State of Florida v. Jimmie Lee Coney

NEXT CASE STATE VERSUS JOANY. FOR THE BENEFIT FIT OF THOSE IN THE AUDIENCE, -- STATE VERSUS CONEY. FOR THE BENEFIT OF THOSE IN THE AUDIENCE, THE COURT WILL HEAR THIS ARGUMENT AND THEN TAKE A BREAK BEFORE RETURNING TO THE BENCH.

GOOD MORNING. SCOTT BROWNE FOR THE STATE OF FLORIDA. YOUR HONORS, WE ARE HERE TODAY ON AN APPEAL FROM THE ORDER OF THE CIRCUIT COURT IN DADE COUNTY GRANTING MR. CONEY A NEW PENALTY PHASE HEARING, BASED ON AN ASSERTION OF THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

YOU HAVE DIVIDED YOUR TIME SO THAT YOU CAN RESPOND TO THE OTHER CASE THAT HAS BEEN CONSOLIDATED HERE?

YES, YOUR HONOR. THERE IS ALSO A CROSS-APPEAL, AND I WILL PRIMARILY ADDRESS MY COMMENTS, NOW, TO THE STATE APPEAL ISSUE. YOUR HONORS --

BEFORE YOU GET TO YOUR ARGUMENT AND YOU WEREN'T HERE, BUT I ASKED THIS QUESTION OF THE STATE YESTERDAY. WHY DO WE HAVE JURISDICTION OVER THE STATE'S APPEAL OF AN ORDER THAT GRANTS A NEW PENALTY PHASE TRIAL, BECAUSE NOW AND ARNL THERE IS NO SENTENCE -- BECAUSE NOW APPARENTLY THERE IS NO SENTENCE OF DEATH BECAUSE THE COURT HAS ORDERED A NEW SENTENCING PHASE. WITH NO ORDER OF PENDING SENTENCE OF DEATH, WHY SHOULD THIS NOT BE DETERMINED BY THE DCA?

YOUR HONOR, I BELIEVE IT HAS HISTORICALLY BEEN HANDLED BY THIS COURT AND I BELIEVE THERE HIS CASE LAW. I DIDN'T CITE ANY. COUNSEL DID NOT CHALLENGE THIS COURT'S JURISDICTION TO HEAR THIS APPEAL, BUT I BELIEVE THAT I CAN LOOK AND FIND THAT AUTHORITY FOR YOU, TO SUBMIT A MEMORANDUM, IF YOU WOULD LIKE, YOUR HONOR, AFTER THE HEARING. YOUR HONORS, WE ARE HERE PRIMARILY BECAUSE THE TRIAL COURT, IN ASSESSING WHETHER OR NOT TRIAL COURT WAS INEFFECTIVE MADE SOME ERRONEOUS FACTUAL FINDINGS, BUT I BELIEVE THE TRIAL COURT MISS APPLIED THE LAW. THE TRIAL COURT-SIMPLY FOUND THAT SOMETHING MORE COULD HAVE BEEN DONE. THEREFORE WE ARE GOING TO THROW IT BACK TO THE JURY. THE TRIAL COURT DID NOT ASSESS THE CREDIBILITY OR THE COUNTERARGUMENTS THAT WERE MADE. RECALL THAT THE PRIMARY ISSUE IS WHETHER OR NOT COUNSEL WAS INEFFECTIVE IN FAILING TO PREPARE AND PRESENT EXPERT MENTAL HEALTH MITIGATION TESTIMONY DURING THE PENALTY.

GIVE US A THUMBNAIL SKETCH TO PULL THIS UP ON OUR VIEW SCREENS AS WE COME UP.

DURING THE TRIAL, COUNSEL PRESENTED TESTIMONY OF SEVERAL FAMILY MEMBERS AND FRIENDS AND HE RELIED PRIMARILY UPON SHOWING THAT MR. CONEY HAD MADE A RELIGIOUS CONVERSION, THAT HE STILL HAD A POSITIVE INFLUENCE, DESPITE BEING INCARCERATED MOST OF HIS ADULT LIFE, THAT HE HAD A POSITIVE INFLUENCE UPON HIS FAMILY AND HIS FRIENDS AND HE WAS STILL PRETTY WORTHY AND COUNSEL DID DEVELOP THIS BACKGROUND THAT HE HAD POLIO, AND COUNSEL MANAGED TO OBTAIN A 7-5 JURY RECOMMENDATION. NOW, THE FACTS OF THIS CASE ARE PRETTY HORRENDOUS. MR. CONEY, WHILE SERVING A 400 YEAR SENTENCE FOR BRUTALLY RAPING AND LEAVING FOR DEAD --

ISN'T THE POINT THAT WE NEED TO ADDRESS IS WHAT HAPPENED WITH REGARD TO DR. MUTTER

AND DR. NOBLE DAVID, THE HEAD OF THE MIAMI DEPARTMENT OF NEUROLOGY. ISN'T THAT REALLY WHERE WE NEED TO GO?

THAT IS IMPORTANT. I JUST WANT TO GIVE THE COURT A LITTLE FACTUAL BACKGROUND AND I KNOW THEY ARE IN THE BRIEFS AND I WILL GO BACK TO THAT POINT, YOUR HONOR. COUNSEL DID NOT IGNORE MENTAL HEALTH ISSUES AND HIRED TWO EXPERTS GRANTED IN THE TWO WEEKS THAT WERE GIVEN HIM AFTER THE TRIAL PHASE AND PRIOR TO THE PENALTY PHASE. DR. MUTTER AND DR. DAVID AND BOTH TESTIFIED IN THE PENALTY PHASE HERE BELOW AND THE KEY HERE IS THAT THERE WAS NO CHANGE IN THEIR TESTIMONY.

SHARPEN US WITH IN TERMS OF WHAT THE THEORY OF THE TRIAL COURT WAS IN GRANTING A NEW PENALTY PHASE AND WHERE THE TRIAL COURT WENT WRONG, A AND I REALIZE THAT IT DOES FOCUS ON THE MENTAL HEALTH BUT SHARPEN THIS FOR US IN THAT REGARD.

YOUR HONOR, THE TRIAL COURT FOUND THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVIDE BACKGROUND MATERIALS TO HIS OWN EXPERTS, DR. MUTTER AND DR. DAVID, AND FAILING TO PROCURE THEM EARLIER THAN HE DID, AND FAILING TO THERE FOR PRESENT, I GUESS PRESUMABLY, SOME EXPERT TESTIMONY. IF HE DIDN'T LIKE DR. MUTTER AND DR. DAVID, WHO WERE OF NO HELP, HE COULD HAVE HAD TIME, THEN, TO GO OUT AND HIRE DR. ICEENSTEIN.

WHAT IS THE FLAW IN THAT REASON SOMETHING.

THE COURT HAS HELD THAT COUNSEL DOESN'T HAVE TO GO OUT AND SHOP AROUND FOR MORE FAVORABLE EXPERTS. THAT IS SIMPLY NOT REQUIRED. YOU DON'T HAVE TO GO TO FIVE OR TEN EXPERTS TO FIND A DOCTOR. EISEN STEEN OR DR. HIDE THAT COLLAT-- OR DR. HYDE THAT COLLATERAL COUNSEL FOUND.

I THOUGHT JUDGE SMITH WAS FINDING THAT THE LETTER, THE REPORTS DIDN'T REALLY ADDRESS THE CORRECT MITIGATION KINDS OF ISSUES AS OPPOSED TO COMPETENCY, AND DR. DAVID HAD RECOMMENDED THE NEURO PSYCHOLOGICAL TESTING. THAT SEEMED TO BE THE KINDS OF THINGS THAT SHE WAS REALLY HANGING HER HAT ON.

