James D. Ford v. State of Florida

MR. CHIEF JUSTICE: THE FIRST CASE ON THE ORAL ARGUMENT CALENDAR FOR THIS MORNING IS FORD VERSUS STATE. PROCEED.

MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS ROBERT MOELLER. I AM ASSISTANT PUBLIC DEFENDER WITH THE TENTH JUDICIAL CIRCUIT. I AM HERE ON BEHALF OF THE APPELLANT, JAMES DENNIS FORD. MR. FORD WAS CONVICTED OF FIRST-DEGREE MURDER OF GREGORY AND KIMBERLY MALNORY, SEXUAL BATTERY OF KIMBERLY MALNORY, AND CHILD ABUSE OF THE MALNORY'S YOUNG DAUGHTER, MIRANDA. THE JURY, IN THIS CASE, RETURNED DEATH RECOMMENDATIONS FOR THE TWO HOMICIDES, BY 11-TO-1 VOTES. THE COURT BELOW SUBSEQUENTLY SENTENCED MR. FORD TO DEATH, FINDING FOUR AGGRAVATING CIRCUMSTANCES, HAC, CCP, COMMITTED DURING A SEXUAL BATTERY AND PREVIOUS CONVICTION OF ANOTHER CAPITAL FELONY, BASED UPON THE TWO CONTEMPORANEOUS HOMICIDES. WITH REGARD TO MITIGATION, THERE IS SOMETHING I WOULD LIKE TO ADDRESS BEFORE THE OTHER ARGUMENTS. THERE WAS SOMETHING MISSTATED IN MY BRIEF, REGARDING THE NO PRIOR CRIMINAL ACTIVITY. IT IS CLEAR, IN REVIEWING, THAT THE TRIAL COURT GAVE IT SOME WEIGHT, BUT I FOUND THAT THE TRIAL COURT DID GIVE THE MITIGATING CIRCUMSTANCE GREAT WEIGHT, AND I JUST WANTED TO MAKE THE CORRECTION OF THE RECORD, BEFORE WE PROCEED. TURNING TO THE ISSUES IN THE BRIEFS, I MAY RELY, IN MY BRIEF, TO THE ISSUE NUMBER THREE, DEALING WITH THE CHILD ABUSE CONVICTION, SINCE THAT IS ONE OF THE NINE CAPITAL OFFENSES OF WHICH MR. FORD WAS CONVICTED. I WOULD LIKE TO BEGIN BY DISCUSSING ISSUE ONE IN THE BRIEF, WHIGEALS WITH4IMP$wwww COMMENTS MADE BYuSABcc THE PROSECUTORS DURING THE GUILT PHASE OF MR. FORD'S TRIAL, AND ALTHOUGH WE ARE ARGUING THAT THE CUMULATIVE EFFECT OF ALL OF THESE IMPROPER ARGUMENTS IS THE BASIS FOR A REVERSAL, THE COURT SHOULD HAVE GRANTED A NEW TRIAL, BASED ON THESE REMARKS. I WOULD LIKE TO HONE IN UPON TWO REMARKS THAT ARE, PERHAPS,nTHE MOST EGREGIOUS ARE KIND OFELATED. AFTER, FIRST, DISCUSSING THE DEFENSE ATTACKS ON THE INVESTIGATION THAT WERE MOUNTED IN THIS CASE, THE PROSECUTOR REFERRED TO THE BEST DEFENSE BEING A GOOD OFFENSE, AND, ALSO, MENTIONED THAT, IN COURT, A GOOD OFFENSE DOES NOT CANCEL THE TRUTH, AND THEN HE REPEATED, IT DOESN'T CANCEL THE TRUTH. THERE WAS AN OBJECTION TO THIS THAT WAS SUSTAINED. AND, ALTHOUGH THE OBJECTIONS WERE SUSTAINED, THAT WERE MADE DURING THE GUILT PHASE, OUR ARGUMENT IS THAT THE CUMULATIVE EFFECT OF THESE REQUIRED A NEW TRIAL AND NOT MERELY THE SUSTAINING OF OBJECTIONS DURING THE TRIAL, BECAUSE ONCE THE JURY HEARD THESE ARGUMENTS, OF COURSE, THE BELL COULD NOT BE UNRUNNING. ANOTHER ARGUMENT THAT THE PROSECUTORS MADE, WHICH WAS SOMEWHAT SIMILAR ALTHOUGH SLIGHTLY DIFFERENT, AFTER --

ON THAT, DID THE JUDGE GIVE CURETIVE INSTRUCTIONS ON SOME OF THOSE?

I BELIEVE THERE WAS ONLY ONE THAT HE DID GIVE A CURETIVE ON, WHICH IS THE ONE THAT I HIM GETTING TO NOW, WHICH WAS PROBABLY THE MOST EGREGIOUS COMMENT. THE PROSECUTOR REFERRED TO THE PROBATIVE WORTH OF DEFENSE COUNSEL'S ARGUMENT TO THE JURY, ABOUT THE -- WHEN THE DEFENSE ATTORNEY HAD BEEN DISCUSSING THE DNA EVIDENCE AND VARIOUS COMMENTS THAT THE DEFENSE ATTORNEY HAD MADE AND REFERRED TO THE DEFENSE ARGUMENT AS, QUOTE, SORT OF A "BAIT AND SWITCH" LEGAL ARGUMENT. THESE TWO, ESPECIALLY TAKEN TOGETHER,, INDICATED TO THE JURY THAT THE DEFENSE ATTORNEYS WERE NOT TRUSTWORTHY AND THAT, IN EFFECT, THEY WERE DELIBERATELY ATTEMPTING TO MISLEAD THE JURY, BY ENGAGING IN THIS, QUOTE, BAIT AND SWITCH LEGAL ARGUMENT, UNQUOTE, AND

THAT SECOND REMARK ABOUT THE BAIT AND SWITCH WAS THE ONE THAT THE CURETIVE INSTRUCTION WAS GIVEN ON, JUSTICE SHAW.

WHAT DID THE JUDGE TELL THE JURY, TO THAT?

THE CURETIVE THAT HE GAVE WAS, QUOTE, YOU ARE NOW TO DISREGARD THE ARGUMENT OF THE STATE, WITH REGARD TO DEFENSE COUNSEL. INSTEAD YOU ARE TO FOCUS ON THE EVIDENCE OF THIS CASE. UNQUOTE.

INSTEAD OF SAYING DISREGARD IT, THE JUDGE AFFIRMATIVELY TOLD THE JURY THAT IT IS JUST ARGUMENT OF COUNSEL, WHICH IS PART OF IT. I AM TRYING TO UNDERSTAND WHAT IS SO, IN TERMS OF ACTUALLY GRANTING A NEW TRIAL, WHAT IT IS THAT WOULD MAKE, PUT THAT TYPE OF REMARK IN THAT CATEGORY OF A REMARK THAT COULDN'T BE CURED.

WELL, BECAUSE IT EASY ESSENTIALLY IMPUGNED THE INTEGRITY OF DEFENSE COUNSEL, BY SAYING, LOOK, THIS LAWYER IS DELIBERATELY TRYING TO MISLEAD YOU, BY ENGAGING IN THIS BAIT AND SWITCH LEGAL ARGUMENT, AND, AGAIN, THE PROBLEM IS, WITH THESE CURETIVE INSTRUCTIONS, AND I THINK SOME CASES HAVE INDICATED THAT, ONCE THE CAT IS OUT OF THE BAG, YOU CAN'T UNRING THE BELL, MERELY BY GIVING A JURY A CURETIVE.

THAT MIGHT BE TRUE FOR COLLATERAL CRIME OR SOMETHING THAT IS NOT ADMISSIBLE, BUT JUST FOR THIS TYPE OF ARGUMENT, SAYING SOMETHING THAT, THIS ISN'T, REALLY, AN ARGUMENT WORTHY OF BELIEF, THAT I HIM JUST TRYING TO SEE HOW THAT WOULD FALL INTO THE SAME CATEGORY AND WHERE THE JUDGE PROPERLY SUSTAINED THE OBJECTION IN THAT SITUATION.

I THINK IN THIS CASE, THE ARGUMENTS OF THE ATTORNEY ARE GOING TO BE IMPORTANT TO THE CASE, AND WHERE YOU HAVE THE STATE ATTORNEY IMPUGN THE DEFENSE COUNSEL --

I AM TALKING ABOUT, LIKE THE ALEXANDER GRAHAM BELL ARGUMENT, IS THAT SOMETHING THAT WAS OBJECTED TO AND, ALSO, SUSTAINED?

