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Amendments to the Florida Rules of Criminal Procedure & Rules of Appellate Procedure

3 (Technical difficulties) 4 SO AT LEAST THE DEFINITION IS OKAY. 5 WE HAVE SIGNIFICANT PROBLEMS WITH REMAINDER PART OF THE 6 RULE, PARTICULARLY THE PROCEDURE TO DETERMINE IF THE 7 DEFENDANT HAS BEEN RETARDED. 8 WE THINK DETERMINING HIS RETARDATION ISSUE AFTER THE 9 PENALTY PHASE IS RETURNED, OR THE PENALTY PHASE JURY HAS 10 RETURNED DEATH RECOMMENDATION IS NOT ONLY INEFFICIENT 11 --. 12

LET ME ASK YOU THIS. 13 THE, UNDER ATKINS, THE MENTAL RETARDATION IS NOT A 14 DEFENSE TO GUILT. 15 DO YOU AGREE? 16

NO, I DON'T AGREE. 17 UNDER THIS COURT'S RULINGS IN CHEST NUT AND THINGS LIKE 18 THAT IT CAN PERHAPS NEGATE SPECIFIC INTENT. 19 THAT SELFISH YOU HAS NOT REALLY BEEN RESOLVED BUT THAT 20 WAS CERTAINLY ISSUE I WOULD RAISE AS DEFENSE LAWYER. 21 BUT GENERALLY SPEAKING SPEAK --. 22

UNDER ATKINS, ATKINS SAYS THE PERSON CAN STILL BE 23 HELD RESPONSIBLE. 24

I'M SORRY, YES, OF COURSE. 25 WE HAVE NO CONTENTION THAT A PERSON WHO HAS BEEN FOUND 26 GUILTY OF FIRST DEGREE MURDER --. 2 1

NOW THAT IS DISTINCTION BETWEEN INSANITY DEFENSE, 2 WHICH GOES TO GUILT. 3 AND MENTAL RETARDATION, CORRECT? 4

YES, INSANITY. 5

AND SINCE THE PERSON CAN STILL BE FOUND GUILTY, EVEN 6 IF DETERMINED TO BE MENTALLY RETARDED, MY CONCERN WITH 7 THE, DOING THIS PRE-TRIAL, IS THE ISSUE OF THE 8 EXAMINATIONS AND THE WAIVER AND WHETHER WE JUST DON'T 9 GET INTO A LOT OF ISSUES AS TO WHAT HAS BEEN DISCLOSED 10 DURING THE EXAMINATION OF THE DEFENDANT. 11 AND FORCED WAIVER OF FIFTH AMENDMENT RIGHTS, WILLIAMS 12 RULE, EVIDENCE COMING OUT, AND I UNDERSTAND SOME STATES, 13 LIKE IDAHO, HAD SAID THAT IT'S -- THAT IF THE DEFENDANT 14 RAISES IT, THEN. 15

YOU CAN DO THAT WITH WITH CONCESSION, COURT CAN FIND 16 CONFESSION VOLUNTARY MADE. 17 YOU CAN CERTAINLY CONTEST THE VOLUNTARINESS BEFORE THE 18 JURY. 19 THERE ARE SOME ISSUES RELITIGATED SEVERAL TIMES. 20 CONFESSION ISSUE IS ONE OF THEM. 21

AS TO EACH ISSUE HERE, I THINK WE WOULD AGREE, IS 22 THIS AN ISSUE OF PROCEDURE OR SUBSTANCE? 23

WELL DEFINITION IS OBVIOUSLY ONE OF SUBSTANCE. 24

ONE IS DETERMINED. 25

ONCE YOU GET PAST THE FIRST SECTION WE ARE TALKING 26 PROCEDURE. 3 1

ALL RIGHT. 2 SO IN TERMS OF THE PROCEDURE, YOU SAID IT'S INEFFICIENT. 3 IS THERE ANYTHING ABOUT THE PROCEDURE THAT WOULD BE 4 UNCONSTITUTIONAL IN DECIDING IT AFTER GUILT PHASE? 5

YES. 6 WELL, USUAL -- I'M TALKING, THE PROCEDURE THAT YOU HAVE 7 GOT HERE IS -- YOU'RE BASICALLY TAKING WHAT THE 8 LEGISLATURE IS SAYING. 9 I AM SAYING IT IS UNCONSTITUTIONAL. 10

WHY? 11

VIOLATES ARTICLE FIVE OF THE CONSTITUTION --. 12

IF WE PROMULGATE THE RULE AND SAY IT IS PROCEDURE, 13 WHAT IS IT ABOUT THAT PROCEDURE, -- IS THERE ANYTHING 14 ABOUT THAT PROCEDURE THAT IS UNCONSTITUTIONAL? 15

DON'T SEE ANYTHING. 16

WE ARE REALLY LOOKING AT -- YOU SAID IT IS 17 INEFFICIENT. 18 JUSTICE PARIENTE IS GIVING US THE REASONS IT IS MORE 19 EFFICIENT. 20 JUSTICE WELLS HAS TOLD YOU CONCERNS THAT HE HAS AND I 21 SHARE THOSE, AS TO THE DISCLOSURES PRE-TRIAL. 22 SO IS THIS SOMETHING THAT THE WHOLE PUBLIC DEFENDERS 23 ASSOCIATION UNANIMOUSLY AGREES SHOULD ALWAYS BE DONE 24 BEFORE TRIAL? 25

I THINK SO, YES. 26 THEY AUTHORIZED ME TO SPEAK ON BEHALF OF THE 4 1 ASSOCIATION, SO THIS IS OUR POSITION. 2 THESE ISSUES IS SUCH CRUCIAL IMPORTANCE THAT WE THINK IT 3 SHOULD BE DETERMINED BEFORE TRIAL. 4

AND YOU SEE THE IDEA BEING IF THE JUDGE DETERMINED 5 THAT THE DEFENDANT WAS NOT MENTALLY RETARDED BUT THEN 6 AFTER THE GUILT PHASE, AND PENALTY PHASE, WOULD YOU THEN 7 SEEK TO RELITIGATE AFTER HEARING ALL THE MITIGATING? 8 WANT TO PRESENT IT TO THE JUDGE AGAIN? 9

NO THIS WOULD COME UP DURING THE PERSONALITY PHASE. 10 OBVIOUSLY MENTAL RETARDATION IS MITIGATING EVIDENCE. 11 SO HE WOULD MITIGATE AS PART OF PENT PHASE EVIDENCE. 12 HE WOULD ALSO BE ENTITLED TO INSTRUCTION. 13

WE HAVE DIVIDED THIS TIME. 14 I'M AFRAID YOU'RE NOW INTO MR. CANNON'S TIME. 15

I HAD MYSELF AT 7 MINUTES. 16

I HAVE GOT YOU OVER 7. 17

. 18

HALF OF A MINUTE. 19

WELL LET ME -- THE -- I WOULD LIKE TO POINT OUT TWO 20 OTHER THINGS. 21 DON'T THINK YOU SHOULD BE ABLE TO WAIVE THIS, IS 22 SOMETHING CAN'T BE WAIVED. 23 PROVISION IN THE RULE TO WAIVE IT. 24 WE DON'T THINK IT SHOULD BE ABLE TO WAIVE IT. 25 JUST LIKE CAN'T WAIVE YOUR AGE TO BE EXECUTED OR SANITY. 26 THIS IS NOT SOMETHING THAT CAN BE WAIVED. 5 1 LIKEWISE -- NOT LIKEWISE BUT SIMILARLY, ONCE THE TRIAL 2 JUDGE HAS FOUND DEFENDANT MENTALLY RETARDED WE DON'T 3 THINK THE STATE HAS RIGHT TO APPEAL THIS. 4 IS THIS IS A MATTER OF FACT AND ISSUES OF FACT CANNOT BE 5 APPEALED. 6 THANK YOU. 7

THANK YOU VERY MUCH. 8 MR. CANNON? 9

THANK YOU VERY MUCH. 10 MAY IT PLEASE THE COURT. 11

SEEM THE DIFFICULTY WE HAVE WITH SHORT AMOUNT OF 12 TIME, WE OF COURSE HAVE YOUR

WRITTEN FILES. 13 BUT IF YOU WOULD GET RIGHT TO THE IMPORTANT POINT. 14

ABSOLUTELY. 15 COUPLE ISSUES I THINK I NEED TO ADDRESS FOR THIS COURT 16 IS, I AM IN DISAGREEMENT, THE DEFINITION, EVERYONE'S 17 TALKING ABOUT IS A PROCEDURAL ASPECT. 18 IT IS NOT SUBSTANTIVE. 19 BECAUSE OF THE REASON THAT MENTALLY RETARDATION, AS 20 DEFINED BY THE SUPREME COURT, JUST TELLS US, WELL 21 THEY'RE LESS CULPABLE THAN THOSE OTHERWISE CONVICTED OR 22 ACCUSED OF FIRST DEGREE MURDER. 23 THE DEFINITION IN THE RULE IS NOTHING MORE THAN 24 ASSESSMENT. 25 THAT IS WHAT IT IS. 26 IT JUST TELLS US HOW TO GET THERE. 6 1 MENTAL RETARDATION TELLS US THESE ARE PEOPLE THAT ARE 2 VICTIMS OF SIGNIFICANT IMPAIRMENT. 3

I'M NOT SURE WHAT YOU'RE SAYING WHEN YOU SAY YOU 4 DISAGREE ABOUT THE DEFINITION NOT BEING SUBSTANTIVE. 5 DO YOU -- YOU DON'T AGREE IT IS SUBSTANTIVE? 6

ABSOLUTELY. 7 IT'S -- THE DEFINITION OF WHAT WE HAVE IN 3.203 TALKING 8 ABOUT IQ SCORES AND ADAPTIVE BEHAVIOR AND ON SET, THAT 9 IS A PROCEDURAL QUESTION. 10 IT TELLS US HOW DO --. 11

YOU THINK THAT'S WHAT THE U.S. SUPREME COURT HAD IN 12 MIND WHEN IT SAID WE ARE GOING TO LEAD THIS -- LEAVE 13 THIS UP TO THE INDIVIDUAL STATES AS FAR AS DEVELOPING 14 THIS FURTHER? 15

ABSOLUTELY. 16

YOU DON'T THINK THEY INTENDED THAT NOW WE ARE GOING 17 TO LEAVE THIS TO LEGISLATURES AND THE VARIOUS STATES? 18 TO DEFINE MENTAL RETARDATION? 19

NO, IT'S A PROCESS. 20 THAT'S WHAT THEY SAID IN ATKINS. 21 THEY SAID HERE, THIS IS MENTAL RETARDATION. 22

HAS THERE BEEN ANY COURT THAT HAS, THAT HAS RULED 23 THAT WAY? 24

NOT THAT I'M AWARE OF, HAS COME OUT AND SAID IT IS 25 SUBSTANTIVE. 26 I THINK EVERYONE IS IN AGREEMENT, ATKINS, THE DEFINITION 7 1 OF MENTAL RETARDATION, THERE IS NONE REALLY. 2 THEY SORT OF POINT TO WHAT IS IN THE AMA R. 3 BUT THAT IS A PROCEDURE. 4 HOW DO YOU GET TO A DETERMINATIVE -- DETERMINATION? 5

YOUR ARGUMENT THEN, BECAUSE THIS IS PROCEDURAL, WE 6 HAVE THE AUTHORITY TO CHANGE WHAT IS THE DEFINITION AND 7 THE STATUTE OF MENTAL RETARDATION? 8 IS THAT WHERE YOU'RE GOING WITH THIS? 9

YOU'RE NOT CHANGING A DEFINITION. 10 YOU'RE CHANGING THE ASSESSMENT. 11 YOU HAVE THE ABILITY. 12

WELL CHANGE THOSE CRITERIA THAT THE LEGISLATURE HAS 13 LAID OUT. 14 WE CAN DO THAT BECAUSE YOUR ARGUMENT IS THIS IS 15 PROCEDURAL? 16

ABSOLUTELY. 17

SO WHAT DO YOU WANT US TO CHANGE IT TO? 18

CORRECT. 19

WHAT'S MISSING FROM THIS ASSESSMENT, ARE SOME KEY 20 TERMS. 21 ONE OF THEM IS IQ SCORES ARE NOT SET IN STONE. 22 IQ SCORES ARE FLUID. 23 THEN IT SHOULD NOT BE A CUT OFF OF TWO

