MENTAL RETARDATION AND THE DEATH PENALTY:

A SURPRISING UNCERTAINTY IN THE *KENNETH GLENN THOMAS* CASE

Jerome T. Wolf*

INTRODUCTION

Death penalty defense is noble in concept and a challenge in practice for any law firm, including large commercial firms that assume this task on a pro bono basis. The author, a partner in SNR Denton US LLP, which has signed the American Bar Association pledge to provide 3% of its billable hours to pro bono work, learned these lessons first-hand.

While SNR Denton and other large commercial firms often lack experience in death penalty cases, they have compensating advantages such as substantial resources, experienced attorneys, access to information from firms similarly committed to pro bono work, and information from foundations such as Alabama's Equal Justice Initiative.

Nonetheless, what at first blush presents itself as a relatively straight forward issue can actually be complex and multifaceted. The Kenneth Glenn Thomas death penalty case is illustrative—a horrific murder of a defenseless octogenarian woman, a compromised client, as well as surprising uncertainty as to the facts and the law.

I. THE MURDER, TRIAL, AND POST-TRIAL PROCEEDINGS

Kenneth Glenn Thomas was convicted on March 26, 1986 of the intentional murder in Athens, Georgia of a woman in her 80's committed during the course of a burglary on December 15, 1984. The woman was sexually assaulted, stabbed to death and her house set on fire.[1] The Athens,

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* Jerome T. Wolf is a partner at law firm SNR Denton US LLP and is the founding managing partner of its Kansas City, Missouri office. He is a past president of the Kansas City Metropolitan Bar Association and was the founding president of the Kansas City Bar Foundation. He was the lead trial counsel in Thomas' federal district court habeas corpus case. Teresa A. Ascencio and Barrett J. Vahle were important members of the team. Ms. Ascencio drafted the Eleventh Circuit Court of Appeals brief and Mr. Vahle second chaired the trial and drafted the brief in the federal district court.

[1] Drugs and alcohol played a significant role in this murder. After interviewing Thomas a number of times in prison, it was difficult to imagine his committing these crimes, although the evidence against him was overwhelming. He was a Caucasian man in his late 40's/early 50's with homemade tattoos on his face. A small ungainly man, who did not understand much

Alabama jury recommended that Thomas be sentenced to death and the trial judge complied. The Alabama Court of Criminal Appeals affirmed the conviction on March 22, 1988.[2] The Supreme Court of Alabama affirmed the conviction and sentence on December 16, 1988.[3] Thomas filed a Rule 32 proceeding, essentially a state habeas corpus proceeding, the trial court heard it on March 4, 1993 and denied post-conviction relief on December 30, 1993. The Alabama Criminal Court of Appeals affirmed the denial of post-conviction relief in a published opinion entered on September 4, 1998.[4] Thomas filed his habeas corpus petition with the United States District for the Northern District of Alabama on March 28, 200. The author and his Kansas City team of lawyers did not begin to represent Thomas until well into the federal habeas corpus proceedings.

II. The Legal Standards Precluding Death Penalty Post-Conviction claims

As is customary in federal habeas corpus proceedings, SNR Denton raised many claims. However, the Antiterrorism and Effective Death Penalty Act of 1996[5] effectively precluded most of those claims. The purpose of the Act was to speed up death penalty litigation and limit appeals and collateral proceedings. Hence, the Act presented daunting obstacles to the presentation of Thomas' habeas corpus claims.

State court factual determinations are presumed to be correct unless rebutted by clear and convincing evidence. When a state court fairly addressed the merits of a federal constitutional claim and adequately explained the basis for its decision, habeas relief will not be granted unless the state court's adjudication of the claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in the light of the evidence produced in the state court proceeding. The United States Supreme Court had also applied a very restrictive test with respect to a claim of ineffective assistance of counsel.[6]

In addition, the procedural default doctrine bars federal habeas review of state court rejections of a state prisoner's claim when the disposition of the claim rested on a state law bar and the state ground was independent of the

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about his case and who appeared to be very needy and manipulative, he must have been transformed by drugs and alcohol into an aggressively evil person the night of the murder.