YES. IT WAS OBJECTED TO AND THAT ONE WAS, ALSO, SUSTAINED, AS WELL, OR I BELIEVE IT WAS. THAT WAS WHERE THE STATE ATTORNEY WAS TALKING ABOUT THE DNA EVIDENCE AND BASICALLY LIKEENING IT TO THE DEFENSE ATTORNEY QUESTIONING ALEXANDER GRAHAM BELL ABOUT THE INVENTION OF THE TELEPHONE, AND THAT OBJECTION BY THE DEFENSE COUNSEL WAS SUSTAINED, BUT THEN THE PROSECUTOR CONTINUED IN MUCH THE SAME VEIN. HE SAID LET ME REPHRASE THAT. CAN'T YOU JUST SEE SOMEONE QUESTIONING ALEXANDER GRAHAM BELL ABOUT THE IN JENNINGS OF THE TELEPHONE -- THE INVENTION OF THE TELEPHONE, SO ALL HE DID WAS TAKE THE ATTORNEY OUT OF THE EQUATION, BUT HE, THEN, CONTINUED TO MAKE THE SAME TYPE OF ARGUMENT, IN A SLIGHTLY DIFFERENT MANNER.

WAS HIS ARGUMENT BASED ON THE FACT THAT HE DID NOT WANT THE PROSECUTOR CONTINUALLY REFERRING TO AND USING THE DEFENSE ATTORNEY, IN THESE EXAMPLES THAT WERE GIVEN. WASN'T THAT THE BASIS OF THE ARGUMENT?

THAT WAS PRIMARILY IT, YES, BECAUSE IT WAS, IN A SENSE, DEMEANING TO THE DEFENSE ATTORNEY AND TO BE PUTTING HIM IN THESE EXAMPLES. I BELIEVE THAT IS CORRECT. SO, CERTAINLY, WHEN HE CHANGED IT, IT WAS NOT AS BAD AS WHEN HE WAS USING THE DEFENSE ATTORNEY IN THE EXAMPLE. THAT IS, CERTAINLY, TRUE.

ON ISSUE NUMBER FIVE, ON CCP.

YES.

WHY ISN'T THAT HEIGHTENED PREMEDITATION, IN THIS INSTANCE?

WELL, I THINK, IF YOU, FIRST OF ALL, THERE IS NO DIRECT EVIDENCE, AS TO WHAT MR. FORD INTENDED, WHEN HE WENT OUT TO THE SOD FARM WITH THESE PEOPLE. THAT WOULD BE THE FIRST PART OF THE ARGUMENT, AND IF YOU LOOK AT THE FINDINGS OF THE TRIAL COURT, THERE IS A LOT OF SPECULATION, IN HERE, THAT, JUST, REALLY ISN'T SUPPORTED BY THE EVIDENCE. WHEN SHE TALKS ABOUT HOW THE DEFENDANT LURED THE MALNORY FAMILY TO THE REMOTE AREA WHERE THE MURDERS OCCURRED, WHERE IS THE EVIDENCE THAT HE LURED THEM? IT IS TOTALLY NONEXISTENT.

HOW ABOUT SOME OF THE OTHER AREAS HERE, AND I AM STRUGGLING WITH SOME OF THESE, WITH REGARD TO THE REQUEST FOR AMMUNITION. THERE DOESN'T APPEAR TO BE EVIDENCE OF ANY KIND OF FRENZIED OR EXCITABLE KIND OF CRIME. THERE SEEMS TO BE, AT LEAST, SOME EVIDENCE OF RELOAD ARE OF WEAPONS. THERE SEEMS TO BE SOME, AT LEAST AN INFERENCE OF MULTIPLE WEAPONS BEING UTILIZED, INVOLVING A GUN, KNIFE, BLUNT INSTRUMENTS. IT SEEMS AS THOUGH, FROM THE CRIME SCENE, THAT JUST AT THE CRIME SCENE, ITSELF, THERE IS A GREAT DEAL OF REFLECTION WITH WHERE THE BODIES ARE LOCATED AND WHAT IS FOUND, AND CERTAINLY WITH THE SEXUAL BATTERY THAT OCCURS HERE, THE RAPE, WHAT SHOULD WE DO WITH THOSE FACTORS? I AM STRUGGLING WITH THOSE. I NEED, PARTICULARLY WITH THIS ARGUMENT.

WELL, OF COURSE, YOU HAVE TO CONSIDER ALL THE EVIDENCE, OBVIOUSLY.

AM I MISINFORMED OR HAVE I MISREAD THOSE FACTORS, IN SOME WAY?

WELL, WITH REGARD TO WHETHER THERE WAS EVIDENCE OF A FRENZIED ATTACK, THE DEFENSE ATTORNEYS ARGUED THAT THERE WAS, AND I THINK -- I HAVE TO GO BACK TO THE FACT THAT THERE WAS NO -- I COULD BREAK EACH ONE DOWN. FOR EXAMPLE, RELOADING. THIS COURT HAS SAID, IN MORE RECENT CASES, THAT THIS IS NOT NECESSARILY INDICATIVE OF CCP, AND AT ANY RATE, IN THIS CASE, RELOADING WOULD ONLY APPLY TO THE SECOND VICTIM, OBVIOUSLY, BECAUSE THERE WAS NO INDICATION THAT THERE WAS A RELOADING, WITH REGARD TO THE FIRST VICTIM. WITH REGARD TO THE BULLETS THAT WERE PROCURED IN ADVANCE, THIS WAS EXPLAINED BY THE DEFENDANT, THAT THEY WERE GOING HOG HUNTING THAT DAY, AND THE TESTIMONY WAS THAT HE WAS AN AVID OUTDOORS MAN WHO ENGAGED IN THIS TYPE OF ACTIVITY QUITE FREQUENTLY.

IS IT YOUR PREMISE THAT THIS WAS A FRENZY OF SOME TYPE? IS THAT WHY YOU NEGATE CCP?

THAT IS PART OF THE ARGUMENT, YES, THAT IT MAY HAVE BEEN.

WHY DO YOU THINK THIS HAPPENED? WHAT IS THE THEORY OF THE DEFENSE?

A BIG PROBLEM WITH THIS CASE IS THAT THERE DOESN'T SEEM TO BE ANY RATIONAL REASON WHY THIS HAPPENED. THERE DOESN'T SEEM TO BE ANY PARTICULAR MOTIVE FOR THIS TO HAVE HAPPENED. WHICH, AGAIN, GOES TO WHETHER IT WAS CCP OR NOT. IF THERE WAS NO MOTIVE, THEN THAT WOULD INDICATE THAT THIS WASN'T SOMETHING THAT WAS PLANNED IN ADVANCE, THAT IT OCCURRED ON THE SPUR OF THE MOMENT.

COULD THE MOTOR I HAVE -- COULD THE MOTIVE HAVE BEEN THE RAPE OF THE FEMALE VICTIM?

THAT WAS THE STATE'S THEORY, BUT AS WE POINTED OUT IN THE BRIEFS, THERE WAS NO INDICATION THAT, PRIOR TO THIS TIME, THAT MR. FORD HAD ANY PARTICULAR INTEREST IN THIS WOMAN OR THAT HE HAD ANY SEXUAL DESIRE FOR HER, ANYTHING THAT WOULD INDICATE THAT HE HAD PLANNED SOMETHING LIKE THIS AHEAD OF TIME.

BUT HE DID, IN FACT, RAPE HER ON THIS OCCASION.

THAT IS WHAT THE CIRCUMSTANTIAL EVIDENCE INDICATED, BECAUSE THERE WAS, I BELIEVE, HIS SEMEN WAS FOUND IN THE WOMAN, INDICATING THAT HE HAD HAD SEX WITH HER, YES. THAT'S CORRECT.

AND DOES THE EVIDENCE INDICATE THAT THE HUSBAND WAS, IN FACT, INCAPACITATED FIRST, AND THEN HE PROCEEDED TO RAPE AND KILL THE WOMAN?

THAT WAS THE COURT'S THEORY. I DON'T KNOW THAT THERE IS, REALLY -- THE EVIDENCE, I BELIEVE, ON THAT, IS INCLUSIVE, AS TO EXACTLY HOW IT HAPPENED, EXACT ORDER IN WHICH IT HAPPENED. THE COURT'S THEORY WAS THAT THE HUSBAND WAS INCAPACITATED FIRST AND THEN THE RAPE AND MURDER OF THE WOMAN OCCURRED AT THAT POINT.

WHICH PUT SOME -- SPEND IN TIME ON ISSUE NUMBER SIX, WHETHER THE COURT CONSIDERED ALL OF THE MITIGATING EVIDENCE. AND WHY DO YOU THINK IT SHOULD NOT CONSIDER.

OKAY. WE FOCUSED, PARTICULARLY, ON THE COURT AFTERNOONS REJECTION OF THE TWO -- COURT'S REJECTION OF THE TWO STATUTORY MITIGATING CIRCUMSTANCES, AND, ALSO, THE CIRCUMSTANCES OF THE DEFENDANT'S ORGANIC BRAIN DAMAGE, AS A MITIGATING CIRCUMSTANCE.

