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Curtis Windom v. State of Florida

CHIEF JUSTICE: GOOD MORNING. ON WONDON VERSUS STATE, YOU MAY PROCEED.

GOOD MORNING. I AM JEFFREY HAZEN, HERE ON APPEAL OF MR. WANDOM'S EVIDENTIARY HEARING AND ON A HABEAS PETITION MOTION.

WOULD YOU TELL US THE FOCUS OF YOUR ARGUMENT.

SURE. ON THE EVIDENTIARY CLAIMS THAT WERE DENIED. IN TERMS OF THE HABEAS PETITION, I WOULD STAND ON THE BRIEF FORM -- ON THE BRIEF. I WOULD LIKE TO FOCUS FIRST ON THE GUILT PHASE IF TIME PERMITS AND THE NEVADA HE CAN'T I HAVE ASSISTANCE CLAIM. THE FACTS TO SORT OF PROVE THE CLAIMS OVERLAP TO A LARGE EXTENT, SO I THINK THAT WOULD HELP IN CONSOLIDATING THE TWO ARGUMENTS.

COULD YOU CLARIFY SOMETHING? WAS THERE AN ACTUAL WAIVER OF MITIGATION IN THIS CASE?

YES, YOUR HONOR. THERE WAS AN ON-RECORD WAIVER OF THE PRESENTATION OF WITNESSES AT THE PENALTY PHASE.

BUT THAT WAIVER WASN'T, NORMALLY WE THINK OF THE DEFENDANT SAYING I DON'T WANT TO PRESENT MITIGATION, AND THE DEFENSE ATTORNEYS SAYING I HAVE MITIGATION TO PRESENT. I AM UNDERSTANDING IT, THAT THIS WAS ACTUALLY SOMETHING THAT THE DEFENSE ATTORNEY --

THAT'S CORRECT.

SAID WE ARE NOT GOING TO PRESENT ANY MITIGATION.

THAT'S CORRECT, YOUR HONOR.

BUT MR. WINDHAM, HIMSELF, WAS ASKED BY THE COURT, IF HE AGREED WITH HIS COUNSEL IN NOT PRESENTING THE EVIDENCE, CORRECT?

RIGHT. IF I CAN SORT OF ANSWER BOTH QUESTIONS.

RIGHT.

YES. THIS IS NOT THE NORMAL CASE, WHERE THE DEFENDANT IS SAYING I DON'T WANT MY TRIAL ATTORNEY TO PUT ON MITIGATION. DON'T DO THIS. I AM OBJECTING TO THAT. THIS IS A SITUATION WHERE THE TRIAL ATTORNEY, BASED ON HIS DECISION, TOLD THE DEFENDANT WE ARE GOING TO WAIVE MITIGATION, AND THE CLIENT ESSENTIALLY AGREED WITH HIM, AND TO YOUR QUESTION, JUSTICE WELLS, ON THE RECORD MR. WINDOM SAID, YES, I AGREE WITH THAT.

JUDGE RUSSELL ASKED THE QUESTIONS.

THAT'S CORRECT. SHE, WELL, I THINK ACTUALLY IF YOU LOOK AT THE RECORD, IT IS MORE MR. LIENSTER ACTUALLY ASKING SOME OF THE QUESTIONS, BUT I THINK JUDGE RUSSELL DID ASK SOME OF THE QUESTIONS AS WELL.

SO THE JURY, LET, THE JURY HEARD NOTHING IN MITIGATION. ALL OF THE MITIGATION WAS SAVED FOR THE SPENCER HEARING. ANOTHER JURY HEARD NOT ONE WITNESS IN MITIGATION, YOUR HONOR.

AND NO ARGUMENT WAS MADE TO THE JURY BY MR. LIENSTER, ABOUT MITIGATING?

