

>> PLEASE RISE.

HEAR YE HEAR YE HEAR YE, THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR, GIVE ATTENTION AND YOU
SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
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 FLORIDA SUPREME COURT.

THE FIRST CASE ON THE COURT'S
AGENDA THIS MORNING IS HODGES
VERSUS STATE.

MR. DAVIS?

>> THANK YOU, YOUR HONOR.

I'M DAVE DAVIS REPRESENTING
WILLY HODGES IN THE CAPITAL
CASE.

THIS CASE ROSE OUT OF A DECEMBER
2001 MURDER IN PENSACOLA AND HE
WAS ACCUSED OF BREAKING --
CONVICTED OF BREAKING INTO THE
HOUSE OF PATRICIA BELANGER AND
SEXUALLY BATTERING HER AND
STABBING HER AND HITTING HER ON
THE HEAD WITH A HAMMER... AND HE
FLED OUT OF THE HOUSE AND
DISAPPEARED INTO THE
ENVIRONMENT.

ABOUT TWO YEARS LATER, THERE IS

--

>> COULD YOU SPEAK UP A LITTLE.

>> I'M SORRY.

ABOUT -- I'LL TALK LOUDER.

TWO YEARS LATER, HE WAS IN
CINCINNATI, OHIO AND KNOCKED ON

LAVERNE JANSEN'S HOUSE AND...

STABBED HER AND...FLED ALSO AND

HE WAS BROUGHT BACK TO

PENSACOLA, TO STAND TRIAL FOR

THIS CASE AND HE WAS SENTENCED

TO DEATH BY A JURY VOTE OF 10-2.

THE ISSUES I WANT TO RAISE IN

THE BRIEF IS NUMBER 2, WHETHER

THE COURT FOUND WHETHER OR NOT

HE WAS MENTALLY RETARDED.

THERE WAS A HEARING ON THE ISSUE

OF MENTAL RETARDATION AND IT

REQUIRES THREE THINGS, HE HAS TO

ESTABLISH, BASICALLY... THAT IS

REALLY UNCONTESTED, HE HAS AN IQ

OF -- BETWEEN 62 AND 69 AND

ACTUALLY, WHAT WAS WHETHER HE

HAD THE SECOND PRONG, ADAPTING

DEFICITS, AND IN THAT CASE, THE

EXPERTS DISAGREED, LET ME BACK

UP.

INITIALLY, THEY ALL AGREED THAT

HODGES WAS MENTALLY RETARDED AND

THE EXPERT FOR THE DEFENSE SAID

THAT HE WAS AND SO DID THE

DOCTOR AND THE STATE GAVE HIM

ADDITIONAL EVIDENCE, AND THE

DOCTOR CHANGED HIS OPINION

SAYING NOW HIS ADAPTIVE DEFICITS

ARE NO LONGER IN THE RETARDED

RANGE --

>> HAD DR. GILGUN, IS THAT HIS NAME, MADE ANY KIND OF DETERMINATION ON THE ADAPTIVE FUNCTIONING PORTION PRIOR TO THE ADDITIONAL EVIDENCE.

>> IN ORDER TO FIND HIM MENTALLY RETARDED HE HAD TO HAVE DONE THAT.

>> I MEAN, SPECIFIC FINDINGS. I KNOW MENTAL RETARDATION REQUIRES NOT ONLY THE LOW INTELLECTUAL FUNCTIONING BUT ADAPTIVE DEFECTS, IN ADAPTIVE FUNCTIONING ALSO BUT PRIOR TO THE ADDITIONAL INFORMATION WHAT FACTORS DID THE DOCTOR SAY INDICATED HE HAD LOW ADAPTIVE FUNCTION.

>> I DON'T RECALL ANYTHING AT THE INITIAL HEARING, IT WAS -- I DON'T WANT TO SAY SUMMARY BUT WASN'T AS EXTENSIVE AS LATER AND I DON'T RECALL THE DOCTOR SAYING WHAT HE FOUND WERE HIS DEFICITS AND LATER THE ISSUE BECAME MORE, MORE CRUCIAL, THAT THE -- THEY BEGAN TO LOOK AT THE EVIDENCE, DR. GILGUN CONSIDERED.

>> BUT, ISN'T THAT ONE OF THE ISSUES HERE?

I MEAN, WHAT WAS THE NAME OF THE DOCTOR WHOSE THE DEFENSE --

>> DR. TURNER.

>> ISN'T HIS INFORMATION ABOUT THIS ADAPTIVE FUNCTIONING PRETTY CURSORY.

>> YES, IN FACT, LET ME -- LET ME BACK UP.
DR. GILGUN BASED HIS DETERMINATION OF LACK OF ADAPTIVE DEFICITS ON TWO TESTS HE HAD GIVEN TO WOMEN THAT HODGES LIVED WITH, EITHER SIX OR EIGHT YEARS EARLIER AND HE ADMINISTERED WHAT THEY CALL THE ADAPTIVE BEHAVIOR SCALE AND WITH REGARDS TO TAMARA WOLF, SHE RATED A 98, WHICH CORE RATES WITH IQ AND BONNIE CHANDLER RATED HIM A 58 AND DR. TURNER SAID, THE RESULTS ARE TOO WIDELY VARYING AND TOSSED THEM OUT AND THERE IS NO REQUIREMENT IN THE STATUTE THAT THEY USE -- HAVE TO USE A... THE TEST AND NO REQUIREMENT IN THE STATUTE THEY HAVE TO -- HAVE TO GO TO OTHER PEOPLE.

TO DETERMINE --

>> COULD WE DISCUSS AND COULD YOU FLESH OUT FOR US WHAT YOU BELIEVE THE STANDARD TO BE? YOU KNOW, IT IS EASY TO SAY THE WORDS DEFICITS IN ADAPTIVE FUNCTIONING.

WHAT IS REQUIRED FOR A FINDING -- IT IS UNLIKE THE NUMERICAL SCORES OF INTELLIGENCE.

IS THERE, HAS THE U.S. SUPREME COURT GIVEN US A DEFINITIVE DEFINITION OR HAVE WE ESTABLISHED A DEFINITION THAT

YOU MUST HAVE THUS AND SO,
BECAUSE, EACH ONE OF THESE
PRESENTS A LITTLE DIFFERENTLY.
AND, AS WE DISCUSS THESE THINGS,
THE NEBULOUS CONCEPT, I'M NOT
SURE THAT ANY OF US AS LAWYERS
CAN GET OUR HANDS AROUND IT.
WHAT DOES THAT REALLY MEAN.

>> THAT IS REALLY... A GOOD
QUESTION.

BECAUSE, THE U.S. SUPREME COURT
HAS NOT DONE THAT, IN ADKINS
THEY SAID WE'LL DETERMINE MENTAL
RETARDATION --

>> DON'T GET AHEAD OF YOURSELF,
DID THE SUPREME COURT IN A
FOOTNOTE OR OTHERWISE ESTABLISH
ANY DEFINITIVE CRITERIA TO LOOK
TO.

>> NO, THEY SPECIFICALLY LEFT
THE STATES TO DEFINE -- AND, AS
YOU ARE SAYING, THE BATTLE IS
FOR ANOTHER DAY AND LET THE
STATES FLESH THIS OUT AND
PERHAPS LOOK AT IT LATER BUT AS
I -- ATKINS, THEY DIDN'T AND THE
ONLY THING I HAVE SEEN THE COURT
COME CLOSE TO IS -- BECAUSE,
THIS ISSUE REALLY NEVER, I HAVE
SEEN COME UP, THE ADAPTIVE
FUNCTIONING, IT HAS ALWAYS BEEN
ON THE IQ --

>> WE'VE HAD SEVERAL OF THEM ANY
ALWAYS SEEMS TO TURN ON THIS
NEBULOUS, THE WORDS, VERY
BROADLY, YET, NO DEFINITIVE WAY

TO MAKE THIS CALL, IS IT NOT MORE OF A JUDGMENT, SUBJECT TESTIFY CALL THAN IT IS ONE THAT CAN BE OBJECTIVELY MEASURED .

>> WELL ONE OF THE PROBLEMS WE HAVE IN THIS CASE, IS DR. GILGUN HAD AN OBJECTIVE REQUIREMENT AND GAVE THE SCORES, ONE 98 AND ONE 58 AND DR. TURNER SAYS THOSE ARE UNRELIABLE.

>> BUT, SEE, MY PROBLEM WITH WHAT YOU ARE SAYING IS THAT YOU ARE ATTACKING THE FINDING THAT THERE WAS NOT DEFICITS IN ADAPTIVE BEHAVIOR.

OR THAT -- THERE WERE NOT, BUT, WHERE IS THEN THE CONTRARY FINDINGS THAT THERE WERE AT LEAST DEFICITS IN I GUESS TWO OF THE TEN SKILL AREAS?

WHO TESTIFIED TO THAT?

AND DON'T WE HAVE TO LOOK AT THE WHOLE PICTURE OF THIS DEFENDANT, NOT JUST A SNAPSHOT FIVE YEARS AGO OR AT PRESENT BUT LOOK AT HIS WHOLE LIFE, WHAT HE DID AND WHAT KIND OF WORK HE DID?

IN OTHER WORDS, AS A --

ATTACKING WHAT THE -- ONE EXPERT DID, WHAT YOU HAVE THE BURP, WHAT DID YOU PROVE TO SHOW THAT THERE WERE DEFICITS IN AT LEAST TWO OUT OF THE TEN AREAS THAT ARE --

>> WELL, FIRST OF ALL, WHAT I'M SAYING IS THE TRIAL COURT COULD

NOT HAVE MADE THE FINDINGS.
SO, OF MENTAL RETARDATION AND
I'M SAYING, THIS IS NOT A
TOTALITY OF THE CIRCUMSTANCES
SORT OF TEST --

>> I'M ASKING, WHAT EVIDENCE DO
YOU SAY THE JUDGE IGNORED OR
WHAT EVIDENCE DID THE -- YOUR
EXPERTS POINT TO THAT WOULD SHOW
DEFICITS IN ADAPTIVE BEHAVIOR?
AS AN ADULT?

>> WELL, FIRST OF ALL,
DR. TURNER SIMPLY SAID HE DID
THE EXAMINATION AND FOUND
ADAPTIVE DEFICITS AND DIDN'T SAY
WHAT THEY WERE.

>> BUT NOW GOING BACK TO WHAT
JUSTICE LEWIS IS ASKING YOU, ARE
YOU SUGGESTING THAT THIS COURT
WOULD RELY ON AN EXPERT MAKING A
CONCLUSION -- CONCLUSORY
STATEMENT WITHOUT POINTING TO
WHAT IN THE -- WHAT EVIDENCE HE
HAD TO BACK THAT UP?

