

>> All rise.

Hear ye, hear ye, hear ye, the  
Supreme Court of Florida is now  
in session.

All who have cause to plea, draw  
near, give attention and you  
shall be heard.

God save the United States, the  
great state of Florida and this  
honorable court.

Ladies and gentlemen, the  
Supreme Court of Florida.

Please be seated.

>> Good morning and welcome to  
the Florida Supreme Court.

The first case on our docket  
today is Snelgrove versus the  
State of Florida.

>> May it please the court.

My name is Jim Wulchak,  
assistant public defender from  
Daytona Beach, and our office  
represents David Snelgrove for  
his resentencing for two death

sentences for a remand penalty  
phase trial.

Due to time constraints with the  
oral argument we would like to  
focus this morning on issues  
one, the denial of the  
continuance issue for  
prosecutors comment on matters  
not in evidence and issue six,  
the impropriety of the death  
sentences and rest on the brief  
on the remaining issues.

The facts briefly relevant to  
these issues the defendant who  
was a mentally-impaired  
crack-cocaine addict  
affirmatively sought residential  
drug treatment or his  
crack-cocaine addiction.

After three months into the  
program wherein he was highly  
successful and an active  
participant he was suddenly  
terminated from the Salvation  
Army drug treatment program for

fraternization which, there was testimony this is a common occurrence, so much so that most programs don't have co-ed drug rehab treatment programs.

So he found himself thrown out on the street from the Salvation Army for this fraternization without any transition or without any support.

He was able to stay clean for a time, a highly impressive feat according to the expert, and he obtained manual labor jobs despite the influence of his crack-cocaine pushing and using cousin however he tragically succumbed to the irresistible craving for crack-cocaine as he wasn't able to complete the drug program.

>> Are you familiar with the factual background.

Are you alleging that the trial judge didn't adequately raise

that mitigation?

And what issue would that be?

>> Yes Your Honor that would be

the impropriety of the death

sentence and the lack of

adequate findings by the trial

court, issue number six.

It was under this influence of

extreme mental and emotional

disturbance the crack-cocaine

addiction and the irresistible

craving for more which even

according to the trial court's

finding significantly impacted

the defendant's thinking that

these crimes tragically

occurred.

The first issue is the trial

court's denial of the

continuance unconstitutionally

deprived the defendant of his

opportunity to present to the

jury evidence regarding his

possible mental retardation.

We would say to this court --

>> Well, let's get the timeframe on this.

This is a resentencing as you said.

>> Yes, Your Honor.

>> At the first sentencing -- at the first penalty phase was the mental retardation of Mr. Snelgrove an issue?

>> No, Your Honor.

>> Nobody even considered after looking at his school record and everything there was an issue?

>> Unfortunately his school records weren't very complete and didn't show an IQ test.

>> Basically what happened and I am not very sympathetic to your argument, virtually on the morning of trial after how long had it lapsed from plan the new penalty phase was granted until the trial started?

Was it months, years?

>> It was slightly over a year

from the denial of the United States Supreme Court search from the initial direct appeal.

>> The night before the mental health experts said, you know I think maybe he could be mentally retarded.

>> A couple of things Your Honor.

>> Is that how it happened essentially?

>> Yes, but when this case was remanded for a new penalty phase the original trial counsel for the defendant no longer worked for the public defender's office and a new council had to take over the case, familiarize himself with it and like I said it was, it was denied October 20 of 2000.

>> Did the trial lawyer ask for a week continuance?

But there were specific requests for how long to review this?

>> What happened was the defense trial repeatedly asked the mental health expert who had testified previously and administered the WAIS test on the defendant, had repeatedly asked him, is there anything else you need?

Have you reviewed your notes?

Is there anything else you need?

No, I haven't gotten to it and it was only the night before trial the new penalty phase was to begin that he informed defense counsel that, Oh wait a minute.

I'm looking at this and he should have been administered the WAIS-III test because that is more accurate.

>> Isn't it a fair reading of for what really occurred is that all of the testing would not satisfy the elements for mental retardation and then as a last

straw, you know what?

They came out with a new form of  
the exam.

Isn't that what this really  
boils down to?

>> I don't think so.

