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Robert Morris v. State of Florida

THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS MORRIS VERSUS STATE. MR. BOLIN.

-- MR. BOLOTIN.

MAY IT PLEASE THE COURT. I AM STEVE BOLO CONTINUE, ASSISTANT -- BOLOTIN, ASSISTANT PUBLIC DEFENDER AND I WILL REPRESENT MR. ROBERT MORRIS IN THE CASE. I WILL FIRST TAKE OTHER ISSUES AND THEN ARGUE THE CROSS APPEAL ISSUE, IF WE HAVE TIME TO COMMENCE. PERPETUATING AN ERROR IN LEGAL THINKING UNDER THE GUISE OF SURE DISTESIS ISN'T RELEVANT. LAST WEEK, IN THE CASE OF DOWNS VERSUS MOORE, IN A SPECIALLY CONCURRING OPINION, JUSTICE ANSTEAD, JOINED BY JUSTICE PARIENTE, REPRESENTED THAT THE CONSTRUCTION OF NONSTATUTORY MITIGATING CIRCUMSTANCES IS INSUFFICIENT TO SERVE THE FUNCTION OF BASICALLY INSTRUCTING THE JURY ON WHAT THE LAW IS, ON WHAT LAW TO APPLY TO THE FACTS THAT THEY FIND. THIS CASE IS AS WELL PRESERVED ON THAT ISSUE AS ANY I HAVE EVER SEEN, AND THE REASONS GIVEN, NOT ONLY BY DEFENSE COUNSEL BYE-BYE THE JUDGE AND BY THE PROSECUTOR IN SUPPORT OF THEIR POSITIONS, DEMONSTRATES WHY JUSTICE ANSTEAD ANSTEAD'S CONCURRING IS CORRECT.

IT WOULD BE MITIGATING, SO YOU WOULD NOT HAVE STANDARDS. YOU WOULD HAVE SPECIAL JURY INSTRUCTIONS.

IT COULD BE MITIGATING, BUT LOTS OF THINGS MAY BE MITIGATING AND THE PROBLEM IS THE JURY IS NOT GOING TO KNOW WHICH IS WHICH.

BUT YOU ARE ADVOCATING, THEN, SPECIAL JURY INSTRUCTIONS IN EACH CASE, BECAUSE YOU REALLY CAN'T HAVE STANDARDS, BECAUSE THEY MAY BE DIFFERENT. I MEAN, WHO KNOWS THE MULTITUDES MULTITUDES?

YOU COULD HAVE STANDARDS, BUT THE STANDARDS WOULD HAVE TO BE SUBJECT TO MODIFICATION, DEPENDING ON THE FACTS OF THE INDIVIDUAL CASE, AS THERE ALWAYS IS ANYWAY. THERE HAVE BEEN CERTAIN GROUPINGS, CERTAIN CLASSIFICATIONS OF NONMITIGATING STATUTORY STANDARDS THAT ARE QUALIFIED BY THIS COURT, AND IF YOU WANTED TO HAVE STANDARDS, YOU COULD HAVE STANDARD, BUT THE STANDARDS WOULD HAVE TO BE OPEN, DEPENDING ON THE MODIFICATION OF THE PARTICULAR CIRCUMSTANCES IN EACH CASE. NOW, IN THE BLANKO CASE, THIS COURT RECOGNIZES PARTICULARLY THAT WHETHER OR NOT A QUESTION IS MITIGATING IS A QUESTION OF LAW, SUBJECT TO DE NOVO REVIEW. JURIES ARE NOT SUPPOSED TO BE DECIDING QUESTIONS OF LAW. ONE OF THE STANDARD INSTRUCTIONS THAT EVERY JURY GETS IN EVERY CRIMINAL CASE, INCLUDING THIS ONE, THE JURY FUNCTIONS DON'T OVERLAP. THE JUDGE DECIDES THE LAW AND THE JUDGE SAYS WE WILL DETERMINE WHAT THE LAW IS AND YOUR JOB IS TO DETERMINE THE FACTS AND APPLY THE LAW AS THE JUDGE INSTRUCTS YOU IN THIS. IT FORCES THE JURY, NOT ONLY AS A GROUP BUT INDIVIDUAL JURORS TO MAKE THEIR OWN DECISIONS WITHOUT GUIDANCE, AS TO LEGAL QUESTIONS WHAT HAVE IS OR WHAT IS NOT A LEGAL MITIGATING FACTOR.

LET ME ASK YOU THIS, WHAT ARE YOU REALLY ADVOCATING HERE? TAKE, FOR EXAMPLE, A DEFENDANT'S BACKGROUND. POOR CHILDHOOD, ABUSED, ALL OF THESE THINGS. NOW, OFTEN IN THESE CASES, WE HAVE THE MOTHER, SISTERS, IN THIS CASEY BELIEVE WE HAVE THE MOTHER

AND THE SISTERS TESTIFYING ABOUT THE BACKGROUND. BUT THERE ARE MANY ASPECTS TO IT. SO ARE YOU ADVOCATING THAT, FOR EVERY ASPECT OF THE BACKGROUND, YOU GET AN INSTRUCTION, OR DO YOU GET -- ARE YOU ADVOCATING A GENERAL INSTRUCTION THAT YOU CAN JUST CONSIDER IS FACT?

BACKGROUND MAY BE A LITTLE TOO GENERAL, BUT I THINK WHAT I AM ADVOCATING HERE, YOU LOOK AT THE CASES OF CONSALVO AND LUCAS, WHICH IS THE CASES, WHEN APPLYING THE CAMPBELL RULE THAT THERE IS SOME OBLIGATION ON DEFENSE COUNSEL TO IDENTIFY TO THE TRIAL JUDGE WHAT NONSTATUTORY MITIGATORS HE WANTS TO CONSIDER, SO HE LISTS WHATEVER STATUTORY MITIGATORS HE WANTS TO CONSIDER, AND CERTAINLY TO COMPLY WITH CAMPBELL, THE DEFENSE COUNSEL MIGHT LIST FIVE. HE MIGHT LIST 15. IF SOME OF THEM ARE SIMPLY TO ADDRESS THE SAME ASPECT OF THE NONSTATUTORY MITIGATOR, I DON'T HAVE A PROBLEM WITH THE JUDGE GROUPING THEM TOGETHER, SAY, FOR EXAMPLE IN THIS CASE, I BELIEVE THERE WERE 16 NONSTATUTORY MITIGATORS REQUESTED. MOST OF WHICH THE TRIAL COURT FOUND IN THIS CASE AND FOUND AS TO THE FAMILY BACKGROUND, THE ABUSIVE CHILDHOOD MITIGATORS, THE JUDGE GAVE GREAT WEIGHT TO. THERE WOULD HAVE BEEN NO PROBLEM IF THE JUDGE HAD TAKEN, SAY, THOSE EIGHT AND GROUPED THEM IN HIS INSTRUCTION, AS HE DID IN THE SENTENCING ORDER AND SAY THAT FACTORS LEADING TO A BRUTAL OR ABUSED CHILDHOOD ARE MITIGATING. THE OTHER INSTRUCTIONS REQUESTED BORDERLINE MENTAL RETARDATION, BORDERLINE INTELLIGENCE, A HISTORY OF ABUSE OF ALCOHOL, BECAUSE I WILL DRIVE AT A VERY POINT HERE AND I WILL GET TO IT, I DON'T THINK OR SAY THE JUDGE HAS TO GIVE THE INSTRUCTION IN THE FORM GIVEN BY THE DEFENSE. HE IS CERTAINLY FREE TO GROUP THEM TOGETHER AS APPROPRIATE, BUT IT IS NOT ENOUGH TO JUST SAY WHATEVER, CONSIDER WHAT YOU LIKE AND THE PROSECUTOR'S Z, IN MANY CASES, AS IN DOWNS, IN THE MANY CASES THE JUDGE GIVES A CASE WHERE THE COURT HAS APPROVED AS IT WAS DONE AND IT WAS GEORGIA AND APPROVED INSTRUCTION. IT SHOULDN'T BE ON THE WHIM OF A TRIAL JUDGE. WE GIVE IT IN THIS COUNTY AND WE DON'T GIVE IT IN THAT CIRCUIT. THAT IS CERTAINLY NOT GOING TO LEAD TO ARBITRARY RESULTS, BUT THE PROBLEM IS THAT THE PROSECUTOR IN THIS CASE SAYS WE DON'T WANT A SPECIFIC INSTRUCTION ON NONSTATUTORY MITIGATING FACTORS, BECAUSE THAT WILL JUST LEGISLATEMIZE THEIR ARGUMENTS. THEY CAN ARGUE IT BUT WE DON'T WANT TO LEGISLATEMIZE IT. WE DON'T WANT TO TELL THE JURY, YET, THIS IS A DECIDING FACTOR. THAT IS EXACTLY OUR POINT.

I GUESS THAT ARGUMENT IS REALLY SAYING, THE STATE'S ARGUMENT, THEN, IS REALLY SAYING HERE THAT, EVEN THOUGH YOU MAY OFFER SOMETHING AS MITIGATING, THAT IT MAY NOT BE NECESSARILY MITIGATING, UNDER THE CIRCUMSTANCES OF THAT CASE, AND SO ARE YOU STILL GOING TO BE ENTITLED TO AN INSTRUCTION, SIMPLY BECAUSE YOU THINK IS MITIGATE SOMETHING.

