR PRONGS -- I THINK YOU ESSENTIALLY SAID THERE ARE
23 THREE PRONGS. PRONG ONE IS SIGNIFICANT DEFICITS IN GENERAL
24 INTELLECTUAL FUNCTIONING. CAN YOU EXPLAIN WHAT THAT MEANS?

25 A I WILL, BUT LET ME FIRST MENTION THAT THE THREE CRITERIA,

1 WHETHER WE ARE REFERRING TO AAMR OR DSM, ARE IDENTICAL. SO,
2 THEY ARE CONSISTENT AND THE STATUTE THAT YOU HAVE IN SOUTH
3 CAROLINA ESSENTIALLY IS PROBABLY DRAWN FROM THE DSM AND
4 AAMR AND SO IT'S NOT SURPRISING THAT IT IS CONSISTENT. SO THE
5 WAY WE ASSESS PRONG ONE IS, IT'S IMPORTANT TO REALIZE THAT
6 THE DSM AND AAMR, BOTH SYSTEMS REFER TO A SCORE THAT IS
7 APPROXIMATELY 70. THE REASON IT SAYS, APPROXIMATELY, IS THAT
8 I.Q. TESTING IS NOT INFALLIBLE, IT IS NOT PRECISE TO THE DIGIT. SO,
9 WE SAY APPROXIMATELY BECAUSE THERE IS ALWAYS ERROR IN
10 TESTING AND THERE IS SOMETHING REFERRED TO AS THE STANDARD
11 ERROR OF MEASUREMENT AND SO DIFFERENT TESTS HAVE AN
12 EMPIRICALLY DERIVED STANDARD ERROR OF MEASUREMENT SO THAT
13 WHEN WE EVALUATE THE TESTS, WE KNOW HOW MUCH ERROR THERE
14 IS AROUND THE SCORES WE OBTAIN FOR THAT SPECIFIC TEST. SO,
15 PRONG ONE REFERS TO A SCORE OF APPROXIMATELY 70 OR TWO
16 STANDARD DEVIATIONS BELOW THE MEAN WHICH IS A NUMERICAL
17 NUMBER OF ABOUT 70.

18 Q BEFORE YOU GO ON, CAN YOU EXPLAIN WHAT YOU MEAN BY TWO
19 STANDARD DEVIATIONS BELOW THE MEAN?

20 A IN THE GENERAL POPULATION, WHEN WE DEVELOP TESTS OF ABILITY,
21 LIKE AN I.Q. TEST, WHAT WE DO IS WE ADMINISTER THESE TESTS TO A
22 LARGE POPULATION, A LARGE SAMPLE, A RANDOM SAMPLE AND THEN
23 WE TRY AND IDENTIFY WHAT IS THE AVERAGE SCORE, THE AVERAGE
24 NUMBER OF POINTS THAT THE GENERAL POPULATION GETS AND WHAT
25 WE DO ON THESE TESTS IS WE ANCHOR THAT STANDARD SCORE AT

1 100. SO THEN, EVERYBODY WHO IS AROUND 100 IS CONSIDERED
2 AVERAGE AND THEN, OBVIOUSLY, THERE ARE PEOPLE WHO SCORE
3 ABOVE AVERAGE, THERE ARE PEOPLE WHO SCORE BELOW AVERAGE.
4 A STANDARD DEVIATION IS A SLICE ABOVE OR A SLICE BELOW THAT
5 MEAN, OR THAT AVERAGE AND WE SET THE SLICE AT ABOUT FIFTEEN
6 POINTS, SO PLUS OR MINUS FIFTEEN POINTS FROM THAT MEAN OF A
7 HUNDRED INCLUDES ABOUT 68% OF THE POPULATION. THEN IF YOU
8 GO TWO STANDARD DEVIATIONS UP AND DOWN, THAT INCLUDES
9 APPROXIMATELY 95% OF THE POPULATION. IN THE CASE OF MENTAL
10 RETARDATION, WE'RE NOT LOOKING AT THE ABOVE MEAN. WE ARE
11 LOOKING AT PEOPLE WHO ARE TWO STANDARD DEVIATIONS BELOW
12 THE MEAN OR TWO TIMES FIFTEEN, PEOPLE WHO ARE ABOUT 70,
13 APPROXIMATELY 70 OR LESS.

14 Q ALL RIGHT. AND YOU EXPLAINED THE STANDARD ERROR OF
15 MEASUREMENT —

16 A BUT IF I MAY, YOU KNOW, THE STANDARD ERROR OF MEASUREMENT IS
17 PRESENT AND ALL THE SYSTEMS INCLUDING THE DSM, AGAIN, THIS IS A
18 QUOTE: IT SHOULD BE NOTED THAT ALL MEASUREMENT ENTERED IS
19 APPROXIMATELY FIVE POINTS PLUS OR MINUS. SO, WHEN WE SAY 70
20 IN THE DSM OR WHEN AAMR SAYS 70, WE ARE ACTUALLY REFERRING
21 TO A CONFIDENCE INTERVAL OF APPROXIMATELY 70 TO 75, WHICH
22 WOULD MEET PRONG ONE, BECAUSE MOST TESTS HAVE AN
23 APPROXIMATE STANDARD ERROR OF MEASUREMENT OF 5 POINTS TO
24 HAVE A CERTAIN DEGREE OF CONFIDENCE AROUND THAT SCORE.

25 Q OKAY. CAN YOU EXPLAIN — I THINK THIS IS TRUE IN THE AAMR.

1 A BOTH SYSTEMS ARE CONSISTENT IN SAYING IN THE DEFINITION, IN THE
2 TEXT, THAT SOMEONE CAN HAVE A SCORE UP TO 75 AND STILL BE
3 CONSIDERED TO MEET PRONG ONE BECAUSE AGAIN, THESE TESTS
4 ARE NOT PERFECT AND WE KNOW WHAT THE ERROR IS
5 APPROXIMATELY AND IT'S THE CONFIDENCE LEVEL AND THE
6 TOLERANCE LEVEL SHOULD BE NO MORE THAN FIVE POINTS OR
7 APPROXIMATELY 70 TO 75 OR LOWER.

8 Q OKAY. CAN YOU EXPLAIN WHAT YOU MEAN BY GENERAL INTELLECTUAL
9 FUNCTIONING OR GEE?

10 A GENERAL INTELLECTUAL FUNCTIONING, I MEAN, INTELLIGENCE IS A
11 BROAD CONCEPT. IT INCLUDES KNOWLEDGE, INFORMATION, KNOWING
12 WORDS, VOCABULARY, UNDERSTANDING HOW WORDS ARE THE SAME,
13 BEING ABLE TO THINK FAST ON YOUR FEET, BEING ABLE TO SOLVE
14 PROBLEMS, BEING ABLE TO USE INFORMATION AND KNOWLEDGE,
15 FROM OTHER SITUATIONS AND NOVEL SITUATIONS WHICH HAVE NOT
16 BEEN CONFRONTED. IT ALSO INCLUDES MEMORY, THE ABILITY TO
17 HOLD THINGS IN YOUR HEAD AND SO INTELLIGENCE OR GEE IS ALL OF
18 THAT ENCOMPASSING PUT TOGETHER. TESTS OF INTELLIGENCE
19 GENERALLY HAVE SUB-TESTS THAT MEASURE ALL THESE DIFFERENT
20 COMPONENTS OF INTELLIGENCE WHETHER WE ARE TALKING ABOUT
21 WECHSLER SCALES OR STANFORD-BINET OR CAUGHMAN TESTS.
22 USUALLY, WHAT WE REFER TO AS THE GEE IS THE FULL SCALE SCORE,
23 THE FULL SCALE OR COMPOSITE I.Q. SCORE AS THE BEST INDICATOR
24 OF GENERAL INTELLECTUAL FUNCTIONING.

25 Q AND HOW IS IT MEASURED?

1 A HOW IS THAT MEASURED?

2 Q YES. HOW DO YOU GO ABOUT MEASURING GENERAL INTELLECTUAL
3 FUNCTIONING?

4 A WE USUALLY, FOR THE PURPOSE OF DIAGNOSING MENTAL
5 RETARDATION, WE USE A STANDARDIZED INDIVIDUALLY ADMINISTERED
6 TEST OF INTELLIGENCE AND THERE ARE A HANDFUL THAT ARE
7 COMPREHENSIVE TESTS OF INTELLIGENCE. AND THEN WE ADMINISTER
8 THOSE AND ONCE YOU CORRECT IT, ONCE YOU CORRECT THE
9 PERFORMANCE OF THE INDIVIDUAL, YOU OBTAIN A FINAL SCORE,
10 WHICH IS A FULL SCALE SCORE AND THEN THERE ARE COMPONENTS
11 TO THAT. THERE IS A VERBAL COMPONENT AND A NON-VERBAL
12 COMPONENT, WHICH ARE SUB-PARTS OF THAT OVERALL SCORE.

13 Q AND I -- CAN YOU LIST, I THINK YOU HAVE A SLIDE THAT LISTS SOME OF
14 THE TESTS THAT PROVIDE THIS TEST TESTING CAPABILITY THAT YOU
15 JUST DESCRIBED.

16 A YES. AND SO AGAIN, AAMR AND DSM REFER TO THE GLOBAL FACTOR,
17 THE GEE, SO THESE ARE PROBABLY THE BEST TESTS THAT WE HAVE
18 TODAY THAT ARE USED TYPICALLY FOR RULING IN OR RULING OUT
19 MENTAL RETARDATION BECAUSE THEY ARE COMPREHENSIVE TESTS
20 THAT ARE STANDARDIZED AND ADMINISTERED INDIVIDUALLY. THERE IS
21 A WECHSLER ADULT INTELLIGENCE SCALE, THERE'S THE ONE FOR THE
22 CHILDREN, THERE'S THE ONE FOR THE PRESCHOOLERS. THERE'S THE
23 STANFORD-BINET, THERE'S THE WOODCOCK-JOHNSON AND THERE
24 ARE A FEW OTHERS. AND THEN THERE ARE OTHER TESTS THAT WE
25 AVOID USING WHICH ARE THESE NARROW BAND TESTS LIKE NON-

1 VERBAL TESTS OF INTELLIGENCE AND IN THIS CASE WITH MISTER
2 SIMMONS, WE DON'T SEE ANY OF THESE NARROW BAND TESTS USED,
3 BUT THERE ARE TESTS THAT ARE SOMETIMES USED AS SCREENERS,
4 SCREENING INSTRUMENTS WHICH ARE QUICK, DIRTY AND CAN GIVE
5 YOU A BALLPARK AND THEN A MORE COMPREHENSIVE TEST WOULD BE
6 USED TO REALLY RULE OUT OR RULE IN SIGNIFICANT DEFICITS IN I.Q.

7 Q CAN YOU EXPLAIN WHAT THE FLYNN EFFECT IS?

8 A THE FLYNN EFFECT IS RESEARCH THAT WE'VE LOOKED AT OR HAS
9 BEEN ANALYZED IN THE FIELD FOR THE PAST FIFTY TO SIXTY YEARS
10 WHICH SHOWS THAT THERE IS AN INCREASE IN TERMS OF
11 PERFORMANCE ON I.Q. TESTS. PEOPLE ARE SCORING BETTER ON OUR
12 I.Q. TESTS FROM GENERATION TO GENERATION. WHAT WE NOTICE IS
13 THAT TEN YEARS AGO, PEOPLE WERE SCORING ON AVERAGE, THREE
14 POINTS LESS THAN TODAY'S GENERATION ON THE SAME TESTS. WHY
15 THAT IS? IS IT NUTRITION, IS IT EDUCATION, IS IT COMPUTERIZATION, IS
16 IT INCREASE, YOU KNOW, NUTRITION? THAT'S NOT QUITE CLEAR AND
17 IT'S NOT NECESSARILY THAT PEOPLE ARE GETTING SMARTER, WE JUST
18 SEEM TO BE GETTING BETTER AT THESE TESTS OF INTELLIGENCE. SO,
19 WHAT IS IMPORTANT IN THAT IS THAT WE NEED TO REVISE THESE
20 TESTS PERIODICALLY. THAT'S WHY WE WENT FROM THE WAIS TO THE
21 WAIS-R TO THE WAIS-III TO THE WAIS-IV AND IT'S IMPORTANT TO USE
22 THE MOST CURRENT AND THE MOST UP TO DATE TESTS WHEN
23 MEASURING INTELLIGENCE. THAT'S WHAT THE FLYNN EFFECT HAS
24 TAUGHT US.

25 Q CAN YOU EXPLAIN WHAT THE PRACTICE EFFECT IS?

1 A THE PRACTICE EFFECT IS A PHENOMENON THAT WE OBSERVED THAT
2 WHEN THE SAME INDIVIDUAL IS ADMINISTERED THE SAME TEST, AN I.Q.
3 TEST IN CLOSE PROXIMITY WITHIN, GENERALLY, SIX MONTHS TO A
4 YEAR, THEY WILL GENERALLY DO BETTER ON THE SECOND TEST.
5 THEIR PERFORMANCE IS HIGHER AND IT'S NOT BECAUSE THEY
6 LEARNED THE ANSWER BECAUSE IN A STANDARDIZED TEST OF
7 INTELLIGENCE, THE PERSON, THE PSYCHOLOGIST, THE TESTER,
8 DOESN'T GIVE THE RIGHT ANSWERS. HOWEVER, WHAT WE ASSUME IS
9 THAT THE FACT OF HAVING PRACTICED SOME OF THESE TASKS,
10 MANIPULATING THE BLOCKS, BEING EXPOSED TO THE SEQUENCE OF
11 PICTURES, THE SECOND TIME AROUND WHEN IT'S STILL CLOSE AND
12 FRESH IN THEIR MEMORY, THEY GENERALLY WILL SCORE HIGHER,
13 EVEN IF THEIR INTELLIGENCE HASN'T CHANGED. SO, THAT'S WHAT WE
14 REFER TO AS THAT PRACTICE EFFECT, THAT HAVING ALREADY DONE
15 THAT, THAT TEST OR A SIMILAR TEST IN CLOSE PROXIMITY, AND
16 GENERALLY THAT'S WITHIN A YEAR.

17 Q ALL RIGHT. I'D LIKE TO TALK ABOUT PRONG TWO, WHICH IS A
18 SIGNIFICANT DEFICIT IN ADAPTIVE BEHAVIOR. HOW DO YOU GO ABOUT
19 ASSESSING THAT?

20 A THE SIGNIFICANCE OF ADAPTIVE BEHAVIOR. REALLY THERE ARE
21 SEVERAL INSTRUMENTS, STANDARDIZED TESTS THAT EXIST TO
22 MEASURE ADAPTIVE BEHAVIOR, LIKE THE TESTS OF INTELLIGENCE. SO,
23 WE HAVE THE ADAPTIVE BEHAVIOR SYSTEM, WE HAVE THE VINELAND
24 ADAPTIVE BEHAVIOR SCALES WHICH WERE USED IN THE CASE OF
25 MISTER SIMMONS, AND THEN WE HAVE THE SCALES OF INDEPENDENT

1 BEHAVIOR AND THE ADAPTIVE BEHAVIOR SCALES. AND SO THESE ARE
2 FOUR TESTS THAT ARE AVAILABLE COMMERCIALY THAT ARE
3 STANDARDIZED, ADMINISTERED INDIVIDUALLY AND HAVE BEEN
4 NORMED ON THE GENERAL POPULATION AND ARE CONSIDERED GOOD
5 INSTRUMENTS TO MEASURE ADAPTIVE BEHAVIOR. IN ADDITION TO
6 THAT, THOUGH, WHAT WE OFTEN RECOMMEND IS USING MULTIPLE
7 SOURCES OF INFORMATION FOR ADAPTIVE BEHAVIOR. SO USING A
8 STANDARDIZED INSTRUMENT IS HELPFUL BECAUSE IT HELPS QUANTIFY
9 THE DEFICITS IF THERE ARE DEFICITS AND WHEN WE ARE MAKING A
10 DIAGNOSIS OF MENTAL RETARDATION, WHAT WE ARE LOOKING AT, THE
11 QUESTION IS, ARE THERE DEFICITS IN ADAPTIVE BEHAVIOR. AND IF WE
12 IDENTIFY DEFICITS, WE NEED TO KNOW, ARE THOSE DEFICITS
13 SIGNIFICANT. SO, KNOWING WHAT THE GENERAL POPULATION, WHAT
14 THEIR SKILLS ARE IN THESE AREAS ON A STANDARD INSTRUMENT
15 ALLOWS US TO KNOW WHETHER THE PERSON IS BELOW AVERAGE,
16 SIGNIFICANTLY BELOW AVERAGE OR NOT. USUALLY WHAT IS
17 RECOMMENDED IS USING MULTIPLE INFORMANTS WHO GIVE
18 INFORMATION ABOUT THE INDIVIDUAL, PARENTS, SIBLINGS, FRIENDS,
19 SPOUSES, ASSESSING THE INDIVIDUAL, THEIR ADAPTIVE BEHAVIOR IN
20 THE COMMUNITY, IN SOCIETY. THAT'S HOW WE ASSESS ADAPTIVE
21 BEHAVIOR. WE WANT TO KNOW, HAS THE PERSON LEARNED AND IS
22 THE PERSON PERFORMING THE SKILLS THAT SOCIETY EXPECTS OF US
23 AND THAT'S RELATED TO MOVING AROUND IN THE COMMUNITY, BEING
24 EMPLOYED SUCCESSFULLY AND BEING ECONOMICALLY SELF-
25 SUFFICIENT, ENGAGING SOCIALLY WITH FRIENDS AND PEERS AND

1 FAMILY MEMBERS, SELF-CARE, HOME LIVING AND SO FORTH. NOW,
2 WHAT WE ASSESS IS TYPICALLY THEIR TYPICAL FUNCTIONING. WHAT
3 DOES THE PERSON TYPICALLY DO? DOES THE PERSON MAKE THEIR
4 BED IN THE MORNING, DO THEY COOK, DO THEY COOK FOR
5 THEMSELVES, DO THEY PAY THEIR BILLS ON TIME AND SO FORTH AND
6 THERE IS A BIG DIFFERENCE THERE BECAUSE WE ARE NOT SAYING, DO
7 THEY KNOW THEY SHOULD PAY THEIR BILLS. WE ASK AND MEASURE,
8 DO THEY PAY THEIR BILLS. THAT'S VERY, VERY DIFFERENT AND VERY
9 IMPORTANT AND THERE ARE A LOT OF ISSUES RELATED TO ADAPTIVE
10 BEHAVIORS AND SELECTING A GOOD INSTRUMENT. AND ONE
11 CONFUSION SOMETIMES IS PROBLEM BEHAVIOR, ADAPTIVE BEHAVIOR
12 AND BY DEFINITION, THOSE ARE TWO DIFFERENT THINGS. SO,
13 ADAPTIVE BEHAVIOR IS ENGAGING BEHAVIOR THAT SOCIETY EXPECTS
14 US TO ENGAGE IN AND SOMETIMES PEOPLE ENGAGE IN PROBLEM
15 BEHAVIOR BECAUSE THEY HAVE POOR ADAPTIVE BEHAVIOR.
16 SOMETIMES THEY ENGAGE IN PROBLEM BEHAVIOR BECAUSE THEY
17 HAVE A MENTAL HEALTH OR FOR OTHER REASONS THAT ARE
18 UNRELATED TO ADAPTIVE BEHAVIOR.

19 Q AND CAN YOU EXPLAIN -- THERE IS A DIFFERENCE BETWEEN
20 ASSESSING MAXIMUM PERFORMANCE AND REGULAR PERFORMANCE.
21 CAN YOU EXPLAIN THAT?

