Attachment O

9251—JUDGMENT AND SENTENCE

FILE NO. MAGL. NO. 29 69

STATE OF OKLAHOMA
Ottawa County } IN DISTRICT COURT

BE IT REMEMBERED, That on the 12th day of October A. D. 1969, the same being one of the days of the July, 1968, term of the District Court of Ottawa County, State of Oklahoma, there being present the

Honorable RICHARD W. SMITH Judge,
WILLIAM M. SCHUELEIN Sheriff,
and EDDIE SIMPSON Clerk.

And public proclamation of the opening of said Court having been made, the following among other proceedings were had:

STATE OF OKLAHOMA
vs.
KARL LEE MYERS
Defendant. } No. 3514

The defendant above named KARL LEE MYERS being personally present in open Court and having been legally presented by information and arranged and having plead guilty to the crime of BURGLARY - SECOND DEGREE as charged in said information and upon being asked by the Court whether he had any legal cause to show why judgment and sentence should not be pronounced against him, and giving no good reason in bar thereof, and none appearing to the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the said KARL LEE MYERS, be delivered to the Department of Corrections ~~the custody of the Sheriff~~ of said State at McAlester in the State of Oklahoma for the term of Two (2) years for said crime by him committed. Said term of imprisonment to begin at and from the 12th day of October A. D. 1969, and that said defendant pay the costs of this prosecution for which execution is awarded.

Now upon further consideration, the Court finds that the defendant is a person of good character and has never previously been convicted of any crime; It is, therefore, ordered that said Judgment and Sentence be suspended during the good behavior of the defendant and upon the terms of the Terms of Suspended Sentence attached hereto.

Done in open Court, this 12th day of October, 1968.

Richard W. Smith
RICHARD W. SMITH, DISTRICT JUDGE

I, EDDIE SIMPSON Court Clerk of Ottawa County, State of Oklahoma, do hereby certify the above and foregoing to be a full, true, correct and complete copy of the judgment and sentence in the case of the State of Oklahoma vs. KARL LEE MYERS as the same appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 12th day of October, 1968 ~~XTHXXX~~

Eddie Simpson
Court Clerk.

By ..... Deputy.

9251—JUDGMENT AND SENTENCE

14 302

STATE OF OKLAHOMA
Ottawa County

BE IT REMEMBERED, That on the 9th day of November A. D. 1965, the same being one of the days of the July, 1965, Adjourned term of the District Court of Ottawa County, State of Oklahoma, there being present the

Honorable JOSEPH G. BREAUNE Judge,
WILLIAM M. SCHUELEIN Sheriff,
and EDDIE SIMPSON Clerk.

And public proclamation of the opening of said Court having been made, the following among other proceedings were had:

STATE OF OKLAHOMA
vs.
KARLLEE MYERS Defendant.
No. 3420

The defendant above named KARLLEE MYERS being personally present in open Court and having been legally presented by information and arranged and having plead guilty to the crime of GRAND LARCENY as charged in said information and upon being asked by the Court whether he had any legal cause to show why judgment and sentence should not be pronounced against him, and giving no good reason in bar thereof, and none appearing to the Court,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the said KARLLEE MYERS be confined in the State Penitentiary at McAlester in the State of Oklahoma for the term of Two (2) years for said crime by him committed. Said term of imprisonment to begin at and from the 9th day of November A. D. 1965, and that said defendant pay the costs of this prosecution for which execution is awarded.

Now upon further consideration, the Court finds that the defendant is a person of good character and has never previously been convicted of any crime; it is therefore ordered that said Judgment and Sentence be suspended during the good behavior of the defendant and upon the terms of the Terms of Suspended Sentence attached hereto.

Done in open Court, this 9th day of November, 1965.

Joseph G Breaune
JOSEPH G. BREAUNE, DISTRICT JUDGE

I, EDDIE SIMPSON Court Clerk of Ottawa County, State of Oklahoma, do hereby certify the above and foregoing to be a full, true, correct and complete copy of the judgment and sentence in the case of the State of Oklahoma vs. KARLLEE MYERS as the same appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 9th day of November, 1965

Court Clerk.

By Deputy.

THE STATE OF OKLAHOMA,)
Plaintiff,)
-vs-) No. CRF-76-430
KARL L. MYERS,)
Defendant.)

THE STATE FURTHER ALLEGES:

That said Karl L. Myers was heretofore on the 9th day of November, 1965, in Case No. 3420, in the District Court of Ottawa County, State of Oklahoma, the same being a Court of competent jurisdiction, convicted of the crime of GRAND LARCENY, said crime being an offense punishable under the laws of the State of Oklahoma by imprisonment in the penitentiary; that the said Karl L. Myers was heretofore on the 12th day of October, 1969, in Case No. 3514, in the District Court of Ottawa County, State of Oklahoma, the same being a court of competent jurisdiction, convicted of the crime of BURGLARY, SECOND DEGREE, that said crime being an offense punishable under the laws of the State of Oklahoma by imprisonment in the penitentiary; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state,

WOODROW G. PENDERGRASS
District Attorney

By: _____
FRANK GREER
First Assistant District Attorney

IN THE DISTRICT COURT IN AND FOR OTTAWA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff

vs.

KARL L. MYERS

Defendant

PRELIMINARY
INFORMATION

No. CRF-76-430

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA:

Now comes WOODROW G. PENDERGRASS, the duly qualified and acting District Attorney in and for Ottawa County, State of Oklahoma, and gives the District Court of said County and State to know and be informed that KARL L. MYERS did in said County and State, on or about the 25th day of June in the year of our Lord, One Thousand Nine Hundred and Seventy-six and anterior to the presentment hereof, commit the crime of ASSAULT WITH INTENT TO RAPE, FIRST DEGREE AFTER FORMER CONVICTION OF A FELONY

Title 21-681

in the matter and form as follows, to-wit: That said defendant, on the day and year aforesaid, in the County and State aforesaid, did unlawfully, wilfully and feloniously assault one Bonnie Mackin a female person of the age of 12 years and not the wife of the said defendant, by taking hold of said female with his hands, tearing her clothing off, putting his hands on the private parts of her body and struggling and contending with her, with the unlawful and felonious intent upon the parts of said defendant to then and there rape, ravish, carnally know and have sexua.. intercourse with said female,

FILED IN DISTRICT COURT OTTAWA COUNTY
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EDDIE SIMPSON
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BY [illegible] DEP.

contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State of Oklahoma.

STATE OF OKLAHOMA
County of Ottawa

I, ROGER CHRISCO being first duly sworn, on oath state that I have read and know the contents of the foregoing information and the statements therein are true.

Roger Chrisco
(Complaining Witness)

Subscribed and sworn to before me this 28th day of June, 19 76

Martha Sue Thompson District Judge

ENDORSEMENTS

WOODROW G. PENDERGRASS District Attorney

By FRANK GREER
First Assistant District Attorney

THE STATE OF OKLAHOMA,)
Plaintiff,)
-vs-) No. CR-76-430
)
KARL L. MYERS,)
Defendant,)

THE STATE FURTHER ALLEGES:

That said Karl L. Myers was heretofore on the 9th day of November, 1965, in Case No. 3420, in the District Court of Ottawa County, State of Oklahoma, the same being a Court of competent jurisdiction, convicted of the crime of GRAND LARCENY, said crime being an offense punishable under the laws of the State of Oklahoma by imprisonment in the penitentiary; that the said Karl L. Myers was heretofore on the 12th day of October, 1969, in Case 3514, in the District Court of Ottawa County, State of Oklahoma, the same being a Court of competent jurisdiction, convicted of the crime of BURGLARY, SECOND DEGREE, that said crime being an offense punishable under the laws of the State of Oklahoma by imprisonment in the penitentiary; that the said Karl L. Myers was heretofore on the 12th day of February, 1971, in Case 4717, in the District Court of Cherokee County, State of Kansas, the same being a Court of competent jurisdiction, convicted of the crime of BURGLARY AND THEFT, that said crime being an offense punishable under the laws of the State of Kansas by imprisonment in the State Penal Institutions; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state,

WOODROW G. PENDERGRASS
District Attorney

By: _____
FRANK GREER
First Assistant District Attorney

IN THE DISTRICT COURT IN AND FOR OTTAWA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff

vs.

KARL L. MYERS

Defendant

AMENDED
PRELIMINARY
INFORMATION

No. CRF-76-430

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA:

Now comes WOODROW G. PENDERGRASS, the duly qualified and acting District Attorney in and for Ottawa County, State of Oklahoma, and gives the District Court of said County and State to know and be informed that KARL L. MYERS

did in said County and State, on or about the 25th day of June in the year of our Lord, One Thousand Nine Hundred and Seventy-six and anterior to the presentment hereof, commit the crime of ASSAULT WITH INTENT TO RAPE, FIRST DEGREE AFTER FORMER CONVICTION OF A FELONY

Title 21-681

in the matter and form as follows, to-wit: That said defendant, on the day and year aforesaid, in the County and State aforesaid, did unlawfully, wilfully and feloniously assault one Bonnie Mackin a female person of the age of 12 years and not the wife of the said defendant, by taking hold of said female with his hands, tearing her clothing off, putting his hands on the private parts of her body and struggling and contending with her, with the unlawful and felonious intent upon the parts of said defendant to then and there attempt to rape, ravish, carnally know and have sexual intercourse with said female,

FILED
IN THE DISTRICT COURT
OTTAWA COUNTY, OKLA.
JUL -2 PM 3 15
BUE SIMPSON
COURT CLERK
BY

contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State of Oklahoma.

STATE OF OKLAHOMA
County of Ottawa

I, FLOYD INGRAM being first duly sworn, on oath state that I have read and know the contents of the foregoing information and the statements therein are true.

(Complaining Witness)

Subscribed and sworn to before me this 29th day of June, 19 76

Martha Sue Thompson District Judge

ENDORSEMENTS

WOODROW G. PENDERGRASS District Attorney

By FRANK GREES
First Assistant District Attorney

[redacted]

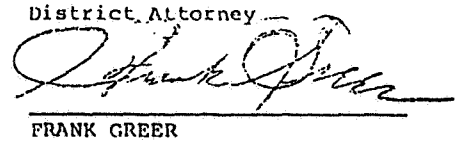
JPR 0761

THE STATE OF OKLAHOMA,)
Plaintiff,)
-vs-) No. CRF-76-430
)
KARL L. MYERS,)
Defendant,)

THE STATE FURTHER ALLEGES:

That said Karl L. Myers was heretofore on the 9th day of November, 1965, in Case No. 3420, in the District Court of Ottawa County, State of Oklahoma, the same being a Court of competent jurisdiction, convicted of the crime of GRAND LARCENY, said crime being an offense punishable under the laws of the State of Oklahoma by imprisonment in the penitentiary; that the said Karl L. Myers was heretofore on the 12th day of October, 1969, in Case 3514, in the District Court of Ottawa County, State of Oklahoma, the same being a Court of competent jurisdiction, convicted of the crime of BURGLARY, SECOND DEGREE, that said crime being an offense punishable under the laws of the State of Oklahoma by imprisonment in the penitentiary; that the said Karl L. Myers was heretofore on the 12th day of February, 1971, in Case 4717, in the District Court of Cherokee County, State of Kansas, the same being a Court of competent jurisdiction, convicted of the crime of BURGLARY AND THEFT, that said crime being an offense punishable under the laws of the State of Kansas by imprisonment in the State Penal Institutions; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state,

WOODROW G. PENDERGRASS
District Attorney

By: 

FRANK GREER
First Assistant District Attorney

IN THE DISTRICT COURT IN AND FOR OTTAWA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff

vs.

KARL L. MYERS

Defendant

AMENDED
PRELIMINARY
INFORMATION

No. CRF-76-430

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA:

Now comes WOODROW G. PENDERGRASS, the duly qualified and acting District Attorney in and for Ottawa County, State of Oklahoma, and gives the District Court of said County and State to know and be informed that KARL L. MYERS

did in said County and State, on or about the 25th day of June in the year of our Lord, One Thousand Nine Hundred and Seventy-six and anterior to the presentment hereof, commit the crime of ASSAULT WITH INTENT TO RAPE, FIRST DEGREE AFTER FORMER CONVICTION OF A FELONY

Title 21-681

in the matter and form as follows, to-wit: That said defendant, on the day and year aforesaid, in the County and State atoresaid, did unlawfully, wilfully and feloniously assault one Bonnie Mackin a female person of the age of 12 years and not the wife of the said defendant, by taking hold of said female with his hands, tearing her clothing off, putting his hands on the private parts of her body and struggling and contending with her, with the unlawful and felonious intent upon the parts of said defendant to then and there attempt to rape, ravish, carnally know and have sexual intercourse with said female,

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COURT CLERK

contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State of Oklahoma.

STATE OF OKLAHOMA
County of Ottawa

I, FLOYD INGRAM being first duly sworn, on oath state that I have read and know the contents of the foregoing information and the statements therein are true.

Floyd Ingram
(Complaining Witness)

Subscribed and sworn to before me this 29th day of June, 19 76

Martha Sue Thompson District Judge

ENDORSEMENTS

WOODROW G. PENDERGRASS District Attorney

By JEANNIE GREER
First Assistant District Attorney

JPR 0763

Attachment P

RECEIVED
LEXINGTON
JUN 01 1979
Assessment & Reception

OKLAHOMA STATE BUREAU OF INVESTIGATION

IDENTIFICATION DIVISION
P.O. BOX 11497
OKLAHOMA CITY, OKLAHOMA

PAGE 1-4

FBI 454 [illegible]

78224

The following OSBI record, NUMBER 22815, is furnished FOR OFFICIAL USE ONLY. Information shown on this identification Record represents data furnished OSBI by fingerprint contributors. WHERE DISPOSITION DATA IS NOT SHOWN OR FURTHER EXPLANATION OF CHARGE OR DISPOSITION IS DESIRED, COMMUNICATE WITH AGENCY CONTRIBUTING THOSE FINGERPRINTS.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
SO Miami Okla	Karl Loo Myers	11-6-65	GL	
PD Sodalia Mo	Karl Lee Meyers #08532	8-13-68	burg 2nd	relsd to Otta Co Okla
SO Miami Okla	Karl Lee Myers	8-14-68	burg 2nd dog	
SO Miami Okla	Karl Lee Myers	2-5-69	burg 2nd	2 yrs SPen McAlister Okla
SPen McAlester Okla	Karl Lee Myers #78224	2-20-69	burg 2nd deg	2 yrs
SRef Granite Okla	Karl Lee Myers #25279	3-19-69 trans fr OSP.	burg 2nd deg	2 yrs 4-15-70 par
PD Kansas City Mo	Karl Lee Myers #122908	10-22-70	burg	Rel by caprop pfi 10-23-70
SO Columbus Ohio	Karl L. Myers #202	3-11-70	burg & T	
SO Columbus Kans	Karl L Myers #202	5-11-70	burg & theft	
St Ind Ref Hutchinson Kans	Karl Lee Myers #23739	Rec'd 4-12-71	Burg & Theft	1-10- & 1-10 yrs CC Bd Parole to Osawatomie Sllosp 11-6-73

JPR 1025

OKLAHOMA STATE BUREAU OF INVESTIGATION

IDENTIFICATION DIVISION
P.O. BOX 11497
OKLAHOMA CITY, OKLAHOMA

PAGE FBI #

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CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
SO Miami OK	Karl Lee Myers	9-19-75	Aslt with deadly weapon	
SO Miami OK	Karl L Myers	6-25-76	lewd molestation	
SO Miami OK	Karl Lee Myers	1-22-78	grand larceny	
STATE BUREAU OK055025C Dept. of Corr. Okla. City, Okla.	Myers, Karl Lee #78224	5/18/79	Assault W/Intent to Rape First Degree (AFCF)	Twenty (20) Yrs

JPR 1026

jkj

Attachment Q

FORENSIC PSYCHOLOGICAL EVALUATION OF

Karl Myers

Prepared by:

John A. Call, Ph.D., J.D.
Diplomate in Forensic Psychology
American Board of Professional Psychology
American Board of Forensic Psychology

TABLE OF CONTENTS

JOHN A. CALL, Ph.D., J.D.
FORENSIC AND CLINICAL PSYCHOLOGY
5100 NORTH BROOKLINE, SUITE 700
OKLAHOMA CITY, OKLAHOMA 73112

(405) 949-9235
FAX (405) 949-9639

DIPLOMATE IN FORENSIC PSYCHOLOGY
AMERICAN BOARD OF PROFESSIONAL PSYCHOLOGY
AMERICAN BOARD OF FORENSIC PSYCHOLOGY

Confidential

I. INTRODUCTION:

A. Referral Data:

Pursuant to the request of Mr. Gene Haynes, District Attorney, Craig, Mayes, and Rogers County, a forensic psychological evaluation was performed on Karl Myers in August 2004. Mr. Myers is currently incarcerated within the Oklahoma Department of Corrections having been convicted of murder.

The following referral question was investigated: Does Karl Myers's demonstrate mental retardation?

B. Sources of Data:

The sources of data for the present forensic psychological evaluation are as follows:

1. Forensic psychological evaluation of Karl Myers including:
    a) Administration of the Wechsler Adult Intelligence Test-III (WAIS-III).
    b) Administration of the Wide Range Achievement Test-3 (WRAT-3).
    c) Administration of the Test of Memory Malingering (TOMM)
    d) Administration of the Hiscock Digit Memory Test (HDMT).
    e) Administration of the Word Memory Test (WMT).
    f) Interview
2. Review of Kansas State Reception and Diagnostic Center records.
3. Review of Oklahoma Department of Correction records.
4. Review of Nancy Cowardin, Ph.D. October 13, 2002 report.
5. Review of Michael Gelbort, Ph.D. July 31, 2002 report.
6. Review of Ray Hand, Ph.D. June 24, 2002 report.
7. Review of Oklahoma State Reformatory records.
8. Review of July 31, 2001 affidavit of John Struchtemeyer.
9. Review of various records of the Oklahoma Indigent Defense System.

II. DISCUSSION:

A. Identifying Information

Mr. Myers is a 56-year-old, white male who appeared wearing prison clothing and had fair grooming. Mr. Myers understood that the present examination was a court-ordered evaluation and was aware that copies of the evaluation report will go to the court, the office of the district attorney and to the attorney representing him. Also present during the examination were three sheriff deputies, an attorney for the defendant, an assistant district attorney, and the present examiner's assistant.

B. Brief Family and Social History

Mr. Meyers was born on March 29, 1948. His parents were Mr. and Mrs. Jesse A. Meyers. Both parents are deceased. Mr. Meyers has one younger brother and two younger sisters. According to Kansas State Reception and Diagnostic Center records Mr. Meyers did not talk until he was about seven years old. Also when Mr. Meyers was either six or nine he was severely injured when he was struck by an automobile. Records suggest that Mr. Meyers did not attend school for one year after this accident because of the severity of his head injuries.

