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Victor Tony Jones v. State of Florida

SC04-726

THE NEXT CASE ON THE DOCKET
IS JONES VERSUS STATE OF
FLORIDA.

>> GOOD MORNING CHIEF
JUSTICE LEWIS AND MEMBERS OF
THE COURT.

I'M WILLIAM HENNIS AND MY
ASSOCIATE AT COUNSEL TABLE
IS CRIS TIN ASPUDAISI
SPOET -- BOTH OF THE OF
HERE AND JONES THE
APPELLANT.

I WOULD LIKE TO JUST NOTE TO
THE COURT IN ADVANCE THAT I
DID WATCH THE CHERRY
ARGUMENT ON FRIDAY AND I'M
HAPPY TO ADDRESS ANY
OVERLAPPING ISSUE YOU MIGHT
HAVE RELATED TO THAT
ARGUMENT.

I WOULD LIKE TO POINT OUT
RIGHT UP FRONT THAT ONE
SIGNIFICANT DIFFERENCE IN
THIS CASE AND THAT CASE ASK
THAT WE DO HAVE TWO IQ
STORES THAT ARE 70 ARE -- OR
BELOW UNLIKE MR. CHERRY'S
CASE.

>> ARE THERE ANY ISSUE IN
THE CASE BESIDE THE MENTAL
RETARDATION?

>> DON'T BELIEVE YOUR HONOR
THERE ARE ISSUE IN THIS CASE
BESIDES THE MENTAL
RETARDATION, DETERMINATION
AND THE LOWER COURT'S
FINDING THAT MR. JONES WAS
NOT MENTALLY RETARDED.

>> LET ME ASK A QUESTION
THAT CONCERNS ME ABOUT THE
KEY OFFICIALSIES THE MENTAL
DEFICIENCIES IN THIS CASE.
HE WAS -- THE DEFENDANT WAS
SHOT IN THE HEAD BY THE
VICTIM.

IF THE DEFICIENCIES IN HIS
FUNCTIONING WERE CAUSED BY
THE GUNSHOT WOUND, YOU WOULD
AGREE THAT HE COULD NOT MEET
THE DEFINITION OF MENTAL
RETARDATION BECAUSE THERE
WOULDN'T BE UNSET BEFORE AGE
18.

AND IT CERTAINLY WOULDN'T
MEET THE CRITERIA OF ATKINS
IN THAT ATKINS IS ASSUMING A
REDUCED MORAL CULPABILITY
FOR THE CRIME SO THAT YOU
WOULD MEASURE THE MENTAL
FUNCTIONING AT LEAST LOOK AT
THE TIME OF THE CRIME.

SO U -- CAN YOU ADDRESS
WHETHER THERE IS EVIDENCE
THAT ANY OF THIS -- THESE
DEFICIENCIES, IN FACT, WERE
A RESULT OF THE GUNSHOT
WOUND AS OPPOSED TO
PREEXISTING DEFICIENCIES IN
HIS INTELLECTUAL
FUNCTIONING?

>> SURE.

ONE OF MY CONCERNS ABOUT THE
JUDGE'S ORDER IS PRECISELY
HER FINDING IN THE ORDER
THAT THE DOCTOR TESTIFIED
THAT THE MAJORITY OF THE
DEFENDANT'S DEFICIT WERE
CAUSED BY THE GUNSHOT WOUND
AT THE TIME OF THE OFFENSE.
I THINK THAT'S UNREASONABLE
DETERMINATION OF THE FACTS
IN THE JUDGE'S ORDER.

I THINK IF YOU REVIEW
DOCTOR'S TESTIMONY YOU WILL
FIND THAT NOWHERE DOES HE
SAY THAT.

AND, IN FACT, SINCE THE
DR. WAS INVOLVED IN THE CASE
THROUGH THE TIME HE
TESTIFIED HE HAD NEARLY 15
YEARS INVOLVEMENT IN THE
CASE AND THAT'S ONE FACTOR
THAT ALLOWED HIM TO FIND
MENTAL RETARDATION.
HE KNEW BASED ON HIS
TESTIMONY BACK AT TRIAL THAT
HE SAID THEN THAT HE
COULDN'T REALLY TESTIFY
ABOUT WHAT MR. JOAN REMORBID

STATUS.

IF PRIOR TO THE GUNSHOT
WOUND TO HIS FOREHEAD HE WAS
NORMAL IN OTHER WAYS, THAT
THE GUNSHOT ALONE WHATEVER
HIS DEFICIT WOULDN'T ALLOW
HIM TO BE MENTALLY RETARDED
HE WOULD HAVE ANOTHER
DISABILITY THAT IN FLORIDA
LAW DOESN'T ALLOW HIM TO BE
EXEMPT FROM THE DEATH
PENALTY.

BUT IN ADDITION TO THE MANY
FEEM MEMBER AND TEST AND
INTERVIEW THAT THE DOCTOR
DID OVER THE 15 YEARS, HE
ALSO HAD A MAY 1975
DISCHARGED SUMMARY FROM
JACKSONVILLE MEMORIAL THAT
HE DIDN'T HAVE IN TRIAL THAT
POINTED OUT THAT MR. JONES
HAD BEEN DIAGNOSED
PREVIOUSLY AS BORDER LINE
MENTALLY RETARDED.

IT ALSO IN THAT REPORT NOTED
THAT HE HAD, HAD.

>> IS BORDER LINE MENTALLY
RETARDED MENTALLY RETARDED?

>> IT REALLY DEPENDS ON
WHERE IN HISTORY GREW LOOK.
YOUR HONOR, CERTAINLY WHAT
WE TALK ABOUT NOW IS BORDER
LINE WAS NOT WHAT BORDER
LINE MEANT BACK IN 1975.

