

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Juan David Rodriguez v. State of Florida

NEXT CASE ON THE COURT'S DOCKET IS RODRIGUEZ VERSUS STATE. MS. DAY.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS RACHEL DAY, AND I WILL HERE WITH MY COLLEAGUE, PATRICIA HOGAN, ON BEHALF OF JUAN DAVID RODRIGUEZ. MR. RODRIGUEZ APPEALS THE DENIAL OF A LIMITED 3.850 MOTION, FOLLOWING A LIMITED EVIDENTIARY HEARING, THAT WAS GRANTED ON MR. RODRIGUEZ'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, WITH REGARD TO HIS FAILURE TO INVESTIGATE, DEVELOP AND PRESENT MENTAL HEALTH EVIDENCE AT HIS PENALTY PHASE OF HIS CAPITAL TRIAL, PARTICULARLY EVIDENCE OF HIS MENTAL RETARDATION, MENTAL RETARDATION AND HIS BRAIN DAMAGE. NOW, FOR THE PURPOSE OF THIS ARGUMENT, I PROPOSE --

WOULD YOU BE KIND ENOUGH TO PULL THE MICROPHONE DOWN JUST A LITTLE BIT. THANK YOU.

IS THAT BETTER?

I AM SORRY, YOUR HONOR. I HAVE A LITTLE COLD. FOR THE PURPOSE OF THIS ARGUMENT I INTEND TO SPEND THE MAJORITY OF THE TIME LOOKING AT THE ISSUES ARISING OUT OF THE EVIDENTIARY HEARING, AND THEN, IF THERE IS TIME, I WANT TO LOOK AT ONE OF THE AREAS WHICH WAS SUMMARILY DENIED BY THE TRIAL COURT. AS FAR AS THE TRIAL RECORD OF MR. RODRIGUEZ'S CAPITAL TRIAL IS CONCERNED, IT IS FAIRLY CLEAR THAT, AFTER THE GUILTY VERDICT, TRIAL COUNSEL SCOTT KALISH PETITIONED THE COURT FOR AN INDEPENDENT PSYCHIATRIC EXAMINER AND THE COURT APPOINTED DR. LEONARD HABER, WHO IS, A CLINICAL PSYCHOLOGIST HAD, WHO CONDUCTED AN EVALUATION OF MR. RODRIGUEZ, AND WHO WROTE A REPORT WHICH WAS FILED WITH THE COURT AND WAS THEN DEPOSED BY THE STATE. THE SUBSTANCE OF DR. HABER'S FINDINGS WERE THAT HE CONDUCTED A PSYCHOLOGICAL EVALUATION. HE INCLUDED A SCREENING TEST, THE BENDER GUESS TARLT MOTOR -- GESTALT MOTOR TEST, AS A RESULT HE FOUND THAT MR. RODRIGUEZ MIGHT HAVE SOME KIND OF MOTOR EFFECTS. HE COULDN'T DETERMINE THE EXTENT OR SEVERITY OR THE EFFECT ON MR. RODRIGUEZ'S CAPACITIES, BUT HE DID PREPARED THAT FURTHER TESTING BE CONDUCTED AND HE RECOMMENDED TWO SORTS OF FURTHER TESTING BE RECOMMENDED. FIRST HE RECOMMENDED NEUROLOGICAL TESTING AND SECONDLY NEWER PSYCHOLOGICAL TESTING. IN HIS OPINION, HE GAVE DETAILED PREDICTIONS OF WHICH HE FELT WOULD BE MORE SUCCESSFUL. HE SAID THE NEUROLOGICAL TESTING DOING SOME KIND OF SCAN WOULD TAKE PICTURES OF MR. RODRIGUEZ'S BRAIN. IT MAIN SHOW ANYTHING ABNORMAL. THAT THE MOST SENSITIVE TEST, IF YOU LIKE, THE MOST SENSITIVE WAY OF DETERMINING IF BRAIN DAMAGE EXISTED, WAS TO DO NEUROPSYCHOLOGICAL TESTING, OF TESTING HOW MR. RODRIGUEZ'S BRAIN WORKED. THE UPSHOT OF THIS WAS THAT THE NEUROLOGICAL TESTING WAS DONE, AND NO ABNORMAL SCANS WERE FOUND EITHER ON THE CT SCAN OR THE EEG BUT NO NEUROPSYCHOLOGICAL TESTING WAS EVER PERFORMED AT THE TRIAL LEVEL, AND CONTRARY TO THE COURT'S, THE LOWER COURT'S ORDER, DEN I HAD POSTCONVICTION RELIEF. NO NEUROPSYCH TESTING WAS EVER PERFORMED AT THE TRIAL LEVEL. NOW --

WAS ALL OF THE DWUN AFTER THE GUILT -- DONE AFTER THE GUILT PHASE WAS COMPLETED?

THE PENALTY PHASE, ITSELF, WAS LIMITED, YOUR HONOR, VERY, VERY MUCH TO MR. RODRIGUEZ'S WIFE, WHO TESTIFIED THAT HE WAS A GOOD HUSBAND, A PROVIDER AND GOOD FATHER TO THE CHILD. IT IS VERY CLEAR THAT, THE POINTS OF THE MENTAL HEALTH EXPERT,

DR. HABER, ONLY TOOK PLACE ON, I THINK, THE SIXTH OF FEBRUARY, 1990. THE GUILT PHASE HAD FINISHED ON THE 31st OF JANUARY, SO HE ASKED FOR AN APPOINTMENT OF A MENTAL HEALTH EXPERT, AFTER THE GUILTY VERDICT. AT THE SAME TIME, OR WITHIN A DAY OF ASKING FOR THAT APPOINTMENT AFTER MENTAL HEALTH EXPERT, HE, ALSO, ASKED FOR A CONTINUANCE OF THE PENALTY PHASE WHICH AT THAT POINT HAD BEEN SET FOR THE 15th OF FEBRUARY THAT YEAR. WHAT IS INTERESTING IS THAT HIS MOTION FOR CONTINUANCE DOESN'T CITE THE FACT THAT HE WANTS TO WORK ON THE PENALTY PHASE. IT CITES THE FACT THAT HE WANTS TO TRAVEL TO SANTA DOMINGO, TO INTERVIEW WITNESSES A CIVIL CASE THAT HE IS INVESTIGATING AND WORKING ON IN PUERTO RICO IN FEDERAL DISTRICT COURT THERE. SO I THINK THE MAJORITY, CERTAINLY THE MENTAL HEALTH ASPECTS OF THIS CASE WERE NOT EVEN TOUCHED UNTIL AFTER THE GUILT PHASE.

HOW MUCH TIME ELAPSED, BETWEEN THE GUILT PHASE AND THE ACTUAL PENALTY PHASE HERE?

I THINK IT IS ACTUALLY A COUPLE OF MONTHS, YOUR HONOR. I CAN CHECK THAT AND LOOK AT IT ON REBUTTAL. BUT ORIGINALLY THE, ORIGINALLY THE PENALTY PHASE WAS SET FOR THE 15th OF FEBRUARY, WHICH IS AN INTEGRAL OF TWO WEEKS AFTER THE GUILTY VERDICT. A CONTINUANCE WAS GRANTED. I HAVE TO CHECK THE ACTUAL TIMING.

AND THE ONLY REASON FOR THE CONTINUANCE WAS BECAUSE THE LAWYER WANTED TO GO TO SANTA DOMINGO ON. THE CASE?

THAT IS WHAT WAS CONTAINED WITHIN HIS MOTION. ANYWAY, AT THE EVIDENTIARY HEARING, TRIAL COUNSEL SCOTT KALISH TESTIFIED, AND HE WAS VERY CANDID. HE SAID THAT, AT THE TIME OF HIS EVALUATION OF OR AT THE TIME OF HIS PREPARATION FOR THE PENALTY PHASE, HE REALLY DIDN'T APPRECIATE THE DIFFERENCE BETWEEN THE NEUROLOGICAL TEST, THE EEG, AND THE NEUROPSYCHOLOGICAL TESTING, AND THAT IS IN THE TRANSCRIPT OF HIS EVIDENTIARY HEARING TESTIMONY.