The mental expert in reviewing  
his notes, realized perhaps  
there was more here and it was  
only the night before the  
penalty phase was to begin that  
he informed the defendant.

>> Had not the tests been done  
before?

>> The original WAIS test  
hadn't.

>> Wait just a minute.

Was that the correct test at the  
time it was administered?

>> I believe WAIS-III might have  
been out by then, but they did  
not administer that test  
originally.

>> You said they administered  
the wrong test?

I didn't read this record to say that.

>> The expert testified -- .

>> We have had other cases and understand it is changed and it affects the view that folks are going to take.

Why don't we wait until they come up with a new version of the test and because of age and each year and things happen maybe it will change sometime in the future.

Isn't that really what happened here?

>> No Your Honor because of what the mental health experts said.

We would cite the case of Sorge versus State where Judge Polston was on the panel and in that case, on the eve of trial, the mental health expert in that case had been ordered to do an insanity test previously, but had not and had only done a

competency exam and said wait a minute, he may be insane.

We need to examine that.

>> Now, but that isn't insanity

a little different matter and

incompetency a little bit

different matter than

retardation?

The law about retardation is

that is something that is

pretty -- it is not like you

just get --

But somebody can be sane one day

and not sane the next.

So isn't that a significant

distinction?

>> No, because it is sanity or

insanity at the time of the

defense, not at the time of

trial.

>> Well, talking about the time

of the event, I agree with that

competency for trial.

>> They had already done the

competency.

The issue was insanity.

We submit insanity going to the  
guilt issue is the same as  
mental retardation.

>> Here is my problem.

We review the judges decision to  
deny a motion for the  
continuance on an abuse of  
discretion.

>> That's correct Your Honor.

>> You are essentially asking  
for a rule that reward somebody  
and it may be if we get into  
postconviction and that we see  
whether it was a trial lawyer or  
the last-ditch effort of them  
together, but it comes up with  
something the night before trial  
and that entitles them to a  
continuance of indefinite  
length?

So, the rule of law on that is  
not satisfactory, and I am not  
saying the judges abuse of  
discretion here, considering the

timing, considering the amount of time before trial and I mean I'm sorry that the defense lawyer had been on his expert and the expert just woke up the night before trial.

That is not something the trial judge --

>> But should you penalize the defendant for that?

Should you deny him his due process rights for a fair trial to present this evidence?

>> I would say if it is newly discovered evidence, it is one thing and you are now alluding to whether it was the due process denial.

As I understand it, the judge allowed some leeway.

Did the testing take place?

>> Yes the testing took place during the penalty phase trial.

>> What was the result of the testing?

>> An IQ of 70 which is the  
mental retardation stage.

It was later tested by the  
state.

They came up with a figure I  
believe of 78.

However, the jury was entitled  
to hear this and what happened  
was --

>> The jury heard an IQ of 70?

>> The state attorney harped on  
this but you cannot say to a  
mental-health expert that this  
defendant was mentally retarded.

No because I haven't done an  
adaptive functioning test and I  
haven't had time to do that so I  
can't say that.

So the prosecutor pointed out to  
the jury time and time again the  
defense cannot say he is  
mentally retarded.

But the continuance had been --  
which the expert said he had  
severe deficits in at least five

areas.

>> Was that presented to the trial judge?

>> It was presented to the trial judge for the hearing after the jury recommendation.

We submit the jury is entitled to hear this.

It is a mitigating circumstance.

>> What the trial judge fined on the adaptive function?

>> The trial judge rejected mental retardation solely as did the state expert Prichard saying the defendant's IQ was 78.

The trial judge indicate that there were some abnormalities in adaptive function issues with the defendant, but rejected those which I would like to address when we get to the penalty issue.

>> What was the jury recommendation?

Did the trial judge grant the

six months so that the adaptive  
test could be done?

>> There was a continuance  
granted.

>> Before the hearing?

>> Before the mental retardation  
hearing.

They had them both  
simultaneously.

We would submit this is no fault  
of the defendant or his counsel  
and while the statute will  
provide for the court to decide  
later to the death penalty in  
the finding of mental  
retardation after the  
recommendation this type of  
evidence is highly relevant for  
the jury to consider and he was  
prevented from considering that.

>> Justice Lewis is asking --

and that being new but the  
problem I have is with us again,  
when was the murder in this  
case?

