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

Victor Tony Jones v. Michael W. Moore

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: ALL RIGHT. LOOKS LIKE YOU ARE READY TO GO ON JONES VERSUS STATE. YOU MAY PROCEED.

CHIEF JUSTICE ANSTEAD AND MEMBERS OF THE COURT, I AM WILLIAM INNIS FROM CCRC SOUTH, REPRESENTING MR. JONES. SEVERAL AREAS I WILL TRY AND CONCENTRATE ON TODAY. FIRST OF ALL, I WANTED TO TOUCH ON THE FAILURE TO INVESTIGATOR TO USE THE INTOXICATION DEFENSE AND, I SUPPOSE, THE CONNECTED ISSUE OF THE FAILURE TO USE SUBSTANCE ABUSE OR INTOXICATION, AS POTENTIAL MITIGATION IN THE CASE.

IS THERE ANY ASSERTION THAT HE WAS INTOXICATED THE DAY OF THE CRIME?

THAT IS A INTERESTING QUESTION, JUSTICE SHAW. I THINK THAT THE STATE'S OWN EXPERT'S TESTIMONY, THAT WOULD BE DR. HERRON, INDICATED ---DR. HERN, INDICATED THAT MR. JONES WAS UNDER THE INFLUENCE AT THE TIME OF THE OFFENSE.

HE HAD TRACES OF COCAINE? WHICH? NOW --

THERE WAS A TOXICOLOGY REPORT, THAT'S RIGHT, THAT SHOWED TRACES OF COCAINE AND A COCAINE MET AND LIGHT IN MR. JONES'S SYSTEM. THAT WAS DONE AT 1:40 P.M. ON THE AFTERNOON OF THE OFFENSE, WHICH WAS SOMETIME BETWEEN ELEVEN AND TWELVE O'CLOCK, AND DR. HERN TESTIFIED, HE ACTUALLY SORT OF WENT ALL OVER THE PLACE. HE SAID IT COULD HAVE BEEN EIGHT TO TEN HOURS BEFORE THE OFFENSE, BUT HE ALSO ADMITTED IT MIGHT HAVE BEEN AS RECENTLY AS ONE TO TWO HOURS BEFORE THE OFFENSE.

I GUESS MY QUESTION WAS IS THERE ANY EVIDENCE, FROM MEDICAL EXPERTS THAT HE WAS INTOXICATED, FOR WHATEVER PURPOSE, ON THE DAY OF THE CRIME?

WELL, WHEN YOU SAY MEDICAL EXPERTS, IF YOU WOULD INCLUDE THE PSYCHOLOGISTS THAT WERE CALLED BY THE DEFENSE AT THE EVIDENTIARY HEARING, I WOULD CERTAINLY ANSWER YES TO THAT. DR. -- DOCTORS ICEENSTEIN AND DR. -- DOCTORS EISEN STEEN AND DR. FISHER, IN THEIR INTERVIEWS WITH MR. JONES AND WITH PEOPLE, WHO SAID THEY WERE ACTUALLY USING ILLEGAL DRUGS WITH HIM THE AFTERNOON OR EVENING BEFORE THE OFFENSE, THEY OPINED THAT, BASED UPON HIS SUBSTANCE ABUSE HISTORY THAT, THEY BELIEVE HE WAS INTOXICATED AT THE TIME OF THE OFFENSE.

DID THE LAWYER TESTIFY AT THE POSTCONVICTION HEARING?

CHIEF JUSTICE, HE DID, IN FACT, TESTIFY. MR. KOCH TESTIFIED. HIS TESTIMONY WAS RATHER CURIOUS, BECAUSE MY INTERPRETATION OF THE TESTIMONY AS WE LAID IT OUT IN THE BRIEF, IS THAT HIS POSITION AS PUBLIC DEFENDER IN MIAMI-DADE COUNTY IS THAT HE DOESN'T BELIEVE THAT THE INTOXICATION DEFENSE IS EVER APPROPRIATE IN A CAPITAL CASE OR IN ANY OTHER CASE. HE CLAIMED NEVER TO HAVE USED IT AND GAVE THAT AS THE RATIONALE FOR NOT INVESTIGATING IT, ALONG WITH WHAT HE SAID WAS MR. JONES'S STATEMENTS TO HIM THAT HE WASN'T GUILTY. THEREFORE HE DIDN'T INVESTIGATE IT. I THINK THE PROBLEM WITH THAT IS THAT THE EVIDENCE THAT WE PUT FORWARD AT THE EVIDENTIARY HEARING SHOWS THAT THE

SOCIAL WORKER WHO WAS WORKING IN THE PUBLIC DEFENDERS OFFICE FOR HIM, MARLENE SCHWARTZ, DID AN INTERVIEW WITH THE CLIENT IN WHICH THE CLIENT SAID THAT HE HAD BEEN DRINKING AND ALSO THAT HE HAD DONE A $25 BAG OF COCAINE AROUND THE TIME OF THE OFFENSE, AND ONE OF THE EXPERTS THAT HE HIRED BUT DIDN'T PUT ON AT THE TRIAL, MARY HABER, TESTIFIED THAT MR. JONES TOLD HER THAT HE HAD BEEN DOING INJECTIONS OF COCAINE FOR THE THREE WEEKS AFTER HE GOT OUT OF PRISON, UP UNTIL THE TIME OF THIS OFFENSE, AND SHE, ALSO, TESTIFIED THAT ONE OF THE NURSES AT THE COUNTY JAIL, TOLD HER THAT SHE SAW CLASSIC SIGNS OF WITHDRAWAL IN MR. JONES AFTER HIS ARREST, SO --

WHAT DID THE EXPERTS WHO, IN FACT, TESTIFIED, THERE WERE A COUPLE OF EXPERTS, MENTAL HEALTH EXPERTS, WHO TESTIFIED AT THE ORIGINAL TRIAL, CORRECT?

THAT'S CORRECT.

AND THOSE TWO EXPERTS HAD INFORMATION CONCERNING MR. JONES'S USE OF INTOXICANTS, CORRECT?

WELL, THAT --

DIDN'T THEY TESTIFY, DIDN'T DR. TUMER, AT LEAST, TESTIFY CONCERNING AND IN FACT SAY SAY THAT HE HAD A HISTORY OF ABUSIVE SUBSTANCE?

I THINK HE DID TESTIFY GENERALLY ABOUT SUBSTANCE ABUSE. I THINK HE MAY HAVE HAD THE MARLENE SCHWARTZ NOTES. HE CERTAINLY DIDN'T HAVE ANY REPORT OR NOTES FROM MARY HABER. THERE WAS NEVER ANY COMMUNICATION BETWEEN MARY HABER AND ANY OF THE OTHER EXPERTS, ONLY BACK TO KOCH, IN THE FORM OF WHATEVER COMMUNICATION THEY HAD, AND NEITHER OF THEM COULD REMEMBER THE EXACT DETAILS OF THEIR CONTACT. SHE SIMPLY TESTIFIED THAT SHE NEVER UNDERSTOOD WHY SHE WAS NEVER CALLED BANG, EVEN AFTER KOCH HAD HER -- CALLED BACK, EVEN AFTER KOCH HAD HER DO FURTHER WORK INTERVIEWING FAMILY MEMBERS.

THERE WERE SIX EXAMINATIONS OF HIM PRIOR TO TRIAL, WEREN'T THERE? MENTAL HEALTH EXAMINATIONS.

THERE WERE SIX DIFFERENT DEFENSE EXPERTS WHO EVALUATED HIM BEFORE THE TRIAL, AND THERE WERE TWO STATE EXPERTS WHO EVALUATED HIM ONLY FOR PURPOSES OF COMPETENCY BETWEEN THE GUILT PHASE AND THE PENALTY PHASE. SO IN ALL, THERE WERE EIGHT EXPERTS.

