Connie Ray Israel v. State of Florida

NEXT CASE ON THE COURT'S DOCKET IS ISRAEL VERSUS STATE OF FLORIDA. WE, ALSO, WHILE THESE CASES ARE, THIS SECOND CASE IS COMING TO COUNSEL TABLE, WANT TO ACKNOWLEDGE THE PRESENCE OF THOSE STUDENTS FROM THE TEAM SUMMER COURT PROCEDURES LAW CLASS, THE TEEN COURT PROGRAM SPONSORED BY THE SECOND JUDICIAL CIRCUIT. WE WOULD LIKE TO WELCOME EACH OF YOU AND THEIR LEADER, MR. RUSS LANDRY. GLAD TO HAVE YOU HERE WITH US THIS MORNING. WE ARE, ALSO, VERY HAPPY THAT THOSE STUDENTS ARE PARTICIPATING IN THAT PROGRAM. MR. WILCHACK.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS CHUCK WOOLCHACK. I AM A PUBLIC DEFENDER IN THE STATE OF FLORIDA, AND I ASSISTING THE APPELLATE ATTORNEY WHO SERVED ON THIS CASE AND WE REPRESENT THE RESULTS OF MURDER AND DEATH. IN 1991, WHEN 77-YEAR-OLD ESTHER HAGANS FAILED TO SHOW FOR WORK, THE POLICE AND NEIGHBORS WERE ALERTED, AND SHE WAS FOUND DEAD IN HER BED WITH HER HANDS TIED BEHIND HER BACK. SHE BEEN RAPED AND BEATEN, AND THE MEDICAL EXAMINER TESTIFIED THAT THE DEATH WAS CAUSED BY A WEAK HEART SUBJECTED TO MULTIPLE EPISODES OF TRAUMA. THE DEFENDANT WAS TRIED TWO YEARS LATER, AFTER HIS DNA MATCHED THE SEMEN SAMPLES FOUND AT THE SCENE.

DO WE HAVE IN THE RECORD THAT TELLS US WHAT WAS GOING ON BETWEEN '91 AND '93?

THERE IS SOME TESTIMONY THROUGHOUT THE COURSE, OF THE DEFENDANT EXPLAINING HIS MEDICAL PROBLEMS, WHERE HE SPOKE OF BEING HOSPITALIZED, I BELIEVE IT WAS IN OKEECHOBEE. HE WAS CONSIDERED A SUICIDE RISK. HE HAD BEEN DIAGNOSED AS HAVING SEVERE DEPRESSION IN THE CASE, SO I BELIEVE THAT WAS PART OF THE DELAY THERE.

AS A PART OF THE POLICE INVESTIGATION. DO WE KNOW WHAT WAS GOING ON FOR THE TWO YEARS?

THEY INDICATED WAS A COLD CASE, YOUR HONOR, I BELIEVE, AND IT WASN'T UNTIL THEY OBTAINED BLOOD SAMPLES FROM THE DEFENDANT WHO WAS INCARCERATED.

WHAT MADE THEM GET BLOOD SAMPLES FROM THE DEFENDANT?

THERE WERE SEVERAL PEOPLE THAT WERE SUSPECTS, I BELIEVE, YOUR HONOR, AND I AM NOT EXACTLY SURE WHY THEY FOCUSED, IN PARTICULAR --

WASN'T THERE A SEXUAL BATTERY BATTERY? APPARENTLY HE WAS CONVICTED IN SEPTEMBER OF '93, OF THESE OTHER SEXUAL BATTERIES.

THAT'S CORRECT.

SO HE MUST HAVE BEEN AND HE WAS INDICTED FOR THIS MURDER IN DECEMBER OF '93.

YES. HE WAS ALREADY SERVING TIME FOR THAT OTHER SEXUAL BATTERY, SO HE WAS INCARCERATED AT UNION CORRECTIONAL, I BELIEVE, SO PERHAPS THAT WAS FURTHER DELAY THERE. THE FIRST TRIAL IN THIS CASE TOOK PLACE IN 1998 AND RESULTED IN A HUNG JURY, AND THE SECOND TRIAL RESULTED IN CONVICTIONS, BASED UPON THE DNA RESULTS AND TESTIMONY OF A JAILHOUSE LAWYER, TO WHOM THE DEFENDANT HAD REPORTEDLY CONFESSED. NORMALLY,

WHEN I COME UP HERE AND ARGUE, I WILL GO THROUGH THE GUILT ISSUES FIRST AND THEN INTO THE SENTENCEING ISSUES, BUT I WOULD LIKE TO DO THE OPPOSITE TODAY. THERE ARE SOME THINGS I WOULD LIKE TO MENTION ABOUT THE SENTENCING ISSUE THAT I HIM AFRAID I WOULD RUN OUT OF TIME OTHERWISE. THESE WOULD BE POINTS 3 AND 5 OF OUR BRIEF. THE TRIAL COURT'S SENTENCING ORDER, WE SUBMIT, IS CONSTITUTIONALLY INFIRM, BECAUSE IT LACKS THE REQUIRED SPECIFICITY TO SHOW THAT THE TRIAL COURT EXPRESSLY EVALUATED RELEVANT MITIGATING FACTORS OF ONGOING DRUG ABUSE AND DEPENDENCY, BRAIN DAMAGE, WHICH SPECIFICALLY AFFECTED HIS JUDGMENT AND HIS IMPULSE CONTROL AND HIS LOW INTELLECTUAL FUNCTIONING.

ARE YOU CLAIMING, ON THAT A CAMPBELL ERROR?

YES, YOUR HONOR, WE ARE. THE TRIAL COURT DID FIND, AND THE EVIDENCE WAS UNREFUTED, BASED ON DR. CROP'S TESTIMONY, THAT THE DEFENDANT WAS UNDER EXTREME EMOTIONAL OR MENTAL DISTURBANCE AT THE TIME, AND THAT THE CAPACITY TO CONTROL HIS BEHAVIOR WAS SUBSTANTIALLY IMPAIRED. THIS WAS BASED ON A BATTERY OF NEUROPSYCHOLOGICAL TESTING THAT THE DEFENDANT SUBMITTED TO OVER A FOUR-YEAR PERIOD.

WHAT KIND OF SENTENCING MEMORANDUM DID THE DEFENDANT GIVE TO THE JUDGE?

PARDON ME?

WHAT KIND OF SENTENCING MEMORANDUM DID THE DEFENDANT GIVE TO THE JUDGE?

THERE APPEARS TO BE NOTHING IN THE RECORD.

WHAT MITIGATION ISSUES WERE RAISED BY THE DEFENDANT FOR CONSIDERATION BY THE JUDGE?

THE DEFENDANT PRESENTED, THROUGH DR. CROP, THIS BATTERY OF NEUROPSYCHOLOGICAL TESTING.

WHAT WE ARE LISTED OUT AS THE ISSUES HE WANTED THE COURT TO CONSIDER?

DURING HIS ARGUMENT, DURING THE PENALTY PHASE TO THE JURY, HE ARGUED, AT, I AM SORRY, THE RECORD CITE IS IN THE BRIEF. I CAN'T FIND IT RIGHT OFF OF THE TOP OF MY HEAD, BUT HE DID ARGUE THAT DR. CROPP HAD JUST TESTIFIED JUST PRIOR TO THE CLOSING ARGUMENTS IN THE CASE, AND HE REFERRED THE JURY AND THE COURT BACK TO DR. CROPP'S TESTIMONY. HE SPECIFICALLY MENTIONED THE DRUG ABUSE, THE BRAIN DAMAGE, AND THE LOW INTELLECTUAL FUNCTIONING, ADMITTEDLY HIS CLOSING ARGUMENT WAS ONLY THREE PAGES LONG, AND THE RECORD WASN'T VERY DETAILED, BUT HE DID PRESENT THIS ISSUE TO THE COURT AND TO THE JURY.

