

70069-3

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WASHINGTON STATE  
COURT OF APPEALS  
DIVISION ONE

2014 JUN 30 AM 11:16  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

State of Washington ) Case # 70069-3-1  
Appellee )  
v. ) Statement of Additional  
Jojo Ejonga-Deogracias ) Grounds  
Appellant ) Pursuant to RAP Rule 10.10

Comes now, the appellant, Jojo Ejonga in proper person, hereinafter collectively referred to as the appellant, and hereby submits his Statement of Additional Grounds, pursuant to Washington State Court Rules, Rules of Appellant Procedure (RAP) Rule 10.10.

Name EJONGA - JOJO - J

Dated 27 - June - 2014

Signed

 EJONGA

## (A) STATUS of APPELLANT

Below are the Additional Grounds for Review that Mr. Ejonga would like to address to this honorable court. It is understood that this court will review this statement of additional grounds when this appeal is considered on merit.

## (B) ASSIGNMENT of ERROR

(1) Mr. Ejonga was prejudiced and violated by the State putting forth an expert witness who used a Structured Interview of Reported Symptoms (SIRS) test that was not designed for African population. This test did not take into account Mr. Ejonga's African upbringing which makes the testimony and opinion of the State's Expert Witness invalid and misleading to the jury.

(2) Mr. Ejonga's trial counsel failed to call, as a witness, the jail psychiatrist that was treating Mr. Ejonga.

## (C) RELEVANT FACTS

(1) Mr. Ejonga was found guilty on January 29, 2013 by jury trial. The charges were three counts of attempted murder in the first degree and three counts of assault in the first degree. Prior to trial, the defendant's original charge was three counts of assault in the first degree. Trial date was set for 11-14-12 but the defense counsel asked for a continuance. The trial date was set at 12-5-12 (see Exhibit(1)). Omnibus was set for 11-30-12. During omnibus the

State moved to amend the charges to three counts of assault 1<sup>st</sup> degree and three counts of attempted murder 1<sup>st</sup> degree. The defense counsel objected to the amendment but Judge Olshi granted the States motion (See Exhibit (2)).

(2) Before trial Mr. Ejonga was evaluated by the States expert witness, Dr. McClung (the States Forensic Psychiatrist). Dr. McClung testified, in trial, to his opinion that Mr. Ejonga was 'malingering'.

Dr. McClung's diagnosis was different from the defendant's expert witness, Dr. Jarome Kroll, who testified and diagnosed Mr. Ejonga with PTSD, delusional disorder with delusional mood and mood disorder, secondary to traumatic brain injury. (See Exhibit (3) pages 1 to 5 of the trial transcript. Dr. McClung did acknowledge "probable PTSD", Dr. McClung's conclusion was based in part on a test administered to Mr. Ejonga called the Structured Interview of Reported Symptoms (SIRS).

(3) Upon Mr. Ejonga's arrival at the jail he mentioned being suicidal and having a history of panic attacks. He was not on any medication. (See RP 123 at 102-) Exhibit #5a Three days later, the jail staff was put on alert that Mr. Ejonga was found in his cell, not moving, and unresponsive to moderate pain cues. His speech was unclear and slow. (See RP 123 at 104) Finally, since his arrest, Mr. Ejonga has displayed symptoms of mental illness in the jail. The jail health service record indicates that Mr. Ejonga's active problem includes PTSD, Delusional Disorder, and Mood Disorder. (See Page 3 of Exhibit (3), also See Exhibit (6) (a) RP 123 at ~~112~~ 112 and Page 21 - Exhibit (4)

the Defense psychiatric examination by Dr. Jarome Kroll (section 3)). Mr. Ejonga was being treated by the jail psychiatrist, Barbara Krsyzek ARPN. She diagnosed Mr. Ejonga on Dec. 1, 2011.

(4) Mr. Ejonga was prejudiced and denied his right to a fair trial when State's witness put forth opinions derived from a SIRS test that was not normed for people from African Population.

#### (D) GROUNDS FOR RELIEF

(1) Trial counsel was ineffective and her performance and representation was deficient by not calling the jail psychiatrist who treated Mr. Ejonga for two years. She knew Mr. Ejonga's mental illness better than Dr. Kroll or Dr. McClung. Her testimony could have been important and useful to establish that Mr. Ejonga was not malingering his symptoms. This violates the defendant's right to have compulsory process for obtaining witnesses in his favor under the 6<sup>th</sup> Amendment of the Constitution of the United States.

(2) Mr. Ejonga was prejudiced and denied his right to a fair trial due to the fact that the State's expert witness, Dr. McClung, used a SIRS test that was not normed and used in the African Population, especially places like the Democratic Republic of the Congo, where Mr. Ejonga was raised. Also, by him not using the most up-to-date version of the test, which Dr. McClung admitted to. The up-to-date version was published in 2010. The test used on Mr. Ejonga was published back in 1992.

## ARGUMENTS

(1) Mr. Ejonga was prejudiced and denied his right to a fair trial guaranteed by the 5<sup>th</sup> & 14<sup>th</sup> Amendment when the State's expert witness, Dr. McClung, "used a test" called a SIRS test that was not normed for African Population. Also, by him not using the most updated version of the test which was published in 2010. Instead he used the 1992 version of it, even though Judge Olshi instructed Dr. McClung to not mention, to the Jury, about the test but allowed Dr. McClung to rely on and base his conclusion on it, but just not mention to the Jury about it. The Jury could have seen that the State's report was invalid and could not be relied on because it was not normed for or to be administered to African Population, such as Mr. Ejonga. In trial, during the telephone interview with Dr. Kroll, the defense expert witness, specifically said the test was not administered correctly. Therefore, it is not valid and should not be used either in a court of law, or even in a regular clinical assessment. (See RP 12/20 at 7-14 Exhibit 6) If a test is invalid or not normed for African people then why is it being used, even though the Judge instructed not to mention it to the Jury. Using an invalid, out-of-date test to make a determination about Mr. Ejonga's mental state obviously makes the conclusion of the examination invalid and inappropriate to use. Even though the test was "not mentioned" to the Jury it was used to determine a decision about Mr. Ejonga's guiltiness. This is prejudicial and violates the defendant's right to a fair trial. (See Exhibit 6 RP 12/20 at 7 line 12 to 25)

see - EXHIBIT # 6C FOR MORE INFORMATION ABOUT THE

(SIRS) TEST THAT TRIAL COUNSEL ARGUES IN HER TRIAL MEMO

PAGE 7 (MOTION TO EXCLUDE EVIDENCE OF THE (SIRS TEST))

This follows the same line of reasoning as to why a lie detector test is inadmissible in court. If an officer of the law bases his determination of guiltiness off a test that is inadmissible then the testimony of the officer is no longer admissible. The same thing is happening here. Dr. McClung based his evaluation on an invalid test. Notwithstanding, the court ordered Dr. McClung to not mention to the Jury about the test. (See RP 12/20 page 5-14 Exhibit 4b) This prejudiced the defendant and violated his right to a fair trial. Dr. McClung agreed that the SIRS test was not normed for African Population. Dr. Kröll, during cross-examination stated that the test was misleading. (See Exhibit 8 RP 12/20 at 19 line 13 to 16) Dr. Kröll repeatedly states that the test is invalid. (See Exhibit 9 RP 12/20 at 20 line 14 to 23) Dr. Kröll states, "if he's designing it get at malingering, the test is not valid. First of all Dr. McClung's evaluation result on Mr. Ejonga was that Mr. Ejonga was malingering, and he based part of his conclusion on the SIRS test." Dr. Kröll wrote to the person who designed the SIRS test asking if the test was validated or translated to African languages. He wrote back and said, NO, it has not been. (See RP 12/20 at 22) Mr. Ejonga is African and just moved to the U.S. in 2010. The test is invalid, therefore, the evaluation is invalid. This shows that the Jury was faced with an invalid testimony. Dr. McClung's evaluation mislead the Jury, in turn, violating and depriving the defendant of his right to a fair trial. Dr. McClung's testimony was prejudicial. For these reasons Mr. Ejonga is entitled to a new trial. Misleading testimony

by a States Expert Witness can not be considered 'harmless error'. Such action was prejudicial and harmful to Mr. Ejonga.

(2) Mr. Ejonga was prejudiced by trial counsel not calling the jail psychiatrist to testify for Mr. Ejonga. Based on the fact that Mr. Ejonga was under her care for more than a year and a half, She knows Mr. Ejonga's mental illness better than both State and Defense. Her testimony could have been very important and there was a reasonable possibility the Jury would believe her testimony and the result of the trial could have been different. Her testimony could have also been used to support Dr. Kroll's testimony. The Jury would have seen two testimonies supporting each other and, reasonably, the outcome of the trial would have been different. Dr. McClung only interviewed Mr. Ejonga for five hours. Mr. Ejonga had been under the care of Ms. Barbara Krzyzek for a year and a half and had been on medication that was making him feel much better. Ms. Krzyzek's testimony would have more weight than Dr. McClung's. His five hour interview was no comparison to the jail psychiatrist's report. This is like comparing 5 hrs. to 500 hrs. of counseling, evaluation, and monthly check-ups. Her testimony would have been accepted by the Jury, more than both Dr. Kroll's and Dr. McClung's testimony and evaluation. Not having her testimony prejudiced Mr. Ejonga. If Mr. Ejonga was malingering his symptoms then, surely, the jail psychiatrist would not have been treating him with medication. Trial counsel's decision to not call Ms. Krzyzek was not a legitimate trial strategy and constitutes inefficiency of counsel, prejudicing Mr. Ejonga.