[2] Thomas v. State, 531 So.2d 375 (Ala. Crim. App.), aff'd, 539 So.2d 399 (Ala. 1988), cert. denied, 491 U.S. 910 (1989) (mem.)

[3] Ex parte Thomas, 539 So.2d 399 (Ala. 1988), cert. denied, 491 U.S. 910 (1989) (mem.)

[4] Thomas v. State, 766 So.2d 860 (Ala. Crim. App. 1998).

[5] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241-2254 (2006)).

[6] Strickland v. Washington, 466 U.S. 668 (1984).

federal question.[7] In the *Thomas* case Alabama state law presented such a bar, which was an equally daunting obstacle in that it prohibited raising an issue in a collateral proceeding that was raised or could have been raised during the trial or direct appeals.[8] A strong showing of prejudice was required for all of these claims.

III. The State Habeas Corpus Proceeding

The issue of mental retardation was raised in the Rule 32 proceeding, but that proceeding pre-dated *Atkins v. Virginia*[9] by nine years. The United States Supreme Court held in *Atkins* that execution of mentally retarded defendants was cruel and unusual punishment under the Eighth Amendment to the United State Constitution. Prior to *Atkins*, the applicable case on mental retardation was *Penry v. Lynaugh,*[10] in which the Supreme Court held that the execution of mentally retarded individuals did not categorically violate the Eighth Amendment's prohibition against cruel and unusual punishment, provided jurors had been instructed that they could consider and give mitigating effect to evidence of a defendant's mental retardation.

The SNR Denton team raised the mental retardation issue in the Rule 32 proceeding but not in a manner that would comply with the *Atkins* test which was established much later. They retained two psychiatrists from the National Institute of Health in Washington, D.C., one of whom was also a neurologist, who testified as to Thomas' apparent intellectual shortcomings and speculated that he possibly had brain damage. The experts failed, however, to administer an IQ test or pursue the other investigations required by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association as prescribed in those associations' applicable manuals. Both of these experts, while highly credentialed, were from outside Alabama and were viewed by the Rule 32 court as biased and, therefore, not credible. The court, obviously, viewed these experts as liberal carpet baggers from Washington, D.C. who had a strong bias against the death penalty.

The Rule 32 court held that Thomas' mental retardation claim was barred by Rule 32(A)(2)-(5) on the apparently inconsistent grounds that the claim could have been raised at trial or during the appellate process, but was not so raised, and paradoxically that the claim had been raised and fully litigated at trial and on appeal. The Rule 32 court also held that Thomas was not, in fact, mentally retarded, relying on the state's expert, Dr. Joe Dixon, who performed a short-form Wechsler Adult Intelligence Scales, Third Edition (WAIS III)[11] IQ test that was one of the accepted tests in the field. Dr. Dixon, a state

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[7] Coleman v. Thomas, 501 U.S. 722, 729-30 (1999).
[8] Ala. R. Crim. P. 32.2 (a)(2-5).
[9] Atkins v. Virginia, 536 U.S. 304 (2002).
[10] Penry v. Lynaugh, 492 U.S. 302 (1989).
[11] David Wechsler, The Wechsler Adult Intelligence Scale, Third Edition (1997).

employee, performed only two of the eleven subtests required by WAIS III and obtained an anomalous 78 IQ score. He also failed to conduct an investigation as to Thomas' impairments in adaptive functioning, a requirement under AAMR's Mental Retardation, Definition, Classification, and Systems of Supports[12] and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorder, Fourth Edition (DSM IV) criteria.[13]

Thomas filed his habeas corpus petition on March 28, 2001 in the United States District Court for the Northern District of Alabama asserting numerous claims, including the Rule 32 court's error in rejecting Thomas' mental retardation mitigation defense. The case was assigned to Judge Lynwood Smith, an extremely fortuitous event for Thomas as will be seen later.

IV. The Change in the Law of Mental Retardation: The *Atkins* Case and Thomas' Federal Habeas Corpus Proceeding

While Thomas' habeas corpus claims were pending, the law of mental retardation dramatically changed in his favor. The Supreme Court in *Atkins v. Virginia*[14] decided that the states had reached a consensus through state legislation that execution of a mentally retarded defendant was cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The Supreme Court followed that consensus making the execution of a mentally retarded person categorically unconstitutional. Thomas' counsel immediately seized on the *Atkins* holding and submitted supplementary briefs to Judge Smith.

