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Michael T. Rivera v. State of Florida

NEXT CASE IS ARRIVE AREA VERSUS STATE.

GOOD MORNING. MAY IT PLEASE THE COURT. COUNSEL. MY NAME IS MARTIN McCLAIN HIM HERE TO REPRESENT MARTIN RIVERA ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THIS. COURT SPECIFICALLY NOTED THAT, CONCERNING THE VOLUME AND EXTENT OF THE ALLEGED MITIGATORS COMPARED TO THE MITIGATION AT TRIAL, THE EVIDENTIARY HEARING WAS WARRANTED. THE EVIDENTIARY HEARING OCCURRED AND THE JUDGE FOUND THAT, OF THE 21 MITIGATING CIRCUMSTANCES THIS COURT LISTED IN THAT OPINION, 18 OF THOSE, ON THE ATTORNEY HAD PRESENTED OR ATTEMPTED TO PRESENT, EVIDENCE IN SUPPORT OF THOSE. SO IT IS CLEAR THAT THERE WAS NO STRATEGIC OR TACTICAL REASON FOR NOT PRESENTING THEM. HE MADE THE DECISION TO PRESENT THOSE MITIGATORS AND HE ATTEMPTED TO DO IT. THE PROBLEM IN THIS CASE IS THAT THE DEFENSE CARRIES A BURDEN OF PERSUASIONUATION AT A -- OF PERSUASION AT A PENALTY PHASE PROCEEDING. SIMPLY GOING TO A CHECKLIST AND MENTIONING MITIGATING FACTORS DOESN'T MEAN THOSE MITIGATING FACTORS WILL ACTUALLY BE WEIGHED IN THE PROS, UNLESS YOU MEET YOUR BURDEN OF --

THE ISSUE, THOUGH, STILL REMAINS AS TO THE INEFFECTIVE OF COUNSEL. IS THAT CORRECT?

YES, SIR. AND THAT IS WHERE I AM GOING. I AM EXPLAINING THAT COUNSEL, IN ORDER TO BE EFFECTIVE, COUNSEL HAS TO BE AWARE OF THAT PERSUASION AND MEET IT. IN THIS INSTANCE, ONLY ONE MITIGATING CIRCUMSTANCE WAS FOUND BY THE SENTENCING JUDGE, AND THE OTHERS WERE NOT FOUND TO EXIST OR NOT WEIGHED AND CONSIDERED, IN IMPOSING SENTENCE. AT THE EVIDENTIARY HEARING, THE STATE DOESN'T, DIDN'T CONTEST THE FACT THAT THESE OTHER 18 MITIGATING FACTORS EXISTED. THE STATE CALLED DR. LIVINGSTON, THE EXPERT WHO TESTIFIED AT THE ORIGINAL TRIAL, AT THE ORIGINAL PENALTY PHASE. HOW SHE CAME ABOUT TO TESTIFY IS THAT SHE HAD BEEN APPOINTED TO DO A CONFIDENTIAL EVALUATION AS TO THE COMPETENCY TO PROCEED IN A SEPARATE CASE. SHE DID THAT EVALUATION IN OCTOBER OF 1986, AND IN APRIL OF 1987, THE TRIAL OCCURS. GUILTY VERDICT COMES BACK. MR. MALALINDA SAID I NEED TIME, BECAUSE WE HAVE GOT TO GET DR. LIVINGSTON. SHE IS CALLED TO THE STAND AND TESTIFIES AND HER TESTIMONY IS TO READ HER REPORT.

WHEN YOU SAY IN A SEPARATE CASE, YOU ARE TALKING ABOUT IN A SEPARATE PROSECUTION OF ANOTHER CRIME.

YES. YES. IN THE JEFFORD GATES PROSECUTION. SHE READS THE REPORT. AND IN CROSS-EXAMINATION, THE STATE BRINGS OUT, WELL, DID YOU TALK, WHO ALL DID YOU TALK TO, IN REACHING YOUR CONCLUSION AS TO THE PRESENCE OF THESE MITIGATING CIRCUMSTANCES? SHE INDICATED SHE HAD BEEN INSTRUCTED THIS WAS CONFIDENTIAL, AND THEREFORE THE ONLY PERSON SHE TALKED TO WAS MICHAEL RIVERA. SHE DIDN'T TALK TO HIS FAMILY. SHE DIDN'T TALK TO ANYBODY ELSE. SHE CORROBORATED THE INFORMATION THAT HE WAS PROVIDING. SHE DIDN'T --

DID HE HAVE ANY SCHOOL RECORDS OR PRISON RECORDS OR -- DID SHE HAVE ANY SCHOOL RECORDS, PRISON RECORDS OR RECORDS OF ANY KIND OF MENTAL ILLNESSES OR HOSPITALIZATIONS OR ANYTHING?

THE ONLY THING THAT SHE INDICATED THAT SHE HAD WAS THE PROBABLE CAUSE AFFIDAVIT, IN

THAT CASE. THAT WAS THE GOETZ CASE, AND SO THE PROSECUTION --

SHE WAS NEVER GIVEN ANYTHING ADDITIONAL, ON MR. RIVERA'S CASE. I KNOW HE WAS THE DEFENDANT IN THE OTHER CASE, BUT I MEAN, IN THE CASE THAT IS BEFORE US.

CORRECT. CORRECT. THERE WAS NOTHING ADDITIONAL GIVEN TO HER, I MEAN, AND THE PROSECUTOR, BASICALLY, BROUGHT OUT FROM HER THAT YOU HAVE CONCLUDED THAT MR. ARRIVE AREA IS A BORDERLINE PERSONALITY DISORDER AND DOESN'T THAT INCLUDE BEING MANIPULATIVE. SHE CONCEDED, YES. SHE, ALSO, HE ALSO BROUGHT OUT FROM HER THAT SHE BELIEVED MR. ARRIVE AREA, WHEN HE SAID HE WAS INNOCENT -- MR. RIVERA, WHEN HE SAID HE WAS INNOCENT OF THIS CRIME. THE PROSECUTOR THEN ARGUED, IN ESSENCE, TO THE JUDGE AND THE JURY, YOU CAN'T BELIEVE HER BECAUSE SHE IS SIMPLY REPORTING WHAT MICHAEL RIVERA TOLD HER, AND THERE IS NO CORROBORATION OF THAT. NOW, AT THE EVIDENTIARY HEARING, THAT OCCURRED IN THE YEAR 1999, THE STATE CALLS HER TO THE STAND. SHE IS NOW THE STATE'S WITNESS, AND SHE TESTIFIES THAT, YES, SHE IS FAMILIAR WITH DR. SULTAN'S CONCLUSIONS AS TO MITIGATING CIRCUMSTANCES.

GETTING BACK TO THE ORIGINAL PENALTY PHASE, HOWEVER, SHE WAS NOT THE ONLY WITNESS THAT TESTIFIED AT THE PENALTY PHASE, WAS SHE?

