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## Melvin Trotter v. State of Florida

MARSHAL: PLEASE RISE . HEAR YE.HEAR YE.HEAR YE.THE SUPREME COURT OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES , THE GREAT STATE OF FLORIDA AND THIS HOW SOONABLE COURT. -- AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING LADIES AND GENTLEMEN AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THIS MORNING'S DOCKET IS TROTTER VERSUS STATE OF FLORIDA . MR. CANON , YOU MAY PROCEED.

MADAM CHIEF JUSTICE , ASSOCIATE JUSTICES , MY NAME IS PETER CANNON ON BEHALF OF MELVIN TROTTER . MAY IT PLEASE THE COURT. THE STATE STANDS BEFORE THIS SUPREME COURT DENYING THAT IT FOUND MR . TROTTER GUILTY 30 YEARS AGO , PURSUANT TO LAW AND RELYING ON LITIGATION. 30 YEARS AGO THE STATE OF FLORIDA FOUND MR . TROTTER DECLARED RETARDED BY LAW . IT PLACED HIM IN EMERGENCY CLASSES AND EDUCATED HIM SO HE COULD BECOME A PRODUCTIVE MEMBER OF SOCIETY TO FIGHT HIS MENTAL RETARDATION.

MR . CANON , WE ARE HERE AFTER A TRIAL COURT'S DETERMINATION THAT HE WAS NOT MENTALLY RETARDED , CORRECT?

CORRECT.

SO IN THE LIGHT MOST FAVORABLE TO THE STATE , WHAT WAS THE EVIDENCE CONCERNING HIS MENTAL RETARDATION ?

WELL , CONSIDERING THE TRIAL COURT'S ORDER , THE EXPERTS THAT WERE CALLED, FOUND THAT MR . TROTTER IS NOT MENTALLY RETARDED TODAY. HOWEVER , UNDER ATKINS , UNDER OUR RULE , THAT IS NOT RELEVANT , WHETHER MR . TROTTER IS MENTALLY RETARDED TODAY IS TOTALLY YOU KNOW , IS TOTALLY UNRELATED TO WHETHER HE WAS RETARDED AT THE TIME OF THE OFFENSE AND WHETHER HE WAS RETARDED PRIOR TO THE AGE OF 18.

DO WE ORDINARILY THINK OF MENTAL RETARDATION AS SOMETHING THAT COMES AND GOES , OR CHANGES? IS THAT , DID ANY OF THE EXPERTS IN THIS CASE TESTIFY THAT THIS IS A CHANGING CONDITION, BECAUSE ISN'T THAT ONE OF THE UNDERPINNINGS OF THE U.S. SUPREME COURT'S DECISION IN ACINSIDE, IS THAT THIS IS A -- IN ATKINS , IS THAT THIS IS A PERMANENT CONDITION THAT, THE DEFENDANT REALLY HAS NO CONTROL OVER , AND THAT BECAUSE OF THAT IMPAIRMENT, THAT THE DEATH PENALTY CANNOT BE CONSTITUTIONALLY IMPOSED , SO I AM HAVING A LITTLE DIFFICULTY WITH THAT PROPOSITION, THAT BECAUSE AT SOME POINT AN EXAMINER OR EXPERT OR ADMINISTRATIVE BODY OR WHATEVER , DETERMINED THAT THERE MIGHT BE MENTAL RETARDATION . IN FACT, IN THIS CASE , ISN'T IT CORRECT THAT A NUMBER OF MENTAL HEALTH EXPERTS TESTIFIED AND FORMED THE BASIS, THEN , OF THE TRIAL COURT'S CONCLUSION THAT THE DEFENDANT IS NOT MENTALLY RETARDED, A SUBSTANTIAL NUMBER OF MENTAL HEALTH EXPERTS.

CORRECT , AND GOING BACK , MR IS A VERY DIFFICULT DIAGNOSIS. THERE ARE THREE COMPONENTS. THE TWO THAT WE HAVE THE MOST TROUBLE WITH , WHETHER THE IQ SCORES FALL WITHIN THE RANGE AND WHETHER THAT PERSON HAS ADAPTIVE SKILLS , THOSE DO CHANGE

GE, AND THEY ARE FLUID. WE LIKE TO THINK THAT IQ IS STAT YOU CAN, AND THAT IS WHAT THE -- IS STATIC, AND THAT IS WHAT THE SUPREME COURT SAYS. IF CORRECT, THE CRYSTALIZED G, THE INTELLIGENCE OF SOMEBODY, CAN OR USUALLY DOES STAY STATIC. HOWEVER, THERE ARE CERTAIN ENVIRONMENTAL FACTORS, AND ANY PARENT WHO HAS A MENTALLY RETARDED CHILD WILL TELL YOU THAT CHANGES, AND THAT IS WHY WE HAVE SUCH PERHAPS, AND ONE OF THE PROGRAMS THAT THE STATE OF FLORIDA HAS RIGHT NOW FOR MR. TROTTER IS DEATH ROW, AND A PERSON ON DEATH ROW IS IN THE HIGHEST STRUCTURED ENVIRONMENT IN OUR SOCIETY.

CHIEF JUSTICE: LET'S GET BACK TO THE FACTS OF THIS CASE. YOU MADE A VERY BROAD STATEMENT THAT THE STATE OF FLORIDA HAD DECLARED HIM TO BE MENTALLY RETARDED, BUT, AND THE TRIAL COURT, IN A VERY THOROUGH ORDER, SPECIFICALLY TALKED ABOUT THE 1976 FINDINGS OF, IT WAS DOCTOR, I AM SURE YOU KNOW WHICH DOCTOR, THAT THEY FOUND HIM TO BE NORMAL AND MATURE FOR HIS AGE, ABLE TO FOLLOW COMPLEX VERBAL DIRECTIONS AND SO ON, AND SO THAT EVEN RETROSPECTIVELY, LOOKING AT WHAT WAS THERE BEFORE 18, IT WASN'T AS IF THIS WAS SOMEBODY THAT WAS JUST SIMPLY FOUND MENTALLY RETARDED AND THEN THERE WAS NO DEBATING THAT THROUGHOUT HIS YOUNGER YEARS. DO YOU AGREE WITH THAT?

WELL, THAT WOULD BE THE TESTIMONY OF DR. PINKARD.

CHIEF JUSTICE: THAT IS IMPORTANT, BECAUSE DR. PINKARD IS THE DOCTOR THAT LOOKED AT HIM BEFORE HE WAS 18, SO, AGAIN, YOU STARTED WITH THIS BROAD STATEMENT ABOUT WHAT HAPPENED 30 YEARS AGO, SO I WANTED YOU TO, TO DRAW ATTENTION TO THAT FINDING THAT, ALSO, WAS THERE PRE-18.

