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**David Cook v. State of Florida & David Cook v. James R. McDonough, etc.
SC04-2066 & SC05-1313**

AND CALL THE NEXT CASE OF COOK VERSUS THE STATE OF FLORIDA.

CHIEF JUSTICE: PARTIES READY? IT LOOKS LIKE ONE PARTY IS READY BUT MAKE SURE THAT BOTH PARTIES GET A CHANCE TO PUT THEIR PAPERS DOWN.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS RACHEL DAY AND I AM HERE ON BEHALF OF CRC FOR THE APPELLANT.

CHIEF JUSTICE: I KNOW YOU TEND TO TALK VERY FAST. WE HAVE GOT A LOT OF ISSUES AND THIS IS A VERY OLD CASE, AND IF YOU WOULD TELL THE COURT WHAT ISSUES YOU ARE GOING TO ARGUE THIS MORNING.

WHAT I AM GOING TO ARGUE THIS MORNING IS THE ISSUE THAT WAS REMANDED BACK BY THIS COURT IN THE ORIGINAL SUMMARY DENIAL OF MR. COOK'S 3.851 MOTION, WHICH IS IT IN EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT MR. COOK'S PENALTY PHASE.

JUSTICE: IN FACT THIS CASE WAS REMANDED BACK ON ONE ISSUE. CORRECT?

THAT'S RIGHT. THAT'S CORRECT, YOUR HONOR.

JUSTICE: WHY HAS IT TAKEN FIVE YEARS FOR THE CASE TO GET BACK HERE?

A NUMBER OF REASONS, YOUR HONOR. I AM NOT SURE WHERE, WHY IT TOOK SO LONG TO GET TO AN EVIDENTIARY HEARING BELOW.

JUSTICE: THE STATE SAYS IN THE BRIEF THAT THE DAY THAT THE HEARING WAS FIRST SCHEDULED TO BE HEARD, THERE WAS SOME CHANGE OF EXPERTS. IS THAT WHAT HAPPENED?

NO. NO. THE WITNESSNESS -- THE WITNESS LIST WAS PROVIDED IN A TIMELY FASHION. THE STATE'S EXPERTS WERE NOT PROVIDED TO MR. COOK UNTIL SOME VERY SHORT TIME BEFORE THE EVIDENTIARY HEARING ACTUALLY HAPPENED, IN SEPTEMBER 2003. CERTAINLY I DON'T THINK THERE IS ANY CAUSE OF DELAY ON THE PART OF MR. COOK IN THIS MATTER. MR. COOK APPEARED AT COURT DILIGENTLY. HE DIDN'T HAVE SK FOR ANY CONTINUANCES BELOW. WAS READY WHEN EVERYONE ELSE WAS READY. AS TO REACHING THIS COURT, THIS IS A DADE COUNTY CASE, AND THAT, LIKE WITH MANY DADE COUNTY CASES, THERE HAVE BEEN ISSUES WITH GETTING THE RECORD TOGETHER. THAT IS, JUST SEEMS TO BE A PROBLEM WITH THAT PARTICULAR JURISDICTION.

JUSTICE: DID THE CHANGE OF THE TRIAL JUDGE AND HIS LEAVING THE BENCH, JUDGE CARNY HAVE ANY IMPACT HERE?

NO. IT DIDN'T. JUDGE CARNY DID ACTUALLY DO THE EVIDENTIARY HEARING IN SEPTEMBER AND IN DECEMBER 2003, JUDGE CARNY ISSUED THE ORDER DENYING POST-CONVICTION RELIEF, EXPECTING A LITTLE BIT, ABOUT A YEAR AFTER THE HEARING HAPPENED, AND JUDGE CARNY ENDED UP OFF THE BENCH AFTER THAT, SO THAT HAD NO ISSUE WHATSOEVER TO DO WITH IT.

CHIEF JUSTICE: THE COURT IS QUITE CONCERNED WITH THE DELAY IN THIS CASE AND LOOK AGO WHAT IN -- LOOKING BACK IN 2001, ALTHOUGH I WROTE A CONCURRING OPINION SAYING IT

SHOULDN'T BE EXPEDITED ABOVE ALL OTHER CASES, IN NO WAY WOULD WE ANTICIPATE THIS TYPE OF EXTRAORDINARY DELAY. NOW, OBVIOUSLY IF MR. COOK, LET'S GET ON TO WHAT MR. COOK WANTS TO ARGUE HERE.

YES, YOUR HONOR. MAY I REMIND THE COURT THIS CASE WAS REMANDED BACK FOR AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE IN LARGE PART BECAUSE OF WHAT THE COURT CHARACTERIZED AS VERY SCARCE MITIGATION THAT WAS PRESENTED AT THE ORIGINAL PENALTY PHASE. THE PENALTY PHASE TOOK AN AFTERNOON. IT WAS LESS THAN FOUR HOURS. FOUR HOURS BEFORE IT WAS BILLED FOR THE ACTUAL PENALTY PHASE BY TRIAL COUNSEL MR. CARTER, AND I THINK BOTH THE RECORD OF THE TRIAL AND THE PENALTY PHASE, ITSELF, AND THE HEARING IMMEDIATELY BEFORE THE PENALTY PHASE, PLUS MR. CARTER'S TESTIMONY AT THE EVIDENTIARY HEARING, THE TESTIMONY OF OTHER WITNESSES AT THE EVIDENTIARY HEARING, ALL SUGGEST THAT NO INVESTIGATION WAS DONE INTO THE PENALTY PHASE BY TRIAL COUNSEL, UNTIL AFTER THE GUILT PHASE WAS OVER.

CHIEF JUSTICE: JUST SO WE UNDERSTAND, THE GUILT, BACK IN THESE DAYS THE PENALTY PHASE ACTUALLY DIDN'T START IMMEDIATELY AFTER THE GUILT PHASE?

NO. THAT IS NOT THE CASE IN THIS CASE, YOUR HONOR. WHAT HAPPENED IN MR. COOK'S CASE WAS THAT THE TRIAL, ITSELF, THE GUILT PHASE FINISHED ON A FRIDAY AFTERNOON, FRIDAY THE 9th OF AUGUST, 1985. ON MONDAY, THE JURY, THE JURY WAS SUPPOSED TO REPORT FOR DUTY ON MONDAY FOR THE PENALTY PHASE TO START, AND WHAT HAPPENED ON THE MONDAY, MONDAY THE 12th WAS THERE WAS A LITTLE HEARING WHICH IS ABOUT 20 PAGES LONG WHICH IS A SUPPLEMENT IN THE RECORD OF APPEAL ON THE TRIAL, IN WHICH TRIAL COUNSEL ACTUALLY ASKED FOR THE APPOINTMENT OF A MENTAL HEALTH EXPERT. CLEARLY PRIOR TO THAT POINT HE HAD NOT THOUGHT ABOUT THAT, AND THERE WAS A GOOD DEAL OF BACK AND FORTH BETWEEN TRIAL COUNSEL AND THE COURT, AND THE PROSECUTION, AS TO WHETHER OR NOT THIS WAS NECESSARY, BUT IN THE END ON THAT MONDAY AFTERNOON, AFTER THE GUILTY VERDICT ON THE FRIDAY, TWO MENTAL HEALTH EXPERTS WERE APPOINTED. THE JURY WENT HOME. THE MENTAL HEALTH EXPERT WENT TO THE JAIL, DID THEIR EVALUATION, AND THE NEXT DAY THE PENALTY PHASE HAPPENED WITH SEVERAL LAY WITNESSES AND ONE MENTAL HEALTH EXPERT WHO -- MENTAL HEALTH EXPERT WHO TESTIFIED.

JUSTICE: WAS THERE ANY REQUEST FOR A CONTINUANCE AT THAT MONDAY HEARING?

NO, THERE WAS NOT, YOUR HONOR.

CHIEF JUSTICE: COULD YOU EXPLAIN THE STATUS OF THE INTOXICATION EVIDENCE. IT SEEMS THERE IS DISPUTE ABOUT THAT AND YOUR EXPERTS RELIED VERY HEAVILY, DID THEY NOT, ON THE FACT OF MR. COOK BEING INTOXICATED?

