No. S20P0937

In the

# Supreme Court of Georgia

Willie Williams Palmer,

*Appellant,*

v.

State of Georgia,

*Appellee.*

On Direct Appeal from the Superior Court of Burke County

**JOINT MOTION TO VACATE THE DENIAL OF MOTION FOR NEW TRIAL AND REMAND TO ENTER CONSENT JUDGMENT GRANTING A NEW TRIAL**

Josh D. Moore 520028
*Counsel for Appellant*
Thea Delage 712602
*Counsel for Appellant*
Office of the Georgia Capital Defender
104 Marietta St. NW
Suite 600
Atlanta, GA 30303
(404) 795-5156
jmoore@gacapdef.org
tdelage@gacapdef.org

Natalie S. Paine 312524
*District Attorney*
Charles R. Sheppard 641938
*Special Assistant District Attorney*
District Attorney's Office Augusta Circuit
735 James Brown Blvd, Suite 2400
Augusta, GA 30901-2974
(706) 821-1135
*Counsel for Appellee*
npaine@augustaga.gov
sheppardlaw13@yahoo.com
Christopher M. Carr 112505
*Attorney General*
Beth A. Burton 027500
*Deputy Attorney General*
Sabrina D. Graham 305755
*Senior Assistant Attorney General*
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
(404) 694-7975
sgraham@law.ga.gov

## INTRODUCTION

After careful and lengthy joint deliberations between Willie Palmer, through counsel, the Augusta Circuit District Attorney's Office, and the Georgia Attorney General's Office, the parties request that this Court vacate the denial of the motion for new trial and remand this case for the trial court to enter the parties' consent judgment granting a new trial. In making this request, the District Attorney's Office and the Attorney General's Office, with all due respect for the jury's verdicts and sentences, respectively concede as part of their agreement certain trial errors that warrant a new trial. This concession was not made lightly, but with the overarching understanding of the State's "solemn obligation to seek justice in every case." *Davidson v. State*, 304 Ga. 460, 469 n.9, 819 S.E.2d 452, 460 (2018).

In 2007, Palmer was tried for the murder of his wife, Brenda Jenkins Palmer, and his stepdaughter, Christine Jenkins. *See Palmer v. State*, 271 Ga. 234, 234, 517 S.E.2d 502, 504 (1999). Palmer asked the jury to determine whether he was guilty but intellectually disabled. *See, e.g.,* T53:2206, 2258-59.[1] The jury did not find him to be intellectually disabled; and Palmer was convicted of murder and

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[1] The following abbreviations are used in citations throughout this brief:

"R" – Record (volume, followed by page number)

"T" — Trial Transcript (volume, followed by page number)

ultimately sentenced to death. R11:3773-74; R12:3867-70. Palmer filed a motion for new trial raising the claims that are before this Court in his brief in support of his direct appeal. R12:3894-96; R12:4058-2400; R13:2401-4496; R14:4598-4744, 4747-50; Appellant's brief. The trial court denied Palmer's motion for new trial on November 27, 2019. R14:4883. Palmer timely filed his notice of appeal, and filed his brief in support on June 26, 2020. R1:1-4; Appellant's brief.

Subsequently, the parties conferred about the enumerations of error and have reached a proposed agreement to have the Court remand this matter for a new trial due to certain conceded errors. As part of this, taking into consideration existing and prevailing law regarding capital punishment and intellectual disabilities together with Palmer's current age of 68, while maintaining respect for the seriousness of his alleged crimes, it was agreed that the option between a life or a life without parole sentence was a necessary option on remand. Current counsel for Palmer conferred with Palmer, advised him of his rights and the District Attorney's offer, and received his explicit consent to the agreement. Consequently, the parties entered into a consent judgment in which: the State would not seek the death penalty; and Palmer would opt-in to a new trial with life without the possibility of parole as a possible sentence. Attachment A; *see generally Kimbrough v. State*, 300 Ga. 516, 796 S.E.2d 694 (2017); O.C.G.A. § 17-10-7: O.C.G.A. § 17-10-16.

## BRIEF PROCEDURAL HISTORY

Appellant, Willie Williams Palmer, was originally indicted by the Grand Jury of Burke County on October 23, 1995, for two counts of malice murder, two counts of felony murder, one count of burglary, one count of kidnapping, one count of cruelty to children, one count of possession of firearm during commission of crime and one count of possession of firearm by convicted felon. R1:6-11. Following a jury trial, Palmer was convicted as charged in the indictment and was sentenced to death on November 12, 1997. R7:2295-301. This Court affirmed Palmer's convictions and sentences on June 1, 1999. *Palmer v. State*, 271 Ga. 234 (1999). Palmer's convictions and death sentences were subsequently vacated during state habeas corpus proceedings due to a *Brady* violation. *Schofield v. Palmer*, 279 Ga. 848 (2005).

