# State of Florida v. Lawrence Francis Lewis

MR. CHIEF JUSTICE

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS STATE VERSUS LEWIS. MS. CAMPBELL.

GOOD MORNING. LESLIE CAMPBELL WITH THE ATTORNEY GENERAL'S OFFICE. MAY IT PLEASE THE COURT. THE TRIAL COURT IN THIS CASE REVERSED THE SENTENCE AND ORDERED A NEW PENALTY PHASE IN THIS CASE. THE TRIAL COURT ERRED IN THREE RESPECTS, AND THIS COURT SHOULD REVERSE THAT FINDING AND SEND IT BACK DOWN TO THE TRIAL COURT WITH DIRECTION TO REINSTATE THE TRIAL COURT'S ORIGINAL ORDER THAT WAS ENTERED, AFTER AN EVIDENCIARY HEARING FINDING THAT THERE WAS NO PREJUDICE. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL RENDERED DURING THE PREPARATION OF THE PENALTY PHASE FOR MR. LEWIS'S TRIAL. IN THE INITIAL COURT ORDER, THE TRIAL COURT ORDER, THE COURT FOUND AND WENT THROUGH ALL OF THE EVIDENCE THAT WAS PRESENTED WITH RESPECT TO MITIGATION AND FOUND, AGAIN, NO PREJUDICE. BASED ON THE FACT THAT THE NEW EVIDENCE WOULD NOT HAVE CHANGED THE VERDICT OR CHANGED THE SENTENCE, AS IT DID NOT OVERCOME THE THREE AGGRAVATORS IN THIS CASE.

GIVE US A LITTLE TIGHTER FRANK WORK HERE. WE ARE TALKING ABOUT THIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT THE COURT REVERSED ITSELF ON?

YES. INEFFECTIVE ASSISTANCE, 3.850.

TELL US WHAT THE CLAIM WAS THAT THE JUDGE DENIED INITIALLY, YOU KNOW, WHAT THE SUBSTANCE OF IT WAS AND WHAT THE EVIDENCE WAS ABOUT IT AND THEN SO WE HAVE A LITTLE BETTER WAY TO BREAK INTO YOUR ISSUES.

THE CLAIM THAT WAS PRESENTED WAS THAT MR. LEWIS'S COUNSEL RENDERED INEFFECTIVE ASSISTANCE, BECAUSE HE DID NOT PROPERLY PREPARE FOR THE PENALTY PHASE AND THEREFORE DID NOT ADVISE HIS CLIENT OF THE POSSIBILITY OF MITIGATION OR PROPERLY ADVISE HIS CLIENT ON HOW TO PRESENT A PENALTY PHASE, AND THEREFORE HIS CLIENT WAIVED MITIGATION. THE FACTS SURROUNDING THAT PARTICULAR FINDING, IN THE INITIAL ORDER, FOUND THAT THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE ANY NEW EVIDENCE THAT WOULD HAVE COME OUT WOULD NOT HAVE CHANGED THE VERDICT. THE EVIDENCE THAT DID COME OUT AT THE EVIDENTIARY HEARING WAS THAT MR. LEWIS TOLD HIS COUNSEL, TOLD HIS COUNSEL AND CO-COUNSEL, THAT HE DID NOT WANT ANY MITIGATION PUT ON, BECAUSE HE KNEW IN A CAPITAL CASE, IF HE WAS GIVEN THE DEATH PENALTY AND HE DIDN'T PUT ON ANY MITIGATION, HE WOULD GET A NEW TRIAL. THAT WAS HIS ULTIMATE GOAL. AND IT SEEMS TO HAVE WORKED HERE. HE, ALSO, WAS ADAMANT NOT TO HAVE HIS FAMILY CONTACTED. HOWEVER --

WERE THESE FACTS FOUND IN BOTH OF THEM, THE INITIAL ORDER AND THE SUBSEQUENT ORDER HAD THE SAME FACTS?

THE SUBSEQUENT ORDER MERELY SAID THAT ETON, A CASE THAT THE TRIAL -- DETON, A CASE THAT THE TRIAL COURT HAD INITIALLY, DETON NOW APPLIED.

BUT THE FACTS DID NOT CHANGE. ANOTHER FACTS WEREN'T CHANGED. THERE WAS NO FINDING OF PREJUDICE IN THE SECOND. DETON APPLIED AND BECAUSE DETON APPLIED, COUNSEL HAD 30 DAYS TO INVESTIGATE. BETWEEN THE START OF THE 30 DAYS AND THE PENALTY PHASE WAS INSUFFICIENT TIME.

THE 30 DAYS ALMOST AN INSUFFICIENT TIME NOT OF LAW, AND THE KNOWINGLY WAIVED IN THE NEXT SENTENCE, IF WE LOOK AT THAT ORDER.

YES, IT WAS A FIRST VIOLATION AND THE STATE WOULD SUBMIT THAT DEET ONE DOES NOT -- THAT DEETON DOES NOT APPLY.

BUT IF WE LEAVE IT AT THAT, WHAT IS WITH REGARD TO THE NEXT FINDING THOUGH? ANOTHER TRIAL COURT TOTALLY MADE A COMPLETE ERROR OF FACT. BASED ON, NUMBER ONE, MR. LEWIS'S DISCUSSION WITH HIS COUNSEL, AS TO WHY HE DIDN'T WANT MITIGATION PUT ON. AGAIN, HE WANTED A NEW TRIAL, AND IN ORDER TO GET A NEW TRIAL, DON'T PUT ON MITIGATION. LET ME GET SENTENCED TO DEATH. ALSO THAT HE DIDN'T WANT FAMILY MEMBERS CONTACTED.

LET ME ASK YOU, DOES YOUR ARGUMENT BREAKDOWN TO THIS, THAT ONCE A DEFENDANT SAYS THAT,, COUNSEL'S OBLIGATION IS OVER?

NO, NOT AT ALL, AND CUNSEL'S OBLIGATION DID NOT STOP HERE AND COUNSEL DID NOT STOP HEE. CNSEL ATTEMPTED TO CONVINCE NOT ONLY MR. LEWIS BUT HIS FAMIY,TO ASSIST.

HOW DID HE DO THAT?

