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Edward Ragsdale v. State of Florida

MR. CHIEF JUSTICE: THE FINAL CASE ON THIS MORNING'S ORAL ARGUMENT CALENDAR IS RAGSDALE VERSUS STATE. MR. GRUBER.

MAY IT PLEASE THE COURT. MY NAME IS MARK GRUBER. I AM STAFF COUNSEL WITH CCRCs MIDDLE, AND I AM HERE TO TRY TO GET A NEW PENALTY PHASE FOR MR. RAGSDALE, IF I CAN. THERE ARE OVERRIDING FACTS THAT I WANT TO URGE AND ALWAYS WANT TO KEEP IN MIND HERE. AT THE EVIDENTIARY HEARING THAT WAS CONDUCTED IN THIS CASE, THERE WAS A WEALTH OF BACKGROUND MITIGATION THAT WAS SHOWN AT TRIAL AND MENTAL MITIGATION. NONE OF THIS MITIGATION WAS PLEADED BEFORE THE JURY. AND THERE WAS SIMPLY NO GOOD REASON FOR THAT FAILURE FOR THAT OMISSION. IT WAS DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE AND REALLY, FOR, TO SOME EXTENT, A LACK OF ANYWHERE INITIATIVE ON DEFENSE COUNSEL'S PART IN PREPARING AND PRESENTING MITIGATION AT TRIAL. THE BACKGROUND MITIGATION, I AM CALLING IT THAT, REFERRING TO THE ABUSIVE CHILDHOOD THAT RAGSDALE HAD, WAS EXTENSIVE, IN FACT AND IN QUALITY IT SOMEWHAT EXCEEDED THAT. THAT WAS EVENAL AMINGD AND COMMENTED ON IN --ALAGED AND COMMENTED ON, IN THIS COURT'S 1998 OPINION.

BEFORE YOU GET TO WHAT THE EVIDENCE WAS, AS FAR AS THIS PARTICULAR DEFENSE LAWYER, THIS WAS HIS FIRST CAPITAL CASE, BUT DID HE, WAS HE BROUGHT IN AT A TIME CLOSE TO THE TRIAL? WHAT, BECAUSE APPARENTLY THERE IS SOME TESTIMONY ABOUT THAT HE HAD TO RELY ON DEPOSITIONS. WHAT IS THE TIME FRAME WHERE HE FIRST GETS INVOLVED IN THIS CASE?

OKAY. MY BEST RECOLLECTIONLATION IS THAT HE -- LEG ELECTION IS THAT HE ACTUALLY DID -- RECOLLECTION IS THAT HE ACTUALLY DID GET A SUBSTANTIAL EXTENSION IN THIS CASE. IT WAS FAIRLY SOON IN THE TRIAL, BUT I DON'T RECALL ANYWHERE AN INDICATION THAT HE WAS UNDER A GREAT TIME PRESSURE.

BUT THERE HAD BEEN PREVIOUS COUNSEL, SEVERAL PREVIOUS COUNSEL.

THERE HAD BEEN SEVERAL PREVIOUS COUNSEL. THE MAIN ONE TO LOOK AT IS WILLIAM WEB. I UNDERSTAND HE IS NOW CIRCUIT JUDGE.

RIGHT.

AND HE HAD DEPOSED, VIRTUALLY ALL OF THE WITNESSES, AND HE HAD ALSO, OBTAINED DR. DELBIATO AS A COURT-APPOINTED CONFIDENTIAL ADVISOR, WHO HAD CONDUCTED AN EVALUATION, AND THERE WAS A REPORT, SO THIS STUFF WAS ALL SITTING IN THE FILE WHEN MR. CULPEPPER GOT THE CASE. IN HIS OWN WORDS, HE THOUGHT IT WAS SIMPLY A MATTER OF READING THE FILE AND GETTING THE CASE READY TO TRY, AND I DON'T THINK THE RECORD REFLECTS THAT MR. CULPEPPER REALLY DID, I DON'T WANT TO SOUND TOO CAUSTIC HERE, BUT DID MUCH OF ANYTHING ELSE IN PREPARATION BEYOND THAT. IN OTHER WORDS I THINK THERE WAS ONE MORE DEPOSITION THAT HE TOOK OF A POLICE OFFICER, AND AS I AM GETTING TO MY POINT ABOUT MITIGATION, HE ONLY, THE ONLY THING HE REALLY DID, AS FAR AS ANY KIND OF BACKGROUND MITIGATION THAT I, THAT HE DESCRIBED, IS HE HAD HIS WIFE MAKE A COUPLE OF PHONE CALLS TO SOME FAMILY MEMBERS, AND A REPORT THAT HE GOT BACK FROM THEM APPARENTLY WAS NOT VERY COOPERATIVE. HE SAID THAT HE TALKED TO HIS CLIENT, AND THEN LEARNED MUCH ABOUT BACKGROUND MITIGATION THERE. HE SAID THAT HE READ DR.

DELBIATO'S REPORT AND ON THE BASIS OF THAT, AN ABANDONED MITIGATION, SO THERE WAS OTHER WORK THAT HE DID, IN PREPARATION FOR THE TRIAL FOR THE PENALTY PHASE.

HOW DID HE MAKE THE DECISION TO CALL THE ONE WITNESS HE DID CALL?

TERRY RAGSDALE? THAT WAS THE BROTHER, WHO HAD TESTIFIED DURING THE TRIAL, AND HE BUTTON-HOLD TERRY OUT IN THE COURTYARD. HE SAID THAT HE HADN'T TALKED TO HIM PERSONALLY BEFORE THEN. BUTTON-HOLD HIM OUT IN THE COURTYARD, DURING THE COURSE OF THE TRIAL, SPOKE TO HIM A LITTLE BIT, THERE IS NO RECORD OF THAT CONVERSATION THERE, BUT HE LIKED WHAT HE HEARD, SO HE PUT HIM ON THE STAND AS HIS ONE AND ONLY PENALTY PHASE WITNESS, HIS ENTIRE PENALTY PHASE EVIDENTIARY PRODUCTION, AND SO THE DECISION WAS MADE ON THAT SORT OF SPUR OF THE MOMENT PANIC SITUATION.

WHAT WAS THE DEFENSE COUNSEL'S EXPLANATION FOR THIS?

WELL, HIS EXPLANATION WAS THAT HE HAD DECIDED ON THE RELATIVE CULPABILITY STRATEGY, ONE THAT I HAVE NEVER CRITICIZED. IT WAS A VERY GOOD STRAGY. AND THEN THE NEXT THOUGHT THAT HE EXPRESSED A NUMBER OF TIMES, DURING THE EVIDENTIARY HEARING, IS THAT WAS THE RIGHT STRATEGY, SO THEREFORE HE DIDN'T DO ANY OF THESE OTHER THINGS. I GUESS I AM, WHAT I AM SAYING IS I DON'T THINK EVER GAVE A COGENT EXPLANATION OF WHY HE DIDN'T GO A LITTLE BIT FURTHER AND INVESTIGATE BACKGROUND MITIGATION OR MENTAL MITIGATION. WITH REGARD TO MENTAL MITIGATION I THINK IS WHERE I DIDN'T SEE MUCH THERE. AFTER READING DR. DELBIATO'S REPORT. THOSE WERE HIS EXPLANATIONS. I WANTED TO SAY --

YOU INDICATED THAT HE TALKED A TO A NUMBER OF PEOPLE AND THEY WERE NOT COOPERATIVE.

