Leonardo Franqui v. State of Florida

SC05-830

>> PLEASE RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL WHO HAVE TO PLEAD, DRAW
NEAR, GIVE ATTENTION, AND YOU
SHALL BE.
GOD SAVE THESE UNITED STATES,
THIS GREAT STATE OF FLORIDA,
AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO
THE ORAL ARGUMENTS FOR THE
FLORIDA SUPREME COURT FOR
THURSDAY, MARCH THE 12th.
THE FIRST CASE ON OUR DOCKET IS
FRANQUI VERSUS STATE.
OR FRANK VERSUS STATE.
MR. SCHER.
>> GOOD MORNING, MAY IT PLEASE THE
COURT.
MY NAME IS TODD SCHER, ON BEHALF
OF APPELLANT FRANQUI.
CLAIM ON 3.203 RAISED BELOW REGARDING
MR. FRANQUI'S MENTAL RETARDATION.
THERE WAS A LIMITED EVIDENTIARY
HEARING ON ONE CLAIM THAT
MR. FRANQUI ADOPTED FROM HIS
CO-DEFENDANT'S CASE.
THAT IS ARGUMENT FIVE OF THE
BRIEF.
>> SO THE EVIDENTIARY HEARING
WAS JUST ONE CLAIM?
>> ONE CLAIM AS TO.
THE ALLEGED RECANTATION OF
PABLO ABREU AS IT RELATED TO
MR. FRANQUI AND MR. SAN MARTIN.
IT WAS LIKE A BOTH JOINT
EVIDENTIARY HEARING TO SAN
MARTIN AND FRANQUI.
>> SO I'M CLEAR, WAS THERE
EVIDENTIARY HEARING ON THE
QUESTION OF MENTAL RETARDATION?
>> NO, THERE WAS NOT.

THAT IS WHAT I HOPE TO BE THE FOCUS
OF MY ARGUMENT THIS
MORNING WHICH IS ARGUMENT ONE
WHAT WE CONTEND TO BE IMPROPER
SUMMARY DENIAL FOR LACK OF A
BETTER WORD THE ATKINS CLAIM OR
THE CLAIM THAT MR.^ --.
>> HOW FAR, WAS THAT RAISED IN
ANOTHER VENUE BEFORE THIS?
BEFORE THIS 3.850, WAS THE,
WHETHER OR NOT HE IS MENTALLY
RETARDED EVER LITIGATED?
>> UNDER ATKINS, NO.
THERE WAS, THIS IS ONE OF THE
BASES OF THE TRIAL COURT'S
DENIAL.
THE TRIAL COURT RULED BECAUSE
MR.^FRANQUI PRESENTED SOME EVIDENCE
ABOUT HIS LOW INTELLECTUAL
CAPACITY OR MENTAL RETARDATION
AT PENALTY PHASE, THAT WAS REJECTED
AS MITIGATION BY THE TRIAL COURT
AND AFFIRMED BY THIS COURT,
THEN THEREFORE THE ISSUE, HE
DIDN'T USE THE WORDS
PROCEDURALLY BAR BUT I THINK
THE GIST OF IT WAS ALREADY
PREVIOUSLY LITIGATED AND
DECIDED.
THAT WAS ONE BASIS OF THE TRIAL
COURT'S ORDER.
>> I'M SYMPATHETIC WE HAVE
LAW THAT JUST BECAUSE IT WAS
NOT FOUND AT THE DIRECT CASE,
THAT MITIGATION IS DIFFERENT
THAN THE ATKINS CLAIM.
I'M CONCERNED ABOUT THE
PLEADINGS IN THIS CASE AND THAT
YOU DID NOT PLEAD THE
REQUIREMENTS OF THE RULE.
IS THERE SOMETHING THAT
OCCURRED PREVENTED YOU AS HIS
LAWYER FROM DOING THAT?
OR I MEAN YOU KNOW BETTER THAN
I WHAT THE STATE OF THESE
PLEADINGS ARE.
>> CLARIFY, FIRST OF ALL I WAS
APPOINTED FOR THE APPEAL.
I DIDN'T HANDLE THE CASE BELOW.
>> TALK BETTER ABOUT THAT.
>> BUT YOU STILL HAVE TO DEAL
WITH THE PLEADINGS.
>> ABSOLUTELY, ABSOLUTELY.
WHAT IS IMPORTANT TO NOTE HERE

THE CHRONOLOGY IN TERMS OF WHEN
ALL THESE MATTERS FIRST CAME
UP. OF COURSE ATKINS CAME OUT IN
2002.
I BELIEVE IT WAS SEVERAL MONTHS
AFTER ATKINS THAT MR.^FRANQUI'S
COUNSEL FILED THE FIRST
SUPPLEMENTAL CLAIM RAISING,
I THINK IT
WAS A RING CLAIM, RING VERSUS
ARIZONA CLAIM. AND THE ATKINS CLAIM
THERE WAS A SUBSEQUENT
SUPPLEMENTAL WHERE HE,
MR.^FRANQUI RAISED AGAIN OR
RESTATED HIS ATKINS CLAIM.
NOW THIS WAS ALL IN 2002 AND
2003.
THIS COURT DIDN'T COME OUT WITH
RULE 3.203, WHICH WAS THE RULE
THAT PROCEDURES FOR ALLEGING
MENTAL RETARDATION IN A
POST-CONVICTION CASE, UNTIL
2004.
SO I THINK THAT WHAT THE COURT
NEEDS TO CONSIDER IS THE
CONTEXT IN TERMS OF AT THAT
TIME, MR.^FRANQUI ALLEGED UNDER
ATKINS CERTAINLY HE MADE
ALLEGATIONS THAT HE WAS
MENTALLY RETARDED.
THAT THERE WAS IQ SCORE OF 60
IN THE RECORD.
THAT HE DROPPED OUT OF THE
SCHOOL IN THE 80th GRADE.
THAT HE HAD LIMITED
INTELLECTUAL FUNCTIONING.
>> DID YOU OR COUNSEL AT THAT
POINT EVER ALERT TO THE
TRIAL COURT TO THE RULE AND SAY
BASICALLY, WE NEED TO ADDRESS
THIS CASE, OR THIS ISSUE
PURSUANT TO THAT RULE?
>> I DON'T, IF MEMORY SERVES I
DON'T BELIEVE HE EVER, BECAUSE
WHEN THE RULE CAME OUT THE CASE
HAD ALREADY BEEN SUBMITTED TO
THE COURT FOR CONSIDERATION.
THE EVIDENTIARY HEARING HAD
HAPPENED.
>> THE EVIDENTIARY HEARING HAD
ALREADY HAPPENED?
>> CORRECT. THE EVIDENTIARY
HEARING ON ONE CLAIM ALREADY
HAPPENED AND THE ORDER DENYING

