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Roger Lee Cherry v. State of Florida

SC02-2023

>GOOD MORNING.

>>> LADIES AND GENTLEMEN,
THE FLORIDA SUPREME COURT.

>>> THE LAST CASE ON THE
CALENDAR THIS MORNING IS
CHERRY VERSUS STATE.
COUNSEL?

>> GOOD MORNING.

MAY IT PLEASE THE COURT,
LINDA McDER NOT ALONG WITH
McCLAIN ON BEHALF OF ROGER
CHERRY.

MR. CHERRY'S CASE IS PENING
WITH SEVERAL ISSUES THE MOST
RECEP ISSUE IS OBVIOUSLY THE
DETERMINATION OF WHETHER OR
NOT HE IS INELIGIBLE FOR A
DEATH SENTENCE DUE TO HIS
MENTAL RETARDATION, I THINK
THAT IS WHERE I WOULD LIKE
TO BEGIN TODAY.

>> BEFORE YOU -- WHAT ISSUES
ARE PENDING BEFORE THE
COURT?

IS IT ONLY THE MENTAL
RETARDATION ISSUE?

ARE THERE OTHERS?

IN OTHER WORDS, HELP US,
BECAUSE WE NEED TO BE SURE
WE ARE ALL ON THE SAME PAGE.

>> SURE, THE ISSUES THAT ARE
PENDING ARE BACK TO ANNUALLY
DISCOVERED EVIDENCE CLAIM
THAT WAS FILED WHILE HIS
CASE ON APPEAL TO THIS COURT
FOR THE FIRST, THE TRIAL OF
THE FIRST MOTION, THOSE
ISSUES HAVE NEVER BEEN RULED
UPON, THERE WERE, I BELIEVE,
TWO ISSUES IN THAT BRIEF,
ANNUALLY DISCOVERED EVIDENCE
CLAIM AND A CLAIM ABOUT THE,
THAT THERE WAS NO
EVIDENTIARY HEARING CONDUCT

ON SPECIFIC ISSUE REGARDING
SOME OF THE TESTING AND THE
DATA.

>> ARE YOU GOING TO ADDRESS
THOSE ISSUES?

>> ONLY IF THE COURT DESIRES
ME TO ADDRESS THOSE.

>> SO YOUR INTENTION IS TO
ADDRESS THE MORE RECENT
ISSUE, THE MENTAL
RETARDATION ISSUE AND THE
HEARING.

I THINK THAT WOULD CONSUME
THE MAJORITY OF THE TIME
UNLESS ANYONE HAS ANY
QUESTIONS ABOUT THE INITIAL
BRIEF THAT WAS SUBMITTED TO
THE COURT.

VIE A QUESTION, SORT OF AN
OVERVIEW QUESTION THAT WE
ARE DEALING WITH.

THE IT IS A VERY TROUBLING
CASE.

THAT WHICH IS THE EXPERTS
BOTH COMING TO THE
CONCLUSION OR HAVING THE
OPINIONS THAT WE HAVE A
RETARDATION SITUATION.

YET, WE HAVE SOME STANDARDS
ESTABLISHED BY, BY THE STATE
THAT CAME TO REGULATION
THROUGH THE LEGISLATURE,
CAME THROUGH THAT PROCESS,
AND IT ALMOST APPEARS, I
MEAN, IT SEEMS TO ME, AS WE
ARE LOOKING AT THIS, THAT
THE EXPERTS JUST SAY, YOU
CAN'T APPLY THE RIDGED
STANDARDS THE STATE HAS
ESTABLISHED.

IT SEEMS TO ME, THAT IS A
FAIR KIND OF OVERVIEW OF
WHERE WE ARE, BECAUSE IT
SEEMS AS THOUGH WE'RE
TALKING ABOUT A FIXED NUMBER
FOR THE IQ ELEMENT AND THEN
YET THE EXPERTS ARE SAYING
BOTH OF THEM SAYING THAT HE
IS MENTALLY RETARDED EVEN
THOUGH WE MAY HAVE NUMBERS
ABOVE THAT.

THIS NEEDS TO BE IN CONTEXT,
IT SEEM, NOT JUST THE
NUMBERS OF WHAT THE EXPERTS

PLAY, BUT THE INTERPLAY, 6
THESE TWO THINGS, HOW DOES
IT WORK?

>> THERE IS ISSUE IN TERMS
OF WHAT US THE DEF NATION OF
MENTAL RETARDATION IN THE
STATE OF FLORIDA AN I THINK
THAT THERE IS SOME CONFUSION
AS TO THAT, UM, THE
LEGISLATURE IN ADOPTING THE
STATUTE IDENTIFIED THE
CLINICAL DEFINITION OF
MENTAL RETARDATION AN IN
THEIR SENTENCE STAFF
ANALYSIS, THEY SPECIFICALLY
REFER TO THE IDEA THAT YOU
DID HAVE THIS PLUS OR MO US
IN 5 POINTS, UM, WHICH
ACCOUNT FORCE THE STANDARD
ERROR OF MEASURE THAT IS
IMPLICIT IN THE TESTING
INSTRUMENT ITSELF AND IT IS
ALSO RECOGNIZED BY EVERY
DYING DIAGNOSTIC MANUAL
ABOUT RETARDATION RECOGNIZED
BY THE APA AND THE DSM AND
SO ANYONE WHO, YOU KNOW,
ACCESSES MENTAL RETARDATION
IS CONSIDERING THAT, IN
ORDER TO HAVE RELIABILITY
RESULT, YOU HAVE TO CONSIDER
THAT ISSUE AND IT APPEARS
THE LEGISLATURE IN FACT DID
CONSIDER IT BECAUSE IT
SPECIFICALLY STATED IN THEIR
STAFF ANALYSIS, THEY DIDN'T
IDENTIFY A DISTINCT NUMBER
IN THEIR STATUTE, NOW, WHEN
THIS COURT ADOPTED 3203, IT
MIRRORS THE SENATE'S -- I
MEAN THE FLORIDA
LEGISLATURE'S STATUTE.
AGAIN, IT DOESN'T
SPECIFICALLY SAY THIS HAS TO
BE 70 OR BELOW OR 69 AND
BELOW.
AND I DO THINK IN LOOKING
BACK AT SOME OF THE CASE LAW
FROM THIS COURT IN RODRIGUEZ
WHICH WAS AGAIN CITED, THIS
COURT DIDN'TFIED THE DSM
DEFINITION OF RETARDATION
WHICH SPECIFICALLY SAYS
APPROXIMATELY 70 OR BELOW.

AND SO I DON'T THINK THAT YOU HAVE IDENTIFIED A NUMBER, I MAGIC NUMBER AS THE STATE CALLS IT IN TERMS OF THE IQ OF DETERMINING MENTAL RETARDATION.

>> THE STATE AGENCY DETERMINED THAT

>> HAS THE STATE?

>> THE STATE AGENCY WITH REGARD TO THE IMPLEMENTATION OF WHAT THE STANDARDS ARE?

WELL, THIS COURT, THE LEGISLATURE DIRECTED THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES TO DETERMINE WHAT TEST WOULD BE USED TO ACCESS MENTAL RETARDATION. THEY HAVE CHOSEN TWO TESTS -- THOSE TESTS IMPLICIT IN THOSE TEST, YOU HAVE TO CONSIDER THE STANDARD OF ERROR OF MEASURE, OTHERWISE, YOU ARE NOT -- IT IS UNRELIABLE, IT WOULD BE INACCURATE RESULT TO SAY THIS IS HIS IQ.

THIS IS HOW HE FUNCTIONS. THAT IS THE ONLY, THAT IS THE END OF THE STORY, AND SO, WHEN YOU LOOK AT IT LIKE THAT, THERE ARE CERTAINLY, ALL OF THIS BACK GROUND INFORMATION THAT SUGGESTS THAT THERE IS NOT A NUMBER, THERE SHOULDN'T BE A NUMBER, BECAUSE WHAT WE KNOW FROM DR. PRICHARD DR. BERNSON, IQ IS SIM POLICE, IT IS A GENERAL SORT OF WAY OF DISCUSSING FUNCTIONING. IT IS A STARTING POINT.

WHEN YOU HAVE IQ OF 72, ACCORDING TO THESE EXPERTS, THAT PLACES THIS INDIVIDUAL IN A RANGE THAT WE NOW HAVE TO, WE HAVE TO LOCK AT THIS EVIDENCE FURTHER.

WE HAVE TO, YOU KNOW, JUST LIKE IN RODRIGUEZ, WHEN YOU SAID, HIS IQ WAS UNDER 70, WE HAVE TO ON, THERE IS MORE TO THE PICTURE.

