

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC22-72
LOWER COURT CASE NO. 87-CF-856**

FRANK ATHEN WALLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, STATE OF FLORIDA**

APPELLANT'S APPENDIX TO REPLY BRIEF

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- Pages 4-39: Appendix – Vol. I of testimony of Dr. Prichard in *State v. Nixon*, Leon County Case No. 1984-CF-2324 (Hearing on October 23, 2006). Dr. Prichard’s testimony spans from the end ROA Vol. I through Vol. II. The ROA pages are marked in original form with numbers in the top right corner.
*Pages comprising of 2-164 of Vol. I have been omitted as irrelevant testimony of other witnesses.
- Pages 40-81: Appendix – Vol II. of testimony of Dr. Prichard in *State v. Nixon*, Leon County Case No. 1984-CF-2324 (Hearing on October 23, 2006).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing appendix has been furnished by electronic service to all counsel of record on this 23rd day of June, 2022.

/s/ Kara R. Ottervanger

Kara R. Ottervanger

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 1984CF2324

STATE OF FLORIDA

VS.

JOE E. NIXON,

Defendant.

FILED

11-13-06
Bob Inzer
Clerk, Circuit Court
Leon County, FL

VOLUME I - Pages 1 - 199

PROCEEDINGS: MOTION HEARING

BEFORE: THE HONORABLE JONATHAN SJOSTROM

DATE: October 23, 2006

TIME: Commencing at 9:00 a.m.
Concluding at 4:30 p.m.

LOCATION: Leon County Courthouse
Tallahassee, Florida

REPORTED BY: LINDA CUNNINGHAM
Notary Public in and for the
State of Florida at Large

LINDA CUNNINGHAM
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

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GREG PRICHARD

was called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Very well. Be seated.

When you and the witness are ready, Mr. Evans.

MR. EVANS: Yes, sir.

DIRECT EXAMINATION

BY MR. EVANS:

Q State your name for the record please, sir.

A My name is Dr. Greg Prichard. Last name is P-R-I-C-H-A-R-D.

Q And what is your profession?

A I'm a licensed clinical psychologist in the state of Florida.

Q And how long have you been so employed?

A I've been licensed in the state of Florida since 1996.

Q And what type of educational background do you have?

A I did my undergraduate work at the University of Florida. My major was psychology. I graduated from the University of Florida with honors in 1988.

I did my doctoral work at Forest Institute of Professional Psychology, which is an APA accredited institution, in Alabama. I had an academic specialization there in assessment and diagnostics, so that was my

1 specialization in school.

2 Following my academic work, I did my internship at
3 Florida State Hospital in Chattahoochee. My internship was a
4 combined forensic and civil track, which essentially is just,
5 my specialization was going to be forensic psychology. Plus,
6 I was dealing with the civil track, which is individuals who
7 were mentally ill, schizophrenic, and had been admitted to the
8 hospital for long-term care.

9 After I finished my internship in 1994, I was at the
10 hospital on a dual diagnosis unit, which was a unit for
11 individuals who had both mental illness and mental
12 retardation. I was the behavioral department head there for
13 about three years, dealing with, exclusively, the mentally
14 retardation population, individuals who were also mentally ill
15 and who were residentially based. I worked in that capacity
16 for three years before transferring to a civil admission unit
17 at the hospital. I stayed there for two years. And then I
18 did a forensic unit. I worked on the forensic unit for about
19 three years before going into the private practice in 2001.

20 Beginning in 1996 was when I licensed -- I did a day
21 of private practice in the community (sic), and what I
22 primarily did is forensic competency evaluations in the
23 community. And my expertise in the community was mental
24 retardation. I was doing assessments for the courts when the
25 question was whether the person was incompetent based on

1 mental retardation. So the assessment required that I do an
2 assessment for retardation and an assessment for competency.

3 I also did just mental retardation assessments in
4 the community without a forensic component. In other words,
5 is a person mentally retardation according to Florida
6 Statutes. And the referral would come from the Agency for
7 Persons with Disabilities, formerly the Developmental
8 Disabilities Program. So it would refer to me and say
9 somebody has applied for services from our agency. That
10 agency serves the mentally retarded population. So my job was
11 to assess and determine whether the person was mentally
12 retarded or not.

13 Since -- I did that in 1996 until resigning from the
14 hospital in 2001. I'm in full-time private practice now. My
15 specialty is forensic psychology and mental retardation. I
16 do, still, assessments for mental retardation and competency
17 for the Courts, a number of assessments for mental retardation
18 for the Agency for Persons with Disabilities still. I also
19 have a specialization in the area of sexual offenders. And
20 that's pretty much it. I do death penalty cases, too,
21 obviously, for when the issue is, under Atkins, whether a
22 person is mentally retarded or not.

23 Q Now, have you ever been qualified as an expert in
24 forensic psychology with the specialization in mental
25 retardation testing before?

1 A Yes, many times.

2 Q And approximately how many tests have -- mental
3 retardation tests have you given?

4 A I've given well over a thousand by now. I've been
5 doing it, again, since 1996 for the agency. Right now, I'm
6 doing approximately two to three per week where the issue is
7 the mental retardation. And it's been about that number since
8 1996. So well over a thousand for sure.

9 Q And have you -- you've testified as an expert in
10 forensic psychology and mental retardation here in the Second
11 Circuit in a death penalty case, in a couple death penalty
12 cases; is that correct?

13 A Yes, I have.

14 Q And have you been employed both by the defense and
15 by the state?

16 A Yes, I have.

17 MR. EVANS: Your Honor, at this time, we would
18 tender Dr. Prichard as an expert in forensic psychology
19 and mental retardation determination.

20 THE COURT: Is there an objection or voir dire?

21 MR. FREEDMAN: No objection, Your Honor.

22 THE COURT: Very well. You can proceed.

23 BY MR. EVANS:

24 Q Now, Dr. Prichard, can you explain to us what the
25 three components for mental retardation are?

1 A I'm sorry. Sure. There is three prongs for a
2 legitimate diagnosis of mental retardation. This is according
3 to all criteria. This is according to the criteria put forth
4 in the Diagnostic and Statistical Manuel of Mental Disorders,
5 Fourth Edition, Text Revision, which is the manual that in the
6 profession of psychology we use to make diagnose and to guide
7 us in making the appropriate diagnose. It's the appropriate
8 standard for the State of Florida in the determination of
9 mental retardation. And it's the appropriate standard for the
10 Agency of -- American Agency of Mental Retardation, AAMR.

11 It's essentially the same standard in all three
12 contexts. That standard is, one, significantly subaverage
13 intellectual functioning. Now, that is defined as a score
14 that is two standard deviations below the mean. And the mean
15 is 100 and the standard deviation is 15. So in terms of IQ, a
16 IQ score must be two standard deviations or more below the
17 mean of 100. So it's a score -- below 70 would correctly
18 apply when a diagnosis of mental retardation is made in terms
19 of intelligence.

20 The second prong is concurrent deficits in adaptive
21 skills. And, essentially, the adaptive skill, it's defined in
22 many different ways, but it's personal and social
23 self-sufficiency. It's the capacity a person has to
24 essentially function independently without the help of other
25 people and how successful they are in adapting in a variety of

1 ways, in a variety of contexts, when compared to same age
2 peers.

3 The third prong of mental retardation -- actually,
4 let me go back to the second prong. Adaptive deficits have to
5 be -- they are measured in the same way. They are measured
6 with adaptive instruments. And adaptive deficits also have to
7 be two standard deviations below the mean of 100. And they
8 have a standard deviation of 15 as well.

9 So in adaptive language, it's the same language as
10 the IQ language. If we get a score, an adaptive measure below
11 a 70, that's consistent with deficiencies consistent with
12 mental retardation, okay? So those are the first two prongs.

13 The third prong is manifestation prior to the age of
14 18. Mental retardation is a developmental disability, okay?
15 By nature, to legitimately diagnosis this, it has to be
16 present in the years from conception to 18, because it's
17 characterized by developmental delays. So there are occasions
18 where somebody might have a brain injury or something in
19 adulthood, which results in subaverage intelligence, but
20 that's not mental retardation, because it has to occur in the
21 years between conception and 18, which is the developmental
22 years.

23 So those are the three criteria for a diagnosis of
24 mental retardation. All three prongs must be in order for the
25 diagnosis to legitimately be made.

1 Q Okay. So if mental retardation -- or if the low IQ
2 and adaptive functioning didn't onset before age 18, then the
3 person is not mentally retarded; is that correct?

4 A That's correct.

5 Q Or if they have adaptive functioning which takes
6 them out two standard deviations below the mean, then they're
7 not mentally retarded; is that correct?

8 A That's correct. I have assessed many people that
9 fall in the category where they will have an IQ above 70,
10 adaptive deficits below 70, onset prior to the age of 18.
11 That means they are not mentally retarded, because they don't
12 meet that first prong. And, additionally, I have had cases
13 where IQ was below 70, but adaptive skills were above 70.
14 Onset may have been prior to the age of 18, but they still
15 don't meet the criteria for a diagnosis of mental retardation,
16 because all three prongs must be in order for that to be a
17 legitimate diagnosis.

18 Q Now, you were referred at -- you were appointed as
19 an expert for the State to do a mental retardation of
20 Mr. Nixon; is that correct?

21 A Yes, I was.

22 Q And what did -- what evaluation procedure did you
23 take and what did you review?

24 A Well, what I did is I reviewed all of the
25 information that was given to me, which was a lot of

1 information. That would have been most of the information
2 that has been talked about, different testing that was done
3 historically with Mr. Nixon, Department of Corrections'
4 records, various affidavits from family members and friends of
5 Mr. Nixon, court transcripts, some records from death row, the
6 evaluations by Dr. Whyte, Dr. Dee, Dr. Doerman, Dr. Keyes. So
7 that was essentially the information that I reviewed. Some
8 court testimony as well.

9 Q And then did you do a face-to-face evaluation with
10 Mr. Nixon?

11 A I did. I reviewed all the information that was sent
12 to me initially. And then I went to death row on the 15th of
13 September to do the face-to-face assessment with Mr. Nixon.