DEMAKE A SEPARATE ARGUMENT TO THE COURT, AFTER THE JURY'S RECOMMENDATION CAME BACK?

YOUR HONOR, THE DEFENDANT, HIMSELF, MADE AN ARGUMENT, AT THE SPENCER HEARING. DEFENSE COUNSEL DID NOT.

DEFENSE COUNSEL DID NOT.

NO, YOUR HONOR.

IT WAS ONLY THE DEFENDANT.

YES. AND WE SUBMIT THIS EVIDENCE WAS THERE, WAS PRESENTED TO THE JURY AND ALTHOUGH THE DEFENSE COUNSEL I THINK, SHOULD HAVE GONE INTO MORE DETAIL IN IT, IT WAS PRESENTED TO THE COURT.

WHAT DOES THE COURT REFER TO, WHEN HE SAID A CATCHALL?

IN HIS CATCH ALL, HE SAYS, HE SIMPLY SAYS THE DEFENDANT'S RECORD IS BAD, HIS CHARACTER IS WORSE, AND THE OFFENSE, ITSELF, HORRIBLE. WE SUBMIT THIS WAS NOT ADEQUATE TO SHOW WHAT HE IS REQUIRED TO SHOW IN THIS CASE, THAT --

GOING BACK TO WHAT JUSTICE HARDING ASKED YOU, WASN'T IT THE DEFENSE, HIMSELF, THAT REQUESTED A CATCHALL NONSTATUTORY MITIGATOR?

YES, YOUR HONOR, AND USUALLY -- I HAVE SEEN IT BOTH WAYS. A LOT OF TIMES YOU WILL JUST HAVE THE CATCHALL ONE, AND SOMETIMES DEFENSE COUNSEL WILL GET THE TRIAL COURT TO GIVE SPECIFIC INSTRUCTIONS FOR SPECIFIC NONSTATUTORY MITIGATING FACTORS. I DON'T THINK THAT IS REQUIRED, AND I DON'T KNOW IF THE JUDGE WOULD HAVE DONE IT HERE, SINCE IT IS NOT REQUIRED, HAD HE BEEN ASKED, BUT WE DON'T KNOW. THAT AGAIN, DEFENSE COUNSEL, WE THINK, IF THIS COURT FAULTS DEFENSE COUNSEL, THEN WE SUBMIT THAT IT IS INEFFECTIVE ASSISTANCE OF COUNSEL ON THE FACE OF THE RECORD, AND THAT THE COURT SHOULD CONSIDER THAT AT THIS POINT, AS WELL.

WOULD YOU GO OVER, THOUGH, WHAT THE ISSUES YOU BELIEVE THE TRIAL COURT DID NOT TREAT ADEQUATELY.

YES, YOUR HONOR. FIRST OF ALL, THE COURT ORDER SAID THAT IT GAVE LITTLE WEIGHT TO THE STATUTORY MENTAL MITIGATORS, BECAUSE WE FEEL A MISPERCEPTION OF THE EVIDENCE. THE COURT SAID THAT DR. CROPP FELT THE DEFENDANT WAS UNCOOPERATIVE AND, ALSO, SAID THAT DR. CROPP INDICATED THAT THERE WAS NO INJURY OR DISEASE THAT COULD EXPLAIN THE RESULTS OF THE NEUROPSYCHOLOGICAL TESTING. I REREAD DR. CROPP'S TESTIMONY THREE OR FOUR TIMES IN THE LAST TWO DAYS. I CANNOT FIND ANY SUCH LANGUAGE IN THERE. AT PAGE 3929 OF THE RECORD, DR. CROPP'S TESTIMONY, HE DID SAY, WHILE IT MAY NOT BE A HEAD INJURY THAT CAUSED THIS, THE DEFENDANT PROBABLY HAD ORGANIC OR NEUROLOGICAL IMPAIRMENT ALL OF HIS LIFE. PROBABLY SINCE BIRTH. HE DIDN'T SAY WHY, BUT HE DID SAY NEUROLOGICAL BRAIN DAMAGE, PROBABLY SINCE BIRTH.

BUT THE JUDGE SAID THAT HE WAS BORN THIS WAY AND THAT HE WOULD LIKE STAY THIS WAY. DIDN'T THE JUDGE SAY, IN WEIGHING THESE MITIGATING FACTORS, THE COURT ASSIGNS SOME CREDENCE TO EACH?

THAT'S CORRECT, YOUR HONOR, BUT HE DID NOT EXPRESSLY EVALUATE, AS THIS COURT HAS HELD HE MUST DO IN CAMPBELL, THESE MITIGATING FACTORS, WHETHER THEY ARE STATUTORY MITIGATING FACTORS AND THEY FALL WITHIN THE STATUTORY MITIGATORS, OR WHETHER THEY ARE NONSTATUTORY MITIGATORS MITIGATORS. HE DID NOT --

WHY DID HE SAY THAT HE DOES IT, SINCE HE GIVES SOME WEIGHT TO THE STATUTORY MITIGATORS, WE ONLY HAD DR. CROPP AS A WITNESS. IS THAT RIGHT?

UM-HUM. RIGHT.

SO HOW MANY WAYS DO YOU TAKE WHAT DR. CROPP HAS TO SAY AND WHY DO YOU HAVE TO EVALUATE IT SOMEPLACE ELSE, IF YOU HAVE EVALUATED IT IN THE STATUTORY MITIGATING PORTION?

WELL, YOUR HONOR, IT DOESN'T APPEAR THAT THE JUDGE EVALUATED THOSE IN THE STATUTORY

MITIGATORS. AS WE SAID, THE REQUIREMENT IS THAT HE HAS TO SHOW AN EXPRESS EVALUATION OF THESE, AND, YES, HE IS ALLOWED TO LUMP THEM TOGETHER. WE ARE NOT CONTENDING THAT THAT WAS IMPROPER.

SO YOUR ARGUMENT, REALLY, IS THAT, IN THAT EVALUATION, HE SHOULD HAVE USED THE TERMS "DRUG ABUSE" AND THEN --

BRAIN DAMAGE, LOW INTELLECTUAL FUNCTIONING, AND EXAMINED THOSE. WHAT THE STATE IS SAYING THE ATTORNEY GENERAL IS REALLY ARGUING TWO THINGS HERE. FIRST THEY ARE SAYING THE STATE ATTORNEY DID NOT SPECIFICALLY ID THESE FACTORS TO THE COURT.

WHETHER YOU LOOK AT WHAT THE STATE ATTORNEY ACTUALLY SAYS, DOESN'T HE ACTUALLY, AS PART OF THOSE STATUTORY MENTAL MITIGATORS, TALK ABOUT THIS EVIDENCE THAT YOU NOW WANT AS A SEPARATE FACTOR?

WELL, WE WANT IT TO BE CONSIDERED, AND WHAT WE ARE SAYING IS THE JUDGE'S SENTENCING ORDER DOESN'T SHOW THAT IT WAS CONSIDERED. AS I WAS SAYING, THE STATE IS ARGUING THAT THERE IS NO BASIS FOR RELIEF, BECAUSE THE DEFENSE DIDN'T ID IT TO THE COURT, AND SECONDLY, AND, NOT OR, THEY ARE ALSO ARGUING THAT IT IS NOT A BASIS FOR RELIEF, BECAUSE THE JUDGE WAS AWARE OF THESE FACTORS. THE WHOLE REASON THAT DEFENSE ATTORNEY HAS A BURDEN TO TELL THE COURT, INFORM THE COURT OF WHICH FACTORS HE IS SEEKING, IS SO THAT THE JUDGE IS AWARE OF IT SO WHAT IS IT? STATE? WAS THE JUDGE AWARE OF IT OR WAS THE JUDGE NOT AWARE OF IT?

