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Ferrell v. State of Florida

LAST CASE ON THE COURT'S DOCKET THIS MORNING IS FERRELL VERSUS STATE AND FERRELL VERSUS CROSBY. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS CAROL C RODRIGUEZ. I AM EMPLOYEE OF CCRC MIDDLE DISTRICT IN TAMPA, ALONG WITH LEAD COUNSEL, MR. ROBERT STRAIN, WHO IS SEATED AT COUNSEL TABLE, I REPRESENT MR. JACK FERRELL IN THIS CASE TODAY. THERE WAS A STATE HABEAS PETITION THAT WAS FILED IN THIS CASE, AND WE WOULD RELY ON THOSE DOCUMENTS BEFORE THE COURT. I WILL FOCUS MY ARGUMENT TODAY, ON THE ORDER THAT DENIED MR. FERRELL RELIEF OF HIS 3.850 MOTION.

CHIEF JUSTICE: REQUEST YOU -- CAN YOU ADVISE US OF THE SPECIFIC ISSUES THAT YOU ARE GOING TO ADDRESS, OR YOU ARE GOING TO ADDRESS THEM ALL?

I HOPE TO ADDRESS THEM ALL, YOUR HONOR, BUT I CERTAINLY HOPE THAT I CAN RESPOND TO ALL OF YOUR QUESTIONS AS WELL. IT IS MY INTENT TO COVER COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATION TO POINT OUT MITIGATION THAT WAS IN THE RECORD, IN BEHALF OF MR. FERRELL, TO POINT OUT TO THE COURT THE FAILURE TO ADDRESS THE BRAIN DAMAGE OF THE DEFENDANT AS NOT BEING CLAIMED AS MITIGATION IN THE RECORD. COUNSEL'S INEFFECTIVENESS FOR FAILING TO GET AN IN-DEPTH PSYCHO SOCIAL ASSESSMENT VIA A SOCIAL WORKER.

ALL OF THOSE RELATE TO INEFFECTIVENESS AS TO THE INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE. IS THAT CORRECT?

YES, YOUR HONOR. ALL OF THEM ARE TIED INTO THE SAME ISSUE.

YOU GO RIGHT AHEAD THEN.

THANK YOU. YOUR HONOR, BASICALLY, IN THIS PARTICULAR CASE, COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE, PRESENT AND POINT OUT MITIGATION. IN ALL THREE AREAS. AS THIS ATTORNEY APPROACHED THIS CASE, YOUR HONOR, HE FAILED TO CONDUCT ANY KIND OF INVESTIGATION INTO THE DEFENDANT'S BACKGROUND, AND SO STATED AT THE EVIDENTIARY HEARING, SPECIFICALLY AT PAGE 113. COUNSEL TESTIFIED THAT HE PUT ON ABSOLUTELY NOTHING, WITH REGARD TO MR. FERRELL'S LIFE HISTORY.

DID HE HAVE AN INVESTIGATOR?

YES, YOUR HONOR, HE DID. HE REQUESTED \$500 IN TOTAL FOR AN INVESTIGATION, SENT OUT AN INVESTIGATOR TO GEORGIA, TO SPEAK TO MR. FERRELL'S MOTHER. HE HAD THE BENEFIT OF A PSI, AS DID COUNSEL IN THE WIGGINS CASE. AND WHAT HE DID WAS HE SENT THE INVESTIGATOR OUT TO SPEAK TO THE MOTHER. WHEN THE MOTHER SAID SHE COULDN'T COME BECAUSE OF A HEART CONDITION, HE DID NOTHING FURTHER. I SUBMIT TO THE COURT THAT THE PSI ALSO PROVIDED HIM WITH THE NAME OF GRACE, THE DEFENDANT'S SISTER, AND THAT THE MOTHER DID NOT EVEN RAISE THE DEFENDANT. HE HAD A MUCH CLOSER RELATIONSHIP WITH THE SISTER, GRACE, HAD LEFT SCHOOL TO SUPPORT HIS SIBLINGS, AND THAT THE PSI EVEN INDICATED THAT THE SISTER WAS RESIDING WITH THE MOTHER IN GEORGIA. THE INVESTIGATOR MADE ABSOLUTELY NO EFFORT TO CONTACT THE PARTICULAR SISTER. AT THE EVIDENTIARY HEARING, COUNSEL WAS

ASKED ABOUT THIS ISSUE AND WHY HE WENT NO FURTHER. WHAT HE SAID WAS THAT THIS WAS HIS FIRST MURDER CASE AND THAT HE DID BOTH THE GUILT AND PENALTY PHASES OF THE CASE.

ON THE INVESTIGATION, THE, ONCE THE INVESTIGATOR SPOKE TO THE MOTHER, DID THE MOTHER GIVE ANY INSIGHT INTO THE BACKGROUND OF THIS DEFENDANT?

SHE DID SPEAK TO THE INVESTIGATOR, AND PROVIDED SOME INFORMATION WITH REGARD TO HER OWN BACKGROUND THAT DID COME OUT AS WELL, WHEN SHE DID COME FOR THE EVIDENTIARY HEARING.

AND THAT WAS, AND SHE SAID SHE COULDN'T COME TO TRIAL.

SHE COULDN'T COME BECAUSE OF A HEART CONDITION.

THAT WAS ALL THAT WAS DONE ON THE FAMILY BACKGROUND?

THAT WAS ALL THAT WAS DONE, YOUR HONOR. THERE WAS NOTHING AT ALL IN THE RECORD.

HOW OLD WAS THIS DEFENDANT AT THE TIME OF THE COMMISSION OF THE MURDER?

THIS DEFENDANT WOULD HAVE BEEN APPROXIMATELY IN HIS 40s, YOUR HONOR.

AND WOULD I UNDERSTAND, EVEN FROM THE EVIDENTIARY HEARING, THAT PEOPLE THAT DID EVENTUALLY TESTIFY AT THE EVIDENTIARY HEARING, HADN'T TALKED ABOUT THINGS THAT HAD HAPPENED YOU KNOW, 30 YEARS BEFORE. IS THAT CORRECT? I MEAN, THAT THAT THEY HADN'T HAD CONTACT WITH HIM FOR MOST OF HIS ADULT LIFE?

