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Loran Cole v. State of Florida

NEXT CASE ON THE COURT'S DOCKET IS COLE VERSUS STATE.

MAY IT PLEASE THE COURT. MY NAME IS KEVIN BECK AND WITH ME IS LESSLY SCALLEY, AND WE HAVE THE PRIVLEGES OF -- PRIVILEGE OF REPRESENTING LORAN COLE BEFORE THIS COURT. POSTCONVICTION RELIEF IS ROUTINELY REFERRED TO AS MONDAY MORNING QUARTERBACKING. OUR VISION IS 20/20 HINDSIGHT OF THE CASE. HOWEVER, IN THE CASE OF THE STATE OF FLORIDA VERSUS LORAN COLE, THE FUTURE WAS OBVIOUS THROUGH THE DEFICIENT PERFORMANCE OF TRIAL COUNSEL. I WOULD LIKE TO RELY UPON OUR PLEADINGS FOR THE MAJORITY OF CLAIMS THAT WE HAVE RAISED AND FOCUS, THIS MORNING, ON TWO PARTICULAR AREAS, AREAS OF DEFICIENCY, AREAS THAT I CLAIM TO BE TEARS OF DEFICIENCY. THE FIRST TIER OF DEFICIENCY WOULD BE THE FACTUAL DEFICIENCY OR TRIAL COUNSEL'S FAILURE TO PRESENT EVIDENCE THAT WOULD SUPPORT STATUTORY AND NONSTATUTORY MITIGATION. IN SUPPORT OF A LIFE SENTENCE, ON BEHALF OF LORAN COLE. THE SECOND TIER, AND I WOULD SUBMIT THAT THAT TIER IS ACTUALLY MORE IMPORTANT THAN THE FACTUAL TIER, IS THE LEGAL TIER. AND THAT WAS TRIAL COUNSEL'S FAILURE TO REQUEST SPECIFIC INSTRUCTIONS THAT WOULD HAVE PROVIDED THE JURY WITH THE NECESSARY LAW TO MAKE AN APPROPRIATE AND LEGAL DETERMINATION AS TO WHETHER OR NOT, IN THE CASE OF THE STATE OF FLORIDA VERSUS LORAN COLE, THE AGGRAVATING FACTORS THAT HAD BEEN PRESENTED CLEARLY AND TRULY OUTWEIGHED THE MITIGATION THAT COULD HAVE AND SHOULD HAVE BEEN PRESENTED. WHAT WE HAVE IN THIS SITUATION, IN THE CASE OF LORAN COLE, WAS TRIAL COUNSEL HAVING PRESENTED, AFTER THE JURY HAD RECEIVED SIGNIFICANT AN EXTENSIVE TESTIMONY REGARDING THE NATURE OF THE EVENTS WHICH LED TO THE DEMISE OF JOHN EDWARDS, EXTENSIVE TESTIMONY THAT WENT TO THE HORRORS THAT WERE SUFFERED BY PAMELA EDWARDS. AS A MATTER OF FACT, THE JURY HEARD, AND THIS COURT UPHELD AS APPROPRIATE, TESTIMONY AS TO HOW THE DEATH OF JOHN EDWARDS HAD AFFECTED THIS COMMUNITY. AS A MATTER OF FACT HOW IT AFFECTED THIS ENTIRE COUNTRY. THE JURY HAD A WONDERFUL OPPORTUNITY TO EXAMINE THE FACTS AS IT PERTAINED TO MR. COLLAPSE GUILT -- TO MR. COLE'S GUILT, MR. COLE'S CULPABILITY. WHAT THE JURY DID NOT RECEIVE WAS A THOROUGH PICTURE OF THE INFORMATION NECESSARY TO DEMONSTRATE THOSE MITIGATING OR THOSE MITIGATION ISSUES THAT WOULD HAVE NECESSARILY ALLOWED THE JURY TO MAKE AN APPROPRIATE WEIGHING. TRIAL COUNSEL PRESENTED THE TESTIMONY OF DR. BURL ENBURLIN AND THREE FAMILY MEMBERS. THE TESTIMONY DEMONSTRATED THAT LORAN COLE SUFFERED FROM A MENTAL ILLNESS AND ORGANIC BRAIN JURY. -- BRAIN INJURY. HOWEVER, DR. COLE TESTIFIED THAT HE HAD NOT RECEIVED SUFFICIENT INFORMATION FROM TRIAL COUNSEL TO MAKE A COMPLETE EXAMINATION, TO DETERMINE WHETHER OR NOT THE MENTAL ILLNESS AND ORGANIC BRAIN INJURY THAT HE HAD EXPERIENCED WERE PRESENT AT THE TIME OF THE INCIDENT. ONCE MORE,AL COUNSEL FAILED, DESPITE HAVING CLEARLY RECOGNIZED THE NEED FOR A NEURO PSYCHOLOGIST IN THIS CASE, TO THOROUGHLY PREPARE AND TO INVESTIGATE AND PRESENT TESTIMONY OF A NEURO PSYCHOLOGIST ON BEHALF OF LORAN COLE.

DID HE CONSULT WITH A NEURO PSYCHOLOGIST?

THE RECORD INDICATES, JUSTICE ANSTEAD, THAT APPROXIMATELY TWO MONTHS, WITH TWO AND-A-HALF MONTHS BEFORE THIS TRIAL WAS TO OCCUR, TRIAL COUNSEL RECOGNIZED THE NEED FOR A NEURO PSYCHOLOGIST AND REQUESTED FROM THE TRIAL COURT, THE NECESSARY FUNDS TO HIRE, AND DID, IN FACT, RETAIN DR. BORDNICK, ONE WEEK BEFORE THE TRIAL. THE RECORD, ALSO, DEMONSTRATES THAT DR. BORDNICK PERFORMED A SIMPLE ONE-HOUR

CONSULTATION OR MEETING WITH LORAN COLE, SPENT ONE HOUR CONSULTING WITH TRIAL COUNSEL, AND THEN BILLED THE COURT FOR AN ADDITIONAL ONE-HALF-HOUR OF TRAVEL TIME. DR. BURLIN TESTIFIED THAT HE HAD REVIEWED OVER --

ARE YOU MAINTAINING THAT THE NEURO PSYCHOLOGIST HAD TO -- AS I UNDERSTAND, THE STATE SAYS THAT THE NEURO PSYCHOLOGIST HAD THE BENEFIT OF TESTING THAT WAS DONE BY DR. BURLIN, AND HE PERFORMED A COUPLE OF MPR TESTS AND OTHER TESTS. ARE YOU MAINTAINING THAT THE NEURO PSYCHOLOGIST HAD TO DO THESE TESTS HIMSELF, THAT HE COULD NOT RELY ON PREVIOUS TESTING THAT HAD ONLY BEEN DONE A SHORT PERIOD PRIOR TO HIS OWN EVALUATION OF THE DEFENDANT?

