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Micah Louis Nelson v. State of Florida

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS NELSON VERSUS STATE.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM ANNE OWNS, FROM THE TENTH JUDICIAL -- I AM ANNE OWENS, FROM THE TENTH JUDICIAL CIRCUIT, PUBLIC DEFENDERS OFFICE, AND I AM HERE TO REPRESENT MICAH NELSON. JUST BRIEFLY, MR. NELSON WAS CONVICTED OF FIRST-DEGREE MURDER IN DECEMBER 1999. THE JURY RECOMMENDED DEATH BY A VOTE OF 9-TO-3, AND THE JUDGE SENTENCED MR. NELSON TO DEATH ON MARCH 17, 2000. MICAH WAS CONVICTED OF KILLING MRS. BRACE, WHO WAS AN ELDERLY WOMAN, AFTER RAPING AND KIDNAPING HER AND DRIVING HER AROUND IN A CAR, AND HE FINALLY STRANGLED HER AND CHOKED HER BY SEVERAL MEANS IN POLK COUNTY, IN AN ORANGE GROVE, AND THE POLICE FOUND HIM IN THE MORNING, ASLEEP IN HER CAR, PARKED NOT TOO FAR FROM HIS HOUSE, AND ALTHOUGH HE DENIED THAT, AT FIRST DENIED THE HAVING COMMITTED THE CRIME, HE CONFESSED AND LED THE POLICE TO HER BODY IN THE ORANGE GROVE, AND HE TOLD THE POLICE THAT HE DIDN'T KNOW WHY HE DID THIS. HE WAS JUST MAD AT LIFE AND MAD AT THE WORLD, AND AT HIS LIFE. WHAT I AM GOING TO TALK ABOUT TODAY IS ISSUE FOUR, WHICH IS MITIGATION, AND IS PRIMARILY THE MENTAL MITIGATION IN THE STATUTORY MENTAL MITIGATORS. AS YOU ALL KNOW, WHEN A REASONABLE QUANTUM OF COMPETENT, UNCONVERTED EVIDENCE OF A MITIGATING CIRCUMSTANCE IS PRESENTED, THE TRIAL COURT MUST FIND THE MITIGATING FACTOR EXISTS. THE JUDGE MAY REJECT MENTAL OPINIONS TESTIMONY, EVEN IF IT IS UNREFUTED, BUT IN ORDER TO DO THAT, HE HAS TO CITE OTHER CONTRADICTORY EVIDENCE IN THE RECORD TO SUPPORT HIS CONCLUSION CONCLUSION. HERE THE TRIAL COURT, DESPITE PSYCHIATRIC TESTIMONY AND, YOU KNOW, THE OPINION ACTUALLY OF THREE MENTAL HEALTH EX-PERSONALITIES, THAT -- MENTAL HEALTH EXPERTS THAT MICAH NELSON WAS DEPRESSED, THE JUDGE REJECTED BOTH MENTAL MITIGATORS, AND HE DIDN'T FIND THEM AS NONSTATUTORY, EITHER. IN FACT, AS NONSTATUTORY, HE FOUND THREE DIFFERENT MITIGATORS THAT MORE OR LESS HE GAVE LITTLE OR SLIGHT WEIGHT TO THE FACT THAT HE WAS TAKING MEDICATION WHILE HE WAS IN JAIL.

IS THE TRIAL JUDGE IN THIS RECORDER -- DOES THE TRIAL JUDGE IN THIS ORDER, INDICATE THAT HE IS REJECTING THIS DOCTOR'S OPINION ABOUT DEPRESSION, BASED ON OTHER TESTIMONY GIVEN BY FAMILY MEMBERS, AND IT, CAN A DOCTOR'S OPINION BE REBUTTED BY THIS KIND OF LAY TESTIMONY?

WELL, YES, THAT IS A PRIMARY REASON. I THINK HE REJECTED IT, THAT, AND THE FACT THAT MICAH NELSON, TO THE JUDGE, DIDN'T ASK CRAZY, YOU KNOW BURKES THE FAMILY MEMBERS, I THINK -- YOU KNOW, BUT THE FAMILY MEMBERS, I THINK --

WE ARE NOT REALLY TALKING ABOUT CRAZINESS. WE ARE TALKING ABOUT DEPRESSION IN THIS INSTANCE, RIGHT?

RIGHT. RIGHT. THE JUDGE COULDN'T SEE THAT. I THINK INSERT CONDITIONS, THE FAMILY, I THINK YOU CAN RELY ON FAMILY MEMBERS. I DON'T KNOW WHETHER YOU CAN EX-CLUES I FEEL. MAYBE IN SOME CASES YOU CAN, BUT IN THIS CASE, THESE WERE, YOU KNOW, RELATIVELY, YOU KNOW, POOR PEOPLE, ALTHOUGH THEY MAY NOT HAVE ALL HAVE BEEN TOTALLY, BUT THEY WEREN'T TOO EDUCATED. NOBODY HAD ANY MENTAL HEALTH EDUCATION, AND THEY HAD NO EXPERTISE TO BASE THIS ON.

SO WAS THE DOCTOR'S DIAGNOSIS OF DEPRESSION BASED ON CLINICAL TESTING OR HOW DID HE REACH THAT CONCLUSION?

HE DID SEVERAL TESTS, LIKE THE MMPI AND THE, YOU KNOW, STANDARD IQ TEST, AND TESTS THAT PSYCHOLOGISTS USE TO EXAMINE BRAIN DAMAGE, AND THEY BELIEVE THAT THIS IS A BETTER INDICATOR OF BRAIN DAMAGE THAN TESTING LIKE CT SCANS AND MRI.

YOU SAID BRAIN DAMAGE. I AT FIRST THOUGHT YOU WERE TALKING ABOUT DEPRESSION, AND IF THEY EVALUATE HIM SOMETIME YEARS AFTER OR MONTHS AFTER THE MURDER AND HE IS NOW INCARCERATED AND CHARGED WITH A CAPITAL FELONY, HIS MMPI, HIS PERSONALITY INDICATOR OF DEPRESSION WOULD CERTAINLY BE REFLECTIVE OF THAT CURRENT CONDITION, BUT IN TERMS OF BEING ABLE TO SAY THAT HE WAS UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE OFF -- AT THE TIME OF THE OFFENSE, EVEN IF HE WERE DEPRESSED ON THE DAY OF THIS MURDER, HOW WOULD DEPRESSION EQUATE WESTBOUNDING UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE, TO RISE TO THE LEVEL OF A STATUTORY MENTAL MITIGATOR?

WELL, THERE ARE DIFFERENT KINDS OF DEPRESSION. DR. DEESE TESTIFIED THAT THIS INCLUDED ANGER AMONG OTHER THINGS, AND BESIDES THE DEPRESSION, HE HAD AUDITORY AND ANGER AND HALLUCINATIONS AND HE TESTIFIED THAT HE WAS PSYCHOTIC.

THERE YOU HAVE, GOING BACK TO WHAT JUSTICE QUINCE SAID, THERE WOULD YOU HAVE THE JUDGE BELIEVE THAT HE WAS HAVING AUDITORY OR SOME TYPE OF HALLUCINATIONS OR ACTING PSYCHOTICLY, AT OR AROUND THE TIME OF THIS INCIDENT, THEN THE TESTIMONY OF HIS FAMILY MEMBERS, AS TO WHAT THEY, HOW THEY OBSERVED HIM TO BE, AND HIS GIRLFRIEND, WOULD BE VERY PROBATIVE, AND SOMETHING THAT THE JUDGE SHOULD BE ABLE TO WEIGH AND EVALUATE, IN DETERMINING HIS MENTAL STATE.

I THINK HIS SISTER AND HIS GIRLFRIEND DID STATE THAT HE WAS HAVING NIGHTMARES. WHAT THEY GLEANED FROM, IT WAS FROM BEING RAPED IN PRISON. HE HAD RECENTLY BEEN IN PRISON BUT HE WOULDN'T TALK ABOUT IT. OTHER THAN THAT, WHAT DR. DEE EMPHASIZED WAS HE HAD BEEN DEPRESSED AND CHRONICALLY DEPRESSED AND HAD THESE INJURIES ALL HIS LIFE, AND THAT HIS BRAIN DAMAGE PROBABLY WAS BECAUSE HIS MOTHER AS A ALCOHOLIC, AND THE JUDGE TALKS ABOUT SPECULATING, BUT THERE WAS NO EVIDENCE SHE WAS NOT AN ALCOHOLIC, AND SEVERAL MEMBERS SAID SHE WAS, AND SHE DIED WHEN HE WAS FIVE, AS AN ALCOHOLIC, AND THEY BELIEVED THAT SHE DRANK DURING HER PREGNANCY. ANOTHER JUDGEAL LUDZ TO THE SCHOOL RECORDS. -- THE JUDGE ALLUDES TO THE SCHOOL RECORDS. ARE THE SCHOOL RECORDS IN OUR RECORDS?