The defense counsel's performance fell below an objective standard of reasonableness and can't be characterized as a legitimate trial strategy. That prejudiced Mr. Ejonga and also deprived him of his constitutional, compulsory right to have a witness or witnesses for his defense. This was not a harmless oversight. To hear further testimony given by the jail psychiatrist, the Jury may have entertained reasonable doubt and found the defendant not guilty. This would have also satisfied the defendant's constitutional right under the 6<sup>th</sup> Amendment to compulsory process for obtaining witnesses on his behalf. Also satisfying the defendant's right to effective counsel.

### ↳ CONCLUSION and AUTHORITY ↴

(1) Regarding the SIRS test, U.S. v. Johnson - 968 F.2d 768 (8<sup>th</sup> Cir). Just one single "misstep" on the part of the government or prosecution may be so destructive to the defendant's right to a fair trial that dismissal is required. In this case, the Jury was misled by the State (government) psychiatrist's opinion and evaluation, not knowing that the source of the evaluation was invalid. Based on the fact that the SIRS test was not normed or administered and validated to African Population like Mr. Ejonga. So this is not just a misstep or harmless error but a violation of the defendant's right to a fair trial under the 14<sup>th</sup> amendment. The misleading of the Jury by the State psychiatrist is chargeable to the prosecutor.

Statement Of Additional Grounds pursuant to RAP 10.10  
PART - 2

1. Ground No. 1 FINAL ARGUMENT & LEGAL AUTHORITY

Mr. Ejonga was denied a fair trial when trial court admitted expert testimony.

A. States Expert Witness Relied On Invalid Criteria

1. The decision to admit expert testimony is within discretion of the trial court. State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990), cert. denied, 111 S.Ct. 752 (1991). Expert testimony will be admitted when: "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." Swan, at 655 (quoting State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)).

2. When conducting his psychological evaluation of Jo Jo Ejonga States expert witness Dr. McClung used the 1992 outdated version of the SIRS-2 psychological battery test instead of the updated version of the SIRS-2 test published in 2010. See exhi-

- bit # 11 pg. 39 lines 24 and 25. <sup>and lines 1 to 4 page 40</sup> It is generally accepted in scientific community and affirmed by both States expert witness Dr. McClung and defense expert witness Dr. Kroll, that the 1992 version of the SIRS-~~2~~ psychological test is not adequate for forming a valid psychological evaluation for an African person traumatized by the atrocities committed by soldiers in the Congo conflict. ~~and he misled the Jury and made them~~

~~lieve a testimony that it foundation was laid by a test that was invalid~~

3. When cross examined by defense counsel Juanita Holmes see pg 40 lines 1-6 exhibit # 11: Dr. McClung admitted he refused to produce the guidelines for the ~~evaluation~~ evaluation as part of the defense discovery request. See Exhibit # ~~12~~ 12, pg 43, lines 10-19. Defense counsel was able to obtain the inference for McClungs reticence to provide the legitimate discovery request. Dr. Kroll expert witness for the defense testified that according to his research in Dr. Rogers book on malingering. The standard was intended to be administered as written. See exhibit ~~13~~ 13 page 48 line 20 to Page 49 line 20 exhibit # 13

A. Conclusions such as Dr. McClungs, the states expert witness reached as malingering by the defendant are bias on the part of the evaluator. See Exhibit # 13 pg. 48, 49, from line 20 to end. The trial court agreed. See exhibit # 14, pg 56, 60, lines 7-25; line 1: the

states evaluation was not valid due to the defendant's African Congo conflict trauma background <sup>also</sup> evaluated from the outdated version of the SIRS-~~2~~ test. Dr. McClung administered to him. not only was it not updated

version but also it wasn't ~~normed~~ or administered or valid

2 For Congo  
2 Population

B. States Expert Witness Was Not Qualified to Testify

1. Practical experience is sufficient to qualify a witness to testify as an expert. *State v. Smith*, 88 N.H. 2d 639, 647, 569 P.2d 1154 (1977). Dr. McClung never attempted to claim he had ever treated an African war survivor. Given the atrocities unique to Rwanda or the blood diamond conflicts in Sierra Leone, where children

2 Congo. D.C.

grow up witnessing decapitations and dismemberments. Dr. McClung's inexplicable insistence to test Mr. Ejonga by the outdated 1992 version of the SIRS-~~2~~ test, when the correct updated 2010 version of the test which provided the <sup>newly</sup> correct standard by which to evaluate Mr. Ejonga's mental state was available precludes him as an expert witness.

Could

2. Mr. Ejonga argues Dr. McClung's testimony was improperly admitted into evidence against him under the standard set forth by *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923). Testimony based on scientific experimental procedures is admissible

'only' if the back ground theory or principle has achieved general acceptance in the scientific community, State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984) (citing Frye at 1014). Dr. McClung offered no testimony to suggest using the outdated 1992 version of the SIRS-2 test was inconsequential to using the up-dated 2010 version of the SIRS-2 test.

3. Unlike State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 where the states expert witness testimony did not involve new methods of proof or new scientific principles from which conclusions are drawn need not be subjected to the Frye test. State v. Young, 62 Wn. App. 895, 906, 802 P.2d 829, 817 P.2d 412 (1991). Dr. McClung had no practical experience for evaluating Congo conflict survivors, nor did he have any acquired knowledge of Mr. Ejonga's post traumatic stress disorder susceptibility to being raised as a child in an environment of constant atrocities.

4. The trial court abused it's discretion when it allowed Dr. McClung's testimony to go to the jury. Aspects within the courts discretion elucidated in State v. Swan, 114 Wn.2d 613, 655, 720 P.2d 610 (1990) that governed when expert testimony will be admitted were not present in Mr. Ejonga's trial. Dr. McClung was not qualified to opine on African war torn refugees; his opinion was not

based upon an explanatory theory generally accepted in the scientific community because he inexplicably used the outdated version of the SIRS-~~a~~ test when the updated 2010 version was available to him and his testimony as opposed to being helpful to the triers of fact thoroughly confused them as to a legible state of Mr. Ejunga's mental capacities for PTSD at the time of the crime. See Swan, at 455 (quoting State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)).

## II Evidentiary Rules

A. Interpretation Of An Evidentiary Rule Is a Question of Law Which a Reviewing Court Reviews De novo.

1. The State had an obligation, according to Evidentiary Rule # 602.10, in procedure to lay a foundation that Dr. McClung's testimony would be based on personal knowledge. State v. Le Fever, 102 Wn.2d 777, 690 P.2d 574 (1984). ~~By failing to object defense counsel~~ ~~waived the objection to the testimony requirement, and~~ Dr. McClung's lack of personal knowledge, acknowledged by the trial court: See Exhibit #14, pg. 59, 60 lines 7-25; line 1, of 60 Judge Patrick Oishi agreed with the defense it was im-

- proper for Dr. McClung to offer his evaluation of Mr. Ejonga based upon the outdated 1992 version of the SIRS-~~a~~ psychological test battery. & the Test wasn't

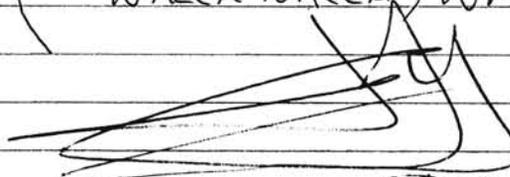
~~created or~~ administered and validated for African Population

2. On cross examination; a witness lack of first hand knowledge testimony lacking a first hand knowledge may be stricken. International Lumber Export Co. v Furuya Co., 121 Wn. 350, 290 P. 858 (1922). Evidentiary Rule # 602.1 (herein E.R.) prohibits witness testimony unless foundation is sufficient to support a finding of personal knowledge. Dr. McClung had no personal knowledge nor experience with Congo war refugee victims. The sufficiency of foundation is a preliminary question for the court alone to decide pursuant to ER 104; see §§ 104.3 to 104.5. In fact he has no knowledge or experience of African refugee victims.