FORTUNATELY, WE HAVE THE TESTIMONY, THE PROPER -- THE PROFFERED TESTIMONY OF DR. DEE AT THE EVIDENTIARY HEARING, THAT DESCRIBES, FOR US, THE TESTS THAT ARE NECESSARY FOR A NEURO PSYCHOLOGIST TO MAKE AN APPROPRIATE EVALUATION OF THE INDIVIDUAL. IT IS OUR CONTENTION, AND THE RECORD INDICATES THAT DR. BORDNICK DID NOT RECEIVE ALL OF THE TEST RESULTS THAT DR. BURLIN HAD PERFORMED IN HIS EVALUATION OF LORAN COLE. HE HAD NOT RECEIVED THE WEXLER TEST OR THE RESULTS OF THE WEXLER TEST AND AS A RESULT WAS NOT ABLE TO RELY UPON THOSE TEST INS DETERMINING OR DEVELOPING AN OPINION. HE HAD CLEARLY, IF WE REVIEW THE TESTIMONY OF DR. DEE, INADEQUATE TIME, INADEQUATE OPPORTUNITY TO DO THE TYPE OF TUGH EVALUATION THAT IS NECESSARY FOR ANYBODY IN T FIELD TO DN PPROPEEVI. ONE OF DR. DEE'S --

S YOUR CLAIM IN THIS REGARD AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM?

IT IS TWO ONG, JUSTICE WELLS, IF I UNDERSTAND THE QUESTION. THE FIRST CLAIM IS THAT, YES, TRIAL COUNSEL WAS INEFFECTIVE FOR HAVING FAILED TO APPROPRIATELY PRESENT THE TESTIMONY OF A NEURO PSYCHOLOGIST, DR. BORDNICK, THAT HE HAD THE OBLIGATION AND RESPONSIBILITY, IF NOTHING ELSE, TO JUSTIFY THE DIFFERING OPINIONS OR DIFFERENT OPINIONS OF DR. BURLIN AND DR. BORDNICK, THAT HE HAD AN OBLIGATION TO REVIEW, UNDER ELEVENTH CIRCUIT CASE MOORE V CAMP, THE QUALIFICATION OF THE NECESSARY STANDARDS OF A NEURO PSYCHOLOGIST, IN DEVELOPING AN APPROPRIATE NEUROPSYCHOLOGICAL EVALUATION. WE ARE, ALSO, MAKING A CLAIM THAT DR. BORDNICK WAS INEFFECTIVE OR THAT HIS SERVICES AS A NEURO PSYCHOLOGIST FAILED TO PROVIDE --

IS -- YOUR CLAIM ON THE BASIS OF ACHEY IS AN INEFFECTIVE NEUROPSYCHOLOGIST CLAIM, OR IS IT A CLAIM THAT THE TRIAL JUDGE FAILED TO PROVIDE HIM FUNDS TO HIRE A NEUROPSYCHOLOGISTT?

CERTAINLY THAT IS A DISTINGUISHING FEATURE, BUT IT IS OUR CONTENTION THAT TRIAL COUNSEL IN THE INSTANT MATTER, FIRST AND FOREMOST, HAD THE RESPONSIBILITY TO INVESTIGATE AND PRESENT THIS EVIDENCE. HE RECOGNIZED THE NEED FOR A NEUROPSYCHOLOGIST, WHEN HE WENT TO THE TRIAL COURT --

YOU ARE NOT BASING YOUR CLAIM ON ACHEY.

THERE IS AN ACHEY CLAIM THAT IS ALSO PRESENT IN THE PLEADING.

WHAT IS THE BASIS OF YOUR ACHEY? >T DR. BORDNICK FAILED TO ADEQUATELY PERFORM AN EVALUATION THAT WOULD HAVE ASSISTED BOTH TRIAL COUNSEL BUT, ALSO, WOULD HAVE PRESENTED, ON BEHALF OF LORAN, THE NECESSARY --

IMTRYING TO UNDERSTAND HOW THAT FITS WITHIN ACHEY. I MEAN, ACHEY, AS I UNDERSTAND IT, IS WHERE THERE IS A STATE FAD TO PROVIDE FUNDS TO HIRE A -- ARE YOU SAYING THAT BORDNICK WASN'T A QUALIFIED PERSON?

NO. WE ARE NOT SAYING THAT DR. BORDNICK --

DR. BURLIN?

NO. DR. BURLIN WAS CLEARLY QUALIFIED AS WE BELIEVE WAS DR. DEE. OUR CONTENTION, THOUGH, DR. BORDNICK HAD A RESPONSIBILITY TO LORAN COLE AND THAT HE DID NOT FOLLOW THROUGH ADEQUATELY, IN PERFORMING HIS SERVICES ON BEHALF OF LORAN COLE.

DID YOU HAVE SOME EVIDENCE OFFERED BY THAT? THAT IS FOR INSTANCE DID YOU HAVE DR. DEE EVALUATE WHAT --

DR. DEE EVALUATED --

WHAT THIS OTHER DOCTOR DID AND SAY IT IS CLEAR THAT THAT DOCTOR DID A SUMMARY, YOU KNOW, EVALUATION, WHICH IS NOT ADEQUATE IN A CASE LIKE THIS, AND THAT HE SHOULD HAVE DONE SO-AND-SO AND SO-AND-SO AND HE DIDN'T DO THAT? DO YOU UNDERSTAND WHAT -- WAS ANY EVIDENCE -- WAS ANY EVIDENCE LIKE THAT PRESENTED AT THE EVIDENTIARY HEARING?

UNDERSTANDING, OF COURSE, THAT DR. DEE WAS NOT ALLOWED TO TESTIFY IN SUCH A MANNER THAT WOULD HAVE ALLOWED THE TRIAL COURT TO HAVE RELIED UPON THAT TESTIMONY BUT WAS MERELY ALLOWED TO PROFFER HIS TESTIMONY, I THINK THAT DR. DEE'S TESTIMONY THAT A NEUROPSYCHOLOGIST CAN IDENTIFY SOMEBODY THAT IS IMPAIRED WITHIN AN HOUR BUT CAN'T IDENTIFY SOMEBODY THAT IS NOT IMPAIRED WITHIN AN HOUR, SPOKE DIRECTLY TO THAT ISSUE. I WOULD ANALOGY JIS THAT TO ONE -- ANALOGIZE THAT, TO ONE OF US WALKING THROUGH THE EMERGENCY ROOM AT TALLAHASSEE MEMORIAL HOSPITAL, WE CAN WALK THROUGH THE EMERGENCY ROOM, AND WE CAN TELL AT FIRST GLANCE, AT FIRST BLUSH WHICH INDIVIDUALS IN THERE ARE NOT HEALTHY. WE CAN'T NECESSARILY IDENTIFY THOSE THAT ARE NOT. IT WAS DR. DEE'S OPINION THAT, INRDERO PERFORM AN EFFECTIVE THOROUGH EVALUATION, YOU NEED TO SPEND SIX-TO-SEVEN HOURS THAT, IT STAKES -- IT TAKES AN HOUR TO AN HOUR AND-A-HALF JUST TO GET THE MEDICAL AND PERSONAL HISTORY OF AN INDIVIDUAL.

SO IN HIS PROFFERED TESTIMONY HE DIDN'T TOUCH ON THE --

HE DID, YOUR HONOR. HE ABSOLUTELY DID. NOW, AGAIN, FOCUSING ON PRIMARILY ON TRIAL COUNSEL'S FAILURE TO PRESENT THIS INFORMATION, TRIAL COL'S FAILURE TO PRESENT A 17-YEAR HISTORY OF CHRONIC DRUG AND ALCOHOL ABUSE, NECESSARILY LEFT THE JURY WITHOUT THE APPROPRIATE INFORMATION TO WEIGH THE MITIGATORS AGAINST THE AGGRAVATORS.

