Alvin Leroy Morton vs State of Florida

THE FINAL CASE ON THE COURT'S CALENDAR THIS MORNING IS MORTON VERSUS STATE. MR. HELM.

MAY IT PLEASE THE COURT. MY NAME IS PAUL HELM. I REPRESENT THE APPELLANT ALVIN MORTON. IN APPROXIMATELY 1994, MR. MORTON WAS CONVICTED OF THE FIRST-DEGREE MURDERS OF JOHN BOWERS AND MADELEINE WISER AND SENTENCED TO DEATH. ON APPEAL, THIS CORT REVERSED THE DEATH SENTENCE AND REMANDED TO THE TRIAL COURT, FOR RESENTENCING PROCEEDINGS BEFORE A NEW JURY. THAT OCCURRED IN 1999, AND MR. MORTON WAS, AGAIN, SENTENCED TO DEATH FOR EACH OF THE TWO MURDERS, AND THAT BRINGS US HERE, TO THIS APPEAL. THE FIRST ISSUE IN THE CASE CONCERNS THE TRIAL COURT, THE RESENTENCING JUDGES, FINDINGS OF FACT IN HIS SENTENCING ORDER. IF THIS COURT GRANTED MY MOTION TO TAKE JUDICIAL NOTICE OF THE ORIGINAL SENTENCING ORDER, BY THE ORIGINAL SENTENCING JUDGE, THERE WERE TWO DIFFERENT JUDGES INVOLVED. IF THIS COURT TAKES THE TWO SENTENCING ORDERS AND LAYS THEM SIDE-BY-SIDE AND READS THE FINDINGS OF FACT, AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES, YOU WILL FIND THAT WHAT THE RESENTENCING JUDGE DID, JUDGE BEACH, WAS THAT HE ESSENTIALLY COPIED THE ORIGINAL SENTENCING ORDER VERBATIM, WITH ONLY A FEW MINOR CHANGES. NOW, THE REASON THAT I THINK THIS IS OBJECTIONABLE IS THAT JUDGE -- THE RESENTENCING PROCEEDING WAS AN ENTIRELY NEW PROCEEDING. THIS COURT HAS REPEATEDLY HELD THAT RESENTENCING, IN CAPITAL CASES, MUST PROCEED DE NOVO. THIS COURT HAS HELD THAT A PRIOR SENTENCING ORDER, IN A CAPITAL CASE, THAT HAS BEEN SET ASIDE ON APPEAL, IS A NULLITY, AND PROVIDES NO PROBATIVE INFORMATION FOR A JURY, REGARDING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. BY THE SAME TOKEN, IT CAN PROVIDE NO PROBATIVE INFORMATION REGARDING THE AGGRAVATING OR MITIGATING CIRCUMSTANCES FOR THE RESENTENCING JUDGE. THE RESENTENCING JUDGE IS REQUIRED TO MAKE AN INDEPENDENT AND REASONED JUDGMENT AS TO WHAT FACTS SUPPORT AGGRAVATING AND MITIGATING CIRCUMSTANCES IN THE CASE. THE COURT IS SUPPOSED TO ENGAGE IN A THOUGHTFUL, KNOWLEDGEABLE, INDEPENDENT EXAMINATION OF THE FACTS OF THE CASE, TO REACH ITS OWN CONCLUSIONS.

AND IT IS YOUR ASSERTION ARE THERE THING IN HIS THE PRESENT SENTENCING ORDER, THAT WERE NOT PRESENTED TO THIS JUDGE OR JURY?

THERE ARE FACTS INCLUDED IN THE PRESENT SENTENCING ORDER THAT WERE NOT PROVEN AT THE RESENTENCING HEARING. YES, YOUR HONOR.

WERE NOT PROVEN. IS THAT DIFFERENT FROM THERE WAS -- THERE WAS NO EVIDENCE.

THEY WERE NOT PROVEN. NO EVIDENCE WHATSOEVER.

AND WHAT ARE THOSE?

THEY INCLUDE SOME OF THE COURT'S FINDINGS, REGARDING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE. WHERE THE COURT'S FINDING IS THAT MORTON SOLICITED SUGGESTIONS OF WHAT PROOF WOULD BE NEEDED TO ESTABLISH THE MURDER, SUCH AS A HUMAN BODY PART OF THE TROPHY -- AS A TROPHY. THERE WAS, IN FACT, EVIDENCE THAT ONE OF MR. MORTON'S ASSOCIATES, ONE OF HIS TEENAGED FRIENDS HAD, JOKINGLY SUGGESTED THAT HE BRING BACK A FINGER, IF HE COMMITTED A MURDER, AND THERE WAS A STATEMENT,

THERE WAS PROOF OF A STATEMENT BY MR. MORTON THAT HE WAS GOING TO KILL SOME PEOPLE, AND HE WOULD BRING BACK A FINGER OR A HEAD. WHAT I AM SAYING IS THAT THERE IS NO PROOF THAT MORTON WENT OUT, SOLICITING SUGGESTIONS FOR WHAT HE NEEDED TO DO TO PROVE THAT HE HAD COMMITTED A MURDER.

IS IT PROPRIETOR INAPPROPRIATE FOR A SENTENCING JUDGE TO -- IS IT APPROPRIATE OR INAPPROPRIATE FOR A SENTENCING JUDGE TO READ A TRANSCRIPT OF A PRIOR SENTENCING OR EVIDENCE PRESENTED TO A PRIOR JURY?

GIVEN THIS COURT'S CLEAN SLATE RULE, IT WOULD BE INAPPROPRIATE FOR THE JUDGE TO RELY UPON EVIDENCE PRESENTED AT THE ORIGINAL TRIAL AND THE ORIGINAL SENTENCING. THIS COURT HAS RULED THAT IT AN ENTIRELY NEW PROCEEDING, AND THE STATE HAS AN INDEPENDENT DUTY TO PROVE BEYOND A REASONABLE DOUBT, EACH AND EVERY AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED.

THE CONVICTION, IN THIS CASE, WAS UPHELD, AND THIS, IN THIS SITUATION, IT IS A DIFFERENT TRIAL JUDGE THAT PRESIDED OVER THE RESENTENCING, BUT THE GUILT PHASE PROCEEDING --

YOUR HONOR, THAT HAS ALWAYS BEEN TRUE, WHEN THIS COURT HAS ORDERED A RESENTENCING, AND WHEN THIS COURT HAS RULED THAT A RESENTENCING IS AN ENTIRELY NEW PROCEEDING THAT MUST PROCEED DE NOVO ON ALL OF THE FACTS AND CIRCUMSTANCES.

THERE CAN'T BE ANY RELIANCE ON WHAT HAPPENED IN THE GUILT PHASE?

THAT IS WHAT THIS COURT HAS RULED, YOUR HONOR.

THAT IS WHAT YOU ARE SAYING, THAT THE GUILT PHASE --

THE COURT CAN ONLY RELY UPON THE FACTS PRESENTED AT THE RESENTENCING PROCEEDING. THAT IS WHAT THIS COURT HAS HELD.

