

>> PLEASE RISE.  
HEAR YE HEAR YE HEAR YE.  
THE FLORIDA SUPREME COURT IS NOW  
IN SESSION.  
ALL WHO HAVE CAUSE TO PLEA, DRAW  
NEAR, GIVE ATTENTION AND YOU  
SHALL BE HEARD.  
GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA AND  
THIS HONORABLE COURT.  
>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.  
PLEASE BE SEATED.  
>> GOOD MORNING AND WELCOME TO  
THE FLORIDA SUPREME COURT.  
THE FIRST CASE ON OUR DOCKET,  
THIS MORNING, IS RUSS VERSUS  
STATE OF FLORIDA.  
>> THANK YOU, YOUR HONOR, PLEASE  
THE COURT, MY NAME IS JIM  
WULCHAK AND OUR OFFICE WAS  
APPOINTED TO REPRESENT DAVID  
RUSS FROM HIS APPEAL FROM THE  
DEATH SENTENCE THOUGH HE REALLY  
DOES NOT WANT ME TO BE HERE  
TODAY.  
THE DEFENDANT WHO WAS FOUND  
COMPETENT ACCEPTED  
RESPONSIBILITY FOR HIS ACTIONS,  
AND PLED GUILTY TO THE CHARGE OF  
THE FIRST DEGREE MURDER,  
KIDNAPPING AND "GRAND THEFT  
AUTO," , AND PERJURY AND WAIVES  
THE PRESENTATION BY HIS ATTORNEY  
OF MITIGATING EVIDENCE AND THE  
TRIAL COURT, APPOINTED CONFLICT  
COUNSEL TO PRESENTS POTENTIAL  
MITIGATION TO THE TRIAL COURT,  
WITHOUT THE COOPERATION OF THE  
DEFENDANT, AND, THE DEATH  
SENTENCE WAS IMPOSED.  
THE APPELLANT DOES NOT WISH TO  
CONTEST THE CONVICTION AND  
SENTENCE BUT RECOGNIZES THAT  
AUTOMATIC REVIEW BY DIRECT  
APPEAL OF THE DEATH SENTENCE IS

REQUIRED BY THIS COURT.  
THE COURT NOTED IT MUST HAVE THE  
BENEFIT OF AN ADVERSARY  
PROCEEDING ON APPEAL, STATING  
COUNSEL FOR APPELLANT IS  
DIRECTED TO PROCEED TO PROSECUTE  
THE APPEAL IN A GENUINELY  
ADVERSARY MANNER PROVIDING  
DILIGENT ADVOCACY OF APPELLANT'S  
INTERESTS IN KLOCOC AND I  
PREPARED AND FILED AN INITIAL  
BRIEF RAISING ISSUES ATTACKING  
THE DEATH SENTENCE OVER THE  
CLIENT'S WISHES.

IN CORRESPONDENCE WITH COUNSEL  
THE APPELLANT INDICATED IT WAS  
HIS DESIRE TO WAIVE ORAL  
ARGUMENT THIS MORNING WHICH WITH  
THE CONSENT OF THE STATE  
ATTEMPTED TO DO SO.

>> I APPRECIATE YOUR GIVING THAT  
INTRODUCTION AND IN THE LETTER  
MR. †RUSS SENT, IS PROBABLY ONE  
OF THE MOST ARTICULATE LETTERS  
WE HAVE SEEN, IT APPEARS, AND I  
THINK THE REASON SOME OF US ARE  
ALWAYS CONCERNED WITH CASES, IS  
WE DO HAVE AN OBLIGATION NOT  
TO... SOMEBODY'S SENTENCE TO  
DEATH.

>> YES, YOUR HONOR.

>> BUT IT APPEARS IN THIS CASE  
THE TRIAL JUDGE FOLLOWED ALL OF  
THE PROCEDURES THAT WE OUTLINED  
IN... [INAUDIBLE] INCLUDING AS  
YOU SAID, HAVING SPECIAL  
COUNSEL, TO PRESENT MITIGATION  
AND AS YOU GAVE THIS, YOU ARE  
HERE AGAINST YOUR CLIENT'S  
WISHES AND I THINK MY CONCERN IS  
ALWAYS TO HAVE A DEFENDANT, NOT  
ONLY THIS COMPETENT BUT ENSURING  
THERE IS NO SIGNIFICANT OR  
SERIOUS MENTAL ILLNESS THAT  
WOULD EITHER SIGNIFICANTLY  
MITIGATE THE CRIME OR CAUSE US

CONCERN.

IN THIS CASE, YOU TELL US IF ANY OF THOSE KINDS OF THINGS...

[INAUDIBLE] EXTREMELY LOW IQ, DOESN'T APPEAR TO BE A SIGNIFICANT MENTAL ILLNESS, IN FRONT OF YOU, ANYTHING THAT SHOULD CAUSE US CONCERN, THAT WOULD... SUBJECT TO AN ADVERSARIAL TEST, GENUINE ADVERSARIAL TESTING, MOST LIKELY, A DEATH SENTENCE... IMPOSED.

>> YES, YOUR HONOR, FIRST OF ALL, MY CLIENT'S WISHES, I NEED TO INDICATE ONE THING HE WISHED ME TO MAKE CLEAR THIS MORNING HE OWNS UP TO HIS CRIME AND AS HE TOLD THE COURT, HE KILLED AN INNOCENT WOMAN WHO DOES NOT DESERVE TO DIE AND WITH THAT IN MIND, AND, GIVEN THE DILEMMA, THAT I'M IN, WHETHER I'M SUPPOSED TO REPRESENT MY CLIENT'S WISHES OR NOT, THERE WAS A CASE IN SEPTEMBER, WHERE A COLLEAGUE OF MINE ARGUED AGAINST HIS CLIENT'S WISHES AND HIS ANSWERS SUBJECTED HIM TO THE RATH OF HIS CLIENT AND A BAR GRIEVANCE.

>> YOU REALLY OUGHT TO ASK THOSE QUESTIONS TO THE STATE.

>> OKAY.

WITH THAT IN MIND, YES, THE TRIAL COURT FOLLOWED THE REQUIRED PROCEDURES AND BARNES AND MOHAMMED AND THE SENTENCING JUDGE MUST BE APPRISED ON WHICH SHE CAN MAKE A REASONED DECISION REGARDING THE APPLICABILITY OF THE DEATH SENTENCE AND THE COURT CAN BE ASSURED OF RELIABILITY AN FAIRNESS AND UNIFORMITY IN THE IMPOSITION OF THE DEATH PENALTY AND THE SAFEGUARDS, THE COURT

MAY CALL ITS OWN WITNESSES OR APPOINT SPECIAL COUNSEL WHICH HE DID, ORDERS AN EXTENSIVE PSI WHICH WAS ALSO DONE HERE AND THE SAFEGUARDS REQUIRE THE PRESENTATION OF ALL EVIDENCE OF MITIGATING NATURE INCLUDING SCHOOL RECORDS, MEDICAL RECORDS, AND A FAMILY BACKGROUND.

>> [INAUDIBLE].

GUILTY PLEA ENTERED HERE, THERE WAS IN FACT A FACTUAL BASIS GIVEN AS -- AT THE GUILTY PLEA AND DO YOU TAKE EXCEPTION TO ANY OF THE INFORMATION GIVEN DURING THE FACTUAL --

>> NO, YOUR HONOR.

AND AS I SAID IF THE COURT IS ALERTED BY THE SAFEGUARDS, SUCH AS THE PSI, PROFFERS BY THE TRIAL PUBLIC DEFENDER WHO IS REPRESENTING HIM AS TO THE POTENTIAL MITIGATION, IF THE COURT IS ALERTED BY THESE SAFEGUARDS TO THE EXISTENCE OF ADDITIONAL MITIGATION THE TRIAL COURT HAS A DUTY TO CONDUCT AN INDEPENDENT EXAMINATION TO THE POSSIBLE EXISTENCE OF ALL EVIDENCE IN MITIGATION, CALLING ADDITIONAL WITNESSES ON ITS OWN OR HAVING THE CONFLICT COUNSEL PRESENT THE ADDITIONAL WITNESSES AND THE PRE-SENTENCE INVESTIGATION SUGGESTED THE DEFENDANT WAS DIAGNOSED AND TREATED FOR A MENTAL ILLNESS, INDICATING DISORGANIZED THOUGHT PROCESSES, AND, THE PSYCHIATRIC HISTORY, THE FAMILY HISTORY OF MENTAL ILLNESS, AND -- IN THIS CASE, AND, THERE WAS UNCONTROVERTED EVIDENCE OF THE HEAD INJURY, BUT THE TRIAL COURT DIDN'T EXAMINE THESE FURTHER THAN THE BARE MENTION OF THEM IN

THE PSI OR THE PROFFER OF THE TRIAL PUBLIC DEFENDER.

THERE WAS A PROFFER OF A PSYCHIATRIC EVALUATION OF THE DEFENDANT.

AGAIN, NOT PRESENTED BY THE CONFLICT COUNSEL, AND EVEN THOUGH THE TRIAL COURT WAS ALERTED TO IT BY THE PROFFER, DID NOT EXAMINE FURTHER ANY OF THIS EVIDENCE.

AND WHAT IMPORT ARE THESE SAFEGUARDS, IF THEY ALERT THE TRIAL JUDGE TO POTENTIAL MITIGATION AND SHE DOES NOT ACCEPT THAT AS TRUE OR DOES NOT EXAMINE IT FURTHER.

>> WHEN -- YOUR CLIENT IS -- WAS AT THE TIME OF THE MURDER, 45 YEARS OLD.

>> YES, YOUR HONOR.

>> WHEN WAS THE LAST TIME ACCORDING TO ANY RECORDS THAT HE HAD RECEIVED TREATMENT INSTITUTIONALIZED FOR PSYCHIATRIC PROBLEMS.

>> THERE WAS -- WHEN HE WAS 16 YEARS OLD THE PSYCHOLOGICAL EVALUATION, HE HAD HEAD TRAUMAS, HEAD TRAUMA WHILE IN PRISON IN GEORGIA, AND I'M SORRY I DON'T RECALL THE EXACT DATE OF THAT.

>> WE HAVE HAD CASES AND WE THINK --

WHERE SOMEBODY IS BEING ACTIVELY TREATED FOR PSYCHIATRIC PROBLEMS UNTIL THE TIME OF THE MURDER WHICH CAUSES CONCERN, WE'RE DEALING WITH SOMEONE THAT MAY BE COMFORTABLE TENT BUT MAY HAVE A SIGNIFICANT PRESENT MENTAL ILLNESS.

>> THERE IS ALSO EXTENSIVE TESTIMONY INCLUDING THE DEFENDANT'S OWN LETTER, CRACK COCAINE USE, 24/7 THE TEN DAYS

PRIOR TO THE KILLING WHERE HE HAD ABSOLUTELY NO SLEEP OR VERY LITTLE SLEEP.

AND THE ONLY EVIDENCE OF ANY SLEEP HE HAD WAS ON THE ROOF OF THE NEIGHBOR'S HOUSE.

>> WE HAD IMPOSED AND UPHELD THE DEATH SENTENCE TO DEFENDANTS WHO HAVE BEEN CRACK COCAINE ADDICTS. ON MANY OCCASIONS.

>> YES, YOUR HONOR.

