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Arthur Barnhill III v. State of Florida

MR. CHIEF JUSTICE: NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS BARNHILL VERSUS STATE. MR. WULCHAK.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS JIM WULCHAK, ASSISTANT PUBLIC DEFENDER FROM DAYTONA BEACH, AND WE REPRESENT THE APPELLANT ARTHUR BARNHILL, IN HIS DIRECT APPEAL FROM CONVICTIONS OF FIRST-DEGREE MURDER, BURGLARY, ROBBERY AND GRAND THEFT, AND THE RESULTING DEATH SENTENCE, TWO LIFE SENTENCES AND A FIVE-YEAR WOULD LIKE TO TRY TO LIMIT OUR ARGUMENT, THIS MORNING, THE FOCUS OF IT TO FOUR POINTS, AGAIN, IF TIME IS PERMITTING. POINTS 1, 3, 4 AND THE DEATH PENALTY, ITSELF, POINT 7.

THIS IS A PLEA?

YES, YOUR HONOR. IT WAS A PLEA OF NOLO CONTENDERE THAT WAS ENTERED AFTER AN INITIAL JURY WAS SELECTED TO TRY THE CASE. THE FACTS, BRIEFLY, A 84-YEAR-OLD VICTIM WAS FOUND STRANGLED IN HIS HOME AND HIS CAR AND MONEY HAD BEEN STOLEN. THE DEFENDANT, WHO DID ENTER A PLEA OF NOLO CONTENDERE, CONTENDED THAT HE ACCOMPANIED JALONI JACKSON AND THAT HE PLAYED ONLY A MINOR ROLE IN THE KILLING. THE STATE RELIED ON JALONI JACKSON'S BROTHER AS TO HIS VERSION OF EVENTS OF THE INCIDENT, THE THIRD VERSION, WHERE HE CLAIMED THAT HE ACCOMPANIED, IN HIS THIRD VERSION, ACCOMPANIED THE DEFENDANT TO THE SCENE AND IMMEDIATELY LEFT, WHEN THE DEFENDANT INDICATED THAT THEY WOULD HAVE TO KILL THE VICTIM, WHO WAS DISCOVERED IN THE HOUSE'S LIVING ROOM. THE FIRST ISSUE, ISSUE ONE IN THE BRIEF, WHERE THE TRIAL COURT PRIOR TO THE PENALTY TRIAL, EXPRESSED PERSONAL BELIEF THAT THE DEFENDANT WAS LYING AND HIS STATES WERE BORG ON PERJURY. THE DEFENDANT HAD A REASONABLE WELL-FOUNDED FEAR THAT HE WOULD NOT RECEIVE A FAIR AND IMPARTIAL PENALTY PHASE TRIAL AND A LIFE OR DEATH SENTENCING DETERMINATION, UNDER THESE, THIS SITUATION.

IN REGARDS TO THAT ISSUE, THERE WAS A HEARING ON A MOTION TO SUPPRESS, IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR.

AND THE MOTION TO SUPPRESS INVOLVED WHETHER OR NOT THERE HAD BEEN AN ILLEGAL ENTRY INTO THE PLACE WHERE THE DEFENDANT WAS FOUND.

THAT'S CORRECT.

AND THE DEFENDANT TOOK THE STAND.

UM-HUM.

IN ORDER TO TESTIFY --

FOR THE LIMITED, YES, ISSUE OF STANDING, WHICH TURNED OUT LATER ON, TO BE IRRELEVANT AND MOOT, BECAUSE IT WAS PRESENTED BY THE STATE AND DISCOVERED THAT THERE WAS AN OUTSTANDING BENCH WARRANT FOR THE DEFENDANT.

BUT IN ORDER TO MAKE A DETERMINATION ON IT, WAS THERE SOME ISSUE OF CREDIBILITY THAT HAD BEEN DECIDED?

NO, YOUR HONOR, I DON'T THINK SO, AND BASICALLY WHAT THE JUDGE SAID, HE WENT ON A RATHER LENGTHY TIRADE ABOUT THE BELIEFABILITY ABOUT THE DEFENDANT'S STORY. HIS TESTIMONY HAD BEEN NOT CONTRA DICKED BY ANY OTHER TESTIMONY, AND -- CONTRADICTED BY ANY OTHER TESTIMONY, AND THERE WERE NO INCONSISTENCY POINTED OUT BY THE PROSECUTOR.

AS I UNDERSTAND WHAT THE TRIAL JUDGE WAS SAYING, HE SAID THE CIRCUMSTANCES OF THIS IS INCREDULOUS. HERE WE HAVE A PERSON WHO COMES TO TRIAL, BASICALLY AT ELEVEN O'CLOCK AT NIGHT. HE HAS NEVER MET THE MOTHER AND FATHER WHO ARE THE LEASEESE OR OWNER OF THIS PLACE WHERE HE LIVES. AND AT SIX O'CLOCK IN THE MORNING, IS HE THE RESIDENT, SO THE JUDGE, IN MY ESTIMATION, SEEMS TO BE EXPRESSING SOME IN CREDIBILITY THAT, IN THIS SHORT PERIOD OF TIME, NOT KNOWING THESE PEOPLE, HE DIDN'T EVEN KNOW THESE PNAMES, THAT NOW HE IS GOING TO GET ON THE STAND AND SAY "I LIVE HERE".

TRULY HE EXPRESSED IN CREDCRUELTY SOLELY AT THE SUBSTANCE -- CRE -- I NCR EDULITY SOLELY AT THE SUBSTANCE OF THE TESTIMONY. HE MERELY STATED, AS HIS PERSONAL BELIEF, THAT THIS COULDN'T POSSIBLY HAPPEN, THAT TWO ADULTS, FOUR CHILDREN AND A GRANDCHILD WOULD BE LIVING IN A TWO BEDROOM APARTMENT. WELL, UNFORTUNATELY, AS WE KNOW FROM AIDE READING CASES, FROM LIVING -- FROM READING CASES, FROM LIVING IN OUR COMMUNITY, THAT THERE ARE PEOPLE IN CERTAIN ECONOMIC CLASSES THAT ARE FORCED TO LIVE IN CROWDED CONDITIONS. THE JUDGE JUST DIDN'T SEEM TO REALIZE THAT. THIS, THE DEFENDANT, WAS THE FATHER OF THESE PEOPLE'S GRAND BABY. THAT TESTIMONY WAS CLEAR. HE WAS THERE WITH THE GIRLFRIEND GIRLFRIEND. HE HAD NOT PREVIOUSLY MET THE END'S S, WHO WERE AWAY AT WORK, WORKING ALL NIGHT AT THE TIME. HE INDICATED THAT THEY RECEIVED A PHONE CALL FROM THE GIRLFRIEND GIRLFRIEND'S MOTHER. HE SPOKE TO HER ON THE PHONE.

SO ARE YOU SAYING, THEN, THAT THE JUDGE HAD TO ACCEPT THIS, NO MATTER HOW INCREDULOUS HE THOUGHT THE CIRCUMSTANCES WERE.

YOUR HONOR, WHAT I AM SAYING IS THERE WERE NO INCONSISTENCIES. HE MERELY BASED HIS IN CREDULEITY ON HIS HIS PERSONAL KNOWLEDGE OR HIS PERSONAL BELIEFS THAT NOBODY WOULD LIVE IN THESE CONDITIONS, EVEN TEMPORARILY.

BUT CERTAINLY JUST ADVERSE RULING, ITSELF, IS NOT SUFFICIENT, SO WHERE DOES THE LINE CROSS ON THIS ONE?

CORRECT, YOUR HONOR. I AM NOT SURE YOU CAN GIVE A BRIGHT-LINE TEST, AND I AM NOT PREPARED TO TELL THIS COURT WHERE THAT LINE WOULD BE, BUT IN THIS CASE WE SUBMIT THAT HE WENT TOO FAMPLT THE CASES ARE CLEAR, AS POINTED OUT IN THE BRIEF, CASES FROM THIS COURT, CASES FROM THE DISTRICT COURTS OF APPEAL.

WE NEED TO DRAW SOME LINES, SO WE CAN DETERMINE WHETHER THIS FALLS WITHIN THAT CATEGORY OF CASES THAT A RECUSAL IS IN ORDER OR IS NOT, SO IF HE SAYS THE RULING DOES NOT, IF HE SAYS I DO NOT BELIEVE THIS TESTIMONY, THAT SUFFICIENT?

I THINK HE HAS TO GO FURTHER AND EXPLAIN THE BASIS FOR HIS NOT BELIEVING IT. AS I STATED HERE, HE WAS JUST, BASED ON HIS PERSONAL BELIEFS AND OPINIONS, HE SAID THIS COULDN'T POSSIBLY BE TRUE, FROM THE DEFENDANT.

IS THAT SUFFICIENT?

I DO NOT THINK SO HERE, YOUR HONOR. HE WENT INTO THE TIRADE AND ANNOUNCED THAT THE DEFENDANT WAS TOTALLY UNBELIEVABLE, BORDERING ON PERJURY. THE CASE LAWS ARE LEGION THAT SAYS, WHERE A TRIAL JUDGE, PRIOR TO A TRIAL, ANNOUNCES THAT HE DOES NOT BELIEVE THE DEFENDANT, THAT HE FEEFES T WOY OF BTHAT THE DEFENDANT IS LYING, IF THE DEFENDANT FILES A MOTION TO RECUSE, CITING THOSE FACTSD THOSE FACTS ARE UNDISPUTED HERE THAT HE SAID THAT, THEN THE COURT MUST RECUSE ITSELF, TO GIVE THE APPEARANCE OF PROPOSE RIGHT.

BUT YOUR BRIGHT LINE THERE THAT ISN'T PRESENT HERE, THAT IS THAT IF THE JUDGE ANNOUNCES THAT UNDER NO CIRCUMSTANCES WOULD I ACCEPT ANY OF YOUR TESTIMONY ABOUT ANY ISSUE, IN OTHER WORDS, FROM HERE ON OUT, THAT THAT ONE SITUATION THAT CLEARLY WOULD REQUIRE RECUSAL, THAT IS IF YOU ARE GOING TO HAVE PROCEEDINGS THAT GO ON IN THE FUTURE, AND THE COURT ANNOUNCES BEFORE THOSE PROCEEDINGS IN THE FUTURE, THAT UNDER NO CIRCUMSTANCES WOULD THE COURT EVER ACCEPT THE TESTIMONY OF THAT PERSON, I AM JUST TRYING TO SET UP SOMETHING --

CORRECT. I DON'T THINK --

WE DON'T HAVE THAT SITUATION, DO WE?

RIGHT. UM-HUM.

