

# **Exhibit F**

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1 DOCTOR DONALD TRAHAN,  
2 having been first duly sworn, testified on his oath as  
3 follows:

4 THE COURT: Thank you, sir.

5 If you'd come up here, Doctor Trahan.

6 MR. CONERLY: Your Honor, the State would  
7 invoke the rule at this time.

8 THE COURT: Do you have anymore witnesses  
9 Mr. Delee?

10 MR. DELEE: I was anticipating another  
11 one, your Honor, but I don't see her in the courtroom;  
12 so, at this time I guess not.

13 THE COURT: Would you pay attention and if  
14 your witness should show up, tell me so I can swear her.

15 (RULE INVOKED)

16 THE COURT: Go ahead with your questions  
17 for Doctor Trahan.

18  
19 DIRECT EXAMINATION

20 BY MR. DELEE:

21 A State your name for the Court, please?

22 A My name is Donald Edward Trahan.

23 Q And Mr. Trahan, what is your occupation?

24 A I'm a neurpsychologist.

25 Q Okay. And, what type of or how much education

3           1     do you have to have and how much practical experience  
2           2     must you have before you can be classed as a  
3           3     neuropsychologist?

4           A     Well, the basic degree is a Ph.D in psychology.  
5           6     And beyond that, typically, two to three additional years  
6           7     of post-doctoral training are required to become eligible  
7           8     for Board Certification. One then takes the Board  
8           9     Certification Examination to become credentialed as a  
9           neuropsychologist.

10          Q     And is that - is that different from a clinical  
11          psychologist?

12          A     A clinical psychologist has a Ph.D in  
13          psychology and a generic license to practice psychology.  
14          They may or may not have any specialty training in  
15          neuropsychology and upon completion of those basic  
16          degrees would not be eligible for the Boards in  
17          neuropsychology.

18          Q     Are you Board Certified then in  
19          neuropsychology?

20          A     Yes, I am.

21          Q     Are you Board Certified in any other field of  
22          psychology or mental health?

23          A     No, I am not.

24          Q     How many years experience have you had as a  
25          neuropsychologist?

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1 A I've been working full time as a  
2 neuropsychologist since 1982. So, that would give me  
3 approximately twenty-two years of experience in this  
4 subspecialty. I had worked previously for about four  
5 years as a general clinical psychologist.

6 THE COURT: Excuse me, Mr. Delee, I'm told  
7 your witness is in the hall.

8 MR. DELEE: Thank you, your Honor.

9 THE COURT: Go ahead.

10 Q (By Mr. Delee) Did you finish your answer?

11 A Yes, I did.

12 Q Okay. Doctor, as a neuropsychologist, do you  
13 understand the criteria, I guess, for mental retardation?

14 A Yes, I do.

15 Q Would you inform the Court as to what that is,  
16 please.

17 A Yes. And those guidelines have actually been  
18 applicable for many years. The State laws are just now  
19 catching up to formally endorsing them, but there's three  
20 criteria:

21 The first is that one must exhibit what is  
22 called significant impairment on a standardized measure  
23 of intellectual ability. Significant impairment  
24 generally refers to scores that are around 70 or below;  
25 however, because of the measurement error of the tests,

3 1 scores of 75 and lower are considered to be within the  
2 general range that we would consider.

3 The second criteria is that one must exhibit  
4 significant deficits and adaptive behavior skills.

5 The third criteria traditionally has been that  
6 these deficits must have occurred during the  
7 developmental phase historically that has been considered  
8 to be a fifteen and younger; although, recent guidelines  
9 have changed that to age eighteen, which is the current  
10 standard.

11 Q All right. Now, approximately how many people  
12 over the years have you seen and evaluated concerning  
13 mental retardation?

14 A Well, I've seen probably close to ten thousand  
15 patients who were referred to me for cognitive disorders  
16 of one type or another, both developmental and required.  
17 Probably five hundred of those cases involved questions  
18 of mental retardation specifically.

19 Q Okay. Are you familiar with the tests or I'm  
20 sure you're familiar with the tests that are given in  
21 determining mental retardation or in determining  
22 intellectual quotients or I.Q.'s?

23 A Quite a number.

24 Q And have you administered these tests yourself?

25 A Yes, I have.

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3           1           Q     And how many tests would you say that you've  
2           administered in all?

4           3           A     Well, between the Wechsler Adult Intelligence  
5           Scales and the Wechsler Scales for Children and  
6           Stanford-Binet, in excess of ten thousand tests over the  
7           last twenty-six years.

8           Q     Doctor, have you also written articles  
9           concerning this and other fields of psychology?

10          A     I have published or presented in excess of  
11          seventy-five or eighty articles pertaining to various  
12          areas of neuropsychology and cognitive development.

13          Q     What specialty would be most appropriately  
14          associated with determining mental retardation?

15          A     Well, psychologist in general deal frequently  
16          with issues of mental retardation. Some clinical  
17          psychologist may specialize in working with mentally  
18          retarded individuals. Most of the neuropsychologist that  
19          I know are routinely involved in evaluating children and  
20          adults of mental retardation.

21          Q     You say mostly that you know. How about  
22          yourself, Doctor, are you - is that your practice, also?

23          A     Many of the people referred to me are referred  
24          for purposes of mental retardation assessment.

25          Q     Now, you have prepared for court appearances a  
26          thing called Curriculum Vitae; have you not?

4

1 A Yes, I have.

2 Q And would you break - briefly explain what that  
3 is, please, sir? I think in criminal courts we don't run  
4 across that too often.

5 A Well, that's just a standard part of what we  
6 keep in our records. Curriculum Vitae basically is a  
7 paper that includes the summary of our educational  
8 background, our clinical experience, the professional  
9 organizations and activities that we're involved in and  
10 any publications and research that we may have pursued  
11 over the years.

12 Q In other words, your qualifications?

13 A Yes, sir.

14 Q Doctor --

15 MR. DELEE: Your Honor, at this time I  
16 would ask that the Curriculum Vitae of Doctor Trahan be  
17 included in the papers of the Court and the papers of the  
18 case so the Court can consider those as --

19 THE COURT: Show them to Mr. Conerly and  
20 they need to be marked.

21 MR. CONERLY: I've seen it. No objection.

22 THE COURT: Okay. You have to have them  
23 marked Mr. Delee.

24 MR. DELEE: I have it marked, your Honor.

25 THE COURT: It is Defendant Number 1A?

4

1 MR. DELEE: Yes, sir.

2 THE COURT: Okay. Defendant Number 1A is  
3 admitted.

4 Q (By Mr. Delee) I also would submit that Doctor  
5 Trahan is an expert in the field of mental retardation in  
6 clinical as well as neuropsychology.

7 THE COURT: Go on with your questions. I  
8 believe for me to confirm that -- I know there's a  
9 difference among Judges, but I think to confirm that  
10 would be a comment on the weight of the testimony. So,  
11 you're free to go ahead with your questions.

12 MR. DELEE: All right.

13 Q (By Mr. DeLee) Doctor Trahan, have you had an  
14 occasion to examine an individual by the name of Marvin  
15 Wilson?

16 A Yes, I have.

17 Q And, when did you do that, Doctor?

18 A That examination was conducted earlier this  
19 month.

20 Q Okay. And do you see Marvin Wilson present in  
21 the courtroom?

22 A Yes, I do.

23 Q And would you point him out for the record,  
24 please, sir?

25 A Yes, sir. He's sitting at the table here.



THE COURT: He's identified the Defendant.

MR. DELEE: Okay.

Q (By Mr. Delee) What kind - what tests did you administer on Marvin Wilson, Doctor?

A The actual tests that we administered are listed in the narrative report that I prepared. In that listing, the procedures is actually contained at the top of Page 6 and the tests per se included the Raven Standard Progressive Matrices, the Test of Nonverbal Intelligence, the Peabody Individual Achievement Test - Revised, the Wide Range Achievement Tests - 3rd Edition, a battery of Language Assessment Test, an Orientation Test as well as some visual memory that - Visual Test that included Verbal Selective Reminding Test, the Visual Reproduction Subtest and a Remote Memory Evaluation.