OKAY. NOW THAT, IS THE TREESE SITUATION, AND THAT DEALS WITH A DIFFERENT THING. TREESE DEALS WITH THE SITUATION THAT, YES, IT IS MITIGATING EVIDENCE AND, YES, IT IS A FINDING, BUT IT IS DUE TO THE SPECIAL CIRCUMSTANCES IN THIS PARTICULAR CASE, BUT YES, IN A SPECIAL SITUATION, AND DUE TO THE JUDGE'S IDENTIFYING THAT IN A SENTENCING ORER AND YOU CAN GIVE IT WEIGHT, WITH REASONABLE DETERMINATION, UNDER ALL OF THE FACTS, AND IN THIS CASEY WILL POINT TO THE FACT THAT, IN THE BLANKO CASE, THIS COURT IDENTIFIES THREE DIFFERENT ASPECTS OF MITIGATION. YOU HAVE GOT IS THIS A MITIGATING FACTOR, A QUESTION OF LAW, DECIDED BY THE COURT SUBJECT TO DE NOVO REVIEW. WAS THIS MITIGATING CIRCUMSTANCE DECIDED BY THE EVIDENCE. WHAT WEIGHT TO GIVE THIS MITIGATING CIRCUMSTANCE? THAT IS THE TREESE ISSUE. AGAIN, QUESTION FOR THE JURY AND THE TRIAL JUDGE, RULED BY THIS COURT UNDER THE ABUSE OF DISCRETION STANDARD. THE MIDDLE ONE, I SAID, WHETHER OR NOT IT WAS SUPPORTED BY THE EVIDENCE THAT, IS REVIEWABLE UNDER A SUBSTANTIAL COMPETENT EVIDENCE STANDARD, BUT THE FIRST ONE, IS THIS A MITIGATING FACTOR IS THIS A QUESTION OF LAW, AND THE JURY NEEDS -- THE JURY IS NOT EDUCATED ON THE LAW. IN THIS PARTICULAR CASE, THE JUDGE WAS JUDGE YOUNG IN POLK COUNTY, AND LIKE

ANY JUDGE THAT PRESIDES OVER A CAPITAL CASE, THE JUDGE IS REQUIRED TO ATTEND A CAPITAL SENTENCING COURSE, GIVEN BY THE ADVANCED JUDICIAL COLLEGE. JUDGES GIVEN THE MATERIALS AND STUDIES THE MATERIALS DEVELOPED BY JUDGE SUSAN SHAFER OF THE SIXTH CIRCUIT. THE JUDGE SHOULD KNOW WHAT IS AND IS NOT A MITIGATING FACTOR. I MEAN, YOU MAY HAVE SOME QUESTIONS WHERE IT HASN'T COME UP BEFORE, BUT CERTAINLY A HISTORY OF DRUG AND ALCOHOL ABUSE HAS COME UP ROUTINELY BEFORE. IN MANY CASES, THE ONE I WOULD MAINLY CITE WOULD BE THE MONN, CASE, WHICH SAYS YE -- YES, CLEARLY A HISTORY OF DRUG AND ALCOHOL ABUSE IS MITIGATING AND IT WAS DECIDED AT THE TIME. NOW, IN THIS CASE, AND I WILL GET TO THAT SEPARATE ISSUE, ISSUE FOUR, IS THAT JUDGE YOUNG COMMITTED LEGAL HARMFUL ERROR, BY FINDING, CONTRARY TO THE ESTABLISHED CASE LAW THAT, A HISTORY OF DRUG AND ALCOHOL ABUSE IS NOT MITIGATING. WELL, UNDER THE CATCHALL INSTRUCTION, IF JUDGE YOUNG COULD MAKE THAT MISTAKE, WHY COULDN'T THE JURY MAKE THAT SAME MISTAKE AS TO THAT MITIGATOR OFFER ANY OTHER. THEY DON'T KNOW IS LOW INTELLIGENCE A MITIGATING FACTOR? IS AN ABUSED CHILDHOOD A MITIGATING FACTOR? LESS SAY YOU GET INTO A CASE ON EXTREME MENTAL OR EMOTIONAL DISORDER MITIGATING FACTOR, AND LET'S SAY THE PROSECUTOR ARGUES, WELL, YOU HEARD SOME EVIDENCE BUT IT WASN'T EXTREME. THAT RAISES THE QUESTION IS A MENTAL DISORDER NOT REACHING THE LEVEL OF EXTREME, THAT SOMETHING YOU CAN CONSIDER AS A NONSTATUTORY MITIGATING FACTOR. THIS COURT HAS HELD CLEARLY THAT YES, IT IS. DOES THE CATCHALL INSTRUCTION TELL THE JURY THAT? NO. THE CATCHALL INSTRUCTION LEAVES THE JURORS OPEN TO SAY I DIDN'T HEAR ANYTHING THAT IT WAS EXTREME, SO I AM NOT GOING TO CONSIDER IT. THE PROBLEM IS EXACERBATED BY THE FACT THAT A JURY RECOMMENDATION IN FLORIDA DOES NOT NEED TO BE UNANIMOUS AND NO SPECIFIC FINDINGS AS TO AGGRAVATORS OR MITIGATORS NEED TO BE MADE BY THE JURY AS A WHOLE. THAT MEANS EVERY SINGLE MEMBER OF THE JURY IS MAKING A DECISION BASED ON NO GUIDANCE, DO I THINK THIS HISTORY OF ALCOHOL IS A FACTOR? DO I THINK THAT THE MOTHER'S BOYFRIEND BEAT HIM IS MITIGATING MITIGATING? I HAVE BEEN TOLD THAT IT IS, BUT I AM TOLD BY ARGUMENTS OF COUNSEL THAT THEY ARE NOT LAW AND NOT EVIDENCE.

IN THIS PARTICULAR CASE, SOMETIMES YOU HAVE PROSECUTORS IN THE CLOSING ARGUMENT, AND THEY MAKE STATEMENTS TO SAY THAT DRUG ABUSE, THAT IS AN EXCUSE. THAT IS NOT MITIGATING. DO WE HAVE ANYTHING LIKE THAT IN THIS CASE, WHERE THE PROSECUTOR MISLED, WOULD BE MISLEADING THE JURY INTO THINKING SOMETHING REALLY COULDN'T BE MITIGATING, THAT WAS? I GUESS I AM LOOKING --

NOCHT MR. HERB, TO HIS -- NO. MR. HERB, TO HIS CREDIT, DID NOT DO THAT PARTICULAR THING, AND I SEE THAT AS MANY REASONS FOR THE LAW TO BE CHANGED ON THIS. IN MANY CASES ARGUMENTS ARE MADE BY THE PROSECUTOR, HEY, THAT IS NOT MITIGATING, AND IN MANY CASES IT DISSOLVES IT. MR. HEART DID NOT DO. THAT WHATu! MR. HEART DID -- MR. HART DID NOT DO. THAT WHAT HE DID DO WAS --

TO CONSIDER IT AS A FCKT OR OR NOT, IF YOU LEFT 16 TO CONSIDER AS AN ASPECT OF THE CHARACTER, THEN THE JURY MAY CONSIDER OTHER THINGS THAT IT CAN'T CONSIDER.

DEFENSE COUNSEL IS PERFECTLY CAPABLE OF IDENTIFYING THE MITIGATORS THAT HE OR SHE HAS ARGUED AND PRESENTED, AND IT IS REALLY NO DIFFERENT, FOR EXAMPLE THAN THE FACT THAT, AS FAR AS THE STATUTORY MITIGATORS, THAT THE JUDGE ONLY INSTRUCTS ON ONES FOR WHICH THERE IS EVIDENCE. CAN YOU SAY THAT THAT IS NOT DIMINISHING THEM BY THE ONES WHICH ARE EVIDENCE? ALL I AM ASKING FOR IS FOR THE NONMITIGATING FACTORS TO BE TREATED THE SAME AS THE NONSTATUTORY FACTORS AND THE AGGRAVATING FACTORS? MR. HART CERTAINLY HAD THE BENEFIT OF LEGISLATEMIZING HIS AGGRAVATING FACTORS. AT ONE POINT I REMEMBER HIS TELLING THAT IS NOT THE STATE'S FAULT THAT MR. HART DOESN'T HAVE STATUTORY MITIGATORS. WHICH SAYS THAT NONSTATUTORY ARE TO BE SWEPT AWAY, TO BE MINIMIZED, THAT THEY ARE NOT EQUAL TO THE SAME WEIGHT. NOW, IN POINT OF FACT, ROBERT