I WOULD NOT SAY REALLY HEAVILY, YOUR HONOR. I THINK IT IS PART OF THE MITIGATION THAT PERHAPS SHOULD HAVE BEEN INVESTIGATED AND WASN'T. I THINK IT BECAME, I THINK THE LOWER COURT LOOKED AT INTOXICATION, PERHAPS TO THE EXCLUSION OF ALL OF THE OTHER MITIGATION THAT WAS PRESENTED AT THE EVIDENTIARY HEARING, BUT, REALLY, THE INTOXICATION IS PART OF THE TOTAL PACKAGE OF MITIGATION THAT RELIES UPON THE SOCIAL HISTORY. THE CHAOTIC NATURE OF THIS FAMILY, THE MOVE FROM NEWARK TO MIAMI AND THE SUBSEQUENT DIFFICULTIES THAT MR. COOK HAD IN HIGH SCHOOL AND HIS PREEXISTING MENTAL HEALTH CONDITIONS. THOSE ARE ALL AN OVERLAY AND FACT THAT HE HAD SUBSTANTIAL ALCOHOL INTOXICATION AT THE TIME OF THE CRIME IS JUST ONE ADDITIONAL FACTOR, ALTHOUGH THE LOWER COURTS SEEMED TO HAVE DONE A GREAT DEAL OF ADDRESSING THAT, TO THE EXCLUSION OF A GREAT DEAL OF THE OTHER --

JUSTICE: WHAT WAS THE EVIDENCE AT THE TIME OF THE ALCOHOL OR COCAINE ABUSE AT THE

TIME THAT THE CRIME OCCURRED?

WELL , THE CODEFENDANT MELVIN MANN , TOLD OUR EXPERT DR . MASH THAT MR . COOK --

JUSTICE: NOT THE EXPERT NOW BUT AT THE TIME OF THE CRIME.

WELL , IF MR . COOK'S ATTORNEY HAD BOTHERED TO SPEAK TO A NUMBER OF MR . COOK'S SIBLINGS , INCLUDING RODNEY COOK , KEVIN COOK , GEORGE HILL AND A NUMBER OF OTHER PEOPLE , HE WOULD HAVE KNOWN THAT MR . COOK HAD A CONTINUING ALCOHOL AND SUBSTANCE ABUSE ISSUE .

JUSTICE: LET ME CUT IT TO THE QUICK HERE. WITHIN THE 24-TO- 36 HOURS BETWEEN THE TIME THE CRIME OCCURRED AND THE TIME THE CRIME WAS HEARD , WHAT EVIDENCE DID YOU PRESENT OR DID COUNSEL KNOW OR SHOULD HAVE KNOWN ABOUT AT THAT TIME ?

NOTHING.

JUSTICE: EXPLAIN THAT TO ME.

MR. MANN EXPLAINED TO THE JURY THAT HE AND MR. COOK HAD DONE SUBSTANTIAL DRUGS BEFORE THE CRIME.

JUSTICE: HAD HE BEEN INTERVIEWED AT A DEPOSITION OR AT THE TIME OF THE TRIAL ?

HE HAD BEEN INTERVIEWED AND HE SAID AT THE EVIDENTIARY HEARING THAT HE HAD BEEN TOLD BY HIS OWN ATTORNEY NOT TO GO INTO THIS , SO HIS TESTIMONY DID CHANGE BEFORE THE EVIDENTIARY HEARING.

JUSTICE: SO WHAT WAS COUNSEL AWARE OF? WHAT WAS THE DEFICIENCY IN COUNSEL'S INVESTIGATION OF THAT WITNESS AT THE TIME OF THE TRIAL IN '85?

YELL , COUNSEL'S DEFICIENCY WAS NOT INVESTIGATING THE OTHER WITNESSES WHO MIGHT HAVE PUT HIM ON NOTICE.

JUSTICE: PLEASE ANSWER MY QUESTION. WHAT WAS THE DEFICIENCY AS TO THAT PARTICULAR WITNESS AT THE TIME?

HE COULD HAVE ASKED THAT, HE COULD HAVE ASKED MORE CERTAIN QUESTIONS OF THAT WITNESS , BUT , YOUR HONOR , WITH RESPECT, ONE HAS TO LOOK AT THE INVESTIGATION AS A WHOLE. ONE HAS TO LOOK AT THE SOCIAL HISTORY , TO SEE WHETHER OR NOT THIS PERSON HAS A SUBSTANCE ABUSE PROBLEM LEADING UP TO THE TIME OF THE CRIME AND THEREFORE WHETHER ONE SHOULD HAVE INVESTIGATED FURTHER AND WITH MORE SPECIFICITY .

CHIEF JUSTICE: I AM HAVING TROUBLE IN THIS CASE. I SEE DEFICIENCY. IT IS HARD NOT TO SEE DEFICIENCY , WHEN HE DOESN'T HAVE ANY BASIS TO CHALLENGE GUILT , SO I AM NOT SURE WHAT HE DID DURING THE GUILTPHASE , AND THEN HE SPENT , HE DOESN'T ASK FOR A MENTAL HEALTH EXPERT UNTIL THE DAY OF THE PENALTY PHASE IS GOING TO BEGIN, BUT HOW ABOUT FOCUSING ON THE PREJUDICE PRONG FOR A FEW MINUTES , JUST AS FAR AS THE PICTURE THAT THE JURY HEARD , THE DOUBLE MURDER , AND THE PICTURE THAT YOU THINK THAT THEY SHOULD HAVE HEARD THAT SHOULD UNDERMINE CONFIDENCE IN THE OUTCOME.

YES, YOUR HONOR. AT THE OUTSET I WOULD ADVISE THE COURT THAT -- ADVISE THE COURT THAT THERE IS ONE DEATH SENTENCE IN THIS CASE AND THAT WAS THE RESULT OF A 8-4 JURY RECOMMENDATION FOR DEATH , SO ONLY LOOKING AT THE POSSIBILITY OF TWO JURORS

RECOMMENDING TO GET A LIFE SENTENCE FOR THIS.

JUSTICE: BUT WE ARE LOOKING AT A DOUBLE MURDER. TWO PEOPLE WERE MURDERED.

INDEED , YES , YOUR HONOR. AND THE OTHER MURDER WAS A 7-5 JURY RECOMMENDATION FOR WHICH --

JUSTICE: HOW IS THE FACT OF ALCOHOL AND DRUG USE GOING TO BE SUBSTANTIAL MITIGATION, SO AS TO CAUSE US TO LOSE CONFIDENCE IN THIS VERDICT IN THE FACE OF TWO MURDERS?

I THINK WE HAVE TO LOOK NOT ONLY AT THE ALCOHOL AND DRUG USE BUT ALL OF THE OTHER MITIGATION EVIDENCE THAT WAS PRESENTED AS WELL , WHICH THE LOWER COURT REALLY DID NOT DO . I THINK IN ADDITION TO THE FACT THAT WE HAVE NOT UNANIMOUS JURY VERDICT OR ANYTHING LIKE IT , WE HAVE A SITUATION IN WHICH THE JURY WAS ERRONEOUSLY INSTRUCTED ON TWO AGGRAVATING CIRCUMSTANCES AT THE TIME OF THE TRIAL , WHICH WERE LATER VACATED BY THIS COURT, THE HEINOUS , ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE AND THAT OF AVOIDING ARREST, SO THAT IS SOMETHING THAT SHOULD BE FACTORED INTO THE EQUATION , TOO.

CHIEF JUSTICE: LET'S GET A PICTURE , WE ARE USING A LOT OF YOUR TIME , JUST PICTURE THIS IS WHAT A JURY HEARD. THIS IS WHAT THEY SHOULD HAVE HEARD. DIRECTLY IMPACTING HOW THIS MURDER OCCURRED , BECAUSE YOU CAN HAVE ALL OF THIS OTHER STUFF OUT THERE , IT IS GOING TO BE WHAT IS IT THAT IS GOING TO MITIGATE AGAINST IMPOSING THE DEATH PENALTY IN A DOUBLE MURDER SITUATION ?

AGAIN , I THINK YOU HAVE TO LOOK AT ALL OF THE OTHER MENTAL HEALTH MITIGATION.

CHIEF JUSTICE: SO TELL US IN YOUR BEST LIGHT, WHAT IS IT, ALL THIS GREAT MENTAL HEALTH MITIGATION AND MENTAL MITIGATION THAT YOU SAID THAT MR . CARTER SHOULD HAVE INTRODUCED.

