Jason Looney v. State of Florida
Docket Number: SC05-159

JUSTIC E: ALL RIGHT . YOU DID IT IN LESS THAN T ENMINUTES. NEXT CASE ON THE MORNING 'S DOCKET IS A J ASON LO ONEY VERSUS THE STATE OF FLORIDA. GOOD MORNING. I WAS THINKING ABOUT THE LAST CASE AND THAT WE NEED TO DO AN OPINION BY APRIL 1. I AM NOT SURE THAT THE COURT WAS AWAR E OF T HAT REQUIREMENT. YOU MAY PROCEED .

MAY IT P LEASE THE COURT. I AM FRANK SHEFFIELD O N BEHALF OF JA SON LOO NEY , THE APPELLANT HERE TO DAY . YOUR HONOR, THE ESS ENCE OF OUR ARGUMENT IS THAT THE TRIAL COURT ERRED IN DENYINGMR. LOON EY'S POSTCONVICTION MOTION, BASED ON THE CL AIM THAT DEFENSE COU NSEL WAS INEFFECTIVE FOR FAILING TO PRESENT ALL MEN TAL HE ALTH MITIGATION AT A STATE COURT TRIAL.

JUSTICE: MR . HARR ISON , YOU SAID YOU ARE HERE ON BEHALF OF ANOTHER ATTORNEY. DID HE WORK WITH YOU OR PARTICIPATE IN THE PREPARATION OF THIS BRIE F AT ALL?

YES, YOUR HONOR. UNDER CHAP TER 27 , REGISTRY COUNSEL CAN DESI GNATE AN ASSISTANT, AND MR . SHEFFIELD DESIGNATED ME, AND I DID PARTICIPATE IN THE PREPARATION OF THE 3.851 MOTION. THE EVIDENT IARY HEA RING , GETTING OUR EX PERT WITNE SS, AND WR ITING THE , B OTH BRIEFS. OKAY. THANK YOU , YOUR HONOR . DURING THE PENALTY PHAS E OF THE TRIAL , THE STATE PRE SENT ED EVIDENCE BEYOND A REASONABLEDOUBT OF THE EXIS TENCE OF SIX STAT UTORY AGGRAVATORS. IT WAS IMPERATIVE , THEREFORE , THAT DEFENSE COUNSEL COUNTERTHIS TO THE BEST OF HIS - - COUNTER THIS TO T HEBEST OF HIS ABIL ITY, TO PRESENT ALL STATUTORY AND NONSTATUTORY MENTAL HEALTH MITIGATION AND USE EXPERTS TO PRES S THE POINT , IF THAT WOULD HELP. DEFENSE COUNSEL IN THIS CASE DID NOT D O.THAT INSTEAD WITH REGARD TO THE MENTAL HEALTH MI TIGATION, COUNSEL PRESENTED ONLY LATE TESTIMONY FROM TWO FA MILY MEMBERS.

CHIEF JUSTICE: MR. HARRISON, WE ARE FAMILIARWITH THE FACTS. WHAT I AM CONCERNE D WITH IS HOW THIS CASE DOESN'T FIT INTO THE SE RIES OF CASES WHERE WE HAVE HELD T HAT GETTING A DIFFERENT MENTAL HEALTH EXPERT IS NOT, THAT JUST BE CAUSE SOM EONE SCHOOL HAVE TESTIFIED DIFFERENTLY, DOES NOT MEAN THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL, AND MORE OVER , THE , YOU HAVE A SIT UATION WHERE THE DIFFICULT CHILDHOOD WAS GIVEN SIGNIFICANT WEIGHT BY THE TRIAL COURT , IN THE SENTENCING ORDER. THERE IS NO BRAIN DAMAGE OR MENTAL ILL NESS . YOU HAVE A HIGH IQ , SO I DON'T SEE WHERE YOU GET EITHER PRONG ESTABLIS HED IN THIS CASE , EITHER DEF ICIENT PERFORMANCE OR PREJUDICE.

OKAY. WHAT WE ARE CLAIMING IS THIS , YOUR HONOR, THAT THERE WERE STATUTORY AND NONS TATUTE ON OTHER MITIGATE ONORS AVAILABLE SEW - MATE G ATORS AVAILABLE THAT -- NOT AVAILABLE , TO THE EX TENT THAT MENTAL HEALTH MITIGATORS, NOT THE EXTENT OR ANYTHING LIKE THAT , W E PRESENTED TESTIMONY AT THE EVIDENTIARY HEARING OF A DOCTOR WHO IS A PSYCHOLOGIST , A MEMBER OF THE FLORIDA BAR AND EXPERTISE IN NEURO PSYCH HOLING . -- PSYCHOLOGY. HE READ THE FILES AND WENT TO THE HEARING AND GAVE TESTIMONY AND PRESENTEDFINDINGS THAT W E FEEL WERE OVERLOOKED. FIRST OF ALL --

CHIEF JUSTICE: THE EXPERT THAT WAS USED , DR . PARDICOV WHO HE CONSULTS WITH , WAS THE DIAGNOSIS THAT T HEDEFENDANT WAS A PSYCHOPATH . IT WOUL D NOT HAVE BEEN HELPFUL TO

PUT THAT TESTIMONY ON. ARE YOU SAYING THAT COUNSEL , FACED WITH THAT, SHOULD HAVE GONE AND THEN FO UND ANOTHER EXPERT ?

