>>> NEXT CASE FOR THE DAY IS WHITTON
VERSUS STATE OF FLORIDA.
>> PLEASE THE COURT, MARK OLIVE
FOR THE APPELLANT.
CONFIDENCE IN THE OUTCOME OF
THIS CASE IS UNDERMINED BY
COMBINATION PROSECUTOR
MISCONDUCT AND INEFFECTIVE
ASSISTANCE OF COUNSEL.
I WOULD LIKE TO TWO EXAMPLES OF
EACH BEFORE GETTING GUILT
INNOCENCE BEFORE GETTING TO
SENTENCING.
THE FIRST IS SORT OF THE
OVERARCHING PROBLEM THAT THE
LOWER COURT DID NOT CONDONE BUT
DID NOT CONDEMN AND THAT IS THE
THREATENING OF AN FDLE AGENT, OF
FLORIDA DEPARTMENT OF LAW
ENFORCEMENT AGENT WAS SUBPOENAED
TO COME AND TELL THE TRUTH.
THAT BLOOD ON SOME BOOTS COULD
NOT BE IDENTIFIED AS THE
VICTIM'S OR THE DEFENDANT'S.
SHE WAS CALLED BY THE SHERIFF
AND TOLD YOU WILL NOT COME,
LEAVE, DO NOT BE SUBPOENAED.
SHE WAS CALLED BY THE PROSECUTOR
WHO TOLD HER, IF YOU COME, YOU
WILL NOT TESTIFY.
SHE WAS SCARED TO DEATH.
THIS IS A LAW ENFORCEMENT
OFFICER.
SHE SPOKE TO HER SUPERVISOR.
THE SUPERVISOR ASSIGNED THREE
AGENTS WHO WERE ARMED TO
ACCOMPANY THIS LAW ENFORCEMENT
OFFICER TO DEFUNIAK
SPRINGS TO TESTIFY TO THE TRUTH.
PROSECUTOR FOUND HER OUTSIDE OF
COURTROOM AND GRABBED HER BY THE
ARM AND SAID WE'RE GOING TO THE
SHERIFF'S OFFICE, WHEREUPON THE
THREE ARMED LAW ENFORCEMENT
OFFICERS WALKED UP
AND SUDDENLY THE PROSECUTOR WAS
FINE.
SHE THEN TESTIFIED.
THE JURY DID NOT KNOW ANYTHING
ABOUT THE LENGTHS TO WHICH THIS

PROSECUTOR WOULD GO TO SUPPRESS
THE TRUTH.
DEFENSE COUNSEL COULD HAVE TOLD
THEM.
DID NOT DO SO.
COULD HAVE TOLD THEM THAT,
INTEGRITY OF THIS PROSECUTION IS
COMPROMISED UNDER KYLES. IT
WOULD HAVE PROVIDED
OPPORTUNITIES TO ATTACK THE GOOD
FAITH OF THE PROSECUTOR.
THE DEFENSE COULD HAVE
CHALLENGED THE PROSECUTION'S
GOOD FAITH, 514 U.S.549, KYLES.
GUZMAN, 11th CIRCUIT.
WOULD HAVE IMPUGNED THE CHARACTER
OF THE ENTIRE PROSECUTION.
IF THE PROSECUTOR AND THIS
SHERIFF WERE WILLING TO THREATEN
A LAW ENFORCEMENT WHO WAS THERE
TO TELL THE TRUTH WHAT WOULD
THEY NOT DO?
THAT IS VERY IMPORTANT BECAUSE
THE KEY TO THIS CASE IN TERMS OF
TESTIMONY ARE TWO SNITCHES.
>> GOING BACK TO THE, THIS IS
ZIEGLER?
>> YES.
>> DID SHE TESTIFY?
>> SHE DID.
>> OKAY.
I THOUGHT YOU SAID BECAUSE OF
THE THREATS SHE DIDN'T TESTIFY?
>> NO, SHE TESTIFIED TO THE
TRUTH.
SHE TESTIFIED TO WHAT SHE KNEW.
SHE DIDN'T TESTIFY TO THE
THREATS.
>> WAS THE, IS THIS A CLAIM OF
INEFFECTIVE ASSISTANCE OF
COUNSEL, BRADY?
WHAT ARE YOU --
>> CAN BE EITHER IN TERMS OF
UNDERMINING CONFIDENCE IN THE
OUTCOME BECAUSE SHE TOLD HIM,
TOLD DEFENSE COUNSEL THE PART
ABOUT THE SHERIFF'S SAYING LEAVE
THE OFFICE SO YOU CAN'T BE
SUBPOENAED.
DEFENSE COUNSEL MADE A MOTION

FOR MISTRIAL AT THAT POINT.
DIDN'T SAY I WANT TO INTRODUCE
THAT TO THE JURY.
MADE A MOTION FOR MISTRIAL.
LATER HE SAID HE WOULD DO MORE
AND MOTION FOR MISTRIAL.
LATER HE FILED A MOTION FOR NEW
TRIAL BUT SAID YOU SHOULD HAVE
GRANTED IT BUT OFFERED NO
FURTHER EVIDENCE.
THE FURTHER EVIDENCE WAS THERE
WERE THREE ARMED GUARDS
PROTECTING HER.
>> DEFENSE COUNSEL KNEW THIS.
>> THE ONLY THING WE KNOW
DEFENSE COUNSEL KNEW IS WHAT
ZIEGLER SAID SHE TOLD HIM.
ALL SHE TOLD HIM ACCORDING TO
HER TESTIMONY BEFORE THAT
SHERIFF McMILAN SAID LEAVE THE
OFFICE AND DON'T BE SERVED.
>> I WANT TO BE SURE, WHAT
ZIEGLER TESTIFIED AT TRIAL --
>> YES.
>> WAS THE TRUTH?
>> ONLY ABOUT THE BOOTS.
SHE SAID NOTHING ABOUT ANY
THREATS.
>> I UNDERSTAND.
BUT SHE WAS NOT THE, THE
EFFECTS OF THREATS WERE NOT THAT
SHE THEN TESTIFIED THE WAY THAT
THE LAW ENFORCEMENT WANTED HER
TO TESTIFY.
>> YOU'RE RIGHT.
>> SO I'M HAVING, AGAIN,
UNDERSTANDING THIS IS NOW 20
YEARS AFTER THE TRIAL WHICH IS
ANOTHER MATTER, AS FAR AS HOW
LONG THIS POST-CONVICTION
PROCEEDING HAS TAKEN BUT WHY
WOULD OUR CONFIDENCE BE
UNDERMINED IF THE, IF THE
WITNESS TESTIFIED TRUTHFULLY?
CERTAINLY AS YOU WOULD SAY, IF
THESE THREATS WERE MADE AND
THAT'S TERRIBLE MISCONDUCT BUT
WHY WOULD THE CONFIDENCE IN THE
OUTCOME OF THE GUILT PHASE BE
UNDERMINED?

>> BECAUSE WHAT IT SHOWS IS THE LENGTHS TO WHICH THE STATE WAS WILLING TO GO TO PUT TOGETHER A CASE.
IF YOU READ GUZMAN FROM THE 11th CIRCUIT, IN DETERMINING IMPACT OF THE STATE'S ACTION COURTS SHOULD CONSIDER HOW THE DEFENSE'S KNOWLEDGE OF WITHHELD INFORMATION WOULD HAVE IMPACTED NOT JUST THE EVIDENCE PRESENTED, ZIEGLER'S TESTIMONY AT TRIAL, FOR EXAMPLE BUT STRATEGY, TACTICS AND THE DEFENSE WOULD HAVE DEVELOPED AND PRESENTED TO THE TRIER OF FACT.
LADIES AND GENTLEMEN OF THE JURY, THERE WERE THREE ARMED GUARDS HERE TO
PROTECT SOMEONE ONLY HERE TO TELL THE TRUTH.
WHAT WOULD THE PROSECUTORS AND SHERIFF DO TO A POOR 18-YEAR-OLD IN JAIL?
SCARE HIM TO DEATH.
>> I HAVE SOME, I GUESS THAT, THINKING DOWN HERE, THAT YOU GET A NEW TRIAL BASED ON THAT.
I'M NOT SURE THAT, I MEAN IT'S, WHO DOES IT IMPEACH?
IN OTHER WORDS, HOW DO YOU GET THAT INTO EVIDENCE AND THEN IS IT, IT'S A NICE ARGUMENT FOR A DEFENSE LAWYER TO MAKE BUT, HOW DOES THAT SHAKE CONFIDENCE IN THE STATE'S CASE?
AND YOU SAID THERE WERE OTHER, YOU WERE GIVING THAT AS ONE EXAMPLE.
SO WHAT'S, IF YOU HAVE -- PAINT THE WHOLE PICTURE HERE.
>> ANOTHER EXAMPLE IS THE PROSECUTOR'S MOTHER WAS ENGAGED TO SATAN, THE CHIEF WITNESS.
>> WASN'T THAT ALSO KNOWN?
>> IT WAS NOT KNOWN.
WHAT WAS KNOWN THAT SHE VISITED HIM IN THE JAIL AND THAT WAS BROUGHT OUT ON CROSS-EXAMINATION

