>> PLEASE RISE.
HEAR YE HEAR YE HEAR YE THE
FLORIDA SUPREME COURT IS NOW IN
SESSION, ALL WHO HAVE CAUSE TO
PLEA, DRAW NEAR, GIVE ATTENTION
AND YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO
THE FLORIDA SUPREME COURT.
THE FIRST CASE ON OUR DOCKET,
THIS MORNING, IS RUSS VERSUS
STATE OF FLORIDA.
>> THANK YOU, YOUR HONOR, PLEASE
THE COURT, MY NAME IS JIM WOLC
-- WULCHAK AND OUR OFFICE WAS
APPOINTED TO REPRESENT DAVID
RUSS FROM HIS APPEAL FROM THE
DEATH SENTENCE THOUGH HE REALLY
DOES NOT WANT ME TO BE HERE
TODAY.
THE DEFENDANT WHO WAS FOUND
COMPETENT ACCEPTED
RESPONSIBILITY FOR THIS IS
ACTIONS, AND PLED GUILTY TO THE
CHARGE OF THE FIRST DEGREE
MURDER, KIDNAPPING AND "GRAND
THEFT AUTO,", AND PERJURY AND
WAIVES THE PRESENTATION BY HIS
ATTORNEY OF MITIGATING EVIDENCE
AND THE TRIAL COURT, APPOINTED
CONFLICT COUNSEL TO PRESENTS
POTENTIAL MITIGATION TO THE
TRIAL COURT, WITHOUT THE
COOPERATION OF THE DEFENDANT,
AND, THE DEATH SENTENCE WAS
IMPOSED.
THE APPELLANT DOES NOT WISH TO
CONTEST THE CONVICTION AND
SENTENCE BUT RECOGNIZES THAT
AUTOMATIC REVIEW BY DIRECT

APPEAL OF THE DEATH SENTENCE IS
REQUIRED BY THIS COURT.
THE COURT NOTED IT MUST HAVE THE
BENEFIT OF AN ADVERSARY
PROCEEDING ON APPEAL, STATING
COUNSEL FOR APPELLANT IS
DIRECTED TO PROCEED TO PROSECUTE
THE APPEAL IN A GENUINELY
ADVERSARY MANNER PROVIDING
DILIGENT ADVOCACY OF APPELLANT'S
INTERESTS IN KLOCOC AND I
PREPARED AND FILED AN INITIAL
BRIEF RAISING ISSUES ATTACKING
THE DEATH SENTENCE OVER THE
CLIENT'S WISHES.
IN CORRESPONDENCE WITH COUNSEL
THE APPELLANT INDICATED IT WAS
HIS DESIRE TO WAIVE ORAL
ARGUMENT THIS MORNING WHICH WITH
THE CONSENT OF THE STATE
ATTEMPTED TO DO SO.
>> I APPRECIATE YOUR GIVING THAT
INTRODUCTION AND IN THE LETTER
MR. RUSS SENT, IS PROBABLY ONE
OF THE MOST ARTICULATE LETTERS
WE HAVE SEEN, IT APPEARS, AND I
THINK THE REASON SOME OF US ARE
ALWAYS CONCERNED WITH CASES, IS
WE DO HAVE AN OBLIGATION NOT
TO... SOMEBODY'S SENTENCE TO
DEATH.
>> YES, YOUR HONOR.
>> BUT IT APPEARS IN THIS CASE
THE TRIAL JUDGE FOLLOWED ALL OF
THE PROCEDURES THAT WE OUTLINED
IN... [INAUDIBLE] INCLUDING AS
YOU SAID, HAVING SPECIAL
COUNSEL, TO PRESENT MITIGATION
AND AS YOU GAVE THIS, YOU ARE
HERE AGAINST YOUR CLIENT'S
WISHES AND I THINK MY CONCERN IS
ALWAYS TO HAVE A DEFENDANT, NOT
ONLY THIS COMPETENT BUT ENSURING
THERE IS NO SIGNIFICANT OR
SERIOUS MENTAL ILLNESS THAT
WOULD EITHER SIGNIFICANTLY

MITIGATE THE CRIME OR CAUSE US CONCERN.
IN THIS CASE, YOU TELL US IF ANY OF THOSE KINDS OF THINGS... [INAUDIBLE] EXTREMELY LOW IQ, DOESN'T APPEAR TO BE A SIGNIFICANT MENTAL ILLNESS, IN FRONT OF YOU, ANYTHING THAT SHOULD CAUSE US CONCERN, THAT WOULD... SUBJECT TO AN ADVERSARIAL TEST, GENUINE ADVERSARIAL TESTING, MOST LIKELY, A DEATH SENTENCE... IMPOSED.
>> YES, YOUR HONOR, FIRST OF ALL, MY CLIENT'S WISHES, I NEED TO INDICATE ONE THING HE WISHED ME TO MAKE CLEAR THIS MORNING HE OWNS UP TO HIS CRIME AND AS HE TOLD THE COURT, HE KILLED AN INNOCENT WOMAN WHO DOES NOT DESERVE TO DIE AND WITH THAT IN MIND, AND, GIVEN THE DILEMMA, THAT I'M IN, WHETHER I'M SUPPOSED TO REPRESENT MY CLIENT'S WISHES OR NOT, THERE WAS A CASE IN SEPTEMBER, WHERE A COLLEAGUE OF MINE ARGUED AGAINST HIS CLIENT'S WISHES AND HIS ANSWERS SUBJECTED HIM TO THE RATH OF HIS CLIENT AND A BAR GRIEVANCE.
>> YOU REALLY OUGHT TO ASK THOSE QUESTIONS TO THE STATE.
>> OKAY.
WITH THAT IN MIND, YES, THE TRIAL COURT FOLLOWED THE REQUIRED PROCEDURES AND BARNES AND MOHAMMED AND THE SENTENCING JUDGE MUST BE APPRISED ON WHICH SHE CAN MAKE A REASONED DECISION REGARDING THE APPLICABILITY OF THE DEATH SENTENCE AND THE COURT CAN BE ASSURED OF RELIABILITY AN FAIRNESS AND UNIFORMITY IN THE IMPOSITION OF THE DEATH PENALTY

AND THE SAFEGUARDS, THE COURT
MAY CALL ITS OWN WITNESSES OR
APPOINT SPECIAL COUNSEL WHICH HE
DID, ORDERS AN EXTENSIVE PSI
WHICH WAS ALSO DONE HERE AND THE
SAFEGUARDS REQUIRE THE
PRESENTATION OF ALL EVIDENCE OF
MITIGATING NATURE INCLUDING
SCHOOL RECORDS, MEDICAL RECORDS,
AND A FAMILY BACKGROUND.
>> [INAUDIBLE].
GUILTY PLEA ENTERED HERE, THERE
WAS IN FACT A FACTUAL BASIS
GIVEN AS -- AT THE GUILTY PLEA
AND DO YOU TAKE EXCEPTION TO ANY
OF THE INFORMATION GIVEN DURING
THE FACTUAL --
>> NO, YOUR HONOR.
AND AS I SAID IF THE COURT IS
ALERTED BY THE SAFEGUARDS, SUCH
AS THE PSI, PROFFERS BY THE
TRIAL PUBLIC DEFENDER WHO IS
REPRESENTING HIM AS TO THE
POTENTIAL MITIGATION, IF THE
COURT IS ALERTED BY THESE SAFE
GUARDS TO THE EXISTENCE OF
ADDITIONAL MITIGATION THE TRIAL
COURT HAS A DUTY TO CONDUCT AN
INDEPENDENT EXAMINATION TO THE
POSSIBLE EXISTENCE OF ALL
EVIDENCE IN MITIGATION, CALLING
ADDITIONAL WITNESSES ON ITS OWN
OR HAVING THE CONFLICT COUNSEL
PRESENT THE ADDITIONAL WITNESSES
AND THE PRE-SENTENCE
INVESTIGATION SUGGESTED THE
DEFENDANT WAS DIAGNOSED AND
TREATED FOR A MENTAL ILLNESS,
INDICATING DISORGANIZED THOUGHT
PROCESSES, AND, THE PSYCHIATRIC
HISTORY, THE FAMILY HISTORY OF
MENTAL ILLNESS, AND -- IN THIS
CASE, AND, THERE WAS
UNCONTROVERTED EVIDENCE OF THE
HEAD INJURY, BUT THE TRIAL COURT
DIDN'T EXAMINE THESE FURTHER

THAN THE BARE MENTION OF THEM IN THE PSI OR THE PROFFER OF THE TRIAL PUBLIC DEFENDER.
THERE WAS A PROFFER OF A PSYCHIATRIC EVALUATION OF THE DEFENDANT.
AGAIN, NOT PRESENTED BY THE CONFLICT COUNSEL, AND EVEN THOUGH THE TRIAL COURT WAS ALERTED TO IT BY THE PROFFER, DID NOT EXAMINE FURTHER ANY OF THIS EVIDENCE.
AND WHAT IMPORT ARE THESE SAFEGUARDS, IF THEY ALERT THE TRIAL JUDGE TO POTENTIAL MITIGATION AND SHE DOES NOT ACCEPT THAT AS TRUE OR DOES NOT EXAMINE IT FURTHER.
>> WHEN -- YOUR CLIENT IS -- WAS AT THE TIME OF THE MURDER, 45 YEARS OLD.
>> YES, YOUR HONOR.
>> WHEN WAS THE LAST TIME ACCORDING TO ANY RECORDS THAT HE HAD RECEIVED TREATMENT INSTITUTIONALIZED FOR PSYCHIATRIC PROBLEMS.
>> THERE WAS -- WHEN HE WAS 16 YEARS OLD THE PSYCHOLOGICAL EVALUATION, HE HAD HEAD TRAUMAS, HEAD TRAUMA WHILE IN PRISON IN GEORGIA, AND I'M SORRY I DON'T RECALL THE EXACT DATE OF THAT.
>> WE HAVE HAD CASES AND WE THINK --
WHERE SOMEBODY IS BEING ACTIVELY TREATED FOR PSYCHIATRIC PROBLEMS UNTIL THE TIME OF THE MURDER WHICH CAUSES CONCERN, WE'RE DEALING WITH SOMEONE THAT MAY BE COMFORTABLE TENT BUT MAY HAVE A SIGNIFICANT PRESENT MENTAL ILLNESS.
>> THERE IS ALSO EXTENSIVE TESTIMONY INCLUDING THE DEFENDANT'S OWN LETTER, CRACK

COCAINE USE, 24/7 THE TEN DAYS
PRIOR TO THE KILLING WHERE HE
HAD ABSOLUTELY NO SLEEP OR VERY
LITTLE SLEEP.
AND THE ONLY EVIDENCE OF ANY
SLEEP HE HAD WAS ON THE ROOF OF
THE NEIGHBOR'S HOUSE.
>> WE HAD IMPOSED AND UPHELD THE
DEATH SENTENCE TO DEFENDANTS WHO
HAVE BEEN CRACK COCAINE ADDICTS.
ON MANY OCCASIONS.
>> YES, YOUR HONOR.
>> AND WHAT WE HAVE HERE WITH
THE DEFENDANT'S LETTER, WE NOW
KNOW THAT THE DEFENDANT WASN'T
JUST -- HE WAS ON A CRACK
COCAINE BINGE, FOR THE TEN DAYS,
BUT THAT HE, THAT MORNING,
ACTUALLY WENT INTO THE VICTIM'S
HOUSE, AND REMAIN THERE MANY
HOURS, WHEN WE MUST ASSUME THAT
HE WASN'T TAKING OR USING CRACK
COCAINE, IN THOSE HOURS, OF --
>> YES, YOUR HONOR, BUT AS YOU
ARE AWARE FROM OTHER CASES, EVEN
THOUGH HE WASN'T ACTIVELY TAKING
IT, THE FACT HE HAD DONE THAT
FOR TEN DAYS STRAIGHT, 24/7, HE
WAS IN AN ACUTE STAGE OF CRAVING
AND HIS ACTIONS WERE MOTIVATED
SOLELY BY THAT ADDICTION.
>> HE HAD NO HISTORY OF VIOLENT
CRIME.
>> THAT'S CORRECT, YOUR HONOR.
>> DID HE EVER EXPLAIN IN THE
LETTERS, THAT WHAT IT WAS THAT
-- ABOUT THE CRACK COCAINE, IT
WOULD LEAD SOMEONE TO WANT TO
GET MONEY, AND, WHAT IT WAS,
THAT LED HIM TO THINK ABOUT
MURDERING SOMEBODY.
>> NO, HIS LETTER DID NOT GO
INTO DETAILS OF THE ACTUAL CRIME
ITSELF, OTHER THAN SAYING THAT
WHEN HE WAS ON THE ROOF, HE SAW
THE VICTIM LEAVE FOR WORK, AND,

