

UNDISCLOSED, The State V. Rocky Myers
Episode 4 - Of Mice and Men
July 8, 2019

[0:39] Colin Miller: At the end of John Steinbeck's *Of Mice and Men*, George Milton learns that his intellectually disabled friend, Lennie Small, has killed the wife of the son of Boss, who runs the farm where they work. Realizing that their dream of owning their own farm is over, George placates Lennie into believing that the dream is still alive before putting him down:

From *Of Mice and Men*:

Lennie Small:

George, if I tell ... tell now, how it's gonna be?

George Milton:

We're gonna let a little place.

Lennie Small:

Okay, yeah. We're gonna get a little place and we gonna ...

George Milton:

We gonna ...

Lennie Small:

Have ...

George Milton:

We'll have a cow, some pigs, we're gonna have maybe ... maybe a chicken.
Down the flat we'll have a little field.

Lennie Small:

A piece of alfalfa for the rabbits!

George Milton:

For the rabbits.

Lennie Small:

And I get to tend the rabbits --

[shotgun fired]

Of Mice and Men is a brilliant piece of fiction, and that's what it remained in the decades after its publication. But now, it has found itself at the center of a legal dispute over whether inmates with Intellectual Disability, like Rocky Myers, can be executed. Some of these inmates have won their claims and been taken off of death row while others have lost their claims and remained on death row, with some even being executed. Rocky Myers, however, falls into neither of these categories.

[2:17] Rabia Chaudry: Hi, and welcome to Undisclosed. This is the fourth and final episode in our series in the Rocky Myers case. My name is Rabia Chaudry. I'm an attorney and the author of *Adnan's Story*, and as always, I'm joined by my colleagues Susan Simpson and Colin Miller.

Susan Simpson: Hi, I'm Susan Simpson. I am an attorney in Washington, D.C. at Clinton and Peed, PLLC, and I blog at the ViewFromLL2.

Colin Miller: Hi, this is Colin Miller. I'm an Associate Dean and professor at the University of South Carolina School of Law, and I blog at EvidenceProf Blog.

[4:17] Rabia Chaudry: On January 18, 1994, the jury found Rocky Myers guilty of the murder of Ludie Mae Tucker. As we noted last episode, the jury voted 9-3 in favor of life without parole, but the judge overruled the jury's vote on June 2, 1994 and imposed a death sentence. Rocky then filed a direct appeal based upon errors evident from the trial record. That appeal ended on January 12, 1998, when the U.S. Supreme Court denied his petition for writ of cert.

Rocky then brought a petition for postconviction relief on December 21, 1998 based upon errors that weren't evident from the trial record. As with most of these petitions, Rocky claimed that he received ineffective assistance of counsel based upon errors such as his trial attorney not asking Mamie Dutton about whether she knew Rocky Myers. Two and a half years later, on July 21, 2001, the trial court set a hearing on the ineffective assistance of counsel claim before denying that claim in November of that same year. Thereafter, the Court of Criminal Appeals of Alabama affirmed the denial of relief to Rocky on February 21, 2003.

As is that court's practice, it then sent notice of its decision to Rocky's attorney and *not* Rocky himself. This turned out to be a fateful decision. Here's Rocky's attorney Kacey Keaton:

Kacey Keaton:

Mr. Myers was procedurally defaulted from pursuing post-conviction appeals in the federal court system because he was completely abandoned by council Earle Schwarz, an attorney from Tennessee, who was publicly reprimanded by the Tennessee Bar for his actions in Mr. Myers' case. It's the sole reason that Mr. Myers has never been allowed to pursue his claims in Federal Court. No court has ever heard testimony or been presented with evidence that demonstrates Mr. Myers is not guilty of the crime for which he is sentenced to die.

Susan Simpson: So, what's going on here? As Keaton notes, Rocky was represented by Earle Schwarz, who had been referred to Rocky's case by the Equal Justice Initiative. He'd received notice of the denial of Rocky's appeal and had done ... nothing. He didn't appeal, he didn't tell Rocky, he didn't tell anyone. Schwarz wasn't willing to speak to us on the record, but he'd previously sent an e-mail to a reporter for The Nation in which he said that when he received the notice from the court, he had joined a new law firm and no longer had the four-person team working on Rocky's case. According to Schwarz, "I should have returned the file to the Equal Justice Initiative at that time; I did not; that's on me."

