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### Glen James Ocha v. State of Florida

#### THE FIRST CASE ON THE ORAL ARGUMENT CALENDAR THIS MORNING IS OCHA VERSUS STATE.

GOOD MORNING, JUSTICE WELLS, MEMBERS. I AM GEORGE BURDEN. I REPRESENT MR. OCHA, THE APPELLANT. THIS IS A DEATH PENALTY CASE THAT IS SORT OF UNIQUE, IN THE FACT THAT THIS GENTLEMAN IS COMMONLY WHAT WE CALL A "DEATH VOLUNTEER", IN THAT HE COMMITTED THIS MURDER IN CENTRAL FLORIDA AND IMMEDIATELY THEREAFTER WENT TO DAYTONA BEACH, DRANK SOME, AND THEN WENT TO THE POLICE DEPARTMENT, CONFESSED TO THIS MURDER, AND FROM THE VERY POINT FORWARD, SAY HE WANTED TO BE PUNISHED BY DEATH FOR HIS CRIMES. THIS IS SORT OF UNIOUE IN THAT SENSE. PROCEDURALLY. WHAT FOLLOWED FROM THAT WAS THE STANDARD CONFIDENTIAL PSYCHIATRIC EVALUATION, AND A COURT-ORDERED PSYCHIATRIC EVALUATION, AND THEN MR. OCHA EXECUTED WRITTEN PLEAS OF GUILT, A WRITTEN WAIVER OF A JURY TRIAL, BOTH IN GUILT PHASE AND PENALTY PHASE, AND HE, ALSO, EXECUTED, WHICH IS OF PARTICULAR IMPORTANCE, I BELIEVE, A WAIVER OF THE PRESENTATION OF MILE MITIGATION EVIDENCE IN THIS CASE. THE STATE AND APPELLANT STIPULATED TO THE PSYCHIATRIC REPORTS THAT WERE GENERATED FROM THE ACTIVITY I TALKED ABOUT. THE TRIAL COURT ALLOWED HIM TO EXERCISE HIS RIGHT NOT TO PRESENT MITIGATION EVIDENCE. HE KNEW THE LESS-FOLLOWED COON VERSUS DUGGAR MANDATE AND THE COURT DID FOLLOW IT IN THIS CASE. HE DID DO SO, IN THAT HE HAD THE TRIAL COUNSEL INFORM HIM OF MR. OCHA'S DESIRE. HE, THEN, PRESENTED TO THE TRIAL COURT WHAT COUNSEL DID KNOW OF MITIGATION, AND HE HAD THE DEFENDANT CONFIRM, ON THE RECORD, THAT HE DID NOT WISH TO HAVE ANY MITIGATION EVIDENCE PRESENTED. HE, ALSO, AT THAT TIME, TOLD THE COURT THAT HE WANTED TO BE BE EXECUTED. IN A BIT OF IRONY, THE TRIAL COURT SAID HE WOULD NOT HONOR THAT REQUEST, BECAUSE HE SAID HE WAS NOT GOING TO ASSIST IN HIS SUICIDE, WHICH, I BELIEVE IN FACT, IS HAPPENING IN THIS CASE. THE FIRST POINT ON APPEAL IS SORT OF BREAKING NEW GROUND FOR THIS COURT, IN MY OPINION. DURING THE COON VERSUS DUGGAR MITIGATION, WHERE MITIGATION, WHERE THE COUNSEL HAD DR.^BERLAND AND HAD THE OTHER THINGS PRESENTED, IT WAS BROUGHT FORWARD THAT HE HAD A HISTORY OF SUICIDAL THINKING, A HISTORY THAT BEGAN IN 1978. IT WAS THE UNDERLYING FELONY THAT BROUGHT THE AGGRAVATING FACTOR THAT, AT HIS ARREST, HE DEMANDED THE POLICE SHOOT AND KILL HIM, RIGHT THERE AT THE SCENE.

LET ME ASK YOU THIS. THERE WAS SOME TESTIMONY FROM A MENTAL HEALTH EXPERT OR THEY HAD SOME EVALUATIONS, CORRECT?

YES, MA'AM.

SO WHAT IS IT THAT YOU ARE ALLEGING, THAT THERE SHOULD HAVE BEEN FURTHER EVALUATIONS AND THAT EVIDENCE PRESENTED TO THE TRIAL JUDGE?

THAT IS CORRECT. THERE WERE --

## WHAT FURTHER SHOULD THEY HAVE DONE?

ALL RIGHT. IN THE INSTANCE OF DR.^BERLAND, DR.^BERLAND DETAILED THE RESULTS OF ONE OF THE STANDARD PSYCHIATRIC TESTS THAT WERE GIVEN. IN THAT TEST, IT REVEALED THAT HE WAS A DELUSIONAL, PARANOID THINKER, OF AN UNUSUAL SCALE. ALSO, THAT HE SCORED VERY HIGH IN A SCHIZOPHRENIC AREA, THAT HE WAS A SCALE EIGHT, WHERE FOUR IS VERIFIED HALLUCIONAL THINKING, WHERE HE IS OFF THE SCALE. DR.^BERLAND NEVER VERIFIED THE TESTING INFORMATION. HE JUST LOOKED AT THE HISTORY THAT HE GLEANED. HE NEVER MET HIM.

WHY DIDN'T DR.^BERLAND MEET THE DEFENDANT?

I THINK IT WAS THE PROCEDURAL HISTORY IN THIS CASE.

DIDN'T THE DEFENDANT REFUSE TO MEET WITH DR.^BERLAND?

I BELIEVE AT THE EVE OF THE PENALTY PHASE, YES, HE DID REFUSE TO MEET WITH HIM.

BUT YOUR ARGUMENT IS BASED ON THAT, THAT SOMETHING MORE SHOULD HAVE BEEN DONE. ARE YOU SAYING SIMPLY THAT THE TRIAL COURT SHOULD HAVE BASED ON THIS EVALUATION BY DR.^BERLAND, APPOINTED SOMEONE ELSE TO DO SOME FURTHER TESTING?

HE SHOULD HAVE APPOINTED A STANDBY COUNSEL, TO INITIATE FURTHER INVESTIGATION, BASED ON THESE TEST RESULTS, BUT, ALSO, BASED ON DR.^BURNS'S OBSERVATION, BASED ON HIS CHILDHOOD HISTORY OF THE HEAD INJURIES AND THE COMA AND SO FORTH, THAT MAYBE THERE IS AN ORGANIC REASON FOR THIS KIND OF BEHAVIOR.

WHAT BASIS WOULD THE TRIAL JUDGE HAVE TO DO MORE THAN WAS DONE IN THIS CASE?

WELL, NOTHING WAS DONE IN THIS CASE, JUSTICE HARDING. NOTHING WAS DONE. ALL THAT WAS PRESENTED WAS THE PRETRIAL EVALUATION. THAT WAS ALL THAT WAS PRESENTED. THERE WAS NO MITIGATION DONE WHATSOEVER.

BUT IN LIGHT OF THE DEFENDANT'S WAIVERS AND OBJECTIONS TO THE PRESENTATION OF MITIGATION, WHAT, AND IN LIGHT OF OUR PRECEDENT, WHAT MORE COULD HAVE THE COURT DONE, HAD THE COURT WANTED TO DO MORE?

THE COURT SHOULD HAVE APPOINTED STANDBY COUNSEL, BASED ON THE FOLLOW-UP AREAS AT THE PRETRIAL.