3. A witness may not testify to a matter unless evidence is introduced sufficient to support a matter. ER 602.1 holds: that a witness who testifies to a fact which can be perceived by the senses must've had an opportunity to observe the fact and actually observed it. Hollingsworth v. Washington Mut. Sav. Bank, 37 Wn. App. 386, 681 P.2d 845 (1984). Mr. Ejonga contends that the courts complete disregard for ER's # 602.10; 602.1 and 404(b) was an abuse of it's discretion. State v. Foxhaven, 161 Wn. 2d 168, 163 P.3d 786; State De Vicentis, 150 Wn. 2d

11, 17, 74 P3d 119 (2003) reasons are the court itself agreed that the test wasn't normed or validated for African populations 4. When a trial court has correctly interpreted an ER, a reviewing court reviews the trial courts decision to admit evidence under ER 404(b) for an abuse of discretion. Id. State v. Trang, 145 Wn. 2d 630, 642; 160 Wn. 2d 934; 161 Wn 2d 174; 161 Wn 2d 396; 141 Wn. App. 139; 144 Wn App. 701; 149 Wn. App. 239; 151 Wn. App. 82; 153 Wn App. 150-51; 146 Wn App. 249) "Discretion is abused if it is exercised on untenable grounds or for untenable reasons (Failure to adhere to the requirements of an evidentiary rule can be considered and abuse of discretion. State v. Neal, 144 Wn. 2d 600, 609, 30 P.3d 1255 (2001) (citing State v. Rivers, 129 Wn. 2d 697, 706, 921 P2d 495 (1996)).

JoJo Enjonga - Deogracias  
 DCC# 366372  
 W.S.P WEST COMPLEX F.E. 235  
 1313 N. 13TH AVE.  
 WALLA WALLA, WA. 99362

  
 June-27-14

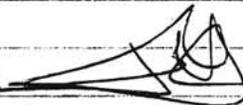
1) For this reason, Mr. Ejonga is entitled to a new trial, if not dismissal.

(2) Trial Counsel's failure to call a compulsory witness on behalf of the defense constitutes insufficiency of counsel and illegitimate trial strategy.

### PRAYER FOR RELIEF

Mr. Ejonga comes before this honorable court pleading his case on appeal. Based on the grounds presented Mr. Ejonga pleads to this honorable court to reverse his conviction and order him a new trial.

I, JoJo Ejonga-Deogracias, the appellant, declare under the penalty of perjury that all the above and foregoing is true and correct and accurate. Signed and executed this 2<sup>nd</sup> day of June, 2014. Under penalty of perjury, pursuant to RCW 9A.72.085, and 28 U.S.C. § 1746.

Signed:  EJONGA

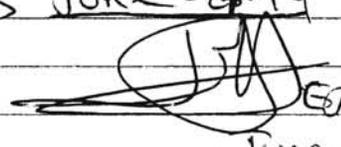
JoJo Ejonga-Deogracias  
Appellant in Proper Person  
Doc # 366372 Fox-E-233  
Washington State Penitentiary  
1313 13<sup>th</sup> Ave. N.  
Walla Walla Wa. 99362-8817

 EJONGA  
27-June-2014

PROOF OF SERVICE

PURSUANT TO WASHINGTON COURT RULE, GENERAL RULE 3.1(a)(b)(c), I THE UNDERSIGNED HERE BY DECLARE AND CERTIFY THAT, I HAVE PLACED A DEFENDANT OR APPELLANT PRO-SE BRIEF / STATEMENT OF ADDITIONAL GROUNDS (O.I.G) REGARDING THE CASE # 70069-3-1 COURT OF APPEALS DIVISION 1 INTO SEALED ENVELOPES WITH FIRST CLASS PREPAID POSTAGE AFFIXED THERETO, HAVING TURNED OVER TO A CORRECTIONAL OFFICER OR STAFF COUNSELOR MR MARC-HILL, EMPLOYED BY DOC FOR PURPOSE OF LOGGING AS LEGAL MAIL-TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION 1 ONE UNION SQUARE 600 UNIVERSITY STREET SEATTLE WA - 98101-4170. AND TO APPELLANT ATTORNEY MR. MITCH-HARRISON AT HARRISON LAW FIRM 101-WARREN AVE-N. SEATTLE-WA 98109-4928 AND TO PROSECUTING ATTY KING COUNTY PROS/APP UNIT SUPERVISOR-W554 KING COUNTY COURT-HOUSE 516 THIRD AVENUE SEATTLE, WA, 98104. ALL DOCUMENTS SENT AS LEGAL MAIL ON 27 day of June 2014

JOJO EJONGA-D  
  
EJONGA.

DATED June -27-14  
  
EJONGA  
June-27-14

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 JUN 30 AM 11:16

DECLARATION

I, JOJO EJONGA-ID, declare that, on June-27-14, I deposited the foregoing document(s),

STATEMENT OF ADDITIONAL GROUNDS  
PRO-SE BRIEF.

or a copy thereof, in the internal mail system of Washington State Penitentiary and made arrangements for postage, addressed to:

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION 7 & TO KING COUNTY PROSECUTOR OFFICE  
AND TO APPELLANT ATTORNEY MITCH-HARRISON

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington on June-27-2014,

Signature and number:  EJONGA-ID #366372  
 EJONGA-ID

EXHIBIT (A)

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
Plaintiff,	)	NO. 11-1-05704-2 KST
	)	ORDER CONTINUING TRIAL
<u>Jojo Ejonga</u> v.	)	(ORCTD)
Defendant.	)	(Clerk's Action Required)
CCN	)	

This matter came before the court for consideration of a motion for continuance brought by  plaintiff  defendant  the court. It is hereby ORDERED that the trial, currently set for 11/14/12 is continued to 12-5-12  \*Upon agreement of the parties [CrR 3.3(f)(1)] or  required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

plaintiff's counsel in trial;  defense counsel in trial;  other: Defense is reviewing state's experts report and preparing for trial

It is further ORDERED.

Omnibus hearing date is 11/30/12  
 Expiration date is 01-04-13

DONE IN OPEN COURT this 14<sup>th</sup> day of November, 2012  
  
 JUDGE

Approved for entry:

[Signature] via telephone Juanita Holmes  
 Deputy Prosecuting Attorney WSBA No. 28791 Attorney for Defendant WSBA No.

I agree to the continuance:

\* Defendant [signature required only for agreed continuance]

I am fluent in the \_\_\_\_\_ language, and I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

\_\_\_\_\_  
 Interpreter  
 Trial Continuance  
 (Effective 1 September 2003)  
 King County, Washington

EXHIBIT (2) A

FILED  
KING COUNTY WASHINGTON

JAN 02 2013

SUPERIOR COURT OF WASHINGTON  
BY: PAMELA ANZAI  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7	THE STATE OF WASHINGTON,	)	
		)	
		)	
8	v.	)	No. 11-1-05704-2 KNT
		)	<i>Second</i>
9	JOJO D. EJONGA,	)	AMENDED INFORMATION
		)	
		)	
		)	
11	Defendant.	)	

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse JOJO D. EJONGA of the crime of **Attempted Murder in the First Degree**, committed as follows:

That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8, 2011, with premeditated intent to cause the death of another person, did attempt to cause the death of Valerie Maganya, a human being; attempt as used in the above charge means that the defendant committed an act which was a substantial step towards the commission of the above described crime with the intent to commit that crime;

Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW 9.94A.825 and 9.94A.533(4).

ORIGINAL

COUNT II

1  
2 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOJO D.  
3 EJONGA of the crime of **Attempted Murder in the First Degree**, a crime of the same or  
4 similar character as another crime charged herein, which crimes were part of a common scheme  
or plan and which crimes were so closely connected in respect to time, place and occasion that it  
would be difficult to separate proof of one charge from proof of the other, committed as follows:

5 That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8,  
6 2011, with premeditated intent to cause the death of another person, did attempt to cause the  
7 death of Estella Nyandwi, a human being; attempt as used in the above charge means that the  
defendant committed an act which was a substantial step towards the commission of the above  
described crime with the intent to commit that crime;

8 Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and  
9 dignity of the State of Washington.

10 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by  
11 the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at  
said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW  
9.94A.825 and 9.94A.533(4).

COUNT III

12  
13 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOJO D.  
14 EJONGA of the crime of **Attempted Murder in the First Degree**, a crime of the same or  
15 similar character as another crime charged herein, which crimes were part of a common scheme  
or plan and which crimes were so closely connected in respect to time, place and occasion that it  
would be difficult to separate proof of one charge from proof of the other, committed as follows:

16 That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8,  
17 2011, with premeditated intent to cause the death of another person, did attempt to cause the  
18 death of Tuwalole Mwamba, a human being; attempt as used in the above charge means that the  
defendant committed an act which was a substantial step towards the commission of the above  
described crime with the intent to commit that crime;

19 Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and  
20 dignity of the State of Washington.

21 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by  
22 the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at  
said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW  
9.94A.825 and 9.94A.533(4).

1 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by  
2 the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA of  
3 committing the current offense, which is a violent offense, knowing that the victim of the current  
4 offense was pregnant, under the authority of RCW 9.94A.535(3)(c).

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COUNT IV

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOJO D. EJONGA of the crime of **Assault in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8, 2011, with intent to inflict great bodily harm, did assault Valerie Maganya, with a deadly weapon and force and means likely to produce great bodily harm or death, to-wit: a knife, and did inflict great bodily harm upon Valerie Maganya;

Contrary to RCW 9A.36.011(1)(a), (c), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW 9.94A.825 and 9.94A.533(4).

