

STATE OF INDIANA)
) SS:
COUNTY OF L A K E)

SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION
SITTING AT CROWN POINT, INDIANA

STATE OF INDIANA,)
)
Plaintiff;)
) CAUSE NOS. 45G01-0505-MR-00004
-v-) 45G01-0505-MR-00005
) 45G01-0505-MR-00006
EUGENE VICTOR BRITT,) 45G01-0505-MR-00007
) 45G01-0505-MR-00008
Defendant.) 45G01-0505-MR-00009
) 45G01-0505-FA-00025

BE IT REMEMBERED that heretofore, pursuant to agreement as to time and place and pursuant to the Statutes of the State of Indiana, the above cause came on for Daubert Hearing on the 18th day of September, 2006, before the Honorable Salvador Vasquez, Judge, Room 1, at Superior Court of Lake County, Criminal Division, 2293 North Main Street, Crown Point, Indiana.

A P P E A R A N C E S:

MR. JOHN BURKE
DEPUTY PROSECUTING ATTORNEY

On behalf of the State;

MR. GOJKO KASICH
MR. JOHN MAKSIMOVICH
LAKE COUNTY PUBLIC DEFENDERS

On behalf of the Defendant.

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1

1 [ALL PARTIES BEING PRESENT, THE FOLLOWING]

2 [PROCEEDINGS ARE HELD IN OPEN COURT ON]

3 [SEPTEMBER 19, 2006.]

4 THE COURT: All right. We're on the record

5 in the case of Britt, and we'll show for the

6 record all the parties are present, including

7 Mr. Britt and his counsel, Mr. Maksimovich,

8 Mr. Kasich. Mr. Burke representing the state.

9 We're here for a final hearing on the Daubert

10 matter, Daubert hearing. I also want to take up

11 this morning the defendant's request for

12 certification of interlocutory order.

13 Specifically, you want to appeal the motion to

14 suppress issue on an interlocutory basis. I

15 reviewed your motion, Mr. Kasich, and presumably

16 at this point -- I should say, Mr. Kasich and

17 Mr. Maksimovich, and I presume at this point,

18 Mr. Burke, you have had a chance to review it as

19 well.

20 MR. BURKE: I have.

21 THE COURT: Are you taking a position as to
22 the interlocutory appeal request, Mr. Burke?

23 MR. BURKE: Your Honor, I -- the Court has
24 made a ruling as I understand it and on the motion
25 to suppress and reject the confession, and I don't

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2

1 know at this point that the defense has a right to
2 take an interlocutory appeal. I guess it's up to
3 the Court as to whether or not they're going to --
4 the trial court, your Honor, as to whether or not
5 you're going to allow them to take an
6 interlocutory appeal on that ruling.

7 THE COURT: Do you want to be heard any
8 further, or do you want to rest on your motion,
9 Mr. Kasich?

10 MR. KASICH: Rest on our motion, your Honor.

11 THE COURT: Your request is denied.
12 Mr. Burke -- Mr. Britt is currently serving a
13 sentence out of Porter County, having pled guilty
14 to a significant charge where he received life

15 without parole. Not that that is a significant or
16 the predominant reason why your request is denied.
17 What I believe in view of the issues raised at the
18 suppression hearing, I do not believe that there
19 is such a significant issue that I believe that we
20 should stop these proceedings, proceedings that
21 have been pending for more than five years.
22 Six years, quite frankly, as we await word from a
23 Court of Appeals as to whether they should even
24 grant the request. I believe that it's -- it's a
25 much -- it is more significant that we continue

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3

1 what we're doing here. I believe that the issues
2 can be taken adequately on appeal should the
3 defendant be found guilty at trial. I believe
4 that his substantial rights are preserved by way
5 of the motion and the -- the motion to suppress
6 and the arguments and evidence heard during the
7 course of the hearings on the motion to suppress
8 as well. It is certainly my intent to go forward
9 and if necessary proceed to trial next month.

10 That brings our attention to our Daubert hearing.
11 Presumably at this point, Mr. Kasich, you have
12 evidence or witnesses to present?

13 MR. KASICH: Yes, your Honor.

14 THE COURT: You ready to proceed then?

15 MR. KASICH: Yes. Dr. Denis Keyes.

16 THE COURT: Very good.

17 [WITNESS SUMMONED.]

18 DR. DENIS WILLIAM KEYES,
19 having been first duly sworn, was examined and
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. KASICH:

23 Q Sir, could you please state your name for the
24 record.

25 A My name is Denis William Keyes.

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4

1 Q Dr. Keyes, could you tell us a little bit about
2 where you're from?

3 A Originally, I'm from Dayton, Ohio, born and
4 raised. I went to Cincinnati for five years where

5 I taught and then I went to Oxford for another
6 eight years, Oxford, Ohio, lived one more year in
7 Cincinnati and moved to New Mexico, was there for
8 three years and now I live in Charleston, South
9 Carolina. This is my 16th year there.

10 Q And what do you do in Charleston, South Carolina?

11 A I'm an associate professor of special education at
12 the College of Charleston.

13 Q Is there a reason that you ended up at Charleston?

14 A Have you ever been to Charleston? It's a great
15 city. It's a beautiful city.

16 Q But how did you get from New Mexico to Charleston?

17 A When I finished -- when I was finishing my Ph.D.
18 at the University of New Mexico, there was a job
19 opening at the College of Charleston where they
20 were looking for someone who had a background in
21 psychology and special education/mental
22 retardation. And so I applied and they offered me
23 the job before I left my interview.

24 Q Sir, obviously you are here today to speak about
25 mental retardation; is that correct?

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1 A That is correct.

2 Q Could you tell the Court about your experience
3 with the subject of mental retardation?

4 A In 19 -- in 19 -- let me see. '74, I was living in
5 south -- in south -- south California, southern
6 California with my sister and I couldn't find a
7 job anywhere because there were no jobs to be had
8 at the time. So I applied as an -- as an
9 assistant, a teaching assistant at a school for
10 children with mental retardation, primarily
11 four-to seven-year-olds and I taught that for
12 about -- actually about six months and went back
13 to Ohio when a family emergency occurred and I had
14 to go back. So I took care of my family for about
15 three months. And then after that, I went back to
16 working with kids with severe and profound mental
17 retardation at the Montgomery County Board of
18 Mental Retardation in Dayton. I was there for a
19 year and a half and then decided I couldn't live
20 on \$3,400 a year and got my bachelor's degree from
21 the Ohio University in special education in 1979.
22 I taught in Cincinnati. Actually, I first taught

23 in Marietta, Ohio, for \$8,100 a year and then I
24 went to Cincinnati, Ohio, and taught there for
25 five years for -- in a school for children with

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6

1 moderate, severe and profound mental retardation.
2 And actually, it wasn't just children. It was up
3 to 22. Then I went from there to Oxford, Ohio, to
4 Miami University and did my first master's in
5 special education/mental retardation. My second
6 master's was in school psychology. My specialist,
7 educational specialist was in school psychology.
8 And at that point, I had substitute -- substituted
9 in classes for kids with mental retardation for
10 another two years and then I became a school
11 psychologist, did a year of that and my internship
12 in Cincinnati and then I went to the University of
13 New Mexico and did my Ph.D. in special
14 education/mental retardation, and I have been a
15 professor of special education now for 16 years.
16 Q During your time at Charleston during your last
17 16 years, what exposure, if any, have you had with

18 mentally retarded adults in general and mentally
19 retarded adults in correctional facilities?
20 A When I was doing my Ph.D., I worked for a woman
21 who -- well, with a woman. She was my
22 dissertation director and the chair of my program.
23 And her name is Ruth Luckasson, L-u-c-k-a-s-s-o-n.
24 And Ruth is the director of the Terminology and
25 Classification Manual for the American Association

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7

1 on Mental Retardation. And she asked me -- I
2 actually was working with her on separate cases
3 dealing with people on death row because Doctor --
4 Professor Luckasson is also a JD, lawyer. We were
5 at the time working on the Johnny Paul Penry case
6 that went before the Supreme Court in 1988.
7 Actually '89. Excuse me. January 11th, 1989, and
8 I did that for -- I worked with her for the
9 three years that I was at the University of New
10 Mexico, and then when I came to College of
11 Charleston, I continued to work on issues,
12 specifically the death penalty and mental

13 retardation, and I have done considerable research

14 in that area.

15 Q How many cases would you say overall have you been

16 involved in related to the issue of mental

17 retardation vis-a-vis an incarcerated adult?

18 A Overall?

19 Q Overall.

20 A I have been contacted probably about 120 times.

21 Q And of those 120 times, do you know how many times

22 you've testified?

23 A I have testified about 35 times total.

24 Q In court?

25 A Uh-huh. Yes.

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8

1 Q And that's in mental retardation proceedings, I

2 believe, and post-conviction proceedings also; is

3 that correct?

4 A Yes, that's correct.

5 Q Of the times you did not testify, are there

6 reasons you didn't testify?

7 A Well, sometimes the cases were settled and I

8 didn't have to testify. These were all criminal
9 cases. I only testified in one civil case and
10 that was a case of a man who was wrongfully
11 convicted. And I had been on his panel -- I had
12 been on his team during the proceedings to get him
13 a pardon which was achieved. The -- the cases
14 that I didn't testify in for reasons of concern
15 were that I did not feel that there was enough
16 evidence or background to suggest that the person
17 was mentally retarded.

18 Q Can you give us an assessment, perhaps,
19 percentage-wise or otherwise, of how often have
20 you turned down cases to testify or cases to
21 participate in because the individual wasn't
22 mentally retarded versus how many cases you have
23 testified where someone's mentally retarded?

24 A Just about 50 percent.

25 Q And, of course, you're being paid to be here

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1 today?

2 A Correct.

3 Q Do you recall how it came to be that you were
4 brought into this case?

5 A I've done some work in Indiana prior to this. I
6 presented at the Indiana Public Defender's Office
7 on a couple of occasions to -- training basically
8 on what mental retardation is and how it affects
9 people in the criminal justice system and some of
10 the basics of how we as professionals in mental
11 retardation view Atkins versus Virginia. I was
12 contacted by a woman named Paula Sikes (phonetic)
13 who asked me if I would be interested in doing
14 that, and I said sure. And apparently you
15 contacted Paula when you got this case and she
16 told you about me.

17 Q Okay.

18 A And the rest is history.

19 Q Did I extract any promises from you before you got
20 involved in this case regarding a result?

21 A No.

22 Q Have you made any promises to us regarding any
23 results?

24 A No.

25 MR. KASICH: If I can approach, your Honor.

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10

1 THE COURT: Yes.

2 MR. KASICH: The witness, I mean.

3 [DEFENDANT'S EXHIBIT 1 IS MARKED.]

4 BY MR. KASICH:

5 Q Sir, I'd like to hand you what's been marked for
6 identification purposes only for purposes of this
7 hearing Defendant's Exhibit Number 1. Can you
8 identify what that document is.

9 A It appears to be a recent copy of my curriculum
10 vitae.

11 Q This will detail and review -- probably in more
12 detail than we've already gone into what your
13 background is; is that correct?

14 A That's correct.

15 MR. KASICH: Move to admit into evidence,
16 your Honor, Defendant's Exhibit Number 1.

17 THE COURT: Any objection?

18 MR. BURKE: State has no objection.

19 THE COURT: Show it admitted for purposes of
20 this hearing.

21 [DEFENDANT'S EXHIBIT 1 IS ADMITTED.]

22 BY MR. KASICH:

23 Q Did you indicate how many years of experience you
24 had dealing with mentally retarded individuals in
25 the classroom?

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11

1 A I was a classroom teacher for five years. I have
2 been a school psychologist as a full-time school
3 psych, I was a school psych for a year when I
4 started my Ph.D.; and as a teacher assistant when
5 I first started in the field, I was a teacher
6 assistant for two years.

7 Q Are you certified by any state or professional
8 association?

9 A Yes, I am.

10 Q And what are those certifications or --

11 A State of Ohio certification as a school
12 psychologist and as a special educator, special ed
13 teacher. Certified as an educational
14 diagnostician by the State of New Mexico,
15 certified as a special ed teacher and as a -- no,

16 wait a minute. I don't think I did get my special
17 ed certification in South Carolina. I'm certified
18 as a school psychologist in South Carolina.

19 Q Are you certified by any national organizations?

20 A Yes, I am, by the National Association of School
21 Psychologists.

22 Q Do you have any -- do you know what the AAMR is or
23 what was formally called the AAMR?

24 A Yeah, the American Association on Mental
25 Retardation, yes.

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12

1 Q And what are they called, now?

2 A The American Association on Intellectual
3 Disabilities. Intellectual and Developmental
4 Disabilities, excuse me. They just changed it
5 last summer.

6 Q Do you have any affiliation with that
7 organization?

8 A I'm a fellow of the American Association.

9 Q And have you worked with them?

10 A Many times.

11 Q And what have you done with them?

12 A I have been on ad hoc committees. I've done
13 research -- I'm currently a consulting editor on
14 the Journal of Mental Retardation which is the --
15 one of the two major publications that AAMR puts
16 out.

17 Q Is there any significance of being certified as a
18 nationally certified school psychologist by the
19 National Association of School Psychologists?

20 A I took a test and passed it and that I adhere to
21 the rules and regulations of the -- of the -- oh,
22 dear. This thing went dead.

23 Q Just move the mouse and --

24 A There we go.

25 Q Other than mental retardation, do you have any

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13

1 other interests or expertises, areas of expertise?

2 A Primarily college education, I do a lot of work
3 with my students. I research an inclusion of
4 children with mental retardation into the regular
5 classrooms, some of the pluses and minuses of

6 that. I have been involved in several legal cases
7 that dealt with people with mental retardation who
8 are involved in the criminal justice system in one
9 situation or another and I -- I do a lot of pro
10 bono work in that.

11 Q Do you have any other areas that you research in,
12 do research in?

13 A Primarily assessment in mental retardation and
14 criminal justice and inclusion.

15 Q And have you been associated with any other
16 colleges or universities other than the ones you
17 have already given us?

18 A Ohio University, Miami of Ohio, University of New
19 Mexico and College of Charleston are the primary
20 schools that I have been involved with.

21 Q And you've taught courses there; is that correct?

22 A That's true.

23 Q Courses in?

24 A At the last -- at the latter three. Miami U, UNM
25 and College of Charleston.

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1 Q Have you had any -- have you authored any academic
2 or professional or scholarly papers of any kind?

3 A Yes, I have.

4 Q And what are those?

5 A Primarily those are papers about mental
6 retardation and the death penalty and mental
7 retardation and inclusion in the classroom.

8 Q And, in fact, one of your works was cited in
9 Atkins?

10 A Yes. Atkins versus Virginia, I'm cited an article
11 I -- that I was coauthor on, lead author on in
12 1997.

13 Q Have you presented any paper that you have written
14 to any academic, professional or scholarly
15 organizations?

16 A Yes.

17 Q Which ones?

18 A National Association of School Psychologists,
19 American Association on Mental Retardation,
20 American Psychological Association, The
21 Association for Severely Handicapped which we're
22 not supposed to call it anymore. It's called

23 TASH, T-A-S-H, and Council for Exceptional
24 Children, CEC, and several others. I don't
25 remember all of them. I did -- I have done a lot

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15

1 of presentations for public defenders and I have
2 done a couple -- one presentation for Prosecutors'
3 Association.

4 Q And where was that?

5 A The Prosecutors' Association?

6 Q Yes.

7 A Florida. It was a great offer.

8 Q I'm sorry?

9 A It was a great offer, Florida.

10 Q Did you recently address the legislatures?

11 A I -- I just -- a group of public defenders on
12 behalf of the Florida state legislature.

13 Q What was the purpose of that?

14 A To train them about the definition of mental
15 retardation and adaptive skills.

16 Q Are they contemplating new legislation there?

17 A To my knowledge, the current statute is being

18 questioned, but I'm not sure. I don't know that I
19 would say they are contemplating new legislation.
20 Q Other than Atkins, have your works been cited in
21 professional, academic or scholarly publications?
22 A Several texts, several scholarly publications and
23 journals. To my knowledge, Atkins is the only
24 legal case that cited one of my articles, but I
25 don't know.

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16

1 Q And have they been published in professional
2 journals?
3 A Yes.
4 Q What are those?
5 A The Mental Retardation Journal which is, like I
6 said, the AAMR publication, practice-oriented
7 publication, and I have also published in
8 Champion. I have published in Mental and
9 Physical -- Mental and Physical Disability Law
10 Reporter. Several others. They're in my vitae.
11 I don't have it with me right now.
12 Q Are you a member of any professional societies or

13 organizations?

14 A Yes, I am.

15 Q And what are those?

16 A The American Association on Mental Retardation,

17 the American Psychological Association, but I

18 think I'm lapsed right now. I need to rejoin.

19 The Council for Exceptional Children and National

20 Association of School Psychologists.

21 Q Have you received any professional honors or

22 awards or any recognition in your field?

23 A Yes, I have been honored by the Council -- the --

24 the Board of Disabilities and Special Need in the

25 State of South Carolina and the County of

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17

1 Charleston as the Breaker of Barriers Award which

2 was very nice. And then I also won another award

3 also from -- from them. I can't remember what it

4 was called, though.

5 Q Anything from the -- Was it Advocate of the Year?

6 A Advocate of the Year for them. That's right.

7 That's what it was.

8 Q Anything from the AAMR?

9 A That was actually from the -- the Advocate of the
10 Year award was from the Advocacy and Coalition
11 Partnership down in Charleston.

12 Q Could you tell us some of the cases that you had
13 testified in recently, where they were?

14 A Oh. I have testified in Missouri, Florida. I
15 testified couple years ago in Indiana. Twice, in
16 fact. Arizona. Let's see. South Carolina
17 several years ago. Texas. I have testified in
18 federal and state court.

19 Q Didn't you also have the kind of neat experience
20 of being at the Supreme Court when Penry was
21 argued?

22 A I was -- I was involved in the writing of the
23 brief, the amicus brief and went to the Court's
24 hearing on that, yes, but I didn't testify.

25 Q Now, sir, is there any difference --

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18

1 MR. KASICH: Well, first of all, I would like
2 to move to have the Court recognize Mr. Keyes as

3 an expert in the field of mental retardation.

4 THE COURT: You may continue, Mr. Kasich.

5 BY MR. KASICH:

6 Q Is there a difference between what a clinical
7 psychologist does and educational psychologist?

8 A Well, yeah. A clinical psychologist goes into
9 more depth in the area of mental illness than an
10 educational psychologist would. An educational
11 psychologist can define that a child or a young
12 adult is emotionally disabled but doesn't
13 typically say well, he has paranoid schizophrenia,
14 et cetera, et cetera. It usually is this is a
15 child who has emotional disabilities and qualifies
16 under the law for assistance in schools. People
17 who are mentally retarded, learning disabled and
18 emotionally disabled in schools, invariably school
19 psychologists and educational psychologists are
20 the people who originate that diagnosis.

21 Q Would you in your opinion consider that there's
22 kind of something called a specialty relating to
23 mental retardation?

24 A Well, I think that psychologists are not always --
25 clinical psychologists are not always

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19

1 well-trained -- and not that they're not
2 well-trained, they're just not always given a good
3 deal of training specifically in the area of
4 mental retardation.

5 Q What is mental retardation?

6 A Well, I have a slide show that I would like to
7 refer to. Is that all right?

8 Q Do you believe it would aid the Court in perhaps
9 understanding your testimony better?

10 A I hope so.

11 THE COURT: You may.

12 THE WITNESS: Thank you.

13 BY THE WITNESS:

14 A Over the years, your Honor, the American
15 Association on Mental Retardation has been
16 acknowledged experts in the field of mental
17 retardation as the oldest organization in the
18 country that is specifically devoted to one
19 disability; that being mental retardation. The
20 definition of mental retardation has been evolving

21 since -- the first one that I know about was Edgar
22 Doll's diagnosis of mental retardation in 1939.
23 He was the first one who brought out the
24 three-prong idea; that being that there are three
25 parts to the definition. That definition has

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20

1 evolved for years and currently the definition
2 that the 2002 Terminology and Classification
3 Manual states is this one right here which talks
4 about significant limitations in both intellectual
5 functioning and adaptive behavior and also
6 originates prior to age 18.

7 There are five assumptions specific to the
8 definition of mental retardation and must be
9 considered prior to any kind of diagnosis. These
10 are the assumptions. I draw the attention of the
11 Court to the third diagnosis -- the third
12 assumption which is that an individual does have
13 weaknesses. There's no question people with
14 mental retardation have significant weaknesses in
15 most areas, but they also do coexist with

16 strengths and that the -- the diagnostician must
17 consider those strengths in determining whether or
18 not a person is mentally retarded. One -- one of
19 the things that's most important to remember about
20 that is that people who are not mentally retarded
21 and don't know anything about it are inclined to
22 think that people with mental retardation are
23 incapable of doing anything. They always think
24 that the people with mental retardation are those
25 cute little kids with Down's Syndrome and crusty

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21

1 noses, and that is not the case. That people
2 with -- with mental retardation can look just like
3 you and I.

