

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

S.C. Supreme Court

Opinion No. 2012-UP-091 (S.C. Ct. App. filed 2/22/2012)
09-GS-02-827

THE STATE,

RESPONDENT,

V.

MIKE SALLEY,

PETITIONER

Appellate Case No. 2012-212233

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Mike Tyrel Salley,

Appellant.

Appeal From Aiken County
R. Ferrell Cothran, Circuit Court Judge

Unpublished Opinion No. 2012-UP-091
Submitted February 1, 2012 – Filed February 22, 2012

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General Mark R. Farthing, all of

Columbia; and Solicitor J. Strom Thurmond, Jr., of Aiken, for Respondent.

PER CURIAM: Mike Tyrel Salley appeals his guilty plea to assault with intent to commit first-degree criminal sexual conduct with a minor, arguing the trial court erred in finding he was competent to stand trial. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992) ("The test of competency to enter a plea is [that] . . . [t]he accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him."); State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002) ("The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial [court]'s ruling will be upheld on appeal if supported by the evidence and not against its preponderance.").

AFFIRMED.

WILLIAMS, THOMAS, and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MIKE SALLEY,

APPELLANT

Appeal from Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 2012-UP-091

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Mike Salley petitions the Court for rehearing. Counsel submits that this Court overlooked the fact that the judge based his finding that petitioner did not meet the burden of proving he was not competent to proceed on the erroneous premise that the defense expert witness, Dr. Schwartz-Watts, found Salley not competent to stand trial because he can't process information quickly enough on cross examination. When trial counsel asked the judge he if he found she had not met her burden of proof with regard to petitioner's competency to stand trial, the trial judge wrote, "It's nothing that – I'm not suggesting you did anything wrong. It's simply based on the evaluation of the doctor, that I have her opinion that he's not but her opinion – what she's saying he's not, because he's not quick enough to process information on

cross-examination. But she found that he responded appropriate in everything else.” (R. p. 69, lines 21 – p. 70, lines 1-2).

While Dr. Schwartz-Watts testified that Salley would be unable to testify because of his low IQ (R. p. 48, lines 1 – 13), she also testified that Salley did not have the ability to pay attention during trial, to remember facts and to confer with his attorney when new information was presented. (R. p. 49, lines 8-15). Dr. Schwartz-Watts also testified that Salley did not have the ability to weigh options. (R. p. 49, lines 11-15). Defense counsel argued, citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), that Dr. Schwartz-Watts’ testified that Salley was incompetent because he did not have a rational as well as factual understanding of the proceedings against him and was unable to consult with his attorney with a reasonable degree of rational understanding. (R. p. 70, lines 19 – p. 71 – 73). The judge again found Salley competent to stand trial. The judge erred. This Court erred in affirming the finding of the trial judge that petitioner failed to prove by a preponderance of the evidence that he did not have a rational or factual understanding of the proceedings against him and that he did not have the ability to consult with his lawyer with a reasonable degree of rational understanding.

The appellant, Mike Salley, has a long documented history of mental retardation and had previously been found not competent to proceed to trial in 2004, by the South Carolina Department of Disabilities and Special Needs. (R. p. 97-99). During a Blair¹ hearing on February 8, 2010, two experts provided conflicting testimony in regard to appellant’s competency to stand trial. Dr. Donna Schwartz-Watts, a forensic psychiatrist, examined Salley for competency. In her written report Dr. Schwartz-Watts wrote, “It is my opinion to a reasonable degree of medical certainty that Mr. Salley does not have a factual or rational understanding of the proceedings nor the capacity to

¹ State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

assist you in his defense due to his mental retardation. He is not likely to become competent in the foreseeable future.” (R. p. 94-95).

At the Blair hearing in this case Dr. Schwartz-Watts was qualified, without objection, as an expert witness in the field of forensic evaluations. (R. p. 39, lines 16-21). . Dr. Schwartz-Watts testified, “The issue I have is he is what I call not rationally competent. And what I mean by that is he doesn’t have the cognitive abilities to follow a trial. Dr. Cornelius stated it took three years for him to learn the roles of court officials and to gather information. And I don’t think most trials take three years. And so what we’re asking him to do in a trial situation is to learn new information, be able to remember it, be able to provide it back to his attorney to assist in his defense. He just does not have the cognitive ability to do that.” (R. p. 41, lines 20 – p. 42, lines 1-5).

Pursuant to a court order dated December 4, 2008, Phillip T. Cornelius, Ph.D. and forensic examiner for the South Carolina Department of Disabilities and Special Needs examined Salley for capacity to stand trial. In a written report signed on January 23, 2009, Dr. Cornelius found Salley competent to proceed to trial. (R. p. 89). The report confirms Salley’s history of mental retardation. The report indicates that Salley was difficult to understand due to a speech impediment. According to the report, Salley informed examiners that he graduated from Wagner High School with a certificate. Salley informed examiners that he had never had a job but would occasionally earn money by cutting grass and raking leaves. Salley reported receiving a \$400 disability check. The report references prior test results showing IQ levels between 42 and 59. The report states that Salley was unable to name the months of the year, unable to name states other than South Carolina, unable to read a simple three word phrase, unable to copy a geometric design, unable to perform a simple subtraction problem and unable to name the first president or the president elect.

During the Blair hearing, Dr. Cornelius was qualified as an expert in the field of forensic psychological evaluations. (R. p. 6, lines 4 – p. 7, lines 1-20). Dr. Cornelius testified that Salley was competent to proceed to trial. (R. p. 8, lines 12-18). Dr. Cornelius testified that when he evaluated Salley in 2004, he was not competent to stand trial. (R. p. 12, lines 23 – p. 13, lines 1-2; R. p. 97-99). Dr. Cornelius evaluated Salley again in 2007, and found him competent to stand trial. (R. p. 100). Dr. Cornelius explained the difference in the evaluations testifying:

When I initially evaluated him in 2004 he was not competent to stand trial. He didn't understand the roles of his attorney, the defense, the solicitor, the court process. In 2007 when I evaluated him, he understood that the jury was the people that decided guilt or innocence. He understood that he shouldn't talk to the solicitor by himself. He had some confusion between the roles of his attorney and the solicitor. We did an education process during the interview and after that he was able to enunciate the roles of his attorney and the solicitor as I just described.

When he came back in 2009 and at the time I saw him again he had retained that information because he was able to, without any education, enumerate his attorney's role, the solicitor's role, the court process, and whether or not he should talk to the solicitor by himself.

(R. p. 12, lines 24 – p. 13, lines 1-15).

Despite the “education process” that, according to Dr. Cornelius, rendered Salley competent, Dr. Cornelius admitted that he still had questions about whether Salley was able to understand the concept of a plea bargain. (R. p. 32, lines 11 – p. 33, 34, lines 1-6). Dr. Cornelius admitted that his evaluation was based on a structured “forced choice” interview. When asked about the significance of IQ, Dr. Cornelius testified, “Not entirely, because our process is based on an interview, a structured interview. It's based on a structured forced choice interview for most of the questions. Because the research shows that if you have somebody that you suspect is mentally retarded that you get a better evaluation using the forced choice format rather than an open –ended

format.” (R. p. 18, lines 11-18). When asked to define forced choice format Dr. Cornelius testified, “That’s asking him a question that has two answers. Is your attorney for you or against you, rather than saying, what does your attorney do, which side’s your attorney on; those kinds of things.” (R. p. 18, lines 22-25).

When Dr. Schwartz-Watts was asked if Salley would be able to assist his attorney at trial, she testified, “In my opinion, no. Again, the methodology used, court is not a forced choice test. To be competent to stand trial is to be able to follow testimony, to be able to pay attention to witnesses. If there’s an inconsistency he can’t protect himself in some ways because of his rational limitation, his cognitive limitation.” (R. p. 43, lines 23 – p. 44, lines 1-3). When questioned on cross examination, Dr. Schwartz-Watts testified, “Well, my opinion is he has a factual understanding of the proceedings. He has a capacity to assist in his defense, but because he doesn’t have a rational understanding, that second prong, because he doesn’t have a rational understanding of the proceedings, he’s not able to assist his attorney.” (R. p. 62, lines 23 – p. 63, lines 1-3). .

Dr. Schwartz-Watts’ report states that Salley believes that the judge is against him, he does not understand concepts such as cross examination, he has difficulty learning new information, he is not able to abstract similarities between objects, he can not perform mathematical calculations and when asked if he would choose a sentence of 24 months or 3 years he replied 3 years because it was smaller. (R. p. 97-99). Dr. Schwartz-Watts testified, as did Dr. Cornelius, that Salley was unable to copy a geometric design. (R. p. 50, lines 19 – p. 51, lines 1-7; R. p. 96). Dr. Schwartz-Watts testified as to specific examples demonstrating Salley’s brain deficits including the inability to learn how to pronounce his lawyer’s name (R. p. 47, lines 5-20), and the inability to abstract similarities. (R. p. 49, lines 16 – p. 50, p. 51, lines 1-12). Dr. Schwartz-Watts also testified that based on Salley’s history with alcohol abuse, neuropsychological testing should be done to determine brain

function. (R. p. 45, lines 10-25). When asked if additional testing would change her mind in regard to Salley's competency, Dr. Schwartz-Watts testified "It would probably strengthen my opinion, your Honor. Honestly." (R. p. 66, lines 11-16). Evidence at the Blair hearing established, by a preponderance of the evidence, that Salley was not competent to stand trial.

On February 11, 2010, after hearing testimony at the Blair hearing and reviewing the evidence presented, Judge Cothran found that the defense failed to meet their burden of proving that Salley was not competent to stand trial by a preponderance of the evidence. The judge stated:

Dr. Schwartz-Watts' opinion, she basically had the same finding but she has some concerns that she didn't - - she did not think he was competent because she did not think that he had the ability to process the information quick enough on cross examination, that withstood cross-examination.

And I don't think that's the test in this state. And I certainly think that being able to assist his attorney, and Dr. Cornelius found that he would be able to recognize if someone was not telling the truth and advise his attorney to that effect.

In the end he even told Dr. Schwartz-Watts that he were to lie, even if his attorney told him to tell the truth, if he thought it would benefit him. So I think he has that understanding of the proceedings.

And the defense has to present evidence that he in fact does not have the ability and is not competent to stand trial. I think that evidence must be by the preponderance of the evidence. And I certainly don't find by the preponderance of the evidence that they have met their burden and I think he is competent to stand trial.

(R. p. 68, lines 21 – p. 69, lines 1-17).

This Court affirmed the finding of the trial judge, "pursuant to Rule 220(b)(1), SCACR and the following authorities: Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992) ("The test of competency to enter a plea is [that] . . . [t]he accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding as well as a factual understanding of the proceedings against him."); State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683,

685 (2002) (“The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial [court]’s ruling will be upheld on appeal if supported by the evidence and not against it preponderance.”).

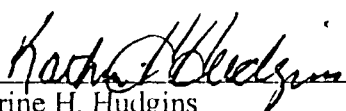
Petitioner met his burden of proof that he was not competent to proceed by a preponderance of the evidence. The trial court’s ruling is not supported by the evidence. “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 102, 112 – 113 (1975). Conviction of a criminal defendant who is not competent violates the due process clause of the fourteenth amendment. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). This right may not be waived by guilty plea. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). Competency is required to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel. Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). The test of competency to enter a plea is the same as required to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). In Hall v. Catoe, 360 S.C. 353, 359, 601 S.E.2d 335, 338 (2004), the South Carolina Supreme Court wrote, “This Court has held that to be competent to stand trial or continue trial, a defendant must have ‘a rational as well as factual, understanding of the proceedings against him’ and the ‘ability to consult with his lawyer with a reasonable degree of rational understanding.’ State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)).”

A defendant must prove that he is incompetent to stand trial by a preponderance of the evidence. State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002); State v. Reed, 332 S.C. 35,

39, 503 S.E.2d 747, 749 (1998). The trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance. State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002). The trial judge's ruling in the present case is not supported by the evidence.

The undisputed evidence before the judge was that Salley is mentally retarded with an IQ between 42 and 59 and was unable to name the months of the year, unable to name states other than South Carolina, unable to read a simple three word phrase, unable to copy a geometric design, unable to perform a simple subtraction problem and unable to name the first president or the president elect. It is undisputed that Salley was previously found not competent to stand trial and was later found competent only after an "education process." The State's examination of Salley consisted of a structured forced choice interview and the State's expert still had concerns about whether Salley was able to understand the concept of a plea bargain. Additionally, the defense introduced credible detailed testimony and evidence proving that Salley did not have a rational, as well as factual, understanding of the proceedings against him and did not have the ability to consult with his lawyer with a reasonable degree of rational understanding. The judge erred in finding that the defense failed to meet their burden of proving that Salley was not competent to stand trial by a preponderance of the evidence. This Court erred in affirming that decision, and rehearing is respectfully requested.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

This 8th day of March, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

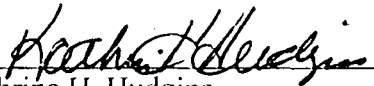
V.

MIKE SALLEY,

APPELLANT

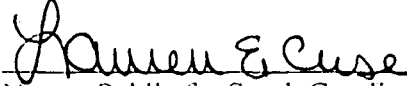
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, this 8th day of March, 2012.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day
of March, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

MIKE TYREL SALLEY,

Appellant.

RETURN TO PETITION FOR REHEARING

On February 22, 2012, this Court issued an unpublished opinion in which it affirmed Appellant Mike Tyrel Salley's conviction for assault with intent to commit first-degree criminal sexual conduct with a minor. State v. Salley, Op. No. 2012-UP-91 (S.C. Ct. App. filed Feb. 22, 2012). Pursuant to Rule 221(a), SCACR, Salley petitioned this Court for rehearing. Respondent ("the State") respectfully submits this Court correctly affirmed Salley's conviction. Salley has failed to demonstrate any argument overlooked or disregarded by the Court. Salley's petition for rehearing should be denied.

Competency to Stand Trial

In his petition for rehearing, Salley contends this Court erred in affirming the trial judge's finding that Salley was competent to stand trial. In support of this position, Salley maintains he presented "credible" evidence proving that he "did not have a rational, as well as factual understanding of the proceedings against him and did not have the ability to consult with his

lawyer with a reasonable degree of rational understanding.” (Pet. for Reh. p. 8). Salley’s position appears to be that the trial judge was required to fully accept the opinion of Salley’s retained defense expert in evaluating Salley’s competency and was required to entirely reject the conflicting opinion of the court-appointed expert who evaluated Salley on multiple occasions over the course of several years. Notwithstanding the fact Salley’s retained expert testified Salley had a factual understanding of the proceedings, which directly contradicts Salley’s synopsis of the expert’s testimony on appeal, the trial judge properly evaluated the conflicting testimony provided by both experts along with Salley’s appropriate behavior and responses in the courtroom before finding Salley competent to stand trial.¹ After thoroughly evaluating all of the relevant information, the trial judge correctly found Salley was competent to stand trial, and his ruling was supported by the evidence.

During the competency hearing, Dr. Phillip Cornelius, an expert in forensic evaluations, testified about his court-ordered evaluation of Salley. (R. pp. 7-8). Dr. Cornelius stated he previously evaluated Salley on two earlier occasions in 2004 and 2007 to determine if Salley was competent to stand trial in similar cases also involving charges of criminal sexual conduct with a minor. (R. p. 9). He indicated Salley was not competent when he evaluated him in 2004, but Salley learned and understood the court process in 2007. (R. pp. 12-13). During the 2004

¹ In his petition for rehearing, Salley asserts Dr. Schwartz-Watts “testified that Salley was incompetent because he did not have a rational as well as **factual understanding** of the proceedings against him and was unable to consult with attorney with a reasonable degree of rational understanding.” (Pet. for Reh. p. 2) (emphasis added). However, during the competency hearing, Dr. Schwartz-Watts testified: “[M]y opinion is he has a factual understanding of the proceedings. He has a capacity to assist in his defense, but because he doesn’t have a rational understanding, that second prong, because he doesn’t have a rational understanding of the proceedings, he’s not able to assist his attorney.” (R. pp. 62-63). Notably, this testimony is inconsistent with Salley’s argument on appeal and is inconsistent with Dr. Schwartz-Watts’ own report on Salley’s competency prepared before the hearing, which stated Salley did not possess a factual understanding of the proceedings. (R. p. 95). Thus, the trial judge was presented with the conflicting testimony of a retained defense expert whose testimony was inconsistent with her own earlier conclusions and the testimony of a court-ordered independent evaluator who concluded Salley was competent and who had significantly more experience evaluating Salley’s competency. Under these circumstances, the trial judge did not abuse his discretion in reaching a conclusion different from the inconsistent conclusions of the retained defense expert.

evaluation performed when Salley was fourteen-years-old, Dr. Cornelius concluded Salley did not understand the process, could not relate details of his charges to his attorney, and did not display self-protection actions. (R. pp. 97-99). However, during the 2007 evaluation performed when Salley was seventeen-years-old, Dr. Cornelius noted Salley was able to retain and learn information, was capable of providing information to his attorney, and knew to consult his attorney if he did not know something during trial. (R. pp. 100-103). Following the 2007 evaluation, Dr. Cornelius concluded Salley had a factual and rational understanding of the court process and was competent to stand trial. (R. p. 14; pp. 100-103).

Regarding the most recent evaluation, Dr. Cornelius reviewed the court order, the related arrest warrants, a law enforcement packet, Salley's school records, prior psychological evaluations, prior diagnostic evaluations, and several prior forensic evaluations. (R. p. 8). Dr. Cornelius then met with Salley for approximately one hour on January 15, 2009. (R. p. 8; p. 10). During the meeting, he reviewed the roles of the parties and the court process with Salley. (R. p. 10). He then exposed Salley to a series of forced-choice and non-forced-choice questions, and Salley consistently provided correct answers, demonstrating an understanding of the questions and answers.² (R. p. 11; pp. 27-28). During the evaluation, Salley demonstrated he understood the roles of the solicitor and defense counsel and understood the pending charges. (R. p. 15). Salley also acknowledged he was accused of having sex with a ten-year-old child and a four-year-old child. (R. p. 15). In his evaluation report, Dr. Cornelius indicated Salley was able to identify a witness on the stand and knew to inform his attorney if a witness was lying. (R. pp. 89-93). He noted Salley knew to consult with his attorney if any issues arose, was capable of providing information to his attorney, and had a factual and rational understanding of the court

² Dr. Cornelius noted Salley was able to articulate his attorney's role, the solicitor's role, the court process, and whether or not he should talk to the solicitor alone without any education from the court-ordered evaluator. (R. p. 13).

process. (R. pp. 89-93). He further indicated Salley was fairly independent in his daily life and possessed higher adaptive behavior skills than he sometimes practiced. (R. pp. 89-93).

Regarding Salley's level of mental disability, Dr. Cornelius noted Salley was mentally-retarded and had an I.Q. ranging from 42 to 59, with the scores falling in the mild to moderate retardation range. (R. p. 12). However, Dr. Cornelius testified Salley was capable of learning and retaining information. (R. pp. 12-13). He stated Salley had the capacity to learn but learned at a slower pace. (R. p. 26). He further noted Salley was alert and oriented throughout all of the evaluations. (R. p. 14). Based on the results of his evaluation of Salley, Dr. Cornelius concluded Salley had a factual and rational understanding of the proceedings and was competent to stand trial. (R. p. 8; p. 30; R. pp. 89-93). He also indicated he met with Salley prior to the hearing, and the meeting reaffirmed his earlier competency finding. (R. p. 10).

Dr. Donna Schwartz-Watts, an expert in forensic evaluations retained by Salley, also testified during the competency hearing on Salley's behalf. (R. p. 39; pp. 52-53). Dr. Schwartz-Watts stated she interviewed Salley for approximately an hour and a half in October of 2009 and for twenty-five minutes prior to the hearing. (R. pp. 39-40). Based on her evaluation of Salley, she concluded Salley had a factual understanding of the proceedings but was not rationally competent. (R. p. 41). She indicated she did not believe Salley had the cognitive ability to follow the trial, learn new information, remember the information, and then provide the information back to his attorney to assist in his defense.³ (R. pp. 41-42). Dr. Schwartz-Watts noted Salley had difficulty determining whether a sentence stated in months was longer than a sentence stated in years, and she testified he did not have the ability to assist his attorney if evidence was presented. (R. pp. 42-43). She further noted Salley had difficulty correctly

³ Regarding Salley's understanding of the competency hearing itself, Dr. Schwartz-Watts opined: "I think at one level he would recognize that somebody is trying to help him, and that somebody has another opinion." (R. p. 44).

pronouncing defense counsel's name, had difficulty understanding more complex concepts, and could not correctly draw a clock or read. (R. p. 47; p. 50). She concluded Salley had the ability to learn but not the ability to learn quickly enough for trial. (R. p. 51). Based on her evaluation, Dr. Schwartz-Watts opined Salley was not competent to stand trial. (R. p. 46). In reaching this conclusion, she noted:

But, for example, I asked him today, if your lawyer wants you to take the stand and she tells you to tell the truth, what are you going to do. And he says he wouldn't tell the truth. So he's not able to assist her at some levels because of some of his cognitive appearance. He does not fully understand what it takes to be competent to stand trial.⁴

(R. p. 42).

However, Dr. Schwartz-Watts testified Salley was very self-protective and knew not to speak to the solicitor alone. (R. p. 42; p. 49). She further testified Salley would assist his attorney, was protective, and did not want to go to prison. (R. p. 42). She noted Salley understood the difference between guilty and not guilty, knew how many jurors were required to convict him, and refused to accept an incorrect statement that only five jurors were necessary for a conviction. (R. pp. 47-48). Additionally, she noted Salley had some street smarts and was not easily led. (R. p. 49).

On cross-examination, Dr. Schwartz-Watts conceded mental retardation does not always translate into a lack of competency and the ability to read was not necessary for a competency finding. (R. p. 53; p. 58). She further testified Salley understood the adversarial process, the roles of the attorneys, the role of the jury, the concepts of guilt and innocence, the availability of entering a plea, and the charges against him. (R. p. 60). She noted he thought the judge was

⁴ Notably, Dr. Schwartz-Watts also later testified Salley admitted his guilt to her. (R. p. 60). Therefore, if Salley knew he was guilty but told the truth on the witness stand at his attorney's request, he would be admitting his guilt to the jury. For this reason, his answer to Dr. Schwartz-Watt's pre-trial question demonstrated he rationally understood the proceedings and was aware of what actions he needed to take to protect his own interests.

against him, but she conceded it was possible he believed that to be true because he had admitted he was guilty. (R. p. 60). Dr. Schwartz-Watts testified Salley initially denied he was guilty when speaking to her before later admitting his guilt. (R. p. 60). She diagnosed Salley with pedophilia and acknowledged he repeatedly acted on those tendencies. (R. p. 62). She also noted Salley openly admitted he was a pedophile. (R. p. 62).

Furthermore, Dr. Schwartz-Watts acknowledged Dr. Cornelius had performed the appropriate testing to evaluate Salley's competency level. (R. p. 54). She further conceded Dr. Cornelius had the benefit of seeing and evaluating Salley over a greater period of time, but she stated she had personally reached a different opinion based on her shorter evaluation. (R. p. 55).

In conclusion, Dr. Schwartz-Watts testified: "Well, my opinion is he has a factual understanding of the proceedings. He has a capacity to assist in his defense, but because he doesn't have a rational understanding, that second prong, because he doesn't have a rational understanding of the proceedings, he's not able to assist his attorney." (R. pp. 62-63). She further stated Salley understood how everything is supposed to work but could not process it and put it into action. (R. p. 63).

After reviewing the experts' reports and the testimony from the hearing, the trial judge determined Salley was competent to stand trial and found Salley had failed to establish his incompetency by a preponderance of the evidence. (R. pp. 67-69). Salley asserted his evidence of incompetency was compelling, which he contended shifted the burden of proving competency to the State. (R. pp. 73-74). After reviewing South Carolina case law, the trial judge concluded the burden remained on Salley to establish his lack of competency, and Salley had failed to overcome that burden. (R. p. 75). The trial judge's ruling was supported by the evidence.

In order to stand trial or plead guilty, a criminal defendant must be competent. State v. Finklea, 388 S.C. 379, 383, 697 S.E.2d 543, 546 (2010). Due process rights prohibit the conviction of an incompetent defendant. Matthews v. State, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004). The standard for evaluating competency to enter a plea is identical to the standard to stand trial, and the competency requirement cannot be waived by entry of a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595-596 (1992). In order to be competent to enter a plea or stand trial, a defendant must have a sufficient ability to consult with his attorney with a reasonable degree of rational understanding and must have a rational and factual understanding of the proceedings against him. Sims v. State, 313 S.C. 420, 422-423, 438 S.E.2d 253, 254 (1993). “The purpose of requiring a defendant to be competent is ‘to ensure that he has the capacity to understand the proceedings and to assist counsel.’ ” State v. Kelly, 331 S.C. 132, 148, 502 S.E.2d 99, 108 (1998) (quoting Godinez v. Moran, 509 U.S. 389, 402 (1993)).

The defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Nance, 320 S.C. 501, 504, 466 S.E.2d 349, 351 (1996). The trial judge’s competency determination should be upheld if it has evidentiary support and is not against the preponderance of the evidence. State v. Reed, 332 S.C. 35, 40, 503 S.E.2d 747, 749 (1998). “[G]reat deference is given to [the] trial judge who sits in a better position to ascertain the defendant’s faculties.” State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007).

In the case sub judice, this Court correctly affirmed Salley’s conviction because the trial judge properly considered the evidence and testimony presented to him before concluding Salley was competent to stand trial. Although conflicting testimony was presented, the testimony presented during the hearing established Salley had a factual and rational understanding of the proceedings against him and had a sufficient ability to assist defense counsel during trial. Salley

appears to contend the trial judge erred in finding him competent because his retained expert testified he was incompetent. However, the trial judge is not required to accept any one expert's position as conclusive but instead must consider all the evidence presented before him. See State v. Bell, 293 S.C. 391, 396, 360 S.E.2d 706, 709 (1987) ("A defendant's claim that a psychologist's testimony was incomplete or wrong does not preclude a finding that the defendant is competent to stand trial where the psychologist was subject to cross-examination by defense counsel."); see also Kelly, 331 S.C. at 149, 502 S.E.2d at 108 (citing to 22A C.J.S. Criminal Law § 554 which stated the trial judge is the sole judge of the credibility and weight to be assigned to witnesses' testimony and is entitled to evaluate conflicting testimony). After considering the testimony of both experts and reviewing the evidence, the trial judge found Salley's showing of incompetency to be insufficient to establish he was not competent to stand trial or enter a plea. The trial judge's ruling was supported by the evidence and was properly affirmed on appeal. See State v. Lee, 274 S.C. 372, 375, 264 S.E.2d 418 (1980) ("We cannot say that [the trial judge's] finding that the defendant was capable of standing trial was without evidentiary support or against the preponderance of the evidence and, accordingly, we find no error on the part of the judge in ordering the defendant to trial."); see also State v. Weik, 356 S.C. 76, 80-81, 587 S.E.2d 683, 685 (2002) (finding the trial judge's competency determination was supported by the evidence even though there was a disagreement between the State's experts and Weik's experts over whether Weik was competent to stand trial).

Looking to the opinions of the experts, Dr. Cornelius, an independent court-ordered forensic evaluator who met with Salley on multiple occasions over a period of years, evaluated Salley prior to trial and determined he was competent to proceed. The strength of Dr. Cornelius' opinion was bolstered by his prior history with Salley, which was a fact conceded by Salley's

expert. Furthermore, Salley's expert further acknowledged there was no error in the method of Dr. Cornelius' evaluation, and the fact Dr. Cornelius previously found Salley to be incompetent in 2004 strongly showed he had no bias or hidden motive to declare Salley competent if he, in fact, was not. Dr. Cornelius' testimony constituted substantial and significant evidence of Salley's competency to stand trial or enter a plea.

Dr. Schwartz-Watts, an expert retained by Salley, reached a contrary conclusion and opined Salley was not competent. Notably, she testified Salley possessed a factual understanding of the proceedings, would assist his attorney, understood the charges against him, and was very self-protective. However, she stated he had an insufficient capacity to learn quickly enough to be able to effectively assist his attorney during trial. She opined he did not have a rational understanding of the proceedings sufficient enough to assist in his defense even though he had the capacity to assist his defense attorney.

Relying on Dr. Schwartz-Watts' testimony coupled with his mental disability and low intelligence, Salley asserts the trial judge erred in finding he was competent to stand trial. However, the trial judge's competency finding was supported by the evidence. See State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976) ("While low intelligence or limited education may cause an appellate court to review the defendant's plea carefully, it does not necessarily preclude a valid plea. The fact that appellant may have only a seventh grade education does not mean that he was unable to understand the proceedings." (citations omitted)); see also 22 C.J.S. Criminal Law § 506 ("The question of whether or not a defendant is competent to enter a guilty plea is ordinarily one of fact to be determined by the trial court. . . . Mental retardation, a mere history of psychological disturbances, or a suicide attempt by the defendant does not necessarily imply incompetence to plead guilty."). The mere fact Salley presented

testimony from a retained expert in conflict with the testimony of the court-ordered evaluator did not render the trial judge's decision lacking in evidentiary support. Cf. Castro v. State, 744 So. 2d 986, 989 (Fla. 1999) ("[A]lthough there was conflicting testimony regarding Castro's competency, it was the function of the circuit court to resolve this dispute. After considering all of the testimony, the circuit court concluded that Castro was competent. There has been no showing that the circuit court abused its discretion in coming to this conclusion." (citations omitted)); Commonwealth v. Kostka, 370 Mass. 516, 523, 350 N.E.2d 444, 449 (Mass. 1976) (affirming the trial judge's competency finding even though conflicting testimony was presented in regards to Kostka's competency to stand trial); State v. Moncada, 161 N.H. 791, 798, 20 A.3d 904, 910 (N.H. 2011) (affirming the trial judge's competency finding where the trial judge accepted the testimony of one expert on the issue of competency over the conflicting testimony of a retained defense expert); Orndorff v. Commonwealth, 271 Va. 486, 501, 628 S.E.2d 344, 352 (Va. 2006) ("Although there was conflicting testimony regarding the issue of Orndorff's competency, the circuit court chose to rely on the testimony of Dr. Wolber and Dr. Sheneman. Based on this evidentiary support for the circuit court's finding, we will not disturb that finding on appeal.").

After evaluating the conflicting expert opinions, the trial judge determined Salley had not met his burden of establishing incompetency and was competent to stand trial. His ruling was supported by the testimony and evidence and was strengthened by Salley's appropriate behavior and answers during the subsequent guilty plea hearing. See Nance, 320 S.C. at 506, 466 S.E.2d at 352 ("Admittedly, the trial court was confronted with conflicting opinions regarding [Nance's] competency. However, we find that there is ample evidentiary support for the trial court's determination that [Nance] was competent, and we find that determination not to be against the

preponderance of the evidence.”); Bell, 293 S.C. at 396, 360 S.E.2d at 709 (“The trial judge’s findings of competency were based on the expert testimony, defense counsel’s testimony, and the trial judge’s own observations of appellant’s behavior. The very nature of the inquiry as to a defendant’s competency to stand trial demands that a court not be bound strictly by the view of experts.”). As the trial judge’s ruling was supported by the evidence, there was no basis to reverse his ruling on appeal. See State v. Davis, 309 S.C. 326, 338, 422 S.E.2d 133, 141 (1992) (“We find that the trial judge’s determination that Davis was competent to stand trial has evidentiary support. Accordingly, we find that the trial judge did not err in finding that Davis was competent to stand trial.” (citations omitted)), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). This Court correctly affirmed Salley’s conviction, and Salley has not identified any arguments overlooked or misapprehended by this Court in reaching its decision. Salley’s petition for rehearing should be denied.

Conclusion

Based on the foregoing coupled with the arguments raised in the Final Brief of Respondent, the State respectfully requests that Salley’s petition for rehearing be denied.

Respectfully submitted,

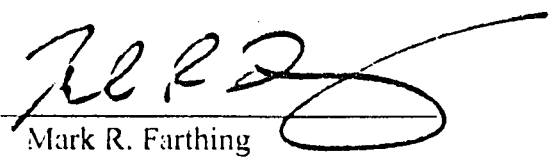
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March 20, 2012

The South Carolina Court of Appeals

The State,

Respondent,

v.

Mike Tyrel Salley,

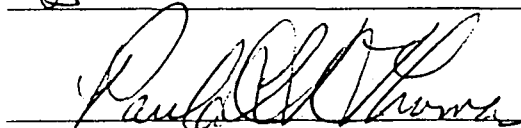
Appellant.

The Honorable R. Ferrell Cothran Jr.
Aiken County
Trial Court Case No. 2009-GS-02-00827

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 J. Williams

 J. Thomas

 J. Lockemy

cc: Appellate Defender Kathrine H. Hudgins
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General Mark R. Farthing

FILED

4 May 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM AIKEN COUNTY

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MIKE SALLEY,

APPELLANT

RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2009-GS-02-827, 828 & 829

3
4 STATE OF SOUTH CAROLINA,

5 -vs-

TRANSCRIPT OF RECORD

6 MIKE SALLEY,

7 Defendant.

8
9
10
11 Heard on Monday, February 8, 2010
Thursday, February 11, 2010
12 Friday, February 12, 2010
Aiken, South Carolina

13
14 BEFORE:

15 THE HONORABLE R. FERRELL COTHRAN, JR.

16
17 APPEARANCES:

18
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22 Wallis Alves, Esq.

23
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PHILLIP T. CORNELIUS - DIRECT

1 ON MONDAY, FEBRUARY 8, 2010 AT 11:10 A.M.:

2 MS. BRISBIN: Mike Salley.

3 Your Honor, this is a Blair hearing on Defendant
4 Mike Salley, indictment numbers 2009-GS-02-828, 829 and
5 827.

6 He's charged with assault and battery with intent
7 to commit criminal sexual conduct with a minor in the
8 first degree and two counts of lewd act on a child and two
9 victims currently.

10 And Dr. Phillip Cornelius with the Department of
11 Special Needs -- Disabilities and Special Needs is here on
12 behalf of the State. We are prepared to go forward at
13 this time.

14 THE COURT: Okay. You may call your first
15 witness.

16 MS. BRISBIN: The State calls Dr. Phillip
17 Cornelius.

18 PHILLIP T. CORNELIUS, having been duly sworn, was
19 examined and testified as follows:

20 THE CLERK: Please have a seat on the witness
21 box.

22 State your full name for the Court and spell your
23 last.

24 THE WITNESS: Phillip T. Cornelius. C. O. R. N.
25 E. L. I. U. S.

PHILLIP T. CORNELIUS - DIRECT

DIRECT EXAMINATION

BY MS. BRISBIN:

Q. Dr. Cornelius, where do you work?

A. I'm retired from the State. I'm in private practice as a behavior analyst and I also do forensic consulting with the South Carolina Department of Disabilities and Special Needs.

Q. And what type of educational background do you have?

A. I have a bachelor's degree in liberal arts and a major in psychology from Mississippi State University. I have my master's in experimental psychology from the University of Mississippi, and a doctorate in physiological psychology from the University of Georgia.

Q. And do you have special training in forensic evaluation?

A. I've had ongoing training through the Department of Disabilities and Special Needs. I've been doing evaluations initially under supervision, and for a good while on my own through the Department of Disabilities and Special Needs.

Q. And do you have any idea of approximately how many evaluations you -- psychological evaluations in criminal cases you have done?

A. Over a hundred.

Q. And have you testified in court previous to this?

PHILLIP T. CORNELIUS - VOIR DIRE

1 A. Yes, ma'am; I have. Around a dozen times.

2 Q. Around a dozen times?

3 A. Uh-huh.

4 MS. BRISBIN: Your Honor, I would ask that
5 Dr. Cornelius be qualified as an expert in the field of
6 forensic psychological evaluations.

7 THE COURT: What says the defense?

8 MS. ALVES: I'd like to ask him some questions
9 about that.

10 THE COURT: Okay.

11 VOIR DIRE

12 BY MS. ALVES:

13 Q. Dr. Cornelius, what training have you had specifically
14 to do forensic evaluations?

15 A. I've had several courses through DDSN. We have
16 ongoing education. I don't have my vitae with me to list
17 the dates and stuff, but I worked under, initially under
18 supervision of our chief forensic psychologist for several
19 years before I started doing independent evaluations for
20 them.

21 Q. So while you were working -- you're working currently
22 as an independent consultant?

23 A. I have retired from state employment. I'm working as
24 a behavior analyst. I do consulting with Disabilities and
25 Special Needs boards on problem -- people that have

PHILLIP T. CORNELIUS - DIRECT

1 problem behaviors.

2 Q. So you specialize in problem behaviors?

3 A. That's currently what I'm doing. I've been doing
4 forensic evaluations under DDSN supervision for about 20
5 years, 15 to 20 years.

6 Q. And, I'm still not clear. What exact training have
7 you had to do forensic evaluation?

8 A. I had supervised practice by a trained licensed
9 psychologist. I've had course attendance. I'm still
10 supervised basically by the agency's chief forensic
11 psychologist who is licensed.

12 Q. And has all of your work been through DDSN?

13 A. All my forensic work has; yes, ma'am.

14 Q. And so that would have been evaluating people who had
15 what's considered mental retardation?

16 A. Yes, ma'am. I've been working in the field of mental
17 retardation since 1972.

18 MS. ALVES: I don't have any further questions.

19 THE COURT: Okay. The Court finds he's an
20 expert.

21 MS. BRISBIN: Thank you, Your Honor.

22 DIRECT EXAMINATION (CONTINUED)

23 BY MS. BRISBIN:

24 Q. Dr. Cornelius, did you have the opportunity to
25 evaluate for competency the Defendant in this case, Mike

PHILLIP T. CORNELIUS - DIRECT

1 Salley?

2 A. Yes, ma'am.

3 Q. And was that by court order?

4 A. Yes, ma'am.

5 Q. Which -- do you know which judge ordered that?

6 A. I can't say his first name. Doyet Early.

7 Q. Judge Early?

8 A. Judge Early.

9 Q. Okay. And what date was that done?

10 A. The evaluation?

11 Q. Yes, sir.

12 A. It was done on January the 15th of last year.

13 Q. And did you -- do you have an opinion to a reasonable
14 degree of medical certainty as to the competency of
15 Mr. Salley?

16 A. Yes, ma'am.

17 Q. And what is that opinion?

18 A. That he is competent to proceed to trial.

19 Q. And what type of documentation did you review prior to
20 doing your evaluation on Mr. Salley?

21 A. I looked at the court order, the arrest warrants, the
22 general sessions packet from the police department,
23 educational, psychological evaluations, school district
24 records, prior diagnostic reports and prior forensic
25 evaluations.

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1 Q. And what prior evaluations are you familiar with that
2 Mr. Salley has had?

3 A. I am familiar with two prior competency-to-stand-trial
4 evaluations that I did. There's a diagnostic report that
5 our agency did regarding his admission to services of the
6 department.

7 Q. And when were the previous evaluations performed?

8 A. The initial forensic evaluation I did was in May of
9 2004. The second one was 2007. And then I saw him in
10 2009.

11 Q. Were those evaluations in 2004 and 2007 as a result of
12 previous charges?

13 A. Yes, ma'am; they were.

14 Q. And what was the nature of those previous charges?

15 A. It'll take me a second to dig those out.

16 2007 with criminal sexual conduct with a minor, lewd
17 act with a child under 16. And the 2004 was disorderly
18 conduct, assault and battery, trespassing after notice,
19 criminal sexual conduct with a minor first degree.

20 Q. So all three evaluations he was charged with criminal
21 sexual conduct with a minor in the first degree?

22 A. Yes, ma'am.

23 Q. And how old is -- was Mr. Salley when you did the last
24 evaluation?

25 A. He was 19. Eighteen years and 11 months. Excuse me.

PHILLIP T. CORNELIUS - DIRECT

1 Q. Eighteen years and 11 months?

2 A. Yes, ma'am.

3 Q. Did you also meet with Mr. Salley this morning?

4 A. Yes, I did.

5 Q. And do you have the same opinion to a reasonable
6 degree of medical certainty as to his competency today?

7 A. Yes, ma'am.

8 Q. And what is that opinion?

9 A. That he's still competent.

10 Q. Okay. And what type of -- do you recall how long you
11 spoke with Mr. Salley in your evaluation that was done,
12 not today but on your previous evaluation?

13 A. About an hour.

14 Q. And what type of information did you obtain in that
15 process that indicated to you that he is competent?

16 A. Well, the competency part of the evaluation is, I
17 talked with him about the role of his attorney, the role
18 of the solicitor, to ascertain if he recognizes that his
19 attorney's on his side, that the solicitor's not on his
20 side.

21 We also talked to him about the court process and who
22 makes the decision about whether he's guilty or not
23 guilty.

24 I also asked his -- part of the rational part of it is
25 if he was approached by the solicitor when he was by

PHILLIP T. CORNELIUS - DIRECT

1 himself would he talk to the solicitor or not. If he
2 answers that correctly we attempt to get a reason out of
3 him. And when I talked to him last --

4 Q. I'm sorry. Attempt to get a reason?

5 A. A reason that he would not talk to the solicitor by
6 himself.

7 Q. He indicated that he would not talk to the solicitor?

8 A. By himself; yes, ma'am. And he indicated that because
9 the solicitor's against him and not on his side. He was
10 able to answer.

11 Q. Did he understand what the defense attorney's role
12 was?

13 A. Yes, ma'am.

14 Q. And what did he indicate that was?

15 A. We ask -- I ask that and most of our evaluations ask
16 that in a forced choice answer situation. We asked if his
17 defendant -- if his lawyer, rather, is on his side or
18 against him, if his lawyer wants him to go home or go to
19 jail after the trial, and if his lawyer wants him to be
20 found guilty or not guilty. We also ask the same
21 questions in respect to the solicitor to see what answers
22 we get there.

23 He was able to say that his attorney is on his side,
24 wants him to be able to go home and be found not guilty.

25 He was able to say that the solicitor's against him, wants

PHILLIP T. CORNELIUS - DIRECT

1 him to go to jail and wants him to be found guilty.

2 Q. Was he able to indicate whether or not he wanted to be
3 found not guilty?

4 A. I didn't ask him that.

5 Q. Did he indicate that, whether or not he was guilty?

6 A. Not that I recall.

7 Q. Did --

8 A. -- we --

9 Q. What type of mental disability does he have?

10 A. He's classified as mentally retarded. He's been
11 eligible for agency services.

12 Q. And what is his IQ level?

13 A. It's varied over a period of time from 59 on the
14 Stanford-Binet, a 42 on the Wechsler for Children, a 48 on
15 the Wechsler, a 54 on the Universal Nonverbal Intelligence
16 Scale. In the 50's; moderate to mild.

17 Q. Are all of those standardized IQ tests, is one
18 preferable to another? How does that work?

19 A. They're all standardized tests. You get different
20 scores. They basically, like most intelligence tests,
21 indicate how well a person does in school or will do in
22 school, how much academic stuff he's learned.

23 Q. Is Mr. Salley, in your opinion, able to learn?

24 A. Yes, he is. When I initially evaluated him in 2004 he
25 was not competent to stand trial. He didn't understand

PHILLIP T. CORNELIUS - DIRECT

1 the roles of his attorney, the defense, the solicitor, the
2 court process.

3 In 2007 when I evaluated him, he understood that the
4 jury was the people that decided guilt or innocence. He
5 understood that he shouldn't talk to the solicitor by
6 himself. He had some confusion over the difference
7 between the roles of his attorney and the solicitor.

8 We did an education process during the interview and
9 after that he was able to enunciate the roles of his
10 attorney and the solicitor as I just described.

11 When he came back in 2009 and at the time I saw him
12 again he had retained that information because he was able
13 to, without any education, enumerate his attorney's role,
14 the solicitor's role, the court process, and whether or
15 not he should talk to the solicitor by himself.

16 Q. So he had learned over time between the age of 14 and
17 17?

18 A. Eighteen. Yeah -- yes, ma'am.

19 Q. As well as between 17 and 18?

20 A. Yes, ma'am.

21 Q. Because you did evaluations when he was 14, 17, and
22 18; correct?

23 A. Yes, ma'am.

24 Q. So when he was 14 he was not competent, in your
25 opinion?

PHILLIP T. CORNELIUS - DIRECT

1 A. Right.

2 Q. And when he was 17 he was competent?

3 A. Yes, ma'am.

4 Q. And when he was 18 he was competent?

5 A. Yes, ma'am.

6 Q. And that's based on his ability to understand the
7 different types of expert or -- lawyers and judges?

8 A. Yes, ma'am.

9 Q. And juries?

10 A. (Nods head.)

11 Q. Okay. Did you ask him in this last evaluation what he
12 would do if he didn't know the answer to something in the
13 legal process of his trial?

14 A. Yes, ma'am. We asked that several times and his
15 consistent answer was, talk to his attorney.

16 Q. So he did understand that his defense attorney was
17 there to help him?

18 A. Yes, ma'am.

19 Q. And was Mr. Salley oriented, alert and oriented
20 throughout all of his evaluations?

21 A. Yes, ma'am.

22 Q. And when you say someone is oriented, what does that
23 mean?

24 A. He knows what day it is, what day of the week it is,
25 what the date is, the month, the year, the date, he knows

PHILLIP T. CORNELIUS - DIRECT

1 where he's at.

2 Q. He knows where he is?

3 A. Uh-huh.

4 Q. And where was he when he had these evaluations done?

5 A. Columbia, South Carolina, at the Midlands Center.

6 Q. That's part of DDSN?

7 A. Yes, ma'am. It's the residential facility for the
8 profoundly handicapped.

9 Q. Was he there overnight or was he just there for the
10 day?

11 A. He was there for the evaluation.

12 Q. Just for the day?

13 A. Yes, ma'am.

14 Q. Did Mr. Salley indicate that he understood the current
15 charges?

16 A. He was able to tell me what they were, and what the
17 police said he did.

18 Q. And what did he tell you they were?

19 A. He stated his current charges as, quote, a 10-year-old
20 and a four-year old did it. When I asked him what did it
21 mean, he finally acknowledged that they were saying he had
22 sex with them.

23 Q. And did he indicate that he had an understanding of
24 what those charges carried, what kind of sentence they
25 carried?

PHILLIP T. CORNELIUS - DIRECT

1 A. He said they could, quote, give you life, the charge
2 carries that.

3 Q. And did he indicate what outcome he wanted?

4 A. No, ma'am.

5 Q. If you --

6 A. Well, in the forced choice he indicated that his
7 lawyer was working for him to go home.

8 Q. To go home?

9 A. Yes, ma'am.

10 Q. All right. Okay. I'm showing you what's been marked
11 State's Exhibit Number One for purposes of this hearing.

12 Do you recognize that?

13 A. Yes, ma'am. That's the 2009 evaluation report.

14 Q. And is your signature on that?

15 A. Yes, it is.

16 Q. And --

17 A. It's not the original, though.

18 Q. That is the report that you made on this evaluation?

19 A. Yes, ma'am.

20 MS. BRISBIN: Your Honor, at this time, I'd ask
21 that State's Exhibit Number One be admitted for the
22 purpose of this hearing.

23 THE COURT: Okay. What says the defense?

24 MS. ALVES: No objection.

25 THE COURT: It's in without objection.

PHILLIP T. CORNELIUS - CROSS

1 (Thereupon, State's Exhibit No. 1, evaluation
2 from 2009, was received into evidence.)

3 MS. BRISBIN: Thank you, Your Honor. Please
4 answer any questions Ms. Alves has.

5 THE WITNESS: Okay.

6 CROSS-EXAMINATION

7 BY MS. ALVES:

8 Q. Dr. Cornelius, you tell us -- I'm sorry. You go by
9 Dr. Cornelius?

10 A. Ma'am?

11 Q. You go by Dr. Cornelius?

12 A. Yes, ma'am.

13 Q. Can you tell us what is the criteria for being
14 competent?

15 A. That he understands the adversarial nature of the
16 Court process, and factual and rational basis and that he
17 has the ability to assist his attorney in preparing his
18 defense.

19 Q. In your determination of competence, what testing do
20 you do or what do you normally do?

21 A. We normally ask the questions that I just told the
22 solicitor we go through. We ask if he understands the
23 charges, appreciates the charges against him, whether
24 they're serious charges, what could be the outcomes. We
25 ask him the role of his attorney, the role of the

PHILLIP T. CORNELIUS - CROSS

1 solicitor. We ask whether the solic -- whether the judge
2 is on his side, against him or in the middle. We ask who
3 makes the determination of guilt or innocence. We ask him
4 questions that are oriented toward whether he has a
5 rational understanding.

6 Q. In your determination of whether someone has a
7 rational understanding, is it important to understand what
8 their IQ is?

9 A. For the person to understand what his IQ is? No.

10 Q. It's not necessary to know what their IQ is?

11 A. Not entirely, because our process is based on an
12 interview, a structured interview. It's based on a
13 structured forced choice interview for most of the
14 questions.

