>> WE RAISE THREE ISSUES IN OUR BRIEF IN ADDITION TO THE MAIN ISSUE.
I WANT TO ADDRESS THE FIRST ISSUE FIRST BRIEFLY AND THEN SPEND MOST OF MY TIME ON REMAINING ISSUES RELATED TO MR. NEWBERRY'S INTELLECTUAL IMPAIRMENT.
WAS AN ERROR TO PRESENT ON STATUTORY AGGRAVATION DURING THE PENALTY PHASE OF MR. NEWBERRY AT TRIAL UNDER THE GUISE OF IN PEACH AND.
THIS COURT HAS LONG HELD IT IS AN ERROR TO DO SO AND GERALD AND HITCHCOCK AND NUMEROUS CASES WE SITE IN OUR BRIEF, IN THIS CASE MR. LESTER WAS A DEFENSE WITNESS WHO TESTIFIED ON DIRECT EXAMINATION THAT HE KNEW MR. NEWBERRY ALL HIS LIFE ENDED WITH HIS OPINION THAT MR. NEWBERRY COULD PROVIDE AREAS OF FAITH AND INSPIRATION, THAT WAS HIS TESTIMONY AND THE STATE ARGUED THAT THIS OPENED THE DOOR BECAUSE IT WAS BASICALLY HE'S GOING TO BE A MODEL PRISONER FOR THE REST OF HIS LIFE IN PRISON. IS OPENED THE DOOR TO PRESENTING A THREAT HE MADE TO A CORRECTIONAL OFFICER IN 2010.
>> TELL ME WHY IS IT RELEVANT TO THAT ISSUE WHAT HE HAS ALREADY DONE?
THEY ARE TRYING TO PRESENT AN ARGUMENT THAT HE COULD DO SOME GOOD IN PRISON BASICALLY.
SO WHY ISN'T IT RELEVANT WHAT HE HAS ALREADY DONE?
>> THE TESTIMONY WAS PURELY ON ABOUT HOW HE COULD INSPIRE OTHER INMATES.
THE TESTIMONY DID NOT GO TO IT HIM BEING A GOOD PRISONER, MODEL PRISONER OR ROLE MODEL.
>> IT IS IMPORTANT -- HOW CAN HE INSPIRE OTHER PEOPLE --
>> NOT INSPIRE WITH HIS ACTIONS

THAT HIS ENCOURAGEMENT AND
COUNSELING ABOUT MATTERS OF
FAITH AND ABOUT JESUS AND
POSITIVE THINGS.
IT WAS VERY SPECIFIC TESTIMONY.
THERE WAS NOTHING ABOUT HE IS
GOING TO BE A GOOD PRISONER,
NOTHING AT ALL.
THE OTHER REASON IS IN THE
PENALTY PHASE OF A CAPITAL TRIAL
THE STANDARD IS VERY STRICT
BECAUSE THIS TYPE OF NON
STATUTORY AGGRAVATION HAS SUCH A
PREJUDICIAL EFFECT.
THERE IS A STRONG RISK THAT THE
JURY IS GOING TO TAKE THAT AND
CONSIDER IT AS AGGRAVATION
RECORD THAN THE REASON
SUPPOSEDLY IT IS INTRODUCED
WHICH IS TO IN PEACH THE
WITNESS.
THE WITNESS MR. LESTER IS NOT
SAYING MR. NEWBERRY WILL BE A
ROLE MODEL.
THAT WAS NOT EVEN HIS KNOWLEDGE
OF MR. NEWBERRY OR THAT HE WAS
GOING TO BE A GOOD PRISONER.
HE WAS SPEAKING SPECIFICALLY TO
HIS KNOWLEDGE OF MR. NEWBERRY AS
SOMEONE WHO CARED ABOUT THE
SCRIPTURES AND COULD TALK ABOUT
JESUS AND WAS INSPIRING AND
URGING IN THAT WAY.
>> HE READ THE SCRIPTURES AND
COULD TALK ABOUT IT.
I JUST DON'T UNDERSTAND HOW HIS
ACTIONS --
>> SCRIPTURES ALSO INVOLVED
FORGIVENESS AND THAT IS WHAT MR.
LESTER RESPONDED IN HIS
TESTIMONY.
>> IT JUST SEEMS TO ME FIT IF
YOU ARE GOING TO PRESENT SOMEONE
AS HAVING THE ABILITY TO TALK
ABOUT JESUS AND THE SCRIPTURES
AND ALL OF THAT, THAT THEIR
ACTIONS WHICH ARE CONTRARY TO
THAT KIND OF PRESENTATION SEEMS
IRRELEVANT TO ME.
I STILL DON'T UNDERSTAND WHY IT