4 The rest of these assumptions specifically
5 refer to the fact there has to be a fair and
6 unbiased assessment and that it has to consider
7 cultural and linguistic factors. The three-prong
8 definition specifically states that the
9 intelligence level has to be two standard
10 deviations below the mean; that being on an

11 individualized test of intelligence. In this
12 country, the basic individualized tests of
13 intelligence are the Wechsler Adult Intelligence
14 Scale or the Wechsler Intelligence Scale for
15 Children which is in the fourth edition. The
16 Wechsler Adult Intelligence Scale is in the third
17 edition. The next one is the Stanford-Binet which
18 is in its fifth edition and the next one is a
19 thing called the Reynolds, R-e-y-n-o-l-d-s,
20 Intellectual Assessment System which is a
21 relatively new and very, very brief test. It
22 takes about 25 minutes to give it.

23 The standard deviation has to be considered
24 within the range of the standard error of measure
25 which is to say that no score is a true score. We

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22

1 assume logistically that a person's true score
2 falls somewhere plus or minus the standard error
3 of measure in any particular test, and each test
4 has its own standard error of measure. In the
5 full scale IQ, in the full scale IQ and the

6 composite score, the rough standard error of
7 measure is five points plus or minus the score
8 that's achieved.

9 The adaptive skill deficits have to be
10 considered within the social and cultural norms of
11 the age and cultural group. Peer group, rather.
12 And have to be considered on a conceptual,
13 practical and social basis. Any particular
14 diagnosis of mental retardation, you have to look
15 at the fact that some people have strengths in
16 getting along with other people and yet don't
17 understand the practicalities of life and the
18 conceptualizations of life at an adult level or
19 even on a child's level. The general rule
20 in working with children is that their adaptive
21 skills have to be roughly half their age up until
22 age 12 and then it's typically considered anything
23 below 70. The age of onset in the State of
24 Indiana is considered 22 which is, like I said,
25 Indiana law. The American Association on Mental

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1 Retardation is a little more strict than that at
2 18, but they do consider the gestation period as
3 part of the possible time of diagnostics.

4 Q Before we go into this.

5 A Sorry.

6 Q That's all right. That's all right. Just to make
7 sure. Now, you have given the mental retardation
8 explanation you have given now. You have given,
9 of course, psychoeducational evaluations and
10 examinations and provided as you mentioned expert
11 testimony in state and federal courts; is that
12 correct?

13 A That's correct.

14 Q And you have been qualified to give expert
15 testimony and opinions; is that correct?

16 A That's correct.

17 Q Now, getting to the area of having defined what
18 mental retardation is, where do we go from there?
19 How do we make a determination of mental retard --
20 whether or not someone is mentally retarded?

21 A Well, originally, it usually is in the schools
22 that someone says this child is having great
23 difficulty in the classroom. He is not

24 functioning at the same level as his peers. And
25 when that happens -- now, it's a lot different

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

24

1 than it used to be. Now, they have what's called
2 a prereferral intervention team which is
3 appropriately named PIT in which case the
4 teachers, both regular and special as well as the
5 school psychologist and usually administrators and
6 sometimes even parents, sit down and talk about
7 some of the things that are problematic and they
8 also talk about what's being done in the classroom
9 to try to help this particular child. This is in
10 an effort to try and keep so many children from
11 being diagnosed as children with special needs.
12 We have an enormous number of children in this
13 country who are diagnosed as special needs,
14 particularly learning disability and also
15 emotionally disabled. The diagnostic principles
16 of mental retardation are so strict typically that
17 we are usually considered underdiagnosed, that
18 being a thing that I'll explain later when we talk

19 about the normal curve. Does that explain your
20 question?

21 Q Well, I think I was trying to segway you into the
22 next slide.

23 A Oh, okay. Well, in that sense, the clinical
24 judgment of the person who is the diagnostician,
25 that being either school psychologist or clinical

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

25

1 psychologist, typically looks at the intelligence
2 that is usually determined by a test. In fact, it
3 has to be determined by a test. The adaptive
4 skills which according to the AAMR also has to be
5 determined by a test and the date of onset or the
6 age of onset of the individual. That is
7 required -- that requires a certain amount of
8 clinical judgment.

9 Q And what are the components of that clinical
10 judgment?

11 A Well, clinical judgment as noted on the -- over on
12 the slide show simply says that it's rooted in a
13 high level of clinical expertise and experience

14 that emerges from the data, and the components
15 specifically are training in mental retardation,
16 primarily taking courses about what mental
17 retardation is and how it's diagnosed, direct
18 experience with people who have mental
19 retardation, familiarity with the individual being
20 diagnosed and his or her environment and also
21 extensive relevant assessment gathering.

22 Q And those components come right from AAMR; is that
23 correct?

24 A That is correct.

25 Q What isn't clinical judgment?

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

26

1 A Clinical judgment is not a justification to do
2 abbreviated evaluations, and that is one of the
3 biggest scourges that I can think of. I don't
4 understand why it's considered okay to give an
5 abbreviated battery of tests to determine whether
6 or not a person has a disability that is going to
7 affect the rest of their lives. It is not an
8 option for stereotype and prejudices. Clearly,

9 there are people who are often overdiagnosed as
10 mentally retarded such as people of color and
11 people of different races. People of different
12 cultural backgrounds as well. It's not a
13 substitute for -- it's not okay to say this is a
14 person with mental retardation because I don't
15 have time to test and make sure that this is a
16 person with mental retardation. You have to do
17 the entire battery. And it's not an excuse for
18 incomplete or missing data in the assessment. If
19 you don't have the data, you've got to find it.

20 Q So how would you say an evaluation should be done?

21 A Well, an evaluation has to start with an
22 intelligence test. If you -- when you get the
23 permission to do the evaluation on the individual,
24 you decide which test you're going to use based
25 upon several factors. First of all, has the

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

27

1 person been given the test before. Second, what
2 tests will give you the information that will give
3 you accurate diagnostic information and the best

4 for that person's particular disability. For
5 example, if you're looking at learning disability
6 as a possible diagnosis, you can give the RIAS
7 because it will give you a good quick indicator of
8 the person's overall intelligence. It's not an
9 abbreviated test. It's just a short test. That's
10 enough for that particular issue because we're
11 looking at the possibility of a learning
12 disability as being high or normal intelligence
13 versus low achievement functioning in reading and
14 writing and those things. With mental retardation
15 since it is an overall category that is -- has
16 potential to affect the rest of that person's
17 life, you give one of the two major tests
18 typically, and that would be either the
19 Stanford-Binet or the Wechsler Intelligence Scale.
20 That's the first part.

21 Q Is that part of what you would call a
22 psychoeducational assessment?

23 A It is.

24 Q Now, is it necessary for you in doing the
25 psychoeducational assessment -- and I guess you're

1 a psychoeducational specialist; is that correct?

2 A That's correct.

3 Q Okay. Is it necessary for you to actually meet
4 and observe the person when you're conducting
5 these examinations?

6 A It is.

7 Q And why is that?

8 A Because it is such a serious diagnosis. It is
9 such an important diagnosis that if you are
10 flippant about making a diagnosis or you can say,
11 you know, I've looked at all this data, I've
12 looked at all the testing that's been done. I
13 feel that it's safe to say this person's mentally
14 retarded based upon other people's ideas. I don't
15 think that's appropriate behavior for such an
16 important diagnosis.

17 Q And can you reliably perform a thorough
18 psychoeducational evaluation without meeting and
19 observing?

20 A No, you cannot.

21 Q And are you familiar with the diagnostic standards

22 to conduct a professionally adequate
23 psychoeducational evaluation?

24 A Yes, I am.

25 Q And what are those?

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

29

1 A Again, we go back to the achievement -- the
2 intellectual tests, the adaptive skill tests, I
3 include an achievement test because achievement
4 school record, basic reading, writing, arithmetic
5 skills are considered part of the functional
6 adaptive skills, and so I include that as well and
7 also checking the records for age of onset
8 information.

9 Q We've talked -- we've talked briefly about IQ
10 testing. What does IQ testing tell you? I mean,
11 how do you measure it, and, what, do you use a
12 scale of some kind or --

13 A Well, the Wechsler scale is the one that's most
14 common. And as you see on the overhead, the
15 verbal IQ scale is considered to be the better
16 indicator of intelligence because when you give

17 the test, there are six subtests in each, the
18 verbal and the performance. That's in the new
19 one. The new one which is now almost 10 years
20 old.

21 Kaufman in his work in 1984 found that the
22 Wechsler verbal scale was considered a better
23 indicator than the performance scale primarily
24 based upon factor analysis work that was done on
25 the different subtests. What finally came to pass

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

30

1 was that there were four subtests in the verbal
2 scale that were considered to be high loaders on
3 "g" which is the theory that the test itself is
4 based upon. All tests are based upon theory, and
5 this particular one is called the "g" factor
6 theory. "G" is considered the general factor of
7 intelligence, and through factor analysis they
8 have determined that information, vocabulary,
9 comprehension and similarities are all high
10 loaders on "g", that they are all good indicators
11 of intelligence versus the other two which is

12 arithmetic and digit span, both of which are
13 considered -- well, one's considered a medium
14 loader on "g" and the other is a low loader on
15 "g".

16 Q And ultimately when you get a number for this IQ,
17 it means something?

18 A Yes.

19 Q Okay. And how do we come up with this concept of
20 IQ historically?

21 A Well, historically, the first test was the -- the
22 Stanford -- excuse me, the Binet-Simon Scale in
23 France in 1905, and that was done giving
24 individuals questions that they had to answer.
25 Usually they were questions that were verbal

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

31

1 oriented and didn't ask the person to do much more
2 than maybe draw a square or write their name or
3 something to that effect. And the idea of -- the
4 minister of education went to a guy named Alfred
5 Binet and said come up with a test that will
6 legally keep kids who are stupid from going to

7 school, and that's what he did. And he came up
8 with what's called the Binet-Simon Scale, and the
9 idea was that each one of those questions was
10 worth so many months of intelligence and he came
11 with up with a total number of questions that the
12 person got correct. You'd multiply that -- those
13 questions by the number of months that was
14 variable for each one and you put that down as the
15 person's mental age and then you divided that by
16 the number of months that the person has as their
17 chronological age. The formula was mental age
18 divided by chronological age times one hundred
19 equals IQ. And the reason it was called an
20 intelligence quotient is because there is a
21 division problem in there, and the answer to a
22 division problem is called the quotient. I'm
23 sorry. I am sorry. The answer to a division
24 problem. Okay. That was called the mental age
25 concept. That changed in the late '40s with a man

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 by the name of David Wechsler, W-e-c-h-s-l-e-r,

2 and David Wechsler came up with the
3 Wechsler-Bellview Scale. He was a doctor at
4 Bellview Hospital in New York, and he came up with
5 this scale that instead of looking at a mental age
6 concept, he decided that he would test a whole lot
7 of people that represented a good bit of the
8 population and he would deviate that -- that IQ
9 from how much deviation there was from what
10 considered -- what was considered to be normal,
11 and that was the beginning of what we now call the
12 deviation IQ.

13 Q And it's also called the Wechsler Adult
14 Intelligence Scale?

15 A Well, that was -- the Wechsler-Bellview Scale was
16 the first one. Then the Wechsler Intelligence
17 Scale and then the Wechsler Adult Intelligence
18 Scale came from that.

19 Q Okay. And is that your representation of that
20 Bell curve?

21 A The Bell curve was brought into play in that
22 specific testing situation. When they were
23 developing the test, they took a stratified
24 sample, and it's gotten better over the years,

25 obviously, your Honor, because early they didn't

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

33

1 include people of color. They didn't include
2 people with low intelligence. They included
3 geniuses and they included average Joes off the
4 street. And the original Bellview scale I think
5 only had like 800 people in its sample which is a
6 pretty small sample. The current one has about
7 5,000 people, and it has to include people of
8 color; it has to include people of different
9 cultural background; it includes educational
10 background; it includes demographic background
11 for, say, income and professions. It includes
12 51 percent women, 49 percent men because there are
13 more women in the population at large. And what
14 they do is they take the scores of these people
15 they put in the sample and they force them into
16 the normal curve by doing statistical devices that
17 are designed to give us a regular population
18 picture so that overall we're looking at
19 approximately 2.27 percent of the population

20 falling below the second standard of deviation
21 which is 70, and 2.27 percent of the population
22 falling above the 130 mark. Geniuses actually
23 doesn't start until 140 supposedly, but you've got
24 two-thirds of population, 68 percent falling one
25 standard deviation below to above the mean.

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

34

1 That's the vast majority of the population. Then
2 you've got actually 13.59 percent of the
3 population that falls from 70 to 85. 2.27 percent
4 of the population falls between below 70 and above
5 130. That's theoretically. Okay. You also
6 notice that the -- the delineation here goes from
7 70 to 55 because the standard deviation is 15
8 points on both now the Wechsler and the Binet.
9 I'm sorry. B-i-n-e-t. On both the Stanford-Binet
10 and Wechsler, the standard deviation is 15 points.
11 It used to be 16 on the Binet. It's changed with
12 the new fifth edition. 70 to 55, 15 points,
13 approximately 2.27 percent of the population fall
14 below that, but two percent falls here, so it's

15 actually less than half a percent falls below 55.
16 It's a very small population. And, of course, the
17 next one down would be 40, the next 25 and the
18 next one 10. But the way that it typically has
19 been historically 70 to 75, considering the
20 standard error of measure, would be mildly
21 retarded. 55 to 40 would be moderately or
22 trainably mentally retarded. 40 to 25 would be
23 severe and 25 and below would be profound.
24 Q These tests that you're talking about that are
25 used to try to give you an IQ number, are these --

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

35

1 would you consider these subjective tests or
2 objective tests?
3 A They -- the people who design them and the people
4 who give them strive very hard to make them as
5 objective as possible.
6 Q Are there any subjective components to them
7 however?
8 A There are some in clinical interpretations, but
9 the manuals of both the Binet and the Wechsler are

10 very, very stringent about what you are allowed to
11 do and what you're not allowed to do.

12 Q Now, does it indicate on that scale or can you
13 tell us, is there any information regarding either
14 more males or females that are considered to be
15 mentally retarded?

16 A More males by far are considered to be mentally
17 retarded.

18 Q Any idea what causes mental retardation?

19 A There are many possible causative factors. The
20 causative factors are broken into three parts;
21 prenatal, perinatal and postnatal. The prenatal
22 causes are very often syndromatic; for example, if
23 the mother was an alcoholic during pregnancy,
24 Fetal Alcohol Syndrome can cause mental
25 retardation. There are also genetic factors such

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

36

1 as Down's Syndrome. There are numerous of those,
2 more than I can possibly tell you. Down's
3 Syndrome is the most common genetic factor that
4 causes mental retardation, however. The more

5 severe and profound levels of mental retardation
6 are caused by genetic factors. We have determined
7 that approximately 70 percent of people with
8 severe and profound mental retardation are caused
9 by genetic factors such as chromosomal
10 abnormalities.

11 Q Do you and other psychologists for that matter
12 rely on textbooks or authoritative treatises in
13 helping diagnose these mental conditions and
14 specifically those with MR?

15 A Yes.

16 Q And what are those?

17 A There are two. Primarily the American Association
18 on Mental Retardation's "Terminology and
19 Classification Manual" which is in the 10th
20 edition right now, the 2002 definition. And the
21 other is the American Psychological -- or excuse
22 me, the "American Psychiatric Association's
23 Diagnostic and Statistical Manual," fourth
24 edition, better known as DSM-IV.

25 Q Is there one that's more universally accepted than

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 the other in using it to diagnose?

2 A That's hard to say. Depending upon the use and
3 the purpose, probably DSM. The American
4 Association on Mental Retardation, however, has
5 been acknowledged by the American Psychiatric
6 Association as the experts in mental retardation.

7 Q And you had kind of a chance to look at some of
8 the Indiana case law and what have you. What does
9 that tell you?

10 A Well, there still is some confusion and some
11 questions regarding what is mental retardation in
12 many areas, specifically what constitutes low
13 adaptive functioning to the extent that one could
14 be diagnosed as mentally retarded and what
15 constitutes intellectual functions and what tests
16 really prove mental retardation in both intellect
17 and adaptive skills.

18 Q Maybe I missed it. I was looking for something.
19 Did you happen to tell the Court what you estimate
20 to be the prevalence of mental retardation in
21 American today?

22 A It's actually estimated just about one percent.

23 It's lower than the theoretical basis would make
24 you think, and that's true both in schools and
25 after.

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

38

1 Q Now, I would imagine there's a difference between
2 mental retardation and something called low
3 intellectual function?
4 A Yes, there is.
5 Q And what is that difference?
6 A A person can be low intellectual functioning to
7 the extent that they could have an IQ, say, of 60
8 or 65 which is significantly low but still not be
9 mentally retarded because of their ability to
10 adapt to their environment and their situation.
11 I've known several situations where one of the
12 reasons I would not diagnose was that the person
13 was adaptive, that the person did adapt to their
14 environment and adapted adequately to the point
15 where they didn't need to be diagnosed as mentally
16 retarded.
17 Q Can you tell us what, if any, difference there

18 would be between a person that is -- has mental
19 retardation and one that doesn't have mental
20 retardation?

21 A Well, if you looked at it like -- an analogy, you
22 can say a genius was a Rolls-Royce and a normal
23 person, regular functioning person would be a Ford
24 and a low intellectual person, say, between 75 and
25 85 might be a Yugo, a person with mental

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

39

1 retardation would be sort of like a skateboard.

2 It's -- it's significantly severe.

3 Q Can you tell if someone is mentally retarded
4 simply by looking at him or her?

5 A Never.

6 Q All right. Now, you talked about IQ testing as
7 far as giving a level of intelligence?

8 A Uh-huh.

9 Q Okay. How is a person assessed for mental
10 retardation aside from -- or in addition to IQ
11 testing?

12 A The second prong of the -- of the definition is

13 the adaptive skills functioning of the individual,
14 and that is done in several ways. First and
15 foremost, looking at the record, what does the
16 child do, what do we know that the child has done
17 in the past, that the individual has done in the
18 past. We would look to see if that person has
19 difficulty with getting along with other people.
20 Does that person have difficulty in getting along
21 on their own. Is that person capable of
22 interacting and behaving like other people the
23 same age or in the same cultural group. For
24 example, we used to have a thing that was called
25 the six-hour retarded child, and, in fact, it

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

40

1 still exists. These are children who are often
2 people of color who are considered to be retarded
3 at school, but when they get home, they're just
4 like everybody else. And that's because they
5 adapt very well to their own environment. And
6 with that -- when that happens, that's one of the
7 reasons why in the last -- or in the '92 and the

8 '02 definitions, AAMR has those assumptions that
9 say you've got to consider what's going on at home
10 before you can say that a person's retarded.

11 Q What's the state of the art in this type of
12 testing? How well normed or conceived are these
13 tests for adaptive behavior and for IQ, for
14 malingering?

15 A I firmly believe that adaptive behavior scales are
16 getting better. I don't think there's any one
17 that's really wonderful yet. I in my testing, I
18 like to use a thing that's called the Independent
19 Living Scale, and the Independent Living Scale is
20 a test that asks the person how well they are able
21 to deal with money, how well they're able to
22 deal -- and he actually has to show me in my
23 testing how well he is able to determine change
24 for a specific amount. For example, I give them
25 \$10 and he has to come back with \$6.75 in change

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

41

1 on something that costs \$3.25, et cetera. It asks
2 them to look up a number in a phone book. It asks

3 them to show how they would dial that number. It
4 asks them many things about how well they would
5 take care of their health if they were sick, what
6 kinds of numbers they were looking at if they had
7 to take their temperature with a thermometer.
8 It's a very practical test of adaptability and
9 adaptive skills whether or not that person really
10 knows what they're doing personally, and that's
11 one of the reasons why I like to give it. It's
12 from 1996.

13 Q Are you also involved in developing new tests?

14 A I have been asked to be involved in a couple of
15 different testing situations. With my current
16 level of work, developing a test is such an
17 enormous amount of work. I don't have time to do
18 a whole lot of it. I am, however, trying to come
19 up with some techniques of looking at what kinds
20 of behaviors we see -- in specifically in adults
21 on death row with mental retardation. That's one
22 of my projects.

23 Q I think we've talked about how or have we talked
24 about how mental retardation is diagnosed?

25 A Well, like I said, I don't think we finally

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

42

1 finished it. Once you finish the IQ test, you go
2 from there to the adaptive skills testing. And in
3 schools and actually afterwards, when you are
4 talking to the individual, you certainly can do a
5 self-report scale on certain tests. The Vineland,
6 V-i-n-e-l-a-n-d, which is one of the older tests.
7 I talked earlier about Edgar Doll, D-o-l-l. He
8 developed the Vineland at the Vineland School or
9 helped to develop the Vineland test at the
10 Vineland School in New Jersey. What we have now,
11 what we're looking at now more is tests such as
12 the Scale of Independent Behavior and the Adaptive
13 Behavior Assessment Scale -- Systems, rather,
14 which is in its second edition. The Scale of
15 Independent Behavior is in a revised edition as
16 well. Those are two tests that allow the person
17 to do a self-report and then you also have to get
18 other respondents to give you information about
19 that individual as much as possible. Plus, you
20 have to look at the record. The big issue there

21 is whether or not two or more areas of adaptive
22 skills are significantly low enough to consider it
23 to be retarded, and the only way that that would
24 work is if the person has an IQ under 75.

25 Q So I think you mentioned that there's three

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

43

1 conditions, then; is that correct?