COUNT V

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOJO D. EJONGA of the crime of **Assault in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8, 2011, with intent to inflict great bodily harm, did assault Estella Nyandwi with a deadly weapon and force and means likely to produce great bodily harm or death, to-wit: a knife, and did inflict great bodily harm upon Estella Nyandwi;

Contrary to RCW 9A.36.011(1)(a), (c), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW 9.94A.825 and 9.94A.533(4).

EXHIBIT (L) B

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	No. 11-1-05704-2 KNT
v.	)	
	)	
JOJO D. EJONGA,	)	INFORMATION
	)	
	)	
Defendant.	)	

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse JOJO D. EJONGA of the crime of **Assault in the First Degree**, committed as follows:

That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8, 2011, with intent to inflict great bodily harm, did assault Valerie Maganya, with a deadly weapon and force and means likely to produce great bodily harm or death, to-wit: a knife, and did inflict great bodily harm upon Valerie Maganya;

Contrary to RCW 9A.36.011(1)(a), (c), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW 9.94A.825 and 9.94A.533(4).

COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOJO D. EJONGA of the crime of **Assault in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which

EXHIBIT (2) b

1 crimes were so closely connected in respect to time, place and occasion that it would be difficult  
2 to separate proof of one charge from proof of the other, committed as follows:

3 That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8,  
4 2011, with intent to inflict great bodily harm, did assault Estella Nyandwi with a deadly weapon  
and force and means likely to produce great bodily harm or death, to-wit: a knife, and did inflict  
great bodily harm upon Estella Nyandwi;

5 Contrary to RCW 9A.36.011(1)(a), (c), and against the peace and dignity of the State of  
6 Washington.

7 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by  
the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at  
8 said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW  
9.94A.825 and 9.94A.533(4).

9 COUNT III

10 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse JOJO D.  
EJONGA of the crime of **Assault in the First Degree**, a crime of the same or similar character  
11 as another crime charged herein, which crimes were part of a common scheme or plan and which  
crimes were so closely connected in respect to time, place and occasion that it would be difficult  
12 to separate proof of one charge from proof of the other, committed as follows:

13 That the defendant JOJO D. EJONGA in King County, Washington, on or about May 8,  
14 2011, with intent to inflict great bodily harm, did assault Tuwalole Mwambi, with a deadly  
weapon and force and means likely to produce great bodily harm or death, to-wit: a knife, and  
15 did inflict great bodily harm upon Twalole Mwambi;

16 Contrary to RCW 9A.36.011(1)(a), (c), and against the peace and dignity of the State of  
Washington.

17 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by  
the authority of the State of Washington further do accuse the defendant JOJO D. EJONGA at  
18 said time of being armed with a deadly weapon, to-wit: a knife, under the authority of RCW  
9.94A.825 and 9.94A.533(4).

19  
20 DANIEL T. SATTERBERG  
Prosecuting Attorney

21  
22 By: \_\_\_\_\_  
Donald J. Raz, WSBA #17287  
23 Senior Deputy Prosecuting Attorney  
24

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

**COPY  
RECEIVED**

EXHIBIT (3)

DEC 04 2012

**DANIEL T. SATTERBERG**  
PROSECUTING ATTORNEY  
**CRIMINAL DIVISION**  
MALENG REGIONAL JUSTICE CENTER

**IN THE KING COUNTY SUPERIOR COURT  
FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

v.

JOJO EJONGA,

Defendant.

NO. 11-1-05704-2 KNT

DEFENDANT'S TRIAL MEMO

**I. INTRODUCTION**

Jojo Ejonga comes before the Court for trial on three counts of attempted murder in the first degree and three counts of assault in the first degree, all with deadly weapon enhancements. The incident giving rise to the charge occurred on May 8, 2011. Mr. Ejonga has been in custody since that time. Current counsel was assigned in October of 2011. The defenses are general denial, insanity, and diminished capacity.

The defense expects to present the testimony of Jerome Kroll, MD, at trial. Accompanying this memorandum are copies of his report and CV. The defense may also present testimony from Mr. Ejonga's mother, Alembe Lihau, and the

Exhibit 3

1 defense investigator, Alyssa Boland. The defense reserves the opportunity to call  
2 any witnesses referenced in the discovery who are not called by the State. Mr.  
3 Ejonga has no criminal convictions. Thus, there are no ER 609 issues.  
4

5 **II. BACKGROUND**

6 **A. Personal History**

7 Jojo Ejonga was born and raised in the Democratic Republic of Congo (DRC).  
8 He was born to a two-parent family, and has two full siblings. His father worked  
9 as a bodyguard for President Mobuto, and his mother worked in law  
10 enforcement/national guard. After Mobuto's ouster and Laurent Kabila's ascent to  
11 power, Mr. Ejonga's father was sent away for re-education, and apparently  
12 poisoned to death. Concerned for her own safety, Mr. Ejonga's mother, Alembe  
13 Lihau, quit her job, and began to work out of the home as a tailor. Around 2005,  
14 Ms. Lihau was arrested while attending a church service with her infant grand-son.  
15 Former colleagues helped her escape from jail and out of the country with the  
16 infant. Mr. Ejonga and his siblings were left behind. It was a time of great civil  
17 unrest and violence. Mr. Ejonga witnessed much of this, and was himself assaulted  
18 by a soldier, who hit him in the head with a rifle butt. Mr. Ejonga's siblings  
19 disappeared. Mr. Ejonga was eventually helped to escape from DRC and join his  
20 mother and nephew to Nigeria. They spent about five years in Nigeria, living in  
21 poverty. In February of 2010, they came to the United States as refugees. Prior to  
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1 his arrest, Mr. Ejonga lived with his mother and nephew in an apartment in Kent.  
2 He was employed for a seafood company and later for Macy's. He took ESL class  
3 at Highline Community College.  
4

5 **B. Medical and Mental Health History**

6 Mr. Ejonga suffered from malaria as an infant. He was hospitalized, and  
7 given IV fluids in his head. When Mr. Ejonga was about eight years old, he and his  
8 brother were playing together in a second story bedroom. Mr. Ejonga fell out of the  
9 window, landing face down on the ground. He was unconscious and hospitalized  
10 for some time. Mr. Ejonga has a visible scar on his forehead from the fall. His  
11 mother reports that he was never the same after the fall.  
12

13 Ms. Lihau noticed that Mr. Ejonga's behavior was unusual in the period  
14 leading up to his arrest. She noted that he was agitated, and would stay on the  
15 computer all night.  
16

17 ~~X~~ Since his arrest, Mr. Ejonga has displayed symptoms of mental illness in the  
18 jail. Jail Health Services records indicate that his "active problems" include Post  
19 Traumatic Stress Disorder (PTSD), Delusional Disorder, and Mood Disorder. He  
20 has been prescribed a number of psychiatric medications, including Abilify, an anti-  
21 psychotic; Lithium, often used to treat mood disorders; Prazosin, often used to treat  
22 PTSD; and Sertraline, an antidepressant and antianxiety medication.  
23  
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1       **C. Forensic Psychiatric Evaluations**

2           Mr. Ejonga was evaluated by Jerome Kroll, MD. Dr. Kroll is the Chief  
3       Psychiatrist for the Refugee Mental Health Program of the Community-University  
4       Health Care Clinic in Minneapolis, Minnesota. His clinical program serves the  
5       refugee population of Minneapolis, which has the largest population of African  
6       refugees in the United States. A copy of his CV accompanies this memo. Dr. Kroll  
7       has treated many African refugees. In 2011, he wrote an original paper entitled  
8       “Psychosis, PTSD and depression in Somali Refugees in Minnesota” that was  
9       published in Social Psychiatry and Psychiatric Epidemiology. This paper discusses  
10      the study of 600 Somali refugees seen in his clinic between 2001 and 2009. He has  
11      published other writings pertaining to PTSD.  
12  
13  
14

15           In his report dated May 14, 2012, Dr. Kroll diagnosed Mr. Ejonga with  
16      PTSD, Delusional Disorder with delusional mood, and Mood Disorder secondary to  
17      traumatic brain injury. He concluded that “[i]t is my opinion to a reasonable degree  
18      of medical certainty that Jojo Ejonga suffered from a delusional mood that  
19      precipitated into a delusional perception on the night of his offense.” He further  
20      opined, “[w]hen in this delusional state, Jojo Ejonga did not have the ability to  
21      know right from wrong or to form a criminal intent.”  
22  
23

24           Mr. Ejonga also submitted to a forensic evaluation by the State’s expert, Mark  
25      McClung, MD. Dr. McClung concluded that Mr. Ejonga was malingering, although  
26

EXHIBIT (37)

5

1 he did acknowledge "Probable Post-traumatic stress disorder." His conclusion was  
2 based in part on a test he administered called the Structured Interview of Reported  
3 Symptoms (SIRS).  
4

EXHIBIT 4 defense  
psychiatrist  
evaluation  
by Dr. Kroll

events in Nigeria that shaded into a delusional system, with the development of a delusional disorder such that the lines between reality and delusion became blurred in a teen-ager's mind; or a total fabrication representing an attempt at malingering.

