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MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.

MARSHAL: LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE AND WE APPRECIATE EVERYONE BEING READY TO GO ON THE FIRST CASE OF ORME VERSUS STATE. YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT, WE ARE HERE ON MR. ORME'S CASE. HE WAS CONVICTED IN 1993 OF A FIRST-DEGREE MURDER, SEXUAL BATTERY AND A ROBBERY. JUST A THUMBNAILED SKETCH OF WHAT HAPPENED IN THE TRIAL COURT, IS THAT LISA

WOULD YOU SPEAK JUST A LITTLE BIT LOUDER.

NO PROBLEM. LISA RED WAS FOUND DEAD IN MR. ORME'S MOTEL ROOM AND THE CAUSE OF DEATH WAS STRANGULATION. IT CAME OUT AT TRIAL THAT MR. ORME WAS BASICALLY ON A DRUG BINGE AND HAD NO RECALL OF THE EVENTS SURROUNDING MS. REED'S DEATH. THE DEFENSE WERE REASONABLE DOUBT AND VOLUNTARY IN TOX INDICATION. AND - - IN COX INDICATION. THE TRIAL COURT FOUND, AS AGGRAVATOR, HEINOUS, ATROCIOUS AND CRUEL, PECUNIARY GAIN AND IN THE COURSE OF A SEXUAL BATTERY.

WHAT WAS THE MITIGATION, MENTAL HEALTH MITIGATION PRESENTED AT THE PENALTY PHASE? IS THAT WHAT YOU ARE GOING TO FOCUS IN ON TODAY, ON THAT ISSUE?

ABSOLUTELY. ABSOLUTELY. THE TWO MENTAL MITIGATORS, STATUTORY MENTAL MITIGATORS WERE FOUND, AND THAT IT WAS FOUND THAT MR. ORME SUFFERED FROM EXTREME EMOTIONAL DISTRESS OR DISTURBANCE, AND HIS ABILITY TO CONFORM HIS BEHAVIOR TO THE LAW WAS SUBSTANTIALLY IMPAIRED. THE TRIAL COURT GAVE BOTH OF THOSE SOME WEIGHT.

SO YOUR ARGUMENT, HERE, REALLY, IS CONCERNING THE BIPOLAR DISORDER THAT DR. WALKER HAD DIAGNOSED AND DEFENDED AS HAVING, CORRECT?

THAT IS CORRECT, AND

THAT BIPOLAR DISORDER WOULD, ALSO, GO TO THE MENTAL MITIGATORS OF, THAT YOU HAVE JUST MENTIONED, CORRECT?

ABSOLUTELY.

AND SO SINCE IT WAS ALREADY FOUND BY THE TRIAL JUDGE, WHY IS HE ENTITLED TO A NEW PENALTY PHASE AT THIS POINT?

BECAUSE OF THE SUBSTANTIAL WEIGHT THAT IT WOULD HAVE ADDED TO THOSE TWO MITIGATORS. THE STATE, IN THEIR ARGUMENTS, FOCUSED IN ON THE VOLITION ASPECT OF DRUG USE, AND

IN THEIR ARGUMENTS . YOU MEAN THAT IS AT THE PENALTY PHASE.AT THE ORIGINAL PENCIL PHASE.

IN PENALTY PHASE AND IN JURY SELECTION AS WELL. THEY MADE COMMENTS ABOUT NOT TO LET HIM HIDE BEHIND HIS CRACK PIPE, THE LAW HAS NO MERCY FOR A CRACK ADDICT.

I ASKED YOU BEFORE AND I AM NOT SURE YOU ANSWERED THE QUESTION. WHAT WAS THE MENTAL MITIGATION THAT WAS PRESENTED THAT SUPPORTED THE TWO MENTAL MITIGATORS THAT WERE FOUND. IT WAS BASED ON HIM BEING A DRUG ADDICT AND DRUG ABUSE?

YES, IT WAS.

THERE WAS NOTHING, WAS THERE ANY MENTAL HEALTH MITIGATION PRESENTED?

DR . McCLAIN FOUND THAT MR . ORME SUFFERED FROM A MIXED PERSONALITY DISORDER. THIS FINDING WAS RENDERED , HE EVALUATED MR. ORME , THE DAY BEFORE THE PENALTY PHASE BEGAN. THE MATERIALS THAT WERE INCLUDED DID NOT INCLUDE THE JAIL RECORDS AND DID NOT INCLUDE DR. WALKER'S DIAGNOSIS . DR . McCLAIN SPECIFICALLY ASKED FOR THE JAIL RECORDS, WHICH WOULD HAVE ALERTED DR . McCLAIN TO THE PREVIOUS DIAGNOSIS THAT MR . ORME WAS BIPOLE BIPOLAR , SEVERE MANIC TYPE. WITHOUT THAT INFORMATION ANDWITHOUT ANY TYPE OF FAMILY HISTORY INFORMATION , DR . McCLAIN MADE THE DIAGNOSIS OF MIXED PERSONALITY DISORDER.

WHAT WAS THE EXPLANATION FOR WHY THEY ONLY OR WHY DR . McCLAIN ONLY SAW THE DEFENDANT THE DAY BEFORE THE PENALTY PHASE .

WHAT HAPPENED WAS , IS DR. WALKER WAS SUFFERING FROM CANCER. ORIGINALLY , TRIAL COUNSEL EVENTUALLY TRIED THE CASE , HAD IT FOR THREE WEEKS IN THE BEGINNING , AND THEN TWO OTHER ASSISTANT PUBLIC DEFENDERS HAD THE CASE FROM MARCH 1992 UNTIL OCTOBER '92, AND THEN TRIAL COUNSEL TOOK IT BACK OVER AGAIN. THE DIAGNOSIS WAS FROM MAY OF 1992. HE DIDN'T GO AND SEE DR . WALKER, UNTIL HE TESTIFIED JANUARY OR MAYBE A LITTLE BIT BEFORE , AND WHENEVER HE VISITED DR . WALKER , HE DISCOVERED THAT HE WAS IN VERY FRAIL HEALTH AND DECIDED THAT HE WOULDN'T BE A STRONG WITNESS, SO, THEN , THAT IS WHEN HE BEGAN SEARCHING FOR ANOTHER DOCTOR.

SO HOW CAN WE FAULT COUNSEL? DIDN'T HE, THEN , TRY TO OBTAIN A MENTAL HEALTH EXPERT? IN OTHER WORDS, HOW IS , HOW I S THAT DEFICIENT PERFORMANCE?

THE DEFICIENT PERFORMANCE COMES IN NOT PROVIDING TO DR . McCLAIN , THE , ALL THE REASONABLY AVAILABLE EVIDENCE THAT HE COULD HAVE. THAT BEING A PRIOR DIAGNOSIS FROM A TREATING PHYSICIAN THAT HAD DIAGNOSED BIPOLAR .

TRIAL COUNSEL HAD DR . WALKER 'S REPORT IN WHICH HE DIAGNOSED THE DEFENDANT AS BEING BIPOLAR?

YES.

WHAT WAS HIS EXPLANATION AT THE EVIDENTIARY HEARING , FOR WHY HE DIDN'T USE THAT OR SUPPLY THAT?

H E REALLY DIDN'T HAVE A N EXPLANATION FOR THAT . AND ACTUALLY, I HAD , HE SAIDTHAT THERE WAS NO STRATEGIC REASON OR TACTICAL REASON FORAM NOT T O GIVE THAT, AND HE IS WELL-TESTIFIED THAT THAT IS TYPICALLY THE KIND OF INFORMATION THAT HE WOULD GIVE TO A MENTAL HEALTH PROFESSIONAL.