WAS IN OCTOBER OF '05.
THE RULE BECAME EFFECTIVE IN OCTOBER OF '04.
MY RECOLLECTION IS THAT THE EVIDENTIARY HEARING ALREADY HAPPENED.
BUT IN ANY EVENT, MR.^FRANQUI OR COUNSEL CERTAINLY POINTED OUT NUMEROUS TIMES THAT ATKINS WAS OUT.
THE STATUTE WAS OUT AND REQUESTED AN EVIDENTIARY HEARING BOTH IN THE PLEADINGS AND BEFORE THE COURT AT SOME OF THE STATUS HEARINGS AND ARGUMENTS THAT WERE AFFORDED TO HIM BEFORE THE TRIAL COURT.
>> AND YOUR CONTENTION IS THAT THE TRIAL COURT, RATHER THAN REJECTING THE CLAIM ON THE BASIS OF FACIAL INSUFFICIENCY ON THE PLEADINGS REJECTED IT BECAUSE IT HAD ALREADY BEEN DECIDED BY REJECTING MITIGATION AT THE ORIGINAL TRIAL?
>> WELL, THE WAY I READ THE ORDER I THINK THERE IS THREE PRIMARY REASONS FOR THE TRIAL COURT'S ORDER.
ONE IS, AS YOU STATED, THAT HAD ALREADY BEEN PREVIOUSLY LITIGATED.
THE SECOND, THE JUDGE INDICATED THAT FRANQUI HAD BEEN PROVIDED AN OPPORTUNITY AT THE EVIDENTIARY HEARING TO PROVIDE THE COURT WITH ANY ADDITIONAL EVIDENCE TO ESTABLISH HIS MENTAL RETARDATION.
OF COURSE OUR POSITION THAT HE WAS NEVER AFFORDED AN EVIDENTIARY HEARING ON THAT CLAIM.
>> WAS THAT THE SAME TRIAL JUDGE THAT HEARD THE, PRESIDED OVER THE EVIDENTIARY HEARING?
>> NO.
>> ENTERED THE ORDER?
>> THE CASE WAS TRANSFERRED ACTUALLY FROM MIAMI-DADE TO BROWARD COUNTY BECAUSE THERE WERE SEVERAL JUDGES IN DADE COUNTY THAT HAD HEARD THE CASE BUT, BECAUSE OF THIS BRADY

GIGLIO CLAIM THAT HAD BEEN
ALLEGED.
MARILYN MILLIAN WAS ONE OF THE
PROSECUTORS.
JUDGES IN MIAMI-DADE COUNTY
RECUSED THEMSELVES BECAUSE THEY
DIDN'T WANT TO BE IN THE
POSITION OF JUDGING HER
CREDIBILITY.
>> RECORD SHOWS THAT THERE
WAS NO OPPORTUNITY TO PRESENT
ATKINS CLAIM AT THE
EVIDENTIARY HEARING IN THIS
CASE?
>> HE PRESENTED AN ATKINS CLAIM.
HE NEVER GOT IT AT THE
EVIDENTIARY HEARING.
>> AT EVIDENTIARY HEARING HE
NEVER GOT OPPORTUNITY TO
PRESENT HIS ATKINS CLAIM?
>> CORRECT. BECAUSE THE HEARING WAS
LIMITED.
>> HOW IS THAT DIFFERENT THAN ZACH v.
STATE?
ARE YOU FAMILIAR WITH THAT
CASE?
ZACH.
>> I KNOW THE NAME.
RINGS A BELL.
UNFORTUNATELY DIDN'T REVIEW IT.
>> WE HAVE CASE LAW, AND I JUST
HAVEN'T BEEN ABLE TO PULL IT UP
ON MY RADAR SCREEN, THAT SAYS NOT
PROCEDURALLY BARRED FROM
REPRESENTING MENTAL RETARDATION
CLAIM EVEN IF IT HAS BEEN
REJECTED IN THE ORIGINAL
SENTENCING; IS THAT CORRECT?
>> PHILLIPS, CORRECT.
NUMBER OF CASES I CITED IN THE
BRIEF BEGINNING WITH PHILLIPS
WHERE THE COURT TALKS ABOUT IN
PHILLIPS THERE WAS ALLEGATION
OF INEFFECTIVE ASSISTANCE OF
COUNSEL FOR FAILURE TO PRESENT
ADDITIONAL EVIDENCE OF
RETARDATION.
THE COURT AFFIRMED DENIAL OF
THAT CLAIM BUT ALSO NOTED THAT
THE DEFENDANT COULD FILE A
3.203 MOTION BECAUSE THE CLAIM
OF RETARDATION AS TO MITIGATION
WAS DISTINCT FROM THE
SUBSTANTIVE ATKINS CLAIM.

>> BUT DIDN'T HE HAVE, DIDN'T WE ALLOY ALLOW EVERYBODY IN MR.^FRANQUI'S SITUATION A PARTICULAR AMOUNT OF TIME TO ACTUALLY FILE A PROPER MOTION UNDER THE RULE?
>> THAT'S CORRECT.
THAT'S CORRECT.
>> AND THAT NEVER HAPPENED.
>> IT DID NOT HAPPEN.
I ASKED FOR LEAVE TO DO THAT ONCE THE CASE WAS UP HERE BUT UNFORTUNATELY I WAS, I HAD THE RECORD THAT I HAD.
BUT MY POSITION WITH RESPECT TO THAT IS AGAIN THAT RULE CAME OUT CERTAINLY AFTER, WHILE THE CASE WAS SUBMITTED TO THE COURT ALREADY FOR ITS RULING.
AND ATKINS, THIS WASN'T A SITUATION WHERE THERE HAD NOT BEEN ANY ATTEMPT BY COUNSEL TO ALERT THE COURT TO AN ATKINS ISSUE OR AN ATKINS CLAIM.
THERE HAD BEEN SEVERAL ATTEMPTS IN SUPPLEMENTAL PLEADINGS TO RAISE THE ATKINS ISSUE.
SO THE FACT THAT THERE WASN'T APPARENTLY A SEPARATE MOTION RAISED, WHY THEY DIDN'T DO THAT CERTAINLY I CAN'T SPECULATE.
>> WHY, BUT YOU SAY THERE IS AN ALLEGATION OF A LOW IQ?
>> CORRECT.
>> BUT AS YOU ARE VERY WELL-FAMILIAR, UNDER THE RULE AND UNDER STATUTE YOU HAVE TO ALSO ALLEGE AND THEN PROVE ONSET PRIOR TO AGE 18.
YOU'VE GOT TO PROVE, I MEAN THE 60 IQ SCORE IS NOT ONE THAT WOULD QUALIFY UNDER CHERRY FOR CURRENT, CURRENT IQ.
>> 60.
>> 60.
WHAT DID I SAY?
>> 60 WOULD QUALIFY.
CHERRY IS 70.
>> THE TEST THOUGH THAT, FOR WHICH THE, THE TEST DID NOT QUALIFY.
>> CORRECT.
>> NOT THE IQ SCORE BUT THE TEST WOULD NOT QUALIFY AS A