I THINK, AGAIN , WE NEED TO LOOK AT THE CONTEXT OF MR. COOK'S LIFE AND SOCIAL HISTORY. THE WHOLE KEY ON THE -- CHAOTIC FAMILY ENVIRONMENT , COMING FROM NEWARK , THE FACT THAT HE SUFFERED FROM MAJOR DEPRESSION THROUGHOUT HIS LIFE. HE HAS POST-TRAUMATIC STRESS BASED ON THE ENCOUNTERS IN NEWARK. THAT ALL IS FACTUAL AND SOCIALLY UNACCEPTABLE .

JUSTICE: NOW , THERE WERE COMPETING EVIDENTIARY WITNESS AT THE STATE HEARING , CORRECT?

THE STATE PUT ON TWO PSYCHOLOGIST, YOUR HONOR.

JUSTICE: AND THE COURT FOUND THAT THERE WAS NO DEFICIENCY, IS THAT CORRECT?

THE COURT --

JUSTICE: THE COURT BELIEVED THE STATE'S MENTAL HEALTH EXPERTS AND NOT YOURS , CORRECT?

WELL , IT IS QUITE HARD TO DETERMINE WHAT THE COURT REALLY DID BELIEVE BECAUSE THE ORDER IS WRITTEN IN A STRANGE LANGUAGE.

JUSTICE: SINCE THE COURT DENIED YOUR POSTCONVICTION MOTION, IT SEEMS LIKE WE HAVE TO TAKE THAT , THE FACTS IN THE LIGHT MOST FAVORABLE TO THE STATE AS PRESENTED AT THE

EVIDENTIARY HEARING. SO MY QUESTION IS, WHEN YOU ARE DESCRIBING THE FACTS TO US ABOUT WHAT YOU PRESENTED AT THE EVIDENTIARY HEARING THAT WAS NOT PRESENTED AT TRIAL, IT SEEMS ALIKE YOU SHOULDN'T BE STATING YOUR MENTAL HEALTH EXPERT'S TESTIMONY THAT CONTRADICTED THE STATE'S MENTAL HEALTH EXPERT'S TESTIMONY. YOU SEE WHAT I AM SAYING.

I SEE WHAT YOU ARE SAYING, YOUR HONOR, BUT WITH RESPECT, I DON'T THINK IT IS QUITE AS SIMPLE AS THAT, THE REASON BEING THAT THE STATE PRESENTED TWO PSYCHOLOGISTS, ONE, DOCTOR SUAREZ, CALLS HIMSELF A NEUROPSYCHOLOGIST BUT ACTUALLY DID NO NEUROPSYCHOLOGICAL TESTING. IN CONTRAST TO MR. COOK'S EXPERT, ONE OF THEM A NEUROLOGIST WHO FOUND HARD EVIDENCE OF A NEURODEVELOPMENTAL DISORDER AND THE OTHER WAS A NEUROPSYCHOLOGIST WHO DID TEST FRONTAL LOBE FUNCTIONING AND FOUND HE HAD FRONTAL LOBE DYSFUNCTION. DR. SUAREZ WAS AN OXYMORON'S TESTIMONY. HE SAID HE DIDN'T FIND SIGNS SO DID NO PSYCHOLOGICAL TESTING.

JUSTICE: YOU ARE TRYING TO DESTROY THE CREDIBILITY OF THE STATE'S WITNESSES, BUT IT SEEMS TO ME THAT THAT DETERMINATION OF CREDIBILITY HAS BEEN MADE BY THE TRIAL JUDGE AND WE NEED TO RESPECT THAT, SO WHAT YOU ARE SAYING THAT THE EVIDENCE THAT YOU PRESENTED AT THE EVIDENTIARY HEARING THAT WAS NOT PRESENTED AT TRIAL, IT SEEMS TO ME THAT YOU HAVE TO LIMIT YOURSELF TO THE UNDISPUTED TESTIMONY.

CERTAINLY WE CAN TALK ABOUT THE UNDISPUTED LAY TESTIMONY WHICH WAS COMPLETELY UNCONTROVERTED TOO MR. COOK'S SOCIAL HISTORY, THE POLICY OF ABUSE, HORRIFIC RIOT CONDITIONS, THE WAR ZONE THAT HE EXPERIENCED, THE FACT THAT HIS FAMILY CAME TO FLORIDA ALMOST UNDER SIEGE, AND YOU HAVE TO LOOK AT THE FACT THAT PEOPLE IN HIS FAMILY ALL SUFFERED. THIS ISN'T THE CASE OF ONE PERSON OUT OF TEN CHILDREN WHO HAVE TROUBLE WITH THE LAW AND THE REST OF THE FAMILY LIVED BLAMELESS LIVES. MR. COOK AND HIS FIVE BROTHERS, FOUR OF THE BROTHERS WERE INCARCERATED FOR MAJOR, MAJOR FELONIES.

CHIEF JUSTICE: I YOU MEAN FINDING THAT -- I AM FINDING THAT QUITE, I AM NOT SURE HOW A JURY, REALLY, WOULD FIND THE FACT THAT OUT OF ALL, EVERYBODY IS IN PRISON, AS BEING SOMETHING THAT WOULD BE MITIGATING TO THE MURDERS. WHAT IS IT, THIS IS WHAT I WAS MORE INTERESTED IN IS THIS SEEMS TO HAVE BEEN AN UNPLANNED MURDER. THIS IS A MAN THAT HAD NO SIGNIFICANT HISTORY OF, CRIMINAL HISTORY.

CORRECT.

CHIEF JUSTICE: WHICH PUTS IT IN CONTRAST TO A LOT OF THE OTHER CASES. AS YOU SAID, THE TWO AGGRAVATORS WERE HAC AND A VOID ARREST, SO IT WAS MURDER DURING THE COURSE AFTER ROBBERY. WHAT IS IT THAT HIS EXPERTS SAID ABOUT MENTAL STATE THAT WOULD HAVE ALLOWED A JURY TO SAY ALTHOUGH THIS IS A TERRIBLE MURDER, THIS WAS MORE NOT BECAUSE HE GREW UP IN NEWARK BUT BECAUSE OF SOMETHING IN HIS FUNCTION, HIS MENTAL FUNCTIONING. JUST HOW DID THEY RELATE IT TO ACTUAL MURDER, AS OPPOSED TO SAYING, YOU KNOW, A GAIN, A SOCIAL HISTORY OF GROWING UP IN NEWARK -- IN NEWARK AND THEN COMING DOWN TO FLORIDA AND HAVING THE RIOTS THERE.

HE HAD AN UNDERLYING HISTORY OF DEPRESSION, WHICH IS LONG STANDING.

CHIEF JUSTICE: HOW IS THAT, WERE THERE MEDICAL RECORDS OF DEPRESSION OR HUPS THAT DOCUMENTED? ANOTHER DOCTORS DETERMINED THAT BY INTERVIEWING HIS FAMILY MEMBERS AND SOME RECORDS, YES.

CHIEF JUSTICE: HOW DOES DEPRESSION END UP WITH DAUBLMURDER?

THAT MAKES HIM -- WITH A DOUBLE MURDER?

THAT MAKES HIM PARTICULARLY SUSCEPTIBLE TO THE SUBSTANCE ABUSE IS SUE. HE HAS GOT A WELL-DOCUMENTED LEARNING DISABILITY FROM A VERY EARLY LEARNING AGE, WHICH IS -- CHIEF WERE THERE SCHOOL RECORDS THAT SHOWED THAT?

CERTAINLY HIS RECORDS OF PERFORMANCE SHOWED THAT HE HAD DIFFICULTY. WE HAVE TESTIMONY THAT HIS YOUNGER COUSIN WAS HELPING WITH HIS SCHOOLWORK, HIS YOUNGER COUSIN WHO WAS TEN YEARS YOUNGER THAN HIM.

JUSTICE: LET ME ASK YOU THIS QUESTION, IN THIS VERY BRIEF EVALUATION BEFOREHAND, WHAT WAS THE EXPERT THAT DID LOOK AT THE DEFENDANT AND WHAT DID DEFENSE COUNSEL KNOW ABOUT THIS? WERE THESE OBVIOUS MENTAL PROBLEMS OR WAS IT SELF-REPORTED, THIS HORRIFIC BACKGROUND REPORTED BY THE DEFENDANT TO COUNSEL?

IT WAS NEVER REPORTED BECAUSE COUNSEL NEVER ASKED IT.

