HEAR YE, HEAR YE, HEAR YE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
ALL WITH CAUSE TO PLEAD
DRAW NEAR,
GIVE ATTENTION, AND YOU SHALL
BE HEARD.
GOD SAVE THIS UNITED STATES.
THIS GREAT STATE OF FLORIDA.
AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> GOOD MORNING.
AND WELCOME TO THE FLORIDA
SUPREME COURT.
THE FIRST CASE ON OUR CALENDAR,
JOHNSON VERSUS STATE.
ARE THE PARTIES READY?
YOU MAY PROCEED, MR.^DOSS.
>> MAY IT PLEASE THE COURT.
TODD DOSS ON BEHALF OF DAVID
JOHNSTON.
WE'RE HERE THIS MORNING FROM
THE DENIAL OF
MR.^JOHNSTON'S POST-CONVICTION
MOTION ALLEGING NEWLY
DISCOVERED EVIDENCE WE HAD
FILED BASED UPON A NEWLY
OBTAINED SCORE OF, IQ SCORE OF
61 OBTAINED ON THE WAIS-IV.
>> LET ME ASK YOU A PRELIMINARY
QUESTION.
WHEN WAS THE WAIS-IV TEST FIRST
AVAILABLE?
>> IN LATE 2008.
I BELIEVE THE WEB SITE HAD SAID
AUGUST 2008.
THE DOCTORS TOLD ME NOVEMBER
2008.
AND I, IF THE COURT WILL RECALL
I CAME ON THE CASE JUST RIGHT

AT THE TIME THE WARRANT WAS SIGNED, RIGHT THERE IN MAY.
I BELIEVE IT WAS LIKE THE LAST WEEK OF APRIL 1st WEEK OF MAY IN 2009.
THAT --
>> HE WAS WITHOUT AN ATTORNEY FOR A PERIOD OF TIME?
>> EFFECTIVELY SO, JUSTICE PARIENTE.
WE DISCUSSED THAT IN MAY.
THEY HAD FILED A MOTION TO WITHDRAW. BASICALLY LANGUISHED IN FRONT OF JUDGE WATTLES FOR A LONG PERIOD OF TIME.
AFTER THE PRIOR MENTAL RETARDATION HEARING AND SUBSEQUENT AFFIRMNESS BY THIS COURT MR.^JOHNSTON'S COUNSEL, MR.^MILLS WITH DREW.
ANOTHER COUNSEL WAS APPOINTED INDICATED HE DIDN'T SEE ANY CLAIMS. IT WENT BACK TO THE MIDDLE REGION.
THE MIDDLE REGION HAD IT WHEN I WAS APPOINTED WHEN GOVERNOR CRIST SIGNED THE WARRANT.
>> LET ME ASK YOU ABOUT THE TIME LIMITATIONS ARE APPLICABLE.
I UNDERSTAND IT IS A COMPLICATED SITUATION.
NOW ISN'T IT, THE CASE, THAT THERE'S A ONE-YEAR LIMITATION WITH RESPECT TO NEWLY DISCOVERED EVIDENCE CLAIMS THAT RUNS FROM THE TIME THAT THE NEWLY DISCOVERED EVIDENCE WAS DISCOVERED OR SHOULD HAVE BEEN COVERED THROUGH THE EXERCISE OF DUE DILIGENCE?
>> I WOULD AGREE WITH THAT.

JUSTICE CANADY.
>> OKAY.
I UNDERSTAND WE'VE GOT THESE
FACTS YOU'RE TALKING ABOUT
WHETHER HE WAS SENTENCED AND WHO
WAS DOING WHAT.
BUT WOULDN'T, IN THIS CASE,
THE ONE YEAR CLOCK, ABSENT
SOME EXCEPTION, START RUNNING
AT THE TIME THIS TEST BECAME
AVAILABLE, GENERALLY AVAILABLE?
>> MY ARGUMENT, JUSTICE CANADY,
IS THAT THE CLOCK BEGAN TO RUN
WHENEVER I BECAME AWARE
OF IT.
AS HE WAS EFFECTIVELY WITHOUT
COUNSEL AND LANGUISHING.
WHICH WOULD PLACE IT IN --
>> IS THERE AUTHORITY TO
SUPPORT THAT?
BECAUSE, YOU KNOW, OR, IT IS
ORDINARILY THE CASE THAT THE
CLOCK BEGINS TO RUN WHEN YOU
SHOULD HAVE KNOWN ABOUT IT
THROUGH THE EXERCISE OF DUE
DILIGENCE.
OBVIOUSLY, THIS TEST IS A TEST
THAT IS NOT SOMETHING THAT IS
SECRET.
IT'S A WIDELY KNOWN TEST, AND
WHEN THERE'S A NEW VERSION THAT
COMES OUT, THAT IS GOING TO BE
SOMETHING THAT WOULD BE WIDELY
PUBLICLY KNOWN.
THE, SO THE NOTION THAT COUNSEL
COULD NOT DETERMINE IT?
WHETHER, YOU KNOW, WHETHER
THERE IS A GAP IN COUNSEL HOW
THAT WOULD AFFECT THIS, THAT'S
A DIFFERENT QUESTION.
BUT ABSENT SOME CIRCUMSTANCE
SUCH AS THAT, WOULDN'T YOU

AGREE THAT THE CLOCK WOULD
START RUNNING, WHEN THE TEST
CAME OUT?
>> I DON'T BELIEVE THAT IS THE
WAY IT READS.
I BELIEVE IT READS THROUGH THE
USE OF DILIGENCE.
AND I CAN ONLY SPEAK TO THE
DILIGENCE I USED WHENEVER I
RECEIVED THE CASE AND HAD HIM
EVALUATED WITHIN A WEEK.
THAT IS WHENEVER I LEARNED IT.
I CAN TELL THAT --
>> IF WE FOLLOW THAT, WHEN WE
ESSENTIALLY, IF WE FOLLOW WHAT
YOU'RE SUGGESTING, WHEN WE
ESSENTIALLY HAVE A SITUATION
WHERE, AT LEAST POTENTIALLY,
THESE CLAIMS, BASED ON, THIS
NEW TEST COULD JUST KIND OF BE
SITTING OUT THERE, AND BECAUSE
COUNSEL DOESN'T HAPPEN TO FIND
OUT ABOUT IT, THEY COULD BE
RAISED, WHEN COUNSEL GETS
AROUND IT, TO CHECKING OUT
ALTERNATIVES, VARIOUS COURSES
OF ACTION ON THE EVE OF
EXECUTION.
WE WOULD FACE WHAT WE'RE FACING
RIGHT NOW, I DON'T KNOW HOW
MANY CASES, BUT PROBABLY BE
SOME OTHER CASES WHERE THERE
ARE CLAIMS THAT COULD BE MADE
ALONG THESE LINES.
AND ISN'T THAT A PROBLEM?
THAT CAN JUST SIT THERE, UNTIL
COUNSEL GETS AROUND TO IT, AND
RAISED IT AT THE 11th HOUR?
>> I BELIEVE THAT IS WHY,
JUSTICE CANADY .THERE IS A
DILIGENCE PRONG BECAUSE IT IS
INDIVIDUALIZED DETERMINATION

BASED ON THE CIRCUMSTANCES OF
THE CASE.
>> WHAT I WANT TO ASK YOU ON
THAT, YOU RAISED A VERY SERIOUS
CLAIM, I THINK IT IS A SERIOUS
CLAIM, IF MR.^JOHNSTON IS IN
FACT MENTALLY RETARDED AS
CONTEMPLATED BY ATKINS AND THE
LEGISLATURE --
YOU CAME ON THE CASE.
YOU SAID IN IT WAS MAY OF 2009?
>> I BELIEVE THE ORDER OF
APPOINTMENT WAS --
>> THE FIRST ISSUE YOU RAISED
TO THIS COURT, WHAT YOU
OBTAINED IS A STAY OF EXECUTION
WAS DNA EVIDENCE WOULD
EXONERATE THIS DEFENDANT.
NOW, AS A OFFICER OF THIS
COURT, AND I'M NO EXPERT ON
MENTAL RETARDATION, WOULDN'T
HIS STATUS, HIS ABILITY TO
COMMUNICATE, HIS OTHER
DEFICITS, THAT WOULD BE
INDICATIVE OF SOMEBODY WHO IS
MENTALLY RETARDED BE SOMETHING
THAT YOU WOULD HAVE BEEN ABLE
TO DISCERN UPON HIS INITIAL,
YOUR INITIAL MEETING WITH HIM?
>> NOT EXACTLY, JUSTICE
PARIENTE. I HAD RAISED A CLAIM THAT
ATKINS SHOULD BE EXTENDED TO
THOSE MENTALLY ILL OR
BRAIN-DAMAGED BECAUSE I THOUGHT
MR.^JOHNSTON WAS IN THE SAME
CLASS AS THOSE MENTALLY
RETARDED.
BECAUSE OF LATENESS OF COMING
IN I WAS AWARE OF THE 2005
DETERMINATION AND THE WAIS-III
SCORE IN 2004.
I DIDN'T HAVE ANY SCORE AT THAT