HE KNEW AT THAT TIME THAT WOULD
BE HIS VICTIM --
>> WHICH IS INTERESTING,
CONSIDERING THE FACT... HE WAS
THERE ALL DAY LONG AND IF HE
WANTED MONEY HE COULD HAVE
RANSAKED THE HOUSE AT HIS
LEISURE AND TAKEN WHAT IT WAS HE
WANTED AND, SO ON AND DONE
ANYTHING AND SO, THE FACT THAT
HE LAID IN WAIT FOR HER TO COME
BACK HOME, IS TELLING ABOUT THE
CRIME.
>> TELLING IN THAT HE WANTED HER
AUTOMOBILE, SO HE COULD --
>> IT WAS PREMEDITATED, THE
MURDER.
>> BUT IT REQUIRES HEIGHTENED
PREMEDITATION AND IT IS PURE
SPECULATION HE HAD A HEIGHTENED
MEDITATION FOR THE KILLING AND
HIS LETTER CAN BE ACCEPTED AS
MEANING --
>> BUT --
>> ROBBERY -- PARDON?
>> DIDN'T HE TIE HER UP.
>> YES, YOUR HONOR.
>> WELL, I'M NOT SURE THAT...
>> DOES THAT SHOW HEIGHTENED
PREMEDITATION FOR MURDER TO
SUBDUE SOMEONE IN WE SUBMIT IT
IS PURE SPECULATION.
>> YOU BELIEVE THAT WAS
NECESSARY IN ORDER TO...
[INAUDIBLE].
>> UNDER HIS CRAVINGS STATE, THE
EFFECT OF THE -- THE CRACK
COCAINE HAD ON HIS MENTAL
ABILITIES, THERE WAS TESTIMONY
HE WAS A DIFFERENT PERSON, FOR
NINE YEARS REMAINED CLEAN FROM
THE DRUGS AND HE WAS A COUNSELOR
AND FAMILY PROVIDER AND CARED
FOR --
>> GOING BACK TO CCC FOR A
SECOND ON THE HEIGHTENED ON THE

HEIGHTENED PREMEDITATION,
HAVEN'T WE HELD, IF ONE HAS AN
OPPORTUNITY... [INAUDIBLE]
COMMITTING THE MURDER, TO COMMIT
THE MURDER AND THEN LEAVE,
DOESN'T THAT GIVE RISE TO
HEIGHTENED PREMEDITATION.
>> HE WAS THERE WITH THE VICTIM
FOR A MAXIMUM OF 20 MINUTES,
YOUR HONOR.
ALSO, WHAT HIS MENTAL STATE WAS,
PRIOR TO HER ARRIVAL MERELY THE
FACT HE WANTED TO TAKE HER CAR
AND GET HER MASTERCARD HE
BELIEVED HE HAD THE PIN FOR IS
THE ONLY DEFINITE EVIDENCE WE
HAVE OF HEIGHTENED PREMEDITATION
AND THAT IS HEIGHTENED
PREMEDITATION FOR THE ROBBERY
AND THEFT.
>> THE RECORD SHOWS, AM I
CORRECT IN STATING NOTHING IN
THE RECORD SUGGESTS THERE WAS A
STRUGGLE.
>> NO, YOUR HONOR.
YOUR HONORS, THERE WAS NO SIGNS
OF A STRUGGLE.
AND THAT GOES TO HEINOUS,
ATROCIOUS AND CRUEL AND THE --
>> DOESN'T IT ALSO GO TO WHAT
WE'RE TALKING ABOUT NOW, IT
NEGATES ANY SUGGESTION THAT HE
GOT A STRUGGLE WITH HER AND
KILLED HER AS PART OF THAT
STRUGGLE.
WHEN THE EVIDENCE TENDS TO SHOW
HERE, SEEMS TO ME, HE WAITED FOR
HER, ALL DAY.
WHEN SHE CAME BACK HE SUBDUED
HER WITHOUT MUCH DIFFICULTY AND
PROCEEDED TO TIE HER UP, IN A
MOST PAINFUL WAY, AND NOT
ENTIRELY CLEAR IN WHICH ORDER
THESE THINGS WERE DONE AND
STABBED HER BRUTALLY, AND I --
IT IS HARD TO SEE HOW THERE IS

NOT HEIGHTENED PREMEDITATION IN
THIS SEQUENCE OF EVENTS, THAT IS
-- WE HAVE HERE.
>> ONE POSSIBLE THEORY.
BEHIND IT.
THE OTHER POSSIBLE THEORY IS THE
INTENT TO STEAL FROM HER AND
ONCE HE HIT HER THE FIRST TIME,
POSSIBLY RENDERING HER
UNCONSCIOUS, HE WAS IN SUCH A
MENTAL STATE, A RAGE THAT HE
WEPT OVER THE TOP.
>> DID HE STRANGLE HER BEFORE HE
HIT HER.
>> WE DO NOT KNOW.
>> ALL RIGHT.
>> THE MEDICAL EXAMINER COULD
NOT TELL.
THE FIRST BLOW COULD HAVE
RENDERED HER UNCONSCIOUS, THE
STRANGLING, IF IT WAS FIRST
COULD HAVE -- INTO THE PROBLEM,
THE FIRST BLOW, IF YOU ARE
CERTAIN THE FIRST BLOW MIGHT
RENDER HER UNCONSCIOUS AND HE
STRANGLED HERE AFTER THE FIRST
BELOW, THINK INTO IT COULD HAVE
BEEN, COULD HAVE BEEN THE
LIGATURE TIED TIGHTLY AROUND HER
NECK AS WELL.
>> IF SHE WAS UNCONSCIOUS, WAS
SHE MOVED.
>> NO EVIDENCE THAT SHE WAS
MOVED.
THIS TRIAL COURT INDICATED
ERRONEOUSLY BLOOD DROPLETS WERE
IN THE GARAGE AND THE STATE
SPECULATED SHE WAS FIRST
ATTACKED IN THE GARAGE AND
MOVED, HOWEVER, CAREFUL CLOSE
READING OF THE EVIDENCE SHOWS
THAT THE BLOOD IN THE GARAGE WAS
MERELY A SHOE PRINT IN BLOOD, BY
THE DEFENDANTS.
THERE IS NO EVIDENCE THERE WAS
STRUGGLE ANYWHERE, NOTHING ELSE

WAS OUT OF PLACE.
>> THE ME SAID THAT THERE WAS MOVEMENT -- PULLING AWAY, AND -- MOVING FROM RIGHT TO LEFT. DOESN'T THAT INDICATE THAT SHE WAS CONSCIOUS?
>> WHICH EVIDENCE IS THAT, YOUR HONOR.
>> MEDICAL EXAMINER'S.
>> I DO NOT RECALL THE MEDICAL EXAMINER INDICATED SHE WAS MOVED FROM ONE LOCATION TO ANOTHER.
>> HE WAS MOVING WITHIN A LOCATION IS WHAT I'M SAYING. BY THE LIGATURES AROUND HER NECK, SHE WAS IN FACT MOVING.
>> I DO NOT RECALL THAT.
>> PAGE 210.
>> IT WOULD TAKE MOVEMENT IN ORDER TO TIE A PERSON AS CAREFULLY AS HE DID.
--
>> NO, SHE WAS PULLING AWAY. SHE WAS PULLING FROM LEVEL. TO RIGHT NO ADDITION, YOUR HONOR, THE PROFFER BY THE TRIAL PUBLIC DEFENDER INDICATED THERE WAS A DOCTOR WHO COULD HAVE BEEN CALLED... WHO COULD HAVE BEEN CALLED -- [INAUDIBLE] AND THAT EVIDENCE WAS NOT PRESENTED TO THE TRIAL COURT.
>> AND, I MEAN, AGAIN, THAT IS WHAT HAPPENS WHEN WE HAVE THE WAIVER.
AND IT MAY BE IN ANOTHER CASE, THAT SOMEBODY WOULD HAVE BEEN ABLE TO SUCCESSFULLY CHALLENGE HAC OR CCP, AND OUR CONCERN --
>> THAT'S CORRECT, YOUR HONOR AND SHOWS THE SAFEGUARD DON'T WORK UNLESS THE TRIAL JUDGE EXAMINES ALL POSSIBLE MITIGATION AND --
>> BUT THERE IS NOTHING IN MOHAMMED THAT SAYS THAT IN

ADDITION TO PRESENTING
MITIGATION THAT THE -- THERE'S
AN OBLIGATION TO CONTEST
AGGRAVATION.
AGGRAVATING EVIDENCE.
>> WE SUBMIT THAT THAT IS PART
AND PARCEL OF IT.
CONFORMITY, BECAUSE IF YOU HOLD
IN THIS CASE IT WAS CCP BASED ON
INCOMPLETE EVIDENCE THAT SKEWS
THE REVIEW PROCESS.
>> LISTEN, THERE IS NO QUESTION
THAT THE PROCESS IS FAR FROM
PERFECT.
MY ISSUE ON THE CCP IS -- AND I
THINK IN CASES WE'VE CREPT AWAY
FROM CCP, AND WHAT IS NECESSARY
IS THAT AS JUSTICE KENNEDY SAID,
SHE IS TIED UP AND SHE'S
HELPLESS.
AND HE HAS AT THAT POINT
ACCOMPLISHED GETS HER VEHICLE
AND HER CREDIT CARD AND INSTEAD
MAKES A CONSCIOUS DECISION TO
KILL HER AND TALKS ABOUT HER AS
BEING A VICTIM AND HE WAS
CAPABLE OF SAYING, I DIDN'T
THINK ABOUT KILLING HER, UNTIL
THE LAST MINUTE.
WE WOULD HAVE KNOWN THAT, BUT I
THINK EVERYTHING THAT -- ABOUT
HIS LETTER INDICATES THAT THIS
WAS HIS PLAN AND THAT IS WHERE
I'M SATISFIED TO THE EXTENT THAT
YOU ATTACK CCP.
THAT IT IS CONSISTENT WITH CASES
WHERE THE VICTIM IS TIED UP,
HELPLESS, THE PERSON HAS A
CHANCE THEN TO LEAVE BUT THEN
MAKES A CONSCIOUS DECISION TO
KILL A HELPLESS VICTIM.
>> AND THERE ARE ALSO CASES THAT
SHOW THE RELATIONSHIP BETWEEN
MITIGATION AND CCP OR HAC SUCH
AS WHITE AND RICHARDSON WE CITED
IN THE BRIEF, BECAUSE OF THE