MORRIS DID AND DOES HAVE, IN FACT, A STATUTORY MITIGATOR OF IMPAIRED PERFORMANCE TO THE REQUIREMENTS OF STATUTORY LAW, BASED ON THE UNCONTROVERTED FINDING OF THE JUDGE THAT HE SUFFERS FROM FRONTAL LOBE DAMAGE THAT DAMAGES HIS ABILITY TO CONTROL HIS IMPULSES, AND THAT HIS ABILITY TO CONTROL HIS IMPULSES IS FURTHER AFFECTED BY WHEN HE IS USING DRUGS, WHEN HE IS USING ALCOHOL. THAT HAS A DOUBLE EFFECT ON IT. IT FURTHER EXACERBATES THE DEGREE OF THE DAMAGE, BUT MAYBE MORE IMPORTANTLY, IT, ALSO, TOTALLY AFFECTS HIS ABILITY TO CONTROL HIS IMPULSES WHEN HE IS ON THE DRUGS. DR. DEAN TESTIFIED THAT EVERY TIME ROBERT MORRIS HAS BEEN IN SERIOUS TROUBLE IN HIS LIFE, IT HAS BEEN WHEN HE IS ON DRUGS, SO AGAIN, I THINK IT IS IMPORTANT TO RECOGNIZE THAT THIS WAS A 8-TO-4 JURY RECOMMENDATION, A FAIRLY CLOSE CASE ON WHETHER THIS WAS GOING TO BE A LIFE SENTENCE OR A DEATH SENTENCE, AND THANK CLEAR AND UNDERSTANDABLE INSTRUCTIONS ON JUST WHAT IS -- YOU KNOW, WHAT IS OR IS NOT A MITIGATING FACTOR COULD HAVE SWUNG THE DIFFERENCE IN THIS CASE. I NEED TO BRING UP BRIEFLY, I CITED AS ADDITIONAL AUTHORITY THE OTHER DAY, THIS JUST CAME OUT LAST WEDNESDAY, THE DOWNS VERSUS MOORE CASE. I HAVE SPOKEN WITH COUNSEL FOR THE STATE. HE IS GOING TO BE FILING A NOTICE OF DISSOLUTE AUTHORITY WHEN HE GETS BACK TO WORK ON A U.S. SUPREME COURT CASE ON BUCHANAN VERSUS ANGELONE. WE HAVE AGREED THAT WE WILL DISCUSS THAT CASE TODAY. BOW OTHERWISE THERE WON'T BE ANY OPPORTUNITY TO RESPOND TO IT, AND WHAT I WOULD SAY ABOUT ANGELONE, I THINK THAT AS NOTED IN JUDGE ANSTEAD'S CASE THERE, IS A FAIR AMOUNT OF CASE LAW FROM THE US SUPREME COURT THAT SUGGESTS THAT THE JURY MUST BE GIVEN THE OPPORTUNITY TO NOT ONLY CONSIDER BUT TO GIVE EFFECT TO MITIGATING FACTORS, THE MOST RECENT OF THOSE BEING THE 2001 CASE OF PENRE TWO, GOING BACK TO GREG, AND THERE ARE ALSO SOME CASES GOING BACK TO OTHER STATES WHERE THE PROCEDURE IS DIFFERENT FROM FLORIDA. BOYD VERSUS CALIFORNIA OR CALIFORNIA VERSUS BOYD, A AND THIS BUCHANAN CASE OUT OF VIRGINIA, WHICH IS A CASE WHERE THEY HAVE SEPARATE SELECTION, SEPARATE ELIGIBILITY AND SELECTION PHASES. WHAT I WANT TO SAY HERE ARE A NUMBER OF THINGS. FIRST OF ALL, BUCHANAN WAS A 6-3 DECISION, AND I THINK YOU WILL FIND JUSTICE BREYER'S DISSENT, SIMILAR TO JUDGE ANSTEAD'S CONCURRING OPINION IN DOWNS IS THE ONE THAT SHOULD BE CONSIDERED FOR FLORIDA, IN ORDER TO AVOID UNFAIR AND INCONSISTENT RULES, AND SECONDLY THAT FLORIDA IS A WEIGHING STATE AND THAT PROCEDURES MAY BE PROCEDURALLY DIFFERENT FROM THOSE DISCUSSED IN CALIFORNIA AND VIRGINIA. THIRDLY, THE PENRE CASE, BEING MORE RESENDIZ RESENDIZENT, I THINK -- MORE RECENT, I THINK THAT PROBABLE JUSTICE ANSTEAD'S DISSENT AND WELL-REASONED REASONS FORGIVINGS THE INSTRUCTION, SHOULD -- FOR GIVING THE INSTRUCTION, SHOULD BE BASED ON WHETHER THE COURT WANTS TO USE THE U.S. CONSTITUTION, THE FLORIDA CONSTITUTION, OR SIMPLY A SUPERVISORY CAPACITY, IN THE SENSE OF OVERSEEING THE FAIRNESS AND EVEN THE APPLICATION OF THE DEATH PENALTY IN THIS STATE. THAT IT IS TIME TO START REQUIRING JUDGES, WHEN REQUESTED TO DO SO, TO PUT STATUTORY MITIGATORS ON THE SAME FOOTING AS AGGRAVATING STATUTORY MITIGATORS, AND UNDER THE CIRCSTAND OF THIS CASE, WITH THE 8-TO-4 VOTE AND THE SUBSTANTIAL AMOUNT OF MITIGATION IN THIS CASE, APPELLANT, ON WHATEVER GROUND IT IS DECIDED TO BE DONE, ROBERT MORRIS SHOULD BE ENTITLED TO THE BENEFIT OF THAT DECISION, AND FOR THAT I WOULD CITE THE WYAND AND THE GRAY CASES CITED IN MY BRIEF. BRIEFLY TO THE FOURTH ISSUE WHICH IS SOMEWHAT RELATED, WHICH IS THE JUDGE'S ERROR IN NOT MITIGATING THE APPELLANT'S HISTORY OF DRUG AND ALCOHOL ABUSE. THE MONN CASE AND FOUR OR FIVE OTHERS MAKE IT CLEAR THAT THAT WAS JUST FLAT-OUT LEGAL ERROR.

BUT THERE IS A LITTLE CONTRADICTION. HE, FIRST, FINDS IT AS BEING UNCONTROVERTED. ENDS UP SAYING THERE IS A SENTENCE THAT IS NOT MITIGATING. BUT THEN HE SAYS IT IS ENTITLED TO LITTLE WEIGHT.

I DON'T KNOW IF IT IS INCONSISTENT OR INCOHERENT. THE PROBLEM IS --

THE PROBLEM IS, IF IT IS INCONSISTENT, IT WOULDN'T HAVE TO BE WEIGHED AT ALL. GIVING IT

WEIGHT MEANS THAT IT WAS ENTITLED TO IT.

IT IS A TROUBLING FINDING, BECAUSE WHAT HE SAYS IN THERE IS A HISTORY -- FIRST HE SAYS SUBSTANTIATED, PROVEN AND UNCONTROVERTED. IN OTHER WORDS THE EVIDENCE SUPPORTING IT WAS THERE. THEN HE SAYS THE HISTORY OF DRUG AND ALCOHOL ABUSE IS NOT MITIGATING. THEN HE TURNS TO WHETHER OR NOT THE DEFENDANT WAS INTOXICATED AT THE TIME OF THE CRIME, ON DRUGS OR ALCOHOL, AND HE SAYS THERE IS NO EVIDENCE OF THAT, WHICH, OF COURSE, IS TRUE, ON THE CIRCUMSTANCES OF THIS CRIME NOT AT ALL CLEAR, LARGELY DUE TO THE FACT THAT APPELLANT MAINTAINED HIS INNOCENCE IN THE TRIAL, SO WE DON'T REALLY KNOW WHAT THE CIRCUMSTANCES LEADING UP TO THE CRIME WERE, BUT THEN, WHEN HE TURNS AROUND AND SAYS THERE FOR I WILL GIVE IT SLIGHT WEIGHT, I DON'T KNOW IF HE IS GIVING SLIGHT WEIGHT TO THE NONMIGHT GART OR THAT HE SAID -- THE NONMITIGATOR THAT HE SAID WASN'T MITIGATING OR WHETHER HE IS GIVING SLIGHT WEIGHT TO THE ONE THAT HE WAS APPROVING, WHICH IS AT THE TIME OF THE CRIME. WHAT POINT IS HE WEIGHING IT? AS A NONMITIGATING FACTOR? HOW DOES THAT WORK? THE OTHER POSSIBILITY IS THAT IT THAT THE WEIGHT TO WHICH HE GAVE IT, ASSUMING HE GAVE IT ANY, AND I DON'T THINK YOU CAN TRUST THAT BUT THE WEIGHT TO WHICH HE GAVE IT WAS AFFECTED BY HIS LEGAL ERROR. IN OTHER WORDS, HAD HE RECOGNIZED THAT, YES, THIS IS A LEGITIMATE MITIGATING FACTOR, HE MIGHT HAVE GIVEN IT MODERATE WEIGHT AND HE MIGHT HAVE WELL GIVEN IT GREAT WEIGHT, THERE AND IS QUITE A BIT OF EVIDENCE, NOT ONLY SUPPORTING MR. MORRIS'S LIFELONG HISTORY OF DRUG AND ALCOHOL ABUSE, BUT BASICALLY HOW THAT FACTORED IN WITH HIS BRAIN DAMAGE AND WITH HIS LIFE AND HOW IT COULD HAVE CONTRIBUTED TO THE CRIME, WHICH DR. DREEN CHARACTERIZED AS LIKELY BEING IMPULSIVE AND DISORGANIZED, THE TYPE AS A RESULT OF BRAIN DAMAGE EXACERBATED BY THE DRUG ABUSE. I WOULD GO BACK, BRIEFLY, TO THE SUPPORTING INSTRUCTION, UNLESS THERE IS A QUESTION.

I SUPPOSE THE QUESTION WOULD BE, IF THERE IS AN ERROR, WHY ISN'T IT HARMLESS, IN THAT THE JUDGE DID FIND A STATUTORY MITIGATOR OF IMPAIRED CAPACITY, WHICH IS CERTAINLY A MUCH STRONGER AND IMPORTANT MITIGATOR IN LOOKING AT THIS WHOLE WEIGHING PROCESS, AND, AGAIN, GIVES THIS AT LEAST GIVES IT LITTLE WEIGHT. WHAT HARM, IN LIGHT OF THIS VERY STRONG AGGRAVATOR --

THERE ARE VERY STRONG AGGRAVATORS BUT THERE ARE VERY STRONG MITIGATORS, ALSO. THE JUDGE FOUND THAT 8-TO-4, AND THIS IS GOING TO THE PROPORTIONALITY ARGUMENT, WHICH I HOPE I HAVE TIME TO ARGUE, BUT WHAT HAPPENED HERE IS NOT ONLY WERE THE MITIGATORS STRONG AND NOT ONLY WERE THEY FOUND, BUT THE JUDGE, HIMSELF, IF YOU READ THE SENTENCING ORDER HERE, THE JUDGE MAKES A GREAT POINT, THE MITIGATING EVIDENCE IN THIS CASE WAS PROVEN AND UNCONTROVERTED. THIS IS NOT A CASE WHERE ANYBODY HAS TO SIFT THROUGH CONFLICTING EVIDENCE AND SAY THIS SHRINK OR THAT SHRINK SHOULD HAVE BEEN BELIEVED OR NOT BELIEVED. CONTRAST COOPER AND JUSTICE WELLS'S DISSENT IN COOPER THIS. IS A CASE WHEREc JUDGE YOUNG FINDS THE MITIGATOR AND GIVES IT A LEVEL OF EIGHT. HE FINDS THE BRUTAL AND ABUSIVE CHILDHOOD AND ADOLESCENCE, PSYCHOLOGICALLY, PROBABLY NOR SO THAN PHYSICALLY, AND NOT ONLY DOES HE GIVE THAT GREAT WEIGHT, BUT HE SAYS THAT FACTORS IN CONSIDERATION BASICALLY IN WHOLE OUTWEIGH THE SUM OF THE PARTS AND THAT, TAKEN TOGETHER, THESE ARE TRULY SUBSTANTIAL FACTORS IN MITIGATION. HE, ALSO, SAYS THAT THE DEFENSE PAINTED AN OBVIOUSLY ACCURATE PICTURE OF THE WORST KIND OF ABUSE AND NEGLECT, SO THIS IS NOT A CASE WHERE ANYBODY HAS TO SECOND-GUESS AND SAY, WELL, THE JUDGE DIDN'T REALLY THINK THIS IS ALL THAT MITIGATED. THE JUDGE OBVIOUSLY DID THINK THAT THIS WAS A VERY MITIGATED CASE. HE, ALSO, THOUGHT THAT THIS WAS A VERY AGGRAVATED CASE, AND THEREFORE I DON'T THINK THAT THIS COURT CAN SAY THAT A LEGAL ERROR OF THIS MAGNITUDE IS HARMLESS BEYOND A REASONABLE DOUBT, AND THAT KIND OF SEGUES INTO THE AREA OF COOPER AND ALMEIDA, WHICH TAKEN THE STANDARD IN THE '70s, WHICH IS THAT THE DEATH PENALTY IS APPROPRIATE ONLY FOR THE MOST MITIGATED AND AGGRAVATED OF FIRST-DEGREE MURDERS. THAT STANDARD FOR DIXON WAS