As part of the evaluation, we also had the opportunity to review previous documents containing other test scores that included a very recent testing on the Wechsler Adult Intelligence Scale, 3rd Edition that had been conducted by Doctor Curtis Wills.

We also had access to prior records of other test scores dating back to 1971 and 1972 time frame. All of those tests were included in my interpretive remarks and in the narrative.

Q Would you mind going over the individual tests

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4           1       and how Mr. Wilson scored on those tests and what they  
          2       mean?

          3           A       Okay. Starting with which one, the ones I  
          4       reviewed previously or the ones we actually administered.

          5           Q       The ones you actually administered and the ones  
          6       you reviewed.

5           7           A       All right. And, again, I just received the  
          8       WAIS-III result from Doctor Wills; so, we didn't give  
          9       that one again.

          10           The Raven Standard Progressive Matrices Test is  
          11       a test that's been around for several decades now and  
          12       it's a measure of nonverbal intellectual ability,  
          13       particularly useful for individuals who have limited  
          14       verbal skills especially in reading and writing. Many of  
          15       the more comprehensive measures rely heavily on  
          16       developing the individuals penalized significantly by not  
          17       being able to verbalize properly.

          18           The Test of Nonverbal Intelligence is similar  
          19       to Raven and in that it does not rely on any kind of  
          20       language response. The Test of Nonverbal Intelligence  
          21       and various forms also have been around for several  
          22       decades.

          23           The Achievement Test that we administered are  
          24       all well recognized standardized measures of achievement  
          25       that have been around for many years. They're widely

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1 used in our field.

2 The Peabody Individual Achievement Test -  
3 Revised is a comprehensive measure of the reading,  
4 writing, math and spelling skills.

5 The Wide Range Achievement Test also is very  
6 widely used and includes measures of reading, spelling  
7 and writing.

8 The Language Assessment Battery that we did is  
9 a broad range of tests that are actually taken from three  
10 different standardized test batteries including the  
11 Boston Diagnostic Aphasia Examination, one called the  
12 Neurosensory Center Examination for Aphasia and one  
13 called the Multi-Lingual Aphasia Examination.

14 Those particular tests are designed to look at  
15 one's ability to express oneself in both in speech as  
16 well as in writing, as well as the ability to comprehend  
17 language, both in terms of what is said verbally to one,  
18 as well as, reading comprehension.

19 The other tests that we administered involving  
20 orientation and memory, are looking at different aspects  
21 of memory. Actually the Remote Recall Evaluation entails  
22 looking at how well a person can recall past life events  
23 whereas the Selective Reminding Test and the Visual  
24 Reproduction Subtest are more involved with assessing the  
25 capacity to learn new information.

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5           1           Q       And how did Mr. Wilson score on these tests and  
2       what do the scores mean?

3           A       Well, his scores varied from test to test. And  
4       again, my summary includes, not only those test that I  
5       administered, but also very recent tests that had been  
6       done by Doctor Wills on which he had earned a full scale  
7       I.Q. of 61 on the WAIS-III.

8                   On the testing that we repeated, during my  
9       assessment on the Raven, he earned a standard 475, which  
10      places him about the fifth percentile when we don't  
11      consider a measurement error.

12                  On the TONI-II, he scored a little bit higher,  
13      79. That test traditionally produces scores that are ten  
14      or fifteen points higher than the WAIS; so, that wasn't  
15      unexpected.

16                  The test that involved language; basically,  
17      revealed that he does a good job in basic communication.  
18      If you sit and talk with him about information that he  
19      knows from his past, he converses very well.

20                  Functional communication skills are quite  
21      adequate; however, he has very severe limitations in  
22      terms of his ability to read and understand, performance  
23      is basically at a 1st or 2nd grade level in those types  
24      of measures.

25                  He also has very significant deficits in terms

5        1        of his writing skills. On writing information that he's  
2        2        not familiar with, such as his own name, his writing  
3        3        skills are at about 2nd grade level overall.

4                So, those were the results from the achievement  
5        5        and the regional language measures.

6                The Assessment of Memory Functioning revealed  
7        7        variable performance with the best scores on Visual  
8        8        Memory, those are only in the borderline range. He  
9        9        performed more poorly on the Verbal Learning Measure with  
10      10      scores in the mildly to moderately impaired range.

11              Q        Doctor, other than the tests that you  
12      12      administered, what other tests did you consider or  
13      13      results of tests that you knew about?

14              A        Well, we reviewed everything that we had access  
15      15      to and I don't know if additional testing has been done  
16      16      or not.

17              His school records, which we were able to  
18      18      review in detail, made reference to Mr. Wilson having  
19      19      been tested with the Lorge - spelled L-o-r-g-e Thorndike  
20      20      Test of Intellectual Ability, this was performed during  
21      21      1971, 1972 school year. That particular measure is one  
22      22      that is similar to the Wechsler Scales in that it  
23      23      contains eight or nine different subtest depending on the  
24      24      version with both verbal and nonverbal tasks included.  
25      25      At that time he earned an I.Q. score of 73, which, again

6           1       within measurement error will either fall in a mildly  
2           2       retarded range or the borderline normal range.

3           3       The other test that we saw in reference to --  
4           4       And I don't have the specifics of this was one that was  
5           5       administered by - while he was in custody at the Texas  
6           6       Department of Criminal Justice. I believe that test was  
7           7       conducted sometime around 1987 time frame. The records  
8           8       just make reference to an I.Q. of 75. It does not  
9           9       mention the test. So, it's difficult for me to speculate  
10          10      further about the - that particular testing occasion.

11          11      We also had the opportunity to review  
12          12      performance records from when he was enrolled in the  
13          13      Windham School, which is a trade school. Performance  
14          14      there again was very much sub-average, and even though he  
15          15      completed six hundred plus hours of schooling, did not  
16          16      receive credit for having completed the certification and  
17          17      trade. Rating was very low overall on that testing; so,  
18          18      those are the past scores that we had access to.

19          19      Q     And what else -- Did you use any other sources  
20          20      in making your determinations concerning his I.Q?

21          21      A     Well, those are basically the test scores we  
22          22      looked at. Now, there was a lot of other information  
23          23      that we reviewed. We had affidavits from a number of  
24          24      different key family members and friends that we were  
25          25      able to review. I also was able to speak with the

6 1 grandmother of his son, Ms. Teno, to obtain additional  
2 life information from her.

3 We also conducted an extensive interview of Mr.  
4 Wilson himself, with regard to his own life history and  
5 developmental abilities. And by using the data from all  
6 of those sources, we were able to complete the Vineland  
7 Adaptive Behavior Skill, which is the formal measure of  
8 adaptive behavior that we use to determine whether a  
9 person meets the second criteria for mental retardation;  
10 that being, deficient adaptive behavior skill.

11 Q And did you -- I believe you mentioned you  
12 included a test that Doctor Wills had conducted; is that  
13 correct?

14 A That is correct. Normally when we review these  
15 evaluations the Wechsler Adult Intelligence Scale - 3rd  
16 Edition with the standard part of our assessment for  
17 people in this age range. However, Doctor Wills had just  
18 seen him a week or two before we got the notice to do  
19 this evaluation and it made no sense at all to repeat  
20 that and risk impractical effects entering the picture.  
21 Doctor Wills in my opinion is very well-respected and  
22 knowledgeable psychologist and I would trust his results  
23 on that.

24 Q What was that score?

25 A His full scale I.Q. on the WAIS-III was 61,

6

1 which places him in the mildly retarded range and  
2 actually below the first percentile when compared with  
3 other people his age.

4 Q What about the Adaptive Behavior?

5 A Well, the Adaptive Behavior, that score on the  
6 Vineland was well within retarded range. His composite  
7 score was actually 44, a bit lower than I had perhaps  
8 initially thought, but they're - like many people with  
9 mild retardation, their scores in various subdomains vary  
10 considerably, but the criteria for diagnosing significant  
11 deficit and adaptive behavior is that they either have to  
12 have deficient scores in one key area of adaptive  
13 behavior or on the composite score as a whole and he met  
14 the criteria in both of those areas.

