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## **F.W. Cummings-El v. State of Florida**

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING, CUMMINGS-EL VERSUS STATE.

GOOD MORNING. MAY IT PLEASE THE COURT. SARA DYEHOUSE ON BEHALF OF THE APPELLANT, FREDERICK CUMMINGS-EL. WITH ME TODAY IS CO-COUNSEL TONY MOSS. YOUR HONORS, THIS CASE PRESENTS A PERVASIVE PATTERN OF INEFFECTIVE ASSISTANCE OF COUNSEL. THAT PATTERN BEGAN THE MOMENT THEODORE MASTICE ENTERED THIS CASE AND UNFORTUNATE NATALIE IT DID NOT -- UNFORTUNATELY IT DID NOT END UNTIL DIRECT APPEAL. WHILE THIS CASE BEGAN AS A MURDER CASE, IT ELEVATED TO A CAPITAL MURDER CASE. AN ENTIRE YEAR PASSED BEFORE MR. MASTICE CONVERSED WITH HIS CLIENT ABOUT THE PENALTY PHASE. GRANTED AT THE TIME, MR. HE WILL CUMMINGS WAS NOT -- MR. CUMMINGS-EL WAS NOT PARTICULARLY INTERESTED INVESTGATION, AS HE WAS FOCUSED ON THE GUILT PHASE, BUT AS MR. MASSTIS TESTIFIED AT THE EVIDENTIARY HEARING, MR. CUMMINGS-EL WAS NOT STRIDEENT ABOUT LITIGATION. HE SIMPLY WAS MORE FOCUSED ON THE GUILT PHASE. NEVERTHELESS, BECAUSE MR. CUMMINGS-EL WAS, IN MR. MASTICE'S OPINION, UNCOOPERATIVE IN THIS REGARD, MR. MASTICE ASKED THE TRIAL COURT TO HAVE A CONVERSATION WITH MR. CUMMINGS ABOUT THE POSSIBILITY OF WAVING MITIGATION.

THE TRIAL JUDGE IN THIS CASE WAS ALSO THE POSTCONVICTION JUDGE, CORRECT?

THAT'S CORRECT.

AND THE TRIAL JUDGE HERE LAID SOME DEGREE OF STRESS IN THE POSTCONVICTION, ON THE FACT THAT MR. CUMMINGS-EL WAS NOT, DID, HAD INDICATED THAT HE DID NOT WANT HIS FAMILY CONTACTED. CORRECT?

THE TRIAL -- CORRECT? THE TRIAL JUDGE DID THAT.

THE TESTIMONY WAS, MR. CUMMINGS-EL DID NOT WANT HIS FAMILY BEGGING FOR HIS LIFE FOR A CRIME HE DID NOT COMMIT. IT WAS NOT THAT MR. CUMMINGS-EL DID NOT WANT HIS FAMILY CONTACTED. IN FACT, AT A JANUARY 4 HEARING, THREE WEEKS BEFORE TRIAL, MR. CUMMINGS TOLD THE TRIAL COURT THAT MR. MASTICE WAS WELCOME TO INTERVIEW THE FAMILY AND ANYBODY ELSE HE WANTED TO ENTER RUE AND INVESTIGATE IN RELATION TO MITIGATION. TWICE HE TOLD THE COURT THAT MR. MASTICE WAS WELCOME TO INVESTIGATE WHATEVER HE WANTED TO. BUT MR. MASS TOES DID NOTHING, AND AGAIN, WHEN THE MENTAL HEALTH EXPERT, DR. STANFORD JACOBSON WAS APPOINTED TO EVALUATE COMPETENCY TO WAIVE, DR. JACOBSON PUT IN HIS REPORT THAT, ALTHOUGH MR. CUMMINGS WAS INCLINED TO WAIVE MITIGATION, THAT HE COULD VERY WELL CHANGE HIS MIND IN THE FUTURE. THAT PUT MR. MASTOS ON NOTICE. OKAY. BESIDES MR. CUMMINGS'S OWN STATEMENTS AT THE HEARING, THAT OR THE FROM DR. JACOBSON PUT MR. MASTOS ON NOTICE THAT THIS WAS NOT AN ABSOLUTE, THAT MR. CUMMINGS WAS NOT ADAMANT ABOUT WAIVING MITIGATION, AND IN FACT THIS IS NOT A WAIVER PHASE.

YOU WOULD AGREE WITH ME THAT, WOULD YOU NOT, THAT THE TRIAL JUDGE, IN THIS DETAILED ORDER, INDICATED THAT HIS OBSERVATIONS OF THIS DEFENDANT WAS THAT THIS DEFENDANT WAS THE VERY STRONG-WILLED PERSON AND WAS --

AND REMAINED SO, YES.

AND IN LETTING HIS WILL BE KNOWN THROUGHOUT THIS TRIAL, AND IN PROCEEDINGS. WOULD YOU NOT? I MEAN THAT WAS --

I WOULD AGREE WITH YOU.

THAT WAS THE TONE THAT I READ FROM JUDGE FARINA'S ORDER.

YES, SIR.

AND THAT THAT DID INFLUENCE JUDGE FARINA'S ASSESSMENT OF WHETHER COUNTRIES HE WILL -- COUNSEL FULFILLED THE REQUIREMENTS OF STRICKLAND, IN SO FAR AS THE PREPARATION FOR THE PENALTY PHASE.

YES. I WOULD AGREE THAT MR. CUMMINGS IS RATHER STRONG WILLED AND WAS PARTICULARLY CONCERNED WITH THE GUILT PHASE OF THIS TRIAL. BUT THE FACT OF THE MATTER IS THIS IS NOT A WAIVER CASE. HE DID NOT WAIVE MITIGATION EVER, IN FACT, HE GETS TO THE PENALTY PHASE, AND HE ALLOWS MR. MASTOS TO PUT ON TWO OF HIS SISTERS. UNFORTUNATELY, BECAUSE MR. MASTOS HAD DONE ABSOLUTELY NOTHING TO PREPARE FOR THIS CASE, THOSE WITNESSES TESTIMONY WAS DISASTROUS. ABSOLUTELY DISASTROUS TO MR. CUMMINGS PENALTY PHASE CASE. IT IS NOT A REASONABLE STRATEGY TO PUT THE SISTERS ON THE STAND AND ASK THEM WHETHER MR. CUMMINGS IS A DANGEROUS MAN AND ELICIT A NEGATIVE RESPONSE. HE HAS JUST BEEN CONVICTED EVERYDAY A BRUTAL, VIOLENT MURDER, AND HE HAS THREE PRIOR VIOLENT FELONIES. THAT IS JUST NOT A REASONABLE STRATEGY. NOR WAS IT A REASONABLE STRATEGY, AS JUDGE FARINA FOUND IN HIS ULTIMATE POSTCONVICTION ORDER, THAT THIS EVIDENCE WOULD NOT HAVE BEEN HELPFUL, AND THE PROBLEM WITH THAT RATIONALE IS HOW CAN YOU MAKE A STRATEGIC DECISION POST WHO CAN, THAT THE EVIDENCE WOULD NOT HAVE -- POST HOC, THAT THE EVIDENCE WOULD NOT HAVE BEEN HELPFUL, WHEN YOU DIDN'T KNOW IT EXISTED?