WHAT'S MOST IMPORTANT IS
THAT HE DIDN'T HAVE THAT AT
THE TIME HE DID THE 1991
THROUGH '93 EVALUATIONS AND
THAT IS A PRECURSOR, IT'S A
RED FLAG THAT SOMETHING IS
WRONG.

JUST LIKE THE 1988 PREMORBID
BETA-IQ SCORE OF 6 WHICH
ISN'T IN AND OF ITSELF
EVIDENCE OF MENTAL
RETARDATION BUT IT IS
EVIDENCE THAT ANY EVALUATOR
NEEDS TO LOOK AT AS PART OF
THE WHOLE SPECTRUM OF
POSSIBLE TRAUMA AND POSSIBLE
PROBLEMS RELATED TO MENTAL
RETARDATION.

>> HELP ME OUT WITH THE
FACTS HERE.

THIS RECORD STATEMENT OF
BORDER LINE WAS IT JUST A
HISTORICAL STATEMENT OR WAS
IT ACTUALLY AN EVALUATION IN
THE SUBSTANCE OF THE
EVALUATION?

>> THE DISCHARGE SUMMARY
TOOK INTO ACCOUNT HISTORY
AND MATERIAL THAT IS NOWHERE
ELSE IN THE RECORD.

IN OTHER WORDS AT THE TIME
THE EVALUATORS SAW HIM ON
INTAKE AND THEN DID THE
DISCHARGE THEY HAD
APPARENTLY BACKGROUND
MATERIAL THAT INCLUDED HIS
PREVIOUS DRUG TREATMENT, HIS
PREVIOUS HOSPITALIZATION
WHERE HE SPENT SIX WEEKS IN
ANIR CU BECAUSE OF A
DRUGGOVER DOSE IS AS A
YOU'VE STPHAOEUL.

IT TALKED ABOUT HIS USE OF
STREET DRUGS FROM THE AGE OF
11.

IT'S ALL INFORMATION THAT
ACCOMPLISHED IN THE
DISCHARGE SUMMARY THAT WAS
NEVER AVAILABLE UNTIL WE GOT
IN POST CONVICTION BUT ISN'T
REAP APPLY INDICATED IN THE
FACT THAT THOSE REPORTS THAT
ARE REFERRED TO ARE NOWHERE
TO BE FOUND.

SO IT'S NOT A STATEMENT
ON -- UPON DISCHARGE.
THAT'S THE EVALUATION OF
DISCHARGE OF HIS CONDITION.

>> I WOULD SAY IT'S MORE
ACCURATELY A PART OF THE
INTAKE HISTORY THAT THEY DID
AT THE TIME OF THE
ADMISSION.

NOW, I MENTIONED ALSO THAT
DOC 1988 BETA-THERE'S ALSO
AN INDEPENDENT ACCOUNTING BY
MR. JONES IN THERE WHEN
INMATE GIVE THEIR HISTORY
AND WHICH HE REFERRED TO HIS
JUVENILE DRUG OVERDOSE.
SO IT'S NOT LIKE THE ONLY
PLACE WE'VE EVER HEARD ABOUT
THAT IS THE 1975 DISCHARGE
SUMMARY.

HE ALSO YOU KNOW TWO YEARS BEFORE THE CRIME IS TELLING DOC ON INTAKE THAT HE HAD THIS CHILDHOOD ADMISSION FOR SIX WEEKS AND THAT'S REPLICATED IN SOME OF THE FAMILY TESTIMONY, TOO.

>> DON'T WE HAVE SCHOOL RECORDS AND TESTIMONY FROM THIRD GRADE TEACHER THAT JONES WAS AVERAGE TO ABOVE AVERAGE STUDENT?

>> A STATE CALLED THAT TEACHER AS A REBUTTAL WITNESS AT THE PRIOR EVIDENTIARY HEARING.

THE DOCTOR TESTIFIED THAT HE TALKED WITH LAURIN LONG MR. JONES' ANXIETY A SECOND TIME IN 2000 AND SHE TALKED TO HIM BOTH ABOUT TEACHER HAD TOLD HER AND WHAT HER OWN MEMORY WAS ABOUT MR. JONES.

>> WHAT DID THE TRIAL COURT SAID ABOUT THE CREDIBILITY?

>> I'M SORRY YOUR HONOR.

>> DID THE TRIAL COURT DETERMINE THE CREDIBILITY OF THE AUNT?

>> SINCE THE ANXIETY DIDN'T ACTUALLY TESTIFY AT THE EVIDENTIARY HEARING I WOULD SAY HER CREDIBILITY DETERMINATION DIDN'T REALLY GO TO WHAT THE AUNT TOLD DR. ISENSTEIN SINCE THAT'S SOMETHING HE RELIED ON AS AN EXPERT.

SHE DIDN'T TESTIFY AT THE EVIDENTIARY HEARING.

>> WHAT DID THEY DETERMINE ABOUT THE DOCTOR'S CREDIBILITY?

>> THERE WAS NO SPECIFIC CREDIBILITY FINDING IN THE ORDER AFTER THE MID -- MENTAL RETARDATION EVIDENTIARY HEARING.

WHAT SHE DID DO WAS DROP A FOOTNOTE SAYING THAT THE FAMILY WITNESSES THAT HAD TESTIFIED AT THE PRIOR EVIDENTIARY HEARING

INVOLVING INEFFECTIVE ASSISTANCE OF COUNSEL WERE NOT CREDIBLE.

>> DID THAT INCLUDE THE AUNT?
>> LIKE I SAID SHE DIDN'T TESTIFY AT THE EVIDENTIARY. SHE HAD TESTIFIED AT THE PRIOR TRIAL.

