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## **George Michael Hodges v. State of Florida**

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: LOOKS LIKE YOU ARE READY TO GO ON WHOMS VERSUS STATE. IF COUNSELL READY, YOU MAY PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM LINDA McDERMOTT AND I REPRESENT THE APPELLANT GEORGE HODGES IN HIS 3.850 APPEAL FROM THE CIRCUIT COURT AND ALSO AT THIS TIME MR. HODGES IS BEFORE THIS COURT ON A WRIT OF HABEAS CORPUS. I WOULD ALSO LIKE TO FOCUS ON MR. HODGES' 3.850 CLAIM THAT HIS CLIENT WAS DEFICIENT, AT HIS CAPITAL PENT PHASE AND THAT THE POSITION RESULTED -- AND THAT THE POSITION RESULT IN A NEW TRIAL, I AM SORRY A NEW PENALTY PHASE.

IS COUNSEL INEFFECTIVE FOR NOT OBJECTING IN THE CLOSING ARGUMENT, TO AN ARGUMENT THAT HAD CLEARLY BEEN FOUND ERROR SEVERAL YEARS BEFORE AND HAD RESULTED IN A REVERSAL IN THE TAYLOR CASE? WAS THERE AN EVIDENTIARY HEARING ON WHY HE DIDN'T OBJECT TO THAT?

NO, YOUR HONOR. THE COURT SUMMARILY ENDED THAT ISSUE AS TO THAT CLAIM. THE STATE HAD ARGUED THAT IT WAS PROCEDURALLY BARRED. IT HAD BEEN RAISED ON DIRECT APPEAL, AND THAT THE INEFFECTIVE ASSISTANCE OF COUNSEL WAS JUST ANOTHER WAY TO RERAISE IT, SO WE WEREN'T ALLOWED TO ASK MR. PERRY, THE TRIAL ATTORNEY, QUESTIONS ABOUT THAT AT THE EVIDENTIARY HEARING.

WHAT ABOUT ON WHY HE DIDN'T ASK FOR A PROPER INSTRUCTION ON CCP? DID YOU GET TO ASK THAT?

LIKEWISE, THAT WAS ALSO SUMMARILY DENIED. HOWEVER, WE DID ASK MR. PER BY THAT AT THE EVIDENTIARY HEARING, AND HE SAID THAT HE HAD NO STRATEGIC REASON FOR NOT OBJECTING TO THAT INSTRUCTION, AND CERTAINLY -- TO MR. PERRY AT THE EVIDENTIARY HEARING AND HE SAID THAT HE HAD NO STRATEGIC REASON FOR NOT OBJECTING TO THAT INSTRUCTION AND CERTAINLY AT THE TIME --

DID IT HOLD?

AT THE TIME IT WAS ESTABLISHED AND HAS RECENTLY BEEN ESTABLISHED BY THIS COURT IN RAGSDALE AND THAT COUNSEL HAD A DUTY TO PROVIDE AN INDEPENDENT EVALUATION OF HIS CLIENT'S BACKGROUND AND TO DETERMINE IF ANY MITIGATION IS PRESENT. IN THIS CASE, TRIAL COUNSEL FAILED TO DO THAT. WHAT HAPPENED AT MR. HODGES'S PENALTY PHASE WAS THAT THE TRIAL ATTORNEY TESTIFIED THAT HE ASKED AN INVESTIGATOR TO CALL A FEW OF THE FAMILY MEMBERS THAT MR. MOJ HOJS HAD PROVIDE -- THAT MR. HODGES HAD PROVIDED TO HIM. THEY WERE IN WEST VIRGINIA. MR. HODGES WAS RAISED AND SPENT LARGE HIS ENTIRE LIFE IN WEST VIRGINIA.

HOW OLD WAS MR. HODGES WHEN THIS PROBLEM OCCURRED?

I BELIEVE HE WAS IN HIS MIDTHIRTY, I YOUR HONOR, SO HE HAD ONLY COME TO FLORIDA IN 1984. THE CRIME OCCURRED IN 1987 AND THE TRIAL WAS IN 1989. SO TRIAL COUNSEL REMEMBERED

THAT HE HAD ASKED AN INVESTIGATOR TO CALL SOME OF INDIVIDUALS IN WEST VIRGINIA THAT MR. HODGES HAD PROVIDED TO HIM. HE DID NOT SEND AN INVESTIGATOR TO WEST VIRGINIA. HE DIDN'T GO TO WEST VIRGINIA. HE DIDN'T SPEAK TO ANYONE OTHER THAN THE FOUR PEOPLE THAT WERE ON THE MITIGATION SUMMARY LIST. HE DIDN'T DO ANY RESEARCH ABOUT THE AREA WHERE MR. HODGES WAS RAISED, WHICH IS WELL-KNOWN TO BE ONE OF THE MOST IMPOVERISHED AREAS IN THE UNITED STATES. HE DIDN'T, AND, ALSO, ONE OF THE MOST POLLUTED AREAS IN THE UNITED STATES.

I GUESS I AM HAVING TROUBLE. I MEAN, YOU KNOW, LET'S JUST ASSUME THERE WASN'T THE BEST INVESTIGATION. THIS THING ABOUT THE KINDS, THAT THERE WERE CONTAMINATES IN THE WATER, I MEAN, UNLESS YOU ARE MAKING THIS HARD CLAIM THAT HE WAS SOMEHOW PERMANENTLY BRAIN DAMAGED AS A RESULT OF INGESTING POLLUTANTS, I AM NOT SURE HOW, I MEAN, WHAT, IT IS SORT OF INTERESTING, BUT HOW IS THAT COMPELLING MITIGATION, THAT SHOULD HAVE BEEN PRESENTED? HOW WOULD THAT MAKE A DIFFERENCE IN THE OUTCOME OF THE CASE?

WELL, YOUR HONOR, I THINK THAT THE PART ABOUT THE TOXICITY AND THE CONTAMINANTS IN THE AREA, REALLY, GOES TO THE POINT OF THIS WAS THE TYPE OF ENVIRONMENT THAT GEORGE HODGES WAS RAISED IN.

BUT IT DOESN'T, OKAY, SO LET'S JUST SAY THAT HE WAS RAISED IN AN IMPOVERISHED ENVIRONMENT. WHAT, I GUESS WHAT IS THE MOST COMPELLING MENTAL HEALTH MITIGATION, BECAUSE THIS CRIME DOES SEEM A LITTLE BIZARRE, THAT YOU KNOW, HERE IS A GUY THAT HAS NO CRIMINAL HISTORY, NOT GOING TO BE, IS GOING TO BE PUT IN A JUVENILE, I MEAN INTO A DIVERSION PROGRAM, AND SOMEHOW GETS SO OBSESSED ABOUT THIS THAT HE NOW KILLS THE VICTIM INSTEAD OF WHERE HE COULD HAVE JUST BEEN IN AN ALTERNATIVE DIVERSION PROGRAM, SO THAT SEEMS A BIT EXTREME FOR SOMEBODY THAT HAS NEVER HAD ANY REAL CRIMINAL HISTORY, SO GIVE ME THE MOST COMPELLING MITIGATION THAT THE JURY, ORIGINAL JURY HEARD, AND WHAT YOU ARE SAYING IF THIS ORIGINAL JURY HAD HEARD THIS OTHER EVIDENCE, IT WOULD HAVE BEEN A WHOLE DIFFERENT BALLGAME.

SWITCHING GEARS A LITTLE BIT, THEN, LET ME JUST FIRST PREFACE SORT OF THE PREJUDICE ANALYSIS WITH THE FACT THAT THE PENALTY PHASE IN MR. HODGES'S TRIAL LASTED 45 MINUTES. THAT INCLUDED TESTIMONY, ARGUMENT AND INSTRUCTIONS. THE JURY HEARD FROM HIS MOTHER AND HIS BROTHER-IN-LAW AND ESSENTIALLY HEARD THAT MR. HODGES WAS A LOYAL FAMILY MEMBER. NOW, THE STATE PRESENTED THREE WITNESSES DURING THE EVIDENTIARY HEARING OR DURING THE CAPITAL PENT PHASE. NO EXHIBITS WERE INTRODUCED. NO MENTAL HEALTH TESTIMONY WAS INTRODUCED.