IF WE TAKE, AS A GIVEN, AND WE KNOW THAT THE MENTAL HEALTH EXPERT, IN FACT, SAID THESE TWO EXISTED, DO WE JUST TAKE THAT STATEMENT AT FACE VALUE? DID THE MENTAL HEALTH MITIGATOR, I MEAN EXPERT, ACTUALLY GO INTO DETAIL, AS TO WHY WE SHOULD FIND THESE TWO STATUTORY MENTAL MITIGATORS EXIST?

I BELIEVE THEY DID GO INTO SOME DETAIL, ESPECIALLY WHEN YOU CONSIDER THE TESTIMONY OF BOTH OF THE MENTAL HEALTH EXPERTS WHO TESTIFIED, DR. MOSSMAN AND DR. GREER. I BELIEVE DR. GREER'S TESTIMONY WAS SOMEWHAT MORE SPECIFIC ABOUT THE INTERPLAY OF THE FACTORS THAT HE FOUND WERE RELEVANT IN THIS CASE, SPECIFICALLY MR. FORD'S USE OF ALCOHOL ON THE DAY IN QUESTION. HIS BORDERLINE TO LOW MENTAL FUNCTIONING. HIS DIABETES, WHICH LED TO ELEVATED BLOOD SUGAR, AND HIS HIGH BLOOD PRESSURE YOUR. DR. GREER, I THINK, EXPLAINED, QUITE WELL, HOW FEES FACTORS PRESENTED AND -- HOW THESE FACTORS PRESENTED AND HOW IT MAY HAVE GIVEN AN EXPLANATION.

I AM HAVING TROUBLE WITH FINDING WEIGHT TO BE ACCORDED SOME OF THESE FACTORS, ABOUT THIS MENTAL AGE OF 14. HERE IS A MAN THAT WAS FUNCTIONING AS A HEAVY EQUIPMENT OPERATOR, HAD CHILDREN, WAS TAKING CARE OF CHILDREN, HAD A GIRLFRIEND. WHAT IS THE BASIS FOR FINDING THAT THIS OR FOR THE CONCLUSION THAT THIS DEFENDANT HAD A MENTAL AGE OF 14? ARE THERE SCHOOL RECORDS THAT VERIFY THAT HE HAD LIMITED LIMITED SCHOOLING? THAT HE HAD BORDERLINE INTELLIGENCE? WHAT IS THAT?

WHAT IS THE BACK -- WHAT IS THE BACKUP ON THAT?

THERE WERE INDICATIONS THAT HE HAD PROBLEMS IN SCHOOL. THERE WAS EVIDENCE TO THAT EFFECT.

PROBLEMS IN SCHOOL IS NOT, REALLY -- MENTAL AGE OF 14 FOR A 38-YEAR-OLD IS A PRETTY SIGNIFICANT STATEMENT.

RIGHT. THERE WAS -- GOING A LITTLE BIT FURTHER, THERE WAS TESTIMONY THAT HE HAD A LEARNING DISABILITY, NOT JUST DIFFICULTIES IN SCHOOL. HE WAS ALWAYS WELL-BEHAVED, BUT HE DID HAVE TROUBLE READING. HE HAD TROUBLE LEARNING. THERE WAS TESTIMONY, FROM, I BELIEVE, THE STATE'S EXPERT, DR. WOHLD, THAT HIS IQ WAS BETWEEN 85 AND 90, SO THIS WAS

BASICALLY THE EVIDENCE THAT WENT TO THAT PARTICULAR ASPECT OF THAT MATTER.

IS YOUR CLAIM OF ERROR THAT THE TRIAL JUDGE GAVE NO WEIGHT TO SOME OF THESE NONSTATUTORY MITIGATORS?

THAT IS PART OF OUR CLAIM, AND I KNOW THAT, IN TREESE, THIS COURT RECEDED FROM CAMPBELL, IN PART, TO SEE THAT IT IS NOT NECESSARY FOR THE COURT TO GIVE ANY WEIGHT TO SOME MITIGATING CIRCUMSTANCES THAT ARE FOUND TO EXIST, BUT THE WAY I READ TREESE IS THAT THERE, STILL, MUST BE SOME REASON PERTAINING TO THE PARTICULAR CASE, FOR NOT GIVING A MITIGATING CIRCUMSTANCE WEIGHT IN THAT PARTICULAR CASE, WHEN IT WOULD OTHERWISE QUALIFY AS A MITIGATE OR.

WOULDN'T THE CIRCUMSTANCES THAT HAVE JUST BEEN TALKED ABOUT, A FELLOW WHO HAS BEEN EMPLOYED AND SURVIVED REASONABLY WELL, 38 YEARS OLD, TEND TO SUPPORT THAT THIS WAS NOT A FACTOR THAT SHOULD BE GIVEN ANY WEIGHT?

WELL, I THINK, WHEN YOU LOOK AT THE TOTALITY OF EVERYTHING, THERE, CERTAINLY THERE WERE SOME THINGS THAT HE WAS ABLE TO DO, BUT LET ME GO BACK, AGAIN, TO DR. MOSSMAN'S TESTIMONY ABOUT THE FACT THAT HE HAD ORGANIC BRAIN DAMAGE, WHICH, ALSO, FACTORS INTO THIS. I THINK, WHEN YOU CONSIDER EVERYTHING, THAT THIS WAS AT LEAST SOMETHING THE COURT SHOULD HAVE GIVEN SOME WEIGHT TO, AND, AGAIN, IT GOES TO THE FACT THAT THIS INCIDENT IS TOTALLY UNEXPLAINABLE. HOW DO YOU EXPLAIN IT, UNLESS YOU CONSIDER SOME OF THESE FACTORS THAT EXISTED PRIOR TO THE INSTANT HOMICIDES.

DID ANY OF THE EXPERTS ATTEMPT TO DO THAT? IN OTHER WORDS TO CONSTRUCT SOME EXPLANATION, YOU KNOW, FOR --

FOR HOW THIS CAME ABOUT?

FOR THIS HORRENDOUS.

I THINK, PROBABLY, DR. GREER CAME THE CLOSEST. HIS THEORY WAS THAT MR. FORD SUFFERED FROM AN ALCOHOL BLACKOUT AT THE TIME, BUT EXACTLY HOW THAT LED TO HIM DOING THIS, I DON'T THINK, WAS TOTALLY EXPLAINED, BUT GREER'S THEORY WAS THAT IT WAS AN ALCOHOL BLACKOUT, AND THAT LED HIM TO DO THIS, SO THAT HE DID IT DURING AN ALCOHOL BLACKOUT, I SHOULD SAY.

BUT DIDN'T -- WASN'T HE, ALSO, THE SAME EXPERT WHO SAID, BUT, IF YOU HAVE ALL OF THESE DETAILS THAT HE, NOW, CAN COME UP WITH AND JUSTIFY WHAT WAS DONE, AT VARIOUS PLACES, SO THAT WOULD NEGATE AN ALCOHOL BLACKOUT, WOULDN'T IT?

I DON'T THINK THAT WAS EXACTLY HIS TESTIMONY. I KNOW THAT THE -- WITH REGARD -- WELL, SPECIFICALLY --

MORE SPECIFICALLY, I BELIEVE, IT WAS SOMETHING TO THE EFFECT OF JUSTIFYING DIFFERENT THINGS THAT HE HAD DONE.

THERE WAS -- YES, I THINK WHAT YOU ARE REFERRING TO IS WITH REGARD TO THE RIFLE. HE TOLD ONE WITNESS, DATE THAT THE BODIES WERE DISCOVERED, THAT HE HAD GIVEN HIS RIFE TOLL THE MALNORYS TO GO HUNTING, OR SOMETHING TO THAT EFFECT.

IT AT LEAST SEEMS TO SUGGEST THAT HE THREW IT AWAY.

RIGHT. BUT DR. GREER'S THEORY WAS THAT HE WOULD HAVE NOTICED THAT HIS RIFLE WAS MISSING AND CONCOCTED A STORY TO EXPLAIN WHY IT WASN'T THERE, EVEN IF HE WASN'T IN AN

ALCOHOL BLACKOUT, SO THIS WOULD NEGATE THE TRIAL COURT'S REJECTION OF DR. GREER'S TESTIMONY, BASED ON ON THE THING THAT WE JUST TALKED ABOUT, WITH REGARD TO FORD'S STATEMENT TO KEITH WORLEY ABOUT THE RIFLE.

LET'S TAKE A COUPLE OF THESE INIESLATION. -- IN ISOLATION. FOR INSTANCE A MEDICAL HISTORY OF DIABETES. NOW, UNDER TREESE, WOULD THAT BE A MITIGATING CIRCUMSTANCE THAT THE JUDGE WOULD HAVE SOME DISCRETION AND GIVE IT NO WEIGHT? IT HAD NOTHING TO DO WITH WHAT HAPPENED IN THIS MURDER.

IF YOU JUST LOOK AT IT IN ISOLATION, THAT MAY BE TRUE, BUT I THINK YOU HAVE TO CONSIDER IT, AS DR. GREER DID, IN COMBINATION WITH THE OTHER FACTORS THAT HE TALKED ABOUT.

