

>> HEAR YE, HEAR YE, HEAR YE.  
THE SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD,  
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  
SUPREME COURT OF FLORIDA.  
PLEASE BE SEATED.

>> WELCOME TO THE FLORIDA  
SUPREME COURT.

THE CASE FOR THE DAY IS  
ZOMMER VERSUS STATE OF FLORIDA.  
YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT.

MY NAME IS RICHARD KILEY.

I WORK FOR CCRC MIDDLE AND I  
REPRESENT TODD ZOMMER IN THIS  
ACTION TODAY.

I WOULD LIKE TO ARGUE ISSUE TWO  
OF THE INITIAL BRIEF.

MR. ZOMMER WAS DENIED EFFECTIVE  
ASSISTANCE OF COUNSEL AT  
SENTENCING PHASE OF HIS CAPITAL  
TRIAL IN VIOLATION OF THE  
6th, 8th, AND 14th

AMENDMENTS OF CONSTITUTION OF  
THE UNITED STATES AND  
CORRESPONDING PROVISIONS OF THE  
FLORIDA CONSTITUTION.

TRIAL COUNSEL FAILED TO  
ADEQUATELY REHABILITATE HIS  
WITNESS ON REDIRECT EXAMINATION.  
TRIAL COUNSEL'S PERFORMANCE WAS  
DEFICIENT.

AS A RESULT THE DEATH SENTENCE  
IS UNRELIABLE.

>> MR. KILEY, LET ME MAKE SURE I  
UNDERSTAND, THIS POINT IS  
LIMITED TO COUNSEL'S FAILURE TO  
REHABILITATE THE WITNESS THAT  
THEY SELECTED?

>> YES, SIR.

>> YOU'RE NOT CHALLENGING THE  
SELECTION OF DR. DANZIGER AS THE  
WITNESS TO BE PRESENTED?

>> NO, SIR.

>> I'M JUST TRYING TO MAKE SURE I UNDERSTAND WHAT THE ISSUE IS. THAT IS VERY LIMITED ISSUE BECAUSE YOU'RE SUGGESTING THAT SHOULD HAVE ASKED FURTHER QUESTIONS ABOUT THE ANTISOCIAL PERSONALITY DISORDER. THAT IS BASICALLY IT THEN; CORRECT?

>> YES, SIR.

>> JUST DOESN'T MAKE ANY SENSE -- DON'T LOOK SO SHOCKED HERE.

DOESN'T MAKE SENSE TO ME THAT IF THE DECISION TO CALL DR. DANZIGER WAS MADE AND HE, THEY KNEW HE WAS GOING TO SAY HE ALSO PERSONALITY DISORDER, CORRECT?

>> CORRECT.

HOWEVER, YOUR HONOR --

>> THEY KNOW THAT, JUST ANSWER YES OR NO.

DID THEY KNOW HE WAS GOING TO GIVE THAT DIAGNOSIS?

>> YES, I BELIEVE.

>> AND THEY DECIDED

STRATEGICALLY BECAUSE THE WITNESS HAD A LOT OF POSITIVE THINGS TO SAY THEY CALLED HIM. I'M TRYING TO SEE, HOW DOES REHABILITATE MEAN THAT YOU WERE SOMEHOW SURPRISED OR HE FORGOT SOMETHING?

I GUESS I'M JUST NOT GETTING THE CLAIM.

>> FIRST OF ALL, YOUR HONOR, REASON THEY DID NOT WANT TO CALL DR. DANZIGER, THEY RETAINED A MAN, DR. MICHAEL GUTMAN, A PSYCHIATRIST. HIS REPORT HAS BEEN PLACED INTO EVIDENCE. HOWEVER DR. GUTMAN DIED. SO THEY CALLED DANZIGER AT THE LAST MINUTE.

DR. DANZIGER ALTHOUGH HE READ THE REPORT, MADE SEVERAL MISTAKES DURING TRIAL.

IN FACT HE,

HE CATEGORIZED MR. ZOMMER AS HYPERMATIC AND UNUSUALLY

UPBEAT FOR SOMEONE FACING  
FIRST-DEGREE MURDER CHARGES.  
AND THE TRIAL COUNSEL IN THE  
MIDDLE OF TRIAL, SAID, OH, NO,  
NO, DOCTOR, YOU'RE MISTAKEN.  
HE WAS IN TRIAL IN BETWEEN  
GUILT AND PENALTY PHASES.  
NOW DR. GUTMAN DIAGNOSED  
ZOMMER AS ADULT  
ATTENTION DEFICIT DISORDER FOR  
AXIS I.

>> LET ME ASK YOU THIS.  
WAS THAT DIAGNOSIS BY DR. GUTMAN  
IN THE RECORD?

>> IT WAS PLACED IN EVIDENCE AT  
THE EVIDENTIARY HEARING.

>> I'M TALKING ABOUT AT TRIAL  
WHERE DR. DANZIGER TESTIFYING  
WAS THAT DIAGNOSIS A PART OF THE  
RECORD?

>> NO.

>> OKAY. SO --

>> BUT DR. DANZIGER READ THE  
REPORT.

HE TESTIFIED AT TRIAL, I'M SORRY,  
THE EVIDENTIARY TRIAL.