JUSTICE: COUNSEL NEVER ASKED WERE YOU HIGH ON COCAINE OR ALCOHOL AND THE DEFENDANT NEVER TOLD HIM I DON'T KNOW WHAT I WAS DOING, I DON'T REMEMBER WHAT WAS HAPPENING, I WAS SO INTOXICATED.' TOLD MARY HABER ABOUT THIS. SHE WAS --

HE TOLD MARY HABER ABOUT THIS. SHE WAS TORN TO SHREDS ON CREATION BECAUSE SHE HAD NO BACK UP WHATSOEVER. IT WAS BASED ENTIRELY MR. COOK'S SELF REPORTING. YOUR HONORS, IF I COULD SAVE THE REMINDER OF MY TIME FOR REBUTTAL, THAT WOULD BE A GOOD PLACE. THANK YOU.

MAY IT PLEASE THE COURT. MARGARITA SAME DeVILLE AN ON BEHALF OF THE -- MARGARITA CIMADEVILLA ON BEHALF OF THE STATE. I DON'T THINK THAT MS. DAY REALLY ADDRESSED YOUR QUESTION AS TO THE REASON WHY THE CODEFENDANT WAS NOT SO INCREDIBLE AT THE EVIDENTIARY HEARING. HE WAS IN FACT CALLED BY THE DEFENSE AT TRIAL, AND HE WAS SPECIFICALLY ASKED ABOUT INTOXICATION. HE RESPONDED THAT HE AND BO HAD SENIORITY ADD GRAHAM OF COCAINE. HE DID NOT SAY ANYTHING ABOUT THE OTHER DEFENDANT HAVING SNORTED COCAINE AND HE WAS SPECIFICALLY ASKED ABOUT LIQUOR AND HE DENIED HAVING CONSUMED LIQUOR.

JUSTICE: THAT WAS THE TESTIMONY AT TRIAL?

THAT WAS THE TESTIMONY AT TRIAL. HE WAS CALLED BY THE DEFENSE.

JUSTICE: WHAT WAS SAID ABOUT WHETHER OR NOT THE DEFENDANT HAD CONSUMED ALCOHOL OR TAKEN DRUGS?

HE WAS ASKED, HE WAS NOT SPECIFICALLY ASKED, THE CODEFENDANT, I AM SORRY, IF MR. COOK HAD SOME LIQUOR, BUT HE WAS ASKED IN GENERAL ABOUT SNORTING COCAINE, AND HE SAID ME AND BO SNORTED COCAINE. AT THE EVIDENTIARY HEARING, HE VARIES GREATLY NOT ONLY AS TO THE AMOUNT OF INTOXICATION -- INTOXICATION BUT OTHER FACTS AS WELL. HE SAID AT TEN IN THE MORNING, WHEN CLEARLY AT TRIAL HE STATED IN THE DEPOSITION THAT THEY HAD GONE TOGETHER AT NIGHT, SO THERE WERE CLEARLY CREDIBILITY PROBLEMS AS TO HIM.

JUSTICE: WHAT DOES JUDGE CARNEY'S ORDER THAT OF THE 22d OF SEPTEMBER, WHERE HE SAYS THAT THE QUESTION REMAINING IS ALSO GOVERNED BY THE THOUGHT THAT THE EVIDENCE SHOWS HIM CLEARLY MORE INTOXICATED THAN HE THOUGHT THAT HE WAS. THE EVIDENCE SHOWED HIM COMPLAINING THAT AT THE GUILT PHASE HE DRANK AN ENORMOUS AMOUNT OF ALCOHOL, DID SEVERAL LINES OF COCAINE AND SMOKED SEVERAL MARIJUANA CIGARETTES TO

ESTABLISH SOME SORT OF INTOXICATION DEFENSE.

YES , YOUR HONOR. THE DEFENDANT NOT ONLY TESTIFIED AT THE PENALTY PHASE, BUT HE ALSO HAD TOLD DR. HABER WHO ALSO TESTIFIED IN THE PENALTY PHASE THAT H E HAD SENIO RITY ADD GRAHAM OF COCAINE WITH THE DEFENDANTAND THAT HE HAD CONSUMED A FIFTH OF RESUME.

JUSTICE: DID THE DEFENDANT TESTIFY TO T HIS?

AT THE PENALTY PHASE.

JUSTICE: AT THE PENALTY PHASE?

AT THE PENALTY PHASE .

JUSTICE: IS HE TALK ING ABOUT THE GUILT PHASE, THEJUDGE S.

I BE LIEVE THAT MAY HAVE BEEN A MI STAKE . AT THE PENALTY PHASE HE TESTIFIED.THE COD EFENDANT WAS ASKED ABOUT THE INTOXI CATION IN THE GU ILT PHASE.

CHIEF JUSTICE: YOU HAVEGOT A DEFENDANT , LET'S TA LK ABOUT YOU HAVE GOT A DEFENDANT WHO CONFESSED TO THE CR IME.

YES.

CHIEF JUSTICE: SO THEREIS NOT A LOT YOU ARE GOINGTO BE ABLE TO DO , SO MA YBE DID HE TR Y TO GET SECOND-DEGREE MURDER? WAS THAT HIS DEFENSE LAWYER'S ATTEMPTS TO SAY THAT THIS WAS AN UNPLANNED MURDER?

YE S, S IR . HE QUESTIONS THE EN TIRE RELY AFBLT CONF ESSION , BUT H E ALTERNATIVELY SAYS THAT, IF WE BEL IEVE THE CONFESSION , HE DID INTEND TO KILL THEM.

CHIEF JUSTICE: BU T HE KNOWS PRETTY WELL , THE DEFENSE LAWYER SHOULD KNOW GOING IN THAT M OST LI KELY CERTAINLY HE IS GO ING TO BE CONVICTED OF MURDER, ANDTHIS IS , W ITH A DOUBLE MURDER, THIS IS PRETTY , I MEAN THE STATE IS GOINGAFTER THE DE ATH PENALTY, SO WHAT DOES H E START TO DO OR WHEN DOES HE FIRST START TO DO ANYTHING AS FAR AS THE PENALTY PHASE IN THIS CASE? WHEN, HIS TESTIMONY, MR . CARTER'S, THAT THE FIRST TIME HE BEGINS TO CONS IDER HOW HE IS GOIN G TO APPROACH THE PENALTY PHASE.

YOUR HONOR, MR . CA RTER'S RECOLLECTION, FRANKLY , 18 YEARS LATE R AT THE EVIDENTIARY HEARING, QU ITE STEVEN I, BUT HE DOES -- IS Q UITE SKET CHY , BUT HE D OES ADMIT THAT HE LIK ELY BEGANAFTER THE VER DICT WAS BACK.

CHIEF JUSTICE: ISN'T THAT ALONE IN 1985 , NOT TALKING ABOUT IN THE '7 0s , A SHOCKING SITUATION, THAT IS , HOW OLD WAS MR . COOK AT THE TIME OF THIS CRIME?

HE WAS 20.

CHIEF JUSTICE: A 20-YEAR-OLD AND HE HAD NO SIGNIFICANT CRIMINALHISTORY.

CORRECT. HE DID NOT.

CHIEF JUSTICE: WE HAVE CASES OUT THERE ABOUT ROBBERY GONE BAD, AND THIS IS , AL THOUGH , AGAIN, IT IS TRAGIC, IT COULD PERHAPS FIT INTO THOSE LINES OF CASES . AND THE DEFENSE LA WYER ASSIGNS - - A S SIGNED TO HIM DOES NOTHING UN TIL AFTER THE GUILT PHASE, KNO WING THEPENALTY PHASE IS ABOUT TO BEGIN . DOES THE STATE AD MIT THAT THAT

ALONE , WHE THER WE GET TO PREJUD ICE , IS A , THAT WE DON'T WANT OUR CRIM INAL JUSTICE SYSTEM IN FLORIDA TO PUT PEOPLE TO THEIR DEATH WITH A SIT UATION WHERE SOMEBODY JUST GIVESSOMETHING A LICK AND A PROMISE AT THE TIME OF THE PENALTY PHASE.

I THINK IT WOULD NOT BE F AIR TO SAY THAT HE DIDNOTHING , YOUR HONOR. HE KNEW MANY THIN GS ABOUT THIS DEFENDANT. HE HAD PREPARED EXTENSIVELY F OR THE GUILT PHASE , AND ALONG WITH PREP ARING FOR THE GUILT PHASE , SPEAKING TO THE CODEFENDANTS, HE LEARNED ANUMBER OF THINGS ABOUT WHAT MAY OR MAY NOT BE MITIGATING EVIDENCE IN THIS CASE, AND HE KNEW --

CHIEF JUSTICE: HOW DID HE APPROACH THE PENALTY PHASE , THE LAY WITNESSES?

