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**Eric Scott Branch v. State of Florida**  
**Docket Number: SC05-433 | SC05-1558**

GOOD MORNING, JUSTICES. I AM REPRESENTING MR. BRANCH IN A 3.850. FIRST I WOULD LIKE TO CORRECT THE RECORD ON PAGE 6 OF THE INITIAL APPELLATE BRIEF.

CHIEF JUSTICE: COULD YOU SPEAK UP A LITTLE BIT.

I AM SORRY. THE APPELLATE THEN IDENTIFIED THE MAN IN THE PHOTOGRAPH AS THE PERSON WHO KILLED THE VICTIM AS AN INCORRECT STATEMENT. IT SHOULD HAVE SAID MR. WIMBERLY IDENTIFIED THE MAN, AS FOUND IN PAGE 323-324. THE SECOND IS THAT THERE ARE A NUMBER OF SUBSTANTIVE SUBSTANTIAL ISSUES THAT I WON'T BE ABLE TO DISCUSS ALL OF THEM. I WOULD LIKE YOU TO KEEP IN MIND THAT THERE ARE TWO THINGS THAT PERMEATE ALL OF THEM. COUNSEL'S DEATH CASE AND FOUR MONTHS TO PREPARE. THE ISSUES I WOULD LIKE TO SPEAK ABOUT RIGHT NOW IS ISSUE ONE AND TWO OF THE INITIAL BRIEF AND TIME PERMITTING, ISSUES THREE AND FOUR OF THE STATE HABEAS.

JUSTICE: CONSIDERING WHAT YOU SAID ABOUT COUNSEL HAD FOUR MONTHS TO PREPARE, IS THIS THE SECOND ATTORNEY ON THIS CASE?

YES.

JUSTICE: SAID TO WHAT EXTENT DID THE FIRST -- AND TO WHAT EXTENT DID THE FIRST ATTORNEY GET INTO THIS CASE AND WHAT WERE HIS DEALINGS WITH THE SECOND ATTORNEY?

NO DEALINGS WITH THE SECOND ATTORNEY OTHER THAN THEY HAD A SHORT CONVERSATION. DIDN'T REMEMBER WHAT THE CONVERSATION ENTAILED. MR. LOVELESS WAS APPOINTED IN JUNE '94 THROUGH OCTOBER '94 AND CONDUCTED A NUMBER OF DEPOSITIONS AND THAT WAS IT.

JUSTICE: THE FIRST ATTORNEY WAS PUBLIC DEFENDER?

YES.

JUSTICE: AND THE SECOND ATTORNEY RETAINED THE FILE OF THE FIRST ATTORNEY.

JUSTICE: AND THE ATTORNEY GAVE THE FILE TO THE SECOND ATTORNEY?

HE OBTAINED THEM BUT DIDN'T KNOW WHETHER HE REVIEWED THEM OTHER THAN FOR PURPOSES OF DISCOVERY, HE DIDN'T KNOW HOW MUCH HE HAD, WHETHER HE HAD ALL OF IT OR NOT.

THE TRIAL COURT ENTERED A VERY DETAILED ORDER ON THE ISSUES IN THIS CASE, AND AS YOU DISCUSS THE ISSUES, WOULD YOU BRING THE PROVISIONS IN THE TRIAL COURT'S ORDER THAT ARE RELEVANT AND HELP US, BECAUSE ORDINARILY WHERE THE TRIAL COURT WENT WRONG IS THE APPELLANT'S POSITION.

I WILL ATTEMPT TO DO THAT, JUSTICE ANSWER. LET ME POINT OUT THAT IN ALMOST ALL OF THE ISSUES IN THE TRIAL COURT'S ORDER HE EITHER FOUND ONE PRONG MISSING OR THE OTHER PRONG. HE DIDN'T DEAL WITH BOTH PRONGS ANYWHERE THAT I CAN FIND. WITH REGARD

TO THE PRESS , BASICALLY THE COURT REITERATED AS WELL AS THE STATE IN THEIR ANSWER BRIEF, THE FACTS THAT WERE CONTAINED IN THE AFFIDAVITS FILED BY THE POLICE OFFICERS AND MAKES THE CONCLUSION THAT THE PROBABLE CAUSE EXISTED BUT NEITHER THE COURT IN ITS ORDER NOR DID THE STATE ARGUE HOW THERE WAS A NEXUS BETWEEN THE VEHICLE THAT WAS BELIEVED TO HAVE BEEN PARKED IN A PARKING LOT WHILE MS. MORRIS WAS STILL ALIVE AND NO EVIDENCE ESTABLISHED THAT THERE WAS ANY CONTACT WITH THAT VEHICLE AFTER MR. BRANCH LEFT THE AIRPORT. WHERE IS THE NEXUS? WHERE IS THE CONTACT WITH THAT VEHICLE THAT ESTABLISHES ANY INDICATION THAT THERE WAS ANY CONTRABAND IN THAT VEHICLE? IT IS NOT EXPRESSED BY THE COURT NOR IS IT EXPRESSED BY THE STATE.

JUSTICE: I THOUGHT AT THAT POINT, THAT THE POLICE DID KNOW THAT THE DEFENDANT WAS SEEN IN HER VEHICLE. IS THAT NOT CORRECT?

THAT IS CORRECT BUT THAT IS NOT THE VEHICLE THAT WAS SEARCHED. IT WAS HIS VEHICLE THAT WAS SEARCHED.

JUSTICE: I REALIZE THAT , BUT IF THAT IS THE VEHICLE THAT HE HAD PREVIOUSLY AND HE NOW HAS BEEN SEEN IN HER VEHICLE , WHY WOULDN'T THAT , FOR INSTANCE, BE A FACT THAT PROVIDES NEXUS WITH HIM AND HER , THIS MISSING WOMAN?

I DON'T KNOW HOW IT WOULD BE ANY DIFFERENT THAN IF HE WAS IN HIS OWN HOME PRIOR TO HER DEATH. WHERE IS THE INDICATION THAT THERE WAS ANY CRIMINALITY IN THAT VEHICLE?

JUSTICE: I THOUGHT IT WAS CONCEDED BELOW THAT IT WAS PROPER FOR THE POLICE , FOR INSTANCE, TO SEARCH THE TRUNK OF HIS CAR . WAS THAT CONCEDED AT THE HEARING?

IT WAS CONCEDED ON AN EMERGENCY CIRCUMSTANCE IN THE FACT THAT THE POLICE HAD INDICATED THAT THE VEHICLE WAS SETTING LOW AND WANTED TO LOOK IN THE TRUNK.

JUSTICE: IF THERE WAS NO NEXUS, THEN WHY WOULD THAT BE CONCEDED? ARE WE TALKING ABOUT THAT THE POLICE ARE GOING OUT AND SEARCHING EVERY TRUNK?

NO, BUT I THINK THE SITUATION WAS AS YOU SUGGESTED , BEING SEEN IN THE RED VEHICLE , INDICATED THE FACT THAT HE MAY HAVE HAD SOME INVOLVEMENT, TO THE EXTENT THAT THERE MAY HAVE BEEN AN ALIVE INDIVIDUAL IN HIS TRUNK , EVEN IF IT WAS STRICTLY A SUPERFLUOUS REASONING. THE BOTTOM LINE WAS THAT WOULD HAVE TRUMPED THE QUESTION OF PROBABLE CAUSE .

JUSTICE: YOUR ESSENTIAL POINT HERE IS THAT THE TRIAL COURT WAS ABSOLUTELY WRONG TO CONCLUDE THAT THE CIRCUMSTANCES THAT EXISTED AT THAT TIME --

I AM SUGGESTING THAT IS CORRECT. THERE IS NO PROBABLE CAUSE.

JUSTICE: THE CIRCUMSTANCES THAT EXISTED WOULD HAVE MEANT THAT A MOTION TO SUPPRESS WOULD HAVE BEEN GRANTED AS OPPOSED TO THE TRIAL COURT'S CONCLUSION THAT THERE WAS LITTLE OR NO CHANCE THAT IT WOULD BE GRANTED.