WHAT IF THE DEFENSE LAWYER ARGUES, WHAT IF THE DEFENSE LAWYER ARGUES TO THE JURY OR TO THE JUDGE, FOR THAT MATTER, THAT BECAUSE OF THESE CONDITIONS, THAT THESE TWO STATUTORY MITIGATORS EXIST? IN OTHER WORDS THAT THE REASON THAT THESE MITIGATORS EXIST IS BECAUSE OF THESE CONDITIONS, AND THEN THE COURT FINDS, IN ACCORD WITH THAT, REALLY, THAT THESE TWO STATUTORY MITIGATORS EXIST? DOES THE RECORD, HERE, SUPPORT A CONCLUSION LIKE THAT?

WELL, THE RECORD SUPPORTS A CONCLUSION, YES, THAT THESE FACTORS COULD HAVE CONTRIBUTED TO THE STATUTORY MITIGATING CIRCUMSTANCES, BUT WE DON'T KNOW WHETHER THE JUDGE CONSIDERED THOSE AS PART OF THE STATUTORY MENTAL MITIGATORS OR NOT, BECAUSE HE DID NOT DO HIS JOB, WE SUBMIT.

WHAT OTHER BASIS WOULD HE HAVE OF FINDING THE TWO STATUTORY?

BASED ON THE TESTIMONY OF DR. CROPP THAT HE SPECIFICALLY FIT THE STATUTORY CRITERIA, BECAUSE OF HIS DEPRESSION, BECAUSE OF HIS, BECAUSE OF HIS INABILITY TO FORM JUDGMENTS, HIS INABILITY TO CONFORM HIS CONDUCT TO THAT.

BUT ULTIMATELY THOSE, THAT IS RELATED TO THESE UNDERLYING CONDITIONS.

YES, THEY ALWAYS ARE, YOUR HONOR, AS YOUR HONOR IS AWARE OF. WHEN YOU HAVE THE STATUTORY MENTAL MITIGATORS, THERE ARE OFTEN THINGS THAT ARE ARGUED IN CONJUNCTION WITH THE STATUTORY MENTAL MITIGATORS THAT, PERHAPS, DON'T EXACTLY FIT IN THERE.

HOW MUCH MORE EXPLICIT WOULD YOU HAVE THE TRIAL COURT BE, THEN, ASSUME HAD GONE THAT THAT WAS WHAT WAS GOING ON HERE, THAT IS THAT HE USED THAT TESTIMONY AND THE DESCRIPTION OF THOSE UNDERLYING CONDITIONS?

NOW, ADMITTEDLY, AS I MENTIONED, THE DEFENSE ATTORNEY DID NOT SUBMIT A SENTENCING MEMORANDUM. THE COURT, HERE, HOWEVER, MIRRORED, ALMOST VERBATIM, WORD FOR WORD,

THE STATE'S SENTENCING MEMORANDUM, WHICH ISN'T IMPROPER IN AND OF ITSELF, BUT HE GOES INTO GREAT DETAIL ON THE AGGRAVATING CIRCUMSTANCES, SEVERAL PAGES ON THAT, BUT ONCE YOU GET TO THE MITIGATING CIRCUMSTANCES, IT IS ALL CLOSER. THE DEFENDANT HAS A BAD CHARACTER OR HIS CHARACTER -- C ON ONCLUSORY. IT IS DETERMINED WHETHER THE COURT CONSIDERED THE BRAIN DAMAGE AS A STATUTORY MENTAL MITIGATOR OR WHETHER HE INTERPRETED THEM AS A NONSTATUTORY MITIGATOR. WE SIMPLY DO NOT KNOW.

DOES THE RECORD INDICATE WHETHER THE DEFENDANT, HIMSELF, TOOK PART IN THIS PENALTY PHASE? WAS HE ACTIVE PARTS PABT?

HE WAS -- PARNTS PANT?

HE WAS -- PARTICIPANT?

HE WAS PRESENT, UNLIKE THE GUILT PHASE, WHERE HE WAS NOT PRESENT.

WAS HE, HIMSELF, MAKING STATEMENTS? WHAT DOES IT DEMONSTRATE, IN REGARD TO ON THE RECORD?

ON THE RECORD -- ANOTHER WAY HE WAS COOPERATING?

DURING THE PORTION OF THE TRIAL THAT HE WAS PRESENT FOR, HE COOPERATED AND BEHAVED HIMSELF, OTHER THAN EARLIER IN THE TRIAL, WHEN HE FELT HE WAS ILL AND LEFT THE COURTROOM, WHICH WAS OUR POINTS NUMBER ONE AND TWO, BUT DEFENSE COUNSEL HAD TAKEN OVER THE CASE. AT ONE POINT THE DEFENDANT, HIMSELF, WAS ACTING AS PRO SE COUNSEL WITHSTAND BY COUNSEL, BUT JUST PRIOR TO THE FIRST TRIAL, THE DEFENSIVE COUNSEL WAS THE PRIMARY LEAD COUNSEL IN THE CASE, AND IT APPEARS THAT DEFENSE COUNSEL WAS THE ONE THAT CONDUCTED THE SENTENCING, THE PENALTY PHASE.

WHAT DID THE DEFENDANT, HIMSELF, SAY TO THE TRIAL COURT JUDGE, WHEN HE ADDRESSED THE TRIAL COURT JUDGE AFTER THE JURY RETURNED ITS VERDICT?

HE MAINLY WAS CONCERNED HE HAD BEEN CONCERNED ABOUT AN INCIDENT, WHERE HE LEFT THE ROOM AND WAS IN A HOLDING CELL, WHERE THE NURSE TRIED TO EXAMINE HIM AND HE BECAME AGITATED WITH HER AND SCUFFLED WITH THE BAILIFF, AND HE SPENT THE ENTIRE HEARING TRYING TO TELL THE COURT, LOOK, THERE IS ANOTHER SIDE OF THE STORY HERE. LOOK. THERE IS ANOTHER SIDE. PLEASE DON'T HOLD THAT AGAINST ME. HE DID MENTION HIS MEDICATIONS AND WHATNOT AT THAT TIME, AS WELL.

WITH REGARD TO ISSUE NUMBER -- WOULD YOU ADDRESS THE ISSUE NUMBER FOUR, THE STATE, THE COURT'S FAILURE TO GRANT THE MOTION FOR MISTRIAL.