WAS THERE A TOXICOLOGY REPORT IMMEDIATELY AFTER HE WAS ARRESTED?

THE TOXICOLOGY REPORT, MY RECOLLECTION IS, DID NOT HAPPEN. IT WAS NOT AVAILABLE FOR SOME MONTHS, BUT IT WAS ACTUALLY DONE. THE BLOOD DRAW WAS DONE AT 1:40 THE AFTERNOON OF THE OFFENSE, BUT I DON'T THINK THAT THE ACTUAL WORKUP WAS DONE FOR SEVERAL WEEKS OR SEVERAL MONTHS, AND IN FACT THERE WAS SOME TESTIMONY AT THE EVIDENTIARY HEARING, ABOUT HOW THE RECORDS SHOWED THAT THAT BLOOD DRAW WAS CONTAMINATED, AND THAT THE EXPERT THAT THE STATE CALLED, THE TOXICOLOGIST FROM THE MEDICAL EXAMINER'S OFFICE, TESTIFIED THAT HIS OPINION WAS THAT HE DIDN'T THINK THAT THAT HAD ANY EFFECT ON THE SAMPLE THAT EVENTUALLY WAS USED TO DO THE TOXICOLOGY REPORT, ALTHOUGH, YOU KNOW, I WOULD URGE THE COURT TO READ THE TESTIMONY CLOSELY, AS I TRIED TO POINT OUT IN MY REPLY BRIEF, BECAUSE I THINK THAT THERE REALLY ARE SOME PROBLEMS WITH HIM HAVING BEEN QUALIFIED AS AN EXPERT TO OPINE ABOUT INTOXICATION, PARTICULARLY WHEN YOU LOOK AT HIS TESTIMONY IN THE CONTEXT OF THE OVERRULED OBJECTION BY US TO PREVENT HIS TESTIMONY ON THAT SUBJECT.

WHAT DID THE REPORT REVEAL, HOWEVER, AS FAR AS THE CONTENTS OF ALCOHOL OR OTHER

SUBSTANCES?

THERE WAS NO ALCOHOL FOUND IN THE TOXICOLOGY REPORT. THERE WAS, AS I SAID BEFORE, THE TRACES OF COCAINE AND A COCAINE MET AND LIGHT THAT, IS A -- METABOLYTE, THAT IS A MARKER THAT WAS IN MR. JONES'S SYSTEM AT THE TIME THAT THE BLOOD WAS DRAWN.

DID KOCH ACTUALLY TESTIFY THAT HE HAD TALKED TO THE DEFENDANT ABOUT WHETHER HE WAS INTOXICATED AT THE TIME OF THE CRIME?

YES. HE SAID MR. JONES TOLD HIM THAT HE HAD NOT DONE THE CRIME THERE. FOR HE DIDN'T REALLY TALK TO HIM ABOUT THE QUESTION OF INTOXICATION. IT NEVER CAME UP.

THERE WERE EXPERT REPORTS THAT SAID THAT THE DEFENDANT WAS NOT INTOXICATED AT THE TIME?

NO. IN FACT, THE EXPERTS, AS I RECALL, DR. EISENSTEIN TESTIFIED THAT KOCH NEVER ASKED HIM TO LOOK INTO THAT. EISENSTEIN ESSENTIALLY DID NEUROPSYCHOLOGICAL, OBJECTIVE TESTING, ABOUT WHETHER OR NOT THERE WERE MENTAL DEFICITS, BASED ON PSYCHOLOGICAL TESTING, SO HE DIDN'T GO INTO THE ISSUE OF SUBSTANCE ABUSE AT ALL.

BUT ISN'T THE DEFENSE TO HAVE VOLUNTARY INTOXICATION, EVEN IF THERE WERE FACTS TO SUPPORT IT, YOU HAVE TO ADMIT THE CRIME, CORRECT?

I WOULD SAY THAT, IF YOU ARE THE ATTORNEY WHO IS IN CHARGE OF THE CASE AND YOU HAVE GOT YOUR SOCIAL WORKER WHO DID A DETAILED INTERVIEW WITH THE CLIENT IN WHICH HE ADMITS A LIFETIME SUBSTANCE ABUSE HISTORY AND THAT HE WAS DOING DRUGS AT THE TIME OF THE OFFENSE AND YOUR FIRST EXPERT THAT YOU HIRE, MARY HABER, THE GUY SAYS HE IS SHOOTING UP COCAINE EVERYDAY UP UNTIL THE OFFENSE, YOU HAVE GOT A BASIS TO GO TO YOUR CLIENT AND SAY, MR. JONES, IS THERE A CHANCE YOU MIGHT HAVE BEEN INTOXICATED AT THE TIME OF THE OFFENSE, BECAUSE YOU TOLD MAYOR HABER YOU WERE SHOOTING DRUGS, AND YOU TOLD MY SOCIAL WORKER THAT YOU WERE DRINKING AND THAT YOU HAD DONE A $25 BAG OF COCAINE, YOU KNOW, ON THE, AT THE TIME OF THE OFFENSE. I THINK THAT IS A RESPONSIBILITY OF THE TRIAL COUNSEL, TO GO INTO THAT AND LOOK AT IT, BECAUSE I THINK THERE IS A REASONABLE POSSIBILITY THAT, IF THAT INFORMATION HAD BEEN PUT BEFORE THE JURY, YOU KNOW, THERE WOULD HAVE HAD TO BE AN INTOXICATION INSTRUCTION, AND ALSO I THINK THAT THERE IS A REASONABLE CHANCE THAT A JURY WOULD HAVE FOUND THAT TO BE MITIGATING, NO MATTER WHAT MR. KOCH'S PERSONAL OPINION WAS, AND HE BASICALLY TESTIFIED HIS PERSONAL OPINION WAS THAT INTOXICATION IS NEVER A VALID DEFENSE AT TRIAL, ESPECIALLY IN CAPITAL CASES, AND SO HE DIDN'T EVEN CONSIDER IT, AND I DON'T THINK --

BUT NOW YOU ARE GETTING TO WHETHER ANOTHER ISSUE WOULD BE WHETHER HE WAS, IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, FOR NOT PUTTING ON THIS SAME EVIDENCE, AND WHAT IS YOUR --

I THINK THAT IS AN ASPECT OF WHAT HE FAILED TO DO AT THE PENALTY PHASE. I THINK IT IS PERHAPS NOT MOST IMPORTANT ASPECT, BECAUSE AS WE KNOW NOW, FROM DR. EISENSTEIN'S TESTIMONY AT THE EVIDENTIARY HEARING, THAT THE ENTIRE BASIS ON WHICH HE APPROACHED THE CASE CHANGED, AFTER HE GOT THE 1975 JACKSON MEMORIAL HOSPITAL REPORT, SHOWING THAT MR. JONES HAD BEEN NUMBER ONE, HOSPITALIZED FOR SOME THREE OR FOUR WEEKS, OR ACTUALLY LONGER THAN THAT IN 197 HAD, WITH A-KNOW 1974, WITH A JUSTIFY -- IN 1974 WITH A JUVENILE DRUG OVERDOSE.

DIDN'T DR. TUMER HAVE THAT REPORT?