---

### HOW ARE WE TO ASSESS THIS FORMULATION

EXHIBIT (4)

1. The main question is whether Jojo suffered from a delusional mood that crystallized into a delusional perception that he was about to be attacked and murdered by terrorists. The prelude to this formulation are the three brain insults sustained by Jojo that had a cumulative effect of increasing his susceptibility to psychiatric illness; the violence, threats and chaos that he experienced in Kinshasa after 1997; the murder of his father around this time; and the unregulated life of a refugee teenager living in Lagos, Nigeria, a place in which al Qaeda was known to have a strong presence.

2. Delusional mood is best described as a mood characterized by perplexity concerning an awareness that something is going on around the person of an uncomfortable, sinister, or threatening nature which he cannot quite grasp or understand. The world appears to be changed but the person cannot quite describe in what way. Usually the meaning of the delusional mood becomes obvious when a sudden delusional idea or a delusional perception occurs, thus making delusional sense of the vague and perplexing anxiety that had been present. (Fish, 1974; Fuchs, 2005; Jaspers, 1963).

\* 3. In the Kent Correctional Facility, Jojo was noted to be confused; he states he was hearing voices. A social worker commented that he appears to be having his first psychotic break. Jojo was diagnosed with Delusional Disorder while at Kent Correctional Facility on December 1, 2011 by Barbara Krzyzek, ARNP (Advanced Registered Nurse Practitioner). Jojo was started on an antipsychotic medication, Abilify, at 5 mg daily. Jojo had already been taking the antidepressant Sertraline (Zoloft) up to 100 mg daily. Jojo reported that me that Abilify has been helpful in clearing up his thinking and blocking his auditory hallucinations.

1 Q. (By Ms. Holmes:) Have you found that page yet?

2 A. Yes.

3 Q. Okay. Maybe you know all this from memory, but I'm just  
4 going to have you have it handy.

5 A. That's not likely.

6 Q. Okay. When Mr. Ejonga was first in the jail, he was on the  
7 psyche unit?

8 A. Right.

9 Q. And then he was later moved to general population?

10 A. I believe that's true.

11 Q. Okay. And there were probably a couple of inches, at least,  
12 of jail health services records?

13 A. Yes.

14 Q. And you basically summarized things that you thought might be  
15 of some significance?

16 A. Right.

X 17 Q. Now, when Mr. Ejonga was first in jail on May 9th of 2011,  
18 initially he stated he might be suicidal?

19 A. Right.

X 20 Q. And then later he denied it?

21 A. Yes.

22 Q. And I want to back up a minute, you mentioned that sometimes  
23 people who are mentally ill deny their symptoms?

24 A. Yes.

25 Q. So just because someone denies they're suicidal doesn't mean

1 A. Yes.

2 Q. And he was unable to follow through with the PTSD  
3 questioning?

4 A. Right.

5 Q. On June -- pardon me, on May 12th of 2011, there was a code  
6 blue in the jail with reference to Mr. Ejonga?

7 A. Right.

8 Q. And that's a medical code?

9 A. Right.

10 Q. Witnesses reported that he had fallen and wasn't moving?

11 A. Yes.

12 Q. And he was found face down and not responsive to verbal cues?

13 A. Yes.

14 Q. And in fact, he didn't respond to moderate pain?

15 A. Right.

16 Q. His speech was slow and unclear?

17 A. Yes.

18 Q. And he was taken to Harborview to rule out a head injury?

19 A. Yes.

20 Q. And you reviewed those Harborview records as well?

21 A. Right.

22 Q. And when he was seen at Harborview on May 12th of 2011, he  
23 reported that he had chronic stomach pain, worked up in the  
24 Congo and the U.S., episodes of fainting with these stomach  
25 pains in the past?

1 A. That's how I understood it.

2 Q. At that point, he continued to endorse flashbacks?

3 A. Yes.

4 Q. And he also reported that his hand sometimes hurts from a  
5 chip in his hand?

6 A. Right.

7 Q. And he said, maybe they gave me PCP?

8 A. Right.

9 Q. And the impression of the psychiatric nurse practitioner who  
10 saw him was paranoia, appears illogical at times, engaged in  
11 interview, frustrated?

12 A. Those were her observations from the mental status exam.

13 Q. Okay. And her diagnosis was post-traumatic stress disorder  
14 and rule out delusional and mood disorder?

15 A. Right.

16 Q. And having a chip implanted in a part of one's body is a  
17 pretty common delusion, isn't it?

18 A. Yes.

19 Q. Mr. Ejonga sometime around that time was started on Abilify?

20 A. Right.

21 Q. And that's an anti-psychotic medication?

22 A. Yes.

23 Q. It's also used to treat mood disorders and post-traumatic  
24 stress disorder?

25 A. Right.

1 Q. Okay. Have you reviewed the evaluation of Dr. McClung in  
2 this case?

3 A. Yes, I have.

4 Q. Have you reviewed his notes?

5 A. Yes, I have.

6 Q. Have you reviewed the raw data or interview booklet used by  
7 Dr. McClung to score the SIRS test?

8 A. Yes, several times.

9 Q. Okay. And have you reviewed the transcript of the defense  
10 interview with Dr. McClung?

11 A. Yes, I have.

\*12 Q. Do you have any concerns about how the SIRS was administered  
13 in this case?

14 A. Well, I have many concerns.

15 Q. And can you tell us what those are?

16 A. Yes. There are two areas of concern.

17 One is that the test was administered incorrectly or  
18 improperly by Dr. McClung having to explain the meanings of  
19 certain terms. And in a sense, the concern is that this  
20 would give the subject a cue as to how he should answer it.  
21 And the -- Richard Rogers, the psychologist who designed the  
22 test, very specifically wrote in his book about the SIRS test  
23 that -- I can quote, the key difference between a structured  
24 and semi-structured interview is that structured interviews  
\*25 do not allow clinicians their own clinical inquiries to

1 clarify a patient's responses. The rationale for restricting  
2 the SIRS to a structured interview is the concern that the  
3 wording or tone of certain idiosyncratic questions may  
4 express incredulity, disbelief, or some other pejorative  
5 response, any of which is likely to alter the patient's  
6 presentation.

7 So my one concern is that the test was not administered  
8 correctly, and therefore it's not valid and should not, could  
9 not be used either in a court of law or even in a regular  
10 clinical assessment at a clinic.

11 Q. And -- yes. The quote you were just reading us, is that from  
12 Dr. Rogers, the developer of the SIRS test?

13 A. Yes. It's in his second edition, and it's 1998, and in his  
14 third edition, 2008. And the third edition, it is on page  
15 314.

16 Q. Okay. And the third edition, what's the title of the book?

17 A. Clinical Assessment of Malingering and Deception, Third  
18 Edition. It's edited by Richard Rogers.

19 Q. Now, along the lines of your concerns about improper  
20 administration of the test, would providing the answer  
21 choices inconsistently be a concern to you?

22 A. Oh, very much so. We have no idea -- it's kind of cuing in  
23 the subject as to what the examiner thinks the question  
24 means, and it may not be how he might have interpreted  
25 otherwise. It interferes with a free and open answer. Not

1 purposefully, it just creates a bias. And that's why one  
2 does a standardized questionnaire.

3 The MMPI, for example, would be a standardized  
4 questionnaire. The person reads the questions and answers.  
5 The examiner just sits there to make sure someone doesn't  
6 speak on a cell phone or something, but you're not to  
7 interrupt or interfere with the questions.

8 Q. Okay.

9 A. So I had two concerns about the SIRS, that was one of them,  
10 the way it was administered.

11 Q. And what was your other concern, Doctor?

\*12 A. Well, the other concern, it is just not normed or validated  
13 on a African population. This was developed in the United  
14 States, in Texas. But since then, other psychologists have  
\*15 studied other populations within America. So these were  
16 initially white and African-American populations. There is  
17 now a version for a Latino or Hispanic population. But it is  
18 not normed, and I'll explain what I mean by that.

19 Q. Please.

20 A. For instance, norm -- norming something, or getting normative  
21 evaluation on a new test, we need to do that because we don't  
22 know how a particular subject's responses are the same or  
23 differ from a sample of his peers within his own country, so  
24 we don't know how 100 or 200 Congolese young men would  
25 respond to each of the items, and how the items would fit

1 into the scale, the scale that has been developed in the  
2 SIRS.

3 So you just cannot use it on a -- on an African  
4 population, on an Asian population, until it's been  
5 translated -- translated back and used in the population as a  
6 research design, and then we have some idea of what the  
7 questions mean.

8 We don't know that Mr. Ejonga's response to a question  
9 should go into a malingering scale because, for all we know,  
10 90 out of a 100 Congolese young men would answer that  
11 question true and they wouldn't be malingering, that's how  
12 they -- that's what their world experience is.

13 Questions such as, are trees alive, or do trees have  
14 spirits, and other questions, do bugs do spying or  
15 surveillance, we might see that as very -- as an abnormal  
16 answer or fake answer in the United States and that's not how  
17 it would be in other populations.