RIGHT, YOUR HONOR. THE TRIAL COURT, BACK UP, WE SUBMIT THAT A REVERSAL IS REQUIRED, BECAUSE THE COURT REFUSE ADMISSTRIAL OR EVEN A CURETIVE INSTRUCTION, AFTER THE WITNESS HAD INFORMED THE JURY, AND THIS WITNESS WAS A JAILHOUSE LAWYER AT UCI, INFORMED, OFFERED TO HELP THE DEFENDANT WITH HIS CASE, SO THE DEFENDANT TALKED TO HIM ABOUT HIS FIRST-DEGREE MURDER CASE, AND THEN THIS WITNESS SAID THE DEFENDANT TOLD HIM THAT HE HAD MORE THAN ONE, AND THE WITNESS COULD TELL, IN GREAT DETAIL, ABOUT TWO SUCH CASES, SPECIFICALLY LANGUAGING, SO HE STARTS TELLING ME ABOUT HIS CASE, AND IT WAS A FIRST-DEGREE MURDER CASE, AND HE TOLD ME THAT HE HAD MORE THAN ONE. I CAN TELL YOU IN GREAT DETAIL ABOUT TWO CASES. THE LAW IS THAT IT IS IMPROPER, IMPROPER,ICSENT IN LIMITED CIRCUMSTANCES, FOR A JURY TO BE TOLD OF THE DEFENDANT'S INVOLVEMENT IN OTHER CRIMINAL ACTIVITIES. HERE, AS IN HARDY VERSUS STATE, CITED IN THE BRIEF, THE WITNESS'S TESTIMONY CREATED AN IMPRESSION THAT HE HAD BEEN INVOLVED IN OTHER CRIMINAL ACTIVITY AND NOT JUST OTHER CRIMINAL ACTIVITY, LIKE IN HARDY BUT HERE

WE SUBMIT THIS LANGUAGE IS CLEAR. IT CREATED THE ERRONEOUS IMPRESSION THAT THE DEFENDANT HAD ANOTHER MURDER CHARGE. THE DEFENSE ASKED, OBJECTED TIMELY, ASKED FOR A MISTRIAL, AND ASKED FOR A CURETIVE INSTRUCTION, WHEN IT BECAME OBVIOUS THE JUDGE WAS NOT GOING TO GRANT A MISTRIAL. THERE WAS SOME DISCUSSION BETWEEN THE JUDGE AND THE STATE ATTORNEY ABOUT WHETHER THIS WOULD JUST HIGHLIGHT THIS COMMENT THAT WAS MADE, AND THE JUDGE, NOT THE DEFENSE ATTORNEY, CONTRARY TO THE STATE'S ARGUMENT IN THEIR BRIEF, BUT THE JUDGE DETERMINED NOT TO GIVE A CURETIVE INSTRUCTION, BECAUSE IT WOULD IMPROPERLY HIGHLIGHT THIS TESTIMONY. DEFENSE ATTORNEY MERELY SAID WE DON'T THINK A CURETIVE INSTRUCTION IS SUFFICIENT TO CURE THE ERROR, AND WE WOULD STILL LIKE OUR MISTRIAL, BUT THEY DID REQUEST A CURETIVE INSTRUCTION.

DID THE JUDGE EXPRESS ANY DISAPPROVAL IN ANY WAY, OF THE TESTIMONY THAT WAS GIVEN?

NO, YOUR HONOR. MY READING OF IT, HE DID NOT EXPRESS DISAPPROVAL.

SO THE JURY ONLY HEARD THE ANSWER.

THAT'S CORRECT.

DID THE STATE EXPRESS ANY SURPRISE IN THAT ANSWER, THAT THEY WERE SURPRISED BY THE ANSWER?

NO. YOUR HONOR, THEY DIDN'T. THE ASSISTANT STATE ATTORNEY, I BELIEVE, SPECIFICALLY INDICATED THAT THIS IS THE INFORMATION THAT HE WAS TRYING TO GET OUT AND TRIED TO EXCUSE IT, BY SAYING, HE WILL, WITH THE JURY OBVIOUSLY, SINCE THIS WAS A CELLMATE OF THE DEFENDANT'S, OBVIOUSLY KNEW THAT HE HAD BEEN PREVIOUSLY -- KNEW THAT HE HAD BEEN PREVIOUSLY CONVICTED OF ANOTHER OFFENSE, BUT WE SUBMIT THE LANGUAGE HERE IS MORE THAN THAT. IT SEEMS TO INDICATE THAT HE HAD ANOTHER FIRST-DEGREE MURDER CHARGE, WHICH WAS CLEARLY ERRONEOUS. HE DID NOT HAVE, AND THE JUDGE, BY FAILING TO SUSTAIN THE OBJECTION, BY FAILING TO GIVE A CURETIVE INSTRUCTION, COMMITTED ERROR, WE SUBMIT. WE ASK THIS COURT TO REVERSE THE JUDGMENT AND SENTENCE --

WAS THERE ANY SUGGESTION OF WHAT THAT CURETIVE INSTRUCTION SHOULD SAY?

NO, YOUR HONOR. THEY NEVER GOT THAT FAR, BECAUSE THE JUDGE, AS I SAID, HAS THIS, HAD THIS DISCUSSION WITH THE STATE ATTORNEY AND DECIDED NOT TO GIVE ANY CURETIVE INSTRUCTION. WE ASK THE COURT TO REVERSE THE JUDGMENT AND SENTENCE AND EITHER GRANT A NEW TRIAL OR REMAND FOR A LIFE SENTENCE.

HOW, HOW OLD WAS THIS DEFENDANT, AT THE TIME OF THE --

I APOLOGIZE, YOUR HONOR, BUT I AM NOT AWARE OF. THAT I WILL TRY AND FIND THAT, WHILE THE STATE IS UP HERE. THANK YOU.

MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS APPEAL. WITH REGARD TO ISSUE NUMBER THREE, THE QUESTION BECOMES JUST EXACTLY WHAT THE TRIAL COURT IS SUPPOSED TO DO, IN ITS SENTENCING ORDER, TO MEET DEFENSE COUNSEL'S STANDARD. THE TRIAL COURT FOUND THE TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES. IT WEIGHED THE TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES, AND IT APPLIED SOME CREDENCE TO EACH AND FOUND THAT THE AGGRAVATING CIRCUMSTANCES, OF WHICH THERE WERE FOUR, OUT WEIGHED THE MITIGATION. WHAT THE TRIAL COURT IS SUPPOSED TO DO, BEYOND THAT, IS BEYOND ME. I DO NOT KNOW. THE TRIAL COURT --

COUNSEL SUGGESTS THAT THE TRIAL JUDGE IS SUPPOSED TO GO THROUGH AND ANALYZE THE FACTUAL BASIS FOR EACH POSSIBLE MITIGATOR AND ANALYZE IT ON A FACTUAL BASIS AND NOT JUST USE CLOSER, IS HIS -- CON INCLUDES OTHER, IS HIS ARGUMENT -- CONCLOUSORY, IS HIS ARGUMENT, AND WHY IS THAT NOT THE DIRECTIVE, UNDER A CAMPBELL ANALYSIS, FOR WHAT THE TRIAL JUDGE, SO THIS COURT CAN LOOK TO SEE? I THINK THAT IS HIS ARGUMENT.

FIRST OF ALL, JUSTICE LEWIS, AND I AM NOT TRYING TO EVADE YOUR QUESTION, BUT THIS CASE DID NOT COME TO THIS COURT IN THE INITIAL BRIEF, AS A DEFICIENT SENTENCING ORDER CASE. THIS CASE GOT UP HERE ON A CLAIM THAT THE TRIAL COURT SHOULD HAVE FOUND THREE NONSTATUTORY MITIGATORS AND DIDN'T. IT DIDN'T COME UP HERE, UNTIL THE REPLY BRIEF, THAT THE DEFENSE WAS TALKING ABOUT CAMPBELL AND ANY PROBLEM WITH THE SENTENCING ORDER, SO I AM, TO SOME DEGREE, DISADVANTAGED BY AN ARGUMENT THAT IS BEING MADE FOR THE FIRST TIME IN A REPLY BRIEF AND REALLY ADVANCED AND PRESSED HERE FOR THE FIRST TIME THIS MORNING, BUT --

I CERTAINLY UNDERSTAND THAT, BY THE ARGUMENT IN POINT 3, THAT THEY WERE TALKING ABOUT THE EXISTENCE OF NONSTATUTORY MITIGATION AND THE FAILURE OF THE TRIAL JUDGE TO ANALYZE OR CONSIDER THAT, SO THERE MUST BE SOME INFORMATION OR SOME WARNING THAT THERE IS A PROBLEM WITH HOW THE TRIAL JUDGE ADDRESSED THIS MITIGATION, SO IF YOU WOULD, COULD YOU ADDRESS THAT.