POINT IN TIME AS I LAID OUT IN
THE SPECIFIC MOTION.
I SPOKE TO DR.^KROP AND
DR.^EISENSTEIN.
DR.^KROP SAID THERE WAS A
WAIS-IV OUT THERE ALTHOUGH HIS
SCHEDULE DIDN'T ALLOW HIM TO
ADMINISTER THE WAIS-IV.
THAT'S WHY --
>> THE REAL QUESTION, SOMEONE
WITH AN IQ, ALLEGEDLY 61,
WOULDN'T THERE BE SOME PHYSICAL
MANIFESTATIONS OF THAT THAT
WOULD BE APPARENT TO SOMEONE
TALKING WITH WHIM?
IF YOU HAVE TO MEET WITH HIM
HAD, WOULDN'T THAT KIND OF IQ
SORT OF BE APPARENT IN
CONVERSATIONS?
>> IT WAS APPARENT AND WHY I
HAVE THE ATKINS CLASS EXTENDED.
FRANKLY I WAS BAFFLED BY THE
84.
THAT'S WHY I SUBSEQUENTLY HAD
HIM TESTED WITH THE WAIS-IV
KNOWING IT WAS MORE ACCURATE
ASSESSMENT BASED ON
RECOMMENDATIONS OF DOCTORS KROP
AND EISENSTEIN?
>> YOU COULDN'T AT THAT POINT
FIND ANYONE ELSE TO CONDUCT
THIS TEST OTHER THAN DR.^KROP?
I WOULD ASSUME THAT THE WAIS-IV
IS AVAILABLE TO WHOEVER
ADMINISTERS, PSYCHOLOGISTS OR
PSYCHIATRISTS AND THAT, NO ONE
OTHER THAN DR.^KROP, YOU
COULDN'T GET ANYONE OTHER THAN
DR.^KROP TO HAVE DONE THIS?
>> I ATTEMPTED TO HAVE
DR.^EISENSTEIN DO IT.
HE DIDN'T HAVE IT AT THAT

POINT.
HE ORDERED IT.
BY THE TIME HE GOT THE TEST WE WERE BEFORE THIS COURT BECAUSE AS THE COURT'S WELL AWARE, IT MOVES SO QUICKLY ONCE A WARRANT IS SIGNED AND I WAS, AS WELL, I WAS ACCLIMATING MYSELF WITH THE CASE HAVING BEEN INUNDATED WITH MANY BOXES OF MATERIALS AND NOT HAVING HAD, NOT IF MY CASE FROM THE BEGINNING WHERE I HAVE A BREADTH OF KNOWLEDGE ABOUT THE CASE.
>> THERE IS NO AUTHORITY THAT WOULD SUGGEST THAT THAT ONE-YEAR TIME WOULD BE TOLLED BECAUSE THE APPEAL OF ANOTHER SUCCESSIVE POST-CONVICTION MOTION IS PENDING?
>> YOUR HONOR, I DON'T BELIEVE, I DON'T BELIEVE THAT THE TRIAL COURT HAD JURISDICTION TO HEAR THE 3851.
I FILED IT WAS STILL, WHILE IT WAS STILL OUT.
IT WAS READY TO BE HEARD IMMEDIATELY COMING OFF A --
>> BUT, WELL, IN FACT YOU FILED THIS WHILE THE CASE WAS STILL UP HERE, THE OTHER CASE.
I DON'T UNDERSTAND HOW, I MEAN, I DON'T UNDERSTAND THAT ABOUT THE TRIAL COURT NOT HAVING JURISDICTION.
THE FILING OF THE CLAIM, WHETHER IT IS GOING TO BE HEARD IMMEDIATELY, THAT'S MAYBE A DIFFERENT ISSUE.
BUT IS THERE, IS THERE ANY AUTHORITY THAT WOULD SUGGEST THAT STATUE IS TOLLED BY

THE PENDENCY OF
APPEAL OF A ONE YEAR
POST-CONVICTION MOTION?
>> I CAN'T SUGGEST ANOTHER CASE
BUT TO SUGGEST THE TRIAL COURT
DOESN'T HAVE JURISDICTION TO
HEAR IT.
>> WE HAVE CASES PROCEDURE TO
BE FOLLOWED.
IT IS TO BE FILED AND THEN
STAYED.
I LIKE TO ASK A QUESTION,
ASSUMING WE GET PAST THE FIRST
PRONG OF TIMELINESS, ABOUT
WHETHER YOU SET FORTH A LEGAL
OR FACTUALLY SUFFICIENT CLAIM.
IT IS ONE THING TO SAY THAT
THIS WAIS-IV IS A REFINEMENT,
AND, THAT IT'S, QUOTE, A BETTER
TEST.
BUT WOULD YOU AGREE THAT IN
ORDER FOR IT TO QUALIFY AS
NEWLY DISCOVERED EVIDENCE,
THAT COULD LEAD TO REASONABLE
PROBABILITY OF A LESSER
SENTENCE OR IN THIS CASE,
IMMUNITY FROM THE EXECUTION,
THAT YOU WOULD HAVE TO SHOW
THAT THE PRIOR TEST, WAS, DID
NOT ACCURATELY MEASURE HIS
INTELLECTUAL FUNCTIONING?
>> I DON'T BELIEVE THAT IT, I
CAN NOT AND SAY THAT IT WAS
INACCURATE.
>> SO THAT, HERE'S THE PROBLEM.
IF THE WAIS-III WAS NOT INACCURATE
AND IT WAS SCORE THAT WAS
OBTAINED OVER A PERIOD OF NOT
JUST DURING THE LITIGATION BUT
ALSO WHEN HE WAS AGE, 13 OR 14,
THEN HOW ARE, YOU KNOW, HOW
ARE YOU GOING TO OVERCOME THE

BARRIER THAT SOME ACTUALLY
NEWLY DISCOVERED EVIDENCE SUCH
THAT IT IS ENTITLED TO, YOU
KNOW, FOR YOU TO HAVE A WHOLE
NEW HEARING ON, YOU KNOW, BOTH,
ALL THREE PRONGS OF THE ATKINS,
OR THIS COURT'S THREE-PRONGED
TEST FOR MENTAL RETARDATION?
I'M TRYING TO SEE WHERE WE
WOULD GO FOR THIS
IF THERE ISN'T ANYTHING THAT
CALLS INTO QUESTION THE
ACCURACY AND VALIDITY OF THE
PRIOR TEST?
>> EACH VERSION OF THE TEST,
BECOMES, I BELIEVE, BECOMES
MORE AND MORE ACCURATE.
I WOULD LIKEN IT TO IF WE WERE
TO COMPARE IT TO THE ADVANCE
FROM SUNDIAL TO A CLOCK, TO A
DIGITAL CLOCK.
AS WE REFINE AND GET MORE
ACCURATE, WASN'T ANY OF THE
PRIOR ONES WERE NECESSARILY
INACCURATE.
WE HAVE A BETTER IDEA WHERE
WE'RE AT.
>> IF THAT IS THE ANALOGY,
THERE SHOULD BE NO REASON WAIS-III,
THERE SHOULD BE NO, THAT
HAS TO CALL IN QUESTION THE
PRIOR TESTS DID NOT ACCURATELY
EVALUATE HIS INTELLECTUAL
FUNCTIONING.
IT'S NOT JUST, WELL, IT WAS
2:00 TWO YEARS AGO ON THAT
CLOCK BUT NOW IT'S GOING TO BE
2:00 AND 10 SECONDS.
YOU'RE TALKING ABOUT ALMOST A
STANDARD, WELL, AT
LEAST A STANDARD DEVIATION,
FROM 84 TO 61?