STANDARDIZED, AUTHORIZED TEST,
IS THAT CORRECT.
>> WELL THAT AGAIN, THAT ISSUE
CAME OUT SUBSEQUENT TO ALL OF
THIS BEING LITIGATED BELOW.
SO THAT WAS ONE OF THE REASONS
WHY WHEN I ASKED THE COURT,
AGAIN IN THE CONTEXT OF THIS
CASE, THE JUDGE NEVER ACTUALLY
ENTERED AN ORDER ON THE ATKINS
CLAIM.
WHEN I GOT THE RECORD I NOTICED
THE PROBLEM AND ASKED THE COURT
TO RELINQUISH JURISDICTION, A, FOR
THE LOWER COURT TO ENTER AN
ORDER OR ALTERNATIVE TO ALLOW
HIM AS THE COURT HAS DONE IN
SOME OTHER CASES TO FILE A
PROPER 3.203 MOTION.
THE COURT ONLY RELINQUISHED
JURISDICTION TO ENTER AN ORDER
RESOLVING ATKINS CLAIM WHICH HE
ULTIMATELY DID.
SO I SUBMIT SOME
OF THE MORE RECENT DEVELOPMENTS
WITH RESPECT TO THE TESTING,
THE SPECIFIC TEST THAT WAS THE
BASIS FOR THE 60 WAS THE
REVISED BETA.
THE RULE, SUBSEQUENTLY STATED
YOU KNOW, THERE HAD TO BE
CERTAIN KINDS OF TESTS BUT THE
RULE ALSO SAYS THERE IS AN
EXCEPTION TO THAT.
AND SO I SUBMIT THAT AT THE
VERY LEAST, THE COURT SHOULD
REMAND TO ALLOW US TO FURTHER
PROPERLY ALLEGE WHAT NEEDS TO
BE ALLEGED.
ALTHOUGH I DO SUBMIT THERE WAS
NO LACK OF SPECIFIC ALGATIONS.
I MEAN, IN MY VIEW I THINK ALL
REALLY NEEDS TO BE DONE TO
ALLEGE ATKINS CLAIM.
HE IS RETARDED UNDER ATKINS.
MAKE ALLEGATION WHAT THE IQ IS.
SUPPLEMENTAL PLEADINGS
DISCUSSED HE DROPPED
OUT OF SCHOOL IN THE EIGHTH GRADE.
HAD LIMITED INTELLECTUAL
FUNCTIONING.
THERE WAS AN UNCLE AT THE PENALTY
PHASE SAID MR.^FRANQUI WAS, IN HIS
WORDS, SLOW OR RETARDED.

I THINK THAT IS SUFFICIENT.
>> LET ME SEE IF I UNDERSTAND YOU CORRECTLY.
YOU BELIEVE AT THE PLEADINGS STAGE YOU HAVE TO, OR, PLEAD A PRESENT IQ OF 70 OR BELOW, IS THAT CORRECT?
>> THAT'S CORRECT.
>> AND THEN YOU WOULD HAVE TO PLEAD PRESENT, LOW ADAPTIVE FUNCTIONING?
>> CORRECT.
>> AND THEN YOU WOULD ALSO HAVE TO PLEAD AN IQ OF 70 OR BELOW THAT, AT BEFORE AGE 18?
>> RIGHT.
ONSET BEFORE AGE 18, CORRECT.
>> WAS ALL THAT DONE IN THIS CASE?
>> IT WAS DONE.
I MEAN GRANTED LIKE I SAID IN THE BRIEF, PERHAPS WASN'T AS THOROUGH AS IT COULD HAVE BEEN UNDER TODAY'S STANDARDS BUT THAT'S WHY I REALLY ENCOURAGE THE COURT TO CONSIDER THE FACT THAT ALL OF THIS WAS DONE WELL BEFORE THE ADVENT OF 3.20.
SO ALL EVERYBODY WAS REALLY OPERATING UNDER AT THAT POINT WAS ATKINS.
THIS COURT I DON'T EVEN THINK AT THE POINT THE CASE WAS IN THE LOWER COURT HAD DECIDED RETROACTIVETY OF ATKINS.
SO, I THINK CERTAINLY SUFFICIENT ALLEGATIONS WERE MADE.
WHAT I WANT TO POINT OUT TO THE COURT IS EVEN TRIAL COUNSEL OR COLLATERAL COUNSEL AT PAGE 589 OF VOLUME 32 BELIEVED THAT THEY WERE MAKING THE REQUISITE ALLEGATION.
MR.^FRANQUI'S COUNSEL STATED WE HAVE RAISED THE FACT THAT OUR CLIENT SUFFERS FROM SUBSTANTIAL LIMITATION OF PRESENT FUNCTIONING SIGNIFICANT UNDERAVERAGE INTELLECTUAL FUNCTIONING.
THAT IS WHAT THE STATUTE SAYS.
WE HAVE TRACKED IT.
THEY WERE DOING THE BEST

THAT THEY COULD CERTAINLY
GIVEN --
>> THE STATUTE WASN'T IN
EXISTENCE AT THAT TIME.
>> THE STATUTE WASN'T IN
EXISTENCE.
>> ATKINS BASICALLY SAID THAT
THE, HE HAD THE DEFINITION,
ESSENTIALLY THE DEFINITION OF
MENTAL RETARDATION IS LEFT TO
THE STATE, CORRECT?
>> CORRECT.
>> I MEAN THERE MAY BE SOME
OUTER LIMITS --
>> ONE OF THE THINGS ATKINS
SAID, CORRECT.
>> SO WHEN ALL THIS IS BEING
DONE THE STATUTE WAS IN PLACE?
>> CORRECT.
>> BUT IT DOESN'T REALLY, THE
ALLEGATIONS HERE DON'T REALLY
TRACK THE STATUTE AND THE RULE
THAT WAS IMPLEMENTED PURSUANT TO
THE STATUTE?
>> WELL, I RESPECTFULLY
DISAGREE.
CERTAINLY COUNSEL BELIEVED THEY
WERE TRACKING THE STATUTE.
I THINK THE PLEADINGS
THEMSELVES SUFFICIENTLY AGAIN,
ALTHOUGH PERHAPS, IT DIDN'T GO
ON AND GO ON AS SOME MOTIONS
MIGHT NOW, NOW THAT WE HAVE
CERTAINLY SEVERAL YEARS OF
DEVELOPED LAW IN TERMS OF
EXACTLY THE RULE MEANS AND WHAT
THE STANDARDS ARE.
BACK AT THE TIME COUNSEL
BELIEVES AND I CONCUR, THAT THE
ALLEGATIONS THAT WERE MADE WERE
MORE THAN SUFFICIENT TO TRACK
THE STATUTE.
AND AGAIN, THE MAIN THRUST OF
THE LOWER COURT'S ORDER WASN'T
THAT THE PLEADING WAS
INSUFFICIENT.
ALTHOUGH THAT WAS CERTAINLY ONE
BASIS BUT I THINK THE PRIMARY
BASIS AGAIN WAS THAT THE LOWER
COURT VIEWED THIS ALREADY HAD
BEEN LITIGATED.
>> BUT THE LOWER COURT, IF THE
LOWER COURT'S WRONG ON ONE
GROUND THERE IS ANOTHER GROUND

