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Kenneth Allen Stewart v. State of Florida

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: GOOD MORNING.

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: THE LAST CASE OF THE COURT'S DOCKET THIS MORNING IS STATE VERSUS STEWART. YOU MAY PROCEED.

GOOD MORNING. I AM HERE REPRESENTING KENNETH ALLEN STEWART. I FIRST WANTED TO EXPLAIN AND I HAVE A REASON FOR DOING THIS, THIS IS A REASON FOR BEING BACK FOR THE THIRD RESENTENCING, THE ORIGINAL ATTORNEY IN THIS CASE WAS MIKE JONES, AND HE DID THE GUILT AND THE PENALTY PHASE AND THEN IT WAS REVERSED AND SENT BACK BY THIS COURT, BECAUSE THE IMPAIRED CAPACITY DEFENSE, THERE WAS A LOT OF EVIDENCE THAT HE WAS DRUNK AT THE TIME. AT THE SECOND RESENTENCING, THEN, HE ALSO HAD MIKE JONES. AT THAT TIME, MIKE JONES WAS ON COCAINE, AND HE SUBSEQUENTLY, I THINK HE WITHDREW FROM THE BAR SO THAT HE WOULD NOT BE DISBARRED, BUT HE ADMITTED IN DEPOSITION WHICH IS IN THE RECORD THAT HE ONLY VAGUELY REMEMBERED THIS RESENTENCING, THIS LAST RESENTENCING. SO HE, AT THE FIRST RESENTENCING, HE WAS ON COCAINE, THEN,, TOO BUT APPARENTLY HE DIDN'T THINK THAT IT WAS BAD ENOUGH TO AFFECT ANYTHING AT THAT TIME, AND WHAT HAPPENED, RIGHT BEFORE IT GOT TO THIS COURT TO DECIDE, THE STATE STIPULATED THAT, FOR A NEW PENALTY HEARING BECAUSE OF THAT. AFTER THE FIRST GUILT PHASE, MIKE JONES DIDN'T HAVE A MENTAL HEALTH EXPERT UNTIL THE NEXT MORNING, AND HE GOT DR. MARCH A TO TESTIFY AND HE RE-- AND DR. MEARA TO TESTIFY AT THE PENALTY PHASE. HE REVIEWED MENTAL HEALTH CORDS, BUT HE DIDN'T --

HOW DOES THIS TIE IN -- MENTAL HEALTH RECORDS, BUT HE DIDN'T --

HOW DOES THIS TIE IN?

I AM GOING TO CONNECT IT UP IN A MINUTE. DR. MARIN TEST FILED, AFTER TALKING TO MR. STEWART FOR ONE HOUR, BASED ON JUST, MOSTLY WHAT MR. STEWART TOLD HIM, AND NOTHING ELSE, AND HE TESTIFIED THAT HE DIDN'T MEET THE MENTAL MITIGATOR. HE DIDN'T MEET SUBSTANTIAL PARTS OF IT, SO AT THE THIRD RESENTENCING, THE DEFENSE HAD TWO OTHER, HAD DR. SULT AND AND DR. -- DR. SULTAN AND DR. MAYOR. DR. MAYER HAD JUST SEEN HIM FOR A FEW WEEKS, BUT DR. SULTAN HAD SEEN HIM SINCE 1995, FOR, LIKE, 20 HOURS, AND SHE HAD RUN ALL KINDS OF TESTS ON HIM, WHICH, OF COURSE, DR. MARIN DIDN'T HAVE TIME TO DO. THE STATE CALLED DR. MARIN AS THEIR ONLY WITNESS, AND DR. MARIN TESTIFIED, WHEN HE TESTIFIED AT THE SECOND RESENTENCING, HE DIDN'T DO IT AGAIN SO HE USED HIS NOTES FROM THE FIRST RESENTENCING, WHEN HE SAW HIM FOR AN HOUR.

COUNSEL, WHICH ISSUE ARE YOU TALKING ABOUT HERE? YOU HAVE GOT FOUR ISSUES ON THE FIELD.

I AM TALKING ABOUT PRIMARILY FOUR RIGHT NOW, FOUR AND FIVE.

THE WEIGHING OF THE MITIGATION?

THE WEIGHING OF THE MITIGATION. RIGHT. RIGHT. SO ANYWAY, I WILL TRY TO SHORTEN THIS A LITTLE BIT. THE STATE, THEN, CALLED DR. MARIN TO REBUT THE TWO DEFENSE EXPERTS, WHO BOTH THOUGHT HE MET THE MITIGATION, AND DR. MARIN, AGAIN, SAID THAT HE DID, EX-SENT IT WASN'T EXTREME AND SUBSTANTIAL, ALTHOUGH -- EXCEPT IT WASN'T EXTREME AND SUBSTANTIAL, ALTHOUGH HE DID SAY HE HAD YEARS AND YEARS OF MENTAL DISTRESS. ACTUALLY THE DOCTORS DIDN'T SAY THAT MUCH DIFFERENT. HE HAD POST-TRAUMATIC STRESS DISORDER, AND DR. MARIN AGREED THAT HE MIGHT HAVE, AND YOU KNOW, THEY BOTH SAID HE WAS DEPRESSED AND THEY BOTH, YOU KNOW, THEY REALLY ALL HAD SOMEWHAT SIMILAR THINGS. IT IS JUST IT WAS THE EXTENT OF IT. WELL, WHAT HAPPENED, WHAT I WAS TRYING TO POINT OUT IS THAT, BECAUSE HE HAD THIS COUNSEL WHO WAS INEFFECTIVE, HE STILL ENDED UP ON DEATH ROW, BECAUSE OF DR. MARIN'S TESTIMONY, WHICH WAS THE THING THAT MIKE JONES DID WRONG IN THE FIRST PLACE AND CARRIED ON TO THE SECOND TIME, WHEN HE DIDN'T HAVE HIM REEXAMINED AHEAD OF TIME, AND THEN THE STATE, I DON'T KNOW WHY HE DIDN'T OBJECT TO THE STATE CALLING HIM, ALTHOUGH SINCE HE HAD TESTIFIED BEFORE, I GUESS THAT RELIEVES THE CONFIDENTIALITY. IT STILL DOESN'T SEEM QUITE FAIR. WHAT I AM TRYING TO SAY IS THAT THE COURT, REALLY, I FEEL LIKE SHE ABUSED THE DISCRETION AND SHE DECIDED ODD TO RELY 'DR. MARIN AND NOT THE OTHER TWO, AND ONE THING SHE DIDN'T LIKE APPARENTLY ABOUT DR. SULTAN, IT IS HARD TO DISCERN, BUT SHE SAID IN REBUTTAL, WAS BECAUSE DR. SULTAN SAID THAT SHE DIDN'T ASK MR. STEWART TOO MUCH OF THE --

DR. MARIN TESTIFIED AT THE TRIAL FROM WHICH THIS APPEAL HAS BEEN TAKEN, IS THAT CORRECT?

RIGHT. FOR THE STATE INSTEAD OF FOR THE DEFENSE THIS TIME, BUT ALL BASED ON THAT SAME FIRST INTERVIEW IN 1986, BEFORE THE PENALTY, THAT ONE HOUR INTERVIEW.