18 Q. Okay. And what about -- can you explain what you mean by  
19 translating back?

20 A. Well, there are really strict rules for an adequate  
21 translating of a test into another language, so you get a  
22 group of five or ten people, psychologists, other people who  
23 translate the SIRS, we'll take that example, from English  
24 into Lingala, and they would sit in a room and talk and come  
25 out with the best translation for each of the items, all 172,

1 and that would then be given to a different group of persons  
2 who also are fluent in Lingala and English, and have them  
3 translate the Lingala translation back into English because  
4 sometimes you find great surprises that you wouldn't have  
5 thought of.

6 So the back translation has been coincided -- back  
7 translation into English has to coincide with the original  
8 English, and then you know that you have a valid translation.  
9 And then you can begin to test that -- that test on the  
10 native population, whether it's African, Asian, some other  
11 culture.

12 Now, the SIRS has not been translated into languages other  
13 than Spanish.

14 Q. And even if it had been translated, then there's still the  
15 norming process on top of that; is that correct?

16 A. Oh, right, just translating it is -- translating it -- the  
17 prerequisite is the beginning, then you have to take that  
18 test and administer to a large enough population of different  
19 kinds of people, mental patients, normal subjects, maybe  
20 medical patients, maybe persons in jail in their country,  
21 forensic patients possibly. It's very extensive. It's a  
22 three, four year process, which is why it's not done too  
23 frequently. But if you want to use the test properly, then  
24 that's the work that has to be done. You can't just take an  
25 American language test, try it out in another country and

1 assume that when we say, are trees alive, or do trees know  
2 things that they understand, that they have the same premises  
3 that we have.

4 Q. Well, what about Dr. McClung had indicated that there were a  
5 number of questions that he simply didn't include in his  
6 scoring because he thought they may have cultural  
7 implications, does that cure the problem?

8 A. No, that's an example of the problem. I think Dr. McClung  
9 was trying to make sense out of it, but, in fact, it's not  
10 his choice or anyone's choice to throw questions out or to  
11 answer what he thinks the person probably meant or what his  
12 -- what Dr. McClung's understanding of Congo culture is to  
13 change the answer from a yes to a no. That test has to be  
14 thrown out in terms of its usefulness.

15 Even in a clinical assessment, not in a court of law, but  
16 certainly when the stakes are as high as a person's guilt,  
17 innocence, or mental state, then the test -- it's just  
18 misleading and it just should not be used.

f 19 Q. Given the circumstances under which the test was administered  
20 in this case, are the results scientifically reliable?

21 A. Absolutely not.

22 Q. And would it be reasonable to rely upon the results in a  
23 forensic context in this case?

24 A. It would not be reasonable. It would be decidedly unfair and  
f 25 should not be done.

12/20/2012

EXHIBIT 66

1 Q. Okay. And would the principles and methodology used in the  
2 administration of the SIRS in this case, the way it was  
3 administered in this case, be generally accepted in the  
4 scientific community?

5 A. Not on a Congo population, no, if I understood you correctly.

6 Q. And what about would the principles and methodology used in  
7 the administration of the SIRS in this case, that is  
8 providing alternate wordings and cues on the answer choices,  
9 would that be generally accepted in the scientific community?

10 A. No. The basic principle is the test is invalid and no valid  
11 conclusions can be drawn from it. It just cannot -- it would  
12 not be accepted.

13 And I'm making this point that the SIRS is not a forensic  
14 test, it's a test for malingering or feigning illness or  
15 symptoms. And it can't be used in any context in a  
16 population for which it was not normed and validated.

17 Q. What about just -- would it be reasonable to just rely on the  
18 answers, not scoring it, but just to provide information in  
19 the case?

20 A. Absolutely not, because we don't know if particular answers  
21 are still misunderstood or answered in terms of Congolese way  
22 of thinking about things or understanding.

23 And the test has -- individual test items have absolutely  
24 no validity whatsoever, no usefulness. The test has to be  
25 used and the items have to go into scales that have been

1 developed; otherwise, it's the same as just asking questions  
 2 and which you end up with a clinical opinion, which is okay,  
 3 but then you cannot call it a psychological test. It's no  
 4 longer the SIRS test, you're just pulling out individual  
 5 items and say, well, he said this to this and he said this to  
 6 this. No, no test has validity when you start pulling items  
 7 out.

8 MS. HOLMES: Okay. Thank you, Doctor. That's all  
 9 my questions.

10 Now Mr. Bales may have some questions for you.

11 MR. BALES: Ready, your Honor?

12 THE COURT: Yes.

13 MR. BALES: Good morning, Dr. Kroll.

14 DR. KROLL: Good morning, Mr. Bales.

15 MR. BALES: I have a few questions for you.

16 CROSS-EXAMINATION

17 BY MR. BALES:

18 Q. Just starting out, forensic psychiatry is not your specialty  
 19 or focus, correct?

20 A. That is correct.

21 Q. And you're not a forensic psychologist?

22 A. That is correct.

23 Q. And did you ever do any kind of fellowship in forensic  
 24 psychology?

25 A. No, sir.

EXHIBIT #6c

1  
2 **B. Motion to Exclude Evidence of the SIRS Test**

Reserved

3 Dr. McClung administered the Structured Interview of Reported Symptoms  
4 (SIRS) test as part of his forensic evaluation. This test has not been normed on  
5 populations from DRC.  
6

7 The SIRS is a series of 172 questions designed to assess feigning and related  
8 response styles. The key difference between a structured and semistructured  
9 interview is that structured interviews do not allow clinicians their own clinical  
10 inquiries to clarify a patient's responses. The rationale for restricting the SIRS to a  
11 structured interview is the concern that the wording or tone of certain idiosyncratic  
12 questions may express incredulity, disbelief, or some other pejorative response –  
13 any of which is likely to alter the patient's presentation.  
14

15 There are also fatal flaws in the way the SIRS was administered in this case. Dr.  
16 McClung did not administer the test verbatim. At times, he offered additional  
17 information, such as alternate words or explanations, to clarify the questions.  
18 Sometimes, but not always, he repeated the answer choices. He excluded some  
19 answers based on his determination that the answers might reflect cultural beliefs,  
20 rather than psychiatric symptoms.  
21

22 The defense moves to exclude all testimony and evidence related to this test  
23 based on ER 401, 402, 403, 702 and 703. The test is not valid under the  
24  
25  
26

EXHIBIT # 6C

1 circumstances administered. Yet jurors may place great stock in it because it is  
2 perceived as quantifiable, scorable, scientific. The danger of unfair prejudice  
3 outweighs any limited relevance of this test. Furthermore, while the SIRS test itself  
4 may be something that professionals reasonably rely on, it is not something that  
5 experts would reasonably rely on when administered to a person from a population  
6 for whom it is not normed, and when administered in a non-standard way.  
7  
8

1 of a test, is that any different than you creating your own  
 2 questions?

3 A. Well, yes, of course it's different because I'm asking the  
 4 person questions about his life, his experience, et cetera.  
 5 Applying a test is giving questions that were specifically  
 6 designed to get at particular points when I have no idea if  
 7 the points they were supposed to get to are expressed  
 8 properly for that person or that person's background.

9 So the point is, it's misleading. I wouldn't know what to  
 10 make of the answers. So the answer is -- do trees have  
 11 spirits, I -- so he says yes, he says no, I don't know what  
 12 to make of it.

\* 13 There's about 100 tests out there on malingering that have  
 14 been used, and so why would one pick one test rather than  
 15 another? It is just not a valid way to go about an  
 + \* 16 assessment. And then worst of all, it's probably misleading.

17 Q. Well, didn't you, in fact, during Ms. Holmes' questions say  
 18 that if you're just using it as a tool, for instance, asking  
 19 questions and getting responses, that that's something that  
 20 would be okay?

21 A. Well, it wouldn't. That's a different question. You asked  
 22 me what I'd do and I say I wouldn't -- I would never use an  
 23 instrument on a subject, you know, cross-culturally that's  
 24 not been normed.

25 If Dr. McClung wants to do it, that's his basis, but then

1 when he uses it as a score to say, well, this score is in the  
2 probable malingering range, I say that's invalid. So why  
3 would I want to use it in the first place?

4 I can't tell other people what to do in their interview,  
5 I'm just telling you that the test is not valid.

6 Q. And again, that seems to be the main focus is the fact that  
7 it has a scale and the score?

8 A. Well, that is the purpose of the instrument, yes.

9 If he wants to ask specific questions and then write his  
10 write-up, well, when I asked this question, Mr. Ejonga said  
11 such and such, that's his choice to do. And then it has to  
12 stand or fall on its credibility and how it fits into the  
13 rest. I'm not about to tell him how to do an interview.

~~14~~ Q. So as part of an interview, that could be just a normal  
15 process that might be acceptable, but, again, it's the score  
16 and the -- and the scale that causes an issue?

17 A. No. I think you're stretching -- you're stretching -- I  
18 don't know what you mean by acceptable. Why on earth would  
19 anyone want to ask a series of questions that are part of a  
20 test that are strange questions.

~~21~~ + 21 If he's designing it to get at malingering, the test is  
22 not valid. If he's not, I don't see where the questions are  
~~23~~ + 23 helpful.

24 I'm just trying to say that each person can conduct their  
25 assessment as they wish. It's not for me to tell him not to

1 do that.