WHAT DID THE TRIAL JUDGE, WHO HAD AN EVIDENTIARY HEARING ON THIS ISSUEUND THAT THERE WAS IT WAS CUMULATIVE, AND I KNOW THAT WE WERE ALWAYS IN THE SITUATION WHERE, IN THIS CASE, WE DON'T HAVE A COMPLETE ABS OF DRUG AND ALCOHOL -- ABSENCE OF DRUG AND ALCOHOL ABUSE TESTIMONY. DO YOU AGREE WITH THAT?

YES, YOUR HONOR.

SO THE QUESTION IS HOW DO WE EVALUATE WHETHER, IN FATHIS WAS JUST CUMULATIVE OR THAT THE QUALITY IS SO MARKEDLY DIFFERENT THAT IT WAS JUST A COMPLETELY DIFFERENT CASAT WOULD HAVE BEEN PRESENTED?

I THINK WE CAN APPROACH IT FROM TWO DIFFERENT PERSPECTIVES. THE FIRST PERSPECTIVE IS TT THE TRIAL COURT ERRED IN HAVING FAILED TO PROVIDE AN EVIDENTIARY HEARING, TO ALLOW POSTCONVICTION COUNSEL TO PRESENT EVIDENCE THAT WOULD HAVE NECESSARILY DETERMINED WHETHER OR NOT IT HAD BEEN CUMULATIVE OR WHETHER, AS A MATTER OF LAW, THE FACTS SUPPORTED ADDITIONAL STATUTORY OR NONSTATUTORY MITIGATORS. HOWEVER --

SO THIS WAS A CLAIM THAT WAS SUMMARILY DENIED?

WE WERE NOT AFFORDED THE OPPORTUNITY FOR AN EVIDENCIARY --

SO IT WAS SORT OF THE JUDGE WENT THROUGH AND DID GIVE YOU SOME PENALTY PHASE CLAIMS, BUT NOT ON THIS. BUT THENOU PROFFERED YOR TESTIMONY AS TO WHAT --

-- AS TO DR. DEE.

NOW, WHAT ABOUT ON THE DRUG AALC?

THERE WAS NO PROFFER ALLOWED. THE EVIDENTIARY WAS LIMITED TO THREE PARTICULAR WITNESSES. THOSE WITNESSES INCLUDED DAWN GLEASON, THE TRIAL COUNSEL.

DID YOU, AT THE HUFF HEARING, EXPLAIN WHAT YOU WOULD HAVE IN THE WAY OF ADDITIONAL OR DIFFERENT TESTIMONY IN DRUG AND ALCOL ABUSE?

NOT HAVING BEEN PRESENT AT TUF HEARING, AND I CANNOT ANSWER THAT DIRECTLY, JUSTICE PARIENTE. WHAT I DO KNOW, HOWEVER, FROM THE RECORD, IS THAT THIS TRIAL URINITS SENTENCING ORDER, DID NOT FIND THAT THERE HAD BEEN ANY, WHETHER IT BE STATUTORY OR NONSTATUTORY MITIGATING EVIDENCE AS TO THE IMPAIRED CAPACITY ON THE PART OF LORAN COLE. SO FOR THE COURT, THEN, TO REJECT AN EVIDENTIARY HEARING IN THIS AREA, AS A RESULT OF A CONCLUSION THAT SUCH EVIDENCE WOULD BE CUMULATIVE, IS INCONSISTENT WITH THE COURT'S FAILURE TO FIND A STATUTORY OR NONSTATUTORY MITIGATION AT THE SENTENCING.

BUT THE DEFENDANT HAD A LONG HISTORY OF DRUG AND ALCOHOL ABUSE. THE IMPAIRMENT ON THE DAY OF THE ACCIDENT THAT, IS A DIFFERENT ISSUE ON WHETHER THERE SHOULD HAVE BEEN TESTIMONY OR THERE WASN'T ENOUGH TESTIMONY ABOUT A LNGTORF GAND AL A. ANOTHER TRIAL COURT FOUND NO, IN ITS SENTENCING ORDER THAT, DRUG OR ALCOHOL ABUSE HAD PLAYED A ROLE, EITHER IN THE EVENT OR IN THE BACKGROUND OF LORAN COLE. AS A RESULT OF INVESTIGATION AND INFORMATION THAT WAS DETERMINED, AND THE INFORMATION WASN'T PURELY ANECDOTAL. THERE WAS INFORMATION AVAILABLE TO TRIAL COUNSE,THE FORM OF D.O.C. RECORDS FROM THE STATE OF OHIO AND FLORIDA,TSHOWED, NOT AS PRESENTED AT TRIAL, THAT LORAN COLE SUFFERED FROM A DRINKING AND A MARIJUANA PROBLEM BECAUSE THAT ISSSLY ALL THAT WAS PRESENTED, WAS THAT HE HAD BEEN DRINKING. HE HAD BEEN SMOKING POT, AND THAT THERE WAS A HISTORY, AND THERE WERE INDIVIDUALS THATNEW THAT HE SMOKED POT AND THAT HE DRANK. WHAT THE RECORDS FROM DOC, WHICH WOULD HAVE BEEN AVAILABLE TO TRIAL SEL, WOULD HAVE EMRD THAT, FOR 17 YEARS, LORAN COLE HAD BEEN I DON'T KNOWCALLY ABUSING CRANK, CRACK COCAINE, LSD, HE HAD BEEN SPEEDO BALLING, HE HAD BEEN SNIFFING PAINT THINNER AND GLUE, AND THAT WAS DOCUMENTED BUT IT WASN'T PRESENTED AT TRIAL, AND COUNSEL WAS NOT PROVIDED AN OPPORTUNITY TO PRESENT EVIDENCE AS EVIDENTIARY IN THIS MATTER, BECAUSE THE TRIAL COURT FOUND IT TO BE CUMULATIVE.

ALL RIGHT. SO YOUR ARGUMENT HERE IS THAT THE QUALITY IS DIFFERENT, BECAUSE WHAT YOU WOULD PRESENT AT AN EVIDENTIARY HEARING IS DOCUMENTARY EVIDENCE OF A LONG-TERM AND SERIOUS DRUG ADDICTION.

QUALITATIVE AND QUANTITATIVE. WHAT I WOULD LIKE TO DO, HOWEVER IS TO MOVE TO THAT AREA WHICH I THINK IS PROBABLY EVEN MORE SIGNIFICANT. MR. CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL TIME.