>> WELL, FIRST OF ALL, THE RULES
OF EVIDENCE ALLOW HIM TO MAKE --

>> I UNDERSTAND THAT.

BUT, WE HAVE TO HAVE -- WHAT YOU
ARE SAYING IS THAT THERE WAS NOT
-- I GUESS, THERE IS NOT
COMPETENT SUBSTANTIAL EVIDENCE
TO SUPPORT THE JUDGE'S FINDINGS.
THAT HE LACKED -- HAD ADAPTIVE
FUNCTIONING.

AND HE MADE PRETTY STRONG
FINDINGS, THAT HE DID HAVE --

DID NOT HAVE THE DEFICITS.

SO, TO SAY ON THE CONTRARY, WE SHOULD RELY ON THE CONCLUSORY STATEMENT BY AN EXPERT, WITHOUT HIM HAVING BACKED IT UP WITH ANYTHING, SEEMS, YOU KNOW... THAT PART TO -- IS HARD FOR ME TO --

>> I'M NOT ASKING YOU TO FIND HIM MENTAL RETARDATION BUT DO THE MENTAL RETARDATION EXAMINATION AGAIN, THE DOCTOR'S CONCLUSION ARE NOT SUPPORTED BY THE EVIDENCE.

>> WHY SHOULD YOU HAVE A SECOND CHANCE AT THIS?

HE SAID, YOU KNOW, FILE THE PROPER MOTIONS, A HEARING WILL TELL, HE HAD AN OPPORTUNITY TO PRESENT WHATEVER IT IS THAT HE HAD, AND, IT LOOKS TO ME LIKE HE FAILED TO PRESENT THE EVIDENCE, THAT INDICATED THAT HE WAS DEFICIT IN TWO OF THESE -- OUT OF THESE TEN AREAS AND SO WHY SHOULD WE GIVE HIM A SECOND OPPORTUNITY TO DO THIS?

>> WELL, ALL RIGHT.

LET ME SAY, ALL RIGHT, FIRST OF ALL, WHAT DEFICITS DOES HE HAVE? ACADEMICALLY, THERE IS ACADEMIC DEFICITS.

IN THE SENSE THAT HE ONLY WENT TO SECOND -- 6TH OR 7TH GRADE, I CAN'T REMEMBER WHAT.

AND AND THE DOCTOR SAID HE COULD

DO ARITHMETIC AT A 4TH GRADE
LEVEL AND... AND SECOND OF ALL,
14 COMMUNICATIONS SKILLS AS
EVIDENCED BY THE DETECTIVE,
JENNE LUKE AND HE WAS WRITING
HER LETTERS THAT ARE --

>> AND, WHO IS -- IN FACT
INDICATED THAT HE HAD THESE TWO
DEFICITS.

>> WELL, DR. TURNER DID.
BECAUSE HE AGAIN, HE THREW OUT
THOSE ASSESSMENTS SAYING THEY
ARE NOT VALID BECAUSE OF THE
WIDE VARIATION.

>> YOU HAVE TALKED ABOUT THOSE
ASSESSMENTS AND DR. G.

-- GILGUN SAYS THERE IS SOME
PROBLEM HERE BECAUSE THERE IS A
WIDE RANGE OF DIFFERENCE BETWEEN
THESE TWO, BUT, WHAT WE ARE
LOOKING FOR, IS, SPECIFIC
INFORMATION IN THE RECORD, THAT
INDICATES THAT HE IS DEFICIT IN
THESE TWO AREAS THAT YOU ARE
TALKING ABOUT BECAUSE AS I SEE
IT, IT SEEMS TO ME THEY
INDICATED, YES.

HE HAS PROBLEMS WITH ACADEMICS
AND READING, BUT --

>> IT DOESN'T MEAN YOU ARE
CATATONIC.

THE MILDLY RETARDED... AND YOU
CAN DO THINGS AND READ AND WRITE
BUT YOU HAVE PROBLEMS READING
AND PROBLEMS WRITING AND READ
THE LETTER I QUOTED IN THE BRIEF

AND YOU CAN HARDLY UNDERSTAND THE THING AND THE DOCTOR HIMSELF SAID WHEN HE LISTENED TO THE TAPES, THAT HODGES AND JENNY LUKE HAD, IT DOESN'T MEAN THEY SIT THERE WITH A GOOFY SMILE THESE PEOPLE FUNCTION IN THE WORLD AND CAN HAVE DRIVER'S LICENSES AND CAN DRIVE CARS AND THE SURPRISING THING ABOUT THEM IS THEY LOOK IN MANY WAYS LIKE NORMAL PEOPLE.

BUT WHEN YOU START LOOKING AT THEM, THESE DEFICITS, THEY HAVE, LIKE READING AND WRITING, AND INABILITY TO SPELL AND COMMUNICATION PROBLEMS, LIKE HODGES HAD, THEN IT COMES TOUT -- OUT THAT THEY HAVE SIGNIFICANT PROBLEMS.

>> DID THE TRIAL JUDGE SAY WHAT HE OBSERVED IN THE -- CAN HE -- HE CANNOT DO THAT.

>> NO.

BECAUSE -- GO AHEAD, I'M SORRY.

>> I MEAN, IT APPEARS THAT THE TRIAL JUDGE WAS OF THE VIEW THAT -- HERE'S YOUR WITNESS, AND THIS WITNESS WAS A VERY CAGEY WITNESS AND KNEW WHEN TO ELABORATE AND KNEW WHEN TO BACK OFF, SOMETHING LAWYERS DON'T KNOW AND WAS VERY, HAVE ADEPT AT THAT IS MY TAKE ON WHAT I'M READING AND THIS IS TRIAL JUDGE PERMITTED OR NOT PERMITTED TO DO THAT AND WHAT

THIS IS AUTHORITY.

>> NO, HE CAN'T BECAUSE HE'S
THEN BECOMING THE EXPERT.
AND HE'S SAYING, BASED ON WHAT I
SEE DOESN'T HAVE ADAPTIVE
DEFICITS.

>> HE'S A FACT FINDER, IS HE
NOT.

>> NOT IN THE SENSE, NO.

>> NO.

>> I DON'T THINK SO.

BECAUSE WHAT HE IS LOOKING
FOR... AGAIN, HODGES MAY HAVE
EXACTLY WHAT YOU SAY, MAY HAVE
BEEN CAGEY BUT THAT DOESN'T MEAN
HE IS MENTALLY RETARDED, HE IS
DOING WHAT YOU CAN'T DO, BECAUSE
HE CAN READ AND WRITE AND
DRESSES WELL HE IS NOT RETARDED.
LOOK AT THE SPECIFIC DEFICITS
HERE AND THE DEFICITS ARE, FOR
EXAMPLE, THAT HE CAN'T READ OR
WRITE, AT VERY GOOD LEVELS.

AND, SO, FOR THE JUDGE TO SAY
HE'S NOT RETARDED, BECAUSE HE
CAN TESTIFY WELL, HE MAY VERY
WELL BE ABLE TO DO THAT ON A
CASE, BUT THAT DOESN'T MEAN HE
IS NOT MENTALLY RETARDED.

>> THAT IS ONE ELEMENT OF IT,
THERE IS A CASE IN SOME LOCATION
OR SOMETHING THAT TELLS US, THAT
THE ACADEMIC THINGS ARE NOT
ALREADY CAPTURED IN THE
INTELLIGENCE TESTING.

>> WELL, I THINK, NO, THERE IS

NO CASE I SEE THAT SAYS THAT.

>> IT SEEMS TO ME ADAPTIVE
FUNCTIONING IS HOW YOU LIVE YOUR
LIFE, DAY-TO-DAY.

WHATEVER YOU ARE GOING TO
ADDRESS, YOU KNOW, HOW DO YOU
GET ALONG IN YOUR WORK, CAN YOU
DO THINGS, CHECKBOOKS, BANKING,
GO TO THE MOVIES, TRAVEL, DRIVE
CARS, I MEAN, THE WHOLE THING,
THE GAMUT, NOT JUST ACADEMIC
WORLD, IS IT OR AM I WRONG ON
THAT.

>> YES, I THINK -- I HATE TO SAY
BUT ONGOING YOU ARE WRONG.

>> OKAY.

WHY.

>> IN THE SENSE YOU ARE DOING
THE SAME THING EVERYBODY ELSE
IS, LOOKING AT THE TOTALITY OF
WHAT HE IS DOING AND WE SAY HE
CAN WRITE CHECKS AND GO TO THE
MOVIES AND DO ALL THIS STUFF BUT
ARE IN AREAS OF READING AND
WRITING AND ACADEMIC SKILLS HE
CANNOT DO IT AT A NORMAL LEVEL.

>> JUSTICE LEWIS ASKED YOU
EARLIER IF THERE WAS OBJECTIVE
TEST -- AN OBJECTIVE TEST THAT
ADAPTIVE FUNCTIONING WOULD FIT
INTO, AND, YOU HAVE REFERENCED
IN YOUR BRIEF AND I'M SURE IT
WAS IN THE TESTIMONY, THAT
DSM-IV LISTS THESE TEN SKILL
AREAS AND THAT IF A PERSON HAS
DEFICITS IN ONLY TWO HE CAN BE

CONSIDERED -- DEFICITS IN ONLY TWO HE CAN BE CONSIDERED MENTALLY RETARDED, COMMUNICATION, SELF-CARE, HOME LIVING, SOCIAL INTERPERSONAL SKILLS, USE OF COMMUNITY RESOURCES, SELF-DIRECTION, AND FUNCTIONAL ACADEMIC SKILLS, WORK, LEISURE, HEALTH AND SAFETY.

NOW, YOU HAVE BEEN TALKING ABOUT THE TWO BEING IN THIS CASE COMMUNICATION AND FUNCTIONAL ACADEMIC SKILLS.

>> RIGHT, YES, MA'AM.

>> WHAT IS MEANT BY FUNCTIONAL ACADEMIC SKILLS?

YOU ARE TELLING US IT MEANS THAT HE CAN'T READ AT ABOVE A SECOND OR THIRD GRADE LEVEL.

IS THAT WHAT IS MEANT BY THAT AND WHAT DO WE HAVE IN THIS REGARD TO TELL US, EXPLAIN THAT?

>> I RECALL NOTHING IN THE RECORD THAT --

>> I MEAN, OBVIOUSLY THIS IS A VERY -- AND I MEAN, I'M TROUBLE BY THIS.