CORRECT. PRE-18, THERE WERE, SINCE WE HAVE BEEN NEGLECTING IN THIS CASE, WHEN MR. TROTTER WAS BARELY 14 YEARS OLD, HE SCORED TWICE WITHIN THE MENTALLY RETARDED AGE. WE HAVE THOSE IQ SCORES. UNRELATED TO DR. PINKARD'S SCORE OF 88, 69 AND AROUND 72. THOSE SCORES HAVE NOT BEEN TOUCHED BY ANY EXPERTS.

CHIEF JUSTICE: BUT THEY WERE EXPLAINED, BECAUSE APPARENTLY THIS IS A YOUNG MAN THAT HAS NOT BEEN PUT IN SCHOOL UNTIL HE WAS NINE YEARS OLD, AND THERE WERE OTHER ISSUES OF DEVELOPMENTAL DELAYS, SO ALTHOUGH, AGAIN, YOU ARE NOT QUESTIONING WHETHER THIS IS A QUESTION OF BRAIN DYSFUNCTION OR SIMPLY THE FACT OF DELAY BECAUSE HE HAD BEEN BELATEDLY PLACED IN SCHOOL.

CORRECT, BUT THE AMR AND VARIOUS OTHER ORGANIZATIONS, THAT IS ONE OF THE FOUR RISK FACTORS, WHICH IS EDUCATION, BIOLOGICAL, SOCIAL, AND SO FORTH. THAT, WE DON'T KNOW WHAT CAUSE MR. THERE ARE A VARIETY OF CONDITIONS THAT CAN CAUSE MR. ALL THAT WE HAVE AS OUR DEFINITION, IS THE IQ SCORE, THE ADAPTIVE SKILLS AND ONSET. WHATEVER CAUSE THAT, THAT PERSON IS MR. NOW, WE DO, WE, ALSO, DR. PINKARD DID TESTIFY ABOUT DIAGNOSES THAT HE MADE ABOUT INAPPROPRIATE PERSONALITY, AND THAT WOULD FIT UNDER THE DEFINITION OF MR.

CHIEF JUSTICE: NOW, I UNDERSTAND THAT YOU HAVE TO ARGUE AS FORCEFULLY AS YOU CAN FOR YOUR CLIENT, BUT EVEN IF THERE WAS A FINDING THAT THERE WAS MENTAL RETARDATION ON SET PRE-18, THAT IS NOT THE END OF THE ATKINS AND THE STATE OF FLORIDA, AND THIS COURT'S, AS MANDATED BY THE LEGISLATURE'S TEST, AS TO WHETHER SOMEBODY IS MENTALLY RETARDED, CORRECT? THERE IS ADAPTIVE SKILLS ASPECTS. WHAT IS THE TESTIMONY ON THAT, IN THE LIGHT MOST FAVORABLE TO THE STATE, ABOUT HIS ADAPTIVE SKILLS AND HOW IT RELATED TO ANY ALLEGED MENTAL RETARDATION?

THE LIGHT MOST FAVORABLE TO THE STATE, PRIOR TO 18 HE WAS EXACTLY WHAT YOU NOTED, MADAM CHIEF JUSTICE, WHICH WAS, WAS IT BECAUSE OF HIS BEING PLACED IN SCHOOL SO

LATE? HIS HORRIBLE, HORRIBLE UPBRINGING, LI STEN ENVIRONMENT. IF I AM ANSWERING YOUR ANSWER CORRECTLY , HOWEVER , WITH THAT ANSWER WE LOOK BACK AND SEE, WELL , HOW DID HE DO, ONCE HE WAS IN HIS EMR CLASSES , EMOTIONALLY , MENTALLY RETARDED CLASSES. HE WAS DOING FINE. ONCE HE WAS TAKEN OUT AND PLACED BACK INTO REGULAR CLASSES , HE STARTED FAILING AGAIN. HE COULD NOT KEEP UP WITH THE REGULAR STUDENTS , AND THEN HE WAS PLACED BACK IN. THESE EMR CLASSES WERE NOT JUST SLOWER CLASSES AND SO FORTH. THEY WERE DESIGNED FOR --

CHIEF JUSTICE: I CAN'T HELP BUT FEEL THAT YOU ARE STILL PICKING THE PART THAT FAVORED YOU THAT WE ARE HERE , AS JUSTICE CANTERO SAID , TO REVIEW A TRIAL COURT'S ORDER THAT MADE FINDINGS OF FACT , BASED ON , AS JUSTICE ANSTEAD SAID, NUMEROUS EXPERTS THAT DISPUTE WHAT YOU ARE SAYING , AND CERTAINLY AS FAR AS HIS ADAPTIVE FUNCTIONING . AND SO HOW DO YOU GET AROUND THAT, I GUESS?

WELL , WE, ALSO, HAVE THE REPORT THAT WAS PLACED INTO EVIDENCE OF DR . LORRENTE , WHICH WAS CITED BY BOTH DEFENSE AND THE ATTORNEY GENERAL. I WOULD LIKE TO STATE , WITH REGARDS TO THEIR STATEMENT IN THEIR BRIEF, WITH REGARDS TO, EXCUSE ME , DR . LORRENTE'S TESTIMONY, THEY CITE A PARAGRAPH WHERE HE GOES THROUGH AND THERE IS DIFFICULTY WITH THIS DIAGNOSIS, AND I AM GOING TO BE CANDID AND ADMIT THAT MR IS A DIFFICULT DIAGNOSIS, AND WITH REGARDS TO MR . TROTTER , THIS IS A DIFFICULT DIAGNOSIS. HOWEVER, WHEN THEY GO THROUGH DR. LORRENTE STATES, WELL , WE DON'T KNOW WHAT CAUSED HIS ADAPTIVE DELAYS . IT COULD HAVE BEEN BECAUSE OF HIS LATE SCHOOLING AND SO FORTH.

CHIEF JUSTICE: I AM LOOKING AT 19 AND 20 OF THE TRIAL COURT ORDER BEGINNING WITH DR . PINKARD SAYING HE WAS NOT SUFFERING FROM PSYCHOLOGICAL COMPLEX. HIS EMOTIONAL DEVELOPMENT WAS NORMAL AND MATURE FOR A YOUNGSTER FOR HIS AGE. DR. CROPP, WHO LOOKED AT EVERYTHING, SAID THAT HE FOUND THAT HE WASN'T MENTALLY RETARDED AND DR . LLORENTE SAID , THOUGH , TALKED ABOUT HIS OTHER SKILLS, SUCH AS CONCEPTION , CONCEPTUAL REASONING IN MY OPINION ARE NOT CONSISTENT WITH MENTAL RETARDATION , AND HE WENT ON AND ON , SO HE , ALSO, FOUND NO DEFICIT IN ADAPTIVE FINDINGS, WHICH IS ANOTHER FUNCTIONING , WHICH IS ANOTHER PRONG THAT YOU HAVE TO MEET , EVEN IF YOU GET BY THE ONSET BEFORE 18, THAT IS CURRENT , THE ADAPTIVE FUNCTIONING OF THE PERSON AFTER AGE 18.