NO. WE GOT THAT REPORT AND WE PROVIDED IT TO OUR EXPERTS, THAN IS ONE OF THE BASES THAT DR. EISENSTEIN WAS ABLE TO SAY IT WASN'T THE SHOT TO THE HEAD THAT CAUSED THIS MAN THE MENTAL HISTORY AND MENTAL PROBLEMS, AND NOW I HAVE INTERVIEWS, WITH THE FAMILY, ALONG, THAT I HAVE DONE, THAT SHOW IT DIDN'T HAPPEN TO THE HEAD --

CAN WE GO BACK FOR A MOMENT IN REFERENCE TO A VOLUNTARY INTOXICATION DEFENSE AT TRIAL. WE KNOW THAT WE HAVE THE TOXICOLOGY REPORT THAT TALKS ABOUT THE TRACE AMOUNTS OF COCAINE AND THAT, AND WE HAVE THE SOCIAL WORKER, I BELIEVE YOU SAID, WHO SAYS THAT MR. JONES SELF-REPORTED HAVING USED COCAINE.

THAT IS WHAT HER NOTES SAID, YES.

WHAT ELSE DO WE HAVE THAT A REASONABLE DEFENSE ATTORNEY COULD HAVE USED TO ACTUALLY SHOW THAT, ON THE DAY THIS CRIME WAS COMMITTED, THAT MR. JONES WAS INTOXICATED?

WE HAVE CARL LEON MILLER, WHO WAS HIS COUSIN, WHO HE GREW UP WITH, WHO TESTIFIED --

IS THIS THE SAME PERSON WHO WAS WRAPPED UP IN HIS OWN USE OF DRUGS AND NEVER CAME FORWARD AND DID ANYTHING IN RELATIONSHIP TO THIS CASE?

WELL, CARL LEON MILLER LIVED IN MIAMI THEN AND STILL LIVES IN MIAMI. HE WAS INVOLVED IN DRUGS BECAUSE HE HAD GROWN UP IN AUNT LAURA'S HOUSEHOLD, ALONG WITH VICTOR, AND ALONG WITH VICTOR HELPED INTRODUCE VICTOR TO THE DRUG SCENE AND DRUG SALES, ALONG WITH LAWRENCE, WHO IS AUNT LAURA'S SON.

ASSUMING ALL OF THAT, WHAT DID HE HAVE TO SAY EXACTLY, ABOUT THE USE OF DRUGS ON THE DAY OF THE MURDER?

HE SAID THAT VICTOR, HE HAD BEEN WORKING CONSTRUCTION WITH VICTOR ON AND OFF, FROM THE TIME VICTOR GOT OUT OF PRISON, UP UNTIL THE TIME OF THE OFFENSE. HE SAID THAT THE DAY OR EVENING BEFORE, HE AND SOME OTHER FAMILY MEMBERS AND A FAMILY FRIEND, WERE ACTIVELY DOING DRUGS IN AUNT BEE'S HOUSE AND THAT VICTOR WAS REALLY, REALLY MESSED UP, AND THAT VICTOR HAD BEEN CONTINUALLY DOING THAT.

DID WE HAVE THE DATE AND TIME AS TO WHEN THIS TOOK PLACE? WAS THERE SOME CONFUSION AS TO WHETHER THIS WAS THE EXACT DAY THAT WE ARE TALKING ABOUT?

NOT FROM MY PERSPECTIVE. I THINK THAT, IF YOU LOOK AT HIS TESTIMONY IN TOTO, IT IS PRETTY CLEAR THAT HIS TESTIMONY WAS THAT IT WAS THE DAY BEFORE VICTOR WAS ARRESTED, AND THAT THE CRIME TOOK PLACE. BUT --

THE DAY BEFORE.

YEAH. I THINK SO. JUSTICE QUINCE.

HOW ABOUT GIVING US A LITTLE SHARPER PICTURE HERE, OF YOUR CLAIM OF WHERE THE LAWYER WENT WRONG, IN HIS HANDLING OF THIS CASE, AND WHERE THE TRIAL JUDGE WENT WRONG, IN HIS EVALUATION OF THE LAWYER'S CONDUCT?

WELL, I THINK MAYBE, IF I CAN MOVE AWAY FROM VOLUNTARY INTOXICATION AND GO INTO MITIGATION, A LITTLE MORE, I CAN TALK ABOUT THAT, BECAUSE I THINK THAT THERE ARE SEVERAL --

THIS IS A DIFFICULT PICTURE HERE. WE HAVE THE INITIAL IMAGE OF, IF I UNDERSTAND IT

CORRECTLY, SOME FIVE MENTAL HEALTH EXPERTS, YOU KNOW, BEING CALLED IN TO EVALUATE THIS FELLOW BY THE LAWYER, AND SO HOW ABOUT GIVING US YOUR STRONGEST CASE OF WHERE THE LAWYER WENT WRONG AND WHERE THE TRIAL JUDGE WENT WRONG IN EVALUATING THE LAWYER'S CONDUCT?

I SHOULD POINT OUT THAT, OF THOSE SIX, ONLY TWO OF THEM TESTIFIED AT THE GUILT PHASE OR AT THE ORIGINAL TRIAL, AND THEY BOTH TESTIFIED AND ONLY JET ROW TUMER TESTIFIED BEFORE -- ONLY JETHRO TUMER TESTIFIED BEFORE THE JURY AT THE PENALTY PHASE, SO HE WAS THE ONLY EXPERT AT THE TRIAL, AS TO PENALTY PHASE ISSUES. DR. EISENSTEIN DIDN'T TESTIFY AT THE PENALTY PHASE OR AT LEAST DIDN'T TESTIFY AS TO MITIGATION, PRECISELY BECAUSE HE COULDN'T SAY AT THAT TIME THAT THERE WAS ANY PREEXISTING CONDITION, PRIOR TO THE GUNSHOT WOUND TO THE HEAD, AND PART OF THE REASON FOR THAT WAS HE DIDN'T HAVE ACCESS TO THE FAMILY MEMBERS AND ACCESS TO THE JMH REPORT. INVESTIGATION PROBLEMS IN THIS CASE WERE MANIFOLD, AND MANIFEST, I SHOULD SAY, AND THEY ARE OUTLINED IN KOCH'S TESTIMONY. HE TALKED ABOUT HOW HE REMEMBERS ASKING THE INVESTIGATOR TO GET ONE PARTICULAR WITNESS, VALERIE, AND THE INVESTIGATOR'S RESPONSE TO THAT WAS TO LEAVE HIS CARD ON ADDRESS THAT HE THOUGHT WAS HER ADDRESS. OTHER THAN THAT, MOST OF THE RELEVANT FAMILY MEMBERS, CARL LEON MILLER, PAM LARKS HIS SISTER WHO WAS UP IN NEW YORK, VALERIE, WHO WAS LIKE CARL LEON MILLER, LIVING IN MIAMI THE WHOLE TIME, NOT ONLY WERE NEVER INTERVIEWED, THEY NEVER TESTIFIED, EITHER, AND SO ONCE THE EXPERTS HAD ACCESS TO THOSE FAMILY MEMBERS AND HAD ACCESS TO THE OTHER MATERIALS THAT WE WERE ABLE TO PROVIDE TO THEM IN POSTCONVICTION, THEY WERE ABLE TO OPINE, AND THEY WERE ABLE TO COME AND BE CALLED, AND THAT INCLUDED MARY HABER, WHO --

BUT YOUR LAWYER DID ABSOLUTELY NOTHING TO FIND THE FRIEND OR FAMILY MEMBERS OR TO INVESTIGATE THIS FELLOW'S LIFE CIRCUMSTANCES LEADING UP TO THE CRIME?