HOW DID THE TRIAL COURT COME DOWN, THEN?

WELL, SHE DECIDED THAT SHE BELIEVED DR. MARIN, INSTEAD, BASED ON, I GUESS, THE WAY HE COMMITTED THE CRIME, AND SHE RELIED PRIMARILY ON WHAT RANDALL BILL URI -- BILL BERRY SAID AS SOMEONE STEWART MET AND THEY WERE DRINKING TOGETHER AND SHORTLY AFTER THE CRIME HE CONFESSED THAT HE WAS A HOMOSEXUAL. I DON'T THINK THAT IS IN THIS CASE BUT THIS WAS IN THE OTHERS.

WE ARE SORT OF STUCK WITH THE HISTORICAL FACTS. I MEAN THE FACT THAT DR. MARIN WAS INVOLVED BEFORE, AND THAT HE HAS THAT HISTORY ON THE CASE, AND NOW --

BUT HE SAW HIM FOR ONLY AN HOUR, AND IN KOENIG V STATE, WHICH IS A FAIRLY RECENT CASE

BUT IS NOT THIS A CLASSIC, I AM HAVING DIFFICULT WE A CLASSIC CREDIBILITY ISSUE FOR THE TRIAL JUDGE TO HAVE TO RESOLVE, IN SORTING OUT ARE SORTING OUT, YOU KNOW, WHAT THE EVIDENCE IS THERE.

WELL, THE TWO NEW DOCTORS HAD EXTENSIVE TIME WITH HIM, AND THEY HAD DONE A LOT OF RESEARCH. NOW, THE TRIAL JUDGE SAID, WELL, DR. MARIN SAW HIM CLOSER TO THE TIME. WELL, HE DID, BUT IT WAS TWO YEARS. IT WASN'T THAT CLOSE. HE SAW HIM FOR AN HOUR AND HAD NO TESTING, AND DIDN'T TALK, ONE OF THE THINGS THE JUDGE DIDN'T LIKE ABOUT DR. SULTAN WAS THAT SHE DIDN'T ASK HIM ABOUT THE CRIME. WELL, NEITHER DID DR. MARIN. HE SAID HE DIDN'T ASK HIM ABOUT THE CRIME, EITHER, AND IN THIS KOENIG CASE, YOU ALL SAID, TURNING TO DR. DAVID'S REPORT IN THE TESTIMONY THAT HE GAVE DURING POSTCONVICTION HEARING, IT APPEARS THE ONLY INFORMATION DR. DAVID RECEIVED ABOUT MR. CONEY'S BACKGROUND CAME FROM MR. CONEY, HIMSELF, BASED ON THAT INFORMAL ONE-HOUR NEUROLOGICAL EXAM CONDUCTED WHILE THE DEFENDANT WAS HANDCUFFED AND SHACKLED. HE WAS SHACKLED, BUT I DON'T KNOW IF HE WAS WHEN HE MET WITH DR. MARIN, AND HE FOUND NO EVIDENCE, AND SO

THIS COURT FOUND THIS INEFFECTIVE ASSISTANCE, BECAUSE YOU KNOW, AND ONE OF THE REASONS WAS BECAUSE THIS DOCTOR ONLY EXAMINED HIM FOR ONE HOUR, AND HE BASED IT UPON THAT.

COUNSEL, IF I CAN GET TO THE CRUX OF YOUR ISSUE, YOU SEEM TO BE ARGUING, HERE, BOTH EXPERTS TESTIFIED THAT THERE WAS SOME MENTAL CONDITION, AND IN FACT, THE COURT FOUND THE STATUTORY MENTAL MITIGATOR, CORRECT?

ALL THREE.

SO THE ONLY ISSUE IS WHETHER THE COURT SHOULD HAVE ASSIGNED MORE WEIGHT THAN HE DID TO THE STATUTORY MENTAL MITIGATOR. HE ASSIGNED SOME WEIGHT, BASED ON DR. MARIN'S TESTIMONY THAT THE CONDITION WAS NOT EXTREME OR SUBSTANTIAL, INSTEAD OF THE DEFENSE EXPERT'S TESTIMONY THAT THE MENTAL CONDITION WAS EXTREME AND SUBSTANTIAL, SO DON'T WE NEED TO DEFER TO THE TRIAL JUDGE AND THE KIND OF WEIGHT THAT HE ASSIGNS TO THE DIFFERENT AGGRAVATOR? HE HAS ALREADY FOUND THE AGGRAVATOR, THE MITIGATOR.

WELL, THAT IS THE GENERAL RULE, BUT IT HAS TO BE SUPPORTED BY THE ESTD. -- BY THE EVIDENCE, AND IT JUST SEEMS THAT --

WAS IT SUPPORTED BY DR. MARIN'S TESTIMONY.

HE SAW HIM FOR AN HOUR BEFORE THE PENALTY PHASE 15 YEARS AGO AND USED HIS NOTES SINCE THEN, AND HE DIDN'T HAVE ANYTHING TO RELY ON OR DID ANY TESTING, SO IT SEEMS TO ME THAT HIS CREDIBILITY --

HOW LONG AFTER THE CRIME DID THE OTHER EXPERTS INTERVIEW HIM?

I THINK ABOUT TEN YEARS, PROBABLY, ORATE OR TEN. I THOUGHT IT WAS 1993. THE COURT SAID '95, WHEN DR. SULTAN BECAME INVOLVED AND SHE STAYED INVOLVED, UP UNTIL THIS TRIAL.

SO WHY WASN'T IT WITHIN THE JUDGE'S DISCRETION TO BELIEVE AN EXPERT WHO HAD INTERVIEWED THE DEFENDANT TWO YEARS AFTER THE CRIME, VERSUS AN EXPERT WHO HAD INTERVIEWED THE DEFENDANT TEN YEARS AFTER THE CRIME?

BECAUSE THE ONE THAT INTERVIEWED HIM TEN YEARS LATER, INTERVIEWED HIM FOR, LIKE, 20 HOURS AND DID ALL KINDS OF TESTING, LIKE THE MMPI, INTERVIEWED WITNESSES AND HIS FAMILY, AND DR. MARIN DIDN'T DO ANY OF THAT. HE ONLY SAW HIM FOR AN HOUR ON THE DAY OF PENALTY PHASE. WHICH ISN'T ENOUGH TIME TO PREPARE, AND CONEY SAID THAT THESE TWO DOCTORS, AND IT SAYS EVEN A FEW DAYS AHEAD IS NOT ENOUGH TIME TO PREPARE YOUR MENTAL HEALTH.

HAVE WE EVER HELD THAT CASE, IN WHICH -- IN A CASE, IN WHICH THE TRIAL JUDGE HAS ASSIGNED SOME WEIGHT TO A STATUTORY MITIGATOR, THAT THE TRIAL JUDGE ABUSED HER DISCRETION IN NOT ASSIGNING MORE WEIGHT TO THAT MITIGATOR?

WELL, I CAN'T TELL YOU, OFFHAND. THAT, THE LAST CASE THAT I --

SO THIS WOULD BE THE FIRST CASE THEN.