AFTER 18 , IT IS IRRELEVANT. ONCE WE HAVE ESTABLISHED MR BEFORE THE AGE OF 18 , WE DON'T SAY, OKAY, NOW HE IS RETARDED BACK BEFORE 18. IS HE RETARDED NOW .

CHIEF JUSTICE: YOU HAVE THE IQ SCORE THAT MAY SHOW MENTAL RETARDATION, BUT WHAT ARE THE OTHER TWO PRONGS THAT HAVE TO BE MET, IN ORDER TO FIND MENTAL , THAT THIS IS , A GAIN , NOT AS A MITIGATOR.

SURE.

CHIEF JUSTICE: BUT AS TO WHETHER THEY ARE NOT IN THIS STATE EXECUTE SOME BODY WHO IS MENTALLY RETARDED. WHAT ARE THE OTHER TWO PRONGS?

WE HAVE TO SHOW THAT THERE ARE DEFICITS IN ADAPTIVE FUNCTIONING - -

CHIEF JUSTICE: WHEN? BEFORE 18 OR NOW?

BEFORE 18.

CHIEF JUSTICE: NOTHING RELATES TO HOW THE PERSON DOES AS AN ADULT?

ABSOLUTELY NOT.

WHERE DOES IT SAY THAT, IN THE STATUTE OR SUPREME COURT CASES THAT THAT DYSFUNCTIONING HAS TO BE TAKEN BEFORE 18?

THAT IS CLEAR IN ATKINS.

IT SEEMS TO ME WHAT IS CLEAR IS ONSET HAS TO BE BEFORE 18.

CORRECT.

THAT IS THE ONLY PRONG, FROM WHAT I READ, THAT DETERMINES MENTAL RETARDATION BEFORE 18. EVERYTHING ELSE, THE IQ SCORE CAN BE DETERMINED AFTER 18, AND THE ADAPTIVE FUNCTIONING CAN BE DETERMINED AFTER 18. IT IS ONLY THE ONSET THAT IS BEFORE 18.

IN ONSET, YOU HAVE TO HAVE THE IQ SCORE, WHICH IS THE INTELLIGENCE, TWO STANDARD DEVIATIONS BELOW, AND THE ADAPTIVE SKILLS BEFORE 18.

RIGHT. YOU HAVE ONLY PROVEN ONE PRONG. IF YOU PROVE ADAPTIVE FUNCTIONING AND IQ SCORES BELOW 70 BEFORE 18, YOU HAVE ONLY PROVEN ONSET BEFORE 18. YOU HAVEN'T PROVEN THE OTHER TWO PRONGS, AND IT SEEMS TO ME THAT TRIAL COURT BASED ITS FINDINGS ON SEVERAL EXPERTS. I KNOW YOU QUOTED DR. EURAN, WHICH WAS A DEFENSE EXPERT. YOU HAVEN'T MENTIONED DR. GAMASH, WHO WAS A STATE EXPERT THAT SAID HE FOUND NO ADAPTIVE BEHAVIOR SUFFICIENT TO MEET DIAGNOSTIC MENTAL CRITERIA.

YES, AND THIS IS A PROBLEM WITH THE TRIAL COURT'S ORDER. FINDINGS OF FACT HAVE TO BE GIVEN GREAT WEIGHT. HOWEVER, WHEN THE TRIAL COURT APPLIES THE LAW ERRONEOUSLY, WHICH IS WHAT THEY HAVE -- WHEN THE TRIAL COURT APPLIES THE LAW ERRONEOUSLY, WHICH IS WHAT THEY HAVE DONE HERE, IS ESTABLISHING THAT THE MR WAS PRESENT BEFORE THE AGE OF 18. ONCE THAT IS DONE, THEN THAT PERSON IS MENTALLY RETARDED.

CHIEF JUSTICE: I THINK WE WILL HEAR FROM THE STATE ON THIS, BUT MY UNDERSTANDING IS THAT YOU DON'T WANT SOMEBODY WHO, REALLY, ALL OF A SUDDEN BE LATELY BECOMES MENTALLY RETARDED. YOU WANT THAT SUBSTANTIAL KNOWLEDGE THAT, AS A CHILD, THIS PERSON WAS DEEMED TO BE MENTALLY RETARDED, BUT IF THE PERSON IS 40 YEARS OLD, I DON'T THINK THERE IS ANYTHING IN WHAT THE SUPREME COURT INTENDED OR THE LEGISLATURE, IN MAKING SURE WE DON'T EXECUTE MENTALLY RETARDED INDIVIDUALS, THAT WOULD NOT HAVE US LOOK AT HOW THAT INDIVIDUAL DID FROM 18 UNTIL THE TIME OF THE CRIME.

WELL, TWO POINTS ON THAT. FIRST, WE HAVE TO REMEMBER THAT 921.137, CAME OUT PRE-ATKINS. THE LEGISLATURE DID NOT HAVE THE BENEFIT OF ATKINS. HOWEVER, WHEN WE LOOK AT ATKINS, IT IS JUST NOT THE EXECUTION OF MENTALLY RETARDED. WHY WOULD ATKINS DECIDE IT THAT WAY. VARIOUS FACTORS. ONE, MORAL CULPABILITY. WHAT WAS THE CULPABILITY OF THE PERSON AT THE TIME OF THE CRIME. TWO --

CHIEF JUSTICE: WITH THAT IN MIND, WHY WOULDN'T YOU WANT TO KNOW WHETHER THEY CURRENTLY, AT THE TIME OF THE CRIME, WERE DEEMED TO BE MENTALLY RETARDED?

WELL, BECAUSE IF WE READ ATKINS, WE DISCUSS MORAL CULPABILITY WITH REGARDS TO OTHER DEFENDANTS SENTENCED AT THAT TIME, NOT EXECUTION. THEY TALK ABOUT, WELL, WE SHOULDN'T BE EXECUTING THOSE WHO ARE MENTALLY RETARDED, BUT THE MORAL CULPABILITY AT THE TIME, FOR EXAMPLE THEY GO INTO DISCUSSION OF CODEFENDANTS AND SO FORTH. HOWEVER, ONE OF THE MOST IMPORTANT DISCUSSIONS IN ATKINS IS THE FACT THAT THE CURRENT PROCEDURAL PROTECTIONS WE HAVE NOW UNDER THE CONSTITUTION, UNDER THE RULES, ARE INSUFFICIENT TO PROTECT THOSE WHO ARE MENTALLY RETARDED DURING

TRIAL, AND THAT IS ONE , AGAIN , ANOTHER ONE OF THE REASONS WHY ATKINS WAS DECIDED THAT WAY , IS BECAUSE THOSE WHO ARE MENTALLY RETARDED HAVE DIFFICULTY IN COMMUNICATING WITH THEIR ATTORNEYS. THEY ARE SUBJECT TO ATTACK BY THE PROSECUTION.