WHERE DO WE COME DOWN? I MEAN, HERE WE HAVE GOT A SITUATION UNLIKE A LOT OF SITUATIONS THAT WE HAVE CONFRONTED IN THE THAT THIS IT IS FOLLOWING A EVIDENTIARY HEARING, AND THE TRIAL JUDGE COMES TO THE CONCLUSION THAT WHAT DID OCCUR HERE WAS A MATTER THAT WAS A DECISION, CONSCIOUS DECISION MADE BY THE TRIAL ATTORNEY. I MEAN, ISN'T THAT PART OF WHAT THIS COURT SHOULD PAY DEFERENCE TO? THE TRIAL JUDGE ASSESSMENT?

I SUBMIT NO, THAT THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S DECISION.

SO IS YOUR ARGUMENT THAT THERE IS NOT COMPETENT SUBSTANTIAL EVIDENCE?

TO SUPPORT THE TRIAL COURT'S FINDINGS, THAT IS CORRECT.

HOW ABOUT NARROWING YOUR FOCUS HERE? ARE YOU TALKING ABOUT THE FAILURE TO INVESTIGATE MITIGATION, OR ARE YOU TALKING ABOUT THE FAILURE, AFTER LEARNING, THROUGH THE LIMITED INVESTIGATION THAT COUNSEL DID DO, WHAT HE LEARNED, AND THEN MAKING A TACTICAL DECISION ABOUT HOW TO USE IT? WOULD YOU NARROW YOUR FOCUS, AS FAR AS WHAT YOU SEE AS THE MAJOR DIFFICULTY WITH COUNSEL'S INADEQUACY? IN THIS CASE.

YES, SIR. THE MAJOR DIFFICULTY IS THAT HE DID ABSOLUTELY NOTHING. THE TWO SISTERS HE PUT ON, HE PUT ON AFTER SPEAKING TO THEM FOR A MERE FEW MOMENTS IN THE CORNER OF THE COURTROOM, PRIOR TO THEIR TESTIMONY. HE HAD NOT EVER SPOKEN TO THE FAMILY IN THIS CASE.

ALL RIGHT. WELL, SO, YOU ARE FOCUSING ON THE FAILURE TO INVESTIGATE. IS THAT IT? IN OTHER WORDS THAT YOU ARE SAYING THAT THERE WAS A COMPLETE FAILURE HERE.

COMPLETE.

TO INVESTIGATE AND LEARN WHAT THERE WAS OUT THERE TO BE LEARNED, TO BE PRESENTED OR NOT PRESENTED, AND SO THAT COUNSEL NEVER GOT TO THE POINT WHERE HE COULD FAIRLY EVALUATE WHAT WAS THERE.

NOR COULD MR. CUMMINGS.

ABOUT HOW TO PROCEED. IS THAT --

THAT IS JUST IN MY -- THAT IS THE GIST OF MY ARGUMENT, YES, MR. CUMMINGS, EVEN IF HE HAD ULTIMATELY DECIDED TO WAIVE MITIGATION, THIS COURT HAS SAID, REPEATEDLY THAT, IT IS THE LAWYER'S OBLIGATION TO GO OUT AND FIND MITIGATION. OKAY. INVESTIGATE THE CASE ZEALOUSLY. PRESENT THE EVIDENCE TO THE CLIENT. SAY HERE IT IS. HERE IS WHAT IT MEANS. HERE IS HOW IT RELATES TO THE LAW OF MITIGATION. NOW, MR. CLIENT, YOU HAVE THE CHOICE, OKAY, TO MAKE A KNOWING, INTELLIGENT, VOLUNTARY WAIVER OF MITIGATION, BUT ONLY WHEN THE CLIENT UNDERSTANDS WHAT IS THERE. IN THIS CASE, THERE WAS NO INVESTIGATION.

WHAT DID, MR. MASTOS TESTIFIED AT THE POSTCONVICTION EVIDENTIARY HEARING, THAT CORRECT?

YES, HE DID.

WHAT WAS MASTOS'S EXPLANATION OF WHAT HE DID? IN OTHER WORDS, DID HE CLAIM I MADE A FULL INVESTIGATION, AND THEN I JUST MADE A DECISION, JUST USE THE TWO SISTERS, OR DID HE CLAIM THAT, AT ALL TIMES, MY CLIENT ADAMANTLY REFUSED TO LET ME INVESTIGATE, OR TO INTERVIEW HIS FAMILY OR WHATEVER? I AM JUST, I AM PUTTING THOSE OUT AS POTENTIAL HYPOTHETICALS, REALLY, WHAT WAS MR. MASTOS'S TESTIMONY, WITH REFERENCE TO THE WORK THAT HE DID WITH REFERENCE TO ANTICIPATING THE PENALTY PHASE?

MR. MASTOS TESTIFIED THAT MR. CUMMINGS WAS NOT INCLINED TO PRESENT MITIGATION. HE WANTED TO MAINTAIN SOME SEMBLANCE OF A CIVIL RELATIONSHIP WITH A CLIENT, SO MR. MASTOS BELIEVED THAT, IN ORDER TO DO THAT, HE SHOULD NOT GO OUT AND INVESTIGATE MITIGATION, WHEN HIS CLIENT, WHEN HE PERCEIVED THAT HIS CLIENT DID NOT WANT TO, QUOTE, BEG FOR HIS LIFE. SO HIS TESTIMONY WAS PRETTY MUCH HE LATCHED ON TO THE DEFENDANT'S DISINCLINATION TO PRESENT MITIGATION AND DID NOTHING AND NEVER INTENDED TO DO ANYTHING, AND IN FACT, AT THE EVIDENTIARY HEARING, I BELIEVE IT WAS COLLATERAL COUNSEL WHO ASKED HIM, IS THERE ANY REASON TO BELIEVE THAT THE FAMILY WOULD NOT HAVE SPOKEN TO YOU, HAD YOU MADE AN ATTEMPT TO CONTACT THEM, AND THE ANSWER WAS NO.

IS, WELL, HIS TESTIMONY ACTUALLY, WAS THAT HE BELIEVED THAT, IF HE ATTEMPTED TO DO THAT, THAT IT WOULD BREAKDOWN THE COMMUNICATION THAT HE HAD BETWEEN HE AND HIS CLIENT.

AND HE, ALSO, TESTIFIED THAT, WHEN HE MOVED TO HAVE DR. JACOBSEN EVALUATE -- DR. JACOBSON EVALUATE THE DEFENDANT, THAT THAT ENDED THE RELATIONSHIP BETWEEN THEM THAT, THE DEFENDANT WAS, AT THAT POINT, UPSET WITH HIM AS IT WAS, SO I UNDERSTAND THAT HE WANTS TO MAINTAIN A RELATIONSHIP WITH HIS CLIENT, BUT TO WHAT END? I MEAN, WE ARE TALKING ABOUT A COMPLETE LACK OF REPRESENTATION.