>> 2000.

>> And the re-sentencing took place in 09?

>> 2008 I believe.

>> That was the first sentencing?

>> It was 2002 I believe.

>> Justice Canady was saying, functioning as a lifelong issue.

And it is really my view the Supreme Court mental retardation is a probability of the time of the crime.

If he was not functioning in life my goodness, what was someone doing for 10 years or nine years to really look at whether that was an issue?

>> They didn't even look at it just like the states experts didn't look at adaptive functioning because of the IQ test, so they didn't think they needed to until the night prior to trial.

>> But it is still mitigating evidence if if you can't La Voz in his own, if he did terrible -- whatever it is it is still mitigating evidence.

>> You mentioned earlier the competency evaluation had been done.

Was that done earlier on?

>> That was in the case of surge versus state Your Honor.

>> What wetware these deficits that were so significant that appeared six months later?

What type of deficits did he have?

>> Had deficits in his communication ability is ability to perform functions.

>> That is what I'm saying.

Those don't just pop out of the blue like a new IQ test.

If he had deficits and communications, it would be a parent and that is what I'm

seeing I am seeing as being a  
last-ditch effort.

>> The defense expert pointed  
out in the original sentencing  
order from the judge back in  
2001 and 2002 include these so  
they were presented.

At the expert had and evaluated  
these and had an look at the  
school records for the onset,  
possible onset before 18 and  
again, this was evidence the  
state attorney harped on so you  
cannot say he is mentally  
retarded but through no fault of  
the defense counsel or the  
defendant he is being punished  
and his due process rights are  
being denied.

Each case admittedly has to be  
decided on equal discretion and  
is on the specific facts of the  
case.

The state has decided the case  
of Dorbal versus the state in

that is clearly distinguishable.

In that case it was limited to its extreme facts were defense counsel actually caused the delay by doing absolutely nothing and this court saying that it was obvious that the defense counsel did nothing just so a continuance would have to be granted.

We would say under the Sorge decision it is clear defense counsel tried and through no fault of the defended and no fault of defense counsel instead through the mental health expert exactly like in Sorge, he was not given this opportunity to present these to the jury.

The jury recommendation is thus tainted and cannot support the death penalty.

Issue number four, the state may not inform the jury through questioning that they have

additional evidence which was not presented to them which would negate the defendants medication and support the death penalty.

The prosecutors prohibited from commenting on matters not in evidence but this is precisely what the prosecutor did hear.

>> Well, you were saying their cross-examination of the expert, correct?

>> Yes.

>> Experts testify with regard to matters that are not in evidence, do they not?

>> They may base their opinion on matters to the evidence --

>> The opposing side cannot ask questions with the test that they have looked at and have not looked at?

>> We submit that even hypothetical questions of expert witnesses may not tell the jury

that there is other evidence

they have not heard.

The evidence has to be

presented.

Here the prosecutor was able to

ask defense mental health

experts whether his alleged

admissions and demeanor about

the killing to Gary Matthews the

jailhouse snitch, they asked

this of Dr. Berland --

>> What is that statement and

what was in that statement in

Dr. Berland's possession?

>> He did not feel that it was

relevant.

>> That is what his examination

was about.

Can we have an orderly oral

argument?

I ask a question and you wait.

>> I'm sorry.

>> Thank you.

The cross-examination was about

the fact that Dr. Berland chose

what he was going to rely on and the point of what the cross-examination was, to say you had this evidence about his skills and you ignored it.

Why is that improper?

>> It is improper because the state was permitted -- the first trial they presented the testimony of Gary Matthews but hear that testimony was not presented.

The prosecutor is telling the jury, we have additional evidence that negates his mental health.

>> Let me ask you about section 921.141, subsection one which says, any evidence that the trial court decides is relevant to any of the aggravators or mitigators of which the court deems to have value may be received regardless of this admissibility under the

exclusionary rules of evidence  
provides the fair opportunity to  
rebut any hearsay statement.

That is right there in the  
statute.

It was to give the opportunity  
to rebut Gary Matthews  
testimony?

No because it wasn't presented  
here.

It was not presented to the  
jury.

>> Did you attempt to present  
anything that you are precluded  
from presenting?