NO, YOUR HONOR. AT THE TRIAL, THE WITNESS THAT WAS BROUGHT, THERE WAS ONE WITNESS THAT TESTIFIED AT TRIAL. THE WITNESSES AT THE EVIDENTIARY HEARING ACTUALLY TRAVELED, EVEN TODAY, TO SEE MR. FERRELL ON DEATH ROW, SO THEY DO HAVE CONTACT WITH HIM. HIS SISTER AND HIS AUNT.

I THOUGHT THIS WAS BEFORE THE MURDER. DID THEY HAVE CONTACT WITH HIM TO KNOW ABOUT HIS LIFESTYLE OR ANYTHING IN THE YEARS PRECEDING THE MURDER?

NO. NO, YOUR HONOR. THEY HAVE SOME LIMITED CONTACT WITH HIM DURING THAT PERIOD OF TIME.

SO IN TERMS OF UNDERMINING YOUR CONFIDENCE, I MEAN IN TERMS OF WHEN YOU HAVE SOMEBODY WHO IS MAYBE 18 OR 19, THE WEIGHT OF WHAT HAPPENED DURING SOMEONE'S CHILDHOOD MAY BE VERY SUBSTANTIAL, BUT WHEN YOU HAVE A MATURE ADULT IN HIS FORTIES, THEN THE FACT THAT SOMEONE KNEW WHAT HE WAS LIKE WHEN HE WAS FIVE YEARS OLD, IS GOING TO BE SOMEWHAT ATTENUATE I MEAN, IT MAY BE MITIGATING, BUT IT IS NOT GOING COME BE -- IT IS NOT GOING TO BE VERY SUBSTANTIAL MITIGATING.

YOUR HONOR, THE TESTIMONY THAT THE SISTER DID GIVE AT THE EVIDENTIARY HEARING, WAS VERY COMPELLING.

BEFORE YOU GET TO THE SISTER, THOUGH, YOU SAID THAT THE INVESTIGATOR TALKED TO THE MOTHER AND DID NOTHING FURTHER, BUT AS I UNDERSTAND IT, DR. UPTON, WHO DID IN FACT TESTIFY IN THIS CASE, DIDN'T HE INDICATE THAT HE ALSO TALKED TO THE MOTHER AND GOT SOME BACKGROUND INFORMATION DURING THE COURSE OF HIS DEALINGS WITH THIS CASE?

HE TESTIFIED VERY BRIEFLY, YOUR HONOR, WITH REGARDS TO ANY CONTACT MADE WITH THE FAMILY IN THIS CASE.

HE DID, IN FACT, SAY HE MADE CONTACT WITH FAMILY.

YES, YES, YOUR HONOR, HE DID. THE SISTER'S TESTIMONY THAT WAS GIVEN AT THE EVIDENTIARY HEARING, WAS THAT MR. FERRELL WAS RAISED BY A GREAT AUNT. HE WAS LIVING WITH A GREAT AUNT, WHO ACTUALLY BEGAN TO HAVE, TO SEXUALLY MOLEST HIM OVER A PERIOD OF TIME. SHE ABSCONDED WITH HER HUSBAND'S MONEY AND RAN OFF WITH MR. FERRELL, AND SO HE WAS THE VICTIM OF SEXUAL ABUSE DURING THE TIME HE WAS THERE.

DID YOU HAVE AN EXPERT THEN, THAT RELATED SOME RAGE REACTION, BECAUSE HE HAD BEEN RAPED, WITH THE FACT THAT HE HAD KILLED, ALREADY KILLED ONE PERSON AND THEN HE KILLED HIS GIRLFRIEND IN THIS CASE?

NO, YOUR HONOR. THAT WAS NOT PRESENTED AT THE EVIDENTIARY HEARING.

SO THE LAWYER DID, ALSO, RETAIN A MENTAL HEALTH EXPERT?

YOUR HONOR, THERE WAS A SECTION THAT WAS PUT FORTH WITH REGARDS TO MENTAL HEALTH, AND ASKED FOR A PSYCHO SOCIAL ASSESSMENT THROUGH A SOCIAL WORKER. THAT WAS ONE OF THE REQUESTS THAT WAS MADE OF THE TRIAL COURT. AND THERE IS A LITTLE CONFUSION WITH REGARDS TO THAT, IN TERMS OF THE RECORD. IF WE ARE TALKING ABOUT THE EVIDENTIARY --

I GUESS WE ARE TALKING ABOUT AT THE TRIAL. DIDN'T THIS DEFENSE LAWYER RETAIN A MENTAL HEALTH EXPERT, WHO TESTIFIED AS FOR BRAIN DAMAGE AT THE ORIGINAL TRIAL?

ONLY DR. UPSON TESTIFIED. HE MENTIONED BRAIN DAMAGE, BUT THE INTERESTING PART OF THIS CASE IS THAT TRIAL COUNSEL NEVER ASKED THE COURT TO ACTUALLY CONSIDER BRAIN DAMAGE AS A SPECIFIC MITIGATOR. I WOULD SUBMIT TO THE COURT THAT YOUR DECISION IN CROOKS, HOLDS THIS COUNSEL TO HAVE BEEN INEFFECTIVE IN TAKING THAT APPROACH. WHAT HE DID WAS TO ARGUE THAT MR. FERRELL HAD A DIMINISHED CAPACITY, DUE TO THE ALCOHOL INTAKE, BECAUSE HE DID ALCOHOL OVER THE COURSE OF A LIFETIME, AND BECAUSE OF THAT, HE SHOULD FIND THE STATUTORY MITIGATION. BUT IF YOU WILL LOOK AT THE SENTENCING ORDER, ITSELF, AND I SUBMIT TO YOU THERE ARE THREE OF THEM BECAUSE THERE WAS CONFUSION IN SENTENCING MR. FERRELL, YOU WILL FIND THAT, ALTHOUGH CAMPBELL WAS THE LAW, THE TRIAL JUDGE DID NOT FIND BRAIN DAMAGE AS A MITIGATOR IN AND OF ITSELF AND ASSIGN ANY WEIGHT TO IT WHATSOEVER.