THE ABSENCE OF ANTISOCIAL TENDENCIES. WOULD THAT FALL IN THAT SAME CATEGORY?

AS SOMETHING THAT THE COURT WOULD GIVE NO WEIGHT TO?

IS THAT ONE OF THE FACTORS THAT THE JUDGE, UNDER TREESE, MIGHT GIVE NO WEIGHT?

WELL, YOU KNOW, I THINK ALMOST ANYTHING COULD BE, IF THE COURT CAN RELATE IT TO OR GIVE A REASON FOR NOT CONSIDERING IT MITIGATING IN THIS PARTICULAR CASE. TO ME THAT IS WHAT TREESE SAYS, IS THAT THE COURT CANNOT ARBITRARILY GIVE IT NO WEIGHT FOR NO REASON, JUST SAY THIS IS MITIGATING CIRCUMSTANCE, BUT I AM NOT GOING TO GIVE IT ANY WEIGHT, PERIOD. I THINK THERE HAS TO BE SOME REASON, IN THE PARTICULAR CASE, FOR NOT GIVING IT ANY WEIGHT.

PAROLE INELIGIBILITY. EXCUSE ME. I WANTED TO DO GET THAT BY. WHAT ABOUT THAT ONE?

PAROLE INELIGIBILITY. I THINK THE COURT SHOULD, ALWAYS, CONSIDER THE ALTERNATIVE SENTENCE, THAT THE DEFENDANT WOULD RECEIVE, IF HE DOESN'T RECEIVE A LIFE SENTENCE. WHETHER YOU CALL THIS A MITIGATING CIRCUMSTANCE OR IT IS A REASON FOR SENTENCING THE DEFENDANT TO LESS THAN DEATH. IS THE ALTERNATIVE PUNISHMENT SUFFICIENT? PAROLE ELIGIBILITY GOES TO THAT, AND CERTAINLY THAT IS SOMETHING THE COURT, I THINK, SHOULD ALWAYS CONSIDER, BUT, AGAIN, IF THERE IS SOME REASON IN THE PARTICULAR CASE FOR REJECTING --

SO THE COURT ALWAYS HAS TO GIVE THAT SOME WEIGHT.

I WAS JUST ABOUT TO SAY, IF THERE IS SOME REASON IN THE PARTICULAR CASE FOR REJECTING IT, I SUPPOSE IT COULD BE GIVEN NO WEIGHT, BUT I CANNOT CONCEIVE OF A REASON FOR NOT CONSIDERING THE ALTERNATIVE PUNISHMENT THAT THE DEFENDANT WOULD RECEIVE, IF HE IS NOT SENTENCED TO DEATH. IT SEEMS THAT THAT IS SOMETHING THAT ALWAYS SHOULD BE CONSIDERED. MAYBE, IN AN ODD CASE, IT MIGHT BE ENTITLED TO NO WEIGHT, BUT I CAN'T THINK OF THAT PARTICULAR CASE.

JUSTICE ANSTEAD.

IN VIEW OF THE RECOMMENDATION BY THE JURY AND THE AGGRAVATING CIRCUMSTANCES IN THIS CASE, WHY WOULDN'T THE TRIAL COURT'S ERROR, EVEN IF WE FOUND IT TO BE ERROR, IN SOME OF THESE INDIVIDUAL INSTANCES, WITH REFERENCE TO WEIGHING, CONSIDERING THE MITIGATING CIRCUMSTANCES, BE HARMLESS?

WELL, I THINK THERE ARE TWO REASONS. FOR ONE THING, THE JURY WAS NOT UNANIMOUS. IT WAS 11-1, SO THERE WAS AT LEAST ONE PERSON WHO THOUGHT THAT MR. FORD'S LIFE SHOULD BE SPARED, AND, ALSO, WE HAVE ARGUED AGAINST CCP. IF YOU KNOCK OUT CCP, AND YOU CONSIDER THE INADEQUATE CONSIDERATION OF THESE MITIGATING CIRCUMSTANCES,

PARTICULARLY THE COMBINATION OF THOSE TWO ISSUES, IT COULDN'T BE HARMLESS ERROR.

YOU ARE GOING BACK TO WHAT YOU SAID RIGHT BEFORE JUSTICE ANSTEAD'S QUESTION. THE CONTENTION, HERE, IS NOT THAT THE TRIAL COURT FAILED TO CONSIDER MITIGATORS. THE CONTENTION IS THAT THE TRIAL COURT, IN THE WEIGHING, FAILED TO GIVE IT WEIGHT. I MEAN, THAT IS THE SEAMING ARGUMENT THAT IS NO WEIGHT, A WEIGHT, BECAUSE THE TRIAL COURT HAS ESSENTIALLY CONSIDERED IT, BUT DECIDED THAT -- TO GIVE IT NO WEIGHT, AND SO THAT IS A PART OF THE WEIGHING, ISN'T IT?

WELL, I THINK WITH REGARD TO SOME OF THESE, THE COURT JUST REJECTED THEM. WITH REGARD TO THE ORDER MAY BE SOMEWHAT AMBIGUOUS IN THIS REGARD, AS TO WHETHER THE COURT REJECTED SOME OF THESE OR FOUND THEM BUT GAVE THEM NO WEIGHT, I AM REFERRING SPECIFICALLY TO THE STATUTE OR OTHER MENTAL MITIGATORS. IT APPEARS THAT THE COURT DID NOT FIND THESE TO EXIST, AS OPPOSED TO FINDING THEM TO EXIST BUT GIVING THEM NO WEIGHT. AND SO PART OF ON OUR CONTENTION IS THAT, CERTAINLY, THOSE TWO SHOULD HAVE BEEN FOUND, BASED UPON THE TESTIMONY, ESPECIALLY THE EXPERT TESTIMONY OF MOSS MAN AND GREER. AND ANOTHER PART OF ON OUR ARGUMENT IS THAT THERE WERE SOME THAT WERE FOUND THAT SHOULD HAVE BEEN GIVEN AT LEAST SOME WEIGHT, SO THERE,, REALLY, TWO PARTS OF THE ARGUMENT.

I AM HAVING THE DIFFICULTY UNDERSTANDING WHY THE JURY'S VOTE OF 11-TO-1 WOULD IMPACT OUR EVALUATION OF HARMLESSNESS.

WELL, BECAUSE THE --

THE JURY HAD, ALREADY, HEARD ALL OF THIS EVIDENCE, AND THEY HAD, ALSO, BEEN INSTRUCTED ON ALL THE MITIGATION AND THE AGGRAVATION, AND THEY, STILL, CAME BACK WITH ONE VOTE SHORT OF AN UNANIMOUS VOTE FOR THE DEATH PENALTY, IN BOTH OF THESE CASES.

RIGHT.

I AM HAVING DIFFICULTY UNDERSTANDING WHY THAT WOULD RENEGE ALT A HARMLESSNESS ANALYSIS, NOW, WHEN WE TURN TO THE TRIAL COURTS' EVALUATION.

WELL, I AM JUST SAYING THAT, BECAUSE IT WAS NOT UNANIMOUS, IF THE SERIOUSNESS, EITHER BY STRIKING OF THE CCP OR RECONSIDERING THE MITIGATING CIRCUMSTANCES, THE COURT MIGHT HAVE LOOKED AT IT DIFFERENTLY THAN IF IT HAD BEEN AN UNANIMOUS VOTE. MAYBE NOT, BUT I THINK THAT IS, CERTAINLY, A POSSIBILITY.

I MEAN, AS FAR AS BACK TO THE DIABETES ISSUE, AND THAT NOT BEING GIVEN ANY WEIGHT, ISN'T, REALLY, WHAT HAS HAPPENED HERE IS THAT THERE IS A THEORY ADVANCED THAT, BECAUSE THE MURDER OCCURRED, IT WAS A COMBINATION OF HIS DRINKING AND HIS PREEXISTING DIABETES, AND THE TRIAL JUDGE, IN LISTENING TO THAT TESTIMONY AND THE DEFENSE, THE STATE'S EXPERTS AND THE CROSS-EXAMINATION, DETERMINED, BASED ON ALL THE EVIDENCE, THAT THAT CIRCUMSTANCE DIDN'T EXIST. THAT IS THAT THAT IS NOT WHAT WAS GOING ON, AT THE TIME OF THE CRIME, AND SO DOESN'T THAT GO, IN TERMS OF OUR LOOKING AT THIS, TO AN ISSUE OF FACT THAT THE JUDGE, DETERMINATION THAT THE JUDGE MADE THAT, EVEN THOUGH ANOTHER TRIER OF FACT MIGHT HAVE THOUGHT THAT WAS A LOGICAL REASON, THAT THIS JUDGE REJECTED.