Schwarz is right; it was on him. Schwarz's new firm was in Memphis, Tennessee, and, in 2005, the Tennessee Board of Professional Responsibility publicly censured Schwarz, finding that he had violated four separate provisions of the Tennessee Rules of Professional Responsibility. So, what's the effect of this public censure? Well ... nothing, really. The public censure was published, and that's it. No disbarment, no suspension, no consequences. Last year, Schwarz would become the President of the Memphis Bar Association.

Meanwhile, back in 2004, Rocky Myers got a letter:

Rocky Myers:

I was ignorant. I was really young and dumb and not really knowing the significance of the weight of what was going on. It was like over my head, ya know? And then I trusted that my lawyers was gonna take care of all that and that I had nothing to worry about. At one time, here on death row, I lost my lawyers -- I didn't have any lawyers at all for years, and years, and years, and the

Attorney General wrote me a letter saying he was gonna file for me an execution date, and I was like, "What the hell? What's goin' on?" So when I dug into it tryin' to find out what's goin' on, come to find out that I didn't have a lawyer because I wasn't paying attention so my own life! I was busy listening to the radio and watching television, ya know what I'm sayin'? And so it's messed up man, this process I guess ...

[8:38] Colin Miller: The letter Rocky is referencing was a letter from the Attorney General of Alabama telling him his execution would soon be scheduled because he had no avenue of appeal left open. In other words, because of the passage of time since the opinion of the Court of Criminal Appeals, Rocky could no longer appeal to the Supreme Court of Alabama or bring an appeal in federal court.

Now, at this point, you might be wondering what's going on. How can Rocky be held responsible for failing to meet a deadline when the Court of Criminal Appeals only sent its opinion to his lawyer, who ended up abandoning him? And the answer is: that's the way the law works. And that's why Kacey Keaton says that Rocky has never been able to present evidence of his innocence in court.

Remember how the State's strongest witness against Rocky Myers was Marzell Ewing, who later came forward and said that he made everything up, with Sergeant Boyd making the stolen car he was picked up in "disappear":

Investigator:

What happened to you after you provided that information to Boyd?

Marzell Ewing:

Uh, Boyd told me that they had Butch in the next room, and that if I go back with him then he'll take the car back to Nashville, or whatever, and tell them he found it on the side of the road.

Investigator:

How did you come to be in possession of that stolen vehicle?

Marzell Ewing:

Me and Flatbroke went to Nashville and stole it.

Now, if you're a long time listener, you probably know there's a pretty strong case that the State's failure to disclose this information was a *Brady* violation because it's

exculpatory and undermines our confidence in the jury's verdict. It's a potentially compelling argument, but no court has ever considered the merits of the claim. Because Rocky Myers was abandoned by his counsel and missed his appellate deadline, he can't bring any new appeals.

Of course, this might prompt another question: It's now been 15 years since Rocky got the letter about his execution being imminent because he was out of appeals. So, how is he still with us 15 years later? Well, let's go back to that letter. When Rocky got it, he had to have another inmate read it to him. Why? Rocky can't really read, he's even worse at math, and his memory isn't much better:

Rocky Myers:

Mr. Miller, I do not ... I can't remember a lot of things, a lot of conversations. You know, my memory is really, really bad, it is. I don't know why. I told my sister maybe it's because I don't read or nothin' like that; I don't exercise your brain to make it stronger and all that stuff, but I don't do none of that stuff. Ya know, I'm not a reader -- I can't read a lot ... I mean I can read, but I can't read that good, ya know? Spelling is not good. Math is off the table (laughs).

[11:26] Rabia Chaudry: As we'll discuss in more detail, there's a strong argument that Rocky Myers actually has mental retardation, which has now been replaced by the preferred term "Intellectual Disability." The question of whether and when people with Intellectual Disability can be executed has vexed the Supreme Court for the past 30 years. It all started with the Supreme Court's 1989 opinion in a case out of Texas: Penry v. Linaugh, in which attorneys for Johnny Penry claimed that executing him would be cruel and unusual punishment:

Attorney for Johnny Penry:

Mr. Chief Justice, and may it please the Court. In the Fifth Circuit, the State of Texas conceded that Johnny Penry had limited mental capacity and that psychological testing supports the U.S. District Court's finding that he has the mind of a 6 to 7 year old child. In addition to this, the evidence in the record is that Johnny Penry was severely abused as a child, that he was in and out of state mental retarded institutions, and that as a teenager he was victimized by older males.