CERTAINLY THE BARE MINIMUM, WHICH HE ADMITTED TO ON THE STAND, DURING THE EVIDENTIARY HEARING. HIS VIEW WAS THAT THE STRUCTURAL PROBLEMS IN THE MIAMI-DADE PUBLIC DEFENDERS OFFICE AT THE TIME WERE SUCH THAT HE HAD A CASELOAD THAT WAS UNMANAGEABLE, THE INVESTIGATOR HAD A CASELOAD THAT WAS UNMANAGEABLE. THE SOCIAL WORKER HAD A CASELOAD THAT WAS UNMANAGEABLE. HE LOOKED INTO THE POSSIBILITY OF HIRE AGO LITIGATION SPECIALIST AND FOR WHATEVER REASON SIMPLY DROPPED T HE TESTIFIED ABOUT THAT AND HE COULDN'T COME UP WITH ANY REASON AS TO WHY HE DIDN'T GO FORWARD ON THAT.

SO WHAT MITIGATION DID HE PRESENT AT THE -- WEREN'T THERE SOME FAMILY MEMBERS WHO WERE, IN FACT, CALLED?

THE ONLY FAMILY MEMBER WHO WAS CALLED WAS AUNT LAURA, WHO WAS THE CAREGIVER, WHO WAS THE HOUSEHOLD MATRIARCH, IN WHICH VICTOR AT DIFFERENT TIMES, HIS SISTER, PAM, AND HIS SISTER, VALUE, AND HIS COUSIN LEON -- AND HIS SISTER, VALERIE, AND HIS COUSIN LEON LIVED WITH. AT THE EVIDENTIARY HEARING WE PRESENTED TESTIMONY FROM EISENSTEIN, WHO TALKED WITH AUNT LAURA, BOTH AT THE ORIGINAL TRIAL NOT IN PERSON AND LATER ON IN PERSON IN A SIT-DOWN INTERVIEW, AND ALTHOUGH WE WEREN'T ALLOWED TO PREVENT WHAT HE TALKED ABOUT, WE WERE ABLE TO PROFFER AS TO WHAT SHE SHOULD AND IT WAS A COMPLETE 360 DEGREE TURN AS TO WHAT HER TESTIMONY WAS. SHE ADMITS THAT THERE WERE PROBLEMS OF SUBSTANCE ABUSE IN THE HOUSEHOLD. SHE ADMITS THAT HER OLDER SON WAS MOLESTING VICTOR'S SISTER AS A YOUNG GIRL IN THE HOUSEHOLD. SHE ADMITS THAT LAWRENCE WAS THE FATHER OF THIS 14-YEAR-OLD GIRL'S CHILD IN THE HOUSEHOLD. SHE ADMITS THAT THERE WAS VIOLENCE AND ABUSE IN THE HOUSEHOLD, AND THAT THERE WAS, THERE WERE ALL SORTS OF PROBLEMS. SO, AGAIN, THIS IS PART OF THE REASON THAT DR. EISENSTEIN WAS ABLE TO OPINE, AT THE EVIDENTIARY HEARING, AS TO THE PRESENCE OF BOTH STATUTORY MENTAL HEALTH MITIGATORS, WHEREAS AT THE ORIGINAL TRIAL, HE COULDN'T

OFFER ANY OPINION AT ALL.

HOW DO YOU FAULT THE LAWYER, THOUGH, FOR A WITNESS COMPLETELY CHANGING HER TESTIMONY.

WELL, YOUR HONOR, I THINK THAT, IF YOU TALK TO EVERYBODY THAT YOU CAN REACH IN A FAMILY, AND YOU START HAVING A PROFESSIONAL INVESTIGATOR COMPARE THOSE STORIES WITH EACH OTHER, YOU GO BACK AND YOU TRY TO PUT TOGETHER WHAT THE REAL FAMILY HISTORY IS, AND KOCH, AGAIN, ADMITS THAT IN HIS TESTIMONY. HE SAYS HOW CAN YOU EXPECT TO SEND A WHITE SOCIAL WORKER INTO THE BLACK FAMILY'S HOUSEHOLD IN LIBERTY CITY, ONE TIME, AND GET THE ENTIRE HISTORY OF ALL OF THE FAMILY SECRETS? HE SAYS I KNOW YOU CAN'T DO IT.

CHIEF JUSTICE: THE LIGHT HAS GONE ON TO REMIND YOU ABOUT THE REBUTTAL, SO IF YOU WANT TO PAUSE AT THIS TIME.

I WILL SAVE MY TIME FOR REBUTTAL. THANK YOU, YOUR HONOR.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF THE STATE. WITH REGARD TO THE VOLUMETARY INTOXICATION -- TO THE VOLUNTARY INTOXICATION DFERX THE VICTIMS WERE ON THE PHONE TALKING TO THEIR DAUGHTER AT ELEVEN THIRTY AND AT NOON WHEN THE UPS MAN SHOWS UP, THE CRIME HAS OCCURRED: THE UPS MAN SEES THE BLOOD IN THERE AND THEY TAKE THEM TO THE HOSPITAL AND THAT IS AT 1:40. AT THE TIME, THAT THE TRACE AMOUNT OF COCAINE WAS SHOWN AT THE TIME THAT IT WOULD NOT HAVE CAUSED THIS MAN TO BE INTOXICATED, TO THE EXTENT THAT HE WAS NOT ABLE TO FORM THE INTENT -- IN FACT, IT WAS FOUND THAT HE WAS NOT INTOXICATED AT THE TIME OF THE TRIAL AND THEREFORE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO DEFEND THIS DEFENSE.

DID THE LAWYER ALSO TESTIFY ABOUT THAT ISSUE?

THE LAWYER ALSO TESTIFIED ABOUT THATISH UNIFORMITY THE LAWYER SAID I SPOKE TO MY CLIENT. HE SAID HE DIDN'T DO IT. HE SAID HE WASN'T INTOXICATED. WITH REGARD TO MS. SCHWARTZ'S NOTES ON WHOM THEY ARE RELYING, THE LAWYER SAID I LOOKED AT THOSE NOTES, AND THERE IS A NOTATION OVER THEM THAT SAYS "ARMED ROBBERY". I THINK THAT HAS TO DO WITH THE DEFENDANT'S LAST CRIME AND HAS NOTHING TO DO WITH THIS CRIME WHATSOEVER. THEY NEVER PRESENTED THE SOCIAL WORKER, SO WHAT YOU HAVE IS NOTES THAT THE LAWYER SAYS IS ABOUT THE LAST CRIME, THAT THEY ARE NOW RELYING ON AND SAYING, WELL, COUNSEL SHOULD HAVE INVESTIGATED THIS CRIME, BASED UPON SOMETHING ABOUT THE LAST CRIME. WE KNOW HE WASN'T DRINKING ALCOHOL ON THE DAY OF THIS CRIME, BECAUSE WE HAD HIS BLOOD TESTED FOR ALCOHOL. WE KNOW, CONTRARY TO DR. MARY HABER'S TESTIMONY ABOUT THIS HORRIBLE HEROIN WITHDRAWAL, THE DEFENDANT WAS NOT WITHDRAWING FROM HEROIN, BECAUSE HE DIDN'T HAVE ANY HEROIN IN HIS SYSTEM. WE TESTED FOR IT. THE TOXICOLOGIST SAID IT WOULD HAVE BEEN THERE FOR WEEKS AFTERWARDS. THERE WAS NO HEROIN.

WHAT ABOUT COCAINE? COULD HE HAVE BEEN WITHDRAWING FROM COCAINE?

COCAINE DOESN'T HAVE A WITHDRAW, AND THAT WAS TESTIFIED TO AT THE EVIDENTIARY HEARING.

HE DID HAVE COCAINE IN HIS SYSTEM, RIGHT?