AND THAT AUTHORITY COMES FROM WHERE?

THE AUTHORITY COMES FROM THE MOHAMMED CASE, TO THE EXTENT THAT THIS COURT STATES THAT THE TRIAL COURT HAS THE DISCRETION TO DO THAT, BUT MOREOVER, THE GENERAL PRINCIPLE OF THIS COURT HAS SAID THAT MITIGATION EVIDENCE HAS TO BE DEVELOPED, WHEREVER IT IS KNOWN OF, AND THE COURT WAS ALERTED THAT THERE WAS MITIGATION EVIDENCE UNDEVELOPED OUT THERE. BECAUSE OF THE ACTIONS OF THE APPELLANT. QUITE CLEARLY.

DIDN'T THE TRIAL JUDGE, HERE, ATTEMPT, REALLY, TO FOLLOW THE PATTERN OF MOHAMMED, EVEN BEFORE MOHAMMED BECAME, WAS PUBLISHED?

YES.

SO THE TRIAL JUDGE, HERE, WITH REALLY, IT SEEMS AS THOUGH HE WENT TO GREAT LENGTH, BEYOND WHICH WOULD BE IN THE PUBLISHED DECISIONS AT THE TIME THAT THE TRIAL JUDGE CONSIDERED THIS MATTER, IT WOULD SEEM.

I AGREE, JUSTICE LEWIS. HE DID ABOVE AND BEYOND EXISTING CASE LAW. THERE IS NO QUESTION THAT HE DID. A LOT LESS COULD HAVE BEEN DONE IN THIS CASE THAN HE HAD DONE, AND I THINK HE WAS TRYING TO BE THOUGHTFUL AND WAS TRYING TO BALANCE THINGS, THE BEST HE COULD. DID THE PSI BRING OUT ANY MITIGATING FACTORS FOR CONSIDERATION BY THE COURT, IN ADDITION TO THE THREE MENTAL HEALTH REPORTS THAT THE JUDGE HAD?

THERE WAS THE HISTORY OF HE IS APPARENTLY AN ACCOMPLISHED ARTIST AND HAD, IN A CONTROLLED ENVIRONMENT, IS A VERY PRODUCTIVE INDIVIDUAL, VERY HELPFUL. HE DOES, HE WILL DO TWELVE HOURS OF WORK IN EIGHT HOURS AND BRING IT HOME AND WORK VERY HARD, WHEN HE IS IN A CONTROLLED SETTING, BUT IN THE OUTSIDE WORLD, HE CAN'T FUNCTION THAT WAY. THOSE ARE THE KINDS OF THINGS THAT ARE BROUGHT FORWARD. HE HAD LETTERS FROM THE WARDENS IN THE PRISONS HE HAD BEEN AT, FOR THE EXEMPLARY THINGS THAT HE DID.

SO THE TRIAL JUDGE REALLY HAD THIS INFORMATION. YOU ARE REALLY TRYING TO CENTER ON THE TESTING FOR THE ADDITIONAL BRAIN DAMAGE AND THAT KIND OF THING, IS WHERE YOUR FOCUS IS?

THAT IS CORRECT. THAT IS CORRECT.

WHAT WAS THE MENTAL HEALTH TESTIMONY HERE? IN OTHER WORDS WHO TESTIFIED OR PRESENTED INFORMATION, AND WHAT WAS THE GIST OF THAT INFORMATION THAT WAS PRESENTED?

WITH DR.^BERLAND, IT WAS A HISTORY. FIRST HE GAVE HIS FAMILIAR HISTORY OF ABUSE AS A CHILD FROM A MOTHER WHO WAS APPARENTLY MENTALLY ILL. THAT HIS SISTERS WERE MENTALLY ILL AND INSTITUTIONALIZED, SUFFERED A GREAT DEAL OF PHYSICAL ABUSE, THAT HE LEFT THE HOME WHEN HE WAS 15. TO GET OUT OF THE PHYSICALLY-ABUSIVE CONDITIONS THAT HE WAS IN. THAT WAS ONE THING THAT WAS BROUGHT FORWARD. THAT HE WAS TORTURED, AT ONE POINT, WITH A BROOM UP HIS RECTUM, AS PUNISHMENT. HE DIDN'T HAVE, YOU KNOW, A VERY GOOD CHILDHOOD. THAT WAS BROUGHT CLEAR BY DR.^BERLAND. BUT WHAT. REALLY. DR.^BERLAND SAID THAT I THINK IS SIGNIFICANT IS THE KIND OF TESTING, HE JUST DID THE ONE MMPI TEST. AND IT SHOWED OFF THE SCALE IN TWO VERY SIGNIFICANT AREAS OF DELUSIONAL THINKING, AND NONE OF THIS WAS FOLLOWED UP ON, BY HIS OWN ADMISSION, OR DEVELOPED, WHICH SHOULD BE, BY HIS OWN TESTIMONY. THAT WAS CRITICAL, AND THAT IS IMPORTANT, BECAUSE HOW IS THIS COURT TO DO PROPORTIONALITY REVIEW, WITHOUT HAVING THAT INFORMATION? ALSO, WITH DR.^BURNS, HE SAID, BECAUSE OF THE HEAD TRAUMAS THAT HE HAD AS A CHILD AND BECAUSE NOW THAT HE HAS THE POOR PERIPHERAL VISION. HE HAS THE UNSTEADINESS OF FOOT. HE EITHER HAS BRAIN LESIONS OR A TUMOR. WHICH WOULD BE AN ORGANIC CLAUSE THAT SHOULD BE KNOWN BY THIS COURT, IN DOING THE PROPORTIONALITY **REVIEW**.

WHAT WAS THE SPECIFIC TEST, WITH REFERENCE TO HIS MENTAL CAPABILITIES?

I DON'T RECALL THERE BEING AN IQ TEST OR ANYTHING OF THAT NATURE, BUT THE UNTESTING REPORTING IS THAT, IN A CONTROLLED SETTING, HE IS A HARD WORKER AND CAN GET THINGS DONE, SO I DON'T THINK THAT HE IS RETARDED TO THE EXTENT THAT IT IMPAIRS HIS COGNITIVE.

WAS HE DIAGNOSED WITH A SPECIFIC MENTAL ILLNESS?

HE WAS NOT, BECAUSE THERE WAS NOT CONCLUSIVE INFORMATION. HE WAS PSYCHOTIC, ACCORDING TO DR.^BERLAND.

DR.^BERLAND DIDN'T EXAMINE THE DEFENDANT, BUT BEFORE COMMITTING THIS MURDER, HE HAD BEEN, APPARENTLY, OUT IN THE WORLD FOR ABOUT A YEAR, FOLLOWING PRISON IN KENTUCKY. PRISON IN KENTUCKY OVER A 14-YEAR PERIOD.

MY CALCULATION WAS LONGER THAN THAT.

LONGER THAN THAT. DO WE HAVE THE RECORDS FROM KENTUCKY ABOUT WHETHER HE WAS TREATED FOR MENTAL ILLNESS, WHILE HE WAS IN THE KENTUCKY PRISON, ANY TESTING THAT WAS DONE, OR ANY MEDICATION THAT HE MIGHT HAVE BEEN UNDER?