>> DR. DANZIGER DID IN FACT MAKE  
HIS OWN DIAGNOSIS OF MR. ZOMMER?

>> YES.

AND HIS DIAGNOSIS WAS THE SAME  
IN AXIS I AS GUTMAN'S.

ADULT ATTENTION DEFICIT  
DISORDER, BIPOLAR, SUBSTANCE  
ABUSE.

NOW --

>> AND THAT BIPOLAR DIAGNOSIS  
WAS IMPORTANT TO THE DEFENSE AND  
THEY WANTED HIM TO TESTIFY TO  
THAT?

>> ABSOLUTELY.

BECAUSE ZOMMER WAS, IF I MAY,  
ALSO ADD, HE ALSO DIAGNOSED,  
GUTMAN, MIXED AXIS II, MIXED  
PERSONALITY DISORDER WITH  
PASSIVE AGGRESSIVE AND  
ANTISOCIAL PERSONALITY TRAITS.  
TRAITS.

>> SEEMS TO ME THAT YOU ARE,  
REALLY TRYING TO SAY, AS OPPOSED  
TO REHABILITATING HIM ABOUT

ANTISOCIAL PERSONALITY DISORDER  
THAT HE SHOULD HAVE IN FACT  
TESTIFIED PURSUANT TO WHAT  
DR. GUTMAN'S DIAGNOSIS HAD BEEN?

>> NO, YOUR HONOR.

WHAT I'M TRYING TO SAY, IS THAT  
THE PREJUDICE --

>> OKAY.

>> -- REFLECTED IN THE COURT'S  
SENTENCING ORDER WAS TRESSLER,  
THE STATE PSYCHOLOGIST SAID,  
ANTISOCIAL PERSONALITY DISORDER.  
DANZIGER SAID, BIPOLAR AND  
ANTISOCIAL PERSONALITY DISORDER.  
NOW, THE COURT, THE TRIAL COURT  
SAID, WELL, WE HAVE THREE  
DIFFERENT OPINIONS BUT TWO OF  
THEM AGREE ON ANTISOCIAL  
PERSONALITY DISORDER.

THEREFORE, HE IS DISREGARDING  
THE MENTAL MITIGATOR OVER  
EXTREME EMOTIONAL MENTAL  
DISTURBANCE.

THE STATE ARGUED IN CLOSING THAT  
THESE TWO DOCTORS ON OPPOSITE  
SIDES AGREE HE HAS ANTISOCIAL  
PERSONALITY DISORDER.

NOW OUR CONTENTION, THE BASIS OF  
THE INEFFECTIVENESS WE HAVE  
REPRODUCED ANTISOCIAL  
PERSONALITY DISORDER IN THE  
DSM-IV, WHICH IS THEIR BIBLE AND  
THE MOST SIGNIFICANT PORTION OF  
IT IS D, THE OCCURRENCE OF  
ANTISOCIAL BEHAVIOR IS NOT  
EXCLUSIVELY DURING THE COURT'S,  
DURING THE COURSE OF  
SCHIZOPHRENIA OR MANIC EPISODE  
WHICH THIS WAS.

AND DANZIGER TESTIFIED IT WAS.  
NOW TRIAL COUNSEL SHOULD HAVE  
OPENED THE BOOK, SEEN THIS, AND  
POINTED OUT TO DANZIGER, HEY  
LOOK, YOU CAN'T DIAGNOSE HIM AS  
ANTISOCIAL PERSONALITY DISORDER,  
NOT TRAITS, EVERYBODY, WELL,  
EVERYBODY, IN WASHINGTON HAS  
ANTISOCIAL PERSONALITY TRAITS.  
YOU CAN'T DO THIS.

YOU CAN'T SAY, HE HAS ANTISOCIAL

PERSONALITY DISORDER IF THE OCCURRENCE OCCURRED DURING A MANIC OR SCHIZOPHRENIC EPISODE WHICH IT DID.

NOW --

>> I'M NOT FOLLOWING THAT BECAUSE I THOUGHT THAT YOU COULDN'T GIVE THAT DIAGNOSIS IF IT ONLY MANIFESTED DURING SUCH AN EPISODE?

IF IT MANIFESTS WITH SUCH AN EPISODE AND OTHER TIMES THE DIAGNOSIS WOULD BE -- IS THAT CORRECT?

>> NO, SIR.

IF THE MURDER OCCURRED DURING A MANIC EPISODE, HE CAN'T BE ANTISOCIAL.

>> IS IT, WHAT YOU'RE SAYING, THAT YOU CAN NOT HAVE ANTISOCIAL PERSONALITY DISORDER AND ALSO HAVE CONDITION THAT MAKES YOU MANIC?

>> CORRECT.

>> MUTUALLY EXCLUSIVE DIAGNOSES?

>> YOU CAN NOT HAVE AN AXIS II DIAGNOSIS, WHICH IS A PERSONALITY DISORDER, IF YOU HAVE ALREADY FOUND AN AXIS I, SCHIZOPHRENIA, DEPRESSION, POSTTRAUMATIC STRESS, BIPOLAR. IF YOU FOUND, ZOMMER HAS A CHEMICAL IMBALANCE AS EVIDENCED BY WHEN HE WAS 12 --

>> WHO TESTIFIED TO THAT AT THE EVIDENTIARY HEARING?