ISN'T.
>> IT IS NOT RELEVANT BECAUSE IT DOESN'T EXPLAIN OR CONTRADICT THE TESTIMONY THAT THE DEFENDANT HAS OFFERED AND THAT IS THE STRICT STANDARD THAT THIS COURT HAS ALWAYS SUPPLY IN THESE CASES.
>> WHY DOESN'T IT CONTRADICTS IT?
THE NOTION THAT SOMEONE CAN BE AN INSPIRATION TO OTHER PRISONERS IS INCONSISTENT WITH CONDUCT THAT IS BAD, ISN'T IT?
>> NO, YOUR HONOR.
>> THAT IS ONE VIEW OF REALITY. THE CIRCUIT COURT JUDGE TOOK A DIFFERENT VIEW OF THE REALITY. YOU HAVE ALSO SAID PARTICULARLY STRICT RULES OF EVIDENCE IN THE PENALTY PHASE, HOW DOES THAT SQUARE WITH WHAT THE STATUTE ACTUALLY SAYS ABOUT THAT IN SECTION 921.141 WHERE IT SPECIFICALLY SAYS THAT EVIDENCE CAN COME IN RELEVANT TO THE NATURE OF THE CRIME AND CHARACTER OF THE DEFENDING SHOWING MATTERS RELATED TO THE AGGRAVATING AND MITIGATING CIRCUMSTANCES ENUMERATED IN THE STATUTE, AND THE COURT DEEMED TO HAVE PROHIBITIVE VALUE MAY RECEIVE, AND DISCRETIONARY RULES OF EVIDENCE.
>> THE STATE CAN ONLY PRESENT --
>> IN REBUTTAL OR TO REFUSE THE MITIGATING CIRCUMSTANCES.
THE STATE CAN DO THAT.
>> IF THE DEFENSE ATTEMPTED TO PUT ON AS MITIGATION THAT THE DEFENDANT IS GOING TO BE A MODEL PRISONER OR A GOOD PRISONER OR A ROLE MODEL THEN THE STATE COULD HAVE IMPEACHED THE EVIDENCE, A PERSON CAN TALK ABOUT JESUS AND THE BIBLE DESPITE THE FACT THAT HE HAS COMMITTED, HE HAS ALSO COMMITTED THE CURRENT CRIME SO THIS CLEARLY IS NOT RELEVANT TO

WHAT THE DEFENSE SAID.
IF YOU LOOK AT GERALD, IF YOU LOOK AT ROBINSON IN THAT CASE, WITNESS TESTIFIED THE DEFENDANT WAS A GOOD PERSON, A GOOD HEARTED PERSON.
YOU CAN'T PRESENT NON STATUTORY AGGRAVATION OR EVIDENCE OF OTHER CRIMES HE HAS COMMITTED AND THE SAME THING IN GENERAL.
MR. GERALD IS TESTIFYING HE WAS A NEIGHBOR OF THE DEFENDANT AND NEVER HAD A CONFRONTATION WITH HIM.
YOU CAN PRESENT EVIDENCE OF HIS VIOLENCE JUST BECAUSE HE SAID HE HASN'T HAD A CONFRONTATION WITH HIM.
I THINK THIS CASE FITS SQUARELY WITHIN THOSE CASES.
AND THEN I WOULD ALSO LIKE TO JUST BRIEFLY ADDRESS A HARMLESS ERROR COMPONENT OF THIS ISSUE.
I DON'T BELIEVE THIS IS HARMLESS FOR A COUPLE REASONS.
NUMBER ONE, THIS TYPE OF EVIDENCE THAT WAS PRESENTED IS EXTREMELY PREJUDICIAL.
IN -- THE STATE ARGUED THIS IN CLOSING, THE STATE IS REALLY TRYING TO GET BEFORE THE JURY EVIDENCE THAT THIS MAN IS GOING TO BE VIOLENT IN PRISON.
THAT IS NOT ALLOWED, THE DEFENSE EVIDENCE DID NOT PRESENT THAT IN ANY WAY.
AND AGAIN, THE STATE ARGUED IN CLOSING, WE CAN'T KNOW WHETHER THIS AFFECTED THE JURY'S RECOMMENDATION, THE JURY OF RECOMMENDATION WAS A-4.
>> WILLING TO BE VIOLENT IN PRISON?
>> THE STATE ARGUED THAT THEY RECITED THIS THREAT THAT HE MADE IN CLOSING ARGUMENT.
THE STATE DIDN'T ARGUE, SAY THAT.
I AM SAYING IT LEAVES THE IMPRESSION BEFORE THE JURY THAT

IT IS GOING TO BE VIOLENT, IT IS
A FORM OF FUTURE DANGER'S
TESTIMONY THAT THIS THREAT WAS
SUBMITTED AND IT IS NOT ALLOWED
AND THEY COULD NOT HAVE
SUBMITTED IT IN THEIR OWN CASE
AND I DON'T BELIEVE THEY COULD
SUBMIT IT UNDER THE GUISE OF
IMPEACHMENT AND THE COURT'S
PRIOR CASE.
>> GIVEN THE FACT THAT THE
AGGRAVATORS, A VIOLENT FELONY
FOR PRIOR VIOLENT FELONIES.
HOWARD IS THAT NOT HARMLESS?
>> I DON'T THINK IT IS HARMLESS
BECAUSE EVEN HAVING HEARD ABOUT
THE PRIOR VIOLENT FELONIES, FOUR
JURORS VOTED FOR LIFE.
THE JURY AS A WHOLE WAS NOT
CONVINCED THE DEATH PENALTY WAS
THE APPROPRIATE SANCTION FOR MR.
NEWBERRY.
SO YOU HAD THIS WHICH REALLY
GOES TO SUGGESTING THAT HE IS
NOT GOING TO BE A GOOD PRISONER,
THAT HE MIGHT BE VIOLENT IN
PRISON, I DON'T THINK WE CAN SAY
THAT THAT DIDN'T TIP THE SCALES
FOR ONE OR TWO MORE JURORS GIVEN
THE JURY'S RECOMMENDATION.
I JUST DON'T THINK WE COULD
ASSUME THAT.
TURNING TO THE NEXT TWO ISSUES
WHICH ARE INTERRELATED, BOTH
HAVING TO DO WITH MR. NEWBERRY'S
INTELLECTUAL IMPAIRMENT.
I USE THAT WORD INTELLECTUAL
IMPAIRMENT SPECIFICALLY AT WITH
A PURPOSE.
WHEN I USE THE TERM INTELLECTUAL
IMPAIRMENT I AM REFERRING TO MR.
NEWBERRY'S CURRENT INTELLECTUAL
IMPAIRMENT, WHAT IT IS, NOT ANY
SORT OF DIAGNOSIS AND THAT IS
WHY I USE OF INTELLECTUAL
IMPAIRMENT AS OPPOSED TO
INTELLECTUAL DISABILITY BECAUSE
THE COURT IS AWARE --
>> FOR THE RECORD, HE HAS A
CURRENT IQ OF 66?

