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William Lee Thompson v. State of Florida

SC07-2000

THE NEXT CASE ON THE COURT

DOCKET IS THOMPSON VERSUS STATE.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

MY NAME IS TERRI BACKUS AND I'M

REPRESENTING WILLIAM LEE

THOMPSON IN TODAY'S ARGUMENT.

>> THE ISSUE BEFORE THE COURT IS

WHETHER TRIAL COURT ADEQUATELY--

THE FACTUAL DISPUTE THAT WERE

OUTLINED IN MR. THOMPSON'S

MENTAL RETARDATION CASE.

>> THE ISSUE HAS GOTTEN-- WITH

WHAT WE SENT BACK, VERY

DISAPPOINTED IN WHAT HAS

HAPPENED IN THIS CASE BECAUSE

THIS MAN IS ON DEATH ROW, SINCE

1976

HERE, IT GOES BACK AND, IF WE

TRY TO SET UP AN EXPEDITED TRIAL

FOR THE COURT HEARING ON THIS

MATTER, YOU FILED YOUR MOTION ON

THE 30TH DAY.

IN YOUR MOTION, I CANNOT FIND
WHERE YOU ALLEGE THAT THIS MAN'S
IQ WAS 70 OR BELOW BEFORE AGE
IN FACT, THE CONTRARY IS
ALLEGED, AS I READ IN YOUR
MOTION.

YOU FILED NOT JUST ON THIS
ISSUE.

YOU FILED ON NUMEROUS OTHER
ISSUES, BUT WHERE IN YOUR MOTION
DO YOU ALLEGE THAT IT IS 70 OR
BELOW?

>> IN THE INITIAL MOTION, I SET
FORTH ALL THREE AREAS OF THE
MENTAL RETARDATION TEST.

I SET FORTH THE SWORN TESTIMONY
OF THE MENTAL HEALTH EXPERTS
THAT SAID MR. THOMPSON WAS
MENTALLY RETARDED.

I DID NOT RECITE CHAPTER AND
VERSE OF THE MENTAL
RETARDATION--

>> YOU ALLEGED THAT HIS IQ WAS
74 AND YOU ALLEGED THAT HIS--
WAS 78 AND YOU ALLEGED HIS--
LATER WAS 79.

I DON'T SEE WHERE YOU ALLEGED
THAT IT WAS 70 OR BELOW IN THAT

MOTION.

>> IN THE INITIAL MOTION, I DID NOT PUT IN ALL OF THE TESTS THAT HAD BEEN GIVEN TO MR. THOMPSON. AND THE REPLY, I DID GO IN AND ANSWER THE TRIAL COURT'S QUESTION, BECAUSE THE TRIAL COURT HAD THE SAME QUESTION IN THE REPLY.

I ANSWERED THE QUESTION AND ATTACHED THE ACTUAL TESTING FROM THE RECORD, TO SHOW THAT THOSE IQ SCORES WERE THERE.

>> HE KNEW AT THAT POINT THE TRIAL JUDGE HAD A QUESTION.

>> SHE PHYSICALLY-- AND I ATTEMPTED TO ANSWER THAT QUESTION.

>> DID SHE FILE ANYTHING THAT EXPLAINED-- THE ONE THAT STARTS WITH AN H.

>> NELSON.

>> WHAT THAT WAS, BECAUSE THAT IS NOT IN ANY OF OUR LITERATURE AS A STANDARD TEST, WHICH IS REQUIRED.

>> ASKING THE QUESTION BEFORE ATTEMPTING TO ANSWER.

>> WHAT I WAS ASKING WAS, THIS

TEST IS NOT SOMETHING THAT WE
HAVE REFERRED TO IN CHERRY.
IT IS NOT SOMETHING THAT WE HAVE
RECOGNIZED AS A STANDARD TEST,
WHICH WE DID--

>> DID YOU MAKE ANY EXPLANATION
AS TO WHAT THAT TEST WAS?

>> WELL, FIRST OF ALL THE TEST
WAS GIVEN IN 1968.

THERE WERE A NUMBER OF TESTS,
INCLUDING CALIFORNIA TESTS, THAT
I WOULD NEED AN EXPERT TO
EXPLAIN TO YOU WHAT THE
DIFFERENCES ARE BETWEEN THOSE
TESTS, BUT THIS IS ONE OF THOSE
CASES WHERE THE FACTUAL DISPUTES
ARE ONE OF THE EXAMPLES, AND I
THINK YOU OUTLINED THIS IN
NIXON.

ONE OF THE PROBLEMS WITH TRYING
TO COME UP WITH A FINITE CUT-OFF
POINT FOR IQ IS THAT NOT
EVERYONE FITS INTO THE NORMS.

>> I THINK THE PROBLEM I HAVE,
AND WE DID SEND IT BACK, BUT WE
SENT IT BACK FOR IMPROVING AND I
THINK YOU ARE CORRECT THAT WE
HAVE NOT REQUIRED SOME KIND OF

DETAILED PLEADING UNDER THE
RULE, BUT IT IS VERY CLEAR THAT
AFTER CHERRY, THERE HAS GOT TO
BE AN IQ FINDING, THAT THE IQ
WAS 70 OR BELOW.

NOW, MY CONCERN IS SIMPLY THIS.
HE HAS BEEN ON DEATH ROW AND AT
THE RESENTENCING, THERE WAS A
7-5 RECOMMENDATION.

THE CODEFENDANT IS NOW, I GUESS,
DECEASED.

IF THERE IS A GOOD-FAITH BELIEF
THAT HE WAS, AND IS STILL
MENTALLY RETARDED, THEN IT WOULD
BE I THINK IMPORTANT, INCUMBENT
TO HAVE THAT DEVELOP.

ON THE OTHER HAND, IF YOU ARE
LOOKING AT EVERYTHING AND WANT
TO SAY CHERRY WAS WRONGLY
DECIDED, AND YOU REALLY WERE
WRONG TO JUST TAKE 70 AND BELOW,
MENTAL RETARDATION CAN BE SHOWN
SO MANY OTHER WAYS.

WE HAVE ALREADY DECIDED THAT
SO-- AND I THINK THAT IS WHERE
JUSTICE WELLS-- WHICH IS
FRUSTRATING TO ME TOO.

YOU MENTIONED A LOT OF OTHER IQ
TESTS, AND YOU DON'T MENTION

THIS 1968 TEST.

SO, IF WE SEND IT BACK, WHAT IS GOING TO BE THE NATURE OF THE TESTIMONY, AND CAN YOU OVERCOME CHERRY?

THAT IS, WELL, WITHOUT ARGUING CHERRY WAS WRONGLY DECIDED.

>> I TRIED TO ARGUE BOTH ACTUALLY, BUT THE POINT I MADE IS, IN MY BRIEF, I WILL ANSWER THIS IN KIND OF A BACKWARD WAY, SO BEAR WITH ME FOR A MOMENT.

HAD WE PLEAD ALL OF THE LISTING OF THE TEST SCORES IN THE INITIAL MOTION, WHICH WE DID GO INTO AND THE REPLY, WHICH THE COURT DID NOT CONSIDER, EVEN IF WE HAD PUT THIS 70 IQ SCORE IN THE INITIAL MOTION, THE JUDGE STILL WOULD HAVE DENIED THE MOTION.