HE HAD A TRACE AMOUNT, AN UNMEASURABLE TRACE AMOUNT OF COCAINE AND A MET AND LIGHT. -- AND A METABOLYTE, SOUGHT COURT FOUND THAT THERE WAS COMPETENT AND

SUBSTANTIAL EVIDENCE THAT THIS MAN WAS NOT INTOXICATED AT THE TIME OF THE CRIME AND SHE ALSO FOUND THAT COUNSEL MADE A STRATEGIC DECISION NOT TO PRESENT THIS AND WHILE THE DEFENSE NOW TRIES TO QUALIFY MR. KOCH'S TESTIMONY, WHEN IT WAS HIS PERSONAL OPINION WHEN YOU READ ALL OF HIS TESTIMONY IS, BASED UPON HIS 22 YEARS AS A CRIMINAL ATTORNEY, HIS 14 YEARS OF EXPERIENCE DOING CAPITAL DEFENSE WORK, HIS INTERVIEWS WITH PEOPLE WHO HAD SERVED ON JURIES AND HIS REVIEW OF JURY STUDIES THAT, JURIES DON'T LIKE INTOXICATION.

BUT WOULD THAT BE, IF THERE WAS EVIDENCE, OVERWHELMING EVIDENCE THAT THE DEFENDANT HAD BEEN INTOXICATED, IS AN ATTORNEY'S OPINION THAT, UNLESS IT IS WITH AN INFORMED CONSENT OF A DEFENDANT, HIS CLIENT, NOT TO PRESENT IT, THAT I JUST DON'T THINK THIS EVER WORKS WOULD THAT BE UNDER A STRICKLAND STANDARD OR, REALLY, ENOUGH TO GET BY, IF WE DIDN'T HAVE THESE OTHER FACTS, WHICH IS REALLY WHETHER YOU LIKE IT OR NOT, THIS, UNLESS YOU HAVE A STRONG EVIDENCE OF IT, IT REALLY IS, WOULD BE NOT A GOOD IDEA?

COUNSEL SAID, IF THERE WAS NO OTHER DEFENSE HE COULD HAVE PRESENTED, HE WOULD HAVE, BUT THERE WAS ANOTHER DEFENSE.

SO HE NOT INNOCENCE -- WHAT WAS THE OTHER DEFENSE?

WHAT THE DEFENDANT HAD TOLD MR. KOCH WAS THAT THE DEFENDANT WAS WORKING FOR THESE PEOPLE. IT WAS HIS SECOND DAY OF WORK. HE HAD ARRIVED AT WORK BEFORE 8:10. HIS CAR IS PARKED THERE BEFORE 8:10, WHEN THE NEIGHBOR WAKES UP, BECAUSE THE NEIGHBOR BOTH LIVES AND WORKS AT THE PLACE NEXT DOOFERMENT THE DEFENDANT IS THERE. NOBODY SEES THE DEFENDANT -- NEXT DOOR. THE DEFENDANT IS THERE. NOBODY SEES THE DEFENDANT, EXCEPT FOR THE VICTIMS WHO ARE NOW DEAD, SO WHERE ARE YOU GOING TO GET EVIDENCE THAT THE DEFENDANT WAS, IN FACT, INTOXICATED. THAT WAS POINTED OUT. NOBODY SEES HIM WITHIN FOUR HOURS OF THIS CRIME. HE BREAKS IN AND HE IS ALERT AND COHERENT, DESPITE HAVING A BULLET IN HIS HEAD. WHERE ARE YOU GOING TO GET EVIDENCE THAT HE WAS --

WHERE IS THE BETTER DEFENSE THOUGH?

THE BETTER DEFENSE IS THE ONE THAT HIS CLIENT TOLD HIM WAS TRUE, WHICH IS ANOTHER PERSON CAME INTO THIS BUSINESS AND STARTED A STRUGGLE WITH THE MALE VICTIM. HE CAME UP AND FOUND THE STRUGGLE GOING ON. HE ATTEMPTED TO PULL THE UNKNOWN ASSAILANT OFF OF THE PERSON, OFF OF THE MALE VICTIM AND THE MALE VICTIM SHOT HIM AND THAT THIS PERSON THEN FLED.

WHICH BRINGS IT TO MIND ONE OF THE ISSUES THAT IS NOT ARGUED HERE IS ABOUT THIS GUNPOWDER RESIDUE, THAT THERE WAS A REPORT THAT SAID THAT THERE WAS NO GUNPOWDER RESIDUE ON THE VICTIM'S HANDS BUT ALLEGEDLY THE STATE'S POSITION WAS THAT THIS MAN FIRED THIS GUN FIVE TIMES, AND THAT IS HOW MR. JONES GETS SHOT IN THE HEAD, AND SO WHY WOULDN'T DEFENSE COUNSEL HAVE USED THAT REPORT IN SUPPORT OF THIS THEORY THAT SOME OTHER PERSON ACTUALLY DID THE SHOOTING?

IT WASN'T THAT SOME OTHER PERSON DID THE SHOOTING. IT IT IS THAT THE VICTIM SHOT THE DEFENDANT IN THE HEAD --

I THOUGHT A PART OF IT WAS THAT HE ACTUALLY ENCOUNTERED THE THIRD PERSON, AND THAT THE GUN, THE THIRD PERSON HAD THE GUN IN HIS SHOT.

NO. IT IS THAT HE IS PULLING THE THIRD PERSON OFF OF THE MALE VICTIM WHEN THE MALE VICTIM SHOOTS HIM. THAT IS WHAT WAS COUNSEL'S THEORY AT TRIAL. THAT IS SUPPORTED BY THE DEFENDANT'S STATEMENT TO THE POLICE WHEN THEY REALIZE HE IS SHOT, BECAUSE IT

WASN'T OBVIOUS THAT THE DEFENDANT HAD A HAT ON. THIS WOUND WAS NOT VERY EXTENSIVE. WHEN THEY REALIZED HE HAD BLOOD ON HIM AND THEY ASKED HIM WHERE HE GOT THE BLOOD ON HIS FORWARD, HE SAID THE OLD MAN SHOT ME! WE DON'T HAVE BEGUN SHOT RESIDUE OFF OF BOTH HANDS. WE ONLY HAVE BEGUN SHOT RESIDUE OFF OF ONE HAND. THE VICTIM COULD HAVE SHOT WITH THE OTHER HAND. THE DEFENDANT, THE RESULTS ON THE DEFENDANT ARE ALSO NEGATIVE, BUT WE KNOW THE DEFENDANT TOUCHED THE GUN, BECAUSE HE HAD IT TUCKED UNDER HIS ARM WHEN THE POLICE ARRIVED, AND THAT, AGAIN, WAS PART OF COUNSEL'S THEORY WAS THAT THIS GUN GETS DROPPED BY THE VICTIM. WHEN THE VICTIM DIES, HE PICKS UP THE GUN TO PROTECT HIMSELF FROM THIS THIRD PERSON COMING BACK, SO THAT IS WHY YOU DON'T USE THE GUN SHOT RESIDUE, BECAUSE NUMBER ONE, ALL THE GUN SHOT RESIDUE SHOWS IS THAT YOU WERE NEAR A GUN THAT WAS SHOT, THAT YOU WERE, TOUCHED A GUN THAT WAS RECENTLY FIRED OR THAT YOU FIRED A GUN. IT DOESN'T SHOW YOU FIRED A GUN. CLEARLY THE DEFENDANT TOUCHED A GUN THAT WAS RECENTLY FIRED. HE DIDN'T HAVE THE --

WHAT DOES THE GUN SHOT RESIDUE MEAN?