>> THAT IS AN APAEMING

INTERPRETATION OF THE THING
BUT THE OTHER SIDE OF IT IS
THAT IT APPEARS THAT THE
LEGISLATURE HAS CHOSEN A
MORE RIDGED DEFINITION, ONE
MAY TALK ABOUT STANDARD
DEVIATION, SO ON THE GROUND,
AT LEAST, YOU KNOW, WHAT WE
ARE SEEING FOR EXAMPLE WOULD
BE THAT IF THE EXPERTS
CONCLUDED THAT ON AN
ACCEPTABLE STANDARD IQ TEST
THAT ALL OF THE SCORES WERE
75, THAT THE DEFENDANT WOULD
NOT QUALIFY UNDER THE
LEGISLATIVE DEFINITION SO
WOULD YOU ADDRESS THE
LEGISLATURE'S TREATMENT OF
THE STANDARD DEVIATIONS AND
HOW THAT DOES NOT IN EFFECT
PRODUCE A NUMBER, A NUMBER
AND SO, AS I SAY, WE CLEARLY
ARE BASED IN THIS PARTICULAR
CASE, APPARENTLY, WITH TWO
EXPERTS THAT SAY, LOOK, THIS
FELLOW IS MENTALLY RETARDED,
BUT NO, HE DOESN'T REALLY
MEET WHAT WE IN TERP FRIGHT
BE THE WAY THE LEGISLATURE
HAS DEFUNED THIS AND WE HAVE
TO BE CANDID ABOUT THAT.
SO THAT WE ARE BASED WITH
THIS ISSUE AS AS YOU HAVE
INDICATED BUT NOW I THINK
YOU NEED TO RESPOND TO THE
DATES, POSITION AND WHAT IS
HAPPENING ON THE GROUND THAT
IT APPEARS THAT THE
LEGISLATURE HAS CHOSEN
REALLY ALMOST IN ESSENCE THE
CAP, THAT IS, IF YOU ARE
OVER THE SCORE OF 7 ON
ACCEPTABLE STANDARDIZED
TEST, THEY HAVE DONE IT
THROUGH THIS VARIABLE OF THE
STANDARD DEVIATION.
SORRY.
WELL, I AGREE THAT IT IS A A
CONUNDRUM, BUT HELP ME WITH
WHAT IS THE FLAW IN THE
STATE'S INTERPRETATION OF
THE LEGISLATURE?
>> WELL, SURE, I THINK THE
FLAW GOES BACK TO THAT WHAT

WE HAVE IS WE HAVE A
DEFINITION OF TWO STANDARD
DEVIATIONS BELOW THE MEANS,
WHICH TAKES TO YOU A NUMBER,
BUT EVEN IN THAT DEFINITION
IN WHAT WE ARE LOOKING AT ON
THE TESTING INSTRUMENT,
THINGS LIKE, THAT YOU HAVE
TO CONSIDER THE STANDARD
ERROR OF MEASURE.

AND SO WHEN YOU LOOK AT SORT
OF THE GLOBAL WAY OF
DIAGNOSING MENTAL
RETARDATION, IT CAN NOT BE A
NUMBER, AND SO.

>> I AM HAVING SOME
DIFFICULTY WITH THAT BECAUSE
THE U.S. SUPREME COURT HAS
MORE OR LESS SAID YES WE ARE
GOING TO FIND THAT THE
MENTALLY RETARDED CAN NOT BE
EXECUTED, BUT WE'LL LEAVE IT
UP TO THE INDIVIDUAL STATE
TO SORT OUT THEIR OWN
STANDARDS FOR MENTAL
RETARDATION.

>> THAT IS TRUE, BUT THE
U.S. SUPREME COURT ALSO
TALKED ABOUT THE, THE WHOLE
SORT OF PURPOSE OF WHY WE
ARE EXEMPTING THIS CLASS OF
PEOPLE AND, UM, WHEN YOU
HAVE SOMEONE WHO HAS A 72 IQ
AND YET THEY ARE FUNCTIONING
AT A LEVEL OF MENTAL
RETAFFERDATION, THEN THAT
PERSON SORT OF FALLING INTO
THE GROUP THAT THE SUPREME
COURT IS IDENTIFYING WHEN
THEY ARE SAYING THESE PEOPLE,
THEY DON'T HAVE THE MORAL
CULPABILITY THAT WE THINK OF
ADULT OFFENDERS TO COMMIT
MURDERS, IT SIMPLY DOESN'T
RESPOND TO THE PHILOSOPHICAL
CONCERNS ABOUT THE URPS OF
PUNISHMENT.

>> IF INSTEAD OF THE TWO
STANDARD DEFATION, THE
LEGISLATURE HAD SAID ON AN
ACCEPTABLE TEST AND NAME THE
TEST AND THEN SAID A SCORE
OF 70 OR BELOW?

>> WHAT WOULD BE

IMPLICATIONS OF THAT?

>> PARDON?

>> WHAT WOULD BE THE
IMPLICATION OF THAT?

>> RIGHT.

WHERE WOULD YOU BE IF THAT
IS WHAT THE LEGISLATURE HAD
DONE?

WELL, I MEAN, ONE PLACE WE
WOULD BE, WE WOULDN'T HAVE
THIS UNCERTAINTY, AND THE IN
TERMS OF JUST SCIENTIFICALLY,
IF YOU ARE LOOKING AT THE IN
PERSPECTIVE OF PSYCHOLOGY,
THESE AREAS IN SORT OF THESE
MENTAL HEALTH PROFESSIONALS,
THEY HAVE TO CONSIDER THESE
TYPES OF ISSUES IN PRODUCING
A RELIABILITY RESULT.

>> WITHIN THE LEDGE SLAY
TIREIVE PREROGATIVE OF
SAYING 70 OR BELOW ON THIS
CERTAIN TEST?

>> IT MAY, IT CERTAINLY MAY
BE WITHIN THEIR PREROGATIVE,
BUT THEN, THAT AGAIN BRINGS
US BACK TO IS THIS
PARTICULAR DEATH SENTENCE,
IS THIS PARTICULAR
INDIVIDUAL THE TYPE OF
INDIVIDUAL THAT IT WOULD BE
UNCONSTITUTIONAL TO EXECUTE
BECAUSE OF HIS FUNCTIONING
AND SO I THINK THAT THERE IS
STILL, THERE IS STILL AN
ISSUE THERE -- IT WOULD BE
AS APPLIED CHALLENGE, THAT
IS WHAT YOU ARE TALKING
ABOUT?

>> CERTAINLY THINK THAT THAT
IS THERE AND I MEAN, I MEAN,
THERE ARE, THERE ARE STATES
WHO HAVE SET AN ACTUAL
NUMBER AND THEN THERE ARE,
YOU KNOW, AND SOME OF THOSE
NUMBERS ARE HIGHER THAN 70
AND SOME OF THOSE NUMBERS
ARE 70.

>> WHY ISN'T THE LEDGE SLAY
LEGISLATION THAT WE HAVE
HERE IN FLORIDA 70 OR BAE
LOW?

>> I DON'T THINK THAT IS THE
LEGISLATION, BECAUSE I THINK

IF YOU LOOK AT EVERYTHING,
THEY DIDN'T IDENTIFY A
NUMBER AND WHEN YOU LOOK AT
THE OTHER STATES WHO HAVE
IDENTIFIED A NUMBER, THEY
ARE IDENTIFYING A NUMBER.
THIS IS SIMPLY MIRRORING A
DEFINITION FROM A THAT SAYS
YOU HAVE TO CONSIDER
STANDARD ERROR OF MEASURE.
YOU HAVE TO CONSIDER
CONFIDENCE.

>> THERE'S SEVERAL
QUESTIONS.

>> AS I UNDERSTAND YOUR
ARGUMENT TODAY, CORRECT ME
IF I AM WRONG, I WANT TO
UNDERSTAND YOUR ARGUMENT, WE
CANNOT RELY ON ANY SPECIFIC
NUMBER, SO EVEN 76?

>> WELL, NO, THAT IS NOT
WHAT I AM SAYING.

WHAT I AM SAYING IS IN
CONDUCTING THESE TYPE OF
EHAVE VALUEATION, YOU HAVE
ALL SORTS OF STATISTICAL
ISSUES THAT ACCOMPANY THE
EVALUATION, YOU WANT TO HAVE
CONFIDENCE IN THE NUMBER
THAT YOU ARE GETTING AND
WHAT THAT MEANS IN TEMPS OF
THE FUNCTIONING.

>> I UNDERSTAND THAT, SO IF
WE HAD IQ OF 76, COULD THEN
THE COURT SAY, WELL, HE IS
NOT MENTALLY RETARDED FOR
SURE?

>> I, I DON'T KNOW.
I MEAN.

I DON'T KNOW.

>> LET ME GO BACK TO THE
QUESTION.

YOU CAN'T RELY ON ANY
NUMBER.

IT SEEMS THAT IF THAT IS
YOUR ARGUMENT, YOU CAN'T
RELY ON ANY NUMBER?

WHAT YOU ARE SAYING IS LET'S
JUST DISREGARD THE TWO
STANDARD DEVIATION PART OF
THE TEST, LET'S RELY ONLY ON
THE OTHER TWO WHICH ON THE
18th DEFICITS AN AN ACTIVE
FUNCTIONING, IF YOU HAVE IQ

OF 89, BUT CAN'T FUNCTION AND THE EXPERTS SAY, WELL, HE HAS DEFICIT, HE CAN'T DO THIS FOR HIMSELF, HE CAN'T DO THAT, THIS WAS ONSET BEFORE 18, THEN, WE SHOULD FIND MENTAL RETARDATION REGARDLESS OF WHAT THE IQ WAS?

THAT SEEMS TO BE TOTALLY CONTRARY TO WHAT THE LEGISLATURE INTENDED, IT SEEMS TO ME, THE MOST WE CAN GO UNDER YOUR ARGUMENT IS TO IQ OF 75 BECAUSE YOU ARE SAYING THERE IS STANDARD DEVIATION OF 5 POINTS, THEREFORE, NOT STANDARD OF ERROR OF 5 POINTS, THEREFORE, TWO STANDARD DEVIATIONS IS NOT REALLY 70 IN ORDER TO BE ACCURATE, IT HAS GOT TO BE 75, I CAN UNDERSTAND THAT ARGUMENT, BUT TO SAY THAT ANY NUMBER IS NOT RELIABLE IS TO SAY WE HAVE TO DISREGARD ONE PRONG OF THE TEST?