YES, YOUR HONOR, AND THE ANSWER IS SIMPLE. THE ANSWER IS LUCAS. IF THE DEFENDANT DOESN'T PRESS THE ON NONSTATUTORY -- PRESS THE NONSTATUTORY MITIGATION THAT IS BEING ADVANCED NOW, THERE CAN'T BE A CAMPBELL ERROR. YOU DON'T GET TO CAMPBELL. CAMPBELL DOESN'T EVEN COME INTO PLAY. IT IS NOT EVEN ON THE FIELD, BECAUSE YOU ARE TALKING ABOUT A BURDEN ON THE DEFENDANT TO SAY, JUDGE, THIS IS THE NONSTATUTORY MITIGATION THAT I WANT TO USE. IF HE JUST SAYS, JUDGE, I AM PRESSING THE TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES, THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE, ET CETERA, ET CETERA, AND DOESN'T SAY, AND OH, BY THE WAY, WE HAVE GOT THIS DRUG ABUSE, THIS BRAIN DAMAGE, WE HAVE GOT WHATEVER, IF HE DOESN'T SAY THAT AND PRESSES THE TWO STATUTORY MITIGATORS ONLY, HOW CAN WE PUT THE TRIAL JUDGE IN ERROR FOR NOT EXPRESSLY DISCUSSING, IN A MANNER THAT WILL PASS CRITIC ON APPEAL -- CRITIQUE ON APPEAL, ALL OF THE SUBFACTORS AND SUBISSUES THAT PLAY INTO THE STATUTORY MENTAL MITIGATORS? HE IS NOT REQUIRED TO DO THAT! THERE IS NO REQUIREMENT THAT HE DO THAT. WHAT YOU DO, AND I WOULD POINT OUT, BY THE WAY, TWO OF THE THREE, BRAIN DAMAGE AND LOW INTELLECTUAL FUNCTIONING, WHICH BY THE WAY THE DEFENDANT HAD AN IQ OF 81, WHICH IS FAR AND AWAY NOT RETARDED, THAT PLAYS IN. THAT IS PART AND PARCEL OF THE STATUTORY MENTAL MITIGATORS. HE GAVE HIM CREDIT FOR IT. TRIAL COUNSEL, DEFENSE COUNSEL AT TRIAL DIDN'T PRESS DRUG ABUSE. WE DON'T KNOW WHY. IF YOU ALL AFFIRM, WE WILL FIND OUT ON 3.850. I WOULD SUGGEST THAT THE DEFENDANT, DEFENSE COUNSEL DIDN'T PRESS IT, FIRST OF ALL, BECAUSE HE DIDN'T WANT TO TELL THE JURY ABOUT IT. HE DIDN'T WANT TO PRESS IT TO THE JURY. HE DIDN'T -- WE ALL, JURIES ARE NOT KINDLY DISPOSED TO DRUG ADDICTS THAT GO COMMIT MURDERS FOR MONEY! IT MAY BE A TACTICAL DECISION. WE DON'T KNOW IF YOU ALL AFFIRM THE CONVICTION AND SENTENCE, WE WILL FIND OUT ON 3.850, I AM SURE, BUT THE FACT OF THE MATTER IS HE DIDN'T ARGUE IT. HE DIDN'T SAY, JUDGE, I WANT YOU TO FIND, AS NONSTATUTORY MITIGATION, THIS DRUG ABUSE. HE DIDN'T DO THAT. AND UNDER LUCAS, IF HE DOESN'T DO, IT WE DON'T GET TO IT. THE TRIAL COURT WERE CAN'T BE PLACED IN ERROR FOR NOT BEING A MIND READER, AND THAT IS EXACTLY WHAT THEY ARE ASKING YOU ALL TO DO HERE TODAY. THE TRIAL JUDGE IS NOT REQUIRED AND IS NOT COMPELLED TO FIND NONSTATUTORY MITIGATION THAT NOBODY TALKS ABOUT TO HIM. THAT IS -- IS COMMON SENSE. YOU DON'T -- YOU CAN'T PUT THE JUDGE AT ERROR FOR THAT.

ARE YOU -- IF WE ARE, FOR OUR PROPORTIONALITY REVIEW, BECAUSE THAT IS WHAT CAMPBELL IS MEANT TO DO IS TO ENHANCE OUR PROPORTIONALITY REVIEW, ARE WE TO TAKE THE JUDGE'S

SENTENCING ORDER, AS TO THE STATUTORY MITIGATOR, AND ASSUME THAT HE HAS GIVEN DR. CROPP, WHO TESTIFIED ON THE STATUTORY MITIGATORS, THAT HE HAS ACCEPTED DR. CROPP'S TESTIMONY?

I THINK THAT IS WHAT HE DID.

I JUST WANT -- BECAUSE IT IS REALLY HARD, IF YOU READ THE SUMMARY OF THE STATUTORY MITIGATOR, WHERE THE JUDGE SAYS DR. CROPP FELT MR. ISRAEL WAS JUST BORN THAT WAY AND HE WOULD LIKE STAY THAT WAY AND THEN TALKS ABOUT A GUY WHOSE RECORD IS BAD, HIS CHARACTER IS WORSE, AND THEN YOU READ THE DETAILS OF WHAT DR. CROPP SAID, WHICH IS INCLUDING HIS SCHOOL RECORDS, WHICH SHOWED THAT, FROM THE TIME THE CHILD WAS NINE OR TEN, HE HAD BAD GRADES. HE WAS EMOTIONALLY DISTURBED, HIS MIND WANDERED, HE REPEATED TENT GRADE. HE QUITO-TENTH GRADE. HE QUIT SCHOOL. -- -- HE QUIT SCHOOL. YOU GET A REPRESENTATION OF A PICTURE THAT THIS WASN'T JUST A BAD GUY. HE HAD PROBLEMS FUNCTIONING. SO THAT IS WHAT I AM ASKING. FROM OUR PROPORTIONALITY REVIEW, ARE WE JUST SUPPOSED TO, THEN, ASSUME THAT THE JUDGE HAD ACCEPTED EVERYTHING THAT DR. CROPP HAS SAID AND WEIGH THAT, IN DECIDING WHETHER THIS IS A PROPORTIONAL SENTENCE BASED ON DR. CROPP'S TESTIMONY, THE JUDGE FOUND MENTAL MITIGATORS. HE GAVE IT TO HIM.

WELL, YOU KNOW, THERE ARE SOME SENTENCING ORDERS WHICH, IN SOME DETAIL, AND WHEN WE GO THROUGH SOMEONE'S LIFE HISTORY AND THEN FIND CERTAIN THINGS AND WE, THEN, WILL LOOK AT THAT AND WEIGH THAT, SO YOU WANT US TO WEIGH THIS AS IF DR. CROPP, IF HE HAD SAID I FIND WHAT DR. CROPP SAID TO BE TRUTHFUL AND THAT I, THEREFORE, HIM CONSIDERING THESE AS, IN GIVING THEM WEIGHT?