THAT'S CORRECT. THE COURT ALSO INFERRED INEVITABLE DISCOVERY IN THE POINTING OUT MOODY'S FIRST SENTENCE, WITH REGARD TO UNDER INVESTIGATION. THE SECOND PART OF MOODY WHICH WAS MOST IMPORTANT IN SAYING THAT EVEN IF THERE IS AN ONGOING INVESTIGATION , THERE NEEDS TO BE PROBABLE CAUSE ANYWAY.

JUSTICE: WHAT DID THE LAWYER TESTIFY TO ABOUT WHY HE DID NOT FILE A MOTION TO SUPPRESS?

BASICALLY HE INDICATED, ONE, HE DIDN'T EVEN REMEMBER WHETHER HE HAD DONE ANY RESEARCH ON PROBABLE CAUSE, AND HE INDICATED THAT, WHEN HE READ THE PROBABLE CAUSE AFFIDAVIT, HE THOUGHT THAT IT WAS SUFFICIENT. THAT WAS IT.

JUSTICE: DO YOU BELIEVE THAT THIS DEFENDANT CLEARLY HAD A SUFFICIENT INTEREST IN THAT VEHICLE, UNDER THE CIRCUMSTANCES THAT WE HAVE HERE, TO PRESENT THOSE ARGUMENTS, AND WHAT IS YOUR BEST AUTHORITY WITH REGARD TO THAT, DO YOU THINK?

ARE WE TALKING ABOUT STANDING OR ABANDONMENT?

JUSTICE: I THINK IT ALMOST HAS, THOSE TWO GO PRETTY CLOSE TOGETHER.

I WOULD ARGUE FIRST OF ALL, THAT IT WASN'T ARGUED EITHER IN THE REPLY TO THE 3.850 NOR AT THE EVIDENTIARY HEARING. STANDING DIDN'T COME UP IN THE COURT RULING AND ABANDONMENT WAS COMMENTED UPON AND NEVER A FINDING. I WOULD SUGGEST WITH REGARD TO THOSE TWO ISSUES THAT THE STATE ACQUIESCED TO IT AND IF IT WERE TO CONSIDER IT THAT WE GO BACK AND BRING THOSE ISSUES BEFORE THE COURT. THERE WAS NO ACQUIESCENCE THAT IT WAS EVEN DISCUSSED. BUT HE HAD STANDING THAT HE WAS GIVEN PERMISSION BY HIS GRANDFATHER TO POSSESS THE VEHICLE.

JUSTICE: I THOUGHT THERE WAS AN ALERT OUT FOR A STOLEN VEHICLE?

THAT WAS THE CONTENTS. WHAT HAPPENED WAS THE COURT UTILIZED PRIOR TESTIMONY OF THE TRIAL I BELIEVE, INCORRECTLY. IN THIS COURT WHEN IT WAS ARGUED BY DEFENSE COUNSEL THAT THIS COURT SHOULD HAVE USED PRIOR TESTIMONY TO SUBSTANTIATE ITS CLAIM, THIS COURT SAID NO, YOU CAN'T DO IT. THERE HAS TO BE FOUR CATEGORIES UNDER WHICH YOU HAVE TO APPLY PRIOR TESTIMONY AND THE LAST TWO DIDN'T EXIST IN THIS CASE, EITHER, AND THAT WAS THERE WAS NO REASON WITH REGARD TO THE QUESTION OF DETECTIVE HARBERT AT THE TRIAL REGARDING THE VEHICLE BEING MISSING, WAS ANY REASON FOR DEFENSE COUNSEL TO QUESTION HIM ON IT BECAUSE THE MOTION TO SUPPRESS NEVER CAME UP NOR WAS THAT ISSUE INVOLVED, PLUS HE WAS AVAILABLE AT LEAST THE STATE DIDN'T SHOW THAT HE WAS UNAVAILABLE, AND THE STATE DIDN'T PREPARE BY CALLING ANY WITNESSES TO THE EVIDENTIARY HEARING TO REFUTE THE MOTION TO SUPPRESS, AND I WOULD SUGGEST THAT, BASED UPON THE AUNT'S TESTIMONY, SHE SPECIFICALLY STATED, WHICH IS THE COURT HAS RECOGNIZED THAT SHE NEVER REPORTED THE VEHICLE MISSING OR SAID IT WAS WITHOUT HIS PERMISSION. SHE DENIES THAT FACT AND I WOULD SUGGEST THAT THE ABANDONMENT, YOU KNOW, IF I HAD A SON THAT WAS IN THE MILITARY AND HE HAD TO GO OUT TO CALIFORNIA AT FOUR O'CLOCK IN THE MORNING AND I DIDN'T WANT TO DRIVE HIM, I WOULD SAY TAKE MY CAR AND PARK IT AT THE AIRPORT AND I WILL PICK IT UP LATER. IF HE LEAVES SOMETHING IN IT AND SAYS, DAD, I HAVE SOMETHING IN THE CAR BUT IT IS PRIVATE. PLEASE SEND IT TO ME. DOES SOCIETY SAY HE HAS LOST EXPECTATION OF PRIVACY WHEN HE LEAVES SOMETHING IN A FAMILY VEHICLE THAT IS LOCKED AND SOCIETY EXPECTS THAT THE VEHICLE WILL NOT BE BROKEN INTO BECAUSE OF A CRIME? I THINK WE HAVE THAT EXPECTATION WITH REGARD TO THE CRIME. ON MARCH 7, THE TRIAL STARTED. ON FEBRUARY 12, MR. MORGAN HIRED A MITIGATION SPECIALIST ON BEHALF THE STATE. ON THE 20th SHE WROTE A LETTER TO MR. ALBRITTON INDICATING I NEED SIX MONTHS TO PREPARE FOR THIS CASE. OTHERWISE I CAN'T GET IT DONE. OTHER THAN THAT, MR. ALBRITTON BY HIS OWN ADMISSION, DID ABSOLUTELY NOTHING ON PENALTY PHASE. HE DIDN'T SPEAK TO THE FAMILY MEMBERS. HE DIDN'T HIRE AN EXPERT AND IRONICALLY HE FILED FOUR SEPARATE MOTIONS INFORMING THE COURT THAT HE WAS GOING TO GO TO INDIANA AND WANTED TO HIRE A MENTAL HEALTH EXPERT, AND HE NEVER DID ANY OF IT.

CHIEF JUSTICE: HE NEVER WENT TO INDIANA?

NO. MR. LOVELESS WENT TO INDIANA.

JUSTICE: THE PRIOR LAWYER.

HE DIDN'T GET ANY SCHOOL RECORDS, DIDN'T GET ANY OTHER RECORDS , DIDN'T DO ANYTHING.

CHIEF JUSTICE: IN LOOKING AT DEFICIENT PERFORMANCE AND AS JUSTICE ANSTEAD POINTED OUT , THIS WAS SECOND COUNSEL. WE DON'T KNOW THAT HE OBTAINED THE PRIOR FILES. HOW IS IT THAT WE DON'T KNOW THAT?

THERE WAS A LOT OF THINGS, MR. AL BRITTON HAD A VERY BAD MEMORY WITH REGARD TO THIS CASE ON DIRECTION. WHEN ASKED IF HE OBTAINED THE RECORDS OF THE PUBLIC DEFENDERS OFFICE, HE DID SAY I GOT SOME DEPOSITIONS AND SOME DISCOVERY. I DON'T KNOW IF I RECEIVED ALL OF IT. THAT WAS HIS RESPONSE . THERE WAS NOTHING IN THAT I COULD FIND IN DEFENSE COUNSEL'S RECORDS TO INDICATE ANY MITIGATION.

CHIEF JUSTICE: ANY WHAT?

ANY MITIGATION, INVESTIGATION OF ANY KIND.

CHIEF JUSTICE: OR DISCUSSION THAT HE HAD WITH PRIOR COUNSEL?