HE TALKED TO MR. LEWIS, EXPLAINED TH FAMILY MEMBERS COUD HELP, THAT AMENTAL HEALTH EXPERT COULD ELP. THEN COUNSEL OBTAINED A MENTAL HEALTH EXPERT. FINALLY CONVINCED MR. LEWIS TO MEET WITH THAT DOCTOR. THAT DOCTOR MET WITH MR. LEWIS. MR. LEWIS WAS COMPLETELY UNCOOPERATIVE. IT WAS ONLY ON THE DAY OF TRIAL THAT HE, THAT MR. LEWIS EVENTUALLY AGREED TO TALK TO THE MENTAL HEALTH EXPERT AND DISCUSSED QUITE A BIT WITH HIM, GAVE HIM QUITE A BIT, ENDED UP GIVING HIM QUITE A BIT OF FAMILY HISTORY AND, ALSO, THAT HE HAD BEEN, THAT MR. LEWIS HAD A SKULL FRACTURE AT THE AGE OF TWO, AND THE DOCTOR WAS READY, WILLING AND ABLE TO TESTIFY TO AN I HAD I DON'T SIN KRAT I CAN OR -- AN I.D. IOSY NCR ATIC OR ANAL ERGE I CAN REACTION TO ALCOHOL, AND -- OR AAL ERGE I CAN REACTION TO ALCOHOL -- OR AN ALLERGIC REACTION TO ALCOHOL, AND THE COURT SAID ARE YOU AWARE THAT YOUR FAMILY OR FRIENDS OR DOCTOR COULD TESTIFY FOR YOU, AND MR. LEWIS SAID HE DID NOT WANT ANYONE ELSE TO TESTIFY. COUNSEL TALKED WITH DEFENDANT'S MOTHER AND EVENTUALLY GOT IN CONTACT WITH DEFENDANT'S FATHER. DURING THE COURSE OF THE GUILT PHASE, COUNSEL WAS TRYING TO FIND THE DEFENDANT'S BIOLOGICAL FATHER. HE WAS IN CONTACT WITH THE MOTHER QUITE REGULARLY, BUT HE WANTED TO FIND THE BIOLOGICAL FATHER. BOTH THE MOTHER AND MR. LEWIS SAID WE DON'T KNOW WHERE HE IS. WE HAVE NO CONTACT WITH HIM. HOWEVER, MIRACULOUSLY, THE FATHER SHOWS UP JUST AFTER THE GUILT PHASE, WHEN MR. LEWIS, WHEN COUNSEL SPOKE TO THE DEFENDANT'S FATHER, HE ENDED UP, THE FATHER SAID THAT, NO, I CAN'T HELP MELF -- I CAN'T HELP MY SON. I AM CONVICTED FELON. I WOULD BE OF NO HELP. I WON'T TALK TO ANYONE.

BUT THE TRIAL COURT SAID THT IF TERE IS SIGNICANT MITIGATION THAT HS NOT COME IN, ISN'T THIS A DISCRETNARY CLL WITH THE TRIAL COURT HEN SAYING THIS IS MITIGAION TAT SHOULD BE IN EVIDENCE. ESHLD T BE SENTENCED TO DEAT WITHOUT THIS MITIGATION BEING CONSIDERED. IS THAT A DISCRETIONARY CALL FOR THE TRIAL JUDGE?

AS FAR AS THE FACTS ARE CONCERNED, YES, YOU GIVE DEFERENCE TO THE FACTS. HOWEVER, IF IT IS A QUESTION OF LAW, YOU HAVE DEPHILOSOPHY DEPHILOSOPHY-REVIEW, BUT -- YOU HAVE DE NOVO REVIEW, HOWEVER I WOULD SUGGEST TO THIS COURT THAT THERE HAS BEEN NO

FINDING. THAT WITHOUT THAT INFORMATION, THAT THERE WOULD NOT HAVE BEEN A SENTENCE OF DEATH. IN FACT JUST OPPOSITE WAS FOUND.

WAT YOU ARE SAYING IN THE FIRST SENTENCE, THE FIRST ORDER THE JUDGE ACTUALLY FINDS THAT, GOES TO THE SECOND PRONG AND SAYS THE COURT IS NOT PERSUADED THAT SUCH MITIGATION EVIDENCE, IF DEVELOPED AND PRESENTED AT THE PENALTY PHASE, WOULD HAVE AFFECTED THE JURY'S RECOMMENDATION OR THE SENTENCE IMPOSEED BY THE TRIAL JUDGE.

IN THREE SEPARATE SPOTS.

AND THEN NEVER, IN THE SECOND ORDER, ADDRESSES THE SECOND PRONG.

NEVER ADDRESSES THE SECOND PRONG. MERELY SAYS THE LAW IS IN A STATE OF FLUX. I NOW BELIEVE DETON APPLIES AND DETON SAYS HE DIDN'T HAVE SUFFICIENT TIME, BUT THE STATE WOULD SUBMIT THAT THAT SHOULD NOT BE THE CASE. THIRTY DAYS COULD BE MORE THAN SUFFICIENT TIME, ESPECIALLY IN THIS CASE, AND FOR TWO REASONS. ONE, IF THE DEFENANT WOULD NOT GIVE INFORMATION, WOULD NEVER GIVE INFORMATION, THEN NO MATTER HOW MUCH TIME WAS RENDERED, THE CONCLUSION THAT THIS TRIAL COURT FOUND WOULD BE THAT HE DIDN'T HAVE SUFFICIENT TIME, SO WHETHER IT BE A DAY, A MONTH, THREE YEARS, OR IN THIS CASE EIGHT EARS, TRIAL COUNSEL WOULD HAVE BEEN INEFFECTIVE, BECAUSE HE DIDN'T HAVE SUFFICIENT TIME.

SO YOU WOULDN'T WANT ANY BRIGHT-LINE RULE TO SAY 30 DAYS IS INADEQUATE, BUT THIS IS A CASE, IF I AM CRAWLING -- IF I AM RECALLING CORRECTLY FROM THE FACTS, THAT THERE LITERALLY WAS HUNDREDS OF HOURS SPENT IN THE GUILT PHASE AND A TOTAL OF 18 HOURS SPENT IN PREPARATION FOR THE PENALTY PHASE?

THAT MIGHT BE. HOWEVER --

THE DR. KRAUSS ADVISED HIM HE NEEDED ADDITIONAL RECORDS. HE WAS NEVER SUPPLIED TH ANY RECORDS, THAT THERE ARE JUST COPIOUS RECORDS ABOUT A HISTORY CONCERNING THIS PARTICULAR DEFENDANT THAT WERE NEVER PRODUCED OR INVESTIGATED.

I WOULD TAKE EXCEPTION WITH THAT IN TWO RESPECTS. NUMBER ONE, THE DOCTOR SAID THAT HE FINALLY GOT COOPERATION FROM THE DEFENDANT, ON THE DAY OF TRIAL. MET WITH HIM FOR FOUR HOURS. DAY OF TRIAL. DAY OF THE PENALTY PHASE. AND WHAT HE TOLD, WHAT HE SAID WAS HE WOULD HAVE LIKED MORE TIME. SURE, HE WOULD HAVE LIKED THE RECORDS, BUT HE COULD NOT GET THE RECORDS AT THAT POINT, BECAUSE THE DEFENDANT ONLY COOPERATED AT THAT TIME. BUT WHAT HE WAS WILLING TO DO WAS TESTIFY AS TO AN ALCOHOL LARGE AND, ALSO, -- AN ALCOHOL LARGE, AND ALSO -- AN ALCOHOLAL ERGE I, AND ALSO WHAT -- AN ALCOHOL ALLERGY AND ALSO THE FAMILY, AS FAR AS THE DEFENDANT WAS CONCERNED. WHAT STOPPED EVERYTHING, AND IF YOU LOOK AT WHAT WAS AVAILABLE TO BE GIVEN TO THE JURY DURING THE PENALTY PHASE AND WHAT CAME OUT NOW, THERE IS REALLY LITTLE DIFFERENCE. THE ORIGINAL DOCTOR WOULD HAVE, AGAIN, SAID THERE IS AN ALCOHOL PROBLEM, AND THERE IS A DYSFUNCTIONAL FAMILY, AND HE WOULD HAVE LISTED THE THINGS. THE MOTHER IS, HAS A MENTAL PROBLEM. THERE WAS FOSTER CARE, ABANDONMENT, THINGS TO THAT EFFECT. ALL OF WHICH HE KNEW AND COULD HAVE TESTIFIED TO AT PENALTY PHASE. A SECOND DOCTOR WOULD HAVE GONE ESSENTIALLY AS FAR, GONE A LITTLE FURTHER AND SAID THAT THERE WERE MITIGATORS FOUND, AND THAT THE MENTAL MITIGATORS, BASED ON THE FAMILY HISTORY. HOWEVER, EVEN WITH ALL OF THAT INFORMATION, THE DEFENDANT WOULD NOT HAVE RECEIVED A DIFFERENT PENALTY. HE STILL WOULD HAVE BEEN SENTENCED TO DEATH. SO IF I COULD, IF THERE ARE ANY OTHER QUESTIONS, I WILL JUST RESERVE THE REST OF MY TIME. MR. CHIEF JUSTICE

THANK YOU, MS. CAMPBELL. MR. SCHER.