THE SUPREME COURT SAID WE'RE NOT GOING TO EXECUTE A CERTAIN CLASS OF PEOPLE, THOSE THAT ARE MENTALLY RETARDED AND MANY OF US AS JUDGES AND LAWYERS ASSUMED THERE WOULD BE FAIRLY STRAIGHTFORWARD WAYS TO DETERMINE THIS AND NOW WE SAY WE

HAVE A GUY WHO HAS BELOW 70 IQ,
BUT, JUDGE TERRELL, WHO SEES
HIM, HE WAS A NOT A HIGH LEVEL
SUPERVISOR BUT HE SUPERVISED
PEOPLE AND LIVED WITH SEVERAL
INDIVIDUALS, HE SEEMED TO -- I
MEAN, HE WAS A CRIMINAL A LOT OF
HIS LIFE, AND HE MURDERED TWO
PEOPLE.

AND WE SAY, WELL, THIS PERSON IS
NOT GOING TO BE SUBJECT TO THE
DEATH PENALTY BECAUSE HE HAS --
MENTALLY RETARDED AND WE CANNOT
EVEN FIGURE OUT WHAT TWO OF
THESE TEN DEFICITS ARE AND IT IS
SUBTLE ARE AND IT IS -- IT SEEMS
TO ME EVEN HOW YOU WOULD WRITE
AN OPINION, SEEMS, YOU KNOW, A
VERY SUBJECTIVE KIND OF DECISION
AS OPPOSED TO SOMETHING
OBJECTIVE AND I'M NOT SURE YOU
ARE HELPING US, TO GET TO WHERE
WE NEED TO GET IN THIS CASE, AND
SAY, YEAH, OKAY.

HIGH DID ALL OF THESE THINGS,
BUT...

>> THAT IS THE UNFORTUNATE THING
ABOUT THE TEST, IT IS A "BUT"
TEST, 80% IS NORMAL AND 20% OF
HIM IS NOT AND THAT IS 20%
ACCORDING TO DSM-IV AND EXPERTS
SAY IT IS ENOUGH TO MAKE HIM
MENTALLY RETARDED AND SEVERAL
YEARS AGO AT A PUBLIC DEFENDER
CONFERENCES, WE SAW VIDEOS ON
RETARDED PEOPLE AND OF THE 250

LOIS THEY WERE AGHAST AND THEY LOOKED LIKE NORMAL PEOPLE, DRIVING CARS AND TALKING AND DIDN'T HAVE THE SORT OF DOWN'S SYNDROME SORT OF TALK AND THEY WERE TALKING LIKE NORMAL PEOPLE AND HAD NORMAL TALK.

>> BUT THERE ARE THINGS THAT WOULD DIE FINE SOMEBODY WHO IS MENTALLY RETARDED, THAT -- MAYBE I'M FALLING INTO THE SAME... TO THE SAME TRAP.

WHAT WOULD IT BE BESIDES, GOING BACK TO THE INTELLIGENCE, THAT THEN WOULD SAY THAT THIS DEFENDANT WAS IN FACT MENTALLY RETARDED.

>> IF YOU WANT TO LOOK SPECIFICALLY AT THE THINGS I TALKED ABOUT, INDICATED BY THE LETTERS AND CONVERSATIONS WITH JENNY LUKE, 2ND, 3RD, 4TH GRADE LEVEL WHICH ARE INDICATIVE OF MENTALLY RETARDED AND COMMUNICATION SKILLS BY THE TAPES THAT -- AND THE DOCTOR LISTENED TO THOSE TAPES AS WELL, DOESN'T KNOW MEANING OF WORDS AND CAN'T SPELL THEM, INDICATIVE OF A MAN WITH LIMITED CAPACITY WHICH IS THE KEY FOR MENTALLY RETARDED, IT'S AN INTELLECTUAL DISABILITY.

>> [INAUDIBLE].

>> THANK YOU, JUDGE.

THAT IS A GOOD QUESTION.

IN JONES AND PHILLIPS, YOU SAID THE DEFENSE TRIED TO SAY, WELL YOU HAVE TO SHOW ADAPTIVE BEHAVIORS AND THE THIRD PRONG I DIDN'T TALK ABOUT WAS ADAPTIVE -- HAVING EXISTED BEFORE THE AGE OF ONSET OF 18 AND WHAT YOU SAID IS, NO, THEY HAVE TO HAVE AGE OF ONSET OF 18 BUT YOU HAVE TO SHOW HIS CURRENTS BEHAVIORS ARE DEFICIT -- WHAT YOU ARE HITTING AT IS A PERSON MAY BE MENTALLY RETARDED AT 18 AND THROUGH LIFE EXPERIENCE, GROWING OLDER MAY NOT BE -- MAY NOT REALLY BE MENTALLY RETARDED AND, SO WHAT I'M SAYING IS, ONE OF THE PROBLEMS THAT MAY BE AN EASIER WAY, TO GET AROUND WRITING AN OPINION IS SIMPLY SAYING THE REPORTS THAT WERE GATHERED HERE FROM TAMARA WOLF, AT FIVE YEARS OLD AND BONNIE CHANDLER, 6 TO 8 YEARS OLD WAS NOT CURRENT AS YOU HAVE EXPECTED THEM TO BE, IN THE CASE CITED IN MY BRIEF. WHERE -- WHERE IT'S NOT CURRENT, IT WILL BE AN ARBITRARY LINE. >> I WANT TO UNDERSTAND THE STATUTE ITSELF IN ITS LANGUAGE TALKS ABOUT... THAT THE -- ADAPTIVE BEHAVIOR DEFICITS MUST BE CONCURRENT WITH THE SUB AVERAGE GENERAL INTELLIGENCE FUNCTIONING AND ALL THAT HAS TO BE BEFORE AGE 18.

>> RIGHT.

>> BUT YOU ARE SAYING OUR CASES
HAVE SAID THAT WE CAN CONSIDER
THINGS AFTER AGE 18.

>> NO, NO.

-- WELL, MAYBE I -- WHAT YOU
SAID IS THOSE ADAPTIVE DEFICITS
HAVE TO EXIST CONCURRENTLY WITH
THE INTELLIGENCE, AS -- SO, IF
THE MAN IS 36 YEARS OLD, HIS
ADAPTIVE DEFICITS AT PAGE 36
HAVE TO EXIST ALSO.

-- AGE 36 HAVE TO EXIST ALSO AND
YOU CAN'T GO BACK TO 18 AND SAY
BECAUSE HE WAS RETARDED AT 18,
THAT WAS ENOUGH AND YOU HAVE TO
SHOW CURRENTLY, HE WAS 41 AND
YOU HAVE TO SHOW NOW HE IS
MENTALLY RETARDED AND THE ONLY
EVIDENCE WE HAVE IN THIS CASE IS
REPORTS FROM PEOPLE WHO LIVED
WITH HIM FIVE TO --

>> AND THE PRELIMINARY MATTER,
SHOULD THERE BE AT LEAST ON --
DEFICITS OF ADAPTIVE BEHAVIOR
BEFORE 18 IS THIS NECESSARY
STEP.

>> NECESSARY BUT NOT SUFFICIENT
IN THE SENSE THAT IT IS
NECESSARY TO SHOW THE ONSET
BEFORE AGE 18 AND YOU HAVE TO
SHOW THE CURRENT DEFICIT AS
WELL.

AND, AS TO THAT PRELIMINARY
NECESSARY STEP THERE IS NO
QUESTION, HE WAS MENTALLY

RETARDED.

>> AS OF --

>> BEHAVIOR AS WELL.

>> YES.

I MEAN, LET ME SAY, IT WAS NEVER QUESTIONED.

EVERYBODY EXCEPT DR. GILGUN FOUND THIS MAN TO BE MENTALLY RETARDED.

THERE WAS NO QUESTION, ABOUT THE AGE OF ONSET BEING SOMETIME AFTER 18.

THAT WAS NOT THE QUESTION.

>> WHEN YOU SAY EVERYBODY EXEMPT DR. GILGUN FOUND HIM MENTALLY RETARDED, HE HAD THE IQ TESTS THAT WERE SHOWING HE WAS FROM AN IQ POINT OF VIEW MENTALLY RETARDED BUT WAS HE EVALUATED FOR SOCIAL SECURITY DISABILITY? DEFINED HIM MENTALLY RETARDED?

I MEAN, WHAT OTHER OFFICIAL FINDINGS WERE THERE, THAT HE WAS MENTALLY RETARDED.

>> HE WAS IN SPECIAL EDUCATION CLASSES IN SCHOOL.

THAT IS... BUT YOU KNOW, AS TO A SPECIFIC FINDING OF MENTALLY RETARDED, I DON'T RECALL ANYTHING.

BUT, OTHER THAN THE FACT THAT HE WAS ALWAYS TREATED AS BEING SLOW.

>> WHAT DID YOU PUT ONTO SHOW CURRENT DEFICITS IN ADANTISIVE BEHAVIOR?

YOU WERE CRITICIZING, YOU CANNOT
RELY ON TWO WOMEN HE LIVED WITH,
AND YOU SAID THAT THEY -- HE
SHOULD HAVE LOOKED AT RELIABLE
OBSERVERS, SUCH AS SCHOOL
TEACHERS, AND PARENTS, WELL,
THAT WOULDN'T BE CURRENT.
SO, WHAT DID YOU PUT ON?
WHAT DID MR. HODGES PUT ON?
LET ME -- CURRENT DEFICITS IN
ADAPTIVE BEHAVIOR.

>> WELL, OTHER THAN DR. TURNER'S
TESTIMONY THAT HE EXAMINED HIM,
AND, BASED UPON HIS CONCLUSIONS,
HE CAME TO THE --

>> SO WOULD YOU THEN -- MAYBE
YOU HAVE SAID THIS BY THE BACK
DOOR, IT SEEMS TO ME THAT WHAT
YOU WOULD HAVE AT LEAST AGREED
TO IS THAT THERE IS -- THERE WAS
A DEFICIT IN PROOF BY
MR. HODGES.

YOU DON'T LIKE WHAT DR. GILGUN
SAID BUT DR. TURNER OTHER THAN
MAKING CONCLUSORY STATEMENTS HE
DIDN'T REALLY GIVE A BASIS IN
WHICH TO FIND THIS DEFENDANT
MENTALLY RETARDED.

>> BUT THAT IS ALL HE HAS TO DO
IS GIVE THE CONCLUSION, I FIND
THIS MAN MENTALLY RETARDED AND
IF THE STATE WANTS TO SAY WHAT
DEFICITS YOU FIND, HE CAN DO
THAT.

THAT IS WHAT THE RULES OF
EVIDENCE ALLOW, 90.704, 702,

SOMETHING LIKE THAT.

AS LONG AS THE EXPERT CAN MAKE
THIS CONCLUSIONS AND IF THE...