CITED IN KRAMER. COOPER AND ALMEIDA DON'T REALLY CHANGE THE LAW ON THAT, BUT WHAT THEY DO IS DECIDE THAT IT IS A TWO-PRONG, NOT A ONE-PRONG TEST. THIS COURTITEAL SIZED AND EMPHASIZED -- THIS COURT ITALISIZED AND EMPHASIZED THAT, BOTH, THIS MAY BE A SUFFICIENT CASE FOR THE DEATH PENALTY DOES NOT AGGRAVATE THE INQUIRY, THE OTHER INQUIRY BEING IS THIS AMONGST LEAST MITIGATED MURDERS, AND I THINK THE JUDGE'S FINDING FINDINGINGS SHOW THAT THIS IS NOT A CASE. I THINK THAT A READING OF THE TRIAL JUDGE'S SENTENCING ORDER SHOWS THAT HE DIDN'T THINK THAT THIS WAS AMONGST LEAST MITIGATED OF FIRST-DEGREE MURDERS. THAT, IN HIS ANSWER BRIEF, MY OPPONENT SAYS THAT, WHILE I AM JUST TRYING TO HAVE THE COURT REWEIGH SUBSTITUTED JUDGMENT FOR THE TRIAL COURT HAD, THAT IS NOT WHAT I AM DOING HERE AT ALL. FIRST OF ALL, IF YOU TAKE THAT TYPE OF ARGUMENT LITERALLY, THERE WOULD NEVER BE ANY PROPORTIONALITY REVERSAL IN ANYTHING OTHER THAN A LIFE OVERRIDE CASE, BECAUSE OBVIOUSLY IN ANY, YOU KNOW, DEATH RECOMMENDATION CASE, IT GETS REVERSED FOR PROPORTIONALITY, AND THERE HAVE BEEN DOZENS AND DOZENS AND DOZENS OF THOSE. THE COURT IS LOOKING AT ALL OF THE CIRCUMSTANCES OF THE CASE, AS THE STATUTE REQUIRES IT TO DO AS THIS COURT HAS TAKEN THE OBLIGATION TO DO, AND FOUND THAT THIS IS NOT, THIS CASE DOES NOT MEET THE STANDARDS, SO EVEN THOUGH THE JURY RECOMMENDED DEATH, EVEN THOUGH THE JUDGE IMPOSED IT, THIS IS NOT A DEATH CASE. THAT IS WHAT THE PROPORTIONALITY REVERSAL IS. THIS CASE IS SPECIAL IN THAT SENSE, BECAUSE WE ARE NOT EVEN ASKING YOU TO GIVE THE MITIGATORS DIFFERENT WEIGHT THAN THE TRIAL JUDGE GAVE THEM PRESIDENT A READING OF SENTENCING -- GAVE THEM. A READING OF THE SENTENCING ORDER SHOWS THAT THE JUDGE GAVE GREAT WEIGHT TO THE SENTENCING ORDERS AND IN A CLEAR REVIEW OF THEM THAT HE FAILED TO FIND. EYE WONDER THAT --

I WONDER THAT, WHILE IT DOES TALK IN THE TERMS OF THE MOST AGGRAVATED AND MITIGATED IN THE SENTENCING ORDER, THAT IT DOES SET UP A MATHEMATICAL FORMULA THAT SAYS IN ALL CASES WHERE THERE IS A SUBSTANTIAL MITIGATION, THAT THE DEATH PENALTY CANNOT BE IMPOSED THAT INDEED THERE HAS TO BE A DISCREET ANALYSIS OF THE CASE, REGARDLESS OF THE FACT THAT THERE MAY AND SUBSTANTIAL MITIGATION, AND THAT THERE ARE MANY CASES WHERE THERE HAS BEEN SUBSTANTIAL MITIGATION, THAT THIS COURT HAS APPROVED THE IMPOSITION OF THE DEATH PENALTY, BECAUSE OF THE SUBSTANTIAL AGGRAVATION IN THE CASE. DO YOU UNDERSTAND THE POINT THAT I AM MAKING?

YES, I UNDERSTAND IT. I AM NOT SURE -- I THINK THAT -- YEAH. I AM RUNNING INTO MY TIME HERE BUT PROBABLY NEED TO ANSWER THAT TOO. YEAH. I THINK THERE IS A TENSION BETWEEN THOSE TWO THINGS. YOU HAVE GOT THE COMPARISON ASPECT OF PROPORTIONALITY, AND FRANKLY I DON'T THINK ANY CASE THAT IS CITED BY ME OR CITED MY MY OPPONENT, REALLY APPROXIMATES -- I THINK EVERY CASE IS INDIVIDUAL AND IT IS HARD TO FIND ONE WHERE YOU SAY YOU CONFIRMED IN THIS CASE AND YOU DIDN'T CONFIRM IN THAT CASE AND THIS CASE IS JUST LIKE T I THINK VIRTUALLY ALL CONTAIN LESS MITIGATION THAN THIS CASE, AND CERTAINLY IN SUSPENSE OR, ONE JUST LIKE IT, WHERE THE TRIAL JUDGE GAVE THE MITIGATORS LITTLE WAISMT SO I THINK THAT -- WEIGHT. SO I THINK THAT THERE MAY BE A TENSION BETWEEN WHAT THE COURT SAID IN COOPER AND ALMEIDA, AND THAT THE CONCEPT IS SORT OF LIKE LOOKING AT THE ENTIRE CASE, ONE INVOLVED, BUT I THINK IN THIS CASE EITHER WAY, I THINK THAT THIS IS A CASE WHERE THE DEATH PENALTY IS NOT APPROPRIATE, AND I THINK, YOU KNOW, IN COOPER, I MEAN, THE WORD "BOTH" IS ITALISIZED, AND I THINK IN COOPER THE COURT SAID THERE IS MORE THAN ENOUGH AGGRAVATION FOR A DEATH SENTENCE HERE, BUT THE MITIGATION IS TOO STRONG, AND I THINK THE SAME THING APPLIES IN MORRIS'S CASE. I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL. MR. CHIEF JUSTICE: THANK YOU, MR. BOLOTIN. MR. BROWNE.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. THE FIRST CASE, TAKING THE TWO CASES, IS WHETHER THE JUDGE SHOULD HAVE INSTRUCTED THE JURY ON MONDAY MATE GAITING ISSUES. -- ON NONMITIGATING ISSUES. THAT CASE WAS DECIDED ADVERSELY TO THE

APPELLANT'S VIEW, AND MOST RECENTLY IN DOWNS V MOORE, THIS CASE WAS CONSISTENT IN REJECTING THAT ARGUMENT. NOW, BEFORE THIS COURT ALTERS WELL-ESTABLISHED CASE LAW, AND THIS IS CLEARLY WELL-ESTABLISHED LAW IN THIS COURT, THERE HAS TO BE A COMPELLING BASIS TO DO SO, EITHER STATUTORY OR CONSTITUTIONAL, AND THERE IS IN NONE IN THIS CASE.

HOW DO WE RECONCILE THAT NOW WE LEAVE IT UP TO THE TRIAL COURT JUDGE, AND THAT IS THAT WE KNOW THAT, IN MANY INSTANCES, TRIAL COURT JUDGES DO GIVE INSTRUCTIONS WHICHITYMIZE SOME OF THE NONSTATUTORY MITIGATION, AS WELL AS THE CATCH-ALL INSTRUCTION? AND IN OTHER CASES LIKE THIS ONE AS YOU SAY, WE HAVE CLEARLY RULED THAT IT IS NOT MANDATED THAT JUDGES DO SO, BUT THAT WE HAVE TO PRACTICE, OUT THERE, WHERE IN THE JIM'S DISCRETION SOMETIMES THEY DO -- IN THE JUDGE'S DISDREINGSCRETION, SOMETIMES THEY -- DISCRETION SOMETIMES THEY DO AND SOMETIMES THEY DON'T AND THIS GIVES A LEVEL PLAYING FIELD, SOMETIMES IN THIS ISSUE AND SOMETIMES IN THE TRIAL COURTS. HELP ME WITH THAT. JUDGE SHAFER'S MATERIALS, I BELIEVE, FOR EXAMPLE, THAT SHE RECOMMENDS THAT THE JUDGES GIVE --

YES, JUDGE, ON OCCASION JUDGES DO. I STILL BELIEVE IT IS VERY MUCH A MINORITY OF TRIAL COURT JUDGES AND THE QUESTION IS DOES THIS COURT WANT TO ARTICULATE A RULE THAT NONSTATUTORY MITIGATORS, WHICH ARE INFINITY IN NUMBER. I THINK THERE SAP DANGER WHEN YOU ARE TRYING TO SPELL -- I THINK THERE IS A DANGER, WHEN YOU ARE TRYING TO SPELL OUT ANYTHING THAT AGREES WITH IT.

THAT IS THE PRACTICE OUT THERE, THAT SOMETIMES THEY ARE GIVEN AND SOMETIMES THEY NORTH GIVEN.

