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Jermaine Foster v. State of Florida

CHIEF JUSTICE: ALL RIGHT.THE LAST CASE ON THECALENDAR THIS MORNING IS FOSTER VERSUS THE STATE OF FLORIDA.YOU MAY PROCEED.

THANK, YOUR HONOR. I A M FRANK BANKOWITZ AND I REPRESENT MR. FOSTER AND REPRESENTED MR. FOSTER IN THE POST-CONVICTION RELIEF PROCEEDINGS , WHICH WERE HELD IN ORANGE COUNTY FLORIDA,. ON BEHALF OF MR . FOSTER , BASICALLY HE WAS CONVICTED ORMEALLY OF TWO MURDERS, IN OSCEOLA COUNTY , FLORIDA , AND HE WAS SENTENCED TO DEATH. THIS COURT IN JULY 1996 , AFFIRMED THOSE DEATH SENTENCES . AND, I AM SORRY , YOUR HONOR , AND THE APPELLANT HERE CLAIMS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR THE PRIMARY REASON AND ESSENTIALLY THE SOLE REASON RAISED AT THE EVIDENTIARYHEARING , WAS THE LACK O F ESTABLISH MENT OF AN INTOXICATION , VOLUNTARY INTOXICATION DEFENSE. ALSO SUPER IMPOSED UPON THAT , WERE HIS MENTAL DEFICIENCIES , AND WE UNDERSTAND THE LONG CASE LAW THAT, IN FACT , MENTAL DEFICIENCY IS NOT A DEFENSE , AS FAR AS MENS REA GOES IN A FIRST-DEGREE MURDER CASE .

THE ISSUE THAT YOU ARE DIRECTING YOUR ARGUMENT TO , OTHER THAN , IS IN THE GUILT PHASE.

YES, SIR.

AND INEFFECTIVE ASSISTANCE OF COUNSEL IN RESPECT TO A VOLUNTARY INTOXICATION DEFENSE.

YES, SIR.

ALL RIGHT. NOW , IT IS , AS I UNDERSTAND FROM THIS RECORD , IT IS, CORRECT THAT THERE WAS A VOLUNTARY INTOXICATION INSTRUCTION.

THERE WAS AN INSTRUCTION, A BRIEF INSTRUCTION REGARDING

COUNSEL DID ARGUE VOLUNTARY INTOXICATION.

HE ARGUED, I BELIEVE, THAT MR . FOSTER WAS INTOXICATED.THERE WAS NO EXPERT TESTIMONY CALLED TO BOLSTER THAT BARE ARGUMENT.

BUT THERE WAS EVIDENCE THAT WAS PRESENTED AS TO THEFACT THAT THERE WAS SOME JOINTS BEING SMOKED ON THEWAY OVER FROM HAINES CITY TO ST. CLOUD .

YES, SIR.

THERE WAS EVIDENCE AS TO SOME BRANDI THAT HAD BEEN SOME BRANDY THAT HAD BEEN CONSUMED .

RIGHT.

ALCOHOL PURCHASED.

RIGHT.

S O YOUR ISSUE IS WHETHER THERE SHOULD HAVE BEEN, IN ADDITION TO THE EVIDENCE THAT WAS PRESENTED , EVIDENCE THAT H E WAS , HE HAD A MENTAL DEFICIENCY, WHICH WOULD HAVE EXACERBATED HIS INTOXICATION.

ESSENTIALLY THAT IS WHAT WE WERE ARGUING , YES, YOUR HONOR. THE INTOXICATION DEFENSE WHICH WAS RAISED IN MY HUMBLE OPINION , WAS VERY MINIMAL.

WAS THERE ANY EVIDENCE PRESENTED IN THIS POSTCONVICTION OF INTOXICATION , CONSUMPTION OF ALCOHOL OR DRUGS , BEYOND WHAT WAS PRESENTED AT TRIAL?

YES, IT WAS.

HOW WAS THAT?

IT WAS THROUGH MR . FOSTER AND , ALSO , DR . JONATHAN LIPPMAN , HAVING REVIEWED THERECORD OF THE TRIAL, THETEST MOANS .

MR . FOSTER DID NOT TESTIFY AT TRIAL , CORRECT?

NO , HE DID NOT.

AND DID TRIAL COUNSELHAVE A REASON FOR NOT HAVING MR . FOSTER TESTIFY , CONCERNING INTOXICATION ?

TRIAL COUNSEL TESTIFIEDAT THE EVIDENTIARY HEARINGTHAT, THE REASON HE DID NOT HAVE MR . FOSTER TESTIFY, IS THAT HE DID NOT WANT OTHER UNDESIRABLE EVIDENCE POTENTIALLY COMING OUT, WHICH BASICALLY WAS A TAPE RECORDING OF A STATEMENT MADE BETWEEN MR . BOOKER , A CODEFENDANT AND MR . FOSTER, IN THE BACKSEAT O F , I BELIEVE IT WAS AN FBI CAR , THAT WAS TAPE-RECORDED , AND ALTHOUGH

TALKING ABOUT AN INTOXICATION DEFENSE.

WELL , TALKING ABOUT, I BELIEVE FOSTER'S STATEMENTS WERE THAT I TOLD THEM I WAS HIGH , AND THAT WAS ESSENTIALLY THE EXTENT OF T IT WASN'T , DIDN'T GO INTO THE REASONING OF WHY HE WAS DOING THAT .

ARE YOU CHALLENGING THAT DECISION? ARE YOU SAYING IT WAS UNREASONABLE FOR COUNSEL NOT TO PUT HIS CLIENT ON THE STAND ?

IN THIS SITUATION , , IN THE CONTEXT OF THE EVIDENTIARY HEARING , I BELIEVE IT WAS.

THAT IS WHAT YOU ARE RAISING THAT HE HE SHOULD HAVE CALLED THE DEFENDANT TO THE STAND?

THAT HAS NOT BEEN RAISED IN THE PLEADINGS OR THEBRIEFS, YOUR HONOR.