STANDARD 24 DEVIATIONS. 25 RATHER WAY THINK IS ACCEPTED, ACTUALLY I WOULD SUBMIT 26 WHAT IS ACCEPTED BY MEDICAL SCIENCE AND BY THE LAW IS 8 1 APPROXIMATELY, APPROXIMATELY TWO STANDARD DEVIATIONS 2 TAKEN INTO ACCOUNT ALL THE WEAKNESSES OF THE INSTRUMENT. 3 THE LIGHTER THE RISK AND SO FORTH, THEY ALL HAVE 4 WEAKNESSES. 5 THESE ARE STANDARDIZED TESTS THAT ARE NORMED NOT BY 6 EVERY PERSON OR WITH EVERY PERSON. 7

I'M HAVING SOME DIFFICULTY WITH, WITH YOUR POSITION 8 THAT THIS IS NOT SUBSTANTIVE. 9 EVENTUALLY, SOMEONE, A JUDGE, IS GOING TO HAVE TO DECIDE 10 WHAT STANDARDS TO FOLLOW IN ORDER TO DECIDE WHETHER 11 MENTAL RETARDATION EXISTS. 12 IS THAT CORRECT? 13

ISN'T THAT A SUBSTANTIVE PROCESS? 14

IT'S STILL PROCEDURAL, IT IS SAME AS INSANITY. 15 HOW DO WE GET TO INSANITY? 16 WELL WE KNOW, IF I'M A DEFENSE ATTORNEY AND I RAISE THE 17 DEFENSE OF INSANITY, THE STATE CAN COME IN, GO AHEAD AND 18 EVALUATE SOMEONE. 19

BUT EVENTUALLY A JURY IS INSTRUCTED ON DEFINITIONS OF 20 INSANITY. 21 AND THEN THEY MAKE A FINDING, TANTAMOUNT TO A FACTUAL 22 FINDING, THAT BASED ON THOSE DEFINITIONS THAT ARE SET 23 OUT IN THESE INSTRUCTIONS, THAT THIS INSANITY EXISTS OR 24 IT DOESN'T EXIST AS A SUBSTANTIVE MATTER. 25 DO THEY NOT? 26

WELL THE FACT WE DEFINE SOMETHING DOES NOT 9 1 NECESSARILY MAKE IT SUBSTANTIVE. 2 WHAT I AM TRYING TO SAY, WHAT WE'RE DEFINING IS A 3 PROCESS. 4 AN ASSESSMENT PROCESS, IN ORDER TO GET TO ATKINS. 5 ATKINS IS VERY GENERAL. 6 WE ARE PROBABLY GOING TO HAVE TO COME BACK AND LITIGATE 7 WHAT ATKINS IS. 8 BUT THE ATKINS COURT JUST GAVE US A GENERALLY DEFINITION 9 OF MR AND SAID THIS IS WHAT IS ACCEPTED. 10

WHERE DOES THIS TAKE US NOW IN TERMS OF YOUR VIEW? 11 WHERE DOES IT TAKE US, THAT YOU'RE PUTTING THE 12 DEFINITION OR THE PROCESS UNDER A PROCESS OR PROCEDURE? 13 WHERE DOES THAT TAKE US NEXT? 14

IT TAKES US TO THE RULE ITSELF IN WHICH THIS COURT 15 HOPES TO PROMULGATE IN A MANNER THAT IS IN LINE, THAT IS 16 IN LINE WITH THE AMA R, IN LINE WITH THE APA. 17 RIGHT NOW THE PROCESS THAT'S IN 22137 AND THE PROCESS 18 THAT'S DEFINED IN THE RULE IS NOWHERE IN MEDICAL 19 SCIENCE. 20

DO WE TOTALLY IGNORE THE STATUTE? 21

THE WAY THAT IT IS DEFINED YES, I THINK WE NEED TO. 22

SO THAT SHEDS NO LIGHT? 23

ABSOLUTELY BECAUSE THE STATUTE IS WRONG ABOUT 24 RETROACTIVE APPLICATION. 25 THE STATUTE IS INCORRECT WITH REGARDS TO IQ SCORES. 26 BECAUSE IT'S ACCEPTED GENERALLY AND NOBODY IN THE STATE, 10 1 NOBODY CAN SAY THAT IQ SCORE OF 70 IS A BEING EXACT CUT 2 OFF FOR MENTAL RETARDATION. 3

SO HOW DOES THIS COURT GO ABOUT DETERMINE WHAT THE 4 ELEMENTS OF, OF WHAT MENTAL RETARDATION WOULD BE IN 5 TERMS OF NOT BEING ELIGIBLE TO HAVE THE DEATH PENALTY? 6

I THINK THE BEST WAY WE DO, WE LOOK (INTERRUPTION) I 7 THINK WHAT THIS COURT NEEDS TO DO IS REAL QUICK IS JUST 8 RESTORE THE PROCESS THAT'S IN THE AMA R, JUST CHANGE 9 SOME OF THE WORDS. 10 NOT SAY THIS IS A SUBSTANTIVE DEFINITION BUT THIS IS THE 11 ASSESSMENT

PROCESS. 12 PERHAPS THIS MIGHT BE EASIER ANALOGY. 13 WE KNOW WHAT A BROKEN ARM. 14 A BROKEN ARM IS A BONE THAT'S BROKEN. 15 HOW DO YOU GET THERE? 16 HOW DO YOU KNOW ABOUT IT? 17 WELL IT'S AN X-RAY OR MAYBE A CLINICAL ASSESSMENT, YOU 18 FEEL THE BONE, IT HURTS AND SO FORTH. 19 IF THE COURT WAS TO SAY A BROKEN BONE WAS DETERMINED BY 20 TAKING AN X-RAY, AND A CLINICAL ASSESSMENT TO SEE IF IT 21 HURTS, THAT DOES NOT MAKE AT BROKEN BONE. 22

ARE YOU SORT OF ANALOGIZING THIS TO SOMETHING LIKE 23 BRAIN DAMAGE WHERE YOU SAY THEY TEST THE BRAIN DAMAGE, 24 WHETHER THE CAT SCAN SHOWS A DEFICIT? 25

SURE. 26

IF IT DIDN'T SHOW THE DEFICIT, THE PERSON WOULDN'T BE 11 1 BRAIN DAMAGED BUT THEY COULD BE BRAIN DAMAGED OTHERWISE? 2 I GUESS MY PROBLEM IS, AND MAYBE IT'S HEARING THAT THE 3 FLORIDA PUBLIC DEFENDERS ASSOCIATION AGREES WITH THE 4 DEFINITION, IT SEEMS THIS DEFINITION ACTUALLY IS IN, IS 5 CONSISTENT WITH ACCEPTED NORMS FOR WHAT IS CONSIDERED TO 6 BE MENTALLY RETARDED. 7 AND IT IS A MUCH MORE PRECISE TERM THAN SOMETHING LIKE 8 BRAIN DAMAGE AS INTENDED BY THE U.S. SUPREME COURT IN 9 ATKINS. 10

WELL ATKINS IS VERY VAGUE AND MENTAL RETARDATION IS 11 VAGUE. 12 IT'S JUST SUBSTANTIAL IMPAIRMENT REALLY THAT RENDERS 13 SOMEONE SIGNIFICANT DISADVANTAGE TO OTHER FOLKS AND 14 CULTURE. 15 THAT'S WHAT MENTAL RETARDATION IS. 16

YOU THINK THAT IS ALL THE U.S. SUPREME COURT WAS 17 SAYING, THIS IS SOMETHING WHERE THE PERSON IS GOING TO 18 BE EXCUSED FROM BEING SUBJECT TO THE DEATH PENALTY, NOT 19 AN ISSUE OF, YOU KNOW, WHETHER THEY'RE GOING TO BE GOING 20 INTO, YOU KNOW, ADVANCED CLASS IN HIGH SCHOOL. 21

DON'T YOU THINK WE SHOULD HAVE A MORE PRECISE TEST, 22 SOMETHING AS SIGNIFICANT AS THAT? 23

THE SIGNIFICANCE IS THAT WE NEED TO HAVE THIS 24 PROCESS, SURE. 25 I MEAN IT IS WHETHER SOMEONE IS GETTING BENEFITS AND SO 26 FORTH WHEN WE HAVE SOMEONE'S LIFE ON THE LINE. 12 1 HOWEVER, WE HAVE TO REMEMBER BACK IN 73, THEY CHANGED 2 THE DEFINITION -- NOT THE DEFINITION, THE PROCESS, FROM 3 ONE STANDARD DEVIATION TO TWO. 4 SO IF YOU'RE MENTALLY RETARDED BACK IN 1970, YOU MAY NOT 5 BE MENTALLY RETARDED IN 1973. 6 THE ASSESSMENT, THAT IS NOT SO MUCH THE DEFINITION. 7

HAVING THE RULE DETERMINED THROUGH THE DCS, WHATEVER 8 THEY PROMULGATE, THAT GIVES YOU A CHANCE TO UPDATE THE 9 DEFINITION, DOESN'T IT? 10

WELL, THE PROBLEM WITH THAT IS THE DCF RULES JUST 11 ALLOW TO ESTABLISH WHAT TESTS TO TAKE. 12 AND AGAIN, IF I TAKE THE LIGHTER OR THE WAIS-3, I'M 13 GOING TO SCORE DIFFERENTLY. 14 THAT'S A FACT. 15 BECAUSE THE LIGHTER AND WAIS-3 TEST DIFFERENT ABILITIES. 16 THAT IS WHAT I'M TRYING TO EXPLAIN IN THIS COURT. 17 IQ IS A FLUID CONCEPT, IT IS NOT A CUT OFF. 18

MARSHAL HAS REMINDED US WE HAVE USED YOUR TIME. 19 THANK YOU VERY MUCH. 20 MR. MCCLAIN? 21

. 22

MR. MCCLAIN, I KNOW YOU HAVE GOT OTHER AREAS THAT YOU 23 WANT, BUT I'M COMING BACK TO DRAWING ON YOUR 24 CONSIDERABLE EXPERIENCE. 25 YOU KNOW, AFTER THIS COURT CAME OUT IN 94 WITH DILLBACK, 26 THERE WAS A RULE THAT WAS PROMULGATED, 202, I THINK IT 13 1

IS, 3.202, AND IT PROVIDES THAT THE EXPERT EXAMINATION 2 BY THE STATE IS TO BE AFTER THE GUILT PHASE RETURN. 3 AND I KNOW THAT WE HAVE HAD ARGUMENT BEFORE THIS COURT 4 ON THE WHOLE DILLBACK PROCEDURE AND WHETHER THAT IS A 5 PROBLEM UNDER THE FIFTH AMENDMENT TO REQUIRE THERE TO BE 6 AN EXAMINATION. 7 WAIVER AND ALL THAT BUSINESS. 8 AND IF YOU COULD GIVE US YOUR VIEW ON WHETHER THERE IS A 9 PROBLEM PRE-GUILT WITH FORCING THE DEFENDANT TO AN 10 EXAMINATION. 11

I RECOGNIZE EXACTLY WHAT YOU'RE TALKING ABOUT. 12 AND I AGREE THE PLACE IS TO START, IS FIGURE OUT, AS YOU 13 HAVE ASKED THE VERY FIRST QUESTION, WHAT EXACTLY IS 14 ATKINS? 15 SO LET ME ADDRESS THAT FIRST. 16 BY POINTING OUT IN THE STATE OF NEW YORK, FOR EXAMPLE, 17 THERE IS THE RIGHT TO THE JURY DETERMINATION OF MENTAL 18 RETARDATION AT THE PENALTY PHASE. 19 BUT THE DEFENDANT IS ALSO GIVEN THE RIGHT TO ASK FOR A 20 PRE-TRIAL DETERMINATION. 21 I THINK --. 22

IS THAT A REQUIREMENT OR PERMISSIVE? 23

IT IS PERMISSIVE. 24 SO I THINK THAT RECOGNIZES THE CONCERN OF THE PUBLIC 25 DEFENDERS AND ALLOWS THEM IN EACH CASE WHERE THEY WANT 26 TO EXERCISE THE PRE-TRIAL DETERMINATION. 14 1 IT IS A DECISION THAT THEY MAKE. 2

HOW DO YOU GET A PERMISSIVE WAIVER BY SOMEONE WHO IS 3 MENTALLY RETARDED WITHOUT THERE BEING A CLAIM AFTER THE 4 FACT THAT KELSO WAS INEFFECTIVE? 5