15 Q Okay. And when did you consider determining  
16 whether this occurred prior to age eighteen?

17 A Well, the documentation that we have would  
18 suggest that these deficits went all the way back to  
19 early childhood. Not having access to - being able to  
20 interview his parents, I can't tell you whether they  
21 become noticeable at age two or three or five, but at  
22 least by the age of ten or so he was having clearly  
23 noticeable deficits. So, my understanding from the  
24 records I reviewed is that he was actually in special  
25 education classes throughout these years in school.

7

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7           1           Q     And I believe you stated that he scored 61 in  
2           the Wechsler Test?

3           A     That's correct.

4           Q     Is that considered to be mentally retarded in  
5           that particular area?

6           A     That is considered to fall within the mildly  
7           mentally retarded range.

8           Q     And the - the Vineland Test was also in the  
9           mildly retarded range?

10          A     The Vineland scores range from mildly to  
11          moderately impaired across the different domains of the  
12          test measures. The composite score actually fell within  
13          the moderately impaired range.

14          Q     And whether or not all of this occurred before  
15          the age of eighteen, you base that opinion on testimony  
16          and affidavits and things like that; is that correct?

17          A     And actual school records, as well as the  
18          affidavits I reviewed and the testimony of other family  
19          members.

20          Q     And, do they indicate whether he was mentally  
21          retarded or not?

22          A     Well, consistently, everyone has expressed the  
23          opinion that he was a very slow learner and exhibited  
24          multiple behavior consistent with mild retardation.

25          Q     Well, then, Doctor, based upon your tests and

7           1     your observation then, in thousands of cases that you've  
          2     had - evaluated over the years, would you say that Mr.  
          3     Wilson is mentally retarded or not mentally retarded?

          4           A     In my opinion, based on the sum of all  
          5     information I received, it's my opinion that he meets the  
          6     criteria for diagnoses of mild mental retardation.

          7                   MR. DELEE: May I approach the witness,  
          8     your Honor.

          9                   THE COURT: Yes, sir.

         10           Q     (By Mr. Delee) I'm going to show you what I've  
         11     marked as exhibits 2A and 3A: (indicating)

         12                   And ask if you can identify those, Doctor?

         13           A     Exhibit 2A is the initial narrative summary  
         14     that I prepared, that's July the 6th of 2004. This  
         15     document I believe is twelve pages long. This represents  
         16     my overall impression. At the time I prepared that  
         17     report I was still trying to collect collateral  
         18     information from additional family members or members in  
         19     addition to those that are reported in here. In order to  
         20     obtain additional information about completing items on  
         21     the Vineland, the second document here, Exhibit 3A is the  
         22     addendum that I produced which specifically addresses the  
         23     adaptive behavior as reflected in performance on the  
         24     Vineland Adaptive Behavior Skill.

         25                   MR. DELEE: Your Honor, at this time, I

7           1       would ask that these be introduced into evidence in favor  
2           2       of the case.

3                       THE COURT: Mr. Conerly.

4                       MR. CONERLY: Your Honor, I would object  
5           5       on the basis of hearsay, not within an exception, and  
6           6       specifically as to Defense Number 2A, included within  
7           7       there quotes from these hearsay affidavits and even an  
8           8       affidavit saying someone told me something. He includes  
9           9       those as though they are part of his report and so I  
10          10       object at that point.

11                      THE COURT: Overruled. 2A and 3A are  
12          12       admitted and I'll take that into consideration reviewing  
13          13       the exhibits.

14                      MR. DELEE: Thank you, your Honor.

15                      At this time I pass the witness.

16                      THE COURT: Mr. Conerly.

17                      MR. CONERLY: Thank you, your Honor.

18

19                               CROSS-EXAMINATION

20       BY MR. CONERLY:

21           Q       Doctor Trahan, I'm Rod Conerly and we just  
22          22       briefly met this morning. I'm an Assistant Criminal  
23          23       District Attorney for Jefferson County.

24                      What is your -- What is your personal opinion  
25          25       of the death penalty?

7

1           A     I don't - have never expressed a personal  
2     opinion about it. I'm just here to testify about the  
3     mental retardation, not to address the rightness or  
4     wrongness of the death penalty.

5           Q     Well, whether you've addressed it or not or  
6     spoken about it, you're bound to have an opinion about  
7     it. What is your opinion of it?

8           A     Regarding the effectiveness, whether it's a  
9     deterrent or whether it's right or wrong morally?

10          Q     Well, do you have a strong feeling that it's  
11     wrong morally?

12          A     No.

13          Q     No?

14          A     Certainly don't.

15          Q     What is your opinion?

16          A     I think it's an appropriate punishment in  
17     severe cases such as those involving capital murder.

18          Q     Have you ever written any articles on the death  
19     penalty?

20          A     No, I have not.

21          Q     Have you ever protested the death penalty?

22          A     No, I have not.

23          Q     I want to look at your assessment here and your  
24     report that has been admitted. And I want to do a little  
25     sort of a test like you. We've got some criteria of

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7       1       intelligence quotient listed. The numbers are 73, 75,  
2       75, 79, 61.

3           A       Uh-huh.

4           Q       Which one of those scores doesn't fit?

5           A       The one I'm --

6                   THE COURT: Mr. Delee, why don't you have  
7       a seat. Mr. Conerly - it's not your fault. Could you  
8       move that over a little bit.

9                   MR. CONERLY: Which way, Judge?

8       10           THE COURT: Towards this way. There you  
11       go. Thank you very much. I'm sorry.

12                   Go ahead.

13           A       You want me to answer which one doesn't fit in  
14       with the others?

15           Q       (By Mr. Conerly) Yes.

16           A       Or which one I think is most accurate?

17           Q       Well, which one doesn't fit in the - in that  
18       group of numbers?

19           A       The Wechsler Adult Intelligence Scale is lower  
20       than the others.

21           Q       Actually, it's the 61?

22           A       That's correct.

23           Q       The 61 sort of jumps out at you; doesn't it, as  
24       just being totally off?

25           A       Not in my opinion.

8           1           Q     Well, in your opinion and in your experience,  
2           when you have a test that is almost one standard  
3           deviation low; don't you throw it out?

4           A     Absolutely not. In fact, in - frequently in  
5           cases like this, we would administer multiple measures of  
6           ability. And as I testified previously, it's not at all  
7           uncommon to see scores, for example, on the TONI-II that  
8           are ten or fifteen points higher than the WAIS, but  
9           there's a large body of research demonstrating that the  
10          WAIS by and away is the most reliable and valid measure  
11          of intellectual ability in adults. So, if I get  
12          discrepant scores, it would be the others that I would be  
13          more likely to throw out than the WAIS score.

14          Q     Are you saying then that Doctor Wills is a  
15          better tester than you are?

16          A     No. I'm saying he used different measures than  
17          we did. We would have also given the WAIS-III if it had  
18          just not been done.

19          Q     And the reason you didn't give the WAIS was  
20          because you were afraid of the practice effect and the  
21          score might have been too high?

22          A     Practice effect is an issue when you retest  
23          someone on the same procedure within a very short period  
24          of time.

25          Q     And, in your field, you obviously must have to

8           1       assume a number of things. You must have to assume that  
2       people who gave earlier test did it appropriately; am I  
3       correct? Wills is a better tester than you are?

4           A       We would normally assume that unless we have  
5       reason to believe otherwise.

6           Q       All right. Now, you're assuming -- I believe  
7       you're assuming -- Tell me if I'm wrong: The Wechsler  
8       Test administered by Doctor Wills was accurately and  
9       appropriately given?

10          A       I'm making that assumption at this point  
11       because I have no reason to believe otherwise.

12          Q       And why do you give that assumption? Why do  
13       you give it validity?

14          A       The test, itself or Doctor Wills'  
15       administration of it?

16          Q       The administration of this specific test, not  
17       the Wechsler?

18          A       Doctor Wills is very well-respected and  
19       well-trained psychologist. He's been doing this for many  
20       years and I know him personally and trust his ability to  
21       conduct those kinds of procedures in a valid fashion.

22          Q       So, based on the fact that Doctor Wills gave  
23       this test, you give it validity. Do you know anything  
24       about where the test was given?

25          A       That information is not available to me right

8

1 now.

