Bruce Douglas Pace v. State of Florida

ICE THAT OCCURRED TO MR. PACE. THE ARGUMENT GOES ON, AND ONE THING IS THAT ALL OF THE MITIGATION THAT WAS ARGUED AT THE TIME OF TRIAL IN MR. PACE'S PENALTY PHASE, ALL OF IT WAS REJECTED BY THE TRIAL COURT. THE TRIAL COURT FOUND THAT NONE OF THE MITIGATION PRESENTED AT MR. PACE'S TRIAL WAS ESTABLISHED, AND THIS COURT, IN 1992, ON MR. PACE'S DIRECT APPEAL, AFFIRMED THAT, ALTHOUGH IT WAS A 4-AFFIRMANCE, THE THREE DIS -- A 4-3 AFFIRMANCE, THE THREE DISSENTERS DISSENTING TO THE CLAIM IN MR. PACE'S APPEAL THAT, ONE, IT WAS IMPROPER FOR THE -- -- IMPROPER FOR THE LOWER COURT TO REJECT THAT, AND THE OTHER WOULD BE THE AFFIRMANCE.

WE CAN'T REVISIT THAT NOW, CAN WE?

IT IS SOMETHING TO KEEP IN MIND, BECAUSE I BELIEVE IT IS SOMETHING THAT MR. PACE'S JURY WOULD NEVER HAVE HEARD WEIGHED INTO THE BALANCING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES BUT ALSO TAKEN INTO ACCOUNT DURING THIS COURT'S PROPORTIONALITY REVIEW, AND, REMEMBER, IT WAS THE THREE JUSTICES WHO DISSENTED, THEY DID DISSENT OVER THE PROPORTIONALITY OR THE ISSUE THAT MR. PACE'S MURDER DEATH SENTENCE WAS NOT PROPORTIONATE.

TELL US ABOUT THE EVIDENTIARY HEARING. WHO TESTIFIED.

AT THE EVIDENTIARY HEARING, MR. PACE PRESENTED UNDON'T VERTED, UNCONTRADICTED EVIDENCE FROM SEVERAL -- UNCONTROVERTED, UNCONTRADICTED EVIDENCE FROM SEVERAL WITNESSES, THE TWO DOCTORS WHO EXAMINED AT THE TIME OF TRIAL, ONE A PSYCHOLOGIST AND ONE A PSYCHIATRIST. BASED ON THE INFORMATION THAT THEY WERE PROVIDED AT THAT TIME, NOT THAT EITHER DOCTOR HAD TOO MUCH MITIGATION PROVIDE AT THIS TIME FOR HIS PENALTY PHASE.

LET ME ASK YOU THIS QUESTION, DOCTOR LARSON WAS PROVIDED INFORMATION, WAS HE NOT, THAT THERE WAS HEAVY COCAINE USE, HEAVY CRACK USE, BUT NOT TO THE EXTENT, MAYBE, THAT IT WAS ELABORATED UPON DURING THE COLLATERAL HEARING THAT YOU ARE TALKING ABOUT. CAN YOU SHAFER SHARE SOME -- CAN YOU SHARE SOME LIGHT WITH ME AS TO WHAT WAS ACTUALLY PRESENTED TO HIM AT THE TIME HE WAS RETAINED, AND THEN SECONDLY, ABOUT THIS CONCEPT OF MITIGATION, BECAUSE YOU HAVE ASSERTED THAT THEY HAVE NOT GIVEN, THEY DID NOT GIVE THE MENTAL HEALTH EXPERT SUFFICIENT GUIDANCE ON MITIGATION, AND THEN THE TESTIMONY FROM THAT EXPERT THAT, WELL, I UNDERSTOOD MITIGATION WAS ANYTHING THAT COULD BE OF HELP. COULD YOU HELP ME WITH THOSE TWO POINTS.

INITIALLY WITH DR. LARSON, DR. LARSON, FROM WHAT WE CAN TELL FROM BOTH THE RECORD AND THE TESTIMONY AT THE EVIDENTIARY HEARING, DR. LARSON WAS NOT PRESENTED WITH SUBSTANTIAL EVIDENCE THAT MR. PACE HAD A SERIOUS DRUG ADDICTION PROBLEM. IN FACT, OF ALL OF THE INFORMATION THAT DR. LARSON WAS PRESENTED, SOME OF THE STATEMENTS MENTIONED THE FACT, MENTIONED CRACK COCAINE, BUT JUST MENTIONED IT. THE BEST INFORMATION THAT MR., DR. LARSON APPARENTLY GOT OR THE ONLY INFORMATION DR. LARSON GOT THAT MADE IT APPEAR THAT THERE WAS SOME SORT OF ADDICTION PROBLEM GOING ON, WAS FROM MR. PACE, HIMSELF, AND JUST WHEN MR. PACE RECOUNTED TO DR. LARSON HOW LONG HE HAD BEEN USING THE CRACK COCAINE, BUT AS FAR AS, LIKE, ANYTHING TO CORROBORATE WHAT MR. PACE TOLD THE DOCTOR AND AS FAR AS ANY STATES THAT COULD

PROVIDE ANY OBSERVATIONS OF THE KIND OF CONDITION THAT MR. PACE WAS IN BECAUSE OF HIS ADDICTION, WHEN THE MURDER OCCURRED, THAT IS THE INFORMATION THAT DR. LARSON USED TO CHANGE HIS OPINION. HE DID, IN HIS OWN WORDS, HE DID NOT REALIZE THE SERIOUSNESS OF MR. PACE'S ADDICTION.

WAS COUNSEL ASKED ABOUT THAT, AT THE EVIDENTIARY HEARING?

ABOUT WHAT SPECIFICALLY?

ABOUT WHAT HE GAVE DR. LARSON PREVIOUSLY?

I DON'T REMEMBER IF COUNSEL WAS ASKED ASKED ABOUT IT SPECIFICALLY, BUT IT WAS INCLUDED IN THE LETTER TO DR. LARSON. IT DOES OUTLINE. WE ARE NOT DISPUTING WHAT, THERE IS NO DISPUTE OVER WHAT DR. LARSON WAS GIVEN.

I AM ASKING IF COUNSEL GAVE ANY TESTIMONY AT THE HEARING. COUNSEL TESTIFIED AT THE EVIDENTIARY HEARING.

YES, JUSTICE WELLS.

DID HE GIVE ANY TESTIMONY AS TO A THOUGHT PROCESS THAT HE ENGAGED IN AS TO WHAT TO GIVE TO THESE EXPERTS AND WHAT NOT TO GIVE TO THESE EXPERTS?

I AM NOT CLEAR OF ANY SPECIFIC ON ANY SPECIFIC TESTIMONY ON THAT, BUT WHAT I AM CERTAIN FROM THE EVIDENTIARY HEARING, IS THAT THE TRIAL ATTORNEY TESTIFIED THAT HE SUSPECTED HIMSELF, AT THE TIME OF TRIAL, THAT MR. PACE HAD A SERIOUS PROBLEM, AN ADDICTION PROBLEM WITH CRACK COCAINE, BUT ONE THING THAT IS CLEAR FROM THE HEARING AND FROM THE RECORD, IS THAT HE DID NOT INVESTIGATE HOW THAT COULD HAVE BEEN MITIGATING. AS FAR AS WHAT THOUGHT PROCESSES WENT INTO WHAT HE PROVIDED DR. LARSON, IT SEEMED TO BE JUST A GRAB BAG OF WHAT HE HAD TO GIVE. HE PROVIDED TO DR. LARSON.