NO, YOUR HONOR. THERE WAS NO MITIGATION TO ARGUE ABOUT. ESSENTIALLY WHAT HE DID AT THE PENALTY PHASE, THE CLOSING ARGUMENT AT PENALTY PHASE IS TO MAKE A GENERALIZED DEATH PENALTY ARGUMENT, WHICH I HAVE ASSERTED IS ONE OF THE FACTORS IN HIS INEFFECTIVE ASSISTANCE AT PENALTY PHASE, AND THE PROBLEM WITH THAT ARGUMENT, THE GENERALIZED DEATH PENALTY ARGUMENT, IS YOU ARE TALKING TO TWELVE JURORS WHO, BASED ON THE VOIR DIRE, HAVE REJECTED SUCH AN ARGUMENT. THEY HAVE SAID THEY AGREE WITH THE DEATH PENALTY, SO IT REALLY SORT OF FALLS ON DEAF EARS.

THE REAL BASIC THAT YOU HAVE TO GET TO HERE, IT SEEMS TO ME THE CONFLICT BETWEEN THE PARTIES, NOW, IS THAT IT WAS GOING TO CAUSE MORE HARM THAN WAS GOING TO DO BENEFIT, BECAUSE OF THIS DRUG INVESTIGATION. IT PROVIDED A MOTIVE FOR THE MURDERS. IT WAS GOING TO TAKE OUT THE INFORMANTS. THAT IS REALLY WHERE IT SEEMS THAT THIS CASE, WHEN YOU CUT AWAY ALL OF THE OTHER STUFF THAT, IS WHERE THIS DISPUTE IS, IS IT NOT?

I WOULD AGREE, YOUR HONOR.

WHAT DO YOU SAY ABOUT THAT?

MY CONTENTION HERE IS THAT THIS, THE WAIVER, WHICH MR. LIENSTER TESTIFIED WAS HIS DECISION, MR. BARR, HIS COY COUNSEL, TESTIFIED -- HIS CO-COUNSEL, TESTIFIED THAT, YES, THAT WAS MR. LIENSTER WAS HIS DECISION. IT WASN'T HIS DECISION. HE BASED THAT ON THE FACT THAT MR. WINDOM HAD BEEN ARRESTED FOR DRUGS AND THAT WOULD COME OUT IF YOU PRESENTED MENTAL HEALTH EXPERTS. THE PROBLEM WITH THAT, AND THE LOWER COURT APPLIED THE WRONG LEGAL STANDARD, THE TRIAL ATTORNEY DID NOT INVESTIGATE MENTAL HEALTH OR THE EXTENT TO WHICH NONSTATUTORY MITIGATION LAY WITNESSES EXISTED, BEFORE HE MADE THAT DECISION. HE MADE THAT DECISION --

WHEN DID DR. KIRKLAND COME INTO THIS PICTURE? WAS HE PRESENTED AT THE SPENCER HEARING OR WAS HE JUST NEVER PRESENTED?

NO, MA'AM. HE WAS NOT PRESENTED AT THE SPENCER HEARING. DR. KIRKLAND WAS RETAINED PRIOR TO, HE WAS APPOINTED BY JUDGE RUSSELL PRIOR TO TRIAL, TO EVALUATE MR. WINDOM FOR COMPETENCY INSANITY. -- FOR COMPETENCY AND SANITY. HE SAW HIM FOR AN HOUR A WEEK BEFORE THE TRIAL, AND HE WROTE A LETTER TO THE COURT AND SAID I DON'T HAVE ENOUGH TIME OR ENOUGH INFORMATION AND I CAN'T GIVE AN OPINION AS TO MR. WINDOM'S SANITY. HE WAS CALLED AT THE GUILT PHASE BY MR. LIENSTER TO TESTIFY GENERALLY, TO WHAT A FEUGE STATE IS, AND AFTER HE TESTIFIED GENERALLY AS TO WHAT A FEUGE STATE IS, HE TESTIFIED, BASED UPON A QUESTION BY THE PROSECUTOR, THE SITUATION DOESN'T APPLY TO HIM. HE WASN'T, MR. WINDOM WASN'T IN A FEUGE STATE WHEN THIS INCIDENT HAPPENED. THAT IS THE EXTENT OF DR. KIRKLAND'S TESTIMONY. IT IS ESSENTIALLY HARMFUL BECAUSE THE JURY HEARS THAT IT DOESN'T APPLY TO HIM, SO THE JURY IS LEFT WITH THE IMPRESSION, WELL THERE, IS NOTHING WRONG WITH HIM, BUT MR. LIENSTER TESTIFIED AS TO, IN TERMS OF HIS STRATEGY AND THE DECISION HE MADE, THE DRUGS VIS-A-VIS THE MENTAL HEALTH EXPERTS, HE TESTIFIED AFTER REVIEWING THE REPORTS AND DEPOSITIONS OF THE EXPERTS THAT WERE PRESENTED IN POSTCONVICTION, HE TESTIFIED, IF I HAD THAT INFORMATION, MY DECISION WOULD HAVE BEEN COMPLETELY REVERSED. I WOULDN'T HAVE MADE THE DECISION THAT I MADE, AND SO I THINK THAT IS, THE DECISION TO FOREGO MITIGATION PRESENTATION TO THE JURY, WAS MADE IN THE BLIND. IT WAS --

