

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.

William Duane Elledge v. State of Florida

THE NEXT CASE ON THIS MORNING'S DOCKET IS ELLEDGE VERSUS THE STATE OF FLORIDA . I WOULD HAVE EXPECTED YOUR FILES TO BE YELLOWED. HAVE YOU GROWN UP WITH THIS CASE, MS. SNURKOWSKI ?

IT IS VERY OLD.

CHIEF JUSTICE: ALL RIGHT. YOU MAY PROCEED.

GOOD MORNING, YOUR HONORS , CHIEF JUSTICE PARIENTE , YOUR HONORS, GOOD MORNING . HILLIARD MOLDOLF ON BEHALF OF MR . ELLEDGE . I WATCHED MR . ELLEDGE PLEAD GUILTY IN FRONT OF JUDGE FUTYH AND GO INTO A SENTENCING PHASE THAT WE SOMEWHAT SCRATCHED OUR HEADS AT AND I AM HERE ARGUING , AFTER A 30- YEAR CAREER IN BROWARD COUNTY , AS A MERE FACT OF AFTER 30 YEARS THE STATE HAS NOT BEEN ABLE TO GET THIS RIGHT AND HAS NOT BEEN ABLE TO AVOID USING EVIDENCE THAT THEY DON'T PLAY FAIRLY WITH , THAT THEY CAN'T SEE ME TO GET THAT CORRECT , AND I AM ASTOUNDED , AND I WOULD LIKE TO START OUT , FIRST, WITH THAT BROAD CLAIM . THE BROAD CLAIM IS PREMISED BY THE USE OF DR . LEWIS. I WILL GET TO THE FACT THAT HE DIDN'T USE DR . LEWIS , BUT UPON GETTING THE ASSIGNED TASK OF EVIDENTIARY HEARING , I WAS QUITE ABLE TO CONTACT DR. LEWIS AND GET HER DOWN TO FLORIDA TO TESTIFY AT THE EVIDENTIARY HEARING AND SHE DID SO AND I THOUGHT SHE PUT OUT WHAT , EXACTLY WHAT SHE EXPECTED TO HAVE FOR HERSELF AND FOR MR . ELLEDGE AT THE TRIAL OR SENTENCING PHASE IN 1993.

SO HOW DO YOU EXPLAIN ALL OF HER RELUCTANCE , IT SEEMS, IN THESE, AT OTHER POINTS , IN NOT COMING? I MEAN , SHE WAS CALLED ON THE PHONE, AND SHE SAID SHE WAS GOING TO SHOW UP AT THE NEXT HEARING . SHE DOESN'T SHOW UP AT THE HEARING, AND HOW DO YOU EXPLAIN ALL OF THAT FAILING TO SHOW UP AT PREVIOUS HEARINGS?

I THINK IT IS QUITE CLEAR IF YOU LOOK AT THE TESTIMONY OF DR . ONGLY , HE SAYS THAT MR. LASWELL BECAME DISENCHANTED WITH DR . LEWIS BEFORE MR. ONGLY GOT INVOLVED, BUT DR . LEWIS SAID I WAS PREPARED TO COME DOWN ON NOVEMBER 5 , ON THAT FRIDAY, AND THEN I GOT A CALL THAT I WASN'T BEING USED, AND SHE HAD SOME ACTUAL NOTES THAT WE PUT INTO EVIDENCE, THE EVIDENTIARY HEARING, SHE WROTE ON THE BACK OF A N ENVELOPE AT HER DESK , BUT MORE IMPORTANTLY TESTIFIED THAT I WAS TOLD I WOULD BE THERE ON THAT MONDAY , NOVEMBER 15. SHE SAID I WAS CALLED BY DR . ONGLY WHO I HAD NEVER HEARD OF, ON THE 13th, AND HE SAID THERE IS SOME UP AND BACK . LASWELL THOUGHT YOU WOULD BE DETRIMENTAL AND I DIDN'T USE YOU, BUT THEN SHE SAID THAT IS EXACTLY RIGHT. I HAD NEVER HEARD OF HER .

HOW DO YOU DEAL WITH THE FACTS , WHICH FIRST OF ALL WE HAD A TRIAL JUDGE ACTUALLY HAVING A CONVERSATION WITH THIS WITNESS, IS THAT CORRECT?

RIGHT.

SO THAT THERE IS REALLY UNIQUE OPPORTUNITY TO HAVE AN INSIGHT INTO WHAT IS GOING ON , AND THEN THE REPRESENTATIVE, IF I UNDERSTAND IT CORRECTLY , THE , OR AT LEAST IT WAS UNUSUAL TO ME , OF THE DOCTOR SAYING THAT SHE DIDN'T PREPARE FOR THIS CASE AND THAT SHE WOULDN'T PREPARE , IT SO UNDEVELOPED LIKE, UNTIL SHE WAS SITTING IN THE HALLWAY

OUTSIDE. I AM OBVIOUSLY OVERSTATING THAT, BUT HELP ME WITH THOSE TWO ASPECTS HERE , WHICH , CERTAINLY NOT BEING KNOWLEDGEABLE IN PREPARING , WHICH SEEMS TO BE A CONSISTENT STATEMENT THAT SHE MAKES, AND THEN THE FACT THAT THE TRIAL JUDGE , REALLY , HAD A PRETTY GOOD OPPORTUNITY HERE TO KNOWWHAT IS GOING ON, IN TERMS OF WHAT THE JUDGE ULTIMATELY DECIDED, BECAUSE THE JUDGE HAD THIS VISIT WITH THIS PERSON. ISN'T THAT A LOT TO OVERCOME?

WELL , I DON'T THINK SO , BECAUSE, I DON'T THINK SO IN THE SENSE THAT IT GETS TO MY IAC CLAIM, THE INEFFECTIVE CLAIM ABOUT MR. LAST WELL. I THINK MR. LASWELL THROUGHOUT THE COURSE OF THIS TRIAL PITTED THE COURT AGAINST HIS CLIENT, WHICH WAS CLEARLY IMPROPER . THE REALITY IS THAT, THE COURT INTERACTING WITH AN EXPERT, AND LASWELL HAS SET THAT UP SO SHE IS CONFUSED . YOU GOT THE WITNESSES ON THE PHONE AND CALL THE WITNESS , WHO HAS GOT INCONSISTENT ADVICE AND THEN SHE SAID I AM NOT GOING TO PREPARE BEFORE I GET DOWN THERE. I WORKED WITH DR. LEWIS AT THE EVIDENTIARY HEARING FOR THREE DAYS BEFORE SHE TESTIFIED, AND THAT IS AN ENORMOUS TIME TO PREPARE.

YOU STARTED OUT BY SAYING AND I ASSUME YOU ARE ON YOUR FIRST POINT THAT , THIS IS MORE EVIDENCE OF THE STATE 'S NOT ACTING PROPERLY. IS, WHERE , IS THE ISSUE ON DR. LEWIS DIRECTED AGAINST THE STATE?

I WAS GOING TO , AT THE END OF DR. LEWIS'S TESTIMONY ON PAGE 474 OF THE EVIDENTIARY HEARING, AT THE END 484 OF THE EVIDENTIARY HEARING, AT THE END OF HER CROSS-EXAMINATION BY MR. SATURDAYS. SHE HAS BEEN ON BY MR. SATS. HE PULLS OUT THE NEUROLOGICAL REPORT REGARDING WHAT SHE HAS BEEN ASKING FOR SINCE 1983 , IS THE PHOTO

NOW WE ARE TALKING IN ENGLISH.