HE PRODUCED NINE LAY WITNESSES, A DEFENDANT EXPERT AND --

CHIEF JUSTICE: WHEN WAS THE FIRST TIME HE MET WITH THE LAY WITNESSES? AFTER THE GUILT PHASE?

HE DID NOT RECALL.

JUSTICE: THERE ANY EVIDENCE OF PREPARATION OF WITNESSES FOR THE PENALTYPHASE?

I AM SO RRY , YOUR HONOR?

JUSTICE: EVIDENCE OF PREPARATION OF WITNESSES FOR THAT PENALTY PHASE?

I DON'T CARE THE RECORD IS -- I DON'T THINK THE RECORD IS CLEAR. HE DID NOT RECALL MUCH OF WHAT HE HAD DONE. THE RECORD --

JUSTICE: ISN 'T THEREEVIDENCE TO THE CONTRA RY, WASN'T THERE EVIDENCE TO THE CONTRARY AS TO THE PREPARATION OF THE WITNESSES?

THERE IS EVIDENCE FROM THE SIBLINGS WHO CLAIMED THAT THEY WERE JUST THROWN ON THE STAND, BUT THERE ARE MANY, MANY REASONS WHY THE CREDIBILITY OF THE LAY WITNESSES AT THE EVIDENTIARY HEARING WAS QUE STIONED BY THE TR IAL COURT , BUT IF I MAY, I JUST WANT TO S AY THAT HE DOES TESTIFY AS TO WHAT HIS STRATEGY WAS, AND HIS STRATEGY, W HICH IS CONSISTENT JUST LOOKING AT THE RECORD OF THE PENALTY PHASE , WAS TO PRESENT MR . COOK AS A PERSON WHO HAD HADA GO OD UPBRINGING , WHICH IS , THERE IS A WEALTH OF INFORMATION IN THE RECORD OF WHAT IN FORMATION WAS THEREAT THAT TIME , THAT IS CONSISTENT WITH THAT .

JUSTICE: DID HE ACTUALLY SUBPOENA THOSE WITNESSES WHO TESTIFIED AT THE HE ARING?

I DON'T BELIEVE THERE IS ANY EVIDENCE TO SUGGEST THAT HE DID.

JUSTICE: S O THERE IS NO , NOTHING IN HIS FI LES OR ANYTHING THAT INDICATES THAT HE ACTUALLY EITHER TALKED TO THEM OR SUBPOENAED THEM OR ANYTHING. BECAUSE IF I UNDERSTAND IT , AT L EAST O N E OF THEM INDICATES THAT, AS SHE CAME TO COURT, HE ASKED HE R ARE YOU WILLING TO TESTIFY?

COR RECT .

JUSTICE: WITHOUT ANY PREPARATION , WITHOUT HAVING TALKED TO HER IN ADVANCE.

YOUR HONOR, IF W E COULD , IF WE FO CUS ON THE FACT THAT HE DID P UT THE NINE WITNESSES AND WITH THE TESTIMONY, WHAT IT SHOWED CONSISTS NT WITH HIS STRATEGY.

JUSTICE: THE NINE WITNESSES HAPP ENED TO AP PEAR NOT AT HIS REQUEST.

WELL THAT, IS WHAT THESE LAY WITNESSES SA ID AT THE EVIDENTIARY HEARING. MR. CAR TER DID NOT RECALL WHETHER HE HAD PREPARED THEM OR SPOKEN. HE DID RECALL HE H AD SPO KEN TO SOME OF THE SIBLINGS , AT L EAST ONE OF THE BROTHERS , ONE OF THE SISTERS.

JUSTICE: IN ADDITION TO THE FACT THAT JUSTICE PARIENTE GAVE YOU , HE KNEW ABOUT A CL AIM OF A FI FTH OF RESUME PLUS COCA INE?

ABSOLUTELY , YOUR HONOR.

JUSTICE: HE KNEW THAT EARLY ON, RIGHT?

H E TRUE NOOU THAT AND H E PRESENTED THAT THROUGH -- HE K NEW THAT AND HE PRESENTED THAT THROUGH DR . HABER AND THE DEFENDANT TESTIF IED.

JUSTICE: WHY WOULDN'T THAT BE E NOUGH TO GET A VOLUNTARY INTOXI CATION DEFENSE WITH THE EXPERT EARLY ON, I F YOUR WITNESS IS SAYING I DID A FIFTH AND SOME COCAINE. ISN'T THAT ENOUGH TO PU RSUE INVOLUNTARY INTOXICATION?

THE REASON H E CHOSE NOT TO PUT THE DEFENDANT ON THE STAND ARE MANY, AND FRANKLY THE ONLY INFORMATION WAS THE DEFENDANT AT THAT PO INT . THE CO DEFENDANT WAS PUT ON BY THE DEFENSE, AND HE DENIED, AND HE TESTIFIED AS I SAID BEFORE , THAT HE AND THE OTHER DEFENDANT HAD DONE A GR AM , A LINE OF COCAINE OR A GRAM OF COCAINE.

JUSTICE: BUT WHAT EVIDENCE WAS THERE OF HIS INVESTIGATION OF THE ALCOHOLAND COCAINE U SAGE AROUND THE TIME OF THE --

HE DEPOSED THE CODEFENDANTS, YOUR HO NOR. HE DID RECALL SPEAKING TO THE CODEFENDANTS, SO PRESUMABLY HE KNEW THAT THAT WOULD BE THEIR TESTIMONY.

CHIEF JUSTICE: JUSTICE LEWIS HAS A QUES TION.

YOU CERTAINLY HAVE SOME SIGNIFICANT PROBLEMS WITH REGARD TO PREPARATION , CERTAINLY UNDER WIGGINS AND RUMFELLOW.WOULD YOU TURN TO THE PRE JUDICE AS PECT , AND THAT IS WHAT WE WERE T R YING TO DO , I THINK , D URING YOUR OPPONENT'S PRES ENTATION, LET'S GET TO THE PREJUDICE. LET'S TALK ABOUT AND WHERE DOES THAT FIT IN.TALKING ABOUT POST-TRAUMATIC STRESS SYND ROME , AND I DON'TTHINK WE EVER GOT THIS DOWNTO WHAT IS THE IMPACT ON THIS INDIVIDUAL AND WHAT SHOULD THE JURY HAVE HEARD , ACCORDING TO THE EXPERTS? WOULD YOU SH ARE WITH US ASYOU SEE THAT FRO M THE TESTIMONY THAT - -

THEY CA LLED A NUMBER OF EXPERTS, FRANKLY OF WHICH A N UMBER WERE NOT AVAILABLE AT THE TIME OF TRIAL BUT FRANKLY NOT A SI NGLE ONE DIAGNOSED THE DEFENDANT AS MEETING THE CRITERIA FOR POST-TRAUMATIC STRESS DISORDER OR ANY OTHER MENTAL ILLNESS. ONE EXPERT TESTIFIED THAT HE HAD POST-TRAUMATIC STRESS FEATURES BUT TESTIFIED THAT HE DID NOT MEET THE CRITERIA. EVERY SINGLE ONE OF THE WITNESSNESSES REACH ED THEIR OPINION AS TO THE STATUTORY MITIGATOR THAT DR . HABER TESTIFIED IN THE PENALTY PHASE, WAS HIS CAPACITY TO UNDERSTAND AND COMPORT HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SIGNIFICANTLY IMPAIRED, IN COMBINATION WITH THE INTOXICATION. THERE WAS NO SUG GESTION THAT HE SUFFERED ANY MENTAL ILLNESS THAT PRESENTED HIM FROM -- THAT PREVENTED HIM FROM UNDERSTANDING WHAT HE HAD DONE , AND IN FACT THE RECORD BELIES ANY SUCH FINDING , BECA USE NOT ONLY WAS THERE A CONFESSION , THERE WAS A SIGNIFICANT CONFESSION WHER E HE AD MITS THAT HE SHOT THE MALE VICTIM BECAUSE HE HAD STRUCK HIM WITH A METAL R OD, THAT THATWAS THE REASON WHY HE SHOT, SO THERE WAS A MENTAL