>> At the first trial --

>> The fact that something  
happened in the first trial is  
not set the standard for the  
second trial, okay?

I don't understand, the rules  
are you would concede, would you  
not that the rules are somewhat  
different in the sentencing  
proceeding then they would be in

the guilt phase?

Like my colleagues I'm having trouble understanding wine expert can't be asked about the basis for his opinions of what he considered didn't consider and did he consider this or that, which are relevant factors.

>> What happened here was that the prosecutor was able to present essentially the testimony of Gary Matthews which was rebutted during the first trial.

That is why I bring that up but here they weren't able to rebut that at all.

The defense wasn't because Gary Matthews didn't testify.

>> In the first trial it was guilt and penalty phase so didn't Matthews testify in the guilt phase of the first trial?

>> Yes, Your Honor pretty

presented evidence relevant to  
the penalty phase is well we  
submit.

The case law indicates that you  
cannot ask hypothetical  
questions even of an expert.

If that evidence is not  
presented to the jury.

Here they told there was  
additional evidence.

>> That is what I'm having  
trouble with.

I can understand it in a vacuum  
they say would you consider this  
and this wasn't something that  
he had been provided.

It was in his file and he chose  
to ignore it for his own  
reasons.

That is legitimate  
cross-examination.

>> What would have a defense  
expert was asked well, are you  
aware of Dr. Jones' report was  
that he didn't have any mental

health issues?

The state has presented to the jury Dr. Jones mental health findings without giving the defended an opportunity to confront that expert.

This is the same type of thing here we submit.

>> Have exhausted all your time including your bottle time -- rebuttal your time however exhausting your time I will give you two additional minutes for rebuttal.

>> Thank you, Your Honor.

>> Good morning, Scott Browne on behalf of the state of Florida.

Your honors, the trial court did not abuse his discretion in this case when he denied the morning of trial request for a continuance and a the basis for that continuance this court is aware is not on the prospect that he was retarded, that he

had a finding from an expert that he was retarded, but on the possibility that he might be retarded if we did some additional testing.

>> But isn't that the kind of information that is relevant and pertinent and a penalty proceeding?

>> Certainly Your Honor, and again, but if you take a look at it in this case, the original trial in 2002, this expert had been used by the original trial attorneys.

It was long known to the defense attorneys.

This case had been continued already at the request of the defense for a year and four months.

>> But wasn't it later?

I mean, after the jury made its recommendations and the trial judge then gave him a

continuance to do some  
additional mental retardation  
testing?

>> Correct Your Honor.

>> It seems to me if you have to  
give him a continuance at any  
point, why not give him the  
continuance at a point then  
where he could get the  
information in the information  
could then be presented to the  
jury as opposed to just to the  
judge?

>> Your Honor I have a couple of  
responses.

First of all no morning of the  
penalty phase trial there is a  
significant inconvenience and  
harm to the parties and in the  
state in this case we had  
out-of-state witnesses,  
out-of-state family members here  
ready to go so when the defense  
counsel comes in on the morning  
of trial, the jury is there are,

we are ready for the trial and a long delay case based on information that hey you might be retarded.

I think the judge made a very accommodating decision in this case.

>> Is not the case that it is not unusual for there to be such a delay between the penalty phase jury proceedings in the Spencer hearing?

>> Correct Your Honor.

The consolidating dispensary hearing was a mental retardation hearing.

The judge said okay you go ahead and test.

You have an expert test them and they led Dr. Bloomfield testified to the obvious prejudice of the state.

They have this expert who was a late addition come in and testified that Mr. Snelgrove, at

least the intellectual function  
on the mental retardation --  
>> Isn't the problem here, and I  
appreciate and I obviously ask  
questions that trouble me about  
what happened with the defense  
and the delay, but what happened  
then is that he allowed the  
state to cross-examine that you  
haven't done the adaption --  
adaptive functioning part and so  
it diminished that testimony in  
front of the jury and when we  
talk about delay unfortunately  
these cases as we know and up  
now two years after the sentence  
and we are just having the  
appeal, which is an unfortunate  
situation.

But we are going to get into  
postconviction and the  
postconviction, the defendant  
goes well, I didn't delay this.  
The defense lawyer says, well I  
didn't delay this because the

expert didn't tell me until the morning of trial.