DIDN'T COUNSEL TEST PIE THAT THE CRACK COCAINE USE, HE BELIEVED, WAS A TWO-EDGED SWORD AND IT COULD COME BACK TO HAUNT HIM IF HE USED THAT AND THEREFORE IT WAS STRATEGIC DECISION NOT TO USE THAT, COUPLED WITH THE FACT THAT THE DEFENDANT, HIMSELF, SAID THAT HE DID NOT USE CRACK COCAINE ON THE DAVE THE MURDER AND THAT HE HAD NOT SUFFERED ANY OF THE EVIDENT EKTS OF CRACK -- EFFECTS OF CRACK COCAINE ON THE DAY OF THE MURDER?

TWO POSITIONS ON. THAT PARDON ME. TRIAL COUNSEL SAM HALL TESTIFIED THAT IT COULD BE A DOUBLE-EDGED SWORD, AS COULD SO MUCH TESTIMONY THAT TRIAL ATTORNEYS HAVE TO DEAL WITH IN PROVIDING WHETHER TO PRESENT, HOWEVER HE COULD HAVE MADE THAT KIND OF STRATEGIC DECISION NOT TO PRESENT THE EVIDENCE THAT WAS EVIDENT AT THE TIME. IN POSTCONVICTION, HE COULD NOT MAKE A DECISION ON WHAT TO PRESENT AT A SPECIFIC EVENT, IF YOU DON'T KNOW WHAT YOU HAVE GOT.

DIDN'T THE CLIENT'S STATES THAT, NUMBER ONE, HE DID NOT SMOKE CRACK COCAINE ON THE DAY OF THE MURDER AND TWO, HE DID NOT SUFFER FROM ANY CRACK COCAINE EFFECTS ON THE DAY OF THE MURDER?

THAT IS NOT WHAT MR. PACE TOLD TRIAL COUNSEL. HE TOLD TRIAL COUNSEL THAT HE HAD NOT SMOKED THAT DAY AND THIS IS NOT WHAT THE LOWER COURT COULD NOT GET STRAIGHT, EITHER. THE ISSUE WAS NOT WHETHER HE WAS UNDER THE INFLUENCE, WHETHER HE HAD A PIPE IN HIS MOUTH WHEN HE PULLED THE TRIGGER OR AN HOUR BEFORE. IT IS THE EFFECT OF THE ADDICTION, ITSELF, HAD ON MR. PARX CAUSING HIM TO BE OUT OF HIS MIND, FRANKLY. SO HE

WAS ADDICTED TO CRACK COCAINE THAT REALLY HIS LIFE HAD COMPLETE FALLEN APART.

WHAT HAVE EVIDENCE WAS THEN APPROPRIATE PRESENTED AT THIS EVIDENTIARY HEARING? WHAT MORE WAS GIVEN TO DR. LARSON FOR THIS EVIDENTIARY HEARING THAT SUPPORTS THAT PROP SNAPTION.

CORROBORATION. CORROBORATION OF THE -- PROPOSITION?

CORROBORATION OF THE EXTENT AND DURATION OF MR. PACE'S DRUG OR CRACK USE, SPECIFICALLY, NUMBER ONE.

SO HE KNEW THAT HE HAD HAD A LONG TERM CRACK USE, BUT NOW WE HAVE, WHAT, SOMEONE ELSE WHO SAYS THAT?

WE HAVE CORROBORATION AS WELL. THEN WE ALSO PROVIDE OBSERVATIONS TO DR. LARSON OF WHAT, OBSERVATIONS OF MR. PACE AROUND THE TIME OF THE CRIME AND IN THE WEEKS LEADING UP TO THE TIME THE CRIME. NOT ANY KIND OF INFORMATION THAT, YES, I SAW BRUCE PACE SMOKE CRACK TWO WEEKS BEFORE THE CRIME. NO. OBSERVATIONS THAT MR. PACE WAS FALLING APART, SPECIFICALLY OBSERVATIONS THAT HE WAS NO LONGER BATHING AND GROOMING, THAT HIS CLOTHES WERE TATTERED AND DIRT AND THIS WAS A MAN WHO, WITNESSES TESTIFIED, WAS ALWAYS VERY CAREFUL ABOUT HIS APPEARANCE AND VERY SERIOUS ABOUT LOOK LIKE A GENTLEMAN. SERIOUS WEIGHT LOSS. HE ALWAYS WALKED AROUND LIKE HE WAS IN A HAZE. SLEEPING IN ABANDONED STRUCTURES OR ANYWHERE WHERE HE COULD LAY HIS HEAD, NEVER SLEEPING IN THE SAME PLACE AT THE SAME TIME.

WHAT WOULD COME OUT ON THIS DOUBLE-EDGED SWORD ISSUE? WHATES WOULD HAVE COME OUT, IF ALL OF THAT EVIDENCE ABOUT CRACK COCAINE USE HAD BEEN STRESSED BY THE DEFENSE LAWYER? WOULD IT HAVE COME OUT THAT HE WAS STEALING TO MAINTAIN HIS HABITS? THAT ALL OF THE NEGATIVES CONCERNING THE DRUG USE?

NEGATIVES CONCERNING THE FACT THAT, YES, HE DID HAVE TO, TO PRESENT THIS TO THE JURY, YES, IT IS MOST LIKELY IT WOULD HAVE COME OUT THAT MR. PACE HUNG OUT WITH OTHER CRACK USERS. YOU COULD SAY, OKAY, SO MR. PACE HUNG OUT WITH OTHER CRIMINALS, AND, YES, MR. PACE WOULD STEAL TO GET THIS DRUG. BUT ANY TIME YOU HAVE A DRUG ADDICT DEFENSE LIKE THIS, YOU ARE FACED WITH THE SAME PROBLEMS, THE SAME DOUBLE-EDGED SWORD BURKES ALL OF THAT COULD HAVE BEEN TAKEN CARE OF IN SEVERAL WAYS. NUMBER ONE, IT COULD HAVE BEEN TAKEN CARE OF BY ADDRESSING IT WITH THE JURY ON VOIR DIRE. IT COULD HAVE BEEN TAKEN CARE OF BY PRESENT AGO ADDICTIONOLOGIST THE LIKE WE ---BY PRESENT AGO ADDICTIONOLOGIST, LIKE WE DID WITH MR. HERCOFF, THAT HE HUNG OUT WITH CRACK USERS AND STOLE A VCR TO GET SOME CRACK.

WHAT WAS THE MOTIVATION FOR THE CRIME OFFERED IN THE ORIGINAL TRIAL? IN OTHER WORDS, DID HE SAY HE DID IT BUT HE DID IT BECAUSE WHAT?

THE MOTIVATION PRESENTED AT THE TIME OF TRIAL, AS FAR AS THE STATE'S MOTIVATION FOR THE KILL SOMETHING.

NO. THE DEFENSE.

THE DEFENSE PUT NOTHING FORWARD AT ALL AT THE TIME OF TRIAL.

