REPRESENTING JOHNNY LEE GATES

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Becoming Involved

I first became involved in the representation of Johnny Lee Gates in 1985.1 At that time, George H. Kendall, then with the American Civil Liberties Union of Georgia, asked me if I would handle Mr. Gates' appeal in the United States Court of Appeals for the Eleventh Circuit if the United States District Court dismissed Mr. Gates' petition for a writ of habeas corpus. I agreed to do so. I had a bit over two years experience in representing death row inmates, all of it pro bono, and virtually all of it appellate briefing and argument. I had met Mr. Kendall when preparing for oral argument in my first capital punishment case. Due to the fact that the Federal District Judge apparently lost track of Mr. Gates' case, it was not until 1988 that I briefed and argued his appeal in the Eleventh Circuit.2 I was by then at my present firm: Skadden Arps Slate Meagher & Flom LLP.

As matters have turned out, I have continued, along with Mr. Kendall, and later also with Gary Parker, representing Mr. Gates for eighteen years. Our work culminated in a November 2003 trial regarding his mental retardation3—a trial that ended in a mistrial followed by an agreement under which Mr. Gates, who has served on Georgia's Death Row since 1977 for a crime he probably did not commit, is no longer in danger of being executed.

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2. Gates VI, 863 F.2d at 1492.

3. Gates IX.
Immediate Skepticism About Gates' Guilt

In preparing to write the opening appellate brief, I reviewed the record of the trial,\(^1\) the direct appeal,\(^5\) the state post-conviction proceeding,\(^6\) and the federal district court proceeding.\(^7\) One thing was apparent from the beginning: the evidence upon which the jury convicted Mr. Gates and sentenced him to death was extremely questionable, although it was challenged little, if at all, at his trial.

Mr. Gates was convicted of the murder and rape of Katharina Wright on November 30, 1976, in Columbus, Georgia. Ms. Wright was killed in her apartment in the middle of a weekday. Initially, the police had the following information: a woman who resided in another apartment in the complex reported seeing a white man running away from the building at about the time of the killing. A man who resided in an apartment on the lower floor of the complex said that over an hour before the killing, a black man, described as about 5 foot 9 or 5 foot 10, and weighing about 170 pounds, had come to his apartment, explained he was from the gas company, and asked if the tenant would like his gas turned off. The police searched the Wrights' apartment for fingerprints but found none from anyone other than the victim and her husband.

Later, a white man named Lester Sanders was found fondling the victim's body in the mortuary. Police testified to a grand jury that Mr. Sanders had begun confessing to the murder and in doing so had told them something only the murderer could know and that the police had not noticed: that when killed, Ms. Wright was tied to a bedroom door. The police testified that they had returned to the scene and, for the first time, saw blood on the door. The grand jury had not indicted Mr. Sanders, for reasons that never became clear.

Ms. Wright's November 1976 murder was unsolved as of January 1977 when Johnny Lee Gates, then 21 years old, was arrested along with two other men while attempting to rob a store. The police asserted that an informant named James Albert Taylor told them that in November 1976, Mr. Gates had borrowed Taylor's .32 caliber gun and later had claimed he had killed Ms. Wright. Taylor allegedly said that he had thrown the gun away in a creek after Gates returned it. Later, the police found the gun, test-fired it, and concluded that it could not have been used in Ms. Wright's killing. In the meantime, they had gotten Mr. Gates to confess to the killing.

Mr. Gates' confession was typed up by the police. He also confessed on a videotape that, for the first time in the history of the Columbus Police Department, was recorded at the crime scene. According to the confessions, Gates:

- dressed up as though he was from the gas company and went to the apartment complex in which the Wrights lived;
- went to an apartment downstairs and talked to a tenant about being from the gas company;

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4. See generally Gates I.
5. See generally Gates II.
6. See generally cases cited supra note 1.
7. Gates II.
went upstairs to the Wrights' apartment and told Ms. Wright he was from the gas company, to which she responded that she had called the gas company because her heater was not working;

- was led to the heater by Ms. Wright, who handed him a can of oil, and he began working on the heater;
- told Ms. Wright it was a robbery, to which she responded that all she could give him was sex; they then had consensual sex, after which he washed up;
- insisted on being given money and was given some by Ms. Wright; he also found $300 under a mattress and $180 in a "reel-to-reel tape" and looked throughout her drawers and elsewhere in the apartment;
- tied up Ms. Wright on her bed, and was about to leave when she said she would identify him, whereupon he shot her.