2 Q Did you look at the test?

3 A Yes, I did. I looked at some of the scores and  
4 face sheet. I don't have actually the items from the  
5 tests.

6 Q Isn't that very important, on a test regarding  
7 I.Q. to - for the tester to make notes about the  
8 motivation, the surrounding, the attentiveness,  
9 cooperativeness of the person being tested?

10 A I normally do those things in each case.

11 Q Isn't that very important to the validity of  
12 the test?

13 A I would consider that to be which is why I  
14 addressed those in my report.

15 Q Did you look at the notes on this particular  
16 Wechsler Test?

17 A I don't have Doctor Wills' personal notes on  
18 that.

19 Q Okay. Would it surprise you and would it make  
20 a difference to you that Doctor Wills didn't give that  
21 test?

22 A He may have actually had someone in his office  
23 assist with the admission of that. I don't have -- I  
24 haven't spoken personally with Doctor Wills.

25 Q But would that surprise you?



8

1 A Those things are done fairly commonly.

2 Q But I thought you just told us that the  
3 validity of the test, you gave it because Doctor Wills is  
4 a well-known, respected psychologist who's been doing it  
5 for a long time?

6 A In each of those cases they're individually  
7 supervised by Doctor Wills even when he doesn't  
8 personally administer every item of the test.

9 Q Do you know who August Wehner is?

10 A No, I don't. I don't know the person  
11 personally.

12 Q Would it surprise you to know that he gave the  
13 test - a student?

14 A No. I don't know. I haven't spoken with  
15 Doctor Wills personally about it.

16 Q Would it surprise you to know that there's not  
17 a single note about motivation, the surroundings, the  
18 circumstance on the test?

19 A Again, I have not been provided individual  
20 notes with regard to the observations that were made  
21 during that testing session.

22 Q The Wechsler Test, would you agree with me,  
23 that it is subjectively graded?

24 A It's not suppose to be subjectively graded.  
25 It's suppose to be objectively graded in accordance with

9

9           1       the criteria listed in the test manual.

2           Q       I understand. But, would you agree with me  
3       that on several portions of the test, the score would be  
4       0, 1 or 2?

5           A       That is correct.

6           Q       And that goes by the person giving the test;  
7       right?

8           A       Those scores of 0, 1 or 2 are based on specific  
9       criteria listed in the test manual. And the data has  
10       shown that the iterate of reliability on scoring is very  
11       high for these three items.

12          Q       Also, a interesting part about the Wechsler is:  
13       When a person - depending on the section of the test -  
14       when a person has gotten so many zeros in a row, they  
15       stop the test?

16          A       That is correct on some of the sections anyway.

17          Q       So, if a person taking the test gave an answer  
18       that the tester didn't like and gave a 0 and he gets in  
19       this particular section, say he gets four more of those,  
20       the test is over for that section whereas if the tester  
21       had given him a 1, he may go down to another word he knew  
22       and it may affect the score how many points; five, six  
23       points?

24          A       Well, all - within those sections where there  
25       are criteria - discontinuation criteria like that, the

9 1 items are always rank ordered in terms of difficulty. So  
2 as you progress through the subtest the items become more  
3 and more difficult. The premise here is that once one  
4 has obtained four or five, six items of 0 in a row, the  
5 likelihood of them getting items further on would be very  
6 low. And that is the way the standardization was done.  
7 So, it has to be done exactly the same way when  
8 individuals are being tested.

9 Q This test has been admitted into evidence. I  
10 don't know if you'd had an opportunity to see it. Let me  
11 ask you a question.

12 THE COURT: Are you speaking of Doctor  
13 Wills' test?

14 MR. CONERLY: Yes. The last test, your  
15 Honor.

16 Q (By Mr. Conerly) Certain -- And I don't know  
17 what the test is about, but there's obviously a question  
18 and a written answer on the other side. And the question  
19 Number 9, you made be familiar with - may be  
20 standardized. The question is: "Terminate". And the  
21 answer was: "Do away with".

22 A Okay.

23 Q And the comment was: "Very hesitant".

24 A Okay.

25 Q Do you understand that we're talking about a

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9           1     case where a person was terminated. In this fact  
2           2     situation, a snitch was terminated. Are you familiar  
3           3     with the facts of this case?

4           4     A     Yes, I am.

5           5     Q     Okay. The Question was: "Terminate". The  
6           6     Answer was: "Do away with".

7                     MR. CONERLY: Judge, I'm on Page 2 of the  
8           8     test, Number 9.

9                     THE COURT: Yes, sir. Thank you.

10          10     Q     (By Mr. Conerly) What kind of score would you  
11          11     give that if you were giving the test?

12          12     A     That's a borderline answer. And you're suppose  
13          13     to ask for additional information because it's an  
14          14     ambiguous response. If you look in the test manual it  
15          15     will have a question mark listed by it and they give that  
16          16     to show you should ask for additional information. And  
17          17     then based on what additional information they give you,  
18          18     if he scored as a 0 on it or as a 1.

19          19     Q     And you would do that if you had twenty years  
20          20     of experience giving tests and you had given hundreds or  
21          21     like you said ten thousand tests you might know to do  
22          22     that?

23          23     A     Well, he should be doing that even if you're  
24          24     less experienced, but yes it's right in the manual, the  
25          25     question marks are all listed there for the various

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9

1 answers that are considered to be ambiguous.

2 Q Would -- Is the answer to the question,  
3 "Terminate: Do away with", that's ambiguous to you?

4 A Terminate means to stop or to finish basically.  
5 Do away with can mean different things. It could mean,  
6 throw something away in the garbage. It could mean do  
7 away with a individual in terminating their life. That's  
8 why it's ambiguous. So, you would ask you know, "What --  
9 Tell me more about what you mean by that." And if they  
10 said, "Oh, well, it means to throw something in the  
11 garbage", then it would be a 0 response. If they gave  
12 you a different response perhaps it could be a 1.

10

13 Q Another Question: "Sentence". This comes up a  
14 lot. "Sentence". The Answer: "Words, you know, like me  
15 and you talking right now. Talk to people in letters".

16 A Uh-huh.

17 Q Is that an ambiguous response or bad response  
18 or a 1 or a 2 or what would you give that?

19 A Well, for "Sentence" actually there are two  
20 correct definitions. One of them has to do with verbal  
21 definition having to do with expression of a complete  
22 thought that's containing a subject and verb and the  
23 other has to do with sentencing as in a punishment  
24 offered by the Court.

25 Could you read that specific one again and I'll

10

1 address the --

2 Q "Words, you know, like me and you talking right  
3 now. Talk to people in letters".

4 A That's pretty ambiguous and probably between a  
5 0 and a 1. As stated, I would certainly ask for more  
6 information.

7 Q But if it were a 1, it would certainly lead to  
8 more questions down the line whereas if it's a 0 and it's  
9 a row of six, the test is over. So, would you agree with  
10 me that the testing is subjective?

11 A The testing itself is not subjective. The  
12 testing is subject to error depending on whose  
13 administering it and scoring it, but the criteria for  
14 scoring it are actually fairly objective.

15 Q Let me ask you about the Number 14 on this list  
16 and ask you about your answer you're looking for. The  
17 Question is: "Ponder".

18 A Okay.

19 Q Do you have the answer -- And I'm not trying to  
20 trick you because there is a road - there is a town not  
21 far from T.D.C. called Ponder and Ponder called a city  
22 down the road is a correct answer depending on where you  
23 live and what culture you're in. But that probably  
24 wouldn't be one of your answers?

25 A And to someone - things like that do come up.

10

1 I mean people will give idiosyncratic responses to a  
2 particular item. In a proceeding - in a situation like  
3 that, if someone told me Ponder was the name of a town  
4 down the road, I would ask them to tell me a definition  
5 of the word, "Ponder" and then ask for their response to  
6 that.

7 Q How much difference in total I.Q. score would a  
8 few points in these sections -- I know the sections are  
9 different, but would a few points in each of these  
10 sections make?

11 A If he consistently obtained three or four more  
12 points in every section on the test, it might make a  
13 difference of a few points on the total I.Q. score. Very  
14 little overall.

15 Q Well, I think we've covered the -- Looking at  
16 this, there was one that just stood out to me and I don't  
17 see it now, but it was -- The Question was:  
18 "Thermometer" And the Answer was: "Temperature" and he  
19 got a 0?