A major lesson learned here is that counsel during the pendency of any death penalty proceeding must keep up with new decisions and changes in the law to take advantage of them and avoid losing the benefit of them. Thomas, fortunately, did not lose the benefit of *Atkins*. In fact, Judge Smith, in a 278-page opinion filed on March 6, 2007, rejected all of his claims based on the federal and state preclusive statute and rules except the mental retardation claim.[15] While the preclusive statute and rules functioned as intended by depriving Thomas of virtually all of his claims, the fact that *Atkins* was decided after the Rule 32 proceeding and before Judge Smith ruled on Thomas' federal habeas claims was a major stroke of luck and probably saved Thomas' life.

Judge Smith found that the state court's determination that Thomas was not mentally retarded was an unreasonable application of clearly established

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[12] American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (Ruth Luckasson et al. eds., 9th ed. 1992).
[13] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders - Text Revision, Fourth Edition (2000).
[14] *Atkins*, 536 U.S. 304.
[15] Thomas v. Haley, No. CV01-S-0772-NE (N.D. Ala. Mar. 6, 2007).

federal law as determined by the Supreme Court in *Atkins*, as well as an unreasonable determination of the facts in light of the evidence presented in the state post-conviction court proceedings. Judge Smith also decided that the federal constitutional issue preempted the state preclusive rules[16] which otherwise would have barred this claim.

V. The Trial Strategy for the Federal Habeas Corpus Proceeding

The mental retardation issue was, therefore, the last opportunity for Thomas to avoid the death penalty. Thomas had another stroke of luck. Judge Smith ordered a remand of the case to state court for a hearing on mental retardation, i.e., a determination of whether, in fact, Thomas was mentally retarded. Counsel for Thomas believed that if the case was remanded to state court, the state court would attempt to correct all of its mistakes and, again, find Thomas not mentally retarded. But the State of Alabama, in the interest of expediency and in an attempt to avoid this case proceeding again through the Alabama appellate process, only to find its way back to federal court, agreed with Thomas that the federal court should decide the issue of mental retardation. Thomas' ray of hope was that Judge Smith, who appeared to be open to the mental retardation claim, would be hearing this issue. That "ray of hope" exploded into a broad band of sunshine the day Judge Smith agreed to hear the case.

The next question was what constituted mental retardation under the law and how should a mental retardation case be tried. *Atkins* had deferred to the states to determine the standards for mental retardation. Alabama had not enacted a statute setting forth those standards but did have some meager case law on the issue. The primary case was *Ex parte Perkins*,[17] which for the most part followed the *Atkins* test with one exception. Whereas *Atkins* had suggested that the threshold was an IQ range of 70 to 75, *Ex parte Perkins* set it at 70.[18] It quickly became apparent that the determination of mental retardation was not a simple issue. It was not a question of the defendant taking a test and passing it or not. There were a whole range of considerations underlying this determination that necessitated a difficult and complex factual hearing and legal determination.

A. The Role of the IQ Test

The Alabama Supreme Court later elaborated on the test. It set forth the three requirements for mental retardation, but added time periods for

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[16] Rule 32(a)(2-5).

[17] Ex parte Perkins, 851 So.2d 453 (Ala. 2002), cert. denied, 540 U.S. 830 (2003) (mem.)

[18] The test for mental retardation was sub-average intellectual functioning (an IQ of 70 or below) significant or substantial deficits in adaptive behavior and that these problems manifested themselves in the developmental period (before the age of 18).

which the test applied. The defendant had to show significant sub-average intellectual functioning accompanied by significant limitations in adaptive functioning before the age of 18, after the age of 18, at the time of the offense, and at the "current time."[19]

The WAIS III IQ test previously mentioned and the Stanford-Binet Intelligence Scales, Fifth Edition (SB5),[20] were the two most widely used IQ tests. Those tests seemed fairly straight forward until the team was presented with two issues: the Standard Error of Measurement ("SEM") and the Flynn effect.