EXTREME DRUG ABUSE THE DEFENDANT
WAS INCAPABLE OF FORMING A
HEIGHTENED PREMEDITATION.
THANK YOU.
>> MAY IT PLEASE THE COURT,
BARBARA DAVIS.
I REMEMBER THE STATE OF FLORIDA.
AND I WILL -- HERE TO ANSWER ANY
QUESTIONS YOU MAY HAVE ABOUT ANY
PART OF THIS CASE.
I FIRST WANT TO POINT OUT AS FAR
AS JUSTICE PARIENTE'S QUESTION,
ABOUT THE MENTAL HEALTH,
MR. RUSS REFUSED THE MENTAL
HEALTH EVALUATION, AND REFUSED A
PET SCAN.
AS FAR AS THE 1978 EVALUATION,
THAT WAS MENTIONED BY THE PUBLIC
DEFENDER, THAT THE PUBLIC
DEFENDER MENTIONED THAT BUT ALSO
SAID IT -- AT PAGE 513 THAT HE
HAD NOT BEEN ABLE TO OBTAIN THAT
EVALUATION.
THE PUBLIC DEFENDER'S PROFFER
WAS A PROFFER ACCORDING TO KOON
AND HE ADMITTED DURING THE
PROFFER THESE ARE AREAS WE ARE
INVESTIGATING, SOME OF THESE
PEOPLE WE HAVE NOT BEEN ABLE TO
CONTACT.
SOME OF THE INFORMATION WE HAVE
NOT OBTAINED.
BUT, THESE ARE POTENTIAL AREAS.
THAT IS NOT EVIDENCE.
THAT IS NOT SOMETHING THAT YOU
SAY COURT COUNSEL WAS
INEFFECTIVE BECAUSE HE DIDN'T DO
ALL OF THAT.
AND, BY THE WAY THAT IS WHAT
THEY ARE SAYING, COURT COUNSEL
MAY HAVE BEEN INEFFECTIVE AND IS
NOT AN ISSUE FOR DIRECT APPEAL
AND THE COURT SAID IN LAMARCA
AND GRIM, WHEN YOU WAIVE
MITIGATION YOU CANNOT CLAIM --
INEFFECTIVE --

>> WE SHOULD PUT THAT TO REST.
IF A DEFENDANT MADE A KNOWING
WAIVER OF MITIGATION I CANNOT
CONCEIVE WE WOULD SAY, WELL,
THAT CALLS COULD BE ATTACKED ON
POSTCONVICTION.
THAT WOULD DEFEAT THE PURPOSE
HERE.
I AGREE WITH WHAT YOU ARE
SAYING.
YOUR -- FROM YOUR REVIEW, AND
THE STATE'S REVIEW OF THE
RECORD, FIRST OF ALL, YOU AGREE,
OF COURSE IT LOOKS LIKE THE
TRIAL COURT FOLLOWED MOHAMMED.
>> ABSOLUTELY.
AND WENT ABOVE AND BEYOND AND
APPOINTED SPECIAL COUNSEL.
WHO PRESENTED EVIDENCE TO THE
TRIAL COURT.
ARE YOU CONCERNED THAT THERE IS
ANY OF THIS MITIGATION, THAT THE
TRIAL COURT THAT WAS IN THE
RECORD, TRIAL COURT DID NOT
CONSIDER?
>> NOT AT ALL.
AND WHEN YOU LOOK AT HER
SENTENCING ORDER, SHE DOES AN
INCREDIBLE JOB OF GALVANIZING
THE ISSUES BECAUSE THOUGH IT IN
THE BRIEF THESE ISSUES AR
DISCIPLINE TER SPLINTERED.
AND THERE WAS NO INDICATION THE
FATHER WAS MENTALLY ILL AND THE
DEFENDANT BASICALLY SAID THAT,
THE DEFENDANT DENIED ANY HISTORY
OF MENTAL ILLNESS, AND, DENIED
HIS FATHER -- THAT IS IN THE
RECORD AT 528.
>> HE MIGHT HAVE DENIED IT, A
LOT OF THESE, WHO WE CALL,
QUOTE-UNQUOTE VOLUNTEERS DON'T
WANT THEIR MENTAL MITIGATION TO
BE PRESENTED AND OUR OBLIGATION
IS TO BE SURE THERE IS NOT A
SERIOUS MENTAL ILLNESS OR

SOMEBODY WHO IS RETARDED,
MENTALLY RETARDED, TO MAKE SURE
THAT -- WE ARE NOT FOLLOWING
THEIR WISHES, WE ARE MAKING A
REASONED JUDGMENT.
THERE'S NOTHING RECENT IN THE
RECENT 20 YEARS, SAY, BEFORE HIS
-- THIS CRIME THAT HE WAS
TREATED FOR MENTAL ILLNESS.
>> NOTHING AT ALL AND THEY PUT
IN ALL THE RECORDS FROM THE
PRISON SYSTEM, FROM THE PSI HE
HAD QUITE A LENGTHY HISTORY.
THERE WAS A NOTATION IN THE LAST
SET OF RECORDS FROM HIS
INCARCERATION IN STANFORD,
PSYCHIATRIC HISTORY, BUT THAT IS
NOT IN ANY OF THE OTHER RECORDS.
AND THERE IS AN ABSENCE OF THIS.
HE WAS TREATED FOR DEPRESSION
ONCE HE WAS ARRESTED FOR THIS
CRIME.
BUT THAT IS AFTER THE CRIME.
SO, NO SERIOUS MENTAL ILLNESS
AND THE JUDGE FOUND HEAD TRAUMA
BECAUSE IN THE PSI THERE WAS
INDICATION HE HAD HAD A CAR
ACCIDENT, HOWEVER, BY WAIVING
THE MENTAL HEALTH EVALUATION OR
PET SCANS THAT WAS NEVER
DOCUMENTED.
AND THE CAR ACCIDENT WAS WAY
BACK, WAY BACK AND REMEMBER, ONE
OF THE MITIGATING CIRCUMSTANCES
IS, THERE WAS NO VIOLENT
CRIMINAL HISTORY
SO... BETWEEN ANY CAR ACCIDENT
AND THE PRESENT CRIME WOULD BE
COMPLETELY SPECULATIVE.
>> LET ME ASK YOU ABOUT HIS
HISTORY.
HE WRITES IN THE LETTER, OF --
ONE OF THE LETTERS THAT WHEN I
WAS A YOUNG BOY I WAS ABUSED, I
WENT TO FOSTER CARE FOR CHILD
ABUSE AND NEVER ADJUSTED FROM

THAT POINT FORWARD AND HE SAID I TELL -- HE SAYS I DON'T OFFER THAT AS AN EXCUSE.
WHAT WAS THE -- THERE IS NO QUESTION HE WAS IN FOSTER CARE, AND WHAT WAS THE NATURE OF THE CHILDHOOD ABUSE?
PHYSICAL ABUSE?
SEXUAL ABUSE?
DO WE KNOW.
>> NO SEXUAL AND IT WAS PHYSICAL AND PSYCHOLOGICAL.
AND, THE TRIAL JUDGE IN HER ORDER, OUTLINES THAT COMPLETELY, ALL THE ABUSE THAT POTS, PANS, EVEN A BASEBALL BAT AND THAT IS FOUND AS MITIGATION, THE FATHER ABUSED BOTH THE DEFENDANT AND HIS BROTHER, AARON.
AARON TESTIFIED AT THE PENALTY PHASE, WHO HAS DEVELOPED INTO A SUCCESSFUL CONTRACTOR AND NEVER HAD ANY OF THESE EMOTIONAL PROBLEMS AND THE DEFENDANT ALSO WAS ABLE TO OVERCOME ANY OF THIS FOR LONG PERIODS OF TIME, HE WAS GIVEN EVERY OPPORTUNITY AND AS HE SAID HE CHOSE, HE CHOSE TO GO BACK TO COCAINE.
HE WAS LIVING IN A RELATIONSHIP, TAKING CARE OF THE 80-YEAR-OLD AUNT, LIKE A FATHER TO THE CHILD, AND HE CHOSE TO GO ON A COCAINE BINGE.
>> THIS DEFENDANT, DID GO TO SOME COLLEGE AND HE WAS ACCEPTED AT TEXAS TECH I BELIEVE IT WAS.
>> YES.
AND HE HAD A GRADE POINT AVERAGE OF 3.67.
>> WE DON'T HAVE ANY ISSUE ABOUT RETARDATION OR ANY OF THOSE OTHER KINDS OF... SLOW LEARNING.
>> NONE WHATSOEVER.
>> DO YOU KNOW WHAT HIS IQ WAS -- IS?

>> NO.
>> BUT WE ASSUME IT MUST BE CERTAINLY AVERAGE OR ABOVE AVERAGE.
>> YES.
AND THIS IS -- WHEN HE WENT TO COLLEGE, HE HAD BEEN IN PRISON, AND FIGHTING AN ADDICTION AND HE OBTAINED A SCHOLARSHIP FOR DRUG ADDICTS TO GO TO COLLEGE AND HE WAS -- THIS IS ALL IN THE MITIGATION, HE WAS WORKING IN A SUBSTANCE ABUSE PROGRAM AND THAT IS HOW HE GOT THE SCHOLARSHIP TO GO TO COLLEGE.
AND HE WAS CLEAN FOR LONG PERIODS OF TIME.
BUT LIKE HE SAID, HE CHOSE TO DO COCAINE.
>> WELL, THERE'S -- YOU KNOW, AGAIN, THE ISSUE OF THE NATURE OF ADDICTION IS ONE OF THE TROUBLING THINGS.
HE SAID THAT IF HE HAD NOT GONE BACK ON CRACK COCAINE, THIS CRIME WOULD NEVER HAVE OCCURRED AND THIS IS -- THAT WILL NOT BE MITIGATING IN ORDER TO OVERCOME THE AGGRAVATING FACTORS BUT DOES THE STATE HAVE ANY REASON TO DISPUTE THAT?
THAT THIS WAS A CRACK COCAINE RELATED CRIME?
>> YOU KNOW, ADDICTS HAVE SO MANY EXCUSES, AND HE WOULD COME AND GO AND COME AND GO AND AT 45 YEARS OLD, HE HAD FOUGHT ADDICTION FOR A LONG PERIOD OF TIME AND TO SAY THAT, WELL, I BECAME A COLD-BLOODED MURDERER BECAUSE OF COCAINE, IS JUST A LITTLE TOO SIMPLISTIC.
>> WHAT -- THEN WHAT DOES -- WE ALWAYS LOOK TO SEE, GOING FORWARD, THIS IS A CHILLING TALE, FOR OTHER PEOPLE, WHAT

ELSE, OTHER THAN AN UNDERLYING ADDICTION, IF THE PERSON HAS NOT BEEN VIOLENT HIS ENTIRE LIFE, COULD EXPLAIN THE HORRIBLE, TERRIBLE CRIME.
>> WHEN YOU ARE 45 YEARS OLD AND YOU ARE STILL BURGLARIZING HOMES AND LYING IN WAIT FOR ELDER WOMEN, GOING THROUGH THE HOUSE, TAKING THEIR VALUABLES, AND PREPARING FOR HER ARRIVAL, HE WENT AND GOT ROPE, FROM GARAGE TO TIE HER UP, GOT THE BUTCHER KNIFE FROM THE KITCHEN, PREPARED FOR HER ARRIVAL.
HE SOCKED HER IN THE FACE AT LEAST 2, MAYBE 3 TIMES.
>> BUT I'M ASKING YOU, THERE IS NO HISTORY, SOMETHING LIKE -- AND AGAIN, THIS IS A DEATH SENTENCE THAT IS GOING TO BE AFFIRMED BASED ON EVERYTHING WE HAVE HERE.
I'M ASKING YOU, AS IF WE WERE LOOKING AND YOU WERE TO -- SEE YOUNG PEOPLE AND THEY SAY THIS CRIME OCCURRED, HAD HERE -- I'M ASKING, EVER BEEN VIOLENT OR ABUSIVE IN HIS ENTIRE 45 YEARS.
>> HE HAD NOT BUT HE ESCALATED.
HE ESCALATED.
HE MADE A CONSCIOUS DECISION TO DO THAT.
AND HE MADE A CONSCIOUS DECISION TO GO AHEAD AND KILL HER AS THE STATE ARGUES, THE MOTIVE FOR THAT WAS WITNESS ELIMINATION, THE TRIAL JUDGE DID NOT FIND THAT.
BECAUSE SHE DID NOT BELIEVE SHE MAY HAVE BEEN ABLE, BEYOND A REASONABLE DOUBT, TO IDENTIFY HIM BECAUSE APPARENTLY HE WAS LYING EN WAIT FOR HER AND HIT HER EN THE FACE TO DISABLE HER AND HAD TO HAVE MOVED HER AND