THAT'S CORRECT, YOUR HONOR.

COULD YOU ADDRESS THOSE?

YOUR HONOR, FIRST OF ALL, BOTH OF THOSE REPORTS WERE COMPLETE. TRIAL COUNSEL, DR. MUTTER, I BELIEVE HAD DONE NUMEROUS PENALTY PHASE MITIGATION EXAMINATIONS. HE DIDN'T NEED AN ATTORNEY TO TELL HIM WHAT TO LOOK FOR, AND NEITHER DID DR. DAVID. NEITHER ONE OF THEM TESTIFIED THAT THEY NEED ADD ATTORNEY PRESENT TO TELL THEM WHAT TO LOOK FOR. THEY WERE LOOKING FOR MENTAL ABNORMALITIES, ANYTHING THAT COULD BE USED DURING THE PENALTY PHASE. SO THEY --

DIDN'T DR. MUTTER'S REPORT SEEM TO REFLECT TO THE OBSERVER, THAT HE WAS TALKING ABOUT WHETHER THE DEFENDANT WAS COMPETENT TO STAND TRIAL AND NOT WHETHER THERE WERE ANY MITIGATING FACTORS IN HIS BACKGROUND THAT COULD BE USED IN THE PENALTY PHASEA?

YOUR HONOR, THAT IS TRUE, HE ADDRESSES COMPETENCY BUT HE ALSO ADDRESSES AND I THINK HE ADDRESSED IT IN HIS TESTIMONY, HE WAS LOOKING FOR THING THAT IS TRIAL COUNSEL COULD USE FOR MITIGATION PURPOSES, SO IT IS KIND OF HARD TO SAY HE WAS JUST LOOKING AT COMPETENCY. THAT IS NOT CORRECT AND I THINK THAT IS ERRONEOUS AND I DON'T THINK THE TRIAL COURT MADE THAT SPECIFIC FINDING THAT THESE DOCTORS ONLY LOOK FOR COMPETENCY. THE PROBLEM WITH THE TRIAL COURT'S ORDER REALLY, IS THE BACKGROUND MATERIALS. WHY DIDN'T THE ATTORNEY GO AHEAD AND DEVELOP ALL OF THESE DOC

DOCUMENTS? BECAUSE THE DEFENDANT HAD BEEN INCARCERATED LARGELY SINCE 1965, SO WHEN WE ARE TALKING ABOUT BACKGROUND MATERIALS, WE ARE TALKING ABOUT A WEALTH OF D.O.C. DOCUMENTS. HE DID PROVIDE SOME OF THESE DOCUMENTS TO DR. MUTTER BUT HE OMITTED A VAST MAJORITY OF DOCUMENTS WHICH REFLECTED HIGHLY-NEGATIVE INFORMATION.

DIDN'T THE JUDGE HAVE BEFORE HIM A LITTLE MORE THAN JUST BACKGROUND MATERIAL? DIDN'T THE LAWYER TESTIFY AT THE EVIDENTIARY HEARING, DIDN'T HE ACKNOWLEDGE THAT IT WAS HIS FIRST CAPITAL CASE THAT HE HAD EVER HANDLED? HE FOUND MR. CONEY TO BE DIFFICULT CLIENT, THAT HE DIDN'T TALK TO HIM ABOUT THE DEATH PENALTY. MR. CONEY DIDN'T WANT TO TALK ABOUT IT. THAT HE WAS AWARE THAT DR. CONEY HAD PRIOR RAPE CASES. THAT HE DIDN'T TALK TO THE PRIOR COUNSEL ABOUT THESE RAPE CASES OR PRIOR RECORD, THAT, IN ALMOST ELEVEN MONTHS, HE FAILED TO FILE A MOTION TO HAVE CONEY PSYCHOLOGICAL EVALUATED? THERE WAS JUST A WEALTH OF THINGS THAT THE JUDGE CONSIDERED, OTHER THAN JUST FAILURE TO DO MORE INVESTIGATION, ISN'T THAT THE REALITY?

WELL, YOUR HONOR, YES, IN FINDING DEFICIENCY, BUT THE PROBLEM WITH THE JUDGE'S ORDER ALSO IS YOU HAVE ALL OF THESE INSTANCES WHERE THE JUDGE IS FINDING DEFICIENCY. OKAY. HE DIDN'T TALK TO CONEY THAT MUCH. WELL, THE TRIAL COUNSEL TESTIFIED THAT IS BECAUSE HE TALKED TO CONEY PRIMARILY ABOUT THE GUILT PHASE, BECAUSE WHEN HE BROUGHT UP THE PENALTY PHASE, CONEY WOULD BECOME VERY UPSET, SO HE HAD EVERY REASON TO FOCUS HIS EFFORTS WHERE CONEY WANTED THEM FOCUSED, ON THE GUILT PHASE, AND THEN HE HAD TWO WEEKS TO PREPARE FOR THE PENALTY PHASE, AND HE OBTAINS --

NORMALLY WE ARE IN SITUATIONS WHERE THE TRIAL COURT HAS FOUND THAT SOMETHING IS A STRATEGY DECISION, AND WE DEFER TO THOSE FACTUAL FINDINGS. THIS WAS A STRATEGY DECISION. AS I TAKE THE NUMEROUS PAGES OF THIS ORDER WHICH MADE FACTUAL FINDINGS, IT APPEARS THAT THE TRIAL COURT, HAVING LISTENED TO ALL OF THE WITNESSES, DISCREDITTED THAT WHAT TRIAL COUNSEL WAS DOING WAS A MATTER OF STRATEGY, SO I GUESS THE QUESTION I HAVE IS WHY DON'T WE DEFER TO THOSE FACTUAL FINDINGS, EVEN THOUGH ULTIMATELY THE QUESTION OF INEFFECTIVE ASSISTANCE OF COUNSEL IS A MIXED QUESTION OF FACT AND LAW? COULD YOU RESPOND TO THAT?

YOUR HONOR, I THINK THE FACTUAL FINDINGS, NUMBER ONE ARE INCOMPLETE. EVEN IF YOU FIND THAT HE DIDN'T DO EXACTLY WHAT -- DIDN'T DO IDEALLY WHAT HE SHOULD HAVE, LET'S TAKE THE BOTTOM LINE HERE. THE TESTIMONY FROM TWO EXPERTS, ONLY ONE OF WHOM OPINED THAT A STATUTORY MENTAL HEALTH MITIGATOR WOULD HAVE APPLIED.

ARE YOU GOING INTO THE SECOND PRONG?

INTO THE SECOND PRONG, A BECAUSE I AM ASSUMEING THAT HE WASN'T THE IDEAL COUNSEL FOR TRIAL. LET'S ASSUME THAT.

LET'S DEAL WITH THE SECOND PRONG OF STRICKLAND.