CHIEF JUSTICE: HOW OLD WAS THIS DEFENDANT, WHEN HE COMMITTED THE CRIME?

25 YEARS OLD.

CHIEF JUSTICE: ARE YOU SAYING, AGAIN, THAT YOU DO NOT LOOK AT ANYTHING BETWEEN 18 AND 25?

ONCE YOU HAVE ESTABLISHED THAT HE WAS MENTALLY RETARDED PRIOR TO 18 , THAT IS IT. YOU CANNOT BECOME , AND NO EXPERT CAN TELL YOU THAT , ONCE YOU ARE RETARDED , YOU BECOME UNRETARDED . THAT IS IMPOSSIBLE.

ISN'T THAT EXACTLY WHAT EXPERTS HAVE SAID , BECAUSE IN THIS CASE , BECAUSE IF YOU ARE CORRECT THAT HE WAS MENTALLY RETARDED BEFORE 18 , THESE EXPERTS HAVE UNEQUIVOCALLY OR AT LEAST SOME OF THEM HAVE SAID THAT HE IS NOT MENTALLY RETARDED NOW. SO --

CORRECT.

SO ASSUMING YOUR PREMISE THAT HE WAS MENTALLY RETARDED BEFORE 18, THAT IS EXACTLY WHAT THEY ARE SAYING , THAT HE IS NOT MENTALLY RETARDED NOW.

THAT IS INCORRECT , AND THAT IS ONE OF THE REASONS THAT THE COURT'S ORDER? CORRECT. THAT DR . G AMASH FOCUSED ALMOST EXCLUSIVELY ON HIS CURRENT MENTAL STATE, AND THAT IS INCORRECT .

DOESN'T ATKINS FOCUS ON THE CULPABILITY OF THE DEFENDANT, AT THE TIME OF THE OFFENSE? THAT IS MUCH LIKE THE ANALOGY TO THE SUPREME COURT RULING , THAT NO PERSON THAT WAS UNDER THE AGE OF 18 , AT THE TIME OF THE OFFENSE , CAN BE EXECUTED. ISN'T THE MENTAL RETARDATION RULING IN ATKINS , SUBSTANTIALLY THAT , BECAUSE OF THE UNDERSTANDING OF A LACK OF CULPABILITY BASED UPON MENTAL DEFECT OF RETARD - - BECAUSE OF THE MENTAL DEFECT OF RETARDATION , THAT WE ARE RULING THAT NO BODY THAT WAS MENTALLY RETARDED AT THE TIME OF THE OFFENSE , CAN BE EXECUTED, AS OPPOSED TO THESE OTHER DISCUSSIONS? ISN'T THAT THE CORE RULING OF ATKINS?

ABSOLUTELY . SIMMONS AND ATKINS .

ISN'T THE FOCUS , THEN , --

TOGETHER.

-- ON THE CONDITION OF THE DEFENDANT AT THE TIME OF THE OFFENSE?

THAT IS WHAT I AM TRYING , EXACTLY. THAT IS THE ARGUMENT . HOWEVER, IF THE PERSON WAS MENTALLY RETARDED --

THAT IS WHOSE ARGUMENT ? IS THAT YOUR ARGUMENT?

WELL, THE ARGUMENT IN SIMMONS AND ATKINS , ABOUT THE MORAL CULPABILITY OF AN INDIVIDUAL AT THE TIME OF SENTENCING, WE ARE NOT TALKING ABOUT EXECUTION OR SO FORTH , BUT AT THE TIME OF SENTENCING, ATKINS AND SIMMONS DO FIT TOGETHER . HOWEVER ,

BECAUSE OF THE TEST TO ESTABLISH MENTAL RETARDATION, DECLARES THAT A PERSON HAS TO BE MENTALLY RETARDED BEFORE THE AGE OF 18. THESE, AGAIN, IT IS CONFUSING. MR IS A VERY DIFFICULT DIAGNOSIS, BUT NOT ONE --

CHIEF JUSTICE: I JUST WANT TO REMIND YOU, YOU CAN COMPLETE YOUR ANSWER HERE BUT YOU ARE USING A LOT OF YOUR REBUTTAL TIME.

YES. I WILL GO AHEAD AND DEFER TO THE STATE NOW.

CHIEF JUSTICE: THANK YOU. CHIEF MR. LANDRY, BEFORE YOU START I NEGLECTED TO STATE THAT JUSTICE QUINCE IS RECUSED ON THIS CASE, GIVING SOME INDICATION OF THE AGE OF THE CASE, SO WITH THAT YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. BOB LANDRY REPRESENTING THE STATE OF FLORIDA IN THIS APPEAL. WITH RESPECT TO THE DISCUSSION THAT WE HAVE HAD SO FAR, IN TERMS OF WHEN IT IS IMPORTANT TO CONSIDER THE DEFENDANT'S RETARDATION. OBVIOUSLY WHAT ATKINS VERSUS VIRGINIA IS ALL ABOUT IS CONCERNING WHETHER OR NOT THE EIGHTH AMENDMENT IS VIOLATED BY THE STATE SEEKING TO EXECUTE SOMEONE WHO HAS, WHO IS MENTALLY RETARDED AND WHO WAS MENTALLY RETARDED AT THE TIME OF THE CRIME. OBVIOUSLY WHAT THE COURT'S CONCERN IS, IS THE CULPABILITY OF THE DEFENDANT AT THE TIME OF THE TRIAL, AT THE TIME OF THE COMMISSION OF THE OFFENSE. CERTAINLY THE CURRENT LEGISLATION, 921.137 TALKS ABOUT THAT THE DEFENDANT BE SHOWN TO HAVE MENTAL RETARDATION. SO OBVIOUSLY WE ARE TALKING ABOUT A SITUATION OF WHAT IS THE STATUS OF THE DEFENDANT, AT THE TIME OF THE COMMISSION OF THE OFFENSE AND AT THE TIME OF THE TRIAL. NOW, THE THREE-PRONG TEST OF MENTAL RETARDATION AS WE HAVE HEARD, IS THREE PART. IT IS A 3-PRONG TEST, INTELLECTUAL FUNCTIONING, ADAPTIVE BEHAVIOR DEFICITS AND ONSET BY AGE 18. NOW, I UNDERSTAND THE ONSET BY AGE 18 COMPONENT TO BE THAT YOU HAVE TO SHOW THAT BOTH OF THOSE PRIOR COMPONENTS ARE SATISFIED AT THAT POINT, SO THAT CONSEQUENTLY, IF THERE ARE NO INDICATIONS AT ALL PRIOR TO AGE 18, AND SOMETIME LATER THE DEFENDANT BECOMES, HAS MENTAL DISEASE OF ONE KIND OR ANOTHER, YOU SIMPLY RULE OUT RETARDATION, BECAUSE IT OCCURS, STARTS AT THAT POINT. HOWEVER, THAT DOES NOT INDICATE THAT WE CAN SIMPLY SAY THAT SOMEONE WHO HAS, WHO IS NOT RETARDED AND CERTAINLY SCORES IN THE '80 -- IN THE 80s AND NINETIES AT THE TIME THAT HE IS IN HIS THIRTIES AND FORTIES, WE DON'T SIMPLY IGNORE ALL OF THAT CURRENT BEHAVIOR.