THAT IS A SIGNIFICANT
DIFFERENCE.
>> AND IT IS NOT A REFINEMENT.
THAT IS WHAT THE CIRCUIT COURT
HAD USED.
IT WAS A NEW CONFIGURATION IS
WHAT WE HAD PLED.
IT WAS A NEW CONFIGURATION,
THAT ADDED,
I BELIEVE THE COURT USED FROM
DR.^EISENSTEIN, IT WAS A NEW
CONFIGURATION OF FOUR INDEX
SCORES RATHER THAN A VERBAL AND
PERFORMANCE.
>> THE PROBLEM IS WE DON'T RIGHT
NOW, AND THIS IS WHERE I AM
CONCERNED WITH, I HAVE THE
TRIAL COURT'S ORDER.
THE TRIAL COURT FOUND THERE WAS
NO EVIDENCE PRESENTED THAT
CALLS INTO QUESTION THE
VALIDITY OF THE WAIS-III BUT
THERE WAS NO EVIDENTIARY
HEARING, CORRECT?
>> THAT'S CORRECT.
>> JUDGE PERRY INDICATED HE DID
INDEPENDENT RESEARCH.
A LOT OF EVIDENCE IS
REFINEMENT.
FIRST PAGE OF HIS ORDER HE SAID
HE DID INDEPENDENT RESEARCH.
THAT IS NOT THE STANDARD
WHENEVER WE'RE PROCEEDING UNDER
NEWLY DISCOVERED EVIDENCE CLAIM
WHETHER THE MOTIONS FILES AND
RECORDS CONCLUSIVELY REFUTE THE
CLAIM.
WHAT IS IN THERE DOESN'T
CONCLUSIVELY REFUTE THE.
A LOT OF THIS IS FLESHED --.
>> YOU'RE DISPUTING THE CLAIM
WAIS-IV IS NOT A SUBSTANTIAL --

IN MANNER THAT WOULD
INVALIDATE THE PREVIOUS
WAIS-III TEST RESULTS ARE YOU
CONCEDING THAT FINDING NEEDS
TO BE FLESHED
OUT RATHER THAN SUMMARILY
DENIED.
>> ABSOLUTELY.
I BELIEVE WHEN WE GET INTO THE
WAY THAT IT IS NEWLY CONFIGURED
THAT WOULD, THAT THAT WOULD
FLESH THAT OUT AND THAT WOULD
SHOW THAT THAT IS AN INACCURATE
ASSESSMENT AND THAT IT IS NOT A
REFINEMENT.
IT IS A NEW CONFIGURATION.
>> DID YOU PLEAD THAT?
>> YES. I HAD PUT THE QUOTES FROM
DR.^EISENSTEIN AND DR.^KROP. IT
WAS A NEW CONFIGURATION.
BASED ON DIFFERENT FACTORS THAN
BEFORE.
>> I UNDERSTAND.
DID YOU PLEAD THAT THE PRIOR
TEST WAS NOT A VALID TEST OR
SOMETHING LIKE THAT?
>> WHAT I PLED WAS THAT THIS
WAS MORE ACCURATE, MORE
RELIABLE AND MORE VALID.
I CAN'T, JUSTICE CANADY, I CAN'T
SAY IT WAS INACCURATE TEST.
JUST THAT THIS IS A MORE VALID
AND ACCURATE ASSESSMENT. THAT'S
WHY WE DID YSTR TESTING,
WE WERE ABLE
TO DETERMINE A LOT MORE THAN IF
WE DID ANY OF THE PRIOR DNA
TESTING BECAUSE OF THE
INCREASED ACCURACY OVER TIME.
IF WE'RE NOT, IF WE'RE NOT
ALLOWED TO TEST WITH MORE
ACCURATE, MORE REASONABLE VALID

SCORES, THEN BASICALLY PEOPLE
ARE TRAPPED AND CAN'T TAKE
ADVANTAGE OF ANY ADVANCEMENT IN
THE SCIENCE.
WOULD BE LOGICAL OUTWORKING OF
THAT IF, IF WE CAN'T CHALLENGE
THESE PRIOR SCORES.
WITH THE NEW SCORES THAT ARE
MORE INDICATIVE OF THE ACTUAL
INTELLIGENCE.
BECAUSE THE INTELLIGENCE IS
ALWAYS THERE.
IT IS HOW WE MEASURE IT.
>> LET ME YOU ABOUT A CASE
WHERE TEST WERE DONE YEARS AGO
AND PERSON WAS FOUND TO BE
ABOVE THE LEVEL OF THE CUTOFF
LEVEL, AND SO THE CLAIM REALLY
WASN'T PURSUED, BECAUSE THE
TESTS WERE DONE AND, HAD NO
CLAIM.
THERE VERY WELL COULD BE CASES
LIKE THAT SITTING OUT THERE.
DOES THAT MEAN, WHAT YOU'RE
SAYING NOW, EVERYBODY WHO
DIDN'T, MAYBE NEVER EVEN HAD A
TEST BEFORE THAT WAS LITIGATED,
CAN NOW COME IN, TAKE, HAVE
THIS TEST ADMINISTERED EVEN
THOUGH THE TIME LIMITATIONS AND
THE RULE FOR BRINGING A,
RETARDATION CLAIM LONG AGO
PASSED.
BECAUSE THIS NEW TEST OR NEW
VERSION OF THE TEST IS THERE,
THAT ALL THOSE CASES CAN NOW,
ALL THOSE FOLKS CAN NOW COME
FORWARD, GET THOSE TESTS AND BE
OFF TO THE RACES ON THEIR
MENTAL RETARDATION CLAIM?
>> NOT ON THAT STANDING ALONE,
NO BECAUSE THEY WOULD STILL

HAVE TO THE SECOND AND THIRD
PRONGS.
>> I UNDERSTAND THAT.
>> IN MR.^JOHNSTON'S CASE HE
EASILY CLEARS THAT HURDLE HE
WAS FOR FOUR YEARS HE WAS IN
THE LEASEVILLE SCHOOL FOR
MENTALLY RETARDED IN LOUISIANA.
I DON'T KNOW THAT OTHER CASES
WOULD FALL WITHIN THIS.
MOST OF THE CASES INVOLVE A
FAILURE ON MULTIPLE PRONGS.
MR.^JOHNSTON'S CASE INVOLVED A
FAILURE ON THAT ONE PRONG.
AND WITHIN THIS COURT'S
OPINION, BACK IN 2005, --
>> WE DON'T REALLY, THE OTHER
PRONG, I WANT TO BE CLEAR AND I
COULD BE WRONG ABOUT THIS BUT
THE OTHER PRONGS HAVEN'T BEEN
LITIGATED.
>> THEY HAVE NOT BEEN
LITIGATED.
>> SO WE DON'T REALLY KNOW.
THERE HAS NOT BEEN FACTUAL
DETERMINATION ON THOSE OTHER
PRONGS.
WE KNOW WHAT YOU'VE ALLEGED BUT
THERE HAS NOT BEEN A FACTUAL
DETERMINATION ON THOSE, IS THAT
CORRECT?
>> THAT'S CORRECT.
BUT UNDER THE CASE LAW RIGHT
NOW AS WE'RE HERE, IT WAS SUM
MERRILLLY DENIED THOSE FACTS
ARE TAKEN TO BE TRUE AND I
PLED OUT HOW ALL OF THE
ADAPTIVE FUNCTIONING
INFORMATION, THAT I HAD
OBTAINED AND PROCESSED THROUGH
DOCTORS KROP AND EISENSTEIN OF
HIM BEING IN THE SCHOOL FOR THE

MENTALLY RETARTED AND, BEING IN
THE SPECIAL EDUCATION CLASSES
AND TALKING ABOUT HOW, HIS
TODAYTIVE FUNCTIONING WAS SO
LOW THAT HIS ADAPTIVE
FUNCTIONING WAS SO LOW HE
WASN'T ALLOWED TO COOK FOR
HIMSELF.
HE WASN'T ABLE TO DRIVE.
HE COULDN'T BALANCE A
CHECKBOOK.
THOSE KINDS OF THINGS WE LOOK
AT FOR ADAPTIVE FUNCTIONING.
BUT I THINK THIS IS A UNIQUE IN
THE SENSE IN 2005 AND TRIAL
COURT ORDERED AND THIS COURT
AFFIRMED ON THE BASIS THAT
SCORE ALONE, I THINK THAT IS A
VERY UNIQUE SITUATION WHERE WE,
WE HAVE EVIDENCE NOW, ON THIS
WAIS-IV THAT DIRECTLY
CONTRADICTS THAT AND IT IS THE
MOST ACCURATE RELIABLE
ASSESSMENT WITH THE MOST VALID
SCORE THAT WE HAVE HE FALLS IN
THAT ATKINS CLASS.
>> I'M CONCERNED ABOUT THE
ASPECT WHEN DID YOU FIRST COME
ON THE CASE?
WHEN WERE YOU FIRST APPOINTED
ON THE CASE?
>> I BELIEVE IT WAS THE LAST
WEEK OF APRIL, JUSTICE LABARGA.
>> APRIL 2009?
>> YES, SIR.
>> BEFORE YOU HAD THE CASE,
APRIL 2009 WHEN WAS THE LAST,
HOW LONG DID THE CASE LINGER
WITH THE MOTIONS TO WITHDRAW
FROM THE PREVIOUS COUNSEL?
>> MY RECOLLECTION IS EIGHT
MONTHS, JUSTICE LABARGA.