My concern is that if the stated it up using delay testing to its advantage to diminish and minimize that medication, now we can say well, the jury would have reached the same result in this case.

I mean the first verdict was 7-5 and this is 8-4 and that is -- with two victims that is certainly enough for the death penalty, so what is the answer to that?

The state used the fact that they couldn't complete their testing to the state's advantage.

>> Your Honor I disagree.

While there was minimal cross-examination of the defense expert, they haven't made a conclusion in this case.

The real harm or if you will the taxable benefits to the defense

attorney because remember they  
have a witness, Dr. Bloomfield,  
come in at the last minute  
without any notice to the state.  
The state didn't have their own  
expert to rebut his testimony  
and he comes in and says it is  
quite likely the defendant is  
retarded.

Now what happened is, and this  
is not the undue prejudice part  
of the denial, the continuance,  
what happens is the state  
retains Dr. Prichard contrary  
to the defense attorneys  
statement that Dr. Prichard and  
neither Dr. Prichard or the  
trial court address adaptive  
functioning he did a complete  
mental retardation analysis and  
he found he didn't meet any of  
the prongs to be mentally  
retarded.

>> Was this at the sentencing?

>> This was at the dispense

hearing Your Honor so

Dr. Prichard testified it is not even a close call in this case.

He looked at the records none of which suggest in any way that

Mr. Snelgrove was intellectually or had any deficits in adaptive functioning so what you had here was the more credible expert is

found by the trial court who also found he didn't need any prong to be retarded comes in and completely rebuts

Dr. Bloomfield who goes, you know what, it is a close call here.

Dr. Prichard said it is not even close.

There is no indication in this record.

>> In fairness and I don't know, there are certain experts just like the defendant has some of the same experts and the state has some of the same experts.

I don't know if Prichard's name sounds familiar.

The state would have been prejudiced by a delay.

Were they asking for specific time periods?

>> No, Your Honor.

Just open-ended.

>> I'm the trial judge.

Twenty days or 30 days to do the adaptive functioning?

Who were your witnesses that were coming from out-of-state?

>> The family members and I believe also the medical examiner and there may have been one or two more.

>> I was going to ask you about the victim impact evidence.

A lot of times the victim impact evidence is given through letters that are red because the whole idea is you don't want to have that become a feature in the trial but did the judge

asked those questions about you

have a witness?

What was the reason the judge

gave for denying?

>> They had ample time to

investigate Mr. Snelgrove's

mental condition, that it would

harm the state.

We are ready to go.

The state is marshaled his

resources in your witnesses are

here.

The jury is ready to be picked

and now in speculation again he

didn't have an expert to say he

was retarded but it is quite

possible he is retarded.

>> Would that have an indefinite

continuance?

>> That is what I said, it was

this idea that it is something

we think might exist and not

asking for 30 days or a certain

time.

>> Correct.

It was nothing more than a request to continue the mitigation investigation long after the original trial in 2000.

>> Did the judge feel this was being done for the purposes of delay and not good-faith?

>> The judge did not say that.

>> It doesn't sound like from what is being said that was the reason and that is what is concerning me which is you have somebody who is a crack-cocaine addict.

The judge found and gave substantial weight to that mental mitigation.

The fact that mental retardation doesn't weigh into whether there was actual prejudice in the trial.

Let me ask you about the victim impact evidence.

The judge gave an instruction

that said that the jury may consider the victims impact evidence in making its decision in this case.

>> I think you are admitting what he said immediately prior to that which is the judge instructed the jury that it is neither an aggravating circumstance nor rebuttal of a mitigating circumstance so I think this court has approved that exact instruction.

>> Is that what we have is a standard instruction?

>> Shortly after this case was tried, you change the standard instruction and I noted that in my brief.

And again we didn't give you no -- that was the instruction that have been improved -- approved and is repeatedly been upheld by this court.

>> Was it part of the standard

instruction?

>> Yes, Your Honor.

>> See, the problem with the victim impact evidence is that it is not to be considered in rendering a decision and aggravation.

That is not us.

That is the U.S. Supreme Court.

So it is in this Neverland which is unfortunate, you know, for the victims but that is how this occurs.