I DIDN'T HAVE TIME IN MY BRIEF AND I KNOW ANOTHER ASSISTANT ATTORNEY GENERAL DID, WE DEBUNKED EACH ONE OF THESE, BUT LET'S ASSUME THE DEFICIENCIES ARE TRUE. WHAT ARE WE LEFT WITH? WITH TWO EXPERTS THAT COLLATERAL COUNSEL HAS OBTAINED. THAT IS IT. WHO HAVE A MORE FAVORABLE OPINION. NOW, WHAT DOES COUNSEL OR WHAT IS LOST IN PREVENTING THAT EXPERT TESTIMONY? NUMBER ONE, THOSE EXPERTS TESTIFIED, DR. HYDE IN PARTICULAR THAT, HE AGREED WITH AN ANTISOCIAL PERSONALITY DIAGNOSIS. THESE EXPERTS, ALSO, WOULD HAVE REVEALED, BASED ON THEIR REVIEW OF D.O.C. DOCUMENTS, THAT MR. CONEY HAD FREQUENTLY BEEN ACCUSED OF RAPING OTHER INMATES. TRIAL COUNSEL TESTIFIED BELOW THAT THAT REVELATION, ALONE, WAS ABSOLUTELY DEVASTATING TO HIS CASE. THAT WAS HIS STRATEGY, IN NOT PROVIDING THESE DOCUMENTS. IT IS INHERENTLY REASONABLE,

BECAUSE MR. CONEY WAS IN PRISON, HIS PRIOR VIOLENT FELONIES WERE TWO RAPES. THE LAST OF WHICH BOTH WERE VIOLENT BUT THE LAT ONE WAS ABSOLUTELY HORRENDOUS. HE RAPED AND LEFT FOR DEAD A 12-YEAR-OLD GIRL. SHE REQUIRED RECONSTRUCTIVE SURGERY ON HER VAGINA, THEN WHEN IN PRISON HE IS CONTINUEING TO SEXUALLY ASSAULT INMATES? HOW DEVASTATING IS THAT INFORMATION FOR THE ADDITION, PERHAPS, OF ANOTHER STATUTORY MITIGATOR?

DESPITE THAT EVIDENCE, THE JURY IN THE PENALTY PHASE, THERE WERE FIVE JURORS THAT RECOMMENDED LIFE. IT WAS A 7-TO-5 DECISION, SO APPARENTLY THERE WERE SOME JURORS THAT THOUGHT THERE WERE MITIGATING CIRCUMSTANCES THAT OUTWEIGHED ALL OF THE AGGRAVATORS YOU JUST DESCRIBED, SO DON'T WE HAVE TO TAKE THAT INTO ACCOUNT IN DETERMINING WHETHER THIS WOULD PUT IT OVER THE TOP? YOU HAVE ONLY GOT 7-TO-5 THE FIRST TIME AND WE HAVE TO TAKE THAT INTO ACCOUNT, PREJUDICE DECIDES?

YES, YOUR HONOR, WE DO -- FOR PREJUDICE?

YES, YOUR HONOR, WE DO, BECAUSE DEFENSE COUNSEL HAD TESTIFY SEVEN FAMILY MEMBERS AND FRIENDS WHO TESTIFIED ABOUT HIS POOR UPBRINGING, POLIO, A CONVERT TO RELIGION. NOW YOU BRING IN EXPERT TESTIMONY, MANIPULATIVE BEHAVIOR IN PRISON, HE BLEW UP HIS TOILET AND FAKING ILLNESSES TO GAIN MEDICAL TREATMENT AND SEXUALLY ASSAULTING OTHER INMATES? HE IS AN ANTISOCIAL PERSONALITY DISORDER, WHICH MEANS YOU DON'T CARE ABOUT OTHER PEOPLE. YOU WILL LIE, CHEAT AND STEAL, AND HIS ENTIRE PENALTY PHASE WAS GUTTED BY THOSE REVELATIONS, SO EVEN IF THOSE TWO EXPERTS WERE BROUGHT IN, A WHAT DO YOU HAVE?

YOU ARE ASKING US, REALLY, TO SECOND-GUESS WHAT THE TRIAL COURT, HAVING HEARD THE EXPERTS, CONCLUDED THAT A JURY WOULD HAVE BEEN PERSUADED TO RECOMMEND A PENALTY OTHER THAN DEATH, AND WAS IMPRESSED WITH DR DR.IZEENSTEIN, WHO HAD TALKED ABOUT THE IMPAIRMENT OF THE FRONTAL LOBE THAT WOULD HAVE AFFECTED HIS RIGHT BRAIN FUNCTIONING, RESULTING IN IMPULSIVE BEHAVIOR, SO MOST OF THESE CASES, YOU KNOW, 95 PERCENT OF THEM, THE STATE IS THERE SAYING, LOOK, EVEN THOUGH WE MIGHT THINK A JURY, THIS MIGHT HAVE BEEN PERSUASIVE, THE TRIAL COURT IS THERE AND MAKES THE DECISION THAT THERE IS NO PREJUDICE, BUT HERE WE HAVE GOT THE OPPOSITE, AND I FEEL LIKE WE ARE BEING ASKED AND NOW SECOND-GUESS THE QUALITY OF THIS EXPERT TESTIMONY, SO WE WENT FROM NO MENTAL HEALTH EXPERT TO WHAT THIS TRIAL COURT SAID WERE EXPERTS THAT WERE READILY AVAILABLE THAT WERE IMPRESSIVE THAT WOULD HAVE LIKELY HAVE RECOMMENDED, CHANGED THE RESULT OF THE JURY VOTE. I MEAN, I THINK WE WOULD, IF WE, WHAT WE ARE SAYING IS, REALLY, THAT THERE IS GOING TO NEVER BE A CASE WHERE WE ARE GOOD GOING TO FIND IN EFFECT -- WHERE WE ARE GOING TO FIND INEFFECTIVE, BECAUSE WE ARE ALWAYS GOING TO TRY TO FIGURE OUT WHAT THE JURY WOULD HAVE DONE DIFFERENTLY.

YOUR HONOR, I THINK YOU CAN LOOK AT THE LANGUAGE OF THE TRIAL COURT'S ORDER TO SEE THAT SHE MISS APPLIED IT. I THINK SHE ONLY CLASSIFIED DR. HYDE AS BEING IMPRESSIVE AND HAVING CREDENTIALS AND ALSO NOTED THAT THE EXPERTS WERE SIGNIFICANTLY IMPEACHED AND SHE ALSO NOTED ALL THIS WEALTH OF SIGNIFICANT INFORMATION WOULD HAVE COME IN. WHAT SHE FAILED TO DO IS ASSESS CREDIBILITY ON HER OWN. SHE BASICALLY THREW HER HANDS UP AND SAID WELL, LET THE JURY DECIDE IT. THAT IS WRONG. SHE HAS TO MAKE A REASONABLE DETERMINATION PROBABILITY. SHE SAID THAT IS THE JURORS' KREBLD. THAT IS IN HER ORDER. THAT IS NOT THE JURORS' CREDIBILITY. WHAT DO YOU HAVE HERE? ONE STATUTORY MENTAL HEALTH MITIGATOR, ONLY TESTIFIED TO BY ONE OF THE TWO EXPERTS, DR. HYDE, WHO I SUBMIT WAS MORE CREDIBLE THAN DR. ICEENSTEIN, DID NOT TESTIFY THAT THE EMOTIONAL DISTURBANCE EVEN REACHED AN EXTREME LEVEL, SO YOU HAVE GOT ONE STATUTORY MENTAL HEALTH MITIGATOR AGAINST FOUR STRONG AGGRAVATING FACTORS, INCLUDING HEINOUS, ATROCIOUS AND KRUCHLT HE BURNED MR. SOUTH MOORE TO DEATH, INFLICTING A LINGERING