YEAH, BUT HE DID HAVE, THIS IS NOT A QUESTION OF HE DID INVESTIGATE MENTAL HEALTH TESTIMONY. HE DID HAVE, HE HIRED TWO EXPERTS, AND THOSE EXPERTS GAVE INFORMATION THAT HE DETERMINED WOULDN'T BE HELPFUL, SO IT IS NOT LIKE A CASE WHERE SOMEONE JUST SAYS I AM GOING TO JUST PLEAD, READ FROM THE BIBLE OR SOMETHING IN CLOSING ARGUMENT.

CORRECT. HE DID NRKTS FACT, RETAIN TWO -- HE DID, IN FACT, RETAIN TWO MENTAL HEALTH EXPERTS. HE GAVE THEM POLICE REPORTS AND HE GAVE THEM THE AUTOPSY REPORT, AND THAT WAS THE EXTENT OF THE BACKGROUND INFORMATION THEY HAD.

WHAT INFORMATION SHOULD HE, SO THAT IS WHAT I AM, SO WHAT WAS THE INFORMATION, NOW, THAT YOU HAVE, SCHOOL RECORDS? ARE THERE PSYCHOLOGICAL RECORDS? ARE THERE MEDICAL RECORDS? ARE THERE SOMETHING THAT IS COMPELLING, OTHER THAN THIS FACT THAT THE WATER WAS POLLUTED?

YES. WHAT HAPPENED WAS TRIAL COUNSEL HAD THE TWO MENTAL HEALTH EXPERTS. THEY EVALUATED MR. HODGES AND RENDERED THEIR OPINIONS IN MAY 1989. TRIAL WAS SCHEDULED

FOR JULY 1989. IN JUNE OF 1989, TRIAL COUNSEL STARTS SENDING OUT LETTERS, ASKING FOR BACKGROUND MATERIALS ON MR. HODGES. HE ZPDZAL LETTER TO HIS SCHOOL SYSTEM. HE SENDS A -- HE SENDS A LETTER TO HIS SCHOOL SYSTEM. HE SENDS A LETTER, A TREATMENT LETTER TO HOSPITALS INVEST VIRGINIA. HE GETS -- IN WEST VIRGINIA. HE GETS MATERIAL BACK FROM THOSE PLACES AND THEY ARE DATED THE END OF JUNE, WITHIN TWO WEEKS OF TRIAL, MIDDLE OF JUNE, THAT IS A MONTH BEFORE TRIAL. HE DIDN'T PROVIDE ANY OF THESE RECORDS TO HIS MENTAL HEALTH EXPERTS. DR. MERIT TESTIFIED AT THE EVIDENTIARY HEARING HE TOLD COUNSEL, WHEN HE MADE HIS OPINION IN MAY 1989, THIS IS A PRELIMINARY OPINION. SHOULD YOU GET ANYTHING ELSE, LET ME KNOW, LET ME LOOK AT IT. I DON'T THINK I CAN HELP YOU RIGHT NOW. I HAVE GOT A SOFT PSYCHIATRIC DIAGNOSIS. I DON'T THINK THAT I CAN BE HELPFUL TO YOU.

WHAT IS THE MENTAL HEALTH EXPERT, THE CHANGE OR ALTERATION OF THEIR APPROACH WAS NOT REALLY ON SCHOOL RECORDS OR MEDICAL RECORDS BUT BASED UPON LIVING CONDITIONS, MORE THAN ANYTHING ELSE? I GET THAT KIND OF SENSE FROM IT.

I THINK IT WAS EQUAL. I THINK DR. MAYER, WHO SPECIFICALLY WAS ONE OF THE MENTAL HEALTH EXPERTS, TESTIFIED ABOUT MR. HODGES'S BACKGROUND. HE HAD NO BACKGROUND INFORMATION TO BASE HIS OPINION ON, NO SCHOOL RECORDS AND NO MEDICAL RECORDS.

THAT COMES TO JUSTICE PARIENTE'S QUESTION. WHAT IS SHOWN IN THOSE RECORDS, BECAUSE IT SEEMS AS THOUGH THEY WERE RELYING UPON THE POVERTY, THE PROVINCIALISM OF LIVING IN THAT AREA, THAT KIND OF THING, WHAT IS IN THOSE MEDICAL RECORDS?

DR. MAYER TESTIFIED AND DR. DEESE TESTIFIED, AND WHEN HE WAS SIX YEARS OLD HE WAS PLACED IN REMEDIAL CLASSES AND DIAGNOSED WITH SPEECH PROBLEMS. HE WAS HAVING PROBLEMS AT A YOUNG AGE. HE WAS GIVEN AN IQ TEST, WHICH WAS SORT OF RARE AT THAT TIME. THAT IS WHAT THE EXPERTS TESTIFIED TO. HAD THEY HAD THOSE RECORDS, IT WOULD HAVE BEEN A BIG RED FLAG THAT SOMETHING IS GOING ON WITH THIS INDIVIDUAL --

ARE YOU SAYING THAT HE, IS HE A BRAIN DAMAGED INDIVIDUAL AND IMPAIRED THINK SOMETHING.

CORRECT.

WHAT IS THAT BASED ON THEN?

THAT TESTIMONY CAME FROM THREE OF THE EXPERTS PRESENTED BY MR. HODGES AT THE EVIDENTIARY HEARING, DR. DEE, DR. MARIN, DR. BEAVER.

BASED ON WHAT?

ALL OF THEM SAID BASED ON THE NEUROPSYCHOLOGICAL TESTING. BASED ON --

IS THAT NEUROPSYCHOLOGICAL TESTING IN THE RECORD?

YES, YOUR HONOR. BASED ON MR. HODGES'S PRESENTATION TO THEM, AND BASED ON THE BACKGROUND REVIEW OF ALL OF HIS MILITARY RECORDS AND THINGS OF THAT NATURE THAT JUST SHOWED HIS PERFORMANCE THROUGHOUT HIS LIFE WAS THE PERFORMANCE OF SOMEONE WHO WAS BRAIN DAMAGED. DR. MARIN, ON THE OTHER HAND, DISAGREED THAT MR. HODGES HAD FRONTAL LOBE BRAIN DAMAGE. HOWEVER, HE DID AGREE THAT MR. HODGES HAD A SIGNIFICANT LEARNING DISABILITY, AND HE CONCEDED THAT THAT, IN AND OF ITSELF, IS A FORM OF BRAIN DAMAGE, SO THERE IS NO QUESTION HERE THAT GEORGE HODGES SUFFERS FROM BRAIN DAMAGE. ALSO, IN TERMS OF WHAT ELSE THERE IS FROM THE MENTAL HEALTH EXPERTS, HE IS, MR. HODGES IS SEVERELY DEPRESSED. HE SUFFERED FROM DEPRESSION HIS ENTIRE LIFE. EVEN

THE STATE'S EXPERT AGREES WITH THAT DIAGNOSIS, ALTHOUGH HE -- HOW DID HE GETS TO THAT? HOW DO WE KNOW THAT HE SUFFERED FROM DEPRESSION HIS WHOLE LIFE?

AGAIN, BASED ON THE RECORDS THAT WERE COLLECTED, THE REVIEW OF SCHOOL RECORDS, HOSPITAL RECORDS.

YOU ARE SAYING THE DEFICIENT PERFORMANCE WAS THAT THIS, THAT THE RECORDS THAT THIS LAWYER ACTUALLY HAD IN HIS POSSESSION, HE DIDN'T, THEN, DO ANYTHING WITH THEM? HE DIDN'T GIVE THEM BACK TO THE EXPERTS, AND IF THOSE EX-PRTS HAD HAD THOSE RECORDS AT THE TIME -- EXPERTS HAD HAD THOSE RECORDS AT THE TIME, THEIR TESTIMONY WOULD HAVE BEEN ENTIRELY DIFFERENT?

CORRECT. THAT WAS CERTAINLY ONE PART THAT THEY RELIED ON. THERE WERE OTHER RECORDS COLLECTED IN POSTCONVICTION THAT TRIAL COUNSEL NEVER OBTAINED, MILITARY RECORDS.

WHAT DO THE MILITARY RECORDS SAY?