AS LONG AS HE'S MADE THE
CONCLUSION AND THAT IS WHAT
DR. TURNER SAID.

AUTO FIND THIS MAN MENTALLY
RETARDED.

>> LET ME ASK YOU THIS:

DID I UNDERSTAND YOU CORRECTLY,
A FEW MINUTES AGO, DID YOU SAY
THAT WHAT HAPPENED IN -- WITH
HIS RELATIONSHIP WITH THE TWO
WOMEN, WHICH WAS AROUND THE
TIME, PART OF IT, AT LEAST WAS
AROUND THE TIME THAT THESE
MURDERS OCCURRED, IS NOT
SOMETHING THAT THEY CAN TAKE
INTO CONSIDERATION?

AND IN DETERMINING HIS ADAPTIVE
FUNCTIONING?

>> YES.

>> AND WHAT -- DO WE HAVE CASE
LAW THAT SAYS THAT?

>> YES.

PHILLIPS AND JOHNS I CITED --
JOYCE AND PHILLIPS I CITED IN
THE BRIEF AND YOU LOOK AT
CURRENT ADAPTIVE DEFICITS AND
THE QUESTION JUSTICE POLSTON IS
ASKING IS HOW FAR BACK IS
CURRENT.

>> HOW FAR BACK IS CURRENT?
IT SEEMS TO ME CURRENT MAY IN
FACT INCLUDE AT LEAST THE TIME
PERIOD THAT THESE MURDERS

OCCURRED.

>> WELL, NO.

NO.

YOU ARE LOOKING AT CURRENT AS A
TIME OF THE TRIAL, I THINK.

>> CAN I ASK YOU A QUESTION?

MANY OF THESE FOLKS ARE
INCARCERATED.

FOR A NUMBER OF YEARS.

HOW LONG WAS THIS INDIVIDUAL
INCARCERATED FROM THAT LAST...

>> YOU KNOW-ON.

I WAS CURIOUS, WHY THE TRIAL
TOOK SO LONG TO COME TO TRIAL.

>> AGAIN IF THAT IS THE LAST
CIVILIAN CONTACT, I MEAN, ARE WE
SAYING THEN YOU CAN ONLY LOOK AT
PRISON LIFE AND THAT IS
CERTAINLY AN ARTIFICIAL...

>> I HAD REAL PROBLEMS WITH
THAT, TOO.

>> I MEAN, THAT IS --

>> THIS IS THE PROBLEM.

PROBLEM WITH PHILLIPS AN JONES,
I THINK, WHEN YOU SAY THEY HAVE
TO HAVE CURRENT ADAPTIVE
DEFICITS, YOU ARE SAYING, AS I
READ THOSE CASES, YOU ARE
LOOKING AT HIM RIGHT NOW.

>> AREN'T WE, THOUGH IN THOSE
CASES LOOKING AT WHAT THE
STATUTE SAYS?

>> NO, BECAUSE OTHER COURTS IN
OTHER STATES SAY NO WE LOOK AT
AGE OF ONSET AS BEING 18 AND IT
IS SURPRISING WHEN HE SAID, HE

SAYS THEY HAVE TO BE AS OF
TODAY.

>> LET'S THINK LOGICALLY THEM.
SUPREME COURT SAID THERE WILL BE
A CLASS OF PEOPLE THAT CANNOT BE
EXECUTED BECAUSE THEY HAVE
LACKED THESE MENTAL SKILLS.
AND, YOU ARE REALLY SAYING THAT
WE WOULD COME OUT WITH THE
DECISION AND SAY THAT WHAT
HAPPENED AND WHAT THEIR
FUNCTIONING AS AT OR AROUND THE
TIME OF THE MURDER WOULD BE
IRRELEVANT TO THAT
DETERMINATION?

>> THAT IS KIND OF WHAT I AM
SAYING.

YES.

>> AS A LOGICAL PERSON, DOES
THAT MAKE SENSE TO YOU, THAT THE
SUPREME COURT WOULD REALLY SAY
MENTAL RETARDATION AND THE STATE
OF THE PERSON'S MENTAL
FUNCTIONING, IS -- IS NOT
RELEVANT WHAT THEIR MENTAL
FUNCTIONING WAS AT AROUND THE
TIME OF THE MURDER, AS TO
WHETHER THEY ARE EXEMPT FROM THE
DEATH PENALTY.

>> NO, I THINK -- I THINK THERE
IS A POINT THERE, YEAH.

>> WHEN WE LOOK AT THE JOBS THE
PERSON HAS HAD, OVER THE YEARS,
WHEN WE LOOK AT ALL OF THE
THINGS THEY HAVE DONE, YOU KNOW,
THEN, THOSE THINGS THAT WE HAVE

BEEN LOOKING AT, UNDER YOUR THEORY THEN WOULD BE IRRELEVANT.

>> YOU ARE LOOKING FOR DEFICITS.

AGAIN, I MEAN, THIS IS --

REALLY, I MEAN, MOST OF US LOOK AT TOTALITY OF THE

CIRCUMSTANCES, AND IT IS -- THAT

WHAT IS WE'RE TRAINED TO DO,

LOOK AT THE WHO'LL THING.

MENTALLY RETARDED IS DIFFERENT,

YOU ARE LOOKING FOR THE HOLES,

WHERE IS THE GUY --

>> BUT AGAIN, WHAT YOU CAN DO

DEMONSTRATES INTEREST IS NO --

YOU HAVE TO SEE THE WHOLE

PICTURE.

>> NO.

NO.

>> I DON'T KNOW HOW YOU... I

UNDERSTAND, I DID NOT -- I WAS

NOT OFFENDED BY THAT AT ALL.

YOU KNOW, IT SEEMS AS THOUGH,

AND IF SOMEONE CAN READ OR CAN'T

READ, I MEAN, IF THEY CAN READ,

THAT SHOWS THERE IS NO HOLE IN

THE LEADING.

I DON'T KNOW...

>> NO, I'M SORRY.

>> I DON'T KNOW HOW YOU CAN SAY

THAT.

THAT IS WHAT TROUBLES ME, WITH

THIS, IS THAT A DEMONSTRATION

THAT YOU CAN DO IS THE

DEMONSTRATION OF THERE IS NO

HOLE.

>> SEE DICK RUN, SEE -- THAT IS

NOT READING.

HE CAN READ.

>> I UNDERSTAND IT MAY BE THE

QUALITATIVE NATURE OF IT.

BUT AGAIN IF YOU DON'T LOOK AT

THIS -- I MEAN, WHAT IS THIS

STATE SUPPOSED TO DO, ACCEPT ALL

OF THE HOLES?

THEY DON'T COME IN AND PRESENT,

YES, HE CAN DO THAT AND SHOW THE

PERSON HAS NO DEFICIT BY

SHOWING, YES, THE PERSON CAN DO

THIS AND SO IT BECOMES EVIDENCE.

>> WELL, BUT, BUT YOU'VE GOT TO

HAVE THE EXPERT SAYING AND THIS

IS --

>> WAIT, WAIT, I HAVE PROBLEM

WITH THE EXPERT THING.

WOULD YOU AGREE A COURT AND JURY

IS NOT BOUND BY THE MERE

CONCLUSIONS OF AN EXPERT?

THEY MAY BE ADMISSIBLE BUT, IF

IT IS DEMONSTRATED THE FACTUAL

-- DEMONSTRATED THE FACTUAL

PREDICATE --

>> IF THERE IS NO FACTUAL

PREDICATE.

>> IF THE STATE PROVES THERE IS

NO FACTUAL PREDICATE, THERE IS

NO HOLE, NO HOLE IN THIS SO

THERE IS NO DEFICIT.

>> BUT, IN THIS CASE THERE WAS

NO DISPUTE THAT HE CAN'T READ

BEYOND I THINK A 3RD, 2ND OR 3RD

GRADE --

>> THAT IS -- WHAT ARE THE

THINGS, THAT IS WHERE ALL THESE
QUESTIONS HAVE BEEN GOING.
WE UNDERSTAND YOUR CONTENTIOUS
-- CONTENTIONS ABOUT READING, HE
READ THE BIBLE AND OTHER THINGS

--

>> HE LOOKS AT THE BIBLE AND
I'VE HAD PEOPLE LOOK AT THE
MIRANDA WARNINGS AND THE COP
SAYS HE UNDERSTOOD IT.
AND THAT IS A PROBLEM WITH
MENTALLY RETARDED, IN SOME WAYS
IT IS A SUBTLE ANALYSIS, ONE
THING THEY ARE BRIGHT IN, THEY
KNOW THEY ARE SLOW AND THEY DO
THINGS...

>> FAKE IT.

>> AND THEY --

>> I UNDERSTAND, WHAT ELSE,
PLEASE, TELL US THE DEFICITS.

>> ACADEMIC ASSESSMENT AND THE
COMMUNICATION SKILLS EXHIBITED
BY THE LETTERS AND THE
CONVERSATIONS WITH JENNY LUKE
AND THE OTHER EVIDENCE SHOWING
THAT HE HAD GIRLFRIENDS THAT DID
A LOT OF STUFF FOR HIM AND
PRIMARY THING I'M LOOKING AT IS
HIS LACK OF ACADEMIC
FUNCTIONING, AS WELL AS
COMMUNICATIONS.

>> HOW CAN YOU SAY THEN, HIS
COMMUNICATION SKILLS AND CURRENT
COMMUNICATION SKILLS ARE
IMPORTANT, THAT A JUDGE WHO IS
EVALUATING THIS MAN AND LISTENS

TO HIS TESTIMONY, AND WATCHES HIM, CANNOT LOOK AT THAT ISSUE OF COMMUNICATION SKILLS.

>> BECAUSE YOU ARE SAYING, YOUR HONOR, THE JUDGE NOW BECOMES AN EXPERT.

HE CAN LOOK AT THE MAN AND SAY, I KNOW BECAUSE I'M A JUDGE THAT YOU DON'T HAVE A INTELLECTUAL DEFICITS AND WHAT I HAVE FOUND IS MANY LAWYERS, WE THINK WE ARE SO BRIGHT AND WE CAN SEEK -- AND HE DOESN'T HAVE THE DEFICITS AND YET I HAVE HAD PSYCHOLOGISTS AND THEY LOOK AT A GUY AND SAY HE'S CLEARLY PSYCHOTIC AND RETARDED AND THE JUDGE WAS BECOMING AN EXPERT IN MENTAL RETARDATION AND HE IS NOT THE EXPERT AND THAT IS WHY THE AREA IS BAD, BECAUSE, EVERYBODY THINKS THEY KNOW WHAT MENTAL RETARDATION LOOKS LIKE AND WE DON'T.