NONE OF THAT WAS DEVELOPED. IT MAY HAVE BEEN, IT MAY BE AVAILABLE, BUT I WOULD, I HAVE DONE DEATH PENALTY TRIAL WORK, AND THE PROCEDURAL ASPECTS OF THIS CASE LENDS ME TO BELIEVE THERE WASN'T TIME TO GATHER THOSE KINDS OF THINGS IN A TIMELY WAY.

THE PSI THAT WAS DONE DID NOT SEEK TO GATHER THE, HIS ACTUAL RECORDS, NOT FOR TESTING OF THE DEFENDANT BUT ACTUALLY, HIS HISTORY OF HIS RECORDS IN SCHOOL OR PRISON RECORDS, WE DO NOT HAVE THOSE.

SOME OF THAT WAS MADE AVAILABLE. OBVIOUSLY BECAUSE WE HAVE A LETTER IN THE PSI THAT WAS FROM AWARD EVEN IN THE PRISON, COMMENDING HIM FOR SOME PAINTING JOB HE HAD DONE, SO THERE IS SOMETHING THAT WAS OBTAINED, BUT THE EXTENT OF WHAT KENTUCKY RECORDS WERE OBTAINED IS UNKNOWN. I PRESUME THAT DR.^BERLAND IS A PART OF HIS CONFIDENTIAL PSYCHIATRIC JOB AND WOULD HAVE SOUGHT TO GET THOSE, BUT IT IS NOT CLEAR IN THE RECORD AS TO WHETHER HE DID OBTAIN THEM OR NOT.

YOU WOULD AGREE THAT ANY EVALUATION BEFORE THE TESTIMONY OF DR.^TRESSLER, BURNS, BERLAND, THE HISTORY OF DRUG ABUSE, LEARNING DISABILITY, TRAUMATIC STRESS DISORDER, AND HIS VIOLENT CHILDHOOD. ALL OF THIS WAS IN THE MIX THAT WAS BEFORE THE JUDGE. WOULD YOU AGREE WITH THAT?

YES. THEY DID A REMARKABLY GOOD JOB, BASED ON THE CONSTRAINTS THAT WERE ON THEM. I WILL CONFIRM THAT. AND MY FEAR IS THEY HAVE DONE A GOOD ENOUGH JOB THAT YOU WILL LET THIS PASS THROUGH AND WRONGFULLY, IN VIOLATION OF DUE PROCESS. BECAUSE HE WAS NOT TESTED AND EVALUATED IN A PROPER WAY FOR YOU TO DO A PROPORTIONALITY REVIEW.

I THINK WHAT THE MOST QUESTIONS ASKED WOULD BE WHAT SHOULD THE LAWYER HAVE DONE PAST THE PRESENTATION OF THIS EVIDENCE?

SEE, THE LAWYER IS, MR. OCHA WAS VERY, VERY VEHEMENT IN HIS OBJECTION TO THE LAWYER DOING ANYTHING WHATSOEVER, FROM DAY ONE, SO WHAT HE IS SUPPOSED TO DO IS HE IS SUPPOSED TO STILL, NONETHELESS, VIGOROUSLY GO FORWARD, BUT HE HAS WAIVERS, EXECUTED BY THIS GENTLEMAN, TO DO ABSOLUTELY NOTHING, BUT HIS JOB IS TO DO THE BEST HE CAN, UNDER THOSE CIRCUMSTANCES, AND HE DID. HE DID ORDER, HE DID ORDER A CONFIDENTIAL PSYCHIATRIC ADVISOR, TO HELP DEVELOP MITIGATION, AND HE DID, UNDER COON VERSUS DUGGAR, DISCLOSE TO THE TRIAL COURT WHAT, THE BEST HE KNEW UNDER THE CIRCUMSTANCES IN THIS CASE, SO HE DID THE BEST HE COULD, WHAT HE IS CHARGED TO DO, BUT IT IS CERTAINLY NOT THE KIND OF ADVOCACY THAT WE ENVISION IN A DEATH PENALTY CASE.

YOUR BOTTOM LINE HERE, MR. BURDEN, THAT A DEFENDANT SHOULD NOT BE ALLOWED TO WAIVE THE PRESENTATION OF MITIGATION?

THAT IS CORRECT. YOU WILL NOT ALLOW THAT AT THE APPELLATE LEVEL BUT YOU ALLOW IT AT THE TRIAL LEVEL.

EVEN IF WE FOLLOWED THE MOST PROGRESSIVE THINKING, AS FAR AS REQUIRING STANDBY COUNSEL TO GATHER MITIGATION, I DON'T KNOW OF ANY AUTHORITY AROUND THE COUNTRY, THAT WOULD, YOU KNOW, IF THE DEFENDANT IS COMPETENT, WHICH YOU ARE NOT CHALLENGING, THAT WOULD FORCE THE DEFENDANT TO ACTUALLY BE EVALUATED FOR VERIFICATION OF UNDERLYING MENTAL ILLNESS THAT WOULDN'T OTHERWISE BE DEVELOPED THROUGH THE RECORDS THAT ARE ALREADY THERE, AND YOU KNOW, KLUCOCK, ANY OF THOSE CASES DON'T REQUIRE THE DEFENDANT TO BE EXAMINED, SO I THINK IN TERMS OF THE POINT THAT YOU WERE SETTING OFF TO BE A MAJOR POINT, BUT I DON'T SEE THAT THERE IS, IN TERMS OF SELF-DETERMINATION, EVEN IF YOU SAY THAT THE TRIAL COURT NEEDS TO DO MORE AND THE SYSTEM NEEDS TO DO MORE, HOW DOES IT GO TO SAYING THIS DEFENDANT SHOULD HAVE BEEN FORCED TO UNDERGO A TESTING FOR BRAIN DAMAGE AND THE POSSIBILITY OF DEVELOPING SOME ADDITIONAL MENTAL HEALTH MITIGATION.

WELL, IF PROPORTIONALITY IS GOING TO HAVE ANY MEANING, THAT THERE IS NO OTHER ALTERNATIVE THAN TO DO THAT.

WHAT YOU WOULD SAY IS, IN EVERY CASE, EVEN WHEN THERE IS A DEFENDANT THAT DOESN'T WAIVE MITIGATION, WE OUGHT TO HAVE THAT DEFENDANT PSYCHOLOGICALLY EVALUATED, HAVE A COMPLETE WORKUP DONE, TO MAKE SURE THAT SOMEBODY IS NOT MISSING SOMETHING, AND REQUIRE THAT OF EACH AND EVERY DEATH PENALTY DEFENDANT.

I WOULD SAY AT THE TRIAL LEVEL, THAT IS ROUTINELY DONE ON EVERY DEFENDANT, EVERY SINGLE DEFENDANT, THAT IS DONE, AS STANDARD COURSE, JUST TO MAKE SURE THAT NO STONE IS LEFT UNCOVERED, IN THE ADVOCACY OF A CLIENT. THAT IS ROUTINELY DONE. CONFIDENTIAL EXPERTS ARE APPOINTED ROUTINELY ON EVERY CAPITAL CASE IN THE STATE.

THE CASE LAW DOES NOT SUSTAIN THAT IT IS -- IT COULD HAVE BEEN DONE, BETTER TESTS. THE CASE LAW DOES NOT SUPPORT THAT.