AND THERE WAS OTHER TESTIMONY
ABOUT HIS ADAPTIVE FUNCTIONING.
WAS THERE NO MOTION ABOUT
RETARDATION?
>> THEY DECIDED NOT TO DO AND
ATKINS HEARING BECAUSE OF HIS
SCHOOL RECORD THAT AN IQ TEST
HAD BEEN GIVEN TO HIM WHEN HE
WAS 8 YEARS OLD AND IN THE FIRST
GRADE AND HE SCORED AND 81 ON
THAT TEST.
I BELIEVE THAT THE DEFENSE AND
EVEN THE EXPERT ACCORDING TO THE
EXPERT'S TESTIMONY, PARTIES WERE
UNDER THE IMPRESSION THAT THERE
HAD TO BE A DIAGNOSIS OF MENTAL
RETARDATION OR INTELLECTUAL
DISABILITY BEFORE THE AGE OF 18
TO HAVE AN ATKINS' HEARING SO
THEY DECIDED NOT TO DO AND
ADKINS HEARING.
DR. BLOOMENFIELD TESTIFIED HE
HAD AN IQ OF 66 ADDED THAT HIS
DEFICIT.
HE MET THE FIRST TWO PRONGS OF
DIAGNOSIS OF INTELLECTUAL
DISABILITY.
IF THEY MET THE THIRD PRONG, AGE
OF ONSET BEFORE THE AGE OF 18 HE
WOULD HAVE BEEN CATEGORICALLY
BARRED FROM EXECUTION.
>> THERE WAS NEVER ANY OTHER IQ
TESTS BETWEEN THE TIME HILLIS
AGE YEARS OLD AND THIS ONE
PRESENTLY.
>> THAT IS CORRECT.
UNDER THE STATUTES THERE IS NO
REQUIREMENT THAT HE BE DIAGNOSED
WITH INTELLECTUAL DISABILITY
BEFORE AGE 18 SO I THINK THAT
WAS INCORRECT OF THE PARTIES TO
ASSUME THAT.
DR. BLOOMINFIELD TESTIFIED THAT
81 GIVEN THE STANDARD ERROR OF
MEASUREMENT COULD HAVE BEEN A
75.
HE COULD HAVE BEEN
INTELLECTUALLY DISABLED AT AGE
8, WE DON'T HAVE THAT EVIDENCE
HERE.

HE WAS --
>> YOU HAVE BEEN RAISED AS A SEPARATE ISSUE, WHETHER THERE SHOULD HAVE BEEN NOT FINDING OF INTELLECTUAL DISABILITY.
>> I RAISE A SEPARATE ISSUE IN TERMS OF ASKING THE COURT TO REMAND FOR THAT HEARING.
THIS CASE WAS THE HALL, PARTIES WERE OPERATING UNDER THE ASSUMPTION THAT THERE HAD TO BE A BRIGHT LINE DIAGNOSIS OF 70 OR ABOVE AND MAYBE THEY APPLIED THAT TO THE AGE OF ONSET.
>> HOW IS THIS DONE?
>> THE TRIAL WAS PRE HALL.
I ASKED THE COURT TO REMAND IT IF THE COURT DECIDES NOT TO REDUCE THE SENTENCE TO LIFE ANYWAY.
>> STARTED TALKING ABOUT A DIFFERENCE BETWEEN IMPAIRMENT A FEW MINUTES AGO, INTELLECTUAL IMPAIRMENT AND DEFICIT, SOMETHING LIKE THAT.
>> I WAS SAYING I HAVE TURNED WHAT MR. NEWBERRY HAS AS INTELLECTUAL IMPAIRMENT AS OPPOSED TO INTELLECTUAL DISABILITY BECAUSE THERE IS NO DIAGNOSIS IN IT.
GOT CONFUSING IN THE BRIEFS AS TO WHAT WE WERE TALKING ABOUT.
SO ON THIS ISSUE, FIRST OF ALL THE TRIAL JUDGE GAVE THIS NO MITIGATING WEIGHT WHATSOEVER DESPITE DR. BLOOMFIELD'S TESTIMONY THAT HE HAS MENTAL IMPAIRMENT OF SOMEONE IN THE RANGE OF MENTAL RETARDATION OR INTELLECTUAL DISABILITY, HAS THE ADAPTIVE DEFICITS, THE TRIAL JUDGE SAID IT WAS NOT MITIGATING AND GAVE IT NO WAGE.
THE JUDGE SAYS HE KNOWS RIGHT FROM WRONG, THE EXPERT DIDN'T LINK IT TO THE MURDER AND JUST SAID IT IS NOT MITIGATING AND GAVE IT NO WAGE.
THAT IS CLEAR ERROR AND THAT