I REALIZE THAT IS A PROBLEM. 6 THAT TIES INTO THE VERY SERIOUS CONCERNS I ALSO HAVE 7 WITH REFERENCE TO THIS RULE. 8 I'M SPEAKING FROM POST CONVICTION EXPERIENCE. 9 A AND I WANT TO POINT OUT MY CONCERNS AS POST CONVICTION 10 ATTORNEY, THAT WE HAVE THIS RIGHT, AN EIGHTH AMENDMENT 11 RIGHT WITHOUT SIXTH AMENDMENT IMPLICATIONS. 12 AND WHEN IT COMES UP IN CASES THAT ARE FINAL, THAT ARE 13 IN THE POST CONVICTION PROCESS THE RULE PROVIDES FOR IT 14 TO BE DECIDED IN 3851 PROCEEDINGS. 15 BUT THERE IS ALSO SIXTH AMENDMENT RIGHTS INVOLVED. 16 RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. 17 THIS COURT HAS NOT RECOGNIZED THAT THERE IS ENFORCEABLE 18 RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN 3850 19 PROCEEDINGS. 20 THERE IS ALSO RIGHT TO DIRECT APPEAL THAT'S GOING TO BE 21 AFFORDED TO PEOPLE WHO ARE COMING INTO THE PROCESS. 22 AS OPPOSED TO THOSE WHO ARE FINAL. 23 THE PROVISIONS HERE ALSO PROVIDE FOR AN APPEAL FROM THE 24 DENIAL OF 3.850, THEY'RE DIFFERENT. 25 A DIRECT APPEAL IS DIFFERENT THAN AN APPEAL IN 3.850 26 PROCEEDING. 15 1 I CAN POINT TO WHAT'S HAPPENED IN GEORGIA. 2 GEORGIA WAS THE FIRST STATE TO RECOGNIZE A RIGHT NOT TO 3 BE EXECUTED WHEN RETARDED. 4 AND THEY HAVE PROVIDED A PROCESS WHERE A MR APPLICATION 5 IS MADE TO THE GEORGIA SUPREME COURT. 6 IF THERE IS A PRIMA FACIE SHOWING. 7 THERE IS A REMAND FOR A JURY TRIAL, IN ESSENCE OF 8 INTERRUPTING THE POST CONVICTION PROCESS. 9 FOR JURY TRIAL ON THE MENTAL RETARDATION AND THEN THERE 10 IS AN APPEAL BACK TO THE GEORGIA SUPREME COURT. 11 THAT IS THE PROCESS THEY HAVE COME UP WITH TO ADDRESS 12 THE CONCERNS THAT ARE SORT OF SIMILAR TO YOUR CONCERNS, 13 WHERE WE HAVE GOT SIXTH -- IT IS NOT JUST THE RIGHT TO 14 COUNSEL. 15 THERE IS ALSO THE RIGHT TO CONFRONTATION, COMPULSORY 16 PROCESS, JURY TRIAL, ETCETERA. 17 ALL THESE RIGHTS UNDER THE SIXTH AMENDMENT AND HOW DOES 18 THAT INTERSECT WITH THE EIGHTH AMENDMENT RIGHT? 19

SO WHAT REALLY ARE YOU RECOMMENDING HERE AS TO WHEN 20 THIS PROCEDURE SHOULD TAKE PLACE? 21

WELL, FOR ONE THING I'M SAYING THE CURRENT RULE, I 22 JUST DON'T THINK IS GOING TO WORK. 23 AND I THINK THAT ANY DETERMINATION UNDER THE PROPOSED 24 RULE IS GOING TO BE SUBJECT TO FEDERAL CHALLENGE AND IF 25 IT'S ULTIMATELY GOING TO JUST DELAY THE PROCESS. 26 I THINK THE RULE JUST NEEDS TO BE STARTED OVER AGAIN. 16 1

AND START WITH WHAT? 2 WHERE SHOULD YOU BEGIN THIS PROCESS? 3 SHOULD IT BE PRE-TRIAL? 4 POST? 5

FIRST WE HAVE TO DECIDE WHAT EXACTLY DOES ATKINS 6 MEAN? 7 AND IN THAT SENSE, BRINGS UP RING, BRINGS UP PARTY SON V 8 NEW YORK. 9

BRINGS IN YOUR ARGUMENT THIS SHOULD BE DONE BY A JURY 10 AND DECIDED UNANIMOUSLY? 11

IS IT AFFIRMATIVE DEFENSE UNDER PATTERSON V NEW YORK? 12

IS IT ELEMENT OF CAPITOL DEGREE MURDER UNDER WILBUR 13 AND RING? 14 THIS THAT QUESTION HAS TO BE ANSWERED, WHAT'S THE BURDEN 15 OF PROOF AND WHO BEARS IT. 16 IF IT IS UNDER PATTERSON V NEW YORK, THE STATE CAN 17 REQUIRE THE DEFENDANT TO BEAR THE PROVE BY PREPONDERANCE 18 BUT NOT GREATER. 19 BUT IT STILL IS A JURY TRIAL ISSUE. 20 I THINK THE STARTING POINT IS FIRST FIGURE OUT WHAT DOES 21 ATKINS MEAN SUBSTANTIVELY? 22

WHAT YOU'RE SAYING, THAT, I MEAN YOUR ARGUMENT THERE 23 IS THAT IT IS AN ELEMENT OF GUILT. 24 PRETTY MUCH MAKES CLEAR IT IS NOT A GUILT ISSUE. 25

IT'S AN ELEMENT OF GUILT OF CAPITAL FIRST DEGREE 26 MURDER, AS OPPOSED TO FIRST DEGREE MURDER. 17 1 IT IS THE DIVIDING LINE. 2 IT IS LIKE THE DIVIDING LINE BETWEEN MANSLAUGHTER AND 3 SECOND DEGREE MURDER. 4

IF WE CONSIDER IT AN ELEMENT OF CAPITAL MURDER, THEN 5 DOES THE STATE HAVE TO PROVE IN EACH CASE WHETHER IT'S 6 ALLEGED OR NOT BEYOND A REASONABLE DOUBT THAT THE 7 DEFENDANT IS NOT MENTALLY RETARDED? 8

WOULD BE NO DIFFERENT THAN TERRITORIAL JURISDICTION 9 UNDER LANE V STATE, WHERE THE STATE ONLY BEARS THE 10 BURDEN OF PROVING BEYOND THE REASONABLE DOUBT, 11 JURISDICTION IN THE STATE OF FLORIDA ONCE IT IS RAISED. 12 IF IT IS NOT RAISED IT IS NOT AN ISSUE. 13

BUT THEY STILL HAVE TO PROVE BEYOND A REASONABLE 14 DOUBT THEN. 15

THAT IS WHERE THE DICHOTOMY COMES INTO PLAY. 16 I FRANKLY DON'T KNOW THE ANSWER TO THIS. 17 IS IT AN AFFIRMATIVE DEFENSE IN LINE WITH PATTERSON V 18 NEW YORK EVEN THOUGH IT IS AN EIGHTH AMENDMENT RIGHT? 19 OR BECAUSE IT IS AN EIGHTH AMENDMENT RIGHT, THE ELEMENT 20 OF CRIME OF FIRST DEGREE MURDER? 21

UNDER ATKINS, A MENTALLY RETARDED PERSON CAN BE FOUND 22 OF FIRST DEGREE MURDER, CORRECT? 23

OF FIRST DEGREE MURDER. 24 BUT CANNOT BE FOUND GUILTY OF CAPITAL FIRST DEGREE 25 MURDERED AS RECOGNIZED IN RING. 26 IS MY ARGUMENT. 18 1

I UNDERSTAND THAT. 2 BUT IF MENTALLY RETARDED PERSON CAN BE FOUND GUILTY OF 3 FIRST DEGREE MURDER, THEN HOW IS IT AN ELEMENT OF THE 4 CRIME? 5

ELEMENT OF CAPITAL FIRST DEGREE MURDER. 6 BECAUSE YOU CANNOT RECEIVE A DEATH SENTENCE IF YOU'RE 7 MENTALLY RETARDED. 8

BUT IT IS STILL CAPITAL MURDER BUT WE JUST CAN'T 9 IMPOSE THE DEATH PENALTY. 10

ACCORDING TO RING, THAT IS THE DEFINITION OF CAPITAL 11 MURDER. 12 IF YOU'RE NOT ELIGIBLE FOR THE DEATH PENALTY, YOU'RE NOT 13 GUILTY -- GUILTY OF CAPITAL FIRST DEGREE MURDER. 14 THAT IS WHOLE THING OF RING. 15

UNDER ARIZONA LAW. 16

UNDER ARIZONA LAW. THIS COURT ALSO RECOGNIZED THAT 17 YOU GET AROUND RING IF YOU HAVE AN AGGRAVATOR, THAT 18 MAKES DEATH ELIGIBLE. 19 BUT THIS IS SOMETHING THAT'S NOT AN AGGRAVATOR. 20 I DON'T KNOW EXACTLY WHAT IT IS, AN AFFIRMATIVE DEFENSE 21 THAT MAKES YOU NOT DEATH ELIGIBLE. 22 YOU CANNOT GET A DEATH SENTENCE IF YOU'RE MENTALLY 23 RETARDED. 24

BUT ISN'T THE PRESUMPTION OF COMPETENCY AND THE 25 PRESUMPTION THAT YOU ARE AS JUSTICE CANTERO WAS SAYING, 26 AND IT IS REALLY AFFIRMATIVE DEFENSE, ARGUMENT OF 19 1 JURISDICTION IS VERY DIFFERENT. 2 IT IS A VERY FINE GEOGRAPHICAL LINE, WHEREAS PRIOR 3 COUNSEL JUST ARGUED THE FLUIDITY AND DIFFERENTIATION 4 BETWEEN MENTAL RETARDATION WHETHER YOU'RE COMPETENT 5 VERSUS COMPETENCY FOR TRIAL PURPOSES, AS OPPOSED TO 6 WHETHER OR NOT THE DEATH PENALTY CAN BE IMPOSED. 7

I THINK APPROPRIATE PARALLEL IS JUVENILES. 8 I DON'T KNOW OF ANY CASE IN FLORIDA THERE HAS BEEN A 9 DISPUTE WHETHER IN FACT A JUVENILE WAS A JUVENILE. 10 IN THE SPORTS WORLD THERE HAS BEEN DISPUTES ABOUT THE 11 BIRTH CERTIFICATE, WAS IT DOCTORED? 12 WAS THE PERSON A PARTICULAR AGE? 13 SEEMS TO ME THE MENTAL RETARDATION IS PARALLEL TO THE 14 JUVENILE DETERMINATION. 15 IF YOU THINK ABOUT EXECUTING A JUVENILE, YOU CAN'T DO 16 IT. 17

BUT WHETHER SOMEBODY IS A JUVENILE OR NOT IS LIKE THE 18 JUVENILE-JURISDICTIONAL LINE. 19 THERE IS A CLEAR LINE. 20

ULTIMATELY THE QUESTION BECOMES, IS IT AN 21 ELEMENT OR AFFIRMATIVE DEFENSE? 22 TO RESOLVE THAT YOU HAVE TO LOOK AT PATTERSON V NEW YORK 23 WHICH HAS BEEN INTRODUCED IN RING, APPRENDI AND JONES. 24 THE U.S. SUPREME COURT RECOGNIZED THAT THAT'S THE BIG 25 ISSUE. 26 AND YET AT THIS POINT IN TIME WE HAVE NO GUIDANCE FROM 20 1 THEM AS TO WHAT EXACTLY THIS NEW EIGHTH AMENDMENT RIGHT 2 IS IN THOSE TERMS. 3 BUT IN ORDER TO --. 4

IF YOU ASSUME THAT WHAT WE ARE TALKING ABOUT IS THAT 5 AN INELIGIBILITY TO BE EXECUTED BY SOMEONE WHO MEETS 6 THIS DEFINITION OF MENTAL RETARDATION, AND USED FOR 7 PURPOSES OF THIS DISCUSSION, TAKE THE RING ARGUMENT OUT 8 OF IT. 9 I WANT TO COME BACK TO THE PROPOSITION OF THE WAIVER BY 10 REASON OF A FORCED EXAMINATION OF THE DEFENDANT 11 PRE-GUILT. 12