14 what I did in the face-to-face assessment, his
15 lawyers were present, I basically did a mental status
16 examination, which is just talking to him. You're assessing
17 memory. You're assessing recall. You're assessing thought
18 fluency, speech. You're assessing various things to make
19 sure, essentially, that the mental status at the time of the
20 assessment, for the purpose of what I was doing, which was a
21 mental retardation assessment, that there didn't seem to be
22 any symptoms present or, you know, peculiar things going on
23 that might affect the IQ score, because that was the main
24 purpose of my meeting with Mr. Nixon.

25 Q Okay. And when informed of the purpose of the first

1 interview, was anyone else present?

2 A Yes. His attorney was present. The gentleman --
3 one of the gentlemen at the table and I guess --

4 Q Mr. O'Connor?

5 A Yes, Mr. O'Connor. I'm sorry. Mr. O'Connor. And
6 his co-counsel. I don't see her present in the courtroom
7 today.

8 Q Okay. And did Mr. Nixon appear to understand what
9 the assessment was for and what was going to take place?

10 A Yes, he did. We had a brief discussion about it. I
11 told him that I was there to assess him at the request of the
12 State, and I would be doing some testing. It was important
13 for him to work hard. That it wasn't confidential. It would
14 be communicated in a report and talked about in open court.

15 Q And what particular -- and did you -- what
16 particular testing instrument did you use?

17 A I used the WAIS-III, the wechsler Adult Intelligence
18 Scale, Third Edition, which is the most recent edition of the
19 adult version of the wechsler Scales. I also administered the
20 Test of Memory Malingering. The acronym for that is TOMM,
21 T-O-M-M, and I also administered a wide Range Achievement
22 Test, Third Edition. And the acronym for that is WRAT-3.

23 Q And what were your results?

24 A On the wechsler Scale, the result was a verbal IQ
25 score of 81, a performance IQ score of 83, with a full scale

1 IQ score of 80. On the test of Memory Malingering,
2 essentially what I'm utilizing that instrument for is to
3 assess for malingering, whether or not a person appears to be
4 putting forth maximum effort in the testing occasion. And on
5 that instrument, there was no indication that Mr. Nixon was
6 malingering. He performed well, suggesting good motivation on
7 my testing occasion.

8 On the WRAT-3, which is basically an academic
9 screening measure, his scores were, reading was a 70, spelling
10 was a 68, and the arithmetic was 75.

11 Q Now, based upon your testing and your training and
12 experience, did you reach a conclusion as to whether there
13 needed to be any further testing as to adaptive functioning or
14 a determination of onset before age 18?

15 A Yes, I did.

16 Q And what was that?

17 A Well, the conclusion is, because of the results of
18 my testing with the full scale IQ score of 80, this means that
19 Mr. Nixon is not mentally retarded, okay? So, again, three
20 prongs are required for diagnosis of mental retardation. If
21 any one prong is not, then retardation does not legitimately
22 exist.

23 So because the result of my assessment said a full
24 scale IQ score of 80, a valid testing occasion, it was -- the
25 referral question was at that point answered. There was no

1 need to go any further in terms of assessing for adaptive
2 behavior. I tell you the reason why. It wouldn't matter what
3 his adaptive behavior was at that point. With a full scale IQ
4 score of 80, a full scale IQ score of 80 means the same thing
5 as a full scale IQ score of 100, or 130 for that matter, in
6 terms of adaptive behavior.

7 In other words, if you get a score that high on IQ,
8 adaptive behavior scores are absolutely moot. They are
9 pointless to account for because it doesn't matter if they are
10 deficient. With an IQ of 80, he is not mentally retarded.
11 And that's the question that I had to answer.

12 Q Okay. Now, the -- was there also some indication --
13 you also had an opportunity to review any -- the prior
14 testing; is that correct?

15 A Yes, I did.

16 Q And did you see any information that supported the
17 finding that he would also not fall under the category of any
18 mental retardation before the age of 18?

19 A Yes, I did. And that's something that I noted prior
20 to meeting with Mr. Nixon, was the occasion of the IQ score of
21 the Wechsler Intelligence Scale for Children that was
22 administered in 1974 when Mr. Nixon was 12 years old. I noted
23 that the result of that was a verbal IQ of 79, performance IQ
24 score of 100, with a full scale IQ score of 88.

25 For me, that was a very important data point,

1 because it was the only data point we had of Mr. Nixon prior
2 to the age of 18. So because of that data point and the score
3 that testing occasion achieved with Mr. Nixon, a full scale of
4 88, that, for me, provides the best data point, aside from my
5 own, to, you know, confirm or bolster my own finding that he
6 is not mentally retarded when I tested him, and he wasn't
7 mentally retarded prior to the age of 18 either.

8 Q Anything about the way that -- about the information
9 on that test back in '74 causes you to -- any concern about
10 giving it weight in this -- in these proceedings?

11 A No. Really, I mean, all the time -- I mean, I would
12 say in the vast majority of the cases I do, especially when
13 you're doing a retrospective analysis of retardation, you're
14 examining data that is 20, 30 years old, data from pre-18 age.
15 Usually, Wechsler Intelligence Scales for Children or Wechsler
16 Intelligence Scales for Children, Revised Edition, it's done
17 all the time.

18 I think that what is important to do is take a look
19 at that data point and assume that that's a good, valid data
20 point unless there is a good reason to believe it's not a
21 valid data point. And I saw no indication in the write-up of
22 that testing occasion that would suggest -- that would suggest
23 that it wasn't communicated accurately. It seemed to me to be
24 communicated very accurately.

25 It was signed off by a Ph.D. psychologist, which I

1 had hundreds of evaluations that were signed off by Ph.D.
2 psychologists when I was doing my internship and when -- or my
3 internship and my practica I've signed off on a lot of
4 interns' reports and people in training, their reports. So it
5 all looked in order to me. And, of course, it's important to
6 pay attention to that. But I think it's a huge error to
7 dismiss it simply because it was done by an intern or
8 whatever, because, you know, we are all interns before we are
9 doctors.

10 Q And anything unusual about the practice of an intern
11 doing -- basically giving the test and its being signed of by
12 the psychologist?

13 A No. I mean, that's how we learn. That is exactly
14 how we learn and that's -- if you didn't do it that way, then
15 you wouldn't be able to get the training you need. And the
16 assumption is that that Ph.D. psychologist who signed off is
17 the one responsible for Ms. Miles' testing and that data. And
18 the signature indicates that, I'm okay with it and it's on my
19 license. So I don't see anything that would lead me to say
20 that uh-oh, this is bad data. Conversely, I would say that
21 it's very good data, probably the most important data point.
22 And absent a reason to say it's not good data, you should not
23 dismiss it.

24 Q with the psychologist signing off on it, that --
25 does that equate to giving it their stamp of approval just

1 like if they had done the testing themselves?

2 A That's what I think. And I have run across an
3 occasion or two when a psychologist signed off on somebody
4 else's work who wasn't apparently licensed and the body of the
5 report was bad. It was just fraught with error or making
6 statements that simply weren't true. So I think that's
7 important to take a look at. And in this occasion, I didn't
8 see anything in the report that would suggest that it was
9 poorly written or untrue in any way, which would suggest a
10 questionable validity and I didn't see that at all.

11 Q Okay. Now, Mr. Nixon I believe indicates -- you
12 indicated was born in August of 1961?

13 A Yes.

14 Q And this test was administered in -- that he
15 received in '88 was administered in 1974?

16 A Correct.

17 Q So depending on the particular month it was given,
18 he was somewhere between 12 and 13 years of age; right?

19 A I think he was 12 years, 7 months, I believe. Yes.
20 February of '74 is when it was given.

21 Q And did you see anything to indicate that he was
22 ever, in fact, placed in special education in the school
23 system?

24 A No, I didn't. I saw references to one or two
25 individuals saying this person may need special education.

1 But, again, that doesn't really mean anything. There's lots
2 of reason for special education. Behavioral issues are a
3 reason for special education. Emotional issues are a reason
4 for special education. So I don't think those statements
5 tell -- tell you anything in terms of, necessarily, that
6 Mr. Nixon -- Mr. Nixon is mentally retarded or not. I don't
7 think it has anything to do with it.

8 Q Okay. So even if that issue had been raised, the
9 fact that he scored 88 in '74 and the -- and the fact that he
10 was never placed in special education would tend to support a
11 validity of the 88 score?

12 A Yeah, I think so. And that's a point that I wanted
13 to make, is there is so much of this that is completely
14 irrelevant, really. I mean, the most important thing as a
15 clinician, to simplify it, and it doesn't need to be
16 complicated, is look at his IQ. If his IQ is 80, 88, which on
17 my occasion and this '74 occasion, you are not talking about
18 an individual who is mentally retarded. You might be talking
19 about something else, but you're not talking about mental
20 retardation. So all of these things about special education
21 and adaptive behavior, it's not relevant when you have IQ
22 scores in those -- IQ scores that are that high, simply not
23 relevant to the determination anymore.

24 Q Okay. Now, back in 1974, in this type of testing of
25 the WISC, now, is it a situation where that -- the use of it

1 on African-American males, was it ever called into question?

2 A It was. I mean, that was the big issue between,
3 say, '49, when the WISC came out, and '55, when the WAIS came
4 out, which was the adult version of the intelligence measure.
5 The big issue is it unfairly says that African-American males
6 and African-American females are not as bright as white males
7 and females. That was the theory, that this proves that they
8 are not as bright. And, of course, that is not -- that did
9 not hold up. What held up is the inherent problem with the
10 test in measuring accurately African-Americans as opposed to
11 whites. In other words, it was biased in favor of whites,
12 biased against blacks. So blacks used to get lower scores.
13 They were artificially deflated because of the inherent bias
14 in the test.

15 Q Okay. And would it be a fair way to put it, that
16 they received false lows?

17 A Absolutely it was false lows. It was not taking
18 into account cultural background. So, you know, you get a
19 deflated score when you compare them to whites.