MAY IT PLEASE THE COURT. TODD SCHER ON BEHALF OF MR. LEWIS. BATTLING A BIT OF A COLD, SO BEAR WITH ME. I WILL FIRST ADDRESS THE STATE'S APPEAL AND THEN I WILL, ALSO, TIME PERMITTING, ADDRESS SOME OF THE ISSUES THAT I HAVE RAISED ON MY CROSS APPEAL. MR. LEWIS'S CASE PRESENTS A CLASSIC EXAMPLE OF WHY THE LAW REQUIRES THAT, IN CAPITAL CASES, THE ATTORNEYS BEGIN THE PENALTY PHASE INVESTIGATION PRIOR TO THE GUILT PHASE. THIS CASE HEIGHTS PERFECTLY WHY THESE -- THIS CASE HIGHLIGHTS PERFECTLY WHY THESE CASES ARE A RICE PARTICULARLY WITH ISSUE ON THIS POINT. I TAKE EXCEPTION SPECIFIALLY TO THE COURT'S TWO ORDERS. I WILL SET THIS OUT A LITTLE MORE CLEARLY. THE LOWER COWARD INITIALLY DENIED AN ORDER OF RELIEF. THE ORDER IS SEVERAL PAGES LONG, AND THE STATE POINTS ONE TO ONE SECTION OF THE ORDER, WHERE JUDGE Le BOW FINDS THAT THERE WAS NO PREJUDICE. HOWEVER, IF YOU GO INTO THE SECTION LATER, THE COURT DISCUSSES TWO CASES PARTICULARLY THAT WERE RELIED ON, WHICH WERE DETON AND THE SINGLETON CASE FROM THE ELEVENTH CIRCUIT. AND THE CASE TATES STATES THAT JUDGE LEBOW SPECIFICALLY MADE NO NOTATION OF THAT POINT. IF YOU LOOK AT THE MOTION, WHICH IS PAGE 1065 OF THE RECORD, JUDGE LEBOW SAYS, WELL, DEFENSE COUNSEL IN HIS CASE AT HAND MAY HAVE BEEN REMISS IN HIS DUTIES AS TO THE PENALTY PHASE OF THE TRIAL AND GOES ON AND DISCUSSES PREJUDICE. IF YOU GO ON TO PAGE 9 OF THE ORDER, WHERE JUDGE LEBOW IS DISCUSSING COULD NOT, WHICH WAS -- DISCUSSING COON, WHICH WAS PROSPECTIVE ONLY, BUT SHE DID SAY IF THE COON CASE DOES APPLY, IT COULD BE FOUND THAT THE COUNSEL FAILED TO INVESTIGATE RESPECT THERE BY RENDERING DEFENSE COUNSEL UNABLE TO PROFESSOR ANY EVIDENCE WHICH HE FEELS MAY HAVE BEEN PRESENT HAD IN MITIGATION. AGAIN, TO THE BOTTOM OF PAGE 9 OF THAT FIRST ORDER. JUDGE LEBOW IS DISCUSSING DETON. THE FACTS OF THIS CASE ARE SIMILAR. THE FACTS OF DETON ARE SIMILAR TO MR. LEWIS'S CASE. DEFENSE COUNSEL KIMPB TESTIFIED THAT -- KIRSCH TESTIFIED THAT HE DID NOT BEGIN INVESTIGATION FOR THE PENALTY FAIINGS -- THE PENALTY PHASE UNTIL AFTER THE GUILT PHASE.

IF THERE IS A PRONG, HOW DOES IT GET AROUND THAT, IN THE FIRST ORDER FOR SURE, THE JUDGE MAKES SPECIFIC FINDING THAT THERE IS NO PREJUDICE UNDER STRICKLAND AND DOESN'T REVISIT THAT FINDING IN THE SECOND ORDER?

WELL, WHAT, IN ORDER TO ADDRESS THAT, YOU REALLY NEED TO LOOK AT THE MOTION FOR RECONSIDERATION THAT WE FILED, BECAUSE BASICALLY WHAT THE JUDGE SAID IN THE FIRST ORDER WAS THAT I AGREE MR. LEWIS, YOU ARE ENTITLED TO RELIEVE UNDER THE DETON CASE AND THE BLANCO CASE, WHICH CLEARLY DISCUSS THAT FACT THAT, THERE IS A WAIVER BUT IF TRIAL COUNSEL DID NOT ADEQUATELY INVESTIGATE, THEN THE DEFENDANT COULD NOT HAVE ADEQUATELY OR KNOWINGLYWAIVED HIS RIGHT TO MITIGATION. THAT IS THE PREJUDICE FORM THE PREJUDICE, UNDER STRICKLAND, IN A WAIVER CASE, IS THAT THERE WAS AN INADEQUATE WAIVER. SO IN MY MOTION FOR -- BASICALLY JUDGE LEBOW SAID I CAN'T RELY ON DETON AND BLANCO BECAUSE THEY WERE DECIDED AFTER MY MOTION FOR PENALTY PHASE AND THE JUDGE SAID NEW YORK CITY THOSE ARE ACTUALLY APPLICATIONS OF STRICKLAND. THE STATE ACTUALLY AGREED WITH THAT POSITION IN ITS RESPONSE, SAYING THEY COULD HAVE RELIED ON DETON AND ON BLANCO. THAT DIFFERED FROM THE SECOND ORDER, WHICH SAID THAT DETON DOES CONTROL. DETON IS THE LAW, AND WHAT IS MADE CLEAR IS THAT PREJUDICE, IN THESE TYPES OF UNQUE SITUATIONS IS THE INVOLUNTARY WAIVER, THE FACT THAT A DEFENDANT IS WAIVING SOMETHING THAT HE DOESN'T KNOW WHAT HE IS WAIVING.

I AM LOOKING AT DETON, AND IT LOOKS LIKE, ONCE THEY GO, THAT THE FIRST PRONG MAY BE SATISFIED WHEN THERE IS NOT ADEQUATE TIME AND THERE CAN'T AND KNOWING WAIVER, BUT THEN THE COURT GOES ON AND SAYS, IN VIEW OF THIS TESTIMONY, AND THEY ARE TALKING ABOUT THE PROEDING COLLOQUY, AND OTHER SUBSTANTIAL EVIDENCE PRESENTED AT THE POSTCONVICTION HEARING, INCLUDING THE TESTIMONY OF TWO MENTAL HEALTH EXPERTS, WE BELIEVE COUNSEL'S SHORTCOMINGS WERE SUFFICIENT, SUFFICIENTLY SERIOUS TO A DEPRIVED DETON OF A RELIABLE PENALTY PHASE AND GOES ON, CONSEQUENTLY REFINES COUNSEL IS

INEFFECTIVE AND SUCH INEFFECTIVE ASSISTANCE WAS PREJUDICIAL. I AM NOT READING DETON AS SAYING SOMEHOW THAT, IF YOU HAVE THIS CIRCSTABS, THAT YOU -- CIRCUMSTANCE, THAT YOU DON'T LOOK AT THE SECOND PRONG OF STRICKLAND.