TO BE HONEST, I DON'T REALLY SEEING THEM.

THE JUDGE REFERS TO THEM IN THE SENTENCING ORDER.

YES.

DO YOU KNOW WHETHER, IN OTHER WORDS, WERE THERE SCHOOL RECORDS RECORDS?

WE, DR. DEE TESTIFIED ABOUT THEM. THAT IS WHY, AS I SAY, I DON'T REALLY SEEING THEM IN THE RECORD BUT DR. DEE TESTIFIED HE HAD SCHOOL RECORDS, AND THAT -- GO AHEAD. WHEN HE WAS EIGHT, HE WAS NOT DOING WELL IN SCHOOL, AND THE SCHOOL PSYCHOLOGIST TESTED HIM, AND THEY COULDN'T FIND OUT WHAT WAS WRONG, BUT DR. DEE SAID IT WAS PROBABLY THE BRAIN DAMAGE, BUT AT THAT POINT AGE, THEY COULDN'T FIND OUT -- BUT AT THAT AGE, THEY COULDN'T FIND OUT, BUT HE WAS RETAINED IN KINDERGARTEN AND SECOND GRADE, I THINK, AND THEN IN FIRST AND THIRD HE GOT SOCIAL PROMOTIONS, AND THEN THEY LIKE, ONE SEMESTER OR QUARTER, WHEN HE WAS, LIKE, IN NINTH GRADE, WHICH WAS PROBABLY HIS LAST

GRADE, THAT HE WAS MAKING, I THINK, AS AND BS AND CS, BUT THERE IS REALLY NOT INFORMATION OR WHAT KIND OF CLASSES HE WAS IN OR THAT KIND OF THING. THAT IS --

THE CONFLICT LIES IN THE SCHOOL RECORDS. AS TO ANY WAY TO REBUT THE SERIOUS -- AS TO ANY WAY TO REBUT THE SERIOUS PROBLEMS AND YOU JUST SAID THAT HE GOT TO THE NINTH GRADE. WAS THE TRIAL JUDGE JUSTIFIED IN SAYING THE SCHOOL RECORDS DON'T SUPPORT A CLAIM FOR MENTAL ABNORMALITIES OR PROBLEMS?

I DON'T THINK THAT IS TRUE. I THINK THAT WE DON'T KNOW ENOUGH ABOUT WHY HE GOT THE BETTER GRADES AT THE END, WITHOUT SOMEONE LOOKING BEHIND THAT.

WE DO KNOW THAT WE DON'T HAVE A CASE OF SCHOOL RECORDS THAT SHOW CONSTANT REFERRALS, BECAUSE OF --

AJ -- -- AT AGE EIGHT, WE DID. WHEN HE WAS EIGHT, HE WAS TESTED BECAUSE HE WASN'T DOING WELL, AND BETWEEN THOSE TIMES, I DON'T THINK THERE ARE ANY SCHOOL RECORDS.

TESTING THAT WAS DONE THEN DIDN'T REVEAL ANY PROBLEMS.

WELL, IT DID THEY JUST COULDN'T DETERMINE WHAT WAS WRONG.

DIDN'T REVEAL ANY UNDERLYING DISEASE.

RIGHT. BUT I THINK THEY WERE WRITTEN TESTS, AND THEY DIDN'T, YOU KNOW THEY COULDN'T FIND OUT WHY HE WASN'T DOING WELL.

BUT THE TRIAL COURT WOULD BE JUSTIFIED IN SAYING THAT, TO THE EXTENT THERE ARE SCHOOL RECORDS, THEY REALLY DON'T SUPPORT A CONCLUSION THAT THERE WAS SOME CHRONIC MENTAL PROBLEMS INVOLVED HERE.

WELL, I THINK MAYBE TO SOME EXTENT THEY DO, NOT CONCLUSIVELY CONCLUSIVELY. I MEAN, IT IS JUST, I MEAN, IF YOU TAKE THE FACT THAT HE WASN'T DOING WELL INNATE GRADE AND HE HAD HAD TWO MOTHERS, BOTH OF WHOM HAD DIED WHEN HE WAS ABOUT FOUR, AND THEN HE HAD BEEN RAISED BY AN AUNT WHO WAS SINGLE AND HAD SEVEN CHILDREN ALREADY. HAD HE HAD A LOT OF PROBLEMS ALREADY. HE WAS EVALUATED WHEN HE WAS ELEVEN ALSO. THIS WAS NOT IN SCHOOL, BUT BECAUSE THE YOUNGER, REALLY, A COUSIN, BUT HE CONSIDERED A BROTHER WHO WAS SEVEN, HAD GONORRHEA, AND IT TURNED OUT THAT HIS SISTER, WHO WAS 13, HAD GONORRHEA, AND THEN MICAH, WHO WAS 11, THE THREE OF THEM HAD BEEN EXPERIMENTING IN SEXUAL INTERCOURSE BECAUSE THE OLDER BROTHER HAD LEFT A VCR IN THE VIDEO ABOUT SEX, WHICH ALSO SUPPORTS THE NEGLECT. I MEAN, THE MOTHER HAD NO IDEA.

BUT WE ARE WONDERING OFF.

I WAS JUST SAYING HE WAS EXAMINED AT AGE 11, AND WHAT WAS THE DIAGNOSIS AT AGE 11? THAT HE HAD DEPRESSION.

BUT DID THEY EVER ASCERTAIN WHY THEY APPARENTLY GAVE CREDENCE TO THE FACT THAT HE, AT AGE 11, WAS HAVING AN INCEST YOUTHS RELATIONSHIP WITH HIS -- AN INCESTUOUS RELATIONSHIP WITH HIS HALF SISTER.

UM-HUM.

WAS THERE EVER A HRS INVESTIGATOR TESTIFIED -- WAS THERE ANY INDICATION THAT HE HAD

BEEN SEXUALLY ABUSED, HIMSELF, AS A CHILD, AND THAT THIS HAD LED TO SOME ABNORMAL SEXUAL ACTION?

THERE WAS NO TESTIMONY, BUT GONORRHEA CAME FROM SOMEWHERE. I MEAN, ONE OF THEM MOST LIKELY HAD SOME SORT OF SEXUAL RELATIONSHIP WITH AN ADULT, IN ORDER TO GET GONORRHEA. POSSIBLY THE SISTER.

THE HRS GAVE, HE WENT TO COUNCIL SOMETHING.

HE WENT TWICE FOR COUNSELING AND THEN HIS AUNT, WHO WAS ACTING AS HIS MOTHER, SAID THAT THE KIDS DIDN'T NEED COUNSELING AND TOOK HIM OUT.

GOING BACK TO WHAT, YOUR ARGUMENT IS THAT THE TRIAL COURT SHOULD HAVE GIVEN GREATER WEIGHT TO CERTAIN MITIGATORS OR IS YOUR ARGUMENT THAT THE TRIAL COURT ERRED IN REJECTING, AND GOING BACK TO WHAT I WOULD CONSIDER A MORE IMPORTANT MITIGATOR, THAT IS WHETHER HE WAS UNDER EXTREME EMOTIONAL DISTURBANCE, AT THE TIME OF THIS CRIME. WHAT YOU ARE TELLING US ABOUT HIS HISTORY, WHICH IS A VERY TORTURED HISTORY, DOESN'T REALLY RELATE UP TO WHAT HAPPENED THE DAY OF THIS CRIME, AND NOT ONLY THAT IT OCCURRED, AS FAR AS IT WASN'T IN A SHORT SPAN. IT WAS, ALSO, A PERIOD OF TIME, WHERE HE NOT ONLY RAPED THIS ELDERLY WOMAN BUT THEN KIDNAPPED HER AND HAD A PLAN, A LONG PLAN TO KILL HER TO TAKE HER ONE PLACE AND THEN ANOTHER, AND WITH THESE KINDS OF VERY, VERY, VERY SUBSTANTIAL AGGRAVATING CIRCUMSTANCES, AND WITHOUT BEING ABLE TO REALLY ESTABLISH THE STATUTORY MENTAL MITIGATORS, HOW WOULD IT MAKE ANY DIFFERENCE IN THIS CASE, AS FAR AS THE IMPOSITION OF THE DEATH PENALTY?

WELL, I AGREE WITH YOU THAT IT WAS AN AGGRAVATOR MURDER, BUT --

EXTREMELY AGGRAVATED.

EXTREMELY AGGRAVATED, RIGHT, NOT NECESSARILY THAT HE PLANNED IT FOR SIX HOURS, BECAUSE HE CLAIMED HE DIDN'T KNOW WHAT TO DO AND HE WAS MENTALLY UPSET AND DIDN'T KNOW WHAT TO DO, AND HE DIDN'T KNOW WHY HE DID THE CRIME AND YOU KNOW --

IS THERE ANY INDICATION, WHEN HE WENT INTO THIS WOMAN'S HOUSE THAT HE WAS GOING IN TO BURGLARIZE THE HOUSE?