AND YOU CANNOT -- WHAT SHE IS ASKING YOU IS THE GUILT PHASE. CAN A RESENTENCING JUDGE READ THE TRANSCRIPT OF THE GUILT PHASE?

NO, MA'AM. THAT IS WHAT I AM ANSWERING. THE -- HE CANNOT RELY ON THE PRIOR GUILT PHASE. THIS COURT HAS RULED THAT A RESENTENCING PROCEEDING IS A DE NOVO PROCEEDING. IT IS A BRAND NEW PROCEEDING. NOTHING THAT WENT BEFORE COUNTS.

BUT IN THE ORIGINAL PENALTY PHASE, THE TRIAL JUDGE AND THE JURY CAN TAKE INTO ACCOUNT WHAT HAPPENED DURING THE GUILT PHASE, CORRECT?

YES, YOUR HONOR. AND IN THE ORIGINAL TRIAL AND PENALTY PHASE, UNDER ORDINARY CIRCUMSTANCES, ALL OF THAT INFORMATION IS SET OUT FOR BOTH THE JUDGE AND THE JURY.

RIGHT.

AND THEY, ALL, HEAR IT, BUT WHEN IT COMES BACK FOR RESENTENCING, YOU HAVE A BRAND NEW JURY, AND IN THIS CASE, YOU HAVE ABRAND NEW JUDGE. THEY WEREN'T PRESENT FOR THE ORIGINAL TRIAL AND SENTENCING PROCEEDINGS. NONE OF THE EVIDENCE PRESENTED BEFORE HAS BEEN PRESENTED TO THEM, AND THIS COURT HAS REPEATEDLY SAID THAT YOU START WITH A CLEAN SLATE. YOU START WITH A DE NOVO PROCEEDING.

BUT WHAT WE ARE, REALLY, TALKING ABOUT IS A DE NOVO PROCEEDING FOR THE SENTENCING. COULDN'T YOU HAVE AGREED-UPON SUM AIR OF WHAT WENT ON IN A TRIAL COURT, IN THE GUILT PHASE OF IT?

YOUR HONOR, LET ME PUT IT THIS WAY. THE -- AS A MATTER OF DUE PROCESS, IF THE COURT IS GOING TO CONSIDER INFORMATION OUTSIDE THE PROCEEDINGS BEFORE HIM, IN DETERMINING WHAT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES ARE, HE IS OBLIGATED TO GIVE COUNSEL NOTICE AND AN OPPORTUNITY TO BE HEARD ABOUT THAT INFORMATION, A CHANCE TO REBUT IT. IF THE COURT HAD GIVEN COUNSEL NOTICE THAT HE WAS CONSIDERING INFORMATION SPECIFICALLY FROM THE PRIOR TRIAL OR SENTENCING PROCEEDINGS, AND GIVEN COUNSEL AN OPPORTUNITY TO EXPLAIN OR REBUT THAT EVIDENCE, THEN I PROBABLY WOULD NOT HAVE A VALID CLAIM, BUT THERE WAS NO SUCH NOTICE GIVEN. THERE WAS NO SUCH OPPORTUNITY GIVEN. THIS COURT HAS CLEARLY RULED THAT IT IS A DE NOVO PROCEEDING. THAT MEANS THAT YOU START FROM THE BEGINNING, WITH A CLEAN SLATE. THE ONLY THING YOU HAVE IS THE CONVICTION.

LET'S GO, THEN, TO LET'S ASSUME THAT YOU ARE CORRECT, THAT THERE CAN'T BE RELIANCE ON THE GUILT PHASE TESTIMONY. LET'S GO TO, THEN, WHAT WAS -- YOU WERE TALKING ABOUT THE CCP AGGRAVATOR, AND THAT THERE WAS NO EVIDENCE PRESENTED AT THIS RESENTENCING THAT HE HAD SOLICITED SUGGESTIONS OF WHAT PROOF WOULD BE NEEDED TO ESTABLISH THE MURDER, SUCH AS A HUMAN BODY PART AS A TROPHY.

THAT IS ONE OF SEVERAL FACTS THAT WERE NOT PROVEN.

DIDN'T WHITCOMB AND MADDEN, WHO WERE FRIENDS OF HIS, TESTIFY THAT MORTON HAD SAID HE WOULD BRING BACK A HEAD OR SOME OTHER BODY PART, TO --

YES, BUT THE THEY SAID THAT HE ASKED THEM WHAT PROOF I NEED BRING YOU.

BUT THIS IS NOT WHAT WAS INSISTED UPON.

YES, YOUR HONOR, AND WITHOUT PROOF.

THE EXTRA AMMUNITION IS SOMETHING THAT YOU WERE SAYING WAS NOT --

THERE IS NO PROOF PRESENTED, AND THE APPELLEE HAS RELIED ON A PHOTOGRAPH THAT WAS NOT READMITTED INTO EVIDENCE, TO SHOW THAT --

AND THE HOPE THAT THE KILLING WOULD PRODUCE A RUSH WAS THE THIRD ONE?

YES, YOUR HONOR, AND THERE WAS ABSOLUTELY NO EVIDENCE OF THAT WHATSOEVER AT THE RESENTENCING PROCEEDING.

AND BASED ON THE CCP AGGRAVATOR, YOU ARE NOT CONTESTING THAT THERE WAS EVIDENCE TO SUPPORT THE OTHER FINDINGS.

NEW YORK CITY YOUR HONOR, I AM NOT SAYING THAT THERE WAS EVIDENCE TO SUPPORT THE OTHER FINDINGS.

BECAUSE IT LOOKS LIKE THERE WERE A LOT OF SIMILARITIES TO THE ORIGINAL SENTENCING ORDER.

YOUR HONOR, IT ISN'T JUST IF YOU PUT THE TWO SENTENCING ORDERS SIDE-BY-SIDE AND READ THEM, YOU WILL FIND THAT VIRTUALLY EVERYTHING IN THE RESENTENCING ORDER IS VERBATIM WHAT THE ORIGINAL JUDGE SAID. IT IS NOT JUST THAT HE FOUND THE SAME CIRCUMSTANCES. HE USED THE EXACT SAME LANGUAGE, WORD FOR WORD, TO FIND THOSE CIRCUMSTANCES, AND THE REAL THRUST OF THIS ARGUMENT IS NOT THAT SOME OF THE FACTS THAT WERE FOUND WERE NOT PROVEN AT THE RESENTENCING PROCEEDINGS. THE REAL THRUST OF THE ARGUMENT IS THAT THE RESENTENCING JUDGE FAILED TO EXERCISE HIS DUTY TO

INDEPENDENTLY DETERMINE WHAT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES WERE AND TO CAREFULLY AND THOUGHTFULLY WEIGH THOS. HE ESSENTIALLY RELIED UPON WHAT THE PRIOR SENTENCING JUDGE HAD DONE, AND HE WENT THROUGH THE PRIOR SENTENCING JUDGE'S ORDER. HE MADE A FEW MINOR MODIFICATIONS IN THE FINDINGS, BUT LARGELY COPIED THEM VERBATIM, AND I AM SAYING THAT THIS DEMONSTRATES THAT HE DID NOT MAKE THE REQUISITE, INDEPENDENT, THOUGHTFUL DETERMINATION OF WHAT SENTENCE IS APPROPRIATE.