BUT THE PROSECUTOR MOCKED THAT
IN CLOSING ARGUMENT AND SAID
WHAT DOES THAT HAVE TO DO WITH
I?.
THEY ARE FRIENDS.
MY MOTHER IS FRIENDS WITH
SOMEONE.
SHE WASN'T FRIENDS.
PUT HERSELF DOWN AS NEXT OF KIN.
HE PUT HER NAME DOWN AS NEXT OF
KIN IN THE PSI THAT THE
PROSECUTOR HAD.
HE TOLD THE JAIL OR THE PRISON
WHEN HE WAS IN JAIL, THIS IS MY
BETROTHED.
WE'LL GET MARRIED.
THIS IS ALL BEFORE THE TRIAL.
SO THE PROSECUTOR'S MAIN WITNESS
WAS GOING TO MARRY HIS MOM.
THIS PROSECUTOR ALSO KNEW THAT
THIS WITNESS HAD BEEN ARRESTED
AND CHARGED WITH A SEXUAL
DEVIANT CRIME AND BEHAVIOR.
AND HE DIDN'T WANT IT KNOWN.
THE INMATE SATAN, DIDN'T WANT IT
KNOWN INSIDE THE PRISON BECAUSE
HE COULD GET ATTACKED INSIDE THE
PRISON BECAUSE OF THIS DEVIANCY
SO THE ARGUMENT COULD BE MADE TO
THE JURY.
WE HAVE THREE ARMED GUARDS HERE,
WHAT IS GOING ON?
THE FDLE HAS TO PROTECT PEOPLE
WHO ARE TESTIFYING.
HERE IS SOMEONE WHO IS
TESTIFYING WHO IS BETROTHED TO
THE PROSECUTOR'S MOM AND HE IS
PROTECTING HIM FROM RAPE IN THE
JAIL.
>> LET ME ASK YOU THIS.
I CAN UNDERSTAND THIS MIGHT BE
IMPEACHMENT OF -- [INAUDIBLE] GO
TO WHY THIS WITNESS WAS
TESTIFYING FOR THE STATE.
I ASSUME THAT IS YOUR ARGUMENT?
>> YES.
>> SO WHAT ABOUT THIS WITNESS'S
TESTIMONY DO WE HAVE THAT WE
COULD NOT, WE DID NOT GET ANY
OTHER SOURCE?

>> I'M SORRY?
>> I MEAN WHAT IS IT THAT THIS WITNESS TESTIFIED TO THAT WAS SO IMPORTANT AND ESSENTIAL TO THE STATE'S CASE?
>> OH.
AGAIN THIS CASE, MR. WHITTON HAS DENIED HIS GUILT AND HE TESTIFIED TO HIS INNOCENCE AND STEADFASTLY HAS DONE THAT.
THEY OFFERED HIM A DEAL BECAUSE I THINK OF THE WEAKNESS OF THE CASE.
HE WOULDN'T TAKE IT, PROTESTING HIS INNOCENCE.
THEN WE GET TWO SNITCHES.
ONE IS SATAN AND THE OTHER IS OZIO.
SATAN SAYS THAT HE HEARD THE DEFENDANT CONFESS TO HIM IN JAIL HIS GUILT.
THAT HE HAD BEEN BEATEN UP BY THE VICTIM EARLIER IN THE DAY.
HE LEFT.
HE CAME BACK.
HE KILLED HIM AND HE ROBBED HIM.
SATAN HAD GOT OUT OF JAIL AND CAME BACK TO JAIL AND SAID HE HAD ANOTHER CONVERSATION N THAT CONVERSATION THE DEFENDANT SAID HE KILLED THE BASTARD.
SO OZIO SAID HE OVERHEARD THE SECOND CONVERSATION.
THAT IS ALL WHAT SATAN BRINGS TO THE TABLE IS A CONFESSION IN THE JAIL.
AND FDLE HAD BEEN INVESTIGATING THIS JAIL.
FDLE KNEW SOMETHING BAD WAS GOING ON IN DEFUNIAK SPRINGS, THAT IS WHY ZIEGLER WAS AFRAID.
SHE SAID, I COULD JUST DISAPPEAR.
IF SHE COULD JUST DISAPPEAR, WHAT WOULD OZIO GET?
IF SHE COULD DISAPPEAR, HOW IS SATAN SAFE?
>> DID OWE CEO RECANT HIS TESTIMONY AND WAS NOT -- SATAN IS HIS NAME?

>> MCCOLLOUGH.
>> DID HE RECANT HIS TESTIMONY.
>> HE RECANTED HIS TESTIMONY
TO -- GO AHEAD.
>> HE IS DECEASED.
>> HE IS NOW DECEASED.
HE RECANTED HIS COMPANY TO A
LIBRARIAN IN PRISON.
THE LIBRARIAN WROTE THE PUBLIC
DEFENDER AND SAYS HE WANTS TO
RECANT.
THE PUBLIC DEFENDER TALKED TO
BISHOP, A TRIAL ATTORNEY AND
SAYS HE WANTS TO RECANT, YOU
SHOULD GO SEE HIM.
SHE THEN GET'S ANOTHER LETTER
FROM -- BILLY KEYS, THE LIBRARIAN,
BISHOP CAME AND THREATENED SATAN
WITH PERJURY.
HE WANTS TO TALK TO APPELLATE
ATTORNEY.
SHE HE AGREED TO TALK TO HIM.
SHE NEVER DID AND SHE PASSED
AWAY LOWER COURT --
>> THAT IS UNFORTUNATE SERIES OF
EVENTS BUT FROM A LEGALLY
ADMISSIBLE POINT OF VIEW, YOU
KNOW THAT THAT WOULD NOT BE
ADMISSIBLE AS A RECANTATION.
>> I THINK IT IS STATEMENT
AGAINST INTEREST.
THIS PERSON KNEW 100% WHAT KIND
OF TROUBLE HE WOULD BE IN WALTON
COUNTY IF HE RECANTED.
THESE GUYS CARRY GUNS.
THESE PEOPLE WILL DISAPPEAR.
FDLE AGENTS.
SO HE KNEW THAT WAS A STATEMENT
AGAINST PENAL INTEREST.
SO I THINK IT WITH WOULD BE
ADMISSIBLE AND OUGHT TO BE
ADMISSIBLE AT CAPITAL SENTENCING
IN ANY EVENT.
>> THE OTHER JAILHOUSE SNITCH,
DID HE RECANT?
>> HE DID RECANT.
SIGNED AN AFFIDAVIT.
WE SUBPOENAED HIM OUT-OF-STATE.
HE WAS FROM WASHINGTON STATE.
WE SUBPOENAED HIM TO COME AND

TESTIFY.
HE WAS SCARED OF PERJURY BECAUSE OF THE PROSECUTOR MENTIONED PERJURY.
HE DIDN'T COME.
WE THEN ISSUED ANOTHER SUBPOENA FOR HIM TO COME.
THE JUDGE IN WASHINGTON STATE, UNDER THE WITNESS INTERSTATE IMPACT STATUTE SAID HE IS NOT NECESSARY.
WE'RE NOT GOING TO MAKE HIM GO BUT I'LL DO A DEPOSITION.
WE ASKED THE LOWER COURT TO ALLOWS TO CONDUCT THE DEPOSITION.
THE LOWER COURT SAID NO WHICH WE CONTINUED WAS AN ABUSE OF DISCRETION.
HE SAID I WAS SCARED TO DEATH IN JAIL.
I THOUGHT I FACED A MANDATORY FIVE YEARS.
SHERIFF'S DEPUTIES TOLD ME THEY WOULD GET ME OUT ON PROBATION.
I WAS SCARED SO I HELPED.
I NEVER HEARD MR. WHITTON SAY ANYTHING ABOUT IT.
SO THE TWO PEOPLE WHO SAY HE CONFESSED NOW SAY THEY WERE LYING.
AND ONE OF THEM SAYS, I WAS COERCED.
THE OTHER ONE SAYS I WAS KIND OF MARRIED.
I GOT TO GET MARRIED TO THE PROSECUTOR'S WIFE AND I WAS BEING PROTECTED FROM RAPE BY THE PROSECUTOR.
SO I GAVE THEM A STORY.
BUT WHEN HE GOT TO PRISON THE STORY TURNED AROUND.
SO I THINK THAT THERE COULD BE ADMISSIBLE AND OUGHT TO BE ADMISSIBLE.
SECOND MOVE QUICKLY TO CAPITAL SENTENCING.
I THINK WE CAN DEMONSTRATE DEFICIENT PERFORMANCE IN THIS CASE AND PREJUDICE AND I WILL