AND IN THIS DAYS, THE DOCTOR IS RELYING UPON REPORTS THAT ARE STALE AND OUT OF DATE.

>> WHAT IF YOU GET TWO EXPERTS THAT REACH DIFFERENT CONCLUSIONS?

CAN'T THE JUDGE USE HIS COMMON EXPERIENCE THE SAME WAY ANY TRIER OF FACT WOULD, TO -- THE KNOWLEDGE ABOUT THE WAY THE WORLD WORKS IN EVALUATING THE JUDGMENTS MADE BY THE EXPERTS? WHAT ELSE DO YOU DO?

>> WILL I SUPPOSE THEY CAN, BUT JUDGE TERRELL DIDN'T DO THAT. HE SIMPLY SAID, BASED UPON WHAT I SAW IN COURT, THE MAN IS NOT MENTALLY RETARDED AND HE CANNOT DO THAT.

>> AND WITH THAT YOU HAVE USED YOUR TIME, THANK YOU, MR. DAVIS.

>> MS. CHARBULA.

>> GOOD MORNING, MEREDITH CHARBULA, AN ASSISTANT ATTORNEY GENERAL AND I REPRESENT THE APPELLEE IN THIS CASE.

I THINK FIRST YOU HAVE TO REMEMBER THAT THE TRIAL JUDGE FOUND DR. GILGUN'S EVALUATION MORE CREDIBLE THAN DR. TURNER. HE DID NOT DO ANY ADAPTIVE FUNCTIONING BEYOND LOOKING AT QUOTATION IN MR. HODGES SCHOOL RECORDS THAT SAID HE WOULD NOT TRY, TRY TO IMPROVE HIMSELF, AGAIN, NO MOTIVATION AND THAT WAS THE ONLY THING DR. TURNER LOOKED AT ADAPTIVE FUNCTIONING. HE DID TALK TO MR. BEN THOMAS, WHO HAD BEEN MR. HODGES' SUPERVISOR WHEN MR. HODGES WAS A LABORER FOR HIS COMPANY. BUT, HE DIDN'T TESTIFY AS TO ANY DEFICITS.

YOU KNOW, THE COURT HAS TALKED ABOUT SIGNIFICANT LIMITATIONS IN A -- VARIOUS SKILLS, COMMUNICATIONS, SELF-CARE, WORK, LEISURE, ET CETERA.

I THINK HOW DID WE DEFINE THAT?
COMMON SENSE SAYS SIGNIFICANT
LIMITATIONS MEANS IT
SIGNIFICANTLY INTERFERES WITH
YOUR ABILITY TO COPE IN LIFE.
YOUR ABILITY TO MAINTAIN LIFE.
MR. HODGES DIDN'T PUT ON ANY
EVIDENCE WHATSOEVER THAT HE HAD
AN INABILITY TO COPE WITH LIFE.
>> LET'S START WITH, BASICALLY,
HOW FAR DO YOU GO IN THIS
EVALUATION OF ADAPTIVE
FUNCTIONING?
AS I UNDERSTAND MR. DAVE'S
ARGUMENT, HE SAYS YOU HAVE TO
LOOK AT HOW THIS GUY IS
FUNCTIONING, CURRENTLY, AND I...
I TAKE HIS ARGUMENT THAT
CURRENTLY MEANS AT THE TIME THAT
WE ARE DOING THIS EVALUATION.
>> WELL --
>> HOW FAR DO WE GO INTAKE
MAKING THIS -- IN MAKING THIS
EVALUATION OF DEFECT IN ADAPTIVE
FUNCTIONING.
>> YOU LOOK AT HIS IQ HAS BEEN
STABLE THROUGHOUT HIS LIFETIME
AND IN PHILLIPS IN FACT THAT WAS
ONE THING THIS COURT LOOKED AT,
EXTENSIVELY, WAS PHILLIPS' WORK
HISTORY PRIOR TO HIS
INCARCERATION FOR MURDER AND,
YOU KNOW, I UNDERSTAND YOU
TALKED ABOUT CONCURRENT
DEFICITS, BUT, IT MAKES NO SENSE
SAY WE'RE ONLY GOING TO LOOK AT

THE TIME WHEN HE IS IN PRISON.
IT IS CERTAINLY RELEVANT TO HIS
CONSIDERATION GIVEN HIS IQ
REMAINED STABLE OVER THE YEARS
OF WHAT HIS WORK HISTORY WAS AND
LIKE GORDON PHILLIPS ANALYZED
MR. PHILLIPS' WORK HISTORY TO
DETERMINE THAT HE DID NOT MEET
THE ADAPTIVE FUNCTIONING --
>> DO YOU AGREE TO MEET THE
ADAPTIVE FUNCTIONING PRONG,
THERE NEED ONLY BE TWO SKILL
AREAS FOR --
>> SIGNIFICANT LIMITATIONS IN
TWO OR MORE.
>> AND SO LET'S GO TO WHAT DOES
THE -- WHAT DOES THE DSM-IV MEAN
WHEN THEY TALK ABOUT FUNCTIONAL
ACADEMIC --
>> READING, WRITING, ARITHMETIC.
>> HE WAS IN PRISON FOR A PERIOD
OF TIME AND A LOT OF THESE
DEFENDANTS GET THEIR GED AND
WENT TO 8TH GRADE AND COULDN'T
READ BEYOND A 2ND GRADE LEVEL.
>> BUT DR. GILGUN'S TESTIFIED
HE'S ILLITERATE AND YOU CAN
EXPLAIN THE LACK OF READING BUT
WHEN YOU LOOK AT WHAT HIS -- HOW
HIS INABILITY TO READ AT A
HIGHER LEVEL AFFECTED HIS LIFE,
NO EVIDENCE OF THAT.
FOR INSTANCE, WHEN HE WENT TO
GET HIS DRIVER'S LICENSE IN
OHIO, BECAUSE OF HIS ILLITERACY,
THEY GAVE HIM A VERBAL TEST.

AND HE SCORED A 90 ON THE LAW
PORTION AND IN 85 ON THE OTHER
PORTION AND A PERFECT SCORE ON
THE DRIVING TEST AND IN PRISON
IN OHIO HE TOOK PRE-GED CLASSES
AND DIDN'T GET HIS GED
APPARENTLY AND HE WAS RATED
ABOVE AVERAGE FROM A SCALE OF 1
TO 10, IN QUALITY AND GRADES,
AND, THE TEACHER MADE A COMMENTS
THAT HE WAS IMPROVING IN ALL
ACADEMIC AREAS.

SO, WE HAVE HIM, YES, DOES HE
HAVE READING LIMITATIONS?
CERTAINLY.

ARE THEY FUNCTIONAL READING
LIMITATIONS?

NO.

TAMARA WOLF --

>> AGAIN, WHAT WOULD THAT MEAN?

I MEAN, YOU KNOW, WE ALL MAY
HAVE IN OUR LIVES PEOPLE THAT WE
KNOW ARE -- HAVE BEEN DIAGNOSED
OR AS MENTALLY RETARDED AND THEY
CAN LIVE ON THEIR OWN, THEY CAN,
YOU KNOW, GET DRIVERS LICENSES
AND CAN DRIVE BUT WE KNOW THERE
ARE SIGNIFICANT DEFICITS, THAT
THEY MAY NOT BE ABLE TO MAKE
THEIR OWN DOCTORS APPOINTMENTS
OR ARE IN LIMITED TYPES OF WORK
THAT NEEDS A GREAT DEAL OF
SUPERVISION AND BACK TO THE
FUNCTIONAL ACADEMIC SKILLS, WHAT
DOES THAT MEAN?

>> WELL, AGAIN, DOES THE

LIMITATIONS IN READING, WRITING
AND ARITHMETIC SIGNIFICANTLY
HAMPER HIS LIFE OR LIMIT HIS
LIFE, HIS ABILITY TO MAKE A
LIVING, LIVE ON HIS OWN...

>> IS THAT -- AGAIN I'M NOT
ASKING YOU AS A LAWYER, I'M
ASKING YOU IF THERE IS ANY
TESTIMONY OR ANY -- ANYTHING
OBJECTIVELY THAT EXPLAINS WHAT
THAT MEANS?

>> NOT REALLY.

NOT REALLY.

IN MY -- YOU KNOW, IN MY
READING, IT -- FUNCTIONAL --
AND, YOU KNOW, THAT WAS WHAT
POPPED UP TO ME, WHAT THE HECK
IS FUNCTIONAL ACADEMICS AND THE
READING OF THE LITERATURE IT IS
READ, WRITING AND ARITHMETIC
WHICH MAKES COMMON SENSE AND THE
STATE PUTS ON EVIDENCE, FOR
INSTANCE, MR. HODGES WAS ASKING
JENNY LUKE, TO SEND HIM MONEY TO
GET A RADIO.

AND, SHE SENT HIM SOME MONEY AND
HE SENT BACK COMMUNICATION
SAYING HE NEEDED THIS MUCH MORE
MONEY IN ORDER TO BUY HIS RADIO
AND HEADPHONES ARMED CARRIED THE
ONE AND SO HE WAS ABLE TO ADD
THE MONEY --

>> HOW DO YOU KNOW, AGAIN THIS
IS LIKE AGAIN TRYING TO PROVE A
NEGATIVE.

HOW DO YOU KNOW THAT IN PRISON,

THAT HE DIDN'T GET SOMEBODY TO
HELP HIM WITH IT.

>> WE DON'T KNOW THAT BUT HE
CERTAINLY DIDN'T PRESENT ANY
EVIDENCE THAT HE DIDN'T DO THAT,
THE STATE PRESENTED EVIDENCE
FROM SOME INMATES, MR. BREEDLOVE
AND RONELL WHO TESTIFIED THAT HE
READ THE BIBLE TO THEM AND LED
HIS LETTERS TO THEM AND HE WAS A
PROLIFIC WRITER AND WROTE 80 OR
MORE LETTERS TO MARIE FIEFIELD
WHILE HE WAS IN PRISON AND SOME
USED POETRY AND COPIED THEM FROM
BOOKS BUT HE COPIED POETRY FROM
BOOKS THAT HE THOUGHT WOULD
APPEAL TO A YOUNG LADY --

>> COULD WRITE POETIC PROSE AND
READ THINGS, AND HE ACTUALLY DID
THEM HIMSELF WITHOUT AID?

>> HE WOULD GET THE BOOK, AND HE
WOULD LOOK AT THE PASSAGE AND
COPY THEM.

>> HE CAN'T READ "RAIN," HE
CAN'T READ "TRAIN."
COME ON, NOW.