2 A Correct.

3 Q And that's intellectual deficit in developmental
4 years, inability to function adequately in social,
5 occupational environments that requires some sort
6 of independent and self-sufficient living and the
7 75 or less IQ; is that correct?

8 A And it has to be before the age of 18.

9 Q Okay.

10 A Or in State of Indiana, 22.

11 Q Developmental years?

12 A Right.

13 Q Has there ever been a rigid cutoff at 70?

14 A Well, you know, this is one of the problems
15 between APA and AAMR or AAIDD. One of the

16 problems is that American Association on Mental
17 Retardation has always said that it is appropriate
18 to consider the standard error of measure which is
19 that plus or minus five points. Yes, two standard
20 deviations below the mean is important, but
21 because we can't be absolutely certain of the true
22 score of that individual, we have to consider what
23 the band of confidence is. That band of
24 confidence is typically considered plus or minus
25 five points so that a person can be considered

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

44

1 mentally retarded if they have an IQ between 70
2 and 75. That could be mental retardation,
3 depending upon the level of adaptive skills. AAMR
4 has typically said that a person's adaptive skill
5 level can be as much if not more important than
6 their intellectual level simply because that is
7 what sets them apart from other people most often.
8 Their adaptability or their ability to act like
9 others. The American Psychiatric Association in
10 DSM-IV also notices that the -- the plus or minus

11 the standard error of measure is important, no
12 question. But at the same time, they have also
13 tried to be a little bit more rigid in their
14 diagnostic procedures. So sometimes they allow
15 it; sometimes they don't, depending upon who is
16 the clinician giving the test and interpreting.

17 Q When you're looking at these things, do you look
18 at one score, or do you consider all the IQ
19 scores?

20 A Oh, you have to consider everything that's ever
21 been done with the individual, but some -- some
22 IQs certain carry more weight than others.

23 Q Would one score, say, above 75 mean a person
24 doesn't have mental retardation?

25 A No, not necessarily.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

45

1 Q What does it mean?

2 A It means that that one person got a score of --
3 above 75 by a clinician who may or may not have
4 been able to do the testing properly, who may or
5 may not have scored it correctly, who may or may

6 not be familiar with the test enough to make the
7 correct number or may have given a test that was
8 less than an appropriate test such as -- a lot of
9 schools give achievement tests like the
10 Metropolitan Achievement, Stanford Achievement,
11 California Achievement tests, Iowa Tests of Basic
12 Skills, et cetera, et cetera. A lot of schools
13 give these things, and these are just achievement
14 tests. These are tests of reading, reading
15 comprehension, word recognition, arithmetic, total
16 arithmetic, conceptual arithmetic, writing skills,
17 et cetera, et cetera. Grammar. All of these
18 tests are important tests for how a child
19 functions in school, yes, but some of them offer
20 what's called an IQ. They call it an IQ based
21 upon the scores that these people get on their raw
22 score of individual subtests, and what they've
23 done is they've taken the raw score that they get
24 from those subtests and they compare them to the
25 raw scores of people that they have IQs on. This

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 is a comparative analysis, and what they do is
2 what's called predictive validity. We predict
3 this person has an IQ based upon his achievement
4 scale. That is not an intelligence test. You
5 cannot call it an IQ, and very often school
6 districts report these things as IQs and they're
7 not.

8 Q Now, if someone scores -- are you familiar with
9 situations where someone might score a little
10 higher on their IQ tests because they've been
11 medicated in any way?

12 A If a person has a possible mental illness and
13 mental retardation which is considered to be dual
14 diagnosis and they are on, say, a psychotropic
15 drug that helps them to create a better niche with
16 reality, then it can, in fact, bring up their IQ
17 somewhat, yes.

18 Q Could you name some of those common psychotropic
19 drugs?

20 A Thorazine, Risperdal, Risperidone. Let's see.
21 Haldol. Sinequan. That's about all I can think
22 of right offhand.

23 Q Do you know if Mr. Britt's on any of these

24 medications?

25 A I believe he has been on those medications, some

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

47

1 of them.

2 Q Now, is there a way that an individual can

3 practice so they can raise their IQ score?

4 A Well, if they've been given considerable exposure

5 to the test over the years, it's possible you can

6 have what's called a practice effect. For

7 example, if you give the test on Monday and you

8 give the test again three weeks later, then

9 there's definitely a likely practice effect.

10 Q What about an IQ increasing over time from, say,

11 at early onset developmental years, be it 18 or

12 22, until later on in life when they're in their

13 40s or 50s?

14 A An IQ typically doesn't change more than 10 to 15

15 points in a person's entire life.

16 Q And when you have that 10- to 15-point change, is

17 part of the reason for that change perhaps the

18 Flynn effect in testing?

19 A The Flynn effect was so named based upon a man by
20 the name of James Flynn, Jim Flynn, who lives in
21 New Zealand who is in his mid 70s now. He's a
22 really lovely man. He came out with this very
23 clear problem that IQ tests tend to increase in
24 number over time that the person -- we used to say
25 that there was a regression to the mean and now it

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

48

1 appears that it's -- instead of regression to the
2 mean, the numbers of the overall IQs go up as the
3 test gets older. And the -- the general number
4 that Jim came up with is about a third to a
5 quarter -- quarter to a third of a point each year
6 so that a person's IQ can go up as much as five
7 points in 10 years, roughly.

8 Q And is that perhaps some sort of reflection of
9 society as a whole getting, quote, smarter?

10 A Not necessarily. It may be just that the person's
11 becoming -- the people are becoming more familiar
12 with the kinds of things that are included in
13 intelligence tests, naturally. I don't -- I don't

14 necessarily think given the last 20 years of my
15 experience in life that anybody's getting smarter,
16 but I do think that there are issues that people
17 do become more aware of over time that are
18 included in intelligence tests such as words, for
19 example, in the vocabulary tests.

20 Q When you talked about an increase in IQ over
21 years, a person -- persons, the people who have
22 that increase in their IQ, is it something that
23 just happens to them, or is there something that
24 has to aid them to get to the point where their IQ
25 has increased?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

49

1 A We don't see so much increasing in IQ. We see
2 more decreasing in IQ, but it's possible that a
3 person will do better on a test on a separate date
4 based upon their health, their physical situation,
5 their comfort in the situation, nervousness,
6 medications, et cetera. All of these things can
7 affect a person's functioning over time. The
8 Flynn effect is what most people use to explain

9 why people have higher IQs 10 years down the road.

10 Q All right. Perhaps I didn't ask it correctly or
11 clarify it well enough. Is it possible that there
12 are people who if they're given the right
13 circumstances, given the right environment, given
14 an environment when they're being cared for and
15 nurtured?

16 THE COURT: Wait up. You know what. What
17 are you doing, Mr. Britt? You're really causing a
18 distraction.

19 THE DEFENDANT: Oh, I didn't know.

20 THE COURT: Are you eating candy?

21 THE DEFENDANT: Yes. My sugar be low.

22 THE COURT: And that's fine, but don't chew
23 it, you know.

24 THE DEFENDANT: Okay.

25 THE COURT: You know, you can suck on your

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

50

1 candy, and that's fine.

2 MR. KASICH: I think it's the wrapper.

3 THE COURT: No, you were biting into it, and

4 I hear you bite into your candy. Just do me the
5 favor, if you will, show some respect to the
6 witness and certainly to me who is hearing this
7 hearing.

8 THE DEFENDANT: See, I don't understand
9 what's going on.

10 THE COURT: Well, it helps -- it helps me to
11 understand when you just don't chew your candy up.
12 Don't play with your wrapper.

13 THE DEFENDANT: I'm not playing.

14 THE COURT: Okay. So just don't chew your
15 candy, okay.

16 THE DEFENDANT: I understand, but I just
17 don't understand what -- what's going on.

18 THE COURT: That's why you have your
19 attorneys to help you understand. Thank you.
20 Mr. Kasich.

21 BY MR. KASICH:

22 Q Doctor, I was talking about situations that I have
23 had other witnesses testify to and that I'm
24 familiar with. Are those situations that you're
25 familiar with where someone's placed in a

1 nurturing type of environment or something like
2 that, their IQ could feasibly increase?

3 A There's no question that stability in a person's
4 life can improve their performance on life in
5 general as well as intelligence tests.

6 Q Okay. What about being in custody, incarcerated
7 in a typical U.S. penal institution, is that the
8 type of increase in stability that would cause an
9 increase in IQ?

10 A Well, it could, yes, but it's been my experience
11 that what incarceration does is it increases their
12 adaptive skills, typically.

13 Q And, of course, most people in prison would be
14 over the age of 18?

15 A Yes. Yes, sir.

16 Q Now, with this increase in adaptive skills or this
17 increase in IQ, can a person with a diagnosis of
18 mental retardation recover from mental
19 retardation?

20 A Well, it has been my experience that on occasion
21 somebody who is able to learn adaptive skills can

22 appear to be functioning within a more normal
23 range and would possibly be considered not
24 retarded. That's possible, and it has happened.
25 In fact, I've had students who were in my -- in my

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

52

1 program who were considered mentally retarded in
2 school but when they got out of school, they
3 were -- they were gainfully employed, managed to
4 live on their own with very little help from their
5 family or just a little bit of help from their
6 family; and because of that, they often have lost
7 their Supplemental Security Income, SSI, because
8 of the fact that they were making more money than
9 they were allowed to and in those circumstances,
10 they would not be considered mentally retarded
11 after having graduated the program. It is the
12 unusual case. Most people with mental retardation
13 are considered retarded for life.
14 Q Do these people with mental retardation that we're
15 talking about, the most people, do they have
16 certain behaviors and characteristics that are

17 common?

18 A Yes, they do.

19 Q What are those?

20 A Mental -- people with mental retardation, the

21 behaviors that you see most often are they

22 persevere in making mistakes, they do the same

23 thing again and again and again and again even

24 though it doesn't work for them. They will have

25 difficulty with short-term memory. That's the

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

53

1 biggest -- one of the biggest issues with mental

2 retardation is they do not remember things from

3 minute to minute, hour to hour, and that's both

4 visual information and auditory information. They

5 just don't remember well. You give -- for

6 example, if I were to say to you a phone number,

7 you'd remember it. If I were to say to a person

8 with mental retardation a phone number, they more

9 than likely would not remember it. They also have

10 difficulty with abstractions. They don't

11 understand very abstract scales such as -- skills

12 such as higher functioning math. They can do
13 multiplication, addition, subtraction, they can do
14 those things, but they have difficulty with
15 understanding fractions, decimals. It's very
16 common to have problems in those areas because
17 they're a little bit more abstract. They do not
18 generalize well. They don't go from one situation
19 into another situation and understand exactly how
20 to behave in both situations even though there may
21 be similarities. The best example I can give you
22 is I took my students to lunch every day in our
23 school, and we sat down, the first thing we did
24 was take those little pathetic napkins, the paper
25 ones that you can't even blow your nose on and put

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

54

1 them over our laps, right. We did this every day
2 for a solid year, and the next -- at the end of
3 the year, we went to a really nice restaurant
4 which we made enough money that we could afford to
5 take them to a really good restaurant, took them
6 to a place called the Brookwood Pottery in

7 Cincinnati and we sat down and on the table were
8 these designed napkins that looked like swans,
9 right. And the students, my students all sat
10 there going wow, look at the artwork, you know.
11 They didn't realize it was a napkin, and when I
12 went, you know, uh-hum, like that and put it on my
13 lap, they were oh, you know. It was like the
14 light went on. And that's -- that's the kind of
15 transfer of skills or generalization of skills
16 that they just didn't get. And that's pretty
17 common for people with mental retardation. They
18 have difficulty with fitting in. They don't fit
19 in well in situations where they don't know how to
20 act and sometimes they will -- they will behave in
21 a very bizarre manner in an effort to try to make
22 friends. And it's also very common for them to
23 act like they know what's going on when they
24 really don't have a clue what's going on, and
25 that's called the cloak of confidence. And then

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 they also tend to acquiesce in situations where

2 they are frightened. If they don't know what to
3 do, they will go along with what's told to them,
4 especially if there's a situation of authority.

5 Q Let's shift back to intelligence testing, testing
6 in schools. Were you able to review some of the
7 scores that Mr. Britt had in school?

8 A Yes.

9 Q And what did you find?

10 A Well, if I can use this again. Why didn't it do
11 it. There we go. If you look here, these were
12 the dates of testing and the tests that were used
13 specifically on Eugene when he was in elementary
14 school and middle school, what's now called junior
15 high -- or what was now called middle school but
16 then called junior high. At nine years,
17 two months, chronological age, he was given the
18 Metropolitan Achievement Test and again the next
19 year, and you'll notice that he was nine is
20 roughly third grade; 10 is roughly fourth grade or
21 fourth or fifth depending on the age of the
22 individual, and word knowledge did not go up at
23 all in that year. Word discrimination went up a
24 year, three, which is pretty good, so that means

25 that his ability to decipher words phonetically

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

56

1 was improving and his reading level did go up
2 almost a full year which is a pretty impressive
3 change. Then you got the '69 October,
4 chronological age 11, almost 12 years old. He was
5 given the Lorge-Thorndike which is a group IQ
6 test, not a very good test, not one that you could
7 use to diagnose mental retardation, but you're
8 still looking at stanines. Stanines are the
9 normal curve broken into groups of nine, your
10 Honor. Roughly the percentage in each group is
11 about the same, and the lowest stanine would be in
12 the very bottom part, and the highest stanine
13 which would be nine which would be in the higher,
14 and the middle would be in the fourth and fifth
15 stanine. Do you understand? So that's what
16 you're looking at here is that his verbal score
17 was in one stanine which is the very lowest you
18 could get and his nonverbal score was three which
19 is just slightly above. That would be roughly --

20 maybe the seventh or eighth percentile, tenth

21 percentile tops. Less than tenth actually.

22 Q When he's given that test at that time, is that --

23 is he being compared to the people of his age --

24 A Yes.

25 Q -- or is he being compared to the people in his

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

57

1 grade?

2 A In his grade typically is what -- the way that the

3 Lorge-Thorndike is organized.

4 Q So if he's older than people in his grade?

5 A He should have done better.

6 Q Okay.

7 A Right.

8 Q Even better than that?

9 A Yes.

10 Q All right.

11 A Then the final one, he was I believe in fifth

12 grade when he took the October '71 Iowa Test of

13 Basic Skills. 13 years, 11 months, almost

14 14 years old, and that would be the normal age for

15 an eighth- or ninth-grader. The -- the vocabulary
16 is 2.8. GE stands for grade equivalent, I'm
17 sorry. 2.8 in vocabulary. 3.9 in reading comp.
18 Arithmetic concepts, 4. Arithmetic, arithmetic,
19 those are all 4.4. Okay. So we're looking at
20 somebody who was supposedly -- should have been
21 functioning at the eighth grade level or ninth
22 grade level and was actually functioning in the
23 second, third and fourth grade level.
24 Q Now, you've, of course, been in contact with Don
25 Levy?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

58

1 A Yes, sir.
2 Q And this is about all that's been found regarding
3 Eugene's school records; is that correct?
4 A School scores, yes, that's correct.
5 Q And there were some IQ scores, however, that you
6 were able to look at; is that correct?
7 A Yes.
8 Q Okay. How many were there?
9 A Two that I found specifically.

10 Q Okay.

11 A One was the Revised Beta from 1979 which I believe

12 was given by the Department of Corrections.

13 Department of Corrections around the country

14 typically use this as a kind of a screener to

15 determine whether or not a person might have a

16 mental disability. Unfortunate thing about the

17 Revised Beta is it's a terrible test. It's got --

18 It's primarily a verbal test, so people who have

19 verbal problems typically score lower. People who

20 have nonverbal problems typically might score

21 higher. This score, particularly 60, puts the

22 individual roughly at the first percentile of the

23 population. It's not a test that I would use to

24 diagnose mental retardation. Like I said, I would

25 use it as a screener, and if I see somebody with a

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

59

1 60 or even up to 70 IQ on the Revised Beta, it

2 should be a red flag that says, you know, this

3 person might have a mental disability, let's go a

4 little further. To my knowledge, I don't think

5 anything more was done by the DOC. The 70 was
6 given by a Ms. Nancy Ayres who was working under
7 the auspices of Dr. Raymond Horn, and that was
8 given in 2004.

9 Q You have a 69 in parentheses there?

10 A That is correct.

11 Q What does that mean?

12 A Well, I went back and looked at the data, and I
13 was concerned that there were a couple of points
14 that I thought probably were -- I wouldn't say
15 misscored, but something wasn't quite right. When
16 I looked at the numbers, I didn't think they made
17 sense. So I went back and rescored it, and
18 instead of having a 70 IQ -- she had 71 -- let me
19 go. She had a verbal of 71, performance of 75 and
20 a full scale of 70. I went back and checked the
21 data using the manual and came up with a verbal of
22 69, a performance of 75 and a full scale of 69.

23 Q Okay. We'll come back to the rescoring a little
24 bit later.

25 A All right.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 Q Now, you did get a chance, of course, to review
2 Dr. Horn's report?

3 A Correct.

4 Q Both his -- actually his deposition, his
5 preliminary written report, his report after the
6 examination and the actual raw tests itself and
7 his in-court testimony; is that correct?

8 A That is correct.

9 Q What did you glean from that or what struck you
10 when you reviewed all of those items?

11 A If you look specifically at the data that
12 Mr. Britt produced during the testing, Dr. Horn
13 was concerned that there was a great amount of
14 inconsistency in his responses. In his testimony
15 he stated, quote: I do not think that Mr. Britt
16 consistently performed below his ability, but the
17 inconsistency in performance was substantial
18 enough to render an overall conclusion about the
19 validity of all of the tests' data much more
20 difficult to make. What he's saying there is that
21 Mr. Britt missed easy things and got more
22 difficult things correct. This is a wide amount

23 of variance. And that's true. He did get that.
24 But it's not because he wasn't trying. In working
25 with mental -- adults with mental retardation, one

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

61

1 of the things we find is that they have years of
2 experience with a lack of intelligence. Their
3 memory is typically defective and not only in
4 short-term but also in long-term. So what we see
5 here is that a person with mental retardation can
6 get easy things correct or easy things wrong and
7 can also get easy -- harder things correct and
8 harder things wrong so that you end up sometimes
9 going a lot further in the testing because they'll
10 miss three and then get one right and then they'll
11 miss two more and then they'll get another one
12 right, and this is exactly the kind of profile
13 that I saw when I reviewed Ms. Ayres' testing of
14 Mr. Britt.

15 Q Did you test Mr. Britt's IQ?

16 A No, I did not.

17 Q And why is that?

18 A It wasn't necessary. There were enough -- there
19 were enough IQ tests that were already done on
20 him. I didn't think it was absolutely necessary
21 to come up with a different one.

22 Q And, of course, you had the actual -- all the
23 tests that Dr. Horn had performed in December of
24 2004; is that correct?

25 A That is correct.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

62

1 Q You had Ms. Ayres' transcript of her -- of her
2 deposition?

3 A Correct.

4 Q And all of the other things regarding Dr. Horn?

5 A That is correct.

6 Q And you felt that that was enough?

7 A There was enough IQ information there. Plus,
8 it -- there was one potential error in the testing
9 that was of some significance in -- hold on just a
10 minute. Let me see if I can find that.

11 Naturally. At the very bottom. Okay.

12 In the IQ testing, the very first subtest

13 that is given is the picture completion. And if
14 you look at this data, you'll see that he gets the
15 first eight correct and then he misses two and
16 then he gets three correct and then he misses two
17 more and then he gets another one correct and then
18 he misses two more. Then he gets another one
19 correct. Then he misses two more. Then he gets
20 another one correct. Your Honor, that's a
21 textbook description of an adult with mental
22 retardation. That's what it looks like. Then
23 you've got the next one, the vocabulary subtest.
24 Now, the vocabulary subtest is a very important
25 subtest. It's a high loader on "g". It's a good

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

63

1 indicator of intelligence whereas this is only a
2 medium loader on "g". It's not that great of
3 indicator. But you've got two, two, okay. He
4 misses the first one which is winter. He only
5 gets a partial score on that. By rules of the
6 test, you have to go back and give the first --
7 two more and back or three, possibly three more,

8 until he gets two in a row fully correct which is
9 two points each. So he gets that and the next --
10 in the first -- Number 2 and Number 3. Then
11 Miss Ayres continues from Number 5 which is
12 correct. She -- he says he doesn't know what
13 assemble means so she gives him a zero there.
14 That's appropriate. Then you turn to the next
15 page and there are five in a row incorrect. The
16 ceiling which is the top item you are to give and
17 then you switch to a different subtest because
18 that person has maxed out on that test, the
19 ceiling is six incorrect items in a row.
20 Ms. Ayres appears to have counted these five and
21 continued to test. Now, the possibility is that
22 she was doing what's called testing the limits.
23 That's accepted practice but not during the
24 process of the test. You go back and do testing
25 of the limits after you complete the test. Here

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

64

1 it doesn't say whether or not she stopped the test
2 at that point and went on. I suspect that she

3 might not have stopped the test correctly because
4 if you look at the bottom, she's crossed out the
5 raw score and put the correct raw score which is
6 11. She had 16 which means that she included all
7 these here. But in doing so, she has given me an
8 opportunity to point out to the Court zeros, all
9 these zeroes and then he gets a perfect score on
10 Number 13. Then he gets a partial score on Number
11 15. He gets another zero. He gets a perfect
12 score on Number 17. He gets a zero on Number 18
13 and he gets a perfect score on Number 19. And
14 then he gets six in a row incorrect where she
15 finally stops the test. Now, whether or not it
16 has any bearing on the IQ or any of that, not
17 terribly important because she did use the correct
18 score. But it did break standardization if she
19 didn't stop and continue the test where she should
20 have.