20 A That is a 0 response because a thermometer  
21 isn't temperature. It's a measuring use - a device used  
22 to measure temperature.

23 Q He was asked a Question: "J.F.K. Jr." And he  
24 gave the Response: "Freedom fighter".

25 A Actually it's Martin Luther King, Jr.

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10           1           Q     M.L.K, I mean. What did I say, J.F.K? M.L.K.  
2           Jr. And he got a 0 for that.

3           A     That's correct because as I stated it's too  
4           ambiguous to really know whether that's a correct answer  
5           or not.

6           Q     You've made your determination of mental  
7           retardation based upon the Wechsler provided by Doctor  
8           Wills' Office and certain affidavits provided by family  
9           members and friends; is that correct?

10          A     That was part of the information. There were  
11          other things as well.

12          Q     Well, the other things were the school records  
13          where he did poorly in school; is to right?

14          A     That's one of the thing we reviewed.

15          Q     And, did you notice his attendance in school?

16          A     Towards the end it was pretty poor.

17          Q     Like all during school he --

18                   MR. CONERLY: And this has been admitted,  
19          your Honor, in the other case.

20                   THE COURT: Yes, sir.

21          Q     (By Mr. Conerly) All during school he - I  
22          think his best attendance was he missed 34 percent up to  
23          94 percent. Did you notice that in the records?

24          A     I don't have the specific figures. I do know  
25          there were regular problems with absenteeism.



10

1 Q Also, missing from the school records is any  
2 designation of mental retardation?

3 A That's in the records that I have. I never saw  
4 that specifically stated. I must state however that's  
5 probably true in about 90 percent of the Advent Records I  
6 reviewed even though I note that they're in special  
7 education. That often is not reflected anywhere in the  
8 transcripts or the grades reports. The only thing would  
9 probably show that is if you actually had an ARD Report  
10 produced where they would actually list the diagnosis.

11 Q And aren't ARD Reports made every year?

12 A Not when he was in school. They are now.

13 Q When did he get out of school? Didn't he go  
14 about ten years?

15 A He tells -- From what I've been able to find,  
16 around the 10th grade; yes.

17 Q And they didn't have ARD Reports when he got  
18 out of school?

19 A Well, not the same type of the ARD Reports that  
20 we have now. But we have umpteen meetings and formal  
21 reports that are generated.

22 Q Well, mental retardation is not a new idea. I  
23 mean, it's been around a long time.

24 A It's been around for a hundred years but school  
25 laws are just now catching up in a lot of respects to

11

1 some of the concepts.

2 Q And certainly there's a place on his school  
3 records to state why he's in special education and many  
4 times that's where they put mental retardation?

5 A I've reviewed hundreds and hundreds of school  
6 records over the years and I can tell you that in a small  
7 percentage of those records have I actual seen on a  
8 transcript like the type that we have or report card  
9 where they actually put mental retardation or learning  
10 disability or whatever. Occasionally, they will indicate  
11 that they're in special education. The documentation for  
12 that is usually in other school records which are often  
13 not kept for extended periods of time. So, years later  
14 when we go back to try to get them, all we have is a  
15 transcript or report card type of thing.

16 Q Well, the hundred - the thousands of cases that  
17 you're seeing maybe the people aren't mentally retarded.  
18 Maybe that's why they're not listed on the school  
19 records?

20 A Well, there are various reasons that people are  
21 in special education. Mental retardation is one,  
22 children with autistic disorders can be in special  
23 education, children with severe learning disabilities may  
24 be. So, there are various reasons that people could be  
25 in special education.

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1 Q Which leads me into the affidavits from the  
2 friends and families who talked about what you called  
3 behaviorial deficits - adaptive behaviorial deficits and  
4 you give credence to this piece of paper. I mean, you  
5 give it like it's the real thing - it's the facts. Did  
6 you take into consideration that these people are kin to  
7 this man and they're trying to help him?

8 A You know, having done a lot of these before, I  
9 always try to evaluate the validity of information that I  
10 have. But we have to -- We go with the best information.  
11 We have to in trying to assess adaptive behavior skills  
12 on a child who is younger is usually done by performing  
13 interviews with people who have known that person in the  
14 past. That is just one piece of the information that we  
15 use in arriving at our final conclusions.

16 Q How many personal interviews did you conduct?

17 A In addition to the one with Mr. Wilson, I also  
18 had the opportunity to interview Ms. Teno and we also had  
19 the opportunity to review the four affidavits from other  
20 family members.

21 Q So, the interview consisted of Ms. Teno who is  
22 Mr. Wilson's ex-mother-in-law?

23 A That's correct.

24 Q And the grandmother of his child?

25 A That's correct.

11           1           Q       Did you ask Ms. Teno if she knew the difference  
2                   between learning disability and mental retardation?

3           A       I was asking her mainly about what his adaptive  
4                   behavior skills and his functional capabilities. Rarely  
5                   do I get into discussing diagnostic differences with  
6                   patients because few of them understand those.

7           Q       When you say you reviewed the things that you  
8                   had access to, you mean the things that Mr. Delee,  
9                   Defense Counsel gave you?

10          A       Plus, what I was able to obtain myself. The  
11                  information that we have included; past medical records,  
12                  records from Beaumont Independent School District,  
13                  records in the Windham School District or school system,  
14                  which is part of the Department of Criminal Justice. We  
15                  also had, you know, the test scores that I mentioned to  
16                  you previously. We had four affidavits from the family  
17                  members. And information from our interview with Mr.  
18                  Wilson and information from my interview with Ms. Teno,  
19                  the observations and test scores that I obtained during  
20                  my evaluation. And my impressions are based on the sum  
21                  total of all of that information not just on one or two  
22                  pieces.

23          Q       Did you -- Did you view the facts of the case?

24          A       I have the papers that were submitted for the  
25                  Writ of Habeas Corpus which included a lot of the

11 1 information about what he's charged with and all of that.  
2 But I don't have all of the additional - all of the  
3 details about, you know, what happened at the time.

4 Q Did you seek any information from the D.A.'s  
5 Office?

6 A No, I haven't talked to the D.A.'s Office.

12 7 Q Did you talk with anyone other than a friend or  
8 family member of Mr. Wilson?

9 A The procedures I just listed to you are what we  
10 did. And all of the people that we knew are people who  
11 have known him in the past. It would make no sense to  
12 interview someone who didn't know him to get about his  
13 past.

14 Q Well, are you aware that some of these same  
15 people - some of these same friends that gave affidavits  
16 testified in the trial?

17 A I'm aware that some of them have; yes.

18 Q Would it be important to see what they said at  
19 the trial versus what they said at the affidavit to get  
20 some sense of validity?

21 A Only if there was some significant difference.

22 Q But, if you hadn't read their testimony, you  
23 wouldn't know what the different is?

24 A Well, you're assuming by your questions here  
25 that there was a difference and unless you can show me

12 1 that there was, that's speculation on my part.

2 Q I don't think I have to assume there was a  
3 difference because I've read the transcript.

4 Did you get an affidavit from Mr. Kelly as part  
5 of your diagnosis; don't remember?

6 A Yes. I have the affidavit. I'm sorry.

7 Q Would it surprise you to know that Mr. Kelly  
8 testified in Volume 23 during the punishment stage that  
9 "Mr. Wilson had to be a very different person on the  
10 street. That he made a living on the street. Took good  
11 care of his family." Was there any mention of that in  
12 the affidavit that you got?

13 A No. This was addressing his functional  
14 deficits when he was growing up.

15 Q And there was an affidavit that I believe you  
16 reviewed of a sister of Mr. Wilson?

17 A Ms. Armstrong.

18 Q Kim Armstrong. And in her affidavit to you,  
19 did she tell you about how Mr. Wilson took care of her?  
20 Did she relate the incident where he told her to go talk  
21 to the clerk of the store so he could go steal some food?

22 A Uh-huh.

23 Q Did she mention that?

24 A No. That particular event is not mentioned in  
25 the affidavit.

12

1 Q Would it surprise you to know that she  
2 testified under oath on the stand that, "Marvin Wilson  
3 was an able body man capable of getting a job".