>> WHAT I THINK THE POINT OF IT IS WHAT DR. PRICH CHARRED TOLD THE LOWER COURT, THAT THE 72 IN MR. CHERRY'S CASE PART OF A BIGGER PICTURE, YOU CAN'T JUST SAY, BECAUSE YOU HAVE 72, HE IS NOT RETARDED.

THERE IS MORE.

>>.

[LOW AUDIO]

>> AS FOR STANDARD OF ERROR, SO EVEN IF WE STANDARD DEVIATION TO 70, IT IS STILL UNDERSTANDS AND TAKES INTO ACCOUNT THE SCIENCE OF MENTAL RETARDATION AND ANALYSIS WHATEVER YOU CALL THAT I SAYS THAT WE HAVE GOT, THE STATISTICAL ANALYSIS REQUIRES THAT ADDITIONAL STEP, BUT I AGREE WITH -- BUT IF YOU ARE TRYING TO SAY THAT IT WOULD BE, IT COULD BE 80, BUT STILL THINK HE IS MENTALLY RETARDED.

>> I AM NOT TRYING TO SAY THAT.

>> WHAT I AM SAYING IS THAT THERE IS -- FOR EXAMPLE, IN THE CASE, WHAT WE KNOW, AND THIS IS A NUMBER THAT PLACES HIM IN THE RANGE OF MENTAL RETARDATION, WHAT WE KNOW ABOUT MR. CHERRY IN TERMS OF FUNCTIONING, AS A CHILD, HIS GIFT GRADE TEACHER SAID HE WOULD HAVE BEEN MENTALLY RETARDED CLASS BECAUSE OF HIS FUNCTIONING.

WHEN THEY DID EVENTUALLY HAVING START HAVING MENTALLY REGARDED STUDENTS IN THEIR OWN CLASSROOM, MR. WILLIAM, HIS MIDDLE SCHOOL TEACHER SAYS HE WAS IN THAT CLASS, WAS IN THAT CLASS BECAUSE OF THE MENTAL FUNCTIONING, THAT STATEMENT WAS MADE PRIOR TO MR. CHERRY EVER BEING CHARGED WITH THIS CRIME OR, UM, US GOING OUT LOOKING FOR SKILLS CAN ISSUE.

>> WHAT EVIDENCE WAS THERE IN THIS CASE IN THE LIGHT MOST FAVORABLE TO THE STATE, PLEASE, AS TO PRESENT ADOPTIVE FUNCTIONING SKILLS?

>> WELL, THIS IS -- I THINK WHAT YOU ARE ASKING ME IS, AT THE HEARING, WE HAVE TWO EXPERTS TESTIFYING THAT HE IS RETARDED AND THAT HIS ADAPTIVE SKILLS FALL INTO THE RANGE OF HIM BEING RETARDED.

THERE WERE --

>> EXPERT FOR THE STATE TESTIFIES SUCH?

>> YES.

YEAH.

THAT IS WHAT PRITCHARD WAS PICKED BY THE STATE.

THIS COURT IS WELL AWARE.

HE HAS BEEN INVOLVED IN MANY OF THESE RETARDATION CASE, TO MY

NOW, IN TERMS OF THE COURT'S ORDER AND POINTING TO SOMETHING THAT SHE THINKS

ARE INCONSISTENT AGAIN THIS IS A BIT TROUBLE CAUTION SHE HAD TWO EXPERTS BEFORE HER WHO ASSESSED THE EVERY DAY WHO ACTUALLY CONDUCTED THE EVALUATIONS TO MET MR. \$\$ MR. CHERRY TALKED TO PEOPLE ON THE PHONE, AND THEY FOUND THE AE ADAPTIVE SKILLS TO BE -- A PROBLEM, BUT IN TELL US OF THE ORDER TALKS A LITTLE BIT ABOUT ANTISOCIAL PERSONALITY DISORDER DOCTORS PRITCHARD AND BURSTYN CONSIDERED THAT ONE THING THEY BOTH SAID UNDER DSM WHEN LOOKING AT RESOLUTION, AND MENTAL -- RETARD ADDITIONAL SUBSTANCE ABUSE THINGS LIKE THAT YOU HAVE TO RULE THOSE OUT BEFORE DIAGNOSING ANTISOCIAL PERSONALITY DISORDER IN THIS CASE AND THEY ARE NOT MUTUAL\$\$ MUTUALLY EXCLUSIVE, SO, IN THIS CASE, THEY CONSIDERED THAT.

AND THEY STILL CAME TO THE CONCLUSION, THAT HIS ADAPT\$\$ ADAPTIVE SKILLS PROBLEMS ARE BECAUSE OF HIS MENTAL RETARD ADDITIONAL BECAUSE OF THE WAY THAT HE -- RETARDATION THE WAY HE IS FUNCTIONING GENERALS IS LOW, AND THINGS LIKE THAT, I THINK, SOME OFF THE OTHER THINGS THAT THE COURT POINTED.

>> I THINK HIS QUESTION WAS TAKING THE EVIDENCE IN LIGHT MOST FIVE RAL TO THE STATE THE THEY ALSO CITED THAT IN THEIR BRIEF IN TERMGS OF ANTI-SOCIAL PERSONALITY DISORDER ISSUE THROUGH CAN DEPRESS ADAPTIVE FUNCTIONING I THINK ANOTHER THING THAT HAS BEEN CITED TO IS THERE IS SOME MR. CHERRY'S DESCRIPTION OF SO MUCH HIS WORK HISTORY THERE ARE THINGS THAT THE COURT AND THE STATE CITE AS BEING SORT OF INCONSISTENT WITH IDEA

THAT HE -- HIS ADAPTIVE SKILLS ARE BELOW THE LEVELS THAT THEY SHOULD BE, BUT, DOCTORS PRITCHARD AND BURSTYN CONSIDERED THAT ONE THING THAT MR. NOT ONLY -- NUNNALLY DID AT HEARING THEY WOULD SAY TELL ME HE WORKED FOR HE WAS FRUIT PICKER, AND, WORKED IN A MIGRANT OUT FROM CAMP AND THEN THERE WAS ALL THIS SPECULATION ABOUT WOULDN'T THAT BE AROUND WOULDN'T HE BE AROUND MACHINERY BUT THERE IS NO EVIDENCE THAT HE WAS, AND NEVER SAID HE WAS.

AND SO THAT HAS FILTERED ILLUSTRATION WAY INTO THE FACILITY\$IED INTO ORDER FAS EVIDENCE WHEN WASN'T PRESENTED THERE WAS EVIDENCE THAT COURT CITES THE STATE RELIES ON IN TERMS OF YOU KNOW THAT HE USES CANTINE IN THE PRISON THAT HE USES THE GRIEVANCE PROCEDURE, AGAIN THESE ARE THINGS THAT THE DOCTORS CONSIDERED AND DR. PRITCHARD SAID, QUITE FRANKLY THOSE ARE NOT THINGS THAT REQUIRE A HIGH LEVEL OF INTELLIGENCE, AND SO THAT IS WHY IN HIS OPINION THEY WERE NOT THINGS THAT MADE THEY MAY SEEM UNUSUAL, BUT THEY WERE NOT THINGS THAT WOULD CHANGE HIS OPINION AS TO THE OVERALL CONCLUSION THAT MR. CHERRY IS RETARDED.

>> OWE NEED TO WATCH YOUR TIME.

>> I JUST WANT IT SEEMS TO ME LOOK AT THE TRIAL \$\$JUDGE'S ORDER WHICH IS VERY EXTENSIVE THAT THE TRIAL JUDGE FINDS THAT A NUMBER OF FACTORS\$\$

FACTORS, THAT SHE FINDS, TO BE INCONSISTENT WITH MENTAL RETAR ADDITIONAL, RETARD\$\$ RETARDATION SUCH AS WHAT HE HAS WHAT THE RECORDS SHOW ABOUT HIM USING INMATE

GRIEVANCE PROCEDURES, THE CANTEEN PROCEDURES SHE GOES ON TO THE CIRCUMSTANCES OF THE CRIME, AND SAYS THAT THEY ARE MORE SOPHISTICATED THAN THOSE EXPECTED OF A MENTALLY RETARDED PERSON. ARE WE TO ARE YOU SAYING, THAT THOSE FINDINGS ARE NOT ENTITLED TO DEFERENCE?

>> WELL, I CERTAINLY THINK WHEN YOU HAVE TWO EXPERTS SAYING, I CONSIDERED THAT, AND THAT WAS THE POINT OF THEIR EVALUATION, AND ONE OF THEM WAS HANDPICKED BY THE STATE.