WHAT CONNECTION WAS THERE MADE BETWEEN THE BRAIN DAMAGE AND THE ACTIONS OF THE DEFENDANT OR HIS ABILITY TO ACT, ET CETERA? I MEAN, THE MERE FACT IF THERE IS BRAIN DAMAGE, THAT THERE HAS TO BE SOME CONNECTION? SOME NEXUS TO SOME RELEVANT FACT. SO WHAT WAS THERE PRESENTED THAT WOULD CONNECT THE BRAIN DAMAGE TO A NEXUS THAT IS IMPORTANT?

DR. UPSON TESTIFIED THAT IT DID EFFECT THE FRONTAL LOBE DAMAGE AFFECTED IN PULLSIVITY, IMPULSIVITY, AND THAT BECAUSE IT AFFECTED IMPULSIVITY, THAT HE WOULD REACT THAT WAY, AND SO THERE WAS SOME CONNECTION TO THE BRAIN DAMAGE AND HIS REACTION.

IT WAS PRESENTED IN THE TRIAL COURT?

IT WAS PRESENTED IN THE EVIDENCE. BUT IT WAS NOT ASKED BY COUNSEL IN CLOSING MEMORANDUM OR IN ANYTHING BROUGHT TO THE COURT AND SPECIFICALLY BROUGHT TO THE COURT'S ATTENTION. I WOULD SUBMIT TO YOU --

BUT WHEN YOU LOOK AT THIS CASE AS A WHOLE, WASN'T THAT TESTIMONY USED, ACTUALLY, TO ARGUE THESE OTHER CIRCUMSTANCES THAT WERE, IN FACT, FOUND THAT HE HAD SOME KIND OF, HE COULDN'T CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW? I MEAN, INSTEAD OF JUST

PICKING OUT, SAY, ONE THING AND SAYING OKAY, HE HAS BRAIN DAMAGE, THE WHOLE ARGUMENT IS THAT HE HAD SOME KIND OF DIMINISHED CAPACITY AND COULD NOT CONTROL OR CONFORM HIS CONDUCT. I MEAN, ISN'T THAT A PROPER USE OF THE BRAIN DAMAGE TESTIMONY?

WELL, THE DIMINISHED CAPACITY, AGAIN, THE ONLY FOCUS THE TRIAL COUNSEL USED, WAS THE IMPACT OF THE ALCOHOL, AND THE ALCOHOL AS IT AFFECTED HIS BEHAVIOR. HE WENT FOR A VOLUNTARY INTOXICATION DEFENSE. AND DID NOT AT ALL FOCUS ON THE BRAIN DAMAGE. IN FACT, TRIAL COUNSEL REFERRED TO BRAIN DAMAGE ONLY AS PROBABLY EXISTING. HE DIDN'T EVEN CONFIRM THAT THE BRAIN DAMAGE WAS THERE OR --

DIDN'T DR. UPSON KIND OF TIE IT IN? DIDN'T HE SAY THAT THIS FRONTAL LOBE DAMAGE WAS PROBABLY CAUSED BY THE ALCOHOLISM?

YES.

OKAY.

AND ALCOHOLISM WAS ESTABLISHED, AS FAR AS THE DIMINISHED CAPACITY BUT NOT THE BRAIN DAMAGE. THE BRAIN DAMAGE, ITSELF, WAS NOT A FOCUS.

WELL, NOW, WHAT IS THE TESTIMONY FROM THE EVIDENTIARY HEARING, ABOUT THE DEFENDANT'S BRAIN DAMAGE? HOW DID IT VARIETIESY? WEEL, AT THE -- WELL, AT THE -- HOW DID IT VARY?

WELL, AT THE EVIDENTIARY HEARING, THE COURT DENIED THE ABILITY TO HAVE A SPEC SCAN, TO DETERMINE THE ABILITY OF HIS -- THE EXTENT OF HIS BRAIN DAMAGE. NOT ONLY WAS HE AFFECTED BY THE BRAIN DAMAGE THAT MAY HAVE BEEN CAUSED BY THE ALCOHOLISM, BUT HE SUFFERED FROM DIABETES AND HE HAD OTHER MEDICAL CONDITIONS --

I DON'T WANT TO KNOW ABOUT THE ABSENCE OF EVIDENCE. I WANT TO KNOW WHAT EVIDENCE WAS PRESENTED AT THE EVIDENTIARY HEARING THAT SHOWS WHAT WE NOW KNOW ABOUT HIM, WHICH IS THAT HE WAS PROFOUNDLY BRAIN DAMAGED OR THERE IS OBJECTIVE EVIDENCE OF BRAIN DAMAGE OR THERE WAS OBJECTIVE EVIDENCE OF BRAIN DAMAGE. WHAT DID --

YOUR HONOR, THE TRIAL COURT DENIED TRIAL COUNSEL'S ATTEMPT TO PUT ON A SPEC SCAN AT THE EVIDENTIARY HEARING. THEREFORE IT CANNOT BE TESTIFIED TO.

IS THAT RAISED AS SEPARATE ISSUE ON APPEAL, WHETHER THE --, WHETHER THERE WAS BRAIN DAMAGE, AND NOT ALLOW A SPEC SCAN NOW?

YES, YOUR HONOR. THE ARGUMENT BEFORE THE COURT AND THE ARGUMENT THAT WAS RAISED IS THAT DR. FOLEY TESTIFIED THAT ATTORNEYS WERE REFERRING CLIENTS TO HIM FOR BRAIN SCANS AT THAT TIME. SO --

THAT --

COUNSEL WAS INEFFECTIVE -- I AM SORRY.

SO, EXCEPT FOR THE ABSENCE OF THE SPEC SCAN, THERE IS NO ADDITIONAL TESTIMONY NOW THAT YOU PRESENTED THAT THE TRIAL COUNSEL SHOULD HAVE KNOWN, IF HE WAS REASONABLY EFFECTIVE BACK IN 1992, THAT THERE WAS COMPELLING EVIDENCE OF BRAIN DAMAGE.

THERE IS NO NEW EVIDENCE, YOUR HONOR, NO.

SO WHAT WE WOULD HAVE TO DO IS TAKE A DOUBLE LEAP, WHICH IS TO SAY IT WOULD HAVE BEEN INEFFECTIVE ASSIST ANSWER OF COUNSEL -- ASSISTANCE IN 1992, NOT TO REQUEST A SPEC SCAN, RIGHT?

YES, YOUR HONOR.