OKAY. VERY BRIEFLY. I THINK PROBABLY THE GREATEST DEFICIENCY, THAT WHICH CAUSES US TO QUESTION OR TO, WHICH UNDERMINES OUR CONFIDENCE IN THE OUTCOME OF THIS MATTER,

WAS TRIAL COUNSEL'S ESSENTIAL STIPULATION OF WEIGHING THE STATUTORY MITIGATORS. THE TRIAL COURT FOUND, THROUGH THE TESTIMONY OF DR. BURLIN, THAT LORAN COLE SUFFERED FROM MENTAL ILLNESS AND ORGANIC BRAIN JURY. -- BRAIN INJURY. HOWEVER, THE DEFENSE COUNSEL FAILED TO REQUEST THE STATUTORY MITIGATORS. WHEN THE PROSECUTOR INSTRUCTED THE COURT THAT HE DID NOT BELIEVE THAT THOSE MITIGATORS WERE PRESENT AND SHOULD NECESSARILY, AND THE JURY INSTRUCTION SHOULD NOT BE GIVEN, HE S MUTE. CONSEQUENTLY THE JURY WAS NEVER INSTRUCTED AS TO THE STATUTORY MITIGATORS THAT WERE PRESENTED, FONY MEAGERLY SO. ALSO, IMPORTANTLY, TRIAL COUNSEL FAILED TO REQUEST THE LIMITING CONSTRUCTION ON THE HEINOUS, ATROCIOUS AND CRUEL INSTRION. HE HAD DONE A VERY GOOD JOB, DURING THE CROSS-EXAMINATION OF THE MEDICAL EXAMINER, MISS PILLOWS, DEMONSTRATING THAT SHE WAS NOT ABLE TO PLACE IN CHRONOLOGICAL ORDER, THE DIFFERENT TRAUMA AND WOUNDS THAT WERE SUFFERED BY THE VICTIM JOHN HE WARDS. SHE WAS NOT ABLE TO TEST -- EDWARDS. SHE WAS NOT ABLE TO TESTIFY AS TO WHETHER OR NOT MR. EDWARDS WAS CONSCIOUS AT THE TIME THAT THE FATAL WOUND WAS APPLIED, AND YET TRIAL COUNSEL, HAVING RECOGNIZED THE IMPORTANCE OF THAT, FAILED TO REQUEST THE LIMITING CONSTRUCTION ON HEINOUS AT ATROCIOUS AND CRUEL, SO THE JURY COULD MAKE ITS OWN DETERMINATION AS TO WHETHER OR NOT ONE OF THE MOST SERIOUS AGGRAVATORS THAT WE HAVE RECOGNIZED DID, IN FACT, EXIST. THE JURY WAS LEFT WITH ABSOLUTELY NO LAW, WITH THE EXCEPTION OF THE CATCH-ALL STATUTORY MITIGATION, THAT WOULD ALLOW THEM TO APPLY THE LAW AS IT EXISTED AT THE TIME NOW TO THE FACTS THAT THEY PRESENTED.

WHAT DO YOU CONTEND WOULD BE THE LIMITING INSTRUCTION ON HEINOUS ATROCIOUS AND CRUEL?

THE LIMITING INSTRUCTION THAT THIS COURT HAS RECOGNIZED, THAT ANY EVENTS WHICH OCCUR AFTER THE DEATH OF A VICTIM ARE IRRELEVANT TO THE ISSUE OF HEINOUS, AT ATROCIOUS AND CRUEL. THE QUESTION AS TO WHETHER ANY EVENTS THAT OCCUR WHILE THE INDIVIDUAL IS UNCONSCIOUS CANNOT BE USED IN THE EVALUATION OF HEINOUS, ATROCIOUS AND CRUEL. THAT WAS EVIDENCE THAT WAS PRESENTED ON CROSS-EXAMINATION OF MS. PILLOWS, BUT THE INSTRUCTION WAS NOT REQUESTED. AS A RESULT, THE JURY WAS NOT ALLOWED TO DELIBERATE.

WAS THERE ANY ARGUMENT MADE ON THAT ISSUE?

THERE WAS, YOUR HONOR. I WOULD LIKE TO SIT DOWN AND RESERVE A LITTLE BIT OF TIME THAT I HAVE FOR REBUTTAL. MR. CHIEF JUSTICE: MS. RUSH.

MAY IT PLEASE THE COURT. I AM JUDY TAYLOR RUSH. I AM AN ASSISTANCE ATTORNEY GENERAL REPRESENTING THE STATE IN THIS CASE. REGARDING THE C AGGRAVATOR, THAT ISSUE WAS RAISED ON DIRECT APPEAL IN THIS COURT. AA CONSIDERABLE PART OF THIS COURT'S OPINION ON DIRECT APPEAL IS DEVOTED TO THAT AGGRAVATOR.

I GUESS HIS ARGUMENT, AND I AM TRYING TO UNDERSTAND, SOMEHOW THAT THERE SHOULD HAVE BEEN AN INSTRUCTGIVENT WASN'T GIVEN? IS THAT WHAT --

HIS ARGUMENT IS THAT THE TRIAL COUNSEL IS INEFFECTIVE FOR NOT REQUESTING AN INSTRUCTION TO THE JURY, THAT WOULD HAVE REQUIRED THAT THE JURY DENED JOHN WAS CONSCIOUS.

DO WE HAVE SOME INSTRUCTION THAT IS WITHIN THE -- THAT IS REGULARLY GIVEN IN CASES?

WE HAVE A STANDARD INSTRUCTION THAT IS REGULARLY GIVEN, AND THAT ONE WAS GIVEN IN THIS CASE. AND IT DOES NOT INCLUDE THE LIMITING INSTRUCTION --

SO YOU ARE SAYING ACTUALLY, IF EVEN IF ONE WAS RETED, THERE IS NO --

THERE IS NO REQUIREMENT THAT THE COURT WOULDEGIVEN IT, BUT EVEN GOING BEYOND THAT, IN THIS COURT'S OPINION ON DIRECT APPEAL,T QUOTED AT LENGTH, FROM THE TRIAL COURT'S ORDER, IN WHICH THE COURT CONCLUDED THAT JOHN WAS CONSCIOUS, THAT THE EVIDENCE ESTABLISHED THAT HE WAS CONSCIOUS FOR SEVERAL MINUTES WHILE HE GASPED FOR AIR FROM A SEVERED PIPE FLOWING WITH BLOOD, THAT IS MORE THAN SUFFICIENT TO MEET ANY INSTRUCTION, HAD ONE BEEN GIVEN THAT, IT MUST BE ESTABLISHED THAT HE WAS CONSCIOUS AT THE TIME THAT HE SUFFERED, AND THIS COURT SAID THAT THERE WAS EVIDENCE BEYOND A REASONABLE DOUBT OF HAC, AND CERTAINLY THAT IS TRUE, SO THERE COULD BE NO INEFFECTIVENESS OF COUNSEL, FOR NAIL FAILURE TO REQUEST, BECAUSE THERE COULD -- FOR FAILURE TO REQUEST, BECAUSE THERE COULD BE NO PREJUDICE, SINCE JOHN WAS CLEARLY CONSCIOUS AT THE TIME. THE OTHER JURY INSTRUCTION ISSUE THAT HE MENTIONED WAS THE STIPULATION OF TRIAL COUNSEL THAT THERE WAS NO STATUTORY MENTAL STATE MITIGATION, MITIGATOR INSTRUCTION BE GIVEN, AND THAT WAS BECAUSE THERE WAS NO EVIDENCE PRESENTED THAT WOULD SUPPORT A FINDING OF EITHER OF THE STATUTORY STATE'S MENTAL MITIGATORS. THE TRIAL JUDGE SPECIFICALLY FOUND THAT, IN HIS ORDER, REGARDING THE EXTREME, UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, THE TRIAL COURT WROTE THAT THE DEFENSE EXPERT, DR. BERLAND, TESTIFIED THAT THE DEFENDANT EXHIBITED SYMPTOMS OF SOME FORM OF ORGANIC BRAIN DAMAGE AND MENTAL ILLNESS. HOWEVEE WAS UNABLE TO ESTABLISH, AS SUCH, SIGNIFICANTLY INFLUENCED THE ACTS OF THE DEFENDANT, AND THEN REGARDING THE --

IS THAT THE ORIGINAL SENTENCING ORDER?