WE ARE NOT SAY ING THAT THIS PARTICULAR DO CTOR WHO MADE NE GATIVE FINDI NGS SHOULD HAVE BEEN CALL ED AS A WITNESS. OBVIOUSLY NATIONAL HAVE BEEN PROPER. WHAT WE ARE SAYING -- OBVIOUSLY THAT WOULD NOT HAVE BEEN PROPER. WHAT WE ARE SAYING AND W HAT DR. MO SSMAN FOUND WAS ST RONG STATUTORY MITI GATORS THAT WERE NOT PRESENTED. DR. MOS SMAN WAS CONVINCEDTHAT THE STATUTORY MITIGATOR FOUND IN SE CTION 921.1416-G, THAT THE AGE OF THE DEFENDANT AT THE TIME OF THECRIME --

JUSTICE: WHAT DID THE MENTAL HEALTH EXPERTS S AYABOUT THE STATUTORY MITIGATORS? WE KNOW THAT THAT EXPERT SAID THAT THIS MAN WAS A PSYCHOPATH, BUT WHAT DID HE SAY ABOUT THESE ACT UAL STATUTE SORRY MENTAL MITIGATORS? ZOO AS I -- STATUTORY MENTAL MITIGATORS?

AS I RECA LL, TH OSE WERE NOT ADDRESSED. THE FIRST DOCTOR WAS ACTUALLY RETA INED BY ANO THERLAWYER BEFORE MR . CUMMINGS GOT THE CASE , AND SO HIS, HE REALLY DIDN'T HAVE IS THAT MUCH INTERACTION WITH MR . CUMMINGS, EXCE PT TO SAY THAT HE FELT THAT MR . LOONEY D IDHAVE SOME ANTI SO CIAL PROCLIVITIES, AND THEREFORE IT WOULD NOT BE APPROPRIATETO HAVE HI M BE A WITNESS, AND WE CERTAINLY SAG DEGREE WITH THAT . -- AND W E CERT AINLY AG REE WITH THAT.

ARE YOU AR GUING THAT COUNSEL WAS DEFI CIENT BECAUSE HE DID NOT HAVE THE ORIGINAL MENTAL HEALTH EXPERT EXPLORE THOSE PARTICULAR MENTAL MITIGATORS?

NOT NECESSARILY. WHAT WE ARE SAYING I S THAT THERE WAS THE STATUTORY MITIGATOR REGA RDING AG E. THAT WAS CRITIC AL. THIS COURT HAS SAID MANY, MANY TI MES , THAT THE AGE MITIGATOR APPLIES TO MORE THAN JUST CHRONOLOGY, THAT IT HAS TO DO WITH , IN THIS CASE, MR. LOONEY'S MENTAL AND EMOTIONAL AGE , AND DR . MOSSMAN , THRO UGH EXTENSIVE TESTING, FOUND THAT HE WAS DEALING WITH A PERSON WHO HAD A MENTAL AGE OF A 15-YEAR-OLD.

JUSTICE: HOW O LD WAS HE IN ACTUALITY?

HE WAS 2 0. AND DEFENSE COUNSEL ONLY REFERENCED HIS CHRONOLO GICAL AGE, AND SO UNDERSTAND ABLY , JUDGE SA UL FOUND THAT THIS WAS NOT ENTITLED TO ANY GREAT WEIGHT AT ALL.

COULD YOU PO INT TO US IN THE REC ORD WHERE THERE W ASEVIDENCE ON OR IN FORMATION FOR COUNSEL TO FOLLOW THAT THE MENTAL AGE WAS DIFFERENT.I HAVE NOT FOUND THAT IN GOING THROUGH ALL THE RECORDS, THAT THIS ATTORNEY WAS NOT PROVIDED THAT INFORMATION , FROM WHAT I C ANDETERMINE, BY THE IN ITIAL EXPERT OR BY ANY OF THE FAMILY MEMBERS. WHERE IS THAT IN THE RECORD SOMEPLACE, THAT THIS LAWYER HAD THAT OR WAS ALERT TO DO THAT?

NO. YOUR HONOR.

JUSTICE: SO IF A LAWY ER IS NOT ALERTED TO A PRO BLEM AREA BY SOMEONE , AND WE CERTAINLY DON'T EXPECT LAWYERS TO BE NEUROPSYCHOLOGISTS, I HOPE .

NO , YOUR HONOR , BECAUSEQUITE FRANKLY IN H A NDLING THESE CAPITAL CASES, I T HINKLAWYERS HAVE TO UNDERSTAND THE SIGNIFICANCE OF THE STATUTORY MITIGATORS. THE LAWYER HAS AN OBLIGATI ON, TOO.

BUT YOU NE ED TO HAVE FACTS TO SATISFY THE STATUTE S IT IS NOT JUST UNDERSTANDING THE

LAW. ONE MUST HAVE SOME FACTS T O WHICH YOU APPLY.

BUT I THINK YOU HAVE TO ASK YOUR EXPERT , OKAY , SO THIS GUY IS 20 YEARS OLD, BUT WHAT IS HIS MENTAL AGE, WHAT IS HIS EMOTIONAL AGE. WHY WOULD A PERSON DO SOMETHING AS ADMITTEDLY HORRIFIC AS WAS DONE IN THIS PARTICULAR CASE .

JUSTICE: WHY DO YOU THINK THE TRIAL JUDGE IN THIS CASE USED THE FINDI NG OR MA DE THE FINDING , SOME THING WITH REFERENCE TO THAT WOULD NOT PLACE AN AGE TO THE MENTAL STATUS OF THIS PART ICULAR INDIVIDUAL?

WELL , I THINK THAT WHAT THE TRIAL JUDGE DID WAS ERR WHEN IT REJ ECTED DR . MOSSMAN'S FINDINGS, BEC AUSETHERE WERE NO FINDINGS PRESENTED DURING THE POSTCON VICTION HEARING TOTHE CONTRARY, AND DR . MOSSMAN TESTED THIS MAN EXTENSIVELY FOR SOME SIX HOURS DO WN AT U CI, AND HE FOUND THAT HE DID HAVE THIS MENTAL AGE OF 15 YEARS , AND THAT FRANKLY IN A CASE L IKE THIS, AND I ADMIT THE FACTS TERMIBLE. I MEAN , THEY ARE JUST HORRIBLE, AND HOW D O YOU REBUT THAT , AND LAWYERS KNOW THAT YOU LOOK AT THE MENTAL AGE OF THE DEFEND ANT.