DEATH. THE PRIOR VIOLENT FELONIES AGAIN ARE ABSOLUTELY HORRENDOUS. THESE FACTS TYPICALLY GIVE YOU A 12-0 RECOMMENDATION. NOW WE ARE GOING TO HOLD A NEW PENALTY PHASE FOR A SINGLE STATUTORY MENTAL HEALTH MITIGATOR? I DON'T THINK SO. I THINK THE JUDGE ABROGATED HER RESPONSIBILITY IN THIS CASE OF ASSESSING THE CREDIBILITY, AND, AGAIN, IF I CAN GO BACK, I CAN ASSERT THAT THERE WAS NO CHANGE IN THE EXPERT'S TESTIMONY THAT TRIAL COUNSEL DID OBTAIN. NONE. THEY BOTH TESTIFIED AT THE HEARING. MR. HENNIS COULD HAVE ASKED THEM, WELL, BASED ON THIS INFORMATION, THIS MATERIAL, WOULD YOUR OPINION CHANGE AT ALL? NO. MOREOVER, THE STATE PRESENTED DR. ANSLEY, WHO SAID THERE IS NO EVIDENCE OF BRAIN DAMAGE. THERE IS NO MAJOR MENTAL ILLNESS HERE. NOTHING. SO WHAT YOU ARE TALKING ABOUT IS HIGHLY-IMPEACHED TESTIMONY, WHICH OPENS UP A PANDORA'S BOX OF NEGATIVE TESTIMONY, SO WE ARE GOING TO GIVE THIS MAN A NEW PENALTY PHASE FOR THAT?

CHIEF JUSTICE: I BETTER ASK YOU TO BAUS BECAUSE OF THE LIMITED AMOUNT OF -- TO PAUSE, BECAUSE OF THE LIMITED AMOUNT OF TIME IN THE CROSS APPEAL.

THANK YOU, YOUR HONOR.

THE STATE WOULD HAVE A VERY DIFFERENT VIEW BY THE SENTENCING ORDER BY THE JUDGE. I WILL WILLIAM HENNIS FROM CCRC SOUTH FOR MR. CONEY. MAYBE START WITH THE PREJUDICE ISSUE. JUST BRIEFLY, ABOUT DR. HYDE'S TESTIMONY, I THINK IF YOU LOOK AT THE TESTIMONY, YOU WILL SEE THAT DR. HYDE TESTIFIED THAT HE BELIEVED THAT VIRTUALLY EVERYONE WHO IS IN PRISON HAS SYMPTOMS OF ANTISOCIAL PERSONALITY DISORDER, AND, ALSO, AS TO HIS OPINION, HE TESTIFIED THAT THERE WAS NOTHING INCONSISTENT IN DR. ICEENSTEIN'S FINDINGS, IN HIS OPINION. AS TO DR. ANSLEY, I THINK YOU WILL ALSO FIND, IF YOU LOOK AT HER TESTIMONY, SHE TESTIFIED SHE RELIED ON DR. ICEENSTEIN'S TESTING, THAT SHE HAD NO QUARREL WITH THE VALIDITY OF HIS TESTING. SHE DIDN'T THINK MR. CONEY WAS IN ANY WAY FALSIFYING THE RESULTS OF THE TEST. SHE SAID --

WHY ISN'T THIS JUST A HINDSIGHT CASE, THAT IS THAT WE TYPICALLY SAY THAT, SURE, A CASE COULD BE TRIED BETTER OR DIFFERENT. YOU KNOW THAT, SOMEBODY ELSE TAKES A LOOK AT IT, AND THAT THEY WOULD APPROACH IT A DIFFERENT WAY, AND NOW THEY HAVE HAD OTHER EXPERTS LOOK AT THE DEFENDANT AND THEY HAVE INVESTIGATED FURTHER. WHY ISN'T THIS JUST ONE OF THOSE CASES, WHERE WE SAY THAT IT IS NOT A MATTER OF WHETHER ANOTHER LAWYER WOULD HAVE DONE IT DIFFERENTLY. IT IS A MATTER OF WHAT THIS LAWYER DID AND WHETHER, WHAT THE LAWYER DID, BOTH AS TO THAT CONDUCT AND THEN AS TO THE PREJUDICE THAT IS CAUSED, YOU KNOW, ACTED WITHIN THIS REASONABLE RANGE THAT THE U.S. SUPREME COURT HAS SET OUT AS THE STANDARD. WHY ISN'T THIS JUST ANOTHER HINDSIGHT CASE?

I THINK, IF YOU LOOK AT JUDGE SMITH'S ORDER, JUSTICE ANSTEAD, SHE MAKES THAT PRETTY CLEAR. RIGHT UP FRONT, LONG BEFORE THE PREJUDICE SECTION IN HER ORDER, SHE POINTS OUT THAT THE MEDICAL EVALUATIONS BY DR. DAVID AND BY DR. MUTTER, IN HER OPINION, WERE NOT COMPETENT, AND SHE JUST SAYS THAT FLAT-OUT, AND SHE ALSO SAYS THAT THE TESTIMONY BY THE FAMILY MEMBERS THAT THE STATE MENTIONED SUPPLIED NO EVIDENCE OF MITIGATING CIRCUMSTANCES. SO YOU HAVE TO REMEMBER THAT THIS IS THE TRIAL JUDGE WHO HEARD ALL THAT ORIGINALLY. NOW, SHE HEARS DR. DAVID AND DR. MUTTER AT THE EVIDENTIARY HEARING, AS WELL AS THE OTHER EXPERTS.

SHE WAS THE ORIGINAL TRIAL JUDGE?

SHE WAS THE ORIGINAL TRIAL JUDGE, JUSTICE PARIENTE, SO THE STANDARD HERE, CONFIDENCE IN THE OUTCOME BEING UNDERMINED, IS PROVEN BY THE MATERIAL THAT SHE HEARS FROM THE NEW EXPERTS, INCLUDING THE STATE'S EXPERTS, AND THIS IS NOT JUST SOMETHING MILD. I MEAN, YOU HAVE TO LOOK AT WHAT DR. HYDE TESTIFIES TO. HE TESTMIZE THAT THERE IS A

CONGENITAL BRAIN ABNORMALITY THAT, THERE IS FRONTAL LOBE DYSFUNCTION, THAT THERE ARE NEUROLOGICAL ABNORMALITIES AND EVIDENCE OF MAJOR PSYCHIATRIC ILLNESS, AND DR. EISENSTEIN POINTS OUT THAT, WITH HIS PSYCHOLOGICAL TESTING, THIS MAN HAS AN IQ SCORE ON WASE THREE THAT RANGES FROM 100 VERBAL TO 75 PERFORMANCE TO 88 FULL SCALE. HE SAYS THE REASON THAT IS IMPORTANT IS IT IS SCATTERED BEFORE THE VERBAL AND THE PERFORMANCE AND INDICATES THAT THERE IS BRAIN DAMAGE, AND DR. HYDE AGREES WITH THAT AND DR. ANSLEY EVEN SAYS THAT IS SIGNIFICANT IN HER TESTIMONY.

WHAT WAS THE EVIDENCE AT THE PENALTY PHASE, CONCERNING THE PRIOR VIOLENT FELONY?

THE, ARE YOU TALKING ABOUT AT THE ORIGINAL TRIAL?

RIGHT.

AT THE ORIGINAL TRIAL, THE MOTHER OF THE CHILD VICTIM, IN THE 1970s CASE TESTIFIED, AND THE VICTIM, I BELIEVE, ALSO TESTIFIED.

THAT IS THE 12-YEAR-OLD CHILD?

YES. OF COURSE SHE WAS AN ADULT BY THE TIME OF THE TRIAL IN THE EARLY 1990s.