AND HE SAYS I CONSIDERED, THAT AND I STILL FIND THIS GUY TO BE RETARDED, THEN, I THINK THAT THAT IS THE COMPETENT SUBSTANTIAL EVIDENCE WE SHOULD BE LOOKING TO, WHAT IS THE POINT OF HAVING EXPERTS IF THE JUDGE CAN SIMPLY LOOK THROUGH THE RECORDS AND PULL OUT SOME THINGS THAT DON'T SEEM TO BE CONSISTENT, IN TERMS OF THE DEFINITION, AND THEN MAKE THAT THE RULING. THAT DOESN'T MAKE ANY SENSE. THESE ARE THE EXPERTS WHO CONSIDERED THIS AND THEY ALSO CONSIDERED ALL OF THE EVERY DAY -- EVIDENCE DR. PRITCHARD SAID SPECIFICALLY TO ADAMENTIVE FUNCTIONING EVERYTHING HE REVIEW WAS ALMOST EXCLUSIVELY SUPPORT\$\$ SUPPORTING THE IDEA THAT MR. CHERRY WAS FUNCTIONING BELOW THE LEVEL THAT HE SHOULD BE, FUNCTIONING AT. I KNOW I HAVE LUCED A LOT OF THE MY TIME I WOULD LIKE TO RESERVE THE REST FOR REBUTTAL\$\$ REBUTTAL.

>> MR. NUNNALLY.

>> MAY IT PLEASE THE COURT PERHAPS I CAN SIMPLIFY SOME OF THE ISSUES BEFORE THE COURT.

WE HAVE MULTIPLE INTELLIGENCE TESTS OF THIS INMATE. WE HAVE \$IQ'S RANGING I WROTE THEM DOWN BECAUSE I CAN'T RECOMMEND THEM THERE ARE TOO MANY NUMBERS. FROM 85, 86, ON THE BETA 2 BEST -- WE HAVE, TWO -- >> -- THOSE DATA TESTS THOSE AREN'T THE ONES RECOGNIZED BY THE STATE OF FLORIDA. >> THEY ARE NOT RECOGNIZED BY THE STATE OF -- STATUTE OF THE RULE FOR PURPOSES OF THE MEMORY RETARDATION EVALUATION\$ EVALUATION. >> IN 92 EVALUATE HE HAD HAD THE SAME THE 72 ON THE -- >> 72, 9 -- 96 HE HAD A 78 ON THE TEST, THEN, 2005, ON THE 3 WE CHEMICAL BACK A 72 LET'S FOCUS ON THOSE THREE SCORES. WE HAVE HEARD THE TALK ABOUT THE STANDARD ERROR OF MEASURE, NOW THE STANDARD ERROR OF MEASURE IS THIS -- 5 THAT WE ARE THAT WE'VE BEEN HEARING ABOUT, AND HAS BEEN AN ISSUE BEFORE THIS COURT REPEATED CASES, THAT NUMBER, THAT PLUS OR MINUS 5 IS REALLY MORE ACCURATELY DISCUSSED AND THIS IS BROUGHT OUT IN THE RECORD, OVER REFERRED TO IN TERMS OF A CONFIDENCE INTVALUE. AND WHAT THAT MEANS, IF ANYBODY REMEMBERS STATE OFS I CERTAINLY DON'T I NEVER TOOK IT. -- THAT MEANS, YOU HAVE IN THIS CONTEXT A 95% CONFIDENCE LEVEL, THAT IN THE CASE OF THE # 8 IQ -- 78 IQ WE CAN SAY WITH 95% SERENITY THAT MR. CHERRY'S IQ FALLS BETWEEN 73 AND 83. WITH RESPECT TO THE 7 # 2 FULL SCALE IFLTQ'S, WE CAN SAY, WITH 95% SERENITY, THAT MR. KERREY'S IQ FALLS

BETWEEN 67 AND 77.

NOW, WHEN YOU OVERLAY THOSE THREE TESTS, TWO OF BROI DEWSED THE SAME NUMBER AND ONE OF WHICH PRODUCED A HOT -- HIGHER NUMBER AND CONSIDER ALONG WITH THAT THE UP DISPUTED NOTION THAT YOU CANNOT FAKE GOOD OR FAKE SMART ON IQ TEST, YOU HAVE THIS OVERLAPPING CONFIDENCE INTERVAL THAT PUTS MR. \$\$ MR. CHERRY'S I.SQ SOMEWHERE BETWEEN 73 AND 77.

WHICH IS OUTSIDE THE RANGE OF MENTAL RETARDATION AND IS ABSOLUTELY DISPOSITIVE OF THIS ISSUE.

>> -- DOES -- 1996 TEST YOU ARE SAYING WOULD PUT HIM -- SLIGHTLY OUTSIDE.

>> 1996 TEST ON IT'S OWN, STANDING ALONE, PUTS HIM OUTSIDE THE RANGE OF MENTAL RETARD\$\$ RETARDATION.

>> THEN WHO MAKES THIS IS -- I DON'T THINK WHEN THE SUPREME COURT THOUGHT THAT THEY WOULD -- WERE, LEAVING IT TO THE STATES TO COME UP WITH THEIR OWN DEFINITIONS THE QUESTION THAT THEY IT WAS GOING GET DOWN TO THIS TYPE OF ISSUE ABOUT, 99, 96 TEST VERSUS 2006 TEST, DOES THE JUDGE THEN -- WHAT DID THE EXPERTS SAY TO EXPLAIN AGAIN INCLUDING THE EXPERTS THAT WAS STATE REQUESTED, ABOUT THE 1996 IQ TEST? WHAT WAS THE EXPLANATION FOR THE HIGH TEST AND THEN WHAT DOES WHERE ARE THE FINDINGS, HOW WE ARE SUPPOSED TO LOOK AT AND REEVALUATE THOSE TESTS IF WE ARE?

>> THE DEFENSE EXPERT, DR. BARSTON\$\$ BARSTON -- FOUND NO REASON IN THE TRIAL COURT FOUND THIS IN HER ORDER BELIEVE IN A FOOTNOTE TOWARD THE BACK, THAT THERE WAS NO REASON TO

DISCOUNT THE 78 IQ SCORE
OBTAINED BY DR. CROWD IN THE
96 TESTING, DR. PRITCHARD.

>> WHY THE STATE DIDN'T CALL
DR. CROWN THEN?

IT SEEMS TO ME AGAIN THIS IS
TRULY LIFE AND DEATH MATTER.
WE WANT TO MAKE SURE WE HAVE
GOOD INFORMATION -- WHEN
JUSTICE LEWIS TALKS ABOUT
SOMETIMES THAT TALKER TALK
THIS LOOKS LIKE A --
SOMEBODY WHO THROUGHOUT HIS
LIFE, WAS AT LEAST AND I
KNOW OF YOUR DIFFERENT VIEWS,
BUT CERTAINLY THIS IS NOT
LIKE A NEWFOUND MENTAL
RETARD\$\$

RETARDATION, THIS IS
SOMEBODY THAT WAS
FUNCTIONING AT A PRETTY LOW
LEVEL SO MY QUESTION IS, IF
DR. CROWN'S TEST IS GOING TO
BE THE CRITICAL TEST NOW,
AND WE SHOULD BE LOOKING AT
THAT TEST, RATHER THAN THE
TEST THAT WE ARE PERFORMED
IN 2005, WHY WOULDN'T WE
WANT TO HAVE HEARD FROM DR.
CROWN THROUGH THE STATE
PUTTING THAT EVIDENCE ON IS
THE ALREADY TESTIFIED.

>> I HAVE NO REASON TO CALL
HIM AGAIN, I HAVE HIS
TESTIMONY IS IN THE RECORD,
IT IS.

>> ADDITIONALLY NOTICE BIRD THE
COURT.

THERE IS NO REASON AND NO
JUSTIFICATION\$\$
JUSTIFICATION, FOR CLOUDING
THE RECORD WITH A THIRD OR
FOURTH OR A FIFTH EXPERT,
THAT GIVES US THIS THICKET
OF NUMBERS ACRONYMS WHEN
I'VE GOT THAT IS ALREADY OUT
THERE THIS COURT ALREADY
FOUND THAT.

ALREADY TALKED ABOUT IT.

>> WHY DID YOU NEED YOUR OWN
EXPERT AT ALL?

YOU ASKED DR. PRITCHARD
DIDN'T YOU.

>> IF YOU.

>> -- THE EXPERTS WERE APPOINTED PURSUANT TO RULE 3203.

WHICH REQUIRES THE APPOINTMENT TWO OF EXPERTS, ONE SUGGESTED BY THE STATE, WHICH I SUGGESTED DR. --

>> WHY WOULDN'T YOU SAY WE DON'T NEED TO GO THROUGH THIS, DR. CROWN IS ALREADY GIVEN HIS OPINION AND IT IS THEIR EXPERT WAS 78?

>> WELL, JUSTICE PARENTE I DON'T MEAN TO GIVE 234RI7ANT ANSWERS THIS COURT ORDERED IT FOR EVIDENTIARY HEARING I'M NOT GOING TO ARGUE WITH WERE A THIS COURT'S REMAPPED ORDER WAS.

>> FROM DR. POLITIC \$\$ CHARRED'S REPORT THE \$\$STATE'S EXPERT ON PAGE 7 GOING ON TO PAGE 8 IT SAYS IT IS IMPORTANT TO NOTE THAT AN OBTAINED IQ SCORE IS NOT ABSOLUTELY THAT IS AN OBTAINED IQ SCORE IS ACTUALLY AN APPROXIMATE TO REPRESENT THAT SCORE IN VALID MANNER PROFESSIONALS MUST BUILD A CONFERENCE INTERVAL HAY ROUND THE OBTAINED SCORE, AND STATE THAT WITHIN THIS CONFIDENCE INTERVAL PERSONS TRUE IQ ACTUALLY FALLS.