NO, SIR. HE DID NOT. HIS WIFE MADE A COUPLE OF PHONE CALLS. HE SAID, DURING THE HEARING, THAT WORDS TO THE EFFECT THAT EDELL GAITED THAT RESPONSIBILITY TO HIS WIFE.

THAT CERTAIN PEOPLE WERE TALKED TO. THAT IS ABOUT THE WAY TO PUT IT.

HE DIDN'T KNOW WHO THEY WERE. HE DIDN'T KNOW THE SUBSTANCE OF THE CONVERSATION. THE IMPRESSION THAT HE GOT WAS THAT THEY WEREN'T VERY COOPERATIVE. SO ON THE BASIS OF THAT, I GUESS ALL FURTHER EFFORTS IN THAT DIRECTION WERE ABANDONED. ERNIE RAGSDALE WAS THE DEFENDANT'S YOUNGER BROTHER. HE WAS OUR LEAD WITNESS AT THE EVIDENTIARY HEARING, AND HE PROVIDED SOME OF THIS MITIGATION MITIGATION. I WOULD LIKE TO GET IT ACROSS TO THE COURT, SO EVERYBODY IS AWARE OF WHAT WE BROUGHT OUT. THE FATHER ESSENTIALLY TORTURED THE DEFENDANT, AS A CHILD. THERE IS TESTIMONY FROM A NUMBER OF WITNESSES, ERNIE, THAT THE DEFENDANT WAS BEATEN WITH A WATER HOSE, WITH TREE LIMBS, WHIPPED WITH CLOTHES HANGARS, FISHING POLES, BEATEN WITH A WALKING CONTAIN, A BROOM HANDLE -- WALKING CANE, A BROOM HANDLE, A LEATHER STRAP, AT ONE TIME BROKE A BELT OVER HIM. HE IS DESCRIBED AS BEING BEAT TONE THE POINT WHERE BLOOD WAS RUNNING DOWN HIS LEGS, HANDCUFFED TO A PORCH, HANDCUFFED TO A POLE, SHOT AT, CLOSED-FIST PUNCHING ACROSS THE ROOM, OCCASIONS WHERE THE FATHER WOULD LURE HIM CLOSE THEN GRAB HIM AND PUNCH HIM. THE ABUSE WAS JUST HORRIFIC. IT WAS GRAPHIC. IT WAS HORRIFIC. IT WAS DETAILED. IT WAS UNDISPUTED, IT WAS SUPPORTED BY NUMEROUS WITNESSES THAT WERE CALLED AT THE EVIDENTIARY HEARING. OUR LEAD WIT NETS WAS ERNIE RAGSDALE, THE YOUNGER BROTHER. HE WAS A STATE'S WITNESS, IN OTHER WORDS LISTED BY THE STATE. HE APPEARED AT THE TRIAL, IN RESPONSE TO THE STATE'S SUBPOENA. THE PROSECUTORS TALKED TO HIM AND TOLD HIM TO GO HOME. YOU CAN'T GET MORE AVAILABLE THAN THAT. AND AS I SAID, THE EFFORTS MADE BY DEFENSE COUNSEL IN THIS CASE WERE TO HAVE HIS WIFE MAKE A COUPLE OF PHONE CALLS. HE FORMED THE OPINION THAT HE WASN'T GETTING ANY COOPERATION, SO HE ABANDONED BACKGROUND MITIGATION.

DID HIS WIFE TESTIFY HERE?

NO, SHE DID NOT.

WAS THERE ANY INDICATION HERE AS TO WHETHER DEFENSE COUNSEL WAS AWARE OF ANY OF THIS INFORMATION? THAT IS DID THE DEFENDANT, HIMSELF, COMMUNICATE ANY OF HIS ABUSIVE CHILDHOOD OR BACKGROUND TO HIS LAWYER?

I DON'T BELIEVE SO. I AM NOT SURE OF THAT. I DON'T WANT TO MAKE IT SO --

WAS THERE ANY TESTIMONY THAT THE LAWYER ASKED HIS CLIENT ABOUT HIS BACKGROUND AND, IN OTHER WORDS, WHAT WAS THE EVIDENCE, IF ANY, WITH REFERENCE TO THE LAWYER INQUIRING OF HIS CLIENT, WITH REFERENCE TO, YOU KNOW, WHAT IS YOUR BACKGROUND? WHERE WERE YOU BORN AND RAISED AND WHAT HAPPENED TO YOU?

I DON'T REALLY THINK THERE IS ANY EVIDENCE ON THE RECORD WITH THAT DEGREE OF SPECIFICITY. HE DID TALK TO HIS CLIENT AND SAID THAT HE ASKED SOME QUESTIONS ABOUT THAT.

BUT DID HE SAY I ASKED HIM QUESTIONS ABOUT THAT AND THEN HE WOULD PROVIDE ME WITH NO INFORMATION, OR I ASKED HIM QUESTIONS ABOUT THAT AND HE WAS UNCOOPERATIVE OR WHAT?

AS FAR AS UNCOOPERATIVE, I AM GLAD YOU MENTIONED THAT. THERE IS JUST NO INDICATION ON THIS RECORD, ANYWHERE, AT ANY TIME, THAT MR. RAGSDALE HAS BEEN AN UNCOOPERATIVE CLIE OR REFUSED OR ANYTHING. THERE IS JUST NO INDICATION ANYWHERE AT ALL THAT HE WAS UNCOOPERATIVE. WHAT MR. CULPEPPER SAID IS, AS I RECALL, THAT HE TALKED WITH HIS CLIENT, AND HIS CLIENT DIDN'T TALK ABOUT AN ABUSIVE BACKGROUND AND SO THEREFORE THAT FIT IN WITH THIS OVERALL IMPRESSION THAT THERE WAS NOTHING THERE TO LOOK FOR.

DID MR. RAGSDALE TESTIFY AT THE EVIDENTIARY HEARING?

NO. HE DID NOT.

WOULD YOU GIVE US A LITTLE BACKGROUND ON THIS, THE WIFE FIGURE, EDUCATIONAL BACKGROUND, EXPERIENCE BACKGROUND, WHAT SHE DID DO, INVOLVEMENT IN ANY RELATED FIELDS?

I THINK THE MOST THAT HAS BEEN DEVELOPED ON THIS RECORD IS THAT SHE WORKED, I THINK, IN A PROBATION OFFICE FOR A LITTLE BIT, AND AT ONE POINT WORKED AS PROBATION OFFICER, EXCUSE ME, AS A PROBATION OFFICER AND, ALSO, WORKED WITH THE PUBLIC DEFENDER'S OFFICE AS AN INVESTIGATOR FOR A PERIOD OF TIME, AND BEYOND THAT, I DON'T THINK THERE IS ANY FURTHER DEVELOPMENT.

DID POSTCONVICTION COUNSEL CALL HER AS A WITNESS?