WHAT WAS MR. KALISH'S -- WAS HE A PRIVATELY-APPOINTED --

HE WAS A PRIVATELY-APPOINTED ATTORNEY. HE HAD REPRESENTED MR. RODRIGUEZ IN A PRIOR MATTER, AND I BELIEVE HE WAS RETAINED IN PART, BECAUSE HE WAS ACTUALLY ABLE TO CONVERSE WITH MR. RODRIGUEZ IN SPANISH. BUT YES. HE HAD NO PRIOR --

HE HANDLED OTHER CAN TALL CASES?

HE HAD HANDLED NO OTHER CAPITAL CASES, EITHER BEFORE OR SENSE, AND HE TESTIFIED TO THAT AT THE EVIDENTIARY HEARING. FURTHERMORE, AT THE EVIDENTIARY HEARING, MR. KALISH SAID THAT HE WOULD HAVE PUT ON EVIDENCE OF MR MR. RODRIGUEZ'S MENTAL RETARDATION, AND HIS BRAIN DAMAGE, HAD HE KNOWN IT EXISTED. I MEAN, FROM WHAT HE GOT FROM DR. HABER WAS VERY MUCH SORT OF A PRELIMINARY VIEW, BUT HE HAD KNOWN THAT THERE WAS A POSSIBILITY THAT MR. RODRIGUEZ WAS MENTALLY RETARDED AND THAT HE HAD BRAIN DAMAGE, HE WOULD HAVE PUT IT ON. HE JUST DIDN'T THINK, HE DIDN'T KNOW ENOUGH ABOUT MENTAL HEALTH PRINCIPLES, AND HE DIDN'T DO IT. NOW, AT THE EVIDENTIARY HEARING, MR. RODRIGUEZ ALSO PRESENTED TESTIMONY FROM DR. RUTH LEITNER, WHO IS ABOARD-CERTIFIED NEUROPSYCHOLOGY CYST -- NEUROPSYCHOLOGIST, AND DR. LATIMER TESTIFIED THAT SHE CONDUCTED A NEUROPSYCHOLOGICAL BATTERY, INCLUDING PSYCHOLOGICAL TESTING, AND AS RESULT OF HER OBJECTIVE TESTING, SHE FOUND THAT MR. RODRIGUEZ WAS SUFFERING FROM BRAIN DAMAGE, PARTICULARLY THE SORT THAT AFFECTS HIS HIGHER CORTICO FUNCTIONING, HIS JUDGMENT, REASONING, ABILITY TO CONTROL IMPULSES. SHE, ALSO, FOUND THAT HE WAS MENTALLY RETARDED, THAT HIS IQ, HIS FULL SCALE IQ, USING A STANDARDIZED TEST, THE WASSAR, FELL AT THE LEVEL OF 64, WHICH IS WELL BELOW 70, WHICH IS GIVE OR TAKE IS THE ACCEPTED LEVEL AT WHICH ONE STARTS, BELOW WHICH ONE DEFINES MENTAL RETARDATION, GIVE OR TWO A LITTLE FOR ARGUMENT, DEPENDING ON WHICH

DEFINITION YOU USE.

DIDN'T THE JUDGE EVALUATE THAT? THIS IS NOW, AS YOU SAID, AN EVIDENTIARY HEARING. WE ARE NOT HERE ON ALLEGATION IN HIS A MOTION.

CORRECT.

AND THE JUDGE HEARD THAT TESTIMONY AND FOUND, BASED ON THE EVIDENCE THAT THE STATE PUT ON, THAT THE DEFENDANT'S ACTIONS BOTH IN PRISON AND IN WHAT THE NATURE OF THIS CRIME, WERE INCONSISTENT WITH A MENTALLY MENTALLY-RETARDED INDIVIDUAL.

THE JUDGE TALKED A LOT ABOUT ADAPTIVE BEHAVIOR. I THINK NOTHING IN THE -- FIRST OF ALL, LET ME MAKE THE POINT THAT NOTHING, EITHER IN DR. HABER'S TESTING OR ANYWHERE ELSE, REBUTS THE LOW IQ OF 64. HE HAS AN IQ WELL BELOW THE LOWEST PERCENTILE OF THE POPULATION. AS TO THE ADAPTIVE FUNCTIONING, HIS BEHAVIOR IN PRISON, DR. LATIMER DID, IN FACT, TESTIFY THAT, ACCORDING TO THE DSM-4, THE, IF YOU LIKE, THE BIBLE FOR MENTAL HEALTH PROFESSIONALS, IN A FORENSIC SETTING, TO QUALIFY AS MENTALLY RETARDED, AN INDIVIDUAL HAS TO DISPLAY IMPAIRED ADAPTIVE BEHAVIOR, IMPAIRED ADAPTIVE FUNCTIONING IN TWO OUT OF A -- FUNCTIONING IN TWO OUT OF A LAUNDRY LIST OF AREAS, AND DR. LATIMER FOUND, AFTER TESTING THAT HE DID MEET THAT IDENTIFICATION, HIS ABILITY TO COMMUNICATE OTHER THAN ON A VERY ELEMENTARY LEVEL AND HIS FUNCTIONING OF ACADEMIC SKILLS. NOW, WITHIN PRISON CONTEXT, THE DSM DOES NOT DEAL WITH IT. THE DSM'S ADAPTIVE BEHAVIOR FUNCTIONING IS DEFINED, IT IS LOOKING AT EVERYDAY LIFE. IT IS ABOUT HOW YOU DEAL WITH CHOICES AND HOW YOU DEAL WITH CARING FOR YOURSELF AND LOOKING AFTER YOURSELF AND MAKING A LIVING AND MAKING DECISIONS IN A DAILY LIVING SITUATION. I THINK IN A PRISON SITUATION, THOSE KINDS OF DECISIONS ARE PRETTY MUCH TAKEN AWAY FROM PEOPLE, AND SO IT IS QUITE COMMON TO MENTALLY-RETARDED PEOPLE TO FUNCTION WELL WITHIN STRUCTURED ENVIRONMENTS OF A PRESENT SETTING.

DID THE DEFENSE COUNSEL, ACCORDING TO YOUR EARLIER STATEMENT, IN EFFECT ADMIT, INEFFECTIVENESS?

HE ADMITTED THAT, HAD HE INVESTIGATED AND HAD HE KNOWN THAT THERE WAS A POSSIBILITY OF MR. RODRIGUEZ'S MENTAL RETARDATION AND BRAIN DAMAGE, HE WOULD HAVE PUT IT ON.

OKAY. I DON'T WANT TO DEFER OR DISTRACT YOU FROM YOUR LINE. I WOULD LIKE FOR YOU TO DISCUSS THE JUDGE'S TESTIFYING AT SOME POINT IN THIS. DID THE JUDGE TESTIFY IN THIS CASE?

THE JUDGE DID TESTIFY IN THIS CASE, YOUR HONOR. IN THE 119 HEARING, THERE WAS A PUBLIC RECORDS HEARING, BACK IN '96.

IS THAT A PART OF THE EVIDENTIARY HEARING?

THAT WAS NOT AN ISSUE THAT WAS COVERED AT THE EVIDENTIARY HEARING. WHAT HAPPENED WAS THE JUDGE TESTIFYING WAS THAT THERE WAS A 119 HEARING. AN ISSUE HAD ARISEN AS TO WHETHER, MATERIALS WHICH HAD BEEN SUBMITTED TO THE JUDGE FOR IN CAMERA INSPECTION BY THE -- FOR ENCAMERA INSPECTION BY THE STATE, NOT OF THE COURT, HAD BEEN TURNED OVER TO THE JUDGE, AND FOR WHATEVER REASON THEY GOT LOST, AND NOBODY KNEW WHETHER IT WAS THE STATE ATTORNEY WHO HAD MISFILED THEM OR THE JUDGE WHO HAD MISFILED THEM OR WHOEVER, SO THE COUNSEL PUT THE JUDGE ON THE STAND TO TRY TO DETERMINE WHAT HAPPENED TO THE MISSING DOCUMENTS, AFTER INSPECTION.