LET'S, ALSO, HOWEVER, LOOK AT WHAT DR. CROPP'S TESTIMONY WAS, WRATH -- RATHER THAN IN ADDITION TO AND STACK IT UP ON TOP OF WHAT THE TRIAL COURT FOUND IN THE SENTENCING ORDER, AS TO THE MENTAL MITIGATORS. DR. CROPP'S DIAGNOSIS WAS THAT THE DEFENDANT SUFFERS FROM, AND I AM QUOTING, A PERSONALITY DISORDER, WITH ANTI-SOCIAL, PARANOID AND PROBABLY WHAT WE CALL HYPOCON DRIEDCAL FEATURES. DR. CROPP HAD CONSIDERED THE OTHER RECORDS FROM PRIOR TREATMENT OR OTHER EVALUATIONS, IN REACHING HIS DIAGNOSIS, TESTIFIED THAT ISRAEL'S JUDGMENT WAS IMPAIRED AT THE TIME OF THE OFFENSE, AND THAT HE IS NOT LIKELY TO CHANGE THE SORT OF CRIMINAL BEHAVIOR IN WHICH HE ENGAGES. WHAT DR. CROPP NEVER SAYS HE IS PSYCHOTIC. DR. CROPP NEVER DOES. BUT HE SAID PROBABLY HYPOCON DRICKAL FEATURES, PRONOUNCE THAT WORD TWICE IN ONE ARGUMENT, AND ANTI-SOCIAL FEATURES, AND THAT GOES TO MR. ISRAEL'S REPEATED COMPLAINTS OF MEDICAL PROBLEMS, SO IN THE FINAL ANALYSIS THE TRIAL COURT WAS PERHAPS OVERLY GENERAL TO MR. ISRAEL BY FINDING THE TWO STATUTORY MENTAL MITIGATORS, TO BEGIN WITH. HE COULD HAVE CLEARLY FOUND THAT THEY WERE NOT ESTABLISHED, BY DR. CROPP'S TESTIMONY, BUT HE FOUND THEM AND WEIGHED THEM AND FOUND THEY WERE ENTITLED TO SOME CREDENCE ONLY AND FOUND THAT THE FOUR AGGRAVATING CIRCUMSTANCES OUT WEIGHED THEM.

WHAT DO YOU THINK THAT THE JUDGE IS TALKING ABOUT, WHEN HE SAYS OTHER EVIDENCE THE COURT HAS CONSIDERED IN MITIGATION ARE ASPECTS OF MR. ISRAEL'S CHARACTER, HIS RECORD AND OTHER CIRCUMSTANCES OF THE SURROUNDING OFFENSE. WHAT DO YOU THINK HE IS REFERRING TO?

I ASSUME THE SOMETIMES CALLED CATCH ALL MITIGATOR, THE OTHER AGGRAVATING CIRCUMSTANCE. WHATEVER THE LAST ALPHABETICALLY ALPHABETICALLY-NUMBERED MITIGATING CIRCUMSTANCE SET OUT IN THE STATUTE IS, HE IS APPARENTLY GOING OR TRYING TO EVALUATE ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER, RECORD, OR OFFENSE.

YOU DON'T THINK THAT THE DR. CROPP'S TESTIMONY IS INCLUDEDED IN THIS AT ALL?

I DON'T KNOW THAT IT IS, JUSTICE SHAW. I DON'T KNOW. I DID NOT READ THE SENTENCING ORDER. I DID NOT NEED READ THE NONSTATUTORY MITIGATING CIRCUMSTANCE DISCUSSION IN THE SENTENCING ORDER, AS INCLUDING DR. CROPP'S TESTIMONY. THAT MAY HAVE BEEN THE JUDGE'S INTENT. I DON'T KNOW.

DID THE DEFENSE ATTORNEY REQUEST THAT INSTRUCTION?

YES, MA'AM. HE DID, IN FACT, REQUEST THE CATCHALL.

AND DID HE ARGUE ANYTHING THAT FELL UNDER THE CATCHALL?

NOT REALLY. HE ARGUED, IN THE PENALTY PHASE CLOSING ARGUMENT, PRIMARILY THE TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES, THE SUBSTANTIAL IMPAIRMENT AND EX-TREATMENT MENTAL OR -- AND EXTREME MENTAL OR EMOTIONAL CIRCUMSTANCES FORM THAT WAS IN THE CLOSING ARGUMENT.

WAS THERE TESTIMONY BY THE STATE ABOUT HIM, AFTER THE MURDERS, HIM HAVING CRACK COCAINE AND BEING CONSTANTLY UNDER THE INFLUENCE OF CRACK COCAINE? WAS THE ARGUMENT MADE, BY THE -- WAS NOT MADE THAT THIS WAS A DRUG-INDUCED MURDER, THAT THIS -- WAS THAT -- BECAUSE, AGAIN, AND AS YOU SAY, WE NEED TO SORT OF KNOW WHAT WE ARE EVALUATING, BECAUSE IF YOU ARE SAYING THAT SOMEONE MIGHT SAY, OPPOSE THE CONVICTION, THAT THAT SHOULD HAVE BEEN THE THRUST OF IT, WE WANT TO MAKE SURE WE ARE EITHER EVALUATING IT IN THE PROPER LIGHT, AS IT WAS PRESENTED TO THE TRIAL COURT. IS DRUG ABUSE A FEATURE OF THIS OFFENSE, FOR OUR PURPOSES, OR NOT?

NO. AND THE REASON FOR THAT IS THIS. THERE WAS NO CLAIM OF INVOLUNTARY INTOXICATION AS A DEFENSE. MR. ISRAEL DID NOT TESTIFY IN HIS OWN BEHALF AT THE GUILT PHASE, DENIED ALL INVOLVEMENT, AND SAID THAT HE HAD BEEN FRAMED BY LAW ENFORCEMENT, WHO HAD PLANTED HIS BLOOD AT THE SCENE, STOLEN THE MONEY, KEPT IT FOR THEMSELVES AND MADE IT LOOK LIKE A MURDER.

IN THIS CIRCUMSTANCE, MR. ISRAEL HAD OBTAINED THE SERVICES OF A PROSTITUTE, TOLD HER THAT THE MONEY OBTAINED WAS THROUGH FLORIDA LOTTERY PROCESS WINGS. HE DID NOT CONSUMMATE THE DEAL WITH THE PROSTITUTE, BECAUSE HE WAS TOO HIGH ON CRACK COCAINE, THE INFERENCE BEING THAT THAT INHIBITED HIS OR PREVENTED HIS ABILITY TO HAVE SEXUAL RELATIONS WITH HER, AND VIS-A-VIS PROBABLY WOULD HAVE ALSO DONE THE SAME, WITH RESPECT TO THE VICTIM.

WOULD YOU ADDRESS DEFENDANT'S ISSUE NUMBER FOUR.