The remainder of the State's case against Mr. Gates consisted of (1) evidence that there was non-consensual sexual intercourse, although from the semen evidence the crime lab could not identify Mr. Gates as the person who had had the intercourse; (2) Mr. Gates' handprint on the heater, which was found shortly after his videotaped confession at the crime scene when a police officer was directed to go to the heater and lift a print; the officer testified that if someone had had oil on his hands, the print could still be there two months later; and (3) the downstairs tenant's testimony that Mr. Gates, although he was only about 5 foot 6, and weighed about 135 pounds, was the person the tenant had seen on the day of the crime posing as someone from the gas company.

It seemed to me, as it did to George Kendall, that it was highly unlikely that anyone would commit a crime in the manner described in the confession. Why would someone, after gaining entry to an apartment by claiming to be from the gas company, then go ahead in the middle of the day—when the chances of being detected are greatest—and try to fix a heater? This seemed even more unlikely when we learned that there was no record that the Wrights' heater had needed repair or that the gas company had been called.

Instead, it appeared to us that Mr. Gates had been "fed" this story so that it would tie in with the account of the downstairs neighbor—although the only thing about Mr. Gates' appearance that was consistent with that account was that he was African-American. This enabled the police, who had found in their initial investigation no physical evidence tying Mr. Gates to the crime scene, to have an "explanation" for "finding" his handprint on the heater two months thereafter. We thought it much more likely that Mr. Gates' handprint had been placed there when he went to the crime scene after his arrest in January 1977.

Arguments Presented to the Eleventh Circuit

The likelihood that an inmate, even a death row inmate, is innocent is not a basis for habeas corpus relief. Accordingly, we had to focus on other issues.

The leading issue on our appeal to the Eleventh Circuit was racial discrimination in the composition of the pool of prospective jurors, from which Mr. Gates' all-white trial jury had been selected. Working closely with a legal assistant, I prepared a detailed showing in our opening brief that the extent to which African-Americans
had been “under-included” in the venire was sufficiently great as to present a prima facie case of unconstitutional racial discrimination. We showed that the percentage of African-Americans in the jury pool was so much lower than the percentage of African-Americans who were eligible to be called for jury service that the federal court would be required to overturn Mr. Gates’ conviction and death sentence unless the State could meet its burden of showing a non-discriminatory reason for this tremendous disparity.

In ruling on Mr. Gates’ appeal, the Eleventh Circuit found that we had shown a prima facie case of unconstitutional racial discrimination. However, instead of requiring the State to refute this showing through a non-discriminatory explanation, the court held that it could not consider this claim because Mr. Gates’ trial lawyer, the appointed public defender, William Cain, had not raised it before or during the trial.

In briefing and oral argument, I pointed out that Mr. Cain had testified in the state post-conviction proceeding that he and the other local defense lawyers had agreed never to allege racial discrimination in the jury pool. They felt that even if they ever won such a claim, jurors would become biased against them and their clients for having raised the claim. I cited cases from the era of legal segregation (which, at the time of Mr. Gates’ trial in 1977, was only about a decade in the past) in which the federal courts dealt with lawyers facing a “Hobson’s choice of evils”: racial segregation or jurors biased against the defendant for having attacked the racial segregation. In these cases, the federal courts held that a lawyer who did not object under such circumstances did not waive his client’s claim of racial discrimination. Nevertheless, the Eleventh Circuit held that Mr. Cain’s failure to object constituted waiver of this argument and that he had not been ineffective when he failed to object.

Our other principal argument in the Eleventh Circuit was that Mr. Cain’s performance had been so ineffective as to be unconstitutional. While we pointed to his failure to present some readily available evidence and argument about the weakness of the prosecution’s guilt-phase case, our principal attack was on his complete failure to present any mitigating evidence. In the penalty phase of a death penalty case, defense counsel is entitled to present anything about the defendant’s background that might lead a jury to sentence him to a sentence other than death. Yet, Mr. Cain claimed in his post-conviction testimony that despite combing Columbus trying to find anyone who could say anything helpful about Mr. Gates, he had been unable to find a single useful witness.