2 But I don't even know what you mean by acceptable.

3 Depends what use he makes of the questions.

4 Q. Well, if you were very -- if you happen to be very familiar  
5 with the test and how it works and what certain responses  
6 mean, wouldn't it be -- potentially be helpful to listen to  
7 somebody's responses and then judge whether or not some of  
8 those responses might be cultural? Wouldn't you have to do  
9 that anyway if you were just asking individual questions?

10 A. Well, I don't know how many other persons from the Congo Dr.  
11 McClung has given this test to.

12 So when you ask a question, then you're supposed to be  
13 deriving some information from the answer, but I don't know  
14 how you can derive information from this answer to this  
15 question when you don't know what it means to a person from  
16 the Congo, so that's why I keep going back to it's  
17 misleading.

18 If you want to ask the question, he can, and if he wants  
19 to write it up, well, in response to this question he  
20 answered such and such, but if he goes, therefore I conclude,  
21 then I think that's questionable, and probably it should not  
22 be considered valid and should not be considered usable.

23 Q. And are you familiar that the SIRS also has been validated  
24 for German?

25 A. Well, I know that, yes.

2/12/2012

EXHIBIT (9)

1 I just -- I wrote to Professor Rogers to find out if it  
2 had been translated into any of the African languages. And  
3 he wrote back saying, no, it hasn't been. And I think that  
4 he mentioned that -- I'm trying to see.

5 He says, it's not in the African language. There's an  
6 authorized Spanish version, and translated, but not  
7 validated, in Mandarin, Spanish, and Dutch. Not validated.  
8 Now, that e-mail came yesterday.

9 So I would say that it may be translated to German, but --  
10 and to the extent that German culture is similar to our  
11 culture, then one could try it out. But in order for it to  
12 really work, you would have to test it out on a German  
13 population, so...

14 Q. So you said somebody -- somebody could try it out and use  
15 that as, for instance, a reference?

16 A. Well, trying it out on a single subject is not the point,  
17 trying it out on 100 patients, 100 persons in prison, 100  
18 persons simulating illness, 100 persons with medical  
19 illnesses would be the relevant way to go, not just to say,  
20 well, it's translated into German so we'll give it to  
21 someone. You can do that, but then you don't know that the  
22 results are valid, and so you need to do it on 99 -- or turn  
23 in 99 more persons.

24 Q. And it's also been validated in the clinical community in  
25 corrections populations, correct?

1 A. Yes, in America. We're not attacking the SIRS.

2 Q. Right.

3 A. I have no basis to do that.

4 Q. And that would include white, black, and Hispanic  
5 individuals?

6 A. Yes. I assume -- one could select from a population, but I  
7 think it has been normed in a black population and a Latino  
8 population. Then one would have to know whether the Latino  
9 population was raised in America, English speaking, raised  
10 in, let's say, Mexico, and just came here two years ago.  
11 There might -- there might be some problems.

12 Q. And I'm just going to touch on this again, but would you  
13 agree that even if you didn't rely on the actual score of the  
14 SIRS, a person's response to interview questions, for  
15 instance, how they reacted, their thought process, a whole  
16 host of other things, might give an evaluator valuable  
17 information?

18 MS. HOLMES: I'm going to object, asked and  
19 answered.

20 THE COURT: Overruled.

21 A. The way a person responds to any question that you give is  
22 useful -- can possibly be useful information in your  
23 assessment. So in that sense, there's nothing special about  
24 the individual items from the SIRS, as opposed to other  
25 questions that might be asked. It might be valuable, but

1 it's not valuable because it comes from the SIRS, and it  
2 cannot be used in the sense of saying, well, therefore this  
3 is malingering because it's an item within the SIRS.

4 So any question in the person's response, whether he  
5 cries, he laughs, he makes up a wild story, can be useful,  
6 but not because it happened to have come from that test.

7 Q. (By Mr. Bales:) And then you would just call that --  
8 obviously, that portion part of his, what, would it be  
9 clinical interview?

10 A. Well, you would have to include that as part of his clinical  
11 interview. But I'm saying that the SIRS in a Congo person is  
12 not a valid test that should be allowed in court, that's what  
13 I'm saying.

14 Again, pulling out individual items is okay if you wanted  
15 to ask it, you could do the same with the MMPI, but it has  
16 nothing do with the MMPI.

17 Q. So you just wouldn't call it doing an MMPI with a score on  
18 the MMPI?

19 A. Well, for instance, the MMPI might have a question, I think I  
20 am being stalked by my enemies. That's an okay question to  
21 ask. But you can't just say, well, it's one out of five of  
22 the 20 questions in the MMPI and therefore leads to a  
23 paranoid scale. That's true, but you can't pull a question  
24 out and use it in such a way as reflecting the MMPI. It  
25 becomes an independent question at that point.

1 Q. Okay. Correct.

2 And you wouldn't have to say, well, you can't ask that  
3 question.

4 A. Oh, I would certainly never say such a thing like that.

5 MR. BALES: Okay. Actually, I have no further  
6 questions.

7 Thank you very much.

8 DR. KROLL: You're very welcome, Mr. Bales.

9 THE COURT: Thank you, Mr. Bales.

10 Any redirect questions?

11 MS. HOLMES: Just briefly, your Honor.

12 REDIRECT EXAMINATION

13 BY MS. HOLMES:

14 Q. Dr. Kroll, this is Juanita Holmes again.

15 A. Yes.

16 Q. So you exchanged e-mails with Dr. Rogers, the developer of  
17 the SIRS test?

18 A. Yes. I just wrote him an e-mail probably a month ago. It  
19 took a second prompting.

20 Q. Okay.

21 A. I'm just saying, I'm asking you whether this test has been  
22 translated, validated in other cultural areas, such as Africa  
23 or Asia.

24 Q. And he indicated that there were no translations in the  
25 African languages?

1 A. Yes. I can quote, "Dear Professor Kroll, There are no  
2 translations of the SIRS" --

3 MR. BALES: Your Honor, I'm going to object to  
4 e-mails from other persons that aren't even testifying here  
5 today.

6 MS. HOLMES: Dr. Kroll, there's been an objection.  
7 Sorry. Hold on.

8 THE COURT: Doctor, if you can just hang on.  
9 Mr. Bales?

10 MR. BALES: Your Honor, he can state whether or  
11 not he understands if there's any other -- there are  
12 interpretations of this particular test, but I think reading  
13 e-mails sent back and forth between some other individual,  
14 obviously, is hearsay. That individual's not here to  
15 testify.

16 But if she wants to ask the doctor what his understanding  
17 is, I guess I would have no objection to that.

18 MS. HOLMES: I can rephrase the question, your  
19 Honor.

20 THE COURT: I'm going to sustain the objection.

21 So, Ms. Holmes, if you can reask your question, please.

22 Q. (By Ms. Holmes:) So, Dr. Kroll, without reading the e-mail  
23 from Professor Rogers --

24 A. Yes.

25 Q. -- was it your understanding that it has not been translated

1 or normed on African populations?

2 A. Yes, it is my understanding.

3 I've also done, you know, a computer search of the SIRS in  
4 translation and there are none.

5 Q. Okay.

6 A. There's no reference to it in the psychology literature.

7 Q. Okay.

8 A. We can leave Professor Rogers out of it.

9 MS. HOLMES: Okay. Thank you.

10 Nothing further.

11 The Court may have a question.

12 THE COURT: Mr. Bales.

13 MR. BALES: I have no further questions, your  
14 Honor.

15 THE COURT: Okay. Dr. Kroll, thank you for your  
16 time. I don't think I have any questions for you.

17 Any reason that we can't let the doctor go at this point?

18 MS. HOLMES: No, your Honor.

19 MR. BALES: No, your Honor.

20 THE COURT: Okay. Thank you, Dr. Kroll. We're  
21 going to disconnect you at this point.

22 DR. KROLL: Thank you very much, Judge.

23 Bye-bye.

24 (Off the record.)

25 MR. BALES: I have my next witness available.

1 did you rely on in making your assessment regarding  
2 malingering?

3 A. Basically, the entirety of information that I had available,  
4 the entirety of my two interviews with Mr. Ejonga, the  
5 collateral interviews, information from other people who knew  
6 him, and the discovery information, which included both  
7 witness interviews, medical -- some medical records related  
8 to Mr. Ejonga, prior criminal records, and the criminal  
9 investigation of this case, as well as my general knowledge  
10 and experience on assessment and observation of malingering  
11 and exaggeration.

12 Q. And again, it sounds like you've done at least 1500 --  
13 possibly 1500 of these evaluations?

14 A. Yes.

15 MR. BALES: Your Honor, I have no further  
16 questions.

17 THE COURT: Thank you.

18 And, Ms. Holmes, cross-examination.

19 MS. HOLMES: Thank you.

20 Good morning, Dr. McClung.

21 DR. McCLUNG: Good morning.

22 CROSS-EXAMINATION

23 BY MS. HOLMES:

24 Q. You administered the SIRS, not the SIRS-2; is that correct?

25 A. Yes.

1 Q. Okay. And SIRS-2 was published in 2010?

2 A. Yes.

X3 Q. And the SIRS that you administered is published in 1992?