BUT THAT WAS FOR THE COUNSEL TO MAKE A DETERMINATION NOT FOR THE JUDGE TO MAKE A DETERMINATION.

THAT WAS PURELY WHETHER OR NOT PUBLIC RECORDS EXEMPTIONS HAD BEEN PROPERLY TAKEN. IT REALLY HAD NOTHING TO DO WITH THE SUBSTANCE OF THE ULTIMATE EVIDENTIARY HEARING IN THAT CASE IN THE CASE, AND IT HAD NOTHING TO DO WITH THE MENTAL RETARDATION ISSUE.

WOULD YOU COME BACK TO DR. HABER'S TESTIMONY, AND TELL US WHAT THE GIST OF HIS TESTIMONY WAS AND WHETHER THAT WAS FAVORABLE TO YOUR CLIENT OR WHETHER THAT REALLY WAS FAVORABLE TO THE STATE.

WELL, DR. HABER'S TESTIMONY, AS I HAVE INDICATED IN THE BRIEFING IN THIS, IS SOMEWHAT SORT OF DIFFERENT, BETWEEN WHAT HE SAID AT THE TIME OF THE TRIAL AND WHAT HE SAID AT THE TIME OF THE EVIDENTIARY HEARING. AT THE TIME OF THE TRIAL, HE IS SOMEWHAT GUARD. HE SAYS I HAVE DONE THIS INITIAL EVALUATION. I THINK THERE MAY BE SOME BRAIN DAMAGE. I DON'T KNOW WHAT IT IS GOING TO BE LIKE. I AM NOT A NEUROPSYCHOLOGIST, I AM NOT A NEUROLOGIST. I REALLY NEED SOME MORE INFORMATION, BEFORE I CAN OFFER A FULL OPINION. HE ALSO MADE THE POINT, THERE IS A LITTLE COLLOQUY AT THE BEGINNING OF THE PENALTY PHASE, WHERE UNUSUALLY DR. HABER AND THE TRIAL COUNSEL FOR THE STATE ARE PRESENT AND TESTIFYING WHETHER OR NOT DR. HABER IS GOING TO TESTIFY BEFORE THE JUDGE, AND DR. HABER MAKES IT KNOWN CLEARLY THAT HE HAD NOT REVIEWED ANY BACKGROUND MATERIAL SUPPLIED TOM BY THE DEFENSE. HE HAD REVIEWED A LOT OF STUFF SUPPLIED TO HIM BY THE STATE, IT IN TERMS OF POLICE REPORTS, ET CETERA, BUT HE HAD HAD NO BACKGROUND INFORMATION, IN TERMS OF FAMILY HISTORY OR ANYTHING LIKE THAT FROM THE DEFENSE, AND THAT IS VERY CLEAR FROM THE TRIAL RECORD.

JUSTICE QUINCE HAD A QUESTION I BELIEVE.

I AM SORRY.

IT WENT BACK TO YOUR STATEMENT CONCERNING THE DEFENDANT'S FUNCTIONING IN PRISON, BUT ISN'T THERE SOME TESTIMONY, IN THE RECORD, ALSO, THAT TALKS ABOUT HIS ACTUAL FUNCTIONING OUTSIDE OF THE PRISON SETTING? HIS BEING A PART OF THIS GANG, HIS ABILITY TO TAKE CARE OF EVERYDAY FUNCTIONING? THERE IS NO TESTIMONY TO THAT EFFECT?

WELL, I THINK THE, THAT THE COURT'S ORDER DENYING POSTCONVICTION RELIEF, RELIES, IN PART, ON THE FACTS OF THE CRIME, AS SHOWING THAT HE WAS ABLE TO CONDUCT A NORMAL LIFE AND THAT HE WAS ABLE TO PLAN A CRIME.

WASN'T DR. HABER PRESENTED SOME HYPOTHETICALS THAT CONCERNED ASPECTS OF THE DEFENDANT'S LIFE AND WHETHER OR NOT DEEDS --

ONLY MINIMALLY. ONLY MINIMALLY. HE TALKED A LOT ABOUT A DRIVER'S LICENSE. I DON'T THINK THERE IS ANYTHING IN THE DSM OR ANY OF THE OTHER TREATIES ON MENTAL RETARTATION THAT SAYS YOU CAN'T BE MENTALLY RETARDED IF A DRIVE A CAR. THE WHOLE POINT OF THIS IN TALKING ABOUT EVERYDAY LIFE IS YOU TAKE VARIOUS ASPECTS OF EVERYDAY LIFE AND LOOK AT HOW THE DEFENDANT IS ACTUALLY FUNSING, TAKING CARE OF THOSE -- FUNCTIONING, TAKING CARE OF THOSE PARTICULAR DETAILS.

BUT IT IS MADE VERY CLEAR THAT YOU DON'T HAVE TO BE DYSFUNCTIONAL IN EVERY SINGLE ASPECT OF EVERYDAY LIFE. YOU CAN HAVE SOME AREAS WHERE YOU ARE QUITE GOOD AT, MAYBE TAKING CARE OF YOURSELF AND BEING CLEAN AND SORT OF WASHING YOUR CLOTHES AND STUFF, BUT IT MAY BE THAT YOUR ACADEMIC SKILLS REALLY PROHIBIT YOU FROM PERFORMING ANY KIND OF MEANINGFUL KIND OF FUNCTIONING, AND DR. LATIMER DID FIND THAT HE MET THE DEFINITION, IN TERMS OF ADAPTIVE FUNCTIONING, PER THE DSM, IN REGARDS TO HIS COMMUNICATIONABILITY AND HIS FUNCTIONAL ACADEMIC -- HIS COMMUNICATION

ABILITY AND HIS FUNCTIONAL ACADEMIC ABILITIES. THE DSM DOESN'T SAY YOU CAN'T BE FUNCTIONAL IN SOME OTHER AREAS. IT DOES SAY THAT YOU CAN BE QUITE GOOD IN SOME AREAS AND QUITE BAD IN OTHER AREAS. AS FAR AS DR. HABER'S TESTIMONY IS CONCERNED, JUSTICE ANSTEAD ASKED ABOUT THAT EARLIER, IT DID CHANGE SOMEWHAT DRAMATICALLY, FROM THE TIME OF THE PENALTY PHASE, ITSELF, TO THE TIME OF THE EVIDENTIARY HEARING. AT THE TIME OF THE PENALTY PHASE IT WAS VERY MUCH A PRELIMINARY THING WHICH RECOMMENDED FURTHER TESTING, THE MOST SIGNIFICANT OF WHICH WAS NOT CARRIED OUT. AT THE EVIDENTIARY HEARING, IT WAS ALMOST AS IF DR. HABER WAS BEING PUT IN AN ADVERSARIAL POSITION TO THAT OF DR. LATIMER. I THINK THE RECORD OF THE TRIAL SPEAKS FOR ITSELF. I AM INTO MY REBUTTAL TIME ALREADY. I AM SWOND WONDERING IF I MIGHT -- I AM WONDERING IF I MIGHT SAVE THE REMAINING TIME FOR REBUTTAL.

THANK YOU. MS. RODRIGUEZ.

I AM LISA RODRIGUEZ, ON BEHALF THE ATTORNEY GENERAL'S OFFICE. MAY IT PLEASE THE COURT. NO RELATION. AS FAR AS THE CONCLUSION CONCERNING DR. HEADACHER'S ANALYSIS AND DIAGNOSIS OF THE DEFENDANT AT THE TIME OF TRIAL, DR. HABER TESTIFIED, AT THE END OF THE EVIDENTIARY HEARING, THAT HE HAS GOT EXTENSIVE EXPERIENCE RELATED TO DIAGNOSEING AND ADMINISTERING CARE TO RETARDED PERSONS, AND SAW NO INDICIA OF RETARDATION IN THE DEFENDANT AND THEREFORE DID NOT CONDUCT FURTHER TESTING. HE TESTIFIED THAT, HAD HE SEEN ANY INDICIA, HE WOULD HAVE ADMINISTERED SUCH A TEST AND A FULL IQ TEST AND WAS CAPABLE OF DOING SO AND WAS CAPABLE OF REFERRING SUCH TESTING OUT TOM. IN TERMS OF RECONCILING THE POSSIBLE DIAGNOSIS OF RETARDATION FROM DEFENDANT'S BEHAVIOR, YOU CAN'T, BECAUSE DEFENDANT IS NOT RETARDED. THE ASPECTS OF THE CRIME, HE ORGANIZED A GROUP OF INDIVIDUALS TO CONDUCT AN EPISODIC SERIES OF CRIMES, INVOLVING NUMEROUS PARTIES. THERE, ALSO, DR. LATNER COULD NOT RECONCILE HER IQ TEST WITH THE FACT THAT, IN FACT, DEFENDANT HAD BEEN GIVEN A PRIOR IQ TEST IN 1984, AT TCI, AND WAS ASSESSED AS HAVING A NORMAL IQ, WITH A CONFIDENT AND MANIPULATIVE PERSONALITY. NOBODY SEEMS TO HAVE ADDRESSED THAT.