Mr. Meyers did not do well in school and eventually left school while in the 6th grade. Reportedly he married at the age of sixteen to a woman approximately four years older than he. Mr. Meyers and his first wife had one daughter. The couple later divorced. Some time later Mr. Meyers married again and the couple also later divorced. He married a third time and this marriage, reportedly, lasted about ten years, until Mr. Meyers' third wife died.

Mr. Meyers has an extensive criminal history and has been imprisoned both in Oklahoma and Kansas upon several occasions. At various times Mr. Meyers has been convicted of theft, concealing stolen property, assault, attempted rape, and murder. When not in prison Mr. Meyers was employed in various blue collars jobs, i.e. mechanic work, mining, and furniture moving.

III. FINDINGS OF FACT AND CONCLUSIONS:

A. General

1. The Oklahoma Court of Criminal Appeals states:

> A person is "mentally retarded": (1) if he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or

mistakes, to engage in logical reasoning, to control impulses, and to understand the reaction of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.[1]

2. The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) states that the essential feature of mental retardation is significantly subaverage intelligence that is accompanied by significant limitation in adaptive functioning in at least two, out of eleven, skill areas, with an onset occurring before the age of 18. The DSM-IV-TR further states that subaverage intelligence is defined by an intelligence quotient (IQ) of approximately two standard deviations (SD) below the mean obtained by an assessment with one or more of the standardized, individually administered intelligence tests.[2]

3. The American Association of Mental Retardation (AAMR) states mental retardation is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The disability must originate before the age of 18.

   The AAMR further states that significant limitation in intellectual functioning is defined by a performance that is at least two SDs below the mean of an appropriate assessment instrument, considering the standard error of measurement for the particular instrument.

   Likewise, the AAMR states that significant limitations in adaptive functioning is defined as a performance that is at least two SDs below the mean, on an appropriate instrument, of (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.[3]

4. An IQ of 70 is two SD's below the mean. This score is also the 2-percentile rank (2 PR). This PR denotes that 98% of the population score at this level or higher. An IQ of 85 is one SD below the mean. This score is also the 16 PR and denotes that 84% of the population

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[1] *Murphy v. State*, 54 P.3d 556 (2002).

[2] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disroders, Fourth Edition, Text Revision 41 (2000).

[3] American Association of Mental Retardation, Mental Retardation: Definition, Classificantion, and Systems of Supports, 10th Edition 23, AAMR (2002).

score at this level or higher. An IQ of 100 is the mean. This score is also the 50 PR and denotes that 50% of the population score at this level or higher.[4]

5. To be mentally retarded means that one's measured intellectual functioning and adaptive behavior is at or less than about 98% of the population.

B. School Records

In 2001 John Struchtemeyer was the records custodian for the Kansas City, Missouri School District. He noted that Mr. Meyers attended Kansas City Schools from 1954 through 1960. However there was no record of Mr. Meyers attending school during the 1956-1957 school year. In the spring of 1954 Mr. Meyers demonstrated a Full Scale IQ=73 on the Revised Stanford-Binet and in September 1957 he demonstrated a Full Scale IQ=66 on the Revised Stanford-Binet. Records also note that from 1958 forward Mr. Meyers was placed in a "special room" in school because he was not able to work in a regular classroom setting.

C. Intellectual and Adaptive Functioning Assessments

1. While in prison in Oklahoma and Kansas Mr. Meyers was administered three intellectual screening tests. The results of these tests are as follows: February 21, 1969 Full Scale IQ=79 (CTMM); 1971 Full Scale IQ=88 (Beta); May 25, 1974 Full Scale IQ=87 (Culture Fair Test of Intelligence Scale 2).

2. In 1971 Mr. Myers was evaluated at the Kansas State Reception and Diagnostic Center. Don Moses, ACSW noted that Mr. Meyers:

> development in all areas of living has been quite retarded and his living situations have been most deplorable and primitive. At the age of twenty-three this individual is illiterate, has essentially never managed for himself, allowing his mother who is herself an incapacitated individual to care for him and to assume his responsibilities. A man this culturally deprived, educationally limited, and vocationally inept is rarely observed in our modern day society...

3. Reportedly, on June 11, 1999 Mr. Meyers earned a WAIS-R Full Scale IQ=77. Philip Murphy, Ph.D, administered this intelligence test. There is no evidence to suggest that a malingering test was administered at that time.

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[4] Helmstadter, Principles of Psychological Measurement 53, Appelton-Century-Crofts New York (1964).

However, Dr. Murphy, who one year later had his psychology license put under probation because of unethical/negligent conduct in a forensic evaluation, used an out-of-date version of the WAIS. In 1999 the correct WAIS to use with Mr. Meyers was the WAIS-III. Research data suggests that using an out-of-date WAIS leads to erroneously elevated Full Scale IQs.

4. On May 24, 2002 Mr. Meyers earned a WAIS-III Full Scale IQ=66. Ray Hand, Ph.D. administered this intelligence test. Dr. Hand also administered the Nonverbal subtest of the Validity Indicator Profile (VIP). The VIP is a test of malingering. Results of the VIP completed by Mr. Myers are as follows:

> This individual's performance on the Nonverbal subtest of the VIP is probably not an accurate representation of his ability. There is sufficient evidence to conclude that he was not engaged in the testing process, or that he has such poor reasoning ability that the test cannot validly assess his ability. This might be the case for individuals with significant mental retardation. Tests that cover similar content areas (for example, abstract reasoning, perceptual accuracy, and attention to detail) that were administered concurrently with the VIP should be interpreted with caution.

5. In October 2002, Dr. Cowardin performed an assessment of Mr. Meyers. In her assessment of Mr. Meyers, Dr. Cowardin utilized the Kaufman Test of Educational Achievement (K-TEA), the Independent Living Scales (ILS), the Peabody Picture Vocabulary Test (PPVB), the Detroit Tests of Learning Aptitude (DTLA-4), the Clinical Evaluation of Language Fundamentals (CELF-3), the Assessment of Adaptive Areas (AAA), and the Kaufman Functional Academic Skills Test (K-FAST). Dr. Cowardin's conclusions regarding Mr. Meyers' intellectual and adaptive functioning are fatally flawed. The reasons for this conclusion are as follows.

   First, Dr. Cowardin did no intellectual assessment with a standardized, individually administered intelligence test.

   Second, the K-TEA, CELF-3, and DTLA-4 are not normed for individual's Mr. Meyers' age. As stated by the AAMR "Professionals not only must select instruments that are technically adequate, they must also be cautious to select ones designed for the particular individual or group...The potential user must employ adaptive skill assessment instruments that are normed within the community environments on the

individuals who are of the same age grouping as the individual being evaluated."[5]

Third, no assessment of Mr. Meyers conscious cognitive effort via a standardized malingering test was obtained.

Fourth, use of the ILS was not appropriate. The AAMR states, when assessing adaptive behavior, the assessor must consider the examinee's opportunities to participate in community life, including limited opportunities resulting from emotional or physical health or residential placement. "A person whose opportunities to learn adaptive skills have been restricted in comparison to age peers may have acquisition or performance deficits that are unrelated to mental retardation."[6]

Fifth, the use of the AAA was not appropriate. The AAA requires the examiner to first administer the Adaptive Behavior Scales—Residential and Community (or the Adaptive Behavior Scales School for children through the age of 21). The AAMR states:

> The Residential and Community version, ABS-RC:2, was developed to be appropriate for individuals through 79 years of age, but norms are not available for adults with typical functioning. Because standard scores and percentile rank do not indicate relative standing to people without developmental disabilities, the ABS-RC:2 does not fit the psychometric criteria proposed in this 2002 manual for a diagnosis of mental retardation...[7]

6. On July 30, 2004 the present examiner psychometrically evaluated Mr. Myers. Mr. Myers was administered the WAIS-III, the WRAT-3, the TOMM, the Hiscock Digit Memory Test (HDMT), and Word Memory Test (WMT). The latter three instruments are used to assess malingering and, in the present examiner's opinion, are valid and reliable tools for use with individuals who are, or are not, mentally retarded.

On the WAIS-III Mr. Meyers earned a Verbal IQ=66, a Performance IQ=77, and a Full Scale IQ=69. On the WRAT-3 Mr. Meyers performed Reading at the .03 percentile, Spelling at the .05 percentile, and Arithmetic at the 1 percentile.

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[5] *Supra* note 4 at 83. Likewise, the Association of State and Provincial Psychology Boards Code of Conduct § H. Assessemnt Procdures (3) Reservations concerning results states--"The psychologist shall include in his/her report of the results of a formal assessment procdure for which norms are available, any deficiencies of the assessment norms for the individual assessed, and any relevant reservations or qualifications which affect the validity, reliabity, or other interpretation of results."

[6] *Id.* at 86.

[7] *Id.* at 89.

As noted above, to assess the issue of malingering and motivation during the present forensic psychological evaluation three techniques were used. The HDMT was administered at the beginning of the evaluation, the WMT was administered during the middle of the evaluation, and the TOMM was administered near the end of the evaluation.

Analyses of the malingering test battery are inconclusive. Mr. Meyers accurately completed the HDMT and the TOMM, while the results of the WMT fell into the suspicious range. There are several possible explanations for these results. These are: (1) Mr. Meyers was forewarned that the present examiner would, or was likely to use, the HDMT and TOMM because he had used these techniques in prior similar cases. However, since the present examiner had never used the WMT in a similar case before, Mr. Meyers could not be forewarned and was thus unprepared to "do well".[8] (2) There was no forewarning, but for his own reasons Mr. Meyers did not malinger during the first or last part of the examination but did malinger during the middle part of the examination.[9] (3) The results of WMT are a "test miss" or false positive.

D. Conclusion

The present examiner does not have sufficient data to definitively conclude whether or not Mr. Meyers is mentally retarded. In other words it is possible that he is mentally retarded. Likewise, it is possible that he is not mentally retarded but rather possesses borderline intellectual and adaptive behavior functioning.

John A. Call, Ph.D., J.D., A.B.P.P.

[8] *See e.g.*, Thomas, Reflections on Coaching by Attorneys, 31 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY & THE LAW 6-9 (2003); Essig, Mittenberg, Petersen, Strauman, & Cooper, Practices in Forensic Neuropsychology: Perspectives of Neuropsychologists and Trial Attorneys, 16 ARCHIVES OF CLINICAL NEUROPSYCHOLGY 271-291 (2001).

[9] Research indicates that exerting variable effort during an examinaiton process is one form, or style, of behavior demonstrated by malingerers.

Attachment R

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
STATE OF OKLAHOMA

KARL LEE MYERS, Petitioner	)	
	)	
v.	)	**CASE NO. CF-1996-233**
	)	
THE STATE OF OKLAHOMA	)	
Respondent.	)	

AFFIDAVIT

I, Richard E. Garnett, Ph.D., do affirm and state the following upon my information and belief:

1) My name is Dr. Richard Garnett. I am over the age of eighteen. I have first-hand knowledge of the facts and opinions asserted in this affidavit.

2) I hold Bachelors, Masters and Doctorate degrees in Psychology, and have taught at the graduate level at the University of Miami, South Florida School of Professional Psychology, Florida International University, and Texas Christian University. I have taught university level courses in abnormal psychology, counseling methods, and community psychology. I have also taught training courses at police academies in Florida and Texas in understanding and dealing with persons with mental impairments, including those with mental retardation.

3) I have forty years of professional experience working with people with mental retardation. I have served as a psychologist and diagnostician, a counselor and therapist, a juvenile probation officer, and as a consultant and trainer in the field. During my forty years of experience, I have served on committees and boards of directors for local, state, and national organizations that serve or represent people with mental retardation. I have developed curriculum and taught courses throughout the country for graduate college programs, criminal justice, law enforcement, and child protective services caseworkers, all with at least some focus on people with mental retardation.

4) In my clinical practice over the last forty years, I have seen over a thousand of people with mental retardation for a wide variety of reasons, including stress, abuse and assessment. I have enjoyed being an advisor, friend, and counselor for members of Advocates United of Tarrant County and recently served on the Board of Directors for the Texas Self Advocates, both active organizations with their memberships made up of people with mental retardation. I am past-President of the Texas Association on Mental Retardation, Immediate Past-President of The Arc of Texas, Chairman of the Fund Development Board of The Arc of Texas, a member of the regional Medicaid Managed Care Advisory Council for HHSC, and a member of the Mental Retardation Public Advisory Council for the Texas Department of Aging and Disability Services for six years. As a member of the MR Advisory Counsel, I assisted in the development of rules and law that control the delivery of services to mentally retarded persons by the State of Texas. I served on the DMR (Determination of Mental Retardation) revision committee, the committee that determines the criteria for eligibility and admission to mental retardation services for the Texas Department of Aging and Disability Services (Health and Safety Code and Texas Administrative Code). I have served on the Board of the Texas Council on Offenders with Mental Impairments, an entity that is a sub-department of TDCJ. It focuses on delivering services to persons with mental retardation when they leave prison and making recommendations to TDCJ about how to serve mentally retarded persons while incarcerated. I only recently ended my tenure on the Board of Directors for the American Association on Mental Retardation (AAMR).

5) I was recently re-appointed by Governor Perry as Chair of the Board of Directors for The Texas Council on Autism and Pervasive Developmental Disorders. I also was recently appointed by The Speaker of the House to the Board of the Texas Office for Prevention of Developmental Disabilities.

6) I have been asked by Mr. Scott Braden, the Attorney for Mr. Myers, to review material related to Mr. Myers' case. I have reviewed the following:

A. Holdings of the Court of Criminal Appeals of Oklahoma (2005 WL 3334712)
B. Psychological Evaluation of Dr. Ray Hand (6-24-02)
C. Individual Assessment Report of Dr. Nancy Cowardin (10-4-02)
D. Forensic Psychological Evaluation of Dr. John Call (8-14-04)
E. CD Disc of Trial of Karl Myers
F. Oklahoma Definition of Mental Retardation
G. Problem List - Osawatomi State Hospital Records
H. Face Sheet – Osawatomi State Hospital Records
I. Classification Form – Oklahoma State Reformatory
J. Data Card – Osawatomi State Hospital (2-20-74)
K. Psychological Report – Oklahoma Department of Corrections
L. Report of Psychiatric Examination – Kansas Reception & Diagnostic Center
M. Group Test Scores Report – Kansas Department of Corrections (1971)
N. Counseling Report – Kansas State Reception and Diagnostic Center
O. Correctional Officer's Report – Kansas State RDC
P. Social Data report – Kansas State RDC
Q. Psychological Evaluation – Eastern State Hospital – Oklahoma
R. Transcript of Proceedings Vol X of X – 9-13-2004
S. Transcript of Proceedings Vol VI of X – 9-7-2004

7) As a result of my reviewing the preceding materials, I have been asked to offer my assesement of the following two issues:

A. The adequacy of measurements of adaptive behavior deficits (the second prong of the diagnosis of mental retardation, noted in the State of Oklahoma's definition of mental retardation and in the DSM-IV).

B. The application and usefulness of brief or prorated assessments of intelligence in the field of psychometrics and mental retardation.

ADAPTIVE MEASUREMENTS

8) As was correctly noted in the Court of Criminal Appeals holdings (2005 WL 3334712 – Okla. Crim. App.), "IQ tests alone are not determinative of whether a capital defendant is mentally retarded…". However, the report from the Court goes on to note anecdoctal reports from "many witnesses" about Mr. Myers' functional abilities and finds "that any rational jury could have concluded Myers was not mentally retarded…" as a result of the reporting of his functional abilities. This is an unfortunate example of a fundamental misunderstanding of the protocol for the diagnosis of mental retardation.

9) The diagnosis of mental retardation is what is commonly referred to as a "deficit model" of diagnosis. The determination of mental retardation is based on a critical threshold of ***deficits*** and not the establishment of strengths. In the 10th Edition of **Mental Retardation**, AAMR notes that "Within an individual, limitations often coexist with strengths (p. 8)." AAMR goes on to note that "Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation". The Diagnostic and Statistical Manual of the American Psychiatric Association – Fourth Edition (DSM-IV) is the standard for diagnostic protocol. In it (p. 45) APA states that "the diagnostic criteria for Mental Retardation do not include an exclusion criteria; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder." This means that when (p. 46) "subaverage intellectual functioning" and "concurrent deficits or impairments" in adaptive functioning are established, the diagnosis is made. Strengths, "functional ability", and "adaptive functioning" are clearly not elements in that diagnostic process.

10) It has been documented that deficits were evident from Mr. Myers' childhood years. These were documented by a variety of professionals and agencies from the time Mr. Myers was six. They were further documented into his adults years.

11) In the case of an adult who has been incarcerated for a number of years, determining adaptive deficits for diagnostic purposes is usually a challenge. A person's ability to adjust to the closed, regimented, repetitive, controlled, and regulated environment of prison, particularly death row, is not germane. It is well documented that people with mild mental retardation are particularly adaptable to such environments and usually do well therein. It is typically necessary to evaluate historical documentation, reports, retrospective reflections and records to gain an adequate perspective upon which to base an adaptive development conclusion. There are no formal, standardized adaptive behavior measures that have been standardized or normed on the prison population or on the mentally retarded population on death row. Therefore, professionals must use their clinical judgment in acquiring and assessing available information.

12) Since there are no standardized adaptive behavior instruments designed for these purposes, assessments must be based on related adaptive information from other sources. In Mr. Myers' case, Dr. Cowardin's use of the Assessment of Adaptive Skills (AAA) and the full Independent Living Scales (ILS) as avenues to collect "observational data" and to structure her review of Mr. Myers' adaptive behavior deficits would be an acceptable approach to an otherwise difficult situation. There has apparently never been a formal assessment of Mr. Myers' adaptive abilities, other than anecdotal and retrospective reflections, particularly over his current legal processes. Dr. Cowardin's approach was as useful, if not more so, in the collection of information as any of the other absent or more informal approaches. It would appear, then, that Dr. Cowardin's conclusions of adaptive deficits is based in a structured and comparatively more substantive data collection and review than any other evaluation completed on Mr. Myers. The DSM-IV states that 'it is useful to gather evidence for deficits in adaptive functioning from one or more reliable independent sources (e.g. teacher evaluation and educational, developmental, and medical history)".