>> AND WHAT WE HAVE HERE WITH THE DEFENDANT'S LETTER, WE NOW KNOW THAT THE DEFENDANT WASN'T JUST -- HE WAS ON A CRACK COCAINE BINGE, FOR THE TEN DAYS, BUT THAT HE, THAT MORNING, ACTUALLY WENT INTO THE VICTIM'S HOUSE, AND REMAIN THERE MANY HOURS, WHEN WE MUST ASSUME THAT HE WASN'T TAKING OR USING CRACK COCAINE, IN THOSE HOURS, OF --

>> YES, YOUR HONOR, BUT AS YOU ARE AWARE FROM OTHER CASES, EVEN THOUGH HE WASN'T ACTIVELY TAKING IT, THE FACT HE HAD DONE THAT FOR TEN DAYS STRAIGHT, 24/7, HE WAS IN AN ACUTE STAGE OF CRAVING AND HIS ACTIONS WERE MOTIVATED SOLELY BY THAT ADDICTION.

>> HE HAD NO HISTORY OF VIOLENT CRIME.

>> THAT'S CORRECT, YOUR HONOR.

>> DID HE EVER EXPLAIN IN THE LETTERS, THAT WHAT IT WAS THAT -- ABOUT THE CRACK COCAINE, IT WOULD LEAD SOMEONE TO WANT TO GET MONEY, AND, WHAT IT WAS, THAT LED HIM TO THINK ABOUT MURDERING SOMEBODY.

>> NO, HIS LETTER DID NOT GO INTO DETAILS OF THE ACTUAL CRIME ITSELF, OTHER THAN SAYING THAT WHEN HE WAS ON THE ROOF, HE SAW THE VICTIM LEAVE FOR WORK, AND, HE KNEW AT THAT TIME THAT WOULD

BE HIS VICTIM --

>> WHICH IS INTERESTING,  
CONSIDERING THE FACT... HE WAS  
THERE ALL DAY LONG AND IF HE  
WANTED MONEY HE COULD HAVE  
RANSACKED THE HOUSE AT HIS  
LEISURE AND TAKEN WHAT IT WAS HE  
WANTED AND, SO ON AND DONE  
ANYTHING AND SO, THE FACT THAT  
HE LAID IN WAIT FOR HER TO COME  
BACK HOME, IS TELLING ABOUT THE  
CRIME.

>> TELLING IN THAT HE WANTED HER  
AUTOMOBILE, SO HE COULD --

>> IT WAS PREMEDITATED, THE  
MURDER.

>> BUT IT REQUIRES HEIGHTENED  
PREMEDITATION AND IT IS PURE  
SPECULATION HE HAD A HEIGHTENED  
MEDITATION FOR THE KILLING AND  
HIS LETTER CAN BE ACCEPTED AS  
MEANING --

>> BUT --

>> ROBBERY -- PARDON?

>> DIDN'T HE TIE HER UP.

>> YES, YOUR HONOR.

>> WELL, I'M NOT SURE THAT...

>> DOES THAT SHOW HEIGHTENED  
PREMEDITATION FOR MURDER TO  
SUBDUE SOMEONE IN WE SUBMIT IT  
IS PURE SPECULATION.

>> YOU BELIEVE THAT WAS  
NECESSARY IN ORDER TO...

[INAUDIBLE].

>> UNDER HIS CRAVINGS STATE, THE  
EFFECT OF THE -- THE CRACK  
COCAINE HAD ON HIS MENTAL  
ABILITIES, THERE WAS TESTIMONY  
HE WAS A DIFFERENT PERSON, FOR  
NINE YEARS REMAINED CLEAN FROM  
THE DRUGS AND HE WAS A COUNSELOR  
AND FAMILY PROVIDER AND CARED  
FOR --

>> GOING BACK TO CCC FOR A  
SECOND ON THE HEIGHTENED ON THE  
HEIGHTENED PREMEDITATION,

HAVEN'T WE HELD, IF ONE HAS AN OPPORTUNITY... [INAUDIBLE] COMMITTING THE MURDER, TO COMMIT THE MURDER AND THEN LEAVE, DOESN'T THAT GIVE RISE TO HEIGHTENED PREMEDITATION.

>> HE WAS THERE WITH THE VICTIM FOR A MAXIMUM OF 20 MINUTES, YOUR HONOR.

ALSO, WHAT HIS MENTAL STATE WAS, PRIOR TO HER ARRIVAL MERELY THE FACT HE WANTED TO TAKE HER CAR AND GET HER MASTERCARD HE BELIEVED HE HAD THE PIN FOR IS THE ONLY DEFINITE EVIDENCE WE HAVE OF HEIGHTENED PREMEDITATION AND THAT IS HEIGHTENED PREMEDITATION FOR THE ROBBERY AND THEFT.

>> THE RECORD SHOWS, AM I CORRECT IN STATING NOTHING IN THE RECORD SUGGESTS THERE WAS A STRUGGLE.

>> NO, YOUR HONOR. YOUR HONORS, THERE WAS NO SIGNS OF A STRUGGLE.

AND THAT GOES TO HEINOUS, ATROCIOUS AND CRUEL AND THE --

>> DOESN'T IT ALSO GO TO WHAT WE'RE TALKING ABOUT NOW, IT NEGATES ANY SUGGESTION THAT HE GOT A STRUGGLE WITH HER AND KILLED HER AS PART OF THAT STRUGGLE.

WHEN THE EVIDENCE TENDS TO SHOW HERE, SEEMS TO ME, HE WAITED FOR HER, ALL DAY.

WHEN SHE CAME BACK HE SUBDUED HER WITHOUT MUCH DIFFICULTY AND PROCEEDED TO TIE HER UP, IN A MOST PAINFUL WAY, AND NOT ENTIRELY CLEAR IN WHICH ORDER THESE THINGS WERE DONE AND STABBED HER BRUTALLY, AND I -- IT IS HARD TO SEE HOW THERE IS NOT HEIGHTENED PREMEDITATION IN

THIS SEQUENCE OF EVENTS, THAT IS  
-- WE HAVE HERE.

>> ONE POSSIBLE THEORY.  
BEHIND IT.

THE OTHER POSSIBLE THEORY IS THE  
INTENT TO STEAL FROM HER AND  
ONCE HE HIT HER THE FIRST TIME,  
POSSIBLY RENDERING HER  
UNCONSCIOUS, HE WAS IN SUCH A  
MENTAL STATE, A RAGE THAT HE  
WEPT OVER THE TOP.

>> DID HE STRANGLE HER BEFORE HE  
HIT HER.

>> WE DO NOT KNOW.

>> ALL RIGHT.

>> THE MEDICAL EXAMINER COULD  
NOT TELL.

THE FIRST BLOW COULD HAVE  
RENDERED HER UNCONSCIOUS, THE  
STRANGLING, IF IT WAS FIRST  
COULD HAVE -- INTO THE PROBLEM,  
THE FIRST BLOW, IF YOU ARE  
CERTAIN THE FIRST BLOW MIGHT  
RENDER HER UNCONSCIOUS AND HE  
STRANGLER HERE AFTER THE FIRST  
BLOW, THINK INTO IT COULD HAVE  
BEEN, COULD HAVE BEEN THE  
LIGATURE TIED TIGHTLY AROUND HER  
NECK AS WELL.

>> IF SHE WAS UNCONSCIOUS, WAS  
SHE MOVED.

>> NO EVIDENCE THAT SHE WAS  
MOVED.

THIS TRIAL COURT INDICATED  
ERRONEOUSLY BLOOD DROPLETS WERE  
IN THE GARAGE AND THE STATE  
SPECULATED SHE WAS FIRST  
ATTACKED IN THE GARAGE AND  
MOVED, HOWEVER, CAREFUL CLOSE  
READING OF THE EVIDENCE SHOWS  
THAT THE BLOOD IN THE GARAGE WAS  
MERELY A SHOE PRINT IN BLOOD, BY  
THE DEFENDANTS.

THERE IS NO EVIDENCE THERE WAS  
STRUGGLE ANYWHERE, NOTHING ELSE  
WAS OUT OF PLACE.

>> THE ME SAID THAT THERE WAS MOVEMENT -- PULLING AWAY, AND -- MOVING FROM RIGHT TO LEFT. DOESN'T THAT INDICATE THAT SHE WAS CONSCIOUS?

>> WHICH EVIDENCE IS THAT, YOUR HONOR.

>> MEDICAL EXAMINER'S.

>> I DO NOT RECALL THE MEDICAL EXAMINER INDICATED SHE WAS MOVED FROM ONE LOCATION TO ANOTHER.

>> HE WAS MOVING WITHIN A LOCATION IS WHAT I'M SAYING. BY THE LIGATURES AROUND HER NECK, SHE WAS IN FACT MOVING.

>> I DO NOT RECALL THAT.

>> PAGE 210.

>> IT WOULD TAKE MOVEMENT IN ORDER TO TIE A PERSON AS CAREFULLY AS HE DID.

--

>> NO, SHE WAS PULLING AWAY. SHE WAS PULLING FROM LEVEL. TO RIGHT NO ADDITION, YOUR HONOR, THE PROFFER BY THE TRIAL PUBLIC DEFENDER INDICATED THERE WAS A DOCTOR WHO COULD HAVE BEEN CALLED... WHO COULD HAVE BEEN CALLED -- [INAUDIBLE] AND THAT EVIDENCE WAS NOT PRESENTED TO THE TRIAL COURT.

>> AND, I MEAN, AGAIN, THAT IS WHAT HAPPENS WHEN WE HAVE THE WAIVER.

AND IT MAY BE IN ANOTHER CASE, THAT SOMEBODY WOULD HAVE BEEN ABLE TO SUCCESSFULLY CHALLENGE HAC OR CCP, AND OUR CONCERN --

>> THAT'S CORRECT, YOUR HONOR AND SHOWS THE SAFEGUARD DON'T WORK UNLESS THE TRIAL JUDGE EXAMINES ALL POSSIBLE MITIGATION AND --

>> BUT THERE IS NOTHING IN MOHAMMED THAT SAYS THAT IN ADDITION TO PRESENTING

MITIGATION THAT THE -- THERE'S AN OBLIGATION TO CONTEST AGGRAVATION.

AGGRAVATING EVIDENCE.

>> WE SUBMIT THAT THAT IS PART AND PARCEL OF IT.

CONFORMITY, BECAUSE IF YOU HOLD IN THIS CASE IT WAS CCP BASED ON INCOMPLETE EVIDENCE THAT SKEWS THE REVIEW PROCESS.

>> LISTEN, THERE IS NO QUESTION THAT THE PROCESS IS FAR FROM PERFECT.

MY ISSUE ON THE CCP IS -- AND I THINK IN CASES WE'VE CREPT AWAY FROM CCP, AND WHAT IS NECESSARY IS THAT AS JUSTICE KENNEDY SAID, SHE IS TIED UP AND SHE'S HELPLESS.

AND HE HAS AT THAT POINT ACCOMPLISHED GETS HER VEHICLE AND HER CREDIT CARD AND INSTEAD MAKES A CONSCIOUS DECISION TO KILL HER AND TALKS ABOUT HER AS BEING A VICTIM AND HE WAS CAPABLE OF SAYING, I DIDN'T THINK ABOUT KILLING HER, UNTIL THE LAST MINUTE.

WE WOULD HAVE KNOWN THAT, BUT I THINK EVERYTHING THAT -- ABOUT HIS LETTER INDICATES THAT THIS WAS HIS PLAN AND THAT IS WHERE I'M SATISFIED TO THE EXTENT THAT YOU ATTACK CCP.

THAT IT IS CONSISTENT WITH CASES WHERE THE VICTIM IS TIED UP, HELPLESS, THE PERSON HAS A CHANCE THEN TO LEAVE BUT THEN MAKES A CONSCIOUS DECISION TO KILL A HELPLESS VICTIM.

>> AND THERE ARE ALSO CASES THAT SHOW THE RELATIONSHIP BETWEEN MITIGATION AND CCP OR HAC SUCH AS WHITE AND RICHARDSON WE CITED IN THE BRIEF, BECAUSE OF THE EXTREME DRUG ABUSE THE DEFENDANT

WAS INCAPABLE OF FORMING A  
HEIGHTENED PREMEDITATION.  
THANK YOU.