Palmer's retrial, which is the subject of the instant appeal, commenced on August 13, 2007. On August 24, 2007, Palmer was convicted as charged in the indictment. R11:3773-74. The sentencing phase of Palmer's trial commenced on August 24, 2007. At the conclusion of the sentencing phase on August 24, 2007, the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt: 1) that the murder of Christine Jenkins was committed while the Appellant was engaged in the commission of a burglary; 2) that the murder of Brenda Jenkins Palmer was committed while the Appellant was engaged in the commission of a burglary; and 3) that the murder of Brenda Jenkins Palmer was committed while the

Appellant was engaged in the commission of another capital offense, to-wit: the murder of Christine Jenkins. R12:3867, 3869. The jury recommended two sentences of death, one for each count of malice murder. *Id.* at 3868, 3870. The trial court then sentenced Palmer to death. *Id.* at 3863-65. Palmer was further sentenced to twenty years for burglary, twenty years for kidnapping, twenty years for cruelty to children, five years for possession of a firearm during the commission of a crime and five years for possession of a firearm by a convicted felon, all to be served consecutively. *Id.* The trial court merged the two counts of felony murder into the two counts of malice murder. *Id.*

Palmer filed a motion for new trial on September 27, 2007, and amendments thereto on January 7, 2014, February 11, 2015 and August 31, 2016. R12:3894-96; R12:4058-2400; R13:2401-4496; R14:4598-4744, 4747-50. This motion, as amended, was denied on November 27, 2019. R14:4883. Palmer filed a notice of appeal on January 21, 2020. R1:1-4. Palmer filed his brief in this Court on June 26, 2020.

## DISTRICT ATTORNEY CONCESSION OF ERROR

Palmer argues in his direct appeal brief that numerous errors were committed at trial by both the trial court and the State regarding his claim of intellectual disability. *See* Appellant's brief at 140-66, 245-57. In sum, Palmer asserts that the jury was misinformed about the correct definition of intellectual disability and his evidence in support

was challenged in front of the jury by the trial court. The State has already conceded some of these errors at the motion for new trial but argued that individually they did not rise to the level of harm necessary to warrant a new trial. However, since the trial court denied the motion for new trial, this Court held for the first time that harm from certain trial errors should be considered cumulatively. *State v. Lane*, 308 Ga. 10, 15, 838 S.E.2d 808, 813 (2020). Additionally, the United States Supreme Court has issued two opinions regarding intellectual disability since the trial and the denial of the motion for new trial that are instructive and weigh against the State on appeal. *See Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986 (2014); *Moore v. Texas*, 139 S. Ct. 666 (2019). Based on this new precedent, and as part of its agreement herein, the State concedes that when several of the errors are considered together, the harm warrants a new trial.

The errors Palmer asserts—that are at issue in this joint motion—are:

> (1) The State argued an incorrect definition of intellectual disability (Appellant's brief at 140-57);
>
> (2) The trial court provided an incorrect charge regarding the definition of intellectual disability (Appellant's brief at 157-66); and
>
> (3) The trial court referred to the testimony of a mental health expert presented by Palmer as "useless" in open court (Appellants brief at 245-57).

There are other errors enumerated by Palmer; however, these are the errors the State concedes.

This Court recently "abandoned" its "prior rule" that cumulative error was not to be considered and held that "weighing prejudice cumulative [was] simply a natural implication of the harmless error doctrine." *State v. Lane*, 308 Ga. 10, 15, 838 S.E.2d 808, 813 (2020). The Court placed certain restrictions on this new rule to include that the errors must involve "involve *evidentiary* issues." *Id.* at 14 (emphasis added). Because the errors accumulated here concern the jury's determination of whether Palmer was intellectually disabled, evidentiary issues are implicated.