THE CASE LAW SAYS, WHERE, IF THE EVIDENCE WILL ONLY GIVE FURTHER LIGHT ON STUFF THAT IS EXISTING AND KNOWN, THEN THAT IS OKAY. WHAT WE HAVE IS FINE. BUT THAT IS NOT WHAT WE HAVE HERE. THIS IS DISTINGUISHABLE. NOTHING WAS DONE IN THIS CASE. YOU HAD THE PRELIMINARY WORK OF PEOPLE ORDERED BY THE COURT, AS A, WHAT I CALL A CYA ACTION FOR LATER REVIEW. THEY JUST DID THAT, THREW TOGETHER AND CAME FORTH AND DID A SENTENCING. THAT WAS WHAT WAS DONE IN THIS CASE, A BARE-BONES ACTION. NOW, A LOT OF STUFF WAS GLEANED FROM THAT. IMAGINE A FULL-BLOWN ADVOCACY, WHICH I SUBMIT DUE PROCESS REQUIRES FOR A DEATH CASE. WHAT YOU WOULD KNOW ABOUT THIS GENTLEMAN, AND YOU KNOW, WHETHER OR NOT HE IS MENTALLY ILL. IF HE IS SCORING EIGHT SCALE IN A SCHIZOPHRENIA PORTION OF THE MMPI, WHAT DOES THAT TELL YOU?

BUT THIS COURT HAS CLEARLY REJECTED THAT POSITION IN THE PAST, HAS IT NOT? YOU HAVE BEEN CANDID WITH US IN CONCEDING THAT THE TRIAL COURT, HERE, REALLY DID MORE THAN OUR CASE LAW REQUIRES.

THAT IS CORRECT.

AND YOU ARE ASKING US TO BREAK NEW GROUND, AS YOU SAY, BUT WE DIDN'T EVEN GO AS FAR AS YOU ARE TALK ABOUT, IN MOHAMMED, DID WE?

THAT IS CORRECT. ON THE ONE --

BUT WE HAVE DEALT WITH THIS, TIME AND TIME AGAIN, AND YOUR POSITION, IF YOU WILL, HAS BEEN DEBATED AMONGST THE MEMBERS OF THE COURT, BUT WE HAVE CLEARLY REJECTED THAT THERE IS ANY DUE PROCESS VIOLATION IN A SITUATION LIKE THIS, HAVE WE NOT?

YES, YOU HAVE, AND I DON'T BELIEVE THAT IS CORRECT. ON THE ONE HAND, THE U.S. SUPREME COURT TELLS YOU, YOU MUST DO A PROPORTIONALITY REVIEW, TO SEE THE UNIFORM APPLICATION OF THIS SENTENCE, AND YOU MUST CONSIDER ALL MITIGATION AND AGGRAVATION. NOW, AT THE APPELLATE LEVEL, YOU ARE SAYING THAT MUST BE DONE. ON A TRIAL LEVEL, YOU ARE SAYING IT DOESN'T HAVE TO BE DONE. IT IS NOT CONSISTENT. MR.^CHIEF JUSTICE JUSTICE QUINCE HAD A QUESTION.

THAT IS NOT LOGICALLY CONSISTENT, THAT YOU CAN PERMIT, IN THE NAME OF SELF DETERMINATION, SOMEONE TO SAY I AM NOT GOING TO LET YOU CONSIDER ANY MITIGATION OF MY CASE, BECAUSE I WANT TO BE EXECUTED, AND THAT IS WHAT WE ARE REALLY TALKING ABOUT HERE.

WE ARE NOT TALKING ABOUT THAT HERE, ARE WE? YOU AGREE THAT THIS JUDGE, IN ANSWER TO JUSTICE LEWIS'S QUESTION BEFORE, WENT FAR BEYOND EVEN WHAT THIS COURT REQUIRES, SO WE DO END UP WITH A RECORD, INCLUDING THE PSI, AND THE EXAMMATION OR AT LEAST THE TESTIMONY OF THESE THREE EXPERTS OF, REALLY, EXTENSIVE MITIGATION THAT YOU HAVE RELIED ON, WITH REFERENCE TO THE OTHER ISSUES THAT YOU HAVE RAISED, IS IT NOT, SO THIS IS NOT A RECORD WHERE NOTHING WAS DONE. THIS REALLY IS A RECORD THAT, AS YOU, IN ANSWERING JUSTICE LEWIS'S QUESTION, INDICATED THE TRIAL JUDGE HERE WENT FAR BEYOND WHAT THIS COURT'S CASE LAWMAN DATED THAT THE TRIAL COURT DO. IS THAT RIGHT?

HE DID. AND THE RESULT STILL WAS CONFIRMED, IN TERMS OF DUE PROCESS, BECAUSE MITIGATION WAS NOT DEVELOPED, AND THIS COURT SEEMS TO BE COMFORTABLE THAT THAT CAN HAPPEN AND YET AT THE SAME TIME SAY YOU ARE GOING TO DO A PROPORTIONALITY REVIEW.

YOUR ARGUMENT, THEN, TO GO BACK TO JUSTICE PARIENTE'S QUESTION, THAT IN EVERY DEATH PENALTY CASE, THERE SHOULD BE CERTAIN THINGS DONE, A PSYCHOLOGICAL EVALUATION, LOOK AT ANY PREVIOUS RECORDS FROM ANY INSTITUTION, HIS SCHOOLING, ET CETERA. IN EVERY DEATH PENALTY CASE, WHETHER THERE IS ANY INDICATION OF ANY PROBLEM OR NOT.

I WOULDN'T CHANGE YOUR EXISTING PRONOUNCEMENTS. YOUR PRONOUNCEMENTS SAY MITIGATION, WHEREVER KNOWN, WHEREVER, WHEN IT BECOMES KNOWN, IT EXISTS, IT SHOULD BE DEVELOPED. THAT IS WHAT I WOULD SAY. I WOULDN'T GO TO THE SPECIFICS OF HOW THAT IS DONE, AS YOUR EXAMPLE IS, BUT WHEN IT BECOMES KNOWN TO THE COURT OR THE ATTORNEYS, IT HAS TO BE DEVELOPED. FOR DUE PROCESS PURPOSES, TO DO PROPORTIONALITY, THAT IS WHAT I SAY, AND IN THIS CASE, THE TRIAL COURT WAS CLEARLY ALERTED, BY TWO EXPERTS, THAT TWO PARTICULAR AREAS ARE NOT BEING EXPLORED HERE, BECAUSE -- BECAUSE! IT'S NOT. AND BECAUSE HE IS A DEATH VOLUNTEER, IS WHY IT IS NOT BEING EXPLORED, AND IT REMINDS ME OF THE LOWER, THE FELONY KIND OF CASES AND SO FORTH, WHERE PEOPLE COMMIT A CRIME AND, LIKE SPOUSAL ABUSE CASES, WHERE SOMEONE TRIES TO SAY, WELL, WE DON'T WANT TO PROSECUTE. IT IS BETWEEN THE FAMILY, AND THE STATE DOESN'T TAKE THAT POSITION. THE STATE INTERVENES AND TAKES ACTION AND GETS INVOLVED, DESPITE THE WISHES OF THE PARTICIPANTS IN A CRIME.

BUT ISN'T THERE ALWAYS GOING TO BE TENSION BETWEEN THE SPECIFIC DESIRES OF THE DEFENDANT AND WHAT THE DEFENDANT CAN BE COMPELLED TO DO, IN ORDER FOR THE STATE AND THE COURTS TO DO THEIR WORK, AND YOU ARE ENVISIONING SOMETHING LIKE STRAPING DOWN A DEFENDANT AND FORCING HIM TO UNDERGO CT SCANS OR THESE OTHER EXTENSIVE TESTS, AND THAT IS WAY, WAY BEYOND ANYTHING THAT ANY COURT HAS EVER SUGGESTED.