MOST PROFESSIONALS USE A 95% CONFIDENCE INTERVAL.

GIVEN DR. BARN\$\$ARD'S OBTAINED RESULTS ## APPROXIMATE CONFIDENCE INTERVAL WOULD BE BETWEEN 67 AND 77.

THEN IT SAYS HENCE

MR. STATEMENT THAT A 72 DOES NOT REPRESENT RETARDATION IS NOT NECESSARILY TRUE.

AND OBTAINED SCORE OF 72 CAN ACTUALLY REPRESENT A TRUE IQ SCORE OF BELOW 70.

QUALIFYING FOR A DIG I KNOWS OF RETARDATION, LATER IN HIS REPORT, HE SAYS, THAT GIVEN THESE RESULTS WOULD IT BE MY OPINION THAT MR. ROGER

CHERRY LIKELY DOES MEET THE STATUTORY CRITERIA FOR A DIAGNOSIS OF MENTAL RETARDATION CLASSIFIED IN THE MAILED RANGE MILD RANGE HE SAID HE DOES EXHIBIT DEFICITS IN ADAPTIVE BEHAVIOR.

SO DON'T -- DON'T THESE CONCLUSIONS BUT THERES MR. McDERMOTT'S ARGUMENT THAT YOU CAN'T JUST RELY ON A SCORE OF 70 THAT THERE IS A BUILT IN STANDARD OF ERROR?

>> THE STANDARD ERROR OF MEASURE OR THE COMPETENCE INTERVAL WE ARE USING THE MATERIALS INTERCHANGEABLY.

-- TERMS EE IS SOMETHING THAT WAS EXPLORED IN SOME DEPTH AT THE EVIDENTIARY HEARING, AND DR. BARSTON LET ME BACK UP, BR BARSTON THE SECOND PAGE OF THE EVIDENTIARY HEARING TRANSCRIPT SAYS MENTAL RETARDATION REQUIRES IQ BELOW 75, THAT IS NOT WITH THE DM-- DSM OR ANY ON THE DEFINITION SAYS DR. BARSTON BUM -- PUMPED -- BUMPED IT 5 POINTS THAT I WOULD SUGGEST IS INDICATIVE OF HIS -- VENT WITH REGARD TO THE CASE.

>> -- HE MAY BE RIGHT FOR THE WRONG REASONS IT MAY BE THAT IT IS IQ OF 70 BUT BECAUSE OF BUILT-IN STANDARD ERROR 5 POINTS YOU ACTUALLY MEASURE FROM # 5.

>> THAT IS WHERE HE -- 7 # 5.

>> THAT IS WHAT HE ULTIMATELY SAID IT COULD REPRESENT A SCORE BASED ON THE COMPETENCE INTERVAL UP TO 7 # 5.

BUT HE DIDN'T DO THAT UNTIL PRESSED ON CROSS-EXAMINATION CROSS-EXAMINATION. THAT IS REALLY KIND OF BESIDE THE POINT. BUT WHAT WE HAVE.

>> IS YOUR ARGUMENT THE 78,
AND WAS IT THE ARGUMENT MADE
AT THIS HEARING IS THAT IT
WENT FROM 72, 78, 82 -- THAT
72s REPRESENT A PERIOD OF
TIME THAT HE WAS MORE
DEPRESSED WHATEVER, THAT
THERE IS AN EXPLANATION FOR
THAT THOSE SIX POINTS, NOT
BASED ON DEVIATIONS OR
STANDARD ERROR OF MEASURE,
BUT BECAUSE OF OTHER THINGS,
THAT MIGHT HAVE BEEN
AFFECTING MR. CHERRY AT THE
TIME THAT HE TOOK HIS TEST,
AND IN 2005, OR 2002?
1245 IS THAT THE EXPLANATION
FOR IT.

>> THAT IS CERTAINLY ONE OF
THE POSSIBLE EXPLANATIONS
FOR THE 72 SCORE OBTAINED ON
THE MOST RECENT TESTING IS
THAT MR. CHERRY SUFFERS FROM
HIGH BLOOD PRESSURE TAKES
MEDICATION FOR IT.
THAT HE HAS BEEN DEPRESSED
THAT HE IS SUFFERING FROM A
LACK OF SLEEP.
TESTIMONY WAS CLEAR THAT ALL
OF THOSE THREE THAT THOSE
FACTORS\$\$
FACTORS, CAN DEPRESS THE
TESTED IQ SCORE.

>> WE ARE CLEAR HE WAS NOT
YOU KNOW FAKING BAD SCORES
THIS IS NOT SOMEBODY THAT
WAS MALL INNINGERING, THAT
WAS -- CONCLUSIONS --
CORRECT.

>> BOTH OF THEM CONCLUDED
THAT HE WAS NOT MALINGERING.

>> I WANTED TO ASK THAT I
DIDN'T HAVE A CHANCE TO
MR. MISS McDERMOTT THIS WHEN
WE LOOK AT THESE CASES, I
TEND TO WANT TO LOOK AND SEE
WHAT WAS PRESENTED AT TRIAL
THE ORANGE -- ORIGINAL TRIAL
AS TO MENTAL MITIGATION,
MENTAL RETARDATION, READING
THE OPINION, DOES NOT EVEN
THERE IS NO MENTION OF ANY
MITIGATION\$\$
MITIGATION, AT ALL.

WHAT WAS THE ORIGINAL TRIAL
TESTIMONY ABOUT MR. CHERRY,
IS BACKGROUND, HIS MENTAL
FUNCTIONING\$\$

FUNCTIONING, WAS THERE
ATTEMPT TO ESTABLISH MENTAL
RETARD\$\$
RETARDATION?

WOULD YOU HELP ME WITH THAT?

>> MY RECOLLECTION OF THE
RECORD IS ALL OF THAT CAME
OUT IN POSTCONVICTION
PROCEEDINGS THERE HAVE BEEN
SEVERAL.

>> THAT THERE WAS NOTHING --
AT THE ORIGINAL TRIAL.

>> I DO NOT BELIEVE THERE
WAS JUSTICE --

>> YOU HAVE NOBODY LOOKED
BACK TO TRY TO EITHER
IMPEACH WHATEVER TO SAY
WELL, THIS IS A JOHNNY COME
LATELY CLAIM, OF MENTAL
RETARDATION.

>> IT WAS JOHNNY-COME-LATELY
CLAIM WITH RESPECT TO A
CLAIM THAT WAS RAISED IN THE
POST CONVICTION PROCEEDINGS
NOT SOMETHING THAT WAS
LITTED GATED AT TRIAL.

>> THIS --

>> POPPED UP --

>> DEFENDANT -- CHILDHOOD AT
TRIAL?

THAT WAS PRESENTED --

>> IF THERE WAS IT WAS VERY
MINIMAL.

THERE WAS NOTHING THAT WAS
-- NOT -- NONE OF THE TRIAL
RECORD NONE OF THE TRIAL PEN
PHASE THIS HAS BEEN AN ISSUE
THAT I THINK I HAVE MAYBE
TWICE UP HERE ALREADY WAS
THAT CAME UP IN THE CONTEXT
OF INEFFECTIVENESS OF
COUNSEL, AT THE TRIAL PHASE,
AND MY MEMORY IS OR MY
RECOLLECTION IS THAT THERE
WAS NOTHING IN THE 3E7B89
PHASE THAT -- PENALTY PHASE
PERTINENT TO MENTAL RETARD\$\$
RETARDICATION QUESTION THE
RETARDATION ISSUE SEEMS IS
TO HAVE POPPED UP IN 1992.

>> DID THE AT THE EVIDENTIARY HEARING, AFTER WE REMANDED IT BACK FOR EVIDENTIARY HEARING IN POSTCONVICTION, THAT IS WHEN THE TESTIMONY CAME IN.

>> YES YOUR HONOR.

>> MENTAL RETARDATION.

>> THAT IS WHERE THE CLAIM POPPED THAT UP IS WHERE THE CLAIM THAT HE WAS MENTALLY RETARDED WAS REJECTED BY THE TRIAL COURT --

>> THAT IS WHERE THE PRIOR TESTIMONY WAS?

YES, SIR.

>> THE 92 TEST WAS BY DR. BRARD FISHER, DR. \$CROWN'S TEST WAS IN 96, DR. BURSTON DID THE TESTING IN 2005, I GUESS, IT WAS.

>> IT WAS CROWN THAT WE REFERRED TO IN OUR OPINION. THAT CAME OUT IN 2001.

>> YES, SIR I DON'T BELIEVE DR. FISHER FIGURED PARTICULARLY PROM FENTLY IN THAT.

IF I COULD TURN TO THE --

>> LET ME ASK YOU THIS, MR. NUNNALLY IF THE COURT SHOULD\$\$

ACCEPT THE ARGUMENT THAT THE SYSTEM IIS WHAT EXPERTS SAY IS APPLIED -- SIM, IS APPLIED STANDARD ERROR -- AND THERE IS A 10-POINT RANGE HOW WOULD YOU SEE THAT BEING APPLIED?

HERE WE GOT A 72 # THAT HAS BEEN TESTIFIED ABOUT.

SO THE RANGE WOULD BE 67, TO 77.

>> THAT IS CORRECT.

>> SO HOW WOULD THAT WORK?

TWO-PART ANSWER, JUSTICE WELLS, THE DEPARTMENT OF CHILDREN AND FAMILIES I'M SORRY THE AGENCY FOR PERSONS WITH DISABILITIES, REQUIRES AN ABSOLUTE CUTOFF SCORE OF 70.