THERE WAS ALSO FAMILY MEMBERS THAT TESTIFIED, AND I WILL GET TO THAT. I WAS FOCUSING, FIRST, ON THE MENTAL HEALTH EXPERT, AND SHE WAS THE ONLY MENTAL HEALTH EXPERT WHO TESTIFIED AT THE ORIGINAL PENALTY PHASE.

HAVE YOU GIVEN US, THOUGH, CANDIDLY A COMPLETE PICTURE OF EITHER HER REPORT OR TESTIMONY AT THE ORIGINAL PENALTY PHASE? DID SHE TEST PHI AS TO -- TESTIFY AS TO ANY MITIGATION, IN THE STATUTORY MITIGATION OR --

SHE HAD, I THINK THAT SHE READ HER REPORT. WITHIN HER REPORT, SHE IS IDENTIFYING WHAT THE GENERALLY RECOGNIZED MITIGATING FACTOR IS, SEXUAL ABUSE, THOSE KINDS OF THINGS. SHE DIDN'T RECALL ANY MITIGATING FACTORS BUT SHE TALKS ABOUT THE INFORMATION SHE IS RECEIVING.

SHE TALKS ABOUT THE HISTORY OF THE DEFENDANT, BASED ON WHAT HE HAD TOLD HER, THAT CORRECT?

THAT'S CORRECT.

DID THAT INCLUDE SUBSTANCE ABUSE OR DID IT INCLUDE HOSPITALIZATIONS FOR --

YES. SHE MENTIONED THE INFORMATION THAT SHE RECEIVED FROM HIM, REGARDING THAT HE HAD ABUSED SUBSTANCES. SHE MENTIONED DIFFERENT TREATMENTS THAT HE HAD RECEIVED. ALL OF THAT IS MENTIONED.

DID SHE TALK ABOUT ANY STATUTORY MITIGATORS?

I BELIEVE THAT THERE IS A SPECIFIC QUESTION OF THE STATUTORY MITIGATING CIRCUMSTANCE OF SUBSTANTIAL IMPAIRMENT OR THE CAPACITY -- OF THE CAPACITY, AND SHE FOUND THAT, BUT THAT IS NOT THE MITIGATING FACTOR THAT THE JUDGE FOUND. HE FOUND THE EMOTIONAL DISTURBANCE MITIGATING FACTOR. I MEAN HE REJECTED THAT ONE. SO, AGAIN, SHE CALLED, IN 1999, TO TESTIFY THAT ALL OF THE MITIGATION THAT HAS BEEN PRESENTED IN 1999, THAT SHE AGREED. IT WAS PRESENT, AND THAT SHE HAD FOUND IT, THAN SHE HAD SO TESTIFIED. SO AT THIS POINT IN TIME, NOW THAT SHE IS THE STATE'S WITNESS THERE, IS NO ISSUE ABOUT THE FACT THAT THESE 18 MITIGATING FACTORS ARE PRESENT! BUT THEY DIDN'T GET WEIGHED IN A SENTENCING PLOSES, BECAUSE THE DEFENSE -- IN A SENTENCING PROCESS, BECAUSE THE

DEFENSE ATTORNEY FAILED TO PRESENT THE EVIDENCE IN SUCH AWAY THAT IT GOT CONSIDERED. SHE DIDN'T HAVE -- HE DIDN'T HAVE HER TALK TO THE FAMILY MEMBERS AND CORROBORATE THAT IT IS NOT JUST MICHAEL RIVERA SAYING THIS, BUT THE FAMILY ESTABLISHED IT AS WELL, OR LOOK AT ANY RECORDS OR TALK TO ANY OF THE FRIENDS REGARDING THE DRUG ABUSE. SO AS A RESULT, THIS IS NOT AN ADEQUATE ADVERSARIAL PROCESS, BECAUSE WHAT WE ARE NOW, EVERYONE RECOGNIZES WAS PRESENT, THE JURY AND THE JUDGE DIDN'T CONSIDER, BECAUSE THEY FOUND THAT THE BURDEN OF PROOF PERSUASION HAD NOT BEEN MET.

WELL, YOU ARE AGREEING, THEN, THAT THESE ITEMS, AS THEY WERE BROKEN DOWN IN THIS COURT'S OPINION ON REMAND, THAT THE OVERWHELMING MAJORITY OF THEM WERE PRESENTED THROUGH THE TESTIMONY OF THE DOCTOR OR OTHER WITNESSES, BUT WHAT YOU ARE SAYING IS THAT IT WAS A VERY SUPERFICIAL PRESENTATION, THAT IT WASN'T AN EFFECTIVE PRESENTATION. IS THAT --

YES. EXACTLY. AND THAT HE DID NOT MEET HIS BURDEN OF PERSUASION. IT IS NOT THAT THE DEFENSE ATTORNEY MADE A CHOICE, HERE IS SOME INFORMATION I HAVE THAT COULD BE MITIGATING, I DON'T WANT TO PRESENT IT FOR "X" REASON OR "Y REASON ROPE ---OR "Y" REASON. HE ADMITTED EVERYTHING HE HAD. THE DOCTOR FAILED TO BE GIVEN INFORMATION AND FAILED TO BE IMPEACHED COMES BACK TO HIS FAILURE, FOR MR. RIVER A IN ADDITION, TWO FAMILY MEMBERS, HIS SISTER AND MOTHER TESTIFIED AT THE TRIAL. IF YOU LOOK AT THE TESTIMONY AT THE HEARING, YOU WILL SEE THAT IT IS VERY SUPERFICIAL. THEY TESTIFIED, AFTER THE 1999 EVIDENTIARY HEARING THAT, THEY HAD NEVER BEEN ASKED ABOUT THE DRUG ABUSE BY COUNSEL. COUNSEL'S RESPONSE, WHEN HE WAS ASKED ABOUT THIS, IS I DON'T FEEL YORBL -- I DON'T RECALL WHETHER OR NOT I ASKED THEM, AND AS A RESULT IT DIDN'T COME OUT. IN ADDITION TO THAT, IN HIS FILES, THERE WAS ACTUALLY A PHONE MESSAGE FROM ONE OF THE FRIENDS WHO GAVE A LOT OF INFORMATION ABOUT THE AMOUNTS OF DRUGS THAT MICHAEL RIVERA WAS USING AT THE TIME.

AT THE TIME OF THE OFFENSE OR AT THE TIME --

YES.

-- AROUND THE TIME OF THE OFFENSE?