JUSTICE ANSTEAD, THEY ROUTINELY REQUIRE ALCOHOL AND BLOOD SCREENINGS FOR PRETRIAL RELEASES IN THIS STATE. IF YOU WANT TO BE RELEASED, YOU HAVE TO SUBJECT YOURSELF TO THESE TESTS. THEY DO IT ROUTINELY, EVERYDAY HERE.

BUT WE HAVE A DEFENDANT WHO HAS REFUSED EVEN TO MEET WITH THE EXPERTS. IS THAT NOT CORRECT?

WELL, I HAVE TO SAY ON THE RECORD, THAT THE DAY BEFORE THE SENTENCING, WHERE DR.^BERLAND WANTED TO GO IN AND SEE HIM, HE REFUSED HIM ON THAT DAY, BUT YOU KNOW, I

WOULDN'T STANDBY THAT AND HANG YOUR HAT ON THIS CASE, BASED ON THAT FACTUAL OCCURRENCE, BECAUSE --

LET'S GO BACK TO THE JUDGE'S SENTENCING ORDER AND LOOK AT WHAT MIGHT HAVE MADE A DIFFERENCE. THE JUDGE FOUND AND GAVE LITTLE WEIGHT TO SEVERAL OF THE MITIGATORS, AS FAR AS THE HISTORY OF MENTAL ILLNESS. THIS IS A GENTLEMAN THAT WAS HOW OLD, AT THE TIME OF THE MURDER?

HE, I BELIEVE, WAS APPROXIMATELY 40 YEARS OLD.

SO THE FACT, THE CASE LIKE THIS, WHERE HE HAD COMMITTED A PRIOR VIOLENT FELONY THAT WAS A VERY SIGNIFICANT VIOLENT FELONY, A VERY WEIGHTY AGGRAVATOR. WE HAVE HAC. SHORT OF THERE BEING EVIDENCE THAT COULD HAVE BEEN DEVELOPED ABOUT HIM BEING UNDER THE INFLUENCE AT THE TIME OF THIS MURDER, OF AN EXTREME MENTAL AND EMOTIONAL DISTURBANCE, SOMETHING THAT WOULD REALLY MITIGATE THE CRIME, WHICH IS SOMETHING THAT COULD ONLY BE DONE THROUGH OPINION OR EXTRAPOLATION AND THESE EXPERTS HAVE ALREADY EXAMINED HIM, I AM STILL, I GUESS, HAVING TROUBLE, IN TERMS OF LOOKING AT A PROPORTIONALITY REVIEW, AS TO HOW PUTTING SOMETHING ELSE IN THE MIX, FOR EXAMPLE, FINDING THAT HE HAD SCHOOL RECORDS THAT SHOWED HE HAD A LEARNING DISABILITY. BASED ON THE WAY THEY WERE EVALUATED BY THIS JUDGE, HOW THAT EVEN WOULD AFFECT THIS PROPORTIONALITY REVIEW, SO IF YOU CAN HELP WITH THAT, MAYBE WE CAN CONCEDE THAT, AS JUSTICE SHAW SAYS, THESE MITIGATORS WERE PUT IN THE RECORD. NOW, IF THE JUDGE GAVE THEM LITTLE WEIGHT BECAUSE THERE WASN'T ANY TESTIMONY ABOUT THEM, BUT THAT DOESN'T LOOK, TO ME, TO BE WHAT THE JUDGE DID, AND YOU HAVEN'T REALLY ATTACKED THE WEIGHING OF ANY OF THE MITIGATORS.

I HAVEN'T PURPOSELY, BECAUSE IN MY OPINION, YOU DON'T KNOW IF THERE WERE ANY STATUTORY MENTAL MITIGATORS, BECAUSE THEY WERE NOT DEVELOPED. NOW, WHAT I AM REFERRING TO IS WHAT IF THIS WAS DURING A SCHIZOPHRENIC DELUSIONAL PARANOID EPISODE, WHICH CLEARLY THE TESTIMONY SHOWS THIS GENTLEMAN SUFFERED FROM. WHAT IF IT OCCURRED DURING THAT KIND OF EVENT? IT CLEARLY WOULD BE VERY WEIGHTY STATUTORY MENTAL MITIGATION. WE DON'T KNOW. THAT WE HAVE NO IDEA, BECAUSE IS HE A DEATH VOLUNTEER. AND THAT IS WHAT IS THE WHOLE CRUX OF THIS ARGUMENT TODAY. WE DON'T KNOW. THAT WE WILL NEVER KNOW IT, BECAUSE HE DOESN'T WANT TO COOPERATE, AND HE HAS, IN YOUR WORDS, THE RIGHT TO SELF- DETERMINATION, TO BE EXECUTED BY THE STATE OF FLORIDA. THAT IS WHAT THIS IS ABOUT.

IS THERE ANY QUESTION AS TO WHETHER OR NOT HE WAS INSANE AT THE TIME THAT THESE CRIMES WERE COMMITTED?

THE, EXCUSE ME, DR.^BERLAND STATED THAT, WITH FURTHER TESTING AND SO FORTH, HE WOULD BE ABLE TO MAKE SOME KIND OF OPINION THAT WAY, BUT HE COULDN'T, BASED ON JUST ONE TEST, AND DR.^BURNS CERTAINLY COULDN'T MAKE AN OPINION, EITHER, BECAUSE IT WASN'T FOLLOW-UP ON THE ORGANIC PROBLEMS THAT HE THOUGHT THIS GENTLEMAN MAY SUFFER. MR.^CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL.

I WILL STOP, UNLESS THERE ARE ANY QUESTIONS. THANK YOU. MR.^CHIEF JUSTICE

MR. AKE.

MAY IT PLEASE THE COURT. MY NAME IS STEPHEN AKE, AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE. AT FIRST ISSUE, THE TRIAL COURT ACKNOWLEDGES THAT IT FOLLOWED ALL OF THE APPLICABLE LAW THAT WAS IN EVENT AND EVEN FORESAW THE CHANGES THAT THIS COURT MADE IN MOHAMMED, WHICH CAME, I THINK, THREE MONTHS AFTER THIS SENTENCING HEARING TOOK PLACE, BUT YET COUNSEL WANTS TO EXTEND THE LAW EVEN FURTHER, AND I BELIEVE THERE IS NO JUSTIFICATION IN THIS RECORD, FOR ANYTHING THAT COUNSEL BROUGHT TO THIS COURT'S ATTENTION. SPECIFICALLY HE IS ARGUING THAT THE TRIAL COURT SOMEHOW ABUSED ITS DISCRETION, IN NOT DEVELOPING MITIGATION, BY, AS JUSTICE ANSTEAD POINTED OUT, BY BASICALLY STRAPPING THIS DEFENDANT DOWN TO A TABLE AND DOING SOME KIND OF CT SCAN OR SOMETHING OF THAT NATURE. IT SHOULD BE IMPORTANT TO NOTE THAT THERE ARE TWO EXPERTS THAT TESTIFIED OR WE HAD TWO THAT TESTIFIED AT THE COMPETENCY HEARING. DR.^TRESSLER AND DR.^BURNS TESTIFIED AT THE COMPETENCY HEARING, AND THEY HAD EXAMINED THE DEFENDANT IN APRIL 2000, AND THEY, BOTH, FOUND THAT HE WAS COMPETENT TO STAND TRIAL, IT TO PLEAD, TO DO ALL OF THE THINGS THAT HE DID, BUT DR.^BURNS, ALSO, TESTIFIED THAT THE DEFENDANT HAD COMPLAINED OF PERIPHERAL VISION, SO HE MADE A NOTE THAT. WELL. THE DEFENDANT. I MAY BE ABLE TO TELL SOMETHING MORE WITH NEUROPSYCHIATRIC TESTING, WHETHER HE HAS SOME KIND OF BRAIN TUMOR OR MASS ON HIS BRAIN, BUT EVEN IF HE DOES, IT IS NOT SIGNIFICANT. IT IS NOT AFFECTING HIM TO ANY SIGNIFICANT DEGREE. IT MAY JUST BE A FACTOR IN HIS DEPRESSION. SO THE ONLY TWO RECOMMENDATION FROM THE EXPERTS WAS DR.^BURNS SAID IT MAY BE USEFUL, BUT REALLY I CAN TELL, BASED ON TESTING HAD, THAT IS NOT AFFECTING HIM TO ANY SIGNIFICANT DEGREE.