4 A Well, he's held jobs before; so, that wouldn't  
5 surprise me and there's nothing wrong with his physical  
6 capabilities. That's not inconsistent with what I have  
7 already.

8 Q In fact, he's held a lot of jobs. Do you know  
9 what jobs he's held; do you remember?

10 A Numerous ones were mentioned in the report and  
11 all of those included basically unskill type of  
12 positions. The sense that I got is that in those jobs  
13 he's always required supervision and direction which is  
14 not inconsistent with mild mental retardation.

15 Q Mr. Wilson obtained a driver's license. That's  
16 in your report; isn't it?

17 A Yes.

18 Q And in order to get a driver's license, don't  
19 you have to take a written test?

20 A Yes, you do.

21 Q And you have to take a driving test?

22 A Right.

23 Q Mental retardation: One of the interesting  
24 things about mental retardation is, one of the criteria -  
25 and the criteria is listed in several places in the

12 1 DSV-IV, in the AAMR and in the Texas Health and Safety  
2 Code, but basically they say the criteria that you said a  
3 while ago. The third criteria is that it must present  
4 itself or be recognized or be labeled or be seen during  
5 the formative years which now is considered eighteen  
6 years of age; is that correct?

7 A That's correct.

8 Q So, if a person were not mentally retarded  
9 until they were eighteen and at nineteen they sniffed a  
10 lot of gasoline, glue, PCP and blew their brain out, they  
11 would never be mentally retarded.

12 A If a person has acquired brain injury from  
13 sniffing glue or whatever else and that occurs after the  
14 developmental stages which are now considered eighteen  
15 years and younger, we would diagnose that as a different  
16 type of disorder entirely. We would not use the label  
17 mental retardation.

18 Q So, unless a label is placed or unless you can  
19 go back and gather facts and place this label, once you  
20 get passed eighteen, that person will never be mentally  
21 retarded no matter what?

22 A If there was no evidence of mental retardation  
23 before the age of eighteen and you could demonstrate  
24 normal functioning throughout that time frame and then  
25 suddenly above the age of eighteen they acquired some



12

1 condition, then, the diagnosis would be something other  
2 than mental retardation.

13

3 Q Well, you say normal functioning, but you don't  
4 have to be normal functioning or not be normal  
5 functioning to be mentally retarded. I mean, isn't there  
6 a scale - mental retardation is on a sliding continuum;  
7 am I right about that?

8 A Well, there is a - there's different degrees of  
9 severity of retardation and the specific deficits that we  
10 would see in real life activities would depend on the  
11 level of retardation.

12 Q For the purposes of this hearing and for the  
13 purposes of the Supreme Court of the United States in  
14 Atkins, for the purposes of this State court, those have  
15 been labeled 70 to 55 on the I.Q. scale is considered  
16 mildly mentally retarded.

17 A Within test measurement error, that's correct.

18 Q Now, you embellish your definitions and your  
19 answers with this test error. There is a test error in  
20 every single test that is given. There is especially a  
21 test error in standardized tests; am I right about that?

22 A Well, there's -- I would think there would be  
23 test error in every procedure.

24 Q And would you not agree with me that the  
25 testing error is built into the scale?

13

1 A Well, it's an issue that more that, you know,  
2 what we're trying to do when we give an intelligence test  
3 is to get an overall measure of a person's ability. But  
4 just as we might, for example, make somebody run a 100  
5 yard dash to measure their athletic ability, if you have  
6 to run a 100 yard dash today and again next week and  
7 again the next week, your trying to get degrees of  
8 variability in that. Now, what is the true score? You  
9 know, is it the one you got today or the one you get next  
10 week or the one the week after that. Test error is what  
11 allows us to realize that there are some fluctuation in  
12 terms of day to day performance. And what we do with  
13 test error is try to develop an interval that would  
14 contain what we called true score, the actual I.Q. and  
15 that's the purpose of us measuring test error.

16 Q And that's -- And what you just said there, a  
17 battery of tests is what is important, not one test but a  
18 string of tests over time that conform to an area of  
19 results that give a validity to the tests themselves?

20 A Well, in diagnosing mental retardation as we  
21 are in this case, certainly one would want to look at  
22 consistent patterns of performance over time across a  
23 broad range of functional areas including testing.

24 Q Going back in time to '71, '72 school year, we  
25 have an I.Q. test of 73?

13

1 A That's correct.

2 Q Coming forward to T.D.C. where he was - gone  
3 through diagnostic, we have a test score of 75?

4 A That's correct.

5 Q When we go to your office -- And I believe Mr.  
6 Wilson actually came to your office and you interviewed  
7 him there; is that correct?

8 A That's correct.

9 Q We have a test score of 75 and 79?

10 A That's correct.

11 Q And when Mr. Wilson was tested in the jail by a  
12 psychology student, we have a test score of 61?

13 A That's correct.

14 Q Do you see an aberration there?

15 A Do I consider the WAIS-III an aberration? No.  
16 Of all of the test that have been done, again, that is  
17 the standard. All of these other tests are briefer in  
18 nature. The Lorge-Thorndike that was administered back  
19 in '71 is the only thing that even close to approximates  
20 the WAIS in terms of it's comprehensive nature and  
21 validity. The others are all brief measures of ability.

22 Q And, you're already testified that you give the  
23 strength of that Wechsler Test because of the test itself  
24 and because of Doctor Wills' expertise in giving it?

25 A Expertise and in dealing with the WAIS-III

3           1     which includes administering it and interpreting it and  
2           2     scoring it and again, you know, when I've had the  
3           3     opportunity to review hundreds and hundreds of records of  
4           4     other psychologists, people make occasionally scoring  
5           5     errors in those things, but unless you can demonstrate  
6           6     the substantial scoring errors consistently in the same  
7           7     direction, it rarely affects the I.Q. by more than a few  
8           8     points at most.

9           Q     Going back to mental retardation as sort of a  
10          10    sliding continuum scale. At the top, as designated by  
11          11    the Courts, we have a - an I.Q. of 70 and below to 55,  
12          12    which is 15 points; one standard deviation is mild mental  
13          13    retardation; would you agree with me?

14          A     Scores of approximately two to three standard  
15          15    deviations below the means of the population are what we  
16          16    typically consider to be mildly retarded.

17          Q     One standard deviation is 15 points, two  
18          18    standards of deviation will be 30 points. 30 from 100 is  
19          19    70; so, 70 down to 55 is considered mildly mentally  
20          20    retarded?

21          A     That's correct using the WAIS and other tests  
22          22    that have a mean of a 100 and a standard deviation of 15.

23          Q     And you can actually go down from there three  
24          24    more levels?

25          A     That's correct.

14

1 Q So, if a person was even - had an I.Q. of 70,  
2 that would be at the very top of the mentally retarded  
3 designation?

4 A That's correct.

5 Q And if they were 71, they would be out of that  
6 designation and they would be in the - what's the next  
7 designation of?

8 A Well, first of all that's not a correct  
9 statement. If someone has an I.Q. of 71, they could  
10 still meet the criteria for mental retardation. Just  
11 from looking at the test scores along that could be  
12 within measurement error. Secondly, we would want to  
13 consider adaptive behavior levels as well. So, we  
14 have -- You know, mental retardation is not just based on  
15 I.Q. scores. It's base on multiple criteria.

16 Q Have you -- Speaking of criteria, have you  
17 looked at any of the Texas cases on determining mental  
18 retardation for purposes of death penalty?

19 A Just -- I've read, you know, some of - a few of  
20 them but not very many.

21 Q Have you read Ex Parte, Briseno?

22 A No, I have not.

23 Q So, your diagnosis is not based on any of the  
24 factors in Briseno since you don't know what they are?

25 A That's correct.

14

1 Q The other thing about mental retardation is  
2 once someone is designated mentally retarded, they remain  
3 that designation for the rest of their lives; do you  
4 agree with that?

5 A If they're truly retarded, that condition is  
6 not going to resolve itself later in life.

7 Q The authorities indicate that they may improve  
8 in their adaptive behavior, but they will always be  
9 mentally retarded?

10 A Is that correct. Adaptive behavior skills can  
11 certainly improve over time and especially within the  
12 mildly retarded range. Individuals may be quite  
13 functional in some selected areas.