WHAT WAS THAT MENTAL AGE BASED ON ? HOW DID DR. MOSSMAN REACH THE CONCLUSION THAT THIS DEFENDANT HAD A MENTAL AGE OF 1 5.

HE GAVE THE APPELLANT A SERIES OF PSYCHOLOGICAL TESTS , AND THOSE TESTS REVEALED TO DR . MOSSMAN T HEFACT THAT THIS MAN HAD A MENTAL AGE OF AR OUND 1 5 YEARS.NOW, THIS IS NOT SOMETHING THAT YOU CAN ABSOLUTELY PINPOINT, BUT DR . MOSSMAN WAS CONFIDENT THAT HIS TESTING WHO SHOW ED THAT THIS MAN WAS NOT FUN CTIONING AT THE TIME OF THIS HOMI CIDE LIKE A 20-YEAR-OLD. HE WAS FUNC TIONING MORE LIKE A 15-YEAR-OLD. AND YOUR HONOR , I C ITED IN MY BRIEF THE R OPER VE RSUS SIMMONS DECI SION, RECENT DECISION IN 20 05 BY T HE UNITED STATES SUPREME COURT, AND THAT IS THE CASE T HAT SAYS THAT YOU CAN 'T EX ECUTE PEOPLE WHO COMM IT THE OFFENSE WHEN THEY ARE UNDER THE AGE OF 1 8.

DO WE AGREE THAT , UN LIKE IQ, THE RE IS N O OBJECTIVE TESTING FOR AGE THAT THIS IS SIMPLY A SUBJECTIVE OP INION OF EXPERTS , AND YOU COULD GET A WIDE VARIETY OF EXPERT OPINIONS ON ANY PARTI CULAR DEFENSE? CEMENTAL AGE.

I WOULD AGREE ABSOLUTELY WITH THAT, YOUR HONOR , BUT THAT DOES NOT N E GATE THE FACT OF WHAT DR . MOSSMAN FOUND IN THIS PARTICULAR CASE AND THERE IS NOTHI NG IN THE RECORD TO RE FUTE THAT.

CHIEF JUSTICE: THE TRIAL JUDGE MADE FINDINGS OF FACT , AND UNDER OUR STANDARD OFREVIEW, WE DEFER TO THOSE FINDINGS OF FACT, E VEN THOUGH WE REVI EW THE ULTIMATE DECISIONS DE NO VO. THE TRIAL COURT IN THIS CASE , STATED IS THAT DR . MOSSMAN TESTIFIED VAGU EL Y WITH OUT ANY DELINEATION OF EMO TIONAL OR SO CIAL DEFICI TS OF T HEDEFENDANT, ACKNOWLEDGED O N CROSS-EXAMINATION THAT HE HAD A FULL S CALE IQ OF 1 20 , AND WAS RE TICENT TO G IVE ANY SPECIFIC MENTAL EMOT IONAL O R SOCIAL SAGE FOR THE DEFENDANT , PREFER RING A BAND OF MIDADDRESS LESSENS. -- OF MIDADOLESCENCE . NOW, THEN , THE TRIAL COURT REALLY SAID IS THAT H E DIDN'T FIND MUCH CREDIBILITY IN DR. MOSSMAN'S TESTIMONY . WHAT DO WE DO WITH THOSE FINDINGS? DO WE JUST IGNORE THE FACT THAT , A GAIN , NOT ONL Y ARE WE TALKING HERE ABOUT YOU SAYING THAT THE TRIAL COUNSWILL WAS DEFICIENT -- COUNSEL WAS DEFICIENT BECAUSE THEY DIDN'T PUT ON THIS ADDI TIONAL EVI DENCE . THEY WERE DEFICIENT BY NOT JUST ACCEPTING IS WHAT THE MENTAL HEALTH EXPERT THEY HAD TOLD THE M. THEY SHOULD HAVE GONE AHEAD AND FOUND SOMEBO DY , BUT IF THE PERSON THAT THEY FOUND MIGHT HAVE IS GIVEN TESTIMONY THAT WAS BA RELY LUKEWARM OR INCRED IBLE , THEN YOU DON'T GET TO THE PREJUDICE PRONG. YOU CAN'T ESTABLISH THAT THERE IS ANY UNDER MINING OF CONFIDENCE IN THE RES ULTS .

YOUR HONOR, I THINK THAT THE RESULT WAS UNDERMINED , AND THERE WAS PREJUD ICE , AND DR. MOSSMAN 'S OPINIONS AND FINDINGS WERE BASED U PON TESTING , AND THEY WERE NOT REFUTED. THE STATE PRESENTED NOTHINGAT THE POSTCONVICTION SHEARING, TO , IN A NY WAY , REFUTE DR. MOSSMAN'S FINDINGS.

LET M E ACCEPT YOUR ARGUMENT. IF DR . MOSSMAN HAD BEEN PLACED OR SOME OTHER MENTAL HEALTH EXPERT HAD BEEN PLACED ON , AS A WITNESS IN THIS CASE , THEN WHAT WOULD IT HAVE OPENED UP FOR T HESTATE TO PRESENT, IN ADDITION TO THE MEN TAL HEALTH MITIGATION ? WOULD IT HAVE ALSO OP ENED THE DOOR THAT HE WAS A SOCIOPATH AND HAD A V ERY HIGH IQ AND PROBABLY WAS THE LEADER OF THE GROUP , ET CETERA, ET CETERA .