THE MILITARY RECORDS SORT OF SAY THAT GEORGE HODGES HAD THIS PROFILE WHERE HE JUST COULDN'T PERFORM IN THE MILITARY. HE COULDN'T, HE DIDN'T HAVE THE CAPACITY, DR. BEAVER DESCRIBED HIM AS HE WASHED OUT. HE JUST COULDN'T PERFORM UNDER THE PRESSURES OF THE MILITARY.

DO WE HAVE THE MILITARY AND SCHOOL RECORDS ARE NOW THIS THIS RECORD?

YES, YOUR HONOR. ADDITIONALLY, THE DOCTORS CONCURRED THAT, HAD THEY HAD THE CORRECT DATE, A THE CORRECT INFORMATION AND DONE A PROPER EVALUATION AT THE TIME OF TRIAL, IT WOULD HAVE SUBSTANTIATED A STATUTORY MITIGATOR. IN THIS CASE, THE TRIAL ATTORNEY DIDN'T ASK, ONLY ASKED FOR ONE STATUTORY MITIGATOR AND THAT WAS THE CATCHALL. HE DIDN'T ASK FOR ANY OF THE MENTAL HEALTH STATUTORY MITIGATORS TO BE READ TO THE JURY. MR. HODGES HAD A HISTORY OF SUICIDE ATTEMPTS. THAT THESE RECORDS, IN FACT MR. HODGES'S JAIL RECORDS PRIOR TO HIS PRETRIAL INCARCERATION IN THIS CASE, SHOWED THAT HE HAD THREATENED SUICIDE AND ATTEMPTED SUICIDE SHORTLY BEFORE THE TRIAL BEGAN. DURING THE TRIAL, AS EVIDENCED BY THE RECORD ON APPEAL FROM DIRECT APPEAL, MR. HODGES ATTEMPTED SUICIDE AGAIN, FOLLOWING THE PENALTY PHASE DURING THE DELIBERATIONS OF THE JURY. NONE OF THAT WAS EVER KNOWN TO THE JURY. NONE OF THAT WAS EVEN ARGUED TO THE SENTENCING JUDGE DURING THE HEARING, FOLLOWING THE PENALTY PHASE. SO THE JUDGE OR THE TRIAL ATTORNEY NEVER ASKED FOR ANY OF THAT TO BE CONSIDERED. THE MENTAL HEALTH EXPERTS, ALSO, TESTIFIED AT THE EVIDENTIARY HEARING, MR. HODGES'S MENTAL HEALTH EXPERTS TESTIFIED THAT, WHILE THEY DIDN'T FEEL THAT MR. HODGES'S CAPACITY TO APPRECIATE THE, HIS, THE CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT WAS SUBSTANTIALLY IMPAIRED, THEY DID FEEL IT WAS IMPAIRED.

WHAT IS THE DEFENSE ATTORNEY'S EXPERIENCE AS A CAPITAL ATTORNEY? WAS HE THE ONLY ATTORNEY TRYING THE CASE OR WERE THERE TWO LAWYERS TRYING THE CASE?

MR. PERRY WAS CO-COUNSEL NECESSARILY THIS CASE. HE WAS RESPONSIBLE FOR THE ENTIRE -- WAS CO-COUNSEL IN THIS CASE. HE WAS RESPONSIBLE FOR THE ENTIRE PENALTY PHASE. HE SAID I HAD TRIALS UNDER MY BELT AND HE ALSO TESTIFIED THAT HE WAS BUREAU CHIEF AT THE TIME OF THIS. HE HAD 25 TO 30 ATTORNEYS AND FULL CAPITAL CASELOAD AND ADMINISTRATIVE DUTIES AND HE WAS QUITE OVERWHELMED. ALSO, IN GOING PACK TO A LITTLE BIT OF WHAT HE FAILED TO DO -- GOING BACK TO A LITTLE BIT OF WHAT HE FAILED TO DO, HE DIDN'T CERTIFY THE NEUROLOGICAL TESTING.

I THINK YOU MADE THIS STATEMENT, DO YOU AGREE, OR AM I INCORRECT, THAT EVEN WITH WHATEVER HAS COME OUT NOW OR WHATEVER THE NEW TESTIMONY MAY BE NOW, WE STILL

HAVE NOT SATISFIED THE STATUTORY MENTAL MITIGATORS?

THE EXTREME, HIS, WITH WHAT THEY SAID WAS THEY WERE CERTAIN THAT HE SATISFIED THE STATUTORY MITIGATOR, THAT HE COULD TESTIFY THAT HE DID, IN FACT, SUFFER FROM EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME. AS TO THE OTHER STATUTORY MITIGATOR, THEY SAID THEY COULDN'T SAY HE SIGNIFICANTLY COULDN'T OR SUBSTANTIALLY COULDN'T APPRECIATE THE CONDUCT OF HIS CONDUCT, BUT THEY DID SAY THAT THAT WAS PART OF THE MITIGATION, THAT, I MEAN, IT DIDN'T RISE TO THE LEVEL OF STATUTORY MITIGATOR BUT IT WAS CERTAINLY MENTAL HEALTH MITIGATION, AND I THINK MOST TELL GOING THIS CASE IS DR. MARIN, THE STATE'S OWN EXPERT, TESTIFIED AT THE EVIDENTIARY HEARING, THAT MR. HODGES HAD SIGNIFICANT MENTAL HEALTH MITIGATION, AND HE TOLD THE LOWER COURT THAT HE THOUGHT IT WAS INAPPROPRIATE THAT THE JURY DIDN'T HEAR THIS TYPE OF MITIGATION AT THE TRIAL. SO LIKE RAGSDALE, EVEN THE STATE'S EXPERT ACKNOWLEDGED THAT THERE WAS SIGNIFICANT MITIGATION THAT WAS NEVER HEARD. I SEE MY LIGHT HAS COME ON. I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL.

MAY IT PLEASE THE COURT. KIM HOPKINS FOR THE STATE OF FLORIDA. I WOULD INITIALLY LIKE TO BEGIN WITH THE QUALIFICATIONS OF THE DEFENSE ATTORNEY NOW JUDGE PERRY. AT THE TIME OF THIS TRIAL, HE WAS A FELONY BUREAU CHIEF. HIS TESTIMONY DID NOT AT ANY POINT INDICATE THAT HE PERSONALLY FELT OVERWHELMED BY THAT POSITION.

GIVEN THAT EXPERIENCE, THEN, CAN YOU, WHAT, WHY WAS, THE JURY, I AM SORRY, THE PROSECUTOR'S ARGUMENT, IN CLOSINGS ARGUMENT, THAT WAS CLEARLY IMPROPER, AND WAS THE BASIS, A SIMILAR ARGUMENT WAS THE BASIS FOR A REVERSAL WHEN IT WAS PROPERLY OBJECTED TO IN THE TAYLOR CASE, WHAT, WHY SHOULDN'T THERE HAVE BEEN AN EVIDENTIARY, WHEN THEY, AS LONG AS THEY WERE QUESTIONING MR., NOW JUDGE PERRY ABOUT IT, AS TO WHY HE DIDN'T OBJECT TO THAT PATENTLY IMPROPER ARGUMENT THAT WOULD HAVE RESULTED IN REVERSAL, MOST LIKELY, OF THIS CONVICTION, AND DIDN'T OBJECT TO A CCP INSTRUCTION, WHEN WE ARE NOW NOT IN THIS 197 50s. WE ARE -- 1970s. WE ARE IN THE LATE 1980s WHEN THAT ISSUE WAS IN THE PROCESS OF BEING LITIGATED. IT WOULD SEEM TO ME IT WOULD BE LESS OF AN EXCUSE, THEN, FOR DOING IT, BUT WE DON'T KNOW IF HE HAD A STRATEGY REASON OR WHAT. COULD YOU SORT OF COMMENT ON THOSE TWO ASPECTS OF THE PERFORMANCE OF THIS DEFENSE ATTORNEY?

CERTAINLY. THE STATE'S POSITION, OF COURSE, IS THAT SUMMARILY, SUMMARY DENIAL OF THOSE WAS APPROPRIATE, BECAUSE THEY WERE NOT OBJECTED TO.