I WOULD SAY, NO, AND OF COURSE THAT COMMENT IN HER MOST RECENT ORDER AT -- AFTER THE MENTAL RETARDATION HEARING DIDN'T INCLUDE THE ADDITIONAL WITNESSES THAT DR. ISENSTEIN HAD TALKED TO IN BETWEEN THE POST CONVICTION HEARING AND THE MR EVIDENTIARY HEARING INCLUDING TWO BROTHERS THAT HAD NEVER BEFORE TESTIFIED OR BEEN INTERVIEWED BY ANYBODY.

A COMMON LAW WIFE THAT MR. JONES LIVED WITH FOR SEVERAL YEARS IN ATLANTA. AND ONE OTHER WITNESS WHO I CAN'T RECALL RIGHT NOW. DR. ISENSTEIN ALSO TESTIFIED ABOUT ADAPTIVE FUNCTIONING?

>> HE TESTIFIED IN SOME DETAIL ABOUT IT.

HE FOUND THAT FIVE OF THE TEN CRITERIA HE BELIEVED MR. JONES MET.

>> MY QUESTION IS: DID HE TESTIFY THAT IN ANALYZING THAT PRONG THAT ONE LOOKS TO -- AT LEAST HE LOOKED TO THE DEFENDANT'S ADAPTIVE FUNCTIONING BEFORE 18 AND REALLY DIDN'T LOOK AT HIS ADAPTIVE FUNCTIONING NOW. AND THAT WAS A AN APPROPRIATE WAY TO ANALYZE IT.

>> THAT WAS HIS TESTIMONY.

>> WAS THERE CONTRADICTORY TESTIMONY ON THAT, THAT SAID THAT NO THE WAY YOU ANALYZE ADAPTIVE FUNCTIONING IS NOW. HOW YOU ADAPT NOW, THE ON SETH BEFORE 18 CERTAINLY GOES TO BEFORE 18. BUT THE ADAPTIVE FUNCTIONING

PRONG GO TO HOW YOU ARE
FUNCTIONING NOW.

>> THAT'S CERTAINLY
DR. SUAREZ'S TESTIMONY.
HE INTERVIEWED THE
DEPARTMENT OF CORRECTIONS
OFFICIAL FOR WHOM HE
ADMINISTERED THE TESTS.
AND I OF COURSE IN MY BRIEF
I TALKED ABOUT SOME OF THE
PROBLEMS WITH THIS TESTING
THAT CAME OUT IN HIS
TESTIMONY.

AND IN WEIGHING THE -- BOTH
THAT CONTRADICTORY TESTIMONY,
DID THE TRIAL COURT AGREE
WITH DR. SUAREZ AND DISAGREE
WITH DR. IRESSTEIN AND HE
DISAGREED ABOUT NOW BEFORE
18?

>> I BELIEVE THAT'S THE ONLY
WAY ONE COULD INTERPRET THE
ORDER.

I WOULD REFER YOU TO THE
CITATION I DID TO THE
KENTUCKY CASE THAT TALKS
ABOUT CULPABILITY AND HOW,
IN FACT IF YOU HAVE A
MENTALLY RETARDED OFFENDER
YOU LOOK TO THE I'M OF THE
OFFENSE OR BEFORE OR WHEN
YOU DETERMINE WHETHER THEY
ARE MENTALLY RETARDED OR.
THAT'S THE ONLY LOGICAL
THINGS TO DO PURSUANT TO
ATKINS AND IT'S FOCUS ON
CULPABILITY.

IF WE AGREE WITH THE TRIAL
COURT LEGALLY SPEAKING I
GUESS OR AS FAR AS WHAT THE
SESSION IS AND INTERPRET
INDEPENDENCE THE THREE
PRONGS IF WE AGREE WITH THE
TRIAL COURT AS PRONG NUMBER
2 PRESENT ADAPTY FUNCTIONING
THAT MEANS PRESENT NOT
BEFORE 18.

THEN WE SIMPLY HAVE TO -- WE
CAN'T TAKE INTO ACCOUNT
DR. ISENSTEIN TESTIMONY ON
THAT PRONG.

>> BELIEVE UNLESS YOU FIND
ITS UNREASONABLE APPLICATION
OF THE LAW TO THE FACTS AND

THAT HER FINDING ABOUT THE FACTS WAS UNREASONABLE, WHICH I THINK IF YOU LOOK AT DR. SUAREZ' TESTIMONY WOULD BE FAIRLY SIMPLE FOR YOU TO DO.

HIS TESTIMONY SHOWS THAT HE BASED HIS FINDING ON INTERVIEWS WITH THE DEPARTMENT OF CORRECTIONS PEOPLE WHO FIRST OF ALL I THINK THREE OR FOUR OR THE FIVE PEOPLE HE ORIGINALLY APPROACHED SAID THEY DIDN'T KNOW ENOUGH ABOUT JOANS TO DO THE INTERVIEWS AND THEN THOSE PEOPLE HE DID INTERVIEW ON MOST OF THEIR ANSWERS THEY WERE GUESSING. AND HE ADMITTED IT WAS COMPLETE GUESSWORK ON THEIR PART THAT HE SCORED POINTS ON THE OBLAS BASED ON THEIR GUESSING.

AS I TRIED TO SHOW ON THE BRIEF I BELIEVE ON AT LEAST TWO OF THE AREAS PERHAPS JUST ONE, OF ADAPTIVE FUNCTIONING DEFICIT THAT DR. ISENSTEIN FOUND ANY REASONABLE INTERPRETATION OF DR. SUAREZ ABBAS RESULT INDICATE HE DIDN'T MEAN THE DEFICIT BASED ON SUAREZ' TERMS.

>> I HAVE SOME DIFFICULTIES IN AN APPROPRIATE CASE WITH HOW ACCURATE THE ADAPTIVE FUNCTIONING TEST ARE GOING TO BE WHEN YOU ARE DEALING WITH DEATH ROW DEFENDANTS. IN A PRISON ENVIRONMENT. WHICH IS HOW THEY STRUCTURE IT.