AND THEN WE WOULD HAVE TO SAY THAT IF ONE WAS PERFORMED THEN AS NOW, IT WOULD BE COMPELLING EVIDENCE OF BRAIN DAMAGE.

YES, YOUR HONOR.

SO THAT IS A TWO-FOLD THING.

YES, YOUR HONOR.

SO ARE YOU ESPousing THAT WE SHOULD BE SAYING THAT EVERY DEFENDANT WAS ENTITLED TO HAVE HIS SPEC SCAN FOR CONFIRMED BRAIN DAMAGE, BACK IN THE LATE '80s, EARLY '90s?

NO, YOUR HONOR, AND I WOULD CONCEDE THAT THERE WERE A LOT OF ATTORNEYS THAT WERE NOT REFERRING AS WELL. IT WAS NOT THE COMMON PRACTICE FOR EVERYONE TO REFER THE CASES THERE. I WOULD JUST SUBMIT TO THE COURT THAT THIS COUNCIL TRYING HIS FIRST CASE DID NOT GET INPUT FROM ANYONE ELSE, AND THAT THERE WERE TRIAL COUNSEL THAT WERE MAKING SUCH REFERRALS.

WHAT DID THE MENTAL HEALTH EXPERT SUGGEST, BACK IN THE EARLY '90s, TO CONFIRM THE BRAIN DAMAGE, THAT HE NEEDED THE ASSISTANCE OF THE OBJECTIVE TEST OF A SPEC SCAN?

NO, SIR, YOUR HONOR. I WOULD SUGGEST TO THE COURT THAT IT WAS ALTERNATIVELY ARGUED AS NEWLY-DISCOVERED EVIDENCE, IN BEHALF OF MR. FERRELL, AND THAT TODAY HE SHOULD HAVE A BRAIN SCAN, AND THAT THAT WOULD PROVIDE THE OBJECTIVE EVIDENCE OF THE BRAIN DAMAGE THAT THAT JURY COULD HAVE CONSIDERED, IN LOOKING AT THE CIRCUMSTANCES OF THE CASE.

DID THE STATE PRESENT CONFLICTING EXPERT TESTIMONY, CONTRARY TO DR. UPSON'S TESTIMONY AT THE ORIGINAL PENALTY PHASE?

NO, YOUR HONOR.

SO THE TESTIMONY OF DR. UPSON WENT UNREBUTTED ABOUT THE BRAIN DAMAGE?

YES, YOUR HONOR, AND THAT IS WHY I WOULD SUBMIT TO THE COURT THAT IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL, FOR COUNSEL NOT TO HAVE FOCUSED THAT ISSUE AND BROUGHT THAT ISSUE TO THE COURT'S ATTENTION. IT WAS UNCONTROVERTED EVIDENCE OF BRAIN DAMAGE, AND YET IN HIS SENTENCING MEMING AND YOU MEAN AND IN CLOSING ARGUMENTS, HE AGAIN ONLY REFERRED TO THE ALCOHOLISM AS THE CAUSE OF HIS DIMINISHED CAPACITY, AND HE DID NOT ASK THE COURT SPECIFICALLY TO FIND BRAIN DAMAGE AS A MITIGATOR IN BEHALF OF MR. FERRELL.

BUT HE DID PUT THAT TESTIMONY ON, IN THE FORM OF DR. UPSON'S TESTIMONY.

YES, YOUR HONOR.

SEE IF YOU CAN HELP US IN SORT OF THE SIMPLIFIED WAY HERE, OF YOU HAVE DESCRIBED FOR US, IN RESPONSE TO OUR QUESTIONS, THAT COUNSEL DID HIRE AN INVESTIGATOR. THE INVESTIGATOR VISITED THE MOTHER. COUNSEL DID HIRE A MENTAL HEALTH EXPERT. WHATEVER.

GIVE US THE CONTRAST IN YOUR VIEW, OF WHAT A REASONABLE LAWYER SHOULD HAVE DONE, BEYOND WHAT THE LAWYER DID HERE, THAT WE KNOW THE LAWYER DID. WHAT DID YOU DEMONSTRATE AT THE EVIDENTIARY HEARING,? DID YOU CALL A LAWYER, A DEFENSE LAWYER EXPERT, FOR INSTANCE, TO SAY I HAVE EVALUATED THIS DEFENSE LAWYER'S WORK? AND IT WAS JUST GROSSLY INADEQUATE? BECAUSE HERE IS WHAT DEFENSE LAWYERS WERE DOING AT THE TIME? WHAT STANDARD DO WE HAVE HERE, TO APPLY TO WHAT THE DEFENSE COUNSEL ACTUALLY DID AND THEN WHAT YOU SAY HE SHOULD HAVE DONE.

YOUR HONOR, BASICALLY, WHAT WE HAVE IS COUNSEL PUT ON ABSOLUTELY NOTHING WITH REGARD TO THE FAMILY BACKGROUND. AND THAT IS CLEARLY IN THE RECORD.

DID THE MENTAL HEALTH EXPERT QUESTION THE DEFENDANT ABOUT HIS FAMILY BACKGROUND?

NO, YOUR HONOR. NONE OF THAT INFORMATION WAS REALLY BEFORE THE COURT AT THE TRIAL.

SO THE MENTAL HEALTH EXPERT DIDN'T HAVE ANY KNOWLEDGE OF THE DEFENDANT'S BACKGROUND, WHEN HE EVALUATED HIM AND TESTIFIED.

VERY BRIEFLY, YOUR HONOR, THERE WERE ONLY TEN PAGES IN MITIGATION, AS FAR AS THIS ENTIRE CASE IS CONCERNED.

HOW MUCH TIME DID THE MENTAL HEALTH EXPERT SPEND WITH THIS DEFENDANT BACK AT THE TIME --

VERY LIMITED TIME, YOUR HONOR. I CANNOT RECALL EXACTLY THE AMOUNT OF TIME, BUT VERY LITTLE TIME WITH HIM.

CHIEF JUSTICE: THE MARSHAL HAS REMIND THE US THAT YOU ARE IN YOUR REBUTTAL TIME, SO IF YOU WANT TO PAUSE AT THIS TIME, YOU COULD.

YES, YOUR HONOR, IF I COULD, THANK YOU.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS DOUGLAS SQUIRE, AND I REPRESENT THE APPELLEE, THE STATE.