>> MAY IT PLEASE THE COURT,  
BARBARA DAVIS.

I REMEMBER THE STATE OF FLORIDA.  
AND I WILL -- HERE TO ANSWER ANY  
QUESTIONS YOU MAY HAVE ABOUT ANY  
PART OF THIS CASE.

I FIRST WANT TO POINT OUT AS FAR  
AS JUSTICE PARIENTE'S QUESTION,  
ABOUT THE MENTAL HEALTH,  
MR. †RUSS REFUSED THE MENTAL  
HEALTH EVALUATION, AND REFUSED A  
PET SCAN.

AS FAR AS THE 1978 EVALUATION,  
THAT WAS MENTIONED BY THE PUBLIC  
DEFENDER, THAT THE PUBLIC  
DEFENDER MENTIONED THAT BUT ALSO  
SAID IT -- AT PAGE 513 THAT HE  
HAD NOT BEEN ABLE TO OBTAIN THAT  
EVALUATION.

THE PUBLIC DEFENDER'S PROFFER  
WAS A PROFFER ACCORDING TO KOON  
AND HE ADMITTED DURING THE  
PROFFER THESE ARE AREAS WE ARE  
INVESTIGATING, SOME OF THESE  
PEOPLE WE HAVE NOT BEEN ABLE TO  
CONTACT.

SOME OF THE INFORMATION WE HAVE  
NOT OBTAINED.

BUT, THESE ARE POTENTIAL AREAS.  
THAT IS NOT EVIDENCE.

THAT IS NOT SOMETHING THAT YOU  
SAY COURT COUNSEL WAS  
INEFFECTIVE BECAUSE HE DIDN'T DO  
ALL OF THAT.

AND, BY THE WAY THAT IS WHAT  
THEY ARE SAYING, COURT COUNSEL  
MAY HAVE BEEN INEFFECTIVE AND IS  
NOT AN ISSUE FOR DIRECT APPEAL  
AND THE COURT SAID IN LAMARCA  
AND GRIM, WHEN YOU WAIVE  
MITIGATION YOU CANNOT CLAIM --  
INEFFECTIVE --

>> WE SHOULD PUT THAT TO REST.

IF A DEFENDANT MADE A KNOWING  
WAIVER OF MITIGATION I CANNOT  
CONCEIVE WE WOULD SAY, WELL,  
THAT CALLS COULD BE ATTACKED ON  
POSTCONVICTION.

THAT WOULD DEFEAT THE PURPOSE  
HERE.

I AGREE WITH WHAT YOU ARE  
SAYING.

YOUR -- FROM YOUR REVIEW, AND  
THE STATE'S REVIEW OF THE  
RECORD, FIRST OF ALL, YOU AGREE,  
OF COURSE IT LOOKS LIKE THE  
TRIAL COURT FOLLOWED MOHAMMED.

>> ABSOLUTELY.

AND WENT ABOVE AND BEYOND AND  
APPOINTED SPECIAL COUNSEL.

WHO PRESENTED EVIDENCE TO THE  
TRIAL COURT.

ARE YOU CONCERNED THAT THERE IS  
ANY OF THIS MITIGATION, THAT THE  
TRIAL COURT THAT WAS IN THE  
RECORD, TRIAL COURT DID NOT  
CONSIDER?

>> NOT AT ALL.

AND WHEN YOU LOOK AT HER  
SENTENCING ORDER, SHE DOES AN  
INCREDIBLE JOB OF GALVANIZING  
THE ISSUES BECAUSE THOUGH IT IN  
THE BRIEF THESE ISSUES ARE  
SPLINTERED.

AND THERE WAS NO INDICATION THE  
FATHER WAS MENTALLY ILL AND THE  
DEFENDANT BASICALLY SAID THAT,  
THE DEFENDANT DENIED ANY HISTORY  
OF MENTAL ILLNESS, AND, DENIED  
HIS FATHER -- THAT IS IN THE  
RECORD AT 528.

>> HE MIGHT HAVE DENIED IT, A  
LOT OF THESE, WHO WE CALL,  
QUOTE-UNQUOTE VOLUNTEERS DON'T  
WANT THEIR MENTAL MITIGATION TO  
BE PRESENTED AND OUR OBLIGATION  
IS TO BE SURE THERE IS NOT A  
SERIOUS MENTAL ILLNESS OR  
SOMEBODY WHO IS RETARDED,

MENTALLY RETARDED, TO MAKE SURE THAT -- WE ARE NOT FOLLOWING THEIR WISHES, WE ARE MAKING A REASONED JUDGMENT.

THERE'S NOTHING RECENT IN THE RECENT 20 YEARS, SAY, BEFORE HIS -- THIS CRIME THAT HE WAS TREATED FOR MENTAL ILLNESS.

>> NOTHING AT ALL AND THEY PUT IN ALL THE RECORDS FROM THE PRISON SYSTEM, FROM THE PSI HE HAD QUITE A LENGTHY HISTORY. THERE WAS A NOTATION IN THE LAST SET OF RECORDS FROM HIS INCARCERATION IN STANFORD, PSYCHIATRIC HISTORY, BUT THAT IS NOT IN ANY OF THE OTHER RECORDS. AND THERE IS AN ABSENCE OF THIS. HE WAS TREATED FOR DEPRESSION ONCE HE WAS ARRESTED FOR THIS CRIME.

BUT THAT IS AFTER THE CRIME. SO, NO SERIOUS MENTAL ILLNESS AND THE JUDGE FOUND HEAD TRAUMA BECAUSE IN THE PSI THERE WAS INDICATION HE HAD HAD A CAR ACCIDENT, HOWEVER, BY WAIVING THE MENTAL HEALTH EVALUATION OR PET SCANS THAT WAS NEVER DOCUMENTED.

AND THE CAR ACCIDENT WAS WAY BACK, WAY BACK AND REMEMBER, ONE OF THE MITIGATING CIRCUMSTANCES IS, THERE WAS NO VIOLENT CRIMINAL HISTORY.

SO... BETWEEN ANY CAR ACCIDENT AND THE PRESENT CRIME WOULD BE COMPLETELY SPECULATIVE.

>> LET ME ASK YOU ABOUT HIS HISTORY.

HE WRITES IN THE LETTER, OF -- ONE OF THE LETTERS THAT WHEN I WAS A YOUNG BOY I WAS ABUSED, I WENT TO FOSTER CARE FOR CHILD ABUSE AND NEVER ADJUSTED FROM THAT POINT FORWARD AND HE SAID I

TELL -- HE SAYS I DON'T OFFER THAT AS AN EXCUSE.

WHAT WAS THE -- THERE IS NO QUESTION HE WAS IN FOSTER CARE, AND WHAT WAS THE NATURE OF THE CHILDHOOD ABUSE?

PHYSICAL ABUSE?

SEXUAL ABUSE?

DO WE KNOW.

>> NO SEXUAL AND IT WAS PHYSICAL AND PSYCHOLOGICAL.

AND, THE TRIAL JUDGE IN HER ORDER, OUTLINES THAT COMPLETELY, ALL THE ABUSE THAT POTS, PANS, EVEN A BASEBALL BAT AND THAT IS FOUND AS MITIGATION, THE FATHER ABUSED BOTH THE DEFENDANT AND HIS BROTHER, AARON.

AARON TESTIFIED AT THE PENALTY PHASE, WHO HAS DEVELOPED INTO A SUCCESSFUL CONTRACTOR AND NEVER HAD ANY OF THESE EMOTIONAL PROBLEMS AND THE DEFENDANT ALSO WAS ABLE TO OVERCOME ANY OF THIS FOR LONG PERIODS OF TIME, HE WAS GIVEN EVERY OPPORTUNITY AND AS HE SAID HE CHOSE, HE CHOSE TO GO BACK TO COCAINE.

HE WAS LIVING IN A RELATIONSHIP, TAKING CARE OF THE 80-YEAR-OLD AUNT, LIKE A FATHER TO THE CHILD, AND HE CHOSE TO GO ON A COCAINE BINGE.

>> THIS DEFENDANT, DID GO TO SOME COLLEGE AND HE WAS ACCEPTED AT TEXAS TECH I BELIEVE IT WAS.

>> YES.

AND HE HAD A GRADE POINT AVERAGE OF 3.67.

>> WE DON'T HAVE ANY ISSUE ABOUT RETARDATION OR ANY OF THOSE OTHER KINDS OF... SLOW LEARNING.

>> NONE WHATSOEVER.

>> DO YOU KNOW WHAT HIS IQ WAS -- IS?

>> NO.

>> BUT WE ASSUME IT MUST BE CERTAINLY AVERAGE OR ABOVE AVERAGE.

>> YES.

AND THIS IS -- WHEN HE WENT TO COLLEGE, HE HAD BEEN IN PRISON, AND FIGHTING AN ADDICTION AND HE OBTAINED A SCHOLARSHIP FOR DRUG ADDICTS TO GO TO COLLEGE AND HE WAS -- THIS IS ALL IN THE MITIGATION, HE WAS WORKING IN A SUBSTANCE ABUSE PROGRAM AND THAT IS HOW HE GOT THE SCHOLARSHIP TO GO TO COLLEGE.

AND HE WAS CLEAN FOR LONG PERIODS OF TIME.

BUT LIKE HE SAID, HE CHOSE TO DO COCAINE.

>> WELL, THERE'S -- YOU KNOW, AGAIN, THE ISSUE OF THE NATURE OF ADDICTION IS ONE OF THE TROUBLING THINGS.

HE SAID THAT IF HE HAD NOT GONE BACK ON CRACK COCAINE, THIS CRIME WOULD NEVER HAVE OCCURRED AND THIS IS -- THAT WILL NOT BE MITIGATING IN ORDER TO OVERCOME THE AGGRAVATING FACTORS BUT DOES THE STATE HAVE ANY REASON TO DISPUTE THAT?

THAT THIS WAS A CRACK COCAINE RELATED CRIME?

>> YOU KNOW, ADDICTS HAVE SO MANY EXCUSES, AND HE WOULD COME AND GO AND COME AND GO AND AT 45 YEARS OLD, HE HAD FOUGHT ADDICTION FOR A LONG PERIOD OF TIME AND TO SAY THAT, WELL, I BECAME A COLD-BLOODED MURDERER BECAUSE OF COCAINE, IS JUST A LITTLE TOO SIMPLISTIC.

>> WHAT -- THEN WHAT DOES -- WE ALWAYS LOOK TO SEE, GOING FORWARD, THIS IS A CHILLING TALE, FOR OTHER PEOPLE, WHAT ELSE, OTHER THAN AN UNDERLYING

ADDICTION, IF THE PERSON HAS NOT BEEN VIOLENT HIS ENTIRE LIFE, COULD EXPLAIN THE HORRIBLE, TERRIBLE CRIME.

>> WHEN YOU ARE 45 YEARS OLD AND YOU ARE STILL BURGLARIZING HOMES AND LYING IN WAIT FOR ELDER WOMEN, GOING THROUGH THE HOUSE, TAKING THEIR VALUABLES, AND PREPARING FOR HER ARRIVAL, HE WENT AND GOT ROPE, FROM GARAGE TO TIE HER UP, GOT THE BUTCHER KNIFE FROM THE KITCHEN, PREPARED FOR HER ARRIVAL.

HE SOCKED HER IN THE FACE AT LEAST 2, MAYBE 3 TIMES.

>> BUT I'M ASKING YOU, THERE IS NO HISTORY, SOMETHING LIKE -- AND AGAIN, THIS IS A DEATH SENTENCE THAT IS GOING TO BE AFFIRMED BASED ON EVERYTHING WE HAVE HERE.