>> WELL, YOUR HONOR, THE
EVIDENCE SHOWED THAT HE WOULD
SEEK POEMS.

ONE OF THE INMATES WHO TESTIFIED
HE WOULD SEE POEMS AND LIKE THAT
POEM AND COPY THAT INTO THE
BOOK.

>> DIDN'T THAT MEAN SOMEONE READ
THEM TO HIM AND HE LIKED THEM OR
NOT?

>> HE TESTIFIED TO THAT.

BUT YOU HAVE INMATES SAYING HE'S
COPYING LETTERS ON HIS OWN.

YOU HAVE INMATES TESTIFYING TO
THE FACT, I SAW HIM WRITING
LETTERS FREEHAND OUT OF HIS OWN
HEAD, HE'S GOT A BOOK, HE'S
COPYING.

SO WE HAVE MR. HODGES MAKING
THOSE STATEMENTS BUT OTHER
STATEMENTS INDICATE THAT'S NOT
THE CASE.

WHILE HE MAY HAVE HAD SOME
ASSISTANCE IN SPELLING THE
WORDS, A LOT OF THE LETTERS HE
WROTE WERE OUTSIDE HIS HEAD.
THERE WAS TESTIMONY FROM, LET'S
SAY MR. BEN THOMAS, FOR
INSTANCE, GOING TO FUNCTIONAL
ACADEMICS.

TWO OF THE THINGS MR. HODGES --
NOW, HE DENIED BEING ABLE TO DO
IT, BUT MR. THOMAS TESTIFIED
THAT HE DID.

TWO THINGS SHOWED THAT ABILITY
TO READ AND APPLY MATH.

DURING HIS TIME WHEN HE WORKED
FOR MR. THOMAS, HE HAD TO MIX
MORTAR, AND HE FOLLOWED A
WRITTEN RECIPE THAT MR. THOMAS
GAVE HIM TWO TO ONE, YOU KNOW,
TWO CUPS OF WATER TO TWO CUPS OF
COLOR, ETC.

HE FOLLOWED A RECIPE.

HE ALSO MEASURED POLES IN A WALL
TO LET OUT MOISTURE AND PREVENT

MOLD IN THE INTERIOR OF THE BUILDING.

HE MEASURED THOSE EQUIDISTANT APART.

MR. THOMAS WOULD SAY, OKAY, THESE NEED TO BE 10 FEET APART, AND ACCORDING TO HIS TESTIMONY, HE WAS ABLE TO MEASURE THOSE POLES --

>> WHAT DOES IT MEAN WHEN WE HAVE THE ONE OBJECTIVE TASK WHICH IS IQ BELOW 70 WHICH IS, WHAT, 1% OF THE POPULATION HAS THIS, AND NOBODY SAYS HE WAS MALINGERING ON ANY OF THESE. NORMALLY, IN MOST OF OUR CASES THAT'S WHAT WE'RE ARGUING ABOUT. DOES THAT NUMBER MEAN NOTHING IN TERMS OF HOW IT TRANSLATES INTO ACTUAL LIFE?

>> WELL, AS DR. GILGUN TESTIFIED, YOU KNOW, HE'S HAD PEOPLE WHO ARE UNDER 70 WHO ADAPTABILITY SHOWS THAT THEY'RE FUNCTIONING AT A MUCH HIGHER LEVEL THAN SOMEONE WHO'S MENTALLY RETARDED, AND HE'S HAD PEOPLE WITH AN IQ OF 75 OR 76 THAT THEY CLEARLY ARE MENTALLY RETARDED.

WHAT WE HAVE TO SEE HERE IS THIS MAN, MR. HODGES, HIS ADAPTIVE FUNCTIONING IS HIGH.

HE'S LIVED ON HIS OWN.

HE COOKS AND CLEANS.

HE GOT THE BILLS, THEY AGREED TO

SPLIT IT 50/50, HE WOULD LOOK AT THE BILLS, HE WOULD GIVE HER HIS AMOUNT OF MONEY, HE APPLIED FOR SOCIAL SECURITY -- NOT JUST BENEFITS, BUT FOOD STAMP BENEFITS ON HIS OWN, HE FILLED OUT A JOB APPLICATION ON HIS OWN --

>> SO, YOU KNOW, MR. DAVIS BASICALLY SAYS THAT THE WAY WE'RE DOING THIS A PERSON WOULD ALMOST HAVE TO BE CATATONIC IN ORDER TO FIT UNDER THE, YOU KNOW, LOW INTELLECTUAL-FUNCTIONING AND THE DEFICITS IN ADAPTIVE FUNCTIONING.

AND IT SEEMS LIKE WE'RE GETTING TO THAT POINT.

I MEAN, UNLESS A PERSON IS, BASICALLY, DEPENDENT ON SOMEONE ELSE, THEN WE'RE NOT GOING TO FIND THEM MENTALLY RETARDED.

>> WELL, THAT'S THE TEST THIS COURT HAS SET OUT, ADAPTIVE FUNCTIONING, HOW ONE LIVES ONE'S LIFE.

EVEN THOUGH SOMEONE HAS A LOW IQ, WE HAVE TO REMEMBER AS DR. GILGUN TESTIFIED, MR. HODGES GREW UP IN RURAL ALABAMA WHERE EDUCATION WAS NOT ENCOURAGED. HE DROPPED OUT OF SCHOOL AT EIGHTH GRADE, HE'S ILLITERATE, BUT HE HAS SHOWN A REMARKABLE ABILITY IN HIS ADAPTIVE

BEHAVIOR.

HE'S LIVED ON HIS OWN, HE'S VERY PARTICULAR ABOUT HIS CLOTHING, HE SHOPS ON HIS OWN, HE COOKS, HE CLEANS, HE'S MAINTAINED HIS OWN APARTMENT, HE'S FOUND WOMEN WHO -- AT LEAST IN BONNIE CHANDLER -- WHO WILL SUPPORT HIM, HE HAS HAD JOBS.

IN FACT, ONE OF HIS JOBS WAS AS A DE FACTO SUPERVISOR.

HE SUPERVISED SEVEN PEOPLE INCLUDING TAMARA WOLF WHO THE DOCTOR TESTIFIED HAS AN IQ OF 103.

HE MADE SURE THEIR JOBS WERE DONE PROPERLY, HE MADE SURE THEY CLOCKED IN AND OUT PROPERLY.

HE WORKED AS A MEASURER WHICH INVOLVED --

>> CAN WE GO TO THE OTHER ONE, THE COMMUNICATION?

>> CERTAINLY.

>> TRYING TO -- THE JUDGE LOOKS AT HIS TESTIMONY, I MEAN, EVALUATES HIM.

MR. DAVIS SAID THAT, YOU KNOW, ALL WE WOULD NEED TO DO IS LISTEN TO THE TAPES OF CONVERSATIONS WITH THE DETECTIVE FROM CINCINNATI, AND WE'D SEE THAT HE REALLY, YOU KNOW, HAS SIGNIFICANT DEFICITS IN COMMUNICATION.

DO WE HAVE THOSE TAPES IN THE RECORD?

>> THEY WERE PROBABLY STILL WITH
THE CLERK OF THE COURT.
THIS COURT DOESN'T TYPICALLY NOW
ORDER --

>> HAVE YOU --

>> I HAVE NOT LISTENED TO THE
TAPE BECAUSE THEY'RE NOT IN MY
RECORD, BUT WHAT I CAN TELL YOU
IS NO ONE TESTIFIED -- DR.

GILGUN AND DR. TURNER AGREED
WHERE HE USED SIMPLE LANGUAGE IN
HIS COMMUNICATIONS, BUT, AGAIN,
WE HAVE SOMEONE WHO'S ILLITERATE
AND HAS VERY LITTLE FORMAL
EDUCATION.

SO --

>> AND THAT'S WHAT THIS WHOLE
THING WE WERE TALKING ABOUT
EARLIER, HE WRITES THESE LETTERS
THAT HAVE POETRY IN THEM.

THERE'S SOMETHING ABOUT THAT,
DOES THAT MAKE SENSE TO YOU THAT
HE WOULD WRITE THESE LETTERS ON
HIS OWN WHEN HE IS ILLITERATE
AND HE ONLY CAN USE SIMPLE WORDS
IN HIS COMMUNICATION?

>> WELL, WE KNOW THAT HE CAN
READ THE BIBLE BECAUSE --

>> HOW DO WE KNOW --

>> BECAUSE THE INMATES TESTIFIED
HE READ THE BIBLE TO THEM AND HE
READ HIS LETTERS TO THEM.

WE ALSO KNOW THAT, YOU KNOW, HE
SHOWED DR. GILGUN, HE BROUGHT
DOWN THE BOOKS TO DR. GILGUN
DURING THE DOCTOR'S EXAMINATION,

THE POETRY BOOKS THAT HE USED
AND TOLD DR. GILGUN THAT HE
PICKED OUT PASSAGES, YOU KNOW,
THAT HE LIKED.

AND RONELLE SAID HE WOULD GET
CARDS FOR HIS WIFE AND GIVE IT
TO MR. HODGES AND HAVE HIM LOOK
AT IT, AND IF HE LIKED IT, HE
WOULD USE IT IN HIS OWN LETTERS.

>> IT'S A GUESS AND, AGAIN, IT
SHOULD BE OBJECTIVE, AND IT
SOUNDS LIKE IN THIS CASE -- I
DON'T THINK THEY'VE, YOU KNOW, I
DON'T THINK THEY'VE ESTABLISHED
THESE DEFICITS, SO I'M KIND OF
REALLY LOOKING FOR THE, FOR SOME
GUIDANCE FOR THE FUTURE.

BUT IF SOMEBODY IS MENTALLY
RETARDED, THEY DON'T WANT
PEOPLE -- AND THEY'RE TRYING TO
FUNCTION -- THEY DON'T WANT
PEOPLE TO KNOW.

SO THE FACT THAT HE WOULD BRING
BOOKS TO SHOW THE DOCTOR SEEMS
TO ME IS AT LEAST SOME EVIDENCE
THAT HE WAS TRYING HIS BEST NOT
TO BE MENTALLY RETARDED IN HIS
LIFE AND OVERCOME WHAT THESE
SIGNIFICANT DEFICITS WERE IN HIS
INTELLECTUAL FUNCTIONING.

>> I THINK, WELL, I DON'T THINK
THERE'S RECORD EVIDENCE TO
SUPPORT THAT ASSUMPTION, BUT
WHAT I WILL SAY BECAUSE
DR. GILGUN WAS TRYING TO GET TO
THE BOTTOM OF HOW HE WAS WRITING

THESE POETIC EXPRESSIONS, BUT,
YOU KNOW, PART OF THE LETTERS
WERE ALSO CONVERSATIONAL.