In the Eleventh Circuit, I was limited to the record that existed prior to my involvement in the case. With regard to available mitigating evidence, this meant that I could cite only such evidence as had been uncovered during the state post-conviction proceeding by Ronnie Batchelor, the pro bono lawyer who represented

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8. Gates VI, 863 F.2d at 1498.
9. Id. at 1500.
10. See, e.g., Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1973) (en banc); Whitus v. Balkcom, 333 F.2d 496, 506-10 (5th Cir. 1964), cert. denied, 379 U.S. 931 (1964).
11. See generally Whitus, 333 F.2d at 496 (holding no procedural bar in “Hobson’s choice” situations).
12. Gates VI, 863 F.2d at 1500.
Mr. Gates. Mr. Batchelor had found several witnesses who were available in Columbus at the time of the trial and who would have said nice things about Mr. Gates. However, the Eleventh Circuit held that even assuming these witnesses could have been presented, Cain’s failure to do so was not ineffective.\textsuperscript{13}

Due to Mr. Batchelor’s limited resources and time, he only skimmed the surface in investigating the available, but never presented, mitigation evidence. He did not even come close to finding the compelling witnesses whom our investigators found years later while looking into Mr. Gates’ mental retardation. Even so, if it were dealing with the issue today the Eleventh Circuit would probably hold, based on what Mr. Batchelor presented, that Cain’s penalty phase performance was unconstitutionally ineffective. Unfortunately, it was not until a decade or more after our appeal that the Supreme Court held in \textit{Williams v. Taylor}\textsuperscript{14} and \textit{Wiggins v. Smith}\textsuperscript{15} that defense counsel should be found ineffective for presenting none of the available mitigating evidence.

One other aspect of our ineffectiveness argument will always remain in my memory. I asserted at oral argument, as I had in the brief, that Cain should have objected when the prosecutor scoffed at the portion of the confession in which Gates said that the sexual intercourse had been consensual by saying that, after all, this was a white woman and he was a black man. The members of the Eleventh Circuit panel were incredulous at my argument. One of them said that the prosecutor’s argument seemed perfectly logical to him. You will not find mention of this in the court’s opinion, which merely says that my remaining arguments were meritless.\textsuperscript{16}

After we lost in the Eleventh Circuit panel, we sought and were denied en banc review, although two judges dissented. We then sought certiorari in the Supreme Court. The Court accepts extremely few cases each year. We hoped to interest the Court in this case by focusing on the egregious racial discrimination. A significant number of amici curiae filed briefs in support of our certiorari petition. These included Jewish, Hispanic, and various other groups that expressed horror at a prima facie case of unconstitutional racial discrimination being barred from consideration because of a timid trial lawyer’s failure to object. The Court, however, declined to grant certiorari.\textsuperscript{17} While Justices Brennan and Marshall dissented, they issued only their usual dissent, stating that they believed capital punishment to be unconstitutional in every case.\textsuperscript{18}

\textit{Our Realization that Mr. Gates Might Have Mental Retardation}

Ordinarily, the denial of certiorari would have meant, for all practical purposes, the end of any meaningful opportunity to prevent Mr. Gates’ execution. Securing executive clemency had become virtually impossible in Georgia by 1989. Moreover, the supposed review of the merits of a death row inmate’s case by

\footnotesize{\textsuperscript{13} Id. at 1500 n.7.  
\textsuperscript{14} 529 U.S. 362 (2000).  
\textsuperscript{15} 123 S. Ct. 2527 (2003).  
\textsuperscript{16} Gates \textit{VI}, 863 F.2d at 1500 n.7.  
\textsuperscript{17} Gates \textit{VIII}, 493 U.S. at 945.  
\textsuperscript{18} Id.}
numerous courts provided another basis for rejecting clemency—even though, as in our case, the merits of our main claim had never been adjudicated, and the facts supporting our ineffectiveness claim had been inadequately investigated by volunteer counsel.