WELL, NONTHAT IT WOULD -- WELL, I DON'T KNOW THAT IT WOULD. I CAN'T JUST, OFF THE TOP OF MY HEAD, TELL YOU. LET ME GET INTO THAT, SINCE YOU HAVE ALREADY DONE IT. THE JUDGE'S ORDER IS A.M. BIFF RANT -- IS A.M. BIFFLANT, BECAUSE NORMALLY -- IS A.M. BIFFLANT. NORMALLY THE -- IS AMBIVILANT, BECAUSE IN THIS CASE SHE WENT TO 25, AND OPPOSING

COUNSEL SAID THAT THEY WERE NONSTATUTORY, AND I DON'T KNOW THAT THAT SHOULD MAKE A DIFFERENCE BUT IT SEEMS, TO AND I THINK SHE INTENDED THEM TO BE STATUTORY OR SHE WOULDN'T HAVE FOUND SOME WEIGHT, AND THEN ON THE REST OF THEM SHE FOUND LITTLE OR NO WEIGHT BECAUSE SHE HAD FOUND WEIGHT IN THE FIRST TWO MENTAL MITIGATORS, AND THE REASON SHE ONLY FOUND SOME WEIGHT WAS BECAUSE THEY WERE NOT EXTREME AND SUBSTANTIAL, AND HAD THIS -- AND HAD THEY BEEN EXTREME AND SUBSTANTIAL, THEN SHE PROBABLY WOULD HAVE FOUND GREAT WEIGHT, AND YOU GO THROUGH THAT AND THEN THROUGH ALL OF THE REST OF THEM, SOME OF THEM, BECAUSE SHE TREATED THEM IN THAT, SHE DIDN'T TREAT, SHE DIDN'T WEIGH THEM AS HEAVILY IN OTHER CASES.

THERE WAS SUBSTANTIAL AGGRAVATION IN THIS CASE, IS THAT CORRECT?

THERE WAS --

WHAT WERE THE AGGRAVATORS?

THERE WERE THREE AGGRAVATORS AND TWO OF THEM WEREN'T THAT BAD. ONE WAS THAT HE WAS ON --

DON'T YOU HAVE AN AGGRAVATOR --

THE BAD ONE, I WILL TELL YOU, THE BAD ONE IS THE PRIOR VIOLENT FELONY, WHICH IS THE OTHER, EXCUSE ME, THERE IS ANOTHER MURDER THAT REALLY HAPPENED FIVE MONTHS LATER, BUT THE TRIAL WAS EARLIER.

WHAT WAS THE OUTCOME IN THAT CASE?

HE HAS A DEATH SENTENCE IN THAT CASE, TOO. AND INTAKE CASE, WHICH IS AT 80 -- AND IN THAT CASE, WHICH IS AT 801.59, THAT IS A RECENT ONE WHERE THIS COURT DIDN'T ALLOW A NEW TRIAL, BUT THAT ATTORNEY WASN'T INEFFECTIVE, BUT THE REASON FOR ALL OF THESE IS THAT THIS KENNY HAD A STEPFATHER, BRUCE SCARPO WHO ABUSED HIM BADLY, BUT HE DIDN'T TELL COUNSEL THAT AT THE FIRST TRIAL. APPARENTLY HE WAS TERRIFIED OF THIS FATHER, AND HE DID HAVE A LOT OF ABUSE AS A CHILD WITH HIS REAL MOTHER AND NEGLECT, BUT THIS BRUCE SCARPO, LIKE WHEN HE WET THE BED, HE MADE HIM SIT IN THE BED NAKED FOR DAYS AT A TIME, AND WHEN HE DIDN'T TAKE OUT THE TRASH, HE PUT THE TRASH CAN ON TOP OF HIM.

DID THIS JURY HEAR THAT EVIDENCE?

THIS JURY HEARD IT. SEE, THE FIRST JURY CAME BACK 12-TO-0 AND THIS YEAR CAME BACK 7-TO-5, SO, AND THE TWO SISTERS TESTIFIED THIS TIME, AND THEY WERE ALL TERRIFIED OF THE FATHER, AND THEY SAID AT DINNER, THEY COULDN'T ENJOY DINNER BECAUSE THEY WERE SO AFRAID OF HIM EXPLODING, BECAUSE HE WAS DRUNK ALL THE TIME. HE OWNED BARS AND HE WAS IN FEDERAL PRISON FOR MONEY-LAUNDERING AND THINGS LIKE THIS, BUT SEE, HE TESTIFIED AT THE FIRST TWO TRIALS, THAT WHEN HE TOOK KENNY, HE HAD THIS LOVELY LIFE. WELL, I MEAN, IT WAS HARD, I THINK, FOR KENNY TO, YOU KNOW, SAY HOW HE ABUSED HIM, NOT WHEN HE WAS AFRAID OF THE GUY, THAT HE MIGHT HAVE HIM KILLED, AND KENNY THOUGHT THAT BRUCE SCARPO HAD HAD HIS REAL MOTHER AND FATHER KILLED AT SOME POINT, BECAUSE HIS GRANDMOTHER HAD TOLD HIM THAT. HE RAN AWAY WHEN HE FOUND OUT, WHEN HE WAS 13, THAT BRUCE SCARPO WASN'T HIS REAL FATHER.

GETTING BACK TO JUSTICE ANSTEAD'S QUESTION, THE PREVIOUS VIOLENT FELONY AGGRAVATOR, THAT ACTUALLY INCLUDED MORE THAN JUST MURDER, CORRECT? THERE WAS TWO ATTEMPTED MURDERS, AN ARMED ROBBERY, ATTEMPTED ARMED RBRY AND AGGRAVATED AS -- ARMED ROBBERY AND AGGRAVATED ASSAULT, IS THAT CORRECT?

HE PICKED UP TWO PEOPLE HITCHHIKING, AND WHEN SHE STARTED TO REF UP THE CAR TO GET AWAY, HE WAS IN THE BACKSEAT AND HE SHOT, AND SHE LIVED. THE GUY DIED.

WAS IT CORRECT THAT THE PRIOR VIOLENT FELONY AGGRAVATOR IS BASED ON THOSE OTHER CRIMES AS WELL?

RIGHT.

AND YOU ALSO HAD, UNDER SENTENCE OF IMPRISONMENT WHEN THE CRIME WAS COMMITTED AGGRAVATOR, CORRECT?

UNDER SENTENCE OF IMPRISONMENT, AND THAT WAS BECAUSE HE WALKED AWAY. HE WAS A TRUSTEE AT THE TAMPA JAIL. HE ALSO HAD AN AGO RIGHT OR OF PECUNIARY -- AN AGGRAVATOR OF PECUNIARY GAME.

SUPPOSEDLY IT WAS A ROBBERY.

SO IN ORDER TO RULE IN YOUR FAVOR, WE WOULD HAVE TO HOLD THAT, SIMPLY BECAUSE THE JUDGE ASSIGNED SOME WEIGHT INSTEAD OF MORE SUBSTANTIAL WEIGHT TO THE EXTREME MENTAL DISTURBANCE AGGRAVATOR, I MEAN, MITIGATOR, THAT THAT WOULD, THEN, PUT IT OVER THE TOP, AS COMPARED WITH ALL THESE AGGRAVATORS.