PLEDGED KIDNAPPING UNDER THE
FACTS AND AT SOME POINT MOVED
HER INTO THE BATHROOM --
>> THAT WAS A QUESTION BECAUSE I
COULDN'T FIGURE OUT WHERE THE
KIDNAPPING CAME FROM BUT YOU
SAY, SHE MUST HAVE BEEN MOVED
FROM ONE PLACE TO ANOTHER.
>> YES.
AND THE -- THERE WAS BLOOD IN
THE GARAGE, HOWEVER, IF THERE
WERE BLOOD DROPLETS THEY WERE
STEPPED UPON AND BECAME A FOOT
IMPRESSION AND THERE WAS BLOOD
IN THE KITCHEN AND THOSE DNA
RESULTS CAME BACK DURING THE
PENALTY PHASE AND IT WAS NOT
ADMITTED HOWEVER THE JUDGE DID
FIND OUT... [INAUDIBLE] THE
DEFENDANT AGREED THAT SHE WAS
MOVED AND, WHAT HAPPENED, SHE
WAS AT SAM'S AND PUT HER PURSE
IN SOME -- AND SOME ITEMS IN THE
GARAGE AND TOOK THE SHRIMP AND
VEGETABLE PLATTER INSIDE AND
OBVIOUS SHE WOULD HAVE BEEN IN
THE HOUSE AND GONE BACK TO GET
HER PURSE AND ITEMS, AND, SHE
WAS ATTACKED AT SOME POINT THERE
SHE WAS HIT IN THE FACE AND HER
HANDS WERE TIED TO THE EXTENT,
BOTH CLAVICLES WERE DISLOCATED
AND BINDINGS SO TIGHT HER HANDS
TURNED PURPLE AND BLUE AND HER
RIBS WERE BROKEN, THE ME SAID BY
BLUNT FORCE TRAUMA AND SHE'S
LAID FACE DOWN ON THE FLOOD --
>> SLAMMED FACE DOWN.
THAT MIGHT HAVE BEEN WHAT CAUSED
THIS RIBS TO BE BROKEN.
>> THAT COULD HAVE CAUSED THE
RIBS, YES.
BUT THE BLOWS TO THE FACE,
CHIPPED A TOOTH, RIGHT HERE AND
RIGHT HERE, TWO, MAYBE THREE.
>> HOW OLD WAS THE VICTIM.

>> 58.
>> AND SHE WAS MENTIONED ABOUT
HER BEING A LARGE WOMAN.
>> 5 FEET, WEIGHED 228 POUNDS
AND THE DEFENDANT WAS, WHAT WAS
HIS SIZE --
>> SIZE AND WEIGHT.
>> 6 FOOT TALL AND BETWEEN 230
AND 250.
HE WAS A ROOFER.
HE WAS A BURLY MAN.
OBVIOUSLY, COULD OVERPOWER HER
AND BECAUSE SHE WAS HEAVY SET
WHEN HE PULLED WITH SUCH FORCE
AND DISLOCATED THE CLAVICLE THE
MEDICAL EXAMINER SAID IT EXCRUCIATING AND WHEN HE LAID
HER ON HER FACE AND HER WEIGHT
WAS ON HER, IT WOULD ALSO BE
EXCRUCIATING PARTICULARLY WITH
HER HANDS BEHIND HER AND HE TIED
HER LEGS WITH A ROPE AND SHE'S
HOG-TIED, AND PUTS A NOOSE
AROUND HER NECK WITH ONE OF
THESE LOOPS WHERE YOU CAN PULL,
AND THERE WAS AT SOME POINT PA
TEAK YEAH AND, STRANGULATION IN
ITSELF IS HEINOUS, ATROCIOUS AN
CCP WITHOUT THE --
>> STRANGULATION ALONE IS NOT
CCP.
>> HAP.
AND, WE HAVE GOT THE MOST TERROR
THAT A WOMAN CAN HAVE IN HER
HOUSE, COMING IN WITH A FRUIT
PLATTER, BEING ATTACKED IN HER
OWN HOUSE, HOG TIED, A NOOSE
AROUND HER NECK AND THE COUPE DE
GRAS, THREE BRUTAL STABS WITH
THE KNIFE HE HAD PROCURED FROM
THE KITCHEN, WHICH, IF YOU LOOK
AT THE CASE OF BUZIA ON CCP AN
HCP, HE HAD BEEN THERE ALL DAY,
CUT HIS ROPE AND GOT HIS KNIFE
AND WAS READY FOR HER TO COME IN
AND ATTACK HER AND THE TERROR
SHE WENT THROUGH AND ULTIMATELY

THERE ARE THREE DEEP STAB ONES,
ONE TO THE SKULL, SEPARATED THE
SKIN AND DIDN'T BREAK THE
CRANIUM, THREE DEEP STAB WOUNDS
THROUGH THE BACK AND NICKED THE
AORTA, DIDN'T SEVER IT AND SO
BLEEDING AND LYING ON YOUR CHEST
AND ASPHYXIATING AND THE MEDICAL
EXAMINER SAID, EVERY STAGE OF
THIS, SHE WOULD BE IN
EXCRUCIATING PAIN AND WHEN YOU
WALK INTO YOUR HOUSE, AND
SOMEBODY PUNCHES YOU IN THE FACE
AND HOG TIES YOU AND TRIES TO
STRANGLE YOU AND STABS YOU IN
THE BACK, YOU PRETTY MUCH KNOW
THAT IS IT.
AND LOOK AT THE CASE OF RALEIGH.
THE BLISS ATTACK, HE SAYS SHE
COULD HAVE BEEN UNCONSCIOUS AT
SOME POINT, SHE ABSOLUTELY WAS
NOT.
AS JUSTIFY PERRY POINTED OUT THE
MEDICAL EXAMINER SAID THERE WAS
MOVEMENT FROM LEFT TO RIGHT
AGAINST THE ROPE.
WHICH DOES A FURROW AND THERE
WERE ABRASIONS ON THE LEFT SIDE
OF HER NECK.
SHE WAS TRYING TO RESIST THAT
NOOSE.
THERE WAS NO EVIDENCE OF A...
[INAUDIBLE] RAGE OR COCAINE
INTRODUCED FRENZY.
HE WAS THERE IN THE HOUSE FOR
ALL DAY LONG.
SO, I THINK THAT ADDRESSES HAC
AND CCP.
ALL IN ONE BUNDLE.
AND AS FAR AS THE CRACK COCAINE
DOES NOT PRECLUDE A FINDING OF
CCP THE COURT FOUND THAT
CONTINUOUSLY, MOST RECENTLY IN
THE CASE OF TURNER.
AND UNLESS THERE IS ANY OTHER
QUESTIONS... ASK THE COURT TOO,

FIRM THE CONVICTIONS AND THE
SENTENCES.
THANK YOU.
>> THANK YOU, BOTH.
WE NOW MOVE TO THE SECOND CASE
ON OUR DOCKET, TODAY, HILDWIN
VERSUS THE STATE OF FLORIDA.
6
>> PLEASE THE COURT, FOR THE
RECORD, I'M MARTIN McCLAIN AND
I'M HERE ON BEHALF OF MR. PAUL
HILDWIN, THIS SPECIFIC APPEAL,
09-1417, IS FROM THE PENALTY
PHASE AND INEFFECTIVE ASSISTANCE
OF COUNSEL AND BECAUSE OF THE
LONG, SOMEWHAT TORTURED HISTORY,
THIS IS A 1985 CRIME, 1986
CONVICTION AND SENTENCE OF DEATH
AND 1988 THIS COURT AFIRMED ON
DIRECT APPEAL, 1992 EVIDENTIARY
HEARING ON A 3850, AND AT THAT
EVIDENCE REHEARING EVIDENCE WAS
PRESENTED REGARDING SUFFICIENT
PERFORMANCE AND MENTAL HEALTH
EXPERTS WERE CALLED IN IN TERMS
OF [INAUDIBLE] AND THE JUDGE
DENIED RELIEF, BUT, NOTED THAT
THE MENTAL HEALTH EXPERTS
PRESENTED THE MOST COMPELLING
AND PERSUASIVE EVIDENCE OF
MENTAL HEALTH MITIGATION.
THIS COURT AFFIRMED THE DENIAL
OF GUILT AND GRANTED PENALTY
PHASE RELIEF RELYING ON THE
JUDGE'S DOET AND THE JUSTICE
PRESIDED IN 1982 AND WAS NOT THE
ORIGINAL JUDGE IN 1986 AND 1996
THE RESENTENCING OCCURS AND A
SENTENCE OF DEATH RESULTS AND
THE COURT AFFIRMS ON APPEAL IN
199 8, 2000, A... IS FILED,
AMENDED AND IN INCLUDES THE
PENALTY PHASE, INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM
INCLUDES A REQUEST FOR DNA
TESTING AND THE JUDGE...

[INAUDIBLE] WARRANTED PHASE, AND HOLD IT IN ABEYANCE WHILE DNA ISSUES ARE HEARD AND DNA TESTING OCCURS, AND THE RESULTS ESTABLISH THAT THERE IS AN UNKNOWN MALE PROFILE IN THE SEMINAL FLUID ON THE PANT IS AND THE WASH CLOTH.
SALIVA SWEAT AND EVIDENTIARY HEARING OCCURS ON THE DNA EVIDENCE AND THE JUDGE DENIES THAT IN TRIAL AND THERE IS AN APPEAL TO THE COURT AND THE COURT AFFIRMS, 4-3 AND, A HABEAS IS FILED AND THEN, MR. HILDWIN FILED A MOTION, SAYING WE NEVER DEALT WITH THE PENALTY PHASE, AND... THE JUDGE GRANTED AN EN DEN -- EVIDENTIARY HEARING, WHICH WAS HELD IN 2009 AND THAT IS THE APPEAL.
MEANWHILE A WRIT OF -- WRIT PETITIONS REGARDING SUBMITTING THE DNA PROFILE... [INAUDIBLE] WAS FILED WITH THE COURT LAST YEAR, AND THE COURT RELINQUISHED JURISDICTION AND AN EVIDENTIARY HEARING OCCURRED FEBRUARY 9TH AND 10TH AND THAT HAS JUST RETURNED TO THE COURT AND, AS THE...
>> WHAT WE'RE HERE AS YOU SAID WE'RE HERE ON THE PENALTY PHASE, IN EFFECTIVE ASSISTANCE AND WHEN WE LOOK AT, THE COUNSEL, I DIDN'T IF HE EFFECTIVE ASSISTANCE WE LOOK AT WHAT HAPPENED THE FIRST PENALTY PHASE AND AS YOU SAID THE POSTCONVICTION AND THEN LOOK AT THE, WHAT WAS PRESENTED AND YOUR EVIDENTIARY HEARING AND I KNOW YOU WILL MAKE ARGUMENTS, THEY SHOULD HAVE CALLED DR. CARBONELL AND SHOULD HAVE GIVEN DR. BERLAND THE RECORD AND THAT