SO AND YOU AGREE THAT, IF THE COURT JUST REJECTED THE TESTIMONY AND MADE AN ADVERSE RULING, BASED ON THAT REJECTION, THAT THAT WOULDN'T BE SUFFICIENT. IS THAT CORRECT?

YES, YOUR HONOR.

NOW, WHY ISN'T THIS JUST AN ARTICULATION OF THAT? THAT IS IT IS JUST AN EXPLANATION OR A STATEMENT, AN ORAL STATEMENT THAT, REALLY, JUST CONFIRT ACT.

I DON'T THINK THE CASES REQUIRE THAT, IN ORDER TO RECUSE A JUDGE. UNDERN ST.E ISLAND, THIS COURT'S CASE FLORIDA 1990, A STATEMENT BY A JUDGE THAT HE FEELS THAT THE PARTY LIED IN A CASE, GENERALLY ICATESA BISAINST THE Y, REJECTING THE RESPONDENT RESPONDENT'S ARGUMENT THAT THIS WAS A MERE COURT ANNOUNCEMENT OF A RULING IN THAT CASE. HERE, AS I SAID, HE WENT FURTHER. THE CASES SAY THAT, YES, IT IS PROPER FOR A JUDGE TO DEVELOP THESE FEELINGS DURING THE COURSE OF A TRIAL, PERHAPS, BUT HE SHOULD NOT VOCALIZE THEM BEFORE THE END OF THE PROCEEDINGS, AND IF HE DOES, HE IS AT-RISK OF BEING ASKED TO RECUSE HIMSELF, AND HE SHOULD RECUSE HIMSELF, UNDER THOSE SITUATIONS. THE MOTION, HERE, WE SUBMIT WAS LEGALLY SUFFICIENT, UNDER THESE CASES THAT ARE CITED IN THE BRIEF. THERE WAS A WELL-FOUNDED FEAR --

AS TO THE LEGAL SUFFICIENCY OF THE MOTION, IS THE MOTION ACCOMPANIED BY AN AFFIDAVIT?

YES, YOUR HONOR, IT IS.

WHAT IS THE AFFIDAVIT?

THE AFFIDAVIT WAS OF THE DEFENDANT, THAT HE HAS A WELL-FOUNDED FEAR THAT HE WOULD NOT RECEIVE --

WHERE DOES THE AFFIDAVIT SAY THAT PARTICULARLYc

I BELIEVE IT IS ON PAGES 232-TO-234 IN VOLUME TWO OF THE RECORD, YOUR HONOR.

IS THAT A STATEMENT SIGNED BY THE DEFENDANT THAT HE HAS A WELL-FOUNDED FEAR?

YES. I BELIEVE HE SIGNED IT UNDER OATH, YOUR HONOR.

DIDN'T THE DEFENDANT SIGN AN OATH? HE AT ANY TIME ACTUALLY -- HE DIDN'T ACTUALLY SIGN THIS DOCUMENT THAT HAS WHAT HE BELIEVES ARE THE WELL-FOUNDED FEARS. WHAT I AM GETTING AT IS, IS THAT DOCUMENT THAT YOU HAVE FILED, AS A, THAT WAS FILED AS A MOTION TO DISY THE TRIAL JUDGE, WITH THE ACCOMPANYING OATH, IS THAT A SUFFICIENT AFFIDAVIT?

I BELIEVE SO, YOUR HONOR. HE ATTESTTED TO WHAT WAS CONTAINED IN THE MOTION.

DOES HE EVEN REFER TO WHAT MOTION HE IS TALKING ABOUT?

IT WAS ATTACHED TO THE MOTION YOUR HONOR, SO I THINK THAT IS CLEAR THAT THIS WAS THE MOTION. THERE WERE NO OTHER MOTIONS REGARDING THIS ISSUE.

SO IT IS YOUR POSITION THAT THAT IS A SUFFICIENT AFFIDAVIT.

YES, YOUR HONOR. PROCEEDING TO THE THIRD ISSUE IN THE BRIEF, WHERE THE TRIAL COURT IMPROPERLY CURTAILED THE DEFENSE VOIR DIRE, LIMITING THE DEFENSE TO GENERAL, WILL YOU FOLLOW THE LAW OR DO YOU HAVE ANY PRECONCEIVED FEELINGS, TYPE OF QUESTIONS, THE COURT REPEATEDLY INTERRUPTED THE DEFENSE VOIR DIRE, EVEN WITHOUT AN OBJECTION ON THE PART OF THE STATE, TELLING THE DEFENSE, IN FRONT OF THE JURY, WE ARE GOING TO STOP IT NOW. COME UP AND APPROACH THE BENCH. HE PRECLUDED THE DEFENSE'S INDIVIDUAL INQUIRY WHETHER THEY COULD ESTABLISH LEGAL MITIGATING CIRCUMSTANCES, SUCH AS A TROUBLED CHILDHOOD AND WHETHER THEY COULD WEIGH THEM, ACCORDING TO THE LAW. THE JUDGE PRECLUDED HIM, ON ANY QUESTIONS REGARDING PRECON SOOEPD SEEVED -- PRECONCEIVED NOTIONS REGARDING THE WEIGHT TO BE GIVEN AGGRAVATING AND MITIGATING CIRCUMSTANCES. JUST BECAUSE HE WAS FOUND GUILTY ALREADY, WOULD THEY GIVE GREATER WEIGHT TO THE AG'S AS OPPOSED TO THE MIT'S. UNDER REASONABLE CASE LAW AND RESTRICTIONS, ON JURY EXAMINATION DURING VOIR DIRE, IS AN ABUSE OF DISCRETION COUNSEL MUST BE ABLE TO PROBE ATTITUDES AND BELIEFS AND THEIR PHILOSOPHIES, TO SEARCH FOR HIDDEN BY ASSIST. THE CASE LAW -- HIDDEN BIASES. THE CASES THAT WE CITED IN THE BRIEF AND MORGAN IN ILLINOIS, IT IS CLEAR IT IS NOT SUFFICIENT JUST TO GO IN AND SAY DO YOU HAVE ANY PRECONCEIVED FEELINGS THAT ARE GOING TO PREJUDICE YOU IN THE CASE OR WILL YOU FOLLOW THE LAW? THOSE ARE NOT ADEQUATE, BECAUSE JURORS ARE NOT FORTHCOMING. THEY HAVE HIDDEN PREJUDICES, PERHAPS, THAT THEY DON'T EVEN REALIZE.

ISN'T IT CLEAR THAT THE JUDGE RESTRICTED THE LA? I READ THOSE EXCHANGES OR SOME OF THEM, ANYWAY, TO SAMPLE, IT APPEARED, ANYWAY, THAT THERE WERE SEVERAL TIMES WHEN THE LAWYER, REALIZING THAT THESE ARE SPONTANEOUS SITUATIONS, BUT THAT THE PREDICATES THAT THE LAWYER HAD AND THE QUESTIONS THAT WERE BEING ASKED, DID APPEAR TO BE RATHER CONFUSING. THAT IS IN TERMS OF GETTING TO THE POINT THAT THE LAWYER WAS GOING TO GET TO, AND SO IN TRYING, OBVIOUSLY, WITH JUST A TRANSCRIPT, WITHOUT A VIDEOTAPE, IT IS DIFFICULT TO SEE WHAT IS GOING ON, BUT ONE WAY TO INTERPRET THAT WAS THAT THE JUDGE WAS LISTENING TO THAT AND SAYING, YOU KNOW, WHAT IS THIS? YOU KNOW, HOW IS THE JURY GOING TO UNDERSTAND WHAT IT IS THAT YOU ARE ASKING HERE? AND WAS TRYING TO GET THE LAWYER TO, PERHAPS, BE MORE SPECIFIC ABOUT WHAT HE WAS ASKING, SO THE JUDGE COULD DETERMINE WHETHER THAT WAS AN APPROPRIATE QUESTION. CAN THE RECORD BE READ THAT WAY?

YOUR HONOR, I BELIEVE TWO THINGS, TO ANSWER YOUR QUESTION. FIRST OF ALL, THE, AT ONE POINT IN TIME, THE DEFENSE ATTORNEY, RIGHT AS HE WAS BEING INTERRUPTED BY THE JUDGE, SPECIFICALLY ASKED THE JURORS, ARE THERE ANY OF YOU THAT DON'T UNDERSTAND WHAT I AM

SAYING? NOBODY RAISED THEIR HAND AND YET THE JUDGE STILL CUT HIM OFF, BECAUSE THE JUDGE SAID HE DIDN'T UNDERSTAND. ALSO, AS YOU POINTED OUT, WITH SPONTANEOUS QUESTIONS, YOU KNOW, IF WE HAD A TRANSCRIPT OF AN APPELLATE COURT ORAL ARGUMENT, WHEN JUDGES ARE ASKING QUESTIONS AND THEY ARE THINKING THESE THINGS THROUGH, OFF THE TOP OF THEIR HEAD AND PRONOUNCING THEM, OFTENTIMES THEY DO BECOME COMPOUND QUESTIONS, AND A TRANSCRIPT COULD RUN FOR A COUPLE PAGES. ALSO THE COURT FAULTED THE DEFENSE ATTORNEY, FOR NOT FULLY EXPLAINI THE LAW AND AGGRAVATING AND MITIGATING CIRCUMSTANCES.

BUT ISN'T THIS A VERY DIFFICULT AREA FOR PERSONS WALKING IN OFF THE STREET, TO ERAND S THING WE CALL THE CAPITAL LITIGATION, THAT WE HAVE THESE THINGS, AND THERE IS A WEIGHING THAT GOES ON AND ISN'T THAT A VERY DELICATE KIND OF A SITUATION THAT MUST BE HANDLED, WITHIN SOME CERTAIN BOUNDS, INSTEAD OF JUST TALKING ABOUT ONE SIDE OR THE OTHER, UNTIL WE HAVE A PICTURE, SO A JURY -- HOW MANY -- THAT IS A MULTIPLE QUESTION, I UNDERSTAND. HOW MANY PEOPLE, REALLY, ISN'T THAT, REALLY, A TROUBLESOME AREA AND DON'T WE NEED TO HAVE JUDGES --

IT IS A HARD AREA, AND THE CASES SAY THAT THIS IS A HARD AREA TO LOOK AT ON APPEAL. HOWEVER, IN THIS CASE, WHAT WE HAVE, SPECIFICALLY, AND THE STATE HAS CONTENDED THAT THE DEFENSE WAS NOT PRECLUDED, R BECAUSE THE COURT, AFTER SAYING NO, I AM GOING TO TAKE OVER AND I AM GOING TO ASK SOME GENERAL QUESTIONS, AND THEN YOU WILL BE ALLOWED TO FOLLOW IT UP, WHEN THE DEFENSE TRIED TO FOLLOW IT UP WITH SPECIFIC QUESTIONS, THE COURT CURTAIL HIM, CUT HIM OFF AGAIN AND SAID, NO, LISTEN, I AM GOING TO ASK THE SAME QUESTION, AND THE SAME QUESTION WAS DO YOU HAVE ANY PRECONCEIVED FEELINGS ABOUT THE FACT THAT HE WAS ALREADY FOUND GUILTY THAT WOULD AFFECT YOUR SENTENCE RECOMMENDATION? THE COURT SAYS I AM GOING TO ASK THE SAME QUESTION, AND YOU CAN ASK THEM WHETHER THEY UNDERSTOOD THAT QUESTION. WHEN THE DEFENSE TRIED TO GO FURTHER, HE WAS NOT ALLOWED TO DO SO.