WHAT WAS THEIR THEORY OF WHAT HAD HAPPENED?

IT IS JUST REASONABLE DOUBT WHETHER OR NOT IT WAS MR. PACE THERE AT ALL.

I ASSUME THAT YOU ARE ARGUING THIS ISSUE NOW, WITH REFERENCE TO THE PENALTY PHASE.

ABSOLUTELY, JUDGE.

OKAY. WELL, HOW ABOUT OUR TIME IS VERY SHORT AND WE HAVE USED MOST OF IT ALREADY, KIND OF THING, I AM TRYING TO GET THIS CONTRAST THAT I THOUGHT YOU WERE GOING TO ADEPT TO PAINT, AND THAT WAS THAT -- WERE GOING TO ATTEMPT TO PAINT, AND THAT WAS THAT THERE WAS VIRTUALLY NOTHING PRESENTED IN THE WAY OF MITIGATION AT THE TIME OF TRIAL AND NOW YOU HAVE DEMONSTRATED THAT A REASONABLE ATTORNEY HAD ALL OF THIS AVAILABLE, IT WOULD HAVE PAINT ADD TOTALLY DIFFERENT PICTURE, AND I AM MISSING THIS.

NOT NECESSARILY JUST A DIFFERENT PICTURE. IT WOULD -- HAVE PAINTED A TOTALLY DIFFERENT PICTURE, AND I AM MISSING THIS.

NOT NECESSARILY JUST A DIFFERENT PICTURE. IT WOULD HAVE PROVIDED THE MITIGATION THAT WAS MISSING.

WHAT WAS THE MITIGATION THAT YOU SUGGEST WOULD BE FOUND HERE?

THE MITIGATION, MAINLY BASED ON THE DRUG ADDICTION AND WHAT IT DID TO MR. PACE, AND ACCORDING TO THE TWO DOCTORS WHO, AT THE TIME OF TRIAL BASED ON THE INFORMATION THAT THEY HAD COULDN'T FIND ANYTHING, AT THE TIME OF POSTCONVICTION, BASED ON WHAT WE GAVE THEM, THEY CHANGED THEIR DIAGNOSIS AND BOTH PRESENTED TWO OF THE STATUTORY MENTAL MITIGATORS, WHICH WOULD BE UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE AND THAT HE COULD NOT CONFORM HIS CONDUCT TO THE LAW. THOSE TWO VERY, VERY STRONG MITIGATORS, COMPARED TO THE THREE WEAK MITIGATORS THAT WERE UPHELD OR FOUND BY THE TRIAL COURT, AND THAT WOULD BE THE AUTOMATIC, THREE AUTOMATIC MITIGATE ON, EXCUSE ME, AGGRAVATORS. PRIOR CONVICTION, PRIOR VIOLENT FELONY. THAT HE IS UNDER SENTENCE OF IMPRISONMENT OR ON PAROLE AND THAT THE FELONY MURDER BAG.

TELL ME, AT THE OUTSET, SORT OF, AN IMAGE OR PICTURE HERE, THAT THESE ARE THE TWO EXPERTS THAT THE DEFENSE LAWYER RETAINED, IS THAT CORRECT?

CORRECT.

SO WE HAVE THE LAWYER WHOSE EXPERTISE IS LAWYERING AND INVESTIGATING, YOU KNOW, MITIGATION AND RETAINING EXPERTS OR WHATEVER, THEN WE HAVE MENTAL HEALTH PEOPLE THAT ARE RETAINED, AND I WOULD ASSUME THAT THEY ARE THE MENTAL HEALTH EXPERTS, AND SO YOU ARE PAINTING THIS IMAGE HERE OF WHAT ABOUT THE RESPONSIBILITY OF THE EXPERTS? THAT IS THAT YOU ACKNOWLEDGE THAT THEY HAD SOME KNOWLEDGE OF THE DEFENDANT'S DRUG ABUSE. NOW, I GUESS I AM TRYING TO SAY THAT, WOULDN'T YOU EXPECT, ORDINARILY, THAT IF YOU HAVE GOT A MENTAL HEALTH EXPERT INVOLVED IN THE THING, IT WOULD BE THE MENTAL HEALTH EXPERT THAT WOULD SAY IF HE HAS GOT A LEAD ABOUT DRUG USE OR SOMETHING LIKE THIS, THAT IT WOULD BE THE MENTAL HEALTH EXPERT WHO WOULD SAY, WELL, I NEED THIS, THIS AND THIS, AND WE NEED TO LOOK INTO THE BACKGROUND HERE IN ORDER TO DEVELOP THAT CASE THAT WAY. REALIZING THE RESPONSIBILITY OF THE LAWYER, TOO, BUT I AM HAVING DIFFICULTY, THOUGH, WITH THE MENTAL EXPERT SORT OF SAYING, WELL, ALL YOU GAVE ME WAS HIS BIRTHDATE, AND HERE I AM. WHAT AM I GOING TO DO? AND NOT HAVING SOME RESPONSIBILITY, THEMSELVES, TO LOOK INTO THE THING HERE. WHAT DID THEY JUST SAY ALL WE DO IS TAKE WHAT WE ARE GIVEN AND WE DON'T DO ANYTHING ELSE OR WHAT?

I DON'T THINK THAT IS ANY KIND OF STEADFAST RULE AMONG EXPERTS, BUT I THINK CERTAINLY THAT AN EXPERT FOLLOWS THE DIRECTION BY TRIAL COUNSEL AS TO WHAT TO DO AND TRIAL COUNSEL, IF YOU LOOK AT THE LETTERS HIRING EITHER EXPERT, IT SEEMED THAT TRIAL

COUNSEL WAS FOCUSED ON JUST USE AT THE DAY OF THE MURDER, AND IN THE SENSE OF LOOKING FOR SOME WAY TO DEFEND, IN THE GUILT PHASE, THE MURDER, THROUGH A VOLUNTARY INTOXICATION DEFENSE, SOMETHING LIKE THAT.

NOTHING LIKE THAT DEVELOPED IN MITIGATION?

JUST A GENERAL DEVELOPING MITIGATION. AND THAT IS IT. JUST BECAUSE A DOCTOR IS GAIN LUMP OF INFORMATION AND A DOCTOR THINKS HE CAN REACH A DIAGNOSIS BASED ON WHAT HE HAS, THE DOCTOR REACHES A DIAGNOSIS. THERE IS NOTHING --

WHAT DID DR. LARSON SAY THAT HE UNDERSTOOD THAT HE WAS SUPPOSED TO DO TO GET MITIGATION? DID HE TESTIFY TO THAT?

HE DID NOT UNDERSTAND THAT IT WAS HIS DUTY TO INVESTIGATE IT AND FIND, HIMSELF. NEITHER DOCTOR D.

DID HE NOT TESTIFY AS TO WHAT HE UNDERSTOOD MITIGATION WAS?

WHAT HE UNDERSTOOD MITIGATION WAS?

WHAT HE UNDERSTOOD HIS JOB IN THIS CASE WAS TO BE?