I RECOGNIZE THERE IS A SERIOUS PROBLEM UNDER ESTELLE 13 V SMITH. 14 AND I FRANKLY YOUR HONOR DO NOT KNOW WHAT THE ANSWER IS. 15 IT IS A PROBLEM. 16 BECAUSE ESTELLE V SMITH, THERE IS THAT FIFTH AMENDMENT 17 RIGHT. 18 AND TO COMPEL SOMEONE TO SUBMIT TO EXAMINATION AND TO 19 TALK TO THE EXAMINER, IN ORDER TO EXERCISE THIS. 20

I KNOW WE HAVE HAD ARGUMENT SINCE DILLBACK AND I 21 FRANKLY HAVEN'T GONE BACK AND LOOKED AT THOSE CASES, IN 22 RESPECT TO, IN FACT, MY MEMORY IS YOU HAVE HAD AN 23 ARGUMENT ON THE DILLBACK FEATURE. 24 AND INEFFECTIVE ASSISTANCE OF COUNSEL. 25

WE ARE GOING TO HAVE TO MOVE ON. 26

I APPRECIATE YOUR TIME. 21 1

THANK YOU VERY MUCH. 2

MR. JACOBS? 3

GOOD MORNING. 4 MAY IT PLEASE THE COURT. 5 ON BEHALF OF THE STATE ATTORNEY'S OF FLORIDA AND 1600 6 ASSISTANTS, WE ARE ABOUT AND LARGE IN FAVOR OF YOUR 7 RULE. 8 WE GOT HERE AFTER ABOUT A DECADE OF DISCUSSION IN THE 9 LEGISLATURE, PROSECUTORS, FOLKS INVOLVED WITH THE 10 ASSOCIATION RETARDED CITIZENS. 11 AND THIS HAS BEEN DEBATED MANY, MANY TIMES, MANY, MANY 12 YEARS. 13 MANY OF THE ARGUMENTS YOU HEARD TODAY AND WILL HEAR 14 AFTER ME WERE MADE TO THE LEGISLATURE. 15 WE JUST HAVE A FEW THINGS ABOUT THE RULE WE'D LIKE TO 16 SEE TWEAKED. 17 BY AND LARGE WE THINK THAT YOU CERTAINLY ARE ON TARGET 18 AS TO, PARTICULARLY BECAUSE OF THE DISCUSSIONS I HAVE 19 HEARD EARLIER FROM JUSTICE WELLS AND JUSTICE PARIENTE 20 ABOUT THE EXPOSURE OF THE DEFENDANT TO THESE EARLY 21 ISSUES. 22 WE THINK YOU OUGHT TO CONSIDER AS THE STATUTE SAID, THAT 23 THE PROSECUTORS HAVEN'T HAVE AN OPPORTUNITY AS WELL TO 24 PUT THEIR EXPERT IN THE MIX. 25 IN THE STATUTE ITSELF, IT TALKS ABOUT AT THE FINAL 26 HEARING, PENALTY PHASE FINAL HEARING, THE PROSECUTION 22 1 HAS AN OPPORTUNITY TO BRING FORTH AN EXPERT AS WELL AS 2 THE COURTS, TWO EXPERTS AND THE DEFENSE EXPERT. 3 IN YOUR RULE, IT'S A LITTLE NUANCE, BUT IT APPEARS THAT 4 IF YOU ALLOW THE COURT TO HAVE THEIR TWO, WHICH YOU DO, 5 AND THEN THE DEFENSE DOESN'T CALL HIS, THEN IT IS NOT 6 CLEAR, WHETHER OR NOT THE PROSECUTION CAN CALL AN 7 EXPERT. 8 SO WE ASK THAT YOU LOOK AT THAT. 9 ANOTHER ISSUE WAS, AND I THINK JUSTICE BROUGHT THIS UP, 10 HOW MANY TIMES DO YOU GET TO LITIGATE AND RELITIGATE 11 WHETHER OR NOT THE PERSON IS MENTALLY RETARDED? 12 WE ASK, IT NOT BE REASONABLE MOVING FORWARD IN THE 13 SYSTEM IF THEY LITIGATED AT THE TRIAL COURT LEVEL AND 14 THE PERSON FOUND TO BE MENTALLY RETARDED, OR NOT 15 MENTALLY RETARDED THAT YOU CAN'T RELITIGATE THAT OVER 16 AND OVER AGAIN. 17

IS THAT YOUR OBJECTION TOO OR WOULD YOU OBJECT TO 18 HAVING THIS DONE PRE-TRIAL? 19

WE DO OBJECT TO IT BEING DONE PRE-TRIAL. 20 IT'S BEEN OUR POSITION A LONG TIME, FOR THE REASONS THAT 21 WERE RAISED EARLIER, ALSO EVEN THOUGH I KNOW THAT THE 22 SPEAKER APTLY WILL SAY THIS IS BETTER FOR JUDICIAL 23 EFFICIENCY. 24 IF YOU JUST LOOKED AT EFFICIENCY OF IT, VERY FEW PEOPLE 25 WHO ARE INDICTED EVER GO TO THE DEATH PENALTY POSITION. 26 SO WE WOULD THINK THAT THERE IS NOT REALLY AN 23 1 EXTRAORDINARILY EFFICIENT WAY OF DOING BUSINESS. 2 BUT BY AND LARGE I THINK THE CONSTITUTIONAL ARGUMENT IS 3 A GOOD ONE AS WELL, THAT YOU SHOULD NOT EXPOSE THESE 4 PEOPLE TO THIS KIND OF EXAMINATION PRIOR TO THE GUILT 5 BEING FOUND. 6 IN FLORIDA WE HAVE THE SYSTEM THAT HAS NOT BEEN 7 CHALLENGED IN ALL THE CASES THAT ARE CITED TO YOU ABOUT 8 THE U.S. SUPREME COURT, THEY HAVEN'T CHALLENGED OUR 9 SYSTEM OF SENTENCING. 10 AND WHEN A PERSON BECOMES, IT'S A CAPITAL OFFENSE, WHEN 11 THEY'RE FOUND GUILTY, THEY BECOME EXPOSED THEN TO THE 12 DEATH PENALTY. 13 UPON THE FINDING OF GUILT. 14 AND THAT'S AN APPROPRIATE TIME TO TAKE UP THE PENALTY 15 PHASE. 16 AND THAT'S OUR POSITION. 17

HOW ABOUT THE BURDEN OF PROVE, RIGHT NOW UNDER THE 18 PROPOSED RULE, THE BURDEN IS CLEAR AND CONVINCING 19 EVIDENCE. 20 FIRST OF ALL, CAN YOU ADDRESS WHETHER THE BURDEN OF 21 PROOF IS A SUBSTANTIVE ISSUE THAT IS FOR THE 22 LEGISLATURE, LEAVING ASIDE ANY CONSTITUTIONALITY 23 CONCERNS AT THIS POINT? 24 AND SECOND, IF IT IS A PROCEDURAL ISSUE, DO YOU AGREE 25 WITH THAT? 26

LET ME TAKE THE FIRST PART FIRST. 24 1 AS FAR AS THE BURDEN OF PROOF IS CONCERNED, THIS IS 2 INDEED THE ULTIMATE MITIGATOR. 3 IF THE PERSON IS FOUND TO BE MENTALLY RETARDED, IT IS 4 THE ULTIMATE MITIGATOR. 5 IT IS NOT AN AGGRAVATOR, IT IS AN MITIGATOR. 6 WE THINK AS THE LEGISLATURE THOUGHT THAT THE CLEAR AND 7 CONVINCING PROVE WAS THE PROPER

PROVE BURDEN. 8 THIS AGAIN WAS DEBATED IN THE LEGISLATURE. 9 AND WE CAME DOWN TO THAT. 10 THIS BILL IS REALLY A COMPANY COMPROMISE OF THE 11 ASSOCIATION OF MENTALLY RETARDED CITIZENS, EXPOSE PEOPLE 12 IN THE LAST COUPLE OF YEARS. 13

BUT SUBSTANTIVE ISSUE FOR THE LEGISLATURE OR IS THAT 14 A PROCEDURAL ISSUE? 15

IF YOU ADOPT IT AS A RULE IT BECOMES PROCEDURAL I 16 GUESS. 17 IN THIS RULE. 18 IF YOU WANT TO -- I CAN ARGUE IT BOTH WAYS. 19 I GUESS, REALLY DOESN'T DEPEND WHERE I'M STANDING, 20 EXCEPT STANDARD TODAY I CAN SEE WHY YOU SEE IT IS 21 PROCEDURAL. 22 BUT I KNOW FULL WELL WHY THE ARGUMENT WAS MADE IN THE 23 LEGISLATURE IT WAS NOT. 24

CAN YOU ANALOGIZE TO ANY OTHER STATUTORY PROVISION 25 WHERE WE HAVE SAID THAT THE LEGISLATURE IMPOSING A 26 BURDEN OF PROOF IS EITHER A SUBSTANTIVE RULE OR 25 1 PROCEDURAL ONE FOR US TO DECIDE? 2

I CAN'T REALLY OFF THE TOP OF MY HEAD COME UP WITH 3 THAT. 4 I WOULD HOPE THOUGH IN YOUR PROPOSED RULE, SINCE YOU 5 HAVE -- I'M SURE YOU HAD SOME DEBATE AMONGST THIS AUGUST 6 BODY AND PROBABLY NOT IN THE MONTH OF AUGUST BUT 7 EARLIER, THAT YOU DEBATED THIS ISSUE AMONGST YOURSELVES 8 AND I THINK THAT I DON'T KNOW WHAT THE DISCUSSION WAS, 9 HAVE NO WAY OF KNOWING BUT I THINK THAT YOU HAVE COME TO 10 THE RIGHT CONCLUSION. 11

IF IT IS THE ULTIMATE MITIGATOR, WHY SHOULD THERE BE 12 A DIFFERENT STANDARD OF PROVE FOR THIS MITIGATOR THAN 13 FOR THE MITIGATORS THAT ARE IN THE STATUTE NOW, WHICH IS 14 JUST MORE THAN 50% OR THE GREATER WEIGHT OF THE 15 EVIDENCE? 16

WELL, AGAIN, THIS IS DECIDED BY A COURT. 17 THE JUDGE DECIDES THIS. 18 AND THEY MUST PUT IN WRITTEN FINDING, FINDINGS AS HOW 19 THEY GOT WHERE THEY GET. 20

WELL THE PRESENT MITIGATION REQUIREMENTS ARE THAT IT 21 BE ESTABLISHED JUST BY THE GREATER WEIGHT OF THE 22 EVIDENCE. 23

WELL, AGAIN, I SAY TO YOU, AND MAYBE I'M PREJUDICED 24 BECAUSE I HAVE BEEN INVOLVED IN THIS DEBATE FOR OVER A 25 DECADE. 26 THIS WAS THE COMPROMISE EVERYBODY CAME TO, EVEN 26 1 ASSOCIATION OF RETARDED CITIZENS CAME TO THAT SAME 2 COMPROMISE, BECAUSE THIS IS NOT -- AS WAS DISCUSSED 3 EARLIER, SOME PEOPLE WOULD PERHAPS WANT IT TO BE BUT IT 4 IS NOT GUILTY BY REASON OF INSANITY. 5 IT IS NOT GUILTY BY REASON OF MENTAL RETARDATION. 6 WHENEVER YOU'RE FOUND GUILTY AND I THINK EVERYONE CAN 7 UNDERSTAND, THAT YOU CAN BE GUILTY OF THESE CRIMES IF 8 YOU'RE MENTALLY RETARDED. 9 IT IS NOT LIKE BEING INSANE. 10 BUT WHEN I SAY THAT, I THINK YOU'RE DEATH ELIGIBLE 11 WHENEVER YOU BECOME, YOU'RE DEATH ELIGIBLE WHENEVER 12 YOU'RE FOUND GUILTY BY THE JURY OF CAPITAL MURDER. 13 FOR THAT TO BE WAIVED, OR TO BE STRICKEN BY A TRIAL 14 COURT, WE BELIEVE THE BURDEN OUGHT TO BE WHERE YOU HAVE 15 IT PLACED, BY CLEAR AND CONVINCING EVIDENCE. 16

MR. JACOBS, WOULD YOU COMMENT UPON THE ROLE OF DCF IN 17 THE DEFINITIONAL ASPECT AND WHERE WE ARE NOW WITH REGARD 18 TO THAT? 19 AND WHAT YOUR COMMENTS MAY BE WITH REGARD TO AN ANALYSIS 20 OF THEIR PARTICIPATION IN THAT DEFINITIONAL RULE? 21