NOTHING. IT MEANS THAT IT GOT WASHED OFF OR THERE WASN'T ENOUGH TO BE TESTED. IT MEANS THAT THE VICTIM SHOT WITH ANOTHER HAND THAT COULDN'T BE TESTED. IT DOESN'T MEAN MUCH OF ANYTHING, WHICH IS WHY IT DIDN'T GET PRESENTED, PARTICULARLY WHEN THE THEORY OF THE CRIME WAS THAT THE VICTIM SHOT THE DEFENDANT. IT WAS JUST A STRUGGLE WITH THE THIRD PERSON BEFORE THE VICTIM DID IT. AND GIVEN THAT THAT IS CONSISTENT WITH THE DEFENDANT'S STATEMENTS, COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT THE GUN SHOT RESIDUE TESTIMONY.

WOULD YOU GO TO THE INEFFECTIVENESS CLAIM, THEN, AS OUTLINED BY YOUR OPPONENT AND THE PICTURE, AT LEAST TOWARDS THE END OF HIS ARGUMENT THAT HE PRESENTED TO US, OF THE DEFENSE LAWYER THAT SAYS WE WERE OVERWORKED AND UNDERSTAFFED AND COULDN'T REALLY DO ANYTHING HERE AND JUST ENDED UP WITH ONE VISIT TO THIS AREA OF TOWN, AND COULDN'T DO ANY INVESTIGATION HERE, AND THAT THAT WAS --

PERHAPS IF THAT WERE THE TESTIMONY, THAT WOULD BE A NICE THING. IT IS NOT. COUNSEL'S TESTIMONY WAS THAT HE DID ATTEMPT TO SEEK ALL THE FAMILY MEMBERS WHOSE NAMES HE HAD, WHICH INCLUDED PAM, WHICH INCLUDED VALERIE, WHICH INCLUDED CARL, THAT HE DOES NOT KNOW WHY THEY COULDN'T BE FOUND, BUT HE KNOWS HE WOULD HAVE TRIED TO LOOK FOR THEM. THE ENTIRE DEFENSE ARGUMENT ON THIS IS BASED ON THE FACT THAT, ACCORDING TO THEM, IN THE DEFENSE FILES, THERE WAS ONLY ONE WRITTEN REPORT OF ONE ATTEMPT TO FIND VALERIE AND THEREFORE THEY DIDN'T ATTEMPT TO FIND THESE OTHER FAMILY MEMBERS. THE PROBLEM WITH THAT IS THE DEFENSE NEVER PRESENTED THE DEFENSE FILE. THE INVESTIGATOR SAID I DESTROYED ALL MY COPIES OF IT, SO WE KNOW THE FILE IS NOT COMPLETE FROM THERE. COUNSEL TESTIFIES I HAVE NO IDEA WHETHER THE FILE IS COMPLETE. SO YOU HAVE GOT A SPIRE CLAIM, BASED ON THE ABSENCE OF A DOCUMENT FROM A RECORD THAT IS NEVER ADMITTED AND THAT THE TESTIMONY SHOWS YOU COULDN'T SHOW WAS A COMPLETE RECORD, SO THEY FAILED TO PROVE THAT COUNSEL DID, IN FARKTS NOT INVESTIGATE, AND COUNSEL -- IN FACT, NOT INVESTIGATE, AND COUNSEL SAID I WOULD HAVE TRIED TO. I DON'T RECALL WHAT I DID BUT I WOULD HAVE TRIED TO FIND EVERY FAMILY MEMBER I HAD A NAME FOR. HE DIDN'T HAVE JUST ONE FAMILY MEETING. HE HAD MEETINGS. HE HAD EXPERTS SPEAK TO FAMILY MEMBERS. HE HAD AUNT LAURA. HE HAD THE GRANDMOTHER AUNT BEE. HE HAD THE FAMILY FRIEND GREG WHITNEY AND HE HAD HIS SCHOOL TEACHER HE TALKED TO. HE GOT THE DEFENDANT'S PRISON RECORDS. HE GOT THE DEFENDANT'S SCHOOL RECORDS. HE PROVIDED THESE TO THE EXPERTS WHO WANTED THEM. HE SAID I WOULD HAVE GIVEN THE EXPERTS WHAT THEY ASKED FOR AND WHAT THEY EXPRESSED NEED FOR, I WOULD HAVE GIVEN TO THEM, BUT I WOULD LET THEM TELL ME WHAT THIS EVENING IS NECESSARY FOR THEM TO DO THEIR EVALUATION. THAT IS A PER EFFECTLY REASONABLE -- A PERFECTLY REASONABLE DECISION BY ATTORNEY. WITH REGARD TO THE HOSPITAL, THERE WAS SOME EVIDENCE THAT THEY MAY HAVE

TRIED TO GET. THAT DR. TUMER WAS AWARE THAT THE DEFENDANT HAD BEEN ADMITED FOR A DRUG OVERDOSE AND THAT THERE HAD BEEN THIS OTHER INCIDENT. THE INTIFER BASIS OF THE -- THE ENTIRE BASIS OF THE IMPORTANCE OF THIS REPORT TO THE EXPERTS NOW IS THE ADMITTING DIAGNOSIS OF SCHIZOPHRENIA. THE DEFENDANT WAS NEVER TREATED FOR SCHIZOPHRENIA. THERE IS NEVER ANY CLAIM HE IS SCHIZOPHRENIC THERE. IS JUST THIS ADMITTING DIAGNOSIS THAT HE IS SCHIZOPHRENIC. THE DISCHARGE DIAGNOSIS HIS REACTION TO ADULTHOOD, WHO IS GIVEN TO PEOPLE WHO HAVE ASPD WHO ARE NOT OLD ENOUGH TO BE DIAGNOSED AS ANTISOCIAL. THEY, ALSO, RELY ON ONE NOTATION IN THERE THAT SAYS BORDERLINE RETARD. THERE IS NO EVIDENCE OF WHERE THAT CAME FROM, AND THE OPINION OF THE DOCTORS, ASIDE FROM DR. EISENSTEIN, WHOM THE TRIAL COURT DIDN'T FIND CREDIBLE, WAS THAT THE DEFENDANT WAS OF AVERAGE INTELLIGENCE. THE SCHOOL RECORDS SHOW --

ISN'T THERE SOME EVIDENCE IN THIS RECORD, THOUGH, THAT THE IQ TEST WAS REVEALED A 67-TO-70 IQ?

I DON'T ACTUALLY RECALL ANY TESTIMONY ABOUT IQ SCORES AT THIS, BECAUSE THERE WAS NO CLAIM OF RETARDATION RAISED BELOW. THERE WAS NO CLAIM OF RETARDATION RAISED IN THE INITIAL BRIEF. THE CLAIM OF RETARDATION SUDDENLY APPEARS IN THE REPLY BRIEF. IT IS NOT PROPERLY BEFORE YOU.

YOU SAID THAT THERE IS NO CLAIM BELOW THAT THE DEFENDANT WAS MENTALLY RETARDED BUT THAT THE LAWYER DIDN'T PROPERLY INVESTIGATE AND FIND EVIDENCE OF THAT?

NO. AND THERE IS EVIDENCE THAT THE DEFENDANT WAS A GOOD STUDENT AS AN ELEMENTARY SCHOOL STUDENT. THE SCHOOL RECORDS SHOW THAT AVENUES GOOD STUDENT, UNTIL HE DECIDES TO QUIT GOING TO SCHOOL BECAUSE HE WOULD RATHER USE DRUGS. DR. TUMER WAS AWARE OF THE DRUG USE, WHICH ALLOWED THE STATE TO PRESENT THAT THE DEFENDANT HAD BEEN THROUGH LOTS AND LOTS OF DRUG TREATMENT PROGRAMS BUT HAD REFUSED TO PARTICIPATE IN ANY OF THEM, BECAUSE HE CLAIMED NOT TO HAVE A DRUG ABUSE PROBLEM.