20 Q Okay. Now, we have an 88 and an 80. Is there any
21 way on the IQ test to fake smart?

22 A No, that's the other occasion. An important thing
23 to understand is that IQ is not something that fluctuates over
24 time. Your IQ is static. Your intelligence quotient is
25 generally static. There may be a few point variation in your

1 IQ, but you are not talking about significant differences of
2 ten, fifteen points in IQ.

3 IQ, generally, when you measure IQ in adolescence,
4 that's going to be about the same over the course of the
5 entire life span until late adulthood. So it does not
6 fluctuate. So, when you get scores that are in variance or
7 disparate from each other, you have to understand that what we
8 are trying to test when we are testing IQ is ceiling, optimal
9 capacity. We are trying to test the highest the person is
10 capable of achieving.

11 So when you get a score of 88 and then you have
12 somewhere in the history or somewhere in the process or over
13 the course of time a score of 68, that's not because the
14 persons IQ has changed over time. It's because there is
15 something about that 68 that probably reflects some other
16 situation was playing into the person's performance at the
17 time, okay? Because you can't fake smart. You can't fake an
18 88, okay?

19 That's -- that's -- that would -- the correct
20 assumption would be to assume that an 88 is probably
21 representative of Mr. Nixon's best functioning; whereas, a
22 score of 68, because of that variation, is probably
23 representative of some other factor, A, motivation, anxiety,
24 depression, something about the testing environment, something
25 about the tester, poor sleep the night before, the person was

1 hungry. There is just a plethora of other reasons that can
2 affect the IQ score. But when it is lowered and you have a
3 score that says 88, you don't converge them and say, Let's get
4 the mean. That's inappropriate way to do it. Okay.

5 You test -- you test for ceiling. And you assume
6 that if you get a ceiling that is valid, like the 88 and like
7 my 80, that those other scores, there is something about those
8 testing occasions that artificially deflated the score and is
9 not representative of optimal functioning.

10 Q Now, let's touch on the so-called Flynn Effect for a
11 moment. Is that something that -- the Flynn Effect, is it
12 something recognized in scoring manuals used with either the
13 Stanford-Binet or the WAIS-III?

14 A No, it's not recognized in scoring manuals. What
15 the Flynn Effect is, it was a theoretical issue that this
16 gentleman, Dr. Flynn, explored. And what he recognized and
17 established in his research is that, yes, this seems to be a
18 legitimate phenomenon, where, over the course of time,
19 individuals or generations seem to get smarter. He
20 demonstrated this by testing individuals on the WISC, the same
21 test we are talking about, and the WISC-R. And what he found
22 is there was about an eight point difference in the scores on
23 those two tests administered to the same people.

24 He has demonstrated generalizability in his research
25 in the sense that he has established that this phenomenon

1 seems to be present in a bunch of different countries and all
2 that. But it's not to be point that we, as a profession, make
3 it standard practice to subtract IQ points when we do testing,
4 which is why it's not in the manuals. If it was recognized in
5 the scientific community, there would be allowance for
6 subtracting IQ points. In the testing that you do in real
7 life situations, there is no such allowance. The only
8 allowance for changing the score is considering the Standard
9 Error of Measurement, which is appropriate.

10 So, at this point, it may be in five, ten, twenty
11 years that the Flynn Effect may be incorporated into standard
12 practice in psychology, but at this point, it's not
13 incorporated in the standard practice in psychology.

14 In fact, I think it was Defense Exhibit No. 5, where
15 you referenced that article, I have the -- I read the -- this
16 is the, what do you call it, the journal that it came out of.
17 And I've read it many times. And, essentially, what the
18 journal says in 2003 is we have got to research this thing
19 more. We have to take a better look at it, because we have
20 these preliminary findings. We have these ideas for mentally
21 retarded folks, these ideas for normally functioning folks,
22 but we don't know for sure. We need to research it more.

23 And that's the bottom line, is it needs to be
24 explored further. Right now, we can't incorporate it into
25 standard practice. There is now allowance for it. It's more

1 of an academic thing right now rather than something we do on
2 a daily basis. I've never subtracted IQ points from an IQ, I
3 have given a thousand administrations, because it's not
4 standard practice. I see nothing in the manual that suggests
5 I do that, that allows for that.

6 So, no, it's not something that should be carried
7 out in individual cases, for a variety of reasons. And some
8 of those reasons are, for an individual, we don't know how
9 many points to subtract. I mean, the average was eight on
10 some of the research Flynn did, but we don't know if for
11 Mr. Nixon it's two. We don't know if it's 22. So you can't
12 practically do it and, you know, assume that what you're doing
13 is a valid application of the Flynn idea at this point in
14 time.

15 Q Okay. And I think you touched on it, but is it
16 something that is recognized whenever the mental retardation
17 evaluations are done -- and, excuse me, which agency is it
18 now?

19 A It's the Agency for Persons with Disabilities.

20 Q All right. Is the Flynn Effect applied there
21 whenever you have reach a result as to determine whether or
22 not it should be lowered using the Flynn Effect --

23 A No, absolutely not. It is not considered. And I
24 will say that, you know, I acknowledge the Flynn Effect as
25 probably a valid phenomenon, but it's something that we can

1 apply and it's wrong to do it.

2 And the other thing I will say is, even if you do
3 consider it, you know, subtract eight points from the 88 that
4 was achieved in '74, you get an 80. And then if you consider
5 the Standard Error of Measurement, subtract all you want, you
6 still get a 75.

7 The statute requires two or more standard deviations
8 below the mean of 100, which should be a 69 or less. So not
9 saying that you should subtract all of those numbers, but
10 carrying that argument out to its logical extreme says, at the
11 best, you will get is a 75. That's still not mental
12 retardation.

13 Q Okay. And the number is, I think, the number of 70
14 has been thrown around. Actually, it's below 70, isn't it?
15 So it would be 69 or below?

16 A Correct.

17 Q Now, the standard area -- standard error rate
18 basically is plus or minus? So --

19 A The Standard Error of Measurement is plus or minus
20 five on the Wechsler scales, yes.

21 Q Okay. So it is a two-way street? It could be
22 higher or it could be lower?

23 A That's the other issue. There's equal probability,
24 with my score for 80, for example, okay, with the Standard
25 Error of Measurement, we are talking about somewhere between a

1 75 and an 85. There is equal probability that that score is a
2 75 as it is that that score is an 85. Okay.

3 If you subtract for Flynn, which you don't do as a
4 standard, for my testing, the WAIS-III is ten years old, so
5 you subtract three points, if you must, which I don't agree
6 with. But you subtract three points from my 80, taking into
7 account the Standard Error of Measurement, taking, you know,
8 only into account the negative 5, which is a 75 minus 3 is a
9 72, you still don't get below 70.

10 The reason the number 74 is allowed for is for the
11 Standard Error of Measurement, because if you get a 74 with a
12 Standard Error of Measure and plus or minus five, there is a
13 possibility that that score of 74 obtained score can be a 69.
14 There is that possibility. So only scores that are 74 or so
15 can consider to be mentally retarded. Not 80. Not 88. It
16 doesn't apply to those scores.

17 (Pause.)

18 BY MR. EVANS:

19 Q Now, I believe we were going back toward talking
20 about the standard area of -- standard error rate or standard
21 deviation and it being plus or minus five.

22 A Okay. That's the Standard Error of Measurement,
23 right --

24 Q Okay.

25 A -- which is different from the standard deviation.

1 But the Standard Error of Measurement is plus or minus five.

2 Q Okay. Now, the -- is it true that as you get to
3 either end, when you -- is it also in form of the bell curve,
4 basically? The Standard Error of Measurement is more are
5 going to tend to be at the middle and that fewer people would
6 be away from it, so you expect the number of people who would
7 actually be five points lower than, let's take a 75, for it to
8 be fewer than the number that would actually be one point
9 lower?

10 A All right. I don't think so. I think that there is
11 equal probability of any number within that range. And what
12 the Standard Error of Measurement, part of what it accounts
13 for is just measurement error based on human error or based on
14 artifacts of the instruments you're trying to use. So I think
15 there is equal probability in that range of scores between
16 negative five and positive five of that being a person's true
17 intellectual quotient. So, for example, an IQ of 80, that's
18 the obtained score, anything between 75 and 85 has equal
19 probability of occurring.

20 THE COURT: Can I stop you for a second?

21 THE WITNESS: Sure.

22 THE COURT: And I'm going to -- something you said
23 earlier I want to just follow up on a little bit. You
24 said that 74, because of the Standard Error of Measure,
25 still yields a possibility within the 95 percent if

1 I'm -- actually, I think Dr. Keyes said the 95 percent.

2 But --

3 THE WITNESS: Confidence.

4 THE COURT: So if you yield -- if you yield your
5 full scale score of 74, then you go to the second prong?
6 Is that what you're telling me?

7 THE WITNESS: That is what I would do personally,
8 yes. If I had the maximum score of a 74, and there is
9 some room for considering that the person's IQ --

10 THE COURT: Then you go to adaptive functioning?

11 THE WITNESS: Then to adaptive functioning, which is
12 prong two, correct.

13 THE COURT: All right. Go ahead, Mr. Evans.

14 BY MR. EVANS:

15 Q And on that case, you would still have to cover
16 prong three, which would be onset before age 18?

17 A That's correct.

18 MR. EVANS: Okay. Now, the -- Your Honor got me off
19 track for second. Let me try to think where I was.

20 THE COURT: I apologize, Mr. Evans. Take your time.

21 BY MR. EVANS:

22 Q Oh. The -- where I was going was, you saw the slide
23 show that Dr. Keyes presented. And I think that was Defense
24 Exhibit No. 3?

25 THE COURT: Yep.

1 MR. EVANS: Okay.

2 BY MR. EVANS:

3 Q Now, at one point on, I believe it was page --
4 excuse me. It was page 36.

5 MR. EVANS: And if I may approach, Your Honor?

6 THE COURT: Very well. You don't have to ask.

7 Neither one of you has to ask to approach the witness.

8 BY MR. EVANS:

9 Q Now, it indicates on that sheet that he averaged and
10 come up with a mean?

11 A Right.

12 Q Now, is that the way this works, you give five or
13 six tests? And then you average them together and come up
14 with a mean?

15 A No. And, again, because what you're doing,
16 essentially, when you do that is you're invalidating every
17 score that isn't right there at the mean. So you would be
18 invalidating any of the outliers, saying that those aren't
19 accurate representations of his IQ. Again, that's not the
20 appropriate interpretation of it.

