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March 17, 2009

The Honorable Michael D. Burton
St. Louis County Circuit Court
7900 Carondelet
Clayton, MO 63105

In Re: State ex rel. Andrew Lyons, Petitioner, vs. Larry Crawford and Jeremiah Nixon, Respondents.
Missouri Supreme Court No. SC88625

Dear Judge Burton:

This will acknowledge receipt of the Master's Report which was filed on March 16, 2009, in the above-entitled cause.

Pursuant to Rule 68.03(g), a copy of the report is being sent to all the parties with a copy of this letter.

Please refer to Rule 68.03(g) which sets out the time for the filing of exceptions to the report and the Master's ruling on them.

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:
Mr. Frederick A. Duchardt, Jr.
Mr. Stephen D. Hawke/Office of Missouri Attorney General

Circuit Court of St. Louis County

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MICHAEL D. BURTON
ADMINISTRATIVE JUDGE
OF THE FAMILY COURT
(314) 615-1516

March 12, 2009

Ms. Cynthia Turley
Deputy Clerk
Missouri Supreme Court
P.O. Box 150
Jefferson City, MO 65102

Re: Lyons v. Crawford
Mo. S. Ct. No. SC88625

Dear Ms. Turley:

I am enclosing my Special Master's report. I will send the file back to you as soon as I hear from the attorneys that there is nothing more for me to do in this matter. Thank you very much.

Very Truly Yours,

Michael D. Burton
Circuit Court Judge for the 21st Circuit

cc: F. Duchardt, atty for Petitioner
S. Hawke, asst. A.G.

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. ANDREW LYONS)
)
Petitioner)
)
v.) Case #88625
)
LARRY CRAWFORD and)
)
JEREMIAH NIXON)
)
Respondents)

REPORT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF SPECIAL MASTER

Pursuant to the Missouri Supreme Court's November 2, 2007 Order, Michael D. Burton, was appointed Special Master in the above captioned cause. In compliance with the Supreme Court's order, the Special Master conducted a hearing on July 1 and 2, 2008. Petitioner Andrew Lyons appeared in person and through his attorney, Frederick A. Duchardt, Jr. Respondents Larry Crawford and Jeremiah Nixon appeared by Assistant Attorney General Stephen D. Hawke. This matter was submitted to the Special Master in November, 2008, when both parties filed proposed findings of fact and conclusions of law. The Special Master consequently makes the following findings of fact and conclusions of law.

1. History of this Case

In 1996, Petitioner was convicted in connection with the September, 1992 killings of his estranged girlfriend, Bridgette Harris; Ms. Harris' mother, Evelyn Sparks; and Dontay Harris, the son of Petitioner and Ms. Harris. State v. Lyons, 951 S.W. 2d 584,

588 (Mo. banc 1997). The jury recommended a sentence of death for the murder of Ms. Harris and of seven years for the involuntary manslaughter of Dontay. Id. The jury could not agree upon a sentence for the murder of Ms. Sparks. Id. The trial court ultimately imposed sentences of death for both murders and a seven year sentence for the manslaughter. These verdicts and sentences were affirmed in 1997. Id.

The case took four years before reaching the trial stage because Petitioner was initially found to be incompetent to proceed to trial. In 1996, the trial court found that Petitioner was competent to proceed. The trial occurred shortly thereafter. Id.

Several efforts for post-conviction relief were attempted in state court. All of the motions addressed mental health issues. At least one federal petition for similar relief was filed as well. None of these efforts were successful. (Lyons v. State, 39 S.W. 2d 32 (Mo. banc 2001); State v. Lyons, 129 S.W. 3d 873 (Mo. banc 2004); Lyons v. Luebbers, 403 F. 3d 585 (8th Cir. 2005)).

In 2007, Petitioner filed a petition for a writ of mandamus, alleging that his death sentences should be set aside, pursuant to Atkins v. Virginia, 536 U.S. 304, 321 (2002). (The United States Supreme Court held in Atkins that a sentence of death for a mentally retarded individual violates the Eighth Amendment's prohibition against cruel and unusual punishment).