>> DR. MICHAEL MAHER.

>> HE SAID YOU CAN NOT HAVE AXIS I --

>> AXIS II, IF YOU ADEQUATELY EXPLAINED THE DIAGNOSIS IN AXIS I.

NOW, YOUR HONOR, ZOMMER AT AGE 12 WAS PLACED IN A CHILDREN'S HOME, PLACED IN CHILDREN'S HOME AND GIVEN HALDOL, A POWER MEDICINE.

>> YOU CAN NOT HAVE ACCESS II IF YOU'RE DIAGNOSES WITH A AXIS I, IS THAT WHAT YOU'RE SAYING?

>> THAT'S WHAT I'M SAYING.

>> THAT WAS SAID AT THE  
EVIDENTIARY HEARING?

>> YES.

>> HOWEVER, WHAT DO WE DO WITH  
THE FACT THAT TWO PEOPLE AT  
PENALTY PHASE SAID THIS MAN HAD  
ANTISOCIAL PERSONALITY DISORDER?  
SHOULD WE DISREGARD THAT IN  
FAVOR OF WHAT WAS SAID AT THE  
EVIDENTIARY HEARING.

IS THAT WHAT YOU'RE ASKING US TO  
DO?

>> NO, I'M ASKING YOU TO, I AM  
SAYING THAT THE PSYCHOLOGIST  
SAID ANTISOCIAL PERSONALITY  
DISORDER FOR THE STATE.

DANZIGER SAID, AXIS I,  
BIPOLAR, ATTENTION DEFICIT  
DISORDER, PLUS SUBSTANCE  
ABUSE.

OH BY THE WAY ON CROSS HE SAYS  
HE HAS ANTISOCIAL PERSONALITY  
DISORDER.

THAT WAS AN ERROR.

>> HERE'S THE PROBLEM I HAVE  
WITH AGAIN, YOU'RE STILL NOT  
SAYING THAT THEY, THAT WAS  
DEFICIENT IN

CALLING DR. DANZIGER.

DID THEY KNOW, DID HE GIVE A  
REPORT BEFORE HE WAS CALLED TO  
TESTIFY?

>> I DON'T KNOW.

>> DID THEY SAY THEY WERE  
SURPRISED BY THAT ADDITIONAL  
DIAGNOSIS?

>> I DON'T THINK SO.

HOWEVER, JUDGE --

>> SOMEHOW WE NEED TO KNOW, AS  
FAR AS SAYING THEY WERE  
DEFICIENT IN NOT REHABILITATING  
HIM, ONCE IT IS OUT AND IT IS  
YOUR EXPERT, THE IDEA, WELL, YOU  
DIDN'T MEAN THAT, DIDN'T YOU  
MEAN THIS?, YOU CAN'T HAVE BOTH,  
I DON'T SEE HOW THAT HELPS THE  
TRIAL.

SO UNLESS YOU CAN SHOW THAT THEY  
WERE, IN MY VIEW, A CLAIM THAT

THEY WERE DEFICIENT IN PREPARING HIM --

>> WE'LL SHOW THAT.

>> BUT THAT IS NOT GOING BACK TO THE FIRST QUESTION, THAT I DIDN'T KNOW WAS, I THOUGHT THAT WAS YOUR CLAIM?

>> I CAN SHOW THAT.

>> WITH TRESSLER, TRESSLER WAS THE DEFENSE.

TOOMER WAS STATE.

STATE GETS UP AND TOOMER AND SAYS HE IS ANTISOCIAL PERSONALITY DISORDER.

TRIAL COUNSEL GETS UP, DR. TOOMER, WOULD SOMEBODY WITH AN ANTISOCIAL PERSONALITY DISORDER STICK UP FOR YOUNGER CHILDREN? NO.

WOULD SOMEBODY WITH A ANTISOCIAL PERSONALITY DISORDER, WOULD THEY HAVE A HAPPY MARRIAGE FOR 2 1/2 YEARS?

NO.

WOULD SOMEBODY WITH A ANTISOCIAL PERSONALITY DISORDER, WOULD THEY SHARE THEIR DRUGS?

NO.

WOULD SOMEBODY WITH ANTISOCIAL PERSONALITY DISORDER WOULD THEY GIVE DRUG ADDICTS A PLACE TO STAY AT THEIR OWN EXPENSE?

NO.

TRESSLER GETS UP SAYS THE SAME THING.

ANTISOCIAL PERSONALITY DISORDER AND TRIAL COUNSEL DOES THE SAME THING.

NOW WITH DANZIGER, AT THE EVIDENTIARY HEARING, TRIAL COUNSEL ACTUALLY CONCEDED HIS INEFFECTIVENESS BY SAYING, QUESTION, COULD HAVE QUESTIONED HIM ABOUT TODD ZOMMER'S BEHAVIOR WITHOUT CHALLENGING HIS DIAGNOSIS IN FRONT OF THE JURY IN AN EXPLICIT KIND OF WAY? AND TRIAL COUNSEL SAYS I, YEAH, I COULD HAVE.

I COULD HAVE JUST SAID, NOW,

DOCTOR, LET'S TALK ABOUT THIS  
AND LET'S TALK ABOUT THAT.  
ASK THE SAME KIND OF QUESTIONS,  
WHICH WERE PRETTY GOOD, WEREN'T  
THEY?

