

>> Please rise.

Ladies and gentlemen, the
Florida Supreme Court.

Please be seated.

>> Next case on the court's
agenda is Dufour versus State.

You may proceed.

>> May it please the court.

I am Maria Chamberlin and I,
along with, my co-counsel,
represent Donald Dufour.

Also present is Gretchen Sween
on behalf of the American
Association for Intellectual and
Developmental Disabilities, to
file an amicus brief on
Florida's behalf.

I will be sharing part of my
time with her this morning.

>> You are going to do nine
minutes.

She is going to do seven and
then you will do a rebuttal?

>> That is correct Your Honor.

Mr. Dufour is mentally retarded
and has spent his entire life--
He received D's and F's, failed
second grade.

He was placed or promoted every
year thereafter until he was
through with school as a
17-year-old, eighth-grader.

Joyce Jones taught Mr. Dufour
seventh grade English.

She thought he was quite
possibly mentally retarded.

The school that Mr. Dufour went to had no programs for mentally retarded children and children easily swept through the class. Dr. Keyes confirmed over his 30 years experience with children with mental retardation, he had never seen a case where children got D's or F's in first grade unless he was developmentally disabled.

>> In the direct appeal I understand you have another shot when you do your post-conviction but I always look to see, was this a thread throughout the whole case from the beginning? Was there any evidence in the original trial about mental retardation in which it was so clear, clear and convincing, that he was mentally retarded?

>> The only evidence put forth in that trial was Mr. Dufour was of average intelligence.

At the post-conviction hearing Dr. Gutman testified his basic statement-- the reason he said he was of average intelligence was based on the mini-mental status exam.

>> Is it not significant in this issue that we have to look at the totality of what happened because what the Supreme Court has mandated for us that we

don't want to execute individuals who were mentally retarded, and what this court struggles with are those that are come-lately claims, tha-- and I am concerned here about it really was not something that his lawyers-- or wasn't something that really came along until after Adkins came along.

>> Actually that is not entirely correct Your Honor.

His lawyers did not present adequate mental health evidence which, was one of the claims in his original appeal.

>> But they didn't say then-- they didn't present adequate evidence because he was mentally retarded.

They really were focused on issues about long-term drug abuse and brain damage from drug abuse, correct?

>> That is correct.

But during the pendency of the hearing, which was in 2002, there was testing by Dr. Merin who found Mr. Dufour to be borderline mentally retarded. It was at that time, and the timing was similar, Florida had no statute promulgated.

>> In 2002 it would not place him below the standards the court established.

We can argue whether that is correct, but isn't that the status?

>> The score that Dr. Merin held was a 74 which would be above the Cherry cut off, which we are arguing in my amicus but more importantly the trial court rejected it.

>> He gave it little weight.

He didn't like the way he testified and he didn't like his attitude, but the defense experts testified with regard to the scoring.

That was the point, what kind of scoring?

Excuse me, I have read the transcripts and I have read the order.

Judge Kirkwood gave it very little weight.

You could see clearly, even with the scoring in the testimony, even from your experts it would reduce it not below 70.

We can argue whether the 70 is correct, but isn't that the fact the records-- the fact the record is the lower court rejected the scoring and gave it little weight because of the administration errors?

>> What is the evidence with regard to scoring?

>> The evidence is as low as a

70 that doctor Merin testified.

The expert said it was anywhere between a 72 and a 74 when you take into account the gross scoring.

>> 74 is consistent with mental retardation.

>> That is a different issue.

We need to talk about the facts.

We are not here to access trial judges, correct?

We have to determine whether his evidence, according to the standards, support the trial judge's determination.

>> That is correct in my position as not only did the court give little weight to the score but what the court did, against the courts ruling in Cherry, is he added five points to Dr. McClain's 67.

Therefore, Mr. Dufour has substantial evidence that his score of 67 is a valid score.

>> Why is the 2002 score not evidence?

>> Several reasons.

The court gave it little weight because of the gross scoring and administration errors.

The court accepted Dr. McClain's score of 67 when it took the middle score and added five points and put it above the Cherry cut off.

Mr. Dufour has a qualifying score.

He had three accepted tests.

All three were within the range of mental retardation.

>> Is that a correct method to reach the amount?

He did accept the 67.

He did accept the 72 and then he put them together.

>> It appears as the most reliable score.