2. Missouri Supreme Court's guidance and directives

This Court established the procedure for post-Atkins claims of mental retardation for individuals who received the death penalty prior to the Atkins decision. A Master must be appointed whenever facts are disputed on the issue of whether a petitioner, who

has received a death sentence prior to 2001, is mentally retarded. In the Matter of the Competency of Parkus, 219 S.W. 3d 250, 254 (Mo. banc 2007. In such a proceeding, the petitioner has the burden of proving that he/she is mentally retarded. As this proceeding is civil in nature, the petitioner must demonstrate mental retardation by a preponderance of the evidence. Id.

Pursuant to Petitioner's writ, this Court appointed Michael D. Burton as Special Master. This Court specifically directed the Special Master to, inter alia, "... take the evidence on the issue joined, ... and to report the evidence taken, together with (his) findings of fact and conclusions of law on the issue of whether Petitioner is mentally retarded as defined in Section 565.030.6, R.S. Mo. 2000."

3. Definition of Mental Retardation

Section 565.030.6, R.S. Mo., states that mental retardation is a "condition involving substantial limitations in general functioning" characterized by:

a) "significantly subaverage intellectual functioning" with

b) "continual extensive related deficits and limitations in two or more adaptive behaviors . . ."

These conditions must be "manifested and documented before eighteen years of age."

4. First requirement for mental retardation: "Significantly subaverage intellectual functioning"

Dr. Robert Fucetola, Ph.D., a licensed psychologist, who is board certified in neuropsychology and an assistant professor of psychology (at Washington University), testified on behalf of Petitioner as to whether or not Petitioner has significantly

subaverage intellectual functioning. In reaching his conclusion, Fucetola considered information that he had received from the extensive interviews and examination of the Petitioner. He also considered the numerous examinations of Petitioner that were conducted to determine his brain functioning since his incarceration in 1992.

Fucetola stressed that one cannot merely review the results of one examination in making a decision about intellectual functioning. He emphasized the need for a more holistic approach, one that involved consideration of a group of tests. Fucetola also considered the extensive court documents and the Missouri Dept. of Corrections records. Further, the neuropsychologist considered collateral sources – family members – who could describe the Petitioner's life prior to his incarceration.

Unlike many of the previous competency evaluations that were conducted, Fucetola focused on a broader scope: Petitioner's capabilities at functioning in society. Fucetola turned to an IQ test to assess Petitioner's "everyday functioning," by determining his abilities and potential.

In determining an individual's intellectual functioning, Dr. Fucetola -- as did Dr. Kline, Respondent's expert – primarily focused on intelligent quotient scores. He cited the DSM-IV as authority for establishing guidelines for determining mental retardation. The DSM-IV allows for a diagnosis of mental retardation (mild) for IQ scores from 50 to 75. While Fucetola stressed that adaptive behaviors must also always be considered before making a diagnosis of mental retardation (akin to Section 565.030.6, R.S. Mo.), his tests determined that the Petitioner had an I.Q. test score of 61.

Fucetola spent a significant amount of his testimony explaining the I.Q. results of other tests that had been conducted of Petitioner since his arrest. In 2002, Dr. Dennis Cowan found that Petitioner's I.Q. was 67 – a score not much different than that of

Fucetola's -- and within the "mild mental retardation" range. (Cowan described Petitioner's score as indicative of an "(e)xtremely low range of intellectual functioning and found to be at the 1st percentile and inferior to 99 of 100 of his age-related peers.")

Other psychological tests were conducted over the years – and many did not address the issue of mental retardation. Forensic psychiatrist Bruce Harry (in 1992 and 1999) and forensic psychologist William Holcomb (in 1994) determined issues relating to Petitioner's competency. In their depositions from last year, they indicated that, despite their findings that Petitioner was ultimately competent to proceed to trial, they had never addressed whether or not Petitioner was mentally retarded. Both doctors reviewed Fucetola's evaluation; they both indicated that there was absolutely nothing in his report that was inconsistent with their findings. Neither doctor ruled out mental retardation.

This Master has some concerns about two test results that were conducted by other psychologists in 1992 and in 1998. At first glance, the I.Q. test results - 84 and 81, respectively – seem to completely contrast with the results of the tests given by Fucetola and Cowan. Fucetola, however, gives a plausible explanation for each result.