YOU DON'T LOOK AT THE SECOND PRONG OF STRICKLAND, BECAUSE IT IS DAVE RENT TEST. IF YOU LOOK A LITTLE EARLIER IN DETON, ON PAGE, IT LOOKS LIKE PAGE 8 OF THE OPINION, PARAGRAPH BEGINNING THE STATE ARGUES THAT THE TRIAL JUDGE APPLIED THE WRONG STANDARD. THIS IS EXACTLY THE SAME PROCEDURE.

I DON'T ASSUME THAT THAT CHANGES OUR INQUIRY UNDER THE SECOND PRONG OF STRICKLAND, AND NOW YOU HAVE GOT JUDGE LEBOW HAVING SAID WHAT SHE SAID, WHICH IS THAT THERE IS NO REASONABLE PROBABILITY THAT HAS DEFENSE COUNSEL CONDUCT AN INDEPENDENT INVESTIGATION. SUCH EVIDENCE WOULD HAVE RESULTED IN A RECOMMENDATION OF A LIFE SENTENCE. WE HAVE SOME TERRIBLE FACTS OF THIS CRIME, SOME VERY SERIOUS AGGRAVATION. HOW DO YOU GET AROUND THE FINDING THAT THERE REALLY WAS NO PREJUDICE?

I DON'T AGREE THAT THE SECOND ORDER COMPLETELY DISCOUNTS OR IGNORES THE PREJUDICE, BECAUSE I DO THINK IT IS CLEAR, IN DISCUSSING DETON, THAT THE JUDGE SAYS EQUALLY CLEAR IS THE FACT THAT THE DEFENDANT CANNOT KNOWINGLY AND INTELLIGENTLY WAIVE SOMETHING HE DOES NOT KNOW ABOUT, AND I WOULD, ALSO, ADD THAT MY READING OF DETON IS COMPLETELY SUPPORTED BY BLANCO FROM THE ELEVENTH CIRCUIT, AS WELL AS A NUMBER OF CASES FROM VARIOUS COURTS AROUND THE COUNTRY, WHICH I HAVE BOTH CITED IN THE BRIEF AND MOST RECENTLY A SUPPLEMENTAL AUTHORITY IN THE TENT CIRCUIT, AS I KNOW, THE BATTENFIELD CASE, WHICH I THINK IS IMPORTANT, PARTICULARLY IN DISCUSSING THE OKLAHOMA COURT OF APPEALS ISSUE, WHICH IS BASICALLY THE ISSUE THAT LEWIS OBSTRUCTED THIS, IT IS A PENTLY AND REASONABLE ONE INSTRUCTION UNDER -- OBSTRUCTION UNDER STRICKLAND. WE DO NOT SEE A WAIVER OF COOPERATION. IF THE WAIVER IS FOUND TO BE DUE TO LACK OF COOPERATION, IT FALLS BY THE WAYSIDE.

I AM NOT SAYING THAT WE RECAST COOPERATION. ARE YOU TELLING ME THE TENTH CIRCUIT, THE OTHER, THAT BLANCO SAYS YOU DON'T DO A SECOND PRONG ANALYSIS UNDER STRICKLAND, IF YOU FIND THAT THERE WAS NOT ADEQUATE TIME TO PREPARE?

WELL, THE SECOND PRONG ANALYSIS IN AWAVR SITUATION, FOCUSES ON THE ADEQUACY OF THE WAIVER. THAT IS WHAT THIS COURT HELD IN DETON, BECAUSE IN DETON, THE STATE WAS MAKING THE SAME ARGUMENT, IN DETON, THE STATE ARGUED TO THIS COURT AND IT IS IN THE OPINION, THAT JUDGE BELOW DIDN'T WEIGH THE MITIGATION WITH THE NEW MITIGATION AND DETERMINE HAT PREJUDICE HAD BEEN ESTABLISHED, SO JUDGE MO WAS WRONG. THIS COURT DISAGREED, AND THAT IS WHY I AM SAYING THAT I READ DETON TO SAY THAT THE PREJUDICE ANALYSIS FOCUSES ON THE WAIVER. EVEN BE THAT AS IT MAY, I STILL THINK THAT, THE PREJUDICE UNDER THE FACTS OF THIS CASE, IT IS CLEAR THAT PREJUDICE HAS BEEN ESTABLISHED. THERE WERE THREE MITIGATORS. ACTUALLY THE STATE WAS TRYING FOR CCP, BUT THE JUNK REFUSED TO FIND IT. -- BUT THE JUDGE REFUSED TO FIND FIND. P AMOUNT C WAS FOUND AND -- PAC WAS FOUND AND THE FELONY AGGRAVATOR MOTIVATE OR. CERTAINLY NO MOTIVATION WAS PRESENTED AND PRETTY SUBSTANTIAL BRADY VIOLATIONS OCCURRING IN THE CASE, WHICH AFFECT NOT ONLY THE GUILT PHASE BUT THE PENALTY PHASE AS WELL, SO MY PREJUDICE ARGUMENT, AGAIN, GOES NOT ONLY TO THE MITIGATION THAT WE PRESENTED BELOW BUT, ALSO, TO SOME OTHER AREAS THAT JUDGE LEBOW NEVER REACHED, BECAUSE BELIEVING IT IN TERMS OF A CLASSIC MITIGATION, SATISFIED STRICKLAND. HERE WE HAD, BELOW WE PRESENTED TESTIMONY FROM DR. CLASS, AND I DO DISAGREE WITH THE STATE'S CHARACTERIZATION OF HOW THAT ALL OCCURRED. WHAT WE HAVE HERE IS THAT DEFENSE COUNSEL HAD THE LUXURY OF 30 GAYS, EVEN THOUGH -- 30 DAYS, HE HAVE THOEN EVEN THOUGH THEY DIDN'T BEGIN INVESTIGATING ON THE FIRSTHAND --

BEFORE THAT, I WANT TO UNDERSTAND WHAT YOU ARE SAYING BY DETON AND THIS ORDER, THE SECOND ORDER, ALTHOUGH THE TRIAL JUDGE NEVER SAYS THAT THE PREJUDICE PRONG HAS BEEN MET, THAT, BY DISCUSSING DETON AND SAYING THAT THE WAIVERAS INVOLUNTARY, THAT IS THE PREJUDICE, AND SO --

CORRECT. CORRECT. AND THAT IS THE STATE, I MEAN, THE STATE AGREED WITH THAT PROPOSITION, IN ITS RESPONSE TO THE MOTION FOR REHEARING TO JUDGE LEBOW. THEY AGREED THAT THAT IS WHAT DETON SAID.

THEY AGREED, HOW, ORALLY?