CAN I ASK A QUESTION ON THAT , THEN . THIS MAY GET CONVOLUTED , BUT ASSUMING THAT THE EXPERTS DID NOT HAVE THE BENEFIT OF YOUR CLIENT'S SELF REPORTING , AS EVIDENCE OF INTOXICATION , WAS THERE TESTIMONY PRESENTED BEFORE THE TRIAL JUDGE, BY THE EXPERTS , OF WHAT THEY COULD HAVE TESTIFIED TO , WITHOUT THAT SELF REPORTING INFORMATION AS TO THE DEGREE OF INTOXICATION ?

THERE WAS

IN OTHER WORDS I F IT WAS REASONABLE FOR TRIAL COUNSEL NOT TO PUT THE DEFENSE ON THE STAND , HE COULD NOT HAVE GOTTEN THE SELF-REPORTING IN, SO HE WOULD HAVE BEEN

LIMITED TO OTHER EVIDENCE.

OTHER EVIDENCE OF OTHER WITNESSES , AS TO THE CON SUJS OF DRUGS AND ALCOHOL PRIOR CONSUMPTION OF DRUGS AND ALCOHOL , IMMEDIATELY PRIOR TO THE MURDERS , AS WELL AS LEONDRABEHIND ARE SON , WHO WAS A CODEFENDANT HENDERSON , WHO WAS A CODEFENDANT WHO , PLED OUT AND TESTIFIED AGAINST FOSTER, TESTIFIED THAT ALL THAT DAY AND IT WAS THEIR REGULAR PRACTICE , HENDERSON AND FOSTER , WHO WERE LIVING TOGETHER, TO SMOKE MARIJUANA ALL DAY , SELL COCAINE ALL DAY , AT TIMES USE COCAINE.

DID THEY TESTIFY AS TO THAT AT TRIAL?

THEY DID NOT AND THEY WERE NOT EXAMINED AS TO THAT AT TRIAL.

IS THERE A REASON WHY THEY DID NOT TESTIFY?

I AM SORRY , YOUR HONOR. HENDERSON DID TESTIFY AT TRIAL.

SO WHO DID NOT?

BOOKER DID NOT , BECAUSE HE WAS , HIS TRIAL HAD NOTCOME UP YET. I BELIEVE HE HADN'T BEEN SENTENCED YET.

SO HE WASN'T AVAILABLE.

RIGHT. AND ALF CATHOLIC WAS TRIED WITH FOSTER.

THERE WAS SOME TRIAL TESTIMONY ABOUT , GIVEN AS TO WHAT HAD HAPPENED DURING THIS DAY AND CERTAIN THINGTHAT IS HAD BEEN SAID TO COME UP WITH THE PLAN TO GO TO ST. CLOUD . IT WAS ALL PART OF THE CONSPIRACY.

THE CONSPIRACY - -

ON DIRECT APPEAL .

YES, YOUR HONOR. THE CONSPIRACY , AS THIS COURT NOTED IN ITS ORIGINAL OPINION , WAS DEFINITELY THERE, AND THAT IS HOW THE PROSECUTION WAS ABLE TO GET IN A LOT OF THE COCONSPIRATORS STATEMENTS ASTO WHAT THEY HAD BEEN DOINGTHAT DAY , BUT THOSE STATEMENTS, AND I DON'TBELIEVE THERE WAS ANY CROSS-EXAMINATION SPECIFICALLY OF HENDERSON , AS TO THE USE OF THE DRUGS AS EXTENSIVE LY AS IT CAME OUT IN THE EVIDENTIARY HEARING. THE TRIAL COUNSEL DID NOTPOUND HIM , S O TO SPEAK, ON HOW MUCH DRUGS AND WHAT THEIR CONSISTENCY WAS , HOW OFTEN THEY USED THEM , AND THESE ARE THING THAT IS CAME OUT IN THE EVIDENTIARY HEARING , AS WELL AS THROUGH DR . HENRY D , WHO HENRYDEE , WHO ACTUALLY HAD EXAMINED THE DEFENDANT BUT JUST FOR THE PENALTY PHASE. HE WAS NOT CALLED IN , AND WE ALLEGED IN OUR PAPERWORK IN OUR BRIEF , THAT THIS WAS A N ERROR OF COUNSEL , THAT THEY SHOULD HAVE BROUGHT HIM IN EARLIER , BECAUSE IN FACT WHAT HE HAD TESTIFIED TO , AND WHEN I MEAN BROUGHT HIM IN EARLIER, I MEAN HAD THE DEFENDANT EXAMINED BEFORE THE GUILT PHASE WAS OVER WITH , TO DETERMINE WHETHER THERE COULD HAVE BEEN A VIABLE INTOXICATION DEFENSE RAISED THROUGH EXPERT TESTIMONY , THERE BY LEADING TO DR. LIPPMAN , WHO WENT THROUGH AND ACTUALLY , AS FAR AS BLOOD ALCOHOL LEVEL , DETERMINED THAT FOSTER'S BLOOD ALCOHOL LEVEL WASTHREE TIMES THE LEGAL LIMIT , AT THE TIME OF THE OFFENSE.

ALL OF THE ISSUES, THE ISSUE IN THIS REGARD THAT U6 RAISED HERE THAT YOU HAVE RAISED HERE, AN ISSUE HAVING TO DO WITH THE GUILT PHASEOF THE TRIAL.

YES, SIR .

YOU HAVE ONLY A SHORT PERIOD OF TIME. LET ME GO TO YOUR ISSUE NUMBER THREE, AND THAT IS HAVING TO DO WITH THIS SOCIAL WORKER FROM SOUTH CAROLINA , AND , NOW , AS I UNDERSTAND WHAT HAPPENED HERE , IS THAT THIS WAS FIRST FILED AS A SHELL 3.850.

YES, SIR.

IT CAME ALONG AND WAS AMENDED IN JANUARY OF 2000, CORRECT?

YES, SIR.

AND THEN THE COURT SET AN EVIDENTIARY HEARING FOR THE THIRD WEEK OF JANUARY , 2002.

YES, SIR.

HOW LONG WAS THAT SET ? HOW MUCH NOTICE DID YOU HAVE?

I WANT TO SAY APPROXIMATELY THREE MONTH'S TO FOUR MONTH'S NOTICE, YOUR HONOR.