As to the 1992 result, Fucetola noted an obvious problem with strict adherence to the I.Q. testing guidelines. The guideline that Fucetola questioned was the seemingly arbitrary instruction to reduce the I.Q. score for all participants who were under the age of 35. Fucetola noted that Petitioner's score was unfairly elevated because, at the time of his 1992 test, he was 35 years and one month old. If Petitioner had taken the test one month earlier, his I.Q. score would have been 78. (Fucetola's adjustment is somewhat extreme – he makes a full six-point reduction. This Master finds that a smaller reduction would be appropriate – if at all.)

Fucetola also questioned the 1992 and 1998 results because of the testers' failure to factor in a reduction that is widely recognized by most mental health experts. This factor – the "Flynn Effect" – addresses the problem of "I.Q. inflation" over time. Fucetola testified to the widespread acceptance of this factor among the scientific community. Taking into account the "Flynn Effect," Fucetola determined that the adjusted I.Q. test results from 1992 and 1998 should be 74.7 and 75.9, respectively. (This Master had some initial suspicions about the supposed acceptance of the "Flynn Effect." Cowan mentioned Flynn – the namesake of the factor – in his report, but never adjusted his final I.Q. scores. During his testimony, Fucetola – who spent considerable time addressing the "Flynn Effect" – rarely referenced the "Flynn Effect" adjusted score of 55.7 given to Petitioner. Throughout his testimony, Fucetola referred to Petitioner's I.Q. as 61. This Master suspects that Petitioner simply did not want to try to reconcile the higher 1992 and 1998 scores with the 55.7 score. Such reconciliation is an easier task with a 61 score...).

This Master closely scrutinized the testimony of Dr. Kline, who ultimately determined -- from his consideration of all previous tests (including Fucetola's), reports and his own interview of Petitioner – that Petitioner was not mentally retarded. Kline opined that Petitioner's I.Q. was best captured by the 1992 test (which found him to have a score of 84). This Master questions Kline's opinion because – unlike Fucetola – he cannot explain the inconsistencies of the test results during the fifteen-year period since the 1992 test.

Kline can give no plausible reason why this Master should reject the recent I.Q. testing results. He does not question in any way whatsoever Fucetola's testing methods, nor the way that the 2002 test was conducted. Further, he does not challenge any of these

test results. (This Master notes that the 1992 and 1998 tests were not scrutinized in the same manner as were the 2002 and 2007 tests...). Moreover, Kline cannot explain a cause for the marked decrease in the I.Q. results. He initially suggested dementia as a possible cause, but admitted that he saw no signs of dementia in his interview of Petitioner. He also never found a single medical record that suggested that Petitioner had dementia. (The Master notes that Dr. Cowan found that Petitioner had dementia. Both Fucetola and Kline agree, however, that if Petitioner had dementia in 2002, he would have had exhibited extreme symptoms of the disease in 2007, if he were alive at all ...). Kline also suggested a recent case of depression as being a possible explanation for the I.Q. decrease, but on cross examination, he admitted that Petitioner had suffered from depression since the date of his arrest. Indeed, in 1992, Dr. Harry addressed Petitioner's depression in great detail. Kline's attempts at explaining the higher scores in the earlier years were simply not persuasive.

Dr. Kline refused to apply the "Flynn Effect" to the 1992 and 1998 test results. He admitted his awareness of such a factoring approach. He gave no published authority for dismissing such a factor. Nonetheless, Kline agreed that much research in this area establishes I.Q. inflation. He admitted that the WAIS technical manual addresses the Flynn correction.

This Master finds Fucetola's explanations persuasive. While there is some limited inconsistency between Petitioner's results in the earlier tests – even with Fucetola's adjustments – and the 2007 Fucetola test, Petitioner has a more plausible explanation for much of the discrepancies. It is possible, as Fucetola suggests, that Petitioner guessed a few answers correctly in these earlier tests and because of "sheer luck," had some elevated scores. This Master notes that no one – including Kline – has

even suggested that Petitioner was malingering (which, if in fact were true, could explain why he received lower scores on the more recent tests). Both experts agree that Petitioner is far from sophisticated, unable to fool the testers (who had established many safeguards in their tests to ensure that such a problem does not occur).