SHE HAS BEEN ASKING THAT FOR 15, 20 YEARS AND HERE MR. SATS HAS HAD IT ALL OF THE TIME IN THE PREPARATION OF THIS CASE AND TALKING ABOUT THE NEED FOR IT THAT IT WAS NEVER DONE AND THEN HE PULLS IT OUT AND CROSS-EXAMINATIONS HER WITH IT AND THEN WE FIND OUT THAT MR. SATS PUT THAT IN THE STATE MATERIAL SO WE COULDN'T CROSS-EXAMINATION HER ON IT , COULDN'T PREPARE WITH TOO. WAS IT FOUND THAT

WHAT WE DID IN THE COURT IS WE BROUGHT IN ALL OF THE EXEMPT MATERIALS AND THE COURT WENT THROUGH IT AND SAID, IT IS IN THE EXEMPT MATERIALS. YOU NEVER HAD IT, AND MS. BAILLY SAID IN THE TRANSCRIPT WE CAN EXCLUDE IT FROM THE DEFENSE AS EXEMPT MATERIAL AND THEN WE CAN STILL USE IT.

HOW IS IT THAT IT WAS REFERRED TO IN SOME OF THE TESTIMONY THAT IT WAS DONE AND IT WAS COMPLETELY NORMAL?

IT WAS , AND THAT IS PART OF THE PROBLEM THAT I WAS GOING TO ADDRESS IS THAT, IF YOU LOOK , MR. SATS IS VERY GOOD AND I GIVE HIM A LOT OF CREDIT FOR THE LIABILITY TO KIND OF BOWL SOMEONE OVER ON CROSS-EXAMINATION. AS AN EXAMPLE , IF YOU LOOK AT DR. LEWIS'S CROSS-EXAMINATION, RELATIVE

LET ME STOP FOR A MINUTE , BECAUSE WHAT WE ARE DOING NOW IS WE HAVE BROKEN DOWN WHERE WE ARE. WHY DON'T YOU TELL US WHICH POINT YOU ARE ON AND THEN GO AHEAD AND COMPLETE YOUR ARGUMENT ON, OKAY , WHICH POINT IN YOUR BRIEF ARE YOU ON NOW?

I AM ON THE BRADY CLAIMS. I WANTED TO MAKE A POINT THE FACT THAT , LIKE MR. SATS SAYS, IT WAS A NORMAL EGG , WE DON'T HAVE THAT . ALL WE HAVE IS A REPORT. WE NEVER SAW THE RAW DATE , THE POINT BEING IF THE STATE HAD GIVEN US THIS IN A TIMELY FASHION, WE COULD HAVE GONE BACK TO DR. NORMAN'S RECORDS , IN OTHER WORDS THE DEFENSE COULD

HAVE GONE TO DR. NORMAN'S RECORDS EARLY ON WHEN THE REPORT WAS GENERATED IN 1993, WHEN THEY HAD NORMAN .

THERE IS NO RAW DATA ON THE EEG?

JUST A SHORT REPORT FROM DR. NORMAN.

OLD NEARLY THAT IS WHAT PEOPLE RELY ON.

EXCEPT IF YOU LOOK AT DR .

ISN'T THAT EVIDENCE THAT IT WAS NORMAL AND THERE FOR IN CONSEQUENTIAL ISN'T THERE EVIDENCE HERE THAT THIS WAS IN THE TESTIMONY OF ONE OF THE EXPERTS?

IT WAS NOT REFERRED TO AT .

THERE IS NO TESTIMONY THAT THAT WAS DONE AND IT WAS NORMAL?

NOT THE EEG. HIS, THERE A DEPOSITION WHERE HE SAYS THE EEG WAS NORMAL.

THERE WAS ONE MORE YOU ARE SAYING THERE WAS MORE THAN ONE EEG?

WE DON'T KNOW.

WHAT IS YOUR VIEW?

THERE IS ONE EEG IS OUR VIEW. A NORMAL EEG.

THERE WAS JUST ONE ?

RIGHT.

WELL, IF THERE WAS JUST ONE AND THERE WAS A REFERENCE TO THAT JUST ONE, THEN WHY DOESN'T THAT INDICATE THAT IT WAS DISCLOSED? THAT EVERYBODY WAS AWARE OF IT?

WE WERE UNDER THE IMPRESSION THAT THERE WAS ONE, BUT THIS REPORT THAT WAS DROPPED ON US AT THE EVIDENTIARY HEARING INDICATES THAT THERE WAS MORE THAN ONE. THERE HAD BEEN MORE THAN ONE DONE BY DR . NORMAN BUT NO RAW DATA WAS PRODUCED BY THAT.

TELL ME WHAT IT IS IN THAT. YOU GO AHEAD.

I JUST WANTED TO FOLLOW-UP, TO CLARIFY THIS. IT APPEARS THAT , DURING THE EXAMINATIONS, EEG'S WERE PERFORMED AND THERE WERE ISSUES THAT AROSE WITH REGARD TO THE UNDER , HYPER VENTILATION AND PHOTO STIMULATION. CORRECT?

CORRECT.

AND WHAT LED TO THE PROBLEM IS THAT EVERYONE THAT LOOKED AT THESE , AND A DEPOSITION WAS COMING UP, AND IT APPARENTLY WAS FAXED TO SOMEONE JUST BEFORE THE DEPOSITION, THAT DIDN'T HAPPEN?

NO.NO. NO.

DID IS NOT.

WHAT HAPPENED WAS THE DEPOSITION WAS CONDUCTED. THE DEPOSITION OF DR. NORMAN JUST

SAYS THERE WAS AN EEG DONE AND IT WAS NORMAL. NOTHING ABOUT PHOTO STIMULATED. NOTHING

DID HE SAY THAT IT WASNOT DONE UNDER HYPER VENTILATION AND THE PHOTO STIMULATION?

THE ISSUE WAS NEVER APPROACH. IT IS IN MY - - WAS NEVER BROACHED. IT IS IN MY OBJECTION TO THE DOCUMENT COMING IN BY DR. SAXON. HERE IS THE DEPOT. READ IT. THERE IS NO MENTION OF IT BY LASWELL AND ONLY . DID YOU DO A PHOTO STIMULATED, DID YOU DO AN EEG , DID YOU DO A HYPERVENTILATED IS WHAT LEWIS HAD BEEN ASKING FOR, SO WHAT I WAS TRYING TO GET TO IS THE REPORT TALKS ABOUT IT, BUT IF YOU LOOK AT THE CROSS OF DR . LEWIS , FOR EXAMPLE A NEUROPSYCHOLOGIST DR. McMAHON , SHE SAID IT WAS NORMAL AND DR. LEWIS SAYS LET ME SEE THAT AND HE SAYS IT WAS NORMAL . HE IS ALSO SAYING THAT FRAGMENTED PSYCHOSIS AND THINKING ABOUT NORMAL , SO WHEN THE SUMMARY OF WHAT McMAHON SAID, I AM SAYING

CAN I ASK YOU A QUESTION? I THOUGHT THAT AN EEG WAS AN ELECTRICAL TEST THAT SHOWS LITTLE LINES ON A PIECE OF PAPER AND IT IS SOMETHING THAT IS A DISCUSSION, SO WHAT IS THIS ABOUT I FIND THAT HE IS INCOHERENT IN A DISCUSSION ABOUT? I AM MISSING SOMETHING HERE.