DO WE HAVE A DEFENSE LAWYER WITH HIS FIRST DEATH CASE THAT DIDN'T DO ANYTHING?

FIRST CAPITAL CASE, THAT'S RIGHT.

HE DIDN'T DO ANYTHING?

I GUESS I WOULD PREFACE THIS BY SAYING THAT THERE IS A 60-PAGE ORDER BY THE TRIAL COURT THAT IS KPEM LATER, IF I FAIL TO -- EX-EMLATER, IF I FAIL TO COVER SOMETHING. FIRST, HE WAS 52 NOT IN HIS 40s. SECOND, THE INVESTIGATOR DID CONTACT THE MOTHER AND SPEAK WITH THE MOTHER AND HE DID CONTACT THE EX-WIFE, GEORGIA MAY LONG, WHO APPARENTLY HAD BEEN PREVIOUSLY MARRIED TO HIS UNCLE. SHE WAS A DOUBLE AMP TEE THAT COULD NOT AT HE END OR TESTIFY.

THIS IS THE SAME -- WHO COULD NOT ATTEND.

THIS IS THE SAME LADY WHO THEY NOW CLAIM RAPED HIM AND WHO HE HAD A RELATIONSHIP WITH HER?

THE INVESTIGATORS SPOKE WITH HER AND NONE OF THAT CAME OUT THEN, AND AS FAR AS THE

SISTER, WHO WAS THE ONLY ONE THAT INFORMATION CAME FROM, I BELIEVE, AT TRIAL, SHE IS NOT CLEAR ON THE DATES, AND SHE SAYS THAT SHE HAD NO CONTACT WITH THE DEFENDANT AFTER HE LEFT AT AGE 18. I DON'T KNOW WHEN THE RELATIONSHIP ACTUALLY STARTED WITH THE AUNT, BECAUSE APPARENTLY HE WENT TO LIVE WITH THEM BEFORE THEY RAN OFF TOGETHER. SHE SKID HIM -- DESCRIBED HIM AS HER COMMON LAW HUSBAND AND THAT THEY HAD A 30-YEAR RELATIONSHIP WHERE THEY CARED FOR EACH OTHER. THERE WAS NOTHING TO BELIEVE AN ABUSED BACKGROUND AND NOTHING DISCLOSED BY THE MOTHER. AND DR. UPSON HAD INTERVIEWED THE MOTHER AND RELATIVES. THERE IS TESTIMONY TO THAT, SO I DON'T REALLY KNOW WHERE YOU CAN ARGUE THAT THE MOTHER WAS THE ONLY ONE CONTACTED, AND AS FAR AS OTHER RELATIVES, THE DEFENDANT WAS UNABLE TO PROVIDE NAMES, ADDRESSES OR TELEPHONE NUMBERS FOR THEM TO CONTACT. THE INVESTIGATOR DID GET THE SCHOOL RECORDS. THEY WERE SPARSE, BECAUSE I BELIEVE HE LEFT SCHOOL IN THE EIGHTH GRADE. THEY GOT THE PRISON RECORDS, AND AS, WHAT IS BEFORE THE COURT, ALTHOUGH IT WAS HIS FIRST CASE, TRIAL COUNSEL ATTENDED TWO SEMINARS, HAD THE MANUAL AND SUBMITTED TO THE RECORD TO DEFEND A CAN'T CASE AND ALSO HAD A CRIMINAL DEFENSE ATTORNEY MANUAL AND SEMINAR, AND IN THE MANUAL AND IN THE STATE'S CLOSING ARGUMENT, AND IN THE CASE, IT SUGGESTS STRONGLY TO GET A NEUROLOGISTS AND DISCUSSES SCANS, MRI'S, C-SOMETHING, AND IT SAYS THAT THE PROBLEM WITH THOSE SCANS ARE THAT, HOWEVER THE MRI, CT SCAN AND EEG ARE VERY LIMITED AND IMPRECISE INSTRUMENTS FOR MEASURING BRAIN IMPAIRMENT AND NEUROLOGICAL TESTING IS MORE RELIABLE FOR TWO REASONS, FIRST IT CAN PINPOINT THE PRECISE AREA OF THE BRAIN WHICH IS DYSFUNCTIONAL AND SECOND DETERMINE THE DYSFUNCTION IMPAIRED BY THE PROBLEM AND NOT JUST BRAIN DAMAGE SOMEWHERE.

IS THAT WHAT COUNSEL MOVED TO DO IN THIS CASE?

YES, AND THIS COURT WAS APPOINTED OUT IN DIRECT APPEAL AND I POINT YOU HAD OUT IN THE ANSWER BRIEF, THEY TRY AND DOWNPLAY THE TEN PAGES DURING THE PENALTY PHASE, THAT THERE WERE 92 OR 93 PAGES OF TRIAL TESTIMONY THAT ALL WENT TO ALCOHOL-CAUSED BRAIN DAMAGE. ALTHOUGH HE MAY NOT HAVE USED THE MAGIC WORDS "FIND BRAIN DAMAGE", HE DID ARGUE THAT THERE WAS IMPAIRMENT BY ALCOHOL. THE COURT DID FIND THAT IN MITIGATION. THIS WAS SIMPLY AS IN GUIDINAS, SECOND-GUESSING. THERE WAS NOTHING IN THE MANUALS OR IN THE CASE LAW SIMPLY PROVIDING NO AUTHORITY FROM EITHER THE SCAN OF 1992 OR THE SOCIAL WORKER 1992, AS FAR AS CASE LAW TO LET THE COURT KNOW THAT COUNSEL THEN HAD REASONABLE DEFENSE TO SUBMIT A CASEWORKER AS OPPOSED TO A PSYCHOLOGIST.

WE ARE REALLY LOOKING AT THREE AREAS OF POTENTIAL DEFICIENCY. ONE IS NOT REQUESTING A SPEC SCAN BACK IN THAT TIME.

CORRECT.

TWO, IS NOT GETTING A SOCIAL WORKER TO LOOK AT THE BACKGROUND OF THE DEFENDANT.

CORRECT.

AND THEN THREE IS THE NOT FOLLOWING UP WITH FINDING MORE RELATIVES.

CORRECT.