The scores on the WAIS III IQ and SB5 tests were essentially a product of initially giving these tests to a focus group of several thousand people, determining their individual raw scores, and, thereafter, determining the group's median score. The median score was thereafter established as a 100 final score, and the mental retardation target score was set at two standard deviations below the median score, or 70. Studies had determined that the SEM was plus or minus 5, and the parties agreed to this proposition.

B. The Flynn Effect

The Flynn effect, however, was another matter. Dr. James Flynn, a New Zealand political scientist, had determined that IQ scores in the Western World were rising every year. Dr. Flynn stated essentially that IQ scores had been increasing approximately .3 points a year from the date an IQ test was normed (i.e., the date the focus group scores were produced) until the time it was taken. As a result, if a person took an old test, for example, a 20 year old test, the test score would have to be reduced by .3 points a year for every year between the date the test was normed and the date the test was taken, or in this example, reduced by six points. Otherwise a score on a very old test would be substantially inflated. This would prove to be a critical factor in the Thomas decision. It was a critical factor because no court up until that time had actually credited a reduction in an IQ score according to this formula. Only a few courts had stated in dictum that the Flynn effect should be considered.[21] While experts had agreed that this score inflation occurred, there was substantial disagreement among experts as to whether IQ scores should be reduced according to this formula. Critically, however, the AAMR in its *Users Guide* recommended that such a reduction occur.[22] The American Psychiatric Association made no such recommendation in its DSM IV.

C. Proof of Deficits in Adaptive Functioning

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[19] Smith v. State, No. 1060427, 2007 WL 1519869 (Ala. May 25, 2007).
[20] Riverside Publishing, Stanford-Binet Intelligence Scales, Fifth Edition, http://www.riverpub.com/products/sb5/details.html (last visited Feb. 16, 2012).
[21] See Walker v. True, 399 F.3d 315 (4th Cir. 2005).
[22] American Association on Mental Retardation User Guide 20-21 (10th ed. 2002).

Thomas had another even more difficult task. His counsel had to develop a factual case that Thomas had deficits in adaptive functioning prior to the age of 18, at the time of the offense, and currently. Thomas had been on death row over 20 years at the time his defense team began to work on this issue. Psychiatrists and psychologists, however, believed that the limitations in adaptive functioning are more important than IQ scores, so this evaluation was critical.

The AAMR establishes criteria for adaptive functioning in three general areas, conceptual, social, and practical skills, and had previously established that the impairment of adaptive functioning criterion is proven by showing impairments in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, and health and safety. The American Psychiatric Association, in its manual, DSM IV, followed essentially the same criteria. These impairments had to be shown at the three critical periods of time: during the developmental period before the age of 18, at the time of the crime, and currently.

D. The Experts

The Thomas habeas corpus team then had two challenges. The first was to find psychological and neuropsychological experts who would have credibility with the court. The second was to develop a credible case for mental retardation. The team wanted to avoid retaining out-of-state experts who might appear to be liberal, biased and, therefore, on a crusade against capital punishment. The team's charge, therefore, was to find the best Alabama experts they could find and the team obviously succeeded. They retained Dr. Karen Salekin, a psychologist and professor at the University of Alabama at Tuscaloosa, and Dr. Daniel Marson, a neuro-psychologist at the University of Alabama at Birmingham. Interestingly, Dr. Marson had a law degree from the University of Chicago, but the team quickly dismissed that concern because they believed they were before a very sophisticated judge who would focus on the merits of the claims. The team was correct in that assessment as well.

Dr. Salekin and Dr. Marson's tasks were to evaluate the history of Thomas' IQ tests, administer current IQ tests, provide an evaluation of Thomas' adaptive functioning during the critical periods of time, and render an opinion as to whether Thomas met the legal requirements for mental retardation. Dr. Marson also had the task to determine if he could link any of Thomas' adaptive deficits to neurological impairments or dysfunctions in order to show that those deficits not only existed but were organic and would persist.