YES. THE ORIGINAL SENTENCING ORDER.

WAS DR. BERLAND PUT ON IN THE ORIGINAL CASE, TO ADDRESS THE STATE OF THE DEFENDANT, AT THE TIME OF THE CRIME?

YES. THAT IS WHY HE WAS PUT ON.

SO --

HE WAS THE DEFENSE MENTAL STATE EXPERT, AND HE WAS UNABLE TO TESTIFY TO THE FACTS THAT WOULD HAVE ESTABLISHED THE STATUTORY MENTAL STATE MITIGATION.

MY UNDERSTANDING IS THAT THIS TRIAL JUDGE FOUND THAT THE SEL WAS DEFICIENT FOR NOT REQUESTING THAT THE JURY BE INSTRUCTED ON IT, BUT THAT THE ECOND PRONG OF STRICKLAND WAS NOT MET. IN OTHER WORDS, THAT BECAUSE THE EVIDENCE DID NOT ESTABLISH THESE OR THAT THE TRIAL JUDGE HAD REJECTED THESE MITIGATORS, THAT THERE WAS NO HARM IN THE FAILURE TO INSTRUCT. IN OTHER WORDS, IA,LIKE YOU SAY, HAC -- HE STILL WOULD HAVE BEEN ENTITLED TO AN INSTRUCTION, BASED ON HIS THEORY OF THE CASE, THROUGH DR. BERLAND, ON THE STATUTORY MITIGATORS.

IF THERE WAS SOME EVIDENCE.

DR. BERLAND PROVIDE SOMEDAY EVIDENCE.

NOT OF THE STATUTOY MENTAL STATE MITIGATOR.

I THOUGHT YOU SAID THAT IS WHAT DR. BERLAND- > DR. BD SREY THE DEFENSE, IN ORDER TO EVALUATE COLE, TO SEE IF THERE WAS ANY MENTAL STATE MITIGATORS. HOWEVER, HE WAS UNABLE TO DETERMINE THAT THERE WERE ANY STATUTORY MENTAL STATE MTORS, AND HE DID NOT TESTIFY TO ANY FACTS THAT WOULD HAVE SUPPORTED THE FINDING OF STATUTORY MENTAL STATE MITIGAT. >F THE DEFENSE LAWYER WOULD HAVE REQUESTED THOSE

INSTRUCTIONS, THE JUDGE WOULD HAVE PROPERLY DENIED --

YES. THE COURT'S DECISION IN JARRALS, I BELIEVE IT IS, CITED IN THE BRIEF, THAT IS WHAT HAPPENED. THERE WAS NO EVIDENCE TO PUT ON OF THE STATUTORY MENTAL STATE MITIGATORS, AND THIS COURT SAID THERE WAS NO REASON TO INSTRUCT ON THOSE IN THIS CASE.

I JUST THOUGHT IT WAS DEFICIENT NOT TO HAVE INSTRUCTED BUT IT DIDN'T MEET THE SECOND PRONG. I THINK I AM IN ANOTHER CASE.

IT IS MY RECOLLECTION THAT THE JUDGE VERY CLEARLY FOUND, AND BY THE WAY, COLLATERAL JUDGE WAS THE SAME JUDGE AS THE TRIAL JUDGE, WHO FOUND IN HIS ORDER, THAT THERE WAS NOT ENOUGH EVIDENCE FOR EITHER OF THE STATUTORY MENTAL STATE MITIGATORS.

DO WE HAVE ANY NONSTATUTORY MENTAL MITIGATION HERE?

YES, WE DO, AND THAT WAS FOUND BY THE TRIAL COURT. HE FOUND NONSTATUTORY MENTAL STATE MITIGATION.

WHAT KIND OF WEIGHT WAS IT GIVEN?

IT WAS GIVEN MODERATE WEIGHT. AT ONE POINT HE SAID SLIGHT TO MODERATE, AND THEN, AT THE END OF THE SENTENCING ORDER, HE SAID HE IS GIVING IT MODERATE WEIGHT. I REMEMBER THAT CORRECTLY, I BELIEVE THAT IS THE WAY IT WAS IN THAT CASE.

IT IS THE STATE'S VIEW OF THE QUALITATIVE AND QUANTITATIVE DIFFERENCE IN THE MITIGATION THAT IS AVAILABLE, CERTAINLY IT SEEMS TO PAINT A COMPELLING PICTURE OF OTHER SUBSTANCES OTHER THAN A SIMPLE DRINKING PROBLEM.

WELL, THERE WAS EVIDENCE PRESENTED OF OTHER SUBSTANCES, AT THE PENALTY PHASE AND AT THE TRIAL. MARIJUANA SPECIFICALLY. I BELIEVE THERE WAS SOME REFERENCE TO OTHER DRUGS BESIDES MARIJUANA, AS WELL. THERE WAS THE SISTER, ONE OF THE -- COLLAPSE SISTERS WAS PRESENTED, AND SHE TESTIFIED THAT COLE HAD PROBLEMS WITH DRUGS DATING BACK TO THE AGE OF 12. IN THEIR BRIEF, THEY SAY, WELL, MR. GLEASON SHOULD HAVE PUT ON COLLAPSE MOTHER, TO SAY THAT SHE CAUGHT HIM DRINKING AT THE AGE OF TEN.

THERE SEEMS TO BEAG EMPHASIS ON DOCUMENTARY KINDS OF EVIDENCE.

THEY DO COMPLAIN THAT GLEASON DID NOT PRESENT DOCUMENTS REGARDING DRUG AND ALCOHOL ABUSE FROM OHIOD FLORIDA PRISON RECORDS. HOWEVER, THEY DID NOT ATTACH ANY SUCH DOCUMENTSO THER 3.850 N.

TS THAT NOT A REQMET GET ANENY HE?

WELL, ONE REQUIREMENT FOR GETTING AN EVIDENTIARY HEARING, YOUR HONOR, IS THAT THE MOTION BE LEGALLY SUFFICIENT, AND TO JUST THOUGH OUT THERE THAT THERE IS THESE DOCUMENTS IN EXISTENCE THAT HE COULD HAVE PRESENTED, D NOT EVEN ATTACH THE DOCUMENTS, I WOULD CONTEND IS LEGALLY INSUFFICIENT.

DID YOU SEE THE DOCUMENTS?

I HAVE NOT SEEN THE DOCUMENTS. WE LOOKED THROUGH THE RECORD, TO TRY TO FIND THE DOCUMENTS THAT HE REFERRED TO. I DID NOT FIND THEM THERE.