22 A TESTS OF INTELLIGENCE MEASURE THE PERSON'S CAPACITY. WHAT
23 CAN THEY DO? CAN THEY MANIPULATE THESE WORDS? CAN THEY
24 UNDERSTAND THESE VOCABULARY WORDS AND DO THEY
25 UNDERSTAND THE RELATIONSHIP OF THESE SHAPES? ADAPTIVE

1 BEHAVIOR, WE ARE NOT MEASURING CAPACITY. WHEN WE ASSESS
2 ADAPTIVE BEHAVIOR WE ARE NOT MEASURING WHETHER OR NOT A
3 PERSON CAN TAKE A LIGHTBULB AND PUT IT IN A FIXTURE. WE'RE
4 MEASURING, DOES A PERSON HAVE THE ABILITY AND DO THEY
5 TYPICALLY CHANGE A LIGHTBULB WHEN IT'S BURNED WHICH IMPLIES
6 RECOGNIZING WHEN THE LIGHTBULB IS BURNED, RECOGNIZE HOW TO
7 TAKE THE BULB OUT SAFELY, PURCHASING THE APPROPRIATE ONE,
8 PUTTING IT IN. THAT'S THE ASPECT OF TYPICAL PERFORMANCE AND
9 NOT JUST MEASURING WHETHER THEY CAN DO THIS OR DO THAT.

10 Q ALL RIGHT. AND THEN, PRONG THREE IS, "SIGNIFICANT DEFICITS IN I.Q.
11 AND ADAPTIVE BEHAVIOR WHICH ORIGINATES BEFORE AGE EIGHTEEN."
12 CAN YOU EXPLAIN WHAT THAT MEANS?

13 A MENTAL RETARDATION IS A DEVELOPMENTAL DISABILITY. WHAT IT
14 MEANS IS THAT IT'S A CONDITION REGARDLESS OF THE CAUSE,
15 REGARDLESS OF THE ETIOLOGY. IT'S A CONDITION THAT MUST BE
16 MANIFESTED BEFORE THE AGE OF EIGHTEEN WHICH WE SET AS WHEN
17 DEVELOPMENT HAS PRETTY MUCH MATURED. SO, SOMEBODY COULD
18 HAVE DYSFUNCTIONING AND SIGNIFICANT DEFICITS IN INTELLIGENCE
19 AND ADAPTIVE BEHAVIOR BECAUSE OF SOMETHING THAT'S GENETIC,
20 THAT THEY'VE INHERITED FROM A PARENT, BECAUSE THERE IS SOME
21 SORT OF INSULT WHEN THE WOMAN IS PREGNANT; THERE'S A
22 TERATOGEN, AN ACCIDENT, AN INFECTION. SOMETHING COULD
23 HAPPEN DURING DELIVERY; AN UMBILICAL CORD GETS CAUGHT
24 AROUND THE BABY'S NECK, THERE IS LACK OF OXYGEN, AN INFECTION
25 DURING DELIVERY AND THERE'S A HOST OF THINGS THAT OCCUR THEN

1 ALSO. A BABY CAN BE BORN NORMAL AND THEN AFTER BIRTH, THINGS
2 CAN HAPPEN; ACCIDENTS, MALNUTRITION, IMPOVERISHED
3 ENVIRONMENT THAT COULD THEN RESULT. AND SO WHAT WE NEED TO
4 DO IS ESTABLISH NOT NECESSARILY THE CAUSE, BUT ESTABLISH THAT
5 THESE DEFICITS ORIGINATED OR WERE PRESENT BEFORE THE AGE OF
6 EIGHTEEN. SO, IT'S IMPORTANT TO DEVELOP A GOOD FAMILY HISTORY,
7 SOCIAL HISTORY, DOCUMENTING A FEW INTERVIEWS OF FAMILY
8 MEMBERS, SIBLINGS, OLDER SIBLINGS TYPICALLY, GRANDPARENTS,
9 DEVELOPMENTAL MILESTONES OF THE PERSON'S LIFE; DO THEY WALK,
10 TALK, KIND OF AT THE SAME TIME AS OTHER KIDS, REVIEWING SCHOOL
11 RECORDS, REVIEWING OTHER PSYCH EVALUATIONS THAT MAY EXIST
12 DURING THE PRE-EIGHTEEN PERIOD AND DOCUMENTING WHETHER
13 THE PRESENCE OF ANY OF THESE DEFICITS WERE THERE BEFORE AGE
14 EIGHTEEN. SO, IT'S INTERESTING BECAUSE, ALTHOUGH WE SAY THE
15 ONSET HAS TO BE BEFORE THE AGE EIGHTEEN, IT DOESN'T
16 NECESSARILY MEAN THE PERSON HAS TO BE DIAGNOSED BEFORE
17 EIGHTEEN. BUT IF THE PERSON HAS NEVER HAD A DIAGNOSIS BEFORE
18 AGE EIGHTEEN, IT'S REALLY INCUMBENT UPON THE PROFESSIONALS
19 TO MAKE SURE THAT THEY DETERMINE THAT THOSE DEFICITS WERE
20 PRESENT BEFORE EIGHTEEN TO MEET A DEFINITION OR A DIAGNOSIS
21 OF MENTAL RETARDATION.

22 Q ALL RIGHT. AND I THINK YOU'VE TOUCHED A LITTLE BIT ON THE
23 CAUSES ALREADY, BUT CAN YOU EXPLAIN IN A LITTLE MORE DETAIL
24 GENERALLY WHAT THE CAUSES OF MENTAL RETARDATION ARE?

25 A OUR RESEARCH IN MENTAL RETARDATION SHOWS THAT ABOUT FIVE

1 PERCENT OF CASES OF MENTAL RETARDATION ARE GENETIC OR
2 HEREDITARY OR CHROMOSOMAL AT 30%. HEREDITARY ARE THINGS
3 THAT A BABY, A CHILD INHERITS FROM THEIR PARENT THAT RESULTS IN
4 A SYNDROME, A FRAGILE X SYNDROME. CHROMOSOME DISORDERS,
5 TOXINS. CHROMOSOME DISORDERS ARE THINGS LIKE DOWNS
6 SYNDROME, WHICH IS ONE THAT PEOPLE RECOGNIZE BECAUSE THERE
7 ARE CHARACTERISTICS AND FACIAL FEATURES THAT ARE TYPICAL OF
8 PEOPLE WHO HAVE DOWNS SYNDROME. THERE COULD BE PROBLEMS
9 DURING PREGNANCY. APPROXIMATELY 10% OF THOSE CASES OF
10 MENTAL RETARDATION ARE ATTRIBUTED TO THAT. INFECTIONS,
11 EITHER PRE OR PERINATAL. THERE ARE ENVIRONMENTAL INFLUENCES
12 THAT COULD BE THE MOTHER TOOK ALCOHOL OR FETAL ALCOHOL
13 SYNDROME OR EFFECTS. DESPITE ALL THAT, THERE'S 30% TO 40% OF
14 CASES FOR WHICH WE HAVE NO IDEA WHAT THE CAUSE WAS OR WE
15 CAN'T DETERMINE IF IT WAS PRENATAL, PERINATAL, POSTNATAL, IT
16 COULD BE -- IT'S UNDETERMINED.

17 Q CAN A PERSON HAVE MENTAL RETARDATION AND SOME OTHER
18 DISORDER AS WELL?

19 A YES. SO, MENTAL RETARDATION ISN'T A PROTECTIVE FACTOR AGAINST
20 MENTAL ILLNESS. IT'S NOT A PROTECTIVE FACTOR AGAINST OTHER
21 DISORDERS, SO SOMEBODY COULD HAVE MENTAL RETARDATION AND
22 DEVELOP SCHIZOPHRENIA. YOU CAN HAVE MENTAL RETARDATION AND
23 DEVELOP DEPRESSION OR ANTISOCIAL PERSONALITY DISORDER. YOU
24 CAN ALSO HAVE SUBSTANCE ABUSE PROBLEMS AND STILL HAVE
25 MENTAL RETARDATION. AND THE DSM IS CLEAR AND THEY STATE IT

1 BECAUSE AT TIMES THERE IS CONFUSION THAT A PERSON HAS MENTAL
2 RETARDATION WELL, THEY CAN'T BE DEPRESSED OR SOMEBODY HAS
3 THIS SO THEY CAN'T HAVE MENTAL RETARDATION. MENTAL
4 RETARDATION CAN COEXIST WITH ANY MENTAL DISORDER.

5 Q CAN YOU TELL IF SOMEONE HAS MENTAL RETARDATION BY LOOKING AT
6 THEM?

7 A NO. I MEAN, I CAN'T AND I'VE WORKED IN THIS FIELD FOR ALMOST
8 TWENTY YEARS. YOU CANNOT. OBVIOUSLY, IF SOMEBODY HAS A
9 GENETIC SYNDROME, HAS DOWNS SYNDROME, HAS WILLIAMS
10 SYNDROME THROUGH DYSMORPHIC FEATURES THAT ARE ASSOCIATED
11 TO THAT, AND SOMETIMES WE'LL SEE A PERSON COME INTO A CLINIC
12 AND WE'LL RECOGNIZE FEATURES SO WE KNOW THEY HAVE A
13 SYNDROME OR WE SEND THEM FOR GENETIC TESTING. BUT THE VAST
14 MAJORITY OF PEOPLE WITH MENTAL RETARDATION HAVE WHAT WE
15 CALL MILD MENTAL RETARDATION AND THERE ARE DIFFERENT
16 CATEGORIES OF MENTAL RETARDATION AND FOR THE MOST PART
17 PEOPLE WITH MILD RETARDATION LOOK AND WALK AND TALK LIKE
18 ANYBODY, BUT WHEN WE TEST THEM COGNITIVELY IN TERMS OF
19 ADAPTIVE BEHAVIOR, THAT'S WHEN WE SEE SIGNIFICANT
20 DIFFERENCES. BUT THEY DON'T LIMP, THEY DON'T NECESSARILY WALK
21 FUNNY OR TALK FUNNY OR LOOK MENTALLY RETARDED.

22 Q CAN YOU TELL IF SOMEONE HAS MENTAL RETARDATION BY THEIR
23 DEMEANOR?

24 A FOR THE MOST PART, NO.

25 Q ALL RIGHT. YOU MENTIONED THERE ARE DIFFERENT LEVELS OF

1 MENTAL RETARDATION. CAN YOU EXPLAIN THAT IN A LITTLE MORE
2 DETAIL FOR US?

3 A SO, THE LEVELS, THERE ARE FOUR LEVELS OF MENTAL RETARDATION
4 AND THOSE LEVELS ARE PRETTY MUCH ESTABLISHED BASED ON THE
5 PERSON'S INTELLECTUAL FUNCTIONING. THE VAST MAJORITY OF
6 PEOPLE WITH MENTAL RETARDATION HAVE WHAT WE CALL MILD
7 MENTAL RETARDATION. SO, YOU EITHER HAVE MENTAL RETARDATION
8 OR YOU DON'T. ONCE WE ESTABLISH THAT YOU HAVE MENTAL
9 RETARDATION, WE'VE CATEGORIZED THIS CONDITION INTO LEVELS OF
10 SEVERITY: SO, THERE'S MILD, WHICH IS SOMEBODY WHO HAS AN I.Q.
11 OF APPROXIMATELY 50/55 TO APPROXIMATELY 70. MODERATE MENTAL
12 RETARDATION, WHICH IS SOMEBODY WHO HAS AN I.Q. OF ABOUT 40 TO
13 55. SEVERE AND PROFOUND. THOSE ARE THE FOUR LEVELS OF
14 MENTAL RETARDATION. AND THE VAST MAJORITY, AGAIN, OF PEOPLE
15 WITH MENTAL RETARDATION, 85% OF PEOPLE WITH MENTAL
16 RETARDATION HAVE WHAT WE CALL MILD MENTAL RETARDATION, HAVE
17 THIS MILDEST FORM. NEXT, IT'S MODERATE AND THEN SEVERE AND
18 THE FEWEST PEOPLE, FORTUNATELY, HAVE WHAT WE CALL
19 PROFOUND MENTAL RETARDATION AND USUALLY THEY WILL HAVE CO-
20 OCCURRING PHYSICAL DISABILITIES AND HEALTH ISSUES.

21 Q CAN YOU DESCRIBE IN A LITTLE MORE DETAIL WHAT PEOPLE IN THESE
22 VARIOUS CATEGORIES CAN DO?

23 A SO, THERE'S OFTEN A LOT OF MISCONCEPTIONS AS TO WHAT
24 SOMEBODY WITH MENTAL RETARDATION, MILD OR PROFOUND, CAN
25 AND CANNOT DO. GENERALLY SPEAKING, THESE ARE TAKEN FROM

1 THE DSM-IV IN HELPING US UNDERSTAND WHAT IS MILD MENTAL
2 RETARDATION. TYPICALLY, THEY WILL HAVE TYPICAL DEVELOPMENT,
3 SOCIAL AND COMMUNICATION DEVELOPMENTS LIKE THEIR PEERS. SO,
4 THEY WILL DEVELOP, PEOPLE WITH MILD MENTAL RETARDATION,
5 GENERALLY TALK AND ARE ENGAGED SOCIALLY LIKE MOST KIDS.
6 OFTEN, MILD MENTAL RETARDATION ISN'T FIRST SEEN UNTIL
7 KINDERGARTEN OR FIRST GRADE. THAT'S WHERE THE TEACHER'S
8 NOTICE THAT THE CHILD ISN'T LEARNING AS QUICKLY. SOMETIMES THE
9 PARENTS ARE SURPRISED. THEY HAVEN'T EVEN SEEN SIGNIFICANT
10 DELAYS. WE WON'T HAVE ANY SIGNIFICANT IMPAIRMENT IN MOTOR
11 DEVELOPMENTS, SO THEY WALK AND RUN AND DO STUFF LIKE EVERY
12 OTHER KID. THEY ARE INDISTINGUISHABLE, YOU KNOW, VIRTUALLY
13 FROM KIDS UNTIL THEY GET OLDER, BECAUSE AS THEY GET OLDER,
14 THE DISCREPANCY WITH THEIR PEERS BECOMES MORE NOTICEABLE IN
15 TERMS OF SCHOOL, IN TERMS OF LEARNING, IN TERMS OF WHAT THEY
16 CAN DO AND RETAIN. WE KNOW THAT WITH GOOD SCHOOLING,
17 PEOPLE WITH MILD MENTAL RETARDATION CAN LEARN TO READ AND
18 WRITE UP TO A FIFTH AND SIXTH GRADE READING LEVEL AND SO
19 PICKING UP A NEWSPAPER IS NOT OUT OF THE REALM OF POSSIBILITY
20 FOR PEOPLE WITH MILD MENTAL RETARDATION. THEY CAN ACHIEVE
21 GOOD SOCIAL AND VOCATIONAL SKILLS, LEARN JOBS, BE EMPLOYED
22 SUCCESSFULLY AND WITH GOOD SUPPORTS, THEY CAN LIVE
23 INDEPENDENTLY, GET MARRIED, HAVE KIDS, DO ALL THOSE KINDS OF
24 THINGS.

25 Q AND I THINK YOU TESTIFIED EARLIER, YOU SPECIFICALLY HAVE DONE

1 SOME WORK WITH PEOPLE WITH MENTAL RETARDATION IN HELPING
2 THEM LIVE INDEPENDENTLY?

3 A YES. SO, WE DEVELOP MANY -- ABOUT TEN TO FIFTEEN YEARS AGO,
4 WE DEVELOPED A CURRICULUM THAT WE WERE FUNDED TO DO WHICH
5 DEVELOPS A TRAINING PROGRAM TO HELP ADULTS LEARN
6 COOPERATIVE LIVING SKILLS, SO ADULTS WHO WANT TO MOVE OUT
7 FROM LIVING WITH THEIR PARENTS AND MAYBE LIVE WITH THEIR
8 GIRLFRIEND OR BOYFRIEND OR LIVE WITH A HOUSEMATE TO SHARE A
9 HOUSE OR AN APARTMENT, WE DEVELOPED THIS CURRICULUM CALLED
10 COOPERATIVE LIVING SKILLS AND WE TEACH IN THAT CURRICULUM:
11 HOW DO YOU RESPECT PRIVACY, HOW DO YOU SHARE COMMON
12 AREAS LIKE THE KITCHEN AND CLEANING UP AFTER YOURSELF,
13 SHARING COMMON AREAS LIKE THE LIVING ROOM, PAYING BILLS AND
14 THE IMPORTANCE OF THAT AND THEN THE SHARING OF THOSE
15 EXPENSES. AND WE RAN THOSE GROUPS, PROBABLY DOZENS OF
16 DOZENS OF THOSE GROUPS WITH ADULTS WITH MENTAL
17 RETARDATION, MOSTLY MILD MENTAL RETARDATION WHO WERE
18 MOVING OUT OR LIVING INDEPENDENTLY AND TEACHING THEM,
19 REDUCING, YOU KNOW, PROBLEMS WITH THEIR HOUSEMATES AND
20 ROOMMATES THROUGH THAT CURRICULUM.

21 Q DO YOU CURRENTLY HAVE SOME RESEARCH INVOLVING DEVELOPING
22 SMALL BUSINESSES?

23 A SO, WHEN I WAS AT UNIVERSITY OF SOUTH FLORIDA, WE HAD A GRANT
24 FROM THE U.S. DEPARTMENT OF LABOR, WHERE WE DEVELOPED A
25 CURRICULUM ON HOW TO ACCOMPANY PEOPLE WITH DISABILITIES

1 INCLUDING PEOPLE WITH MENTAL RETARDATION ON HOW TO HELP
2 THEM THINK THROUGH IDEAS THEY MAY HAVE AND WHAT ARE THE
3 STEPS IN DEVELOPING A SMALL BUSINESS AND GETTING THE
4 BUSINESS GOING AND WHAT IS A BUSINESS PLAN AND WE RAN THAT
5 PROJECT FOR APPROXIMATELY THREE YEARS.

6 Q ALL RIGHT. SO THOSE ARE SOME THINGS THAT PEOPLE WITH MILD
7 MENTAL RETARDATION CAN DO.

8 A SURE. YES.

9 Q CAN YOU EXPLAIN WHAT IS DIFFERENT BETWEEN THAT AND THE
10 OTHER LEVELS OF MENTAL RETARDATION?

11 A WELL, AS WE GET INTO THE MORE SIGNIFICANTLY IMPAIRED ONES,
12 THEN WE START SEEING LATER DEVELOPMENT IN LANGUAGE AND
13 COMMUNICATION. PEOPLE MAY NEED MORE VOCATIONAL TRAINING
14 WITH MODERATE MENTAL RETARDATION. THEIR CAPACITY TO LEARN
15 TO READ AND WRITE IS DIMINISHED AND SO THEY CAN LEARN TO READ
16 AND WRITE AT ABOUT A FIRST, SECOND GRADE LEVEL, BUT NOT AS
17 WELL IN THEIR CAPACITY IN TERMS OF INTELLECTUAL ABILITY AS
18 PEOPLE WITH MILD MENTAL RETARDATION. GENERALLY, THEY WILL
19 LIVE IN MORE SUPERVISED SETTINGS, GROUP HOMES, AND THEN IF WE
20 GET INTO MORE SEVERE AND PROFOUND, THESE PEOPLE MAY LIVE IN
21 INSTITUTION-LIKE SETTINGS, WON'T HAVE A CAPACITY FOR
22 EMPLOYMENT, WON'T LIVE INDEPENDENTLY, MAY HAVE TOILETING
23 PROBLEMS. PEOPLE WITH MILD MENTAL RETARDATION DON'T HAVE
24 BATHING PROBLEMS MUCH BEYOND THE YOUNG, THREE, FOUR, FIVE-
25 YEAR-OLD RANGE. GENERALLY, PEOPLE WITH MILD RETARDATION ARE

1 INDISTINGUISHABLE IN TERMS OF PERSONAL HYGIENE, TOILETING,
2 THEY GO TO THE BATHROOM ON THEIR OWN AND SO FORTH.

3 Q ALL RIGHT. WE'VE TALKED A LITTLE BIT ALREADY ABOUT SOME
4 COMMON MISCONCEPTIONS REGARDING PERSONS WITH MENTAL
5 RETARDATION. CAN YOU EXPLAIN IN A LITTLE MORE DETAIL WHAT
6 SOME OF THE OTHER MISCONCEPTIONS ARE WITH MENTAL
7 RETARDATION?