15 Because the research shows that if you have somebody
16 that you suspect is mentally retarded that you get a
17 better evaluation using the forced choice format rather
18 than an open-ended format.

19 Q. Using the forced choice format?

20 A. Yes, ma'am.

21 Q. Can you tell us what that is?

22 A. That's asking him a question that has two answers. Is
23 your attorney for you or against you, rather than saying,
24 what does your attorney do, which side's your attorney on;
25 those kind of things.

PHILLIP T. CORNELIUS - CROSS

1 Q. And what would happen if you let Mr. Salley answer an
2 open-ended question?

3 A. You would probably get a variety of answers.

4 Q. So in your forced choice format you give a choice, you
5 give him two options and he has to pick one?

6 A. Yes, ma'am.

7 Q. And so, is your attorney for you or against you, and
8 the fact that he says his attorney is for him, then you
9 think you feel that he's competent?

10 A. That's part of it. It's not the sole basis of the
11 competency thing. We ask those same questions about his
12 attorney, and about the solicitor.

13 Q. But don't you in fact educate him about the solicitor
14 being against him?

15 A. If necessary, which we did in the 2007 interview. And
16 he learned that, and he retained it to the 2009 interview.
17 He learned it.

18 Q. But you don't think that someone, even someone with
19 basic mental understanding would understand that if you're
20 giving them a choice of two people, the solicitor and
21 their attorney, and one of them is for them, then the
22 other one would be against them?

23 A. Well, that's what we're trying to determine if they do
24 understand. And we do that by a forced choice question.

25 Q. In a forced choice, wouldn't he always pick the more

PHILLIP T. CORNELIUS - CROSS

1 obvious answer?

2 A. Not necessarily. In 2004 he didn't. In 2004 he
3 didn't pick the answer that the solicitor was against
4 him. In 2007 he didn't pick the answer that the solicitor
5 was against him.

6 Q. But, wait a minute.

7 A. In 2007 after I educated him, he was able to make the
8 distinction between the solicitor and his defense
9 attorney. And he retained that until 2009.

10 Q. All right. Well -- do you have the 2004 evaluation
11 with you?

12 A. Yes, ma'am.

13 Q. In 2004, didn't he in fact state that -- well, your
14 report says that he indicated that the prosecution was
15 against him, one of the outcomes of the charge was to go
16 to jail, that he should not talk with the solicitor
17 without his attorney, and that the solicitor was against
18 him.

19 Isn't that what your report states that he said in
20 2004?

21 A. That's what it says in 2009.

22 Q. Excuse me?

23 A. Do you have the 2004 report?

24 Q. Yes.

25 A. Let me go back and look in it.

PHILLIP T. CORNELIUS - CROSS

1 Q. Are you reviewing your 2004 report?

2 A. Yes, ma'am; I am. If you'll hold on a minute.

3 (Pause.)

4 Okay. Yes. He did benefit from education in 2004
5 with regards to the roles of his attorney and the
6 solicitor.

7 Q. So, in 2004 he was able to understand that the
8 solicitor was against him and that his attorney was for
9 him?

10 A. That part of it, he did.

11 Q. He understood what guilty or not guilty were?

12 A. Yes, he did.

13 Q. And he understood at least some basics about the
14 possible outcomes; to be guilty and go to jail or not
15 guilty and go home?

16 A. Yes, he did; but it took numerous attempts to get him
17 to say that during the 2004 evaluation.

18 Q. But he was able to basically memorize the information
19 you had told him and repeat it back?

20 A. At that point. And if I had thought there was a
21 higher problem with him being competent after I had done
22 the education, I would have had him back for a second
23 evaluation in 2004. But apparently he did retain most of
24 that because he had it when he came back in 2007.

25 Q. Okay. Now, you had -- in 2004 you had an opportunity

PHILLIP T. CORNELIUS - CROSS

1 to review his -- you did a behavioral observation and
2 mental status examination?

3 A. 2004?

4 Q. 2004.

5 A. Yes, ma'am.

6 Q. And can you read us what that says? Just the
7 paragraph under the behavior observation mental status
8 examination.

9 A. Mr. Salley arrived for the interview dressed in a DJJ
10 jump suit. Mr. Salley's hygiene and grooming were
11 adequate. Upon introduction to the examiners he was
12 polite and sat attentively at the table. Eye contact was
13 good. Facial expressions were animated and appropriate.
14 Sensory systems appeared intact and no unusual mannerisms
15 or agitation were noted. Speech was difficult to
16 understand due to a speech impediment. Mr. Salley's
17 thought processes appeared coherent and logical.
18 Mr. Salley's sensory processes appeared intact. He denied
19 any attempts at self-injury, head injuries or loss of
20 consciousness. He denied suicidal/homicidal ideation.
21 Mr. Salley denied any visual or auditory hallucinations
22 and delusions. Mr. Salley was oriented to time and place
23 although he did not know the date and needed prompting to
24 get the month correct. Mr. Salley was unable to say the
25 months of the year. Mr. Salley knew he was in Columbia,

PHILLIP T. CORNELIUS - CROSS

1 but could not identify the state nor could he name any
2 other states. Mr. Salley was able to repeat and recall
3 three objects after an intervening task. Mr. Salley was
4 unable to read time on an analog or digital clock.

5 Q. That's sufficient. Thank you. Now when you did your
6 evaluation in 2009, you also did your same behavior
7 observations and mental status examination?

8 A. Yes, I did.

9 Q. Could you read that, please?

10 A. Mr. Salley arrived for the interview dressed casually
11 but neatly. Mr. Salley's hygiene and grooming were
12 adequate. Upon introduction to the examiners, he was
13 polite and sat attentively at the table. Eye contact was
14 good. Facial expressions were animated and appropriate.
15 Sensory systems appeared intact and no unusual mannerisms
16 or agitation were noted. His speech was difficult to
17 understand due to a speech impediment. Mr. Salley's
18 thought processes appeared coherent and logical.
19 Mr. Salley's sensory processes appeared intact.
20 Mr. Salley denied any attempt at self-injury, head
21 injuries or loss of consciousness. He denied suicidal or
22 homicidal ideation. Mr. Salley denied any visual or
23 auditory hallucinations or delusions. Mr. Salley
24 described his current mood as good and his usual mood as
25 good. Mr. Salley denied any fire setting or animal

PHILLIP T. CORNELIUS - CROSS

1 cruelty.

2 Q. That's sufficient.

3 A. Mr. --

4 Q. Thank you. Also I do want to add that in your mental
5 status evaluation examination in the same paragraph he did
6 know he was in Columbia, South Carolina?

7 A. Yes, he did.

8 Q. He could not name any other states?

9 A. No, he couldn't.

10 Q. And he also was able to recall three objects after an
11 intervening task?

12 A. Yes.

13 Q. And he was able to read -- let's see. You said he was
14 able to tell time?

15 A. On an analog watch; yes, ma'am.

16 Q. Well, those evaluations sound almost identical. I
17 mean, can you tell me what's changed since 2004?

18 A. Well, the evaluations are identical. We have a
19 standard protocol we follow. We ask the same questions as
20 far as mental status and the other things. We ask
21 knowledge questions that are pretty much the same.

22 What's changed is, in 2004 he required considerable
23 education and it didn't appear to take. In 2007 he had
24 retained, as it turned out, some of the knowledge from
25 2004 but not all of it.

PHILLIP T. CORNELIUS - CROSS

1 He was reeducated and when he returned on 2009 he was
2 able to answer all the questions in the protocol without
3 education, indicating he had retained most of his prior
4 education during the evaluations.

5 Q. Did you have the capacity or the abilities to give any
6 kind of IQ testing?

7 A. I had the ability but we don't generally do IQ testing
8 as part of evaluations to stand trial.

9 Q. So you relied on his IQ testing from the previous test
10 which had been done, the most recent in 2003?

11 A. Yes.

12 Q. And who did you rely on for information about
13 Mr. Salley's background? Did you talk to any of his
14 family members?

15 A. No. We relied on what's in the record or what's
16 furnished as far as the court order.

17 Q. Did you talk to his mother?

18 A. No, ma'am.

19 Q. Well, if you had known that Mr. Salley was perhaps
20 using drugs or using alcohol, would that have made a
21 difference in your determination of his IQ?

22 A. I wasn't concerned with his IQ.

23 Q. So do you think it would have been a relevant
24 consideration if he had been drinking or using alcohol?

25 A. Relevant to what?

PHILLIP T. CORNELIUS - CROSS

1 Q. Relevant to determining whether he was competent to
2 stand trial or to his mental abilities or to the change in
3 his mental abilities?

4 A. He didn't appear to be using drugs or alcohol when I
5 saw him. What he did in his own time wasn't relevant. My
6 opinion is based on his answers during the interview which
7 follows the protocol.

8 Q. You saw him in January of 2009?

9 A. Yes, ma'am.

10 Q. Were you aware that he had spent the previous seven
11 months incarcerated?

12 A. I may have, but I didn't look at that as part of the
13 relevancy to what I was tasked to do.

14 Q. In fact, when he came to your evaluation he was
15 escorted by detention center officers in detention center
16 clothing?

17 A. Well, that's saying he was in detention due to his
18 charges. But a lot of the people that show up for our
19 competency evaluations are incarcerated.

20 Q. What capacity does Mr -- has Mr. Salley exhibited
21 throughout his lifetime in his education to learning?

22 A. He's exhibited a retarded capacity which doesn't mean
23 he can't learn, it just means he's slower.

24 Q. And how was he able to -- if he wasn't capable of
25 learning this information to your satisfaction in 2004,

PHILLIP T. CORNELIUS - CROSS

1 how was he capable of learning it between 2004 and 2007
2 when you did the first evaluation -- excuse me, the second
3 evaluation?

4 A. I really don't know. I just looked at the difference
5 in the information he had in 2004 and 2007. He had
6 learned it somewhere. It may have been during the 2004
7 evaluation education. He may have talked to other people
8 on the street or in prison or wherever he might have been.

9 Q. So you're basing your opinion of competency on the
10 fact that he can give the appropriate answers to these
11 questions?

12 A. Yes, I am.

13 Q. What testing have you done to make sure that he
14 understands the answers he's giving?

15 A. Consistency.

16 Q. He can repeat the answer back over and over again,
17 same thing over and over again?

18 A. And I ask him if he can repeat the answers back over
19 and over the same way if he understands it. Just like if
20 you answered my question the same way 15 times, I assume
21 that you understand it without going into anything deeper
22 than that.

23 Q. Isn't it possible for somebody who is diagnosed as
24 mentally retarded to be able to repeat back information
25 without having a full understanding of what they're

PHILLIP T. CORNELIUS - CROSS

1 saying?

2 A. It's possible. It's possible you could teach a parrot
3 to answer you the right things but if you ask them a
4 question that calls for a non forced choice answer like,
5 what you would do if the solicitor approached you while
6 you're alone and they can come up with the right answer,
7 then I assume you're understanding and several other
8 questions like that.

9 Q. Well, how many non forced choice questions did you ask
10 Mr. Salley?

11 A. We generally ask them two or three during the course
12 of an interview.

13 Q. And what two or three questions did you ask him?

14 A. What do you do if the solicitor approaches you while
15 you're alone? What would you do if the witness on the
16 stand is lying? Why do you not talk to the solicitor
17 while you're alone? Who should you tell when, if you are
18 approached by the solicitor while you're alone?

19 Q. And those questions were after you had already asked
20 him the forced choice questions about who was for him and
21 who was against him?

22 A. Yes, it were.

23 Q. And what is perseveration?

24 A. What is what?

25 Q. I believe it's called perseveration.

PHILLIP T. CORNELIUS - CROSS

1 A. Perseveration?

2 Q. Yes.

3 A. If somebody insists on answering something the same
4 way, inappropriate context.

5 Q. So if somebody is perseverating, what would they be
6 doing?

7 A. They would be answering something the same way over
8 and over in an inappropriate context.

9 Q. In an inappropriate context?

10 A. Yes.

11 Q. What's the difference between that and somebody just
12 repeating the same information over and over again, even
13 if it's in an appropriate context?

14 A. If it's in an appropriate context you assume that it's
15 an appropriate answer.

16 Q. You just assume it's the appropriate answer?

17 A. It helps when it is the appropriate answer, yeah.

18 Q. Did you notice any perseveration on the part of
19 Mr. Salley?

20 A. No.

21 Q. You did not? He was giving you the answers that he
22 had given you before, they were appropriate this time?

23 A. He was giving me the answers in an appropriate context
24 every time I talked to him. We were talking about court
25 process.

PHILLIP T. CORNELIUS - CROSS

1 Q. And based on that you believe that Mr. Salley could,
2 if he were in a court proceeding, answer an open-ended
3 question?

4 A. I don't know. I don't know about that part of it.

5 Q. Excuse me. I'm sorry?

6 A. I don't know that part of it. It wasn't part of our
7 interviews, it's not part of what we're asked to
8 determine.

9 He has a factual understanding of the adversarial
10 nature of the process and he seemed to rationally
11 understand it. I did do to a systematic evaluation of how
12 many times he could appropriately answer an open-ended
13 question.

14 Q. Would it have been possible for you to do testing to
15 determine whether he would giving you just the answers,
16 repeating the answers back over and over consistently or
17 whether he fully understood what he was, the answer he was
18 giving you?

19 A. Say the question again.

20 Q. Would it have been possible for you to do further
21 testing to determine whether Mr. Salley was just repeating
22 the same answers back to the questions over and over again
23 or whether he really understood the answers that he was
24 giving you to the questions you asked him?

25 A. I don't know the answer to that. He answered the

PHILLIP T. CORNELIUS - CROSS

1 questions correctly in the appropriate context. He
2 answered some rational questions appropriately in the
3 relevant context.

4 Q. Well, could you have done further testing to ensure
5 that he understood the answers he was giving?

6 A. I probably could. I probably could have spent two or
7 three, four hours asking him the same questions over and
8 over.

9 Q. Did you do any of that testing?

10 A. No, I didn't. If the Court wants to order it and the
11 State's willing to pay for it, I'll be glad to ask him the
12 same questions for extended periods of time, but I don't
13 foresee that it would change his answers.

14 Q. You were paid by the State to do the tests?

15 A. I was paid for the evaluations; yes, ma'am.

16 Q. And you could have done the testing to determine
17 whether he understood the answers he was giving, whether
18 he fully understood what he was talking about, but you
19 didn't?

20 A. My opinion was that he did understand it, but the
21 State didn't ask me to do extended evaluations. The
22 State's generally confident in their protocol that when we
23 ask them several times during the interview that they
24 understand it.

25 Q. Well, let me ask you this --

PHILLIP T. CORNELIUS - CROSS

1 A. He understood it this morning when I asked him.

2 Q. What questions did you ask him this morning?

3 A. Is your attorney for you or against you; does your
4 attorney want you to go home or go to jail; is the
5 solicitor for you or against you; does the solicitor want
6 you to be found guilty or not guilty, go home or go to
7 jail; who decides.

8 Q. And that was all you asked him, the same questions you
9 asked previously?

10 A. Uh-huh.

11 Q. Now let me ask you this: Normally during a competency
12 evaluation, do you question the client about their ability
13 to understand plea bargains?

14 A. We do.

15 Q. And Mr. Salley was not able to understand the concept
16 of a plea bargain, was he?

17 A. Let me look at the report. He didn't at the time of
18 the 2009 evaluation. I have a question about whether he
19 understood the explanation or not.

20 Q. So you did have a question about whether he understood
21 what a plea bargain was?

22 A. Uh-huh.

23 Q. And you attempted to educate him about what plea
24 bargains were?

25 A. Somewhat. We give him a hypothetical situation --

PHILLIP T. CORNELIUS - CROSS

1 Q. But even --

2 A. -- involving plea bargains to explain it, and then we
3 ask him questions about their situation and whether he
4 seemed to get an answer, whether they understood plea
5 bargains. I had a question that he didn't fully
6 understand plea bargains. But he did understand that if a
7 plea bargain came up, he should talk to his attorney about
8 it.

9 Q. But what did you understand that he understood about
10 what a plea bargain was?

11 A. That he understood he should talk to his attorney
12 about it if it came up.

13 Q. But you don't think he was able to understand fully
14 what a plea bargain is?

15 A. No. He had difficulty understanding what the
16 solicitor got out of offering the plea bargain.

17 Q. Excuse me. I'm sorry?

18 A. He had difficulty understanding what the solicitor got
19 out of a plea bargain, why the solicitor would offer it.
20 But the fundamental thing as far as my evaluation was that
21 he understood that he should talk to his attorney if the
22 plea bargain situation came up.

23 Q. So to clarify, he didn't understand why the solicitor
24 would offer a plea bargain?

25 A. I didn't have the impression that he understood that,

PHILLIP T. CORNELIUS - CROSS

1 no.

2 Q. And he didn't understand why he should take one?

3 A. He understood that there was something in it for him
4 but he didn't understand what was in it for the solicitor,
5 but he did understand that he should talk to his attorney
6 if it came up.

7 MS. ALVES: Begging the Court's indulgence one
8 moment.

9 (Pause.)

10 THE WITNESS: Did she say she was through or
11 what?

12 THE COURT: No. Wait.

13 THE WITNESS: Okay.

14 BY MS. ALVES:

15 Q. Dr. Cornelius, in looking at someone's IQ, would their
16 IQ enable you to get an idea about what their
17 comprehension is or their ability to comprehend?

18 A. Yes, ma'am.

19 Q. But the only information that we have is the
20 information from two thou -- the most information we have,
21 is that from 2003?

22 A. As far as IQ test --

23 Q. And I want to clarify --

24 A. -- yes.

25 Q. -- you could have done at DDSN during this evaluation

PHILLIP T. CORNELIUS - REDIRECT

1 process, you could have done additional testing to
2 determine whether there had been changes in his IQ or
3 whether his IQ was the same?

4 A. I could have but, again, we don't generally do that as
5 part of our protocol. I do ask questions off of the
6 Wechsler Intelligence Scale as part of the mental status
7 examination.

8 Q. But you could have done testing to determine his level
9 of comprehension now?

10 A. I could have but our agency generally does not advise
11 us to do intelligence testing as part of the evaluation.

12 Q. They don't advise you, but it could have been done?

13 A. I suppose.

14 Q. It could have been authorized. You could have
15 requested that testing be done?

16 A. If I thought it was important; yes, ma'am

17 MS. ALVES: I don't have any further questions.

18 REDIRECT EXAMINATION

19 BY MS. BRISBIN:

20 Q. Dr. Cornelius, does IQ in a mentally retarded person
21 change over time?

22 A. It can, but it would be very slow.

23 Q. It would be what?

24 A. It could, but it would be very slow.

25 Q. And unless there's brain damage or mental, some other

1 type of mental brain injury, would a mentally retarded
2 person's IQ ever go lower than it was?

3 A. It's generally stable once they hit the age of
4 majority, once they get to be an adult.

5 Q. So there wouldn't be any purpose to do any additional
6 IQ testing at age 18?

7 A. No, ma'am.

8 Q. Thank you. And did you follow all the proper protocol
9 that DDSN has for evaluating someone for forensic
10 psychological evaluations?

11 A. Yes, ma'am.

12 MS. BRISBIN: Thank you.

13 THE COURT: Anything further of Dr. Cornelius?

14 MS. ALVES: Yes, sir. Just very briefly.

15 RECROSS-EXAMINATION

16 BY MS. ALVES:

17 Q. Could drinking or drug use affect someone's IQ?

18 A. It could.

19 MS. ALVES: Thank you. No further questions.

20 THE COURT: You can step down. State have any
21 further witnesses?

22 MS. BRISBIN: No, Your Honor.

23 THE COURT: Okay. Yes, ma'am.

24 MS. ALVES: Your Honor, I'd call Dr. Donna
25 Schwartz-Watts.

DONNA MARIE SCHWARTZ-WATTS - DIRECT

1 DONNA MARIE SCHWARTZ-WATTS, having been duly
2 sworn, was examined and testified as follows:

3 THE CLERK: Please have a seat in the witness box
4 state your full name for the Court and spell your last.

5 THE WITNESS: Donna Marie Schwartz Watts. S. C.
6 H. W. A. R. T. Z., hyphen, W. A. T. T. S.

7 DIRECT EXAMINATION

8 BY MS. ALVES:

9 Q. Dr. Schwartz-Watts, where are you currently employed?

10 A. I'm a professor of clinical psychiatry and director of
11 forensic services at the University of South Carolina
12 Medical School in their department of neuropsychiatry.

13 Q. And can you tell us, what is your education?

14 A. Sure. I graduated from Furman University in 1985 with
15 a Bachelor of Arts degree in psychology. I graduated from
16 medical school in 1989 from the University of South
17 Carolina School of Medicine. I became licensed to
18 practice medicine at that time.

19 I completed a four-year general psychiatry residency
20 at the Department of Mental Health and I completed a year
21 of forensic psychiatry which is an additional year of
22 training at the Department of Mental Health in 1994. I
23 went on to work at the Department of Mental Health for a
24 number of years where I conducted competency to stand
25 trial and criminal responsibility evaluations.

DONNA MARIE SCHWARTZ-WATTS - DIRECT

1 I also worked in the insanity unit during that time.
2 I also worked at the Department of Juvenile Justice during
3 that time which I continue to do. I took my boards in
4 psychiatry and forensic psychiatry and passed those. And
5 I've been at the University of South Carolina School of
6 Medicine since 1997 full-time.

7 Q. And have you had an opportunity during your time with
8 both the Department of Mental Health and in your current
9 office, had opportunity to do forensic evaluations to
10 determine competency?

11 A. Yes. Your Honor, I probably average about two a day
12 when I'm in the office working so about 10 a week.
13 Thousands, probably close to 10,000 at this point over
14 those 20 years.

15 Q. And have you testified in court about the results of
16 your evaluations before?

17 A. Yes.

18 Q. Can you tell us about how many times?

19 A. Over 750 times now. Somewhere between 750 and a
20 thousand times.

21 Q. You've been qualified as an expert?

22 A. Yes.

23 Q. Do you know how many times that has been on the times
24 you've testified?

25 A. It's between 750 and a thousand, somewhere around

DONNA MARIE SCHWARTZ-WATTS - DIRECT

1 there. I average probably, usually about one or two
2 testimonies a week.

3 Q. And do you typically see mentally retarded patients
4 or --

5 A. Yes. That is part of my practice. When you work at
6 the Department of Mental Health, Your Honor, if you are
7 opined to be mentally retarded and not mentally ill, the
8 Department of Mental Health is not allowed to render
9 opinions about that but since I'm working for the
10 University I can. So oftentimes I'm called in those kinds
11 of cases as well.

12 Usually as in most cases, the patients with mental
13 retardation also have an axis one or mental illness as
14 well. So that's certainly an area I'm comfortable with
15 and have testified to.

16 MS. ALVES: Your Honor, at this time I'd move to
17 qualify Dr. Schwartz-Watts as an expert in the field of
18 forensic evaluations.

19 THE COURT: What says the State?

20 MS. BRISBIN: No objection, Your Honor.

21 THE COURT: Okay. So find.

22 BY MS. ALVES:

23 Q. Dr. Schwartz-Watts, have you had an opportunity to
24 meet with Mike Salley, the Defendant in this case?

25 A. Yes, I did. I spent an hour and a half interviewing

DONNA MARIE SCHWARTZ-WATTS - DIRECT

1 him October 27th, last year, and about 25 minutes this
2 morning.

3 Q. Would you also -- in addition to speaking with
4 Mr. Salley, did you review any documents?

5 A. Yes. Very similar to the ones Dr. Cornelius did. I
6 was very aware of his charges. I had seen his prior DDSN
7 evaluation and I also spoke with his mother.

8 Q. So you did talk with his mother?

9 A. Yes.

10 Q. Is that what you -- is that something that you
11 standardly do, talk with a parent or a family member?

12 A. Sure, if you can. Your Honor, competency's a
13 precapacity. So I agree with Dr. Cornelius. It's more
14 important, you have to interview the person because the
15 person that you're interviewing is the one whose capacity
16 you're assessing.

17 But in this case sometimes it's good to have other
18 history because people with mental retardation, they like
19 to give you the answers you want to hear. They try to
20 please you. And they minimize.

21 And so very specifically in this case Mr. Salley told
22 me he wasn't a drinker or didn't use drugs and his mom
23 says he drinks liquor and beer every weekend and every
24 chance he can.

25 So sometimes it's just important to get a history that

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1 will show if there's any contradictions in the information
2 that he provides.

3 Q. Based on your evaluation of Mr. Salley, your talking
4 to his mother and review of the documents, were you able
5 to form an opinion to a reasonable degree of medical
6 certainty regarding Mr. Salley's competency to stand
7 trial?