FOCUS ON ONE PARTICULAR PART IN
THAT THE DEFENDANT'S BRAIN
DAMAGE.
THE CASE LAW IS SETTLED YOU HAVE
TO DO A COMPLETE INVESTIGATION
INTO A DEFENDANT'S BACKGROUND
AND SOCIAL HISTORY, UNDER
WILLIAMS, UNDER VARIOUS CASES
BEFORE YOU MAKE STRATEGY
DECISIONS.
IN THIS CASE DEFENSE COUNSEL MET
WITH THREE FAMILY MEMBERS IN
FLORIDA OF THE DEFENDANT.
LEARNED THE NAMES AND AGES OF
NINE OR EIGHT SIBLINGS.
LEARNED THERE WERE HEALTH
DEPARTMENT AND FOSTER CARE
RECORDS IN NEW YORK STATE.
KNEW THAT ONE OF MR. WHITTON'S
SIBLINGS HAD BEEN BEATEN TO
DEATH AT NINE MONTHS.
THE DEFENSE TEAM DID NOT GO TO
NEW YORK AND SENT NO ONE TO NEW
YORK.
DIDN'T INTERVIEW OTHER FAMILY
MEMBERS, SCHOOL TEACHERS, FOSTER
PARENTS, BABY SITTERS,
NEIGHBORS.
DIDN'T OBTAIN SOCIAL SERVICES
RECORDS SIX INCHES WORTH, A
STACK OF SOCIAL SERVICES
RECORDS.
DIDN'T GET THE AUTOPSY FOR THE
DEAD BROTHER MICHAEL AND GAVE US
NO STRATEGY PURPOSE FOR NOT
DOING THAT NO STRATEGY, NO
STRATEGIC DECISION.
THOUGH JUST SAID WE HAD THREE
WITNESSES LOCALLY.
WE DIDN'T NEED THE OTHER
WITNESSES SO THEY DIDN'T
INVESTIGATE.
PREJUDICE.
SO THAT IS UNREASONABLE.
I THINK IT IS UNREASONABLE
ATTORNEY CONDUCT PER SE.
NOW WITH RESPECT TO BRAIN
DAMAGE, TALK TO PRINCIPAL, TALK
TO A SCHOOL TEACHER, PRINCIPAL
FOBY TESTIFIED THAT THE SCHOOL

NURSE AND PE TEACHERS WERE
CONCERNED ABOUT HIS FINE GROSS
AND MOTOR SKILLS.
NO ONE TALKED TO HIM.
OF GROSS MOTOR SKILLS WAS
EVIDENT WHEN TRIED TO PLAY GAMES
OR RUNNING OR ATTEMPTING LARGER
OR DIFFERENT ACTIVITIES.
HE SAID BASED ON HIS TRAINING
AND EXPERIENCE HE HAD BRAIN
DAMAGE AND COGNITIVE
DYSFUNCTION.
HAD DEFICIT PROBLEMS STAYING ON
TASK AND FOLLOWING THROUGH.
WE BASED ON THAT INVESTIGATION
DID WHAT?
NEUROPSYCHOLOGICAL TESTING TO
SEE IF THERE'S BRAIN DAMAGE.
>> DID THEY HAVE AN EXPERT
TESTIFY.
>> HAD AN EXPERT TESTIFY.
>> DR. LARSON?
>> DID NOT ADMINISTER NEUROPSYCH
TESTING.
>> BUT THEY CONTACTED AN EXPERT
AND THE EXPERT TESTIFIED AS TO
WHAT AS FAR AS HIS MENTAL
STATUS?
>> WELL, HE HAD SOME SCHOOL
RECORDS.
HE DIDN'T HAVE ANY INTERVIEWS
WITH ANY WITNESSES.
HE HAD THE POLICE REPORT.
HIS SCHOOL RECORDS AND SAT DOWN
WITH GARY WHITTON.
THAT'S WHAT HE DID.
>> WHAT DID HE TESTIFY TO?
>> HE TESTIFIED THAT HE MIGHT
HAVE FEET TALL ALCOHOL SYNDROME
AND THAT HE WAS AN ALCOHOLIC AND
CAME FROM A DYSFUNCTIONAL HOME.
THE BREADTH OF HIS TESTIMONY.
>> NOT THAT, YOUR CLAIM IS NOT
THAT DR. LARSON DIDN'T DO A
COMPLETE INVESTIGATION?
IT IS THAT BECAUSE THEY DIDN'T
PROVIDE ALL THESE ADDITIONAL
RECORDS DR. LARSON --
>> EXACTLY.
DIDN'T GO TALK TO ANYBODY.

GO TALK TO A TEACHER WHOSE JOB
IT IS TO RECOGNIZE THE DEFICITS.
THE TEACHER SAYS HE HAS GOT
BRAIN DAMAGE BUT WE DIDN'T HAVE
SPECIAL EDUCATION CLASSES AT
THAT TIME.
SO THEN WHAT DO YOU DO?
YOU DO NEUROPSYCH TESTING AND
FIND THE BRAIN DAMAGE.
THE STATE'S CASE OF
VALENTINE v. STATE WHICH MISS
DITTMAR WAS COUNSEL FOR THE
STATE, SHE SAYS YOU CAN'T COME
UP WITH A NEW EXPERT
POST-CONVICTION AND SAY THE
TRIAL EXPERT WAS IN EFFECTIVE OR
COUNSEL WERE IN EFFECTIVE BUT IN
VALENTINE, UNLIKE HERE, QUOTE,
COUNSEL CONDUCTED A THOROUGH
INVESTIGATION OF VALENTINE'S
BACKGROUND.
MULTIPLE TRIPS TO COSTA RICA TO
LOCATE WITNESSES.
MADE TRIPS TO LOUISIANA, MADE
TRIPS TO TEXAS TO INVESTIGATE
THE BACKGROUND.
GAVE THAT BACKGROUND TO AN
EXPERT.
HAD MY LAWYERS DONE THAT I WOULD
SAY VALENTINE CONTROLS BUT THEY
DIDN'T DO THAT.
YOU KNOW, YOU GOT TO TALK TO
SCHOOL TEACHERS.
THEY HAVE MORE INFORMATION THAN
ANYONE OUTSIDE OF THE FAMILY
ABOUT DEVELOPMENT, ABOUT TRUANCY,
ABOUT BRAIN DAMAGE IN THIS
CASE.
AND THE DOCTOR AT TRIAL TOLD
DEFENSE COUNSEL, SHOULD YOU WISH
ME TO PROCEED FURTHER, WITH
OTHER THIRD PARTY INFORMATION
YOU MAY HAVE AVAILABLE, DO NOT
HESITATE TO CONTACT ME.
IF THEY GAVE HIM THE INFORMATION
HE WOULD HAVE HAD A DIFFERENT
BASIS FOR COMING TO A
CONCLUSION.
THEIR FAILURE TO DO THAT WAS
SIGNIFICANT.

PROBABLY THE MOST IMPORTANT
MITIGATING CIRCUMSTANCE IN THIS
COURT'S OPINION AND CERTAINLY
THE SUPREME COURT'S OPINION IS
BRAIN DAMAGE.
YOU KNOW, MILD BRAIN DAMAGE OR
POSSIBLE BRAIN DAMAGE.
HERE WE HAVE SERIOUS BRAIN
DAMAGE AS IT IS NOT CONTESTED.
STATE DOESN'T SAY, OH, NO, HE
DOESN'T.
THEY DIDN'T SAY ANYTHING LIKE
THAT.
NONE OF THE PSYCHIATRIC OR
PSYCHOLOGICAL TESTIMONY THAT WAS
INTRODUCED BELOW WAS CONTROVERTED.
THEY JUST SAY YOU CAN'T GO GET A
NEW EXPERT AND SAY THAT PRIOR
COUNSEL WERE INEFFECTIVE.
WHAT WAS TESTIFIED TO BELOW WAS
IS PERTINENT TO THIS OFFENSE.
THE BRAIN DAMAGE IN THIS CASE
IMPAIRS THE ABILITY TO ORGANIZE
AND PROCESS INFORMATION AND
DR. WOODS TESTIFIED THE PROBLEMS
WITH SEQUENCING, PROCESSING AND
ORGANIZING INFORMATION ARE
PARTICULARLY TRUE IN RAPIDLY
EVOLVING CIRCUMSTANCES.
THIS IS EXACTLY THE AREA WHICH
MR. WHITTON HAS SIGNIFICANT
IMPAIRMENT.
IF IT IS TAKEN THAT HE IS GUILTY
THIS CRIME SCENE WAS A RAPIDLY
EVOLVING CIRCUMSTANCE.
AND BRAIN DAMAGE DIRECTLY
IMPACTS THAT.
INDEED DR. WOODS TESTIFIED THAT
HE SATISFIES TWO OF FLORIDA'S
STATUTORY MITIGATING
CIRCUMSTANCES BASED UPON THIS
BRAIN DAMAGE.
>> YOU ARE IN YOUR REBUTTAL?
>> PARDON.
I DIDN'T SEE THIS.
>> YOU'RE IN YOUR REBUTTAL TIME.
>> OKAY.
I SEE, ALL RIGHT.
THANKS.
>> GOOD MORNING, YOUR HONORS.