However, a confluence of circumstances enabled us to keep Mr. Gates before the courts and, in 2003, finally to get him off of Death Row. First, in 1989, after its execution of a mentally retarded man, Jerome Bowden, Georgia became the first state to enact legislation prohibiting the execution of people with mental retardation.19 Although the legislation limited its application to those not already on Death Row, the Georgia Supreme Court later held that people already on Death Row could not be executed if they could prove by a preponderance of the evidence that they were mentally retarded.20 (Under the new statute, those not already on Death Row had to prove their retardation beyond a reasonable doubt.)

Second, George Kendall and I were among those who attended a session on mental retardation at the NAACP Legal Defense and Educational Fund, Inc. ("LDEF") annual conference for death penalty litigators. We were both surprised and impressed by Dr. Ruth Luckasson’s presentation, which included a videotape showing various people. Dr. Luckasson asked the audience members which of the people they observed talking on the videotape had mental retardation. She told us that all but one had mental retardation. From this and other things she explained that day we realized that we had a great deal more to learn about mental retardation.

While Dr. Luckasson’s presentation was geared toward lawyers throughout the country and focused on the importance of showing a client’s mental retardation as mitigating evidence in a capital sentencing proceeding, for those with cases in Georgia the significance of her discussion was even greater. Based on her talk, and our subsequent discussion with her and others, George and I decided that we needed to consider the possibility that Johnny Lee Gates has mental retardation.

Securing an Order Requiring a Trial on Whether Mr. Gates Has Mental Retardation

This required us, with the enormous help of an investigator from Washington, D.C., Lee Coykendall, to find and review all the school, health, and prison records we could find on Mr. Gates. We then had to interview him and as many people as we could find who knew him prior to age eighteen. Those with knowledge of him prior to age eighteen were particularly important because, in order to demonstrate mental retardation, one must show not only a significantly subaverage IQ, but also limitations in two or more aspects of “adaptive behavior,” and that these limitations manifested themselves prior to age eighteen.

In this process, our client was probably the least reliable source of information. This is usually so with people with mental retardation, because they have spent a lifetime honing their ability to hide, or “mask,” their retardation. They are ashamed of their mental limitations and do everything they can to make it appear that they

can do more than they really can. Nonetheless, I spent a great deal of time with him, trying to get names and contact information about people he knew while growing up, and attempting (much less successfully) to get accurate details about his childhood. Even after we learned from numerous other people about his problems doing things that non-retarded children could do, he would consistently deny that he had had such problems, or would say that if these things happened, he did not remember them.

Fortunately, we saw in the school records significant information consistent with mental retardation. Mr. Gates failed the second and seventh grades and was sent to a reading program that was the closest thing to special education that Columbus' segregated school system then provided to African-American students. We also saw an I.Q. score of 77 from when he was in a Youth Development Center in Augusta. There was no back-up documentation about the administration of that test, but we realized that it could pose a problem because, even though at the time it was administered 77 was within the mental retardation range, thereafter the generally accepted definitions lowered the upper range of I.Q. for the mentally retarded to approximately 70-75 or below. We also saw that when Mr. Gates entered the adult prison system, he was given a screening I.Q. test, which was less complete than a full I.Q. test, and he had scored 65.

George found a Georgia psychologist, Dr. Mary Ann Drake, who agreed to administer I.Q. and other tests to Mr. Gates, to review the background documents on him that we had collected, and to meet him and people who had known him prior to age eighteen. Before Dr. Drake did this work, Lee Coykendall located a substantial number of such people who described numerous adaptive behavior problems that Mr. Gates had prior to age eighteen. Dr. Drake found these people credible, and the score she calculated for Mr. Gates on the most commonly used I.Q. test for adults, 72, was within the mental retardation range and was supported by her substantial additional testing. She prepared an affidavit setting forth her firm conclusion that Mr. Gates had mental retardation.

George and I submitted Dr. Drake's affidavit to a state post-conviction court. The State submitted nothing in opposition. The post-conviction judge found our submission sufficiently persuasive to create a genuine issue for trial on the issue of whether Mr. Gates was mentally retarded.