Because he added five points to the 67 to push it up above the cut-off.

What Cherry says is there is no standard and you cannot add five points or subtract five points.

Mr. Dufour has shown he meets the deficits.

The court failed to address the adaptive functioning, the objective testing done by Dr. Keyes, all areas across Mr. Dufour's life.

He spoke to individuals who knew him prior to the age of 18.

Mr. Dufour has demonstrated he has adaptive deficits in the areas required by clear and convincing evidence.

He has never had a checking account.

He has never lived on his own.

He has never been responsible for paying bills.

He has always had assistance in obtaining jobs through friends or family.

His jobs were sporadic and menial.

Those are the kinds of things this court has looked at when determining functioning and in Burns and Rogers which were two cases that the court found adaptive functioning was too high, both of the cases the defendants had jobs, have provided financial support for their families.

>> We have got to listen to all of this--

and came to the conclusion that he experienced mental, physical and sexual abuse as a boy and was a heavy drug user and performed poorly, but then he said he had participated a teaching small engine repair class while in prison and talked about other aspects of his adaptive functioning.

The trial court found that there were no-- he did not meet the test of deficits in adaptive functioning.

>> The trial court did not-- did make that finding.

If you look at the trial court findings about Mr. Dufour the fact that he was in the small

engine repair course, those things are actually consistent with what people with mental retardation can do.

[INAUDIBLE]

>> Absolutely.

Dr. Merin testified that someone with mental retardation can't be taught job skills, can certainly be taught--

I don't know that there was specific testimony, however there was testimony that Mr. Dufour cheated.

>> It would help a great deal if you would permit justice to ask the question.

It is more professional to do it that way.

Is there any evidence from any of the experts?

I know there was some with regard to cheating but presenting from the experts?

>> There is no testimony from experts that would preclude finding mental retardation.

Just the fact that Mr. Dufour received a GED.

>> That is what I was wondering.

>> Certainly the experts would not have relied on just the fact that he passed the GED in finding mental retardation.

>> You are into your rebuttal time.

>> I will allow--

[INAUDIBLE]

>> Madam Chief Justice may it please the court.

My name is Gretchen Sween and I represent the American Association of intellectual and developmental disabilities, formerly known as the American Association on mental retardation and amicus filed a brief in this matter.

The AAIDD comes as a friend of this court to promote an understanding of Florida law that comports with generally accepted scientific principles.

In fact, Florida statute, section 921127.1 is not an issue and not constitutionally suspect.

The statute as written is very accessible to the scientific community.

What happens is that the interpretation of that statute, it was adopted three years ago in the carry case, put Florida off step with the normative science that underpinned Florida statute as well as the United States Supreme Court decision in Adkins versus Virginia.

It is interesting to note that Florida was actually ahead of the game in this issue.

It wasn't that the U.S. Supreme Court came down and dictated to Florida to get in line with evolving standards of decency that had and the execution of the mentally retarded or go Florida got there before the U.S. Supreme Court.

The problem is the plain language of the statute.

This court correctly assumed, giving the answer you need to apply it to capital cases.

However the court read into the plain language a hard cut-off of the 70 IQ that is not in the statute and does not comport with the science of the IQ.

So we will look at the statute.

What Florida has directed courts to do is to identify those persons who are eligible for capital sentences to who have significantly subaverage, general intellectual functioning as measured by a performance that is two or more standard deviations from a mean score on a statutorily acceptable test.

That language, which seems very plain on its face, in fact is a scientific term.

What does it mean to be two or more standard deviations below the mean?

I submit that words such as

chip, crack, driver seemed to be words that are plainly understood, but if we put those words into the context of a computer programming, suddenly those words aren't the plain language that we thought they were on first impression.

Similarly, with this notion of two or more standard deviations to the mean, in the realm of IQ testing, a mean is a perfect concept, a pure concept.

You have a valid test that produces in those terms 100 as an average IQ score in a perfect world.

And yet, scientists understand that intelligence is exceedingly complex phenomenon, something that will never be ascertainable in a perfect way.

In taking a valid test, and having a qualified trained professional administer that test under the best possible circumstances, you are going to get a specific score that science understands is not the be-all and end-all of a person's IQ.

Therefore, that number produced in the specific contest has to be interpreted in terms of the standard error of measurement.

This is a construct universally

accept good in the mental health profession and is explained at great length and manuals produced by my client, the most recent of which came out just this year.