I AGREE THAT THAT I S POSSIBLE, BUT IT IS MY UNDERSTANDING THAT DR . PARTICKA WAS RETAINED UNDER THE R ULE AND STATUTE THAT MAKES HIS COMMUNICATION WITH MR. CUM MINGS CONFIDENTIAL. IN OTHER WO RDS , HE WASN'T A PERSON, A WITNESS WHO COULD BE CA LLED, AND THE STATE DIDN'T GO THROUGH THE PROCEDURE TO OB TAIN EXPERTS WHO COULD SAY THAT MR . LOONEY WAS PSYC HOPATH .

JUSTICE: LET'S SAY THIS DEFENSE COUNSEL HAD THAT EXPERT, AND LE T'S ASSU ME THAT THAT EXPERT WOULD HAVE SAID SOME LOONEY HAS A MENTAL AGE. WE COULD POSSIBLY GET THE MENTAL HEALTH OR THE AGE MITIGATOR OF 15. THIS AT TORNEY WOULD ST ILL SOUTHBOUND LOOKING AT AN EXPERT WHO WOULD , ALSO, SAY HE IS A SOCIOPATH.

THAT'S RIGHT, AND WE CERTAINLY DON'T CONTEND THAT IT WAS INEFFECTIVE NOT TO USE DR. PARTIKA OBVIOUSLY.

JUSTICE: SO WHAT YOU ARE SAYING IS IS HE SHOULD HAVE GOTTEN AN ADDITIONAL MENTAL HEALTH EXPERT.

YE S. HE SHOULD HAVE GOT TEN SOMEONE ELSE, AND I WANT T O POINT OUT THAT THERE IS A FACTUAL BASIS TO IN DICATE SERIOUS MENTAL DISTURBA NCE WITH REGARD TO MR . LOONEY,WHICH IS AN OTHER STATUTORY MITIGATOR THAT WAS NOT PROPERLY BROU GHT OUT DURING THE PENALTY PHASE. LOONEY'S , THE COUNSEL DID PRESENT SOME TESTIMONY T HAT MADE IT CLEAR THAT THIS YOUNG MAN DID HAVE A TERRIBLE CHILDHOOD. I MEAN , WE HAVE TO ACKNOWLEDGE THAT. HE WAS SEXUALLY ABUS ED. THAT WAS BROUGHT OUT . SOME REAL PROBLEMS. BUT THERE WAS SO MUCH MORE, AND WE HAVE LI STED THEM IN OUR BRIEF, JUST VE RY QUICKLY. HIS MOTHER WAS VERY SERIOUSLY DIST URBED MENTALLY. THIS WAS NOT BROUGHT OUT AT THE TRIAL. SHE ABUSED D R UGS AND ALCOHOL. HER PROBLEMS W ERE SO IS SERIOUS THAT THE T EXASDEPARTMENT OF H UMAN SER VICES TERMINATED HER PAR ENTAL RIGHTS. THE SITU ATION - -

CHIEF JUSTICE: THAT WAS NOT BR OUGHT OUT , THE CIRCUMSTANCES THAT HE WAS TAKEN F R OM HIS NAT URAL MOTHER SHORTLY A FTER BIRTH? ZOO YES. BUT SHE ACTUALLY --

YES, BUT SHE ACTUALLY TESTIFIED, AND SHE KIND OF SAN TIZED HER SITUATION, SO IS THAT THE DEPTH OF THIS YOUNG MAN'S CHILD HOOD AND HOW BAD IT WAS , WAS NE VER FULLY PRESENTED .

JUSTICE: WHO WOULD PRESENT THAT OTHER THAN PEOPLE WITH PERSONAL KNOWLEDGE, BECAUSE THEGRANDFATHER WAS DEAD AND THE GRANDMOTHER TESTIFIE D AND THE MOTHER TESTIFIED .

RIGHT, BUT OBV IOUSLY T HEMOTHER WAS NOT GOING TO LAY ALL OF THE CARDS ON T HETABLE IN TERM S OF HER ABUSE AND NEGLECT OF THIS YOUNGMAN.

GOING BACK TO THE CHI EF'S QUESTION, WHO EL SE WOULD HAVE TESTIFIED?

DR . MOSSMAN ANSWERED THIS QUESTION.

JUSTICE: BUT HE WASN'TTHE RE. HE DIDN'T HAVE THE FACTUAL PREDICATE.

I AGREE, EX CEPT FOR THEFACT THAT DR. MOSSMAN POINTED OUT THAT ALL OF THIS INFORMATION WAS IN THE RECORD. IN OTHER WORDS, THERE WAS A CONSIDERABLE FILE , DOCU MENTS THAT SHOWED THE EXTENT OF THE ABUSE OF THIS KID. WHEN HE WAS ONLY 18 MONTHS OLD ON, HE WAS SE XUALLY ABUSED BY THE GRANDFATHER .

CHIEF JUSTICE: THAT CAME OUT IN TRIAL. DIDN'T THAT COME O UT?

Y ES. THAT CAME OUT BRIEFLY AND I WILL ADMIT THAT, BUT THERE WAS A LOT MORE , AND FINALLY ON THE SUBJECT , DR . MOSSMAN POINTED OUT THAT A LOT OF THIS YOUNG MAN'S PROBLEMS COULD BE CONNECTED TO VERY , VERY SEVERE ALCOHOL ABUSE AND DEPRESSION , AND THIS WAS NOT A PART OF THE PENAL TY PHASE HEA RING.

CHIEF JUSTICE: I WANT TO REMIND YOU, YOU ARE IN YOUR REBUTTAL.