PROCESS AND THERE WAS EVIDENCE OF THAT AT THE TIME OF TRIAL, AND HE ALSO TESTIFIED THAT HE HAD SHOT FEMALE VICTIM BECAUSE SHE WAS SCREAMING AND HE WANTED TO SHUT HER UP, SO CLEARLY HE HAD A THOUGHT PROCESS AT THE TIME THAT HE WAS DOING THE SHOOTING AND THAT WAS PRESENTED, SO ANY MITIGATION THAT WAS PRESENTED IN THE LINE OF WHAT THEY ARE SUGGESTING AT THE POSTCONVICTION HEARING, WOULD HAVE HAD TO HAVE BEEN QUITE OVERWHELMING TO OVERCOME --

CHIEF JUSTICE: THAT SOUNDS LIKE, THAT IS NOT, AGAIN, THAT SOUNDS LIKE AN UNPLANNED SITUATION. AGAIN, WHEN WE TALK ABOUT THIS, A YOUNG MAN WHO IS HIGH ON DRUGS OR ALCOHOL, AND IS CONFRONTED WITH A STRESSFUL SITUATION, DOESN'T THERE HAVE TO BE SOME, AGAIN AT THAT POINT SOME REAL EXPLANATION ABOUT WHAT WOULD TAKE SOMEBODY WHO HAD NOT COMMITTED ANY VIOLENT ACTS FOR THE FIRST 20 YEARS OF HIS LIFE, AND IN REACTION TO THING THAT IS SHOULD NOT HAVE CAUSED SOMEBODY TO SHOOT, CAUSED HIM TO SHOOT, SO WHAT FACTS TO THE DEFICIENCY OR TO THE PROBLEM COULD YOU CONNECT UP WITH, AND JUSTICE CANTERO SAYS IN THE LIGHT MOST FAVORABLE TO YOU HAD, IN TERMS OF OVERALL, WHAT THE EXPERTS WERE AVAILABLE TO TESTIFY ON THAT.

WELL, YOUR HONOR, I THINK THAT IS WHY THE STRATEGY THAT MR. CARTER CHOSE WAS A MUCH MORE EFFICIENT, EFFECTIVE ONE, IN THAT HE PRESENTED THAT THIS WAS A GOOD PERSON, UP UNTIL A POINT IN HIS LIFE HE FAILED TO DRUG -- HE FELL TO DRUG USE AND HE WAS SEVERELY INTOXICATED AT THE TIME, WHETHER THERE IS INCONSISTENCY OR NOT, THAT IS WHAT HE PRESENTED THROUGH THE PAPER AND HIMSELF, AND THEN HE MADE A MISTAKE AND FOCUSED ON REHABILITATION AND GOOD POTENTIAL.

CHIEF JUSTICE: FACED WITH THOSE TWO THINGS THAT IS YOU ANSWERED JUSTICE LEWIS ON, THAT IS THAT IT WAS NOT LIKE HE DOESN'T REMEMBER WHAT HAPPENED. HE WAS VERY CLEAR ABOUT WHAT WAS PRECIPITATING EACH MURDER.

I THINK, YOUR HONOR, THAT IS WHY THE SUGGESTION THAT IT WAS THE THINGS THAT HAPPENED TO HIM, THE RIOTS IN NEWARK, NEW JERSEY HAPPENED WHEN HE WAS THREE OR FOUR. THE SUGGESTION THAT WHAT HAPPENED TO HIM WHEN HE WAS THREE OR FOUR SOMEHOW CAUSED THIS DOWN TURN IN HIS LIFE WERE BELIED BY OTHER THINGS IN THE RECORD. HE WAS GAINFULLY EMPLOYED AND RECENTLY HAD BEEN PROMOTED HE WAS EMPLOYED AT CHURCH'S FRIED CHICKEN PHONE TWO YEARS AND IN FACT THEY HAD -- CHICKEN TWO YEARS AND IN FACT THEY HAD PLANNED TO ROB THE CHURCH'S FRIED CHICKEN WHERE HE USED TO WORK BUT HE HAD MOVED, AND IN THE -- MOVED, AND WHEN, IN THE PRESENTENCE REPORT, IN THE RECORD THAT WAS IMPOSED, HE SAID THERE WAS NOTHING THAT AN EMPLOYER WOULD FIND WITH A SEVERE DRUG PROBLEM.

CHIEF JUSTICE: WERE THOSE MITIGATORS IN THE ORIGINAL TRIAL? THAT IS A PRETTY COMPELLING HISTORY OF, AGAIN, GOOD EMPLOYMENT AND BEING A GOOD FATHER AND THOSE --

I BELIEVE THAT THEY WERE FOUND IN THE ORIGINAL SENTENCE ORDER. I AM PRETTY CERTAIN THAT IN THE SUBSEQUENT ORDER, THEY MAY NOT HAVE BEEN SPECIFICALLY FOUND, WHICH WAS AN ISSUE ON THE APPEAL FROM THE RESENTENCE, THAT COURT FOUND THAT, ALTHOUGH THEY SHOULD HAVE BEEN ADDRESSED, ERROR HAD BEEN HARMLESS.

CHIEF JUSTICE: ERROR, NOW, JUST A MINUTE. ERROR WAS HARMLESS, BECAUSE WHAT WE WERE SEEING BACK THEN IS JUST WE DIDN'T SEE MUCH MORE THAT WAS THERE MITIGATING, SO DO WE LOOK AT WHAT THIS COURT MIGHT HAVE DONE IN TERMS OF WHETHER IT -- IN TERMS OF WHETHER IT UNDERMINES OUR CONFIDENCE IF WE FOUND SOMETHING HARMLESS BUT WE GO O MY GOODNESS IF WE HAD SEEN THIS OTHER EVIDENCE, IT MIGHT REMEMBER RESENTS SOMETHING.

AG AIN, YOUR HONOR, THE DETERMINATION FROM THE LOWERCOURT AS TO THE SUBSTANTIAL PORTION OF ALL OF THIS EVIDENCE THAT WE ARE TALKINGABOUT , AND I SUGGEST THAT THE RECORD BELIES THAT ANY OF THAT MITIGATION , REALLY,HAD ANY EFFECT WHATSOEVER ON THE CRIME , AND I WOULD SUGGEST THAT THE SUBSTANTIAL AGGRAVATOR OF THE PRIOR , OF THE DOUBLE MURDER .

JUSTICE: HOW ABOUT SPECIFICS FROM SCHOOL RECORDS, NOT JUST GENERALITIES, OF HE LIVED WHERE THERE WERE RIOTS , BUT SPECIFICS OF SCHOOL RECORDS , MENTAL HEALTH RECORDS , HOSPITAL RECORDS, WHAT IN THE LIGHT MOST FAVORABLE TO YOU?

THE SCHOOL RECORDS FRANKLY WOULD HAVE REVEALED QUITE NEGATIVE INFORMATION. THE DEFENDANT WAS SUSPENDED MULTITUDE OF TYPES FOR FIGHTING AND I SUGGESTED THAT WOULD NOT HAVE BEEN SOMETHING ONE WOULD WANT TO PRESENT TO THE JURY. IN ADDITION TO THAT, IT IS MOST IMPORTANT THAT ALTHOUGH DR . MARY HABER WAS CALLED AT THE EVIDENTIARY HEARING , SHE AT NO TIME TESTIFIED THAT ANY OF THOSE RECORDS THAT SHE WAS NOT PROVIDED WITH , WOULD HAVE CHANGED HER OPINION IN ANY WAY.

JUSTICE: LET ME ASK YOU A QUESTION ON THIS PREJUDICE PRONG. THE TRIAL COURT'S ORIGINAL SENTENCING FINDING , HE SAID THAT THERE WAS CONFLICTING TESTIMONY BETWEEN THE DEFENDANT , WHO MAINTAINED MASSIVE SUBSTANCE ABUSE , AND THEN SAYS THAT IS INCONSISTENT WITH FRIENDS AND RELATIVES WHO TESTIFIED HE WAS A TOTALER AND A SAINT . HOW WAS THAT PRESENTED AT TRIAL?

WELL, YOUR HONOR, THAT WAS PRESENTED IN THE STRATEGY MR . CARTER SAYS THAT HE WAS A GOOD PERSON WHO, THEN , BECAME INVOLVED WITH DRUGS. THE DEFENDANT HIMSELF ADMITS THAT HE HID HIS DRUG ABUSE FROM ANY OF THE FAMILY MEMBERS .