BUT ISN'T THAT THE BASIS OF --

YES. I UNDERSTAND, BUT THE IMPORTANT THING TO NOTE, THOUGH, IS --

THE TRIAL ATTORNEY DOESN'T OBJECT, THEN IT CAN'T BE REVIEWED FOR A HARMLESS-ERROR ANALYSIS ON APPEAL, CAN IT?

WELL, THAT IS THE RULING OF THIS COURT, AND THAT WOULD SEEMINGLY BE A CATCH-22, BUT THE PROBLEM IS THAT THAT IS THE RULING THAT WE HAVE HERE, AND IMPORTANTLY, ESPECIALLY WITH THE ESPINOSA CLAIM, THIS COURT DID CONSIDER WHETHER OR NOT THAT AN ERROR HAPPENED, BASED ON ESPINOSA IN THIS CASE, AND FOUND THAT IT WAS BARRED BUT, ALSO, THAT IT WAS HARMLESS, DUE TO THE OVERWHELMING EVIDENCE OF CCP IN THIS CASE, SO REGARDLESS OF WHAT MIGHT HAVE BEEN FLUSHED OUT IN AN EVIDENTIARY HEARING, THERE IS NOTHING THERE, BECAUSE IT WOULDN'T MEET THE PREJUDICE PRONG OF STRICKLAND, WHERE THIS COURT HAS ALREADY RULED THAT THAT IS HARMLESS, AND THE SAME GOES WITH RESPECT TO THE PROSECUTOR'S COMMENTS. THIS COURT HAS FOUND THEM TO BE HARMLESS, SO REGARDLESS OF WHETHER OR NOT THERE HAD BEEN A HEARING ON SUCH ISSUE, IT COULD NOT HAVE REACHED THE LEVEL OF PREJUDICE THAT WOULD REQUIRE A NEW HEARING AT THIS

JUNCTURE ON A STRICKLAND CRIME -- ON A STRICKLAND CLAIM, BUT GOING BACK TO HIS PERSONAL QUALIFICATIONS, WHAT HE TESTIFIED TO WAS 15 TO 20 CAPITAL CASES AT THE TIME THAT HE TRIED MR. HODGES AND INTERESTINGLY MR. HODGES WAS THE ONLY CASE THAT HE RECEIVED THE DEATH PENALTY. HE WAS SUCCESSFUL IN ALL OTHER CAPITAL CASES THAT HE WORKED ON. HE WAS FOCUSED SOLELY ON THE PENALTY PHASE OF THIS CASE AND HE DID HAVE AN INVESTIGATOR WORKING WITH HIM.

SO GIVEN THAT, IT SORT OF, THEN, SEEMS REMARKABLE THAT, WHY DIDN'T THEY GO UP TO WEST VIRGINIA, TO TALK TO THE WITNESSES UP THERE? WHY DIDN'T THEY PURSUE, YOU KNOW, THE SCHOOL RECORDS, MILITARY RECORDS? I MEAN, YOU HAVE GOT A GUY THAT REALLY HASN'T COMMITTED, I MEAN, THIS IS AGAIN, SORT OF A BIZARRE CRIME. HE IS SUICIDAL AROUND THE TIME. IT IS, AND YET HE GIVES THIS SORT OF PRETTY LAME CLOSING ARGUMENT. WHAT IS THE --

WELL, YOUR HONOR, I DON'T THINK THERE IS ANY INDICATION TO JUDGE PERRY THAT HE WAS SUICIDAL UP UNTIL THE TIME THAT HAPPENED. IN FACT HE TESTIFIES THAT UP UNTIL THE MOMENT WHERE HODGES DECIDES HE IS NOT GOING TO TESTIFY IN THE PENALTY PHASE, THAT HE HAD BEEN COOPERATIVE WITH HIM AN AT THAT JUNCTURE, SO HE HAD NO SIGN THAT THAT WAS A POSSIBILITY. HE DIDN'T SPECIFICALLY RECALL ASKING MR. HODGES HAVE YOU EVER COMMITTED SUICIDE, BUT HE HAD TWO MENTAL HEALTH EXPERTS TELL HIM THAT THERE WAS ABSOLUTELY NOTHING WRONG WITH HIM AND IMPORTANTLY DR. GAMOSH TELLS JUDGE PERRY THAT YOU DON'T WANT TO YOU PUT ME ON THE STAND, BECAUSE I WILL GIVE YOU INFORMATION THAT WILL ENHANCE WHATEVER PENALTY YOU RECEIVE, SO --

BASED ON WHAT?

THAT HE WAS ANTI-SOCIAL.

BASED ON DID HE HAVE A CRIMINAL HISTORY?

NOT TO MY KNOWLEDGE. THE ONLY THING WE HAVE IS OBVIOUSLY THE INDECENT EXPOSURE CHARGE, BUT THAT WAS WHAT DR. GAMOSH'S CONCLUSION WAS AND DR. MARIN DID SAY HE DIDN'T HAVE ANYTHING TO HELP HIM AT THAT TIME. WHILE HE SAID IF YOU HAVE FURTHER INFORMATION, I WOULD BE HAPPY TO DO IT, HE TESTIFIED THAT HE WAS A STANDARD COMMENT HE WOULD MAKE TO ANY DEFENSE ATTORNEY, NOT AS IF HE WAS SPECIFICALLY SEEKING ADDITIONAL STUFF IN THIS CASE. I THINK WE HAVE, HERE, AN INVESTIGATION THAT WAS THWARTED BY THE FAMILY MEMBERS AND FRIENDS OF THE DEFENDANT.

WOULD YOU GO INTO THE SUBSTANCE OF YOUR OPPOSING COUNSEL HAS PRESENTED A, SOME COMPELLING ARGUMENTS, WITH REGARD TO CONTENT OF SCHOOL RECORDS, MILITARY RECORDS T APPEARS THAT CERTAINLY THERE WAS INVESTIGATION OF EMPLOYERS -- MILITARY RECORDS. IT APPEARS THAT CERTAINLY THERE WAS INVESTIGATION OF EMPLOYERS. TELL US WHAT IS THE STATE'S REVIEW. WHAT DID IT SHOW? IS THIS A TOTALLY DEVASTATED HUMAN BEING THAT JUST DIDN'T COME OUT?

NOT AT ALL, YOUR HONOR. MY PERSONAL RECOLLECTION, I CAN'T RECITE TO YOU WHERE THIS TESTIMONY CAME IN, WAS THAT HE DID HAVE SCHOOL AND MEDICAL RECORDS. THAT NONE OF THE RECORDS SHOWED SIGNS OF SEXUAL ABUSE, SUICIDE ATTEMPTS OR ANYTHING OF THE NATURE THAT THEY WOULD CLAIM IS AVAILABLE TO THEM NOW.

SO WHAT IT IS THEY ARE REFERRING TO, WHEN THEY SAY THAT IT SHOWS ALL OF THESE HORRIBLE THINGS, THEN, IS THAT WHAT YOU ARE REPRESENTING --

CORRECT. CORRECT. I THINK THAT A REVUF THE RECORD WOULD SHOW THAT IT DOES NOT RISE TO THE LEVEL THAT THE DEFENSE WOULD ARGUE THAT IT DOES. MOREOVER, HE DID SPEAK WITH FAMILY MEMBERS. HE SPOKE WITH FAMILY MEMBERS THAT THEY BROTH FORT AT THE --

BROUGHT FORTH AT THE EVIDENTIARY HEARING AT THE TIME OF TRIAL AND CLEARLY DEFENSE COUNSEL CANNOT BE FAULTED THAT THE DEFENDANT'S SISTER REFUSED TO COME TO TRIAL. NO ONE EVER CONTACTED HER, SHE SAYS, BUT PARTS OF THE FILE THAT WE DO HAVE CONTRADICT THIS, AND THE JUDGE DID FIND IN HIS ORDER THAT SHE WAS NOT CREDIBLE ON THAT TESTIMONY, SO THAT CALLS --

WHAT WAS THE BASIS THAT DR. MAYER, NOW, SEEMING TO HAVE A SUBSTANTIALLY DIFFERENT VIEW, THAT THERE ARE MUCH MORE SERIOUS PROBLEMS NOW?

THE STATE WOULD ARGUE THAT HE DOES NOT TRULY CONCLUDE THAT THERE ARE MORE SERIOUS PROBLEMS, DESPITE HIS ATTEMPTS.