NO. I WAS TALKING ABOUT A NEUROPSYCHOLOGIST. I WAS JUST COMPARING THAT MR. SATS HAS A REPORT THAT SAYS NORMAL, BUT IF YOU LOOK AT THE RAW DATA BEHIND IT AND SAY THAT ALTHOUGH DR. NORMAN FOUND THAT IT WAS NORMAL SO TO SPEAK, WHEN WE LOOK AT IT WE FIND SIGNS OF FRONTAL LOBE DAMAGE THAT THE NEUROLOGIST DIDN'T PICK UP ON THAT WE ARE LOOKING FOR THAT THE NEUROLOGIST DIDN'T SEE, AND SHE WAS REALLY EMPHATIC ABOUT IT AND SAID I WOULD LIKE TO SEE SOME MORE, A PET SCAN , AND PHOTO STIMULATED, SHE SAID I WOULD LIKE TO DO A PET SCAN .

YOU STILL ANNOUNCED THE PREJUDICE ASPECT, AND I GET BACK, THIS IS A CRIME THAT HE PLED GUILTY TO AND WE ARE NOT TALKING ABOUT TRYING TO WITHDRAW HIS PLEA, RIGHT? HE PLED GUILTY OVER 30 YEARS AGO.

CORRECT. CORRECT. CORRECT.

AND IT WAS A PLANNED CRIME. IT WASN'T A SPUR OF THE MOMENT CRIME. HE SAID HE WAS GOING TO KILL THIS GUY.

NO. NO. IT WAS A RAPE OF MARGARET STRAP, A WOMAN IN A MOTEL ROOM WITH HIM THAT WAS AN UNPLANNED , JUST , HE SAYS THAT, MATTER OF FACT ONE OF THE PSYCHOLOGIST TRIED TO SAY IT WAS A RAGE REACTION IN RESPONSE TO HER NOT WANTING TO HAVE SEX AT SOME POINT AND THAT WAS GETTING INTO MY CLAIM, SO IF I CAN MOVE OFF THE BRADY CLAIM FOR A MOMENT AND GO TO THE INEFFECTIVE CLAIM AS TO MR. LASWELL WITH RESPECT TO CALLING THE TWO DOCTORS, IF YOU HAVE THE HISTORY OF WHAT HE DID WITH REGARD TO THE EXPERTS, HE HIRES A NUMBER OF EXPERTS , DR. BLOCK GARFIELD, WHO GIVES HIM A REPORT THAT SAYS THAT MR. ELLEDGE IS BASICALLY A PERSONALITY DISORDER SOCIOPATH IF YOU WILL, AND MR. LASWELL SAYS THAT IS CONFIDENTIAL. I BURY THAT BECAUSE IT IS NOT GOING TO BE HELPFUL , NOT GOING TO GIVE ME A MENTAL DISORDER OR 9214 -B OR 6 - F. I CAN'T USE HER AND HE SPECIFICALLY LISTS A NEUROLOGIST AND DOESN'T HAVE A DEFENSE AND LET'S MR. SATS TAKE A DEPOT AND DOESN'T USE IT, SO HE Buries ONE DOCTOR TAKE IS NOT GOING TO HELP HIM, DR. NORMAN AND SKIPS ANOTHER DR. AND ULTIMATELY USES THAT CATEGORY OF WITNESSES, BUT IF YOU LOOK AT DR. GREEN, THE JUDGE FOUND THAT THOSE TWO DOCTORS WERE NOT BOARD CERTIFIED. THEIR OPINIONS WERE NOT ONLY DIVERSE BUT IN CONFLICT WITH EACH OTHER TO THE EXTENT THAT HE GAVE ZERO WEIGHT TO THE DOCTORS. NOW, CERTAINLY A LAWYER PRACTICING LIKE MR. LASWELL HAS FOR 30 YEARS, IF NOTHING ELSE, WOULD CALL JUST ONE DOCTOR, WHO , NOT A LOW YOUR SECOND EXPERT , YOUR OWN

SECOND EXPERT, THE S TATEDOESN'T HAVE TO DO ANY THING AFTER THAT, THE JUDGE FINDS THAT THE SENS E OF PUTTING ON TWO DOCTORS CANCELLED EACH OTHER OUT. ONE FOUND A RAGE REACTION AND THE OTHER DISAGREED IT WAS NOT A RAGE REACTION , SOME EVIDENCE OF ORGANICITY , BUT IN CROSS-EX AMINATION , THE DOCTOR REC EDES AND AGREES WITH MR. SATS THAT IT MIGHT BE MILD ORGANICITY , BUT I T CAN'T B E SUPPORTED B Y THE EVIDENCE, WHICH IS THAT HE COULD CON TROL HIMSELF. THERE WAS NO OUT OF CONT ROL.

HOW WOULD YOU RESPOND TO IT? IT APPEARS THAT , IN THE EVALUATION, THAT ESSENTIALLY THE TRIAL JUDG E WAS NOT , REALLY, R ULING ON OR DIDN'T FIND INCONSISTENCIES TO BE OF ANY MOMENT AND, REALLY , DIDN'T FIND THE FAIL URE OF BOARD CERTIFICATION TO BE OF ANY MOMENT, REALLY, I N THE FINAL , IN THE DETERMINATION , BUT FOUND THAT THE DIAG NOSIS AND THE PROBLEMS THAT THEY HAD WERE IN CONFLICT WITH AND CONTRA DICTED BY THE FACTS OF THE CASE AND THEEVIDENCE THAT THE TRIAL JUDGE HAD BEEN THERE AND LISTENED TO ? HOW WOULD YOU RESPOND T O THAT?

I THINK THAT IS ACCURATE , TOO. I THINK MR. LAST WELL CALLS TWO DOCTORS WHO ARE NOT PREPARED TO HAVE O R WEREN'TPREPARED TO TAKE THE FAC TS OF THE CAS E AND HAVE THEIR OPINION DOVETAIL, IF YOU WILL, OR COINCI DE. IN OTHER WORDS, HE PU TS ON EXPERTS WHO CAN'T JUST IFY THEIR OPINION AND THEIR DIAGNOSIS TO THE FACT S OF THE CASE! AND THAT IS WHE RE I THIN K DR . LEWIS, HE HAD DR . LEWI S. SHE IS BOARD CERTIFIED PSYCHIATRIST SINCE 19 72 , AND THE FACT THAT , AS SHE DESCRIBES IT, WE GOT OFF T HERAILS IF YOU WILL , THAT SHE AND I GOT OFF THE RA ILS, AND I TURN IT OVER TO DR . ONGLY, THE FACT IS THAT DR. LEWIS WAS THE EXPERT THAT SH OULD HAVE BEEN USED. SHE WAS CL OSEST IN T IME TO THE INCIDENT , SAW MR. HE WILL EVENLY IN PRISON IN 1983, SOME EIGHT YE ARS AFT ER THE CRIME AND HAD HAD A HISTORY WITH HIM FOR T HAT LENGTH OF TIME AS A SEAS ONED TRIAL LAWYER, DOING DEATH PENALTY WORK, YOU KNOW , I WILL DO WHATEVER IT TAKES TO GET THAT DOCTOR DOWN HERE .