CHIEF JUSTICE: NOW, IN THIRTIES AND FORTIES. HE COMMITTED THE CRIME AT AGE 25. I DON'T KNOW, I GUESS AS WE GET THESE CASES WE WILL LEARN MORE AND MORE ABOUT MENTAL RETARDATION, JUST LIKE MENTAL ILLNESS, WHERE WE ARE NOT AS EDUCATED AS WE MIGHT OUGHT TO BE, BUT WE WOULD LOOK AT WHAT IS THE SITUATION AT AGE 25, RIGHT, THE COMMISSION OF THE CRIME?

CERTAINLY THAT WOULD BE --

CHIEF JUSTICE: YOU SAID DISCUSSING MORAL CULPABILITY AT THE TIME OF THE CRIME.

CERTAINLY.

CHIEF JUSTICE: SO YOU AND MR. CANON AGREE ON THAT, THAT IS THAT YOU ARE LOOKING AT WHETHER THE PERSON WHO COMMITTED THIS CRIME WAS NOT MORALLY CULPABLE BECAUSE HE OR SHE WAS MENTALLY RETARDED.

RIGHT. I THINK THAT THE ATKINS CONCERN IS WHAT IS THE DEFENDANT'S SITUATION AT THE TIME OF TRIAL AND AT THE TIME OF THE COMMISSION OF THE OFFENSE.

CHIEF JUSTICE: I THINK SOMEBODY WHO IS UNQUESTIONABLY MENTALLY RETARDED, AND E

EVERYONE KNEW AS A CHILD THEY WERE MENTALLY RETARDED , YOU KNOW , WERE BARELY FUNCTIONING , COULDN'T FUNCTION ON THEIR OWN , IT WOULD BE A LITTLE SURPRISING TO SEE THAT, AFTER AGE 18 , THEY HAVE BLOSSOMED AND NOW WERE A FULLY FUNCTIONING ADULT , SO IT IS SORT OF THAT YOU GROW OUT OF MENTAL RETARDATION.

NO.

CHIEF JUSTICE: BUT HERE COULD YOU GIVE US THE PICTURE OF WHAT, FROM THE STATE'S POINT OF VIEW , THE EVIDENCE SHOWED ABOUT THERE WERE SOME TEST THAT IS INDICATED MENTAL RETARDATION. WHAT WAS THE SITUATION WITH THIS DEFENDANT PRE-18?

WELL , LET'S START , I GUESS, WITH DR . PINKARD , AND DR. PINKARD , WHO IS A DEFENSE EXPERT , I GUESS, WHO STILL IS OF THE VIEW , THE ONLY EXPERT WHO IS STILL OF THE VIEW THAT HE HAS THE DISCRETION TO DETERMINE THE DEFENDANT TO BE MENTALLY RETARDED. HE SCORED THE DEFENDANT ON A 88 ON THE WISK TEST , AND AT THAT POINT WHEN HE GAVE HIS TEST, HE DID NOT WRITE A CONCLUSION THAT THE DEFENDANT IS MENTALLY RETARDED. HE TALKED ABOUT THAT THE DEFENDANT HAS AN INADEQUATE PERSONALITY DISORDER. AS NOTED IN HIS ORDER , DR . PINKARD NOTED THAT THE DEFENDANT WAS EMOTIONALLY MATURE FOR HIS AGE , AND --

CHIEF JUSTICE: WHAT ABOUT THAT WHEN HE MADE THOSE FINDINGS?

THAT WAS IN '76. I THINK HE WAS 16 YEARS OLD AT THAT TIME .

YOU HEARD THE OPENING STATEMENT OF YOUR OPPONENT , WHO SAID THAT MANY YEARS AGO , THAT THE STATE OR THE GOVERNMENT HAD DECLARED HIS CLIENT MENTALLY RETARDED . HE IS NOT JUST PICKING THAT OUTFIT THE BLUE , IS HE? HE IS BASING THAT ON SOMETHING. COULD YOU EXPLORE FOR US , WHAT IS HE TALKING ABOUT. WHAT EVIDENCE IS HE TALKING ABOUT?

I THINK WHAT HE IS REFERRING TO IS THE FACT THAT THE DEFENDANT WAS , AT A CERTAIN PERIOD OF TIME WAS IN THE EDUCATIONALLY MENTALLY RETARDED CLASSES IN SCHOOL. NOW, THE EVIDENCE AT THE HEARING INDICATED THAT HE WAS , FOR A PERIOD OF TIME IN THOSE CLASSES, AND THEN THE SCHOOLS MADE A DETERMINATION OR A RECOMMENDATION THAT HE BE RETURNED TO HIS REGULAR CLASSES, BECAUSE HE COULD NOT FIT INTO THAT .

EXPLAIN TO US WHAT, AS OPPOSED TO JUST STATEMENT THAT HE WAS DECLARED EDUCATIONALLY MENTALLY RETARDED OR WHATEVER, WHAT TESTS WERE DONE OR WHAT , WHAT IS BEHIND THAT DETERMINATION , IF ANYTHING , IN OTHER WORDS, WERE THERE RECORDS INTRODUCED IN THIS CASE THAT SHOW IQ TESTS GIVEN AT THE TIME ? OR TESTS OR WHAT BACKS THAT UP?

WELL , THERE ARE EXHIBITS IN THE , INTRODUCED AT THE HEARING , IN WHICH TALKS ABOUT THERE WERE LETTERS OF , YOU KNOW , IN WHICH THE PARENT OR THE STEPPARENT HAD GIVEN PERMISSION THAT HE BE PUT INTO AN EDUCATIONALLY MENTALLY RETARDED CLASS. THERE WERE STATUS REPORTS BY VARIOUS PEOPLE AS TO HIS PROGRESS OR WHAT HIS STATUS WAS IN THOSE CIRCUMSTANCES , AND THE EXHIBITS INDICATED THAT SUBSEQUENTLY A RECOMMENDATION WAS MADE BY ONE OF THE PEOPLE INVOLVED IN IT THAT HE BE RETURNED TO HIS NORMAL CLASSES . I WOULD LIKE TO POINT OUT THAT, IN ADDITION, I THINK ONE OF THE IMPORTANT WITNESSES IN THIS CASE WAS DR. CROPP. DR. CROPP WAS THE DEFENSE MENTAL HEALTH EXPERT AT THE RESENTENCING PROCEEDING , AND HE WAS , HE TESTIFIED AT THE EVIDENTIARY HEARING IN THIS CASE, AND HE TESTED THE DEFENDANT AT ABOUT 72 , I THINK IS WHAT I RECALLED. HE SAID THAT HE WAS NOT RETARDED IN HIS OPINION . WHAT WAS IMPORTANT ABOUT DR. CROPP IN THIS CONTEXT AT THIS POINT , IS DR. CROPP HAD ALL OF THE SCHOOL RECORDS AVAILABLE AT THAT TIME , AND HE WAS VERY , SEEMED TO ME VERY FORCEFUL IN HIS CONCLUSION THAT THE ADAPTIVE FUNCTIONING, THE MATERIAL THAT WAS AVAILABLE THAT

THERE WAS A TEST OF 1 20 DIFFERENT CATEGORIES AS TO HOW --

WH Y ARE YOU STILL TALKING ABOUT THE SCH OOL RECORD S, AND IN ORDER TO PIN THIS DOWN, YOUR OPPONE NT IS MAKING A CLAIM IN ES SENCE THAT HIS CL IENT WAS ADJUDICATED MENTALLY RETARDED BEFORE , AND SO --

NO.