AND SHE WAS 18 BY THAT TIME?

YES. SHE WAS WELL OVER 18. IT WAS SOME 15 YEARS LATER, I GUESS, BECAUSE IT WAS A 1976 CASE.

SHE TESTIFIED AS TO THE RAPE?

YES, YOUR HONOR, ALTHOUGH SHE HAD NO ACTUAL RECOLLECTION, AS I RECALL, OF SOME OF THE EVENTS. THAT IS WHY THE MOTHER WAS ALSO ALLOWED TO TESTIFY BY THE COURT.

WHAT IS THE, IS THERE ANY RELEVANCE TO, YOU KNOW, A LOT OF TYPES IN THESE CASES, WE ARE, WE FIND THERE ARE ATTORNEYS WHO ARE, YOU KNOW, HAVE VERY SUBSTANTIAL BACKGROUNDS IN TRYING CAPITAL CASES. YOU KNOW, MAYBE THE HEAD OF THE PUBLIC DEFENDERS OFFICE. THE JUDGE MADE SOME STATEMENTS BY THE ORIGINAL TRIAL JUDGE, WHO WAS SOMEBODY THAT WAS SUBSEQUENTLY INVOLVED IN A JUDICIAL CORRUPTION SCANDAL, AND THERE SEEMS, IN BRINGING THAT OUT, AND THE FACT THAT THIS WAS THE FIRST CAPITAL CASE HE HAD HANDLED, THAT THERE IS SOME, THAT THE JUDGE'S VIEW WAS, AS OPPOSED WE SEE LOT OF ORDERS WHERE THIS ISN'T REALLY A GREAT LINE OF STANDING ATTORNEY, WHICH SEEMS TO INFLUENCE THE JUDGE. WHAT DO WE DO WITH SORT OF THIS IMPLIED THREAD HERE THAT THIS WAS SOMEBODY WHO HAD NO BUSINESS THAT WAS BEING APPOINTED TO HANDLE THIS CASE, AND THAT YOU KNOW, HE REALLY DIDN'T DO ANYTHING UNTIL THE END OF THE GUILT PHASE, AND NOT BECAUSE OF A STRAEJT I REASON BUT JUST BECAUSE HE REALLY WASN'T COMPETENT.

JUSTICE PARIENTE -- STRATEGY REASON, BUT JUST BECAUSE HE REALLY WASN'T COMPETENT.

JUSTICE PARIENTE, I BELIEVE THAT WAS BRIEFED, AND AS YOU RECALL AT THE HEARING, THE CONFLICT CLAIM, WE WERE ONLY ALLOWED A HEARING ON A VERY NARROW AREA OF THE CONFLICT CLAIM. THAT IS WAS THERE A CONFLICT OF INTEREST THAT AFFECTED CASIOBEL'S DECISION NOT TO GET MR. CONEY EVALUATED PRETRIAL AND DID IT HAVE ANY IMPACT ON THE CHOIFS MENTAL HEALTH EXPERTS THAT HE ENDED UP CHOOSING BETWEEN THE GUILT PHASE AND PENALTY PHASE, AND IN MY BRIEF, I TRIED TO EXPAND THAT CONSIDERABLY, BECAUSE THE CONFLICT CLAIM FROM OUR PERSPECTIVE WENT FROM GUILT PHASE AND PENALTY PHASE MUCH MORE EXTENSIVELY THAN THAT, AND AS YOU POINTED OUT, WE TRIED TO PROFFER A

CONSIDERABLE AMOUNT OF EVIDENCE AT THE EVIDENTIARY HEARING ABOUT THE RELATIONSHIP BETWEEN MR. CASIOBEL AND THE ORIGINAL TRIAL JUDGE, MR. GOOD DEAL BERT, WHO WAS THE ORIGINAL -- MR. GELBERT, WHO WAS THE ORIGINAL TRIAL JUDGE UP UNTIL 1991, AND CAUGHT UP IN THE FEDERAL CASES --

NOW YOU ARE GOING INTO YOUR CROSS APPEAL. WHAT I AM WANTING TO KNOW IS TO WHAT EXTENT, IN TERMS OF THE JUDGE'S FACTUAL FINDINGS AND THE ISSUE OF WHETHER IT FELL WITHIN THE ACCEPTABLE STANDARDS, IS THE FACT THAT THIS WAS SORT OF A FIRST APPOINTMENT, AND IT LOOKS LIKE THE JUDGE IS SAYING THIS WAS SORT OF A POLITICAL APPOINTMENT.

IF I UNDERSTAND YOUR QUESTION CORRECTLY, I THINK, IF YOU LOOK AT THE FACTS THAT JUDGE SMITH DIDN'T ACTUALLY GET THIS CASE UNTIL JANUARY OF 1992, ABOUT THREE WEEKS BEFORE IT WENT TO TRIAL, AND THE VERY FIRST HEARING THAT CASIOBELL HAD BEFORE HER, WAS THE HEARING AT WHICH HE WAIVED MR. CONEY'S PRESENCE AND THEN COMPLAINED ON THE RECORD ABOUT MR. CONEY'S COMMUNICATION PROBLEMS WITH HIM AND THEN TOLD THE JUDGE THAT HE HAD, IN FACT, HAD MR. CONEY EVALUATED BY A PSYCHIATRIST, WHEN HE HAD NOT, SO I THINK THAT FROM HER PERSPECTIVE AT THE EVIDENTIARY HEARING, LOOKING BACK ON THAT AS HER FIRST CONTACT WITH THE TRIAL LAWYER IN THIS CASE, A LOT OF HER BASIS FOR HER FEELING THAT WHAT HE DID FROM THERE ON OUT AND BEFORE THEN WAS BASED ON THE FACT THAT HE HAD ACTUALLY MISREPRESENTED HIMSELF TO THE COURT. AND I THINK THAT THAT CARRIED OVER TO THE PENCIL PHASE, WHEN, IN FACT, HE -- TO THE PENALTY PHASE, WHEN IN FACT HE PRESENTED THE FACT TO THE COURT THAT THESE TWO EXPERTS HAD EVALUATED MR. CONEY BUT NEVER SHOWED MR. CONEY THE REPORTS AND HAD THEM SEALED IN THE RECORD WITHOUT THE JUDGE OR ANYONE ELSE SEEING THEM, SO IT WAS NEVER ANYBODY THAN HIM AND THE TWO EXPERTS, WHO KNEW ABOUT THE FACT THAT DR. MUTTER WAS IN FACT NOT LOOKING AT MITIGATION BUT WAS LOOKING AT COMPETENCY ISSUES AND IN FACT, DR. MUTTER SAYS IN HIS REPORT THAT ANYBODY WHO IS PROCLAIMING INNOCENCE THERE, IS NOT ANY MITIGATION ISSUES ANYWAY, AND HE THOUGHT MR. CONEY OUGHT TO HAVE A POLYGRAPH, AND IN THE OTHER REPORT, DR. DAVID, YOU MAY RECALL, SAYS THAT HE DID HIS EVALUATION, HIS NEUROLOGICAL ON MR. CONEY WHEN MR. CONEY WAS IN HANDCUFFS AND SHACKLES. SO I THINK ALL THOSE THINGS COMBINED, WHEN THE JUDGE LOOKED BACK, READ THE REPORTS FOR THE FIRST TIME IN POSTCONVICTION, HEARD THOSE TWO EXPERTS, HEARD MR. CASIOBEL, DEFINITELY LED TO HER BELIEF THAT CONFIDENCE IN THE OUTCOME WAS UNDERMINED BY THE JURY NOT HEARING ANY OF THE FAMILY MEMBERS WHO DR. EISENSTEIN REVIEWED THE AFFIDAVITS OF AND RELIED ON FOR HIS TESTIMONY OR FOR THAT PARTY, THE FAMILY MEMBERS THAT TESTIFIED IN THE ORIGINAL TRIAL, WHO, WHEN WE PUT CASIOBEL ON THE STAND AND HE TALKED ABOUT HIS NOTES THAT HE HAD TAKEN WITH THE FAMILY MEMBERS, THEY WERE THE DIAMETRIC OPPOSITE OF WHAT HE WAS ELICITING FROM THEM ON THE STAND.