As stated in the introduction, Palmer asked the jury to determine whether he was guilty but intellectually disabled. *See, e.g.,* T53:2206, 2258-59. In support, he presented two mental health experts who provided testimony in support of his plea of intellectual disability. *See* T52:1964-2050; T53:2100-172. During cross-examination of a mental health expert, it was brought out that the state statute defining intellectual disability did not specify an intelligence quotient number for "significantly subaverage general intellectual functioning." T52:2035; O.C.G.A. §17-7-131. Also, during the testimony of one of Palmer's experts, the trial court questioned the expert as to whether his testimony was helpful in determining whether Palmer was intellectually disabled. T52:2050. In response, the expert testified that he was "essentially useless" to which the trial court responded "[t]hat's

what I thought." *Id.* During closing argument, the State argued that because state law did not specify an intelligence quotient, the jury was free to assign any number they chose—specifically that the jury could determine Palmer was intellectually disabled if he had an IQ of "130" or not intellectually disabled if he had an IQ of "30." T53:2224-225. The trial court mistakenly instructed the jury that the first prong of intellectual disability was met if Palmer proved he had "*sufficiently* limited general intellectual functioning" instead of the correct definition of "significantly limited" with no further clarification. T53:2258-259.

Following the trial in 2007, the United States Supreme Court issued *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986 (2014) and *Moore v. Texas*, 139 S. Ct. 666 (2019). In *Hall*, the Court was tasked with deciding whether Florida's strict 70 IQ score cut-off was constitutional. *Hall*, 572 U.S. at 707 ("Florida law requires that, as a threshold matter, Hall show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability"). The Court explained that while its decision in *Atkins* had left to the States … *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection. *Id.* at 709. Moreover, while "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, [] it is informed by the medical community's diagnostic framework." *Hall*, 572 U.S. at 721. And the medical community had long stated that IQ scores were "imprecise" and those individuals

mildly intellectually disabled could have a "range" of IQ scores—which the Court had previously explained was between "50" and "75." *Hall v. Florida*, 572 U.S. 701, 712, 719 ("The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range."). Because Florida's interpretation of its statute governing intellectual disability was contrary to the majority of the courts', states', and medical community's definitions and "diagnostic framework" the Court held Florida's strict IQ cutoff was unconstitutional.

Several months before the trial court in this case denied the motion for new trial, the Supreme Court decided *Moore v. Texas.* The Court again explained that [w]hile our decisions in '*Atkins* and *Hall* left to the States the task of developing appropriate ways to enforce the restriction on executing the intellectually disabled,' [] a court's intellectual disability determination '*must be informed* by the medical community's diagnostic framework.'" *Moore v. Texas*, 139 S. Ct. 666, 669 (2019) (quotation marks omitted) (citation omitted) (emphasis added) (quoting *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017)).

The State recognizes that this Court has not ignored the medical community's "diagnostic framework" in examining intellectual disability claims. *See, e.g., Stripling v. State*, 261 Ga. 1, 4, 401 S.E.2d 500, 504 (1991) (citing Diagnostic and Statistical Manual, Version III, 36) ("Significantly subaverage intellectual functioning is generally

defined as an IQ of 70 or below."). Therefore, given the precedent of this Court and United States Supreme Court, the above-cited errors reviewed cumulatively were harmful.

## ATTORNEY GENERAL CONCESSION OF ERROR

Palmer argues in his direct appeal brief that exculpatory information provided by the State's mental health expert was withheld from the defense in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963). Appellant's brief at 29-74. After reviewing the record and the law, the Attorney General's Office concedes there was a *Brady* violation— and a new trial is warranted.[2]

Prior to Palmer's second trial in 1996, the trial court ordered an evaluation of Palmer to determine whether he met the criteria for intellectual disability. *See* Attachment B at 11-13. Palmer was taken to Central State Hospital and evaluated by psychologist David Peterson. *Id.* At Palmer's trial, Peterson testified that his evaluation did not support a diagnosis of intellectual disability. *Id.* at 14-16. The jury rejected Palmer's plea of guilty but intellectually disabled and Palmer was convicted and sentenced to death. *Palmer v. State*, 271 Ga. 234, 234-35, 517 S.E.2d 502, 504 (1999).

During state habeas proceedings in 2002, Dr. Peterson was deposed by counsel for Palmer. Attachment B at 1-2. Dr. Peterson

[2] The Attorney General also agrees with the District Attorney's current concession of cumulative error.

testified that the additional information he obtained prior to the deposition provided evidence that would support a diagnosis of intellectual disability. *Id.* at 3-9. However, at that time he was unable opine whether Palmer met the criteria for intellectual disability. *Id.* at 8.