But this concept of the standard error of measurement, when applied to a specific score, and means you add the plus and minus generally, so if someone scores a 72 on a specific test, validly administered, you would still as a good scientist, add five points and subtract five points.

>> If somebody scored a 70, can a trial judge say it was more likely a 75?

>> What the experts informing the trial judges should do, if they are validly trained and listen to the authoritative science, should know that that individual score taken on a specific date needs to be understood and translated into a range of confidence and a 70 would then become 65 to 75 and in that range is where the general IQ score exists.

>> What would they then do with that?

Would the trial judge, because the range is from 75 to 65, say he is not retarded?

>> No Your Honor because, in

fact, as even the Supreme Court recognized in Adkins, the upper range of mental retardation goes up to 75, and 70 to 75 and below is where you have intellectual dysfunctioning.

The reason why do you have to understand the upper range as being permeable is that the vast majority of people with MR exist in that upper range.

80 to 90% of persons with mental retardation are going to be 65 to 75 IQ.

>> The bottom line is you are suggesting if a score is adopted in Cherry, that that number should have been 75, not 70?

>> Not precisely, Your Honor.

Your Honor, I am very aware that the court, all courts are attracted to bright line rule.

They are very helpful.

[INAUDIBLE]

>> Not exactly, Your Honor, but I would say the science has nothing to do with this particular case.

>> I am asking, what is wrong with Cherry?

I am trying to understand, if you can say it in words that we judges can understand.

>> Certainly Your Honor.

What the science directs is that anytime you have a hard cut-off

and you are trying to make that be a variable that you can say, if you hit this number above or below, you qualify as mentally retarded, that is bad science. Instead, what one can do quite accurately is to say, if an IQ score, when taken, when the science is taken into account, produces a range of 70, then you probably have passed the first prong.

>> From that prong, then 75, if you are above that and you add five points, you will never get below 70, according to the schools I went to.

Granted, they were probably not as good as yours.

You are saying that, if we would say it is 75 and not 70, is that erroneous?

>> Your Honor, the difficulty from the AAIDD's perspective is trying to settle on a bright line arbitrary.

>> It is the range.

Do you agree at some point, there has to be some number that if you are above that you are not considered scientifically to be retarded?

>> The problem is Your Honor looking for any kind of digital response to a nondigital phenomenon.

>> Then we might as well do away with everything because we can't get a number for anything that means anything.

I am trying to understand what you were saying, but we keep going back.

If there is a five-point margin of error one way or the other, and I'm having difficulty understanding how if somebody scores 80, that you can get below 70 with that margin of error.

>> You cannot, Your Honor.

>> Okay then, how about 78?

I still find it hard to get below 70 with that margin of error.

>> Your Honor, you are correct however what is incorrect is the fixation on the number 70.

What one can do is to say the mean is this perfect 100.

The score is never perfect.

It is a range.

>> How would you suggest we would settle on one?

>> Your Honor, the simple solution is to say that any IQ score produced from the validly-administered test by a qualified professional needs to be interpreted in the context of the SIMM and turned into a range.

If that range includes the number 70, then there it is more probable than not you have the first prong, but then I would direct Your Honor to the fact of the two more prongs.

>> You mean in the functioning?

We understand that.

The Cherry discussion is not about the others, but I am finding it hard to understand, with all that you said, that you were saying it must be-- the 75 would preclude it from falling into your range because you can never get below 70 with a 75 score if you apply that margin of error.

>> Your Honor, it is because the way clinically-trained professionals who administer IQ tests work.

They don't say, "I passed the first prong, check."

Then I go to adaptive deficits. If the score is at the upper limit for mental retardation in the context we were just discussing, you would still need to look at the deficit.

Even if the score were 65, a qualified technician says, I have to look at the adaptive deficits and I have to find significant impairment in at least one of three distinct

domains.

>> I thought there were others that said you had to have two.

>> One confusion Your Honor is that since Adkins was announced, the definition has changed in terms of organization but not in terms of underlying substance.

The AAIDD--

>> The parties here are certifying you have to show deficits of certain adaptive functions.

>> What the parties have asserted is, out of this whole range of variables, you have to show variables in at least two areas.

What my client has said is there are three categories in domain, conceptual, social, practical, and someone to be mentally retarded who has significant deficit in one, and that can even be the case if their IQ is slightly above 75, if they are extreme enough.