HE HAD ONE DISCUSSION WITH PRIOR COUNSEL REGARDING EXAMINATION BY DR . LARSON. MY UNDERSTANDING WAS THAT HE WAS TOLD BY MR . LOVE LESS THAT THERE IS NO MENTAL ILLNESS PRESENT. THAT IS MY UNDERSTANDING OF THE ENTIRETY OF THAT CONVERSATION. WHEN SPEAKING WITH MR . BRANCH WITH REGARD TO MITIGATION. MR. ALBRITTON SAID THAT MR . BRANCH WAS HAVING SOME DIFFICULTY BUT DIDN'T GET ALONG WELL WITH HIS FAMILY. THEY HAD FIGHTS. SHE TOOK THAT TO MEAN THERE WASN'T GOING TO BE ANYTHING THERE. AT THE TIME OF THE TRIAL --

JUSTICE: DIDN'T THERE , DIDN'T SOME FAMILY MEMBERS TESTIFY AT THIS HEARING? I THOUGHT THE BROTHER AND THE GRANDFATHER ACTUALLY TESTIFIED AT THE PENALTY PHASE, AND TALKED ABOUT MR . BRANCH'S CHILDHOOD AND THOSE KINDS OF ISSUES.

OKAY. HE DID. MR . BRANCH, THE GRANDFATHER TESTIFIED AND ROBERT THE BROTHER TESTIFIED, BUT HERE THE TYPES OF THINGS THAT BROUGHT OUT BY DR . DEE , WHO HAD AFFIDAVITS AND FAMILY RECORDS FROM THE FAMILY MEMBERS WHO APPEARED AT TRIAL.

CHIEF JUSTICE: WHEN YOU SAY HE DID NOTHING AND THEN IN ANSWER TO JUSTICE QUINCE'S QUESTION , THERE ARE , WERE SEVERAL FAMILY MEMBERS THAT TESTIFIED , NOW , THEY DIDN'T JUST APPEAR OUT OF THIN AIR. HE OBVIOUSLY DID SOMETHING TO GET FAMILY MEMBERS THERE, SO LET'S MAKE SURE WE ARE ACCURATE AS TO WHAT THE RECORD SHOWS AS TO WHAT WAS DONE , HOW MUCH WAS DONE. YOU MAY SAY HE SHOULD HAVE DONE MORE, BUT IT IS NOT AS IF NO PENALTY PHASE TESTIMONY WAS PRESENTED .

LET ME POINT IT OUT CHRONOLOGICALLY SO I CAN GET A POINT ON IT. APPROXIMATELY 11 OR 12 PEOPLE SHOWED UP TO TESTIFY , NOT PREVIOUSLY SPOKEN TO BY MR. ALBRITTON. HE -- ALBRITTON . HE PUT THEM ALL IN A ROOM TOGETHER AND SAID , SAY THE WORST THINGS YOU CAN ABOUT MR. BRANCH. THAT WAS THE EXTENT OF HIS CONVERSATION --

JUSTICE: WAS THERE A MENTAL HEALTH EXPERT HIRED IN ANTICIPATION OF MITIGATION?

NO. WHEN WE GET TO TRIAL --

JUSTICE: NO MENTAL HEALTH EXPERT CONSULTED BY EITHER DEFENSE LAWYER?

DR . ALBRITTON CONSULTED WITH DR . LARSON , WHO SAID THERE WAS NO MENTAL HEALTH --  
JUSTICE: HE SPOKE TO DR . LARSON.

MR . LOVE LESS DID .

JUSTICE: DID HE INDICATE ANYTHING THAT MIGHT --

HE INDICATED HIS MENTAL HEALTH MIGHT HAVE BEEN A FACTOR . CHRONOLOGICALLY , JUDGE  
BELL, MR. ALBRITTON ACKNOWLEDGED HE NEVER SPOKE TO MR . LARSON, BUT  
CHRONOLOGICALLY , AT THE TIME THAT THE STATE RESTED DURING PENALTY PHASE, THE  
DEFENSE IMMEDIATELY RESTED. AND JUDGE NICKINSON SAID WAIT A MINUTE. I AM USED TO SEE  
ING FAMILY MEMBERS COME UP HERE. ARE YOU TELL ME GO THAT THE DENIAL OF THE  
CONTINUANCE DIDN'T ALLOW YOU TO DO THAT? MR. ALBRITTON DIDN'T ANSWER THE QUESTION.  
SAID I NEED A MOMENT. SPEAKS TO HIS CLIENT AND THEN CALLS THE GRANDFATHER AND THE  
BROTHER . NOW , AT THE EVIDENTIARY HEARING, THESE ARE THE THINGS THAT WERE  
PRESENTED THAT WERE NOT PRESENTED BY EITHER MR ., THE GRANDFATHER OR THE BROTHER :  
IMPULSIVE PERMITS. MR. BRANCH HAS DIFFICULTY IN --

JUSTICE: WHO PRESENTED THAT TESTIMONY?

DR . DEE . WHO PRESENTED --

JUSTICE: WAS THAT IN THE INITIAL MENTAL HEALTH EXPERT'S REPORTS?

NO. THIS STRICTLY THROUGH AN EVALUATION BY --

JUSTICE: WHAT WE ARE GETTING TO IS IT DOES APPEAR THAT A MENTAL HEALTH EXPERT WAS  
CONSULTED , ALBEIT BY THE FIRST LAWYER, SO ARE YOU ARGUING THAT, WHEN YOU HAVE  
REPLACEMENT COUNSEL -- THAT HE MUST AS A MATTER OF LAW, GO GET ANOTHER EXPERT?

NO. I THINK I AM NOT BEING CLEAR. DR. LARSON, HIRED BY THE PUBLIC DEFENDERS OF FICE ,  
MERELY STATED THAT HE SUFFERED FROM ANTI-PERSONALITY DISORDER AND SUFFERED NO  
MENTAL ILLNESS. THAT WAS THE EXTENT OF HIS TESTIMONY AS FAR AS WHAT HE DID. AT THE  
HEARING HE INDICATED HE WOULD HAVE GIVEN SUBSTANTIALLY MORE INFORMATION , HAD HE  
BEEN REQUESTED. DR. DEE WAS HIRED BY ME DURING THE EVIDENTIARY HEARING , WHO HAD  
AFFIDAVITS FROM FAMILY MEMBERS AND RECORDS , AND WHAT I AM ABOUT TO TELL YOU IS  
WHAT WAS TESTIFIED TO AT THE EVIDENTIARY HEARING THAT COULD HAVE BUT WAS NOT  
PRESENTED AT THE TRIAL. HE SUFFERED FROM IMPULSIVE PERSONALITY. HE STARTED OUT , HE  
HAD AN ALCOHOL DEPENDENCY STARTING AT THE AGE OF IN THE EIGHTH GRADE. HE HAD AL  
COHOL --

JUSTICE: I MISSED THAT.

MR . BRANCH --

JUSTICE: IN THE EIGHTH GRADE?

14 YEARS OLD HE STARTED BECOMING DEPENDENT ON CHOCOLATE ALCOHOLIC PARENTS. NOW --  
ON ALCOHOL. ALCOHOLIC PARENTS . NOW , THE GRANDFATHER DID MENTION THE FACT THAT  
THE FATHER HAD ALCOHOLIC PROBLEMS. THAT WAS TRUE HOWEVER , ACCORDING TO DR. DEE , HE  
HAD SEVERE ALCOHOLIC PROBLEMS AS WELL AS THE MOTHER. JUST THAT WAS BASED UPON  
WHAT?

BASED UPON TESTIMONY , AFFIDAVITS BY FAMILY MEMBERS WHO WERE PRESENT AT THE TRIAL ,

WHO DID NOT TESTIFY , SUBMITTED AFFIDAVITS TO DR . DEE.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL, BUT BEFORE YOU SIT DOWN, THIS IS , ALL MURDERS ARE HORRIBLE BUT THIS IS PARTICULARLY HORRIBLE CIRCUMSTANCES . WHAT IS IT THAT IS THE MOST DEVASTATING MITIGATING TESTIMONY THAT WASN'T PRESENTED AT THE ORIGINAL TRIAL THAT WOULD UNDERMINE OUR CONFIDENCE IN THE TESTIMONY THAT WOULD HAVE SHIFTED , PUT THIS CASE IN A DIFFERENT LIGHT?