>> BUT THE QUESTION I HAVE NOW IS, IF WE REVERSE OR REMAND AN EVIDENTIARY HEARING, ARE YOU GOING TO BE ABLE TO PRESENT EVIDENCE THAT IS GOING TO ESTABLISH THAT HIS IQ IS 70 OR BELOW, AND THAT HE MAY SEE OTHER

REQUIREMENTS FOR MENTAL
RETARDATION?

>> I THINK YOU ARE ASKING ME TO
PREDICT SOMETHING THAT I CAN'T.

>> LET'S TRY TO-- I'M NOT ASKING
YOU TO PREDICT SOMETHING.

I'M ASKING YOU WHETHER, IN GOOD
FAITH, YOU HAVE EXPERT TESTIMONY
TO EXPLAIN THESE TESTS AND
EXPLAIN WHY, IN FACT, HIS IQ HAS
BEEN 70 OR BELOW, EVEN THOUGH
MOST OF THE TESTS SHOW IT AS
BEING IN THE MID-70S.

>> RIGHT.

THE POSITION THAT I AM IN AT
THIS POINT, POST-CONVICTION, IS
TRYING TO DO SOMETHING THE COURT
NORMALLY WOULD HAVE DONE PRIOR
TO TRIAL, OKAY?

I AM TRYING TO PREDICT FOR YOU
WHETHER HIS IQ SCORES FROM THE
MENTAL HEALTH PROFESSIONAL,
BECAUSE NONE OF THE DOCTORS THAT
TESTIFIED--

>> I THINK YOU MISS THE POINT.

THE POINT IS, WHEN YOU WERE
HERE, WHEN THIS CASE WAS HERE,
AND WE SENT IT BACK FOR AN
EVIDENCE HEARING, THE HEARING WE

DID IT ON THE PREMISE THAT THERE
WAS EVIDENCE THAT WAS AVAILABLE,
THAT HAD NOT BEEN HEARD, THAT
WAS REPRESENTED TO BE THERE,
THAT WOULD BE EVIDENCE OF MENTAL
RETARDATION.

NOW, AND THAT IS THE REASON THAT
WE SET THIS UP, WHERE IT WAS TO
BE DONE WITHIN 90 DAYS.

YOU HAVE TO GO OUT AND SEARCH
FOR SOME EXPERT OR FIND SOME
EXPERT.

THE QUESTION IS, CAN YOU
REPRESENT TO US THAT YOU HAVE
SUCH AN EXPERT?

>> WE NEVER GOT TO THAT POINT
JUDGE.

>> YOU SHOULD HAVE GOTTEN TO
THAT POINT.

>> WE ALREADY HAD THE 70 SCORE.
WE ALREADY HAD THE TESTIMONY
FROM DR. STILLMAN SAYING HE IS
MENTALLY RETARDED.

THAT IS SWORN TESTIMONY FROM
1989

WE HAVE THE PROSECUTOR ARGUING
THAT MR. THOMPSON IS A RETARDED
BUMP ON A LOG TO THE JURY.

WE HAVE OHIO SCHOOL--

>> IF YOU COULD JUST CALM DOWN
FOR A MOMENT.

THE QUESTION REALLY IS, DO YOU
HAVE SOME OTHER EXPERTS THAT YOU
COULD HAVE CALLED AT THE END OF
EVIDENTIARY HEARING BEYOND THE
EXPERT WHO, IN 1988, SAID HE WAS
MENTALLY RETARDED?

DO YOU HAVE ADDITIONAL EVIDENCE?

DO YOU HAVE AN ADDITIONAL
EXPERT?

THAT IS THE QUESTION.

>> I DON'T HAVE AN ADDITIONAL
EXPERT.

ONE WAS NEVER APPOINTED.

I NEVER GOT TO THE POINT THAT
THE EVIDENTIARY HEARING--

>> DID YOU EVER ASK FOR THE
APPOINTMENT, BECAUSE THE
FRUSTRATION YOU HAVE HEARD HERE
IS THAT THIS WAS SENT BACK, THIS
WAS MORE THAN A YEAR AGO AND
THAT WAS THE TIME FOR YOU TO ASK
FOR THE APPOINTMENT OF SOMEONE,
OR WHATEVER, NOT AT THE DATE YOU
HAD YOUR HEARING BASICALLY OR
WHATEVER KIND OF HEARING YOU
HAD-- I GUESS YOU DID NOT HAVE

THE HEARING, BUT WE HAVE NOTHING
IN THIS RECORD THAT DEMONSTRATES
YOU EVER ASKED FOR THE
APPOINTMENT OF ANY EXPERT, AND I
DON'T UNDERSTAND WHY DO YOU ARE
SAYING AT THIS POINT THAT WE
NEVER GOT TO THAT POINT.

THE CASE WAS THERE.

YOU COULD HAVE ASKED THE COURT
FOR THE APPOINTMENT.

>> I THINK I AM UNDERSTANDING,
THE ONLY POINT THAT I GOT TO
WITH THE COURT, THE ONLY-- THE
FIRST TIME WAS A TELEPHONE
CONVERSATION WHERE WE WERE
SUPPOSED TO HAVE A HUFF HEARING
BUT I DIDN'T HAVE THE STATE'S
RESPONSE, SO BASICALLY NOTHING
HAPPENED.

THAT CAUSED ME TO FILE A
TWO-PAGE REPLY, IN WHICH I
LISTED EVERYTHING.

I TRIED TO ANSWER THE JUDGE'S
QUESTION BECAUSE SHE SAID SHE
HAD QUESTIONS ABOUT WHETHER I
CAN MEET THE THRESHOLD STANDARD.

I SAID YES, I THOUGHT I ALREADY
HAD, BECAUSE I HAD A REASONABLE

BELIEF THAT MR. THOMPSON IS
MENTALLY RETARDED AND HIS IQ
SCORES ARE ALL OVER THE PLACE.

I AGREE, BUT THAT DOESN'T MEAN
HE IS MENTALLY RETARDED.

>> DID YOU COMPLY WITH THE
REQUIREMENT IN OUR ORDER OF
APRIL 12, 2007, THAT YOU FILE A
MOTION IN CONFORMANCE WITH THE
ORDER WITHIN 30 DAYS OF THE DATE
OF THE ORDER?

>> YES, I DID.

AND, AS I SAY, I THINK THIS
COURT RECOGNIZED THAT IN NIXON.
WHEN YOU PHYSICALLY STATED THERE
IS NO IRREFUTABLE, IRREBUTTABLE
PRESUMPTIONS, THAT IF SOMEONE
DOES NOT HAVE A 70 IQ SCORE,
THAT THEY CANNOT BE MENTALLY
RETARDED, IF THEY HAVE AN IQ
SCORE THAT IS HIGHER.

YOU SPECIFICALLY STATED THAT IN
NIXON.

>> YOU HAVE TO MEET ALL THREE OF
THOSE.

>> CORRECT.

>> EITHER OF THOSE HAVE TO BE
MET, SO IF ONE IS MISSING, WHAT
DOES THAT MEAN?

>> I THINK MAYBE I AM
MISUNDERSTANDING NIXON THEN,
BECAUSE I THOUGHT THE REASON THE
COURT HAD THAT, THAT SECTION
CALLING, SAYING THERE IS NO
IRREGRETABLE PRESUMPTIONS, AND
IF YOU HAVE AN IQ SCORE OVER 70
THAT YOU CANNOT BE MENTALLY
RETARDED, BECAUSE NONE OF THE
LITERATURE SAYS THAT.