WELL, JUDGE FARINA DOESN'T COME TO THAT CONCLUSION, IS THE PROBLEM I AM HAVING. I MEAN, HE COMES TO THE CONCLUSION THAT, IN SEEING THIS CLIENT, HAVING THESE PRESENTATIONS MADE IN THE COURTROOM BEFORE HIM, THAT THE DEFENDANT DID, AS HE SAYS,

GRUDGINGLY PERMIT THE TRIAL COUNSEL TO CONTACT THE SISTERS. I UNDERSTAND THAT THE CONTACT WAS MADE IN THE HALL, AS THEY CAME TO THE COURTROOM, BUT THEN HE, JUDGE FARINA DRAWS A CONCLUSION THAT THE TESTIMONY OF THE PEOPLE, THE ADDITIONAL FAMILY MEMBERS, WAS ESSENTIALLY THE SAME AS THE TESTIMONY THAT WAS PUT ON BY THESE TWO SISTERS THAT DID TESTIFY. ISN'T THAT WHERE THAT ENDED UP?

THAT WAS THE TRIAL COURT'S CONCLUSION, YES. AND KIND OF A TWO-PRONGED STATEMENT, SO LET ME TAKE THE FIRST ONE, AND THAT IS THE DEFENDANT, MR. CUMMINGS NEVER PREVENTED COUNSEL FROM INVESTIGATING MITIGATION. OKAY. THAT IS WHAT JUDGE FARINA ULTIMATELY DECIDED. THAT MR. CUMMINGS PREVENTED COUNSEL FROM INVESTIGATING, AND THAT IS SIMPLY NOT SUPPORTED BY THE RECORD. HE DID NOT PREVENT HIM. OKAY. MR. MASTOS SIMPLY CHOSE NOT TO INVESTIGATE AND DID NOT INVESTIGATE. OKAY.

WELL, IT'S TRUE THAT THE DEFENDANT DID NOT COOPERATE IN THAT INVESTIGATION, AND HE WAS VERY GUARDED ABOUT HIS FAMILY BACKGROUND, WHEN MR. MASTOS INQUIRED? I MEAN, HE WASN'T FALLING ALL OVER HIMSELF TO PRESENT MITIGATING EVIDENCE, AND BEGGING HIS COUNSEL TO DO THAT, RIGHT?

THAT IS CORRECT. AND I AM NOT STANDING HERE TELLING YOU THAT MR. CUMMINGS WAS ENTIRELY COOPERATIVE WITH HIS ATTORNEY. HE WAS NOT. HOWEVER, MR. MASTOS TESTIFIED AT THE EVIDENTIARY HEARING, THAT NOT ONLY DID HE HAVE NO REASON TO BELIEVE THAT THE FAMILY WOULDN'T SPEAK TO HIM, BUT THAT HE JUST SIMPLY WANTED TO RELY UPON HIS CLIENT'S IDEA OF WAIVING MITIGATION. HE LATCHED ONTO THAT IDEA, AND THAT IS WHAT HE WENT WITH, AND THAT IS WHERE HE WAS STUCK.

YOU ARE SAYING THERE IS EVIDENCE HE SHOULD HAVE PRESENTED THAT HE DIDN'T PRESENT?

I AM SORRY?

CAN YOU EXPLAIN WHAT MITIGATING EVIDENCE THAT HE SHOULD HAVE PRESENTED THAT HE DID NOT PRESENT.

THERE WAS INCREDIBLE WEALTH, AND I THINK I SPENT MANY, MANY PAGES OF MY BRIEF RECOUNTING THAT EVIDENCE, BUT THE GIST OF IT IS HIS ENTIRE PSYCHO SOCIAL HISTORY THAT BEGINS FROM HIS BIRTH AS THE SIXTH OF TWELVE CHILDREN TO A MOTHER THAT WAS NEVER HOME, AND WHEN SHE WAS HOME, SHE WOULD BEAT THE CHILDREN REPEATEDLY WITH WHATEVER SHE HAD AVAILABLE TO HER. THESE CHILDREN, INCLUDING MR. CUMMINGS, GREW UP IN ABJECT POVERTY, AND HE LEARNED FROM THE MOMENT HE WAS BORN, TO SURVIVE. TO SURVIVE ANY WAY HE COULD POSSIBLY SURVIVE.

WHO WOULD HAVE TESTIFIED TO THESE FACTS? WOULD IT HAVE BEEN HIS SIBLINGS?

YES.

DIDN'T HIS SIBLINGS ALSO HAVE CRIMINAL RECORDS?

YES.

AND WOULDN'T THAT HAVE COME OUT?

SURE.

OKAY. AND DIDN'T MR. MASTOS MAKE A STRATEGIC DECISION NOT TO PRESENT THOSE WITNESSES, BECAUSE HE THOUGHT IT WOULD HAVE DONE MORE HARM THAN GOOD?

NO. ABSOLUTELY NOT. THAT WAS A POST HOC RAGSIZATION FOR HIS ACTIONS. HE DIDN'T KNOW --

CAN WE ENGAGE IN THE POST HOC RAGSIZATION IN DETERMINING WHETHER THERE WAS PREJUDICE OR NOT? WE STILL HAVE TO DETERMINE PREJUDICE, EVEN IF WE REACH INEFFECTIVE ASSISTANCE.

THAT IS VERY TRUE.

IN THAT SENSE WE CAN HAVE POST HOC RAGSIZATION. I MEAN, WE CAN LOOK BACK AND SEE WHAT WOULD HAVE HAPPENED.

THAT IS TRUE, BUT IT IS NOT, IT IS NOT FAIR FOR MR. MASTOS TO SAY, IN POSTCONVICTION, WELL, YEAH, I DIDN'T KNOW ANYTHING ABOUT THIS EVIDENCE. I DIDN'T INVESTIGATE IT. I DIDN'T DISCOVER T I DIDN'T KNOW ANYTHING. BUT YOU KNOW WHAT? NOW THAT YOU HAVE TOLD ME ABOUT IT, WELL, I PROBABLY HAVE USED IT ANYWAY AND IT WOULDN'T HAVE MADE ANY DIFFERENCE. THAT IS JUST NOT A FAIR ASSESSMENT OF HOW PREJUDICE IS DETERMINED.

WELL, BUT THE TRIAL COUNSEL MADE A SPECIFIC FINDING IN HIS ORDER, TRIAL COUNSEL IS NOT EFFECTIVE FOR FAILING TO PRESENT BACKGROUND INFORMATION, WHICH WOULD HAVE ALLOWED THE PRESENTATION OF DAMAGING OR DROINGTORY EVIDENCE, INCLUDING VIOLENT -- DEROGATORY EVIDENCE, INCLUDING VIOLENT TENDENCIES, IN REBUTTAL. AND HE IS FOUND THAT THE FAMILY MEMBERS, BY EVIDENTIARY HEARING, WOULD HAVE EXPOSED THE JURY TO PARTS OF THE DEFENDANT'S CRIMINAL RECORD THAT WERE NOT PRESENTED AT TRIAL.