X4 A. Right.

5 Q. Okay. And that test comes in the form -- written form called  
6 an interview booklet?

7 A. Yes.

8 Q. And there are 172 questions on the test?

9 A. I believe that's right.

10 Q. And after each question, there are a set number of answer  
11 options?

12 A. Yes.

13 Q. Okay. And the answer options are not the same throughout the  
14 test?

15 A. That's right.

16 Q. The answer choices were not read to Mr. Ejonga after each  
17 question, correct?

18 A. That's correct.

19 Q. Sometimes they were read to him, sometimes not?

20 A. They were not read after each question.

21 Q. Okay. They were read to him on an as-needed basis?

22 A. They were read to him at the beginning of each section where  
23 that set of answer choices was -- was to be used.

24 Q. Okay. And if it appeared that he was given an answer where  
25 it was unclear how the answer fit into the choices given,

1 cultural factors, yes.

2 Q. And for example, you didn't use the rhyming words or  
3 antonyms?

4 A. Correct.

5 Q. Okay. So all together, there were seven questions that you  
6 either didn't include in the scoring or you scored them  
7 differently --

8 A. Yes.

9 Q. -- based on that?

f10 Okay. Now, the SIRS, it's a structured interview?

11 A. Correct.

12 Q. And you said that the guidelines allow for some minor  
13 explication?

14 A. Yes.

15 Q. Okay. And did you provide the guidelines to Dr. Kroll as  
16 part of our discovery request?

17 A. No.

18 Q. Okay. That's because they're proprietary?

f19 A. Yes.

20 Q. Okay. So, basically, we're not allowed to see that unless we  
21 pay for the test?

22 A. If Dr. Kroll has received training in the test or has  
23 purchased the test, he could receive the guidelines for the  
24 test, too.

25 Q. And that's not something you can just provide to the Court?

1 And, Ms. Holmes, any --

2 Well, let me ask this, Mr. Bales, any additional evidence  
3 that you wanted to put on for this hearing?

4 MR. BALES: No, your Honor.

5 THE COURT: Okay. Ms. Holmes, just regarding  
6 argument on this issue.

7 MS. HOLMES: Your Honor, I'm asking the Court to  
8 exclude any reference to the SIRS test in the trial,  
9 including any reference to the test being administered or the  
10 test being scored.

11 And the reason for that is because -- twofold. One is  
12 from the testimony of Dr. Kroll, and to a certain extent from  
13 the testimony of Dr. McClung, it's evident it hasn't been  
14 normed on African populations. And then there's a question  
15 about what the meaning of the answers and the scoring mean.  
16 And so you can't necessarily conclude from the scoring  
17 information that -- to compare it to when you don't have it  
18 compared to a population similar to Mr. Ejonga who came here  
19 from the DRC in 2010. So that's one problem.

20 And the other problem articulated by Dr. Kroll is that  
21 there were problems in its administration. It is a  
22 structured interview of reported symptoms. According to the  
23 quote that he read from Dr. Rogers, in the book that Dr.  
24 Rogers wrote on malingering, it's intended to be administered  
25 as written, and that there are problems when it's not

1 administered as written because it could interject bias on  
2 the part of the evaluator.

3 And that quote from Dr. Rogers' report is also included in  
4 Dr. Kroll's declaration, which was previously provided to the  
5 Court.

6 Now, Dr. McClung has indicated that there are some -- that  
7 the guidelines for administration of the tests allow for some  
8 minor explication. I have a problem with this because we  
9 don't know, really, what those guidelines say. It's  
10 proprietary information. He hasn't shared it with me. He  
11 hasn't shared it with Dr. Kroll. He's indicated he can't  
12 even share it with the Court because of their agreement with  
13 the developers of the test.

14 I don't see how the Court can, you know, assess what's  
15 permitted without being able to see that. And who's to  
16 determine what's a minor explication versus an explication  
17 that would warp the results of the test.

18 And also, I mean, the test he gave was the SIRS 1992. He  
19 admitted that there's now a SIRS-2 that was published in  
20 2010, so he didn't even give the most up-to-date version of  
21 the test.

22 But given the two primary problems that it's not normed on  
23 an African population, that it wasn't administered as given,  
24 and that the scoring was changed subjectively based on Dr.  
25 McClung's decision that certain questions should not be

1 that is Dr. Kroll is very specific and says this test is  
2 structured, it only can be administered one way; whereas, Dr.  
3 McClung is clear that based on the guidelines that he has  
4 referenced, that he has given at least some latitude to  
5 explain, for example, terminology. So I think there's  
6 somewhat of a dispute there.

7 Where I think there is absolutely no dispute is the issue  
8 of the norming of the tests. And it's very clear that this  
9 test has not been normed for a Congolese population. And in  
10 Dr. McClung's own testimony, he indicated that the test not  
11 being normed or validated for this particular population,  
12 that in itself can raise a serious question about the scoring  
13 based on the cultural issues.

14 Because of that, I believe under Evidence Rule 703 that  
15 the specific testing of Mr. Ejonga and the administration of  
16 the SIRS test to Mr. Ejonga I think is not information that  
17 is reasonably relied upon by experts in this field.

18 And I want to be real specific, the actual administration  
19 of the tests and the numerical scoring is information that I  
20 don't believe should be reasonably relied upon by experts in  
21 this field.

22 With that said, under ER 403, I think making reference to  
23 the actual SIRS tests, administration of the SIRS tests, or  
24 numerical scoring, or results of the SIRS tests I think would  
25 be unduly prejudicial to Mr. Ejonga and would outweigh any

EXHIBIT #17

RE 12/20-2012

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probative value that that testimony has.

So I want to be very specific because I went back and took a look at Dr. McClung's report that Mr. Bales provided to the Court. And this is on page 12 down towards the bottom, he describes the SIRS tests. He describes, essentially, how he administered the tests, but just his conclusions are as follows:

On the SIRS, Mr. Ejonga had several subskills that were elevated in the probable range for malingering. His test result profile with its combination of elevated scores is characteristic of individuals who are feigning a mental disorder and is rarely seen in clients responding truthfully regarding psychiatric symptoms.

So, again, I want to be very specific, I am not going to allow Dr. McClung to give that specific testimony that I just noted.

So the fact that he administered the SIRS and any results regarding scales, subscales, test result profiles and/or comparison to others, because I think that's what the issue is with the norming, that's the concern that the Court has and, obviously, Ms. Holmes has raised, that testimony is absolutely excluded.

Now, he does make reference -- let's see, I tabbed a few other places. In his -- on page 15 of his report, forensic issues, mental state at the time of the crime, Dr. McClung

1 scored a certain way because of potential cultural  
2 implications, it takes away any possibility of the  
3 scientifically valid conclusion to be drawn from the score.

4 And so as Dr. Kroll indicated, it's not something that in  
5 this context can be reasonably relied upon and is not  
6 specifically reliable and would not be generally acceptable  
7 as administered in the scientific community.

8 So I, for those reasons, would ask the Court to exclude  
9 any reference to the SIRS test being given or the scoring of  
10 the SIRS test.

11 And the other thing that I think is important to note is  
12 this is a case where our defense is a mental defense, the  
13 State's rebuttal to that is malingering, so it's a serious  
14 issue in this case. And we already know just from going  
15 through one round of juror questionnaires, jurors are already  
16 hostile to mental defenses.

17 THE COURT: And/or from the first round of jury  
18 questions, we had folks that perhaps were sympathetic to  
19 mental health issues.

20 MS. HOLMES: I think we had one person who is.  
21 I'm sure that person would have been the recipient of a  
22 peremptory challenge.

23 THE COURT: And vice versa.

24 MS. HOLMES: Yeah.

25 And I think it's common knowledge these are unpopular

1 the SIRS test himself. He had never been familiar with the  
2 SIRS test until this case came about. And he looked at it  
3 and then started doing some reading. So he is not familiar  
4 necessarily with the details of that particular test. Dr.  
5 McClung, on the other hand, again, has done numerous, over a  
6 thousand, forensic evaluations. He has used this test in the  
7 past. He had indicated, I believe, somewhere in the  
8 neighborhood of 20 -- 25 times he's used this particular  
9 test. He's familiar with the questions in the test. He  
10 evaluates individuals' responses, et cetera.

11 According to Dr. McClung, in the guidelines he is allowed  
12 to do minor adjustments within that test. And he did make  
13 some clarifications.

14 It's interesting -- and I know that these are standard  
15 tests, but it's interesting that one of the defense's  
16 arguments is that the defendant might have understood the  
17 questions too well, that if he -- because their argument is  
18 if he was asked a question and he was puzzled or unsure, by  
19 the expert doing a minor clarification so that he ensured  
20 that he understood a question that somehow makes the test bad  
21 because the defendant may have actually understood that  
22 particular question. I do not feel that that somehow kind of  
23 skews the results in this particular test.

24 Dr. McClung agrees that this test has not been validated  
25 for individuals from the Congo, but he also has specifically