The Supreme Court rejected the claim that the 8th Amendment provides a blanket ban on executing those with Intellectual Disability, and that opinion stood for 13 years, until right around the time that Rocky Myers was losing his appeals in Alabama. In 2002, the

Supreme Court took up the case of Daryl Atkins, a Virginia man with Intellectual Disability who faced execution. Here's Justice Stevens announcing the opinion of the Court in Atkins.

Supreme Court Justice Stevens:

Those mentally retarded persons who meet the law's requirements for criminal responsibility, should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgement, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably, for these reasons, in the 13 years since we decided the case of Penry against Linaugh, the American public, legislatures, scholars, and judges have deliberated over the question of whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case, whether such executions are, "cruel and unusual punishment," prohibited by the 8th Amendment to the Federal Constitution.

And, according to Justice Stevens, that national consensus was that it was cruel and unusual punishment to execute those with Intellectual disability. As Justice Stevens alluded to in announcing the Court's opinion, the Court agreed with this consensus for two reasons. Colin spoke about these reasons with Shira Wakschlag, the legal director of the The ARC, the country's largest community-based organization working to advance the civil rights of people with intellectual and developmental disabilities:

Shira Wakschlag:

The court actually held, to be completely exact, that anyone that has a diagnosis of intellectual disability cannot be executed because it would violate the Eighth Amendment ban on cruel and unusual punishment, like you said, they articulated that people with intellectual disability face special risk of wrongful execution, largely because of some of the risks that I articulated just now - about things like false confession, greater risk of exploitation, and less ability to assist counsel in their case. And the court also noted that doing so, executing people with intellectual disability, would violate their inherent human dignity.

[15:16] Susan Simpson: The wrongful conviction component of this analysis takes us back to the very start of this series and the use of judicial override in Rocky's case. As we noted then, Patrick Mulvaney, the managing attorney for capital litigation at the

Southern Center for Human Rights wrote an essay about the increased likelihood of wrongful conviction of people in Alabama given death sentences as the result of judicial override. At the end of that essay, Mulvaney called for throwing out the death sentences of these defendants such as Rocky Myers, who were given the death penalty by judicial override, and he did so by drawing an analogy to the Supreme Court's Atkins opinion:

Patrick Mulvaney:

People with intellectual disability face a special risk of wrongful execution, for a variety of reasons, including that it's more difficult for them to work meaningfully with their counsel, they're susceptible to false confessions, and so forth. And so what the court was saying is that if we have a category of individual who face a special risk of wrongful execution, then we have to look at that category, and decide if maybe the death penalty is not appropriate for that category. And the analogy to judicial override is fairly strong, because this is the category of individuals who face a special risk of wrongful execution, because their jurors came back with life sentences, not death sentences. They voted for life, and we know that one of the main reasons juries can vote for life is because they have lingering doubts about guilt.

[18:53] Susan Simpson: So, if Rocky Myers does have an Intellectual Disability, there are **two** strong reasons to believe that he's an innocent man. And, as we'll discuss later, Rocky does indeed have such a diagnosis. But, before we get to that, let's start with the basics: What exactly is an Intellectual Disability, and what did the Court hold in Atkins?

Shira Wakschlag:

Intellectual Disability, a lot of people don't necessarily realize that Intellectual Disability is not kind of a broad category, but it's actually a formal diagnosis, just in the way that something like autism or Down's Syndrome is a formal diagnosis with a formal definition. So, the court actually held, to be completely exact, that anyone that has a diagnosis of intellectual disability cannot be executed because it would violate the Eighth Amendment ban on cruel and unusual punishment.

While this seems relatively straightforward, it's been anything but in practice. And that's because of an important decision, or rather lack of decision, made by the Atkins Court:

Shira Wakschlag:

The Atkins case specifically left it to the states to develop appropriate ways to enforce the restriction, but they did say that it was important or necessary to consult clinical standards, such as the American Association on Intellectual and

Developmental Disabilities and the DSM definitions when coming to these conclusions.

Some states did a good job with this. Other states...not so much. The Florida courts rejected Freddie Lee Hall's claim that he couldn't be executed despite substantial evidence that he had an Intellectual Disability. And here's Justice Kennedy announcing the Supreme Court's opinion to reverse that decision in Hall v. Florida:

Supreme Court Justice Kennedy:

There was evidence of Hall's low IQ scores, including a test score of 71. But the Florida Supreme Court interprets the Florida statute implementing Atkins to define Intellectual Disability to require an IQ score of 70 or lower. And since Hall's relevant score was 71, one point above the Florida limit, it held Atkins to be inapplicable. As a result, the substantial evidence of Hall's developmental disabilities was deemed not relevant to the constitutional claim raised under Atkins. Because Hall's lowest test score was 71, one point above the Florida cutoff of 70, he was not allowed to present other evidence showing deficits in adaptive functioning as bearing upon his Intellectual Disability for the purpose of invoking the protection of Atkins. This court now holds that Florida's ruling setting 70 or below as an absolute cutoff point is unconstitutional.