>> NIXON WAS BEFORE--

[INAUDIBLE]

>> THIS WAS SUPPLEMENTAL
AUTHORITY.

>> OKAY, YOU ARE REFERRING TO
THE SUPPLEMENTAL.

>> YES, THE MOST RECENT ONE.

>> IN THAT CASE, THE HISTORY
HERE, AND WHAT I THINK, AT LEAST
THE WAY I UNDERSTAND IT AND THE
WAY WE ARE PROCEEDING HERE NOW,
WHEN THESE CASES CAME THROUGH
PRIOR TO NIXON, THAT PRIOR TO
THE ATKINS DECISION, WE SAID,
WELL YOU HAVE GOT TO GO BACK AND
GIVE THE DEFENDANT THE
OPPORTUNITY TO PLEAD IN
CONFORMITY WITH THE STATUTE, BUT

WHAT THE LEGISLATURE PASSED, WE THEN INTERPRETED IN CHERRY, AND WE SAID IN CHERRY, THAT YOU DO HAVE TO MEET ALL OF THOSE AND ONE OF THOSE IS YOU HAVE GOT TO BE ABLE TO PROVE THAT-- THAT IT IS 70 OR BELOW, AND WE WERE USING THAT AS A CUT-OFF.

THAT IS YOUR UNDERSTANDING OF THE LAW?

>> YES IT IS.

AND THAT IS ONE OF THE PROBLEMS I HAD WITH THE JUDGE'S ORDER.

SHE WAS IMPOSING A SUPER STANDARD, THAT IT HAD TO BE UNDER 70, BECAUSE WE DO HAVE AN IQ SCORE OF 70.

BUT, LIKE I SAID, MR. THOMPSON'S IQ SCORES ARE EVERYWHERE.

>> I HAVE A QUESTION.

IN THE APPEAL FROM THE RESENTENCING FROM THE 1993 OPINION, IT STATES THAT AT TRIAL, A PSYCHIATRIST TESTIFIED AND FOUND THOMPSON TO BE RETARDED AND THREATENED BY SUAREZ.

IS THAT DR. STILLMAN, THE PSYCHIATRIST?

BUT THEN DR. STILLMAN'S ACTUAL
IQ TESTING, DID DR. STILLMAN
TEST HIM OR DO WE KNOW?

>> I CAN'T REMEMBER OFF THE TOP
OF MY HEAD.

>> BUT, BASICALLY, IF WE WOULD
LOOK AT THIS AND APPLY,
SOMETHING CONCLUSIVELY WAS
REFUTED OR NOT, I AGREE WITH YOU
THAT WE HAVE NOT SAID, JUST
BECAUSE THE RESENTENCING OR
SENTENCING DOESN'T SHOW
RETARDATION, THAT THAT PRECLUDES
YOU.

ON THE OTHER HAND, WE HAVE MORE
INFORMATION IN THIS CASE.

YOU HAVE DR. STILLMAN, WHO SAYS
HE IS RETARDED, AND THEN YOU
HAVE GOT THIS 1968 SCORE.

SO YOUR POSITION WITH THAT IS
ENOUGH TO DISPUTE IN THE RECORD,
LIKE WE HAVE IN OTHER CASES, IT
SHOULD PROCEED TO ANOTHER
HEARING?

>> MY REASON WAS THAT, AND THIS
COURT REFERS TO AN INSANITY TYPE
OF THING, WHICH EACH OF THESE
THINGS ARE IN FLUX, AND THAT HAD

BEEN UNABLE TO MAKE THIS MOTION
AT THE TIME OF TRIAL, WE MAY NOT
HAVE HAD HARDLY ANY IQ SCORES.
WHEN SOMEONE COMES TO TRIAL,
THEY MAY NOT HAVE THE IQ SCORES
BUT THEY STILL COULD HAVE A
REASONABLE BELIEF THAT THEIR
CLIENT--

>> ALRIGHT, LET ME ASK YOU-- SO,
YOU ARE SAYING PART OF THE
PROCESS WOULD BE FOR HIM TO GET
RETESTED?

>> CORRECT.

>> I WANT TO ASK THIS QUESTION,
AND I AM PROBABLY CUTTING YOU
OFF AND I APOLOGIZE, BECAUSE
YOUR TIME IS LIMITED.
YOU STILL THOUGH, IS THE PERSON
MENTALLY RETARDED, YOU KNOW THAT
WHAT WE ARE LOOKING AT, THAT
THEY ARE LOOKING AT, IS WAS THE
PERSON MENTALLY RETARDED AT THE
TIME THE CRIME WAS COMMITTED?
THAT HAS GOT TO BE A LOGICAL
THING, THAT YOU MUST SHOW ONSET
BEFORE AGE 18.

IS THERE EVIDENCE IN THIS RECORD
THAT YOU ARE PREPARED TO PRESENT
THAT SHOWS ONSET OF MENTAL

RETARDATION?

>> YES.

ACTUALLY, THIS IS ONE OF THE FEW
CASES WHERE WE HAVE EXTENSIVE
RECORDS FROM THE OHIO SCHOOL
RECORDS, SHOWING HE HAD
DETERMINATION BY THE SCHOOL
PSYCHOLOGIST THAT HE WAS
MENTALLY RETARDED.

HE WAS FOUR GRADES BEHIND AT AGE
18 WHEN HE WAS IN THE EIGHTH
GRADE.

DR. SHEBERT--

>> YOU SAID HE WAS IN THE FOURTH
GRADE AT AGE 18?

>> HE WAS FOUR GRADES BEHIND.

HE WAS FOUR GRADES BEHIND AND HE
DEFINITELY GAVE UP, BUT THERE IS
AN EXTENSIVE RECORD OF ADAPTIVE
BEHAVIOR SKILL DEFICIT.

DR. SHEBERT TESTIFIED AT THE
SENTENCING THAT THERE WERE
NEUROLOGICAL DEFICITS, MOTOR
SKILL DEFICITS.

THERE IS ORGANIC BRAIN DAMAGE.

HE HAD ACTUAL ABNORMALITIES THAT
SHOWED UP ON THE
ELECTROENCEPHALOGRAM ON HIS

BRAIN.

HE COULD NOT FUNCTION IN A
NORMAL SOCIETY.

HE HAD JOBS, BUT THE JOBS WERE
ALWAYS FOR A SHORT PERIOD OF
TIME.

I THINK A MONTH WAS THE LONGEST
HE HAD A JOB, AND THEN HE WAS
INCARCERATED BY AGE 24, SO THIS
CASE IS 33 YEARS OLD, AND IS ONE
OF THOSE CASES THAT IT IS
DIFFICULT TO GO BACK AND
RECREATE WHAT HAPPENED.

BUT, AT THIS POINT, MENTAL
HEALTH IS NOT STATIC.

IT IS SOMETHING THAT WE HAVE TO
EVALUATE FROM THIS POINT
FORWARD.

I TRIED TO PUT AS MUCH DETAIL AS
I COULD IN WHAT I HAD AND, WHEN
THE JUDGE HAD QUESTIONS, I TRIED
TO ANSWER HER QUESTIONS.

>> WE WOULDN'T BE HERE IF THE
68-- MAYBE NOT, IF THE 68 IQ WAS
70

IN 1968, 70 WAS IN THE ORIGINAL
PLEADING.