BRIEF AND PRORATED ASSESSMENTS

13) Brief and prorated sub-tests should never be used as a significant element in diagnosis. The concept of intelligence is based on a model of intelligence that is "multimodel", one that shows that general intelligence is made up of multiple factors. The DSM-IV requires that IQ be determined by an "assessment with one or more of the standardized, individually administered intelligence tests". AAMR also refers to intelligence as "a general mental capability" reflecting a broader and deeper capacity for comprehending our surroundings. The "general mental capability" model states that "general intelligence" is made up of as many as eight elements or sub-structures: fluid intelligence, crystallized intelligence, general memory and learning, broad visual perception, broad auditory perception, broad retrieval capacity, broad cognitive speediness, and process speed or decision speed. As a result, a comprehensive standardized test of intelligence that samples abilities in as many of these areas as possible must be given to establish an individual's overall level of intelligence. Intelligence is not a singular factor and is not measured by a test that focuses on a singular concept (word recognition, receptive vocabulary, knowledge of word meaning, etc.). It depends upon a test that measures the broad areas making up "general mental capability". Otherwise it is diagnosing a disorder by one symptom (e.g. cancer due to fever), when a true diagnosis depends on measuring a critical threshold of symptoms.

14) *Handbook of Psychological Assessment (4th Ed.)* states that "although time efficient, these short forms tend to provide less information about a person's cognitive abilities, produce a wider band of error than a full administration, result in less clinical information, and are often of questionable accuracy when used for intelligence classification (p. 191)". "None of the short forms should be confused with a full intellectual assessment or even with a valid indicator of IQ (p. 191)". "Unfortunately, prorating may produce error by failing to consider the relative reliabilities of the different subtests that were used (p. 192)". These statements reflect the position that if intelligence is made up of multiple factors, the measurement of only one or two of those factors gives a distorted, skewed and limited measure of intelligence.

15) *Handbook of Psychology Assessment (4th Ed.)* "It is probably inadvisable to use such abbreviated versions except as rough screening devices. Many of the qualitative observations made possible by the administration of an individual scale are lost when abbreviated scales are used. Moreover, the assumption that the original Full Scale norms are applicable to prorated total scores on short scales may not always be justified (p. 246)".

16) Screening tests that only measure limited areas of intelligence do not have a reliable representation of the general mental ability of the individual. Most screening measures (TONI, CTMM, Beta, Culture Fair, etc.) are not accepted in the field of psychometrics and mental retardation as accurate or useful measures of general mental ability in the development of a diagnosis. Their fields of focus are simply to narrow. For example, the Beta is noted for its manual's claim to measure a limited number of facets of nonverbal intelligence. It is clear in its self-description that it does not measure the global area of intelligence that is necessary for diagnosis. In a correspondence from the Texas Department of Criminal Justice (8/5/2003), TDCJ staff state that the Beta "in no way is an actual IQ score" and "the Revised Beta is not a precise instrument". The TDCJ staff clearly note the screening and superficial nature of the test. The biggest shortcoming is that the Beta does not assess general intellectual functioning which contraindicates its use for diagnosing mental retardation under accepted professional diagnostic procedures.

17) In a review of the Beta II, published in the Buros Mental Measurements Yearbook (Ninth Yearbook, Volume II, 1985, pp. 1276-9), questions are raised about the Beta II norms, validity, and reliability. "Perhaps the major weakness of the Beta II is the lack of evidence that this test is what it purports to be, viz., a measure of intelligence for illiterates, non-English speakers, and those with 'other language difficulties'". The review goes on to comment specifically about the subtests of the Beta II: Geometric Forms Test "no longer considered a good test of general intelligence; Number Substitution Test "not a very successful measure of intelligence; and Maze Tracing Test "whose time limits damns it completely as a measure of planning capacity, the only feature which makes a maze test worth using'. The review states that "The statistical information on validity of the Beta II is also unimpressive". It further states that "the Beta II manual found lower validity coefficients for the Beta II than those typically reported for the Beta I." In discussing reliability, the review states that "Given the brevity of the Beta II...and the simplicity of the stimulus materials used in the six Beta tests, strong memory-type carryover effects...may have spuriously inflated the test-retest" reliability data. "The evidence supporting the conjecture that the Beta II measures general intellectual ability is almost as scanty as the reliability data. Both the reliability and validity studies are too limited and are based on inappropriate samples (p. 1279)."

18) In a review of the Beta II, published in the Buros Mental Measurements Yearbook (Sixth Yearbook, 1965, p. 769-771), questions are raised about the validity and reliability of the Beta II. "A paucity of statistical data is presented to support the authors' claim that the test is intended to 'serve as a measure of general intellectual ability of persons who are relatively illiterate or who are non-English speaking'" (p. 770).

19) Based on extensive research and professional protocol, screening or prorated tests (i.e. TONI, CTMM, Beta, Culture Fair, prorated sub-tests, etc.) propounding to measure "intelligence" should not be considered when determining a diagnosis of mental retardation.

I declare under penalty of perjury that the foregoing is true and correct, signed this 5th day of April, 2006.

Name:

STATE OF TEXAS, COUNTY OF TARRANT

SUBSCRIBED and SWORN before me in the jurisdiction aforesaid, this 15th day of APRIL, 2006.

Notary Public

DONNA J. HOOKER
MY COMMISSION EXPIRES
June 3, 2008

My Commission Expires: 6-3-08

Attachment S

I James P. Malicoat, # 261820, do hereby swear and state:

I am an inmate on death row, H-unit, and have known Carl Myers for about (5) five years.

I have had the chance to talk to Carl on several occasions over the past and have noticed that his conversations are broken and somewhat confused. I'm not sure what it is but there is something not quiet right about his thinking process. It can get a little difficult to hold a conversation with Carl due to the fact that he tends to jump from topic to topic without any notice.

Carl has had the opportunity to play dominoes and sometimes he has a very hard time keeping up his hand of the game. Some of the other inmates will not play with him because of this fact.

I, myself, talk with him to Carl and play dominoes, handball, and basketball because I feel a little sorry for him and don't want him to feel alone.

I do hereby swear and state that the above facts are true and to the best of my knowledge.

James P. Malicoat
D.O.C. # 261820
April 12, 2006

Notary Public
Commission #99011762
Expires: Aug. 20, 2007

I Edward Primeaux do hereby swear and state

I am currently at O.S.P. on H-Unit for the past 2 years I have been Karl Myers Cell mate.

I have a step-daughter Name Georgia who is mentally retared. She gets a check from S.S.I. To Karl is just like my step daughter. He is like a big kid. When I first moved in with Karl, he was dirty. didnt know how to keep his self clean. I had to teach him how to wash up every morning and night he smelled bad. He didnt really know much about keeping his self clean or his cell. Karl's teeth was real bad and I asked him why he didnt get his teeth fixed up. he said he didnt know how to fill out a request. and nobody would help him fill one out. So I help him. I filled it out for him. because I know he cant read or write. because I had to read and write all his letter for him and his ~~canaue~~ canteen. When he order canteen the only way he could do it was make an empty bag of coffee or soup with the canteen list. Karl has a hard time remember things he can recognize letter but if you ask him to write it down he cant remember it.

Edward Primeaux
4-17-06.

2

I tried to teach him to read write and draw but he just couldn't learn he couldn't remember how I would teach him a few letter. one day all day long and he thinks he know them but the next day he won't remember any of the letters I tried to teach him craft work like make jewelry boxes. but he couldn't use a ruler. or couldn't follow my pattern. Karl couldn't even draw a square.

I hereby swear the above is true and correct.

Edward Brisbon
4-17-06.

Ronada McEntire
Notary Public
Commission# 99011762
Expires: August 20, 2007

#1.

I Gary R. Welch, do hearby swear & state that I was received here at O.S.P. Death-Row on 6-5-96.
During this time in which I was celled & housed with inmate Karl Lee Myers for about 5 to 6 months on H-unit.
And while I was in the cell with Karl, I tried to HELP him understand his written letters that were sent to him by his Sister, I would READ them to him & also I would READ his "Legal-Work" to him. He couldn't understand any of his legal work, or what a legal issue is, & I tried to explain things to him the very BEST & most simple way that I could, because his level of being able to understand.

It was very difficult to have a talk or a conversation with Karl, because he can't think correctly or think in terms of a normal functioning human-being, when I try to tell him something, he will flash-back & talk about some thing that has happened over 20 years ago & doesn't even know how to make the difference between "NOW" the present DAY, or if it was 20 or more years ago? So, I just couldn't get him FOCUSED on much of any thing, because he CAN'T keep it together in his mind of what the real subject IS before him at the time

Gary R. Welch

#2.

I dearly swear that the above statement that I've written is TRUE & correct.

My name is Gary R. Welch, #104158

Gary R. Welch
4-17-2,006

Ranada McCutry
Notary Public
Commission # 99011762
Expires: August 20, 2007

Attachment T

Nancy Cowardin, Ph.D.
EDUCATIONAL DIAGNOSTICS
Post Office Box 4006 Whittier, California 90607-4006
Phone: 562 789-9922 FAX: 562 789-9552

INDIVIDUAL ASSESSMENT REPORT

CLIENT: Karl Myers

EXAMINER: Nancy Cowardin, Ph.D.

D.O.B.: 03/29/48

AGE: 54 years, 6 months

ASSESSMENT DATE: 10/4/02

DATE OF REPORT: 10/13/02

REPORT CONTENTS

Nancy Cowardin, Ph.D.
EDUCATIONAL DIAGNOSTICS
Post Office Box 4006 Whittier, California 90607-4006
Phone 562 789-9922 FAX 562 789-9552

INDIVIDUAL ASSESSMENT REPORT

WARNING: CONFIDENTIAL MATERIAL:
This evaluation and all related materials are the property of the Client and/or Defense Counsel. Unauthorized reading other than for professional use is a violation of the client's rights.

CLIENT: Karl Myers

EXAMINER: Nancy Cowardin, Ph.D.

D.O.B.: 03/29/48

C.A.: 54 years, 6 months

ASSESSMENT DATE: 10/4/02

DATE OF REPORT: 10/13/02

ATTORNEY: Scott Braden, Federal Public Defender, Oklahoma City, Oklahoma

REFERRAL

Karl Myers is a 54 year old Caucasian male who was referred for assessment by his attorney as part of a post-conviction proceeding in the state of Oklahoma. The client was involved in a serious car accident during childhood which resulted in traumatic brain injury and subsequent inclusion in special education programs as a student in several mid-west public school systems. In addition, all available sources document reduced adaptive skills and IQ estimates consistent with mental retardation. Accordingly, psychoeducational testing was conducted in order to measure the adult client's current intellectual functioning, to examine any cognitive and/or language deficits which may interfere with his expression and processing of information, and to determine the extent to which school-identified learning handicaps continue to impact his functional skills in adulthood. Almost six hours was devoted to the direct assessment of this client, which was conducted in a single split (morning/afternoon) session at the Oklahoma State Penitentiary in McAlester, Oklahoma.

BACKGROUND

Karl was born to a mother who was also suspected of having developmental disabilities (per hospital records). This may explain her failure to take action when her son's conversational speech was delayed to age seven. An IQ test administered in 1954 (age 6) scored at 73, which codes to "borderline" mental retardation, prompting Karl's inclusion in a "special room" for slow learners at his school. Over the next few years, he was subjected to beatings and other instances of abuse by

his mother's male friends, at least two of which may have caused head trauma. Additionally, in 1955, the youngster was involved in a freak accident in which he was struck by three different cars and rendered unconscious. The client recalls damage to the left side of his skull which left a residual "blood clot" and recurrent headaches into adulthood. This accident is the probable cause of the epilepsy that was subsequently diagnosed, and a repeat IQ test at age 9 that scored at only 66. To compound matters, Karl's family moved to an area of Oklahoma (Picher) where mining activity sloughed huge piles of "chat" containing lead and other metal residue harmful to humans. Area residents were unaware of the potential for physical and developmental problems in children exposed to chat on the surfaces of playgrounds, ball fields, school yards, private homes, driveways, and local roadways. In fact, science now confirms that, through groundwater run-off, chat contaminated the soil throughout Pitcher and Ottawa County, creating environmental hazards that went unnoticed or ignored for decades. From 4th grade onward, Karl enjoyed daily solitary play in the chat piles for hours at a time and later, as a teenager, obtained work in the very mines that produced this toxic hazard. The combination of traumatic brain insult and toxic influences with the client's unfortunate cognitive heredity explains the severe deficit profile he demonstrates today.

Karl began school in Kansas City, Missouri, where teachers immediately noted his delayed language and requested professional assessment. They had only begun initial academic instruction when the youngster was involved in the multiple car accident mentioned above, and regressed to pre-primer levels once again. Karl recalls having to "start over again" in school, but was never able to process and incorporate the symbol system needed for automatic reading and writing. When he didn't progress at all in these academic areas, the youth was placed in an all-day special education class on the school campus (per self report) with the intention of providing remedial instruction. He remained in special classes up through the 4th grade Missouri, but no such option was available when the family moved to Picher. As a result, the youth was placed in a standard 6th grade classroom, based primarily on his physical appearance (he was several inches taller than most of the other children). It wasn't long before the other students realized the extent of Karl's cognitive and language disabilities and reacted in typical preadolescent fashion. He endured their taunts and teasing for the bulk of the school year, then dropped out unceremoniously.

Since leaving school, this client has obtained work in several venues including mining, food service, and as a truck driver for the Mayflower company. He married three times, fathering a daughter with his first wife, who remains estranged today. He also completed a 10 year prison term at the Lansing penitentiary, where remedial education was again attempted. Here, according to Karl, the nun-instructors were unsuccessful in overcoming the "big problem" he had learning basic academic skills, but "were nice enough to keep trying." After a few months in the prison classroom, he was transferred to the kitchen to work as a fry cook. The client remains pleased with what he learned here ("I learned myself to cook") and continued to cook both at home and professionally for some time following his release.

Since Karl was previously identified with one or more disabilities that can affect both learning and behavior, a general investigative assessment was performed to ascertain his present skill levels. Here, his ability was estimated based on a brief composite IQ test and these outcomes were compared with academic achievement to determine score discrepancies. Underlying skills related to auditory and visual processing, language, and basic/social information were then examined in order to determine the cause of impairments that continue to interfere with typical adult functioning today. Finally, his adaptive skills were assessed using two standardized tools as well as the other formal measures described below. Because he has never reengaged in school, the adult client was considered a 7th grade, spring term placement, and these norming tables were used to compute score discrepancies for purposes of comparisons in the present evaluation.

MULTIDIMENSIONAL ASSESSMENT

In addition to the above procedures, the current evaluation adhered to the revised American Association on Mental Retardation (AAMR, 1992) approach to classification and systems of support. This was elected because Karl clearly suffers from a developmental disability (traumatic brain injury, or TBI) which has the potential to limit the adaptive skills and behaviors needed for full adult independence, and has also been diagnosed with mental retardation by two recent evaluators. This analysis calls for a composite measure of intelligence plus a functional evaluation of adaptive behavior across life domains. In order to qualify as having mental retardation, an individual must score *70 to 75 or below* on a standardized IQ test, with evidence that subaverage functioning was present prior to adulthood and is likely to continue indefinitely. In addition to subaverage intellectual functioning, individuals must show related limitations in a minimum of two (to three) of the adaptive skill areas which include Communication, Self Care, Home Living, Social Skills, Community Use, Self-Direction, Health and Safety, Functional Academics, Leisure, and Work. The current evaluation will address these adaptive areas using data from standardized tests, work samples, the *Assessment of Adaptive Areas* and the *Independent Living Scales*, and client observation/interview. Rankings for specific adaptive skills are reported in scaled scores between 1 and 20 (see charted results), as well as qualitative estimates of support needs in daily environments: *Intermittent-* as needed; *Limited-* regular but time limited; *Extensive-* regular and ongoing; *Pervasive-* constant, high intensity supports.

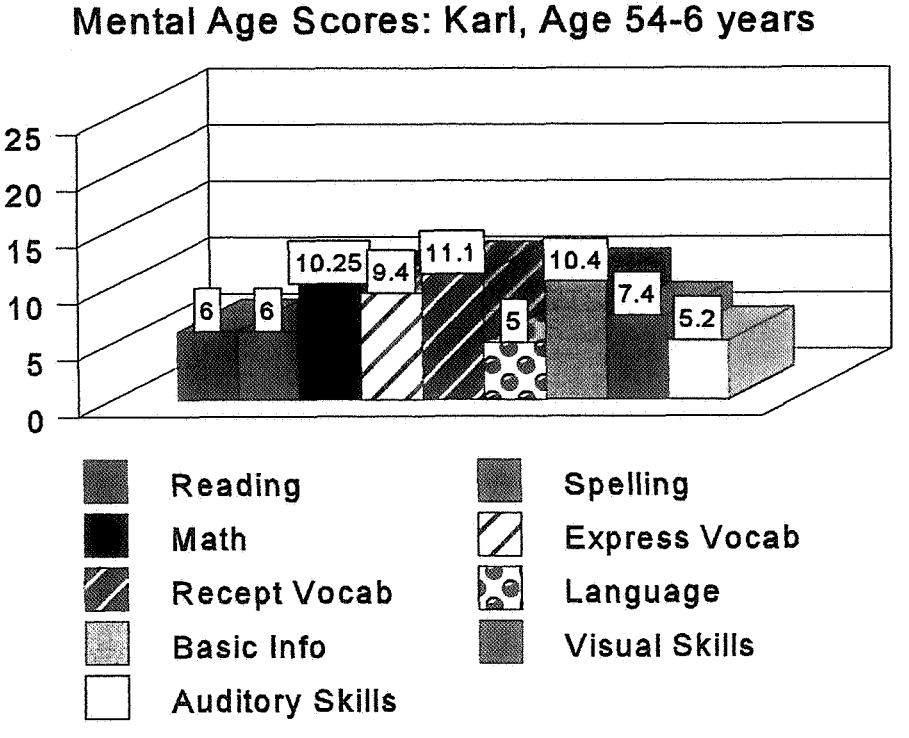
BEHAVIOR DURING TESTING

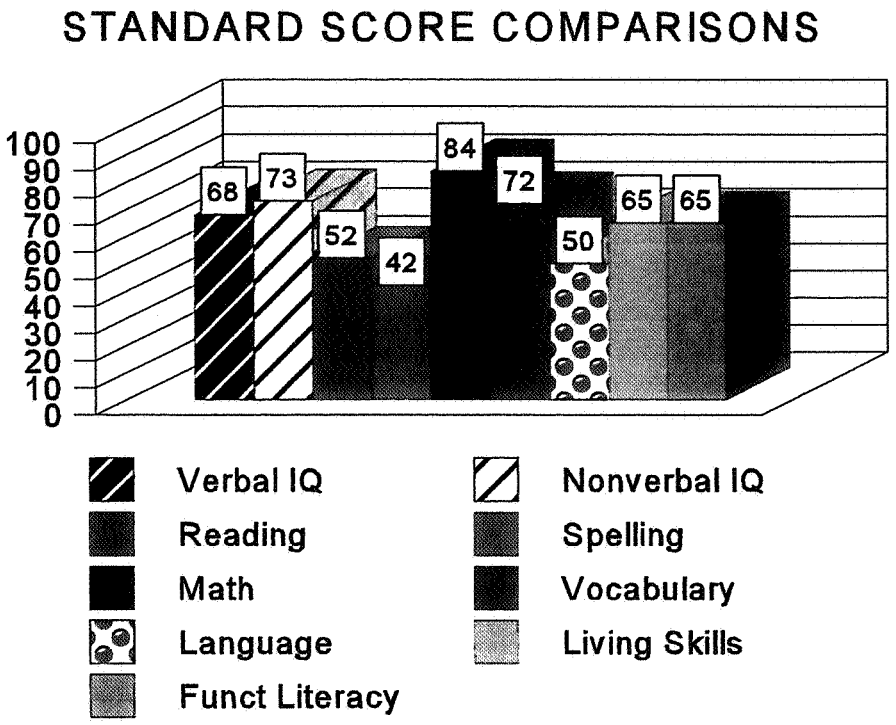
Karl provided verbal consent for the assessment and maintained a cooperative and interactive style. He can be described as an earnest worker, who utilized all available resources in order to maximize accuracy during task completion. Testing diligence was observed in facial expressions and body language which indicated "struggle behavior" for questions of increasing difficulty. In addition, the client's score profile within and across tests remained consistent, which

lends credibility to the overall performance. Karl reported adequate vision and hearing acuity for testing purposes and was in good general health on the day of assessment. Medications maintained over the period of his incarceration were not reported and did not appear to alter stamina, affect, or concentration abilities. Overall clinical impression was that this defendant put forth his maximal effort during all phases of the lengthy evaluation, thus these outcome data and observations were accepted as valid for interpretation. His full psychoeducational score profile is attached along with illustrative charts of outcomes and brief descriptions of all tested areas. These findings depict an earned IQ range in the "mild" range of mental retardation, as well as significant standard score and mental age discrepancies across tested areas, and adaptive skills deficits which are also consistent with this diagnosis.