HOW MUCH TIME DID HE SPEND INVESTIGATING, LIKE, MAYBE NOT MENTAL HEALTH BUT ANYTHING, JUST IN THE WHOLE PENALTY PHASE? WHAT IS THE TESTIMONY OF THAT? HOW MUCH TIME WAS SPENT?

I DON'T BELIEVE MR. LIENSTER SPENT ANY TIME INVESTIGATING THE PENALTY PHASE. MR. BARCH, WHO WAS CO-COUNSEL, TESTIFIED THAT I WAS RESPONSIBLE FOR INVESTIGATING MITIGATION WITNESSES. HE WENT OUT THERE TO THE WINTER GARDEN COMMUNITY, WHERE MR. WIND ONLY IS FROM -- WHERE MR. WINDOM IS FROM, AND HE SAID THE WITNESSES ARE NOT OPENING UP TO ME. AND HE ALSO TESTIFIED THAT THERE ARE MENTAL HEALTH ISSUES THAT NEED TO BE LOOKED INTO, AND MR. LIENSTER DID NOTHING. HE DID NOT HIRE AN INVESTIGATOR. HE DID NOT INVESTIGATE MENTAL HEALTH, SO THEY WERE LEFT WITH A FEW WITNESSES AT THE SPENCER HEARING THAT MR. BARCH WAS ABLE TO TESTIFY TO BUT THAT THAT INVESTIGATION WAS INCOMPLETE.

WAS MR. LIENSTER A PRIVATELY-ENGAGED COUNSEL?

YES, YOUR HONOR. HE WAS PRIVATELY RETAINED BY MR. WINDOM.

WHAT WAS LIENSTER'S ARGUMENT TO THE TRIAL JUDGE AFTER THE SPENCER HEARING?

AFTER, I DON'T --

IN OTHER WORDS WE KNOW WHAT THE ARGUMENT WAS TO THE JURY THAT YOU HAVE ALLUDED TO BEFORE, BUT, NOW, WHAT WAS HIS ARGUMENT TO THE TRIAL JUDGE?

I BELIEVE, I BELIEVE, IF I AM CORRECT YOUR HONOR, I THINK MR. BARCH MADE THE ARGUMENT AFTER THE SPENCER HEARING AND BASICALLY HIS ARGUMENT WAS THAT, BASED ON THESE WITNESSES THAT WERE PRESENTED AT THE SPENCER HEARING, THEY TESTIFIED GENERALLY THAT MR. WINDOM WAS A GOOD FATHER, THAT HE HAD HELPED HIS SISTER OUT. HE SAVED HER FROM DROWNING AS A CHILD. THAT THOSE FACTORS OUTWEIGHED THE KILLING OF THREE PEOPLE AND THAT WAS THE ARGUMENT. THERE WAS NO ARGUMENT BASED ON THE SORT OF MENTAL HEALTH EVIDENCE, BECAUSE THEY HAD NONE. THE ONLY EVIDENCE THEY HAD WAS DR. KIRKLAND.