JANUARY OF 1986. WHICH IS WHEN THE OFFENSE HAPPENED, AT THE END OF JANUARY. AND HE, THAT INDIVIDUAL TESTIFIED HE NEVER RECEIVED A PHONE CALL BACK FROM THE ATTORNEY, AND THE ATTORNEY TESTIFIED HE HAD NO MEMORY. THEN, IN ADDITION TO THAT, THERE IS MARK PETERS. MARK PETERS IS AN IMPORTANT WITNESS, BECAUSE HE GOES BOTH TO THE GUILT PHASE AND TO THE PENALTY PHASE. HE IS THE OWNER OF THE VAN. IN THIS CASE, THE BLUE VAN IS THE PIVOTAL THING. ACCORDING TO THE ORIGINAL STATEMENT, MR. RIVERA MADE THE OBSCENE PHONE CALL TO STAR PECK. THE HOMICIDE HAPPENED IN THE BLUE VAN, AND SO THE STATE'S WHOLE CASE WAS TRYING TO TIE A LINK BETWEEN STACY JACK ZACH AND THE BLUE -- STACI JAZVAC AND THE BLUE VAN, AND BY THE TIME MARK PETERS CAME ALONG, HE IN MOVED AND WAS NO LONGER IN FT. LAUDERDALE.

HE WAS ONE OF THE PEOPLE THAT WAS GOING TO TESTIFY ABOUT THE USE OF DRUGS AROUND THE TIME OF THIS OFFENSE.

YES.

WHAT ELSE WAS HE GOING TO OFFER, IN IN THE WAY OF MITIGATION?

THE DRUG USE WAS ABSOLUTELY VERY IMPORTANT FOR HIM. BUT HE WAS, ALSO, A GUILT PHASE WITNESS, IN TERMS OF THAT MICHAEL RIVERA DIDN'T HAVE THE BLUE VAN, AT THE TIME THAT --

HE DID NOT.

DID NOT HAVE THE BLUE VAN. MARK PETERSON HAD POSSESSION OF THE BLUE VAN, AT THE TIME THE MURDER HAPPENED, AND THAT THE ABDUCTION OCCURRED, AND SO SOMEHOW THIS GOT CHARACTERIZED PREVIOUSLY.

I AM SORRY. WOULD YOU SORT OF REFRESH MY RECOLLECTION OF WHAT, THE IMPORTANCE OF THIS BLUE VAN.

THE, DID YOU READ THE PROSECUTOR'S CLOSING ARGUMENT? THE BLUE VAN IS HIS CASE. HE IS CLAIMING THAT, ACCORDING TO WHAT MICHAEL RIVERA SAID TO STAR PECAN THE DISCUSSIONS HE HAD WITH -- WITH STAR PEC, AND THE DISCUSSIONS HE HAD -- WITH STAR PECK, AND THE DISCUSSIONS THAT HE HAD.

I AM HAVING DIFFICULTY OF KNOWING WHETHER OR NOT WE ARE GOING DOWN A RABBIT TRAIL OR SOMETHING, BECAUSE MARK PETERSON, IN THE PENALTY PHASE, NOT A REVIEW, NOW, AGAIN, OF GUILT PHASE INADEQUACY, AM I RIGHT?

EXCEPT THEY OVERLAP, BECAUSE THE STATE RELIED UPON WHAT HAPPENED AT THE GUILT PHASE EVIDENTIARY HEARING, REFERENCE TO MARK PETERS, AND THIS COURT'S FINDING WITH REFERENCE TO MARK PETERS, TO PRECLUDE THE DEFENSE FROM PRESENT O'CLOCK EVIDENCE THAT TRIAL COUNSEL -- FROM PRESENTING EVIDENCE THAT TRIAL COUNSEL COULD HAVE FOUND MARK PETERS AND PRESENTED THE DRUG TESTIMONY AT THE PENALTY FAIINGS.

YOU ARE SAYING THAT WAS A -- AT THE PENALTY PHASE.

YOU ARE SAYING THAT WAS A DECISION.

THE DEFENSE COUNSEL COULD HAVE ARGUABLY INTRODUCED THE DEPOSITION OF MARK PETERS, BY SHOWING HE WAS UNAVAILABLE. THE STATE RELIED UPON THAT ON TO CONVINCE JUDGE BACK MAN AT THE EVIDENTIARY HEARING, THAT WE COULD NOT ASK MARK PETERS ABOUT HIS AVAILABILITY TO TESTIFY AS TO DRUG USAGE, BECAUSE THIS COURT HAD ALREADY FOUND HE WAS UNAVAILABLE. SO THAT THERE IS THIS OVERLAPPING THAT OCCURS, AND AS A RESULT, THE ARGUMENT TWO OF THE BRIEF, THE EVIDENTIARY HEARING WAS NOT FULL AND FAIR, BECAUSE THAT INFORMATION WAS NOT ABLE TO BE PRECHTED. -- TO BE PRESENTED. JUST A MOMENT. DRY MOUTH TODAY. IN ANY EVENT, GETTING BACK TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, THE JUDGE FOUND THAT THE MITIGATION, THE DEFENSE WANTED TO PRESENT, WERE THESE 18 MITIGATING FACTORS. IT DIDN'T, HE DIDN'T MEET HIS BURDEN OF PERSUASION, BECAUSE HE FAILED TO CONDUCT THE NECESSARY WORK TO MAKE SURE THAT ALL OF THE INFORMATION GOT PRESENTED. AS A RESULT, THE PREJUDICE IS CLEAR. THIS COURT STRUCK AN AGGRAVATING CIRCUMSTANCE ON DIRECT APPEAL. THIS COURT CONCLUDED THAT THE STRIKING OF THE AGGRAVATING CIRCUMSTANCE WAS HARMLESS BEYOND A REASONABLE DOUBT, BECAUSE THERE WAS ONLY ONE MITIGATING FACTOR PRESENT. BUT THERE WEREN'T. THERE WERE ALL THESE OTHERS. SO IT IS NOT JUST UNDERRIDING CONFIDENCE IN THE OUTCOME OF THE PROCEEDING BEFORE THE JURY. IT IS ALSO THIS COURT'S ANALYSIS IN THE DIRECT APPEAL.

THE MARSHAL HAS REMINDED US YOUR REBUTTAL TIME.

AND SO FOR THOSE REASONS, I AM ASKING FOR THE REVERSAL. AND I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. CELIA TERENZIO ON BEHALF OF THE PEOPLE OF FLORIDA. THE ONLY DIFFERENCE BETWEEN THE PRESENTATION OF MENTAL HEALTH EVIDENCE AT THE PENALTY PHASE AND WHAT WAS PRESENTED AT THE EVIDENTIARY HEARING, IN 19, IN THE YEAR 2000, WAS THE FACT THAT THE DEFENDANT, THE ALCOHOL USE OR THE ALLEGED ABUSE AT THE TIME OF THE CRIME WAS NOT PRESENTED. BUT THERE IS A VERY GOOD REASON WHY THAT WASN'T PRESENTED, AND THAT IS BECAUSE IT DIDN'T EXIST. THE DEFENDANT, EVEN TO THIS DAYS, STILL MAIN -- EVEN TO THIS DAY, STILL MAINTAINS HIS INNOCENCE, AND IF YOU REMEMBER FROM THE LAST EVIDENTIARY HEARING, AS WAS NOTED IN THIS COURT'S OPINION, THAT THERE WAS NO EVIDENCE OF ABUSE AT THE TIME, THAT THE DEFENDANT PRESENTED A VOLUNTARY INTOXICATION DEFENSE BECAUSE HE MAYBE OBTAINED HIS INNOCENCE, SO -- BECAUSE HE MAINTAINED HIS INNOCENCE, SO THAT WAS WHY IT WASN'T PRESENTED. EVERYTHING ELSE, EITHER THROUGH DR. CEROS LIVINGSTON OR THE TWO SISTERS, WAS, IN FACT, PRESENTED.