NO. HE WAS WALKING AROUND SUPPOSEDLY AND SAW THE WINDOW OPEN AND WENT IN.

HE NEVER TOOK ANYTHING FROM THE HOUSE.

HUM-UM. NO. NO. AND AS FAR AS I AM NOT ARGUING THAT HE DIDN'T GIVE ENOUGH WEIGHT TO THE MENTAL MITIGATORS. HE DIDN'T GIVE, HE REJECTED THEM TOTALLY, BOTH AS --

LOOK AT THE OTHER PART OF THE SENTENCING ORDER, HOWEVER, THE NONSTATUTORY MITIGATORS. I MEAN, THERE IS SOME DISCUSSION ABOUT AUDITORY AND HALLUCINATIONS THAT HE WAS HAVING, AND THERE IS SOME OTHER DISCUSSION ON THE MENTAL LINES, THAT HE GIVES SOME, LITTLE TO SOME WEIGHT ON SOME OF THE --

BUT REALLY --

AGGRAVATORS, SO DOESN'T IT REALLY COME BACK TO HOW MUCH WEIGHT YOU ARE GOING TO GIVE THIS KIND OF TESTIMONY?

NO, BECAUSE THOSE NONSTATUTORY MENTAL MITIGATORS WERE, ALL, BASED ON THE FACT

THAT HE WAS GIVEN MEDICATION IN JAIL, AND THE JUDGE COULDN'T DENY THAT. AND HE CLAIMED THAT HE WAS HE WASN'T DEPRESSED BEFORE, AND WHAT, SOMEWHAT WHAT YOU ARE TALKING TO IS WHAT HE IS SAYING THAT THE DEFENSE ALLEGES AND SOMEBODY TESTIFIED THAT HE HAD HALLUCINATIONS AND THAT HE HAD IN JAIL, BUT THIS IS ALL AFTER THE CRIME.

AND IN ANOTHER MITIGATOR, HE GOES ON TO DISCUSS THE FACT THAT THERE ARE PROBLEMS HERE, BECAUSE THE DEFENDANT WAS ACTUALLY SEXUALLY ASSAULTED WHILE HE WAS IN JAIL, AND HE GIVES THAT SOME WEIGHT AND CONSIDERATION, ALSO, AND SO THEN WHEN YOU LOOK AT A NUMBER OF THESE NONSTATUTORY MITIGATORS, THE TRIAL JUDGE, AT LEAST IN SOME PART, ATTEMPTS TO READ IN SOME OF THIS MENTAL MITIGATION TESTIMONY THAT HAS BEEN RECEIVED.

I AM NOT ARGUING HE NEVER CONSIDERED IT. HE OUTRIGHT REJECTED IT. I MEAN, THAT IS WHAT HE SAID, AND HE SAID HE DIDN'T --

AS THE STATUTORY MITIGATOR.

RIGHT. AND THE RAPE IS NOT MENTAL ILLNESS, ALTHOUGH OBVIOUSLY IT PROBABLY CAUSED IT, BUT THERE WAS DR. DEE, WHO TESTIFIED THAT HE QUALIFIED FOR BOTH MENTAL MITIGATORS. DR. ASHBY, WHO IS THE JAIL PSYCHIATRIST AND, ALSO, HAS A PRIVATE PRACTICE, TESTIFIED PRIOR TO TRIAL THAT, THE MEDITATION HELPED -- THAT THE MEDICATION HELPED MAKE HIM COMPETENT TO STAND TRIAL, SO HE MAY HAVE NOT BEEN COMPETENT TO STAND TRIAL, WITHOUT MEDICATION, AND HE SAID THAT HE WAS PSYCHOTIC OR THAT HE HAD, WELL, HE DESCRIBED ANTI-PSYCHOTIC MEDICATION -- HE PRESCRIBED ANTI-PSYCHOTIC MEDICATION, THEN DOCTOR PRIMPER WAS --

WAS HE ON MEDICATION WHEN HE WAS IN PRISON AFTER THIS ARE AES?

RIGHT. RIGHT.

WHAT WAS THE MEDICATION?

THE FIRST MEDICATION WAS MELORIL, AND THEN THEY CHANGED IT TO SOMETHING CALLED, IT WAS AN ANTI-DEPRESSANT, AND I HAVE IT IN HERE SOMEWHERE. ISOPANIL OR SOMETHING LIKE THAT.

WAS HE ON ANTI-PSYCHOTIC MEDICATION?

MELORIL IS FOR HALLUCINATIONS AND THIS OTHER ANTI-DEPRESSANT WAS ALSO SUPPOSED TO HELP WITH HALLUCINATIONS, AND LIKE I SAY, DR. PRIMPER WAS THE STATE PSYCHIATRIST WHO WAS WAITING IN THE WINGS, BUT THE PROSECUTOR DIDN'T CALL HIM. HE EXAMINED MICAH NELSON WHEN HE WAS 16, PROBABLY WHEN HE WENT INTO THE JOB CORPS, ALTHOUGH IT DIDN'T SAY IT IN THE RECORD, BUT HE DID GO INTO THE JOB CORPS AT THAT TIME, BUT DR. DEE READ THE REPORT FROM DR. PRIMPER AND HE FOUND THAT, AT 16, MICAH NELSON WAS DEPRESSED AND HAD HALLUCINATIONS, SO THERE WAS THREE DOCTORS THERE WHO ALSO FELT THAT HE HAD MENTAL ILLNESS, AND THE JUDGE HAS NO TRAINING IN MENTAL ILLNESS, AND HE RELIED ON FAMILY, WHO HAD NO TRAINING IN MENTAL ILLNESS, AND HE SAID HE REJECTED THE BRAIN DAMAGE, WHICH AS YOU POINTED OUT IS NOT THE SAME AS DEPRESSION BUT IT IS RELATED AND IT IS MAYBE PARTIALLY CAUSING IT, BUT HE CLAIMS THAT, YOU KNOW, THAT WAS A POPULAR DEFENSE IN CAPITAL CASES, AND MAYBE IT IS, BUT THAT DOESN'T MEAN HE CAN JUST ARBITRARILY REJECT IT, AND THIS SPECIFIC CASE, TO SAY, WELL, BECAUSE SO MANY PEOPLE ARE USING IT, WE ARE NOT GOING TO USE IT ANYMORE, AND I MEAN, IT APPEARED THAT HE JUST DIDN'T FEEL AS THOUGH MENTAL MITIGATION EXISTED UNLESS A PERSON WAS, YOU KNOW, INSANE, AND IT WAS VERY OBVIOUS, AND THERE HIS CASE LAW THAT SAYS DIXON, IN FACT, SAYS THAT MENTAL MITIGATION IS FOR CASES IN WHICH THE DEFENDANT IS NOT INSANE, AND EVEN IN

THOSE NONSTATUTORY MENTAL MITIGATORS, ALTHOUGH THE JUDGE DID ADMIT HE WAS ON MEDICATION IN JAIL, WELL, HE PRETTY MUCH HAD TO, BUT EVEN THEN HE POINTED OUT THAT HE HAD REJECTED THE BRAIN DAMAGE AND HE WAS REJECTING THE MENTAL MITIGATION, SO HE PRETTY MUCH SAID THAT HE REJECTED IT AS NONMENTAL, AS NONSTATUTORY, OTHER THAN THE FACT THAT HE WAS ON MEDICATION AND DEPRESSED IN JAIL, AND THE JUDGE MAINTAINED HE WAS DEPRESSED BECAUSE OF HIS SITUATION, ALTHOUGH DR. DEE SAID THAT HE WAS DEPRESSED, BOTH BECAUSE OF HIS SITUATION AND, ALSO, BECAUSE OF HOW BAD HIS GUILT AND HOW BADLY HE FELT ABOUT WHAT HE HAD DONE. BECAUSE IT WAS SOMETHING HE HADN'T PLANNED TO DO AND HE HAD DONE, YOU KNOW, MOMENTARILY, WITHOUT, WELL, MAYBE HE THOUGHT, WELL, WHILE HE WAS DRIVING HER AROUND IN THE CAR, BUT WHEN HE WENT IN THE HOUSE, CERTAINLY HE HADN'T INTENDED TO DO ANYTHING LIKE THAT, AND HE DIDN'T KNOW WHAT TO DO. I WAS GOING TO MENTION, TOO, THAT, IN THIS CASE INSANITY OWES AND, ALSO -- IN SANTOS, AND ALSO IN PARKER V DUGGAR, A FEDERAL CASE, THIS COURT IS ABLE TO KPANL THE RECORD AND FIND MITIGATION THAT THE TRIAL JUDGE DIDN'T FIND, AND IN SANTOS, IT WAS SENT BACK TO THE TRIAL JUDGE TO CONSIDER MITIGATION. IF THE JUDGE HAD FOUND IT AS NONSTATUTORY OR EVEN JUST GIVEN IT A LITTLE WEIGHT, THEN THAT IS PROBABLY WITHIN HIS DISCRETION BUT THERE WAS NO EVIDENCE THAT HE DIDN'T, I MEAN THE STATE CROSS-EXAMINED DR. DEE BUT THEY DIDN'T REFUTE WHAT HE SAID, AND THEY HAD A PSYCHIATRIST WHOM THEY DIDN'T CALL, AND THEY, IN NO WAY, REFUTED THAT HE HAD THAT MITIGATION. I DON'T KNOW WHAT MY TIME IS. MR. CHIEF JUSTICE

THERE IS A CLOCK ON THE PODIUM.