HOW DO WE KNOW THAT THE TRIAL JUDGE DID NOT INDEPENDENTLY THINK ABOUT THIS AND THINK ABOUT THE EVIDENCE THAT WAS PRESENTED --

I HIM SAYING --

WAIT A MINUTE.

I AM SORRY.

-- AND THEN LOOK AT THE PRIOR ORDER AND SAYS, YOU KNOW, THIS MIRRORS WHAT MY THOUGHT PROCESS WAS.

YOUR HONOR, THIS IS A CAPITAL CASE. EXTRA RELIABILITY IS REQUIRED IN CAPITAL SENTENCING. WHAT YOU ARE SAYING COULD HAVE HAPPENED. WE CAN SPECULATE THAT THAT HAPPENED. BUT WHAT WE KNOW, WE DON'T KNOW FOR SURE SURE HOW MUCH THOUGHT HE -- FOR SURE HOW MUCH THOUGHT HE PUT INTO THIS. IF YOU COMPARE THE TWO ORDERS AND SEE HOW NEARLY IDENTICAL THAT THEY ARE, I AM SUGGESTING THAT THAT IS VERY STRONG EVIDENCE THAT THERE WAS NOT SUFFICIENT INDEPENDENT THOUGHT PUT INTO THE RESENTENCING.

IF WE AGREED WITH YOU ON THIS POINT, WHAT, FOR FUTURE RESENTENCINGS, AND ESPECIALLY IF IT IS THE SAME TRIAL JUDGE, WOULD WE CAUTION THE TRIAL JUDGE TO NOT USE ANY LANGUAGE FROM THE ORIGINAL SENTENCING ORDER, FOR FEAR THAT WE WOULDN'T KNOW WHETHER HE OR SHE EXERCISED THE INDEPENDENT JUDGMENT, AND I AM SAYING THIS SERIOUSLY, TO UNDERSTAND THAT YOU HAVE GOT -- IS IT BECAUSE IT WAS A DIFFERENT JUDGE, THE JUDGE HAD TO COME UP WITH DIFFERENT LANGUAGE, TO EXPRESS THE FACTS THAT WERE, IN FACT, ESTABLISHED? WHAT IS -- WHAT WOULD WE TELL A TRIAL JUDGE IN THE SNUT.

WHAT YOU SHOULD TELL FUTURE RESENTENCING JUDGES IS THAT THEY SHOULD NOT COPY THE PRIOR RESENTENCING ORDER, THAT -- THE PRIOR SENTENCING ORDER. THEY SHOULD NOT RELY UPON THE PRIOR SENTENCING ORDER, THAT THEY SHOULD MAKE THEIR OWN PERSONAL, INDEPENDENT DETERMINATION OF WHAT THE FACTS ARE AND EXPRESS THOSE FACTS IN THEIR OWN LANGUAGE. I WOULD LIKE, IF I CAN, TO TURN TO THE SECOND ISSUE IN THE CASE, WHICH CONCERNS THE PROSECUTOR'S CLOSING ARGUMENT. NOW, I WILL ACKNOWLEDGE, UP-FRONT, THAT DEFENSE COUNSEL RAISED NO OBJECTIONS, WHATSOEVER, TO THE PROSECUTOR'S CLOSING ARGUMENT IN THIS CASE. HOWEVER, I WOULD URGE THE COURT TO CONSIDER THAT THE PROSECUTOR'S REMARKS IN THIS CASE WERE SO EGREGIOUS THAT THEY VIOLATED MR. MORTON'S RIGHT TO A FAIR RESENTENCING TRIAL, AND BECAUSE THEY VIOLATED HIS RIGHT TO A FAIR TRIAL, THAT IS A VIOLATION OF DUE PROCESS, AND THIS COURT HAS SAID THAT FUNDAMENTAL ERROR IS ERROR WHICH IS TO BE EQUIVALENT OF A VIOLATION OF DUE PROCESS. FIRST --

IS THERE FLORIDA CASE LAW THAT WOULD SUPPORT YOUR PREMISE THAT IMPROPER ARGUMENT WOULD BE FUNDAMENTAL ERROR?

YES, YOUR HONOR. AS LONG AGO AS THE 1950s, INTATE VERSUS STATE, THIS COURT -- IN TATE VERSUS STATE, WHERE THIS COURT RULED THAT THE REMARKS ARE SO EGREGIOUS THAT REVIEW NOR RETRACTION COULD CURE THE HARM DONE BY THE REMARKS. THAT REVERSAL IS REQUIRED, DESPITE THE LACK OF OBJECTION, AND EVEN IN -- AND EVEN IN SPITE OF AN

INSTRUCTION, BY THE JUDGE, TO DISREGARD THE REMARKS.

WAS IT CALLED FUNDAMENTAL ERROR?

NO, SIR. YOU DIDN'T CALL IT FUNDAMENTAL ERROR AT THAT TIME. BUT THE DISTRICT COURTS OF APPEAL HAVE REPEATEDLY APPLIED THE CONCEPT OF FUNDAMENTAL ERROR TO IMPROPER CLOSING ARGUMENTS, AND THIS COURT WILL CONSIDER IMPROPER ARGUMENT, COMMENTS THAT ARE NOT OBJECTED TO, WHEN THERE ARE OTHER IMPROPER COMMENTS THAT ARE OBJECTED TO. I AM ONLY ASKING YOU TO TAKE A SLIGHT STEP FURTHER THAN WHAT YOU HAVE BEEN DOING RECENTLY AND REMEMBER WHAT YOU HAVE SAID IN THE DISTANT PAST, THAT SOME ARGUMENTS ARE SO BAD, THAT REGARDLESS OF THE LACK OF OBJECTION, THE DEFENDANT'S RIGHT TO A FAIR TRIAL HAS BEEN DESTROYED BY THESE REMARKS, AND THE CASE NEEDS TO BE REVERSED.

BUT ISN'T THAT A SLIPPERY SLOPE, ONCE WE GET ON THAT? FUNDAMENTAL ERROR IS VERY LIMITED, AND ONCE WE START INCLUDING THINGS, SUCH AS IMPROPER ARGUMENT, AS FUNDAMENTAL ERROR, AREN'T WE PUT TO THE TASK OF EVERY CASE, NOW, TO LOOK AT ARGUMENTS, AND IS THAT THE KIND OF THING THAT WE OUGHT TO BE DOING, TO SAY THAT THIS ARGUMENT WAS SO BAD THAT, EVEN THOUGH IT IS NOT OBJECTED TO, THIS IS FUNDAMENTAL ERROR?