NO, I DID NOT.

WHY NOT?

CANDIDLY, YOUR HONOR, MY FEELING WAS THAT THE DEFICIENCY PRONG OF STRICKLAND HAD BEEN DEMONSTRATED BY THE TIME WE WERE DONE SHOWING WHAT MITIGATION THERE WAS ON THE RECORD, AND WITH ALL OF OUR WITNESSES TESTIFYING, THAT NO ONE EVER TALKED TO THEM. THE ONE WITNESS TESTIFYING HE WAS THERE AT TRIAL, AND MY FEELING WAS THAT IT WAS JUST APPARENT FROM THE RECORD, AT THAT TIME, THAT COUNSEL HAD NOT GONE OUT AND

BROUGHT THESE WITNESSES IN. THE DEFENSE LAWYER WAS CALLED BY THE STATE, IN REBUTTAL TO MY CASE.

YOU DIDN'T CALL THE DEFENSE LAWYER EITHER.

NO. I DIDN'T CALL HIM AS A WITNESS. THE STATE DID. AND WHAT HE SAID WAS DEVELOPED.

HIS DEPOSITION WAS TAKEN.

YES, SIR.

HERS WAS NOT.

NO. THE TWO OF THEM WERE DIVORCED. I AM IN THE REBUTTAL TIME ALREADY. THE TWO OF THEM APPARENTLY WERE SEPARATED AT THE TIME OF THE EVIDENTIARY HEARING. I WILL RESERVE. MR. CHIEF JUSTICE: MISS DITTMAR.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE APPEAL, THE STATE OF FLORIDA. FIRST OF ALL, JUSTICE PARIENTE, ON THE TIMING, MR. CULPEPPER WAS APPOINTED IN AUGUST OF 1987. AND THE CASE WAS TRIED IN MAY OF 1988. THERE HAD BEEN SEVERAL, I FORGET WHETHER IT WAS FIVE, SIX, SEVEN ATTORNEYS APPOINTED BETWEEN, PROBABLY NOT, PROBABLY COUNTING WEB AND CULPEPPER AS THE BEGINNING AND ENDING, BUT THERE WERE A SUCCESSION OF ATTORNEYS. THE CRIME OCCURRED IN JANUARY OF 1986, AND MR. RAGSDALE WAS ARRESTED IN ALABAMA LATER THAT MONTH.

DO WE KNOW WHY THERE WERE SO MANY ATTORNEYS?

WELL, THERE WERE DIFFERENT REASONS. IN THE DIRECT APPEAL RECORD, THE WE KNOW THAT MR. WEBB INITIALLY MOVED TO WITHDRAW, CITING IRRECONCILEABLE DIFFERENCES WITH HIS CLIENT. THE NEXT ATTORNEY, ATTORNEY IVY, ALSO, THAT WAS IN FEBRUARY OF '87, SO MR. WEBB HAD IT FOR ABOUT A YEAR, AND THEN HE WITHDREW. THE ATTORNEY CAME ON IN FEBRUARY AND IN JUNE HE, ALSO, CITED IRRECONCILEABLE DIFFERENCES. THERE WAS. THE ATTORNEY APPOINTED IN JUNE, AND HE GOT OUT BECAUSE OF A CONFLICT IN JULY, AND. THE ATTORNEY WAS APPOINTED AT THAT POINT IN JULY OF '87. HE WITHDREW IN AUGUST, I THINK, AGAIN, BECAUSE OF A CONFLICT THAT HIS PARTNER HAD, NOT A CONFLICT WITH THE CLIENT, BUT MORE OF A CONFLICT WITH THE STATE ATTORNEYS OFFICE OR SOMETHING ALONG THOSE LINES. THERE WAS. THE ATTORNEY APPOINTED IN THE END OF JULY, AND THEN THE ORDER APPOINTING MR. CULPEPPER IN AUGUST OF 1987. SO PROBABLY JUST A VARIETY OF PRETTY MUNDANE REASONS. AND THERE IS NO INDICATION, FROM MR. CULPEPPER'S TESTIMONY, THAT HE HAD ANY LACK OF COOPERATIN FROM HIS CLIENT. HE SAID THAT HE TALKED TO HIS CLIENT, THAT HIS CLIENT DIDN'T GIVE HIM ANY INDICATION OF THIS BACKGROUND TYPE ABUSE. HE DID TALK, I THINK, A LITTLE MORE THAN HAS BEEN PRESENTED, ABOUT THE EFFORTS THAT HE AND HIS WIFE MAKE TO CONTACT THE FAMILY WITNESSES. IT JAUNTS I HAD MY WIFE MAKE A COUPLE PHONE CALLS. THERE WAS A DIFFICULTY WITH HIS BEING ABLE TO RECALL, AT THE EVIDENTIARY HEARING, WHO HIS WIFE HAD TALKED TO, WHAT INFORMATION HAD BEEN GIVEN, BUT HE SAID, YOU KNOW, BACK THEN I KNEW EXACTLY. SHE WAS TELLING ME WHO SHE HAD TALKED TO AND WHAT THEY HAD SAID T WASN'T THAT HE DIDN'T KNOW THAT INFORMATION OR WASN'T PAYING ANY ATTENTION TO IT, AND IT CERTAINLY WASN'T THAT HE FELT LIKE HE DIDN'T HAVE TO INVESTIGATE THIS. HE CLEARLY WAS AWARE THAT HE HAD --

DID HE HAVE A FILE IN THE CASE, WHICH WOULD INDICATE WHO HAD BEEN INTERVIEWED OR WHAT HAD BEEN DONE OR ANYTHING LIKE THAT?

HE HAD NOTES. HE DIDN'T -- HE WASN'T ASKED DIRECTLY ABOUT WHAT HAPPENED TO YOUR FILE

OR WHERE HAVE YOU SHARED YOUR FILE. HE TALKED ABOUT HOW HE HAD SPOKEN WITH TERRY RAGSDALE, THE BROTHER THAT TESTIFIED AT THE PENALTY PHASE, AND THAT HE WAS AWARE, FROM HAVING READ THE DEPOSITION, THAT TERRY HAD HAD UNFAVORABLE THINGS TO SAY ABOUT MR. RAGSDALE, BUT WHEN HE TALKED TO HIM, HE FELT LIKE TERRY REALLY HAD SOME IMPORTANT INFORMATION FOR THE DEFENSE, PARTICULARLY IN SUPPORT OF THEIR THEORY THAT, SAYING THINGS LIKE RAGSDALE WAS A FOLLOWER AND NOT A LEADER AND THAT HE WOULD BOAST ABOUT HAVING DONE THINGS AND YOU COULDN'T BELIEVE IT HIM, THAT TYPE OF EVIDENCE, AND HE SAID HE WAS MUCH MORE FAVORABLE, AND THEN WHEN HE GOT UP ON THE STAND HE FELT LIKE HE REVERTED BACK AND SAID SOME THINGS THAT HE WASN'T EXPECTING.

HE HAD NOT PARTICIPATED IN THE DEPOSITION FORM CORRECT? THAT IS SOMETHING THAT HAD BEEN TAKEN EARLIER IN THE SDMIS RIGHT. THAT WAS SOMETHING THAT MR. WEBB HAD DONE.