AND S O THEN A WEEK BEFORE THAT IS GOING TO OCCUR , YOU FILED A MOTION T O AMEND.

YES, SIR .

THE MOTION TO AMEND RAISED THE ISSUE O F THE RACIAL SLUR, BUT I T DID NOT ATTACK ANYTHING AS TO WHAT THIS PERSON'S TESTIMONY , THE SOCIAL WORKER'S TESTIMONY , RIGHT? THAT WASN'T GOING TO BE AMENDED HERE. NOOSE , IT WAS NOT.

WHAT I AM DISTURBED ABOUT , IS THE FACT THAT THERE WAS NO MOTION FOR A CONTINUANCE OF THE HEARING.

NO , YOUR HONOR , THERE WAS NOT.

IS THE FACT THAT THIS HAS BEEN SET , THIS HAS BEEN LONG-DELAYED FOR POSTCONVICTION, TO START IN 1988 TO START IN 1998 AND HERE WE ARE IN 2002. A WEEK BEFORE THE TRIAL , SUDDENLY UP COMES A MOTION TO AMEND , AND IT DOESN'T REALLY , IT RAISES THIS VERY SERIOUS STATEMENT , BUT IT DOESN'T RAISE ANYTHING THAT SUBSTANTIVE AS TO WHAT HAPPENED DURING THE TRIAL. AND HOW CAN THAT STOP ONE OF THE , BE PERMITTED TO STOP THIS HEARING?

YOUR HONOR, WE DID NOT WANT TO STOP THE HEARING. WE WANTED TO GO FORWARD WITH THE HEARING , WHICH IS WHY A CONTINUANCE WAS NOT FILED. MR . LERNER , THE POSTCONVICTION COUNSEL FORTHE STATE, HAD DEPOSED THIS PERSON I N PRELUDE TO THE EVIDENTIARY HEARING , AND SHE PROVIDED ME WITH THE AFFIDAVIT THAT WAS ATTACHED TO THE MOTION TO AMEND, ONE WEEK BEFORE I FILED THEMOTION. AND THIS IS WHY THE TIMELINESS OF IT IS APPARENTLY SUSPECT TO THE COURT. MY TIMELINESS IS NOT TO GAIN A CONTINUANCE. IT IS TO BE ABLE TO PUT THAT FORWARD TO THE COURT AND TO PUT THE COURT ESSENTIALLY ON NOTICE OF THIS POTENTIAL RACIAL ISSUE.

SO ARE YOU SAYING, THEN , THAT, WAS YOUR FIRSTKNOWLEDGE OF IT , WHEN SHE GAVE YOU THE AFFIDAVIT?

I HAD SPOKEN TO MS. VOGEL SANG, I BELIEVE IN OCTOBER , THE OCTOBER PRECEDING THE EVIDENTIARY HEARING.

AND THE EVIDENTIARY HEARING WAS IN?

JANUARY.

AND SHE TOLD BUT THE RACIAL SLUR AT THAT TIME?

WHAT SHE ADD ADVISED ME WAS SHE THOUGHT THAT THERE MAY HAVE BEEN SOMETHING SAID, BUT THAT SHE HAD TO REVIEW HER NOTES, A AND THAT IF THERE WAS SUFFICIENT DOCUMENTATION IN HER NOTES , THAT SHE WOULD ADVISE ME OF THAT . I KEPT CONTACTING HER, TO SEE IF SHE HAD REVIEWED HERNOTES. WHEN I MET WITH HER IN SOUTH CAROLINA , I WENT TO SOUTH CAROLINA AND MET WITH HER AT HER OFFICE, SHED NOT HAVE HER NOTES BECAUSE OF THE TIME FRAME. THEY WERE IN STORAGE. I KEPT ASKING HER AND ASKING HER AND ASKING HER , AND FINALLY I RECEIVED THIS AFFIDAVIT , ESSENTIALLY TWO WEEKS BEFORE THE PROCEEDINGS WERE T O TAKE PLACE. AND WHICH IS WHY

YOU WERE IN THIS , THE SLUR RELATES T O THAT HE DIDN'T THINK IT WAS WORTH PUTTING ON MITIGATION , BUT YOUR INVESTIGATION OF THIS , AND YOUR PUTTING FORTH THE CLAIMS , MOCK THESE CLAIMS ARE NOT A CLAIM AMONG THESE CLAIMS ARE NOT A CLAIM THAT THE MITIGATION PHASE WAS IMPROPERLY PUT ON , THAT THERE WAS , I MEAN, WASN'T THERE SUBSTANTIAL MITIGATION THAT WAS OFFERED IN THAT?

THERE WAS SUBSTANTIAL EXPERT MITIGATION IN THE FORM OF MISS VOGEL SANG AND IN MS. VOGEL SANG AND IN DR. HENRY DEE, AND THERE WERE A NUMBER OF WITNESSES THAT WERE CALLED IN BEHALF OF THIS INVESTIGATION.

AND YOU HAD NEVER MADE A CLAIM THAT THE MITIGATION PRESENTATION BY THE DEFENSE LAWYER , WAS BELOW THE STANDARD OF PROPER REPRESENTATION, CORRECT?

THAT IS CORRECT, YOUR HONOR.

SO I GUESS , NOT, I MEAN , WHAT WOULD BE , HOW WOULD YOU BE ABLE TO ESTABLISH A PREJUDICE PRONG ON THIS KIND OF STATEMENT?

WELL , IF YOU THEN G O BACK TO THE GUILT PHASE AND OUR ARGUMENT THAT THEY FAILED TO ESSENTIALLY PRESENT A DEFENSE FOR MR . FOSTER, I BELIEVE THAT RELATES BACK TO THE STATEMENTS MADE FROM MS. VOGEL SANG.

BUT THAT WENT TO MITIGATION, AND ON THE GUILT PHASE WE HAVE GOT THE ISSUES AS TO WHAT THE LAW WAS AT THE TIME, CORRECT , THAT THEY , CHESTNUT WAS THE LAW.