HOW ABOUT , HOW DOES THE , FOR LACK OF A BE TTER TERM , PROFESSIONAL EMBARRASSMENTTHAT THE , THIS , THAT YOU ARE SUGGESTED THE PSYCHIATRIST HAD SUFFERED WITH, WITH REGARD TO , THERE SEEMS TO B E SOME UNDER CURRENT OF , THAT HER PROFESSIONAL JUDGMENT WAS SOMEWHAT UNDER MINED BY A DIAGNOSIS IN A CASE AND THEN PUBLICITY THE PATIENT HADSAID I REALLY DUPED THIS PROFESSION AND ALAN SOME RE PROFESSIONAL AND SOME RELUCTANCE, DOES THAT FAC TOR INTO AN ATTORNEY WA NTING TO CALL A WITNESS , WHEN THIS KIND OF THING HAD HAPPE NED?

INTERESTING THE SH AH CROSS CASE WAS IN 1991. DR. LEWIS WAS GOING TO BE USED IN 1993. IT IS CLEAR

TOGE THER. THAT IS THE PO INT .

IT IS CLEAR THAT AT THAT POINT , DR . LEWIS , THAT WOULDN'T BE SOMETHING THAT WOULD BE EVEN RELEVANT. IT IS NOT LIKE IN TRIAL MR . SAT S COULD HAVE B R OUGHT I T UP AND SAID DIDN'T YOU GET EMBARRASSED IN THE 1991 SHAW CROSS CASE. THAT HAD NO MOMENT IN T HETRIAL.IT IS NOT RELEVANT AND WOULD BE INADMISSIBLE EVID ENCE TO TRY TO SAY L I STEN , DIDN'T YOU BE EMBA RRASS ED IN ROCHESTER IN THE SHAH CROSS CASE. IT WOULD BE SOMETHING THAT WOULD BE IN THE SHAW CROSS CASE. IT WOULD BE SOMETHING THAT IS COMPLETELY IRRELEVANT .

HOW WOULD SOMEBODY THAT WOULD AND DEFENSE EXPERT , BE BRADY MATERIAL? YOU ARE SAYING THE STATE HAD IT.

WE NEVER HAD IT. I PUT MR . LASWEL ON AND MR . ONGLY ON.

HE SAID DIDN'T SEE IT?

HE SAID I DIDN'T SEE IT AND I CAN TELL THE COURT

HOW WAS IT FAVORABLE TO THE DEFENSE? HOW IS IT EVIDENCE THAT WOULD BE HELPFUL TO THE DEFENSE?

IT IS FAVORABLE, IN THAT IF DR. LEWIS HAD IT IN 1993, THERE IS A LOT THAT CAN BE DONE WITH THE RAW DATA. IN OTHER WORDS, HELP ME

ON THE SURFACE OF WHAT YOU ARE TALKING ABOUT, IT IS A NORMAL EEG. NOW, TELL ME HOW THAT IS EXCULPATORY.

I UNDERSTAND THE COURT. THE LANGUAGE OF NORMAN IS THAT IT IS NOT EXCULPATORY AT ALL, BUT I DON'T THINK IT HAS TO BE EXCULPATORY. IT CAN BE EXCULPATORY OR IMPEACHMENT FAVORABLE TO THE DEFENSE.

IMPEACHMENT IS EXCULPATORY TO THE DEFENSE, IN THE SENSE THAT IT BREAKS DOWN THE EVIDENCE AGAINST THE DEFENDANT. HOW DOES THIS FALL IN THE BRADY CATEGORY AT YOU WILL AT ALL?

I THINK IT FALSE IN THE BRADY CATEGORY, WHEN YOU LOOK AT THE INEFFECTIVE CLAIM OF MR. LASWELL. THAT IS THAT MR. LASWELL HAD A PHOTO STIMULATED EEG.

SO BRADY IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL?

IT IS NOT NOW.

WHAT IS THE DEFINITION OF BRADY?

IT HAS TO BE FAVORABLE TO THE GOVERNMENT.

HOW IS IT FAVORABLE?

FAVORABLE IN THE SENSE THAT IT COULD BE USED AT THE EVIDENTIARY HEARING. IF I HAD HAD THAT, I COULD SHOW THAT MR. LASWELL HAD BEEN INEFFECTIVE.

AM I WRONG OR IS IT FAVORABLE BECAUSE IT IS IMPEACHING OR EXCULPATORY, NOT FAVORABLE IN THE AIR BUT FAVORABLE FOR REASONS IT COULD HAVE BEEN USED FOR PURPOSES OF IMPEACHMENT?

FAVORABLE IN THE SENSE THAT IT COULD HAVE BEEN USED AT THE HEARING.

CHIEF JUSTICE: YOU ARE VERY MUCH INTO YOUR REBUTTAL.

MAY IT PLEASE THE COURT. MY NAME IS CAROLYN SNURKOWSKI FROM THE ATTORNEY GENERAL'S OFFICE. AS I CAME IN, THE COURT NOTED THAT MY PAGES ARE YELLOW AND THIS HAS BEEN A LONG TIME IN THIS CASE.

ALONG THAT LINE.

I ASSUMED YOU WERE GOING TO ASK ME A QUESTION.

ALONG THAT LINE.

YES, YOUR HONORS.

I NOTE THAT THE , THIS CASE WAS LAST HERE IN , REHEARING DENIED IN 1998. THAT THE CASE WAS THEN DENIED CERT, OCTOBER OF 1998. A MOTION WAS FILED POSTCONVICTION, IN SEPTEMBER OF 1999. THAT THERE , APPARENTLY , A SECOND MOTION WAS FILED ON MAY 29 , 2001.

CORRECT.

NOW, DURING THAT 18-MONTH PERIOD, WAS THERE A HEARING IN THE TRIAL COURT?

THERE WERE HEARINGS WITH REGARD TO PUBLIC RECORDS. THERE WAS A , THIS WAS A VERY CONTENTIOUS PERIOD OF TIME WITH REGARD TO DEVELOPING PUBLIC RECORDS, YOUR HONOR .

HOW MANY HEARINGS WERE THERE?

I DON'T KNOW. I WAS NOT PRESENT AT THOSE HEARINGS, BUT I KNOW THAT THERE ARE VOLUMES , I SHOULDN'T SAY VOLUMES , BUT THERE ARE PAGES WITH REGARD TO THE NEED TO SECURE PUBLIC RECORDS. THERE WERE SOME PROBLEMS WITH THAT , AND IN FACT , THAT DID OCCUR. AND THAT RESULTS , THOUGH , EXCUSE ME, THAT RESULTS , THOUGH, IN ONE OF THE ISSUES ON DIRECT APPEAL HAD TO DO WITH PUBLIC RECORDS, IF I AM NOT MISTAKEN , AND IN POSTCONVICTION. IN POSTCONVICTION . BELOW. IT, BECAUSE WE WERE STILL ARGUING ABOUT PUBLIC RECORDS , AT THE EVIDENTIARY HEARING IN 2002 , ON JULY 1 AND 3 OF 2002.