THAT JUSTIFIES THE DECISION,
THEN OBVIOUSLY THE DECISION IS
UPHELD, CORRECT?
>> CERTAINLY, CERTAINLY.
BUT I'M NOT AGREEING THAT
PLEADING WAS INSUFFICIENT.
WHAT I'M SAYING I DON'T THINK
THAT WAS THE PRIMARY BASIS FOR
THE LOWER COURT'S RULING.
I THINK LOWER COURT VIEWED THIS
AS HAVING BEEN AS YOU CAN SEE
IN THE ORDER, GOES ON TO
ADDRESS WHAT THIS COURT ARGUED
OR STATED ON DIRECT APPEAL THAT
THE COURT FOUND ON DIRECT
APPEAL WITH RESPECT TO THE
MENTAL HEALTH ASPECT THE CASE.
AND I WANT TO POINT OUT ALSO,
IN TERMS OF THE DIRECT APPEAL,
WHAT THE COURT REALLY, ALL THE
COURT REALLY FOUND IT WAS
COMPETENT SUBSTANTIAL EVIDENCE
TO SUPPORT THE LOWER COURT'S
FINDING OF, NOT FUND FINDING
THE INTELLECTUAL CAPACITY TO BE
NON-STATUTORY MITIGATOR.
>> I'M ALL FOR TRYING TO GIVE,
IF SOMEONE IS ACTUALLY MENTALLY
RETARDED, WE DON'T WANT TO DENY
THAT PERSON AN OPPORTUNITY TO
ESTABLISH IT, BUT IN LOOKING AT
TRIAL COURT'S ORDER, YOUR OWN
EXPERT, ADMINISTERED THE
STANDARD, THE WESCHLER, HOWEVER
YOU SAY IT, WESCHLER INTELLIGENCE
TEST.
SCORED FULL-SCALE IQ OF 83 AND
PERFORMANCE IQ OF 92.
FAILED TO ALLEGE TWO STANDARD
DEVIATIONS BEFORE THE NORM OR
STANDARD IQ DETERMINED BY A
QUALIFIED TEST.
ARE YOU, FIRST OF ALL, NO
QUESTION THAT DR.^TOOMER
ADMINISTERED THOSE TESTS AND
THOSE TESTS THAT WOULD BE
CONSIDERED TO BE APPROPRIATES
UNDER THE CURRENT STATUTE.
>> CORRECT.
>> SO HOW ARE YOU GOING TO GET
AROUND THAT?
>> FIRST OF ALL DR.^TOOMER ALSO
ADMINISTERED A TEST THAT CAME
UP WITH 60.

>> BETA TEST.
>> BETA TEST, CORRECT.
>> THAT IS NOT, DO YOU DON'T CONCEDE IT IS NOT A QUALIFIED TEST UNDER OUR CURRENT RULE OR THE STATUTE?
>> THE WAY I HAD READ THE RULE IT DISCUSSES TWO, AGAIN THIS IS THE ADMINISTRATIVE, THIS IS THE GLEANED FROM THIS CODE CAME OUT AFTER ALL THIS HAPPENED BUT THERE ARE TWO TESTS IDENTIFIED. STANFORD-BINET AND THE WATE. AND THERE IS ANOTHER EXCEPTION THAT THE COURT CONSIDERS SOME TESTS AS THERE IS SUFFICIENT RELIABILITY.
NONE OF THIS WAS LITIGATED AND SO I WAS CERTAINLY AT A HEARING PRESENT THIS INFORMATION IN ORDER TO INQUIRE FURTHER AS TO THE VALIDITY OF THE BETA TEST, AS DR.^TOOMER EXPLAINED THE DIFFERENCE BETWEEN THE TWO TESTS AND PERHAPS DO SOME ADDITIONAL WORK.
I KNOW THAT PRIOR COLLATERAL COUNSEL INDICATED THERE WERE ADDITIONAL TESTING THAT, MR.^FRANQUI WAS UNDERGOING. THEN OF COURSE THE CASE ENDED AND SO THAT'S WHERE THE RECORD STANDS IN TERMS THAT ISSUE.
AND SO AGAIN, CONSIDERING THE CONTEXT IN WHICH ALL OF THIS AROSE IN EARLY STAGES OF ALL THIS LITIGATION IN THE STATE, I SUBMIT AT VERY LEAST, YOU KNOW, MR.^FRANQUI SHOULD BE ALLOWED TO GO BACK, AS THE COURT HAS DONE IN NUMBER OF OTHER OCCASIONS, GRANT HIM LEAVE TO, AT LEAST, PLEAD OR ALLEGE FULLY IN COMPLIANCE WITH THE RULE, ALL THESE VARIOUS THINGS THAT WE'VE DISCUSSED TODAY.
>> YOU ARE INTO YOUR REBUTTAL TIME NOW IF YOU WANT TO SAVE ANY TIME.
>> I WILL REST ON MY BRIEF WITH REGARD TO THE OTHER TWO ISSUES. I WOULD JUST POINT OUT THAT ARGUMENT TWO, REALLY THE MAIN

FOCUS OF OUR ARGUMENT TWO IS
REPORT EROHN FINDING OF A
PROCEDURAL BAR.
AND AGAIN I WILL --
>> PROSCUTORIAL COMMENTS, IS
THAT THE ISSUE?
>> FAILURE TO INJECT
ALLEGATIONS MADE.
I REST TO MY BRIEF AS TO
REMAINING ARGUMENTS AND SAVE MY
TIME FOR REBUTTAL.
THANK YOU.
>> MISS JAGGARD.
>> MAY IT PLEASE THE COURT.
SANDRA JAGGARD, ASSISTANT
ATTORNEY GENERAL BEHALF OF THE
STATE.
SAME JUDGE WHO HELD EVIDENTIARY
HEARING WHO ENTERED ATKINS
ORDER.
THERE WAS AMPLE
OPPORTUNITY TO PLEAD ATKINS
CLAIM.
IN FACT --
>> THE ISSUE TO WHATEVER WAS
PLED, DID THE DEFENDANT HAVE
THE OPPORTUNITY AT EVIDENTIARY
HEARING TO PRESENT EVIDENCE ON
THE ATKINS CLAIM?
>> WHETHER THE TRIAL JUDGE
WOULD HAVE LET HIM OR NOT I
DON'T KNOW BECAUSE HE DIDN'T
TRY.
THAT CERTAINLY WASN'T THE CLAIM
THE HEARING WAS GRANTED ON.
HOWEVER, THE REASON WHY WE HAVE
AN EVIDENTIARY HEARING
OCCURRING AT THE END OF '02 AND
NO ORDER COMING OUT UNTIL '05
IS THAT MR.^SAN MARTIN, YOU
CAN SEE IN THIS RECORD WAS
ATTEMPTING TO DO THE TEST AND
SUPPLEMENT HIS CLAIM AND TRIAL
COURT LET HIM DO ALL SORTS OF
TESTS.
>> YOU ARE TALKING ABOUT
MR.^FRANQUI?
>> MR.^SAN MARTIN.
CODEFENDANT.
CASES WERE GOING THROUGH
POST-CONVICTION TOGETHER.
THEY BOTH RAISED THEIR CLAIMS.
MR.^FRANQUI DID NOT RAISE THE
CLAIM ON A PRIOR WHICH THE