FULL BATTERY SCORE PROFILE

This client's score profile across test batteries demonstrates a consistent reduction in mental age and standard scores (both outcomes charted separately, below) that typifies individuals with reduced cognitive ability. In this analysis, standard scores are comparable to mini-IQs with a population mean of 100; while mental age equivalents may be compared with one's chronological age group. Each tested area is briefly described in the report section that follows.





Cognition. Karl's significantly reduced intellectual ability yields a composite score between 67 and 69, falling in the range consistent with "mild" mental retardation. Adding +/-6 error points to the earned score places the client in an ability *range* between 61 and 73 which is approximately two standard deviations below the population mean of 100. These data suggest rather pervasive cognitive deficits which affect auditory processing, verbal reasoning, oral expression, and written language more so than his visual and nonverbal skills.

Reading. This client's overall reading ability scored below the first grade level, with the standard score of 52, percentile of .1, and mental age below 6 years, identifying this area as totally undeveloped despite at least six years of formal education. The composite score represents identical decoding and comprehension skills (both, below grade 1), suggesting equally reduced ability to decode individual words and to interpret prose content. Karl's performance in these subtests indicates that virtually *no* academic learning has taken place, in that he has neither mastered phonetic word analysis techniques, nor incorporated a usable store of "sight words" for daily use. Assisted to decode the stimulus word *here* phonetically, the client was unable to combine the prompted sounds, coming up with "her" as a guess. Comprehension of prose text was nonexistent, so he was administered several "document literacy" items taken from the K-FAST battery. Here,

Karl could identify two restrooms designed for "*handicapped*" patrons by "reading" the rebus wheelchair symbols. However, he was unable to locate three restrooms intended for women and girls, could not specify which sign indicated a machine was "*Out of order*", or identify the "*Closed*" sign on a restaurant door. Asked how he manages to determine whether a store is open for business, Karl remarked that he tries the door and, "if it don't open, I know it's closed." His standard score of 55 on this K-FAST subtest falls at the "lower extreme" for an adult age band due to his inadequate skills deciphering public signs, labels, and abbreviations. He continues to require extensive assistance to negotiate the community, pay bills, and obtain information from product labels and package directions.

Written language. Spelling also scored below the first grade level for Karl, with the standard score of 42, percentile <.1, and mental age below 6 years again indicating Level 1 illiteracy for an American adult. This client can write his own name because his sister taught him some time ago, but has no other words stored for automatic use. As for reading, he remains unable to "sound out" words using phonetic analysis, and substituted "in" for *"and"* in his only written attempt. He reports enlisting his third wife's help to carry out all tasks involving reading and written work, and Karl contributed to their partnership by "just working." Due to the *severe* discrepancies noted in the spelling subtest, the client was judged incapable of supplying a self-produced sample of his written language. He rarely if ever uses a pencil and paper for any purpose other than when directed to add or subtract simple sums.

Mathematics. Scoring just below the 5th grade level, mathematics is Karl's academic strength, with a standard score of 84, percentile of 14, and mental age just above 10 years. The composite score represents better application (grade 5.2) than computation skills (grade 4.6), indicating quantitative awareness in functional situations. In the KTEA computation subtest, he could perform addition, subtraction, and multiplication with inconsistent skill, but was less familiar with long division, fractions, and all more advanced problems. He was a careful worker, checking his answers with opposite functions in a few instances ("I'll just double check it!"); yet, has not memorized the multiplication facts, thus had to add up these quantities to complete assigned problems. Math application was tested using both the standard KTEA and the K-FAST "quantitative literacy" subtests. The former revealed fairly good "math sense" in dealing with whole number quantities, time, money, and numerical estimates. On the other hand, Karl could not "round" a number to the nearest hundred, interpret a graph of temperatures, or make fractional estimations. His quantitative literacy score fell "well below average" (standard score of 78) due to a careless error counting up 42 cents in change (Karl's answer: "37 cents") and his inability to interpret a pie chart of expenses, to figure cost per item, and to indicate one-third the amount of a recipe ingredient. On the positive side, he was able to figure the time one should arrive at the bus station if told to be there 30 minutes prior to a 3:20 departure, and correctly estimated the cost of 6 eggs when told that the price per dozen was 90 cents. Math is the only academic area which indicates marginal teaching and learning success for the now 54 year old client.

Oral Language. This client's combined expressive and receptive vocabulary skills earned mental ages ranging from approximately 9½ to the 11½ year level. Expressive deficits stemmed from word-finding problems (*boomerang*/"a game..."; *binoculars*/--; *greenhouse*/"flowers... glass"; *starfish*/ "uh... fish?"), in-class substitutions (*leopard*/"tiger"; *dock*/"water ramp"), and generally simplified conceptualization (*microscope* and *telescope*/"hariscope"; *trumpet*/"horn"). Several misarticulated responses were awarded credit in this subtest (*compass*/"computs"; *funnel*/"fundle"; *bulldozer*/ "dozer") and this undoubtedly augmented his score to some extent. Most of Karl's receptive difficulties resulted from unfamiliarity with the concepts themselves (*musical instruments; geometric shapes*); however, he was able to gain receptive credit for several items he had missed expressively (*globe; canoe; rodent; hurdling*) and was pleased whenever this sort of recognition occurred. Scores reported here represent this adult client's skills in dealing with single-words out of oral context.

Due to the severe reduction in Karl's auditory processing of language content (see discussion below), he was administered an extended (*CELF-3*) battery to examine underlying semantic and syntactic skills. This endeavor yielded expressive, receptive, and total language standard scores that bottomed off the test (all, 50), and mental age equivalent below age 5 years. Severe deficits were noted in oral expression, where the client virtually *could not* produce complete sentences for stimulus words, even where pictural prompts were provided. For example, when shown a picture of a mother serving breakfast and given the stimulus word "*gave*", he could only produce a partial utterance ("gave her cereal") in response. Similarly, the stimulus "*before*" prompted a disjointed partial utterance: "before get into the line to check out." Karl's ability to recall sentences with precision was also seriously flawed, with cycling omissions of entire endings of these relatively simple statements. For example, "*The tall seventh grader made the field goal*" was recalled only as, "The seventh..." This observation is consistent with those in the comparable auditory processing subtest that revealed omitted endings for more complex items. His best performance (63% correct) was in carrying out motor directions using visual cues (e.g., "*point to the big black triangle*"), but the earned scale score of 3 still fell at the lowest attainable level. Overall findings point to language as one of Karl's greatest deficit areas, suggesting residual effects of the left brain hemisphere trauma documented in childhood.

Basic and Social Information. Karl's basic acquired knowledge averaged just above the 10 year level, with incidental facts outscoring social knowledge by more than three years. Over his 54 years, the adult client has become aware of certain information through his various jobs (what to throw on a *grease fire* in the kitchen) and other life observations (*8th month* of the year; source of *solar power*; meaning of a *quarantine sign*). Yet, he was inaccurate for several very basic items in the subtest, such as the number of *days in a week* ("5") and the item containing a *terminal, disk drive, and monitor* ("a plane?") Nevertheless, this score represents one of the highest earned in the overall psychoeducational battery for Karl. In contrast, his basic social knowledge was severely delayed,

with abstract conceptualization noted in only 25% of the items covered. This sort of performance depicts more concrete learning of purpose without consideration of broader societal application. For example, the purpose of the *post office* was to "mail letters" and *courts* are places where they "have trials." These answers are not incorrect, but do not earn maximum credit due to their limited focus. Here, we would expect adults to view the post office as a distribution center where mail is sorted and delivered; and courts as arbiters of justice. Karl's simplistic answers were therefore probed so as to allow opportunities for upward expansion. The two particular items mentioned as examples did not benefit from probing in that these additional comments were seen as continuations of the original answers ("mail letters... */Probe/* to where it's supposed to go"; "have trials... */Probe/* and pay fines"); while a few others did improve to abstract levels (e.g., *purpose of police*/"patrol areas..." */Probe/* "to keep crime down.") It should come as no surprise that one with such severe cognitive, academic, and social limitations would not develop an adult fund of knowledge regarding the purpose and function of standard public practices and institutions.

Visual Information Processing. Karl's visual skills surpassed the comparable auditory channel by more than 2 years, suggesting that this is his preferred modality for intaking new material. Processing of both objects and letters were considerably more reduced (ages 5-9 and 7 years) than his ability to copy forms (age 9½), and this may be because the latter subtest allows ample time and has no mnemonic requirement. Nevertheless, with a standard score below 71, the form copying task demonstrated poor perception and rendering of advanced forms containing angle intersections, perspective, and overlapping parts. The chart on the following page depicts this client's mental age levels across the visual subtests; while the lower chart on page 10 documents reductions in precision as he encountered longer object chains.

Auditory Information Processing. Karl's auditory skills averaged at the 5 year level, with extremely poor recall of both word chains and sentences (ages 4-6 and 4-3 years). As word chains reached the 4-item level, he began shaking his head and apologizing for his ineptness, but still made a good effort to comply with task requirements by closing his eyes to block out visual distractors. Delayed recall of previous items interfered with accuracy, as did perceptual errors at intake (*toad*/"road"; *desk*/"dust") and conceptual processing errors (*south*/"east"; *shoe*/"shirt"). As in the *CELF-3* battery, sentence recall was fraught with ending omissions, as well as substituted words (*dark green*/"bright green"; *a party*/"my party") and phrases (*the nights are very short*/"the days is long") signaling communicative failure. Finally, his ability to follow oral directions was somewhat improved (to age 6-9) due primarily to the use of visual cues on the test protocol. Still, Karl confused the sequence of these directions, forgetting partial information about the items discussed and actions to be carried out. These subtests are contrasted with the visual outcomes in the chart on page 9, which compares the very reduced mental age equivalents earned by this adult subject across processing tasks. The chart at the top of page 10 depicts the severe drop in accuracy that occurred at the 4-item level for Karl, and never improved to greater than 50% recall of the remaining chains.

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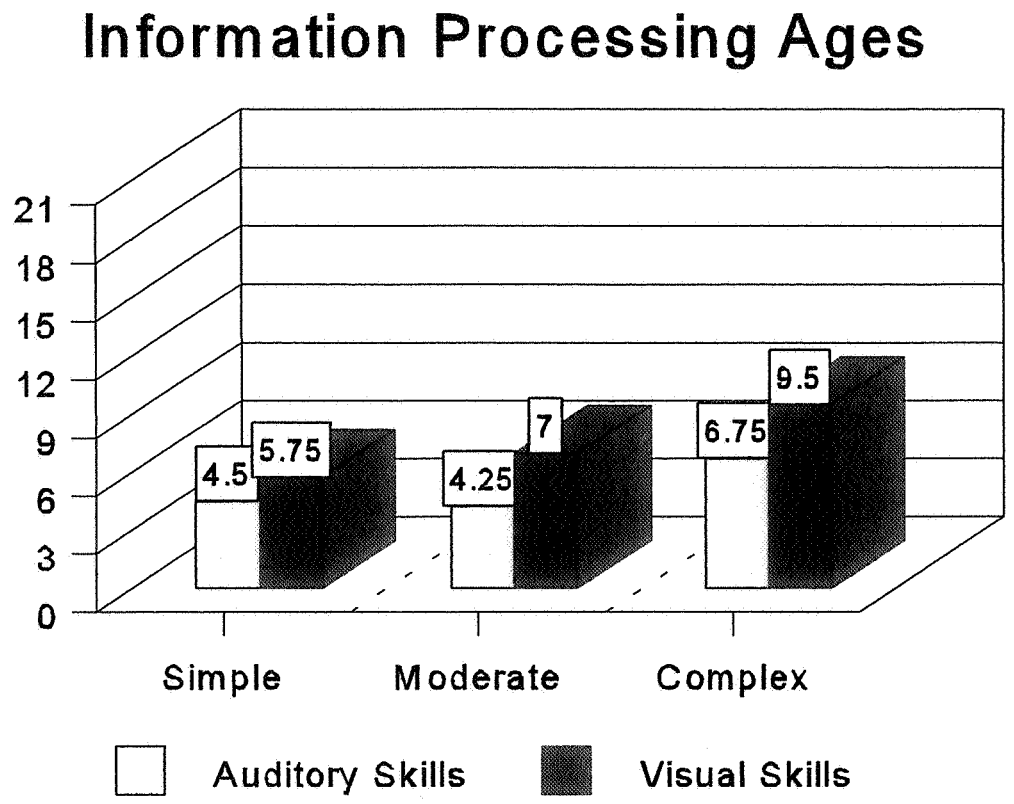
EDUCATIONAL DIAGNOSTICS



KEY:

MODALITY	**SIMPLE**	**MODERATE**	**COMPLEX**
AUDITORY-VOCAL SKILLS	Recalling dictated word chains in any sequence	Recalling whole sentences with precision	Recalling and following oral directions
VISUAL-MOTOR SKILLS	Recalling pictured objects, any sequence	Recalling chains of letter symbols in precise order	Visual-motor copying of geometric forms

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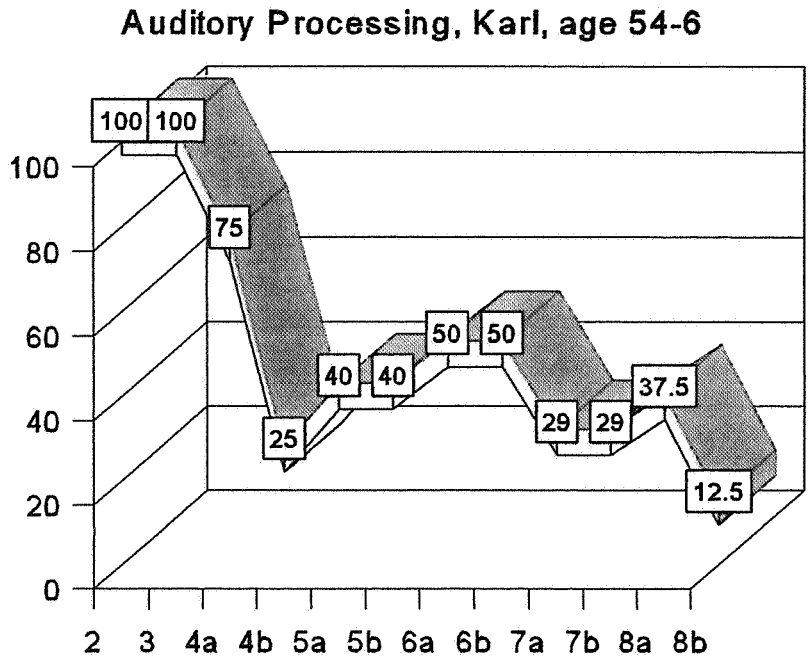
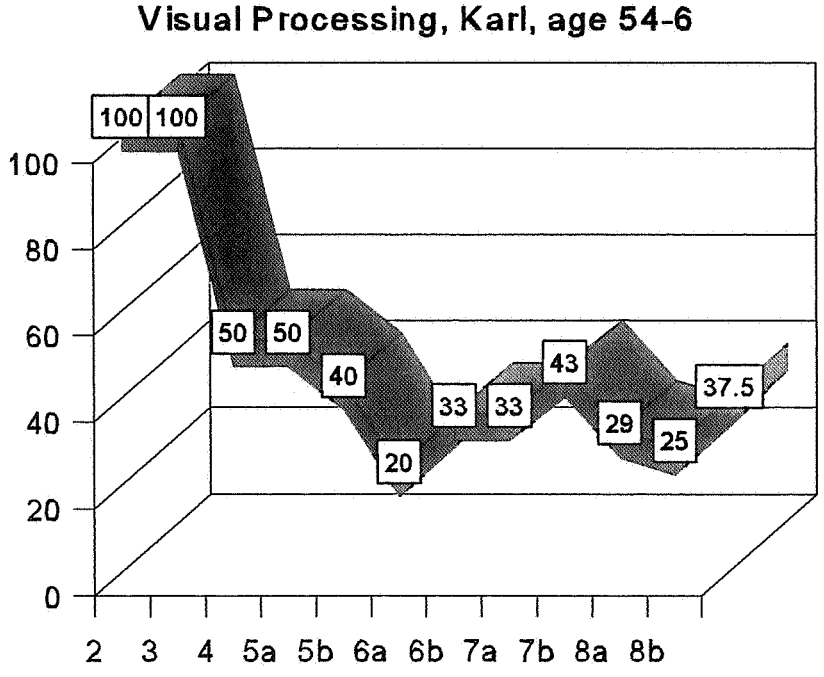
EDUCATIONAL DIAGNOSTICS



Auditory

Processing of word chains (by percent) shows no significant recovery spikes from the 4-item level onward, with clear cognitive "overload" for longer chains of words (up to 8 per chain).