AND IT WAS THE DEFENSE LAWYER THAT SOLICITED THE HELP OF SOME FIVE OR SIX MENTAL HEALTH EXPERTS?

HAD HE A NEUROLOGIST, BECAUSE THE DEFENDANT HAD BEEN SHOT IN THE HEAD. THAT NEUROLOGIST TOLD DEFENSE COUNSEL HE WAS AMAZED AT HOW LITTLE THERE WAS DONE TO THE DEFENDANT. HE HAD A PSYCHOLOGIST DR. LEFFLER BUT HE RETIRED AND SO HE STOPPED USING HIM. HE HAD DR. HABER, WHO DID THE INITIAL WORK, AND COUNSEL TESTIFIED THAT HE FIRED HABER BECAUSE HE DIDN'T LIKE THE QUALITY OF HER WORK. HE HAD DR. FISHER WHO HE HIRED. IT IS NOT ENTIRELY SURE WHERE HE -- WHY HE HIRED HIM, BECAUSE THERE IS NO NOTATION OR MEMORY THAT HE DID ANYTHING ON THIS CASE THERE. IS A NOTE MISSION FISHER'S FILE THAT SAID ON -- A NOTE IN FISHER'S FILE THAT SAID NGRI, AND THAT WAS THE ONLY NOTE BY FISHER AND HE HAD DR. EISENSTEIN AND DR. TUMER. DR. EISENSTEIN IS A PSYCHOLOGIST AND DR. TUMER IS A NEUROPSYCHOLOGIST, AND HE THOUGHT THAT DR. TUMER WOULD HAVE THE BEST RAPPORT WITH HIM BECAUSE HE WAS A VETERAN.

WAS THERE TESTIMONY THAT HE SAID I AM OVERWORKED AND UNDER RESOURCED, AND THEREFORE I COULDN'T REALLY INVESTIGATE THIS CASE?

HE TESTIFIED THAT HE WOULD LIKE TO HAVE MORE RESOURCES, BUT HE, AND THAT HE WOULD LIKE TO HAVE MORE THINGS. HE SAID, YOU KNOW, THE SOCIAL WORKER GOT INVOLVED LATE BUT THEN HE HAD TO ADMIT THE SOCIAL WORKER HAD BEEN INVOLVED FOR A YEAR. HE HAD INVESTIGATORS. HE DID COMPLAIN THAT, UNLESS YOU SPEND YOUR LIFE WITH THESE FAMILY MEMBERS, THEY ARE NOT GOING TO TELL YOU THE TRUTH AND THAT IS WHY THEY, QUOTE, LIED TO ME, UNQUOTE, BUT HE HAD AMPLE RESOURCES. HE ADMITTED THAT ANY TIME HE NEEDED A CONTINUANCE TO GO INVESTIGATE MORE, HE COULD HAVE GOTTEN IT, AND THAT HE WAS

PREPARED FOR TRIAL WHEN HE WENT TO TRIAL. ADDITIONALLY, WE HAVE HEARD A LOT ABOUT ALL THESE FAMILY MEMBERS. THEY ONLY PRESENTED TWO FAMILY MEMBERS AT THE EVIDENTIARY HEARING, SO TO SAY ALL THESE OTHER FAMILY MEMBERS WERE AVAILABLE, THERE IS ABSOLUTELY NO EVIDENCE THAT THESE FAMILY MEMBERS WERE AVAILABLE TO DO ANYTHING.

WHAT ABOUT THE ONE THAT IS THE SISTER, PAM MILLS?

YES.

WAS, DID THE TRIAL JUDGE FIND THAT SHE WAS ACTUALLY UNAVAILABLE AT THE TIME OF THE TRIAL?

THE TRIAL JUDGE FOUND EVERY WORD OUT OF HER MOUTH TO BE INCREDIBLE, INCLUDING THAT SHE WOULD HAVE BEEN AVAILABLE AT THE TIME OF TRIAL. AND THE REASON FOR THE TRIAL JUDGE DOING THAT IS YOU HAVE CARL LEON MILLER, WHO IS PRESENTING THIS EVIDENCE ABOUT HOW THE DRUG ABUSE WAS RAMPANT IN THE HOUSE. PAM IS SAYING THERE WAS NO DRUG ABUSE AT ALL IN THE HOUSE. YOU HAVE PAM AND CARL SAYING THEY WERE ABUSED FOR BEING BAD CHILDREN. BAD STUDENTS. YOU HAVE THE SCHOOL TEACHER AND THE SCHOOL RECORDS SHOWING THEY WEREN'T BAD STUDENTS. YOU HAVE PAM SAYING SHE WOULD HAVE COME IN AND TESTIFIED BUT YOU HAVE HER ADMITTING THAT SHE WAS NOT IN CONTACT WITH HER FAMILY, THAT SHE DID NOT EVEN REMEMBER HER FAMILY'S NAMES BETWEEN 1990 AND 1997, SO THE TRIAL COURT JUST FOUND SHE CLAIMED THAT SHE WAS TEN OR ELEVEN WHEN SHE GOT PREGNANT. IN FACT SHE WAS 14. THE TRIAL COURT FOUND SHE WAS INCREDIBLE, BECAUSE HER TESTIMONY WAS INCREDIBLE. THE TRIAL COURT FOUND CARL LEON MILLER'S TESTIMONY INCREDIBLE, BECAUSE HE IS BUSY GIVING THIS STORY. AND SAYING OH, I WAS AVAILABLE TO TESTIFY. HE WAS LIVING AT THE HOUSE WHERE VALERIE LIVED, WITH THE GRANDMOTHER. VALERIE, THEY GO OUT AND TRY AND FIND AND SHE DOESN'T COME IN. WITH THE GRANDMOTHER, WHO THEY ARE IN CONTACT WITH. HE SAYS I KNEW THE -- WHO SAYS I KNEW THE DEFENDANT WAS IN JAIL CHARGED WITH FIRST-DEGREE MURDER. I RAN INTO HIM IN JAIL MYSELF, AND I AM IN TOUCH WITH AUNT LAURA, WHO IS TALKING TO THE DEFENSE ATTORNEYS BUT, YOU KNOW, HAD ANYBODY JUST ASKED ME, I WOULD HAVE COME IN. THE TRIAL COURT SAID, GIVEN ALL THIS, YOU ARE INCREDIBLE. GOOD-BYE. TRIAL COURT MAKES THOSE CREDIBILITY DETERMINATIONS. THEY ARE SUPPORTED BY THE RECORD, AND THEREFORE THIS COURT IS BOUND TO AFFIRM THEM. WITH REGARD TO THE OTHER FAMILY MEMBERS, THEY HAVE NEVER BEEN BROUGHT IN. VALERIE DOESN'T COME IN AT THE EVIDENTIARY HEARING. MICHAEL DOESN'T COME IN AT THE EVIDENTIARY HEARING. LAWRENCE DOESN'T COME IN AT THE EVIDENTIARY HEARING. THEY NEVER TRIED TO CALL ANY OF THESE PEOPLE, SO TO SAY WELL, YOU SHOULD HAVE PRESENTED THEM TO THE DOCTORS WHEN YOU NEVER APPROACHED THAT THEY WERE AVAILABLE TO BE PRESENTED -- YOU NEVER PROVED THAT THEY WERE AVAILABLE TO BE PRESENTED TO THE DOCTORS, THEY WERE NEVER AVAILABLE TO BE CALLED AT TRIAL, BECAUSE YOU NEVER PRODUCED EVIDENCE THAT THEY WERE AVAILABLE. YOU NEVER TRIED TO CONTACT VAERL I. THEY -- TO CONTACT VALERIE. THEY SENT AN INVESTIGATOR OUT TO THE HOUSE.