WHAT WAS THE IQ IN THAT OTHER IN THE RECORD?

THE RECORD DOESN'T REFLECT THE NUMBER. SHE WAS CROSS-EXAMINED. DR. LATNER WAS CROSS-EXAMINATION ODD THAT ASPECT, AND SHE DID ACKNOWLEDGE THAT, YES, THE PRIOR IQ TEST SHOWS THAT IT WAS NORMAL.

YOU ARE SAYING THE IQ OF 64 IS, IN FACT, CHALLENGED BY CROSS-EXAMINATION AND EVALUATED BY THE TRIAL JUDGE.

YES.

WHICH WE HAVE GOT TO ACCEPT THE TRIAL JUDGE'S FACTUAL FINDINGS CONCERNING THIS MAN'S MENTAL FUNCTIONING.

YES. I WOULD SUBMIT THAT TO THE COURT THAT, YES THERE, IS THAT PRIOR IQ TEST, AND IT DOES CONTRAST WITH DR. LATIMER'S IQ TEST, BUT MORE IMPORTANTLY SHE PUTS HER DIAGNOSIS ON AN OPPOSING IQ TEST AND OPPOSING COUNSEL TOUCH ON -- TOUCHED ON THIS BRIEFLY. RETARDATION IS NOT DEFINED BY IQ. IT IS DEFINED IN THE MANUAL AS HAVING A LOW IQ BELOW 70, IMPAIRMENT AND AT LEAST THE TWO ADAPTIVE FUNCTIONING.

CLEARLY IQ IS A VERY IMPORTANT GREEDIENT IN THAT FORMULA, IS IT NOT?

IT IS. THE STATE WOULD CONCEDE --

YOU ARE SAYING THAT THE OTHER ASPECTS OF IT, THAT THE EVIDENCE WAS IN CONFLICT HERE S

THAT BECAUSE ARE SAY SOMETHING.

YES, YOUR HONOR. IT IS ONE CRITERIA. BUT THE OTHER IMPORTANT CRITERIA IS ADAPTIVE FUNCTIONING, WHICH I THINK THE STATE CLEARLY PRESENTED AMPLE EVIDENCE, COMPETENT EVIDENCE TO SUPPORT THAT HE HAS NO IMPAIRMENT IN ADAPTIVE FUNCTIONING. THEY PRESENTED THE TESTIMONY OF THE INMATE GUARD, WHO DEALS WITH CARING TO THE INMATES ON DEATH ROW, TO MAKE SURE THAT THEY HAVE NO SPECIAL NEEDS. THAT SERGEANT YOUNG, I BELIEVE, TESTIFIED THAT HE SPOKE WITH DEFENDANT IN ENGLISH AND SPANISH. THE DEFENDANT HAD NO PROBLEMS ARTICULATING HIMSELF. THAT THE OTHER INMATES ON DEATH ROW LOOKED UP TO THE DEFENDANT, THE OTHER SPANISH INMATES LOOKED UP TO THE DEFENDANT, THAT HE HAD NO PROBLEMS MANAGING HIS CANTINA COUNT. THAT HE HAD NO PROBLEMS. HIS GROOMING WAS EXCELLENT. THERE WAS TESTIMONY BY PSYCHOLOGIST SPECIALIST LISA WILEY, WITHIN THE INSTITUTION, WHO ALSO DEALS WITH THE INMATE POPULATION. SHE, FIRST OF ALL --

WOULD YOU COME BACK TO DR. HABER'S TESTIMONY AND COMPARE IT TO WHAT HIS TESTIMONY WAS ORIGINALLY AND THEN COMPARE IT TO WHAT TESTIMONY HE PRESENTED, NOW, AT THE EVIDENTIARY HEARING.

I WOULD SUBMIT TO THIS COURT THAT HIS TESTIMONY AT THE DEPOSITION WAS FULLY CONSISTENT WITH HIS TESTIMONY AT THE EVIDENTIARY HEARING. IN FACT, IF WE LOOK AT VOLUME THREE, AT PAGE 499, WHICH IS THE DEPOSITION OF HIS ASSESSMENT, GIVN AT TRIAL, HE SAID TO ME, HE SAID THAT THERE SEEMS TO ME THAT THERE IS A POSSIBLE ORGANIC BRAIN DYSFUNCTION, WHICH CAN ONLY BE CHECKED IN A FEW REAL WAYS, AND HE GOES ON TO LIST THREE WAYS IN WHICH IT MAY BE CHECKED. ONE IS A NEUROLOGICAL EXAM. TWO IS A BRAIN SCAN OR EEG AND, THIRD, THE NEUROPSYCHOLOGICAL EXAMINATION. THE DEFENDANT, AFTER DR. HABER'S ASSESSMENT WAS REFERRED TO DR. DAVID, WHO PERFORMED A NEUROLOGICAL EXAMINATION, WHICH WAS COMPLETELY NORMAL, BUT BECAUSE THE DEFENDANT HAD SELF-REPORTED OF FALLING OFF A HORSE, THEY, IN AN ABUNDANCE OF CAUTION, SENT HIM TO GET THE BRAIN SCAN, THE SECOND ITEM THAT DR. HABER ENUMERATED THAT YOU COULD FOLLOW-UP, TO DETERMINE WHETHER THERE WAS ANY BRAIN ORGANICITY, AND THAT WAS CONDUCTED BY DR. MARS ONE, I BELIEVE, AND -- DR. MARSON, I BELIEVE, AND THAT WAS DETERMINED TO BE NORMAL, BUT MORE IMPORTANTLY, HE GOES TO STATE IN HIS INITIAL REPORT THAT HE FILED AT THE TIME OF TRIAL, THAT EVEN IF THERE WAS SOME INDICATION, AND HE DIDN'T FEEL THAT THERE WAS BUT THERE WAS A POSSIBILITY OF BRAIN ORGANICITY, EVEN IF THERE WAS BRAIN ORGANICITY, IT WOULD NOT NECESSARILY BECOME A MITIGATING FACTOR, UNTIL AND UNLESS THE DAMAGE INTERFERES WITH HIS TEMPERAMENT OR ABILITY TO FOCUS HIS THOUGHTS AT THE TIME OF THE INCIDENT, AND HE FELT THAT THERE WAS NO OTHER EVIDENCE THAT IT DID INTERFERE WITH HIS TEMPERAMENT AT THE TIME OF CRIME, AND TESTIFIED THE SAME AT THE EVIDENCE NARY HEARING, AND -- AT THE EVIDENTIARY HEARING, AND DR. LATIMER COULD PURPORT NO EVIDENCE THAT NO CONTROL THOUGHT WAS AFFECTED BY THE BRAIN ORGANICITY, OTHER THAN HER BALD ASSERTION TO THE CONTRARY. DR. HABER FOUND HIM COMPETENT TO PROCEED TO TRIAL. DR. HABER FOUND THAT HE HAD SUFFICIENT INTELLIGENCE TO UNDERSTAND THE PROCESSES AGAINST HIM, TO INTERACT WITH HIS ATTORNEY. AS STATED PREVIOUSLY, HE SAW NO --

I JUST WANT TO MAKE SURE. COMPETENCY TO PROCEED AND MENTAL RETARDATION ARE TWO DIFFERENT CON SETS. WOULD YOU AGREE WITH THAT?