TELL ME ABOUT THAT.

THERE WAS. HE REPEATEDLY STATES ON THE RECORD THAT HIS ONLY CHANGE, AND HE WAS QUESTIONED DIRECTLY BY THE TRIAL JUDGE AT THE EVIDENTIARY HEARING, JUDGE MALONEY ABOUT THAT, AND HE SAYS THE ONLY ADDITIONAL EVIDENCE THAT I HAVE IS BACKGROUND. I HAVE THIS BACKGROUND INFORMATION, AND HE NEVER EVENS TALKS ABOUT THIS NEUROPSYCH TESTING AS BEING A HUGE DIFFERENCE IN WHAT HE DOES COME FORWARD WITH. HE WOULD ULTIMATELY CONCLUDE MOST RECENTLY IS DEPRESSION, WHICH WE HEARD THE FIRST TIME. BRAIN DAMAGE IS USED OCCASIONALLY BUT HE DOES HE EQUIVOCATE LATER ON AND SAYS IT IS A BRAIN IMPAIRMENT, AND HE DOESN'T DISAGREE WITH DR. MARIN'S FINDINGS THAT IT IS JUST A LEARNING DISABILITY THAT WE ARE DEALING WITH.

OBVIOUSLY HE WOULD BE DEPRESSED MORE RECENTLY, BUT DID THE STATE'S DOCTOR ACTUALLY SAY A LIFELONG HISTORY OF DEPRESSION?

YES, BUT I THINK SOME OF THE TESTING THEY DID, THEY EQUIVOCATED AS WELL ON THAT, THAT THE TESTING DIDN'T GO TO A LONG-TERM DURATION BUT OBVIOUSLY HE IS DEPRESSED NOW, ON DEATH ROW FOR TEN YEARS, BUT YOU DO HAVE THE FINDING BY DR. MARIN THAT HE WAS -- BY DR. MAYER THAT HE WAS DEPRESSED THEN, SO I DON'T THINK THERE IS ANY EMPIRICAL FINDINGS THAT WOULD SHOW A LONG-TERM DEPRESSION, BUT CERTAINLY IF IT IS, WE ARE NOT TALKING ABOUT A STATUTORY MITIGATION THAT DOES NOT OUTWEIGH THE AGORATION THAT WAS PRESENT.

COULD YOU ADDRESS THESE TWO AGGRAVATORS THAT WERE FOUND, WITNESS ELIMINATION AND CCP, EVEN THOUGH HE THEY ARE TWO SEPARATE ONES, THEY ARE KIND OF FLIPS OF THE SAME THING, THAT HE WANTED TO GET RID OF THIS PERCEIVED THREAT TO HIM, WHO HAD COMPLAINED AGAINST HIM ABOUT THE INDECENT EXPOSURE. COULD YOU ADDRESS THE RING ISSUE, WHY THIS WASN'T AN UNANIMOUS VERDICT, AND WHY ISN'T THERE A PROBLEM UNDER RING, WITH THERE NOT BEING A JURY FINDING OF THESE AGGRAVATORS?

WELL, FIRST, I WOULD LIKE IT TO RESPECTFULLY DISAGREE THAT THE AGGRAVATORS ARE THE SAME THING. I THINK YOU ARE DEALING METHOD VERSUS MOTIVE IN THIS CASE.

I KNOW THEY CAN BE LISTED.

AND THEY CAN BE SEPARATE AND THIS COURT HAS FOUND THAT IN COOPER AND NUMEROUS OTHER CASES. WITH RESPECT TO RING, I THINK CLEARLY, THIS, THAT HAS NOT BEEN RAISED HERE. WE WOULD ARGUE A PROCEDURAL BAR TO THAT, AND IT IS NOT RETROACTIVE. EVEN IF THE COURT WERE TO CONSIDER THAT THERE HAD BEEN SOME CHANGE, THIS COURT HAS RULED IN BOTTOSON AND KING THAT RING DOES NOT APPLY TO THE CAPITAL SENTENCING SCHEME THAT WE HAVE HERE IN THE STATE OF FLORIDA, AND BASED ON THE FACT THAT DEATH IS THE STATUTORY MAXIMUM, WE WOULD ARGUE THE QUESTION OF UNANIMITY OR THE QUESTION OF WHETHER OR NOT THE JURY FOUND, WOULD GO TO MORE OF A HARMLESS ARGUMENT THAT WE

OONT WOONT NEED TO REACH IN THIS CASE, BECAUSE SUBSTANTIVELY WE -- WE WOULDN'T NEED TO REACH IN THIS CASE, BECAUSE SUBSTANTIVELY WE ARE NOT THERE.

WOULD YOU EXPAND UPON THE ANSWER TO JUSTICE ANSTEAD'S QUESTION. YOU USED THE WORD BACKGROUND. EXPAND UPON THAT FOR THE COURT, PLEASE. WHAT BACKGROUND PRODUCED THAT CHANGE?

CERTAINLY AND WHAT I WOULD WANT TO POINT OUT IS THAT, WHEN DR. MAYER DID PRODUCE QUESTIONS UPON HIS FIRST TRIAL, HE DID LIST IMPOVERISHED RAISING OF THE DEFENDANT. SO IT IS NOT A COMPLETE SHOCK TO THE KIND OF BACKGROUND THAT WE ARE COMING UP WITH AT THE EVIDENTIARY HEARING. I THINK THAT HE DOES TALK ABOUT SOME OF THE STUFF THAT DOES COME FROM THE TOXICOLOGIST AND SOCIOLOGIST WHICH I THINK JUSTICE PARIENTE POINTS OUT IS NOT RELEVANT TO THE DEFENDANT, HIMSELF.

WE ARE TRYING TO GET TO WHETHER THESE RECORDS, FOR INSTANCE, THAT APPARENTLY WERE RECEIVED AFTER THE EXPERTS INITIALLY GAVE THEIR VIEWS, AND THEN WEREN'T PROVIDED TO THE EXPERTS AFTER ANYWAY RECEIVED BY THE LAWYER. NOW, IS THAT CORRECT? IS THAT A CORRECT STATEMENT THAT IS THAT THE SCHOOL RECORDS AND OTHER RECORDS WERE RECEIVED AFTER THE EXAMINATION BY THE MENTAL HEALTH EXPERTS, AND THEN THOSE RECORDS WERE NOT PROVIDED TO THE MENTAL HEALTH EXPERTS? JUST THAT LIMITED, IS THAT A CORRECT STATEMENT?

I MUST SAY I DON'T KNOW THE ANSWER TO. THAT I DO RECALL THAT THE DEFENSE ATTORNEY HAD THOSE RECORDS. I DO NOT RECALL SPECIFICALLY ANYTHING COMING FORWARD, EITHER AT THE EVIDENTIARY HEARING OR AT TRIAL, THAT SHOWS THESE RECORDS HAVE ANY KIND OF DAMAGING INFORMATION.

WELL, THAT IS --

THE NEXT THIS EVENING ABOUT DR. MAYER, FOR INSTANCE, THAT, NOW, DID HE, THEN, SAY, WELL, NOW THAT I HAVE THOSE RECORDS, YOU KNOW, I REALLY HAVE A MUCH MORE SOLID GRIP ON THIS CASE, AND HERE IS A LOT OF EXPLANATIONS, NOW, FOR THINGS OR WHAT, I AM TRYING - - WITH YOUR KNOWLEDGE OF THE RECORD AND LOOKING AT HIS TESTIMONY, GIVE US SORT OF A QUALITATIVE FEEL FOR WHAT HE HAD TO SAY.

CERTAINLY, YOUR HONOR.