WHAT WOULD YOU DO WITH, LIKE AUNT LAURA, WHO TESTIFIED IN A COMPLETE OPPOSITE OF WHAT SHE TESTIFIED TO AT THE PENALTY PHASE?

IT IS NOT AN AFFIDAVIT OF AUNT LAURA BUT OF DR. EISENSTEIN WHO ALLEGEDLY SAYS WHAT AUNT LAURA TOLD HIM. THEY NEVER BOTHERED TO PRESENT AUNT LAURA. AUNT LAURA LIVES IN MIAMI. THEY NEVER PRESENTED AUNT LAURA AND SO YOU SHOULD IGNORE THE AFFIDAVIT, BECAUSE IT IS NOT ADMISSIBLE. WE HAVE HER SWORN TESTIMONY, SUBJECT TO CROSS-EXAMINATION, THAT NONE OF THIS HAPPENED. IF THEY WANTED HER TO RECANT THAT, WHICH I DON'T KNOW HOW YOU CAN FAULT COUNSEL FOR THE FAMILY LYING TO HIM ALLEGEDLY, BUT IF

THEY WANTED HER TO RECANT THAT, THEN THEY NEEDED TO BRING HER IN AND HAVE HER TESTIFY. I WOULD LIKE TO MAKE ONE LAST POINT, WHICH IS WITH REGARD TO THE CONTAMINATION QUOTE/UNQUOTE, OF THE BLOOD FOR THE INTOXICATION TEST. WHAT IT WAS IS IT HAD EXCESSIVE RED BLOOD CELLS ON IT. THE ONLY PERSON WHO HAD ANY EXPERTISE IN TOXICOLOGY WAS THE STATE'S TOXICOLOGIST. HE WAS THE ONLY PERSON WHO TESTIFIED ABOUT THE CONTAMINATION, AND HE SAID, HAVING EXCESS RED BLOOD CELLS HAD NO EFFECT ON THE TOXICOLOGY TEST. THE DEFENSE DOCTORS WHO WERE RELYING ON THIS REPORT ALL ADMITTED THEY COULDN'T READ IT, OTHER THAN TO SEE WHERE IT SAID TRACE AMOUNTS OF COCAINE. THEY HAD NO IDEA WHAT ELSE IT SAID, AND THEREFORE IF ANYBODY WAS UNQUALIFIED, IT WAS NOT THEM AND NOT THE STATE'S EXPERT WHO WAS A TOXICOLOGIST AND PHARMACOLOGIST AND THE COURT ACCEPTED HIS TRIAL TESTIMONY AS SUCH. THE STATE RESPECTFULLY REQUESTS YOU AFFIRM.

CHIEF JUSTICE: COUNSEL.

AS TO THE GUN SHOT RESIDUE, I WOULD JUST ASK YOU TO LOOK AT THE REPLY BRIEF. THERE WERE CONTRADICTORY DEFENSES PRESENTED BY MR. KOCH, AND THE STATE'S EXPLANATION, I DON'T THINK, HOLDS WATER. THE STATEMENTS HE MADE TO THE JURY WERE COMPLETELY CONTRADICTORY ABOUT WHETHER OR NOT THERE WAS A THIRD PERSON WHO WAS A GUNMAN OR WHETHER THE VICTIM WAS A GUNMAN, AND AS FAR AS MR. JONES TOUCHING THE GUN, THE FACT THAT THE GUN WAS FOUND UNDER HIS ARM IN NO WAY INDICATES THAT MR. JONES TOUCHED THE GUN, AND I THINK THAT THAT IS FAIRLY STRAIGHTFORWARD. THE STATE GOT A COPY OF THE ENTIRE TRIAL ATTORNEY FILE WELL BEFORE THE HEARING, AND THEY NEVER RAISED ANY OBJECTION TO ITS COMPLETENESS OR OR ANY OTHER KIND OF OBJECTION PRIOR TO THE EVIDENTIARY HEARING. AS TO THE ATKINS ISSUE THAT I ADDED IN THE REPLY BRIEF, OBVIOUSLY THERE ARE IQ SCORES THAT RAISE THE ISSUE OF MENTAL RETARDATION NOW, POST ATKINS. THE MARCH 1999 FULL SCALE WASE SCORE, AS YOU ASKED ABOUT, JUSTICE WELLS, WAS 67, WHICH IS CERTAINLY WELL WITHIN THE RED ZONE FOR POTENTIAL MENTAL RETARDATION.

BUT WASN'T JEWELRY FOUND IN HIS POCKET THAT BELONGED IN THE HOME, ALSO, OR WAS IT, WAS JEWELRY AND THE PROCEEDS FROM A ROBBERY FOUND ON THE DEFENDANT?

THAT WAS CERTAINLY PART OF THE EVIDENCE AT TRIAL, JUSTICE SHAW, YES, SIR.

RIGHT.

THERE ALSO ARE IQ SCORES RANGING FROM 72 TO A BETA SCORE IN THE D.O.C. RECORDS FROM 1988, PRIOR TO THE CRIME, OF 76.

THE WAY IT IS BEING RAISED NOW, I MEAN, WE ARE HERE, AND NOT ONLY WAS MENTAL RETARDATION, WHICH CERTAINLY WAS A KNOWN MITIGATING FACTOR, SINCE THE BEGINNING OF DEATH PENALTY JURISPRUDENCE, WAS NOT EVER ASSERTED AT THE ORIGINAL TRIAL. OPPOSE THE CONVICTION, YOU DID NOT ASSERT THAT THE DEFENSE ATTORNEY WAS INEFFECTIVE FOR FAILING TO PUT ON EVIDENCE OF MENTAL RETARDATION AS A SIGNIFICANT --

THAT IS ABSOLUTELY TRUE.

SO WHY WOULD WE ENTERTAIN THIS ON APPEAL? I MEAN ATKINS --

BECAUSE THE TESTIMONY FROM THE EXPERTS, THEY DO REFER TO MENTAL RETARDATION, AND THERE IS ALSO TESTIMONY FROM DR. TUMER THAT THERE ARE ADAPTIVE BEHAVIOR PROBLEMS IN HIS EVIDENTIARY HEARING TESTIMONY, AND THERE ALSO WAS TESTIMONY FROM PAM AND FROM THE OTHER FAMILY MEMBERS, ABOUT HIS SCHOOL PERFORMANCE, AND I SHOULD ALSO JUST ADD THAT, AS TO THE CREDIBILITY FINDINGS, PLEASE CONSIDER THE CREDIBILITY FINDINGS BY THE COURT, IN LIGHT OF LIGHT V STATE, THE SECOND DCA CASE, BECAUSE I THINK THE

EFFECT OF THE JURY ON HEARING BOTH FAMILY MEMBERS THAT TESTIFIED AND THE EXPERTS WHO SPOKE IN DETAIL WITH THE FAMILY MEMBERS WHO DIDN'T TESTIFY AT THE EVIDENTIARY HEARING, YOU KNOW, WHO THEY RELIED ON IN ORDER FOR THEIR FINDINGS, IF THAT INFORMATION HAD BEEN BEFORE THE JURY, WE BELIEVE THE NATURE OF THE FAMILY EVIDENCE WOULD HAVE BEEN MUCH DIFFERENT, AND THE RESULT WOULD HAVE BEEN DIFFERENT.

CHIEF JUSTICE: OKAY. THANK YOU. THANK YOU, BOTH, VERY MUCH.