21 That's not a big deal. My concern is this is
22 what an MR profile very often looks like, too. He
23 got scores correct after the ceiling. Now --

24 MR. KASICH: If I may, your Honor, I would
25 just like to approach. For some reason and maybe

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

65

1 I'm just -- I have the original transcript of
2 Dr. Horn's testimony. Does the Court want it for
3 its file? Normally I don't have original
4 transcripts of court proceedings. They're usually
5 in the Court file.

6 THE COURT: I don't have the entire file here
7 in front of me. I'm not sure whether we already
8 have those, but we'll show them admitted.

9 MR. KASICH: All right.

10 THE COURT: For purposes of today's hearing.

11 BY MR. KASICH:

12 Q Sorry, Doctor.

13 A That's all right. I can talk forever. I promise

14 I won't.

15 Q You were saying.

16 A If you look at similarities which is the next high

17 loader on "g". In fact, similarities is

18 considered the best indicator of intelligence on

19 the test. You have first item, the very first

20 item given which by the way she's quite right.

21 She did have to go back and give them, but she
22 gave the fork and spoon and he got a zero on that.
23 Then he gets correct scores on Numbers 2, 3, 4 and
24 5. Then he gets a correct score on Number 6,
25 Number 7 and then he gets an incorrect --

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

66

1 partially correct score on Number 8 and then two
2 more perfect scores and then two more partial
3 scores and then four zeroes. Again, a little
4 bit -- not quite as convincing, but a mental
5 retardation profile there, too.

6 Skip ahead to Matrix Reasoning. Keep in
7 mind, your Honor, that these tests are ordered
8 easy to hard, easy questions to hard questions.
9 He gets the first four correct, misses two, gets
10 another one correct, misses one, gets another one
11 correct and misses four to the ceiling, okay.

12 Another MR profile.

13 Then Information. Information is considered
14 a high loader on "g", too. By the way, Matrix
15 Reasoning is considered one of the two good

16 indicators of intelligence on the performance side
17 of the test, not verbal. Information, he gets two
18 in a row correct, Number 4 and Number 5. Then he
19 misses 6 and 7 and 8 and 9. Then he gets 10
20 correct, misses 11, gets 12 correct, misses 13,
21 gets 14 correct, which -- which this is a real
22 interesting question. Who discovered -- who
23 gave -- who developed the theory of relativity.
24 And he said Einstein, okay. Now, people with
25 mental retardation might know that. That's a

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

67

1 possibility. It's a tough question, but it's
2 possible that person might know that, and it can
3 come from watching television. It -- it certainly
4 didn't come from school prior to age 19, I would
5 think. And then he misses five in a row and gets
6 another one correct, Number 20. Then he gets --
7 then he maxes out on the ceiling. But this kind
8 of Aces and Spaces which is what I call it, Aces
9 and Spaces means that they get little bits correct
10 and then they miss some and then they're correct

11 and then they miss them and the testing is replete
12 with this kind of thing.

13 Q I think you indicated that shows you what?

14 A That suggests to me that this is an adult with
15 mental retardation. At least intellectual
16 retardation, I should say.

17 Q Okay. We've pointed out and we discussed in the
18 last couple days since you came this Saturday,
19 Dr. Horn's concerns about the math problems. Do
20 you want to address that at this point in time?

21 A Well, the math problems -- the math test that he
22 gave is the -- the part two of a test that's
23 called the Wide Range Achievement Test or better
24 known as the WRAT which is a very good description
25 in my opinion. The WRAT is also a screener. It

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

68

1 is not considered a good indicator for -- for
2 example, it's not the kind of test you would use
3 to define a learning disability. It's a screening
4 test. If you were trying to determine whether or
5 not a child had a specific disability, you

6 wouldn't give the WRAT. You would give the
7 Wilcock-Johnson or the Test of Educational
8 Achievement, Kaufman. There are lots of different
9 tests you would give, but you wouldn't give the
10 WRAT. The WRAT is a screener and the WRAT is the
11 test that teachers will sometimes give to
12 determine what's called error pattern analysis.
13 You look for a pattern to the error to help teach
14 the child. And it's a good -- it's a good test
15 for that, I would say. I actually have used it
16 for that when I was teaching.

17 All right. The Wide Range Achievement is
18 broken into three parts; the reading, the math and
19 the -- the spelling. And simple spelling test
20 with X number of words and you have to get 10
21 words in a row incorrect before you can call it
22 quits and move to the next one. The WRAT spelling
23 is good for item analysis. You can actually look
24 and see what the problems that the child is
25 making, and it's a good test for that. The math

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 has been argued for years. This test has been
2 around and around about whether or not the math is
3 a good test. Personally, I don't think it is a
4 good test, and the reason I don't give this test
5 is because two things; one, it has been suggested
6 that this test is not good for people of color
7 that has been tested and it does turn out that
8 people of color do typically score lower on it;
9 and, two, it goes from simple math to very
10 difficult math in lightning speed. If you were
11 going to use this test as a screener, there are
12 better math tests that you can come up with. If
13 you were going to use this test as an identifier,
14 there are lots of better tests that you could come
15 up with. But to say that because of this math
16 test this man is not mentally retarded seems to me
17 a little bit too convenient. I would not use this
18 test to determine that.

19 Q Well, can the test help you to determine effort?

20 A It might. It could, yeah. It could tell you
21 consistency of effort, but another thing you can
22 see in the Wide Range Achievement Test that he
23 gives -- gave, rather. In the spelling, for

24 example, he gets the first six correct, then he
25 misses one. Then he gets the eighth correct and

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

70

1 misses another one. Gets two more correct, misses
2 three. Gets another one correct, misses one.
3 Gets the next one correct, misses the next one.
4 Gets the next one correct, misses the next one.
5 Misses the next one after that and gets the next
6 one correct and then finally hits the ceiling.
7 Again, your Honor, Aces and Spaces. Then you go
8 to the --

9 Q Well, wait.

10 A -- to the math.

11 Q You jumped off to the Aces and Spaces, but I mean,
12 more specifically --

13 THE COURT: Wait up. Mr. Kasich, I'm sorry.

14 Wait up. Mr. Britt gives my bailiff a note that
15 says he needs his medication.

16 THE DEFENDANT: Yeah, yeah, my knees and my
17 hip.

18 THE COURT: Do you have it with you?

19 THE DEFENDANT: No, no, they got it. They
20 didn't give it to me. I came here instead.

21 THE COURT: Do you know anything about
22 this --

23 MR. KASICH: No, your Honor.

24 THE COURT: -- medication issue?

25 THE DEFENDANT: They know about it.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

71

1 MR. KASICH: I knew he was on medication. I
2 didn't know -- Were you supposed to take it this
3 morning?

4 THE DEFENDANT: Yeah. They brought me here.

5 THE COURT: Did you even take it today at
6 all?

7 THE DEFENDANT: They didn't give it to me.
8 You know, they didn't pass it out yet. They
9 brought me here.

10 THE COURT: What time do they usually pass it
11 out?

12 THE DEFENDANT: Supposed to be -- you know,
13 in the morning.

14 THE COURT: What time did they bring you here
15 today? Do you know?

16 MR. BAILIFF: 8:00. He was here on the first
17 shift.

18 THE COURT: Let's go about 15 more minutes.
19 That will take us to about quarter 'til. At that
20 point, we'll get you your medication during the
21 lunch break.

22 THE DEFENDANT: All right.

23 THE COURT: All right.

24 THE DEFENDANT: Okay.

25 THE COURT: We'll just break early for lunch.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

72

1 BY MR. KASICH:

2 Q I'm sorry, Doctor. When you indicated the Aces
3 and Spaces as a kind of conclusion on this, you're
4 talking about what, because of the -- some are
5 wrong and some are right and that means again?

6 A It's the same thing. It's an MR profile. It's
7 what you expect to see in an adult with mental
8 retardation.

9 Q And if it was somebody extending less than premium
10 effort, what would you see?

11 A You would see -- oh, actually, in people who are
12 trying to malingering, very often you see people who
13 miss all of them. That's what they think mentally
14 retarded people would do.

15 Q All right.

16 A And the math that you asked me about earlier.

17 Q Yes.

18 A The kinds of errors that you see here, and, again,
19 you've got it all over the -- the numbers are all
20 over the place. He gets four in a row correct,
21 misses one, gets another one correct, misses two,
22 et cetera, et cetera. And it goes like that all
23 the way through.

24 Q Well, I think one of the more glaring ones in the
25 math that Dr. Horn pointed to was the $3 \times 4 = 13$?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

73

1 A Uh-huh.

2 Q And his concern, of course, was that that was not
3 extending effort?

4 A Again, he gets 6X7 correct, okay. That -- 3X4, he
5 could have missed it for any number of reasons. I
6 don't -- I don't necessarily think he was
7 malingering if that's what Dr. Horn is suggesting.
8 Carelessness is very common.

9 Q You talked about there being a profile for mental
10 retardation; is that correct?

11 A Yes.

12 Q Is there a malingering profile?

13 A Yes.

14 Q And, again, I imagine that you said this is a
15 mental retardation profile. What's your opinion
16 as to whether it comes anywhere close to
17 malingering profile?

18 A I don't see a malingering profile in what I've
19 reviewed, and I met with Mr. Britt for six hours
20 in June and I did not feel that he was malingering
21 when he was with me.

22 Q Okay. You were here -- let's segway to that
23 briefly. You were here June 2nd, 3rd and 4th; is
24 that correct? June 4th through 6th? 4th through
25 7th?

1 A 4th, 5th and 7th -- 6th and 7th, yeah. I was here
2 four days.

3 Q And you just alluded to meeting with Mr. Britt?

4 A Correct.

5 Q How many days?

6 A Two days. Almost all day, both days.

7 Q All right. How many total hours would you say
8 that you spent with Eugene Britt?

9 A I think I spent three or four hours with him the
10 first day and six hours the second day. Roughly
11 10 -- nine, 10 hours. I'm not entirely sure of
12 that, though.

13 Q Now, when you were talking to him and reviewing
14 with him, I believe you then also considered
15 something called the risk factors for mental
16 retardation?

17 A Yes. If you look on the overhead. The risk
18 factors for mental retardation are also broken
19 into prenatal, perinatal and postnatal most like
20 the causative factors of mental retardation.
21 These are all possible reasons that people can

22 become mental retarded. Biomedical, social,
23 behavioral and educational. They have to do with
24 family situations, poverty, medical situations,
25 neglect, various different areas of factors in

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

75

1 people's lives that can possibly lead to mental
2 retardation.

3 When we sat down and looked at Eugene Britt's
4 life, we also looked at what might be considered
5 risk factors for him. Known risk factors here are
6 noted in yellow and the red is the suspected or
7 possibly inferred risk factors for people for
8 such -- for Eugene. When you see something like
9 that, it does jump out at you.

10 Q Coming up with this particular table, I think you
11 relied upon a review of records provided to you,
12 the prior testimony provided to you by Dr. Horn,
13 Dr. Koonz (phonetic), I think Parker and Sena
14 also?

15 A Yes.

16 Q I think you also talked to some people in addition

17 and I believe we have -- I know I have it here
18 somewhere, if you recall, off the top of your
19 head. That's why we did it.

20 A Well, I talked to several people who had been
21 teachers. I attempted to contact more. I
22 contacted his sister, Brenda Britt, and had a
23 conversation with her, two conversations with her;
24 one face-to-face at her house in Gary and the
25 other was on the phone. I did as much as I could

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

76

1 to get as much information as I could. My last
2 conversation was last night at 9:00 o'clock.

3 MR. KASICH: If I can approach, your Honor.

4 THE COURT: Yes.

5 [DEFENDANT'S EXHIBIT 2 IS MARKED.]

6 BY MR. KASICH:

7 Q I'd like to hand you what's been marked for
8 identification purposes only for the purposes of
9 this hearing as Defendant's Exhibit Number 2. Can
10 you identify what that is?

11 A It appears to be the list of people that I

12 attempted to contact and did contact some of them.

13 MR. KASICH: Move to admit that into

14 evidence, your Honor.

15 THE COURT: Any objection?

16 MR. BURKE: No.

17 THE COURT: Okay. We'll show it admitted.

18 [DEFENDANT'S EXHIBIT 2 IS ADMITTED.]

19 BY MR. KASICH:

20 Q And those -- everything we just talked about then

21 helped you formulate that table; is that correct?

22 A It helped me, yes.

23 Q Okay. And what was the significance of this table

24 again?

25 A Again, you're looking at the possible risk factors

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

77

1 in Eugene Britt's life that might have led to his

2 retardation.

3 Q Now, you talked somewhat about the IQ component in

4 developing an opinion relating to whether or not

5 an individual is mentally retarded?

6 A Yes.

7 Q And I believe with your -- you've already looked
8 at the Bell curve with the two IQ test results,
9 the one with, of course, Dr. Horn being given by
10 Nancy Ayres being 70 and your parentheses, your
11 recalculation of it being 69, all right?

12 A Uh-huh. Yes.

13 Q And now then we go to another area that we have
14 to -- that you have to weigh and it's called
15 adaptive behavior; is that correct?

16 A Correct.

17 Q And what do you consider when you're talking about
18 adaptive behaviors?

19 A You look at the individual's ability to function
20 within the range of their own age group and their
21 own peer group and their own cultural group on
22 various different levels. For example,
23 practically, socially and conceptually. Does this
24 person have an understanding that would be
25 considered, quote, unquote, normal of how they fit

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

78

1 into society, how they fit into individual groups,

2 how they fit into their family, how they fit into
3 a job situation. Does this person have the kind
4 of skills that allow that person to function
5 within normal society.

6 Q And I believe those are part of the
7 considerations, those are the representative
8 skills?

9 A In the 2002 definition of mental retardation, the
10 American Association on Mental Retardation
11 produced a list of representative skills that were
12 related to adaptive behavior. These were the
13 representative skills.

14 Q Now, is there some sort of way to measure these --
15 these adaptive behaviors? Are there any scales or
16 anything like that?

17 A There are many scales, yes.

18 Q Okay. Which do you look at?

19 A I use the independent living scale which is the
20 one that I told you about earlier asking the
21 person to do various different tasks. I also use
22 the Scale of Independent Behavior Revised which
23 was the better known as the SIB-R, and it is a
24 self-report scale as well as getting information

25 from the family members, teachers, et cetera.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

79

1 Q When you spoke to Mr. Britt for those six, seven,
2 eight hours, whatever they were over two days,
3 what type of things did you ask him? What
4 information did you seek to obtain from him? What
5 test modes or what test protocols did you use?

6 A I used the Scale of Independent Behavior. I used
7 the Independent Living Scale and I discussed his
8 background, his family, his work -- his
9 occupational background, his history, school, how
10 he felt about school, how he felt about his
11 family, work. We did not discuss the situation of
12 the crimes at all and basically information that
13 would help me understand his adaptive functioning
14 and his intellectual functioning.

15 Q Why did you not talk about the crimes?

16 A It's not relevant to a diagnosis of mental
17 retardation in many ways. Whether or not a person
18 is criminally responsible for behavior that they
19 have done is determined by the courts, not by a

20 psychologist.

21 Q And in talking to him and in talking to his
22 sister, Brenda -- and by the way, can you tell us
23 a little bit about Brenda about where she lives
24 and what she does as far as you can recall from
25 meeting with her?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

80

1 A To my knowledge, she works in a nursing home and
2 she is living in Gary -- in a house that was not
3 very well kept and is clearly impoverished.

4 Q And did she seem like she wanted to do everything
5 she could to help her brother, Eugene?

6 A She tried. She tried as best she could. I talked
7 to her yesterday on the phone and she did not --
8 she could not give me any assistance, not much
9 assistance. On some simple questions that I
10 wanted to put her, she was concerned that she
11 would get dragged into this.

12 Q When you say get dragged into that, she made it
13 quite clear, did she not, that she did not want to
14 come to court?

15 A Yes, she did.

16 Q Now, I believe you talked to her about other

17 family members also in doing your workup?

18 A Yes, I did.

19 Q What did you learn about other family members?

20 A Well, Mr. Britt has a brother who is mentally

21 retarded or had a brother who was mentally

22 retarded, Michael. He was in a class of a person

23 that I talked to on the phone actually, a

24 Mrs. Exum, who talked to me about the family and

25 the situation. She -- Brenda told me that her

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

81

1 parents did the best they could under the

2 circumstances she felt and that there was violence

3 in the house, that there was alcohol in the house.

4 There were situations that were unpleasant, that

5 one of her sisters is -- will not speak to anybody

6 in the family for any reason despite the fact that

7 she was a drug addict and in the process of her

8 drug addiction she left her child alone in a cold

9 apartment to the extent that the child's legs were

10 removed because of neglect.

11 Q Is that Darlwin?

12 A Yes, that's Darlwin.

13 Q Okay.

14 A He also has an older brother who has been

15 incarcerated most of his life.

16 Q The brother that she identified to you as being

17 mentally retarded, how did she know he was

18 mentally retarded?

19 A Because he was in special education.

20 Q Anything else she told you about his mental

21 retardation?

22 A Said that he was not able to do anything for

23 himself.

24 Q All right.

25 A But she also stated the same thing about Eugene,

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

82

1 that he couldn't do things for himself either.

2 Q And she gave you several examples; is that

3 correct?

4 A She did. Yes.

5 Q And we tried to find Michael, did we not?

6 A Yes, we did.

7 Q We were kind of unsuccessful doing that?

8 A That's right.

9 Q Now --

10 A He hangs out -- supposedly he hangs out near the

11 corner that they grew up on, and I think it's 17th

12 and Jefferson in Gary.

13 Q And I think you were driving around Gary, and

14 that's really not a corner where some of us want

15 to go ahead and just hang out and wait for someone

16 to show up; is that correct?

17 A That's correct. It's right in front of a liquor

18 store. He apparently is very much addicted to

19 liquor.

20 Q Based upon that, I think you also -- did you also

21 have a chance to read some witness statements from

22 former employers or from individuals who he worked

23 with?

24 A Yes, I did.

25 Q Okay. And did that also give you some information

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 regarding these adaptive skills?

2 A Yes.

3 Q And what were you able to go ahead and come up
4 with as far as the independent living scale?

5 A The Independent Living Scale in testing him, it
6 suggested that he was insufficiently prepared to
7 be independent in his own life. He's not able to
8 care for money. He's not able to budget. He's
9 not able -- his memory is not very good needless
10 to say. He's unable to manage a household, to
11 shop. He's unable to take care of his own health
12 and safety. In -- independently I should say.
13 His social adjustment was negligible and his
14 ability to problem-solve is also negligible. He's
15 in the lowest percent of the population.

16 Q And is that one there performance information?

17 A That's how well -- it's overall looking at some of
18 the skills. In fact, problem-solving and
19 performance are both based upon how he does on the
20 individual items of the first five scales.

21 Q All right. So then you came up with the Scale of
22 Independent Behavior for Mr. Britt?

23 A Why he.

24 Q What does that tell us?

25 A Well, his motor skills are just below average.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

84

1 His motor skills except for the fact that he's in
2 a wheelchair. His ability -- excuse me. His
3 ability to use his hands and his upper body seem
4 to be unaffected. His age equivalent on that
5 would be approximately 10 years, six months, but
6 his social interaction, communication skills,
7 personal living skills and community living skills
8 are all very low, in the seven- and eight-year-old
9 area. Finally, the broad independence, roughly
10 eight years, four months.

11 Q Can you tell us what those numbers are since
12 we're not going to have -- we're making a record.

13 A 79 was the standard score for motor skills, 44 for
14 social interaction and communication, 30 for
15 personal living skills, 34 for community living
16 skills and 40 for broad independence.

17 Your Honor, it's important to realize that

18 what we're looking at here is based upon the same
19 scale and same calibration as the IQ. Mean of
20 100, standard deviation of 15. So that you're
21 looking at somebody who's dull/normal in motor
22 skills but severely impaired in all areas of
23 adaptive skills.

24 Q And the age equivalence then, for example, for the
25 social interaction was seven-five?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

85

1 A Seven years, five months; seven years, one month;
2 eight years, five months; and eight years,
3 four months.

4 Q Those are personal living skills, community living
5 skills and broad independence respectively; is
6 that correct?

7 A That is correct.

8 Q How did you come up with the social interaction
9 and communication skills of 44?

10 A That was based upon primary information from
11 Mr. Britt himself. This was pretty much
12 self-report.

13 Q Same thing with -- what specific information do
14 you rely upon that takes you to that score as
15 opposed to a score of 79?

16 A Well, you look to see how the person is rated and
17 you also by working with that individual, you can
18 tell certain things that the person can do,
19 certain things they can't do. The self-report
20 scale, primarily you ask the person individual
21 questions and the person tells you whether or not
22 they can do it, they don't do it, they could do it
23 but not very well but they do it most of the time,
24 various different levels.

25 Q Okay. Now, is that a subjective score or

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

86

1 objective score based upon an actual test that you
2 give?