I THINK WHAT HAPPENED IS HE SUFFERS FROM ANTI-PERSONALITY DISORDER OR AT LEAST SYMPTOMS OF AND ALSO IMPULSIVITY AND ALCOHOL ABUSE. THOSE THREE TOGETHER CREATED CIRCUMSTANCES BASED UPON BEATINGS WHEN HE WAS A CHILD , HEAD INJURY , A BAN ONEMENT , ALL OF HIS EXPERIENCES AS A CHILD GROWING UP , CAUSED HIM TO BE IN A SITUATION WHERE HE IS UNABLE TO CONTROL HIMSELF.

CHIEF JUSTICE: YOU WANT TO SAVE THE REST OF YOUR TIME FOR REBUTTAL?

YES.

MAY IT PLEASE THE COURT. CASSANDRA DALTON ON BEHALF OF THE STATE OF FLORIDA. I WANT TO CORRECT SOME FACTS IN THE RECORD. COUNSEL HAD SAID THAT MR . ALBRITTON HAD REPRESENTED THE DEFENDANT FOR FOUR MONTHS, FOUR MONTHS TO PREPARE. I POINT OUT TO THE COURT THAT THE RECORD REFLECTS THAT MR . ALBRITTON WAS CRIMINAL ATTORNEY SINCE 1977, BUT HE WAS NOT SURE HOW MANY CAPITAL CASES HE HAD HANDLED AT THE TIME THAT HE HAD REPRESENTED MR . BRANCH . MR . LOVELESS , THE CHIEF KAZAND THE PUBLIC DEFENDER -- THE CHIEF ASSISTANT PUBLIC DEFENDER HAD REPRESENTED MR . BRANCH BEGINNING IN JUNE 1993, ALL THE WAY THROUGH OCTOBER, BEGINNING OF NOVEMBER. MR . LOVELESS DID THE INVESTIGATION, AND THERE WAS TESTIMONY AT THE EVIDENTIARY HEARING THAT THAT DEFENSE FILE HAD BEEN PRESENTED TO MR. ALBRITTON . MR . ALBRITTON TESTIFIED -- MR . ALBRITTON TESTIFIED THAT HE HAD THE DEFENSE FILE AND THAT IS ON THE POSTCONVICTION RECORD AT PAGE 120. HE ALSO TESTIFIED THAT HE HAD THE DISCOVERY , INCLUDING THE DEPOSITIONS. MR. LOVELESS --

JUSTICE: WAS THE INVESTIGATOR FROM THE PUBLIC DEFENDERS OFFICE INVOLVED?

YES AND MR . LOVELESS TESTIFIED TO THAT AS WELL , YOUR HONOR. MR. LOVELESS TESTIFIED AT THE EVIDENTIARY HEARING THAT HE MET WITH MR . ALBRITTON AT LEAST ONE TIME , ON PAGES 298-THROUGH-299. I WANT TO ADDRESS THE SECOND ISSUE FIRST. THAT IS THE COUNSEL'S ALLEGED INEFFECTIVENESS AS TO THE PENALTY PHASE. IT IS CLAIMED THAT HE DID NOTHING. AND AS I SAID , HE TESTIFIED THAT HE HAD THE FILE. HE TALKED TO THE DEFENDANT. HE TALKED TO THE FAMILY , AND TESTIMONY IS ON PAGE 268. THE DEFENDANT CLAIMS THAT --

CHIEF JUSTICE: ON THE FAMILY, SO WE GET A SENSE OF IT , MR . REITER SAID HE TALKED TO THE FAMILY BUT IT WAS SORT OF AS ONE OF THESE THINGS THAT, I HAVE SEEN THE SAME IN OTHER CASES WHERE FAMILY MEMBERS JUST COME IN AND THEN THERE IS A LICK AND PROMISE AND ALL OF A SUDDEN THEY ARE PUT ON THE STAND. WHAT KIND OF CONTACT DID HE HAVE WITH THE FAMILY MEMBERS?

WELL , MR . ALBRITTON TESTIFIED THAT HE HAD TALKED WITH THE FAMILY , I BELIEVE IT WAS THE WEEK BEFORE. HE HAD NUMEROUS CONVERSATIONS --

CHIEF JUSTICE: IN INDIANA?

NO. WHEN THEY WERE IN FLORIDA.

CHIEF JUSTICE: DID HE TELL THEM TO CONTACT? WAS THERE CONTACT BEFORE AS TO WHICH

ONE SHO ULD COME DOWN?

THE DEFENDANT DIDN'T PUT ON ANY EVIDEN CE AS TO THIS, AND AGAIN THIS IS A CLAIM OF INEFFECTIVE ASSISTANCE.IT IS HIS BU RDEN. BUT WHAT MR . ALBRITTON DID TESTIFY TO IS THAT HE HAD TALKED WITH THE DEFENDANT NUMEROUS TIMES AND WAS AWAREIN TALK ING TO HIM , BASED UPON FAMILY CONF LICT , THAT THERE WAS NOT POSITIVE FOR MITIGATING EVIDENCE THAT COULD COME OUT. AS TO THE ISSUE OF --

CHIEF JUSTICE: THEN WHY DID HE HAVE THE FAMILY COME, I F THAT IS SO?

I DON'T KNOW , YOUR HONOR, IF THE FAMILY CAME BECA USE THEY WANTED TO OBSERVE THE TRIAL. THEY DID ME ET AND TALK , A NDMR. ALBRITTON TESTIFIED THAT,IN TALKING WITH THEM , BECAUSE SOME OF THE FAMILY MEMBERS FELT THAT THEY HAD A GO INDICATE V AITING INFORM -- AGGRAVATING INFORMATION , THEY DIDN'T WANT TO TESTIFY.

CHIEF JUSTICE: HOW DID THIS HAPPEN? IT DOES SE EM SO RT OF , JUST SORT OF HAPHAZARD THAT HE ALMOST RE STS HIS PENALTY P HASE NOT PUTTING ANYTHING ON, AND THEN THE JUDGE ASKS ARE YOU G O ING TO PUT SOME FAMILY MEMBERS ON, AND THEN HE MISS WHIZ% AND THEY PUT A COUPLE -- AND THEN HE WHISPER S AND THEY PUT A COUPLE OF PEOPLE O IS THAT HOW IT HAPPENED?

ON PAGES 383 AND 3 84 , THE COURT ASKED GOOD THEY WERE G OING TO MAKE A RECORD , THAN IS WHY THAT IS AND WHAT THIS COURT HAS DIRECTED , AND ORIGINALLY THE FAMILY HAD AGREED NOT TO PUT ON MITIG ATING EVIDENCE , BECAUSEWHAT THE FAMILY WOULD TESTIFY TO WOULD BEING AVATING. IT WOULD OPEN THE DOOR TO AGGRAVATING INFORMATION , AND I WOULD POINT OUT THAT THEDEFENDANT SAYS THAT THEREWERE NO SCHOOL RECORD S THAT THE DEFENS E PUT ON , AND THOSE RECORDS ALSO DID NOT COME IN DURING THE EVIDENTIARY HEARING . NOW , DR . DEE TESTIFIED TO VARIOUS FACTS THAT H E HAD READ THAT DOES NOT PROVE THOSE FACTS SUBSTANTIVELY. THOSE ARE FACTS THAT AN EXPERT RE LIES UP ON IN MAKING HIS OPINION OR COMING TO HIS O PINION, BUT NONE OF THOSE RECORDS WERE PRESENTED, AND, AGAIN , THOSE RECORDS WOULDHAVE OP ENED THE DOOR TO VERY NEGATIVE INFORMAT ION. THE DEFENDANT HAD BEEN EXPELLED FROM SCHOOL , BASED U PON THERE WERE REPORTS THAT HE WAS INVOLVED IN BREAKINGINTO THE SCHOOL , AND THAT THE SC HOOOL WAS SET ON FIRE. SO CERTAINLY THAT KIND OF INFORMATION WOULD NOT HAVE BEEN HEF HELPFUL TO THE DEFENDANT . IN REGARDS TO TO THERE WAS DISCUSSION TO THE DEFENDANT WAIVING HIS RIGHT TO PUT ON MITIGATION, AND MR . ALBRITTON , THEY MA DE A RECORD OF THAT. HE SAID, WELL , LET ME TALK TO MY CLIENT AGAIN AND MAKE SURE THAT IS WHAT HE WANTS , AND AT THAT TIME THE DEFENDANT DECIDED TO GOAHEAD AND LET HIS GRANDFATHER AND HIS BR OTHER TESTIFY , AND THEY TESTIFIED AS TO HIS BACKGROUND. INTERESTING LY AT NO TIME DID THEY TESTIFY THAT THEDEFENDANT HAD BEEN AB USED , THAT HE WAS AN ALCOHOLIC OR THAT HE DR ANK HEAVILY. THAT INFORMATION DID NOT COME OUT. IN FACT THE DEFENDANT'S A UNT CONNIE WHO HAD TESTIFIEDDURING THE EVIDENCE YAEFER HAEING -- EVIDENTIARY HEARING , WHILE SHE TESTIFIEDTHAT THERE WAS ABUSION -- A BUSE DURING CROSS-EXAMINATION, SHE WAS ASKED IF SHE PERSONALLY KNEW THERE WAS ABUSE AND SHESAID, WELL, IT WAS SUSPECTED. AND SHE WAS ASKED IF HE WAS WHOLE ALCOHOL I CAN AND SHE TESTIFIED THAT SHE HAD -- ASKED IF HE WAS ALCOHOLIC AND SHE TESTIFIED THAT SHE HAD SEEN HIM HAVE ONE DR INK.