WHAT SPECIFIC SD THSE ATTEMPT TO ASK THAT THE COURT ABSOLUTELY WOULDN'T ALLOW THE DEFENSE TO ASK OF THE PERSPECTIVE JURORS? -- PROSPECTIVE JURORS?

AS CITED ON PAGE 54 OF MY BRIEF, HE ATTEMPTED TO ASK ABOUT ANY PRECONCEIVED FEELINGS ON THE APPROPRIATE OF A -- ON THE APPROPRIATETY OF A DEATH SENTENCE IN THE -- ON THE PROPRIETY OF THE DEATH SENTENCE IN A CASE. THE JUDGE WOULD ONLY ALLOW HIM TO DO IT AS A WHOLE AND NOT OF THE INDIVIDUAL JURY VENIRE MEMBERS. THE A COUPLE OF JURORS THAT EXPRESSED THAT, IF HE IS GUILTY OF FIRST-DEGREE MURDER, HE SHOULD AUTOMATICALLY GET LIFE. WHEN THE DEFENSE TRIED TO DELVE INTO THOSE ABOUT THEIR PRECONCEIVED FEELINGS ABOUT THIS AND HOW THEY WOULD WEIGH AGGRAVATING CIRCUMSTANCES AND MITIGATING CIRCUMSTANCES, AND, YES, BECAUSE OF YOUR FEELINGS, WOULD YOU TEND TO GIVING AVATING CIRCUMSTANCES GREATER WEIGHT, BEFORE YOU HEAR EVEN ANY OF THE EVIDENCE? AND THEYSTARTED O ANS, A THE JUDGE IMMEDIATELY CUT HIM OFF AGAIN.

IN ALL FAIRNESS, DIDN'T THE TRIAL JUDGE SAY AT THIS POINT WE HAVE NOT DISCUSSED AGGRAVATING AND MITIGATING CIRCUMSTANCES. IF YOU WANT TO ASK THAT KIND OF QUESTION, YOU NEED TO AT LEAST GET INTO WHAT IS AGGRAVATING CIRCUMSTANCES AND WHAT IS THE MITIGATING CIRCUMSTANCE, BEFORE YOU ACTUALLY ASK QUESTIONS LIKE THAT, AND THEN A DEFENSE ATTORNEY DIDN'T FOLLOW IT UP BY DOING SO.

HE TRIED TO, YOUR HONOR. HE TRIED REPEATEDLY, I BELIEVE THE RECORD SHOWS, WITH RECORD CITES THAT WE PUT IN THE BRIEF. BUT EVERY TIME HE TRIED TO DO THAT, THE JUDGE WOULD SAY, COME ON NOW, YOU HAVE GOT TO ASK QUESTIONS. YOU CAN'T JUST BE GIVING A COLLOQUY HERE.

WERE THERE ANY PRELIMINARY INSTGIVEOURY THE DEATH PENALTY PNGS? I BELIEVE SO, YOUR HONOR, BUT I CAN'T SWEAR TO. THAT I AM SORRY.

OKAY.

SO WE CONTEND THAT THE TRIAL COURT IMPROPERLY CURTAILED THE VOIR DIRE, CURTAILED THE DEFENSE COUNSEL'S ABILITY TO DETERMINE WHO HE WAS GOING TO EXERCISE PREEMPTORY CHALLENGES OR WHO HE WOULD BE ABLE TO EXERCISE CHALLENGES FOR CAUSE. HE WAS NOT ALLOWED TO DELVE INTO THESE SPECIFIC QUESTIONS WITH SPECIFIC JURORS. THIS DID NOT RISE, WHEN HE WAS TALKING ABOUT THE MITIGATING CIRCUMSTANCES, OF ABUSIVE CHILDHOOD, THIS DID NOT RISE TO THE LEVEL OF PRETRYING THE CASE UNDER THE WALKER DECISION, FOURTH DCA 1999. IT WAS BECAUSE YOU ARE ALLOWED TO DISCUSS LEGALc CONCEPTS AND TO ESTABLISH ANY BIAS THEY HAVE AGAINST THOSE LEGAL CONCEPTS. THIS, ALSO, HURT THE DEFENSE, IN S ABILITY REGARD ISSUE TWO AND THE CHALLENGE FOR CAUSE ISSUE THAT I DON'T THINK WE WILL HAVE TIME TO GET INTO TODAY, POINT FOUR IN THE BRIEF DEALS WITH THE COURT'S DENIAL FOR A CONTINUANCE MADE NOT AT THE ELEVENTH HOUR BUT MADE WELL BEFORE THE PENALTY PHASE WAS SCHEDULED TO BEGIN, WHICH CONTINUANCE WOULD HAVE ENABLED THE LIVE TESTIMONY OF A KEY DEFENSE MEDICAL EXPERT, AND THIS PREJUDICED THE DEFENSE IN HIS ABILITY TO REBUT THE TESTIMONY OF THE STATE'S LIVE MEDICAL EXPERT. THE COURT INDICATING THAT, RATHER THAN GIVE A CONTINUANCE, WE CAN JUST DO A VIDEOTAPE, PERPETUATE HIS TESTIMONY PRIOR TO THE TRIAL. THE DEFENSE ATTORNEY SPECIFICALLY SAID, YOUR HONOR, THAT WILL NOT BE SUFFICIENT. I OBJECT, BECAUSE OUR EXPERT NEEDS TO SPECIFICALLY REBUT THE TESTIMONY AT TRIAL OF THIS EXPERT, AND AS THIS COURT ISAWARE,Y, MAY TIMES DURING A DEATH PENALTY CASE, THE OTHER PARTY'S MEDICAL EXPERT WILL BE ALLOWED --.

HOW LONG A PERIOD OF TIME WAS THERE, BETWEEN THE TIME WHEN THE -- THERE WAS THE PLEA AND THE PENALTY PHASE?

THERE WAS A LONG PERIOD OF TIME, YOUR HONOR, BECAUSE --

HOW LONG WAS IT?

I AM SORRY. I DO NOT RECALL THE EXACT TIME FRAME. I BELIEVE IT MAY HAVE BEEN A MATTER OF A YEAR OR TWO, BECAUSE THE DEFENDANT HAD BEEN FOUND TO BE INCOMPETENT AND WAS ON PSYCH TROPIC MEDICATION, SO THERE WAS A DELAY THERE.

WAS THERE A NEW JURY PICKED?

YES, THERE WAS. THEY DISCHARGED THE ORIGINAL JURY.

AND SO ALL OF THIS JURY SELECTION --

ALL OF THIS JURY SELECTION WENT ON RIGHT BEFORE THE PENALTY PHASE.

YES. THIS WAS THE SECOND JURY SELECTION FOR THE SOLE PURPOSE OF THE PENALTY-PHASE JURY. THE DEFENSE MEDICALTWITNESS WAS REQUIRED TO GO IN FOR SERIOUS SURGERY ON THE DATE THE TRLS TO COMMENCE. THE -- ASE OFE PERPETUATED TESHES NOT GIVEN THE OPPORTUNITY TO REBUT THINGS THAT THE STATE'S MEDICAL EXPERT SAID FOR THE FIRST TIME, AT THE PENALTY PHASE HEARING. THE DEFENSE WAS SURPRISED, DESPITE HAVING AN ERROR OF THE DOCTOR, DESPITE DOING HIS DEPOSITION PRIOR TO THIS, WHEN THE STATE'S MEDICAL EXPERT CAME IN AND ON BIND -- OPINED THAT THE DISCOLORATION OF VICTIM'S SHORTS PROBABLY MEANT THAT HE PEDHIS SHORTS OUT OF FEAR.

-- HE PEES HIS SHORTS OUT OF FEAR.

IS THERE SOME DEPOSING OF THE STATE'S EXPERT PRIOR TO --

HE HAD DEPOSED THE STATE'S EXPERT PRIOR TO THIS, BUT THE STATE'S EXPERT NEVER PREVIOUSLY, IN HIS REPORT OR DION T AS DBEFS, AND THIS WAS IN RESPONSE TO DIRECT QUESTIONING BY THE STATE, THE STATE KNEW THAT THEY WERE GOING TO BE GETTING INTO THIS. WHEN HE SAID THIS, THERE WAS NOTHING THAT THE DEFENSE HAD TO REBUT IT, BECAUSE HE HADN'T ASKED HIS EXPERT, IN THE PERPETUATED TESTIMONY, TO GO INTO THIS MATTER T TURNS OUT THAT, AT THE MOTION FOR NEW TRIAL HEARING, HE PRESENTED THE COURT, ANDE COURT MONTHLY, NOT THE JURY, AN AFFIDAVIT BY HIS MEDICAL EXPERT, SAY AGO THAT THE DISCOLORATION DID NOT NECESSARILY MEAN THAT THE VICTIM WAS IN FEAR. THE PROSECUTOR, THEN, ARMED WITH THIS AM -- SAYING THAT THE DISCOLORATION DID NOT NECESSARILY MEAN THAT THE VICTIM WAS IN FEAR. THE PROSECUTOR, THEN, ARMED WITH THE OPINION TESTIMONY, WAS ABLE TO GO ON FOR QUITE SOME TIME ABOUT HEINOUS, AT ATROCIOUS AND CRUEL, ABOUT THE FACT THAT THE VICTIM PEEED HIS PANTS OUT OF FEAR, WHEN THE DEFENSE DIDN'T HAVE ANYTHING TO REBUT THAT AT THE TIME OF THE PRESENTATION TO THE JURY. AS A RESULT, THE JURY WELL COULD HAVE TAKEN THE SAILIENT TESTIMONY AND FOUND HEINOUS, ATROCIOUS AND CRUEL, WHERE THE DEFENSE WAS NOT GIVEN THE OPPORTUNITY TO REBUT THAT.