THERE WAS TESTIMONY TO THIS TOO ABOUT THAT AT THE

EVIDENTIARY HEARING.

THERE IS NO DOUBT AND I DO NOT DISPUTE THAT PSYCHOLOGISTS SPEAK IN TERMS OF THIS RANGE OF SCORES.

HOWEVER\$\$

HOWEVER, IT IS ALSO CLEAR THAT THE LEGISLATURE KNEW THAT WHEN THEY ADOPTED THE STATUTE, BECAUSE IT WAS IN THE STAFF ANALYSIS.

THE LEGISLATION AND THIS \$\$ COURT'S RULE IS WRITTEN IN TERMS OF DEFINING THE INTELLECTUAL UP IF SHUNG COMPONENT OF MENTAL -- MENTAL RETARDATION AS A SCORE ON A SPECIFIED ONE OR TWO SPECIFIED IQ TESTS, THAT FALLS TO FOLLOWS TWO OR MORE STANDARD DEVIATIONS BELOW THE MEAN, I WOULD SUGGEST THAT THE LANGUAGE OR THE USE OF THE FWRIEZ STANDARD DEVIATIONS IS A WAY I'M TRYING TO THINK HOW TO PUT THIS.

WITH -- LET ME PUT IT THIS WAY, IF WE WERE TALKING ABOUT THE -- WAY 3, STANDARD DEVIATION ON THE WAYS 3 IS 15.

THAT IS ONE STANDARD DEVIATION TWO STANDARD DEVIATIONS IS 30 EVEN I CAN FIGURE OUT THAT 100 MINUS 30 IS 70.

THE COURT OR RATHER LEGISLATURE COULD HAVE SAID 70 OR BELOW AND THAT WOULD HAVE BEEN RIGHT.

FOR THE WAYS 3, BUT WITH THE WAYS 4 COMES OUT.

THE STANDARD DEVIATION ON THE WAYS 4 MAY BE 16.

JUST LIKE IT IS ON THE STANFORD BENET, 16 ON STANFORD BENET NOT 15, THAT MEANS 68 IS TWO STANDARD DEVIATIONS BELOW THE MEAN ON THE TEST THAT IS ALSO ACCEPTABLE FOR USE IN THIS CONTEXT.

AND I WOULD SUGGEST, THAT

THE USE OF THE PHRASEOLOGY
THAT PPZ TECHNICAL IN --
APPEARS TECHNICAL IN NATURE
IS IN FACT BEING THE BEST
WAY TO DO IT BECAUSE WHEN
THE TESTS GET RESTANDARDIZED\$\$
RESTANDARDIZED, WE DON'T
HAVE TO GO BACK TO COURT OR
RATHER BACK TO THE
LEGISLATURE, AND CHANGE IT
BECAUSE STANDARD DEVIATION
IS CHANGED.

BUT IN BUT GOING -- PERHAPS
BACK TO YOUR QUESTION,
JUSTICE -- JUSTICE WELLS I'M
AFRAID I DIDN'T DO REALLY
GOOD JOB ANSWERING IT.

-- THE PLUS OR MINUS 5 THAT
WE ARE TALKING ABOUT IS PART
OF WHAT THE PSYCHOLOGICAL
PROFESSION USES.

DR. PRITCHARD RECOGNIZED
THAT THERE IS DIVERGENCE
BETWEEN THE DEFINITION
APPLIED BY PROCTOLOGISTS AND
THE DEFINITION THAT IS
APPLIED IN THE LEGAL CONTEXT
SPEAKING DIRECTLY TO THE
AGENCY FOR PERSONS WITH
DISABILITIES\$\$

DISABILITIES, BUT LET ME --
MAKE A COUPLE OF OTHER
POINTS, ABOUT THIS.

IT IS NOT JUST AS SIMPLE AS
US MR. OR-5.

BECAUSE WHAT YOU HAVE, TAKE
DEFENDANT WITH IQ 75, FULL
SCALE IQ ON THE WAYS 3 THAT
CAN BE IQ OF 70 OR IQ 80
SOMEWHERE IN THAT 10 POINT
BAND IF WE BUY INTO PLUS OR
MINUS FIVE NOTION, WHAT THE
ARGUMENT CAN BE, AFTER THAT
WE ASSUME, IN THIS CONTEXT,
THAT RATHER THAN BEING 5
POINTS ADDED TO THAT 75
MAKES IT 80 WE AUTOMATICALLY
ASSUME OR AT LEAST THE
DEFENSE IS AUTOMATICALLY
ASSUMING THAT YOU SUBTRACT
THAT 5 POINTS RIGHT OUT OF
THE CHUTE.

THAT GETS HIM DOWN TO 70.

AND THEN THE ARGUMENT THAT\$\$

THATTURE GOING TO SEE IS
THAT WE HAVE TO THEN HAVE TO
CONSIDER WHAT IS CALLED THE
FILM EFFECT.

-- FLIMEFFECT A PHENOMENON
DEVELOPED SLIGHTLY IN THIS
CASE DID NOT GET REALLY
FLESHED OUT THAT MUCH
BECAUSE --

>> MY ARGUMENT -- NOT MY
ARGUMENT, MY QUESTION REALLY
GOES TO HOW IS THE
DETERMINATION TO BE A MADE
WHETHER YOU ADD 5, OR YOU
SUBTRACT 5?

>> YOU CAN'T MAKE IT.
THE DEFENDANT, TAKES THE
POSITION AND DR. BURSTON
TOOK THE POSITION YOU
AUTOMATICALLY SUBTRACT B 5.

>> IS NOT THE ANSWER THAT
THAT IS WHY THE LEGISLATURE
HAS THE SECOND PRONG WHICH
IS DIE EFFICIENCY ADAPTIVE
BEHAVIOR BECAUSE AFTER --
DEEFFICIENCY AFTER YOU GET
THE NUMBER I'M READING FROM
YOUR EXPERTS REPORT DR.
PRITCHARD THAT WHEN SOMEBODY
IS AT 72, WHICH OFTEN DOES
EQUATE TO A SCORE CONSISTENT
WITH MENTALLY RETARDATION,
IT BECOMES IMPERATIVE, WITH
THE SCORE ON THE CUSP
BETWEEN MENTAL RETARDATION
AND BORDERLINE THAT THE
PROFESSIONAL CONDUCT ADAPT
TO BEHAVIOR TESTING, AND HE
DID THIS, WITH MR. CHERRY
AND THEN HE GOES ON, AS TO
WHY HE FOUND WHAT WAS DONE
AND THEN HIS OWN TESTING
WITH THE PRISON, GUARD,
OFFICER TO BE PARTICULARLY,
COMPELLING\$\$
COMPELLING, AND SO, I GUESS,
THE QUESTION I HAVE THE
REASON WE DON'T JUST TAKE
THE NUMBER AND SAY IF
SOMEBODY WAS 68, THAT THAT
IS GOING TO BE THE END OF
THE QUESTION, THE INQUIRY,
THAT IS THAT THEY ARE
MENTALLY RETARDED THE

LEGISLATURE HAS DIRECTED US THAT BEYOND THE NUMBER WE MUST HAVE TWO OTHER THINGS ESTABLISHED\$\$ ESTABLISHED.

DEFICITS IN ADAPTIVE BEHAVIOR, AND ONSET BEFORE 18.

>> THAT IS CORRECT PROFESSIONAL DEFINITION THAT WAS FOLLOWEDED INTO THE STATUTE AND THAT IS BECAUSE BEING MENTALLY RETARDED MEANS MORE THAN SCORING A LOW ON IQ TEST.

AND WITH RESPECT TO THE -- CONDUCT GRID PRITCHARD -- I WOULD -- REMIND THE COURT THAT THAT TESTING PRODUCED AN AGE EQUIVALENT WHICH IS HOW THE -- REPORTS BACK 9.9 YEARS THAT IS JUST FLATLY WAY, WAY TOO LOW FOR THIS MAN'S DEMONSTRATED PROVEN ESTABLISHED HISTORY IN GETTING BY THE WORLD.

>> LET ME ASK YOU ANOTHER QUESTION ON THIS IQ THING. AS OFTEN HAPPENS AND HAPPENED IN THIS CASE THERE ARE SEVERAL IQ TESTS. SO WHAT HAPPENS IF DEFENDANT SCORES DURING HIS LIFETIME AN 86, 80, 76, AND A 70? WHICH -- AND 70?

WHICH DO YOU TAKE IN DETERMINE WHETHERING THAT IS IQ SCORE WE ARE GOING TO USE OR DO YOU AVERAGE THEM OUT LIKE WE DO S.A.T. SCORES SO IF PRESUMPTIVELY, AND AGAIN THIS GOES BACK TO THE ONE OF THE OPENING COMMENTS THAT I MADE, BECAUSE ONE CANNOT FAKE SMART, THEN ASSUMING THAT ALL OF THOSE TESTS YOUR HYPOTHETICAL ARE PROPERLY ADMINISTERED CORRECTLY SCORED, THE HIGH SCORE WOULD BE THE ONE THAT IS THE MOST ACCURATE INDICATION OF THE \$\$ DEFENDANT'S TRUE LOVE OF THE INDIVIDUAL'S TRY LEVEL OF MENTAL FUNCTIONING.