MAY IT PLEASE THE COURT, I'M
CAROL DITTMAR FROM THE
ATTORNEY GENERAL'S OFFICE,
REPRESENTING THE APPELLEE IN
THIS CASE THE STATE OF FLORIDA.
STARTING WITH INTIMIDATION TO
THE FDLE AGENT FROM
JACKSONVILLE,
THAT WAS KNOWN AT THE TIME OF
TRIAL.
THERE WAS A REQUEST FOR A
MISTRIAL WHICH WAS DENIED.
THE JUDGE SUGGESTED, LOOK IF YOU
WANT TO SEEK CONTEMPT AGAINST
SOMEBODY FROM THE SHERIFF'S
OFFICE OR THE STATE ATTORNEY'S
OFFICE FOR TRYING TO THREATEN A
WITNESS YOU'RE WELCOME TO SEEK
THOSE KIND OF SANCTIONS BUT
BECAUSE THE WITNESS IS HERE,
WILLING TO TESTIFY AND WILLING
TO TESTIFY TRUTHFULLY, THERE IS
NO IMPACT ON THE EVIDENTIARY
PICTURE BEFORE THE JURY, AS TO
THE TESTIMONY, I CAN'T FIND THAT
THERE'S A REASON TO GIVE A NEW
TRIAL AND, SAME, SAME RESULT
REALLY AT POST-CONVICTION WHEN
THE ISSUED IS RAISED AGAIN, THE
JUDGE SAID, SHE WAS ABLE TO
TESTIFY TRUTHFULLY.
THIS WOULD NOT COME IN TO
IMPEACH HER TESTIMONY.
THERE IS REALLY NO WAY IT REALLY
FITS INTO THE PICTURE OR SHOULD
CAUSE THIS COURT TO LOSE
CONFIDENCE IN THE VERDICT.
CERTAINLY NOBODY IS SUGGESTING
THAT THIS WAS OKAY,
THAT THIS WAS PROPER.
EVERYBODY RECOGNIZES THAT THIS
WAS EGREGIOUS AND SHOULDN'T HAVE
HAPPENED BUT THE QUESTION IS,
HOW DID IT AFFECT THE TRIAL?
WHEN THERE IS NO IMPACT ON THE
TESTIMONY THAT WAS BEFORE THE
JURY, IT IS CLEAR IT DIDN'T
AFFECT THE TRIAL.
AS FOR THE INMATE WITNESSES,
FACTUAL FINDING BELOW THERE IS

NO CREDIBLE EVIDENCE OF
RECANTATION BY EITHER WITNESS.
YOU HAVE, FIRST OF ALL --
>> CAN YOU, JUST BECAUSE,
JAILHOUSE SNITCHES HAVE BEEN
FOUND TO BE INHERENTLY
UNRELIABLE, MY IMPRESSION OF THE
EVIDENCE IN THIS CASE IS THAT
REALLY WASN'T BUILT ON THE TWO
SNITCHES.
THAT THERE WAS A GREAT DEAL OF
BOTH DIRECT AND CIRCUMSTANTIAL
EVIDENCE OF THE DEFENDANT'S
GUILT?
>> THAT'S CORRECT.
THIS HAPPENED IN A MOTEL AND THE
DEFENDANT AND THE VICTIM WERE
FRIEND AND THE TESTIMONY WAS
CLEAR THAT, THAT MORNING THEY
HAD GONE TO THE VICTIM'S BANK,
WITHDRAWN SOME MONEY.
HE HAD TAKEN THE MAN TO THE
HOTEL AND HELPED HIM CHECK IN.
HE HELPED HIM, BECAUSE THE
VICTIM WAS ALREADY INTOXICATED
EVEN THOUGH THIS IS EARLY IN THE
MORNING, HE HELPED HIM FILL OUT
PAPERS AT THE BANK.
ALSO WHEN HE IS REGISTERING AT
THE MOTEL.
HE PUTS DOWN, HE BEING THE
DEFENDANT, MR. WHITTON, WRITES A
WRONG CAR TAG NUMBER ON THE CAR
REGISTRATION AND INCORRECT
ADDRESS AND THE MOTEL CLERK
HAPPENS TO NOTICE WHEN THEY
DRIVE AROUND TO THE ROOM THAT IT
IS AN ALABAMA TAG ON THE CAR AND
MENTIONS SOMETHING TO THE OTHER
CLERK, NO, HE WROTE DOWN A
FLORIDA TAG.
SO HE GOES AND GETS THE CORRECT
TAG NUMBER.
SO THEY'RE FAMILIAR WITH THE
CAR.
THEY PAID ATTENTION TO THE CAR.
MR. WHITTON IS THERE AT THE, HE
AND THE VICTIM GO ACROSS THE
STREET TO A CONVENIENCE STORE.
GET A BOTTLE OF WINE OR LIQUOR

OR SOMETHING, COME BACK.
MR. WHITTON LEAVES.
STILL IN THE MORNING, SOMETIME BEFORE NOON.
>> HOW MUCH MONEY HAD THE VICTIM WITHDRAWN?
>> ABOUT $1100.
SO IN THE FIRST STATEMENT THAT MR. WHITTON GIVES TO LAW ENFORCEMENT WHEN THEY COME TO HIM AND WANT TO KNOW ABOUT WHAT'S GOING ON HE SAYS THAT WHEN HE LEFT THAT DAY AT NOON HE NEVER RETURNED TO THE HOTEL.
HE NEVER WENT BACK THERE.
AND IN FACT HE TALKS ABOUT HIS ACTIVITIES AND I WAS HOME THAT EVENING AND DIDN'T LEAVE HOME AFTER 10:00 AT NIGHT.
HE GIVES CONSENT FOR THE POLICE TO SEARCH HIS CAR AND TO SEARCH HIS HOME.
THEY TALK MEANWHILE TO THE CLERK AT THE HOTEL.
THE CLERK RECALLS NOT ONLY THAT MR. WHITTON HAD LEFT IN THE MORNING, BUT THAT HE WOKE UP THAT NIGHT, 10:00, 10:00, 10:30.
NOTICED THAT THE DEFENDANT'S CAR WAS BACK AT THE HOTEL.
LATER ABOUT MIDNIGHT AT 12 HE HEARS ANOTHER CAR DOOR AND LOOKS OUT OF AND DOESN'T SEE, HE DOESN'T IDENTIFY THE DEFENDANT AS BEING THERE BUT HE IDENTIFIES THE DEFENDANT'S CAR.
HE SEES SOMEBODY DOING SOMETHING IN THE TRUNK.
PUTTING SOMETHING IN THE TRUNK AND GOES TO THE DRIVER'S SIDE AND DRIVES OFF.
SO THE TESTIMONY HIS CAR WAS THERE.
WHEN POLICE SEARCH HIS HOUSE AND FIND HIS BOOTS WITH SOME BLOOD IN THEM AND PAIR OF JEANS THEY SUSPECT HAS BLOOD IN THEM AND SEARCH THE CAR AND FIND RECEIPTS IN THE CAR SHOWING THAT THE MORNING AFTER THE MURDER THE

DEFENDANT, AMONG OTHER THINGS
DROVE TO ALABAMA AND RENEWED HIS
CAR TAG WHICH EXPIRED, HE WENT
AROUND PENSACOLA PAID BILLS
DELINQUENT AND OVERDUE.
>> PAYING THE BILLS, THERE IS
SOME TESTIMONY THAT A FRIEND
GAVE HIM SOME MONEY.
AND THAT IS WHAT HE USED TO PAY
THESE BILLS.
DID THESE BILLS COME TO THAT HE
PAID THAT WERE OVERDUE?
>> TOTAL THEY WERE SEVERAL
HUNDRED DOLLARS BETWEEN THE CAR
TAG AND THE BILLS.
>> SHE SAID SHE GAVE HIM 200?
>> SHE GAVE HIM 200.
>> IT WAS MORE THAN THAT?
>> IT WAS MORE THAN 200.
BUT WE ALSO KNOW HE HAD A
PAYCHECK.
HE HAD GOTTEN $140.
HIS TESTIMONY AT TRIAL.
THE FRIEND HAD GIVEN HIM $200
AND SOLD FURNITURE AND HAD SOME
MONEY AT THAT.
HE ALSO INDICATED THAT THE JOB,
ALTHOUGH HE HAD GOTTEN A
PAYCHECK, HE HAD BEEN FIRED FROM
THAT JOB.
HE KNEW HE WOULDN'T HAVE MORE
MONEY COMING IN ALTHOUGH THERE
WAS SOME EVIDENCE THAT HOPED TO
HAVE ANOTHER JOB LINED UP THAT
WAS SUPPOSED TO REFUTE THAT.
SO THE TESTIMONY WAS HIS
TESTIMONY AT TRIAL WAS HE HAD
THE MONEY ALONE TO PAY THOSE
BILLS.
SO THE JURY HEARD HIS TESTIMONY
ABOUT THAT MONEY ALTHOUGH
THE TIMING IS SUSPICIOUS
SUPPOSEDLY HE HAD THIS MONEY
FOR, YOU KNOW, BEFORE THEN AND
HADN'T PAID THEM OFF.
>> BUT HE CHANGES HIS
STORY AFTER HE REALIZES --
>> HE IS CHANGES HIS STORY AFTER
HE IS CONFRONTED WITH THE FACT
THAT THEY FIND THE TICKET IN HIS