MADE HIM LESS EFFECTIVE.
BUT DON'T KNOW, WHEN WE ARE LOOKING AT WHETHER COUNSEL IS INEFFECTIVE.
RATHER THAN LOOKING AT ONE SPECIFIC THING DONE, SHOULDN'T WE LOOK AT THE TOTALITY OF HOW THE PENALTY PHASE WAS IN FACT PRESENTED?
BECAUSE IT LOOKS LIKE YOU IN AN EXPERT WAY AS YOU OFTEN DO, PICKED OUT SOME THINGS THAT MIGHT BE OF CONCERN, BUT, YET, NOT LOOK AT THE WHOLE PICTURE.
THAT IS, DR. MAHER TESTIFIED LAY WITNESSES WERE NOT PRESENTED ORIGINALLY, THAT MITIGATION WAS FOUND BY THE TRIAL JUDGE, THAT WAS NOT FOUND ORIGINALLY, THE JURY DID SPLIT 8-4 AND ORIGINALLY THERE WAS 11-1 OR 12-0.
SO, HELP ME UNDERSTAND IN TERMS OF YOUR PICKING OUT THESE THINGS, DO WE LOOK AT THOSE IN ISOLATION OR DON'T WE HAVE TO LOOK AT THAT IN THE TOTALITY OF HOW THE PENALTY PHASE WAS PRESENTED?
>> WELL, I'M NOT ADVOCATING THAT -- IN ISOLATION, CONTEXT IS IMPORTANT AND THE FACT THAT THE ORIGINAL ATTORNEY BACK IN 1986 WAS PARTICULARLY PAD AND COMPARISON THE ATTORNEYS IN 1996 DID BETTER IS INTERESTING BUT IN AND OF ITSELF DOES NOT RESOLVE WHETHER OR NOT THE 1996 ATTORNEYS RENDERED SUFFICIENT PERFORMANCE AND, SPECIFICALLY, WHAT IS UNIQUE ABOUT --
>> LET ME PUT IT ANOTHER WAY. IF THE ATTORNEYS HAD TAKEN EVERYTHING THAT WAS IN THE 1992 EVIDENTIARY HEARING, AND PRESENTED IT, LIKE IT WAS IN THE

1992 EVIDENTIARY HEARING, WOULD
THERE BE A CLAIM -- YOU ARE NOT
SAYING THEY DIDN'T UNCOVER,
FAILED TOWN COVER ADDITIONAL
MITIGATION.
IS THAT CORRECT?
THEY HAD THE OUTLINE FOR WHAT
THEY NEEDED TO DO AND DIDN'T DO
IT?
>> YES.
AN --
>> THAT'S ESSENTIALLY IT.
>> AND PARTICULARLY WHAT THIS
COURT SPECIFICALLY RELIED UPON
THE JUDGE'S FINDING THE EXPERTS
WERE MOST COMPELLING AND
PERSUASIVE.
>> BUT WE HAVE A SITUATION ON
DOCTOR CARBONELL THERE IS A
FINDING THAT HE BECAME AN
UNWILLING WITNESS, WE HAVE
DEFENSE COUNSEL THAT ATTEMPTED
TO USE HER 1992 TESTIMONY AND
THE JUDGE DENIED IT, WHAT ELSE
DID YOU WANT THEM TO DO?
DRAG HER INTO COURT WITH --
UNWILLINGLY.
>> THEY COULD HAVE HAD
DR. BERLAND LOOK AT HER
TESTIMONY AND HER BACKGROUND,
EVERYTHING SHE CONSIDERED WAS
INTRODUCED INTO EVIDENCE IN
1992.
IT WASN'T --
>> IT WAS GIVEN TO DR. MAHER WHO
TESTIFIED.
>> AND THE FINDING, THE JUDGE
MADE WAS, THERE WERE SUBTLE
DIFFERENCES, BETWEEN DR. MAHER
AND DR. BERLAND, WHICH
UNDERMINED THEIR CREDIT BELTED,
THE JUDGE SAID IN 1992, MOST
COMPELLING AND PERSUASIVE AND
1996, THE RESENTENCING.
>> BUT, BUT... GO BACK.
YOU AGREE THE INFORMATION WAS

GIVEN TO THE PERSON WHO ACTUALLY
TESTIFIED THE INFORMATION FROM
THE IN WILLING WITNESS, ALL THE
INFORMATION WAS GIVEN TO THE
EXPERT WHO TESTIFIED?
>> DR. BERLAND DID NOT HAVE
ACCESS TO THE BACKGROUND PACKET
INTRODUCED INTO EVIDENCE.
>> NOW WE HAVE A DIFFERENT
EXPERT.
>> DR. BERLAND TESTIFIED IN
1996.
>> YOU SAY THE INFORMATION WAS
NOT GIVEN TO THE EXPERT WHO
TESTIFIED, THE INFORMATION THAT
WAS NEEDED.
>> YES.
THAT'S CORRECT.
>> SEEMS -- AGAIN IT SEEMS, THEY
HAVE NO EXPLANATION FOR THAT AND
SEEMS LIKE THAT IS A SCREW-UP.
THAT IS -- I GUESS I QUESTION I
HAVE FOR YOU IS, EVERY --
ANYTHING THAT HAPPENS WHERE YOU
LOOK BACK AND GO, THERE WAS NO
STRATEGIC REASON NOT TO GIVE
DR. BERLAND ALL OF THOSE
RECORDS.
SO IT ENDS UP THAT HE IS MUCH
LESS EFFECTIVE WITNESS.
BUT ALL OF THE INFORMATION IS
GIVEN TO DR. MAHER.
WHO TESTIFIED.
IS THAT ITSELF SOMETHING THAT --
THAT ERROR RISE TO THE LEVEL OF
CONSTITUTIONALLY DEFICIENT
PERFORMANCE?
>> YOUR HONOR, I RECOGNIZE THERE
ARE SCREW-UPS AND THERE ARE
SCREW-UPS AND TO SOME EXTENT THE
DEGREE OF THE SCREW-UP THAT
DETERMINES WHETHER --
>> NOT MY TERM OF ART.
>> WE ARE COMMUNICATING I THINK.
>> SUFFICIENT PERFORMANCE.
>> IS THE BAR AND, I MEAN, THE

PROBLEM HERE RISES, I MEAN, IF THIS COURT GRANTED THE RESENTENCING IN 1992 ON THE BASIS OF THE TESTIMONY WOULD THE COURT HAVE GRANTED THE RESENTENCING IN 1992 IF WHAT WAS PRESENTED IN 1996 WAS PRESENTED IN 1992?
THE PROBLEM IS THE COURT WAS RELYING ON WHAT WAS PRESENTED IN 1992, TO SAY A RESENTENCING WAS REQUIRED AND THEN IT'S NOT PRESENTED.
I DON'T KNOW OF ANY OTHER CIRCUMSTANCE, QUITE LIKE THIS ONE.
>> YOUR ARGUMENT SEEMS TO BE THAT I THINK THE ATTORNEY ON RESENTENCING IS REQUIRED TO DO EXACTLY WHAT WAS DONE IN THE EVIDENTIARY HEARING TO GET THE NEW SENTENCING AND I'M NOT SURE I TOTALLY AGREE WITH THAT.
>> I'M NOT SURE I TOTALLY AM STATING THAT IN MOST CONTEXTS BUT IN THIS CONTEXT, WHERE THIS COURT SPECIFICALLY RELIES ON THE JUDGE'S FINDING, THOSE EXPERTS WERE MOST COMPELLING AND PERSUASIVE.
>> MOST COMPELLING AND PERSUASIVE THAT THIS MAN NEEDED A NEW SENTENCING --
>> NO, MOST COMPELLING AND PERSUASIVE THERE WERE STATUTORY MENTAL HEALTH MITIGATING CIRCUMSTANCES.
>> YOU NEEDED A NEW PROCEEDING AND HE GOT ONE AND IN FACT LAY WITNESSES CALLED AT THE NEW SENTENCING WASN'TS THERE TO SUPPORT ALL OF THE INFORMATION.
>> BUT -- YES.
BUT THE JUDGE IN HIS SENTENCING ORDER SPECIFICALLY CRITICAL CRITICIZED DR. BERLAND IN

CROSS-EXAMINATION, IT CAME OUT, THAT HE HAD NOT REVIEWED THE RECORDS.
HE HAS NOT TALKED TO THE WITNESSES AND, SO, THE JUDGE FINDS THAT THERE IS NOT -- EVEN THOUGH HE FINDS STATUTORY MENTAL HEALTH MITIGATION FINDS THE BURDEN OF PROOF HAS NOT CARRIED AND UNDERMINES THE WEIGHT TO BE GIVEN TO THE TESTIMONY.
>> THE PROBLEM IS, IN THE JUDGE'S SENTENCING ORDER, HE SAYS THE DEFENDANT'S CHILDHOOD WAS HORRIBLE AND, HE HAD A HISTORY OF DRUG ABUSE AND SUFFERED FROM ORGANIC BRAIN DAMAGE AND... HIS TYPE OF MENTAL ILLNESS IS APPROPRIATE AND TREATABLE IN A PRISON SETTING. NEVERTHELESS, THESE FACTORS ARE GREATLY OUT WEIGHED BY THE HEARTLESSNESS AND CALLOUSNESS OF THE MURDER OF MS. COX AND I'M NOT SURE THAT SUFFICIENT EXPENSIVE EQUALS CONSTITUTIONALLY DEFICIENT, EVERY ERROR BECOMES CONSTITUTIONALLY DEFICIENT BUT IF WE RECOGNIZE THEY SHOULD HAVE GIVEN THE RECORDS TO DR. BEHR AND WE HAD DR. MAHER AND ALL OF THE LAY WITNESSES HOW DO YOU GET TO WITH THE FINDINGS MADE BY THE JUDGE ON MITIGATION, THAT THIS WOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME, THE SECOND PRONG OF STRICKLAND.
>> I RECOGNIZE WHAT YOU QUOTED FROM THE JUDGE'S ORDER BUT I WOULD MAKE THE POINT, THAT THIS COURT SAID IN AFFIRM THE TRIAL COURT EXPLAINED AT LENGTH WHY IT DOES NOT FIND THE PSYCHOLOGICAL MITIGATING EVIDENCE TO BE PARTICULARLY COMPELLING.