The analog for this is, an offensive concept, particularly to my client, but it is the idiot savant.

We are familiar with the fact that the human brain is a bizarre phenomenon.

Someone can be exceedingly gifted, and painfully limited

and dysfunctional in another.

So the adaptive deficit, which can be tested objectively, also looks at that.

But, Your Honor the problem--

>> Excuse me, you have well exceeded your time.

If you would bring us to a conclusion.

>> Thank you, Your Honor.

The important thing, why I am harping on that, is the Supreme Court directed courts to look to the science.

It is rather unique in that, that a legal principle was announced in the context of contemporary science, so we urge this court to reconsider its Cherry decision in the way it interprets Florida law so it is in line with scientific evidence.

>> Thank you very much.

>> Good morning, Scott Browne on behalf of the state of Florida.

Justice Lewis, all four experts agree that Donald Dufour had a qualifying score in 2002 above the cut-off for Cherry.

>> Do you agree that the trial judge was incorrect in the manner in which--

do you accept our current law and the manner in which it approached it?

>> I think he was trying to reconcile the court but ultimately what he concluded was you don't add five points.

He was looking at this scatter and ultimately concluded he was above the cut-off so he ultimately concluded--

>> He added the five points to 67 to get it to that point?

>> I don't know what the calculus was, but his bottom-line conclusion is he didn't meet the 70 cut-off. He ultimately-- he didn't like Dr. Marin responding to some of them and certainly didn't like being questioned after the intelligence tests, but even if you assume, if you look at the defense experts, they rescored this test.

They gave Donald Dufour the benefit of every possible computational error.

Dr. Merin's score at worst dropped one point.

>> In his evaluation in 2002, was he a state expert?

>> Correct, Your Honor.

>> Was there a defense in 2002 in connection with the evidentiary hearing?

>> No Your Honor, and actually the interesting point and I know you raised that to my opponent

when she was talking.

She represented Donald Dufour.

They hired mental health experts who critique Dr. Gutman's analysis from the trial.

None of them opined, including that he is mentally retarded.

>> None of them commented on behavior as a result of mental limitations.

>> No, Your Honor and it is clear, Donald Dufour was seen as a leader among members of his social group.

>> So you have got-- to me, that is somewhat significant as to the evolution of the claim.

Dr. Merin offered in 2002 his IQ score of the 74 with a verbal IQ of 85.

Has anyone attacked the verbal IQ of 84?

>> You know, I don't believe so and again even-- and there is a lot of testimony about how you administer the test and the reverse order role-- but the bottom line is Dr. Merin did a thorough examination and the interesting thing here, Your Honor, is, on rebuttal and through rebuttal, Dr. Keyes, a defense expert, admitted there were some scoring errors that Dr. Merin made.

In other words they increased his IQ, so ultimately Dr. Keyes, his last testimony on IQ-- and he had already testified on direct -- was that Donald Dufour had a 74 on Dr. Merin's test.

The same exact score that Dr. Merin and Dr. McClaren, Ms. Chamberlin said that Dr. McClaren came up with a 70. No he didn't.

The testimony is, no matter how you look at Dr. Merin's test, you can't get below a 70.

You can't get below a 72 or 73.

>> Let me ask you about the pure IQ issue.

I know you are not going to say we got it wrong in Cherry, and I have to look back at Cherry.

It was a unanimous decision, but is Florida now in our interpretation, the way that the real world of IQ has-- are we out of step with the majority of states?

In other words, somebody who has a 71, is it just as likely that they have got-- they are in the mentally retarded range because of the standard merit?

That concerns me in how we got there.

>> This court in Cherry did a survey, and cited a case in

Kentucky in 2005, Commonwealth of Kentucky and it cited Cherry.

Seventeen of the 24 jurisdictions have a similar bright line cut-off.

In other words, it is two standard deviations below the mean on a qualified IQ test or an actual 70 IQ, so this court to its face value is out of step.

>> Your contention is we were actually interpreting the plain language of the statute, not making a decision as to whether it was scientific, whether there was room in the scientific community to employ the standard error of measurement?

>> Well, this court ended the bright line test and this court has repeatedly upheld that.