LET ME ASK YOU THIS ABOUT THE NEUROPSYCHOLOGIST, AS I UNDERSTAND THE RECORD, THIS, THE NEUROPSYCHOLOGIST, MET WITH THE DEFENDANT A NUMBER OF TIMES, AND --

MAYBE THREE TIMES.

SPENT, LIKE, TEN HOURS OR MORE WITH HIM.

SEVERAL TESTS. YES.

WHAT KINDS OF TESTS WERE DONE DURING THE COURSE OF THESE MEETINGS?

I BELIEVE IT IS OUTLINED BETTER IN MY BRIEF, BUT AS FAR AS THERE WAS IQ TESTS, AND I BELIEVE HE GAVE THE MMPI, DIFFERENT ONES, AND WAS ABLE TO TESTIFY THAT THIS DEFENDANT DIDN'T SHOW ANY ANTI SOCIAL SYMPTOMS. HE HAD A GOOD PRISON RECORD FROM HIS PRIOR INCARCERATION, THAT HE PERFORMED WELL IN A STRUCTURED ENVIRONMENT WHERE HE WAS REMOVED FROM ACCESS TO ALCOHOL. THEY MADE ALL OF THE RECOMMENDATIONS THAT YOU WOULD MAKE WHEN YOU USE A NEUROPSYCHOLOGIST.

AND HE, IN FACT, FOUND THAT MR. FERRELL HAD SOME BRAIN DAMAGE.

YES. THEY ACTUALLY DISCUSSED WITH THE CLIENT, DURING THE GUILT PHASE, WHETHER OR NOT THEY WERE GOING TO USE UPSON DURING THE GUILT PHASE, AND THEY BELIEVE THEY HAD ENOUGH EVIDENCE OF IMPAIRMENT, THAT IT WOULD BE A VALID DEFENSE AGAINST THE CRIME. AND THAT IS WHY MOST OF THE TESTIMONY CAME IN DURING THE GUILT PHASE.

AT POSTCONVICTION, I BELIEVE A COUPLE OF OTHER MENTAL HEALTH EXPERTS TESTIFIED, AND WITHOUT THIS PET SCAN, ALL OF THEM, ALSO, SAID THAT MR. FERRELL HAD BRAIN DAMAGE.

CORRECT. THE TRIAL COURT DID AN EXCELLENT JOB. EACH EXPERT WAS ABLE TO DIAGNOSE THE DEFENDANT WITHOUT THE SCANS, AND AS WE KNOW FROM OTHER CASES, SUCH AS MICHAEL ROBINSON, THEY DO OBTAIN THESE PET SCANS AND NEVER FILE THEM. THAT WAS ONE OF THE THINGS THE DEFENSE ATTORNEY KNEW AHEAD OF TIME, IS THAT EVEN IF HE GOT A SCAN, IT MIGHT NOT SHOW ANYTHING AND THEN IT MIGHT BE USED AGAINST HIM TO SHOW, WELL THERE, IS NOTHING HERE THAT SHOWS HE HAS BRAIN DAMAGE, AND NONE OF THE EXPERTS CONTRADICTED DR. UPSON. WHAT IS DIFFERENT ABOUT THE NEUROPSYCHOLOGIST IN THIS CASE IS HE ACTUALLY SHOWED THE FUNCTION IMPAIRMENT. THE SCAN WOULD DO NOTHING TO SHOW OR CORRELATE HOW THAT DAMAGE WOULD AFFECT THE BEHAVIOR OF THE DEFENDANT.

DID DR. UPSON TESTIFY AT THE EVIDENTIARY HEARING?

YES, SIR.

AND DID HE TESTIFY THAT, NOW, THAT BASED ON INFORMATION THAT HE HAS NOW, THAT HAS MORE RECENTLY BEEN PROVIDED, THAT HE WOULD HAVE DONE OTHER THINGS OR CHANGED HIS VIEW?

CORRECT. I BELIEVE I WAS MAKING THE, ALSO THE POINT SHE WAS MAKING, WHICH IS SHE SAID WHAT HE WOULD DO TODAY NOT WHAT HE WOULD HAVE DONE 11 OR TEN YEARS AGO AND DR. FOLEY NEVER CONTRADICTED HIM, AND IT IS POINTED OUT THAT, ALTHOUGH SPEC SCANS WERE BEING USED IN '92, THEY WERE ONLY BEING USED FOR TRAUMA THERE IS NO EVIDENCE AND THEY STILL PROVIDED NO AUTHORITY THAT THESE WERE BEING USED IN ALCOHOL CASES OR IN CAPITAL CASES, AND THE TRIAL COURT DENIED THE SPEC SCAN, BECAUSE NONE OF THE EXPERTS SAID THEY NEEDED ONE. THEY WERE ALL LABELED TO DIAGNOSE THAT HE WAS QUALIFIED FOR THIS MITIGATION, THAT HE WAS IMPAIRED, THAT HE HAD ALCOHOL DAMAGE.

DID THE OTHER EXPERT'S TESTIMONY VARY SUBSTANTIALLY WITH DR. UPSON'S?

NOT THAT I RECALL.

IT WOULD SEEM TO ME THAT, AT THE MOST, AND I SAY THIS JUST TO THINK OUT LOUD, SINCE WE DON'T KNOW THAT THERE IS ANY OBJECTIVE EVIDENCE OF BRAIN DAMAGE, AND MOST IT WOULD

BE IS TO LOOK AT THIS ISSUE AS TO WHETHER THE JUDGE ABUSED HIS DISCRETION IN NOT ORDERING A SPEC SCAN NOW.

CORRECT. WHEN THE EXPERTS --

WE DON'T KNOW WHAT IT WOULD REVEAL.

THE INEFFECTIVENESS OF COUNSEL AND THE EXPERTS DISAGREED AS TO WHETHER COUNSEL HAD ANY REASON TO QUESTION HIS EXPERT, AND NO ONE ACTUALLY CONTRADICTED US, SO THE TRIAL COURT GAVE HIM THE OPPORTUNITY TO FILE AUTHORITY, WHEN THEY MADE THEIR LAST REQUEST. BECAUSE THEY, I DON'T THINK, I BELIEVE THEY MADE IT, I DON'T KNOW IF THEY FIRST MADE IT IN SEPTEMBER, BUT THEY AGAIN TRIED TO GET IT IN DECEMBER, BUT HE WAS, LIKE, WELL, HE WAS STILL WAITING FOR AUTHORITY THAT SHOWED THIS WAS SOMETHING THAT WAS DONE IN 1992. TO USE TEST RESULTS TO JUDGE SOMEONE ON HINDSIGHT, WHEN THE ADVICE HE WAS FOLLOWING IS THAT THE SCANS MIGHT NOT SHOW ANYTHING, AND THERE WOULDN'T HAVE ANY IMPACT ON THE FUNCTIONAL IMPAIRMENT OF THE DEFENDANT.