THANK YOU VERY MUCH. I WILL RESERVE THE REST OF THE TIME. THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS CAROL SNURKOWSKI FROM THE ATT ORNEY GENE RALS OFFICE. FIRST OF ALL, I THIN K WE HAVE HAD A CH ANGE , A CHANGE THAT CAME ABOUT AT THE TIMEOF THE EVIDENTIARY HEARING IN THIS CASE. WHEN DR . MOSSMAN WAS HIRED TO COME FORWARD AND PRESENT EVIDENCE AND ASCERTAIN WHAT COULD HAVE BEEN PRESENTED , HE WAS UNAWARE THAT IN F ACT,MR. BA ILLY , WHO WAS THE FIRST COUNSEL IN THIS C ASE AND THEN MR . CUM MINGS W HOTOOK OVER THE CASE , ACTUALLY HAD A DOCTOR ON STA FF , ONBOARD , AND WAS DOING INVESTIGATIONS AND DID A WHOLE PANO PLY OF TESTS WITH REGARD TO MR . LOONEY'S CIRCUMSTANCES. AND SO HAVING SAID THAT , THE DAY BE FORE , THE EVIDENTIARY HEARING , DR . MOSSMAN IS? COURT, AND H E FIND S OUT THAT THERE IS A DOCTOR AND THAT EVENING, HE S POKE TO MR . PARTIK A OR D R . PARTIKA A NDTHE NE XT DAY APPARENTLY IN A PHONE CALL THAT HE MADE T O DR. PARTIKA BEFORE THE EVIDENTIARY HEARING AND HADA DISCUSSION WITH HIM WITH REGARD TO THAT, AND THE R ONY BRING THIS TO YOUR ATTENTION IS BECAUSE WE NO W HAVE A CHANGE OF WHAT THE THE OR Y IS AT THE EVIDENTIARY HEARING. IT IS NO LO NGER ABOUT DEFENSE COUNSEL FILED T O PRESENT A NUMBER OF -- FAILED TO PRESENT A NUMBER OF MITIGATING FACT ORS, BUT NOW WE ARE CHAN GING THAT METHOD OR HOW THIS WAS PRESENTED T SHOULD HAVE BEEN PRESENTED THROUGH A DOCTOR. A ME DICAL HEALTH EXPERT SHOULD HAVE PRESENTED ALL OF THIS IN FORMATION, AND THAT WOULD HAVE CONVINCED T HEJURY AND THE TRIAL COURT TO GIVE A LIFE SENTENCE.

CHIEF JUSTICE: HOW DO Y OUKNOW THAT, UNTI L THE D AYBEFORE, HE DIDN 'T REALIZETHERE WAS --

HE TESTIFIED TO THAT.

CHIEF JUSTICE: I SEE. IS DR. MOSSMAN, WHAT I S THERE IN THE RECORD, IN TERMS OF THE JU DGE DIDN'T SEEM TO GIVE WHAT HE SAID MUCH CRED ENCE. MR. HARRISON MENTIONED HE IS A LA WYER, A DOCTOR , AND --

RI GHT.

CHIEF JUSTICE: AND NOT THAT THAT ME ANS THAT HE IS A PROFESSIONAL EXPERT , BUT WHAT --

HE TESTIFIED IN A NUMBER OF CASES. THIS COURT HAS SEEN HIS WORK WITH RE GARD TO THE CAPITALCASES.HE DOES COME IN AS A DEF ENSE EXPERT WITH REGARD T O PRESENTING

MITIGATION . HIS THEME GENERALLY, I AM JUST MA KING A GENERALOBSERVATION, BUT HIS THEME , HE DOES HAVE A THEME OF MENTAL AGE OR EMO TIONAL AGE IN A LOT OF THE CASES. HE SEEMS TO BELIEVE THAT THAT IS A IMPORTANT FACTOR , AND THUS FAR HE HAS NOT REALLY HAD A CASE WHER E HE HAS FOUND THAT TO BE COMPELLING, AND I MI GHT ADD IN THIS PARTICULAR CASE , MR . HARRISON SAID THAT HE HAD FOUND THE AGE OF 1 5.I DON'T RECALL THAT IN THE RECORD AND THE RECORD WILL CERTAINLY SPE AK FOR ITSE LF , BUT HE WAS UNABLE TO , AS FARASY IS RECALL , GIVE A MENTAL OR EMOTIONAL AGE , AND I MIGHT ADD THAT THIS INDIVIDUAL WAS 20 YE ARS O LDAT THE TIME THIS WAS FOUND , WITH A 120 IQ, BASED ON DR . MOSSMAN'S TESTIMONY. DR. PARTIKA SAID AN I Q OF 114. HE WAS A SMART INDIVIDUAL. HE HAD NO DIFFICUL TIES.

CHIEF JUSTICE: THERE WAS NO QUESTION AS I LOOK BA CK AT THE SENTENCING ORDER THAT THIS DEFENDANT HAD AN EXTREMELY TROU BLED CHILDHOOD , AN EXTREME , THAT THAT PICTURE WAS PRESENTED TO THIS ORIG INAL JU RY.

YES. RIGHT. BUT THE PORT RAIT OF T HIS INDIVIDUAL IS ABSOLUTELY HORRIBLE. NO ONE WANTS THIS KIND OF LIFE, AND YOU CRINGE AT T HETHOUGHT OF IT, BUT THE POINT IN FACT IS NOT TO DIMINISH IT BUT THE POINT IN FACT IS THAT IT ENDED AT 18 MONTHS. HE WAS THEN PUT IN THE FOSTER SYSTEM AND THERE WAS NO RECORD EVIDENCE, NO RECORD EVIDENCE, I RE PEAT , ONLY DR . MOSSMAN 'S ACCOUNTING, BUT THERE IS NO RECORD EVIDENCE PRESENTED IN THIS RECORD TO RE NEXT THAT HIS FO STER CARE -- T O REFLECT THAT HIS FOSTER CARE TIME, WHICH IS A PERIOD OF MORE THAN 16 YEARS , WAS IN ANY WAY ABER RANT OR ABUS IVE .

WAS HE GIVEN ANY KIND OF COUNSELING OR ANY THING, AFTER THIS 1 8 MON THS PERIOD?