YES, I THINK YOU SHOULD BE DOING THAT. I THINK THIS COURT HAS A DUTY TO ENSURE THAT PROSECUTORS BEHAVE LEGALLY AND ETHICALLY, IN REPRESENTING THE STATE, AND IF I CAN ZOOM STRAIGHT THROUGH THE RECORD AND THIS PROSECUTOR IN THIS CASE DIDN'T DO IT, THEN YOU HAVE A RESPONSIBILITY TO CORRECT WHAT HE DID -- YOU HAVE AN OPPORTUNITY TO CORRECT WHAT HE DID. I WILL RESERVE THERIES RES OF MY TIME.

THANK. MR. -- I WILL RESERVE THE REST OF MY TIME.

THANK YOU. MR. BROWN.

FIRST OF ALL, MY NAME IS SCOTT BROWNE. I REPRESENT THE STATE OF FLORIDA. I APOLOGIZE FOR MY VOICE. I HAVE GOT THE FLU, BUT I THINK I SHOULD BE ABLE TO GET MY POINTS ACROSS. THE TRIAL COURTS IN THIS CASE DID NOT SIMPLY ADOPT THE PRIOR ORDER. I FIND SIX OR SEVEN CHANGES OF SUBSTANCE THAT WERE MADE PIE JUDGE BEECH. JUSTICE PARIENTE, AS YOU RECOGNIZED, PART OF THE ALLEGATION THAT APPELLANT MAKES, AS FAR AS UNSUPPORTED FACTORS,, ARE BY THE RECORD. THE APPELLANT DID SOLICIT SUGGESTIONS AS TO WHAT KIND OF BODY PART HE MIGHT NEED, TO BRING BACK, TO PROVE THAT HE COMMITTED THE MURDERS.

BUT IF WE HAVE GOT A TOTALLY NEW PROCEEDING, AND THAT, OF COURSE, IS SOMETHING THAT OCCURRED IN THE GUILT PHASE THAT THIS TRIAL JUDGE, IN FACT, DID NOT HEAR AND THE JURY DID NOT HEAR, HE CAN'T GO BACK AND BRING IT UP THAT WAY, ON THE RESENTENCING, THEN IT HAS TO COME OUT IN THE RESENTENCING HEARING, AS I UNDERSTAND WHAT THE ARGUMENT IS. WHAT DO YOU SAY TO THAT? IS THAT APPROPRIATE?

I THINK, IN THAT RESPECT, IT IS ESSENTIALLY CORRECT, AS I READ THE CASE LAW, THAT THIS JUDGE HAD AN OBLIGATION TO REVIEW THE EVIDENCE THAT WAS PRESENTED DURING RESENTENCING. IN THAT JURY.

AND THESE ARE SIMPLY NOT FACTS THAT WERE PRESENTED AT THE SENTENCING, IN ANY WAY, SHAPE OR FORM, IS WHAT I UNDERSTAND THE ARGUMENT TO BE.

YES, YOUR HONOR, AND I UNDERSTAND THAT TO BE THE ARGUMENT, TOO, AND I SHOW THAT IN MY BRIEF, THAT MANY OF THESE FACTS ARE FACTS THAT WEREN'T SUPPORTED BY THE RECORD, AND ISSUES LIKE THE EXTRA AMMUNITION, THERE IS NO DOUBT THAT HE CARRIED TWO ROUNDS

OF EXTRA SHOTGUN AMMUNITION. NOW, IT WAS NOT ADMITTED THAT IT CARRIED FOUR ROUNDS, SO I AM SURE THAT IS WHERE THAT JUDGE GLEANED IT FROM, BUT IS THAT ATTRIBUTABLE TO A FINDING OF A SINGLE AGGRAVATOR IN THIS CASE? THE ANSWER IS NO.

IS THAT FACTS THAT WERE NOT PROVEN BY THE RECORD? IS THAT WHAT YOU ARE SAYING NOW?

NEW YORK CITY YOUR HONOR, I AM NOT. MANY OF THOSE FACTS, YOU CAN TELL --

LET ME PRESENT THAT IN A DIFFERENT WAY. WERE THOSE FACTS THAT WERE NOT PROVEN IN THIS RESENTS SOMETHING.

THAT'S CORRECT, AND I HAVE ADMITTED THAT IN MY BRIEF, BUT THEY WERE MINOR.

WERE THEY SIGNIFICANT FACTS?

ABSOLUTELY NOT, YOUR HONOR. NOT A SINGLE ADDITIONAL MITIGATOR WOULD HAVE BEEN FOUND, BUT FOR THESE ADDITIONAL FACTS, NOT A SINGLE AGGRAVATOR WOULD HAVE BEEN FOUND, BUT FOR THOSE FACTS, AND I HAVE GONE TO SOME LENGTH TO EXPLAIN THAT IN MY BRIEF.

BUT DO THOSE FACTS -- I GUESS THE QUESTION, THEN, BECOMES DO THOSE FACTS DEMONSTRATE, BECAUSE THEY ALREADY IN THERE, THAT THE TRIAL JUDGE DID NOT INDEPENDENTLY WEIGH WHAT WAS ACTUALLY PRESENTED TO HIM, VERSUS WHAT HAPPENED IN THE ORIGINAL PROCEEDING?

NOT AT ALL, YOUR HONOR. EVEN IF HE USED THE PRIOR ORDER AS SOME KIND OF GUIDELINE, I MEAN, HE DID MAKE SIGNIFICANT CHANGES. FOR INSTANCE, IN THE AVOIDING OR PREVENTING LAWFULLY ARREST AGGRAVATOR, HE ADDED THAT THE APPLEANT WORRY GLOVES. HE, ALSO, PRESENTED THAT HE SET FIRES AFTERWARDS TO COVER UP HIS CRIME, AND THERE WERE OTHER INFERENCES, AS WELL, SO IT IS NOT AS SIMPLE AS IF THE JUDGE ENTIRELY ADOPTED THE PRIOR ORDER. THERE WERE DIFFERENCES. THERE WERE VERY STRONG SIMILARITIES. BUT THE BOTTOM LINE HERE --.

YOU WOULDN'T CHALLENGE DE NOVO HERE, WOULD YOU?

FROM THIS COURT'S CASE LAW, IF YOU ARE GOING TO RELY ON THE PRIOR TRIAL RECORD OR SOMETHING LIKE THAT, HE SHOULD HAVE GIVEN THE DEFENSE NOTICE, BUT I FOUND A CASE THAT IS SOMEWHAT SIMILAR, AND I CITED IT MY BRIEF, HUFF V STATE, AND THIS COURT REMANDED IT FOR ANOTHER TRIAL. IT WAS A CAPITAL CASE, AND IT CAME BACK FOR A NEW TRIAL AND RESENTENCING HEARING, AND WHAT THE JUDGE DID, HE TOOK JUDICIAL NOTICE OF THE PRIOR TRIAL RECORD, AND FOR A SENTENCING ORDER, HE SIMPLY AND END THE PRIOR -- AND ENDED THE PRIOR SENTENCE -- APPENDED THE PRIOR SENTENCING ORDER. THIS COURT FOUND IT WAS FUNDAMENTAL ERROR BUT DID NOT REVERSE THE SENTENCE IN THAT CASE. THIS COURT FOUND THAT, RELYING UPON THE PRIOR ORDER AND RECORD RESULTED IN ONE ADDITIONAL AGGRAVATOR.