I WOULD AGREE WITH THAT, YES, HOWEVER HE FURTHER TESTIFIED THAT HE SAW NO INDICIA OF RETARDATION. HE WAS CAREFUL NOT TO MAKE A FORMAL DIAGNOSIS OF HIS INTELLIGENCE AND RIGHTFULLY SO, BECAUSE HE HADN'T PERFORMED A FORMAL INTELLIGENCE QUOTIENT TEST AT THAT TIME AND TESTIFIED CONSISTENTLY AT THE DEPOSITION DURING TRIAL AND AT THE EVIDENTIARY HEARING, HE WOULD NOT GIVE A FORMAL NUMBER TO HIS IQ TEST BUT STATED IN BOTH INSTANCES THAT, YES, HE WAS OF SUFFICIENT INTELLIGENCE TO UNDERSTAND THE

PROCEEDINGS AGAINST HIM AND TO INTERACT WITH HIS ATTORNEY.

WAS HE ASKED TO COMMENT, AT ALL, ON THE TESTS PERFORMED BY THE OTHER EXPERT THAT WAS PRESENTED AT THE EVIDENTIARY HEARING, BY THE DEFENDANT, OR THE OPINIONS OF THE OTHER EXPERT EXPERT?

YES, HE WAS CROSS-EXAMINED ON DR. LATNER'S ASSESSMENT OF HIS IQ AND ASSESSMENT OF RETARDATION IN CONJUNCTION WITH, WELL, IS HER DIAGNOSIS CONSISTENT WITH THE DEFENDANT'S BEHAVIOR, AND THIS GETS TO WHAT JUSTICE QUINCE WAS ASKING EARLIER, ABOUT, WELL, YOU KNOW, WOULD SOMEONE WHO IS RETARDED BEHAVE, WOULD IT BE CONSISTENT BEHAVIOR FOR THAT RETARDED PERSON TO DESERT THE MERCHANT MARINES, BECAUSE THE DEFENDANT'S RECORD SHOWS, IN FACT, HE WAS IN CUBA IN THE MERCHANT MARINES AND DESIRED TO DESERT THE MERCHANT MARINES AND PRESENTED HIMSELF TO THE SPANISH EMBASSY TO SEEK REFUGE, AND DR. HABER WAS ASKED IS THAT CONSISTENT WITH RETARDED, AND HE SAID, NO, THAT IS NOT CONSISTENT AND DR. LATNER WAS ASKED IF IT IS CONSISTENT, AND SHE COULDN'T REALLY SAY. AND WAS IT RECONCILED THAT HE IS ASSISTANT AT THE JAIL? NO. SHE COULDN'T RECONCILE THE DIFFERENCES. DR. LATNER WAS ASKED WOULD IT BE POSSIBLE FOR SOMEONE WHO IS RETARDED NOT JUST TO GET A DRIVER'S LICENSE BUT A CHAUFFEUR'S LICENSE?

NO. IT WOULDN'T BE CONSISTENT AND WAS IT POSSIBLE TO PERFORM THESE SORDID EPISODES, THE HOME INVASION AND NEXT DAY THE MURDER OF THE LAVIA FAMILY, AND THAT WAS CONSISTENT WITH HER RECORD OF DIAGNOSIS. AS I SAID BEFORE, HE DIDN'T CONDUCT A FORMAL IQ TEST OF THE DEFENDANT, SO HE WAS RELUCTANT AND WOULD NOT STATE WHAT HIS FORMAL INTELLIGENCE LEVEL WAS BUT STATED IN NO UNCERTAIN TERMS THAT HE WAS COMPETENT, IT THAT HE HAD NO SIGNS OF RETARDATION, THAT HE HAD NO SIGNS OF IMPAIRMENT AND ADAPTIVE FUNCTIONING, WHICH WAS FURTHER BUTTRESSED BY THE TESTIMONY OF THE ARE STATE'S WITNESSES AT THE EVIDENTIARY HEARING, WHO TESTIFIED THAT THE DEFENDANT WAS ALWAYS WELL-GROOMED, LOOKED UP TO BY OTHER INMATES, MANAGED THE CANTEEN ACCOUNT, AND DIDN'T HAVE ANY EVIDENCE OF IMPAIRMENT IN ADAPTIVE FUNCTIONING.

JUSTICE QUINCE.

WOULD YOU AT SOME POINT DISCUSS THE ALLEGATION MADE, CONCERNING THE STATE PREPARING THE SENTENCING ORDER?

AT THE OUTSET, I WOULD STRENUOUSLY OBJECT TO THE FACT THAT IT IS UNTIMELY. IT WAS NOT INCLUDED IN THE THIRD AMENDED MOTION. AT THE TIME OF THE HUFF HEARING, DEFENSE, DEFENDANT'S COUNSEL PRESENTED A FOURTH AMENDED MOTION AT THE HUFF HEARING, FOR THE THIRD AMENDED MOTION, WHICH INCLUDED A NEW CLAIM REGARDING THIS ALLEGATION THAT THE STATE PREPARED THE SENTENCING ORDER.

BUT IT WAS BEFORE THE EVIDENTIARY HEARING.

YES. THAT'S CORRECT. HOWEVER, THE RECORD SHOWS THAT THE STATE TURNED OVER ITS FILES IN 1995. THE HUFF HEARING WAS IN 1997. SO NEARLY TWO YEARS LATER, GROSS GROSSLY UNTIMELY, THEY DON'T EVEN HAVE IT IN THE PLEADING, BUT THEY HAVE IT INCLUDED IN A OURTH AMENDED MOTION THAT THEY FILE AT THE HUFF HEARING.

WASN'T THERE SOME ALLEGATIONS HEAR -- HERE, CONCERNING WHETHER OR NOT, IN FACT, ALL OF THE RECORDS WERE TURNED OVER?

I WOULD SUBMIT TO THIS COURT NO. IF WE FOLLOW THE CORRESPONDENCE IN THE RECORD, THE STATE'S FILE ON DEFENDANT'S CASE WAS TURNED OVER IN 19956789 THERE WERE FOUR OF SIX FELONY CASE FILES RELATING TO A CODEFENDANT THAT WERE TURNED OVER IN 1996, AND TWO,

THE OUTSTANDING TWO WERE LOST, AND SO WERE NOT ABLE TO BE TURNED OVER, AND THERE WAS THE ISSUE OF PUBLIC RECORDS, WHICH I WANTED TO TOUCH ON BRIEFLY, REGARDING JUDGE CARNEY BEING CALLED AS A WITNESS. THOSE DOCUMENTS WERE DECLARED TO BE NOT PUBLIC RECORDS, BEFORE THEY WERE LOST, AND THE JUDGE WAS THE ONE WHO STATED ON THE RECORD THAT HE LOST THEM. THERE WAS NO BONE OF CONTENTION OF WHO LOST THEM. THE JUDGE STATED, IN NO UNCERTAIN TERMS, THAT HE LOST THM, BUT GETTING BACK IT YOUR QUESTION, THE STATE'S FILE ON DEFENDANT'S CASE WAS TURNED OVER IN 1995. WERE OTHER DOCUMENTS, OTHER CASES TURNED OVER AFTER THAT POINT? YES, BUT NOT DEFENDANT'S CASE.

DESPITE THE, WHEN THE ACTUAL MOTION WAS FILED, IS THERE ANY DISPUTE THAT THERE WAS AN UNSIGNED MOTION, AN UNSIGNED SENTENCING ORDER IN THE STATE ATTORNEYS FILE?

WELL, THE LOWER COURT NEVER ADD DRESZED THIS ISSUE, PROPERLY SO -- ADDRESSED THIS ISSUE, PROPERLY SO, BECAUSE HE FOUND IT TO BE GROSSLY UNTIMELY AND NEVER BROUGHT IT UP.

WAS A COPY OF IT ATTACHED?

NO. NO COPY WAS ATTACHED TO THE FOURTH AMENDED PLEADING AND NO OTHER EVIDENCE IN THE RECORD, OTHER THAN TO THE ASSERTION THAT THERE IS A UNSIGNED ORDER IN THE STATE'S FILE.