CONTROLLED . WELL , BUT I BELIEVE , BY LOOKING AT THE CASE IN TOTAL, THAT THEY DID NOT MAKE THE STATEMENT AND HE HAD PHONE THE RACIAL REASONS THAT, IT DOESN'T MATTER ANYWAY , THEN THAT PLAYS TOGETHER, AS FAR AS THE EFFECTIVENESS , EVEN IN THE GUILT PHASE.

WAS THE LAWYER ASKED ABOUT THESE STATEMENTS ?

I BELIEVE JUDGE JOHNSON WOULD NOT LET ME GO INTO IT AT THE EVIDENTIARY HEARING. HE WAS CALLED AT THE EVIDENTIARY HEARING.

IS THERE A PROFFER ON THAT?

JUST AFFIDAVIT THAT WAS ATTACHED TO THE MOTION.

BUT I AM TALKING ABOUT OF ANYTHING THAT WAS ASKED OF THE LAWYER.

NO, SIR.

DID YOU MAKE A CLAIM ALONG THESE LINES? IN OTHER WORDS, DID YOU SAY, JUDGE, I AM NOW MAKING A CLAIM THAT THE CONDUCT OF COUNSEL WAS DEFICIENT AND DEFECTIVE, UNDER THE STRICKLAND STANDARD, AND NOW I HAVE THE REASON, YOU KNOW, THAT IT WAS DEFECTIVE AND DEFICIENT, AND IT IS BECAUSE THE DEFENSE LAWYER ALSO WAS A RACIST OR HOWEVER YOU A RACIST OR HOWEVER YOU WANTED TO CHARACTERIZE THAT AT THE TIME. I DON'T UNDERSTAND FROM THIS RECORD THAT YOU MADE CLAIM LIKE THAT.

WE DID NOT MAKE THE FORMAL CLAIM. WE WERE ASKING THE COURT TO BE ABLE TO FILE THAT CLAIM IN OUR MOTION TO AMEND.

SO YOU ASKED THE COURT, THEN
FOR LEAVE TO AMEND.

LEAVE TO AMEND TO SAY WHAT? DID YOU HAVE AN AMEND PLEADING ATTACHED THAT SAID WHAT I JUST OUTLINED?

NO, I DID NOT, YOUR HONOR.

YOU SEE, I THINK THAT IS THE PROBLEM IS WHAT YOU WANTED TO SAY IS THERE IS IN THIS NEW EVIDENCE HERE, OF THIS THERE IS THIS NEW EVIDENCE HERE, OF THIS STATEMENT, BUT WHAT WE ARE HAVING TROUBLE IS SEEING HOW THE STATEMENT WOULD HAVE RELATED TO SOME ADDITIONAL CLAIM THAT YOU COULD HAVE MADE.

HOW YOU CONNECTED IT UP. I REALIZE THAT YOU ARE IN YOUR REBUTTAL TIME. DID YOU FILE A MENTAL RETARDATION CLAIM IN THIS CASE?

NO.

OKAY.

WE DIDN'T, BECAUSE THE STATUTE 921.137, SPECIFICALLY STATES THAT MENTAL RETARDATION IN DEATH CASES IS NOT RETROACTIVE PRIOR TO THE EFFECTIVE DATE OF THE STATUTE, WHICH WAS 2001.

ARE YOU FAMILIAR WITH THE RULE THAT WE HAVE?

YES, SIR.

AND IS IT YOUR INTENTION TO FILE A MENTAL RETARDATION CLAIM UNDER THE RULE?

MENTAL RETARDATION ISSUE IN THIS CASE, IS BORDERLINE AT BEST.

SO YOU EVALUATED THAT CLAIM AND YOU DON'T FEEL THERE IS A VALID CLAIM THERE, I TAKE IT.

PROBABLY NOT.

BUT WE DO HAVE AT LEAST IN THE ORIGINAL, WHEN THE CASE CAME THROUGH THE FIRST TIME, CERTAINLY SOME MENTION OF WHETHER IT IS MILD RETARDATION OR NOT, WE DID HAVE SOME MENTION ABOUT THAT, AND WAS THIS EXPLORED WITH DR. DEE AT ALL OR THIS WAS NOT EXPLORED?

IT WAS EXPLORED WITH DR. DEE, AND HE INDICATED THAT HE COULD NOT GO FURTHER THAN WHERE HE HAD IN THE INITIAL PROCEEDINGS, ALTHOUGH HE FELT THAT THE ALCOHOL, THE

MORE INFORMATION HE HAD AT THAT TIME WITH THE WITH ALCOHOL , I BELIEVE HIS WORDS WERE THAT IT OBLITERATED FOSTER'S ABILITY TO UNDERSTAND WHAT HE WAS DOING.

I WAS UNDER THE IMPRESSION THAT HE MENTIONED TWO OF THEM, THAT EVEN THIS ABILITY TO FUNCTION WAS EVEN HIS ABILITY TO FUNCTION WAS ON ALONG THE RETARDED SIDE , AND THERE MAY HAVE EVEN BEEN SOME FIGHT ABOUTTHE IQ, BUT ARGUABLY , WAS THERE ANY DISCUSSION ABOUT WHEN THIS REGARD OWES OR MEDICAL WHEN THIS A ROSE OR MEDICAL RECORDS BEFORE 18 OR I S THIS NOT ANYTHING T O TALK ABOUT?

IT WAS RAISED IN THE CONTEXT OF IT HAVING OCCURRED PRIOR TO HIM BEING 18, AND I BELIEVE THE PROSECUTOR IN HIS CROSS-EXAMINATION OF DR . DEE , AT THE EVIDENTIARY HEARING , INDICATED THAT WE AGREE THAT IT HAPPENED BEFORE HE TURNED 18 , BUT WITH THIS COURT'S REVIEW, PREVIOUS REVIEW AND THE FACT THAT THE OPINION OF THIS COURT REGARDING THAT MENTAL RETARDATION ISSUE , WE DID NOT FEEL AT THAT POINT IN TIME , THAT

WHAT DID WE SAY , REGARDING MENTAL RETARDATION ?

IT WAS JUST DISCUSSED AS A MIGHT GHAT OR , WASN'T IT? MITIGATOR , WASN'T IT?

IT WAS DISCUSSED AS A MITIGATOR.