WAS THAT THE SAME JUDGE?

I BELIEVE IT WAS YOUR HONOR YOUR HONOR.

IT WOULD BE A DIFFERENT SITUATION, IF IT IS A DIFFERENT JUDGE. WOULDN'T YOU AGREE?

I DON'T AGREE AT ALL, BECAUSE YOU ARE BASICALLY, THIS JUDGE IS RELYING ON MATERIAL AND HIS PRIOR ORDER, AND --

IF I UNDERSTAND THE ARGUMENT OF THE DEFENDANT HERE, IT GOES TO THIS PROPOSITION, WE WANT TO ENSURE THAT THE SENTENCING JUDGE ACTUALLY GOES THROUGH THIS THOUGHTFUL EXERCISE OF REFLECTING ON WHAT THE AGGRAVATING AND MITIGATING FACTORS ARE AND THE CIRCUMSTANCES OF THE CASE, AND DOING THIS INDEPENDENT ANALYSIS, AND THAT, THROUGH THAT, HE ENDS UP MAKING UP HIS MIND OR HER MIND AS TO WHAT AN APPROPRIATE SENTENCE SHOULD BE, AND THAT THAT IS, REALLY, WHAT THE COMPLAINT THAT IS BEING MADE HERE, OKAY, SO WOULD YOU AGREE THAT IS THE CORE ISSUE?

I AGREE WITH THE CORE COMPLAINT.

WOULD YOU AGREE, IF WE HAD A MORE BLATANT CASE, AND LET'S JUST SAY THE JUDGE, AT THE END OF THIS, SAID BY THE WAY, I HAVE READ JUDGE SMITH'S ORDER FROM THE PREVIOUS SENTENCING, AND IT SURE LOOKS GOOD TO ME, AND I DON'T THINK I NEED TO DO ANYTHING MORE, AND JUST SAID HERE IS A COVER ORDER. I HERE BY ADOPT.

THAT WOULD BE --

THAT THAT WOULD BE I AM PROP PER?

THAT WOULD BE IMPROPER.

OKAY. HOW ABOUT ADDRESSING, THOUGH THAT, UNDERLYING CLAIM THAT YOUR OPPONENT IS MAKING, THAT THAT IS THE CONCERN, AND HELP US WITH THAT IS, HERE, IN OTHER WORDS, JUST TO REASSURE --

YES, YOUR HONOR, AND I AM INITIALLY BOTHERED BY IT, BUT THE REASON THAT CAN CHANGE IS --

REASSURE US HERE, BECAUSE THAT CAN HAPPEN HERE. THAT IS, REALLY, WHAT THE STATE IS SAYING, AM I RIGHT? THAT THAT IS WHAT THIS JUDGE DID DO. HE USED HIS OWN ANALYSIS AND REACHED A CAREFUL AND INDEPENDENT CONCLUSION ABOUT THIS, SO TELL US HOW WE CAN DISCERN THAT.

YES, YOUR HONOR. I HAVE GONE THROUGH AND THE APPELLANT HAS GONE THROUGH. THERE WERE CHANGES MADE. HE DID NOT ADOPT THE PRIOR ORDER. HE DIDN'T AND END THE ORDER AND SAY I MADE THE FOLLOWING FINDINGS. THE FACT THAT HE MADE CHANGES REVEALED THAT HE WAS LOOKING FOR DIFFERENCES, USING HIS OWN RECOLLECTION, USING HIS OWN JUDGMENT, IN DETERMINING WHAT THE APPROPRIATE SENTENCE IS IN THIS CASE, AND THE BOTTOM LINE HERE IS YOU HAVE UNCHALLENGED AGGRAVATORS IN THIS CASE, AND NOT A SINGLE AGGRAVATOR WOULD NOT HAVE BEEN FOUND, BUT FOR THE RELIANCE ON THESE MINOR FACTS, AND I AM TALKING ABOUT THE ONLY FACTS THAT WERE NOT SUPPORTED BY THE RECORD, HAD NOTHING TO DO WITH FINDING THE AGGRAVATORS. THERE WAS, INSTEAD OF FOUR SHOTGUN SHELLS, YOU KNOW THERE WERE TWO SHELLS, BUT WE KNEW THAT HE HAD PLANNED THIS MURDER LONG OR WELL IN ADVANCE, SO IT WOULD HAVE NO IMPACT ON THE COLD, CALCULATED, PREMEDITATED AGGRAVATOR, SO THE BOTTOM LINE, HERE, IS DO YOU REMAND THIS CASE FOR RESENTENCING, AND THE ANSWER TO THAT QUESTION IS NO. THIS COURT HAS, IN THE PAST, SAID IT WILL NOT REMAND FOR RESENTENCING, WHERE THERE IS NO REASONABLE POSSIBILITY OF A DIFFERENT RESULT. THERE IS NO REASONABLE POSSIBILITY OF A DIFFERENT RESULT IN THIS CASE. NONE. AND I WILL BRIEFLY ADDRESS THE PROSECUTOR'S ARGUMENT, AS APPELLANT AC NOGE -- ACKNOWLEDGES, THERE WAS NO OBJECTION MADE TO, IN THE COMMENTS NOW ON APPEAL. HIS BURDEN BEFORE THIS COURT IS A HEAVY ONE. HE NEEDS TO SHOW THAT THOSE COMMENTS NOT ONLY WERE IMPROPER BUT THAT THESE RISE TO THE LEVEL OF FUNDAMENTAL ERROR, AND THIS COURT HAS DESCRIBED FUNDAMENTAL ERROR AS AN ERROR SO SERIOUS THAT THE VERDICT COULD NOT HAVE BEEN REACHED, WITHOUT THE BENEFIT OF THE ERROR ALLEGED.

LET ME ASK YOU A QUESTION ABOUT THE FIRST ARGUMENT, WHICH WAS FOR THE SISTER, TO GO TO WHAT THE SISTER HAD SAID. SHE TESTIFIED, IN THE RESENTENCING HEAR SOMETHING.

THAT'S CORRECT, YOUR HONOR.

AND SHE WAS SAYING THAT SHE DIDN'T RECALL CERTAIN THINGS.

THAT'S CORRECT.

AND THEN THE PROSECUTOR, ACTUALLY, STARTED, READ HER PRIOR DEPOSITION.

THAT'S CORRECT.