FINALLY , THE EVIDENTIARY HEARING IN THIS CASE , WAS IN JULY OF 2002.

CORRECT .

SO HERE WE ARE , NOW , 31 YEARS AFTER THIS MURDER.

THAT'S CORRECT, YOUR HONOR.

AND ACTUALLY , EIGHT YEARS AFTER JUSTICE BREYER WROTE HIS DISSSENT IN THIS CASE , SAYING THAT THIS CASE HAS GOT TO MOVE. IT IS TOO LONG AT 23 YEARS.

CORRECT.

OKAY .

BUT I MIGHT ADD , IF I AM PERMITTED TO DO SO IN RESPONSE TO YOUR QUESTION , THAT ADMITTEDLY THIS CASE HAS TAKEN A PERIOD OF TIME, 30 YEARS TO GET TO THE POINT WHERE WE ARE AT TODAY. HOWEVER , IF YOU LOOK AT WHAT HAS TRANSPIRED , I BELIEVE NONE OF THE ACTIONS ALTHOUGH THERE WAS A STATEMENT TO THE CONTRARY THIS MORNING , NONE OF THE ACTIONS WERE DIRECTLY RELATED TO THE STATE. IF YOU LOOK AT THE ISSUES UPON WHICH REVERSAL OCCURRED WITH REGARD TO THE FOUR OR THREE PREVIOUS RESENTENCING , THEY HAD TO DO WITH A COURT ACTION. I AM NOT SUGGESTING OR TRYING TO LAY BLAME JUST SAYING THERE IS JUSTIFICATION.

ONE OF THEM WAS A RICHARDSON VIOLATION.

NO. THE FAILURE TO CONDUCT A RICHARDSON HEARING WITH REGARD TO THE RICHARDSON VIOLATION.

AS REGARDS THE RICHARDSON VIOLATION.

THAT'S TRUE BUT AT THAT TIME IT WAS REVERSIBLE ERROR NOT TO CONDUCT A RICHARDSON HEARING.

BUT ISN'T THERE ANYTHING IN THIS 31 YEARS OF PROCESS , THAT YOU CAN FIX UPON , THAT

WAS ATTRIBUTABLE TO THE DEFENDANT, AS FAR AS THIS CASE HAVING TO BE TRIED FOUR TIMES. PERHAPS THE , THIS MOST RECENT DELAY IN FILING THE SHELL MOTION ,, COULD BUTT OTHER PART CANNOT, CAN IT?

WELL , YOUR HONOR, I UNDERSTAND WHAT THE COURT IS SAYING AND HOW THERE HAVE BEEN CONCERNS BY THE COURT, BUT, AGAIN, I THINK WHAT IS ARE IMPORTANT TO LOOK AT , IS WHAT IS IMPORTANT TO LOOK AT IS THE PROCESS HAS NOT BEEN BROKEN DOWN. THE PROCESS WORKS. AN INDIVIDUAL HAS THE OPPORTUNITY TO APPEAL THE CORRECTNESS OF THE JUDGMENT AND SENTENCE THAT HAS BEEN ENTERED HEREIN IN FACT THAT HAS OCCURRED IN THIS CASE, AND BECAUSE ERROR HAS BEEN FOUND , MATTER GOES BACK. THIS IS NOT A SITUATION WHERE AN INDIVIDUAL HAS NOW BEEN SOMEHOW HARMED BECAUSE THEY CANNOT DEFEND AGAINST A CHARGE AGAINST THEM. THIS IS NOT A BAR KERS V. S. WING-TYPE OF CONSTITUTIONAL WINGO TYPE OF CONSTITUTIONAL ISSUE. WE ARE TALKING ABOUT SENTENCINGS, AND IN FACT AS TIME WENT ON THE MITIGATION INCREASED. WE HAVE ENHANCED THE MITIGATION, WITH REGARD TO THE NATURE OF TIMING BECAUSE THE AGGRAVATING FACTORS HAVE NOT CHANGED, BUT THE MITIGATION HAS BEEN ENHANCED , AND IN FACT NOT THAT THE VOTES ARE IMPORTANT BUT THEY HAVE BEEN RELATIVELY CONSISTENT WITH REGARD TO INJURIES RECOMMENDING AFTER HEARING, EVEN MORE AND MORE EVIDENCE , JURIES RECOMMEND WITH REGARD TO JURIES RECOMMENDING AFTER HEARING , EVEN MORE AND MORE EVIDENCE , JURIES RECOMMENDING . IN OCTOBER OF 194 , HE WROTE A LETTER SAYING THAT HE WAS GOING TO DO AN EEG AND IT HAD TO DO WITH THIS PHOTO , WHATEVER THE TECHNICAL TERMS ARE FOR THAT, AND THAT IN FACT IT WAS TO BE DONE. THAT WAS FOUND IN THE FILE OF MR. LASWELL , AND IN FACT I THINK THE PRESENTATION THIS MORNING HAS KIND OF CONFUSED THE ISSUES. THERE ARE TWO SEPARATE ISSUES, ONE HAVING TO DO WITH THE BRADY ISSUE AND DR . NORMAN AND HOW THE STATE SECURED A REPORT THAT IT WAS ENTITLED TO HAVE , IN A FAX TRANSMITTAL FROM THE DOCTOR'S OFFICE TO THE STATE ATTORNEYS OFFICE , GIVING THEM A REPORT AFTER IT WAS MADE KNOWN THAT HE WAS GOING TO BE DEPOSED , DR . NORMAN. HE WAS A WITNESS FOR THE DEFENDANT. HE HAS ALWAYS BEEN A DEFENSE WITNESS. THEY HAVE ALWAYS HAD THE OPPORTUNITY TO TALK WITH THEIR WITNESS.

IT SEEMS TO ME THAT AT LEAST THE UNDERLYING ALLEGATION SEEMS TO BE THAT , SOMEHOW THE STATE GOT SOME REPORT FROM EVEN THE DEFENSE WITNESS , THAT THE DEFENSE NEVER GOT.

I DON'T BELIEVE THE RECORD BEARS THAT OUT, BECAUSE I THINK THE TESTIMONY AT THE EVIDENTIARY HEARING , REFLECTS THAT, BOTH MR. LASWELL AND MR . ON GLY COULDN'T RECALL WHETHER THEY HAD EVER RECEIVED THOSE REPORTS NOT THAT THEY DID N'T.

WAS HE A CONFIDENTIAL DEFENSE WITNESS?

NO. HE WAS LISTED AS A WITNESS FOR THE DEFENSE.

WHO NOTICED HIM FOR THE DEPOSITION?

I BELIEVE THAT THE STATE DID.

SO IT WAS THE STATE'S DEPOSITION.

CORRECT.

AND HE WAS NEVER CALLED AS A WITNESS IN ANY OF THE SENTENCE, IN ANY OF THE SENTENCING HEARINGS?

NO, YOUR HONOR.