SO THE JUDGE DENIED IT AS PROCEDURALLY-BARRED?

HE DIDN'T EVEN GET TO THE CLAIM, BECAUSE IT WAS INCLUDED IN THE FOURTH AMENDED MOTION THAT WAS PRESENTED TO HIM AT THE HUFF HEARING, SO NOT REALIZING WHAT THAT WAS EVEN IN THERE --

HE DIDN'T ACCEPT THE FOURTH AMENDED MOTION.

THAT'S CORRECT. HE ALLOWED IT TO BE FILED.

WAS THERE A ROBE GIVEN FOR NOT ACCEPTING -- A REASON GIVEN FOR NOT ACCEPT SOMETHING.

YES. THAT IT WAS GROSSLY UNTIMELY, NEARLY TWO YEARS AFTER IT WAS IN THE, THE DEFENDANT WAS IN POSSESSION OF THE STATE'S FILE, WE ARE PRESENTED WITH THIS CLAIM AND ACTUALLY I SHOULD BACKTRACK. THERE WAS SOME DISCUSSION AT THE HUFF HEARING, ABOUT THIS ORDER. I AM MISTAKEN. THERE WAS SOME DISCUSSION, BECAUSE THE PROSECUTOR SPOKE UP AND SAID, LOOK, THEY HAVE HAD OUR FILES FOR NEARLY TWO YEARS, AND THIS IS THE FIRST TIME WE ARE EVER HEARING OF THIS, YOU KNOW, THIS IS GROSSLY UNTIMELY, SO THE JUDGE WAS AWARE OF THE CLAIM.

DID THAT REFER TO EVERY NEW -- HOW MANY NEW ALLEGATIONS WERE IN THE FOURTH AMEND MOTION? DO YOU KNOW?

TWO, I BELIEVE BUT I MAY BE MISTAKEN.

WERE BOTH OF THE CLAIMS BASED ON THE INFORMATION THAT THEY SHOULD HAVE RECEIVED, THAT THEY DID RECEIVE TWO YEARS PREVIOUSLY?

YES. I WOULD SUBMIT TO THIS COURT THAT THE ONLY CLAIMS THAT COULD HAVE BEEN ADDED IN THE FOURTH AMENDED PLEADING WOULD HAVE HAD TO DEAL WITH THE FILES PERTAINING TO, THERE WAS THE CO-DEFENDANT'S FILE, MR. SPANZA, FOUR OF SIX OF HIS FELONY FILES WERE TURNED OVER, BUT THE ADDITIONAL CLAIMS DIDN'T RELATE TO HIM, AND ADDITIONALLY LATER, THERE WAS. THE FILE RELATING TO MR. GONZALEZ, WHO, I DON'T KNOW HOW HE RELATES TO

THIS CASE, BUT IT WAS. THE FILE., THE PUBLIC RECORDS REQUEST THAT WAS TURNED OVER AFTER THE HUFF HEARING.

HOW ABOUT THE JUDGE'S TESTIMONY?

THE DEFENDANT, I MEAN, THE DEFENSE, THE DEFENDANT'S COUNSEL CALLED THE JUDGE TO TESTIFY, SO I WOULD SUBMIT TO THE COURT THAT THAT IS SORT OF GORILLA TACTICS, TO DIRECTLY PLACE THE LOWER COURT ON THE STAND, THEY CAN TESTIFY, AND THEN COMPLAIN WHEN WHEN-BOW IT LATER. I BELIEVE THERE ARE APPROXIMATELY 10,000 PAGES OF DOCUMENTS THAT THE STATE ATTORNEY HAD FILED A PUBLIC RECORDS EXEMPTION FOR AND TURNED ENCAMERA OVER THE DOCUMENTS AND THE JUDGE REVIEWED THEM AND DETERMINED THAT THEY WERE NOT PUBLIC RECORDS AND LOST THEM, SO HIS BRIEF TESTIMONY ON THE RECORD WAS, YES, MY SECRETARY HANDED THESE DOCUMENTS OVER TO ME. I CAN'T REMEMBER WHETHER I GAY THEM TO THE CLERK ARE A TO MY SECRETARY, BUT I RECEIVED THEM FROM THE PROSECUTOR AND I COULDN'T RETRIEVE THEM, WHEN I WENT TO RETURN THEM WITH THE RECORD, SO I AM THE ONE WHO LOST THEM. THE STATE DIDN'T LOSE THEM. THAT WAS THE EXTENT OF HIS TESTIMONY, AND TO THE EXTENT THAT DEFENDANT CALLED HIM TO TEST MY AND NOW -- TO TESTIFY AND NOW WANTS TO BE HEARD, COMPLAINING THAT THAT IS ERROR, THAT IS FUNDAMENTALLY UNFAIR TO HIM, THAT IS CONTENTIOUS. HE WAS THE ONE WHO CALLED HIM TO TESTIFY. HE TESTIFIED. IT SHOULD NOT BE HELD AGAINST THE STATE FOR THE DEFENDANT'S CHOICE TO PUT THE JUDGE ON THE STAND TO TESTIFY. ESSENTIALLY WHAT HE SAID ON THE STAND ALREADY WAS I DETERMINED THEY WEREN'T PUBLIC RECORDS. THEY WOULDN'T HAVE BEEN TURNED OVER ANYWAY. THEY WERE HANDWRITTEN NOTES OF THE PROSECUTOR. GETTING BACK TO DR. HABER'S TESTIMONY OF THE, OF HIS RETARDATION, I THINK I COVERED. THAT DEFENDANT'S RECORD ESTABLISHES DEFENDANT WAS NOT RETARDED. IN FACT, HIS PRIOR CONVICTIONS FOR DRUG TRAFFICKING, HE WAS GIVEN \$28,000 AND SENT TO DC, TO PERFORM PRETTY HIGH-LEVEL DRUG TRANSACTION IN HIS DC, RECEIVED A FEDERAL DRUG TRAFFICKING CONVICTION FOR THAT, ESCAPED FROM THE FEDERAL CORRECTIONAL INSTITUTE, HAD A CONVICTION FOR STAEP. -- FOR ESCAPE. HE, ALSO, HAD CONVICTIONS FOR GRAND THEFT AND BURGLARY, POSSESSION OF CONCEALED FIREARM AND POSSESSION OF COCAINE. DEFENSE --

DID ALL OF THAT COME OUT AT TRIAL?

NO. THAT IS WHAT I AM HIM GETTING AT. DR. HABER DIDN'T TESTIFY, AND DEFENSE COUNSEL TESTIFIED AT THE EVIDENTIARY HEARING, HE MADE A STRATEGIC DECISION NOT TO DO SO, BECAUSE DR. HABER'S ASSESSMENT AND REPORT FOUND NO STATUTORY MITIGATION, SO HE HAD NO POSITIVE, ON THE ONE HAND, OF PRESENTING THEM, AND HE HAD THIS NEGATIVE OF THE PRIOR RECORDS THAT THE JURY WOULD HEAR. IN FACT, DEFENSE COUNSEL HAD MADE A MOTION TO TRY AND KEEP THAT OUT FROM THE JURY, AND THE TRIAL COURT SAID, NO, THE STATE CAN CROSS-EXAMINATION DR. HABER ON HIS KNOWLEDGE OF THOSE PRIOR OFFENSES, SO DEFENSE COUNSEL MADE A STRATEGIC DECISION NOT TO PUT ON DR. HABER AT THE PENALTY PHASE, AND THUS THE JURY DIDN'T HEAR ABOUT HIS FEDERAL DRUG TRAFFICKING CONVICTION, THE ESCAPE, AND HIS OTHER MISCELLANEOUS PRIOR CONVICTIONS, AND TO THE EXTENT THAT IT WAS A STRATEGIC DECISION NOT TO PUT ON DR. HABER, WE DON'T HAVE DEFICIENCY. WE CERTAINLY DON'T HAVE PREJUDICE, BECAUSE THERE WAS NO PREJUDICE. DEFENDANT, DR. HABER'S TESTIMONY IS CONSISTENT AT THE EVIDENTIARY HEARING. HE WASN'T RETARDED. THERE IS NO STATUTORY MITIGATION AND DR. LATNER'S TESTIMONY IS NOT ONLY REBUTTED BY DR. HABER BUT THE EVIDENCE IN THE RECORD AND THE TESTIMONY OF THE STATE'S OTHER WITNESSES, WHO CAME FORWARD AND SAID THIS BEHAVIOR ISN'T CONSISTENT WITH SOMEBODY BEING RETARDED. HE DIDN'T --

IS THERE ANOTHER REPORT IN THE RECORD, OF. THE DOCTOR WHO ON PINES THAT HE IS -- ON PINES THAT HE IS MENTALLY -- OPINES THAT HE IS MENTALLY RETARDED, DR. KEYS OR SOMEONE OF THAT NAME?