IS THAT WHAT HE SAID OR BECAUSE IT WAS NOT CORROBORATED BY HISTORY FROM FAMILY AND OTHER FOLKS?

HE HAD INDICATED THAT , IF HE HAD HAD THAT KIND OF INFORMATION , HE WOULD PRESENT IT. HE NEVER WENT AND TRIED TO OBTAIN THAT. HE TESTIFIED THAT HE ORIGINALLY SPOKE TO THE FATHER AND THE STEPMOTHER , BACK INITIALLY WITHIN A COUPLE OF WEEKS OF THE ARREST. THEN HE DIDN'T SPEAK TO

WAS IT FAMILY OR THE PRIOR COUNSEL , STONE?

WELL , SOMEWHAT BOTH. HE PERSONALLY , WITH A LEGALINTERN , MET WITH THE FATHER AND THE STEPMOTHER , WITHIN ABOUT TWO WEEKS OF ARREST , TO GET KIND OF SOME BASIC INFORMATION . THAT WAS PRIOR TO DR . WALKER'S DIAGNOSIS OF BIPOLAR. THEN , THE TWO OTHER ASSISTANT PUBLIC DEFENDERS TOOK OVER, AND HAD SENT OUT A LEGALINTERN AS WELL , TO GET SOME BASIC INFORMATION. THEY TESTIFIED AT THE EVIDENTIARY HEARING, THAT THEY INTENDED TO FOLLOW-UP ON THAT. THEY NEVER DID , BECAUSE THE RESIGNATION CAME IN THE MEANTIME, AND THEN IT WENT BACK TO THE TRIAL COUNSEL THAT TRIED THE CASE EVENTUALLY .

WERE THOSE OTHER INTERVIEWS DONE PRIOR TO DR . WALKER'S DIAGNOSIS OF BIPOLAR?

I CAN'T RECALL , ONE WAY OR ANOTHER , AND IT WAS UNCLEAR AS TO EXACTLY WHAT QUESTIONS WERE ASKED DURING THAT INTERVIEW , BECAUSE THERE WAS NO TESTIMONY FROM THE LEGAL INTERN THAT DID THAT.

NOW , YOUR BASIS O F YOUR ARGUMENT SEEMS TO BE THAT THIS BIPOLAR INFORMATION WOULD HAVE GIVEN GREATER WEIGHT TO THE MENTAL MITIGATORS THAT WERE, IN FACT , FOUND BY THE TRIAL JUDGE, BUT DO WE HAVE EVIDENCE AND TESTIMONY FROM THESE DOCTORS , THAT WOULD SAY THAT THIS BIPOLAR , REALLY , AFFECTED OR HOW THAT BIPOLAR WOULD AFFECT HIS USE OF COCAINE OR WHATEVER DRUGS HE WAS TAKING AT THE TIME.

ABSOLUTELY. DR . MAYOR HAD TESTIFIED DR . MAYER HAD TESTIFIED AT THE EVIDENTIARY HEARING AND STATED THAT THE CAPACITY TO ABUSE DRUGS OR NOT IS SUBSTANTIALLY DIMINISHED IN INDIVIDUALS WHOSUFFER FROM BIPOLAR DISORDER . AS WELL , DR . McCLAIN AND HERCOFF ALSO AGREED WITH THAT , IN THEIR TESTIMONY, WITH THATSTATEMENT.THE IMPORTANCE OF THAT IS IT WOULD TAKE AWAY THE VOLLEYATION IINGS ALASPECT O F VOLITION ALASPECT OF THE DRUG USE , BECAUSE WHEN YOU TAKE THE REVIEWING O R WEIGHING OF THE DEFENDANT'S CAPACITY TO APPRECIATE THIS CONDUCT , SHE STATES THE DEFENDANT 'S ACTIONS WERE VOLUNTARY AND IN NO WAY EXCUSES THIS MURDER , AND WHEN SHE WAIST EXTREME EMOTIONAL DISTURBANCE , SHE STATES THE EMOTIONAL DISTURBANCE THE DEFENDANT EXPERIENCED WAS BY HIS OWN UNLAWFUL DOING. THE DEFENDANT WAS UNDER THEINFLUENCE OF ILLEGAL DRUG USAGE.

YOUR ARGUMENT ABOUT THAT IS , BECAUSE HE HAD BIPOLAR , I T WAS NO LONGER A VOLITIONAL ACT , THAT HE COULD NOT CONTROL HIS INTAKE OF DRUGS?

HE WAS IN ABSENCE OF VOLITION. HIS CONTROL OF WHETHER OR NOT IT THE TO CHOOSE TO AND WHETHER OR NOT TO CHOOSE TO ABUSE DRUGS IS LESS THAN SOMEONE WHO DOES NOT SUFFER FROM BIPOLAR , AND THAT WOULD CHANGE THE WEIGHING PROCESS , AS TO HOW BLAMEWORTHY HE WAS , FOR BECOMING UNDER THE INFLUENCE OF THOSE DRUGS.

ISN'T THE PROBLEM HERE , THOUGH , THAT WHAT YOU ARE TALKING ABOUT , REALLY, ARE MATTERS OF DEGREE. THIS TRIAL JUDGE HEARD THE TESTIMONY AT THE TRIAL , AND DECIDED THAT , GAVE AN INSTRUCTION , CORRECT , ON THE MENTAL MITIGATORS , TO THE JURY.

YES.

THEN FOUND THE TWO MENTAL MITIGATORS. THEN HEARD THE TESTIMONY OF ALL THESE PEOPLE AT THE POSTCONVICTION TRIAL, AND MADE A DETERMINATION ON THIS VERY ISSUE , OF WEIGHT AND THIS COURT WOULD HAVE TO COME I N AND REVERSE A DETERMINATION BY A TRIAL JUDGE , AS TO THE WEIGHT GIVEN T O MITIGATION. ISN'T THAT WHAT WE WOULD HAVE TO DO TO REVERSE THIS?

THE WEIGHT GIVEN TO THE MITIGATION, YES, IF THE BIPOLAR HAD BEEN PRESENTED. THE OTHER THING THAT FACTORS INTO IT , IS THIS WAS A 7-TO-5 RECOMMENDATION, S O ESSENTIALLY THIS MAJOR MENTAL ILLNESS , HAD IT BEEN PRESENTED , COULD HAVE VERY EASILY SWAYED ANOTHER JURY , ANOTHER JUROR TO VOTE FOR LIFE, AND WE COULD HAVE A 6-6 OR A 5-7 OR ANY OF THE OTHER NUMBERS THAT WE WANTED TO CHOOSE . IF THIS HAD BEEN PRESENTED. AND AS THE TRIP TYPE OF INFORMATION AND IT IS THE TYPE OF INFORMATION THAT SHOULD BE PRESENTED . WIGGINS VERSUS U.S. SUPREME COURT RECENT LY CITED THE ABA GUIDELINES THAT STATE ALL REASONABLY AVAILABLE MITIGATING EVIDENCE SHOULD BE PRESENTED TO YOUR MENTAL HEALTH PROFESSIONAL, AND WE HAVE A PRIOR DIAGNOSIS BY A TREATING PHYSICIAN THAT WAS NOT PRESENTED, AND AS WELL IN POSTCONVICTION

ON THAT POINT , THE PRIOR DIAGNOSIS THAT WAS NOT PRESENTED TO THE OTHER MENTAL HEALTH EXPERTS , ISN'T THERE SOME INDICATION IN THIS RECORD, THAT ONE OF THESE , THE PSYCHOLOGISTS ACTUALLY KNEW OF THIS BIPOLAR DIAGNOSIS BUT NEVER, HIMSELF , FOLLOWED UP ON IT OR EVEN TALKED ABOUT IT DURING HIS TESTIMONY AT THE PENALTY PHASE.