And then there's Texas. Here's Shira Wakschlag describing their approach:

Shira Wakschlag:

In *Moore v. Texas* there was a challenge to Texas's use of stereotypical and outdated factors, called the Briseno Factors, that they were being used by the state of Texas to determine Intellectual Disability in death penalty cases. One thing that's been noted frequently among these factors, which were not scientific, included basically a comparison to the character of Lennie in *Of Mice and Men*. And that was one factor in how the state of Texas was determining Intellectual Disability in these cases.

[22:20] Colin Miller: Understandably, many took offense to the state of Texas using a fictional character created by John Steinbeck to determine who lives and who dies. One of those people was Steinbeck's own son. Here's Renee Feltz from an episode of Democracy Now:

Renee Feltz:

And what the courts have done is ended up relying on stereotypes. One of the stereotypes they relied on was Lennie in John Steinbeck's novel, a fictional novel, *Of Mice and Men*. People might remember him patting the bunnies, very distinctly a developmentally challenged person. The courts used him and said, if he is not similar, the defendants before us doesn't seem like this person, then we might use our own interpretation to say that he is not mentally retarded. We have a statement from him that we can read part of if you like...

Interviewer:

This is the son of John Steinbeck.

Renee Feltz:

That's right He writes "Prior to reading about Mr. Wilson's case I had no idea that the state of Texas would use a fictional character that my father created to make a point about human loyalty and dedication, i.e. Lennie Small from *Of Mice and Men*, as a benchmark to identify whether defendants with Intellectual Disability should live or die. My father was a highly gifted writer who won the Nobel Prize for his ability to create art about the depth of the human experience and condition. His work was certainly not meant to be scientific, and the character of Lennie was never intended to diagnose a medical condition like Intellectual Disability.

The case that Feltz is referencing is the case of Bobby James Moore. Moore was scheduled to be executed because, in effect, the Texas courts had concluded he wasn't like Lennie from *Of Mice and Men*. But the Supreme Court stepped in in 2016 and told Texas to reconsider its opinion. Here's Justice Ginsberg announcing the opinion of the Court:

Supreme Court Justice Ginsberg:

Based on two of Moore's IQ scores, 74 and 78, the CCA concluded that Moore had not shown intellectual functioning deficits. Even if he had, the CCA continued, his adaptive strengths offset any adaptive weaknesses. Briseno's seven evidentiary factors, the CCA added, weighed against finding Moore intellectually disabled. We vacate the CCA's judgement because it disapproved the habeas court's employment of current medical guidance

In other words, the Texas courts were supposed to determine whether Moore had Intellectual Disability by using current medical guidance; instead, they compared him to a fictional character. So, the Supreme Court gave Texas a do-over. And, during that

do-over, they again found that Moore did not have Intellectual Disability. The case went back up to the US Supreme Court, and the Court again found that Texas had botched the analysis in an opinion issued in February of this year. According to the Court:

To be sure, the court of appeals opinion is not identical to the opinion we considered in Moore. There are sentences here and there suggesting other modes of analysis consistent with what we said. But there are also sentences here and there suggesting reliance upon what we earlier called “lay stereotypes of the intellectually disabled.”

So, at this point, you might be wondering what happened at the Atkins hearing to determine whether Rocky Myers had Intellectual Disability. Again, here’s Shira Wakschlag:

Shira Wakschlag:

The thing that’s really important to emphasize in the Rocky Myers case is that there was never an actual Atkins hearing to fully consider whether he had Intellectual Disability because he never had that opportunity based on a variety of factors in his record, having to do with statute of limitations and his attorney not following up on the issue. So the only time that it ever was brought up in court was in the context of an equitable tolling hearing and his attorneys were arguing, well, there should be some extra consideration here because of his Intellectual Disability, but there was never, you know there should be...when it comes to this issue there should be a full hearing just to discuss the Intellectual Disability diagnosis, and he never had that opportunity to really present the full range in court.

[26:14] Rabia Chaudry: Breaking that down, asking for equitable tolling is asking for tolling of or an extension to the statute of limitations. In other words, Rocky’s attorneys acknowledged that Rocky missed his deadline to appeal and therefore technically could no longer appeal. But, based on his appellate counsel abandoning him and Rocky arguably having Intellectual Disability, they asked for mercy from the court. No such mercy was given.