>> I UNDERSTAND, BUT CERTAINLY
IN MY REPLY, WHEN THE JUDGE HAD

QUESTIONS, I DON'T THINK ANYONE
WOULD SAY MY REPLY WAS
INCORPORATED WITH THE INITIAL
PETITION.

CERTAINLY, I HAVE A REASONABLE
BASIS AND THAT IS A REASONABLE
BELIEF, THAT MY CLIENT WAS
MENTALLY RETARDED.

[INAUDIBLE]

DON'T YOU THINK THAT THE CONCEPT
THAT HAS BEEN ADOPTED BY THE
LEGISLATURE, AND THERE IS
LITERATURE TO SUPPORT IT, THE
FACT THAT MENTAL RETARDATION,
DIFFERENT THAN MENTAL ILLNESS,
MENTAL RETARDATION, IS A
CONDITION THAT YOU HAVE FROM THE
TIME BEFORE--

[INAUDIBLE]

>> TO THE EXTENT THAT THERE HAS
TO BE ONSET EARLY AND IT HAS TO
BE FOLLOWED THROUGH, THROUGHOUT
YOUR ENTIRE LIFETIME, THAT IS
CORRECT.

I THINK THE IQ SCORES, HOWEVER,
ALWAYS FLUCTUATE BECAUSE THERE
ARE DIFFERENCES IN THE SCORING
PRACTICES.

THERE ARE CHANGES IN THE
DEFINITION OF MENTAL
RETARDATION.

FROM 1958 UNTIL TODAY, THERE
HAVE BEEN MANY, MANY DIFFERENT
CHANGES IN WHAT THE DEFINITION
OF MENTAL RETARDATION IS AND THE
NUMBERS THAT ARE REQUIRED, I
GUESS, THE CUT-OFF NUMBERS ABOUT
WHAT IS MENTALLY RETARDED AND
WHAT IS NOT.

>> LET ME MAKE SURE I
UNDERSTAND, BUT COMING INTO
THIS, IT SEEMS TO ME THIS WAS
REALLY A QUESTION OF WHETHER
THERE WAS SUFFICIENTLY PLED
FACTS TO KEEP GOING FORWARD WITH
IT, SO IT SEEMS TO ME YOU REALLY
ARE SAYING IF YOU WANT THE
CHALLENGE GOING BACK OVER THE
HISTORY OF MENTAL RETARDATION,
THE OPPORTUNITY TO SHOW FACTS
THAT WHATEVER, THAT 70 THAT WE
MAY BE APPLYING NOW, WAS NOT
CORRECT AT THE TIME THAT SHOULD
BE LOOKING AT FOR THIS
INDIVIDUAL, BECAUSE I LOOK
THROUGH HERE AND THERE IS NO
ALLEGATION IN THE PETITION AT

ALL THAT WOULD MEET A CHERRY
REQUIREMENT, SO I SEE YOUR
ALLEGATIONS ABOUT ALL OF THE
OTHERS AND HIS ADAPTIVE
FUNCTIONING, BUT IS THAT WHAT
YOUR SAYING?

THAT IS WHAT THIS CASE IS ABOUT,
TO GO BEHIND THE CHERRY
STANDARD?

>> I THINK IT IS BOTH.

I THINK WE DID MEET THE
THRESHOLD.

>> YOU SEE, I HAVE A REAL
PROBLEM WITH THE PLEADINGS, THAT
THERE IS AN ELEMENT NOT
SATISFIED, AND IF WE ARE LOOKING
AT ELEMENTS, THAT MUST BE
SATISFIED TO GO FORWARD.

WE HAVE HAD SEVERAL CASES WHERE
IT HAS BEEN SUMMARILY DENIED
BECAUSE THERE IS NO EVIDENCE
THAT WOULD MEET THE CRITERIA OF
THE NUMBERS.

IT IS LIKE A MAGIC NUMBER.

>> I HAVE TO SAY HONESTLY, I
COULD NOT FIND ANY CASES WHERE
THERE IS A DETERMINATION BY A
PRIOR MENTAL-HEALTH EXPERT OF

MENTAL RETARDATION OR THE COURT,
WHERE SUMMARY DENIAL BY THIS
CASE-- I UNDERSTAND YOUR
CONCERN.

>> I'M TRYING TO UNDERSTAND WHAT
YOUR ARGUMENT IS.

>> IT IS BOTH ACTUALLY, IT IS
BOTH.

UNDER CHERRY, WE HAVE
ESTABLISHED THERE IS A 70 IQ
SCORE AND HAS PASSED THE-- WHERE
WE GET AN EVIDENTIARY HEARING.
YOU CAN CORRECT ME IF I'M WRONG,
BUT MY UNDERSTANDING IS, WHEN
YOU FILE, WHEN ANYONE FILES A
MOTION TO HAVE AN EVALUATION FOR
MENTAL RETARDATION AT ANY TIME,
PRE-TRIAL OR POST-CONVICTION,
WHAT DEFENSE COUNSEL NEEDS TO
HAVE IS A REASONABLE BELIEF--

>> SOMETHING SPECIFIC, BUT THIS
IS A SPECIFIC RULE YOU ARE
FOLLOWING AND A SPECIFIC STATUTE
AND IT HAS BEEN SPECIFICALLY
INTERPRETED.

--

THAT YOU ALLOW MR. THOMPSON
TO PLEAD AND PROVE AND PROVE,
MEANT TO ME, AN EVIDENTIARY

HEARING, BOTH NIXON AND CHERRY

GOT EVIDENTIARY HEARINGS.

THAT'S WHAT WE'RE ASKING FOR.

>> THANK YOU, MISS BACKUS FOR

YOUR ARGUMENT.

>> THANK YOU.

>> MAY IT PLEASE THE COURT.

SANDRA JAGGARD, ASSISTANT

ATTORNEY GENERAL FOR THE STATE.

NUMBER TWO, TWO PRONGS DEAL

WITH RETARDATION ON ADULT IQ

SCORE AND ADULTHOOD.

ONSET BEFORE THE AGE OF 18.

PLEADING WITH ADULT IQ SCORE HE

HAD THE SCORE LOWEST END OF

AVERAGE ACCORDING TO DR.^MARINA

THE SCORE IS ACTUALLY 85.

>> WHAT DID DR.^STILLMAN BASE HIS

FINDING OF RETARDATION ON?

>> HIS PERSONAL BELIEF, THAT'S

HOW HE ENDED

UP HAVING HIS OPINION REJECTED

ON RESENTENCING.

>> THIS IS A PROBLEM.

WHEN I LOOKED AT THIS, I

THOUGHT WHAT WE HAVE DONE AND SAY

IN RULE 3.023.

YOU'RE EQUATING RULE 3.20.

ANY SUCCESSIVE POST-CONVICTION
MOTION.

STARTING IN 2006, WE

ENTERED ORDER REMAND FOR

EVIDENTIARY HEARING AN ATKINS

CLAIM WHENEVER A

DEFENDANT SEEKS A

DETERMINATION OF MENTAL

RETARDATION.

SAID SAME THING IN WALLS,

FOSTER AND NIXON.

THE ONLY POST, THE ONLY CASE

POSTATKINS WHERE WE UPHELD A

SUMMARY DENIAL ON MENTAL

RETARDATION WAS IN ZACK.