CAR INDICATING HE WAS AT A GAS STATION AT 2:30 IN THE MORNING AND FIND THESE OTHER -- WHEN THEY CONFRONT HIM ABOUT IT HE ADMITS, YES, I DID GO BACK INTO THE HOTEL AND DID GO INTO THE ROOM BUT THE VICTIM WAS ALREADY DEAD.
I PULLED UP THE BLANKET AND SAW IT WAS THE VICTIM AND I WAS SCARED AND I JUST LEFT.
>> HE IS ON PAROLE.
>> HE IS ON PAROLE FROM THE STATE OF ALABAMA.
AND HE ALSO ADMITS THAT AS HE DROVE BACK TO PENSACOLA AFTER LEAVING, FINDING THE VICTIM DEAD AND LEAVING THAT HE DIDN'T LOOK BUT HE FELT LIKE HIS FEET WERE WET AND HE FELT IT WAS BECAUSE THE BLOOD SOAKED INTO HIS BOOTS SO HE STOPPED AND DISPOSED OF HIS BLOODY SOCKS BEFORE THE TIME HE GOT TO PENSACOLA.
THIS WAS PART OF HIS TRIAL TESTIMONY.
THERE WAS VERY STRONG EVIDENCE TYING HIM.
HE IS MAKING INCONSISTENT STATEMENTS WHICH, THEN HE, YOU KNOW, THERE WERE ALSO THE SOME EVIDENCE OF THE SCENE WHERE HE WAS ABLE TO EXPLAIN THAT HE HAD BEEN THERE AND SO THE CIGARETTES, CIGARETTE BUTTS WERE TESTED AND THEY WERE, BLOOD TYPE FROM THE SECRETORS WERE AVAILABLE FROM THE CIGARETTE BUTTS, THAT TYPE OF CIRCUMSTANTIAL EVIDENCE WHICH I THINK IS THE MOST INCRIMINATING THE MOTEL CLERK, THE FACT THAT HE IS GIVING THE WRONG TAG NUMBER TO THE MOTEL CLERK. THE MOTEL CLERK SEEING THE CAR COME BACK AT MIDNIGHT.
WITNESSES AND HIM MAKING INCONSISTENT STATEMENTS.
USING MONEY THE NEXT DAY TO PAY OFF THE DELINQUENT BILLS.

IT IS A VERY STRONG CASE BUT LET
ME TALK ABOUT THE INMATES.
I THINK IN THIS CASE IT IS A
LITTLE MORE RELIABLE THAN IN
CASES WHERE YOU HAVE INMATE
TESTIMONY.
YOU HAVE, THE TESTIMONY WAS
FROM, YOU HAVE THE ONE INMATE,
MCCOLLOUGH.
THERE ARE FOR DEFENDANTS IN THE
CELL WHEN THE DEFENDANT IS
ARRESTED.
THERE IS WHITTON, MCCOLLOUGH.
THE AT THE TIME HE IS ARRESTED
SHORTLY AFTER HE IS HAPPENS.
MCCOLLOUGH IS ARRESTED IN
NOVEMBER.
AND MCCOLLOUGH'S TRIAL
TESTIMONY, THAT MCCOLLOUGH WAS
IN JAIL BRIEFLY.
WHITTON MADE A STATEMENT TO HIM
ABOUT HAVING KILLED THIS MAN.
NOW MCCOLLOUGH SAYS, THE
TESTIMONY IS, HE IS SORT OF A
JAILHOUSE LAWYER.
A LOT OF PEOPLE COME TO HIM FOR
ADVICE ABOUT THEIR CASES TO TALK
ABOUT THEIR CASES.
SO HE MENTIONS THAT BUT IT IS
REALLY THE APRIL CONVERSATION
BECAUSE THAT IS BACK IN
NOVEMBER.
MCCOLLOUGH ACTUALLY GETS OUT OF
JAIL.
GETS REARRESTED AND APRIL AND
MCCOLLOUGH AND JAKE OZIO AND THE
DEFENDANT AND ANOTHER MAN ARE
ALL FOUR IN THE SAME CELL.
MCCOLLOUGH HAS BOTTOM CELL AND
JAKE OZIO HAS CELL ON TOP OF
THAT.
>> YOU MEAN BUNK OR CELL?
>> I'M SORRY, THE BUNK, YES.
LOWER BUNK AND TOP BUNK YES.
JAKE OZIO'S TESTIMONY THAT HE
WAS ON THE TOP BUNK AND READING
NOT PAYING ATTENTION BUT HE KNEW
THAT THE DEFENDANT AND
MCCOLLOUGH WERE TALKING ABOUT
THE DEFENDANT'S CASE AND WAS

LEGAL ISSUES AND WASN'T REALLY
PAYING A LOT OF ATTENTION BUT IT
GOT HIS ATTENTION WHEN HE HERD
THE DEFENDANT MAKE THE
STATEMENT, I STABBED THE
BASTARD, EXCUSE MY LANGUAGE.
HE HEARD THAT STATEMENT.
THAT GOT HIS ATTENTION.
SO HE PAID A LITTLE MORE
ATTENTION.
NOW NEITHER OZIO OR MCCOLLOUGH
DO ANYTHING ABOUT HAVING HAD
THIS CONVERSATION.
THEY DON'T GO TO LAW ENFORCEMENT
AND SEEK A BENEFIT RIGHT AWAY.
OZIO TWO WEEKS LATER IS GOING
AROUND WITH THE DETECTIVES IN
HIS CASE TO SHOW THEM, HE HAS
BEEN ARRESTED FOR GRAND THEFT
AND FOR BURGLARIES.
HE IS GOING AROUND TO PAWN SHOPS
TO BE ABLE TO TRY TO FIND, HE IS
COOPERATING WITH THE POLICE.
HE HAS CONFESSED TO THE CHARGES
THAT HE WAS ARRESTED FOR AND HE
IS TRYING TO HELP THE POLICE
LOCATE THE PROPERTY THAT WAS
STOLEN SO THAT HE CAN REDUCE THE
RESTITUTION.
SO AS PART OF GOING AROUND WITH
THEM, HE MENTIONS TO THEM THAT
HE TWO WEEKS AGO, OVERHEARD THIS
CONVERSATION BETWEEN THE
DEFENDANT AND MCCOLLOUGH.
NOW MCCOLLOUGH BY THIS TIME, HE
HAS ALREADY BEEN SENTENCED, BEEN
PROCESSED,
BEEN SENT TO THE DEPARTMENT OF
CORRECTIONS AND HE IS DOWN IN
LAKE BUTLER ACTUALLY GETTING
PROCESSED TO GO INTO THE
DEPARTMENT OF CORRECTIONS AT THE
TIME THAT LAW ENFORCEMENT
BECOMES AWARE THROUGH JAKE OZIO
ABOUT THE CONVERSATION.
SO SOMEONE FROM THE SHERIFF'S
OFFICE GOES DOWN AND TALKS TO
MCCOLLOUGH AND ASKS HIM ABOUT IT
AND HE ADMITS THE CONVERSATION
AND SAYS HE HEARD THE SAME

THING, THAT THE DEFENDANT
ADMITTED STABBING AND MADE THE
SAME STATEMENT BY, I STABBED THE
BASTARD.
SO YOU HAVE THIS CORROBORATION
AND YOU HAVE MCCOLLOUGH NOT EVER
SEEKING ANY BENEFIT.
WHEN HE TESTIFIED AT TRIAL WAS
THAT IF SOMEBODY HAD NOT COME
DOWN AND ASKED HIM ABOUT IT HE
WOULD HAVE NEVER REVEALED IT
BECAUSE THIS IS THE TYPE OF
STUFF HE HEARD TYPICALLY AND HE
DIDN'T TAKE TO LAW ENFORCEMENT
OR DIDN'T TRY TO USE FOR HIS OWN
BENEFIT.
SO YOU HAVE THAT AND YOU HAVE
THE FACT THAT THERE REALLY IS NO
BENEFIT ANYBODY GETS OUT OF THIS
TO SUGGEST THAT THERE ARE MORE
RELIABLE THAN SOME INMATE
STATEMENT THAT IS YOU SEE.
THEY'RE CONSISTENT.
THEY'RE TALKING ABOUT THE SAME
CONVERSATION THAT WAS OVERHEARD.
THEY'RE DESCRIBING THE SAME
THING.
THE OTHER THING WHEN YOU LOOK AT
THE ATTEMPTS TO RECANT THESE,
THESE CONVERSATIONS, YOU HAVE,
THE RECANTATIONS THEMSELVES TO
THE EXTENT YOU WANT TO CALL THEM
THAT, THEY ARE INCONSISTENT
BECAUSE THEM SAYING AT SOME
POINT THEY'RE SAYING I DIDN'T
KNOW ANYTHING ABOUT IT.
I THINK ONE THING HE SAID HE
DIDN'T KNOW ANYTHING ABOUT THE
CASE.
EVEN HIS RECANTATION, JAKE
OZIO'S AFFIDAVIT HE WOULD
PREPARE AND NOT COME DOWN TO
SWEAR TO, HIS AFFIDAVIT SAID
THEY DID TALK ABOUT HIS CASE AND
I DID HEAR THEM TALK ABOUT HIS
CASE BUT I NEVER HEARD HIM MAKE
THE ADMISSION OF KILLING
ANYBODY.
HE'S SAYING THE CONVERSATION
HAPPENED.