NOT NECESSARILY. EVEN IF YOU DIDN'T DECIDE THAT, THERE WERE OTHER THINGS. THERE WERE OTHER THINGS. ONE THING --

YOU RAISED OTHER ISSUES, BUT I AM SAYING REGARDING THAT PARTICULAR ISSUE.

I AM ANSWERING THAT QUESTION THERE WAS A LOT OF TESTIMONY THAT HE HAS BEEN REHABILITATED. HIS AUNT AND THE TWO CCR LAWYERS, BOTH, TESTIFIED THAT HE WAS THE EASIEST CLIENT THEY EVER HAD TO DEAL WITH AND HE WAS SPIRITUAL AND HE HAD BEEN IN NO TROUBLE IN PRISON, THAT HE HAD THAT INFORMATION, PLUS, ACTUALLY, HE WAS, AS A CHILD HE WAS ABANDONED AND THEN HE WAS ABUSED. THERE IS REALLY NEVER, I HAVE NEVER SEEN SUCH MITIGATION, YOU KNOW, SUCH BAD MITIGATION, IN A CASE. I MEAN, MAYBE SOME OF THE CASES DON'T GO INTO ALL OF THE DETAILS LIKE THIS. BUT --

BUT THAT IS THE SAME WITH REFERENCE TO THE AGGRAVATION, IS IT NOT? THAT IS, YOU KNOW, TO HAVE AS AN AGGRAVATOR HERE, A PRIOR MURDER IN WHICH THE DEATH PENALTY IS IMPOSED AND ATTEMPTED MURDERS, THAT IS THAT YOU HAVE, PERHAPS, EXTENSIVE MITIGATION. DO YOU ALSO HAVE EXTRAORDINARY AGGRAVATION, IS THAT RIGHT?

THAT IS TRUE, BUT THEN THIS COURT SAID, IN COOPER AND CROOK, THAT A CRIME MUST BE ESPECIALLY AGGRAVATED AND ONE OF THE LEAST MITIGATED, AND THIS IS NOT ONE OF THE LEAST MITIGATED THIS. IS ONE OF THE MOST MITIGATED. IT MAY BE, ALSO, ONE OF THE ESPECIALLY AGGRAVATED OR MOST AGGRAVATED, BUT IT IS ALSO ONE OF THE MOST MITIGATED, AND IT SAYS THAT IT HAS TO BE "AND". MOST AGGRAVATED AND THE LEAST MITIGATED, AND AS FAR AS THE CASES THAT OPPOSING COUNSEL CITED, YOU KNOW, FOR PROPORTIONALITY, SHE CITED DANNY ROLLING, AND IN THIS CASE, IT IS NOTHING LIKE THIS. HE RAPED FIVE WOMEN AT THE UNIVERSITY OF FLORIDA, AND HE HAD FOUR, HE HAD FOUR AGGRAVATORS, INCLUDING HAC AND CCP. THAT IS ANOTHER THING. TIM STEWART DIDN'T HAVE HAC OR CCP IN THIS CASE. ALSO, FOR SAYING HE, DR. MARIN SAYING HE WASN'T, YOU KNOW, EXTREMELY DRUNK, HE HAD BEEN THAT MORNING, HE SAID, AT HIS MOTHER'S GRAVE, AND HIS GIRLFRIEND TESTIFIED TO THIS, TOO, AT HIS MOTHER'S GRAVE, HIS REAL MOTHER, WITH A BOTTLE OF WHISKEY AND A GUN AND THE GIRLFRIEND SAID HE WOULD GO THERE IN THE MIDDLE OF THE NIGHT, SO DRUNK, HE WOULD GO AND SIT THERE AND DRINK, AND HE WAS DRINKING, IT SAID, LIKE A BOTTLE OF WHISKEY AND 24 BEERS A DAY.

DID THE TRIAL COURT FIND THAT, AS A MITIGATION?

YES. BUT BASED ON DR. MARIN, IT WASN'T EXTREME, BECAUSE HE WAS USED TO IT, HE SAID.

THE MARSHAL HAS REMINDED US THAT WE ARE IN YOUR REBUTTAL TIME.

I AM SORE I

CHIEF JUSTICE: IF YOU WANT TO SAVE SOME TIME FOR RESPONDING TO THE STATE.

YEAH. THAT IS FINE. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH.

UM-HUM.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE APPELLEE, THE STATE OF FLORIDA. THE MENTAL MITIGATION THAT WAS PRESENTED, ONE OF THE MORE INTERESTING FACTS IS, AS MY OPPOSING COUNSEL NOTED, REALLY THE THREE DOCTORS IN THIS CASE WERE VERY SIMILAR, WITH REGARD TO THE FACTUAL BASIS FOR THEIR PARTICULAR CONCLUSIONS, WITH REGARD TO THE MENTAL MITIGATION.

INCLUDING DR. MARIN.

YES. DR. MARIN RECOGNIZED THAT MR. STEWART HAD SEPARATE TRAUMA AS A CHILD, WAS SUBJECT TO ABUSE AS A CHILD, AND IN ADDITION, THE, HE DID SEE HIM BACK IN 1986, BUT HE, ALSO, RELIED ON A NUMBER OF DOCUMENTS AND OTHER REPORTS, SO HE WASN'T --

WAS HE UPDATED, SO TO SPEAK? WE HAD THIS ISSUE ABOUT THE FATHER, AND THE FATHER ACTUALLY TESTIFIED, BUT THEN IT ENDED UP THAT OTHER FAMILY MEMBERS -- USE YES, HE ACKNOWLEDGED THAT THERE WAS ADDITION --

YES. HE ACKNOWLEDGED THAT THERE WAS ADDITIONAL THINGS NOW. HE SAID THAT DIDN'T CHANGE HIS OPINION. IN ADDITION, IT IS IMPORTANT TO RECOGNIZE THAT THERE IS A LOT OF MENTAL HEALTH INFORMATION AVAILABLE, WHICH THESE DOCTORS HAD, WHICH ARE NOT A PART OF THIS RECORD, BECAUSE THEY ARE A PART OF THE OTHER CAPITAL SENTENCING RECORD. HE WAS, MR. STEWART, WAS EXAMINED PRIOR TO TRIAL FOR COMPETENCY PURPOSES, BY DR. SCHLESSINGTON AND GONZALEZ, BUT THOSE REPORTS WERE AVAILABLE TO ALL OF THE DOCTORS, INCLUDING DR. MARIN,, BECAUSE THAT TRIAL PRECLUDED THIS TRIAL.

AND HE WAS ABLE TO USE THAT.