WAS THERE ANY TESTIMONY BY EITHER OF THE ATTORNEYS THAT AS THEY DEVELOPED THEIR STRATEGY OF THEIR APPROACH TO THE JURY COMPARED TO THEIR APPROACH TO THE JUDGE, IN THE WAY THEY DEALT, THAT THEY, ALSO, DEVELOPED HAD, INSOFAR AS THEIR INVESTIGATION OF MITIGATION AND SUCH, YOU KNOW, WOULD BE DIFFERENT?

THEY TESTIFIED THAT THEIR INVESTIGATION WAS LIMITED, WAS BASED ON, THEY TESTIFIED THAT ESSENTIALLY I THINK WHAT HAPPENED IS THEY MADE A DECISION ABOUT THE MENTAL HEALTH EVIDENCE, THE DRUG EVIDENCE, TO FOREGO MENTAL HEALTH EVIDENCE, WITHOUT INVESTIGATING IT, AND SO THAT WAS, THEY JUST WANTED TO KEEP OUT MILE ANYTIMEGATION EVIDENCE, BECAUSE -- MITIGATION EVIDENCE BECAUSE OF THE PROSPECT OF THE DRUGS. AS FAR AS THE DRUGS, I WANTED TO GET TO THE POINT, IN TERMS --

BEFORE YOU MOVE ON TO THE DRUGS, DIDN'T THE TRIAL JUDGE IN THIS CASE, IN FACT, FIND MENTAL HEALTH MITIGATION, AND SO WHAT WAS THAT BASED ON?

YOUR HONOR, IF YOU READ THE ORDER, ESSENTIALLY WHAT JUDGE REDUCE SELL SAYING IS THAT SHE CONSIDERED THAT STATUTORY MITIGATOR BUT GAVE IT, I THINK THE TERM SHE USED WAS VERY LITTLE WEIGHT. I THINK THE FAIR READING OF THE ORDER IS THAT SHE CONSIDERED IT --

CONSIDERED BOTH OF THEM, BOTH THE STATUTORY MENTAL HEALTH MITIGATORS.

BUT ESSENTIALLY, I THINK IF YOU READ IT, ESSENTIALLY THERE IS NO EVIDENCE AT ALL TO SUPPORT IT, SO ALTHOUGH SHE CHARACTERIZED IN HER ORDER AS GIVING IT VERY LITTLE WEIGHT, ESSENTIALLY I MEAN, IN MY ARGUMENT, IF THAT EVIDENCE WHICH WAS PRESENTED AT THE EVIDENTIARY HEARING, HAD IN FACT, BEEN PRESENTED TO HER, THAT HER, IF, THAT IT WOULD, IT WOULD HAVE CHANGED HER SENTENCING CALCULUS IN TERMS OF WEIGHING THE STATUTORY MENTAL HEALTH MITIGATION.

ARE YOU SAYING THERE WAS REALLY NO EVIDENTIARY BASIS TO FIND THOSE TWO STATUTORY MITIGATORS?

I DON'T THINK THERE WAS ANY EVIDENTIARY BASIS AT ALL. THE ONLY BASIS THAT COULD POSSIBLY BE RELIED UPON, I THINK, JUSTICE ANSTEAD, IS MAYBE SOME OF THE LAY WITNESSES WHO TESTIFIED AT THE GUILT PHASE, YOU SAID THAT MR. -- GUILT PHASE, YOU SAID THAT MR. WINDOM LOOKED LIKE HE HAD CLICKED, WAS SOME OF THE TERMS.

DID DR. KIRKLAND TESTIFY AT TRIAL?