IN THAT CASE WE EXPLAINED THAT

HE HAD, ESSENTIALLY, ALMOST A

WAIVER.

HE ACKNOWLEDGED HE HAD NO NEW

EVIDENCE.

MY QUESTION IS, BECAUSE WE, YOU

KNOW, I GUESS IT IS

INTERPRETATION OF WHAT WE MEANT

WHEN WE SENT IT BACK.

PLEAD AND PROVE.

I DIDN'T THINK WE WERE

REQUIRING MR. THOMPSON TO HAVE

A GREATER THRESHOLD OF PLEADING

THAN WE'VE DONE BEFORE.

AND, YOU KNOW, IN THIS CASE,
UNLIKE SOME OF THE OTHER CASES
WHERE IT WAS, YOU KNOW, SOMEONE
HAD 120 IQ, BUT YOU'VE GOT
ALLEGATIONS OF SOME SERIOUS
PROBLEMS IN SCHOOL, SERIOUS
ADAPTIVE BEHAVIOR ISSUES.

WHY DOESN'T THE RULE, AND OUR
PRECEDENT REALLY REQUIRE THAT
THIS GO BACK, AS WE THOUGHT IT
WAS GOING BACK TWO YEARS AGO,
FOR EVIDENTIARY HEARING, TO,
LET THE JUDGE MAKE THIS
DETERMINATION OF MENTAL
RETARDATION?

>> WELL, NUMBER ONE I THINK
THIS IS LIKE ZACK YOU GAVE HER
OPPORTUNITY TO PLEAD IN
ACCORDANCE WITH TERRY.

YOU NEED TO PUT IN IQ SCORES
ABOVE 70, BELOW 70.

WHAT WE GOT BACK WAS LOW
EVIDENT END OF LOW AVERAGE
WHICH 85.

WHICH IS 15 POINTS ABOVE 70 AS
ONLY EVIDENCE ON PRONG ONE THAT
IS ALLEGED AT ALL.

ON PRONG THREE WE HAD TWO

CHILDHOOD IQ SCORES, WHICH ARE ONLY TWO CHILDHOOD IQ SCORES HE HAD ON TESTS THAT QUALIFY UNDER THE RULE AND STATUTE.

ANOTHER 74.

>> JOINED, IN ZACK, HE HAD A IQ OF LOW OF 79 TO HIGH OF 86.

HE INDICATED HE HAD NO OTHER EVIDENCE TO PRESENT.

AND THAT IS, SO, THIS ONE, AGAIN, IS WHAT TROUBLES ME BECAUSE, WHEN ALL THESE CASES WERE GOING BACK AFTER ATKINS, LOOK AT THIS RECORD.

NO IS GOING TO BE SHOW THEY'RE MENTALLY RETARDED BUT MR. THOMPSON HAS A, WAS 7-5 JURY RECOMMENDATION.

I REALIZE THAT IS NOT ONLY ISSUE.

IT WAS A HORRIBLE CRIME.

HE PLED GUILTY.

>> TWICE.

>> TWICE.

CODEFENDANT, GOT A REDUCED CHARGE AND, SECOND DEGREE BUT LOOKS LIKE HE MAY HAVE BEEN ONE OF, MOTIVATING FORCE.

AND, I'M JUST NOT, ME, NOW MY

COLLEAGUES MAY FEEL
DIFFERENTLY, HAVING THIS JUST
DETERMINED BY ANY DENIAL WHEN
THERE IS POSSIBILITY THAT THIS
MAN MAY BE MENTALLY RETARDED.

>> AND MY POINT IS, THERE IS NO
POSSIBILITY.

THE ONLY TWO CHILDHOOD IQ
SCORES THAT QUALIFY ARE 74 AND
A 75.

THEY ARE TOO HIGH.

>> WHAT IS THE, TELL ME ABOUT
THE 1968 IQ SCORE.

>> 1968, WHICH WAS NOT PLED IN
THE MOTION AND COMES IN WHAT IS
CALLED A REPLY WHICH WASN'T
FILED UNTIL AFTER THE TRIAL
COURT ACTUALLY DENIED IT ON
A TEST CALLED THE HENMON-NELSON
IQ TEST.

IN ORDER TO GET IN TEST THAT IS
NOT STANFORD-BINNET OR WAITE.

KNOW IT IS INDIVIDUALLY
MINISTERED IQ TEST VALIDITY AND
RELIABILITY DATA WITH IT.

ALL HE IS PLEADING HE HAS
HENMON-NELSON.

IF YOU CHECK PSYCHOLOGICAL

LITERATURE THE HENMON IS, AS I
CITED IN MY BRIEF, IS NOT
INDIVIDUALLY ADMINISTERED IQ
TEST.

IT IS NOT.

IT DOES NOT QUALIFY.

>> WE REALLY NEED TO AMEND RULE
3.203.

IT PRESENTLY SAYS FOR ANYONE
LOOKING AT IT, EVERYBODY WHO IS
ALLEGING MENTAL RETARDATION IS
ENTITLED TO, TO AN EVIDENTIARY
HEARING AND, WE'RE HEARING NOW,
THAT THE QUESTION, THAT YOU'RE
TELLING ME, AS TO WHETHER, WHAT
THIS TEST IS, THAT SEEMS TO ME
WHAT WOULD HAPPEN IN
EVIDENTIARY HEARING.

YOU MAY BE PERFECTLY CORRECT,
BUT I DON'T THINK THAT, THAT
HAS TO BE ESTABLISHED BEFORE
THE EVIDENTIARY HEARING?

>> WELL, I THINK ONE NEEDS TO
PLEAD, WHEN ONE'S PLEADING A
POST-CONVICTION CLAIM BECAUSE
3.852 MUST BE PLEAD IN
ACCORDANCE WITH 3.20.

MUST BE PLED IN ACCORDANCE
8.051.

YOU REQUIRED IN HALLIBURTON
THEY ATTACH OLD REPORTS OF
EXPERTS.

>> WHAT HAPPENS AT EVIDENTIARY
HEARING, ASSUMING THEY GET ONE?

DO EXPERTS COME IN AND TALK
ABOUT THE IQ TESTS THAT WERE
PERFORMED BEFORE AGE 18?

THE KIND OF ANALYSIS YOU JUST
WENT THROUGH?

OR DO THEY GET ANOTHER IQ
TEST?

>> YOU NEED AN ADULT IQ TEST.

YOU NEEDED A ADULT ADAPTIVE
FUNCTIONING AND NEED ONSET
BEFORE AGE OF 18.

YOU HAVE TESTIMONY ABOUT A
PRESENT IQ TEST AND ADULT IQ
TEST.

THE ONLY SCORE WE HAVE IN THIS
RECORD FOR AN ADULT IQ TEST IS
85.

THAT'S 15 POINTS TOO HIGH.

SHE NEVER REQUESTED AN EXPERT.

>> WELL, AN ADULT IQ TEST IS
REQUIRED, IS THAT, ARE THOSE
TESTS, CHANGING AS SHE HAS
SAID?

ARE THOSE IQ TESTS THE SCORES
SUBJECT TO BEING DIFFERENT
SCORES DEPENDING UPON WHEN YOU
TAKE THEM?

>> GENERALLY SPEAKING NO.
THAT'S NOT AN ACCEPTED
PSYCHOLOGICAL CONTEXT.
THEY NORM THEM AGAINST YOUR AGE
GROUP.