IS THERE ANY INDICATION HOW LONG THE DEFENSE MEDICAL WITNESS WOULD BE TIED UP IN TRIAL? I MEAN TIED UPNER? NO, YOUR HONOR, BUT IT WAS A SERIOUS CARDIOVASCULAR SURGERY, BUT THERE WAS NO TESTIMONY WHETHER IT WOULD TAKE A WEEK OR A MONTH OR WHATEVER, AND WE CONTEND HERE, THAT YOU KNOW, THIS WASN'T YOUR ELEVENTH-HOUR MOTION TO CONTINUE THAT WE OFTEN SEE BY DEFENSE ATTORNEYS SAYING I AM NOT PREPARED FOR TRIAL, AND AS COURTS HAVE POINTED OUT IN CASES, BUT THIS WAS THE DEFENSE DEFENSE'S CRUCIAL MEDICAL EXAMINER TESTIMONY, WHO WOULD REBUT WHAT THE PROSECUTION'S MEDICAL EXAMINER WAS SAYING, NOT ONLY ABOUT THE TIME OF CONSCIOUSNESS --

THAT WHOLE ISSUE THAT THAT WITNESS WOULD HAVE BEEN USED FOR THE DISCOLORATION, TO REBUT THE STATE'S, WAS THAT THE ONLY PURPOSE THAT THE DEFENSE'S MEDICAL WITNESS WOULD HAVE BEEN CALLED FOR, WOULD BE TOBUT?

NO. NO. IN THE PERPETUATED TESTIMONY, HE WAS REBUTTING THE LENGTH OF TIME OF CONSCIOUSNESS, THE LENGTH OF TIME IT WOULD TAKE FOR DEATH TO OCCUR, THE AMOUNT OF FORCE THAT D BIRED, ESPECIALLYN N ELDERLY GENTLEMAN WHO HAD SOME SERIOUS MEDICAL PROBLEMS.

HIS TESTIMONY WAS PRESENTED THROUGH THE VIDEO.

THAT TESTIMONY WAS, BUT BECAUSE --

WAS THERE A PROBLEM WITH OTHER WITNESSES, THOUGH, THAT IS THAT THE STATE, FOR INSTANCE, HAD WITNESSES FROM OUT OF TOWN?

YES. THE STATE SAID WE HAVE SOME PROBLEMS COORDINATING WITNESSES, BUT, AGAIN, THIS WASN'T AN ELEVENTH-HOUR, THE DAY OF TRIAL MOTION FOR CONTINUANCE THIS. TOOK PLACE WELL BEFORE THAT, WHEN THE WITNESSES HAD NOT COME DOWN TO FLORIDA YET OR HAD NOT COME TO THE COURTHOUSE, SO THEY WEREN'T THERE, READY AND WAITING WHEN THIS MOTION FOR CONTINUANCE WAS MADE. THE CASE LAW IS CLEAR THAT, WHERE THERE IS AN INABILITY --

DO YOU KNOW, OFFHAND, WHEN THE TRIAL DATE WAS SET, AND THEN WHEN THIS MOTION FOR CONTINUANCE WAS MADE?

I BELIEVE IT WAS A MON AHEAD EUR. I MAY BE INCORRECT, BUT IT WAS AT LEAST THE TIME OF THE PRETRIAL CONFERENCE, AND I WILL Y TOD THAT IN THE RECORD FOR YOU. JUST I SEE I AM

RUNNING INTO MY REBUTTAL TIME. SO TO GO ON TO THE PENALTY ISSUE QUICKLY, WE CONTEND THAT THE DEATH SENTENCE IS INAPPROPRIATE HERE. IT WAS WHERE THE COURT IMPROPERLY FOUND TWO AGGRAVATING CIRCUMSTANCES AND ABUSED ITS DISCRETION IN NOT GIVING WEIGHT TO SERIOUS MITIGATING CIRCUMSTANCES, CONCERNING THE AGGRAVATOR OF HEINOUS, ATROCIOUS AND CRUEL, WHILE THIS COURT HAS UPHELD NUMEROUS CASES AND NUMEROUS INSTANCES OF HEINOUS, ATROCIOUS AND CRUEL, IN CASES INVOLVING STRANGULATION, IT IS NOT, WE CONTEND, A PER SE HEINOUS, ATROCIOUS AND CRUEL, ALTHOUGH SOME DICTA FROM THIS COURT RECENTLY MAY INDICATE OTHERWISE THERE. HAVE BEEN CASES INVOLVING STRANGULATION, WHERE THIS COURT HAS REJECTED HEINOUS, ATROCIOUS AND CRUEL. FOR EXAMPLE --

WASN'T THIS A PARTICULARLY AGGRAVATED STRANGULATION?

NO, IT WASN'T, YOUR . THE TESTIMONY, EVEN FROM --

ABOUT THE LENGTH OF TIME?

EVEN FROM THE STATE'S MEDICAL EXAMINER, TESTIFIED THAT UNCONSCIOUSNESS WOULD HAVE OCCURRED RELATIVELY QUICKLY. THERE IS NO ADDITIONAL ACT, AND THE CASES WHERE STRANGULATION HAS BEEN FOUND TO BE HEINOUS, ATROCIOUS AND CRUEL, THERE HAVE ALWAYS BEEN ADDITIONAL FACTS, EITHER ADDITIONAL TORTURE OR ADDITIONAL FACTS THAT CLEARLY SHOW THAT THE VICTIM WAS CONSCIOUS OF HIS IMPENDING DEATH.

WEREN'T THERE ADDITIONAL FACTS HERE, IN THAT THE INITIAL ATTEMPT WAS UNSUCCESSFUL AND DIFFERENT WEAPONS WERE USED?

EVEN THE COURT FOUND THAT THE VICTIM NEVER REGAINED CONSCIOUSNESS FROM THE ATTEMPTED MANUAL STRANGULATION, THAT HE WAS UNCONSCIOUS AFTER THAT HAPPENED.

WHAT WAS THE MAXIMUM AMOUNT OF TIME, UNDER THE STATE'S EVIDENCE, THAT THE VICTIM WOULD HAVE BEEN CONSCIOUS, IF THE JUDGE AND THE FACT FINDER SEND THE STATE'S VERSION? >THE STATE'S VERSION, I BELIEVE HE SAID IT COULD HAVE BEEN 30 SECONDS T COULD HAVE BEEN UP TO A MINUTE. THE DEFENSE EXPERT WAS SAYING IT WOULD HAVE BEEN 30 SECONDS OR EVEN SHORTER. THE STATE MEDICAL EXAMINER DIDN'T PERFORM AN AUTOPSY ON THE KROR ON THETED ONE CORATED ARTERIES, WHICH, IF THEY WERE INCLUDED, DEATH WOULD HAVE OCCURRED MORE QUICKLY THAN IF JUST AIRPLANE WERE BEING BLOCKED.

BUTc HAVEN'T WE HELD THAT EVEN AS LITTLE AS A MINUTE, OBVIOUSLY A LIFETIME IN A SITUATION LIKE THAT, CAN BE ENOUGH TO JUSTIFY THE FINDING OF THAT AGGRAVATOR?

IN THOSE CASES I WOULD CONTEND, YOUR HONOR, THERE HAS ALWAYS BEEN ADDITIONAL FACTORS. FOR EXAMPLE, IN A CASE CITED AS SUPPLEMENTAL AUTHORITY BY THE STATE, THERE WAS ADDITIONAL TORTURE INVOLVED. THERE WERE TWO VICTIMS WHERE THEY WERE BOUND AND DURING THE BINDING, THERE WERE BEATINGS OCCURRING, WHERE THE DEFENDANT, PRIOR TOG INTO THE DWELLING, CUT HIMSELF A CLOTHES LINE SO HE WOULD HAVE A LIGATURE. THOSE FACTORS ARE NOT PRESENT HE. TNOENE OF ANY SEVERE BEATING. THERE WAS NO EVIDENCE OF THE VICTIM BEING BOUND, KNOWING THAT HE WAS GOING TO DIE.

THERE WAS EVIDENCE OF HUMAN BINDING, WAS THERE NOT, THAT EDHE VICTIM DOWN?

THERE IS EVIDENCE THAT --

THAT WAS THE ADMISSION, CORRECT?

YES. THE ADMISSION BY THE DEFENDANT WAS THAT HE RELUCTANTLY AGREED TO HELP JALONI

JACKSON BY HOLDING HIM DOWN. HE DID SO FOR A SHORT PERIOD OF TIME AND DIDN'T HAVE THE STOMACH FOR IT AND LEFT, BUT THAT ALL OCCURRED VERY, VERY QUICKLY. THE COURT, IT IS PECULIAR THAT THE COURT REJECTS THE DEFENDANT'S TESTIMONY, SAYS THAT HE IS A LIAR NOT WORTHY OF BELIEF IN RIVASPECT EXCEPT FOR THE INCREDIBLE TIME FRAMES RECOUNTED BY THE DEFENDANT, WHICH HAVE BEEN ATTRIBUTED BY THE EXPERTS TO HIS MENTAL HEALTH DEFICIENCIES, WHERE THE DEFENDANT CLAIMED THAT HE WAS IN THE KITCHEN FOR SEVERAL HOURS' WORTH OF TIME BEFORE THIS HAPPENED, AND THAT HE DIDN'T LEAVE UNTIL WELL AFTER DARK, WELL AFTER SEVEN O'CLOCK, WHEN ALL OF THE PHYSICAL EVIDENCE SHOWS THAT THE VICTIM'S CAR WAS SEEN LEAVING AT 2:30 IN THE AFTERNOON. THE VICTIM'S WALLET WAS FOUND ON THE FRONT STREET BY NEIGHBORS AT 6:00 P.M.. THEY ACTUALLY WENT INTO THE HOUSE SOMETIME AROUND SEVEN, WHEN THE DEFENDANT CLAIMED HE WAS SN THE HOUSE, ACCORDING TO HIS STATEMENT. HE WASN'T. ALL OF THIS TESTIMONY SPECIFICALLY CONTRADICTED THE DEFENDANT'S WILD IDEAS OF TIME FRAME, WHICH WERE CAUSED BAY HIS MENTAL HEALTH DEFICIENCIES. MR. CHIEF JUSTICE: YOU ARE WELL INTO YOUR REBUTTAL.

THANK, YOUR HONOR. WE ASK THIS COURT TO REVERSE FOR A NEW PENALTY PHASE OR FOR A LIFE SENTENCE. MR. CHIEF JUSTICE: THANK YOU. MR. AKE?