YES, YOUR HONOR, AND DR. KIRKLAND, I WOULD POINT OUT THAT DR. KIRKLAND TESTIFIED AT THE EVIDENTIARY HEARING, THAT HE WAS NOT RETAINED TO EVALUATE MR. WINDOM FOR MITIGATION, STATUTE-OR NONSTATUTORY, THAT HE DID NOT HE VALUE -- STATUTORY OR NONSTATUTORY, THAT HE DID NOT HE VALUE WAIT HIM FOR STATUTORY.

-- HE DID NOT EVALUATE HIM FOR STATUTORY.

THE JUDGE, BACK AT THE TRIAL, THE JUDGE WEIGHED DR. KIRKLAND'S TESTIMONY AT THE TIME.

YES. I THINK IN MENTAL HEALTH MITIGATORS, I THINK SHE ESSENTIALLY SAID THAT THE ARGUMENT ABOUT THE FEUGE STATE, SAID IT WAS PROPS ON TRUST -- PREPOSTEROUS.

WE HAVE INTERRUPTED YOU SEVERAL TIMES. YOU WANTED TO TALK ABOUT THE DRUGS FORM.

AS TO THE DRUG AND MOTIVE EVIDENCE, FIRST OF ALL, I THINK THAT, WHEN YOU COMPARE THE POWERFUL MITIGATION WHICH WAS PRESENTED AT THE EVIDENTIARY HEARING, THE MENTAL HEALTH EVIDENCE WHICH WAS PRESENTED, AND THE NONSTATUTORY MITIGATION WHICH WAS PRESENTED BY LAY WITNESSES, THAT THE DRUG EVIDENCE WHICH THE STATE HAS ARGUED AND WHICH THE LOWER COURT HAS RELIED UPON AS PREJUDICE ANALYSIS AS TO THE MITIGATION PRESENTED, THAT DRUG EVIDENCE IS FAIRLY BENIGN, EVEN IF TRUE, THE DRUG EVIDENCE WHICH WOULD HAVE COME OUT IS FAIRLY BENIGN, AND I THINK THAT MR. LIENSTER'S TESTIMONY THAT HE WOULD HAVE USED THE MENTAL HEALTH EVIDENCE --

WHAT, GIVE US HOW BENIGN IT IS. I MEAN, I THOUGHT THAT HE HAD, THERE IS TESTIMONY HE WAS ONE OF THE MOST SUCCESSFUL DRUG DEALERS ON ORLANDO'S WEST SIDE.

I AM NOT SURE WHERE THAT, I THINK THAT MAYBE FROM THE JUDGE'S SENTENCING ORDER AND I DON'T KNOW WHERE THAT EVIDENCE COMES FROM. I THINK THAT IS HER CHARACTERIZATION OF IT, BUT THE FACT IS WHAT HAS BEEN INTRODUCED BY THE STATE IS AN ARREST AFFIDAVIT FROM DECEMBER OF 1991, HE WAS ARRESTED ONCE FOR COCAINE POSSESSION AND SALE.

THIS IS AT THE EVIDENTIARY HEARING?

THAT WAS INTRODUCED AT THE EVIDENTIARY HEARING. AND THEN THEY INTRODUCED THE TESTIMONY OF MR. ASHTON, WHO TESTIFIED THAT HE WOULD HAVE LIKED TO HAVE PRESENTED MOTIVE EVIDENCE AS TO THE FACT THAT THESE MURDERS WERE POSSIBLY MOTIVATED BY THIS DRUG INVESTIGATION. BUT THERE IS NO EVIDENCE IN THIS RECORD THAT MR. WINDOM KILLED

ANY OF THESE VICTIMS BECAUSE THEY WERE CONFIDENTIAL INFORMANTS THERE. IS NO EVIDENCE IN THIS RECORD THAT ANY OF THESE PEOPLE WERE CONFIDENTIAL INFORMANTS, AND IF YOU READ THE MEMO WHICH MR. ASHTON CITES TO, IT BELIES WHAT HE TESTIFIED TO, WHICH IS THAT THEY WERE PREPARED TO INTRODUCE MOTIVE EVIDENCE. THAT MEMO SUGGESTS THAT THERE WAS NO FACTUAL BASIS FOR PROCEEDING IN FEDERAL COURT, WHICH THE UNDERLYING BASIS OF PROCEEDING IN FEDERAL COURT IS THAT THE MURDERS WERE MOTIVATED BY ELIMINATION OF A WITNESS.