8 A THE GENERAL PUBLIC IS USUALLY EXPOSED TO MENTAL RETARDATION
9 THROUGH, GENERALLY SPEAKING, MEDIA. TELEVISION, YOU KNOW,
10 SEEING CORKY, THE DOWNS SYNDROME ACTOR ON T.V. RADIO, YOU
11 KNOW, THE MOVIE ABOUT THE YOUNG MAN WHO WAS A WATER BOY
12 FOR THE FOOTBALL TEAM. THOSE ARE GENERALLY
13 CHARACTERIZATIONS OF PEOPLE WITH MENTAL RETARDATION THAT
14 PEOPLE CAN SEE. SO, IT'S TYPICALLY PEOPLE WITH MORE MODERATE
15 MENTAL RETARDATION, SEVERE MENTAL RETARDATION. THE
16 MISCONCEPTIONS ARE THAT PEOPLE WITH MENTAL RETARDATION
17 KIND OF WALK FUNNY, THEY LOOK -- YOU CAN TELL BY LOOKING AT
18 SOMEBODY, YOU CAN TELL BY TALKING TO THEM IF THEY HAVE
19 MENTAL RETARDATION. AND THAT'S NOT TRUE FOR THE MOST PART
20 AND I'M TALKING NOW ABOUT PEOPLE WITH MILD MENTAL
21 RETARDATION. IF SOMEBODY WITH SEVERE, PROFOUND MENTAL
22 RETARDATION WALKED INTO THIS ROOM, EVERYBODY WOULD SEE
23 THAT. BUT SOMEBODY WITH MILD MENTAL RETARDATION, YOU CAN'T
24 SEE THAT. THEY DON'T LOOK RETARDED AND FOR THE MOST PART
25 PEOPLE WITH MILD MENTAL RETARDATION DO EVERYTHING NOT TO

1 ACT RETARDED, THEY TRY TO FAKE THAT THEY KNOW THINGS AND,
2 YOU KNOW, MASK THEIR DISABILITY BECAUSE YOU KNOW IT'S A VERY
3 PEJORATIVE LABEL TO HAVE AND NOBODY LIKES TO BE STUPID. AND
4 SO WHEN THEY CAN, THEY TRY AND FAKE KNOWING THINGS. PEOPLE
5 WITH MENTAL RETARDATION ARE NOT ALWAYS HAPPY-GO-LUCKY. YOU
6 KNOW, WE HAVE THIS NOTION THAT DOWNS SYNDROME PEOPLE ARE
7 ALWAYS SMILING AND HAPPY AND SO EVERYBODY WITH MENTAL
8 RETARDATION IS ALWAYS HAPPY AND THAT'S JUST A MISCONCEPTION.
9 IT'S NOT BASED ON ANY FACT. PEOPLE WITH MENTAL RETARDATION
10 KNOW RIGHT FROM WRONG. THEY, FOR THE MOST PART, THEY
11 UNDERSTAND WHAT'S RIGHT, WHAT'S WRONG, THEY CAN OBEY LAWS
12 AND THEY CAN FOLLOW LAWS. THE MISCONCEPTION IS THAT THEY
13 CAN'T LEARN, THEY CAN'T READ. THEY CAN CERTAINLY LEARN, THEY
14 NEED MORE REPETITION, THEY NEED MORE EXERCISES, THEY NEED
15 MORE CONCRETE EXAMPLES, THEY NEED MORE SYSTEMATIC
16 TEACHING AND A HOST OF OTHER THINGS THAT WE THINK THAT THEY
17 CANNOT DO. AND I'LL TALK ABOUT DRIVER'S LICENSE. NOT
18 EVERYBODY WITH MENTAL RETARDATION HAS A DRIVER'S LICENSE. IT
19 REQUIRES A CERTAIN CAPACITY, BUT THERE IS A SMALL PERCENTAGE
20 OF PEOPLE WITH MENTAL RETARDATION WHO CAN ACQUIRE A
21 DRIVER'S LICENSE, PASS AND MAINTAIN THEIR DRIVER'S LICENSE.

22 Q AND IS THERE A PARTICULAR STUDY THAT YOU ARE REFERRING TO
23 WHEN YOU TALK ABOUT A DRIVER'S LICENSE? CAN YOU EXPLAIN
24 WHAT THAT STUDY IS AND WHAT THE SIGNIFICANCE IS?

25 A WE DON'T HAVE A LOT OF GOOD DATA, A LOT OF EPIDEMIOLOGICAL

1 RESEARCH DATA ON PEOPLE WITH MILD MENTAL RETARDATION,
2 BECAUSE FOR THE MOST PART, ONCE THEY LEAVE SCHOOL, THEY
3 DON'T GET PAID SERVICES, THEY LIVE AT HOME WITH THEIR PARENTS
4 OR THEY MAY LIVE WITH A FRIEND OR A SPOUSE AND LIVE RELATIVELY
5 INDEPENDENTLY. BUT THERE WAS A STUDY COMMISSIONED ABOUT
6 TEN YEARS AGO BY THE DEPARTMENT OF EDUCATION LOOKING AT
7 TRANSITION FROM HIGH SCHOOL TO LIFE AFTER HIGH SCHOOL FOR ALL
8 STUDENTS WITH DISABILITIES. SO, THEY LOOK AT STUDENTS WHO HAD
9 AUTISM, THEY LOOKED AT STUDENTS WHO HAD LEARNING DISABILITIES
10 AND ONE OF THE GROUPS THEY LOOKED AT AND TRACKED OVER TEN
11 YEARS WERE STUDENTS WITH MENTAL RETARDATION AND I WANTED
12 TO PRESENT SOME OF THE STATISTICS, BECAUSE THESE ARE THE FEW
13 STATISTICS THAT WE HAVE THAT ASK QUESTIONS ABOUT WHAT ARE
14 YOU DOING AFTER HIGH SCHOOL: "YOU ARE A STUDENT, YOU'RE A
15 PERSON WITH MENTAL RETARDATION, WHAT ARE YOU NOW DOING,
16 ARE YOU LIVING AT HOME WITH YOUR MOM, ARE YOU LIVING
17 INDEPENDENTLY," AND SO FORTH. AND -- CAN I SHOW SOME OF
18 THESE? (POWERPOINT PRESENTATION)

19 Q YES. PLEASE.

20 A SO, WE SEE THAT IN TERMS OF POST SECONDARY SCHOOL, SOME
21 STUDENTS WITH MENTAL RETARDATION DO GO ON TO SCHOOL, EITHER
22 COMMUNITY COLLEGE OR A TWO-YEAR SCHOOL. LESS THAN 5% GO ON
23 TO COLLEGE WITH A LOT OF SUPPORTS. BUT THERE ARE SOME
24 STUDENTS AT OSU, WE HAVE A PROGRAM THAT SUPPORTS STUDENTS
25 WITH MENTAL RETARDATION IN ATTENDING COLLEGE CLASSES.

1 REALISTICALLY, I DON'T EXPECT THEM TO GRADUATE, BUT THE POINT
2 IS THAT THEY CAN PARTICIPATE AND TAKE COLLEGE CLASSES LIKE
3 OTHER STUDENTS THEIR AGE, IN THEIR TWENTIES. SO, THERE'S A
4 SMALL PERCENTAGE THAT DO GO ON TO COLLEGE. ONE FASCINATING
5 THING IS THAT MOST STUDENTS, WHEN YOU ASK THEM, "DO YOU HAVE
6 MENTAL RETARDATION?" "DO YOU HAVE A DISABILITY?" 40% OF THEM
7 WILL DENY IT, THEY WON'T TELL YOU, BECAUSE IT'S A STIGMA. IT'S
8 LIKE SAYING, "ARE YOU STUPID?" PEOPLE WON'T SAY, "YES, I AM." SO,
9 THEY GENERALLY, IF THEY CAN, THEY'LL DENY IT. THEY WON'T LET
10 OTHER PEOPLE KNOW THEY HAVE A DIAGNOSIS. OTHER INTERESTING
11 THINGS IS, WE KNOW THAT THEY CAN BE EMPLOYED. IN THIS STUDY,
12 27% OF THE STUDENTS WITH MENTAL RETARDATION HAD
13 EMPLOYMENT THAT WAS SUSTAINED OVER MORE THAN A YEAR. SO,
14 WE KNOW THAT THEY CAN GET JOBS. AND OFTEN, THE HARD PART
15 FOR THEM IS TO KEEP JOBS FOR A LONG TIME BECAUSE OF THEIR
16 SKILL LEVEL, BUT YOU KNOW, AS MUCH AS, YOU KNOW, ONE FOURTH
17 OF THEM CAN HAVE JOBS THAT ARE LONG TERM.

18 Q DO YOU HAVE SOME DATA ON WHAT KINDS OF JOBS THEY WERE ABLE
19 TO OBTAIN?

20 A THEY DID ASK HERE IN THIS STUDY-- SO THIS IS TYPICALLY, OFTEN, WE
21 SEE FOOD SERVICE, YOU KNOW WAITING TABLES, BUSSING TABLES.
22 CASHIER, 16% WERE WORKING AS A CASHIER. AND, YOU KNOW, WITH
23 TECHNOLOGY AS A SUPPORT WITH COMPUTER CASHES WHERE THEY
24 JUST PUNCH IN NUMBERS, IT BECOMES ACCESSIBLE FOR PEOPLE WITH
25 LOWER I.Q. TO BE A CASHIER. CLERICAL WORK. CLEANING IS A BIG

1 ONE. STOCKING, SHIPPING, RECEIVING AND UNSKILLED LABOR AND
2 MAINTENANCE ARE THE ONES THAT SEEM TO BE THE MOST
3 PREVALENT IN TERMS OF TYPES OF EMPLOYMENT.

4 Q CAN A PERSON WITH MILD MENTAL RETARDATION GET MARRIED AND
5 HAVE A FAMILY?

6 A SURE. SOME DO. SOME ARE VERY ACTIVE SEXUALLY. SOME PRACTICE
7 SAFE SEX AND A LOT OF EMPHASIS NOW IS PUT IN THE SCHOOLS TO
8 TEACH SEX ED SO THAT PEOPLE WITH DISABILITIES, ONCE THEY LEAVE
9 SCHOOL, DO PRACTICE SAFE SEX AND ARE ACTIVE. (REFERRING TO
10 POWERPOINT PRESENTATION) AND I THINK THERE ARE STATISTICS IN
11 THIS ONE, 8% IN THIS SAMPLE WERE MARRIED OR LIVING IN A MARRIED-
12 LIKE RELATIONSHIP, SO LIVING WITH A LONG-TERM GIRLFRIEND OR
13 BOYFRIEND. ALMOST 15% WERE A PARENT AND HAD A CHILD.

14 Q WHAT ABOUT FINANCES? ARE PEOPLE WITH MILD MENTAL
15 RETARDATION ABLE TO HANDLE THEIR PERSONAL FINANCES?

16 A SOME ARE. IN THIS STUDY OF THESE STUDENTS THAT HAD
17 GRADUATED FROM HIGH SCHOOL, 40% HAD OPENED UP A SAVINGS
18 ACCOUNT OR HAD A SAVINGS ACCOUNT. FEWER HAD A CHECKING
19 ACCOUNT. THAT'S MORE COMPLICATED, BECAUSE THEN YOU ARE
20 WRITING CHECKS AND VERY FEW OF THEM, LESS THAN 9%, HAD A
21 CREDIT CARD THAT THEY WOULD USE TO PURCHASE THINGS WITH.

22 Q WHAT ABOUT SOCIAL RELATIONSHIPS? DO YOU HAVE ANY DATA
23 ABOUT THAT WITH REGARD TO THIS GROUP?

24 A 70% REPORTED HAVING FRIENDS OUTSIDE OF SCHOOL OR WORK THAT
25 THEY WOULD SOCIALIZE WITH ON A LEISURE BASIS OR A SOCIAL BASIS

1 OR AT LEAST ON A WEEKLY FREQUENCY OR ONCE A WEEK.

2 Q AND THEN, WHAT ABOUT COMMUNITY ACTIVITIES? DO YOU HAVE DATA
3 ON THAT AS WELL?

4 A COMMUNITY ACTIVITIES. SO, THERE ARE ALL SORTS OF ENGAGEMENT
5 OF ACTIVITIES: TAKING CLASSES, PARTICIPATING IN COMMUNITY
6 GROUPS LIKE SPORTS TEAMS OR HOBBY CLUBS. AT OSU, ONE OF MY
7 COLLEAGUES HAS A PROGRAM CALLED NEXT CHAPTER BOOK CLUB
8 WHERE THEY DO A COFFEE SHOP. ADULTS WITH MENTAL
9 RETARDATION MEET AND READ ALOUD PASSAGES IN BOOKS. SOME
10 DON'T READ SO WELL AND SO THEY LISTEN AND PARTICIPATE IN THE
11 READING. SO, THOSE ARE FORMS OF SOCIAL CLUBS THAT ADULTS
12 ENGAGE IN. AND IN THIS STUDY, THEY DID ASK IF THE STUDENTS HAD
13 A LEARNER'S PERMIT OR A DRIVER'S PERMIT AND ALMOST 35% DID
14 HAVE ONE OR THE OTHER.

15 Q OKAY. SO, A PERSON WITH MILD MENTAL RETARDATION CAN GET A
16 DRIVER'S LICENSE.

17 A COULD CONCEIVABLY PASS A DRIVER'S TEST AND GET A DRIVER'S
18 LICENSE. YES. SOME CAN. NOT ALL, SOME CAN.

19 Q COULD SOME PERSONS WITH MILD MENTAL RETARDATION PLAY
20 GAMES LIKE CARDS OR CHECKERS?

21 A CERTAINLY THEY CAN LEARN TO PLAY GAMES. SIMPLE GAMES THAT
22 HAVE CLEAR RULES.

23 Q COULD THEY WRITE NOTES OR SEND LETTERS?

24 A DEPENDING ON THEIR WRITING ABILITY AND READING ABILITY,
25 CERTAINLY SOME CAN.

1 Q COULD THEY PLAY ON A FOOTBALL TEAM?

2 A THEY CAN PLAY SPORTS DEPENDING ON THEIR PHYSICAL ABILITY.
3 THAT IS MORE RELATED TO A PHYSICAL ABILITY THAN ADAPTIVE
4 ABILITY. I GUESS THERE IS SOME INTELLECTUAL ABILITY
5 REQUIREMENT THERE.

6 Q WOULD A PERSON WITH MILD MENTAL RETARDATION BE ABLE TO MAKE
7 UP A STORY OR TELL A LIE?

8 A YOU HAVE TO REMEMBER THAT AN ADULT WHO HAS MILD MENTAL
9 RETARDATION, YOU KNOW, ONE METAPHOR OR ANALOGY THAT WE
10 USE IS SOMEBODY WHO IS AN ADULT WITH MILD MENTAL RETARDATION
11 IS AS COGNITIVELY, INTELLECTUALLY FUNCTIONING SORT OF AT A TEN
12 OR ELEVEN YEAR OLD CHILD. NOT EMOTIONALLY, NOT SEXUALLY, BUT
13 COGNITIVELY, THEY ARE AT ABOUT A TEN OR ELEVEN YEAR OLD CHILD
14 IN TERMS OF THEIR FUNCTIONING. SO, WHEN YOU THINK OF KIDS,
15 EIGHT, NINE YEAR OLDS, THEY LIE, THEY LIE TO GET OUT OF TROUBLE
16 AND TELL STORIES AND SO FORTH. SO YES, ADULTS WITH MILD
17 MENTAL RETARDATION CERTAINLY ARE CAPABLE OF DOING THAT. I
18 HOPE NOT ALL OF THEM LIE, BUT THEY CERTAINLY CAN LEARN TO LIE IF
19 IT GETS THEM OUT OF TROUBLE.

20 Q ALL RIGHT. AND I UNDERSTAND YOU ARE NOT A FORENSIC
21 PSYCHOLOGIST --

22 A I AM NOT.

23 Q --- BUT CAN YOU SAY ANYTHING ABOUT WHETHER OR NOT -- CAN A
24 PERSON WITH MILD MENTAL RETARDATION UNDERSTAND THEIR
25 MIRANDA RIGHTS? IS THAT OUTSIDE THE REALM OF WHAT THEY MIGHT

DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

1 BE CAPABLE OF DOING?

2 A YOU KNOW, ASIDE FROM T.V., HEARING THAT, I HAVE NO REAL
3 PROFESSIONAL UNDERSTANDING OF WHAT THE MIRANDA RIGHTS
4 WOULD ENTAIL AND IMPLY IN TERMS OF LEVEL OF DIFFICULTY. SO, I
5 CAN'T SAY IF SOMEBODY WITH MENTAL RETARDATION IS ABLE TO
6 UNDERSTAND THEIR MIRANDA RIGHTS.

7 Q ARE THEY ABLE TO LEARN AND BE EDUCATED ABOUT THE MEANING OF
8 A RIGHT?

9 A RIGHT. IF WE MAKE IT CONCRETE, SIMPLE, BREAK IT UP IN STEPS,
10 THEY CAN LEARN A LOT OF THINGS. ABSOLUTELY.

11 Q AND IF THEY ARE ABLE TO LEARN, WOULD THEY ALSO PRESUMABLY BE
12 ABLE TO EXERCISE THAT RIGHT?

13 A THEY -- PEOPLE WITH MENTAL RETARDATION UNDERSTAND RIGHT
14 FROM WRONG. THEY KNOW IF THEY ARE -- IF THERE IS A RULE, THEY
15 CAN UNDERSTAND RULES. THEY CAN UNDERSTAND WHEN THEY ARE
16 BREAKING THOSE RULES AND THEY CAN ALSO UNDERSTAND THAT
17 THERE ARE CONSEQUENCES AND THEY WILL BE PUNISHED FOR IT.
18 THEY HAVE THAT CAPACITY. AND AGAIN, I'M TALKING ABOUT PEOPLE,
19 GENERALLY, WITH MILD MENTAL RETARDATION.

20 Q ALL RIGHT. NOW THAT WE'VE TALKED ABOUT SOME OF THE
21 BACKGROUND INFORMATION ON WHAT M-R IS AND HOW -- IS IT ALL
22 RIGHT IF I USE M-R? YOU WILL KNOW WHAT I MEAN BY THAT?

23 A SURE.

24 Q AND HOW YOU ASSESS IT. I'D LIKE TO MOVE NOW TO THE SPECIFICS
25 REGARDING KENNETH SIMMONS. COULD YOU PLEASE EXPLAIN TO THE

DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

- 1 COURT WHAT EXACTLY YOU WERE ASKED TO DO IN THIS CASE?
- 2 A WHEN YOU CONTACTED ME, A COUPLE, TWO YEARS AGO, YOU ASKED
- 3 ME IF I WOULD AGREE TO REVIEW EXPERT EVALUATIONS,
- 4 PSYCHOLOGICAL EVALUATIONS REGARDING AN INDIVIDUAL WHERE
- 5 THERE WAS A QUESTION OF MENTAL RETARDATION AND WOULD I
- 6 REVIEW THOSE EVALUATIONS AND FILES AND OPINE REGARDING
- 7 WHETHER OR NOT THIS PERSON HAD MENTAL RETARDATION.
- 8 Q ALL RIGHT. AND DID YOU DO THAT?
- 9 A I DID. I REVIEWED THE RECORDS.
- 10 Q DO YOU HAVE AN OPINION TODAY ON WHETHER KENNETH SIMMONS IS
- 11 A PERSON WITH MENTAL RETARDATION?
- 12 A I DO.
- 13 Q AND WHAT IS THAT OPINION?
- 14 A BASED ON THE RECORDS AND THE PREVIOUS PSYCH EVALUATIONS IN
- 15 TERMS OF INTELLECTUAL FUNCTIONING, ADAPTIVE FUNCTIONING AND
- 16 INFORMATION FROM THE SOCIAL HISTORY, IN TERMS OF THE RECORDS
- 17 AND LARGELY FROM INFORMATION I HEARD MS. HAMMOCK DISCUSS
- 18 WITH ME AND PRESENTED TODAY, KENNETH SIMMONS PRESENTS ALL
- 19 THREE PRONGS AND MEETS THE DEFINITION OF MENTAL
- 20 RETARDATION.
- 21 Q ALL RIGHT. AND I WOULD LIKE TO BREAK IT DOWN BY EACH PRONG IN
- 22 A LITTLE MORE DETAIL. AND SO WITH REGARD TO PRONG ONE, WHICH
- 23 IS THE I.Q. PRONG, WHAT MATERIALS DID YOU REVIEW, PREVIOUS I.Q.
- 24 EXAMS ADMINISTERED TO KENNETH SIMMONS?
- 25 A SO, THERE ARE FIVE INDIVIDUALLY ADMINISTERED I.Q. TESTS THAT ---

1 Q YES. AND I'M SORRY -- I SEE YOU ARE REFERRING TO THAT CHART.
2 LET ME SHOW YOU WHAT HAS BEEN MARKED AS APPLICANT'S EXHIBIT
3 #6. (MS. PAAVOLA HANDS WITNESS A DOCUMENT) IS THIS A SUMMARY
4 OF THE RESULTS THAT YOU ARE PREPARING TO TESTIFY TO?