I SEE IT. I AM JUST NOT. YES. OKAY. ANOTHER THING I WANTED TO POINT OUT THAT A LOT OF THE EVIDENCE THAT THE JUDGE CITED IN HERE WASN'T CORRECT, AND HE SHOULDN'T BASE HIS OPINION ON EVIDENCE THAT ISN'T CORRECT WELL, FIRST OF ALL -- CORRECT. WELL, FIRST OF ALL HE SAID THAT THERE WAS NO SCHOOL RECORD, AND WE DISCUSSED THAT ALREADY, BUT THERE WAS SOME SCHOOL RECORD EVIDENCE, AND HE SAID THAT THE TESTIMONY OF THE DOCTOR, OF DR. DEE, CONFLICTED WITH THE FAMILY MEMBERS, AND THERE REALLY WASN'T A CONFLICT. BASICALLY WHAT THE FAMILY MEMBERS SAID WAS, AFTER THIS HAPPENED, AFTER THE DEFENDANT COMMITTED THIS CRIME, HE DIDN'T ACT ANY DIFFERENTLY.

GO BACK TO THE SCHOOL RECORDS. IN THE SENTENCING ORDER, THE COURT FOUND THAT HE DID HAVE DIMINISHED EDUCATIONAL EXPERIENCE, DIDN'T HE?

HE DID FIND THAT. YES.

AND AFFORDED IT, AND THAT HE HAD HAD COMPLETED THE NINTH GRADE AND ENTERED THE JOB CORPS. I AM --

RIGHT.

I DON'T UNDERSTAND WHY YOU SAY THAT WAS INCORRECT INFORMATION.

WELL, WHAT I THINK HE SAID, IN HERE, WAS THAT THERE WAS NO SCHOOL RECORDS AS TO HIS MENTAL ILLNESS NOT AS TO HIS, YOU ARE RIGHT. THERE WAS EVIDENCE AS TO THE FACT THAT HE HADN'T COMPLETED SCHOOL, BUT IT SAID, WHAT HE SAID WAS THERE WAS NO INDICATION IN DEFENDANT'S RECORDS TO SUGGEST ANY MENTAL HEALTH PROBLEMS. AND I THINK THAT THE EVIDENCE, WHEN HE WAS EIGHT, SUGGESTED MENTAL HEALTH PROBLEMS THAT, HE COULDN'T PROGRESS NORMALLY IN SCHOOL. SO I THINK THAT THERE WAS --

I THOUGHT YOU SAID WITH THOSE THAT ALL OF THE TESTING CAME BACK UNRESOLVED, THAT THERE WAS NO DIAGNOSED PROBLEM.

WELL THAT, IS NOT REALLY WHAT IT SAID. WHAT IT REALLY SAID WAS THAT THEY, THERE WAS A

PROBLEM. HE WASN'T PROGRESSING IN SCHOOL. BUT THEY COULDN'T FIND --

AN UNDERLYING MENTAL HEALTH PROBLEM THEY COULD NOT IDENTIFY.

THEY COULDN'T IDENTIFY WHAT IT WAS. YOU KNOW, THEY COULDN'T FIND OUT.

HOW IS THAT A MENTAL HEALTH PROBLEM, IF THEY CAN'T IDENTIFY WHAT IT IS THAT PRESENTS THE PROBLEM. COULD IT NOT HAVE BEEN SOCIALIZATION? COULD IT NOT HAVE BEEN ADJUSTMENT, OTHER THAN MENTAL HEALTH KINDS OF PROBLEMS?

I SUPPOSE IT COULD HAVE BEEN, ALTHOUGH THERE IS KIND OF A CONNECTION BETWEEN THOSE TWO, AND DR. DEE SEEMED TO THINK THAT OR TESTIFIED, THAT HE BELIEVED IT WAS BECAUSE OF THE DEPRESSION AND MEMORY PROBLEMS, BUT THAT THEY WERE HARD TO DIAGNOSE AT AGE EIGHT, BUT THAT WAS AN OPINION, AND YOU KNOW --

THERE IS ALSO EVIDENCE THAT HE HAD LIMITED INTELLIGENCE AND THE JUDGE INDICATED HIS IQ WAS 79, WHICH MEANS THAT 87 PERCENT OF THE POPULATION PERFORMED BETTER THAN HIM, AND HE FOUND THAT AND AFFORDED IT SOME WEIGHT.

UM-HUM. UM-HUM.

I MEAN, WHY WOULD THAT NOT BE AS REASONABLE, REFERRING TO JUSTICE LEWIS'S QUESTION?

WELL, IT IS QUESTIONABLE. I DON'T THINK THAT IS REALLY MENTAL MITIGATION, ALTHOUGH IT PROBABLY, WELL, IT IS, IT IS A PART OF MENTAL MITIGATION. IT IS NOT, IT HASN'T SHOWN BRAIN DAMAGE, AND IT DOESN'T SHOW DEPRESSION AND HALLUCINATIONS, BUT IT DOES, IT IS A PORTION, BECAUSE IT IS RELIED ON IN THE MENTAL MITIGATORS, THAT HE DID --

IS DR. KEMPER -- IS DR. PRIMPER'S REPORT IN THE RECORD OR JUST READ BY DR. DEE?

IT WAS READ BY DR. DEE.

DID HE READ THE WHOLE REPORT?

I DON'T KNOW WHETHER HE READ THE WHOLE REPORT OR NOT. I THINK HE PARAFROOIS PHRASED IT IT.

-- I THINK HE PARAPHRASED IT.

AND ALL OF THE RECORDS SUPPORT MENTAL MITIGATION?

YES, AND ALL THREE DOCTORS, PRIMARILY DR. DEE BUT DR. ASHBY, DEFINITELY SUPPORTED MENTAL MITIGATION, BECAUSE HE SAID THAT THE MEDICATION HE WAS ON HELPED HIM TO BE COMPETENT TO STAND TRIAL, AND THAT IT HELPED IN HIS DEPRESSION AND HIS HALLUCINATIONS WHICH HE HAD AT THAT TIME. DR. PRIMPER, BASICALLY, ALL HIS REPORT NOTED WAS THAT, AT 16, THAT HE HAD DEPRESSION AND HALLUCINATIONS, WHICH SHOWED THAT IT WAS A LONG-TERM CHRONIC THING, NOT THAT IT WAS, YOU KNOW SOMETHING THAT JUST HAPPENED AT THE MOMENT.

HE HAD EXAMINED HIM AT AGE 16?

RIGHT. UM-HUM. AND IT DOESN'T -- THAT IS WHEN THE REPORT WAS FILED. IT DOESN'T TELL A LOT, BUT HE WENT INTO THE JOB CORPS AT AGE 16, AND I THOUGHT THAT PERHAPS THAT MIGHT HAVE REQUIRED A --

EVALUATION?

-- EVALUATION, EITHER THAT OR HE WAS HAVING PROBLEMS, BUT THERE WAS NO RECORD EVIDENCE THAT HE WAS HAVING PROBLEMS. MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL TIME NOW.

OKAY. THANK YOU. MR. CHIEF JUSTICE

THANK YOU. MR. LANDRY.

MAY IT PLEASE THE COURT. MY NAME IS BOB LANDRY, REPRESENTING THE STATE IN THIS APPEAL. WITH RESPECT TO THE CLAIM THAT THE LOWER COURTERED IN FAILING TO CONSIDER AND WEIGH APPROPRIATE MITIGATING EVIDENCE, THE TRIAL COURT'S ORDER, WE RESPECTFULLY SUBMIT, ADEQUATELY ADDRESSED THE EVIDENCE THAT WAS PRESENTED TO AND THE COURT EXPLAINED THE REASONS FOR REJECTING.

WOULD YOU GIVE THE REASONS FOR THE TRIAL COURT REJECTING THAT BRAIN DAMAGE SEEMS TO BE A POPULAR CLAIM OF MITIGATION NOW, IN DEATH PENALTY CASES. IS THAT EVIDENCE THAT TRIAL COURTS ARE JUST SORT OF PER SE REJECTION OF CONSIDERATION OF BRAIN DAMAGE IN DEATH PENALTY CASES AND APPLYING THAT RULE TO THIS CASE, THAT IS THAT HE THINKS THAT CAPITAL DEFENDANTS ARE TRYING TO AVOID THE DEATH PENALTY BY FALSELY ASSERTING BRAIN DAMAGE?