BUT HE HAD NO FILE THAT SHOWED, FOR INSTANCE, THAT MY WIFE INTERVIEWED THESE SIX WITNESSES, THAN IS THE GIST OF WHAT THEY HAD TO SAY?

APPARENTLY NOT. HE DISCUSSED HAVING NOTES, FROM HAVING TALKED TO TERRY THAT, HE SAID WERE ATTACHED TO THE DEPOSITIO. I DON'T KNOW, I WAS NOT PRESENT AT THE EVIDENTIARY HEARING, SO I DON'T KNOW IF PHYSICALLY THOSE WERE AVAILABLE AND ATTACHED AND JUST DIDN'T MAKE IT INTO A RECORD, OR IF HE JUST, THAT WAS JUST HIS MEMORY, THAT THEY WERE ATTACHED AT SOME POINT, BUT HE CERTAINLY DIDN'T APPEAR TO HAVE AN ORGANIZEED FILE WHICH WE WOULD LIKE TO SEE, THAT TELLS EXACTLY WHAT HE DID OR WHAT HIS WIFE DID. AND SO I THINK --

WHAT WAS THE GIST OF HIS TESTIMONY, AS FAR AS THE WIFE'S INVESTIGATION INTO THE BACKGROUND?

THE GIST OF HIS TESTIMONY WAS THAT THEY TALKED TO A NUMBER OF DIFFERENT PEOPLE, AND THEY WERE NOT ABLE TO GET ANY COOPERATION FROM THE FAMILY. THEY WERE NOT ABLE TO GET ANYBODY WHO WAS INTERESTED IN HELP HAD GONE MR. RAGSDALE. NOBODY CAME DOWN TO VISIT MR. RAGSDALE IN JAIL, AND SO HE SAID THAT THEY REALLY FELT LIKE, AND I THINK IT WAS KIND OF FLIP, THE WAY THAT MR. GRUBER MENTIONED IT THAT HE DEVELOPED THIS RELATIVE CULPABILITY THEORY AND SAID HE DIDN'T HAVE TO INVESTIGATE ANYTHING ELSE, BECAUSE THIS WAS A GOOD THEORY FOR HIM. ACTUALLY WHAT HIS TESTIMONY WAS AT THE EVIDENTIARY HEARING, BECAUSE THAT THEY STARTED WITH THE FAMILY MEMBERS. THEY TRIED TO DEVELOP MITIGATION FROM THE FAMILY MEMBERS. THEY DIDN'T GET THE INTEREST. THEY DIDN'T GET THE COOPERATION. THEY DIDN'T GET ANYTHING THAT WAS GOING TO BE HELPFUL TO THEM, SO HE SAID, YOU KNOW, I HAVE GOT TO COME UP WITH SOMETHING, AND THAT IS WHEN I STARTED THINKING ABOUT THE RELATIVE CULPABILITY.

DID HE ACTUALLY NAME NAMES, IN TERMS OF THE FAMILY MEMBERS THAT THEY HAD CONTACTED THAT HAD BEEN UNCOOPERATIVE?

NO.

OR DID HE JUST GENERALLY OFFER THEM?

HE COULD NOT REMEMBER. HE COULD NOT REMEMBER WHO HIS WIFE HAD SPOKEN TO, BUT HE DESCRIBED IT AS A NUMBER OF PEOPLE, AND HE COULD NOT SAY WHAT NUMBER MUCH HE COULD NOT TAMPA --. -- WHAT NUMBER. HE COULD NOT TAMPA NUMBER TO IT, BUT CERTAINLY IT MADE IT APPEAR, AND CERTAINLY THE TRIAL COURT FOUND THAT THIS INFORMATION JUST WASN'T AVAILABLE TO HIM, WHICH I THINK THE TRIAL COURT IS JUDGING HIS DETERMINATION, MR. CULPEPPER CULPEPPER'S CREDIBILITY IS TO WHAT EFFORT HE HAD TAKEN TO TRY AND DEVELOP THIS MITIGATION.

BUT ON THAT ISSUE, I MEAN, A LOT OF TIMES WE HAVE, THAT IS WHAT WE HEAR, THAT THEY WERE UNCOOPERATIVE AT THE TIME OF THE PENALTY PHASE AND THEN AFTER THE DEATH SENTENCE, EY BECOME COOPERATIVE, AND USUALLY THERE IS PROBABLY A LOT OF ACCURACY IN THOSE STATEMENTS. HERE, THOUGH, I GUESS MY CONCERN IS THAT THE ONLY WITNESS THAT THIS DEFENSE LAWYER PUTS ON, HE HAS A CONVERSATION WITH, IT IS ALMOST AS IF IT IS AN AFTERTHOUGHT, BECAUSE IT IS IN THE COURTYARD AFTER HE HAS TESTIFIED, I GUESS, IN THE GUILT PHASE, AND HE GOES, BASED ON THIS SORT OF CONVERSATION IN A COURTYARD, HE DECIDED TO PUT ON A WITNESS THAT ACTUALLY ENDS UP BEING MORE HARMFUL THAN HELPFUL, AND THEN THE BROTHER, ERNIE, WHO IS SORT OF THE MAIN WITNESS A -- WITNESS ON ALL OF THESE YEARS OF CHILDHOOD ABUSE, ACTUALLY CAME DOWN, WAS PRESENT, AND AVAILABLE TO TESTIFY, SO DOESN'T, EVEN THOUGH WE HAVE SOMEBODY SAYING, WELL, WE DIDN'T FIND ANYTHING HELPFUL, WITHOUT HAVING THE NOTES, WE HAVE ACTUALLY AFFIRMATIVE TESTIMONY THAT THE FAMILY, AT LEAST ERNIE, WHO WAS HERE, WAS AVAILABLE TO TESTIFY, AND WAS COOPERATIVE, SO I GUESS HOW DO WE RESOLVE, HOW DO WE, IN LOOKING AT WHAT THIS LAWYER ACTUALLY DID DO, SINCE WE KNOW HE DIDN'T TALK TO THE MENTAL HEALTH CONFIDENTIAL PERSON. HE LOOKED AT THE REPORT. HE DIDN'T DO ANYTHING FURTHER ON MENTAL HEALTH. WE KNOW THAT THERE AREN'T ANY NOTES OF ANY INTERVIEW OF ANY PARTICULAR WITNESSES, AND WE KNOW THAT ERNIE WAS AVAILABLE AND DOWN HERE AND THE ONE WITNESS HE DID PUT ON, HE PUT ON AFTER, YOU KNOW, HAVING SOME BRIEF CONVERSATION WITH HIM IN THE COURTYARD.