YES, AND HE ALSO WAS EXAMINED BY DR. AF IMPLT ELD, WHO HAD DONE OTHER TESTING. NOW, DR. MAYER, WHO TESTIFIED IN THIS PROCEEDING BELOW, AS A PSYCHIATRIST, THEY TYPICALLY DO NOT DO THE PSYCHOLOGICAL TESTING THAT PSYCHOLOGISTS DO. DR. SULTAN AND DR. MARIN ARE BOTH PSYCHOLOGISTS AND WOULD BE, TAKE INTO ACCOUNT A LOT OF THE PSYCHOLOGICAL TESTING. THE FACT THAT MARINE DID NOT DO HIS OWN TESTING IS NOT SIGNIFICANT, SINCE HE HAD THE TESTING OF OTHER PSYCHOLOGISTS THAT HE COULD REVIEW. SO CERTAINLY BY THE TIME OF THIS PROCEEDING, HE HAD THE INFORMATION, AND HE HAD THE ADDITIONAL INFORMATION THAT HAD BEEN DEVELOPED, WITH REGARD TO THE ABUSE BY BRUCE SCARPO, AND HE WAS ABLE TO TAKE THAT INTO ACCOUNT, AND, AGAIN, EVEN AT THE TIME OF THE INITIAL PENALTY PHASE, HE WAS AWARE, JUST FROM HIS DISCUSSIONS WITH STEWART, THAT

THERE HAD BEEN CHILD ABUSE PRIOR TO THAT TIME, AND THAT HE HAD BEEN ABANDONED BY HIS MOTHER AND THAT HE HAD HAD THE LOSS OF THE FATHER FIGURE AND SOME OF THESE OTHER FACTORS THAT HE TALKS B THE OTHER DOCTORS, DR. MAYER AND DR. SULTAN IN THIS ERROR, REALLY, THE DISTINCTION -- IN THIS RECORD, REALLY THE DISTINCTION BETWEEN THEM AND DR. MARIN IS THEIR CONCLUSION THAT THIS AMOUNTED TO THE STATUTORY MENTAL MITIGATION, BECAUSE THEY FOUND THAT THE QUALIFIERS OF EXTREME DISTURBANCE AND SUBSTANTIAL IMPAIRMENT WERE ESTABLISHED THIS THIS CASE. THEY DON'T BASE THAT, AND EVEN DR. SULTAN FOR ALL HER TESTING, SHE DOESN'T TALK ABOUT THE MMPI SCALES OR OBJECTIVE TESTING. SHE IS TALKING ABOUT THE SAME FACTS THAT DR. MARIN TALKED ABOUT, TO COME UP WITH HIS CONCLUSION. DR. MAYER AND DR. SULTAN SAID WE THINK, BECAUSE OF THE POST-TRAUMATIC STRESS, WHICH IS BROUGHT ON FROM THE CHILDHOOD ABUSE, WE BELIEVE THAT THIS CRIME WAS AN IMPULSIVE CRIME, THAT STEWART COMMITTED, AND MARINE DISAGREED WITH THAT CONCLUSION. HE FELT LIKE THAT, ALTHOUGH HE RECOGNIZED THAT THERE WAS SOME EMOTIONAL DISTRESS, HE SAID THAT THIS IS, THIS DISTRESS WAS WITH MR. STEWART ALL HIS LIFE. THERE WAS NOTHING PARTICULAR ABOUT THE TIME OF THE CRIME, THAT AGGRAVATED IT OR THAT CAUSED IT TO BE ANYMORE THAN THE DISTRESS THAT HE HAD LIVED WERE FROM THE TIME HE WAS BORN, BASICALLY, BECAUSE HE HAD ALWAYS BEEN SUBJECT TO THE ABUSE. SO ON THESE FACTS, THE ALLOCATION OF WEIGHT AND CREDIBILITY DETERMINATION ARE CLEARLY MATTERS FOR THE TRIAL JUDGE, AND IN THIS CASE, JUDGE FLEISCHER WAS MORE COMPELLED TO FIND DR. MARIN'S CONCLUSIONS CONSISTENT WITH NOT ONLY HIS BASIS FOR REACHING HIS CONCLUSIONS BUT CONSISTENT WITH THE FACTS OF THIS CASE THAT DEMONSTRATED THAT MR. STEWART, IN HIS -- THAT MR. STEWART AND HIS ACCOMPLICE HAD SELECTED THIS VICTIM OUT OF A BAR BY SEEING A CAR THAT THEY LIKED IN THE PARKING LOT AND WAITED FOR HIM AND STARTED TALKING TO HIM AND GOT HIM TO GIVE THEM A RIDE OUT TO A REMOTE LOCATION, KNOWING THAT THEY WERE GOING TO ROB AND KILL HIM AND SHOT HIM TWICE, TWO DIFFERENT GUNSHOTS TO THE HEAD. IT IS HIGHLY AGGRAVATED THAT, AT THAT TIME, THEY TOOK MONEY. THEY TOOK THE COCAINE FROM THE VICTIM. THEY TOOK HIS CAR TO ANOTHER LOCATION AND SET IT ON FIRE, AND THEN A FEW MONTHS LATER, WHEN MR. STEWART, BY HIMSELF, NO LONGER ACTING WITH ANOTHER INDIVIDUAL, DOES BASICALLYES SECTIONALLY THE SAME CRIME -- BASICALLY ESSENTIALLY THE SAME CRIME WITH MARC HARRIS AND MICHELLE ACOSTA, ACOSTA LIVED AND WAS ABLE TO TESTIFY MORE ABOUT HIS ROLE IN THAT CRIME AND WHEN HE DID THAT, HE TOOK THE CAR TO THE EXACT SAME LOCATION TO SET IT ON FIRE AND IT WAS THREE DAYS AFTER THAT THAT HE WENT INTO A CONVENIENCE STORE AND THE MANAGER WORKING AT THE CONVENIENCE STORE, ABOUT TWO O'CLOCK IN THE MORNING, AND MR. STEWART SAID THIS IS A ROBBERY AND SHOLT HIM RIGHT BETWEEN -- AND SHOT HIM RIGHT BETWEEN THE EYES, AND BUT FOR FATE OR SOMETHING, THAT COULD EASILY HAVE BEEN ANOTHER CAPITAL CRIME, BUT THE VICTIM LIVED THROUGH THAT EPISODE, SO THIS COULD EASILY BE A FORMER DEFENDANT AS EASILY AS HAVING THE TWO PRIOR MURDERS.

COULD YOU ADDRESS THE PROPORTIONALITY?

I THINK IT GOES TO THAT THAT YOU HAVE THE TRIAL JUDGE FINDING, THERE IS NOT, ALTHOUGH THERE IS SIGNIFICANT CHILD ABUSE IN THIS CASE, THAT REALLY THE MENTAL MITIGATION DOES NOT RISE TO THE LEVEL OF THE STATUTORY MITIGATORS, ALTHOUGH SHE FOUND STATUTORY MITIGATORS TO APPLY, SHE DIMINISHED THEIR WEIGHT, BECAUSE THE MODIFIERS OF EXTREME AND SUBSTANTIAL HAD NOT BEEN ESTABLISHED, AND GIVEN THE STRONG AGGRAVATION IN THIS CASE, AND THE FACT THAT, REALLY, THERE IS NO STATUTORY MITIGATION, IF YOU LOOK AT IT IN THAT LIGHT, I DON'T THINK THERE IS A REASONABLE PROPORTIONALITY ARGUNIT TO BE MADE, ESPECIALLY -- ARGUMENT TO BE MADE, ESPECIALLY WHEN YOU HAVE THE PRIOR CAPITAL MURDER. THESE ARE VICTIMS THAT WERE SELECTED WITH THESE PARTICULAR CRIMES IN MIND. JUSTICE CANTERO, I DO WANT TO MENTION THAT I DO BELIEVE THIS COURT, IN THE BELL DECISION, MADE A DETERMINATION THAT THE TRIAL JUDGE HAD ABUSED HIS DISCRETION WITH REGARD TO THE WEIGHT GIVEN THE STATUTORY FACTOR OF AGE, WHICH I THINK IS A LITTLE