JUSTICE: DID HIS FAMILY MEMBERS, WERE THEY PRESENTED AND DID THEY TESTIFY IN CONTRADICTION TO WHAT THE DEFENDANT'S TESTIMONY WAS AT THE PENALTY PHASE?

WELL , I AM NOT SURE THAT IT IS IN CONTRADICTION BECAUSE THE DEFENDANT ADMITS THAT HE HID HIS DRUG USE FROM FAMILY MEMBERS, BUT NONE OF THE FAMILY MEMBERS HAD ANY SPECIFIC KNOWLEDGE OF THE DEFENDANT HAVING ANY SUBSTANCE ABUSE PROBLEM, AND IN FACT AS I INDICATED ON THE PRESENTENCE REPORT , HIS WIFE WAS ALSO INTERVIEWED , AND SHE SAID THAT HE NEVER HAD A PROBLEM BRINGING HIS ENTIRE PAYCHECK HOME , THAT SHE NEVER SAW ANY SIGNS, AND THEY COHABITED, SO PRESUMABLY SHE WOULD HAVE SEEN SOME SIGNS OF IT.

JUSTICE: WHAT ABOUT THE NEXT FINDING THAT THE COURT WAS HIS ACTION IN THESE MURDERS ALL INDICATED LOGICAL PROGRESSION OF THOUGHT, UNAFFECTED BY PSYCHOLOGICAL OR EMOTIONAL DISTURBANCE. THAT IS WHAT THE TRIAL COURT FOUND ORIGINALLY .

YES, YOUR HONOR.

JUSTICE: WHAT DID THE EVIDENTIARY HEARING SHOW? TIME SO RRY ?

JUSTICE: WHAT DID THE EVIDENTIARY HEARING SHOW IN THIS CASE?

THERE IS A DISPUTE BETWEEN THE EXPERTS , CERTAINLY, BUT, AGAIN , AS I SAID, ALL OF THE EXPERTS PRESENTED BY THE DEFENSE , THEIR OPINIONS ARE THAT HIS JUDGMENT WAS IMPAIRED , WHICH, AGAIN, IS EXACTLY WHAT DR . HABER TESTIFIED AT THE PENALTY PHASE. BECAUSE OF THE INTOXICATION IN COMBINATION WITH THESE COGNITIVE DEFICIENCIES , THAT THEY CLAIM THAT MR . COOK HAS. BUT , AGAIN , ALL THE INTOXICATION EVIDENCE THAT THEY RELY ON THAT EVERY SINGLE ONE OF MR. COOK'S EXPERTS RELY ON IS FROM HIS OWN MOUTH , AND THERE

WERE TWO EXPERTS PRESENTED WHO, AGAIN , POINTED OUT ALTHOUGH THE CRIME , THAT THEY WAITED BEHIND THE DUMPSTER FOR AN HOUR AND-A-HALF, WAITED FOR THE VICTIM TO EXIT , THE REWAS A NUMBER, MR. COOK HAD DRIVEN TO THE LOCATION . HE KNEW HOW TO GET TO HIS HOUSE AFTER THE CRIME. THERE WAS A NUMBER, A MULTITUDE OF FACTS ON THE RECORD THAT SHOW THAT HIS JUDGMENT WAS IN FACT.

JUSTICE: OUTSIDE HIS SELF REPORTING, WHAT WAS THE EVIDENCE OF SUBSTANCE ABUSE AT AND AROUND THE TIME OF THE OUTCOME ?

AT THE TIME OF THE TRIAL.

JUSTICE: NO. AT THE EVIDENTIARY HEARING.

AT THE EVIDENTIARY HEARING THEY CALLED THE DOE COE DEFENDANT , WHO , IN CONTRADICTION TO HIS PRIOR , AS WELL AS THE EXPERTS WHO RELIED ON THE DEFENDANT'S OWN STATEMENT AND ALSO MR . NAI RN'S STATEMENTS AS TO INTOXICATION.

JUSTICE: DID N'T THE EXPERTS ALSO SAY THAT THERE WAS A SUBSTANCE ABUSE PROBLEM WITH THE DEFENDANT, THE TWO STATE EXPERTS , THAT THEY ALSO --

THEY ARE RELYING ON THE DEFENDANT, ON MR. COOK'S OWN STATEMENTS.

JUSTICE: WHAT WAS THE EXTENT OF THE EXAMINATION BY THE STATE EXPERTS? DID THEY ACTUALLY DO ANY TESTING ON HIM OR ANY --

YOUR HONOR, I THINK IT IS INTERESTING THAT THEY QUESTIONED ONE OF THEIR EXPERTS TESTED EXPERTS TESTIFIED THAT THERE WAS --

JUSTICE: I AM ASKING YOU ABOUT THE STATE'S EXPERTS. DID THEY DO ANY TESTING ON THIS DEFENDANT?

I UNDERSTAND. THERE WAS A TEST OF HIS IQ WHICH WAS SUBSTANTIALLY DIFFERENT, THE RESULTS THAT THE STATE EXPERTS CAME OUT WITH CAME OUT WITH WERE SUBSTANTIALLY DIFFERENT FROM THE DEFENDANT'S EXPERTS.

JUSTICE: THEY DID A TEST ON THIS DEFENDANT.

ONCE THE EXPERT DOES A TEST ON SOMEBODY , THEIR RELIABILITY WHEN THEY PERFORM AGAIN BECOMES NULL .

JUSTICE: AND THE FACT THAT THE DEFENSE HAD SOME TESTIMONY FROM EXPERTS THAT THERE WAS A FRONTAL LOBE DYSFUNCTION. DID EITHER OF THE STATE'S EXPERTS ATTEMPT ANY TESTING FOR THAT PARTICULAR FACT OR?

YES , YOUR HONOR , AND IN FACT ONE OF THE EXPERTS SAID THAT IT DIDN 'T EVEN OCCUR TO HIM BECAUSE THERE WAS NO INDICIA WHATSOEVER THAT THERE WOULD BE ANY --

JUSTICE: YOU YOU SAY YES BUT IT DIDN'T OCCUR TO HIM?

YES, YOUR HONOR, THERE WAS TESTING IN THAT THEY INTERVIEWED THE DEFENDANT THROUGH A CLINICAL INTERVIEW , I BELIEVE.

JUSTICE: A CLINICAL INTERVIEW BUT NO OTHER KIND OF TESTING , TO DETERMINE IF THERE WAS IN FACT ANY FRONTAL LOBE PROBLEMS.

SUCH AS A MEMORY TEST OR IQ TEST? THERE WAS AN IQ TEST PERFORMED.

JUSTICE: NO, NOT AN IQ TEST, BUT AREN'T THERE OTHERKINDS OF TESTS THAT YOU CANPERFORM ON A DEFENDANT IN ORDER TO DET ERMINE IF THERE IS SOME FRONTAL LOBE PROBLEMS?

WELL , I DON'T RECALL EXACTLY WHAT THE TESTS PERFORMED BY THE STATE WAS , BUT CERTAINLY HE TESTIFIED AT THE EVIDENTIARY HEARINGTHAT HE DID NOT FIND ANY IND ICIA OF BRAIN DYSFUNCTIONTHAT, IT DIDN'T EVEN OCCURTO HIM BE CAUSE THE DEFENDANT'S MEMORY WAS INTACT , AND THERE SI MPLY WAS NO RED F LAG TO INDICATE TOHIM THAT THERE WAS SUCH. AND EVEN THE DEFENSE EXPERTS ADMIT THAT ANY SUCH DYSFUNCTION THAT THEY FOUND HAD NO, HAD THE POTENTIAL TO BEAR ON HIS BEHAVIOR , BUTTHEY DID NOT FIND THAT IN FACT IT DID BEAR ON HIS BEHAVIOR.

JUSTICE: WHAT DID THEY FIND THE FACTS I N FACE OFTHE TWO STAT UTORY MENTAL MITIGATORS?

INTOXICATION , YOUR HONOR. THAT IS THE WHOLE PROBLEM.

JUSTICE: ONE LAST QUESTION BEFORE YOU SIT DOWN , THE COURT AFTER THE POSTCONVICTION HEARING ANDIN THE ORDER, SEEMED TO HAVE BEEN DISTRESSED BY THE TESTIMONY OF THE B ROTHER OF THE DEFENDANT. COULD YOU YOU GIVE US THE CONTEXT FOR THAT .