>> EIGHT MONTHS.
AND DR.^EISENSTEIN I BELIEVE
CONTACTED ACTUAL EVALUATION IN
JULY.
>> JULY 20th.
>> THE REPORT CAME OUT IN
DECEMBER?
>> RIGHT. YOU KNEW OF THE
SCORE SHORTLY THEREAFTER.
JULY 20th.
AS PLED IN THE MOTION I SENT
THE INVESTIGATOR OUT TO
INVESTIGATE THE ADAPTIVE
FUNCTIONING AND VERIFY THE
INFORMATION WE HAD REGARDING
THE OTHER TWO PRONGS.
AND THEN, PROVIDED THAT BACK TO
THE DOCTORS WHO ADMINISTERED
THE, THE ABAS REGARDING THE
ADAPTIVE FUNCTIONING AND MADE
THE CLINICAL ASSESSMENTS AND
RENDERED THEIR REPORTS ON, IN
DECEMBER AND JANUARY, DECEMBER
2009 AND JANUARY 2010.
>> THANK YOU.
>> COUNSEL, WHERE IS THE
FINALITY IN THIS?
MOST RECENT TEST SHOWS IQ OF
61.
ALL FOUR PREVIOUS TESTS SCORE
OVER 70?
AT 45 AT 84.
40 YEARS OLD, 76.
28.IT WAS 83.
THEN AT 14 IT WAS 80.
SO THERE WERE FOUR TESTS ABOVE
RETARDATION LEVEL BEFORE THIS
LAST TEST, RIGHT?
>> THERE WAS, THERE WAS FOUR
ABOVE AND THERE'S THREE BELOW.
AND THAT'S WHY THIS FIRST
PRONG --

>> WHERE DO WE STOP?
WE TAKE BEST THREE OUT OF FIVE?
WHAT ARE WE GOING TO DO?
>> WE TAKE THE MOST ACCURATE,
VALID ASSESSMENT IS THE
WAIS-IV.
PRIOR CONSIDERS SCORES ARE ONLY
INDICATIVE OF WHAT HIS
SITUATION WAS BEFORE THAT AGE
OF 18.
WHETHER THAT ONSET WAS THERE
BEFORE 18.
AND THOSE ARE WHAT THAT'S
RELATIVE TO.
WE HAVE NOW THE MOST ACCURATE
VALID ASSESSMENT HE IS AT 61.
WHEN YOU COUPLE THAT WITH THE
ONSET BEFORE THE AGE OF 18 AND
HIS ADAPTIVE FUNCTIONING IS
PROFOUNDLY LOW, DR.^EISENSTEIN
IN HIS REPORT THAT I ATTACHED
TO THE 3851 EVEN QUOTES FROM A
2002 PSYCHOLOGICAL SURVEY DONE
BY THE DEPARTMENT OF
CORRECTIONS THAT, TALKS ABOUT
HOW LOW HIS ADAPTIVE
FUNCTIONING IS AND SO MEETS
THAT ON MANY, MANY DIFFERENT
LEVELS.
AND I THINK THAT IS THE
UNIQUENESS OF MR.^JOHNSTON'S
CASE IT ESSENTIALLY TURNS ON
THIS IQ SCORE AND THAT'S WHY IT
IS SO IMPORTANT AS TO THIS, AS
TO GETTING THAT ACCURATE VALID
ASSESSMENT.
I SEE MY TIME IS OUT I'D LIKE
TO RESERVE SOME FOR REBUTTAL
UNLESS THE COURT HAS ANY
FURTHER QUESTIONS.
>> YOU'VE USED YOUR TIME BUT WE
WILL GIVE YOU A MINUTE FOR

REBUTTAL IF YOU HAVE ANYTHING
ELSE TO ADD.
>> OKAY. THANK YOU.
>> MAY IT PLEASE THE COURT I'M
KEN NUNNELLEY. I REPRESENT THE
STATE OF FLORIDA IN THIS
PROCEEDING.
IN ANSWER TO THE QUESTION WHERE WE
STOP, UNDER THIS THEORY WE NEVER
STOP.
SOONER OR LATER, THE WAIS-V WILL
COME OUT.
SOME DEFENDANT TESTED WITH
WAIS-IV, THEY WILL COME BACK
AND SAY. THE WAIS-V
I SHOW UP RETARDED ON THIS EVEN
THOUGH UNDER THE PRIOR ONE.
IT IS NEVER GO GOING TO END.
>> EXCUSE ME ONE MINUTE.
WE DON'T HAVE A FULLY LITIGATED
RECORD, DO WE, SO WE CAN MAKE
COMPARISONS?
FOR EXAMPLE, MR.^NUNNELLEY,
THROUGHOUT HISTORY.
SCIENCE CHANGES AND MOVES.
FOR EXAMPLE YOU MAY HAVE AN
X-RAY MACHINE WOULDN'T SHOW
CERTAIN CHANGES.
NOW WE HAVE AN MRI.
AND, TO KNOW HOW THAT'S
DIFFERENT WOULD WE NOT NEED A
HEARING SOMEBODY TO EXPLAIN THE
DIFFERENCES? IT MAY BE THERE
ARE NONE.
YOU MAY BE CORRECT BUT DO WE
HAVE A RECORD WHERE THIS IS
LITIGATED?
YOU HAVE PUT ON YOUR, THEY HAVE
PUT ON WHATEVER THEY HAVE?
WE DON'T HAVE THAT HERE, DO WE?
>> YES, SIR, WE DO.
>> WE DO.

>> WE HAVE IT IN 2005.
LET ME TELL YOU WHAT WE HAVE.
IN THE 2005 PROCEEDING, TWO
EXPERTS APPOINTED.
ONE EXPERT SELECTED BY THE
DEFENSE, ONE EXPERT
SELECTED BY THE STATE.
THE DEFENSE EXPERT WAS
DR.^BLANDINO.
I WOULD REFER THE COURT TO
DR.^BLANDINO'S TESTIMONY AT
RECORD PAGE, CITING TO MY
ATTACHMENT TO THE ANSWER, IT
ACTUALLY APPEARS TWICE IN THE
RECORD BECAUSE JUDGE PERRY ALSO
ATTACHED IT TO HIS ORDER.
RECORD 105, 107, 108, 126 WHERE
DR.^BLANDINO SAYS UNEQUIVOCALLY
THIS MAN IS NOT MENTALLY
RETARDED.
I BELIEVE IT IS AT 126 HE SAYS
THIS MAN'S IQ HAS TESTED THE
SAME OVER THE LAST 31 YEARS.
DR.^BLANDINO ALSO SAYS, AND I
BELIEVE DR.^PRITCHARD THE SAME
THING, I CAN'T GIVE YOU RECORD
CITED TO IT. I KNOW IT IS IN
THERE BECAUSE I CROSS-EXAMINED
DR.^BLANDINO.
HE SAYS ON CROSS, THAT
INTELLIGENCE IS RELATIVELY
STABLE OVER TIME.
HE EXPLAINS WHY THE SUB-70
SCORES ARE NOT VALID SCORES.
AND IN DOING SO HE RELIES ON
THE NOTES OF THE CLINICIAN WHO
ADMINISTERED THOSE TESTS AND
THOSE NOTES REFLECTED THAT
BECAUSE OF THE EMOTIONAL ISSUES
I BELIEVE WAS THE PHRASE, THESE
SCORES DO NOT ACCURATELY
REFLECT THIS MAN'S