5 A YES.

6 Q ALL RIGHT. GO AHEAD.

7 A SO, THERE ARE FIVE DIFFERENT PSYCHOLOGISTS OR TEAMS OF
8 PSYCHOLOGISTS WHO'VE ADMINISTERED STANDARDIZED INDIVIDUALLY
9 ADMINISTERED TESTS OF INTELLIGENCE FOR MISTER SIMMONS. IN
10 FACT, THE WAIS-R, THE WAIS, THE WAIS-R WAS REPEATED. THE K-K-I-T
11 IS THE KAUFMAN AND THEN THE WAIS-IV AND SO THERE ARE ACTUALLY
12 FOUR DIFFERENT TESTS OF INTELLIGENCE THAT WERE ADMINISTERED
13 TO MISTER SIMMONS OVER THE COURSE OF APPROXIMATELY TEN
14 YEARS. IN EACH OF THESE, IF WE LOOK AT THE FSIQ, WHICH IS A FULL
15 SCALE I.Q., ALL OF THESE RESULTS MEET THE CUT-OFF ACCORDING TO
16 DSM AND AAMR OF APPROXIMATELY TWO STANDARD DEVIATIONS
17 BELOW THE MEAN OR 70 AND 75 AND BELOW.

18 Q ALL RIGHT. AND YOU WERE PRESENT HERE IN THE COURTROOM
19 DURING MS. HAMMOCK'S TESTIMONY?

20 A YES.

21 Q AND THERE WERE SOME DISCUSSION ABOUT THIS SRA TESTS. CAN
22 YOU EXPLAIN WHAT THOSE ARE?

23 A I DON'T KNOW WHAT SRA IS, BUT I KNOW WHEN I GOT THE FILE, I TRIED
24 TO LOOK IT UP. MY UNDERSTANDING IS THAT IT IS A TEST THAT THE
25 SCHOOL USES. IT'S A BROAD MEASURE, I THINK, OF A GROUP

1 ADMINISTERED TEST THAT PROVIDES A SCORE THAT'S LABELED I.Q.,
2 BUT IT'S CERTAINLY NOT AN INDIVIDUALLY ADMINISTERED TEST OF
3 INTELLIGENCE.

4 Q IS THE SRA LISTED IN ANY OF THE DIAGNOSTIC MANUALS THAT YOU
5 REFERRED TO AS AUTHORITATIVE?

6 A I'VE NEVER SEEN IT MENTIONED ANYWHERE. NO.

7 Q AND YOU REVIEWED KENNETH'S SCHOOL RECORDS?

8 A YES.

9 Q CAN I ASK YOU, SPECIFICALLY, THE I.Q. SCORE THAT IS LISTED AS 94
10 WHEN HE WAS, IT LOOKS LIKE 1969.

11 A ARE YOU REFERRING TO SCHOOL RECORDS?

12 Q YES.

13 A (WITNESS LOOKS THROUGH DOCUMENTS)

14 Q ON PAGE TWO OF THE SCHOOL RECORDS, WHERE THE SRA RESULTS
15 ARE LISTED.

16 A YES.

17 Q DO YOU SEE THE ONE, MY COPY LISTS THAT IT WAS ADMINISTERED IN
18 1969 AND IT'S THE I.Q. SCORE OF 94.

19 A I THINK WHEN HE'S IN FIRST GRADE, IS THAT LIKE '67 OR '69, AGE
20 SEVEN?

21 THE COURT: SHOW HIM WHERE YOU ARE.

22 Q I'M LOOKING RIGHT HERE. (INDICATING ON DOCUMENT)

23 A OH, OKAY. I WASN'T LOOKING AT THE SAME PLACE. YES.

24 Q AND WHAT IS THE PERCENTILE LISTED THERE?

25 A ELEVEN.

1 Q IS AN I.Q. SCORE ON ONE OF THE STANDARD I.Q. TESTS THAT YOU'VE
2 TESTED, IS AN I.Q. SCORE OF 94 IN THE ELEVEN PERCENTILE?

3 A GENERALLY SPEAKING -- I DON'T KNOW. I MEAN, I DON'T KNOW WHAT
4 THE PERCENTILE WOULD BE FOR THIS TEST. USUALLY, IF YOU HAVE
5 AN I.Q. AVERAGE SCORE OF 100, YOU'RE BASICALLY AT THE 50TH
6 PERCENTILE AND THEN AS YOU GO UP IN TERMS OF I.Q. SCORE, YOU'D
7 BE AT 55, 60 AND SO FORTH. SO, AN I.Q. SCORE OF 94 IS STILL IN THE
8 AVERAGE RANGE AND SO THAT WOULD BE -- THAT WOULD SEEM LIKE A
9 MUCH LOWER PERCENTILE THAT I WOULD EXPECT FOR SOMEBODY
10 WITH AN AVERAGE I.Q. OR AN I.Q. OF 94.

11 Q SO, IF IT CORRELATED TO ONE OF THE FULL SCALE I.Q. TESTS THAT
12 YOU'VE TALKED ABOUT TODAY, THE PERCENTILE WOULD NOT BE AT
13 ELEVEN. IS THAT ACCURATE?

14 A I'M GUESSING THAT IT WOULD BE PROBABLY HIGHER THAN ELEVEN.
15 ELEVEN SOUNDS TOO LOW.

16 Q AND YOU DID ALSO REVIEW THE INFORMATION FROM MS. FLOY SHULER
17 REGARDING THE TESTING REQUIREMENTS FOR PLACEMENT IN THE
18 RESOURCE PROGRAM.

19 A YES.

20 Q CAN YOU TALK A LITTLE BIT ABOUT WHAT THOSE REQUIREMENTS
21 WERE?

22 A CAN I LOOK AT THAT COPY THAT I HAVE?

23 Q PLEASE.

24 A THAT'S SOMETHING THAT I THINK SHE REFERRED TO AS A RED BOOK?

25 Q YES. NOT YOUR RED BOOK, BUT A DIFFERENT RED BOOK.

- 1 A I DON'T HAVE IT. (MS. PAAVOLA HANDS WITNESS DOCUMENT) YES. I'VE
2 REVIEWED THIS.
- 3 Q ALL RIGHT. AGAIN, CERTAIN TESTS HAVE TO BE ADMINISTERED FOR
4 MEASURING I.Q.?
- 5 A IT DOES. YES. ON PAGE EIGHTEEN.
- 6 Q WHAT ARE THOSE TESTS?
- 7 A HERE, IT LISTS THE WISC, THE WAIS, THE WISC-R, THE STANFORD-
8 BINET FORM L-M, THE WPPSI, THE MCCARTHY SCALES OF CHILDREN'S
9 ABILITIES, AND A SPANISH LANGUAGE TEST.
- 10 Q DOES IT LIST THE SRA?
- 11 A IT DOES NOT.
- 12 Q OKAY. CAN YOU ALSO EXPLAIN ON THIS SUMMARY THAT YOU HAVE
13 PROVIDED, IN ADDITION TO THE FULL SCALE I.Q. SCORES, YOU HAVE
14 REVIEWED SOME OTHER TYPES OF TESTING, ACADEMIC ACHIEVEMENT
15 TESTING. CAN YOU EXPLAIN THE SIGNIFICANCE OF THOSE RESULTS?
- 16 A THESE ARE INDIVIDUALLY ADMINISTERED STANDARDIZED TESTS OF
17 ACHIEVEMENT AND ACHIEVEMENT, THE DIFFERENCE BETWEEN
18 ACHIEVEMENT AND I.Q., ACHIEVEMENT TESTS MEASURE ACADEMIC
19 LEARNING, WHAT THE PERSON HAS LEARNED AND WHETHER
20 FUNCTIONING IN TERMS OF GRADE LEVEL FOR PRIMARILY READING,
21 SPELLING, ARITHMETIC. THERE ARE TWO -- THIS TYPE OF TEST WAS
22 ADMINISTERED TWICE. THE WIDE RANGE ACHIEVEMENT TEST, THIRD
23 EDITION BY DOCTOR SAYLOR IN 1998 AND DOCTOR KEYES
24 ADMINISTERED THE WOODCOCK-JOHNSON ACHIEVEMENT TEST IN 1999
25 OF MISTER SIMMONS.

1 Q IN A SIMILAR FASHION, WHEN YOU EXPLAIN ADAPTIVE BEHAVIOR
2 MEASUREMENTS, THE DIFFERENCE BETWEEN MAXIMUM
3 PERFORMANCE AND TYPICAL PERFORMANCE. DO YOU MEASURE I.Q.
4 BY MAXIMUM PERFORMANCE?

5 A YOU -- MAXIMUM IS NOT THE RIGHT -- WE DON'T MEASURE MAXIMUM.
6 WE DON'T KNOW WHAT SOMEONE'S MAXIMUM IS. WHAT WE TRY TO
7 MEASURE IS THEIR FULL POTENTIAL, THEIR CAPACITY, THEIR ABILITY.
8 THAT'S WHAT WE TRY TO DO. WE TRY TO MAKE SURE THE TESTING
9 ENVIRONMENT IS OPTIMAL TO ALLOW THE INDIVIDUAL TO PERFORM TO
10 THEIR FULLEST POTENTIAL.

11 Q WHY WOULD YOU NOT RELY ON A GROUP ADMINISTERED EXAM AS A
12 GOOD MEASUREMENT FOR I.Q.?

13 A IT'S A GOOD, QUICK AND DIRTY MEASURE. BUT IF YOU ARE GOING TO
14 MAKE A DIAGNOSIS OR RULE OUT A DIAGNOSIS FOR A CONDITION LIKE
15 MENTAL RETARDATION, ALL MANUALS RECOMMEND AGAINST DOING
16 THAT. YOU MUST ADMINISTER AN INDIVIDUAL INSTRUMENT BECAUSE
17 AN INDIVIDUAL INSTRUMENT ALLOWS YOU -- IT'S A MUCH BROADER
18 MEASUREMENT AND IT ALSO ALLOWS YOU TO CONTROL THE
19 PRESENTATION, IT ALLOWS YOU TO OBSERVE AND ASSESS HOW THE
20 PERSON IS PERFORMING AND SO FORTH.

21 Q AND THE JUDGE HAD A QUESTION ABOUT THE SRA SCORES BEING SO
22 VARIED OVER A SHORT PERIOD OF TIME. CAN YOU EXPLAIN THAT IN
23 ANY WAY?

24 A WHEN I SAW THESE SCORES GOING FROM 94 TO 104 TO 69, I
25 QUESTIONED THE RELIABILITY OF THIS INSTRUMENT. I MEAN, FOR IT

1 TO JUMP SO MUCH IS, FOR ME, IS PUZZLING. NO ONE INDIVIDUAL
2 SHOULD HAVE SUCH A DISCREPANCY ESSENTIALLY MORE THAN 30 TO
3 35 POINTS ON A TEST THAT CLAIMS TO MEASURE THE SAME THING. SO,
4 THE SRA, AGAIN, THIS IS A TEST THAT DATES NOW SOME THIRTY-ODD
5 YEARS. IT'S AN OLD TEST. I DON'T EVEN KNOW IF THEY STILL USE IT.

6 Q SO, YOU HAVE NOT INCLUDED THE SRA RESULTS ON THE SUMMARY
7 THAT YOU PROVIDED.

8 A CORRECT. I HAVE NOT.

9 Q I BELIEVE YOU HAVE A SLIDE WHERE YOU PLOTTED THE TEST
10 RESULTS?

11 A I DID. I CLOSED MY COMPUTER, I CAN OPEN IT. (POWERPOINT
12 PRESENTATION CHART IS NOW DISPLAYED ON SCREEN) SO, THIS IS
13 JUST A PLOTTING OF MISTER SIMMONS' SCORES ON THESE FIVE
14 DIFFERENT I.Q. TESTS AND THESE I.Q. TESTS RANGE FROM 45 TO 155,
15 THE LOWEST TO THE HIGHEST. THE RED LINE IS WHAT WE WOULD
16 CALL THE CUT-OFF, 70 TO 75 AND LOWER AND WE SEE THAT MISTER
17 SIMMONS' I.Q. SCORES HAVE BEEN FAIRLY CONSISTENT OVER THESE
18 TEN YEARS OF TESTING ACROSS THESE FIVE TESTING SESSIONS,
19 FOUR DIFFERENT INSTRUMENTS, ALL BETWEEN '66 TO '75 FULL SCALE
20 I.Q.

21 Q CAN YOU FAKE A LOW I.Q. SCORE?

22 A YES. YOU CAN.

23 Q CAN YOU TALK A LITTLE BIT ABOUT WHAT THIS SLIDE SHOWS -- DOES
24 THIS SLIDE GIVE YOU ANY SIGNIFICANT FINDINGS WITH REGARD TO
25 WHETHER OR NOT KENNETH SIMMONS MAY HAVE FAKED HIS I.Q.

1 SCORES IN THE PAST?

2 A WHEN A PSYCHOLOGIST IS ADMINISTERING A TEST OF INTELLIGENCE
3 AND WHENEVER YOU ARE MAKING A DIAGNOSIS FOR MENTAL
4 RETARDATION, THERE IS ALWAYS A SECONDARY GAIN, WHETHER IT'S
5 TO AVOID THE DEATH PENALTY OR TO GET SPECIAL SERVICES OR IF
6 YOU HAVE SUPPLEMENTAL SOCIAL SECURITY PAYMENTS. SO, THE
7 PSYCHOLOGIST IS ALWAYS ASSESSING WHETHER OR NOT THE
8 PERSON SEEMS TO BE PUTTING FORTH THEIR BEST EFFORT. USUALLY
9 THE BEST INDICATOR IS CONSISTENT TEST RESULTS OVER NUMEROUS
10 YEARS, DIFFERENT MEASURES. THIS IS A PATTERN, A VERY TIGHT
11 PATTERN OF SCORES THAT WOULD BE HARD TO REPRODUCE ON FOUR
12 DIFFERENT TYPES OF TESTS ON FIVE DIFFERENT ADMINISTRATIONS
13 ACROSS TEN YEARS. SO, TO ME THIS SEEMS TO INDICATE A FAIRLY
14 CONSISTENT PERFORMANCE ON TESTS OF INTELLIGENCE.

15 Q ALL RIGHT. AND DO EACH OF THESE TESTS HAVE SUB-PARTS OR SUB-
16 COMPONENTS INCLUDED?

17 A YES. FOR THE MOST PART, THERE IS A FULL SCALE I.Q., WHICH IS THIS
18 GRAPH AND THEN THERE IS A VERBAL I.Q., WHICH IS VERBAL
19 COMPONENTS, IF YOU WILL. AND THERE IS NON-VERBAL, WHICH IS
20 CALLED PERFORMANCE I.Q.

21 **THE COURT:** THAT'S INDICATED BY VIQ AND PIQ ON APPLICANT'S
22 EXHIBIT #6?

23 **MR. TASSE:** THAT'S RIGHT, YOUR HONOR.

24 Q AND DO YOU SEE A PROBLEM OVER TIME WITH REGARD TO THE SUB-
25 COMPONENTS AS WELL?

1 A MISTER SIMMONS SEEMS TO CONSISTENTLY HAVE SCORED SLIGHTLY
2 HIGHER ON THE NON-VERBAL TASKS OF INTELLIGENCE, ON THE PIQ
3 AND SEEMS TO HAVE CONSISTENTLY HAD A PATTERN OF SCORING
4 LOWER ON THE VIQ.

5 Q ALL RIGHT. AND LASTLY, WITH REGARDS TO THIS CHART, YOU
6 ALREADY TESTIFIED THAT ALL OF THESE SCORES ARE BELOW THE
7 CUT-OFF FOR MENTAL RETARDATION.

8 A YES.

9 Q IN ORDER TO REACH THAT CONCLUSION, HAVE YOU HAD TO MAKE ANY
10 ADJUSTMENTS FOR THE FLYNN EFFECT?

11 A I HAVE NOT.

12 Q HAVE YOU MADE ANY ADJUSTMENTS FOR THE PRACTICE EFFECT?

13 A I HAVE NOT.

14 Q ALL RIGHT. WITH REGARD TO PRONG TWO, DO YOU HAVE AN OPINION
15 WITH REGARDS TO WHETHER MISTER SIMMONS MEETS PRONG TWO?

16 A WELL, MISTER SIMMONS WAS ADMINISTERED ONE STANDARDIZED
17 TEST OF ADAPTIVE BEHAVIOR BY DOCTOR KEYES IN 1999. DOCTOR
18 KEYES INTERVIEWED MISTER SIMMONS' EX-WIFE, VALERIE SIMMONS
19 AND ONE OF HIS OLDER SISTERS, EARTHA SMOOTH, I BELIEVE HER
20 NAME IS. SO, HE INTERVIEWED THOSE TWO PEOPLE AND ON THE
21 INSTRUMENT CALLED THE VINELAND ADAPTIVE BEHAVIOR SCALE,
22 WHICH IS A VERY GOOD STANDARDIZED, INDIVIDUALLY LISTED
23 MEASURE OF ADAPTIVE BEHAVIOR, AND ON THAT INSTRUMENT, HE
24 OBTAINED A STANDARD SCORE ON THE COMPOSITE OF 43, WHICH IS
25 SIGNIFICANTLY BELOW AVERAGE.

1 **THE COURT:** AND WHAT IS THE AVERAGE ON THAT?

2 **DR. TASSE:** THE AVERAGE IS 100 AND SIGNIFICANTLY BELOW AVERAGE
3 IS ANYTHING APPROXIMATELY 70 OR LOWER.

4 **THE COURT:** THAT'S TWO MEANS BELOW?

5 **DR. TASSE:** CORRECT.

6 Q ALL RIGHT. AND WHAT IS YOUR OPINION WITH REGARD TO PRONG
7 THREE?

8 A THE ONSET BEFORE EIGHTEEN IS REALLY THE MORE CHALLENGING
9 ONE IN THIS CASE AND I HAD REQUESTED WHEN WE MET THAT I
10 WANTED TO MEET WITH MS. HAMMOCK BECAUSE YOU HAD TOLD ME
11 MS. HAMMOCK WAS INTERVIEWING FAMILY MEMBERS AND GETTING
12 THE HISTORY AND THE SOCIAL HISTORY AND MY SENSE FROM THE
13 INFORMATION I GOT FROM MS. HAMMOCK, LOOKING AT THE SCHOOL
14 RECORDS, LOOKING AT THE ACHIEVEMENT SCORES. YOU KNOW, THE
15 ACHIEVEMENT SCORES ARE SHOWING THAT THIS INDIVIDUAL, MISTER
16 SIMMONS WAS STRUGGLING IN SCHOOL. I MEAN, HE'S READING AT A --
17 I UNDERSTAND THAT HE HAS A HIGH SCHOOL DIPLOMA, BUT WHEN WE
18 ASSESS HIS READING, HIS ARITHMETIC, HIS WRITING, HE'S AT A FIRST,
19 SECOND, THIRD GRADE READING LEVEL. SO, CLEARLY, THERE'S SOME
20 SIGNIFICANT DEFICITS IN FUNCTIONAL ACADEMICS.