As above, Karl's recall ability declined early (4-item level) and never recovered significantly despite good efforts at personal control over the final 7- and 8-item chains.

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EDUCATIONAL DIAGNOSTICS

ASSESSMENT RESULTS **KARL MYERS, Age 54-6 years**

KAUFMAN BRIEF INTELLIGENCE TEST

Vocabulary	68 (+/- 6)
Matrices	73 (+/- 8)
Composite	67 +/- 6 =
	61 - 73 IQ Range

KAUFMAN TEST OF EDUCATIONAL ACHIEVEMENT	*Grade Level*	*Standard Scores++ / Percentile*	*Mental Age Equivalent*
Reading Decoding	<1.0	52 / <.1	<6-0
Reading Comprehension	<1.0	40 / <.1	<6-0
Total Reading Battery	<1.0	52 / <.1	<6-0 years
Spelling	<1.0	42 / <.1	<6-0 years
Math Application	5.2	89 / 23	10-9
Math Computations	4.6	81 / 10	10-0
Total Math Battery	4.9	84 / 14	10-3 years
Total Educational Battery	2.1	66 / 01	Age 7-6 years

++ Standard Scores were derived from 7th grade, fall semester tables.

KAUFMAN FUNCTIONAL ACADEMICS TEST (K-FAST)	*Standard Score*	*Percentile*	*Interpretation*
Reading/Document Literacy	55	<.1	Lower Extreme
Math/Quantitative Literacy	78	07	Well Below Average
Functional Literacy	65	01	Lower Extreme

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EDUCATIONAL DIAGNOSTICS

KARL MYERS
Page 12

	Mental Age	*Standard Score*	*Age Discrepancy*
PEABODY PICTURE VOCABULARY TEST (Receptive Language)	11-5	72	37% Moderate
EXPRESSIVE ONE-WORD PICTURE VOCABULARY TEST	9-5	<73	48% Moderate to Severe

DETROIT TESTS OF LEARNING APTITUDE	*Mental Age*	*Discrepancy*
Auditory Attention/Unrelated	4-6	75% Severe
Auditory Attention/Sentences	4-3	<75% Severe
Oral Directions	6-9	62% Severe
TOTAL Auditory	5-2	70% Severe
Visual Attention/Objects	5-9	68% Severe
Visual Attention/Letter Chains	7-0	61% Severe
Visual-Motor Integration [SS <71]	9-6	51% Severe
TOTAL Visual	7-5	59% Severe
TOTAL Modality Battery	6-4	65% Severe
Social Maturity	8-9	51% Severe
Basic Information	12-0	33% Mild/Moderate

CLINICAL EVALUATION OF LANGUAGE FUNDAMENTALS (CELF-3)	*Scaled Score*	*Percent Correct*	*Standard Score*
<u>Receptive Language</u>			
Concepts/Directions	3 of 14	63.3%	
Word Classes	3 of 15	38.3%	
Semantic Relationships	3 of 14	4.5%	
Receptive Total			50

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CLINICAL EVALUATION OF LANGUAGE FUNDAMENTALS (CELF-3) [Continued]	*Scaled Score*	*Percent Correct*	*Standard Score*
Expressive Language			
Formulated Sentences	3 of 14	4.5%	
Recalling Sentences	3 of 15	23.1%	
Sentence Assembly	3 of 14	0%	
Expressive Total			50
Overall Language Age: 5-0 years			50

ASSESSMENT OF ADAPTIVE AREAS		*Standard Score (of 20)*	*Percentile Score*	*Mental Age*
CO	Communication	4	02	<5-0 years
SC	Self Care		--Age Appropriate--	
HL	Home Living		--Age Appropriate--	
SO	Social Skills	7	16	<5-0
CO	Community Use	5	05	8-9
SD	Self Direction	6	09	<5-0
HS	Health & Safety	6	09	7-6
FA	Functional Academics	5	05	7-0
LE	Leisure	6	09	8-6
WO	Work	6	09	6-6

INDEPENDENT LIVING SCALES	*Scale Score*	*Standard Score Equivalent*	*Interpretation*
Memory/Orientation	25	63	Low
Managing Money	43	90	Average
Home/Transportation	35	78	Low Average
Health & Safety	39	84	Low Average
Personal Adjustment	20	55	Very Low
Problem Solving	39	84	Low Average
Performance/Information	40	85	Low-Average
Full Scale Score	162	65	Low

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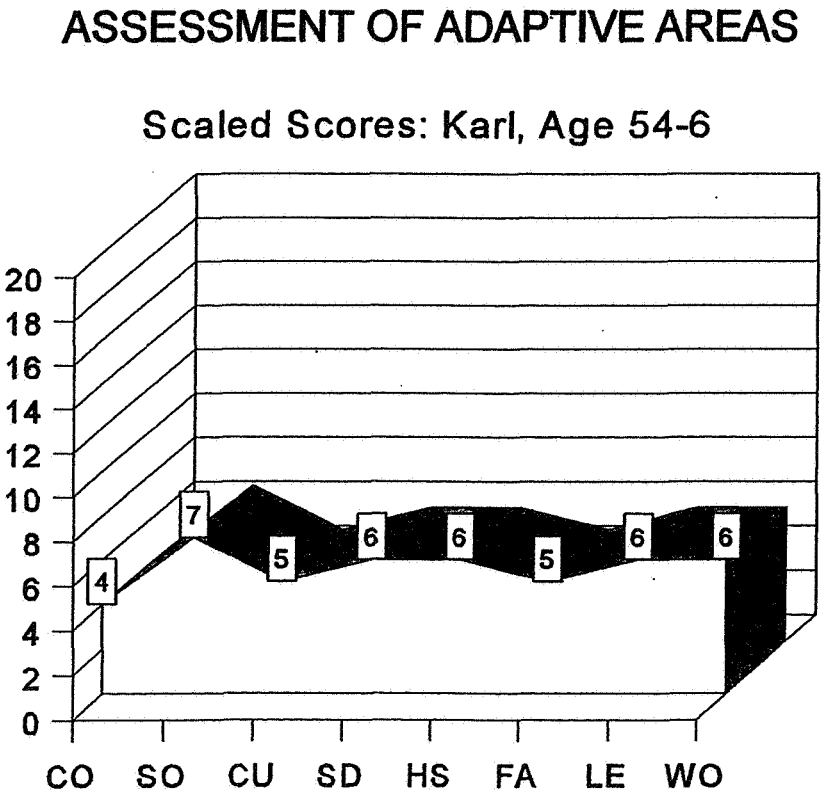
EDUCATIONAL DIAGNOSTICS

ADAPTIVE SKILLS

Scores in this area were derived from a partial administration of the *Assessment of Adaptive Skills* (*AAA*) and the full *Independent Living Scales* (*ILS* - scores charted on page 16, below) which allowed analysis of all adaptive skills areas proposed by the American Association on Mental Retardation (AAMR, 1992). The full adaptive skills assessment also included interview comments, client observation, and data from other standardized tests. As such, all available data characterize only two adaptive areas (Self Care and Home Living) as comparable to typical adult subjects, despite years of independent community living on the client's part. The remaining adaptive areas demonstrate mild to moderate delays, with at least three (Communication, Community Use, and Functional Academics) consistent with a diagnosis of mental retardation.



Interpretation: Scaled scored between 8 and 12 fall in the "normal" range for the statistical peer group. Making this comparison, the above client was estimated as "average" in at least two adaptive areas (SC and HL, not charted above), and approaches average in the Social area as well. All other areas demonstrate deficits, with substantial delays noted in Communication, Community Use, and Functional Academics which scored at the 4 to 5 level on the 20 point scale.

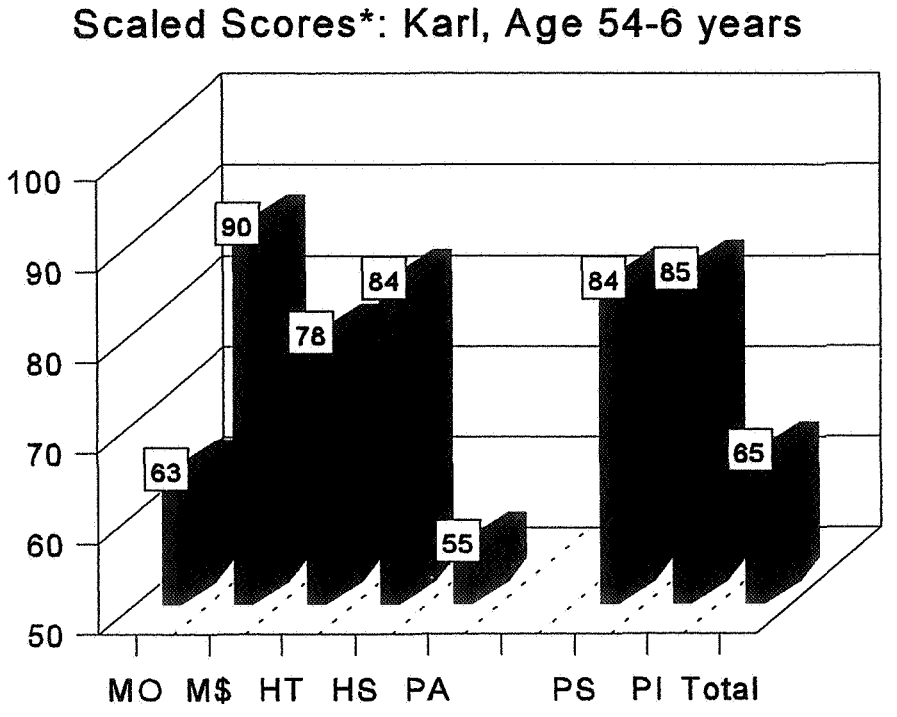
Communication. Due to only marginally adequate social conversation and his inability to utilize written language in any context, this adaptive area ranked an *AAA* scale score of only 4 and mental age below 5 years of age. Karl has adequate preverbal skills in place and is fairly appropriate in pragmatics and affect in self-chosen conversation. However, he often requires prompting as well as repetition of questions and conversation directed to him to obtain full communicative intent. He is also situationally concrete and literal, and does not consider abstractions without specific guidance from the questioner. His weak ability to differentiate details in describing pictures/actions and reduced language processing skills undoubtedly lowered the category score, and this helps to account for the client's confusion when presented with complex utterances. Thus, academic as well as social communication appears to be affected by interrelated cognitive and processing deficits of longstanding duration that will require *Intermittent to Limited (levels 1-2 of 4 /"as-needed" to "regular") supports* across life domains in most contexts.

Self Care. Karl reports typical self care skills for an adult age band, requiring no external intervention for tasks related to eating, dressing, toileting, hygiene, and grooming. Accordingly, the area was judged age-appropriate (mental age greater than 8-6 years) at this time.

Home Living. Likewise, Karl reports functioning semi-independently in the adaptive area of Home Living prior to his current incarceration. Here, he routinely carried out home duties such as laundry, cleaning, and other chores, tended to simple home and clothing repairs, and prepared cooked meals with success. During the current evaluation, he provided several acceptable *ILS* answers (standard score of 78) related to solving problems that may occur in one's home, again suggesting marginally adequate skills, especially with the assistance and supervision of his more capable wife. As an inmate, most responsibilities in this adaptive area are eliminated due to close monitoring by custodial staff. As a result, the adaptive area of Home Living was not estimated to require external supports at this time.

Social Skills. Karl's reduced conceptualization and language deficits suggest that he has cognitive limitations, factors which can (and have in the past) interfere with normal socialization. Interview and observation characterize him as socially appropriate, as well as good-natured and cooperative in our two-way interactions. Yet, his store of basic/social information is reduced to the 9 to 12 year level indicating some learning of classroom facts, but less social maturity related to everyday experiences. The client describes a good third marriage and close relationship with his mother, yet with both women now deceased, he can name no work-related, prison, or other friendships. Karl's 6 rating (of 20 possible) in this area therefore reflects the need for *Intermittent (as-needed) supports* in the form of befriending, crisis intervention, and other social assistance if he is to function as independently as possible in the social domain.

INDEPENDENT LIVING SCALES



KEY:

M/O- Memory / Orientation
M$ - Managing Money
HT - Home & Transportation
HS - Health and Safety
SA - Social Adjustment

PS - Problem Solving
P/I - Performance/Information

***NOTE**: The minimum scale score value on this test is 55.

Community Use. The adaptive area of Community Use could not be fully evaluated in the confined prison setting, thus received consideration in terms of the skill development needed for successful independence in public contexts. Here, Karl is incapable of reading directional/informational signs to access needed services, could not locate streets (or even match them) by name, or read a map to plan a travel route. On the *ILS*, he could not draw a line "*three blocks north and two blocks west*" on a street map, even with assistance locating North on the diagram. As an aside, this client did

obtain his commercial driver's license by oral examination, and drove the moving van while his partner read map directions and street names to him. As a wage-earner, he was seen as capable of managing small amounts of money, but rarely budgeted , thus often found himself short by the end of the pay period. Other *ILS* items indicated that he can access medical help in an emergency by dialing 9-1-1, and claims to have taken public transportation to familiar community destinations on occasion. On the negative side, Karl could not order a complete meal using the menu (unless pictorial), use public machines or ATMs, or read signs to know the business hours of stores. He has never filled out a bank deposit/withdrawal slip or possessed a credit card, depending solely on his wife in this department. Finally, the prison is also a "community" of sorts, and judging from Karl's isolation, he does not participate fully in opportunities for social interaction, cannot complete forms accessing medical attention, or use the commissary to purchase supplemental food items. Accordingly, the adaptive area of Community Use was judged subaverage (*AAA* scale score of only 5; mental age between 8 and 9 years), suggesting the need for *Intermittent (as-needed) to Limited (regular) Supports* for full independence.

Self Direction. Given clear initial directions and opportunity to clear up misinterpretations, it was observed that Karl will attend to tasks for 15 minute intervals. He is diligent in task completion, requiring little external monitoring or prompting to comply as directed. In addition, he was seen as competent to initiate productive activities if left on his own, and reports being able to manage household tasks and work-related routines in an appropriate manner. On the negative side, Karl has always depended on others to direct and assist daily living activities on an as-needed basis, and admits that he could not have managed independently without these people in his life. After his wife's death, he relied on his mother-in-law to handle his financial affairs and other activities that required reading. Thus, though not fully scorable in the prison environment, the estimated scale score of 6 (and mental age below age 5) in Self Direction suggests the need for *intermittent supports* to promote satisfactory function.

Health & Safety. Karl is in generally good health and seemed knowledgeable about how and where to obtain community medical help in an emergency. With reading assistance, he can access the larger community while driving, and knows to avoid potentially dangerous strangers. He also explained how one who cannot read the posted signs crosses the street safely, discussed several good safety practices related to home maintenance, and could elaborate on safety tips related to bathing and first aid. Accordingly, though this adaptive area is estimated as marginally appropriate, the scale score of 6 (mental age 7½ years) suggests the need for *intermittent supports* through family monitoring and public assistance.

Functional Academics. As detailed earlier in this report, Karl has developed few practical academic skills needed for adult independence. Reading and written language are similarly affected, scoring *below* the first grade level despite approximately seven years of formal education. In addition, this

client has learned virtually no "compensatory" reading and writing skills which replace rote learning and foster adult independence, relying on others in every related circumstance. On the positive side, his fairly good math skills permit such tasks as adding and subtracting small monetary sums, but his practical application errors prohibit accuracy in more complex activities such tallying checks and figuring bank account deductions. His AAA functional score at the 7 year age level (scaled score of 5) tells the story of one who requires *Intermittent ("as-needed" in math) to Limited ("regular" in reading/writing) support* in order to work around skill deficits in various aspects of daily life.

Leisure. Although this area cannot be formally assessed in the prison setting, it appears that in the past, Karl had developed a few age-appropriate leisure activities such as watching movie rentals on television, carrying out home maintenance projects, and tending to his seven dogs. As a result, the adaptive area of Leisure was again rated as close to age-appropriate, but the scaled score of 6 (mental age of 8½ years) suggests possible *Intermittent support* needs in specific circumstances.

Work. Karl held several steady jobs over his adult life which supported his family at a minimum level. Deductions in the adaptive area come from his inability to complete an application form seeking paid employment and reduced ability to catalog and control stock, care for complex equipment, and reorder goods. Indeed, he is better suited to carrying out low-level jobs following trained routines and/or supervised closely by more competent personnel. Accordingly, with a scaled score of 6 and mental age at 6½ years, this area has required *Intermittent supports* to maintain gainful employment.

In summary, two of Karl's adaptive skills (Home Living and Self Care) were considered age-appropriate for an adult peer group at this time; and several others (Social Skills, Self-Direction, Health & Safety, Leisure, and Work) were evaluated as requiring less intensive, *Intermittent* supports for full adult function. However, like other consumers with developmental disabilities, he appears to require more intensive supports in three areas (Communication, Functional Academics, and Community Use) in order to maintain appropriate adult independence in any setting. Personal independence is the primary goal of all juvenile and adult programs which serve the disabled, both to maintain their personal dignity and to conserve valuable resources for more severely afflicted clients. Making this sort of comparison, Karl must be evaluated as one with minimal support needs in most of the functional areas, but who could also benefit from both monitoring/supervision and specific training programs to upgrade skills in other adaptive areas.

REPORT SUMMARY

Karl Myers is a 54 year old male with a history of TBI and toxic exposure whose significantly reduced intellectual potential supports classification as one with mild mental retardation. His academic lags are matched by similar deficits in language, social knowledge, and certain adaptive skills, thereby satisfying the second criterion for such classification. Typical of many clients with cognitive deficits due to brain trauma, we see reductions across test batteries that yield few spikes approaching normalcy and no areas of superior performance. He has achieved an academic age equivalent of 7½ years, vocabulary skills and basic acquired information estimated below age 10½, and processing skills across auditory and visual modalities averaging below age 6½ years. Finally, there is ample evidence that this client suffers from *severe* deficits which reduce language fundamentals to below the 5 year age level, with concomitant auditory processing lags as low as age 4. This helps to account for his Level 1 illiteracy where reading and written language are concerned, and practical application skills across the academic areas falling at the "lower extreme" for adult subjects.