CAPABILITIES.
THAT THEY ARE HIGHER THAN THIS
REFLECTS.
>> DO YOU HAVE ANY REASON TO
BELIEVE THAT THE WAIS-IV IS
LESS ACCURATE THAN THE
WAIS-III?
>> YOU'RE MAKING ME AN EXPERT
ON MENTAL RETARDATION, JUSTICE
PARIENTE.
THERE IS SOME, IN FACT, IN
INTERNET RESEARCH THERE IS SOME
QUESTION THAT THE WAIS-IV MAY
IN FACT NOT BE QUITE AS GOOD.
>> WELL, ISN'T THAT THOUGH,
AGAIN THE ANSWER TO STOP THE
FLOOD OF WHATEVER THERE IS,
WHEN THE ABA REPORT CAME OUT WE
GOT SOME MOTIONS ABOUT THAT'S
NEWLY DISCOVERED AND THIS COURT
MADE A DECISION BECAUSE
WITHOUT HAVING AN EVIDENTIARY
HEARING, THAT WASN'T NEWLY
DISCOVERED EVIDENCE.
WE'VE HAD SEVERAL OF THESE
WAVES. EACH TIME THIS COURT HAS
SAID IT IS NOT NEWLY DISCOVERED
EVIDENCE.
MY CONCERN HERE IS BECAUSE IN
THIS CASE WE NEVER LOOKED AT
THE OTHER TWO PRONGS.
AND BECAUSE WE DO HAVE THIS
EVIDENCE OF HIS EARLY CHILDHOOD
BEING IN SCHOOLS FOR THE
MENTALLY RETARDED.
AND BECAUSE ON DIRECT APPEAL,
WE ACTUALLY UPHELD THE JUDGE'S
DENIAL OF MR.^JOHNSTON'S
REQUEST FOR SELF-REPRESENTATION.
AND REPORTS OF PSYCHIATRIST
AND PAST ADMISSIONS TO MENTAL
HOSPITALS DID NOT MAKE HIM

CAPABLE OF REPRESENTING
HIMSELF.
AND THAT WAS A POINT ON APPEAL.
THROUGHOUT THIS RECORD THERE IS
INDICATION THAT THIS DEFENDANT,
DOES HAVE SIGNS OF MENTAL
RETARDATION.
AND YET, BECAUSE WE CERTAINLY,
DID RELY ON WHAT HAPPENED IN
2005.
BUT MY CONCERN IS, IS THAT WE
ARE GUESSING ABOUT WHAT THIS 61
MEANS.
IF IT IS A MORE ACCURATE AND
RELIABLE TEST THAT'S ONE THING.
IF IT IS ACTUALLY REFINEMENT OR
LESS RELIABLE, THEN THAT OUT TO
BE KNOWN.
BUT RIGHT NOW I FEEL LIKE WE,
THE COURT WOULD BE GUESSING
ABOUT IT AND WRITING SOMETHING
IN AN OPINION THAT WE HAVE NO
REAL BASIS TO, YOU KNOW, TO
ASSESS.
>> JUSTICE PARIENTE, LET ME
RESPOND TO THAT IN THIS WAY.
THE DEFENDANT HAS NOT ALLEGED
IN HIS MOTION, THAT THE
TESTING OVER THE LAST 31 YEARS,
EACH OF WHICH HAS PRODUCED A
SCORE AT LEAST A STANDARD
DEVIATION ABOVE THE CUTTOFF FOR
MENTAL RETARDATION, WERE IN ANY
WAY, SHAPE, OR FORM INACCURATE.
>> WHAT DOES IT MEAN WHEN HE
SAYS THAT THE WAIS-IV IS REALLY
A MORE ACCURATE ASSESSMENT OF
HIS MENTAL, INTELLECTUAL
CAPABILITIES?
I MEAN SEEMS TO ME, IF HE IS
SAYING THAT THIS TEST IS MORE
ACCURATE, THAN, THERE IS

SOMETHING THAT IS NOT QUITE AS
ACCURATE ABOUT THE TEST THAT
WAS DONE BEFORE.
>> HE HAS GOT TO EXPLAIN 23
POINTS AND HE HADN'T BOTHERED
TO TRY.
IT IS THAT SIMPLE.
THIS IS, THE PRIOR TESTING, AND
LET ME PUT IT THIS WAY.
LET ME BACK UP A LITTLE BIT.
THE FIRST MENTAL RETARDATION OR
INTELLIGENCE TEST, RATHER, THAT
WAS GIVEN TO HIM OVER THAT
31-YEAR PERIOD DR.^BLANDINO
WAS TALKING ABOUT BACK IN 2005,
WAS THE WAIS-R.
THE FIRST REVISION OF THE WAIS
TEST.
SUBSEQUENT TO THE
ADMINISTRATION STATION OF THE
WAIS-R, THIS MAN WAS GIVEN THE
WAIS-III.
GUESS WHAT?
THE SCORE WAS THE SAME.
THAT WOULD SUGGEST, AND I WOULD
SUGGEST, PUT THE NAIL IN THE
COFFIN OF THE NOTION THAT
INTELLIGENCE IS STABLE OVER
TIME.
AND LET ME POINT OUT A COUPLE
OTHER THINGS DR.^BLANDINO SAID
THAT ARE KIND OF SIGNIFICANT TO
WHAT IS GOING ON HERE.
>> I'M A LITTLE PUZZLED BY YOUR
TOTAL RELIANCE ON TESTIMONY IN
2005 TO ADDRESS SOMETHING THAT
WAS NOT EVEN IN USE UNTIL 2009.
I READ BLANDINO'S.
I'VE GONE THROUGH EVERY LINE OF
HIS TESTIMONY AND ALL OF HIS
EXPLANATIONS WITH REGARD TO
EMOTIONAL OVERLAYS AND ALL

THOSE THINGS.
HOW DOES THAT EXPLAIN WHAT IS OR IS NOT INVOLVED WITH A NEW TEST?
>> WHAT IT IS RES JUDICATA.
IT IS AN ISSUE THAT'S BEEN LITIGATED AND DECIDED.
THIS IS SERIAL LITIGATION BASED UPON --
>> NO ONE IS DEBATING THAT THIS IS, THAT THIS IS NOT A PLEASANT KIND OF THING TO CONTINUE EXTENDING AND THESE THINGS EXTEND AND THIS COMES UP AND THAT COMES UP BUT IT DOESN'T ADDRESS WHETHER THERE IS SOME, SOME DEVELOPMENT IN SCIENCE THAT DIFFERENCE FOR EXAMPLE BETWEEN AN X-RAY MACHINE AND AN MRI.
I DON'T KNOW THAT THIS TEST IS OR IS NOT.
YOU MAY BE ABSOLUTELY RIGHT BUT CERTAINLY BLANDINO'S TESTIMONY DOES NOT ADDRESS THE 2009 TEST.
>> OF COURSE NOT. IT COULDN'T.
>> OF COURSE, BUT YOU'RE ARGUING IT LIKE THAT IS THE BE-ALL-END-ALL.
THAT'S WHAT I'M ASKING.
WHY SHOULDN'T WE HAVE EVIDENCE WITH REGARD TO WHAT IT IS, WHAT IT DOES?
AND YOU MAY BE CORRECT.
TO GET THE ANSWER, WE NEED FACTS.
>> BECAUSE, JUSTICE LEWIS, THERE HAS GOT TO BE SOME FINALITY TO THIS CASE AND FINALTY IS NOT ACHIEVED BY WAITING UNTIL THE LAST MINUTE AS WE HAVE HERE.