I DON'T KNOW THAT THAT IS TERRIBLY TRUE. THE JURY KNEW ABOUT THE THREE PRIOR VIOLENT FELONIES. IT IS TRUE THAT MR. CUMMINGS HAD OTHER RUN-INS WITH THE LAW AND IT WOULD HAVE COME OUT, BUT THE WHOLE POINT OF THIS IS THE JURY WAS ENTITLED TO KNOW WHO THIS PERSON WAS! WHO MR. CUMMINGS WAS, HOW HE CAME TO BE THERE, HOW HE CAME TO BE CHARGED WITH AND CONVICTED OF THIS VIOLENT FIRST-DEGREE MURDER. AND THE JURY KNEW ABSOLUTELY NOTHING.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU OF YOUR REBUTTAL TIME, IF YOU WANT TO STOP HERE.

YES. THANK YOU. I WOULD.

CHIEF JUSTICE: THANK YOU

GOOD MORNING. MY NAME IS STEVE PARRISH, ASSISTANT ATTORNEY GENERAL FOR THE STATE OF FLORIDA. I THINK MR. MOSS TOES WOULD HAVE HAD TO GET THAT LITTLE BIT OF TESTIMONY BEFORE THE JURY, AND WE WILL TELL YOU THAT THE EVIDENCE THAT WAS PUT ON BY THOSE TWO SISTERS WAS THE ABSOLUTE BEST LIGHT THAT THIS PARTICULAR DEFENDANT COULD HAVE POSSIBLY BEEN PUT IN BEFORE THIS JURY. NOW, THREE WEEKS PRIOR TO THE TRIAL ON THE GUILT PHASE OF THIS CASE, HIS SITUATION WITH THE DEFENDANT WAS SUCH THAT, HE WAS NOT BEING ALLOWED TO, HE WAS NOT BEING GIVEN TO -- BEING GIVEN PERMISSION TO DO ANY KIND OF INVESTIGATING IN THIS CASE. THE QUESTION OF WHERE IS THE LIST ON THE SENTENCING PHASE, THE WITNESS LIST, AND THAT IS WHEN IT WAS BROUGHT UP THAT THE CLIENT WAS BEING RECALCITRANT AND WOULD NOT ALLOW IT.

WHAT WAS THE TESTIMONY FROM MR. MASTOS THAT THE CLIENT WOULD NOT ALLOW IT? IN OTHER WORDS, CITE, FOR INSTANCE, WHAT YOU BELIEVE TO BE THE STRONGEST TESTIMONY THAT HE OFFERED, TELLING MR. MASTOS NOT TO CONTACT HIS FAMILY OR NOT TO DO ANYTHING ON MITIGATION? WHATEVER IT WAS, WHAT IS THE STRONGEST EVIDENCE TO REALLY SUPPORT TRIAL COURT'S CONCLUSION?

WELL, I THINK THE STRONGEST EVIDENCE COMES FROM MR. MASTOS AND FROM THE ACCUSED, BUT WHAT MR. MASTOS TESTIFIED TO WAS THAT HE EXPLAINED AGGRAVATORS AND MITIGATORS TO HIS CLIENT AND THAT HIS CLIENT DIDN'T WANT HIM TO PUT ON A CASE, HE DIDN'T WANT ANYBODY BEGGING FOR HIS LIFE. IN DECEMBER '99, SIX YEARS AFTER THE EVIDENTIARY HEARING, THE CLIENT IS STILL TELLING PEOPLE THAT HE DID NOT WANT LIFE IN PRISON, THAT HE DID NOT WANT MITIGATION PUT ON IN HIS CASE. WHAT HE IS SAYING IS HE DOES NOT WANT TO SPEND LIFE IN PRISON. THAT IS WHAT HE TOLD THE COURT AND WHAT HE TELLS SIX YEARS AFTER THE FACT, WHEN HE STILL SIGNED THE WAIVERS OF MR. REISENBORNE, THE NEW COUNSEL THAT APPEARED ON THE NEW HEARING THAT IS THE SUBJECT MATTER.

BUT IT IS CORRECT, AS YOUR OPPONENT SAYS, THAT WHAT HAPPENED HERE WAS THAT, IN JANUARY, RIGHT BEFORE THE TRIAL, IN OPEN COURT SESSION, THE DEFENDANT SAYS, OKAY, HE CAN TALK TO ANYBODY HE WANTS TO. THEN, WHAT HAPPENS IS THAT MR. MASTOS DOESN'T TALK TO ANYBODY. UNTIL, AND DOESN'T TRY TO CALL THEM. HE, IN FACT, AT THAT POINT, TELLS THE DEFENDANT, YOU CAN HAVE THEM CALL ME IF YOU WANT TO.

MR. MASTOS TOLD HIM HE COULD HAVE THEM CALL HIM, BUT I THINK YOU HAVE TO READ IT IN CONTEXT.

BUT HE DIDN'T INITIATE ANY --

I THINK YOU HAVE TO TAKE IT IN CONTEXT, THE WHOLE HEARING, NOT JUST THAT THE DEFENDANT EVENTUALLY CONCEDED TO THE COURT'S PRESSURE THAT HE CAN GO OUT AND DO THIS. HE HAD CONCEDED THAT THAT WAS GRUDGINGLY GIVEN TEN OR AN TONE OF THAT WAS IN NO WAY PERMISSION TO GIVE HIM CARTE BLANCHE TO GO OUT AND DO ANYTHING, AND IN FACT DAYS LATER, WHEN HE WAS TALKING TO DR. JACOBSON WHETHER THAT WAS A VOLUNTARY THING, HE AGAIN FLAT-OUT TOLD DR. JACOBSON THAT HE DIDN'T WANT FAMILY MEMBERS TO TESTIFY ON HIS BEHALF. PERIOD. COUNSEL SAID THAT HE MIGHT CHANGE HIS MIND. THAT WAS NOT THE DEFENDANT SAYING HE COULD CHANGE HIS MIND. THAT WAS THE DOCTOR SAYING THE ODDS AS A HUMAN BEING ARE THAT HE COULD CHANGE HIS MIND, BUT MR. MASTOS TESTIFIED THAT HE WAS AN ARTICULATE, INTELLIGENT INDIVIDUAL, AND HE WAS SORRY HE COULDN'T MAKE HIM HIS LAW CLERK, BECAUSE HE REVIEWED THE DEPOSITIONS OF THE TRIAL AND POINTED OUT INCONSISTENCY IN THE TESTIMONY AND THERE WAS NOTHING TO BELIEVE THAT HIS CLIENT DIDN'T HAVE MENTAL CAPACITY, UNTIL SUCH TIME AS HE DUG IN AND BECAME ADAMANT. IT IS TRUE HE WASN'T AS -- AND BECAME ADAMANT. IT IS TRUE HE WASN'T AS STRIDENT, BECAUSE HE WAS FOCUSED ON THE GUILT PORTION OF THE TRIAL, BUT IT WAS TRUE THAT HE DIDN'T ALLOW HIS COUNSEL TO DO ANY TYPE OF MITIGATION OR DID NOT WANT HIM TO DO ANY MITIGATION.