3 A That's more subjective because it's subjective to
4 his own opinion. But at the same time, the
5 clinician while doing that has to note that
6 certain behaviors that are tested in that test
7 also give you the opportunity to say well, that's

8 not right.

9 Q Is that -- when you come up with those, do you use

10 a written form of any kind to aid you?

11 A There is a format, yes, and then you get what's

12 called a raw score and then you transform those

13 raw scores based on the individual test itself.

14 Q Is that --

15 MR. BURKE: I'm sorry to interrupt. Can we

16 take just about five minutes?

17 THE COURT: We're ready to break for lunch.

18 I mean just in about five more minutes anyway.

19 Can you wait?

20 MR. BURKE: I just need to go to the

21 bathroom.

22 THE COURT: Why don't you go and come and

23 right back.

24 MR. BURKE: That would be fine.

25 THE COURT: That's fine.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

87

1 [BRIEF RECESS TAKEN.]

2 MR. BURKE: Thank you, your Honor.

3 THE COURT: You're welcome, Mr. Burke.

4 [DEFENDANT'S EXHIBITS 3-4 ARE MARKED.]

5 BY MR. KASICH:

6 Q I would like to hand you what have been marked for
7 purposes of this hearing as Defendant's Exhibits 3
8 and 4. Could you identify those documents,
9 please.

10 A They appear to be the protocols that I used in
11 working with Mr. Britt.

12 Q Okay. What's three?

13 A Defendant's Exhibit 3 is the Independent Living
14 Scale protocol, and Defendant's Exhibit 4 is the
15 Scale of Independent Behavior protocol.

16 Q I don't mean to be too anal, but when you say they
17 appear to be, can you take a look at them and
18 verify that they are, indeed, the one that you
19 used.

20 A They are.

21 MR. KASICH: I would like to move to admit
22 into evidence, your Honor, Defendant's Exhibits 3
23 and 4 to show -- to go ahead and illustrate what
24 the doctor was doing when he was examining for the
25 Independent Living Scales.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

88

1 THE COURT: Mr. Burke, any objection?

2 MR. BURKE: I'm assuming these are the two
3 things that you set on my desk.

4 MR. KASICH: Yes.

5 MR. BURKE: State has no objection.

6 THE COURT: Very good. Three and four
7 admitted without objection for purposes of today's
8 hearing.

9 [DEFENDANT'S EXHIBITS 3-4 ARE ADMITTED.]

10 BY MR. KASICH:

11 Q Now, did you use both of those to come up with
12 these numbers or one of those more exclusively?

13 A The Independent Living Scale, I got these numbers
14 for. The Scale of Independent Behavior, I got
15 these numbers for.

16 Q Can we go back to the other one then. What
17 numbers are we talking about, the standard scores?

18 A The standard score is 20 in that area. That would
19 be profound disability.

20 Q Are those Mr. Britt's numbers?

21 A They are.

22 Q And what would be an average score?

23 A A hundred.

24 Q So he has profound disabilities in all of those

25 areas?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

89

1 A In each of those areas, correct.

2 THE COURT: This is self-report also,

3 correct?

4 THE WITNESS: No. This is actually a

5 subjective test that he does the information for

6 me. For example, I asked him to look up a phone

7 number in a phone book. He was unable to do it.

8 I asked him to figure out a budget. He couldn't

9 do it. I asked him to write a check or money

10 order. He couldn't do it. There are various

11 different parts of it that are difficult.

12 BY MR. KASICH:

13 Q But I believe what the judge has asked is the

14 source of this information is Mr. Britt?

15 A Yes, he actually worked with me on this.

16 Q Okay. And do -- is the information you gleaned
17 from Brenda Britt or from other individuals that
18 you've spoken to, is that included in this?

19 A No, it's not, nor in this which would be the
20 independent -- Scale of Independent Behavior.

21 Q And what else did you go ahead and use as far as
22 what you considered when you were --

23 MR. KASICH: May I approach.

24 BY THE WITNESS:

25 A I asked Brenda Britt to please fill out a Scale of

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

90

1 Independent Behavior form. She started to. She
2 was unable to complete it; and because of that, I
3 was unable to determine scores for her. But the
4 data that she gave which I believe she was very
5 careful about being as accurate as she could, the
6 data that she gave supported the possible --
7 possibility of mental retardation as a definition.
8 As I diagnosis, rather.

9 [DEFENDANT'S EXHIBIT 5 IS MARKED.]

10 BY MR. KASICH:

11 Q I'd like to hand you what's been marked for
12 identification purposes only as Defendant's
13 Exhibit Number 5. Can you identify that set of
14 documents?

15 A Yes.

16 Q What is that?

17 A This is the -- the protocol that I gave to Brenda
18 Britt asking her to give me some information
19 regarding her brother's functioning.

20 Q Okay.

21 MR. KASICH: Move to admit Defendant's
22 Exhibit Number 5.

23 THE COURT: Mr. Burke.

24 MR. BURKE: Is this what we're talking about?

25 I just --

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

91

1 MR. KASICH: The one that says Brenda Britt
2 on top. I just put --

3 MR. BURKE: This?

4 MR. KASICH: Yes.

5 MR. BURKE: No objection.

6 THE COURT: All right. Admitted.
7 [DEFENDANT'S EXHIBIT 5 IS ADMITTED.]
8 BY MR. KASICH:
9 Q Now, in doing the adaptive behavior, adaptive
10 skills review and the consideration in mental
11 retardation cases, is this case typical or unusual
12 in the amount of information that you were able to
13 go ahead and obtain?
14 A Every case varies. Depending upon how much
15 school records -- how many school records are
16 still available, how many family members are
17 available to talk to, how many teachers are
18 available to talk to, school psychologists,
19 principals, it varies from case to case. I would
20 say that this one is a little bit less than
21 average because so many of the records have
22 been -- do not exist. The school records were
23 very, very sketchy. The -- because of Mr. Britt's
24 age, a lot of the teachers are no longer with us
25 and a lot of them -- most of them, in fact almost

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 all of them, have retired. Some remembered
2 Eugene. Some don't. It was -- it was difficult
3 to get accurate information.

4 Q Now, is there any kind of minimum requirement as
5 far as what sources you have to tap into or you
6 should tap into, the amount of information you
7 should have before you are able to give a
8 professional opinion as it relates to adaptive
9 behavior?

10 A Well, there is a minimum requirement in some ways,
11 and that would be that the AAMR strictly says you
12 have to do some kind of a valid instrument to
13 determine mental retardation adaptive skills.
14 The -- the basis for this is to say if you use
15 just your own covering of the information or your
16 interview with the individual, it -- it's too
17 subjective, so you want to get something more
18 subjective -- more objective. And that's why I
19 like to use the Independent Living Scale because
20 it does tend to be more objective.

21 Q Now, in this particular case then, do you believe
22 you had enough information?

23 A I think that I did as well as could be expected

24 under the circumstances with the people who are
25 dead, parents are both dead, siblings are dead and

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

93

1 siblings won't speak to us. I did -- I would say
2 I had enough to make a reasonably good diagnosis,
3 yes, within a psychological certainty.
4 Q Okay. Now, when you're making the diagnosis in
5 this particular case, what do you think is --
6 makes -- gives you that ability to be able to make
7 a diagnosis to a reasonable degree of certainty?
8 A Well, I'm -- been in the field of mental
9 retardation for 32 years. I have been involved in
10 death penalty cases all over the country. I am
11 reasonably well -- I'm familiar with the
12 diagnostic procedures and the diagnostic
13 necessities, and I felt that given all of the data
14 and Mr. Britt's performance and the consistency or
15 as Dr. Horn said inconsistency of his performance
16 strongly supported a definition and diagnosis.
17 Q Now, you, of course, are familiar with the Atkins
18 opinion?

19 A Reasonably so, yes, sir.

20 Q You certainly read the footnote where your work is

21 referred to; is that correct?

22 A My five minutes of fame, yes.

23 Q But you read Atkins, and does that give you -- did

24 that give you an understanding of what the Supreme

25 Court from the United States is looking for when

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

94

1 they're asking someone like you to come to court

2 to testify regarding mental retardation?

3 A The Supreme Court of the United States took the

4 American Association on Mental Retardation and the

5 Diagnostic Statistical Manual, fourth edition,

6 their definitions and more or less applied them

7 pretty much verbatim to what would be expected,

8 and those are the same diagnostic standards that I

9 have always used in my work.

10 Q Now, you read Dr. Horn's deposition, his report

11 and the transcript, and he went through a list of

12 the adaptive behaviors, his analysis of adaptive

13 behaviors, his opinion on where those are or what

14 they mean, and he came to a conclusion relating to
15 those adaptive behaviors, right?

16 A Yes, he did.

17 Q Okay. And my difficulty in this area has been
18 since the very beginning of the issue of mental
19 retardation is what is a -- an adaptive behavior
20 or -- and what isn't and what level of functioning
21 are you supposed to have or should have before
22 it's something that's considered to contribute
23 towards diagnosis of mental retardation or
24 something that's considered not to go ahead and
25 contribute toward defining a mental retardation?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

95

1 A Well, there's difficulty in that issue for another
2 reason, and that is because people who are
3 mentally ill and mentally retarded will often
4 have -- have behaviors that are sometimes bizarre,
5 sometimes are totally nonproductive. They are
6 oppositional and defiant. They are dealing with a
7 reality that none of the rest of us see. Those
8 situations when that occurs make it very difficult

9 for the clinician to specifically zero in on the
10 kinds of behaviors that would suggest either
11 mental illness or mental retardation, and what you
12 have to do in those circumstances is to get a
13 broader view of the information that's out there
14 by doing a lot of interviewing and testing and
15 review of the records that's perhaps more than you
16 might do in other situations.

17 Q For example, in Dr. Horn's testimony, in his
18 report, he points to Mr. Britt's time of being
19 homeless as something that -- you know, I naively
20 thought would indicate perhaps is a skill or lack
21 of a skill that makes him perhaps mentally
22 retarded or contributes towards that diagnosis not
23 being a psychologist, but Dr. Horn surprised
24 certainly me when he indicated that being homeless
25 actually shows a high degree of adaptive skill

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

96

1 because you can forge for food or what have you.
2 What are your thoughts on that particular
3 component that he looked at?

4 A I would disagree with him respectfully. My -- in
5 my experience with people who are homeless which
6 is limited, I would say that it is a maladaptive
7 behavior for the most part. And because it's a
8 maladaptive behavior, homelessness cannot be
9 considered adaptive. There are ways to avoid
10 homelessness. I mean, there are lots of different
11 options to, for example, live in a mission. In
12 Charleston, we have two missions, and I've done
13 work with both. It's simply there are lots of
14 opportunities to avoid homelessness or to lessen
15 it, and I don't see that as an adaptive skill at
16 all.

17 Q I think some of the court of opinions I have read
18 and I think we talked about. If someone had a
19 driver's license, would that in and of itself be
20 an adaptive skill?

21 A Having a license?

22 Q Yes.

23 A No, I don't think that's necessarily an adaptive
24 skill, but it is a -- it suggests that the person
25 has some adaptability. But whether or not it

1 itself is a skill is questionable. I had lots of
2 students who are mildly -- mostly mildly retarded
3 who have attained their driver's license.

4 Q Dr. Horn as you might recall in his report I
5 believe indicated that he had kind of mixed
6 thoughts on whether or not Mr. Britt ever drove.
7 His recollection in his report I think was that
8 Mr. Britt -- or he had indicated that Mr. Britt --
9 either got it from Mr. Britt or somewhere that
10 Mr. Britt had got a learner's permit. I believe I
11 advised you the record in this case reflects that
12 we received a certified document from the Indiana
13 Bureau of Motor Vehicles filed with this court way
14 back when Mr. Heilbronner testified,
15 Dr. Heilbronner, and had indicated per the BMV
16 that no one named Eugene Britt with that Social
17 Security number ever even applied for a driver's
18 license?

19 A That is correct. I reviewed that.

20 Q Okay. So when you reviewed that, that played a
21 part in your determination; is that correct?

22 A Certainly.

23 Q And lacking ever pulling or asking for a driver's

24 license?

25 A Correct.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

98

1 Q There's also an indication in Mister -- Dr.

2 Horn's, I'm sorry, report and his testimony that

3 him going ahead and living with a woman in the

4 neighborhood for a period, later perhaps living in

5 independently and being able to cook a hot dog and

6 eggs, that that showed -- and that he paid others

7 to cook for him suggested quote, the capacity to

8 seek out solutions to possible limitations to his

9 own skills, and Dr. Horn believed that suggested a

10 capacity for independence and consequently he

11 considered that as an adaptive type of skill. Do

12 you agree with that?

13 A It shows some level of adaptability but certainly

14 not normal level of adaptability.

15 Q Okay. Now, other things he considered was when

16 Mr. Britt, Eugene was incarcerated, he would ask

17 for medical care, and I think one -- one time he
18 had an open sore on his leg and he repeatedly
19 asked for medical care. Did you see those things
20 in reports?

21 A Yes, I did.

22 Q Okay. I believe Dr. Horn indicated that this
23 showed to him that he initiated and followed up on
24 medical treatments and this suggests
25 age-appropriate concern and management of health

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

99

1 issues. Do you agree with that?

2 A Virtually every one of my cases on death row has
3 done the same things, and if I take a case on
4 death row, it's a mentally retarded case. So I
5 would disagree with that. I don't think that
6 seeking medical assistance necessarily puts you
7 over the top of intelligence or adaptability.

8 Q And here he also notes that it was important to
9 him that Mr. Britt asked -- requested and
10 independently took a shower and brushed his teeth.
11 Is that to you an indication of some sort of level

12 of adaptive behavior that would take him out of
13 the realm of mental retardation?

14 A I had students who were severely retarded who took
15 showers and brushed their teeth on their own. No,
16 that does not meet the standard.

17 THE COURT: We're going to break. It's time.

18 All right. We're going to take about -- let's
19 take the full hour. Please try to be back here
20 about 10 minutes until 1:00. It's 12:00 o'clock
21 now to start at approximately 1:00. I do not want
22 to go any longer than that, so time yourselves
23 accordingly. During this break, you will receive
24 the medication that you need. I made -- I had my
25 bailiffs call the jail, and they're going to bring

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

100

1 that to you. All right.

2 [PROCEEDINGS RECESSED FOR LUNCH & CONT'D.]

3 THE COURT: We're back on the record in the
4 case of Britt. We'll show that all parties are
5 present. Mr. Kasich, you were continuing your
6 questioning.

7 MR. KASICH: Yes, your Honor.

8 BY MR. KASICH:

9 Q Doctor, we were talking about the adaptive skill
10 measure and what you looked at and what you found
11 for the most part. Go down a couple slides to the
12 Pruitt entry. There. The last couple of days,
13 you and I and Mr. Maksimovich have kind of gone
14 over Atkins and Pruitt versus State and we've
15 tried to get a little bit of a flavor for what the
16 State of Indiana law is these days; is that
17 correct?

18 A That is correct.

19 Q Do you have a handle on it on what you believe the
20 Indiana law is?

21 A The statute, I think I have an understanding of
22 what they want in the statute, but the definition
23 as they described it in Pruitt is a little
24 unfathomable.

25 Q Because it starts out saying -- obviously the

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

101

1 Indiana statute requires a defendant to show

2 significant impairment of adaptive behavior?

3 A Correct.

4 Q It says in Rogers, this court held that Indiana's

5 adaptive functioning prong is much more general

6 and open-ended than the DSM-IV adaptive behavior

7 prong requiring a showing of substantial

8 impairment of adaptive behavior without specifying

9 any particular skills. So your understanding I

10 believe and most everyone's understanding is

11 Atkins discussed defining the adaptive -- or

12 relating to the adaptive behavior in terms of the

13 DSM-IV and in terms of AAMR?

14 A That is correct.

15 Q DSM-IV, we have I believe -- how many areas did we

16 look at?

17 A Ten years.

18 Q I think if we go back up a couple slides. Okay.

19 AAMR, the old standard also had 10 areas, but they

20 named them a little bit differently and that's why

21 we have a slash there; is that correct?

22 A The '92 definition did cover those 10 areas, yes.

23 Q Okay. Looking at those 10 areas under DSM-IV,

24 version 2004, and we might as well I guess mesh

25 them with AAMR, 1992, okay, how many of those

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

102

1 areas is it your understanding based upon your
2 experience and research and knowledge and
3 everything, how many of those areas does an
4 individual have to be deficient in before they
5 fail the adaptive skill prong and they are deemed
6 mentally retarded?

7 A Two.

8 Q Now, that's another thing I'm a little fuzzy on is
9 does Indiana require that you -- if you fail or
10 pass or however you want to look at it, depending
11 on your framework or your perspective, you have to
12 fail a certain IQ number and adaptive skills
13 before you're mentally retarded?

14 A The statute does not specify either, to my
15 knowledge.

16 Q Okay. And when you look at Pruitt, if you recall,
17 they seem to put a lot of weight on adaptive
18 skills?

19 A That's correct.

20 Q Okay. Of these 10 areas that we're looking at
21 regarding DSM-IV and AAMR 1992 version, how many
22 of those in your professional opinion based upon
23 your five degrees, based upon your 32 years of
24 experience, based upon all of your work and your
25 review of cases and individuals, how many of those

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

103

1 is Mr. Britt deficient in? Let's go through one
2 by one. Is he deficient in communication?

3 A Yes, he is.

4 Q Okay. And why do you find that? Why do you feel
5 that?

6 A He has a limited ability to understand what's
7 coming to him, more limited than what comes out.

8 In other words, his receptive language is more
9 impaired than his expressive language.

10 Q Okay. And what about self-care?

11 A I would say that he has a moderate ability in
12 that. He does not know how to care for his

13 health, but -- and that is part of self-care, but

14 I have never noticed him being, you know, filthy,

15 dirty or smelly, so I would say that's a mild --

16 Q And, of course, your situation is you saw him

17 two days?

18 A Yes, I saw him two days, and I saw him in a

19 situation that he was incarcerated. Now, other

20 people that I have talked to said that, you know,

21 he was like -- one of his teachers, for example,

22 adolescent teachers said, you know, he was like

23 every adolescent boy. Days he smelled; some days

24 he didn't.

25 Q Home living?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

104

1 A I do not believe he's capable of taking care of

2 himself in the home, no, or taking care of a home.

3 Q So when you say that, do you mean he falls below

4 the level?

5 A He has a substantial disability in that area.

6 Q Okay. Social skills, social interpersonal skills?

7 A Probably the most severely impaired area. He

8 is -- he is extremely impaired as far as social

9 abilities.

10 Q Community use, use of community resources?

11 A I don't believe he's capable of adequate use of
12 community resources. Even for a person with mild
13 mental retardation, he has great difficulty in
14 that area.

15 Q I think one of the areas to look at there is the
16 use of Gary resources perhaps in the way of
17 transportation?

18 A That is correct.

19 Q Okay. And what do you know about how he moved
20 from one place to another?

21 A When he was working for Hardee's, he would ride
22 his bicycle for several miles in whatever weather
23 happened to be and also even at night without a
24 light on his bike; and under those circumstances,
25 he could have been killed many times and very

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

105

1 nearly was once.

2 Q Okay.

3 A And he also didn't take the time or didn't
4 understand how to use public transport in those

5 situations.

6 Q Do you recall reviewing a written statement from a

7 person who was his manager at Hardee's?

8 A Ms. Hubbard, yes.

9 Q Okay. Did she make any mention of his bicycle?

10 A Yes, she did.

11 Q Was anything significant that you gleaned from

12 that?

13 A Well, that he would ride his bicycle home in the

14 dark and that he also like I said was hit by a car

15 one time when he was on his bicycle, and the other

16 thing was is he was -- even if he knew he was

17 late, he would ride his bicycle rather than take

18 public transport.

19 Q Do you recall anything about police involvement?

20 A Oh. I'm sorry. I can't. I don't remember right

21 offhand.

22 Q Okay.

23 A I'm sorry.

24 Q Would it refresh your recollection if it was

25 something about police involvement stopping him on

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 a bicycle, when he was riding the bicycle?

2 A I'm sorry. I don't remember. I apologize.

3 Q That's all right.

4 A I have been trying to cram all this stuff in my

5 head.

6 Q That's all right. And we're talking about

7 self-direction. What are your thoughts on

8 self-direction?

9 A Many people with mental retardation are capable of

10 basic self-direction; getting a job, holding a

11 job, having goals in their lives, having

12 independence as a major goal. I -- I think that

13 anybody who has spent any time with Eugene Britt

14 knows that self-direction is an area that he is

15 significantly impaired in. He doesn't understand

16 what he's doing with his life.

17 Q Health and safety?

18 A Absolutely not. I don't think he has any

19 capabilities of taking care of his health other

20 than asking for his medication which he did this

21 morning, which I think is indicative -- what

22 reason I say that it's important is that he is in

23 a highly structured environment. He is used to a
24 routine. One of the things that we know about
25 people with mental retardation is that they

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

107

1 respond exceedingly well to a routine whereas
2 people who are normal don't like routine; they
3 like a change of pace once in a while. People who
4 are retarded are more capable of understanding a
5 routine. And because of that, he knew that he was
6 supposed to have his medication and asked for it.
7 Had he been in a highly structured environment in
8 the outside, I think he probably would have been
9 able to take care of himself much better, but I
10 don't think anybody ever taught him how.