WOULD REQUIRE THE COURT TO SEND
IT BACK FOR RECENT DANCING
BEFORE THE TRIAL JUDGE.
>> BUT THE TRIAL JUDGE DID TAKE
INTO CONSIDERATION THOSE FACTORS
THEY POINTED AND OUT LIKE HE WAS
VERY NAIVE, AND IMAGE OR FOR HIS
AGE, SUFFERS FROM DEPRESSION, IS
VULNERABLE, THOSE ISSUES THE
DEFENSE PRESENTED, THEN THE
TRIAL JUDGE CONSIDERED THOSE AND
GIVES THOSE WEIGHT?
>> THE TRIAL JUDGE FOUND THOSE,
IMAGE OR, NIGHT, REACTED TO
EXTERNAL INFLUENCES, NEED FOR
APPROVAL, POOR DECISION MAKING
SKILLS, ACTS IMPULSIVELY.
FOR THOSE OF THOSE THE TRIAL
JUDGE GIVE THOSE LIVE SERVICE.
HE GAVE SOME VERY SLIGHT WEIGHT.
WHAT THE TRIAL JUDGE FAILED TO
UNDERSTAND IS THAT THIS
CONFLUENCE OF CHARACTERISTICS
DERIVED DIRECTLY FROM HIS LOW
INTELLECTUAL ABILITIES.
>> THAT WAS WHAT I WAS GETTING
AT.
ISN'T THE FACT THAT THE TRIAL
JUDGE CONSIDERED THOSE NO MATTER
WHAT, HE END ED UP GIVING THOSE,
IT DEMONSTRATES THAT HE REALLY
DID TAKE INTO CONSIDERATION THIS
LOW INTELLECTUAL FUNCTIONING.
>> WHAT IT DEMONSTRATES IS THAT
HE DID NOT BECAUSE AS FAR AS IQ,
THE INTELLECTUAL IMPAIRMENT,
THE JUDGE SAYS THIS IS NOT EVEN
MITIGATING.
HI THINK IF THE JUDGE HAD
UNDERSTOOD THAT THIS WAS
MITIGATING OF GREAT WEIGHT
SIGNIFICANTLY AS A PRISONER
MITIGATED.
IT IS EQUIVALENT TO THE
INTELLECTUAL IMPAIRMENT THAT
EXEMPTS MOST DEFENDANTS FROM THE
DEATH PENALTY AT ALL.
THE REASON PERSONS --
>> IN TERMS OF ADAPTIVE DEFICITS
AND THOSE SORTS OF THINGS, THE

ATKINS ISSUE REALLY HAS NOT BEEN LITIGATED.
TRYING TO TALK ABOUT IT, THE POINT HERE EVEN IF THIS WAS AN ERROR, THE TRIAL COURT, FINDINGS OF MITIGATION OR FINDINGS ABOUT CIRCUMSTANCES OR CONSEQUENCES OF COGNITIVE DEFICITS, AND THESE FLOW FROM COGNITIVE DEFICITS, THE CONSEQUENCES, THE COGNITIVE DEFICITS.
THAT WAY OF LOOKING AT IT --
>> THE PROBLEM IS THE JUDGE DIDN'T UNDERSTAND THESE WERE THE CONSEQUENCES OF HIS INTELLECTUAL DEFICIT.
>> THE CONSEQUENCES AS MITIGATING COIN.
THAT IS INDISPUTABLE.
>> WE GIVE THEM VERY SLIGHT WEIGHT.
IT IS IMPORTANT THAT THE RELATIONSHIP BETWEEN INTELLECTUAL IMPAIRMENT WITH DEFENDANTS CULPABILITY AND IF THE TRIAL JUDGE DIDN'T UNDERSTAND THAT THESE CHARACTERISTICS RELATED TO INTELLECTUAL IMPAIRMENT, HIS ENTIRE LIFE, HIS REASONING AND JUDGMENT AND ABILITY TO LEARN, HIS ABILITY TO UNDERSTAND CONSEQUENCES, THE JUDGE HAS NOT RECOGNIZED THE MITIGATING THIS IS MITIGATING AND THE WEIGHT OF IT IS THAT MITIGATED.
THE JUDGE HASN'T ADDRESSED THE KEY ISSUE HERE, THE EFFECT OF THIS MATTER GATOR OF THIS IMPAIRMENT ON HIS CULPABILITY.
THAT IS WHAT IS IMPORTANT.
WHEN THE JUDGE IS WANING, WE DON'T COUNT ON IT, WE LOOK AT WHAT IT ACTUALLY MEANS.
THIS CHARACTERISTIC HAS DONE THIS MAN'S LIFE.
THERE WAS NO PLAN TO ISSUES OR KILL ANYONE.
DRINKING AND SMOKING WEED, A CO-DEFENDANT IS THE ONE WHO