JUSTICE: WAS THERE ALCOHOL INVOLVED?

NO ALCOHOL IN THE VEHICLE THAT THE DEFENDANT HAD BEEN DRIVING.

JUSTICE: THE T H REAT M OST OFTEN WHERE WE SE E THERE IS A PROBLEM IS A GR EAT DEAL OF MENTAL HEALTH EVIDENCE THAT HAS NOT BEEN EXPLORED OR APPROACHED. WOU LD YOU ADDRESS THAT WITH REGARD TO THE MENTAL HEALTH EXPERT THAT WAS ORIGINALLY HIRED TO

TAKE A LOOK AT THIS CASE, AND THEN WHAT COMES IN LATER AND IS THERE A HUGE DISCONNECT, OR WHERE ARE WE WITH REGARD TO THAT ?

YOUR HONOR , THE , DR . LARSON HAD TESTIFIED DURING THE EVIDENTIARY HEARING , AND HIS TESTIMONY WAS THAT HE HAD FOUND THAT THE DEFENDANT HAD ANTISOCIAL PERSONALITY DISORDER. AND HE HAD TALKED TO COUNSEL , AND THAT WOULD HAVE BEEN MR . LOVELESS.

IS THE RECORD CLEAR THAT HE DID A FULL EXAMINATION OF THIS DEFENDANT?

APPARENTLY HIS EVALUATION WAS BASED UPON WHETHER THE DEFENDANT WAS COMPETENT. THE RECORD COULD NOT BE FOUND, AND DR . LARSON TESTIFIED TO THAT . HE WAS HIRED AS CONFIDENTIAL EXPERT , SO OF COURSE THEREPORT WAS NOT IN THE TRIAL COURT RECORD, BUT HE TESTIFIED THAT HE HAD TALK TO COUNSEL AND HAD RECOMMENDED IF I TESTIFY , THERE IS GOING TO BE VARIOUS , A NUMBER OF NEGATIVE INFORMATION WILL COME OUT . AND COUNSEL, MR . LOVELESS WAS AWARE OF. THAT MR . ALBRITTON TESTIFIED THAT HE HAD TALKED TO MR . LOVELESS AND WAS AWARE THAT THE DEFENDANT HAD BEEN EVALUATED BY DR . LARSON. NOW , DR . DEE'S TESTIMONY IS BASED SOLELY UPON IN TERMS OF THE ALCOHOLISM , SOLELY UPON THE DEFENDANT'S SELF-REPORT.THERE IS NO EVIDENCE IN ANY OTHER RECORDS THAT HAVE BEEN PRESENTED THAT THE ALCOHOL, THAT THE DEFENDANT HAD BEEN AN ALCOHOLIC . IN FACT, HIS TESTIMONY , DR . DEE'S TESTIMONY DOESN'T EVEN MATCH WITH THE DEFENDANT'S TRIAL TESTIMONY. WHEN HE TESTIFIED AT TRIAL , HE SAID HE HAD HAD A BEER EARLIER IN THE AFTERNOON, AND THEN LATER, WHEN HE WAS WITH THIS OTHER ERIC, HE HAD , THEY PLAYED POOL FOR AN HOUR AND THEN HAD A FEW BEERS AT THAT TIME.HE NOW HAD TO TELL DR. DEE THAT HE HAD 12 OR 15 BEERS THENIGHT OF THE MURDER AND THAT THE BARTENDER HAD CUT HIM OFF.THERE WAS NO EVIDENCE. THEY DIDN'T PUT ON A BARTENDER TO ESTABLISH THAT . ALL OF THE EVIDENCE OR ALL OF THE INFORMATION THAT DR . DEE HAD RELIED UPON , IS BASED UPON SELF-REPORT AND FAMILY INFORMATION, AND, AGAIN, THIS IS THE FIRST TIME WE ARE HEARING ABOUT ABUSE. AND THERE IS NO REPORTS THAT WERE SUBMITTED TO --

JUSTICE: WHAT DID DR . DEE BASE HIS DIAGNOSIS OF SOME KIND OF IMPULSE PROBLEM ON?

ACTUALLY I HAVEN'T SEEN THAT DIAGNOSIS . DR. DEE HAD TESTIFIED THAT THE DEFENDANT DID NOT HAVE A PERSONALITY DISORDER. HE HAD PERSONALITY FEATURES. ANTISOCIAL BORDERLINE AND HISTRIONIC FEATURES . THERE WAS TESTIMONY THE DEFENDANT'S IQ IS UP THERE AROUND 115. THERE IS NO QUESTION THAT HE WAS ABLE TO ARTICULATE HIMSELF AND IN FACT DR . DEE AND ALL OF THE EXPERTS THAT TESTIFIED HAD RECOGNIZED THAT. I HAVE NOT SEEN ANY THING IN MATERIALS OF IMPULSE CONTROL THAT WAS PUT BEFORE THE COURT AND IS A MATTER OF RECORD.

JUSTICE: THE DEFENDANT IS NOT MAKING THAT ARGUMENT THAT HE HAD IMPULSE CONTROL PROBLEMS?

NO.IN FACT , DR. DEE IN HIS EVALUATION OR HIS CONCLUSIONS , WHERE HE SAYS THESE CERTAIN STATUTORY MITIGATORS SHOULD HAVE BEEN SUBMITTED , HE RELIES UPON THE DEFENDANT'S ALCOHOL CONSUMPTION AND THE FACT THAT HE WAS ON THE RUN , BASED UPON INDIANA. IT IS MY UNDERSTANDING THAT HE HAD BEEN ERRONEOUSLY RELEASED FROM PRISON. HE HAD PLED GUILTY TO A SEXUAL ASSAULT. HE WAS WANTED IN PAINA CITY FOR A SEXUAL ASSAULT, SO HE WAS ON THE RUN , AND DR. DEE TESTIFIES THAT THE COMBINATION OF THAT AND THIS ALCOHOL CONSUMPTION , CAUSED HIM TO BE UNDER EXTREME EMOTIONAL DISTRESS . HE ALSO SAID HIS CAPACITY TO CONFORM WAS SUBSTANTIALAMEND A HE WILL IMPAIRED - - SUBSTANTIALLY IMPAIRED , BASED UPON THESE PERSONALITY DISORDERS WHICH HE SAID WAS NOT THERE. THEY WERE JUST FEATURES , AND HIS ALCOHOL CONSUMPTION.

CHIEF JUSTICE: WOULD YOU GO TO UNDERSTANDING THE PRIOR VIOLENT FELONY . THERE WAS A

SEXUAL ASSAULT IN INDIANA, AND HE HAD BEEN IN PRISON AND THEY ERRONEOUSLY RELEASED HIM?