21 But remember that, again, IQ is IQ. And it's not
22 subject to variation. When you're trying to determine a
23 person's IQ, it's not going to be somewhere between mentally
24 retarded and average. You know, you have five different
25 testing occasions, and your range is mentally retarded to

1 average.

2 The appropriate thing to do is to say, no, wait a
3 minute, that's not -- that's not possible. IQ doesn't work
4 that way. Something is wrong. And then, basically, you
5 examine the data. And, again, you, essentially, I think, if
6 you're doing it correctly, arrive at the conclusion that I
7 arrived at, that on my occasion and on the one historical
8 occasion that was pre-18, with no forensic context, we have
9 scores of 80 and 88. And, again, when you have those scores
10 established on valid testing occasions, those other scores
11 that are a lot lower, you don't average them and come to some
12 kind of mean. What you say is probably the most appropriate
13 scientific explanation for this variance that shouldn't occur
14 is that there was some other variable present during those
15 examining occasions, with the lower score that artificially
16 lowered the score, primarily because you can't fake smart, and
17 you're testing ceiling and optimal performance. That's what
18 you want on an IQ.

19 Q Okay. Let me touch on scatter for a second.

20 A Sure.

21 Q Now, much to-do was made by an earlier witness about
22 scatter. Could you explain to us what scatter is and what you
23 would be -- what could cause it and what you look for when you
24 see it?

25 A Essentially, what scatter is, is when you have a

1 full scale IQ score, your -- it's a conglomerate of subtests.
2 There is 11 of them. So what you are looking at, one, is
3 subtest scatter, what are the different scores on each the
4 subtests and there is a big variation in those scores. Okay.

5 Number two, in terms of scatter, is intrasubtest
6 scatter. In a particular subtest, in one single subtest,
7 like, say, for example, information, is there a lot of
8 scatter. Did the person get a lot right and then miss some
9 and then get some more right and miss some? And those are the
10 two ways that scatter is generally applied in intelligence
11 testing.

12 It's important because, you know, one, it does -- it
13 does give you an idea of strengths and weaknesses, what's the
14 person good at and what's the person not so good at. Two, a
15 lot of times scatter can give you an idea of possibly some
16 learning disabilities, some brain damage, other things. It's
17 not definitive. There isn't a pattern of scatter that tells
18 us specifically a diagnosis, but it can give us some ideas
19 about diagnosis, and, essentially, that's it.

20 If there is huge variations in subtest scores, like,
21 for example, say you got on one subtest you got a two, and on
22 another subtest you got a fifteen, that's a huge, huge
23 significant difference, and you want to make some accounting
24 for that kind of variation. There is a reason for that kind
25 of scatter. And if it's usually significant, you need to talk

1 about it and figure out why it's occurring, essentially.

2 It does not, I will add, subtest scatter or
3 intrasubtest scatter has nothing necessarily to do with mental
4 retardation. Scatter occurs with genius IQs. Scatter occurs
5 with normal IQs. In the criminal population that I test all
6 the time, you have scatter -- that kind of scatter very
7 regularly, which is more probably a function of some brain
8 damage that's not global and that's not severe because it's
9 not causing huge, huge deficits consistent with mental
10 retardation, but these are criminals, say, that have some kind
11 of brain damage who are average IQ or borderline IQ or even
12 above average IQ. So subtest scatter, it doesn't really tell
13 you necessarily anything.

14 Now, in a mentally retarded person, if you have
15 scatter, simply what it is, is it tells you some strengths and
16 weaknesses just like it does with an intellectually average
17 person. It can give you an idea of strengths and weaknesses,
18 too. So in the context of the mentally retarded, if you're
19 trying to do a support plan or trying to figure out how to
20 address the person's needs, then that would be useful
21 information, because you have a pattern of strengths and
22 weaknesses and you plan according to the person's strengths,
23 essentially.

24 Q Now, Doctor, let's go over the -- let me hit some
25 numbers real quick. With the 1985 WAIS-R that was given, they

1 came up with a score of 73; is that correct?

2 A Correct.

3 Q So if -- let's do the opposite of what Dr. Keyes was
4 doing. Instead of subtracting five, let's add five. That
5 could as high as 78; is that correct?

6 A That's correct.

7 Q On the Stanford-Binet, that number -- and it has a
8 different standard error measuring rate?

9 A Standard Error of Measurement, yes.

10 Q Okay. And a 65. Now, what's a Standard Error of
11 Measurement on it?

12 A I don't remember. I think it's about six points,
13 though.

14 Q Okay. Let's assume it's six points. That would
15 bring it up to what, a 71?

16 A Correct.

17 Q And if we did the WAIS-R in '93, if you add five
18 points to that, it would bring it up to 77?

19 A Correct.

20 Q And we could even add five points on yours and bring
21 it up to an 85?

22 A Correct. And I don't think we talked about the one
23 in '74, but that could as high as a 93.

24 Q Okay. Now, let's -- you have your, the WAIS-III
25 that you gave; correct?

1 A Yes.

2 Q I believe defense put it into evidence as State's
3 Exhibit -- I mean, excuse me, Defense Exhibit No. 6.

4 MR. EVANS: Do you have a copy of it, Your Honor?

5 THE COURT: I've got a copy. It sitting up here
6 somewhere. This one; right?

7 MR. EVANS: Yes, sir. You got it?

8 MR. O'CONNOR: Yes, I do.

9 BY MR. EVANS:

10 Q Now, Doctor, can you go over some of the type
11 questions that were -- that are covered by this test and that
12 you look at that you -- that you thought were particularly
13 significant, the way Mr. Nixon scored?

14 A Well, this is -- I think one of the important
15 things, because I've done this kind of assessment a lot, well
16 over a thousand times, you kind of get internal norms where
17 you kind of know what a mentally retarded person is going to
18 be able to do versus not be able to do, reasonably well.
19 There are always strengths and weaknesses, but it's within
20 certain limitations of the mental retarded population,
21 because, remember you're talking about the bottom 2.2
22 something percent of the population. These people simply are
23 not very bright. They have strengths, but the strengths
24 aren't just stellar. Ordinarily you don't get strengths where
25 they are in the average range, even.

1 So there was one subtest, I think, that was
2 reflective of Mr. Nixon's ability level. And that would be
3 number nine, information. Some of these questions were fairly
4 remarkable when I'm assessing for the presence or absence of
5 mental retardation. I will tell you that in over a thousand
6 assessments, I didn't have a mentally retarded person get
7 these things right. Okay. For example, number eight on
8 information, who wrote Hamlet. And he answered Shakespeare.
9 That's a fairly advanced response from an individual.
10 Ordinarily, a mentally retarded person doesn't know that
11 Shakespeare wrote Hamlet, because he had no exposure to
12 Shakespeare in school or wherever. Okay.

13 Another very remarkable one was number 14, whose
14 name is usually associated with the theory of relativity.
15 It's hard to even ask the question, whose name is usually
16 associated with the theory of relativity. And he replied
17 Einstein. Again, that's one of those questions where mentally
18 retarded folks are usually not exposed to that kind of
19 learning.

20 If you assume that they can learn those kinds of
21 things like Mr. Nixon demonstrated, then you -- you're pretty
22 much looking at somebody whose capacity is probably a lot
23 higher than mentally retarded, because the nature of the
24 mentally retarded is, these more complicated things, they
25 can't comprehend and understand.

1 We went on with this same test. Never, never did I
2 have a mentally retarded person answer the one about Einstein
3 correctly. Never. Never did I have a mentally retarded
4 person tell me that -- where do -- in what country did the
5 Olympics originate, which is number 15. He said Greece.
6 what's the main theme of the Book of Genesis. Ordinarily,
7 mentally retarded folks don't know what a theme is. Okay.
8 But he correctly says -- or he says, Adam and Eve. And I
9 said, well, tell me more. And he said the beginning,
10 understanding what theme is.

11 Number 18 was pretty remarkable. Who painted the
12 Sistine Chapel and he correctly said Michelangelo. So these
13 kinds of things, again, with the internal norms, what are you
14 expecting from a mentally retarded person. You are not
15 expecting these kinds of sophisticated answers. These are
16 answers demonstrative of more average intellectual
17 functioning, certainly not the mentally retarded folks.

18 Mentally retarded folks by nature are very concrete.
19 They aren't good at learning. These complex things, they
20 aren't exposed to. They are simply kind of getting by each
21 day and not learning these things that are more abstract and
22 academic and kind of book knowledge.

23 Q Now, I also look on -- see on number 19, he -- when
24 asked about who Gandhi was --

25 A Yes.

1 Q -- how did he respond to it? Even though he
2 didn't -- didn't look like he got the answer completely
3 correct, but what --

4 A He said on Gandhi, number 19 -- I said, who was
5 Mahatma Gandhi. And he said, It's the bald dude. And I made
6 a comment something like, well, you're bald, too, Mr. Nixon,
7 as kind of a joke, and I -- tell me more. He said it's the
8 religious guy. So he was real close on that one. I didn't
9 give him credit for it, but I think he had in his mind the
10 accurate person and just didn't explain it very well.

11 But, yeah, I mean, these are sophisticated -- these
12 are sophisticated ideas, these are sophisticated pieces of
13 information that he has in his head, which suggests -- again,
14 we are measuring capacity. Do you have the capacity to learn
15 this kind of stuff. Mentally retarded folks, no. If you're
16 demonstrating you do have the capacity, you're probably a lot
17 brighter than mentally retarded.

18 Q And going back on number 11 --

19 A Okay.

20 Q -- he was asked who the president was during the
21 Civil War?

22 A Right. Who was President of the United States
23 during the Civil War. And he said Jackson, which, again,
24 wasn't correct. But it's a historical president. Most of the
25 mentally retarded folks I talk to, they will say either, I

1 don't know, or they will say Bush or Clinton, present
2 presidents.

3 So it was interesting in that sense, but the correct
4 responses and some of the incorrect responses seem to strongly
5 suggest that, you know, Mr. Nixon had the capacity for a great
6 deal of knowledge.

7 Q Okay. Anything else in the -- maybe in the way
8 he -- the abstraction and scores on the subtest that gave you
9 insight?