BUT I THINK YOU HAVE OTHER HURDLES TO GET OVER IN THIS CASE.

TO ME THE BIGGEST HURDLE BESIDE -- BESIDE THE FACT THAT THE TRIAL COURT MADE THE FINDING IS THAT I DON'T KNOW THAT WHEN ATKINS WAS DECIDED THAT THERE WOULD BE THERE -- THIS NOTION THAT

THOSE DEFENDANTS THAT WERE MENTALLY RETARDED -- AND IT WOULD BE A PRETTY CLEAR PICTURE THAT WOULD BE PRESENTED BUT WHAT CONCERNS ME HERE IS THAT IT WAS NEVER CONTENDED AT TRIAL OR IN POST CONVICTION PROCEEDINGS THAT MR. JONES WAS MENTALLY RETARDED.

AND NOT UNTIL THE REPLY BRIEF IN THIS COURT WAS THAT BROUGHT UP.

NOW, WE'RE DEALING THAT THE FIRST PRONG YOU HAVE TO GET THROUGH IS ONSET BEFORE AGE 18 AND AS JUSTICE CANTERO SAID YOU HAVE WHOEVER PUT THEM ON I ASSUME IT IT WAS DEFENDANT IN POST CONVICTION THIRD GRADE TEACHER WAS SAYING HE WAS AN AVERAGE OR ABOVE AVERAGE CHILD.

WHAT OUT YOU KNOW WITH THAT SCENARIO, THAT IS IT'S TRULY COMES ALONG AFTERS AKINS IS DECIDED, CLEARLY, YOU KNOW, I DON'T BELIEVE A DEFENDANT FOR WANTING TO TAKE A SHOT AT IT.

BUT IN TERMS OF THE CREDIBILITY OF THIS DEFENDANT'S MENTAL RETARDATION, AND IN ADDITION WITH THE PRESENCE OF THE GUNSHOT WOUND TO THE HEAD THAT CAN EXPLAIN AT LEAST SOME OF THE DEFICITS, WHY SHOULDN'T WE AFFIRM THE TRIAL COURT'S FINDING IN THIS CASE?

AND WHAT -- SO DO YOU UNDERSTAND THE DRAFT I'M -- I THINK I MENTIONED IN CHERRY THIS IDEA THAT JOHNNY COME LATELY L RETARDATION CLAIMS. SHOULDN'T WE LOOK AT THOSE THROUGH A DIFFERENT LENSE THAN THOSE CASES WHERE THE CONSISTENTLY CONTENDED THE PERSON IS MENTALLY RETARDED?

>> THAT'S A COMPLICATED QUESTION.

I DON'T -- I WILL TRY TO
ANSWER AS BEST I CAN.

>> IT'S TWO ASPECT OF WHAT'S
TROUBLING ME IN MANY OF THE
CASES THAT'S IF IT WAS
PRETTY APPARENT WHY IS IT
COMING ON 20 YEARS AFTER AND
I ALSO DO SEE THAT OTHER
ISSUE THAT YOU BROUGHT UP
THAT -- THE CONCERN ABOUT
THE ADAPTIVE FUNCTION BUT I
THINK YOU HAVE THE OTHER
HURDLES TO GET THROUGH HERE.

>> IF YOU LOOK AT THE DOCTOR
ISENSTEIN'S TESTIMONY AT THE
PRESEEDINGS HE ACKNOWLEDGES,
I THINK IN THAT TESTIMONY
THAT BACK AT THE TIME OF
TRIAL IT WAS ACTUALLY HIS
UNDERSTANDING THAT UNDER 3-R
YOU HAD TO HAVE IQ UNDER 70
TO ORDER TO QUALIFY.

AT THE TIME HE HAD DONE HIS
TESTING IN '91 AND 199 K3,
HIS SCORES WERE RESPECTIVELY
I BELIEVE 72 AND 70.

SO HE HAD AN HONEST
MISUNDERSTANDING AT
THAT -- AT THAT TIME AS TO
WHAT THE FUNCTIONAL
INTELLIGENCE LEVEL WAS THAT
WAS NECESSARY.

YOU WILL SEE THAT DR. SUAREZ
MAKES THAT SAME MISTAKE IN
SOME OF HIS CONTEMPORARY
TESTIMONY.

HE MADE -- HE SAID MATES
IT'S 70.

PURSUANT TO DIAZ.

I THINK THERE'S AN HONEST
DISAGREEMENT AND
MISUNDERSTANDING AT THE TIME
OF TRIAL.

YOU MAY RECALL FROM THE
RECORD THAT DR. ISENSTEIN
TESTIFIED IN THE PRIOR
PROCEEDING THAT TRIAL
COUNSEL DIDN'T EVEN ASK HIM
AT THAT TIME ABOUT WHETHER
OR NOT HE THOUGHT MR. JONES
WAS MR. JONES WAS COME
TENT OR NOT AND HIS OPINION
WOULD HAVE BEEN BACK AT THAT
TIME THAT HE WAS NOT

CONFIDENT, SO IT FITS IN WITH DR. EISENSTEIN'S PAST WORK ON THE CASE, MENTAL RETARDATION HAT TIME WOULD HAVE BEEN SIGNIFICANT LITIGATION BUT NOT A BAR ON THE DEATH PENALTY AT THE TRIAL LEVEL, SO ON THAT BASIS, I REALLY --

>> I MEAN YOU AGREE BACK WHEN THE CASE WAS TRIED, I MEAN, THERE WAS CERTAINLY MANY CASES WHERE MENTAL RETARDATION WAS BEING ADVOCATED.

I FIND THAT A LITTLE DISINGENIUS THAT SOMEBODY LOOKING AT A NUMBER 70 WOULDN'T KNOW THAT THAT IS AT LEAST BORDERLINE IF NOT MENTAL RETARDATION.