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS STEPHEN AKE, AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE. AS TO THE FIRST ISSUE, THE STATE WOULD SUBMIT THAT THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISQUALIFY, BASED ON THIS ADVERSE RULING AT THE SUPPRESSION HEARING. WHAT YOU HAVE IN THIS CASE IS THE TRIAL COURT IS NECESSARY THAT THE COURT DETERMINES THE DEFENDANT'S CREDIBILITY IN THIS CASE, IN ORDER TO MAKE HIS RULING ON THE SUPPRESSION ISSUE, AND THAT IS EXACTLY WHAT HAPPENED. THIS COURT CANNOT ALLOW THESE TICH ADVERSE RULINGS TO BE THE BASIS OF A MOTION TO DISQUALIFY. YOU WOULD OPEN THE FLOODGATES TO MO SYLIY IN ALL SINACASES, WHERE A COURT HAS TO MAKE A DETERMINATION AS TO THE DEFENDANT'S --

ISN'TITTEETN N ADVERSEG? EISE Y CLO TO THE COURT SAYING ID ERE UNRYIRCES,IOF -- NOHO. THINK JUSTE. I TE T CALLY LIMITED HIS COMMENTS. I THINK HIS COMMENTS COVER, BASICALLY, ONE SENTENCE. IT IS THAT I FINDRTESTY UNBELIEVABLE. IT ABOUT BORDERS ON PERJURY, AND THAT IS SIMPLY AN EXPLANATION AS TO WHY HE IS MAKING HIS RULING ON THE MOTION. HE IS NOT SAYING I AM NEVER GOING TO BELIEVE YOU AGAIN. IT IS JUST AS TO THIS ALLEGATION AS TO STANDING. BASICALLY WHEN THE DEFENDANT TESTIFIED THAT HE DIDN'T KNOW THE PARENTS, THE ADDRESS, THE KEY, HE DIDN'T HAVE POSSESSIONS, ALL OF THIS OTHER STUFF. THE COURT SAID THIS TESTIMONY IS UNBELIEVABLE. THE COURT COULD HAVE SAID MOTION DENIED AND NOT SAID ANYTHING, BUT THAT WOULD HAVE BEEN IMPLIED THAT THE COURT REJECTED THE APPELLANT'S STORY, BUT THE COURT GAVE HIS REASON FOR DENYING THE DEFENDANT'S STORY, SAYING I FIND YOUR STATEMENT TO, YOUR TESTIMONY TO BE UNBELIEVABLE. THAT IS AN ADVERSE RULING. YOU ARE GOING TO HAVE THAT IN ALL KINDS OF SUPPRESSION CASES, WITH VOLUNTARINESS OF CONFESSION AND ALL SORTS OF ISSUES WHERE THE COURT HEARS TESTIMONY FROM A DANTASIGHAT AGAINST THE STATE'S CASE, AND THE TRIAL COURT IS GOING TO HAVE TO RECUSE HIMSELF EVERY TIME IN THE GUILT PHASE, WHEN HE REJECTS THE DEFENDANT'S TESTIMONY? I WOULD SUGGEST THAT THAT IS GOING TO BE AN UNWORKABLE SITUATION.

WHAT IS THE BASIS OF SAYING T THSBORDON PERJURY. IF I UNDERSTAND THE FACTS CORRECTLY, THE WAS A RELATIONSHIP BETWEEN THE DEFENDANT AND THE DAUGHTER OF THE OCCUPANTS OF THIS --

CORRECT, YOUR HONOR. HE WAS THE FATHER OF THIS YOUNG WOMAN'S, THEY HAD A BABY TOGETHER, AND SHE WAS LIVING RE WITH HER MOTHER DRSTEPFATHER ADUPLEF SISTERS AND THIS BABY WAS LIVING ALL IN THAT SAMEHOU. THE TESTIMONY FROM THE DEFENDANT WAS I HAD NEVER EVEN MET THE PARENTS. I DON'T KNOW THEIR NAME. BUT YET THE MOTHER CALLED

ME THAT NIGHT, AND YET KEEP IN MIND THAT HE GOT THERE AT ELEVEN O'CLOCK. HE CAME FROM HIS MOTHER'S HOUSE, WHO WAS ONLY SIX BLOCKS AWAY, COMES TO HIS GIRLFRIEND'S HOUSE OR HER PARENTS HOUSE, THEIR AMOUNT, AT ELEVEN O'CLOCK AT NIGHT AND THE POLICE ARREST HIM AT FIVE THE NEXT MORNING. HE HAS NO POSSESSIONS ON ONLY. THE STORY THAT HE LIVED THERE WAS TOTALLY UNBELIEVABLE AND THAT IS WHAT THE COURT COURT SAID. THE COURT MADE THE ADDITIONAL STATEMENT THAT IT ABOUT BORDERS ON PERJURY. ALL THAT REALLY IS SAYING IS THAT IS HOW UNBELIEVABLE I FIND YOUR TESTIMONY, PLACING IT IN CONTEXT. IS I AM NOT GOING TO BELIEVE U FROM E . T IS JUSTISEN ESUON THING, IDIDN'T BUY YOUR TESTIMONY.

I BELIEVE IT IS THE STATE'S POSITION THAT THE AFFIDAVIT WAS INSUFFICIENT. IS TECT?

NO, YOUR HONOR. RIT DID NOT MAKE A FINDING AS OYESNIE.HET SAIDLEGY IIET. THE AFFIDAVIT, WHICH IS ON PAGE 235 OF THE RECORD, HIS OATH THAT THE DEFENDANT SIGNED, SAID I HERE BY SWEAR OR AFFIRM THAT THE MATTERS WHICH ARE CONTAINED IN THIS MOTION ARE TRUE AND CORRECT. THE STATE NEVER ARGUED THAT THAT WAS INSUFFICIENT. >T IS THE STATE'S POSITION THAT THAT IS A SUFFICIENT AFFIDAVIT.

WELL, HE IS ATTESTING, HE DID ATTACH THIS TO THE MOTION, AND HE IS ATTESTING THAT HE IS SWEARING TO THESE MATTERS. HE DOES NOT USE THE MAGICAL PHRASE THAT HE HAS A WELL-GROUNDED FEAR.

I AM ASKING A YES OR NO YES.

WELL, YOUR HONOR -- A YES OR NO QUESTION.

WELL, YOUR HONOR, I WOULD SUBMIT THAT THAT ARGUMENT WAS NOT MADE IN THE BRIEFS, BUT I WOULD SUBMIT THAT THAT IS THOUGHT SUBMISSION. I BELIEVE, AND I HAVE NO REASON, REALLY, TO FIND THIS WAY,ENT THAT I THOUGHT THE -- EXCEPT THAT I THOUGHT THE COURT'S RULING WAS BASED ON AN ADVERSE RULING, BUT THAT IS NOT SUFFICIENT, BECAUSE THAT IS WHAT THE DEFENSE IS ALLEGING AND THAT IS AT THE HEARING WHEREY USSED THIS MO. THAT IS THEYE FOCUSING THREN'T REALLY FOCUSING ON -- THERE WAS A BIGGER ISSUE --

IS IT THE STATE'S POSITION THAT YOU CANNOT ATTACH THE AFFIDAVIT TO THE MOTION OR WHY IS IT INSUFFICIENT? IF THAT IS YOUR POSITION, I AM NOT QUITE SURE.

WELL,ALL HE SAYS IS THAT THE STATEMENTS IN THIS MOTION ARE TRUE AND CORRECT. THE DEFENDANT DOES NOT PERSONALLY SAY THAT HE HAS A WELL-GROUNDED FEAR, THAT HE WILL NOT RECEIVE A FAIR TRIAL. WHAT I THINK HAPPENED IS THIS MOTION WAS FILED AFTER THE SUPPRESNING, NINEAYS WITHIN THE TIME LIMIT, BUT THERE IS A QUESTION AS TO HIS COMPETENCY, AND THINGS GOT DRAWN OUT ALMOST A YEAR, BECAUSE THE TRIAL COURT HAD A QUESTION AS TO WHETHER HE WAS WE KPE TENT TO SIGN THIS AFFIDAVIT -- WHETHER HE WAS COMPETENT TO SIGN THIS AFFIDAVIT, BASED ON WHAT TRANSPIRED IN THE COURT, AND THE COURT SAID I WILL CONSIDER IT TIMELY FILED, AND UNTIL YOU ARE DEEMED COMPETENT, I AM NOT GOING TO RULE ON THIS, THEN ONCE HE ED ENT THERT ENI, BUT BASICALLY THE ARGUMENT THAT I WANT TO STRESS TO THIS COURT IS THAT, IN THESE ADVERSE RULING SITUATIONS, THE CASES THAT HE CITES ARE TOTALLY DISTINGUISHABLE. THERE YOU HAVE THE TRIAL JUDGE MAKING AN EXTRANEOUS COMMENT THAT IS NOT RELEVANT TO JUDGING A DEFENDANT'S CREDIBILITY, AND IN CRIMINAL CASES, THE TRIAL JUDGE IS ALWAYS GOING TO BE IN A POSITION OF HAVING TO MAKE A CREDIBILITY DETERMINATION, AND YOU CAN'T SIMPLY DISQUALIFY THE JUDGE, EVERY TIME HE KS OUT AGAINST YOU IN THAT DETERMINATION. THE NEXT ISSUE THAT APPELLANT ADDRESSES IS THE TRIAL COURT'S SO-CALLED RESTRICTION OF -- T THERE CASE LAW OUT THERE TO THE EFFECT THAT, IF THE JUDGE SAYS THAT HE DISBELIEVES THE DEFENDANT, THAT WOULD AFFORD A BASIS FOR HIS RECUSAL?