WELL, I DON'T THINK THE TESTIMONY WAS REALLY DEVELOPED ABOUT WHEN HE MADE THE DETERMINATION TO PUT TERRY ON AS A WITNESS. I THINK HE WAS INTENDING TO USE TERRY AS A WITNESS. HE HAD TERRY'S DEPOSITION. HE HAD ERNIE'S DEPOSITION. NOW, WE HAVE TERRY'S DEPOSITION IN THE RECORD, BECAUSE IT WAS SUBMITTED AT THE EVIDENTIARY HEARING. WE DO NOT HAVE THE DEPOSITION FROM ERNIE, SO WE DON'T KNOW WHAT INFORMATION HE HAD ABOUT ERNIE, AND HE DIDN'T SEE ERNIE TESTIFY. BUT WE HAVE ERNIE'S EVIDENTIARY HEARING TESTIMONY, AND A LOT OF THE CRITICISMS THAT HAVE BEEN LEVELED AT THE THING THAT IS TERRY HAD TO SAY AT TRIAL, ARE EQUALLY TRUE OF THE THINGS THAT ERNIE WAS SAYING. ERNIE WAS SAYING, YEAH, MY BROTHER WAS MEAN. WE WERE ALL BULLIES. YOU KNOW, HE WAS STEALING HIS DAD'S PAIN PILLS WHEN HE WAS EIGHT YEARS OLD. HAD HE A LOT OF UNFAVORABLE THINGS TO SAY ABOUT MR. RAGSDALE SO I THINK IF THE QUESTION IS, WELL, WHY DIDN'T THE ATTORNEY PUT ON ERNIE INSTEAD OF TERRY, IT DOESN'T APPEAR TO ME, FROM THE TESTIMONY, THERE IS NOT MUCH DIFFERENCE. NOW, THE POSTCONVICTION COUNSEL WAS ABLE TO DEVELOP, THROUGH ERNIE, SOME OF THE ABUSE THAT ERNIE DISCUSS THAT DID NOT COME OUT AT TRIAL, BUT I THINK THAT IS KIND OF A DIFFERENT ISSUE, WHEN YOU ARE LOOKING AT. THAT THE QUESTION --

WHAT IS YOUR THOUGHT, THOUGH, IN RESPONSE TO THE FACT THAT THERE WAS THIS REPORT FROM THE PSYCHOLOGIST IN THE FILE, WHICH APPARENTLY, AS I UNDERSTAND THIS HAD, HE HAD DONE AN EXAMINATION FOR THE GUILT PHASE OF THIS.

WELL, ACTUALLY HE HAD DONE A CONFIDENTIAL EVALUATION, AND HE INCLUDED AN EVALUATION FOR COMPETENCY, ALSO FOR SANITY AT THE TIME OF THE OFFENSE, AND HE, ALSO, LOOKED AT MITIGATING FACTORS.

BUT THE RECORD IS PRETTY CLEAR THAT MR. CULPEPPER JUST READ THE REPORT. HE DIDN'T GO TALK TO HIM.

RIGHT. WELL, HE READ THE REPORT, AND I THINK WHAT IS INTERESTING ABOUT THE MENTAL MITIGATION IS, IF YOU LOOK AT THE TESTIMONY THAT WAS PRESENTED, THERE IS REALLY NOT MUCH MORE THAN WHAT WAS IN THAT INITIAL REPORT THAT CULPEPPER HAD AND CONSIDERED AND DETERMINED HE DID NOT WANT TO USE AS MITIGATION.

WHETHER BARRON AND -- WHEN MARON AND BURLIN AND CULPEPPER ALL GOT INTO IT?

THEY ALL AGREED THAT MR. CULPEPPER HAS -- THAT MR. RAGSDALE HAS A BORDERLINE IQ. HE AGREED WITH DELBITO THAT THERE IS NO BRAIN INJURY, THERE IS NO PCHOSIS, THERE IS NO MENTAL ILLNESS. BERLIN TOOK ISSUE WITH THAT AND FELT LIKE THE TEST SCORES SHOWED SOME BIOLOGICALLY-DRIVEN MENTAL ILLNESS THAT WAS COMING INTO PLAY, BUT DELBIATO AND MARINE, BOTH OF WHOM DID NEUROLOGICAL SCREENINGS, DID NOT DETECT ANY KIND OF BRAIN INJURY, AND DELBIATO PUT THAT IN HIS REPORT AS WELL AND PUT IN THE REPORT ABOUT HIS HISTORY OF DRUG AND ALCOHOL ABUSE, SO THAT, AGAIN, IS SOMETHING THAT CULPEPPER WAS AWARE OF, AND THE FACT THAT DOCTOR BERLIN COMES ALONG, YEARS LATER, AND DOES HIS OWN TESTS AND REACES A DIFFERET RESULT, DOESN'T MEAN THAT THERE WAS A PROBLEM WITH CULPEPPER RELYING ON THE REPORT THAT HE HAD FROM DELBIAT ON, TO BEGIN WITH. REALLY -- DELBIATO,, TO BEGIN WITH. YOU HAVE TO LOOK AT THE INFORMATION HE HAD AND WHETHER HE PICKED UP THE PHONE AND TALKED TO THE PSYCHOLOGY ABOUT THE REPORT, REALLY ISN'T GOING TO MAKE ANY DIFFERENCE, IF THE PSYCHOLOGIST ALREADY HAD WHAT WAS GOING ON IN THE REPORT.

ISN'T THE PROBLEM, THOUGH, THAT IF HE HAD PICKED UP THE PHONE AND TALKED TO HIM OR GONE OUT TO HIS OFFICE AND TALKED TO HIM, THAT HE PROBABLY WOULD HAVE DEVELOPED SOME OF THIS BACKGROUND INFORMATION --

WELL, NO. HE WOULDN'T.

HE WOULDN'T HAVE?

NO. BECAUSE ACTUALLY WHAT DR. DELBIATO SAID, HE WAS ASKED SPECIFICALLY ABOUT -- HE DID NOT TESTIFY SPECIFICALLY E6D YEAR HEARING -- EVIDENTIARY HEARING. THEY DID A DEPOSITION IN LIEU OF HIS TESTIMONY AT THE EVIDENTIARY HEARING, SO IT OCCURRED CONTEMPORANEOUSLY WITH THE EVIDENTIARY HEARING. HE WAS ASKED WOULD YOU HAVE GONE BACK AND TAKEN A HISTORY AND INCLUDED THAT INFORMATION IN YOUR REPORT? AND DR. DELBIATO SAID, WHEN I DID THIS IN 1986, I CONDUCTED AN EVALUATION. I DID NOT ROUTINELY ASKED AT THAT TIME IF THEY HAD BEEN ABUSED AS CHILDREN. I TOOK IT AS A GIVEN. IT WASN'T ANYTHING UNIQUE TO ME. NOW, TODAY WE HAE A LOT MORE FOCUS ON IT AND A LOT RE EMPHASIS ON IT, AND YOU ASK AND IT IS INCLUDED IN MY REPORT.

BUT DELBIATO DIDN'T HAVE A FILE ON THIS, EITHER?