AND THERE WAS NO , I MEAN , THE ISSUE ABOUT THIS EEG BEING NORMAL , THERE WAS

THAT, YOU KNOW , IT IS NOT A SURPRISE. EVERYBODY WHO HAS TALKED , EVERYBODY, EVERY DOCTOR , I SHOULDN'T SAY EVERYBODY , EVERY DOCTOR THAT HAS INTERVIEWED THIS INDIVIDUAL, HAS FOUND THAT, IN FACT , THERE IS NO BRAIN DAMAGE, AND THAT IS WHAT , DR . NORMAN IS A NEUROLOGIST. THAT IS WHAT HE WAS PURCHASED FOR. HE WAS SUPPOSED TO GO IN THERE , DO THE TESTING FOR THIS BY MR . LASWELL AND MR . ONGLY AND HE DID THAT AND HE REPORTED BACK TO THEM.

HE IS NOT A NEUROPSYCHOLOGIST.

HE IS A NEUROLOGIST .

HE DID A FULL NEUROLOGICAL EXAM OF HIM AND AN EEG?

HE DID AN EEG AND DR . TODD, WHO DOES A REPORT AND I ASSUME HE IS AN ASSOCIATE OF DR. NORMAN BUT I DON'T KNOW , BECAUSE IT SEEMS LIKE THEY ARE COMING FROM THE SAME OFFICES, AND HE DID THE MRI ON MR. ELLEDGE.

IS THERE A REPORT THAT WAS ALSO, AND AN MRI ?

YES. YES. AND NO CLAIM THAT THOSE WERE

NO. THE MRI WAS MADE AVAILABLE ON THE SAME DAY AND THE DEFENDANT SAID THEY SAW THAT , EXCUSE ME, NOT THE DEFENDANT , MR. LASWELL AND MR . ONGLY SAID THEY SAW THAT.

WAS IT IN THE TESTIMONY?

ACTUALLY IT WAS IN DR . SCHWARTZ'S TESTIMONY THAT HE HAD SEEN THE EEG THAT WAS DONE A MONTH EARLIER BY ANOTHER DOCTOR AND REFLECTS THAT THAT WOULD HAVE BEEN DR . NORMAN'S EEG AND IT WAS NORMAL.

DE SAY THAT, THAT IT WAS NORMAL?

IT WAS NORMAL AND HE SAID THAT, YES.

IN HIS TRIAL TESTIMONY?

YES. IT CAME UP.

WHEN THIS CAME UP IN THE MOST RECENT HEARING, WASTHERE A REQUEST, THEN, FOR A RICHARDSON HEARING OR SOMETHING? A IN OTHER WORDS

NO. THIS CAME AT THE END OF THE TESTIMONY. EVERYTHING HAD TO DO WITH THE EFFECTIVENESS OF COUNSEL WITH REGARD TO MR. LASWELL AND MR. ONGLY'S REPRESENTATION. IT HAD TO DO WITH THE DIFFICULT ANY SECURING DR . LEWIS. DR. LEWIS DID COME DOWN FOR THIS EVIDENTIARY HEARING , AND AT THAT TIME WHEN SHE WAS ON THE STAND, THE PROSECUTOR CROSS-EXAMINED HER WITH REGARD TO WHAT KNOWLEDGE SHE HAD WITH REGARD TO THIS CASE AND HOW SHE HAD PREPARED , BECAUSE , A GAIN, HER WILLINGNESS TO COME TO FLORIDA WAS THE ISSUE NOT WHAT SHE KNEW OR WAS GOING TO TESTIFY TO , BECAUSE IT WAS AN ISSUE AS TO WHAT MR . LASWELL AND DR. ONGLY WANTED HER TO DO. HER VIEW PURPORTEDLY WAS THAT SHE WANTED TO HAVE ALL OF THE DOCTORS' REPORTS SO THAT SHE COULD GIVE HER OPINION AND WHAT THEY HAVE SAID AND GOES REPEATEDLY WITHOUT DISPUTE , IS THAT THEY WANTED TO HAVE HER TESTIFY BECAUSE SHE HAD EXAMINED MR. ELLEDGE IN 1983 AS PART OF A SUBJECT STUDY AND IT WAS PART OF H

ERSUBJECT STUDY THAT ANYBODY THAT HAD EVER HAD A BUMP ON THEIR HEAD, HAD BRAIN DAMAGE, AND THAT WAS THE CORE OF WHAT SHE WOULD HAVE PRESENTED AND THAT IS WHAT THEY WOULD HAVE WANTED HER TO TESTIFY ABOUT, IS HER EXPERTISE AND HAVING GONE THROUGH WITH HIM WITH THIS STUDY AND THAT IS WHAT THEY WANTED TO LIMIT IT TO. SHE WAS NOT WILLING TO COOPERATE WITH THAT. ANYWAY, I FORGOT WHERE I WAS.

ONE IS AT THE END OF MR. SATS, SAYS, WELL, LOOK, HERE IS A NORMAL EEG. THIS IS NOT A BRAIN DAMAGE OR SOMETHING LIKE. THAT ANOTHER POINT IS SHE WAS BEING CROSS-EXAMINED BY THE STATE ATTORNEY, AND AT THE POINT IN TIME THEY WERE TALKING ABOUT THE EEG AND OTHER, OR A TEST, AND THINGS THAT SHE SHOULD KNOW ABOUT, AND MIRACULOUSLY, SHE KNEW ABOUT THE EEG AND SHE WAS MAKING STATEMENTS, AND AT THAT POINT THERE WAS AN OBJECTION MADE AND THEN WE HAD THIS DISCUSSION ABOUT HOW POSTCONVICTION COUNSEL DIDN'T HAVE THIS PARTICULAR TEST, AND MIRACULOUSLY AS I HAVE INDICATED IN MY BRIEF, AT THE END OF THIS DISCUSSION, DR. LEWIS SUDDENLY FORGOT EVERYTHING SHE HAD SEEN OR HEARD OR KNEW AND SHE COULDN'T REMEMBER IF SHE HAD SEEN AN EEG, BUT THE RECORD, I THINK, BEARS OUT THAT SHE WAS AWARE OF IT, AND THE STATE HAS

I GUESS WHAT I AM ASKING YOU IS AT THAT POINT DID, WAS THERE A REQUEST FOR A RICHARDSON HEARING?

NO. NO. NO. WELL, NO. NOT IN THE POSTCONVICTION. THIS IS POSTCONVICTION. WE ARE NOT TALKING ABOUT THE TRIAL. WE ARE TALKING ABOUT A POST CONVICTION PROCEEDING, WITH REGARD TO WHETHER THE ALLEGATION WAS THAT POSTCONVICTION COUNSEL WAS NOT MADE AND GIVEN THIS INFORMATION BECAUSE OF SOME DISCOVERY VIOLATION, BUT THE BOTTOM LINE IS THIS, IS AGAIN, I CAN'T EMPHASIZE TOO MUCH, THIS WAS A DEFENSE WITNESS. HE HAD THESE INDIVIDUALS, AND WHEN GIVEN AN OPPORTUNITY, HE NEVER CALLED DR. NORMAN. THIS, THAT

I AM NOT SURE, HE WAS GIVEN AN OPPORTUNITY AT THIS PARTICULAR EVIDENTIARY

BECAUSE WE HAD ANOTHER HEARING, WE HAD A LITTLE HEARING AT THE END OF OUR POSTCONVICTION HEARING, TO DISCERN WHAT EXACTLY WE WENT ON AND HOW THIS INFORMATION CAME ABOUT.

SO THAT WAS WHAT I WAS ASKING. IT WASN'T CALLED A RICHARDSON HEARING BUT SOMETHING DID GO ON.