THAT IS MY UNDERSTANDING THAT HE HAD BEEN SENTENCED IN, I BELIEVE IT WAS 1992. HE HAD PLED GUILTY, AND HAD RECEIVED, AND IT WAS A FELONY, SO HE WAS SENTENCED TO A TIME BEFORE, AT LEAST AT YEAR. AND IT IS MY UNDERSTANDING THAT HE HAD ALREADY, AND I COULD BE WRONG. -- WRONG. IF ANYTHING ELSE, HE HAD PLED IN 1992 AND HAD BEEN SENTENCED AND WAS DOWN HERE IN FLORIDA. THERE WERE WARRANTS FOR HIS ARREST FROM INDIANA AND HE WAS ALSO WANTED IN PANAMA CITY.

CHIEF JUSTICE: WAS THAT, THE PANAMA CITY SEXUAL ASSAULT, WAS THERE EVER A CONVICTION ON THAT?

YES, YOUR HONOR. AND THAT WAS BROUGHT OUT DURING THE EVIDENTIARY --

CHIEF JUSTICE: WAS THAT A PRIOR VIOLENT FELONY, THE PANAMA CITY?

THAT WAS NOT INTRODUCED AT TRIAL. ACTUALLY THE PANAMA CITY SEXUAL ASSAULT OCCURRED PRIOR TO THIS MURDER. ACTUALLY IT OCCURRED DECEMBER 31 OF 1992, AND THEN THIS CASE INVOLVED JANUARY 11 OF 1993.

JUSTICE: BUT THAT WAS NOT USED IN AGGRAVATION.

NOT AT TRIAL, NO, BECAUSE THE CONVICTION ACTUALLY OCCURRED SUBSEQUENT.

CHIEF JUSTICE: THIS WON'T COME OUT --

IT WOULD COME OUT NOW.

CHIEF JUSTICE: WHAT YOU ARE SAYING IS DR. DEE'S TESTIMONY WOULD HAVE ACTUALLY SHOWN THE REASON HE IS UNDER EXTREME EMOTIONAL DISTRESS IS BECAUSE HE IS A SERIAL SEXUAL ASSAULTER. THAT CERTAINLY WOULDN'T BE --

IT CERTAINLY WOULDN'T BE MITIGATING AND THE TRIAL COURT DURING THE EVIDENTIARY HEARING AND IN HIS ORDER RECOGNIZED THAT. IN ADDITION, DR. DEE RELIES UPON THE SELF-REPORTED ALCOHOLISM. IN RESPECT TO THE PRIOR VIOLENT FELONY, CERTAINLY THAT WOULD COME OUT IN ANY SUBSEQUENT RESENTENCING, AND OF COURSE AS PREVIOUSLY SAID, THAT THAT IS NOT NECESSARY. WE KNOW THAT IS GOING TO BE PRESENTED. TURNING TO THE MOTION TO SUPPRESS OR THE FAILURE TO FILE A MOTION TO SUPPRESS, I WANT TO FIRST CLARIFY THIS IS A CLAIM OF INEFFECTIVE ASSISTANCE. THE STATE DOES NOT HAVE THE BURDEN TO COME FORWARD TO ESTABLISH THAT THE SEARCH WAS CONSTITUTIONAL. IT HAS BEEN ITS BURDEN TO ESTABLISH DEFICIENT PERFORMANCE AND THAT HE WAS PREJUDICED. NOW, DEFICIENT PERFORMANCE HE HAS TO SHOW THAT A REASONABLE ATTORNEY WOULD HAVE FILED A MOTION TO SUPPRESS.

CHIEF JUSTICE: YOU ARE CORRECT ON THIS BUT I GUESS WE NATURALLY GO TO THE ISSUE OF THE MERITS, IF IT WAS ONE OF THE SLAM DUNK MOTIONS TO SUPPRESS, SOMEONE WOULD HAVE TO BE OUT OF THEIR MIND NOT TO TOTALLY INEFFECTIVE NOT TO FILE IT, SO WE DO LOOK AT THE MERITS, JUST TO SEE IF THERE IS ANY BASIS FOR IT, BUT I AGREE WITH YOU THAT THE PARADIGM, WE LOOK AT --

I THINK WE LOOK AT THAT IN TERMS OF THE SEARCH WARRANT. THE ANALYSIS, THOUGH, EVEN IF THE COURT WERE TO SAY THIS WARRANT, THE SEVERAL WARRANT SHOULD HAVE NEVER ISSUED. THE STATE, THEN, HAD A MOTION TO SUPPRESS BEEN FILED, THE STATE, THEN, COULD HAVE COME FORWARD AND ARGUED NO STANDING, BECAUSE THE DEFENDANT, THE CAR WASN'T

IN HIS NAME. THE CAR HAD BEEN REPORTED MISSING. AT NO TIME WHEN IT WAS REPORTED MISSING, DID THEAUNT SAY, BUT IF YOU FIND MY NEPHEW IN THE CAR THAT IS OKAY. SHE DIDN'T SAY THE CAR IS MISSING BUT MY NE PHEW HAS PERMISSION TO BE DRIVING IT. ALL THE --

JUSTICE: THE TIME FR A ME THAT WE ARE TALKING ABOUT, HE HAD THE VICTIM'S CAR, SO HE HAD , HE HAD JUST LE FT THE OTHER CAR AT THE A IRPORT AND AT WHAT TIME?

THIS IS THE SEQUENCE OF EVENTS. ON J ANUARY 9 , THE A UNT REPORTS THE CAR MISSING . THEN O N JANUARY 9 AND 10 , HIS CAR WAS SE EN AT THE UNIVERSITY, AND WE KN OW THAT BECAUSE THE UNIVERSITY P OLICE HAD BEEN --

JUSTICE: WHAT CAR ? WAS AT THE UNI VERSITY.

HE WAS DR IVING THE BONNEVILLE, HAD BEEN AT THE UNIVERSITY. THERE HAD BEEN RECORD CHECKS OR COMPUTER CHECKS ON IT. THE UNIV ERSITY PO LICE WERE LOOKING AT THAT. HE IS SEEN AT THE UNIVERSITY ON THE N INTH AND 10 th OR HIS CAR THERE , AND WE HAD TESTIMONY FROM MELISSA COWED EN, THAT HE WAS -- COWDEN THAT HE WAS THERE ON THE 9th AND 10th AND THEN ON THE 11th, THE CAB DRIVER TESTIFIES THAT HE SAW , HE ACTUALLY DROVE THE DEFENDANT TO THE CAMPUS ON THE 11th , BETWEEN 6:00 P.M. AND 8:00 P.M.. WE KNOW THAT THE VICTIM IN THIS CASE HAD CLASS THAT NIGHT. THERE WAS TESTIMONY THAT SHE GOT OUT OF CLASS AT ABO UT 8:20. WHAT THE POLICE KNEW , THOUGH , WHEN THEY DID THE SEARCH WARRANT, WAS THAT CLASS ENDED AT 9:15 67 89 SHE HAD BEEN REPO RTED MISS ING ON JAN -- AT 9: 15. SHE HAD BEEN REPORTED MISSING ON JANUARY 1 2. THE DEFENDANT WAS SEEN DRIVING THE VICTIM 'S CAR ON THE 11th , THE NIGHT OF THE MURDER. ACTUALLY HE WAS SEEN PUTTING SOMETHING IN THE CAR. THERE WAS TESTIMONY FROM JOSHUA SWANN, I BELIEVE. ON THE 12 th HE I S SEEN DRIVING THE CAR THAT MATCHES THE VICTI M'S, B OTH HIS BROTHER AND HIS COUSIN TESTIFIES TO THAT. HE THEN DRIVES TO PANAMA CITY. I THINK HE STOPS IN DESTIN. THERE WAS AN OTHER WITNESSTHAT TESTIFIED THAT HE WAS IN THAT CAR ON 12th. AND HIS -- IN THAT CAR , ON THE 12th, AND HIS CAR WASN'T FOUND UN TI L 4:15 ON THE 10th OF JANUARY. WHAT THE POLICE KNEW AT THAT TIME IS THE VEHI CLE SOMETIME IS 'HE OO -- THE VICTIM IS MISSING. HE HAD BEEN SEEN WIT H THE CAR. THEY OPENED THE TR UNK BECAUSE O F EDGY GENT CIRCUMSTANCES OF THE THEY KNEW THE DEFENDANT THEY KNEW THE VICTIM WAS MISSING AND THEY WERE CONCERNED THAT SHE WAS THERE .