WELL, THE ONLY THING ON THAT ONE, I THINK THAT AS FAR AS WHAT WAS GOING ON AT THE TIME IS CERTAINLY RELEVANT, BUT WE SEE, OVER AND OVER, IN TRANSCRIPTS, WHEN NEUROPSYCHOLOGISTS TESTIFY, AND THEY, EVEN THOUGH THERE IS TESTING, THAT THE PROSECUTORS ARE ALWAYS SAYING WHERE IS THE OBJECTIVE EVIDENCE OF BRAIN DAMAGE, AND SO IN THAT REGARD, THE JURY SEEING SOMETHING, WHETHER IT IS A CT SCAN OR YOU KNOW, IT CERTAINLY ADDS WEIGHT TO IT, BUT I THINK THAT THE ISSUE HERE IS, WHETHER IT WAS UNREASONABLE BACK IN THAT TIME PERIOD.

WELL, IN THE '92 MANUAL, IT ADVISES AGAINST IT, AND I WAS HERE A FEW WEEKS NAG POWERS, WHERE THEY WERE BEING CRITICIZED FOR HAVING THE SCANS AND NOT THE NEUROPSYCHOLOGISTS, SO IT SEEMS THAT THEY ARE TRYING TO ARGUE IT BOTH WAYS, AND THAT HE FOLLOWED THE ADVICE AT THAT TOMORROW. -- AT THAT TIME. AGAIN, JUST TRYING TO MAKE SURE I, AND ALSO I DON'T RECALL ANYTHING IN THE BRIEFS ABOUT THE PSI, SO I DON'T KNOW THAT THAT IS ACTUALLY BEEN BRIEFED, AND AS FAR AS THE SEPARATE ISSUE, AS FAR AS IN DENYING THE SCAN, I DON'T KNOW THAT THAT THAT WAS, THAT IS BEFORE US. I MEAN, THAT IS WHETHER OR NOT WE HAVE A HEARING.

WAS THERE A PSI FROM THE PREVIOUS CASE AVAILABLE?

AGAIN, I APOLOGIZE. I DON'T RECALL THE PSI.

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

I DON'T KNOW THAT --

DO YOU RECALL?

I DON'T KNOW THAT THAT HAS BEEN BRIEFED, BUT FROM WHAT I RECALL READING THE OPINIONS AND THINGS, THAT IS WHEN THEY BROUGHT IN, I GUESS ONE OF THE DETECTIVES. YOU MEAN THE FIRST MURDER?

YES. THE FIRST MURDER.

AGAIN, IN THIS CASE WE HAVE ONLY ONE SURVIVING EX-WIFE. I MEAN, HIS FIANCES, TWO OTHER TIMES, WHAT THE INVESTIGATOR LOOSE FOR, YOU KNOW, PARENTS, WIVES, THOSE ARE THEIR FAVORITE WITNESSES. AS FAR AS YOUR QUESTION, I DON'T, I BELIEVE THOSE WERE TRIAL ISSUES. I DON'T KNOW THAT --

IT IS RELEVANT, CERTAINLY TO IT WAS A SINGLE AGGRAVATOR CASE.

CORRECT.

AND TO THE EXTENT THAT THERE COULD BE COMPELLING EVIDENCE THAT THIS GUY HAS GOT A BRAIN DISORDER THAT, UNDER ALCOHOL, CAUSE HIM TO SNAP OR THAT BECAUSE HE WAS RAPED BY AN AUNT, HE HAS A RAGE AGAINST WOMEN. THAT WOULD BE COMPELLING?

NOW I SEE WHERE, IN THE FIRST DEFENSE THERE WAS NO ALCOHOL INVOLVED. AND THERE WAS NO ALLEGATION OF ALCOHOL, AND HE PLED TO SECOND-DEGREE. IT WAS A FIGHT IN FRONT OF WITNESSES. AND A SHOOTING. AND IN, I AM TRYING TO REMEMBER WHERE IT WAS. I LOST THE THOUGHT.

THE FACT OF THAT PRIOR CONVICTION, CIRCUMSTANCES WAS USED AS THE ONLY AGGRAVATION IN THE CASE.

YES, YOUR HONOR.

CHIEF JUSTICE: OKAY.

AND FOR THE REST OF IT, I RELY ON THE BRIEFS AND THE ORDER AND ASK THAT YOU AFFIRM THE TRIAL COURT. THANK YOU.

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

FOUR MINUTES.

CHIEF JUSTICE: FOUR MINUTES. OKAY. CLARIFY ABOUT THE PSI THAT YOU HAVE REFERRED TO. WAS THERE A PSI FROM THIS CASE OR FROM THE PREVIOUS CASE THAT COUNSEL HAD AVAILABLE?

THE PSI WAS AVAILABLE TO THIS COUNSEL. IN THE TRIAL OF THIS PARTICULAR CASE.

SO THIS WAS A PSI PREPARED FOR THIS VERY CASE.

YES, YOUR HONOR. IT IS PART OF THE RECORD. IT WAS PREPARED ABOUT A MONTH BEFORE COUNSEL ACTUALLY WENT OUT AND DID THE INVESTIGATION. OR THE LIMITED INVESTIGATION.

SO DID COUNSEL TESTIFY THAT HE UTILIZED THE PSI?

NO. NO. HE DID NOT.

WHAT WAS THE RELEVANCE OF THE PSI HERE AT THE EVIDENTIARY HEARING?

WELL, THE PSI IS WHAT WILL PROVIDED TO HIM THE INFORMATION WITH REGARDS TO THE RELATIVES.

WELL, THAT IS, I GUESS, YOU ARE SAYING THAT IT SHOULD HAVE OR THAT IT DID AND THEN HE UTILIZED THAT?