WHAT WAS THE SEQUENCE OF EVENTS HERE -- WHAT WAS THE SEQUENCE OF EVENTS HERE, IF YOU COULD TELL ME FROM THE RECORD. THE JURY CAME BACK WITH A GUILT DETERMINATION, AND THEN THERE WAS AN INDICATION THAT CUMMINGS-EL SAID SOMETHING TO THE EFFECT THAT HE WANTED TO GO RIGHT AHEAD.

HE WANTED TO WAIVE HIS MITIGATION PHASE, AND THE JUDGE BASICALLY DELAYED IT FOR TWO WEEKS, BECAUSE HE DIDN'T WANT HIM TO MAKE A --

WHEN DID THIS STATEMENT BY CUMMINGS-EL THAT HE COULD CONTACT THE FAMILY OCCUR? WAS IT AFTER THE GUILT PHASE OR WAS IT BEFORE THE GUILT PHASE?

THE COMMENT TO THE COURT ABOUT THE, YEAH, HE CAN GO AHEAD AND CONTACT MY FAMILY, WAS THREE WEEKS PRIOR TO THE GUILT PHASE.

ALL RIGHT. OKAY.

THREE WEEKS PRIOR TO THE GUILT PHASE, BUT LIKE I SAID, TWO DAYS AFTER THAT HE TOLD DR. JACOBSON I AM NOT LETTING HIM CALL MY FAMILY, PERIOD, SO IT STRICTLY MAKES IT CLEAR THAT YOU HAVE A DUTY, BUT THAT DUTY IS SHAPED BY WHAT YOUR CLIENT ALLOWS YOU TO DO, AND IN THIS CASE THE CLIENT DID NOT WANT TO PUT ON A MITIGATION CASE, AND FRANKLY HE IS NOT INTERESTED IN A MITIGATION CASE AS WE STAND HERE TODAY, TO ALL OF OUR KNOWLEDGE. HE WANTS TO BE ACQUITTED EVERYDAY THIS CRIME. HE DOES NOT WANT LIFE IMPRISONMENT AND HAS MADE THAT PAINFULLY CLEAR SINCE THE CONVICTIONS THAT HE DOES NOT WANT AND CANNOT DO LIFE IN PRISON. HE WOULD RATHER DIE. IT IS NOT RELEVANT TO SHOW, BUT IT IS RELEVANT TO SHOW THE DEPARTMENT AND DemeanOR OF THIS DEFENDANT -- THE DEPTH AND DemeanOR OF THIS DEFENDANT, AFTER THE FINDINGS CAME BACK AND HE STILL DID NOT WANT TO PUT ON A MITIGATION CASE. THE JUDGE SAID LET'S TAKE A COUPLE OF WEEKS AND HE THEN CHANGED HIS MIND AND BASICALLY ALLOWED MR. MASTOS TO PUT ON THE TWO SISTERS AND THEY TESTIFIED ABOUT HOW HE WAS A LOVING FATHER AND HAD CLOSE FAMILY AND STRONG FAMILY SUPPORT AND ONE OF THE SISTERS, AND MOST IMPORTANTLY HE INTRODUCED THREE OF HIS CHILDREN AT THE TRIAL, WHO BY THE WAY DID NOT WANT TO TESTIFY, ACCORDING TO MR. MASTOS'S TESTIMONY AT THE 3.850 HEARING, WHICH INDICATES, OBVIOUSLY, HE DID TALK TO THEM. GRANTED HE TALKED TO THEM THAT MORNING OF THE SENTENCING HEARING, BUT THE POINT OF THE MATTER IS HE DID TALK TO THEM. HE DID PUT THEM ON THE STAND. THEY PUT THE MITIGATING EVIDENCE BEFORE THEM, AND I WOULD SUGGEST TO YOU THAT IF YOU SAY THAT IS NOT GOOD ENOUGH THAT, IS PREJUDICE, THAT IS DEFICIENT, WHEN YOU TAKE A LOOK AT THE PREJUDICE PRONG THERE, IS NO EVIDENCE, WHEN YOU READ THE ENTIRE TRANSCRIPT OF THE 3.850 HEARING, THAT THERE IS NO EVIDENCE THAT WOULD PUT MR. CUMMINGS-EL IN A BETTER LIGHT THAN WHAT HE WAS IN THAT DAY. THEY DID NOT OPEN A DOOR THAT WAS NOT ALREADY BEFORE THE JURY. THE JURY KNEW ABOUT --

HOW CAN WE SAY THAT? THIS IS A SITUATION WHERE IT WAS A 8-TO-4 RECOMMENDATION FOR DEATH, CORRECT?

CORRECT, MA'AM.

AND AS I UNDERSTAND WHAT WAS PRESENTED AT THE EVIDENTIARY HEARING, WE HAD TWO OR THREE MENTAL HEALTH EXPERTS WHO WERE TALKING ABOUT HIS PERSONALITY DISORDER OR WHATEVER THEIR DIAGNOSIS WAS OF HIM. HOW CAN WE TRULY SAY THAT THIS ADDITIONAL INFORMATION WOULD NOT HAVE MADE THIS A, YOU KNOW, 7-TO-5 OR HE HAVE AND 6-TO-6, AND OF COURSE A 6-TO-6 RECOMMENDATION WOULD HAVE BEEN A RECOMMENDATION OF LIFE, SO HOW CAN WE REALLY SAY, WITH THIS ADDITIONAL INFORMATION, THAT IT WOULDN'T HAVE PUT THE PENALTY PHASE IN A DIFFERENT LIGHT?

IT WOULD HAVE PUT AM IN A WORSE LIGHT, YOUR HONOR, BECAUSE ALL, THERE WAS THREE DEFENSE EXPERTS AND TWO PROSECUTION EXPERTS AND THEY ALL CAME TO BASICALLY THE SAME CONCLUSION, THAT HE WAS SUFFERING FROM ANTI-PERSONALITY -- ANTISOCIAL PERSONALITY DISORDER.

THAT IS ADMITTED, ISN'T IT?

NEW YORK CITY IS NOT. IT IS NOT DEFECTIVE -- IT -- NO, IT IS NOT. IT IS NOT DEFICIENT TO NOT PUT THAT ON, BECAUSE IT WAS IN THE TRIAL.

AT THE TIME HAD IT BEEN PUT ON AND SAID IT WAS MITIGATING, THE JUDGE WOULD HAVE SAID IT IS NOT MIGHT DATING?