>> AND THAT EVIDENCE DID, OF COURSE, COME TO THE TRIAL. I MEAN, DID HE TESTIFY ABOUT WHAT HIS FINDINGS WERE ON THE WAY AND ABOUT WHAT HIS, YOU KNOW, WHAT THE RAT SCORES WERE, THEY WERE ON THE EDUCATIONALLY-DEFISH SENT LEVEL THAT POINT, FOR WHATEVER REASON IT WAS NOT SPECIFICALLY ARCTICLATED AND LET ME --

>> LET ME CLARIFY FOR THAT RECORD.

WE ARE NOT JUST TALKING ABOUT EISENSTEIN, WE ARE TALKING ABOUT TWO PSYCHOLOGIST, THREE FORENSIC PSYCHOLOGISTS OVER THE HISTORY OF THE CASE, SO AT LEAST SEVEN MENTAL HEALTH EXPERTS HAVE EVALUE WEIGHED THIS DEFENDANT, THE ONLY ONE OF THOSE WHO HAVE INDICATED NONE BEFORE HIM, BUT IN THIS PROCEEDING, EISENSTEIN CAME POR WARD AND TESTIFIED THAT HE THOUGHT HE WAS MENTALLY RETARDED, BUT NONE OF OH OTHERS DID, CORRECT?

>> I THINK TO BE CORRECT ABOUT IT.

THERE WERE ONLY TWO PEOPLE

WHO TESTIFIED TO EXPERTS
THAT TESTIFIED AT THE MENTAL
RETARDATION HEARING THAT WAS
DR. EISENSTEIN AND SCHWARZ.

>> IN THE HE PRIOR
PROCEEDING, THIS DEFENDANT
HAS BEEN EVALUATED BY SEVEN
MENTAL HEALTH EXPERTS AN UP
UNTIL THIS PROCEEDING WE ARE
TALKING ABOUT TODAY,
NEITHER, NONE OF THOSE
INCLUDING DR. EISENSTEIN
FOUND HIM TO BE MENTALLY
RETARDED.

>> THAT IS CORRECT.
THAT IS ABSOLUTELY RIGHT.

>> YOU ARE WELL INTO THE
REBUTTAL.
FINISH YOUR ANSWER, BUT YOU
ARE USING UP YOUR REBUTTAL.

>> SURE.

VERY QUICKLY.

S ONLY, ONE OF THE EXPERTS
WAS DR. PRITCHARD, THE LOWER
COURT STRUCK AN ALLOWED HIS
RAW DAT TAT TO BE IN
TERPTATED BY DR. EISENSTEIN.
HIS IQ SCORE IS 75.

THE LAST THAT WAS DONE, I
THINK IF YOU LOOKED AT THE
SCORES FROM 1991 TO 2005
PARTICK CAPITOL HILL THE 3
FROM 99 TO 2005 YOU WILL SEE
A PERFECT EK AMPLE OF THE
PRACTICE OF THAT, HOW IT
WORKS WITH 3 WITH IQ SCORE
GOING FROM 67 TO 75 OVER SIX
YEARS.

>> THAT IS ONE OF THE THINGS
THAT TROUBLES ME ABOUT THE
CASE THAT IS WE HAVE A
NUMBER OF IQ TESTING HERE AN
YOU ARE REALLY IN ESSENCE
ASKING US TO RELY ON ETH ARE
THE 93 OR THE 99 TEST WHICH
THOSE SHOW 67 AND 70 WHEREAS
ALL OF THE OTHERS ARE ABOVE
70, SO WHICH OF THESE TESTS
REALLY ARE WE TO RELY ON.

>> WITHOUT GETTING TO
REBUTTAL TIME, I WOULD POINT
OUT THE TWO LOWEST SCORES
WERE BOTH ATKINS WHICH IS
2002 DAYS WERE BOTH AT A

TIME WHEN MENTAL RETARDATION WAS NOT SOMETHING THAT THE INMATE OR THE COUNSEL KNEW MIGHT EVENTUALLY SAVE THEM FROM THE DEATH PENALTY, SO MY ARGUMENT WOULD BE THE EARLIER SCORES ARE PROBABLY MORE RELIABLE, BUT ULTIMATELY, THE SAME QUESTION THAT YOU CAME UP.

>> HOW ABOUT THE 91 SCORE AND THE 72?

>> I WILL TRY TO ANSWER THAT BETTER FOR YOU IN REBUTTAL BECAUSE I ONLY GOT A MINUTE AND 30 SECONDS LEFT.

>> MAY IT PLEASE THE COURT, SANDRA JAGGARD ATTORNEY ASSISTANT GENERAL.

THERE IS NO DIAGNOSIS FOR RETARDATION IN THE 75 HOSPITAL REPORT WHAT IT SAYS IN THE HISTORY SECTION THAT IS THE DEFENDANT WAS LABELED AS BORDERLINE MENTALLY RETARDED THERE IS NO SUCH THING AS MENTALLY RETARDED YOU ARE EITHER MENTALLY RETARDED OR BORDERLINE. IT IS LIKE BEING PREGNANT. YOU ARE RETARDED OR YOU ARE NOT.

>> IT ONLY SEEMS AS THOUGH THIS CONCEPT OF MENTAL RETARDATION OF HOW MANY, HOW MANY POINTS HAVE BUILT IN ERROR ARE THERE, ALL OF THESE THINGS, IT DOESN'T SEEM AS THOUGH IT IS JUST THIS BLK AND WHITE THAT COMES OUT.

ALL OF THESE IS SUCH SA SOFT SEE YOU DWLINS AREA, THAT THE TEST, YOU KNOW, WE HAVE STANDARD DEVIATIONS, WE HAVE BIMENT IN ERROR, ALL OF THESE THINGS, WHERE GOU? DO YOU ADD THE FIVE POINT, DO YOU TAKE THEM AWAY?