EVIDENTIARY CLAIM WAS GRANTED.
MR.^SAN MARTIN WAS GRANTED EVIDENTIARY HEARING ON TWO OF HIS CLAIMS.
MR.^FRANQUI WAS ALLOWED TO PARTICIPATE.
>> LOOK AT QUALITY OF LAWYERING THEN.
WE CAN'T LOOK AT WHAT IF MR.^FRANQUI'S LAWYER JUST DIDN'T UNDERSTAND, WASN'T AS GOOD AS MR.^SAN MARTIN'S LAWYER.
>> WELL, NUMBER ONE THERE IS NO SUCH THING AS INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL.
AND NUMBER TWO, THERE IS NOTHING HERE THAT WOULD EVEN REMOTELY APPROACH RETARDATION.
THERE IS AN 83 ON THE WATE.
THESE CRIMES ARE INCREDIBLY PLANNED. MR.^FRANQUI WAS PARTICIPATING IN THOSE PLANNING.
HE, THE EVIDENCE WAS HE COMPLETELY NORMAL.
WAS HOLDING DOWN TWO JOBS.
WAS RAISING A FAMILY.
HAD NO PROBLEMS OTHER THAN THE FACT HE WAS A CRIMINAL.
>> BUT MISS JAGGARD, ONE OF THE PROBLEMS HERE AND WE'VE SEEN IT COME UP NOW IN SOME OTHER CASES, IS A TEST THAT IS ADMINISTERED THAT IS NOT THE STANFORD-BINET OR THIS WECHSLER TEST.
>> YES.
>> SHOULD THE DEFENDANTS HAVE THE OPPORTUNITY TO MAKE THE CASE TO THE TRIAL COURT, EVEN THOUGH IT IS NOT THOSE TWO IQ TESTS, THAT THE IQ TEST THAT WAS ADMINISTERED LIKE THIS BETA TEST, FALLS UNDER THE CATEGORY OF, IN THE ADMINISTRATIVE RULE OF SOME OTHER TEST AS LONG AS IT HAS THESE INDICIA OF RELIABILITY?
>> IF THE DEFENDANT HAD IN FACT FILED A 3.203 WHEN HE HAD OPPORTUNITY TO DO SO INSTEAD OF ABANDONING THE CLAIM, YES YOU RULED HE HAD.

HE DID NOT DO THAT.
HE HAD THE OPPORTUNITY.
THE JUDGE WHO WAS HEARING THIS CASE WAS ALLOYING THE CODEFENDANT TO ENGAGE IN TESTING FOR THINGS LIKE LYME DISEASE.
THAT WAS SOMEHOW GOING TO SHOW RETARDATION.
>> WAS THERE AN ORDER ENTERED OR AT LEAST DISCUSSION AT A HEARING THAT SAYS, YES, YOU CAN HAVE A EVIDENTIARY HEARING BUT YOUR EVIDENTIARY HEARING IS LIMITED TO, TO THE CLAIM BY THE CODEFENDANT?
>> YEAH.
>> SO THAT IS WHAT HE WAS TOLD? THAT WHAT HIS EVIDENTIARY HEARING WAS FOR?
>> THAT WAS BEFORE THE, THE EVIDENTIARY HEARING WAS GRANTED BEFORE ATKINS EVEN CAME OUT.
HE WAS ALLOWED TO FILE THE SUPPLEMENTAL PLEADINGS.
WAS ALLOWED TO SUPPLEMENT THE SUPPLEMENTAL PLEADINGS.
>> DID HE ASK FOR A HEARING ON THAT CLAIM?
>> HE ASKED FOR A HEARING BUT HE DIDN'T ALLEGE HE WAS RETARDED.
HE SAID HE WAS RETARDED OR SOMETHING CLOSE TO IT.
HE HAD SIGNIFICANT DEFICITS IN ADAPTIVE FUNCTIONING OR A SIGNIFICANT SUBAVERAGE --
>> PLEADING ASPECT, FROM WHAT I UNDERSTAND HIS ARGUMENT TO BE THAT THIS PROCEDURAL RULE THAT NOT RETROACTIVE ON THESE PLEADING REQUIREMENTS.
THAT'S WHAT I UNDERSTAND HIS ARGUMENT TO BE.
WHAT IS YOUR RESPONSE?
>> MY POSITION IS THIS COURT GAVE EVERY SINGLE INMATE ON DEATH ROW UNTIL 60 DAYS AFTER OCTOBER 1st ON 2004 TO FILE A 3.203.
HE DIDN'T DO IT.
HE ABANDONED THE CLAIM ENTIRELY.
WHEN TRIAL COURT RULED ON HE DIDN'T FILE NOTICE OF APPEAL.

HE DIDN'T CLAIM THERE WAS AN ORDER.
HE COMPLETELY ABANDONED THE CLAIM.
HE WAS ALLOWED TO FILE ORIGINAL PLEADING.
ALLOWED TO FILE A SUPPLEMENT.
SUPPLEMENT SAYS I KNOW WHAT I SAID IS REALLY ENOUGH BUT MAYBE THERE IS NEW TESTS OUT THERE FOR RETARDATION.
NEITHER OF THE IQ TESTS ARE NEW.
MAYBE HE HAS DEGENERATIVE CONDITION CHANGED HIS FUNCTIONING.
RETARDATION IS A DEVELOPMENT DISORDER.
IF YOU DON'T HAVE IT BY 18 YOU DON'T HAVE RETARDATION.
A DEGENERATIVE DISORDER WOULD NOT BE RETARDATION.
DESPITE THE FACT THIS TRIAL COURT WAS ALLOWING THIS CODEFENDANT IN THIS CASE WHO IS GOING THROUGH THESE PLEADING PROCEEDINGS SIMULTANEOUSLY WITH THIS DEFENDANT TO SPEND YEARS TRYING TO COME UP WITH AN ATKINS CLAIM, THIS DEFENDANT JUST ABANDONED THE CLAIM.
>> IT IS VERY INTERESTING TO ME THEY WERE EVEN DOING CODEFENDANT AND THE DEFENDANTS HEARINGS ALL TOGETHER BUT I'M NOT SURE HOW MUCH WE CAN ACTUALLY USE WHAT A CODEFENDANT DID DO?
>> THE QUESTION WAS IF THERE IS OPPORTUNITY TO PLEAD IT.
CLEARLY THIS JUDGE WAS ALLOWING OPPORTUNITY.
CLEARLY THE RULE ALLOWED THIS OPPORTUNITY.
>> THIS IS MY TAKE ON THIS.
I KNOW YOU'VE BEEN HERE BEFORE ON THESE ISSUES.
IF THIS WERE TO GO BACK AND THE JUDGE IS TO ORDER THE CURRENT TESTING UNDER CHERRY, AND IT COMES BACK HE HAS GOT OVER 70, IT ENDS THIS ISSUE FOREVER.
HUNDREDS OF PEOPLE ON DEATH ROW, PROBABLY OR MAYBE THIS IS