I DIDN'T HEAR HIM ACTUALLY ADMIT
TO KILLING ANYBODY BUT
DEFINITELY TALKING ABOUT HIS
CASE.
IF YOU LOOK WHAT EVERYBODY SAID
OR WHAT THE DIFFERENT INMATES
SAID THAT MCCOLLOUGH REPEATED TO
THEM AND THAT GOT REPEATED AND
REPEATED AND REPEATED,
MCCOLLOUGH WAS SAYING HE DIDN'T
KNOW ANYTHING AT ALL ABOUT THE
CASE.
EVERYTHING HE KNEW ABOUT THE
CASE THE PROSECUTOR TOLD HIM.
SO HE ONLY TESTIFIED TO WHAT THE
PROSECUTOR TOLD HIM.
WELL HE HAD NOT EVEN TALKED TO
THE PROSECUTOR AT THE TIME THE
SHERIFF'S GUY WENT DOWN TO LAKE
BUTLER TO TALK TO HIM.
>> SO WHAT IS THE ISSUE WITH THE
RELATIONSHIP, SEEMS A LITTLE
COINCIDENTAL?
>> THE PROSECUTOR'S MOTHER?
THAT'S, THAT IS AGAIN, IT WAS
RATHER EXPLORED AT TRIAL.
HE ADMITTED, MCCOLLOUGH ADMITTED
IN HIS TESTIMONY ON
CROSS-EXAMINATION AS HE WAS
BEING IMPEACHED THAT HE WAS A
CLOSE, PERSONAL FRIEND OF THE
PROSECUTOR'S MOTHER.
HE SAID SHE HAD NOT COME TO
VISIT HIM WHEN HE WAS IN JAIL IN
NOVEMBER WITH THE LITTLE
NOVEMBER STAY BUT WHEN HE WAS
THERE IN APRIL SHE WAS A
FREQUENT VISITOR AND OTHER
PRISONERS THAT WERE IN THE JAIL
WITH HIM WERE AWARE THAT SHE WAS
A FREQUENT VISITOR OF HIS AND
THEY WERE VERY CLOSE FRIEND WAS
THE TESTIMONY AT TRIAL.
NOW IN POST-CONVICTION, CLOSE
FRIEND TURNS INTO AN ENGAGEMENT
SOMEHOW BECAUSE THE DEFENDANT
TELLS THE DOC GUY DOING HIS PSI
THAT HE IS HIS NEXT OF KIN.
AND THAT IS, WE HAVE HEARSAY
STATEMENTS ABOUT THAT THERE WAS

SOMETHING, YOU KNOW, THEY
INTENDED TO GET MARRIED BUT
REALLY THE ENGAGEMENT, NONE OF
THAT, THERE WAS NO CREDIBLE
EVIDENCE OF THAT REALLY
PRESENTED BELOW.
THERE WAS MCCOLLOUGH'S SON
TESTIFIED HE WENT AND VISITED
HIS FATHER A COUPLE YEARS AFTER
THE TRIAL, '94 AND '95.
HE SAID AT THAT TIME HE WAS
LIVING WITH THE PROSECUTOR'S
MOTHER.
SO, YOU KNOW THAT'S THE
TESTIMONY ABOUT THE
RELATIONSHIP.
IT IS REALLY NOT ANYMORE THAN
WHAT THE JURY HEARD, THAT THEY
HAD A CLOSE, THERE WAS A CLOSE
RELATIONSHIP AND SHE VISITED
HIM.
IT IS RATHER BIZARRE.
SEEMS RATHER BIZARRE BUT THAT IS
WHAT THE TESTIMONY WAS AND THAT
IS WHAT THE JURY HEARD.
THEY WERE ABLE TO WEIGH THAT AND
TAKE THAT INTO ACCOUNT WITH THE
CREDIBILITY ALSO.
AS FAR AS THE -- I'M SORRY,
DID YOU HAVE A QUESTION?
>> I WAS GOING TO ASK YOU ABOUT
THE PENALTY PHASE OF THE TRIAL
AND WHETHER OR NOT THERE IS SOME
CREDIBLE EVIDENCE NOW HE HAS
SOME MENTAL ISSUES AND --
>> AT THE TIME OF TRIAL, WHAT
THE COURT BELOW FOUND OUT AT THE
EVIDENTIARY HEARING THERE HAD
BEEN NO DEFICIENCY OR PREJUDICE
WITH THE CLAIM OF INEFFECTIVE
ASSISTANCE COUNSEL AT THE
PENALTY PHASE BECAUSE
THESE AVENUES WERE ALL EXPLORED.
HE DID HAVE THE EXPERT,
DR. LARSON, ALTHOUGH DR. LARSEN
DID NOT CONDUCT
NEUROPSYCHOLOGICAL TESTING AT
THE TIME HE THOROUGHLY EVALUATED
AND EXAMINED THE DEFENDANT
SEVERAL TIMES.

HE HAD A LOT OF BACKGROUND RECORDS.
I THOUGHT HE HAD, MY MEMORY MAY BE WRONG ON THIS I KNOW HE DID NOT TALK TO PRINCIPALS AND TEACHERS AND THAT TYPE OF STUFF BUT I THOUGHT HE TALKED TO SOME LOCAL RELATIVES AND I MAY BE UNCLEAR ABOUT THAT HE CERTAINLY HAD A LOT OF BACKGROUND INFORMATION AND SAID ALL OF IT CORROBORATED THE DEFENDANT'S STATEMENTS TO HIM ABOUT HIS BACKGROUND AND HIS CHILDHOOD.
THE JURY WAS WELL AWARE HE HAD A HORRENDOUS CHILDHOOD.
THEY HEARD FROM HIS BROTHER.
THEY HEARD FROM HIS AUNT AND
YES, WE DO IN POST-CONVICTION, WE HAVE A LOT MORE TIME AND LOT MORE RESOURCES AND GO A LOT MORE FARTHER WHAT WE'RE SEEKING IN A MITIGATION CASE BUT A DEFENSE ATTORNEY AT TRIAL HAS LIMITED TIME, LIMITED BUDGET.
THEY HAVE TO EXPLORE WHAT THEY CAN EXPLORE AND WHEN THEY HAVE LOCAL RELATIVES, FAMILY RELATIVES, A BROTHER AND AN AUNT WHO ARE ABLE TO DESCRIBE THE CONDITIONS AT THE HOUSE, THEY HAVE TO DETERMINE, THEY CAN MAKE THEIR EVEN INVESTIGATION ABOUT HOW MUCH THEY HAVE TO TRAVEL TO WHERE THE DEFENDANT LIVED PREVIOUSLY AND HOW MANY TEACHERS THEY HAVE TO TALK TO.
>> THERE IS SOMETHING IRONIC IN WHAT YOU JUST SAID.
YOU'VE BEEN DOING THIS A LONG TIME.
WHAT YOU'RE SAYING IS THERE'S MORE OPPORTUNITY IN POST-CONVICTION TO DEVELOP BOTH GUILT AND PENALTY PHASE DEFENSE.
>> ABSOLUTELY.
>> AND THAT THERE'S LIMITED TIME IN THE ORIGINAL CASE BUT WE REALLY HAVE A FEEL, AND THIS IS