COUNSEL SAID IT WAS A VERY SUPERFICIAL MINIMALIST THE PRESENTATION AND THAT HE REALLY HAD NO EFFECT HERE, AS COMPARED TO THE EVIDENCE NOW THAT HAS BEEN PRESENTED AT THE EVIDENTIARY HEARING OPPOSE THE CONVICTION RELIEF. WOULD YOU RESPOND TO THAT.

CERTAINLY. AS A MATTER OF FACT, WHAT I WOULD LIKE TO DO IS TO READ TO YOU, THE HIGHLIGHTS OF BHOT REPORTS, AND -- OF BOTH REPORTS, AND WILL FIND THAT THEY ARE ALMOST VERBATIM. AS A MATTER OF FACT, DR. SULTAN, AT THE EVIDENTIARY HEARING, SAID SHE AGREED WITH EVERYTHING, CALLED DR. LIVINGSTON'S REPORT COMPREHENSIVE, AND SAID HER ONLY DISAGREEMENT WITH IT WAS THE FACT ABOUT THE COCAINE ADDICTION, WHAT I JUST MENTIONED, BUT I CAN GIVE YOU THE HIGHLIGHTS.

SOMETIMES WE SEE MENTAL HEALTH EXPERTS. FOR INSTANCE IT HAS BEEN ELUDEED HER THAT -- ALLUDED HER HERE THAT SHE ACTUALLY EXAMINED HIM, IN ANOTHER CASE AGAINST THE SAME DEFENDANT BUT IT WAS THE SAME PERSON. WAS THERE ANY EVIDENCE AS TO HOW MUCH TIME SHE SPENT WITH HIM OR HOW IN-DEPTH IT WAS OR WHAT WAS THE PROOF ON THAT?

SHE SAW MICHAEL RIVERA ON THREE OCCASIONS TOTALLY SEVEN AND-A-HALF HOURS. SHE CONDUCTED THREE INTERVIEWS AND PSYCHOLOGICAL TESTS, AND AS A MATTER OF FACT, THEIR NEW PENALTY PHASE DOCTOR, DR. SULT AND RELIED ON. THAT SHE -- DR. SULTAN RELIED ON. THAT SHE DIDN'T CONDUCT NEW TESTS. SHE RELIED ON RESULTS BY DR. LIVINGSTON.

THE RECORDS WILL SUPPORT THAT SHE DID AN EXTENSIVE EVALUATION OF THE DEFENDANT AT THAT TIME. IS THAT RIGHT?

YES. ABSOLUTELY, AND ACTUALLY, JUSTICE ANSTEAD, DR. LIVINGSTON FOUND THAT THERE WAS A BORDERLINE PERSONALITY DISORDER, EXHIBITIONISM, CROSS-DRESSING, VOYEURISM, IDENTITY PROBLEMS, ENGAGES IN SELF-DESTRUCTIVE BEHAVIOR, INCLUDING DRUG ABUSE, SEXUAL DEVIANCE, IMPULSIVITY, INTENSE ANGER, FEW COPING SKILLS, SEXUAL LIAM BIFFLANT AND -- SEXUALLY AMBIVALENT AND A RESULTING BORDERLINE PERSONALITY DISORDER, IMPULSIVITY, CAN'T BE DELAYED, SAME SEX PRO CLIFFITY, DRUG ABUSE, IMPULSIVE SEXUAL URGES, CROSS-DRESSING, SADISTIC CHARACTERISTICS AND VOYEURISM AND CROSS-DRESSING. BOTH ARE UNFLATTERING BUT BOTH PRETTY IDENTICAL AS TO WHAT EACH DOCTOR FOUND, AND, AGAIN, THE ONLY DIFFERENCE AS PRESENTED IN THEIR ARC UNIT IN THE -- ARGUNIFORM IN THE BRIEF, IS THAT -- ARGUMENT IN THE BRIEF, IS THAT THERE IS NO SUPPLEMENTATION, AS IN DR. LIVINGSTON'S REPORT, THAT THERE IS NO EVIDENCE OF COCAINE ABUSE AND SHE DID NOT GO INTO THE FACT THAT HE HAD A HISTORY OF DRUG ABUSE. THAT SIMPLY IS NOT TRUE. DR. LIVINGSTON, ON NINE SEPARATE OCCASION IT IS IN THE REPORT DISCUSSED -- OCCASIONS IN THE REPORT DISCUSSED THE DRUG ABUSE AND THE SUBSTANCE OF IT AND HOW HE WAS KICKED OUT OF THE HOUSE BECAUSE HE WAS STEALING FROM FAMILY MEMBERS AND HIS COCAINE ABUSE

GOT SO EXTENSIVE.

IS THIS THE CASE, THE ISSUE OF THE CRACK COCAINE, GIVEN THE NATURE OF THIS CRIME, IT IS NOT A ROBBERY. I AM EVEN TRYING TO UNDERSTAND, EVEN IF THAT WAS PRESENTED AT THE ORIGINAL TRIAL, I MEAN, THIS IS SORT OF A FRIENDLY QUESTION TO THE STATE, BUT WHAT DOES THAT HAVE TO DO WITH THIS?

NOW YOU ARE GETTING TO THE PREJUDICE PRONG, AND THAT IS EXACTLY RIGHT. THERE WAS EXTENSIVE TESTIMONY ABOUT WHY HE DID WHAT HE DID. I MEAN, THIS JURY KNEW EITHER THIS WAS A WILLIAMS RULE EVIDENCE AT THE GUILT PHASE, THE ATTEMPTED MURDER OF JENNIFER GOETZ, AND AT THE PRIOR VIOLENT FELONIES THAT WERE PRESENTED AT THE PENALTY PHASE, THAT THIS KILLER PEDOPHILE COULD NOT STOP HIMSELF, A AND SO TO COUNTERTHAT, MR. MALAVENDA TRIED TO PRESENT A MENTAL HEALTH DEFENSE TO TRY TO EXPLAIN THESE INAPPROPRIATE OR POWERFUL SEXUAL URGES AND THAT IS WHAT HE WENT WITH. TO, AGAIN, TO SAY, TO ADD TO THAT THAT HE VOLUNTARILY TOOK DRUGS WHICH MAY OR MAY NOT HAVE EXACERBATED THOSE URGES, IS HARDLY MITIGATING EVIDENCE, AND I GUESS THAT GOES TO WHAT YOU ARE SAYING, IT WOULD NOT HAVE MADE A DIFFERENCE.