In 2007, Dr. Peterson was subpoenaed as a witness for the State. R14:4880. After he was sequestered with the other State witnesses, he informed the District Attorney that, based upon the information he had received that was created during Palmer's state habeas proceeding, his opinion was now that Palmer was intellectually disabled. *Id.* The State released Dr. Peterson from his subpoena prior to his testifying at trial and did not inform the defense of Dr. Peterson's change in opinion. *Id.* Palmer learned this information when his present counsel contacted Dr. Peterson in preparation for Palmer's motion for new trial. *Id.* Palmer raised his current *Brady* claim in his motion for new trial. R13:4255-257. Dr. Peterson provided an affidavit that was submitted by Palmer's motion for new trial counsel attesting that Dr. Peterson had informed the District Attorney that he had changed his opinion. R14:4880. Additionally, the District Attorney signed a written stipulation that this occurred. R14:4878. However, the State argued at the motion for new trial stage that there was not a *Brady* violation because Dr. Peterson was known to the defense, and had been on the State's witness list, and that therefore this information could have been obtained through reasonable diligence. *Id.* at 4564-565. The trial court

denied the motion for new trial in a single paragraph order that did not specifically mention the *Brady* claim.[3] *Id.* at 4883.

This Court has long-held that a *Brady* violation must meet a four-part test:

> (1) [T]he State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed to the defense.

*McCray v. State*, 301 Ga. 241, 246, 799 S.E.2d 206, 211-12 (2017) (quoting *State v. James*, 292 Ga. 440, 441 (2) (738 SE2d 601) (2013)). At the motion for new trial proceedings, the State conceded that it had the information, argued that Palmer could have obtained the information with "reasonable diligence," and did not address the remaining prongs of *Brady*.

With all due respect to the State's position at the motion for new trial, the Attorney General disagrees that this Court's application of "reasonable diligence" precludes relief here. Where "reasonable diligence" has been at issue, this Court has found it to be met where the defendant had general knowledge of the evidence and did not seek it out. *See, e.g., Cain v. State*, 306 Ga. 434, 439-40, 831 S.E.2d 788, 793

[3] The Attorney General's Office is not implying that the motion for new trial court was obligated by law to issue an opinion specifically deciding each claim but is merely pointing this out so that the Court understands there is no specific holding on this issue.

(2019) (determining that the defendant could have obtained the voicemails in question with "reasonable diligence" because he "was aware of the existence and contents of the voicemails" and "were available to him from other sources" than the cellphones confiscated by the State). Here, the defendant was not aware, or on notice, that the State's mental health expert had changed his opinion and diagnosed him as intellectually disabled.

As stated by this Court, "The constitutional guarantee of due process does require the State to turn over evidence in its possession that is material to guilt or punishment and is favorable to the accused." *Bello v. State*, 300 Ga. 682, 683 n.3, 797 S.E.2d 882, 885 (2017). And in *Perkinson,* where the State's mental health expert diagnosis concurred with the defendant's mental health expert's diagnosis that he was intellectually disabled, this Court pointed out that "the State needed to disclose" this information. *Perkinson v. State*, 279 Ga. 232, 236-37, 610 S.E.2d 533, 539 (2005).

However, with all due respect to the defense's position, the Attorney General's Office, to be clear, does not agree with Palmer's argument to this Court that "reasonable diligence" should not be a factor in this Court's *Brady* analysis. As correctly pointed out by Palmer, this Court has never applied the "due diligence" component in a manner inconsistent with the purpose of *Brady*.

Ultimately, though, given the facts and this Court's precedent, the Attorney General's Office concedes that Palmer is entitled to relief on his *Brady* claim.

## REQUEST TO ACCEPT AGREEMENT ON APPEAL

This was a solemn and difficult agreement reached by the parties with the humble understanding that determining error on appeal is solely within this Court's province. Therefore, given the enormity of the errors alleged on appeal, the age of the defendant, the seriousness of his crimes, and the need to conserve judicial resources, the parties respectfully request that this Court accept the agreement of the parties and vacate the denial of the motion for new trial, or in the alternative, to remand to the trial court for further consideration in light of the revised position of the State as to the necessity of new trial.

## CONCLUSION

For the reasons set out above, the parties request that this Court vacate the denial of the motion for new trial without opinion and remand to the trial court to enter the parties' consent judgment granting a new trial; or in the alternative, to remand to the trial court for further consideration in light of the revised position of the State as to the necessity of new trial.

Respectfully submitted.