8 A. Yes.

9 Q. And what was your opinion?

10 A. It's my opinion, Your Honor, he clearly has a factual
11 understanding of some of the proceedings. I agree with
12 Dr. Cornelius. He clearly knows the prosecution is
13 against him. He appreciates the adversarial nature of
14 these proceedings.

15 The problem is even factually he always thinks that
16 you're against him. He says the judge is against him
17 because the judge has to pass sentencing. So he's got a
18 little bit of confusion factually there which probably he
19 could be educated on to change.

20 The issue I have is he is what I call not rationally
21 competent. And what I mean by that is he doesn't have the
22 cognitive abilities to follow a trial. Dr. Cornelius
23 stated it took three years for him to learn the roles of
24 the court officials and to gather information. And I
25 don't think most trials take three years.

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1 And so what we're asking him to do in a trial
2 situation is to learn new information, be able to remember
3 it, be able to provide it back to his attorney to assist
4 in his defense. He just does not have the cognitive
5 ability to do that.

6 If you look at his evaluation back in 2004, his mental
7 status examination is exactly the same as it is now. He
8 has not learned any -- he doesn't have any new cognitive
9 skills. They're the same. He still can't do math. He
10 still can't remember things.

11 And examples of rational competency, you have to be
12 more than just self-protective. He's very self-
13 protective. He would not talk with the solicitor without
14 his attorney present. He understands that.

15 But, for example, I asked him today, if your lawyer
16 wants you to take the stand and she tells you to tell the
17 truth, what are you going to do. And he says he wouldn't
18 tell the truth. So he's not able to assist her at some
19 levels because of some of his cognitive appearance. He
20 does not fully understand what it takes to be competent to
21 stand trial.

22 And those are the concerns I have. He would assist
23 his attorney. He's protective. He doesn't want to go to
24 prison. He's got some confusion about, he can't -- some
25 of his forced choice tests, he's not able to pick the

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1 right answer. For example, I asked him, do you want a
2 24-month sentence or a three year. And he said a three
3 year because it's less time. The number three is smaller,
4 but that's an example of how his brain works.

5 And so he doesn't have the ability to learn new
6 information. So if, for example, during trial if there's
7 some evidence presented and he doesn't know it, he doesn't
8 have the ability to assist his attorney. He probably
9 doesn't even understand what it is.

10 But he does have some factual -- he does have a
11 rudimentary factual understanding of the proceedings.

12 Q. Let me ask you this: If you're talking about ability
13 during trial so, when Dr. Cornelius questioned him, he
14 said that he asked -- Dr. Cornelius asked Mr. Salley if
15 somebody, I believe he said, if somebody was lying what we
16 would he do. He said he would tell his attorney.

17 Do you believe that if -- can you tell us -- what do
18 you think would happen if Mike Salley were to hear new
19 information on the witness stand that hadn't been
20 previously told to him, would he be able to assist his
21 attorney? Would he be able to process that and discuss it
22 with his attorney at the table during the trial?

23 A. In my opinion, no. Again, the methodology used, court
24 is not a forced choice test. To be competent to stand
25 trial is to be able to follow testimony, to be able to pay

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1 attention to witnesses. If there's an inconsistency he
2 can't protect himself in some ways because of his rational
3 limitation, his cognitive limitation.

4 So if someone were to -- I'm very doubtful if you
5 asked him what just happened today in these court
6 proceedings that he's going to have a full understanding
7 of that.

8 I think at one level he would recognize that somebody
9 is trying to help him, and that somebody has another
10 opinion. But in the terms of really rationally
11 understanding these proceedings, his IQ is very low. And
12 nothing has changed in his IQ, most likely, since he's
13 been 14. And in fact it's probably lower because he's
14 been drinking so much. Drinking does affect your memory.
15 It does affect your cognitive ability.

16 So there's no reason in my mind that he would have
17 improved, that his IQ should be any better or that he's
18 had any change in his cognitive status since he's been 14.

19 Q. Do you think it is important for -- let me ask you
20 this: How important is it that he understands who his
21 attorney is and the role the attorney plays?

22 A. Well, that's important to a degree. He needs to
23 understand. He's got an understanding that this is an
24 adversarial proceeding.

25 But, again, he would assist you in any way that he's

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1 able to understand. He is clearly self-protective.
2 There's no question about that. And that is important.

3 He's got a factual understanding and even the parts
4 that he doesn't factually understand, I think could be
5 corrected. But his ability to take those things and use
6 them to protect him in court, he doesn't have that
7 capacity. That's not something he can learn. That's the
8 result of his mental retardation and his IQ being in the
9 40s.

10 Q. Can you tell us what tests have you done to determine
11 whether Mr. Salley is able to comprehend the information
12 that he's able to sift back out?

13 A. I thought about that, Your Honor. I should have done
14 it and I apologize. It wasn't until talking to his mother
15 that I realized that he's used drinking so much. Probably
16 it would not be a bad idea to have current
17 neuropsychological testing done on him.

18 And that's to measure the different areas of his
19 brain. It would include an IQ test, but it's much more
20 sensitive testing. It looks at all of his brain
21 function. And it would be a way to determine if he has
22 been drinking so much that it has further impaired his
23 capacity since he was tested in 2003.

24 That's maybe something that could be done. And I
25 should have done it. I apologize.

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1 Q. Is that a test that DDSN can do?

2 A. No, not necessarily, no. They could have given a new
3 IQ test but a neuropsychologist, that's a whole different,
4 that's a subspecialty of psychology. And that's a
5 specialty of psychology that just studies brain function
6 and does brain assessments.

7 There may be more to him than mental retardation. He
8 certainly has an axis one diagnosis. He's mentally ill.
9 He has a sexual disorder, but he may have a further,
10 something else affecting his ability to think.

11 Q. At this -- today, do you have an opinion to a
12 reasonable degree of medical certainty of whether or not
13 he's able to fully comprehend the court proceedings and
14 the interaction that would take place at trial?

15 A. In my opinion, no.

16 Q. Now you did a report. It's a very brief one, one page
17 and a little bit on a second page whether -- concerning
18 your findings about Mr. Salley?

19 A. Yes.

20 Q. And in your report you express concern about the fact
21 that he does not say my name correctly?

22 A. That's correct.

23 Q. And what do you believe that he says my name as?

24 A. This is example, Your Honor, of what's called
25 perseveration. To me he demonstrates an inability to

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1 learn new concepts. When I first met him -- and
2 Dr. Cornelius is also right on that, he does have a speech
3 impediment. So it's a little difficult to understand
4 him.

5 But he very clearly calls Ms. Alves -- I said, what's
6 your attorney's name. And he said, Wally S. Bees. And so
7 I kind of chuckled and had him go over it a few times and
8 I taught him how to say Wallis Alves.

9 Three minutes later I asked what his lawyer's name
10 was, and Wally S. Bees. It's Wally S. Bees today. And in
11 fact, when I examined him today he gave me exactly the
12 same answers to every question that he did back in October
13 of 2009.

14 And so his brain, it uses the same strategies to
15 recall information. That's what perseveration means. It
16 means that each time you're faced with a problem or
17 something that requires you to think, your brain uses the
18 same exact strategy to retrieve that information. And
19 that's a sign of pathology. That's a sign of cognitive
20 impairment.

21 Q. You stated in your letter that he does understand the
22 difference between guilty and not guilty?

23 A. Yes.

24 Q. But then you said he does not understand concepts such
25 as cross-examination?

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1 A. No, not at all. If you ask him -- and I agree again
2 with Dr. Cornelius. I think we saw exactly the same
3 information. He's given a very consistent story, but he
4 doesn't understand.

5 If you -- he can say things, but he doesn't have an
6 understanding. Cross-examination, he wouldn't be able to
7 testify. His IQ is so low he wouldn't, he would easily be
8 tricked.

9 As he told me, even if his lawyer told him to take the
10 stand and tell the truth he may not do that. So he
11 certainly wouldn't be following your advice.

12 And I'm not sure that's because it's a choice. It's
13 just because of his cognitive deficits.

14 Q. Well, if he were asked a question that suggested an
15 answer, would he be able to -- in your opinion, would he
16 be able to deviate from the answer that is suggested?

17 A. Yes. It depends what it is. Yes, he's protective.
18 He is protective. If you try to lead him -- and I tried
19 to lead him this morning. For example, I asked him, how
20 many jurors did it take to find him guilty. And he said
21 12. And I said, well what if your lawyer told you it only
22 took five. He would not believe that.

23 So once he learns something and once it's in his head,
24 he's very self-protective. So I don't think you could
25 confuse him if it's something that he understands.

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1 Q. So if it's something that he understands then you
2 wouldn't be able to confuse him?

3 A. I don't think he's easily led. He's got some street
4 smarts. He's protective. As much -- for the cognitive
5 ability that he has, he's very self-protective.

6 Q. You're not saying he doesn't understand anything about
7 the court systems?

8 A. No, not at all. Trials are complex. I've sat through
9 many. We all have. They require an ability to pay
10 attention, an ability to remember, the ability to confer
11 with your attorney after new information is presented, an
12 ability to weigh options. It's much more than just being
13 self-protective to stand trial.

14 Q. In your opinion, does he have those abilities?

15 A. No.

16 Q. You also commented that he was, he didn't understand
17 abstract similarities?

18 A. That's correct.

19 Q. Why is that important?

20 A. Again, that's a measure of higher levels of brain
21 functioning that you need, in my opinion, to stand trial.
22 If you ask him to put things into categories, he has
23 difficulties doing that. I'll give you the exact
24 answers.

25 He has many brain deficits. He cannot even copy a

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1 design, Your Honor. I drew him a picture of two houses
2 and asked him to recopy that. His brain doesn't even see
3 the same thing our brain sees when you ask him to copy
4 something.

5 When asking him to abstract similarities, I asked him
6 what put an apple and orange in the same group. And he
7 did well on this one. He said, they're food together.

8 When asked what puts a car and a train in the same
9 group. Instead of saying transportation -- he got it
10 right to a degree. He said, they both be on the road.

11 And when I asked him what put a fly and a tree in
12 common, he had no answer. When I asked him what put a
13 mountain and a lake, what they had in common, he was not
14 able to give an answer.

15 So the more complex the concept is, the more
16 difficulty he has understanding it. His brain can't work
17 at that level. And in my opinion that happens in trials
18 all the time.

19 If I may, I'll give another example, Your Honor. This
20 is the figure I drew for him. And I asked him to copy
21 it. And that's what he copied. I asked him also to draw
22 a clock. And that's the clock he drew. And he was unable
23 to give it the correct time.

24 And part of standing on trial is looking at exhibits,
25 perhaps, or looking at documents. He can't even read.

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1 And so, again, just severe cognitive limitations.

2 Q. So I want to clarify. You asked him to draw basically
3 the five-figured, two five-figured shapes that were
4 touching each other and he drew two triangles?

5 A. Correct. I call them overlapping pentagrams but
6 pentagons, and he drew two triangles that didn't overlap
7 but just touched each other.

8 Q. Now does he have the capacity to learn?

9 A. Yes. I think that's clearly been demonstrated but it
10 took three years for him to learn that. And I don't think
11 in the pace of a trial he's got that capacity. He can't
12 learn information that quickly.

13 MS. ALVES: Beg the Court's indulgence for one
14 minute. (Pause.)

15 I don't have any further questions. Please
16 answer any the solicitor may have.

17 CROSS-EXAMINATION

18 BY MS. BRISBIN:

19 Q. Dr. Schwartz-Watts, do you recognize -- well, get this
20 marked. I apologize.

21 (State's Exhibit No. 2, Dr. Schwartz-Watts' 10/27/09
22 report of evaluation, marked for identification.)

23 BY MS. BRISBIN:

24 Q. Do you recognize what's been marked State's Exhibit
25 Number Two for the purposes of this hearing?

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1 A. Yes, ma'am.

2 Q. What is that?

3 A. That's a Xerox copy of my report.

4 Q. When did you do your evaluation of Mr. Salley?

5 A. October 27. Normally what I practice is now as soon
6 as I see someone I'll write a report just so in case the
7 case settles or if something happens later that I got a
8 record of what I did.

9 Q. October 27th of this year?

10 A. 2009.

11 Q. That's right. It is 10. Judge, I'd ask that her
12 report be admitted into evidence for purposes of this
13 hearing.

14 THE COURT: What says the defense?

15 MS. ALVES: I don't have any objection, Your
16 Honor.

17 THE COURT: All right. It's in without
18 objection.

19 (Thereupon, State's Exhibit No. 2, October 27,
20 2009 report by Dr. Schwartz-Watts, was received into
21 evidence.)

22 BY MS. BRISBIN:

23 Q. And who referred Mr. Salley to you for his evaluation?

24 A. Ms. Alves.

25 Q. So there was not a court order for your evaluation, he

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1 was referred by the defense attorney?

2 A. That's correct.

3 Q. Was that before or after he was found competent by
4 DDSN?

5 A. I would presume, I believe the way the system works
6 now, they have to be -- there has to be an evaluation done
7 by the Department of Mental Health or DDSN first and then
8 the public defenders are allowed to get an expert.

9 Q. Okay. And you said he was diagnosed with moderate
10 mental retardation. Are you saying that someone who's
11 mentally retarded is never competent to stand trial?

12 A. No, no, not at all. Now, honestly I've got to say in
13 the 60s there's been plenty of people that in my opinion
14 have been competent. It's not real common in the high 40s
15 and low 50s. That's usually a sign where the mental
16 retardation is moderate and that's not as common. But
17 certainly I have opined that there are many people, I've
18 even had a patient with a IQ of 48 that it was my opinion
19 he was competent to stand trial. So it happens.

20 Q. His IQ ranged between 42 and 59 with the Stanford-
21 Binet reading was 59?

22 A. Yes. The Stanford-Binet, the test results are
23 generally higher than what your IQ testing is. The other
24 testing he had in 2003 is probably more reliable. They're
25 a little bit better tests than what used to exist.

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1 Q. Is that an older test?

2 A. Yes, the Stanford-Binet's an older test.

3 Q. You would agree that aside -- unless the alcohol
4 caused brain damage or some other brain injury occurred,
5 his IQ would not be likely to be lower over time?

6 A. That's correct. Unless, you know, sometimes you can
7 have a medical illness intervening. He's not had that.
8 We don't have any pertinent medical records but that's
9 correct, it should stay stable unless you get Alzheimer's
10 when you get older or you used drugs or chemicals. That
11 could impair your brain functioning further.

12 Q. That's why DDSN protocol would not include retesting
13 of IQ over time?

14 A. That's exactly right. They had no question he was
15 mentally retarded. They had those records. And so there
16 was no question to repeat that. Dr. Cornelius, I don't
17 believe he had a history that he had been using alcohol.
18 Mr. Salley denied that to me as well.

19 Q. So you would agree that Dr. Cornelius did the
20 appropriate testing to evaluate Mr. Salley?

21 A. Sure. Sure.

22 Q. And when you say he -- it took him three years to
23 learn, you're referring to the three years between the
24 first and second evaluation?

25 A. The -- all together. I think Dr. Cornelius very

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1 nicely put out over time, even though his mental status
2 appeared to be the same compared to 2004 as it is now but
3 that over time that he didn't have to give him as many
4 trials to learn, he was able to retain the information.
5 He clearly stated that, you know, in 2004 his opinion, he
6 wasn't competent because even though he could say the
7 answers back it was taking more trials, he had to learn
8 them.

9 But it appears from then until 2007, 2009, that he
10 finally understood those concepts to his --

11 Q. So what you're saying is it took three years for him
12 to progress to the point where he was able to learn the
13 concepts?

14 A. Yes, that's my understanding of Dr. Cornelius's
15 testimony. That's correct.

16 I don't have that same opinion. I think he has
17 difficulties learning. I've not -- but again, he's seen
18 him over time and he's had that benefit.

19 Q. Well, would you agree that Dr. Cornelius agreed that
20 he had difficulties learning or that he was a slow
21 learner --

22 A. Yes.

23 Q. -- is the way that he put it, not that he was not
24 capable of learning at all?

25 A. That's correct.

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1 Q. Would you agree with that?

2 A. Yes. And I agree. Absolutely.

3 Q. Now you said he had trouble with the difference
4 between 24 months and three years, and he thought that he
5 would prefer to get a three-year sentence because it was
6 less time?

7 A. Right. Three was smaller than 24.

8 Q. Right. So he doesn't understand how to do math,
9 obviously?

10 A. No, it's much more than just math. It's looking at
11 options, weighing -- it's similar to new information being
12 presented. He's not been asked that question before so
13 you asked him a question that requires a complicated
14 thought process.

15 It's not even a matter of math. It's the fact that he
16 can't convert months to years. That's an abstract frame
17 concept, similar to finding similarities between objects.
18 It's a sign of his cognitive impairment.

19 So it's a little bit more than math. It's an ability
20 to look at the big picture, look at evidence, look at
21 options and be able to go through a thought process and
22 say, okay, months are less than years.

23 So it's a sign of his cognitive impairment.

24 A. Right.

25 Q. But you would agree that he understands that he wants

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1 the lower sentence?

2 A. Absolutely. He is -- there's no question, Your Honor,
3 he is self-protective. And if he -- even if he didn't
4 understand that concept, if somebody explained it to him
5 and he, and we were sure he understood that he would
6 definitely opt for the more self-protective measures. No
7 question.

8 Q. He understands that he can ask his defense attorney
9 which is better for him, 24 months or three years?

10 A. That depends if he knows. If he understands that
11 there's an option involved and it requires rational choice
12 but, yes, if he understood that he could certainly do
13 that.

14 Q. You would agree that his defense attorney would know
15 that and she would be able to tell him that?

16 A. Absolutely.

17 Q. Okay.

18 A. But understand, just keep in mind -- you're exactly
19 right for that detail, but in a trial he may not --
20 something could come up that he may not understand to ask
21 his attorney. So there could be, you know, somebody could
22 have said something on the stand in evidence about months
23 and years. And he wouldn't even be able to understand the
24 time line in that, necessarily. So that would be more of
25 the concern.

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1 Q. And, you would agree that he can tell time on an
2 analog clock?

3 A. Yes.

4 Q. Or did you test him?

5 A. Yes.

6 Q. Okay. And you said he can't read, but not being able
7 to read is not a test of competency; is it?

8 A. That's correct. But if you take all of those things
9 compared with his cognitive deficits, he is very, very
10 limited.

11 Reading is not a requirement to be competent. But
12 when you can't read and your visual spatial orientation is
13 not correct and your frontal lobe's not working correct
14 and your IQ is at the best the high 50s, in my opinion
15 that renders you not able to assist your attorney because
16 you rationally don't understand the proceedings.

17 Q. But you would agree that he understands the
18 adversarial process?

19 A. Absolutely. Yes.

20 Q. And he understands the role of the public defender and
21 the prosecutor?

22 A. Absolutely.

23 Q. And he understands the role of the jury?

24 A. Yes. Well, I didn't ask him that. He just knows
25 there's 12 people on the jury. I didn't ask him about --

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1 he does understand guilt and innocence, too. He also
2 understands a plea is available to him.

3 But I was a little bit concerned because he thinks
4 because a judge passes sentence that that automatically
5 means a judge is against him. So that's an example of the
6 cognitive impairment in his thinking.

7 Q. And you said that he had very poor self-esteem and was
8 not able to come up with three wishes. Does that have
9 something to do with competency?

10 A. Yes. This, Your Honor, part of what we have to do in
11 these competency evaluations you have to diagnose them
12 with a mental illness and so we're looking at those
13 things. He had little bit of depression. That's more
14 evidence of depression. If you get very depressed, it can
15 lower your present capacity.

16 The fact that he just couldn't think ahead to the
17 future, that's usually a sign of depression in young
18 males. I learned that from DJJ all the years working
19 there. And it means that he doesn't seem very hopeful but
20 of course that could also be related to the trouble he's
21 in and the charges.

22 It's a demonstration that he's a little bit depressed
23 which in my opinion was consistent with him being in jail,
24 being confined and the serious charges he's facing. And
25 he knows these charges are serious.

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1 Q. Right. He understands the seriousness of the charges
2 and he knows what the charges against him are?

3 A. Yes, he does. He does.

4 Q. And he knows who his defense attorney is even though
5 he has trouble saying her name?

6 A. Yes. He recognizes her.

7 Q. And so he has an understanding of the way court works
8 and who's for him and who's against him?

9 A. I call it a rudimentary factual understanding except
10 for the role of the judge because I certainly don't think
11 the judge is against him.

12 Q. Well, he understands that the role of the judge is to
13 determine the sentence?

14 A. Yes, he does. That he does.

15 Q. He just thinks the judge is against him?

16 A. Because he sentences people in general.

17 Q. Could it be because he's guilty and he admitted his
18 guilt?

19 A. It could be, certainly.

20 Q. He did admit he's guilty, didn't he?

21 A. Yeah, he did.

22 Q. Although your report says he denied it, but from what
23 I understand he did later admit it to you?

24 A. That's correct.

25 Q. And he also admitted it to law enforcement?

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1 A. That's correct.

2 Q. After initially denying it?

3 A. That's correct.

4 Q. Admitted it to his mother?

5 A. Correct.

6 Q. In the presence of law enforcement in fact; correct?

7 A. Correct.

8 Q. And you said that you believed that he's not likely to
9 become competent, but that he needs sex offender
10 treatment?

11 A. Absolutely.

12 Q. Now if someone is not competent and doesn't have the
13 ability to understand basic concepts, how can sex offender
14 treatment benefit them?

15 A. That's a great question. That's a very good
16 question. There's medicines, Your Honor, to lower the sex
17 drive that we commonly have to use less -- I've actually
18 had to prescribe those medicines for inmates, children at
19 the Department of Juvenile Justice. There's medicines
20 that can decrease the sex drive.

21 There is also treatment, believe it or not, even in
22 the Department of Mental Health, their sexual program,
23 they have tracks that are geared for people with mental
24 retardation. There is some sex offender treatment
25 available for them, but it's usually individualized.

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1 These guys can't participate in groups with patients that
2 have higher IQs. They usually have to have individualized
3 treatment.

4 And similar to Dr. Cornelius, it would take years. It
5 takes years to internalize that stuff, but he could be
6 taught.

7 Q. You would agree that in your opinion he is a
8 pedophile?

9 A. Absolutely. Yes. In my opinion he's got pedophilia.
10 And it's attracted to males and females, not limited to
11 incest.

12 Q. And, in fact, he has acted on that, those tendencies
13 repeatedly?

14 A. Correct.

15 Q. And doesn't deny it?

16 A. Correct.

17 Q. So I guess what you're saying basically is that in
18 your opinion he, although he understands the legal process
19 and the roles of all the individuals involved, and what
20 he's charged with, and that he wants to be found not
21 guilty so that he doesn't have to go to prison, but he's
22 just not competent enough in your opinion?

23 A. Well, my opinion is he has a factual understanding of
24 the proceedings. He has a capacity to assist in his
25 defense, but because he doesn't have a rational

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1 understanding, that second prong, because he doesn't have
2 a rational understanding of the proceedings, he's not able
3 to assist his attorney.

4 Because if these concepts come up that are too
5 complicated for him, he doesn't have the cognitive
6 capacity to follow trial testimony to confer with his
7 attorney to, for example, if there's a statement made
8 that's contrary to something that may have happened to
9 him, he would have to be able to recognize it, have to
10 recognize that it's maybe contrary to his case or it's not
11 self-protective for him, and then have the ability to work
12 with his attorney to let her know that.

13 And that's where his capacity's impaired. It's a
14 rational understanding. He understands how everything is
15 supposed to work, but when it comes to putting it into
16 action and to processing it, his brain can't do that.

17 Q. Wouldn't that be true of a large number of defendants
18 in the legal system? Would you expect every defendant to
19 be able to understand every concept and advise their
20 defense attorney on how to proceed?

21 A. No. That's a good question. No, but I would expect
22 them to know when they don't understand something and to
23 be able to ask.

24 And that's one of his issues. He doesn't know of
25 this -- I don't mean to be circular, he doesn't know what

1 he doesn't know. So even people with limited IQs,
2 defendants, some may be more intelligent than others.
3 They know when they don't understand something and they
4 can ask for help. And that's what concerns me.

5 MS. BRISBIN: Thank you.

6 MS. ALVES: Judge, I don't have any further
7 questions of Dr. Schwartz-Watts.

8 THE WITNESS: Thank you. May we be excused?

9 MS. ALVES: I'm sorry, Judge. One thing I would
10 I do is I would ask to put a copy of the drawing that she
11 showed Your Honor into the record. I will have to make a
12 copy of that because it's part of her report.