>> IT IS NOT FIVE POINTS.

IT IS STA TIST CALL CONSTRUCT WHICH CAN BE A GREAT BARRIER OF NUMBER OF POINTS DEPENDING ON THE AGE

OF THE PERSON AND THE
VARIOUS STATISTICAL ANALYSIS.

>> WE SIT HERE, MISS
JAGGARD, WE HEAR IT FRIDAY
FROM THE STATE THAT IT IS
THOSE POINTS, SO I MEAN, YOU
HEAR DIFFERENT ARGUMENTS ON
THIS.

WE HAVE TO GET IT RIGHT.
THERE IS ONLY ONE LAW ON
FLORIDA.

WE DON'T GO ON PER CASE
BASIS.

WE NEED TO GET UNDERSTANDING
ON WHAT THE NUMBERS MEAN
THAT CAME UP IN CHERRY AS
WELL THAT YOU AVERAGE ALL OF
THESE THINGS TOGETHER, WHERE
DO YOU GO, IS IT JUST BLACK
AND WHITE?

TO THIS COURT, AT LEAST, TO
ME, IT DOESN'T APPEAR THAT
IT IS THIS BLK AND WHITE IN
ANY CASE THAT WE HAVE EVER
SEEN.

>> IT IS NOT AVERAGING.
THE REASON YOU HAVE THAT,
THAT 95% COMPETENCE INTERVAL
IS TO -- BECAUSE YOU CAN
HAVE VARIATIONS IN THE
HEALTH OF THE TEST SUBJECT
IN THEIR CONCENTRATION
LEVEL, PERHAPS, MR. JONE'S
DIABETIC, IF HE HAS NOT HAD
THE FOOD AT THE PROPER TIME,
THEREFORE, IT IS SUPPOSED TO
ACCOUNT FOR REPEATED
TESTING.

HERE, YOU HAVE REPEATED
TESTING.

REPEATED TESTING THAT IS TOO
HIGH REPEATEDLY.

IN ADOIX THAT, OTHER THAN
DR. EISENSTEIN'S SCORE WHICH
INCLUDE THE 7 AND THE 67,
THE SCORES COME WITHIN.
THE 75 REPORT, WELL, IT
INDICATEDS HE IS LABELED AS
BORDERLINE MENTALLY RETARDED
THEN HAS EVALUATION CHECK
SCORE OF AVERAGE, NOT
TARREDED.

BASED ON THE EVALUATION
LAURA LONG TESTIFIED AT

TRIAL, TESTIFIED AT TRIAL THAT THE DEFENDANT WAS GOOD STUDENT WHO RECEIVED CONDUCT AWARDS AND THIS TESTIMONY ABOUT BEING A BAD STUDENT IS DR. EISENSTEIN WANTING TO RECOUNT WHAT LAURA LONG TOLD HIM YEARS AFTER.

>> DO WE HAVE THE SCHOOL RECORDS?

>> WE DO HAVE THE SCHOOL RECORDS.

>> WHAT IS IT?

>> HE GETS Bs, Cs UNTIL HE STARTS RUNNING AWAY TO VISIT HIS FAMILY IN NEW YORK AND EVENTUALLY MOVE WITH THEM, WHICH INDICATEDS HE MANAGED TO STOWAWAY ON PUBLIC TRANSPORTATION TO GET HIMSELF ONCE TO VIRGINIA, ONCE ALL THE WAY TO NEW YORK.

HE CERTAINLY HAS CAPACITY TO USE.

>> HE DID THAT WHEN HE WAS 11ERS OLD.

>> YES, THAT WOULD INDICATE HE DIDN'T HAVE A PROBLEM WITH THE ADAPTIVE FUNCTIONING BEFORE HE WAS 18 IF HE IS ABLE TO DO THOSE TYPES OF THINGS.

>> I WANT TO GO BACK A MOMENT TO THE IQ SCORE BECAUSE I FIND IT REALLY TROUB LING WE HAVE THE MULTIPLE SCORES AND WHAT DO YOU MAIN FAIN WE SHOULD DO WITH THESE?

WHAT WHICH OF THESE IS CREDIBLE?

ARE THEY ALL CREDIBLE?

IF SO, WHAT ARE WE GOING TO DO WITH THEM?

>> WELL, THE STATE'S POSITION THE REASON YOU HAVE THE 95% COMPETENT INTERVAL IS TO LOOK AT THE SCORES BECAUSE IT IS SUPPOSED TO REFLECT WHAT WOULD HAPPEN OVER REPEATED TESTING. HERE YOU HAVE REPEATED TESTING.

YOU DON'T NEED TO WORRY ABOUT THE 95% COMPETENCE INTERVAL, YOU HAVE REPEATED TESTING.

YOU HAVE REPEATED TESTING WITH ALL OF THE TESTS BEING GIVEN BY EVERYONE OTHER THAN DR. EISENSTEIN, THERE IS PROBLEM WITH THE EFFORT, HE IS LINGERING ON THE TEST, THEREFORE, SO WE CAN THROW OUT -- THE 93 AND THE 99 TEST, WE CAN THROW OUT BECAUSE THE DOCTOR SAYS THAT HE WAS MA LUN GERING.

>> WELL, THE DOCTOR WHO GAVE THE 93 AND THE 99 SCORES IS EISENSTEIN, HE NEVER BOTHERED TO LOOK AT THAT OR CONSIDER IT.

THE STATE'S POSITION IS YOU LOOK AT THE GENERAL TREND HERE, THE GENERAL TREND IS YOU HAVE SCORES THAT ARE TOO HIGH, THAT IS WHAT THE 95% INTERVAL IS DESIGNED TO ACCOUNT FOR WHAT IS WOULD HAPPEN IF WE REPEATEDLY TEST HIM, WHERE WOULD THESE FALL? YOU HAVE THE REPEATED TESTING HERE.