THE DEFENDANT WAS INCARCERATED AT NEW RIVER CORRECTIONAL INSTITUTION, ON CHARGES BURGLARY, AS WELL. HE WAS HELD IN A CONFINEMENT CELL AT NEW RIVER CORRECTIONAL AND WAS, FOR SOME SIX OR SEVEN DAYS, CELLMATES WITH ONE ARTHUR McCOMB, WHO WAS DOING TIME ON AN ATTEMPTED MURDER CHARGE OUT OF HILLSBOROUGH COUNTY. MR. McCOMB WAS APPARENTLY A LEGAL CLERK, WHATEVER THAT IS, INMATE, PARALEGAL, I AM NOT SURE WHAT THE EXACT TITLE IS. ACCORDING TO MR. McCOMB, MR. ISRAEL REALIZED THAT McCOMB WAS AT LEAST PASSINGLY FAMILIAR WITH LEGAL PROCEDURES, SHOWED HIM THE INDICTMENT AND BEGAN DISCUSSING HIS CASE WITH HIM. THE TESTIMONY OF MR. McCOMB AND MY OPPONENT READ IT ACCURATELY, CANNOT, I BELIEVE, BE FAIRLY INTERPRETED TO REFER TO TWO MURDER CHARGES. THERE HAS NEVER BEEN A SUGGESTION THAT MR. ISRAEL HAS COMMITTED TWO MURDERS. IF HE HAS, THE STATE IS UNAWARE OF IT. THE COMMENT BY MR. APPEARS, PERHAPS, TO REFER TO EITHER THE OBVIOUS THAT HE IS ALREADY DOING TIME AND HAS ALREADY COMMITTED ONE OR MORE OTHER OFFENSES THAT LANDED HIM IN THE FLORIDA DEPARTMENT OF CORRECTIONS, OR, PERHAPS, IT REFERS TO THE FOUR OFFENSES THAT WERE CHARGED IN THE INDICTMENT CHARGING MR. MILLS OR, EXCUSE ME, I AM GETTING AHEAD OF MYSELF TO

TOMORROW, CHARGE MR. ISRAEL THE FIRST-DEGREE MURDER AND THE ORIGINAL OFFENSES HERE. I DON'T KNOW WHETHER THE TRIAL COURT WAS IN THE BEST POSITION, PARTY TO OBSERVE THE EFFECTS OF THE STATEMENT, ITSELF, AND THE TRIAL COURT SHOULDN'T BE SECOND-GUESSED AT THIS TIME.

ISN'T IT ARGUABLE THAT THE JURY WAS LEFT WITH THE IMPRESSION THAT THERE WERE ADDITIONAL FIRST-DEGREE MURDER CHARGES HAD THAT MR. ISRAEL WAS INVOLVED IN? I THINK THAT IS THE ARGUMENT OF THE DEFENDANT.

THAT IS THE ARGUMENT.

DO YOU HAVE THE LANGUAGE AS IT STARTS TO TELL ABOUT, HIS CASE, AND IT WAS A FIRST-DEGREE MURDER CASE, AND HE TOLD ME HE HAD MORE THAN ONE, ISN'T THAT THE IMPRESSION THAT IS LEFT?

MORE THAN ONE MURDER OR MORE THAN ONE CASE. THAT IS THE POINT I AM TRYING TO MAKE. IT REFERS --

WELL, IT COMES RIGHT OUT TO SPEAKING ABOUT FIRST-DEGREE MURDER. IT IS THE NEXT SENTENCE.

I BELIEVE, JUSTICE SHAW, BASED UPON THE CONTEXT OF THE STATEMENT, THAT HE IS REFERRING TO HE HAS MORE THAN ONE CASE AGAINST HIM, AND LIKE I SAID, WHETHER HE IS REFERRING TO THE CASE THAT LED TO HIM BEING INCARCERATED AT NEW RIVER CORRECTIONAL OR THE FOUR CHARGES AGAINST HIM OUT OF MS. HAGAN'S MURDER, I DON'T KNOW. THE TRIAL COURT WAS THE ONE IN THE BEST POSITION TO OBSERVE IT, AND UNDER SPAZIANO, THERE WAS NO ABUSE OF DISCRETION IN THE DENIAL OF THE MOTION FOR MISTRIAL. IF THERE ARE NO FURTHER QUESTIONS, I WOULD ASK THE COURT TO AFFIRM MR. ISRAEL'S CONVICTION AND SENTENCE OF DEATH. THANK YOU.

MR. WOLCHAK.

THANK YOU, YOUR HONOR. JUSTICE PARIENTE, I DID FIND OUT HE WAS AGE 34, AT THE TIME OF THE OFFENSE HERE. THE TESTIMONY DID INDICATE, AS YOU CORRECTLY MENTIONED, THAT, SINCE AGE NINE OR TEN, HE HAD A HEAD INJURY. HE HAD SEIZURES. THERE WEREN'T VERY MANY RECORDS ON. THAT THE SCHOOL RECORDS INDICATED THAT HIS HEAD CONDITION HINDERED HIM, THAT HE APPEARED EMOTIONAL DISTURBED AND IN A DAZE FOR HOURS AT A TIME, AND THAT HE HAD BRAIN DAMAGE, PROBABLY SINCE BIRTH. THE LOW SBERL HE CAN'TULE FUNCTIONING, THE COURT FOUND -- THE LOW INTELLECTUAL FUNCTIONING THE DOCTOR CROP FOUND WAS EITHER ORGANIC OR NEUROLOGICAL. HE WAS, IT IS CORRECT, HAD AN IQ OF 81, BUT WHAT THE STATE DIDN'T POINT OUT WAS THAT THIS IS THE LOWEST 15 PERCENT OF OUR POPULATION FORM THE STATE, ALSO, CONTENDS THAT PERHAPS THIS WAS A TACTICAL DECISION OF THE DEFENSE NOT SPECIFICALLY ADDRESSING NONSTATUTORY MITIGATORS TO THE JUDGE. I CAN'T IMAGINE WHAT POSSIBLE TACTICAL DECISION THERE COULD BE IN THIS CASE, SO WE WOULD SUBMIT THAT, IF THIS COURT FINDS THE DEFENSE ATTORNEY WAS AT FAULT, THAT IT FINDS INEFFECTIVE ASSISTANCE AS MATTER OF LAW, ON THE FACE OF THIS RECORD, WITH THIS ISSUE. THE AG, IN RESPONSE TO THE QUESTION ARE WE TO ASSUME THAT THE COURT FOUND THESE FACTORS IN THE STATUTORY MITIGATORS? THE STATE SAID I PRESUME THE COURT IS REFERRING TO, OR I DON'T KNOW. THOSE WERE HIS WORDS THIS. COURT CANNOT KNOW. WE CANNOT KNOW WHAT THE COURT WAS CONSIDERING, BECAUSE OF THE SHORTNESS OF HIS ANALYSIS REGARDING THE STATUTORY MENTAL MITIGATORS. YES. THE CONCLUSION OF THE COURT WAS SIMPLY IN HIS CATCH ALL PHRASE THAT HE WAS BORN THIS WAY AND THAT HE WAS GOING TO STAY THIS WAY. HOWEVER, THAT DOESN'T TELL THE WHOLE STORY. HE WAS BORN THIS WAY, DR. CROPP OPINED. HE HAS BRAIN DAMAGE. IS HE NOT ABLE TO CONTROL HIS JUDGMENT, HIS IMPULSE CONTROL IS LACKING HERE. HE IS GOING TO STAY THIS WAY, THE DOCTOR SAID, BECAUSE MOST LIKELY HE

WOULD NOT GET THE PSYCHIATRIC HELP THAT HE NEEDS IN PRISON. AGAIN, NO FAULT OF THE DEFENDANT PER SE. IT WAS BRAIN DAMAGE THAT CAUSED THIS.

IS THAT CLEAR FROM DR. CROPP'S TESTIMONY? AND I DON'T KNOW, FOR THIS CASE, WHETHER IT MATTERS OR NOT, BUT THERE IS PARTS OF DR. CROPP'S TESTIMONY WHERE HE TALKS ABOUT HE DOESN'T SEE ANY MAJOR MENTAL ILLNESS, AND HE TALKS ABOUT A PARANOID, YOU KNOW, PERSONALITY, WITH ANTISOCIAL PERSONALITY.

RIGHT.