HIS TESTIMONY WAS THAT HE WAS TOLD THAT HE COULD NOT MAKE A DIAGNOSIS , BECAUSE HE WAS A, HE WAS NOT A MEDICAL DOCTOR , AND THAT WHEN ASKED, HE WAS NOT ASKED T O MAKE A DIAGNOSIS AS SUCH, AND THAT HE WOULD HAVE RENDERED A BIPOLAR DIAGNOSIS OF MR . ORME. AND THAT , ONCE , THAT ONCE HE DID RECEIVE THE LETTER STATING DR . WALKER'S DIAGNOSIS AS WELL AS THE AFFIDAVITS THAT WERE OBTAINED FROM FAMILY AND ASSOCIATES OF MR. ORME THAT CORROBORATED INSTANCES OF MANIA, THAT IT JUS T FURTHER SEEMENTED WHAT HIS ORIGINAL THOUGHT WAS , SO, NO , HE DIDN'T TESTIFY TO IT, BUT THE TESTIMONY WAS THAT HE WOULD HAVE, HAD HE ASKED, HE HAD BEEN ASKED.

YOU ARE ALSO ARGUING THAT THIS AFFECTED NOT ONLY THE PENALTY PHASE BUT THE GUILTPHASE AS WELL. IS THAT RIGHT?

THAT'S CORRECT .

ARE YOU ARGUING , YOU TALKED ABOUT THE VOLITIONAL CAPACITY BEFORE. ARE YOU SAYING THAT DEFENSE COUNSEL WOULD HAVE BEEN ABLE TO PRESENT A DEFENSE OF INVOLUNTARY IN COX INDICATION INTOXICATION ? THEN HOW WOULD IT HAVE BOLSTERED THE VOLUNTARY INTOXICATION DEFENSE, IF HE ALREADY HAD PRESENTED HIS EVIDENCE ABOUT HIS USE OF THE DRUGS?

BECAUSE THE DOCTORS WERE PREPARED OR WOULD HAVE BEEN PREPARED TO TESTIFY THAT COCAINE , PARTICULARLY AT THE LEVELS INGESTED BY MR . ORME , AS WELL A S THE OTHER DRUGS THAT WERE INGESTED, I BELIEVE IT WAS DWARF ONE AND FLEXRIAL DARVON AND FLEXRIAL , THAT FLEXERIL, THAT THOSE WOULD EXACERBATE BEYOND THE SYMPTOMS OF MANIA , BEYOND WHAT THE TYPICAL PERSON WOULD, IF THEY HAD INGESTED THE SAME AMOUNTS OF COCAINE AND OTHER DRUGS.

IS THERE SOME TESTIMONY IN THIS RECORD ABOUT THE USE O F LITHIUM? IS LITHIUM JUST PRESCRIBED FOR PEOPLE WHO HAVE BIPOLAR?

I DON'T BELIEVE IT IS JUST PRESCRIBED FOR PEOPLE WITH BIPOLAR , BUT THAT IS A VERY , VERY

COMMON PRESCRIPTION FOR SOMEONE THAT SUFFERS FROM BIPOLAR.

DIDN'T THE DOCTORS CLAIM , THOUGH , ALSO, THAT THE DEFENDANT WAS TAKING LITHIUM ?

HIS COMMENT WAS THAT THE DEFENDANT HAD TOLD HIM , I N THAT EVALUATION THE DAY BEFORE THE PENALTY PHASE, THAT HE THINKS HE MIGHT HAVE BEEN PRESCRIBED LITHIUM . IF DR . McCLAIN WOULD HAVE HAD THE JAIL RECORDS THAT HE REQUESTED, THEN IT WOULD HAVE SHOWN THAT HE WAS, IN FACT , PRESCRIBED LITHIUM , PROZAC AND XANAX BY DR . WALKER.

I WOULD LIKE TO ASK YOU SOME QUESTIONS ABOUT LINKING UP THE BIPOLAR DISORDER WITH THE ACTUAL CRIME , BECAUSE WHEN WE GET TO THAT STATUTORY MITIGATOR, THAT, REALLY, BECOMES CRITICAL . THE , DID YOU , WAS THERE SOMETHING IN THE TESTIMONY THAT , WHERE THE POSTCONVICTION DOCTORS WHO TESTIFIED , WOULD HAVE SAID THAT HE WAS IN A MANIC EPISODE , AT THE TIME THAT HE , THAT THESE KILLINGS OCCURRED? IN OTHER WORDS, SOMETHING OTHER THAN SAYING BECAUSE YOU ARE BIPOLAR , YOU ARE MORE LIKELY TO BECOME A DRUG ABUSER. THAT IS ONE THING THAT IS THE EFFECT OF BIPOLAR DISORDER , BUT THE OTHER EFFECT OF A BIPOLAR DISORDER CAN BE THAT, AGAIN , YOU HAVE THE MANIC EPISODE. IS THAT TRUE OR IS THERE, WHAT WOULD BE THE MANIFESTATION AND HOW WOULD YOU SAY THAT YOU WOULD LINK THAT UP , WITH WHY THIS PARTICULAR MURDER OCCURRED?

THE AFFIDAVIT THAT WAS, AND I BELIEVE THERE WAS A DEPOSITION, AS WELL , OF CHERYL WHETSEL. IT WAS A DEPOSITION NOT AN AFFIDAVIT. TESTIFIED REGARDING MR. ORME'S BEHAVIOR PRIOR TO THE MURDER ON THAT DATE. SHE WAS A FORMER GIRLFRIEND , AND SHE HAD SAID THAT IT SEEMED LIKE HE WAS POSSIBLY SUICIDAL AND THAT HE WAS REAL FIDGETTY AND IRRITABLE . ONE OF THE DOCTORS HAD TESTIFIED THAT THAT WAS POSSIBLY INDICATIVE OF A MANIC TYPE OF PHASE THAT HE WAS IN , BECAUSE A LOT OF PEOPLE ASSOCIATE THE MANIA WITH THAT SOMEBODY IS JUST UP AND IN A GOOD MOOD, AND H E TESTIFIED THAT THAT IS NOT ALWAYS THE CASE , THAT IT CAN ACTUALLY PROGRESS INTO BEING SUICIDAL OR IRRITABLE AND THAT THE COCAINE CAN SOMEWHAT SELF MEDICATE THAT .

MEDICATE THAT.

CHIEF JUSTICE: I REALIZE THAT THE WARNING HAS GONE ON FOR YOUR REBUTTAL TIME , BUT I WANT YOU TO TAKE ONE MORE ATTEMPT HERE TO ARTICULATE WHAT YOU CONSIDER TO BE THE CRUCIAL DIFFERENCE TO A FACT FINDER LIKE A JURY, TO THE PRESENTATION OF THIS EVIDENCE OF BIPOLAR DISORDER, AS COMPARED WITH THE EVIDENCE THAT WAS PRESENTED , MAINLY FOCUSING ON THE DRUG ABUSE AND THE EFFECT, THEN , O N THIS DEFENDANT, OF THE DRUG ABUSE THAT GAVE RISE TO THE FINDING OF THE TWO MENTAL MITIGATORS IN THE CASE. WHAT IS THE CRUCIAL DIFFERENCE THAT YOU SAY, THEN , WOULD MAKE A DIFFERENCE , TO A FACT FINDER , TO A JURY , AND SEE THIS THING IN A COMPLETELY DIFFERENT LIGHT?