ANSWER, YES THEY WERE.

>> THE QUESTION IS WHAT IS THE  
STATE GOING TO DO?  
ISN'T THE, A BIG PROBLEM YOU  
HAVE HERE, IS THAT AT THE  
EVIDENTIARY HEARING DR. DANZIGER  
REAFFIRMED HIS CONCLUSIONS THAT  
ZOMMER SUFFERED FROM BOTH  
BIPOLAR AND SUBSTANCE ABUSE  
DISORDERS, AND, SOCIAL  
PERSONALITY -- ANTISOCIAL  
PERSONALITY DISORDER?  
HE TESTIFIED TO THAT.  
AND, THAT SUPPORTS THE  
CONCLUSION OF THE  
POST-CONVICTION COURT, DOESN'T  
IT?

>> WELL, NO, JUDGE.

I WOULD SAY THAT DANZIGER WAS  
WRONG.

>> I UNDERSTAND.

>> AND TRIAL COUNSEL WAS  
INEFFECTIVE IN NOT PREPPING HIM  
ADEQUATELY OR CORRECTING HIM --

>> BUT AT THE EVIDENTIARY  
HEARING REAFFIRMED THESE  
ESSENTIAL POINTS AND, I  
UNDERSTAND YOU DISAGREE WITH  
THAT BUT THERE IS, BUT THAT'S  
NOT REALLY THE QUESTION.

>> WELL, NOT ONLY DO I DISAGREE  
WITH IT, SIR, THE DSM IV  
DISAGREES WITH IT.

THIS IS THE BIBLE THESE GUYS USE  
ALL THE TIME AND YOU CAN NOT BE  
DIAGNOSED ANTISOCIAL PERSONALITY  
DISORDER IF THE INCIDENT  
OCCURRED DURING A MANIC OR  
SCHIZOPHRENIC EPISODE WHICH IT  
DID.

THAT IS UNCONTROVERTED BY ANY  
EXPERT THAT IS ZOMMER IS  
BIPOLAR.

THERE LIES THE INEFFECTIVENESS.  
HE COULDN'T HAVE GOTTEN ANY



WORSE.

WHAT DID THE TRIAL COUNSEL DO?  
HE GAVE A CONCURRING OPINION, HE  
LET THAT SLIDE.

HE IMPEACHED HIM, HE IMPEACHED  
THE OTHER TWO EXPERTS.

DANZIGER HE JUST LETS IT SLIDE  
AND SAYS, YEAH, I COULD HAVE.  
THEY WERE PRETTY GOOD QUESTIONS,  
WEREN'T THEY.

>> WAIT A SECOND.

IT IS HIS OWN EXPERT.

I'M MISSING SOMETHING. HOW YOU  
SHOW -- LET'S GO TO THE  
PREJUDICE.

WE'RE NOT GOING TO GET ANYWHERE  
FURTHER ON THIS DEFICIENCY.

ON PREJUDICE THOUGH, ARE YOU  
SAYING THAT IF THIS QUESTION HAD  
BEEN ASKED OF, THESE QUESTIONS  
HAD BEEN ASKED OF DANZIGER, WHY  
WOULD WE THINK THAT HE WOULD SAY  
ANYTHING DIFFERENTLY THAN HE  
SAID AT THE EVIDENTIARY HEARING,  
HOW WOULD IT CHANGE THE, OR  
UNDERMINE CONFIDENCE IN WHAT THE  
TRIAL JUDGE DECIDES AND OR IN  
FRONT OF THE JURY?

AGAIN YOU'RE TALKING ABOUT  
REHABILITATING YOUR OWN WITNESS  
AND I'M STILL HAVING TROUBLE  
WITH THAT AS YOUR SOLE CLAIM ON  
THIS ISSUE.

HOW THAT WOULD UNDERMINE THE  
WHOLE PENALTY PHASE?

>> IF HE HAD, IF HE HAD ASKED  
THOSE SAME QUESTIONS,  
REMEMBER, THERE WAS A JURY THERE  
AND JURY WOULD HAVE SAID, YOU  
KNOW, DRUG ADDICTS DON'T SHARE  
THEIR DRUGS.

THEY DON'T HELP YOUNGER PEOPLE,  
YOUNGER CHILDREN IN TROUBLE.

>> I THOUGHT YOU SAID HE ASKED  
THAT --

>> TO THE OTHER EXPERTS, YES.

>> OH, THEY'RE THERE GOING THE  
THIRD TIME'S A CHARM?

NOW THAT HE IS ASKING AND BEING  
DENIED I WILL REALLY THINK ABOUT

THAT ONE?

THAT IS JUST SPECULATION.

YOU'VE GOT, IT'S YOUR BURDEN TO PROVE IT, NOT FOR US TO THINK IT MIGHT HAVE MADE A DIFFERENCE.

>> WELL, JUDGE, I WOULD CONTEND THAT IT DID MAKE A DIFFERENCE AND FOR THE COURT TO CONTEND IT DIDN'T MAKE A DIFFERENCE IS LIKE PREDICTING A FUTURE EVENT.

NONE OF US CAN DO THAT.