WHAT DID THIS COURT SAY ABOUT MENTAL RETARDATION?

MENTAL RETARDATION ? I MEAN, YOU COULD PARAPHRASE.

MY RECOLLECTION , WITHOUT GOING THROUGH THE ENTERDECISION, IS THAT IT WAS BORDERLINE AND THAT IT WAS WITHIN THE COURT'S DISCRETION WHETHER TO GIVE OR NOT GIVE THE MENTAL INSTRUCTION OR THE MENTAL MITIGATORS IN THIS CASE, WHICH IT DID NOT D O . THE TRIAL COURT REFUSED TO INSTRUCT ON MENTAL MITIGATORS, ALTHOUGH IT DID STATE , IN ITS INSTRUCTION TO THE JURY THAT, FOSTER WAS PARAPHRASING , HAD? COMPROMISE IN HIS - - PARAPHRASING, HAD SOME COMPROMISE IN HIS MEDICAL CONDITION.

CHIEF JUSTICE: IF YOU WANT TO TAKE A LOOK AT THAT FOR REBUTTAL , YOU ARE IN YOUR REBUTTAL TIME . MS. DAVIS.

MAY IT PLEASE THE COURT. MY NAME IS BARBARA DAVIS AND I REPRESENT THE STATE OF FLORIDA.I HAVE JUST ADDRESSED THE CLAIMS THAT YOU HAVE ASKED HIM QUESTIONS ABOUT.

COULD YOU , THE LAST ISSUE OF AN ABSENCE CLAIM , IS THIS SOMETHING THAT HAS ALREADY BEEN DECIDED OR IS HE ABLE UNDER OUR RULE , TO BE TBL TO RAISE THAT UNDER THE NEW RULE ON, A SEPARATE SUCCESSIVE MOTION?

ARE YOU REFERRING TO THE PROPOSED NEW RULE 3.203?

CORRECT.

THAT WOULD BE IN EFFECT IN OCTOBER , CORRECT? MY , THE STATE'S POSITION IS THAT HE WOULD BE UNDER SECTION 4-D , AND H E HAS ALREADY HAD A HEARING ON THAT. HE WAS

DID HE REALLY HAVE A HEARING ON THIS , AS FAR AS REALLY LOOKING FOR WHAT THAT IS DESIGNED TO DO? BEFORE IT WAS DISCUSSED AS A MITIGATE OR , WAS IT NOT?

YES .

WHY SHOULD THIS NOT BE WITH PREJUDICE TO , WHATEVER WE DO , I F THERE IS SOMETHINGTHERE THAT IS LEGITIMATE AND IT COULD BE PRESENTED , THAT IT SHOULD NOT BE

PERMITTED TO UNDER THE NEW RULE?

THERE ISN'T ANYTHING THERE THAT IS LEGITIMATE, AND DR. DEE ADMITTED THAT AT THE EVIDENTIARY HEARING. WHAT DR. DEE WAS TESTIFYING ABOUT WAS MENTAL RETARDATION OR THE BORDER LINE INTELLECTUAL FUNCTIONING BUTTHERE IS NO BORDERLINE MENTAL RETARDATION . AS THAT GOES TO DIMINISHED CAPACITY AND AS THAT WOULD AFFECT THE VOLUNTARY INTOXICATION DEFENSE , BUT THEY EXHAUSTIVELY EXPLORED THE ENTIRE MENTAL RETARDATION ISSUE , AS FAR AS WHAT IS THE STANDARD THAT IS REQUIRED , THE THREE ELEMENTS , WHETHER THERE WAS ANY EVIDENCE OF ONSET BEFORE AGE18 , WHETHER DR . DEE FELT THE ADAPTIVE FUNCTIONING WAS THERE , AND THE TRIAL JUDGE ACTUALLY DISCREDITED THAT TESTIMONY , AS FAR AS ADAPTIVE FUNCTIONING , BECAUSE

CLEAR U P FOR US , IF YOU WOULD , BECAUSE THERE IS A LITTLE CONFUSION , BOTH IN THE BRIEFS AND , PERHAPS , IN THE RECORD, TOO , WAS THERE A SEPARATE ATKINS CLAIM SET OUT IN THE MOTION FOR POST-CONVICTION RELIEF?

WHAT HAPPENED I S , AFTER THE EVIDENTIARY HEARING WAS IN JANUARY AND FEBRUARY. ATKINS WAS DECIDED I N JUNE . AND WE ARE IN 2002 NOW. THE JUDGE RENDERED HIS FINAL ORDER IN JULY , AND AT THE END OF JULY , THEY RAISED A MOTION FOR REHEARING , SAYINGTHAT HE WAS ENTITLED TO A NEW TRIAL UNDER BOTH RING AND ATKINS . RING , OF COURSE , WAS DECIDED FOUR DAYS AFTER ATKINS , SO THEY FILED A MOTION , REQUESTING A NEW TRIAL UNDER RING AND ATKINS . THE TRIAL JUDGE SAID, WELL , WE JUST HAD A FULL EVIDENTIARY HEARING ON THE MENTAL RETARDATION , AND HE IS NOT RETARDED . HE DOESN'T MEET ANY OF THAT CRITERIA.

HELP US. LET'S GO BACK, AS FAR AS THE EVIDENTIARY HEARING THAT WAS HELD, WAS AN EVIDENTIARY HEARING ON THE COMPETENCY OF COUNSEL CLAIM, WITH REFERENCE TO THE PENALTY PHASE AND SUBMITTING EVIDENCE ABOUT MENTAL HEALTH. IS THAT CORRECT?

YES.

OKAY. IT WASN'T AN ATKINS MENTAL RETARDATION CLAIM.

NO.

OKAY . BUT AT THAT HEARING , THE ISSUE OF MENTAL RETARDATION WAS FULLY EXPLORED ?

YES.

IS THAT BECAUSE ARESAYING?

YES.

IS THAT IS THAT , AS A MATTER OF FACT , THE JUDGE TOOK IT AS AN ISSUE , AS TO WHETHER OR NOT THE DEFENDANT WAS MENTALLY RETARDED . THERE WAS EVIDENCE PRESENTED , AND THE JUDGE CONCLUDED THAT , UNDER ANY TEST FOR MENTAL RETARDATION , THAT THIS DEFENDANT WAS NOT MENTALLY RETARDED. IS THAT WHAT HAPPENED?