I'M ASKING YOU, AS IF WE WERE LOOKING AND YOU WERE TO -- SEE YOUNG PEOPLE AND THEY SAY THIS CRIME OCCURRED, HAD HERE -- I'M ASKING, EVER BEEN VIOLENT OR ABUSIVE IN HIS ENTIRE 45 YEARS.

>> HE HAD NOT BUT HE ESCALATED. HE ESCALATED.

HE MADE A CONSCIOUS DECISION TO DO THAT.

AND HE MADE A CONSCIOUS DECISION TO GO AHEAD AND KILL HER AS THE STATE ARGUES, THE MOTIVE FOR THAT WAS WITNESS ELIMINATION, THE TRIAL JUDGE DID NOT FIND THAT.

BECAUSE SHE DID NOT BELIEVE SHE MAY HAVE BEEN ABLE, BEYOND A REASONABLE DOUBT, TO IDENTIFY HIM BECAUSE APPARENTLY HE WAS LYING EN WAIT FOR HER AND HIT HER EN THE FACE TO DISABLE HER AND HAD TO HAVE MOVED HER AND PLEDGED KIDNAPPING UNDER THE

FACTS AND AT SOME POINT MOVED  
HER INTO THE BATHROOM --

>> THAT WAS A QUESTION BECAUSE I  
COULDN'T FIGURE OUT WHERE THE  
KIDNAPPING CAME FROM BUT YOU  
SAY, SHE MUST HAVE BEEN MOVED  
FROM ONE PLACE TO ANOTHER.

>> YES.

AND THE -- THERE WAS BLOOD IN  
THE GARAGE, HOWEVER, IF THERE  
WERE BLOOD DROPLETS THEY WERE  
STEPPED UPON AND BECAME A FOOT  
IMPRESSION AND THERE WAS BLOOD  
IN THE KITCHEN AND THOSE DNA  
RESULTS CAME BACK DURING THE  
PENALTY PHASE AND IT WAS NOT  
ADMITTED HOWEVER THE JUDGE DID  
FIND OUT... [INAUDIBLE] THE  
DEFENDANT AGREED THAT SHE WAS  
MOVED AND, WHAT HAPPENED, SHE  
WAS AT SAM'S AND PUT HER PURSE  
IN SOME -- AND SOME ITEMS IN THE  
GARAGE AND TOOK THE SHRIMP AND  
VEGETABLE PLATTER INSIDE AND  
OBVIOUS SHE WOULD HAVE BEEN IN  
THE HOUSE AND GONE BACK TO GET  
HER PURSE AND ITEMS, AND, SHE  
WAS ATTACKED AT SOME POINT THERE  
SHE WAS HIT IN THE FACE AND HER  
HANDS WERE TIED TO THE EXTENT,  
BOTH CLAVICLES WERE DISLOCATED  
AND BINDINGS SO TIGHT HER HANDS  
TURNED PURPLE AND BLUE AND HER  
RIBS WERE BROKEN, THE ME SAID BY  
BLUNT FORCE TRAUMA AND SHE'S  
LAID FACE DOWN ON THE FLOOR --

>> SLAMMED FACE DOWN.

THAT MIGHT HAVE BEEN WHAT CAUSED  
THIS RIBS TO BE BROKEN.

>> THAT COULD HAVE CAUSED THE  
RIBS, YES.

BUT THE BLOWS TO THE FACE,  
CHIPPED A TOOTH, RIGHT HERE AND  
RIGHT HERE, TWO, MAYBE THREE.

>> HOW OLD WAS THE VICTIM.

>> 58.

>> AND SHE WAS MENTIONED ABOUT HER BEING A LARGE WOMAN.

>> 5 FEET, WEIGHED 228 POUNDS AND THE DEFENDANT WAS, WHAT WAS HIS SIZE --

>> SIZE AND WEIGHT.

>> 6 FOOT TALL AND BETWEEN 230 AND 250.

HE WAS A ROOFER.

HE WAS A BURLY MAN.

OBVIOUSLY, COULD OVERPOWER HER AND BECAUSE SHE WAS HEAVY SET WHEN HE PULLED WITH SUCH FORCE AND DISLOCATED THE CLAVICLE THE MEDICAL EXAMINER SAID IT WOULD BE EXCRUCIATING AND WHEN HE LAID HER ON HER FACE AND HER WEIGHT WAS ON HER, IT WOULD ALSO BE EXCRUCIATING PARTICULARLY WITH HER HANDS BEHIND HER AND HE TIED HER LEGS WITH A ROPE AND SHE'S HOG-TIED, AND PUTS A NOOSE AROUND HER NECK WITH ONE OF THESE LOOPS WHERE YOU CAN PULL, AND THERE WAS AT SOME POINT PETECHIA AND, STRANGULATION IN ITSELF IS HEINOUS, ATROCIOUS AN CCP WITHOUT THE --

>> STRANGULATION ALONE IS NOT CCP.

>> HAP.

AND, WE HAVE GOT THE MOST TERROR THAT A WOMAN CAN HAVE IN HER HOUSE, COMING IN WITH A FRUIT PLATTER, BEING ATTACKED IN HER OWN HOUSE, HOG TIED, A NOOSE AROUND HER NECK AND THE COUPE DE GRAS, THREE BRUTAL STABS WITH THE KNIFE HE HAD PROCURED FROM THE KITCHEN, WHICH, IF YOU LOOK AT THE CASE OF BUZIA ON CCP AN HCP, HE HAD BEEN THERE ALL DAY, CUT HIS ROPE AND GOT HIS KNIFE AND WAS READY FOR HER TO COME IN AND ATTACK HER AND THE TERROR SHE WENT THROUGH AND ULTIMATELY

THERE ARE THREE DEEP STAB ONES, ONE TO THE SKULL, SEPARATED THE SKIN AND DIDN'T BREAK THE CRANIUM, THREE DEEP STAB WOUNDS THROUGH THE BACK AND NICKED THE AORTA, DIDN'T SEVER IT AND SO BLEEDING AND LYING ON YOUR CHEST AND ASPHYXIATING AND THE MEDICAL EXAMINER SAID, EVERY STAGE OF THIS, SHE WOULD BE IN EXCRUCIATING PAIN AND WHEN YOU WALK INTO YOUR HOUSE, AND SOMEBODY PUNCHES YOU IN THE FACE AND HOG TIES YOU AND TRIES TO STRANGLE YOU AND STABS YOU IN THE BACK, YOU PRETTY MUCH KNOW THAT IS IT.

AND LOOK AT THE CASE OF RALEIGH. THE BLISS ATTACK, HE SAYS SHE COULD HAVE BEEN UNCONSCIOUS AT SOME POINT, SHE ABSOLUTELY WAS NOT.

AS JUSTIFY PERRY POINTED OUT THE MEDICAL EXAMINER SAID THERE WAS MOVEMENT FROM LEFT TO RIGHT AGAINST THE ROPE.

WHICH DOES A FURROW AND THERE WERE ABRASIONS ON THE LEFT SIDE OF HER NECK.

SHE WAS TRYING TO RESIST THAT NOOSE.

THERE WAS NO EVIDENCE OF A... [INAUDIBLE] RAGE OR COCAINE INTRODUCED FRENZY.

HE WAS THERE IN THE HOUSE FOR ALL DAY LONG.

SO, I THINK THAT ADDRESSES HAC AND CCP.

ALL IN ONE BUNDLE.

AND AS FAR AS THE CRACK COCAINE DOES NOT PRECLUDE A FINDING OF CCP THE COURT FOUND THAT CONTINUOUSLY, MOST RECENTLY IN THE CASE OF TURNER.

AND UNLESS THERE IS ANY OTHER QUESTIONS... ASK THE COURT TOO,

FIRM THE CONVICTIONS AND THE SENTENCES.

THANK YOU.

>> THANK YOU, BOTH.

WE NOW MOVE TO THE SECOND CASE ON OUR DOCKET, TODAY, HILDWIN VERSUS THE STATE OF FLORIDA.

>> PLEASE THE COURT, FOR THE RECORD, I'M MARTIN McCLAIN AND I'M HERE ON BEHALF OF MR. †PAUL HILDWIN, THIS SPECIFIC APPEAL, 09-1417, IS FROM THE PENALTY PHASE AND INEFFECTIVE ASSISTANCE OF COUNSEL AND BECAUSE OF THE LONG, SOMEWHAT TORTURED HISTORY, THIS IS A 1985 CRIME, 1986 CONVICTION AND SENTENCE OF DEATH AND 1988 THIS COURT AFFIRMED ON DIRECT APPEAL, 1992 EVIDENTIARY HEARING ON A 3850, AND AT THAT EVIDENCE REHEARING EVIDENCE WAS PRESENTED REGARDING SUFFICIENT PERFORMANCE AND MENTAL HEALTH EXPERTS WERE CALLED IN IN TERMS OF [INAUDIBLE] AND THE JUDGE DENIED RELIEF, BUT, NOTED THAT THE MENTAL HEALTH EXPERTS PRESENTED THE MOST COMPELLING AND PERSUASIVE EVIDENCE OF MENTAL HEALTH MITIGATION.

THIS COURT AFFIRMED THE DENIAL OF GUILT AND GRANTED PENALTY PHASE RELIEF RELYING ON THE JUDGE'S ... AND THE JUSTICE PRESIDED IN 1982 AND WAS NOT THE ORIGINAL JUDGE IN 1986 AND 1996 THE RESENTENCING OCCURS AND A SENTENCE OF DEATH RESULTS AND THE COURT AFFIRMS ON APPEAL IN 1998, 2000, A... IS FILED, AMENDED AND IN INCLUDES THE PENALTY PHASE, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM INCLUDES A REQUEST FOR DNA TESTING AND THE JUDGE...

[INAUDIBLE] WARRANTED PHASE, AND

HOLD IT IN ABEYANCE WHILE DNA ISSUES ARE HEARD AND DNA TESTING OCCURS, AND THE RESULTS ESTABLISH THAT THERE IS AN UNKNOWN MALE PROFILE IN THE SEMINAL FLUID ON THE PANT IS AND THE WASH CLOTH.

SALIVA SWEAT AND EVIDENTIARY HEARING OCCURS ON THE DNA EVIDENCE AND THE JUDGE DENIES THAT IN TRIAL AND THERE IS AN APPEAL TO THE COURT AND THE COURT AFFIRMS, 4-3 AND, A HABEAS IS FILED AND THEN, MR. †HILDWIN FILED A MOTION, SAYING WE NEVER DEALT WITH THE PENALTY PHASE, AND... THE JUDGE GRANTED AN EVIDENTIARY HEARING, WHICH WAS HELD IN 2009 AND THAT IS THE APPEAL.

MEANWHILE A WRIT OF -- WRIT PETITIONS REGARDING SUBMITTING THE DNA PROFILE... [INAUDIBLE] WAS FILED WITH THE COURT LAST YEAR, AND THE COURT RELINQUISHED JURISDICTION AND AN EVIDENTIARY HEARING OCCURRED FEBRUARY 9TH AND 10TH AND THAT HAS JUST RETURNED TO THE COURT AND, AS THE...

>> WHAT WE'RE HERE AS YOU SAID WE'RE HERE ON THE PENALTY PHASE, IN EFFECTIVE ASSISTANCE AND WHEN WE LOOK AT, THE COUNSEL, I DIDN'T IF HE EFFECTIVE ASSISTANCE WE LOOK AT WHAT HAPPENED THE FIRST PENALTY PHASE AND AS YOU SAID THE POSTCONVICTION AND THEN LOOK AT THE, WHAT WAS PRESENTED AND YOUR EVIDENTIARY HEARING AND I KNOW YOU WILL MAKE ARGUMENTS, THEY SHOULD HAVE CALLED DR. †CARBONELL AND SHOULD HAVE GIVEN DR. †BERLAND THE RECORD AND THAT MADE HIM LESS EFFECTIVE.