SUPPLIED THE TWO GUYS THAT USED
IN THE ROBBERY.
THIS WAS A VERY UNSOPHISTICATED
CRIME WITH VERY LITTLE PLANNING.
IT IS VERY CONSISTENT WITH MR.
NEWBERRY --
>> THE MK 47s, SOMETHING ELSE --
AND DIDN'T HE HAVE ANOTHER
HANDGUN?
>> THERE IS TESTIMONY THAT HE
HAD PISTOL BUT NO INDICATION WAS
USED IN THE ROBBERY.
>> HE WAS 40 YEARS OLD AT THE
TIME OF THE MURDER.
AND HE HAD THREE PRIOR VIOLENT
FELONIES.
BOTH HIS AGE AS WELL AS THE
EXISTENCE OF PRIOR VIOLENT
FELONIES ALWAYS USING GUNS,
FACTOR INTO THE CALCULUS OF
WHETHER HE IS DESERVING OF THE
DEATH PENALTY.
>> THE KEY ISSUE IS THE
RELATIONSHIP BETWEEN THOSE
FACTORS AND HIS INTELLECTUAL
IMPAIRMENT.
>> YOU ARE NOW GOING BACK ON
THIS INTELLECTUAL IMPAIRMENT.
WHAT WAS THE TESTIMONY PRESENTED
BY THE DEFENDANT THAT TRIAL?
CONCERNING HIS INTELLECTUAL
IMPAIRMENT AND HOW THAT
AFFECTED, I ASSUME THAT WAS
SOMETHING THAT EXISTED SINCE
BIRTH THAT HE WAS INTELLECTUALLY
IMPAIRED.
WHAT IS THE BEST EVIDENCE, HOW
WAS THAT PRESENTED?
>> OF HIS IMPAIRMENT?
>> IF IT WASN'T FOR THAT, THIS
-- THREE PRIOR VIOLENT FELONIES,
HE IS FELICIA YEARS OF AGE AND
KILLS AN UNSUSPECTING VICTIM FOR
-- INTELLECTUAL IMPAIRMENT TAKES
THAT AND MAKES IT --
>> CURRENT IQ OF 66, HE HAS
ADAPTIVE DEFICITS, HE IS IN THE
RANGE OF SOMEONE DIAGNOSE --
>> HOW DID THAT TESTIMONY COME
OUT ABOUT THE EFFECT, WHAT

ADAPTIVE DEFICITS, WHAT WAS HIS
LIFE LIKE UP UNTIL HE MURDERED
THIS VICTIM?
WHAT WAS HIS WORK LIFE?
HIS RELATIONSHIPS?
>> DR. BLOOMFIELD TESTIFIED
ABOUT HIS ADAPTIVE DEFICITS AND
IQ.
WE KNOW --
>> I AM SORRY.
IS IT BLOOMFIELD?
I AM LOOKING AT THE SENTENCE
ORDER.
THAT HE HAD -- HE SAID HE HAS
SHOWN LESS THAN ADEQUATE
ADAPTIVE SKILL AND FUNCTIONING.
NEITHER PARTY VOLUNTEERED ANY
FACTUAL FINDINGS OR BASES
FORMING THE FOUNDATION OF THE
OPINION SO WAS SOMEONE JUST
SAYING IT?
WHAT WAS THE ACTUAL EVIDENCE AT
TRIAL?
>> THIS IS BASED ON HIS
EVALUATION.
SIX TIMES.
>> WHAT COULDN'T HE DO IN LIFE?
IS ADAPTIVE FUNCTIONING, WHAT IS
NOT ABLE TO DO?
>> WE DON'T HAVE A LOT OF
INFORMATION.
>> YET YOU WANT THE JUDGE AND
THIS COURT TO DOES THAT IS
ENOUGH TO SAY THAT IS THE DEATH
PENALTY CASE?
>> LOOK AT ADKINS, LOOK AT ALL,
THESE OTHER REASONS PERSONS WITH
INTELLECTUAL DISABILITY ARE
EXEMPT AS A CLASS.
>> ASKING FOR A REMAND IN THIS
CASE TO HAVE A HALL HEARING, ARE
YOU ASKING, ASKING THAT THIS
WILL BE BROUGHT UP IN POST
CONVICTION?
ON THIS RECORD, WHAT ARE YOU
ASKING?
>> I AM ASKING FOR A NUMBER OF
THINGS, IF YOU DON'T GET IT NOW
YOU WILL GET IT LATER.
TO TRULY CONSIDER THIS AS

MITIGATING.
I AM ASKING THE COURT TO REDUCE HIS SENTENCE TO LIFE AND THAT ARGUMENT --
>> NOT NECESSARILY IN THAT ORDER.
>> MY REQUEST FOR REDUCING SENTENCE TO LIFE, THE SUPREME COURT'S OPINIONS, THIS HAS THE EQUIVALENT IMPAIRMENT OF PERSONS EXCLUDED FROM THE DEATH PENALTY FOR A RANGE OF REASONS?
>> WE ASK YOU ABOUT WHETHER OR NOT THERE WAS ANY REQUEST TO DETERMINE WHETHER IT THERE WAS A MENTAL RETARDATION, THAT THEY NEVER GOT TO THE POINT WHERE THE ONSET OF ORIGINAL 18, YOU ARE ASKING US TO MAKE THAT DETERMINATION WITHOUT IT BEING IN THE RECORD.
>> WHAT I AM ARGUING IS A DIAGNOSIS OF INTELLECTUAL DISABILITY IS NOT REQUIRED FOR THE COURT TO RECOGNIZE THAT HIS IMPAIRMENT IS EQUIVALENT.
THAT IS WHAT I AM ASKING THE COURT TO DO.
I UNDERSTAND AREAS NO DIAGNOSIS BUT IN PROPORTIONALITY.
>> YOU ARE ASKING US TO SAY DESPITE THE FACT THAT THERE WAS NO DETERMINATION ON THAT ISSUE THAT BECAUSE HE HAS AN IQ OF 66 AND HAS SOME IMPAIRMENT IN ADAPTIVE FUNCTION WHICH WE DON'T KNOW EXACTLY WHAT IT IS AND WE HAVE NO DETERMINATION ABOUT WHAT HAPPENED BEFORE THE AGE OF 18, THAT WE ARE GOING TO SAY HE HAS THE FUNCTIONAL EQUIVALENCE OF SOMEONE WHO IS NOT ELIGIBLE?
>> THAT IS CORRECT.
WE DO HAVE INFORMATION ABOUT HIS FUNCTION AND ADAPTATION BEFORE THE AGE OF 18.
HE WAS IN THIRD GRADE THREE TIMES, HE WAS IN FOURTH GRADE TWO TIMES, AND WE HAD ACHIEVEMENT TESTS, WE KNEW HIS