THE CRUCIAL DIFFERENCE IS THAT MR . , THE TRIAL COUNSEL TESTIFIED THAT JURIES OFTEN TIMES TEND TO LOOK AT DRUG USAGE AS THE VOLITIONAL ACT AND YOU DESERVE THE CONSEQUENCES, WHETHER YOU ARE ON DRUGS OR NOT AND SOMETIMES IT CAN TURN INTO A NONSTATUTORY AGGRAVATOR, IF YOU WILL. THIS EVIDENCE OF THE BIPOLAR, WOULD REDUCE THE CULPABILITY OF THE DRUG USAGE , BECAUSE , AND NOT HAVE MR. ORME BE HELD TO THE SAME STANDARD AS SOMEONE WITHOUT BIPOLAR , AND HAVE MORE OF A N EXPLANATION AS TO WHY HE WAS IN THE SITUATION THAT HE WAS , AND WHY HE HAD BEEN UNABLE TO BASICALLY KICK HIS DRUG HABIT , THAT THERE WAS TESTIMONY HAD EXISTED FOR A PRETTY LONG TIME .

CHIEF JUSTICE: THANK YOU. YOU CAN PAUSE NOW, AND SAVE THE REST OF YOUR TIME FOR REBUTTAL.

THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS MEREDITH CAR BULL A , AND I CAR BULL A , AND I REPRESENT THE STATE OF FLORIDA MY NAME IS MEREDITH CHARBULA , AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE . THE ALLEGED BIPOLAR DISORDER, WHETHER IT WOULD HAVE BEEN ADMISSIBLE IN THE GUILT PHASE , ABSOLUTELY NOT. THIS COURT HAS ALREADY RULED THAT SUCH EVIDENCE WOULD BE AN ATTEMPT BY COUNSEL TO INTRODUCE EVIDENCE OF DIMINISHED CAPACITY, WHICH IS NOT A DEFENSE RECOGNIZED IN FLORIDA.

EVEN IF WE AGREE WITH THE LEGAL PRINCIPLE OF DIMINISHED CAPACITY , IS NOT AVAILABLE UNDER THESE CIRCUMSTANCES , WHY WOULD NOT A SUBSTANTIAL MENTAL HEALTH ISSUE OR ILLNESS, COME INTO PLAY, WHEN THE STATE IS ARGUING SUCH A VOLITIONAL OR VOLUNTARY ACT THAT ENHAPZ , ALMOST, THE CULPABILITY THAT IS INVOLVED? SHOULD THERE BE SOMETHING DIFFERENT APPROACH , WHEN THIS , WHEN THAT IS ATTEMPTED?

WELL , JUSTICE LEWIS , I THINK TRIAL COUNSEL DID. THE RECORD SUPPORTS THAT TRIAL COUNSEL DID, INDEED , PURSUE MENTAL STATUS DIFFICULTIES OR MENTAL HEALTH MITIGATION AT TRIAL. FIRST OF ALL , IT IS NOT ACCURATE TO SAY THAT COUNSEL WAS DILLTORY IN OBTAINING EXPERT WITNESSES TO TESTIFY ON BEHALF OF MR . ORME. COUNSEL BROUGHT IN DR . WARNER VERY EARLY , ALMOST IMMEDIATELY AFTER HIS ARREST, AND IT WAS DR . WARNER

IT GOES TO SOMEWHAT OF A DIFFERENT ISSUE AS REGARDS THE FIRST ISSUE OF DEFICIENT PERFORMANCE, BUT I THINK WE ARE TALKING ABOUT THE IMPACT AND THE PREJUDICE , WITHOUT REGARD TO THAT FIRST ISSUE. THAT IS WHERE I AM GOING AND THAT IS WHAT MOST OF THE DISCUSSION THIS MORNING HAS BEEN. YOU SAY IT DOESN'T MAKE ANY DIFFERENCE ANYWAY BECAUSE THAT IS NOT A DEFENSE. THAT IS WHY I WANT TO PROBE JUST A LITTLE BIT, DOES IT NOT BECOME RELEVANT , WHEN THE ARGUMENT FROM THE STATE IS THAT YOUR REALLY CULPABLE , BECAUSE YOU GOT INVOLVED WITH ALL OF THESE THINGS , BUT THE MENTAL ILLNESS ASPECT MAY PLACE THAT ALL IN A DIFFERENT LIGHT.

YOU MEAN IN THE GUILTPHASE?

BOTH.

WELL , IN THE GUILT PHASE , AGAIN, I BELIEVE THAT THE DEFENSE WAS SUCCESSFUL I N GETTING A VOLUNTARY INTOXICATION DEFENSE. THAT TESTIMONY PRIMARILY CAME FROM WITNESSES WHO WERE DISINTRESTED WITNESSES , AS WELL AS ORME 'S OWN TESTIMONY THAT HE WAS FREE BASING COCAINE THE ENTIRE EVENING , BUT THERE WAS EVIDENCE HE APPEARED THE NEXT MORNING, IN A STATE OF ACUTE COCAINE TOXCOSIS AND WITHDRAWAL, SO COUNSEL PRESENTED THAT EVIDENCE THROUGH WITNESSES THAT REALLY COULDN'T BE REBUTTED BY THE STATE, SO HE WAS SUCCESSFUL

I THINK THE QUESTION , THOUGH, IS DOES THE MENTAL ILLNESS ON TOP OF THAT , DOES THAT ADD A NEW DIMENSION THAT SHOULD HAVE BEEN EXPLORED?

CERTAINLY NOT IN THE GUILTPHASE , YOUR HONOR, BUT I N THE PENALTY PHASE , DR . McCLAIN DIAGNOSED HIM WITH CHRONIC DEPRESSION. HE DID DIAGNOSE HIM WITH AN ACCESS ONE MENTAL ILLNESS, AND HE PRESENTED THAT EVIDENCE TO THE JURY. HE, ALSO, , DIAGNOSED HIM WITH A PERSONALITY DISORDER AND POLYSUBSTANCE ABUSE. POLYSUBSTANCE ABUSE AND DEPRESSION, ACCORDING TO DR . McCLAIN , WERE , BOTH , MAJOR MENTAL ILLNESSES, AND THAT EVIDENCE WAS PRESENTED TO THE JURY.

WOULD YOU COME BACK TO JUSTICE LEWIS'S QUESTION , THOUGH , WHICH INITIALLY, ALTERNATE LEAST - - AT LEAST , HE SAYS IN BOTH FACES , THE GUILT, AND IF I UNDERSTOOD YOUR ANSWER TO THE QUESTION ABOUT THAT, IT WAS JUST NO. HOW ABOUT GIVING US A LITTLE

MORE HELP THAN THAT. AT LEAST PART OF HIS QUESTION, AS I UNDERSTOOD IT, IS THAT, WHY WOULDN'T IT HAVE MADE A QUALITATIVE DIFFERENCE, IF, IN ADDITION, WITH REFERENCE TO THE VOLUNTARY INTOXICATION INSTRUCTION, IF IN ADDITION TO THE ACTUAL INTOXICATION, THAT YOU HAD EXPERTS THERE, TESTIFYING AND EXPLAINING THE BIPOLAR DISORDER HAVING AN EFFECT ON HIS INTOXICATION AND HIS ABILITY TO AVOID IT. YOU SAID THERE WAS A VOLUNTARY INTOXICATION GIVEN TO THE JURY, IS THAT CORRECT?