THERE IS NO RECORD OF THAT. SOCIAL SERVICES CAME IN AND TOOK HIM OUT OF THE HOME IMMEDIATELY.TOOK HIM AWAY FROM THE MOTHER, AND THEN THERE WAS SOME SUGGESTION THAT IT WOULD GO TO THE GRANDPARE NTS.THERE WAS AN EXT ENSIVE INQUIRY AS IT TO WHE TH ERTHAT WAS AN APPROPRIATE PLACEMENT, AND IT WAS FOUND TO BE NOT ACCEPTABLE AT ALL , AS EVIDENCE WAS THAT THAT WAS PART OF THE PROBLEM IN THIS CASE.AFTER THAT, AFTER THE 18-MONTH PERIOD, NOTHING MORE HAP PENED.WE HAVE A SILENT RECORD WITH REGARD TO ANY PROBLEMS WITH HIS SCHO OLING, ANY PROBLEMS WITH HIS L IFE. HE LIVED , THE ONLY THING WE HAD A PROBLEM , IS WE HAVE SOME SUGGES TIONS BY G LENDA PLODGER, WHO IS THE GRANDMOTHER, WHO TRI ED TO STAY IN CONTACT WITH HIM THROUGH THE FOSTER HOME AND THE ADOP TIVE PARENTS, AND SHE SAID THAT T HEY WERE TOO RIGID . HE DID NOT LIKE BEING THERE BECAUSE THEY WERE TOO RIDGE ED IN -- RIGID IN HER BELIEFS AND THEIR REQUIREMENTS A NDTHEY WERE S KIP NARNS , B UTTHAT IS THE ONLY RECORD. THE ONLY RECORD COMES F R OM DR. MOSSMAN WHO READ SOME RECORDS AND NOTHING THAT THE COURT CAN SE IZE U PON , AND THE RONY SAY THAT EMPHATICALLY AND REPEAT EDLY IS BECAUSE OF THE CREDIBILITY THAT DR . MOSSMAN SUFFERED IN THIS C ASE. WHILE HE MAY HAVE THOUGHT H E READ SOME OF THE RECORD, HE DID NOT KNOW WHAT THIS CASE WAS ABOUT. HE DIDN'T KN OW WHAT THE CRIME WAS.HE KN EW NOTHING ABOUT THE THREE DEFENDANTS ON THEIR WAY BACK AND T HE CONVERSATIONS THAT THEY HAD. HE KNEW NOTHING ABOUT THIS CRIME. HE FOCU SED ON WHAT W ASPRESENTED TO HIM , AND THAT WAS WHAT THE AGGRAVATION THAT WAS PRESENTED , AND HAVING NO KNOWLEDGE OF WHAT THE BACKGR OUND WAS BE HIND THAT, THAT IN FACT THERE W ASA DOCTOR, AND IN FACT THERE WAS EVIDENCE THAT MR . CUMMINGS WAS WO RKING WITH AND THAT DR . PARTIKA AND MR . CUMMINGS HAD DISCUS SED ON A NUMBER OF INDICATIONS WHAT WOULD BE THE BEST THEORY IN HOW TO -- A NU MBER OF INDICATIONS, WHAT WOULD BE THE - - A NUMBER OF ON INDICATIONS, WHAT WOULD BE THE -- A NUMBER OF OCCASIONSAND THE BEST THEORY AND H OWTO PRESENT IT. THIS HORRIBLE CRIME WHE N HE WAS 18 YEARS OLD, WHO BETTER THAN A MOTHER WHO COMES BACK AFTER 20 Y EARS NOT IS SEEING HER CHILD AND SAYS I LOVE THIS CHILD. HE WAS TAKEN AWAY . HE WAS RI PPED FROM MY BOSOM IN A SENSE , AT 18 MONT HS, AND I HAVE NOT SEEN H IM. I HAVE HAD NO CONTACT. YOU HAVE THE GRANDMOTHER SAYING,

YES, HOR RIBLE THI NGS HAPPENED. I TRIED TO COMMUN ICATE W ITH HIM.I SENT HIM LETT ERS , AND HE WOULDN'T RESPOND. L O AND BEHOLD, I FIND OUT THAT MRS . LOONEY NEVER GAVE HIM THE LE TTERS. I ME AN, HE LLO , THIS IS WHAT THE BOTTOM LINE IS IN PRESENTING THIS MITIGATION , PUTTING IT IN PERSPECT IVE. WHO BETTER THAN TO PRESENT IT THAN THE FA MILY ? THE FAMILY. SO WHAT IF DR . PARTIKA COULD GET UP THERE AND SAY EXCUSE ME BUT HE HAS AN IQ OF 1 14 , IS HE A SOCIOPATH. HE HAS NO REMO RSE. HE DOESN'T CARE ABOUT PEOPLE. HE IS EM PTY AND GRATIFIES HIMSELF BY BEING HAP PY. HE IS DOES NOT HAVE ANXIETY.HE IS NOT A PA NIC TY PE. THIS CRIME WASN'T DONE BY PANIC. THAT IS ALL THAT DR . PARTIKA COULD TESTIFY TO , AND THAT IS WHAT HE WAS WORKING WITH. NOT THAT DR . MOSSMAN C OMESIN AND SAYS HE HAS A MENTAL AGE OF PER HAPS 18.