AND THAT IS CONTRASTED WITH THE PREVIOUS FINDING, WHERE IT WAS --
>> I'LL LOOK AT THAT AGAIN BUT, IT -- THE JUDGE DID NOT GRANT A PENALTY PHASE, THE COURT GRANTED IT.
HE MIGHT HAVE SAID THESE WERE COMPELLING WITNESS AND DIDN'T THINK THEY WERE COMPELLING ENOUGH TO REQUIRE A NEW PENALTY PHASE.
PENALTY PHASE, IS THAT CORRECT.
>> PART OF THE JUDGE'S REASONING IN NOT GRANTING A RESENTENCING WAS BECAUSE THE ORIGINAL JUDGE WAS WELL-KNOWN AND WOULD HAVE IMPOSED DEATH IN ANY REGARD AND IN FACT WAS PART OF THE JUDGE'S SPECIAL CONCURRENCE, HIS CONCERN OVER THAT.
BUT REMEMBER, THIS IS 8-4 AND HAD THE EXPERTS BEEN PARTICULARLY COMPELLING AND WE ARE TALKING ABOUT TWO INJURY RAILROADS WHO CHANGED THEIR VOTED AND THAT IS UNDERMINING THE CONFIDENCE IN THE OUTCOME, MUCH MORE WAS DONE IN 1996 THAN 1986.
YES.
THE JURY WAS MUCH CLOSER IN 1996 THAN BEFORE AND THE QUESTION IS WHETHER THE MISTAKE...
[INAUDIBLE] EFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME AND HERE, WHAT WE HAVE IS HAD THERE BEEN A PARTICULARLY COMPELLING MENTAL HEALTH MITIGATION PRESENTED --
>> I'M STILL TRYING TO FIND OUT WHAT IS NOT COMPELLING ABOUT DR. MAHER'S TESTIMONY?
>> WELL, WHAT THE JUDGE SAID IS BECAUSE OF THE SUBTLE DIFFERENCES BETWEEN MAHER AND

DR. BERLAND IN 1996, WHICH
ARISES FROM THE FACT THAT
DR. BEHR DID NOT PROVIDE THE
BACKGROUND INFORMATION AND
DIDN'T INTERVIEW THE WITNESSES
HE WANTED TO INTERVIEW...
[INAUDIBLE] REDUCES THE
COMPELLING NATURE OF THE MENTAL
HEALTH LITIGATION.
>> THE EVIDENTIARY HEARING, DID
D BERLAND SAY WITH THE
INFORMATION HIS DIAGNOSIS WAS
BASICALLY THE SAME AS WHAT HE
SAID AT THE 1996 RESENTENCING.
>> CORRECT.
AND THAT IS MY POINT.
YES.
HIS BOTTOM LINE CONCLUSION
REMAINED THE SAME BUT HIS -- THE
ATTACK WAS ON HIS FAILURE TO
SUPPORT THAT CONCLUSION, BY
ACTUALLY DOING WORK, RESEARCH,
TALKING TO THE WITNESSES AND
REVIEWING THE RECORDS.
>> IT IS ALWAYS INTERESTING TO
ME.
WE HAVE THESE CASES, MOST OF
THEM WE END UP WITH, YOU KNOW,
IT'S NOT ENOUGH YOU PREVENT ONE
MENTAL HEALTH EXPERT AND THEN
YOU HAVE TWO OR THREE WHO HAVE
DIFFERENT, SLIGHTLY DIFFERENT
THINGS IN THEIR DIAGNOSIS AND
THERE'S A PROBLEM WITH, YOU
KNOW, THE TRIAL JUDGE AND, YOU
KNOW, BECAUSE THERE'S
DIFFERENCES IN DIAGNOSE SEES YOU
DON'T KNOW WHICH WAY TO GO ON
THESE THINGS AND SO, THAT IS
WHAT WE ALWAYS END UP SEEING IN
THESE CASES, YOU KNOW?
DR. MAHER'S DIAGNOSIS IS
DIFFERENT FROM DR. BERLAND'S
DIAGNOSIS AND, REGARDLESS WITH
ONE OF THEM, WE'D BE HERE WITH,
HE SHOULD HAVE PRESENTED THE

EVIDENCE OF DR. BERLAND IN ADDITION TO DR. MAHER AND WE'VE ONLY DONE ONE AND IS TROUBLING TO ME.
IT DOESN'T MATTER WHAT THE ATTORNEYS DO AND HOW MANY EXPERTS THEY SEEM TO FIND TO EXAMINE THE DEFENDANT, THERE'S ALWAYS A PROBLEM.
>> TO SOME EXTENT, INHERENT IN A SITUATION THERE WILL ALWAYS BE A POSTCONVICTION MOTION FILED AND SOMETHING WILL BE ALLEGED.
AND I DON'T DISPUTE THAT.
BUT I DON'T NEGATE THE FACT I'M STANDING HERE TODAY REPRESENTING MR. HILDWIN AND WHAT HAPPENED IN HIS CASE AND THE FACT THAT SOMEBODY ELSE MAY RAISE SOMETHING IN SOME OTHER CASE, NOTWITHSTANDING, AND THIS COURT SPECIFICALLY GRANTED A RESENTENCING ON THE BASIS OF DR. CARBONELL AND DR. MAHER'S TESTIMONY AND IF THE COURT GRANTS RESENTENCING AND RELIES ON THIS AS EVIDENCE SAYING THIS EVIDENCE IS SIGNIFICANT AND THIS IS WHY WE'RE GRANTING THE RESENTENCING BECAUSE THE ATTORNEY DIDN'T PRESENT IT.
IN THIS RESENTENCING ATTORNEY, DOESN'T USE IT, IT IS LIKE DEFEATED THE PURPOSE OF WHY THE COURT GRANTED IT IN THE FIRST PLACE.
>> I DON'T THINK THAT IS THE CASE.
I DON'T THINK WHEN WE REVERSE FOR RESENTENCING OUR CONFIDENCE IN THE OUTCOME HAS BEEN UNDERMINED BUT WE DON'T GIVE A BLUEPRINT HOW THE NEXT SENTENCING WILL GO AND YOU HAVE... YOU HAD THEM DECIDE WHICH LAY WITNESSES THEY WERE

GOING TO USE AND THEY DID THAT
AND DIDN'T HAVE MORE MITIGATION
THAT YOU SAY SHOULD HAVE BEEN
PRESENTED.
AND SO, AGAIN, I STILL FEEL LIKE
YOU ARE ISOLATING THIS ONE
THING, OF -- ABOUT DR. BERLAND
AND I DON'T SEE HOW THAT IS
ENOUGH TO GET TO EITHER
CONSTITUTIONALLY DEFICIENT
PERFORMANCE OR PREJUDICE.
BUT YOU HAVE DONE A GOOD JOB OF
MAKING YOUR ARGUMENT.
>> MR. McCLAIN, YOU ARE WELL
INTO YOUR REBUTTAL TIME, YOU MAY
CONTINUE, IF YOU WANT, YOU HAVE
THREE MINUTES --
>> I UNDERSTAND.
I'LL RESERVE THE REST OF MY TIME
FOR REBUTTAL.
>> I'M KEN NUNNELLEY,
REPRESENTING THE STATE OF
FLORIDA IN THE PROCEEDING.
DR. CARBONELL FIRST, SHE'S THE
EASIEST TO DEAL WITH.
SHE HAD TOLD TRIAL COUNSEL, BOTH
OF THEM, BOTH SITTING CIRCUIT
JUDGES IN THE 5tH CIRCUIT NOW
THAT HER TESTIMONY WOULD HURT
THEIR CLIENT.
NO LAWYER IN THEIR RIGHT MIND IS
GOING TO CALL A WITNESS THAT
TELLS THEM THAT.
IF THEY HAD CALLED HER ANYWAY,
I'M SURE WE'D BE TALKING ABOUT
THAT THIS MORNING.
SO I THINK IN THE STATE -- AND
THE STATE'S POSITION IS THAT
DR. CARBONELL CAN BE DEALT WITH
EASILY AND WE DON'T NEED TO
SPEND TIME ON THAT AND
DR. BERLAND.
>> I GUESS, BEFORE YOU PUT
DR. CARBONELL TO REST, HER
INFORMATION... IN 1992, HIS
ARGUMENT IS THAT THAT

INFORMATION INCLUDING THE DATA
THAT SUPPORTED HER TESTIMONY AT
THE 1992 EVIDENTIARY HEARING,
WAS GIVEN TO DR. BERLAND SO HE
HAD THAT KIND OF INFORMATION TO
HELP INFORM HIS OWN OPINION.
>> NEXT THING I WAS GOING TO
SAY.
DR. BERLAND, IF YOU LOOK AT THE
RECORD, 2465, DR. BERLAND ON
CROSS CANNOT DISTINGUISH WHAT HE
HAD AT THE TIME OF THE
RESENTENCING PROCEEDING AND WHAT
HE HAD AT THE TIME OF
POSTCONVICTION AND CAN'T PARSE
OUT WHAT DOCUMENTS HE HAD --
>> WE KNOW FROM THE WAY HE WAS
CROSS EXAMINED THAT HE DIDN'T
HAVE THE RECORDS THAT DR. MAHER
HAD.
ARE YOU REALLY -- I APPRECIATE
WHAT YOU SAID ABOUT
DR. CARBONELL AND THE RECORD
BEARS OUT THAT IS FINDING OF
CREDIBILITY AND IS WHAT HAPPENED
BUT WITH REGARD TO DR. BERLAND,
HE SOUNDED LIKE A COMPLETELY
UNPREPARED WITNESS WHICH IS HOW
HE WAS CROSS EXAMINED AND,
ULTIMATELY, JUDGE FACTORED THAT
INTO HOW THE JUDGE EVALUATED
MITIGATION SO, HELP ME ON THAT.
YOU ARE NOW SAYING HE HAD THESE
RECORDS?
>> I'M SAYING WE DON'T KNOW.
>> WHAT WAS THE
CROSS-EXAMINATION ABOUT THEN
1234.
>> THE PENALTY PHASE CROSS
FOCUSED ON HIS WORK AND
PREPARATION, THE SAME HIS CROSS
AT THE POSTCONVICTION HEARING
FOCUSED ON --
>> DIDN'T HE SAY THAT HE DIDN'T
HAVE RECORDS?
>> I BELIEVE HE DID BUT --

>> STAY WITH THAT.
HOW THEN, IF HE WAS CROSS EXAMINED, YOU HAVE A WITNESS ON THE STAND AND THEY ARE ASKING HIM ABOUT RECORDS, SAME RECORDS THAT WERE SUPPLIED TO DR. CARBONELL AND SUPPLIED TO DR. MAHER AND THE EXPERT SAYS, I WASN'T GIVEN ANY RECORDS, WHAT ELSE DO WE NEED TO KNOW, BUT THAT HE WASN'T GIVEN ANY RECORDS.
>> I DON'T KNOW THAT THERE IS ANYTHING FURTHER TO KNOW.
BUT I WOULD POINT OUT IF YOU READ THE CROSS OF DR. BERLAND AT THE POSTCONVICTION PROCEEDING IT LOOKS A LOT LIKE WHAT HE TESTIFIED TO BEFORE.
UNPREPARED.
THIS MAN DIDN'T KNOW WHAT HE HAD, HE ADMITTED IT BUT THE BOTTOM LINE -- LET'S CUT TO THE ABSOLUTE BASELINE FOR THE WHOLE ISSUE WITH DR. BERLAND.
IS NOTHING CHANGED.
NOTHING WHATSOEVER CHANGED ABOUT HIS OPINIONS AND CONCLUSIONS WITH REGARD TO THIS DEFENDANT.
>> I THINK -- MR. McLAIN'S POINT IS THIS.
HELP ME.
YOU HAVE A SITUATION WHERE YOU KNOW WHAT WAS COMPELLING BECAUSE YOU HAVE NOW THIS EVIDENTIARY HEARING THAT TOOK PLACE IN 199... LET'S ASSUME THE -- THERE'S NOTHING THAT WAS DEVELOPED THAT SHOWS THE DEFENSE LAWYERS HAD A STRATEGIC REASON, NOT GIVING DR. BERLAND THE EXTENSIVE RECORDS GIVEN TO DR. CARBONELL AND DR. MAHER HAD.
NO EXCUSE, AN ERROR, FAILURE, DEFICIENCY.
WE NOW HAVE THEN -- ALLOWED THE