JUSTICE: WAS THERE AN ARGUMENT BY THE STATE THAT HE HAD ABANDONED THE CA R?

THAT IS PART OF THE ARGUMENT, AND THE STATE CAN SEE THE INITIAL ENTRANCE OF THE TRUNK , THAT THERE WERE EXGENT CIRCUMSTANCES .

JUSTICE: A FTER THE SEARCH OF THE TRUNK , THEN THE CAR WAS REMOVED?

THE CAR WAS SEIZED AND REMOVED TO THE SHERIFFS OFFICE.

JUSTICE: I THINK THAT THE TRIAL JU DGE, AC TUALLY , FOUND THAT THERE WAS N O EVIDENCE FURTHER. THERE WAS NO FURTHER SEARCH OF THE CAR .

THAT'S CORRECT, YOUR HONOR.

JUSTICE: AFTER THE CAR WAS REMOVED AND UNTIL A WARRANT WAS OBTAINED.

THAT'S CORRECT. THE CAR WAS REMOVED ON THE 1 3th , THE LATE AFTERNOON OF THE 13th , AND AT THAT TIME , IT WAS NOT SEARCHED. A SEARCH WARRANT WAS SUBSEQUENTLY THE VERY NEXT DAY, WAS OB TAINED. AND CER TAINLY THE CASE LA W IS CLEAR THAT , WHERE YOU HAVE A VEHICLE , IT IS IN A PUBLIC LOT. IT IS A BO NDONED , AND -- IT IS A ABANDONED, AND EVEN IF THE COURT WERE TO DETERMINE IT WAS NOT ABAN DONED , IT IS MISSING. THE POLICE CAN

SEIZE A VEHICLE AND IMPOUND IT WHEN IT IS MISSING. THERE IS NOTHING REQUIRED THAT IT HAD BEEN REPORTED STOLEN. IT HAD INDIANA TAGS ON IT AND THE KEYS WERE IN, THERE WAS TESTIMONY THAT KEYS WERE SEEN IN THE CAR IN PLAIN VIEW. IN TERMS OF NO PROBABLE CAUSE, IN ADDITION TO KNOWING THAT THE VICTIM WAS MISSING, HER BODY WAS DISCOVERED LATER, AFTER THE TRUNK WAS ACTUALLY GOTTEN INTO, AND --

CHIEF JUSTICE: WHAT WAS THE REASON THAT THE DEFENSE LAWYER STATED THAT HE HAD DIDN'T FILE THE MOTION TO SUPPRESS?

HE TESTIFIED THAT HE ACTUALLY DID RESEARCH, AND, ON THE ISSUE.

CHIEF JUSTICE: I MEAN, IT SEEMS LIKE THERE IS AT LEAST A COULDER ARGUMENT THAT COULD BE MADE, WHETHER IT IS A SLAM DUNK WINNER.

I WOULD RESPECTFULLY DISAGREE. HE TESTIFIED THAT HE RESEARCHED THE ISSUE. THAT IS ON PAGES 132-THROUGH-141 OF THE EVIDENTIARY HEARING AND PAGES 227-THROUGH-228. HE SAID HE FELT IT WOULD BE A WASTE OF TIME. HE HAD TALKED WITH MR. LOVELESS REGARDING THE CASE, AND WHILE MR. LOVELESS HAD TESTIFIED AT THE EVIDENTIARY HEARING, HAVING READ THE AFFIDAVIT THAT HE WOULD HAVE EXPECTED TO, WHAT IS INTERESTING IS HE HAD ALL OF THE DEPOSITIONS PRIOR TO TRIAL.

CHIEF JUSTICE: THE PRIOR LAWYER SAID HE EXPECTED THAT HE WOULD HAVE FILED A MOTION TO SUPPRESS?

AFTER HE READ THE AFFIDAVIT DURING OR RIGHT BEFORE THE EVIDENTIARY HEARING, BUT HE HAD THAT AFFIDAVIT PRIOR TO TRIAL, WHILE HE WAS STILL TRIAL COUNSEL. HE DIDN'T FILE, AND MR. ALBRITTON HAD TESTIFIED THAT HE DID RESEARCH AND HE FELT THAT THERE JUST WAS NOT A BASIS FOR FILING THE MOTION. AND, AGAIN, HAD THE MOTION BEEN FILED, THE STATE COULD HAVE BROUGHT OUT NOT ONLY THAT THE DEFENDANT HAD ABANDONED THE CAR BUT, BECAUSE THE POLICE HAD THE RIGHT TO SEIZE IT, THEY, THEN, COULD HAVE DONE AN INVENTORY SEARCH. IN SEEKING THE SEARCH WARRANT, THE POLICE ALSO KNEW BY THAT TIME, THEY KNEW THE VICTIM, SHE HAD BEEN FOUND. SHE WAS NUDE. WHEN THEY HAD OPENED THE TRUNK, THEY SAW CLOTHES LAYING IN THERE. THEY, AGAIN, KNEW THAT THE DEFENDANT WAS DRIVING THE VICTIM'S CAR, AND THE DEFENDANT HAD BEEN DRIVING THE VICTIM'S CAR HAD BEEN ON THE CAMPUS AT THE TIME THAT SHE WAS THERE. -- ON THE CAMPUS AT THE TIME THAT SHE WAS THERE AND THE DEFENDANT WAS WANTED FOR SEXUAL OFFENSES. THERE CERTAINLY WAS PROBABLE CAUSE IN ORDER FOR THE POLICE TO HAVE GOTTEN THE SEARCH WARRANT. THE DEFENDANT, ALSO, ARGUES THAT THERE WERE A NUMBER OF FACTS THAT WERE FALSE, THAT WERE IN THE POLICE REPORT, AND I BELIEVE I ADDRESSED THAT IN MY BRIEF, AND IN LOOKING AT THE RECORD, THE COURT WILL SEE THAT THAT REALLY IS AN OVERSTATEMENT. AND THAT WE ARE QUIBBLING ABOUT WHETHER A WITNESS HAD SOMEONE PROBABLE LOOKED LIKE, AND THEN WHETHER HE IN FACT, IDENTIFIED THE DEFENDANT. RESPECTFULLY ASK REQUEST THAT THE COURT AFFIRM THE JUDGEMENT.

I WILL START ON MITIGATION FIRST.

CHIEF JUSTICE: LET'S START ON SOMETHING THAT I WANT TO MAKE SURE ABOUT, BECAUSE YOU KNOW THE COURT IS QUITE CONCERNED WHEN THINGS ARE EITHER ACCURATELY STATED OR INACCURATELY STATED. MS. DOLGIN HAS POINTED OUT THAT IN THE RECORD THERE IS EVIDENCE THAT THE, THAT HE DID HAVE MR. ALBRITTON DID HAVE THE PRIOR LAWYER'S FILE AND HAD TALKED TO THE PRIOR LAWYER, SO DO YOU WANT --

THERE ARE A NUMBER OF FACTS THAT WE DISAGREE ON. I THINK I SAID BEFORE, WAS HE DID IN FACT HAVE DISCOVERY DEPOSITIONS, BUT WHEN ASKED DO YOU KNOW IF YOU HAD THE ENTIRE FILE, HE SAYS I DON'T KNOW IF I HAD THE ENTIRE FILE. HE HAD DEPOSITIONS, NO QUESTION

ABOUT THAT.

CHIEF JUSTICE: HOW ABOUT SPEAKING WITH THE LAWYER?

I SAID THAT HE DID SPEAK WITH MR. LOVELESS BUT NEITHER MR. LOVELESS NOR MR. ALBRITTON COULD REMEMBER WHAT WAS TALKED ABOUT IN THE CONVERSATION, BUT WITH REGARD TO WHETHER OR NOT HE HAD SPOKEN TO THE FAMILY MEMBERS, IF YOU LOOK AT THE RECORD, MY RECOLLECTION IS, WHEN HE SAID TO YOU, DID YOU SPEAK TO THE FAMILY MEMBERS BEFORE THEY CAME DOWN TO FLORIDA? NO. QUESTION WAS --

JUSTICE: I THOUGHT THAT THE, YOUR OPPONENT SAID THAT THEY CAME A WEEK BEFORE THE TRIAL, AND THAT WAS DURING THAT TIME PERIOD THAT --

I SPECIFICALLY --

-- THE ATTORNEY TALKED WITH THESE WITNESSES. NOW, IS THAT TRUE?