YES. BUT WHY DID THE JUDGE REJECT THESE PARTICULAR POINTS? I THINK YOU HAVE TO LOOK AT THAT AND DECIDE WHETHER THERE WAS AN ADEQUATE REASON, WHETHER THERE WAS EVIDENCE TO SUPPORT THE REJECTION OF THESE FACTORS. WHETHER THERE WAS EVIDENCE TO SUPPORT WHAT HAPPENED IN THIS CASE AND, AGAIN, ESPECIALLY IF YOU LOOK AT THE CCP

FINDING, I THINK YOU WILL FIND A LOT OF SPECULATION IN THERE THAT IS NOT SUPPORTED BY THE EVIDENCE. I AM RUNNING INTO MY REBUTTAL TIME, SO I THINK I WILL SIT DOWN FOR NOW. THANK YOU.

LET ME JUST ASK YOU ONE QUESTION. WAS THE JURY INSTRUCTED ON ALL OF THESE MITIGATORS THAT WERE, EITHER, FOUND BUT GIVEN NO WEIGHT OR NOT FOUND?

YES. THEY WERE. INSTEAD OF GIVING THE CATCH-ALL, THERE WAS AN INSTRUCTION THAT BROKE THESE DOWN, AND THEY WERE GIVEN ON, I BELIEVE, INSTRUCTIONS ON ALL OF THESE MITIGATING CIRCUMSTANCES. MR. CHIEF JUSTICE: MS. DITTMAR.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE APPELLEE, THE STATE OF FLORIDA. JUST TO FOLLOW UP, JUSTICE QUINCE, ON YOUR QUESTION ABOUT THE JURY INSTRUCTIONS, BEFORE I LOSE MY TRAIN OF THOUGHT ON THAT, THERE WAS NO JURY INSTRUCTION ON STATUTORY MENTAL MITIGATORS OF EXTREME DISTURBANCE AND SUBSTANTIAL IMPAIRMENT. THE DEFENSE COUNSEL, SPECIFICALLY, REQUESTED THAT THE JURY NOT PROVIDE AN INSTRUCTION -- THE JUDGE NOT PROVIDE A JURY INSTRUCTION ON THOSE TWO STATUTORY MITIGATORS, AND THAT IS IN THE CHARGE CONFERENCE. THE JUDGE WAS VERY CONCERNED --

IS THERE EVIDENCE TO THAT?

THE JUDGE WAS VERY CONCERNED AND ASKED THE DEFENSE COUNSEL WHY THOSE HAD NOT BEEN REQUESTED, AND HE STATED THAT, AS A MATTER OF STRATEGY, THE DEFENSE WAS NOT REQUESTING THOSE. SHE, ALSO, ASKED IF HE HAD DISCUSSED THIS DECISION WITH MR. FORD, AND THE RECORD REPRESENTS THAT HE HAD DISCUSSED IT. IN FACT, SHE PLAYSED MR. FORD UNDER OATH, TO HAVE HIM SAY THAT THEY HAD DISCUSSED THAT DEFENSE STRATEGY, AND HE AGREED WITH HIS COUNSEL'S DECISION NOT TO PRESENT THOSE PARTICULAR JURY INSTRUCTIONS, BUT AS TO THE NONSTATUTORY MITIGATING, SHE DID IDENTIFY AND GO THROUGH ALL OF THE PARTICULAR NONSTATUTORY MITIGATORS, WHICH THE DEFENSE HAD SUGGESTED, AND GAVE A VERY THOROUGH INSTRUCTION ON EVERYTHING THEY COULD CONSIDER. SHE DIDN'T JUST SAY, YOU KNOW, THE FINAL CATCH ALL.

IS THERE ANY FURTHER EXPLANATION ON THE RECORD AS TO WHAT STRATEGY WE ARE TALKING ABOUT, IN NOT HAVING THE JURY INSTRUCTED ON --

NO. NOT OTHER THAN IT WAS DISCUSSED THAT POINT, AT THE CHARGE CONFERENCE, RIGHT BEFORE THE ATTORNEYS WENT INTO THEIR CLOSING ARGUMENTS IN THE PENALTY PHASE, AND TO MY KNOWLEDGE, IT IS NOT -- IT IS -- THEY ARE DISCUSSED IN THE WRITTEN MEMORANDUM THAT THE DEFENSE FILED, SUGGESTING MITIGATING CIRCUMSTANCES, AND HE ARGUES IN THAT MEMORANDUM, THAT THE STATUTORY MENTAL MITIGATOR SHOULD BE FOUND, AND I THINK THE JUDGE, IN HER SENTENCING ORDER, MAY HAVE EVEN REFERRED TO THE FACT THAT, ALTHOUGH HE HAD STATED AT THE CHARGE CONFERENCE HE WASN'T REQUESTING THE INSTRUCTIONS, SHE WAS GOING TO ADDRESS THESE MITIGATORS, SINCE HE HAD INCLUDED THEM IN THE MEMORANDUM, SO OTHER THAN THAT, I AM NOT AWARE OF ANYWHERE ELSE IN THE RECORD WHERE THERE IS A DISCUSSION ON THAT ISSUE.

OKAY.

THE -- ALSO LOOKING AT THE EXPERT TESTIMONY, TO SUPPORT THOSE MITIGATORS, YOU DON'T HAVE, REALLY, AN EXPLANATION. YOU HAVE DR. MOSSMAN SAYING THERE WAS EXTREME DISTURBANCE AND THERE WAS IMPAIRMENT, AND HE USED THE MAGIC PHRASE, BUT HE NEVER EXPLAINS WHERE IT IS COMING FROM OR WHAT IT MEANS. HE NEVER IDENTIFIES WHAT THE DISTURBANCE IS THAT HE FOUND TO EXIST IN THIS CASE.

WHAT WAS THE TESTIMONY, CONCERNING THE INTERRELATIONSHIP REGARDING THE PREEXISTING DIABETES AND THE AMOUNT OF ALCOHOL THAT HE CONSUMED ON THAT DAY?

THE TESTIMONY FROM DR. GREER WAS, REALLY, THE ONE THAT FOCUSED ON HIS MEDICAL SITUATION. AND WHAT DR. GREER SAID WAS THE EXISTENCE OF THE DIABETES, WHICH HE HAD HAD, I BELIEVE, FOR SEVEN OR EIGHT YEARS PRIOR TO THAT.

AND THAT IS CONFIRMED.

YES. I BELIEVE IT WAS IN 1992 OR 1993, SO IT WASN'T QUITE FIVE OR SIX YEARS, BUT A NUMBER OF YEARS BEFORE THIS INCIDENT, HE HAD HAD THE DIABETES.

DO YOU AGREE THAT, IF THERE IS A CATEGORY OF MITIGATORS, THAT IF THEY ARE FOUND, THEY MUST, ALL, BE GIVEN WEIGHT?

MENTAL RETARDATION IS ONE.

I AGREE, AND I THINK THOSE ARE, PROBABLY, THE STATUTE ON OTHER MITIGATORS. I THINK THE LEGISLATURE HAS, BY IDENTIFYING THOSE AND, POSSIBLY, EVEN INCLUDING THE BACKGROUND OF STATUTORY MENTAL MITIGATORS, THE LEGISLATURE HAS SAID THESE ARE ENTITLED TO CONSIDERATION, AND WEIGHT IS A HARD THING, BECAUSE I THINK, AGAIN, AS JUSTICE WELLS WAS SAYING, IF YOU ASSIGN SOMETHING NO WEIGHT.

LET'S SAY LOW IQ UNDER TREESE. MUST THAT BE GIVEN WEIGHT? IF IT IS FOUND THAT HE HAS A LOW IQ, YOU KNOW, OUT OF THE NORM, AND THE JUDGE FINDS THAT, AND UNDER TREESE, GIVE IT NO WEIGHT AT ALL.

I THINK, UNDER TREESE, THE TRIAL JUDGE IS GIVEN THE DISCRETION TO MAKE A DETERMINATION AS TO WHETHER THIS PARTICULAR FACT, WHICH HAS BEEN FOUND TO EXIST, IN ANY WAY REDUCES THE DEFENDANT'S CULPABILITY FOR THE CRIME. AND I THINK THAT DEPENDS ON THE CRIME, ITSELF, AND THE FACT, ITSELF, AND SO I THINK IT CAN BE -- THERE CAN ALWAYS BE A POSSIBILITY THAT THIS FACT, EVEN THOUGH IT CAN EXIST, IF IT IS A LOW INTELLIGENCE, YOUR EXAMPLE, IF IT IS A CRIME THAT, REALLY, TOOK MENTAL PLANNING AND MENTAL REASONING ON THE PART OF THE DEFENDANT, THEN I CAN SEE THE JUDGE NOT GIVING THAT ANY WEIGHT, BECAUSE THE FACTS OF THE CASE SHOW THAT THE LOW INTELLIGENCE DIDN'T REDUCE THE PERSON'S CULPABILITY IN COMMITTING THE CRIME.