I AM SAY -- MITIGATE SOMETHING' I AM SAYING MR. MASTOS WOULD NOT HAVE PUT THAT INFORMATION ON, BECAUSE, IN HIS QUOTE, IT WOULD RESULT IN A FIRE, AND IT WOULD RESULT IN A 10-TO-2 VOTE. BUT YOU HAVE TO BACK UP, TALKING ABOUT THAT, TO THREE WEEKS EARLIER, THE FINDINGS WHERE HE HAD DR. JACOBSON KPANLMENT. THERE WAS NO TYPE OF

MENTAL HISTORY THAT WOULD REQUIRE A MENTAL HEALTH EXPERT TO LOOK AT HIM. IT WAS BASED ON MR. JACOBSON'S COMMENTS AT THE, BASED ON HIS OWN REPORT AND OWN OBSERVATIONS --

AT THE TIME HE WAS HIRED TO DETERMINE COMPETENCY. HE WASN'T LOOKING AT THE DEFENDANT IN THE LIGHT OF WHETHER OR NOT THERE WAS ANY MITIGATING EVIDENCE THAT COULD BE PRESENTED, WAS HE?

THAT IS CORRECT, YOUR HONOR, BUT IT IS ALSO CORRECT THAT HE DID TAKE A LOOK AT THE COMPETENCE AND SAW NO MENTAL DEFECTS, IF I CAN QUOTE FROM IT.

BUT AREN'T WE LOOKING AT SOMETHING COMPLETELY DIFFERENT, WHEN WE ARE TALKING ABOUT WHETHER A DEFENDANT IS COMPETENT TO WAIVE ANY OF HIS RIGHTS, VERSUS WHETHER OR NOT THERE IS? MENTAL PROBLEMS THAT MAY EXIST THAT COULD BE MITIGATING OF WHETHER A PERSON SHOULD RECEIVE THE DEATH SENTENCE?

BUT WHEN AN ATTORNEY WHO HAS OBSERVED HIS CLIENT FOR OVER A YEAR GOES TO A DOCTOR AND SAYS CAN THIS GUY MAKE THIS CHOICE AND HE COMES BACK AND SAYS HE CAN NOT ONLY MAKE THIS CHOICE BUT HE HAS GOT NO MENTAL DEEFECTS OR ANYTHING OF THAT NATURE, THEY MENTION THIS DRUG HISTORY, AND HE BASICALLY DENIED HAVING A DRUG HISTORY. HE TOLD DR. JACOBSON THAT HE WAS PRETTY OKAY WITH HIS FAMILY AND THAT HE HAD A GREAT FAMILY AND EVERYTHING. WHAT, OUT OF THAT, WOULD CAUSE MR. MASTOS TO SAY I HAVE GOT TO HAVE FURTHER -- THERE IS NO OBLIGATION FOR A DEFENSE COUNSEL TO GO OUT AND FIND THE ONE ORIENTED DOCTOR TO SAY GOOD THINGS ABOUT HIS PARTICULAR CLIENT.

WHAT WOULD BE THE DEFENSE IN THIS CASE, HERE WE HAVE A SITUATION WHERE A WOMAN WAS --

IT WAS A DEFENSE OF MISIDENTIFICATION, AND A TWO-PRONGED DEFENSE. ONE, HE WANTED TO SAY THAT THIS MISIDENTIFICATION, THAT THE FOUR PEOPLE WHO KNEW THE DEFENDANT REALLY DIDN'T RECOGNIZE HIM, AND ALSO PART OF THE DEFENSE WHERE THERE IS A LOT OF WILLIAMS RULE EVIDENCE WHERE HE HAD BASICALLY BEEN STALKING AND THREATENING THIS LADY AND IN FACT BEAT HER UP AND THREW A TELEVISION ON HER AND BROKE HER WRIST, TWO WEEKS BEFORE THE MURDER. THIS GUY IS CONFRONTATIONAL AND HE WILL GET IN YOUR FACE, AND IN THIS CASE IT WAS COMMITTED IN THE MOST CALLOUS OF FASHION. SO THAT IS BASICALLY WHAT WE WERE TRYING TO GET TO.

IT SEEMS TO ME THAT, ONCE YOU HAVE GOT PAST THE FACT OF EXPLAINING A MISIDENTIFICATION, ONCE THE JURY HAS CONVICTED HIM OF THIS CRIME, IS THAT THERE WAS NO MISIDENTIFICATION, THAT YOU ARE THE PERPETRATOR OF THIS CRIME, IS IT INCUMBENT UPON A DEFENSE ATTORNEY TO, THEN, TRY TO SAY WHAT COULD HAVE DRIVEN MY CLIENT TO HAVE COMMITTED THIS KIND OF HEINOUS ACT?

ALL OF THE EVIDENCE OUT THERE IS THAT HE HAS GOT ANTISOCIAL PERSONALITY DISORDER AND HE HAS GOT A MUCH MORE EXTENSIVE CRIMINAL RECORD THAN WHAT THE JURY ALREADY SAW. HOW WOULD THAT BE VIEWED AS MITIGATE SOMETHING I THINK THAT IS WHAT THEY ARE SAYING.

THAT IS FOR THE JURY TO DECIDE AND THE TRIAL JUDGE TO DECIDE, WHETHER OR NOT THAT KIND OF INFORMATION IS, IN FACT, MITIGATING, ISN'T IT?

THAT'S CORRECT, YOUR HONOR. THAT'S CORRECT. BUT IN THIS PARTICULAR CASE, WOULD YOU PUT FORTH THE FACT THAT HE HAD DONE TEN MONTHS OF TIME IN CALIFORNIA AND THAT HE HAD BEEN ARRESTED FIVE TIMES IN CALIFORNIA, THAT HE AN ABANDONED HIS -- HE HAD ABANDONED HIS CHILDREN IN NORTH CAROLINA WITHOUT TELLING THEM OR HIS COMMON LAW

WIFE, WHICH WOULD DESTROY THE ONE NUGGET THAT HE DID ENJOY OF CLOSE FAMILY SUPPORT AND A GOOD FATHER, ALL OF THESE MITIGATING FACTORS THAT HE DID GET IN BETWEEN THE TWO PEOPLE THAT DID TESTIFY IN THE MITIGATION OF HIS TRIAL, THAT WENT AWAY. ALL OF THE MITIGATION IN THE PRONG OF THIS CASE, ALL OF THE MITIGATION THAT THEY HAVE GOES TO MAKE THIS GUY PUT IN A WORSE LIGHT. HE IS 33 YEARS OLD, SO THE FACT THAT HE HAD TROUBLE AS A CHILD --

ISN'T IT ACTUALLY FOUND AS MITIGATING? AS I REMEMBER THIS RECORD, THERE WAS, THESE PEOPLE WERE SORT OF IMPEACH,, BECAUSE THEY SAID HE SPENT MOST OF HIS TIME IN JAIL SO HE DIDN'T REALLY SPEND TIME WITH HIS FAMILY. ONCE THEY WERE IMPEACHED, WERE THESE FOUND AS MITIGATING CIRCUMSTANCES?