To understand why, let’s do what Texas didn’t: look at current medical guidance about what constitutes Intellectual Disability. Here’s Dr. Kristen Triebel, an Associate Professor of Neuropsychology at the University of Alabama-Birmingham:

Dr. Kristen Triebel:

So, the AAIDD and DSO Boards here are agreed that there are three criteria that must be met for a diagnosis of mental retardation. The first is that there must be current IQ scores of around 70 or as high as 75 indicating a limitation in intellectual functioning. Second, there must be limitations in adaptive behavior. So adaptive functioning refers to how well individuals cope with common life demands and how independent they are for their age, considering age and sociocultural background and community setting. And then third, the intellectual disability must have begun before the age of 18, which is during the developmental period.

Let's start with the third of those factors: evidence of intellectual disability manifesting before the age of 18. Rocky's friends and family definitely have a recollection of this. For example, here's his neighbor and childhood friend Andrea Regina Jenkins:

Andrea Regina Jenkins:

Rocky did not go to school with us. We would go to school that they would call "Oh, you have to ride the Special Ed bus!" 'cuz it was a yellow bus. We didn't ride the yellow bus. So, he felt kind of bad and sometimes he would just leave and come back, 'cuz sometimes if you get teased a lot, it frustrates you, even as an adult.

But more than memories are needed in court proceedings. Luckily, after some searching, Rocky's team was able to locate his school records. Here's Sara Romano, the investigator on Rocky's case:

Sarah Romano:

As a clinical social worker, it was obvious to me of Rocky's cognitive difficulties and that he was ID, and when we were trying to get the documents, get the proof to show the courts that he shouldn't be executed because he's ID, there's a Supreme Court case that relates to that, Atkins. And in our effort to try to prove that, I was in New Jersey a lot, 'cause that's where he grew up. I had been to the Orange County school system many times, trying to get documents to show he was in ID classes, special education, and all that stuff. Ended up to just happen upon two women in the special education department who offered to help me try to find records, because they had a warehouse. So they went on their time off, it was a Saturday, they met me at this warehouse, we open up the building, there was literally file cabinets just thrown all over the place, on top of each other, whatever. Drawers falling out of some of them. One of those women ended up finding Rocky's records...

Susan Simpson:

Just by chance?

Sarah Romano:

Yes, it was such an emotional high for us, because they both started crying, at the time the attorney I was working with, it wasn't Kacey Keaton, it was another attorney at the time. And we were ecstatic, 'cause it's like here, we have it. I just figured it was like, a done deal.

So, what did those records show? Again, here's Shira Wakschlag:

Shira Wakschlag:

In elementary school he was placed in special education and in middle school he was actually placed in a separate school only for students with intellectual disabilities. He had challenges with things like attention, concentration, and memory...

From these records and other information we'll discuss later, Dr. Triebel was able to conclude that Rocky Myers had Intellectual Disability or Mental Retardation prior to the age of 18:

Dr. Kristen Triebel:

My conclusion from all my review of the information is that Mr. Meyers had Mental Retardation prior to age 18, and he continues to have Mental Retardation.

[30:56] Susan Simpson: In reaching this conclusion, Dr. Triebel partially relied upon IQ tests given to Rocky Myers at the ages of 11, 12, and 16, which lead to scores of 75, 64, and 71. In 2013, Dr. Triebel administered her own IQ test to Rocky Myers, and he scored a 73 on it. According to Dr. Triebel, all four of those scores fall in the acceptable range for a finding of mild Mental Retardation or Intellectual Disability:

Dr. Kristen Triebel:

So his current WAIS full scale IQ score fell within the 70-75 range, that the DSM-4 and the AAIDD state are appropriate ranges for diagnosing mild Mental Retardation.