THAT'S CORRECT.

WHAT IF THE JURY WOULD HAVE BOUGHT THAT?

THEN MR. ORME WOULD HAVE BEEN STILL FOUND GUILTY OF CAPITAL MURDER AND SEXUAL BATTERY, BECAUSE THE VOLUNTARY INTOXICATION IS NOT A DEFENSE TO THOSE DEFENSES. OFFENSES.

YOU ARE SAYING IT WOULD HAVE BEEN A VOLUNTARY INTOXICATION THING, IT WOULD BE ERROR IF

I DON'T THINK IT WOULD HAVE BEEN ERROR AT ALL.

LET'S EXPLORE THAT AND TELL US WHY WOULDN'T IT HAVE MADE A QUALITATIVE DIFFERENCE THAT, IN ADDITION TO THE DRINKING, THAT THERE WERE PHYSICIANS THERE THAT SAID AND HE COULDN'T CONTROL THAT, AND HERE IS THE ACTUAL, AND IT WAS BECAUSE OF THIS PREEXISTING MENTAL IMPAIRMENT OF THE BIPOLAR BRAIN DYSFUNCTION DISORDER.

FIRST OF ALL, THERE IS NO EVIDENCE THAT HE WAS INTOXICATED ON ALCOHOL AT THE TIME OF THE CRIME, BECAUSE BY THE TIME HE APPEARED AT THEREHAB CENTER, HE HAD NO ALCOHOL IN HIS SYSTEM. THE OTHER THING IS THAT NONE OF THE EXPERTS

CLEARLY THE JUDGE FOUND THE EVIDENCE SUFFICIENT TO GIVE THE INSTRUCTION, IS THAT RIGHT THE EVIDENCE SUFFICIENT TO GIVE THE INSTRUCTION, IS THAT RIGHT?

VOLUNTARY INTOXICATION. THE COCAINE

AGAIN WE ARE JUST ASKING YOU TO EXPLORE WHETHER THERE WOULD HAVE BEEN A QUALITATIVE DIFFERENCE IN THE EVIDENCE PRESENTED ON THAT VOLUNTARY INTOXICATION DEFENSE.

CERTAINLY NOT IN THE GUILT PHASE, BECAUSE NONE OF THE EXPERTS TESTIFIED.

IT WOULDN'T HAVE MADE ANY QUALITATIVE DIFFERENCE.

NO, SIR. NONE OF THE EXPERTS TESTIFIED THAT THE BIPOLAR WOULD HAVE EXACERBATED HIS INTENT TO KILL OR ANYTHING LIKE THAT, ONLY THAT IT WENT TOWARD HIS ABILITY TO RESIST THE INITIAL USE. DR. McCLAIN TESTIFIED THAT, BECAUSE OF HIS SEVERE ADDICTION, HIS VOLUNTARINESS OF TAKING DRUGS WAS DIMINISHED, WAS SEVERELY DIMINISHED. IN FACT, HE COMPARED MINOR INTOXICATION TO SEVERE INTOXICATION, WHICH HE OPINED ORME WAS AT THE TIME OF THE MURDER, TO A MINOR MENTAL ILLNESS VERSUS A SERIOUS MENTAL ILLNESS, SUCH AS BIPOLAR, SO HE TESTIFIED THAT AT LEAST AT THE PENALTY PHASE, THAT THERE WAS A DIMINISHED CAPACITY TO CONTROL ONE'S JUDGMENT, IMPULSE CONTROL, ET CETERA, AS A RESULT OF THE COCAINE INTOXICATION.

WHAT WAS THE TESTIMONY, IF YOU TAKE SOMEBODY IN MANIC PHASE OF BIPOLAR DISORDER AND ADD COCAINE ON TOP OF THAT, WHAT WAS THE EXPERT TESTIMONY?

THE , THERE WAS SOME TESTIMONY THAT I RECALL FROM THE EVIDENTIARY HEARING , THAT HAVING BOTH ILLNESSES WERE MORE SEVERE, BUT I DON'T SPECIFICALLY RECALL WHETHER THERE WAS TESTIMONY THAT BEING IN A MANIC STAGE WOULD MAKE THE JUDGMENT PRESS , JUDGMENT MORE IMPAIRED OR HIS ABILITY TO CONTROL HIS IMPULSES LESS STRONG. THERE WAS TESTIMONY AT THE , AT TRIAL , THAT ORME WAS INTOXICATED TEST THE CRIME , AND IRONICALLY , WHEN YOU LOOK AT THE RECORD , DR . MAYER TESTIFIED AT THE EVIDENTIARY HEARING, THAT HE BELIEVED THAT THIS CONTACT WOULD THIS CONTACT WITH CHERYL WETSELL AT THE TIME OF THE MURDER OR SHORTLY AFTER THE MURDER , THAT HE WAS IN AN INTOXICATED STAGE .

I THINK YOU HAVE GOT THE 7-TO-5 JURY RECOMMENDATION , EVEN THOUGH THIS WAS A TERRIBLE CRIME. YOU HAVE GOT THIS DEFENDANT GOING, KIND OF COMING TO THE , WHERE HE CAME AND SAYING WHERE THE MOTEL WAS IN ROOM 15 AND DIDN'T EVEN SEEM TO BE IN SOME KIND OF A REAL AGITATED STATE , SO THIS IS DIFFERENT THAN MANY CASES WE SEE , WHERE THERE IS REALLY NO EVIDENCE OF SOMEONE BEING UNDER THE INFLUENCE, BUT I SORT OF , IF I AM THERE AS A TRIAL LAWYER AND I KNOW I HAVE DRUG ADDICTION , I THINK I AGREE WITH COUNSEL THAT YOU KNOW , JURIES THAT , IS A TWO -END SWORD, YOU KNOW, EVEN THOUGH WE KNOW ADDICTIONS ARE SOMETIMES , YOU CAN'T HELP IT ONCE YOU GET ADDICTED , I THINK THE GENERAL POPULATION, REALLY, IS NOT AS SYMPATHETIC TO THAT AND CERTAINLY NOT YOU KNOW , TEN YEARS AGO. BUT WE HAVE, WE HAD DR . WALKER , WHO TELLS DEFENSE COUNSEL THAT HE DIAGNOSIS BIPOLAR DISORDER , WHICH , AS YOU ALLUDED TO IS A SERIOUS MENTAL ILLNESS. IT IS GENETIC. IT IS NOT ANYTHING THAT SOMEONE CAN CONTROL . AND THAT IS THE DIAGNOSIS . I AM TRYING TO UNDERSTAND ON THIS , THE FIRST PRONG OF STRICKLAND , ABOUT DEFICIENT PERFORMANCE. HOW , IF HE IS AWARE , DEFENSE COUNSEL IS AWARE OF THAT DIAGNOSIS AND KNEW IT WOULD HAVE A SIGNIFICANT EFFECT ON THE DEFENSE , THAT HE DOESN'T , WHEN HE, THEN , RETAINS ANOTHER EXPERT , EVEN , AND HAS HIM EXAMINE HIM THE DAY BEFORE HE IS GOING TO PUT HIM ON, WHICH IS , IN ITSELF , A VERY DISCONCERTING SITUATION , THAT HE DOESN'T GIVE HIM DR . WALKER'S LETTER OR TALK TO HIM ABOUT THE DIAGNOSIS AS BIPOLAR. I MEAN , COULD YOU, REALLY , EXPLORE, IN TERMS OF THE WIGGINS CASE OUT OF THE U.S. SUPREME COURT , JUST DEFICIENCY PRONG OF STRICKLAND, WITH REGARD TO THE PENALTY PHASE AND THE TOTAL ABSENCE OF A , YOU KNOW , OF THAT EVIDENCE THAT A JURY COULD HAVE HEARD AND , REALLY , RELATED TO , WAS SOMETHING THAT SOMEBODY CAN'T HELP, THAT IT IS JUST GENETIC, AND THAT THAT IS WHAT YOU KNOW , THAT THAT CAUSED HIS ADDICTION AND YOU KNOW , GIVE IT A REAL COMPLETE PICTURE. COULD YOU , WHY , HOW WOULD A LAWYER NOT PURSUE THAT TYPE OF INFORMATION?