DR. LARSON UNDERSTOOD HIS JOB. THE OTHER EXPERT, DR. SCHMERLO HAD A PROBLEM ONLY IN UNDERSTANDING MITIGATION. AT THE TIME THAT THE DOCTOR DIDN'T THINK HE MISUNDERSTOOD ANYTHING, THE LAWYER'S ORDER SIMPLY SAID ANYTHING THAT CAN MITIGATE THIS CRY. THE GENERAL DEFINITION OF MITIGATE, OKAY. GENERALLY MOST PEOPLE UNDERSTAND WHAT THE WORD MEANS AND THAT IS HOW DR. SCHMERLO LOOKED AT IT, JUST IN THE SENSE OF ANYTHING THAT COULD MITIGATE KRIRJS WHAT DID DR. SCHMERLO FIND? EXTENSIVE HEAVY USE, DRUG USE, OTHER THAN THAT I CAN'T FIND ANYTHING TO MITIGATE THIS CRIME.

HAD ET CETERA DOCTOR HAD EX-NERNS DEATH -- HAD EITHER DOCTOR HAD EXPERIENCE IN DEATH PENALTY MITIGATION?

DR. LARSON HAD A GREAT DEAL OF EXPERIENCE. DR. SCHMERLO HAD NO DEATH PENALTY EXPERIENCE, SO HIS WHOLE ANALYSIS WAS NOT DONE WITHIN THE FRAMEWORK OF STATUTORY EXPERIENCE.

IF DR. LARSON WAS EXPERIENCED, WHY WOULDN'T HE BE THE ONE TO SAY I NEED SCHOOL RECORDS. I NEED HISTORY. I NEED FAMILY MEMBERS THAT WILL TELL ME ABOUT THIS.

IT IS HARD TO SAY, BUT DR. LARSON THOUGHT HE COULD GIVE THE TRIAL ATTORNEYS A DIAGNOSIS, WHICH HE DID BASED ON THE EVIDENCE HE HAD, YOU BUT DR. LARSON MADE IT -- BUT DR. LARSON MADE IT CLEAR THAT HE WAS WRONG THAT HE DID NOT UNDERSTAND THE EXTENSIVENESS OF THE ADDICTION, AND HE HAD NO JUVENILE RECORD, AND THAT IS ONE THING THAT DR. LARSON BROUGHT UP IN POSTCONVICTION.

CHIEF JUSTICE: WE HAVE COME TO THE TIME THAT YOU WANTED TO SAVE FOR REBUTTAL. THAT IS YOUR CHOICE OBVIOUSLY.

I WILL SAVE THE FROZE REBUTTAL.

CHIEF JUSTICE: OKAY. -- I WILL SAVE THE REST FOR REBUTTAL.

OKAY. THANK YOU. GOOD AFTERNOON.

CHIEF JUSTICE ANSTEAD. MAY IT PLEASE THE COURT. I AM CURTIS FRENCH REPRESENTING THE STATE OF FLORIDA IN THIS CAUSE. IF I MAY, I WOULD, FIRST, LIKE TO ADDRESS THE CLAIM THAT DR. LARSON, WHO IS UNDISPUTED AS AN EXPERIENCEED CAPITAL PSYCHLOG--OLOGIST AND HAS TESTIFIED IN -- PSYCHOLOGIST AND HAS TESTIFIED IN A NUMBER OF CASES, THAT HE DIDN'T HAVE ANY EXPERIENCE -- FIRST I WOULD LIKE TO POINT OUT THAT THIS EXHIBIT RIGHT HERE, WHICH IS DEFENDANT'S EXHIBIT 6, SOME 200 PAGES OF POLICE REPORTS, DEPOSITIONS AND SWORN STATEMENTS IS WHAT WAS PROVIDED TO DR. LARSON BY TRIAL COUNSEL BACK IN 1989. SOME OF THE SWORN STATEMENTS AND/OR DEPOSITIONS IN THAT EXHIBIT ARE FROM PERSONS INCLUDING KENNETH BIMBO, MELANIE PACE AND CYNTHIA PACE, WHOSE AFFIDAVITS ARE IN, AT THE BASK EXHIBIT 7, WHICH IS THE NEW INFORMATION THAT DR. LARSON BASED HIS PRESENT OPINION UPON, AND, OF COURSE, ONE OF OUR ARGUMENTS THAT WE MADE BELOW AND, ALSO, HERE IS THAT, TO THE EXTENT THAT SOME OF THESE WITNESSES HAVE CHANGED THEIR TESTIMONY AND HAVE MADE, TESTIFIED BY OBSERVATIONS OF DRUG USE THAT THEY DIDN'T MAKE AT THAT TIME THAT COUNSEL CANNOT BE OF -- CANNOT BE INEFFECTIVE FOR NOT HAVING BEEN AWARE OF THOSE STATEMENTS THEN AND THEY TALKED TO HIM BACK IN 1989 AND DIDN'T SAY ANYTHING ABOUT IT.

GIVE US A THUMBNAIL SKETCH OF THIS DEFENDANT AS HE WAS DESCRIBED IN BOTH THE ORIGINAL PROCEEDINGS AND THEN HERE, AS FAR AS THE CIRCUMSTANCES OF THIS OFFENSE AND WHO THIS DEFENDANT WAS AND --

IF I MAY POINT OUT REAL QUICKLY, DR. LARSON DID TESTIFY THAT HE, AT THE EVIDENTIARY HEARING, THAT HE FELT LIKE HE HAD ENOUGH INFORMATION TO EVALUATE PACE'S MENTAL CONDITION ACCURATELY IN 1989. OTHERWISE HE WOULD HAVE SOUGHT ADDITIONAL INFORMATION BEFORE DELIVERING HIS CONCLUSION TO GET TRIAL COUNSEL. THAT IS WHAT HE SAID.

HE TESTIFIED AT THIS EVIDENTIARY HEARING TO THAT EFFECT?

YES, SIR. VOLUME 9 OF THE 30ES THE CONVICTION -- OF THE POSTCONVICTION RECORD AT PAGES 417-TO-459. IN TERMS OF WHAT HE SAID AT THE TIME, AND LET ME SAY THIS, TOO, IT IS ABSOLUTELY CLEAR THAT DR. LARSON AND DR. SCHMERLO WERE AWARE OF PACE'S HEAVY COCAINE USAGE. IN FACT, DR. SCHMERLO, IN HIS REPORT, AND BY THE WAY, THE REPORT, THE ORIGINAL REPORT FROM DR. SCHMERLO AND ALSO THE ORIGINAL REPORT FROM DR. LARS OWNER CONTAINED IN DEFENDANT'S -- FROM DR. LARSON ARE CONTAINED IN DEFENDANT'S EXHIBIT 3 AND I BELIEVE THE COURT SHOULD HAVE A COPY OF THAT DEPOSITION. DR. SCHMERLO STATED THAT PACE RELATED TO ME THAT FOR THE PAST THREE MONTHS PRIOR TO THE MURDER, PACE HAD BEEN USING $150 WORTH OF COCAINE A DAY. PACE ALSO TOLD DR. SCHMERLO THAT HIS COST WAS $150 A WEEK RATHER THAN $150 A DAY, BECAUSE HE WAS BUYING FOR PEOPLE WHO WERE AFRAID OR DIDN'T WANT TO DO IT, THEMSELVES. IN OTHER WORDS HE WAS SELLING DRUGS. HE DID TELL DR. SCHMERLO HE HAD NOT BEEN USING ANY COCAINE THE DAVE THE MURDER. DR. LARSON, AND THAT IS SIGNIFICANT AND I WILL GET TO THAT IN A MINUTE. DR. LARSON ALSO WAS AWARE OF THE DRUG USAGE AND STATES, AT PAGE 5 OF HIS REPORT --

THIS IS THE ORIGINAL REPORT THAT HE RENDERED TO THE LAWYER?