>> MY PROBLEM IS THAT IS WHY
WHEN YOU HAD YOUR EXPERT
YOUR EXPERT DISCOUNTED THE
-- BEAT AND KEN SCORE SAID
IQ NOT CONSIDERED STANDARD
PROFESSIONALLY ACCEPTED IQ
MEASURES YOU THREW THAT OUT
HE THEN TALKS ABOUT WHAT'S
WHAT DR.DRAWN -- CROWN DID
BUT THERE IS NOT AT LEAST IN
THE REPORT NOT IN --
TESTIMONY HE SEEMED TO
DISCOUNT AND WENT BACK TO
DR. \$BERNARD'S TESTING IN
1992.

AND THEN AGAIN, IN 2005.
AND SO I AND THAT THERE
COULD BE I THERED COULD BE
ON THE TIMES YOU MIGHT SAY
WE ARE GOING TO AVERAGE TAKE
THE HIGHEST ONE BUT IT
SEEMS, THAT -- THE DR.
PRITCHARD REALLY INTHAURTS
DR. BERNARD FOUND IN HERE
UNDERSTAND AND THOSE ARE
EXPERTS\$\$
EXPERTS, THAT WE OUGHT TO HE
BE RELYING ON.

>> DR. PRITCHARD DID NOT
PROVIDE A COGENT
EXPLANATION, FOR NOT CREDIT\$\$
CREDITING DR. \$CROWN'S FULL
SCALE IQ OF 78.

HE SAID THINGS ABOUT WELL I
HAVEN'T SEEN THE RESULTS, I
KNOW MY LIGHT IS BLINKING
COULD I COULD HAVE
INDULGENCES\$
INDULGENCE.

>> WE ARE LET HUG TIME TO
EXBLAIP PLEASE DO.

>> HE SAID I DON'T HAVE THE
TEST.

OKAY, YOU DON'T HAVE THE
TEST THIS IS A PROFESSIONAL
HE IS KNOWN TO EVERYBODY IN
THE COURT SYSTEM BECAUSE HE
HAS BEEN AROUND A MILLION
YEARS I CAN'T, THERE IS NO,
WE DON'T JUST AUTOMATICALLY
ASSUME IN INVALIDITY WE
DON'T MAKE AUTOMATIC
ASSUMPTIONS\$\$
ASSUMPTIONS, THAT ALWAYS

DEFAULT TO THE DEFENDANT.
JUST LIKE WE DON'T SUBTRACT
5 AUTOMATICALLY, WE DON'T
AUTOMATICALLY ASSUME THAT
THERE IS SOME DEFICIT OR
DEFICIENCY WITH THE IQ SCORE
A 78 --

>> YOU WERE IN POSITION
IMPEACHING YOUR EXPERT AT
LEAST WITH THESE TWO 72
SCORES, HAVING US UNDERSTAND
WHAT IT WAS ABOUT DR. \$\$
CROWN'S TEST THAT WOULD BE
THE ONE THAT WE OUGHT TO
CONSIDER AS BEING THE
APPROPRIATE ONE TO CREDIT.

>> WELL -- YOU ALREADY
CREDITED IT ONE TIME I WOULD
SUGGEST THAT THIS COURT
ACCEPTANCE OF THE 78 SCORE
FROM DR. CROWN BACK IN ONE
OF THE PRIOR OPINIONS, IS
GOOD ENOUGH FOR THOSE
PURPOSES, AND YOU KNOW I
DIDN'T CALL DR. PRITCHARD AS
A WITNESS THE DEF DRAULD
PRITCHARD I GOT TO
CROSS-EXAMINE HIM BUT IN
CONCLUSION I'M TRYING TO
WRAP UP, JUSTICE LIEIS.

>> WE WANT TO BE SURE WE HAD
A LOT OF THE QUESTIONS I
WANT TO BE SURE YOU HAVE THE
OPPORTUNITY I'M GOING TO
BEGIN THE OTHER SIDE
OPPORTUNITY TO EXPLORE THIS
FULLY GET YOUR ARGUMENT
WITHOUT -- OUT I DON'T WANT
YOU TO WALK AWAY SAYING I
DIDN'T GET MY ARGUMENT OUT.

>> JUSTICE LIEIS YOU KNOW
I'M NOT GOING TO DO THAT.

>> BUT --.

WHAT I WOULD SUGGEST, WE
HAVE HERE, IS A CLOSE CASE I
WILL CONCEDE THAT IT IS
CLOSE ON THE SCORES, WHEN
YOU REVIEW THE TRIAL \$COURT'S
ORDER, THAT EXPLAINS THE
HISTORY OF THIS MAN, AND
SETS OUT WHAT MR. CHERRY HAS
DONE, IN HIS LIFE, WHEN HE
WENT IN JAIL, AND IN FACT --
WHEN HE WAS IN PRISON WHERE

WE HAVE DOCUMENTED RECORDS,
WE HAVE A MAN THAT READS AT
10th GRADE LEVEL FOR EXAMPLE\$\$
EXAMPLE,ALL THIS IS IN THE \$\$
STATE'S BRIEF I DON'T NEED
TO READ THE BRIEF TO YOUALL
BECAUSE Y'ALL HAVE ALREADY
READ IT BUT WHAT I WOULD
SUGGEST WE HAVE GOING ON
HERE, IS ANALOGOUS TO A
DETERMINATION BY THE TRIAL
COURT OF WHEN OR NOT
DEFENDANT IS COMPETENT TO
STAND TRIAL IF I COULD BACK
OH, TO MY OWN CASE JAMES
EUGENE HUNTER CASE WHERE
THIS COURT EXPLICITLY SAID
THAT THE OPINIONS OF THE
EXPERTS ARE ADVISORY AND THE
COURT RETAINS THE FINAL
WORD, ON WHEN OR NOT THE
DEFENDANT IS COMPETENT TO
STAND TRIAL.

AND I WOULD SUGGEST THAT THE
RULE SHOULD BE NO DIFFERENT
IN THE CONTEXT OF A 2KER78\$\$
2KER78ATION OF MENTAL
RETARD, I GUESS, ADDITIONAL,
BECAUSE OTHERWISE WE GET TWO
EXPERTS WHATEVER THEY COME
IN AND SAY, THEN, YOU
KNOW,FINE WHATEVER IT IS
THEY SAY HE IS NOT MENTALLY
RETARD GOOD TO TRIAL THAT IS
END OF IT THEY SAY HE IS
MENTALLY RETARDED NOT
ELIGIBLE FOR DEATH AND THAT
IS THE END OF IT.

THAT IS NO THE THE WAY THE
SYSTEM WORKS THAT IS NOT THE
WAY THE SYSTEM SHOULD WORK.
WE ARE A SYSTEM ABOUT
ADVERSARIAL TESTING THAT IS
WHAT WE HAD IN THIS CASE I
HAD TO EXPERTS, THAT SAID
THIS MAN WAS MENTALLY RETARD\$\$
RETARDED.

THE TRIAL COURT, AFTER
HEARING BOTH OF THOSE
EXPERTS TESTIFY, FOUND AFTER
CONSIDERING ALL FACTS AND
CIRCUMSTANCES AND THE
TESTIMONY -- OF THESE TWO
EXPERTS\$\$

EXPERTS, MR. CHERRY IS NOT\$\$
NOTMENTLY RECARD OWED RETARD
I WOULDDED SUGGEST THE TRIAL
COURTED TO BE AFFIRMED.

>> THANK YOU.

>> THANK YOU VERY MUCH.

>> PLEASE GIVE OPPOSING KUNS
THE TIME TO BE ADDED ON SO
EQUAL TIME.

>> OKAY.

>> THANK YOU JIFZ LEWIS.

A COUPLE THINGS IN RESPONSE
TO -- THE \$\$STATE'S ARGUMENT.

>> CAN YOU EXPLAIN DR.
CROWN?

I THINK THAT DR. KOUN WAS
YOUR EXPERT.

>> HE WAS EXPERT HE IS
PSYCHOLOGIST TESTIFIED AT 9
HEARING ABOUT BRAIN DAMAGE
IN THE COURSE OF DOING HIS
NEUROYOU SEE KWLOJ CAL
EXAMINATION DID CONDUCT SOME
IQ TESTING AND OBTAINED A
FULL SCALE SCORE OF 78.

WHAT DOCTORS PRITCHARD AND
BURSTON TALKED ABOUT IN
TERMS OF THAT NUMBER WAS
FIRST OF ALL, DR. PRITCHARD
EXPLAINED THIS PRETTY
COMPREHENSIVELY HE SAID
NUMBER ONE I DON'T HAVE THE
SUBSCALES FOR THAT, SCORING.

>> WHY NOT.

>> I I MEAN WHY WASN'T THAT
AVAILABLE?\$\$
AVAILABLE?.

>> THIS IS -- AGAIN, LIFE
AND DEATH SITUATION WHY
DIDN'T YOU MAKE THAT
AVAILABLE TO DR. PRITCHARD.

>> IT I I MEAN I DON'T -- IT
WASN'T IN THE RECORD.
FROM THE PREVIOUS PREVIOUS
HEARING.

>> YOU DIDN'T HAVE THOSE.