-- RECORDS OR WERE THERE TESTS GIVEN OR OTHER THIN GS THAT WOULD SU PPORT THAT?

I HAVE NO EVIDENCE OR INDICATION IN THE REC ORD THAT THERE WAS ANY ADJUDICATION THAT HE WAS MENTALLY RETARDED . I AM NOT CE RTAIN HOW THINGS WORKED IN THE 196 0s ALL OF THAT, BUT I T COULD HAVE BEEN VOLUNTARY ACTI ONS AND PROGRAMS THAT WERE AVAIL AB LEIN THE SCHOOL SYSTEM .

NO IQ TEST .

HE HAD, WELL , THE MAN ATEE SCHOOL SY STEM IN 19 74 , HAD AN IQ TEST OF 70 , BUT W E DON'T KNOW WHAT THE CIRCUMSTANCE, I MEAN , WE DON'T KNOW WHO ADMINISTERED IT OR, WE DON 'T HAVE THE RAW DATA.

BUT THERE WAS AN IQ TEST , AND APPARENTLY HE MET THE ONE PRO NG AT THAT TIME, I N THAT IQ TEST , OF A SCORE OF 70?

HE HAD A 7 0 SCORE AT THAT TIME , AND PRESUMABLY THE ADMINISTRATORS DECIDED TO SEE WHETHER OR NOT HE WOULD DO BE TTER IN THE ED YOU CABLE MENTALLY RE-- EDUCABLE MENTALLY RETARDED CLASSES.

WHY DON'T WE TAKE A R ULE BY THE LEGISLATURE , AND AT SOME POINT HE HAS MET THE 70 SCORE ON THE IQ TEST , BY THEFACT THAT THE SCHOOL PEOPLE HAVE DETERM INED THAT HE IS NOT FUNCT IONING , THAT HE , THAT THE MENTAL RETARDATION ISN'T AFFE CTING HIS FUN CTIONING AS A ST UDENT OF BELOW NORMAL. WHY, THEN , DON'T WE HAVE A SITUATION WHERE , IN ESSENCE , HE HAS BEEN DETERMINED TO BE MENTALLY RETARDED AT THAT TIME, AND THAT HASN'T CHANGED?

WELL , I DON'T KNOW T HAT HE HAS BEEN DETERMINED TO BE MENTALLY RETARDED AT THAT TIME. I THINK THAT , WHEN YOU DO AN ANALYSIS AND A RE VIEW OF ALL OF THE STUDIES AND WORK THAT HAS BEEN DONE BY DR. CROPP AND EV ERYONE E LSE, THAT AS TO THE SCHOOL RECORDS AND SCORES THAT HE WAS DO ING ON THE ADAPTIVE FUNCTI ONING TEST , 120 QUESTIONS AND ALL OF THAT , PLUS A REVIEW AND DETERMINATION OF HOW HE PERFORMED AND HOW HE DID , HOW HE GOT ALON G IN THE SCHOOL SYSTEM AND WITH OTHERS , IT IS Q U IT E CLE AR THAT THE DEFENDANT FA ILED T O MEET THE ADAPTIVE FUNCTIONING TEST, EVEN WAY BACK T HEN.NOW , DR . PI NKARD , WH OM THEY PLACED A GREAT DEAL OF RELIANCE ON , INDICA TE D THAT IF THE TEST THAT HE G AVE WAS ACCURATE AND THE 88 SKORX HE WOULD NOT QUALIFY AS MENTALLY RETARDED , AND HE INDICATES THAT HIS CURR ENT, THAT THE CURRENT SCORES , CERTAINLY, WOULD NOT PLACE HIM IN THE MENTALLY RETARDED CATEGORY. MATTER OF FACT DR . PIN KARD WAS N EVER EVEN I N FORMED AS TO SOME OF THE HIGH ER, THE LATER SCORES THAT WERE GIVEN , AND BY DR . MOSSMAN AND B Y SOME OF THE OTHE RS. WHEN WE LOO K AT SOME OF THE OTHER DEFENSE EXPERTS , DR . MOSSMAN WAS ONE OF THE EXPERTS CALLED BY T HEDEFENDANT, AND HE SAYS I EVALUATED HIM AND GOT SCORE OF 78 , AND HIS SCORE WAS SO HIGH, I DIDN'T EVEN BOTHER DOING ADAPTIVE FUNCTIONING TESTS BECAUSE MENTAL RETARDATION IS NOT IMPLICATED. WHEN YOU LOOK AT SOME OF T HEOTHERS, DR . GAMASH , THE TRIAL J U DGE PL ACED A GREAT DEAL OF REGARD TO DR . GAMASH'S REPORT BECAUSEOBVIOUSLY IT FI T IN WITH EVERYTHING. DR. GAMASH OBTAINED A SCORE OF 91 O VERALL , AND IN S OME OF THE SCORES , SOME OF THE SUBTESTS THAT WERE GIVEN , THE

DEFENDANT WAS SUPERIOR , IN ART APPRECIATION , DR AWING AND ARTISTIC AND ENDEAVORS AND THINGS OF THAT NAT URE . DR. GAMASH CONCLUDED THAT , IF HIS SCORES IN THAT AREA WERE ACROSS THE BOARD IN OTHER AREAS, HE WOULD HAVE AN IQ OF 120! NOW, BOTH DR . GAMASH AND DR . LLORENTE AND DR. CROPP AND DR . ME LON, THEY , ALL , DESCRIBE THESE THINGS AS WHEN YOU SEE MENTAL RETARDATION, YOU GENERALLY SEE FLAT LINE APPROACHES ACROSS THE BOARD ON THE SUBTESTS, AND THE EXPERT'S OPINION IS , THAT IS BASICALLY INCONSISTENT , TO HAVE SOME SCORES FLUCTUATING AT THE AGREE TO WHI CH WE HAVE HE RE.