CHIEF JUSTICE: THE MARSHAL HAS GIVEN YOU A REMINDER ABOUT YOUR REBUTTAL TIME.

SO I THINK MY ARGUMENT, JUST TO FINISH UP THAT, IS THAT EVEN IF THIS DRUG EVIDENCE HAD BEEN PRESENTED, IT APPEALS IN COMPARISON, IN -- IT PALS, IN COMPARISON, IN TERMS OF A PREJUDICE ANALYSIS, IT PALES IN COMPARISON TO MENTAL HEALTH OR OTHERWISE THAT WOULD HAVE BEEN PRESENTED AND I THINK MR. LIENSTER'S TESTIMONY THAT HE WOULD HAVE CHANGED HIS STRATEGY COMPLETELY, SUPPORTS THAT.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING, YOUR HONOR. SCOTT BROWNE FOR THE STATE OF FLORIDA.

WOULD YOU PICK UP ON THAT LAST ISSUE THAT HE ADDRESSED. THAT IS HE SEEMS TO INDICATE THAT, AT THE EVIDENTIARY HEARING HERE, THAT THERE WAS NOT MUCH EVIDENCE PUT ON TO BACK UP THE STATE'S OR MR. LIENSTER'S EARLIER ASSERTION THAT HE WAS TRYING TO KEEP OUT DEAF AS STATING EVIDENCE THAT THIS FELLOW WAS THE BIGGEST DRUG DEALNER FLORIDA OR WHATEVER.

YOUR HONOR, I DISAGREE.

WHAT EVIDENCE WAS PRESENTED?

THERE IS AMPLE EVIDENCE. FIRST OF ALL, WE HAVE LIENSTER'S TESTIMONY THAT THERE WAS -- THAT THIS WAS A DRUG CASE WITH A MURDER OVERLAY. IN OTHER WORDS THAT WAS THE TWO-TON PINNACLE FANTHAT MR. LIENSTER WANTED TO KEEP OUT, THAT IN FACT MR. WINDOM WAS A SUCCESSFUL DRUG DEALNER THE WINTER GARDEN AREA. HE HAD BEEN ARRESTED FOR NOT JUST POSSESSION OF COCAINE BUT IN TRAFFICKING IN COCAINE AND IT WAS FOR \$1,000 WORTH OF COCAINE, JUST TWO MONTHS PRIOR TO THE MURDER, SO THERE IS AMPLE EVIDENCE IN THIS RECORD THAT NOT ONLY WAS WINDOM A DRUG DEALER BUT THAT HE DID, INDEED, HAVE REASON TO BELIEVE THAT ONE OF THE VICTIMS, ACTUALLY TWO OF THE VICTIMS WERE INFORMANT, ONE BEING VALERIE DAVIS.

OKAY. AGAIN, HE WAS ARRESTED ONCE FOR TWO MONTHS BEFORE. WHAT OTHER EVIDENCE, GOING BACK TO IN EITHER THE RECORD THAT MR. LIENSTER HAD OR IN THIS EVIDENTIARY HEARING RECORD. THERE IS A BIG DIFFERENCE BETWEEN SOMEONE BEING ARRESTED FOR DRUGS AND BEING A SOPHISTICATED, YOU KNOW, LONG TIME DRUG DEALER.