Activities During the Years Before Trial

Although that order was issued in 1992, it was not until 2003 that the trial on Mr. Gates' mental retardation occurred. Why? First, after the case was sent back to Columbus, it was assigned to a judge who was a member of all-white clubs and had otherwise acted in ways that raised questions about his impartiality in a case such as this. George, myself, and our new co-counsel, former Columbus State Senator Gary Parker, asked this judge to recuse himself. When he refused to do so, we filed for mandamus in an appeals court. Second, while that was pending, a scandal arose in Columbus when it was disclosed that the District Attorney's office had been determining which judges got selected to preside over important criminal cases. Not long thereafter, an order was issued that reassigned Mr. Gates' case to Judge John...
Allen—the Muscogee County District Court's only African-American judge. Several years had elapsed by this time.

A substantial amount of time then elapsed because of our effort to get Judge Allen to decide whether, and to what extent, he would allow evidence about the killing of Ms. Wright to be introduced at the trial concerning Mr. Gates’ mental retardation. We said that it would put us in an impossible situation to either (a) have an expert whom we would retain evaluate Mr. Gates and find him mentally retarded without considering the crime evidence, only to have the judge thereafter decide that it would be admissible or (b) have the State expert evaluate Mr. Gates and find him not mentally retarded after considering the crime evidence, only to have the judge thereafter decide that it would be inadmissible. In the former situation, our expert could be attacked for “conveniently” adhering to a conclusion already reached before considering the crime evidence. In the latter situation, we could not mount a similar attack on the state expert, since by doing so we would be revealing the very crime evidence that, in that scenario, the judge would have excluded from consideration. We urged the judge to have a hearing in which experts who would not be appearing at the trial could testify about the relevance, or lack thereof, of the crime evidence in this case.

Judge Allen ultimately ruled (in 1997) that he would not hold such a hearing and that he would not at that time make a decision about the admissibility of the crime evidence. He ordered that we decide and announce whether or not we were going to present an expert witness within several months. In making this order, Judge Allen said that an expert witness could put things into or out of his or her mind and reach a new conclusion based on consideration of new evidence or exclusion of previously considered evidence.

We then were in a great quandary, because Dr. Drake was not available to testify. She was no longer a practicing psychologist, and when she had moved from one house to another, she had discarded all of her records about Mr. Gates. Fortunately, she had provided George with copies of most of her records on Mr. Gates, and George had retained them.

In a very short amount of time, we had to find a new expert and have her undertake new testing of Mr. Gates, review the documents we had obtained (now including extensive prison files), and meet with a substantial number of people who had known Mr. Gates prior to age eighteen. Sadly, our best witness in that regard, Roberta Robinson, who had cared for Mr. Gates extensively when he was a child, had recently died. Thanks to the work of Elizabeth Adams, an investigator based in New York who took over from Lee Coykendall, we had located many additional useful witnesses. Moreover, I had met several times with Maedel Chandler, Mr. Gates’ sister who lived in Los Angeles, and had learned a great deal from her.

We heard about Dr. Catherine Boyer, who had recently moved from Arizona to Alabama, from Stephen Bright, Executive Director of the Southern Center for Human Rights. Dr. Boyer was an experienced psychologist, who had particularly great expertise in evaluating prisoners. She had done work for numerous prosecutors, including in death penalty cases, while sometimes testifying (although never before in a capital case) for defense counsel. In addition to her private practice, she worked part-time at a hospital in Columbus and often did evaluations at the request of the court or of the District Attorney’s office. From meeting with
her, it was apparent that she was extremely knowledgeable, had an engaging personality, and was a "straight shooter." This presented both an opportunity and a potentially fatal danger for us. Since we had had to go to Judge Allen to seek permission for her to examine Mr. Gates, she was, as a practical matter, the only expert we could credibly use. Yet, if she were to obtain an I.Q. score for Mr. Gates that was above the current range for mental retardation, or were to conclude he was not mentally retarded, presenting her as a witness would be disastrous for our case.

We were exceedingly pleased and relieved when, in December 1997, Dr. Boyer reported that after administering to Mr. Gates (among other things) the newly-revised version of the most widely used adult measure of I.Q., she had calculated his I.Q. at 69—three points lower than Dr. Drake's calculation after using the previous version of that test. Dr. Boyer also concluded, based on her testing of the documentation and witness interviews, that Mr. Gates had mental retardation. We reported this conclusion to Judge Allen and the District Attorney early in 1998.