So if they are told they may consider it in making the decision, how do they consider it?

If it is not aggravation and not mitigation how do they consider victim impact evidence?

>> I think they are told the uniqueness of the individual and remember, that instruction, they are told properly that it is neither an aggravating or

mitigating circumstance so what it does is it recognizes that we are here because Mr. Snelgrove chose to murder two individuals, Glyn and Vivian Fowler.

The victims in this case were entitled to at least the -- and we have that by statute but that is entirely proper so again, I think the trial judge in this case repeatedly Hernandez has approved this very forum of instruction.

The trial court Your Honor didn't just say you may consider in your verdict.

He said immediately prior to that it is not an aggravating circumstance nor rebuttal of the mitigating circumstance.

>> How long had the new penalty phase defense attorney been representing Mr. Snelgrove?

>> I don't have that exact information you are on it but I

believe it was a substantial  
portion of time.

I believe they were the ones who  
requested the original  
continuance.

There was at least a year in  
four-month delay.

>> He was newly appointed but he  
had a year in?

>> I don't think he was newly  
appointed.

We may quibble over what is  
newly appointed.

>> That is what I'm wondering.

I wanted to know how long --

>> Your Honor it was well over a  
year from my recollection.

>> You had a chance to observe  
his conduct?

>> Yes, Your Honor.

And again, this is Dr. Berland  
who was not a recently retained  
expert and I pointed that out in  
his brief.

He suggested Dr. Berland, just

newly talked to Mr. Snelgrove  
and thought he was retarded.

>> He was renewing his notes  
from the original penalty phase.

>> The original penalty --

>> No, Your Honor.

Absolutely not and again he is a  
has a history.

>> What the doctor Berland and  
say with this new possible  
retardation, what evidence did  
he look at to make that  
assumption?

>> The only thing Dr. Berland  
did was he looked over his  
original notes and he goes,  
there is something called the  
Flynn effect and the juncture of  
the court is aware of it.

That is much disputed by many  
particularly by the state and  
various experts but the increase  
in the general population IQ of  
about .3.

>> So he had an IQ test that he

looked at and said if you apply  
that he might be retarded?

>> There is the possibility that  
he was not conclusive.

He just said you better go test  
him because they're at least the  
possibility.

That is where the trial judge is  
confronted.

Remember he is there with  
everyone would -- ready to go  
and the morning of trial -- you  
know he is possibly retarded.

You have a whole prior penalty  
phase.

Do you have Dr. Berland's  
testimony?

That is a very slim ground in my  
opinion to request continuance  
and the state decided the number  
of cases which added to the  
notion that the 11th hour a  
defense attorney can come in and  
continue to investigate.

There is also one directly on

point.

Granted it is a Kentucky case

but it is white v.

Commonwealth wherein the

situation the defending came in

and said he is possibly retarded

in that court found there was no

prejudice because he could

present his IQ scores in a way

to the jury and argue it's

effect.

>> Since we have gone through

this exercise, we have a

continuance and we got more

information about retardation.

The defendant precluded from

filing a motion saying he is

mentally retarded?

>> Yes Your Honor.

We have findings.

Again the judge had a full and

fair mental retardation hearing

in this case and the judge found

it wasn't even a close call.

Contrary to what the Council

asserts, not only the state experts but the judge went through each prong of mental retardation and Mr. Snelgrove did not need any.

Dr. Prichard had a stack of documents.

I submit the real harm if any was the fact that the defense had an unlisted, undisclosed expert come in at the last minute to testify he is quite likely retarded.

I think that turned out to the defense counsel's benefit in this case and he cannot find on this and record an abusive discretion and briefly on the other issue mentioned by defense counsel, in this case, the defense presented Dr. Berland and another expert, Dr. Edwards, on addiction allergy I believe and these two experts relied upon a wealth of information,

most of which never were  
introduced during the penalty  
phase.

So what the defense argues now  
is that we can't rely on all  
this material but the state  
can't ask us what we really  
relied upon or chose what not to  
relied upon.

That is not the proper about.

You don't have to go further  
than your recent opinion in this  
case.

A list of facts that supposedly  
the prosecutor inserted into  
this penalty phase.

Mr. Snelgrove hid bloody clothes  
in the attic.