YES AND I DON'T WANT TO QUALIFY IT AS RICHARDSON, BECAUSE I DON'T WANT TO ACQUIESCE ON THE NOTION OF HAVING SOME SORT OF BRADY VIOLATION BUT, NOT A BRADY VIOLATION BUT

DR. NORMAN COULD HAVE BEEN CALLED TO EXPLAIN

RIGHT.

THAT THIS WAS REALLY A VERY SIGNIFICANT TEST OF SOME SORT.

CORRECT, CORRECT, OR FOR THAT MATTER WHAT, EXACTLY, HE DID. WE ARE GETTING CAUGHT UP ON THE NOTION OF WHAT THE TEST WAS. THAT IS NOT THE ISSUE BEFORE THIS COURT IN TRUTH. THIS COURT HAS SAID A NUMBER OF TIMES, YOU ARE NOT A TRIER OF FACT. YOU ARE A TRIER OF THE LAW AND AND WHAT THE RESOLUTION OF IT IS, SO CERTAINLY THE EVIDENTIARY HEARING OR THE DETERMINATION OF WHAT THE FACTS WERE WITH REGARD, WERE POSED WITH THE TRIAL COURT NOT HERE.

BUT YOU WOULD, AND I THINK THAT THE , THE ARGUMENT WAS STARTED WITH , HERE IS ONE MORE EXA MPLE O F SOMETHING THAT THE STATE HASDONE. JUST LET ME FINISH.

RIGHT.

SO IT WOULD B E SIGNIFICANT , IF THIS WAS SOMETHING THAT WAS WITHHELD FROM THE STATE, EVEN IF I T WAS LESS THAN HELPF UL OR NOT , IT MIGHT BE SIGNIFICANT TO OUR ANALYSIS. YOU ARE JUS T, AG AIN , REEMPHASIZING THAT THERE I S PROBABLY KNOW WA Y THAT THIS COULDN'T HAVE BEEN IN MR . LASWELL'S POSSESSION, IF IT WAS HIS EXPERT AND HE WAS AT THE SAME DEPOSITION.

RIGHT. WELL, I THINK, WELL , DR . ONGLY WAS ACT UALLY T HEDEFENSE LAWYER WHO ATTENDED THE DEPOSITION. THEY SHOULD HAVE KNOWN.

MADE IT AVAILABLE.

RI GHT, AND I THINK THAT IS THE PROBLEM WE HAVE WITH THESE KIND OF LOOSE LANGUAGE WITH REGARD TO ALLEGATIONS ABOUT WHAT THE STATE HAS DONE IN THIS PARTICULAR CASE AND THE TIME PERIODS TAKEN. AGAIN , THE STATE CAN'T OVEREMPHASIZE THE FACT T HAT THIS IS NOT A CASE WHERE IT HAS BEEN WRONGFUL STATE ACTION WITH REGARD TO THE DELAYS. THERE HAS BEEN A LO T OF ACTIVITY IN T HIS CASE. IF YOU LOOK AT EVEN THE V ERY FIRST TIME THIS CASE WAS REMANDED FOR A NEW SENTENCING HEARING, IT WAS BECAUSE OF A QUESTION AS TO WHETHER, IN FACT, THE GAFFNEY MURDER , WHI CH WAS THE SECOND MURDER WHICH HAD NOT BEEN TRIED YE T, COULD BE USED, A PRIOR VIOLENT FELONY,AND THE LAW AT THAT TIME WASNO, BECAUSE A CONV ICTION HAD NOT OCCURRED.

WOULD YOU CE MENT COMMENT ON THE CLAIM THAT COUNSEL WOULD YOU COMMENT ON THE CLAIM THAT COUNSEL WAS INEFFECTIVE BECAUSE HE PRESENTED TWO EXPE RTS THAT CANCELLED EACH OTHER OUT.

I THINK IT IS VERY CLEAR IN THIS RECORD , TALKING ABOUT DR . SCHWARTZ AND D R . CADEY . WE FOUND AND HIS WHOLE CHILDHOOD CAME OUT THRO UG H THE TESTIMONY. THE DEFENSE HEARD, EVEN I F THERE MIGHT BE CONF LICT, WHICH ALWAYS OCCURS WITH REGARDS TO DOCTORS GIVING THEIR TESTIMONY AS TO WHAT THEY BELIEVE MA Y BE THE MEDICAL OUTCOME OF AN INDIVIDUAL'S HISTORY A NDTHAT IS OUTWEIGHED BY THAT , BUT HERE THEY PRES ENTED MEDICAL HISTORIES AND FA MILY HISTORIES OF HOW THEY GOT T O THEIR END RESULT. THE DISCREPANCIES OF THAT OCCURRED, H AD TO DO WITH FETAL ALCOHOL SYND ROME , IS WHAT THE STATE RECALLS BEST OF ALL, AND THAT IS DR . SCHWARTZ THOU GHT THAT, BECAUSE THE MOTHER WAS AN ALCOHOLIC AND THERE WAS REPLETE EVIDEN CE AS TO HER DRINKING AND CAROUSING AROUND AND HER PROBLEMS, THAT, IN FACT, AND HE WAS A BLUE BABY , MR . E LLEDGE WAS A BLUE BABY AND UNDER WEIGHT AND ALL OF THAT IS , THAT HE HAD FETAL ALCOHOL SYNDROME. DR. CADEY SAID, NO , HE DIDN'T THINK THAT , BECAUSE THERE WAS NO PHY SICAL EVIDENCE OF THAT. THERE IS A MAR KED PH YSICAL EVIDENCE WHEN YOU HAVE FETAL ALCOHOL SYNDROME, AND THAT DID NOT EX IST. THAT WAS THE BIGGEST DISCREPANCY WITH REGARD TO THE DIFFERENCES IN THIS TESTIMONY , BUT , AGAIN , EVEN IF THERE WERE OTHER DISCREPANCIES AND I AM NOT SAYING THERE ARE BUT ASSUMING FOR THE MOMENT THERE ARE OTHER DISCREPANCIES WITH REGARD TO THEIR TESTIMONY, THAT IN AND OF ITSELF WOULD MEAN THAT MR . LASWELL WASN'T INEFFE CTIVE FOR NOT PRESEN TING THE M. HE TO OK GREAT OPPORTUNITY TO HAVE THEM PRESENT TO THE JURY, ALL THE MITIGATION WITH REGARD TO MR. ELLEDGE. IN FACT , THERE WERE 21 WITNESSES AND THEY ALL CORROBORATED WITH ONE ANOTHER WITH REGARD TO THIS HORRENDOUS LI FE THIS INDIVIDUAL HAD AS A YOU TH AND AS A CHILD AND WHAT WAS GOING ON IN HIS LIFE , AND S O THAT, ALL , CAME BE FORE T HEJURY, S O TO SUGGEST THAT, BECAUSE THE NUANCES OF THE DOCTOR'S REPORTS ARE SOMETHING VARIED, THAT IN AND OF ITS ELF DOES N OTQUALIFY AS A