BUT DON'T KNOW, WHEN WE ARE  
LOOKING AT WHETHER COUNSEL IS  
INEFFECTIVE.

RATHER THAN LOOKING AT ONE  
SPECIFIC THING DONE, SHOULDN'T  
WE LOOK AT THE TOTALITY OF HOW  
THE PENALTY PHASE WAS IN FACT  
PRESENTED?

BECAUSE IT LOOKS LIKE YOU IN AN  
EXPERT WAY AS YOU OFTEN DO,  
PICKED OUT SOME THINGS THAT  
MIGHT BE OF CONCERN, BUT, YET,  
NOT LOOK AT THE WHOLE PICTURE.  
THAT IS, DR. MAHER TESTIFIED LAY  
WITNESSES WERE NOT PRESENTED  
ORIGINALLY, THAT MITIGATION WAS  
FOUND BY THE TRIAL JUDGE, THAT  
WAS NOT FOUND ORIGINALLY, THE  
JURY DID SPLIT 8-4 AND  
ORIGINALLY THERE WAS 11-1 OR  
12-0.

SO, HELP ME UNDERSTAND IN TERMS  
OF YOUR PICKING OUT THESE  
THINGS, DO WE LOOK AT THOSE IN  
ISOLATION OR DON'T WE HAVE TO  
LOOK AT THAT IN THE TOTALITY OF  
HOW THE PENALTY PHASE WAS  
PRESENTED?

>> WELL, I'M NOT ADVOCATING THAT  
-- IN ISOLATION, CONTEXT IS  
IMPORTANT AND THE FACT THAT THE  
ORIGINAL ATTORNEY BACK IN 1986  
WAS PARTICULARLY PAD AND  
COMPARISON THE ATTORNEYS IN 1996  
DID BETTER IS INTERESTING BUT IN  
AND OF ITSELF DOES NOT RESOLVE  
WHETHER OR NOT THE 1996  
ATTORNEYS RENDERED SUFFICIENT  
PERFORMANCE AND, SPECIFICALLY,  
WHAT IS UNIQUE ABOUT --

>> LET ME PUT IT ANOTHER WAY.  
IF THE ATTORNEYS HAD TAKEN  
EVERYTHING THAT WAS IN THE 1992  
EVIDENTIARY HEARING, AND  
PRESENTED IT, LIKE IT WAS IN THE  
1992 EVIDENTIARY HEARING, WOULD

THERE BE A CLAIM -- YOU ARE NOT SAYING THEY DIDN'T UNCOVER, FAILED TO UNCOVER ADDITIONAL MITIGATION.

IS THAT CORRECT?

THEY HAD THE OUTLINE FOR WHAT THEY NEEDED TO DO AND DIDN'T DO IT?

>> YES.

AN --

>> THAT'S ESSENTIALLY IT.

>> AND PARTICULARLY WHAT THIS COURT SPECIFICALLY RELIED UPON THE JUDGE'S FINDING THE EXPERTS WERE MOST COMPELLING AND PERSUASIVE.

>> BUT WE HAVE A SITUATION ON DOCTOR CARBONELL THERE IS A FINDING THAT HE BECAME AN UNWILLING WITNESS, WE HAVE DEFENSE COUNSEL THAT ATTEMPTED TO USE HER 1992 TESTIMONY AND THE JUDGE DENIED IT, WHAT ELSE DID YOU WANT THEM TO DO? DRAG HER INTO COURT WITH -- UNWILLINGLY.

>> THEY COULD HAVE HAD DR. †BERLAND LOOK AT HER TESTIMONY AND HER BACKGROUND, EVERYTHING SHE CONSIDERED WAS INTRODUCED INTO EVIDENCE IN 1992.

IT WASN'T --

>> IT WAS GIVEN TO DR. †MAHER WHO TESTIFIED.

>> AND THE FINDING, THE JUDGE MADE WAS, THERE WERE SUBTLE DIFFERENCES, BETWEEN DR. †MAHER AND DR. †BERLAND, WHICH UNDERMINED THEIR CREDIT BELTED, THE JUDGE SAID IN 1992, MOST COMPELLING AND PERSUASIVE AND 1996, THE RESENTENCING.

>> BUT, BUT... GO BACK.

YOU AGREE THE INFORMATION WAS GIVEN TO THE PERSON WHO ACTUALLY

TESTIFIED THE INFORMATION FROM THE IN WILLING WITNESS, ALL THE INFORMATION WAS GIVEN TO THE EXPERT WHO TESTIFIED?

>> DR. †BERLAND DID NOT HAVE ACCESS TO THE BACKGROUND PACKET INTRODUCED INTO EVIDENCE.

>> NOW WE HAVE A DIFFERENT EXPERT.

>> DR. †BERLAND TESTIFIED IN 1996.

>> YOU SAY THE INFORMATION WAS NOT GIVEN TO THE EXPERT WHO TESTIFIED, THE INFORMATION THAT WAS NEEDED.

>> YES.

THAT'S CORRECT.

>> SEEMS -- AGAIN IT SEEMS, THEY HAVE NO EXPLANATION FOR THAT AND SEEMS LIKE THAT IS A SCREW-UP. THAT IS -- I GUESS I QUESTION I HAVE FOR YOU IS, EVERY -- ANYTHING THAT HAPPENS WHERE YOU LOOK BACK AND GO, THERE WAS NO STRATEGIC REASON NOT TO GIVE DR. †BERLAND ALL OF THOSE RECORDS.

SO IT ENDS UP THAT HE IS MUCH LESS EFFECTIVE WITNESS.

BUT ALL OF THE INFORMATION IS GIVEN TO DR. †MAHER.

WHO TESTIFIED.

IS THAT ITSELF SOMETHING THAT -- THAT ERROR RISE TO THE LEVEL OF CONSTITUTIONALLY DEFICIENT PERFORMANCE?

>> YOUR HONOR, I RECOGNIZE THERE ARE SCREW-UPS AND THERE ARE SCREW-UPS AND TO SOME EXTENT THE DEGREE OF THE SCREW-UP THAT DETERMINES WHETHER --

>> NOT MY TERM OF ART.

>> WE ARE COMMUNICATING I THINK.

>> SUFFICIENT PERFORMANCE.

>> IS THE BAR AND, I MEAN, THE PROBLEM HERE RISES, I MEAN, IF

THIS COURT GRANTED THE RESENTENCING IN 1992 ON THE BASIS OF THE TESTIMONY WOULD THE COURT HAVE GRANTED THE RESENTENCING IN 1992 IF WHAT WAS PRESENTED IN 1996 WAS PRESENTED IN 1992?

THE PROBLEM IS THE COURT WAS RELYING ON WHAT WAS PRESENTED IN 1992, TO SAY A RESENTENCING WAS REQUIRED AND THEN IT'S NOT PRESENTED.

I DON'T KNOW OF ANY OTHER CIRCUMSTANCE, QUITE LIKE THIS ONE.

>> YOUR ARGUMENT SEEMS TO BE THAT I THINK THE ATTORNEY ON RESENTENCING IS REQUIRED TO DO EXACTLY WHAT WAS DONE IN THE EVIDENTIARY HEARING TO GET THE NEW SENTENCING AND I'M NOT SURE I TOTALLY AGREE WITH THAT.

>> I'M NOT SURE I TOTALLY AM STATING THAT IN MOST CONTEXTS BUT IN THIS CONTEXT, WHERE THIS COURT SPECIFICALLY RELIES ON THE JUDGE'S FINDING, THOSE EXPERTS WERE MOST COMPELLING AND PERSUASIVE.

>> MOST COMPELLING AND PERSUASIVE THAT THIS MAN NEEDED A NEW SENTENCING --

>> NO, MOST COMPELLING AND PERSUASIVE THERE WERE STATUTORY MENTAL HEALTH MITIGATING CIRCUMSTANCES.

>> YOU NEEDED A NEW PROCEEDING AND HE GOT ONE AND IN FACT LAY WITNESSES CALLED AT THE NEW SENTENCING WASN'T THERE TO SUPPORT ALL OF THE INFORMATION.

>> BUT -- YES.

BUT THE JUDGE IN HIS SENTENCING ORDER SPECIFICALLY CRITICAL CRITICIZED DR. †BERLAND IN CROSS-EXAMINATION, IT CAME OUT,

THAT HE HAD NOT REVIEWED THE RECORDS.

HE HAS NOT TALKED TO THE WITNESSES AND, SO, THE JUDGE FINDS THAT THERE IS NOT -- EVEN THOUGH HE FINDS STATUTORY MENTAL HEALTH MITIGATION FINDS THE BURDEN OF PROOF HAS NOT CARRIED AND UNDERMINES THE WEIGHT TO BE GIVEN TO THE TESTIMONY.

>> THE PROBLEM IS, IN THE JUDGE'S SENTENCING ORDER, HE SAYS THE DEFENDANT'S CHILDHOOD WAS HORRIBLE AND, HE HAD A HISTORY OF DRUG ABUSE AND SUFFERED FROM ORGANIC BRAIN DAMAGE AND... HIS TYPE OF MENTAL ILLNESS IS APPROPRIATE AND TREATABLE IN A PRISON SETTING. NEVERTHELESS, THESE FACTORS ARE GREATLY OUT WEIGHED BY THE HEARTLESSNESS AND CALLOUSNESS OF THE MURDER OF MS. †COX AND I'M NOT SURE THAT SUFFICIENT EXPENSIVE EQUALS CONSTITUTIONALLY DEFICIENT, EVERY ERROR BECOMES CONSTITUTIONALLY DEFICIENT BUT IF WE RECOGNIZE THEY SHOULD HAVE GIVEN THE RECORDS TO DR. †BEHR AND WE HAD DR. †MAHER AND ALL OF THE LAY WITNESSES HOW DO YOU GET TO WITH THE FINDINGS MADE BY THE JUDGE ON MITIGATION, THAT THIS WOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME, THE SECOND PRONG OF STRICKLAND.

>> I RECOGNIZE WHAT YOU QUOTED FROM THE JUDGE'S ORDER BUT I WOULD MAKE THE POINT, THAT THIS COURT SAID IN AFFIRM THE TRIAL COURT EXPLAINED AT LENGTH WHY IT DOES NOT FIND THE PSYCHOLOGICAL MITIGATING EVIDENCE TO BE PARTICULARLY COMPELLING. AND THAT IS CONTRASTED WITH THE

PREVIOUS FINDING, WHERE IT WAS

--

>> I'LL LOOK AT THAT AGAIN BUT, IT -- THE JUDGE DID NOT GRANT A PENALTY PHASE, THE COURT GRANTED IT.

HE MIGHT HAVE SAID THESE WERE COMPELLING WITNESS AND DIDN'T THINK THEY WERE COMPELLING ENOUGH TO REQUIRE A NEW PENALTY PHASE.

PENALTY PHASE, IS THAT CORRECT.

>> PART OF THE JUDGE'S REASONING IN NOT GRANTING A RESENTENCING WAS BECAUSE THE ORIGINAL JUDGE WAS WELL-KNOWN AND WOULD HAVE IMPOSED DEATH IN ANY REGARD AND IN FACT WAS PART OF THE JUDGE'S SPECIAL CONCURRENCE, HIS CONCERN OVER THAT.

BUT REMEMBER, THIS IS 8-4 AND HAD THE EXPERTS BEEN PARTICULARLY COMPELLING AND WE ARE TALKING ABOUT TWO INJURY RAILROADS WHO CHANGED THEIR VOTED AND THAT IS UNDERMINING THE CONFIDENCE IN THE OUTCOME, MUCH MORE WAS DONE IN 1996 THAN 1986.