HOW ABOUT, AS FAR AS SOMETIMES WE, AGAIN, LOOKING AT WHAT IS GOING TO HUMANIZE THE DEFENDANT, WHAT LED TO THIS MENTAL ILLNESS OR THIS DEVIANT BEHAVIOR, COULD YOU COMPARE THE QUALITY OF THE, YOU KNOW, THE FAMILY MEMBERS THAT TESTIFIED ORIGINALLY, VERSUS THE EVIDENTIARY HEARING, AS FAR AS WHAT WAS UNCOVERED, AS FAR AS THAT?

SURE. AT THE ORIGINAL PENALTY PHASE, THE BROTHER AND SISTER TESTIFIED AS TO THE SEXUAL ABUSE AT THE HANDS OF A MR. DONOVAN. THE ABUSE, THE OVERALL VIOLENT NATURE OF THE FAMILY, THAT THE DEFENDANT WAS VERY ALIENATED FROM HIS FAMILY, AND EVENTUALLY WAS KICKED OUT OF THE HOUSE. THE STATE HAS --

WHAT AGE WAS THAT SEXUAL ABUSE, DID THAT OCCUR?

ADOLESCENCE.

WAS THERE ANY, SUBSEQUENTLY WAS THERE ANY ACTUAL THERAPY? WAS THE PERSON EVER PROSECUTED?

THAT WE DO NOT KNOW.

THAT NEVER --

NO.

SUBSEQUENTLY.

NO, BUT THE STATE NEVER CONTESTED THAT. IT IS INACCURATE TO SAY THAT THE STATE, DURING THE CROSS-EXAMINATION OF DR. LIVINGSTON OR DURING THE CLOSING ARGUMENTS AT THE PENALTY PHASE, THAT THE STATE EVER SAID THAT NONE OF THIS WASN'T TRUE. NOT AT ALL. WE JUST SAID THAT IT DOES NOT MITIGATE TO THE POINT WHERE THIS MAN STILL DOES NOT DESERVE THE DEATH PENALTY.

DID THE STATE PRESENT AN OPPOSING MENTAL HEALTH EXPERT?

NO, SIR.

IN THE ORIGINAL PENALTY PHASE?

ABSOLUTELY NOT. NONE AT --

THERE WAS NO MENTAL HEALTH EXPERT PRESENTED IN OPPOSITION.

RIGHT. IT WAS, EXACTLY, IT WAS UNCONTESTED. THE DRUG ABUSE, THE DRUG ABUSE HISTORY WAS UNCONTESTED.

AND WAS THE SEX ABUSE AS AN ADOLESCENT, WAS THAT PRESENTED BY THE MENTAL HEALTH EXPERT, ALSO, AT THE PENALTY PHASE?

YES. YES. AS A MATTER OF FACT, AND THAT WAS A GOOD PART OF THE BASIS OF HER DIAGNOSIS AS TO HOW HE GOT FROM POINT A TO POINT B, IN TERMS OF HIS OVERALL SEXUAL PATHOLOGY. SO THE ONLY DIFFERENCE BETWEEN WHAT WAS PRESENTED AT THE PENALTY PHASE AND AT THE EVIDENTIARY HEARING, IN TERMS OF THE FAMILY, WERE, THERE WERE MORE FAMILIAR MEMBERS THE SECOND TIME AROUND, AND THERE WAS AN A LITTLE MORE DETAIL AS TO WHAT THE DEFENDANT DID, HOWEVER, IT WAS ALL COVERED THE FIRST TIME, AND IT WAS THE BASIS OF THE DOCTOR'S OPINION THAT WAS UNREBUTTED. THE ONLY OTHER DIFFERENCE, AS I SAID BEFORE, WAS THE DRUG ABUSE, THAT THEY HAD AN ADDICTIONOLOGIST THE THIS TIME THAT WOULD NOT SAY THAT THOSE, THAT THE COCAINE EXACERBATED THE SEXUAL URGES.

THE STATUTORY MITIGATOR THAT WAS ORIGINALLY FOUND WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. WHAT, WAS THAT WEIGHTED? DID THE JUDGE, ORIGINAL JUDGE THAT HEARD THIS CASE, DESCRIBE A CERTAIN AMOUNT OF WEIGHT -- AS SCRIBE A CERTAIN AMOUNT OF WEIGHT TO THAT, DO YOU KNOW?

YES. JUDGE FERRIS, LET'S SEE I AM SORRY. I AM READING FROM THE ORIGINAL SENTENCING ORDER. CORRECT. THE COURT DID FIND THAT THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. YOU WERE APPARENTLY UNDER SOME EXTREME EMOTIONAL DISTURBANCE DURING THE COMMISSION OF THE MURDER. THE COURT DID NOT SAY WHAT WEIGHT IT GAVE TO IT, BUT, AGAIN, THIS SENTENCING ORDER WAS PRECAMPBELL, BUT THE COURT DID CONSIDER IT, AND ACTUALLY ON THE SECOND TO THE LAST PAGE OF THE ORDER, THE COURT DID DISCUSS THE NONSTATUTORY MITIGATING EVIDENCE THAT WAS FOUND. AND THE COURT DID FIND THAT MITIGATOR, BUT THE FACT THAT YOU HAVE A DEFENDANT WHO HAS PROGRESSED FROM VOYEURISM TO FANTASIZING ABOUT RAPING AND KILLING 11-YEAR-OLD GIRLS AND HAS FINALLY DONE SO, ALSO THE A. ATTEMPTED MURDER OF JENNIFER -- ALSO THE ATTEMPTED MURDER OF JENNIFER GOETZ, THE HEINOUSNESS OF THIS CRIME.

YOU READ FROM THE ANALYSIS OF ONE OF THE ADD IINGSZAL MENTAL HEALTH EXPERTS THAT TESTIFIED AT THE EVIDENTIARY HEARING IN THE POSTCONVICTION, AND COMPARED IT TO DR. LIVINGSTON'S ORIGINAL FINDINGS THERE. COULD YOU GIVE US A GENERAL CHARACTERIZATION OF WHETHER OR NOT THE MENTAL HEALTH EXPERT TESTIMONY PRESENTED AT THE POSTCONVICTION EVIDENTIARY HEARING SHARPLY DIFFERED, IN ANY WAY, FROM THE ORIGINAL TESTIMONY OF DR. LIVINGSTON?

NO. ACTUALLY NONE. AS A MATTER OF FACT, DR. SULTAN SAID SO, AT THE EVIDENTIARY HEARING, THAT SHE WAS IN FULL AGREEMENT WITH DR. LIVINGSTON'S DIAGNOSIS.