NO. I DON'T THINK IT IS A PER SE REJECTION.

WHAT IS THAT REFERRING TO?

I THINK HE IS, YOU KNOW, MAKING A SIDE BAR COMMENT, TO THE EFFECT THAT IT IS BECOMING POPULAR OR THAT YOU FREQUENTLY SEE IT. I THINK WHAT HE IS REALLY GETTING AT IS THE FACT THAT MUCH OF DR. DEE'S TESTIMONY AND HIS OPINIONS, REALLY, ARE CONTRARY TO THE FACTS OF THE CASE AND CONTRARY TO THE TESTIMONY.

WAS DR. DEE TESTIFYING FOR HIM IN OTHER CASES? IN OTHER WORDS I AM CONCERNED THAT THE JUDGE --

NO. I DON'T THINK --

-- IN OTHER CASES, TO EVALUATE THE EVIDENCE HERE, I AM NOT SURE THAT I UNDERSTAND HIS REFERENCE TO SAYING THAT THIS, THE CLAIM OF BRAIN DAMAGE IS BECOMING A POPULAR DEFENSE, MITIGATION IN DEATH PENALTY CASES. WHAT IS YOUR BEST TAKE ON WHY HE WAS REFERRING TO THAT AND WHAT HE MEANT BY IT.

WELL, MY IMPRESSION IS THAT HE SIMPLY IS MAKING A COMMENT THAT FREQUENTLY IT IS SEEN THAT AN ARGUMENT WILL BE MADE ABOUT, IN CAPITAL CASES, ABOUT BRAIN DAMAGE, WHEN PERHAPS THE FACTS OF THE CASE OR THE TOTALITY OF THE EVIDENCE REALLY DOESN'T REALLY DEMONSTRATE IT. I DON'T THINK HE IS MAKING AN ATTACK ON DR. DEE. I MEAN, IS HE NOT SAYING --

WELL, YOU JUST SAID THAT IT IS BEING USED WHEN THE EVIDENCE DOESN'T DEMONSTRATE IT, SO IS THAT, THEN, A CARRY OVER FROM OTHER CASES? IN OTHER WORDS THAT HE APPARENTLY FOUND IN OTHER CASES, THAT THERE WAS A CLAIM MADE, BUT THE EVIDENCE DIDN'T SUPPORT IT, AND HE IS USING HIS IMPRESSION FROM THOSE OTHER CASES TO NEGATE THE EVIDENCE THAT WAS PRESENTED HERE?

I DON'T KNOW THAT THE JUDGE IS TALKING ABOUT PRIOR EXPERIENCE OF JUDGES IN OTHER

CASES.

WHAT ELSE COULD HE BE ALLUDING TO, IF HE IS SAYING THAT IT IS BECOMING POPULAR IN DEATH PENALTY CASES?

WELL, I MEAN, I THINK PERHAPS JUST PERHAPS READING THE OPINIONS OF THIS COURT OR WHATEVER, THAT TRIALS THAT GO ON ALL OF THE TIME IN ALL OF THE CIRCUIT COURTS, CONTAIN ARGUMENTS ALONG THIS LINE. I THINK WHAT HE IS GETTING AT, THE BOTTOM LINE OF WHAT HE IS TALKING ABOUT, IS SIMPLY THAT THE TESTIMONY OF THE DOCTOR IN THIS CASE, REALLY, IS INCONSISTENT WITH THE FACTS AND CIRCUMSTANCES. FOR EXAMPLE, THAT STATEMENT OCCURS IN HIS DISCUSSION OF THE CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS ACTS AND TO CONFORM TO THE REQUIREMENTS OF LAW, AND THE PRECEDING PARAGRAPH OR TWO BEFORE THAT, THE TRIAL JUDGE GOES INTO A GREAT AMOUNT OF DETAIL, SAYING, TO DEMONSTRATE THAT THE COURTS THAT DR. DEE'S OPINIONS REALLY DO NOT CONFORM TO THE FACTS. I MEAN, THIS IS A, YOU CANNOT SAY THAT MR. ELSE IN HON DID NOT -- THAT MR. NELSON DID NOT APPRECIATE THE CRIMINALITY OF HIS ACTS, WHERE NUMBER ONE HE BURGLARIZED HER HOME IN THE MIDDLE OF THE NIGHT AND THE COURT FOUND, AS ONE OF THE AGGRAVATING FACTORS, THAT HE WAS ON FELONY PROBATION. HE HAD SERVED SOMETHING LIKE FOUR YEARS FOR PRIOR BURGLARIES, SO MR. NELSON IS NOT INEXPERIENCED TO OTHER BURGLARIES, BUT AT ANY EVENT, MR MR. NELSON KIDNAPPED AND RAPED THE VICTIM AND PUT HER IN THE CAR AND DROVE HER AROUND FOR HOURS AND DECIDED AT ONE POINT THAT SHE COULD IDENTIFY HIM. THE LIGHT HAD BEEN ON IN THE BATHROOM AND HE WAS CONCERNED, OBVIOUSLY, ABOUT GOING BACK TO PRISON, WHERE HE HAD JUST GOTTEN OUT OF 27 DAYS EARLIER. WHEN HE IS FRUSTRATED BY THE CARBING STUCK IN THE SAND AND HAS TO OBTAIN THE ASSISTANCE OF MR. WEIR AND MR. MORGAN TO GET THE CAR OUT, HE THEN TURNS UP THE RADIO, SO THAT THESE WITNESSES CANNOT HEAR THE VICTIM BANKING ON THE TRUNK OF THE CAR. HE, THEN, -- BANGING ON THE TRUNK OF THE CAR. HE, THEN, DRIVES HER TO A SEPARATE LOCATION, 16 MILES AWAY FROM HER HOME, WHERE HE TAKES THREE DIFFERENT STEPS TO OCCASION HER DEATH. NOW, I THINK WHAT THE TRIAL COURT IS SAYING HERE, THAT THE TESTIMONY OF DR. DEE, ESPECIALLY WITH REGARD TO HIS TESTIMONY ABOUT IMPULSIVITY, IT JUST DOESN'T MAKE ANY SENSE T DOESN'T WASH HERE. THAT, AS A MATTER OF FACT, WHEN DR. DEE IS BEING QUESTIONED ABOUT THE MENTAL STATE OF THE DEFENDANT AND ASKED ABOUT IMPULSIVITY AND HOW IT AFFECTS THE DEFENDANT'S CONDUCT AND WHAT HE DID THAT NIGHT AFTERWARDS, HE BASICALLY SAID I DIDN'T QUESTION HIM ABOUT THAT.

THE TRIAL COURT SEEMS TO REJECT, THOUGH, EVERYTHING THAT DR. DEE TESTIFIED TO, INCLUDING, FOR INSTANCE, THE DIAGNOSIS OF DEPRESSION PREEXISTING THIS EPISODE.

DR. DEE HAD TESTIFIED, BOTH DR. DEE, EITHER/OR BOTH ON DIRECT OR CROSS, SAY TAG THAT THE DEPRESSION WOULD REFLECT, BOTH, THE DEFENDANT'S CURRENT STATUS FOR BEING IN JAIL CHARGED WITH FIRST-DEGREE MURDER IN THE CASE OR DR. DEE, ALSO, THOUGHT THAT IT PERTAINED TO HIS REMORSE OR HIS GUILT FEELINGS, AS A RESULT OF THE CRIME. I MEAN, I THINK IT CERTAINLY IS A FAIR READING BY THE TRIAL COURT, TO INDICATE THAT CERTAINLY A DEFENDANT WOULD BE DEPRESSED BY HIS CURRENT STATUS.

BUT WAS THERE EVIDENCE OF PREEXISTING DEPRESSION AND MENTAL ILLNESS?

WELL, I THINK IN DR. DEE'S TESTIMONY, HE SAID SOMETHING TO THE EFFECT OF THAT HE HAD READ A REPORT BY DR. CRIMPER. I DON'T THINK ANY OF DR. CRIMPER'S REPORTS OR ANYTHING OF THAT NATURE CAME INTO EVIDENCE. I THINK IT WAS DR. DEE WAS TESTIFYING AS TO WHAT HE HAD CONSIDERED AND LOOKED AT. HE HAD HAD REPORTS FROM DR. CRIMPER, WHO APPARENTLY HAD EXAMINED HIM EARLIER AND --

WHAT HAD DR. CRIMPER CONCLUDED?