I JUST WANT, ONE OF THE THINGS THAT IS ALWAYS OF CONCERN HERE, AND IN KEEPING WITH JUSTICE LEWIS'S QUESTION, IS THAT, YOU KNOW, YOU PUT ON EVIDENCE OF EITHER MENTAL ILLNESS OR EVEN DRUG USE, AND THEN ON THESE 3.8 50s, THEY FIND SOME OTHER INFORMATION ALONG THE SAME LINES, AND WE LOOK AT THE TRIAL JUDGE'S ORDER, AND HE GAVE WHAT WAS PRESENTED, MODERATE WEIGHT IN THIS PARTICULAR SITUATION, BUT THE QUESTION THAT ALWAYS COMES IS THAT IF, IN FACT THE OTHER INFORMATION HAD BEEN GIVEN TO THE TRIAL COURT, WOULD THAT SAME MITIGATION, WHETHER IT BE STATUTORY OR NONSTATUTORY, HAVE BEEN GIVEN GREAT WEIGHT, AND IF GIVEN GREAT WEIGHT, WOULD IT HAVE MADE A DIFFERENCE IN THE WHOLE WEIGHING PROCESS OF AGGRAVATION AND MITIGATION?

I THINK IT IS PRETTY CLEAR THAT, IN THIS CASE, IT WOULD NOT HAVE MADE A DIFFERENCE IN THE WEIGHING OF THE AGGRAVATION AND THE MITIGATION. THE AGGRAVATORS HERE, FOUR STRONG AGGRAVATORS, SO CLEARLY OVERWHELM THE MITIGATION, THAT I HAVE ENHAD HE GIVEN -- EVEN HAD HE GIVEN NONSTATUTORY MITIGATION GREATER WEIGHT, IT WOULD NOT HAVE MADE A DIFFERENCE IN THE OUTCOME. HOWEVER, THIS COURT HAS HAD SITUATIONS IN WHICH IT HAS SAID IT IS NOT THIS COURT'S JOB, ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, TO GRADE THE PERFORMANCE OF THE ATTORNEYS. HERE WHAT YOU NEED TO BE CONCERNED WITH IS WHETHER THIS COUNSEL, HIS PERFORMANCE WAS DEFICIENT. HE RENDERED AN UNREASONABLE REPRESENTATION OF MR. COLE IN THIS CASE. THERE IS ALWAYS CASES, THERE IS ALWAYS INSTANCES, WHERE THE ATTORNEY COULD HAVE DONE A LITTLE MORE, MIGHT HAVE FOUND SOME OTHER EVIDENCE HERE. THAT IS NOT WHAT THIS PART OF THE LAW IS ALL ABOUT. IN THIS CASE, MR. GLEASON PRESENTED SUBSTANTIAL EVIDENCE OF COLLAPSE DRUG AND ALCOHOL HISTORY. THERE WAS A LOT OF IT PRESENTED IN REGARD TO THE ACTUAL CRIME, EVEN. PAM EDWARDS TESTIFIED ABOUT THE BEER CANS STRAWN ALL OVER THE CAMPSITE AND COLLAPSE STATEMENTS TO HER THAT HE HAD BEEN DRINKING. MR. DEBT WEILLER TESTIFIED HE TOOK COLE TO THE STORE SHORTLY BEFORE THE MURDER AND HE BOUGHT A CASE OF BEER. THAT WAS ALL HE BOUGHT. AND TOOK IT BACK. THEN WE HAD COLLAPSE FAMILY MEMBERS, TWO OF HIS SISTERS AND HIS FATHER, WHO TESTIFIED REGARDING SOME OF THESE THINGS. WE, ALSO, HAD THE FOSTER MOTHER WITH WHOM HE LIVED AT TWO DIFFERENT PERIODS IN HIS LIFE, WHO TESTIFIED BOTH TO HIS PROBLEMS WHILE HE WAS WITH HER AND TO THE PROBLEMS THAT CARRIED OVER, AFTER HE LEFT HER, SO THERE WAS A LOT OF EVIDENCE PRESENTED ON THIS ISSUE, AND TO SAY THAT THE TRIAL COUNSEL WAS DEFICIENT BECAUSE HE NEVER FOUND EVERY SINGLE PERSON OR EVERY SINGLE DOCUMENT THAT MIGHT HAVE ADDED TO IT, WOULD BE AGAIT ALL THE PRECEDENT THAT HAS BEEN ISSUED BY THIS AND BY THE FEDERAL COURTS.

ARE WE TALKING ABOUT WHETHER AN EVIDENTIARY HEARING SHOULD HAVE BEEN HELD ON THAT CLAIM, AND I HOPE AFTER OCTOBER 1, THIS ISSUE WON'T COME UP AGAIN, TO, SO THAT WE HAVE A RECORD TO KNOW THAT THIS IS, REALLY, JUST MORE OF THE SAME, OR IT IS DRAMATICALLY DIFFERENT, AND WHERE, REALLY, WE SUFFER FROM THAT LACK OF EVALUATION, WHEN WE HAVE A SUMMARY DENIAL ON THIS. GRANTED, AGAIN, THIS IS NOT A CASE WHERE THERE WAS NO EVIDENCE BUT YOU KNOW, EXPERIENCE TELLS US THAT RECORDS, DOCUMENTS, ARE PROBABLY A STRONGER FORM OF SHOWING A PARTICULAR ISSUE THAN FAMILY MEMBERS TESTIFYING THAT, YOU KNOW, A JURY IS GOING TO THINK THEY ARE GOING TO SAY WHATEVER THEY CAN SAY TO SAVE THE DEFENDANT.

AS THE DEFENDANT, HIMSELF, WILL, WHICH WAS EVIDENCED IN THIS CASE, IN THAT MR. COLE ACTIVELY WORKED TO SKEW THE RESULTS OF THE TESTS THAT DR. BERLAND GAVE HIM TWO DIFFERENT TIMES. HE GAVE HIM THE TESTS TWO DIFFERENT TIMES, AND COLE LINGERED ON BOTH OF THOSE AND DID SO IN SUCH A MANNER THAT IT WAS THE DOCTOR'S OPINION THAT HE WAS WORKING VERY INTELLIGENTLY TO TRY TO DECEIVE THE DOCTOR IN HIS CONCLUSIONS, AND HE, ALSO, ADMITTED TO THE DOCTOR THAT HE HAD LIED TO THEM DURING THE INTERVIEWS.

AND WHAT IS THAT RELEVANT TO?

THAT IS RELEVANT TO WHETHER HE RECEIVED, TO WHETHER HE RECEIVED COMPETENT PSYCHOLOGICAL EVALUATIONS AT THE TIME.

THAT RELY DEFERS THE POINT.

RIGHT. -- THAT REALLY DEFERS THE POINT.

RIGHT. ABOUT PSYCHOLOGICAL EVALUATIONS.

I JUST DIDN'T KNOW THAT WAS WHERE WE WERE GOING.

OKAY. IF YOU HAVE ANY OTHER QUESTIONS, THOUGH, ABOUT THE OTHER SUBJECTS YOU KNOW, LET'S GO BACK TO THEM. I WOULD LIKE TO ANSWER THEM.

GO AHEAD. CONTINUE WITH WHAT YOU WERE SAYING.