FIRST OF ALL , I THINK IT IS NOT CORRECT TO SAY THAT BIPOLAR CAUSED ADDICTION. THE EXPERT TESTIMONY IS THAT BIPOLAR TENDS TO , THERE IS A HIGHER INCIDENCE OF COCAINE ADDICTION IN BIPOLAR , BUT THERE IS NO INDICATION THAT IT CAUSES IT.

I DIDN'T MEAN IT CAUSED ADDICTION. I MEAN IT WOULD MAKE YOU MORE PREDISPOSED TO DRUG USE, WHICH, THEN , ONCE THE DRUG USE STARTS, WOULD MAKE YOU ADDICTED TO IT , SO IT IS A FACTOR IN THE DRUG ADDICTION , IS THE WAY AS I UNDERSTAND THAT THE TESTIMONY CAME OUT.

CLEARLY THERE , THE EXPERT TESTIMONY TOLD THE TRIAL COURT THAT PERSONS WITH BIPOLAR ARE MORE SUSCEPTIBLE . IN FACT , THE EXPERT TESTIMONY SAID THAT BOTH DEPRESSION AND BIPOLAR HAVE A

THAT IS WHY , IN OTHER WORDS , YOU DON'T, THIS ISN'T ANYTHING, THIS ISN'T A TWO-EDGED SWORD TESTIMONY. YOU KNOW , THAT IS , WELL , GEE , I DON'T WANT TO PRESENT THIS, BECAUSE IT IS GOING TO EVISCERATE, ALL OF THIS STUFF IS GOING TO COME OUT. HE WAS ALREADY PUTTING ON DRUG ADDICTION , AND HAVING THAT, AND YOU KNOW, AGAIN, WHEN YOU TALK ABOUT ANTISOCIAL PERSONALITY DISORDER OR WHATEVER THESE THINGS ARE, YOU

KNOW , JURORS , YOU ARE ROLLING YOUR EYES , WELL , WHAT DOES THAT MEAN . BIPOLAR IS SOMETHING , SO WHAT IS THE EXPLANATION THAT YOU GIVE AS TO WHY A LAWYER DOING A DILIGENT INVESTIGATION , WOULDN'T PRESENT OR DO EVERYTHING IN HIS POWER TO PRESENT THAT DEFENSE TO THE OR EVIDENCE TO THE JURY .

I THINK YOU HAVE TO LOOK AT WHAT COUNSEL DID. COUNSEL WAS AWARE THAT DR . WALKER HAD DIAGNOSED HIM WITH BIPOLAR . ACCESS ONE AND POLYSUBSTANCE ABUSE, ALSO, AND ACCESS ONE. THERE WAS NO EVIDENCE IN THE RECORD THAT DR. WALKER HAD ANY OBJECTIVE SUPPORT FOR HIS DIAGNOSIS OF BIPOLAR . AND COUNSEL WAS AWARE OF THAT.THERE WAS NO EVIDENCE THAT, THE RECORD ESTABLISHES THAT DR. WALKER SAW ORME ONE TIME IN JAIL. EFFORTS TO GET DR . WALKER TO RETURN TO THE JAIL TO FOLLOW UP WERE UNSUCCESSFUL , DUE TO HIS TERMINAL ILLNESS AND HIS HOSPITALIZATIONS.

YOU SAY THAT COUNSEL WAS AWARE THAT THERE WAS NO CORROBORATION FOR THIS DIAGNOSIS.WAS IT INCUMBENT UPON THE ATTORNEY TO, THEN , SEEK CORROBORATION FOR THAT ? IF HE HAS A DIAGNOSIS OF A VERY SERIOUS MENTAL ILLNESS , THE GUY IS ACTUALLY TAKING DRUGS , THAT WAS , SUPPOSED T O HELP WITH HIS MENTAL ILLNESS , SHOULDN'T COUNSEL HAVE, THEN , GONE A STEP FURTHER AND TRIED TO FIND OTHER EVIDENCE TO SUPPORT THIS DIAGNOSIS ?

WELL , FIRST OF ALL , HE HAD ALREADY , RECORDS FROM CARE TREATMENT FACILITY, AND HE PROVIDED THOSE TO DR . McCLAIN. ORME HAD BEEN TREATED BY DR . HORDE OR SEEN BY DR . HORDE , A PSYCHOLOGIST RELATED TO IT , AND THERE WAS NO EVIDENCE

DR . McCLAIN, BUT WE ARE AT THE STAGE WHERE , D R . WALKER'S DIAGNOSIS RIGHT NOW. WHAT WAS DONE, ONCE YOU GOT THE DIAGNOSIS FROM DR. WALKER THAT THIS WAS A BIPOLAR PERSON , WHAT WAS DONE AT THAT STAGE, TO ENHANCE THAT DIAGNOSIS?

WELL

OR CORROBORATE THAT DIAGNOSIS?

COUNSEL TESTIFIED AT THE EVIDENTIARY HEARING THAT HE DID INTERVIEW OR THE DEFENSE TEAM INTERVIEWED FAMILY MEMBERS AND FRIENDS.

WAS THAT BEFORE OR AFTER THAT DIAGNOSES?

IT APPEARS THAT THE FAMILY MEMBERS , THE RECORD SEEMS TO ESTABLISH THAT COUNSEL INTERVIEWED OR THE DEFENSE TEAM INTERVIEWED ORME'S FATHER AND STEPMOTHER , BEFORE DR . WALKER SAW HIM , THOUGH IT IS NOT EXACTLY CLEAR WHEN THEY INTERVIEWED HIM, AND FRIENDS WERE INTERVIEWED LATER.

ISN'T THERE SOME EVIDENCE HERE, THAT THE FATHER OR AN UNCLE OR SOMEONE ELSE , IN THE FAMILY , ACTUALLY HAS BIPOLAR DISORDER, ALSO ?

THERE WAS SOME ANECDOTAL EVIDENCE THAT AN UNCLE MAY HAVE HAD IT.

AND WHEN WAS THAT DETERMINED?

I BELIEVE THAT WAS DETERMINED CLOSER IN TIME TO THE EVIDENTIARY HEARING.

NOW , WE HAVE GOT, I GUESS, LET ME GO BACK , S O HE HAS GOT DR . WALKER'S DIAGNOSIS WHICH HE THOUGHT WOULD HAVE A SIGNIFICANT EFFECT ON THE DEFENSE , BUT HE DOESN'T DO ANYTHING ABOUT IT , AND THEN DR. WALKER IS IN BAD HEALTH, SO HE DECIDES , BECAUSE THE PHARMACOLOGY ASPECT OF THE CASE IS, TO HIM , NOW , THE MOST IMPORTANT , HE GETS DR.