E. The Strategy for the Intellectual Functioning Issue

The first challenge was dealing with Thomas' eight IQ scores. Although *Ex parte Perkins* stated that the IQ cutoff for mental retardation was 70, Thomas had a number of IQ scores above 70. Specifically, in 1968 when Thomas was 9 years old, he scored a 56 on the Wechsler Intelligence Scales for children (WAIC). He was given the short-form of the test and although the state disputed the validity of the test for that reason, it was given some consideration. When Thomas was 13, he took the California Test of Mental Maturity Short-Form and scored a 68. The experts were not familiar with this test and had difficulty evaluating it. In 1973 when Thomas was 14, he took the full WAIS, a forerunner of the WAIS III, test and scored a 64 on the test and had poor results on related tests administered at the same time. At his 16th birthday, Thomas was again administered the WAIS test, a forerunner of the WAIS III test, and scored a 74.

The most troublesome test was given to Thomas by a high school counselor a month after his 18th birthday, which again, was a WAIS test, on which he scored a 77.

Prior to his trial, Thomas was administered a WAIS test and scored a 65. In preparation for this evidentiary hearing, the state's expert, Dr. Harry McLaren, administered a WAIS III test in which Thomas scored a 65. Dr. McLaren also administered a malingering test which demonstrated that Thomas was not malingering, i.e., attempting to manipulate the test results by intentionally giving false answers, at the time he took the WAIS III test. Thomas' expert, Dr. Salekin, administered the Stanford-Binet (SB5) intelligence test and Thomas obtained a score of 62.

The problem tests for Thomas were those that produced scores over 70, and the major problem was the 77 score that the state tried to show belonged in the developmental period (pre-age 18 period) in order to escalate the average developmental period scores and disqualify Thomas from that criterion.

F. The Strategy for the Adaptive Functioning Issue

In addition, the experts had to evaluate Thomas' adaptive functioning for the critical periods of time, and the most problematical period was before the age of 18. Thomas came from a very fluid and impoverished environment in which many of the people with whom he dealt had long since left or could not remember much about him. The AAMR *Manual*, moreover, prescribed an instrument, a kind of questionnaire called the SIB-R, to administer to witnesses to arrive at a score measuring Thomas' adaptive functioning. The problem was that the SIB-R was created to evaluate current functioning in the context of evaluating school children for their placement in school. The SIB-R was not conducive to a historical evaluation in which the vagaries of memory played such a great role.

In spite of those handicaps, Dr. Salekin, most prominently, and Dr. Marson, with the substantial assistance of counsel, went to Athens, Alabama, Thomas' home and vicinity, to interview as many people as they could who could comment on Thomas' functioning prior to the age of 18. Dr. Salekin developed a picture of Thomas' youth as one of impoverishment, dislocation, abusive parents, inability to adapt and learn, and minor scrapes with the law. Dr. Marson, to a lesser extent, substantiated that picture.

To say that it was a huge challenge to find people who knew Thomas and who were willing to talk about him and remembered specific circumstances from 20 years before the interview is an understatement. But the Salekin and Marson effort was a winning effort compared to the desultory investigation made by the state's expert, Dr. McLaren. Dr. McLaren only spoke to a few people and obtained one interview from a prison guard at a prison where Thomas spent a brief period of time that, if believed, would make out Thomas to be just short of a genius. But the team could not be sanguine about hearsay anecdotal information related by two experts that it had employed.

Thomas' counsel knew they had to obtain third party witnesses who actually experienced Thomas' adaptive functioning during the developmental period. Through the team's numerous visits to Alabama, their persistence, and ability to establish a rapport with these witnesses, Thomas was able to present at trial a social worker, the son of a foster parent, and Thomas' special education teacher, all who had direct experience with him and his adaptive functioning before the age of 18. Their testimony was credible, powerful, and established several adaptive deficits. For example, they gave graphic testimony about Thomas failing the early grades and being placed in special education courses thereafter, about having to give directions repeatedly to Thomas for him to perform menial work, and about Thomas' inability to live independently or handle finances. The state could only produce a police officer who stopped Thomas in a traffic incident and said, in effect, that he knew how to drive a car. Dr. Salekin and Dr. Marson quickly established that even mentally retarded people can drive automobiles and do manual labor, a conclusion with which the state's expert agreed. Thus, the overwhelming evidence by Thomas' three fact witnesses and two expert witnesses carried the argument.