[34:20] Susan Simpson: This takes us to the first of the four factors for a diagnosis of Intellectual Disability, which is a limitation in intellectual functioning at the time of the

crime, which often coincides with an IQ of up to 70 or 75. Under Dr. Triebel's testing, which was done after Rocky's equitable tolling hearing, Rocky would have satisfied this factor. But, in preparation for this hearing, the State had Dr. Glenn King perform his own IQ test on Rocky in prison, and that testing produced a different result, one that Dr. Triebel questions:

Dr. Kristen Triebel:

The only exception to this was Dr. Glenn King's results in 2006, which revealed a WAIS full scale IQ score of 84. This score is an outlier because it's outside the expected range, even of error, I would give less weight to that score. There's a variety of issues that can come into play in terms of how the tests are administered, how items are queried. The problems that I found with Dr. King's assessment, first off, he relied on Robin's self-report of his own adaptive skills, which is not something that's clinically accepted. The proper way to assess adaptive behavior is to interview 3rd parties, family or friends or teachers. Another issue was, he did not measure adaptive skills in a typical community environment. There's no way in a prison that you're actually functioning on your own. The three areas that he did the best on in Dr. King's evaluation, so the subtests of picture completion, picture arrangement, and comprehension, those tasks were removed from the WAIS 4, they tried to get rid of some of the tasks that were redundant and tasks that would have more of a practice effect. Another issue Dr. King's higher score, the WAIS 3 when they gave it, it was right before the WAIS 4 came out, so really that testing needed to be renormed. Individuals do get smarter over time and tests need to be renormed so that they accurately reflect a person's performance and relation to other people.

And so, at the equitable tolling hearing, the court did a few things. First, it found that three of Rocky's IQ scores were above 70 and that a score above 70 pretty much precludes a finding of Intellectual Disability. However, this appears medically wrong because the consensus is that a score between 70 and 75 is thought to be consistent with Intellectual Disability. And, this is also legally wrong because this is the exact analysis the Supreme Court rejected in Hall v. Florida. Second, the court looked at Rocky's score of 84 on his most recent IQ test and figured that his lower scores as a teenager were likely the result of him not taking the test seriously and not the result of Intellectual Disability. Therefore, the court rejected his claim that Rocky had Intellectual Disability and refused to consider evidence that Rocky had limitations in adaptive behavior, which is the third element of an Intellectual Disability diagnosis.

Let's dig into that last element a bit more. Shira Wakschlag observed some of the same issues as Dr. Triebel with Dr. King's testing of Rocky:

Shira Wakschlag:

Some of those flaws were things like relying only on Rocky Meyers to self-report about his disability, rather than also interviewing friends and family and assessing the full record, which is something that she did, as well as relying on an assessment of him only in the prison setting, which experts say that's not the typical environment and because you can't really see what somebody's adaptive behaviors skills are in a controlled environment like that because it's not comparable to life on the outside. So it's not considered reliable to think about assessments in that context only.

[38:14] Colin Miller: This then takes us back to what Dr. Triebel did. In order to meet the third factor of the test for Intellectual Disability, a person needs to demonstrate at least 2 limitations in adaptive behavior. Based upon her testing of Rocky Myers, reviewing statements of friends and family members who interacted with Rocky outside of prison, and talking to some of these same individuals, Dr. Triebel was able to find five limitations. The **first** of those limitations was a limitation in functional academic skills:

Dr. Kristen Triebel:

So I guess to begin with, let's start with functional academic skills, and these things include things such as basic literacy, time or temporal relationships, and quantitative concepts or abilities. And this is an area that Robin Meyers is severely impaired. So his school records consistently demonstrate very low skills in all four academic areas, including reading, spelling and arithmetic. Mr. Meyers was essentially illiterate. He learned how to sight read, but could not read more than single syllable words. He never learned to read phonetically. Therefore he could only read the words that he had memorized or he had to practice over and over again, just kind of basic survival words. But he could not read a letter or read a newspaper or read complex legal documents. His reading math and spelling skills were about at the 3rd grade level when he was 16 years old, and when he left school they were about at the 4th grade level for reading.

This is consistent with what Rocky's lifelong friend James Anderson reports observing when the two of them were teenagers:

James Anderson:

One day when I was over there at their house, there was a paper on the coffee table that had like a picture and maybe the first letter of the word, and you fill in the rest of the blanks. And I thought it was Derek's, his youngest brother, because Derek was, I don't know, 7, 8 at the time. But when I saw one of the, I don't remember the word, when I saw one of the words misspelled, I said to Derek, that he misspelled it. And he told me that wasn't his, it was Rocky's. And that was the first time I knew that he didn't read well anyway.

And, as Dr. Triebel notes, this limitation continued into adulthood:

Dr. Kristen Triebel:

His wife, or ex-wife, testified that he was unable to fill out job applications, that she would have to do this for him, even very simple job applications that just had information like name, address, and the type of work he did in the past. He was unable to read job ads or write letters or read the newspaper or the bible. He was completely dependent on his family and friends to do this for him.