10 A Not really. He -- he had a lot of responses that
11 were -- that were not common, in fact, that were not
12 reflective of mentally retarded folks that I have assessed.
13 And, again, it's been a large number. So the quality of his
14 responses were just superior to that of the mentally retarded
15 folks that I have seen. And that seemed to be pretty
16 consistent across subtests.

17 Q Now, if we go to the profile page and score
18 conversion page of the WAIS-III that you gave -- and I don't
19 believe those were included in Defense Exhibit No. 6.

20 MR. O'CONNOR: Eddie, what page?

21 THE COURT: I don't think they are. Oh. They are
22 in the exhibit.

23 MR. EVANS: We are going to need to make copies real
24 quick. Apparently, they haven't gotten them.

25 THE COURT: That's fine. We will take a --

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MR. EVANS: Not more than five.

THE COURT: We will take five minutes. That's fine.

(Break taken.)

(Proceedings continued in volume II.)

IN THE
SUPREME COURT
OF FLORIDA

CASE NO: 1984CF2324A1
SUPREME CT. NO: SC07-953

JOE ELTON NIXON

APPELLANT,

V

STATE OF FLORIDA

APPELLEE.

APPEAL FROM THE CIRCUIT COURT
OF LEON COUNTY, FLORIDA

HONORABLE JONATHN SJOSTROM

TRANSCRIPT OF MOTION HEARING VOLUME II
VOLUME 9

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IN AND FOR LEON COUNTY FLORIDA

CASE NO: 2004CF2324A1

SUPREME COURT NO: SC07-953

JOE ELTON NIXON,
APPELLANT

V.

STATE OF FLORIDA
APPELLEE

VOLUME 9

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 1984CF2324

STATE OF FLORIDA

vs.

JOE E. NIXON,

Defendant.

FILED
11-13-06
Bob Inzer
Clerk, Circuit Court
Leon County, FL

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PROCEEDINGS: MOTION HEARING
BEFORE: THE HONORABLE JONATHAN SJOSTROM
DATE: October 23, 2006
TIME: Commencing at 9:00 a.m.
Concluding at 4:30 p.m.
LOCATION: Leon County Courthouse
Tallahassee, Florida
REPORTED BY: LINDA CUNNINGHAM
Notary Public in and for the
State of Florida at Large

LINDA CUNNINGHAM
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

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P R O C E E D I N G S

THE COURT: Can we get an idea of how much more time you think you're going to have with the witness?

MR. EVANS: Probably maybe 15.

THE COURT: That's fine. Are you all going to recall Dr. Keyes?

MR. FREEDMAN: Oh, no. We are not anticipating it.

THE COURT: Okay. Whenever you are ready, Dr. Prichard, come on up and make yourself comfortable. Take your time.

Mr. Evans, when you and the witness are ready.

BY MR. EVANS:

Q Okay. Dr. Prichard, if you will go to the profile page of the WAIS-III. And in that, it will state's Exhibit No. 1.

A Yes.

Q And do you recognize it?

A I do, yes.

Q Okay. Is that, in fact, a copy of the scoring you did on the profile page and the score conversion page of the WAIS-III that you gave Mr. Nixon?

A Yes, it is.

MR. EVANS: Your Honor, at this time, we would seek to have that admitted as State's Exhibit No. 1.

THE COURT: Any objection?

1 MR. FREEDMAN: No objection, Your Honor.

2 THE COURT: State's 1 is admitted.

3 (State's Exhibit No. 1 received in evidence.)

4 BY MR. EVANS:

5 Q Okay. Now, could you explain to us what these two
6 pages are and what, if anything, you see significant on them?

7 A Well, the first page is the score conversion page.
8 That is the -- you see --

9 THE COURT: Yeah, you don't really have to be the --
10 you don't really have to be a ease[.]

11 MS. SNURKOWSKI: I was just going to say, I'm too
12 short for that.

13 THE COURT: Now that I have got the photocopies, I
14 think we can follow along.

15 THE WITNESS: Doing a great job.

16 MS. SNURKOWSKI: Thank you.

17 THE WITNESS: You're welcome.

18 THE COURT: Whenever you are ready, Mr. Evans.

19 BY MR. EVANS:

20 Q Okay. All right. On the score conversation page.

21 A Score conversation page, you see the column that
22 says raw score. That is the score obtained in terms of the
23 number of correct responses on each of the subtests. Those
24 raw scores are converted into scaled scores.

25 The scale scores are the numbers you see to the

1 right of the raw scores. The scale scores range from 1 to 19
2 on this Wechsler Scale, the WAIS-III. Ten is average
3 functioning. So what is very significant about Mr. Nixon's
4 profile is you see I have 11 different subtests with 11
5 different scale scores.

6 what I want to do is I want to look at those scaled
7 scores and see how many of them are -- seem to be
8 representative of the range of mental retardation. Okay.
9 Average is between 8 and 12. Dead average is 10. And there
10 is a standard error of about two. So between 8 and 12 is an
11 average subtest score. Okay.

12 of the 11 subtests for Mr. Nixon, on his profile, 6
13 of the 11 were in the average range. Eight, 9, he didn't have
14 any 10, 11s or 12s, but he had 6 that were in the range of --
15 or is that 5? Let's see, 1, 2 -- no, he had 6 in the range of
16 8 to 9, which is average. Okay. That's -- the majority of
17 the subtest scores were in the average range. Now, borderline
18 range is in the area between 6 and 8, which is 6 and 7.
19 Subtest score in 6 and 7 are borderline, reflective of
20 borderline intelligence.

21 Now, he has three additional subtests of 11 that are
22 in the borderline range. So that is 9 of the total 11
23 subtests are in the average to borderline range. Okay. And
24 that's really significant to me, because what I would say
25 about this profile is the subtest scores suggest to me that

1 Mr. Nixon is a person with -- with average to high borderline
2 intellectual potential. There were a couple of subtests in
3 the MR range. Those two subtests were the Digit Span and the
4 Digit Symbol. He got a 4 and a 5 on those two subtests.
5 Those are in the MR range.

6 In an MR profile, what you would see on those 11
7 subtests ordinarily is a majority of the scores clustering
8 around 4, 5, 6 or less. Okay. They -- a mentally retarded
9 person might have a subtest score or two that's a little
10 higher than that. That would be a relative strength. That's
11 how you would characterize it.

12 In Mr. Nixon's case, I would characterize his
13 profile as he has average to high borderline intellectual
14 potential with a couple of areas that tend to pull him down, a
15 couple of areas of weakness. And for Mr. Nixon, the Digit
16 Symbol and the Digit Span, those are kind of immediate
17 attention, ability to learn, visual information, you know,
18 responding rapidly. He didn't do very well in that area. A
19 lot of that has to do with attention and concentration. I
20 would say he has a relative deficit in that area, but
21 otherwise, the vast majority of the scatter that we were
22 talking about suggests that he is capable of functioning in
23 the average, low average, high borderline range, which is
24 essentially what my testing was telling me, my full scale
25 score told me.

1 Q Okay. So -- and let me ask -- if I understand this,
2 that if you had a person with a 100 IQ --

3 A Yes.

4 Q -- you would expect them to be scoring what numbers?

5 A If you have somebody with a 100 IQ, you're going to
6 expect that they're scoring somewhere between 8 and 12 on all
7 of the 11 subtests.

8 Q Okay. So -- and that score, the 8 and 12, the
9 number was 6, I believe you said he fell into?

10 A The number was 6 out of 11 subtests were between 8
11 and 12, yes.

12 Q Okay. If somebody was in the borderline
13 intelligence, not the retarded but borderline, that is in
14 what?

15 A In the range of -- usually 6 and 7s is borderline
16 range. In fact, if a person on all 11 subtests gets a 6 as a
17 scaled score, then his full scale IQ would be a 74. So all 6s
18 would be indicative of a 74. And that's in the borderline
19 range.

20 Q Okay. And Mr. Nixon scored in the majority of the
21 areas well above the mental retardation range?

22 A Well above the mental retardation range. In fact,
23 in the borderline and average range in 9 of the 11 subtests.
24 So, again, if you want to characterize it in terms of
25 strengths and weaknesses, he has strengths in most areas as

1 measured by this test. He had a weakness in a couple of areas
2 that pulled his score down a little bit, but the vast majority
3 of the scores were in the low average to high borderline
4 range.

5 Q Okay. If we go the other direction with it and you
6 have -- you see somebody with, you know, the 8 to 12 is the
7 average range; correct?

8 A Correct.

9 Q And what's the -- what are the next levels up?

10 A Up would be -- 13 and 14 would be, essentially, high
11 average. Fifteen to 17 would be superior. Eighteen and 19
12 would be very superior.

13 Q Okay. If you have got somebody who scores the
14 majority in the average range --

15 A Right.

16 Q -- and have one or two up in the genius range --

17 A Right.

18 Q -- they couldn't being classified as being genius,
19 could they?

20 A They not going to be genius. What they are going --
21 it's going to be -- the appropriate interpretation would be
22 this person is somebody with average capacity with a couple of
23 strengths that exceed average but certainly not superior.

24 Q Okay. Could the same be said for Mr. Nixon, that he
25 is in the low to borderline range with maybe certain lower

1 functionings but not in the mental retardation range?

2 A That's exactly how you would characterize it, the
3 same way, is most of the functioning for Mr. Nixon is about in
4 the average to low average, high borderline range. A couple
5 of things in the possibly deficient range, having to do with
6 attention, concentration immediate recall, immediate memory,
7 isolated skills and that's a weakness for him. But otherwise
8 in the average to high borderline range.

9 And that's the beauty of these intellectual tests.
10 You compare his performance to the standardization
11 performance. Okay. Otherwise, if you are not comparing these
12 scores or these numbers, then you are just using subjective
13 ideas that -- it loses its value when you do that. That's why
14 it's so nice to have these data points where we can compare
15 them to other people and tell you exactly what it means.
16 Otherwise, again, subjectivity, that is what is prone to a
17 great deal of error and something that will make a test score
18 be very invalid.