13 THE COURT: Any objection?

14 MS. BRISBIN: Was this the drawing of the
15 pentagon that looked like a triangle? No objection.

16 THE COURT: Okay.

17 (Thereupon, Defendant's Exhibit No. 1, drawing,
18 was received into evidence.)

19 MS. ALVES: Your Honor, I'd also ask, there's
20 been numerous conversations about a 2004 report of
21 Dr. Cornelius. I'd just ask to be able to put that into
22 the record.

23 MS. BRISBIN: Your Honor, if the 2004 report goes
24 in, I would ask that the 2007 report goes in as well.

25 MS. ALVES: No objection.

1 THE COURT: All right. 2004 and 2007 are in.

2 MS. BRISBIN: We'll have to get those to you.

3 Just one more. The 2007, we still haven't found that one.

4 THE COURT: Anything from either side?

5 MS. BRISBIN: Nothing further, Your Honor, from
6 the State.

7 (Thereupon, Defendant's Exhibit No. 2, 5/19/04
8 forensic evaluation, and Defendant's Exhibit No. 3,
9 10/3/07 letter and 2007 evaluation were received into
10 evidence.)

11 MS. ALVES: Your Honor, I have nothing further.
12 I would just note that during her testimony, Dr. Schwartz-
13 Watts stated that it might be beneficial to have a full
14 neuropsychological testing done on Mr. Salley to determine
15 where his true cognitive skills are.

16 If Your Honor feels that's appropriate, I would
17 ask you to consider allowing that prior to making a
18 decision on this. That's all I have.

19 THE COURT: And of course the State's position on
20 that?

21 MS. BRISBIN: Your Honor, he has actually denied
22 use of alcohol and drugs during that time period although
23 his mother, according to Dr. Schwartz-Watts, said that he
24 was abusing alcohol.

25 I don't believe there's any evidence to support

1 the need for additional IQ testing. She's already
2 saying -- agreeing -- both of the doctors agree that he's
3 in the moderate mentally retarded range.

4 I don't think that's really an issue and it's not
5 going to change anything as far as his competency goes.
6 They're still going to have the disagreement. The two
7 doctors are still going to disagree as to whether or not
8 he's competent based on their opinion of his ability to
9 understand the legal process. And I don't think that's
10 going to change anything.

11 THE COURT: Okay. Is that -- do you agree,
12 Doctor, that even though it'd give you a better diagnosis
13 it would not change your opinion or whether he's competent
14 or not?

15 DR. SCHWARTZ-WATTS: It would probably strengthen
16 my opinion, Your Honor. Honestly.

17 THE COURT: Okay. Dr. Cornelius, would that
18 affect your opinion in any way?

19 DR. CORNELIUS: No, sir.

20 THE COURT: Okay. At this point I probably won't
21 order that. I need to read these reports and I'll get
22 back with y'all as to my opinion. After I read them all I
23 may change my mind about further testing. Let me read
24 what's been introduced into evidence and I'll let you all
25 know.

1 MS. BRISBIN: Yes, sir.

2 MS. ALVES: Thank you, Your Honor.

3 MS. BRISBIN: Should the witnesses be excused,
4 Your Honor?

5 THE COURT: I don't have any objection unless
6 y'all have something else. I don't need them.

7 MONDAY, FEBRUARY 8, 2010 PROCEEDINGS ENDED AT 12:35 P.M.

8 * * *

9 ON THURSDAY, FEBRUARY 11, 2010 AT 9:43 A.M.:

10 MS. BRISBIN: Mike Salley.

11 Judge, this is Mike Sally, indictment numbers
12 2009-GS-02-828, 829 and 827. And we are going back on the
13 record on the issue of competency.

14 THE COURT: Okay. Y'all, I have reviewed case
15 law as well as the documents that were entered into
16 evidence which were the 2004 evaluation of Dr. Cornelius,
17 the 2007 and 2009 as well as the testimony as well as the
18 evaluations done by Dr. Schwartz-Watts.

19 And based on these evaluations -- and one thing
20 that I point out, the 2004 evaluation, Dr. Cornelius did
21 not find Mr. Salley competent, that he could not respond
22 appropriate to the questions, he did not understand the
23 role of his attorney, the solicitor, the judge.

24 But in the 2007 evaluation, he found that he was
25 competent. He responded appropriately. He seemed to

1 understand the role of the different people in court as
2 well as the process.

3 And he made that finding again in 2009 after
4 spending considerable time with him as well as
5 interviewing him, as both doctors did just prior to the
6 hearing here in court.

7 The fact that Dr. Cornelius interviewed him over
8 those three times, the first time he didn't find he was
9 competent so I don't have a doctor who -- with differing
10 opinions. I have one doctor who examined him, didn't find
11 him competent.

12 And then two years later or three years later he
13 found him competent because he did seem to understand the
14 process that was going on. And he seemed to, in his
15 opinion, have the ability to consult with the attorney to
16 a reasonable degree of rational understanding.

17 And understanding, I don't know how much normal
18 lay people understand the court process, but that he
19 understood and he had enough factual basis to be able to
20 assist in his defense.

21 Dr. Schwartz-Watts' opinion, she basically had
22 the same finding but she has some concerns that she
23 didn't -- she did not think he was competent because she
24 did not think that he had the ability to process the
25 information quick enough on cross-examination, that

1 withstood cross-examination.

2 And I don't think that's the test in this state.

3 And I certainly think that being able to assist his
4 attorney, and Dr. Cornelius found that he would be able to
5 recognize if someone was not telling the truth and advise
6 his attorney to that effect.

7 In the end that he even told Dr. Schwartz-Watts
8 that he were to lie, even if his attorney told him to tell
9 the truth, if he thought it would benefit him. So I think
10 he has that understanding of the proceedings.

11 And the defense has to present evidence that he
12 in fact does not have the ability and is not competent to
13 stand trial. I think that that evidence must be by the
14 preponderance of the evidence.

15 And I certainly don't find by the preponderance
16 of the evidence that they have met their burden and I
17 think he is competent to stand trial.

18 MS. BRISBIN: Thank you, Your Honor.

19 MS. ALVES: Your Honor, are you saying that I did
20 not meet the burden?

21 THE COURT: It's nothing that -- I'm not
22 suggesting you did anything wrong. It's simply based on
23 the evaluation of the doctor, that I have her opinion that
24 he's not but her opinion -- what she's saying he's not,
25 because he's not quick enough to process information on

1 cross-examination. But she found that he responded
2 appropriate in everything else.

3 And that Dr. Cornelius who examined him three
4 times with other independent examiners there who have
5 spent more time with him, found that he was competent
6 because he could answer the questions appropriately, he
7 understood the roles of each player in the court, and that
8 he could in fact assist his attorney.

9 I don't think the standard is that he can't get
10 through cross-examination or he can't process information
11 fast enough on cross-examination. I just don't think
12 that's the standard. So...

13 MS. ALVES: Yes, sir. Your Honor, I would
14 like -- I know that we've had numerous discussions since
15 Monday about this, the solicitor and I with Your Honor.

16 I would like to put the argument that I made on
17 the record --

18 THE COURT: Certainly.

19 MS. ALVES: -- since none of those were.

20 Your Honor, my argument was that, and going with
21 the testimony of Dr. Schwartz-Watts, Dr. Schwartz-Watts
22 didn't just really mention cross-examination although that
23 was clearly discussed. She also talked about his ability
24 to process information during the trial and lean over and
25 discuss that with his attorney.

1 Her concern was, I mean, even though she asked
2 similar questions as Dr. Cornelius and that they said that
3 he would be able to tell his attorney if there was a
4 matter to be discussed or if there was a concern during
5 the trial, her concerns were that he wouldn't know what
6 was something that he needed to discuss. He might not
7 even be able to process that something was a matter that
8 needed to be brought to the attorney's attention during
9 the trial.

10 Your Honor, Dr. Schwartz-Watts' concerns were
11 that during the trial Mr. Salley would not be able to
12 think fast enough or to process information fast enough to
13 be able to rationally assist his attorney and to discuss
14 the information with his attorney.

15 There was a case that I talked to Your Honor
16 about briefly yesterday, Dusky versus US. I know that's
17 an old case but it seems to be the standard upon which a
18 lot of the South Carolina cases are based.

19 In that particular case it says that it is not
20 enough for the judge to find that he's oriented to time
21 and place, that -- or that the person has a recollection
22 of events but there must -- the Court must find whether or
23 not the Defendant has sufficient present ability to
24 consult with his attorney with a reasonable degree of
25 rational understanding and a rational and factual

1 understanding of the proceedings.

2 I think that with Dr. Schwartz-Watts' testimony,
3 Mr. Salley would have insufficient present ability to
4 consult with his attorney with a reasonable degree of
5 rational understanding during the trial, not just during
6 cross-examination which of course is an important part of
7 the trial, but he wouldn't be able to rationally process
8 information to let his attorney know if there was a
9 problem during the trial.

10 Possibly -- I mean, something might get past the
11 attorney. He would be the person with that information.
12 And I would have to rely on him to tell me. And without a
13 reasonable degree of rational understanding and ability to
14 process information during -- at the speed of which is
15 necessary during a trial, it would be, Mr. Salley would be
16 incapable of assisting in his own defense.

17 Also, Your Honor, in considering the 2004, 2007
18 or 2009 evaluations, Dr. Cornelius was unable to give any
19 explanation for the, for what had changed with
20 Mr. Salley. He relied on the same evaluations for the,
21 for his -- for his IQ. And, in fact, in the evaluations
22 in the sections marked behavioral observations and mental
23 status examination, those were almost word for word
24 identical in what Dr. Cornelius stated.

25 Also Dr. Cornelius could not explain anything

1 that Mr. Salley had done different except that in 2007 and
2 2009 Mr. Salley was able to repeat information. I believe
3 he said parrot information back. And as we know a parrot
4 can be taught to repeat word for word, but there's no
5 guarantee that the parrot understands exactly what he's
6 repeating. And that's the situation we have here with
7 Mr. Salley.

8 Dr. Schwartz-Watts did ask for -- she did say
9 that it was possible that additional neuropsychological
10 testing might help to get a full understanding of where
11 his brain function was. She did say that that would be
12 helpful to her. Of course Dr. Cornelius said it would not
13 be helpful to him and Your Honor declined to allow that
14 testing to be done to make that -- and make that a part of
15 the consideration of your -- consideration of this
16 hearing.

17 Your Honor, one other matter that I did bring up
18 in one other argument that I did make is about regarding
19 the burden of proof in this matter. Your Honor, I do
20 admit that the defense does have the burden to prove that
21 Mr. Salley is not competent by a preponderance of the
22 evidence. However, I think that in this situation the
23 State has the burden of proof of proving that Mr. Salley
24 is competent.

25 I did discuss my arguments with Your Honor, and

1 the arguments that I did make, I mean, are the same that
2 I, that we discussed previously. I think that in this
3 situation my -- the testimony of Dr. Schwartz-Watts does
4 satisfy my burden of by a preponderance of the evidence
5 that there is evidence that Mr. Salley is not competent.

6 I think that once I've met that burden the State
7 now has to find that Mr. Salley is not -- is competent.
8 And so I think that the burden has now shifted back to the
9 State, that they must now put up evidence that Mr. Salley
10 is competent because I think that Dr. Schwartz-Watts'
11 information was compelling that he is not competent, that
12 he does not have a -- that he is incapable of assisting in
13 his own defense during a trial.

14 Also the other argument that I made regarding the
15 State's burden is that based on the -- we're relying
16 heavily on the 2004 evaluation as well as the 2007
17 evaluation in this case. And taking all three of those
18 evaluations into consideration, Mr. Salley has been
19 previously found not competent by a court.

20 In fact, in 2004 he was in family court due to
21 his age and his charges and at that time he was found not
22 competent. That was a finding that was made by Judge
23 Sawyer in family court. And, in fact, he was later
24 judicially committed to DDSN as a result of that finding
25 and he was then placed in Wil-Lou Glenn School where he

1 was kept until he finished that program.

2 So in 2004 there was a finding by a court that he
3 was not competent to stand trial. He was judicially
4 committed to DDSN. And at this point I think that the
5 burden does shift to the State to prove that he is now
6 competent and is no longer a burden on the defense.

7 THE COURT: Okay. And I don't think that the
8 burden shifts. I think that all the case law that I have
9 reviewed, it is the defense burden to prove that he's in
10 fact not competent.

11 And the fact that in the 2004 evaluation
12 Dr. Cornelius found that he wasn't competent because he
13 didn't have any understanding of the court process at that
14 time or the roles of the parties and that he could not
15 answer the questions appropriately. But he also testified
16 in court that it was not that he could not learn, that he
17 was a slow learner.

18 In between 2004 and 2007 and 2009 he in fact had
19 learned a good bit about the court process. He understood
20 the role of the jury. He understood that the jury was the
21 one to find him guilty, the 12 folks.

22 He understood based on his finding the
23 prosecutor's role and the prosecutor was against him. He
24 should not talk to the prosecutor alone without notifying
25 his attorney. That he was able to identify witnesses on

1 the stand and knew if he felt they were lying to tell his
2 public defender.

3 And I think that this evaluation goes far more
4 than simply in the Duffy case that you talked about, that
5 the Court just simply finding someone was oriented to time
6 and place and knew the date and where they were.

7 This evaluation goes far beyond that. Certainly
8 somebody can understand time and place and where they were
9 and not necessarily understand the court proceedings
10 against him, the roles of the different parties, the roles
11 of the judge and jury.

12 And the fact that Dr. Cornelius found him
13 competent in 2007 when he didn't in 2004 strengthens that
14 evaluation in my opinion, because you don't have two
15 different doctors with two different opinions. And
16 clearly if Dr. Cornelius did not feel that he was
17 competent in 2007, he would have found so because he
18 didn't find him competent -- and based on, I understand
19 that you were saying it's many of the same questions and
20 criteria but he couldn't answer them in 2004 but he had
21 learned.

22 And the fact that he says that he could
23 understand when a witness was on the stand and if they
24 were lying to tell his attorney, that's more than just
25 simply repeating what you were told in a parrot-type

1 response, that he had ability to understand that and he
2 understood, and assist and rationally assist his attorney
3 in the defense of his case.

4 Okay. Now, what y'all want to do?

5 MS. BRISBIN: I don't believe we have anything
6 further on that case to take up today, Your Honor.

7 THE COURT: Okay.

8 MS. BRISBIN: Thank you.

9 END OF FEBRUARY 11, 2010 PROCEEDINGS AT 10:00 A.M.

10 * * *

11 ON FRIDAY, FEBRUARY 12, 2010 AT 10:53 A.M.:

12 MS. BRISBIN: Mike Salley.

13 (Defendant placed under oath.)

14 MS. ALVES: Judge, can we approach on this just
15 for one second?

16 (Off-the-record discussion.)

17 MS. BRISBIN: Your Honor, this is Mike Salley.

18 He's pleading guilty but mentally ill to assault with
19 intent to commit criminal sexual conduct with a minor in
20 the first degree for a negotiated sentence of 25 years.

21 THE COURT: Okay. Ms. Alves, have you explained
22 the nature of the charges against Mr. Salley as well as
23 his constitutional rights to him?

24 MS. ALVES: Yes, sir.

25 THE COURT: And the possible punishment he could

1 receive?

2 MS. ALVES: Yes, sir.

3 THE COURT: And do you think he understands
4 that?

5 MS. ALVES: Yes, sir.

6 THE COURT: Okay. Did he -- when you had these
7 conversations with him, did he respond at least
8 appropriately to your statements to him?

9 MS. ALVES: Yes, sir.

10 THE COURT: Okay. Mr. Salley, you want to plead
11 guilty?

12 THE DEFENDANT: (Nods head).

13 THE COURT: You got to answer. Okay?

14 THE DEFENDANT: (Nods head).

15 THE COURT: You got to speak because this lady's
16 got to take it down.

17 THE DEFENDANT: Yeah. I want to plead guilty,
18 yeah.

19 THE COURT: Huh?

20 THE DEFENDANT: Yeah.

21 THE COURT: Okay. You had enough time to talk to
22 your lawyer?

23 THE DEFENDANT: (Nods head).

24 THE COURT: You got to answer up for me.

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Okay. You got any complaints against
2 her?

3 THE DEFENDANT: (Shakes head). No.

4 THE COURT: Did anybody promise you anything?
5 Your lawyer and the State have entered into the
6 negotiations, but outside of that, has anybody promised
7 you anything or threatened you to get you to plead guilty?

8 THE DEFENDANT: No, sir.

9 THE COURT: So you're pleading guilty freely and
10 voluntarily?

11 THE DEFENDANT: (Nods head).

12 THE COURT: Answer up for me.

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You're under the influence of any
15 drugs today?

16 THE DEFENDANT: Huh-uh.

17 THE COURT: And I've been in the hearings so I
18 understand your mental condition. And the doctors have
19 testified here Monday and I understand -- I've looked at
20 all your reports and I understand those.

21 Now, pleading guilty, you're giving up your right
22 to remain silent because you're telling me you're guilty.
23 Do you understand that?

24 THE DEFENDANT: Yeah.

25 THE COURT: Do you understand that?

1 THE DEFENDANT: (Nods head).

2 THE COURT: Okay. You're also giving up your
3 right to a trial on this case. You have a right to a jury
4 trial. Do you understand that? You got to answer for
5 me.

6 THE DEFENDANT: Yes.

7 THE COURT: And during that trial you would sit
8 at that table with your lawyer and you could confront the
9 witnesses that would testify from this witness stand,
10 right here. You could watch them while they testify, and
11 your lawyer could cross-examine those witnesses. She
12 could subpoena witnesses to testify in your behalf. She
13 could put up any defenses you may have. But when you
14 plead guilty you're going to give up that right to a jury
15 trial. Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. You also -- any appeals that
18 would come out of that jury trial you're giving that up,
19 too. Do you understand?

20 THE DEFENDANT: Yeah. Yes.

21 THE COURT: Okay. Now, if you want to appeal
22 this guilty plea today you got to file that appeal, you or
23 your lawyer, with the clerk's office within 10 days. Do
24 you understand?

25 THE DEFENDANT: (Nods head). Yeah.

1 THE COURT: Okay. The solicitor's going to talk
2 to me about the facts in this case as well as the
3 negotiations. And we're going to come back and talk to
4 you about them. Okay?

5 MS. BRISBIN: Thank you, Your Honor.

6 In August of 2008, the Wagener Police Department
7 received a report from the victim's great aunt, Eartha
8 Davenport. Excuse me. Eartha -- they received a report
9 from Eartha Davenport but the child is with Eartha Oliver,
10 so it's a little confusing, but that the victim who was 10
11 years old had disclosed that she had been sexually
12 assaulted by Mike Salley who was a family friend.

13 The victim had a forensic interview done at the
14 Child Advocacy Center in Columbia, the ARC, and disclosed
15 that Mr. Salley had tried to penetrate her anally with his
16 penis and that it hurt. She stated that it happened at
17 her home and he was a family friend of her mother and
18 stepfather, or mother's boyfriend that lived in the home
19 with her in Wagener. And that he had molested her at
20 least five times starting around July 10th of 2008 and
21 continuing up until that date which was August 27th of
22 2008.

23 Mr. Salley was interviewed by the Wagener Police
24 Department and initially denied doing this, but eventually
25 came back with his mother present and confessed to this

1 incident as well as another, later, with a different
2 child. But he is pleading only on this particular
3 charge.

4 And, Your Honor, as you know, he was -- you did
5 find him competent this week. And during that process
6 Dr. Schwartz-Watts testified that he was moderately
7 mentally retarded and that his only known mental illness
8 was pedophilia.

9 And because of that we have agreed that he plead
10 for the 25-year incarceration sentence under the guilty
11 but mentally ill statute so that he would get treatment as
12 a sex offender while he's in prison.

13 And his prior convictions are disorderly conduct
14 and entering premises after warning in 2008. And this
15 plea does, will resolve all of the charges that are
16 pending as well as other charges that we are aware of
17 involving other victims for which he's not been charged as
18 yet.

19 The victim's great aunt -- and I think the
20 confusion over the name, her name is Eartha Oliver. I
21 think the report says Eartha Davenport. And she's the one
22 that the child disclosed to initially. She is present. I
23 don't believe she wishes to address the Court, Your Honor.

24 THE COURT: Okay. Thank you.

25 Mr. Salley, you heard what the solicitor told

1 me?

2 THE DEFENDANT: (Nods head).

3 THE COURT: Are those facts correct?

4 THE DEFENDANT: (Nods head).

5 THE COURT: You got to answer loud for me.

6 THE DEFENDANT: (Nods head).

7 THE COURT: You got to say yes or no.

8 THE DEFENDANT: Yeah.

9 THE COURT: Okay. You got any questions you want
10 to ask me concerning your rights?

11 THE DEFENDANT: No.

12 THE COURT: You got any questions you want to ask
13 your lawyer?

14 THE DEFENDANT: Huh-uh.

15 THE COURT: You want me to accept this plea?

16 THE DEFENDANT: Yeah.

17 THE COURT: Do you understand if I accept this
18 plea, I'm going to sentence you to 25 years in prison?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. I find that there's a
21 substantial factual basis for your plea, it's freely and
22 voluntarily entered into, that you've had the advice of
23 competent counsel with whom you tell me you're satisfied
24 with and I'll accept the plea. Yes, ma'am?

25 MS. ALVES: Your Honor, may it please the Court.

1 Mr. Salley is 19 years old. He has resided his
2 entire life in Wagener, South Carolina with his mother
3 who's present in the courtroom today. Also in the home
4 were his brothers and sisters.

5 Your Honor, Mr. Salley has been a victim himself
6 of crimes of this nature. The earliest date that the
7 mother can place is the age of 12 when -- he never told
8 her that he was being molested. He never said anything
9 about it, but there was man in the neighborhood who would
10 frequently house -- who would frequently have all the
11 children in the neighborhood over to his home who was
12 doing acts to Mike.

13 And it was only discovered after another child
14 caught this man molesting Mike and told the mother what
15 happened. Mike never said anything. He was -- he would
16 never be able to express himself due to his disability,
17 his mental disability as well as his speech impediment.

18 He -- at that time the police did a brief
19 investigation. My understanding from talking to his
20 mother that that man passed a polygraph and that was the
21 end of that investigation.

22 A few years later, Mrs. Salley received a call
23 from one of Mike's friends who was upset saying that
24 Ms. Salley needed to come quickly, that Mike was over at
25 this man's house and that would have been at age 16. And

1 that they had caught the man doing something to Mike.

2 She came over to the house. She found herself
3 very upset and she found a scene that was very
4 suspicious. They contacted the police. This time they
5 had the other witnesses who were older than young children
6 and they were all older teenagers and they were able to
7 give statements to the police.

8 And the police did -- they have a warrant pending
9 against this person. He's currently on the run but there
10 is a warrant outstanding for the same man who had been
11 molesting Mike since he was age 12.

12 Your Honor, I tell you all of that to tell you
13 Mike's background. You heard a lot about his history
14 during the hearings. There's not much for me to go into
15 that.

16 He had education that was afforded to him as a
17 mentally-retarded child in the school system. At age 14
18 when he was found not competent he was judicially
19 committed to Wil-Lou Glenn where he continued his
20 education there in that structured setting.

21 And, Your Honor, you've heard numerous
22 discussions from both me and the solicitor about the
23 allegations he's had since then.

24 Your Honor, the only thing I can say is that due
25 to his mental disability and the behavior that was

1 inflicted on him that he -- that is the only excuse I can
2 give for why he has, why he has continued on this behavior
3 toward other children. His -- there's really not much I
4 can say for this.

5 He's going to be doing 25 years if you accept
6 this negotiation. He's been in jail. He's been in jail
7 since the time of his arrest. That doesn't afford him
8 very much time. He's been in jail for a total of 534 --
9 excuse me, 533 days as of today. That doesn't afford him
10 very much time, Your Honor, toward that 25-year sentence.
11 And he knows that he's going to have to do at least 20
12 years more. And whether he really understands how much 20
13 years really is, I don't think so, but, I mean, there is
14 that.

15 I have had the support of his family in doing
16 this plea. And -- his mother has been 100 percent
17 supportive. Every time I've asked her to come to my
18 office to help her understand what was going on with Mike,
19 she has. She's been supportive 100 percent of the time
20 throughout his childhood.

21 In fact, she was taking him and helping him to
22 receive services through Disabilities and Special Needs
23 where they would try to give him independent life skills
24 so that one day he would be able to live on his own prior
25 to being arrested. So I have had the support of his

1 family and in being able to take this plea for Mr. Salley
2 today.