HIS CLAIM --
>> MR.^NUNNALLY, FINALITY IS
ALL WELL AND GOOD.
WHAT WE'RE FACING THIS COURT IS
LOOKING THAT A TEST THAT WAS
DONE SAYS THIS MAN AS HAS A 61
IQ. EXECUTION IS FINAL.
>> YES, MA'AM, IT IS.
>> THIS MAN HAS A VALID AND
LEGITIMATE 61 IQ.
HE FALLS SQUARELY IN THE CASES
THAT SAID, A PERSON WHO IS
MENTALLY RETARDED CAN NOT BE
EXECUTED.
THAT'S WHAT WE ARE FACING.
WHETHER OR NOT THIS MAN SHOULD
BE EXECUTED WITHOUT FULLY
EXPLORING WHETHER OR NOT THIS
61 IQ IS A VALID IQ FOR THIS
DEFENDANT.
AND WHAT IS WRONG US AT LEAST,
SENDING THIS CASE BACK FOR A
EVIDENTIARY HEARING TO EXPLORE
WHETHER OR NOT THAT IS A VALID
IQ?
>> THERE ARE PRACTICAL AND
PROCEDURAL ISSUES THAT COME
INTO PLAY.
FIRST OF ALL, BY COUNSEL'S OWN
ADMISSION, THIS TEST WAS KNOWN
TO HIM IN AUGUST OF 2009, AND
COULD HAVE BEEN RAISED.
AND I WOULD SUGGEST, SHOULD
HAVE BEEN RAISED IN THIS COURT
THEN.
>> MR.^NUNNELLEY, AND I APPRECIATE
THAT THE COURT DOES
EVERYTHING IT CAN
WHEN A DEATH WARRANT IS SIGNED TO
ADHERE TO THOSE TIME LIMITS.
THE ISSUE IS WHETHER IT SHOULD
HAVE BEEN BROUGHT, IF HE HAD

THE TEST SINCE THE SUMMER,
WHETHER WE SHOULD HAVE HAD THE
MOTION FILED EARLIER. BUT WHAT
YOU'RE REALLY SAYING, LET'S GO
TO THE, ON THE MERITS IS THAT,
WHENEVER IT WAS FILED IF IT WAS
FILED THE DAY AFTER THE APPEAL
ON THE LAST CASE WAS FINAL, IT
WOULD BE, IT WOULD BE BARRED
BECAUSE THERE HAD ALREADY BEEN
A DETERMINATION OF MENTAL
RETARDATION.
THAT'S YOUR, THAT'S YOUR MAIN
POINT, CORRECT?
THAT WE'VE HAD A DETERMINATION?
THERE SHOULD NOT BE ANOTHER
BITE AT THE MENTAL RETARDATION
ANGLE, CORRECT?
>> THIS COURT IN ITS RULES
ESTABLISHED TIMES WITHIN WHICH
THOSE CLAIMS SHOULD BE BROUGHT
AND THIS DEFENDANT DID NOT DO
IT SO YES, IT IS TIME-BARRED.
>> IF HE HAD THE TEST SINCE, HE
HAD THE TEST IN AUGUST.
HE HAD A YEAR, THAT'S WHEN HE
KNEW THERE WAS SERIOUS DOUBT
ABOUT THE PRIOR TEST, THEN,
UNDER ORDINARY CIRCUMSTANCE HE
WOULD HAVE A YEAR FROM THEN.
>> NO, MA'AM.
WELL, YES, BUT I'M TALKING
ABOUT A DIFFERENT TIME BAR.
I'M TALKING ABOUT RULE 3.203
THAT SETS OUT IN THIS COURT'S
RULE WHEN CLAIMS FOR MENTAL
RETARDATION, WE'RE TALKING
HERE, IS JUSTICE LEWIS, ASKED
TO YOU FOCUS ON A, AS TO NEW,
THE EXCEPTION IS, IF SOMETHING
IS NEWLY DISCOVERED EVIDENCE.
YOU'RE ASKING USE TO MAKE A

DETERMINATION THAT THE WAIS-IV
ISN'T NEWLY DISCOVERED EVIDENCE
BECAUSE IT'S ONLY A REFINEMENT
AND IT WOULDN'T CALL INTO
QUESTION THE VALIDITY OF THE PRIOR
TESTING.
MY CONCERN IS WHEN YOU HAVE A
TEST THAT KNOW SHOWS A FULL
STANDARD DEVIATION DIFFERENCE,
AND AS JUSTICE QUINCE SAYS,
CLEARLY PUTS SOMEBODY IN THE
RANGE OF THE FIRST PRONG OF
MENTAL RETARDATION, WITH NO
KNOWLEDGE ABOUT THE TWO OTHER
PRONGS HAVING BEEN LITIGATES,
WITH THE HISTORY OF THIS MAN,
SHOWING INDICATIONS OF MENTAL
RETARDATION FROM EARLY STAGES,
HOW DO WE NOT INSURE WHAT
YOU'RE SAYING IS CORRECT
THROUGH EVIDENTIARY HEARING AS
OPPOSED TO JUST TAKING WHAT
YOU'RE SAYING AT FACE VALUE?
THAT'S MY CONCERN?
>> MY RESPONSE TO THAT WOULD
BE THIS. JUSTICE PARIENTE.
WE FULLY LITIGATED THE ISSUE OF
THIS MAN'S INTELLIGENCE.
THE DEFENDANT HAS NEVER, EVER,
EVER, CHALLENGED THOSE RESULTS.
HE SAYS THIS TEST IS BETTER.
BUT HE DOES NOT EXPLAIN WHY,
AND HE DOES NOT ALLEGE, ANY
PROBLEM WITH WAIS-R OR
THE WAIS-III.
THAT IS A FAILURE OF PLEADING.
IF THERE IS A PROBLEM WITH
THOSE TESTS, IF HE CONTENDS
THOSE ARE INACCURATE THAT IS
PART OF, HE HAS TO PLEAD IN
ORDER TO COME IN WITH THIS.
>> THIS IS, THIS IS MORE VALID

AND RELIABLE TEST AND THAT TEST
SAYS 61, BY THE VERY NATURE
THAT SOMETHING IS MORE
RELIABLE, WOULD SAY THAT THE
PRIOR TEST IS LESS RELIABLE.
I MEAN I DON'T KNOW THAT WE, I
MEAN, AM I MISSING SOMETHING?
YOU SAID, YOU SAID YOU HAVE REASON
TO DOUBT THE WAIS-IV, AND ITS
ACCURACY?
>> I SAID THERE ARE SOME
QUESTIONS ABOUT IT.
I KNOW FROM INTERNET RESEARCH.
I HAVEN'T, I HAVEN'T LITIGATED
THE ISSUE AND --
>> 61 IS MORE ACCURATE
ASSESSMENT OF HIS IQ THEN THAT
WOULD RAISE A CLAIM THAT NEEDS
TO BE AT LEAST EXPLORED ON AN
EVIDENTIARY BASIS.
LET ME ASK YOU THIS.
NOW, I CAN UNDERSTAND MORE
ACCURATE BUT DOES MORE ACCURATE
FIT THE KIND OF DISCREPANCY WE
HAVE HERE BETWEEN 61 AND THESE,
SERIES OF OTHER TESTS THAT WERE
SIGNIFICANTLY HIGHER?
I MEAN, IF THE NOTION THAT
THIS, THAT THE 61 IS ACCURATE,
WOULD CALL INTO QUESTION THE
WHOLE WAIS THREE SEEMS TO ME
BECAUSE OF THE MAGNITUDE.
IF THIS 61 IS ACCURATE, IT
WOULD SEEM TO FOLLOW FROM THAT
THAT THE WAIS-III WAS NOT A
VALID TEST.
>> NO, SIR.
>> THAT HAS NOT BEEN ALLEGED.
THERE ARE TWO POSSIBILITIES
HERE, THERE MAY BE OTHERS BUT
TWO OCCUR TO ME.
ONE IS THAT THE WAIS-III IS

INVALID, WHICH HAS NOT BEEN
ALLEGED.
THE OTHER IS THERE IS SOME
MALINGERING GOING ON HERE OR
SOME OTHER CIRCUMSTANCE THAT
WOULD HAVE AFFECTED HIS
PERFORMANCE AT THE TIME THE
TEST WAS ADMINISTERED.
AM I MISSING SOMETHING?
>> YOU'RE ABSOLUTELY RIGHT.
AND, I WOULD ADD, JUSTICE
CANADY, THAT IN ADDITION TO
CALLING INTO QUESTION THE
WAIS-III, THIS ALSO CALLS
INTO QUESTION THE WAIS-R THAT
PRODUCED THE SAME SCORE.
IF YOU BUY THE DEFENDANT'S
ARGUMENT THAT THE NEWEST TEST
IS ALWAYS THE BEST ONE, THEN,
THAT WIPES OUT ALL THE PRIOR
TESTING.
IT DOESN'T WIPE OUT JUST THE
WAIS-III THAT SHOWED THE
DEFENDANT NOT MENTALLY
RETARDED.
IT WIPES OUT EVERY SINGLE PRIOR
TEST AND WE START OVER, AND
THAT IN TURN CALLS INTO
QUESTION THE ABILITY TO EVER
ESTABLISH THE PRE-18 ONSET IF
YOU'RE GOING TO WIPE OUT ALL
THE PRIOR TESTING WHICH THIS
ARGUMENT DOES.
>> IT REALLY IN MY MIND COMES
DOWN TO WHY NOT EXPLORE ALL OF
THE THINGS THAT YOU HAVE SAID
IN AN EVIDENTIARY HEARING
RATHER THAN US SPECULATING
ABOUT WHETHER OR NOT THE WAIS-IV
IS BETTER, WHETHER IT
CALLS INTO THE QUESTION THE III
AND THE R?