WHAT DO THE DOCTORS' EVALUATIONS CONSISTS OF? DID THEY INTERVIEW HIM? DID THEY GIVE HIM STANDARD TEST SOMETHING.

MMPI. I BELIEVE THEY BOTH MET WITH HIM FOR APPROXIMATELY AN HOUR AND-A-HALF. AS FAR AS THE OTHER TESTING, THE MMPI II WAS THE ONLY TESTING THAT WAS DONE ASIDE FROM THE NORMAL PSYCHIATRIC EVALUATION. THE DEFENDANT REFUSED TO MEET WITH DR.^BERLAND BACK IN, I BELIEVE IT WAS MARCH OF 2000, AND THEN HE SUBSEQUENTLY MET WITH THESE TWO DOCTORS. HE GAVE THE REASONS WITH DR.^BURNS OR TRESSLER. HE SAID HE DIDN'T WANT TO MEET WITH DR.^BERLAND, BECAUSE HE HAD READ ABOUT HIM IN SOME OF THE CASES AND HE SET UP TWO FUTURE MEETINGS AND HE REFUSED TO MEET WITH DR.^BERLAND, SO HE DID NOT COOPERATE WITH DR.^BERLAND BUT HE DID COOPERATE WITH THE TWO DOCTORS WHO WERE APPOINTED TO DO THE COMPETENCY EVALUATION. THEY DID THE TESTING, AND THE TRIAL COURT UTILIZED THAT TESTING IN SUBSEQUENTLY REVIEWING AND UTILIZING THAT TESTIMONY, AND DR.^BERLAND'S TESTIMONY, AS TO THE EVALUATION.

AS COMPETENCY HEARINGS ARE BEING DEVELOPED, WHAT IS THE COMMON PRACTICE WITH REGARD TO THIS, IN VIEWING WHAT OCCURRED IN THIS CASE? WAS THERE SUFFICIENT EXAMINATION, TESTING, INQUIRY, TO PROVIDE A BROAD BASIS UPON WHICH YOU COULD DRAW CONCLUSIONS WITH REGARD TO MENTAL HEALTH STATUS, SEPARATE AND APART FROM JUST PURE COMPETENCEY?

I BELIEVE IN THIS CASE, THE EXPERTS GENERATED A PRETTY LENGTHY REPORT THAT DISCUSSED HIS SCORES ON THE MMPI II, AND THEY GAVE CONCLUSIONS AND OPINIONS AS TO HIS MENTAL HEALTH, AND I BELIEVE THEY DIDN'T DIAGNOSE HIM WITH ANY SEVERE MENTAL ILLNESSES AT THAT TIME. THEY INDICATED THAT HE SUFFERED FROM DEPRESSION AND THAT HE HAD SOME ANTISOCIAL TRAITS THAT HAVE BEEN LONG STANDING FOR NUMEROUS YEARS, BUT I BELIEVE THEIR EXAMINATION WAS VERY SUFFICIENT, FOR THIS PURPOSE. AND I BELIEVE THAT WHAT, HOW IT WAS SUBSEQUENTLY USED WAS JUST WHAT THIS COURT ENVISIONED IN MOHAMMED, WHEN THIS COURT SAID, WHEN YOU HAVE A DEFENDANT THAT IS WAIVING EVERYTHING AND NOT COOPERATING WITH THE PRESENTATION OF MITIGATION EVIDENCE, YOU HAVE TO ORDER A PSI TO DEVELOP THIS TYPE OF INFORMATION, AND IN ADDITION IN THIS CASE THE COURT FORESAW AND THAT ORDERED THE PSI, BUT WE ALSO HAVE THESE TWO COMPETENCY EXAMINATION, SO WE HAVE AN ABUNDANCE. THIS WAS NOT A CASE WHERE NOTHING WAS PRESENTED. WE HAVE AN ABUNDANCE OF PROFFERED EVIDENCE THAT THE COURT CAN LOOK AT AND UTILIZE IN DEVELOPING THIS MITIGATION, AND THAT IS EXACTLY WHAT THE TRIAL COURT

### DID UTILIZE.

# ARE WE ALSO PRESENTED WITH A SITUATION WHERE, IN ESSENCE, THE MITIGATION CLAIMED, ON THE BASIS OF THIS EVIDENCE, LARGELY WENT UNREFUTED? THAT IS THE STATE DIDN'T --

## CORRECT.

# -- CONDUCT AN ADDITIONAL EXAMINATION OR TESTING OR PRESENT OTHER EVIDENCE TO ATTEMPT TO REFUTE IT? SO TO SOME DEGREE, THE DEFENDANT BENEFITED.

### BENEFITED.

### GOT THE BENEFIT.

CORRECT, YOUR HONOR. THE PROCEDURE THAT WAS UTILIZED WAS PROBABLY NOT THE BEST. BASED ON COON V DUGGAR, WHICH THEY WERE COMPLYING WITH, IT WAS DEFENSE COUNSEL'S BURDEN TO TELL THE COURT WHAT MITIGATION HE HAS DISCOVERED, AND COUNSEL KIND OF WENT BEYOND THAT IN PROVEERING THE MITIGATION, BY ACTUALLY CALLING DR.^BERLAND, AND I THINK THE RECORD REFLECTS THAT AT THAT HEARING, THE STATE HAD NO OPPORTUNITY TO REVIEW ANY OF THE STATE'S MATERIAL -- TO REVIEW ANY OF THE DEFENSE'S MATERIAL PRIOR TO RIGHT THERE, AND THE STATE WAS UNABLE TO REBUT ANY OF THIS. NOW, THIS COURT PREVIOUSLY SAID, IN LEMARCA AND IN HAUSER, THAT PROSECUTION EVIDENCE DOES NOT HAVE TO BE ACCEPTED. I BELIEVE THAT THIS COURT COMMENTED IN HAUSER, THAT THIS THE PROSECUTOR IN HAUSER BENT OVER BACKWARDS TO FIND INFORMATION IN HAUSER. WE HAD THE PROSECUTOR GOING OUT OF HIS WAY TO FIND AND PRESENT ANY MENTAL MITIGATION, AND THAT WAS HE DIDN'T GET ANY PROPER DISCHARGE FROM THE MILITARY.