IT WAS PUT IN HIS -- IT WAS NUT, BUT IN HIS ORDER, IN DECIDING TO SENTENCE HIM TO DEATH, HE DID NOT TAKE INTO ACCOUNT THOSE FACTORS. THAT IS IN TERMS OF PUTING THIS PERSON IN THE LIGHT AFTER HUMAN BEING, THAT IS ALL THEY HAD OUT THERE, AND THAT IS WHAT MR. MASTOS CHOSE TO DO WITH WHAT LITTLE TIME HE HAD AND AGAIN, I CAN'T EMPHASIZE IT ENOUGH, THE CONSTRAINTS PUT ONLY BY HIS OWN CLIENT. ESSENTIALLY THE DEFENSE IS IT DOESN'T MATTER WHAT YOUR CLIENT THINKS ABOUT THIS IN ANY TYPE OF CASE. YOU MUST GO OUT AND DO XY AND Z AND WE WOULD HAVE TO PASS NEW RULES THAT SAY YOU MUST DO XY AND Z, BECAUSE WITHIN STRICKLAND, WHAT IS EFFECTIVE IS WHETHER OR NOT THE FACTS AND CIRCUMSTANCES ARE EFFECTIVE OR NOT, AND THE FACTS ARE A CIRCUMSTANCES ARE YOU HAVE A CLIENT WHO DOES NOT WANT LIFE IN PRISON. HE TURNED OUT 40 YEARS, BECAUSE HE DOESN'T WANT TO GO TO PRISON. HE STILL WOULD RATHER DIE. THAT IS WHAT MR. MASTOS WAS DEALING WITH, AND WHEN MR. MASTOS SAID I WANT TO MAKE SURE YOU ARE COMPETENT TO MAKE THAT DECISION, TURNED ON HIM AND HE SAID I WANT TO KEEP THE TRUST OF MY CLIENT, SO HE DIDN'T PUSH HIM HARDER AT THAT POINT IN TIME AND IN FACT, EVERY COUNSEL SINCE THAT HAS PUSHED IT HAS BEEN FIRED FOR IT, SO WHEN YOU HAVE A CLIENT LIKE THAT, AND HE IS WITHIN HIS RIGHTS TO WAIVE MITIGATION, BY THE WAY, WHEN YOU HAVE A CLIENT WHO IS LIKE THAT, HOW DO YOU GO BEHIND HIM AND DO THAT? HE DID TALK TO THE TWO FAMILY MEMBERS WHO WERE THERE AND THEY DID GO ON AND PUT ON A MITIGATION CASE, AND THERE IS NO -- THERE IS NOTHING TO SAY THAT, WITHOUT THAT TESTIMONY, IT MIGHT HAVE BEEN A 12-0 CASE. HE PUT ON WHAT HE HAD AND IF YOU ARGUE THAT IS DEFICIENT, WE WOULD ARGUE STRENUOUSLY THAT THE CLIENT HAS NOT BEEN PREJUDICED HERE, BECAUSE WHEN YOU TAKE A LOOK AT THE TESTIMONY OF THE DOCTORS, HE DID HAVE MEDICAL EVIDENCE PRIOR TO THE THING AND BASED ON THAT FACT AND WHAT DR. JACOBSON FOUND AND BASED ON THE ACTIONS OF HIS CLIENT, HE SAW NO REASON TO GO ANY FURTHER. YOU ONLY HAVE TO DO A REASONABLE INVESTIGATION AND IT WAS CERTAINLY REASONABLE NOT TO PUT SUCH EVIDENCE FORWARD, AND STRATEGIC DECISION, BECAUSE OF WHAT HIS CLIENT TOLD HIM. BY THE WAY, HE IS FROM A FAMILY OF CRIMINALS AND HE GRADUATED AT THE TOP OF THE CRIMINALS IN HIS FAMILY, AND IF YOU TAKE A LOOK AT THE FAMILY SOCIAL STRUCTURE, THAT IS WHAT WE HAVE HERE AND BY THE WAY, DOESN'T HAVE A MENTAL DEFECTOR DISEASE THAT EXPLAINS OR EXONERATES HIM FROM DOING THIS. HE HAS AN ANTISOCIAL PERSONALITY DISORDER, MR. AND MRS. JURY, WHICH SAYS THAT HE ONLY DOES WHAT HE WANTS, WHICH IS A PERFECTLY GOOD EXAMPLE OF HOW STRIDENT HE WAS ON HIS WAIVER HERE, AND I GUESS BECAUSE IT IS HIS LIFE AT STAKE, HAS A RIGHT TO BE STRIDENT ON THAT, BUT THAT IN NO WAY MITIGATES WHETHER OR NOT HE WOULD HAVE GOTTEN LIFE IN PRISON RATHER THAN DEATH, SO IT IS THE STATE'S POSITION, I AM NOT SURE HOW THIS TIME WORKS BUT IT IS THE STATE'S POSITION THAT HE WAS NOT DEFICIENT, THAT HE PUT FORTH A MITIGATION PHASE AND PUT FORWARD A REASONABLE CHOICE THAT THERE WAS NO FURTHER MITIGATION, ALBEIT THE HEALTH EXPERTS WAS AS TO COMPETENCY AS OPPOSED TO HEALTH FACTORS, BASED ON WHAT HIS CLIENT TOLD HIM, AND IF YOU DO FIND THAT DEFICIENT, THEN OBVIOUSLY IT DIDN'T PREJUDICE HIM, BECAUSE IF YOU TAKE A LOOK AT THE EVIDENCE THAT THEY NOW WANT TO FUTURE FORWARD AS MITIGATING, IT MAY BE MITIGATING IN THE STATUTE BUT IT IS CERTAINLY NOT GOING TO BE MITIGATING TO ANY JURY THAT HEARS IT. THIS MANY WAS REASONABLY SENTENCED TO DEATH.

IF WE WERE TO LOOK AT THE SOCIAL HISTORY IN THE COMPETENCY EVALUATION PERFORMED PRIOR TO TRIAL, WAS SOME OF THE INFORMATION THAT HAS COME UP AFTERWARDS, IN THAT SOCIAL HISTORY? WHEN THE PSYCHIATRIST OR PSYCHOLOGIST TAKES THE HISTORY? I DON'T HAVE THE RECORD BEFORE ME.

WELL, NO, HE BASICALLY MINIMIZED THE SOCIAL HISTORY. THIS WAS THE DEFENDANT TELLING DR. JACOBSON WHAT WAS GOING ON. HE MINIMIZED HIS DRUG ABUSE AND TOLD HIM THAT HE WASN'T REALLY ABUSING DRUGS ANYMORE. HE BASICALLY SAID THAT HE WAS GETTING ALONG FINE WITH HIS FAMILY AND DESCRIBED A GOOD RELATIONSHIP WITH HIS MOTHER AND SIBLINGS, AND OF COURSE THE RELATIONSHIP THEY WANT TO PUT ON NOW IS THE MOTHER WAS A PERSON FROM HELL AND USED TO BEAT HIM, BUT THE POINT OF THAT CAN BE IMPEACHED BY THE DEFENDANT'S OWN WORDS OF, WELL, I DIDN'T THINK IT WAS THAT BAD.