YES, SIR. THE ORIGINAL 1989 REPORT. DR. LARSON TALKED TO PACE ABOUT HIS DRUG USAGE. APPARENTLY SOMETIME AFTER PACE GRADUATED FROM HIGH SCHOOL, HE STARTED PARTYING AND DOING DRUGS. AND DR. LARSON REPORTS THAT PACE ESPECIALLY LIKED COCAINE, BECAUSE IT ALLOWED HIM TO PARTY LATE INTO THE NIGHT AND CONTINUE WITH WORK THE NEXT DAY. IT KEPT HIS, QUOTE, HYPER ACTIVITY GOING, AND HE, ALSO, TALKED OF FREQUENTLY PARTYING ALL NIGHT LONG. DR. LARSON REPORTS THAT, FOR THE THREE MONTHS PRIOR TO THE INCIDENT FOR WHICH HE IS CHARGED, THE DEFENDANT REPORTED THAT HE USED COCAINE ALMOST DAILY. HE DENIES USING COCAINE ON THE DAVE THE OFFENSE. -- ON THE DAY OF THE OFFENSE. NOW,

WHAT DR. LARSON TESTIFIED TO AT THE HEARING, IS THAT ALTHOUGH HE ORIGINALLY FOUND NO IMPAIRMENTS OR EMOTIONAL DISTRESS, HE WAS NOW OF THE OPINION, BASED UPON THE NEW AFFIDAVITS THAT DIDN'T EXIST AT THE TIME, THAT PACE WAS, QUOTE, UNDER APPRECIABLE EMOTIONAL DISTRESS, AND, ALSO, QUOTE, WOULD HAVE IMPAIRMENTS IN HIS KPATS TO CONFORM HIS BEHAVIOR TO THE LAW. I THINK MY -- IN HIS CAPACITY TO CONFORM HIS BEHAVIOR TO THE LAW. I THINK I AM CORRECT THAT THE MITIGATORS IS NOT AN INDICATION OF STATUTORY MITIGATION, BECAUSE DR. LARSON DID NOT SAY EXTREME EMOTIONAL DISTURBANCE AND DID NOT SAY THAT THE IMPAIRMENT WAS SUBSTANTIAL.

WHAT DID DR. LARSON TESTIFY TO AT THE EVIDENTIARY HEARING IN THE 3.850? DID HE TESTIFY CONCERNING MAKING A CONSCIOUS DECISION NOT TO CALL THESE EXPERTS?

YES, HE DID. HE INVESTIGATED THE CASE, OF COURSE. DID, OBTAINED THE SWORN STATEMENTS, OBTAINED DEPOSITION, AND WAS LOOKING FOR MITIGATION THAT HE COULD PRESENT TO THE JURY. HE WAS LOOKING FOR SOME EXPLANATION THAT HE COULD GIVE TO THE JURY WHY THIS DEFENDANT HAD COMMITED THIS CRIME, AND HE WAS HOPING HE COULD FIND SOME MENTAL MITIGATION THAT HE COULD PRESENT TO THE JURY, SO HE OBTAINED THE SERVICES OF DR. LARSON, WHO HE WAS FAMILIAR WITH AND HAD USED HIM IN OTHER CASES. SAM HAUL WAS THE PENALTY PHASE -- SAM HALL WAS THE PENALTY PHASE, DEFENSE COUNSEL WAS PRIMARILY RESPONSIBLE FOR THE PENALTY PHASE, TESTIFIED THAT IT IS RELATIVELY EASY TO FIND A PSYCHOLOGIST TO TESTIFY IN THESE KINDS OF -- KINDS OF CASES AND MORE DIFFICULT TO FIND PSYCHIATRIST. HE DID FIND DR. SCHMERLO AND HE HAD NOT TESTIFIED BEFORE AND UNDERSTOOD THAT WAS WHAT HE COULD GET. HE COULD HAVE STOPPED AT DR. LARSON AND THAT WOULD HAVE BEEN REASONABLE, BUT HE WENT OVER AND PAST THAT AND GOT DR. SCHMERLO AND SPECIFICALLY ASKED DR. LARSON TO LOOK FOR ANY EVIDENCE OF BRAIN DAMAGE AND IN FACT DR. LARSON ADMINISTERED A NEUROPSYCHOLOGICAL BATTERY TO MR. PACE AND FOUND NO EVIDENCE OF BRAIN DAMAGE. THAT WAS IN HIS ORIGINAL REPORT.

WELL, WHAT WAS, THE STATE OF THE TESTIMONY, THEN, AT THE EVIDENTIARY HEARING WAS BY TRIAL COUNSEL THAT HE HAD SUPPLIED INFORMATION TO TWO EXPERTS AND THEN HE DIDN'T CALL THE EXPERTS.

CORRECT. HE MADE THAT DECISION, BECAUSE THE INFORMATION THEY GAVE TO HIM WOULD NOT HAVE HELPED HIM, IN HIS JUDGMENT. A COUPLE OF REASONS, NUMBER ONE --

NOW, WAS THERE EVIDENCE AT THE EVIDENTIARY HEARING BY SOME, SOMEBODY THAT HE SHOULD HAVE CALLED THOSE EXPERTS? THOSE EXPERTS THAT HE HAD THERE?

WELL, HE PRESENTED TWO NEW EXPERTS. ONE WAS DR. HERKOFF, WHO IS AN ADDICTION SPECIALIST AND ONE IS DR. BARE CROWN, WHO TESTIFIED THAT HE FOUND SOME BRAIN DAMAGE, EIGHT YEARS AFTER THE CRIME. IT IS A LITTLE HARD TO ADDRESS ALL OF THIS AT ONCE, BECAUSE IT ALL KIND OF TIES TOGETHER. HOWEVER, INITIALLY, WE THINK THE TRIAL COUNSEL'S INVESTIGATION WAS REASONABLE. HE PRESENTED, HE RETAINED THE SERVICES OF TWO EXPERTS, WHO, AT THE TIME, AND HE GAVE THEM A LOT OF INFORMATION. THEY FOUND NO MITIGATION. THEY FOUND NO BRAIN DAMAGE AND I SHOULD POINT OUT, TOO, THAT DR. SCHMERLO DIDN'T DO A FULL PSYCHOLOGICAL BATTERY BUT DID ADMINISTER A PSYCHOLOGICAL SCREENING AND FOUND NOTHING. DR. BARE CROWN TESTIFIED AT THIS HEARING THAT HE TESTED PESO NOVEMBER 22, 1994 -- TESTED PACE, ON NOVEMBER 22, 1994, USING A DIFFERENT PSYCHOLOGICAL BATTERY, ROKNIZE -- RECOGNIZED THAT HE ACKNOWLEDGED THAT HIS TESTING IN 1994 SHOWED MR. PACE'S CONDITION AT THAT TIME WOULD ONLY BE PROBABLEISTIC FOR 1988. THE REDUCED ABILITY TO SHIFT SMOOTHLY FROM ONE TASK TO ANOTHER AND TO CONCENTRATE IN THE FACE OF DISTRACTION ANSWER TO DRAW, HE REPORTED. DR. CROWN ACKNOWLEDGED THAT PACE FUNCTIONS NORMALLY IN MANY WAYS, THAT MANY PEOPLE WITH THE SAME DEGREE OF IMPAIRMENTS DO NOT COMMIT CRIMES AND WHAT HE ALSO SAID, AND I THINK THIS IS