THIS IS OF CONCERN, WHEN EVEN THE STATE'S MENTAL HEALTH EXPERT SAYS, WELL, IT IS A SHAME THAT THE JURY REALLY DIDN'T GET TO HEAR ALL THIS ABOUT THIS FELLOW, BUT I AM TRYING TO FOCUS ON DR. MAYER, BECAUSE THERE IS A LOT OF EMPHASIS ON THE --

BECAUSE HE LOOKED AT HIM BEFORE, AND I THINK REALLY --

TELL US ABOUT HIS REFERENCES TO THE RECORDS AND THE BACKGROUND AND EVERYTHING BEING RESPONSIBLE FOR HIM, REALLY, FIRING UP HIS VIEWS OR GETTING A DIFFERENT TAKE ON IT. HOW --

MY UNDERSTANDING, YOUR HONOR, IS WHAT HE WAS REALLY RELYING ON IS THE STUFF THAT CAME FORWARD FROM THE WITNESSES THAT THEY BROUGHT FORTH, NOT SO MUCH FROM THE DOCUMENTATION FROM SCHOOL AND MEDICAL RECORDS, SO IT IS FROM THE BROTHER AND THE SISTER, YES.

THE PEOPLE, NOW, THAT HAD NOT REALLY BEEN INVOLVED BEFORE. IS THAT --

YES, AS WELL AS THE TOXICOLOGY REPORT AND STUFF HAVING TO DO WITH THE SOCIOLOGY



REPORT.

AND ALL OF THAT, THEN, HAS TO DO WITH HIS CHILDHOOD AND THE ENVIRONMENT THAT HE GREW UP IN?

YES, YOUR HONOR, AND IN FACT THE STATE WOULD POINT OUT THAT INFORMATION, THAT THE DEFENSE ATTORNEY SPOKE WITH THE DEFENDANT'S MOTHER AND HIS FATHER. HE SPOKE WITH KAREN TUCKER, THE SISTER THAT CAME FORWARD AT THE EVIDENTIARY HEARING AND SHE REFUSED AS I SAID EARLIER, TO COME TO TRIAL. THE BROTHER AT THE TIME OF THE TRIAL WAS IN PRISON, SO HE WAS NOT AVAILABLE TO THE DEFENSE ATTORNEY.

WHEN DID HE SPEAK WITH THE MOTHER AND FATHER? WAS IT, DID IT, WAS IT IN PROXIMITY TO WHEN THE PENALTY PHASE OCCURRED? WAS IT, DO WE KNOW THAT?

I DON'T RECALL, YOUR HONOR, IF WE KNOW. I KNOW THAT THE WHOLE, THE THING WENT TO TRIAL WITHIN A SIX-MONTH PERIOD, SO WE ARE NOT TALKING ABOUT YEARS OF PREPARATION FROM THE TIME THAT HE WAS ARRESTED. HE WENT TO TRIAL IN SIX MONTHS.

WHEN WAS THE PENALTY PHASE IN RELATIONSHIP TO THE GUILT PHASE?

IMMEDIATELY AFTER.

AND COMING BACK TO THIS --

WELL, I THINK, IT TOO, THAT IS IMPORTANT HERE, IF WHAT YOU ARE LOOKING AT IS WHAT THE DEFENSE ATTORNEY WAS GOING TO PUT ON AT PENALTY PHASE, THIS PENALTY PHASE WAS TRUNCATED AS NOTED BY JUSTICE BARKETT, BY THE DEFENDANT'S OWN ACTIONS. WHAT JUDGE PERRY HAD WAS NOTHING. NO ONE WOULD COME FORWARD. HIS BEST FRIEND WOULDN'T TESTIFY FOR HIM. HIS EMPLOYERS COULDN'T EVEN REMEMBER HIM. HE HAD A SEEMINGLY COOPERATIVE DEFENDANT WHO TOLD HIM NOTHING ABOUT ANY OF THIS BACKGROUND. HE TALKED TO HIS MOTHER WHO, TALKS ABOUT NONE OF THIS ALLEGED ABUSE IN THE FAMILY AND SHE IS TRYING TO SAVE HER SON FROM THE DEATH PENALTY AND SHE KNOWS THAT IS WHAT SHE IS DOING, AND MORE IMPORTANTLY, AT THE EVIDENTIARY HEARING, JUDGE PERRY TESTIFIES THAT HE DID ASK THOSE KINDS OF QUESTIONS OF HER. HE ASKED ABOUT CHILDHOOD. HE ASKED ABOUT INJURIES. HE ASKED ABOUT ABUSE, AND HE GOT NO INFORMATION, SO ALL HE HAD WAS THESE.

DESCRIBE FOR US EARLIER, YOU WERE ASKED ABOUT WHETHER OR NOT THIS WAS SORT OF A FAIRLY BIZARRE THING TO HAPPEN. DID THE EVIDENCE REVEAL THAT HE WAS LEADING A FAIRLY, QUOTE, NORMAL LIFE, REALLY, AT THE TIME THIS INCIDENT HAPPENED? THAT IS THAT HE HAD A JOB THAT HE HAD HAD FOR A WHILE?

YES. UM-HUM.

AND HAD A FAMILY.

YES.

AND THAT, REALLY, THERE WAS NOTHING OR YOU HELP ME. IS IT TRUE THAT THERE REALLY WAS NOTHING IN THOSE APPARENT CIRCUMSTANCES THAT INDICATED THAT HE HAD A PROBLEM? OF COURSE WHAT HE DID, YOU KNOW, BOTH WITH THE, APPARENTLY THE INDECENT EXPOSURE AND THEN, YOU KNOW --

CLEARLY WE DON'T KNOW WHAT HE MAY HAVE DONE THAT HE WAS NEVER CAUGHT FOR DOING, BUT HE WAS SEEMINGLY A FUNCTIONING MEMBER OF SOCIETY. HE WAS MARRIED. HE HAD A RELATIONSHIP WITH HIS STEPSON. THESE WERE CONSIDERED IN MITIGATION BY THE TRIAL

COURT, BECAUSE THAT IS REALLY ALL THERE WAS.

SO THAT WAS A SUPERFICIAL APPEARANCE HERE. IS THAT CORRECT?

YES, AND BECAUSE OF THAT, THAT WOULD, ALSO, LIMIT WHAT THE DEFENSE ATTORNEY'S THEORY COULD BE AT PENALTY PHASE, AND I THINK IF YOU LOOK AT HIS CLOSING, WHAT HE WAS GOING FOR WAS THIS ISN'T A DEATH CASE, THAN IS REALLY ESPECIALLY ALL HE WAS LEFT WITH, ONCE THE DEFENDANT, MIDPENALTY PHASE, IT IS VERY CLEAR ON THE RECORD, AND I BELIEVE THAT THE DEFENSE COUNSEL ARGUES DIFFERENTLY IN THEIR BRIEF, BUT IF YOU LOOK AT THE RECORD, IT IS VERY CLEAR THAT THE DEFENSE ATTORNEYS ARE CAUGHT OFF GUARD BY THE FACT THAT HE NOW WILL NOT TESTIFY. THEY HAD GONE INTO PENALTY PHASE THINKING THEY WERE GOING TO PUT THE DEFENDANT ON, AND HE REFUSED, AND THAT IS WHEN THE OTHER PROBLEMS ENSUED.

I GUESS A -- I GUESS WHAT I AM CONCERNED ABOUT IS WOULDN'T YOU HAVE WANTED TO COME UP BEFORE THE PENALTY PHASE BEGAN, BECAUSE ONCE YOU ARE IN THE MIDDLE OF IT, WITH SOME EXPLANATION TO THE JURY ABOUT WHY A SEEMINGLY NORMAL PERSON WOULD DO SOMETHING OUT OF CHARACTER. SOMETHING ABOUT A LIFELONG HISTORY OF DEPRESSION OR WHATEVER.

CERTAINLY.

AND THEN, IN LOOKING AT WHAT JUSTICE BARKETT SAID, SHE DIDN'T SAY THAT HE WAS UNCOOPERATIVE. WHAT SHE SAID IS I BELIEVE MORE MITIGATION COULD AND SHOULD HAVE BEEN PRESENTED. HOWEVER, HIS MENTAL CONDITION CALM NATURING HAD IN A SUICIDE -- CULMINATING IN A SUICIDE ATTEMPT TRUNCATED THE PENALTY PHASE, SO AT THAT POINT YOU HAVE GOT A DEFENDANT, NOW, WHO IS NOT REALLY UNCOOPERATIVE IN A CLASSIC SENSE THAT WE SEE. I MEAN, HE TALKED TO THE MENTAL HEALTH EXPERTS, BUT IS SOMEBODY THAT BECAME SUICIDAL.

WELL, I THINK --.