THAT WAS THE SECOND DOCTOR THAT DEFENDANT PROFFERED OPPOSE THE CONVICTION BUT DID NOT TESTIFY AT THE EVIDENTIARY -- TESTIFY AT THE EVIDENTIARY HEARING, AND I AM NOT SURE, I DON'T BELIEVE THERE WAS A REPORT DEDUCED TO SUCH. I KNOW THAT DR. KEYS DIDN'T TESTIFY AT THE EVIDENTIARY HEARING. THEY SIMPLY PRESENTED DR. LATNER'S TESTIMONY. ALSO IT IS NOTEWORTHY THAT THEY DID NOT PRESENT ANY WITNESSES FROM CUBA. THAT IS ESSENTIALLY THE SUBSTANCE STANCE OF THEIR -- THE SUBSTANCE OF THEIR SECOND CLAIM, BECAUSE DEFENSE COUNSEL DID NOT TESTIFY ABOUT HIS EXISTENCE IN CUBA, A HARSH UPBRINGING AND POVERTY AND UPBRINGING, REGARDING RETARDATION IN CHILDHOOD.

AS I UNDERSTAND THEIR ARGUMENT, IT IS THAT THE EVIDENTIARY HEARING WAS LIMITED TO THIS WHOLE MENTAL HEALTH ISSUE, AS OPPOSED TO THE -- ISSUE, AS OPPOSED -- AS OPPOSED TO THE MORE GENERAL FAMILY RECORD KIND OF BACKGROUND ISSUE.

THAT IS WHAT THE RECORD DID BEAR OUT. THERE IS EXTENSIVE DISCUSSION ABOUT HOW THESE WITNESSES' TESTIMONY IN CUBA WOULD BE HEARD AND IN RELATION TO THE EVIDENTIARY HEARING. IN FACT THEIR BRIEF GOES ON AND ON ABOUT ANECDOTAL EVIDENCE ABOUT DEFENDANT'S POSSIBLE RETARDATION OR BRAIN DAMAGE. THAT HE SUCCEEDED HIS THUMB, THAT HE WOULD TRADE RADIOS FOR PANTS AND DIDN'T SEEM TO HAVE CONCEPTS OF VALUE. THE ALLEGATIONS IN THEIR CLAIM, UNDER THAT CLAIM, DEFINITELY RELATE TO POSSIBLE RETARDATION AND BRAIN DAMAGE, AND THAT DOOR WAS OPEN. THE JUDGE WAS WILLING TO HEAR THAT. THERE WAS DISCUSSION ON THE RECORD ABOUT HOW THESE WITNESSES' TESTIMONY WOULD BE SECURED, AND THEY PRESENTED NO WITNESSES TO TESTIFY ABOUT, YOU KNOW, WHATEVER INDICATIONS THE DEFENDANT YIELDED OF BEING RETARDED DURING HIS EARLY CHILDHOOD. SO TO THE EXTENT THAT, AT THE EVIDENTIARY HEARING, HIS COUNSEL HIS POSTCONVICTION COUNSEL HAVE NOT BEEN ANYMORE SUCCESSFUL AT PRESENTING ANY OF THIS TESTIMONY IT IS SILLY TO THINK THAT HIS DEFENSE COUNSEL AT TRIAL WAS DEFICIENT FOR NOT PRESENTING THOSE WITNESSES.

HOW DO WE DEAL WITH THE WHOLE IDEA THAT THE TRIAL JUDGE FOUND AND SORT OF THAT DEFENSE COUNSEL WOULD NOT HAVE BEEN ABLE TO GO TO CUBA, AND IF THERE IS ALL THIS OTHER DISCUSSION ON THE RECORD ABOUT HOW YOU COULD HAVE GONE TO THE STATE DEPARTMENT OR IMMIGRATION OR SOMEONE AND GOTTEN THESE PAPERS TO ALLOW YOU TO GO THERE?

YOU MEAN DISCUSSION AT THE HUFF HEARING?

I BELIEVE IT WAS AT THE HUFF HEARING.

WELL, THE JUDGE AND THE PROSECUTOR WERE DISCUSSING HOW THOSE HURDLES WOULD BE OVERCOME IN 1995. AT THE TIME OF TRIAL, IT WAS 1989. I THINK THE POLITICAL CLIMATE HAS CHANGED SOMEWHAT. NONETHELESS, THIS CASE IS NOT THAT --

I GUESS MY QUESTION REALLY COMES TO THIS, SHOULD DEFENSE COUNSEL HAVE ATTEMPTED TO GO TO CUBA AND THEN WE WOULD HAVE RECORD THAT SAYS THEY EITHER WOULDN'T LET HIM GO OR HE COULD HAVE GONE?

WELL, DEFENSE COUNSEL DID TESTIFY THAT THE DEFENDANT WAS NOT COOPERATIVE WITH PROVIDING THIS INFORMATION TO DR. HABER OR HIMSELF, AND I BELIEVE HE TESTIFIED THAT HE DIDN'T WANT OTHER FAMILY MEMBERS TO BE INVOLVED, AND TO THE EXTENT THAT MARSHALING THESE WITNESSES TOGETHER WAS THWARTED BY DEFENDANT'S OWN FAILURE TO COOPERATE IS NOT DEFICIENCY ON HIS COUNSEL'S PART.

I AM GATHERING THAT YOU ARE ARGUING THIS MORE AS THAT THERE IS, IN THE END, NO PREJUDICE, WHETHER OR NOT THERE IS DEFICIENT INFORMATION.

YES, YOUR HONOR. HOWEVER, I WOULD SUBMIT THAT THERE IS NO DEFICIENCY, EITHER, BUT CERTAINLY NO PREJUDICE.

I THOUGHT THE DEFENSE LAWYER TESTIFIED HE THOUGHT HE WAS PROHIBITED FROM GOING TO CUBA.

YES. HE DID TESTIFY THAT HE DID THINK HE WOULD.

SOMEBODY WHO HAS NEVER HANDLED A CAPITAL CASE, WHO DOESN'T KNOW THE DIFFERENCE BETWEEN NEUROPSYCHOLOGICAL TESTING AND NEUROLOGICAL TESTING A THAT THE END GOES TO SANTA DOMINGO FOR A CIVIL CASE AS OPPOSED TO TRYING TO GO TO CUBE, A THERE IS SOME CONCERN AS TO HOW MUCH PREPARATION WAS REALLY GOING ON, BUT YOU MAKE A STRONGER CASE THAT IS, AFTER WE HEAR WHAT HAS GONE ON IN THE EVIDENTIARY HEARING, THAT, YOU KNOW, MAYBE IT WILL HAVE MADE A DIFFERENCE.

FOLLOWING ALONG THE LINES OF BEING NO PREJUDICE, THERE IS ONE FINAL NOTE I WOULD MAKE, WHICH IS THAT, AT THE TIME OF THE OFFENSES, DEFENDANT WAS 32, SO CERTAINLY WHATEVER EVIDENCE LIED IN CUBA, REGARDING HIS UNFORTUNATE CHILDHOOD, BECOMES WEAK AND DISTANT AND APPEALS IN TERMS OF MITIGATING -- AND PALES IN TERMS OF MITIGATING HIS ACCOUNTABILITY FOR THE CRIMES THAT HE WAS ULTIMATELY CONVICTED WITH, FOR. BUT I WOULD ALSO NOTE THAT --

MISS RODRIGUEZ, YOUR TIME IS UP. THANK YOU VERY MUCH. MS. DAY.