YOU DON'T NEED TO WORRY ABOUT A 95% COMPETENCE INTERVAL.

YOU ARE NOT WORRIED ABOUT ONE TEST, WHAT WAS EFFECTING THAT ONE TEST THAT MAY HAVE CAUSED IT TO WIGGLE A LITTLE OVER WHAT HIS FUNCTIONING. THE STATE'S POSITION IS THESE SCORES TO THE EXTENT THAT YOU HAVE THEM, NUMBER ONE, THEY TEND TO BE TOO HIGH TO BEGIN WITH WHICH INDICATES HE IS NOT MENTALLY RETARDED, NUMBER TWO ALL OF THE ONES COME WITH A NOTE THAT EVEN THESE SCORES WHICH ARE TOO HIGH IN THEMSELVES ARE TOO LOW TO REFLECT HIS TRUE INTELLECTUAL FUNCTIONING.

>> SO WE ARE THEN DON'T HAVE THE FIRST PROMPT OF THE

RETARDATION TESTS?

>> WE DON'T HAVE THE FIRST.
WE DON'T HAVE THE SECOND
PRONG WHICH ACCORDING TO THE
STATUTORY AND RULE
DEFINITION IS IQ SCORE
CONCURRENT WITH DEFICITS
UNADPTIVE FUNCTION.

IT MEANS AT THE SAME TIME,
VOW TO TEST THE ADAPTIVE
FUNCTIONING AT THE SAME TIME
YOU TEST THE IQ WHICH WOULD
MEAN BEFORE '91 AND 2005
WOULD BE THE APROPERTY OF
TIME TO HAVE MEASURED HIS
ADOPTIVE FUNCTIONING.

DR. EISENSTEIN DIDN'T
ATTEMPT TO MEASURE HIS
ADAPTIVE FUNCTIONING THEN
EVEN IF YOU ACCEPT IT IS AT
THE TIME OF THE CRIME, THE
DEFENDANT WAS 29 AT THE TIME
OF THE CRIME.

DR. EISENSTEIN WAS MEASURING
BEFORE HE WAS 18.

THAT WOULDN'T ACCOUNT FOR
EVEN AT THE TIME OF THE
CRIME.

>> DO YOU SEE A POTENTIAL
PROBLEM IN A CASE WHERE IT
LOOKS PRETTY CLEAR THAT A
DEFENDANT, YOU KNOW, IS
LABELED A SLOW LEARNER, WAS
IN CLASSES INDICATIVE OF A
VERY LOW INTELLECTUAL
FUPTIONING, WHERES THERE WAS
KIND OF TESTIMONY ABOUT NOT
LIVING ON HIS OWN THAT
TRYING TO MEASURE THE
ADAPTIVE FUNCTIONING IN A
PRISON ENVIRONMENT, I MEAP,
SHORT OF OFFICERS SAYING,
THIS PERSON IS READING MORE
IN PEACE, YOU KNOW IS THE
LEADER OF THE -- THINGS THAT
ARE ACTUALLY OBSERVATIONS AS
OPPOSED TO THESE TESTS WHICH
ARE MEANT TO MEASURE PEOPLE
WHO ARE LIVING ON THEIR OWN,
NOT IN A PRISON ENVIRONMENT.
MIGHT I START OFF IN ATKINS
TEFL THEY USE PRISON.
NUMBER TWO, THEY ARE GOING
TO HAVE PRIOR IN CARSRATION,

THEY ARE GOING TO HAVE BEEN LIVING WITH PRISON GUARD, IN FACT, THIS DEFENDANT UP TO THREE WEEKS BEFORE THIS CRIME HAD BEEN LIVING WITH PRISON GUARDS FOR YEARS BECAUSE THAT IS WHERE WE IS GOING TO BE FUNCTIONING. YOU ARE GOING TO HAVE TO COPE WITH THE FACT THAT PEOPLE ARE GOING TO BE FUNCTIONING IN A RESTRIKT ENVIRONMENT AT TIMES.

-- RESTRICTIVE ENVIRONMENT AT TIMES.

SECONDLY, THEY DO HAVE THE ABILITY WHILE THEY MAY NOT DO IT THE SAME WAY YOU AND I DO IT, MR. JONES HAD A PROBLEM WITH THE TELEVISION IN THE CELL, WHILE HE COULDN'T TAKE IT OUT TO THE REPAIR STORE, HE HAD TO GO ABOUT GETTING IT REPAIRED. HE HAD TO GO THROUGH A PROCESS OF DOING THAT. HE HAD TO USE RESOURCES TO DO THAT.

MR. JONES HAS HEALTH PROBLEMS.

HE HAS TO BE CONCERNED FOR HIS PERSONAL SAFETY. HE DEMONSTRATED AN ABILITY TO DO THAT.

TAKE MESSED ON HIS OWN, AND THE PRISON GUARDS WOULD BE ABLE TO SEE WHETHER OR NOT THEY COULD DO THAT.

THEY MAINTAIN INMATE CAN TEEN ACCOUNTS, MR. JONES INDICATED A QUITE EXTENSIVE KNOWLEDGE OF THE ACCOUNT WHEN HE BEGINS TO COMPLAIN ABOUT HOW THEM SENDING MONEY BUT IT HAS NOT BEEN CREDITED TO HIS ACCOUNT.

WE ARE TALKING ADAPTIVE FUNCTIONING, WE ARE NOT TALKING ROCKET SCIENCE, WE'RE TALKING FEEDING YOURSELF, CLOTHING YOURSELF, TAKING CARE OF YOUR HEALTH, COMMUNICATES WITH OTHERS, SO EVEN PRISON GUARD WAS HAVE

THE ABILITY TO OBSERVE
WHETHER OR NOT PEOPLE COULD
DO THAT.