YES.

THE JURY WAS MUCH CLOSER IN 1996 THAN BEFORE AND THE QUESTION IS WHETHER THE MISTAKE...

[INAUDIBLE] EFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME AND HERE, WHAT WE HAVE IS HAD THERE BEEN A PARTICULARLY COMPELLING MENTAL HEALTH MITIGATION PRESENTED --

>> I'M STILL TRYING TO FIND OUT WHAT IS NOT COMPELLING ABOUT DR. †MAHER'S TESTIMONY?

>> WELL, WHAT THE JUDGE SAID IS BECAUSE OF THE SUBTLE DIFFERENCES BETWEEN MAHER AND DR. †BERLAND IN 1996, WHICH

ARISES FROM THE FACT THAT DR. †BEHR DID NOT PROVIDE THE BACKGROUND INFORMATION AND DIDN'T INTERVIEW THE WITNESSES HE WANTED TO INTERVIEW...

[INAUDIBLE] REDUCES THE COMPELLING NATURE OF THE MENTAL HEALTH LITIGATION.

>> THE EVIDENTIARY HEARING, DID DR. BERLAND SAY WITH THE INFORMATION HIS DIAGNOSIS WAS BASICALLY THE SAME AS WHAT HE SAID AT THE 1996 RESENTENCING.

>> CORRECT.

AND THAT IS MY POINT.

YES.

HIS BOTTOM LINE CONCLUSION REMAINED THE SAME BUT HIS -- THE ATTACK WAS ON HIS FAILURE TO SUPPORT THAT CONCLUSION, BY ACTUALLY DOING WORK, RESEARCH, TALKING TO THE WITNESSES AND REVIEWING THE RECORDS.

>> IT IS ALWAYS INTERESTING TO ME.

WE HAVE THESE CASES, MOST OF THEM WE END UP WITH, YOU KNOW, IT'S NOT ENOUGH YOU PREVENT ONE MENTAL HEALTH EXPERT AND THEN YOU HAVE TWO OR THREE WHO HAVE DIFFERENT, SLIGHTLY DIFFERENT THINGS IN THEIR DIAGNOSIS AND THERE'S A PROBLEM WITH, YOU KNOW, THE TRIAL JUDGE AND, YOU KNOW, BECAUSE THERE'S DIFFERENCES IN DIAGNOSE SEES YOU DON'T KNOW WHICH WAY TO GO ON THESE THINGS AND SO, THAT IS WHAT WE ALWAYS END UP SEEING IN THESE CASES, YOU KNOW?

DR. †MAHER'S DIAGNOSIS IS DIFFERENT FROM DR. †BERLAND'S DIAGNOSIS AND, REGARDLESS WITH ONE OF THEM, WE'D BE HERE WITH, HE SHOULD HAVE PRESENTED THE EVIDENCE OF DR. †BERLAND IN

ADDITION TO DR. †MAHER AND WE'VE ONLY DONE ONE AND IS TROUBLING TO ME.

IT DOESN'T MATTER WHAT THE ATTORNEYS DO AND HOW MANY EXPERTS THEY SEEM TO FIND TO EXAMINE THE DEFENDANT, THERE'S ALWAYS A PROBLEM.

>> TO SOME EXTENT, INHERENT IN A SITUATION THERE WILL ALWAYS BE A POSTCONVICTION MOTION FILED AND SOMETHING WILL BE ALLEGED.

AND I DON'T DISPUTE THAT.

BUT I DON'T NEGATE THE FACT I'M STANDING HERE TODAY REPRESENTING MR. †HILDWIN AND WHAT HAPPENED IN HIS CASE AND THE FACT THAT SOMEBODY ELSE MAY RAISE SOMETHING IN SOME OTHER CASE, NOTWITHSTANDING, AND THIS COURT SPECIFICALLY GRANTED A RESENTENCING ON THE BASIS OF DR. †CARBONELL AND DR. †MAHER'S TESTIMONY AND IF THE COURT GRANTS RESENTENCING AND RELIES ON THIS AS EVIDENCE SAYING THIS EVIDENCE IS SIGNIFICANT AND THIS IS WHY WE'RE GRANTING THE RESENTENCING BECAUSE THE ATTORNEY DIDN'T PRESENT IT.

IN THIS RESENTENCING ATTORNEY, DOESN'T USE IT, IT IS LIKE DEFEATED THE PURPOSE OF WHY THE COURT GRANTED IT IN THE FIRST PLACE.

>> I DON'T THINK THAT IS THE CASE.

I DON'T THINK WHEN WE REVERSE FOR RESENTENCING OUR CONFIDENCE IN THE OUTCOME HAS BEEN UNDERMINED BUT WE DON'T GIVE A BLUEPRINT HOW THE NEXT SENTENCING WILL GO AND YOU HAVE... YOU HAD THEM DECIDE WHICH LAY WITNESSES THEY WERE GOING TO USE AND THEY DID THAT

AND DIDN'T HAVE MORE MITIGATION THAT YOU SAY SHOULD HAVE BEEN PRESENTED.

AND SO, AGAIN, I STILL FEEL LIKE YOU ARE ISOLATING THIS ONE THING, OF -- ABOUT DR. †BERLAND AND I DON'T SEE HOW THAT IS ENOUGH TO GET TO EITHER CONSTITUTIONALLY DEFICIENT PERFORMANCE OR PREJUDICE.

BUT YOU HAVE DONE A GOOD JOB OF MAKING YOUR ARGUMENT.

>> MR. †McCLAIN, YOU ARE WELL INTO YOUR REBUTTAL TIME, YOU MAY CONTINUE, IF YOU WANT, YOU HAVE THREE MINUTES --

>> I UNDERSTAND.

I'LL RESERVE THE REST OF MY TIME FOR REBUTTAL.

>> I'M KEN NUNNELLEY, REPRESENTING THE STATE OF FLORIDA IN THE PROCEEDING.

DR. †CARBONELL FIRST, SHE'S THE EASIEST TO DEAL WITH.

SHE HAD TOLD TRIAL COUNSEL, BOTH OF THEM, BOTH SITTING CIRCUIT JUDGES IN THE 5th CIRCUIT NOW THAT HER TESTIMONY WOULD HURT THEIR CLIENT.

NO LAWYER IN THEIR RIGHT MIND IS GOING TO CALL A WITNESS THAT TELLS THEM THAT.

IF THEY HAD CALLED HER ANYWAY, I'M SURE WE'D BE TALKING ABOUT THAT THIS MORNING.

SO I THINK IN THE STATE -- AND THE STATE'S POSITION IS THAT DR. †CARBONELL CAN BE DEALT WITH EASILY AND WE DON'T NEED TO SPEND TIME ON THAT AND DR. †BERLAND.

>> I GUESS, BEFORE YOU PUT DR. †CARBONELL TO REST, HER INFORMATION... IN 1992, HIS ARGUMENT IS THAT THAT INFORMATION INCLUDING THE DATA

THAT SUPPORTED HER TESTIMONY AT THE 1992 EVIDENTIARY HEARING, WAS GIVEN TO DR. †BERLAND SO HE HAD THAT KIND OF INFORMATION TO HELP INFORM HIS OWN OPINION.

>> NEXT THING I WAS GOING TO SAY.

DR. †BERLAND, IF YOU LOOK AT THE RECORD, 2465, DR. †BERLAND ON CROSS CANNOT DISTINGUISH WHAT HE HAD AT THE TIME OF THE RESENTENCING PROCEEDING AND WHAT HE HAD AT THE TIME OF POSTCONVICTION AND CAN'T PARSE OUT WHAT DOCUMENTS HE HAD --

>> WE KNOW FROM THE WAY HE WAS CROSS EXAMINED THAT HE DIDN'T HAVE THE RECORDS THAT DR. †MAHER HAD.

ARE YOU REALLY -- I APPRECIATE WHAT YOU SAID ABOUT DR. †CARBONELL AND THE RECORD BEARS OUT THAT IS FINDING OF CREDIBILITY AND IS WHAT HAPPENED BUT WITH REGARD TO DR. †BERLAND, HE SOUNDED LIKE A COMPLETELY UNPREPARED WITNESS WHICH IS HOW HE WAS CROSS EXAMINED AND, ULTIMATELY, JUDGE FACTORED THAT INTO HOW THE JUDGE EVALUATED MITIGATION SO, HELP ME ON THAT. YOU ARE NOW SAYING HE HAD THESE RECORDS?

>> I'M SAYING WE DON'T KNOW.

>> WHAT WAS THE CROSS-EXAMINATION ABOUT THEN 1234.

>> THE PENALTY PHASE CROSS FOCUSED ON HIS WORK AND PREPARATION, THE SAME HIS CROSS AT THE POSTCONVICTION HEARING FOCUSED ON --

>> DIDN'T HE SAY THAT HE DIDN'T HAVE RECORDS?

>> I BELIEVE HE DID BUT --

>> STAY WITH THAT.

HOW THEN, IF HE WAS CROSS EXAMINED, YOU HAVE A WITNESS ON THE STAND AND THEY ARE ASKING HIM ABOUT RECORDS, SAME RECORDS THAT WERE SUPPLIED TO DR. †CARBONELL AND SUPPLIED TO DR. †MAHER AND THE EXPERT SAYS, I WASN'T GIVEN ANY RECORDS, WHAT ELSE DO WE NEED TO KNOW, BUT THAT HE WASN'T GIVEN ANY RECORDS.

>> I DON'T KNOW THAT THERE IS ANYTHING FURTHER TO KNOW. BUT I WOULD POINT OUT IF YOU READ THE CROSS OF DR. †BERLAND AT THE POSTCONVICTION PROCEEDING IT LOOKS A LOT LIKE WHAT HE TESTIFIED TO BEFORE.

UNPREPARED.

THIS MAN DIDN'T KNOW WHAT HE HAD, HE ADMITTED IT BUT THE BOTTOM LINE -- LET'S CUT TO THE ABSOLUTE BASELINE FOR THE WHOLE ISSUE WITH DR. †BERLAND.

IS NOTHING CHANGED.

NOTHING WHATSOEVER CHANGED ABOUT HIS OPINIONS AND CONCLUSIONS WITH REGARD TO THIS DEFENDANT.

>> I THINK -- MR. †McLAIN'S POINT IS THIS.

HELP ME.

YOU HAVE A SITUATION WHERE YOU KNOW WHAT WAS COMPELLING BECAUSE YOU HAVE NOW THIS EVIDENTIARY HEARING THAT TOOK PLACE IN 199... LET'S ASSUME THE -- THERE'S NOTHING THAT WAS DEVELOPED THAT SHOWS THE DEFENSE LAWYERS HAD A STRATEGIC REASON, NOT GIVING DR. †BERLAND THE EXTENSIVE RECORDS GIVEN TO DR. †CARBONELL AND DR. †MAHER HAD. NO EXCUSE, AN ERROR, FAILURE, DEFICIENCY.

WE NOW HAVE THEN -- ALLOWED THE STATE, REALLY, TO ARGUE AND PUT

THE TWO EXPERTS -- DILUTES THE  
EXPERT TESTIMONY AND THIS  
DEFENDANT NEEDED COMPELLING  
EXPERT TESTIMONY IN ORDER TO  
AVOID THE DEATH PENALTY AND THAT  
IS THE ARGUMENT.

SO, WHERE IS THE FLAW OR FALLACY  
IN THAT ARGUMENT?

>> THAT ARGUMENT PRESUPPOSES, I  
THINK, THAT IF THIS COURT GRANTS  
A RESENTENCING PROCEEDING, THAT  
THAT RULING LOCKS IN WHAT  
COUNSEL HAS TO DO AT THAT  
PROCEEDING.