IMPORTANT, THAT PACE'S IMPAIRMENTS WERE SO SUBTLE THAT THEY COULD EASILY BE OVERLOOKED IN A CLINICAL PSYCHOLOGICAL EXAMINATION. THE STATE'S POSITION WOULD BE ASIDE FROM ANY QUESTION OF DEFICIENT ATTORNEY PERFORMANCE BUT EVEN GOING TO THE PREJUDICE, THAT THIS TESTIMONY IS, DOESN'T ESTABLISH SUFFICIENT IMPAIRMENT TO BE MITIGATING ENOUGH TO MEET STRICKLAND STANDARD FOR PREJUDICE. DR. HER COUGH, AND LET ME POINT OUT -- DR. HERKOFF TESTIFIED, AND LET ME POINT OUT QUICKLY THAT HE TESTIFIED THAT HE WOULD FIND TWO STATUTORY MITIGATORS BASED ON CRACK COCAINE DEPENDENCY, HOWEVER HE HAD NOT READ THE TRIAL TRANSCRIPT AND RECORDS AND WAS NOT FAMILIAR WITH THE CRIME CRIME AND HIS OPINION WAS BASED ON WHAT PACE TOLD HIM 11 YEARS LATER AND HE ADMITTED THAT HE WOULD HAVE -- THAT IT WOULD HAVE AN EFFECT ON HIS OPINION, IF PACE HAD NOT USED CRACK COCAINE ON THE DAY OF THE MURDER AND EVEN NOW THERE IS NOT TESTIMONY FROM ANY WITNESS THAT PACE USED CRACK COCAINE ON THE DAY OF THE MURDER, EXCEPT THE TESTIMONY THAT HE USED CRACK COCAINE IN THE AFTERNOON OF THE FOURTH, IN OTHER WORDS AFTER THE CRIME WAS COMMITTED AND NO EVIDENCE THAT HE WAS HIGH AT THE TIME OF THE CRIME. WHAT TRIAL COUNSEL TESTIFIED WAS THAT HE WAS AWARE THAT PACE HAD USED DRUGS. HE WAS AWARE THAT HE HAD BEEN USING CRACK COCAINE. HE HAD THOUGHT HE HAD A DRUG AND ALCOHOL PROBLEM AND CERTAINLY HIS EXPERTS AGREED, BUT THE PROBLEM WAS THAT HE COULDN'T GET ANY EXPERT TESTIMONY, AND HE TRIED, TO LINK THIS DRUG PROBLEM THAT HE HAD TO THIS CRIME OR TO EXPLAIN IT IN A WAY THAT WOULD BE PERSUASIVE TO A JURY, WHY HIS DRUG USE WOULD MITIGATE THIS CRIME. AND BEING AWARE THAT ONES HE GETS INTO THIS, IF HE TROO -- THAT ONCE HE GETS INTO THIS, IF HE TRIES TO INTRODUCE EVIDENCE OF DRUG USAGE, THAT THAT WOULD BE A TWO-EDGED SWORD, AND IN FACT THE JURY MAY BE LESS SYMPATHETIC FOR THE DEFENDANT RATHER THAN MORE.

DID THE JURY HEAR ANYTHING ABOUT CRACK COCAINE USE AT THE ORIGINAL TRIAL OR PENALTY PHASE?

I DON'T THINK SO.

HOW DID THE STATE EXPLAIN AT TRIAL, WHY THIS CRIME OCCURRED? IT WAS DONE FOR MONEY.

IT WAS DONE FOR MONEY.

WHAT WAS THE REASON? DID THEY INTRODUCE A REASON WHY HE WOULD HAVE NEEDED MONEY, IN ORDER, AND KILLED SOMEONE, BE THAT DESPERATE TO KILL SOMEBODY?

THE STATE INTRODUCED THE TESTIMONY OF ANGELA PACE, WHO WAS A COUSIN, THAT THE DAY BEFORE THE MURDER, ON NOVEMBER 3, 1988, THAT PACE HAD TOLD HER THAT HE WAS TIRED OF BEING BROKE. THERE WAS SOMETHING HE COULD DO TO MAKE MONEY TOMORROW. HE HATED TO DO IT BUT HE WAS GOING TO. THERE WAS, ALSO, EVIDENCE THAT THE VICTIM GOT HIS SOCIAL SECURITY CHECK ON NOVEMBER 3, AGAIN, THE DAY BEFORE THE MURDER, SO THAT HE WOULD HAVE THAT CHECK AT THE TIME.

AND THEN THE JURY, IN THE PENALTY PHASE, WAS THAT EVIDENCE ABOUT WHAT HE TOLD THE COUSIN USED IN THE PENALTY PHASE, FOR THE STATE TO ARGUE CCP?

I HONESTLY DON'T RECALL THE ANSWER TO THAT QUESTION.

WHAT WOULD HAVE BEEN THE BASIS TO ARGUE CCP TO THE JURY?

WELL, IT WOULD MAKE SENSE. I DON'T RECALL, BUT IT WOULD MAKE SENSE THAT THE STATE WOULD HAVE ARGUED THAT HE PLANNED IT AHEAD OF TIME THAT HE WAS PLANNING IT THE DAY BEFORE, AND I AM NOT SURE OF ANY OTHER EVIDENCE THAT WOULD ESTABLISH CCP.

I AM THINKING, AGAIN, GOING BACK TO TRY AND SEE THE WHOLE PICTURE, BECAUSE WE DO HAVE A 7-5 JURY VERDICT HERE, AND WE DON'T KNOW ON WHAT BASIS THE JURY MADE THEIR RECOMMENDATION, YOU KNOW, THE RECOMMENDATION. WE HAVE GOT THIS UNCONSTITUTIONAL CCP AGGRAVATOR. WE HAVE GOT NO INDICATION THAT THIS MAY HAVE BEEN A DESPERATE MAN WITH A VERY, VERY HEAVY ADDICTION TO COCAINE THAT WAS KIND OF DRIVING HIM, AND I KNOW IT IS HARD TO DECIDE WHEN WHAT WE ARE DOING IS SECOND-GUESSING, BUT IT IS OF CONCERN THAT THE, NEITHER THE JUDGE NOR THIS COURT FOUND ANY MITIGATING STATUTORY OR NONSTATUTORY, BASED ON WHATEVER WAS PRESENTED AT THE ORIGINAL TRIAL, SO COULD YOU JUST --

THIS COURT DIDN'T EXPLICITLY FIND NO MITIGATION. WHAT THIS COURT SAID ON APPEAL WAS THAT EVEN IF ONE OR MORE STATE OTHER MITIGATORS WERE EFFECTIVE, WE ARE DECIDING THAT THE ERROR WAS HARMLESS, REGARDLESS OF WHAT THE TRIAL JUDGE FOUND.