JENNY LUKE TESTIFIED HE WOULD
RESPOND TO QUESTIONS THAT SHE
ASKED HIM EITHER IN THE PHONE
CALL OR IN HER LETTERS.

SO THEY ARE CONVERSATIONAL WHICH
SORT OF BELIE OTHER PEOPLE ARE
WRITING THESE LETTERS, AND HE'S
JUST ACCEPTING WHATEVER THEY
WRITE.

AGAIN, THE FACT THAT SOMEONE
USES SIMPLE LANGUAGE AS THE
EXPERTS TESTIFIED CAN BE
EXPLAINED BY THE LACK OF
EDUCATION.

BUT, AGAIN, THE STANDARD IS
SIGNIFICANT LIMITATIONS.

HOW DOES IT INTERFERE WITH HIS
LIFE?

HODGES PUT ON ABSOLUTELY NO
EVIDENCE THAT HIS INABILITY TO
COMMUNICATE IN USING BIG WORDS
INTERFERED IN ANY WAY WITH HIS
LIFE.

AS I SAY, HE WAS ABLE TO TAKE A
DRIVER'S TEST AND PASS IT
BECAUSE HE -- VERBALLY.

HE FILLED OUT JOB APPLICATIONS,
HE FILLED OUT AN APPLICATION --

>> HOW OLD IS MR. HODGES?

HOW OLD AT THE TIME OF THE
TRIAL?

>> HE WAS 41.

>> AND WHEN DID HE FIRST GET A

DRIVER'S LICENSE?

>> IT WAS IN OHIO SOMETIME, SO IT WAS PROBABLY -- THERE'S NOTHING IN THE RECORD OF WHETHER HE HAD A DRIVER'S LICENSE PRIOR TO GOING TO OHIO, BUT HE WAS IN OHIO -- HE LEFT HOME AROUND 13, SO I BELIEVE THAT IT PROBABLY WAS IN THE, AROUND IN THE '90s, LATE '90s, 2000.

BUT I DO NOT KNOW WHETHER THAT WAS THE FIRST TIME HE HAD A DRIVER'S LICENSE.

THERE'S NO EVIDENCE IN THE RECORD THAT HE DIDN'T HAVE A DRIVER'S LICENSE BEFORE THAT TIME.

BUT I DO KNOW HE GOT A DRIVER'S LICENSE ON OHIO, AND HE WENT AND TAKED THE VERBAL TEST, AND HE SCORED VERY HIGH ON IT.

THAT WAS ALSO THE TIME WHERE HE WAS WORKING FOR BEN THOMAS, WORKING AT THE KENWOOD MALL AS A SUPERVISOR, A DE FACTO SUPERVISOR OF SEVEN PERSONS, AND PRIOR TO THAT -- PRIOR TO GOING TO PRISON IN OHIO -- HE HAD LIVED ON HIS OWN, AND THEN HE ALSO LIVED WITH BONNIE CHANDLER. HE MET HER AT A HALFWAY HOUSE.

>> COULD YOU ALSO CLARIFY FOR ME, I MEAN, THERE'S EVIDENCE IT SEEMS THAT AT TIMES HE WOULD HAVE SOMEONE WRITE LETTERS, AND HE WOULD ACTUALLY JUST RECOPY

WHAT THEY HAD WRITTEN IN HIS OWN
HANDWRITING.

>> THAT'S WHAT HE SAID.

>> SO, SO WHAT IS THE RECORD,
AND WHAT IS THERE IN THE RECORD
THAT SUPPORTS THAT NOTION?

>> HIS TESTIMONY.

HE TESTIFIED THAT'S WHAT HE DID.
HE WOULD GET A LETTER, SOMEONE
WOULD READ IT TO HIM AND EXPLAIN
IT TO HIM.

THEY WOULD WRITE THE LETTER FOR
HIM AND HE WOULD RECOPY IT IN
HIS HANDWRITING.

HE PRESENTED ABSOLUTELY NO
EVIDENCE OTHER THAN HIS OWN
TESTIMONY OF THAT, BUT WE ALSO
HAVE RONELLE AND MR. BREEDLOVE
TESTIFYING HE'S WRITING LETTERS
ON HIS OWN.

>> DIDN'T THESE PEOPLE GET
CREDIT FOR, WEREN'T THEY SORT
OF, LIKE, THEIR SENTENCES
REDUCED FOR COOPERATING WITH THE
STATE?

>> ACTUALLY, NO.

>> NO?

>> NO, SIR.

NO EVIDENCE THEY GOT THEIR
SENTENCE REDUCED IN THAT.
AND THE, ALSO MS. WOLF TESTIFIED
THAT HE WROTE HER LETTERS AND
LEFT THEM IN THE APARTMENT.
THERE WASN'T ANY, WE DIDN'T SEE
THOSE LETTERS, SHE DIDN'T RETAIN
THOSE LETTERS, BUT THAT HE WOULD

WRITE HER NOTES ASKING HER TO RECONCILE WITH HIM.
SO EVEN THOUGH WE HAVE -- AND WE ALSO HAVE JENNY LUKE TESTIFYING THAT HER LETTERS WERE RESPONSIVE TO THINGS SHE WOULD ASK HIM.
SO ANY NOTION, I THINK HIS TESTIMONY WAS SOMEWHAT UNDERCUT THAT, YOU KNOW, THE OTHER PERSON WROTE THE LETTER AND WROTE WHATEVER HE WANTED WHEN WE HAVE JENNY LUKE TESTIFYING THAT HE'S RESPONDING IN THE LETTERS TO THINGS SHE TALKED ABOUT WITH HIM.
YOU KNOW, SENDING MOTHER'S DAY CARDS, REMEMBERING HER KIDS' NAMES, THINGS LIKE THAT.
SO WHEN YOU LOOK AT THE SIGNIFICANT LIMITATIONS ON ADAPTIVE SKILLS, LOOK AT HOW DID THIS INTERFERE WITH HIS LIFE? DID HIS READING, WRITING AND ARITHMETIC AT A LOW LEVEL INTERFERE IN ANY WAY WITH THE ABILITY TO LIVE HIS LIFE?
YOU KNOW, APART FROM THIS, OF COURSE, LOOKING AT THE CIRCUMSTANCES OF THIS CRIME YOU CAN SEE ADAPTIVE FUNCTIONING.
>> WHAT -- IS THERE ANY EVIDENCE IN THIS RECORD OF ANY PERIOD OF TIME WHERE HE ACTUALLY LIVED ALONE?
HAD AN APARTMENT, YOU KNOW, PAID UTILITY BILLS, DID ALL THOSE

KINDS OF THINGS?

>> DR. GILGUN, WHEN HE TALKED TO HIM ABOUT LIVING ON HIS OWN FOR A PERIOD OF TIME.

WE ACTUALLY, THERE'S QUITE A GAP IN THE RECORD BETWEEN THE TIME HE'S 13 AND 14 UP UNTIL THE TIME HE'S IN HIS 30s AND STARTS TO LIVE WITH BONNIE CHANDLER.

BUT WHAT WE DO KNOW, HE TOLD DR. GILGUN THAT HE DID LIVE ON HIS OWN.

BUT WE DON'T HAVE SPECIFIC TESTIMONY OF HIM PAYING RENT OR UTILITIES, BUT HE DID TELL THE DOCTOR HE LIVED ON HIS OWN, SHOPPED FOR HIS OWN CLOTHING, LAUNDERED HIS OWN CLOTHING, THINGS LIKE THAT.

BUT INSOFAR AS DETAIL ABOUT THAT AND TIMES, NO.

>> WELL, WE WOULD THINK THAT, AGAIN, AND SO WE DON'T STEREOTYPE, THAT SOMEBODY'S MENTALLY RETARDED CAN GET A DRIVER'S LICENSE, CAN LIVE ON THEIR OWN, CAN COOK, CAN DO THE SIMPLE TASKS.

IT SEEMS TO ME THE PART THAT REFUTES WHAT IS BEING SAID HERE IS THE KEY IS THESE LETTERS AND ALSO SOME OF THESE, THE JOBS THAT HAVE SUPERVISORY RESPONSIBILITY.

AS FAR AS THE LETTERS, I MEAN, THAT WAS SOMETHING -- HOW DID

DR. GILGUN RESPOND TO ISSUE
ABOUT THE LETTERS?

>> WELL, DR. GILGUN FELT THAT
THE POETIC EXPRESSION AND THE
ABSTRACT REASONING WAS ABOVE
THAT EXPECTED OF A PERSON WHO'S
MENTALLY RETARDED.

AND ALTHOUGH HE ACKNOWLEDGED
THAT HE GOT THE POETRY FROM THE
BOOK, HE THOUGHT IT WAS, YOU
KNOW, HE DID THINK, TAKE INTO
CONSIDERATION THAT HODGES WOULD
SELECT PASSAGES THAT HE THOUGHT
THAT THE YOUNG LADY WOULD LIKE.

BUT I THINK WHAT THE -- INSOFAR
AS THE COMMUNICATIONS, THAT
DIDN'T PARTICULARLY, YOU KNOW,
REFUTE EVIDENCE THAT HIS
COMMUNICATION SKILLS WERE AT A
LOW LEVEL.

BUT, AGAIN, I THINK WHAT THIS
COURT REALLY HAS TO FOCUS ON IS
SIGNIFICANT LIMITATIONS.

DOES HIS COMMUNICATION SKILLS,
DO THEY SIGNIFICANTLY LIMIT HIS
ABILITY TO LIVE HIS LIFE?

AND THE ANSWER IS, NO, THERE'S
NOT A SINGLE BIT OF EVIDENCE IN
THIS RECORD THAT HIS INABILITY
TO WRITE, TO READ, TO DO
ARITHMETIC ADVERSELY INFLUENCED
HIS LIFE.

BECAUSE HE WAS ABLE TO FILL OUT
JOB APPLICATIONS, GET JOBS.

HE WAS ABLE TO FILL OUT FOOD
STAMP APPLICATIONS, GET FOOD

STAMPS.

HE WAS ABLE TO GO TO THE DRIVER'S LICENSE BUREAU, GET THEM TO ADMINISTER THE TESTS VERBALLY AND SCORE VERY HIGH. HE WENT TO GED CLASSES, AND HE SCORED ACADEMICALLY ABOVE AVERAGE.

HE SHOPPED, HE WAS PARTICULAR ABOUT HIS CLOTHES, HE COOKED, HE PAID BILLS ALONG WITH TAMARA WOLF.

SO I THINK WHEN YOU LOOK AT THE TESTIMONY THAT TALKS ABOUT HOW IT'S SIMPLE LANGUAGE, IT'S SMALL WORDS, HE DIDN'T KNOW HOW TO SPELL.