>> WELL THE BASIC, AS I LOOK AT THE CASE, IS THAT DANZIGER, YOU MAY SAY IT'S WRONG BUT HE WAS OF THE VIEW THAT YOU CAN HAVE AXIS I AND AXIS II ELEMENTS.

>> THEN HE DISAGREES WITH HIS OWN TOME.

>> I UNDERSTAND WHAT YOU'RE SAYING BUT DID HE NOT TESTIFY TO THE CONTRARY, THAT YOU CAN HAVE AXIS I AND AXIS II?

>> YES HE TESTIFIED.

>> THIS IS WHERE WE RUN INTO THE WALL IS THAT YOU, YOU HAVE SOMEONE, SOME SIDE AND YOUR INTERPRETATION IS THIS WAY AND WE'VE GOT A WITNESS THAT'S THE OTHER WAY.

THAT'S A CLASSIC FACTUAL DISPUTE, ISN'T IT?

>> YES, I KNOW BUT --

>> WE DO NOT DECIDE FACTUAL DISPUTES.

WE'RE HERE TO DETERMINE WHETHER THERE IS EVIDENCE THAT SUPPORTS IT.

>> JUDGE, HE DID NOT PROPERLY PREPARE AND REHABILITATE HIS OWN WITNESS.

>> OKAY.

>> HE DID IT WITH THE OTHER TWO. HE DIDN'T DO IT WITH DANZIGER. NOW YOU HAD TWO PSYCHOLOGISTS. DANZIGER WAS SUPPOSEDLY AND IS, A MEDICAL DOCTOR.

GUTMAN WAS A MEDICAL DOCTOR.

MAHER IS A MEDICAL DOCTOR.

SO THAT CARRIED A LOT OF WEIGHT I WOULD SUBMIT, CERTAINLY TO THE

TRIAL COURT AND PROBABLY TO THE JURY WHEN YOU HAVE A PSYCHIATRIST AGREEING WITH THE STATE PSYCHOLOGIST.

>> BUT YOU TALK ABOUT REHABILITATING.

I'M JUST STRUGGLING WITH, SEEMS LIKE HE IS GOING TO BE IMPEACHING HIM.

YOU WANT HIM TO ATTACK DOCTORS VIEWS WHICH --

>> JUDGE, THE EVIDENCE CODE SAYS ANYBODY CAN IMPEACH.

>> BUT YOU SAID REHABILITATE. I JUST DON'T UNDERSTAND HOW IT IS REHABILITATING HIM WHEN HE IS ATTACKING HIS VIEWS.

I DON'T UNDERSTAND THAT.

WHAT YOU'RE REALLY -- YOU'RE CONTENDING THAT HE SHOULD HAVE IMPEACHED HIM, RIGHT?

>> NOT IMPEACHED.

CORRECTED HIM.

DOCTOR, DID YOU READ THE DSM IV?

>> ASSUME THAT HE COULD HAVE, WHERE IS THE PREJUDICE AS JUSTICE PARIENTE ASKED A FEW MOMENTS AGO?

>> I CONTEND THAT THE PREJUDICE IS THAT YOU HAVE THE STATE DOCTOR CONTENDING HE IS ANTISOCIAL PERSONALITY DISORDER AND DANZIGER IS, INSTEAD OF SAYING ANTISOCIAL PERSONALITY TRAITS, LIKE GUTMAN DID, SAYS ANTISOCIAL PERSONALITY DISORDER AND THAT SENTENCING COURT SAID, GEE, THEY AGREE ON SOMETHING.

YOU GOT THREE OF THESE GUYS DISAGREEING EXCEPT TWO OF THEM ARE AGREEING ON ANTISOCIAL PERSONALITY DISORDER AND --

>> DID DR. DANZIGER CHANGE HIS TESTIMONY?

>> ACTUALLY, DR. DANZIGER STOOD BY THE BIPOLAR DIAGNOSIS.

>> OKAY.

SO YOU'RE SAYING HAD HE TRIED TO REPEAT, REHABILITATE HIM OR IMPEACH HIM DURING THE TRIAL HE

WOULDN'T HAVE STUCK BY HIS GUNS?

>> AGAIN, SIR, YOU'RE ASKING ME TO PREDICT SOMETHING I'M UNABLE TO PREDICT.

>> AT THE EVIDENTIARY HEARING HE STILL SAID HE HAD ANTISOCIAL PERSONALITY DISORDER.

>> AT THE EVIDENTIARY, YES.

>> YEAH.

AND SO EVEN IF THEY HAD TRIED TO REHABILITATE HIM AT THE PENALTY PHASE, IT SEEMS THE LOGICAL CONCLUSION IS THAT HE WOULD HAVE STILL STUCK BY HIS ANTISOCIAL PERSONALITY DISORDER DIAGNOSIS.

>> HE MIGHT HAVE CHANGED IT TO ANTISOCIAL PERSONALITY TRAITS AS DID GUTMAN.

>> THAT IS JUST PURE SPECULATION.

THAT IS INCONSISTENT WITH WHAT HE TESTIFIED TO AT THE EVIDENTIARY HEARING, ISN'T IT?

>> SIR --

>> I AM JUST TRYING TO GET THE FACTS HERE.