WHEN , AT THE TIME OF THE HEARING , THE , THEY WERE PRESENTING MENTAL RETARDATION AS IT GOES TO DIMINISHED CAPACITY /VOLUNTARY INTOXICATION DEFENSE IN THE GUILT PHASE.

I SEE. SO THAT EVIDENCE WASN'T, THEN, A S TO MITIGATION PUT ON BY DEFENSE COUNSEL. IT WAS AS TO WHETHER OR NOT DEFENSE COUNSEL HAD DONE AN ADEQUATE JOB DURING THEGUILT PHASE?

AND THEY ALSO WERE PRESENTING IT, BECAUSE THEY THOUGHT THAT THE , THERE SHOULD HAVE BEEN EXTREME EMOTIONAL, AS THE STATUTORY MITIGATOR.

SO THEY WERE PRESENTING IT, THEN, AS IT AFFECT ED THE PENALTY PHASE TO PERFORMANCE OF COUNSEL.

YES , AND REMEMBER THAT THERE WERE EIGHT OR NINE CLAIMS THAT WENT TO THE JUDGE AT THE EVIDENTIARY HEARING. THE CLAIM , THE VOLUNTARY TOX INDICATION /EVIDENCE THE VOLUNTARY INTOXICATION /EVIDENCE IN THE EVIDENTIARY CLAIM

IT SEEMS TO ME THAT AT ONE TIME THE JUDGE TOOK THE POSITION THAT THE ATKINS EVIDENCE WASN'T RETROACTIVE AND THE POSITION HERE I BELIEVE YOU HAVE ARGUED, THAT ATKINS I S NOT RETROACTIVE. AND

YES.

OF COURSE WE HAVE HELD THAT ATKINS I S RETROACTIVE. IS THAT CORRECT? HAVE I OUTLINED CORRECTLYWHAT, THE TRIAL JUDGE BELIEVED THAT ATKINS WAS NOT RETROACTIVE AND THE STATEHAS TAKEN THE POSITION THAT ATKINS IS NOT RETROACTIVE AND WE HAVE HELD THAT I T IS RETROACTIVE?

I DON'T KNOW OF ANY CASE WHERE YOU HAVE HELD THAT IT IS RETROACTIVE .

WE HAVE EFFECTED A RULE WHERE ATKINS IS RETROACTIVE . DID WE NOT?

MY UNDERSTANDING IS THAT THE RULE WILL BECOME EFFECTIVE IN OCTOBER AND POSSIBLY REENACTED . IN ANY CASE, EVEN I F ATKINS WAS RETRO AFKT AND THIS RULE WERE ENACTED - - RETROACTIVE AND THIS RULE WERE ENACTED , UNDER SECTION 4-D , HE HAD RULED ON THE POSTCONVICTION MOTION BUT IT HAD NOT BEEN APPEALED. HE RAISED THAT IN A MOTION IN THAT SECTION D. THE JUDGE CONSIDERED THAT ISSUE , AND H E DISCARDED IT , BECAUSE NUMBER ONE , THERE IS NO GOOD FAITH BASIS FOR MENTAL RETARDATION, AND I THINK MR . BANKOWITZ JUST TOLD YOU THAT , IS THAT DR . DEE AT THE HEARING , SAID , OUT OF 75 AT A 75 , YOU MIGHT CONSIDER RETARDATION , BUT IN THIS CASEY HIM RELUCTANT TO FIND THAT, BECAUSE YOU DON'T HAVE IN THE SCHOOL RECORD , YOU DON'THAVE THAT ONSET BEFORE AGE18. THE ADAPTIVE FUNCTIONING , AND HE SAID, YOU KNOW , THERE ARE SIGNS OF ADAPTIVE FUNCTIONING THAT COULD BE DEFICIENT , BECAUSE HE DIDN'T , HE HAD THIS SPORADIC CHILDHOOD.

OKAY. THE JUDGE MADE THE FINDINGS. WHAT I AM CONCERNED ABOUT IS WHETHER OR NOT THE JUDGE DID MAKE FINDINGS OF FACT

YES.

THAT IN ESSENCE SAID , UNDER ANY TEST FOR MENTAL RETARDATION , WHETHER IT IS A THREE-PART OR A SIX-PART OR A 90-PART OR WHATEVER, THE JUDGE MADE A DETAILED FINDINGS OF FACT , BASED O N THE EVIDENTIARY HEARING , OPPOSE THE CONVICTION RELIEF , THAT SAID THIS DEFENDANT WOULD NOT QUALIFY.

YES, SIR. AND THAT IS IN YOUR RECORD AT 617 IN THIS RECORD, AND HE QUOTES DR . DEE AS FAR AS WHAT , EXACTLY , DR . DEE'S TESTIMONY WAS. HE SETS OUT THE CRITERIA . HE TALKS ABOUT THE - -

YOU ARE TALKING ABOUT IN THE ORDER O F DENIAL?

YES, SIR , IN THE ORDER.

WHAT PAGE?

ON THE ORDER, PAGE TWO , HE STARTS ON PAGE TWO ON THE ATKINS CLAIM , BECAUSE THIS ALSO DENIED THE RING CLAIM. STARTS ON PAGE TWO.

YOU SAID THAT THE APPELLANT HAS RAISED THIS ISSUE ON APPEAL THAT , ISTHAT THE ATKINS CLAIM SHOULD NOT HAVE BEEN DENIED.

YES. YES. I WOULD SAY THAT HE HAS SUFFICIENTLY RAISED THIS, AND BECAUSE HE WAS , IF YOU TAKE THE PROPOSED RULE , AND WE ARE IN THAT CATEGORY WHERE IT HAS BEEN DENIED , BUT IT HAS NOT YET BEEN APPEALED, SO HE FILED THE MOTION , AND HE RAISED THIS ISSUE , AND THE JUDGE SAID , MADE A RULING ON THE MERITS , AND HE SAID , BUT, WE HAD A HEARING ON THIS. THAT WAS FULLY EXPLORED . DR . DEE WAS THERE. HE WAS TESTIFY IN G ABOUT MENTAL RETARDATION , ALBEIT AS TO MITIGATING OR GUILTPHASE ISSUES , BUT HE WAS CROSS-EXAMINED FULLY , AND THEN REDIRECT EXAMINED AND THEN CROSS-EXAMINED AGAIN.