THAT IS NOT KNOWING ANY HISTORY ABOUT THIS LONG COCAINE ADDICTION.

CORRECT BUT TRIAL COUNSEL CHOSE NOT TO PRESENT THAT HISTORY. WHAT HE CHOSE INSTEAD TO DO WAS TO SANITIZE THIS DEFENDANT, BASICALLY TO SHOW THAT THE DEFENDANT HAD BEEN A MODEL PRISONER, THAT HE WAS A GOODATH LEELT AND STAYED OUT OF TROUBLE -- A GOOD ATHLETE AND STAYED OUT OF TROUBLE WHEN HE WAS IN HIGH SCHOOL AND WAS A GOOD EMPLOYEE AND BEFORE 1991 HAD NEVER BEEN ARRESTED FOR ANYTHING. SAM HALL TESTIFIED THAT HIS STRATEGY WAS TO SHOW THAT PACE WAS SOMEONE WHO HAD A LIFE, WHO WAS A HUMAN BEING, WHO SHOULD BE SAVED. HE HAD GOOD QUALITIES AND WAS A GOOD EMPLOYEE AND GOOD ATHLETE AND HELPED RAISE SIBLINGS AND THAT MURDER WAS OUT OF HIS CHARACTER AND THAT HE WOULD NOT BE A THREAT IN PRISON, AS REASON FOR THE JURY NOT TO RECOMMEND DEATH. I WOULD SUGGEST THAT --

IF HE WAS A GOOD EMPLOYEE, THEN HOW DOES THAT EXPLAIN BUT HE TOLD THE PERSON THE DAY BEFORE HE WAS TIRED OF BEING BROKE. HOW DOES THAT, WAS HE WORKING AT THE TIME?

HE WASN'T EMPLOYED AT THE TIME OF THE CRIME. I WOULD SUGGEST THAT HE KIND OF SLOUGHED OVER THAT AND DIDN'T EMPHASIZE THAT. HE HAD BEEN A GOOD EMPLOYEE WITH GOOD POTENTIAL AT ONE TIME.

AND THE DEFENSE LAWYER KNEW THE REASON HE HAD LOST HIS JOB AND HIS LIFE HAD FALLEN APART?

I AM NOT SURE THAT HE LOST HIS JOB, BUT MY UNDERSTANDING, I DON'T THINK HE HAD A JOB AT THE TIME OF THE MURDER. NOW, HE DID ODD JOBS. THERE WAS SOME TESTIMONY SOMEWHERE THAT HE HAD DONE ODD JOBS FOR FLOYD COVINGTON, AND IN FACT THE WEDNESDAY BEFORE THE MURDER HAD HELPED HIM MOVE DIRT. BUT HAD, I DON'T BELIEVE A STEADY JOB AT THE TIME OR ANY SOURCE OF INCOME OTHER THAN DEALING DRUGS,, WHICH OF COURSE, COUNSEL DIDN'T WANT TO EMPHASIZE.

HOW MUCH MONEY DID HE TAKE FROM THIS VICTIM?

WE DON'T KNOW. ALL WE KNOW IS THAT HIS WALLET, THE VICTIM'S WALLET WAS FOUND AFTERWARDS AND IT WAS EMPTY, BUT HOW MUCH HE HAD BEFORE, WE DON'T REALLY KNOW.

SO WAS PECUNIARY GAIN AGGRAVATOR?

ROBBERY AGGRAVATOR, AND OF COURSE IF IT IS ATTEMPTED ROBBERY, THAT IS ENOUGH TO SATISFY THE AGGRAVATOR, BUT AT ANY RATE THIS COURT FOUND THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PRIOR VIOLENT FELONY AGGRAVATOR AND ROBBERY AGGRAVATOR AND IMPRISONMENT AGGRAVATOR. THIS DEFENDANT, AND ANOTHER CONTENTION THAT

DEFENSE COUNSEL NOW MAKES, IS THAT WE SHOULD HAVE GONE INTO THE PRIOR CRIME, WHICH WAS COMMITED IN 1981, WHICH DEFENDANT WAS CONVICTED OF STRONG ARMED ROBBERY, AND THE JURY KNEW ABOUT THE STRONG ARMED ROBBERY BUT THEY DIDN'T KNOW ANY OF THE DETAILS ABOUT THE CRIME. IN FACT, HE HAD ORIGINALLY BEEN CHARGED WITH ARMED ROBBERY AND ATTEMPTED MURDER BECAUSE HE HAD HIT THE VICTIM ON THE HEAD WITH AN IRON PIPE OR LEAD PIPE AND THE VICTIM HAD STATED, SOMEWHERE IN THE RECORD IT SHOWS THAT HE TOLD SOMEBODY THAT HE THOUGHT HE WOULD HAVE DIED, IF HE HADN'T RECEIVED IMMEDIATE MEDICAL ATTENTION. DEFENSE COUNSEL IN THIS CASE, TRIAL COUNSEL TESTIFIED THAT HE REALLY DIDN'T WANT THE JURY TO KNOW THE DETAILS OF THAT PRIOR OFFENSE, EVEN IF HE HAD BEEN INTOXICATED AT THE TIME, WHILE IT MIGHT HAVE, YOU KNOW, BEEN INCONSISTENT WITH SOME SORT OF DEFENSE THEORY THAT THIS GUY HAS A DRUG AND ALCOHOL PROBLEM, THAT THE NEGATIVE BAGGAGE WOULD OUT WEIGH WHATEVER POSITIVE MIGHT COME INTO PLAY FROM EXPLORING THOSE KINDS OF DETAILS. AT BOTTOM, WHAT WE HAVE HERE IS A COUNSEL WHO INVESTIGATED THIS CASE, WHO PREPARED, WHO RETAINED THE SERVICES TWO MENTAL HEALTH EXPERTS AND MADE A DECISION, AFTER DOING THAT INVESTIGATION, THAT IT WOULD BE BETTER FOR THIS DEFENDANT TO PORTRAY HIM AS BASICALLY A PRETTY GOOD PERSON, A GOOD FAMILY, SOMEONE WHO WOULD NOT BE A FUTURE THREAT TO SOCIETY, RATHER THAN TO PROVE THAT HE WAS SOMEBODY WHO WAS HEAVILY INTO DRUGS AND USING CRACK, $150 WORTH OF CRACK COCAINE A DAY AND SELLING DRUGS TO MAINTAIN THAT LIFESTYLE. THE STATE WOULD SUGGEST THAT THAT WAS A REASONABLE JUDGMENT. NOTHING HAS BEEN PRESENTED TO SHOW THAT THAT JUDGMENT WAS NOT REASONABLE. IF WE COME TO THE YIFERB PREJUDICE, I WOULD -- TO THE ISSUE OF PREJUDICE, I WOULD SUGGEST THAT THE, AND I HAVE ADDRESSED THIS IN MY BRIEF AND PROBABLY AT GREATER LENGTH THAN I CAN DO HERE, BUT I WOULD SUGGEST THAT NOTHING HAS BEEN PRESENTED HERE, TODAY, ESTABLISHES THE PREJUDICE STANDARD OF STRICKLAND OR SHOWS, DEMONSTRATES A REASONABLE PROBABILITY OF A DIFFERENT JURY RECOMMENDATION, HAD HE PURSUED THE THEORY THAT THE DEFENDANT IS A CRACK HEAD WHO HAS SOME MODEST AMOUNT OF BRAIN DAMAGE. AND THAT IS BASICALLY OUR POSITION IN THIS CASE. AND WE WOULD ASK THIS COURT TO AFFIRM THE JUDGMENT OF THE COURT BELOW.