21 Q YOU HAVE ALSO REVIEWED SOME INFORMATION WITH REGARD TO
22 MISTER SIMMONS' DRUG AND ALCOHOL ABUSE?

23 A I READ A REPORT FROM A DRUG AND ALCOHOL ABUSE CENTER.

24 Q DOES HIS HISTORY OF DRUG AND ALCOHOL ABUSE IMPACT YOUR
25 OPINION IN ANY WAY?

1 A YOU KNOW, YOU CERTAINLY HAVE TO MAKE A DETERMINATION OF
2 WHAT IS THE INFLUENCE WHEN HE'S TESTED. IS HE SOBER? WHAT IS
3 THE IMPACT OF THE HEAVY USE OF DRUGS OR ALCOHOL. WHEN HE
4 WAS ASSESSED, HE WAS OBVIOUSLY SOBER. OVER YEARS OF DRUG
5 AND ALCOHOL CONSUMPTION, THERE ARE ALWAYS QUESTIONS ABOUT
6 HOW DOES THAT AFFECT THE BRAIN. DOES IT DETERIORATE THE
7 BRAIN, IS THERE BRAIN DAMAGE. I FORGET WHO DID IT, BUT THERE
8 WAS AN M-R-I EVALUATION DONE WHICH SEEMED TO INDICATE THAT
9 THERE WAS NO BRAIN DAMAGE, NOTHING SIGNIFICANT ON THE MRI
10 WHEN IT WAS DONE. TODAY, WHEN HE WAS ASSESSED A YEAR AGO
11 ON THE WAIS-IV, HIS I.Q. SCORE WAS, AGAIN, YET AGAIN, CONSISTENT
12 WITH PREVIOUS TESTING. SO, NO BIG JUMP WHERE ONE MIGHT HAVE
13 THOUGHT AFTER BEING SOBER FOR TEN YEARS. AS DRUGS AND
14 ALCOHOL WASH OUT, HE ALL OF A SUDDEN PERFORMS BETTER
15 COGNITIVELY OR INTELLECTUALLY.

16 Q THE LAST THING I WANT TO ASK YOU ABOUT YOUR REVIEW OF THE
17 WORK OF THE OTHER EXPERTS WHO TESTIFIED AT TRIAL, OR I GUESS
18 NOT ALL OF THEM ACTUALLY TESTIFIED, BUT YOU REVIEWED A
19 NUMBER OF THEIR CASE FILES AS WELL AS TESTING. IS THAT RIGHT?

20 A I REVIEWED THE CASE FILES AND TESTIMONY OF THE ONES THAT ARE
21 LISTED HERE: SAYLOR, BEHRMANN, VIDIC, SANDLER, MCABEE, KEYES
22 AND KNIGHT.

23 Q AND WERE ALL OF THESE EXPERTS ASKED TO RENDER AN OPINION ON
24 MENTAL RETARDATION?

25 A I DON'T THINK SO. NO.

1 Q YOU REVIEWED SOME INFORMATION FROM DOCTOR SAYLOR. I'D LIKE
2 TO START WITH HIM. CAN YOU EXPLAIN WHAT YOU FOUND WHEN YOU
3 EVALUATED WHAT HE DID.

4 A WELL —

5 THE COURT: I'M NOT SURE YOU CAN DO THIS. ARE YOU TRYING TO PIT
6 TWO WITNESSES AGAINST EACH OTHER? I MEAN, I'M NOT SURE WHAT YOU
7 ARE TRYING TO DO HERE.

8 MS. PAAVOLA: WELL, I THINK THAT DOCTOR TASSE IS QUALIFIED TO
9 RENDER AN OPINION ABOUT WHETHER THE EXPERTS THAT GAVE OPINIONS
10 ON M-R FOLLOWED THE PROPER METHODOLOGY FOR DOING THAT
11 ASSESSMENT.

12 THE COURT: WHETHER OR NOT SAYLOR FOLLOWED THE PROPER
13 METHODOLOGY?

14 MS. PAAVOLA: YES. ALL OF THEM THAT RENDERED OPINIONS ON M-R. I
15 THINK HE IS QUALIFIED TO GIVE AN OPINION ON WHETHER THEY FOLLOWED
16 THE PROPER METHODOLOGY IN THAT FIELD, IN HIS FIELD.

17 MS. ZELENKA: YOUR HONOR, DOCTOR SAYLOR TESTIFIED AT THE TRIAL
18 AND HIS TESTIMONY SPEAKS FOR ITSELF. IT SOUNDS LIKE WE ARE PITTING
19 WITNESSES, WHICH IS NOT APPROPRIATE. SO, I WOULD HAVE AN OBJECTION
20 TO THAT. HE CAN TESTIFY ABOUT WHAT HE REVIEWED AND WHAT THOSE
21 RESULTS WERE.

22 THE COURT: WHICH HE'S DONE. NO OBJECTION. I'M NOT SURE HE CAN
23 NOW COME IN AND SAY WHY THE OTHER EXPERT WAS WRONG AND THAT IS
24 FOR THE FACT FINDER, AS I AM IN THIS CASE.

25 MS. PAAVOLA: WELL, YOUR HONOR, I THINK TO THE EXTENT THAT HIS

DIRECT EXAMINATION OF DR. MARC TASSE BY MS. PAAVOLA

1 OPINION RELIES ON WHAT THE OTHER EXPERTS -- SOME OF THEIR WORK,
2 AND SO I THINK HE SHOULD BE ALLOWED TO AT LEAST SAY WHETHER HE
3 GIVES MORE WEIGHT OR LESS WEIGHT TO PARTICULAR PARTS OF THEIR
4 WORK OR NOT.

5 THE COURT: WELL, HE'S RENDERED AN OPINION BASED ON THESE
6 FIVE, FOR THE LACK OF A BETTER WORD, I.Q. TESTS. IF HE'S GOING TO
7 CRITICIZE THEM, YOU MAY BE UNDERMINING YOUR OWN TESTIMONY. I'M NOT
8 SURE WHAT YOU ARE TRYING TO DO. YOU CAN DISCUSS IT WITH MISTER
9 MORTON IF THIS IS THE WAY YOU WANT TO GO. (MS. PAAVOLA CONFERES
10 WITH MISTER MORTON)

11 MS. PAAVOLA: CAN I ASK HIM SOME MORE SPECIFIC QUESTIONS ABOUT
12 THE TEST RESULTS?

13 THE COURT: YOU GO AHEAD AND ASK HIM. I'M GOING TO LET YOU
14 MAKE YOUR RECORD, BUT DON'T --

15 MS. PAAVOLA: I'LL TRY TO BE MORE SPECIFIC.

16 THE COURT: NO, MA'AM, I'M JUST -- YOU'VE DONE A PRETTY GOOD JOB
17 SO FAR OTHER THAN THAT.

18 MS. PAAVOLA: OKAY.

19 Q ALL RIGHT. WELL, DOCTOR TASSE, DOCTOR SAYLOR ADMINISTERED A
20 WAIS-R. IS THAT CORRECT?

21 THE COURT: SAYLOR WAS WHO?

22 MS. PAAVOLA: HIS NAME IS CHARLES BARTON SAYLOR.

23 THE COURT: AND HE TESTIFIED FOR WHO?

24 MS. PAAVOLA: FOR THE DEFENSE.

25 THE COURT: IN THE ORIGINAL TRIAL?

1 **MS. PAAVOLA:** YES.

2 Q DOCTOR SAYLOR ADMINISTERED THE WAIS-R.

3 A HE DID.

4 Q AND ON YOUR CHART HERE, KENNETH'S I.Q. WAS 69.

5 A YES.

6 Q YOU TALKED A LITTLE BIT EARLIER ABOUT THE FLYNN EFFECT. COULD
7 YOU EXPLAIN WHAT THE SIGNIFICANCE IS WITH THE FLYNN EFFECT,
8 SPECIFICALLY IN REGARDS TO THIS I.Q. TEST?

9 **MR. ZELENKA:** I OBJECT, YOUR HONOR. THE FLYNN EFFECT HAS NOT
10 BEEN ESTABLISHED AS A STANDARD IN SOUTH CAROLINA FOR THE TESTING
11 AND EVALUATION OF I.Q. TESTS IN ANY WAY, SHAPE, OR FORM. THE FOURTH
12 CIRCUIT, IN FACT, HAS REJECTED THE FLYNN EFFECT AND A VIRGINIA CASE.

13 **THE COURT:** HE ALSO SAID A WHILE AGO HE DIDN'T ADD ANY FLYNN
14 EFFECT TO IT, IF I REMEMBER CORRECTLY.

15 **MS. PAAVOLA:** RIGHT. YOU DON'T HAVE TO MAKE THE FLYNN
16 ADJUSTMENTS TO SAY WHETHER THEY WOULD BE IN THE RANGE. I WAS
17 JUST WANTING TO ESTABLISH THE POINT THAT IT DOES APPLY TO THAT
18 TEST.

19 **THE COURT:** WELL, JUST ASK YOUR QUESTION THEN. RE-STATE YOUR
20 QUESTION.

21 Q DOES THE FLYNN EFFECT HAVE ANY IMPACT ON THIS PARTICULAR
22 RESULT, THE 69 ON THE WAIS-R THAT DOCTOR SAYLOR
23 ADMINISTERED?

24 A BECAUSE THE WAIS-R WAS AT THE END -- ACTUALLY THE WAIS-R
25 PROBABLY SHOULD NOT HAVE BEEN USED BECAUSE THE WAIS III WAS

1 AVAILABLE THEN AND SO THE WAIS-R HAD BEEN IN EXISTENCE FOR
2 WELL OVER TWENTY SOME YEARS, SO OBVIOUSLY THE FLYNN EFFECT
3 SAYS, IF ANYTHING, THERE'S GOING TO BE INFLATION IN SCORES
4 OBTAINED ON AN OLDER VERSION VERSUS A NEWER VERSION.

5 Q SO, IF YOU DID APPLY THE FLYNN EFFECT TO THIS TEST RESULT, IT
6 WOULD BE LOWER, THE SCORE WOULD BE LOWER?

7 MR. ZELENKA: OBJECT. I THINK HE'S ALREADY ANSWERED. I'M
8 CONFUSED BY THE QUESTION. I APOLOGIZE.

9 THE COURT: RE-STATE YOUR QUESTION.

10 Q IF YOU APPLIED THE FLYNN EFFECT TO THIS TEST, TOOK IT INTO
11 CONSIDERATION, THE 69 SCORE, YOU WOULD NEED TO LOWER IT IN
12 ORDER TO PROPERLY APPLY THE FLYNN EFFECT TO THIS TEST.

13 A SINCE THE WAIS-R IS AN OLD TEST, AT THIS POINT IT HAD BEEN IN
14 EXISTENCE FOR A COUPLE OF DECADES, THE OBTAINED FULL SCALE
15 PROBABLY IS AN INFLATION, AN OVER-ESTIMATE.

16 THE COURT: IS THAT -- YOU ARE TESTIFYING NOW TO AN OPINION TO A
17 REASONABLE DEGREE OF M-R CERTAINTY, FOR A LACK OF A BETTER WAY OF
18 SAYING IT, OR IS THAT JUST SPECULATION? DO YOU KNOW THAT?

19 DR. TASSE: YES, YOUR HONOR. WE KNOW THAT THE WAIS-R, WHEN
20 YOU COMPARE IT TO THE WAIS-III, IT OVER-ESTIMATES COMPARED TO THE
21 NEWER TEST.

22 THE COURT: OKAY. I UNDERSTAND. MOVE ALONG.

23 Q ALL RIGHT. YOU REVIEWED THE FILES OF DOCTOR BEHRMANN AND
24 DOCTOR VIDIC.

25 A YES.

1 Q CAN YOU TELL US WHAT SIGNIFICANCE THAT HAS, IF ANY, WITH
2 REGARDS TO YOUR OPINION?

3 A WELL, THEY ADMINISTERED AN I.Q. TEST AND I THINK IN THAT CASE
4 THEY RULED A PROVISIONAL DIAGNOSIS OF MENTAL RETARDATION. I
5 THINK THE PROVISIONAL WAS APPROPRIATE BECAUSE THEY DIDN'T DO
6 AN ADAPTIVE BEHAVIOR EVALUATION.

7 MR. ZELENKA: OBJECT, YOUR HONOR. THAT CALLS FOR SPECULATION
8 AND I CAN DEAL WITH THAT ON CROSS EXAMINATION, BUT AS YOUR HONOR
9 KNOWS, UNDER OUR STATE STATUTE, DMH IS ONLY ALLOWED TO MAKE A
10 PROVISIONAL DIAGNOSIS ON COMPETENCY AND CRIMINAL RESPONSIBILITY
11 THEN THE MATTERS ARE REFERRED OVER TO THE DEPARTMENT OF MENTAL
12 RETARDATION AND SUBSEQUENTLY THE DEPARTMENT OF DISABILITIES AND
13 SPECIAL NEEDS TO MAKE THE APPROPRIATE ASSESSMENT.

14 THE COURT: ALL RIGHT. I'M GOING TO LET THIS QUESTION STAND AND
15 THE ANSWER. OBVIOUSLY, YOU CAN CROSS EXAMINE HIM ON THAT. I THINK
16 WE'RE GETTING INTO AN AREA WHERE WE'VE GOT ONE EXPERT AND THEN
17 YOU ARE PITTING HIM AGAINST THE OTHER EXPERTS, WHICH I DON'T THINK IS
18 PROPER TESTIMONY. HE'S PRESENTED HIS CASE, HE'S PRESENTED HIS
19 OPINIONS, HE'S PRESENTED WHAT HE BASED HIS OPINIONS ON AND NOW TO
20 GO BACK AND TRY TO EVALUATE THESE OTHER TESTS THAT HE'S ALREADY
21 RELIED UPON, I'M NOT SURE THAT'S SOMETHING I CAN TAKE INTO ACCOUNT,
22 BUT I DON'T WANT TO CUT YOU OFF. I UNDERSTAND THE MAGNITUDE OF
23 WHAT WE ARE DOING HERE AND SO IF YOU WANT TO MAKE A RECORD, I'M
24 GOING TO LET YOU DO IT, BUT I DON'T KNOW WHETHER I'M GOING TO
25 CONSIDER ANY OF THIS.

1 **MS. PAAVOLA:** ALL RIGHT. THAT'S FINE. I'LL JUST MAKE ONE MORE
2 POINT AND THEN I'LL MOVE ON.

3 **THE COURT:** THANK YOU.

4 **Q** YOU REVIEWED THE FILES OF DOCTOR SANDLER AND DOCTOR
5 MCABEE AT THE DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS?

6 **A** YES.

7 **Q** DID THEY DO A MEASUREMENT OF ADAPTIVE FUNCTIONING?

8 **A** I BELIEVE THEY ATTEMPTED TO ADMINISTER THE VINELAND ADAPTIVE
9 BEHAVIOR SCALE WITH, I THINK, THE REPORT STATED WITH
10 CORRECTIONAL OFFICERS AND DID NOT GET, I THINK, A COMPLETE
11 PROTOCOL AND NO FAMILY MEMBERS WERE AVAILABLE.

12 **THE COURT:** AND YOU INDICATE THAT ON EXHIBIT #6 BY SAYING "NO
13 SCORES - FAILED TO RECRUIT APPROPRIATE RESPONDENT?"

14 **DR. TASSE:** CORRECT. YES, YOUR HONOR.

15 **Q** ALL RIGHT. NO FURTHER QUESTIONS.

16 **THE COURT:** YOU MAY WANT TO ASK MISTER MORTON IF HE HAS --- **MS.**

17 **PAAVOLA:** I'M SORRY. YOUR HONOR, I DO HAVE ONE MORE QUESTION.

18 **Q** THERE WAS SOME TESTIMONY EARLIER FROM MARJORIE HAMMOCK
19 ABOUT KENNETH SIMMONS' SISTER BEING DIAGNOSED WITH MENTAL
20 RETARDATION.

21 **A** YES.

22 **Q** DOES THAT HAVE ANY SIGNIFICANCE FOR YOU IN YOUR ASSESSMENT
23 OF KENNETH SIMMONS?

24 **A** IT'S NOT DIRECTLY RELATED BUT THERE IS ALWAYS A QUESTION WHEN
25 YOU'RE EVALUATING SOMEBODY WITH MENTAL RETARDATION AND

1 THERE'S NO CLEAR ETIOLOGY OR CAUSE, YOU ALWAYS HAVE TO
2 WONDER IF IT'S GENETIC, IS IT ENVIRONMENTAL. IN A CASE WHERE
3 THERE'S ANOTHER SIBLING, IT JUST MAKES YOU THINK IT'S A SHARED
4 ETIOLOGY OR SHARED CAUSE AND IT DOESN'T MEAN THAT I KNOW IF
5 IT'S GENETIC AND/OR ENVIRONMENTAL. IT JUST ATTESTS TO THE FACT
6 THAT THERE'S A PRESENCE OF MENTAL RETARDATION.

7 Q ALL RIGHT. AND JUST TO SUM UP -- (CONFERS WITH MISTER MORTON)
8 SO, YOUR OPINION IS THAT KENNETH SIMMONS HAS MENTAL
9 RETARDATION?

10 A YES.

11 Q AND THAT WOULD MEAN HE PASSES ALL THREE PRONGS OF THE TEST?

12 A YES.

13 **THE COURT:** OKAY. LET'S DO THIS. IT'S FOUR O'CLOCK. WE'LL TAKE A
14 SHORT BREAK, EVERYBODY CAN USE THE RESTROOM AND WHATEVER AND
15 LET ME TALK TO THE LAWYERS IN CHAMBERS AND ONE SCDC GUY WHO IS
16 HEAD OF THE DETAIL. WE'LL STAND AT EASE FOR, NOT LONG.

17 (BRIEF BREAK)

18 **MS PAAVOLA:** YOUR HONOR, WE WOULD LIKE TO ENTER EXHIBIT #6
19 INTO EVIDENCE. THE COURT REPORTER WAS HELPFULLY TELLING ME THAT
20 WE IDENTIFIED IT BUT FAILED TO MOVE IT INTO EVIDENCE.

21 **THE COURT:** ANY OBJECTION BY THE STATE?

22 **MR. ZELENKA:** FOR DEMONSTRATIVE PURPOSES, NO OBJECTION.

23 **THE COURT:** #6 IS ENTERED INTO EVIDENCE.

24 (WHEREUPON, A SUMMARY OF KENNETH SIMMONS' I.Q. TEST SCORES
25 IS ENTERED INTO EVIDENCE AS APPLICANT'S EXHIBIT #6, WITHOUT

1 OBJECTION.)

2 THE COURT: THANK YOU. YOU MAY CROSS.

3 **CROSS EXAMINATION OF DOCTOR MARC TASSE BY MISTER ZELENKA**

4 Q DOCTOR TASSE, DID YOU DO A WRITTEN REPORT?

5 A I DID NOT. NO.

6 Q WHEN YOU ARE TEACHING YOUR STUDENTS AT THE OHIO STATE
7 UNIVERSITY HOW TO DO ASSESSMENTS FOR MENTAL RETARDATION,
8 DO YOU TELL YOUR STUDENTS NOT TO PUT THEIR OPINIONS IN
9 WRITING?

10 A I'M SORRY. DO I TELL THEM...

11 Q NOT TO PUT THEIR OPINIONS IN WRITING.

12 A I DON'T TELL THEM NOT TO PUT THEIR OPINIONS IN WRITING.

13 Q IN FACT, IT WOULD BE YOUR APPROACH AS AN INSTRUCTOR TO HAVE
14 THEIR OPINIONS PLACED IN WRITING. ISN'T THAT CORRECT?

15 A IT DEPENDS. THEIR OPINION REGARDING AN EVALUATION OF MENTAL
16 RETARDATION?

17 Q YES.

18 A SURE. YES.

19 Q SO, WHY DIDN'T YOU DO A WRITTEN OPINION IN THIS CASE WHEN
20 THAT'S YOUR OWN STANDARD WITH YOUR STUDENTS?

21 A I WASN'T ASKED TO PRODUCE A REPORT.

22 Q BUT AS A PROFESSIONAL, YOU CHOSE TO GO AGAINST YOUR OWN
23 TEACHING AND NOT PREPARE A REPORT?

24 A I DIDN'T DO AN EVALUATION IN THIS CASE. I DID A REVIEW OF THE
25 EXISTING MATERIALS AND I WASN'T ASKED TO PREPARE A REPORT.