I THINK HE INDICATED SOMETHING, ACCORDING TO DR. DEE, HE INDICATED THERE WAS SOMETHING ALONG, LIKE HE HAD A DEPRESSIVE MOOD OR SOMETHING OF THAT NATURE. CRIMPER DIDN'T TESTIFY AT ALL. THE MENTION IS MADE, IN THE BRIEF AND IN THE ARGUMENT TODAY, THAT THE TRIAL COURT DIDN'T CONSIDER EXPERT TESTIMONY THAT WAS PRESENTED TO IT. CERTAINLY THE TRIAL JUDGE DID CONSIDER IT. THE JAIL PSYCHIATRIST WHO HAD TESTIFIED IN THE PRETRIAL MOTION CONCERNING THE MEDICATION THAT THE DEFENDANT HAD BEEN TAKING, THAT IS ALL REFLECTED IN THE TRIAL COURT'S ORDER, WITH RESPECT TO THE NONSTATUTORY MITIGATING FACTORS. I THINK A FAIR READING OF THE TRIAL COURT'S ORDER DEMONSTRATES THAT HE DID CONSIDER EVERYTHING THAT WAS PRESENTED. THE PARTS THAT HE COULD NOT ACCEPT OF DR. DEE'S TESTIMONY WAS THE MATERIAL THAT WAS BASICALLY CONTRADICTED BY THE FACTS OF THE CASE OR BY TESTIMONY OF OTHER WITNESSES. FOR EXAMPLE, THE DEFENDANT, DR. DEE TESTIFIED THAT THE DEFENDANT WASN'T ABUSED OR -- WAS ABUSED OR NEGLECTED AS CHILD AND THEY SAID WHERE DID YOU GET THAT INFORMATION OR WHERE DID THAT COME FROM? HE TESTIFIED, WELL THAT, IS WHAT THE DEFENDANT TOLD ME HOW HE FELT OR HOW HE FELT WITH HIS FAMILY. HE SAID DID YOU GET ANY FEEDBACK FROM THEM? AND HE SAID, NO, I DIDN'T TALK TO ANY OF THOSE PEOPLE, AND ALL OF THE DEFENSE WITNESSES SAID WE WERE A STRONG FAMILY UNIT AND WHENEVER ANYONE GOT DOWN, WE WOULD HELP THEM UP AND ALL OF THIS KIND OF STUFF.

DID THEY TESTIFY THAT HE WAS RAISED BY HIS AUNT, THAT CORRECT? AND HE HAD SUPPORT?

THAT'S RIGHT. THE MOTHER HAD DIED WHEN HE WAS AT AN EARLY AGE OF ALCOHOLISM OR ALCOHOLISM-RELATED KIND OF ILLNESSES, AND AN AUNT HAD TAKEN HER, TAKEN THE DEFENDANT AND HIS SISTER IN, AND THEY HAD LIVED AS A STRONG FAMILY UNIT THEREAFTER.

HE IN ESSENCE, HAD A NORMAL CHILDHOOD?

ESSENTIALLY, AND THAT, AS A MATTER OF FACT, TO SHOW EVEN FURTHER SUPPORT FOR THAT, AFTER THE DEFENDANT WAS RELEASED FROM PRISON, HE CAME BACK TO THIS FAMILY UNIT. HE CAME AND LIVED WITH THE AUNT AND SISTER AND THE AUNT AND ALL OF THAT.

DID THE DEFENSE TRY TO LINK UP, IT SEEMS TO ME THAT YOU HAVE GOT A DEFENDANT HERE, WHO, I DON'T KNOW, HE DIDN'T HAVE A NORMAL CHILES HOOD. THE FATHER ABANDONED -- NORMAL CHILDHOOD. THE FATHER ABANDONED HIM AT OR NEAR BIRTH. THE MOTHER DRANK DURING THE PREGNANCY. HIS MOTHER DIED WHEN HE WAS VERY YOUNG. HAVING SEX WHEN HIS SISTER WHEN HE WAS 11. HE HAS GOT A 79 IQ AND FINISHES NINTH GRADE ONLY AND IS INCARCERATED FOR BURGLARSIES FOR THE PRECEDING TWO YEARS, SELF-REPORTS THAT HE WAS SODOMIZED WHEN HE WAS IN PRISON, BUT HE DIDN'T REPORT THAT TO THE AUTHORITIES, BUT THE JUDGE FOUND THAT, IN FACT, THAT PROBABLY HAD OCCURRED, AND HE IS OUT FOR 24 DAYS, AND DURING THAT TIME, HIS FAMILY MEMBERS AND HIS GIRLFRIEND REPORT THAT HE IS HAVING NIGHTMARES, AND HE COMMITS AN EXTREMELY VIOLENT ACT FOR THE FIRST TIME, 24 DAYS AFTER COMING OUT OF PRISON. DID THE DEFENSE TRY TO LINK UP THIS, WHAT OCCURRED WHILE HE WAS IN PRISON, WITH A WHAT OCCURRED ON THE NIGHT OF ACCIDENT -- WITH WHAT OCCURRED ON THE NIGHT OF ACCIDENT, WHICH IS DIFFERENT THAN AN ISSUE OF WHETHER HE HAD BRAIN DAMAGE OR DEPRESSION, BUT THAT SOMEHOW THE AFTERMATH OF THIS VERY, VERY TRAUMATIC OCCURRENCE WITH HIM AND A COUPLE OF THE HALLUCINATIONS, CAUSED HIM TO SORT OF LOSE IT? I MEAN, WAS THAT WHAT THEY WERE TRYING TO DEVELOP?

WELL, I THINK, MAYBE IN AN INDIRECT WAY, CERTAINLY THERE WERE INTRODUCED THE EVIDENCE OF HIS PROBLEMS WHEN HE HAD BEEN IN PRISON, ACCORDING TO THE SELF-REPORT THAT HE GAVE TO DR. DEE. I THINK THAT THEY WERE TRYING TO OFFER SOME TYPE OF EXPLANATION TO THE JURY, AS TO WHY THIS CRIME HAD OCCURRED. YOU KNOW, I DON'T KNOW, AND THEY ALSO, WERE TRYING TO MAKE AN ARGUMENT THAT HE MAY HAVE GOTTEN INTO AN ARGUMENT WITH HIS STEP BROTHER OR SOMETHING, EARLIER IN THE EVENING, WHILE

WATCHING A TELEVISION SHOW, WHETHER THE OTHER SIBLING WANTED TO GO TO BED OR WATCH TELEVISION.

BUT IT WAS BECAUSE OF THAT, THAT THE TESTIMONY OF THE FAMILY MEMBERS BECAME RELEVANT, THEN, ABOUT WHAT HIS MENTAL STATUS WAS AT OR AROUND THE TIME OF THE CRIME, THAT HE WAS, QUOTE, ACTING NORMALLY, THAT HE WAS NOT UNDER THE INFLUENCE OF ANY ALCOHOLIC BEVERAGES, THAT HE WAS HIS THOUGHT PROCESSES SEEMED TO BE INTACT. I AM TRYING TO UNDERSTAND THE JUDGE'S REJECTION OF THE TWO MENTAL STATUTORY MENTAL MITIGATORS. IT WOULD BE THE STATE'S POSITION THAT THAT IS WHY THE, IN THIS CASE, THE TESTIMONY OF THE LAY WITNESSES WOULD BE PARTICULARLY IMPORTANT ABOUT HOW HE WAS ACTING AT OR ABOUT THE TIME --

YEAH. I THINK THE RELATIVES TESTIFIED, BOTH AT GUILT AND PENALTY PHASE, AS TO WHAT HIS, HOW HE WAS ACTING A DAY OR SO BEFORE THE HOMICIDE AND THE LAST TIME THAT THEY HAD SEEN HIM BEFORE HE WENT OFF ON HIS, ON THIS CRIME SPREE. AND ESSENTIALLY THE TESTIMONY ALONG THAT LINE WAS NOTHING WAS OUT OF THE ORDINARY. NOTHING WAS ABNORMAL.

IN OTHER WORDS THIS DEFENDANT DID NOT HAVE A VIOLENT PAST. THERE IS NO INDICATION IN ANY OF HIS PRIOR YEARS, THAT HE HAD HAD BURGLARIES WHERE HE WENT IN TO AN OCCUPIED DWELLING. THERE WERE NO ARMED ROBBERIES, NO VIOLENT ACTIONS, AND NOW HE GOES INTO, WANDERS INTO AN ELDERLY WOMAN'S HOUSE, DOESN'T PLAN TO TAKE ANYTHING, AND RAPES HER AND THEN KIDNAPS HER AND KILLS HER. I MEAN, THERE IS SOMETHING HAS EITHER SNAPPED OR WENT WRONG IN THIS DEFENDANT'S LIFE, FOR THIS SENSELESS ACT TO HAVE OCCURRED.

WELL, ALONG THAT LINE, OF COURSE WE DON'T KNOW THE DETAILS OF THE PRIOR BURGLARIES FOR WHICH HE WAS CONVICTED. I NOTICE, I THINK WE STATED IN OUR BRIEF, THAT WHEN IT CAME TIME, AT THE SPENCER HEARING, THE DEFENSE WAS VIGOROUSLY OBJECTING TO THE TRIAL COURT CONSIDERING THE DETAILS OF THE PRIOR BURGLARIES, SAYING THAT THAT HAS GOT NOTHING TO DO WITH ANYTHING. IT IS HIGHLY PREJUDICIAL, THINGS OF THAT NATURE.