19 Q Okay. Now, on the profile page, we have the sum
20 scales and the index scores?

21 A Correct. Those are, in the far left column, you see
22 the VIQ. That's verbal IQ. The scaled scores, when I added
23 them up, it added up to 41. So you convert that to IQ, verbal
24 IQ, which is 81, according to the normative sample. Same for
25 the PIQ, which is performance IQ. The sum is 37, which

1 converts to an 83. And then the sum of the verbal and
2 performance scaled scores are 78, which converts to a full IQ
3 score of 80.

4 Q Okay. Now, based upon your findings with an IQ of
5 80 and reinforced by the 88 from 74, you made a determination
6 that you didn't need to look at adaptive functioning, because
7 he didn't meet the IQ prong of the mental retardation test; is
8 that correct?

9 A That's correct, yes.

10 Q Okay. And those types of scorings would also
11 indicate there was no onset of any mental retardation period
12 much less before age 18?

13 A That's correct.

14 Q Now, on the adaptive functioning -- you had an
15 opportunity to talk to Mr. Nixon. And did you also have an
16 opportunity to review anything dealing with the crimes
17 Mr. Nixon had committed?

18 A Yes, I did.

19 Q And with the crime he committed in this case?

20 A Yes.

21 Q And anything about there that would cause you any
22 concerns about saying that he was functioning at an age of a
23 10 or 11 year old?

24 A Well, I would say that the adaptive testing that
25 Dr. Keyes performed, those numbers, it wasn't -- the composite

1 score wasn't a 48. It was a 41. Okay. Remember, that score
2 essentially translates the same way an IQ score translates.
3 It has a mean of 100 and a standard deviation of 15. So when
4 you're getting down to a composite score of 40 on an adaptive
5 behavior measure like the Vineland, you're talking about in
6 the range of severe retardation, severe deficiency in adaptive
7 skill. Okay.

8 It would be moderate -- low end of the moderate
9 range to high end of the severe range of adaptive deficit.
10 That does give us an age equivalent. The age equivalent is
11 seven years, eight months. Okay. I don't know where this 11
12 came from, but in terms of adaptive skills, that is the
13 translation, seven years, eight months. Okay.

14 Q Okay. So let me ask a question here. The seven
15 years, eight months is what the scoring manual indicates?

16 A That's what the scoring manual indicates. And
17 that's how it's useful to us as clinicians, is we want to get
18 a picture of how this person functions relative to other
19 people. So they give us age equivalent, saying this person,
20 at whatever age they are, is functioning like a child that's
21 seven years old. Developmentally, he is doing the skills of a
22 seven year old child. That's what the adaptive testing told
23 us according to what Dr. Keyes was reporting.

24 Q Okay. So a number of 10 or 11 years of age would be
25 something that is not in the scoring manual but something --

1 somehow, Dr. Keyes came up with that age?

2 A I think that's more -- that's more IQ. That's
3 more -- the hypothetical IQ equivalent of 70, around there,
4 would be equivalent to about an age of 10, 11, 12 years old.
5 I would agree with that.

6 The adaptive testing is different, separate from the
7 IQ. You have to separate it out. And when you have the
8 adaptive score of 41, we are talking about severe, almost
9 severe -- if you consider the Standard Error of Measurement,
10 it would be severe -- deficits in adaptive skills, means he is
11 functioning at about the age of a seven-year-old child. And
12 that's what you compare him to.

13 Is that -- does that seem to be valid data? Does
14 the information you got from his relatives seem supported?
15 When you look at Mr. Nixon and his history, does it look like
16 he's functioned like a seven-year-old child his entire life?
17 And, I mean, my thing is no. That's way too low. You can't
18 say that Mr. Nixon's functioning like a seven year old. I
19 mean, it doesn't -- it doesn't match up with the historical
20 data. This is anecdotal. I can't tell you exactly what age
21 he was functioning at, but I can tell you he is not
22 functioning like a seven year old.

23 I'll concede he has got adaptive deficits. Okay.
24 He has got adaptive deficits throughout his records. It
25 doesn't necessarily mean it's adaptive deficits based in

1 A Hello, sir. How are you?

2 Q Now, your speciality in the psychological field is
3 in doing assessments for forensic purposes?

4 A Correct.

5 Q You don't write scholarly articles?

6 A No. I'm not a research-oriented person.

7 Q In fact, you've never published in a peer-reviewed
8 journal?

9 A That's correct.

10 Q And you do at least two or three mental retardation
11 assessments a week?

12 A Yes.

13 Q And you also do many other categories of
14 assessments?

15 A Yes.

16 Q And putting together the mental retardation
17 evaluations, the sexual predator evaluations, the competent to
18 stand trial evaluations, and the other categories, you do 10
19 or 15 per week?

20 A Yes.

21 Q And multiplied by 50 weeks a year, that's between
22 500 and 750 assessments a year?

23 A Yes.

24 Q In fact, you do enough of those assessments that you
25 gross over \$200,000 a year doing them?

1 A Correct.

2 Q Very busy guy.

3 A Yes, I am.

4 Q Now, in this case when you did your assessment, you
5 decided there was no reason to address the adaptive behavior
6 issue?

7 A Correct.

8 Q Because, as we have discussed, you found that the IQ
9 test that you gave and the ones that you reviewed meant that
10 there was no significantly subaverage intellectual
11 functioning, so there was no need to address that adaptive
12 behavior issue?

13 A That's correct.

14 Q So you haven't assessed that?

15 A Correct.

16 Q If -- and therefore, you, yourself, did not do any
17 formal measures of his adaptive behavior?

18 A Correct.

19 Q Now, if you had found his IQ to be around 74 or
20 below, then you would have proceeded to an adaptive behavior
21 assessment?

22 A Probably, yes.

23 Q That's because if, hypothetically, an individual
24 obtains an IQ score of 73, what an competent examiner does is
25 to construct a confidence interval around that obtained score

1 and conclude that the likelihood is 95 percent that the true
2 intelligence score must be between 68 and 78?

3 A Correct.

4 Q And that's how one takes account of Standard Error
5 of Measure?

6 A That is Standard Error of Measurement. And that's
7 the correct way to communicate it.

8 Q Okay. And on your direct, you recognized as the
9 authoritative standard for doing these assessments the
10 DSM-IV-TR?

11 A Yes.

12 Q And so I take it, then, you agree with the statement
13 on page 48 that says: As discussed earlier, an IQ score may
14 involve a measurement error of approximately five points
15 depending on the testing instrument. Thus, it is possible to
16 diagnose mental retardation in individuals with IQ scores
17 between 71 and 75 if they have significant deficits in
18 adaptive behavior that meet the criteria for mental
19 retardation. Differentiating mild mental retardation from
20 borderline intellectual functioning requires careful
21 consideration of all available information.

22 A Correct. I would agree with that, yes.

23 Q And, in fact, last year you did a mental retardation
24 assessment on a capital defendant named Roger Cherry; correct?

25 A Yes.

1 Q And he had a full scale IQ of 72, and you wrote in
2 your report that because this meant that with a 95 percent
3 competence interval, the true IQ was between 67 and 77, it
4 would be imperative that the professional conduct adaptive
5 behavior testing?

6 A I don't recall that from memory, but if you say so,
7 I believe you.

8 MR. FREEDMAN: I would ask the clerk to mark this as
9 the next exhibit in order.

10 THE COURT: I think we are on Defense 8. Is that
11 right, Ms. Odom?

12 THE CLERK: Yes, sir, it is.

13 THE COURT: All right. And this is Dr. Prichards'
14 report on Roger Cherry.

15 BY MR. FREEDMAN:

16 Q Could you identify that document for me, Doctor?

17 A Yes. It looks like an evaluation report that I
18 conducted and completed on July 17th of 2005 on an individual
19 named Roger Cherry.

20 MR. FREEDMAN: I'll offer that into evidence, Your
21 Honor.

22 THE COURT: I'm sorry?

23 MR. FREEDMAN: I'll offer that, Your Honor.

24 THE COURT: Any objection to Defense 8?

25 MR. EVANS: None.

1 THE COURT: Defense 8 is admitted.

2 (Defense Exhibit No. 8 received in evidence.)

3 BY MR. FREEDMAN:

4 Q Now, Doctor, if one were going to take several -- if
5 I wanted to administer several IQ tests to a particular
6 individual, say, four years apart, you wouldn't expect that
7 all the numbers came out exactly the same? I assume a fairly
8 normal pattern would be, well, you know, 70 on one occasion
9 and 68 on another occasion, 72 on another occasion. That
10 would be normal, wouldn't it?

11 A Yeah, ordinarily, you wouldn't expect a identical
12 numbers. Ordinarily, also what happens, if there isn't much
13 of an interval between testing occasions, the second test
14 generally is a little bit higher than the first, based on
15 practice effect, which is just exposure to the testing
16 information.

17 Q So there is just normal variability of intertest
18 reliability?

19 A Yeah. There is normal variability in the scores you
20 obtain, Yes.

21 Q Okay. Now, each of those particular reported scores
22 also has possible inaccuracy in it? That's what the Standard
23 Error of Measure is supposed to be covering for us?

24 A It's supposed to account for that, correct.

25 Q Okay. Now, if we could return to page 43 on Defense

1 Exhibit 3. That's the slides.

2 THE COURT: Page 43 on the slide show?

3 MR. FREEDMAN: Yes.

4 THE COURT: All right. Do you have that in front of
5 you?

6 THE WITNESS: This might be it. Let's see.

7 MR. FREEDMAN: That's it.

8 THE WITNESS: Yes. Okay. Yes, here it is.

9 BY MR. FREEDMAN:

10 Q Okay. This same picture was presented to our -- two
11 witnesses and they were both -- Dr. Keyes was asked, there
12 must be something wrong with that. And he said, no. And you
13 looked at this and said there must be something wrong with
14 this.

15 So the -- as we agreed, I think, it's perfectly
16 possible that the 80 could really be a 75, right, just as we
17 agreed that it's possible that the 66, raising a lower score,
18 could really be a 71?

19 A Yes.

20 Q Okay. In which case, fine, then we would have a 71
21 and we would have a 75. And if we got a 71 and a 75, then, as
22 we have just discussed, we wouldn't think anything shocking
23 was going on. We would, in fact, think those results were
24 statistically the same, wouldn't we?