WHY NOT EXPLORE ALL OF THIS IN
AN EVIDENTIARY HEARING SO ALL
OF US REALLY HAVE SOMETHING TO
REALLY PIN OUR HATS ON?
SITTING HERE TODAY WE CAN NOT
REALLY SAY WHETHER IT IS OR IT
ISN'T BECAUSE IT'S NEVER
ACTUALLY BEEN EXPLORED IN AN
EVIDENTIARY HEARING.
MAYBE YOU CAN GET A
PSYCHOLOGIST OR PSYCHIATRIST
WHO WILL CONVINCE US THAT THIS
TEST IS NO BETTER THAN THE
TESTS WE HAD BEFORE AND MAYBE
HE WAS, AS JUSTICE CANADY SAYS,
MALINGERING WHEN THIS TEST WAS
ADMINISTERED.
BUT WE REALLY DON'T HAVE ANY OF
THAT BEFORE US.
THAT'S THE REAL PROBLEM, AND
THE REAL ISSUE I THINK THAT IS
BEFORE US.
>> IF THIS COURT BUYS THE
DEFENSE ARGUMENT THAT THE
NEWEST TEST IS ALWAYS THE BEST,
IF HE CAN FIND A PSYCHOLOGIST
SOMEWHERE TO GET A SCORE THAT
HELPS HIM, THAT OPENS EVERY
SINGLE ONE OF THESE CASES UP.
IT OPENS UP EVEN THE CASES THAT
HAVE NOT PREVIOUSLY ALLEGED
MENTAL RETARDATION.
>> WE'RE NOT IN THE BUSINESS OF
BUYING ANYTHING.
WE'RE TRYING TO BE IN THE
BUSINESS OF RULING BASED ON FACTS.
YOUR ARGUMENTS ARE NOT FACTS.
YOU'RE ENTITLED TO YOUR LEGAL
ARGUMENTS BUT YOU'RE NOT
ENTITLED TO ESTABLISH THE FACTS
WITHOUT A RECORD.
AND THAT'S ALL THAT THE

QUESTIONS ARE DIRECTED TO.
YOU'VE BECOME INDIGNANT BECAUSE SOMEONE IS GOING TO ASK A QUESTION ABOUT SCIENTIFIC TESTING THAT HAS NOT BEEN, ACCORDING TO ANY RECORDS DELIVERED TO US, BEEN TESTED IN AN ADVERSARIAL WAY IN A COURT OF LAW.
YOU MAY BE ABSOLUTELY CORRECT BUT DON'T WE OPERATE ON RECORDS THAT ARE GIVEN TO US? AND WE'VE GONE THROUGH THESE PRIOR TRANSCRIPTS.
WE UNDERSTAND EVERYTHING THAT YOU'VE SAID AND YOU MAY ULTIMATELY, ABSOLUTELY BE RIGHT BUT DON'T WE OPERATE, HAVEN'T WE SAID WE OPERATE ON TESTIMONY, ON EVIDENCE PRESENTED TO A TRIAL JUDGE SO THAT WE KNOW THAT IS CORRECT OR NOT CORRECT?
WE'RE PRETTY FINAL WHAT WE'RE TALKING ABOUT TODAY.
>> THIS ISSUE, THE ISSUE OF THIS MAN'S MENTAL RETARDATION HAS BEEN FULLY AND FAIRLY LITIGATED IN THE 2005-2006 PROCEEDINGS.
THE DEFENDANT AT THAT TIME. WHO WAS REPRESENTED BY ABLE COUNSEL, CHOSE NOT AND DID NOT GO INTO THE ADAPTIVE FUNCTIONING COMPONENTS THAT ARE ALLEGED WITHIN THE PLEADING. I THOUGHT THAT, NOW I LOOKED BACK AT THOSE, THE ISSUES ON APPEAL.
>> I THOUGHT THERE WAS AN ARGUMENT THAT THE, THAT THE LAWYER WANTED TO BRING UP ADAPTIVE

FUNCTIONING BUT THE TRIAL JUDGE
AND IN THE ARGUMENT THEN WAS,
LISTEN, IF HE DOESN'T GET PAST
THE FIRST PRONG WE DON'T HAVE
TO LOOK AT OTHER TWO PRONGS.
SO OUR RECORD DOESN'T CONTAIN
ANY OF THESE SCHOOL RECORDS
FROM PRE-18 THAT SHOWS
MARGINAL FUNCTIONING IN SCHOOL.
SECOND, ABLE TO READ AT FIRST
GRADE OR SECOND GRADE LEVEL.
THAT IS NOT IN OUR RECORD.
DO YOU AGREE THAT IT IS NOT THERE?
IT WAS SOMETHING, THAT THE
DEFENSE LAWYER SAID, THAT HE
WANTED TO BRING UP BUT THE
JUDGE SAID, NO, WE'RE JUST GOING
TO DO THE FIRST PRONG?
AM I WRONG ABOUT THAT?
>> PARTIALLY.
>> I'M PARTIALLY WRONG ABOUT
THAT?
DOES THAT MEAN I'M AT LEAST
PARTIALLY RIGHT?
>> DEPENDS.
HALF FULL OR HALF EMPTY.
IT STILL HAS TO BE RIGHT.
NOTHING KEPT DEFENSE COUNSEL
FROM INTRODUCING THAT EVIDENCE.
THE TWO EXPERTS TESTIFIED
BECAUSE THIS MAN'S FUNCTIONING
WAS SO HIGH, THAT THE STANDARD
OF THE PROFESSION DID NOT
NECESSITATE INQUIRY INTO
ADAPTIVE FUNCTIONING.
HOWEVER THAT DOESN'T MEAN
COUNSEL COULD NOT HAVE PUT IT
IN HAD HE CHOSEN TO DO SO.
HE -- THAT EVIDENCE IS NOT
NEWLY DISCOVERED.
IT'S BEEN AROUND HOWEVER IT HAS
BEEN AROUND.

IT COULD HAVE BEEN USED THEN
BUT IT WAS NOT.
>> LET ME ASK YOU A QUESTION
ABOUT THE OTHER TWO PRONGS.
ONE HAS TO DO WITH THE ONSET
BEFORE AGE 18 BUT THE ADAPTIVE
FUNCTIONING PORTION OF IT, IS
THAT PRESENT ADAPTIVE
FUNCTIONING OR DO WE GO, DO WE
LOOK AT PRESENT AND PAST
ADAPTIVE FUNCTIONING?
>> AS THIS COURT FOUND IN A
CASE THAT, DR.^EISENSTEIN WAS
INVOLVED IN, PRESENT MEANS WHAT
IT SAYS.
PRESENT MEANS, RIGHT NOW EVEN
THOUGH DR.^EISENSTEIN WAS
TRYING TO SAY PRESENT REALLY
MEANT PAST AND THERE WAS A
COMMENT ABOUT ALICE THROUGH THE
LOOKING GLASS AND, THE RABBIT
OR MAD HATTER, I CAN'T REMEMBER
WHICH ONE.
REPRODUCED IN THE STATE'S
BRIEF.
PRESENT MEANS RIGHT NOW.
PRESENT DOESN'T MEAN AT SOME
POINT IN TIME IN THE PAST.
THE RULE OF STATUTE AND LAW.
>> OF COURSE THAT THEN, SO THE
ARGUMENT THEN IS, THE ADAPTIVE
FUNCTIONING, IF THAT'S TRUE,
KEEPS ON CHANGING THROUGH TIME
AND, HAPPENSTANCE OF WHEN THE
MOTION IS BROUGHT.
BECAUSE IF, YOU KNOW, AGAIN, I
THINK WE HAVE HAD THIS BECAUSE
ADAPTIVE FUNCTIONING IN A
PRISON SETTING WHERE YOU'VE
BEEN ON DEATH ROW FOR OF THIS
TIME, WHAT DOES THAT MEAN?
FIRST, WHETHER THIS MAN EVER