DID HE HAVE SUICIDAL THINKING FROM SOMETIME IN HIS TEENS?

THAT IS IN THE PRISON RECORDS. I BELIEVE THE PRISON RECORDS, YOUR HONOR ASKED ABOUT THAT EARLIER, IS THAT THE KENTUCKY PRISON RECORDS WHERE HE WAS INCARCERATED, BASICALLY UP UNTIL A YEAR BEFORE THIS MURDER, I THINK FOR ABOUT 14 OR 15 YEARS, THOSE PRISON RECORDS WERE AVAILABLE TO DR.^BERLAND. HE ATTACHES DOCUMENTATION FROM THESE KENTUCKY PRISON RECORDS, IN HIS PROFFERED MITIGATION THAT HE SUBMITTED TO THE COURT.

DO WE KNOW WHETHER HE WAS TREATED FOR MENTAL ILLNESS IN THE KENTUCKY PRISON? DO WE HAVE ANY IDEA?

I BELIEVE I DID NOT SEE ANY RECORDS OF THAT SORT.

AND THE REASON I AM ASKING THIS, AND THIS CAME UP AND MAYBE IT WASN'T ONE OF THE CASES WHERE THIS DEFENDANT, AT THE TIME THAT HE PLED GUILTY, SAID THAT HE NEVER BEEN TREATED IN THE PAST FOR MENTAL OR EMOTIONAL DISORDERS THAT, HE HADN'T BEEN TREATED, YET WE HAVE GOT A PATTERN, HERE, OF SOMEBODY THAT CLEARLY HAS A FORM OF MENTAL ILLNESS, AS MANY OF OUR DEATH PENALTY DEFENDANTS DO, AND YOU KNOW, NOW THE QUESTION IS WHAT DEGREE OF MENTAL ILLNESS DOES HE HAVE. IF HE IS COMPETENT TO STAND TRIAL OR PLEAD GUILTY OR COMPETENT TO MAKE THESE DECISIONS, BUT HOW SEVERE OF A MENTAL ILLNESS IS THAT, IN FACT, INTERFERING WITH HIS THOUGHT PROCESSES? SO AS FAR AS JUST INTEGRITY OF HIS PROCESS, IS THERE, IT SEEMS TO ME THAT THE KENTUCKY RECORDS, THERE FOR 15 YEARS, IF HE HAD HAD A SERIOUS MENTAL ILLNESS, THAT WOULD HAVE BEEN DEVELOPED IN THERE, AND IT DOESN'T, FROM WHAT YOU UNDERSTAND --

I DON'T RECALL YOUR HONOR, SEEING, I KNOW DR.^BERLAND ATTACHED A NUMBER OF THINGS FROM KENTUCKY, AND I DON'T REALLY SEEING THOSE IN THERE. WHETHER THEY WERE WITHHELD OR NOT PROFFERED, I DON'T KNOW. I DIDN'T SEE IT. BUT I KNOW THERE WERE A NUMBER OF INSTANCES WHERE HE DID CITE TO THE KENTUCKY RECORD. APPARENTLY, WHEN HE WAS ARRESTED FOR AN ATTEMPTED ROBBERY AND THE MURDER, HE DID SAY THAT HE WANTED TO COMMIT SUICIDE AT THAT TIME, SO I DON'T KNOW WHATEVER HAPPENED TO --

#### IS THE PSI IN THIS RECORD?

YOUR HONOR, I BELIEVE IT WAS SUPPLEMENTED INTO THE RECORD. IF NOT, I HAVE IT IN MY SUPPLEMENTAL FILE, SO IF THIS COURT DOESN'T HAVE IT, I WILL PROVIDE IT. I KNOW THEY REFERENCED KENTUCKY, BUT THEY ALSO HAD ALL OF THESE REFERENCES THAT HE HAS BEEN EXAMINED FOR COMPETENCY AND THAT HE HAS BEEN DECLARED COMPETENT IN THE SECTION THAT DEALS WITH MENTAL HISTORY, AND IF THIS COURT DOESN'T HAVE IT, I WILL CERTAINLY SUPPLEMENT. I BELIEVE MINE IS FAXED TO ME. I HAVE A FAX ON HERE, SO IT MIGHT NOT BE IN THE RECORD.

IN MOHAMMED, WHAT WE ENVISION IS THAT THERE WOULD BE A GATHERING OF THOSE KINDS OF RECORDS, YOU KNOW, OBJECTIVE RECORDS OF THE PAST, AND, OF COURSE, THIS IS BEFORE MOHAMMED. IT DOESN'T APPEAR THAT THAT --

WELL, IT APPEARS THAT THEY DON'T HAVE, I WAS LOOKING AT, IN THE SCHOOL RECORDS, HE WENT TO SCHOOL IN MICHIGAN, I BELIEVE IT WAS, AND DROPPED OUT IN TENTH GRADE BECAUSE THEY WANTED TO PUT HIM IN A SPECIAL EDUCATION CLASS, AND HE DROPPED OUT AT THAT TIME. I DON'T KNOW WHAT RECORDS WAS BASED ON THE PSI INPUTING THAT INFORMATION IN THERE. I BELIEVE THAT, BASED ON WHAT IS IN THE ERROR, BASED ON DR.^BERLAND'S SUPPORTING DOCUMENTS, WHICH COVERS APPROXIMATELY 100 PAGES, THERE IS AN ABUNDANCE OF MATERIAL HERE, IN THESE RECORDS.

BASED ON OUR PRIOR CASE LAW, THESE MENTAL ILLNESSES THAT THE TRIAL COURT FOUND TO EXIST, GAVE LITTLE WEIGHT TO, IF THE TRIAL COURT, BASED ON ACTUAL TESTIMONY, HAD GIVEN ALL THESE MENTAL MITIGATORS GREAT WEIGHT, IS THERE SUPPORT, STILL, IN THE CASE LAW THAT THIS IS A PROPORTIONAL DEATH SENTENCE?

SURE. NONE OF THESE MITIGATORS ROSE TO THE LEVEL. THEY ARE ALL THE NONSTATUTORY-TYPE MENTAL MITIGATORS. THEY DIDN'T RISE TO THE LEVEL OF STATUTORY EXTREME NATURE. AND YOU STILL HAVE THESE TWO VALID HAC AND PRIOR VIOLENT FELONY, WHICH WAS A VERY WEIGHTY AGGRAVATOR, IN THAT HE SHOT SOMEBODY IN THE HEAD AND ATTEMPTED TO MURDER THEM. YOU HAVE THESE TWO VALID AGGRAVATORS AND NONSTATUTORY MITIGATION. I BELIEVE I CITED A NUMBER OF CASES IN MY BRIEF THAT DEAL WITH PROPORTIONALITY REVIEW IN THIS CASE, AND I BELIEVE IT IS SUFFICIENT WITH THESE TWO WEIGHTY AGGRAVATORS AND NONSTATUTORY MITIGATION, EVEN THE WAY IT IS DEVELOPED IN THIS RECORD THAT, THIS COURT CAN STILL DO ITS PROPORTIONALITY REVIEW AND A PROPORTIONATE SENTENCE IN THIS CASE. BASICALLY WHAT APPELLATE COUNSEL ENVISIONED AS PROPER PROCEDURE TO FOLLOW IN THIS CASE IS UNWORKABLE. YOU CAN'T HAVE A TRIAL COURT DEVELOPING MITIGATION AND FORCING A COMPETENT DEFENDANT TO UNDERGO THESE TYPES OF TESTS. TO THE EXTENT THAT COUNSEL DISCUSSED HIS SECOND ISSUE, THE HAC, THE STATE WOULD SUBMIT THAT CLEARLY THE STRANGULATION MURDER CONSTITUTES A VALID HAC AGGRAVATOR. HERE YOU HAVE THE DEFENDANT STRANGLING THIS WOMAN IN, LIKE, THREE SEPARATE OCCASIONS, BECAUSE HE WAS UNABLE TO KILL HER THE FIRST COUPLE OF TIMES, AND HE KEPT, HE WOULD STRANGLE HER, TAKE A BREAK, LISTEN FOR A HEARTBEAT AND SEE THAT SHE IS STILL BREATHING AND SEE SHE HAS A HEARTBEAT AND HE WOULD DO IT AGAIN. THAT DIDN'T WORK, AND THE THIRD TIME HE HUNG HER UP ON A DOOR FRAME AND WENT AND HAD A BEER AND WAITED.