SO THE STATE DIDN'T TRY TO SHOW A PRIOR VIOLENT FELONY.

AND THE DEFENDANT STIPULATED TO THE JURY THAT THEY WERE NOT TRYING TO SHOW THE MITIGATING FACTOR OF NO SIGNIFICANT HISTORY SO, I MEAN, WHAT YOU SAY IS ACCURATE, BUT I THINK IT IS SOMEWHAT INCOMPLETE, BECAUSE WE REALLY DON'T KNOW THE DETAILS OF HIS PRIOR BURGLARIES. I WOULD SAY THAT, YOU KNOW, THE DEFENDANT HAD JUST BEEN OUT OF JAIL FOR 27 DAYS, AND YOU KNOW, I, READING INTO THIS, IT SEEMS TO ME THAT HE, YOU KNOW, WANTED TO GET BACK INTO DOING, COMMITTEDING -- COMMITTED OTHER BURGLARIES, LIKE HE HAD DONE BEFORE. AS PART OF HIS CONFESSION TO THE POLICE, HE INDICATED THAT HE WAS ATTRACTED TO THE HOUSE BECAUSE A LIGHT WAS ON IN THE BATHROOM WINDOW, WHICH MADE IT A SUITABLE TARGET, APPARENTLY, FOR HIM TO ENTER, BUT, YOU KNOW, I THINK THE, WHILE THE DEFENDANT AND HIS DEFENSE TEAM TRITE TO -- TRIED TO ARGUE AND DEMONSTRATE TO THE JURY THAT HE HAD HAD AN UNPLEASANT EXPERIENCE IN PRISON OR THAT HE, THAT THERE HAD BEEN SOME SEXUAL ABUSE IN PRISON, THE RECORDS WERE INCOMPLETE UPON OR THAT THEY DIDN'T HAVE ANY FURTHER DETAILS ON IT, I DON'T KNOW WHETHER THAT WAS SIMPLY IN AN EFFORT BY THE DEFENSE, SIMPLY TO HUMANIZE HIM OR TO EXPLAIN THAT THAT IS WHY THIS CRIME OCCURRED. I MEAN, I DON'T SEE ANY CONNECTION, HAVING BEEN MADE, THAT, AND THAT IS REALLY NOT THE DEFENDANT'S CONFESSION. I MEAN, HIS STATEMENT BASICALLY IS HE BROKE IN THERE. HE SURPRISED THE WOMAN. SHE SURPRISED HIM. SHE WAS, STARTED SCREAMING OR HE GOT INTO A TUSSELE WITH HER. HE WAS CONCERNED ABOUT HER MAKING NOISE OR BEING ABLE TO IDENTIFY HIM, AND THAT HE COMMITTED SEXUAL BATTERY. HE DENIES, HE CONTINUES TO DENY COMMIT AGO SEXUAL BATTERY. PROOF OF THAT -- COMMITTING A SEXUAL BATTERY. PROOF OF THAT IS DEMONSTRATED THROUGH THE DNA TESTIMONY AND THE EXPERT WITNESSES,

WHO FOUND HIS SEMEN ON THE PRESENCE AT THE HOME OF THE VICTIM. SO CONSEQUENTLY, I DON'T REALLY SEE A CONNECTION HAVING BEEN MADE, CERTAINLY NOT SUCCESSFULLY THAT AS A RESULT OF ANY INCIDENT IN JAIL, HE COMMITTED THIS CRIME.

WOULD YOU ADDRESS, ASSUMING THAT THE TRIAL COURT DID MAKE SOME MISTAKES IN HIS FINDINGS, WITH REF TONES MITIGATION, WHETHER OR NOT THOSE -- WITH REFERENCE TO MITIGATION, WHETHER OR NOT THOSE MISTAKES WOULD BE HARMLESS, IN VIEW OF THE SUBSTANTIAL AGGRAVATION?

I THINK THERE IS NO DOUBT ABOUT IT THAT ANY ERROR THAT HE MAY HAVE MADE, IN FAILING TO ARTICULATE OR IN FAILING TO FIND CERTAIN KINDS OF MITIGATION, WHETHER IT IS MENTAL HEALTH OR OTHERWISE, IS CLEARLY HARMLESS ERROR, UNDER THE FACTS OF THIS CASE. THIS COURT HAS HELD, IN CASES LIKE WUORNOS AND OTHER CASES, WICKHAM IS A GOOD CASE IN WHICH THERE WAS SIMPLY FIVE AGGRAVATORS, FIVE OR SIX AGGRAVATORS, AND THE TRIAL COURT FAILED TO FIND A LONG HISTORY OF SCHIZOPHRENIA, THAT THE MAN HAD BEEN HOSPITALIZED FOR YEARS WITH SCHIZOPHRENIA AND THE TRIAL COURT HAD NOT FOUND IT OR REFUSED TO FIND IT APPARENTLY, AND THIS COURT SAID, WELL, IN LIGHT OF THE TOTALITY OF AGGRAVATION IN THAT CASE, IT REALLY MADE NO DIFFERENCE. THAT IS WHAT WE HAVE GOT HERE. WE HAVE GOT SIX AGGRAVATING FACTORS HERE, AND I SUBMIT THAT NONE OF THEM ARE REALLY CHALLENGEABLE. THE TRIAL COURT FOUND THAT FIVE AGGRAVATING FACTORS WERE ENTITLED TO GREAT WEIGHT UNDER THESE PARTICULAR FACTUAL CIRCUMSTANCES HERE. THE ONLY AGGRAVATING FACTOR THAT HE DIDN'T GIVE GREAT WEIGHT TO IS THE VICTIM'S AGE, SHE WAS A VULNERABLE VICTIM, BEING 80 YEARS OLD AND HARD OF HEARING. GIVEN GREAT WEIGHT.

DID THIS DEFENDANT ACTUALLY TESTIFY THAT THIS ACTUALLY ALL OCCURRED BECAUSE, AVOID ARREST, HE PANICKED AND REALLY DIDN'T KNOW WHAT TO DO, ONCE HE HAD TAKEN HER OUT OF THE HOUSE?

NO. HE DIDN'T TESTIFY, BUT IN HIS CONFESSION, HE, IN HIS CONFESSION, HE WAS SAYING AT ONE POINT, THAT HE DIDN'T KNOW WHAT TO DO, AND HE TOOK HER OUT, AND HE, YOU KNOW, HE WAS CONFUSED AND DIDN'T KNOW WHAT TO DO, BUT I THINK THE TRIAL COURT'S SENTENCING ORDER, YOU KNOW, DEMONSTRATES THAT THAT REALLY CAN'T ACCEPTED AS FACT. HE WAS CONCERNED THAT SHE HAD IDENTIFIED HIM OR COULD IDENTIFY HIM FROM THE LIGHTING AND THAT SHE KEPT STARING AT HIM IN THE FACE IN THE BEDROOM. HE WAS CONCERNED, OBVIOUSLY, HE HAD JUST BEEN OUT OF PRISON FOR 27 DAYS. HE COULD GO BACK. HIS STATEMENTS IN HIS CONFESSION TO THE POLICE, HE HAD INDICATED THAT HE HAD DECIDED THAT HE WAS GOING TO KILL THE VICTIM, AT THE POINT WHERE HE GOT STUCK IN THE ORANGE GROVE, WITH, UNTIL HE HAD TO ASK FOR THE HELP OF MR. WEIR AND MR. MORGAN TO GET THEM OUT, SO HE WAS, HE CERTAINLY HAD PLENTY OF TIME TO PONDER AND IN FACT, DID PONDER AND DECIDE WHEN AND WHERE AND HOW TO KILL HER. I MEAN, CLEARLY REMOVING THE VICTIM FROM HER HOME, SO THAT WOULD DELAY OR IMPEDE OR STOP ANY INVESTIGATION AT THAT POINT, HE TOOK HER TO TWO EXCLUDED, ISOLATED PLACES, NOT ONLY EVEN AFTER, EVEN AFTER HE GOT TO THE FINAL DEATH SCENE, HE STARTED TO STRANGLE HER AND APPARENTLY THERE WERE BROKEN RIBS AND CERVICAL INJURIES AND ALL OF THAT NATURE. THAT WASN'T SUFFICIENT, SO HE WENT BACK TO THE AUTOMOBILE AND GOT TWO, ON TWO SEPARATE INDICATIONS, TO GET ADDITIONAL MURDER WEAPONS, THE FIRE EXTINGUISHER AND THE TIRE IRON, WHICH HE ULTIMATELY IMPALED HER WITH, SO I THINK IT IS, THE EVIDENCE IS MORE THAN ABUNDANT TO SATISFY THIS COURT'S PRECEDENCE IN TERMS OF THE AVOID AVOID-ARREST AGGRAVATOR. I MEAN, AS WE SAY, YOU KNOW, HE DIDN'T, HE APPARENTLY DIDN'T STEAL ANYTHING IN THE HOUSE, AND IT WASN'T, HE WASN'T, AND OBVIOUSLY HE WAS CONCERNED ABOUT HAVING RAPED HER AND WHAT THE CONSEQUENCES OF THAT WOULD BE. WE THINK, AS WE HAVE INDICATED IN OUR BRIEF, THAT YOU KNOW, IF THERE IS ANY ERROR THAT THE TRIAL JUDGE MADE IN HIS SENTENCING ORDER, WE SUBMIT THAT IT IS COMPLETELY HARMLESS IN TOTALITY OF FACTS IN THIS CASE T WAS A GRUESOME, TERRIBLE MURDER OF SIX AGGRAVATING FACTORS. THE TRIAL JUDGE CERTAINLY