1 Q YOU DIDN'T DO AN EVALUATION AND SO, DOES THAT MEAN YOU DON'T
2 REALLY HAVE AN OPINION ---

3 A I DO HAVE AN OPINION.

4 Q --- THAT YOU CAN EXPRESS? WELL, I'M CONFUSED. SO, DID YOU
5 EVALUATE MISTER SIMMONS FOR MENTAL RETARDATION OR DID YOU
6 NOT?

7 A I REVIEWED THE MATERIALS, THE PREVIOUS EVALUATIONS AND I
8 RENDERED AN OPINION BASED ON THE MATERIALS THAT I REVIEWED.

9 Q ACCEPTING SOME AND REJECTING SOME.

10 A ACTUALLY, I THINK I TOOK ALL THE INFORMATION THAT WAS THERE. I
11 DON'T THINK I REJECTED ANYTHING. NO.

12 Q AND YOU TESTIFIED -- IN YOUR POWERPOINT, YOU STATED THAT YOU
13 RELIED UPON DSM TR. IS THAT CORRECT?

14 A YES.

15 Q AND YOU RELIED UPON THE -- NOW, I ALWAYS HAVE TO DOUBLE CHECK
16 IT BECAUSE THEY CHANGE THEIR NAME, BUT YOU TELL ME IT IS THE
17 AAID?

18 A AAIDD.

19 Q AAIDD, WHICH IS THE AMERICAN ASSOCIATION OF WHAT?

20 A INTELLECTUAL AND DEVELOPMENTAL DISABILITIES.

21 Q INTELLECTUAL AND DEVELOPMENTAL DISABILITIES WHICH USED TO BE
22 WHAT?

23 A THE AMERICAN ASSOCIATION ON MENTAL RETARDATION.

24 Q OKAY. AND THAT GROUP OVER WHAT PERIOD OF TIME HAS CHANGED
25 ITS CHARACTERISTICS FOR ITS DIAGNOSES OF MENTAL RETARDATION?

1 HOW MANY REVISIONS OF THAT DIAGNOSTIC CRITERIA HAS THAT
2 ASSOCIATION DONE?

3 A THEY ARE CURRENTLY AT THEIR ELEVENTH MANUAL IN OVER, I GUESS,
4 NINETY YEARS, APPROXIMATELY.

5 Q ELEVEN CHANGES OVER THE YEARS. NOW, ARE YOU FAMILIAR WITH
6 WHEN THE SOUTH CAROLINA DEFINITION WAS CREATED?

7 A NO. I DON'T KNOW WHEN IT WAS CREATED.

8 Q OKAY. AND THE SOUTH CAROLINA DEFINITION WHICH IS SET OUT,
9 ACTUALLY, IN THIS DEFENDANT'S CASE; FRANKLIN SIMMONS, ET.AL.
10 VERSUS MAYNARD, DOESN'T ADOPT SPECIFICALLY EITHER OF THE
11 DEFINITIONS YOU RELIED UPON. DOES IT?

12 A I THINK THE STATE DEFINITION IS CONSISTENT WITH THE DSM AND
13 AAMR DEFINITION.

14 Q OKAY. BUT DOES THAT DEFINITION SAY I.Q. OF 70?

15 A I THINK IT SAYS SIGNIFICANTLY SUB-AVERAGE.

16 Q SIGNIFICANTLY SUB-AVERAGE INTELLECTUAL FUNCTIONING.
17 CORRECT?

18 A FROM MEMORY, I BELIEVE THAT'S WHAT IT SAYS.

19 Q BUT IT DOESN'T SAY APPROXIMATELY 70. DOES IT?

20 A NOT IN THAT TEXT. NO

21 Q AND IT'S NOT DEFINED. IS IT?

22 A THEY DON'T DEFINE WHAT SIGNIFICANTLY SUB-AVERAGE MEANS?

23 Q CORRECT.

24 A I DON'T THINK SO.

25 Q DO YOU KNOW WHAT YEAR THAT DEFINITION WAS INITIALLY ADOPTED

1 BY THE LEGISLATURE IN SOUTH CAROLINA?

2 A I DO NOT KNOW.

3 Q DO YOU KNOW WHEN THAT DEFINITION IN SOUTH CAROLINA WAS
4 ADOPTED, WHETHER THE I.Q. THAT WAS GENERALLY APPLIED AND
5 ACCEPTED IN SOUTH CAROLINA WAS 70, RATHER THAN
6 APPROXIMATELY 70?

7 A I'M NOT SURE I UNDERSTAND YOUR QUESTION.

8 Q DO YOU KNOW WHAT THE STANDARD WAS FOR I.Q.'S IN SOUTH
9 CAROLINA WHEN THAT DEFINITION FOR MENTAL RETARDATION WAS
10 FIRST ADOPTED BY THE GENERAL ASSEMBLY?

11 A NO. I SAID I DIDN'T. I HAVE NO IDEA WHEN IT WAS FIRST ADOPTED.
12 I DON'T KNOW.

13 Q AND ARE YOU AWARE THAT AN ATTEMPT WAS MADE IN THE
14 DEFENDANT'S CASE IN THE SUPREME COURT TO HAVE THE COURT
15 REVISE THE DEFINITION TO BE THE DEFINITION THAT YOU ARE RELYING
16 UPON AND THE COURT CHOSE NOT TO TAKE THAT COURSE AND SAID
17 THAT'S A MATTER FOR THE GENERAL ASSEMBLY TO DO?

18 A I DID NOT KNOW THAT. NO.

19 Q OKAY. NOW, THE DSM ---

20 THE COURT: MISTER ZELENKA, THE CASE THAT YOU ARE REFERRING
21 TO, OBVIOUSLY, IS FRANKLIN VERSUS MAYNARD, CITED 2003, DECEMBER.

22 MR. ZELENKA: THAT'S CORRECT.

23 THE COURT: AND THERE WAS A FOOTNOTE ABOUT ANY CHANGE THE
24 GENERAL ASSEMBLY COULD DO SO. HAS IT BEEN AMENDED AT ALL SINCE
25 THEN?

1 **MR. ZELENKA:** NO.

2 **THE COURT:** THERE WAS A FOOTNOTE AND THEY WERE CURRENTLY
3 CONSIDERING A DEFINITION FOR MENTAL RETARDATION BUT SINCE
4 FRANKLIN, HAS THERE BEEN ANY CHANGE TO IT AT ALL?

5 **MR. ZELENKA:** NO, THERE HASN'T. THERE WERE BILLS PENDING
6 BEFORE THE GENERAL ASSEMBLY DURING THAT SESSION AND MAYBE AGAIN
7 DURING THE NEXT SESSION, BUT THEY NEVER MOVED BEYOND COMMITTING.

8 **THE COURT:** AND THE DEFINITION THAT THEY ADOPTED OR
9 RE-ADOPTED SO TO SPEAK UNDER 16-3-20(C)(d)(10), THAT'S BEEN THERE FOR
10 A WHILE HAS IT NOT?

11 **MR. ZELENKA:** IT'S BEEN THERE BEFORE IT BECAME A DEFINED TERM
12 AS A STATUTORY MITIGATING CIRCUMSTANCE. IT WAS THE TERM WITHIN THE
13 PROBATE STATUTES AND I BELIEVE THAT MAY GO BACK TO BEFORE 1980.

14 **THE COURT:** BUT WE'VE NEVER SET A NUMBER SUCH AS 70 LIKE THE
15 DSM DOES OR IN THE TESTIMONY TODAY, WE SIMPLY USE SIGNIFICANTLY
16 SUB-AVERAGE GENERAL INTELLIGENCE.

17 **MR. ZELENKA:** RIGHT. AND THE EVALUATORS WERE THE ONES THAT
18 ESTABLISHED THEIR OWN PRACTICE WITH THAT AND SIMILARLY AND
19 POSSIBLY MORE IMPORTANTLY, THEY DIDN'T ADOPT, IN THE ADAPTIVE
20 FUNCTIONING PORTION, THAT SPECIFIC LANGUAGE OUT OF DSM IV TR
21 WHERE IT IS "AT LEAST TWO OF THE FOLLOWING, THEREFORE IT MEETS."
22 AND SO IT DIDN'T HAVE WHAT I WOULD ALMOST SAY WERE SPECIFIC
23 CONDITIONS; IF YOU HAVE "A" AND "B" THEN YOU MUST HAVE MENTAL
24 RETARDATION. THAT WAS NOT ADOPTED AS A MATTER OF LAW AND SO
25 THOSE TWO FACTORS, AND SO WE HAVE THE MORE GENERAL DEFINITIONS.

1 STILL OUT THERE.

2 Q NOW, WITH RESPECT TO THE MATTERS THAT YOU SPOKE ABOUT, YOU
3 ARE AWARE THAT SOME STATES HAVE VARYING DEFINITIONS FOR
4 MENTAL RETARDATION?

5 A STATE'S ESTABLISH THEIR OWN DEFINITIONS, YES. I AM AWARE OF
6 THAT.

7 Q AND SOME STATES HAVE EVEN SAID MENTAL RETARDATION HAS TO BE
8 BELOW 75. ISN'T THAT CORRECT?

9 A I DON'T KNOW THE STATE DEFINITIONS. I DON'T KNOW ALL OF THEM.

10 Q AND SOME OF THEM HAVE SAID IT HAS TO BE BELOW 65. SOME STATES
11 HAVE PASSED THOSE AFTER ATKINS.

12 A I DIDN'T KNOW THAT.

13 Q AND SOME STATES HAVE SAID THERE IS A CEILING OF 70. NOT 71, 72,
14 73, 74. 75, BUT 70. CORRECT?

15 A I DON'T KNOW THAT. NO.

16 Q YOU DON'T KNOW THAT?

17 A I DON'T KNOW THE STATE DEFINITIONS. NO. I MEAN I KNOW THE
18 SOUTH CAROLINA ONE. I KNOW THE STATE'S THAT I'VE WORKED IN,
19 BUT I DON'T KNOW THAT FOR A FACT.

20 Q OKAY. AND THE DEFINITION FOR MENTAL RETARDATION IN DSM IV TR
21 IS NOT 75. IS IT?

22 A IT SAYS VERY CLEARLY IN THE DSM, APPROXIMATELY 70 AND A SCORE
23 OF 70 TO 75 WOULD QUALIFY FOR PRONG ONE.

24 Q OKAY. WOULD QUALIFY. BUT THAT'S WITH THE STANDARD ERROR OF
25 MEASUREMENT. CORRECT?

1 A WHICH IS VERY IMPORTANT. AND WHEN IT SAYS, IF I MAY —

2 Q AND THE STANDARD ERROR OF MEASUREMENT GOES TWO WAYS.
3 DOESN'T IT?

4 A YES. IT DOES.

5 Q SO, ACTUALLY A SCORE OF 75, COULD ACTUALLY WITH THE STANDARD
6 ERROR OF MEASUREMENT, BE AN I.Q. OF 80.

7 A NO. NO, BECAUSE THE 70 TO 75 NOW TAKES INTO CONSIDERATION ANY
8 STANDARD ERROR OF MEASUREMENT.

9 Q NO. WHAT I'M SAYING IS WITH AN I.Q. SCORE OF 75, WITH THE
10 STANDARD ERROR OF MEASUREMENT ON THAT I.Q. SCORE IS PLUS OR
11 MINUS 5 AND FOR THAT I.Q. SCORE, IT COULD BE 80. RIGHT?

12 A IT COULD BE. YES.

13 Q AND IF IT'S 80, HE CANNOT BE MENTALLY RETARDED UNDER DSM IV TR.
14 CORRECT?

15 A CORRECT. AN I.Q. SCORE IS AN OBTAINED SCORE WHICH IS NOT
16 PERFECT AND WE ASSUME THAT A PLUS OR MINUS FIVE POINTS ABOVE
17 AND BELOW IS PROBABLY A GOOD CONFIDENCE INTERVAL OF WHERE
18 A PERSON'S TRUE I.Q. IS SITUATED.

19 Q OKAY. SO, IN YOUR LEVEL, IT ACTUALLY COULD BE FIVE MORE ON ALL
20 THOSE SCORES TO A LEVEL OF CONFIDENCE. ISN'T THAT CORRECT?

21 A NO. NO. THE 75 IS THE UPPER BOUNDARY OF THE —

22 Q I MEAN ON AN INDIVIDUAL ---

23 A STANDARD ERROR OF ---

24 THE COURT: HOLD ON. HOLD ON. Y'ALL ARE BOTH TALKING. PLEASE
25 LET EACH ONE FINISH THEIR ANSWER OR THE QUESTION BEFORE SPEAKING.

1 THE COURT REPORTER CAN'T TAKE IT DOWN.

2 MR. ZELENKA: I APOLOGIZE.

3 THE COURT: NO PROBLEM.

4 Q OKAY. WHEN I'M SPEAKING OF 75 OR 60 OR 71 OR 72, I'M SPEAKING OF
5 AN INDIVIDUAL TEST SCORE. OKAY? AND THAT INDIVIDUAL TEST
6 SCORE IS WHAT YOU LOOK AT FOR A STANDARD ERROR OF
7 MEASUREMENT. RIGHT? YOU'RE NOT AVERAGING TEST SCORES
8 TOGETHER, YOU'RE LOOKING AT INDIVIDUAL TEST SCORES. AREN'T
9 YOU?

10 A YOU'RE LOOKING AT THE INDIVIDUAL SCORE OBTAINED ON A SPECIFIC
11 TEST. YES. SO, THE SCORE OBTAINED, THEN YOU ADD OR SUBTRACT
12 THE STANDARD ERROR OF MEASUREMENT.

13 Q OKAY. AND YOU'RE NOT ADDING, YOU'RE JUST SUBTRACTING,
14 GENERALLY, IN WHAT YOU'RE DOING WITH RESPECT TO THAT 75
15 THAT'S GIVEN. CORRECT?

16 A I DON'T FOLLOW.

17 Q OKAY. DOCTOR SANDLER AND MCABEE ON FEBRUARY 9, 1999 HAD A
18 FULL SCALE I.Q. OF 75. BASED UPON THAT FULL SCALE I.Q. OF 75,
19 WHICH THEY RELIED UPON IN MAKING THEIR OPINION AT THE TIME OF
20 THE TRIAL, WAS THAT THE DEFENDANT DID NOT SUFFER FROM MENTAL
21 RETARDATION. CORRECT?

22 A THAT WAS THEIR OPINION.

23 Q STATE EXHIBIT #A, ADMITTED INTO EVIDENCE BEFORE THE COURT.
24 CORRECT?

25 A I DON'T KNOW THE STATE EXHIBIT NUMBER.

1 Q OKAY. BUT THAT FULL SCALE SCORE OF 75, WITH THE STANDARD
2 ERROR OF MEASUREMENT, YOU COULD LOOK AT IT UNDER DSM IV TR
3 WITH A PLUS OR MINUS FIVE AND YOU COULD MAKE A DETERMINATION
4 THAT THAT PERSON WAS NOT MENTALLY RETARDED.

5 A YOU COULD. YES.

6 Q AND EVEN IF HE HAD A SCALED SCORE OF 70, YOU COULD MAKE THAT
7 SAME ASSESSMENT. ISN'T THAT CORRECT?

8 A YOU COULD.

9 Q EVEN IF HE HAD A SCALED SCORE OF 65, YOU COULD MAKE AN
10 ASSESSMENT THAT HE WAS NOT MENTALLY RETARDED. CORRECT?

11 A YOU WOULD CERTAINLY NEED TO LOOK AT PRONG TWO AND PRONG
12 THREE. ABSOLUTELY. I MEAN, LOOKING AT PRONG ONE ALONE ISN'T
13 SUFFICIENT.

14 Q BUT EVEN LOOKING AT PRONG ONE, THAT SCORE OF 67, 66, AND 69,
15 YOU COULD STILL FIND WITH PLUS OR MINUS FIVE, THE STANDARD
16 ERROR OF MEASUREMENT, THAT HE DIDN'T MEET PRONG ONE.

17 A NO. BECAUSE ONCE YOU'RE AT 69 PLUS OR MINUS FIVE IS 74 AND
18 THAT'S WITHIN THAT CONFIDENCE INTERVAL OF 70 TO 75 OR LOWER.

19 Q YEAH. BUT YOU'RE LOOKING AT OTHER SCALED SCORES, TOO, THAT
20 ARE ABOVE THAT LEVEL. WE'VE ALREADY GOT A 75. SO, THAT WOULD
21 DRAW IT UP A LITTLE IN YOUR MIND. WOULDN'T IT?

22 A NOT NECESSARILY. NO.

23 Q SO, IF HE HAD A 78 I.Q. SCORE AND HE HAD A 69 I.Q. SCORE, ARE YOU
24 SAYING HE WOULD MEET PRONG ONE?

25 A NOT ON THE FIRST EVALUATION, NO. ON THE SECOND ONE, YES.

1 Q BUT IT COULDN'T BE -- YOU WOULD FIND THAT THAT SCALED SCORE
2 ALONE WOULD ALLOW HIM TO BE MENTALLY RETARDED EVEN THOUGH
3 HE HAD A SCALED SCORE THAT WAS ABOVE THE RANGE?

4 A YOU'RE TALKING ABOUT TWO DIFFERENT ADMIN -- I MEAN ---

5 Q TWO DIFFERENT ADMINISTRATIONS.

6 A YOU'RE NOT BEING CLEAR WITH ME.

7 Q I APOLOGIZE.

8 A YOU ARE TALKING ABOUT TWO DIFFERENT ADMINISTRATIONS.

9 Q CORRECT.

10 A TWO FULL SCALED SCORES.

11 Q CORRECT.

12 A ONE IS A 78. THE OTHER ONE IS A 69.

13 Q CORRECT.

14 A SO, ON THE FIRST EVALUATION OBTAINED, HE DOES NOT MEET PRONG
15 ONE. ON THE SECOND ONE, HE DOES.

16 Q SO, WHAT DOES THAT INDIVIDUAL MEAN? WHEN HE DOESN'T MEET IT,
17 THAT MEANS HE DOESN'T MEET PRONG ONE PERIOD. CORRECT?

18 A OH. WELL, NO. YOU NEED TO EVALUATE. THERE ARE OTHER
19 SOURCES OF ERROR, POTENTIALLY. I MEAN, I WOULD HAVE TO
20 EVALUATE THE ADMINISTRATION OF BOTH THOSE INSTRUMENTS
21 BECAUSE THAT'S DISCREPANT INFORMATION. THOSE ARE DIFFERENT
22 SCORES, DIFFERENT ADMINISTRATION. I WOULD WANT TO EVALUATE
23 WHAT YEAR, WAS THE APPROPRIATE TEST USED, WAS IT AN
24 OUT-OF-DATE VERSION OF THE TEST WHICH GAVE ME EITHER THE 69
25 OR THE 78. I WOULD WANT TO EVALUATE ALL THAT INFORMATION

1 BEFORE I RULE OUT OR RULE IN ONE OR THE OTHER SCORES. WHEN I
2 LOOK AT THESE TWO SCORES ON THESE TWO DIFFERENT TESTS WITH
3 THE SAME INDIVIDUAL, I'M ASSUMING YOU ARE MEANING THE SAME
4 INDIVIDUAL.

5 Q CERTAINLY.

6 A TESTED ON TWO. YES.

7 Q CERTAINLY. SO, EVEN THOUGH THE SCALED SCORE WAS ABOVE 75,
8 EVEN WITH THE STANDARD ERROR OF MEASUREMENT WHICH WOULD
9 MOVE IT, THAT INDIVIDUAL SCORE OF 78 ABOVE 70, YOU WOULD STILL
10 SAY THAT WOULDN'T ELIMINATE THE INDIVIDUAL FROM BEING
11 MENTALLY RETARDED?