NOT MENTALLY RETARDED OR MAYBE HE IS.
I AM CONCERNED A PRIOR LAWYER, TALK ABOUT ABANDONING A CLAIM. THAT IS A, YOU KNOW, THAT IS PRETTY DRASTIC STATEMENT.
AND WHAT YOU'RE ASKING US TO DO IS LOOK AT WHAT THE CODEFENDANT'S LAWYER DID WHO, SEEMS LIKE HE IS LITIGATING MUCH MORE AGGRESSIVELY AND SAY, WELL, HE COULD HAVE DONE IT. THIS GUY COULD HAVE DONE IT. BUT WE DON'T HAVE EFFECTIVE ASSISTANCE OF POST-CONVICTION.
JUST BECAUSE FRANQUI GOT A LAWYER THAT WASN'T AS GOOD AS SAN MARTIN, ISN'T IT JUST BETTER FOR THE SYSTEM TO GO BACK AND, IF HE CAN'T MEET THAT THRESHOLD, THAT IS THE END OF IT?
>> IT IS NOT THE END OF IT. EITHER ONE OF THE DEFENDANTS HAVE NOT MET THE THRESHOLD. THEY CONTINUE TO LITIGATE THE CLAIMS.
DOESN'T END THE CLAIMS AT ALL. AND A JUDGE HAS EVIDENTIARY HEARINGS THAT GO ON FOR WEEKS WITH MULTIPLE EXPERTS HIRED TO PRESENT EVIDENCE THAT THE STANDARD IS INCORRECT.
AND IF IT ENDED THE CLAIM I WOULD BE HAPPY TO HAVE EVIDENTIARY HEARING BUT I KNOW BETTER.
WHEN YOU DON'T EVEN BOTHER TO --
>> I THINK OUR LAW UNDER CHERRY IS PRETTY CLEAR, IF THEY DON'T MEET THAT STANDARD, THAT'S IT.
>> I CERTAINLY AGREE WITH YOU THAT YOUR LAW IS CLEAR IN CHERRY AND JONES AND PHILLIPS. UNFORTUNATELY I HAPPEN TO KNOW THAT PHILLIPS AND JONES ARE CONTINUING TO LITIGATE THIS CLAIM IN FEDERAL COURT.
>> WE CERTAINLY CAN'T CONTROL WHAT GOES ON IN FEDERAL COURT.
>> I UNDERSTAND BUT YOU'RE SAYING HAVE A QUICKEST EVIDENTIARY HEARING AND IT WILL GET RID

OF THE CLAIM. IT DOESN'T.
WE HAVE A CLAIM THAT THE PERSON DIDN'T EVEN PLEAD HE WAS RETARDED.
>> MISS JAGGARD, SEEMS AS THOUGH WHAT YOU'RE REALLY URGING US TO DO, IF WE DO LOOK AT EACH OF THE PLEADINGS THAT THEY WILL FACIALLY STRAIGHT THAT THIS PERSON COULD NOT SATISFY AND, IT'S REFLECTS THAT IN ALL OF THOSE PLEADINGS.
I'VE NOT SEEN, I REALLY NOT HAD A CHANCE TO PULL THE ACTUAL DOCUMENTS.
IS THAT THE ESSENCE OF YOUR ARGUMENT?
THAT WILL, EITHER IT WILL OR IT WON'T?
>> ESSENCE OF MY ARGUMENT IS, YES, THAT THE CLAIM WAS NEVER PLED PROPERLY.
WE NEVER HAD A CLAIM --
>> NOT ONLY JUST NOT PLED PROPERLY, IT SHOWS REALLY FROM WHAT THEY'RE PLEADING HE DOES NOT QUALIFY AND HE IS TRYING TO MAKE DIFFERENT ALLEGATIONS THAT JUST DON'T EVEN REALLY COME INTO THE BALLPARK WHAT WE'RE TALKING ABOUT?
>> HE, HE IS MAKING ALLEGATIONS ABOUT LOTS OF THINGS.
HE IS IGNORING, HE IS SAYING HE HAS LESS THAN 60.
LESS THAN 60 WOULD BE DROOLING.
HE IS NOT DROOLING SO THAT CLEARLY ISN'T TRUE.
AND YOU HAVE THE 83.
YOU HAVE COMMENT ABOUT HE DROPPED OUT IN 8th GRADE AND THEN YOU HAVE A RECORD ABOUT WHAT HE HAD MANAGED TO DO WITH HIS LIFE SINCE THE 8th GRADE.
>> BUT NOW, SEE THE PROBLEM, I THINK WHAT JUSTICE LEWIS WAS TRYING TO SAY, WE'RE WILLING TO GO AND LOOK AND SAY, IF NOTHING ALLEGED COULD EVEN REMOTELY COME CLOSE TO A 3.203 MOTION, THEN, IT PROBABLY IS USELESS.
BUT GOING BACK AND SAYING WELL THIS OTHER EVIDENCE WILL SHOW THAT HE REALLY ISN'T MENTALLY

RETARDED, WE'VE ALREADY CROSS
THAT AND SAID, EVEN IF THE
EVIDENCE AT TRIAL DIDN'T
ESTABLISH MENTAL RETARDATION,
THE DEFENDANT IS ALLOWED TO
ATTEMPT TO ESTABLISH MENTAL
RETARDATION UNDER THE STATUTE,
AND UNDER OUR RULE.
>> MY POINT WAS MORE, WHERE YOU
SAY HE IS RETARDED OR CLOSE TO
IT, YOU DON'T EVEN ALLEGE A
GOOD-FAITH BASIS WHICH IS THE
MINIMAL PLEADING REQUIREMENT
UNDER 3.203 WHICH HE IS FAR
FROM DOING.
HE HAD HIS 60 DAYS.
HE COULD HAVE FILED A MOTION.
HE DIDN'T FILE THE MOTION.
BUT THEY DIDN'T SAY THAT.
THEY SAID HE'S RETARDED OR
CLOSE TO IT.
YOU'RE EITHER RETARDED OR NOT.
YOU'RE NOT CLOSE TO IT.
THEY SAID HE EITHER HAS ONE OR
THE OTHER PRONGS, ONE AND TWO.
>> AGAIN, WE HAVE TO LOOK AT
WHEN THESE WERE ALLEGED,
BECAUSE AGAIN THERE WAS A
LITTLE BIT OF A MOVING TARGET.
I AGREE WITH YOU IT IS
TROUBLING THAT HE DIDN'T AVAIL
HIMSELF OF THE 60 DAYS AFTER
OCTOBER 2004, AND HAVE WE HELD
THAT IF A DEFENDANT IN THIS
SITUATION WHERE THE EVIDENTIARY
HEARING WAS ALREADY HELD AND
BUT THE ORDER HADN'T BEEN
ENTERED IF THE DEFENDANT DIDN'T
AVAIL HIMSELF OF TRYING TO
REFILE IN THE CIRCUIT COURT,
THAT HE IS THEN BARRED BECAUSE
OF THAT REASON?
WE HELD THAT IN THIS CASE?
>> IN -- YOU HELD A DEFENDANT
DID NOT RAISE RETARDATION CLAIM
WITHIN THE TIME PERIOD IN
POST-CONVICTION
WAS BARRED.
>> WE HELD?
>> YOU HELD THAT IN HILL.
I'M NOT SURE WHERE HILL WAS.
HILL WAS FAIRLY LATE IN THE
GAME SO HE MAY HAVE BEEN
THROUGH.