/s/ Josh D. Moore
Josh. D. Moore

/s/ Charles R. Sheppard
Charles R. Sheppard

/s/ Natalie S. Paine
Natalie S. Paine

/s/ Beth A. Burton
Beth A. Burton

/s/ Sabrina D. Graham
Sabrina D. Graham

Josh D. Moore 520028
*Counsel for Appellant*
Thea Delage 712602
*Counsel for Appellant*
Office of the Georgia Capital Defender
104 Marietta St. NW
Suite 600
Atlanta, GA 30303
(404) 795-5156
jmoore@gacapdef.org
tdelage@gacapdef.org

Natalie S. Paine 312524
*District Attorney*
Charles R. Sheppard 641938
*Special Assistant District Attorney*
District Attorney's Office Augusta Circuit
735 James Brown Blvd, Suite 2400
Augusta, GA 30901-2974
(706) 821-1135
*Counsel for Appellee*
npaine@augustaga.gov
sheppardlaw13@yahoo.com
Christopher M. Carr 112505
*Attorney General*
Beth A. Burton 027500
*Deputy Attorney General*
Sabrina D. Graham 305755
*Senior Assistant Attorney General*
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
(404) 694-7975
sgraham@law.ga.gov

# ATTACHMENT A

**IN THE SUPERIOR COURT OF BURKE COUNTY**
**STATE OF GEORGIA**

| | | |
|---|---|---|
| **STATE OF GEORGIA,** | ) | |
| **PLAINTIFF,** | ) | **CASE: 96 R 43** |
| **V.** | ) | |
| **WILLIE WILLIAMS PALMER,** | ) | |
| **DEFENDANT.** | ) | |

**CONSENT ORDER GRANTING**
**DEFENDANT'S MOTION FOR NEW TRIAL**

Based upon agreement and consent of the parties that reversible error in the trial proceedings of this matter warrant a new trial and explicitly contingent both upon the Defendant's commitment to opt-in for eligibility for a sentence of life without the possibility of parole (LWOP) as well as the State's commitment not to seek the death penalty at re-trial, this Court hereby GRANTS the Defendant's motion for new trial and orders trial proceedings to follow consistent with the agreements and representations contained herein. Such proceedings are to entail a jury trial as to the question of criminal responsibility and a sentencing determination to be made by the trial court. Both the Defendant and the State have explicitly agreed to be bound by the

commitments set forth herein, and the Court understands that the Defendant makes no admission or concession as to criminal responsibility and that the State makes no admission or concession that the Defendant is intellectually disabled.

So ORDERED this _____ day of _____, 2020.

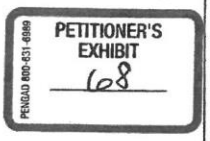
_____
The Honorable James G. Blanchard, Jr.
Augusta Judicial Circuit Superior Court

Jointly prepared and submitted by:

/s/ Josh D. Moore
Josh D. Moore
Counsel for Mr. Palmer
Georgia Bar. No. 520028
Office of the Georgia Capital Defender 104 Marietta St. NW, Suite 600
Atlanta, GA 30303
(404) 795-5156
jmoore@gacapdef.org

/s/ Geoffrey L. Fogus
Geoffrey L. Fogus
Chief Assistant District Attorney
Georgia Bar No. 326433
Office of the District Attorney
Augusta Judicial Circuit
735 James Brown Blvd., Ste. 2400
Augusta, GA 30901
706-821-1151
gfogus@augustaga.gov

# ATTACHMENT B




IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS
STATE OF GEORGIA

* * * * * * * * * * * * * * * * *

WILLIE PALMER, Petitioner, vs. FREDRICK HEAD, Warden, Georgia Diagnostic Prison, Respondent.

HABEAS CORPUS
NO. 2000-V-474

* * * * * * * * * * * * * * * * *

Videotaped Deposition of DR. DAVID PETERSON, taken by the Petitioner, before Wendy J. Boone, Certified Shorthand Reporter and Notary Public, at 303 Elizabeth Street, N.E., Atlanta, Georgia, on the 11th day of June, 2002, commencing at approximately 11:00 a.m.

ORIGINAL



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INDEX OF TRANSCRIPT



INDEX OF EXHIBITS

Plaintiff's Exhibits

when I did this.
Q. When you did the evaluation?
A. Right. If I had I probably would have cited it.
Q. Okay. And you're --
A. The fact that there's no citation any place makes me think that I didn't have that back then.
Q. And just so the record is clear, when you say no citation any place I assume you're referring principally to Plaintiff's Exhibit No. 3 --
A. Right.
Q. -- your letter report to Judge Fleming?
A. Right.
Q. Okay. And then there's a notation that appears on that same page, referencing paragraph 16 --
A. Right.
Q. -- on the right-hand column. Who wrote that?
A. I wrote that too.
Q. What does that say?
A. It says me either.
Q. Okay. What is that referring to?
A. That is referring to material in here that Dr. Maish is citing that were not available to him.