The tests conducted by Fucetola found that Petitioner had severe impairment in such areas as attention, "learning and memory," academics and functional abilities. His spelling skills are at a first grade level; some of his math skills are at a second grade level. In the 50 neuropsychological tests (with percentile scores) that Fucetola conducted, Petitioner scored in the lowest 1% for 26 of the tests; he scored in the lowest 5% for 43 of the tests.

This Master finds that Petitioner has established by a preponderance of the evidence that the Petitioner has an I.Q. lower than 70. While this Master will not disregard the 1992 and 1998 results, it seems appropriate to adjust the scores in a manner closer to Fucetola's suggestions. (Given Kline's acceptance of the 2002 and 2007 test methodologies and results, this Master gives more weight to these two tests as more accurately reflecting Petitioner's intelligence). Taking all of the results into consideration, this court finds that Petitioner has established that his I.Q. falls within the range of 61 and 70 (even without any Flynn adjustment). Petitioner, therefore, has proven that he has significantly subaverage intellectual functioning.

5. **Second requirement for mental retardation: "Continual extensive related deficits and limitations"**

Section 565.030.6 further requires that, in order to make a finding of mental retardation, the court must determine that a "continual extensive related deficits and limitations in two or more adaptive behaviors" exists. The statute specifically suggests

certain adaptive behaviors that might be worth examining: "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work..."

Both parties' experts agreed that mentally retarded individuals could have extreme deficits and limitations in certain behaviors while evidencing no deficits and limitations whatsoever in other behaviors. Accordingly, as the aforementioned statute provides, the Petitioner need only establish that he has continual extensive related deficits and limitations in <u>two</u> adaptive behaviors.

This Master will now address each of these ten behaviors.

a. <u>*Communication*</u>

This Master is persuaded that Petitioner has continued extensive deficits and limitations in the area of communication. Dr. Fucetola noted Petitioner's inability to verbally communicate with him; he could not participate in a discourse about any matter of substance. Both of his prior attorneys – Beth Davis and William Swift – noted how difficult it was for them to prepare Petitioner's defense. He never engaged in meaningful conversation with them, not able to assist in his defense in anyway whatsoever. Their affidavits from a decade ago indicated their concern for Petitioner's general inability to understand basic information and explanations related to the case.

Petitioner's limited family history established Petitioner's deficits and limitations in the communication area. Dr. Fucetola's rating of Petitioner's behavior as described by Rose DePree (his half-sister) in "social communication" was "severely impaired" (in the lowest percentile for his age). Rose described Petitioner as a loner, who always kept to himself. Two of Petitioner's brothers,

David Lyons and James Lyons, described him as quiet and withdrawn. James described him as ". . . very shy . . . Even as a small child, he played by himself a lot. He just didn't interact too much with other people." James recalled that Petitioner "never talked a lot . . . that he was one of these people that when you did talk to him . . . you didn't get much of an answer from him, but you would usually get a smile." James stated that "smiling would replace words for (Petitioner). He never really talked a lot . . . (Petitioner) would kind of just smile at you and say one or two words." Petitioner's mother described him as ". . . just quiet. He kind of stay off by hisself (sic)."

One of Petitioner's sisters, Lillie Foster, described how extreme Petitioner's situation was. She recalled how he would regularly get nauseous whenever he would get ready for school. He did not like to associate with others.

Petitioner's written communication skills were even worse than his verbal communication skills. He is (and has always been) illiterate, unable to write, read and spell.

Petitioner clearly has "continual extensive related deficits and limitations" in communication.

b. *Self-care*

The evidence suggested that Petitioner had exhibited some deficits and limitations in the area of self-care. To some extent, he could provide the very basics for himself. He could make his own sandwiches (and arguably, even cook for himself.) Petitioner could not be counted on to attain medical care for himself. He rarely saw a doctor - and when he did, it was through the assistance of others.

Petitioner was unable to deal with his own finances. His brother James recalls how he had to assist Petitioner in paying his bills.

Several of Petitioner's siblings recalled how Petitioner lived in an abandoned house for a period of time. They recalled how he lived like "an animal," with no running water, electricity or plumbing.