WELL, YOUR HONOR, THE FACT THAT HE HAD \$10,000, LARGE AMOUNTS OF CASH. HE PAID CASH FOR HIS CAR. THIS WAS A MAN WHO HAD NEVER BEEN GAINFULLY EMPLOYED, ACCORDING TO THE TRIAL COURT, YET HE HAS CASH TO HIRE MR. LIENSTER. HE HAS \$10,000 IN CASH STOLEN FROM HIM IN A SAFE. HE NOT ONLY THAT, MARY JACKSON TESTIFIED THAT WINDOM HAD HEARD A RUMOR THAT VALERIE DAVIS WAS ABOUT TO INFORM ON HIM, THAN IS PRIOR TO THE MURDER. THAT IS POWERFUL MOTIVE EVIDENCE IN THIS CASE, NOT TO MENTION --

WHY DIDN'T THE STATE TRY TO PRESENT THAT? I MEAN, I WOULDN'T SEE HOW THAT, IF THERE WAS, BECAUSE TO ME IT WOULD LOOK LIKE THIS WAS SOMEBODY WHERE, IT STARTED OUT WITH ONE SHOOTING THAT LOOKED INTENTIONAL, AND THEN I THINK WE EVEN, DID WE STRIKE CCP IN

THIS CASE?

YES, YOUR HONOR, NOT FOR THE FIRST MURDER BUT FOR THREE OF THE SUBSEQUENT MURDERS.

RIGHT. BUT IT WAS LIKE THIS GUY WENT BALLISTIC, AND NOT ANYTHING PLANNED AND WHERE, IF THE STATE HAD THAT KIND OF EVIDENCE, THAT THIS WAS A STRATEGIC THING THAT THAT DAY HE DECIDED HE WAS GOING TO FIND EVERYBODY THAT WERE POSSIBLE INFORMANTS, WHY WOULDN'T THE STATE HAVE WANTED TO PUT THAT ON?

THE STATE DID WANT TO PUT THAT ON. IN FACT, THERE WAS A MOTION IN LIMINE FOR THE, I BELIEVE THIRD VICTIM, THE ONE WHO SURVIVED, TO KEEP OUT ANY EXPLANATION OF WHAT THE STATEMENT "I DON'T LIKE POLICE-ASED NIGGERS ANYWAY." THE STATE WANTED TO GO INTO THAT. WHAT DOES THAT MEAN IN YOUR COMMUNITY? THAT MEANS HE WAS A TH.ANT AND THAT IS ONE OF THE SHOTS, BUT AGAIN I THINK YOU ARE PROVING YOUR POINT, YOUR HONOR, BECAUSE THE STATE STRUCK CCP BECAUSE THERE WAS NO MOTIVE FOR THE SUBSEQUENT MURDERS BUT THE FACT WAS THERE WAS A DRUG-RELATED MOTIVE, AND I THINK THE STATE COULD HAVE STRONGLY URGED THE COURT BELOW AT TRIAL TO INTRODUCE EVIDENCE OF COCAINE DEALING. ANOTHER TRIAL COURT MADE A FINDING, STATEMENT IN HERE THAT THE PROSECUTOR ASHTON TESTIFIED ABOUT "OPERATION COOKIE MONSTER".

WHAT WAS THAT?

THAT WAS A LARGE-SCALED FEDERAL INVESTIGATION INTO DRUG DEALING WITH REGARD TO CURTIS WINDOM AND VALERIE DAVIS. IN FACT, TWO FEDERAL AGENTS WERE PRECLUDED BY THE DEFENSE ATTORNEY, BY ARGUING THAT THEIR TESTIMONY DURING THE PENALTY PHASE WOULD BE IRRELEVANT. THE STATE HAD THESE TWO AGENTS LINED UP TO TESTIFY ABOUT "OPERATION COOKIE MONSTER CO" AND THE FACT THAT VALERIE DAVIS WAS BEING CALLED AS A WITNESS TO TURN AGAINST WINDOM. AND AGAIN ONE OF THE THINGS THAT I WANT TO GET TO IS THE FACT THAT COLLATERAL COUNSEL THINKS THERE IS ALL OF THIS GREAT MITIGATION. AND IF ONLY COUNSEL HAD STEPPED FORWARD TO UNCOVER IT, HE WOULD HAVE UNCOVERED IT.