McCLAIN , WHO HAS GOT DOCTOR'S EXPERTISE , BUT HE DOESN'T DELIVER DR. WALKER'S LETTER ABOUT THE DIAGNOSIS , DOESN'T MENTION THE DIAGNOSIS TO DR . McCLAIN , AND HE DOESN'T DELIVER THE PRISON RECORDS TO HIM. I JUST HIM TRYING TO UNDERSTAND HOW THOSE DEFICITS , NOW, WE CAN GO BACK TO WHETHER THERE IS PREJUDICE , BUT IT IS AS IF HE JUST GOT CONSUMED AND YOU KNOW, DID A GOOD JOB IN PRESENTING IT , ON THE VOLUNTARY INTOXICATION PART O F THIS CASE , AND KIND OF DROPPED THE BALL, WHEN I T CAME TO WHAT WAS GOING TO HAPPEN IN THE PENALTY PHASE.

WELL, I THINK IT IS , I THINK , FIRST OF ALL

IS HE THE ONLY LAWYER, BY THE WAY? THERE WERE TWO LAWYERS. HOW MANY LAWYERS WERE THERE?

HE IS THE ONLY LAWYER AT THE TIME OF TRIAL. MR . STONE AND PAM SUTTON RESIGNED FROM THE PUBLIC DEFENDERS OFFICE PRIOR TO TRIAL AND MR . SMITH RESUMED RESPONSIBILITY FOR THE CASE , BUT I THINK FIRST OF ALL, YOU HAVE TO SAY THE DEFENSE TEAM BROUGHT IN DR. WARNER VERY EARLY AND HE SAW DR . WARNER , FROM THE VERY FIRST TIME HE WAS ARRESTED , VERY CLOSE IN TIME , AND HE CONTINUED TO TREAT AND EVALUATE HIM THROUGHOUT THE 17 MONTHS.

THERE IS ALSO THE ONE THAT SAID THAT THIS MAN HAD SOME SERIOUS PROBLEMS. DR . WARNER WAS THE PSYCHOLOGIST AND SAID YOU NEED TO GET A MEDICAL DOCTOR IN HERE TO SEE HIM , AND THAT IS WHY DR . WALKER CAME I N , RIGHT?

YES. HE BROUGHT IN DR . WALKER FOR TREATMENT AND EVALUATION . BUT. MR. SMITH TESTIFIED AT THE EVIDENTIARY HEARING , THAT , BECAUSE , THERE WAS A COUPLE OF THINGS THAT WENT INTO CONSIDERATIONS. NUMBER ONE, THERE DIDN'T APPEAR TO BE ANY OBJECTIVE SUPPORT FOR DR . WALKER'S DIAGNOSIS.THERE WAS NO EVIDENCE THAT HE SAW HIM IN A MANIC STAGE , AND ALL OF THE EXPERTS AGREED THAT, PRIOR TO DIAGNOSIS ING SOMEONE WITH BIPOLAR MANIC TYPE , THERE HAS TO BE A MANIC EPISODE, AND THERE IS NO EVIDENCE HE EVER SAW MR . ORME IN A MANIC STAGE. ADDITIONALLY INTERVIEWS OF FAMILY MEMBERS DIDN'T INDICATE ANY HISTORY OF BIPOLAR AND CERTAINLY HIS MEDICAL RECORDS FROM CARE HOUSE DIDN'T. ALSO

LET ME ASK YOU ON THAT QUESTION, BECAUSE , IN THE APPELLANT 'S BRIEF HE SAID FOUR MATERNAL UNCLES HAD SERIOUS SUBSTANCE ABUSE DISORDERS, ONE DIED OF A DRUG OVERDOSE AS WELL AS VARIOUS FORMS OF MENTAL ILLNESS AND THAT MR . ORME SUFFERED FROM BIPOLAR DISORDER.

I DON'T SEE SUPPORT FOR THAT IN THE RECORD. I DO SEE IN THE RECORD SUBMITTED AT THE EVIDENTIARY HEARING , AN AFFIDAVIT FROM ORME'S BROTHER , WHO SAID THAT HE THOUGHT HIS DAD WAS TAKING MEDICATION FOR DEPRESSION, SO I DON'T , I DON'T SEE THE RECORD SUPPORT FOR ALL THAT EXTENSIVE FAMILY HISTORY. THERE WAS SOME INDICATION , ANECDOTAL EVIDENCE ONLY, THAT AN UNCLE MAY HAVE SUFFERED FROM BIPOLAR , AND DR. McCLAIN , THE THING IS THAT COUNSEL , HERE IS WHAT HE DID. HE HAD DR. WALKER 'S DIAGNOSIS . IT IS UNDISPUTED THAT HE INADVERTENTLY DID NOT PROVIDE THIS INFORMATION TO DR . McCLAIN .

NOW, CAN WE GET, THAT IS WHERE I STILL, IN TERMS OF WHAT HE DID, WHEN YOU SAY SOMEONE INADVERTENTLY DIDN'T DO, IT YOU HAVE GOT AS A LAWYER, A DIAGNOSIS OF BIPOLAR DISORDER. HE HAD BEEN SUICIDAL IN PRISON. HE WAS ON LITHIUM. HIS PRIOR LAWYERS WERE ACTUALLY CONCERNED THAT HE WAS SUICIDAL, AND THEY WERE , AND YET HE WAS , THIS DEFENDANT WAS REFUSING MEDICATION , WHICH YOU KNOW, NORMALLY SOMEONE IS TRYING TO COME UP WITH A DEFENSE.THEY ARE GOING TO DO EVERYTHING THEY CAN TO MAKE IT LOOK , YOU KNOW, LIKE , GIVE ME ALL TH I S MEDICATION, YET HE INADVERTENTLY DOESN'T GIVE THE

DOCTOR WHAT IS THE MOST CRITICAL PART OF WHAT COULD BE A MENTAL HEALTH MITIGATION DEFENSE? THAT IS WHERE I HAVE GOT, HOWDO YOU EXPLAIN THAT, IN TERMS OF ANYTHING , OTHER THAN THAT THAT DEFICIENT PERFORMANCE?

WELL , I THINK THIS LETTER,I THINK THIS LETTER IS REALLY OF NO CONSEQUENCE. IT IS NOT REASONABLE TO CONCLUDE THAT NEITHER DR . WALKER NOR DR . McCLAIN COULD HAVE COME UP WITH THE SAME DIAGNOSIS.DR . McCLAIN TESTIFIED AT THE EVIDENTIARY HEARING , THAT HE GAVE ORME A FULL PSYCHOLOGICAL EVALUATION, AND THAT PART OF THAT EVALUATION IS TO DETECT EVIDENCE O F BIPOLAR, AND WHEN HE DID THAT INVESTIGATION , HE WAS A FEL FULLY QUALIFIED HE WAS A FULLY-QUALIFIED PSYCHOLOGIST. HE DID NOT DIAGNOSE HIM WITH BIPOLAR DISORDER.