Petitioner, however, also lived for a substantial period of time without significant problems. While the above concerns are noted, his ability to meet his basic needs suggests that he does not have the sort of self-care deficits and limitations that were intended to be recognized by the statute.

c. *Home Living*

The evidence indicated that Petitioner had kept a clean residence, evidencing few deficits and limitations in this limited area of home living. Petitioner, however, was obsessed with cleaning. His siblings consistently described how Petitioner would constantly clean his residence. Alice DePree recalls that he would vacuum his rugs three to four times a day. Another sister, Mary Carter, remembers occasions in which Petitioner would wake up in the middle of the night to clean. Lillie Foster recalls her brother bathing his children in the upstairs bathroom and showering them in the downstairs bathroom immediately thereafter.

As described in the previous section, there was some evidence presented that suggested that Petitioner had the ability to cook for himself. This Master heard little more than that he was able to make sandwiches. He could feed himself – but it is unclear whether he could do more than that.

Petitioner's home living was indeed bizarre and obsessive. Such behavior, however, does not necessarily establish deficits and limitations that were intended by Section 565.030.6. Such behavior certainly is consistent with the deficits and limitations that Petitioner has in other areas.

d. *Social Skills*

This Master has heard very little evidence as to Petitioner's social skills. While there is indeed evidence to support Petitioner's having several "girlfriends," there is very little evidence to support Petitioner's abilities to maintain relationships. Petitioner had numerous children, but surely the fact that he engaged in sexual activities measures very little as to his social skills.

Petitioner's family recalled that he had no friends throughout his childhood. He only interacted with family members. His mother recalled how he did not like to be around people; he "stayed away from the crowd."

This Master is unclear as to whether or not Petitioner has met his burden in establishing his deficits and limitations in this area. The problem relates to the definition of "social skills." Indeed, Petitioner had relationships with women. He perhaps had sufficient social skills to meet his various partners. Whether or not Petitioner did anything at all to maintain or develop these relationships is uncertain. Given the family's description of Petitioner, it is very unlikely that he had the social skills to foster any relationships.

e. *Community Use*

This Master is persuaded that Petitioner has continued deficits and limitations in the area of "community use." There is scant evidence that Petitioner in fact "used the community." Indeed, his half-sister, Rose DePree,

recalled how Petitioner was unable to access the community: he could not use the phone book (nor a dictionary or encyclopedia as well). Fucetola determined that he could not use a street map.

Petitioner's family members agree that Petitioner would have been lost without them. He only used the community as much as they assisted him in doing so.

f. *Self Direction*

Petitioner has presented testimony to support his position that he has had continued extensive deficits and limitations in the area of self direction. The evidence is clear that he has made few major decisions and/or accomplishments without his family's support. For example, Petitioner attained all of his jobs through the assistance of his family.

On the other hand, Petitioner had exhibited sufficient self-direction in his life, as seen in the small decisions he has made on a daily basis. He knew what he needed to do to keep a job and to maintain a household. He successfully achieved these goals, even though they involved little more than a series of minor tasks. Consequently, this Master is not persuaded that Petitioner has had continued extensive deficits and limitations in self-direction (as intended by the pertinent statute).

g. *Health and Safety*

Petitioner presented very little evidence to support an allegation of his having deficits or limitations in the area of health and safety. On the one hand, he did very little to maintain good health: there was evidence to suggest that Petitioner rarely went to the doctor or dentist. On the other hand, Petitioner did

not appear to have any major health problems that would have warranted medical attention. Moreover, there was no evidence to suggest that he disobeyed any doctor's orders.

Petitioner did take some significant measures to address the health of others. He moved to Detroit to care for his ailing father.

This Master does not find that Petitioner had significant deficits or limitations in this area.

h. *Functional Academics*

Petitioner has clearly demonstrated his deficits and limitations in the area of functional academics. The only records that exist from Petitioner's entire years of schooling are two single-page documents. (The Cape Girardeau School District has also included four additional pages – which merely state that Petitioner "dropped" his classes due to truancy. He was noted to be in the 10th grade for three consecutive school years. There is no documentation whatsoever of Petitioner's education prior to the fall of 1972).

The first document that was provided by the Petitioner's school district reflects his scores from the Iowa Basics Test (taken in March 1973). His composite score of "53" placed him in the bottom 2% of all 9th graders taking the test.