SO THEREFORE AGAIN, SHOULD FLAGS HAVE BEEN GOING UP AND, I MEAN, YOU KNOW, IN TERMS OF THAT THERE WAS MITIGATION TO PRESENT THAT WASN'T HARMFUL, BECAUSE NORMALLY WHEN WE THINK OF THE TWO-EDGED SWORD, WE THINK OF, WHEN YOU GET INTO THIS YOU ARE GOING TO HAVE TO GET INTO ALL OF THESE OTHER BAD THINGS THIS GUY DID. WELL, THIS STUFF, THE SCHOOL RECORDS, THE MILITARY RECORDS, BEING BRAIN DAMAGED, CERTAINLY WOULDN'T BE, DETRACT FROM SAYING HE WAS DOING THE BEST HE COULD WITH SOME LIMITED INTELLIGENCE, AND HE WAS A GOOD PROVIDER, BUT LOOK AT THIS GUY AS HAD PROBLEMS HIS WHOLE LIFE. HE IS, LEARNING DISABILITY, HE HAS GOT IN THE MILITARY, HE JUST REALLY TRIED TO DO IT BUT HE IS, YOU KNOW, NOT ALWAYS QUITE THERE. WHAT IS, WHY WOULDN'T THAT BE --

FIRST OF ALL, I DISAGREE WITH THE CHARACTERIZATION OF WHAT MITIGATION THEY EVENTUALLY COME UP WITH AT THE MITIGATION HEARING. I KNOW THERE IS NOTHING THERE, REGARDLESS OF IF YOU TAKE IT AT FACE VALUE. THEY ARE NOT SAYING HE IS BRAIN DAMAGED. THEY ARE SAYING HE HAS A LEARNING DISABILITY. NOBODY SAYS HE -- I THOUGHT THAT --

THE WORD BRAIN DAMAGE IS USED BUT THEY ARE ALL EXPERTS EQUIVOCATION ON EXPERTS SAYING HE IS IS BRAIN DAMAGED. DR. BEAVERS SAID HE HAS A LEARNING DISABILITY WHICH IS MILD, HE REPEATEDLY SAYS MILD. DR. MAYER QIF INDICATES THE TERM OF BRAIN DAMAGE OF SAYING IT IS REALLY A BRAIN IMPAIRMENT NOT SPECIFIC DAMAGE.

WHAT IS THE REASON WHY THIS CRIME OCCURRED? DO THEY GIVE A REASON?

NONE.

SO THEY DON'T REALLY RELATE THESE MULTIPLE PROBLEMS TO ANYTHING ABOUT THE CRIME?

DR. MAYER SAYS HE MAY POSSIBLY BE ACTING UNDER EXTREME DURESS, BUT AGAIN WE HAVE A DEFENDANT WHO DENIES TO THIS DAY KMIINGT THE CRIME, SO WE HAVE NO TRUE -- TO THIS DAY COMMITTING THE CRIME, SO WE HAVE NO TRUE EVIDENCE OF THE CRY. HE WAS CALCULATED AND PREMEDITATED IN CARRYING OUT THIS MURDER BY WAITING TO AMBUSH THIS GIRL AT HER PLACE OF BUSINESS AND FURTHER FOLLOWING UP WITH WHAT HE DID BY SWITCHING THE WEAPONS AND HE GOT AWAY WITH THIS FOR TWO YEARS. HE CONVINCED HIS WIFE AND STEPSON TO PROVIDE AN ALIBI FOR HIM BECAUSE THEY COULDN'T BELIEVE HE WOULD DO SUCH A THING, AND IF HIS OWN FAMILY MEMBERS DIDN'T BELIEVE IT, IT IS DIFFICULT FOR HIS DEFENSE ATTORNEY TO COME UP WITH SOME KIND OF EXPLANATION FOR IT WHEN HE DOES GO TO TWO EXPERTS WHO PROVIDE HIM WITH NOTHING BUT DAMAGING INFORMATION AND HE PERSONALLY GOES TO FIND WHAT SHOWS HIM A WINDOW AND HE CAN'T GET ANY INFORMATION FROM HIS FAMILY OR FRIENDS, SO --

THERE WAS SOME INFORMATION THAT THE DEFENDANT WAS UNCOOPERATIVE IN THE PENALTY PHASEA?

HE WRITES A NOTE THAT HE ATTEMPTS TO COMMIT SUICIDE TO HIS ATTORNEYS, APOLOGIZING TO THEM, BUT JUDGE PERRY SAID I DON'T KNOW WHAT HE WAS TALKING ABOUT, BECAUSE UP UNTIL THAT POINT I FOUND HIM TO BE COMPLETELY COOPERATIVE. IT WAS A SHOCK TO THEM THAT THIS SUICIDE ATTEMPT HAPPENED WHEN IT DID. NOBODY QUESTIONS THAT HE WAS DEPRESSED, BUT I DON'T THINK ANYBODY EXPECTED THAT KIND OF BEHAVIOR FROM HIM, AND HE HAD NO INDICATION OF ANY PREVIOUS SUICIDE ATTEMPTS AT THAT TIME. I THINK, YOU KNOW, ULTIMATELY WHAT YOU HAVE TO LOOK AT IS DID HE PROVIDE THE ADEQUATE PERFORMANCE OF A DEFENSE ATTORNEY, AND GIVEN THE COOPERATION LEVEL HE MET AT EVERY TURN, HE DID THE BEST HE COULD WITH WHAT HE HAD, AND EVEN IF HE DID HAVE THIS INFORMATION, WE WOULD SUBMIT CERTAINLY THAT IT WOULD NOT OUTWEIGH THE AGGRAVATORS THAT WERE PRESENTED.

CHIEF JUSTICE: THANK YOU.

THANK YOU.

I WANT TO START BY ADDRESSING WHETHER OR NOT MR. HODGES COOPERATED WITH HIS TRIAL COUNSEL. BECAUSE THE CIRCUIT COURT MADE THAT FINDING THAT HE THWARTED TRIAL COUNSEL'S EFFORTS, AND JUDGE PERRY, THE TRIAL ATTORNEY, STATED AT THE EVIDENTIARY HEARING, MR. HODGES DID NOT THWART MY EFFORTS, SO --

I THINK THE ORDER HAS BEEN CANDID IN SAYING THAT.

THE ORDER IS CONCLUSIVELY REBUTTED BY JUDGE PERRY'S TESTIMONY. I ALSO WANT TO POINT OUT ON THE DIRECT APPEAL RECORD AT PAGE 701-TO-702, THE COURT, JUDGE GRIFFIN SPEAKS TO MR. HODGES. WHEN MR. HODGES GETS UPSET AT THE PENALTY PHASE, HIS TRIAL ATTORNEYS SAY CAN WE HAVE A RECESS? WE WOULD LIKE TO TALK TO MR. HODGES. THE STATE IS TRYING TO REPRESENT THIS AS MR. HODGES WOULDN'T TESTIFY AND WAS REFUSING TO TESTIFY. IN FACT, THE EXACT OPPOSITE WAS WHAT WAS GOING ON. WHEN THE TRIAL ATTORNEYS COME BACK INTO COURT AND THEY SAY, OKAY, JUDGE, HE HAS CALMED DOWN. WE HAVE DISCUSSED EVERYTHING WITH HIM. HE IS FINE. THE COURT SAYS, MR. HODGES, YOU UNDERSTAND WHAT YOUR ATTORNEY JUST SAID? AND HE SAYS YES, SIR. AND HE DISCUSSED IT WITH YOU AND YOU HAVE TALKED ABOUT IT THOROUGHLY, IS THAT CORRECT? YES, SIR. YOU UNDERSTAND THAT YOU HAVE THE RIGHT TO TESTIFY. BUT ON THE ADVICE OF COUNSEL, YOU HAVE DECIDED NOT TO TESTIFY IN THE SECOND PHASE, AND HE SAYS YES, SIR. SO IT WAS EXACTLY WHAT THE STATE IS SAYING THE EXACT OPPOSITE OF WHAT HAPPENED, AND, ALSO, DURING THE MOTION FOR A NEW TRIAL, WHAT

HAPPENED WAS MR. HODGES'S TRIAL ATTORNEY TOLD THE JUDGE, YOUR HONOR, I DON'T THINK MR. HODGES WAS COMPETENT DURING THE ENTIRE PENALTY PHASE. I THINK THAT, I DON'T THINK HE WAS COMPETENT. I DON'T THINK HE KNEW WHAT WAS GOING ON. HE WAS OUT OF IT. THAT IS WHAT HE TELLS THE COURT. SO ANYTHING THAT HAPPENED FOLLOWING THE PENALTY PHASE, MOMENTS BEFORE HE ATTEMPTED TO COMMIT SUICIDE, I DON'T THINK THAT YOU CAN ATTRIBUTE THAT TO MR. HODGES'S RELATIONSHIP WITH HIS ATTORNEYS IN THE FIVE MONTHS PRECEDING THE TRIAL, WHERE HE GAVE THEM NAMES OF PEOPLE TO TALK TO. HE GAVE THEM PLACES WHERE HE HAD MEDICAL TREATMENT. YOU KNOW, SCHOOLS WHERE HE HAD ATTENDED SO THEY COULD SEEK RECORDS, AND CERTAINLY HE ALWAYS COOPERATED WITH COUNSEL, AND THAT WAS JUDGE PERRY'S TESTIMONY AT THE EVIDENTIARY HEARING.