[41:28] Rabia Chaudry: According to Dr. Triebel, a **second** area of limitation for Rocky Myers is in the area of self-direction:

Dr. Kristen Triebel:

So this category refers to behaviors that are directed or guided by oneself, this refers to the ability of an individual to take initiative, to exercise self discipline, and the ability to engage in goal directed behaviors and task completion. It requires planning abilities. There were numerous examples of Mr. Meyers impairment in this area. He was unable to complete tasks independently. His mother noted on the ABAS that he was unable to keep working on tasks, even when he became discouraged. That was noted numerous times in the academic records, that he would get discouraged and would give up. He wasn't able to persist with a task and see it through its completion. There were other notes from family and friends that he, that people had to sit there and observe him and supervise him doing a task to make sure that it got completed correctly or got finished. He was unable to arrive places on time, or to plan ahead to get places on time, or to complete big projects on time. Or to make plans to complete home projects in logical order. Again this is another area that was noted by Lorraine Woodso on the ABAS too. His wife testified that she had to wake him up every day and make sure that he got ready to work on time and to make sure that he got there. He didn't have that ability, the self-directed skills to be able to manage himself and get himself to work independently on his own.

Rabia Chaudry: A **third** limitation is in the area of self-care. Dr. Triebel was able to make this conclusion based upon statements by friends and family:

Jeffrey Meyers:

You know, he didn't, keep himself clean. He used to wet the bed and he'd get up and put his clothes on and go to school.

Andrea Jenkins:

His hygiene wasn't the best, he smelled like urine. As far as dressing himself, he dressed himself. In some of the same dirty clothes he may have had on the day before...

According to Dr. Triebel, this is classic evidence of a deficit in self-care:

Dr. Kristen Triebel:

A third area that I believe was impaired in terms of adaptive skills was self care, or the ability to perform activities of daily living. And this is an area that is noted both by the DSM-4 and the AAIDD. So there were evidence of deficits in the personal hygiene and in the areas of self care. There were numerous anecdotes of bed-wetting, even as a teenager. These included interview information obtained from Andrea Jenkins, who was a neighbor and friend of the family, as well as James Anderson, again, neighbor and friend of Mr. Meyers. As well as Jeffrey Meyers, who was Rocky's brother, and his sister Karen James, and his uncle Moses Smith, and his ex-wife. All of those people noted the bed-wetting and problems with personal hygiene. Robin's ex-wife reported in her declaration that she was aware that her husband had a problem with bed-wetting at least until the age of 19 when they were married. James Anderson noted that between the ages of 15 and 17, that Rocky had a urine smell on him. He would wet the bed, he would get up, and he wouldn't wash his body. It was hard to go around girls with Rocky because he smelled like urine. His brother noted that he would wet the bed and he didn't keep himself clean, he'd wet the bed and he'd get up and put on his clothes and go to school that way. His brother also noted, and his sister as well, that he didn't brush his teeth regularly. And as a result he suffered from dental problems later on. He didn't think to put on clean clothes or to take baths regularly. That was something that other people had to remind him to do, or he would fail to do it.

A **fourth** limitation found by Dr. Triebel was in the area of home living, something that really couldn't be measured when Rocky was in the controlled prison environment:

Dr. Kristen Triebel:

So, while Robin was able to do very simple household tasks, like putting dirty clothes in the hamper or throwing away trash, there were a lot of household tasks and chores that he was unable or inconsistently did on his own. His friend James Anderson noted in his testimony that Robin was able to cook simple meals, such as like heat up a hot dog or microwave dinner. However, he wasn't able to do anything more complicated because he couldn't read a recipe. Even his wife noted that he couldn't do something that required simple measurements, such as making mashed potatoes, because he'd put too much water, he didn't know how to use a measuring cup to measure the right amount of water. And his mashed potatoes came out too soupy.

A **fifth** and final limitation found by Dr. Triebel was in the area of social and interpersonal skills. This conclusion came from statements like this one by Rocky's brother Jeffrey:

Jeffrey Meyers:

When I was coming up I had a lot of friends. And he didn't hang around with us or anything like that. Rocky was more... like we had a dog named Duke, he would be with the dog and stuff like that. He didn't have friends.

[47:26] Susan Simpson: And here, Dr. Triebel explains this area of limitation in more detail:

Dr. Kristen Triebel:

Social skills, the fifth area of impairment, and this involves interpersonal skills and social responsibility, self esteem, gullibility, social problem solving. And he was very susceptible to being fooled or tricked, manipulated or lied to.

All of the above led Dr. Triebel to write a report in which she concluded:

It is my opinion that Mr. Myers had an intellectual disability prior to age 18, and he continues to have an intellectual disability.