JUSTICE: BASED ON THIS CHILDHOOD THAT YOU HAVE JUST DESCRIBED TO US , WOULDN'T A PRUDENT DEFENSE ATTORNEY HAVE ASKED DR . PART I CAN A TO AT LE AST EXPLORE THE I DEA THAT , BASED O N THIS TRAUMA , HE MAY HAVE BEEN UNDER , THAT MENTAL MITIGATORS THAT THEY TALK ABOUT --

DR. PARTIKA TESTIFIED AT THIS HEARING, AND HIS TESTIMONY WAS LIMI TED BECAUSE HE WAS FEAR FUL , STILL BELIEVE ING THAT HE WAS NOT FREE OF THE ATTO RNEY OR DOCTOR/CLIENT PRIVILEGE, SO IS HE CUSHIONED HIS TESTIMONY, BUT WHEN HE WAS TESTIFYING, HE SAID , HE LOOKED AT THE RECORD. THERE WAS NOTHING IN T HERECORDS TO REFLECT THAT HE WAS ABUSED , THAT ANY THING HAPPENED , AT THE TIME THAT HE WAS MOVED FROM THE REAL HOME INTO A FOSTER CARE, AND THEN INTO IS THE ADO PTIVE FAMILY. THERE WAS NOTHING IN THE RECORD. AND SO THAT WAS EXPL ORED. AND I MIGHT ADD IF YOU RECALL IN THIS RECORD , THERE WAS AN INVESTIGATOR , MR . JOHNSON, WHO WAS VERY , VERY VOCAL WITH REGARD TO INVESTIGATING THIS CASE. I MEAN, IF YOU LOOK AT THIS RECORD AT THE TRIAL RECORD LEVEL , MR. CUMMI NGS WAS SAYING HOW TENACIOU S HE WAS IN SEEKING EVERYTHING OUT, AND THEN MA TTER OF F ACT THERE WAS SOME REFERE NCE TO IT IN THE POSTCONVICTION LITIGATION, THAT HE WAS M AKING NO ISES ABOUT HOW WE OUGHT TO HAVE THIS G UY EXAMINED BY A PSYCHOLO GIST , AND SO THERE W ERE DISCUSSIONS. IT WAS NOT LI KE THIS WAS SOMETHING OUT IN THE FAR REACHES AND NOBODY WAS TALKING ABOUT IT. THEY WERE TALKING ABOUT IT. IT IS JUST THAT MR. CUMMINGS AND DR. PARTIKA AND MR . JOHNSON HAD TO GET TO GETHER AND DECI DE WHAT WAS THE STRATEGY TO PRESENT IN THIS CASE AND THEY DID IT BASED ON REA SONED STRATEGY A NDBASED ON ON THE RECORD T HAT THEY HAD , AND THERE I S NOTHING PRESENTED BEFORE THIS COURT OR THE COURT BELOW THAT REFLECTS ANYTHING WOULD HAVE CHANGED THAT , BECAUSE DR. MOSSMAN, IN TRYING TO DEVELOP MITIGATION THAT POTENTIALLY COULD HAVE BEEN DEVELOPED, DID NOT BASE IT ON ANY REALIT Y OF THIS RECORD. HE BASED ON IT ON HIS THEME OF WHAT HE TH OUGHT SHOULD HAVE BEEN PRESENTED AS OPPOSED TO WHAT COULD HAVE FOUND OUT WAS PRESENTED. IN FACT THE VERY THING T HAT IS BEING ATTACKED BY. MR. CONSUMINGS IN A PRESENTATION OF -- MR . CUMMINGS IN A PRESENTATION OF MITIGATION , AND BY DR . MOSSMAN GOING BACK AND LOOKING AT THIS RECORD MORE CAREFULLY AND FULLY, AND PRESENTING WHAT HE FOU ND, AND THAT IS WHAT SHO ULD HAVE BEEN DONE, BECAUSE THAT IS WHERE I THINK HE LO ST THE CREDIBILITY WITH REGARD TOTO THE TRIAL COURT FINDINGTHAT HIS STATEMENTS WERE NOT BELIEVEABLE.

JUSTICE: DO WE H AVE ANYTHING IN THIS RECORD T HAT INDICATES HOW MR . LOONEY WAS FUNCTIONING JUST PRIOR TO THIS MURDER? WAS HE EMPLOY ED? DID HE LIVE WITH HIS PARENTS?DID HE LIVE IN AN APAR TMENT ON HIS OWN?

MR . LOONEY WAS A TRAVELER. HE HAD BEEN TRAVELING A ROUND THE COUNTRY , BASED ON BOT H DR. MOSSMAN AND DR . PARTIKA'S ASSE SSMENT OF HIM. HE REACTED . HE NE EDED STIM ULI AND SO H E MOVED AROUND. HE CAME TO TALLAHASSEE OR CAME TO LEON COUNTY AND WAKULLA COUNTY APPROXIMATELY A WE EK BEFORE THIS ALL OCCURRED, I BELI EVE, OR AT LEAST HE MET UP WITH MR . HERTZ AND MR . DID DEMPSEY -- MR. DEM PSEY WITHIN THREE DAYS OF THIS OCCU RRING

JUSTICE: WAS HE ON PROBATION?