I WILL JUST SAY ONE MORE THING ABOUT THE OTHER SUBJECTS. WE CITED THE COURT TO THE CASE OF HILL VERSUS DUGGAR, AND OF COURSE THAT IS BEFORE OCTOBER AS WELL, BUT IT IS A CASE WHERE THIS COURT HAD A LOT MORE DETAILED EVIDENCE, INCLUDING AFFIDAVITS AND THE DOCUMENTARY DOCUMENTARY-TYPE EVIDENCE THAT YOU JUST REFERRED TO, BEFORE IT, AS BEING ADDITIONAL EVIDENCE OF WHAT HAD BEEN PRESENTED, AND IN THAT CASE, THIS COURT SAID YOU DIDN'T EVEN NEED TO HAVE AN EVIDENTIARY HEARING, EVEN THOUGH YOU HAVE GOT ALL OF THIS EXTRA STUFF, WHICH INCLUDES AFFIDAVITS FROM MENTAL HEALTH PROFESSIONALS INCLUDES AN AFFIDAVIT FROM EVERYONE WHO TESTIFIED AT THE TRIAL, WHO SAID, WELL, NOW WITH ALL THIS EXTRA INFORMATION, I WOULD NOW SAY HE MET STATUTORY QUALIFICATIONS. YOU HAD ADMISSION FROM COUNSEL THAT HIS PERFORMANCE WAS INEFFECTIVE. YOU HAD AFFIDAVITS FROM FAMILY MEMBERS WHO GAVE GREAT DETAIL OF FAMILY BACKGROUND AND DRUG USES, AND THIS COURT SAID NOT ONLY WAS THE CONDUCT NOT DEFICIENT IN NOT PRESENTING ALL OF THIS, BUT IT DIDN'T EVEN WARRANT AN EVIDENTIARY HEARING. NOW, REGARDING THE MENTAL STATE EVIDENCE AND WHETHER MR. COLE RECEIVED ADEQUATE MENTAL HEALTH EVALUATIONS AND SO FORTH, WE WOULD LIKE TO POINT OUT, FIRST OF ALL, THAT THERE IS NO EVIDENCE IN THIS CASE, THAT DR. BORDNICK DID NOT PERFORM AN ADEQUATE NEUROPSYCHOLOGICAL EVALUATION. DR. BORDNICK, HIS --

WAIT A MINUTE. WHEN YOU SAY THAT, ARE YOU DISCOUNTING, WAS THERE A PROFFER THAT DR. DEES WOULD HAVE SET THIS? -- WOULD HAVE SAID THIS? AS I UNDERSTAND, DR. DEES WOULD HAVE SAID THAT IT TAKES MORE THAN THE TIME THAT THE DEFENSE EXPERT SPENT ON THIS CASE, TO DO A COMPETENT MENTAL HEALTH EXTIO. > ALY, JUSTICE QUINCE, WHAT HE TESTIFIED TO WAS HE COULD NOT DO IT INNEOUR. DR. DEE TESTIFIED THAT HE, DR. DEES, COULD NOT DO IT IN ONE HOUR. DR. BORROWED NICK DID NOT DO IT -- DR. BORDNICK DID NOT DO IT IN ONE HOUR, EITHER. THE RECORD IS CLEAR THAT DR. BORDNICK BILLED FOR AT LEAST UR REWING RECORDS AND SO FORTH ON COLE. HE BILLED FOR AN HOUR INTERVIEWING COLE. I BELIEVE SOME TRAVEL TIME, AND THEN THERE WAS OTHER TIME TT LEARLY SPENT ON THE CASE, THAT WAS NOT BILLED FOR. FOR EXAMPLE, ATTORNEY GLEASON, WAS ESTABLISHED IN HIS TESTIMONY, AT THE EVIDENTIARY HEARING, THAT HE HAD TALKED TO BORDNICK AT LEAST THREE TIMES. ONE OF THOSE TIMES HE HAD JOTTED DOWN A NOTE IN HIS FILE THAT I THEOCTR'S FINAL CONCLUSION WAS THAT COLE WAS NEUROPSYCHOLOGICAL SOUND. THERE WAS, ALSO, AN INDICATION T, ALTHOUGH IT WAS NOT ESTABLISHED, BUT THERE WAS AN INDICATION THAT DR. BORDNICK MAY ESULTD WITH OR CALLED DR. BERLAND. ATTORNEY GLEASON ADDRESSED THAT O SOME EXTENT. HE RECALLED THAT THERE MIGHT HAVE BEEN SOMETHING LIKE THAT HAPPENED. HE COULDN'T REMEMBER THE DETAMES OR THE SPECIFICS OF IT --THE DETAILS OR THE SPECIFICS OF IT, SO IT IS CLEAR, HERE THAT, THIS DOCTOR DID MORE IN THIS CASE, THAN WAS REFLECTIN EES. ISR THTHAT WAS REFLECTED IN THE BILLINGS, WAS MORE THAN WHAT MR. COLE WOULD HAVE YOU BELIEVE IT WAS, AND THIS IT WAS MORE THANEE HOUR THAT DR. DEES TESTIFIED THAT HE WOULD NOT HAVE BEEN ABLE TO MAKE AN ADEQUATE NEUROPSYCHOLOGICAL EVALUATION OF COLE IN.

FURTHER, DR. BERLAND TESTIFIED THAT HE SPENT A LOT OF TIME WITH COLE, AND HIS --

SPEAKING OF DR. WE LAND, HE IS THE ONE -- DR. BERLAND, HE IS THE ONE WHO ACTUALLY DID THE TESTING, CORRECT?

YES.