>> The area where I would be concerned is where somebody has a 71, but you see clear evidence throughout history that this person has not functioned as we would expect someone to function in the world and I know, it is always what is the U.S. Supreme Court getting at in executing mentally retarded and, despite whatever we put on it, we are assuming the class of people that are so limited in their ability to function that it

would be inhumane to execute them.

The concern would come if it looked like they had two of the other prongs, and there was a question as to where their IQ had been scored.

I would like you to maybe address that.

As far as the adaptive functioning, do we have that or do we not have that?

>> Clearly, under the preponderance of the evidence standard, first of all the court has recognized that a premeditated murder on its own terms is inconsistent with the conduct of a mentally retarded individual described by the Supreme Court.

They are unlikely to pre-meditate--

What we know about Donald Dufour are five murders.

He eliminates witnesses and, "anyone who sees my face or hears my voice has to die."

He isolates his victims and plans ahead of time, and there is abundant evidence in the record of criminal adaptive behavior.

Not only do you consider the leader of this criminal group, planning and organizing crime,

Dr. Lippmann's notes from the 2002 hearings are illustrated. He describes dropping a car off, robbing an individual and dropping a car off in another section of town to throw the police off.

This is an individual that has been described by family members as someone who is very persuasive.

He is persuasive, he is a leader, he can talk you either into or out of anything.

This is a clear, consistent personality characteristic of Donald Dufour.

He is manipulative.

He is persuasive and sure he hasn't had many jobs, but he doesn't like to earn and in fact he explains to Dr. Lippmann why he had a job in Orlando and he said, "I could earn the kind of wages that would allow me to have a lifestyle I wanted to live."

Dr. Merin says he has worked at the McDonald Center and most of the time they are happy to have a job.

Donald Dufour chose the criminal lifestyle so I don't think this court should put any stock in the fact that Donald Dufour did not hold a job.

He didn't want to.

He could live a parasitic lifestyle.

>> Don't we have to be careful as far as determining who is not mentally retarded based on the nature of the crime and then we have to look at the other surrounding aspects?

Did he live on his own.

>> In fact, most often he did not, but there is clear evidence that he is capable of it because after he committed to Mississippi murders, his associate was caught right away.

Donald Dufour obtained a room in a boarding house under false identity.

He cut his hair, he dyed his hair.

So he can actually live on his own if he is forced to, but again, he has had people help him along the way.

Siegler, who testified he was concerned about his appearance and profited from prostitution, but no one in the social group thought he was in any way intellectually limited and that is what the trial court focused on.

There is absolutely no evidence below of poor adaptive functioning.

Dr. Keyes administered a SIPHAR to two death row inmates who were in a cell next to him for about a year.

So that is how they arrived and, one family friend from 25 years ago of the mother of a family friend, that is how they came up with adaptive functioning deficits.

They ignored the history of records that showed Donald Dufour cares for and is concerned about himself, all of which are completely--

>> Do we have letters in this file by him?

>> Yes we do, Your Honor.

Again, there are some grammatical errors certainly, but even according to defense expert, Dr. McClain, he fought forfeiture of his car from Mississippi.

These are all examples of adaptive behavior over a number of years.

The defense had no counter to below, so the trial court, there is no evidence on this record.

>> What about-- I mean is there any doubt that he obtained a GED?

>> No, Your Honor.

>> How about the small engine repair class?

>> He not only insisted in completing the course, he was actually teaching other inmates. That little assessment group, it was for individuals, thought he was definitely capable of college work, another indication in the record among many that he functioned well above those and was confident.

>> He had dropped out of school at what age?

>> I believe it was in high school at 17, 16.

>> It really was an issue here that probably whatever drove him, it was primarily due to the childhood that was at least in the more recent evidence, a victim of sexual, physical and mental abuse, drug use, repeated drug use that any deficits were coming from that behavior.

>> Also Donald Dufour was not terribly concerned with school because he explained to Dr. Lippmann, again an expert from the 2002 era, he explained he did nothing but sell drugs and get high.

It is not surprising under those circumstances but again the defense makes much of the school records, but what they ignore is he was actually administered an IQ test.

He scored an 80.

With what we know about Donald Dufour, that is a pretty good estimate.

Not an ideal test.

It is a group test but it should be taken into account along with his school records.

Again--

>> Speaking of IQ test, it always troubles me when we have IQ tests, and here we have a couple which clearly fall below the 70 mark, assuming we are going to stay with the 70 mark.

We have 67 and we have a 62.