It was not until almost four years later that we learned of the opinion of the State's experts. Almost two years were lost due to the State's insistence that Mr. Gates be evaluated for two full weeks at Central State Hospital—far greater access, both in time and degree, than Dr. Boyer had been granted. Eventually, the Central State psychologist decided he was too busy to evaluate Mr. Gates, and the District Attorney chose to use two psychologists who had previously worked at the same Columbus hospital where Dr. Boyer worked part-time (indeed, one of them, Dr. Karen Bailey-Smith, had hired Dr. Boyer to work there), and who now headed up Georgia's bureaucracy for dealing with mentally disabled people. These psychologists (the second of whom, Dr. Christine Gault, had been certified to practice only months before) decided that they would test Mr. Gates in the same location as had Dr. Boyer.

Although they tested Mr. Gates in March 2000, and later claimed that their conclusion that he was not mentally retarded was based solely on their testing and school records that they already had by that time, they did not advise the District Attorney, the Court, or us of their conclusion until December 2001. At that point, we got their report in which they stated that when they administered to Mr. Gates the same I.Q. test that Dr. Boyer had administered, his score had been 84, well above the generally accepted range for mental retardation. In view of this, plus the score of 77 when Gates was in the eighth grade and scores from standardized tests that Gates took in kindergarten, the first grade, and the second grade, they claimed it was obvious that he was not mentally retarded and that inquiry into his adaptive behavior was irrelevant. Therefore, they had not interviewed anyone about Mr. Gates, except for Mr. Gates himself. They proceeded to speculate that he was failed by his family and the school system and not by any significant cognitive impairment.

Thereafter, the pre-trial court proceedings mainly concerned the issue we had tried to resolve in 1996-97: what, if any, crime evidence would be admissible. At two separate hearings, the District Attorney asserted that the State's experts had told him that the crime evidence was highly relevant. This District Attorney claimed the way that Mr. Gates answered questions in the videotaped confession and also the way in which he purportedly committed the crime were evidence that he was not mentally retarded. We argued, among other things, that it was unfair to admit the
videotaped confession and police officer testimony—even assuming they might somehow be relevant—because we could not present evidence that contradicted them. This was because, as we showed at a hearing in early 2003, the state crime lab claimed to have destroyed all of the physical evidence in 1978, including semen evidence on which DNA analysis might now have been done. The lab witness asserted that this happened after the lab had notified the police that this evidence would be destroyed unless the lab was told not to do so within a specified time frame. The lab had heard nothing in response. Judge Allen stated on the record that he believed that he had never before heard of crime evidence being destroyed so shortly after a capital trial and that its destruction quite likely had violated Mr. Gates’ right to due process of law. But he nonetheless allowed the State to present the videotape and other crime evidence.

Final Trial Preparations and the Trial

After adjournments to see if the Georgia Supreme Court would change the burden of proof in view of recent United States Supreme Court decisions22 (it did not do so), the trial began on November 3, 2003. In the weeks before that date, I engaged in a whirlwind of travel, working with several witnesses.

We first learned of Dr. Suzanne McDermott thirteen days before trial, and I flew down to South Carolina to meet her the following night. We had concluded that we had to find a “set-up” expert, who could explain to the jury that which George and I had learned years earlier from Dr. Luckasson: that one can be mentally retarded and still be generally capable; the nature of mental retardation, particularly what used to be referred to as “mild” mental retardation, which is what most mentally retarded people have; how one determines whether a person has mental retardation; and the causes, and more often, the lack of known causes, of mental retardation. Dr. McDermott, although not a psychologist, is one of less than 100 members of the most prestigious group in the field of mental retardation. She has authored a chapter that will be part of the American Psychological Association’s forthcoming revised manual on mental retardation and teaches about mental retardation to medical students, special education teachers, and other teachers in courses at the University of South Carolina. We were extraordinarily lucky that someone else to whom we had been referred, who did not have relevant expertise, mentioned Dr. McDermott. Dr. McDermott’s only prior testimony had been given several decades ago when she presented statistical evidence about the life expectancy of a man with cancer if he had not been killed in a car accident.