An analysis of the records acquired in this case revealed the omission of current, complete information regarding Karl Myers' disability condition at his 1997 trial and subsequent sentencing hearing. Here, legal counsel reportedly failed to seek professional assessment and testimony to describe the client's well documented developmental disability as a mitigating factor that can impact one's overall life functioning. Post-conviction investigation indicates that his mental retardation was indeed diagnosed prior to age 18, with adaptive skills deficits that required external supports throughout adulthood. These developmental disabilities have been verified by three professionals (Dr. Ray Hand, 5/02; Dr. Michael Gelbort, 7/02; and the current 10/02 functional evaluation) as part of the current post-conviction proceeding. Thus, the discrepant personal style we see in Karl today was certainly present during his arrest and trial, but was not presented to the jury deliberating his fate. Proper explanation of these factors in the penalty phase of the trial may have led the jury to a very different conclusion in this case. Now, in the wake of the recent Atkins decision, it would seem that his execution is prohibited by retroactive mandate of the United States Supreme Court.

Evaluations like this one are not intended to excuse antisocial actions on the part of a disabled defendant, but are offered to explain how cognitive impairments impact overall functioning across life domains. It is hoped that this functional evaluation may be of value to the Court in making decisions related to the post-conviction proceeding at hand.

Nancy Cowardin, Ph.D.
Educational Diagnostics

Attachment U

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

GILBERTO MARTINEZ)
)
Petitioner,)
)
vs.) Case No. CIV-00-1165-L
)
MIKE MULLIN, Warden, Oklahoma)
State Penitentiary,)
)
Respondent.)

ORDER

Before the Court is Petitioner's *Motion To Hold This Matter In Abeyance And To Permit Mr. Martinez's Lawyers To Present Constitutional Claims To The State Court Of Oklahoma*, filed on July 3, 2002. (Docket No. 52.) In his Motion, Petitioner requests this Court to hold the pending Petition for a Writ of Habeas Corpus ("Petition") in abeyance to allow him to present a claim based on an intervening change in federal law to the Oklahoma Court of Criminal Appeals. Petitioner additionally requests the current appointment of counsel to encompass the presentation of the issue of Petitioner's mental retardation to the Oklahoma Court of Criminal Appeals and for counsel to be compensated for the time expended in this matter in state court under 21 U.S.C. § 848(q).

Petitioner's Petition was filed on April 16, 2001. On June 20, 2002, the United States Supreme Court, in Atkins v. Virginia, __ U.S. __, 122 S.Ct. 2242 (2002), held the Eighth Amendment forbids the execution of mentally retarded criminal defendants. The Supreme Court further concluded that the states were to be left with the "'task of developing appropriate ways to

enforce the constitutional restriction upon its execution of sentences.'" Id. at 2250 (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416-17 (1986)). This claim has not been presented in state court and is, therefore, unexhausted.[1] The Court is cognizant that in light of the Supreme Court's determinations in Atkins and in the interest of comity and federalism, the Oklahoma Court of Criminal Appeals should have the opportunity to address this issue. In the instant case, allowing Petitioner to merely amend or supplement this claim would result in a mixed petition of exhausted and unexhausted claims normally requiring dismissal. See Rose v. Lundy, 455 U.S. 509 (1982). The Court finds that under the unique facts and circumstances of this case, abatement, rather than dismissal, is appropriate. Petitioner should seek review of his claim in state court and this case will be held in abeyance until Petitioner has exhausted his state remedies.

Petitioner further requests his currently appointed counsel be permitted to present this claim to the Oklahoma Courts on his behalf and that Mr. Joseph L. Wells be compensated for the time expended in this matter in state court. If authority exists for this Court to issue an order resulting in compensation of counsel from federal funds for state court representation, it must be found in 21 U.S.C. § 848(q). Section 848 (q)(8) states:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

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[1] Petitioner has presented a claim in his Petition regarding his competency to be executed. (Petition, Ground 10, pp. 90-92.)

This Court has not found specific language in section 848(q) or a Tenth Circuit opinion supporting or providing authority or a definitive opinion for the assertion that representation in state courts is compensable with federal funds. The issue has, however, been addressed in other jurisdictions which have held that federal compensation applies only in connection with federal proceedings. See e.g. Sterling v. Scott, 57 F.3d 451 (5th Cir. 1995)(no statutory right to federally funded counsel to pursue unexhausted post-conviction claims in state court); In re Joiner, 58 F.3d 143 (5th Cir. 1995)(no statutory right to the assistance of federally appointed counsel or experts to exhaust state remedies); Clark v. Wade, 278 F.3d 459 (5th Cir. 2002)(federal compensation statute does not cover representation by federal habeas court appointed attorneys in state clemency proceedings); In re Lindsey, 875 F.2d 1502, 1505-07 (11th Cir. 1989)(language of section 848(q)(8) does not encompass any proceedings convened under authority of a State). The Court concludes, therefore, that Section 848 does not provide authority for expansion of attorney representation as requested by Petitioner.

Further, the Court concurs with the opinion set forth by Judge Egan in an Order from the Northern District of Oklahoma addressing this issue:

> Finally, the Court acknowledges that principles of federalism and comity are involved in this issue. Counsel who are appointed by federal judges are ultimately responsible to federal courts. This Court is reluctant to interfere with the independence of state courts unnecessarily by appointing attorneys for representation in state court proceedings.

Myers v. Mullin, Case No. 02-CV-0140, slip op. at 4 (N.D. Okla. July 3, 2002).

For the reasons set forth above, the Court GRANTS Petitioner's request to hold this case in abeyance to allow him to present his claim under Atkins to state court. The Court finds, however, that Petitioner should seek state assistance for attorney representation in the Oklahoma courts on his

Atkins claim, and DENIES Petitioner's motion to expand the current appointment of counsel and any requested federal funding to encompass the representation of Petitioner and the presentation of the issue in state court.

IT IS SO ORDERED this 11th day of July, 2002.

Tim Leonard

TIM LEONARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

RICHARD EUGENE HAMMON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 01-CV-253-S**
	)	
MIKE MULLIN, Warden, Oklahoma State Penitentiary,	)	
	)	
Respondent.	)	

ORDER

This matter comes before the Court on Petitioner's Motion to Hold this Habeas Corpus Proceeding in Abeyance and to allow the federal public defender to expand their representation of Petitioner to encompass presentation of the issue of Petitioner's mental retardation in state court. The Respondent has not filed any response to Petitioner's motion. Specifically, Petitioner asserts that the recent Supreme Court decision in *Atkins v. Virginia*, — U.S. —, 122 S.Ct. 2242 (2002), may effect this action and that the issue of Petitioner's mental retardation must be relitigated in state court. Additionally, Petitioner asserts that further state court litigation may be dispositive of many of the issues before this court. Alternatively, Petitioner states return to state court is necessary to exhaust Petitioner's claim under *Atkins*.

Petitioner initiated this habeas corpus proceeding on May 7, 2001, by filing a motion for appointment of counsel and a request to proceed *in forma pauperis* (Docket Nos. 1 & 2).

On May 11, 2001, this court granted Petitioner's request for appointment of counsel, appointing the Death Penalty Federal Habeas Corpus Division of the Federal Public Defender's Office for the Western District of Oklahoma (Docket Nos. 4 & 5). On May 21, 2001, Jennifer B. Miller, Assistant Attorney General for the State of Oklahoma, entered her appearance for the Respondent (Docket No. 6). On May 22, 2001, two attorneys from the Federal Public Defender's Office, Scott W. Braden and Vicki Ruth Adams Werneke, entered their appearance on behalf of Petitioner (Docket Nos. 7 & 8). On December 18, 2001, Petitioner filed his Petition for Writ of Habeas Corpus (Docket No. 18). On February 13, 2002, Respondent filed a Response to the Petition for Writ of Habeas Corpus (Docket No. 28). On May 7, 2002, a Reply to the Response was filed by Petitioner (Docket No. 33). A Joint Final Designation of Record and Certification of State Court Records was filed on May 24, 2002 (Docket No. 35). Thus, the case is currently at issue herein.

On June 20, 2002, the United States Supreme Court issued its decision in *Atkins v. Virginia*, — U.S. —, 122 S.Ct. 2242 (2002), holding executions of mentally retarded defendants violates the Eighth Amendment ban on cruel and unusual punishment. The Court, however, left to the states "the task of developing appropriate ways to enforce" this constitutional restriction. *Id.*, at 2250.

The first proposition of Petitioner's petition indicates Petitioner's execution would violate the Eighth Amendment ban on cruel and unusual punishment because Petitioner is mentally retarded. Abatement of these proceedings and return to state court appears to be the most reasonable course of action in light of *Atkins*. Accordingly, this Court finds this

issue would best be resolved, in the first instance, by the Oklahoma state courts. Therefore, Petitioner's Motion for an order holding this habeas corpus proceeding in abeyance is hereby granted.

Petitioner also requests this Court to extend his federally appointed counsel's appointment to allow and/or cover representation of his *Atkins'* claim in state court proceedings. Petitioner does not, however, cite any authority which would authorize the expenditure of federal funds for the payment of attorney fees incurred in state court proceedings.

Petitioner's counsel was appointed pursuant to 18 U.S.C. § 3006A(a)(2)(B) and 21 U.S.C. § 848(q)(4)(B). Title 18 U.S.C. § 3006A specifically authorizes the appointment by this Court of counsel for any "financially eligible person who" seeks relief under 28 U.S.C. § 2254. State court proceedings are not encompassed within the type of cases for which a federal district court can appoint counsel under 18 U.S.C. § 3006A and 21 U.S.C. § 848(q)(4).

Title 21 U.S.C. § 848(q)(8), however, provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout ever subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Reading 18 U.S.C. § 3006A and 21 U.S.C. § 848(q)(4)(B), which authorize appointment of counsel in federal court proceedings, in conjunction with 21 U.S.C. § 848(q)(8), this Court finds that the legislature did not intend to authorize this Court to appoint federally funded counsel to pursue state court proceedings and/or remedies. Although the Tenth Circuit has never addressed this compensation issue, several circuits have rejected such a position holding the federal attorney fee compensation statutes do not cover representation in state court proceedings. *See*, *Clark v. Johnson*, 278 F.3d 459 (5th Cir. 2002) (holding § 848(q)(8) does not encompass state, as opposed to federal proceedings); *Sterling v. Scott*, 57 F.3d 451 (5th Cir. 1995), *cert. denied*, 516 U.S. 1050, 116 S.Ct. 715, 133 L.Ed.2d 669 (1996) (holding indigent state death row petitioner, who failed to exhaust state remedies, could not use federally appointed counsel to exhaust state remedies); and *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989) (holding appointment of attorney for death sentence inmate proceeding under § 2254 did not authorize appointment to aid inmate in state court proceedings). *Contra*, *Hickey v. Schomig*, 2002 WL 1575070 (N.D. Ill. 2002) (stating an attorney appointed to represent a habeas corpus petitioner under a sentence of death is required to pursue state clemency relief if it is available and desired by petitioner and the attorney is entitled to reasonable compensation for this work, while denying compensation under the facts of this particular case). *See also*, *McKinney v. Paskett*, 753 F.Supp. 861 (D. Idaho 1990) (holding 21 U.S.C. § 848(q)(8) did not require federal payment to counsel for state proceedings initiated in connection with representation of federal habeas petitioner in capital case in federal court). This Court, therefore, concludes that it has no authority to

authorize the federal public defender's office to expand its representation of Petitioner to include further state court proceedings.

Additionally, principles of federalism and comity come into play where, as in this case, a federal court is asked to upset a state court conviction without an opportunity being given the state court to correct any alleged constitutional violations. Under the doctrine of comity, this Court should defer any resolution on this matter until the state court is given an opportunity to consider petitioner's claims in light of *Atkins v. Virginia*, — U.S. —, 122 S.Ct. 2242 (2002). Similarly, in this Court's opinion, authorizing federally paid attorneys to intervene in state court proceedings, where the state clearly has a mechanism for appointing attorneys, would unnecessarily infringe on the independence of the state court's judicial system. Specifically, pursuant to Oklahoma statutes, the Oklahoma Indigent Defense System has the responsibility of providing representation in all capital post-conviction cases. *See*, 22 O.S. § 1360.

Accordingly, this Court hereby grants Petitioner's Motion to Hold this matter in abeyance. This matter shall be held in abeyance for a period of 180 days from the date of this order to allow Petitioner an opportunity to relitigate, in light of *Atkins v. Virginia*, — U.S. —, 122 S.Ct. 2242 (2002), the issue of Petitioner's mental retardation in the courts of the State of Oklahoma. Counsel for Petitioner shall file a report at the end of the 180 day period advising this Court of the status of the state proceedings and seeking a further abeyance if state litigation has not been completed. Respondent may seek modification of this Order if further state court proceedings are completed in less than 180 days. Further,

for the reasons set forth herein, Petitioner's request to expand the representation of his federally appointed counsel to encompass the presentation of Petitioner's *Atkins'* claim in state court is hereby denied.

IT IS SO ORDERED on this 7th day of August, 2002.

FRANK H. SEAY
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KARL LEE MYERS,

Petitioner,

v.

MIKE MULLIN, Warden,
Oklahoma State Penitentiary

Respondent.

No. 02-CV-0140 EA (X)

ORDER

This matter comes before the Court on Oklahoma death row inmate Karl Lee Myers' motion to permit his federally appointed counsel to present a second post-conviction petition in the Oklahoma state courts (Docket #9). On June 25, 2002, this Court conducted a telephonic conference with Petitioner's counsel, Scott W. Braden, and Respondent's counsel, David Brockman, for the purpose of discussing various matters related to the motion. Respondent's counsel has not filed a written response to the motion, but advised during the conference that he had no objection to the granting of the motion. After taking the matter under advisement, and for the reasons discussed below, the Court finds that Petitioner's request should be denied.

Petitioner initiated the instant habeas corpus proceeding on February 19, 2002, by filing a motion for appointment of counsel and a request to proceed *in forma pauperis* (Docket #1 and #2). On February 28, 2002, Magistrate Judge Frank H. McCarthy issued an Order granting the motion for appointment of counsel (Docket #4). The Death Penalty Federal Habeas Corpus division of the Federal Public Defender's Office for the Western District of Oklahoma was appointed to represent Petitioner, and attorney Scott W. Braden from that office entered his appearance on March 6, 2002.

(Docket #5). David Brockman, Assistant Attorney General for the State of Oklahoma, has entered his appearance for the Respondent. (Docket #7). On April 12, 2002, a scheduling order was entered by agreement of the parties. (Docket #8). Because the scheduling order does not require Petitioner to file his petition for writ of habeas corpus until September 3, 2002, the Court is not yet familiar with the constitutional issues to be raised by Petitioner.[1]

On June 20, 2002, the United States Supreme Court rendered its decision in Atkins v. Virginia, --U.S.--, 122 S. Ct. 2242 (2002), holding that executions of mentally retarded criminals is cruel and unusual punishment in violation of the Eighth Amendment. In Atkins, the Supreme Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction" that mentally retarded persons are to be categorically excluded from execution. Id. at 2250 *(citing* Ford v. Wainwright, 477 U.S. 399, 405, 416-17, 106 S. Ct. 2595 (1986)). On June 21, 2002, Petitioner filed the instant motion, indicating that Petitioner is mentally retarded but that determination of such retardation must be made by the Oklahoma courts. During the telephonic conference Petitioner's counsel argued that the Atkins decision requires Petitioner to return to state court for disposition of mental retardation issues, and that continuity of representation would best serve his client's interest. Petitioner specifically requests an order from this Court directing his federally appointed counsel to represent him in state court regarding the issue of mental retardation and related matters.

[1] In the June 25, 2002, conference Petitioner's counsel clarified that he is not seeking an abatement or stay of the federal habeas proceedings, and that he intends to file the habeas corpus petition by September 3, 2002, in accordance with the scheduling order.

If authority exists for this Court to issue an order resulting in compensation of counsel from federal funds for state court representation, it must be found in 21 U.S.C. § 848 (q). Section 848 (q) (8) provides as follows:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

21 U.S.C. § 848 (q)(8).

Although Petitioner's counsel has been appointed pursuant to Section 848 (q), Petitioner now asks this Court to expand his federally appointed attorney's representation beyond the federal court system. The scope of the language in Section 848 (q) neither authorizes nor forbids the extension of representation to state court matters This Court cannot find specific language in section 848 (q)(8), or in the legislative history of such statute supporting the position that representation in state proceedings by federally appointed counsel is compensable with federal funds. Nor has this Court found a Tenth Circuit opinion which provides a clear rule or definitive opinion addressing the issue. Other jurisdictions, however, have rejected a broad interpretation of 21 U.S.C. § 848, and have held that it applies only in connection with federal proceedings. *See e.g.* Sterling v. Scott, 57 F. 3d 451 (5th Cir. 1995) (no statutory right to federally funded counsel to pursue unexhausted post-conviction claims in state court); Clark v. Wade, 278 F. 3d 459 (5th Cir. 2002) (federal compensation statute does not cover representation by federal habeas court appointed attorneys in state clemency proceedings); In re Lindsey, 875 F. 2d 1502, 1505-07 (11th Cir. 1989) (language of Section

848(q)(8) does not encompass any proceedings convened under authority of a State). This Court concludes that Section 848 does not provide authority for expansion of attorney representation as requested by Petitioner.

This Court appreciates Petitioner's argument that continuity of representation is efficient and practical. The Court, however, is unconvinced that the benefits of continuity of representation offset the very real possibility that granting Petitioner's motion may set a precedent for other federal petitioners to seek orders from this Court allowing their federally appointed and compensated attorneys to handle various state court matters.[2] Petitioner was represented by attorneys from the Oklahoma Indigent Defense System ("OIDS") in his state post-conviction proceedings before the Oklahoma Court of Criminal Appeals.[3] The OIDS attorneys are familiar with Petitioner's facts, issues and the underlying record, and should be able to competently handle Petitioner's Atkins claim in state court proceedings.[4]

Finally, the Court observes that principles of federalism are involved in this issue. Counsel who are appointed by federal judges are ultimately responsible to federal courts. This Court is reluctant to interfere with the independence of state courts unnecessarily by appointing attorneys for representation in state court proceedings.

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[2] Petitioner's counsel acknowledged during the telephonic conference that a favorable decision by the Court on Petitioner's motion may, indeed, encourage other petitioners to seek similar relief.

[3] See docket sheet for Karl Lee Myers v. State of Oklahoma, Oklahoma Court of Criminal Appeals No. PCD-2000-516, found at www.oscn.net.

[4] Petitioner's present counsel stated at the June 25, 2002, conference that he had not inquired of OIDS whether they would be willing to pursue a second post-conviction proceeding for Petitioner regarding the Atkins related issues.

For all the reasons stated above, this Court finds that Petitioner should seek state assistance for attorney representation in the Oklahoma courts on his Atkins claim and related issues, and DENIES Petitioner's motion to expand the representation of his federally appointed counsel to handle state court matters.