YOU WOULD CHARACTERIZE THE ADDITIONAL MENTAL HEALTH EXPERT'S EVIDENCE AT THE POSTCONVICTION HEARING, AS BEING --

CUMULATIVE.

-- IN ACCORD AND SIMILAR TO DR. LIVINGSTON'S ORIGINAL TESTIMONY.

YES, AND THAT IS WHAT THE TRIAL JUDGE FOUND AS WELL. HER ONLY DIFFERENCE, THE FOCUS WAS THE FACT THAT THERE WAS NO EXTENSIVE DISCUSSION BILE DR. LIVINGSTON ABOUT THE -- DISCUSSION BY DR. LIVINGSTON ABOUT THE DRUG ABUSE, AND THAT IS TRUE, THERE WAS NO EXTENSIVE, BUT IT WAS CHRONICLEED THAT HE HAD A HISTORY OF DRUG ABUSE, BUT SHE, DR. LIVINGSTON, EVEN AT THE EVIDENTIARY HEARING, SAID THAT SHE STILL, WITH ANYMORE INFORMATION OF DRUG ABUSE, WOULD NOT CHANGE HER ORIGINAL DIAGNOSIS. THAT HE HAD A DRUG ABUSE HISTORY, BUT THERE WAS NO EVIDENCE THAT THERE WAS, HE WAS HIGH AT THE TIME OF THE CRIME. ALL HIS OTHER SEXUAL DEVIANT BEHAVIOR HAPPENED WHEN HE WAS, WHEN HE WAS SOBER, SO SHE PLAYSED VERY LITTLE SIGNIFICANCE ON THAT, AND THAT IS BASICALLY WHAT THE TRIAL JUDGE FOUND, THAT IN TERMS OF THE MENTAL HEALTH TESTIMONY, THAT THEY WERE VIRTUALLY IDENTICAL.

GOING BACK, SOMETIMES WE SEE SITUATIONS WHERE THE STATE, WHERE THERE IS A MENTAL HEALTH EXPERT FOR THE DEFENDANT, AND THAT IT IS BASED EXTENSIVELY ON JUST SELF REPORTING, THAT THE STATE WILL THEN MAKE AN ARGUMENT TO THE JURY AND TO THE JUDGE, THAT THIS IS ONLY SELF-REPORTING, AND THEREFORE NONE OF THIS, REALLY, IS PROBABLY TRUE, AND YOU KNOW, DON'T RELY ON THAT. COULD YOU CHARACTER SIZE WHETHER OR NOT THAT OCCURRED AT THIS PENALTY PHASE, THAT IS DOES THAT, DID THE STATE TAKE DR. LIVINGSTON'S TESTIMONY AND THEN SAY, SINCE IT IS ALL BASED ON SELF-REPORTING, WE DON'T THINK ANY OF IT, YOU SEE WHERE --

YES, SIR. I SEE. AND, NO, THE STATE DID NOT CONTEST THAT IT DIDN'T HAPPEN. AS A MATTER OF FACT, THOUGH, THE NATURE OF THE CRIMES OF THIS DEFENDANT COULD ONLY COME FROM THE DEFENDANT. WE WERE TALKING ABOUT HIS OBSCENE PHONE CALLS. WE ARE TALKING ABOUT THE ATTEMPTED MURDER OF JENNIFER GOETZ, WHICH SHE DID TESTIFY TO, AND WE ARE TALKING ABOUT MR. DONOVAN, THE ABUSE, WHICH WAS BROUGHT OUT AT THE PENALTY PHASE, BUT EVERYTHING ELSE COULD ONLY COME FROM THE DEFENDANT.

PROBLEMS LIKE THIS.

EXACTLY. SO IT IS, MANY PEOPLE WERE NOT --

IT IS TOTALLY CONSISTENT, REALLY, WITH THE STATE'S CASE.

YES, SIR.

THAT IT WOULD HAVE COME FROM SOMEBODY THAT HAD SUBSTANTIAL PROBLEMS LIKE THIS.

EXACTLY. AND SINCE MOST OF HIS, MOST OF THE PATHOLOGY OR MOST OF THE DEMONS, SOMETHING FROM WITHIN, IT IS NOT THAT ANYBODY ELSE COULD CORROBORATE IT.

THERE WAS NO AT ACTION AC -- ATTACK ON DR. LIVINGSTON.

NO, IT IS NOT, SIR, JUST IN TERMS OF THE PREJUDICE, IT JUST DID NOT OUTWEIGH THE SIGNIFICANT AND HORRIFIC NATURE OF THE CRIME OR THIS DEFENDANT'S RECORD.

SO WOULD YOU SAY SAY THAT, WHEN WE IN 19198 -- WOULD YOU SAY THAT, WHEN WE, IN 1998, CONSIDERED THOSE VOLUMES AND THE ALLEGED MITIGATORS IN COMPARISON TO THE ALLEGED MITIGATION ACTUALLY PRESENTED AT TRIAL, THAT WE AGREE THAT IT WARRANTED EVIDENTIARY HEARING, AND WHAT YOU SEEM TO BE SAYING TODAY, IS THAT EVEN IF WE LOOK NOW AT WHAT WAS PRINTED, ADDITIONALLY PRESENTED -- PRESENTED, ALTHOUGH THEIR MAIN HAVE BEEN OTHER STATUTORY MITIGATORS THAT COULD HAVE BEEN FOUND ORIGINALLY, THAT WE ARE STILL LOOKING AT AN ISSUE THAT, WHERE OUR CONFIDENCEY OUTCOME IS UNDERMINED, IT WOULD NOT BE, COMPARED WHEN WE LOOK SIDE-BY-SIDE AT THE EVIDENTIARY HEARING, VERSUS THE ORIGINAL --

RIGHT. I THINK THIS COURT, AND I KNOW OPPOSING COUNSEL MAKES A LOT OF THE FACT THAT THIS COURT CHARACTER SIZED THE -- CHARACTERIZED THE 21 MITIGATORS AS THE VOLUME AND EXTENT, AND ON PAPER MAYBE THAT IS TRUE, AND SO THAT IS WHAT PROMPTED THIS COURT TO HAVE HIS DAY IN COURT AND TO PROVE. THAT WELL, HE HAD THE OPPORTUNITY, AND WHEN YOU PUT DR. SULTAN NEXT TO DR. LIVINGSTON, THEY ARE ALMOST, THEY ARE ALMOST IDENTICAL, BUT --

LET ME, I GUESS THIS IS, SEXUAL ABUSE AS A CHILD, YOU SAY, WAS UNCONTESTED AT THE ORIGINAL PENALTY PHASE, BUT THE JUDGE DIDN'T, HE FOUND EXTREME EMOTIONAL DISTRESS. HE FOUND NO NONSTATUTORY MITIGATION. WHAT DO WE, BUT THAT IS REALLY, NOW WE ARE TALKING ABOUT THAT WOULD HAVE BEEN A SUBJECT OF THE ORIGINAL APPEAL. WAS THAT APPEAL THAT SAID HE SHOULD HAVE FOUND THIS NONSTATUTORY MITIGATION? WHAT --