WELL, IN READING ALL THE DOCUMENTS THAT WE RECEIVED 22 IN THIS AND CERTAINLY IN PART OF ONE OF THE BRIEFS, IT 23 TALKS ABOUT THE FACT THAT DCF HAS NOT COME FORWARD WITH 24 THE RULE, EVEN THOUGH THEY'RE REQUIRED TO BY THE 25 LEGISLATURE. 26 I'M CERTAINLY DISAPPOINTED IN THAT. 27 1 BUT THEY DO HAVE SOME RULE THAT'S IN PLACE. 2 I BELIEVE GAS BACK TO 1984 THAT TALKS ABOUT THESE KINDS 3 OF THINGS. 4 I THINK THAT IS WHERE PEOPLE ARE HANGING THEIR HATS 5 TODAY. 6 I'M DISAPPOINTED AS YOU ARE, HASN'T CLICKED IN WITH

THE 7 LEGISLATURE AND I'M SURE IT WILL AFTER THIS HAS BEEN 8 BROUGHT TO LIGHT, THAT DCF HAS NOT COME FORWARD WITH THE 9 RULE AS REQUIRED BY THE LEGISLATURE. 10

IS THAT A WEAKNESS IN THE LINKAGE OF THE DEFINITIONAL 11 ASPECT WE ARE DEALING WITH HERE? 12

I THINK NOT BECAUSE THE DEFINITION YOU HAVE ASCRIBED 13 AND ADOPTED HERE IS A DEFINITION NATIONALLY RECOGNIZED. 14

BUT IT CALLS ON A TESTING MECHANISM TO BE ESTABLISHED 15 BY A GROUP OR AN ENTITY THAT HAS NOT ESTABLISHED IT. 16 AND YOU HAVE TO RELY UPON THAT ENTITY TO ESTABLISH THE 17 CERTAIN TESTING, AND WE HAVE GOT ISSUES WITH REGARD TO 18 RETESTING AND THAT'S WHERE I HAVE SOME CONCERNS. 19

WELL, AND I DON'T SAY YOUR CONCERNS AREN'T WELL 20 FOUNDED. 21 BUT, AND I AM SURE YOU HAVE PERHAPS LOOKED AT THE 1984, 22 I BELIEVE IT IS 1984, FORGIVE ME IF I'M FORGETFUL. 23 AT MY AGE I JUST QUIT BUYING GREEN BANANAS. 24 I BELIEVE IT WAS 1984. 25 IS THERE IS A PROCEDURE OUT THERE. I KNOW DISCUSSION OF 26 THE LEGISLATURE, THERE WAS DISCUSSION ABOUT A PROCEDURE 28 1 ALREADY IN PLACE. 2 AND INDEED, IN THIS COMPROMISE, THE CITIZENS -- 3 ASSOCIATION OF RETARDED CITIZENS WAS WELL AWARE OF THAT 4 AND WE HAD A LOT OF DEBATE ABOUT IN IT THE LEGISLATURE. 5

THIS IS ALSO MY CONCERN. 6 IF WE HAVE TO, IF A JUDGE IN MAKING THE DETERMINATION 7 HAS TO SEEK OUT WHAT DCF DOES, AND DCF REALLY DOESN'T 8 HAVE A DOG IN THIS FIGHT, ISN'T IT BETTER SINCE WE ARE 9 DEALING WITH THE RULE OF PROCEDURE HERE, AT LEAST AS TO 10 WHAT TESTING THERE SHOULD BE TO ACTUALLY ESTABLISH WHAT 11 IT IS IN THE RULE, RATHER THAN HAVE TO LITIGATE WHETHER 12 DCF IS GOING TO CHANGE IT OR WHO IS GOING TO INFLUENCE 13 DCF, AND WHAT IT IS? 14

AND AGAIN, IN YOUR RULE, YOU SET UP A STANDARD AND 15 THAT STANDARD IS NATIONALLY RECOGNIZED. 16 SO I DON'T --. 17

ISN'T THERE REFERENCE TO DCF IN THE RULE? 18 I'LL HAVE TO LOOK BACK. 19

I CAN'T REMEMBER OFFHAND. 20 CAROLYN WILL SAY IF THERE IS NOT, I'M SURE AFTER ME. 21

PROCEDURALLY THOUGH, IN MY EXPERIENCE, WHEN WE WERE 22 DOING THE DEATH CASES, I DIDN'T OFTEN WAIT TWO MONTHS, 23 THREE MONTHS, FOUR MONTHS BETWEEN A GUILT PHASE AND A 24 PENALTY PHASE. 25 AND I HAVE SOME OF THE SAME CONCERNS ABOUT REQUIRING 26 THIS PRE-TRIAL. 29 1 BUT AS A PRACTICAL MATTER, IF YOU WAIT UNTIL POST GUILT 2 SO THAT THE DEFENDANT IS ELIGIBLE BEFORE YOU NOTIFY, 3 ISN'T THE PRACTICAL RESULT GOING TO BE THAT YOUR GOING 4 TO DELAY THE PENALTY PHASE FOR MONTHS? 5

NO AND AGAIN. 6 THIS IS SOMETHING THAT WAS DISCUSSED I KNOW SENATOR 7 MITCHELL, ONE OF THE, PEOPLE INVOLVED IN THIS 8 LEGISLATION, WAS VERY ACTIVE WITH ASSOCIATION OF 9 RETARDED CITIZENS. 10 SENATOR SMITH OF COURSE WAS A PROSECUTOR WHO WAS VERY 11 INVOLVED IN THE WRITING OF IT. 12 AND THIS WAS PART OF THE DEBATE THAT CAME UP IN THE 13 LEGISLATURE. 14 THERE WASN'T THE UNIVERSAL CONCERN THERE WOULD BE GREAT 15 DELAYS ABOUT IT, NO, SIR. 16

ALL RIGHT. 17 WITH THAT, THE RED LIGHT HAS GONE ON AND WE WILL GET TO. 18

GOOD MORNING. 19

GOOD MORNING, MAY IT PLEASE THE COURT MY NAME IS 20 CAROLYN SNURKOWSKI FROM THE

ATTORNEY GENERAL'S OFFICE. 21 THE RULE DOES DCF WILL PROVIDE SUPPORT TO THAT. 22 BUT I DON'T THINK THAT IS FATAL TO OUR DEFINITION. 23 NOR IS IT FATAL TO THIS COURT'S RULE WITH REGARD TO 24 THAT. 25 I THINK DELETION OF THAT WOULD NOT IMPACT THE ABILITY OF 26 THIS COURT TO PROPERLY ADDRESS WHAT THE LEGISLATURE 30 1 INTENDED TO BE A DEFINITIONAL PURPOSE. 2

BE STANDARDIZED INTELLIGENCE TESTS IN THE FAMILY 3 SERVICES, WE SHOULD FIND WHAT THOSE TESTS ARE AND 4 ACTUALLY PUT THOSE IN THERE? 5

MAYBE EVEN A NOTE AS OPPOSED, NOT PUT SPECIFIC, NOT 6 EVEN ADDRESS THERE, DO IT IN A COMMITTEE NOTE OR NOTE TO 7 THE RULE SO THAT THERE IS SOME ABILITY TO CHANGE IF IN 8 FACT OVER TIME THERE IS MODIFICATIONS TO WHAT REGARD AN 9 APPROPRIATE TEST WOULD BE. 10

WHAT TESTED IS MIGHT BE PART OF A PROCESS. 11 WHAT MENTAL RETARDATION IS, WHICH IT IS YOUR POSITION 12 THAT IT IS A SUBSTANTIVE DEFINITION? 13

YES. 14

MY ONLY -- WELL IT IS NOT MY ONLY CONCERN BY MY 15 SPECIFIC CONCERN IS THIS IDEA OF THE AGE OF ON SET AT 16 18. 17 AND I NOTICE SOME OF THE OTHER STATES SAID AGE OF ON SET 18 OF 22. 19

THERE WAS ONE OTHER COMMENT ABOUT THAT, RIGHT. 20

AND IF THE ISSUE IS, WAS, IF WE ARE DEALING WITH WHO 21 IS ELIGIBLE TO RECEIVE THE DEATH PENALTY OR HOWEVER WE 22 PHRASE THIS MENTAL RETARDATION ISSUE, ISN'T THE CRITICAL 23 QUESTION WHETHER THE DEFENDANT AT THE TIME OF THE CRIME 24 WAS MENTALLY RETARDED? 25 NOT WHETHER THE -- YOU KNOW, ONLY SITUATION I CAN THINK 26 OF WHERE THERE MIGHT BE A DIFFERENCE WOULD BE IF THERE 31 1 WAS A MAJOR, WELL MAYBE THE TESTING WASN'T AVAILABLE. 2

OR HEAD INJURY. 3

OR A HEAD INJURY. 4 WHY THE AGE, THE ON SET AT 18? 5

BECAUSE I THINK THE MEDICAL ESTABLISHMENT HAS 6 DETERMINED THAT, MENTAL RETARDATION IS ONE OF THOSE 7 UNIQUE EVENTS THAT DOES OCCUR. 8 AND THAT IT SHOULD AS A MATTER OF FACT, 18 IS AT THE FAR 9 END OF IT ACTUALLY. 10 IT MANIFESTS ITSELF MUCH SOONER THAN THAT. 11

WHAT IF THE PERSON WAS IN ANOTHER COUNTRY AND THERE 12 WAS NO TESTING? 13 ISN'T THERE A PROBLEM WITH HAVING TO ACTUALLY ESTABLISH 14 -- HOW YOU EXTRAPOLATE? 15 I AM NOT SURE I -- I KNOW TO BE VALID YOU WOULD EXPECT 16 THAT SOMEBODY WOULD HAVE SHOWN EVIDENCE OF MENTAL 17 RETARDATION EARLY IN LIFE. 18 I UNDERSTAND THAT. 19 BUT I'M JUST CONCERNED THAT IT'S GOING TO ADD A NUANCE 20 TO THE DEFINITION THAT'S NOT NECESSARY IN LIGHT OF WHAT 21 WE ARE TRYING TO DO. 22

I THINK EVERYBODY'S ACCEPTED THAT AS A THREE PRONG 23 DEFINITION. 24 AND THAT THAT IS AS EQUALLY IMPORTANT AS SOMEBODY MAKING 25 A DOCTOR MAKING SOME FINITE DETERMINATION BASED ON A 26 SCORING OR SCORING ERROR, THAT SOMEBODY HAS AN IQ OF 69 32 1 VERSUS A 72. 2 I THINK THESE ARE ALL RELATIVELY SUBJECTIVE IN THE SENSE 3 THAT WE HAVE HUMAN BEINGS MAKING THESE DETERMINATIONS. 4 SAME THING IS TRUE WITH REGARD TO ON SET BEFORE 18, 5 THERE ARE, -- EVERYBODY MIGHT NOT HAVE A PORTFOLIO OF 6 DOCUMENTATION THAT REFLECT THAT BUT THEY WILL HAVE 7 SOMETHING THAT LEADS TO

THAT. 8 THERE HASN'T BEEN A LOT OF TANGIBLE EVIDENCE TO REFLECT 9 THAT IS NOT ACCESSIBLE. 10

IF A JUDGE SAYS WELL I CAN DETERMINE THAT THE 11 DEFENDANT WAS MENTALLY RETARDED AT THE TIME OF CRIME, I 12 CAN'T DETERMINE WHETHER THE ON SET WAS 18 AND THEN WE 13 WILL DECIDE? 14