FUNCTIONAL ACADEMICS ARE WAY
BELOW NORMAL, SO WE DO HAVE THAT
INFORMATION.
HE WAS IN EXCEPTIONAL SPECIAL ED
CLASSES HIS WHOLE LIFE.
IN SEVENTH GRADE OR SIXTH GRADE
HE WAS 14 YEARS OLD.
>> ALL OF THIS YOU ARE SAYING WE
SHOULD TAKE INTO CONSIDERATION.
IT WAS NOT ENOUGH TO HAVE A
HEARING ABOUT.
>> MAYBE THERE SHOULD HAVE BEEN
ADHERING.
I AM ASKING THE COURT TO SEND IT
BACK FOR A HEARING.
>> YOU ARE DEEP INTO YOUR
REBUTTAL.
>> I WILL WAIT UNTIL REBUTTAL,
THANK YOU VERY MUCH.
>> MAY IT PLEASE THE COURT,
PATRICK DELANEY REPRESENTING THE
STATE OF FLORIDA.
>> LET ME ASK AT THE OUTSET WHY
IS IT THAT A PROBLEM, WHY WAS AN
ERROR FOR THE TRIAL COURT TO
CONCLUDE THAT THE DEFENDANT'S
COGNITIVE DEFICITS WHICH MIGHT
NOT AMOUNT TO INTELLECTUAL
DISABILITY WHICH HASN'T BEEN
ESTABLISHED AS INTELLECTUAL
DISABILITY BUT WHICH NONETHELESS
SIGNIFICANT COGNITIVE DEFICITS,
THAT WAS A MITIGATING
CIRCUMSTANCE?
>> THERE'S ALSO THE I.Q. SCORE
OF 81.
THIS ARGUMENT, MY DEFENSE IS
BEING PRESENTED IN A VACUUM AND
IGNORING THE I.Q. SCORE THE
DEFENDANT HAD OF 81.
>> WHEN HE WAS HOW OLD?
>> WHEN HE WAS 8 YEARS OLD.
>> WHEN THE JUDGE SAID IN
REJECTING IT, DESPITE THE
DEFENDANT THAT LOW TEST SCORES,
DR. BLOOMFIELD TESTIFIED HE DID
NOT JUST THE DEFENDANT WAS
INSANE AT THE TIME OF THE
OFFENSE.
WAS CERTAINLY COMPETENT.

THEN IT SAYS THE COURT FINDS THE DEFENDANT HAS ESTABLISHED THE CIRCUMSTANCE BUT IT IS NOT MITIGATING IN NATURE AND THE COURT GIVES IT NO WEIGHT.
YEARLY THIS IS SOMEWHAT POTENTIALLY ESPECIALLY IF ALL OF THIS BEARS OUT ABOUT THE SCHOOL RECORDS, CERTAINLY ENTITLED TO BE GIVEN WEIGHT, MAYBE EVEN SIGNIFICANT WEIGHT.
HE JUST REJECTED IT BASED ON SAYING HE WASN'T INSANE AT THE TIME OF THE SHOOTING.
>> IN THE PRECEDING PARAGRAPH THE VERY FIRST SENTENCE HE ALSO TALKS ABOUT DR. BLOOMFIELD DISCUSSING THE DEFENDANT'S PRIOR TEST SCORES AND HIS STORY AND FAMILY RELATIONSHIPS.
IT IS NOT EXPLICIT IN THE SENTENCING QUARTER BUT HE DOES DISCUSS THAT AND THIS IS BASED --
>> YOU MAY HAVE IT IS HARMLESS OR IT MAY BE -- WE HAVE GOT IN THIS AGE OF UNDERSTANDING THE SIGNIFICANCE OF IN DELECTABLE DISABILITY, MENTAL RETARDATION, POTENTIAL IMPACT U.S. SUPREME COURT HAS BROUGHT AND THE IMPACT ON THE DEATH PENALTY FOR A JUDGE TO SAY IN WHAT EVERY YEAR THIS WAS DONE THAT HE WASN'T IN SANE AND HIS LOW IQ DOESN'T MATTER IS JUST -- CAN'T SANCTION THAT.
>> BEST PRACTICES WOULD HAVE DICTATED SOME WEIGHT BE APPLIED TO THE I.Q. SCORE BUT WHAT THE TRIAL COURT DID WAS LOOK AT THE CONSEQUENCES OR AFFECTS SOMEONE WOULD HAVE FOR A VERY LOW I.Q. SCORE AND GIVE THOSE FACTORS WAGE.
HOW THIS WAS COUCHED BY THE DEFENSE IN THEIR SENTENCING MEMORANDUM WAS A HEADING OF NON STATUTORY MENTAL LITIGATORS AND A SERIES OF BULLET POINTS THE LISTED VARIOUS ISSUES ONE OF