IN WRITING. I BELIEVE WE HAD A HEARING ON THIS. AN ORAL ARGUMENT, SO TO SPEAK. IT ASN'TVERY LONG, BUTTT IS WHAT THEY AGREED, THAT THE PROPOSITION SET FORTH WAS WRONG. THEY SAID THAT IT IS SIMILAR TO THE FACTS, THAT MR. LEWIS HAD FAR LESS TIME. OUR PROPOSITION IS THAT HE HAD A FAR GREATER AMOUNT OF TIME, AND IT WAS NOT 18 HOURS BUT TWELVE HOURS. THERE WERE 12 HOURS SPNT ON MR. LEWIS'S CASE AT THE END OF THE GUILT PHASE BUT ACTUALLY TWELVE WERE SPENT ON PENALTY PHASE ISSUES. THE OTHER HOURS WERE SPENT COPYING DEPOSITIONS AND MOTIONS FOR NEW TRIAL AND THINGS LIKE. THAT SO ABOUT ONE WORKDAY SPENT IN A MONTH, PREPARING FOR THIS MAN'S CAPITAL PENALTY PHASE, WHEN ABSOLUTELY NOTHING WAS DONE PRIOR TO THE GUILT PHASE. THE STATE DISCUSSES LACK OF COOPERATION, THE FAMILY, THIS, THAT AND THE OTHER THING. THAT IS WHY COUNSEL IN CAPITAL CASES ARE CONSTITUTIONALLY REQUIRED TO BEGIN THIS PROCESS AT THE BEGINNING. AFTER THE GUILT PHASE IS OVER, THE DEFENDANT LOSES HOPE, COUNSEL THROWS IN THE TOWEL, PEOPLE AREN'T HAPPY, AND IN MR. LEWIS'S CASE IN PARTICULAR, THE STATE TALKS ABOUT MR. LEWIS'S MOTHER WASN'T COOPERATIVE. WELL, OF COURSE, WHAT HAPPENED AT THIS TRIAL WAS THAT THE STATE WAS ALLOWED TO PRESENT TO THE JURY THAT MR. LEWIS'S MOTHER SUPPOSEDLY HAD BRIBED SOME OF THESE WITNESSES INTO CHANGE THEIR STORY. A BIG SURPRISE THAT SHE IS NOT HAPPY, AND AFTER THE TRIAL, SHE NOT EXACTLY ENAMOURED OF TRIAL COUNSEL. THAT IS WHY THIS PROCESS MUST BEGIN PRIOR TO THE GUILT PHASE. EVEN THE SUPREME COURT HAS SAID THAT AND THE ELEVENTH CIRCUIT CASE IN BLANCO MAKES IT CLEAR THAT IT IS OBJECTIONABLE PERFORMANCE IN A CAPITAL CASE.

IS THERE ANYTHING IN THE RECORD THAT TELLS US WHAT WAS GOING ON, PRIOR TO THE APPOINTMENT OF THIS EXPERT? WAS THE DEFENSE ATTEMPTING TO GET SOME OTHER EXPERT AND COULDN'T GET THEM, OR ANY OF THAT KIND OF SITUATION?

NO. I MEAN, ALL WE KNOW IS THAT THERE WAS AN APPOINTMENT, AN ORDER APPOINTING DR. CLAUSE. I BELIEVE IT WAS AUGUST 23, WHICH IS A WEEK BEFORE THE PENALTY PHASE. THERE WERE SOME DISCUSSIONS AT THE EVIDENTIARY HEARING, SOME TESTIMONY THAT COUNSEL MAY HAVE TALKED TO MR. LEWIS AROUND THE 14th OR SO OF AUGUST ABOUT THE POSSIBILITY OF HAVING DR. CLAUSE TESTIFY. HOWEVER, THE ORDER WAS NEVER ENTERED, UNTIL A WEEK LATER, AND DR. CLAUSE SAW MR. LEWIS THE FOLLOWING DAY AND, AGAIN, SAW HIM THE DAY BEFORE THE PENALTY PHASE, AND WHAT, DR. CLAUSE'S TESTIMONY IS EXTREMELY IMPORTANT IN THIS SITUATION, BECAUSE HE INDICATES THAT MR. LEWIS'S IMPAIRMENTS ARE PRECISELY THE REASON WHY SOMEONE COMING IN HERE AT THE LAST MINUTE CAN'T GET THE TYPE OF INFORMATION THAT IS NEEDED TO DO AN ADEQUATE MITIGATION INVESTIGATION IN A CAPITAL CASE. HERE YOU HAVE SOMEBODY WHO WAS FOUND GUILTY, DIDN'T BELIEVE HE SHOULD BE FOUND GUILTY, CLEARLY DIDN'T UNDERSTAND, AS DR. CLAUSE SAID, WHAT HIS ROLE WAS. MR. LEWIS DID NOT UNDERSTAND WHAT DR. CLAUSE'S ROLE WAS. ACCORDING TO THE TIME SHEETS, WE HAVE TRIAL COUNSEL SEEING MR. LEWIS TWO OR THREE TIMES IN THE MONTH BETWEEN THE GUILT PHASE AND THE PENALTY PHASE. THE STATE WOULD HAVE IT SEEM THAT, YOU KNOW, COUNSEL WAS IN THAT JAIL EVERY SINGLE DAY, TRYING TO PERSUADE MR. LEWIS THAT HE REALLY NEEDED TO PRESENT MITIGATION. IT JUST WAS NOT THE CASE.

WAS THAT MR. -- WAS THIS THE MAIN TRIAL ATTORNEY'S TIME SHEETS?

YES.

DO WE HAVE ANYTHING FOR THE SECOND?

THERE WERE ONE TIME SHEET, JOINT, TOGETHER. SO IT REFLECTS BOTH TIMES.

HE IS A FAIRLY ASTUTE DEFENSE ATTORNEY. IS THERE ANY TESTIMONY ON WHY THEY DIDN'T START ANYTHING ON THE PENALTY PHASE? THEY THOUGHT THEY HAD A GOOD GUILT POSITION?

APPARENTLY THEY FOCUSED THEIR EFFORTS ON THE GUILT AND IN 24 CASE THAT IS ALL -- IN THIS CASE THAT IS ALL THEY DID. THE INVESTIGATOR DID ABSOLUTELY NOTHING, NO INVESTIGATION IN THE PENALTY PHASE AND MR. SCHER DID NOTHING IN THE INVESTIGATION. AND THERE WAS AN ABUNDANCE WEALTH OF DOCUMENTS ABOUT MR. LEWIS'S HORRIFIC CHILDHOOD. CATHOLIC CHARITY RECORDS ARE VERY, VERY DETAILED, IN TERMS OF THE PHYSICAL AND EMOTIONAL ABUSE THAT WAS GOING ON BETWEEN MR. LEWIS, HIS BROTHER AND THE PARENTS, THE FACTS THAT MR. LEWIS SUFFERED A SEVERE SKULL FRACTURE AT THE AGE OF TWO WHEN HE FELL OUT THE WINDOW. THE SCHOOL RECORDS WERE IN THERE. HIS ABYSMAL WORK RECORDS WERE IN THERE. ALL OF THAT WAS AVAILABLE TO MR. LEWIS, AND SO HE WAS WAIVING MITIGATION THAT HE DIDN'T KNOW B THE STATE RELIED ON THE JUDGE WHEN CONDUCTING COLLOQUY. MR. LEWIS, HIMSELF, SAID ALL THE TERMS WERE GENERALIZED WITH REGARD TO THE INVESTIGATION. IN FACT, PAGE 247 AT THE EVIDENTIARY HEARING, MR. KIRSCH SAID HE WAS NOT IN A POSITION TO ADVISE R. LEIS ABOUT ANYTHING THAT HE MIGHT SAY IN MITIGATION, ANYTHING THE SCHOOL RECORDS MIGHT SAY IN MITIGATION, ANYTHING THE FOSTER PARENTS MIGHT SAY IN MITIGATION, BECAUSE MR. KIRSCH DID NOT KNOW WHAT THEY CONTAINED, AND THAT IS NOT ACCEPTABLE UNDER THE SIXTH AMENDMENT. THE STATE, ALSO, BEFORE I TURN TO THE OTHER ISSUES, THE STATE, ONE THING I DO NEED TO CLARIFY, THE STATE INDICATED IN ONE OF THEIR LAST ARGUMENTS, WAS THAT THERE WAS VERY LITTLE DIFFERENCE BEWE HAT WAS PRESENTED AT THE PENALTY PHASE OR WHAT DR. CLAUSE COULD HAVE BEEN PRESENTED IF HE HAD BEEN CALLED AT THE PENALTY PHASE VERSUS WHAT WAS PRESENTED AT THE EVIDENTIARY PHASE AND THAT SIMPLY WAS NOT TRUE. DR. CLAUSE INDICATED THAT HE HE HAD VERY LITTLE INFORMATION ABOUT MR. LEWIS'S BACKGROUND, ALTHOUGH DR. CLAUSE DID SAY THAT WITH TIME, HE COULD HAVE GOTTEN MR. LEWIS TO OPEN UP MORE AND OF COURSE HE DID OPEN UP MORE, BUT WHEN YOU THROW HIM IN THE ROOM WITH THE DEFENDANT AT THE LAST MINUTE, THIS IS WHAT HAPPENS.