Through my preparation of Dr. McDermott, Dr. Boyer, and Dr. Pamela Jennings, I realized that we were now in a position to prove persuasively that Dr. Boyer’s I.Q. result, not that of the State’s experts, closely approximated his actual cognitive intelligence. Their testimony would show that it is not correct to say that one cannot ever get an I.Q. score on a validly administered test that is higher than one’s “true” I.Q., and that what one needs to do is try to get as much information as possible about each such test over time, and see if one can find a range within which fall the

22. See Ring v. Arizona, 536 U.S. 584 (2002) (holding that the State must prove to a jury’s satisfaction every fact that is a precondition to eligibility for the death penalty).
predominance of the I.Q. test results. Our experts were also prepared to say that, particularly in a case of major consequence, it was most unwise to fail to look into adaptive behavior, particularly since it could help answer questions about differing I.Q. scores.

Also, during my final preparation of Dr. Boyer, I learned that she had undertaken a special experiment to determine how it was that Mr. Gates’ prolific “writings” while in prison, including numerous letters of complaint using sophisticated legal terms, came to be written even when he was in “isolation.” She knew that he said he had been aided by other prisoners, and that when in isolation he had been helped with this writing by guards. She also saw a sort of dictionary he had developed in which he listed words organized by the letters with which they began, although not in alphabetical order, even though many were misspelled and he did not know the meanings of many of these words. Her experiment was to ask Mr. Gates to sit down with a piece of paper and write a paragraph about his childhood and a paragraph about his life in prison. She saved these paragraphs, which were of a much lower quality than the prison “writings” on which the State was going to rely.

After George, Gary, and I arrived in Columbus on the weekend before trial, a key question was who was going to do the examination of our three expert witnesses. I strongly resisted doing it because, although I had prepared them and knew what they were going to say far better than my colleagues, I had never examined a single witness of any kind about anything during a trial. Nonetheless, George and Gary insisted that I do these examinations at the trial. I reluctantly agreed to do so.

Our hope was that through the experts we might nullify the adverse impact of the State’s experts so that, although the jury might not understand any of the experts, we might win the case based on the testimony of the witnesses who had known Mr. Gates prior to age eighteen. These included family members, a former sister-in-law, former schoolmates, a school speech therapist, and a school principal. From them, the jury—which this time had nine African-Americans—learned about Mr. Gates’ slow development and other problems.23

Nonetheless, despite the strength of this testimony, we came to believe that without the testimony of our experts, we might not have persuaded the jurors that Mr. Gates had mental retardation. Dr. McDermott, who testified as the trial’s opening witness, did a masterful job in creating the proper context for all that followed, including our adaptive behavior witnesses and Dr. Boyer, as well as the State’s witnesses (whom she discredited through her answers to hypotheticals based on what we knew the State’s witnesses would say). Then, after we had presented most of our fact witnesses, I called Dr. Boyer to testify. George and Gary both felt that the jury was, indeed, understanding the essence of our experts’ testimony.

After Dr. Boyer’s testimony, we presented one more fact witness and then closed our case. The two State experts testified that afternoon and both said on direct

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23. The evidence included Mr. Gates’ being put in the sixth grade in the last seat of the “dumb” row; his having extreme problems with hygiene, including wetting his pants in bed as late as the seventh grade and wearing the pants to school; his inability to learn the song that his class sang at the end of every day; his putting his shoes on the wrong feet as late as age 12; his acting recklessly; his being treated “like a monkey” by neighborhood boys who would ask him to climb up in trees and get things for them; his having been cheated by a storekeeper due to his inability to count change; and much more.
examination that the videotaped “confession” was either of no relevance or of extremely little relevance. Since this was the opposite of what the District Attorney had twice represented that they would say, George and Gary prepared a motion to preclude introduction of any crime evidence. Meanwhile, I finished working with Dr. Jennings on her rebuttal testimony. Although Judge Allen ultimately overruled the motion, he reiterated in open court (outside the jury’s presence) that the State’s destruction of all of the physical crime evidence had probably denied Mr. Gates due process. And, after viewing again the videotaped “confession,” he stated (again outside the jury’s presence) that it made absolutely no sense, and that no one would commit a crime in that manner.