STATE, REALLY, TO ARGUE AND PUT THE TWO EXPERTS -- DILUTES THE EXPERT TESTIMONY AND THIS DEFENDANT NEEDED COMPELLING EXPERT TESTIMONY IN ORDER TO AVOID THE DEATH PENALTY AND THAT IS THE ARGUMENT.
SO, WHERE IS THE FLAW OR FALLACY IN THAT ARGUMENT?
>> THAT ARGUMENT PRESUPPOSES, I THINK, THAT IF THIS COURT GRANTS A RESENTENCING PROCEEDING, THAT THAT RULING LOCKS IN WHAT COUNSEL HAS TO DO AT THAT PROCEEDING.
>> BUT COUNSEL DOESN'T HAVE A -- YOU ARE RIGHT -- AS TO DR. CARBONELL YOU SAID THERE WAS A GOOD REASON NOT TO CALL HER AND WHAT IS THESE FOR NOT GIVING DR. BERLAND THE RECORDS COMPELLING FOR DR. CARBONELL AND THIS COURT?
THERE IS NO STRATEGIC REASON.
>> THE RECORD IS SILENT AS TO HOW AND WHY THAT HAPPENED.
>> I THOUGHT THEY SAID THEY'D SIMPLY -- IF HE DIDN'T GET THEM, SIMPLY FORGOT TO GIVE THEM TO HIM BECAUSE THEY GAVE THEM TO OTHER PEOPLE.
IS THAT WHAT THE ATTORNEYS SAID?
>> MY MEMORY OF THE TESTIMONY, JUSTICE QUINCE IS THAT DR. BERLAND WAS WORKING WITH THE INVESTIGATOR AND THE INVESTIGATOR WAS TO BE GETTING RECORDS TO HIM.
NOW, WHETHER -- I'M GOING TO SPECULATE A LITTLE BIT HERE, BUT, WHETHER OR NOT DR. BERLAND REALLY DIDN'T HAVE THESE RECORDS OR NOT HIS TESTIMONY IS WHAT IT IS.
AT THE RESENTENCING PROCEEDING.
BUT THE BOTTOM LINE IS, THERE IS

NO PREJUDICE, I'M NOT CONCEDING
SUFFICIENT PERFORMANCE BUT THE
FUNDAMENTAL BOTTOM LINE, TO THE
WHOLE ISSUE IS, THERE IS NO
PREJUDICE AND IN ORDER TO FIND
INEFFECTIVENESS UNDER STRICKLAND
YOU HAVE TO HAVE DEFICIENT
PERFORMANCE AN PREJUDICE AND YOU
KNOW THAT, I DON'T HAVE TO
REPEAT IT BUT IN THIS CASE YOU
DON'T HAVE THE PREJUDICE.
IT JUST SENTENCE THERE.
>> WHAT WE HAVE TO LOOK AT IS
WHETHER THE ABILITY TO CROSS
EXAMINE DR. BERLAND AND THE
EVALUATION OF DR. BERLAND AND
DR. MAHER, THAT THAT ITSELF
UNDERMINES CONFIDENCE...
[INAUDIBLE] WHAT WE FOCUS ON.
>> I BELIEVE SO, YES.
>> AND YOU SAID -- TELL US THE
ARGUMENT AND SUPPLY...
[INAUDIBLE].
>> BECAUSE -- AND BEFORE I
FORGET LET ME REFER TO YOU PAGES
12 TO 14 OF THE SENTENCING
ORDER.
I DON'T HAVE THE RECORDS...
NUMBERS ON THE BOTTOM OF THE
PAGES, THAT IS WHERE THE JUDGE
DISCUSSED THE MENTAL MITIGATORS
THAT HE HAD ALREADY FOUND AND
THE TESTIMONY OF DOCTORS BERLAND
AND MAHER.
NOT SOMETHING I'LL GO INTO,
OTHER THAN THAT IS WHERE IT IS
AND SPEAKS FOR ITSELF AND I
CANNOT CHANGE IT AND NEITHER CAN
MR. McCLAIN.
WITH THAT SAID, IN LIGHT OF THE
FINDINGS OF THE TWO MENTAL STATE
MITIGATORS, THIS TESTIMONY AT
THE POSTCONVICTION PROCEEDING,
TESTIMONY OF DR. BERLAND THAT
EVEN AFTER I'VE DONE ALL THESE
THINGS I SAY I DIDN'T DO BEFORE,

MY TESTIMONY IS THE SAME.
MAYBE HE DOESN'T GET IMPEACHED
OR CHEWED UP AS MUCH ON
CROSS-EXAMINATION BUT AT THE END
OF THE DAY THIS SCALES THAT THE
DEFENSE TALKS ABOUT ALL THE TIME
LOOK THE SAME.
THERE IS NOTHING NEW ADDED TO
THE MITIGATION SIDE OF THE
EQUATION BECAUSE YOU HAVE A
VICIOUS, BRUTAL MURDERER AS THE
JUDGE FOUND AND HAVE A DEFENDANT
UNDER SENTENCE OF IMPRISONMENT,
YOU HAVE A PRIOR FELONY
AGGRAVATOR, YOU HAVE A MURDER
COMMITTED FOR PECUNIARY GAIN AND
A MURDER IN DISPUTEDABLE
HEINOUS, ATROCIOUS OR CRUEL.
>> IS THE PROBLEM THAT... HELP
ME WITH THIS.
WHEN HE WAS GIVEN A NEW
SENTENCING PHASE, CLEARLY AT
THAT POINT THE COURT FELT THAT
CONFIDENCE IN THE OUTCOME HAD
BEEN UNDERMINED AND IN OTHER
WORDS -- DO YOU AGREE?
>> SURE.
NO REASON OTHERWISE, TO RULE
OTHERWISE.
>> BUT IF YOU ARE SAYING THAT
THESE AGGRAVATORS ARE SO
AGGRAVATING, IT REALLY COULDN'T
BE MITIGATION THAT WOULD
OVERCOME THAT, IS THAT YOUR
ARGUMENT.
>> NO, MA'AM, I'M SAYING EVEN
WITH THE MITIGATION THAT WAS
FOUND, I'M NOT TRYING TO REARGUE
THE OLD... [INAUDIBLE] SOUNDS
LIKE I HAVE, THOUGH, DOESN'T IT.
BUT I'M NOT TRYING TO DO THAT.
WHAT I'M SAYING IS YOU HAVE THE
TWO MENTAL STATE MITIGATORS
FOUND AND VARIOUS NONSTATUTORY
MITIGATION FOUND BY THE
SENTENCING COURT AND THE

SENTENCING COURT FINDS THAT THE
AGGRAVATORS OUT WEIGH THE
MITIGATION AND WHAT WE HAVE
SUBMITTED NOW AT THE
POSTCONVICTION PROCEEDING
DOESN'T CHANGE THE MIX.
NOTHING CHANGES ABOUT IT.
DR. BERLAND EVEN PRETTY MUCH
ADMITTED THAT, I DON'T HAVE
ANYTHING -- ANYTHING HERE TO
SAY, I DIDN'T LIKE WHAT THE
SUPREME COURT SAID ABOUT ME.
THAT IS WHAT HE SAID.
THAT WAS HIS TESTIMONY.
AGAIN, HIS TESTIMONY SPEAKS FOR
ITSELF.
I CANNOT CHANGE THAT.
I WILL NOT TRY TO BUT THE BOTTOM
LINE IS THERE WAS NO CHANGE TO
HIS ULTIMATE OPINIONS AND
CONCLUSIONS AND THAT IS WHAT IS
IMPORTANT.
AND IS WHAT CONTROLS HERE.
JUDGE HOWARD COMMENTED IN
TALKING ABOUT DR. CARBONELL THAT
-- PUTTING THIS OUT THERE FOR
WHAT IT IS WORTH AND NOT HANGING
MY HAT ON IT BUT THE JUDGE
POINTED OUT WHEN DR. CARBONELL
SAYS, IF YOU CALL ME I'LL HURT
YOUR CLIENT, AT THAT POINT, IN
HIS MIND... BECAME SUSPECT AND
HE WASN'T SURE WHAT HE HAD WITH
HER AND COMES ACROSS IN HIS
TESTIMONY HE WASN'T SURE WHAT
SHE'D DO OR WHAT MIGHT BE OUT
THERE, BUT HE WASN'T GOING TO
LET HER NEAR THE COURTROOM AND I
DON'T BLAME HIM.
>> WE GOT PAST DR. CARBONELL.
>> I'M JUST BRINGING THAT BACK
UP, THAT HE LOOKED AT EVERYTHING
SHE HAD DONE INCLUDING HER
DOCUMENTS, BEING KIND OF --
>> I GUESS MY PROBLEM IS THIS:
WE HAVE A DEATH PENALTY CASE,

RESENTENCING, EVERY LAWYER THAT PUTS ON AN EXPERT WITNESS IN A TRIAL, CIVIL TRIAL, FOR SURE, BEFORE THEY PUT AN EXPERT ON, MAKE SURE THAT THE BASIS OF THEIR OPINION HAS BEEN FULLY VETTED, THE NECESSARY RECORDS HAVE BEEN PROVIDED.
I CAN'T IMAGINE ANY EXCUSE FOR NOT GIVING AN EXPERT WITNESS -- WE HAVE CASES WHERE THE DEFENSE LAWYER DOESN'T HAVE -- WHERE THERE ARE AVAILABLE RECORDS AND THEY ARE NOT GIVEN TO AN EXPERT WITNESS, BEFORE HE TESTIFIES AND SO YOU GO -- I THINK YOUR ARGUMENT AND YOU DID GO BACK TO PREJUDICE, IS THAT EACH AT THE EVIDENTIARY HEARING, IF WE LOOK AT THIS IT DOESN'T CHANGE THE MIX OF AGGRAVATORS AN MITIGATORS AND I AM DEFINITELY MORE PERSUADED BY THE ARGUMENT AND I THINK IS A VALID POINT BUT I'M STILL CONCERNED IF WE SAY THAT THERE'S NO DEFICIENCY HERE THAT WE WOULD BE CONDONING SOMEBODY NOT GIVING A RECORD -- RECORDS AVAILABLE RECORDS TO AN EXPERT WITNESS.
AND I DON'T KNOW HOW -- ANY WAY YOU SLICE IT, THAT IS A PROBLEM.
>> I UNDERSTAND WHAT YOU ARE SAYING, JUSTICE PARIENTE -- LET ME BACK UP.
I CAN ENVISION AND HAVE THE COURSE, OVER DOING DEATH LITIGATION A VERY LONG TIME IN CASES WHERE A DELIBERATE DECISION WAS MADE NOT TO GIVE PARTICULAR DOCUMENTS OR WHATEVER, TO A DEFENSE EXPERT FOR VARIOUS REASONS, THAT OF COURSE VARY WITH THE CASES AND SOMETIMES --
>> I STAND CORRECTED.