WHEN A DEFENDANT TELLS HIS OR HER ATTORNEY I DON'T WANT YOU TO BOTHER WITH MY FAMILY. I DIDN'T DO THIS CRIME. I DON'T WANT YOU PUTTING ON MITIGATION. WHAT IS THE DEFENSE ATTORNEY'S OBLIGATION AT THAT POINT?

WELL, THE DEFENSE ATTORNEY STILL HAS AN INDEPENDENT OBLIGATION TO CONDUCT AN INVESTIGATION, BECAUSE AN ATTORNEY HAS AN ETHICAL DUTY, WHEN ADVISING A CLIENT, WHAT TO DO OR WHAT NOT TO DO, TO FULLY INFORM THE CLIENT OF THE OPTIONS AND IN THIS SITUATION, THE LAW IS VERY CLEAR THAT A LAWYER CANNOT JUST BLINDLY FOLLOW THE COMMANDS OF A CLIENT, AND IN THIS CASE THE STATE RELIES ON, AGAIN, MR. LEWIS'S ALLEGED PROHIBITION OF MR. KIRSCH TALKING TO ANYBODY AND THAT MR. LEWIS REFUSED TO COOPERATE WITH THE EXPERT AND THINGS OF THAT NATURE. THAT IS JUST NOT TRUE. MR. LEWIS DID TALK TO DR. CLAUSE. MRS. LEWIS DID NOT WANT TO SPEAK WITH COUNSEL, BECAUSE SHE WAS MAD AT HIM ABOUT WHAT HAPPENED AT TRIAL. AGAIN, ALL OF THIS GOES BACK TO THE FACT THAT THIS SHOULD ALL HAVE BEEN DONE OR THE PROCESS SHOULD HAVE COMMENCED WELL IN ADVANCE OF THE GUILT PHASE. IT TAKES TIME FOR PSYCHOLOGISTS TO GET A DEFENDANT TO OPEN UP ABOUT THEIR BACKGROUND. IT TAKES TIME TO GET BACKGROUND INFORMATION ABOUT A DEFENDANT'S BACKGROUND. IT TAKES TIME TO DO NEURO

PSYCHOLOGICAL TESTING. HERE WE HAVE DR. CLAUSE SAYING I MEAN, BASED ON THIS GUY'S BACKGROUND, I DEFINITELY THINK THERE WAS RED FLAGS THAT REQUIRED FURTHER TESTING, AND I TOLD MR. KIRSCH THAT. IT WAS NEVER FOLLOWED UP ON. AND DR. CLAUSE SAID MR. LEWIS DIDN'T SAY IT UNTIL THE DAY BEFORE THE PENALTY PHASE. NONE OF THIS WAS DONE. THAT IS MY ARGUMENT. ALL OF THIS WAS DONE WITHIN THE LAST WEEK OR SO OF THE PENALTY PHASE, THE TWELVE HOURS THAT WAS SPENT, ALL WAS DONE IN THE LAST WEEK. IN MY BRIEF, IT DOES DISCUSS, IN TERMS OF THE LITTLE INFORMATION THAT DR. CLAUSE HAD, AT THE TIME AS OPPOSED TO THE WEALTH OF INFORMATION THAT HE WAS PROVIDED AT THE EVIDENTIARY HEARING, AND SO I WON'T SPEND ANYMORE TIME ON. THATI DO, ALSO, WANT TO TOUCH UPON THE GUILT PHASE CLAIMS, WHICH I SUBMIT, A, ORDER OF A NEW TRIAL AND A MINIMUM WARRANT FOR FURTHER EVIDENTIARY DEVELOPMENT, PARTICULARLY AS TO SEVERAL OF THE ISSUES WHICH WERE SUMMARILY DENIED.

JUST ONE OTHER QUESTION ON THE STATE'S APPEAL. IF, FOR WHATEVER REASON, WE WERE TO REVERSE THE TRIAL COURT'S ORDER, THERE STILL HAS TO BE AN EVIDENTIARY HEARING ON THE ISSUE OF THE BIAS OF THE TRIAL JUDGE.

THAT'S CORRECT, JUDGE.

THAT WAS, THE JUDGE FOUND THAT WAS MOOTED OUT BY -- BY THE GRANTING OF THE PENALTY PHASE RELIEF.

AND DO YOU AGREE THAT, IF WE REJECT WHATEVER YOU SAY ON YOUR CROSS APPEAL ABOUT THE GUILT PHASE, THAT THE BIAS OF THE TRIAL JUDGE ISSUE JUST GOES, DOES THAT JUST GO TO THE PENALTY PHASE, OR ARE YOU MAKING SOME ARGUMENT THAT HIS, THAT THERE WOULD HAVE TO BE AN EVIDENTIARY HEARING ON THE BIAS AND THAT IT IS SOMEHOW AFFECTING --

I THINK THE EVIDENTIARY HEARING SHOULD BE PLENARY, AND IT WOULD BE UP TO A JUDGE TO DETERMINE WHETHER OR NOT -- I KNOW THAT THIS COURT IN PORTER FOUND THAT THE BIAS ONLY WENT TO ONE PHASE, THE RALLY PORTER -- THE RALEIGH PORTER CASE. BUT THERE IS NOTHING AS TO THE PENALTY PHASE.

BUT JUDGE CAPLAN MAKING STATEMENTS THAT HAVE INDICATED BIAS, YOUR BIAS CLAIM COMES FROM HIS STATEMENTS IN THE INTERVIEW.