A QUESTION. WASN'T THAT -- AND THAT WAS NOT OBJECTED TO?

NO, IT WAS NOT, YOUR HONOR.

YOU AGREE THAT THE PRIOR MORTON OPINION EXPRESSLY STATES THAT THAT IS NOT THE WAY TO REFRESH A WITNESSES' RECOLLECTION. YOU ARE NOT TO READ, INTO THE RECORD, THE VERY STATEMENT THAT YOU ARE SEEKING TO HAVE THE WITNESS SAY, REFRESH THEIR RECOLLECTION. DO YOU AGREE WITH THAT?

I AGREE THAT THERE WERE A NUMBER OF PROBLEMS WITH MORTON. THERE WERE A NUMBER OF WITNESSES.

BUT I AM SAYING THAT SPECIFIC METHOD OF REFRESHING RECOLLECTION WAS CONDEMNED, AND THIS PROSECUTOR DID THAT, ANYWAY FORM.

BUT, YOUR HONOR, THIS COURT HAS RE-- DID THAT, ANYWAY.

BUT, YOUR HONOR, THIS COURT HAS RECEDED FROM MORTON. WE KNOW THAT THE PRIOR STATEMENTS CAN BE USED AS SUBSTANTIVE. THERE WAS NO OBJECTION TO THAT TESTIMONY, BELOW, AT ALL, SO THE PROSECUTOR CERTAINLY WAS ALLOWED TO COMMENT UPON IT. THE DEFENSE HAD THE OPPORTUNITY TO CROSS-EXAMINE ANGELA, AND ANGELA, IN FACT, REMEMBERED LARGE PARTS OF THAT TESTIMONY ON THE STAND. IN FACT, SHE TOLD THE PROSECUTOR THAT HER, WHEN SHE MADE THAT STATEMENT, HER REC LECTURES WAS -- HER RECOLLECTION WAS BETTER. I DON'T THINK THAT WHAT THE STATE DID IN THIS CASE WAS AT ALL IMPROPER. THERE WAS NO OBJECTION. THE JURY COULD HAVE CONSIDERED HER TESTIMONY AS SUBSTANTIVE EVIDENCE. AND THERE WAS ABSOLUTELY NO PROBLEM WITH THE PROSECUTOR COMMENTING ON IT.

WHAT DID WE SAY, IN RODRIGUEZ, ABOUT MORTON?

IT WAS THE NUMBER AND EXTENT OF -- THAT IT WAS CONFUSING, IN THE MANNER AND METHOD IN WHICH IT WAS PRESENTED TO THE JURY, SO YOU REMANDED FOR ANOTHER RESENTENCING HEARING, ALTHOUGH YOU AFFIRMED THE CONVICTION. NOW, IN THIS CASE, YOU HAVE A SINGLE WITNESS, ANGELA MORTON, SO YOU DON'T HAVE THE EXTENT OR THE NUMBER OF WITNESSES INVOLVED, BUT, ALSO, YOU HAVE --

NO. I AM SORRY. YOU SAID, A MINUTE AGO, THAT WE RECEDED FROM THINGS WE SAID IN MORTON, IN A SUBSEQUENT OPINION, IN A CASE CALLED RODRIGUEZ.

THAT IS CORRECT.

THAT IS WHAT I AM TALKING ABOUT. WHAT DID WE SAY, IN RODRIGUEZ, THAT WE RECEDED

FROM IN MORTON?

ACTUALLY YOU SATISFIED THAT THE RESULT, IN MORTON, WOULD HAVE REMAINED THE SAME, BASED ON THE CONFUSING MANNER IN WHICH TESTIMONY WAS PRESENTED, SO YOU RECEDED FROM MORTON, ON THE BOTTOM LINE PROPOSITION THAT A PRIOR EXISTING STATEMENT CANNOT BE USED, IN THE SENTENCING PHASE, AS SUBSTANTIVE EVIDENCE. I DON'T WANT TO MISLEAD THE COURT, BECAUSE THAT IS CLEARLY -- YOU DIDN'T RECEDE ENTIRELY FROM MORTON, ON THAT PROPOSITION, BUT, AGAIN, IN THIS CASE --

THE STATE ONE SEDZ -- THE STATE CONCEDES -- YOUR POSITION, IN THIS CASE, IS IT IS TO INCONSEQUENTIAL THAT IT IS HARMLESS.

THE SENTENCING ORDER, YOUR HONOR?

THAT -- IS THAT THE STATE'S POSITION, OR ARE YOU SAYING ERROR AT ALL?

IT IS INTERESTING THAT THE JUDGE DID THIS. HE WAS LOOKING AT THE OTHER SENTENCING ORDERS, BUT IT IS, ALSO, CLEAR THAT HE USED HIS OWN JUDGMENT. HE DID NOT RECEDE FROM THE SENTENCING ORDER.

I AM SAYING WHERE EVIDENCE IN THE PRIOR TRIAL WAS USED. THE JUDGE CONSIDERED EVIDENCE THAT DIDN'T COME IN, AT THIS DE NOVO HEARING.

THERE WERE SOME FACTS, MINOR FACTS, THAT WERE IN THE SECOND OR THE RESENTENCING ORDER.

THAT WAS ERROR H THAT IS THE ONLY THING I AM ASKING YOU. ARE YOU CONCEDING THAT THAT WAS ERROR?

I CONCEDED. IT IS INTERESTING. I DON'T KNOW THAT THE JUDGE, IF YOU LOOKED AT THE PRIOR ORDER AT ALL AND SAID, AND USED HIS OWN JUDGMENT, I AM NOT SURE THAT IS ERROR. I DON'T WANT TO GO OUT AND SAY THAT WAS CLEARLY IMPROPER, BECAUSE HE WAS USING HIS OWN JUDGMENT.

HE COULD USE THINGS AT A DE NOVO HEARING THAT DID NOT COME INTO THAT HEARING? AND THAT WOULD NOT BE ERROR?

I DON'T KNOW, YOUR HONOR. WHAT IF HE USED A PRIOR SENTENCING ORDER THAT HE HAD WRITTEN IN ANOTHER CASE, JUST TO GET THE GUIDELINES AND THE FORMAT? I DON'T KNOW. I DON'T KNOW WHAT THE JUDGE WAS -- WHAT HIS DECISION-MAKING PROCESS WAS.

THERE IS NO QUESTION, BACK ON THIS FIRST ONE, THERE IS NO QUESTION, IN THIS CASE, THAT THIS JUDGE USED THIS PRIOR SENTENCING ORDER IN SOME MANNER. I MEAN, UNLESS IT JUST HAPPENED -- THERE IS -- IDENTICAL SENTENCING THAT -- IDENTICAL SENTENCES THAT WOULD APPEAR --

IT APPEARS THAT HE MAY HAVE USED T.