What we pick out, the one that says he is at 73 or 74 IQ and say well, he has that so we are going to say he is not mentally retarded.

What do you do with these other IQ tests?

How do we factor those into our determination about whether he is or is not mentally retarded?

You would agree that those other two tests would at least get him.

>> In the range.

>> Into the first prong of intellectual functioning.

>> The interesting thing about IQ tests is, I hate to say it but you can't say you are smarter than you are.

You can always malingering have a bad day but what we have here is clear evidence that the two lower scores were the result of less than optimum effort or malingering, as the state that just because Dr. McClain came to test for mental retardation and told him what she was there to test him for.

After Donald Dufour signed a motion saying, "I am retarded, you cannot execute me."

Dr. McClaren had concerns, you are going to tell them upfront what you are testing him for?

More than that, Dr. McClain administered two tests to determine whether or not he was malingering and guess what?

Both of those tests revealed Donald Dufour was well into the malingering range.

Dr. McClain recognized that to tell showing malingering, but my IQ score is good.

Pretty inconsistent.

She tried to explain that well, that test of malingering is not for the mentally retarded.

The problem with that theory is Dr. Keyes did not administer an IQ test but what test did he administer?

That TOMS and Donald Dufour did perfectly well on that.

We know that TOMS administered by Dr. McClain and Dr. McClaren before testing was the result of malingering, not any lack of ability.

It is a test that measures malingering and they came out clearly in the range.

Again--

>> It shows that he had been malingering when these tests were administered?

>> Well, in fact he did discount Dr. McClain's testimony because she discounted her own test that showed he was malingering so yes, when he ultimately came to the conclusion that he did, he discounted her scores because she discounted her own test.

>> What if Dr. McClaren came up with a full scale 62?

What was this explanation for that low IQ?

>> Lack of motivation, malingering.

>> She testified that it was an invalid score?

>> Yes.

>> Dr. Zimmerman in 1989, was he a defense expert?

>> That is my understanding.

>> So, it was not one of the recommended test that was there an explanation for the 66 IQ?

>> I thought it was even lower

than that.

The test of performance is a quick assessment instrument much like the beta.

Donald Dufour was on death row at that time and that was the first indication anyone had that he might be mentally retarded.

>> That was not used in the evidentiary hearing?

>> No, not in the 2002 hearing.

They had the evidentiary hearing where they were complaining about Dr. Gutman--

But they did not contend he was mentally retarded.

I suggest that this is a Johnny-come-lately claim.

It is not supported by the record that Donald Dufour does not meet either the intellectual functioning prong nor the adaptive functioning prong for mental retardation.

>> Did you do the trial on this?

>> No, Your Honor.

I did attend the evidentiary hearing.

>> I am concerned about the way you put the judicial notice, what comes into evidence.

This is a hearing that should follow the rules of evidence.

>> Yes, Your Honor.

>> I understand because I have been there, been in those shoes

where the rules of evidence were changed to allow experts to rely on the things that experts generally rely on even though they not-- may not be evidence that I see here a real problem in which the manner that the state was attempting several of the items that otherwise would not-- I mean they were not properly authenticated at times. Would you address that last point?

It can't be a free-for-all as we go into these kinds of hearings.

>> First of all, the trial court indicated that while the documents were it made it, they did not form the basis of this opinion and were not considered.

>> I'm just saying it was erroneous.

These things, if we are going to have late proceedings and be governed by the appropriate rules, we need to make sure they are followed and not to have the judge let everything and although it is erroneous, so I didn't really look at it.

None of that evidence was shown to be erroneous.

It was not evidence in a proper manner was it?

>> I believe it was.

>> Not to support an expert

opinion.

>> That is not how they were offered, Your Honor.

Maybe we are talking-- we admitted them as an exhibit and the defense did as well in a number of documents, going back years.

The important thing is, the experts themselves, even the defense, Dr. McClain admitted these letters were the kind of thing she had reviewed, the document, and she considered them as part of her opinion, so I don't think there is a need here to reverse or remand especially when the trial court in this case indicated those documents formed the basis of its opinion.

>> You are avoiding my question. Are we going to let just anything go through these kinds of hearings without following the rules of evidence?

>> I agree that they can be cross examined the does that mean the document comes into evidence?