12 A NOT IF I GOT THIS OTHER SCORE THAT'S PUTTING HIM AT A 69. I
13 WOULD WANT TO LOOK AT THAT. IF I ONLY HAD ONE SCORE OF 78, I
14 WOULD WANT TO EVALUATE THE ASSESSMENT, BUT TO ME THAT PUTS
15 IT OUTSIDE OF THE RANGE.

16 Q OKAY. NOW, YOU TESTIFIED YOU RELIED UPON DOCTOR KEYES'
17 VINELAND TEST FOR MAKING A DETERMINATION OF ADAPTIVE
18 FUNCTIONING.

19 A YES.

20 Q WAS THAT TEST SCORED CORRECTLY?

21 A I BELIEVE IT WAS.

22 Q ARE YOU SURE?

23 A I DIDN'T RE-SCORE IT.

24 Q OKAY.

25 A I DIDN'T RE-SCORE ANY OF THE TESTS.

1 Q OKAY. HOW DO YOU DETERMINE RESPONDENTS ON A TEST? WHO DO
2 YOU TRY TO LOCATE? IN THAT TEST, THAT TEST WAS GIVEN IN
3 FEBRUARY OF 1999.

4 A CORRECT.

5 Q AND THE VINELAND ASKED QUESTIONS ABOUT THE INDIVIDUAL'S
6 CURRENT ADAPTIVE FUNCTIONING. CORRECT?

7 A YES

8 Q HOW IS KENNETH SIMMONS CURRENTLY ACTING IN 1999. CORRECT?

9 A OR YOU WOULD GENERALLY, IN MOST CASES, YOU WOULD ASK THE
10 PERSON WHEN YOU WERE -- HOW IS THE PERSON'S BEHAVIOR AND I
11 WOULD IMAGINE HE WOULD DO IT BEFORE HE WAS INCARCERATED.

12 Q WELL, YOU WOULD IMAGINE THAT, BUT THAT'S NOT THE QUESTION
13 THAT'S ASKED. IS IT? THE RESPONDENT IN THE VINELAND IS BEING
14 ASKED DIRECTLY, YOUR UNDERSTANDING OF HIM TODAY. CORRECT?

15 A GENERALLY SPEAKING, HOW DOES HE PERFORM HIS SKILLS.

16 Q AND IF AN INDIVIDUAL HASN'T HAD MUCH CONTACT WITH AN INDIVIDUAL
17 MAYBE SINCE 1982, WILL THAT PERSON BE AN APPROPRIATE
18 RESPONDENT IN 1999 ABOUT HIS CURRENT ADAPTIVE FUNCTIONING IN
19 THE TRAINING THAT YOU GIVE YOUR STUDENTS?

20 A IT MIGHT BE.

21 Q MIGHT BE?

22 A BECAUSE THEY HAVE A GOOD HISTORY, THEY'VE OBSERVED THEM,
23 THEY KNOW THEM WELL. ABSOLUTELY.

24 Q THEY MIGHT BE. BUT WOULD THAT BE THE TYPE OF RESPONDENT
25 THAT YOU WOULD LOOK TO AND RELY UPON?

1 A IT COULD VERY WELL BE. YES.

2 Q DO YOU KNOW WHETHER THESE RESPONDENTS WERE THOSE TYPES
3 OF INDIVIDUALS IN THE VINELAND TEST THAT WAS GIVEN?

4 A I WOULD THINK, YES. IN MY OPINION, AN OLDER SISTER WHO LIVED
5 WITH A PERSON WHO KNOWS THE INDIVIDUAL WELL, AN EX-WIFE WHO
6 LIVED WITH THE INDIVIDUAL A NUMBER OF YEARS, WOULD BE
7 POTENTIALLY VERY GOOD RESPONDENTS.

8 Q DO YOU KNOW THAT THESE INDIVIDUALS LIVED AT ANY PERIOD OF
9 TIME FROM 1982 TO 1999 WITH THE DEFENDANT?

10 A DO I KNOW IF THEY LIVED WITH HIM?

11 Q UH-HUH.

12 A I WOULD HAVE TO LOOK AT MY NOTES. I DON'T KNOW OFF THE TOP OF
13 MY HEAD IF HE LIVED WITH THEM.

14 Q WELL, YOU ARE RELYING UPON THAT TO MAKE YOUR DETERMINATION
15 FOR ADAPTIVE FUNCTIONING, WHICH EXISTS CONTEMPORANEOUSLY
16 WITH THAT PARTICULAR TIME PERIOD AND IF THEY ARE BEING ASKED
17 TO GIVE THEIR OPINIONS, IT'S THE WAY HE'S ACTING AT THAT TIME,
18 NOT BEFORE, ON THE VINELAND TEST. CORRECT?

19 A A REQUIREMENT TO BEING A RESPONDENT IS NOT THAT YOU HAVE TO
20 BE LIVING WITH THEM PRESENTLY. OTHERWISE, WE WOULD HAVE
21 VERY FEW RESPONDENTS.

22 Q OH, CORRECT. BUT YOU HAVE TO HAVE HAD CURRENT AND
23 CONSISTENT CONTACT WITH THE INDIVIDUAL IN A SETTING THAT YOU
24 WOULD HAVE AN UNDERSTANDING OF THEIR RESPONSES.

25 A ABSOLUTELY. YES. AND IN THE COMMUNITY. THAT'S THE SETTING

1 WE'RE INTERESTED IN.

2 Q OKAY. AND IN DOING A VINELAND ASSESSMENT, DO YOU TRAIN YOUR
3 INDIVIDUALS TO DO THOSE ASSESSMENTS SIMULTANEOUSLY WITH
4 TWO RESPONDENTS?

5 A YOU COULD.

6 Q YOU COULD?

7 A YES.

8 Q IS THAT APPROPRIATE UNDER THE VINELAND?

9 A I DON'T RECALL.

10 Q WOULDN'T IT BE INAPPROPRIATE UNDER THE VINELAND BECAUSE ONE
11 RESPONDENT COULD BE CUING THE OTHER RESPONDENT IN THEIR
12 RESPONSES?

13 A WELL, I DON'T RECALL IF THEY FORBID IT OR IF THEY RECOMMEND
14 AGAINST DOING IT. I DON'T KNOW.

15 Q BUT WOULD YOU DO THAT?

16 A I WOULD. YES.

17 Q YOU WOULD HAVE TWO RESPONDENTS TOGETHER?

18 A I WOULD. YES.

19 Q AND FILL OUT THE FORMS?

20 A YES.

21 Q WOULD YOU FILL OUT THEIR RESPONSES ON THE SAME FORM ---

22 A YES. I HAVE.

23 Q --- OR ON A DIFFERENT FORM? IS THAT CONSISTENT WITH THE
24 TESTING MATERIAL IN THE VINELAND TO DO THAT?

25 A I DON'T KNOW OFF THE TOP OF MY HEAD FROM MEMORY IF THEY

1 RECOMMEND AGAINST DOING THAT OR NOT, BUT I DO THAT
2 ROUTINELY.

3 Q YOU DO IT ROUTINELY?

4 A YES.

5 Q WELL, THEY DON'T GIVE SPACE FOR IT. DO THEY?

6 A THEY DON'T GIVE SPACE FOR TWO RESPONDENTS. NO, THEY DO NOT.

7 Q NO. THEY DON'T. NOW, WHEN YOU WERE DESCRIBING THE
8 IDENTIFICATION OF THE LEVELS OF MENTAL RETARDATION, YOU
9 SUGGESTED THAT IT WOULD BECOME EVIDENT TO SOME OTHERS IN
10 THE EARLY DEVELOPMENTAL PERIOD OF THE PARTICULAR INDIVIDUAL.
11 IS THAT CORRECT?

12 A ARE YOU REFERRING TO MILD MENTAL RETARDATION?

13 Q YES.

14 A I SAID THAT GENERALLY WITH MILD MENTAL RETARDATION, AS A CHILD
15 GETS OLDER IT'S NOT COMMONLY NOTED IN, LET'S SAY, ZERO TO
16 THREE OR FOUR. USUALLY, IT'S MORE TYPICALLY FIRST DIAGNOSED
17 WHEN A CHILD ENTERS SCHOOL.

18 Q OKAY. AND THAT WOULD BE FIRST GRADE, SECOND GRADE?

19 A ELEMENTARY ONWARD.

20 Q AND THIS DEFENDANT WAS NOT IDENTIFIED IN THAT GROUP IN FIRST
21 GRADE OR SECOND GRADE. WAS HE?

22 A HE WAS NOT. HE WAS NOT DIAGNOSED BY THE SCHOOL.

23 Q HE WAS NOT DIAGNOSED EVER AS BEING MENTALLY RETARDED UNTIL
24 1998 OR '99. CORRECT?

25 A I DID NOT SEE A DIAGNOSIS IN ELEMENTARY SCHOOL. HE WAS -- THE

1 RECORDS INDICATE THAT HE WAS SENT FOR -- IN A RESOURCE CLASS,
2 BUT I DID NOT SEE A DIAGNOSIS FOR MENTAL RETARDATION. NO.

3 Q AND YOU DIDN'T SEE ANY TESTING BECAUSE ALL SUCH TESTING HAS
4 BEEN REPORTED AS BEING UNAVAILABLE. ISN'T THAT CORRECT?

5 A I ASSUME IT'S BEEN SHREDDED.

6 Q SO, WE DON'T KNOW IF IT EXISTED OR IT DIDN'T EXIST. CORRECT?

7 A CORRECT.

8 Q IT'S NOT REPORTED ON THE TEST MATTERS. CORRECT?

9 A I DIDN'T SEE ANY -- I DID NOT RECEIVE ANY COPIES OF ANY PSYCH
10 EVALUATIONS FROM THE SCHOOL. I ASKED. I WAS TOLD NONE WERE
11 AVAILABLE.

12 Q IN YOUR CURRICULUM YOU'RE DOING WITH COOPERATIVE LIVING
13 SKILLS, WHERE YOU'VE GOT INDIVIDUALS WHO HAVE BEEN DIAGNOSED
14 WITH MENTAL RETARDATION, YOU SET THEM UP IN A PROGRAM
15 ESSENTIALLY? IS THIS CORRECT?

16 A NO. WE DON'T SET THEM UP IN A PROGRAM.

17 Q EXPLAIN THAT TO ME. I WAS TRYING TO FOLLOW.

18 A IT'S A CURRICULUM THAT WE HAVE DEVELOPED AND THEN WE
19 USUALLY ADVERTISE IT TO COMMUNITY AGENCIES, COMMUNITY
20 PROGRAMS AND WE SAY, "WE HAVE A CURRICULUM. IT'S A TEN-WEEK
21 CURRICULUM. IF YOU OR YOU KNOW SOMEONE WHO HAS MENTAL
22 RETARDATION AND ARE INTERESTED IN PARTICIPATING IN THIS
23 CURRICULUM, COME TO OUR SESSIONS AND THEN PEOPLE COME,
24 RELATIVELY LOCALLY. IT'S WORD OF MOUTH.

25 Q WORD OF MOUTH. BUT THESE PEOPLE HAVE ALL BEEN PREVIOUSLY

1 DIAGNOSED WITH SUFFERING UNDER MENTAL RETARDATION?

2 A FOR THE MOST PART, YES. THEY'VE BEEN DIAGNOSED WITH MENTAL
3 RETARDATION.

4 Q WHAT DO YOU MEAN FOR THE MOST PART?

5 A WELL, YOU KNOW, WE DON'T CHECK DIAGNOSES, BUT I'M ASSUMING IF
6 THEY ARE COMING, OUR PROGRAM ADVERTISES, YOU KNOW, FOR
7 PEOPLE WITH MENTAL RETARDATION WHO WANT TO LEARN PROPER
8 LIVING SKILLS. IF I ASK THEM I KNOW THAT MOST OF THEM WON'T
9 ADMIT IT, BUT I'M ASSUMING THEY ARE BEING REFERRED TO US
10 BECAUSE THEY HAVE THIS DIAGNOSIS OF MENTAL RETARDATION. AND
11 THEY DON'T, AS I SAID, THEY DON'T LOOK ANY DIFFERENT, THEY LOOK
12 JUST LIKE REGULAR PEOPLE.

13 Q WHICH LEADS ME TO A LOT OF THE MATERIAL THAT YOU'VE FOCUSED
14 ON THAT POST-GRADUATE STUDY SCENARIO, THE NATIONAL
15 LONGITUDINAL TRANSITION STUDY? I THINK THAT'S WHAT YOU WERE
16 REFERRING TO. ONE THING I'M NOT SURE I UNDERSTOOD WAS, YOU
17 TESTIFIED THAT IN THE INDIVIDUALS IN THAT GROUP, 40% OF
18 WHATEVER THAT GROUP WAS, SAID THAT THEY WERE NOT MENTALLY
19 RETARDED. IS THAT CORRECT?

20 A RIGHT. THEY DON'T ADMIT TO HAVING A DISABILITY OR MENTAL
21 RETARDATION.

22 Q WAS 100% OF THAT GROUP MENTALLY RETARDED?

23 A YES. I'M TALKING ABOUT PEOPLE WITH JUST MENTAL RETARDATION.

24 Q AN HOW WAS THAT GROUP DEFINED TO GET IN THAT STUDY?

25 A THEY WERE IDENTIFIED AS HAVING MENTAL RETARDATION IN SCHOOL.

1 Q AND HOW WERE THEY IDENTIFIED?

2 A HOW WERE THEY DIAGNOSED?

3 Q UH-HUH.

4 A THEY HAD TO HAVE THREE CONDITIONS PRESENT: SIGNIFICANT SUB-
5 AVERAGE INTELLECTUAL FUNCTIONING, SIGNIFICANT DEFICITS IN
6 ADAPTIVE BEHAVIOR AND ONSET BEFORE AGE EIGHTEEN.

7 Q SO, THEY ALL HAD THAT DEFINED DETERMINATION ON THEIR REPORT
8 CARD OR ...

9 A IT WAS A SCHOOL, THE SCHOOL HAD TO HAVE DONE IT WHICH WOULD
10 HAVE PROBABLY IMPLIED A PSYCHOLOGICAL EVALUATION AND SO IT
11 WOULD HAVE HAD TO HAVE BEEN AN INDIVIDUALIZED ASSESSMENT OF
12 INTELLIGENCE, ASSESSMENT OF ADAPTIVE BEHAVIOR.

13 Q DID THE INDIVIDUALS KNOW THAT THEY WERE DEFINED MENTALLY
14 RETARDED BEFORE THEY HAD THIS STUDY?

15 A YES. I DON'T ACTUALLY KNOW THAT FOR A FACT.

16 Q SO, THE FACT THAT 40% DENIED THAT THEY SUFFERED UNDER MENTAL
17 RETARDATION, DO WE KNOW THAT FOR A FACT?

18 A WE KNOW FOR A FACT THAT THEY WERE IDENTIFIED AND WERE
19 RECEIVING SERVICES IN SCHOOL UNDER MENTAL RETARDATION. WE
20 KNOW THAT FOR A FACT.

21 Q BUT DO WE KNOW FOR A FACT THAT THEY WERE MENTALLY
22 RETARDED?

23 A YES. WELL, I DIDN'T GO IN AND TEST EVERYBODY, BUT THEY HAD BEEN
24 TESTED AND MET THIS CRITERION AND THAT WAS THE CRITERION TO
25 BE INCLUDED IN THE STUDY.

1 Q SO, DO WE KNOW THAT THE 40% THAT DENY THAT THEY ARE
2 MENTALLY RETARDED, WHERE THEY FIT IN TO THE 27% THAT WENT TO
3 POST SECONDARY SCHOOL?

4 A I DON'T KNOW IF THEY WERE THE SAME NUMBER -- WERE THEY THE
5 SAME INDIVIDUALS? I DON'T KNOW.

6 Q OKAY. AND DO WE KNOW WHAT TYPE OF ENTRY TESTING THEY DID TO
7 GET INTO THOSE SCHOOLS?

8 A NO. I DON'T KNOW.

9 Q THE 4% THAT QUALIFIED FOR A FOUR-YEAR COLLEGE, DO WE KNOW
10 WHAT TYPE OF TESTING THESE INDIVIDUALS DID TO GET INTO THAT
11 FOUR-YEAR COLLEGE?

12 A I DON'T KNOW IF THEY HAD ANY REQUIRED TESTING TO GET INTO A
13 FOUR-YEAR COLLEGE.

14 Q NOW, YOU ARE NOT A FORENSIC PSYCHOLOGIST. CORRECT?

15 A I AM NOT A FORENSIC PSYCHOLOGIST. NO.

16 Q AND WHAT EXACTLY ARE YOU?

17 A I AM TRAINED AS A CLINICAL PSYCHOLOGIST AND I WORK ALMOST
18 EXCLUSIVELY IN THE FIELD OF MENTAL RETARDATION.

19 Q WHAT'S THE DIFFERENCE BETWEEN CLINICAL PSYCHOLOGY AND
20 FORENSIC PSYCHOLOGY?

21 A CLINICAL PSYCHOLOGY IS THE STUDY OF MENTAL DISORDERS;
22 DEPRESSION, MENTAL RETARDATION, AS IT APPLIES IN THE
23 COMMUNITY AND LIFE SETTINGS. FORENSIC PSYCHOLOGY IS THE
24 STUDY OF THOSE DISORDERS BUT AS THEY INTERFACE WITH THE
25 CRIMINAL JUSTICE SYSTEM.

1 Q SO, A CLINICAL PSYCHOLOGIST WOULD BE LOOKING MORE TOWARDS
2 TREATMENT OPTIONS, IDENTIFICATION OF INDIVIDUALS FOR SOCIAL
3 PROGRAMS THAT WOULD BE AVAILABLE FOR A PARTICULAR INDIVIDUAL
4 FOR TREATMENT FOR MENTAL RETARDATION. IS THAT CORRECT?

5 A ELIGIBILITY, DETERMINATION, REFERRAL FOR PLACEMENT,
6 INTERVENTION, TREATMENT, AND WHATNOT.

7 Q OKAY. A FORENSIC PSYCHOLOGIST WOULD GENERALLY BE PLACED
8 MORE IN A COURTROOM SETTING FOR A FACTUAL DETERMINATION OF
9 THE EXISTENCE OR NON-EXISTENCE OF A MENTAL ILLNESS, DISEASE
10 OR DEFECT FOR THE PURPOSE OF DEFINING WHETHER AN INDIVIDUAL
11 HAS COMMITTED A CRIME, POSSESSES APPROPRIATE MENTAL SKILLS
12 FOR THAT COURTROOM SETTING. ISN'T THAT CORRECT?

13 A I WOULD IMAGINE TO THEIR COMPETENCY TO STAND TRIAL, ISSUES
14 RELATED TO COURT AND TESTIMONY AND WHATNOT.

15 Q OKAY. PROBABLY A TIGHTER CONCERN AS OPPOSED TO A LOOSER
16 CONCERN.

17 A I WOULDN'T SAY THAT. NO.

18 Q SO, LOOKING FOR SOMEBODY TO MAKE A DETERMINATION AS TO
19 WHETHER THEY SHOULD BE ENTITLED TO GOVERNMENT BENEFITS AND
20 THE LIKE AS OPPOSED TO LOOKING AS TO WHETHER AN INDIVIDUAL
21 SHOULD BE PUNISHED FOR A PARTICULAR CRIME, THAT DOESN'T SEEM
22 ANY DIFFERENT TO YOU?

23 A ARE YOU TALKING ABOUT MENTAL RETARDATION?

24 Q NO. YES. WE CAN TALK DIRECTLY ABOUT MENTAL RETARDATION.

25 A MENTAL RETARDATION IS A DIAGNOSIS WHETHER YOU ARE IN PRISON

1 OR YOU'RE IN A COMMUNITY OR IN A SCHOOL, THE DIAGNOSIS SHOULD
2 BE EVALUATED AND MADE IF A PERSON PRESENTS WITH THAT
3 CONDITION RELEVANT TO WHAT CONTEXT THEY ARE LIVING IN.