YOU ARE CORRECT, JUDGE. THAT CASE, BROWNc, ST. GEORGE ISLAND CASE, SAYS THAT GENERALLY A STATEMENT TO THIS EFFECT THAT A JUDGE DOES NOT BELIEVE A PARTY COULD BE A BASIS FOR DISQUALIFICATION, BUT THAT WAS IN A TOTALLY DIFFERENT CONTEXT. THAT WAS A PARTY SUBMITTING AN AFFIDAVIT. THE COURT WASN'T IN A POSITION OF HAVING TO DETERMINE THIS PARTY'S CREDIBILITY. IT WAS AN EXTRANEOUS COMMENT. THERE AREN'T ANY CASES CITED THAT DEAL DIRECTLY WITH THIS TYPE OF ISSUE, WHERE A TRIAL JUDGE IS TRYING TO MAKE A DETERMINATION AND A RULING, BASED ON THIS DEFENDANT'S TESTIMONY. AND IT IS TOTALLY DISTINGUISHABLE. IN THATT WAAL ROP, AI WOULD SUBMIT THAT THIS WAS AN EXCEPTION TO THAT PROPOSITION, WHERE YOU HAVE A CRIMINAL DEFENDANT TESTIFYING AND A JUDGE IS FORCED TO MAKE A CREDIBILITY DETERMINATION. AS TO THE ISSUE ABOUT THE RESTRICTION OF THE VOIR DIRE, I THINK IF THE COURT LOOSE AT THE VOIR DIRE, STARTING WITH DEFENSE COUNSEL'S VERY FIRST QUESTION, WHICH COVERS SOME SIX PAGES AND GOES ON TO A NUMBER OF TOPICS, YOU GET A SENSE OF WHAT THE COURT WAS DEALING WITH, WITH THIS DEFENSE ATTORNEY, AND TRYING TO MAKE HIM ASK QUESTIONS THE VENIRE EXPRESSED THEIR CONFUSION ON HIS QUESTIONS REPEATEDLY, AND THE JUDGE WOULD ULTIMATELY SAID, OUT OF THE PRESENCE OF THE JURY, THAT HE FELT HE NEEDED TO REIN IN COUNSEL BECAUSE HE WAS ASKING RAMBLING, BIFURCATED QUESTIONS THAT HAD NO IMPORTANCE TO THE JURY. BASICALLY HERY RESTRICTED HIM FROM -- HE -- BASICALLY HE RESTRICTED HIM FROM ASKING ANY QUESTIONS. THE DEFENSE COUNSEL HAD A HABIT OF TRYING TO GIVE THE JURY JUST A PORTION OF THE STORY AND NOT ALL OF THE LAW, AND THEE WAS PLAYING -- PLACING A REASONABLE RESTRICTION, AND THE STATE HAS NOT SHOWN ANY ABUSE OF THAT DISCRETION IN CONTROLLING THE VOIR DIRE PROCESS AND MAKING SURE THAT THE DEFENSE ATTORNEY, IN THIS CASE, DID A REASONABLE VOIR DIRE. YOU HAVE NO INSTANCE OF THE JUDGE SAYING, NO, YOU CANNOT INQUIRE INTO THIS MATTER. THAT NEVER HAPPENED, AND THE STATE WOULD SUBMIT THAT THE TRIAL COURT NEVER RESTRICTED DEFENSE COUNSEL IN ANY WAY. COUNSEL WOULD SOMETIMES INTERRUPT OR THE COURT WOULD INTERRUPT COUNSEL AND WOULD INSTRUCT THE JURY ON THE LAW AND THEN TURN IT BACK OVER TO DEFENSE COUNSEL AND ALLOW HIM TO CONTINUE ON WITH HIS LINE OF QUESTIONING. THE NEXT ISSUE, THE MOTION FOR CONTINUANCE REGARDING DR. FEEGLE'S TESTIMONY, WHAT HAPPENED HERE, AND JUSTICE QUINCE HAD A QUESTION AS TO WHEN THIS WAS FILED, AND I NOTE THAT THAT IS IN THE RECORD AT PAGE 253 AND 254, IS THAT COUNSEL FILED THE MOTION TO CONTINUE ALMOST EXACTLY A MONTH, AS COUNSEL SAID, BEFORE THE SCHEDULED PENALTY PHASE. THIS WAS A MOTION --

HOW LONG HAD THE PENALTY PHASE BEEN SET?

IT HAD BEEN CONTINUED NUMEROUS TIMES, YOUR HONOR, AND THAT WAS ONE OF THE STATE'S REASONS FOR CONTESTING THIS CONTINUANCE, WAS THAT DEFENSE COUNSEL HAD CONTINUED IT A NUMBER OF TIMES. I THINK THE STATE SAID HE HAD, LIKE, EIGHT OUT-OF-STATE FROM NEW YORK, I BELIEVE IT WAS, WITNESSES, THAT HE WAS TRYING TO JUGGLE THEIR SCHEDULES. THIS DATE HAD BEEN SET FOR SOME TIME, SEPTEMBER WAS THE DATE OF THE PENALTY PHASE, AND HE FILED THE MOTION THE PREVIOUS MONTH, TO CONTINUE IT FOR DR. FEEGLE'S TESTIMONY. AND THE COURT BASICALLY SAID YOU CAN GO AND PERPETUATE HIS TESTIMONY VIA VIDEOTAPE, AND THAT IS WHAT HAPPENED, AND THAT WAS PRESENTED TO THE JURY. THE DEFENDANT'S ONLY ARGUMENT ON APPEAL IS THAT SOMEHOW HE WAS SURPRISED BY THE STATE'S MEDICAL EXAMINER'S TESTIMONY THAT THE DISCOLORATION IN THE VICTIM'S SHORTS MAY HAVE BEEN FEAR FACTOR. THE STATE'S MEDICAL EXAMINER, DR. GORE, TESTIFIED TO THAT FACT. HE SAID, HE DIDN'T SAY IT WAS DEFINITE. HE JUST SAID THIS MAY HAVE BEEN A RESULT OF THE FEAR OF THE STRANGULATION, THAT HE MAY HAVE URINATED ON HIMSELF.

WAS THAT COVERED IN PRETRIAL OR PREPENALTY PHASE DISCOVERY, THROUGH DEPOSITION OR OTHERWISE?

DR. GORE HAD HIS DEPOSITION TAKEN. I HAVE NOT ACTUALLY READ THE DEPOSITION. IT IS NOT IN THE RECORD, AND COUPS HE WILL REPRESENTED THAT THAT WAS SO-CALLED SURPRISE

TESTIMONY.

WAS THERE ANYTHING TO REFUTE THAT?

NO. THERE IS NOTHING DIRECTLY TO REFUTE. THAT I DON'T KNOW IF THEY -- MY UNDERSTANDING, FROM COUNSEL, DEFENSE COUNSEL'S REPRESENTATION BELOW IN THE TRIAL LEVEL, WAS THAT HE NEVER ASKED THAT SPECIFIC QUESTION. HE WAS AWARE OF THE FACT THAT IT WAS DISCOLORATION IN THE SHORTS, BUT IT WAS JUST NOT -- HE NEVER QUESTIONED THE STATE'S MEDICAL EXAMINER REGARDING THAT.

SO THE MEDICAL EXAMINER REPORT, ITSELF, HAS STATES STATEMENTS ABOUT THE DISCOLOR -- HAS STATEMENTS ABOUT THE DISCOLORATION?

CORRECT, YOUR HONOR.

SO IF THERE IS, QUOTE, SURPRISE, IT WOULD BE IN THE CONCLUSION THAT WOULD BE DRAWN FROM THAT.

CORRECT, AND I WOULD POINT OUT THAT THE DEFENSE COUNSEL NEVER OBJECTED AT TRIAL, WHEN DR. GORE TESTIFIED TO THE SO-CALLED SURPRISE TESTIMONY.

SO THERE WAS NO RICHARDSON HEARING.

EXCUSE ME, YOUR HONOR?

THERE WAS NO RICHARDSON HEARING AT THE TRIAL.

NEW YORK CITY YOUR HONOR, BECAUSE I DON'T BELIEVE THIS WAS -- NO, YOUR HONOR, BECAUSE I DON'T BELIEVE THIS WAS ANYTHING THAT REALLY CONSTITUTE ADD SURPRISE. IT WAS CERTAINLY NOT ANYTHING THAT WAS WITHHELD. IT WAS ALWAYS THERE. I MEAN, I DON'T THINK IT IS A GREAT LEAP, FOR COUNSEL TO THINK THAT, HEY, THIS DISCOLORATION MAY HAVE BEEN A RESULT OF THIS FEAR FACTOR.

WOULD YOU GO BACK TO JUSTICE QUINCE'S QUESTION, SO WE CAN GET A TIME LINE.

YES.

I BELIEVE SHE HAD ASKED WHEN THE CASE WAS SCHEDULEDR TL RBER, T ORDER WAED, S EEL BETWEENE VETHE MEDICAL WITNESSES'S UNAVAILABILITY, THE SCHEDULING OF TRIAL AND THEN THE ULTIMATE TRIAL. CAN YOU GIVE US A TIME LINE ON THAT?

I CAN TRY, YOUR HONOR. I CAN TRY TO HIT MOST OF. THAT I CAN TELL YOU THAT, BASED ON THE MOTION FOR CONTINUANCE, AND THAT WAS FILED ON AUGUST 18 OF 1999,DECHD Y ES S3,999OT. FEL HONDEO- DED O ERGOY ONUGUT9,19 HES ATH OF ANEY PHASES AYT FOR R. ARY YERSSUD THAS, ALSO -- >ERSD. BUT WHEN WAS THS CASEULED I? IS THAT SOMETHING THAT HAPPENED --

I DON'T KNOW, YOUR HONOR. I BELIEVE HE WAS DEEMED COMPETENT EARLY JANUARY, AND SOMEWHERE AROUND JANUARY OR FEBRUARY, THEY SET THIS DATE, AND I MAY BE OFF ON. THAT I HONESTLY CAN'T GIVE YOU --

HE PLED GUILTY ON AUGUST 14, 1998, I THOUGHT DEFENSE COUNSEL SAID THAT HE WAS INCOMPETENT OR NOT RESTORED TO COMPETENCY FOR CLOSE TO A YEAR. NOW YOU ARE TELLING US THAT WOULD BE ONLY 30 OR 6 ON DAYS AFTER THE GUILT --

I DON'T RECALL EXACTLY THE DATE OF THE ORDER THAT HESMEPETENR. AGAIN, I BELIEVE IT WAS AROUND JANUARY OR FEBRUARY. I COULD BE MISTAKEN ON THAT, BUT I WILL CERTAINLY --

IS IN THE RECORD. I KNOW IS EASILY DISCOVERABLE, BUT YOU KNOW, YOU STILL HAVE THE PENALTY PHASE HAD BEEN SET FOR SOME TIMENDWE STATE ATTORNEY REPRESENTED, AT THIS CONTINUATION, THAT I HAVE SCHEDULED MY WITNESSES. THEY HAVE TAKEN LEAVE FROM THEIR JOBS AS POLICE OFFICERS IN NEW YORK AND WHAT HAVE YOU TO COME HERE. BUT, REALLY, THE IMPORTANT THING HERE IS THAT ALL. FE WOULD REBUT WOULD BE HE FILED AN AFFIDAVIT AT THE SPENCER HEARING TO THE JUDGE, AND ALL HIS AFFIDAVIT SAID WAS IT IS NOT NECESSARILY A VALID CONCLUSION THAT THE VICTIM URINATED OUT OF FEAR. IT WAS, YOU KNOW, DR. GORE SAYING THIS MAY HAVE BEEN THE CASE AND DR. FEEGLE SAYING IT MAY HAVE BEEN BUT IT MAY NOT HAVE BEEN. WE REALLY DON'T KNOW. AND SIGNIFICANTLY, COUNSEL SAYS THAT THE STATE SPENT AN ENORMOUS AMOUNT OF TIME ON IT ON CLOSING AND THAT IS NOT THE CASE. COUNSEL MENTIONED IT ONE TIME IN CLOSING. IT COVERS TWO PAGES AND TECHNICALLY HE PROBABLY MENTIONED TWICE BECAUSE IT IS AT THE END OF ONE PAGE, BUT THE STATE DIDN'T PRESS IT IN ITS ARGUMENT AND IT WAS CUMULATIVE T WASN'T NEEDED TO ESTABLISH THE HAC AGGRAVATING FACTOR.