NO. HE DIDN'T. BUT HE DIDN'T SEEM TO INDICATE THAT THIS WOULD HAVE BEEN SOMETHING, IF AN ATTORNEY WOULD HAVE ASKED HIM ABOUT IT IN 1986 OR 1987, HE WOULD NOT HAVE BEEN ABLE TO PROVIDE ANY INFORMATION ABOUT MR. RAGSDALE'S BACKGROUND, BECAUSE HE DIDN'T GET INTO IT, AND HE SAID THAT THAT WAS THE NORM AT THAT TIME. HE WAS FOLLOWING THE STANDARDS THAT WAS AVAILABLE FOR DOING THESE EVALUATIONS, AND YOU KNOW, IT JUST WASN'T SOMETHING THAT WAS THAT SIGNIFICANT. WE ARE A LOT MORE AWARE OF IT TODAY AND IT IS CONSIDERED MORE SIGNIFICANT TODAY, AND SO WE ARE MORE SENSITIVE TO IT. WE ARE INCLUDING IT IN OUR REPORTS. WE ARE LOOKING AT IT. WE ARE PUTTING IT ON IN MITIGATION, BUT BACK AT THIS TIME, IT WASN'T THAT BIG AN ISSUE THAT HE CONSIDERED IT TO BE SOMETHING SIGNIFICANT TO INCLUDE IN HIS REPORT. AND HE CERTAINLY DIDN'T THINK HIS REPORT WAS DEFICIENT FOR NOT HAVING THAT.

WELL, ON THE, IF THE STRATEGY OF THE DEFENSE LAWYER WAS RELATIVE CULPABILITY, AND THE JURY CAME BACK WITH THAT STRATEGY AND WITH A 8-TO-4 RECOMMENDATION, AND YOU HAVE GOT IN DR. DELBIATO'S REPORT, THAT HE SAID THAT HIS, HE WAS FUNCTIONING, DULL TO NORMAL, JUST ABOVE THE MILDLY RETARDED, AND SAID THAT I SUSPECT HIS INTELLECTUAL FUNCTIONING IS SOMEWHAT LOWER THAN I EXPECTED, DUE TO A SPECIFIC LEARNING DISABILITY, WHICH I THINK HE HAS HAD SINCE CHILDHOOD. AND THEN HE SAID THAT IT LOOKS LIKE HE HAS

GOT A THIRD GRADE NINE MONTH LEVEL, AND HE IS REALLY DOING A LOT OF THIS. THIS IS REALLY MORE FOR COMPETENCY THAN FOR, YOU KNOW, THIS ISN'T REALLY A MITIGATION EXPERT. I GUESS MY QUESTION IS, IN TERMS OF LOOKING AT BOTH WHETHER IT GOES TO THE FIRST ORSECK PRONG AND UNDERMINING OUR CONFIDENCE IN THE RESULT OF THE OUTCOME, DID THE JURY HAVE ANY, DID THEY HAVE KNOWLEDGE AS TO THAT THIS PARTICULAR DEFENDANT AND THE ISSUE WAS RELATIVE CULPABLE, WAS -- CULPABILITY, WAS JUST SLIGHTLY ABOVE MILDLY RETARDED AND HAD A LEARNING DISABILTY AND HAD ALL THESE THINGS THAT DR. MARINE EVEN AGREES TO WITH -- DR. MARCHIN EVEN AGREES TO -- THAT DR. MARIN E6 ENAGREES TO WITH DR. BERLIN. DID THEY HAVE ALL OF THAT?

FIRST OF ALL THE DOCTORS AGREED THAT HE WAS MILDLY RETARDED, BECAUSE THEY DID ALL PUT HIM IN THE BORDER LINE RANGE BUT MARIN TALKS ABOUT SPECIFICALLY HOW IN HIS OPINION, YOU HAVE TO LOOK AT THE DIFFERENT SUBTESTS AND WHAT HE FELT LIKE TWO CRITICAL SUBTESTS ON SOCIAL JUDGEMENT AND VISUAL JUDGMENT, A THAT RAGSDALE WAS IN THE AVERAGE RANGE, SO I THINK YOU HAVE TO BE CAREFUL YOU DON'T JUST GENERALIZE.

DID THE JURY HAVE ANY INFORMATION ABOUT HIS MENTAL FUNCTION SOMETHING.

NO, BUT, AGAIN, WE ARE HERE ON INEFFECTIVE ASSISTANCE OF COUNSEL, AND COUNSEL HAD THAT INFORMATION. MR. CULPEPPER HAD THAT INFORMATION, CHOSE NOT TO PRESENT IT. HE WAS AWARE OF IT. HE DID NOT FEEL LIKE IT WAS SIGNIFICANT, AND IF HE IS ARGUING A RELATIVE CULPABILITY, HE MAY NOT WANT THE JURY TO KNOW THAT THIS IS A DRUG-ABUSED, MENTAL-ILL DEFENDANT. THAT MAY NOT WORK IN HIS FAVOR, WITH A RELATIVE CULPABILITY ARGUMENT, SO I DON'T THINK YOU CAN IS SAY THE JURY DIDN'T HAVE IT SO WE HAVE A PROBLEM HERE. YOU, AGAIN HAVE, TO LOOK AT WHETHER COUNSEL HAD IT, WHETHER HE MADE A DECISION ABOUT WHETHER OR NOT TO USE IT, AND HE SAID THAT HE DID THINK EXTENSIVELY ABOUT THE MENTAL MITIGATION AND REVIEWED DR. DELBIATO'S REPORT AND CONSIDERED THE SIGNIFICANCE OF IT AND DETERMINED IT WOULD NOT BE HELPFUL FOR THEM WITH THE JURY. SO HE DID NOT WANT TO PUT ON THAT INFORMATION. NOW, HE SAID, YOU KNOW, HE WAS KNOW THE AWARE OF THE CHILD ABUSE, AND AS FAR AS GETTING THAT IN, HE SAID I WOULD HAVE TO GIVE THAT FURTHER THOUGHT, BUT, YOU KNOW, THAT, AS FAR AS THE MENTAL MITIGATION, HE MADE THE DETERMINATION HE WOULD NOT HAVE USED THAT.

MARIN AND BERLIN, BOTH RESPECT TESTIFIED, AT THE --

YES.

AND HAD DELBIATO'S DEPOSITION AT THE EVIDENTIARY HEARING. IS THAT CORRECT?

THEY TESTIFIED THAT THEY HAD HIS --

NO. THEY TESTIFIED AT --

YES.

AND THE TRIAL JUDGE.

THE TRIAL JUDGE HAD ALL THREE EXPERT OPINIONS.

AND HAD MR. CULPEPPER'S TESTIMONY.

YES.

WHAT ELSE WAS THERE?

THERE WAS TESTIMONY FROM THE BROTHER ERNIE, AND THERE WAS TESTIMONY FROM SEVERAL COUSINS AND, I BELIEVE, AN AUNT, WHO GENERALLY CORROBORATED SOME OF THE THINGS THAT ERNIE SAID ABOUT THE CHILDHOOD ABUSE. THEY WERE NOT, THE COUSINS WERE NOT AS SPECIFIC, AND THERE IS A LITTLE INCONSISTENCY WITH THE DATES. THERE IS SOME, AT SOME POINT RAGSDALE'S FAMILY MOVED UP TO ALABAMA, AND AT A VERY YOUNG AGE APPARENTLY HE WENT AND LIVED WITH HIS COUSIN RAYMOND, AND THERE IS SOME --

NO OTHER LAWYERS TESTIFIED.