3 And I would just ask you to accept the
4 negotiations.

5 THE COURT: Thank you, ma'am.

6 SENTENCE OF THE COURT IS YOU'RE COMMITTED TO THE
7 STATE DEPARTMENT OF CORRECTIONS FOR A TERM OF 25 YEARS.
8 I'M GIVING YOU CREDIT FOR 533 DAYS. I'M RECOMMENDING SEX
9 OFFENDER TREATMENT.

10 Good luck to you, Mr. Salley. I hope they can
11 help you.

12 MS. ALVES: Your Honor, I would just ask, we had
13 this problem with another GBMI plea, I would just ask that
14 you note on the sentence sheet that he be considered as
15 guilty but mentally ill plea. I know I wrote it on the
16 top.

17 THE COURT: I'll put that on the record. I have
18 taken it as guilty but mentally ill, and I will write it
19 on the sheet as well.

20 MS. ALVES: Yes, sir. And I'd also ask that you
21 note on the sentence sheet that he be required to attend
22 sex abuse -- excuse me, sex offender treatment while
23 incarcerated as well as, and continue with sex offender
24 treatment while he's on community supervision because I
25 suspect that may be the only way that the department would

1 actually try to give him some treatment before the time of
2 his release.

3 THE COURT: All right. I got sex offender
4 treatment on here. You need me to write --

5 MS. ALVES: While incarceration -- excuse me.
6 While incarcerated and during his community supervision.

7 MS. BRISBIN: And, Your Honor, GPS monitoring
8 is --

9 THE COURT: It's checked.

10 MS. ALVES: It's mandatory.

11 END OF PROCEEDINGS: 11:09 A.M.

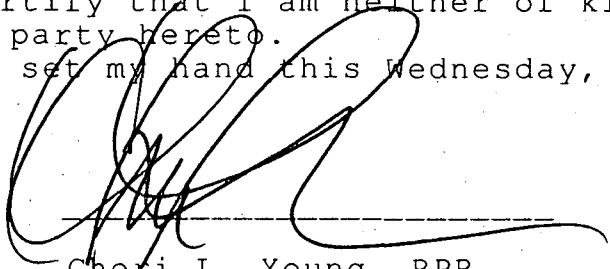
12 * * *

13 CERTIFICATE OF REPORTER

14
15 I, Cheri L. Young, Registered Professional Reporter,
16 and Official Court Reporter for the State of South
17 Carolina, hereby certify that the foregoing transcript
18 of proceedings heard on Monday, February 8, 2010,
19 Thursday, February 11, 2010, and Friday, February 12,
20 2010, in Aiken, South Carolina, was reported by me using
21 machine shorthand and realtime computer-aided translation
22 and is a true, accurate and complete transcript of the
23 proceedings had and evidence introduced in the hearing of
24 the matter.

25 I do further certify that I am neither of kin, counsel
nor interest to any party hereto.

I have hereunto set my hand this Wednesday, the 17th
day of March, 2010.


Cheri L. Young, RPR
Official Court Reporter



Stanley J. Butkus, Ph.D.
State Director
 Robert W. Barfield
Deputy State Director
Administration
 David A. Goodell
Associate State Director
Operations
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 John Powell
 Kelly Hanson Floyd

January 26, 2009

Ms. Liz Godard
 Aiken County Clerk of Court
 P. O. Box 583
 Aiken, SC 29802

RE: Mike Salley

Dear Ms. Godard:

In accordance with the Court Order issued by the Honorable Doyt A. Early, III, Judge of the Second Judicial Circuit, General Sessions Court, an evaluation on the above named individual was conducted by the Department of Disabilities and Special Needs.

Please find the enclosed evaluation for the Court.

Please contact me at (803) 898-9694 should you have any questions or need additional information.

This four (4) page document is hereby certified to be the original court-ordered evaluation report issued pursuant to S.C. Code Ann. §44-23-410 or 17-24-10 (1976) et. seq.

Sincerely,

Donna Culley, Ph.D.
 Office of Clinical Services
 Division of Operations

**STATE'S
 EXHIBIT**

Enclosure

cc: Brenda Brisbin, 2nd Circuit Solicitor's Office
 Wallis Alves, Esq., Defense Counsel
 Tana Vanderbilt, Esq., General Counsel, DDSN
 File

DISTRICT I

P.O. Box 239
 Clinton, SC 29325-5328
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 Whitten Center - Phone: 864/833-2733

9995 Miles Jamison Road
 Summerville, SC 29485
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DISTRICT II

Coastal Center - Phone: 843/873-5750
 Pee Dee Center - Phone: 843/664-2600
 Saleeby Center - Phone: 843/332-4104

~~803/898-9600~~
 803/898-9600



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Mary Katherine Bagnal, MSW, CMC
John Powell
Kelly Hanson Floyd

FORENSIC EVALUATION

Name: Mike Tyrell Salley
Date of Birth: 2-20-90
Date of Evaluation: 1-15-09
Place of Evaluation: Midlands Regional Center
Columbia, SC

Gender: Male
Race: African American
Age: 18 years 11 months

Examiners: Phillip T. Cornelius, Ph.D.-Lead Examiner
Brianna M. Smith, M.A.-Secondary Examiner

Criminal Act with a Child Under Sixteen - Assault with Intent to Commit Sexual
Conduct 1st, Degree on a M

Purpose of Evaluation:

This evaluation was conducted pursuant to an order of the court (Case No. 19-08) by the Honorable Judge in the General Session of the Court of General Sessions. The order stated that Mr. Salley be evaluated regarding his capacity to stand trial.

Limits of Confidentiality:

Mr. Salley was advised of the purpose of the evaluation, and that the results and content of the evaluation would be communicated to his defense counsel, the prosecution, and the court. In addition, he was informed of the possibility that the examiner(s) might be called to testify regarding the content and results of the evaluation.

Summary of Evaluation Results:

Presence of mental retardation:	Yes
Competency to Stand Trial:	Yes

DISTRICT I

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Phone: (864) 938-3497

Midlands Center - Phone: 803/935-7500
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Mike Tyrell Salley
Forensic Evaluation
Page 2

Evaluation Procedures:

Mr. Salley was interviewed for approximately 1 hour on 1-15-09 by the undersigned. Mr. Hawkins, secondary examiner, was also present.

In addition the following records were reviewed:

Court Order dated 12-04-08

Arrest warrants K-205335, K-205336, K-205344

Wagner Police Department General Sessions Packet case 08-044748

Aiken County School District educational and psychological evaluation report 12-16-03

Department of Juvenile Justice Child Assessment and Evaluation packet 2-10-04

Aiken County School District Individualized Education Program 2003-2004, Mike Salley

Aiken County School District psychoeducational evaluation report 3-14-96

Aiken County School District educational and psychological evaluation report 4-02-02

Aiken County Board of Disabilities records 2-12-04

SCDDSN Diagnostic Report 6-14-04

SCDJJ Psychosexual Consultation report 6-14-04

SCDDSN Forensic Evaluation report 5-19-04

SCDDSN Forensic Evaluation report 10-2-07

Relevant History:

Mr. Salley reported for the evaluation transported by detention center staff. Mr. Salley reported that he still lived in Wagner, SC on Center Street. Mr. Salley was unable to provide a phone number. Mr. Salley was able to tell his age and correct birth date. Mr. Salley said that he lived with his mom, step dad, an older sister, two brothers, and a nephew. Mr. Salley related that he had last attended Wagner High School in the 12th grade graduating with a certificate last October. Mr. Salley said he had had no jobs but occasionally earned money cutting grass and raking leaves for people. Mr. Salley said he gets a disability check of \$400. Available records indicate that Mr. Salley is an 18-year-old male who was in self-contained classes for students with mild mental disabilities. Mr. Salley has had learning and behavioral problems since entering school but was not formally diagnosed with a mental disability until 1996. Mr. Salley's mother noted on a health and developmental history form for the school that her pregnancy with Mr. Salley was uneventful, as was his birth. Mrs. Salley also noted that his developmental milestones were normal except for language development. Records indicate that Mr. Salley's adaptive behavior skills are higher than he sometimes practices. It is noted in the record that he can find his way around town, to school and back, and to other towns on his bicycle without difficulty. School personnel have reported that Mr. Salley's performance on educational tasks would be better if he attended school more frequently. Records indicate that he has exhibited a number of behavior problems in school resulting in various suspensions and development of a behavior intervention plan. In an intake form for the Aiken Board of Disabilities Mrs. Salley notes that Mr. Salley is fairly independent in his activities of daily living but does need occasional reminders. Mr. Salley was evaluated 5-19-04 for competency to stand trial on charges including criminal sexual conduct 1st. He was found incompetent, adjudicated incompetent, and judicially committed to SCDDSN. Mr. Salley spent some time subsequently at Willowglen prior to returning home. On September 26, 2007 Mr. Salley was again evaluated for competency to stand trial on charges of Criminal Sexual Conduct with a Minor, and Lewd Act with a Child Under Sixteen. Mr. Salley was found to be competent to stand trial during that evaluation.

Behavioral Observations/Mental Status Examination:

Mr. Salley arrived for the interview dressed casually but neatly. Mr. Salley's hygiene and grooming were adequate. Upon introduction to the examiners he was polite and sat attentively at the table. Eye contact was good, and facial expressions were animated and appropriate. Sensory systems appeared intact and no unusual mannerisms or agitation were noted. His speech was difficult to understand due to a speech impediment. Mr. Salley's thought processes appeared coherent and logical. Mr. Salley's sensory processes appeared intact. Mr. Salley denied any attempts at self-injury, head injuries, or loss of consciousness. He denied suicidal or homicidal ideation. Mr. Salley denied any visual or auditory hallucinations or delusions.

Mike Tyrell Salley Forensic Evaluation

Page 3

Mr. Salley described his current mood as "good" and his usual mood as "good". Mr. Salley denied any fire setting, or animal cruelty. Mr. Salley denied any drug use except for cigarettes and denied alcohol use. Mr. Salley was oriented to time and place. Mr. Salley was able to report that there are 12 months in the year but could not say them. Mr. Salley knew he was in Columbia, South Carolina but could not name any other states. Mr. Salley was able to repeat and recall three objects after an intervening task. Mr. Salley was able to read time on an analog clock. Mr. Salley was unable to read a simple three-word phrase. Mr. Salley could not copy a geometric design. Mr. Salley was able to identify some concrete similarities and interpret a proverb. Mr. Salley knew the colors in the American flag, the shape of a ball, and the function of a thermometer. Mr. Salley knew the name of the current President, but not the first or the President elect. Mr. Salley was able to perform a simple addition problem but not a couple of simple subtraction problems.

Prior Test Results:

3-14-96 Stanford Binet Intelligence Scale	Full scale IQ 59
3-14-96 Vineland Adaptive Behavior Scale	Composite score 64
4-02-02 Wechsler Intelligence Scale for Children -III	Full Scale score 42
4-02-02 Vineland Adaptive Behavior Scale	Composite score 51
12-16-03 Wechsler Intelligence Scale for Children-III	Full Scale score 48
12-16-03 Universal Non-Verbal Intelligence Scale	Full Scale score 54
12-16-03 Adaptive Behavior Inventory	Composite quotient 67

Competency to Proceed

After the confidentiality advisement, Mr. Salley was able to say that we were going to talk about "court" and his lawyer, that there were no secrets, and that the report would go to the judge, solicitor, and his attorney. Mr. Salley stated his current charges as "a 10 year old and 4 year old, did it". Mr. Salley finally acknowledged that they were saying he had sex with them. He acknowledged that he was in trouble and that the charges are serious indicating that they could "give you life, charge carries that". Mr. Salley indicated that he had received this information from his attorney. He verbalized the role of his attorney as "work on my case, when you go to court". Mr. Salley was able to indicate that his attorney is "for me", and wanted the outcome of "go home" and wanted him found "not guilty". Mr. Salley said that the solicitor's job was to "give you time or let you go home", Mr. Salley was able to say that he is "against me", wanted him found "guilty", and for him to "go to jail". When asked who was in court to prove you guilty he said "the judge". When shown a drawing of a courtroom Mr. Salley identified the jury as the "jury". He said they "see what you did, decide if you go home or go to jail". When asked what they decided if they said you could go home, he said "not guilty". When asked what they decided if they said you went to jail, he said "guilty". Mr. Salley knew that all twelve had to decide on a verdict. When asked later if guilty meant you did it or didn't do it, he replied, "had sex". When asked if not guilty meant you did it or didn't do it, he replied, "didn't do it". When Mr. Salley was asked if he should talk to the solicitor if he approached him while alone, he said "no, she's against me". Mr. Salley was also able to say that he should tell his lawyer if that happened. Mr. Salley was again able on the drawing to indicate that the solicitor was "against", wanted him found "guilty", and for him to go to "jail" after his trial. He said the role of the judge was "to give time or let go home" and that "the jury tells him which". Mr. Salley was able to identify a witness on the stand and knew that he should tell his "public defender" if they were lying. When asked if there was evidence in his case, he said he did not know but was able to say that he could ask his lawyer. When asked if there were witnesses in his case he "they can't find them" but again was able to say that he could ask his lawyer. Mr. Salley was able to relate some of the events surrounding his arrest indicating that he could provide information to his lawyer. Mr. Salley was able to indicate a few of the rules of probation and house arrest but did not know about plea bargains. Mr. Salley appeared to benefit minimally from education on plea bargains but did know to consult his attorney if it came up. It appears that Mr. Salley has a factual and rational understanding of the adversarial nature of the court process.

Conclusion:

Mr. Salley has intellectual and adaptive scores that fall within the range of mental retardation. Mr. Salley has been determined to be eligible for the services of SCDDSN as mentally retarded. Additionally it is the

Mike Tyrell Salley
Forensic Evaluation
Page 4

examiner's clinical impression that Mr. Salley is functioning in the mentally retarded range at the present time. It appears that Mr. Salley does have the cognitive skills to understand the nature of the court process and does understand the court process. The opinion is offered that Mr. Salley is competent to proceed to trial at this time.



Philip T. Cornelius, Ph.D.
Forensic Examiner
SCDDSN

Date signed: 1/23/09



UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF MEDICINE

UNIVERSITY SPECIALTY CLINICS[®]

October 27, 2009

Wallace Alves
Defender Corporation of Aiken
410 Barnwell Avenue, NW
P. O. Box 2247
Aiken, SC 29802

Dear Ms. Alves:

Thank you for referring Mike Salley for psychiatric evaluation. As you know, he has a long documented history of mental retardation and was previously opined to be Not Competent when evaluated by DDSN in 2004 when he had similar charges. He has been diagnosed with moderate mental retardation and has had IQs ranging from 42-59 with impaired adaptive functioning as well. He receives services from DDSN and receives a disability check.

He is 19 years old and reports he was living with his mother and her husband before his charges. He recognizes that he has two charges against a ten year old and four year old. He recognizes you by face and your role. He does not say your name correctly, and even after taught your name, he perseverated and called you Wally S. Bed. He understands there is a prosecutor. He reports the judge is against him. He recognizes the pleas available to him as guilty and not guilty. He does not understand concepts such as cross examination. When asked whether he would choose a sentence of 24 months or 3 years, he replied three years because it was smaller. He cannot perform mathematical calculations although he gives a good effort. He was alert and oriented. His fund of knowledge is poor. He is not able to abstract similarities between objects. He has difficulty learning new information and perseverates during those times. He has a very poor self esteem and no plans for the future. He was not able to come up with three wishes. He did not have a favorite television show or music group. He spends his day doing pushups and curling the bed with his roommate.

He reports his mother used to hit him with switches for being bad. He states his grandmother hit him with a baseball bat but it didn't hurt. He reports he was sexually molested by an uncle, Kirk LNU when he was 16 years old, which was around the period of time of the onset of his offending behavior. He states he told his mother, but doesn't know the outcome. He says it happened eight times. He reports three consensual relationships and has had a relationship with Santana, his baby's mother. He states they broke up because Santana told him "she was a dike." He denies offending against his present victims. He denies drug or alcohol use but admits to smoking cigarettes.

Regarding his past legal history, Mr. Salley believes he was sentenced to two years in jail and then Willow Glen.

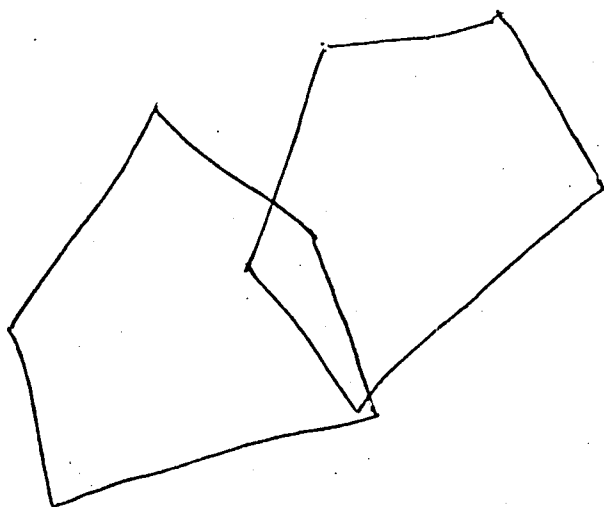
NEUROPSYCHIATRY
AND BEHAVIORAL SCIENCE
16 Medical Park, Suite 141, Columbia, SC 29203
803-434-4300, FAX 803-434-4351

STATE'S
EXHIBIT

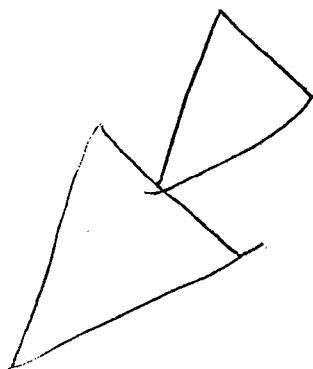
2

It is my opinion to a reasonable degree of medical certainty that Mr. Salley does not have a factual or rational understanding of the proceedings nor the capacity to assist you in his defense due to his mental retardation. He is not likely to become competent in the foreseeable future. He needs sex offender treatment and pharmacological management of his sex drive. He should not be around any children unsupervised.

Donna Schwartz-Watts, M.D.



DEFENDANT'S
EXHIBIT



80' dia.

help -

Cities in SC

Waggoner

Antien

Batesburg

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State Director
Robert W. Barfield
Deputy State Director
Administration
Ronald G. Dozier
Associate State Director
Operations
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Associate State Director
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AIKEN COUNTY
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DEFENDANT'S
EXHIBIT

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VTTY: 803/898-9600, FAX: 803/898-9653
Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

FORENSIC EVALUATION

Name: Mike Tyrell Salley
Date of Birth: 2-20-90
Date of Evaluation: 5-19-04
Place of Evaluation: DJJ Detention Center
Columbia, SC

Gender: Male
Race: African American
Age: 14 years 2 months



Examiners: Phillip T. Cornelius, Ph.D.-Lead Examiner
Steve Von Hollen, M.S. -Secondary Examiner

Charge(s): Disorderly Conduct, Assault and Battery, Trespassing After Notice, Criminal Sexual Conduct with a Minor-First Degree

Purpose of Evaluation:

This evaluation was conducted pursuant to an order dated February 17, 2004 (received 2-24-04) by the Honorable Peter Nuessle, Presiding Judge in the Aiken County Court of Family Court Second Judicial Circuit. The order stated that Mr. Salley be evaluated regarding his capacity to stand trial, whether he is criminally responsible pursuant to the McNaughton test for his actions on or about September 12, 2003, November 7, 2003, and December 25, 2003, and if found criminally responsible, his capacity to conform his actions to the requirements of the law.

Limits of Confidentiality:

Mr. Salley was advised of the purpose of the evaluation, and that the results and content of the evaluation would be communicated to his defense counsel, the prosecution, and the court. In addition, he was informed of the possibility that the examiner(s) might be called to testify regarding the content and results of the evaluation.

Summary of Evaluation Results:

Presence of mental retardation:	Yes
Competency to Stand Trial:	No
Criminal Responsibility:	NA
Capacity to Conform:	NA

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

MAY 28 2004

COASTAL REGION
Field Office - Phone: 843/332-3362
9995 Jamison Rd., Summerville, SC 29485
Coastal Center - Phone: 843/873-5750

MIDLANDS REGION
Field Office - Phone: 803/935-7412
8301 Farrow Road, Columbia, SC 29203
Midlands Center - Phone: 803/935-7500

PEE DEE REGION
Field Office - Phone: 843/664-2655
PO Box 3209, Florence, SC 29502
Pee Dee Center - Phone: 843/664-2600
Saleeby Center - Phone: 843/722-4104

PIEDMONT REGION
Field Office - Phone: 864/938-3101
PO Box 2277 & G.S., Aiken, SC 29801
Piedmont Center - Phone: 864/933-2733
Deputy Clerk

Mike Tyrell Salley Forensic Evaluation

Page 2

Evaluation Procedures:

Mr. Salley was interviewed for approximately 1 1/2 hours on 5-19-04 by the undersigned. Mr. Von Hollen, secondary examiner, was also present.

In addition the following records were reviewed:

Court Order dated 2-17-04

Incident reports case number 2003-454

Supplemental incident report case number 03-039260 and attached statements

Department of Juvenile Justice complaint form 11-14-03

Juvenile report 11-14-03, case number 03-048053

Aiken County Incident Report case number 03-048053

Juvenile report 9-19-03, case number 03-039260

Department of Juvenile Justice Child Assessment and Evaluation packet 2-10-04

Aiken County School District Individualized Education Program 2003-2004, Mike Salley

Aiken County School District psychoeducational evaluation report 3-14-96

Aiken County School District educational and psychological evaluation report 4-02-02

Aiken County School District educational and psychological evaluation report 12-16-03

Aiken County Board of Disabilities records 2-12-04

ARC Forensic Mental Health Evaluation, Traquan Salley, 1-13-04

Interview Gerda Willmet, teacher, DJJ

Relevant History:

Mr. Salley was seen in the detention center conference room at DJJ. Mr. Salley said that he had lived in Aiken on Center Street prior to being incarcerated at DJJ. Mr. Salley could not relate the street number or his zip code. Mr. Salley was able to provide his phone number and the phone number of his grandmother with an apparent number reversal. Mr. Salley said that he lived in a trailer with his mom, step daddy, and two brothers. Mr. Salley said that his 15-year-old older brother was currently in jail. Mr. Salley said that his other brother was 13, and when asked if this brother was older or younger, he replied "older" consistently despite several hints otherwise. Mr. Salley related that he is in the 7th grade at A.L. Corbett School and was going on to the 8th grade next year. Mr. Salley admitted to a number of suspensions and absences from school. Mr. Salley said he had had no jobs but did occasionally rake leaves for people for \$5 a yard. Mr. Salley said that he used his money on his go-cart. Available records indicate that Mr. Salley is a 14-year-old male who is in self contained classes for students with mild mental disabilities. Mr. Salley has had learning and behavioral problems since entering school but was not formally diagnosed with a mental disability until 1996. Mr. Salley's mother noted on a health and developmental history form for the school that her pregnancy with Mr. Salley was uneventful, as was his birth. Ms. Salley also noted that his developmental milestones were normal except for language development. Records indicate that Mr. Salley's adaptive behavior skills are higher than he sometimes practices. It is noted in the record that he can find his way around town, to school and back, and to other towns on his bicycle without difficulty. School personnel have reported that Mr. Salley's performance on educational tasks would be better if he attended school more frequently. Records indicate that he has exhibited a number of behavior problems in school resulting in various suspensions and development of a behavior intervention plan. In an intake form for the Aiken Board of Disabilities Ms. Salley notes that Mr. Salley is fairly independent in his activities of daily living but does need occasional reminders. Mr. Salley was recently referred and determined eligible for DDSN services on 4/6/04.

Behavioral Observations/Mental Status Examination:

Mr. Salley arrived for the interview dressed in a DJJ jump suit. Mr. Salley's hygiene and grooming were adequate. Upon introduction to the examiners he was polite and sat attentively at the table. Eye contact was good, and facial expressions were animated and appropriate. Sensory systems appeared intact and no unusual mannerisms or agitation were noted. His speech was difficult to understand due to a speech impediment. Mr. Salley's thought processes appeared coherent and logical. Mr. Salley's sensory processes appeared intact. Mr. Salley denied any attempts at self injury, head injuries, or loss of consciousness. He denied suicidal or homicidal ideation. Mr. Salley denied any visual or auditory hallucinations or delusions. Mr. Salley was oriented to time and place although he did not know the date and needed prompting to get the month correct. Mr. Salley was unable to say the months of the year. Mr. Salley knew he was in Columbia but could not identify the state, nor could he name any other states. Mr. Salley was able to repeat and recall

Mike Tyrell Salley
Forensic Evaluation
Page 3

three objects after an intervening task. Mr. Salley was unable to read time on an analog or digital clock. Mr. Salley was unable to read a simple three-word phrase. Mr. Salley was unable to write anything other than his name, and could not copy a geometric design. Mr. Salley was able to identify some concrete similarities after considerable prompting on the first two. He was able to correctly answer some simple information questions and a couple of comprehension questions. Mr. Salley was not able to interpret two proverbs. Mr. Salley was able to identify several coins. However, he could not routinely do simple addition of coins correctly, frequently coming up with only close approximations. Mr. Salley could not make correct change in transactions such as spending \$6 for an item and identifying the change from a \$10 bill. His DJJ teacher confirmed this difficulty.