IS THAT WHAT WE ARE, NOW, GOING TO BE HEARING, IS THAT IN ORDER FOR IT TO BE FOUND AND GIVEN SOME WEIGHT AS A MITIGATING CIRCUMSTANCE, IT HAS TO HAVE HAD SOMETHING TO DO WITH THE CRIME, ITSELF, AND THAT IS A CONCERN? BECAUSE I HAVE --.

NO.

BECAUSE THAT WOULD BE A PROBLEM HERE. I GUESS I AM THINKING THAT, WHAT WE WERE SAYING IN TREESE IS THAT SOMETHING COULD HAPPEN, LIKE YOU COULD HAVE BEEN A DRUG ADDICT 20 YEARS AGO, AND IT DOESN'T CONTINUE UP UNTIL THE TIME OF THE CRIME, AND IT HAS, REALLY, NOTHING -- IT HAS NEVER RELATED. IT HAS NOTHING AT ALL TO DO WITH THE CHARACTER, ANYTHING AT THE TIME OF THE CRIME, WHEREAS AS JUSTICE SHAW WAS ASKING YOU, SOMEBODY, SAY THEY HAVE A FIFTH OR SIXTY IQ, NOW, THE -- A FIFTY OR SIXTY IQ, NOW, THE CRIME IS STILL AN AGGRAVATED CRIME, BUT THE QUESTION IS THE PERSON IS OF LIMITED INTELLIGENCE. IS THAT NOT, AT LEAST, TO BE FOUND AS A MITIGATING FACTOR?

I DIDN'T MEAN TO SUGGEST THAT THERE HAD TO BE A NEXUS BETWEEN THE FACT AND THE CRIME, ITSELF, BUT I THINK THAT IS SOMETHING THE TRIAL JUDGE -- I THINK THAT IS A FACTUAL QUESTION FOR THE TRIAL JUDGE, AND I THINK THAT IS SOMETHING THE TRIAL JUDGE CAN

CONSIDER, IN DETERMINING HOW MUCH WEIGHT OR HOW LITTLE WEIGHT TO GIVE ANY MITIGATOR.

WELL, HERE, LET'S GO BACK TO THIS DIABETES. OBVIOUSLY -- SAY HE HAD A -- TROUBLE WITH HIS EYESIGHT. SO THAT IS NOT -- WE GO WHAT DOES THAT HAVE TO DO WITH ANYTHING. NOW, IT IS DIABETES. THE PROBLEM I AM HAVING, AND I JUST WANT TO UNDERSTAND, AGAIN, THE TESTIMONY AS TO THE DIABETES WASN'T JUST THAT HE HAD THIS MEDICAL CONDITION IN THE ABSTRACT. WHAT WAS THE ATTEMPT TO RELATE THE DIABETES AND THE ALCOHOL TO THE CRIME, AND HOW WAS THAT TREATED BY THE TRIAL JUDGE?

WHAT DR. GREER SAID WAS THE FACT THAT HE HAD NOT ONLY DIABETES BUT HE HAD HYPERTENSION. HE HAD HIGH BLOOD PRESSURE YOUR. HE HAD THIS ALCOHOL USE, AND I THINK GREER WAS -- DIDN'T WANT TO SAY IT WAS -- HE SAID IT WAS ALCOHOL DEPENDENCE BUT NOT ALCOHOL ABUSE. I MIGHT BE GETTING THE TERMS CONFUSED, BUT, ANYWAY, SEVERE ALCOHOL USE, AND, ALSO, THE LOW INTELLIGENCE. HE SAID THAT THOSE FOUR FACTORS, TOGETHER, ARE POSSIBLE THAT THEY REACH THEIR EXTREMES ON THIS AFTERNOON AND CREATED A ALCOHOLIC BLACKOUT. DR. GREER COULD NOT SAY THAT THAT IS WHAT HAPPENED. HE COULD NOT SAY THAT THIS WAS AN ALCOHOLIC BLACKOUT. HE JISD THOSE FOUR FACTORS, TOGETHER, MIGHT BE AN EXPLANATION, BECAUSE IN THE RIGHT COMBINATION, AT THE RIGHT TIME, THEY COULD CREATE THIS ALCOHOLIC BLACKOUT.

IS THAT WHAT THE DEFENSE ARGUED TO THE JURY, THAT THAT IS WHY THIS CRIME OCCURRED?

THE DEFENSE TALKED ABOUT HIS HISTORY OF ALCOHOLISM, AND I DON'T BELIEVE THEY ARGUED THAT SO MUCH IN ISOLATION. THEY ARGUED A LOT OF THE EXPERT TESTIMONY THAT HAD BEEN PRESENTED, AND THEY DID ARGUE THAT IT WAS AN ALCOHOLIC BLACKOUT, AND THE STATE HAD PRESENTED AN EXPERT TO SAY IT WASN'T, AND THEY SAID THAT -- THEY SPOKE AGAINST THAT EXPERT AND SAID HE HAD NOT DONE ENOUGH RESEARCH AND HIS CREDENTIALS WERE NOT AS IMPRESSIVE AND THINGS LIKE THAT, TO TRY AND REFUTE THAT.

SO YOU WOULD SAY, THOUGH, THAT THE JUDGE, IN LISTENING TO ALL OF THIS, HAD THE ABILITY TO SAY THAT SAY THAT THE DIABETES -- TO SAY THAT THE DIABETES HAD NOTHING DO WITH THIS CRIME, BECAUSE SHE REJECTED THIS IDEA THAT THE CRIME WAS A RESULT OF AN ALCOHOLIC BLACKOUT.

YES, SHE DID.

AND THEREFORE, IF IT DIDN'T HAVE DIABETES IN THE ABSTRACT, IT WOULD HAVE NOTHING TO DO WITH MITIGATING A CRIME, UNLESS -- SOMETHING LIKE DIABETES, YOU COULD RELATE TO THE CRIME, ITSELF. CORRECT?

-- I MEAN IN THIS CASE. WHAT ELSE WOULD DIABETES HAVE TO DO WITH MITIGATING A MURDER.

YES.

WHAT ABOUT THE MENTAL AGE OF 14? HOW DID THE JUDGE TREAT THAT?

WHAT THE JUDGE DID WITH THAT IS SHE GAVE WEIGHT TO THE STATUTORY MITIGATOR OF AGE, AND SHE DID THAT, BASED NOT ONLY -- NOT ON HIS PHYSICAL AGE OF 37. SHE DID THAT BASED ON TESTIMONY THAT HIS EMOTIONAL DEVELOPMENTAL AGE WAS MUCH LOWER THAN THAT, AND SO SHE DID GIVE WEIGHT TO THAT STATUTORY MITIGATOR, AND THEREFORE SHE WEIGHED -- I MEAN SHE, LATER, REJECTED THE NONSTATUTORY MITIGATOR, BUT SHE HAD PREVIOUSLY WEIGHED IT AS THE STATUTORY MITIGATOR OF AIMING, SO SHE DID GIVE WEIGHT TO THAT. SHE JUST DIDN'T DOUBLE THE WEIGHT, BY TREATING IT, BOTH, AS A STATUTORY AND A NONSTATUTORY MITIGATOR. SHE DID NOT REJECT THE FACT THAT THAT IS WHAT DR. MOSSMAN

SAID HIS AGE WAS, ALTHOUGH THERE WAS CONFLICTING TESTIMONY ABOUT WHAT, EXACTLY, HIS IQ WAS, AND THEY TALKED -- I THINK EVERYBODY AGREED IT WAS BELOW AVERAGE IQ, BUT THEY TALKED THAT THERE WAS SOME DIFFICULTY -- ALL OF THE EXPERTS RECOGNIZED THERE WAS SOME DIFFICULTY GETTING A PROPER IQ, BECAUSE OF THE FACT THAT HE HAD NOT ATTENDED SCHOOL FREQUENTLY AS A CHILD, THAT HIS FATHER FREQUENTLY, IF HE DIDN'T WANT TO GO TO SCHOOL, HIS FATHER JUST LET HIM COME TO WORK WITH THE DAD, AND THERE WERE MANY DAYS THAT HE DIDN'T GO TO SCHOOL, AND ALL OF THE EXPERTS FELT LIKE THIS HAD AN IMPACT ON HIS DOING POORLYLY IN THE SCHOOL RECORDS, THE INTELLIGENCE TEST AT SCHOOL, AND, ALSO, IN THE LATER YEARS, BECAUSE WHEN HE HAD BEEN IN JAIL, THEY SAW A LOT OF IMPROVEMENT IN HIS SCORES. THEY FELT LIKE, BECAUSE HE WAS MAKING THE EFFORT, SO IT IS NOT NECESSARILY WHAT HIS CAPABILITIES WERE BUT IT WAS, ALSO, JUST LACK OF INFORMATION, FROM NOT HAVING BEEN IN SCHOOL.

WHAT EVIDENCE WAS THERE THAT HE HAD A MENTAL AGE OF 14?