>> HE DIDN'T HAVE -- ONE
THING I WANT TO POINT BUT
THE -- WHAT BURSTON TALKED
ABOUT IN HIS TESTIMONY,
ROGER \$\$CHERRY'S IQ IS
ACTUALLY INFLATED SLIGHTLY
BECAUSE OF THE SUBSCALES --
IF YOU LOOK AT HIS REPORT HE

IS SPECIFICALLY TALKS ABOUT HOW HE DID FAIRLY WELL ON THE DIGIT SPAN -- TEST AND THAT ISN'T A SUBTEST THAT TAPS INTO WHAT WE THINK OF AS INTELLECTUAL FUNCTIONING SO IN DR. BUR STANN'S OPINION SUBSCALES DR. PRITCHARD WOULD AGREE THE SUBSCALES DO HAVE SOME IMPACT IN TERMS OF THE OVERALL IQ AND HOW THIS HOW AN INDIVIDUAL IS FUNCTIONING FUNCTIONING, BUT THE SECOND THING DR. PRITCHARD TALKED ABOUT WAS WHAT IS CALLED THE -- FLINEFFECT THE YEAR THAT MR. CHERRY WAS ADMINISTERED THAT IT WAS THE LAST YEAR OF THE TEST, AND WHAT THE RESEARCH IS SHOWING NOW IS THAT AS A TEST, GETS OLDER, AND THEY GENERALLY LAST ABOUT 15 YEARS, YOU SEE IQ SCORES INCREASE, BUT THAT DOESN'T MEAN EE --

>> NO.

NO NO.

THAT IS FINE THAT IS FINE COUNSEL.

>> BUT THAT DOESN'T MEAN THAT -- A PERSON WHO IS TAKING THE TEST IN THE THAT YEAR HIS IQ IS ACTUALLY HIGHER THAN SOMEONE WHO TOOK IT YOU KNOW SEVERAL YEARS BEFORE, AND GOT SOMEWHAT LOWER IQ.

SO THERE IS --

>> -- PHENOMENON.

>> I THINK JUSTICE ANSTEAD'S ORIGINAL QUESTION TO YOU OUT OF THE BOX THE BEGINNING OF THIS ARGUMENT WHICH IS REGARDLESS WHAT YOU ARE ARGUING AS THE STANDARD OF ERROR ALL THAT, THE LEGISLATURE HAS DETERMINED THAT THE IQ SCORE IS TWO STANDARD DEVIATIONS BELOW THE MEAN, WHICH WOULD BE 70. AND THE U.S. SUPREME COURT HAS SAID THAT STATES ARE FREE TO DEFINE MENTAL RETARD

RETARDATION HOWEVER THEY WISH.

GIVEN THOSE TWO THINGS, WOULDN'T WE BE ESSENTIALLY REWRITING THE STATUTE FOR THE LEGISLATURE, IF WE SAID THAT THE STANDARD IS NOT 70, BUT IT IS REALLY 75, BECAUSE OF THE STANDARD OF ERROR?

>> WELL, AGAIN, I MAY BE MISSING HAVING A DISCONNECT HERE BUT I THINK THE STATUTE TWICE STANDARD DEVIATIONS I THINK IMPLICIT IN THAT IS WHEN THEY ARE MIRRORING DEFINITION OF THE DSM THE DSM SAYS YOU HAVE TO CONSIDER STANDARD ERROR OF MEASURE IN ORDER TO HAVE A RELIABLE RESULT, WOULD YOU HAVE 20 CONSIDER THAT.

>> THE PROBLEM IS THAT WE COULD WE COULD GO THE OTHER WAY AND SAY WELL IT IS NOT REALLY 70 IT IS 65, BECAUSE STANDARD DEVIATION COULD BE BELOW 2.

SO, IN ORDER NOT TO DO THAT WHY SHOULDN'T WE JUST SAY WELL IT IS NOT 65 IT IS NOT 75 IT IS 70?

BECAUSE WHAT WOULD KEEP US FROM GOING TO 56 WHY WOULD WE INSTINCTIVELY SAY 75, RATHER THAN 65?

>>.

>> WELL I THINK WHAT THE EXPERTS WERE TRYING TO EXPLAIN IS THAT IN ORDER TO HAVE CONFIDENCE, IN ORDER TO BE ABLE TO EXPRESS AN OPINION, A RELIABLE OPINION, YOU HAVE TO HAVE YOU HAVE TO UNDERSTAND THE STATISTICAL WAY THAT THE TEST WORKS AND YOU HAVE TO CONSIDER THESE, OF CONFIDENCE, STANDARD ERROR OF MEASURE, SO I THINK THAT THAT IS JUST PART OF DOING I I MEAN BOTH OF THEM SAID THIS IS PART OF DOING A RELIABLE EVALUATION IS YOU COULDN'T DO THE EVALUATION YOU COULDN'T USE THESE

TESTING INSTRUMENTS, IF YOU WEREN'T ALLOWED TO CONSIDER THAT.

>> SO IF THE DEFENDANT HAS SCORED 86 IN THE PAST, AND HE SCORED 72, WOULDN'T SOMEBODY SAY WELL WE SHOULD PROBABLY ERROR SHOULD BE GOING UP, NOT DOWN? ON THE 72?

.
>> I MEAN I CERTAIN THINK YOU HAVE TO BE WITHIN A RANGE, I DON'T DISAGREE WITH YOU THAT I THINK THERE IS A POINT WHERE YOU ARE GETTING WAY OUTSIDE, I I MEAN IF YOU ARE AT 76, THERE -- THERE IS YOU ARE GOING TO HAVE TO REALLY SHOW SOMETHING MORE AND EXPLAIN SOMETHING ABOUT WHAT HAPPENED WITH THAT TEST.

IN ORDER TO BE MEET ANY KIND OF CRITERIA THAT THIS COURT IS LOOKING AT.

BUT --

>> ASK THE SAME QUESTION I ASKED MR. NUNNALLY WHICH WHAT IS DO YOU DO WHEN YOU HAVE SEVERAL IQ SCORES OVER A LIFETIME, DO YOU AVERAGE THEM OUT DO YOU TAKE A HIGHEST I DO TAKE THE LOWEST.

>> WITH THESE -- DID.

>> IN A HEARING?

>> WELL, WHAT WE HAVE IN THIS -- THIS CASE, IS THERE ARE SEVERAL IQ SCORES AND THE FIRST THING IS WHAT KIND OF IQ SCORES WHAT KIND OF TESTS PRO, DEWS RELIABLE RESULTS, AND BOTH DOCTORS PRITCHARD AND BURSTON SAID BETAS AND -- AREN'T RELIED IN SIGN STIFFIC COMMUNITY SHOULDN'T BE CONSIDERED WHEN LACKING ALTHOUGH IQ WHEN OF YOU WAYS AND --

>> DR. CROWN, EXCUSE ME.

>> I UNDERSTAND THAT, THIS CASE, BUT GENERALLY, WE HAVE A LOT OF THE CASES WHERE

THERE HAVE BEEN IQ SCORES
OVER A LIFETIME, AND THEY
VARY.

SO WHAT DOES A TRIAL COURT
DO WITH VARYING IQ SCORES?

>> I THINK THAT ONE THING A
COURT DOES IS THEY HAVE TO
LOOK AT THE OTHER EVIDENCE
FOR EXAMPLE IN THIS CASE WE
HAVE VERY COMPELLING OVER
HEAD OF THE BELIEVE \$CHERRY'S
INTELLECTUAL FUNCTIONING WAS
BELOW MUCH BELOW AVERAGE IN
INTO THE RETARDATION RANGE
AS A CHILD, WE HAVE HIS
INDICATORS TELLING US THAT,
TELLING -- EDUCATORS TELLING
THUS WAS A KID WOULD HAVE
BEEN IN MENTAL RETARDATION
CLASSES HAD WE HAD THEM HE
WAS WHEN THEY WERE ACTUALLY.
HE IS THE IQ SCORES VARY
OVER A LIFETIME LET'S JUST
DISREGARD THE IQ SCORES
ALTOGETHER AND GO RIGHT TO
ADAPTIVE FUNCTIONING?

>> WELL, I THINK THAT AT
SOME POINT THE VARIANCE -- I
DON'T I'M NOT TRYING TO
DISAGREE WITH YOU BECAUSE I
THINK AT SOME POINT WHEN YOU
HAVE A SUBSTANTIAL VARIANCE,
YOU HAVE TO SAY, THAT THERE
IS SOMETHING GOING ON.
HERE, AND THAT THIS PERSON
CANNOT I I MEAN -- MEET
CRITERIA SO IF ONE LAST
QUESTION.

>> AT THE EVIDENTIARY
HEARING IN 3.850 THAT LED TO
OUR 2000 OPINION, DR. CROWN
DID TESTIFY.

>> CORRECT.

>> YES, HE DID.

>> AND THE TRIAL COURT FOUND
FROM HIS TESTIMONY THAT
MR. THAT DR. CROWN -- FOUND
THAT CHERRY HAD BORDERLINE
RETARD\$\$
RETARDATION.

THAT WAS AN ACCEPTED
FINDING; CORRECT?

>> YES.

>> THANK YOU VERY MUCH, WITH

OUR HELP OF YOU NOT ONLY
USED YOUR TIME BUT EXTRA
TIME WE THANK YOU BOTH
COUNSEL IN THIS CASE, FOR
YOUR VERY EXCELLENT
PRESENTATION\$\$
PRESENTATION.

WE WILL TAKE THE CASE UNDER
ADVISE\$\$
ADVISEMENT.

>> COURT WILL STAND IF
RECESS UNTIL MONDAY MORNING
AT # CLOK.

>> PLEASE RISE,,,,,,,,,,,,,,,,,