11 Q Functional academics, functional academic skills,
12 we had a look at some of his scores in school?

13 A His scores in school were poor. Probably I think
14 a big part of that was that his environment when
15 he was young was exceedingly topsy-turvy. He
16 didn't know from day to day, I don't know that
17 they had an understand -- a comfort about whether

18 or not there was going to be violence in the home,
19 whether or not the family was going to stick
20 together. The amount of interaction he had with
21 his teachers was probably not very positive for
22 him, and children as we know are not always fond
23 of school, and children with disabilities are
24 usually not fond of school because it -- it throws
25 their disability back in their face again and

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

108

1 again. What I know from experience with people on
2 death row is after they get incarcerated, they
3 start to learn to read, they start to learn to
4 write, and it's not at all uncommon for people who
5 did not graduate from high school to get their
6 GEDs in prison even if they are mildly
7 handicapped.

8 Q Was there anything else that indicated to you that
9 he had problems with functional academics,
10 functional academic skills besides those school
11 tests?

12 A Well, he -- Dr. Horn in his investigation gave a

13 test of functional academics such as the WRAT
14 which is -- his scores in that were, you know,
15 within the fifth grade range, so he's not exactly
16 up to par on those either, but it's not unusual,
17 really it's not terribly unusual for a person
18 who's mentally retarded to be able to recognize
19 words which is the only thing that the WRAT tests
20 in reading. It does not have a comprehension
21 subtest.

22 Q And a few of those words if you recall we looked
23 at, a few of those words that seem to be a little
24 bit more difficult, do you know possibly why he
25 might have been able to read those words?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

109

1 A Over the years of experience and he has some good
2 deciphering skills. He can decipher words that he
3 sees, even two-, three-syllable words.

4 Q For example, the word "sanctuary"?

5 A Sanctuary was one. That was actually from -- that
6 was -- that was not a word that was in the WRAT.
7 That was in the -- that was in the Wechsler, and

8 that's in vocabulary. He didn't have to read
9 that. The word is presented to him, but the
10 examiner also says the word.

11 Q Leisure, what about the leisure category?

12 A This is a category that's been receiving a lot of
13 press lately. One of the things we know about
14 people with mental retardation is that leisure
15 skills are something that they lack, and that's
16 because a lot of times people who lived in
17 institutions when they were younger or people who
18 lived in group homes, they don't get leisure
19 skills because it's expensive. It costs money,
20 and sometimes people won't pay for it. The state
21 won't pay for it. And we have found in the recent
22 past in research that if people have good leisure
23 opportunities and, you know, are directed towards
24 those opportunities, it can make a difference. I
25 don't think that anyone who knows Eugene Britt

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

110

1 knows that his leisure skills were based on things
2 that were not always appropriate.

3 Q Work. Work is one of those areas?

4 A He was capable of keeping a job for a while. He
5 had the job at Hardee's for approximately one year
6 according to Ms. Hubbard. And during that time,
7 he maintained a level of performance that enabled
8 him to keep his job; however, she did point out
9 that he was chronically late, that he was -- he
10 fooled around a lot at work and got into arguments
11 with some of the other workers and at one time was
12 accused of acting sexually inappropriate with one
13 of the females.

14 Q Now, we also then have a new AAMR scale, I guess
15 you call, for adaptive skills?

16 A That's correct.

17 Q And what are those?

18 A Well, it's -- it still considers these areas to be
19 extremely important, but it also looks at a more
20 general category of functioning and that -- those
21 are three different areas; those being conceptual,
22 practical and social ability. In other words, how
23 well they adapt in practical situations, social
24 situations and how well they conceptualize their
25 own behavior.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

111

1 Q Forgive me, Doctor. Coming back to this for just
2 a moment. How many of those areas could you point
3 to again specifically that Mr. Britt falls below
4 the level to which it would be two or more of
5 those areas or if you fall below that level you
6 are considered to be mentally retarded?

7 A I would consider at least seven to be of concern.

8 Q Could you point them out again specifically?

9 A Communication, home living, social skills,
10 community use, self-direction, health/safety,
11 leisure and functional academics.

12 Q I'm sorry.

13 A That's eight actually come to think of it. But
14 functional academics at this time is questionable
15 because he has been improving in those areas.

16 Q Going back to AAMR 2004, what --

17 A 2002.

18 Q 2002. In each of those three areas, are there
19 subparts, or does just each area encompass
20 something -- well, tell us what each area

21 encompasses just briefly.

22 A You mean the three areas?

23 Q Three.

24 A Practical knowledge would be things like can he

25 keep a job, can he behave appropriately in

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

112

1 different situations, and that goes along with
2 conceptual. Can he -- can he understand the
3 difference between the way to behave in church
4 versus the way to behave in society, out in a
5 restaurant. For some of -- for the low
6 functioning people with mental retardation, for
7 example, it is socially and conceptually
8 inappropriate for a person to run up and hug
9 somebody they've never met before, and that does
10 happen and in very inappropriate situations.

11 Practically, I think Mr. Britt is extremely
12 impaired. He doesn't understand the practicality
13 of keeping a job and behaving in a certain way
14 professionally so that he holds onto that job and
15 doesn't get in trouble. He also doesn't

16 understand how to take care of himself as far as
17 his health and safety, and that's a very important
18 practical skill.

19 Conceptually, I think he has some conceptual
20 skills. He's able to conceptualize the situation.
21 For example, he knows he's in trouble. And I
22 think he probably has an understanding what this
23 hearing is basically about.

24 Socially, however, as I said before, was the
25 area that he is so badly impaired in. His social

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

113

1 skills are abysmal. He does not understand how to
2 behave in society.

3 Q How many of those areas, those three I guess core
4 areas do you need to be deficient in to meet the
5 qualification or be considered mentally retarded?

6 A Two.

7 Q And how many of those areas is Mr. Britt deficient
8 in sufficiently to where he meets that definition?

9 A I would say practical and social, two.

10 Q If we can go back to that page on Pruitt and

11 towards the bottom, the Court said: Its current
12 definition calls for significant limitations in
13 adaptive behavior as expressed in conceptual,
14 social and practical adaptive skills. Although
15 the Indiana statutory definition is somewhat
16 different from the DSM-IV, it is very similar to
17 the revised AAMR definition and therefore within
18 the range of permissible standards. Under the
19 Eighth Amendment, we conclude the Indiana statute
20 does not impose a standard incompatible with the
21 Eighth Amendment as explained in Atkins, rather
22 it's within the flexibility allowed by the
23 consensus found in Atkins. I'm not sure what that
24 means, and the Court has to go ahead and make that
25 determination ultimately, but I believe, correct

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

114

1 me if I'm wrong, in your opinion, under both
2 DSM-IV and under the old and revised AAMR
3 definitions, what does Mr. Britt fall under?
4 A In my professional opinion, I believe that Eugene
5 Britt is mentally retarded.

6 Q Okay. Now the next slide?
7 A Down or up?
8 Q Court further then said: In sum, we find the
9 Indiana statute to meet Atkins requirements, but
10 we do not interpret it to vary from the clinical
11 standards to the extent that it embraces only
12 those in the bottom 10 to 25 percent of those
13 meeting the clinical standards. We, like the
14 Supreme Court in Atkins, leave refinement of that
15 standard for another day. For purposes of this
16 case, it is sufficient to note the clinical
17 definitions provide a safe harbor. Although
18 variation is permissible, it cannot go to the
19 point of excluding a majority of those who fit
20 clinical definitions.

21 All right. Again, you have five degrees.
22 You have been doing this for 32 years, I believe
23 you testified, all right. Now, based upon your
24 clinical experience, I think one of your very
25 first slides discussed clinical judgment is a

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 special type of judgment rooted in a high level of
2 clinical expertise and experience. It emerges
3 directly from extensive data?

4 A Correct.

5 Q You have, have you not, had exposure to extensive
6 data?

7 A Yes.

8 Q Do you feel confident, do you feel -- how
9 confident do you feel that you -- that your
10 findings and that your conclusion that Mr. Britt
11 is mentally retarded is correct?

12 A Mr. Kasich, if I didn't feel that he was mentally
13 retarded, I would not be here. I am very
14 confident that Eugene Victor Britt has met the
15 standard for a diagnosis.

16 Q Since 2002 obviously since Atkins, we've had this
17 situation now where it is unconstitutional to
18 execute someone being mentally retarded, and I
19 think one of the areas we're looking at here is,
20 and correct me if you haven't found this, if I'm
21 wrong, is it's the issue of having people -- and
22 just because you're mentally retarded doesn't mean
23 you're absolutely dumb as a box of rocks; is that

24 correct?

25 A That is correct.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

116

1 Q So people have some idea of what they're facing
2 and realizing perhaps that if they test high,
3 they're going to go ahead and they could be
4 executed possibly?

5 A Correct.

6 Q So we're giving these tests now like, for example,
7 let's point to the TOMM test, and the TOMM -- it's
8 a memory test, is it not?

9 A It is actually -- it stands for the Test of Memory
10 Malingering.

11 Q And that test, do you know -- I think you
12 indicated to me yesterday that you met the
13 gentleman who -- or have spoken at least to the
14 gentleman who created the TOMM?

15 A Dr. Tom Biaz.

16 Q And that test, do you know how it was normed?

17 A It was normed on a standard population of
18 Canadians primarily, and it did not include people

19 with mental retardation.

20 Q So in your professional opinion, does the TOMM

21 test mean anything? Does it have any relevance

22 whatsoever in testing someone who is facing

23 execution when they're being tested for IQ?

24 A Well, I wouldn't say it has no relevance. Every

25 bit of data that you can gather has relevance. In

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

117

1 the situation of giving it to a person with mental

2 retardation, it depends upon that individual's

3 ability to remember things. For example, as I

4 said before, people with mental retardation

5 typically have very poor short-term memory skills.

6 Some people have better auditory memories. Some

7 people have better visual memories. That's true

8 for everyone. But memory is not considered a very

9 good indicator of intelligence. Specifically, the

10 lowest -- one of the lowest loaders in "g" on the

11 Wechsler is the digit span test which is an

12 auditory skill, a memory skill. The TOMM does

13 give you some data that can be useful, but it

14 doesn't necessarily suggest that a person with
15 mental retardation upon whom that test was not
16 normed, that a person with mental retardation
17 could specifically do poorly on the test because
18 they were trying to malingering. The concept behind
19 malingering is to fake bad so that there is some
20 kind of a secondary gain according to DSM. In his
21 situation, the TOMM that was administered to
22 Mr. Britt, he did not do well on and he did very
23 poorly on it, but I've seen other people with
24 mental retardation do just as well, and I've seen
25 other people with mental retardation who did much

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

118

1 better.

2 Q Perhaps I phrased it incorrectly. What about
3 validity? Do you use the term validity in
4 testing?

5 A Yes.

6 Q What validity, if any, does the TOMM have in this
7 context when you're testing someone for IQ when
8 they're facing execution?

9 A If you're testing for malingering of an IQ?
10 Q Yes.
11 A It would have -- every bit of data is important.
12 I would say that the TOMM itself is not the best
13 indicator of whether or not the person's giving a
14 good effort.
15 Q I think you might recall that Mr. Britt was also
16 given the Seashore Rhythm Test?
17 A I'm not familiar with that test.
18 Q All right.
19 A That's a neuropsych test.
20 Q What about the Ray (phonetic) Test?
21 A The Ray-15, yes, I know that one.
22 Q What does that test?
23 A Memory and whether or not you are really giving an
24 effort.
25 Q And do you know what the results of the Ray Test

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

119

1 were for Mr. Britt?
2 A Yes.
3 Q And do you believe that that test is reflective in

4 any way on the issue of malingering?

5 A Again, it's a test of memory, and memory for

6 people with mental retardation is almost always a

7 problem. So I'm not sure it's a good indicator of

8 whether or not he was giving his full effort. I

9 think there are better ways to tell on whether or

10 not he was actually making effort.

11 Q And he gave I believe this was the RENT Test?

12 A I'm sorry?

13 Q The R-E-N-T?

14 A I don't know that one either.

15 Q Now, what about the WMT, that was the --

16 A Wechsler -- WMT?

17 Q Yes.

18 A Or WMS?

19 Q WMT. Do you recall seeing that?

20 A I'm not sure. Hold on just a second. Let me take

21 a look.

22 Q I believe it's the very last one. The Word Memory

23 Test?

24 A Oh, Word Memory Test. Okay, yes. I know what

25 you're talking about.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 Q What is that test?

2 A Again, it's a test of whether or not the person

3 can remember categories of words and put them

4 into -- commit them to memory for later

5 regurgitation.

6 Q All right. And you saw this test and the results

7 of that, of this test?

8 A Correct.

9 Q And does this test have any validity as far as

10 malingering?

11 A Same situation. It -- it has validity only in as

12 much as it's a test of the person's memory and

13 doesn't necessarily suggest that he's malingering,

14 even if he doesn't do well. If he had done -- let

15 me put it this way. If he had done well on all of

16 them, that would have indicated he definitely was

17 not malingering. If he did poorly on all of them,

18 that may indicate that he is malingering, but it

19 also may indicate that his memory which we know is

20 impaired because of his disability is also a

21 problem. Ergo, you can't say for sure that he was

22 malingering based upon the results of those tests.

23 Q I think you indicated there was better ways to

24 determine?

25 A Yes.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

121

1 Q And what would be one of those ways?

2 A All you have to do is look at the IQ test, the --

3 the IQ test that he gave that Dr. Horn -- or

4 excuse me, that Ms. Ayres gave clearly indicates

5 in his results that he has wide variance in each

6 one of the subtests that I noted and, in fact, in

7 most of the subtests that are in there. That wide

8 variance is a stronger indicator of his ability

9 and his disability than any of the malingering

10 tests that were given to my way of thinking.

11 Q If you can go back to the characteristics of

12 people with --

13 A That one?

14 Q All right. This is again another slide you put

15 together?

16 A Yes.

17 Q These are the characteristics of people with
18 mental retardation?

19 A Yeah, I should give credit. This came from a --
20 part of it came from a book by Jim Patton and Mary
21 Birdie Smith and Richard Ittenbach some years
22 back.

23 Q And does Mr. Britt have any of these
24 characteristics?

25 A Yes. He has most of them, in fact.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

122

1 Q Could you detail for us the ones that he does
2 have?

3 A I believe short-term memory is significantly
4 impaired. He is male. I believe he has poor --
5 almost no ability for abstract thought on a grand
6 scale. His concentration and focussing is not
7 anywhere near normal, but it's better than some of
8 the other skills he's got. His judgment skills
9 are abysmal. His -- I would say that he does tend
10 to acquiesce. In my introduction to him, I told
11 him that if I did not feel he was giving his best

12 effort in our work together that I would walk out
13 the door and that he could, you know, take his
14 chances on what else came down the pike. And I
15 had to make that very clear to him on two
16 occasions, and both times he agreed to do his best
17 work, and I believe I did get more or less his
18 best work. I really do believe I did. His
19 acquiescence ability, he will give in to authority
20 in situations where he's afraid, and that's true
21 for most people with mental retardation. His
22 transference and generalization skills I believe
23 are not very good, in fact, within the range of
24 mental retardation. He is impulsive. He will do
25 things without thinking about it. He

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

123

1 perserverates on behavior that are -- behaviors
2 that are unsuccessful, and for the most part, I
3 would say his coping skills are low average to low
4 and his planning skills appear to be low average
5 as well, recalling once again that mental
6 retardation can have areas of strengths as well as

7 deficit.

8 Q And, again, you reviewed Mr. Britt's school

9 records?

10 A Yes.

11 Q Was there any evidence in the records that

12 Mr. Britt was given a thorough psychoeducational

13 evaluation for possible special educational

14 placement during his school years?

15 A I saw no evidence that he was ever given a proper

16 psychoeducational evaluation which I found to be

17 hard to believe because he -- he had low grades

18 even as a small child and I think that's -- that's

19 a significant concern because when you see

20 somebody who is in first, second, third grade who

21 is getting Cs and Ds, something's not right, but

22 yet they did not give him a full-scale psych

23 workup.

24 Q Is a diagnosis of mental retardation appropriate

25 when an individual who scores low on an IQ test

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 demonstrates a high ability to function in social

2 and occupational environments which require some
3 independent self-sufficient life skills?

4 A No, because it would not be -- it would not meet
5 two -- it would not meet one of the three prongs.

6 Q Okay. Is a diagnosis of mental retardation
7 appropriate for an individual who scores high on
8 an IQ but demonstrates little, if any, ability in
9 social and occupational environments which
10 requires some independent self-sufficient life
11 skills?

12 A No. Again, it does not meet one of the prongs,
13 and I think the weird thing is that most of us
14 know people like this. These are the people that,
15 you know, still live with their parents after
16 40 years. These are the people that, you know,
17 are -- got through high school, maybe even got
18 through college, maybe they have a job but they
19 can't live independently and they cannot cook
20 their own food, and we all knew kids like that,
21 that had problems but they weren't retarded
22 because they did have the intellect, they just
23 didn't have the adaptability.

24 Q Now, Mr. Britt's case, does he meet -- you know,

25 and it doesn't appear that Indiana has an IQ prong

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

125

1 in the statute and it doesn't certainly appear

2 that it has it in the case law; is that correct?

3 A Not to my knowledge.

4 Q But having asked that, the IQ tests that you have

5 reviewed, the IQ tests that you have examined,

6 would they be consistent with mental retardation?

7 A Yes.

8 Q And we've already gone over the adaptive skills,

9 and we've gone over your clinical experience.

10 Now, okay. Percentage-wise if we go back to that

11 Bell curve on where people fit, where would you go

12 ahead and guesstimate or opine based again upon

13 your experience, your education, your knowledge

14 and research, where would Mr. Britt fall in the

15 normal population?

16 A About the second percentile.

17 Q Okay.

18 A Between the second and the first percentile.

19 Q And does that meet the requirement for mental

20 retardation under DSM-IV?

21 A Yes.

22 Q And does that meet it under AAMR?

23 A Yes.

24 Q 1992 and 2002?

25 A Yes, it does.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

126

1 Q And were you able to reach this opinion within a

2 reasonable degree of psychological certainty?

3 A Given the background and the testing that has been

4 done, yes.

5 Q Okay. Do you believe that given Mr. Britt's level

6 of functioning that he's able to meaningfully

7 communicate with his attorneys in his defense?

8 A I didn't -- I did not do any specific testing for

9 competence. Under medication and given

10 explanations and carefully showing him what the

11 situation is, it's possible that he could to a

12 very small extent cooperate and give you

13 information that would suggest he was competent in

14 that situation. I have -- I've known several

15 people who have been mentally retarded who were
16 competent to stand trial.

17 MR. KASICH: Nothing further, your Honor.

18 THE COURT: Thank you, Mr. Kasich.

19 Mr. Burke.

20 CROSS-EXAMINATION

21 BY MR. KASICH:

22 Q Dr. Keyes, you said how many cases, death penalty
23 cases have you been involved in?

24 A Well, like I said, Mr. Burke, it's a matter of
25 what are you calling involved. I have been asked

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

127

1 to be involved in many cases, probably over a
2 hundred.

3 Q Death penalty cases we're talking about.

4 A Specifically death penalty cases?

5 Q That's what I asked.

6 A Gosh, you know, it's really hard to be sure. I
7 probably would think around a hundred.

8 Q A hundred death penalty cases?

9 A Probably.

10 Q On the issue of mental retardation?

11 A Yes.

12 Q And about how many of those hundred cases you have

13 been involved in have you found that the defendant

14 who is charged with a crime not to be mentally

15 retarded?

16 A Over half.

17 Q Over half?

18 A Uh-huh.

19 Q Have you ever been appointed by the Court?

20 A Depends on the statute of the state. Some courts

21 have appointed me at the nomination of the

22 defense. Some courts -- sometimes I'm, you know,

23 called directly from the defense or whatever.

24 Q You spent, correct me if I'm wrong, nine to 10

25 hours with Mr. Britt?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

128

1 A I think it was about seven to eight hours. I'm

2 not exactly sure.

3 Q Seven to eight hours?

4 A Over two days.

5 Q Seven to eight hours with Mr. Britt?

6 A I think so. I'm not positive.

7 Q And that would have been over June 4th, 5th, 6th

8 and 7th, those four days?

9 A It was during those four days, yes.

10 Q Seven or eight hours?

11 A I think.

12 Q You did not do an IQ test?

13 A No, I did not.

14 Q Why not?

15 A He had already had an IQ test.

16 Q Well, an IQ test that you apparently were very,

17 based upon your testimony, very critical of. Why

18 didn't you do an IQ test?

19 A I didn't think it was necessary.

20 Q You didn't think that it was necessary?

21 A No, sir.

22 Q Were you aware -- let me ask you about this

23 Revised Beta IQ that was done on Mr. Britt back in

24 1979 when he went to prison for two counts of rape

25 and a count of robbery.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 A Uh-huh.

2 Q What's the validity of -- validity of that test?

3 A It's a good screener. It has some screening
4 value. It -- the '68 version of that test which
5 was called the Revised Beta, it's out in the third
6 edition now, the '68 version of that test had a
7 high correlation with the old Stanford-Binet, the
8 LM edition, and that suggests that it has good
9 concurrent validity with the Binet.