THAT'S VERY WELL AND GOOD, YOU CAN EQUATE THAT WITH DR. GILGUN'S TESTIMONY THAT HE'S ILLITERATE AND THAT, YOU KNOW, HE DROPPED OUT IN EIGHTH GRADE. CLEARLY, HIS SCHOOL RECORDS SUPPORT HE DIDN'T DO WELL ACADEMICALLY.

BUT WHEN YOU TALK ABOUT SIGNIFICANT LIMITATIONS, YOU TALK -- YOU LOOK AT, AND IT'S COMMON SENSE YOU LOOK AT HOW IS IT THESE ALLEGED DEFICITS INTERFERE WITH HIS LIFE? AND WHEN YOU LOOK AT THAT IN EVERY AREA, YOU CAN SEE THAT HE DOES NOT HAVE SIGNIFICANT DEFICITS.

EVEN THOUGH HE READS AT A BASIC

LEVEL OR WRITES AT A BASIC LEVEL OR DOES ARITHMETIC AT A FOURTH GRADE LEVEL, THE FACT IS THAT HE CAN DO EVERYTHING HE NEEDS TO SURVIVE ON HIS OWN.

AND, AGAIN, WHEN YOU ACTUALLY FACTOR IN, ALSO, THE FACTS OF THIS CRIME, HE'S INCREDIBLY ADAPTABLE, YOU KNOW?

THE TAYLORS COME TO PICK UP THEIR MOM TO TAKE HER TO IDAHO TO SPEND THE HOLIDAYS AND USE THE KEY TO GET INTO THE HOUSE, AND MR. HODGES PUTS A CHAIR UP UNDER THE DOORKNOB SO THEY CAN'T GET OUT?

SO THE TAYLORS CAN'T GET IN BY USING THEIR KEY.

HE GOES AROUND TO THE BACK AND TAKES A PAIR OF SOCKS OUT OF THE DRAWER, BUSTS THE WINDOW OUT AND RUNS OFF AND EVADES CAPTURE.

>> IS THERE ANY EVIDENCE IN THE RECORD WITH REGARD TO THESE FACTORS THAT THEY WAX AND WANE, THAT YOU CAN COMMUNICATE ON ONE DAY BUT CANNOT ON ANOTHER DAY OR ANYTHING LIKE THAT?

THERE'S NO EVIDENCE LIKE THAT?

>> NO, SIR.

NO, SIR.

AT THE -- AND ALSO GOING BACK TO, YOU KNOW, HE TOLD AN INMATE THAT HE LEFT A PHOTOGRAPH OF HIS COUSIN AT THE SCENE OF THE CRIME TO FRAME HIM FOR THE MURDER,

WHICH HE LEFT A CARNIVAL
PHOTOGRAPH, AN OLD-TIME
PHOTOGRAPH OF HIS NEPHEW.
SO HE LEFT, HE DROPPED THAT AT
THE CRIME SCENE TO IMPLICATE
HIM.

SO I THINK WHEN YOU SEE THE FACT
THAT THERE'S ABSOLUTELY NO
EVIDENCE OF SIGNIFICANT
LIMITATIONS IN HIS LIFE IN ANY
OF THE --

>> WELL, I MEAN, AND I REALIZE
YOU CAN PICK SOMETHING OUT, BUT
YOU COULD ALSO SAY THAT SOMEBODY
WHO WOULD THINK THAT THEY COULD
PUT A PHOTOGRAPH, THAT SOMEBODY
WOULD BE CARRYING THEIR OWN
PHOTOGRAPH AND DROP IT AT THE
CRIME SCENE IS A FAIRLY NAIVE
VIEW OF TRYING TO FRAME
SOMEBODY.

I MEAN, AGAIN, WE COULD ARGUE
BACK AND FORTH ON WHAT LEVEL OF
SOPHISTICATION ANY OF THESE
CRIMES HAVE OR DON'T HAVE, AND I
APPRECIATE YOU HAVE TO LOOK AT
ALL THIS, THIS WHOLE PICTURE.

I THINK THAT I'M JUST STRUCK
WITH HOW SUBJECTIVE STILL THIS
ADAPTIVE FUNCTIONING PRONG IS
FOR THIS COURT TO EVALUATE AND
FOR GUIDANCE FOR THE FUTURE.
IT STILL SEEMS THAT WE'RE, WE'RE
GOING TO BE STRUGGLING WITH THIS
FOR A LONG TIME.

>> WELL, I THINK WHEN YOU, YOU

KNOW, IF YOU WANT TO LOOK AT THE VINELAND, I THINK THAT SORT OF -- DR. TURNER THOUGHT THAT BROUGHT IN SUBJECTIVITY. BUT I THINK WHAT THE OBJECTIVITY IS, IS WHEN YOU LISTEN TO PEOPLE LIKE BONNIE CHANDLER AND BEN THOMAS AND TAMARA WOLF WHO SAYS, YOU KNOW, HE CAN PAY BILLS, HE'S VERY METICULOUS ABOUT HIS HYGIENE --

>> I THOUGHT BETWEEN THE TWO WOMEN IT WAS LIKE THEY WERE SEEING TWO DIFFERENT PEOPLE.

>> WELL --

>> CORRECT?

>> DR. GILGUN EXPLAINED HE THOUGHT BONNIE CHANDLER'S OPINION OF HIS WAS SOMEWHAT COLORED BY MORAL JUDGMENTS BECAUSE HE BASICALLY HAD LIED TO HER, HAD STOLEN HER PROPERTY TO PAWN IT --

>> WAS HERS THE HIGHER ONE?

>> HERS WAS THE LOWER. AND WITH TAMARA WOLF HE HAD BEEN MORE UPRIGHT, AND THAT WAS THE HIGHER ONE.

BOTH OF THEM PUT HIM IN DAILY LIVING SKILLS AS ABOVE AVERAGE. SO, BUT WHEN YOU LOOK AT THEIR TESTIMONY OF WHAT HE ACTUALLY DID, I MEAN, BONNIE CHANDLER TESTIFIED ABOUT HOW THEY LIVED TOGETHER, HE READ CHILDREN'S BOOKS TO HER DAUGHTER, HE COOKED

HER FAVORITE MEAL FROM A RECIPE,
HE, HE WORKED DURING PART OF THE
TIME, HE WAS VERY -- HE WENT
SHOPPING FOR HIS OWN CLOTHES, HE
CAREENED THE HOUSE, HE DID --
CLEANED THE HOUSE, HE DID
HOUSEHOLD CHORES, THINGS LIKE
THAT.

AND WITH TAMARA YOU HAVE HIM
AFTER HE'S GOTTEN OUT OF PRISON
IN OHIO LIVING WITH HER AND
APPLYING FOR FOOD STAMPS,
APPLYING FOR JOBS, GETTING A JOB
SUPERVISING, HE WORKED WITH BEN
THOMAS TWICE ONCE BEFORE HE WENT
TO PRISON AND AFTER HE WENT TO
PRISON.

AND DOING SKILLS THAT, YOU KNOW,
REQUIRE HIM TO FOLLOW A RECIPE
FOR MIXING MORTAR AND MEASURING
EQUIDISTANT WHEAT POLES AND
STRUCTURES, AND HE WAS ABLE TO
DO ALL THAT.

SO WHEN YOU LOOK AT WHETHER HE
IS SIGNIFICANTLY LIMITED IN HIS
LIFE SKILLS, YOU'LL SEE THAT, IN
FACT, HE'S NOT.

SO BASED ON THAT THE EVIDENCE,
THERE'S COMPETENT SUBSTANTIAL
EVIDENCE TO SUPPORT THE TRIAL
COURT'S FINDING THAT MR. HODGES
DOES NOT MEET THE SECOND PRONG
OF THE MENTAL RETARDATION TEST
AS OUTLINED BY THIS COURT AND
THAT HE DOES NOT HAVE
SIGNIFICANT LIMITATIONS IN HIS

ADAPTIVE FUNCTIONING, AND WE
WOULD ASK THIS COURT TO AFFIRM
MR. HODGES CONDITION AND
SENTENCE TO DEATH.

>> MR. DAVIS, YOU'VE USED YOUR
TIME, BUT --

>> I'M SORRY, I THOUGHT THAT
WAS -- I'M SORRY.

SOMEBODY ASKED A QUESTION ABOUT
THE DRIVER'S LICENSE.

I BELIEVE HE GOT A DRIVER'S
LICENSE WHEN HE WAS 36 OR 37.

I THINK THAT -- I'M SORRY, I
THOUGHT I HAD FIVE MORE MINUTES.

BUT THANK YOU VERY MUCH, I
APPRECIATE IT.

>> SHE JUST GAVE YOU TWO
MINUTES.

>> OH, DID YOU?

I'M SORRY.

WELL, I WASN'T LISTENING, I
GUESS.

I APOLOGIZE.

>> NOW ONE AND THREE-FOURTHS.

>> YOU KNOW, DR. GILGUN'S
TESTIMONY IS KIND OF FUNNY
BECAUSE HE CAN'T EXPLAIN THESE
LETTERS, HE PICKS 15 WORDS OUT
OF LETTERS, AND HODGES CAN'T
SPELL THE WORDS, HE DOESN'T KNOW
WHAT THEY MEAN.

THERE'S SOME EVIDENCE OR THE
STATE SAYS THAT HE PICKED
LETTERS THAT SHE WOULD WANT,
THAT HE THOUGHT SHE'D
APPRECIATE, BUT HE DOESN'T EVEN

KNOW WHAT THE POEMS MEAN BECAUSE
HE DOESN'T UNDERSTAND THE WORDS.
IT'S HARD TO SEE HOW THIS MAN IS
IN ANY WAY LITERATE.

>> DO YOU AGREE WITH THE STATE
THAT THIS CONCEPT OF DEFICITS IN
ADAPTIVE FUNCTIONING RELATE TO
DAILY LIVING?

>> WELL, THAT'S KIND OF WHAT
WE'RE LOOKING AT --

>> OKAY, YOU DO AGREE WITH THAT?
HOW DOES IT IMPACT THE WAY THE
INDIVIDUAL CAN PERFORM IN JUST
DOING DAILY LIVING ACTIVITIES?

>> THAT'S THE IDEA.

AND THE IDEA HERE IS HE HAS
DEFICITS AT LEAST IN HIS
ACADEMIC AND COMMUNICATION
SKILLS.

THANK YOU VERY MUCH.

>> ALL RIGHT, THANK YOU.

THANK YOU BOTH FOR YOUR
ARGUMENTS HERE TODAY.