TO ME, THERE IS A DIFFERENCE THERE THAN A LOW INTELLECTUALLY FUNCTIONING BRAIN-DAMAGED INDIVIDUAL THAT IS BROKEN TO -- PRONE TO RAGE AS A RESULT OF HIS BRAIN DAMAGE. DO WE, CAN WE TELL, BY IF WE READ ALL OF DR. CROPP'S TESTIMONY --

I THINK SO, YOUR HONOR. THIS WASN'T JUST A PURE CONCLUSION, AS WE OFTEN GET WITH SOME MENTAL HEALTH EXPERTS, THAT HE FIT THESE CRITERIA, BUT HE GAVE THE BASIS FOR HIS CONCLUSION. THE BATTERY OF NEUROPSYCHOLOGICAL TESTS, AND BY THE WAY, THE COURT FOUND, SAID THAT DR. CROPP SAID THAT THE DEFENDANT WAS UNCOOPERATIVE. THAT MAY HAVE BEEN TRUE WITH REGARD TO THE FIRST CASE THAT DR. CROPP GOT INVOLVED IN, BUT DR. CROPP SAID, AS TIME PROGRESSED AND HE GAINED THE DEFENDANT'S CONFIDENCE, THE DEFENDANT WAS MUCH MORE COOPERATIVE WITH HIM, WITH THE EXCEPTION OF SOME OF THE PSYCHIATRIC TESTS, THE RORSCHACH TEST, THE IN BLOCK TEST THE, THE PERSONALITY TEST THAT HE DIDN'T WANT TO SUBMIT TO, BUT HE DID SUBMIT IN GREAT DETAIL, TO THE COOPS OF THE NEUROLOGICAL BATTERY OF TESTS THAT DR. CROPP HAD MENTIONED. DR. CROPP DETERMINED, FROM THE RESULTS OF THOSE TESTS, THAT HE DID HAVE ORGANIC OR NEUROLOGICAL BRAIN DAMAGE, WHICH RESULTED IN HIS LACK OF JUDGMENT AND HIS POOR IMPULSE CONTROL. IT IS CLEAR THAT THIS CRIME --

WHAT IT BOILS DOWN TO, MR. WOLCHAK, IS YOU ARE THE APPELLANT'S INITIAL BRIEF IS MR. NUNNELLEY SAYS, AND, REALLY, YOUR ARGUMENT IS NOT ASKING THIS COURT TO SEND THIS BACK FOR A CAMPBELL ERROR ANALYSIS, FOR A NEW SENTENCING ORDER. WHAT YOU ARE ASKING US TO DO IS TO STEP IN AND FIND THAT COUNSEL WAS INEFFECTIVE IN THE PRESENTATION OF THE PENALTY PHASE AND TO GIVE A NEW PENALTY PHASE. THAT IS WHAT YOU ARE ASKING FOR.

WE ARE ASKING FOR TWO THINGS, YOUR HONOR. FIRST OF ALL, WE CAN'T TELL FROM THIS ORDER, WE FEEL, EXACTLY WHAT FACTS THE JUDGE CONSIDERED, BECAUSE IT WAS MERELY CONCLUSORY WITH REGARD TO THE MITIGATING CIRCSTANDS, SO, YES, WE THINK IT SHOULD GO BACK -- CIRCUMSTANCE, SO, YES, WE THINK IT SHOULD GO BACK TO THE JUDGE TO SPECIFY WHETHER HE CONSIDERED THE STATUTORY MENTAL MITIGATORS AND WHETHER HE CONSIDERED THE BRAIN DAMAGE, THE LOW INTELLECTUAL FUNCTIONING AND THE DRUG USE AND DEPENDENCY. IF THIS COURT FINDS THAT THE TRIAL COURT DID NOT MEET HIS BURDEN BY SPECIFICALLY RAISING THESE ISSUES, THEN WE SUBMIT IT IS ON ITS FACE INEFFECTIVE ASSISTANCE OF COUNSEL.

BUT WE HAVE BEEN PRETTY STEADFAST OF SAYING THAT INEFFECTIVE ASSISTANCE OF COUNSEL IS A MATTER THAT COMES UP IN POSTCONVICTION.

MOST OF THE TIME, YOUR HONOR. HOWEVER, IN KOEMS VERSUS STATE, THIS COURT -- IN KOMS VERSUS -- IN COMBS VERSUS STATE, THIS COURT SAID, AND I CANNOT IMAGINE THAT THIS IS SOMETHING THAT IS NOT TACTICAL TO SAVE AGO PERSON'S LIFE.

IF THIS COURT HAD A POSITION TO KNOW MISSOURI MORE ABOUT THE HANDLING -- TO KNOW MORE ABOUT THE HANDLING OF THE DEFENSE AND, ALSO, WHAT WAS GOING ON WITH THE DEFENDANT, HIMSELF, IN THE REPRESENTATION THAN WE DO ON THE BASIS OF THIS RECORD.

WOULDN'T YOU AGREE?

FORGIVE ME FOR DISAGREEING, YOUR HONOR, BUT I THINK THE RECORD IS CLEAR WHAT WAS GOING ON HERE. THE DEFENSE ATTORNEY, EVEN THOUGH INVITED TO A COUPLE OF TIMES, BY THE TRIAL COURT, TO SUBMIT A SENTENCING MEMORANDUM, NEVER DID. THAT IS NOT TACTICAL. THAT IS INEFFECTIVE.

LET ME ASK YOU THIS

LET ME ASK YOU THIS, IF WE CONSIDER THAT THE TRIAL COURT DID CONSIDER ALL OF THE TESTIMONY AND REACHING THE CONCLUSION THAT THE TWO STATUTORY MENTAL MITIGATORS WERE FOUND, THEN ARE YOU STILL SUGGESTING THAT THERE IS A PROBLEM HERE, BECAUSE NO NONSTATUTORY MENTAL MITIGATORS FOUND? ARE YOU STILL FINDING THAT THERE ARE NO NONSTATUTORY MINUTE MENTAL MITIGATORS FOUND?

-- NONSTATUTORY MENTAL MITIGATORS FOUND?

YES, YOUR HONOR, BECAUSE OFTEN THEY OVERLAP WITH THE NONSTATUTORY MENTAL MITIGATORS, AND IF WE KNEW THAT THE JUDGE CONSIDERED ALL OF THESE THINGS IN THE NONSTATUTORY MENTAL MITIGATORS, WE DON'T KNOW THAT. THAT WOULD BE ONE THING. WHAT WE DO KNOW IS THAT HE NEEDS TO CONSIDER THESE THINGS AND SHOULD HAVE GIVEN THIS COURT THE BENEFIT OF HIS REASONING, GOING INTO THE FACTS OF THE CASE. WE SUBMIT THAT THE ORDER WAS INFIRM, THAT HE SHOULD HAVE GIVEN MORE WEIGHT TO THE STATUTORY MENTAL MITIGATORS. HE ERRONEOUSLY FOUND THAT JUDGE CROPP HAD SAID THAT THE DEFENDANT WAS UNCOOPERATIVE. HE ERRONEOUSLY FOUND THAT, SECONDLY, THAT I HIM SORRY. I LOST MY TRAIN OF THOUGHT HERE, BUT HE FOUND THAT HE WAS NOT COOPERATIVE AND THAT DR. CROPP SAID THERE IS NO INJURY OR DISEASE THAT COULD EXPLAIN THE RESULTS OF THE NEUROLOGICAL TESTING. THAT SIMPLY NOT CORRECT. THAT IS NOT WHAT DR. CROPP TESTIFIED. I INVITE THIS COURT TO LOOK AT THAT TESTIMONY. I INVITE THIS COURT TO LOOK AT THE JUDGMENT AND REVERSE THE SENTENCE. THANK YOU.

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.