SUBSEQUENT. CORRECT. RIGHT. AND THEY DO REFLECT BIAS, AND SO THAT WAS MY POSITION. THE OTHER MATTER THAT OCCURRED TO ME, DURING, IN TERMS OF JUDGE LEBOW'S SECOND ORDER, IF FOR SOME REASON THE COURT DETERMINES THAT THE ORDER IS NOT SUFFICIENT FOR EXPERT PREJUDICE, I DO THINK THAT ASIDE FROM, OUTRIGHT REVERSAL CERTAINLY COULD BE THE ONLY REMEDY. NUMBER ONE, REMAND IS AN ARGUMENT, AND SECONDLY UNDER THE CASSO CASE, THIS COURT, I BELIEVE, CAN MAKE AN INDEPENDENT DETERMINATION, AS TO THE PREJUDICE PRONG, WHICH IS ON DE NOVO REVIEW, ANYWAY. I THINK IT SHOULD BE AFFIRMED IN ALL RESPECTS. I DO WANT TO TALK ABOUT THE BRADY CASE. HERE THERE WAS REALLY UNDISPUTED EVIDENCE PRESENTED BELOW THAT THE JURY WAS NOT AWARE OF THE BEHIND THE SCENES NEGOTIATIONS AND DEALS AND DISCUSSIONS THAT WERE GOING ON BETWEEN THE SPATE STATE AND -- BETWEEN THE STATE AND JAMES MAYBERRY, WITH RESPECT TO MANY OR ALL OF HIS PRIOR CONVICTIONS.

BUT ISN'T THERE, I THOUGHT THAT THERE WAS EVIDENCE THAT THE LAWYER KNEW ABOUT ALL OF THESE PENDING CHARGES AND, AM I INCORRECT IN THAT ASSUMPTION?

YES. THERE WERE, MY BRIEF MAKES IT CLEAR, AND I THINK IT IS A VERY IMPORTANT POINT. THERE WERE TWO LETTERS SENT BY THE PROSECUTOR TO DEFENSE COUNSEL. IN MY BRIEF, I KNOW IN THE REPLY IN MY LAST REPLY BRIEF, IT SETS FORTH THAT THE LETTERS ONLY DISCUSS A FEW OF THE CHARGES. THERE WAS A WEALTH OF OTHER CHARGES THAT MAYBERRY HAD,

PENDING AT THE TIME, THAT WERE NOT DISLOWSED BY THE PROSECUTOR PROSECUTOR IN THOSE LETTERS, AND SO THEY DIDN'T FULLY SET FORTH THE CRIMINAL HISTORY OF MR. MAYBERRY AND CERTAINLY DIDN'T DISCLOSE THE FACT THAT THERE HAD BEEP CONVERSATIONS WITH THE PROSECUTOR. MR. CHIEF JUSTICE

MR. SCHER, YOUR TIME IS UP.

I WOULD RELY ON MY BRIEF FOR THAT POINT. THANK YOU. MR. CHIEF JUSTICE

MS. CAMPBELL.

TO BRIEFLY ANSWER YOUR QUESTION, JUSTICE LEWIS, WITH RESPECT TO THE INFORMATION THAT WAS DISCLOSED WITH MR. MAYBERRY MAYBERRY'S DADE AND BROWARD CASES, THE CASE NUMBERS WERE SET OUT. THE JUDGE'S NAME, AND IN THE CASE OF DADE, THE DADE COUNTY CASE, THE DEFENDANT'S ALIAS WAS SET OUT, SO AS FAR AS A BRADY CLAIM, THE STATE WOULD SUBMIT THAT ENOUGH INFORMATION WAS THERE THAT, WITH DUE DILIGENCE, DEFENSE COUNSEL COULD HAVE FOUND ANYTHING ELSE OUT, AND, ALSO, WITH RESPECT TO THE FACT THAT THERE WAS ANY DISCUSSING BETWEEN THE DADE PROSECUTOR AND THE BROWARD PROSECUTOR, THE BROWARD PROSECUTOR SAID WE DON'T NEED TO YOU MAKE ANY DEAL. THE DADE PROSECUTOR TOLD THE SENTENCING JUDGE IN DADE COUNTY THAT THEY OBJECTED TO ANY DOWNWARD DEPARTURE, AND ANY DOWNWARD DEPARTURE WAS MERELY BASED ON THE FACT THAT DEFENSE COUNSEL IN DADE, FOR MR. MAYBERRY, ASKED FOR AND RECEIVED THAT, BASED ON MR. MAYBERRY'S DRUG USAGE, DRUG HISTORY, AND ALSO THE FACT THAT HE WAS GIVING COOPERATION IN THE BROWARD CASE. HOWEVER, TO GET BACK TO THE STATE'S INITIAL POINT, IF DETON APPLIES AND THE STATE WOULD SUBMIT THAT THE TRIAL COURT COULD LOOK AT DETON, THE FACTS OF DETON ARE SO DRASTICALLY DIFFERENT THAN THE FACTS THAT WE HAVE HERE. ONE, DEFENSE COUNSEL IN OUR CASE NEVER EVER ACQUIESCED TO WHAT THE DEFENDANT WANTED. THE DEFENSE COUNSEL STILL WENT AHEAD AND DID INVESTIGATION. NOW, WHETHER HE COULD GET ADDITIONAL INFORMATION THAT WOULD BE PERSONAL TO MR. LEWIS, SUCH AS SCHOOL RECORDS, MEDICAL RECORDS, CATHOLIC CHARITIES RECORDS, IT HAS NEVER BEEN EXPLAINED BY THE DEFENSE HOW DEFENSE COUNSEL COULD GET THOSE RECORDS, WITHOUT MR. LEWIS'S PERSONAL WAIVER. THOSE ARE PERSONAL DOCUMENTS THAT WOULD REQUIRE SOME SORT OF WAIVER FROM THE DEFENDANT TO PRESENT. SO THE THINGS THAT HAPPENED IN DETON, SUCH AS AN ACQUIESCENCE TO THE DEFENDANT'S DESIRE NOT TO PUT ON MITIGATION AND THE FACT THAT HE, THAT DEFENSE COUNSEL FOR DETON ONLY HAD A FEW DAYS, AND IN THOSE FEW DAYS DID ABSOLUTELY NOTHING, AND IF YOU LOOK AT THE TESTIMONY OF THE DETON DEFENSE COUNSEL, HE DIDN'T KNOW WHAT TO DO OR HOW TO GO ABOUT DOING IT. THAT IS NOT THE CASE THAT WE HAVE HERE.

WHAT DOES THIS RECORD DEMONSTRATE? THIS TRIAL ENDED THE END OF JULY JULY?

THE GUILTY VERDICT CAME OUT AUGUST 5.

AUGUST 5. AND THE EXPERT WAS APPOINTED ON THE 22d AND 23th?

ENDED UP BEING APPOINTED. HOWEVER, THERE WERE DISCUSSIONS WITH THE EXPERT SOMETIME BEFORE THAT, APPROXIMATELY AUGUST 14, BECAUSE THEY WOULD NOT, THIS WAS THE RECOLLECTION OF DEFENSE COUNSEL. THEY WOULDN'T HAVE KNOWN TO HAVE THIS PARTICULAR DOCTOR APPOINTED HAD THEY NOT SPOKEN TO THIS DOCTOR BEFOREHAND, AND THERE WERE RECORDS THAT THEY HAD HAD SOME DISCUSSION ON THE 14th OF AUGUST, SO IT IS NOT THAT DEFENSE COUNSEL JUST SAT AND WAITED UNTIL THE 23d OF AUGUST OR, THEN, AGAIN, WAITED UNTIL THE DAY OF THE PENALTY PHASE STARTING. HE WAS TRYING TO GET INFORMATION WAS TRYING TO ADVISE HIS CLIENT THAT MITIGATION FROM FAMILY, FROM FRIENDS, FROM DOCTORS --

WHAT ELSE DO WE HAVE IN THIS RECORD THAT SHOWS WHAT WAS GOING ON, FROM AUGUST 5 UNTIL THE 22d? WHAT ELSE DO WE HAVE THAT DEMONSTRATES WHAT COUNSEL WAS DOING?