VI. The Federal District Court's Decision

The question of whether Thomas had an IQ of 70 or below, as required by *Ex parte Perkins* during the critical periods was a challenging burden of proof. Dr. Salekin and Dr. Marson both endorsed the Flynn effect. The state's expert agreed to the existence of the Flynn effect (in other words that IQ scores were increasingly inflated), but disagreed with its application to adjust an admittedly flawed score. What the Flynn effect did was to allow the court

to consider adjusting the 77 IQ score which Thomas had achieved on a 20-year-old test by reducing it 6 points (.3 points a year times 20 years) to virtually a 70. The Flynn effect similarly allowed a reduction of the 74 and 71 scores. The SEM, provided that it was applied on the downward side, also tended to reduce those scores or to at least place them in a range, the bottom of which was below 70. The Thomas team also pointed out that the 77 score was not in the development period but in the after age 18 period, thereby establishing that Thomas' average IQ score before the age of 18 was below 70 without the application of the SEM or the Flynn Effect.

Dr. McLaren sought to place the 77 score in the development period and further concluded that the 74 and 77 scores in the development period showed a trend upward so that by the age of 18, Thomas was no longer mentally retarded.

Judge Lynwood Smith wrote a masterful opinion analyzing all these issues.[23] While he did not specifically find that the Flynn effect must be applied to reduce Thomas' above 70 IQ scores, he applied it in his analysis to find that the scores were below 70 and that the 77 score, at the least, was an anomaly but was probably after application of the SEM and the Flynn effect a score of 70.

In another precedential finding, Judge Smith stated that because Thomas clearly suffered from significant deficits in adaptive functioning, the SEM should be applied on the downward side, i.e., by reducing the scores by 5 points rather than on the upward side, and that at the least, the range of scores established by the SEM should be considered with emphasis on the lower score of the range. Judge Smith, therefore, found that Thomas had deficits in adaptive functioning prior to age 18 in functional academics, work, social and interpersonal skills, home living and self-direction. He also found that Thomas currently suffered limitations in adaptive functioning skills in social and interpersonal skills and self-direction. Judge Smith's 123 page opinion was a virtual treatise on mental retardation and the death penalty. It provided a comprehensive history of mental retardation and the instruments and criteria by which it is evaluated. Any lawyer who has a death penalty case would be well advised to read and learn from it.

VII. The Eleventh Circuit's Affirmance

On May 27, 2010, the United States Court of Appeals for the Eleventh Circuit applied the clear error test and affirmed Judge Smith's opinion and

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[23] Thomas v. Allen, 614 F. Supp. 2d 1257 (N.D. Ala. 2009), aff'd, 607 F.3d 749 (11th Cir. 2010).

judgment.[24] The state, after a period of consideration, elected not to seek certiorari to the United States Supreme Court.

VIII. Lessons Learned and a Grateful Client

This was a substantial learning experience for the defense team. The team learned that IQ tests are not what they seem. They learned how to address the variability inherent in the test results and take advantage of the variables. They learned that psychologists believe that the adaptive functioning evidence is the most important part of the diagnosis of mental retardation and that it is critical to develop that historical evidence. They also learned that while there is an instrument, the SIB-R, to assess current adaptive functioning, the evidence of adaptive functioning is, for the most part, anecdotal and has to be developed through credible and persuasive witnesses who knew the defendant years ago. The decision regarding impairments of adaptive functioning was substantially based on clinical judgment and, therefore, involves some significant subjectivity.

While there is no magic to the determination of mental retardation, it is for the most part an arbitrary low end percentage of the population, determined, in part, by imprecise tests. As a result, the mental retardation issue in many cases presents a lot of room for successful, factual and legal advocacy and should be thoroughly explored wherever mental retardation is suspected and is at issue.

After the Eleventh Circuit Court of Appeals ruled and the state decided not to take the case further, the author telephoned Thomas at the Holman Prison in Atmore, Alabama, where Thomas was incarcerated. The author said, "Kenny you are off death row." Thomas broke down and cried. Payment enough.

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[24] Thomas v. Allen, 607 F.3d 749 (11th Cir. 2010).