DID THIS LAWYER GO ON TO DO MORE CAPITAL CASES?

HE HAS CONTINUED TO DO CAPITAL CASES, I BELIEVE, YES. IN FACT, I THINK HE HAS HAD SOME SUCCESS IN DOING CAPITAL CASES MORE RECENTLY.

BRIEFLY SUMMARIZE THE CSE THAT, AS YOU SEE IT, THAT SUPPORTS THE JUDGE'S FINDING.

WELL, I BELIEVE THAT, AS TO THE PREJUDICE PRONG, WHAT I TRIED TO DO BEFORE WAS POINT OUT THAT THE QUALITY OF THE TWO EXPERTS THAT TESTIFIED AT THE EVIDENTIARY HEARING, ALONG WITH DR. ANSLEY AS WELL, PROVIDED SPECIFIC DIAGNOSES OF MENTAL HEALTH CONDITIONS, SEVERE MENTAL HEALTH CONDITIONS THAT MR. CONEY EXHIBITED ON EXAMINATION, AND DOCUMENTED THAT WITH RECORDS GOING BACK TO 1965, FROM DOC, SHOWING THAT HE HAD CONTINUED INSTANCES OF PSYCHOLOGICAL TREATMENT. THAT HE HAD BEEN ON PSYCH TROFK DRUGS FOR A -- PSYCHO TROFK DRUGS FOR A NUMBER -- PSYCHOTROPHIC

DRUGS FOR A NUMBER OF TIMES AND THEY WERE STARTING TO GET AN IDEA OF WHO THIS MAN WAS. IN FACT IN 1964, WHEN HE FIRST WENT INTO PRISON, WERE ABOUT 70, SO BY THE TIME DR. EISENSTEIN WAS DOING HIS EVALUATION, HE COMMITTED THAT THIS IS SOMEBODY WHO CAME FROM BRICHB A VERY POOR BRAG GROUND -- FROM PRISON, WITH A VERY POOR BACKGROUND SETTING, DESPITE THE FACT THAT HE WAS IN PRISON, SO I THINK THAT WAS ADDRESSED, TOO.

ARE YOU GOING TO BRIEFLY ADDRESS YOUR CROSS APPEAL?

LET ME BRIEFLY TALK ABOUT THAT. THE CONFLICT --

BEFORE, IT WAS ALSO A FINDING THAT ONE OF THE EXPERTS, DR. DAVID, HAD SAID THAT THERE SHOULD BE NEUROLOGICAL PSYCH AT THE TIME TESSING, AND THAT WASN'T FOLLOWED UP -- PSYCH TESTING, AND THAT WASN'T FOLLOWED UP ON BY TRIAL COUNSEL.

THAT IS ONE OF THE REASONS THAT WE GOT SOMEONE IN TO SEE HIM POSTCONVICTION. THERE WAS NO TESTING DONE BY EITHER DR. MUTTER --

THAT WOULD GO TO HER FINDING THAT TRIAL COUNSEL WAS NOT DEFICIENT -- WAS DEFICIENT IN NOT FOLLOWING UP ON THIS.

YES, AND I THINK SHE DID MEN'S THAT IN HER ORDER AS WELL. I WANT TO TOUCH BRIEFLY ON THE CONFLICT ISSUE. I THINK THAT THE STATE CONTINUALLY POINTS OUT THAT THERE WAS NO IMPAIRMENT OF INTEREST, AND I THINK IF YOU LOOK AT THE OVERALL CASE, THERE WERE A NUMBER OF AREAS IN WHICH THERE WAS IMPAIRMENT OF INTEREST. THERE WAS A FAILURE TO INVESTIGATE MENTAL OR STATE OF MIND DEFENSES AT THE GUILT PHASE, BECAUSE OF THE DECISION NOT TO USE THE EXPERT THAT HAD BEEN APPOINTED BY GEL BECHLT BER. THERE WAS -- BY GELBER. THERE WAS A FAILURE TO COMMUNIQUES KATE WITH THE -- TO COMMUNICATE WITH THE CLIENT IN TWO SPECIFIC INSTANCES.

HOW DO YOU TIE THAT INTO ANY CONFLICT OF INTEREST? I MEAN, THERE ARE ANY NUMBER OF TIMES WHEN A DEFENSE ATTORNEY MAY HAVE SOMEONE EXAMINED AND THEN NOT USE THE EXPERT'S TESTIMONY, WHEN IT ACTUALLY COMES TO THE TRIAL OR THE PENALTY PHASE, AND SO HOW DO YOU TIE THAT KIND OF DECISION INTO YOUR CLAIM OF A CONFLICT OF INTEREST?

WELL, THIS IS A SITUATION IN WHICH THERE WAS AN EXPERT APPOINTED IN EARLY 1991, AND MORE THAN A YEAR LATER, THE TRIAL ATTORNEY HAD NOT GOTTEN THE EXPERT TO DO THE EVALUATION AND STILL HAD THE $500 THAT THE JUDGE HAD APPROVED IN THE ACCOUNT TO PAY FOR HIM, AND DURING THAT PERIOD OF TIME, HE FAILED TO COMMUNICATE WITH HIS CLIENT. WHAT IS MOST IMPORTANT IS TO LOOK AT THE DATES FROM MARCH OF '91 THROUGH JANUARY OF '92, WHEN HE DIDN'T MEET WITH CONEY AT ALL, AND THAT IS THE VERY TIME WHEN HE WAS INVOLVED INCOME COURTROOM, HIS NAME APPEARED IN THE PAPER, AND FOR MONTHS HE DIDN'T GO TO SEE CONEY. CONEY TRIED THREE TIMES DURING THAT PERIOD OF TIME TO DISCHARGE HIM FROM THE CASE.

HIS OWEN PERSONAL PROBLEMS WAS THE CON -- HIS OWN PERSONAL PROBLEMS WAS THE CONFLICT OF INTSFLES.

HIS OWN -- OF INTEREST?

HIS OWN PERSONAL PROBLEMS TIED WITH GELBER. GELBER HAD APPOINTED HIM, AND UNLESS HE STAYED ON THE CASE, GELBER WOULD NOT GET THE KICKBACK AND HE WOULD NOT GET WHAT WOULD BE PAID TO HIM ON HIS FIRST CAPITAL CASE PENALTY PHASE. HE NEVER TOLD CONEY ABOUT HIS INVOLVEMENT IN COURT BROOMER AS A DEFENDANT.

DIDN'T THAT COME UP?