14 Q Would it be important to you that another  
15 expert had determined Mr. Wilson was mentally retarded or  
16 had determined that he wasn't mentally retarded. Would  
17 that be important to you?

18 A I would consider that as a source of  
19 information, but my purpose here is to do an independent  
20 evaluation and not simply follow what has been said  
21 before.

22 Q Are you aware of any other determinations by  
23 any other experts?

24 A The only information I have is basically what I  
25 presented to you today. If someone has determined that

14           1       he's not mentally retarded, I haven't seen that document.

2           Q       Would it change your opinion at all if you knew  
3       that the Texas Department of Corrections had never found  
4       him to be mentally retarded?

5           A       It wouldn't change my opinion now.

6           Q       Do you know Doctor Quijano?

7           A       No, I don't.

8           Q       Are you familiar at all with the Texas  
9       Department of Corrections system and the diagnostic  
10       system?

11          A       No, I don't know exactly how they work.

12          Q       If Doctor Quijano -- Do you know whether or not  
13       he testified in this trial?

14          A       I have not seen the trial testimony.

15          Q       Would it change your opinion to know that -- Do  
16       you know Doctor Ed Gripon?

17          A       Yes, I do.

18          Q       Would it change your opinion to know that  
19       Doctor Ed Gripon has said that he's not mentally  
20       retarded?

21                   MR. DELEE:   Objection, your Honor.  I  
22       don't believe that is the case.

23                   THE COURT:   Overruled.

24                   You'll have the right to cross-examine or  
25       re-examine.

14

1 Go ahead.

2 Q (By Mr. Conerly) But, if you haven't read the  
3 record you wouldn't know that that's in there?

4 Q Well, Doctor Gripon doesn't do independent  
5 evaluations of mental retardation without having test  
6 scores to rely upon. So, I would have to see the data if  
7 he in fact said that.

8 Q But what you're saying is that if he said that,  
9 he's wrong?

10 A I would say that I would need to see what he  
11 has that based on. The criteria we've talked about in  
12 detail today, clinician is not simply you interview one  
13 and say they're mentally retarded.

14 Q You put in your report that you viewed an  
15 affidavit from Laurel Gorman. Do you know her?

16 A No. She is actually the one I believe that  
17 interviewed -- It's a secondary interview. It's a report  
18 of an interview.

19 Q Right. Do you know her to be a credible  
20 person, Laurel Gorman?

21 A I don't know Laurel Gorman personally.

22 Q Do you know Beverly Walters?

23 A No, I do not personally.

24 Q But Laurel Gorman interviewed Beverly Walters  
25 and then told in an affidavit form what she said and you



14  
--

1 used that as criteria in your determination?

2 A All part of the information gathering phase.

3 Q Did you ask Ms. Teno whom you interviewed her  
4 daughter's name - Mr. Wilson's wife?

5 A No. I don't know what her full name is, no.

6 Q Did you ask her how long they were married?

7 A They had a common-law relationship actually. I  
8 don't - from what she said they were never legally  
9 married.

10 Q But how long was the relationship; do you know?

11 A I think they were together a couple of years,  
12 but I'm not certain of the exact time frame on that.

13 Q And they have a child?

14 A Yes, they do.

15 Q Would you agree with me that most testers say  
16 you can fake a low score but you can't fake a high score?

17 A That would generally be a true statement.

18 Q If it would greatly benefit someone to produce  
19 a low score, don't you think they would do that if they  
20 had the opportunity?

21 A Surprisingly that is not always the case and  
22 I've had many many examples where it was not.

23 Q Well, you're a very educated man. I saw from  
24 your C.D. and all of the things you produced. If you  
25 were on death row and you knew that you could fail an

15

1 I.Q. test and get off of death row, would you do it?

2 A Would I personally do it?

3 Q Yeah.

4 A I don't know whether I would or not, but I have  
5 had the opportunity to evaluated multiple other  
6 individuals who were either on death row or facing life  
7 sentences for severe crimes and many of those folks  
8 performed average range or higher on I.Q. test and  
9 produced very normal performance. So, why some  
10 individuals choose to pursue that path and others not,  
11 that's an individual decision they have to make.

12 Q And going through the records that were  
13 presented to you and the records that you were able to  
14 obtain, there's no indication in Mr. Wilson's school  
15 records that he was mentally retarded?

16 A I haven't seen that listed as a diagnosis on  
17 the transcripts and grade reports.

18 Q Looking at his records from T.D.C., where he  
19 was in the Windham Educational Unit, he had been to  
20 T.D.C. several times. Looking at those records when he  
21 was eligible for the Mentally Retarded Offender Program,  
22 he wasn't in that program; was he?

23 A Not to my knowledge.

24 Q He was never designated in any of those records  
25 that you have as mentally retarded?

KARLA O'FIEL, CSR

15           1           A       There was no designation in the record that he  
2           was.

3           Q       His -- Mental retardation is defined in the -  
4           the psychiatric book, DSM-IV or whatever the designation  
5           is as a mental disorder; do you agree with that?

6           A       No.

7           Q       No?

8           A       I think there's a lot of things in DSM-IV that  
9           I personally don't believe are mental disorders, but  
10          they're listed there anyway.

11          Q       I see. Well, that's what I'm asking you: You  
12          don't believe that mental retardation is a mental  
13          disorder?

14          A       No, I don't.

15          Q       But would a psychiatrist believe that mental  
16          retardation was since that's the definition in their  
17          book?

18          A       Well, if I went out and interviewed a hundred  
19          psychiatrists and psychologists, you'd probably get a  
20          range of opinions about that, but cases of mental  
21          retardation that I've seen over the years are not because  
22          of mental health issue. They were because of biological  
23          factors, medical problems and things like that. And  
24          furthermore, in the AAMR Manual, they don't consider it a  
25          mental disorder either.

15

1 Q Do you know what the definition is in the AAMR  
2 Manual, and I'm referring to the 2002 version.

3 A Yes. And that's addressed in the addendum  
4 here.

5 Q Could you tell the Court what that definition  
6 is?

7 A Well, it's basically the definition of what  
8 we've already talked about. You have to meet three  
9 criteria. One, you have to have a score interviewed,  
10 standardized I.Q. test of approximately 70 or lower. And  
11 you have to have significant impairment and adaptive  
12 behavior and the deficits have to have been present  
13 before the age of eighteen.

14 Q Aren't there certain assumptions that are  
15 essential to the application of that definition as  
16 described in that manual?

17 A I'm not sure. What assumptions are you talking  
18 about?

19 Q Well, the assumption that the limitation and  
20 present functioning must be considered within the context  
21 of community environment typical of the individual's age  
22 pure and culture?

23 A Certainly. Those have been long standing  
24 criteria.

25 Q Would you agree with me that the Institutional

15

1 Division of the Texas Department of Criminal Justice is a  
2 subcultural?

3 A Probably so.

4 Q And would you agree with me then that people on  
5 death row are subculture of that subculture?

6 A That's correct.

16

7 Q So, in order to really adequately test those  
8 people or to make a determination of those people, you'd  
9 really have to look at their cultural group and give some  
10 difference to that; wouldn't you?

11 A Not to diagnose mental retardation because he's  
12 only been there since he's - in recent years well into  
13 adulthood and that's really not that germane to the issue  
14 of whether he suffers from mental retardation which had  
15 to have happened many years before that.

16 Q But, aren't you going by a WAIS test  
17 administered two months ago where Mr. Wilson has been on  
18 death row for twelve years. Wouldn't that affect the  
19 outcome of that test?

20 A The outcome on the intelligence test is based  
21 on life-long interaction with the environment as well as  
22 a whole range of biological and medical variables and  
23 again I want to say explicitly my diagnosis of mental  
24 retardation is not based exclusively on WAIS-III. It's  
25 based on the sum of all of the information we gathered

16

1 from these different sources.

2 Q You made your diagnosis of mental retardation  
3 before you finished the Vineland; is that correct?

4 A No. I had actually done that. I was hoping  
5 that I would be able to interview a couple of other  
6 informants just to gain additional information, but  
7 actually the data for the Vineland had all been collected  
8 by the time I actually did my first report.