WHICH BEING JUST BE I.Q. SCORE.
WITH THE TRIAL COURT DID WAS
JUST NOT GIVE WEIGHT TO THE I
USED FOR.
>> WE HAD SOME DEFENSE LAWYERS
THAT WERE NOT DOING WHAT THEY
NEEDED TO DO TO DEVELOP THIS.
MAYBE IT CAN'T BE BUT WE ARE
GOING TO JUST WAIT FOR POST
CONVICTION TO LOOK AT THIS?
A PRUDENT POSSIBLE ROUTES, DON'T
EXPECT YOU TO AGREE WITH IT, LET
IT BE RELINQUISHED FOR A HALT
HEARING AND SEE WHAT THE
FINDINGS ARE.
>> IT WAS VERY EXPLICIT BY THE
DEFENSE THAT THEY WERE NOT
PURSUING AN INTELLECTUAL
DISABILITY CLAIM.
THAT WAS EXPLICIT IN THEIR
SENTENCING MEMORANDUM AND THEIR
ARGUMENTS TO THE COURT.
OBVIOUSLY EVENT HAD A REASON AND
THE REASON CAN BE FLESHED OUT IN
POST CONVICTION.
THESE WERE EXPERIENCED DEFENSE
LAWYERS HANDLING THIS CASE.
YOU ASKED ABOUT WHAT WAS THE
EVIDENCE OF ADAPTIVE FUNCTIONING
AND THERE REALLY WASN'T ANY
EVIDENCE OF ADAPTIVE FUNCTION
IN.
WHAT CAME IN WAS THE DEFENDANT
WAS IN SPECIAL EDUCATION
CLASSES, COMPLETED 10 GRADE, HE
DID HAVE SOME JOBS.
>> DID HE GO THROUGH THIRD GRADE
THREE TIMES?
>> I BELIEVE THAT IS CORRECT.
SHE HAD JOBS AS A HEAVY MACHINE
OPERATOR OR A TRUCKING JOB.
IS UNCLEAR IN THE RECORD WHICH
ONE IT WAS.
BUT HE DID HOLD JOBS.
HIS BROTHER TESTIFIED THAT HE
COULD LIVE AND WORK CAN'T MAKE A
LIVING AND FUNCTION IN SOCIETY
BUT CHOSE NOT TO.
>> WAS HE LIVING ON HIS OWN?
ASSUMING HE DIDN'T LIVE WITH HIS

PARENTS.
>> THERE IS NO REAL EVIDENCE HOW HE LIVED OR WHO HE WAS LIVING WITH.
IN ADDITION THE REPORTS FROM DR. BLUM SAID THE FIELD GAVE TWO REPORTS THAT ARE NOT PART OF THIS RECORD.
THOSE REPORTS CAN CONTAIN INFORMATION FOR WHICH WILL BE DISCOVERED POST CONVICTION AS TO WHAT WAS TRIAL COUNSEL PROCEEDING ON WITH INTELLECTUAL DISABILITY CLAIM.
I WANT TO BRIEFLY DISCUSS THE FIRST ISSUE ABOUT NON STATUTORY AGGRAVATION.
THE QUESTION POSED BY DEFENSE TO REGINALD LESTER WAS IN YOUR EXPERIENCE WITH MR. NEWBERRY, DO YOU THINK HE CAN MAKE A POSITIVE DIFFERENCE IN THE LIVES OF OTHER INMATES IN PRISON?
MR. LESTER ANSWER IS YES, MA'AM.
THE QUESTION WAS ONE THAT WAS ASKED, IS THIS GOING TO BE A MODEL PRISONER, IS IT GOING TO BE A ROLE MODEL FOR OTHER PEOPLE IN PRISON?
MR. LESTER ANSWERED YES.
WHAT THE STATE ON CROSS-EXAMINATION REBUTTED THAT TESTIMONY WITH WAS THE THREAT TO A CORRECTIONS OFFICER.
THAT WAS PROPER REBUTTAL OF EVIDENCE INTRODUCED BY THE DEFENSE.
FOR THE OPPOSING COUNSEL FOCUSING ONLY ON THE ANSWER FROM REGINALD'S MR. WHICH DOES TALK ABOUT JESUS AND HE THINKS HE CAN BE A GOOD PERSON IN PRISON.
CAN HE MAKE A POSITIVE DIFFERENCE OF THE LIVES OF OTHER INMATES IN PRISON?
WHAT THE STATE DOES IS NOT GO AND BRING IN THREATS TO OTHER PEOPLE OUTSIDE PRISON, NOT BRING IN PRIOR CONVICTIONS THAT WERE NOT PREVIOUSLY PROVEN.