DEFENDANT HASN'T MADE ANY CLAIM HERE THAT HE HAS ANY ADDITIONAL EVIDENCE ON THIS ISSUE.

NO, SIR. NO, SIR. JUST OPPOSITE.I THINK THAT THERE IS NOT .

IT LOOSE LIKE , I AM LOOKING AT THE JUDGE'S ORDER THAT ACTUALLY SPENDS SUBSTANTIAL TIME TALKING ABOUT THE DEFENDANT 'S CANNOT BE EXECUTED BECAUSE HE IS MENTALLY RETARDED . EXECUTION FOR MENTALLY RETARDED IS PROHIBITED BY ATKINS AND THEN GOES THROUGH ALL OF THE EVIDENCE. IS THAT WAUR REFERRING TO?

YES, SIR. I MEAN YES, MA'AM.

COULD YOU GO ON THIS ISSUE ABOUT WHETHER THIS NEWLY-DISCOVERED EVIDENCE CLAIM AND THE SOCIAL WORKER'S AFFIDAVIT AND HOW THAT WAS PRESENTED TO THE TRIAL COURT. THE DEFENDANT SAYS HE WASN'T LOOKING FOR A CONTINUANCE. HE JUST WANTED TO BE ABLE TO RAISE WITHIN THE CONTEXT OF THE EVIDENTIARY HEARING.

YES. WELL , FIRST OF ALL , MR . SMALLWOOD AND MR . KELLY WERE AT THE EVIDENTIARY HEARING. THEY WERE AVAILABLE. THEY TESTIFIED ABOUT EVERYTHING. THERE WAS NO REASON THAT THEY DIDN'T PROFFER THIS. IT WOULD HAVE TAKEN ONE QUESTION. ASK THE JUDGE, I WANT TO PROFFER THIS BECAUSE I DID THIS MOTION TO AMEND. YOU DENIED T I NEED TO PROFFER THIS FOR MY RECORD ON APPEAL. THEY NEVER ASKED , AND THE TWO DEFENSE ATTORNEYS WERE SITTING RIGHT THERE . SECONDLY , THE, IT IS A SUCCESSIVE MOTION THAT THEY RAISED, AND THEY ARE SAYING IT IS NEWLY -DISCOVERED EVIDENCE. HOWEVER , THEY ARE BARRED, NOT ONLY BY THE ONE-YEAR TIME RULE , BUT THEY FILED IT SEVEN DAYS BEFORE

LET'S GET , WHAT I AM TRYING TO UNDERSTAND IS THE NATURE OF THE CLAIM. WE ARE SAYING THAT THE DEFENSE LAWYER HAD SUPPOSEDLY SAID THAT IT WASN'T WORTH PUTTING ON MITIGATION TESTIMONY. HOW WAS THE CLAIM , WAS IT JUST , THE SOCIAL WORKER'S AFFIDAVIT , LET'S ASSUME SHE TESTIFIED TO THAT AT THE EVIDENTIARY HEARING. I MEAN, I GUESS THIS IS SORT OF A FRIENDLY QUESTION. WHAT WOULD THIS HAVE RELATETODD, IN TERMS OF THE PRESENTATION O F SUBSTANTIVE CLAIMS?

NOTHING. BECAUSE THEY HAVEN'T MADE ANY SPECIFIC ALLEGATIONS HOW THIS RACIAL BIAS SO INFECTED THIS PROCEEDING.

HOW DID THEY ARGUE THIS TO THE JUDGE , IF THEY DID?

THEY DID A MOTION TO AMEND. THEY ASKED FOR LEAVE TO AMEND. IT WAS A MOTION FOR

LEAVE TO AMEND. THEY ASKED TO AMEND .

WAS LEAVE TO AMEND GRANTED?

NO, SIR .

AND WHAT DID THEY ASK TO AMEND TO SAY?

THEY JUST ASKED TO , THEY ASKED T O AMEND WITH THE AFFIDAVIT OF MS. VOGELSANG. NOT WITH A CLAIM O R THEY JUST SAID WE HAVE GOT EVIDENCE, AN AFFIDAVIT, AND SHE SAYS THIS IN THE AFFIDAVIT , AND THEY ATTACHED THE AFFIDAVIT.

WAS THERE AN ORAL PRESENTATION TO THE TRIAL COURT JUDGE, O F WHAT THEY WANTED TO DO WITH THE AFFIDAVIT? AND HOW IT WAS RELEVANT TO ANY INEFFECTIVE NESS CLAIMS?

NO, SIR. NOT THAT I KNOW OF , BECAUSE THERE WAS NOTHING IN THE RECORD ABOUT THIS , UNLESS IT HAPPENED. THIS WAS FILED ONE WEEK BEFORE THE HEARING. THE STATE RESPONDED . THE ORDER WAS ISSUED THE DAY OF THE HEARING. AND IN MY RECORD , THERE WAS , THERE WAS NOTHING THAT I HAD THAT THEY ARGUED IT , UNLESS THERE WAS , AND MR . BANKOWITZ WOULD KNOW WHETHER THERE WAS SOME LITTLE OUTSIDE HEARING BEFORE WE WENT ON THE RECORD.

BASICALLY IF WE TOOK THE AFFIDAVIT AS TRUE, THIS WOULD NOT MEET THE SECOND PRONG O F JONES OR STRICKLAND. IT WOULD BE OUT THERE AS A STATEMENT THAT RELATES TO NOTHING, IN TERMS OF THE DEFENSE LAWYER'S PERFORMANCE.