The second document contains grades from three semesters of high school. The documents state as follows:

1. For the Fall of 1972 (ending on January 19, 1973): one "F" and five "incompletes";

2. For the Spring of 1972 (ending on June 1, 1973): two "Fs" and four "incompletes";
3. For the second trimester of 1973 and 1974 (no ending date mentioned): four "Fs and one "incomplete".

This report card document does not mention Petitioner's first trimester grades for 1973-74 nor whether or not Petitioner took any measures to make up his failed and incomplete classes. This Master assumes that the school district merely moved Petitioner to the 10th grade despite his not passing a single class in the 9th grade.

Family members (Rose, James, David and Sister Lillie) recall that Petitioner had always been in Special Education classes. They remember his being in classes with mentally retarded children. They recall Petitioner's being very slow at reading and mathematics. Rose recalled that Petitioner was nicknamed "Malcolm" after the Malcolm Bliss State Hospital (a "crazy hospital").

These scant Cape Girardeau records speak for themselves. Many tests conducted since Petitioner's incarceration corroborate the aforementioned limitations. In 2002, Dr. Warren Wheelock assessed Petitioner to be a "functional illiterate," with a reading ability on a first grade level. Petitioner has clearly demonstrated extreme deficits and limitations in the area of functional academics.

i. Leisure

The evidence seemed to suggest that Petitioner had no hobbies and engaged in no recreational activities (other than cleaning). This Master is uncertain as to what the statute means when referring to deficits/limitations in this area. Petitioner's having absolutely no "meaningful" leisure time whatsoever

would certainly seem to suffice as evidencing his having extreme deficits and limitations in this area.

j. *Work*

Petitioner introduced some evidence to support his contention that he had deficits and limitations in the area of employment. Several family members indicated that the family was responsible for getting Petitioner his various jobs. The issue in this inquiry does not merely center on Petitioner's ability to find employment, as Petitioner seems to suggest.

This Master finds that the Petitioner was able to maintain his employment for relatively lengthy periods of time. Accordingly, one can safely assume that Petitioner was able to both get to these jobs on time and perform the necessary tasks (as menial as they might have been).

Petitioner has not demonstrated that he has "continued extensive related deficits and limitations" in the work area.

k. *Summary*

This Master finds that Petitioner has proven by a preponderance of the evidence that he suffered from (and still does suffer from) "continual extensive related deficits and limitations" in at least two "adaptive behaviors." As indicated above, this Master finds such deficits and limitations are evident in, inter alia, communication and functional academics. Petitioner made sound arguments that he was deficient and limited in many of the other areas; Respondents made strong arguments as well. Both sides were limited due to the lengthy period of time that has elapsed – and due to the incredible absence of documentation that could have established more details about Petitioner's history.

This Master supports Fucetola's findings that Petitioner has mild mental retardation. The doctor describes such a condition to be "the cloak of competence." In other words, Petitioner can appear to function somewhat well in various situations – especially with family/peer support. Mildly mentally retarded individuals typically function at a sixth grade level or below in most activities (as opposed to those with moderate mental retardation who typically function at a second grade level).

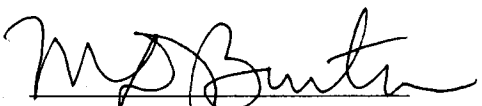
6. **Conditions that are "manifested and documented before eighteen years of age"**

The above findings are not recent phenomena for Petitioner. His family recounts numerous stories from his childhood that demonstrate his significantly sub average intellectual functioning and his continual extensive related deficits and limitations in many different adaptive behaviors. The Cape Girardeau school records document his extremely limited functioning while he was in high school.

7. **Conclusion**

As stated above, Petitioner has met his burden of proof. First, he established by a preponderance of the evidence that he had significantly subaverage intellectual functioning – through Dr. Fucetola's evaluation (and his logical explanation of other evaluations). Second, Petitioner established that by a preponderance of the evidence that he had suffered continual extensive related deficits and limitations in at least two adaptive behaviors – most notably in communication and functional academics. Petitioner, therefore, is mentally retarded as defined in Section 565.030.6, R.S.Mo.

Respectfully submitted,



Michael D. Burton
Special Master

March 12, 2009

Cc: Frederick A. Duchardt, Jr.
Attorney for Petitioner

Stephen D. Hawke
Assistant Attorney General