BUT THIS QUESTION WOULD COME TO HOW WE DETERMINE THAT HE EXERCISED INDEPENDENT JUDGMENT, WEIGHING A DE NOVO, AGAINST YOUR POINT IS THE FACT THAT THERE ARE STATEMENTS IN THIS SENTENCING ORDER, FROM THE PRIOR SENTENCING ORDER, THAT DID NOT COME IN, IN THIS CASE. CORRECT?

THAT'S CORRECT, YOUR HONOR.

AND WEIGHING IN FAVOR OF WHAT YOU SAY IS THAT THERE ARE ADDITIONAL STATEMENTS AND DELETIONS THAT THE JUDGE MADE.

THAT'S CORRECT THAT IS CORRECT, YOUR HONOR. -- THAT IS CORRECT, YOUR HONOR.

SO WE HAVE GOT TO LOOK AT THAT, AS A WHOLE, AND SEE WHETHER THE PARTS THAT WERE ADDED IN DID NOT COME INTO THIS RECORD, FIRST OF ALL UNDERMINED THROUGH THE INTEGRITY OF THE SENTENCING ORDER, AND TENDS TO SHOW THAT THE JUDGE DIDN'T EXERCISE HIS INDEPENDENT JUDGMENT. THAT IS WHAT WE HAVE THE TO --

THAT'S CORRECT, YOUR HONOR. THAT IS THE DECISION YOU NEED TO MAKE, BUT I, ALSO, WOULD NOTE AND NEED TO POINT OUT THAT THE CHANGES THAT WERE MADE WERE MORE SIGNIFICANT THAN ANY OF THE MINOR FACTS THAT WERE LEFT IN, IF HE RELIED ON THE PRIOR ORDER.

ALL RIGHT. LET ME ASK YOU ONE OTHER QUESTION RELATED TO THAT. IF WE CONDEMN A TRIAL COURT, RELYING ON A SENTENCING ORDER THAT HAS BEEN GIVEN TO HIM OR HER BY THE PROSECUTION, EVEN THOUGH THAT COULD REFLECT WHAT THE EVIDENCE WAS, WHY SHOULDN'T IT BE EQUALLY INAPPROPRIATE, ESPECIALLY WHEN YOU ARE NOT -- WEREN'T THE SENTENCING JUDGE, SO YOU KNOW THAT IS NOT WHAT YOU SAID THE LAST TIME, TO ALLOW A RESENTENCING JUDGE TO USE THE PRIOR RESENTENCING ORDER? WHY ISN'T THAT JUST AS PROBLEMATIC, BECAUSE WE CAN'T GET INTO SOMEONE'S MIND, TO KNOW IF IT WAS INDEPENDENT OR NOT.

I THINK YOU ARE ADDING ANOTHER FACTOR HERE, IS THAT YOU ARE ASKING ONE OF THE PARTIES WHO DIDN'T PROVIDE ANY INPUT TO SUBMIT MATERIAL TO THE JUDGE, AND THAT WOULD MAKE IT, I THINK, THE APPEARANCE OF IMPROPRIETY MUCH GREATER THAN THIS JUDGE LOOKING IT AT THE PRIOR ORDER AND DETERMINING, USING HIS OWN JUDGMENT, ON WHAT HE THOUGHT WAS PROPER, IN THIS CASE, AND IF I CAN BRIEFLY GET BACK TO, IN SUM, ON THAT ISSUE, I JUST WANT TO NOTE, AGAIN THAT, THERE IS NO REASONABLE POSSIBILITY AFTER DIFFERENT RESULT, IF YOU REMAND THIS CASE AND HAVE THE JUDGE SIMPLY MAKE UP OR USE HIS OWN FINDINGS. HE DID EXERCISE HIS INDEPENDENT JUDGMENT IN THIS CASE. I THINK REMAND WOULD AMOUNT TO NO MORE THAN LEGAL CHURNING. AND BRIEFLY, AGAIN, ON THE PROSECUTOR'S COMMENT, BECAUSE THAT IS THE ONLY OTHER ISSUE THAT THE APPELLANT HAS ADDRESSED, IN HIS ARGUMENT, I WOULD NOTE THAT THIS WAS NOT A CLOSE CASE. THERE WERE THREE AGGRAVATORS IN THE CASE OF THE MURDER OF JOHN BOWERS. THERE WERE A TOTAL OF FIVE FOR THE MURDER F MADD LIEN WISER. -- OF MADELINE WISER. THIS IS AN EXTREMELY BRUTAL DOUBLE HOMICIDE. I HAVE GONE THROUGH, IN MY BRIEF, EACH INDIVIDUAL COMMENT THAT WAS OBJECTED TO. I DID NOT FIND THOSE IMPROPER, BUT EVEN IF THEY WERE, THEY CERTAINLY DID NOT RISE TO THE LEVEL OF FUNDAMENTAL ERROR IN THIS CASE.

THANK YOU. YOUR HONOR?

JUSTICE QUINCE?

I THINK THERE IS A ARGUMENT, HERE, CONCERNING HIS ANTISOCIAL BEHAVIOR.

THAT IS CORRECT, YOUR HONOR.

AND WHILE HE DIDN'T ADDRESS IT IN HIS ORIGINAL ARGUMENT HERE, SHOULDN'T THE TRIAL JUDGE HAVE AT LEAST HAVE DISCUSSED THIS PARTICULAR PRESENTATION IN THE SENTENCING ORDER?

YOU KNOW, I DON'T KNOW IF THAT WOULD HAVE BEEN MORE ADVISEABLE, BUT I DO KNOW THAT HIS CONTENTION THAT ANTISOCIAL PERSONALITY IS A MITIGATOR IN THIS CASE, IS INCORRECT. THE ESSENTIAL FEATURE OF ANTISOCIAL PERSONALITY DISORDER IS A PERVASIVE PATTERN OF DISREGARD FOR THE RIGHTS OF OTHERS. AND THIS COURT AND OTHER COURTS HAVE FOUND

THAT A DEFENSE COUNSEL CAN MAKE A TACK DAL DECISION -- A TACTICAL DECISION TO OMIT PSYCHIATRY TESTIMONY ALL TOGETHER, WHEN IT MIGHT REVEAL THIS DISORDER.

DIDN'T THEY PRESENT EXPERT WITNESSES ABOUT THIS ISSUE AND WHAT IS ASKING, AT LEAST, THE COURT TO CONSIDER IT AS MITIGATING EVIDENCE. WERE THEY?

THERE WAS AN ARGUMENT MADE THAT IT WAS SOME TYPE OF MITIGATOR. IT IS PRETTY CLEAR, THOUGH THAT, THE TRIAL JUDGE, FROM HIS OMISSION OF IF, DID NOT -- OF IT, DID NOT VIEW IT AS SUCH. THERE WAS NO MAJOR THOUGHT DISORDER. THE APPELLANT HAD NO MAJOR ILLNESSES.

BUT WE DON'T KNOW WHAT THE TRIAL JUDGE DID WITH IT, EXCEPT HE DIDN'T INCLUDE T.