Prior Test Results:

3-14-96 Stanford Binet Intelligence Scale Full scale IQ 59
 3-14-96 Vineland Adaptive Behavior Scale Composite score 64
 4-02-02 Wechsler Intelligence Scale for Children -III Full Scale score 42
 4-02-02 Vineland Adaptive Behavior Scale Composite score 51
 12-16-03 Wechsler Intelligence Scale for Children-III Full Scale score 48
 12-16-03 Universal Non-Verbal Intelligence Scale Full Scale score 54
 12-16-03 Adaptive Behavior Inventory composite quotient 67

Competency to Proceed/Criminal Responsibility/Capacity to Conform Procedure:

During the confidentiality advisement, it took a number of attempts to get Mr. Salley to report that the outcome of the evaluator's report would go to the judge, solicitor, and his attorney. It appeared that he had difficulty initially distinguishing between the solicitor and his attorney. Mr. Salley stated his current charges as "Assault and battery, child molesting, threatening a teacher and trespassing". Mr. Salley did not mention the disorderly conduct, and did not appear to comprehend that "threatening a teacher" is not one of the charges. Likewise, he was unable or unwilling to give any details about the "child molesting" charge. He did not appear to associate the disorderly conduct charge with the instance where he "mooned" the teacher. Mr. Salley did persevere on the threatening a teacher item. He acknowledged that he was in trouble but did not acknowledge the charges as serious until after it was pointed out that they had resulted in him being placed in DJJ. He verbalized the role of his attorney as "see me when I go to court". After some education Mr. Salley was able to identify that his attorney is "for" him, and wanted the outcome of "go home". After education Mr. Salley was able to say that the prosecutor was "against" and wanted the outcome of "go to jail". Mr. Salley was able to indicate that he should not talk to the solicitor without his attorney and that the solicitor was against him. He said the role of the judge was "let go home or go back to jail". When asked if the judge was for him, against him, or neither, he said "neither". He identified guilty as "did it" and "go to jail". Mr. Salley defined not guilty as "didn't do it" and "go home". Mr. Salley did not appear to know about witnesses despite several prompts about who may or may not be witnesses in his charges. Mr. Salley was unable or unwilling to talk about any of the details of the criminal sexual conduct charge. It does not appear that he is aware of this activity being related to a charge or what it is they are saying he did in respect to the criminal sexual conduct charge. Mr. Salley initially said that if someone told a lie on the stand that he would do nothing but after several prompts he was able to say "ask my lawyer". It took numerous education attempts during the evaluation to get Mr. Salley to consistently say "for" and "against" in respect to his lawyer and the solicitor. The evaluator has no confidence this is retained as despite numerous rehearsals during the evaluation he could not repeat the name of his attorney. He does not appear to understand the adversarial nature of the legal process, have the ability to relate details of his charges to his attorney, or display self protective actions. Mr. Salley did not demonstrate either a factual or rational understanding of the legal process.

Conclusion:

Mr. Salley has intellectual and adaptive scores that fall within the range of mental retardation. Additionally it is the examiner's clinical impression that Mr. Salley meets the criteria for a diagnosis of mental retardation. It appears that Mr. Salley does not have the cognitive skills to be competent to proceed to trial at the present time.



Philip T. Cornelius, Ph.D.
 Chief Psychologist
 SCDDSN Midlands Center

Date signed: _____

5/20/04

Stanley J. Butkus, Ph.D.
State Director
 Robert W. Barfield
Deputy State Director
Administration
 David A. Goodell
Associate State Director
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 Kathi K. Lacy, Ph.D.
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Vice Chairman
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Secretary
 Ronald Forrest
 Edythe C. Dove
 Audrey Ingle Horne
 Otis D. Speight, MD, MBA, CPE

October 3, 2007

Ms. Liz Godard
 Aiken County Clerk of Court
 P. O. Box 583
 Aiken, SC 29802

**DEFENDANT'S
 EXHIBIT**

3

RE: Mike Salley

Dear Ms. Godard:

In accordance with the Court Order issued by the Honorable Thomas Cooper Judge of the Second Judicial Circuit, General Sessions Court, an evaluation on the above named individual was conducted by the Department of Disabilities and Special Needs.

Please find the enclosed evaluation for the Court.

Please contact me at (803) 898-9694 should you have any questions or need additional information.

This three (3) page document is hereby certified to be the original court-ordered evaluation report issued pursuant to S.C. Code Ann. §44-23-410 or 17-24-10 (1976) et. seq.

Sincerely,

Donna Culley, Ph.D.
 Office of Clinical Services
 Division of Operations

Enclosure

cc: Brenda Brisbin, Solicitor, 2nd Circuit Solicitor's Office
 Wallis Alves, Esq., Defense Counsel
 Tana Vanderbilt, Esq., General Counsel, DDSN
 File

DISTRICT I

P.O. Box 239
 Clinton, SC 29325-5328
 Phone: (864) 938-3497

Midlands Center - Phone: 803/935-7500
 Whitten Center - Phone: 864/833-2733

9995 Miles Jamison Road
 Summerville, SC 29485
 Phone: 843/832-5576

DISTRICT II

Coastal Center - Phone: 843/873-5750
 Pee Dee Center - Phone: 843/664-2600
 Saleeby Center - Phone: 843/332-4104



Stanley J. Butkus, Ph.D.
State Director
 Robert W. Barfield
Deputy State Director
Administration
 David A. Goodell
Associate State Director
Operations
 Kathi K. Lacy, Ph.D.
Associate State Director
Policy

3440 Harden Street Ext (29203)
 PO Box 4706, Columbia, South Carolina 29240
 V/TTY: 803/898-9600
 Toll Free: 888/DSN-INFO
 Home Page: www.state.sc.us/ddsn/

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 Otis D. Speight, MD, MBA, CPE

FORENSIC EVALUATION

Name: Mike Tyrell Salley
Date of Birth: 2-20-90
Date of Evaluation: 9-26-07
Place of Evaluation: Midlands Regional Center
 Columbia, SC

Gender: Male
Race: African American
Age: 17 years 7 months

Examiners: Philip T. Cornelius, Ph.D.-Lead Examiner
 Dennis Goodwin, M.S. -Secondary Examiner

Charge(s): Criminal Sexual Conduct with a Minor, Lewd Act with a Child Under Sixteen

Purpose of Evaluation:

This evaluation was conducted pursuant to an order dated August 16, 2007 (received 8-30-07) by the Honorable Thomas Cooper, Presiding Judge in the Aiken County Court of General Sessions. The order stated that Mr. Salley be evaluated regarding his capacity to stand trial.

Limits of Confidentiality:

Mr. Salley was advised of the purpose of the evaluation, and that the results and content of the evaluation would be communicated to his defense counsel, the prosecution, and the court. In addition, he was informed of the possibility that the examiner(s) might be called to testify regarding the content and results of the evaluation.

Summary of Evaluation Results:

Presence of mental retardation:	Yes
Competency to Stand Trial:	Yes

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CC

Mike Tyrell Salley Forensic Evaluation

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Evaluation Procedures:

Mr. Salley was interviewed for approximately 1 1/2 hours on 9-26-07 by the undersigned. Mr. Goodwin, secondary examiner, was also present.

In addition the following records were reviewed:

Court Order dated 8-16-07

Arrest warrants K-205053, K-205054

Wagner Police Department General Sessions Packet case 2007-01599

Aiken County School District educational and psychological evaluation report 12-16-03

Department of Juvenile Justice Child Assessment and Evaluation packet 2-10-04

Aiken County School District Individualized Education Program 2003-2004, Mike Salley

Aiken County School District psychoeducational evaluation report 3-14-96

Aiken County School District educational and psychological evaluation report 4-02-02

Aiken County Board of Disabilities records 2-12-04

SCDDSN Diagnostic Report 6-14-04

SCDJJ Psychosexual Consultation report 6-14-04

SCDDSN Forensic Evaluation report 5-19-04

Relevant History:

Mr. Salley reported for the evaluation accompanied by his mother. Mr. Salley said that he had lived in Wagner, SC on Center Street. Mr. Salley could not relate the street number or his zip code. Mr. Salley was unable to provide his phone number. Mr. Salley was able to tell his age and correct birth date. Mr. Salley said that he lived with his mom, step dad, and a sister and brother. Mr. Salley related that he had last attended Wagner High School in the 11th grade. Mr. Salley said he has had no jobs but did occasionally earn money cutting grass and raking leaves for people. Mr. Salley said that he used his money on his go-cart. Available records indicate that Mr. Salley is a 17-year-old male who was in self-contained classes for students with mild mental disabilities. Mr. Salley has had learning and behavioral problems since entering school but was not formally diagnosed with a mental disability until 1996. Mr. Salley's mother noted on a health and developmental history form for the school that her pregnancy with Mr. Salley was uneventful, as was his birth. Mrs. Salley also noted that his developmental milestones were normal except for language development. Records indicate that Mr. Salley's adaptive behavior skills are higher than he sometimes practices. It is noted in the record that he can find his way around town, to school and back, and to other towns on his bicycle without difficulty. School personnel have reported that Mr. Salley's performance on educational tasks would be better if he attended school more frequently. Records indicate that he has exhibited a number of behavior problems in school resulting in various suspensions and development of a behavior intervention plan. In an intake form for the Aiken Board of Disabilities Mrs. Salley notes that Mr. Salley is fairly independent in his activities of daily living but does need occasional reminders. ~~Mr. Salley was previously evaluated for competency to stand trial on similar charges when he was 14 years old. He was found incompetent at that time and judicially committed to SCDDSN. He was served residentially at Willowglen prior to returning home.~~

Behavioral Observations/Mental Status Examination:

Mr. Salley arrived for the interview dressed casually but neatly. Mr. Salley's hygiene and grooming were adequate. Upon introduction to the examiners he was polite and sat attentively at the table. Eye contact was good, and facial expressions were animated and appropriate. Sensory systems appeared intact and no unusual mannerisms or agitation were noted. His speech was difficult to understand due to a speech impediment. Mr. Salley's thought processes appeared coherent and logical. Mr. Salley's sensory processes appeared intact. Mr. Salley denied any attempts at self-injury, head injuries, or loss of consciousness. He denied suicidal or homicidal ideation. Mr. Salley denied any visual or auditory hallucinations or delusions. Mr. Salley was oriented to time and place. Mr. Salley was unable to say the months of the year. Mr. Salley knew he was in South Carolina but could not identify the city, nor could he name any other states. Mr. Salley was able to repeat and recall three objects after an intervening task. Mr. Salley was able to read time on an analog clock. Mr. Salley was unable to read a simple three-word phrase. Mr. Salley was unable to write anything other than his name, and could not copy a geometric design. Mr. Salley was able to identify some concrete similarities. He was able to correctly answer some simple information questions and a couple of comprehension questions. Mr. Salley was not able to interpret two proverbs. Mr. Salley was only able to repeat two digits forward.

Mike Tyrell Salley
Forensic Evaluation
Page 3

Prior Test Results:

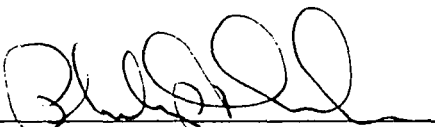
3-14-96 Stanford Binet Intelligence Scale	Full scale IQ 59
3-14-96 Vineland Adaptive Behavior Scale	Composite score 64
4-02-02 Wechsler Intelligence Scale for Children -III	Full Scale score 42
4-02-02 Vineland Adaptive Behavior Scale	Composite score 51
12-16-03 Wechsler Intelligence Scale for Children-III	Full Scale score 48
12-16-03 Universal Non-Verbal Intelligence Scale	Full Scale score 54
12-16-03 Adaptive Behavior Inventory	Composite quotient 67

Competency to Proceed/Criminal Responsibility/Capacity to Conform Procedure:

After the confidentiality advisement, Mr. Salley was able to say that we were going to talk about court and his lawyer, that there were no secrets, and that the report would go to the judge, solicitor, and his attorney. Mr. Salley stated his current charges as "sexual activity with a kid". Mr. Salley did not mention the Lewd Act with a Child under Sixteen. He acknowledged that he was in trouble and that the charges are serious indicating that he could "get time". Mr. Salley indicated that he could get 15 years if found guilty and that he had received this information from his attorney. He verbalized the role of his attorney as "public defender suppose to help, at my trial". Mr. Salley was able to indicate that his attorney is "for me", and wanted the outcome of "go home" and wanted him found "not guilty". Mr. Salley initially said that the solicitor's job was to "see how much time you get", and that he is "for you", wanted you found "not guilty", and for you to be able to "go home". When asked who was in court to prove you guilty he said "no one". Mr. Salley was then educated on the roles of the people involved in General Sessions court. After education Mr. Salley was able to say consistently that the prosecutor was "against" and wanted the outcome of "go to jail" and to be found guilty. When Mr. Salley was asked if he should talk to solicitor if he approached him while alone, he said "no, he against, trying to send me to jail". Mr. Salley was also able to say that he should tell his lawyer if that happened. He said the role of the judge was "to decide how long you get". Mr. Salley identified the jury on a drawing as "the twelve, the jury", and said their role was to "see if guilty or not guilty". Mr. Salley was able to say that guilty meant you "did it", and not guilty meant "you didn't do it". Mr. Salley initially said that if someone told a lie on the stand that he would tell the judge, but after a prompt he said "tell my lawyer". Mr. Salley was able to identify witnesses and evidence in a hypothetical situation. When asked if there was evidence in his case, he said he did not know but was able to say that he could ask his lawyer. When asked if there were witnesses in his case he again said he didn't know but again was able to say that he could ask his lawyer. Mr. Salley was able to relate some of the events surrounding his arrest indicating that he could provide information to his lawyer. Mr. Salley was able to indicate a few of the rules of probation and house arrest but did not know about plea bargains. Mr. Salley was able to benefit some from education on plea bargains but will need assistance of his attorney if this comes up. It appears that Mr. Salley has a factual and rational understanding of the adversarial nature of the court process.

Conclusion:

Mr. Salley has intellectual and adaptive scores that fall within the range of mental retardation. Mr. Salley has been determined to be eligible for the services of SCDDSN as mentally retarded. Additionally it is the examiner's clinical impression that Mr. Salley is functioning in the mentally retarded range at the present time. It appears that Mr. Salley does have the cognitive skills to understand the nature of the court process and does understand the court process. The opinion is offered that Mr. Salley is competent to proceed to trial at this time.


 Philip T. Cornelius, Ph.D.
 Forensic Examiner
 SCDDSN

Date signed: 10/2/07

100

04
WITNESSES

Wagener Police Department

Charles Thomas

Law Enforcement Case #: 2008 2169

ARREST WARRANT NUMBER

K205336

ACTION OF GRAND JURY

True Bill

Joe Wood

Foreperson of Grand Jury

Date: *5-14-2009*

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-02-00827

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

MAY TERM 2009

THE STATE

vs.

MIKE TYREL SALLEY

CDR #: 0385

Indictment for

ASSAULT WITH THE INTENT TO
COMMIT CRIMINAL SEXUAL CONDUCT
WITH A MINOR- FIRST DEGREE

§ 16-03-0655(1)

J. STROM THURMOND, SOLICITOR

FILED

May 14

200

9

Liz Hedard

C.C.C.P. & G.S.

Sherry Langley

Deputy Clerk

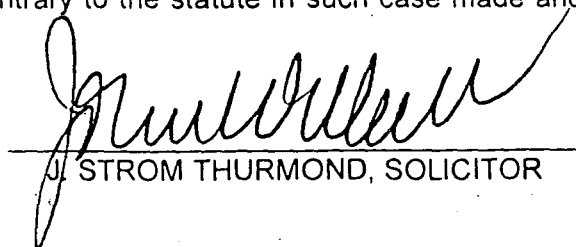
STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	ASSAULT WITH THE INTENT TO COMMIT
COUNTY OF AIKEN	)	CRIMINAL SEXUAL CONDUCT WITH A
	)	MINOR- FIRST DEGREE

§ 16-03-0655(1)

At a Court of General Sessions, convened on May 18, 2009, the Grand Jurors of Aiken County present upon their oath:

That MIKE TYREL SALLEY, did in Aiken County at divers times on or between July 10, 2008 and August 27, 2008, commit the crime of Assault with the Intent to Commit Criminal Sexual Conduct With A Minor In The First Degree, in that the Defendant did attempt to commit a sexual battery, to wit: anal penetration upon Jacquetta Davenport, a minor who was Ten (10) years of age at the time of the incident. All in violation of §16-3-655, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


STROM THURMOND, SOLICITOR

COUNTY OF
STATE

Aiken

VS.

Mike Tyrel Salley

AKA:

Race: B Sex: M Age: 19

DOB: SS#: 000-00-0000

Address:

City, State, Zip: WAGENER, SC 29164

DL# * SID#

*CDL Yes ☐ No ☒ CMV Yes ☐ No ☒ Hazmat Yes ☐ No ☒

In disposition of the said indictment comes now the Defendant who was

TO: Sex / Criminal sexual conduct with minor or Attempt - victim under 11 yrs of age - First degree

In violation of § 16-03-0655(1) of the S.C. Code of Laws, bearing CDR Code # 0385

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ Mandatory GPS ☐ \$17-25-45(CSC w/minor 1st or Lewd Act)The charge is: ☒ As indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(defendant's initials)

The pleas: ☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

Brenda Brindin
Solicitor63163 Salley Mike
SC Bar #

Defendant

Wallis Alues
Attorney for Defendant65401
SC Bar #WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 533 days☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211 (A)(1)(Conv. Surcharge)

§14-1-211 (A)(2)(DUI Surcharge)

§56-5-2995 (DUI Assessment)

§56-1-286 (DUI Breath Test)

§47.12 (Public Def/Prob)

§14-1-212 (Law Enforce. Funding)

§14-1-213 (Drug Court Surcharge)

§50-21-114 (BUI Breath Test Fee)

§56-5-2942(J) (Vehicle Assessment)

§90.7 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other:

set off for treatment
while incarcerated
and during community sup.☐ Appointed PD or appointed other counsel,
§47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date

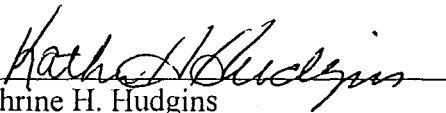
Clerk of Court/Deputy Clerk

Court Reporter:

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 15th, 2011


Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MIKE SALLEY,

APPELLANT

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS

Appellate Defender

South Carolina Commission on Indigent Defense

Division of Appellate Defense

PO Box 11589

Columbia, S. C. 29211-1589

(803) 734-1343

ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding that appellant was competent to stand trial when appellant proved by a preponderance of the evidence that he did not have a rational or factual understanding of the proceedings against him and that he did not have the ability to consult with his lawyer with a reasonable degree of rational understanding?

STATEMENT OF THE CASE

In May of 2009, the Aiken County Grand Jury indicted Salley for assault with intent to commit criminal sexual conduct with a minor first degree, indictment #2009-GS-02-827. On February 8, 2010, the Honorable R. Ferrell Cothran, Jr. heard testimony from both the State and the Defense in regard to Salley's competency to stand trial. On February 11, 2010, Judge Cothran found Salley competent to stand trial. On February 12, 2010, Salley appeared before Judge Cothran, Jr. and pled guilty but mentally ill as charged. Pursuant to negotiations with the State, Judge Cothran sentenced Salley to 25 years. A timely notice of intent to appeal and Rule 203 explanation was served on February 19, 2010. This appeal follows.

ARGUMENT

The trial judge erred in finding that appellant was competent to stand trial when appellant proved by a preponderance of the evidence that he did not have a rational or factual understanding of the proceedings against him and that he did not have the ability to consult with his lawyer with a reasonable degree of rational understanding.

The appellant, Mike Salley, has a long documented history of mental retardation and had previously been found not competent to proceed to trial in 2004, by the South Carolina Department of Disabilities and Special Needs. (R. p. 97-99). During a Blair¹ hearing on February 8, 2010, two experts provided conflicting testimony in regard to appellant's competency to stand trial. Dr. Donna Schwartz-Watts, a forensic psychiatrist, examined Salley for competency. In her written report Dr. Schwartz-Watts wrote, "It is my opinion to a reasonable degree of medical certainty that Mr. Salley does not have a factual or rational understanding of the proceedings nor the capacity to assist you in his defense due to his mental retardation. He is not likely to become competent in the foreseeable future." (R. p. 94-95).

At the Blair hearing Dr. Schwartz-Watts was qualified, without objection, as an expert witness in the field of forensic evaluations. (R. p. 39, lines 16-21). . Dr. Schwartz-Watts testified, "The issue I have is he is what I call not rationally competent. And what I mean by that is he doesn't have the cognitive abilities to follow a trial. Dr. Cornelius stated it took three years for him to learn the roles of court officials and to gather information. And I don't think most trial take three years. And so what we're asking him to do in a trial situation is to learn new information, be able to remember it, be able to provide it back to his

¹ State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

attorney to assist in his defense. He just does not have the cognitive ability to do that.” (R. p. 41, lines 20 – p. 42, lines 1-5).

Pursuant to a court order dated December 4, 2008, Phillip T. Cornelius, Ph.D. and forensic examiner for the South Carolina Department of Disabilities and Special Needs examined Salley for capacity to stand trial. In a written report signed on January 23, 2009, Dr. Cornelius found Salley competent to proceed to trial. (R. p. 89). The report confirms Salley’s history of mental retardation. The report indicates that Salley was difficult to understand due to a speech impediment. According to the report, Salley informed examiners that he graduated from Wagner High School with a certificate. Salley informed examiners that he had never had a job but would occasionally earn money by cutting grass and raking leaves. Salley reported receiving a \$400 disability check. The report references prior test results showing IQ levels between 42 and 59. The report states that Salley was unable to name the months of the year, unable to name states other than South Carolina, unable to read a simple three word phrase, unable to copy a geometric design, unable to perform a simple subtraction problem and unable to name the first president or the president elect.

During the Blair hearing, Dr. Cornelius was qualified as an expert in the field of forensic psychological evaluations. (R. p. 6, lines 4 – p. 7, lines 1-20). Dr. Cornelius testified that Salley was competent to proceed to trial. (R. p. 8, lines 12-18). Dr. Cornelius testified that when he evaluated Salley in 2004, he was not competent to stand trial. (R. p. 12, lines 23 – p. 13, lines 1-2; R. p. 97-99). Dr. Cornelius evaluated Salley again in 2007, and found him competent to stand trial. (R. p. 100). Dr. Cornelius explained the difference in the evaluations testifying:

When I initially evaluated him in 2004 he was not competent to stand trial. He didn't understand the roles of his attorney, the defense, the solicitor, the court process. In 2007 when I evaluated him, he understood that the jury was the people that decided guilt or innocence. He understood that he shouldn't talk to the solicitor by himself. He had some confusion between the roles of his attorney and the solicitor. We did an education process during the interview and after that he was able to enunciate the roles of his attorney and the solicitor as I just described.

When he came back in 2009 and at the time I saw him again he had retained that information because he was able to, without any education, enumerate his attorney's role, the solicitor's role, the court process, and whether or not he should talk to the solicitor by himself.

(R. p. 12, lines 24 – p. 13, lines 1-15).

Despite the "education process" that, according to Dr. Cornelius, rendered Salley competent, Dr. Cornelius admitted that he still had questions about whether Salley was able to understand the concept of a plea bargain. (R. p. 32, lines 11 – p. 33, 34, lines 1-6). Dr. Cornelius admitted that his evaluation was based on a structured forced choice interview. When asked about the significance of IQ, Dr. Cornelius testified, "Not entirely, because our process is based on an interview, a structured interview. It's based on a structured forced choice interview for most of the questions. Because the research shows that if you have somebody that you suspect is mentally retarded that you get a better evaluation using the forced choice format rather than an open –ended format." (R. p. 18, lines 11-18). When asked to define forced choice format Dr. Cornelius testified, "That's asking him a question that has two answers. Is your attorney for you or against you, rather than saying, what does your attorney do, which side's your attorney on; those kinds of things." (R. p. 18, lines 22-25).