25 A Not really. I mean, if you're accounting for the

1 Standard Error of Measurement on each test score and the two
2 don't overlap, then, you know, your accounting for the five
3 points --

4 Q I'm sorry. I'm sorry. We started -- we started --
5 we started -- you started out by telling me that you would
6 expect that on repeated administrations of the test, you would
7 see a range of different scores.

8 A Yeah.

9 Q And each of those scores might or might not be quite
10 the right number.

11 A Yeah, but within reason. I'm not talking about
12 variations in scores that are significant.

13 Q Sure.

14 A I'm talking about if you -- I think your point was
15 like a -- you know, if you found a 68 and a 72, yes, in which
16 case, if you had a 68 and a 72, the Standard Error of
17 Measurements encompass those scores. So it would seem to be a
18 valid reputation if that's the two data points you have.

19 Q And in this particular case, the two data points
20 that we have at the furthest extreme are 71 and 74. And the
21 point, I believe, of the testimony based on Exhibits V and W
22 to Dr. Keyes' supplemental affidavit earlier this morning was
23 that that kind of range, that four-point range, on separate
24 administrations is perfectly statistically usual. And
25 therefore, no, there is nothing wrong with this. Every one of

1 these could have been perfectly fine, and what you have is
2 statistical variability well within normal ranges.

3 A No, I would disagree with you wholeheartedly. And
4 this is why. When you construct your confidence interval,
5 what you're trying to do, and you appropriately stated --
6 listen to what you're saying. When you have a full scale IQ
7 score of 80, you're saying, with a 95 percent degree of
8 confidence, your true score falls between 75 and 85. You
9 can't say that and it be true and also say, if you have a full
10 scale IQ score of 66, there's a 95 percent confidence that
11 your true IQ score is a between 71 and a 61. Those two things
12 are mutually exclusive. One of those two things is false.
13 You can't have a 95 percent confidence interval that
14 encompasses these ten numbers that is apart from a 95 percent
15 confidence interval that encompasses these ten numbers and
16 those two things be true.

17 Q well, the studies that Dr. Keyes referred to which
18 asked what the results were on retesting and showed that
19 people, on average, there was a six-point variation, in some
20 cases more, in some cases less, those were just the obtained
21 numbers. Nobody applied any Standard Error of Measure to
22 those. That was a six-point variation in obtained scores;
23 correct?

24 A Yes.

25 Q Okay.

1 A within three years of each other, yes.

2 Q Okay. So, that's one set of scatter as it relates
3 to obtained scores, and the second set of corrections is
4 applying the Standard Error of Measure to those obtained
5 scores. So there is no contradiction?

6 A I think there is. Either we are miscommunicating or
7 maybe you're not understanding what I'm saying or I'm not
8 understanding what you're asking. But when you construct that
9 confidence interval around the obtained score, you're saying
10 that true IQ falls in that range. So on each obtained score,
11 if those intervals do not overlap, then you cannot be -- you
12 cannot be accurate on both of those assertions.

13 Q well, in that case, presumably what you would do is
14 precisely what Dr. Keyes has done here and draw a
15 confidence -- draw a bell-shaped curve of the obtained data
16 and see where you turn out?

17 A Now, I'll make a point about that. We will show how
18 it's in error. Okay. Say, for example, somebody scores a 120
19 on an IQ one day and then he scores a 60 on an IQ on another
20 day. would the appropriate thing to be to find true
21 intelligence is to average those scores and come up with an
22 80? That would be invalidating both the 60 and the 120 and
23 coming up with a score that isn't representative of the
24 person's intelligence.

25 Q Of course. Everyone agrees with you about that. I

1 agree with you. Dr. Keyes agrees with you. That would
2 totally wrong. And the area in which we are miscommunicating
3 is that I'm trying to show you that that is not what has been
4 done here. If that had been done here, of course it would be
5 invalid for exactly the reason to which you testified. If you
6 had an accurate IQ score of 120 on one day, right, then
7 quite -- then quite obviously, since, 95 you say, you can't --
8 your potential is a ceiling, right? Okay.

9 what is being suggested here is that the true
10 number, because of the fact that there is varying of six
11 points, let's say, in a range that you would expect of
12 obtained scores when you give tests repeatedly, and each of
13 those has its own error, every one of these tests could have
14 been absolutely honestly and accurately given by an unbiased
15 examiner and an unbiased test-taker and statistically come to
16 these results?

17 A I don't think that's accurate.

18 Q In fact -- in fact -- in fact -- in fact, the --
19 since in the article with the table in Exhibit W that
20 Dr. Keyes was reviewed before, there were some people who, on
21 repeated tests, scored as much as 13 points apart, that could
22 possibly -- that could account for the whole variation with no
23 reason -- no invalidity at all?

24 A Well, the applicability of that idea to Mr. Nixon
25 make no sense. This research that we are referring to is

1 test, retest three years apart on one instrument. It's not
2 referencing test, retest on different measures of the WISC
3 over some occasions, what, eight years' time and some
4 occasions on 10, 15 years' time. There is no reason to
5 believe that we can accurately say -- I mean, to generalize
6 from that data you're referencing and to say that we can say
7 that it represents a variation of six points on the second
8 testing occasion somehow, it just -- you can't do it. You
9 can't apply that.

10 Q Again -- again, all we have to explain is the
11 difference between 71 and 74. All right. Let us now take a
12 look at another case.

13 Now, you were hired by the prosecution as a mental
14 retardation expert in the capital case of State of Florida
15 versus Clarence F. Jones, which was a prosecution right here
16 in Leon County; correct?

17 A Yes, sir.

18 Q And, in fact, you testified at an evidentiary
19 hearing in this building, didn't you?

20 A Yes, sir.

21 Q And the defense expert was Dr. Keyes?

22 A It was.

23 Q And the record in that case reflected a
24 Stanford-Binet test that had been administered to the
25 defendant when he was nine years old and on which he had

1 scored a 67; correct?

2 A Okay.

3 Q Okay. And you took the position that that score was
4 unreliable, for various reasons. And then you testified: The
5 other problem with that score is that we have no idea who
6 administered it, and we have one single number on one single
7 document. I wouldn't draw any conclusions based on that. If
8 I don't see, you know, some of the subtest scores and know who
9 administered it and see some reference to it in other places,
10 you know, you are really going out on a limb if you are going
11 to take that number that's referenced in one place and draw
12 any conclusions about a person's presence or absence of mental
13 retardation.

14 And, therefore you concluded: The best thing to do
15 is take that number and just completely throw it out, because
16 we don't have enough information about what was going on at
17 that time, who administered the test, et cetera. Wasn't that
18 your testimony?

19 A I would absolutely stand by that. And as I recall,
20 that was a reference in a deposition or somebody's statement
21 that there was a Stanford-Binet score of whatever it was, 67.
22 I saw no -- I didn't have a report, who administered it, who
23 signed off on it. Again, I like to review the body of the
24 report and see if the body of the report makes sense in terms
25 of what the person is reporting.

1 I've had occasions where the body of the report
2 didn't make any sense, and so I didn't throw it out, saying
3 it's invalid. On this occasion, it's completely different.
4 It's the context of the psychological report. The scores are
5 reported, verbal performance and full scale, which is what you
6 want to know. The person who administered it is there, talked
7 about motivation, said he seemed to be motivated, but on one
8 subtest probably wasn't functioning optimally. That was
9 important.

10 All of the other conclusions seemed absolutely
11 valid, reasonable. Probably the same conclusions I would have
12 drawn, given the administration of the test, signed off by an
13 individual with a Ph.D. on the cosignature. Very different
14 than what you're referencing.

15 Q well, except that all of the information you don't
16 know, like was the administration consistent with the
17 training, testing, repetitive protocols of how a standardized
18 test is supposed to be kept standardized, not to mention the
19 test itself, but the -- all the administrative information you
20 don't know is the same.

21 A No. I mean, I don't claim to know that on any
22 historical testing occasion, whether it was administered
23 exactly the way it was supposed to be administered. I don't
24 claim to know that for sure. I'm assuming when it's in the
25 body of a report with the reported score, the report makes

1 sense in how it explains the score, signed off by somebody,
2 you know, an intern with a licensed psychologist, that's
3 totally appropriate to me.

4 Q By the way, you are assuming that this person who
5 signed off is a licensed psychologist?

6 A Yeah.

7 Q Okay. Now, we've had this discussion about
8 motivation. And in this case, the State is seeking to execute
9 Joe Nixon. And when you started this assessment, you informed
10 Mr. Nixon that you were conducting it at the request of the
11 State Attorney's Office; correct?

12 A Correct.

13 Q And he knew that the purpose of obtaining this
14 information was for you to use it in court proceedings?

15 A Yes.

16 Q So this testing was in a forensic environment?

17 A Yes.

18 Q And in a forensic environment, there is this concern
19 that the defendant might be motivated to perform poorly and
20 might be malingering?

21 A Correct.

22 Q So you administered the psychological test that's
23 now available called the Test of Memory Malingering in order
24 to assess whether Mr. Nixon was malingering on this occasion?

25 A Correct.

1 Q And the maximum possible score on that test is 50,
2 which means no malingering?

3 A Correct.

4 Q And on the first trial, Mr. Nixon scored a 49;
5 correct?

6 A That's correct.

7 Q And on the second trial, he scored a 50; correct?

8 A Yes.

9 Q And you concluded that his motivation was good?

10 A Yes.

11 Q And he was working hard and making a good effort?

12 A Yes.

13 Q Okay. And then turning to the score protocol, which
14 we have previously marked as Exhibit 6 --

15 THE COURT: This one?

16 MR. FREEDMAN: That one.

17 BY MR. FREEDMAN:

18 Q -- you had a discussion with Mr. Evans about the
19 sophisticated responses on section 9 about information?

20 A Yes.

21 Q Now, earlier -- the items are marked in order of
22 difficulty, correct -- or arranged in order of difficulty?

23 A That's correct.

24 Q And so, for instance, he misses number 6, the
25 question of, in which direction the sun rises?

1 A Yes.

2 Q Okay. And displays a scattered pattern of getting
3 some right and some wrong until he ceilings out after 21?

4 A Yes.

5 Q And my question to you is, why isn't this completely
6 consistent with the testimony of Dr. Keyes this morning that
7 the pattern of aces and spaces reflects the fact that a mental
8 retarded person accepts some information in the course of
9 growing up and so, for instance, might know from a movie that
10 Gandhi was a bald dude but not know that the sun doesn't rise
11 in the south? Why does this, you know, mean that you
12 understand the theory of relativity?