>> Your Honor, I submit that if you look at the documents themselves, if we are talking about which rules were violated, and there was a rule violated for the criminal procedure,

3.203, where the state had no notice and in the reply brief they said we had noticed that the expert on mental retardation had examined it before.

We did not prior to the hearing and at that date it was too late to suppose.

There is a clear violation of the rule of criminal procedure in this case and it is not on behalf of the state.

There was an expert who testified before.

>> I can see I'm not going to get a direct answer on this one.

>> I don't believe if you look at the purpose, that they were admitted as an exhibit and not relied on by the trial court-- that is my answer.

Thank you.

>> Justice Pariente, I would like to go into the procedural history of this case.

I think it would help clear up the confusion.

There was a notice of evidence intent to rely on act filed by a judge in November 2002 in the middle of the evidentiary hearing.

It became clear at that point Mr. Dufour was going to rely on-- to show he was mentally retarded.

What procedurally happened was when the 3.851 came out for repeal, they filed a jurisdiction to go back into the hearing so that court would have won complete record so it is on mental retardation and 3.851. This court declined to grant the relinquishment of jurisdiction.

>> I understand that but if you had experts that were preparing and it is not like mental retardation is a new concept, it is a new concept to make someone an eligible but it is always considered mitigation so it seems the fact that none of the experts even talked about the issue of mental retardation, to me is significant.

>> I think that they did because Dr. Merin was the one that said he was borderline mentally retarded.

Mental retardation could be mitigation.

They felt the stronger evidence was the evidence of rain damage.

>> You are telling me if you have the case of mental retardation and brain damage he can pick and choose?

>> Certainly not that it is important to note that Dr. Berland did not test for mental retardation.

As soon as he learned of Dr.--

>> Mental retardation is so esoteric that it can go through 20 years and no one says, this guy has significant deficits. Obviously he is competent, but are we saying that mental retardation is so subtle that you can go through that many years and not realize that they are our significant deficits in a person's intellectual functioning?

>> I understand that.

I think actually that is--

Dr. Zimmerman found Mr. Dufour was mentally retarded and while it is not an accepted test, it wasn't an individually administered test by a neuropsychologist, so I don't think.

>> Is that offered into evidence in the evidentiary hearing?

>> In the evidentiary hearing, Dr. McClain spoke to Dr. Zimmerman and relied on his findings, and as a piece of her opinion to show that, while everyone agreed it was not an accepted, test it was certainly predictive of the testimony of Mr. Dufour, of his actual functioning.

I would like to touch on a few other points that Mr. Browne

raised specifically about

Mr. Dufour.

He did withdraw from from the eighth grade at age 17 and there was testimony about his disinterest and lack of interest in school but it is unclear that he got D's and F's in first grade.

He was seven years old.

>> Is there an explanation for that as far as learning disabilities and those kinds of things suggested by the experts?

>> It was not in the testimony, teachers who testified at the elementary and middle schools.

[INAUDIBLE]

>> Dr. Keyes, all the experts testified that those grades, D's and F's in first grade, were predictive and an indicator of something being developmentally wrong, not a learning disability.

But an administration of low IQ was their testimony.

Dr. Keyes and Dr. McClain relied on the school records as far as the onset before age 18 to show Mr. Dufour had difficulties.

>> There was testimony the sister who had lived with him and said that the reason he did not have any problems-- no problems with life skills-- and

the other brother who was at the time diagnosed with mental retardation--

>> That is correct, he did.

>> They drew a distinction between the two.

>> One of the distinctions they drew was John, who was mentally retarded, had an outburst in class and was violent.

[INAUDIBLE]

>> Correct and the testimony-- absolutely and that was presented below.

Briefly in terms of the step-sister who testified, her testimony was given little weight by the court because she was directly contradicted by the expert that Mr. Dufour presented that showed the step-sister really was completely testifying essentially untruthfully about their relationship.

Her testimony was found not credible by the trial court.

The defense was put on significant evidence of adaptive deficits.

One of the things Mr. Browne discussed, the crime, and Justice Pariente was concerned with the pro se finding of, just because there is a cold, calculated, premeditated, that concludes a finding of mental

retardation and what is important to focus on with adaptive deficits is the need to focus on what the person can't do, not what they can do.

It is the weaknesses, not the strengths.

>> With that, you have exceeded your time.

>> Thank you, Your Honor.

>> That concludes your arguments here today.

The last case on the agenda for today is State versus Stang.