When Dr. Schwartz-Watts was asked if Salley would be able to assist his attorney at trial, she testified, “In my opinion, no. Again, the methodology used, court is not a forced choice test. To be competent to stand trial is to be able to follow testimony, to be able to pay attention to witnesses. If there’s an inconsistency he can’t protect himself in some ways because of his rational limitation, his cognitive limitation.” (R. p. 43, lines 23 – p. 44, lines 1-3). When questioned on cross examination, Dr. Schwartz-Watts testified, “Well, my opinion is he has a factual understanding of the proceedings. He has a capacity to assist in his defense, but because he doesn’t have a rational understanding, that second prong, because he doesn’t have a rational understanding of the proceedings, he’s not able to assist his attorney.” (R. p. 62, lines 23 – p. 63, lines 1-3). .

Dr. Schwartz-Watts’ report states that Salley believes that the judge is against him, he does not understand concepts such as cross examination, he has difficulty learning new information, he is not able to abstract similarities between objects, he can not perform mathematical calculations and when asked if he would choose a sentence of 24 months or 3 years he replied 3 years because it was smaller. (R. p. 97-99). Dr. Schwartz-Watts testified, as did Dr. Cornelius, that Salley was unable to copy a geometric design. (R. p. 50, lines 19 – p. 51, lines 1-7; R. p. 96). Dr. Schwartz-Watts testified as to specific examples demonstrating Salley’s brain deficits including the inability to learn how to pronounce his lawyer’s name (R. p. 47, lines 5-20), and the inability to abstract similarities. (R. p. 49, lines 16 – p. 50, p. 51, lines 1-12). Dr. Schwartz-Watts also testified that based on Salley’s history with alcohol abuse, neuropsychological testing should be done to determine brain function. (R. p. 45, lines 10-25). When asked if additional testing would change her mind in regard to Salley’s competency, Dr. Schwartz-Watts testified “It would probably

strengthen my opinion, your Honor. Honestly.” (R. p. 66, lines 11-16). Evidence at the Blair hearing established, by a preponderance of the evidence, that Salley was not competent to stand trial.

On February 11, 2010, after hearing testimony at the Blair hearing and reviewing the evidence presented, Judge Cothran found that the defense failed to meet their burden of proving that Salley was not competent to stand trial by a preponderance of the evidence.

The judge stated:

Dr. Schwartz-Watts’ opinion, she basically had the same finding but she has some concerns that she didn’t - - she did not think he was competent because she did not think that he had the ability to process the information quick enough on cross examination, that withstood cross-examination.

And I don’t think that’s the test in this state. And I certainly think that being able to assist his attorney, and Dr. Cornelius found that he would be able to recognize if someone was not telling the truth and advise his attorney to that effect.

In the end he even told Dr. Schwartz-Watts that he were to lie, even if his attorney told him to tell the truth, if he thought it would benefit him. So I think he has that understanding of the proceedings.

And the defense has to present evidence that he in fact does not have the ability and is not competent to stand trial. I think that evidence must be by the preponderance of the evidence. And I certainly don’t find by the preponderance of the evidence that they have met their burden and I think he is competent to stand trial.

(R. p. 68, lines 21 – p. 69, lines 1-17). The judge based his finding on the erroneous premise that Dr. Schwartz-Watts found Salley not competent to stand trial because he can’t process information quickly enough on cross examination. (R. p. 69, lines 21 – p. 70, lines 1-12). While Dr. Schwartz-Watts testified that Salley would be unable to testify because of his low

IQ (R. p. 48, lines 1 – 13), she also testified that Salley did not have the ability to pay attention during trial, to remember facts and to confer with his attorney when new information was presented. (R. p. 49, lines 8-15). Dr. Schwarz-Watts also testified that Salley did not have the ability to weigh options. (R. p. 49, lines 11-15). Defense counsel argued, citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), that Dr. Schwartz-Watts' testified that Salley was incompetent because he did not have a rational as well as factual understanding of the proceedings against him and was unable to consult with his attorney with a reasonable degree of rational understanding. (R. p. 70, lines 19 – p. 71 – 73). The judge again found Salley competent to stand trial. The judge erred.

“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 102, 112 – 113 (1975). Conviction of a criminal defendant who is not competent violates the due process clause of the fourteenth amendment. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). This right may not be waived by guilty plea. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). Competency is required to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel. Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). The test of competency to enter a plea is the same as required to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). In Hall v. Catoe, 360 S.C. 353, 359, 601 S.E.2d 335, 338 (2004), the South Carolina Supreme Court wrote, “This Court has held that to be competent to stand trial or continue trial, a defendant must have ‘a rational , as well as factual, understanding of the proceedings

against him' and the 'ability to consult with his lawyer with a reasonable degree of rational understanding.' State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960))."

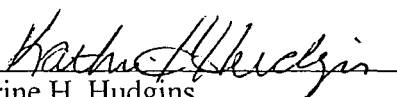
A defendant must prove that he is incompetent to stand trial by a preponderance of the evidence. State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002); State v. Reed, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998). The trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance. State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002). The trial judge's ruling in the present case is not supported by the evidence.

The undisputed evidence before the judge was that Salley is mentally retarded with an IQ between 42 and 59 and was unable to name the months of the year, unable to name states other than South Carolina, unable to read a simple three word phrase, unable to copy a geometric design, unable to perform a simple subtraction problem and unable to name the first president or the president elect. It is undisputed that Salley was previously found not competent to stand trial and was later found competent only after an "education process." The State's examination of Salley consisted of a structured forced choice interview and the State's expert still had concerns about whether Salley was able to understand the concept of a plea bargain. Additionally, the defense introduced credible detailed testimony and evidence proving that Salley did not have a rational, as well as factual, understanding of the proceedings against him and did not have the ability to consult with his lawyer with a reasonable degree of rational understanding. The judge erred in finding that the defense failed to meet their burden of proving that Salley was not competent to stand trial by a preponderance of the evidence.

CONCLUSION

Based on the above argument, Salley's conviction should be reversed.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

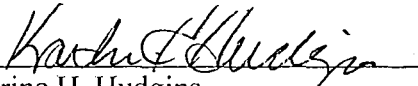
ATTORNEY FOR APPELLANT.

This 5th day of May, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 5, 2011


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

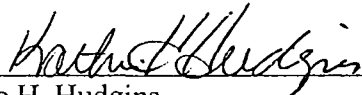
V.

MIKE SALLEY,

APPELLANT

CERTIFICATE OF SERVICE

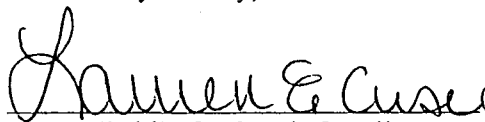
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 5th day of May, 2011.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 5th day of May, 2011.



Lauren E. Cuse (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Aiken County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE

Respondent

VS

MIKE TYREL SALLEY

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly determined Appellant was competent to stand trial based on the evidence and testimony presented establishing Appellant had a factual and rational understanding of the proceedings against him along with a sufficient ability to consult with his attorney with a reasonable degree of rational understanding.

STATEMENT OF THE CASE

Appellant Mike Tyrel Salley was arrested following an investigation into allegations of the sexual assault of a ten-year-old girl. In May of 2009, Appellant was indicted by the Aiken County grand jury for assault with the intent to commit criminal sexual conduct with a minor in the first degree. On February 8, 2010, a competency hearing was conducted in the Aiken County court of general sessions before the Honorable R. Ferrell Cothran, Jr., circuit court judge. Following the hearing, the trial judge ruled Appellant was competent to stand trial. On February 12, 2010, Appellant entered a plea of guilty to the indicted offense in exchange for a negotiated sentence of twenty-five years. The solicitor noted Appellant's guilty plea to the indicted offense resolved several other indicted and non-indicted offenses pending against Appellant. The trial judge accepted Appellant's guilty plea and sentenced Appellant to a term of imprisonment of twenty-five years. Appellant subsequently filed a timely notice of appeal.

STATEMENT OF FACTS

In August of 2008, Appellant Mike Tyrel Salley was visiting the home of a family friend when he attempted to penetrate the anus of a ten-year-old girl ("Victim") with his penis. (R. p. 81). After Victim revealed the incident to her great aunt, the aunt reported the incident to law enforcement officers. (R. p. 81). Victim was then interviewed at the Child Advocacy Center in Columbia and recounted the painful circumstances of the attempted sexual assault committed by Appellant. (R. p. 81). She also stated Appellant molested her on at least five occasions between July and August of 2008. (R. p. 81). Subsequently, police officers interviewed Appellant about the allegations, and he initially denied any involvement. (R. p. 81). However, Appellant later returned to the police department with his mother and admitted to sexually-assaulting Victim. (R. pp. 81-82). Appellant also admitted to sexually-assaulting another child in a different incident. (R. pp. 81-82). Following his confessions, Appellant was arrested and indicted for several offenses, including one count of assault with intent to commit criminal sexual conduct with a minor in the first degree and two counts of committing a lewd act upon a minor. (R. p. 4).

On February 8, 2010, Appellant appeared in the Aiken County court of general sessions for a hearing to determine if he was competent to stand trial. (R. p. 4). Dr. Phillip Cornelius, an expert in forensic evaluations, testified about his court-ordered evaluation of Appellant. (R. pp. 7-8). Dr. Cornelius stated he previously evaluated Appellant on two earlier occasions in 2004 and 2007 to determine if Appellant was competent to stand trial in similar cases also involving charges of criminal sexual conduct with a minor. (R. p. 9). He indicated Appellant was not competent when he evaluated

him in 2004, but Appellant learned and understood the court process in 2007. (R. pp. 12-13). During the 2004 evaluation performed when Appellant was fourteen-years-old, Dr. Cornelius concluded Appellant did not understand the process, could not relate details of his charges to his attorney, and did not display self-protection actions. (R. pp. 97-99). However, during the 2007 evaluation performed when Appellant was seventeen-years-old, Dr. Cornelius noted Appellant was able to retain and learn information, was capable of providing information to his attorney, and knew to consult his attorney if he did not know something during trial. (R. pp. 100-103). Following the 2007 evaluation, Dr. Cornelius concluded Appellant had a factual and rational understanding of the court process and was competent to stand trial. (R. p. 14; pp. 100-103).

Regarding the most recent evaluation, Dr. Cornelius reviewed the court order, the related arrest warrants, a law enforcement packet, Appellant's school records, prior psychological evaluations, prior diagnostic evaluations, and several prior forensic evaluations. (R. p. 8). Dr. Cornelius then met with Appellant for approximately one hour on January 15, 2009. (R. p. 8; p. 10). He reviewed the roles of the parties and the court process with Appellant. (R. p. 10). He then exposed Appellant to a series of forced-choice and non-forced-choice questions, and Appellant consistently provided correct answers, demonstrating an understanding of the questions and answers.¹ (R. p. 11; pp. 27-28). During the evaluation, Appellant demonstrated he understood the roles of the solicitor and defense counsel and understood the pending charges. (R. p. 15). Appellant also acknowledged he was accused of having sex with a ten-year-old child and a four-

¹Dr. Cornelius noted Appellant was able to articulate his attorney's role, the solicitor's role, the court process, and whether or not he should talk to the solicitor alone without any education from the court-ordered evaluator. (R. p. 13).

year-old child. (R. p. 15). In his evaluation report, Dr. Cornelius indicated Appellant was able to identify a witness on the stand and knew to inform his attorney if a witness was lying. (R. pp. 89-93). He noted Appellant knew to consult with his attorney if any issues arose, was capable of providing information to his attorney, and had a factual and rational understanding of the court process. (R. pp. 89-93). He further indicated Appellant was fairly independent in his daily life and possessed higher adaptive behavior skills than he sometimes practiced. (R. pp. 89-93).

Regarding Appellant's level of mental disability, Dr. Cornelius noted Appellant was mentally-retarded and had an I.Q. ranging from 42 to 59, with the scores falling in the mild to moderate retardation range. (R. p. 12). However, Dr. Cornelius testified Appellant was capable of learning and retaining information. (R. pp. 12-13). He stated Appellant had the capacity to learn but learned at a slower pace. (R. p. 26). He further noted Appellant was alert and oriented throughout all of the evaluations. (R. p. 14). Based on the results of his evaluation of Appellant, Dr. Cornelius concluded Appellant had a factual and rational understanding of the proceedings and was competent to stand trial. (R. p. 8; p. 30; R. pp. 89-93). He also indicated he met with Appellant prior to the hearing, and the meeting reaffirmed his earlier competency finding. (R. p. 10).

Dr. Donna Schwartz-Watts, an expert in forensic evaluations retained by Appellant, also testified during the competency hearing on Appellant's behalf. (R. p. 39; pp. 52-53). Dr. Schwartz-Watts stated she interviewed Appellant for approximately an hour and a half in October of 2009 and for twenty-five minutes prior to the hearing. (R. pp. 39-40). Based on her evaluation of Appellant, she concluded Appellant had a factual understanding of the proceedings but was not rationally competent. (R. p. 41). She

indicated she did not believe Appellant had the cognitive ability to follow the trial, learn new information, remember it, and then provide it back to his attorney to assist in his defense.² (R. pp. 41-42). Dr. Schwartz-Watts noted Appellant had difficulty determining whether a sentence stated in months was longer than a sentence stated in years, and she testified he did not have the ability to assist his attorney if evidence was presented. (R. pp. 42-43). She further noted Appellant had difficulty correctly pronouncing defense counsel's name, had difficulty understanding more complex concepts, and could not correctly draw a clock or read. (R. p. 47; p. 50). She concluded Appellant had the ability to learn but not the ability to learn quickly enough for trial. (R. p. 51). Based on her evaluation, Dr. Schwartz-Watts opined Appellant was not competent to stand trial. (R. p. 46). In reaching this conclusion, she noted:

But, for example, I asked him today, if your lawyer wants you to take the stand and she tells you to tell the truth, what are you going to do. And he says he wouldn't tell the truth. So he's not able to assist her at some levels because of some of his cognitive appearance. He does not fully understand what it takes to be competent to stand trial.³

(R. p. 42).

However, Dr. Schwartz-Watts testified Appellant was very self-protective and knew not to speak to the solicitor alone. (R. p. 42; p. 49). She further testified Appellant would assist his attorney, was protective, and did not want to go to prison. (R. p. 42).

²Regarding Appellant's understanding of the competency hearing itself, Dr. Schwartz-Watts opined: "I think at one level he would recognize that somebody is trying to help him, and that somebody has another opinion." (R. p. 44).

³Notably, Dr. Schwartz-Watts also later testified Appellant admitted his guilt to her. (R. p. 60). Therefore, if Appellant knew he was guilty but told the truth on the witness stand at his attorney's request, he would be admitting his guilt to the jury. His answer to Dr. Schwartz-Watt's pre-trial question demonstrated he rationally understood the proceedings and was aware of what actions he needed to take to protect his own interests.

She noted Appellant understood the difference between guilty and not guilty, knew how many jurors were required to convict him, and refused to accept an incorrect statement that only five jurors were necessary for a conviction. (R. pp. 47-48). Additionally, she noted Appellant had some street smarts and was not easily led. (R. p. 49).

On cross-examination, Dr. Schwartz-Watts conceded mental retardation does not always translate into a lack of competency and the ability to read was not necessary for a competency finding. (R. p. 53; p. 58). She further testified Appellant understood the adversarial process, the roles of the attorneys, the role of the jury, the concepts of guilt and innocence, the availability of entering a plea, and the charges against him. (R. p. 60). She noted he thought the judge was against him, but she conceded it was possible he believed this because he had admitted he was guilty. (R. p. 60). Dr. Schwartz-Watts testified Appellant initially denied he was guilty when speaking to her before later admitting his guilt. (R. p. 60). She diagnosed Appellant with pedophilia and acknowledged he repeatedly acted on those tendencies. (R. p. 62). She also noted Appellant admitted he was a pedophile. (R. p. 62).

Furthermore, Dr. Schwartz-Watts acknowledged Dr. Cornelius had performed the appropriate testing to evaluate Appellant's competency level. (R. p. 54). She further conceded Dr. Cornelius had the benefit of seeing and evaluating Appellant over a greater period of time, but she stated she had personally reached a different opinion based on her evaluation. (R. p. 55).

In conclusion, Dr. Schwartz-Watts testified: "Well, my opinion is he has a factual understanding of the proceedings. He has a capacity to assist in his defense, but because he doesn't have a rational understanding, that second prong, because he doesn't have a

rational understanding of the proceedings, he's not able to assist his attorney." (R. pp. 62-63). She further stated Appellant understood how everything is supposed to work but could not process it and put it into action. (R. p. 63).

After reviewing the experts' reports and the testimony from the hearing, the trial judge determined Appellant was competent to stand trial and found Appellant had failed to establish his incompetency by a preponderance of the evidence. (R. pp. 67-69).

Appellant asserted his evidence of incompetency was compelling, which he contended shifted the burden of proving competency to the State. (R. pp. 73-74). After reviewing South Carolina case law, the trial judge concluded the burden remained on Appellant to establish his lack of competency, and Appellant had failed to overcome that burden. (R. p. 75).

Subsequently, on February 12, 2010, Appellant indicated he wished to enter a negotiated plea of guilty but mentally ill to the charge of assault with intent to commit criminal sexual conduct with a minor in the first degree. (R. p. 77). Defense counsel stated Appellant understood his rights, the charges against him, and the potential sentencing range. (R. pp. 77-78). Appellant informed the trial judge he wished to plead guilty. (R. p. 78). Following the solicitor's factual recitation of the crime, Appellant admitted the factual statement was accurate and he was guilty of sexually-assaulting Victim. (R. pp. 81-82; p. 83). Appellant further stated he wanted the judge to accept his guilty plea and was aware he would receive a twenty-five-year sentence. (R. p. 83). The trial judge then accepted Appellant's guilty plea and sentenced him to a term of incarceration of twenty-five years. (R. p. 83; p. 87).

ARGUMENT

The trial judge properly determined Appellant was competent to stand trial based on the evidence and testimony presented establishing Appellant had a factual and rational understanding of the proceedings against him along with a sufficient ability to consult with his attorney with a reasonable degree of rational understanding.

Appellant asserts the trial judge erred in finding him to be competent to stand trial or enter a plea. Appellant asserts he presented credible and compelling testimony establishing his incompetence. After hearing testimony from both a court-ordered expert and Appellant's expert, the trial judge evaluated the evidence and testimony and determined Appellant was competent to stand trial. The trial judge's ruling was supported by the evidence. Therefore, the competency finding should be upheld on appeal. Appellant's conviction and sentence should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

In order to stand trial or plead guilty, a criminal defendant must be competent. State v. Finklea, 388 S.C. 379, 383, 697 S.E.2d 543, 546 (2010). Due process rights prohibit the conviction of an incompetent defendant. Matthews v. State, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004). The standard for evaluating competency to enter a plea is identical to the standard to stand trial, and the competency requirement cannot be waived by entry of a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595-596 (1992). In order to be competent to enter a plea or stand trial, a defendant must have a sufficient ability to consult with his attorney with a reasonable degree of rational understanding and must have a rational and factual understanding of the proceedings against him. Sims v. State, 313 S.C. 420, 422-423, 438 S.E.2d 253, 254 (1993). "The purpose of requiring a defendant to be competent is 'to ensure that he has the capacity to understand the proceedings and to assist counsel.' " State v. Kelly, 331 S.C. 132, 148, 502 S.E.2d 99, 108 (1998) (quoting Godinez v. Moran, 509 U.S. 389, 402 (1993)).

The defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Nance, 320 S.C. 501, 504, 466 S.E.2d 349, 351 (1996). The trial judge's competency determination should be upheld if it has evidentiary support and is not against the preponderance of the evidence. State v. Reed, 332 S.C. 35, 40, 503 S.E.2d 747, 749 (1998). "[G]reat deference is given to [the] trial judge who sits in a better position to ascertain the defendant's faculties." State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007).

In the case at bar, the trial judge properly considered the evidence and testimony presented to him and concluded Appellant was competent to stand trial. The testimony established Appellant had a factual and rational understanding of the proceedings against

him and had a sufficient ability to assist defense counsel during trial. Appellant appears to contend the trial judge erred in finding him competent because his expert testified he was incompetent. However, the trial judge is not required to accept any one expert's position but instead must consider all the evidence presented before him. See State v. Bell, 293 S.C. 391, 396, 360 S.E.2d 706, 709 (1987) ("A defendant's claim that a psychologist's testimony was incomplete or wrong does not preclude a finding that the defendant is competent to stand trial where the psychologist was subject to cross-examination by defense counsel."); see also Kelly, 331 S.C. at 149, 502 S.E.2d at 108 (citing to 22A C.J.S. Criminal Law § 554 which stated the trial judge is the sole judge of the credibility and weight to be assigned to witnesses' testimony and is entitled to evaluate conflicting testimony). After considering the testimony of both experts and reviewing the evidence, the trial judge found Appellant's showing of incompetency to be insufficient to establish he was not competent to stand trial or enter a plea. The trial judge's ruling was supported by the evidence and should be affirmed on appeal. See State v. Lee, 274 S.C. 372, 375, 264 S.E.2d 418 (1980) ("We cannot say that [the trial judge's] finding that the defendant was capable of standing trial was without evidentiary support or against the preponderance of the evidence and, accordingly, we find no error on the part of the judge in ordering the defendant to trial."); see also State v. Weik, 356 S.C. 76, 80-81, 587 S.E.2d 683, 685 (2002) (finding the trial judge's competency determination was supported by the evidence even though there was a disagreement between the State's experts and Weik's experts over whether Weik was competent to stand trial).

Looking to the opinions of the experts, Dr. Cornelius, an independent court-ordered forensic evaluator who had met with Appellant on multiple occasions over a period of years, evaluated Appellant prior to trial and determined he was competent to proceed. The strength of Dr. Cornelius' opinion was bolstered by his prior history with Appellant, which was a fact conceded by Appellant's expert. Furthermore, Appellant's expert further acknowledged there was no error in the method of Dr. Cornelius' evaluation, and the fact Dr. Cornelius previously found Appellant to be incompetent in 2004 strongly shows he had no bias or hidden motive to declare Appellant competent if he in fact was not. Dr. Cornelius' testimony was strong evidence of Appellant's competency to stand trial or enter a plea.

Dr. Schwartz-Watts, an expert retained by Appellant, reached a contrary conclusion and opined Appellant was not competent. She testified Appellant had a factual understanding of the proceedings, would assist his attorney, understood the charges against him, and was very self-protective. However, she stated he had an insufficient capacity to learn quickly enough to be able to effectively assist his attorney during trial. She opined he did not have a rational understanding of the proceedings sufficient enough to assist in his defense even though he had the capacity to assist his defense attorney.

Relying on Dr. Schwartz-Watts' testimony coupled with his mental disability and low intelligence, Appellant asserts the trial judge erred in finding he was competent to stand trial. However, the trial judge's competency finding was supported by the evidence. See State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976) ("While low intelligence or limited education may cause an appellate court to review the

defendant's plea carefully, it does not necessarily preclude a valid plea. The fact that appellant may have only a seventh grade education does not mean that he was unable to understand the proceedings." (citations omitted)); see also 22 C.J.S. Criminal Law § 506 ("The question of whether or not a defendant is competent to enter a guilty plea is ordinarily one of fact to be determined by the trial court. . . . Mental retardation, a mere history of psychological disturbances, or a suicide attempt by the defendant does not necessarily imply incompetence to plead guilty.").

After evaluating the conflicting expert opinions, the trial judge determined Appellant had not met his burden of establishing incompetency and was competent to stand trial. His ruling was supported by the testimony and evidence and was strengthened by Appellant's appropriate behavior and answers during the subsequent guilty plea hearing. See Nance, 320 S.C. at 506, 466 S.E.2d at 352 ("Admittedly, the trial court was confronted with conflicting opinions regarding [Nance's] competency. However, we find that there is ample evidentiary support for the trial court's determination that [Nance] was competent, and we find that determination not to be against the preponderance of the evidence."); Bell, 293 S.C. at 396, 360 S.E.2d at 709 ("The trial judge's findings of competency were based on the expert testimony, defense counsel's testimony, and the trial judge's own observations of appellant's behavior. The very nature of the inquiry as to a defendant's competency to stand trial demands that a court not be bound strictly by the view of experts."). As the trial judge's ruling was supported by the evidence, there is no basis to reverse his ruling on appeal. See State v. Davis, 309 S.C. 326, 338, 422 S.E.2d 133, 141 (1992) ("We find that the trial judge's determination that Davis was competent to stand trial has evidentiary support. Accordingly, we find that the trial judge

did not err in finding that Davis was competent to stand trial." (citations omitted)),
overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 20, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Aiken County
Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

MIKE TYREL SALLEY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 20th day of April, 2011.

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