I THINK THAT'S PART OF THE PROOF, THAT IS PART OF THE 15 EVIDENCE. 16 BUT THAT IS ALSO THE DEFENDANT'S BURDEN TO COME FORWARD. 17 AGAIN, THIS -- I DON'T WANT TO SAY THIS IS AN 18 AFFIRMATIVE DEFENSE. 19 THIS IS THE SUPER DUPER MITIGATING FACTORS THAT TRUMPS 20 NO MATTER WHAT YOUR AGGRAVATION. 21 YOU CAN HAVE 25,000, THAT'S EXAGGERATION, AGGRAVATORS, 22 BUT IT WON'T MATTER. 23 IF YOU CAN DEMONSTRATE TO THE TRIAL COURT AT THE END OF 24 THE PENALTY PHASE THAT THIS INDIVIDUAL IS MENTALLY 25 RETARDED, THE UNITED STATES SUPREME COURT HAS INDICATED 26 THAT WE ARE NOT GOING TO DO THIS. 33 1 THIS IS NO DIFFERENT THAN A FORD VERSUS WAINWRIGHT 2 SCENARIO WHERE THERE HAS BEEN A DETERMINATION INDIVIDUAL 3 HAS BEEN GUILTY OF A CRIME, THERE IS AGGRAVATION AND 4 MITIGATION, HE HAS BEEN CONVICTED, SENTENCED TO DEATH. 5 AND BEFORE THE ULTIMATE SENTENCE IS IMPOSED, THERE IS A 6 DETERMINATION THAT THIS INDIVIDUAL IS NOT COMPETENT TO 7 BE EXECUTED BECAUSE IN FACT HE DOESN'T APPRECIATE WHAT'S 8 HAPPENING TO HIM OR WHY. 9 I THINK THIS IS NO DIFFERENT THAN THAT. 10 WE ARE TALKING ABOUT AT THE END RESULT. 11 THAT IS WHY THE STATE WOULD STRONGLY SUPPORT WHAT WE 12 THOUGHT WAS THIS COURT'S RULE. 13 NOT SO MUCH A ARGUMENT AS TO WHETHER IT'S PROCEDURAL OR 14 SUBSTANTIVE AS TO WHAT THE LEGISLATURE DID. 15 BUT WHAT THAT, THIS COURT HAD LOOKED AT WHAT THE 16 LEGISLATURE DID, AND FASHIONED ITS OWN RULE. 17 THE RULE MIMICRED QUITE NICELY WHAT THE LEGISLATURE 18 PASSED, BUT WITH SOME DIFFERENCES AND NUANCES TO IT. 19 AND THAT WAS, THAT'S WHY THE STATE WENT FORWARD AND 20 SAID, HOW DO WE MAKE THIS RULE WORK? 21 AND ALL'S NOTE IN OUR PLEADINGS BEFORE THE COURT, WE 22 HAVE SUGGESTED SOME ADDITIONS OR DELETIONS TO THE RULE. 23 BUT IN FACT, THOSE ARE, WERE -- I DON'T WANT TO USE THE 24 WORK TWEAKING. 25 ENHANCING OR TRYING TO ENHANCE THE RULE WITH REGARD TO 26 HOW WE CAN MAKE IT WORK WITHIN THE FRAMEWORK OF OUR 34 1 DEATH PENALTY STATUTE. 2

WHY NOT GIVE THE DEFENDANT THE OPTION TO RISE THIS 3 PRE-TRIAL? 4 THAT IS ALL THESE ISSUES ABOUT WHETHER OR NOT THERE IS A 5 WAIVER OF confidentiality OR COMPULSION? 6 TO WHY NOT PLACE THAT IN THE HANDS OF THE DEFENDANT AND 7 THEREFORE AT LEAST CREATE AN OPPORTUNITY TO GET THIS 8 RESOLVED SO THAT THIS, YOU KNOW THIS BEFORE YOU GO INTO 9 THE TRIAL OF A MURDER CASE? 10

I MEAN THAT'S CERTAINLY IS AN OPTION THAT COULD BE 11 LOOKED AT. 12 BUT FRANKLY, BASED ON ALL THE STATISTICAL INFORMATION 13 AND THE INFORMATION THAT WAS EVEN IN ATKINS, I BELIEVE 14 ITSELF, THE LIKELIHOOD AND THE NUMBERS OF INDIVIDUALS 15 WHO WILL ACTUALLY BE DETERMINED TO BE MENTALLY RETARDED 16 ARE VERY FEW. 17 I FORGOT WHO THE EXPERT WAS THEY WERE TALKING ABOUT. 18 LOOKING AT A SCENARIO. 19 AND THEY WERE INDICATING HOW ONE IN 20 MIGHT. 20

BUT DOESN'T THAT REALLY SUPPORT MORE, HAVING THE 21 OPPORTUNITY TO RAISE IT PRE-TRIAL? 22

NO, BECAUSE I DON'T THINK IT GOES TO WHAT REALLY WHAT 23 WE ARE TALKING ABOUT. 24 WE ARE TALKING ABOUT WHETHER THIS INDIVIDUAL IS AN 25 APPROPRIATE CANDIDATE TO BE GIVEN THE ULTIMATE SENTENCE. 26 HE GETS CONVICTED. 35 1 WE ARE NOT TALKING ABOUT GUILT OR INNOCENCE IN THIS 2 INSTANCE. 3 WE ARE BEYOND THAT POINT. 4 WE ARE MAKING AN ASSESSMENT AS TO HIS MENTAL AGILITY TO 5 APPRECIATE AND WHETHER IN FACT ALL THE BAD THINGS HE MAY 6 HAVE DONE IN A GIVEN DAY, COMMITTING THIS HORRENDOUS 7 CRIME,

WHETHER THOSE, THOSE DON'T EVEN COUNT. 8 THIS WIPES OUT ANY OF THAT BECAUSE HE CAN DEMONSTRATE 9 THAT HE HAS MET A STANDARD THAT PHYSICIANS AND PEOPLE 10 NATIONWIDE UNDERSTAND. 11

BUT BECAUSE IT DOES THAT, WHY GO THROUGH ALL THE 12 EXERCISE OF DEMONSTRATING ALL OF THOSE OTHER THINGS OR 13 WHATEVER WHEN YOU KNOW THAT IF THIS IS ESTABLISHED, IT'S 14 GOING BE TO, AS YOU HAVE INDICATED BEFORE, QUITE 15 CORRECTLY, IT IS GOING TO TRUMP WHETHER --. 16

WELL I MIGHT BE VERY CAVALIER, SAY, IF THAT IS THE 17 CASE, WHY MAKE HIM GO TO TRIAL THEN? 18 IT GETS TO THE POINT, WHAT ARE WE REALLY TALKING ABOUT? 19 WE TALKING ABOUT SOMEBODY SO MENTALLY DYSFUNCTIONAL THAT 20 HE CAN'T EVEN STAND TRIAL, I THINK THAT WE HAVE TO BE 21 VERY CAREFUL AT WHAT WE ARE DOING. 22 I THINK THERE IS SOME REAL CONSTITUTIONAL PROBLEMS WITH 23 REGARD TO WHAT THE DEFENDANT'S GIVING UP, WHAT HE IS 24 WILLING TO ACQUIESCE AND WILL HE APPRECIATE THAT? 25 IS THIS IS AN INDIVIDUAL, WHO MAY NOT MEET THE TEST FOR 26 MENTAL RETARDATION BUT MAY COME CLOSE TO THAT, IS HE THE 36 1 KIND OF INDIVIDUAL WHO CAN MAKE THESE DETERMINATIONS 2 PRE-TRIAL? 3

CLEARLY WOULDN'T THIS BE THE KIND OF THING THAT IF 4 THE DEFENDANT'S LAWYER WENT TO THE PROSECUTOR, AND MAYBE 5 THE PROSECUTOR OF COURSE HERSELF SAID WELL WE SEE SOME 6 INDICATION MENTAL RETARDATION HERE, AND I'M GOING TO USE 7 THAT IN EVALUATING WHETHER OR NOT I'M GOING TO SEEK THE 8 DEATH PENALTY ANYWAY, THAT IS, I'M SURE ON AN INFORMAL 9 BASIS THIS IS ALREADY GOING ON. 10 WHY NOT PROVIDE THAT VEHICLE WHICH REALLY WOULD BE THE 11 ALTERNATIVE, TO THIS INFORMAL THING OF THE DEFENSE 12 LAWYER GOING TO THE THING, I THINK I HAVE ENOUGH REPORTS 13 AND EXAMINATIONS, NOT TO SEEK THE DEATH PENALTY, BECAUSE 14 I THINK THAT WITH THESE EXAMINATIONS WE HAVE HAD, AND 15 THE SCHOOL RECORDS, WHATEVER, I THINK YOU WILL AGREE, 16 YOU KNOW, ON AN OBJECTIVE BASIS, THAT THIS LOOKS LIKE. 17

THAT MIGHT VERY WELL DISQUIET THE VERY THINGS YOU 18 WERE TALKING ABOUT. 19 SEEMS TO ME, I'M ACTUALLY KIND OF SURPRISED ABOUT THE 20 ARGUMENTS THAT ARE BEING PRESENTED BECAUSE IT SEEMS TO 21 ME THAT THE DEFENSE WOULD WANT THIS AT THE TAIL END. 22 BECAUSE WHAT IT DOES, IT PROVIDES AN INDIVIDUAL TO 23 PRESENT THEIR MENTAL CAPACITY AT TRIAL. 24 YOU MAY NOT GET THE DEATH PENALTY, NOT THE DEATH 25 PENALTY, EXCUSE ME, FIRST DEGREE MURDER, MIGHT BE 26 CULPABILITY WILL BE LESSENED. 37 1 YOU GO TO A PENALTY PHASE. 2 YOU HAVE A JURY HEARING THE EVIDENCE WITH REGARD TO YOUR 3 MENTAL CAPACITY. 4 IT MIGHT NOT RISE TO THE LEVEL OF MENTAL RETARDATION BUT 5 YOU HAVE THE ABILITY TO ASK THE JURY TO CONSIDER THAT 6 AND THAT MAY BE A FACTOR IN WHATEVER THEIR VOTE IS. 7 THEN YOU HAVE THE RIGHT TO GO TO THE JUDGE AND MAKE THIS 8 DETERMINATION. 9 SEEMS TO ME THEY ARE WILLING TO ACQUIESCE A NUMBER OF 10 OPPORTUNITIES TO SOMEBODY WHO HEY NOT HAVE AS STELLAR A 11 CASE AS THE NEXT MAN. 12 AND GO FORWARD. 13 AND THEY MAY GET LUCKY. 14 THEY MAY HAVE MADE A GOOD PRESENTATION WITH REGARD TO 15 THAT AND HAVE MITIGATED THEIR CASE. 16

IN YOUR EXPERIENCE, IS THE, ALL THAT THERE ARE 17 DIFFERENT ISSUES, WOULDN'T COMPETENCY OF COURSE IS 18 LITIGATED PRE-TRIAL. 19 IT HAS TO BE. 20 WOULDN'T IN A SITUATION WHERE SOMEBODY IS CERTAINLY 21 SIGNIFICANTLY MENTALLY RETARDED, WOULDN'T THOSE ISSUES 22 INTERTWINE AND SO FOR THE JUDGE WHO IS THERE AND AGAIN, 23 WE ARE TALKING ABOUT ONE OF THE ISSUES BEING EFFICIENCY, 24 WHY WOULDN'T AGAIN IF THERE IS OPTION AND WAIVER ISSUES, 25 THAT WHEN THE ISSUE OF COMPETENCY IS BEING LOOKED AT, 26 FOR EXAMPLE, THAT THAT MAKES SENSE AND SO THAT WE RATHER 38 1 THAN HAVE A RIGID PROCESS, UNLESS THERE ARE 2 CONSTITUTIONAL CONCERNS, THAT --. 3

WHICH I THINK THERE ARE. 4

OKAY, SO, IF -- NOW WE GO BACK, NOT WHETHER IT IS A 5 GOOD IDEA OR NOT. 6 IT IS WHETHER IT IS CONSTITUTIONAL. 7 SO YOU'RE ARGUING THAT IT WOULD BE UNCONSTITUTIONAL? 8

NO, THERE, I AM NOT TALKING ABOUT UNCONSTITUTIONAL. 9 I THINK THERE ARE CONSTITUTIONAL ISSUES, RIGHTS AN 10 INDIVIDUAL MAY NOT CHOOSE TO WAIVE AND HE MAY NEVER BE 11 ABLE TO EXERCISE THAT. 12 HE MAY CHOOSE NOT TO. 13 AND THEN GO TO THE END. 14 ALL I'M SUGGESTING TO YOU, IS EVERY TIME YOU GIVE 15 SOMEBODY AN OPPORTUNITY TO WAIVE, I THINK YOU OPEN THE 16 DOOR TO PROBLEMS LATER ON AS TO KNOWING WAIVERS AND ALL 17 THE THINGS THE SCOPE AND WHEN WE ARE TALKING ABOUT 18 MENTAL RETARDATION, WHY ARE WE ENGAGING IN AN EXERCISE 19 OF ALLOWING SOMEBODY TO HAVE AN OPTION TO DO WITH THAT 20 SOME OTHER POINT IN THE TRIAL WHEN THERE IS A PERIOD OF 21 TIME IT CAN BE DONE AT AN APPROPRIATE TIME? 22 TO DO IT PRE-TRIAL, I DON'T SEE HOW THAT SOLVES ANY 23 PROBLEMS. 24 IT SEEMS LIKE AS YOU HAVE HEARD THIS MORNING, SEEMS TO 25 GENERATE MORE CONCERNS. 26 AND I GUARANTEE YOU, THERE WILL BE LITIGATION ON THAT. 39 1 THE OTHER THING I THINK IS IMPORTANT --. 2