WAS THERE ANY INDEPENDENT TESTIMONY AS TO WHAT THE FAMILY MEMBERS SAID WAS THE CONDITION OF THE HOME?

AT TRIAL?

THE DEPENDENCY REPORTS AT 3.850, THE DEPENDENCY REPORTS OR ANYTHING LIKE THAT?

I DON'T THINK THEY HAD REPORTS. THEY DID HAVE THE MIDDLE SCHOOL PRINCIPAL TESTIFY AS TO, BUT IN TERMS OF THE STATE OF FLORIDA GOING IN AND LOOKING AT THE HOUSEHOLD, NO, TO MY KNOWLEDGE THERE IS NONE OF THAT.

WHAT EVIDENCE OTHER THAN SIBLINGS COMING FORWARD AS TO THE NEGATIVE --

AND IF YOU TAKE A LOOK AT THE EVIDENCE PUT FORTH BY THE SIBLINGS AND BY HIS FRIEND, HOW MUCH DRUGS HE MAY HAVE ABUSED VARIES, DEPENDING ON WHICH INDIVIDUAL YOU ARE TALKING TO, AND OH, BY THE WAY, HIS COMMON LAW WIFE MENTIONED WHILE HE WAS IN CALIFORNIA, THAT HE PHYSICALLY ACCOSTED HER TWICE WHILE HE WAS OUT THERE AND THAT BASICALLY PUTS IT IN WORSE LIGHT, AND IN THIS CASE IT WOULD HAVE BASICALLY HELPED INSTEAD OF -- HURT INSTEAD OF HELPED HIM. BOTH OF THESE WOMEN TESTIFIED THAT THEY DIDN'T BELIEVE THAT HE DID IT. THEY BELIEVE THAT AT LEAST THE JURY SAW THAT HE HAD PEOPLE ROOTING FOR HIM. IF YOU PUT ON THE MITIGATION THAT NOW THEY ARE TALK ABOUT, THAT GOES OUT THE WINDOW AND IF YOU FIND THAT HE IS A BIGGER CRIMINAL THAN MENTIONED THERE, IS NO EXCUSE FOR IT, AND THAT HE HAD TROUBLES WHEN HE WAS A CHILD, BUT ANY MITIGATION THERE WOULD BE VERY MINOR. IN ESSENCE, MR. MASTOS PUT ON WHAT WAS AVAILABLE, WHAT WAS BEST AVAILABLE, AND IT WAS TO GREAT EFFECT.

CHIEF JUSTICE: ALL RIGHT. THANK YOU VERY MUCH. HOW MUCH TIME IN REBUTTAL? OKAY. COUNSEL.

I HAVE A FEW STATEMENTS TO MAKE. ONE IS THAT DEFENSE COUNSEL HAD AN ABSOLUTE DUTY TO INVESTIGATE. THIS COURT MOST RECENTLY REAFFIRMED THAT, IN THE LAWRENCE LEWIS CASE. HE FAILED, IN THAT DUTY.

WHAT ABOUT THE PREJUDICE PRONG?

YES. AS TO PREJUDICE, I WOULD LIKE TO TOUCH UPON THE APD LABEL, AND THAT IS EXACTLY WHAT IT IS. ANTISOCIAL PERSONALITY DISORDER IS A LABEL THAT ATTACHES AFTER THE FACT. NOW, GRANTED, THERE WOULD HAVE BEEN SOME NEGATIVE INFORMATION THAT WOULD HAVE COME OUT ABOUT MR. CUMMINGS AND HIS FAMILY. THIS WAS NOT A LAW-ABIDING, ""LEAVE IT TO BEAVER"". THIS WAS A FAMILY STEEPED IN THE DEPTHS OF POVERTY. THEY SURVIVE BY COMMITTING CRIMES. IT IS A MATTER OF SOCIETY AND THIS FAMILY CREATED THIS DEFENDANT,

AND LOOK WHERE HE IS, AND MY POINT IS THAT THE JURY HAD A RIGHT TO HEAR THIS EVIDENCE. THEY HAVE A RIGHT TO ASSESS HIM IN THE CONTEXT IN WHICH HE GREW UP, IN THE CONTEXT OF HIS MENTAL HEALTH, AND ONLY THEN CAN WE SAY THAT THE JURY MADE A LEGITIMATE DETERMINATION IN SENTENCING HIM TO DEATH. AND SO WE TALK ABOUT PREJUDICE --

PROBLEM I HAVE, AND IT IS NOT THAT A LAWYER COULDN'T DECIDE TO PUT ON EVIDENCE OF ANTISOCIAL PERSONALITY DISORDER AS MITIGATION, BUT WE DO KNOW THAT THERE IS A TWO-EDGED SWORD, WITH THAT KIND OF MENTAL DISORDER VERSUS OTHER, SOMETHING WHERE SOMEBODY IS BRAIN DAMAGED OR YOU KNOW, HAS, IS SCHIZOPHRENIC OR SOMETHING ELSE, AND I THINK THAT, YOU KNOW, SO WE ARE REALLY FACED WITH THIS ISSUE THAT SOMEONE DOESN'T MAKE THE KNOWING DECISION, BUT DIDN'T, AGAIN, GOING BACK TO THE CLIENT, AT SOME POINT, THE CLIENT, PUTTING A STOP ON THE ATTORNEY, SEEMS TO BE SOMETHING THAT WE HAVE FACTORED IN AND NEED TO FACTOR IN, IN A CASE LIKE THIS, AND YOU ARE SAYING JUST DISREGARD THAT, AND JUST --

IF HE HAD PRESENTED COUNSEL, IF HE HAD SAID, YOU KNOW, ABSOLUTELY YOU WILL NOT CONTACT THEM UNDER ANY CIRCUMSTANCES, AND IF YOU DO, I WILL ACT OUT IN COURT, AND I WILL PREVENT YOU FROM TALKING, AND I WILL ACS ON THE YOU, YOU -- ACS ON YOU, IF -- A COST YOU, IF THAT WERE -- I WILL ACCOST YOU, BUT THAT WASN'T THE CASE, AND RELATIVE TO COUNSEL AND FAMILY MEMBERS, HE SIMPLY DIDN'T MAKE AN EFFORT. AND IT IS NOT THAT THE CLIENT PREVENTED HIM. HE ALLOWED THE CLIENT TO DICTATE HIS COURSE OF ACTION, AND THAT IS NOT EFFECTIVE REPRESENTATION. PERIOD. NMS YOU HAVE OTHER -- UNLESS YOU HAVE OTHER QUESTIONS, THANK YOU VERY MUCH.

CHIEF JUSTICE: ALL RIGHT. THANK YOU. THE COURT WILL NOW STAND IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.