LAWYER RENDERING INEFFECTIVE ASSISTANCE OF COUNSEL. HE HAD TO GO WITH THE BEST HE GOT. THIS INDIVIDUAL, MR. LASWELL, WHEN HE TOOK ON THIS CASE FOR THE FOURTH RESENTENCING, CAME IN. HE HIRRED. HE WENT AND TALKED TO TREATY BLOCK CRAWFORD, GARFIELD, EXCUSE ME, WHO SAID THAT, YOU KNOW, YOU DON'T WANT TO CALL ME. I AM NOT GOING TO GIVE YOU ANYTHING GOOD TO SAY. HE SECURED A NEUROLOGIST. HE SECURED TWO MORE DOCTORS. HE KNEW ABOUT DR. SCHWARTZ AND ABOUT DR. CADEY. HE HAD A WHOLE HISTORY, BECAUSE PETER GIAGAMO HAD BEEN THE DEFENSE LAWYER PREVIOUSLY. HE HAD GOTTE N ALL OF HIS FILES. IT IS NOT LIKE THIS MAN DIDN'T DO ANYTHING. HE WENT OUT THERE AND GOT AULT RECORDS, HAD THE PRISON RECORDS FROM CALIFORNIA, SOME RECORDS FROM COLORADO. THERE HAD BEEN DOCTORS IN THE EARLIER YEARS, WHO HAD EXAMINED HIM, DR. MILLER AND DR. EGGERT, SO ALL OF THOSE AND DR. EGBERT, SO HE HAD ALL OF THIS INFORMATION AVAILABLE AND HE DID PRESENT ALL OF THAT THERE ARE A NUMBER OF OTHER ISSUES THAT I AM NOT GOING TO ADDRESS. MOST OF THEM ARE NOT PRESERVED FOR REVIEW BECAUSE THEY EITHER COULD HAVE BEEN RAISED ON DIRECT APPEAL AND WERE NOT, OR THEY WERE ALREADY ADDRESSED. THE STATE WOULD URGE THAT THIS IS THE FOURTH SENTENCING PROCEEDING, AND THAT THE STATE SHOULD AFFIRM OR THE COURT SHOULD AFFIRM. THANK YOU.

CHIEF JUSTICE: REBUTTAL.

I WANT TO ADDRESS JUST A COUPLE OF THINGS. PAGE 555 OF THE TRANSCRIPT OF EVIDENTIARY HEARING, THIS IS WHAT YOU CALL THE RICHARDSON HEARING THERE. IS NO RICHARDSON HEARING BECAUSE THERE IS NO DISCOVERY RULES WITH AN EVIDENTIARY HEARING, BUT EFFECTIVELY IT WAS THE SAME THING. I AM TALKING, AND 555, LINE 5, I START AND I SAY, I HAVE NORMAN'S DEPOT IN MY HAND AND I AM SAYING THE DEPOSITION OF DR. NORMAN, WHICH IS THE ONLY THING I HAVE OF DR. NORMAN, DOESN'T HAVE ANYTHING ABOUT A PHOTO SENSITIVE. I DON'T KNOW IF WE MOVED IT. AND I MOVED IT INTO EVIDENCE AT THE EVIDENTIARY HEARING, BUT I AM SAYING IT IS THE ONLY THING I HAVE. IF YOU LOOK TO

YOU WOULD AGREE IT IS NOT WHAT YOU HAVE IN NEWER POSSESSION.

IT IS WHAT THE DEFENSE HAD.

I WAS GOING TO GO RIGHT TO THAT. IF YOU LOOK AT OUR REPLY BRIEF, ON PAGE 4 OF OUR REPLY BRIEF, WE QUOTE THERE RECORD, THE COURT FINDS, I DON'T THINK IT TAKES A ROCKET SCIENTIST TO FIGURE OUT IT WAS PART OF THE STATE'S FILE, THIS LETTER THAT MR. SATS CROSS-EXAMINED WITH, IF WE LOOK AT THAT

WOULDN'T YOU ORDINARILY, IF THE EEG WAS ORDERED BY OR DONE BY OR INTERPRETED BY A PARTICULAR PHYSICIAN OR EXPERT, WOULDN'T YOU CALL THAT EXPERT, THEN, AND SAY WHAT IS THE SCOOP, BECAUSE WE ARE CLAIMING THERE WAS AN EEG DONE AT YOUR DIRECTION AND BY YOU OR WHATEVER.

I HEARD

AND THAT WE NEVER GOT IT.

HERE IS THE PROBLEM. WE NEVER SAW THIS COMING BECAUSE NORMAN, ALL I KNEW WAS THAT NORMAN HAD A NORMAL, REGULAR EEG. SATS DROPS THIS ON US AT THE END OF THE EVIDENTIARY HEARING.

HOW DID DR. LEWIS KNOW ABOUT IT THEN?

SHE DIDN'T.

SHE TESTIFIED AND I AM READING FROM 30 5 OF THE TRANSCRIPT, THE QUESTION, YOU HAD INDICATED THAT YOU WANTED AN EEG WITH HYPER VENTILATION AND PHOTO STIMULATION. HER ANSWER, KRECHBLINGT QUESTION, DO YOU REALIZE THAT WAS, THAT WAS DONE ON OCTOBER 4, '93. ANSWER, THERE IS ON OCTOBER 4, '93, I WAS GOING TO SAY, I THOUGHT THAT DR. NORMAN ORDERED THAT. QUESTION, AND IT WAS NORMAL. ANSWER, IT HAD SOME REFERENCES IN IT, TO SAY THAT IT IS PROBABLY NORMAL. IT HAD SOME ABNORMAL ACTIVITY, ET CETERA. SHE GOES ON AND QUOTES WHAT THE EEG REPORT, SO IF YOU DIDN'T HAVE IT AND YOU DIDN'T GIVE IT TO HER, SHE HAD TO HAVE HAD IT AT SOME EARLIER TIME, TO KNOW WHAT THE REPORT SAYS.

WHAT I AM TRYING TO TELL YOU IS THAT IN THAT HEARING, THIS WAS LIKE TWO DAYS OF HEARING, MR. SATSK EPT OFFERING THINGS UP AND I THINK SHE WAS TRYING TO GRASP HAD I SEEN THIS OR THAT BEFORE. I DON'T THINK SHE WAS SAYING I HAVE SEEN THAT DOCUMENT BEFORE.

DIDN'T DR. SCHWARTZ REFER TO IT, ALSO?

DR. SCHWARTZ, YES, REFERRED TO A NORMAL EEG, JUST A REGULAR EEG, AND I GUESS WHAT WE ARE PERHAPS SPLITTING HAIRS ABOUT IS THE FACT THAT LEWIS HAS BEEN ASKING FOR THESE OTHER EEG'S AND WE

SHE NEVER ESTABLISHED YOU NEVER ESTABLISHED THAT THERE WERE TWO EEG'S TAKEN BY DR. NORMAN, HAVE YOU?

MR. SATS SAYS YOU REALIZE THAT THE PHOTO STIMULATION AND HYPER VENTILATION AND HYPER VENTILATION WERE NEVER DONE. WE PULL OUT THE BOXES AND THAT FAXED TO HIM DIRECTLY BY DR. NORMAN, WAS PUT INTO THE MATERIAL BY THE STATE.

CHIEF JUSTICE: YOUR TIME HAS EXPIRED.

OKAY.

CHIEF JUSTICE: THANK YOU. THE COURT WILL TAKE ITS MORNING RECESS. 15 MINUTES.

MARSHAL: PLEASE RISE.