WAS CONSCIENTIOUS IN FINDING AND ARTICULATE AGO LOT OF, AS NONSTATUTORY MITIGATION, MUCH OF WHAT THE DEFENDANT CLAIMS WAS OF A STATUTORY NATURE. I THINK THE TRIAL COURT DID A GOOD JOB ON, THIS AND I WOULD ASK THE COURT TO AFFIRM THE JUDGMENT AND SENTENCE IN THIS COURT, UNLESS THE COURT HAS ANY QUESTIONS. MR. CHIEF JUSTICE

THANK YOU, MR. LANDRY. REBUTTAL?

COUNSEL AS PART OF YOUR REBUTTAL, WOULD YOU ADDRESS THAT ISSUE, THE AGGRAVATION IN THIS CASE THAT IS SO OVERWHELMING, THAT EVEN IF THERE WAS SOME ERRORS BY THE TRIAL COURT IN CONSIDERING THE MITIGATION THAT, THE AGGRAVATION WAS SO OVERWHELMING, THAT THAT WOULD BE HARMLESS ERROR?

RIGHT. THIS COURT HAS FOUND THAT MENTAL MITIGATION IS, PERHAPS, THE STRONGEST FORM OF MITIGATION, SO TO SAY THAT THIS MURDER IS SO HEINOUS, AND IT WAS A HEINOUS MURDER, I MEAN, TO SAY THAT A CRIME CAN BE SO HEINOUS THAT YOU DON'T NEED TO CONSIDER ANY MITIGATION, YOU CAN JUST FIND THAT THE, THERE ARE SO MANY AGGRAVATORS THAT WHY BOTHER, AND I DON'T THINK THAT IS WHAT THE COURT HAS SAID IN THE PAST. AND I THINK THAT MENTAL MITIGATION IS THE MOST IMPORTANT OF ALL. ALSO THERE WERE THREE OUT OF NINE JURORS WHO RECOMMENDED LIFE IN THIS CASE. ADDITIONALLY, IN HIS ORDER, THE JUDGE HAD FACTS THAT WERE INACCURATE. I AM NOT SAYING HE LIED, BUT I FELT THAT THEY WERE NOT ACCURATE. FOR ONE THING HERE, HE SAYS THERE WAS NO TESTIMONY CONCERNING THE HISTORY OF THE DEFENDANT, OTHER THAN DR. DEE'S SPECULATION CONCERNING HIS MOTHER'S ALCOHOLISM, TO INDICATE BRAIN DAMAGE, AND THERE WAS OTHER TESTIMONY. BESIDES WHICH, BRAIN DAMAGE IS VERY HARD TO DETERMINE, EVEN NO. I MEAN -- EVEN NOW. I MEAN, SOME BRAIN DAMAGE CAN ONLY BE DETERMINED BY WRITTEN TESTING, THE FUNCTION, AND SOME CAN BE SHOWN BY MEDICAL TESTS FOR STRUCTURE BRAIN DAMAGE. IT IS A HARD THING TO DO, BUT THE JUDGE DID HAVE THINGS THAT I THOUGHT, AND THAT IS IN MY BRIEF THAT WERE INACCURATE, AND HE SHOULDN'T BE PERMITTED TO USE INACCURATE STATEMENTS TO JUSTIFY WHAT HE HAS DECIDED HE WANTS TO REJECT OR TO FIND, AND I FEEL THAT, FOR THAT REASON, HE ABUSED HIS DISCRETION AND I THINK THAT I JUST DON'T THINK THAT ANY CRIME IS SO HEINOUS THAT MITIGATION SHOULDN'T BE CONSIDERED AT ALL, AND THIS IS THE MOST IMPORTANT MITIGATION, AND IF THE JUDGE WAS WRONG IN NOT CONSIDERING IT AT ALL, THAT HE SHOULD CONSIDER IT, WHETHER THAT WOULD CHANGE ANYTHING, I DON'T KNOW.

HERE JUSTICE PARIENTE'S QUESTION, AS TO WHETHER THE DEFENSE, THROUGH THE TESTIMONY OF THE MENTAL HEALTH EXPERT, ATTEMPT TODDLING THESE ALLEGED EVENTS IN THE DEFENDANT'S LIFE TOGETHER. THAT IS HIS EARLIER MENTAL HEALTH PROBLEMS, IF WE CHARACTERIZE THEM THAT WAY, AND THEN THE ALLEGED SODOMY WHILE HE WAS IN PRISON AND BEFORE HE GOT OUT.

DID WHO ATTEMPT TO LINK THEM?

DID THE MENTAL HEALTH EXPERT CONNECT THOSE THINGS TOGETHER AND THEN, WITH HIS LOW IQ AND THE WHOLE --

I THINK HE DID OVERALL. I DON'T KNOW WHETHER HE DID IN SO MANY WORDS, BUT I MEAN, I THINK THAT HIS TESTIMONY INDICATED THAT THAT ALL KIND OF FOLLOWED AND WENT TOGETHER THIS, I MEAN TO SAY THAT HE HAD A NORMAL STRONG FAMILY UNIT, I MEAN, HE WAS TAKEN AWAY FROM HIS MOTHER WHEN HE WAS BORN.

GOING BACK TO, SEE, THE PROBLEM WITH CASES LIKE THIS, IS THAT YOU HAVE A LOT OF SCATTERED PROBLEMS, LOW IQ OR BRAIN DAMAGE OR DEPRESSION. BUT FOR THE KIND OF MENTAL MITIGATION THAT YOU ARE TALKING ABOUT, WHICH IS THAT HE WAS UNDER AN EXTREME EMOTIONAL DISTURBANCE AT THE TIME OF THIS CRIME, SOME EXPERT NEEDS TO BE ABLE TO TAKE THAT CONSTELLATION OF PROBLEMS AND GIVE A COHERENT OPINION ABOUT HOW

IT RELATES TO THE BRAIN DAMAGE IS NOT CAUSED, UNLESS IT IS A FOCAL POINT BRAIN DAMAGE, FOR SOMEBODY TO IRRATIONALLY ACT OUT, SO THROWING OUT BRAIN DAMAGE OR DEPRESSION DOESN'T REALLY, THAT MAY BE FINE TO, FOR NONSTATUTORY MENTAL MITIGATION, BUT UNLESS IT GIVES US THE UNDERSTANDING OF HOW THIS PARTICULAR CRIME OCCURRED, HOW CAN WE SAY, AS A MATTER OF LAW, THE JUDGE WAS WRONG IN REJECTING THOSE TWO STATUTORY MENTAL MITIGATORS?

I THINK THE DEPRESSION IS NOT DR. DEE SAID THAT IT WAS NOT ALWAYS WHAT YOU MIGHT EXPECT. HE SAID DEPRESSION IS A PSYCHOLOGICAL TERM, DESCRIBING HIS CONDITION, WHICH FREQUENTLY INCLUDES ANGER ABOUT ONE'S SITUATION THAT, AINGEER OFTEN MISSED IN DEPRESSION AND IT IS ALMOST ALWAYS THERE, AND NELSON HAD TRIED TO COMMIT SUICIDE, BASED IN PART, ACCORDING TO DR. DEE ON, THE GUILT HE FELT FROM THIS. SO I THINK THE DEPRESSION PLUS THE HALL YOU GET NATIONS -- THE DEPRESSION PLUS THE HALLUCINATIONS. LOOK AT ANDREA YATES. SHE WAS SUPPOSEDLY DEPRESSED AND LOOK WHAT SHE DID. WHETHER SHE WAS, I AM NOT, BUT I AM JUST SAYING DEPRESSION, I THINK IN THIS CASE, THEY CONSIDER IT TO BE MORE THAN JUST BEING UNHAPPY. IT INCLUDES ANGER AND THE BRAIN DAMAGE INCLUDES LACK OF IMPULSE, AND HE DID SAY HE WAS HAVING HALLUCINATIONS WHEN HE WENT INTO THE VICTIM'S HOUSE, AUDITORY. THANK YOU. MR. CHIEF JUSTICE

THANK YOU VERY MUCH. THANK YOU, COUNSEL, FORURE OF YOUR ASSISTANCE -- FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS FOR 15 MINUTES.