THEY BROUGHT IN EVIDENCE OF A THREAT TO A CORRECTIONS OFFICER. VIOLENT THREAT.
SHE THREATENED TO KILL A CORRECTIONS OFFICER.
THAT IS NOT A MODEL INMATE AND THE JURY IS ENTITLED NOT ONLY TO HEAR THE REBUTTAL EVIDENCE BUT USE IT TO ESTABLISH THE CREDIBILITY OF THE PERSON WHO IS TESTIFYING SAYING I THINK HE HAS GOT TO BE A GOOD PERSON IN PRISON, HE CAN MAKE A POSITIVE DIFFERENCE WITH THOSE OTHER INMATES.
THERE ARE NO OTHER QUESTIONS FOR THE AFOREMENTIONED REASONS THE STATE REQUEST THIS COURT AFFIRMED MR. NEWBERRY'S CONVICTION AND SENTENCE, THANK YOU.
>> WITH REGARD TO THE JUDGE GIVING WEIGHT TO ASPECTS OF THE DEFENDANT'S PERSONALITY, THE IMPORTANT POINT IS THE JUDGE IGNORES ASPECTS OF HIS LOW INTELLECTUAL FUNCTION, THE CULPABILITY WHICH IS WHY THE JUDGE ERRED IN NOT GIVING THIS ANY WEIGHT WHATSOEVER IN HIS ORDER.
IN THE THIRD ISSUE WITH REGARD TO PROPORTIONALITY, THE ONLY THING THAT SEPARATES THIS CASE FROM DEFENDANTS, EXEMPT CATEGORICALLY FROM THE DEATH PENALTY IS LACK OF CLEAR EVIDENCE OF THE AGE OF ONSET OF THIS MAN'S INTELLECTUAL DISABILITY.
>> IN FAIRNESS THE COUNCIL MAY HAVE REASONS, IT SEEMS THEY REALLY WENT WITH THIS AND WHETHER IT THEY HAD REASONS, IT DOES SEEM THIS IS MORE APPROPRIATE AS SOMETHING THAT ISN'T THE DEFICIENCY POST CONVICTION OR I DON'T KNOW WHAT THE TIMING IS TO REQUEST A NEW HEARING ON ATKINS' HALL IF ONE

WAS REQUESTED.
>> I REQUESTED ONE, THE DEFENDANTS WHEN THEY DISCOVERED A TASK GIVEN AT AGE 8 THAT THEY FELT THEY COULDN'T.
IT WAS THEIR UNDERSTANDING OF WHAT THAT MEANT, THEY COULD NOT PROVE THE DIAGNOSIS OF MENTAL RETARDATION BEFORE THE AGE OF 18.
THAT IS INCORRECT AND WRONG.
>> ADAPTIVE FUNCTION IS ONE OF THE PRONGS AND IT IS JUST CURSORY TESTIMONY FROM THE DOCTOR ON IT.
>> THE STATE DID NOT CONTEST THAT, DID NOT CROSS-EXAMINE WITH REGARD TO HIS OPINION ON THAT.
>> IN ANY CASE THE DEFENDANT PUTS ON AN IQ SCORE AND SAYS THERE WAS ADAPTIVE DEFICITS.
>> Reporter: THE COURT DOES AND SHOULD LOOK AT THAT BECAUSE THE PREPONDERANT OF EVIDENCE IS HE HAS ADAPTIVE DEFICITS.
DR. GLENNFIELD NEVER WAFFLE ON THAT.
HE WAS ASKED AT ONE POINT IS THE STREET SMART, HE SAID HE LOOKS LIKE HE CAN FUNCTION, THAT IS IT, HE HAS HIGH PROCESSING SPEED, THAT IS ONE ASPECT OF HIS INTELLECTUAL IMPAIRMENT WHICH IS NOT IN THE BOTTOM --
>> YOU TALK ABOUT HIS ADAPTIVE FUNCTIONING, GO THROUGH THINGS LIKE CAN HE HOLD A JOB, CAN HE TAKE CARE OF HIMSELF, A LOT OF DIFFERENT ASPECTS OF HOW PEOPLE LIVE IN SOCIETY.
HE LOOKS LIKE HE IS STREET SAVVY, DOESN'T ANSWER THE QUESTION.
>> AGAIN, IF THE COURTS WERE REVIEWING THE TRIAL COURT'S DECISION AS TO WHETHER HE MEETS THE DIAGNOSIS.
THAT MIGHT BE AN ISSUE COURT -- I AM ASKING YOU TO RECOGNIZE WHAT THE RECORD SAYS ABOUT WHO

THIS MAN IS.
>> YOU TALK ABOUT THREE
DIFFERENT THINGS YOU ARE ASKING
FOR.
YOU SENT IT BACK FOR A HEARING,
YOU WANT US TO REDUCE IT TO LIFE
BECAUSE HE HAS AS YOU SAID ALL
THE ASPECTS OF THIS INTELLECTUAL
DISABILITY.
YOU ARE ASKING US TO TAKE ON
FAITH WHAT THE DOCTOR SAYS HE
HAS LOW ADAPTIVE FUNCTIONING
WITHOUT GOING THROUGH THE
SPECIFICS OF WHAT THAT MEANS.
>> WHEN REVIEWING A COURT CASE
FOR PROPORTIONALITY THAT IS WHAT
THE COURT ALWAYS DOES.
DON'T DISPUTE IT.
>> IT IS UNDISPUTED THAT WE
DON'T HAVE IN THIS RECORD TO --
>> IT WAS NEVER CHALLENGED.
THE JUDGE FOUND IT.
>> IF THERE IS NO EVIDENCE WHAT
IS THERE TO CHALLENGE?
I AM JUST SAYING --
>> THE STATE COULD HAVE
CROSS-EXAMINED DR. BLOOMFIELD IF
THEY FELT HIS OPINION WAS
INCORRECT AND THEY DIDN'T.
IN CLOSING, MY FIRST ARGUMENT IS
TO REDUCE THE SENTENCE TO LIFE.
MY SECOND ARGUMENT IS TO SEND IT
BACK.
THE ALTERNATIVE FOR AN ADKINS
HEARING RIGHT NOW, MY THIRD
ARGUMENT WOULD BE TO SEND IT
BACK FOR RESEND AND THINGS SO
THE TRIAL JUDGE CAN PROPERLY
CONSIDER HIS INTELLECTUAL
IMPAIRMENT.
>> THANK YOU FOR THE ARGUMENTS.