IF YOUR AVERAGE IN YOUR AGE
GROUP SHOULD ALWAYS BE AVERAGE
IN YOUR AGE GROUP UNLESS THERE
IS SOME INSULT TO YOUR BRAIN.
IF YOU'RE BELOW AVERAGE YOU
SHOULD ALWAYS BE BELOW AVERAGE.
IT SHOULD NOT VARY.

IT IS SUPPOSED TO BE CONSTANT.
THAT'S WHAT THE IQ IS SUPPOSED
TO BE MEASURING, YOUR CONSTANT
LEVEL OF INTELLECT.

AND HIS IQ SCORE IS WAY TOO
HIGH AND YOU CAN'T FAKE SMART.
HE DIDN'T ACCIDENTALLY GET AN
85.

AS FAR AS, HAVING NEW EVIDENCE,
WE'VE NEVER HAD ANY NEW
EVIDENCE PROFFERED.

SHE SAYS SHE IS GOING TO CALL
DR. ^STILLMAN.

DR. ^STILLMAN DIED IN 1997.

HE IS NOT GOING TO BE CALLED.

>> WHAT IS THE STATE'S RESPONSE
TO, MISS BAKCUS'S ARGUMENT THAT
THE TRIAL COURT WAS WORKING ON
THE ASSUMPTION THAT IT WAS
BELOW 70?

>> THE TRIAL COURT WAS WORKING
ON THE ASSUMPTION THAT IT WAS
CHERRY.

AND, SHE HAD IQ SCORES THAT ARE
ABOVE 70.

SHE ISSUED HER ORDER, HER ORDER
TALKS ABOUT HOW SHE NEVER GOT A
REPLY.

IT WAS DUE AT NOON.

IT IS 4:00.

IT IS NOT HERE.

SHE DIDN'T HAVE THAT PLEADING
BEFORE SHE RULED.

>> WAS THE ORDER DENYING THE
MOTION FOR REHEARING -- I NOTE
THAT, IN THE ORIGINAL ORDER,
SHE SAID, THAT, BELOW 70.

BELOW 70.

AND, THE ORDER ON REHEARING,
SHE SAID, FLORIDA SUPREME COURT
HELD THAT 70 MEANS 70.

>> AND, --

>> WHAT, DID THIS ORDER ON
REHEARING COME OUT AFTER THE
REPLY.

>> YES.

AND, THE REPLY WAS NOT FILED,
THIS IS NOT AN INITIAL VERSION
OF THIS MOTION.

THIS IS THE FOURTH VERSION THIS
MOTION.

YOU GAVE SPECIFIC DIRECTIONS
THAT SHE PLEAD AND PROVE IN
ACCORDANCE WITH CHERRY AND SHE
SIMPLY IGNORED YOUR REQUEST.

>> MAY I ASK A QUESTION ABOUT
THE STATUS OF THE CASE THOUGH,
IF I'M CORRECT.

HE HAS BEEN HERE MANY TIMES BUT
HE HAD TWO APPEALS OR
POST-CONVICTION WHERE HE GOT
RELIEF.

FIRST, I MEAN HE FIRST HAD PLED
GUILTY.

HE APPEALED AT SOME POINT.

HE WAS, HE WAS REMANDED.

AND HE THEN REPLED GUILTY.

THERE WAS A RESENTENCING IN
1989, CORRECT?

>> WELL, THERE'S, PLEAS, DIRECT

APPEAL REVERSED, PLEAD, DIRECT

APPEAL AFFIRMED.

>> AFFIRMED.

>> FIRST MOTION FOR

POST-CONVICTION AFFIRMED.

FEDERAL HABEAS DENIED AND

AFFIRMED.

SECOND MOTION FOR

POST-CONVICTION RELIEF GRANTED.

RESENTENCING.

FOURTH MOTION --

>> THERE WAS THREE, THERE WAS

THREE SENTENCINGS IN THE CASE?

>> YEAH.

>> SO AFTER THE THIRD

RESENTENCING HE FILED A

POST-CONVICTION MOTION AND THAT

WAS SUMMARILY DENIED.

>> YES.

>> LIKE OTHER CASES WE DON'T

HAVE, THIS CASE HAS BEEN AROUND

A LONG TIME, BUT, PART OF IT IS

THAT THERE ACTUALLY BEEN CLAIMS

RAISED THAT WERE FOUND

MERITORIOUS AND REQUIRED

REVERSAL.

AND, MY CONCERN IS, THAT WE

HAVEN'T EVEN, THERE WASN'T A

POSTCONVICTION EVIDENTIARY

HEARING.

AND I JUST GUESS, AND MAYBE, IT
IS JUST WHERE I THOUGHT WE WERE
ANYWAY TWO YEARS AGO, THAT
THERE IS JUST BETTER DEVELOPED
AT AN EVIDENTIARY HEARING THAN
TRYING TO FERRET THIS OUT WITH
THE INDICATIONS IN THIS RECORD.

>> ACCEPT WHAT WE HEAR BELOW IN
THE REPLY BELIEVE BRIEF IN THIS
COURT.

STATE KNOWS ALL ABOUT THIS
CLAIM BECAUSE IT IS
WELL-DEVELOPED IN THE
RESENTENCING RECORD.

WITNESSES LISTED ARE THE
WITNESSES FROM REING.

NOT ONLY IS DR.^STILLMAN DEAD,
JUDGE DURANT'S DEAD AND THEY'RE
GOING TO BE AVAILABLE TO BE
CALLED.

AT AN EVIDENTIARY HEARING EVEN
THOUGH THEY ARE BOTH DEAD FOR A
DECADE BY THE TIME SHE PLEADS
THEY'RE AVAILABLE.

SHE TOLD YOU HERE TODAY SHE
DOESN'T HAVE ANYTHING.

SHE NEVER ASKED FOR A NEW

EXPERT AT THE LAST HOUGH HEARING.

THERE WAS A HEARING, A HOUGH
HEARING. WE SPECIFICALLY SAID
WE'RE HAVING A HOUGH HEARING
NEXT WEEK.

SHE ON AMPLE NOTICE THERE WOULD
BE A HOUGH HEARING ON THE 22nd.
SHE COMES IN.

>> WHAT DO YOU DO, AT A HOUGH
HEARING IS THAT A TIME YOU COME
AND TELL THE COURT, WHAT
WITNESSES YOU PLAN TO PRESENT
TO THE COURT TO PROVE UP YOUR
CLAIM, CORRECT?

>> WELL, IN SUCCESSIVE MOTION
THEY'RE SUPPOSED TO BE NAMED IN
THE MOTION AND -- NAMED IN THE
MOTION.

>> OKAY.

>> THERE WAS A LIST OF NAMES.

>> WHAT DO YOU DO AT THE HOUGH
HEARING IF YOU ALREADY -- WE
DISCUSS WHETHER OR NOT WE NEED
AN EVIDENTIARY HEARING.

WE TRADE REPORTS, WHATEVER WE
NEED TO DO.

BUT IN SUCCESSIVE MOTION THE
DEFENSE'S STUFF IS ALREADY ALL

SUPPOSED TO BE ATTACHED.

SO, MAINLY AT A SUCCESSIVE
MOTION HEARING YOU TALK ABOUT,
WHETHER OR NOT THERE'S A NEED
FOR EVIDENTIARY HEARING.