NO. NO OTHER. THE OTHER WITNESSES WERE ALL JUST FAMILY BACKGROUND WITNESSES THAT TESTIFIED. I THINK IF YOU LOOK AT THE CONCLUSIONS THAT THE TRIAL COURT MADE IN DENYING THE 3.850, HE MADE THE DETERMINATION, WHICH IS SUPPORTED BY CULPEPPER'S TESTIMONY, THAT CULPEPPER DID MAKE A REASONABLE EFFORT TO GET THIS, WAS NOT ABLE TO DEVELOP THE ABUSE MITIGATION, WAS AWARE OF THE MENTAL MITIGATION AND CHOSE NOT TO DETERMINE THAT, AND FOUND BOTH THAT THERE WAS NO DEFICIENCY BUT EVEN IF THERE WAS SOME DEFICIENCY, THAT IN LIGHT OF THE STRONG AGGRAVATING FACTORS AND THE NATURE OF THE MITIGATION, THAT WAS PRESENTED AT THE EVIDENTIARY HEARING, AS WELL AS AT TRIAL, AND, OF COURSE A LOT OF IT WAS THERE WAS SOME THAT WAS JUST SAME. THE HEAD INJURIES, THE HAVING BEEN SHOT IN THE EYE WITH AN ARROW WHEN THEY WERE PLAYING COWBOYS AND INDIANS AND THE CAR ACCIDENT, THOSE WERE THINGS THAT TERRY TESTIFIED AT THE ORIGINAL PENALTY PHASE, SO THEY WERE AWARE OF THAT, AND THE JUDGE SAID, YOU KNOW, EVEN LOOKING AT ALL THE MITIGATION THAT HAS BEEN PRESENTED, AND IF TAKE IT ALL AND ACCEPT IT ALL, I STILL FIND THAT IT WOULD NOT HAVE MADE ANY DIFFERENCE IN THIS TRIAL, IN THE SENTENCING, SO HE FOUND, MADE STRONG FINDINGS, BOTH, THAT THERE WAS NO DEFICIENT PERFORMANCE AND, ALSO, THAT THERE WAS NO PREJUDICE, AND HIS FINDINGS ARE SUPPORTED BY THE TESTIMONY THAT WAS PRESENTED, SO I WOULD ASK THIS COURT TO AFFIRM HIS RULING DENYING 39.85.

IS THAT REALLY, THE SECOND PRONG, AS ALWAYS, THERE IS DIFFERENCES THAT PEOPLE SAY IT, BUT THE REASONABLE PROBABILITY PRONG APPLIES TO NEWLY-DISCOVERED EVIDENCE, BUT IF WE LOOK AT THE SECOND PRONG OF STRICKLAND, IT IS REALLY NOT A QUESTION AS TO WHETHER THERE WOULD HAVE BEEN A DIFFERENT RESULT. THE QUESTION IS WHETHER CONFIDENCE IN THE SENTENCING PROCEEDING HAS BEEN UNDERMINED. ISN'T THAT, WOULD YOU AGREE WITH THAT?

RIGHT. YES. THANK YOU. MR. CHIEF JUSTICE: THANK YOU. MR. GRUBER. --

I DO HAVE TO FLATLY DISAGREE THAT MR. CULPEPPER MAY HAVE INTENDED TO CALL TERRY UP UNTIL THE TIME OF THAT ON THE SPOT OCCURRENCE IN THE COURTYARD, BUT EVEN SO, THE ARGUMENT THAT I HAVE MADE A NUMBER OF TIMES IN BRIEFING, IS MR. CULPEPPER, IN SPITE OF HIS RELATIVE CULPABILITY STRATEGY, DECIDED NOT TO PURSUE THIS MITIGATION -- PURSUE THIS MITIGATION, THEN WHY DID HE CALL TERRY AT ALL? THE FACT THAT HE DID CALL TERRY ENDS, IN MY ARGUMENT, ANY SORT OF STRATEGY DEFENSE ON THAT ISSUE. IN REGARD TO THE MENTAL MITIGATION, I WOULD LIKE TO POINT OUT A NUMBER OF THINGS. DR. MARIN, THE STATE'S EXPERT, CALLED IN REBUTTAL TO OUR EXPERT SAID POINT-BLANK THAT RAGSDALE IS BORDERLINE RETARDED. THERE WAS SOME DISCUSSION ABOUT ALL OF THEM AGREE THAT THERE IS EITHER LOW INTELLECTUAL FUNCTIONING OR AN IQ PROBLEM OR SOMETHING OF THAT SORT, BUT DR. MARIN, HIMSELF, JUST SAID BORDERLINE RETARDED. DR. BETTERLAND, OUR EXPERT, SAID THAT THERE WAS BRAIN INJURY INJURY. THERE WAS PSYCHOTIC AT THE TIME OF THE OFFENSE HE DESCRIBED THE TWO EXTREMES, MENTAL CAPACITY AND CAPACITY TO PERFORM. DR. BERLAND ALSO IDENTIFIED NONSTATUTORY MENTAL MITIGATORS AND CHRONIC DRUG AND ALCOHOL ABUSE AND APPARENTLY GO BACK TO, REALLY, WHEN RAGSDALE WAS TAKING HIS FATHER'S PAIN PILLS.

DON'T EXPERTS SORT OF NEWLY PHI EACH OTHER? WHEN THE STATE -- FULL ANY -- NULLIFY EACH OTHER? THE DEFENSE EXPERT RE-- THE STATE'S EXPERT REBUTTED THE DEFENSE EXPERT AND SAID HE ONLY DID ONE TEST, AND THE STATE'S EXPERT SAID YOU HAD TO DO MORE THAN VARIOUS TESTS. THAT IS SORT OF A DRAW, AS FAR AS EXAMINING THAT, ISN'T HE?