THERE WAS A CHALLENGE TO THE TRIAL, TO THE WEIGHT, I THINK, THAT THE TRIAL JUDGE GAVE TO THE MITIGATION. WHETHER OR NOT THERE WAS A SPECIFIC ONE AS TO THE NONSTATUTORY, I DON'T THINK THAT WAS SEPARATED OUT. I AM LOOKING AT THE JUDGE'S ORDER. AND ACTUALLY THE TRIAL JUDGE SAYS THE TESTIMONY OF YOUR GIRLFRIEND LINDA WAS, ALSO, OF INTEREST, BUT THE SUM TOTAL OF THE NONSTATUTORY MITIGATING CIRCUMSTANCES OFFERED ON YOUR BEHALF PRESENTS NO MITIGATING CIRCUMSTANCES TO WEIGH AGAINST. NOW, AGAIN, UNDER CAMPBELL, THIS MIGHT GIVE, YOU KNOW, THE COURT SOME CONCERN, IN TERMS OF WHAT, EXACTLY, HOW MUCH WEIGHT WAS GIVEN TO EACH, BUT THE COURT CONSIDERED, CONSIDERED ALL THE EVIDENCE, AND THEN FOUND THAT IT DID NOT OUTWEIGH THE AGGRAVATION, AND YOU HAVE TO, ALSO, REMEMBER, TOO, THAT THE OTHER MENTAL MITIGATOR, HE COULD NOT CONFORM HIS BEHAVIOR TO THE REQUIREMENTS OF LAW, IS NOW BASED ON THE FACT OF THIS COCAINE USE, AND IT IS THE STATE'S CONTENTION, STILL TODAY, AS THIS COURT FOUND IN THE LAST OPINION, THAT THERE WAS NO EVIDENCE TO SAY THAT HE WAS UNDER THE INFLUENCE OF COCAINE AT THE TIME OF THE CRIME, SO THERE IS STILL NO EVIDENCE TO ESTABLISH THAT STATUTORY MITIGATOR. SO I THINK THAT THE TRIAL COURT'S FINDING THAT THERE WAS NO DEFICIENT PERFORMANCE, GIVEN THE FACT THAT YOU PUT THESE TWO PRESENTATIONS SIDE-BY-SIDE, THEY ARE VIRTUALLY IDENTICAL, AND, ALSO, WITH THE POINT THAT JUSTICE PARIENTE, YOU WERE TRYING TO MAKE IN TERMS OF THE PREJUDICE, THAT EVEN IF THIS ADDITIONAL EVIDENCE HAD COME OUT, IT WOULD NOT HAVE CHANGED THE OUTCOME OF THIS CRIME. IF THERE ARE NO FURTHER QUESTIONS, WE ASK THAT YOU AFFIRM THE TRIAL COURT'S RULING. THANK YOU.

CHIEF JUSTICE: COUNSEL. MR. MARSHAL, HOW MUCH TIME?

I RECOGNIZE THIS IS A UNUSUAL ARGUMENT FOR ME, IN THAT IN MANY WAYS, THERE IS NOT THAT MUCH DIFFERENCE BETWEEN MYSELF AND MS. TERENZIO. THERE IS A SUBSTANTIAL AMOUNT OF MITIGATION IN THIS CASE. I AGREE THAT DR. LIVINGSTON AND DR. SULTAN CONCUR ON MOST POINTS. THE PROBLEM IS, IT WAS NEVER FACTORED INTO THE SENTENCING! THAT IS THE DISAGREEMENT. THE STATE OPPOSED THIS MITIGATION AT TRIAL. THE STATE ARGUED, IN ITS CLOSING ARGUMENT AT TRIAL, DON'T BELIEVE DR. LIVINGSTON. SHE IS JUST RELYING ON WHAT MICHAEL RIVERA SAID. HE SAID HE IS INNOCENT, AND HE IS LYING. YOU NEED TO LET HIM KNOW THAT HE REALLY DOES REMEMBER, AND HE IS LYING.

THAT SOUNDS LIKE AN ISSUE FOR DIRECT APPEAL.

EXACTLY, AND THIS COURT FOUND, ON DIRECT APPEAL, THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS THAT THERE WAS NO MITIGATION, OTHER THAN THE ONE MITIGATING FACTOR, SO THE NONSTATUTORY MITIGATION WAS REJECTED. THE SEXUAL ABUSE WAS REJECTED, AND NOT CONSIDERED. EVERYTHING, ALL THESE 18 MINK THINGS THAT THE JUDGE NOW -- THESE 18 THING THAT IS THE JUDGE NOW SAYS WAS THERE AND THE DEFENSE ATTORNEY TRIED TO PRESENT WAS NOT CONSIDERED BECAUSE IT WAS NOT FOUND! THE

STATE CONCEDES, NOW, THEY ARE PRESENT, BUT IT WAS NOT WEIGHED AT THE SENTENCING! THE JUDGE FERRIS DIDN'T CONSIDER IT.

DID THE STATE CONTEST THAT HE HAD BEEN A VICTIM, YOUR CLIENT HAD BEEN A VICTIM OF SEXUAL ABUSE AS A CHILD?

HE, THE STATE CROSS-EXAMINED SOME OF THE WITNESSES. IN CLOSING ARGUMENT, HIS OWN, THE STATE DOES NOT CONCEDE ITS PRESENCE. HE REALLY DOESN'T SPECIFICALLY ADDRESS IT. HE SAYS DR. LIVINGSTON IS THE MOST IMPORTANT WITNESS, AND EVEN THE FAMILY MEMBERS SAY THAT THEY DON'T SEE AN EMOTIONAL DISTURBANCE, SO YOU KNOW, DON'T CONSIDERING THAT.

SO YOU ARE SAYING THE STATE DID DISCREDIT DR. LIVINGSTON IN THEIR FINAL ARGUMENT.

THE WHOLE THRUST OF THE CROSS-EXAMINATION WAS YOU HAVE NO BASIS FOR BECAUSE ARE SAYING! YOU ARE JUST RELYING ON MICHAEL RIVER, A WHO IS MANIPULATIVE, WHO IS A BORDERLINE PERSONALITY DISORDER, WHO IS TELLING YOU HE IS INNOCENT, AND WHO IS LYING TO YOU.

SO THE STATE DID ASK THE JUDGE TO REJECT THAT.

YES, AND YOU CAN TELL JUDGE FERRIS REJECTED THAT. HE DIDN'T CONSIDER IT.

HOW DO YOU FOUND UNDER EXTREME EMOTIONAL DISTURBANCE? ' FOUND THAT WAS THE ONLY MITIGATOR THAT WAS FOUND, THE ONLY ONE THAT WAS WEIGHED.