THE RULE PROVIDED FOR VARIOUS DIFFERENT METHODS THAT YOU COULD HAVE GONE IN AND PLED THIS CLAIM BY OCTOBER 1st.
IF YOU WERE STILL IN THE TRIAL COURT, PRETRIAL YOU FILED YOUR MOTION THEN.
IF YOU WERE POSTTRIAL ON APPEAL YOU FILED YOUR MOTION THEN.
IF YOU WERE PENDING IN A RULE 3, YOU FILED YOUR MOTION THEN.
IF YOU WERE ON RULE 3 APPEAL YOU DID MOTION TO RELINQUISH AND FILE THEN.
IF YOU WERE IN SUCCESSIVE POSITION YOU FILED BY THAT IT TODAY.
THE DATE WAS THE SAME ON ALL THE DEFENDANTS.
AND SO THE STATE'S POSITION IS HE HAD THE OPPORTUNITY IT DO THIS.
HE DID NOT PLEAD HE WAS RETARDED AND ONCE WE GOT A RULE, HE ABANDONED THE CLAIM COMPLETELY.
THE STATE'S POSITION IS, THAT IS RECOGNITION THAT WE COULDN'T MEET THE RULE AND THEREFORE --
>> HEARINGS THAT YOU'RE TALKING ABOUT ARE TAKING SEVERAL WEEKS, ARE THESE STATE COURT OR FEDERAL COURT?
>> STATE COURT.
>> I HAVEN'T SEEN A RECORD OF SEVERAL MENTAL RETARDATION --
>> YOU IN FACT SAW A RECORD IN PHILLIPS OF A FULL WEEK-LONG MENTAL RETARDATION.
IN JONES IT WAS FOUR DAYS.
THEY HAVE GONE ON FOREVER AND IT DOESN'T, I HAVE GOT A COUPLE PENDING NOW WE'RE ALREADY LOOKING AT, MORE THAN'S WORTH OF TIME WITH ALL THE WITNESSES THAT ARE LINED UP.
IT IS NOT A SHORT HEARING.
IT DOESN'T PUT THE CLAIM TO BED.
IT IS SIMPLY THIS MASSIVE LITIGATION FOR SOMEBODY WHO HASN'T EVEN PLED A CLAIM.
AS FAR AS THE COMMENTS IN CLOSING, THERE WERE OBJECTIONS

TO SEVERAL OF THEM.
THEY ARE BARRED BECAUSE THE CLAIM IS, COMMENT IS REALLY SO BAD ON OR NO IT IS FUNDAMENTAL ERROR AND IT CAN BE RAISED ON APPEAL AND SHOULD BE RAISED ON APPEAL.
THE PURPOSE OF HAVING PROCEDURAL BARS TO MOVE PROCESSING OF THE CLAIMS FORWARD SO YOU DON'T HAVE INTERFERENCE WITH FINALTY OF THE CONVICTION AND THE OTHER ISSUES IN HERE THAT.
>> BUT THE CLAIMS THAT WERE NOT OBJECTED TO, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS SAYING THAT SEE THAT COUNSEL SHOULD HAVE IN FACT OBJECTED TO THESE AND HAD THE OBJECTIONS, AND MY POINT IS, THAT SURE THAT'S A CLAIM BUT IN CHANDLER YOU SAID THE, IF WE'VE ALREADY RULED ON DIRECT APPEAL IT IS NOT FUNDAMENTAL ERROR, THEN IT IS NOT INEFFECTIVE OF ASSISTANCE. AND THE CONVERSE SHOULD BE TRUE
>> IN THIS CASE WAS THIS RAISED ON DIRECT APPEAL?
>> NO.
THE COMMENTS ARE IN FACT PROPER AND FAIR RESPONSE TO WHAT WAS BEING SAID BY THE DEFENSE.
THE DEFENSE CAME IN, MR.^SAN MARTIN'S COUNSEL ACCUSED THE VICTIMS OF RUNNING AN ILLEGAL BUSINESS SIMPLY BECAUSE THEY DID NOT USE AN ARMORED TRUCK TO PICK UP THEIR MONEY.
THE STATE RESPONDED TO THAT.
MR.^FRANQUI CAME IN --
>> CAN I JUST ASK A QUESTION?
I'VE BEEN SEEING THIS, MUST BE IN OUR RULE, WHY ISN'T THERE ACCOMPANYING HABEAS IN THESE CASES?
>> I IMAGINE BECAUSE MY OPPONENT CHOSE NOT TO FILE ONE.
HE CERTAINLY HAD THE OPTION.
>> -- AT THE SAME TIME, CORRECT?
>> YES.
THE COMMENTS, MR.^FRANQUI'S

DEFENSE, MR.^SAN MARTIN'S
DEFENSE THE CONFESSIONS WERE
COERCE BUT WHOEVER COMMITTED
THESE CRIMES CERTAINLY
COMMITTED A FIRST-DEGREE
MURDER.
MR.^FRANQUI AT END OF HIS
CLOSING ARGUMENT WITHOUT HIS
INITIAL CLOSING ARGUMENT
WITHOUT SUGGESTING HOW THEY
APPLY SUGGESTED EVEN IF YOU
DON'T BELIEVE MY DEFENSE FIND
ME GUILTY OF LESSER.
STATE RESPONDED EVIDENCE IS
OVERWHELMING ABOUT THE GUILT.
MAIN CRIME.
THIS ISN'T EVEN A DEFENSE AND
LESSERS AREN'T APPROPRIATE.
SO, ALL OF THESE COMMENTS ARE
PROPER COMMENTS ON THE EVIDENCE
AND FAIR RESPONSE TO WHAT THE
DEFENSE SAID.
IF THE COURT HAS NO FURTHER
QUESTIONS THE STATE
RESPECTFULLY REQUESTS YOU
AFFIRM.
>> THANK YOU.
>> MR.^SCHER.
>> IN LITTLE TIME I HAVE TO
ADDRESS THE ABANDONMENT
ARGUMENT.
STATE NEVER ARGUED IN ITS BRIEF
CERTAINLY THAT ANY CLAIM OF
MENTAL RETARDATION HAS BEEN
ABANDONED.
MY UNDERSTANDING WHAT THE STATE
IS SAYING THERE WAS NO 3.203
MOTION THAT SOMEHOW THIS CLAIM OF
MENTAL RETARDATION WAS
ABANDONED.
HOWEVER WHAT WE HAVE BEFORE
3.203 CAME INTO EFFECT, 3.851
WAS SUPPLEMENTED NOT ONCE BUT
TWICE WITH ATKINS CLAIMS AND
THAT --
>> AS I UNDERSTAND, PART OF HER
ARGUMENT IS THAT EVEN AFTER THE
JUDGE SET THE EVIDENTIARY
HEARING FOR THE CLAIM ABOUT THE
RECANTATION, THAT, AND YOU
SUPPLY MENNED, COUNSEL
SUPPLEMENTED THIS ATKINS ISSUE,
WAS THERE NO REQUEST AT THAT
POINT TO SAY, JUDGE, IN LIGHT,