DID THE TRIAL COURT Z ERO IN ON ANY PARTICULAR TIME? YOU KNOW, WE HAVE TALKED ABOUT THE EARLIER TIME W HEN HE WAS IN SCHOOL , AND WE HAVE TALKED ABOUT THE TIME OF THE OFFENSE . NOW WE HAVE TALKED A BOUTLATER, IN TE RMS OF WHETHER OR NOT HE CAN BE EDUCATED , EXECUTED IF HE IS DETERMINED TO BE MENTALLY RETARDED . DID THE TRIAL COURT FOCU S ON ANY ONE OF THOSE TIMES , OR WAS IT AT THE TIME OF THE EVIDENTIARY HEAR ING? IN OTHER WORDS WHAT WAS THE TRIAL COURT'S DETERMINATION? WAS IT THAT HE DET ERMINED,WELL, AT THE TIME WE WERE HAVING THIS HEARING , O KAY , I AM DETERMINING THAT HE IS NOT NOW MENTALLY RETARDED ? WHAT WAS THE CONCLUSION OF THE TRIAL COURT , W ITH REFERENCE TO THAT CHRONOLOGY AT THAT TIME?

WELL, I THINK HIS CONCLUSION WAS THAT HE IS CERTAINLY NOT MENTALLY RETARDED NOW, AND IN ADDITION, IT I S PRE TTY CLEAR FROM THE TENOR OF HIS ORDER THAT HE IS SAYING THAT THERE IS B ASIC AGRE EMENT BET WEEN DR. CROPP , DR . MELON , AND DR . GAMASH , AS WELL AS DR. LOREENT I, BY THE WAY , THAT -- DR . LLOR ENTE , BY THE WAY , I DON'T KNOW IF DR . L L ORENTE SAYS HE WASN'T RETARDED WAY BACK WHEN , BUT THEY ALL AGREE , THE OTHER EXPERTS AGREE THAT HE WAS NOT RETARDED WAY BACK WHEN --

CHIEF JUSTICE: I WANT TO REFRESH MY RECOLLECTION. I AM PRET TY SURE ABOUT THIS , BECAUSE WE ARE GOING TO START TO SEE SOME O F THESE CASES, AND WE HAVE CERTAIN CASES AND WE KNOW THEIR NAMES, WHERE THERE WAS NO QUESTION IN THE ORIG INAL SENTENCING HEARING AND IN THE CASE ON APPEAL , THAT THE DEFENDANT HAD BEEN FOUND TO BE MENTALLY RETARDED , A NDMAYBE IT WAS USED AS A MITIGATOR. I AM LOOKING BACK AT THE SENTENCING ORDER IN THIS CASE, AND IT DOESN'T APPEAR THAT, EVEN AT THE TIME BEFORE ATKINS , THAT EVEN AS A MITIGA TO R , THAT MENTAL RETARDATION WAS FOU ND. THE MITI GATING CIRCUMSTA NCES THAT WAS FOUND WAS THIS DEFENDANT HAD A BE LOW AVERAGE IQ AND HAS HAD , BOTH, FAMILY PROBLE MS AND DEVELOPMENTAL PROBLEMS, AND IT DOESN'T APPEAR THAT , OTHER THAN YOU KNOW , WE HAVE MADE SH ORT SHRIFT OF THAT ON APPEAL, THAT THAT WASN'T LIKE A SEPARATE ARG UMENT.IS THAT THE STATUS ON DI RECT APPEAL?

ON THE RESENTENCING APPEAL, ON MY RECOLLECTION OF THE SENTENCING ORDER WAS THE JUDGE DID FIND T HAT HE WAS BELOW AV ERAGE INTELLIGENCE.

CHIEF JUSTICE: THAT IS WHAT I WAS READING HERE .

AND I AM FAIRLY CONFIDENT THAT THE DEFENSE ARGU ED TO THE JURY AND IN C L OSING ARGUMENT THAT HE WAS RETARDED. I MEAN , THEY WERE RELY ING, I THINK, TO SOME E X TENT ON DR. CROPP'S TESTIMONY WHO TALKED ABOUT HIM BEING IN THE BORDER LINE AREA ON THAT. THE DEFENSE , I AM SURE, ARGUED THAT, BU T, AGAIN , AS THE TRIAL JUDGE POINTED OUT , I THINK IN THE CONCLUSION , IN THE CONCLU DING PARAGRAPH OF HIS SEN TENCING ORDER , THAT LESS THE THERE BE ANY DOUBT -- THAT LEST THERE BE ANY DO UBT ABOUT THE CIRCUMSTANCES OF THE CRIME DEMONSTRATE THAT IT IS NOT SOMETHING LIKE A REACTIVE SITUATION BY THE DEFENDANT. IT WAS A FAIRLY -WELL-PLANED THING. HE WENT IN TO THE S T ORE. HE WA ITED UNTIL THE OTHER CUSTOMERS HAD LE FT. FORTUNATELY THERE WAS A PRIOR CUST OMER , I GUESS , O R SOMEONE STANDING NEA RBY WHO SAW THAT HE WAS THE L AST PERSON IN THE STORE TO , INFORMED THE POLICE ABOUT THAT. HE WAITED UNTI L THE STORE WAS EMPTY, COMMI TTED T HE CRIME. HE AD MITTED TO - - HE ATTEMPTED TO O BTAIN AN AL IBI

FROM A FRIEND AFTERWARD S. OBVIOUSLY IT IS V ERY PURPOSEFUL ACTIVITY GOING ON HERE, AND I THIN K THE SENTENCING JUDGE WHO ENTERED THE ORDER SAID IT IS REALLY NOT THE SITUATION THAT THIS DEFENDANT'S MORAL CULPABILITY SHOULD BE REDUCED OR ELI MINATED IN THIS CASE. IT WAS A VERY BRUTAL CRIME , AND YOU KNOW , I AM NOT , I DON'T WANT TO LEAVE THE IMPRESSION THAT THE JUDGESLOFD IT OFF . -- SLOUGHED IT OFF.

CHIEF JUSTICE: M Y STATEMENT AS WE CONCLUDEHERE IS THAT WE ARE GOIN G TO , I AM CONCER NED THAT WE ARE GOING TO START IN EVERY CASE RELITIGATING THE ISSUE OF MENTAL RETARDATION. I HO PE THAT THE STATE , IN CASES WHERE THERE HAS BEEN CONSISTENT FINDINGS OF MENTAL RETARDATION , BUT IT WAS PREATK INS , WE W ILL L OOK AT THOSE CASES SERI OUSLY , TO SAY THAT THOSE CASES SHOULD BE REDUCED TO LIFE , BUT IN CASES WHERE THERE HAVE BEEN NO FINDINGS THAT , FOR US TO NOW , 20 YEARS LATER , BE SECOND-GUESSING WHAT WASALREADY PRESENTED IN THE TRIAL JUDGE , TO ME IS A DIFFERENT SI TUATION. THAT IS ALSO FOR MR . CANNON TO RESPOND TO .