THAT WOULD HAVE BEEN BASED UPON THE MENTAL HEALTH TESTIMONY OF DR. LIVINGSTON.

DR. LIVINGSTON FOUND THAT THERE WAS SUBSTANTIAL IMPAIRMENT AND HE REJECTED THAT ONE AND THIS COURT AFFIRMED.

HE REJECTED ABOUT THE DRUG ISSUE.

HE REJECTED THE SUBSTANTIAL IMPAIRMENT OR CAPACITY TO APPRECIATE THE CRIMINALITY OF THE CONDUCT.

BASED ON THE USE OF DRUGS OR BASED ON A, SOMEONE WHO HAS A HISTORY OF BEING A PEDTIME AND -- A PEDOPHILE AND AN ABERRANT PERSONALITY?

DR. LIVINGSTON WAS BASING HER CONCLUSION ON HIS WHOLE DIAGNOSIS, NOT SPECIFICALLY ON THE DRUG AND ALCOHOL. SHE SAID HE SAID HE IS INNOCENT. I BELIEVE IT HIM, SO IT IS DIFFICULT FOR ME TO ADDRESS THIS, BUT I BELIEVE THAT, IF HE DID IT, THEN THERE WAS SUBSTANTIAL IMPAIRMENT.

IS THERE ANY DNA, I GUESS THIS ISN'T THE TIME TO TALK ABOUT IT, IS THERE ANY DNA?

THE DNA SHOWS THAT THE HAIR THAT MS. TERENZIO RELIED UPON IN THE LAST ARGUMENT, TO SAY THE BLUE VAN EVIDENCE FROM MARK PETERS DIDN'T MATTER, IS, IN FACT NOT STACI JAZVAC'S.

THAT IS STILL PENDING IN THE TRIAL COURT.

THAT IS CURRENTLY PENDING IN THE TRIAL COURT, BUT CERTAINLY, YOUR HONOR, I WOULD CONTEND THAT THAT IS RELEVANT IN TERMS OF MITIGATION, AS WELL, BECAUSE IT CHANGES THE WHOLE STATE'S THEORY. IF HE IS GUILTY, IT DIDN'T HAPPEN THE WAY THE STATE CONTENDED, AND THAT IS GOING TO AFFECT THE AGGRAVATING CIRCUMSTANCES, AS WELL, AND THE OTHER IMPORTANT POINT IS THIS COURT ONLY AFFIRMED ON DIRECT APPEAL, BECAUSE ALL

OF THE OTHER MITIGATING FACTORS WERE REJECTED. THIS COURT'S ANALYSIS, WHEN YOU STRIKE, IS IT HAS GOT TO BE HARMLESS BEYOND A REASONABLE DOUBT, AND THIS COURT FOUND IT WAS HARMLESS BEYOND A REASONABLE DOUBT, BECAUSE THERE WAS ONLY ONE STATUTORY MITIGATING FACTOR FOUND.

SO YOU ARE SAYING THE LACK OF EFFECTIVENESS OF COUNSEL IS REFLECTED IN THE TRIAL COURT NOT FINDING, AS A MIGHT KBATING FACTOR, THESE OTHER -- AS A MITIGATING FACTOR, THESE OTHER THINGS.

EXACTLY. AND THE EVIDENCE AT THE OTHER HEARING SAYING HE WANTED TO PRESENT IT BUT HE FAILED TO TALK TO THE FAMILY MEMBERS UNTIL THE DAY BEFORE THEY TESTIFIED.

WHEN WE FOCUS ON THE EVIDENCE OF COUNSEL, DO WE FOCUS ON THE EVIDENCE PRESENTED IN ALL OF THIS OR DO WE FOCUS ON THE POTENTIAL OF TRILT COURT TO ACCEPT IT -- TRIAL COURT TO ACCEPT IT?

YOU FOCUS ON WHETHER OR NOT THERE WAS AN ADVERSARY PROCESS, AND PART OF THAT THEY SAY IS -- THAT TEST IS LOOKING AT WHAT WENT IN.

FOR INSTANCE, YOU ARE ARGUING ABOUT THE EFFECTIVENESS OF THE MENTAL HEALTH EXPERT. ORDINARILY, WHEN WE SEE AN ARGUMENT LIKE THAT, IT IS A MATTER THAT THERE HAS BEEN A SUPER FIFERBL EXAMINATION -- A SUPERFICIAL EXAMINATION, AND THERE HAVE BEEN NO FINDINGS OF ANY STATUTORY MENTAL MITIGATORS AND THAT KIND OF THING.

THAT IS THE NORMAL CIRCUMSTANCES, YES.

HERE IT APPEARS THAT WE HAVE A MENTAL HEALTH EXPERT THAT, REALLY, WENT OVERBOARD, IN TERMS OF EXHAUSTIVELY EXAMINING THIS PERSON, AND THEN WENT TO THE PENALTY PHASE, AND THERE WAS NO OPPOSITION. THAT IS THAT THERE WAS NO, AND, AGAIN, THAT, USUALLY THERE IS A CHARACTERISTIC PART OF THAT, AND SO WE HAVE GOT A MENTAL HEALTH EXPERT THAT WAS ASKED TO SEE THIS PERSON, THAT, THEN, SAW HIM FOR, I FORGET HOW MANY HOURS, BUT A LONG AN EXTENSIVE EXAMINATION, AND TESTING, AND THEN TESTIFIED, UNREBUTTED, AS OPPOSED TO, SO --

WHEN YOU SAY UNREBUTTED, I JUST WANT TO MAKE A POINT THAT IT WAS CONTESTED AND IMPEACHED, AND ARGUED THAT, BECAUSE SHE IS RELYING SIMPLY ON WHAT HE SAYS, IT IS NOT A RELIABLE CONCLUSION.

BUT THE STATE DID NOT, AS IT WOULD HAVE HAD A RIGHT TO DO, PUT ON ANOTHER MENTAL HEALTH EXPERT TO --

THEY DID NOT DO THAT. BACK IN 1987, THAT WAS FAIRLY COMMON, BECAUSE IT WAS THEIR BURDEN -- IT WAS BEFORE THEIR BURDEN TO ESTABLISH THEIR OWN EVALUATION, SO THEY SAID SHE IS SIMPLY RELYING ON MICHAEL RIVERA, AND THE PROBLEM IS THAT COUNSEL DID NOT HAVE HER TALK TO THE OTHER PEOPLE.

CHIEF JUSTICE: ALL RIGHT. WITH OUR HELP, THE TIME IS EXPIRED. WE APPRECIATE BOTH OF YOU BEING HERE TODAY. THANK YOU VERY MUCHMENT THE COURT WILL TAKE ITS -- VERY MUCH. THE COURT WILL TAKE ITS MORNING RECESS FOR 15 MINUTES, BEFORE WE HEAR THE LAST CASE ON THE DOCKET. WE WILL STAND IN RECESS. HAR

MARSHAL: PLEASE RISE.