In fact, I may as well read this: In evaluating the second prong of the criteria for mental retardation I used my own observations of Willie Palmer, this is Dr. Maish writing, the notes obtained by the trial lawyer, the records I reviewed. I have since reviewed the following additional affidavits that, this word underlined, were not made available to me prior to the trial. That's my note. They weren't made available to me either prior to the trial. And it goes on and lists of whole slew of people that I never heard of.

Q. And that carries over onto the next page?

A. Right.

Q. And would that type of information have been helpful in doing an evaluation as to whether or not Mr. Palmer was mentally retarded?

A. Very. I mean, that's why I'm still curious as to what his admission status was and what the text of the court order was because ordinarily you don't even evaluate mental retardation in an adult. It's typically done in a child and typically by someone with a background in something along the lines of educational or school psychology which is what I mean when I say ordinarily we wouldn't even admit someone for specifically an evaluation for mental

retardation. That's one of the things that puzzles me when I was going through this.

Q. Okay.

A. So I'm really I'm -- I don't know. It's one of the things that I just don't remember. It smacks of, you know, administrative interference and managed care shenanigans.

Q. Okay. And I think at the end of paragraph 16 on page 9 of Plaintiff's Exhibit No. 6 you've underlined the words Social Security documents.

A. Right.

Q. I assume that means you didn't have those either?

A. I didn't have those either that I recall. Again, if I had I would have cited them ordinarily.

Q. Then in paragraph 18 you underlined the words -- I assume these are your underlinings; is that correct?

A. I can't see them from here. They probably are. Yeah, they are.

Q. You've underlined the words received disability payments pursuant to a prior diagnosis of mild mental retardation, but was assigned a payee to be responsible for his money.

A. Right.



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diagnosis of mental retardation and, in fact, confirm and strengthen my prior diagnosis of mental retardation. Yeah.

Q. And you underlined all that?

A. Right.

Q. Why did you underline that?

A. Again, I wanted to be able to retrieve that information, be able to find that again because, again, he didn't have this information at that time, nor did I.

Q. Do you agree with the statement that they are, meaning the materials discussed in this affidavit, entirely consistent with a diagnosis of mental retardation?

A. As far as they're presented here they would be. Whether there's other contraindicating information in some of that, you know, I don't know because I haven't seen it and I haven't read it.

Q. Right.

A. I mean, those things can be consistent with, you know, some other things too including, you know, acquired organic brain syndrome, brain damage of various types, toxicities, and so forth.

Q. I'm going to show you what's been marked as Plaintiff's Exhibit No. 7 --



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A. Right.
Q. -- and direct your attention to --
A. This is the one that Jonathan Venn did.
Q. This is the sworn affidavit of Jonathan Venn?
A. Yeah, Dr. Venn. Okay.
Q. On page 3 of that document on the left-hand side there's some notations in the margin. Did you make those notations?
A. Yes, I did.
Q. And what does that say?
A. It says I had none of this, referring to the affidavits and testimony of several people listed here. I had never seen Dr. Maish's testimony until I received this. I wasn't privy to that at the trial and for obvious reasons.
Q. On page 7 of that document in paragraph 32 you've underlined, quote, his IQ score of sixty-seven on the CTMM, a group-administered IQ test given to him when he, onto page 8, was a child at school, indicates significantly subaverage intellectual functioning during the developmental period. Why did you underline that?
A. Again, I wanted to retrieve that information because basically I disagree with that. It's a



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A. Yeah. I'm trying to think of what -- I don't remember doing any testing for Aphasia.
Q. No. Again, I believe that was a test administered by Dr. Maish.
A. Could be. I guess I must have been commenting on what he was writing in his report then.
Q. So this really came down to an issue of you weren't presented with sufficient information to make a diagnosis of mental retardation?
A. That's about the size of it. And the only diagnosis that I remember is the one of depression. And that was even by review of the record and consultation with medical staff, not on assessment.
Q. But I guess it's also conversely true to say that you couldn't say that he wasn't mentally retarded, you just didn't have the evidence?
A. Exactly. Exactly.
MR. DUNN: I'm going to have this marked. And I'm sorry I don't have a copy of that.
(Plaintiff's Exhibit No. 10 was marked for identification.)
A. She did just what a prosecuting attorney would do. There's no argument for mental retardation. But, of course, she's not going to tell you that -- yeah, not going to tell you. That's the

note. There's no argument against mental retardation either.

Q. Let me show you what's been marked as Plaintiff's Exhibit No. 10.

A. Let's see. What is this?

Q. You have not seen that. That's a report that was generated by the Department of Corrections --

A. Okay.

Q. -- after Mr. Palmer was transferred to death row.

A. Oh.

Q. But there's a diagnostic impressions down there. Do you see that?

A. They're all rule outs. That's what the R O means. Yeah. Rule out mild mental --

Q. Rule out mild mental retardation. I mean, I guess you would say that what that person writing that report is saying the same thing as you.