ENLARGE THE EVIDENTIARY HEARING
AND ENCOMPASS PASS THIS CLAIM
OR NOT?
>> WELL, THE HEARING HAPPENED
BEFORE THE ATKINS ISSUES WERE
BROUGHT UP.
BUT IN THE PLEADINGS, AND AT
SEVERAL STATUS HEARINGS FOR
LACK OF A BETTER TERM.
MR.^FRANQUI'S COUNSEL
REQUESTED, AND IT IS IN THE
SUPPLY MENTAL PLEADINGS AN
EVIDENTIARY HEARING.
FOR THE STATE TO ARGUE THAT HE
DIDN'T TRY TO PRESENT EVIDENCE
ON A CLAIM AND FOR THE LOWER
COURT TO FIND THIS TOO, THAT HE
DIDN'T TRY TO PRESENT EVIDENCE
ON A CLAIM WHICH HE DIDN'T GET
A HEARING, CHANGES ALL OF,
CHANGES EVERYTHING.
IF NOW WE'RE REQUIRED TO TRY TO
PRESENT EVIDENCE ON WHICH WE
DIDN'T GET A HEARING, IT SORT
OF SEEMS TO, DOESN'T MAKE ANY
SENSE.
>> THIS IS, MY CONCERN IS, AND
I DON'T KNOW IF WE SHOULD
PROPERLY LOOK AT WHAT SAN
MARTIN WAS DOING BUT, MISS
JAGGARD HAS REPRESENTED THAT HE
WAS ACTIVELY LITIGATING HIS
CLAIM.
HE HAD, DID HE NOT AS A RESULT
60 DAYS AFTER OCTOBER 1st,
2004, TO FILE A PROPER MOTION
UNDER RULE 3.203?
>> FRANQUI?
>> FRANQUI?
>> YES. THAT'S WHAT THE RULE SAYS.
BUT HE HAD ALREADY SUBMITTED
HIS CLAIMS UNDER ATKINS.
SO I CERTAINLY DON'T, I CAN'T
SPECULATE.
PERHAPS COUNSEL THOUGHT,
PERHAPS, A THEY DIDN'T KNOW
ABOUT THE RULE OR B, WE ALREADY
PRESENTED AND PRESERVED THESE
ISSUES.
THERE IS NO NEED TO PRESENT IT.
I READ, 3.203 WAS THE MANNER IN
WHICH COURT FINALLY SAID, THIS
MENTAL RETARDATION ISSUE IS
RETROACTIVE TO EVERYBODY.

EVERYBODY WHO HAS A RETARDATION CLAIM WHO HASN'T ALREADY LITIGATED IT OY RAISED HEAR IS THE WAY YOU DO SO.
WELL MR.^FRANQUI HAD ALREADY DONE THAT.
I SUBMIT THAT THE FAILURE TO FILE A 3.203 MOTION IS REALLY RED HERING IN THE RESPECT THAT THE ATKINS ISSUES ALREADY HAD BEEN PRESENTED.
IF THEY HADN'T BEEN PRESENTED, IF THERE HAD BEEN NO SUPPLEMENTATION OF THE 3.851 MOTION WITH THE ATKINS CLAIM, THEN, I CERTAINLY WOULD BE IN A FAR DIFFERENT POSITION BEFORE THE COURT IN TERMS OF ARGUING THAT THIS CLAIM SHOULD BE HEARD AT THIS POINT.
BECAUSE OBVIOUSLY THAT'S SOMETHING THAT WASN'T DONE.
>> BUT APPARENTLY YOU WOULD AGREE WITH PRINCIPLE OF LAW, A GENERAL PRINCIPLE OF LAW, IF ONE PULLS OUT OF THE RECORD BOTH THE INITIAL PLEADING OF THE CLAIM AND ALL OF THOSE SUPPLEMENTS OR AMENDMENTS TO THAT AND A FAIR READING OF THOSE PLEADINGS DEMONSTRATE FACIALLY THAT THERE IS NO SATISFACTION, OF THE STANDARDS FOR RETARDATION, THAT A TRIAL JUDGE WOULD, WOULD CORRECTLY DENY THAT CLAIM, WOULD YOU AGREE TO THAT PRINCIPLE?
>> I THINK THAT'S CERTAINLY THE LAW BUT.
>> WHAT WE'RE LOOKING AT THEN THE STATE IS SAYING THOSE DOCUMENTS DO NOT, AND YOU'RE SAYING THEY DO AND THEN THAT CREATES THE QUESTION OF LAW OF WHETHER A FAIR READING OF THOSE ESTABLISH THAT CLAIM?
>> LET ME CLARIFY MY POINT.
UNDER THE LAW NOW IN TERMS OF HOW IT IS DEVELOPED WITH REGARDING TO WHAT THE ALLEGATIONS NEED TO BE HOW SPECIFIC THEY NEED TO BE --
>> I DO UNDERSTAND THAT BUT YOU ALLEGE THAT HE EATS CHEERIOS

RATHER THAN RICE CRISPIES THAT
IS NOT GOING TO GO VERY FAR IN
THE STANDARD.
>> THAT IS NOT --
>> I UNDERSTAND.
THAT IS THE POINT.
IS THAT WHAT REALLY WE'RE
LOOKING AT HERE?
>> THAT IS CERTAINLY PART OF
WHAT WE'RE LOOKING AT.
THE OTHER THOUGHT WENT INTO MY
HEAD AND FLEW OUT.
>> SORRY, I DIDN'T MEAN TO
MISDIRECT YOU.
>> THINKING ABOUT BREAKFAST.
>> TERRIBLE.
ADVENT OF AGE.
WHAT CAN I SAY.
AND ALSO, ACTUALLY THAT'S ALL I
HAD TO COVER.
OH, JUST TO POINT OUT ONE THING.
I STILL HAVE A MINUTE.
IN TERMS OF THESE EVIDENTIARY
HEARINGS THAT GO ON AND ON AND
FOR WEEKS AND WEEKS AND WEEKS I
WANT TO POINT OUT THERE HAVE
BEEN CASES RELIEF HAS BEEN
GRANTED UNDER ATKINS AFTER
WEEKS OF HEARINGS.
THE FACT THAT THE STATE IS
UPSET THESE HEARINGS MAY TAKE A
LONG TIME IS REALLY NOT ANY
BASIS TO DENY MR.^FRANQUI THE
OPPORTUNITY THAT ALL THESE
OTHER DEFENDANTS HAVE.
CERTAINLY IN CASE WHERE RELIEF
WAS GRANTED THE STATE STOOD
BEFORE THIS COURT AND STOOD
BEFORE TRIAL COURTS AND SAID
FACTS OF THE CRIME SHOW THIS
DEFENDANT IS NOT RETARDED.
THIS COURT HELD HE WASN'T
RETARDED UNDER DIRECT APPEAL
AND THOSE ARGUMENTS REALLY HAVE
GONE NOWHERE.
I ALSO WANT TO POINT OUT A
NUMBER OF PEOPLE HAVE RECEIVED
LIFE SENTENCES AND PLED OUT IN
CIRCUITS COURTS BASED ON ATKINS
CLAIMS.
WITH ALL THAT BEING SAID I
RESPECTFULLY REQUEST THE COURT
REVERSE.
>> THANK YOU VERY MUCH.

THANK BOTH OF YOU FOR YOUR ARGUMENT.