9 Q When did you interview Mr. Wilson, what day?

10 A Let's see. The actual testing date - I have to  
11 look that up. Probably about a week before I actually  
12 did the report.

13 Q The report was issued on July the 6th?

14 A Right. Let me look on my calendar, if you give  
15 me just a moment.

16 Q Sure.

17 A And I'll get that information for you.

18 (Referring) The testing that I actually performed was on  
19 June the 28th of 2004.

20 Q Did you interview Mr. Wilson subsequent to  
21 that?

22 A No, not on a separate day, I have not.

23 Q How long did you interview him on the 28th?

24 A The entire examination lasted all day long.

25 The initial interview was probably an hour to an hour and

16

1 a half. At that point, we conducted a range of testing.  
2 Then I had a follow-up interview with him to go over  
3 additional facts that I needed to ask him about.

4 Q You mean an eight-hour day?

5 A Basically. We were there all day long.

6 Q And did you have a -- Did you have a - what  
7 they call informant or a respondent for the Vineland?

8 A The Vineland was based on information from  
9 various sources. One of the specific reasons I had  
10 called Ms. Teno was to try to obtain additional  
11 information with regard to some of the adaptive behavior  
12 items that were on the Vineland involving such things as  
13 money management and practical daily living skills. We  
14 also had information from the affidavits and also we had  
15 direct observations from our own examination that  
16 directly addressed some of the items on the Vineland such  
17 as reading skills, writing skills, receptive and  
18 expressive language abilities, money management which is  
19 actually part of the testing that we do and a lot of the  
20 other items. So, again, the Vineland is - the scores  
21 there were derived from a variety of different sources.

22 Q So, did you have a respondent or an informant  
23 for the Vineland?

24 A Again, we had Mr. Wilson himself, Ms. Teno and  
25 the affidavits. There was not a single respondent; no.

16

1 Q But you made your diagnosis of mental  
2 retardation in your report which was mailed on the 6th  
3 before you completed the Vineland which was - the report  
4 was at least mailed on the 14th?

5 A Well, I had actually -- Again, I had collected  
6 the data. When I prepared this initial report on the  
7 6th, I had hoped that I would be able to get in touch  
8 with a couple of additional informants just to get  
9 additional information from them. Despite numerous phone  
10 calls, I was not able to get in touch with additional  
11 informants; so, I actually went ahead and actually  
12 calculated the Vineland scores and prepared the addendum.

13 Q You calculated the Vineland scores on or about  
14 July the 14th?

15 A Or within a couple of days or before that  
16 perhaps. The addendum was actually done on the 14th.

17 Q So, you calculated the scores maybe as early as  
18 the 12th?

17

19 A Within -- I know I was looking at it over the  
20 weekend because that's when I was trying to make the  
21 different calls. So, I think Monday was the 12th. By  
22 Wednesday I had decided I probably wasn't going to find  
23 anybody else to talk to. So, I generated the addendum.

24 Q So, in your addendum that's been introduced, I  
25 believe it's Defendant 3A where you say, "I have had the



17

1 opportunity to collect additional collateral  
2 information"; that would be wrong?

3 A No. Other than the fact that they sent me  
4 actual copies of some scores and things that I didn't  
5 have -- I was trying to get documentation from them with  
6 regard to the 1987 scores that were obtained while he was  
7 in Texas Criminal Justice system on the I.Q. testing and  
8 that's really the only new information that I had.

9 Q But, at any rate, you made a diagnosis before  
10 you calculated the Vineland scores?

11 A Before I actually calculated the final score,  
12 that diagnosis was made because it was very clear that he  
13 was within the impaired range on all three sections of  
14 the Vineland.

15 Q Would you agree with this statement in your  
16 report, Defendant's, I believe it's 2A, the report issued  
17 on July the 6th that I got yesterday. "I would certainly  
18 rely most heavily on the WAIS-III score as an indicator  
19 of his level of intellectual function"?

20 A As I stated several times already, the WAIS-III  
21 is by far the most reliable and valid measure of adult  
22 intellectual ability in current usage.

23 Q And regardless of who gives it?

24 A Well, I say if an untrained person was giving  
25 it - they shouldn't be doing it to begin with, but you

17

1 know, a lot of these tests are administered by interns  
2 who are under supervision of a licensed psychologist and  
3 unless there was gross error in the administration of  
4 scoring, the likelihood of it affecting the I.Q. score by  
5 more than two or three points is infinitesimal small.

6 MR. CONERLY: Pass the witness, your  
7 Honor.

8 THE COURT: Thank you, sir.

9 Mr. Delee, will you have anymore  
10 questions?

11 MR. DELEE: Just basically one or two,  
12 your Honor.

13 THE COURT: I've never seen a lawyer ask  
14 one or two questions, but let's see if we can.

15 MR. DELEE: I'll do my best, your Honor.

16 THE COURT: Go ahead.

17

18 REDIRECT EXAMINATION

19 BY MR. DELEE:

20 Q Mentally retarded people drive; don't they?

21 A Many of them do. Getting a driver's license  
22 doesn't mean that you're not mentally retarded. I have  
23 numerous people I know who are clearly mentally retarded  
24 who have obtained driver's license and been able to work  
25 in unskilled positions. I even have a family member who

17 1 falls in that category.

2 Q And in spite of this cross-examination that you  
3 just endured, do you still feel comfortable in your  
4 diagnosis of mild mental retardation.

5 A Having obtained information from a wide range  
6 of sources, my diagnosis is that he is mentally retarded  
7 and that he falls within the mild range. As I testified  
8 previously there are some adaptive skilled areas that he  
9 does better with and that's consistent with a long  
10 history of research on mild mental retardation, but all  
11 things said and done, at the end of the day, the  
12 diagnosis is still mild mental retardation in my opinion.

13 Q Thank you, Doctor.

14 MR. DELEE: Pass the witness.

15 THE COURT: Mr. Conerly.

16 MR. CONERLY: Just one more question.

17

18 RECROSS-EXAMINATION

19 BY MR. CONERLY:

20 Q On the Vineland, what would a good score be for  
21 communication?

22 A Well, the overall - each item is rated on a  
23 three-point scale of 0, 1 or 2. 2 means that they  
24 consistently can perform a certain type of activity. 1  
25 means that they do it sometimes. There's another

17           1       criteria to 2, but basically don't consistently do it  
2           2       independently. A 0 means that they cannot perform that  
3           3       particular function.

4           Q       What would be a good total score on Vineland  
5           5       communication?

6           A       For someone who is an adult?

7           Q       Yes.

8           A       In his age range, the Vineland -- Well, there's  
9           9       different areas here. For the Receptive Domain, the  
10          10       maximum score there is 46. And typically for adults who  
11          11       you can engage in basic functional communication, they  
12          12       would have a score close to 46.

13          Q       Well, what was Mr. Wilson's score on the  
14          14       communication?

15          A       Well, that's on the Receptive Subdomain,  
16          16       meaning that he can understand conversation.

17          Q       Right. What was the score on that?

18          A       And he scored 46. He did fine on that.

19          Q       Okay. Thank you.

20                   THE COURT: Mr. Delee?

21                   MR. DELEE: I have nothing further, your  
22          22       Honor.

23                   THE COURT: All right.

24                   May Doctor Trahan be excused Mr. Delee?

25                   MR. DELEE: Yes, sir.

17

1 THE COURT: Mr. Conerly.

2 MR. CONERLY: I have no object.

3 THE COURT: Thank you very much, sir.

4 Will you have additional testimony?

5 MR. DELEE: I have one short witness.

6 THE COURT: Okay. That's fine.

18

7 Let's just take a short recess.

8 We'll reconvene in about ten minutes.

9 (RECESS)

10 (HEARING RESUMED)

11 THE COURT: Who is next Mr. Delee?

12 MR. DELEE: Beverly Walters, your Honor.

13 THE COURT: Beverly Walter?

14 MR. DELEE: Yes, your Honor.

15 THE COURT: Beverly Walters, please.

16 (WITNESS ENTERS THE COURTROOM)

17 THE COURT: Raise your hand and take the  
18 oath, please, ma'am.

19

20

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22

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24

25