That was one area of inquiry and  
Mr. Matthews did testify during  
the original trial.

There were no details concerning  
Mr. Matthews testimony that were  
introduced although I submit  
that would be proper.

What happened was the prosecutor  
said did you consider that  
Mr. Matthews testimony that  
Dr. Berland just said no he is  
jailhouse snitch.

I don't consider that reliable.

Dr. Berland relies upon all  
kinds of information like the  
only evidence supporting the  
so-called chronic psychotic  
disorder that Dr. Berland found  
was the wife of a long-term  
friend, so that is certainly  
hearsay which again Dr. Berland  
can rely upon and testify to  
apparently, but the state can't  
go ahead and rebut it with  
readily available information  
and this court has largely  
recognized that is not a proper  
restriction on  
cross-examination.

Now the state had no good-faith  
basis for asking this question  
that would be another matter but

that was not alleged and  
certainly you can review your  
opinion and go you know what?

Those facts were in there.

They were in the original record  
and again expert

cross-examination, you can ask

them if you chose to rely on

something, why did you and if

you had the material like the

police reports and other

information that showed

deliberate behavior, why didn't

you review that?

Well it wouldn't support your

opinion.

Okay, according to your defense

then we can't inquire because

the expert did not want to

review it.

That is not the standard and the

trial court is given obviously

broad leeway in determining the

relevance of the scope of

cross-examination and no such

abuse has been shown in this case.

It is the trial court's discretion.

No further questions.

I request that you affirm the sentences that were judged and recommend that the jury and impose by trial court.

Thank you.

>> Thank you Your Honor for the extra time.

As was pointed out, the state used a late testing to its advantage in cross-examining the defense expert at the penalty phase before the jury.

The state has complained, there is no notice to this day.

They came in and with a 70 IQ test at the last minute.

We didn't have the opportunity to rebut it but that begs the question at the court granted a continuance they would have had

the opportunity to rebut that.

What is the defense counsel supposed to do in this instance when the defense expert the night before the trial said he may be mentally retarded?

Are they just supposed to ignore that?

No, they have to seek a continuance and they have to get this evidence to present to the jury.

>> Let me ask you this.

Dr. Berland testified in the original penalty phase, correct?

>> Right.

>> So what did he have at this point the day before trial, the day before the penalty phase, that he did not have at the time of the original penalty phase?

>> Just his mental processes and in re-reviewing his notes on the original WAIS test a flag went off saying Oh wait, he could be

mentally retarded.

We need to get him to WAIS-III test and indeed that tested show that he met the first pond of mental retardation which would justify additional testing and examination for the adaptive functioning test.

Regarding the victim impact instruction, yes, the jury was told that victim impact evidence does not relate to aggravating or mitigating circumstances but they were also told you may consider this so the jury was left with a mistaken impression that they can weigh mitigating circumstances and they can weigh this additional victim impact, the relative worth of the victim included during their verdict.

>> What did you think the jury would do with the victim impact?

The Supreme Court has certainly said it is relevant information

that can't be presented to a jury.

They know that if not aggravating is not mitigating what do they do with it?

>> They are allowed under the U.S. Supreme Court.

>> Can they consider it?

>> In Florida we submit they cannot consider it because it is related to the aggravating circumstances.

[INAUDIBLE]

>> The that in studying these cases be is beyond me.

I represented a penalty case where trial judge asked the same questions of the parties.

He didn't know what they were supposed to do with it.

That the U.S. Supreme Court says when you are looking at the defendants quality of life and his upbringing that the jury should be able to hear, they

should be able to present what  
the victims did.

>> Well, there were proposed  
instructions by the defense  
lawyer --

>> Which was ultimately approved  
by this court, that cleared up  
any misconceptions the jury  
could possibly hear.

What was the harm in giving it?

The harm in giving it was the  
state didn't want to because the  
instruction they got told them  
they could consider this.

We submit also that the  
sentencing findings by the court  
were inconsistent.

When one breath you say drug out  
of and impacting his thinking at  
the time of the murders but  
later said he made a conscious  
decision and chose not to inform  
his conduct the inquiry of the  
law.

We ask this court to reverse the

death sentences in this case.

>> Thank you.

>> Thank you both for your  
arguments.