THAT IS CORRECT --
>> I'M NOT NITPICKING BUT I'M SAYING I CANNOT GIVE YOU AN ANSWER SPECIFICALLY TO WHY THIS HAPPENED, ASSUMING THAT IT DID, IN THIS CASE.
WHAT I CAN SAY -- THAT IS BECAUSE OF THE PASSAGE OF TIME.
BUT WHAT I CAN SAY IS THAT THE DEFENDANT HAS THE BURDEN OF PROOF, NOT THE STATE AND, SILENT RECORD THE DEFENDANT LOSES.
IN THIS PARTICULAR CASE, AGAIN, I GUESS WHAT I'M SAYING, THIS IS NOT THE CASE TO BE MAKING CASE LAW --
>> TELL ME ABOUT DR. BERLAND.
DID HE DO AN INDEPENDENT EVALUATION OF THE DEFENDANT AND HOW MUCH TIME DID HE SPEND WITH THE DEFENDANT?
>> I DON'T THINK -- IF MY MEMORY SERVES, HE HAD NOT SEEN THE DEFENDANT SINCE 1996.
HIS LAST FACE-TO-FACE EVALUATION, MY MEMORY IS, WAS BEFORE THE RESENTENCING PROCEEDING.
>> THAT IS WHAT I'M TALKING ABOUT, BEFORE THE RESENTENCING PROCEEDING, HOW MUCH TIME HAD HE SPENT WITH HIM, DID HE DO AN INDEPENDENT EVALUATION?
DID HE RUN TESTS, DO ANY KIND OF PSYCHOLOGICAL TESTS, ON HIM?
>> YES, MA'AM.
HIS TIME SHEETS ARE ALMOST IMPOSSIBLE TO READ.
I MEAN, THAT AS NO DISPUTE, THANK GOODNESS I DON'T HAVE TO KEEP THEM, OR MIGHT HAVE KEPT THEM ON THE COMPUTER.
BUT HE DID THE MMPI, THE OUT OLD, OUTDATED VERSION OF THE MMPI AND SAW THE DEFENDANT FACE-TO-FACE AND I DON'T

REMEMBER AND I'M NOT SURE IT WAS DEVELOPED EXACTLY] HOW MUCH TIME IN FACT HE SPENT WITH THE DEFENDANT.
>> THE RECORD IS CLEAR HE DID HIS OWN INDEPENDENT WORK --
>> YES, MA'AM, IT'S NOT WHERE HE'S SITTING IN HIS OFFICE, WAITING ON THINGS TO COME INTO THE MAIL FOR HIM TO DO HIS WORK IN THIS CASE AND HE'S DOING WHAT HE DOES DOING HIS PSYCHOLOGIST THING AND THE ADMINISTRATION OF TESTS AND, FACE-TO-FACE INTERVIEW AND YOU CAN'T DO THE MMPI WITHOUT BEING FACE-TO-FACE WITH THE MAN.
SO, IT'S NOT ONE OF THOSE CIRCUMSTANCES WHERE HE DID NO WORK OF HIS OWN, AND, HE DID A LOT OF IT, I DON'T REMEMBER THE AMOUNT OF TIME HE TESTIFIED TO AND I'M NOT SURE HE TESTIFIED TO THE AMOUNT OF TIME HE SPENT.
I THINK THAT WAS ONE OF THOSE THINGS THAT HE, ALSO COULD NOT SAY WITH SPECIFICITY AND MMPI TAKES THREE HOURS, I KNOW THAT.
NOT TRYING TO MAKE MYSELF A WITNESS, THAT IS HOW LONG IT TAKES TO GET IT.
I GUESS THAT IS THE BEST ANSWER I CAN GIVE YOU, AND THAT IS A LONG ONE BUT THE BEST I CAN DO UNDER THE RECORD.
BEYOND THAT, IF THE COURT HAS NO FURTHER QUESTIONS I'D ASK THE COURT TO AFFIRM THE DENIAL OF POSTCONVICTION RELIEF AND I WILL NOT ARGUE THE ISSUE OF THE APPROPRIATENESS OF AN EVIDENTIARY HEARING IN THE FIRST PLACE AND I THINK THE RECORD DOCUMENTS OVER THE COURSE OF THE PROCEEDINGS SPEAKS FOR ITSELF, WE PROBABLY SHOULD BE DISPOSED

OF BASED ON AN ABANDONMENT OF
THE CASE RATHER THAN A MERIT TUS
DECISION BECAUSE OF THE TIMING
OF THE APPEAL WHERE THE
DEFENDANT LITERALLY WALKED AWAY
FROM AN EVIDENTIARY HEARING
ORDERED BY APPEALING HALF OF HIS
CASE AND NOT ALL OF IT.
I WOULD SUGGEST THAT THAT IS
UNDER FLORIDA'S CLEAR RULES A
ABANDONMENT WAIVER, WHATEVER
WORD OR LABEL ONE WISHES TO PUT
TO IT.
BUT BE THAT AS IT MAY --
>> THE TRIAL JUDGE FOUND EXACTLY
THE OPPOSITE.
WE ALL GOT CARRIED AWAY AND, THE
DNA LOOKED LIKE IT WAS POWERFUL
AND THEY PROCEEDED ON THE DNA
AND THE JUDGE ADMITTED...
[INAUDIBLE]... I THINK YOUR
STRONGER ARGUMENT IS TO LOOK AT
THE... [INAUDIBLE] ABANDONMENT.
AND WE HAVE INEFFECTIVE...
[INAUDIBLE] COUNSEL ON
ABANDONMENT.
AND I GUESS --
>> POSTCONVICTION.
>> BUT IS NOT A SATISFYING WAY
TO DEAL WITH THIS.
>> IT IS A CIRCUMSTANCE AND
PROCEDURAL POSTURE I NEVER
ENCOUNTERED BEFORE MY POSITION
WOULD BE, STATE'S POSITION WOULD
BE THE CASE LAW AND THE RULES
ARE WHAT THEY ARE.
I BELIEVE THEY ARE CLEAR AND I
BELIEVE HE DID ABANDON IT BUT I
DON'T HAVE TO HAVE THE FINDING
FROM Y'ALL TO WIN.
MY PROBLEM, MY CONCERN IS THAT
THE MESSAGE NOT BE SENT TO
CAPITAL DEFENDANTS, THEY CAN DO
THIS AT WILL, AND SPLIT UP THEIR
APPEALS, AND DOUBLE-LOAD THE
COURT ON A WHIM.

THAT IS MY CONCERN.
AND THAT IS MY PROBLEM WITH THE WAY --
>> THE EARLIER APPEAL, THE STATE NEVER TOOK A POSITION THAT THERE WASN'T A FINAL ORDER.
>> THERE WAS NO REASON FOR ME TO.
THE DEFENSE IS THE MASTER OF HIS CASE.
AND THE ORDER WAS ENTERED DECIDING THE DNA ISSUE, MOCK JURY --
>> THE DNA WAS A SEPARATE MOTION.
>> NO, AN AMENDMENT TO --
>> RULE -- THEY FILED THE DNA AS A 3.853 ON THE DNA, THAT IS WHAT WAS APPEALED.
>> NO, MA'AM.
NO.
NO.
THE 3.853 WAS THE VEHICLE THEY USED TO GET THE DNA TESTING AND GOT THE --
>> AND HAD A SUCCESS JIFF POSTCONVICTION, TWO POSTCONVICTION MOTIONS, ONE IN JANUARY AND ONE IN JUNE OF 2001.
>> THE JUNE ONE WAS LABELED A SUCCESSIVE MOTION BUT IT WAS AN AMENDMENT TO JANUARY 7, 2000 MOTION WHICH WAS AMENDED JANUAR 16, 2001 AND, AMENDED AGAIN, THOUGH MISLABELED IN JUNE, AND THEY WERE THE SAME CASE AND WERE NOT SEPARATE PROCEEDINGS.
THERE WAS ONE HUFF HEARING THAT TOOLS AFTER THE JUNE 21, 2001 AMENDMENT.
WE HAVE ALL OF THIS BALLED UP TOGETHER.
>> THE TRIAL JUDGE NEVER CONSOLIDATED THE TWO MOTIONS, DID HE.
>> HE DIDN'T HAVE TO.

THE DEFENSE --
>> BUT THEY WERE -- IF HE HAD DESIGNATE... [INAUDIBLE] REMAIN TWO SEPARATE MOTIONS, SEEMS TO ME.
>> IT WAS AN AMENDMENT TO THE PRECEDING MOTION, AND, IT'S A COMPLICATED ISSUE AND MY CONCERN WITH IT, IS NOT THAT I NEED THAT FOR THE STATE TO PREVAIL BUT THE WRONG MESSAGE NOT BE SENT, FAIR GAME TO SPLIT UP YOUR CASES AND TAKE YOUR APPEALS SEPARATELY. WITH THAT SAID I WILL ASK THE COURT TO AFFIRM THE DENIAL OF POSTCONVICTION RELIEF.
>> WHAT CHANGED WITH THE WEIGHTINESS OF DR. BERLAND'S SITUATION AND THE... [INAUDIBLE].
>> DON'T WE LOOK -- IF WE LOOK AT AN EVALUATION -- EVALUATE DR. BERLAND'S TESTIMONY, THIS TIME AND WE'RE NOT IMPRESSED WITH DR. BERLAND'S TESTIMONY, EVEN AS YOU HAVE GIVEN IT, DOESN'T THAT FACTOR IN -- AGAIN, I THINK DR. BERLAND NOW SAYS, WELL, IF I HAD RECEIVED THIS, MY TESTIMONY WOULD HAVE BEEN THIS OR THAT AND I THINK THAT IS WHERE THE PROBLEM IS, IS THAT WE LOOK AT THAT EVIDENTIARY HEARING NOW, THE ONE SUBSEQUENT AND WHAT I THINK THE STRONGEST ARGUMENT IS, IT DOESN'T CHANGE MUCH ABOUT THIS WEIGHT THAT WOULD BE GIVEN TO THE MITIGATOR.
>> EXCEPT... [INAUDIBLE] YOU HAVE TO LOOK AT IT -- [INAUDIBLE] HOW THE JURY COULD HAVE HEARD THIS AND WHEN YOU HAVE, YOU HAVE TO LOOK AT, IN FRONT OF THE 1996 JURY, BERLAND WAS ATTACKED ON CROSS FOR NOT REVIEWING THE DOCUMENTS, NOT

TALKING --
>> THAT IS WHAT YOU -- WHEN THIS IS ALL SAID AND DONE THIS IS WHAT IT BOILED DOWN TO, IF WE LOOK AND THINK THE ATTACK ON BERLAND WAS SO SIGNIFICANT, THAT IT WOULD HAVE CHANGED THE JURY'S OUTCOME, EVALUATION, OR THE JUDGE'S OUTCOME, IN NEW SENTENCING PHASE, IF WE DON'T THINK IT IS AS SIGNIFICANT AS YOU ARE PLAYING IT... [INAUDIBLE].
>> PROBABILITY OF TWO JURORS WHO VOTED FOR DEATH CHANGED THEIR MIND AND... [INAUDIBLE] IS THE CONTROLLING STANDARD AND DR. BERLAND TESTIFIED, MY RECOLLECTION OF HIS TESTIMONY AT THE EVIDENTIARY HEARING, HE HAD AN HOUR-AND-A-HALF TO WORK ON THE CASE AND FELT RUSHED.
I DON'T BELIEVE HE PERSONALLY ADMINISTERED THE MMPI AND ONLY TALKED TO GOLDMAN AND DIDN'T TALK TO ANYBODY ELSE AND DIDN'T REVIEW THE RECORDS AND I SUBMIT UNDER -- YOU HAVE A POINT, THE POINT, JUSTICE PARIENTE MADE... AND THE COURT ALREADY DETERMINED THE AGGRAVATION ISN'T SUCH THAT A COMPELLING AND PERSUASIVE PRESENTATION OF MENTAL HEALTH MITIGATION DOESN'T UNDERMINE CONFLICT IN THE OUTCOME.
I MEAN, TO THAT EXTENT THE COURT'S 1995 RULING AND THE APPEAL OF -- WHERE YOU GRANTED THE PENALTY PHASE YOU ALREADY DETERMINED THAT THE AGGRAVATION IS NOT SUCH THAT, YOU KNOW, A COMPETENT PRESENTATION WARRANT -- UNDERMINES CONFIDENCE IN THE OUTCOME AND I THINK YOU HAVE TO HAVE THAT DECISION IN YOUR MIND... INAUDIBLE BINDING ON THE

COURT AND THAT IS... AND I AM
OUT OF TIME AND WOULD ASK THE
COURT TO REVERSE AND ORDER
RESENTENCING.
>> THANK YOU BOTH FOR YOUR
ARGUMENT.
THE COURT WILL NOW STAND IN
RECESS FOR 10 MINUTES.
>> PLEASE RISE.