DIFFERENT, BECAUSE AGE IS KIND OF AN AUTOMATIC, ESPECIALLY SOMEONE WHO IS UNDER THE AGE OF 18, YOU HAVE TO FIND THAT, BUT I THINK THAT IS AN EXAMPLE, TO MY MIND, THE ONLY ONE THAT THIS COURT HAS ACTUALLY DISAGREED WITH A MITIGATOR WHICH WAS FOUND, NOT GIVEN APPROPRIATE WEIGHT, AND I THINK BELL WAS THERE AFTER REDUCED ON PROPORTIONALITY GROUNDS, BUT I DON'T THINK THAT, WHEN YOU HAVE THE EVIDENCE IN THIS CASE, THE COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL JUDGE'S FINDINGS WITH REGARD TO THE MENTAL MITIGATION, YOU CAN FIND THAT ABUSE OF DISCRETION.

COULD YOU ADDRESS THE REQUEST FOR THE SPECIAL JURY INSTRUCTION ON NONSTATUTORY MITIGATION? I KNOW WE HAVE,, HAVE UPHELD THAT JUST GENERAL MITIGATOR, JUSTICE ANSTEAD HAS EXPRESSED CONCERN, THAT ESPECIALLY WHEN YOU HAVE THIS KIND OF COMPELLING NONSTATUTORY MENTAL MITIGATION, IS THE JURY REALLY GIVEN ENOUGH GUIDANCE? HERE WE HAVE A 7-TO-5 --

AGAIN, THAT IS REVIEWED FOR ABUSE OF DISCRETION AND I THINK WHEN CLEAR CASE LAW HAS REPEATEDLY SAID IT IS NOT NECESSARY TO GIVE THAT INSTRUCTION, THAT YOU CAN'T SAY A TRIAL JUDGE ABUSED THEIR DISCRETION IN DENYING IT. HOWEVER --

LET ME, SO IN OTHER WORDS THIS CURRENT STATE OF THE LAW IS THAT THE JUDGE COULD EITHER GIVE ONE OR NOT GIVE ONE, AND EITHER IS FINE.

I THINK IT IS DISKREINGS AREA WITH THE COURT.

-- I THINK IT IS DISCRETIONARY WITH THE COURT.

GUIDING DISCRETION IS THERE, IN OTHER WORDS, THE KIND OF HERE HE HAS GOT UNDENIABLE ABUSIVE CHILDHOOD, SOME COMPELLING NONSTATUTORY MITIGATION. WHAT WAS THE REASON IN THIS CASE THAT THE JUDGE DENIED A SPECIAL REQUEST? DID IT NOT ACCURATELY STATE THE LAW? DID IT GIVE TOO MUCH EMPHASIS TO NONSTATUTORY --

THE JUDGE'S REASONING AT THE TIME OF THE CHARGE CONFERENCE, WAS THAT IS ALREADY COVERED BY THE STANDARD JURY INSTRUCTIONS, WHICH IS WHAT THIS COURT HAS SAID IN DENYING THE CLAIM PREVIOUSLY. I THINK THERE IS ALSO A LEGITIMATE CONCERN, WITH THAT INSTRUCTION, THAT YOU GET ALMOST INTO A REVERSE HITCHCOCK PROBLEM THAT YOU ARE HIGHLIGHTING SOME MITIGATING FACTORS FOR THE JURY, AND THAT MAY DETRACT FROM THEIR ABILITY TO CONSIDER NONSTATUTORY MITIGATION THAT IS NOT ACTUALLY LISTED IN THE INSTRUCTION. IF YOU LOOK AT THE PARTICULAR INSTRUCTION THAT WAS REQUESTED IN THIS CASE, IT IS A LIST OF 13 NONSTATUTORY MITIGATORS. IF YOU LOOK AT THE TRIAL COURT'S ORDER, WHERE SHE, BY NUMBER, AS ASSIGNED BY THE DEFENSE, IN URGING NONSTATUTORY MITIGATION, SHE IS ADDRESSING 26 NONSTATUTORY MITIGATING FACTORS.

WHAT WAS, DO WE HAVE THE PROPOSED --

IT IS IN THE RECORD. YES. THE PROPOSED.

DOES IT INACCURATELY OR ACCURATELY STATE THE LAW?

WELL, I THINK IT IS AN ACCURATE STATEMENT OF THE LAW, TO THE EXTENT IT JUST SAYS YOU MAY CONSIDER, AND THERE IS A COMMENT ABOUT THIS IS NOT, THIS LIST, YOU KNOW, YOU MAY COUNTERIT -- YOU MAY CONSIDER IT, IF YOU ARE REASONABLY CONVINCED BY THE EVIDENCE THAT THESE FACTORS EXIST. YOU MAY CONSIDER ANY OF THESE AS NONSTATUTORY MITIGATION, AND THEN IT LISTS 13 SPECIFIC ITEMS, AND THEN THERE IS, IT FOLLOWS UP WITH SOME SORT OF STATEMENT ABOUT THIS IS NONINTENDED TO BE EXHAUSTED AND YOU CAN CONSIDER OTHER THINGS, EVEN IF THEY ARE NOT ON THIS LIST, BUT I THINK THAT THE FACT THAT YOU ARE HIGHLIGHTING THOSE TO A JURY IS DANGEROUS, WHEN THERE MAY BE OTHER

NONSTATUTORY MITIGATION THAT ISN'T ON THE LIST THAT THE DEFENSE CERTAINLY WANTS THE JURY TO CONSIDER.

I THINK YOU SAID, BEFORE, THAT THE COURT CONSIDERED THE MITIGATING FACTOR OF, COMMITTED WHILE UNDER EXTREME MENTAL OR EMOTIONAL DISTRESS BUT NOT AS A STATUTORY? DID YOU SAY?

ACTUALLY SHE FOUND IT TO BE A STATUTORY, SHE FOUND THAT STATUTORY FACTOR TO EXIST, BUT SHE SAID SHE WAS GIVING IT SOME WEIGHT, BECAUSE SHE WAS NOT CONVINCED THAT IT WAS, INDEED, AN EXTREME DISTURBANCE, AND --

SO THE JUDGE INSTRUCTED THE JURY ON THAT MITIGATOR.

YES. ON BOTH STATUTORY MITIGATORS, WITH THE QUALIFIERS EXTREME AND SUBSTANTIAL.

THE OTHER MITIGATOR BEING THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT.

WAS SUBSTANTIALLY IMPAIRED.

AND THEN THE CATCHALL, RIGHT?