AND MY OPPONENT KEEPS ON
TALKING ABOUT UNREASONABLE
OBLIGATION OF THE LAW.

THIS IS A QUESTION, THE
QUESTION OF WHETHER THE
TRIAL COURT FINDING IS
SUPPORTED BY EVIDENCE.

HERE THE TRIAL COURT FOUND
NO CREDIBLE EVIDENCE THAT
THE DEFENDANT COMMITTED ANY
CRIME.

WE HAVE DR. EISENSTEIN
BOOING THE ONLY ONE
TESTIFYING THAT THE
DEFENDANT IS RETARDED THIS
IS THE FOURTH TIME
DR. EISENSTEIN HASED IN THE
CASE, THE FOURTH TIME
DR. EISENSTEIN HAS BEEN
FOUND INCREDIBLE.

WHEN ONE CONSIDERS WE HAVE A
LONG HISTORY IN THE CASE OF
THE DEFENDANT'S OWN DOCTORS
TALKING ABOUT HIM BEING --
DR. EISENSTEIN, WELL, THE
TRIAL TESTIMONY CHANGED
BECAUSE HE GOT THIS 75
REPORT.

HE TESTIFIED AT THE FIRST
POST-CONVICTION HEARING
DIDN'T FIND THE DEFENDANT
RETARDED, HE HAD THE REPORT
THEN.

DR. EISENSTEIN'S EXPLANATION
WAS BETWEEN THE EVIDENTIARY
HEARING IN 2000 AND THE
PRESENT EVIDENTIARY HEARING
THE DEFINITION OF RETARD
CHANGED, THERE IS NO CHANGE
IN THE DSM.

THE TRIAL COURT HAD AMPLE
BASES TO FIND HIM CREDIBLE.
THE STATE RESPECTED TO FIND
THE COURT ORDER.

>> THANK YOU VERY MUCH.

>> REBUTAL?

>> AS TO THE QUESTION OF
INMATE ACCOUNTS, THIS IS
ANOTHER EXAMPLE OF WHERE THE
COURT'S ORDER SIMPLY IS NOT
TRUE.

THERE IS ABSOLUTELY NOT A SHRED OF EVIDENCE THERE IS ANYTHING ABOUT WIRE TRANSFERS FROM EUROPE AS INDICATIVE OF ACTIVE FUNCTIONING DEFICIT ANYWHERE IN THE RECORD.

THERE ARE THREE INMATE GRIEVANCES IN WHICH MR. JONES TALKS ABOUT THINK FACT THAT THE MONEY ORDERS HAVE NOT GOTTEN INTO HIS ACCOUNT.

THIS IS SOMETHING THAT IS NOT -- THIS IS -- THIS HAS NOTHING TO DO WITH ADAPTIVE FUNCTIONING.

IT IS COMPLETE MISREPRESENTATION OF THE FACTS BELOW, IS JUST ONE EXAMPLE OF MAN ANYONE THE ORDER THAT DO JUST THAT. THE MMIs IN WHICH THE COURT SAYS DR. EISENSTEIN SAYS THEY ARE CLEARLY INVALID. THAT IS NOT WHAT HE TESTIFIED.

IN FACT, HE DID THE MMPI AND DIDN'T THINK THE MMPIs WERE CLEARLY INVALID, HE THOUGHT THE ELEVATED F-SCALE WAS AN EXAMPLE OF A CRY FOR HELP. AND THE COURT ALSO SAYS THAT, AS YOU I SAID BEFORE, THE, THE IQs WERE CONSISTENTLY ABOVE 70.

THERE WERE ONLY 4 IQs SCORES THAT THE COURT SHOULD HAVE CONSIDERED IN THE CASE TO BEGIN WITH.

THE THREE THAT DR. EISENSTEIN DID AND '91, '93 AND '99 THEN THE 2003 IQ SCORE BY DR. CADDY, DR. PRITCHARD DIDN'T OF T. HE WAS STRUCK AS A WITNESS. EISENSTEIN GOT TO LOOK AT THE RAW DATA TO MAKE WHAT THEY COULD OUT I OF IT.

THE DOCTOR CHOSE NOT EVEN TO GIVE A CREDITED IQ TEST. HE GAVE A SCREENING IQ TEST WHICH THE COURT RELIED ON NOT ONE WIDTH BECAUSE HE

KNEW IT WAS LIKELY THAT
MR. JONES WOULD SCORE LOWER
BECAUSE THAT IS WHAT THE
RECORDS AND THE MANUALS
ABOUT THE TEST SAY.
SO HE CHOSE TO GIVE
UNACREDITED TEST, THEN GIVE
TESTIMONY WHEN HIS OWN TEST
SHOWED THAT THE NON-VERBAL
ASPECT OF HIS MELINGERING
RESULTS SHOW THE TONY
INVALID BUT THE VERBAL
RESULTS SHOW THAT MR. JONES
WAS COOPERATING COMPLETELY,
SO I WOULD ASK THE COURT TO
TAKE A LOOK AT THIS CASE
BOTH AS TO THE FUNCTIONING,
THE IQ, THE ADAPTIVE
FUNCTIONING AND THE FIVE
AREAS THAT DR. EISENSTEIN
FOUND WERE DEFICIENT AS TO
THE QUESTION OF ONSET, I
THINK RETROSPECTIVE
DIAGNOSIS IS THE ONLY
POSSIBLE WAY FOR AN INMATE
IN THE CIRCUMSTANCE TO POST
CONVICTION WITH A CRIME LONG
BEFORE AN A DERTH OF PRIOR
RECORDS TO MAKE THE SHOWING
HE IS MENTALLY RETARDED.
YOU THANK YOU FOR YOUR TIME.
>> THANK YOU VERY MUCH.
THE COURT WILL TAKE THE
MORNING RECESS.
>> PLEASE Rise