SOMETHING LIKE THAT, IF A JURY HEARS SOMETHING AS A SORT OF STARTLING FACT, IT IS HARD TO SAY IT IS CUMULATIVE, BUT THE TRIAL JUDGE DID NOT, DID THE TRIAL JUDGE MENTION IT IN HIS FINDINGS?

NO, YOUR HONOR, AND THAT IS WHERE I WAS GOING TO HEAD INTO, IS THAT THE DEFENSE COUNSEL PRESENTED THIS AT THE SPENCER HEARING, AND THE TRIAL JUDGE DID N T N FINDING HAC, SO THEO ERRORT IS HARMFUL TO THEANT N T. IANc,ARLEE CN E, WITH OT S FACTOR, AND I THINKSE MAYVE INDICATED LIERHATSN ESPECIALLYEINDT FRORB RBIANGE- AND AN CIOUSTAINN C. YOU HAVE THE VETICULAR HEMORRHAGING IN HIS EYES AND THE DEFENDANT USING HIS HANDS AND THE MEDICAL EXAMINER TESTIFYING FOR THE STATE THAT IT TOOK ONE TO TWO MINUTES FOR THE VICTIM TO LOSE CONSCIOUSNESS. YOU HAVE THE HEMORRHAGEING IN THE EYES WHICH INDICATES THAT PRESSURE WAS RELEASED AND THEN REAPPLIED.

IN THIS PARTICULAR CASE, WHETHER IT IS REQUIRED OR NOT, TES THE INTENT TO MAKE THIS VICTIM SUFFER AND ESPECIALLY A TORTUROUS DEATH? I AM TRYING TO UNDERSTAND, AND, AGAIN, WE ARE TALKING ABOUT A GUY THAT PLED GUILTY, THAT LAYING IN WAIT TO DO SOMETHING FOR SOME PERIOD OF TIME, THE STATE'S THEORY IS THAT WE REALLY WANTED -- THAT HE REALLY WANTED TO KILL THIS GUY SO HE COULD GET HIS VEHICLE.

CORRECT.

AND YET HE SORT OF IS LIKE IN SOME WAYS YOU COULD SAY INSTEAD OF IT BEING A INTENDED TORTUROUS DEATH, IT WAS SOMETHING THAT WAS MORE HE DECIDED ON THE SPUR OF THE MOMENT TO TRY TO KILL HIM AND DIDN'T HAVE A WEAPON WITH HIM AND SO USED HIS HANDS AND THAT DIDN'T WORK. IN OTHER WORDS, WHAT IS THE STATE'S TAKE ON HOW CCP AND HAC, HERE, FIT TOGETHER, TO SHOW THIS AS BEING A, YOU KNOW, WELL-THOUGHT-OUT PLAN OF A, YOU KNOW, CALCULATING KILLER?

RIGHT. WELL, YOUR HONOR, I THINK YOU HAVE THE DEFENDANT WAS STAYING WITH THE JACKSON FAMILY. THAT MORNING MS. JACKSON SAID YOU HAVE TO FIND A NEW PLACE TO STAY. HE WAS GETTING KICKED OUT. HE INDICATED THAT MORNING THAT HE HAD TO FIND A NEW CAR. HE TOLD THE JACKSON BROTHERS I HAVE TO GO GET MY I GIRLFRIEND'S C,'SD CLUEDTHEMN T THAT HE SINOE 'S ETD M.> HE HADORKED FR HIM?

CORRECT, YOUR HONOR,E HAD D FRMR OF TYPS MOWING THE YAUHIS FATHER'S BUSINESS, BUT NONETHELESS THEY GET TO TE HOUSE --

WHAT TIME OF DAY IS IT?

THE DEACON OF THE CHURCH WHO GAVE DHEM A RIDE AND DROPPED THEM OFF AT THE

SUBDIVISION, TESTIFIED THAT IT WAS ABOUT TWO O'CLOCK WHEN HE DROPPED HIM OFF.

THAT AFTERNOON, SO HE WAS KICKED OUT OF THE HOUSE THAT MORNING.

THE APPELLANT WENT TO CHURCH THAT MORNING WITH MICHAEL JACKSON.

I THOUGHT YOU SAID HE HAD NO PLACE TO LIVE.

I AM SORRY?

I THOUGHT YOU SAID --

THE MOTHER TOLD HIM THAT MORNIG THAT SUNDAY IS YOUR LAST DAY. THEY GO TO CHURCH THAT MORNING AND THEN THE CRIME TAKES PLACE IN THE AFTERNOON, AND THEN HE GETS THIS CAR SO HE CAN DRIVE UP TO NEW YORK. THAT WAS HIS MOTIVATION FOR DOING THIS IS HE WAS GOING TO DRIVE UP TO NEW YORK.

BUT WHETHER IS THE STATE'S CLAIM THAT HE FORMED THE INTENT TO ACTUALLY KILL THE VICTIM?

WELL, WE HAVE DIRECT STATEMENTS FROM THE DEFENDANT, ONCE HE IS INSIDE THE HOUSE, AS SOON AS THEY ARRIVE, MICHAEL JACKSON AND THE APPELLANT, THEY ARRIVED IN THERE. APPELLANT GOES AND LOOSE INTO THE KITCHEN AND SEES THE VICTIM, LOOSE INTO THE LIVING ROOM AND SEES THE VICTIM WATCHING TELEVISION AND COMES BACK AND TELLS MICHAEL JACKSON THERE IS A OLD MAN IN HERE AND I AM GOING TO KILL HIM, AND MICHAEL JACKSON SAID, NO, LET'S JUST LEAVE. THE WALLET IS SITTING THERE AND THE KEYS ARE SETTING RIGHT THERE THERE. LET'S JUST LEAVE. AND APPELLANT TOLD HIM, NO, LET'S WAIT FIVE MINUTES, SO APPELLANT GOES AND LOOSE AND COMES BACK AND SAYS, OKAY, ARE WE READY TO GO, AND MICHAEL JACKSON SAID, NO, I AM OUT OF HERE AND HE LEAVES, AND WE HAVE HIM STAYING BEHIND AND WATCHING THE VICTIM AND FORMULATING --

SO THE WALLET WAS THERE.

CORRECT.

AND WHERE WERE THE KEYS?

RIGHT THERE BY THE WALLET, ON THE COUNTER.

AND THE CAR IS OUTSIDE?

THAT'S CORRECT.

AND SO WHERE IS THE PLAN TO GO AND KILL THE VICTIM?

HE EXPRESSED HIS PLAN RIGHT THERE. HE SAID HE WAS GOING TO SIT THERE AND LIE IN WAIT AND KILL HIM.

HE IS SITTING THERE, WATCHING TV. SO THE VICTIM IS ALREADY IN THE HOUSE. WHAT IS HE WAITING FOR?

I HAVE NO IDEA WHAT HE IS WAITING FOR EXCEPT THE RIGHT MOMENT. HE CLEARLY, THOUGH, WAITS FOR A SUBSTANTIAL PERIOD OF TIME AND THINKS ABOUT WHAT HE IS GOING TO DO.

HE IS IN A KITCHEN OF SOMEONE'S HOUSE.

RIGHT.

AN ELDERLY MAN, WATCHING TV.

CORRECT.

HIS KEYS AND THE WALLET ARE RIGHT THERE. THE CAR IS OUTSIDE. IT IS BROAD DAYLIGHT.

RIGHT.

DOES HE WAIT UNTIL NIGHTTIME?

NO. I DON'T BELIEVE HE DO. F YOUOY HIS STATEMEN, HIS MEY, BUT IF YOU LOOK AT ALL OF THE OTHER EVIDENCE OF THE CAR IS SEEN AT ANOTHER HOUSE, THE APPELLANT DRIVES UP IN THE CAR AT TWO TO FOUR O'CLOCK, IS WHAT THE WITNESSES SAID. THEY WEREN'T FIRM ON THAT, BUT HE WAS IN THE HOUSE FOR A LENGTH OF TIME, CERTAINLY A SUFFICIENT LENGTH TO HAVE FORMED --

IT WAS LIKE HE WAS BEING ODD? I GUESS I WANTED YOU TO GET INTO A LITTLE BIT, OF WHAT THE MENTAL HEALTH STATUS OF THIS DEFENDANT WAS.

I CAN'T GET INTO THE MENTAL STATUS AFTER KILLER, YOUR HONOR, AS TO KNOW WHY --

NO. THE MENTAL MITIGATION, NOT WHAT YOU THINK HE WAS THINKING. WHAT ISEENLGAN INS CASE THAT WAS PRESENTED THAT THE JURY HEARD AND THE JUDGE HEARD?

WELL, THEY HEARD THAT HE WAS A DEPRESSED INDIVIDUAL, THAT HE HAD SOME LEARNING DISABILITIES, AND THIS IS ALL FOUND BY THE COURT IN MITIGATION. THESE WERE ALL THE NONSTATUTORY MITIGATORS.

WHAT WAS HIS IQ.

87, WHICH WAS THE AVERAGE IS 90 TO 110, SO HE WAS SLIGHTLY BELOW AVERAGE THERE. HE HAD A DIFFICULT CHILDHOOD. THE COURT FOUND THAT NONE OF THE STATUTORY MITIGATORS APPLIED, BECAUSE HE DIDN'T MEET THAT LEVEL OF, YOU KNOW, EXTREME OR SUBSTANTIAL, BUT THAT THE COURT DID FIND SOME OF THESE NONSTATUTORY ONES.

ALSO ON THAT, THERE WAS SOMETHING THAT BOTHERED ME. THEANTS L DIHE JT ODD SYRS. IETIS KDOF L STRA.

C.>HEE->TE WDHE INSTRUCTIONS.

WHY DID THE STATE WANT THEM?

BECAUSE THE EVIDENCE CAME OUT THEY WERE BASICALLY PRESENTING EVIDENCE AS TO THE STATUTORY MENTAL MITIGATORS, AND YOU CAN'T INVADE THE PROVIDENCE OF THE JURY AND SAY, YOU KNOW, WE ARE JUST GOING TO TAKE AWAY THESE MODIFYING TERMS FROM THE STATUTORY MENTAL MITIGATORS. THERE HIS CASE LAW. I CITE ADD NUMBER OF CASES FROM THIS COURT, WHERE A TRIAL JUDGE IS NOT REQUIRED TO DELETE THESE QUALIFYING TERMS OF SUBSTANTIALLY AND EXTREME, WHEN THERE IS EVIDENCE PRESENTED THAT GOES TO MENTAL MITIGATION.