DURING JURY SELECTION, THAT CAME UP AND HE WAIVED FOR CONEY PRECISELY BECAUSE AN AGENT'S WIFE, WHO WAS ON THE STAND, TESTIFIED THAT HE HAD BEEN INVOLVED IN THE COURT BROOM, AND IT WAS CLEAR THAT THE REASON HE ASKED FOR THE SIDE BAR WAS BECAUSE HE DIDN'T WANT CONEY TO HEAR ABOUT HIS INVOLVEMENT IN COURT BROOM. CONEY HAD ALREADY TRIED TO DISCHARGE HIM THREE TIMES, SO THAT WOULD HAVE BEEN ANOTHER ATTEMPT, I AM SURE, BY CONEY TO DISCHARGE HIM, GIVEN THE FACT THAT HE HAD BEEN NAMED IN THIS CORRUPTION SCANDAL.

YOU USED THE FACT THAT MR. CONEY HAD TRIED TO HAVE HIM DISCHARGED A COUPLE OF TIMES, AS A PART OF THIS CONFLICT ISSUE.

AND SEVERAL TIMES IN FRONT OF JUDGE GELBER, TOO. YOU NEED TO UNDERSTAND THAT.

WHAT WAS THE BASIS OF MR. CONEY'S ATTEMPT TO HAVE HIM DISCHARGED?

DECEMBER SATISFACTION WITH THE -- DISSATISFACTION WITH THE LACK OF INVESTIGATION THAT WAS BEING PERFORMED BY TRIAL COUNSEL. IF YOU LOOK AT THE RECORD, ALL OF THESE INMATES THAT WERE SUPPOSEDLY INTERVIEWED BY THE INVESTIGATOR FOR TRIAL COUNSEL, THOSE INTERVIEWS DIDN'T HAPPEN UNTIL JANUARY 1992, WEEKS BEFORE THE TRIAL, AND IN FACT THE INVOICE, THE ONLY RECORD OF ANY INTERVIEWS, THERE IS NO WRITTEN RECORD OF INTERVIEWS ON ANY OF THESE INMATES ANYWHERE, THE INVOICE SAYS THAT THE INVESTIGATOR SAW 50 OF THEM IN ONE DAY. NOW, I AM NOT SURE, BUT I DON'T THINK YOU CAN DO A VERY DETAILED INVESTIGATION, SEEING 50 PEEP IN ONE DAY, ESPECIALLY WHEN THERE IS NO REPORT, AND THAT TIES IN -- PEOPLE IN ONE DAY, ESPECIALLY WHEN THERE IS NO REPORT, AND THAT TIES IN WITH ANOTHER ISSUE OF THE CROSS APPEAL, WHICH IS THE FAILURE TO GIVE US AN EVIDENTIARY HEARING ON THE DONALD SMITH CLAIM AT R-85. THIS IS A INMATE AT DCI, WHO TOLD US THAT HE SAW THE ROOMMATE OF PATRICK SOUTH WORTH LEAVE THE CELL AFTER THERE WAS A PUFF OF SMOKE, STOP, SHUT THE DOOR, SHUTTING PATRICK SOUTH WORTH IN THERE, WHERE HE BURNED, AND THE JUDGE DIDN'T GIVE US AN EVIDENTIARY HEARING ON THAT CLAIM. THE STATE ARGUED THAT THE FILES AND RECORDS, PURSUANT TO GASKIN,CLUSIVELY REFUTE -- TO GASKIN, CON COLLUSION I FEEL REFUTED THAT CLAIM -- CHRUFL REFUTED THAT CLAIM -- CONCLUSIVELY REFUTEED THAT CLAIM. THEY TRIED TO MAKE A CASE THAT THE DOOR WOULD AUTOMATICALLY SLAM SHUT.

DID DEFENSE COUNSEL KNOW OF THIS PARTICULAR INMATE?

DONALD SMITH WAS ONE OF THE PEOPLE LISTED, OUT OF THE 70 OR 80 PEOPLE ON THE INVOICE THAT HIS INVESTIGATOR CLAIMED TO HAVE TALKED TO.

THERE WAS NO WRITTEN STATEMENT OR DEPOSITION TAKEN OF HIM?

NO WRITTEN STATEMENT. NO DEPOSITION. NO NOTES OF ANY KIND FROM THE INVESTIGATOR. THERE IS NOTHING IN THE RECORD, BEYOND THE INVOICE, INDICATING WHAT, IN FACT, WAS DONE WITH THOSE INMATES, AND IN FACT, THE TESTIMONY BY CASIOBEL AT THE EVIDENTIARY HEARING WAS EQUIVOCAL. HE FIRST SAID THAT HE HAD INTERVIEWED ALL OF THE INMATES AND THEN CORRECTED HIMSELF AND SAID, WELL, IT WAS MY INVESTIGATOR, AND THIS WAS THE INVESTIGATOR THAT ALSO TESTIFIED THAT DIDN'T DO ANY WORK AT ALL FOR THE PENALTY PHASE. HE HAD NO INVESTIGATOR FOR THE PENALTY PHASE, SO WE BELIEVE THAT WE SHOULD HAVE A HEARING ON THE DONALD SMITH CLAIM, BECAUSE CLEARLY IT IS HIS STATEMENTS, AS THERE, AS WE PUT THEM IN OUR 3.850 ARE EVIDENCE OF MR. CONEY NOT BEING THERE, BECAUSE HE DIDN'T SEE CONEY, AND THERE ARE NO EYEWITNESSES ANYWHERE THIS THIS CASE TO MR. CONEY SET HAD GONE MR. SOUTH WORTH AFFAIR -- MR. SOUTH WORTH AFTER IRE. THAT IS ANOTHER REASON THAT WE SHOULD HAVE AN EVIDENTIARY HEARING ON THE GUILT PHASE CLAIM AS WELL AS SOME OF THE OTHER GUILT PHASE CLAIMS RELATING TO THE PRISON

WITNESSES, WHO TESTIFIED AS TO MR. CONEY'S INVOLVEMENT IN THE BURNING INCIDENT. I THINK WE LAID OUT TO SOME DEGREE, THE PRISON RECORDS THAT WE HAD GOTTEN THAT INDICATED BENEFITS THAT SOME OF THESE PRISONERS HAD RECEIVED. DCI WAS A MENTAL HEALTH PRISON. MOST EVERYONE WHO WAS THERE HAD SOME SORT OF MENTAL HEALTH PROBLEM,, AND MANY OF THE PRINCIPLES -- AND MANY OF THE PRINCIPALS WHO TESTIFIED AGAINST MR. CONEY DID HAVE AN AX TO GRIND AGAINST HIM OR AGAINST OTHER PEOPLE IN THE PRISON, SO WE LAID THAT OUT.

CHIEF JUSTICE: THANK YOU VERY MUCH.

JUSTICE SHAW, ON BEHALF OF THE CAPITAL COLLATERAL OFFICES, WE ARE SORRY YOU ARE LEAVING AND APPRECIATE THE LONG SERVICE YOU HAVE HAD TO THE STATE.

THANK YOU VERY KINDLY.

I WOULD LIKE TO ADDRESS JUSTICE PARIENTE. YOU MENTION THAT THE TRIAL COUNSEL IS PERHAPS INEXPERIENCED IN THIS CASE, WHILE TRUE, TRIAL DEFENSE COUNSEL MAY HAVE NOT TRIED A PENALTY PHASE BEFORE, BUT HE HAD TRIED FIRST-DEGREE MURDER CASES.