IT SEEMS LIKE YOU JUST WANT US, YOU WANT US TO SPECULATE THAT DR. DANZIGER WOULD HAVE DONE SOMETHING DIFFERENT AT TRIAL THAN HE DID AT THE EVIDENTIARY HEARING AND I JUST, I DON'T KNOW WHAT BASIS WE WOULD HAVE FOR DOING THAT.

THAT IS PURELY SPECULATIVE.

I MEAN I UNDERSTAND THAT THAT IS WHAT WOULD SERVE YOUR PURPOSE BUT ISN'T IT JUST PURELY SPECULATIVE?

>> JUDGE, I'M ALMOST IN MY REBUTTAL TIME.

>> THANK YOU, MAY IT PLEASE THE COURT.

MY NAME IS KATHERINE DIAMANDIS, ASSISTANT ATTORNEY GENERAL AND REPRESENTING THE STATE OF FLORIDA IN THIS APPEAL.

THERE, DURING THE REDIRECT EXAMINATION OF DR. DANZIGER THERE WAS NOT ANYTHING TO

EXPLAIN OR TO CLARIFY OR TO  
REHABILITATE OR TO IMPEACH  
DR. DANZIGER ON.  
HIS DIAGNOSIS WAS, AT TRIAL, AND  
REMAINS THIS DAY, THIS  
DEFENDANT, TODD ZOMMER, SUFFERED  
FROM ANTISOCIAL PERSONALITY  
DISORDER.

>> WHICH DOCTOR SAID THAT?

>> DR. DANZIGER.

>> IT IS FUNNY, NOT FUNNY BUT  
I'M LOOKING AT THE DIRECT APPEAL  
OPINION AND WE WRITE IN THE  
DIRECT APPEAL OPINION THAT  
DR. DANZIGER ALSO CONCLUDED THAT  
ZOMMER SUFFERS FROM BIPOLAR  
DISORDER.

>> THAT IS CORRECT.

>> SO DID WE INCORRECTLY STATE  
DR. DANZIGER'S TRIAL TESTIMONY?

>> NO, YOUR HONOR.

DR. DANZIGER HAD THREE  
DIAGNOSES.

THE FIRST ONE WAS BIPOLAR  
DISORDER.

THE SECOND DIAGNOSIS WAS  
SUBSTANCE ABUSE DISORDER.

THE THIRD DIAGNOSIS WAS  
ANTISOCIAL PERSONALITY DISORDER.

>> THE WAY THIS WAS EXPLAINED, I  
MEAN, HE ADDRESSED IT AT THE  
EVIDENTIARY HEARING, DID HE NOT?

HE WAS ASKED, CAN YOU HAVE BOTH  
AXIS I AND AXIS II DIAGNOSIS,  
AND HE SAID YES YOU CAN.

ISN'T THAT CORRECT, ISN'T THAT  
WHAT HE SAID?

>> THAT IS CORRECT, YOUR HONOR.  
HE SAID THOSE DIAGNOSES ARE NOT  
MUTUALLY EXCLUSIVE.

>> SOMEBODY QUESTIONED HIM ABOUT  
THAT TOPIC AT THE EVIDENTIARY  
HEARING.

>> YES, YOUR HONOR.

>> REAFFIRMED HIS TRIAL  
TESTIMONY AGAIN.

>> YES, HE DID.

>> AND AT TRIAL HE DID TESTIFY  
TO THE BIPOLAR CONDITION.

THE OPINION BEFORE IS NOT

INCORRECT, IS IT?

>> NO, IT IS NOT.

AND --

>> WAS HE QUESTIONED ABOUT WHETHER OR NOT YOU COULD IN FACT HAVE THE BIPOLAR AND THE ANTISOCIAL PERSONALITY DISORDER? I MEAN WAS HE QUESTIONED ABOUT THAT PURSUANT TO THE BIBLE AS YOUR OPPONENT KEEPS TALKING ABOUT, THE DSM IV?

>> AT THE EVIDENTIARY, AT THIS HEARING HE WAS.

>> HE STILL MAINTAINED HIS POSITION?

>> YES, YOUR HONOR, HE DID.

>> THE REAL QUESTION IS WHETHER THIS MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER, I NEVER GET THE RIGHT NAME.

EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

AND SO THE ISSUE IS WHETHER ANYTHING HAS BEEN PRESENTED AT THE EVIDENTIARY -- MY VIEW, THAT WOULD SAY THAT, THAT IS COMPELLING EVIDENCE THAT IN FACT BECAUSE OF THE COUNSEL'S DEFICIENT PERFORMANCE THAT ZOMMER WAS UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE SO AS TO HAVE GIVEN RISE TO THAT STATUTORY MITIGATOR.

IS THAT HOW WE SHOULD ANALYZE IT?

>> YOUR HONOR, I THINK, THE QUESTION IS, IN THIS CASE, WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN THEIR REDIRECT EXAMINATION --

>> SO FINE, SO WE'RE CUTTING IT REALLY SO FINE AS OPPOSED TO SAYING THEY DIDN'T PUT ON THE RIGHT EXPERT.

THIS IDEA THAT SOMEHOW BY ASKING QUESTIONS ON REDIRECT WOULD HAVE CHANGED THE JUDGE'S VIEW OF THE MENTAL HEALTH MITIGATION, IS AGAIN.