WHAT IS THE DIFFERENCE, IF THE JURY, IF HE WANTS TO PRESENT MENTALN ADOEST WANT STATUTORY MITIGATORS, AND IS CONTENT WITH A CATCHALL, WHAT IS THE STATE'SESTN HAVINGETHG INSTRUCTED ON THAT IS NOT PART OF THEIR CASE?

BOTH THE STATE AND THE TRIAL JUDGE'S FINDING THAT THE EVIDENCE WAS PRESENTED TO GO TO THIS, AND WHAT DEFENSE COUNSEL WANTED WAS HE WANTED THE STATUTORY MENTAL MITIGATORS INSTRUCTIONS. HE JUST WANTED THEM TO DELETE ONE WORD OUT OF THEM. HE WANTED THEM.

DID THE STATE USE THOSE INSTRUCTIONS AGAINST THE DEFENDANT?

I DON'T UNDERSTAND WHAT YOU MEAN, AS FAR AS USED THEM AGAINST HIM.

DID THE STATE USE THOSE AGAINST HIM, HYPOTHETICALLY, ONE WAY WOULD BE TO SAY TO THE JURY, AS FAR AS MENTAL MITIGATION IS CONCERNED, YOU WILL HEAR FROM THE JUDGE, AND HE WILL GIVE YOU TWO INSTRUCTIONS ABOUT WHAT CONSTITUTES MENTAL MITIGATION. ONE HAS THE WORD EXTREME OR WHATEVER, AND THEN THE STATE WOULD SAY OBVIOUSLY THERE IS NOT ANY MENTAL MITIGATION HERE, BECAUSE YOU HAVEN'T HEARD ANY WITNESS SAY THAT THIS THING WAS EXTREME OR WHATEVER THE OTHER. THAT IS THE WAY THAT I WOULD, AND I AM ASKING.

NO. I THINK THE STATE PROPERLY ARGUED THAT HIS EVIDENCE DID NOT RISE TO THE LEVEL OF THE STATUTORY MENTAL MITIGATORS, BUT HE WAS PROPOSING ALL THESE OTHER ONES THAT THE STATE HAD TO ADDRESS, ALL THESE NONSTATUTORY ONES, AND THEY SET OUT THE DEFENSE COUNSEL PROPOSED, THESE SPECIFIC INSTRUCTIONS AND THAT IS WHAT THE COURT GAVE THE JURY.

THE JUDGE DID GIVE SPECIFIC INSTRUCTIONS ON THE NONSTATUTORY MITIGATOR?

YES, YOUR HONOR. HE GAVE THE ONES THAT WERE PROPOSED BY DEFENSE COUNSEL, AND HE GAVE THE CATCHALL ONE, AND THE CASE LAW THAT I HAVE CITED SAYS THERE CAN'T CAN'T BE ANY ERROR, WHEN -- THERE CAN'T BE ANY ERROR, WHEN A JUDGE REFUSES TO EXTRACT THOSE MODIFYING TERMS. AS LONG AS YOU LET THEc JURY, AS LONG AS IT MEETS THE OTHER NONTAUGHT OTHER ONES THERE, IS NO -- NONSTATUTORY OTHER ONES,ITO PROBLEM WHAT HAPPENED, AND THAT IS EXACTLY WHAT HAPPENED IN THIS CASE. THE COURT FOUND THAT IT WAS IMPROPERLY NOT A HAC, AND THIS IS A HAC CASE. THE STATE TALKED ABOUT THAT ALREADY AND REASSERT THAT THIS IS ONE OF THE WORST STRANGULATION CASES YOU WILL SEE. I CITED SUPPLEMENTAL AUTHORITY, BLACKWOOD, WHICH WAS A SINGLE-AGGRAVATOR STRANGULATION CASE, WHICH IS VERY SIMILAR TO THIS CASE, IN THAT YOU HAVE VERY SIMILAR CASES OF STRANGULATION USED, IN THAT THE HEMORRHAGING OF THE EYES AND THE REAPPLICATION AND REUSEFUL THE PRESSURE TO STRANGLE HIM. WE HAVE THE DEFENDANT'S STATEMENT TO LAW ENFORCEMENT, ALTHOUGH HE TRIED TO SAY THAT JALONI JACKSON WAS THE PERSON INVOLVED, AND THE TRIAL COURT DID NOT BELIEVE THE SUBSTANCE OF HIS STATEMENT, YOU STILL HAD HIS STATEMENT AS TO THE ACTUAL MURDER MADE SENSE, WITH ALL OF THE OTHER EVIDENCE THAT CAME IN, AND THE TRIAL COURT IS ALLOW TO LOOK AT THAT, IN CONJUNCTION WITH ALL OF THE REST OF THE EVIDENCE, AND IN HIS STATEMENT, HE SAID THAT THE VICTIM PUT UP A GREAT STRUGGLE, TOOK ABOUT SIX TO SEVEN MINUTES FOR HIM TO FINALLY DIE, AND THAETION PLAINS WHY HE HAD TO USE HIS HANDS, THEN A TOWEL, AND THEN A BELT TO FINALLY SUCCEED WHAT HE HAD TO DO AND HAD SET OUT TO ACCOMPLISH SO BASED ON THAEVED, THE STATE WOULD SUBMIT THAT THE TRIAL COURT PROPERLY FOUND THE HAC.

WHAT IS THE STATE'S EVIDENCE, THOUGH, AS TO THE LENGTH OF THE TIME HE WAS, THAT THE VICTIM WAS CONSCIOUS?

WELL, THE STATE'S MEDICAL EXAMINER TESTIFIED THAT THIS WOULD BE ONE TO TS. DR. FEEGLE, IN HIS TESTIMONY, INDICATED THAT IT WOULD PROBABLY BE LESS, ANYWHERE FROM 30 SECONDS TO A MINUTE. YOU HAVE BASICALLY UP TO A TWO-MINUTE WINDOW BEFORE HE LOSES CONSCIOUSNESS, BUT BASED ON THE DEFENDANT'S STATEMENT, IT WAS CLEAR THAT THIS VICTIM

WAS SUFFERING THAT, HE WAS FIGHTING, THAT HE WAS GASPING OUT, TRYING TO SCRATCH, AND HE KNEW, HAD THIS FORE KNOWLEDGE OF DEATH, PARTICULARLY IN THESE STRANGULATION CASES, IT IS A PRIME EXAMPLE OF HAC, BECAUSE THE VICTIM HAD THIS FORE KNOWLEDGE OF IT, AND FOR THOSE REASONS, WE SAY THAT IS EXACTLY WHAT HAPPENED AND FOR THOSE REASONS WE WOULD ASK THAT THIS COURT AFFIRM. THANK YOU.

REBUTTAL?

THANK, YOUR HONOR.

WOULD YOU ADDRESS THE CCP AGGRAVATOR AND, AGAIN, TAKING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, WHAT DOES THE FACT THAT HE IS -- HOW LONG IS HE IN THE KITCHEN AND FORMULATING THIS PLAN?

THE TIME FRAMES HERE, ESPECIALLY THOSE PRESENTED BY THE STATE, ARE ALL IN CONFLICT. THEY HAD THE TESTIMONY THAT HE WAS DROPPED OFF AT AROUND TWO O'CLOCK, ABOUT TWO MILES FROM THE VICTIM'S HOUSE. THEY HAD TO WALK THAT DISTANCE, AND YET THE CAR WAS SEEN LEAVING ABOUT TWO THIRTY FROM THE VICTIM VICTIM'S RESIDENCE. THERE WAS, ALSO, TESTIMONY OF ACQUAINT ANSWER OF MICHAEL JACKSON, WHO SAID THAT SHE SAW HIM WALKING IN A DIRECTION AWAY FROM THE SCENE, NO LATER THAN 12:30 OR ONE O'CLOCK. WHICH DOESN'T JIVE WITH THE OTHER STATE'S TIME LIMITS IN THE CASE. ALSO THE NEIGHBOR SAW, SHE THOUGHT, TWO PEOPLE LEAVING IN THE CAR, SO THE DEFENDANT OBVIOUSLY DIDN'T WAIT IN THE KITCHEN, AS HIS TESTIMONY BECAUSE OF HIS MENTAL HEALTH PROBLEMS, WOULD INDICATE. IF HE GOT THERE, HE GOT THERE SOMETIME AFTER TWO. IF HE, WHEN HE LEFT, HE LEFT SOMETIME AROUND TWO-THIRTY, SO THERE WASN'T THIS LONG TIME FRAME. ' COULDN'T REMEMBER BECAUSE OF HIS MENTAL HEALTH PROBLEMS. I AM READING THE SENTENCING ORDER, AND I AM NOT GETTING A REAL FEEL OF WHAT KIND OF MENTAL ILLNESS WAS OCCURRING ON THE DATE OF THIS MURDER, WHETHER IT WAS DELUSIONAL THINKING, WHETHER THERE WAS, YOU KNOW, INCOMPLETE --

RIGHT.

WHAT KIND OF MENTAL ILLNESS ARE WE TALKING ABOUT?

WHAT WAS PRESENT HERE, WAS THAT THE DEFENDANT HAD A LEARNING DISABILITY.

NOW, IN FAIRNESS, THE LEARNING DISABILITY IS SOMETHING THAT MANY, MANY PEOPLE HAVE. I DON'T THINK WE CHARACTERIZE IT AS A MENTAL ILLNESS. I AM TALKING ABOUT SOMETHING THAT WOULD, THAT WAS GOING ON ON THIS DAY OF THIS MURDER.

RIGHT. RIGHT.

EXPLAIN, AND I SEE YOU ARE OUT OF TIME.

SPECIFICALLY TESTIFIED THAT HE HAD ORGANIC BRAIN DAMAGE TO HIS FRONTAL LOBE, WHICH THE EXPERT SAID WOULD CAUSE HIS TYPE OF ACTIONS TO OCCUR ON THIS. HE HAD A LACK OF IMPULSE CONTROL. HE HAD THE INABILITY TO CONTROL HIS ACTIONS, AND AN INABILITY TO THINK AHEAD. THESE ARE ENTITLED TO GREAT WEIGHT, WHERE THEY SPECIFICALLY ARE APPLIED TO THE CRIME, WHICH THE MENTAL HEALTH EXPERTS DID HERE. THE CASE SHOULD BE REVERSED FOR RESENTENCING. THANK YOU, YOUR HONOR. MR. CHIEF JUSTICE: THANK YOU, MR. WULCHAK. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.