IT IS SO ORDERED this 3rd day of July, 2002.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

Attachment V

STATE OF OKLAHOMA)
) SS
COUNTY OF CLEVELAND)

AFFIDAVIT OF VICKI RUTH ADAMS WERNEKE

I, Vicki Ruth Adams Werneke, being of lawful age and sound mind I do hereby swear under oath the following is true and accurate to the best of my knowledge.

1. I am a licensed attorney for the State of Oklahoma Bar No. 13441. I am Chief of the Capital Post Conviction Division of the Oklahoma Indigent Defense System.

2. After the United States Supreme Court issued its **Atkins v. Virginia**, opinion in June 2002, the Executive Director of OIDS directed the Capital Post Conviction Division to identify those cases involving a colorable claim that the defendant may have been mentally retarded. The Division identified several cases and filed notices with the Oklahoma Court of Criminal Appeals concerning those cases.

3. Four attorneys in the Division were assigned to the various cases in teams of two on each one. The other attorneys were Bryan Dupler, Laura Arledge, and Wyndi Thomas Hobbs. Mr. Dupler and Ms. Arledge were a team and Ms. Hobbs and I were a team.

4. The Division filed several successor applications for post conviction relief from October 2002, to June 2003. Not long after we filed the applications, the Court of Criminal Appeals began issuing orders remanding the cases for evidentiary hearings and jury trials.

5. The following is a chronology of the cases initially identified as having a colorable claim of mental retardation handled by the Division:

October 14, 2002	**Pickens v. State**, Case No. PCD-2002-983; Application filed
October 18, 2002	**Hammon v. State**, Case No. PCD-2002-971; Application filed
October 28, 2002	**Allen v. State**, Case No. PCD-2002-977; Application filed*
October 29, 2002	**VanWoudenberg v. State**, Case No. PCD-2002-985; Application filed
October 31, 2002	**Lambert v. State**, Case No. PCD-2002-974; Application filed
November 1, 2002	**Martinez v. State**, Case No. PCD-2002-972; Application filed
November 4, 2002	**Snow v. State**, Case No. PCD-2002-979; Application filed
	Salazar v. State, Case No. PCD-2002-984; Application filed
	Myers v. State, Case No. PCD-2002-978; Application filed
December 19, 2002	**Salazar**, Order granting evidentiary hearing
December 31, 2002	**Hooks v. State**, Case No. PCD-2002-980; Application filed
January 15, 2003	**Hooks** - Order granting evidentiary hearing
March 4, 2003	**Smith, Roderick v. State**, Case No. PCD-2002-973; Application

	filed
March 5, 2003	**Hooks** - Evidentiary hearing conducted
March 14, 2003	**Bland v. State**, Case No. PCD-2002-969; Application filed*
March 17, 2003	**Phillips v. State**, Case No. PCD-2002-982; Application filed*
	Gilbert v. State, Case No. PCD-2002-976; Application filed*
April 15, 2003	**Salazar**, Evidentiary hearing conducted
April 16, 2003	**Martinez** - Order granting evidentiary hearing
April 21, 2003	**Charm v. State**, Case No. PCD-2002-986; Application filed
April 25, 2003	**Smith, Richard v. State**, Case No. PCD-2002-970; Application filed*
May 1, 2003	**Marshall v. State**, Case No. PCD-2002-981; Application filed
May 16, 2003	**Marshall** - Order granting evidentiary hearing
May 29, 2003	**Lambert** - Order granting jury trial
June 2, 2003	**Charm** - Petition for writ of certiorari filed with Supreme Court
June 11, 2003	**Martinez** - Evidentiary hearing conducted
	Salazar - Order granting jury trial
June 16, 2003	**Howell v. State**, Case No. PCD-2003-268; Application filed
July 23, 2003	**Pickens** - Order granting mental retardation jury trial
July 28, 2003	**Hooks** - Supplemental brief after evidentiary hearing filed
August 1, 2003	**Snow** - Order granting evidentiary hearing
	Myers - Order granting evidentiary hearing
	Hammon - Order granting jury trial
August 5, 2003	**Smith, Roderick** - Order granting jury trial
August 6, 2003	**Smith, Richard** - Order granting evidentiary hearing
September 2003	**Salazar** - Jury trial conducted
September 2003	**Marshall** - evidentiary hearing conducted
November 2003	**Myers** - evidentiary hearing conducted
November 5-7, 2003	**Snow** - Evidentiary hearing conducted
November 7, 2003	**Martinez** - Order granting jury trial
November 17, 2003	**Smith, Roderick** - Mental retardation trial commenced; ended in mistrial on November 20, 2003
November 18, 2003	**Howell** - Order granting evidentiary hearing
December 9, 2003	**Hooks** - Order granting jury trial
January 28, 2004	**Myers**, - Order granting jury trial
February 17-20, 2004	**Pickens** - Mental retardation trial
February 19, 2004	**Snow** - Order granting jury trial
February 24, 2004	**Marshall** - Order granting jury trial
March 8, 2004	**Smith, Roderick** - Mental retardation trial
March 11, 2004	**Martinez** - Order granting motion to withdraw
March 23, 2004	**Snow** - Order granting motion to withdraw
May 3, 2004	**Howell** - Order granting jury trial on mental retardation issue
May 3-21, 2004	**Lambert** - Mental retardation trial
June 4, 2004	**Salazar** - Order remanding for evidentiary hearing

June 7-15, 2004	**Hooks** - Mental retardation trial
July 2004	**Salazar** - Evidentiary hearing conducted
August 9, 2004	**Smith, Roderick** - Supplemental brief filed
September 2004	**Myers** - jury trial conducted
October 25, 2004	**Hooks** - Supplemental brief filed
November 5, 2004	**Lambert** - supplemental brief filed
November 8, 2004	**Marshall** - sentenced modified to lwop
February 23, 2005	**Pickens** - supplemental brief filed

9. In the Divison, we had clients that had been initially identified as having colorable claims for mental retardation. After further review of their cases though, we determined a viable claim could not be raised. These cases are identified in the above list with an *.

10. In addition to the many mental retardation trials, the attorneys in the Division continued to represent other clients. These cases involved the review of extensive records and necessitated investigations.

11. After the cases were remanded for a jury trials, I, as Chief of the Division, requested the cases be transferred to the trial divisions or contracted out to experienced trial attorneys. Both requests were denied by the Executive Director. It was suggested that the trial divisions could assist us with the trials. However, the attorneys in those divisions were too busy with their own heavy caseloads to provide any assistance. The four appellate attorneys within the Capital Post Conviction Division were forced to conduct the trials on our own.

FURTHER AFFIANT SAYETH NOT

Vicki Ruth Adams Werneke

Vicki Ruth Adams Werneke

Subscribed and sworn to me by the person know to me as Vicki Ruth Adams Werneke this 13 day of April 2006.

My commission number: 00014061

My commission expires: 9-11-08

Notary public

Attachment W

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL WAYNE HOWELL,	)	
	)	
Petitioner,	)	
v.	)	Case No. PCD 2003-268
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DISMISSING APPLICATION FOR POST-CONVICTION RELIEF AND MOTION FOR EVIDENTIARY HEARING FILED DECEMBER 22, 2005; ORDER DENYING MOTION TO PROVIDE SEPARATE PROCEDURE FOR REVIEW OF CLAIMS BASED ON NEWLY DISCOVERED EVIDENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL IN CONNECTION WITH A POST-CONVICTION DETERMINATION OF MENTAL RETARDATION AND DENYING MOTION TO SEVER

Petitioner, Michael Howell, through counsel, filed his Second Application for Post-Conviction Relief and Motion for Evidentiary Hearing on June 16, 2003. We granted an evidentiary hearing on the sole proposition of error raised therein. *See* Order Granting Motion for Evidentiary Hearing on Proposition One of Second Application for Post-Conviction Relief, PCD 2003-268 (Okl.Cr. November 18, 2003)(not for publication). Following the evidentiary hearing, we remanded Howell's case to the District Court of Oklahoma County for a jury trial on mental retardation. *See* Order Granting Post-Conviction Relief and Remanding to the District Court of Oklahoma County for a Jury Determination on Mental Retardation, PCD 2003-268 (Okl.Cr. May 3, 2004)(not for publication).

Jury trial on mental retardation was held in May 2005 and the jury found Howell not mentally retarded in its verdict rendered May 26, 2005.

Following the parties' joint motions to expand the time in which to file Supplemental Briefs, both Petitioner Howell and Respondent State of Oklahoma filed Supplemental Briefs on September 23, 2005. Resolution of this matter is currently pending in this Court.

On December 22, 2005, Petitioner, through different attorneys[1], filed an Application for Post-Conviction Relief and Motion for Evidentiary Hearing. This Application, subsequent to the Second Application, was filed under this same case number. In the Application filed December 22, 2005, counsel of record raise new claims of error relating to the jury trial on mental retardation which were not raised in the Supplemental Brief of Petitioner. These claims are raised under the guise of newly discovered evidence and ineffective assistance of counsel (at the mental retardation hearing and on appeal from that hearing). Counsel of record request this Court grant the Application and remand the matter to the District Court for an evidentiary hearing, appoint and compensate new counsel for Petitioner Howell, approve funding necessary to represent Howell's claims, and grant post-conviction relief and order a new trial on mental retardation.

On January 3, 2006, counsels who filed the December 22, 2005 Application filed a Motion to Provide Separate Procedure for Review of Claims based on Newly Discovered Evidence and Ineffective Assistance of Counsel in Connection with a *Lambert* Post-Conviction Determination Regarding Mental

[1] Counsel of record in the Second Application for Post-Conviction Relief, filed under Case No. PCD 2003-268, are Bryan L. Dupler and Laura Arledge of the Oklahoma Indigent Defense

Retardation, and to Sever Petitioner's Newly-Filed Post-Conviction Application in Keeping with Such Procedure. Herein, counsel recognize that the Application filed on December 22, 2005 should be considered separately from the original Application filed under this case number and also that the "new application for post-conviction relief may also be premature."

The appeal from the jury trial on mental retardation remains before this Court as part of Howell's post-conviction case which was originally filed on June 16, 2003, under this case number. *Myers v. State*, 2005 OK CR 22, ¶ 5, --- P.3d ---. We have yet to render a final decision in this matter. To that end, we find the Application for Post-Conviction Relief and Motion for Evidentiary Hearing, filed by different counsel, is premature and the claims raised therein will not be addressed.

After this Court issues a final order or opinion in this case and if further relief is not granted, a subsequent Application for Post-Conviction Relief may be filed, under a different case number, in accordance with *Davis v. State*, 2005 OK CR 21, 123 P.3d 243, 22 O.S.Supp.2005, § 1089(D)(9), and Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005).

Accordingly, because we find the Application for Post-Conviction Relief and Motion for Evidentiary Hearing filed December 22, 2005 is premature, it is hereby **DISMISSED**. The Motion to Provide Separate Procedure for Review of Claims and Motion to Sever is **DENIED**.

IT IS SO ORDERED.

System. Counsel filing the Application for Post-Conviction Relief on December 22, 2005 are

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 31st day of January, 2006.

CHARLES S. CHAPEL, Presiding Judge

GARY L. LUMPKIN, Vice Presiding Judge

CHARLES A. JOHNSON, Judge

ARLENE JOHNSON, Judge

DAVID B. LEWIS, Judge

ATTEST:

Michael S. Richie
Clerk

Mandy Welch, Josh Welch and J.David Ogle, Attorneys at Law.

123 P.3d 243
123 P.3d 243, 2005 OK CR 21
(Cite as: 123 P.3d 243)

H

Court of Criminal Appeals of Oklahoma.
Brian Darrell **DAVIS**, Appellant
v.
STATE of Oklahoma, Appellee.
No. PCD-2003-686.

Oct. 27, 2005.

Background: Following appellate affirmance of convictions for first degree murder and first degree rape and imposition of death penalty, 103 P.3d 70, 2004 OK CR 36, defendant sought post-conviction relief.

Holdings: The Court of Criminal Appeals, A. Johnson, J., held that:
(1) ineffective assistance of trial counsel claims in post-conviction petition would not be barred when appellate counsel and trial counsel were the same;
(2) trial counsel's failure to object to State's alleged gender discrimination in use of peremptory challenges was not deficient assistance;
(3) and defendant failed to establish ineffective assistance of counsel.
Application denied.

C. Johnson, J., concurred specially and filed opinion.

Lumpkin, V.P.J., concurred in part, dissented in part, and filed opinion.

West Headnotes

[1] Criminal Law 1430
110k1430

[1] Criminal Law 1433(2)
110k1433(2)
Court of Criminal Appeals will not consider for post-conviction relief issues which were raised on direct appeal and are barred by res judicata, or issues which have been waived because they could have been, but were not, raised on direct appeal. 22 Okl.St.Ann. § 1089(C)(1, 2).

[2] Criminal Law 1440(3)
110k1440(3)
Proceedings.
Ineffective assistance of trial counsel claims raised in a timely application for post-conviction relief are not procedurally barred when appellate counsel and trial counsel were the same. U.S.C.A. Const.Amend. 6; 22 Okl.St.Ann. § 1089(D)(4).

[3] Criminal Law 735
110k735

[3] Criminal Law 1139
110k1139
Claims of ineffective assistance of counsel are mixed questions of law and fact reviewed de novo.

[4] Criminal Law 641.13(1)
110k641.13(1)
Judicial scrutiny of counsel's performance is highly deferential. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 1519(4)
110k1519(4)
In considering post-conviction claim of ineffective assistance of counsel, Court of Criminal Appeals may address the performance and prejudice components in any order and need not address both if a petitioner fails to make the requisite showing for one. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 641.13(2.1)
110k641.13(2.1)
Generally, a trial attorney's actions during jury selection are considered matters of trial strategy, for purposes of ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6.

[7] Constitutional Law 221(4)
92k221(4)

[7] Constitutional Law 224(4)
92k224(4)
Equal Protection Clause forbids the use of peremptory challenges to exclude jurors solely on the basis of their gender or race. U.S.C.A. Const.Amend. 14.

[8] Criminal Law 641.13(2.1)
110k641.13(2.1)
Trial counsel's failure to object to State's alleged gender discrimination in use of peremptory challenges during jury selection was not deficient assistance for purposes of ineffective assistance of

counsel claim; failure to object may have been trial strategy, gender-neutral reasons for the removal of the majority of the women were readily apparent, and counsel made two other *Batson* objections during jury selection. U.S.C.A. Const.Amend. 6.

[9] Criminal Law ⚿641.13(6)
110k641.13(6)
Trial counsel's failure to raise issue that defendant's waiver of rights at police interview was involuntary was not deficient assistance for purposes of ineffective assistance of counsel claim; although there was evidence that defendant's medications created "potential for impairment," testimony and medical records showed that defendant answered questions and followed commands appropriately at time of interview. U.S.C.A. Const.Amend. 6.

[10] Criminal Law ⚿532(.5)
110k532(.5)
Trial judges at *Jackson v. Denno* hearing need not make formal findings of fact or write opinions concerning their rulings on the voluntariness of a defendant's confession; only requirement is that a finding that a confession is voluntary appear in the record with "unmistakable clarity."

[11] Criminal Law ⚿1433(2)
110k1433(2)
Petitioner was precluded by res judicata from raising in post-conviction petition issue of whether trial and appellate counsel were ineffective for failing to argue that defendant was denied a fair trial due to the admission of certain inculpatory statements, where substance of the claim was litigated both at trial by trial counsel and on direct appeal by appellate counsel.

[12] Judgment ⚿591.1
228k591.1

[12] Judgment ⚿751
228k751
Doctrine of res judicata does not allow the subdividing of an issue as a vehicle to relitigate at a different stage of the appellate process.

***244** Wyndi Thomas Hobbs, Oklahoma Indigent Defense System, Norman, OK, Attorney for Petitioner.

OPINION DENYING APPLICATION FOR POST-CONVICTION RELIEF, MOTION FOR DISCOVERY AND REQUEST FOR EVIDENTIARY HEARING

A. JOHNSON, Judge.

¶ 1 Brian Darrell Davis, Petitioner, was convicted by jury of First Degree Murder and First Degree Rape in the District Court of Kay County, Case No. CF-2001-733. The district court followed the jury's verdict and sentenced Davis to death for murder and one hundred years imprisonment for rape. Davis appealed and this Court affirmed his Judgment and Sentence in *Davis v. State,* 2004 OK CR 36, 103 P.3d 70.

[1] ¶ 2 Davis now seeks post-conviction relief in this Court, raising five propositions of error. Under the Capital Post-Conviction Procedure Act, only those claims that "[w]ere not and could not have been raised in a direct appeal" and that also "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent" can be raised. 22 O.S.Supp.2004, § 1089(C)(1) & (2). "This Court will not consider issues which were raised on direct appeal and are barred by *res judicata,* or issues which have been waived because they could have been, but were not, raised on direct appeal." *Cummings v. State,* 1998 OK CR 60, ¶ 2, 970 P.2d 188, 190. The burden is on the applicant to show that his claim is not procedurally barred. *See* 22 O.S.Supp.2004, § 1089(C). For purposes of post-conviction, a claim could not have been previously raised if:

1) it is a claim of ineffective assistance of trial counsel involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal, or

2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.

22 O.S.Supp.2004, § 1089(D)(4)(b)(1) & (2).

¶ 3 In Proposition I, Davis claims trial and appellate counsel were ineffective for failing to challenge at trial and on direct appeal the prosecutor's use of eight peremptory challenges to remove women from the jury, claiming the State engaged in a pattern of gender discrimination that violated his rights to due process and equal protection. Davis contends this claim could not have been raised on direct appeal

because appellate counsel also served as trial counsel and the Oklahoma Indigent Defense System has a policy prohibiting a member of the trial team, serving as appellate counsel, from raising a claim of ineffective assistance of trial counsel on direct appeal.

¶ 4 In *Neill v. State,* 1997 OK CR 41, ¶ 7, 943 P.2d 145, 148, we held that under 22 O.S.Supp.1995, § 1089(D)(4)(b)(1), the fact that trial and appellate counsel may be the same did not excuse appellate counsel from ***245** raising a claim of ineffective assistance of trial counsel on direct appeal. The *Neill* court found that the language in the amended Capital Post-Conviction Procedure Act overruled our previous decisions in *Roberts v. State,* 1996 OK CR 7, ¶ 12, 910 P.2d 1071, 1078-79; *Fowler v. State,* 1995 OK CR 29, ¶ 3, 896 P.2d 566, 569; and *Webb v. State,* 1992 OK CR 38, ¶ 11, 835 P.2d 115, 117, holding appellate counsel who was trial counsel in the same case was not required to raise a claim of ineffective assistance regarding his own performance below and that claims of ineffective assistance of trial counsel would be considered on collateral review. *Neill,* 1997 OK CR 41, ¶ 6, 943 P.2d at 148 n. 2. *See also McCracken v. State,* 1997 OK CR 50, ¶ 6, 946 P.2d 672, 676. This Court followed a minority position requiring a criminal defendant to raise ineffective assistance of trial counsel claims on direct appeal or forfeit them. [FN1] *See Cannon v. Mullin,* 383 F.3d 1152, 1159 (10th Cir.2004).