WAS ABLE TO LIVE ON HIS OWN,
WRITE A CHECK, BALANCE A
CHECKBOOK.
GO TO SCHOOL.
THOSE ARE CERTAINLY LOOKED AT
AS BEING, INDICATIVE OF
ADAPTIVE FUNCTION, WOULDN'T
YOU, WOULDN'T IT BEAR ON THAT
DETERMINATION IN SOME WAY?
WHOLE TOTALITY OF THE PERSON'S
LIFE?
>> LET ME ANSWER THAT THIS WAY.
I'M REALLY NOT TRYING TO EVADE
THE QUESTION.
THIS COURT HAS SAID PRESENT
ADAPTIVE FUNCTIONING HAS ITS
COMMON MEANING WHICH IS RIGHT
NOW TODAY.
I SUPPOSE THE INDIVIDUAL'S
PRIOR, PRIOR BEHAVIORS, OKAY,
WOULD BE ARGUABLY RELEVANT TO
THE PRE-18 ONSET COMPONENT.
AS FAR AS MEETING PRESENT
ADAPTIVE FUNCTIONING
COMPONENT, NO, THEY DO NOT.
ANY OF THE EVALUATIONS NO
MATTER WHAT TEST IT IS, NO
MATTER WHAT IT IS A SNAPSHOT OF
THAT DEFENDANT'S FUNCTIONING
THAT DAY.
HE MAY BE HAVING A GOOD DAY, HE
MAY BE HAVING A BAD DAY, BUT
THE BOTTOM LINE IS HE CAN'T
FAKE. THAT IS SOMETHING WE KNOW,
I'VE SAID THAT BEFORE IN THIS COURT
IN THESE CASES, AND, THE BOTTOM
LINE TO ALL OF THIS IS, THIS
MAN HAS TESTED CONSISTENTLY
ABOVE THE LEVEL OF MENTAL
RETARDATION.
THIS COURT HAS UPHELD THAT
FINDING THAT CAME FOLLOWING A

FULLEST TRIHEARING.
THERE IS NO ASSERTION
WHATSOEVER THAT ANY OF THAT
PRIOR TESTING WAS SO WRONG,
THAT IT WAS 23 POINTS HIGH,
THAT THERE HAS NEVER BEEN ANY
SUCH ASSERTION.
THIS ISSUE HAS BEEN DECIDED, IT
HAS BEEN FULLY LITIGATED AND IT
IS TIME FOR THIS SENTENCE BE
CARRIED OUT.
THANK YOU.
>> AND THANK YOU.
MR.^DOSS, WE GIVE YOU A COUPLE
MINUTES FOR REBUTTAL.
>> AS TO JUSTICE PARIENTE'S
QUESTION REGARDING WHETHER THIS
HAD BEEN, THE ADOPTIVE
FUNCTIONING ISSUE HAD BEEN
LITIGATED BEFORE, WHEN YOU LOOK
AT THE OPINION FROM THE PRIOR
CASE THE, MR.^MILLS ACTUALLY
MADE THE ARGUMENT, I'M LOOKING
AT 960 SO,2D, 761 AND
THIS COURT SAID JOHNSTON ARGUES
THAT THE TRIAL COURT ERRED
FINDING HIM NOT MENTALLY
RETARDED BECAUSE THE EXPERTS
APPOINTED BY TRIAL ONLY
CONSIDERED THE FIRST PRONG.
THE COURT WENT ON TO FIND NO
ERROR AND WITHIN THE TESTIMONY
OF BLANDINO, DOCTORS BLANDINO
AND PRITCHARD, THEY BOTH SAID
THEY NEVER EVEN CONSIDERED THE
SECOND OR THIRD PRONG BECAUSE
HE DIDN'T MEET THE FIRST PRONG.
WHAT IS BEFORE THE COURT IS
WHAT WE ALLEGED IN THE
SUCCESSIVE MOTION THAT AT THIS
POINT IS TO BE TAKEN AS TRUE.
>> NOW, WHY IS MR.^NUNNELLEY

NOT CORRECT?
THAT THIS HAS BEEN LITIGATED FOR YEARS AND WE GO BACK THROUGH AND WE SEE ALL OF THESE SCORES, THEN ALL OF SUDDEN WE GOT NEW TEST?
WHY IS THAT NOT LIKE OR SIMILAR TO, RETESTING WE CAN ALWAYS FIND A DIFFERENT EXPERT, WE CAN ALWAYS FIND SOMETHING DIFFERENT TO BRING UP? WHY IS HE NOT CORRECT?
THAT THIS IS A STEP IN THESE STANDARDIZED STEPS THAT HAVE BEEN DEVELOPED.
BECAUSE THERE MAY BE SOME CHANGES IN THE TEST DOES NOT NECESSARILY TRANSLATE INTO WHAT OCCURRED BEFORE IS WRONG, AND THAT'S WHAT WE'RE DEALING WITH HERE.
>> BECAUSE THE LITERATURE SAYS THESE ARE THE MOST ACCURATE, RELIABLE TESTS.
IT IS NOT AS IF, NOT AS IF THE SITUATION WHERE EXPERTS ARE LOOKING AT THE SAME DATA THAT THESE OTHER EXPERTS WERE LOOKING AT AND CAME UP WITH A DIFFERENT OPINION.
THERE IS DIFFERENT DATA OUT THERE, THAT BEING THE WAIS-IV THAT WASN'T PRESENT IN 2005 THAT DOCTORS BLANDINO AND PRITCHARD, IT WOULD BE IMPOSSIBLE FOR THEM TO HAVE BEEN CONSIDERED.
>> YOU WOULD AGREE IF DR.^PRITCHARD LOOKS AT THIS AND SAYS, AND GIVES A REASON FOR THE DISPARITY, TRIAL COURT COULD FIND THAT IN FACT, THIS

ISN'T NEWLY DISCOVERED
EVIDENCE?
IT'S, IT IS ACTUALLY AN
INACCURATE TEST?
ONE OF THEM HAS TO BE
INACCURATE, WOULD YOU AGREE
WITH THAT?
>> I THINK IT IS CLEAR FROM THE
LITERATURE AND FROM WHAT WE'VE
ALLEGED THAT THE WAIS-IV IS
MORE ACCURATE.
I DON'T KNOW WHAT DR.^PRITCHARD
WOULD COULD SAY BUT.
>> THAT'S CERTAINLY --
>> MIGHT CALL INTO QUESTION BUT
WHAT IS BEFORE THE COURT NOW WE
HAVE AS THE MOST ACCURATE --
>> YOU WOULD AGREE IF THE COURT
HEARS FROM WHOEVER THE STATE
PUTS ON AND
EXPLAINS THE DISCREPANCY IN THE
WAIS AS TO WHY THIS WAS AN
ABERRANT SCORE AND THAT
FINDING WOULD BE SOMETHING THAT
WE WOULD HAVE TO AFFIRM ON
APPEAL, IF THERE'S CREDIBILITY
DETERMINATIONS?
>> IF THE STATE WAS ABLE TO
PRODUCE COMPETENT, SUBSTANTIAL
EVIDENCE AND THE TRIAL COURT
RULED THAT I THINK THAT WOULD
FALL WITHIN THAT, WITHIN THAT,
WITHIN THE COURT'S CASE LAW,
THAT GOVERNS THAT, NOT KNOWING,
NOT KNOWING WHAT WAS SAID.
I CAN'T PROPERLY RESPOND.
I DON'T THINK ONE WAY OR
ANOTHER, OTHER THAN TO SAY THEY
WOULD HAVE TO BE COMPETENT AND
SUBSTANTIAL.
>> AND MR.^DOSS AND
MR.^NUNNELLEY, THANK YOU VERY

MUCH FOR YOUR PRESENTATIONS
HERE TODAY.