A 1994 CASE, THAT IN MORE RECENT YEARS THERE HAS BEEN THE OPPORTUNITY TO EXPLORE AND IF NECESSARY GO, IF IT'S, IF THE EVIDENCE IS IN NEW YORK, ARE YOU SAYING IN THIS CASE, DID THE DEFENSE LAWYERS REQUEST THE FINDINGS TO GO TO NEW YORK?
THE WAY I'M HEARING IT FROM MR. OLIVE, THEY JUST SAID, WELL, WE'VE GOT THEM HERE, WE DON'T NEED TO GO FURTHER.
SO GIVE US THAT PICTURE WAS THIS ISSUE THEY WANT AD CONTINUANCE TO EXPLORE THE PENALTY PHASE OR WHAT?
>> I DON'T THINK THEY EVER REQUESTED A CONTINUANCE.
I THINK WHEN I TALK ABOUT THERE BEING MORE LIMITED TIME, AND YOU'RE CORRECT, TODAY, IN THE TRIALS WE SEE THERE IS LOT MORE TIME AND EFFORT PUT INTO IT.
WE HAVE A WHOLE COTTAGE INDUSTRY OF MITIGATION SPECIALISTS AND A LOT OF PEOPLE THAT WERE NOT AVAILABLE IN 1991 THAT REALLY WEREN'T USED.
WHEN YOU'RE LOOKING AT A TRIAL THAT OCCURRED MANY YEARS AGO.
IT IS HARD.
I KNOW STRICKLAND SAYS YOU HAVE TO PUT YOURSELVES IN THE SHOES OF THE ATTORNEY AT THAT TIME.
WHAT THEY DID WAS REASONABLE AT THAT TIME.
YOU DON'T COMPARE THEM TO SURE, SOMEBODY TODAY, MIGHT SAY, OH, WE'VE GOT TO GO TO NEW YORK AND DO THIS AND THAT IS MORE COMMONLY ACCEPTED.
>> IS THIS A CASE WHERE THIS WAS CLEARLY A BRAIN-DAMAGED DEFENDANT WHERE THERE WOULD HAVE BEEN EVIDENCE OF POTENTIAL STATUTORY -- LET ME, STATUTORY MITIGATION?
WE MUST WHEN WE'RE LOOKING AT WHETHER THIS DEFENDANT DESERVES TO HAVE A NEW TRIAL, IT'S, WELL,

THEY JUST, YOU KNOW, IT WAS BACK
THEN.
NOT LIKE IT WAS THE DARK AGES.
SO I'M CONCERNED WITH YOUR
SAYING THAT AND HOW THAT RELATES
TO THIS CASE.
SO IS THERE NOW CREDIBLE
EVIDENCE THAT IF IT HAD BEEN
EXPLORED BACK THEN WOULD HAVE
SHOWN BOTH FETAL ALCOHOL
SYNDROME AND SUBSTANTIAL BRAIN
DAMAGE?
>> DR. LARSON EXPLORED IT BACK
THEN AND HE SAID THERE WAS
SIGNIFICANT POSSIBILITY THAT THE
DEFENDANT SUFFERED FROM FETAL
ALCOHOL SYNDROME AND TALKED TO
JURY A GREAT DEAL ABOUT EFFECTS
OF THAT INCLUDING POSSIBLE BRAIN
DAMAGE AND A LOT OF OTHER THINGS
THAT DR. WOODS SPOKE TO.
SO HE TALKED ABOUT THE LOW I.Q.
HE TALKED ABOUT MANY OF THE SAME
FACTORS.
HE TALKED ABOUT THE ALCOHOLISM
AND WHAT IT WOULD DO AND HOW IT
WOULD CLOUD HIS JUDGMENT.
I THINK WHEN YOU LOOK AT THE
BOTTOM LINE, YOU'RE LOOKING AT
IS AGAIN, HOW DOES THE
EVIDENTIARY PICTURE CHANGE FROM
WHAT THE JURY HEARD?
WHAT DID THE JURY HEAR ABOUT HIS
BRAIN?
THE JURY HEARD HIS BRAIN WASN'T
FUNCTIONING.
IT HAD NOT BEEN FUNCTIONING.
>> RECEIVE THIS INFORMATION WITH
REGARD TO SCHOOL RECORDS BACK
FROM --
>> APPARENTLY COUNSEL DID NOT
OBTAIN THE SCHOOL RECORDS.
>> DID THE SCHOOL RECORDS
CONTAIN WRITTEN DOCUMENTATION AS
OPPOSED TO JUST -- NOT HEARD OF
BEFORE BEING QUALIFIED TO
EXPRESS BRAIN DAMAGE OPINIONS
BUT WAS THERE SOMETHING THAT WAS
ULTIMATELY DEVELOPED THAT HAD
THEY DEVELOPED THE RECORDS AND

SECURED THEM, THAT THERE WAS
INFORMATION IN THE SCHOOL
RECORDS TO -- THAT?
>> I DON'T RECALL ANYTHING
SPECIFIC.
I DIDN'T GO VERY CAREFULLY
THROUGH A LOT OF SCHOOL RECORD.
THERE WAS NO TESTIMONY BIT AT
THE EVIDENTIARY HEARING SCHOOL
RECORDS REFLECTING THIS.
>> TALKING ABOUT THE TEACHERS
THINKING THAT HE --
>> RIGHT.
I THINK THE OTHER THING THAT IS
IMPORTANT, YOU DON'T HAVE
DR. LARSEN COMING BACK IN
POST-CONVICTION, OH, IF I HAD
KNOWN THIS STUFF MY TRIAL
TESTIMONY WOULD HAVE BEEN
DIFFERENT.
HE DOESN'T, HE DOESN'T COME BACK
AND TESTIFY IN POST-CONVICTION.
SO THERE'S NO SHOWING THAT IF
THEY HAD DONE, ANYTHING
DIFFERENT, IF THEY HAD OFFERED
HIM ANY FURTHER BACKGROUND
INFORMATION THAT IT WOULD HAVE
HAD ANY IMPACT OR ANY CHANGE ON
HIS TESTIMONY.
YOU HAVE DR. WOODS SPECULATING
THAT IF DR. LARSON HAD HAD MORE
INFORMATION HE MIGHT HAVE SAID,
MORE FAVORABLE THINGS.
>> IT JUST STANDS TO REASON IF
SOMEONE HAS SCHOOL RECORDS,
AGAIN SEEMS, THAT IT IS 1994.
WASN'T A LONG TIME, LIKE
THERE WASN'T AN ABILITY TO GET
SCHOOL RECORDS.
SCHOOL RECORDS ARE USUALLY THE
FIRST THING THAT YOU SEE.
THEY HAVEN'T BEEN OBTAINED YOU
BECOME CONCERNED AS TO WHETHER
THEY HAVE DONE A PROPER
INVESTIGATION.
>> WELL I THINK, I DON'T KNOW
THAT IN 1991 ANYBODY STARTED
WITH SCHOOL RECORDS.
I THINK THEY STARTED, YOU KNOW,
MOST MITIGATION INVESTIGATIONS

YOU START OUT TALKING TO THE
DEFENDANT.
YOU TALK TO HIS FAMILY.
DEPENDING ON WHAT YOU HAVE
AVAILABLE YOU MAKE A DECISION
ABOUT HOW MUCH FARTHER YOU CAN
GO.
AND WHEN YOU'RE INVESTIGATING
THAT BACKGROUND UNDER YOU'RE
ALSO INVESTIGATING MENTAL HEALTH
ISSUES AND OTHER ISSUES YOU
CAN'T GO AS FAR AS MAYBE YOU
WOULD LIKE TO GO.
SO IT WOULD HAVE BEEN NICE
AND --
>> I DON'T UNDERSTAND THAT.
AGAIN, WHAT WAS THE, THIS ISN'T
LIKE THE DEFENDANT GREW UP IN,
YOU KNOW IN ANOTHER COUNTRY.
ALTHOUGH SOME PEOPLE THINK NEW
YORK IS ANOTHER COUNTRY.
THEY, I DON'T UNDERSTAND WHAT
THE IMPEDIMENT WAS TO OBTAINING
THE RECORDS?
>> WELL, YOU KNOW, HE WAS
ARRESTED IN OCTOBER.
THE TRIAL, IN OCTOBER OF '90.
THE TRIAL WAS IN AUGUST OF '92.
SO YOU KNOW THAT HE'S, AT THAT
TIME OF, DR. LARSON IS
EVALUATING HIM.
THEY'RE TALKING AGAIN TO THE
FAMILY MEMBERS.
I DON'T KNOW THAT THERE IS AN
IMPEDIMENT.
IT IS NOT SOMETHING THAT COMES
UP IN THEIR REGULAR
INVESTIGATION AS TO WHAT THEY'RE
DOING.
I DON'T KNOW THAT THERE IS ANY,
THERE ARE CASE THAT IS COURT GO
BACK TO '90 AND '91 WHERE THERE
IS A BIG ISSUE OVER THE SCHOOL
RECORDS.
I THINK THAT IS SOMETHING HAS
COME UP AS POST-CONVICTION IS
DEVELOPED AND EXPAND AND TRIAL
INVESTIGATIONS EXPANDED AND
DEVELOPED AND SOMETHING WE SEE
AND SO ROUTINE AND COMMON TODAY