DR. MOSSMAN SAID HE HAD A MENTAL AGE OF 14. HE DOESN'T EXPLAIN IT. HE DOESN'T, REALLY, PROVIDE SUPPORT FOR A LOT OF HIS TESTIMONY. IN FACT, HE TESTIFIED THAT HE HAD BEEN ABUSED AND NEGLECTED AS A CHILD, AND THERE WAS A GREAT DEAL OF EVIDENCE THAT HE HAD NOT BEEN, AND THE DEFENSE COUNSEL, EVEN IN THEIR CLOSING ARGUMENT, TESTIFIED THAT HE WAS LOVED BY HIS FATHER AND MAYBE HIS FATHER WASN'T RESPONSIBLE BY GETTING HIM TO SCHOOL BUT HE WAS NOT ABUSED, AND SO A LOT OF -- I THINK THAT IS WHY THE JUDGE DISCREDITED A LOT OF DR. MOSSMAN'S TESTIMONY, BECAUSE IT WAS INCONSISTENT WITH MUCH OF THE OTHER EVIDENCE THAT WAS PRESENTED, THROUGH THE OTHER DEFENSE WITNESSES.

WHEN WE LOOK AT THE ISSUE OF CCP FOR A MOMENT, AND WHY DO YOU THINK THAT THE STATE TAKES THE POSITION THAT -- WELL, DO YOU THINK THERE IS A HEIGHTENED PREMEDITATION THAT IS NEEDED --

YES.

-- AND IF SO, HOW DO YOU RECOLLECT ONE SIL THAT WITH THE FACT THAT THIS IS -- RECONCILE THAT WITH THE FACT THAT THIS IS NO MORE THAN PREMEDITATION, A SINGLE BOLT.22 WOULD NOT BE THE WEAPON OF CHOICE, IF YOU WERE PLANNING PUTTING SOME THOUGHT AHEAD OF TIME, AS TO COMMITTING THIS TYPE OF HOMICIDE. SO IT ARGUABLY IS SOMETHING THAT GOT OUT OF HAND, AND AS DEFENSE COUNSEL SUGGESTED, SO HOW DO YOU RECOLLECT ONE SIL THOSE?

I THINK THE EVIDENCE REFUTES THAT THIS IT IS SOMETHING THAT GOT -- THAT IT IS SOMETHING THAT GOT OUT OF HAND. THE RIFLE, OF COURSE, WAS NOT THE ONLY WEAPON THAT HE HAD. HE, ALSO, APPARENTLY HAD AN AX-LIKE WEAPON, WHICH WAS NEVER DISCOVERED, AND HE USED HIS POCKETKNIFE TO CUT GREG'S THROAT, AND SO HE DID HAVE THE OTHER WEAPONS AVAILABLE AND, CERTAINLY, HE USED THE OTHER WEAPONS ON BOTH VICTIMS, BUT I THINK IF YOU LOOK AT THE SEQUENCE OF HOW THIS OCCURRED, THE FACT THAT IT IS APPARENT THAT GREG WAS SHOT FIRST, BECAUSE THE SHOT TO GREG WAS TO THE BACK OF HIS HEAD. HE -- THERE WAS A CAMERA FOUND IN HIS TRUCK WITH HIS BLOOD ON IT, SUGGESTING THAT HE HAD -- HE WAS ATTACKED WHILE HE WAS HOLDING THE CAMERA OR HAD THE CAMERA. HE RAN FROM THAT TIME, WE KNOW THAT AT SOME POINT HE RAN DURING THE ATTACK, FROM THE TRUCK TOWARDS THE FIELD, BECAUSE HE WAS CAUGHT UP IN A FISHING LINE. THERE WAS A FISHING POLE STUCK OFF THE BACK OF THE TRUCK, AND THE LINE FROM THE FISHING POLE WAS CAUGHT UNDERNEATH HIM, WHERE HE WAS LATER FOUND IN THE FIELD, SO THAT TESTIMONY ESTABLISHES THAT HE WAS SHOT WHILE IT WAS COMPLETELY UNEXPECTED. HE WAS SHOT FROM BEHIND. IT WAS A SURPRISE ATTACK. HE WAS NOT PREPARED FOR IT. THERE WAS NO THIS AN ARGUMENT OR -- THERE WAS NOT AN ARGUMENT OR SOMETHING, A FIGHT THAT ESCALATE. THERE WASN'T A CONFRONTATION, BECAUSE HE HAD HIS BACK TO THE DEFENDANT WHEN HE

WAS SHOT, AND THAT IS WHAT TRIGGERED THE WHOLE THING. HE RAN. HE WAS CHASED DOWN. HE WAS ATTACKED WITH THE AX. WE, ALSO, KNOW SIMILARLY WITH THE ATTACK ON KIM, IT STARTED AND THEN WE KNOW AT SOME POINT IT WAS STARTED INSIDE THE TRUCK. IT WAS FOUND ON THE CAR SEAT AND THE BABY'S SEAT AND ON THE CLOTHES, AND YET HER BODY WAS FOUND OUTSIDE THE TRUCK. SHE HAD, PROBABLY, BEEN BEATEN. SHE HAD BRUISES ON HER FACE AND WAS TRYING TO GET THE BABY INTO THE CAR SEAT AND, PROBABLY, ESCAPE, BUT SHE WAS CAUGHT AND THEN, AGAIN, YOU HAD THE AX AND THE GUN SHOT WOUND WAS TO THE ROOF OF HER MOUTH, BUT SHE WAS RAPED WHILE SHE WAS ALIVE, SO YOU HAVE THE PROLONGED NATURE OF HER ATTACK.

WHAT IS THE STATE'S THEORY, RELATIVE TO THE MOTIVATION HERE? WHY DID THIS HAPPEN?

THIS HAPPENED FOR THE RAPE. THE THEORY IS THAT THE MOTIVE WAS THE RAPE OF KIM, AND SINCE THE ATTACK STARTED ON GREG AND GREG WAS IN NO WAY COMING TO KIM'S ASSISTANCE, BECAUSE, AGAIN, HE WAS SHOT IN THE BACK OF THE HEAD. HE WASN'T COMING TOWARDS HER, THAT THAT WAS DONE FIRST AND DONE IN ORDER TO ATTACK KIM. I THINK, IF YOU LOOK AT THE WALLS CASE, IT IS SIMILAR, WHEN YOU ARE FINDING THE UPHOLDING OF CCP IN WALLS. THAT WAS THE CASE WHERE THE DEFENDANT WENT INTO A MOBILE HOME AND ATTACKED, ACTUALLY WOKE UP THE OCCUPANTS OF THE HOME AND KILLED THE HUSBAND AND THEN KILLED THE WIFE, AND I THINK IT IS SIMILAR, WHEN YOU TALK ABOUT CCP IN THAT CASE, AND I THINK YOU EVEN TALK ABOUT HOW, TYPICALLY, THE COLD ELEMENT IS FOUND, UNLESS THERE IS SOME HEAT OF PASSION TYPE OF FACTUAL SITUATION, WHICH WE CERTAINLY DON'T HAVE HERE. WE HAVE THE DEFENSE SAYING THIS WAS A FRENZIED ATTACK, BUT THE QUESTION WAS ASKED WHERE IS THE EVIDENCE OF THE FRENZY, AND THE ANSWER IS THE DEFENSE COUNSEL ARGUED THERE WAS A FRENZY. THERE, REALLY, IS NO EVIDENCE THAT THERE WAS A FRENZY HERE. THE EVIDENCE, TO THE CONTRARY, SUGGESTS THAT IT WAS VERY COLD AND VERY CALCULATED.

IS IT THE STATE'S THEORY THAT HE ACTUALLY WENT OUT TO THIS AREA, IN ORDER TO KILL AND RAPE THE -- KILL BOTH OF THEM AND RAPE THIS PERSON?

THAT WAS THE STATE'S THEORY, AND THAT WAS WHAT THE TRIAL JUDGE FOUND, BUT I THINK, EVEN IF --

I AM HAVING TROUBLE -- YOU HAVE A PERSON WHO IS 3838 YEARS OF AGE. HAS HAD NO HOUY- WHO IS 38 YEARS OF AGE. HAS HAD NO HISTORY OF CRIMINAL ACTIVITY, HAS ALL OF THE CHARACTER EVIDENCE IS CONTRARY. HE -- AND THE OTHER THING IS IT DOESN'T JIVE. HE, THEN, COMES BACK TO WORK THE NEXT DAY.

WELL, EVEN BEFORE THEN, HE HAD SEEN, HE HAD STOPPED ON THE SIDE OF THE ROAD AND WAS DISPOSING OF THE WEAPONS AND HAD SEEN PEOPLE, AND HE IS EXPLAINING WHERE THE BLOOD CAME FROM.