A. Yeah.

Q. There's just -- there's not enough evidence here to say whether or not he's mildly mentally retarded, but there's clearly stuff that might suggest that?

A. Yeah. Yeah. See, ordinarily the

ordinary -- I guess the way I learned it ordinarily when you do the rule out notation it's a preliminary finding. The idea is to go do the assessment and either rule it in or rule it out --

Q. Right. But based on --

A. -- which often doesn't get done.

Q. Right. And based on the materials that have been reviewed in Dr. Maish's recent affidavit and Dr. Venn's recent affidavit it's clear that you were deprived of significant relevant information to do a determination?

A. Yeah. Well, it's interesting all this came out after the trial. That's one of the things that puzzled me when I was reading this is why didn't we have this. You know, I suppose there's always reason to suspect the veracity of things that come out after a trial like that. But, I mean, a lot of those people don't look like they'd have any kind of stake in the case at all: old school teachers, old school principals, you know.

Q. Social Security records of a diagnosis over ten years prior, obviously that's very relevant information --

A. Yeah.

Q. -- you didn't have. I think you knew of the

# CENTRAL STATE HOSPITAL

Superintendent, Britton B. Dennis, Sr.
Chief Medical Officer, James W. Mimbs, MD
Milledgeville
Georgia 31062

Quality Service Provided In A Caring Way
CSH

February 21, 1997

912-453-4281

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The Honorable William M. Fleming, Jr.
Judge, Superior Courts
Augusta Judicial Circuit
305 City-County Building
Augusta, Georgia 30911

PLAINTIFF'S EXHIBIT 3 6-11-02

Re: Willie Palmer
CSH Case No: 273-652
Burke County
Binion 2 South

Dear Judge Fleming:

This letter is in response to your order dated December 3, 1996 for an evaluation of possible mental retardation. Specifically, your order requested the diagnosis, prognosis and pertinent clinical and assessment findings regarding possible mental retardation in this individual. This is in regard to two charges of malice murder and two charges of felony murder as well as one charge of cruelty to children, one charge for possession of a firearm during a crime and one charge of possession of a firearm by a convicted felon.

Dr. Peterson performed the evaluation at Central State Hospital from the dates February 10 thru February 14, 1997. After being informed of his rights and the limits of confidentiality in the situation, he was interviewed for approximately one hour. This was followed by a second brief interview several days later as well as an attempt to administer the Wechsler Adult Intelligence Scale-Revised.

Additional information was obtained from consultation with Binion 2 South unit staff, telephone consultation with Burke County Jail personnel, review of the existing medical records and behavioral observation.

Identifying Data:

Mr. Palmer is a 44-year-old, widowed, African-American male who at this time is housed in the Burke County Jail following his transfer from Binion 2 South. Mr. Palmer completed the eighth grade and quit school in the ninth grade in order to work at home to help his mother. He has been employed as a truck driver for several years as well as a construction worker and has also been employed in a Pepsi-Cola plant. He has also been employed as a

day laborer on and off through the Local 1137 Union. He has been married once, involved in a common-law relationship once and has had several children by these relationships as well as children by five other women.

Health History/Assessment:

Review of medical records indicate that he was born at home by a midwife as a full-term baby without complications during birth and delivery. He evidently reached the usual childhood developmental milestones of walking, talking and toileting without any delay. Medical records further indicate that he stated that when he was a teenager he might have received a head injury when he was hit in the head by his brother. However, there is no record of any sequelae from this possible injury. Neurological evaluation including an EEG was conducted February 7, 1997, both were found to be within normal limits with no evidence of seizure activity. Physical examination was essentially within normal limits, except for minor surgical scaring as well as scars from several knife wounds.

Mental Health History:

This is Mr. Palmer's first admission to Central State Hospital. There is some history of treatment for depression with antidepressant medication. There is no record of any other mental health treatment that we have available. He was treated with antidepressant medication at this facility.

Clinical Impression:

Psychometric testing was attempted with the Wechsler Adult Intelligence Scale-Revised. Mr. Palmer's approach to the assessment was at first highly avoidant. He complained at some length about needing glasses and not being able to see well enough to complete testing. When this issue was finally settled and Mr. Palmer agreed to cooperate with the evaluation, the examiner quickly became suspicious of his approach to the test. He began by giving an obviously wrong answer to the first and most simple question, which was quite elementary. His progression of responses on the subsequent subtests also had a very uneven quality to them. He would miss very elementary items while easily passing the somewhat more difficult subsequent items.