AND EVEN 10 YEARS AGO OR 15
YEARS AGO OR 20 YEARS AGO IT MAY
HAVE BEEN COMMON.
DOESN'T MEAN BACK IN 1991
EVERYBODY ALWAYS GOT ALL THE
SCHOOL RECORDS PARTICULARLY WHEN
THEY'RE NOT LOCAL SCHOOL RECORD.
THEY ARE OUT-OF-STATE.
SO IT IS MORE OF A BURDEN TO
HAVE TO TRACK DOWN A LOT OF
OUT-OF-STATE RECORDS.
AND HE DID HAVE A HISTORY NOT
JUST WITH SCHOOL BUT WITH SOCIAL
SERVICES AND OTHER AGENCIES.
>> THOSE WERE NOT OBTAINED
EITHER?
>> THOSE WERE NOT OBTAINED
EITHER.
BUT THINK IF YOU COME BACK TO IF
YOU'RE CONCERNED ABOUT THE
SUFFICIENCY OR ADEQUACY OF
COUNSEL'S INVESTIGATION YOU COME
BACK TO THE ISSUE OF PREJUDICE
AND LOOK TO THE EVIDENTIARY
PICTURE THAT WENT TO THE JURY
AND THERE IS NO INDICATION
REALLY THAT LARSON WOULD HAVE
TESTIFIED ANY DIFFERENTLY HE IF
HE HAD HAD SCHOOL RECORDS.
THAT HIS OPINION WOULD HAVE BEEN
CHANGED.
AND HE DID TALK ABOUT THE
COGNITIVE ISSUES AND IMPAIRMENT
ISSUES.
THE OTHER THING I THINK IF YOU
LOOK AT PREJUDICE, IF YOU LOOK
AT DR. WOODS, THERE ARE MORE
FAVORABLE POST-CONVICTION AND
OBVIOUSLY NOT JUST VALENTINE.
THIS COURT SAID IN MANY, MANY,
MANY CASES HAVING A MORE
FAVORABLE EXPERT IN
POST-CONVICTION IS NOT, DOES NOT
SATISFY THE SHOWING FOR IAC.
YOU HAVE TO HAVE A LOT MORE THAN
THAT.
IF YOU LOOK AT THE ACTUAL
EVIDENTIARY PICTURE.
WOODS IS SAYING THAT, THE EFFECT
THAT THIS BRAIN DAMAGE,

WHATEVER DIFFUSIVE BRAIN
DAMAGE MAY HAVE EXISTED TO MAKE
THE DEFENDANT MORE IMPULSIVE.
TO MAKE HIM, TO IMPAIR HIS
JUDGMENT AND HIS COMMON SENSE
BUT IN THIS CASE YOU DON'T HAVE
AN IMPULSIVE CRIME.
YOU HAVE SOMEBODY WHO MAKES A
DECISION IN PENSACOLA.
WHAT DR. WOODS SAID, WELL THE
DECISION HE MADE TO DRIVE BACK
TO THE MOTEL IN DESTIN WHICH IS
A GOOD WAYS FROM PENSACOLA, THAT
DECISION --
>> YOU'RE OUT OF TIME.
IF YOU WOULD SUM UP.
>> I APOLOGIZE.
THAT DECISION WAS IMPULSIVE.
THIS WAS NOT IMPULSIVE MURDER.
HE HAD AN HOUR DRIVE TO THINK
ABOUT THAT DECISION.
I DON'T THINK THAT IS HELPFUL IN
THE MITIGATION.
I WOULD ASK THE COURT TO AFFIRM
THE DENIAL OF POST-CONVICTION
RELIEF.
THANK YOU, YOUR HONORS.
>> REBUTTAL.
>> MR. OLIVE, TO WHAT EXTENT DID
THESE SCHOOL RECORDS CONTAIN
WRITTEN DOCUMENTATION
WITH REGARD TO THE ORGANIC BRAIN
DAMAGE?
>> I DON'T THINK THEY DID AND I
THINK ACTUALLY DR. LARSON, THE
TRIAL EXPERT, HAD SCHOOL
RECORDS.
AND THAT IS IN HIS REPORT.
HIS REPORT SAYS WHAT HE HAD,
POLICE REPORT, STATEMENT OF
DEFENDANT'S SCHOOL RECORDS AND
ADMINISTERED MM.
PI AND THAT'S ALL THAT HE DID --
MMPI THE STATE SAYS THERE WERE
WITNESSES THAT TESTIFIED ABOUT
THE DEFENDANT'S BACKGROUND.
HERE IS ONE, TWO PAGES.
HERE IS ANOTHER FIVE-PAGES
DIDN'T KNOW HIM BETWEEN AGES
EIGHT AND 15.

HERE IS ANOTHER, FOUR PAGES.
HERE IS SIX INCHES OR FOUR
INCHES, SOCIAL SERVICE RECORDS
THAT WERE AVAILABLE.
NOT TWO FAMILY MEMBERS AND --
[INAUDIBLE]
ALL HE HAD TO DO WAS GET A
RELEASE, SEND IT OFF AND THEY
WOULD HAVE PEOPLE WHOSE JOB IT
IS TO DOCUMENT ABUSE AND NEGLECT
AVAILABLE TO TESTIFY ABOUT THIS
DEFENDANT'S BACKGROUND.
INSTEAD THEY HAD A BROTHER WHO
PROSECUTOR MOCKED SAYING IN
CLOSING ARGUMENT.
WHAT IS THE BROTHER GOING TO
SAY?
HOW ABOUT A SCHOOL TEACHER?
HOW ABOUT A SOCIAL SERVICE
PERSON?
HOW ABOUT ANY NUMBER OF PEOPLE
THAT THE BRIEF IS REPLETE WITH
INFORMATION ABOUT HIS BACKGROUND
AND SOCIAL HISTORY THAT SHOULD
HAVE BEEN OBTAINED.
ONE INTERVIEW THAT THEY DID WITH
THE FAMILY MEMBERS, WHICH IS
EXHIBIT 74, MIKE BEAT TO DEATH,
DIED OF HEAD INJURY.
STATE POLICE, '56-57, WATERTOWN,
NEW YORK.
THE LEGACY OF THIS FAMILY IS,
YOUR PARENT CAN KILL YOU WITH
IMPUNITY.
IT WENT THROUGH THE FAMILY AS
THEY WERE GROWING UP.
RED FLAG?
THAT'S A HUGE RED FLAG.
COUNSEL DID NOTHING.
IT IS NOT UNUSUAL IN 1985 TO GO
FIND OUT WHERE SOMEONE WAS
RAISED.
THAT IS NOT SOMETHING THAT
SPRUNG FROM WHOLE CLOTH IN 1995
OR '98.
EVERY CASE FROM THE UNITED
STATES SUPREME COURT, WILLIAMS,
WIGGINS, ROMPEEL, PORTER,
SEARS, EVERYONE OF THEM TAKE THE
STANDARD OF CARE WE'RE TALKING

ABOUT INTO THE '80s.
THIS IS NOT JUST SOMETHING THAT DEVELOPED JUST IN THE YEAR 2000.
>> WITH RESPECT TO QUESTION ABOUT OTHER EVIDENCE IN THIS CASE BEING STRONG, THERE IS NO EVIDENCE IN THIS CASE, OTHER THAN THE SNITCHES, THAT CONTRADICTS HIS STORY.
HIS STORY IS I WALKED INTO A BLOODY CRIME SCENE AND GOT BLOOD ON MY SHOES.
HAD HE DONE THIS HOMICIDE, HE WOULD HAVE BEEN COVERED IN BLOOD.
THAT BLOOD WOULD HAVE GONE TO THE CAR.
HE DIDN'T DO IT.
TOO MUCH BLOOD.
COULDN'T GET IT OFF.
BUT HIS, HIS STORY REFUTED BY ANYTHING OTHER THAN THE SNITCHES?
>> WHAT IS THIS ABOUT TAKING HIS SOCKS OFF?
>> HIS SHOES, THE SOLE OF HIS SHOES SEPARATED FROM THE TOP OF THE SHOE SO BLOOD GOT INTO HIS SOCKS WHEN HE WAS IN THE CRIME SCENE.
>> IS THAT LIKELY TO HAPPEN SOMEONE JUST WALKING ON THE FLOOR --
>> IT IS LIKE A FLIP-FLOP.
IT PULLS AWAY.
IT WAS FULL OF BLOOD.
SO IF HE DID IT, IT WOULDN'T JUST BE IN HIS BOOT.
IT WOULD BE ALL OVER HIM AND ALL OVER THE CAR.
SOMEBODY, SOMEWHERE, HAS WALKED INTO A CRIME SCENE AND BEEN CHARGED AND THEY'RE INNOCENT.
THAT'S HAPPENED.
IT COULD BE THIS CASE.
BUT FOR THE MISCONDUCT OF THE STATE.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS

IN THIS CASE.