AND MR. COLE, NOW, ARGUING THAT YOUR NEUROPSYCHOLOGISTR THEIR NEUROPSYCIST DID NOT HAVE ALL OF THE TESTING THAT DR. BERLAND DI. >ERGUES THAT DR. BORDNICK DID NOT HAVE THE WEISS TEST, I BELIEVE. HOWEVER, HE DID HAVE DR. BERLAND'S REPORT, WHERE THE CONCLUSION REACHD, THERE, WAS THAT COLE WAS ABOVE AVERAGE IN INTELLIGENCE, ANDAT HE HAD HDME C BRAIN DAMAGE, AND POSSIBLY SOME MENTAL ILLNESS AND THAT THOSE THINGS, TOGETHER, HAD COMBINED TO REDUCE HIS LEVEL OF INTELLIGENCE TO AVERAGE. HE STILL HAD NORMAL AND AFTER HANDLE LEVEL OF INTELLIGENCE, SO BORDNICK KNEW THAT. HE MAY NOT HAVE HAD THE ACTUAL TEST ON THE WEISS, SO I AM NOT SURE ABOUT THAT, BUT HE DID HAVE APPARENTLY, THE RECORD INDICATES THE TESTS, THE MMPI, AND HE DID THAT TWIRTION DR. BERLAND DID, AND ALSO I WOULD LIKE TO POINT OUT THAT THE TESTIMONY BETWEEN DR. DEES AND DR. BERLAND IS NOT SIGNIFICANTLY DIFFERENT. BERLAND TESTIFIED THAT HE HAD ORGANIC BRAIN DAMAGE, AND THAT IS WHAT DR. DEES FOUND AS WELL. BERLAND WENT A LITTLE BIT BEYOND THAT, ACTUALLY, AND SAID, AND I THINK HE PROBABLY ALSO HAS SOME MENTAL ILLNESS. AND I DO NOT BELIEVE THAT DR. DEES'S PROFFERED TESTIMONY ESTABLISHES EITHER OF THE STATUTORY MENTAL STATE MITIGATORS. I WENT INTO THAT, SOME, IN THE BRIEF, BUT DR. DEES TESTIFIED TO THEY ASKED HIM SPECIFICALLY, AT THE EVIDENTIARY HEARING, WAS HE UNDER THE INFLUENCE OF EXTREME EMOTIONAL DISTRESS, AT THE TIME OF THE CRIME, AND HE DID NOT ANSWER THAT QUESTION. INSTEAD HE SAYS, WELL, I HAVE TO DISTINGUISH BETWEEN MENTAL AND EMOTIONAL. I DON'T KNOW IF THE STATUTE EXPECTS ME TO DO THAT, BUT THAT IS THE WAY I DO, IT AND THEN HE SAYS THAT HE INTERPRETS MENTAL AS MEANING COGNITIVE IMPAIRMENT, AND THAT COLE SHOWED IMPAIRMENT IN MEMORY FUNCTION. THAT IS NOT THE SAME AS TESTIFYING TO THAT STATUTORY AGGRAVATOR, TO SAY THAT THERE WAS SOME IMPAIRMENT IN MEMORY UN. SO WE WOULD SUBMIT THAT HIS PROFFERED TESTIMONY DOESN'T EVEN ESTABLISH THAT STATUTORY MENTAL EIGA. ALSO, REGARDING THE OTHER ONE, ABOUT WHETHER COLE WAS ABLE TO CONFORM HIS CONDUCT TO THEES SECTION REQUIREMENTS OF THE LAW -- TO THE ESSENTIAL REQUIREMENTS OF LAW AND TO APPRECIATE HIS CONDUCT, DR. DEES SAID NOT ONLY WAS HE ABLE TO CONFORM HIS CONDUCT TO THEESENTIAL REQUIREMENTS OF THE LAW AT THE ME OF THE CRIME, ONLY THAT COLE HAD SHOWN INDIFFICULTIES CONFORMING HIS CONDUCT IN THE PAST, NOTHING ABOUT AT THE TIME OF THIS CRIME, AND FURTHERMORE, HE WENT ON TO ADD THAT HE COULD NOT SAY THAT HE HAD SEEN ANY EVIDENCE THAT COLE DID NOT APPRECIATE THE WRONGFULNESS OF HIS CONDUCT, SO, AGAIN, WE WOULD SAY DR. DEES'S PROFFERED TESTIMONY DOES NOT SUPPORT, EVEN THAT STATUTORY MENTAL STATE MITIGATOR, SO HIS TESTIMONY IS ARGUABLY WORTHLESS TO COLE THAN DR. BERLAND'S WAS, BECAUSE DR. BENOT OY FOUND THE ORGAC BRAIN DAMAGE, BUT HE SAID HE BELIEVED, ALSO, THERE WAS POSSIBLY MENTAL ILLNESS AS WELL. I BE THAT THAT RS ALL OF THE ISSUES THAT HE ADDRESSED NIS ARGUMENT. I WOULD LIKE TO TAKE JUST A COUPLE OF MINUTES THAT I HAVE LED ADDRESS AN ISSUE THAT B E AT DEALD THT IS IR CLAIM THAT THE TRIAL, THE COLLATERAL COURT SHOULD EMITD THEM TO HAVE THE SEMEN FOUND IN PAM OR NM TEDYAO DETERMINE IF IT NGEDO COLE. RE ISSOLUTELYOT A SHD OF EVIDENCE ANYWHERE THAT IT COULD HAVEN . ALSO THE CLAIM AS TO WHETHER IT WOULD BE RELEVANT -- MR. CHIEF JUSTICE: I AM SORRY, S.. YOUR TIME IS UP. WE WILL HAVE TO RELY UPON YOUR BRIEFS. THANK YOU. MR. BECK.

I WOULD LIKE TO BRIEFLY RESPOND, I THINK THAT IS ALL OF E TIME THAT IVE A BRIEF OUNT OFE ANDESS THE ATE'SFERENE TO THE JERROLD N CITED IN THEIR BRIEF. JERROLD WAS NOT DECIDED UL 1995, AND WE WILL RELY UPONR BRIEFS TO ARGUE TOUD HAVE ECESSED THETL COUR, AS ITD,O EGIVENE L HEALTHUTORY ATION INSTRUCTIONS HD THEY BEENEQUED. WITHE LIBITF E THT

I HAVE GOT LEFT, WHAT I WOULD LIKE TO ASKIS COURT IS TO CONSIDER TE EFFECT OF TRIAL SELVING FAILED TO REQUEST STATUTORY MITIGATION INSTRUCTIONS AND HAVING FAILED O REQUEST, AND THIS COURT HAS FOUND, IN CASEF JACKSON V STATE, THE ISSUES AS TO THE LIMITING CONSTRUCTIONS THAT CITED IN OUR BRIEF AND OBVIOUSLY INLY YOU HAVE REVIEWED THAT AND WILL REVIEW IT FURTHER. WHAT TRIAL COUNSEL EFFECTIVELY MANAGED TO DO, BY HAVING FAILED TO REQUEST THE LIMITING CONSTRUCTS -- CONSTRUCTION, AS WELL AS THE STATUTORY MENTAL MITIGATION INSTRUCTIONS, WAS ELIMINATE THE OPPORTUNITY FOR THE JURY TO PLACE APPROPRIATE ROLE IN WEIGHING THE AGGRAVATORS AGAINST THE MITIGATORS. THE JURY WAS NEVER AFFORDED THE OPPORTUNITY TO UNDERSTAND THAT, IN THE STATE OF FLORIDA, IMPAIRED CAPACITY, EXTREME EMOTIONAL AND MENTAL DISTURBANCE ARE GIVEN THE WEIGHT OF LAW OF STATUTORY MITIGATORS. THEY HAVE, BEHIND THEM, NOT JUST SOME TOUCHY FEEL I FEEL-GOOD EFFECT ON THE JURY'S DELIBERATION, BUT WE, AS A STATE HAVE COME FORWARD AND SAID THAT THESE STATUTORY MITIGATORS ARE RECOGNIZED AND HAVE AUTHORITY UNDER THE LAW, AND THE JURY DID NOT HEAR THAT. IN ADDITION, THE JURY HEARD STATUTORY AGGRAVATING INSTRUCTIONS AS TO A NUMBER OF STATUTORY AGGRAVATORS, AND THEY WERE FOUND, BYE TRIAL COURT. THE MOST SERIOUS OF THOSE WHICH THIS COURT HAS RECOGNIZED IN THE PAST, WAS THE HEINOUS ATROCIOUS D CRUEL AGGRAVATOR. MR. CHIEF JUSTICE: THANK YOU, MR. BECK. YOUR TIME IS UP. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL TAKE ITS MORNING RECESS, ANDSMEW BN RECESR TEN MINUTES. THE MARSHAL: PLEASE RISE.