YOUR HONOR, I DON'T HAVE A GOOD ANSWER FOR. THAT SOMETIME JUDGES DO. I KNOW THAT IT HAS CAUSE ADD PROBLEM. I KNOW THAT IT WAS NOT REQUIRED IN THIS CASE. IT HAS NOT BEEN REQUIRED. IT IS NOT REQUIRED IN THE CONSTITUTION. WHAT THE CONSTITUTION PREINCLUDES IS THE STATE GIVING A INSTRUCTION THAT WOULD PRECLUDE THE JURY FROM CONSIDERING MITIGATION. BUT AS TO WHAT THE CONSTITUTION REQUIRES AND SHOULD THIS COURT EXERCISE ITS VAST AUTHORITY AND CHANGE THIS AREA THE LAW, WHEN PRIOR, THIS COURT HAS PREVIOUSLY AND MOST RECENTLY, IN DOWNS V MOORE, REJECTED THIS VERY ISSUE. IT IS IMPORTANT TO THE STABILITY OF THE LAW AND IS THERE A COMPELLING REASON TO CHANGE, AND I ARGUE THAT CLEARLY THERE IS NOT.

DON'T WE HAVE A CONTRAST, THOUGH, IN MANY INSTANCES, WHERE THE ONLY MITIGATION BEING OFFERED, AND IT MAY BE SUBSTANTIAL, IS IN THE NONSTATUTORY CATEGORY, AND THE STATE IS OFFERING EVIDENCE OF A NUMBER OF STATUTORY AGGRAVATORS, AS IT APPROPRIATELY SHOULD, AND THE STATE, THEN, RECEIVES AN INSTRUCTION BY THE COURT, THAT IS VERY SPECIFIC AS"t CIRCUMSTANCES THAT GIVE RISE TO AGGRAVATION, WHEREAS ALL OF THE INSTRUCTIONS THAT THE DEFENDANT RECEIVES IN THIS CIRCUMSTANCE, AS TO THE BROAD AND CONSTITUTIONAL FACTORS, IN THE DEFENDANT'S BACKGROUND THAT MAY BE MITIGATING, AS OPPOSED TO THE STATE RECEIVING SOMETHING THAT IS PRETTY CONCRETE, IN WE DO REQUIRE TRIAL COURT JUDGES, NOW, TO BE SPECIFIC, CAMPBELL AND ITS PROGENY, AND WHY SHOULD JURIES THAT KNOW LESS ABOUT THE LAW, THAN JUDGES, BE EXCEPTED FROM THAT, AND SHOULDN'T JURIES RECEIVE MORE GUIDANCE THAN TRIAL JUDGES, WHOM WE ASSUME ALREADY KNOW ABOUT THE LAW.

I THINK AS WE KNOW, I CAN DISTINGUISH THE ASPECT OF THE STATUTORY AGGRAVATORS. NOW, THE STATE IS LIMITED TO THOSE, AND THE JURY SPECIFICALLY INSTRUCTED THEY ARE NOT TO CONSIDER ANY OTHER EVIDENCE IN AGGRAVATION, ASIDE FROM THOSE THAT THE JURY HAS INSTRUCTED ON, SO THE FACT THAT THE STATE RECEIVES AN INSTRUCTION AND IS REALLY LIMITING THE JURY AS TO WHAT THEY CAN CONSIDER IN AGGRAVATION, AND THEY ARE NARROWLY-TAILORED RULES FOR HAC THAT IT HAS A TO BE DEFINED FOR THE -- IT HAS TO BE

DEFINED FOR THE JURY, BUT WHEN WE ARE TALKING ABOUT NONSTATUTORY MITIGATORS, WE ARE TALKING ABOUT AN INFINITY NUMBER OF POSSIBILITIES. ONE IS THAT THE DEFENDANT WORE SHOES EVERYDAY AND THE JURY SHOULD CONSIDER THAT IN ITS DELIBERATIONS, WHAT YOU ARE REALLY ASKING US TO DO IS LIMIT AND INSTRUCT ON THESE NONSTATUTORY MITIGATORS, WHEN THEY ARE IN FINITY, AND THEN ARE WE GOING TO OPEN UP A PANDORA'S BOX AND WHAT HAPPENS IF AN INSTRUCTION IS NOT GIVEN? THE STATED INSTRUCTION SPECIFICALLY ADVISES THE JURY THAT THEY CAN CONSIDER ANYTHING IN THIS MAN'S BACKGROUND OR CHARACTER THAT WOULD MITIGATE THE OFFENSE OR MILL TATE AGAINST THE IMPOSITION OF THE DEATH PENALTY. ANT DEFENSE ATTORNEY IS THERE AND APARTMENT AND ABLE TO ARGUE, WITHOUT HIS HANDS BEING TIED AT ALL, AS TO WHAT HE BELIEVES THOSE FACTORS ARE, AND IN THE SITUATION THAT MR. BOLOTIN IS CONCERNED ABOUT, IT DIDN'T OCCUR IN THIS CASE, THAT THE PROSECUTOR COMES IN AND SAYS, WELL, LOOK, YOU SHOULDN'T CONSIDER THAT, BECAUSE THEY ARE NOT STATUTORY MITIGATORS, THAT DIDN'T HAPPEN IN THIS CASE, AND IF IT HAPPENS, THE DEFENSE ATTORNEY WOULD JUMP UP AND RAISE AN OBJECTION, AND THEN AN APPROPRIATE INSTRUCTION WOULD BE GIVEN, SO WE ARE NOT TALKING ABOUT THAT SITUATION HERE. THE DEFENSE ATTORNEY WAS FREE TO ARGUE ANYTHING HE CONSIDERED AS A MITIGATOR, DURING CLOSING ARGUMENT, AND IF THE PROSECUTOR MISLEADS THE JURY IN ANY WAY, THE DEFENSE ATTORNEY CAN JUMP UP AND RAISE AN OBJECTION AND THE TRIAL COURT CAN INSTRUCT THE JURY, AND THAT CERTAINLY DIDN'T HAPPEN HERE. MOVING ON, NOW, TO ISSUE TWO, DRUG ABUSE. SPECIFIC NONSTATUTORY MITIGATOR WAS FOUND BY THE JUDGE. THERE WAS A HISTORY OF DRUG ABUSE, AND I THINK WHAT YOU SEE IN THE SENTENCING ORDER IS THE TRIAL COURT'S THOUGHT PROCESS, BECAUSE WE DO HAVE EVIDENCE OF IN GENERAL, A LONG-STANDING ABUSE OF ALCOHOL AND DRUGS, BUT WAS THERE ANY LOGICAL TIE TO EITHER THE OFFENSE IN THIS CASE OR ANY IMPACT ON THE DEFENDANT'S LIFE? AND THE ANSWER TO THAT QUESTION IS NO. IT IS ALL VERY GENERAL. I DIDN'T HEAR ANYTHING ABOUT HIM LOSING JOBS BECAUSE OF DRUG ABUSE. THERE WAS SOME TESTIMONY THAT HIS WIFE LEFT HIM BECAUSE OF DRUG USE, BUT THAT WAS BACK IN 1987. I DIDN'T SEE ANYTHING RECENT, REGARDING DRUG USE, SO I THINK THE --

FOR IT TO BE A NONSTATUTORY MITIGATOR, THE DRUG AND ALCOHOL ABUSE DOESN'T NEED TO BE FOUND AND TO BE MITIGATING, DOESN'T NEED TO BE LINKED WITH THE CRIME THE COMMISSION OF THE CRIME, CORRECT?

I AGREE WITH THAT.

OKAY. SO MY ONLY CONCERN IS THAT WHAT IS, BY SAYING, I MEAN, THE JUDGE MAKES A VERY SPECIFIC STATEMENT THAT, ON THE DRUG ABUSE, THAT HE SAYS -- HE SAID IT IS NOT MITIGATING, AND IS THAT -- SHOULDN'T WE BE CONCERNED WITH THAT STATEMENT?

NO. I THINK IT IS VERY NARROW, YOUR HONOR. WHAT HE SAID IS THE SIMPLE FACT THAT THE DEFENDANT HAS USED DRUGS IN THE PAST IS NOT MITIGATING. HE WENT ON TO SAY THAT THE LONG-STANDING OR HISTORY OF DRUG ABUSE HAS BEEN FOUND. IT IS ESTABLISHED. IT IS UNCONTROVERTED, AND THE LAST THING THAT THE JUDGE SAID, IN EVALUATING THIS NONSTATUTORY MITIGATOR, IS I AM GIVING IT SLIGHT WEIGHT. SO IT IS CLEAR. THE STATE IS ARGUING IN THIS CASE THAT THE JUDGE CLEARLY FOUND IT AND GAVE IT APPROPRIATE WEIGHT. THERE IS NO ERROR IN THAT. YOU ARE SIMPLY REVIEWING SOME OF THE JUDGE'S ANALYSIS, AND I LOOKED THROUGH THE MITIGATION, AND I COULDN'T FIND ANYTHING CONCRETE ABOUT DRUG ABUSE, EXCEPT FOR THE PSI, I GUESS THERE IS REFERENCE TO THE PSI, FOR HIS PRIOR STRONG-ARMED ROBBERIES THAT HE WAS USING DRUGS AT THAT TIME, BUT I HAVE NO PRESENT IMPACT, WITHIN THREE YEARS OF ANYTHING THAT DRUGS HAD TO DO WITH THIS INDIVIDUAL'S LIFE, SO I THINK THE JUDGE WAS WRESTLING WITH THAT IDEA, AND HE PUT THAT DOWN ON PAPER, HIS THOUGHT PROCESS, BUT HE ULTIMATELY FOUND IT AND GAVE IT SLIGHT WEIGHT. IN ANY CASE, YOUR HONOR, YOU HAVE FOUR STRONG AGGRAVATORS IN THIS CASE. IT WOULD NOT HAVE MADE ANY DIFFERENCE. THE TRIAL JUDGE FOUND THAT THE CASE IN AGGRAVATION GREATLY OUTWEIGHED THE MITIGATION IN THIS CASE. ON PROPORTIONALITY, YOUR HONORS, IT IS PRETTY

CLEAR THAT THE --

BEFORE YOU MOVE ON, THERE WAS ONE STATUTORY MITIGATOR FOUND?