YES, YOUR HONOR, VERY BRIEFLY. REGARDING THE SENTING ORDER ISSUE, SINCE IT WAS BROUPT, THE FOURTH AMENDED MOTION WAS FILED WITH THE COURT AT THE HUFF HEARING.

I AM SORRY. THE WHAT KIND OF MOTION?

THE 3.850 MOTION, YOUR HONOR, WAS FILED AT THE -- WITH THE COURT AT THE HUFF HEARING, BECAUSE BETWEEN THE THIRD AND FOURTH AMENDED MOTION, THERE WAS STILL PUBLIC RECORD LITIGATION GOING ON. MR. RODRIGUEZ HAD NEVER RECEIVED THE FINAL DETERMINATION.

DID THE FOURTH AMENDED MOTION CONTAIN INFORMATION THAT WAS RECEIVED DURING THAT TIME PERIOD?

I BELIEVE SO, YOUR HONOR. I MEAN, THE POINT THAT THE STATE MAKES ABOUT THE STATE HAVING SUPPLIED ITS FILE TO MR. RODRIGUEZ NEARLY TWO YEARS BEFORE, IS NOT SHOWN BY THE RECORD. THE STATE ALLEGED IT. COUNSEL FOR MR. RODRIGUEZ, AT THE HUFF HEARING, STRENUOUSLY REFUTED IT, AND IN FACT --.

WHETHER DO YOU ALLEGE THE DEFENSE GOT THE INFORMATION CONCERNING AN UNSIGNED SENTENCING ORDER?

IT IS NOT REFLECTED IN THE RECORD, YOUR HONOR. AT THE TIME WE WERE WINDING UP LITIGATION UNDER CHAPTER 119, AND UNLIKE RULE 3.852, THAT WAS DONE NOT NECESSARILY THROUGH THE COURT FILE. I MEAN, YOU WOULD FILE A LETTER, A LOT OF IT WAS DONE ON THE TELEPHONE BETWEEN INVESTIGATORS AND CCR'S OFFICE, AND THE RECORDS CUSTODIAN AT THE STATE ATTORNEYS OFFICE. SOME BUT NOT NEARLY ALL OF THE FILES THAT WERE RECEIVED FROM THE STATE ATTORNEYS OFFICE WERE RECEIVED AFTER THE THIRD AMENDED 3.850 MOTION. I DON'T KNOW WHICH ONE THE UNSIGNED SENTENCING ORDER IS. IT IS CONTAINED WITHIN.

WHERE IS THE MOTION, ITSELF?

I AM SORRY.

THE UNSIGNED ORDER. WHERE, IS IT A PART OF THIS RECORD?

IT IS NOT A PART OF THIS RECORD, YOUR HONOR. THE ALLEGATION IS A PART OF THE RECORD.

YOU HAVE A FOURTH AMENDMENT MOTION. ISN'T IT INCUMBENT ON CC R. C TO SAY THAT THIS -- ON CC R. C TO SAY THAT THIS WAS DISCOVERED WHEN IT WAS DISCOVERED, WITH RELATIONSHIP TO THE FILE SOMETHING.

I BELIEVE IT WAS MENTIONED, DISCOVERED AT SOME POINT SUBSEQUENT TO THE THIRD AMENDED MOTION.

WAS THAT STATED IN THE MOTION?

IT WAS NOT STATED IN THE MOTION. I BELIEVE IT WAS STATED AT THE HUFF HEARING, YOUR HONOR.

AND SO WHAT ARE WE SUPPOSED TO DO, IF WE DON'T EVEN HAVE A COPY OF THE MOTION?

THE ORDER.

THE ORDER. I AM SORRY. WE DON'T HAVE A COPY OF THIS ORDER THAT YOU ALLEGE EXISTS?

WELL, I MEAN, THE PLEADING REQUIREMENTS OF RULE 3.850 WERE MET AND WE MADE A GOOD FAITH ALLEGATION, WITHIN THE FOURTH AMEND MOTION, THAT THIS UNSIGNED SENTENCING ORDER EXISTS, WHICH TENDS TO SHOW THAT EXPARTE COMMUNICATION BETWEEN THE STATE ATTORNEYS OFFICE AND THE JUDGE HAD HAPPENED, IN TERMS OF THE STATE ATTORNEYS OFFICE WRITING THE SENTENCING ORDER. IT EXISTS. IT IS NOT PART OF THE RECORD IN THIS CASE.

WHAT DID THE JUDGE DO WITH THE FOURTH AMENDED MOTION? DID HE DENY YOU LEAVE TO FILE IT OR DID HE DISMISS IT?

HE ALLOWED US LIVE TO -- LEAVE TO FILE IT, BUT HE CONTINUED ON WITH THE HUFF HEARING, BASED ON THE THIRD AMENDED MOTION.

AND THE EXPLICIT REASON FOR DENYING, FOR NOT CONSIDERING IT WAS UNTIMELINESS?

I BELIEVE SO, YES. YOUR HONOR. I MEAN, BUT THE FACT REMAINS THAT CHAPTER 119 PUBLIC RECORDS LITIGATION WAS STILL GOING ON, BETWEEN THE THIRD AND THE FOURTH. WE HAD NOT EXPECTED THE THIRD ONE TO BE THE FINAL MOTION. UNFORTUNATELY WHAT HAD HAPPENED WAS THAT, WITH THE TRANSITION FROM CHAPTER 119 TO 3.852, WE ENDED UP LITIGATING ON THREE PARALLEL PARTS. ONE WAS THE ROUGHING UP OF THE OLD CHAPTER 119 RECORDS REQUEST. THE SECOND ONE WAS THE 3.852 RECORDS REQUEST, AND THE THIRD ONE WAS THE JUDGE KEPT SETTING DEADLINES TO FILE AMENDED 3.850 MOTIONS, WITHOUT HAVING WRAPPED UP THE PUBLIC RECORDS, AND SO THIS FOURTH AMEND MOTION WAS AN ATTEMPT, BY MR. RODRIGUEZ, TO GET EVERYTHING THAT HAD BEEN OBTAINED TO DATE INTO THE RECORD AT THIS POINT AND TO HAVE THE JUDGE TAKE A LOOK AT IT. AS FAR AS THE PREJUDICE PRONG, RELATING TO THE NEUROPSYCHOLOGY IS CONCERNED, I THINK THE RECORD IS CLEAR. MR. KALISH SAID THAT HE WOULD HAVE --

EXCUSE ME, BUT THIS WAS -- THIS WHOLE EPISODE WITH THESE AMENDED MOTIONS, THAT WAS NOT YOU. THAT WAS MR. KISSINGER. CORRECT?

THERE HAVE BEEN A NUMBER OF COUNSEL ON THIS CASE, YOUR HONOR.

RIGHT. BUT BACK AT THE TIME --

BACK AT THE TIME I WAS VERY LOWELL.

THIS HUFF HEARING HELD WAS MR MR. KISSINGER.

-- HELD, I WAS VERY LOWLY.

I BELIEVE IT WAS MR. STRAND HAD JOINED CCRCs, AND MR. KISSINGER HAD LEFT CCR AT THAT POINT, AND SO HE CONDUCTED THE HUFF HEARING. AS FAR AS PREJUDICE IS CONCERNED, IT IS VERY CLEAR THAT MR. KALISH WOULD HAVE PUT ON THE TESTIMONY AFTER NEUROPSYCHOLOGIST, TO SHOW THAT MR. RODRIGUEZ IS MENTALLY RETARDED. DR. LATNER TESTIFIED THAT HIS PSYCHOLOGICAL TESTING, HER IQ TESTING IS PART OF HER BATTERY. DR. HABER RECOMMENDED THAT. HE CANNOT BE HELD, HE CANNOT THEN REJECT IT TEN YEARS AFTER THE FACT. I WOULD ASK THIS COURT TO GRANT MR. RODRIGUEZ ALL THE RELIEF THAT HAS BEEN REQUESTED IN THE BRIEF. THANK YOU FOR LISTENING. MR. CHIEF JUSTICE: THANK YOU, COUNSEL. THANK YOU, COUNSEL.