PRECISELY. PRECISELY. AND IF THERE IS N O QUESTIONS ON ISSUE ONE , I WOULD JUST LIKE TO POINT OUT THE STATEMENT IN THE PATROL CAR , THAT WAS EXHIBIT 7 AT OUR HEARING, AND I THINK YOU HAVE THE EXHIBITS , IF YOU WANT TO SEE WHAT THAT WAS BTHAT WAS WHERE FOSTER AND BOOKER WERE DISCUSSING SETTING UP A VOLUNTARY INTOX DEFENSE , SO THAT HE COULD GET OFF OF THE CRIME.

WHAT DID THE DEFENSE LAWYER TESTIFY TO, WITH REFERENCE TO THIS ISSUE ? THAT I S HE WAS QUESTIONED ABOUT THIS, WAS HE NOT?

YES.

WHAT WAS HIS TESTIMONY? HE GOT AN INSTRUCTION FROM THE COURT.

YES.

HE CROSS-EXAMINED SOME WITNESSES . HE MENTIONED IT , I EASTBOUND LEAVE IN HIS OPENING STATEMENT.

YES. I BELIEVE , IN HIS OPENING STATEMENT.

YES.

WHAT WAS , IF HE WAS ASKED FOR ACTION PLANATION OF WHY HE DIDN'T - - FOR AN EXPLANATION OF WHY HE DIDN'T PRESENT MORE EVIDENCE ABOUT INTOXICATION OR PERHAPS HAVE AN EXPERT TALK ABOUT IT OR ARGUE IT MORE VIGOROUSLY DURING THE GUILT PHASE? WAS HE ASKED ABOUT ALL THOSE THINGS?

YES , HE WAS.

WHAT WAS HIS TESTIMONY?

HE DID ARGUE IT VIGOROUSLY. HE DID PRESENT TESTIMONY . THE GIRLFRIEND OF CATHOLIC , LESHAWN. SHE TESTIFIED ABOUT THEM DRIVING TO THE CLUB IN THE CAR, PASSING AROUND THE BOTTLE OF BRAND Y AND THE COAX , SMOKING MARIJUANA. MR . BEHIND ARE SON WAS ONE OF THE TWO DEFENDANTS WHO PLED AND AGREED TO TESTIFYFOR THE STATE. HE TESTIFIED THAT THEY WOULD SMOKE MARIJUANA ALL DAY LONG , THAT THEY WERE DRINKING AT THE CLUB THAT MR . FOSTER WAS HIGH. THAT WAS THE WORDS H E USED . IN CLOSING ARGUMENT , DEFENSE COUNSEL ARGUED IT IN BOTH THE CLOSINGS AND THE REBUTTAL CLOSING ARGUMENT , THAT MR. FOSTER WAS NOT CAPABLE O F PREMEDITATION , BECAUSE HE WAS DRUNK. HE SAID , AS ANDERSON SAID,HE WAS DRUNK. HE COULD NOT FORM THE INTENT TO PREMEDITATE OR TO ULTIMATELY KILL THEM, AND HE PRESENTED THE EVIDENCE OF GWEN AND HENDERSON , AND THAT WAS WHAT WAS AVAILABLE. AT THE HEARING , THEY TESTIFIED THEY DEPOSED ALL OF THE PEOPLE THAT WERE IN THE CAR , ALL, THIS WAS THE BEST EVIDENCE THEY COULD HAVE. THE ALF CATHOLIC WAS THE CODEFENDANT SITTING WITH HIM AT TRIAL , WHO TESTIFIED AT THE HEARING AND SUPPLIED MORE INFORMATION. MR. BOOKER HAD PLED BUT HAD NOT GONE TO HIS PENALTY PHASE YET , AND HE WENT TO PENALTY PHASE BEFORE THE JUDGE , AFTER THIS TRIAL. THAT WAS THE TESTIMONY THAT WAS PRESENTED AT THE HEARING, AND THAT DR . LIPPMAN BASED HIS RETROGRADE EXTRAPOLATION ON , TO GET THE BLOOD ALCOHOL CONTENT , BUT THEY DID FULLY INVESTIGATE.THAT THEY FOUND AS MUCH EVIDENCE AS THEY COULD , AND THEY DID PRESENT THAT . AT THE GUILT PHASE , INSTRUCTION, AND ARGUMENT. IF THERE ARE N O FURTHERQUESTIONS , ILL JUST RELY ON THE BRIEF.THANK YOU.

CHIEF JUSTICE: ONE MINUTE FOR REBUTTAL .

BRIEFLY, AS T O JUSTICE ANSTEAD 'S QUESTION ABOUT HEARING ON THE MOTIONS TO AMEND. ON THE MOTION TO AMEND. THE HEARING WAS NOT ALLOW , IS MY RECOLLECTION , THAT JUDGE JOHNSON DID NOT HAVE HEARING TIME AVAILABLE , AND ON THE DATE OF THE EVIDENTIARY HEARING, HE DENIED THE MOTION, IS MY BEST RECOLLECTION ELECTION OF THAT FACTUAL SITUATION . AND , ALSO , GOING BACK , THIS COURT AGREED WITH THE TRIALCOURT , THAT THE INSTRUCTION REGARDING NONSTATUTORY MITIGATION, NOTING THE DEFENDANT HAD AN ABUSIVE CHILDHOOD , SUFFERED FROM SOME ORGANIC BRAIN DAMAGE , WAS MILDLY MENTALLY RETARDED , SUFFERED FROM SUBSTANCE ABUSE AND WAS TO SOME EXTENT , UNDER THE INFLUENCE OF DRUGS AND ALCOHOL DURING THE MURDERS, BUT DID NOT FIND THAT IT ROSE TO THE LEVEL OF STATUTORY MENTAL MITIGATOR . THAT WAS DEGREED BY THE TRIAL COURT.

YOU AGREE THAT THE CLAIM AS RAISED SHOULD NOT HAVE BEEN DENIED, BUT IN GOOD FAITH, YOU REALLY DON'T HAVE ANYTHING ADDITIONAL THAT YOU CAN OFFER.

ON THE BASIS OF THE DECISIONS FROM THIS COURT, SINCE THAT TIME , I CAN'T , YOUR HONOR .

CHIEF JUSTICE: THANK YOU VERY MUCH . BOTH SIDES . ALL RIGHT.THE COURT WILL BE IN RECESS UNTIL 9:00 A.M. TOMORROW MORNING.