CORRECT.

IS THAT IMPAIRED --

SUBSTANTIAL IMPAIRMENT.

AND WHAT FACTORS DID THE TRIAL JUDGE TAKE INTO CONSIDERATION, IN REACHING THAT? WAS THE DRUG AND ALCOHOL AT ALL A PART OF THAT?

I THINK IT WAS MENTIONED, BUT I THINK THE MAIN PART WAS FRONTAL LOBE DAMAGE AND LOW IQ. AND I THINK THE JUDGE WAS WRESTLING WITH THAT MITIGATOR, TOO, BECAUSE HE WASN'T SURE HOW TO TIE IT UP TO THIS OFFENSE AT ALL, AND THAT WAS A DIFFICULTY THAT THE JUDGE HAD, BUT HE NONETHELESS FOUND IT AND GAVE IT SOME WEIGHT. I DO BELIEVE TAKE IT WAS MENTIONED IN ITS ANALYSIS OF THE STATUTORY MITIGATOR, SO IT IS PRETTY CLEAR THE JUDGE DID CONSIDER THE EVIDENCE OF ALCOHOL AND DRUG ABUSE IN THE APPELLANT'S PAST, IN ARRIVING AT AN APPROPRIATE SENTENCE. MOVING ON, NOW, TO PROPORTIONALITY, THE APPELLANT IS ASKING THIS COURT, IN THE STATE'S VIEW, TO REWEIGH THE AGGRAVATION AND THE MITIGATION PRESENTED IN THIS CASE, AND THIS COURT, IF YOU WILL, AS THIS COURT IS, NO DOUBT, AWARE, AS JUSTICE ANSTEAD MENTIONED, IS, REALLY, ESSENTIALLY THE FINAL SAFEGUARD, IF YOU WILL, TO ENSURE THAT THE DEATH PENALTY IN ANY PARTICULAR CASE IS NOT AN UNUSUAL PUNISHMENT. THAT IS THAT THIS COURT HAS AFFIRMED CASES IN THE PAST OF A SIMILAR NATURE, AND CLEARLY THIS CASE IS PROPORTIONAL. YOU HAVE HAC, WHICH IS ONE OF THE, THIS COURT'S STRONGEST AGGRAVATORS OR THE STATE'S STRONGEST AGGRAVATORS, IN ITS SENTENCING CALCULUS. THIS WOMAN, VIOLET LIVINGSTON, WAS HORRIBLY BEAT TONE DEATH IN HER OWN HOME. THIS WAS NOT A QUICK AND PAINLESS DEATH. SHE SUFFERED DURING APPELLANT'S ATTACK N ADDITION TO 30 BLUNT FORCE TRAUMA INJURIES, SHE WAS STRANGLED. AGAIN, THIS WAS A HORRIBLY VIOLENT ATTACK. APPELLANT HAD CRIMES OF VIOLENCE IN HIS PAST. HE WAS ON PAROLE AT THE TIME HE COMMITTED THE MURDER.

WHAT WERE THE PRIOR CRIMES?

STRONG-HARMED ARMED -- STRONG-ARMED ROBBERIES. TWO WOMEN, PUSHING THEM DOWN BY FORCE. TAKING PURSES, AS I UNDERSTAND IT.

WHAT WAS IT? I AM NOT, AGAIN, MINIMIZING IT, BUT WAS THERE --

ONE VICTIM WITH A BROKEN ARM.

THERE WAS NO WEAPONS USED?

NOT TO MY KNOWLEDGE.

WAS THERE ANY TESTIMONY WHETHER THOSE CRIMES WERE COMMITTED IN CONNECTION WITH HIS DRUG ADDICTION?

THAT THOSE CRIMES WERE? CORRECT. THERE WAS AN ALLEGATION, I THINK IN THE MISSOURI PSI, WHICH I DID NOT REVIEW, THAT HE WAS USING DRUGS AT THAT TIME. CORRECT. BUT IN THIS CASE, BALANCED AGAINST THE CASE IN AGGRAVATION --

HE, THEN, SERVED -- DESERVE PRISON TIME IN MISSOURI?

YES. HE WAS ON PAROLE AT THE TIME THAT HE COMMITTED THE INSTANT MURDER.

WAS THERE ANY EVIDENCE WHETHER HE GOT ANY TREATMENT FOR HIS DRUG ADDICTION, AFTER THOSE?

I AM NOT AWARE, YOUR HONOR. AND, AGAIN, GOING BACK TO THE DRUG USE, I DIDN'T FIND ANY FROM ANY FAMILY MEMBER OR THE DOCTOR, OF ANY CONCRETE IMPACT THE DRUG ABUSE HAD HAD ON HIS LIFE RECENTLY. IN OTHER WORDS CLEARLY HE HAD A PAST OF ADDICTION PROBLEMS, BUT WE DON'T HAVE ANY EVIDENCE OR TESTIMONY TO SUGGEST THAT APPELLANT COMMITED THIS MURDER, TO GET MONEY FOR DRUGS OR IN ANY WAY IT WAS LINKED TO DRUG ABUSE. THE STATE HAS CITEDc SEVERAL CASES IN ITS BRIEF THAT SHOW THAT THIS COURT HAS, IN FACT, AFFIRMED CASES WHERE THERE WERE EITHER LESS AGGRAVATION AND/OR MORE MITIGATION, AND SPECIFICALLY SPENCER V STATE AND BLACKWOOD V STATE. I HAVE VERY LITTLE TO SAY IN ADDITION, ON PROPORTIONALITY. I NOTE THAT THE APPELLANT DID NOT TOUCH ON ISSUES ONE AND TWO IN HIS ORAL ARGUMENT. THEREFORE I WILL NOT AS WELL. I DO WANT TO BRIEFLY MENTION THE CROSS APPEAL IN THIS CASE. BY WAY OF BACKGROUND INFORMATION THE SEXUAL BATTERY COUNT WAS SEVERED PRIOR TO TRIAL, AND THE REASON IT WAS SEVERED WAS BECAUSE THE DEFENDANT APPARENTLY WANTED TO PRESENT INCONSISTENT TESTIMONY THAT THE VICTIM WAS DEAD AT THE TIME HE SEXUALLY BATTERED HER. HE WANTED TO PRESERVE THE RIGHT TO PRESENT THAT DEFENSE WHILE PRESERVING THE RIGHT ON REMAINING COUNTS, TO PRESENT TESTIMONY THAT HE WAS NOT PRESENT. THE TRIAL COURT DID SEVER THE CHARGES. THAT CASE WENT TO TRIAL. HE WAS ACQUITTED ON THE SEXUAL BATTERY COUNT, AND WE KNOW EXACTLY WHY HE WAS ACQUITTED. IT WAS THE MOTION FOR JUDGMENT OF ACQUITTAL WAS GRANTED, BECAUSE THE STATE COULD NOT REBUT THE REASONABLE HYPOTHESIS OF INNOCENCE THAT THE VICTIM WAS DEAD AT THE TIME THAT HE SEXUALLY BATTERED HER, AND THAT IS THE ONLY REASON THE MOTION FOR JUDGMENT OF ACQUITTAL WAS GRANTED. THAT IS NOT ISSUE, THE SEVERANCE. WHAT IS AT ISSUE, TODAY, IS THE MOTION IN LIMINE. THE STATE WENT INTO THIS TRIAL AND WAS PRECLUDED FROM PRESENTING EVIDENCE RELATING TO ANY SEXUAL CONTACT BETWEEN THE VICTIM AND THE DEFENDANT IN THIS CASE. NOW, THE SEXUAL BATTERY, WHETHER OR NOT THE VICTIM WAS ALIVE OR DEAD, WAS HIGHLY RELEVANT EVIDENCE, BECAUSE IT STABBED HIS PRESENCE AT THE TIME OF THE -- IT ESTABLISHED HIS PRESENCE AT THE TIME OF THE MURDER. HE LEFT DNA, THROUGH HIS SEMEN, ON TWO LOCATIONS ON THE VICTIM'S BODY, HER VAGINA AND THE ANDAL REGION, CLEARLY RELY -- AND THE ANAL REGION, CLEARLY RELEVANT EVIDENCE THAT THE DNA WAS MATCHED THROUGH HIS DNA TESTING, AND IN THE COURT'S RULING ON THE MOTION IN LIMINE, THE STATE WAS PREVENTED FROM ESTABLISHING THAT THERE WAS, INDEED, CONTACT BETWEEN THE VICTIM OF A SEXUAL NATURE, BETWEEN THE VICTIM AND THE DEFENDANT. WHAT KIND OF FLUID WAS FOUND? IN FACT THE STATE HAD TO --

YOU ARE SAYING THAT THIS WAS RELEVANT, BECAUSE IT DEMONSTRATES HIS PRESENCE AT THE SCENE. CORRECT?

CORRECT, YOUR HONOR.

BUT YOU WERE, THE STATE WAS ALLOWED TO BRING IN SOME EVIDENCE CONCERNING THE DNA TESTING, CORRECT?

THAT'S CORRECT, YOUR HONOR.

AND THAT IT WAS, IN FACT, FOUND ON THE VICTIM BUT JUST NOT THE LOCATION ON THE VICTIM WHERE IT WAS FOUND.

YES, YOUR HONOR.

SO DIDN'T YOU, MY QUESTION TO YOU IS THIS: DIDN'T YOU GET THE SAME EFFECT? THE FACT

THAT THIS WAS HIS DNA FOUND ON THE VICTIM, DOESN'T THAT HELP TO ESTABLISH EXACTLY WHAT YOU WANTED IT TO ESTABLISH, THAT HE WAS PRESENT THEIR AND IN THE VICTIM'S HOUSE?