>> BUT COUNSEL DOESN'T HAVE A --  
YOU ARE RIGHT -- AS TO  
DR. †CARBONELL YOU SAID THERE WAS  
A GOOD REASON NOT TO CALL HER  
AND WHAT IS THESE FOR NOT GIVING  
DR. †BERLAND THE RECORDS  
COMPELLING FOR DR. †CARBONELL AND  
THIS COURT?

THERE IS NO STRATEGIC REASON.

>> THE RECORD IS SILENT AS TO  
HOW AND WHY THAT HAPPENED.

>> I THOUGHT THEY SAID THEY'D  
SIMPLY -- IF HE DIDN'T GET THEM,  
SIMPLY FORGOT TO GIVE THEM TO  
HIM BECAUSE THEY GAVE THEM TO  
OTHER PEOPLE.

IS THAT WHAT THE ATTORNEYS SAID?

>> MY MEMORY OF THE TESTIMONY,  
JUSTICE QUINCE IS THAT  
DR. †BERLAND WAS WORKING WITH THE  
INVESTIGATOR AND THE  
INVESTIGATOR WAS TO BE GETTING  
RECORDS TO HIM.

NOW, WHETHER -- I'M GOING TO  
SPECULATE A LITTLE BIT HERE,  
BUT, WHETHER OR NOT DR. †BERLAND  
REALLY DIDN'T HAVE THESE RECORDS  
OR NOT HIS TESTIMONY IS WHAT IT  
IS.

AT THE RESENTENCING PROCEEDING.  
BUT THE BOTTOM LINE IS, THERE IS  
NO PREJUDICE, I'M NOT CONCEDING

SUFFICIENT PERFORMANCE BUT THE  
FUNDAMENTAL BOTTOM LINE, TO THE  
WHOLE ISSUE IS, THERE IS NO  
PREJUDICE AND IN ORDER TO FIND  
INEFFECTIVENESS UNDER STRICKLAND  
YOU HAVE TO HAVE DEFICIENT  
PERFORMANCE AN PREJUDICE AND YOU  
KNOW THAT, I DON'T HAVE TO  
REPEAT IT BUT IN THIS CASE YOU  
DON'T HAVE THE PREJUDICE.  
IT JUST SENTENCE THERE.

>> WHAT WE HAVE TO LOOK AT IS  
WHETHER THE ABILITY TO CROSS  
EXAMINE DR. †BERLAND AND THE  
EVALUATION OF DR. †BERLAND AND  
DR. †MAHER, THAT THAT ITSELF  
UNDERMINES CONFIDENCE...

[INAUDIBLE] WHAT WE FOCUS ON.

>> I BELIEVE SO, YES.

>> AND YOU SAID -- TELL US THE  
ARGUMENT AND SUPPLY...

[INAUDIBLE].

>> BECAUSE -- AND BEFORE I  
FORGET LET ME REFER TO YOU PAGES  
12 TO 14 OF THE SENTENCING  
ORDER.

I DON'T HAVE THE RECORDS...  
NUMBERS ON THE BOTTOM OF THE  
PAGES, THAT IS WHERE THE JUDGE  
DISCUSSED THE MENTAL MITIGATORS  
THAT HE HAD ALREADY FOUND AND  
THE TESTIMONY OF DOCTORS BERLAND  
AND MAHER.

NOT SOMETHING I'LL GO INTO,  
OTHER THAN THAT IS WHERE IT IS  
AND SPEAKS FOR ITSELF AND I  
CANNOT CHANGE IT AND NEITHER CAN  
MR. †McCLAIN.

WITH THAT SAID, IN LIGHT OF THE  
FINDINGS OF THE TWO MENTAL STATE  
MITIGATORS, THIS TESTIMONY AT  
THE POSTCONVICTION PROCEEDING,  
TESTIMONY OF DR. †BERLAND THAT  
EVEN AFTER I'VE DONE ALL THESE  
THINGS I SAY I DIDN'T DO BEFORE,  
MY TESTIMONY IS THE SAME.

MAYBE HE DOESN'T GET IMPEACHED OR CHEWED UP AS MUCH ON CROSS-EXAMINATION BUT AT THE END OF THE DAY THIS SCALES THAT THE DEFENSE TALKS ABOUT ALL THE TIME LOOK THE SAME.

THERE IS NOTHING NEW ADDED TO THE MITIGATION SIDE OF THE EQUATION BECAUSE YOU HAVE A VICIOUS, BRUTAL MURDERER AS THE JUDGE FOUND AND HAVE A DEFENDANT UNDER SENTENCE OF IMPRISONMENT, YOU HAVE A PRIOR FELONY AGGRAVATOR, YOU HAVE A MURDER COMMITTED FOR PECUNIARY GAIN AND A MURDER INDISPUTABLY HEINOUS, ATROCIOUS OR CRUEL.

>> IS THE PROBLEM THAT... HELP ME WITH THIS.

WHEN HE WAS GIVEN A NEW SENTENCING PHASE, CLEARLY AT THAT POINT THE COURT FELT THAT CONFIDENCE IN THE OUTCOME HAD BEEN UNDERMINED AND IN OTHER WORDS -- DO YOU AGREE?

>> SURE.

NO REASON OTHERWISE, TO RULE OTHERWISE.

>> BUT IF YOU ARE SAYING THAT THESE AGGRAVATORS ARE SO AGGRAVATING, IT REALLY COULDN'T BE MITIGATION THAT WOULD OVERCOME THAT, IS THAT YOUR ARGUMENT.

>> NO, MA'AM, I'M SAYING EVEN WITH THE MITIGATION THAT WAS FOUND, I'M NOT TRYING TO REARGUE THE OLD... [INAUDIBLE] SOUNDS LIKE I HAVE, THOUGH, DOESN'T IT. BUT I'M NOT TRYING TO DO THAT. WHAT I'M SAYING IS YOU HAVE THE TWO MENTAL STATE MITIGATORS FOUND AND VARIOUS NONSTATUTORY MITIGATION FOUND BY THE SENTENCING COURT AND THE SENTENCING COURT FINDS THAT THE

AGGRAVATORS OUT WEIGH THE  
MITIGATION AND WHAT WE HAVE  
SUBMITTED NOW AT THE  
POSTCONVICTION PROCEEDING  
DOESN'T CHANGE THE MIX.  
NOTHING CHANGES ABOUT IT.  
DR. †BERLAND EVEN PRETTY MUCH  
ADMITTED THAT, I DON'T HAVE  
ANYTHING -- ANYTHING HERE TO  
SAY, I DIDN'T LIKE WHAT THE  
SUPREME COURT SAID ABOUT ME.  
THAT IS WHAT HE SAID.  
THAT WAS HIS TESTIMONY.  
AGAIN, HIS TESTIMONY SPEAKS FOR  
ITSELF.  
I CANNOT CHANGE THAT.  
I WILL NOT TRY TO BUT THE BOTTOM  
LINE IS THERE WAS NO CHANGE TO  
HIS ULTIMATE OPINIONS AND  
CONCLUSIONS AND THAT IS WHAT IS  
IMPORTANT.  
AND IS WHAT CONTROLS HERE.  
JUDGE HOWARD COMMENTED IN  
TALKING ABOUT DR. †CARBONELL THAT  
-- PUTTING THIS OUT THERE FOR  
WHAT IT IS WORTH AND NOT HANGING  
MY HAT ON IT BUT THE JUDGE  
POINTED OUT WHEN DR. †CARBONELL  
SAYS, IF YOU CALL ME I'LL HURT  
YOUR CLIENT, AT THAT POINT, IN  
HIS MIND... BECAME SUSPECT AND  
HE WASN'T SURE WHAT HE HAD WITH  
HER AND COMES ACROSS IN HIS  
TESTIMONY HE WASN'T SURE WHAT  
SHE'D DO OR WHAT MIGHT BE OUT  
THERE, BUT HE WASN'T GOING TO  
LET HER NEAR THE COURTROOM AND I  
DON'T BLAME HIM.  
>> WE GOT PAST DR. †CARBONELL.  
>> I'M JUST BRINGING THAT BACK  
UP, THAT HE LOOKED AT EVERYTHING  
SHE HAD DONE INCLUDING HER  
DOCUMENTS, BEING KIND OF --  
>> I GUESS MY PROBLEM IS THIS:  
WE HAVE A DEATH PENALTY CASE,  
RESENTENCING, EVERY LAWYER THAT

PUTS ON AN EXPERT WITNESS IN A TRIAL, CIVIL TRIAL, FOR SURE, BEFORE THEY PUT AN EXPERT ON, MAKE SURE THAT THE BASIS OF THEIR OPINION HAS BEEN FULLY VETTED, THE NECESSARY RECORDS HAVE BEEN PROVIDED.

I CAN'T IMAGINE ANY EXCUSE FOR NOT GIVING AN EXPERT WITNESS -- WE HAVE CASES WHERE THE DEFENSE LAWYER DOESN'T HAVE -- WHERE THERE ARE AVAILABLE RECORDS AND THEY ARE NOT GIVEN TO AN EXPERT WITNESS, BEFORE HE TESTIFIES AND SO YOU GO -- I THINK YOUR ARGUMENT AND YOU DID GO BACK TO PREJUDICE, IS THAT EACH AT THE EVIDENTIARY HEARING, IF WE LOOK AT THIS IT DOESN'T CHANGE THE MIX OF AGGRAVATORS AN MITIGATORS AND I AM DEFINITELY MORE PERSUADED BY THE ARGUMENT AND I THINK IS A VALID POINT BUT I'M STILL CONCERNED IF WE SAY THAT THERE'S NO DEFICIENCY HERE THAT WE WOULD BE CONDONING SOMEBODY NOT GIVING A RECORD -- RECORDS AVAILABLE RECORDS TO AN EXPERT WITNESS.

AND I DON'T KNOW HOW -- ANY WAY YOU SLICE IT, THAT IS A PROBLEM. >> I UNDERSTAND WHAT YOU ARE SAYING, JUSTICE PARIENTE -- LET ME BACK UP.

I CAN ENVISION AND HAVE THE COURSE, OVER DOING DEATH LITIGATION A VERY LONG TIME IN CASES WHERE A DELIBERATE DECISION WAS MADE NOT TO GIVE PARTICULAR DOCUMENTS OR WHATEVER, TO A DEFENSE EXPERT FOR VARIOUS REASONS, THAT OF COURSE VARY WITH THE CASES AND SOMETIMES --

>> I STAND CORRECTED.

THAT IS CORRECT --

>> I'M NOT NITPICKING BUT I'M SAYING I CANNOT GIVE YOU AN ANSWER SPECIFICALLY TO WHY THIS HAPPENED, ASSUMING THAT IT DID, IN THIS CASE.

WHAT I CAN SAY -- THAT IS BECAUSE OF THE PASSAGE OF TIME. BUT WHAT I CAN SAY IS THAT THE DEFENDANT HAS THE BURDEN OF PROOF, NOT THE STATE AND, SILENT RECORD THE DEFENDANT LOSES. IN THIS PARTICULAR CASE, AGAIN, I GUESS WHAT I'M SAYING, THIS IS NOT THE CASE TO BE MAKING CASE LAW --

>> TELL ME ABOUT DR. †BERLAND. DID HE DO AN INDEPENDENT EVALUATION OF THE DEFENDANT AND HOW MUCH TIME DID HE SPEND WITH THE DEFENDANT?

>> I DON'T THINK -- IF MY MEMORY SERVES, HE HAD NOT SEEN THE DEFENDANT SINCE 1996. HIS LAST FACE-TO-FACE EVALUATION, MY MEMORY IS, WAS BEFORE THE RESENTENCING PROCEEDING.