The ARC also has written a letter on Rocky Myers's behalf based in large part on Dr. Triebel's report:

Shira Wakschlag

And then we considered an evaluation from 2015 that was an expert neuropsychological evaluation. And this was something that was never actually able to be presented in court, it was done after, because of basically procedural limitations and timing this was never something that was able to be presented in court. But it was put together essentially to argue for clemency.

[48:40] Colin Miller: Both Dr. Triebel's report and the ARC letter are compelling evidence of Rocky's Myers's Intellectual Disability, and there's strong reason to believe that the analysis done on this issue by the Alabama courts wouldn't withstand Constitutional scrutiny if done at an Atkins hearing. But, as noted, Rocky Myers never had an Atkins hearing, and as noted, neither Dr. Triebel's report nor the ARC letter have ever been considered as part of any court proceeding. Instead, they were both submitted as part of an attempt to have the Governor of Alabama grant Rocky clemency.

And, at least as of now, that's the only real shot that Rocky has of being taken off death row. And what's very clear from Rocky's family is that even just Rocky being taken off of death row would be a huge thing. Here's his son Deon:

Deon Meyers:

My name is Deon Meyers, I'm the son of Rocky Meyers... You know, I have four kids, he has grandbabies, and he hasn't seen any of them. I got a wife, we been married for 4 years, been together 9. You know, I really would like to get to see my dad and get to know him and I can't do that if you take him away from me. So I'm asking if you can, you know, just show a little mercy.

And here's his son Robin:

Robin Meyers Jr.

I know the allegations that he's facing, I know the charges that he's facing, but I still believe deep down in my heart that my father is a good man and he loves his family. He do. He hates not being in our life. He hates the fact that where he's at, we can't really come see him all the time, we can't really talk to him all the time. He didn't have the chances that I have in life. He didn't have time to be with his children, I get to see my mama every day. I get to go hug her and tell her I love her. And he really never had that chance to even say goodbye to her when she passed away. You know, that's hard on a man. I'm asking you for clemency for

Robin Meyers, I'm asking you to just, extend his life for me. I can talk to him on the phone, he can tell me things that I need to know in life, and he just keeps me lookin' and thinkin' straight. You might not believe it but he does. He tells me all the time that you gotta be a man for your family. And if it wasn't for my father, a lot of people don't have a father to even talk to, their fathers are gone on with God. But I have a father that I can talk to. I have a father that is somewhere in my life. And right now I'm just asking you just to save his life.

Finally, here's his daughter Karen:

Karen James:

Mr. Robin Meyers was convicted on capital murder charges in Morgan County, Alabama, in 1994, for a crime that occurred in 1991. The jury recommended 9-3 that Mr. Meyers be sentenced to life without the possibility of parole.

And then, there's Rocky himself:

Colin Miller:

What would it mean for you now if the governor of Alabama were to decide she has questions about your guilt and takes you off of death row? What would that mean for you?

Rocky Meyers:

Oh lord (laughs). I pray, you know I pray every night for the relief of my case, and to get off of death row. To me, as a convict, an inmate, it's a step, another step toward me being with my family, you know. And to get off death row and not to have this threat of being executed is really really good because I don't want to die. I don't. I do not want to be executed, especially for something I did not do. I don't want to be executed and I want to spend time with my kids. I want to be able to talk to my kids and see my kids, my grandkids, and say happy birthday to 'em, and congratulate them for doing good in school, it would mean the world to me to get off death row. It really would. It would mean the world to me. And to be honest with you, and this is probably going to sound crazy because I think it is, but to get off death row is just... what some of us want, at least I'm not gonna die. And if I gotta spend the rest of my life in prison for something I didn't do at least they ain't gonna kill me.

As we've noted before, it's unclear when Rocky will be executed. He could get notice tomorrow that his execution will take place in 30 days, on the other hand it may be

another year or two before the State decides to take his life. When the State does give notice, we will place a call for all of our listeners to blow up the phone and email of the Governor of Alabama and ask for clemency. As for now, the ACLU has a website where you can sign a petition asking for clemency for Rocky. It's at <https://action.aclu.org/petition/save-rocky-myers>.

In the meantime, we're going to be working on a way to get Rocky back into court as well as on legislation that would take everyone given a death sentence in Alabama based on judicial override off of death row.

[54:57] Rabia Chaudry: This ends our series on Rocky Myers, but starting next week, we'll be back with new episodes dealing with the fifth trial of Keith Davis Jr.

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