YOU HAVE THE TIME SHEETS, AND YOU HAVE THE EVIDENTIARY HEARING TESTIMONY.

AND THE EVIDENTIARY HEARING TESTIMONY, REALLY, OTHER THAN THE EXPERT WHO, WHAT DOES IT SHOW WHO THEY TALKED TO OR WHAT THEY WERE DOING?

THEY SAID THAT THEY TRIED TO TALK TO THE FAMILY. IN FACT, DR. CLAUSE ALSO TRIED TO TALK TO THE FATHER AND HAD SOME DISCUSSION WITH THE FATHER. THE FATHER REFUSED TO TALK TO, TO ACTUALLY HAVE A LONG CONVERSATION WITH DR. CLAUSE, SO THERE WERE ATTEMPTS, IN ORDER TO GET FAMILY MEMBERS TO COOPERATE. NOW, ONCE MR. LEWIS MERELY SPOKE ABOUT MOTHER, FATHER, BROTHER, HE DIDN'T DISCLOSE ANYTHING FURTHER. WHAT IS TELLING, SO COUNSEL WOULD NOT KNOW WHO ELSE TO CONTACT. HOWEVER, WHAT IS TELLING IS, DURING THIS EVIDENTIARY HEARING, A COUSIN TESTIFIED, AND HER TESTIMONY ON DIRECT IS I WAS ALWAYS AVAILABLE. I WOULD HAVE TESTIFIED. HOWEVER, ON CROSS, SHE SAID, WELL, I DIDN'T EVEN KNOW THAT MR. LEWIS WAS ON TRIAL. OUR FAMILY KEEPS SECRETS VERY WELL. I DIDN'T KNOW. SO IF MR. LEWIS ISN'T TELLING COUNSEL, CONTACT MY COUSIN, THEN HOW IS COUNSEL SUPPOSED TO FIND HER? IF MR. LEWIS IS SAYING I DON'T KNOW WHERE MY FATHER IS, AND HIS MOTHER IS SAYING I DON'T KNOW WHERE MY EX-HUSBAND IS, HOW IS MR. , HOW IS DEFENSE COUNSEL SUPPOSED TO FIND HIM? I MEAN THERE ARE CERTAIN THINGS WHERE A DEFENDANT PUTS UP SUCH ROADBLOCKS, I MEAN, THERE SHOULD BE SOME POINT WHERE IT IS THE DEFENDANT'SBURDEN. THE DEFENDANT'S, YOU KNOW, RESPONSIBILITY TO AT LEAST HELP HIS COUNSEL. THE DEFENDANT CAN'T SIT AND SAY COUNSEL WAS INEFFECTIVE, BUT I THREW UP EVERY ROADBLOCK IN FRONT OF HIM SO HE WAS EFFECTIVE.

AND THERE ARE MANY, MANY CASES THAT HAVE HELD JUST THAT, THAT IS THE LACK OF COOPERATION MAY EXCUSE WHAT A DEFENSE LAWYER DOES, AND I GUESS IN THIS CASE, REALLY, IT IS OUR TASK TO SEE WHETHER JUDGE LEBOW APPROPRIATELY OR PROPERLY SAW THAT THE FACTS IN THIS CASE FELL MORE INTO SOMETHING ALONG THE LINE OF DETON OR BLANCO THAN IT DOES MANY OF THE OTHER CASES, WHERE I AGREE WITH YOU THAT JUST WHEN A DEFENDANT SAYS, NO, DON'T DO THIS, THAT IT IS REASONABLE FOR A DEFENSE LAWYER TO FOLLOW THAT, BUT ADOPT, DO WE HAVE, HERE, I MEAN, YOU DO AGEE THAT, EXCEPT FOR,MAYBE, CONTACTING THE EXPERT, MAYBE, A FEW DAYS BEFORE, THAT NONE, NOTHING STARTED. THERE WAS A SECOND CHAIR ON THIS PENALTY PHASE, UNTIL THERE WAS A GUILTY VERDICT.

THAT IS WHAT DEFENSE COUNSEL SAID. HE DID NOT START UNTIL THERE WAS A GUITY VERDICT. HOWEVER, DETON SHOULD NOT BE READ AS SAYING THAT THER ISA PER SE VIOLATION OF 30 DAYS. I MEAN,THETEST ISAT WAS DEVELOPED? YOU HAVE TO LOOK AT IT, YOU KNOW FROM WHAT WE HAVE NOW. AND WHAT WE HAVE NOW WOULD NOT HAVE OVERCOME THE AGGRAVATORS THAT WE HAD THEN, SO IT MATTERS NOT THAT HE HAD 30 DAYS.

SO YOUR ARGUMENT, YOU SAY THAT WHETHER IT IS DETON APPLIES OR BLANCO, THERE IS NOT A DIFFERENCE IN THE PREJUDICE EVALUATION, SO YOU DISAGREE WITH MR. SCHER.

THE PREJUDICE EVALUATION IS THE PREJUDICE EVALUATION. WHETHER IT BE STRICKLAND, DETON OR ANYTHING. IF WHAT YOU HAVE TODAY DOES NOT OVERCOME WHAT YOU HAD TEN YEARS AGO, THEN THERE IS NO NEED TO VACATE THE SENTENCE, AND IN THIS CASE, THE SENTENCE SHOULD NOT HAVE BEEN VACATED. THE STATE WOULD ASK YOU, ALSO, TO LOOK AT PORTER AND FRY, WHICH ARE -- FRYE, WHICH ARE BOTH CSES -- FRYE IS A FEDERAL CASE AND PORTER S UT OF TH COURT, THAT TAL ABOUT THE ROADBLOCKS THAT THE DEFENDNTS PUT UP IN FRONT OF THEIR COUNSEL.

DO YOU REE THAT ABUSE OF DISCRETION IS OUR STANDARD OF REVIEW, IN REVIEWING THE COURT'S ORDER?

ABUSE OF DISCRETION WELL, NO, IF, IN AIXED QUESTION OF LAW AND FACT, WHICH PREJUDICE IS, THE FACTS THAT THE JUDGE FOUND SHOULD STAND, IF THEY ARE SUPPORTED BY SUBSTANTIAL, COMPETET VDENCE. THE LEGAL AALYSIS WLD B DE NOVO. I I AM UNDERSTANDING THE COURT'S QUESTION CORRECTLY. NOW, WITH RESPECT TO THE, TO A PER SE VIOLATION, AGAIN, THAT IS A LEGAL QUESTION, AND I WOULD SAY THATTHE COURT, THE TRIAL COURT TOTALLY MISSED THAT, DIDN'T UNDERSTAND THE ANALYSIS THAT WAS SUPPOSED TO BE DONE UNDER DETON. I SEE MY TIME IS UP. UNLESS THE COURT HAS ANY FURTHER QUESTIONS, I WOULD ASK YOU TO REVERSE THE TRIAL COURT'S ORDER AND HAVE THE SENTENCE REIMPOSED. MR. CHIEF JUSTICE

THANK YOU, MS. CAMPBELL. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE FORM THE