10 Unfortunately, the Binet and the Wechsler, the old
11 Binet and the Wechsler revised edition did not
12 have good validity to each other.

13 Q That test, that's a group-administered test?

14 A It can be. It can be administered by group or by
15 individual.

16 Q Do you know whether it was a group-administered
17 test in Mr. Britt's case back in 1979?

18 A In most of the DOC experience that I have had,
19 they were usually individually administered.

20 Q You didn't answer my question. Do you know
21 whether it was individual --

22 A No, I don't.

23 Q -- or a group-administered test?

24 A I'm sorry. No, I don't.

25 Q Okay. The -- so you don't think that it was

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

130

1 important for you over this four-day period of

2 time for you to do an individual IQ test?

3 A I didn't think it was necessary at the time.

4 Q If you had wanted to do one, you could have done

5 one?

6 A I could have, yes.

7 Q And according to your testimony, Mr. Britt was

8 cooperating fully with you during the seven or

9 eight hours that you spent with him?

10 A I felt that he was reasonably cooperative, yes.

11 Q Were you aware that defense counsel in this case

12 tried to prevent a doctor from doing an IQ test on

13 him?

14 MR. KASICH: I'd sure like to know about

15 that, your Honor. I'm going to object. I don't

16 know whether there's ever been any evidence of

17 that.

18 THE COURT: Mr. Burke.

19 MR. BURKE: There's been evidence of it, your
20 Honor. I mean, there's in the record Mr. Kasich
21 for probably a year and a half tried to prevent
22 Dr. Heilbronner from doing an IQ test. He
23 appealed to a former judge in this case to not
24 allow him to do an IQ test.

25 MR. KASICH: Mr. Jarrett and I asked the

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

131

1 presiding judge at that time if an IQ test was
2 necessary since we had an IQ test that was close
3 to age 22. The judge at that time said no, she
4 didn't want an IQ test done, she wanted
5 Mr. Heilbronner to do the Adaptive Skills Test.
6 When Dr. Heilbronner came here, we reminded him of
7 that and he didn't agree with it so he went in
8 front of Judge Kouros and the judge indicated to
9 him not to do an IQ test.

10 THE COURT: I understand.

11 MR. KASICH: And when he characterizes it.

12 THE COURT: I will not allow this witness to

13 answer that question because it has absolutely no
14 relevance to the issue at hand on mental
15 retardation. Next question.

16 BY MR. BURKE:

17 Q I just got these things today handed to me for the
18 first time. You apparently did this testing back
19 in June?

20 A Yes, sir.

21 Q Three months ago. Do you know of any reason why
22 it wasn't given to me before today?

23 A Well -- I don't -- actually, I don't think
24 Mr. Kasich had a copy of it until day before
25 yesterday.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

132

1 Q You just completed it the day before yesterday?

2 A No, I had --

3 Q The testing that you did?

4 A No, I completed the testing in June. I just
5 didn't give him a copy of it. He didn't ask for
6 one.

7 Q He didn't ask for one?

8 A No.

9 MR. BURKE: I don't have any further
10 questions of this witness.

11 THE COURT: Okay.

12 REDIRECT EXAMINATION

13 BY MR. KASICH:

14 Q Regarding you not doing an IQ test, were you
15 instructed by us not to do an IQ test?

16 A Not specifically, no. You asked if I was going to
17 do one, and I said I didn't see the need for it.

18 Q Okay. And regarding the documentation provided to
19 Mr. Burke, when did we make those copies?

20 A Last night around 6:00 o'clock.

21 Q Okay. And with regard to one of them that was --
22 was it completed before you made your phone calls
23 and talked to the individuals you talked to?

24 A Of the things that we just sent out?

25 Q Yes.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

133

1 A The phone list was not completed until then.

2 Q Okay.

3 A The other tests were, yes. They were completed.

4 Q Okay. And I made you aware that we had offered to

5 Mr. Burke the opportunity to depose you and that

6 he had declined?

7 A Yes, you did.

8 MR. KASICH: I have nothing further, your

9 Honor.

10 THE COURT: All right. Let's see if I have

11 any questions.

12 EXAMINATION

13 BY THE COURT:

14 Q You are aware of Dr. Horn doing a series of tests

15 essentially to determine malingering?

16 A Yes.

17 Q In fact, you read his report. The one I'm

18 referring to is the one dated January 14th, 2005,

19 correct?

20 A Yes, sir, I did.

21 Q If my notes are correct, we're talking about

22 what's known as the Ray Test?

23 A Yes.

24 Q The Test of Memory and Malingering, the TOMM Test

25 and this Word Memory Test, these are recognized

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

134

1 tests on the issue of malingering, correct?

2 A Yes, they are.

3 Q Okay. So you're not suggesting that it was

4 improper to give these tests or that these tests

5 are not recognized tests; is that correct?

6 A Not in the least, no, they are perfectly proper to

7 give.

8 Q All right. So as to Dr. Horn administering these

9 tests, do you believe as you sit here now that it

10 was improper for him to have even given these

11 tests to Eugene Britt?

12 A No, not that it's improper.

13 Q Do you think it was appropriate?

14 A With the caveat of understanding that a person

15 with mental retardation may do abysmally in any

16 case because of memory problems that people with

17 mental retardation have. It is possible that a

18 person with mental retardation will do all right

19 on them, and it's very possible that a person with

20 mental retardation will do terribly on them.

21 It's -- and part of it has to do with how well the
22 person's feeling that day which is true for
23 everybody, of course, but a person with mental
24 retardation we know has significant memory
25 problems, and the numbers that we see on those

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

135

1 tests can vary wildly. I mean, 20 -- I believe
2 that he had a 26 on the TOMM. The normal on the
3 TOMM is like a 45 out of 50, but this is not
4 normal intelligence that we're dealing with.

5 Q So the idea of giving these malingering tests, the
6 use of them was not a bad idea?

7 A Not at all.

8 Q Or certainly maybe even proper, but you would
9 question the weight that they should be given?

10 A That is exactly right, your Honor. There are
11 other ways to tell if a person's malingering that
12 can be equally as effective, probably more so. I
13 did my dissertation on malingering.

14 Q On what?

15 A On malingering, mental retardation.

16 Q I'm reviewing this report by Dr. Horn. I'm
17 beginning on page eight. In his section where he
18 talks about information from records and from
19 Mr. Britt regarding adaptive behavior. Continues
20 to page nine, page 10. Dr. Horn gives this
21 assessment of Mr. Britt on the issue of the
22 adaptive behavior that he was able to live on his
23 own. He moved out of his family home when he was
24 15, held jobs. Apparently, he lived independent.
25 I'm looking at page nine.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

136

1 A I'm sorry. I don't have a copy of it with me.
2 Q Oh, I'm sorry. Maybe just for the record then --
3 MR. KASICH: Want me to give the witness --
4 THE COURT: Yes, if you can.
5 MR. KASICH: Yes.
6 THE COURT: Perhaps it would help him to
7 follow along where I'm referring to.
8 THE WITNESS: Thank you.
9 BY THE WITNESS:
10 A Which paragraph are you on, sir?

11 BY THE COURT:

12 Q Dr. Horn's report, page nine.

13 A Uh-huh. Well -- All right. I'm sorry.

14 Q You know, he's going on about how all of this is
15 indicative of significant adaptive behavior in his
16 opinion?

17 A Uh-huh.

18 Q Being able to hold jobs, cooking, even minimal;
19 hot dogs, eggs, but independent. Self-care.

20 A Uh-huh.

21 Q Although you may have already talked about this to
22 some extent with Mr. Kasich's examination of you,
23 I want you to discuss once again your assessment
24 of adaptive behavior that you saw in Mr. Britt
25 compared to how Dr. Horn views it.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

137

1 A Okay.

2 Q Distinguish it, if you will, if not for my
3 benefit, for the record.

4 A Certainly.

5 Q This is a big deal.

6 A Yes, I agree with you. It is a big deal. I think
7 that the most important thing that I can say under
8 these circumstances is I've known people with
9 mental retardation who were younger than Mr. Britt
10 who were able to do all of these things and who
11 were still mentally retarded. Again, as I said
12 before, it is possible for a person -- and the
13 definition of mental retardation and its
14 assumptions that I gave you, the second page of
15 the Power Point, it is possible for a person with
16 mental retardation to function above that level
17 and therefore no longer be considered mentally
18 retarded. That's possible.

19 Q I understand.

20 A But I have known people who were mentally retarded
21 who lived in semi-independent and independent
22 situations who had all of these skills that
23 Mister -- that Dr. Horn rightfully points out,
24 although cooking is minimal, hot dog and eggs,
25 that's pretty minimal. I knew kids that could do

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 a lot better than that who were, like I said,
2 younger than Mr. Britt and still were considered
3 mentally retarded, still received their
4 Supplemental Security Income and could do -- and
5 kept jobs, not sheltered, also in employment,
6 regular employment, and in shelter work for that
7 matter.

8 Q So they were still mentally retarded because of
9 why, these sample individuals?

10 A Their overall functioning level required a certain
11 amount of supervision, and that supervision is
12 something that Mr. Britt lacked which I think is
13 part of the reason we're here today.

14 Q In your behavior checklist, the 10 points that you
15 talk about, looking on page 11 of Dr. Horn's
16 report now --

17 A Yes, sir.

18 Q -- indicates that his -- that he chose not to use
19 formal behavior checklists which are sometimes
20 used to describe and quantify adaptive function in
21 these individuals being assessed clinically for
22 retardation?

23 A Uh-huh.

24 Q Many of the behavior abilities addressed in the
25 typical checklist, I'm sure that he's referring to

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

139

1 the checklist that you referred to earlier?

2 A Uh-huh.

3 Q Require the observation of an independent and
4 unbiased party. Not that you are biased
5 but certainly --

6 A I understand.

7 Q -- nor independent. He says that he did not have
8 access to that individual. That the checklists
9 were not designed to be used in forensic settings.
10 I am unaware of research demonstrating the
11 validity in cases such as this one. It seems to
12 cut across what you're doing today.

13 A Uh-huh.

14 Q Prior examples of behavioral functioning,
15 particularly from the years before his current
16 incarceration would in my opinion provide the most
17 objective and unbiased data available from which
18 to infer his adaptabilities and he goes on. I'm

19 curious that you seem to rely on this checklist
20 but yet Dr. Horn says I'm not going to use it
21 basically because it's not that reliable in this
22 type of case?

23 A Absolutely.

24 Q Explain please.

25 A I understand your concern, your Honor, and I

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

140

1 understand his point of view. A self-report scale
2 is always questionable. There's no question about
3 that. Any time a person is reporting on
4 themselves, they tend to exaggerate typically what
5 they're able to do. A person with mental
6 retardation typically exaggerates what they're
7 capable of doing. That's why I did the
8 Independent Living Scale which is not a
9 self-report scale, it is an actual test of ability
10 in that area. If -- I think that you have got a
11 copy of the protocol for that. It was admitted
12 into evidence. I think it was State's Exhibit 3
13 if I'm not mistaken -- excuse me, Defense

14 Exhibit 3.

15 Q The Independent Living Scales?

16 A Yes, sir.

17 Q Defendant's 3. Defendant's 3.

18 A The way that this is given is like a test. It's

19 not a checklist. It is, in fact -- I am giving

20 that person specific questions asking him -- for

21 example, I show him a clock. It says what time

22 does this clock show. He tells me the time. What

23 is your telephone number. He tells me the phone

24 number. What day of the week is it today. These

25 are simple ones, obviously. At one point I ask

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

141

1 him to remember that he's got a doctor's

2 appointment at 2:00 o'clock on -- or excuse me, at

3 3:00 o'clock on Tuesday with Dr. Thomas, and then

4 I am supposed to go back approximately seven or

5 eight minutes later and ask him that to see if he

6 knows it and then there's another third

7 opportunity to tell me if he remembers it or not.

8 Each one of these questions -- the next part,

9 managing money. How are you supported
10 financially. I believe his response in that was
11 taxes, wasn't it?
12 Q Welfare after jail. Then a job at Hardee's. Jail
13 now.
14 A And that he got two points for, correct?
15 Q Correct.
16 A Yeah. He was able to identify certain things. He
17 was unable to identify other things. He was able
18 to do certain tasks. He was unable to do others.
19 If you look at that -- that protocol, that
20 profile, your Honor, you're looking at Aces and
21 Spaces, and that's pretty much what I've been
22 saying all along, that if he were trying to
23 malingering mental retardation, he would have missed
24 them all. That's -- that's the characteristic.
25 And the harder things that he got correct support

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

142

1 the idea that he is unable to do easier things and
2 get harder things correct, he was not faking it
3 under those circumstances. That's all I could

4 say.

5 Q Speaking of your Aces and Spaces idea where an
6 individual may get a series of questions wrong and
7 suddenly get a harder question right and then get
8 more wrong and then get yet another question
9 right, you call that Aces and Spaces and you said
10 that I believe in the context of the Wechsler
11 Test?

12 A Yes.

13 Q Specifically?

14 A Yes. But it happens in most --

15 Q Is that recognized in your profession, or is that
16 just your opinion on Aces and Spaces?

17 A It's recognized --

18 Q I shouldn't say just. Or is that your opinion?

19 A That's okay. It is recognized by people who have
20 experience with adults with mental retardation
21 that there are these oddball skills that pop up
22 and then other areas that you would think they
23 definitely are going to know and they don't. It
24 has been recognized there. As far as in the
25 research, the only book I remember seeing that in

1 was in Satler (phonetic) where he talked about the
2 wide variance in people who have mental
3 retardation in their skills.

4 Q Do you typically see this?

5 A Yes. In testing, you see it a lot. The way I
6 always know a person's trying to malingering is that
7 they miss a lot more than they get right and they
8 miss the easy ones and they miss the hard ones.

9 Q Going back to Dr. Horn's report?

10 A Yes, sir.

11 Q He makes mention of comparing letters purportedly
12 written by Mr. Britt.

13 A Yes, sir.

14 Q That may be indicative or could be indicative of
15 adaptive functioning?

16 A That's true.

17 Q What's your opinion on that, if any?

18 A Well, I've seen those letters, and I was concerned
19 about them because they do have information that
20 would suggest he's more aware than I would have
21 suggested he was capable of doing. My concern

22 here is that -- and I have seen this happen a lot
23 in the prisons that people get assistance from
24 other people in how to write a letter for a
25 specific purpose, and I think that might have

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

144

1 happened in this situation.

2 In addition, I think that the one letter that
3 was written requesting that Mr. Kasich and his
4 co-counsel be forced to change his not guilty,
5 reason of insanity, the terminology used in there
6 was such that I don't really think that Eugene
7 Britt was doing that without some assistance. In
8 addition, looking at his handwriting in that, it's
9 a little flowery, and I'm not sure that he
10 actually physically wrote that as well. Sometimes
11 you get jailhouse lawyers who do these letters for
12 you.

13 Q Really?

14 A Yeah. I'm telling you, right?

15 I didn't just toss those off. I think that
16 that was of concern to me, and I was concerned

17 about that.

18 Q Did you ever ask Eugene Britt whether he wrote

19 the -- at least the 1985 letter?

20 A Yes, I did.

21 Q And what did he say?

22 A Yes, he did.

23 Q He said he did write the letter himself?

24 A Yes, he did, uh-huh.

25 Q I'm talking about the 1985 letter addressed to

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

145

1 Mr. Duckworth, the one that's referenced on page

2 15 of Dr. Horn's report?

3 MR. KASICH: I believe there's a copy in that

4 also, your Honor.

5 BY THE COURT:

6 Q Dr. Horn indicates these are -- this physical

7 writing sample, letter formation, the use of

8 complex sentence structure is essentially

9 identical in appearance to the 2002 letter wrote

10 to Judge Kouros 17 years later at a different

11 location?

12 A I am no expert in handwriting, your Honor. I
13 disagree with that in some ways. I don't think it
14 looks exactly identical. But to me, that's --
15 that's very flowery handwriting, and that was not
16 the handwriting that I saw in the work that I gave
17 for him to do.

18 Q So you just believe it's not Mr. Britt that wrote
19 the letter?

20 A I don't believe he wrote those letters, no.

21 Q Any idea why he would tell you that he did?

22 A People with mental retardation will tell people
23 things very often that they are capable of doing
24 despite the fact that they're not really capable
25 of doing them. It's part of the ruse of I'm a

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

146

1 capable person, I can do these things.

2 Q Bottom line is that Dr. Horn believed that on the
3 issue of adaptive behavior that Mr. Britt does not
4 fall within the statute as to the definition of
5 mental retardation?

6 A Where are you looking, sir?

7 Q Oh, I'm just off the top of my head. I mean,
8 bottom line is that he just believed that he was
9 not so impaired as to fall within the parameters
10 of mental retardation in terms of substantial
11 impairment of adaptive behavior. I think that was
12 within his summary, Dr. Horn.

13 A Yes.

14 Q You disagree?

15 A Yes.

16 THE COURT: Mr. Kasich.

17 REDIRECT EXAMINATION

18 BY MR. KASICH:

19 Q Dr. Keyes, do you recall in Mr. Horn's deposition
20 I asked him if he had ever testified in court
21 regarding an opinion on mental retardation prior
22 to this case, and his answer was no?

23 A Yes, I do recall that.

24 Q Do you recall in -- and I can't find at this point
25 in time whether it was in the deposition or in the

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

147

1 transcript Mr. Horn -- Dr. Horn being asked if he

2 ever testified in a forensic case before. And do
3 you recall what his answer was?

4 A No, he had not.

5 Q He only testified in civil cases?

6 A Civil cases, that's correct.

7 MR. KASICH: If I can approach, your Honor.

8 THE COURT: Yes, you may.

9 [DEFENDANT'S EXHIBIT 6 IS MARKED.]

10 BY MR. KASICH:

11 Q I would like to hand you what's been marked for
12 purposes of this hearing as Defendant's Exhibit

13 Number 6. Can you take a look at that and
14 identify that for the Court, please.

15 A This is a copy of the basic part of my
16 dissertation.

17 Q On?

18 A Malingering and mental retardation.

19 Q And when was that written?

20 A It was defended in February of 1992.

21 Q So that 70-some page document was researched and
22 prepared by you in 1992?

23 A Correct.

24 Q On the issue of malingering?

25 A Correct.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

148

1 Q Have you kept abreast on that? Have you kept
2 recent on studies and on -- and on research on
3 malingering?

4 A Specifically on research and malingering and
5 mental retardation, yes.

6 MR. KASICH: Move to admit into evidence the
7 dissertation that Dr. Keyes had mentioned in
8 response to your question, your Honor.

9 THE COURT: Any objection?

10 MR. BURKE: I have no objection.

11 THE COURT: That's fine. It will be
12 admitted. Defendant's 6.

13 [DEFENDANT'S EXHIBIT 6 IS ADMITTED.]

14 BY MR. KASICH:

15 Q Now, the Court brought up, of course, the two
16 letters that we thought Mr. Burke was going to
17 bring up regarding considerations made by Dr. Horn
18 and one of the conclusions or findings by
19 Dr. Horn. I believe he also consulted

20 Dr. Couvillion -- I can't remember his name now --
21 and Dr. Farrell to look at those letters and give
22 an assessment based upon vocabulary used in those
23 letters. You as we have put up on the chart
24 reviewed Mr. Britt's scores, his verbal scores
25 when he was 11, 12, I think even 14 years old, did

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

149

1 you not?
2 A Yes.
3 Q Okay. And --
4 A 13, 11.
5 Q I'm sorry?
6 A 13 years, 11 months.
7 Q Did the vocabulary in those two letters seem
8 consistent with those scores?
9 A No, I would say they did not.
10 Q All right. What level would you say that
11 vocabulary was in the more recent letter? I think
12 it was to judge -- allegedly to Judge Kouros?
13 A It was a letter from someone who had a good
14 education, a reasonably good education, although

15 there was some grammatical mistakes, and someone
16 who very much wanted not to be seen by the public
17 as a person who is mentally ill.

18 Q Which would be contradictory I guess to this
19 proceeding?

20 A Well, I mean, if you're -- if somebody's saying
21 he's malingering, I think that the letter such as
22 that would not support any reason for malingering.
23 If you don't want to be seen as mentally ill, you
24 sure don't want to be seen as mentally retarded.

25 Q And given studies and your exposure of, what,

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

150

1 32 years now dealing with mental retardation and
2 probably at least, what, 20 dealing with mental
3 retardation in the field of corrections?

4 A 16, 17.

5 Q 16, I'm sorry. You know, I have read anecdotally,
6 and correct me if it's not true, or if the stud --
7 that there are people who would rather go to death
8 row and be executed than be labeled mentally
9 retarded?

10 A Yes. It's called cheating to lose. It was coined
11 by Bob Perske.

12 Q And when the Court was asking you questions about
13 how obviously Dr. Horn pointed out that he didn't
14 have any independent way to judge some of the
15 adaptive behaviors, that was part of the reason,
16 was it not, that we delayed this proceeding is to
17 try to get more information?

18 A That is correct.

19 Q And unlike Dr. Horn, we did get some of those
20 school test scores, I believe?

21 A We got the school scores.

22 Q Okay. You were able to talk to Brenda Britt?

23 A Yes.

24 Q Okay. We were -- we were able to find that
25 statement from his employer I think at Hardee's?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

151

1 A Ms. Hubbard, yes.

2 Q I think you also talked to some other teachers?

3 A Yes.

4 Q Plus you have the advantage of Dr. Horn's own

5 report?