RIGHT. YES, SHE DID. SO THEY HAD THOSE INSTRUCTIONS, AND THEY WOULD CERTAINLY CONSIDER THOSE, AND IN FACT, WHEN THIS COURT HAD THIS CASE THE FIRST TIME, THAT WAS THE REASON IT WAS SENT BACK FOR THE SECOND PENALTY PHASE, WAS THAT THE TRIAL JUDGE HAD NOT GIVEN THE SUBSTANTIAL IMPAIRMENT INSTRUCTION, HAD NOT GIVEN EITHER INSTRUCTION ON THE STATUTORY MENTAL MITIGATION, AND THAT TIME, EVEN THOUGH DR. MARIN HAD TESTIFIED THAT HE FELT LIKE THERE WAS IMPAIRMENT BUT IT WASN'T SUBSTANTIAL, THIS COURT SAID THAT WAS STILL A QUESTION FOR THE JURY, AND THE JUDGE SHOULD HAVE GIVEN THE SUBSTANTIAL IMPAIRMENT INSTRUCTION, AND THAT IS WHY IT WENT BACK THE FIRST TIME. WITH THE SECOND PENALTY PHASE, AGAIN, THE TRIAL JUDGE REJECTED ALL OF THE MENTAL MITIGATION, FINDING THAT IT DID NOT MEET THE LEVEL OF BEING STATUTORY MITIGATION, AND DID NOT WEIGH IT AT ALL, EVEN AS NONSTATUTORY MITIGATION, AND WHEN THAT WAS ON APPEAL TO THIS COURT, THIS COURT AFFIRMED, FINDING THAT THERE WAS ERROR IN THE FAILURE TO WEIGH IT AS NONSTATUTORY MITIGATION, BUT ON THE FACTS OF THIS CASE, THEY SO --, BEING SO HEAVILY AGGRAVATED, IT WAS HARMLESS, SO IT IS CONSISTENT THAT THESE HAVE BASICALLY BEEN NONSTATUTORY MITIGATORS AVAILABLE TO THE JURY AND THE JUDGES SINCE 1986. AND ALTHOUGH THE COURT, THIRD TIME AROUND, FOUND THEM AS STATUTORY MITIGATION TO EXIST, SHE ACKNOWLEDGED THAT SHE DID NOT THINK THE MODIFIERS OF EXTREME AND SUBSTANTIAL HAD BEEN PROVEN.

IS THERE A DANGER THAT, WITHOUT A MORE SPECIFIC INSTRUCTION, THAT A JURY, UNLIKE THE SOPHISTICATED JUDGE, THAT, WHILE NOT FINDING THE EXTREME OR SUBSTANTIAL, KNOWS THAT THEY STILL ARE REQUIRED TO GO AHEAD AND CONSIDER THAT MENTAL MITIGATION, THAT A JURY HEARING THE REQUIREMENT OF EXTREME AND SUBSTANTIAL AND, PERHAPS, HAVING THE PROSECUTION ARGUE THAT IT DIDN'T REACH THAT LEVEL AND THEREFORE YOU CAN'T CAN'T -- YOU CAN'T CONSIDER THOSE STATUTORY MITIGATORS, WOULD NOT CONSIDER THAT AS MITIGATION AT ALL, BECAUSE THE APPEARANCE WOULD BE, SINCE THE STATUTORY MITIGATORS REQUIRE EXTREME AND SUBSTANTIAL, THAT IS NOT MET, AND THAT THERE IS NO OTHER INSTRUCTION ABOUT CONSIDERING THAT MENTAL MITIGATION, THAT UNLIKE THE JUDGE, THAT THEY MAY NOT HAVE CONSIDERED THAT AS MITIGATION?

WELL, I THINK THERE IS, BECAUSE I THINK --

DO YOU UNDERSTAND MY QUESTION?

YEAH, BUT I THINK THAT THAT INSTRUCTION IS GIVEN BY THEM BEING TOLD TO CONSIDER EVERYTHING IN THE CATCHALL.

THEY GET THAT CATCH ALL, THOUGH, RIGHT AFTER GETTING THESE TWO STATUTORY MITIGATORS, WHICH REQUIRE EXTREME AND SUBSTANTIAL, DOESN'T IT APPEAR THAT THE CATCH ALL IS SOMETHING ELSE, YOU KNOW, BESIDES THAT MITIGATION?

WELL, I SUPPOSE THAT THEORETICALLY, IN A GIVEN CASE, THAT MIGHT MAKE A DIFFERENCE. I DON'T KNOW. ON THE FACTS OF THIS CASE, I DON'T BELIEVE IT POSSIBLY COULD, BECAUSE FOR ONE THING, THE FACTS GIVING RISE TO THE MENTAL MITIGATION, WHETHER YOU WANT TO CALL IT STATUTORY OR NONSTATUTORY, EVER BASICALLY ALL RELATED -- ARE BASICALLY ALL RELATED WITH THE OTHER NONSTATUTORY MITIGATION. IT IS BASED ON HIS CHILD ABUSE. IT IS BASED ON THE LOSS OF A FATHER FIGURE. IT IS BASED ON HIS SUBSTANCE ABUSE PROBLEMS, SO THESE ARE, REALLY, ALL, THEY WERE ALL PART AND PARCEL OF THE EXPERTS SAYING IT IS THESE FACTORS THAT LED TO THERE BEING AN EXTREME DISTURBANCE, AND THAT LED TO THERE BEING SUBSTANTIAL IMPAIRMENT, AND IN FACT, THE TRIAL COURT KIND OF ENHANCED THEM, BY WEIGHING THEM NOT ONLY AS STATUTORY MITIGATION, BUT THEN SHE TURNED AROUND AND ALSO GAVE THEM ADDITIONAL WEIGHT, AS NONSTATUTORY MITIGATION.

WE ARE NOT TALKING ABOUT, WE ARE TALKING ABOUT THIS 7-TO-5 AND WHETHER, IF, THAT THE PROBLEM BEING, AND REALIZING THAT WE HAVE UPHELD THE STANDARD JURY INSTRUCTION, BUT THE CONCERN HERE IS WHERE THERE IS PRETTY SUBSTANTIAL, I MEAN, THERE IS SOME CASES THAT ARE LESS SUBSTANTIAL, BUT PRETTY SUBSTANTIAL NONSTATUTORY MITIGATION, WHETHER, YOU KNOW, MAY NOT BE PROPORTIONALITY ANALYSIS OUTWEIGHED THE MITIGATION, AS FAR AS FOR OUR REVIEW, BUT AS FAR AS THE JURY'S CONCERN, IF THEY DON'T FIND THAT IT IS, THAT IT WAS UNDER EXTREME MENTAL EMOTIONAL DISTURBANCE, HOW IS THE JURY, DO THEY KNOW THAT THEY STILL CONSIDER IT AS OTHER MITIGATION?

WELL, I CAN'T SAY THAT, WHEN I READ THE PROPOSED INSTRUCTION IN THIS CASE, I HAD THAT IN MIND. I DO NOT RECALL THAT THE PROPOSED INSTRUCTION SAID A DISTURBANCE WHICH IS NOT EXTREME OR IMPAIRMENT WHICH IS NOT SUBSTANTIAL. I DO NOT BELIEVE THAT WAS PART OF THE PROPOSED INSTRUCTION THAT WAS BEFORE THE TRIAL JUDGE TO RULE ON FOR THIS ISSUE BELOW, SO I DON'T THINK EVEN HAD THE JUDGE GRANTED WHAT THEY WERE ASKING FOR, THAT YOUR CONCERN THAT THEY WOULD HAVE JUST IGNORED ALL OF THIS MENTAL MITIGATION, WHICH I CAN'T IMAGINE A JURY --

DIDN'T DEAL WITH THAT ISSUE.