HE DISCUSSED, UNDER THE CHILDHOOD ABUSE, HE SAID THAT THE TESTIMONY WAS THAT APPELLANT SUFFERED FROM NO MAJOR THOUGHT DISORDER OR WAS NOT UNDER ANY -- STATE STATUTORY MENTAL MITIGATORS CERTAINLY DID NOT APPLY, BUT, NO, HE DID NOT USE THE WORD "PERSONALITY DISORDER" IN HIS ORDER, BUT I THINK IT IS CLEAR THAT IT IS NOT MITIGATING, ANYMORE THAN BEING SAID THAT BEING EVIL IS A MITIGATOR.

THANK YOU, MR. BROWNE. MR. HELM.

COUNSEL, LET ME ASK YOU, IS THE SUBJECT, IS ERROR -- LET'S SAY THAT THERE WAS ERROR. IS THE ERROR SUBJECT TO A HARMLESS ERROR TEST, TO WHICH COUNSEL'S STATEMENT THAT THERE IS NO REASONABLE POSSIBILITY OF A DIFFERENT OUTCOME? WOULD IT BE SUBJECT TO A HARMLESS ERROR ANALYSIS?

I DON'T THINK IT CAN BE SUBJECT TO A HARMLESS ERROR ANALYSIS. THE PROBLEM IS THE COURT'S FAILURE TO CARRY OUT ITS DUTY TO REACH AIMEDENT, REASONED JUDGMENT. IF THE -- AN INDEPENDENT, REASONED JUDGMENT, AND I HAVE ARGUED, IN MY BRIEF, THAT IT IS ESSENTIALLY THE SAME AS NOT FILING ANY SENTENCING ORDER AT ALL, AND IF THAT HAD BEEN THE CASE, YOU WOULD REMAND THE DEATH SENTENCES AND ARGUE THE REMANDING OF LIFE SENTENCES. I THINK AT LEAST THE RESENTENCING WITH A NEW JURY AND A NEW JUDGE, AND HAVE A PROPER RESENTENCING HEARING, WHERE THE JUDGE PROPERLY UNDERSTANDS HIS ROLE AND PROPERLY FULFILLS THAT ROLE.

WOULD YOU NEED A NEW --

WOULD YOU HAVE THAT SAME RESPONSE, IF THERE WAS NO POSSIBILITY THAT THE OUTCOME WOULD BE DIFFERENT? WOULD YOUR ANSWER STILL BE THE SAME?

IN THE ABSENCE OF THE COURT HAVING PERFORMED ITS DUTY TO ENGAGE IN THAT INDEPENDENT, REASONED JUDGMENT, I DO NOT BELIEVE THAT YOU CAN SAY THAT ANY JUDGE WOULD HAVE REACHED THE SAME RESULT. IT IS LIKE THE STRUCTURAL DEFECT. YOU ARE ENTITLED TO THE INDEPENDENT JUDGMENT OF AN UNBIASED JUDGE. MAY I PLEASE ADDRESS, BRIEFLY, THE QUESTION ABOUT THE ANTISOCIAL PERSONALITY DISORDER, SINCE JUSTICE QUINCE ASKED MR. BROWNE.

BEFORE YOU GET TO THAT, WHY WOULD YOU NEED A NEW JURY, ASSUMING THAT WE AGREE WITH YOU THAT THIS WAS A CONCERN THAT THE PRIOR SENTENCING ORDER WAS USED TO MODEL THIS ONE. WHY WOULD THERE BE A NEW --

I AM ASSERTING THAT THERE IS A NEED FOR A DIFFERENT JUDGE, THAT JUDGE BOOECH HAS DEMONSTRATED HIS -- JUDGE BEECH HAS DEMONSTRATED HIS PREDISPOSITION TO ENGAGING IN A THOUGHTFUL AND CAREFUL ANALYSIS, AND I THINK IF THIS COURT REMANDS, THIS COURT SHOULD REQUIRE A NEW JURY, IN A FULL RESENTENCING PROCEEDING. IF I MAY ADDRESS JUSTICE QUINCE'S CONCERNS ABOUT ANTISOCIAL PERSONALITY DISORDER, THERE IS NO LEGAL

QUESTION WHETHER ANTISOCIAL PERSONALITY DISORDER IS MITIGATING. IN EDDINGS VERSUS OKLAHOMA, THAT WAS THE VERY EVIDENCE, THAT, COMBINED WITH CHILDHOOD BEATINGS. THERE WERE TWO KINDS OF STRONG MITIGATING EVIDENCE THAT WERE PRESENTED IN THIS CASE, WITH THE EXACT EVIDENCE THAT WAS PRESENTED IN EDDINGS, AND THAT WAS REJECTED BY THE OKLAHOMA COURTS. THE U.S. SUPREME COURT SAID THAT, IN FAILING TO CONSIDER AND WEIGH EVIDENCE OF THAT PERSONALITY DISORDER AND THE YOUTHFUL, THE ABUSE SUFFERED BY EDDINGS, IN HIS CHILDHOOD, THAT OKLAHOMA COURTS HAD VIOLATED THE EIGHTH AMENDMENT. THE TRIAL JUDGE, IN THIS CASE, THE RESENTENCING JUDGE, IN THIS CASE, BY FEEL E FAILING TO ADDRESS WHAT -- BY FAILING TO ADDRESS WHAT DEFENSE COUNSEL ARGUED, WAS THE MOST IMPORTANT MITIGATING CIRCUMSTANCE IN THE CASE. THIS ANTISOCIAL PERSONALITY DISORDER. BY FAILING TO EVEN ADDRESS IT, THE JUDGE CLEARLY VIOLATED THE EIGHTH AMENDMENT. THIS CASE IS JUST LIKE EDDINGS, AND IT MUST BE REVERSED.

DID THE -- WAS THE EVIDENCE OF ANTISOCIAL PERSONALITY DISORDER, IN THIS CASE, DIFFERENT FROM THE FIRST SENTENCING? IN OTHER WORDS WAS THERE A DECISION, IN THIS CASE, TO PUT THAT EVIDENCE ON, THAT WAS NOT PUT ON THE FIRST CASE?

YOUR HONOR, I AM NOT FAMILIAR WITH THE ORIGINAL SENTENCING PROCEEDING. I DON'T KNOW IF IT WAS PUT ON. I DO KNOW THAT, AT THE RESENTENCING, THAT THE STATE CALLED A DIFFERENT DOCTOR THAN IF IT HAD CALLED THE DOCTOR AT ALL, IN THE FIRST PROCEEDING, IT DIDN'T CALL DR. GONZALEZ, AND DR. GONZALEZ AGREED AS TO THE STATE'S EXPERT, AGREED WITH THE DEFENSE EXPERTS THAT THE DEFENDANT SUFFERS FROM AN ANTISOCIAL PRSONALITY DISORDER. THERE IS OVERWHELMING EVIDENCE OF IT, AND THERE IS NO EVIDENCE TO CONTRADICT IT.

THANK YOU, MR. HELM. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.