CHIEF JUSTICE: COUNSEL, HOW MUCH TIME, MR. MARSHAL?

I WOULD JUST LIKE TO SUMMON THING UP TO MAKE SURE EVERYTHING IS CLEAR. THE TRIAL ATTORNEY KNEW OR EXCUSE ME, TAKE THAT BACK, THE TRIAL ATTORNEY SUSPECTED THAT HE HAD A CRACK COCAINE ADDICTION, BUT THE TRIAL ATTORNEY DID NO INVESTIGATION WHATSOEVER DOWN THAT AVENUE. SO WE ARE NOT DISPUTING THAT THE TRIAL ATTORNEY DOESN'T LIKE THE REPORTS HE GOT FROM THE EXPERTS. THEY WERE BASED ON INSUFFICIENT INVESTIGATION, AND THAT FACT IS VERY CLEAR FROM THESE TWO DOCTORS, SHOWING UP IN POSTCONVICTION, WITH TWO STATUTORY MITIGATING CIRCUMSTANCES OR AT LEAST, IF YOU WANT, WE ARE GOING TO ARGUE SEMANTICS ON THE WORD, CERTAINLY NONSTATUTORY MITIGATION.

DID HE TESTIFY THAT, IF HE HAD KNOWN ABOUT, NOW, THIS, ALL THIS OTHER EVIDENCE OF HIS DRUG USE, THAT WOULD RISE TO THE LEVEL OF THE DRUG USE AND ADDICTION, THAT HE REALIZES THAT WAS SOMETHING THAT HE SHOULD HAVE PRESENTED?

ABSOLUTELY. THAT IS EXACTLY WHAT HE TESTIFIED TO IN POSTCONVICTION, THAT, IF, I ASKED HIM, I SAID IF YOU HAD THESE TWO STATUTORY MITIGATORS --

NOT IF I HAD THESE TWO STATUTORY -- OBVIOUSLY IF SOMEONE, IF YOU SAY YOU COULD HAVE HAD TWO STATUTORY MITIGATORS, WOULD YOU USE IT, I AM ASKING WHETHER HE WAS ASKED WHETHER HE REALIZES THAT THERE WAS THIS DRUG ADDICTION EVIDENCE THAT HE JUST SIMPLY DROPPED THE BALL AND DIDN'T INVESTIGATE?

HIS RESPONSE WAS THAT HE WOULD HAVE USED IT, IF HE COULD HAVE TIED IT TO THE CRIME. AND THERE IS NO QUESTION THAT YOU COULD TIE IT TO THE CRIME. BOTH HIS EXPERTS AT THE TIME OF TRIAL, NOW WITH MORE INFORMATION, HAVE TIED IT RIGHT TO THE CRIME, AS HAS THE EXPERT, THE ADDICTIONOLOGIST AND --

DON'T YOU HAVE A PROBLEM, AND I UNDERSTAND THAT DRUG USE CAN BE MITIGATING, BUT IN TERMS OF THE REAL ISSUE OF A STRONG STATUTORY MITIGATOR, THAT A PERSON WAS, AT THE TIME OF THE CRIME, UNDER EXTREME EMOTIONAL OR MENTAL DISTRESS OR HAD SUBSTANTIALLY IMPAIRED CAPACITY, THAT YOU, WITHOUT THERE BEING, YOU KNOW, ALTHOUGH THERE CAN CERTAINLY BE EFFECTS THAT HE MIGHT HAVE COMMITED THIS CRIME BECAUSE HE IS A CRACK COCAINE ADDICT, WITHOUT THEIR BEING ADDITIONAL EVIDENCE THAT HE WAS ACTUALLY USING DRUGS ON THE DAY OF THE CRIME, THAT YOU ARE GOING TO HAVE PRETTY WEAK STATUTORY MITIGATION?

BUT THAT IS THE KEY. IT IS HARD TO GET PAST THE LOWER COURT. IT IS THAT HE WASN'T USING IT THAT DAY, BECAUSE HE COULD NOT GET IT THAT DAY. A CRACK HEAD IS NOT DANGEROUS, WHEN THE CRACK HEAD HAS HAD HIS CRACK. THE CRACK HEAD WILL BE CLIMBING IN YOUR WINDOW TO ROB YOUR HOUSE, WILL BE CARJACKING YOU, WILL BE MUGGING YOU, WHEN HE CAN'T GET HIS CRACK, BECAUSE HE HAS NO MONEY. IT WAS THE CRACK DEPRIVATION. THIS IS AN ADDICT. NOT JUST AN ADDICT THAT, NOT EVEN AN ADDICT THAT COULD HIDE IT, LIKE, SAY THE JURY FROM THE JOHNSON CASE POSSIBLY. THIS IS AN ADDICT WHOSE LIFE WAS FALLING APART, BASED ON THE SIGNS OF HIS CLOTHES, HIS TATTERED APPEARANCE, SLEEPING WHEREVER, ALWAYS IN A HAZE. SO IF THE TRIAL ATTORNEY MADE A DECISION NOT TO PRESENT THIS INFORMATION, IT WASN'T STRATEGIC, BECAUSE HE DID NOT HAVE IT, AND YOU CAN'T MAKE A STRATEGIC DECISION, IF YOU DON'T HAVE THE INFORMATION.

I DON'T UNDERSTAND. DID THE LAWYER HAVE THE REPORTS FROM THE MENTAL HEALTH EXPERTS?

YES, AND THAT IS ONE THING -- AND DON'T THOSE SAY SOMETHING TO THE EXTENT THAT HE IS SAYING HE HAS A $150 A DAY CRACK HAS BEEN SIT? THIS IS JUST NOT ADDING -- HABIT? THIS IS JUST NOT ADDING UP. THE INFORMATION IS THERE WITH REGARD TO THE ADDICTION. IT IS $1.

A DAY. HOW DO YOU -- THAT IT IS $150 A DAY. HOW DO YOU OVERLOOK THAT IT IS A ADDICTION?

MAY I ANSWER?

CHIEF JUSTICE: YES.

THE TRIAL ATTORNEY HAD THE REPORTS THAT HE USED THE DRUG EXTENSIVELY, BUT THAT STILL DOESN'T PROVIDE ALL OF THE INFORMATION ABOUT THE ADDICTION OR THE EFFECTS OF THE ADDICTION AND HOW IT CAUSED MR. PAYS TO COMMIT THIS CRIME. IT IS -- MR. PAYS TO COMMIT -- MR. PACE TO COMMIT THIS CRIME. IT IS BECAUSE THE ATTORNEYS DIDN'T GO OUT THERE AND FIND IT. THANK YOU VERY MUCH FOR YOUR TIME.

CHIEF JUSTICE: THANK YOU VERY MUCH FOR YOUR ASSISTANCE. THE COURT WILL NOW STAND IN RECESS UNTIL TOMORROW.

MARSHAL: PLEASE RISE.