NO. I BELIEVE IT WAS MORE THE CHILD ABUSE AND THE OTHER KIND OF STANDARD NONSTATUTORY. I DON'T BELIEVE THAT IT TRIED TO MAKE ANY DISTINCTION, BECAUSE I DON'T THINK THEY WANTED TO PLANT A SEED THAT MAYBE IT WASN'T EXTREME OR MAYBE IT WASN'T SUBSTANTIAL, BUT THAT IS SPECULATION ON MY PART, BUT THAT WASN'T, THAT WOULDN'T HAVE BEEN SOLVED BY THE PROPOSED INSTRUCTION IN THIS CASE, AND I THINK THAT YOU KNOW, YOU HAVE TO PRESUME THAT THE JURIES WILL FOLLOW THE INSTRUCTIONS AND FOLLOW THE LAW, AND WHEN THEY ARE TOLD THAT THEY CAN CONSIDER EVERYTHING, AND OBVIOUSLY A GREAT DEAL OF WHAT WAS PRESENTED TO THEM RELATED TO THE MENTAL CONDITION OF STEWART, I THINK THEY HAD TO AVOID THAT, IN MITIGATION, ALONG WITH THE OTHER NONSTATUTORY EVIDENCE PRESENTED.

I MEAN, THEY ARE NOT TOLD THAT, JUST BECAUSE ONE STATUTORY AND THE OTHERS ARE NONSTATUTORY, THAT THE STATUTORY GETS MORE WEIGHT.

NO.

NOTHING LIKE. THAT.

NO. NO. THEY ARE NOT. THEY ARE TOLD TO BASICALLY CONSIDER EVERYTHING AND GIVE IT THE WEIGHT YOU THINK IS APPROPRIATE, AND THEN WEIGH IT AGAINST THE WEIGHT THAT YOU GIVE THE AGGRAVATORS. SO I THINK THAT THAT IS GOING TO BE -- I DON'T THINK THEY HAVE THE APPRECIATION FOR STATUTORY VERSUS NONSTATUTORY, AS THE JUDGE OR AS THE ATTORNEYS MIGHT, SO I DON'T THINK THAT IS SOMETHING THAT IS FOCUSED ON TO THE JURY. I THINK WHAT IS FOCUSED ON TO THE JURY IS HERE IS A GUY WITH MENTAL PROBLEMS. YOU KNOW, GIVE IT WHAT WEIGHT YOU THINK IT DESERVES, WHEN YOU HEAR ALL THE TESTIMONY ABOUT IT, AND I THINK THAT IS WHAT THE JURY UNQUESTIONINGLY DID IN THIS CASE. SO FOR THOSE REASONS, I WOULD ASK THIS COURT TO AFFIRM THE DEATH SENTENCE IMPOSED ON MR. STEWART. THANK YOU.

CHIEF JUSTICE: THANK YOU. COUNSEL. HOW MUCH TIME? MARCH HARTWO MINUTES.

OKAY. -- MARY: TWO MINUTES.

OKAY. I DON'T HAVE MUCH -- MARY: TWO -- MARY: MAR -- MARSHALL. TWO MINUTES.

OKAY. I DON'T HAVE MUCH. I DON'T THINK THAT HE EVER MENTIONED DR. AFIELD'S REPORT.

IS THERE ANY INDICATION THAT HE UPDATED IT HIMSELF?

NO, NOT AT ALL.

WITH REFERENCE TO THE ADDITIONAL ABUSE.

THE DEFENSE COUNSEL ASKED THE COURT IF HE COULD SIT IN AND LISTEN TO IT, BECAUSE HE DIDN'T KNOW ABOUT IT YET, WHAT HE COULD SIT THERE AND LISTEN TO THE TWO OTHER EXPERTS, SO HE DIDN'T KNOW ABOUT THOSE. DR. MARIN TESTIFIED THE EXCESSIVE CONSUMPTION OF ALCOHOL CAUSE THE SUPPRESSION AND LOSS OF ABILITY TO CONTROL BEHAVIOR, EXCESSIVE ALCOHOL CON SUGES OVER A PERIOD OF YEARS CAUSE A CHEMICAL AND STRUCTURAL CHANGE IN THE BRAIN AND THIS 134 CASES IT MIGHT -- AND IN SOME CASES IT MIGHT ANNIHILATE THE ABILITY TO CONFORM TO THE LAW. IN DHAS HE DIDN'T THINK IT DID SUBSTANTIALLY. HOWEVER, HE DID SAY IT WAS THE END RESULT OF YEARS OF YEARS AND YEARS OF EXTREME EMOTIONAL DISTURBANCE.

GETTING BACK TO WHETHER, AGAIN, THE WEIGHT THAT THE JUDGE GAVE, IN READING THIS JUDGE'S VERY CAREFULLY WORDED AND DETAILED SENTENCING ORDER, IT APPEARS THAT THE REASON THAT SHE GAVE DR. MARIN'S CONCLUSION MORE WEIGHT IS, REALLY, THE FACTS ABOUT HOW THIS CRIME OCCURRED AND WHAT HAPPENED LEADING UP TO IT. NOW, WHETHER THERE WASN'T CCP, THIS WASN'T JUST SOME KIND OF A, YOU KNOW, DRUNKEN -- TYPE --

WE DON'T KNOW. THAT ALL THE TESTIMONY WE HAVE IS RANDALL BILL BERRY, WHO WAS DRUNK AT THE TIME AND REPEATED THIS HEARSAY THAT HAS BEEN REPRESENTEDED -- REPEATED EVER SINCE, SO WE DON'T KNOW THAT THE CRIME HAPPENED LIKE THAT.

YOU ARE ATTACKING, YOU SEE, THOSE ARE FINDINGS THAT THE JUDGE HAS MADE AS TO WHAT SHE IS BASING HER CONCLUSIONS ON THAT DR. MARIN IS MORE CREDIBLE, SO THEN YOU WOULD HAVE TO GO AND ATTACK ALL OF THE SPECIFICS, WHICH I DON'T REALLY SEE THAT YOU HAVE --

WHAT I AM SAYING IS THAT I DON'T THINK THOSE CONCLUSIONS FOLLOW FROM HIS FINDINGS, AND HE DID ADMIT THAT HE FOUND MORE MITIGATION THIS TIME. HE FOUND DEPRESSION THIS TIME, BECAUSE HE HAD FIRST HEARD ABOUT, HE FIRST HEARD WHAT THE TWO SISTERS SAID.

CHIEF JUSTICE: ALL RIGHT. THANK YOU VERY MUCH FOR YOUR PRESENTATION. THANK YOU, BOTH, VERY MUCH. THE COURT WILL NOW STAND IN RECESS.

MARSHAL: PLEASE RISE.