CHIEF JUSTICE: YOUR OPPONENT SAYS THAT DR. MAYER'S DIAGNOSIS AND REVIEWS WERE REALLY NOT THAT SIGNIFICANTLY DIFFERENT, AND THAT THERE REALLY WAS NO GREAT NEW NEWS FOR HIM TO BASE ANY CHANGE OF OPINION ON. WOULD YOU ADDRESS THAT.

THAT IS ABSOLUTELY NOT TRUE. WHAT DR. MAYER SAID WAS I MISSED THE DIAGNOSIS AT THE TRIAL. AND I DIDN'T HAVE ANY RECORDS. I DIDN'T DO A PRORP EVALUATION. THE RECORDS, THE BACKGROUND -- PROPER EVALUATION. THE RECORDS, THE BACKGROUND MATERIALS, NOT JUST FAMILY STATEMENTS BUT THE ACTUAL MATERIALS WOULD HAVE GIVEN ME THE RED FLAGS, WOULD HAVE GIVEN ME THE ABILITY TO DO THE RIGHT EVALUATION AND TO FIND THE THINGS THAT I FOUND TODAY.

WHAT WOULD BE THE DIFFERENCE IN HIS DIAGNOSIS?

WHAT IS SIGNIFICANT IS HE, DIAGNOSED MR. HODGES WITH A LIFELONG BATTLE WITH DEPRESSION. HE HAS CATAGORIZED IT AS MAJOR DEPRESSIVE DISORDER, WHICH IS AN AXIS ONE DIAGNOSIS. DR. MARIN, JUST TO -- DR. MAYER, JUST TO REBUT WHAT THE STATE SAID, DR. MAYER

WHERE DOES THAT COME FROM?

I THINK THAT IS BASED UPON HIS ENTIRE REVIEW OF THE CASE, HIS INTERVIEWS WITH MR. HODGES.

ARE THERE A HISTORY OF MEDICAL RECORDS THAT THIS EXPERT DID NOT HAVE?

RECORDS OF SUICIDE ATTEMPTS THAT HE DIDN'T HAVE. THERE WERE RECORDS OF TREATMENT --

WHAT RECORDS OF THE SUICIDE ATTEMPTS?

MR. HODGES HAD HAD SOME MINOR INFRACTIONS IN WEST VIRGINIA, WHERE HE HAD BEEN INCARCERATED, AND THERE WERE RECORDS WHICH HAD SUICIDE ATTEMPTS THERE. AT ONE POINT HE SLASHED HIS WRISTS. AT ANOTHER POINT HE DRANK DISINFECTANT, AND THEN THERE WERE ALSO FAMILY MEMBER BACKGROUND MATERIALS THAT TALKED ABOUT MR. HODGES'S DEPRESSION, CRASHED HIS CAR INTO A WALL AND DOING THINGS LIKE THAT, WHICH DR. MAYER CATAGORIZED AS VERY SORT OF SELF-DESTRUCTIVE BEHAVIOR, AND HE TOOK THAT TO MEAN THAT THOSE WERE SUICIDE ATTEMPTS.

DO WE HAVE THOSE RECORDS, AGAIN, IN THIS RECORD?

YES, YOUR HONOR. IN TERMS OF JUST A COUPLE OF OTHER THINGS ABOUT THE FAMILY, IT DOESN'T, KAREN TUCKER THAT, IS NOT THE TESTIMONY AT TRIAL, THAT SHE REFUSED TO COME. WHAT THE RECORD SAYS IS SHE JUST HAD A CHILD. IF SHE CAN GET DOWN AND BACK AS QUICKLY AS POSSIBLE, SHE NEEDS TO DO THAT. TRIAL COUNSEL --

IF SHE CAN GET DOWN AND BACK WITHIN A DAY AND SHE WAS COMING FROM WEST VIRGINIA AND SHE COULDN'T FLY.

SHE DIDN'T SAY I COULDN'T FLY. SHE SAID I WOULD RATHER NOT FLY BUT IF YOU CAN GET ME DOWN AND BACK IN ONE DAY, I WILL COME TO THE TRIAL, AND NO ONE EVER FOLLOWED UP WITH HER. NO ONE EVER TRIED TO MAKE IT HAPPEN.

HOW WAS THAT TO BE ACCOMPLISHED FROM WEST VIRGINIA DOWN AND BACK IN ONE DAY AND HER TESTIFY? AT THE EVIDENTIARY HEARING WE BROUGHT HER DOWN ONE EVENING AND SHE WAS OUT THE NEXT MORNING, SO SHE WAS ESSENTIALLY OUT THE NEXT DAY,, IN ONE DAY, AND THEY COULD HAVE PROVIDED A AFFIDAVIT AND UNDER THE CIRCUMSTANCES THAT SHE WAS IN WHERE SHE HAD JUST HAD A CHILD, CAN WE TAKE HER DEPOSITION, CAN WE PERPETUATE TESTIMONY? SHE HAD CRITICAL COMPELLING EVIDENCE THAT WAS JUST NEVER HEARD BY THE JURY, AND IF YOU LOOK AT THOSE NOTES, IT IS CLEAR THAT THEY NEVER ASKED HER THOSE QUESTIONS. THEY NEVER GOT TO THE EVIDENCE WERE TO BEGIN WITH. ALL THEY TALKED ABOUT WAS TRAVEL ARRANGEMENTS.

WHAT ABOUT, WHEN DID THEY TALK TO THE MOTHER?

JUDGE PERRY KNEW A PHONE CALL HAD HAPPENED WITH THE MOTHER. HE DIDN'T RECALL IF IT WAS BETWEEN HE AND THE MOTHER OR THE INVESTIGATOR AND THE MOTHER. THE NOTES FROM THE INTERVIEW SHOWED THAT SHE STARTED PROVIDING INFORMATION. SHE SAID THAT MR. HODGES HAD HAD A SERIOUS CAR ACCIDENT WHEN HE WAS FIVE YEARS OLD. HE HAD FALLEN OUT OF THE CAR. JUDGE PERRY DIDN'T NOTE IF HE EVER DID A SUBSTANTIVE INTERVIEW WITH HER UNTIL SHE CAME TO FLORIDA, BUT THE ONLY INTERVIEW HE REMEMBERED WITH GEORGE HODGES'S FATHER WERE AFTER HE ATTEMPTED TO COMMIT SUICIDE, THE FATHER APPROACHED MR. PERRY AND ASKED HIM CAN I HAVE MY GUN BACK THAT HAD BEEN CONFISCATED BY THE POLICE, SO HE NEVER DID AN INTERVIEW WITH THE FATHER THAT HE CAN RECALL AND THAT WAS HIS ONLY REMEMBRANCE OF ANY KIND OF CONVERSATION THAT HE CAN RECALL WITH THE FATHER. I SEE THAT MY TIME HAS COME TO AN END. I WOULD JUST ASK THIS COURT TO REVERSE THE LOWER COURT'S ORDER, AS IT IS NOT SUPPORTED BY THE RECORD.

CHIEF JUSTICE: THANK YOU BOTH VERY MUCH.