YOU HAVE A GUARANTEE IF WE DO IT THIS WAY THERE WON'T 3 BE LITIGATION? 4

WELL, NO, OBVIOUSLY NOT. 5 I WOULD BE TO BE HERE A LITTLE WHILE LONGER BEFORE I 6 RETIRE. 7 BUT THE POINT IN FACT THOUGH IS, IF YOU DO IT THE WAY 8 IT'S SET UP, I THINK IT ALSO GOES TO SOMETHING THE STATE 9 IS VERY INTERESTED IN, AND THAT IS MAINTAINING THAT ALL 10 APPEALS COME TO THIS COURT. 11 I THINK THAT YOU GUARANTEE THAT WE ARE NOT HAVING 12 PRE-TRIAL PROCEEDINGS THAT ARE GOING TO BE DISTRICT 13 COURTS WITH REGARD TO RESOLUTION. 14 WE HAVE THE OPPORTUNITY TO WRAP IT ALL UP INTO ONE 15 APPELLATE REVIEW. 16

YOU'RE CONCERNED WITH THE IDEA IT WOULD GO, IF IT WAS 17 PRE-TRIAL TO, THE DISTRICT COURTS OF APPEAL? 18

RIGHT. 19 I THINK WE WOULD BE LITIGATING IT AD NAUSEAM. 20 EVERYBODY WOULD BE SEEING THAT OVER AND OVER AGAIN. 21

DOESN'T IT NEED TO GOES TO THE COURTS OF APPEALS 22 REGARDLESS WHEN IT IS DONE UNLESS IT IS DONE AFTER A 23 SENTENCE OF DEATH? 24 BECAUSE CONSTITUTION ONLY GIVES US THE JURISDICTION OVER 25 DEATH PENALTY CASES AFTER THERE HAS BEEN AN ORDER 26 IMPOSING A SENTENCE OF DEATH. 40 1 SO, EVEN THE RULE AS WRITTEN NOW IT WOULD GO TO THE 2 DISTRICT COURT OF APPEALS. 3 WHY WOULD THAT MAKE A DIFFERENCE? 4

I THINK AS THE RULES, IF THERE HAS BEEN IMPOSITION OF 5 THE DEATH PENALTY OR THE JURY HAS RECOMMENDED DEATH AND 6 THE TRIAL COURT DETERMINES THIS INDIVIDUAL IS NOT 7 MENTALLY RETARDED, CERTAINLY WOULD BE AN APPEAL AND THAT 8 ISSUE WOULD COME TO THIS COURT. 9

BUT THE RULE IS NOT THE JUDGE WOULD NOT IMPOSE A 10 SENTENCE OF DEATH. 11 IT WOULD BE DETERMINED AFTER THE GUILT PHASE BUT BEFORE 12 -- AND MAYBE AFTER THE PENALTY PHASE, I AM NOT SURE. 13 BUT BEFORE IMPOSITION OF A SENTENCE. 14 SO UNDER THE RULE AS WRITTEN, ANY APPEAL BY THE STATE 15 WOULD GO TO THE DCA. 16

IF HE CHOOSE TOSS DO A LIFE, RIGHT, I UNDERSTAND 17 THAT. 18

OR AN APPEAL BY THE DEFENDANT AS WELL. 19

WELL THERE IS -- IF THE TRIAL COURT COULD, IF THE 20 TRIAL COURT IS A HEARING AND THERE HAS BEEN A 21 DETERMINATION HE IS NOT MENTALLY RETARDED, AND MAKES 22 THAT PART OF HIS APPEAL, THAT WOULD COME HERE. 23 I WOULD SAY THAT WOULD BE THE GREATER NUMBER

OF CASES. 24

WHY WOULD IT COME HERE? 25 BECAUSE THE COURT HAS NOT IMPOSED. 26

HE WOULD IMPOSE THE DEATH PENALTY . 41 1

NOT UNDER THE CURRENT RULE. 2 WE'D HAVE TO CHANGE THE RULE. 3

I DON'T MEAN TO ARGUE. 4 SEEMS TO ME THAT IS IN FACT THERE HAS BEEN A 5 DETERMINATION THAT HE IS NOT MENTALLY RETARDED, THAT 6 WOULD BE AN ISSUE FOR APPELLATE REVIEW BEFORE THIS 7 COURT. 8 COURT COULD IMPOSE DEATH PENALTY. 9 THERE IS NO IMPEDIMENT. 10

DOESN'T THE. 11

BUT GO THROUGH THE PENALTY PHASE, IF THE JURY COMES 12 BACK WITH A RECOMMENDATION OF DEATH, ISN'T IT AT THAT 13 POINT THAT YOU DO THE MENTAL RETARDATION? 14

SURE. 15

SO THERE ISN'T ANY SENTENCE OF DEATH THAT HAS 16 ACTUALLY BEEN IMPOSED. 17

NO, BUT IF IN FACT YOU GO TO A HEARING, DEFENDANT 18 ASSERTS HE IS MENTALLY RETARDED, THERE IS A HEARING 19 BEFORE THE TRIAL COURT. 20 AND THE TRIAL COURT ASSESSES, NO, YOU HAVE NOT MET YOUR 21 BURDEN, YOU HAVE NOT SATISFIED US. 22 YOU HAVE FAILED ON THIS. 23 HE COULD THEN IMPOSE THE DEATH PENALTY. 24

BUT SEEMS TO ME, YOU THINK ABOUT THIS, THAT EITHER 25 WAY, WHETHER YOU DO IT AT A BEGINNING PRE-TRIAL, WHETHER 26 YOU DO IT AT THE CONCLUSION OF THE PENALTY PHASE ONCE 42 1 THE JURY HAS RECOMMENDED DEATH, THAT THE DEFENDANT IS 2 GOING TO HAVE AT LEAST THREE OPPORTUNITIES TO PRESENT 3 THIS, OR TWO OPPORTUNITIES TO PRESENT THIS RETARDATION 4 EVIDENCE. 5 WHY NOT THEN JUST DO IT AT THE BEGINNING? 6 IF THE DEFENDANT IS FOUND TO BE MENTALLY RETARDED, WE 7 THEN ELIMINATE, NO MATTER WHO DOES THE ACTUAL APPEAL, 8 WHAT COURT HEARS IT, WE ELIMINATE ALL THIS DEATH 9 QUALIFYING OF THE JURY AND THIS WHOLE PENALTY PHASE. 10

BECAUSE AGAIN, MY TIME IS UP, BUT AGAIN, HOPE IS TO 11 NEGATE THE AGGRAVATION. 12 THIS IS NOT AN AFFIRMATIVE DEFENSE, STATE IS ASSERTING 13 THIS IS THE ULTIMATE MITIGATOR. 14 AND AS THE ULTIMATE MITIGATOR, IT NEEDS TO BE DETERMINED 15 AT THE TAIL END AFTER ALL THE EVIDENCE IS PRESENTED SO 16 THERE IS A FULL ACCOUNTING OF WHAT HAS TRANSPIRED AND WE 17 HAVE A FULL UNDERSTANDING OF WHY IN FACT THIS INDIVIDUAL 18 IS NOT DEATH ELIGIBLE AT THAT POINT. 19

ALL RIGHT. 20 THANK YOU VERY MUCH. 21 JUDGE EATON? 22

GOOD MORNING. 23 MAY IT PLEASE THE COURT. 24 I'M O.H. EATON JUNIOR, A CIRCUIT JUDGE AND I CHAIR YOUR 25 CRIMINAL COURT COMMITTEE. 26

JUDGE EATON, I NOTE THAT YOUR PAPERS SAY IT IS 43 1 DRAFTED THE PROPOSED RULE IS BOTH PROLIX AND -- PRO LIX 2 AND UNNECESSARILY REDUNDANT. 3 THAT WHAT GOVERNOR COLLINS USED TO SAY PUTS YOU IN THE 4 DOUBTFUL COLUMN? 5

I USE WORDS LIKE IXIE DIXIE TWO. 6 I AGREE WITH JUSTICE QUINCE ABOUT HER LAST REMARKS, NO 7 MATTER WHAT YOU DO, WHEN YOU TRY THESE CASES, YOU'RE 8 GOING TO DEAL WITH THIS ISSUE TWICE. 9 EITHER GOING TO DEAL WITH IT BEFORE TRIAL AND DURING THE 10 PENALTY PHASE ORDEAL WITH IT DURING THE PENALTY PHASE 11 AND POST TRIAL. 12 THAT'S THE FIRST

THING. 13

WHAT ABOUT YOUR -- I NOTE THAT THE COMMITTEE HAS COME 14 UP WITH A, ANY INFORMATION ELICITED DURING A HEARING ON 15 MENTAL RETARDATION SHALL BE USED ONLY IN DETERMINING IF 16 THE DEFENDANT IS MENTALLY RETARDED. 17 BUT ISN'T THAT JUST FRAUGHT WITH FURTHER LITIGATION ON 18 THAT ISSUE? 19

WELL YOU KNOW, JUSTICE, I HAVE TRIED THESE CASES. 20 AND TO GIVE A DEFENDANT AN OPPORTUNITY TO MAKE THE 21 DECISION AS TO WHETHER OR NOT HE WANTS TO BRING IT UP 22 BEFORE TRIAL, OR WHETHER HE WANTS TO WAIT AND BRING IT 23 UP DURING THE PENALTY PHASE IS A DECISION THAT DEFENSE 24 LAWYERS MAKE. 25 THEY MAKE THESE KINDS OF DECISIONS ALL THE TIMES. 26

BUT I SIT UP HERE MONTH IN AND MONTH OUT, AND SEE ALL 44 1 OF THESE ARGUMENTS ON INEFFECTIVE ASSISTANCE OF COUNSEL. 2 NOW, HOW -- HOW ARE WE GOING TO GET A, SOME TYPE OF 3 WAIVER HERE ON MENTAL RETARDATION BY A MENTALLY RETARDED 4 PERSON? 5

I DON'T THINK IT IS A WAIVER ISSUE. 6 I REALLY DON'T. 7 YOU EITHER CHOOSE TO USE THE RULE OR NOT USE THE RULE. 8

IT IS A WAIVER WHETHER YOU'RE GOING TO DO IT PRIOR TO 9 THE GUILT PHASE AND HAVE THE DEFENDANT EXPOSED TO 10 EXPERTS THAT ARE GOING TO BE QUESTIONING THAT PERSON ON 11 HIS ADAPTIVE BEHAVIOR, WHICH CAN AFFECT THE GUILT PHASE. 12 ISN'T THAT RIGHT? 13