> FN1. The Tenth Circuit has declined to apply Oklahoma's procedural bar to collateral review of ineffective assistance of trial counsel claims, finding Oklahoma's rule that such claims must be raised on direct appeal or forfeited was inadequate and denied defendants meaningful review of their ineffective assistance of trial counsel claims in certain circumstances. *Hooks v. Ward,* 184 F.3d 1206, 1213-15 (10th Cir.1999). While the Tenth Circuit found there was no rigid constitutional rule prohibiting Oklahoma from requiring the presentation of ineffective assistance of trial counsel claims on direct appeal, it held that given the importance of the Sixth Amendment right to counsel it would not apply Oklahoma's procedural bar where a petitioner had the same counsel at trial and on appeal, or where the ineffectiveness claim could not be resolved solely on the basis of the trial record. *See Turrentine v. Mullin,* 390 F.3d 1181, 1206 (10th Cir.2004); *Hooks,* 184 F.3d at 1214; *McCracken v. State,* 268 F.3d 970, 977 (10th Cir.2001); *English v. Cody,* 146 F.3d 1257, 1264 (10th Cir.1998).

¶ 5 The Legislature amended the Capital Post-Conviction Procedure Act in 2004. The Act now provides that "[a]ll claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court." 22 O.S.Supp.2004, § 1089(D)(4). In *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the Supreme Court explained why the procedural bars applied to other habeas claims were not suitable for ineffective assistance of counsel claims:

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to ... hold that criminal defendants may not raise ineffective-assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel ...
>
> *Id.,* 477 U.S. at 378, 106 S.Ct. at 2584-85 (citation omitted).

[2] ¶ 6 We recognize the importance of applying our rules of procedural bar uniformly and consistently to effectuate finality of judgment. By amending the Act as it did, the Legislature implicitly overruled the approach adopted by this Court in *Walker* [FN2] to review ineffective assistance of counsel claims on post-conviction and instead requires this Court to review these claims under the standards in established Supreme Court precedent. Requiring appellate counsel to evaluate his or her own performance and decisions at trial or forfeit a claim of ineffective assistance of trial counsel does

not comport with *Kimmelman* because post-conviction applicants are not provided the opportunity to consult with separate counsel on ***246** appeal in order to obtain an objective assessment of trial counsel's performance. In light of *Kimmelman,* we find that the importance of the Sixth Amendment compels us to consider all claims of ineffective assistance of trial counsel raised in a timely application for post-conviction relief and no longer apply a procedural bar when appellate counsel and trial counsel were the same. This procedure adequately protects a criminal defendant's ability to vindicate his or her constitutional right to the effective assistance of counsel.

FN2. *Walker v. State,* 1997 OK CR 3, 933 P.2d 327.

[3][4][5] ¶ 7 We now consider Davis's claim of ineffective assistance of trial counsel. Claims of ineffective assistance of counsel are mixed questions of law and fact which we review *de novo. See Hanes v. State,* 1998 OK CR 74, ¶ 4, 973 P.2d 330, 332. These claims are governed by the two-part *Strickland* test that requires a petitioner to show: [1] that counsel's performance was constitutionally deficient; and [2] that counsel's performance prejudiced the defense, depriving the petitioner of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To prove deficient performance, Davis must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Judicial scrutiny of counsel's performance is highly deferential. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *Patterson v. State,* 2002 OK CR 18, ¶ 17, 45 P.3d 925, 929. If Davis demonstrates that counsel's performance was deficient, he still must show prejudice before this court may rule in his favor. *Lockett v. State,* 2002 OK CR 30, ¶ 15, 53 P.3d 418, 424. To show prejudice, Davis must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *Lockett,* 2002 OK CR 30, ¶ 15, 53 P.3d at 424. This Court may address the performance and prejudice components in any order and need not address both if a petitioner fails to make the requisite showing for one. *See Lockett,* 2002 OK CR 30, ¶ 15, 53 P.3d at 424; *Davis v. State,* 1999 OK CR 16, ¶ 38, 980 P.2d 1111, 1120.

[6] ¶ 8 Generally, a trial attorney's actions during jury selection are considered matters of trial strategy. *See Roberts,* 1996 OK CR 7, ¶ 20, 910 P.2d at 1080; *Cheney v. State,* 1995 OK CR 72, ¶ 69, 909 P.2d 74, 91. The record here shows that after questioning by the attorneys and numerous for-cause challenges, a panel of thirty potential jurors was passed for cause, consisting of fourteen women and sixteen men. Each side then exercised their nine peremptory challenges, leaving a jury of 12 consisting of nine men and three women. Davis is correct that the State exercised eight of its nine allotted peremptory challenges to remove women from the panel. Because of these numbers, it is Davis's theory that women were systematically excluded from the jury.

[7] ¶ 9 It is well established that the Equal Protection Clause forbids the use of peremptory challenges to exclude jurors solely on the basis of their gender or race. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Ezell v. State,* 1995 OK CR 71, ¶ 4, 909 P.2d 68, 70. "The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Batson,* 476 U.S. at 86, 106 S.Ct. at 1717 (*quoting Strauder v. West Virginia,* 100 U.S. 303, 308, 10 Otto 303, 25 L.Ed. 664 (1879)).

[8] ¶ 10 Davis claims that trial counsel was ineffective because he did not object to the allegedly deliberate exclusion of female jurors from the jury panel. Given our highly deferential scrutiny of counsel's performance, we cannot find that counsel's failure to challenge the State's use of peremptory challenges was not sound trial strategy. In *Sorensen v. State,* 6 P.3d 657, 662-63 (Wyo.2000) and *State v. Wilson,* 117 N.M. 11, 868 P.2d 656, 663-64 (App.1993), the Wyoming Supreme ***247** Court and the New Mexico Court of

Appeals respectively rejected an ineffective assistance of counsel claim based on failure to make a *Batson* challenge. Both of these courts were unwilling to second guess defense counsel, reasoning that defense counsel might have had sound reasons related to the defendant's theory of the case for not opposing the prosecutor's use of the State's peremptory challenges. It was equally conceivable to those courts that the defense lawyers were satisfied that the final jury selected was a fair cross-section of the community and that the defendant's chances for a favorable outcome would not improve with any changes and might instead lessen. *See Sorensen,* 6 P.3d at 663. We agree with this reasoning because it reflects fitting deference to defense counsel, who had an eyewitness view of the venire, in deciding to make, or refrain from making, a *Batson/J.E.B.* challenge.

¶ 11 Defense counsel here is a seasoned capital trial attorney who raised two *Batson* challenges during the State's exercise of its peremptory challenges. There is no evidence before us to show counsel was unaware of the expansion of *Batson* in *J.E.B.* A review of the jury selection in this case supports a finding that defense counsel's decision not to raise a *J.E.B.* challenge was strategic and that gender-neutral reasons for the removal of the majority of the women were readily apparent. Based on this record, we find no ineffectiveness on this ground. [FN3]

FN3. Having rejected Davis's claim of ineffective assistance of trial counsel on the merits, he necessarily cannot prevail on his claim of ineffective assistance of appellate counsel on this same basis and we need not address this claim further.

¶ 12 In Proposition II, Davis claims trial counsel was ineffective for failing to present scientific evidence and supporting witness statements to show Davis did not knowingly and intelligently waive his rights to remain silent and to counsel. He further claims appellate counsel was ineffective for failing to raise on direct appeal a claim of ineffective assistance of trial counsel on this same basis. As discussed in Proposition I, we will consider Davis's claim of ineffective assistance of trial counsel on the merits on post-conviction and no longer apply a procedural bar where trial and appellate counsel were the same.

¶ 13 The record shows defense counsel filed a motion to suppress Davis's November 4th and November 6th statements to the police, arguing that the effects of the medication administered to him on the days of the interview prevented Davis from fully understanding his rights and knowingly and voluntarily waiving them. [FN4] The issue was litigated in a *Jackson v. Denno* [FN5] hearing prior to trial and the trial court found that Davis's waiver of rights was not involuntary as a matter of law. Appellate counsel on direct appeal challenged the trial court's ruling and admission of Davis's statements at trial. We held that the evidence supported the trial court's ruling and that the trial court did not err in admitting Davis's statements. *Davis,* 2004 OK CR 36, ¶ 35, 103 P.3d at 80-81.

FN4. Davis did not confess in his November 4th interview; rather, he claimed he could not remember anything. *See Davis,* 2004 OK CR 36, ¶ 37, 103 P.3d at 81.

FN5. *Jackson v. Denno,* 378 U.S. 368, 380, 84 S.Ct. 1774, 1783, 12 L.Ed.2d 908 (1964) established a defendant's right to an *in camera* hearing on the voluntariness of his confession.

[9] ¶ 14 Davis now claims that his medical records, his expert's report and affidavits of his family members contained in the appendices to his application compel a finding that his waiver of rights was involuntary and that trial counsel was ineffective for not presenting this evidence. *See* Appendices 4 through 15. We disagree and find that he cannot prevail on his ineffective assistance of trial counsel claim. The material neither leads to a conclusion that the trial court's ruling would have been different had counsel presented the information to the court nor that the outcome of his trial would have been different had the information been presented to the jury. At best, the medical records and expert's report show there was a "potential for impairment" from the medications Davis received. The affidavits concerning Davis's clarity were refuted not only by the detectives who interviewed Davis, but by his own medical records. [FN6] *See* Appendix 6 (Nov. 4th ***248** "Nurses Notes" state that Davis was answering questions appropriately and following commands shortly after his interview on November 4th.) We find trial counsel was not ineffective on this ground.

FN6. All but one of the affidavits address Davis's

clarity on November 4th when Davis did not confess, but only claimed he could not remember what had happened.

¶ 15 In Proposition III, Davis claims trial and appellate counsel were ineffective for failing to object at trial and argue on direct appeal that the trial court's findings following the *Jackson v. Denno* hearing did not comport with constitutional requirements and denied Davis due process. Davis argues the trial court did not make the necessary factual findings as required by *Jackson v. Denno, supra,* and *Sims v. Georgia,* 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967).

[10] ¶ 16 As noted above, trial counsel filed a motion to suppress Davis's statements to police. The trial court held a *Jackson v. Denno* hearing and found, after reviewing the totality of the circumstances, that the statements were not involuntary as a matter of law. Stated in the positive, the trial court found that the statements were voluntary and admissible. [FN7] Trial judges need not make formal findings of fact or write opinions concerning their rulings on the voluntariness of a defendant's confession. *Sims,* 385 U.S. at 544, 87 S.Ct. at 643. The only requirement is that a finding that a confession is voluntary appear in the record with "unmistakable clarity." *Id.* Davis's contention that the trial court should have made specific findings of fact concerning the voluntariness of Davis's statement is ill-founded because such a finding was implicit in the court's decision that the confession was voluntary. The trial court's ruling here satisfied the requirements of *Jackson* and *Sims. See Chatham v. State,* 1986 OK CR 2, ¶ 5, 712 P.2d 69, 71; *Fogle v. State,* 1985 OK CR 50, ¶ 5, 700 P.2d 208, 210; *Harger v. State,* 1983 OK CR 30, ¶ 11, 665 P.2d 827, 830. Because the trial court's ruling complied with *Jackson* and *Sims,* Davis cannot show that trial and appellate counsel were ineffective in failing to challenge the ruling on this basis. We find no ineffectiveness of trial or appellate counsel on this ground.

FN7. This Court reviewed the record on direct appeal and found that the evidence supported a finding that Davis knowingly waived his rights and that his statements were voluntary and admissible. *Davis,* 2004 OK CR 36, ¶ 35, 103 P.3d at 80-81.

[11][12] ¶ 17 In Proposition IV, Davis claims trial and appellate counsel were ineffective for failing to argue that Davis was denied a fair trial due to the admission of Davis's statements given while he was injured and under the influence of medication administered as part of his medical treatment. While this claim was not raised in this exact manner below, the substance of the claim was litigated both at trial by trial counsel and on direct appeal by appellate counsel. As we stated in *Turrentine v. State,* 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989, "[t]hat post-conviction counsel raises the claims in a different posture than that raised on direct appeal is not grounds for reasserting the claims under the guise of ineffective assistance of appellate counsel. The doctrine of *res judicata* does not allow the subdividing of an issue as a vehicle to relitigate at a different stage of the appellate process." Because this claim was raised and decided on direct appeal, it is barred by *res judicata.*

¶ 18 In Proposition V, Davis claims the cumulative impact of the errors identified in the preceding propositions renders the result of his trial unreliable. We have reviewed each of Davis's claims and found that he has failed to meet his burden to show he is entitled to relief under the Capital Post Conviction Procedure Act. Consequently, when these alleged errors are considered cumulatively, they do not require relief.

¶ 19 We turn finally to Davis's motions for an evidentiary hearing, discovery and supplementation of the record. [FN8] A post-conviction applicant is not entitled to an evidentiary ***249** hearing unless "the application for hearing and affidavits ... contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2005). Davis has failed to make this clear and convincing showing or to overcome the presumption of regularity both in his post-conviction application and appendices and his motion for evidentiary hearing. As for Davis's discovery request, he has failed to show this Court why additional discovery is necessary and has failed to overcome the presumption of regularity. Rule 9.7(D)(3), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2005). His requests for an evidentiary hearing and discovery

are denied.

FN8. Davis requests this Court to issue an order supplementing the record with the material contained in the appendices filed with the verified application. Rule 9.7(D), *Rules of the Court of Criminal Appeals,* Title 22, Ch. 18, App. (2005), provides that the record on capital post-conviction consists of the original application and any affidavits and material filed along with the original application. Because the material contained in the appendices is part of the record, there is no need to issue an order supplementing the record. The request is DENIED.

DECISION

¶ 20 After reviewing Davis's application for post-conviction relief and motion for evidentiary hearing and discovery, we conclude: (1) there exist no controverted, previously unresolved factual issues material to the legality of Davis's confinement; (2) Davis's grounds for review which are properly presented have no merit or are barred by *res judicata;* and (3) the Capital Post-Conviction Procedure Act warrants no relief. Accordingly, Davis's Application for Post-Conviction Relief and Motion for Evidentiary Hearing and Discovery are DENIED. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2005), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

CHAPEL, P.J. and LEWIS, J.: concur.

C. JOHNSON, J.: specially concur.

LUMPKIN, V.P.J.: concur in part/dissent in part.

LUMPKIN, P.J.: concur in part, dissent in part.

¶ 1 Unfortunately, the Oklahoma Legislature provided little or no insight into the reason(s) why it suddenly amended the Capital Post-Conviction Act in 2004 to state that "[a]ll claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court." While I agree the focus of the Opinion is correct when it states this language "implicitly overruled" the approach adopted by this Court in *Walker v. State,* 1997 OK CR 3, 933 P.2d 327, concerning the method of analyzing ineffective assistance of counsel claims, I believe the Opinion paints with too broad a brush in applying the limited purpose of the language.

¶ 2 It seems to me that the Legislature's only intent was to do away with the *Walker* method of reviewing post-conviction ineffective assistance claims. Therefore, I am inclined to agree with the Opinion to the extent it holds, in regards to post-conviction claims of ineffective assistance of trial counsel, that this Court should apply the procedure required by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). But I believe it goes too far when it states we will "no longer apply a procedural bar when appellate counsel and trial counsel were the same."

¶ 3 The Opinion reads too broadly on this point. That is, the Opinion suggests, whether intentionally or not, that this Court can no longer set its own rules and procedures for reviewing post-conviction ineffective assistance of counsel claims arising from the direct appeal, but must simply defer to the United States Supreme Court. Insofar as the Opinion takes that position or interprets the statute in that manner, I dissent. *See Behrens v. Patterson,* 1997 OK CR 76, ¶ 3, 952 P.2d 990, 991 (finding the Supreme Court's application or interpretation of a federal rule of appellate procedure "is not controlling as to the construction, application, or interpretation of any Oklahoma rule of appellate procedure").

¶ 4 I do not believe either the language of the statutory amendment or the intent of the Legislature was to make sweeping changes in the way this Court does business to the extent the opinion advises. Indeed, the Supreme Court has recognized a State's authority to establish and apply procedural waiver ***250** rules on this very issue. *See Stewart v. Smith,* 536 U.S. 856, 122 S.Ct. 2578, 153 L.Ed.2d 762 (2002) (disallowing federal habeas review of a state procedural rule that is independent of federal law). Thus, it appears to me the statutory amendment is nothing more than a confirmation of the analysis in my *Walker* dissent, which focused on the fact that *Strickland* should be our guide for reviewing ineffective assistance of counsel claims, not the newly formulated *Walker* process.

¶ 5 I find it reasonable and appropriate to restrict this new statutory language to exactly that. Our other rules regarding how and when we will accept and rule on ineffective assistance of counsel claims do not need to be "federalized." Oklahoma can and

should retain our tried and proven procedures of review, while applying *Strickland,* just as we did prior to *Walker*. But I cannot join in a wholesale relinquishment of the authority held by the State of Oklahoma and this Court to set our own rules and procedure. It is the responsibility of the judges of this Court to preserve the rights of the State of Oklahoma to establish and administer its rules of procedure, not relinquish those rights.

C. JOHNSON, JUDGE, specially concurring.

¶ 1 I specially concur in the well-reasoned decision by the Court. I personally have a problem with the application of procedural bar, and the use of such terms as "procedural bar," "bar" and "waiver," which strictly prohibit consideration of legal issues raised on appeal. I am troubled by the use of these procedural rules which keep this Court from reviewing potentially meritorious claims involving factual innocence, and ineffective assistance of counsel when counsel at trial and on appeal are the same or counsel on appeal and post-conviction counsel are the same.

¶ 2 I recognize that a criminal defendant is entitled to a fair trial--not a perfect trial. *Lahey v. State,* 1987 OK CR 188, ¶ 29, 742 P.2d 581, 585. A fair trial requires effective assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984)("In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.") This Court has a responsibility under the separation of powers doctrine to review ineffective assistance of counsel claims or other matters raised on appeal, even where the legislature seemingly has precluded review of those claims by legislating what power this Court may exercise.

123 P.3d 243, 2005 OK CR 21

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