I AM SORR Y. YOUR HONOR. AT THE EVIDENTIARY HEARING?

JUSTICE: THERE IS A STATEMENT IN THE ORDER ABOUT THE BR OTHER TESTIF YING , AND --

I BELIEVE IT WAS HIS COU SIN.

JUSTICE: WAS IT HIS COUSIN?

HE SAID THAT THERE WAS A COUPLE OF BODIES . THAT IS ALL?

JUSTICE: DID YOU GET THE CONTEXT OF THAT?

WELL , YOUR HONOR , I THINK THAT SORT OF SUGGESTS M U CHOF THE REST OF THE TESTIMONY , WHICH WAS FRANKLY ALL OF THE SIBLINGS THAT WERE CALLED HAD A LOT TO SAY ABOUT HOW THEY FELT THIS WAS U N FAIR THAT THEIR SI BLING HAD G OTTEN PUNISHED MORE SEVERELY. THEY IG NORE THE FACT THAT HE HAD BEEN THE SHOOTER. THEY MADE A LOT OF EXCUSES , FRANKLY, WHICH, AGAIN, GO ESTO THE PREJUDICE PRONGS, BECAUSE I DON'T THINK SUCH TESTIMONY WOULD HAVE BEEN VERY COMPELLING TO A JURY , AND ON THAT I RELY ON THE BRIEF AND AS K THE COURT TO AFFIRM THE L O WER COURT'S DENIAL OF MR . COOK'S FI RST POSTCONVICTION MOTION.THANK YOU.

CHIEF JUSTICE: REBUTTAL.

YES , YOUR HONOR. V ERY BRIE FLY. IT IS NOT A QUESTION OF WHAT DR. HAB ER'S OPINION WAS AT THE TRIAL THAT IS REALLY A M ATTER FOR THIS COURT.IT IS HOW SHE WAS TO THEJURY. WHEN THIS COURT REMANDED BACK FOR THE EVIDENTIARYHEARING, IT NOTED SPECIFICALLY THAT THE EXAMINATION OF THE DEFENDANT TOOK FIVE PAGES AND THE CROSS-EXAMINATION TOOK 8 PAGES.

JUSTICE: LET ME ASK YOU THIS. AT THE TIME THAT DR . HABER AND DR . NEILY, I BELIEVE IT WAS , DID THE IN ITIAL EVALUATIONS OF THE DEFENDANT , WHAT IF ANYTHING , WAS IN E ITHHER OF THEIR ORAL OR WRITTEN REPORTS , THAT WOULD HAVE AL ERTED THE DEFENSE ATTORNEY TO DO SOME THING DIFFERENT , SOMETHING MORE?

WELL , THERE WASN'T ANYTHING. FIRST OF ALL , THE WRITTEN REPORT, DR . HABER TESTIFIED THAT HER WRITTEN REPORT WAS ACTUALLY SUBMITTED TO THE COURT ABOUT FIVE MONTHS AFTER THE PENALTY PHASE , SO THAT WOULDN'T HAVE HELPED.

JUSTICE: THE DEFENSE ATTORNEY, ONCE THE EXAMINATION --

VERY BRIEFLY IN THE DADE COUNTY COURT SHE TESTIFIED AT THE EVIDENTIARY HEARING.

JUSTICE: WHAT DID SHE SAY IN THE COURSE OF THAT CONVERSATION THAT WOULD HAVE TOLD THE DEFENSE ATTORNEY THAT, WOULD HAVE ALERTED A REASONABLE DEFENSE ATTORNEY THAT MAYBE WE NEED TO DO SOMETHING MORE THAN THIS EVALUATION THAT HAS TAKEN PLACE .

WHAT SHE TESTIFIED TO AT THE EVIDENTIARY HEARING WAS THAT SHE REALLY DIDN'T TALK WITH HIM MUCH AT ALL. SHE DID THE BEST THAT SHE COULD UNDER THE EXTREME TIME CIRCUMSTANCES THAT SHE FOUND HERSELF IN. SHE SAID AT THE EVIDENTIARY HEARING THAT THINGS SHOULD HAVE BEEN DIFFERENT. SHE SHOULD HAVE HAD MORE TIME. SHE SHOULD HAVE BEEN ABLE TO LOOK AT --

JUSTICE: DID SHE CONVEY THAT TO THE DEFENSE ATTORNEY AT THE TIME THAT SHE DID THE INITIAL EVALUATION , DID SHE CONVEY TO THE DEFENSE ATTORNEY, LOOK, I HAVE DONE THIS IN AN HOUR'S TIME. IN ORDER TO DO A REALLY THOROUGH JOB, I REALLY NEED SOME MORE TIME. MAYBE YOU NEED TO GET A CONTINUANCE? ANYTHING LIKE THAT?

I DON'T KNOW IF SHE SAID THAT OR NOT. NEITHER PARTY REMEMBERS THAT , YOUR HONOR.

JUSTICE: AND WHAT ABOUT DR . NEILY ? DID THE DEFENSE ATTORNEY TALK WITH HIM AND WHAT IF ANYTHING, DID HE SAY THAT WOULD HAVE ALERTED THE DEFENSE ATTORNEY THAT I NEED MORE TIME. I NEED TO DIG DEEPER INTO THIS WHOLE PSYCHOLOGICAL ISSUE.

IF THE DEFENSE ATTORNEY HAD TALKED TO DR . NEILY , IT WOULD HAVE BEEN VERY BRIEF AND IN THE CONTEXT OF THAT ONE AFTERNOON. AGAIN, THE RECORD IS NOT CLEAR AND MEMORIES ARE VERY SKETCHY AT THIS POINT.

JUSTICE: BUT HE DID TELL HIM THAT HE OBSERVED NO EVIDENCE OF MAJOR MENTAL ILLNESS AND FOUND NO GROSS MENTAL IMPAIRMENT .

I WOULD LIKE TO --

JUSTICE: WHAT DID YOU SAY IN RESPONSE TO JUSTICE BELL?

I WAS AGREEING WITH WHAT JUSTICE BELL SAID. DR . NEILY DID A VERY CURSORY EVALUATION AND HE FOUND NO OBVIOUS GROSS SIGNS OF MENTAL ILLNESS. AS TO THE NEUROPSYCHOLOGICAL EVALUATION, LET'S BE VERY CLEAR , DR . SUAREZ DID NOT DO ANY FRONTAL LOBE TESTING IN THE POSTCONVICTION HEARING. HE DID MEMORY TESTING. HE DID IQ TESTING. DOCTOR , MR . COOK HIRED DR . HARVEY, THE NEUROPSYCHOLOGIST, ON THE RECOMMENDATION OF DR. H YATT , THE NEUROLOGIST , WHO FOUND GROSS SIGNS OF A NEUROLOGICAL MENTAL DISORDER. DOCTOR SUAREZ ADMIT ODD CROSS-EXAMINATION THAT IF HE HAD -- ADMITTED ON CROSS-EXAMINATION THAT IF HE HAD BEEN REFERRED BY A NEUROPSYCHOLOGIST, HE WOULD HAVE DONE NEUROPSYCHOLOGICAL TESTING YOU BUT HE WASN'T RECOMMENDED TO DO ANY NEUROPSYCHOLOGICAL TESTING. THE FRONTAL LOBE TESTING THAT DR . HARVEY DID WAS COMPLETELY UNCONTROVERTED. AS FOR THE LAY TESTIMONY , IT IS VERY CLEAR FROM THE EVIDENTIARY HEARING THAT THE LAY WITNESSES WERE NOT ONLY PUT ON THE STAND WITH ANY IDEA OF WHAT THEY WERE GOING TO BE ASKED ABOUT , THEY WERE CHOSEN AT RANDOM

AND SIMPLY THE PEOPLE WHO HAPPENED TO BE IN THE COURTROOM AT THE TIME OF THE EVIDENTIARY HEARING AT THE TIME OF THE HEARING. ONLY TWO SISTERS AND ONE BROTHER AND BROTHER IN LAW TESTIFIED BECAUSE THEY RANDOMLY HAPPENED TO BE IN THE COURTROOM AT THAT TIME. THAT IS NOT AN INVESTIGATION INTO MR. WIGGINS.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE THIS MATTER UNDER ADVISEMENT AND WILL TAKE ITS MORNING RECESS OF 15 MINUTES.