MY RECOLLECTION IS I SPECIFICALLY SAID HOW MUCH TIME DID YOU SPEND WITH THE FAMILY? I DON'T REMEMBER. WHAT WAS ENTAILED IN THE CONVERSATIONS? I DON'T REMEMBER.

JUSTICE: IS IT TRUE, HOWEVER, THAT THEY CAME DOWN TO FLORIDA A WEEK OR SO BEFORE THE TRIAL?

THE WEEK PRIOR TO THE TRIAL, AND ACCORDING TO CONNIE BRANCH, THE ONLY CONVERSATION THAT TOOK PLACE WAS HE SAID TO THEM, ALL IN THE ROOM AT THE SAME TIME, WAS STATE WORST THINGS YOU CAN THINK ABOUT HIM. THEY DID NOT PREP THEM OR SPEAK ON ANY FACTS WHATSOEVER REGARDING THE CASE, AND IT WAS UNREFUTED.

JUSTICE: WHO RETAINED MR. ALBRITTON FOR MR. BRANCH?

HIS GRANDFATHER.

WHO?

BRANCH'S GRANDFATHER.

JUSTICE: WHAT DISCUSSION WAS THERE AT THAT TIME, AT THE RETAINING OF THE ATTORNEY?

I AM NOT FOLLOWING.

JUSTICE: GENERALLY WHEN A FAMILY MEMBER COMES AND TRIES TO HIRE AN ATTORNEY, THEY TALK TO THEM. WHAT WAS THE DISCUSSION REVEALED AT THE EVIDENTIARY HEARING?

NO, IT WAS NOT.

JUSTICE: AROUND THE TIME OF THE HIRING OF THE --

NO, THERE WAS NOT. THE ONLY DISCUSSION CAME WHEN HE TRIED TO FIRE HIM AND HE REFUSED TO BE FIRED.

JUSTICE: WOULD YOU DISCUSS THE FACT THAT THE TRIAL COURT, IN TERMS OF THE MITIGATION, INEFFECTIVE ASSISTANCE, SAID THAT THE CLAIM WAS PRESENTED AT THE POSTCONVICTION HEARING THROUGH DR. DEE THAT TESTIMONY WOULD BE PRESENTED THAT HE WAS UNDER MENTAL DURESS AT THE TIME OF THE OFFENSE, BECAUSE HE HAD FLED INDIANA, BECAUSE OF THE PROSECUTION UP THERE FOR THE PRIOR SEXUAL BATTERY, AND THAT HE WAS UNDER STRESS BECAUSE HE HAD COMMITTED ANOTHER SEXUAL BATTERY, AND THAT, IF YOU COUPLE

THE STRESS THAT HE WAS UNDER FROM RUNNING FROM THOSE TWO SEXUAL BATTERIES WITH HIS CONSUMPTION OF ALCOHOL, THAT THE EXPERT DR. DEE WOULD HAVE TESTIFIED THAT HE WAS, ALTHOUGH IT DIDN'T MEET THE STATUTORY DEFINITION, THAT IT WOULD ESTABLISH THAT HE WAS UNDER SOME STRESS. NOW, IS IT CORRECT, DID YOU PRESENT THAT IN YOUR MEMORANDUM TO THE TRIAL COURT JUDGE?

WELL, FIRST OF ALL THERE WAS A QUESTION WHETHER OR NOT IT WAS DURESS OR UNDER EXTREME EMOTIONAL DISTRESS.

JUSTICE: WHAT I AM REALLY INTERESTED IN THERE, APPARENTLY, IS, ARE YOU REALLY SAYING THAT YOU WOULD HAVE OFFERED, IF YOU WERE DOING THIS, TESTIMONY THAT, I ASSUME DIDN'T COME OUT, THAT HE HAD COMMITTED ANOTHER SEXUAL BATTERY IN PANAMA CITY AND THAT HE WAS IN FLIGHT FROM THE AUTHORITIES IN INDIANA? -- INDIANA? IN ORDER TO GET IN TESTIMONY THAT HE WAS UNDER STRESS FROM BEING IN FLIGHT?

WHAT YOU HAVE TO REALIZE THOUGH IS WHAT CAME OUT --

JUSTICE: FIRST ANSWER THAT. IS THAT PART --

IN CONJUNCTION WITH OTHER --

JUSTICE: YES, THAT WOULD HAVE BEEN PRESENTED. NOW, HOW DEVASTATING WOULD THAT HAVE BEEN?

NONE AT ALL. LET ME TELL YOU WHY. SEE, THAT IS WHERE THE PROBLEM COMES IN. WHEN YOU TALK ABOUT UNFAVORABLE INFORMATION, THE STATE SAYS, EXPELLED FROM SCHOOL. STARTED A FIRE. THAT CAME IN. PRIOR VIOLENT FELONY. THAT CAME IN! THE STATE INTRODUCED THAT INFORMATION. SO WHAT ARE YOU SUPPOSED TO DO? IGNORE IT? YOU HAVE TO PRESENT THAT INFORMATION THAT THE STATE SHOWS BAD INFORMATION, IN LIGHT OF HIS TOTAL CIRCUMSTANCES. THE MAN IS IMPULSE CONTROL. HAS PROBLEMS. HE HAD ANTI-PERSONALITY SOCIAL DISORDER, WHICH THIS COURT SAID IS A MITIGATOR. WHAT ARE THE FACTORS THAT CREATE THAT? WHEN YOU SAY THAT THE MAN HAS IMPULSE PROBLEMS, HE HAS ALCOHOL PROBLEMS, HE SUFFERS FROM ANTISOCIAL PERSONALITY DISORDER, WHAT THINGS WOULD AFFECT HIM TO BECOME STRESSED AND ACT IN A MANNER WHICH HE NORMALLY WOULDN'T DO?

JUSTICE: DR. DEE'S SAID HE HAD AN IMPULSE CONTROL PROBLEM, BASED UPON WHAT?

FACTS THAT WERE IN HIS AFFIDAVIT WITH REGARDING TO STARTING THE FIRE. HE TOOK RESPONSIBILITY FOR ACTS HE DIDN'T DO HIMSELF. YOU HAVE TO REALIZE --

CHIEF JUSTICE: WE WILL SEE IF ANY OTHER MEMBERS OF THE PANEL HAVE QUESTIONS, BUT YOU ARE OUT OF YOUR TIME. SO IF YOU WOULD LIKE TO CONCLUDE, MAKE A CONCLUDING STATEMENT.

I WOULD ASK YOU TO REVIEW, THAT WE DO HAVE DISAGREEMENTS WITH THE FACTS AND STATED THE WAY I RECOLLECT THEM AND I THINK SOME OF THE FACTS THAT ARE STATED BY THE STATE ARE BEING SKEWED IN FAVOR OF THE STATE AND NOT TAKEN THE EXACT WORDS.

CHIEF JUSTICE: WE ALWAYS HAVE, I HOPE YOU BOTH KNOW, LOOK AT THE RECORD VERY CAREFULLY. I THANK BOTH OF YOU. I, ALSO, WANT TO NOTE THAT ON A GOOD SIDE, THAT THE ORDER IN THIS CASE WAS ENTERED FEBRUARY OF 2005, AND SO THAT MEANS THAT THE RECORD CAME UP AND THERE MUST HAVE BEEN NO CONTINUANCES AND BRIEFS FILED IN A TIMELY FASHION BY BOTH SIDES, AND THE COURT IS GOING TO CONTINUE TO MONITOR THESE CASES, BECAUSE, TO SEE THAT THIS CAN BE PERFECTED WITHIN A YEAR AND BROUGHT TO ORAL

ARGUMENT, SO I THANK BOTH SIDES FOR THAT.