YOUR HONOR, IN A SENSE IT WAS. IT DID HELP US ESTABLISH IT, BUT OUR HANDS WERE TIED BEHIND OUR BACKS UNFAIRLY, BECAUSE THE JURY WAS PRECLUDED FROM KNOWING WHAT THIS MATERIAL WAS. THE JURY WAS NOT EVEN TOLD THAT THIS CAUSE WAS SEMEN. THEY WERE TOLD THAT BIOLOGICAL MATERIAL WAS FOUND. WAS IT SPIT SOME BLOOD? SALIVA? THEY WEREN'T TOLD.

WHAT WOULD THE FACT THAT IT WAS SEMEN HAVE ADDED TO HIS PRESENCE AT THE VICTIM.

I THINK BECAUSE IT SHOWS SEMEN IS AS GOOD AS BLOOD, AS FAR AS GETTING GENETIC MATERIAL FROM, AND IT SHOWS EXACTLY WHAT HAPPENED BETWEEN THE PARTIES. TO SEGREGATE OR ARTIFICIALLY DOCTOR REPORTS, IT TO KEEP THIS KIND OF RELEVANT EVIDENCE OUT, AND I THINK, REALLY, THIS COURT NEEDS TO LOOK AT WHAT KIND OF BALANCING TEST WAS USED IN THIS CASE, RELEVANT EVIDENCE, AND IT WAS CLEARLY RELEVANT, SHOULD ONLY BE EXCLUDEED, IF THE DANGER OF UNFAIR PREJUDICE IS SUBSTANTIALLY OUTWEIGHED BY THE PROBATIVE VALUE.

ISN'T THAT A CLASSIC TEST THAT WE OPINE TO THE TRIAL JUDGE TO MAKE, AND THAT IS WHAT THE TRIAL JUDGE DID, AND SAID THAT THE PREJUDICIAL VALUE OUTWEIGHED ANY PROBATIVE HE HAVE HECHT?

WELL, YOUR HONOR, THE KEY HERE IS UNFAIR PREJUDICE. WHAT IS THE UNFAIR PREJUDICE. IT IS HIGHLY-RELEVANT EVIDENCE. THE FACT THAT -- THE STATE HAS FOUND NO CASE IN WHICH A SEXUAL BATTERY AND A MURDER OCCURRING AT OR ABOUT THE SAME TIME WAS SEVERED. THEY ARE INEXTRICABLY INTERTWINED. YOU HAVE GOT OF THE SAME DEFENDANT, THE SAME VICTIM, THE SAME TIME, THE SAME LOCATION.

THAT HAPPENED. ONCE THE SEXUAL BATTERY GOT SEVERED, BY THE TIME THIS WENT TO TRIAL, AS YOU SAID, HE WAS ALREADY FOUNDING IN OF THE -- FOUND NOT GUILTY OF THE SEXUAL BATTERY, CORRECT? AND IT WAS NOT PROPER TO ARGUE THAT THE SEXUAL BATTERY OCCURRED PRIOR TO HER DEATH, CORRECT?

BUT THE STATE SAYS THE EVIDENCE IS RELY RANT -- IS RELEVANT AS TO WHETHER SHE WAS ALIVE OR DEAD. IF IT OCCURRED AFTER SHE WAS DEAD, IT IS STILL RELEVANT T SHOWS THAT HE WAS PRESENT IN THE APARTMENT AND THAT HE COMMITTED THE MURDER. SO IN OTHER WORDS, WHEN YOU ARE TRYING TO BALANCE THE TEST, NOW, AGAIN --

BUT THE JUDGE HAD EXCLUDED THE DNA. YOU HAD, OF COURSE, A WHOLE DIFFERENT SITUATION, BUT THE JUDGE DIDN'T.

BUT, YOUR HONOR, SHOULD COURTS BE IN THE POSITION OF PROTECTING DEFENDANTS FROM THEIR OWN CONDUCT WHEN IT HIGHLY RELEVANT? REALLY, THE BALANCING TEST, THERE WAS NO UNFAIR PREJUDICE. THIS IS NOT A COLLATERAL CRIME THAT YOU CAN DESCRIBE THIS CRIME WITHOUT IT, AND THE STATE WAS REQUIRED TO GO INTO THIS TRIAL, GOING SOME BIOLOGICAL MATERIAL WAS FOUND AT LOCATIONS A AND B OF VIOLET LIVINGSTON, AND THIS BIOLOGICAL MATERIAL MATCHED THE APPELLANT'S GENETIC PROFILE, NOW GRANTED --

THE JURY, I GUESS THEY DID A PRETTY GOOD JOB.

IT DAN BLOOD WAS FOUND ON THE CURTAIN TO THE ENTRANCE, BUT CLEARLY THE STATE SHOULD NOT HAVE BEEN HAM STRUNG IN THIS CASE. IT WAS CLEARLY AN ERRONEOUS RULING OF LAW, AND THE DEFENDANT IN HIS REPLY BRIEF, ARGUED, AND I WILL TOUCH UPON THIS

BRIEFLY, THE COLLATERAL ESTOPPEL DOCTRINE. THAT WOULD NOT APPLY IN THIS CASE, BECAUSE COLLATERAL ESTOPPEL ONLY APPLIES TO ISSUES THAT WERE DECIDED BETWEEN THE PARTIES. IN OTHER WORDS YOU HAVE A PRONG AND ACQUITTAL ON THE IDENTIFICATION ISSUE. THE IDENTIFICATION ISSUE AND THE LINK TO APPELLANT MAY HAVE BEEN DECIDEDED IN THAT PRIOR LAWSUIT, BUT, AGAIN, WE KNOW WHY THE APPELLANT RECEIVED AN ACQUITTAL ON THE SEXUAL BATTERY COUNT, AND IT WAS ONLY BECAUSE THE STATE COULD NOT DISPROVE THE HYPOTHESIS THAT VIOLET LIVINGSTON WAS MERCIFULLY DEAD, WHEN HE SEXUALLY BATTERED HER BODY, SO THAT ISSUE IS AS TO IDENTIFY FIX, AND THAT IS THE ONLY ISSUE THAT THE STATE WAS GOING TO BRING THAT INTO THE SUBSEQUENT TRIAL WAS NOT DECIDED BETWEEN THE PARTIES, BUT I HAVE, ALSO, CITED, IN SUPPLEMENTAL AUTHORITY, THE CASE OF AMORUS VERSUS STATE, AND I THINK JUSTICE ANSTEAD IS FAMILIAR WITH THAT CASE, AND EVEN THOUGH THERE WAS ACQUITTAL ON A PRIOR MURDER, THE PRIOR MURDER SHOWED THE DEFENDANT'S POSSESSION OF THE MURDER WEAPON, SO NOTWITHSTANDING THE ACQUITTAL IN THE PRIOR CASE, THIS COURT FOUND THAT THAT EVIDENCE WAS, IN ESSENCE, INEXTRICABLY INTERTWINED AND IMPORTANT RELEVANT EVIDENCE, TO SHOW THE POSSESSION IN THE CURRENT MURDER CASE, OF THE MURDER WEAPON. AND IN THIS CASE, COLLATERAL ESTOPPEL SHOULD NOT PRECLUDE THE JURY FROM LEARNING OF THE SEXUAL CONTACT WITH MRS. LIVINGSTON, WHETHER OR NOT SHE WAS ALIVE OR DEAD, AND, REMEMBER, THAT IS THE KEY POINT. WE DON'T CARE WHETHER -- WE DO CARE, BUT IT IS NOT IMPORTANT TO THE STATE THAT VIOLET LIVINGSTON WAS ALIVE OR DEAD WHEN SHE WAS SEXUALLY BATTERED, BECAUSE IT SHOWS APPELLANT'S PRESENCE, AND THE STATE SHOULD NOT HAVE TO ACCOMMODATE A DEFENDANT, TO PREVENT HIM FROM BEING SUBJECTED TO HIS OWN CRIMINAL MISDEEDS OR MISS DEED, WHEN THEY ARE CERTAINLY RELEVANT TO PROVE THE MURDER CHARGES.

WAS THERE, ALSO, EVIDENCE OF A STATEMENT THAT THE DEFENDANT HAD MADE TO SOMEBODY ELSE?

YES, YOUR HONOR.

SEXUAL?

YES, AND THAT WAS, ALSO, PRECLUDE, SO THAT WOULD HAVE CORROBORATED THE DEFENDANT'S STATEMENT TO HIM, IN THE CELL, THAT I BELIEVE I WON'T GO INTO IT, BUT THERE WAS SEXUAL CONTACT SO THAT IS ANOTHER CORROBORATING FACTOR THAT THE STATE WAS PRECLUDED FROM PRESENTING.

THAT WAS EXCLUDED.

THATc PART.

THAT PART WAS EXCLUDED, AND IT REALLY INTERESTING THAT THE DNA REPORTS HAD TO BE RENAMED. THEY HAD TO DOCTOR OFFICIAL LAB REPORTS AND INSTRUCT THE DNA WITNESSES THAT THEY CAN'T USE CERTAIN NAMES THAT THEY USUALLY DESCRIBE AND POSITIONS, AND THAT WAS WRONG. THIS WAS CLEARLY AN ERRONEOUS RULING, AND WE ASK THIS COURT TO RECTIFY THAT WRONG. THANK YOU. THE STATE HAS NOTHING FURTHER. THANK YOU. MR. CHIEF JUSTICE: MR. BOLOTIN, REBUTTAL?

THE ISSUE ABOUT THE NONSTATUTORY MITIGATION INSTRUCTION, THE JUDGE GAVE TWO REASONS FOR DENYING IT. BOTH WERE UNSOUND. THE FIRST REASON WAS THAT HE SAID IT WOULD BE A COMMENT ON THE EVIDENCE. WELL, IT IS NO MORE A COMMENT ON THE EVIDENCE THAN GIVING AN INSTRUCTION ON AN AGGRAVATING CIRCUMSTANCE OR A STATUTORY MITIGATING CIRCUMSTANCE WOULD BE. IT DOESN'T TELL --

AGGRAVATING INSTRUCTION, ISN'T THAT A LIMITING INSTRUCTION?