HE IS COMING I N AGAIN. THAT IS THE PROBLEM WITH THE TIMING OF THIS , THAT HE IS BASICALLY COMING IN ON THE EVEOF THE PENALTY PHASE, SO HE IS UNDER PRESSURE TO COME UP WITH A DIAGNOSIS , SO HE IS NOT SOMEBODY THAT HAS BEEN TREATING THE DEFENDANT ALL ALONG. CERTAINLY HAVING ALL OF HIS PRIOR RECORDS FROM THE PRISON AND DR . WALKER 'S LETTER WOULD HAVE PUT HIM ON THE RIGHT TRACK, AND HE SAYS HE WOULD HAVE MADE THAT DIAGNOSIS AND MORE IMPORTANTLY, HE WOULD HAVE BEEN ABLE T O LINK HIS MAJOR MENTAL ILLNESS TO HIS DRUG ADDITION . ADDICTION, AND TO ME I GUESS THAT IS THE CRUX OF THIS,IS THAT IS WHAT STARTS TO TELL THAT YOU THE JURY , WHICH WAS 7-5, WHO MUST HAVE BEEN , ALTHOUGH THIS WAS A HORRIBLE CRIME, MUST HAVE BEEN SYMPATHETIC , AT LEAST FIVE OF THEM WERE , TO HAVE SAID ON TOP OF THAT NOT ONLY IS HE JUST ADRUG ADDICT , BUT HE IS A DRUG ADDICT THAT HAD A MAJOR MENTAL ILLNESS. ISN'T THAT , THAT DOESN'T CAUSE YOU A PROBLEM?

I THINK WE HAVE TO LOOK AT WHAT DR . McCLAIN HAD. DR . McCLAIN WAS BROUGHT I N . ACTUALLY HE WAS RETAINED PRIOR TO DR. WALKER BEING INTERVIEWED BY COUNSEL AND COUNSEL COMING TO THE CONCLUSION THAT HIS , DR . WALKER WOULD NOT PRESENT GOOD , SOLID CORROBORATED TESTIMONYAND WOULD NOT MAKE A STRONG WITNESS FOR THE JURY. ON THE OTHER HAND , COUNSEL WHO HAD A DEGREE IN BIOCHEMINDUSTRY , HAD AN ALMOST UN BIOCHEM INDUSTRY, HAD AN ALMOST UNREBUT BIO CHEMISTRY , HAD AN ALMOST UNREBUTTABLE POSITION, AND IT WAS NOT CONTESTED BY THE STATE.HE WAS RIGHT.

CHIEF JUSTICE: THANK YOU FOR RESPONDING TO OUR QUESTIONS.WE HAVE USED UP ALL OF YOUR TIME. MR . MARSHAL, HOW MUCH TIME? WOULD YOU FIRST ADDRESS THE FAMILY HISTORY ISSUE THAT ONE OF THE JUSTICES RAISED.

YES, SIR.THE FAMILY HISTORY ISSUE WAS CONTAINED WITHIN DEFENDANT'SEXHIBIT 1 1 IN THE AFFIDAVITS THAT WERE T O CORROBORATE THE DIAGNOSIS AS WELL. THERE WERE HANDWRITTEN NOTES FROM DR. McCLAIN THAT REFLECTED SOME OF WHAT MR . ORME HAD ACTUALLY TOLD HIM IN THAT PERSONAL EVALUATION , AND SO THAT ANECDOTAL

WHAT WAS THE EXTENT OF THAT THEN? THE FATHER, THE UNCLES , WHATEVER.

THE FAE FATHER THE FATHER EXHIBITED SYMPTOMS OF BIPOLAR. THERE WAS SOME QUESTION ABOUT WHETHER HE ACTUALLY TOOK THE MEDICATION OR NOT. WITHIN THE AFFIDAVIT IT WAS SAID THAT AN UNCLE HAD BEEN TREATED FOR BIPOLAR , AND ALLOF THE DOCTORS INDICATED THAT THAT WAS SOMETHING THAT WOULD BE VERY HELPFUL TO THEM , IN MAKING AND ASSISTING IN A DIAGNOSIS , AND NONE OF THIS HAD BEEN PURSUED BY TRIAL COUNSEL. TRIAL COUNSEL, BY THE TIME DR. McCLAIN CAME ON BOARD , THE LETTER , THAT WAS PRESENTED AS A DEFENSE EXHIBIT , FINALIZEDDR . McCLAIN 'S ASSISTING ON FEBRUARY 1 , WHICH IS 21 DAYS BEFORE TRIAL. IT INDICATES THAT VARIOUS THINGS THAT WERE SENT TO HIM. JAIL RECORDS WERE NOT SENT, AND DR . WALKER'S LETTER WAS NOT SENT. WITHIN THE DEFENDANT'S EXHIBIT 1 1 IS THE SUPPLEMENTAL DISCOVERY THAT PROVIDES THE JAIL RECORDS ON FEBRUARY 17, SO

WHEN DR. WALKER EVALUATED MR . ORME ON FEBRUARY 21 AND THEN ASKED FOR THE RECORDS , THEY WERE AVAILABLE , JUST LIKE DR. WALKER'S LETTER WAS AVAILABLE. WE ARE NOT TALKING ABOUT TRIAL COUNSEL HAVING TO GO AND PURSUE AND FIND OTHER THINGS THAT ARE OUT THERE IN POSTCONVICTION. HE HAD THEM IN HIS HAND, AND HE DID NOT PROVIDE THEM AND TESTIFIED THAT THERE WAS NOT A STRATEGIC OR TACTICAL REASON NOT TO PROVIDE THOSE.

WOULD YOU , AS CLEARLY AND CONCISELY AS POSSIBLE , TOUCH UPON THE GUILT PHASE , BECAUSE ASSUMING , ACCEPTING AS A CORRECT PRINCIPLE OF LAW , THAT DIMINISHED CAPACITY IS NOT AN APPROPRIATE DEFENSE HERE , DON'T GO ALONG. JUST WHAT IS IT, THE ESSENCE OF YOUR ARGUMENT.

IT IS NOT BIPOLAR IN AND OF ITSELF SHOULD HAVE BEEN PRESENTED. IT IS THAT THIS VOLUNTARY INTOXICATION AND THE WAY COCAINE AFFECTS MR . ORME IN PARTICULAR . YOU NEED THE BIPOLAR TO EXPLAIN THAT. AND WITH THAT EXPLANATION, IT IS GOING TO SHOW THAT IT , THE EFFECT.

I AM MISSING THAT ONE. I THOUGHT THE BIPOLAR DISORDER RENDERED HIM MORE SUSCEPTIBLE TO DRUGS. HOW WOULD THE ADDITION OF THE BIPOLAR DISORDER , HAVE EXPLAINED IN ANY WAY , THIS CRIME, OTHER THAN SAYING IT MADE HIM MORE PREDISPOSED TO ADDICTION?

ONLY THAT IT EXACERBATES THE EFFECTS OF THE INTOXICATION WITH THE COCAINE.

THAT IS WHAT , WHO SAID , NOW , WHO TESTIFIED TO THAT , THAT IF YOU HAD

I BELIEVE IT WAS DR. MAYER THAT HAD TESTIFIED TO THAT AND MAYBE DR . HERCOFF AS WELL.

THAT DR . HERCOFF AS WELL.

THAT ACTUALLY THE EFFECTS OF TAKING DRUGS, THAT IS HIS TESTIMONY.

I BELIEVE IT WAS DR. MAYER AND DR . HERCOFF. I DON'T HAVE THE CITE AT MY FINGERTIPS BUT THAT IS MY RECOLLECTION.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO CLOSE, BECAUSE OF THE TIME ISSUE AND YOUR RESPONSE TO THAT QUESTION. WE APPRECIATE BOTH OF YOU RESPONDING TO OUR QUESTIONS. WE TALK IT FROM HERE. THANK YOU VERY MUCH.