When the jury was brought in, it viewed the videotape. I carefully observed the jurors’ reactions to it, and it appeared not to make much of an impression. Our experts’ testimony about how people with mental retardation, including children, can learn scripts, act in plays, and answer rehearsed questions quickly and in detail may have helped undercut whatever force the State hoped the videotape would have. Of course, it helped that every expert witness on both sides had already testified that the videotaped confession was either completely, or almost completely, irrelevant to a determination of mental retardation.

The State’s final witnesses were prison guards and a prison counselor. They were presented in an effort to show that whatever Mr. Gates’ problems before age eighteen may have been, he now could function well in a structured prison setting—no longer putting his shoes on the wrong feet, no longer wiping his nose with his shirt sleeve, helping to clean the prison, and keeping a clean cell. This went over “like a lead balloon,” particularly because both Dr. McDermott and Dr. Boyer had clearly explained why one could not determine someone’s adaptive behavior by considering how someone functions in an extremely structured prison setting, where so much is provided by others.

We were on what was probably Gary Parker’s final cross-examination question of the State’s last witness, a prison counselor, when the witness gave an answer that caused a mistrial. Earlier in the trial, Judge Allen had specifically ordered counsel for both sides to stress to each witness they called that they should not reveal that Mr. Gates was on Death Row or that the mental retardation issue would determine whether or not he could be executed. The judge had told counsel that if a witness were to blurt this out, he would order a mistrial. Nonetheless, when Gary asked the counselor whether he had ever met Mr. Gates prior to his eighteenth birthday, the counselor responded that Mr. Gates was already on Death Row when the counselor first met him. The counselor seemed completely befuddled by the uproar that resulted from this answer. My guess is that the District Attorney had not prepared him much, if at all, since his answers on direct examination were more helpful to us than to the State.

In any event, Judge Allen declared a mistrial. 24

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24. See generally Gates IX, Transcript of Nov. 12, 2003 court session.
The Settlement

At that point, we renewed our numerous prior requests that the District Attorney consider settling the case in a way that would have Mr. Gates receive a sentence that did not exist at the time of the trial: life without possibility of parole. Given the fact that we were winning the trial (as we were told by several unbiased observers), that a re-trial would add further expense, and that the only way in which Mr. Gates could ever be subject to execution would be if a jury unanimously found that he was not mentally retarded, the District Attorney finally agreed to this.

Getting our client to agree proved even more difficult, because despite his cognitive limitations, the one thing from which he had drawn comfort when sitting through this trial was that he could tell we were winning. We ultimately persuaded him, provided that we could get removed from the settlement agreement a provision under which he would never be allowed to challenge his conviction. When we made clear to the District Attorney that that would be a deal-breaker, he agreed to remove it.

Why did we agree to the settlement when we had been winning the trial? There were three reasons. First, although we were winning the trial, that did not necessarily mean that if it had gone to verdict we would have gotten all twelve jurors (one of whom was a member of the same church as the District Attorney and at least one of his predecessors) to vote that Mr. Gates was mentally retarded. Had the jury not been unanimous, there would have been a mistrial. Second, at a retrial, unlike this trial, the State would have the benefit of already knowing what our witnesses would say, or some of our witnesses might die or become incapacitated in the interim, so there might be a mistrial at a second trial. Third, unless we were somehow able to succeed in challenging Mr. Gates' conviction, it would have been virtually impossible for him to be paroled even if he had gotten a life sentence with possibility of parole. He will, in any event, be eligible for parole consideration when he reaches age sixty-two, which is fourteen years from now.

Conclusion

This was an experience unlike any other I have had. The outcome was at least as professionally rewarding as winning in the United States Supreme Court on behalf of my first death row client. I certainly had greater personal satisfaction this time, because I had gotten to know Mr. Gates and members of his family so well, I had met several of our fact witnesses, and I had managed to help our experts present their testimony in a way that the jury could understand. At the same time, I am painfully aware that Mr. Gates remains in prison, under a life sentence with possibility of parole. He will, in any event, be eligible for parole consideration when he reaches age sixty-two, which is fourteen years from now.

25. Indeed, although we did not call him as a witness, Mr. Gates' brother died in the month after the trial.
representation that we provided Mr. Gates, much of it uncompensated, and who will be put to death because of inadequate representation.