AS A PRACTICAL MATTER, I AM NOT SURE IT, AND WHAT THE INSTRUCTIONS DO, THE AGGRAVATING INSTRUCTIONS THAT ARE GIVEN ARE NOT THE ENTIRE STATUTORY LIST. IT IS JUST ONES THAT THE STATE SAYS THAT IT WANTS TO PRESENT THAT THE JUDGE FINDS THAT THERE IS SOME EVIDENCE OF, AND THEN THE SAME THING OCCURS WITH THE STATUTORY MITIGATORS. THEY ARE NOT ALL GIVEN, JUST ONES THAT THE DEFENSE ASKS FOR, AND THE JUDGE FINDS THAT THERE IS SOME EVIDENCE TO SUPPORT. THE EXACT SAME RULE SHOULD APPLY TO NONSTATUTORY MITIGATORS. NOW, THE JUDGE'S SECOND REASON, AND IT IS A REASON MR. BROWN GAVE AS WELL, IS THAT NONSTATUTORY MITIGATORS ARE POTENTIALLY INFINITY, SO WHY HARM THE DEFENDANT, BY JUST GIVING SOME OF THEM, AND HE GAVE AS EXAMPLE, WELL, MAYBE SOME JUROR IS GOING TO SAY I THINK THE FACT THAT HE WEARS SHOES IS MITIGATING. WELL, THAT IS GREAT, BUT SOME OTHER JURY MAY SAY I THINK THE FACT THAT HE WAS BRUTALLY ABUSED AS CHILD IS NOT MITIGATING. I THINK THE FACT THAT HE WAS ON DRUGS AND ALCOHOL MOST OF HIS LIFE IS NOT MITIGATING. THERE IS A FLIP SIDE TO THIS THING, AND TO SAY WE, THE DEFENSE, REQUESTING SPECIFIC INSTRUCTIONS ON NONSTATUTORY MITIGATORS, IS SAYING WE WANT THESE, JUST AS WE WANT THE STATUTORYS. THIS WILL HELP US EXPLAIN TO THE JURY OR MAKE ARGUMENT TO THE JURY, SO THEY WILL KNOW HOW TO APPLY THE FACTS TO THE LAW, AND YOU KNOW, WE LEAVE OUT, IF WE INADVERTENTLY LEAVE OUT THAT THE DEFENDANT WORRY SHOES, WE WILL LIVE WITH THAT MISTAKE.

WOULD YOUR INSTRUCTION SAY "AND ANY OTHER THING THAT YOU MIGHT CONSIDER"?

IN THIS PARTICULAR CASE IT DID. THE WORDS, THE WAY THE INSTRUCTION WAS REQUESTED, IT INCLUDED THE SPECIFICS. IT SAID NOT LIMITED, AND THEN IT GAVE THE CATCH-ALL ATWELL. I THINK THAT THAT SUBJECT TO, YOU KNOW, COUNSEL COULD DECIDE, IN A GIVEN CASE, HOW HE WANTED TO REQUEST T I DON'T REALLY CARE WHETHER THE JUDGE GIVES THE CATCH-ALL IN ADDITION OR NOT. I THINK IT WOULD REALLY DEPEND ON WHETHER IT WAS REQUESTED, BUT THE CATCH-ALL, ALONE, IS, CREATES AN UNLEVEL PLAYING FIELD AND PUTS THE DEFENDANT AT A WEAKER POSITION, VIS-A-VIS THE STATE. IT PUTS THE NONSTATUTORY, THE DEFENDANT WITH NONSTATUTORY MITIGATORS IN A WEAKER POSITION, VIS-A-VIS THE DEFENDANT WITH LOTS OF STATUTORY MITIGATORS, AND IT, ANOTHER FACTOR IS THAT THE LEGISLATURE KEEPS ADDING TO THE LIST OF STATUTORY AGGRAVATORS, I THINK WE ARE NOW UP TO 14. AT ONE TIME I REMEMBER I THINK IT WAS SEVEN OR EIGHT. THE LEGISLATURE DOESN'T ADD TO THE LIST OF STATUTORY MITIGATORS PRESUMABLY IT DOESN'T FEEL LIKE IT HAS TO, BECAUSE OF THE SUPPPOSEDLY INFINITY VARIETY, BUT MAYBE THE LEGISLATURE COULD DO. THAT MAYBE WE COULD MAKE AN ABUSED CHILDHOOD OR HISTORY OF DRUG AND ALCOHOL ABUSE OR POTENTIAL FOR REHABILITATION OR GENUINE REMORSE, MAYBE WE COULD MAKE THOSE STATUTORY MITIGATORS AND MAYBE MAKE A MORE LEVEL PLAYING FIELD THAT WAY, BUT CURRENTLY THE PLAYING FIELD IS NOT LEVEL, AND JURORS CAN ARBITRARILY OR MISTAKENLY DECIDE JUST AS THE JUDGE DID, THAT THE STATUTORY IS NOT MITIGATOR -- MITIGATING. THE JURY IS ALLOWED TO MAKE DECISIONS THAT THEY ARE NOT ALLOWED TO MA. THE PROSECUTOR TRIES TO MISLEAD AND TELLS THE JURY, BY SAYING THE PARTICULAR FACTOR IS NOT MITIGATING AND THE DEFENSE COUNSEL WOULD JUMP UP AND AN APPROPRIATE INSTRUCTION WOULD BE GIVEN. FIRST OF ALL, I HAVE SEEN PLENTY OF CASES WHERE AN APPROPRIATE INSTRUCTION WAS NOT GIVEN, BUT WHAT WOULD THE APPROPRIATE INSTRUCTION BE? WOULD YOU, THEN, RESURRECT THE ENTIRE REQUEST, AND STAY SAY IT WOULD NOT BE MITIGATING AND SAY IT WOULD BE MITIGATING AFTER ALL? WHY DO THIS THEN, WHEN EVERY OTHER IS GIVEN IN THE PENALTY-PHASE INSTRUCTION, AND I THINK THERE ARE COMPELLING IN THIS, REASONS FOR THE LAW TO BE CHANGED AND FOR THE FAIRNESS TO BE PERPETUATED. I WILL BRIEFLY TALK, IF I HAVE ANY TIME LEFT, ON THE CROSS APPEAL. THIS IS A CLASSIC APPEAL OF A TRIAL JUDGE DOING WHAT IS SUPPOSED TO DO UNDER 94 ON 3, WHICH, AS -- 9403, WHICH AS JUSTICE PARIENTE POINTED OUT, THE DNA EVIDENCE WAS ADMITTED. THE FACT THAT THE JUDGE IS ALLOWED TO CONSIDER WHETHER THE PREJUDICE OUTWEIGHS PROBATIVE VALUE, THE NEED FOR CURETIVE INSTRUCTION AND EFFICACY AND THE ATTENDANCE OF EMOTIONAL OR IMPROPER BASIS TO THE JURY. IN THIS CASE THERE WAS VERY LITTLE NEED FOR THE EVIDENCE. THE DNA, BASED, THE

STATE DID GET THE BULK OF WHAT IT NEEDED, WHICH IS THAT THE EVIDENCE OF THE DEFENDANT'S DN A OR THE DNA, DEPENDING UPON WHICH POPULATION GENETICIST WAS BELIEVED TO BE FOUND CONSISTENT WITH THE DNA ON THE VICTIM'S BODY. THERE WAS NO NEED TO BRING ANY NECK FEEL YEAH INTO IT. THE STATE -- NECROPHELIA INTO IT THE. THE STATE SAID THAT THEY WOULDN'T HAVE SAID THE CONTACT OCCURRED PRIOR OR OR AFTER DEATH. WHAT WOULD THEY HAVE DONE THEN? SHOWN THRONE OUT THAT THERE WAS SEMEN FOUND ON THE VICTIM'S BODY AND THEN WE WOULD HAVE BEEN IN THE POSITION OF HAVING TO RESURRECT THE DEFENDANT'S DEFENSE. WHICH IS FUNDAMENTALLY UNFAIR. WE WOULD BE IN THE POSITION OF SAYING BUT THERE IS NO EVIDENCE THAT THE VICTIM WAS DEAD AT THE TIME THAT WHOEVER DID THIS, IT WASN'T OUR CLIENT THAT, AT THE TIME THAT THIS OCCURRED. IT WOULD HAVE BEEN A FEATURE OF THE TRIAL AND A GROSS DISTRACTION AND THERE WAS NO REASON FOR IT. THE DEFENDANT CAME IN AND DID EXACTLY WHAT HE WAS SUPPOSED TO DO AND THE CURETIVE INSTRUCTION BY THE JUDGE WOULD HAVE BEEN USELESS AND THIS WAS A DEATH CASE, A CASE WHERE, IN THE EVENT OF CONVICTION OF FIRST-DEGREE MURDER WAS GOING TO GO TO A PENALTY PHASE. THE STATE ALREADY SAID THAT IT BASICALLY ACKNOWLEDGES THAT IT IS PRECLUDED BY DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL FROM ARGUING THAT THE VICTIM WAS ALIVE AT THE TIME OF THE SEXUAL CONTACT. WHAT YOU ARE LEFT WITH, THEN, IS NECROPHELIAT CAN'T BE USED AS A HAC FACTOR AND AS A NONSTATUTORY AGGRAVATING FACTOR AND YET YOU KNOW THAT THE JURY WOULD HAVE CONSIDERED IT AS SUCH, SO, AGAIN THE JUDGE WAS EXERCISING HIS DISCRETION IN A VERY WEISS AND REASONABLE MANNER, BY REALIZING THAT LETTING IN THIS EVIDENCE THE WAY THE STATE WANTED WOULD COMPLETELY NOT ONLY HAVE BECOME A FEATURE OF THE GUILT PHASE BUT WOULD HAVE TOTALLY AFFECTED THE PENALTY PHASE. CHIEF. MR. CHIEF JUSTICE: THANK YOU, MR. BOLOTIN. YOUR TIME IS UP. THANK YOU FOR YOUR ASSISTANCE IN THIS CASE. THERE WAS NO INDICATION THAT THERE WAS GOING TO BE ANY REBUTTAL ON THIS. THERE IS NO REBUTTAL.

THANK YOU. RIGHT.

. MR. CHIEF JUSTICE: THERE IS NO REBUTTAL. THE COURT WILL BE IN RECESS.