I THINK WHAT I WAS REALLY, AND I AM TRYING, I DON'T WANT TO DISPARAGE ANYBODY, BUT A LOT OF TIMES, AGAIN, IN THESE ORDERS, WE SEE TRIAL JUDGES SAYING THIS GUY OR WOMAN THAT WAS APPOINTED IS SOMEBODY THAT I HAVE KNOWN FOR YEARS AND HAS THIS GREAT REPUTATION IN THE COMMUNITY AND HAS TRIED ALL THESE CASES, AND WE TAKE THAT AND REALIZE THEY ARE EVALUATING THAT AND SAYING, WELL, THIS WAS A STRATEGY DECISION, OR THIS IS WHY WE ARE GOING TO ACCEPT THE EXPLANATION FOR WHY THE LAWYER DID THIS OR THAT, AND IT APPEARED TO ME THAT THIS JUDGE, HAVING PERSONAL FAMILIARITY WITH THE LAWYER BY BEING THE JUDGE INVOLVED AND KNOWING THE CIRCUMSTANCES IN DADE COUNTY, WAS TAKING THAT INTO CONSIDERATION, IN EVALUATING THE CREDIBILITY AS TO WHETHER THIS WAS AN ORDINARY HINDSIGHT CASE AS, AS JUSTICE ANSTEAD WAS REFERRING, OR WHETHER YOU HAVE A QUESTION OF HOW HARD HE WAS REALLY WORKING FOR HIS CLIENT, AND YOU KNOW, THAT WAS MY CONCERN, NOT NUMBERS BUT JUST REALLY HOW, WHETHER THIS GUY WAS PROVIDING THE PROPER PRESENTATION.

YOUR HONOR, IF I MAY, I ENCOURAGE THIS COURT TO GO BACK AND READ OVER THE PENALTY PHASE. SEVEN WITNESSES WERE PRESENTED. MR. CONEY HAS BEEN INCARCERATED SINCE 1965. HE PRESENT ADD VERY GOOD PICTURE. WAS ABLE TO HUMANIZE CONEY, AND THE RESULT IS A CLOSE 7-5. NOW, WHAT YOU HAVE IS THE TRIAL COURT IGNORED THE TRIAL DEFENSE COUNSEL'S STRAEJT I DECISION AND DIDN'T EVEN ADDRESS IT IN HER ORDER, BECAUSE TRIAL COUNSEL TESTIFIED THAT IT WAS ABSOLUTELY CRITICAL TO HIM TO KEEP THESE D.O.C. RECORDS OUT OUT AND NOT OPEN A DOOR FOR THE STATE, SO WHAT HAPPENED WAS EVEN TRIAL COUNSEL MENTIONED BELOW THAT DURING THE PENALTY PHASE THE PROSECUTOR MENTIONED TO HIM I WAS HOPING YOU WOULD GET INTO THOSE PRISON RECORDS BECAUSE I WAS GOING TO HAMMER YOU WITH THEM, AND WHAT HAPPENED DURING THE POSTCONVICTION HEARING. THE DEFENSE EXPERTS WERE HAMMERED WITH THOSE RECORDS. THEY SHOW ANTISOCIAL PERSONALITY DISORDER. PRIOR SEXUAL ASSAULTS ON INMATES, MANIPULATIVE BEHAVIOR. HE BLEW UP HIS TOILET. HE FAKED ILLNESSES. AN MMPI SHOWS A SPIKE SCALE FOUR, WHICH IS THE PSYCHOPATH DEVIATE SCALE. THAT IS NOT THE INFORMATION THAT YOU WANT IN FRONT OF A JURY, AND TRIAL COUNSEL MADE A REASONABLE DECISION TO KEEP THOSE RECORDS FROM HIS EXPERTS. AND THE TRIAL COURT FAILED TO MAKE THAT ANALYSIS AND JUST SIMPLY SAID THAT SOMETHING MORE, SOMETHING DIFFERENT COULD HAVE BEEN DONE, AND BECAUSE IT WAS A CLOSE VOTE, I AM GOING TO LET THE JURY ASSESS ALL OF THIS INFORMATION, EVEN THOUGH THE CREDIBILITY OF HIS EXPERTS WAS RECOGNIZED BY THE TRIAL COURT AS SEVERELY CHALLENGED AND THAT THIS NEGATIVE INFORMATION WAS GOING TO COME IN. SHE PLAYED A NUMBERS GAME. INSTEAD OF ASSESSING WHETHER OR NOT ON BALANCE, THE REMAINING

AGGRAVATING AND MITIGATING FACTORS WOULD LEAD A SENTENCE OR TO -- A SENTENCOR TO CONCLUDE IN OTHER THAN DEATH AND THAT IS THIS COURT'S DECISION IN CHERRY V STATE, SO WHAT YOU HAVE WITH THE BEST CASE SCENARIO DEFENSE IS FOUR OF THE AGGRAVATORS, TWO OF THE STRONGEST IN FLORIDA'S SENTENCING CAPITAL, HAC AND PRIOR VIOLENT FELONY, AGAINST ONE EXTREME OR SEVERE EMOTIONAL DISTURBANCE FACTOR. NOW, COUNSEL INDICATED THERE WAS A FLAW IN PRESENTING SOME OF THE FAMILY MEMBERS' TESTIMONY DURING THE PENALTY PHASE. THERE IS NO EVIDENCE TO THAT EFFECT IN THIS RECORD. COLLATERAL COUNSEL FAILED TO CALL A SINGLE ADDITIONAL FRIEND OR FAMILY MEMBER AT THE EVIDENTIARY HEARING, SO THERE IS NO FACTUAL BASIS TO SHOW THAT TRIAL COUNSEL'S PERFORMANCE IN PRESENTING THE SEVEN FAMILY MEMBERS AND FRIENDS DURING THE ORIGINAL PENALTY PHASE WAS INACCURATE. TRIAL COUNSEL SEEMS TO BE RELYING ON AFFIDAVIT, BUT THOSE WERE NOT SUBMITTED IN ANY MANNER TO PRESERVE, SIMPLY TO BACK UP HIS OPINION, SO THIS COURT NOR THE TRIAL COURT COULD ASSUME THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PREVENT -- TO PRESENT FAMILY MEMBER TESTIMONY. IT EASY ESSENTIALLY BOILED DOWN TO TRIAL COUNSEL RECEIVED MONEY FOR REPRESENTING MR. CONEY, AS ALL PRIVATELY-NAMED DEFENSE ATTORNEYS DO, AND HE RECEIVED MONEY FOR REMAINING ON THE CASE. HE WOULD WANT TO REMAIN ON THE CASE AND DO A GOOD JOB AND NOT BE REMOVED. THAT IS WHAT THE ALLEGED CONFLICT BOILS DOWN TO, WHAT MR. CONEY HAS FAILED TO SHOW, A SINGLE ADVERSE INTEREST WAS HELD BY TRIAL COUNSEL TO HIS OWN.

CHIEF JUSTICE: GOING TO HAVE TO ASK YOU TO BRING IT TO A CLOSE ON THAT NOTE.

THANK YOU, YOUR HONOR. IN SUM, AGAIN, I HAVE GONE THROUGH THE PENALTY PHASE, AND I ENCOURAGE THIS COURT TO LOOK AT THAT TESTIMONY. TRIAL COUNSEL WAS NOT INEFFECTIVE. THANK YOU. YOUR HONOR, I ECOTHE SENTIMENTS OF COLLATERAL COUNSEL MR. HENNIS. YOU WILL BE MISSED, JUSTICE SHAW.

CHIEF JUSTICE: ON THAT POSITIVE NOTE, THE COURT WILL TAKE ITS REGULAR 15-MINUTE RECESS BEFORE HEARING THE LAST TWO CASES. THE COURT WILL STAND IN RECESS. PECULIAR MARCH PLEASE RISE.0ô&