WELL, YOUR HONOR, I AM SAYING THAT IT WAS PART OF THE RECORD AVAILABLE TO HIM, AND HE SHOULD HAVE USED THAT, IN ORDER TO OBTAIN THE NAME OF THE SISTER THAT WAS LIVING WITH THE MOTHER AND THAT HAD ALL OF THIS RELEVANT MITIGATING INFORMATION IN THIS CASE.

WHAT INFORMATION DID THE PSI HAVE THAT COUNSEL DIDN'T HAVE? OR DIDN'T INVESTIGATE AND FIND?

WELL, IT INDICATED THAT MR. FERRELL HAD LEFT WITH NOT, WAS NOT RAISED BY THE MOTHER, SO THAT ALL OF THE SIBLINGS WERE LISTED, THE AGES OF THE SIBLINGS, WHERE THE SIBLINGS LIVED, INCLUDING THE SISTER THAT RESIDED WITH THE MOTHER. IT INDICATED THAT HE HAD LEFT SCHOOL IN ORDER TO SUPPORT THESE SIBLINGS AND THEREFORE HAD A MUCH CLOSER RELATIONSHIP WITH THE SIBLINGS THAN HE HAD WITH THE MOTHER, SO IT WOULD HAVE DIRECTED HIS ATTENTION RIGHT TO THE SIBLING AS OPPOSED TO THE MOTHER THAT HE DID SPEAK TO. ALSO IT INDICATED THAT SOME OF THE HEALTH ISSUES THAT HE HAD WITH REGARDS TO DIABETES AND THAT TYPE OF THING. ONE OF THE ISSUES, AND ALL OF THE ISSUES HERE IN MITIGATION, ARE IMPORTANT, BECAUSE IT IS A SINGLE MIGHT AGGRAVATOR THAT WE ARE DEALING WITH IN THIS CASE.

BUT IT IS A VERY SERIOUS --

YES, YOUR HONOR. I WOULD SUBMIT TO THE COURT THAT IT MOST DEFINITELY IS, WHICH WOULD HAVE MADE IT INCUMBENT UPON COUNSEL TO LOOK FOR EVERY SINGLE PIECE OF MITIGATION THAT HE COULD HAVE PRESENTED IN BEHALF OF MR. FERRELL. MR. FERRELL, AND THIS VICTIM WERE IN A RELATIONSHIP AND HAD BEEN FOR FOUR MONTHS. THE DEPUTY THAT TESTIFIED AT THE TRIAL, TESTIFIED THAT THEY WERE IN A DOMESTIC VIOLENCE RELATIONSHIP. THIS COURT HAS FOUND THAT IT IS MITIGATING, WHEN A KILLING OCCURS AS A RESULT OF A LOVER'S QUARREL. THAT FACTOR WAS NEVER ADDRESSED, NEVER BROUGHT TO THE COURT'S ATTENTION, AS MITIGATING EVIDENCE FOR MR. FERRELL. ALTHOUGH IT WAS TESTIFIED TO THAT THEY ARGUED THAT DAY, AND THAT THIS OCCURRED AS A RESULT OF A HEATED ARGUMENT, COUNSEL NEVER BROUGHT THAT BEFORE THE COURT. NOT IN THE MEMORANDUM THAT HE PREPARED AND NOT IN ANY ARGUMENTS THAT HE PUT FORTH BEFORE THE COURT.

COULD YOU JUST GIVE US SOME CASES THAT SAYS THAT, THAT TALKS ABOUT IF YOU ARE IN A HEATED ARGUMENT, THAT IS MITIGATING?

YES, YOUR HONOR.

WHILE YOU ARE LOOKING FOR THAT, WAS THE DEFENDANT LIVING WITH THE VICTIM AT THE TIME?

YES, HE WAS. AND NEIGHBORS ON BOTH SIDES INDICATED THAT THIS HAD BEEN, THEY OCCURRED SO OFTEN THAT THEY NO LONGER PAID ANY ATTENTION TO THE ARGUMENTS BETWEEN THEM. BOTH OF THEM GOT DRUNK TOGETHER AND PRETTY MUCH FOR THE OVER EVERYTHING. I WAS LOOKING -- FOUGHT OVER EVERYTHING. I WAS LOOKING AT THE RECORD AND IT DOESN'T APPEAR THAT I HAVE IT WITH ME, AND I CAN SUPPLEMENT IT FOR THE RECORD, BUT THERE ARE CASES THAT THIS COURT HAS FOUND THAT TYPE OF SITUATION TO BE MITIGATING IN NATURE.

HAVE YOU ARGUED THAT IN YOUR BRIEF?

YES, YOUR HONOR.

HAVE YOU CITED THOSE CASES IN YOUR BRIEF?

YOUR HONOR, I WOULD HOPE THAT I HAVE. AGAIN, I WOULD PROPOSE TO SUPPLEMENT THE RECORD, IF NECESSARY, BUT I DO KNOW THAT THERE ARE A LOIN OF CASES THAT HAVE FOUND THAT IT -- A LINE OF CASES THAT HAVE FOUND THAT TO BE MITIGATING.

WASN'T THERE A STATEMENT, THOUGH, IN THIS RECORD THAT HE HAD MADE TO SOMEBODY ELSE BEFORE THIS CRIME, THAT HE INTENDED TO KILL?

YES, YOUR HONOR. WHILE INTOXICATED, SOMETIME BEFORE HE MADE A REFERENCE AFTER HAVING KILLED SOMEONE ELSE, KILLED ONE BITCH, AND, IN HIS PAST, AND THAT WAS TAKEN AS THE ONLY COMMENT THAT HE MADE. AND USED TO ESTABLISH PREMEDITATION, BUT I WOULD URGE YOU TO LOOK AT DR. UPSON, WHO TESTIFIED THAT, IN HICKS OPINION, HIS PROFESSION -- IN HIS OPINION, HIS PROFESSIONAL OPINION, THIS WAS NOT A PREMEDITATED ATTACK AND OCCURRED AS A RESULT OF A HEATED ARGUMENT.

CHIEF JUSTICE: ALL RIGHT. WE ARE GOING TO HAVE TO CLOSE ON THAT NOTE. THANK YOU ALL FOR RESPONDING TO OUR QUESTIONS ESPECIALLY. THE COURT WILL NOW STAND IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.