SO THAT IS WHAT WE'RE FOCUSING

ON.

THIS IS A FRIENDLY QUESTION.

>> YES, CORRECT.

>> THERE IS NOTHING, THAT'S WHAT WE HAVE TO FOCUS ON WHETHER THERE IS EVIDENCE NOW AT THE EVIDENTIARY HEARING IF THEY PRESENTED THIS PROPERLY THE JUDGE WOULD HAVE LIKELY FOUND THE STATUTORY MITIGATION.

WE WOULD HAVE FOUND THAT COMPELLING AND IT WOULD HAVE CHANGED THE WHOLE MIX IN THIS PENALTY PHASE, CORRECT?

>> YES, YOUR HONOR, CORRECT.

AND I SUGGEST EVEN IF DANZIGER PERHAPS CAME OFF HIS DIAGNOSIS, IT WOULDN'T HAVE CHANGED THE SIGNIFICANT AGGRAVATION FOUND AND UPHELD BY THIS COURT.

THIS, THERE ARE FOUR AGGRAVATORS IN THIS CASE.

PRIOR VIOLENT FELONY, COLD CALCULATED, PREMEDITATED.

AND AVOID ARREST.

AND IF DANZIGER WOULD HAVE AT TRIAL SAID, MAYBE HE REALLY DOES HAVE A ANTISOCIAL PERSONALITY -- MAYBE HE REALLY DOESN'T HAVE THAT DISORDER, THAT WOULD NOT HAVE CHANGED THE PENALTY PHASE. THE RESULT OF THE PENALTY PHASE WOULD NOT HAVE BEEN DIFFERENT.

IN THIS CASE AND I JUST WOULD LIKE TO, REGARDING DR. MICHAEL GUTMAN, HE WAS, HE DID NOT TESTIFY AT THE EVIDENTIARY HEARING AND I BELIEVE WE DISCUSSED HIM AT THE EVIDENTIARY HEARING. MR. GUTMAN, EXCUSE ME, DR. GUTMAN, PASSED AWAY IN 2009 AND THE TRIAL IN THIS CASE OCCURRED IN 2010.

WHAT TRIAL COUNSEL TESTIFIED TO AT THE EVIDENTIARY HEARING THAT DR. DANZIGER WAS KEY TO THEIR MITIGATION CASE.

HE WAS VERY WELL-CREDENTIALLED. HARVARD-EDUCATED.

PRESENTED HIMSELF VERY WELL.

HE TESTIFIED FOR BOTH THE DEFENSE AN PROSECUTION AND HE HAD THIS TESTIMONY REGARDING WHAT HE EXPLAINED AS THE PERFECT STORM.

AND MR. SIMS WHO WAS THE TRIAL COUNSEL THAT EXAMINED DR. DANZIGER DURING TRIAL, ASKED DR. DANZIGER DURING THE PENALTY PHASE, HE ASKED DR. DANZIGER, DR. DANZIGER, NOT AN EXCUSE AS TO WHY THIS MURDER HAPPENED -- EXCUSE ME.

BUT AN EXPLANATION, WHAT COULD THE EXPLANATION BE?

AND DR. DANZIGER SAID, WELL, THIS IS A PERFECT STORM COMING TOGETHER.

HERE YOU HAVE A DEFENDANT WITH THE HISTORY OF FAMILY ABUSE, OF DRUG ABUSE, DRUG USE AND BY POLAR DISORDER.

WHEN YOU ADD THE DRUG USE AND BY POLAR DISORDER, HE SAID THAT THIS CREATED THE PERFECT STORM WHERE THIS TRAGIC EVENT, THIS TRAGIC MURDER HAPPENED.

AND HE OFFERED IT NOT AS AN EXCUSE BUT AS AN EXPLANATION AS TO WHY THIS MURDER OCCURRED.

AND THAT, THAT THEORY AND THAT, PRESENTING THE EVIDENCE THAT WAY WAS CONSISTENT WITH HOW TRIAL COUNSEL PRESENTED THIS CASE FROM THE VERY BEGINNING.

FROM VOIR DIRE, MR. SIMS, TRIAL COUNSEL, TOLD THE JURY, THIS IS NOT A CASE OF WHO DONE IT.

THIS IS A CASE OF WHY.

AND PRESENTING DR. DANZIGER TO GIVE AN EXPLANATION AS TO WHY WAS CRITICAL TO THEIR MITIGATION CASE.

FURTHERMORE, MR. SIMS TESTIFIED IN POST-CONVICTION THAT HE WAS NOT GOING TO ARGUE WITH DR. DANZIGER REGARDING HIS DIAGNOSIS.

THEY WERE AWARE OF HIS DIAGNOSIS.