WELL , I DON'T KNOW WHETHER THE COURT IS INQUIRING WHETHER THE STATE IS GOING TO , IN THE FU TURE OR OTHER CASES - -

CHIEF JUSTICE: NO. I CERTAINLY WOULDN'T ASK YOU THAT. I AM JUST NOT ING THAT , FOR THIS CASE IT DOE SN'T APP EAR THAT THIS IS A CASE WHERE HE DOES HAVE BELOW AVERAGE IQ, BUT THERE WAS NE VER A FINDING THAT HE WAS MENTALLY RETARDED BY THE T RIAL COURT .

IT WOULD SEEM TO ME T HAT THERE WOULD W E LL BE A NUMBER OF CASES THAT ARE PREVIO USLY CITED IN WHICH A NUMBER OF PEOPLE PREVIO USLY TESTIFIED , MENTAL HEALTH EXPERTS , ONE WAY OR THE OTHER WHO MAY HAVE DESCRIBED THE DEFENDANTAS BEING ON THE BORDER LINE AREA, AND THAT WAS LOO SELY INTERPRETED, EITHER BY THE TRIAL JUDGE OR BY OTHERS , TO MEAN AN AC TUAL FINDING O F MENTAL RETARDATION , W HEN Y OUKNOW, THERE SEEMS TO BE, STILL , SOME OF THOSE WHO WOULD ARGUE THAT BORDER LINE MENTAL RETARDATION IS T HESAME AS MENTAL RETARDATION, WHEN MOST OF THE EXPERTS IN THIS CASE SAID THAT IS NOT TRUE, NOT THE CASE , SO I DON'T KNOW IF I AM , I CERTAINLY DON'T WANT T O ANTICIPATE OR ARGUE AHEAD OF SOME FUTURE CASE Y AM N OT APART OF OR DON'T KNOW ANYTHING ABOUT. IN ANY EVENT, WE SU BMIT THAT THE FINDINGS OF FACT M ADE B Y THE TRIAL COURT HERE ARE OVERWHELMING, BAKERY. I DON'T SEE THAT -- BASICALLY.I DON'T SEE THAT THERE CAN BE ANY JUDGMENT MADE THAT THE DEFENDANT IS MENTALLY RETARDED AT THE CUR RENT TIME . AND I THINK THE OB VIOUS FACTOR OF DR . MOS SMAN 'S ACTIVITY HERE THAT HE WOULDN'T EVEN DO ADAPTIVE FUNCTIONING TESTING BECAUSE THE SCORING WAS TOO HIGH , PRETTY MUCH DEMONSTRATES THAT FACTOR, SO UNLESS THE COURT HAS ANY O THERQUESTIONS, I WOULD ASK THE COURT TO AFFIRM THE LO WER COURT'S ORDER. THANK YOU.

CHIEF JUSTICE: REBUTTAL.

YES. I JUST WANT TO BE GIN REAL QUICKLY, BY STATING THAT I N 19 AM 4 , TWO I Q - - IN 1974 , TWO IQ TESTS WERE ADMINISTERED BY MS. DU KES. WE DO HAVE THAT IN T HERECORD AND THAT IS VERY CLEAR, THE FIRS T ONE 69 AND THE SECOND ONE A 7 0.AT THE TIME OF THE OFFENSE IN 19 76 , MR . TROT TER WAS ADMINISTERED A TEST AND SCORED A 72 , WH ICH IS WELL WITHIN THE STANDARD OF MEASUREMENT, PLUS OR MI NUS FIVE POINTS, SO THAT WAS ESTABLISHED, AND IT WAS REFERENCED BY THE STATE THATTHERE WAS POSS IBLY SOME I Q TEST OR WHAT EVER . THAT IS VERY CL EAR THAT THE IQ TEST IND ICATED HE WAS MENTALLY RETARDED WITH REGARDS TO THAT FIRST PRO NG, AND THEN WITH , WHEN WE MOVE ON TO THE ADAPTIVE SKI LLS, EVERYTHING WE HAVE BEEN TALKING ABOUT , ABOUT DELAYS AND SOCIALIZATION, THAT IS THE SECOND PART. THAT IS , ONE , USED TO BE TEN CONSTRUCTS AND NOW IT I S D OWN TO THREE WITH REGAR DS TO ADAPTIVE SK ILLS , AND DR . PINKARD DID STATE, HE GAVE TWO DIAG NOSIS OF A SPECIFIC LEARNING DISTURBANCE AND INADEQUATE PERSONALITY, AND THEN HE DID TESTIF Y AT THE EVIDENTIARY HEARING THAT THAT WAS

DEFICITS, THOSE WERE DEFICITS IN ADAPTIVE FUNCTIONING BACK PRIOR TO THE AGE OF 18.

CHIEF JUSTICE: AND THAT, THOSE, THAT TESTIMONY THAT THE TRIAL JUDGE FOUND, THAT IS THE CHANGE NOT TO BE CREDIBLE, AND HE FOUND THE OTHER EXPERTS THAT WERE OVERWHELMINGLY IN CONSENSUS, TO BE MORE CREDIBLE.

WELL, ALSO, DR. LLORENTE, NOW, THE STATE KEEPS SAYING THAT DR. LLORENTE SAID THAT MR. TROTTER IS NOT RETARDED. THAT WAS DR. LLORENTE'S DETERMINATION AS OF RIGHTNOW, BASED ON HIS IQ SCORES, AND, AGAIN, THESE ARE NOT IQ SCORES THAT ARE FLUCTUATING RAPIDLY. THIS MAN HAS BEEN ON DEATH ROW FOR QUITE SOME TIME, AND THEY HAVE GONE UP A LITTLE BIT. THE 91 SHOULD BE THROWN OUT. THAT 91 IS AN ABERRATION. THAT WAS TAKEN, PRACTICE BACK WHEN EXPERTS WILL AGREE THAT, WHEN YOU HAVE A 91 AND 69, THERE IS SOMETHING WRONG WITH THAT 91, WHEN ALL OF THE OTHER SCORES ARE, WE HAVE 69 AND THEN IN THE 70s. THAT 91, AGAIN, WAS INFLATED BECAUSE OF THE PRACTICE EFFECT, BUT DR. LLORENTE DID TESTIFY, HAS NOT TESTIFIED, PUT IN HIS REPORT WHICH THE JUDGE HAD ACCEPTED THAT, THAT HE DID HAVE THESE ADAPTIVE SKILLS, ALSO, HE DID HAVE THESE DEFICITS, AND THAT MR. TROTTER WAS MENTALLY RETARDED PRIOR TO THE AGE OF 18, AND THEN THAT WOULD BE ENOUGH TO STATIFY PHILATKINS AND THE STATUTE. -- TO SATISFY ATKINS AND THE STATUTE. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU TO BOTH SIDES. WE WILL TAKE THE CASE UNDER ADVISEMENT AND