Dr. Peterson concluded that this was an individual who was essentially refusing to demonstrate his level of competence accurately and discontinued assessment at that point. There is, therefore, no psychometric data in the present evaluation which would support any diagnosis. However, behavioral observation and

consultation with Binion 2 South treatment staff was significant for observations of social behavior that would not be consistent with any significant level of intellectual impairment.

Mr. Palmer's social behavior is seen to be age appropriate and he quickly became a ring leader on the unit and within days after his arrival, staff indicated that he had become "top dog" and had taken power from the dominant male patient on the unit. He has been observed to play cards and sports in the courtyard and clearly knows the rules of these games and can follow these rules sequentially. This extra-test presentation of competent social behavior would not be consistent with a diagnosis of mental retardation. The only diagnosis that appears to be supportable from the available data at the present time is that of major depression, by history.

Thank you for this opportunity to be of assistance to your court. If I can clarify any of the information in this report or be of assistance in any other way, please contact me at 912-453-4281 or write to me at the above address.

Sincerely,

Dave Peterson, Ph.D.
Forensic Psychologist

Jerold S. Lower, Ph.D., J.D., ABPP
Forensic Psychologist

/id

c: Ms. Nancy Johnson
Defense Counsel (Enclosed)

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(Dr. David Peterson took the stand)

THE COURT: Raise your right hand. Do you solemnly swear the evidence you will give on issues pending will be the truth, the whole truth, and nothing but the truth, so help you God?

WITNESS DR. DAVID PETERSON: Yes, I do.

DAVID LEONARD PETERSON, Ph.D., being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CRAIG:

Q. Sir, would you state your full name for the jury and for the benefit of the court reporter?

A. Dr. David Leonard Peterson.

Q. Sir, where are you employed now?

A. Presently I'm not. I resigned from Central State Hospital as a forensic psychologist in May. I may be signing on to Wisconsin Department of Corrections, but I haven't made a decision yet.

Q. Okay. And in the interim -- intervening period of time, after you left Central State, what is your day-to-day routine?

A. I took the summer off; spent it on my land over in Alabama, worked there. Since then I've attended several professional conferences and have been interviewing around the United States for different forensic related psychology slots.



test. The performance I.Q. is essentially the I.Q. generated from the performance section; performance is half of the I.Q. test; with the verbal I.Q. being made of the verbal scale on the test, the verbal half of the test. So each of those have approximately half of the items that the full scale I.Q. would have.

Q. Did you review other records, including a neuro-psychological evaluation of school records and notes from interviews that had been conducted with the defendant in order to try and formulate an opinion pursuant to the Court's order?

A. Yes, I did.

Q. And did you have sufficient information in order to attempt to formulate an opinion with regard to whether or not the defendant is mentally retarded?

A. Yes, fairly well.

Q. And based upon the information which was provided to you, Doctor, do you have an opinion about whether the defendant is mentally retarded?

A. Yeah. I never did believe he would warrant such a diagnosis on the grounds of -- to begin with, the full scale I.Q. that was obtained, which is the highest score that I could find in the record, did not fall within the range of mental retardation; it falls at the very bottom of the range of what is called borderline intellectual functioning. The issue of adaptive behavior, certainly, would have excluded, in my opinion,

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from such a diagnosis the -- if I -- you know, when I thought of this and reframed it in my mind as a clinical evaluation outside the forensic issues would be concerned -- when I reframed the question in my own mind, I thought, if this was a clinical evaluation for purposes of referral for services for mental retardation and developmental disabilities, and with this kind of report and these test scores, if I referred such an individual, I mean, they wouldn't be accepted for such services. And that to me was really the deciding factor in not offering a diagnosis of mental retardation.

Q. The medical standards that you work with and the programs available to help persons diagnosed as mentally retarded, those programs would not be available to this defendant?

A. No, not within my knowledge.

Q. Would you answer any questions that defense counsel might have for you?

A. Certainly.

THE COURT: Before we begin, we had better take a short recess. The jury needs a break.

(The jury retired to the jury room)

(Short recess)

(The jury returned to the courtroom)

THE COURT: All right, proceed.

## CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2020, I served this brief by mailing a copy of the brief to be delivered via email, addressed as follows:

jmoore@gacapdef.org
tdelage@gacapdef.org
npaine@augustaga.gov
sheppardlaw13@yahoo.com

/s/ *Sabrina D. Graham*
Sabrina D. Graham