13 A Well, I mean, it's not -- it's certainly the pattern
14 of aces and spaces, so it's been termed. That pattern does
15 not necessarily reflective mental retardation. More
16 importantly is, the score that he obtained on that subtest of
17 an 11 is in the average range.

18 The assumption is that other folks who truly are
19 mentally retarded are exposed to the same information,
20 potentially, in movies and that kind of thing that Mr. Nixon
21 was exposed to. The difference between Mr. Nixon and a truly
22 retarded individual is Mr. Nixon was able to learn that
23 information.

24 Q Right.

25 A And that's reflective of higher capacity than mental

1 retardation, obviously, because a mentally retardate isn't
2 capable of learning that information ordinarily.

3 Q So that -- that has nothing to do with patterning.
4 That has to do with your obtained score on this. He has
5 learned this much information during the course of his life?

6 A Well, a mental retardation profile does not
7 necessarily suggest that there is going to be aces and spaces
8 or patterning. In other words, all mental retardates do not
9 do this thing of aces and spaces. Some do. All average
10 individuals do not do patterns of aces and spaces. Some do.

11 Does it tell us anything, really? Well, aside from
12 strengths and weaknesses for a mentally retarded person and
13 strengths and weakness for an average -- a person of average
14 intellect, it really doesn't tell us anything at all.

15 Q Now, we talked about another instrument which seems
16 to be a different kind of instrument, which is the Vineland
17 Adaptive Behavior --

18 A Scale.

19 Q -- Scale.

20 A Yes, sir.

21 Q Now, as far as I understand, that is a structured
22 questionnaire in which you ask for questions indicated. And
23 then based on the responses, tally them up and come to some
24 number which we then report.

25 A Essentially. It's a semi-structured format where

1 you're kind of conversationally talking to the individual who
2 knows the person you're assessing, who is called the
3 respondent. And you're kind of helping, getting that person
4 to help you characterize the individual you're assessing so
5 that you can adequately score the Vineland. And then you
6 tally up the numbers and get a score, yes.

7 Q Yeah. Okay. But the -- to the extent that you
8 weren't using a Vineland for this purpose, you would, in fact,
9 go out and do exactly the same thing, which is talk to a
10 number of people who know the person, collect information
11 about the ability to adapt in all of these various areas, and
12 come to an assessment?

13 A Yes.

14 Q Okay. So the fact that Dr. Keyes gave this one
15 particular questionnaire to this one particular person who
16 came up with this one particular score is not inconsistent
17 with talking to a lot of people coming to a conclusion that,
18 well, on the basis of what all of those people have to say
19 about all of the same information, I conclude he is
20 functioning at a higher level than the score of this
21 particular questionnaire would indicate?

22 A Yeah, that's true.

23 MR. FREEDMAN: Thank you very much.

24 THE COURT: Any redirect?

25 MR. EVANS: Yes.

REDIRECT EXAMINATION

1
2 BY MR. EVANS:

3 Q You opined in the Cherry case that Mr. Cherry was
4 mentally retarded; is that correct?

5 A I did opine that Mr. Cherry was mentally retarded,
6 yes.

7 Q And Mr. Cherry was, in fact, found not to be
8 mentally retarded by the court; is that correct?

9 A That's correct.

10 Q Now, the question about the testing and the various
11 ranges that counsel was asking you about, on the I think it
12 was Defense's Exhibit No. 2, the -- when trying to explain the
13 possible variances in the numbers and the IQ results, that
14 recording on the test, I'll ask you to look at v under the
15 Dinning, D-I-N-N-I-N-G, report. And that was with what
16 particular test?

17 A It was with the WAIS, the Wechsler Adult
18 Intelligence Scale.

19 Q And what interval was that test given over?

20 A It was given over -- the test, retest data was given
21 over a 32-month interval.

22 Q Now, was Mr. -- did that ever occur with Mr. Nixon?

23 A No, and that's the thing. It's -- I mean, I don't
24 think this is at all applicable to the case of Mr. Nixon,
25 because what we have is testing with the WISC, a different

1 Wechsler Scale, in '74. We have testing with the WAIS-R in
2 '85, which is a different measure. Of course, the one in '74,
3 a child measure. The one in '85 by Doerman, an adult measure.
4 Then we had, actually, eight years later testing by Dr. Dee
5 with the same WAIS-R, not the WAIS that this article
6 references, but the revised WAIS. And the test, retest
7 interval was eight to nine years rather than the 32 months
8 that this article is referencing.

9 Q Okay. And Section W of Defense Exhibit No. 2 was --

10 A Okay.

11 Q And I had forgotten the name. What was the name of
12 that?

13 A WISC-R Subtest Reliability Over Time, Implications
14 for Practice and Research.

15 Q And the interview -- interval in those cases was,
16 was it two years -- or two times within three years and then
17 three times within six years?

18 A It was retest -- test, retest with the WISC-R, which
19 is a revised version of the WISC that Mr. Nixon was never
20 given, and it was three and six year intervals.

21 Q Okay. Now -- and does it look like it indicates
22 that one interval was he was giving the person, the subjects
23 in those -- in that literature was tested twice within three
24 years and then three times within six years?

25 A That's correct. Twice in three years and three

1 times over a six year period.

2 Q Okay. Is it true, in neither one of those
3 articles -- that Mr. Nixon was ever given those tests, much
4 less those tests under similar circumstances?

5 A That is absolutely true. He was never given the
6 WISC-R, was never given the WAIS, and I just referenced the
7 interval of between test occasions, plus my own between '93
8 and 2006, which is 13 years.

9 Q Okay. Can you make such generalizations as to
10 applying that research to situations that -- like Mr. Nixon's
11 without it being tested in you all's relative community, the
12 scientific psychological community?

13 A No, you really can't. What you do is, usually, in a
14 good measure of intelligence, they are going to address the
15 test, retest issue in the manual. And, essentially, the
16 WISC -- or, excuse me, the WAIS-III manual that I administered
17 with Mr. Nixon does address the test, retest issue. And,
18 basically, it says their test says, we did test, retest with
19 the WAIS-III over a six- to twelve-week interval and find --
20 found this practice effect. In other words, the second score
21 did raise up, but their assessment was over only over six and
22 twelve weeks.

23 So you can't make the assumption. They are
24 different tests, they are different time periods, so that you
25 just cannot try to put a square peg in a round hole like that.

1 Q Okay. Now, the reference to Dr. Keyes' bell curve
2 and --

3 A Correct.

4 Q -- and I'm not 100 percent sure of the question, but
5 did not Dr. Keyes graph take the Flynn Effect, which is
6 something that is in effect -- wasn't the Flynn Effect applied
7 in his bell curve, along with subtracting the standard area of
8 measurement?

9 MR. FREEDMAN: Object to the form.

10 THE COURT: what's the --

11 MR. FREEDMAN: I don't understand the question.

12 THE COURT: Okay. Just rephrase it, Mr. Evans.

13 BY MR. EVANS:

14 Q Okay. The curve, when they were talking -- the
15 question that defense counsel asked you about the bell curve.

16 A Yes.

17 Q All right. Dr. Keyes' graphics indicated that it
18 took into effect the Flynn Effect and also the Standard Error
19 of Measurement to try to get those -- the bell curves to
20 overlap.

21 A Yes, it did take into account the Flynn Effect and
22 the Standard Error of Measurement. And, again, on some of
23 those occasions, it didn't produce scores below 70, which is
24 problematic, you know, and I think it's an inappropriate way
25 to apply those ideas.

1 Q And, again, the Flynn Effect is not something that
2 is accepted as -- that you apply and to reach the numbers, IQ
3 numbers?

4 A That's correct.

5 Q And on Clarence Jones, both you and Dr. Keyes had
6 Mr. Jones' IQ above 70; wasn't that correct?

7 A Yes, we did.

8 Q Okay. And, again, that's not a situation, in
9 Mr. Jones' case, just like in Mr. Nixon's case, you can't fake
10 smart?

11 A That's correct.

12 MR. EVANS: No further questions.

13 THE WITNESS: Thank you, sir.

14 THE COURT: Anything else?

15 MR. FREEDMAN: No, Your Honor.

16 THE COURT: Thank you, sir, for your time and your
17 testimony. You may step down, sir. The witnesses are
18 released.

19 Was I missing something?

20 MR. EVANS: No, sir.

21 THE COURT: All right. Thank you.

22 All right. Well, what I would suggest, I'm going to
23 get the -- I'm planning on getting this, the testimony so
24 far transcribed. I would suggest rather than oral
25 argument, written submissions sometime within 30 days

1 after that, and then I will issue an order. Is there any
2 problem with that?

3 MR. FREEDMAN: I'm sorry. I just didn't hear you.

4 THE COURT: I'll get the testimony transcribed. And
5 then both sides can submit their final written
6 submissions within 30 days after that. And then I will
7 issue an order. Is that acceptable?

8 MR. FREEDMAN: That will be fine.

9 THE COURT: All right. Very well.

10 MR. EVANS: It will be contemporaneously filed so
11 that --

12 MS. SNURKOWSKI: Simultaneously filed.

13 THE COURT: Yes, that was my thought.

14 MS. SNURKOWSKI: Yes, Your Honor.

15 THE COURT: Both sides file within 30 days. I think
16 the issue is pretty well -- pretty well plain now, so.

17 (Discussion held off the record.)

18 THE COURT: All right. So, a transcript 30 days. I
19 will do an order.

20 Thank you both very much -- thank you all very much
21 for your advocacy.

22 (The proceedings were concluded.)

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CERTIFICATE


STATE OF FLORIDA:

COUNTY OF LEON:

I, LINDA CUNNINGHAM, Official Court Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED this 13th day of November, 2006.



LINDA CUNNINGHAM
OFFICIAL COURT REPORTER
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301