>> HIS DUAL DIAGNOSIS?  
>> YES, YOUR HONOR.  
>> THE ISSUE THAT YOU CAN'T HAVE BOTH IS NOT SOMETHING THAT, THAT'S NOT A FACT IN THIS RECORD?  
>> CORRECT.  
>> WELL IT IS A DISPUTED FACT. THE OTHER SIDE SAYS IT IS AND POINTS TO THE DSM AND THE OTHER EXPERTS.  
SO IT IS A DISPUTED FACT.  
>> IN POST-CONVICTION IT IS DISPUTED FACT.  
>> IT IS NOT AN UNDISPUTED FACT.  
>> RIGHT.  
>> BUT DIDN'T EVEN DR. MAHER ACKNOWLEDGE THERE WERE CIRCUMSTANCES WHICH YOU COULD HAVE A ACCESS II AND AXIS I DIAGNOSIS?  
>> YES, YOUR HONOR.  
HE DID. IN --  
>> AGAIN, WITH THE AGGRAVATION OF CCP AND HAC, AS YOU SAID THESE OTHER AGGRAVATORS, WE CAN'T IGNORE THAT, EVEN IF IT WAS THE, THE MURDER WAS DONE BY SOMEBODY THAT WAS UNDER EXTREME EMOTIONAL DISTRESS, THAT IT WAS STILL A CALCULATED MURDER AND IT WAS HAC AND BY SOMEBODY THAT HAD PRIOR VIOLENT FELONIES.  
GOING BACK TO THAT EVEN IF THE JUDGE WERE TO -- EXTREME EMOTIONAL DISTRESS, IT'S JUST, DOESN'T, THE QUESTION IS, IT DOESN'T REALLY CHANGE THE CALCULUS OF THE PENALTY PHASE, CORRECT?  
THAT IS ALSO WHAT WE HAVE TO LOOK AT.  
>> IT DOES NOT CHANGE THE PENALTY PHASE.  
IF --  
>> I GUESS I MEANT THE CALCULUS SO THAT THE MITIGATION IS STILL, DOESN'T OUTWEIGH THE AGGRAVATION?  
>> THE OUTCOME OF THE PENALTY

PHASE WOULD NOT HAVE BEEN ANY DIFFERENT, YES, YOUR HONOR. IF THERE ARE NO FURTHER QUESTIONS, I WOULD ASK THAT YOU AFFIRM THE JUDGMENT OF THE POST-CONVICTION COURT.

>> THANK YOU.

>> THANK YOU VERY MUCH.

>> REBUTTAL?

>> THANK YOU.

JUSTICE PARIENTE, YOU ASKED ABOUT THE EVIDENCE THAT ZOMMER WAS UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME.

RIGHT BEFORE THE CRIME, LIKE A DAY BEFORE, DURING TRIAL, DEFENSE CALLED ONE DANNY NEWELL. DANNY NEWELL WAS MR. ZOMMER'S LONG-TIME COUNSELOR AT THE CHILDREN'S HOME.

HE KEPT IN TOUCH WITH HIM.

FOR SIX YEARS THIS MAN COUNSELED ZOMMER.

ZOMMER CALLED AND SAID, LOOK, I DON'T KNOW WHAT IS HAPPENING TO ME.

I NEED HELP.

I NEED TO TALK TO YOU.

SO HE WAS UNDERGOING HIS EXTREME MENTAL AND EMOTIONAL DISTURBANCE BEFORE THE CRIME OCCURRED.

THIS WAS A SENSELESS CRIME BY THE WAY.

NOW, IN REGARDS TO MAHER SAYING, YOU COULD HAVE AN AXIS I AND AN AXIS II, HE DID NOT DO THAT.

HE SAID, IF EVERYTHING CAN BE EXPLAINED BY AXIS I, THERE'S NO REASON TO GO TO AXIS II.

AXIS I IS A CHEMICAL IMBALANCE.

IF YOU CAN EXPLAIN THAT, ZOMMER'S PERSONALITY DEVELOPMENT IS IRRELEVANT.

YEAH, IT HELPED, IT CONTRIBUTED TO THE BIPOLAR AND THE ABUSE HE SUFFERED WAS CERTAINLY NOT BENEFICIAL TO HIS OUTLOOK ON LIFE BUT THIS WAS CAUSED BY A BIPOLAR DISORDER.

HE IS NOT A BAD GUY.  
HE'S A SICK GUY.  
AND THERE LIES THE  
INEFFECTIVENESS.  
COUNSEL SHOULD HAVE BROUGHT THAT  
OUT.  
HE SHOULD HAVE SAID, LOOK,  
DOCTOR, DSM IV SAYS THIS, DON'T  
YOU MEAN PERSONALITY TRAITS AS  
OPPOSED TO PERSONALITY DISORDER?  
AND THEY GO INTO A BIG DEAL  
ABOUT DR. TRESSLER WENT IN AND  
THESE PEOPLE ARE CONSCIENCELESS  
AND PITILESS.  
ZOMMER'S NOT.  
HE IS A BIPOLAR WHO COMMITTED A  
HORRIFIC ACT.  
I THINK IF THE JURY HAD HEARD  
THIS COMPELLING EVIDENCE -- THEY  
HEARD A LOT OF COMPELLING  
EVIDENCE ABOUT HIS UPBRINGING,  
HIS ABUSE AND HIS TESTING.  
IF THEY HEARD HE WAS BIPOLAR,  
THERE IS A DISTINCT POSSIBILITY,  
I CONTEND, THEY WOULD HAVE VOTED  
FOR LIFE.  
THAT'S ALL I HAVE, THANK YOU FOR  
YOUR PATIENCE.  
>> THANK YOU FOR YOUR ARGUMENTS.  
COURT IS ADJOURNED.  
>> ALL RISE.