>> WELL, AT WHAT POINT DOES THE
DEFENSE THEN HAVE AN
OPPORTUNITY TO ACTUALLY ASK THE
COURT TO APPOINT ANOTHER EXPERT
OR, WHATEVER IT IS THEY MAY
NEED?

>> WELL THE DEFENSE CAN
CERTAINLY COME IN AND ASK TO
HAVE AN, PERIOD OF TIME
APPOINTED FOR THEM.

THEY ALSO HAVE, THIS IS CCR.
THEY HAVE A BUDGET.
THEY WANT AN EXPERT, THEY CAN
GO OUT AND HIRE ONE.
NOBODY IS STOPPING THEM FROM
DOING THAT.

>> MY SENSE, LET ME ASK YOU
THIS.

LET'S ASSUME FOR A SECOND THAT
A NEW EVIDENTIARY HEARING IS ORDERED.
WHAT DO YOU ANTICIPATE BEING
PRESENTED?

IS THIS, ARE WE GOING TO GO
THEN BACK TO THE TRIAL COURT

AND ASK THE TRIAL JUDGE APPOINT
A NEW PSYCHOLOGIST TO RETEST
HIM?

WHAT IS IT THAT IS GOING TO BE
PRESENTED?

>> I HAVE NO IDEA WHAT THE
DEFENSE IS PRESENTING BECAUSE
ALL I HAVE IS, IT COMES FROM
THE RESENTENCING RECORD AND
THEY'RE GOING TO BE CALLING THE
DEFENDANT'S FAMILY MEMBERS AND
EVERYONE WHO TESTIFIED AND
PEOPLE WHO ARE NO LONGER ALIVE
WHO ARE GOING TO SUPPORT THIS
CLAIM.

>> NONE OF THAT WAS SAID AT
HOUGH HEARING?

>> THAT WAS ALL IN THE MOTION.
AT THE HOUGH HEARING, MY,
OPPONENT CLAIMED TO BE
UNPREPARED SO ALL THE JUDGE
GAVE HER OPPORTUNITY TO RESPOND
TO MY, PLED TO MY RESPONSE
WITHIN A FEW DAYS BUT ASKED HER
WHERE SHE HAD PLED AND
ACCORDING TO CHERRY IN THE
MEANTIME, SHE RESPONDED SHE
COULDN'T TELLER BECAUSE SHE

HADN'T THOUGHT ABOUT TERRY
AFTER FILED THE MOTION.

>> IT WAS AFTER THAT POINT THAT
THE, I GUESS REPLY WAS FILED?

>> THE REPLY WAS DUE AT NOON ON
A MONDAY.

THE JUDGE HAD SAID, AT THE
HOUGH HEARING THAT SHE WAS
GOING TO RULE BY NOON TUESDAY
ON WHETHER WE WERE HAVING AN
EVIDENTIARY HEARING OR NOT.

I HAD TOLD HER THAT, IF YOU'RE
GOING TO ORDER A HEARING, I'M
GOING TO NEED AN EXPERT.

MY OPPONENT DIDN'T ASK FOR
EXPERT BUT I DID IF WE'RE GOING
TO AN EVIDENTIARY HEARING.

AND WE COME TO NOON.

THE REPLY DOESN'T SHOW UP.

AT 4:00 THE REPLY STILL HASN'T
SHOWN UP.

I ATTEMPT TO FIND THE REPLY.

I'M TOLD IT IS NOT FILED.

AND IN THE MEANTIME THE JUDGE
RULES.

SO, WHAT WE HAVE HERE IS WE
HAVE A CLAIM WHERE THE
DEFENDANT CAN NOT GO BACK IN
TIME AND OBTAIN A QUALIFYING IQ

SCORE.

HE IS 56 YEARS OLD HE CAN'T GO

BACK AND BE LESS THAN 18.

THERE ARE TWO QUALIFYING IQ

SCORES IN THE RECORD.

THEY'RE TOO HIGH.

ONLY PLED ADULT IQ SCORE IS WAY

TOO HIGH.

AND, WHEN YOU HAVE A CLAIM LIKE

THIS, WHERE WE'RE BEING TOLD

THAT IT IS WELL-DEVELOPED IN

THE APPELLATE RECORD AND WE

DON'T HAVE NEW EVIDENCE, WHAT

IS THE POINT OF HOLDING AN

EVIDENTIARY HEARING?

>> LET ME ASK YOU.

THIS IF AT A HEARING, WHAT IS

THE NAME OF THIS, THE HEN

MON-NELSON IQ PROCEDURE IS,

FOUND TO BE VALID.

WOULD THAT BE A IQ THAT WAS

BEFORE AGE 18?

>> YES.

BUT THE HENMON-NELSON CAN'T BE

FOUND TO BE VALID BECAUSE IT IS

NOT INDIVIDUALLY ADMINISTERED

SCORE.

>> THAT IS WHAT YOU SAY,

BUT, AND I KNOW YOU SAY YOU
READ THE LITERATURE.

>> WELL --

>> I'M TRYING TO CARRY THIS
THROUGH TO A POINT HERE.
IF THAT SCORE WAS A VALID
SCORE FOR ON SET BY THE AGE OF
18, AND HE HAD AN EXPERT NOW
THAT SAYS, THAT HE HAD AN IQ OF
69, PRESENTLY, IS THAT, IS THAT
SUFFICIENT UNDER THE, OUR TEST,
FOR RETARDATION?

>> COULD HE PROVE ASSUMING THAT
HE CAN CREDIBLY HAVING ALREADY
SCORED AN 85 CLAIM TO NOW HAVE
A 69?

SURE.

I SUPPOSE BUT I DON'T THINK
THAT IS GOING TO BE TERRIBLY
CREDIBLE BECAUSE YOU CAN'T FAKE
SMART BUT YOU CAN FAKE DUMB.

>> LET ME FROM A PLEADING
STANDPOINT, THAT'S REALLY WHAT
WE'RE LOOKING AT.

>> YEAH.

>> LET ME ASK THIS ONE
QUESTION, THIS ONE TEST SHE IS
TALKING ABOUT, BEFORE 18, CAN
YOU WITHOUT GOING SOMEWHERE

ELSE DETERMINE FROM THE
STANDARDS OF THE STATUTE AND
THE RULE, WHETHER THAT
PARTICULAR DOES OR DOES NOT
QUALIFY AS ONE OF THOSE TWO
STANDARD DEVIATIONS, ET CETERA,
ET CETERA?

>> WELL, WE KNOW IT IT IS NOT
STANFORD-BINET.

>> ARE THOSE SPECIFICALLY
MENTIONED BY NAME?

>> THOSE ARE SPECIFICALLY
MENTIONED.

THERE IS THIRD CATCH-ALL
CATEGORY.

>> RIGHT.

>> ANY INDIVIDUALLY
ADMINISTERED IQ TEST FOR WHICH
THERE IS VALIDITY AND
RELIABILITY DATA PRESENTED.

>> OKAY.

UNDER THAT, SOMEONE COULD SAY,
YOU KNOW, IT'S THE DUMBO TEST
AND FACIALLY WE MAY NOT, IT MAY
STILL ALLEGE COMPLIANCE, RIGHT
WITH THAT THIRD?

>> I THINK ONE WOULD NEED TO
ALLEGE THE DUMBO TEST,

WHICH IS --

>> SATISFIES THAT.