WELL, I HAVE A REAL PROBLEM WITH THE WORD NULLIFICATION. THE WAY I PHRASE IT, WHICH I THINK IS RIGHT, THAT DR. BERLAND SAYS THERE IS THIS GREAT DEAL OF MITIGATION, AND THE STATE'S EXPERT, WHO IS DEBUNKING, IF YOU WILL, DR. BERLAND, SAYS, IN ESSENCE, YES, THERE IS A LOT OF MITIGATION, BUT NOT AS MUCH AS DR. BERLAND SAYS. ALL THREE OF THESE MENTAL HEALTH EXPERTS IN THIS CASE ALL PROVIDE THROUGH THEIR REPORTS, DEPOSITIONS, THROUGH THEIR TESTIMONY, MENTAL MITIGATION. AS I SAID, DR. MARIN, IS THE STATE'S EXPERT, GIVES ME BORDERLINE RETARDATION AS A NONSTATUTORY MITIGATOR. THE JURY GOT NOTHING. AND I REALLY RESPONDED TO THE COMMENT ABOUT NOT SOCHES MAKING A PHONE CALL TO DR. DIATO. HERE IS A DEFENSE LAWYER WHO HAS HIS VERY OWN FIRST CAPITAL CASE. HE IS OUT ON HIS OWN AND NOT IN A PUBLIC DEFENDERS OFFICE WHERE HE IS ACTING AS A SECOND CHAIR OR SOMETHING LIKE THAT, WHERE HE HAS OTHER LAWYERS HE CAN TALK TO. HE IS ON HIS OWN AND HIS THIS REPORT AND HE DOESN'T MAKE A PHONE CALL. WHAT KIND OF GUY IS THIS? WHO IS THIS? TELL ME SOMETHING ABOUT IT. THAT CONDUCT, I WOULD SUBMIT, IS CONSISTENT WITH ALL OF THE OTHER CONDUCT SHOWN ELSEWHERE IN THIS RECORD OF A REAL LACK OF INITIATIVE AND LACK OF PREPARATION. TO SOME EXTENT, I WOULD SAY EVEN NOT REALLY THAT MUCH AWARENESS THAT MORE WAS GOING TO HAPPEN THAN SOMETHING CALLED A PENALTY PHASE. I ASKED MR. CULPEPPER, IN THE EVIDENTIARY HEARING, HOW WOULD THIS MITIGATION BE DEVELOPED, RELATIVE TO YOUR STRATEGY? AND, QUOTE, IT WOULD HAVE REQUIRED, I MEAN, I THINK IT WOULD HAVE REQUIRED MORE INVESTIGATION. NOW, I THINK I COULD HAVE FELT DOWN AND SAT DOWN RIGHT AT THAT POINT. I SORT OF FELT THAT THE POINT HAD BEEN MADE. ALSO WITH REGARD TO THE INCONSISTENCE I SUGGESTION, I THINK, BY THE -- INCONSISTENCY SUGGESTION, I THINK, BY THE STATE, THIS IS A QUOTE FROM DR. DELBIATO'S REPORT. MR. RAGSDALE TELLS ME THAT HE IS INNOCENT OF THE MURDER. THE CODEFENDANT, LEON ILLICK IS THE PERPETRATOR OF THE CRIME. HE, RAGSDALE, STATES THAT HE WAS INDEED AN ACCESSORY AFTER THE CRIME BUT DID NOT MURDER THE VICTIM. IN OTHER WORDS WHAT RAGSDALE IS TELLING TO THE CONFIDENTIAL EXPERT BEFORE MR. CULPEPPER EVER COMES ON THE STAGE, SO TO SPEAK, BEFORE HE EVEN COMES UP WITH A RELATIVE CULPABILITY DEFENSE, IS CONSISTENT WITH MR. CULPEPPER'S RELATIVE CULPABILITY DEFENSE. FOR WHATEVER IT MIGHT HAVE BEEN WORTH, AND WE KNOW THAT IT WOULD NOT HAVE BEEN INCONSISTENT, HE COULD HAVE PUT ON DR. DELBIATO, BROUGHT OUT THAT MITIGATION. IT COULD NOT POSSIBLY HAVE HURT HIM IN ANY WAY. THAT IS VERY, VERY DIFFERENT FROM A LOT OF CASES. I THINK SOME OF THEM CITED IN BRIEFING BY THE STATE, WHERE THERE OBVIOUSLY IS A PROBLEM WITH INTRODUCING THE MITIGATION. FOR EXAMPLE, THE DEFENDANT SAYS SOMETHING TO THE CONFIDENTIAL EXPERT THAT DEFENSE COUNSEL DOESN'T LATER WANT TO REVEAL. HERE IT WAS PRACTICALLY HANDED TOM. WITH -- HANDED TO HIM. WITH SOME OF THE NUMBERS, AS FAR AS --

IT IS CORRECT, MR. GRUBER, THAT THERE WAS NO EXPERT TESTIMONY AS TO ANY, THE DEVIATION BY MR. CULPEPPER FROM THE STRICKLAND STANDARD. I MEAN, THERE DIDN'T BRING IN AN EXPERT TO TESTIFY TO THAT.

NO, SIR. THAT IS TRUE.

SO THE COURT IS LEFT TO MAKE A DETERMINATION, THE TRIAL COURT MADE A DETERMINATION, CORRECT?

WELL, NOW, I RAISED THAT ISSUE SORT OF IN THE BACK PAGES OF THE BRIEF. JUDGE SWANSON RULED, ON THE LAST DAY OF THE HEARING, AND, WELL, HE RULED. HE MADE A RECOMMENDATION. HE SAID I RECOMMEND THAT THE SUPREME COURT NOT GRANT THE MOTION. THAT WAS AFTER ABOUT A ONE OR TWO-PARAGRAPH ORAL STATEMENT THAT IS CITED IN THE

BRIEFING. IT IS CONFUSING. I WILL JUST SAY IT SIMPLY TRACKS THE MAJOR LANGUAGE OF STRICKLAND AND IT DOESN'T CONTAIN ANY SPECIFIC FINDINGS. BUT I DON'T KNOW IF THAT ANSWERED YOUR QUESTION. I, THERE WAS NOT, WE DID NOT CALL AN EXPERT DEFENSE LAWYER, TO SAY THAT. WE HAVE HAD CONVERSATIONS ABOUT DOING THAT IN THE PAST. I HAVE SEEN IT DONE BEFORE. I THINK THERE IS A FEELING THAT IT IS, PERHAPS, A MATTER OF LAW, SO THAT IT MAY NOT EVEN BE APPROPRIATE TO HAVE AN EXPERT TESTIFYING TO THAT. ALSO IN THAT REPORT BY DR. DELBIATO, HE SAID THAT RAGSDALE WAS NOT SOCIO-PATHIC OR NOT PSYCHOPATH I CAN. I THINK THE LANGUAGE WOULD BE AN ANTISOCIAL DISORDER, AND HE INDICATED THAT HE WAS TELLING THE TRUTH, THE VALIDITY SCALES FROM THE MMPI INDICATED SOMEONE WHO WAS OPEN AND HONEST, AND THAT IS AT THE SAME POINT THAT HE IS SAYING, THAT RAGSDALE IS SAYING I DIDN'T DO IT. I AM AN ACCESSORY BUT I DIDN'T DO IT, WHICH, AGAIN, TOTALLY CONSISTENT WITH THE DEFENSE. WITH REGARD TO TERRY, TERRY RAGSDALE, WHO IS THE ONLY WITNESS CALLED BY MR. CULPEPPER, HE DID HAVE THE PRETRIAL DEPOSITION FROM TERRY RAGSDALE, AND AMONG OTHER THINGS NOTED IN THIS COURT'S '98 OPINION ABOUT TERRY'S TESTIMONY, TERRY SAID THE PERSON WHO DID THIS NEEDS TO BE PUT IN THE ELECTRIC CHAIR. I AM SAYING THIS IS JUST NOT THE KIND OF WITNESS THAT ANY COMPETENT DEFENSE ATTORNEY ANYWHERE IN THE COUNTRY WOULD WANT TO CALL AS HIS ENTIRE EVIDENTIARY PRESENTATION. EVEN WITHOUT KNOWING ABOUT THE MITIGATION THAT WE SHOWED AT THE EVIDENTIARY HEARING. THAT DECISION IS JUST INDEFENSIBLE. UNLESS THERE ARE FURTHER QUESTIONS, I THINK I HAVE SAID WHAT I HAVE TO SAY. MR. CHIEF JUSTICE: THANK YOU, COUNSEL.