4 Q WITH AN ERROR OF MEASUREMENT.

5 A THERE'S ALWAYS A DEGREE OF UNCERTAINTY.

6 Q THERE'S ALWAYS A DEGREE OF UNCERTAINTY IN A DETERMINATION OF
7 MENTAL RETARDATION AT THE MILD MENTAL RETARDATION LEVEL?

8 A THERE'S ALWAYS A DEGREE OF UNCERTAINTY IN ANY CLINICAL
9 PSYCHOLOGICAL OPINION.

10 Q OKAY. AND YOU DID NOT GIVE ANY PERSONAL TESTING FOR THE
11 DEFENDANT IN THIS CASE. DID YOU?

12 A I DID NOT TEST MISTER SIMMONS. NO.

13 Q WHY DIDN'T YOU GIVE MISTER SIMMONS AN I.Q. TEST?

14 A WHEN I REVIEWED THE MATERIALS I FELT THAT THERE WERE
15 SUFFICIENT I.Q. TESTS AVAILABLE TO SHOW SUFFICIENT DATA. IN
16 FACT, I SUGGESTED TO MS. PAAVOLA THAT IF THEY COULD FIND
17 SOMEONE LOCALLY TO ADMINISTER A WAIS-IV, THAT WOULD BE
18 INFORMATIVE TO KNOW ON THE MOST CURRENT I.Q. TEST, WHAT WAS
19 HIS I.Q.

20 **THE COURT:** WELL, WHO ORDERED OR WHO GOT DOCTOR KNIGHT TO
21 DO HIS WAIS-IV IN DECEMBER OF '08? I GUESS THAT WOULD BE THE LATEST
22 ONE.

23 **MS. PAAVOLA:** I ASKED HER TO PERFORM THAT EXAM AT DOCTOR
24 TASSE'S REQUEST.

25 **THE COURT:** AND DOCTOR KNIGHT IS WHO?

1 **MS. PAAVOLA:** DOCTOR SUSAN KNIGHT. SHE IS FROM M-U-S-C.

2 Q AND THAT TEST, HIS CURRENT I.Q. TEST, THAT ONE, IS VIRTUALLY THE
3 LOWEST TEST IN VERBAL COMPREHENSION. ISN'T THAT CORRECT?

4 A I'M SORRY? WHAT DID YOU ASK ME?

5 Q THE MOST CURRENT I.Q. TEST YOU RELIED UPON, THE 2008 TEST, HAS
6 THE LOWEST LEVEL OF VERBAL COMPREHENSION. ISN'T THAT
7 CORRECT?

8 A BUT IT'S A DIFFERENT TEST. I MEAN, IT HAPPENS TO BE A 61, BUT IT'S
9 REALLY THE FULL SCALE I.Q. THAT WE ARE RELYING UPON TO MAKE OR
10 RULE OUT A DIAGNOSIS OF MENTAL RETARDATION. IT'S ALSO A
11 DIFFERENT TEST, SLIGHTLY DIFFERENT BECAUSE IT'S THE NEWEST,
12 THE MOST RECENT TEST OF THE WECHSLER SCALE.

13 Q AND WHAT IS THE DIFFERENCE BETWEEN PERCEPTUAL REASONING
14 AND WHAT I USUALLY UNDERSTOOD TO BE PERFORMANCE I.Q.?

15 A PERCEPTUAL REASONING IS VERY SIMILAR. IT'S A NON-VERBAL BASED
16 SET OF SCALES.

17 Q OKAY.

18 A EXCEPT IN THE NEWEST VERSION, IT'S A DIFFERENT STRUCTURE.
19 THERE ARE FOUR SUB-SCALES VERSUS TWO.

20 Q NOW, WITH RESPECT TO I.Q. TESTING, YOU MENTIONED THIS BEFORE.
21 A 100 IS AT 50%. CORRECT?

22 A YES.

23 Q FIFTY PERCENT OF THE POPULATION SHOULD HIT A 100. CORRECT?

24 A FIFTY PERCENT OF THE POPULATION IS ABOVE AND 50% IS BELOW.
25 IT'S SORT OF A MIDPOINT.

1 Q RIGHT. AND I.Q. TESTING IS DONE BASICALLY MAKING THAT
2 DETERMINATION ON A BELL CURVE. CORRECT?

3 A YES.

4 Q AND THAT BELL CURVE (DRAWS ON CHART) RIGHT AT THE TOP OF THE
5 CURVE WOULD BE 100, WHICH HAS 50% THIS WAY AND 50% THAT WAY.
6 CORRECT?

7 A YES.

8 Q AND BECAUSE OF THE NATURE OF THE BELL CURVE, THE FURTHER
9 YOU GET AWAY FROM THE BELL CURVE, THE LESS THE POPULATION.

10 A THAT'S CORRECT.

11 Q HOW MUCH OF THE POPULATION HAS AN I.Q. OF 70?

12 A AN EXACT I.Q. OF 70?

13 Q UH-HUH.

14 A I DON'T KNOW. I COULD TELL YOU HOW MUCH OF THE POPULATION IS
15 APPROXIMATELY 70 OR BELOW BECAUSE OF THE BELL CURVE.

16 Q OKAY. TELL ME 70 OR BELOW. THAT'S ACTUALLY ---

17 A THAT'S APPROXIMATELY 2.34%.

18 Q TWO POINT THREE FOUR PERCENT ARE BELOW 70.

19 A APPROXIMATELY.

20 Q OKAY. 2.4%.

21 THE COURT: OR 2.34 ABOVE?

22 DR. TASSE: YES, YOUR HONOR.

23 Q SO, THE REST OF THE POPULATION BEING ABOVE THAT. IS THAT
24 CORRECT?

25 A YES.

1 Q SO, IN HIS POPULATION IN THE SCHOOL CLASSES HE WAS ALWAYS
2 SHOWING ABOVE THAT 2% IN THE TEST SCORES HE WAS TAKING AT
3 THAT TIME. IS THAT NOT CORRECT?

4 A I DON'T KNOW WHO WAS IN HIS CLASSROOM. I MEAN, I DON'T KNOW IF
5 IT WAS JUST A CLASSROOM OF OTHER STUDENTS WITH MENTAL
6 RETARDATION OR NOT.

7 Q WELL, IN THE TEST SCORES OF THE SCHOOL RECORDS THAT YOU
8 LOOKED AT, HE WAS 11% AND 7% IN THOSE PARTICULAR SCORES,
9 THAT'S ABOVE THAT LEVEL FOR MENTAL RETARDATION IN THAT POOL,
10 GENERALLY. IS THAT NOT CORRECT?

11 A ARE YOU REFERRING TO SRA?

12 Q YES.

13 A WELL, ON THE SRA, YEAH, HE SCORED PERCENTILES OF 11 AND 7, BUT
14 THAT'S NOT A PERCENTILE IN RELATION TO HIS PEERS IN THE
15 CLASSROOM. IT'S LIKE, I IMAGINE, A STANDARDIZED POOL THAT THEY
16 HAVE. AND I DON'T KNOW WHAT THAT REFERENCES.

17 Q BUT HE WASN'T SHOWING THE BOTTOM 2.4%.

18 A AGAIN, I'LL SAY, I DON'T KNOW WHAT THE SRA IS. IT'S CERTAINLY NOT
19 A TEST OF INTELLIGENCE.

20 Q AND WITH RESPECT TO THE 82 PERFORMANCE I.Q. AND 81
21 PERCEPTUAL REASONING PART OF THAT SCORE, THAT STILL WASN'T IN
22 THE BOTTOM 2.4% OF THE INDIVIDUALS ON THAT PORTION OF THE
23 TEST EITHER. WAS IT?

24 A YOU ARE REFERRING TO THAT SUB-TEST OF THE ---

25 Q YES.

1 A I DON'T KNOW WHAT PERCENTILE THAT WAS OR WHAT PERCENTAGE
2 THAT REFERS TO.

3 Q BASED UPON THE INFORMATION THAT YOU REVIEWED, DID YOU
4 DETERMINE THAT THE DEFENDANT HAD A HIGH OR LOW LEVEL OF
5 VERBAL COMPREHENSION?

6 A BASED ON HIS PERFORMANCE OF ---

7 Q SCHOOL SCORES.

8 A WAS HE ASSESSED ON VERBAL COMPREHENSION? OH, YOU ARE
9 REFERRING TO -- I'M NOT SURE WHAT YOU ARE REFERRING TO.

10 Q I'M ASKING.

11 A WAS HE TESTED ON VERBAL COMPREHENSION?

12 Q YES. I MEAN, WHAT WERE HIS VERBAL SKILLS? WHEN HE WAS IN
13 ELEMENTARY SCHOOL, JUNIOR HIGH OR HIGH SCHOOL.

14 A I DIDN'T SEE ANY EVALUATION OF HIS VERBAL SKILLS.

15 Q WHAT WERE HIS PERFORMANCE SKILLS AT THAT TIME?

16 A I DIDN'T SEE ANY EVALUATION OF HIS PERFORMANCE SKILLS. ARE YOU
17 REFERRING TO PERFORMANCE I.Q.?

18 Q OKAY. WHEN YOU ARE UTILIZING THE ASSOCIATION AAIDD DEFINITION,
19 DOES AAIDD SUGGEST YOU LOOK AT CERTAIN FACTORS WHEN MAKING
20 A RULING OR A DETERMINATION IN YOUR PROFESSION AS TO
21 WHETHER AN INDIVIDUAL HAS CERTAIN ADAPTIVE BEHAVIORAL SKILLS?

22 A CAN YOU RE-PHRASE THAT? I DON'T THINK I UNDERSTAND YOUR
23 QUESTION.

24 Q OKAY. AAIDD ASKED THE INDIVIDUALS IN MAKING DETERMINATIONS OF
25 MENTAL RETARDATION TO ASSESS ADAPTIVE BEHAVIOR SKILLS.

1 CORRECT?

2 A THEY RECOMMEND THAT PEOPLE ASSESS ADAPTIVE BEHAVIOR SKILLS.

3 Q AND IN THEIR RECOMMENDATION, THEY RECOMMEND THAT YOU
4 ASSESS CONCEPTUAL SKILLS. CORRECT?

5 A CONCEPTUAL AND ADAPTIVE SKILLS. YES.

6 Q WHICH INCLUDE RECEPTIVE AND EXPRESSIVE LANGUAGE.

7 A YES.

8 Q READING AND WRITING, MONEY CONCEPTS, SELF-DIRECTION.

9 CORRECT?

10 A CORRECT.

11 Q AND YOU DID NOT INTERVIEW THE DEFENDANT. CORRECT?

12 A I DID NOT INTERVIEW -- WELL, I MET WITH HIM BUT I DID NOT INTERVIEW
13 HIM FOR THE PURPOSE OF DOING AN ADAPTIVE BEHAVIORAL
14 EVALUATION.

15 Q DO YOU HAVE AN UNDERSTANDING OF HIS RECEPTIVE AND
16 EXPRESSIVE LANGUAGE SKILLS?

17 A I DIDN'T ASSESS THAT. I DID NOT. NO.

18 Q HIS READING AND WRITING SKILLS?

19 A BASED ON THE RECORDS. YES. HE WAS TESTED SEVERAL TIMES ON
20 HIS READING AND WRITING AND ARITHMETIC SKILLS. YES.

21 Q HIS MONEY CONCEPTS?

22 A BASED ON THE INFORMATION THAT MS. HAMMOCK PRESENTED THERE
23 IS EVIDENCE THAT HE HAD POOR MONEY CONCEPT SKILLS.

24 Q IN WHAT WAY?

25 A HE HAD DIFFICULTY PAYING BILLS, MANAGING HIS MONEY TO PAY BILLS

1 APPROPRIATELY AND SO FORTH.

2 Q BUT SHE TESTIFIED THAT HE MAY HAVE HAD A JOINT CHECKING
3 ACCOUNT WITH HIS WIFE. ISN'T THAT CORRECT?

4 A I HEARD MS. HAMMOCK TESTIFY THAT HIS EX-WIFE SAID SHE OPENED
5 UP A JOINT CHECKING ACCOUNT.

6 Q AND IT MAY OR MAY NOT HAVE BEEN IN HER NAME ONLY. CORRECT?

7 A ACTUALLY, THAT'S WHAT SHE SAID. SHE WASN'T SURE IF IT WAS IN
8 HER NAME OR NOT BUT SHE HAD OPENED IT.

9 Q OKAY. BUT DO YOU KNOW WITH MONEY CONCEPTS, WHETHER HE
10 KNEW THE VALUE OF A DOLLAR?

11 A I DON'T KNOW. BUT REALLY, WHEN WE ARE ASSESSING MONEY
12 CONCEPTS WE ARE TALKING ABOUT USING MONEY, PAYING BILLS,
13 GETTING CHANGE AND SO FORTH. SO, KNOWING A DOLLAR IS FOUR
14 QUARTERS IS A RELATIVELY SIMPLISTIC END OF THAT ASSESSMENT.

15 Q DO YOU HAVE ANY UNDERSTANDING THE HE DIDN'T UNDERSTAND --
16 LET ME BACK UP. I'M NOT SURE I UNDERSTOOD WHAT YOU JUST SAID.
17 WHERE DID MS. HAMMOCK TESTIFY THAT HE DIDN'T KNOW HOW TO
18 MAKE CHANGE?

19 A OH, I DIDN'T SAY THAT. I THOUGHT YOU WERE ASKING ME THAT.

20 Q NO, BUT THAT'S A MONEY CONCEPT.

21 A MONEY CONCEPTS THOUGH, ARE MEASURED QUITE EXTENSIVELY ON
22 THE VINELAND, WHICH WAS DONE BY DOCTOR KEYES. MS. HAMMOCK
23 BROUGHT UP SEVERAL OTHER EXAMPLES IN HER INTERVIEW WITH
24 FAMILY MEMBERS, SPOUSE, THAT RELATED TO THAT AS WELL.

25 Q DID YOU REVIEW THE VINELAND WITH RESPECT TO MONEY CONCEPTS?

1 WHAT HIS RESPONSES WERE ON THE VINELAND THAT WAS DONE BY
2 DOCTOR KEYES?

3 A I SAW THE OVERALL SCORES, YES.

4 Q AND THESE INDIVIDUALS, SOME WHO HAD HAD LITTLE CONTACT WITH
5 HIM FOR SOME SEVENTEEN OR EIGHTEEN YEARS BY HER STATEMENT,
6 ARE ANSWERING QUESTIONS, "STATE VALUE OF PENNY, NICKEL, DIME
7 OR QUARTER." THOSE ARE THE QUESTIONS BEING ASKED HIM?

8 A THOSE ARE SOME OF THE QUESTIONS. YES.

9 Q AND I'M NOT TRYING ISOLATE THESE OUT, BUT THIS INFORMATION ON
10 THE VINELAND IS JUST TALKING ABOUT GENERAL MONEY CONCEPTS.
11 ISN'T IT?

12 A THIS IS VERY WELL STANDARDIZED AND ONE OF THE GOLD
13 STANDARDS IN OUR FIELD TO MEASURE ADAPTIVE BEHAVIOR. THAT'S
14 WHAT WE RELY UPON EVERYDAY.

15 Q WHY DIDN'T YOU DO ANOTHER VINELAND NOW RATHER THAN RELYING
16 UPON DENNIS KEYES?

17 A BECAUSE MISTER SIMMONS HAD BEEN INCARCERATED FOR A NUMBER
18 OF YEARS AND I WOULD NOT BE ABLE TO ASSESS HIS CURRENT
19 BEHAVIOR OTHER THAN IN A PRISON SETTING, WHICH IS IRRELEVANT
20 TO THE MEASURE OF ADAPTIVE BEHAVIOR. IT NEEDS TO BE, HIS
21 BEHAVIOR, IN THE COMMUNITY.

22 Q AND WHY IS THAT RELEVANT?

23 A BECAUSE BY DEFINITION, ADAPTIVE BEHAVIOR IS HOW SOMEONE
24 FUNCTIONS IN THE COMMUNITY, IN SOCIETY.

25 Q OKAY. AND FOR PURPOSES OF MENTAL RETARDATION, IS IT HOW IS HE

1 ADAPTING NOW OR IS IT HOW HE IS ADAPTING BEFORE EIGHTEEN?

2 A WELL, BOTH, IN THIS CASE. WE ARE ASSESSING HOW HE IS NOW AND
3 IF THOSE DEFICITS ARE PRESENT NOW, WE HAVE THE THIRD PRONG
4 WHICH WE THEN NEED TO DOCUMENT THAT THEY WERE PRESENT OR
5 ORIGINATED BEFORE EIGHTEEN, SO THE TWO ARE NOT MUTUALLY
6 EXCLUSIVE.

7 Q BUT THE TWO RESPONDENTS THAT WERE BEING ASKED THESE WERE
8 INDIVIDUALS WHO WEREN'T EVEN HAVING SIGNIFICANT CONTACT WITH
9 HIM THEN.

10 A WHEN IS THEN?

11 Q THEN WOULD BE WHEN THEY DID THE ASSESSMENT IN FEBRUARY OF
12 1999.

13 A THOSE WERE TWO PEOPLE WHO KNEW HIM WELL. THEY ARE THE
14 BEST PEOPLE TO PROVIDE INFORMATION LIKE ON THE ADAPTIVE
15 BEHAVIOR SCALES.

16 Q SOCIAL SKILLS, INTERPERSONAL RESPONSIBILITY, SELF ESTEEM,
17 GULLIBILITY, NAIVETE, FOLLOWS RULES, OBEYS LAWS, AVOIDS
18 VICTIMIZATION. THOSE ARE SOME EXAMPLES POINTED OUT BY THE
19 AAIDD OF SOCIAL SKILLS.

20 A YES.

21 Q TO REVIEW AND CONSIDER.

22 A YES.

23 Q HOW DID YOU ASSESS THAT WITH THIS DEFENDANT?

24 A I DIDN'T DO IT, THE SPECIFIC ASSESSMENT. I REVIEWED THE EXISTING
25 EVALUATION AND THE OTHER INFORMATION IN THE FILE.

1 Q PRACTICAL SKILLS. PERSONAL ACTIVITIES OF DAILY LIVING SUCH AS:
2 EATING, DRESSING, MOBILITY, AND TOILETING. INSTRUMENTAL
3 ACTIVITIES OF DAILY LIVING SUCH AS: PREPARING MEALS, TAKING
4 MEDICATIONS, USING THE TELEPHONE, MANAGING MONEY, USING
5 TRANSPORTATION AND DOING HOUSEKEEPING ACTIVITIES,
6 MAINTAINING A SAFE ENVIRONMENT AND OCCUPATIONAL SKILLS. HOW
7 DID YOU ASSESS THOSE?

8 A BY REVIEWING THE MATERIALS, CASE FILES, THE PREVIOUS
9 ASSESSMENTS.

10 Q AND WHAT WAS YOUR ASSESSMENT WITH PERSONAL ACTIVITIES OF
11 DAILY LIVING SUCH AS EATING AND DRESSING?

12 A BASED ON WHAT I SAW, HE DOESN'T HAVE ANY DEFICITS IN THAT
13 SPECIFIC AREA.

14 Q MOBILITY AND TOILETING.

15 A PROBABLY NO DEFICITS AS WELL.

16 Q DAILY LIVING SUCH AS PREPARING MEALS, TAKING MEDICATION, USING
17 THE PHONE, MANAGING MONEY, USING TRANSPORTATION AND DOING
18 HOUSEKEEPING ACTIVITIES.

19 A IT SOUNDED FROM THE RECORDS AND FROM OBSERVING THE
20 RECORDS, THERE WERE SOME DEFICITS IN THOSE AREAS CERTAINLY.

21 Q HE WAS ABLE TO ENSURE THAT HE WAS GETTING FOOD. CORRECT?

22 A BY GOING TO A HOMELESS SHELTER, YOU ARE REFERRING TO?

23 Q AND WHEN HE WAS LIVING AT HOME.

24 A THE RECORDS DON'T SEEM TO INDICATE THAT HE COOKED FOR
25 HIMSELF AS WE WOULD EXPECT FOR A TYPICAL, SAME AGE PERSON.