YES AND IN FACT THE PROBATION CALL ED MR . CUMMINGS TO SAY THAT THREE YEARS PRIOR TO T HIS OCCURRING , HE WAS A MO DEL PROBATIONER.HE WAS NOT SE LF MEDICA TING AND NOT ON ANY KIND O F DRUGS.THAT IS CONTRA RY TO WHAT DR . MOSSMAN WAS SAYING IS THAT HE HAD STRESSORS AND TO ALLEVIATE THE STRE SSORS OF HIS CHILDHOOD AND GROW ING UP , HE WAS USING DR UGS AND ANXIOUS AND HAD PANIC , ALL OF THIS WAS DONE THROUGH PANIC EFFORTS, I GUESS , AND THAT IS NOT BO RNE OUT BY ANY OF THE RECORD. IT IS ABSOLUTELY NOT BORNE OUT BY ANY OF THE RECO RD. HE APPARENTLY WAS VERY G OOD , HAD DONE FOR THREE YEARS , BEEN SUCC ESSFUL ON HIS PROBATION, AND PROBATION OFFICER SO STATED THAT. YOU HAVE OTHER PEOP LE, FOR EXAMPLE , THE RE WAS A, I LE EB HIS NAME WAS -- I BELIEVE HIS NAME WAS AND REW HA RRIS , WHO WAS A JAILHO USE CO HORT NOT TO THE CRIME BUT JUST LIVING TOGETHER IN THE JAIL , WHO WAS WITH DEMP S I , AND THEY TALKED, AND -- WITH DEMPSEY AND THEY TALKED , AND MUCH ADO WAS B ROUGHT O UTDURING THE COURSE OF THE CASE THAT DEMPSEY WAS THE LEAD HERB AND THAT LOONEY WAS A FOLLOW-LEADER , AND THAT LOONEY WAS A -- WAS A LEADER AND THAT LOONEY WAS A FOLLOWER , JUST A LOOK OUT, AND BASED ON THAT , THAT WAS THE REASON WHY THE DE ATH PENALTY SHOULD BE IMP OSED BECAUSE OF THE LI FE SEN TENCE THAT DEMPSEY RECEIVED AND THAT WAS GIVEN GR EAT EMPHASIS AND WEIGHT , AND THE POINT I AM TRYING TO MAKE TO THIS IS THAT IN ESSENCE FOR ONE TO BE A FOLLOWER , ONE WOULD THINK LO WER INTELLIGENCE, NOT AS EXPERIENCED AND THAT SORT OF THING AND THAT THEY WERE HAVING SOME ON E ELS E COME ALONG AND THEY WOULD FOLLOW THEM. DR. MOSSMAN SAID THAT HE I S SMART. HE HAS GOT A 114 IQ. HE IS SMART AND MANIPULATIVE AND HE DOES THESE KINDS OF THINGS. THERE IS NO WAY THAT PRESENTING THE PICTURE THAT HE WAS A LOOKOUT ONLY THROUGH THIS ONE WITNESS , THERE WAS NO WAY THAT THEYWERE GOING TO PRESE NT A DOCTOR OR HAVE DR . PARTIKA COME IN AND FIND HE HAS G OTAN IQ OF 1 20 , THAT WOULD HAVE COME OUT. WITH REGARD TO THE ASSESSMENT OF THIS CASE A NDWITH REGARD TO HOW MR . CUMMINGS ASSESSED THIS CASE AND DETERMINED THAT THIS WAS THE BEST POSITION THAT WE COULD PRESENT OR THEY C OULDPRESENT WITH REGARD TO THIS CASE. AND I MIGHT ADD, I M EAN , WE ARE TALK ING A LOT ABOUT WHAT COULD HAVE BEEN PRESENTED AND LOOKING BACK WARD . AGAIN, THE NOTION THAT WE ARE HERE FOR , IS TO DE CIDE WHETHER MR. CUMMINGS RENDERED EFFE CTIVE ASSISTANCE OF COUN SEL. THAT WAS THE BASIS U PON WHICH POSTCONVICTION EVIDENTIARY REVIEW WAS CONSIDERED AND THE FINDING BY THE TRIAL COURT WAS THAT HE RE NDERED EFFECTIVE ASSISTANCE, COULD NOT FIND DEFICIENT PERFOR MANCE BECAUSE THERE WAS NO DEFICIENT PERFORMANCE HERE AND CERTAINLY N O PRE JUDICEWITH REGARD TO THE LACK OF CREDIBLE INFORMATION. THAT WAS NOT PRESENTED. THANK Y OU.

CHIEF JUSTICE: THANK YOU. REBUTTAL.

VERY BRIE FLY , Y OUR HO NOR , MR. S NURE S KOU SKI -- S MS SNURKOWSKI AND I HAVE SOME DIFFERENCE OF OPINI ON ON WHAT THE RECORD SHOWS , BUT IT IS NITPICKING AND SO I DON'T KNOW IF DR . MOSSMAN SAID 15.I KNOW HE SAID MID TO L OWERTEENS, SO? I SAID 15 YEARS O LD, THAT IS WHAT I WAS REFERRING TO THERE.THE POINT I WANT TO END THIS , IF YOU LOOK AT THE SENTENCING, PAR DON ME AT THE PENALTY P HASE PROCEEDING AND THE CLOSING ARGUMENTS, IT JUST SE EMS THAT THE STATE HAD BETTER COUNSWILL T HAT DAY. MR. MEG GS LOOKED AT THE PENALTY PHASE STAT UTE, AND HE AR GUED STATU TORY AGGRAVATORS. I MEAN, HE WENT RIGHT DOW N THE LINE WITH THE MOST POWERFUL TO OL THAT THE STATE HAS, STATUT ORY AGGRAVATORS. WHAT THE DEFENSE HAS IS STATUTORY MITIGATORS , AND WHAT WE ARE SAYI NG IS T HAT THERE WAS EVIDENCE TO SUPPORT STATUTORY MITIGATORS , AND IF YOU LOOK AT WHAT MR . CUMMINGS DID, HE N EVER EVEN REFERENCES ANY OF THE STATUTE IS OTHER MITIGATORS , AND THE DEFENDANT DOES N' T HAVE A PRAY ER IN THE SITUATION LIKE THAT , BECAUSEWHAT THE DEF ENSE ARGUMENT AND CASE IS, IS BASI CALLY AS IF YOU WERE ARGUING A ROBBERY CASE . IN A DEATH CASE , YOU HAVEGOT TO DEAL WITH THOSE STATUTORY MITIGATORS , AND WE ASK THAT IF YOU TAKE ANOTHERLOOK AT OUR BRIEF , HOPEFUL LY YOU

WILL SEE THAT WE WERE RIGHT IN THAT REGARD. THANK YOU VERY MUC H.

CHIEF JUSTICE: THANK Y OU, MR. HARRISON.