DID HE TAKE ECSTASY AT THE TIME OF THIS MURDER?

HE DID SAY HE HAD A SMALL AMOUNT OF ECSTASY THAT NIGHT AND A BEER.

## DID DR.^BERLAND TESTIFY AS TO WHAT EFFECT THAT WOULD HAVE ON HIS MENTAL STATUS AT THE TIME?

HE PROBABLY DID, BUT I DON'T RECALL WHAT HE SAID ABOUT. THAT DR.^BERLAND, OF COURSE, NEVER MET WITH THE FELLOW, AND THE OTHER TWO EXPERTS TESTIFIED THAT HE WAS VERY AWARE, AND I BELIEVE YOU CAN REMEMBER IN HIS CONFESSION THAT HE HAD NO PROBLEM REMEMBERING THE DETAILS AND WHAT TOOK PLACE, BOTH BEFORE, DURING AND AFTER THIS MURDER. I BELIEVE, EVEN JUST LOOKING AT HIS CONFESSION, YOU CAN TELL THAT. IF THERE ARE NO FURTHER QUESTIONS, THE STATE WILL RELY ON ITS BRIEF. MR.^CHIEF JUSTICE

THANK YOU, COUNSEL. MR. BURDEN, REBUTTAL?

THANK YOU. I WOULD SAY TO THE COMMENTS ABOUT THE KENTUCKY RECORDS, THAT WHAT IS IMPORTANT, PROCEDURALLY, IS THERE IS NO PROCESS THAT REQUIRED IT, BY ANY MEANS. IF THERE WAS ANY GATHERED, IT WAS BECAUSE TRIAL COUNSEL GOT A COURT ORDER TO GET A CONFIDENTIAL PSYCHIATRIC EXPERT TO ASSIST HIM IN THE DEVELOPMENT OF THIS CASE, BUT NONETHELESS, BECAUSE OF THE APPELLANT'S DESIRES, WAS UNABLE TO BE AN ADVOCATE IN THIS REGARD, AND THAT SPILLS OVER TO THE HAC AGGRAVATOR, WHERE THERE WAS NO CROSS-EXAMINATION OF THE MENTAL, THE MEDICAL EXAMINER IN THIS CASE, BY ORDER OF MR. OCHA. HE DIRECTED HIS COUNSEL NOT TO CROSS-EXAMINATE THE MEDICAL EXAMINER, WHO SAW THIS VICTIM 48 HOURS AFTER THE CRIME AND, BY HER OWN ADMISSION, IT WAS VERY DIFFICULT TO DETERMINE HOW THINGS HAD OCCURRED. SO WE ARE RELYING --

YOUR OPPONENT HAS COMMENTED BRIEFLY UPON THE PROPORTIONALITY ISSUES. WOULD YOU ADDRESS THAT, ON THE BASIS OF THE RECORD THAT WE HAVE, BECAUSE DESPITE THE FAILINGS THAT YOU SUGGEST EXIST HERE, THERE IS THE REFERENCE TO THE ATTEMPTED SUICIDE, THE LENGTHY HISTORY OF DRUG ABUSE, ALCOHOL ABUSE. WOULD YOU GIVE US YOUR ANALYSIS, WITH REFERENCE TO PROPORTIONALITY.

YES. AT THE TIME OF THE CRIME, THIS APPELLANT WAS UNDER THE INFLUENCE OF ALCOHOL AND ECSTASY. I THINK THE RECORD SUPPORTS THAT. HOW MUCH ALCOHOL IS UNKNOWN. IT IS KNOWN THAT HE CONTINUED TO INGEST ALCOHOL THE REST OF THE EVENING AFTER THE CRIME, TO THE POINT OF GREAT INTOXICATION AND THAT, LATER ON, WENT TO THE POLICE DEPARTMENT WHEN HE SOBERED UP, TO CONFESS, AND GAVE A FULL ACCOUNT OF WHAT OCCURRED. THE EVIDENCE OF PROPORTIONALITY SHOWS THAT HE IS A DISTURBED INDIVIDUAL. THERE IS NO QUESTION ABOUT THAT. THAT HE HAS THIS SUICIDAL AGGRAVATION PROBLEM THAT, HE DEMAND THEY SHOOT HIM IN 1978. HE TRIED TO HANG HIMSELF IN JAIL. AND BY MY ACCOUNT, THIS IS JUST ANOTHER ATTEMPT TO COMMIT SUICIDE AND HAVE THE STATE OF FLORIDA DO IT.

DOES THE RECORD REFLECT HOW MANY SUICIDE ATTEMPTS?

TWO PRIOR, AND HIS FAMILY IS REPLETE WITH EPISODES OF SUICIDE, HIS SISTERS AND MOTHERS AS WELL, SUICIDE ATTEMPTS.

AND BEYOND THE TWO?

OF OTHER FAMILY MEMBERS NOT OF HIM.

I SEE. A FAMILY HISTORY.

YES, SIR. A FAMILY HISTORY OF THIS. AND I THINK IT PROBABLY HAS TO DO WITH SCHIZOPHRENIC EPISODES THAT HAVE BEEN UNDIAGNOSED, AS FAR AS THE RECORD GOES, BUT WE CERTAINLY HAVE AN IDEA THAT IT EXISTS, BECAUSE HE IS OFF THE SCALE, AND A SCHIZOPHRENIC, DELUSIONAL THINKING OFF THE SCALE IN THIS TEST. WHY? WE DON'T KNOW.

DID THIS EPISODE TAKE PLACE AFTER HIS ARREST? DID ONE TAKE PLACE IN 1978 AND ONE TOOK PLACE IN THE ARREST FOR --

THE SECOND ONE OCCURRED AFTER THE ARREST IN '78, WHILE HE WAS IN JAIL. HE TOOK HIS JACKET AND HUNG IT UP AND TRIED TO HIMSELF.

WITH THE DOCUMENTATION --

YES, AND I SUBMIT THIS IS ANOTHER ATTEMPT TO HAVE THE STATE OF FLORIDA DO IT FOR HIM, ANOTHER SUICIDE ATTEMPT. MY TIME HAS EXPIRED. MR.^CHIEF JUSTICE

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.