>> WHICH IS ADMINISTERED AND I
CAN PRESENT THE DATA.

>> BUT THAT --

>> IN FACT I CITED A SOURCE IN
THE BOOK AND IN MY BRIEF, THE
YEARBOOK OF MINIMUM MEASURES.

IT'S NOT.

IT'S JUST NOT.

SHE IS NOT GOING TO BE ABLE TO
PROVE THAT BECAUSE IT IS NOT
TRUE.

>> GOING BACK TO MY QUESTION,
THIS IS WHAT I'M JUST
INTERESTED IN, IF AN
EVIDENTIARY HEARING IS HELD, I
THINK WHAT YOU'RE TELLING ME
IS, TELLING US, IS THAT, ONLY
THING THAT'S GOING TO HAPPEN,
THAT SHE'S GOING TO REQUEST
APPOINTMENT OF AN EXPERT AND
YOU'RE GOING TO GET YOUR OWN
EXPERT AND WE'RE GOING TO GO
BACK TO SQUARE ONE AGAIN WITH
TESTING AND SO ON?

>> WELL I DON'T KNOW THAT SHE'S
GOING TO REQUEST THE
APPOINTMENT OF THE EXPERT

CONSIDERING SHE
HAS BEEN PLEADING THIS CLAIM
FOR EIGHT YEARS NOW AND HAS
NEVER DONE SO.

>> SO AGAIN, HERE'S MY POINT --

>> I WOULD REQUEST THE
APPOINTMENT OF AN EXPERT IF WE
WERE GOING FORWARD TO REBUT THE
CLAIM BUT, AND, THE PROBLEM IS,
EVEN WITH THE NEW EXPERT YOU'RE
NOT GOING TO CHANGE THE FACT
THAT THE CHILDHOOD IQ SCORES
ARE TOO HIGH.

>> MAYBE, YOU KNOW AND I MAY
BE, I'M NOT GOING TO MAKE
JUDGMENT ABOUT THIS PARTICULAR
CASE BUT, THIS HAS IN A SENSE
YOU CAN SAY IT HAS BEEN GOING
ON SINCE 1979.

I STILL SAY, UNLIKE A LOT OF
OTHER CASES WHERE, MR.^TOMKINS
IS SET FOR, EXECUTION YOU KNOW,
MANY, MANY EVIDENTIARY
HEARINGS, WE HAVE NOT HAD AN
EVIDENTIARY HEARING ON HIS
MENTAL STATUS.

IT SEEMS TO ME, AS I LOOK BACK
AT THE RULE, WE WERE TRYING TO

CONTEMPLATE ALL DIFFERENT
SITUATIONS, BUT EVEN ON THE
ONES THAT WHERE THEY HAD AN
APPEAL PENDING, ALL WE SAID IS
THAT MOTION SHOULD CONTAIN THE
CERTIFICATE BY APPELLATE
COUNSEL, MOTIONS MADE IN GOOD
FAITH AND ON REASONABLE GROUNDS
TO BELIEVE THAT THE DEFENDANT
IS MENTALLY RETARDED.

YOU'VE BEEN TALKING ABOUT HOW
THERE'S GOT TO BE ALL THESE
EXTRA PLEADING REQUIREMENTS.

SEEMS TO ME THAT, AGAIN, THE
PLAIN READING OF OUR RULE IS,
FREESTANDING AND REQUIRES IT.

NOW I UNDERSTAND THAT WE DON'T
WANT TO HAVE USELESS ACTS AND,
YOU KNOW, BUT, IT JUST SEEMS TO
ME THAT THE RECORD IS IN A
STATE THAT'S NOT SUFFICIENTLY
DEVELOPED FOR US BASED ON ALL
OUR OTHER CASES, SINCE ATKINS,
TO ALLOW FOR A SUMMARY DENIAL.

>> WELL, AND I DISAGREE.

BECAUSE --

>> LET ME MAKE SURE.

YOU TOLD ME ZACK IS, YOU ADMIT
ALL THE OTHER CASES WENT BACK

FOR EVIDENTIARY HEARINGS I HAD
CITED; CORRECT?

>> YES.

>> YOU AGREE WITH THAT.

>> YES.

>> WE ALWAYS SAID HAVE AN
EVIDENTIARY HEARING EXCEPT FOR
ZACK.

>> WE ENDED UP HAVING
EVIDENTIARY HEARINGS WHERE
PEOPLE COME IN AND ADMITTED
THEY CAN'T PROVE ANY OF THE IQ
SCORES BUT PLEASE GRANT ME
RELIEF ANYWAY.

THAT IS TIME TO CHANGE THAT
RULE AND, REQUIRE SOME,
SOMETHING MORE THAN THE GOOD
FAITH BELIEF OF SOMEONE WHO IS
RELYING ON A RECORD WHERE THE
CLAIM WAS REJECTED.

>> AS OF TODAY'S DATE, HAS
THERE BEEN A FACTUAL FINDING
THAT THE, THE ACCUSED IN THIS
CASE IS NOT MENTALLY RETARDED?

>> THE TRIAL COURT REJECTED LOW
IQ BECAUSE HE FOUND HIS IQ WAS
HIGHER THAN THE NUMERICAL
SCORE.

>> SUMMARILY DONE?

>> NO.

THAT WAS IN THE RESENTENCING.

THEY PRESENTED THIS EVIDENCE AT
RESENTENCING.

>> THAT IS EXACTLY WHAT

HAPPENED, IN 1989, THAT WAS FOR
MITIGATION WE HAVE SAID IN CASE
AFTER CASE THAT FINDINGS FOR
MITIGATION ARE SEPARATE FROM
THE ATKINS FINDINGS.

REQUEST YOU IN GOOD FAITH I
MEAN, ISN'T THAT WHY THIS WHOLE
THING HAS GONE ON NOW LAST FEW
YEARS?

>> WHAT I'M SUGGESTING IS --

>> DO YOU AGREE WITH THAT.

>> THAT IS PERFECT EXAMPLE WHY
THAT IS INAPPROPRIATE.

SOMEBODY WHO IS NOT PRESENTING
ANY NEW EVIDENCE.

>> SO YOU DISAGREE WITH WITH
OUR PRIOR RULING IN THIS CASE?

>> I DON'T DISAGREE WITH YOUR
PRIOR RULING.

YOU SENT IT BACK TO PLEAD AND
APPROVE IN ACCORDANCE WITH
CHERRY AND SHE DIDN'T DO IT.

>> BECAUSE HE WASN'T ESTOPPED

BECAUSE OF THE 1989 FINDINGS.

THAT WAS EXACTLY THE ISSUE WAS

ON APPEAL TWO YEARS AGO.

>> THAT WAS HER ISSUE.

MY ISSUE WAS THE TRIAL COURT

PROPERLY FOUND IT REFUTED BY

THE RECORD.

>> WITH THAT YOU HAVE USED YOUR

TIME.

MISS BACKUS YOU HAVE USED MORE

THAN YOUR TIME ALSO.

I THANK BOTH OF YOU FOR YOUR

ARGUMENTS HERE TODAY.

AND I THE COURT WILL BE IN

RECESS FOR TEN MINUTES.

>> PLEASE RISE.

STANFORD BIN NEY.

HEN MON NELSON.

THE SUPREME COURT IS NOW IN

RECESS.