6 A That is correct.

7 Q You had a chance, of course, to review Dr. Horn's
8 credentials?

9 A Yes.

10 Q His experience?

11 A Certainly.

12 Q Okay. From his own description of his experience,
13 can you give us an opinion on how much -- how --
14 how much he, himself, said, how much he, himself,
15 admitted as to how often he's been involved
16 examining individuals charged with the death
17 penalty in mental retardation cases?

18 MR. BURKE: I'm going to object. That's
19 irrelevant. It's irrelevant.

20 THE COURT: It's overruled.

21 MR. BURKE: The issue is mental retardation,
22 it's not whether it's a death penalty or anything
23 else.

24 THE COURT: I understand. You can answer.

25 BY THE WITNESS:

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 A Oh. To my knowledge, he had not had any
2 experience in those areas.

3 BY MR. KASICH:

4 Q Okay. Have you been involved with mental
5 retardation in nondeath penalty cases?

6 A Almost none. Two that I can think of right
7 offhand.

8 Q Okay. I'm talking about -- you are talking about
9 testimony?

10 A Testifying?

11 Q Yeah. I'm talking about have you ever been
12 involved with assessing mental retardation in
13 nondeath penalty cases?

14 A Twice, yes.

15 Q And have you been around mental retarded
16 individuals in situations other than death penalty
17 cases?

18 A Oh, absolutely. Many times. For years.

19 Q All right. And I think you were -- you were a
20 teacher in special education?

21 A I have worked in the field of mental retardation,
22 direct service over 10 years one way or another,

23 and I have been an educator of mental retardation
24 for 32 years total.

25 Q Okay. So have you evaluated people for -- correct

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

153

1 me if I'm wrong -- so you're saying in only two
2 other instances then other than death penalty
3 cases have you even evaluated people to see if
4 they're mentally retarded?

5 A That is correct.

6 Q Okay. And, again --

7 A Oh, well, wait a minute. In criminal justice
8 situations. I mean, I've worked with hundreds of
9 kids.

10 Q So you have done hundreds of evaluations relating
11 to mental retardation?

12 A Yes.

13 Q And those involved using IQ tests?

14 A Sometimes, yes.

15 Q And adaptive behavior testing?

16 A Yes.

17 Q And with -- obviously with your death penalty

18 involvement, those assessments have involved IQ
19 testing?

20 A Yes.

21 Q Adaptive behavior assessments?

22 A Yes.

23 Q And I think we talked about it earlier, but just

24 to make sure and clarify, is this the only time

25 you have ever had a situation where you've not had

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

154

1 the perfect amount of witnesses or the perfect
2 amount of information available to go ahead and
3 make an assessment?

4 A No.

5 Q And of course the alternative, I guess, would be

6 that if someone has, you know, a lack of

7 information, I guess the alternative is we just

8 automatically find them not to be mentally

9 retarded and we execute them?

10 A I would be loathed to think that.

11 Q So you are trying to make an assessment as best

12 you can given the facts; is that correct?

13 A That is correct.

14 Q If you had not had enough facts, if you did not
15 feel comfortable that your investigation here
16 based upon again your five degrees, based upon
17 your 32 degrees of experience, based upon your 16,
18 17 years with dealing with death penalty cases, if
19 you had not felt that you had sufficient
20 information to give your professional opinion,
21 would you have been here -- would you have come
22 today?

23 A No.

24 MR. KASICH: Nothing further, your Honor.

25 MR. BURKE: Just a couple questions.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

155

1 RE-CROSS-EXAMINATION

2 BY MR. BURKE:

3 Q I want to make something clear here. You asked
4 Mr. Britt whether he wrote this letter to
5 Mr. Duckworth back in 1985?

6 A Yes, I did.

7 Q And he told you he did?

8 A Yes, he did.

9 Q Did you ask him whether he wrote this letter to

10 Judge Kouros in 2002?

11 A Yes, I did.

12 Q And what did he say?

13 A Yes, he did.

14 Q And it's your testimony that you believe he was

15 lying to you?

16 A I doubt very seriously if that's his handwriting.

17 Q Well, did you put the cart before the horse and

18 make the determination that he's mentally retarded

19 and because of your opinion that he's mentally

20 retarded you determined that he couldn't write

21 these letters?

22 A Not necessarily, Mr. Burke. When you're looking

23 at a person with mental retardation, you have to

24 take the strengths and weaknesses together; and in

25 those cases, it's possible that he had help

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

156

1 writing those letters. And even if he didn't

2 actually use the pen and pencil himself, there's a

3 chance that that may have been written by him, but
4 it was with a lot of assistance from someone else.

5 I don't think he has the capability of doing that
6 by himself.

7 Q Well, I understand you don't believe he has the
8 capability of doing it, but you asked him whether
9 he did it and he told you he did?

10 A That's correct.

11 Q And it's over his signature; is that correct?

12 A Well, that is not what his signature looks like in
13 the work that I did with him.

14 Q Well, does it look like his -- what it looks like
15 in Doctor -- Mr. Duckworth's letter that he
16 admitted to writing to you? I'm not a handwriting
17 expert either.

18 A Yeah, and neither am I.

19 Q Here. I'm going to show you the two.

20 A Uh-huh.

21 Q The judge has them already.

22 A Right.

23 Q Here's Mr. Duckworth's. Does that appear to be
24 looking --

25 A It's the same -- Well, where's the first one. Here

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

157

1 it is. I would say that those appear to be very
2 similar.

3 Q Appear to be the same signature?

4 A Yes.

5 Q Did Mr. Kasich -- by the way, did you ever review
6 during the four days that you were here the
7 confessions that he gave?

8 A I have -- I have got the DVD of that, yes.

9 Q You have the DVD of --

10 A His confession.

11 Q Of his confession?

12 A His statement.

13 Q His statement. Both the transcript of it --

14 A I have the -- I have the DVD of his -- the
15 videotaped version, and I have a copy of the
16 audiotape that was done before that.

17 Q Okay.

18 A And then I have seen the notes and the two-page --
19 two- or three-page typed written statement.

20 Q Written statement?

21 A That was done before that.

22 Q That signature on that two -- I guess it's a
23 three- or four-page typed statement, that appeared
24 to be the same signature?

25 A It looked very similar, yes.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

158

1 Q Did defense counsel make you aware that for about
2 a year period of time that Mr. Britt refused to
3 even talk to defense counsel, both Mr. Kasich and
4 a previous defense counsel, because they filed an
5 insanity defense and he didn't want an insanity
6 defense filed?

7 MR. KASICH: I would like to be aware of
8 that.

9 MR. BURKE: Well --

10 MR. KASICH: I'm going to object to him
11 mischaracterizing evidence. There's no evidence
12 ever put on the record here or ever put in open
13 court that we did not speak to our client for one
14 year.

15 MR. BURKE: I didn't say that.

16 MR. KASICH: Yes, you did. You said for
17 about a year.

18 THE COURT: That he refused to speak with
19 you.

20 MR. BURKE: He refused to talk to you.

21 THE COURT: I don't know anything in the
22 record that would suggest it either.

23 MR. BURKE: Well, it corroborates what is in
24 this letter to Judge Kouros that he wrote. It
25 corroborates that he basically: I do not wish to

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

159

1 enter a plea of insanity to the charge as I was
2 not insane at the time. It corroborates that.

3 MR. KASICH: So something never in evidence
4 that's only in Mr. Burke's mind corroborates that
5 letter. That's what he's saying. Nothing in
6 evidence ever introduced that our client didn't
7 speak to us for a year, but that that's not in
8 evidence corroborates the letter. Am I hearing
9 Mr. Burke correctly?

10 MR. BURKE: You are hearing me correctly,

11 because --

12 MR. KASICH: I object, your Honor. There's
13 nothing in evidence to that, and I object to his
14 question.

15 THE COURT: Next question, Mr. Burke. I'm
16 going to sustain the objection.

17 MR. BURKE: I don't have any other further
18 questions.

19 REDIRECT EXAMINATION

20 BY MR. KASICH:

21 Q Regarding the 1985 letter?

22 A Yes.

23 Q Written --

24 A '95 letter.

25 Q I'm sorry?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

160

1 A Is it '85 or '95?

2 Q The first letter to Duckworth, 1985?

3 A '85, okay.

4 Q Almost 21 years prior to you talking to Mr. Britt?

5 A Correct.

6 Q Correct?

7 A Yes.

8 Q Over 19 years prior to Dr. Horn talking to

9 Mr. Britt; is that correct?

10 A Yes.

11 Q Would it be unusual, unfathomable, hard to believe

12 that someone of lower intelligence might believe

13 that they wrote something 19 years ago and

14 sincerely believe they had no help?

15 A It's an interesting point because I asked him

16 about the letters, but I didn't have copies of

17 them with me when I asked him about them. So I

18 would say it's a good point.

19 Q Let's ask this. What specifically do you recall

20 asking him about the letters?

21 A Do you remember the letters that are in evidence

22 that were placed in evidence sometime back, and he

23 said yeah. And I said were you the one that wrote

24 those letters. He said yeah.

25 Q But you didn't show him the letters?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 A No, I didn't have copies of them with me.

2 Q And, of course, the letter from 2002?

3 A Uh-huh.

4 Q Apparently dated August 1st. Actually -- all

5 right. I'm sorry. That would have been almost

6 four years prior to you having spoken to

7 Mr. Britt?

8 A Correct.

9 Q And over -- well over two years since Dr. Horn, I

10 believe, spoke to Mr. Britt December 7th, 2004,

11 two years prior to Dr. Horn having spoken to

12 Mr. Britt down in Indianapolis?

13 A Uh-huh. Yes.

14 Q And, again, apparently the expectation is that

15 someone of this -- assuming Mr. Britt is mentally

16 retarded, how likely or even if he's not mentally

17 retarded, how likely is it that he remembers the

18 details of the writing of that letter?

19 A Not very likely. Not completely out of the realm

20 of possibility but not very likely.

21 Q And, again, what we have to look at is we have the

22 history in school?

23 A Uh-huh.

24 Q From ages 11, 12, 13 and 11 months?

25 A Correct.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

162

1 Q We even have grades in school that were quite low

2 when he was 13.

3 A Correct.

4 Q All Fs and Ds, I believe?

5 A Uh-huh. That's correct.

6 Q We have the 60 Revised Beta?

7 A Yes.

8 Q He have with the 70 or rescored 69 IQ test?

9 A Correct.

10 Q Now, again, and maybe this begs the question. Do

11 you believe that IQ test is valid?

12 A Yes, I do.

13 Q And could someone with a 69 or 70 IQ write a

14 letter such as this one of August 1st, 2002,

15 without any help?

16 A Without assistance, no.

17 Q How much assistance would he need?

18 A Considerable assistance.

19 Q Okay. And what -- by assistance, by considerable
20 assistance, can you specifically say like what
21 kind?

22 A Content.

23 Q Okay.

24 A The big thing here is the content. The -- the
25 information specifically in the 2002 letter uses

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

163

1 terms that are legal or -- legally oriented,
2 spelling is not good. The grammar is not good.
3 But it is written in a way that would suggest that
4 somebody who had better knowledge of the language
5 was able to assist him.

6 Q So --

7 A To my professional opinion.

8 Q Would you say this letter is consistent with or
9 inconsistent with someone with a history that
10 you're aware Eugene Britt had as far as his
11 academic performance?

12 A No, I would say it's not consistent with it.

13 MR. KASICH: Nothing further.

14 THE COURT: All right.

15 FURTHER EXAMINATION

16 BY THE COURT:

17 Q Let me ask you this.

18 A Certainly.

19 Q Your dissertation was on malingering and mental

20 retardation. Your first paragraph talks about

21 citation to Rogers 1988. This is Richard Rogers,

22 I believe?

23 A Yes, it is.

24 Q Okay.

25 MR. KASICH: I'm sorry. Dr. Keyes, do you

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

164

1 need a copy of that?

2 THE COURT: No.

3 BY THE WITNESS:

4 A University of North Texas, Richard Rogers.

5 BY THE COURT:

6 Q Page 14, Dr. Horn's report, he mentions Rogers

7 also. In fact, he indicates in that first

8 paragraph there, says this pattern of performance

9 is not consistent with a hypothesis either of lack
10 of mathability or a neurological impairment.
11 Richard Rogers in his text, "Malingering and
12 Deception", 1997, which would have been several
13 years after you wrote your dissertation
14 specifically mentions these near misses, miss
15 errors as indicators of likely malingering.
16 Dr. Parker mentions these same types of errors in
17 his Psychiatric Mental Status Examination.
18 Clarify.

19 A Okay. The problem I have with that, your Honor,
20 is based upon all the experience that I've got,
21 background with people with mental retardation, it
22 is not unusual. It is very common. I would
23 say -- and specifically, Dr. Rogers' experience is
24 more in neuropsychological and psychiatric-type
25 testing, not specifically for mental retardation,

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

165

1 and that's why I would disagree with that.

2 Q Okay. So you disagree -- you agree that near
3 misses can be indicators of malingering?

4 A Yes.

5 Q But you disagree that it should be related -- your

6 position is that not necessarily to the issue or

7 to individuals with mental retardation?

8 A That's correct.

9 Q Correct?

10 A Correct.

11 THE COURT: All right.

12 MR. KASICH: Can I follow up on that?

13 THE COURT: Only on that issue.

14 REDIRECT EXAMINATION

15 BY MR. KASICH:

16 Q Doctor, are you familiar with an article that came

17 out apparently just a few weeks before I

18 interrogated or questioned Dr. Horn way back when

19 that was, February 9th, it's called the Use of

20 TOMM in a Criminal Court Forensic Assessment

21 Setting by Cheryl Delain (phonetic) at Kent State,

22 Kathleen Stafford from Kent State and a Yossef Ben

23 Porath at Kent State, conclusion being use of the

24 test of malingering TOMM in a criminal court

25 forensic assessment setting was examined. Results

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

1 indicated that those initially suspected of
2 cognitive malingering and thus administered the
3 TOMM differed from others in the setting in ways
4 that are consistent with descriptions of
5 cognitive -- and then he interrupted me so I never
6 was able to finish my sentence, but they talked
7 about a norm being N=29 for a forensic setting for
8 the TOMM?

9 A Correct.

10 Q Are you familiar with that study?

11 A I remember seeing it, yes.

12 Q So when we're talking about -- I think you
13 indicated that 45 was the norm for a normal
14 individual in the TOMM?

15 A 45 is actually a little low. 46, 47 would be
16 expected.

17 Q Okay. And that finding, and that was one of the
18 questions I had for Dr. Horn. I just remembered,
19 and I apologize. And I think we talked earlier
20 how is the TOMM normed and that study --
21 thankfully I saw it inadvertently a few moments

22 ago -- indicates the norm for forensic TOMM was

23 29?

24 A Uh-huh. Correct.

25 Q And what was Mr. Britt's scores here?

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

167

1 A 26 and -- on the first one I think it was. It

2 wasn't substantially different in the second, I

3 don't think. Hold on a sec. No, the first one

4 was 30, second one was 26, third one was 22.

5 Q Okay. So we're talking about a 30 which is above

6 the norm, a 26 which is a little bit above that

7 norm and that 22?

8 A Correct.

9 Q In the TOMM?

10 A Correct.

11 Q And compared to the N=29 in a forensic setting,

12 are those -- do you know what the standard

13 deviations from the norm are on the TOMM?

14 A No, I don't. I'm sorry.

15 MR. KASICH: Nothing further, your Honor.

16 MR. BURKE: Nor I.

17 THE COURT: All right. Thank you, Doctor.

18 THE WITNESS: Thank you, your Honor.

19 THE COURT: We're finished.

20 MR. KASICH: I have no other witnesses.

21 THE COURT: Go ahead.

22 MR. KASICH: No other witnesses. If the

23 Court wants us to brief. Ten days to brief?

24 THE COURT: You're done, sir.

25 THE WITNESS: Thank you.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

168

1 THE COURT: Do you wish to brief it? It's up
2 to you.

3 MR. KASICH: I always like the opportunity to
4 brief.

5 THE COURT: I will give you the opportunity.
6 Ten days. September 27th as your deadline. I
7 will not consider any brief submitted after the
8 end of business September 27th. That gives you
9 approximately 10 days from today's date for
10 briefing. I will make a decision soon thereafter.
11 Quite frankly, with the trial date coming up of

12 the 10th day of October, it will be very soon
13 thereafter. Any final word?

14 MR. KASICH: Well, the only -- only thing I
15 need to bring to the Court's attention, Dr. Keyes
16 told us over the weekend his schedule if we do go
17 to trial, and we obviously I think need Dr. Keyes'
18 testimony if not in the guilt phase, certainly in
19 the sentencing phase. His schedule now is such
20 that he's not available until -- when was that?

21 DR. KEYES: December.

22 MR. KASICH: December. So I just wanted you
23 to hear that from him and that's where we are with
24 that. And if we have to file the appropriate
25 motion at the appropriate time, we'll do so but

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

169

1 just so you hear it from him and not have to hear
2 it secondhand from me.

3 THE COURT: Okay. I will resolve one of the
4 issues that you have raised. Your motion for
5 Daubert hearing on psychological tests relied upon
6 by Court's expert. Based on the testimony

7 presented, and essentially this was a continuing
8 hearing on this very motion, I think that was
9 indicated in prior hearings, waiting to hear from
10 not only any state's witness or let alone Dr. Horn
11 but also from any witness you may present. I
12 believe that based on the evidence presented and
13 including the testimony of the witness today, I
14 believe that the tests and the information relied
15 upon by Dr. Horn in his examination of defendant,
16 Mr. Britt certainly meets the Daubert standard. I
17 do believe that that information was not only
18 reliable and relevant, I take into account once
19 again the testimony presented today. If there's
20 any discrepancies or any issue as to the use of
21 those tests, it would not necessarily go to the
22 relevancy, it will not necessarily go to the -- on
23 whether that information was below a Daubert
24 standard. If anything, it may go to the weight
25 given to that information. So any request to

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

170

1 strike that portion of the testimony of Dr. Horn

2 is denied, and that information will be taken into
3 account when making any final determination as to
4 defendant's mental retardation.

5 All right. That will conclude our hearing.

6 Probably will not be a bad idea to set this matter
7 yet one more time. Mr. Kasich, I think 10 days is
8 too long.

9 MR. KASICH: Seven days.

10 THE COURT: Seven days. A week -- the 25th.
11 End of business on the 25th for any --

12 MR. KASICH: I was going to --

13 THE COURT: Any brief. Ten days is just too
14 long. We're just too close to trial. I
15 appreciate your effort, but I think that's just
16 too long.

17 MR. KASICH: You're right. After I said it,
18 I kind of thought seven and then you went ahead
19 and --

20 THE COURT: If you're going to file anything,
21 I do want it by the 25th day of September. A week
22 from today. I'll give you to end of business.
23 Gives you the weekend to work, if necessary. I
24 can set this matter for another pretrial by the

25 end of the week. Friday, the 29th.

CHRISTINE M. ORR, CSR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

171

1 MR. MAKSIMOVICH: That's fine with me, your

2 Honor.

3 THE COURT: Mr. Kasich.

4 MR. KASICH: I'm available Wednesday,

5 Thursday, Friday.

6 THE COURT: Mr. Burke.

7 MR. BURKE: I prefer Thursday, the 28th, if

8 they're available.

9 THE COURT: Well, I think I may use that

10 entire time for my own reason to review the

11 information. Knowing Mr. Kasich, he may file

12 something very thick and long, and I want to make

13 sure I have enough time to review it.

14 MR. BURKE: 29th is fine.

15 THE COURT: 29th. Final pretrial September

16 29th. We'll see you then.

17 MR. KASICH: What time?

18 THE COURT: Well, it will be at 8:30 or we'll

19 make it near the end of the court call, so say

20 11:00 o'clock as opposed to first thing in the
21 morning. Realistically, I will not hear this case
22 first thing in the morning. 11:00 o'clock on the
23 29th.

24 [END OF PROCEEDINGS ON SEPTEMBER 18, 2006.]

25

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SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION

172

1 SUPERIOR COURT OF LAKE COUNTY - CRIMINAL DIVISION
2 SITTING AT CROWN POINT, INDIANA

2

STATE OF INDIANA,)

3

)

)CAUSE NOS. 45G01-0505-MR-00004

4 -v-

)

45G01-0505-MR-00005

)

45G01-0505-MR-00006

5

EUGENE VICTOR BRITT,)

45G01-0505-MR-00007

)

45G01-0505-MR-00008

6

Defendant.)

45G01-0505-MR-00009

)

45G01-0505-FA-00025

7

REPORTER'S CERTIFICATE

8

9

10 I, CHRISTINE M. ORR, CSR, Official Court

11 Reporter, Superior Court of Lake County, Criminal

12 Division, Crown Point, Indiana, do hereby certify that

13 the foregoing is a true, correct and complete

14 transcript of the proceedings held on the 18th day of

15 September, 2006, in the above-entitled cause; that said
16 proceedings were reported stenographically by me and
17 reduced to a printed transcript from said notes taken
18 on the aforementioned day, while sitting in Crown
19 Point, Indiana.

20 WITNESS MY HAND and SEAL this 21st day of
21 September, 2006.

22

23

24

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OFFICIAL COURT REPORTER

25

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