THAT CERTAINLY REFUTES THE ALCOHOLIC -- THE BLACKOUT ISSUE, BUT I GUESS, GOING BACK TO THIS HEIGHTENED PREMEDITATION, YOU KNOW, THAT CERTAINLY THERE IS ENOUGH EVIDENCE FOR PREMEDITATION, BUT THIS HEIGHTENED PREMEDITATION IS --

I THINK YOU CAN -- EVEN IF HIS PREMEDITATION DID NOT ARISE UNTIL THEY WERE ALREADY AT THE SCENE, WHICH, AGAIN, THE TRIAL JUDGE FOUND INFERENCES FROM THE RECORD THAT HE HAD INJECTED HIMSELF INTO THIS FAMILY OUTING, BECAUSE THE PLANS HAD BEEN MADE DID NOT INCLUDE HIM ORIGINALLY, AND FOR THE SECURING THE WEAPON AND THE BULLETS AND THE THINGS THAT SHE CITED, BUT EVEN IF YOU HAVE CONCERNS ABOUT THE INFERENCES THAT SHE DREW TO SUPPORT CCP BEFOREHAND, ONCE HE GETS TO THE SCENE, THE COLD AND CALCULATED NATURE OF HIS ACTIONS AND THE WAY THAT THIS WAS A PROLONGED ATTACK, I THINK, CLEARLY ESTABLISHES THAT IT WAS HEIGHTENED PREMEDITATION, AND IN CASES, I BELIEVE, THE KNIGHT CASE IS ANOTHER CASE WHERE THIS COURT SAID KNIGHT INVOLVED A

KIDNAPPING. HE KIDNAPPED THE HUSBAND AND HAD HIM GO TO THE BANK AND GET THE MONEY AND GOT THE WIFE AND DROVE THEM OUT TO THE SCENE, AND THEY WERE, BOTH, SHOT IN THE HEAD, AND WHAT THIS COURT SAID WAS, EVEN IF HE DIDN'T INTEND TO KILL THEM WHEN THE KIDNAPPING STARTED, BY THE TIME IT WAS OVER, HE HAD HAD THAT HEIGHTENED PREMEDITATION THAT IS NECESSARY FOR THIS FACTOR, AND THIS COURT HAS, ALSO, SAID THAT, WHERE THEY HAVE HAD THE OPPORTUNITY TO LEAVE THE SCENE -- IF HIS INTENTION WAS JUST TO RAPE HER AND LEAVE THE SCENE, HE COULD HAVE DONE THAT, BUT HE WENT FURTHER THAN THAT, SO I THINK THAT, ALL, SUPPORTS THE HEIGHTENED PREMEDITATION THAT IS NECESSARY FOR THIS COURT TO UPHOLD CCP. AND, AGAIN, I THINK, ALSO, HIS ACTIONS AFTER THE FACT, IN DISPOSING OF THE WEAPONS, GOES TO THE COLDNESS AND THE CALMNESS OF WHAT HE IS DOING.

WITHOUT CCP, IS THIS, STILL, A DEATH CASE?

YES. THERE ARE STILL THREE STRONG AGGRAVATING FACTORS. THESE WERE VERY BRUTAL MURDERS. THERE WAS THE RAPE. THERE WAS, YOU KNOW, THE FACT THAT IT IS A DOUBLE MURDER, AND, REALLY, THE MITIGATION JUST IS NOT SIGNIFICANT. HE HAD BELOW AVERAGE ICHT Q, DEPENDING ON WHICH TEST YOU LOOK AT. IT WAS ANYWHERE FROM, I THINK THE LOWEST -- BELOW AVERAGE IQ. DEPENDING ON WHICH TEST YOU LOOK AT, IT WAS RECORDED AT 78 AND THE HIGHEST WAS 104, ON A PARTICULAR SUBTEST, SO THAT WAS JUST NOT THAT PERSUASIVE. HE HAD BEEN DRINKING. THIS WAS THE SAME DRINKING PATTERN THAT HE HAD HAD SINCE HE WAS A TEENAGER, SO HOW MUCH CAN THAT, REALLY, OFFER FOR MITIGATION, FOR WHY THIS HAPPENED. IT IS A VERY AGGRAVATED CRIME, AND THERE JUST IS NO SIGNIFICANT MITIGATION. I THINK THE STRONGEST IN WHICH THE COURT GAVE GREAT WEIGHT BELOW THE STATUTORY MITIGATOR OF NO CRIMINAL HISTORY, BUT GIVEN THE FACT OF THIS CASE, IT IS, STILL, CLEARLY A DEATH CASE, EVEN WITHOUT CCP.

YOU HAVE HAC.

RIGHT. DURING THE COURSE AFTER SEXUAL BATTERY.

YOU HAVE THE MURDERS AND THE CHILD ABUSE.

THE CHILD ABUSE WAS NOT USED AS AN AGGRAVATING FACTOR. THAT WAS NOT USED, IN ANY WAY, TO AGGRAVATE THE SENTENCES. THE SENTENCES WERE BASED ON THE RAPE THAT OCCURRED AND, ALSO, THE PRIOR VIOLENT FELONY CONVICTIONS FOR THE CONTEMPORANEOUS MURDERS, SO THAT IS WHERE THE OTHER --

THE JURY WAS TOLD THEY COULDN'T CONSIDER THAT IN AGGRAVATION?

NO. I DON'T BELIEVE IT WAS ADDRESSED, ONE WAY OR THE OTHER, BUT THERE IS NO REASON THAT IT WOULD BE CONSIDERED. IT WASN'T A PRIOR VIOLENT FELONY, THE CHILD ABUSE, SO IT CERTAINLY WASN'T OFFERED TO BE THAT TO THE JURY. FOR ALL THESE REASONS, I WOULD ASK THE COURT TO AFFIRM THE JUDGMENT AND SENTENCES IMPOSED BELOW. THANK YOU.

THANK YOU. REBUTTAL.

THERE IS JUST A FEW BRIEF POINTS I WANT TO MAKE. WITH REGARD TO THE QUESTION ABOUT HOW DR. MOSSMAN ARRIVED AT THE MEBLTAL AGE OF THE -- MENTAL AGE OF THE DEFENDANT, THERE WASN'T EXTENSIVE TESTIMONY REGARDING THAT. THE TESTIMONY WAS THAT, FROM HIS TESTING, DR. MOSS MAN INTERVIEWED AND TESTED MR. FORD, AND FROM THE TESTING THAT DR. MOSS MAN DID, HE ASCERTAINED THAT MR. FORD'S MENTAL INTELLECTUAL AGE WAS BETWEEN 11 AND 14, WHILE HIS EMOTIONAL DEVELOPMENTAL AGE WAS ABOUT NINE, SO HE DIDN'T GO INTO DETAIL AS TO WHAT TESTS HE ADMINISTERED, BUT IT WAS FROM HIS TESTING THAT HE ARRIVED AT THE CONCLUSIONS REGARDING MR. FORD'S INTELLECTUAL AGE. GOING BACK TO TREESE JUST FOR A MOMENT, JUSTICE PARIENTE REFERRED TO THE FACT THAT, THERE, THE EXAMPLE YOU

GAVE WAS IF SOMEBODY WAS DRAWING ADDICT 20 YEARS AGO, THEN -- A DRUG ADDICT 20 YEARS AGO, THEN THAT COULD BE A REASON FOR SOMEBODY REJECTING DRUG ADDICTION AS A MITIGATING CIRCUMSTANCE, THE REMOTENESS FACTOR, AND THAT IS WHAT I AM TALKING ABOUT, THAT THERE NEEDS TO BE SOME REASON, IN A SPECIFIC CASE, THIS OR ANOTHER FACTOR, THAT WOULD GIVE THE COURT NO WEIGHT TO THE MITIGATING FACTOR. JUST ON THE ALCOHOL USE, ON THE DAY IN QUESTION, JUST FOR A MOMENT, ALTHOUGH MR. FORD DID HAVE A HISTORY OF DRINKING ALCOHOLIC BEVERAGES RATHER HEAVILY, I URGE THE COURT TO TAKE A LOOK AT THE SPECIFIC TESTIMONY REGARDING HIS DRINKING ON THAT DAY. THE TESTIMONY FROM FRANCISCO GUT RES, FOR EXAMPLE -- GUTTIERREZ, FOR EXAMPLE, THAT JIM-BOW, AS HE CALLED HIM, WAS DRUNK THIS AFTERNOON, THE TESTIMONY FROM JOSE ZIZMO, PARTICULARLY, THAT HE HAD SEEN MR. FORD DRINKING SOME BEERS AFTER WORK IN THE PAST, BUT IT WAS SIGNIFICANT ON THAT SUNDAY, SO THERE WAS SOMETHING SIGNIFICANT ABOUT THAT SUNDAY, EITHER HIS HEAVY DRINKING, WHICH WAS UNUSUAL, AND THAT, PERHAPS, OR THE COMBINATION OF THE HEAVY DRINKING, PERHAPS, AND SOMETHING ELSE THAT LED TO SOMETHING DIFFERENT AND LED TO THESE HOMICIDES. THANK YOU.

THANK YOU VERY MUCH, COUNSEL.