WELL THAT'S TRUE, BUT ANY TIME YOU HAVE A CHOICE 14 BETWEEN TWO THINGS AND YOU CHOOSE ONE, DOES THAT MEAN 15 YOU WAIVE THE OTHER? 16 I THINK IT MEANS YOU MADE AN AFFIRMATIVE CHOICE. 17 LET ME GIVE YOU AN EXAMPLE FOR INSTANCE OF WHAT MAY 18 HAPPEN UNDER THIS RULE THE WAY IT IS PRESENTLY 19 PROMULGATED. 20 LET'S ASSUME YOU HAVE A DEFENSE LAWYER HE IS NOT GOING 21 TO TRY TO SWAY THE JURY. 22 INSTEAD HE WANTS TO WIN THE ISSUE OF MENTAL RETARDATION 23 AT TRIAL. 24 SO WHAT HE DOES, HE DOES NOT COMPLY WITH RULE 3.20 2:HE 25 DOES NOT DISCLOSE ANY EXPERTS BECAUSE HE DOESN'T WANT TO 26 CALL ANY. 45 1 AND YOU ONLY HAVE TO DISCLOSE UNDER THAT RULE IF YOU'RE 2 GOING TO CALL THEM. 3 INSTEAD, AND BY THE WAY HE DOES COMPLY, FILES HIS NOTICE 4 AND CLAIMS THAT HE WANTS TO HAVE MENTAL RETARDATION 5 DECIDED. 6 SO DURING THE PENALTY PHASE OF THE TRIAL HE PRODUCES THE 7 FOLLOWING EVIDENCE. 8 HE INTRODUCES INTO EVIDENCE A BUSINESS RECORD FROM A 9 DOCTOR THAT SAYS THAT THERE HAS BEEN AN EVALUATION DONE 10 AND THE DEFENDANT HAS AN IQ OF 60 AND THAT HE HAS BEEN 11 MENTALLY RETARDED SINCE AN EARLY AGE. 12 HE ALSO PUTS ON HIS MOTHER, THE DEFENDANT'S MOTHER AND 13 SHE TESTIFIES THAT THE DEFENDANT WENT TO SPECIAL 14 EDUCATION CLASSES, THAT HE NEVER GRADUATED FROM HIGH 15 SCHOOL. 16 THAT HE CAN BARELY READ AND WRITE. 17 AND NOT ONLY THAT, BECAUSE IT'S ADMISSIBLE IN THE 18 PENALTY PHASE, THE HEARSAY STATEMENT AND HIS DOCTOR TOLD 19 ME HE'S MENTALLY RETARDED. 20 NOW AT THAT POINT, THE DEFENSE SITS DOWN. 21 THE STATE HAS NO WAY TO REBUT THAT. 22 BECAUSE UNDER THIS RULE, THEY DON'T GET TO DO ANY 23 EXAMINATIONS UNTIL AFTER THE TRIAL. 24 SO AT THAT POINT, THE DEFENSE LAWYER STANDS UP AND SAYS 25 I WANT JUDGMENT. 26 NOT BECAUSE THIS IS THE ULTIMATE MITIGATOR. 46 1 THIS IS A CONSTITUTIONAL BAR, YOU CANNOT EXECUTE A 2 PERSON WHO IS MENTALLY RETARDED. 3 NOW DIFFERENT JUDGES MAY HANDLE THAT THING DIFFERENT 4 WAYS. 5 BUT YOU'D BE AWFULLY TEMPTED TO SAY YOU'RE RIGHT. 6

ARE YOU THEN SUGGESTING THAT IT IS SOMETHING THAT CAN 7 EITHER -- THAT THE JUDGES IN CONJUNCTION WITH THE 8 EMPLOYER SHOULD BE ABLE TO SAY WE COULD DO IT PRE-TRIAL 9 OR DO IT POST TRIAL? 10

I THINK THE ONLY WAY TO DO IT THAT MAKES ANY SENSE IS 11 TO DECIDE IT PRE-TRIAL. 12 WE DECIDE A LOT OF THESE ISSUES PRE-TRIAL. 13 WE DECIDE IF THE PERSON IS 15 YEARS OF AGE PRE-

TRIAL. 14 WE DECIDE IF THE EXCLUSION EXISTS PRE-TRIAL. 15 WE DECIDE IF A CO-DEFENDANT IS MORE CULPABLE THAN THE 16 PRESENT DEFENDANT. 17 WE DECIDE THAT PRE-TRIAL. 18

BUT YOU DECIDE THAT EDMUND TYSON AFTER TRIAL. 19 I GUESS MY CONCERN IS, OBVIOUSLY I HAVEN'T TRIED DEATH 20 PENALTY CASES, YOU HAVE. 21 AS THE RECORD GETS DEVELOPED, AS YOU START WITH 22 PRE-TRIAL AND THERE YOU HAVE THE DEFENSE LAWYERS STILL 23 FOCUSING ON THE GUILT, SO THEY PUT ON SOME EVIDENCE. 24 BUT AS YOU GO AND YOU PREPARE FOR THE PENALTY PHASE, 25 ISN'T THERE A BETTER ADVANTAGE POINT AFTER YOU HAVE SEEN 26 THE ENTIRE TRIAL AND THE ENTIRE PENALTY PHASE TO BE ABLE 47 1 TO REALLY MAKE AN APPROPRIATE ASSESSMENT WHILE YOU SAT 2 THERE FOR WEEKS OR MONTHS AS OPPOSED TO IN A HEARING 3 THAT IS BEING DONE, WHEN YOU REALLY HAVEN'T HAD A 4 CONNECTION WITH THE CASE? 5 I MEAN ISN'T THAT -- YOU'RE JUST GOING TO HAVE MORE 6 INFORMATION AVAILABLE. 7 AND AS WAS STATED EARLIER, THERE WILL BE A BETTER RECORD 8 FOR WHOEVER GETS TO REVIEW IT TO REALLY LOOK AT ALL OF 9 THE EVIDENCE THAT IT WAS AVAILABLE. 10

BUT IT REALLY ISN'T THAT WAY. 11 THE TWO ISSUES ARE NOT REALLY CONNECTED. 12 THE FACTS OF THE CASE ARE, AND I AGREE WITH COUNSEL. 13 THE FACTS OF THE CASE IN THESE SITUATIONS ARE NOT 14 CONNECTED WITH THE ISSUE OF WHETHER OR NOT THIS PERSON 15 IS MENTALLY RETARDED. 16 AND THAT CAN BE DECIDED AT A HEARING, IT CAN BE DECIDED 17 PRE-TRIAL. 18

SO YOU DON'T THINK THAT IF YOU HEARD THIS DEFENDANT 19 HAD BEEN ENGAGED IN THESE HIGH FINANCE PLANNING OF THE 20 CRIME, THAT THAT WOULD AT LEAST, THAT WOULD BE EVIDENCE 21 THAT MIGHT REBUT OR BE SOMETHING THE STATE WOULD WANT TO 22 PUT ON TO SHOW, YOU KNOW, IN FACT THIS DEFENDANT DID 23 HAVE --. 24

THEY PROBABLY WILL AND PROBABLY PUT IT ON AT THE 25 HEARING. 26 BUT YOU'RE GOING TO LITIGATE THE ISSUE TWICE. 48 1 DOESN'T MAKE ANY DIFFERENCE. 2 YOU CAN EITHER LITIGATE IT BEFORE TRIAL AND AT THE 3 PENALTY PHASE OR LITIGATE IT AT THE PENALTY PHASE AND 4 AFTER TRIAL. 5 WHAT YOU DO IF YOU DO IT THE LAST WAY --. 6

WHAT ABOUT MR. MCCLAIN'S ARGUMENT, IF WE COULD 7 SWITCH, SINCE TIME IS RUNNING OUT, AS TO THE 3.851, 8 PUTTING IT IN 3.851 AND THE PROBLEM OF BEING ABLE TO 9 GIVE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM? 10 TO THE DEFENDANT? 11 COMING OUT OF THAT DETERMINATION, WOULD THESE PEOPLE 12 THAT WE HAVE ALREADY TRIED AND WE HAVE GOT A LOT OF 13 PEOPLE ON DEATH ROW, YOU SEE ANY ANSWER TO THAT 14 CONUNDRUM? 15

ARE YOU TALKING ABOUT THE WAY THE RULE, HOW IT DEALS 16 WITH THESE DIFFERENT CATEGORIES OF PEOPLE? 17 YES, IN FACT WE MADE A RECOMMENDATION. 18 THERE ARE A CERTAIN NUMBER OF PEOPLE ON DEATH ROW NOW 19 THAT PROBABLY HAVE 3.851 CLAIMS FLOATING AROUND THE 20 COURT. 21 WE HAVE SUGGESTED THERE IS NOT A REASON TO CROW A RULE 22 FOR THOSE -- INCLUDE A RULE FOR THOSE CASES. 23 BUT THIS THERE ARE IS CERTIFY NINTH NUMBER OF CASES, 24 ONCE DECIDED THEY ARE GONE. 25

AS I UNDERSTAND IT, HIS POSITION IS WE HAVE SAID THAT 26 THERE IS NO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN 49 1 POST CONVICTION. 2 HOWEVER, IN RAISING THIS ISSUE, IN POST CONVICTION, DOES 3 A DEFENDANT HAVE A RIGHT TO AND INEFFECTIVE ASSISTANCE 4 OF COUNSEL CLAIM AS TO THE PRESENTATION OF MENTAL 5 RETARDATION? 6

I DON'T THINK THAT THAT'S THE WAY TO APPROACH IT. 7 BECAUSE WE ARE TALKING NOW JUSTICE WELLS ABOUT A 8 CONSTITUTIONAL BAR. 9 WE ARE NOT TALKING ABOUT ANYTHING ELSE. 10 SO THERE IS NO REASON WHY YOU CAN'T AMEND 3.851 LIKE WE 11 SUGGESTED. 12 AND THAT IS JUST GIVE THESE PEOPLE A RIGHT TO RAISE THE 13 ISSUE. 14 JUST LET THEM RAISE IT. 15 HOW MANY OF THEM ARE THERE GOING TO BE? 16 AS YOU KNOW, THERE IS VERY FEW THAT ARE GOING TO MEET 17 THE THRESHOLD. 18 SO, JUST DEAL WITH THEM AND GET THEM OVER WITH

AND THEN 19 YOU'RE THREW WITH THEM BECAUSE YOU WILL NEVER HAVE THEM 20 AGAIN. 21

WOULD YOU SPEAK TO THE BURDEN OF PROOF? 22

YES, SIR. 23 I FILED A NOTICE OF RELIANCE ON ADDITIONAL AUTHORITY 24 BECAUSE THAT WAS A PARTICULAR CONCERN OF MINE. 25 THERE IS A CASE I CITED IN THERE, RELIANCE INSURANCE 26 COMPANY CASE THAT CITES SEVERAL CASES. 50 1 AND THEY VERY SPECIFICALLY STATE THAT THE BURDEN OF 2 PROOF IS PROCEDURAL. 3 AND I DON'T NEED TO ARGUE IT ANY FURTHER. 4 WHEN YOU READ THEM I THINK YOU WILL AGREE WITH ME, 5 THAT'S WHAT THEY SAY. 6

WHAT ABOUT AS TO THE DEGREE THOUGH CLEAR AND 7 CONVINCING VERSUS? 8

IF YOU READ COOPER VERSUS OKLAHOMA, I THINK THAT'S A 9 DEAD DEAL. 10 TO MAKE IT CLEAR AND CONVINCING EVIDENCE INSTEAD OF 11 PREPONDERANCE OR THE WAY THE WORDING OF THE STATUTE IS 12 ACTUALLY I THINK IT IS JUST BEING CLEARLY, OR REASONABLY 13 CONVINCED THAT THE MITIGATING FACTOR HAS BEEN 14 ESTABLISHED IS ENOUGH. 15 I DON'T EVEN THINK IT IS A PREPONDERANCE OF THE 16 EVIDENCE. 17 BUT THIS SHOULD BE A PREPONDERANCE OF THE EVIDENCE 18 STANDARD. 19 IT IS THAT WAY IN MOST OTHER STATES. 20 AND YOU HAVE THE AUTHORITY TO DO THAT AND YOU SHOULD DO 21 IT. 22

I KNOW WE HAVE CASES WHERE WE SAID IT IS PROCEDURAL. 23 BUT IF, IF IT IS PROCEDURAL THEN THAT WOULD INDICATE WE 24 HAVE A CHOICE AS TO WHETHER IT'S CLEAR AND CONVINCING OR 25 IT IS PREPONDERANCE OF THE EVIDENCE. 26 BUT YOU'RE RAISING A CONSTITUTIONAL CONCERN. 51 1

IF YOU READ COOPER VERSUS OKLAHOMA LIKE I DID, THERE 2 IS NOT ANY CHOICE. 3

SO, IT IS REALLY NOT A PROCEDURAL ISSUE. 4 IT IS A CONSTITUTIONAL SUBSTANTIVE ISSUE? 5

IT IS. 6 BUT BECAUSE IT'S PROCEDURAL, YOU DON'T HAVE TO WAIT FOR 7 THE CASE. 8 YOU CAN DO IT NOW. 9

ALL RIGHT. 10 JUDGE EATON, THANK YOU VERY ARE MUCH. 11 THANK AWFUL YOU VERY MUCH FOR ENGAGING IN THIS DIALOGUE 12 ABOUT A VERY, VERY IMPORTANT ISSUE THAT THE COURT WILL 13 FACE. 14 THANK YOU VERY MUCH. 15 WE ARE GOING TO TAKE OUR MORNING RECESS AT THIS TIME. 16 AND WE WILL RETURN IN 15 MINUTES FOR THE NEXT CASE.