>> THAT IS WHAT I'M TALKING ABOUT, BEFORE THE RESENTENCING PROCEEDING, HOW MUCH TIME HAD HE SPENT WITH HIM, DID HE DO AN INDEPENDENT EVALUATION? DID HE RUN TESTS, DO ANY KIND OF PSYCHOLOGICAL TESTS, ON HIM?

>> YES, MA'AM.

HIS TIME SHEETS ARE ALMOST IMPOSSIBLE TO READ.

I MEAN, THAT AS NO DISPUTE, THANK GOODNESS I DON'T HAVE TO KEEP THEM, OR MIGHT HAVE KEPT THEM ON THE COMPUTER.

BUT HE DID THE MMPI, THE OUT OLD, OUTDATED VERSION OF THE MMPI AND SAW THE DEFENDANT FACE-TO-FACE AND I DON'T REMEMBER AND I'M NOT SURE IT WAS

DEVELOPED EXACTLY] HOW MUCH TIME  
IN FACT HE SPENT WITH THE  
DEFENDANT.

>> THE RECORD IS CLEAR HE DID  
HIS OWN INDEPENDENT WORK --

>> YES, MA'AM, IT'S NOT WHERE  
HE'S SITTING IN HIS OFFICE,  
WAITING ON THINGS TO COME INTO  
THE MAIL FOR HIM TO DO HIS WORK  
IN THIS CASE AND HE'S DOING WHAT  
HE DOES DOING HIS PSYCHOLOGIST  
THING AND THE ADMINISTRATION OF  
TESTS AND, FACE-TO-FACE  
INTERVIEW AND YOU CAN'T DO THE  
MMPI WITHOUT BEING FACE-TO-FACE  
WITH THE MAN.

SO, IT'S NOT ONE OF THOSE  
CIRCUMSTANCES WHERE HE DID NO  
WORK OF HIS OWN, AND, HE DID A  
LOT OF IT, I DON'T REMEMBER THE  
AMOUNT OF TIME HE TESTIFIED TO  
AND I'M NOT SURE HE TESTIFIED TO  
THE AMOUNT OF TIME HE SPENT.

I THINK THAT WAS ONE OF THOSE  
THINGS THAT HE, ALSO COULD NOT  
SAY WITH SPECIFICITY AND MMPI  
TAKES THREE HOURS, I KNOW THAT.  
NOT TRYING TO MAKE MYSELF A  
WITNESS, THAT IS HOW LONG IT  
TAKES TO GET IT.

I GUESS THAT IS THE BEST ANSWER  
I CAN GIVE YOU, AND THAT IS A  
LONG ONE BUT THE BEST I CAN DO  
UNDER THE RECORD.

BEYOND THAT, IF THE COURT HAS NO  
FURTHER QUESTIONS I'D ASK THE  
COURT TO AFFIRM THE DENIAL OF  
POSTCONVICTION RELIEF AND I WILL  
NOT ARGUE THE ISSUE OF THE  
APPROPRIATENESS OF AN  
EVIDENTIARY HEARING IN THE FIRST  
PLACE AND I THINK THE RECORD  
DOCUMENTS OVER THE COURSE OF THE  
PROCEEDINGS SPEAKS FOR ITSELF,  
WE PROBABLY SHOULD BE DISPOSED  
OF BASED ON AN ABANDONMENT OF

THE CASE RATHER THAN A MERITOUS DECISION BECAUSE OF THE TIMING OF THE APPEAL WHERE THE DEFENDANT LITERALLY WALKED AWAY FROM AN EVIDENTIARY HEARING ORDERED BY APPEALING HALF OF HIS CASE AND NOT ALL OF IT.

I WOULD SUGGEST THAT THAT IS UNDER FLORIDA'S CLEAR RULES A ABANDONMENT WAIVER, WHATEVER WORD OR LABEL ONE WISHES TO PUT TO IT.

BUT BE THAT AS IT MAY --

>> THE TRIAL JUDGE FOUND EXACTLY THE OPPOSITE.

WE ALL GOT CARRIED AWAY AND, THE DNA LOOKED LIKE IT WAS POWERFUL AND THEY PROCEEDED ON THE DNA AND THE JUDGE ADMITTED...

[INAUDIBLE]... I THINK YOUR STRONGER ARGUMENT IS TO LOOK AT THE... [INAUDIBLE] ABANDONMENT. AND WE HAVE INEFFECTIVE...

[INAUDIBLE] COUNSEL ON ABANDONMENT.

AND I GUESS --

>> POSTCONVICTION.

>> BUT IS NOT A SATISFYING WAY TO DEAL WITH THIS.

>> IT IS A CIRCUMSTANCE AND PROCEDURAL POSTURE I NEVER ENCOUNTERED BEFORE MY POSITION WOULD BE, STATE'S POSITION WOULD BE THE CASE LAW AND THE RULES ARE WHAT THEY ARE.

I BELIEVE THEY ARE CLEAR AND I BELIEVE HE DID ABANDON IT BUT I DON'T HAVE TO HAVE THE FINDING FROM Y'ALL TO WIN.

MY PROBLEM, MY CONCERN IS THAT THE MESSAGE NOT BE SENT TO CAPITAL DEFENDANTS, THEY CAN DO THIS AT WILL, AND SPLIT UP THEIR APPEALS, AND DOUBLE-LOAD THE COURT ON A WHIM.

THAT IS MY CONCERN.

AND THAT IS MY PROBLEM WITH THE WAY --

>> THE EARLIER APPEAL, THE STATE NEVER TOOK A POSITION THAT THERE WASN'T A FINAL ORDER.

>> THERE WAS NO REASON FOR ME TO.

THE DEFENSE IS THE MASTER OF HIS CASE.

AND THE ORDER WAS ENTERED DECIDING THE DNA ISSUE, MOCK JURY --

>> THE DNA WAS A SEPARATE MOTION.

>> NO, AN AMENDMENT TO --

>> RULE -- THEY FILED THE DNA AS A 3.853 ON THE DNA, THAT IS WHAT WAS APPEALED.

>> NO, MA'AM.

NO.

NO.

THE 3.853 WAS THE VEHICLE THEY USED TO GET THE DNA TESTING AND GOT THE --

>> AND HAD A SUCCESSIVE POSTCONVICTION, TWO POSTCONVICTION MOTIONS, ONE IN JANUARY AND ONE IN JUNE OF 2001.

>> THE JUNE ONE WAS LABELED A SUCCESSIVE MOTION BUT IT WAS AN AMENDMENT TO JANUARY 7, 2000 MOTION WHICH WAS AMENDED JANUARY 16, 2001 AND, AMENDED AGAIN, THOUGH MISLABELED IN JUNE, AND THEY WERE THE SAME CASE AND WERE NOT SEPARATE PROCEEDINGS.

THERE WAS ONE HUFF HEARING THAT TOOK PLACE AFTER THE JUNE 21, 2001 AMENDMENT.

WE HAVE ALL OF THIS BALLED UP TOGETHER.

>> THE TRIAL JUDGE NEVER CONSOLIDATED THE TWO MOTIONS, DID HE.

>> HE DIDN'T HAVE TO.

THE DEFENSE --

>> BUT THEY WERE -- IF HE HAD DESIGNATE... [INAUDIBLE] REMAIN TWO SEPARATE MOTIONS, SEEMS TO ME.

>> IT WAS AN AMENDMENT TO THE PRECEDING MOTION, AND, IT'S A COMPLICATED ISSUE AND MY CONCERN WITH IT, IS NOT THAT I NEED THAT FOR THE STATE TO PREVAIL BUT THE WRONG MESSAGE NOT BE SENT, FAIR GAME TO SPLIT UP YOUR CASES AND TAKE YOUR APPEALS SEPARATELY. WITH THAT SAID I WILL ASK THE COURT TO AFFIRM THE DENIAL OF POSTCONVICTION RELIEF.

>> WHAT CHANGED WITH THE WEIGHTINESS OF DR. †BERLAND'S SITUATION AND THE...

[INAUDIBLE].

>> DON'T WE LOOK -- IF WE LOOK AT AN EVALUATION -- EVALUATE DR. †BERLAND'S TESTIMONY, THIS TIME AND WE'RE NOT IMPRESSED WITH DR. †BERLAND'S TESTIMONY, EVEN AS YOU HAVE GIVEN IT, DOESN'T THAT FACTOR IN -- AGAIN, I THINK DR. †BERLAND NOW SAYS, WELL, IF I HAD RECEIVED THIS, MY TESTIMONY WOULD HAVE BEEN THIS OR THAT AND I THINK THAT IS WHERE THE PROBLEM IS, IS THAT WE LOOK AT THAT EVIDENTIARY HEARING NOW, THE ONE SUBSEQUENT AND WHAT I THINK THE STRONGEST ARGUMENT IS, IT DOESN'T CHANGE MUCH ABOUT THIS WEIGHT THAT WOULD BE GIVEN TO THE MITIGATOR.

>> EXCEPT... [INAUDIBLE] YOU HAVE TO LOOK AT IT -- [INAUDIBLE] HOW THE JURY COULD HAVE HEARD THIS AND WHEN YOU HAVE, YOU HAVE TO LOOK AT, IN FRONT OF THE 1996 JURY, BERLAND WAS ATTACKED ON CROSS FOR NOT REVIEWING THE DOCUMENTS, NOT TALKING --

>> THAT IS WHAT YOU -- WHEN THIS IS ALL SAID AND DONE THIS IS WHAT IT BOILED DOWN TO, IF WE LOOK AND THINK THE ATTACK ON BERLAND WAS SO SIGNIFICANT, THAT IT WOULD HAVE CHANGED THE JURY'S OUTCOME, EVALUATION, OR THE JUDGE'S OUTCOME, IN NEW SENTENCING PHASE, IF WE DON'T THINK IT IS AS SIGNIFICANT AS YOU ARE PLAYING IT...

[INAUDIBLE].

>> PROBABILITY OF TWO JURORS WHO VOTED FOR DEATH CHANGED THEIR MIND AND... [INAUDIBLE] IS THE CONTROLLING STANDARD AND DR. †BERLAND TESTIFIED, MY RECOLLECTION OF HIS TESTIMONY AT THE EVIDENTIARY HEARING, HE HAD AN HOUR-AND-A-HALF TO WORK ON THE CASE AND FELT RUSHED.

I DON'T BELIEVE HE PERSONALLY ADMINISTERED THE MMPI AND ONLY TALKED TO GOLDMAN AND DIDN'T TALK TO ANYBODY ELSE AND DIDN'T REVIEW THE RECORDS AND I SUBMIT UNDER -- YOU HAVE A POINT, THE POINT, JUSTICE PARIENTE MADE... AND THE COURT ALREADY DETERMINED THE AGGRAVATION ISN'T SUCH THAT A COMPELLING AND PERSUASIVE PRESENTATION OF MENTAL HEALTH MITIGATION DOESN'T UNDERMINE CONFLICT IN THE OUTCOME.

I MEAN, TO THAT EXTENT THE COURT'S 1995 RULING AND THE APPEAL OF -- WHERE YOU GRANTED THE PENALTY PHASE YOU ALREADY DETERMINED THAT THE AGGRAVATION IS NOT SUCH THAT, YOU KNOW, A COMPETENT PRESENTATION WARRANT -- UNDERMINES CONFIDENCE IN THE OUTCOME AND I THINK YOU HAVE TO HAVE THAT DECISION IN YOUR MIND... INAUDIBLE BINDING ON THE COURT AND THAT IS... AND I AM

OUT OF TIME AND WOULD ASK THE  
COURT TO REVERSE AND ORDER  
RESENTENCING.

>> THANK YOU BOTH FOR YOUR  
ARGUMENT.

THE COURT WILL NOW STAND IN  
RECESS FOR 10 MINUTES.

>> PLEASE RISE.