TO ME AT LEAST, THERE IS A KNOWING WAIVER ON THIS RECORD, BUT I DON'T RECALL IN MY TIME HERE, SAYING -- SEEING A SITUATION WHERE THERE IS A WAIVER OF ALL MITIGATION BY THE DEFENSE COUNSEL, MAKING THAT DECISION, AND WE HAVE GOT SOME PRETTY BAD ACTORS THAT COME UP HERE, AND THEY SOMEHOW MANAGE TO PUT SOMETHING ON, WHETHER THEY ARE GOING TO SAY LISTEN, I AM GOING TO STAY AWAY FROM MENTAL HEALTH BECAUSE I WANT TO HUMANIZE THIS PERSON, AND THEY WALK THAT LINE, AND I GUESS, DO YOU KNOW OF ANY OTHER CASES THAT WE HAVE WHERE A DEFENSE ATTORNEY HAS ACTUALLY THROWN UP HIS HANDS AND SAID, NO, THIS GUY IS SUCH A BAD DUDE THAT THERE IS NOTHING THAT I AM GOING TOABLE ABLE TO TELL THE -- TO BE ABLE TO TELL THE JURY ABOUT?

I DON'T KNOW A CASE OFFHAND DIRECTLY FROM THIS COURT BUT I DO KNOW ONE FROM THE SUPREME COURT, DARDEN V WAYNE WRIGHT, WHERE THE COURT FOUND A SIMPLE PLEA FOR MERCY AND FORE GOING ANY EVIDENCE WAS A REASONABLE TACTICAL CONVERSATION, SO YES, THE SUPREME COURT HAS APPROVED THAT TACTIC, AND WHAT YOU HAVE HERE IS EVIDENCE THAT MR. LIENSTER WAS VERY CONCERNED ABOUT DRUG DEALING AND THE DRUG EVIDENCE COMING BEFORE THE JURY. YOU HAVE AN INFORMED WAIVER. YOU DON'T HAVE COUNSEL SUGGEST SOMEONE WHO DID NOT INVESTIGATE THE POTENTIAL OR POSSIBILITY OF PRESENTING MITIGATING EVIDENCE TO THE JURY. IN FACT, COUNSEL CALLED FIVE CHARACTER WITNESSES AT THE SPENCER HEARING. ELICITED EIGHT WITNESSES ON THE JUDGE, PRIOR TO THE PENALTY PHASE, WITNESSES HE WAS PREPARED TO CALL, SO THEY HAD CHARACTER WITNESSES THERE, BUT THEY MADE THE JUDGMENT, AND ALL THE STATE HAS TO SHOW IS NOT THAT EVERY COMPETENT ATTORNEY WOULD HAVE MADE THAT DECISION BUT THAT SOME REASONABLE ATTORNEY COULD HAVE MADE THAT DECISION, IN THESE CIRCUMSTANCES.

WELL, I GUESS ONE THING THAT BOTHERS ME IS, IF THESE WITNESSES WERE CALLED AT THE SPENCER HEARING, I MEAN, THE STATE COULD HAVE, IN FACT, BROUGHT UP THIS OTHER EVIDENCE THAT THEY KEEP SAYING THEY WANTED TO GET OUT, KEEP OUT, EVEN AT THE SPENCER HEARING, SO WHY IS IT DIFFERENT?

ACTUALLY --

FROM BRINGING IT BEFORE THE TRIAL JUDGE, AS OPPOSED TO BRINGING IT BEFORE THE TRIAL JURY?

WELL, MR. LIENSTER TESTIFIED THAT HE THOUGHT THE JUDGE WOULD BE BETTER ABLE TO DISREGARD THAT SITUATION OR REMEMBER WE ARE TALKING ABOUT ORLANDO IN THE '90s, AND THE FACT THAT YOU ARE A COCAINE DEALER IN THE WINTER GARDEN AREA, IS NOT THE KIND OF CHARACTER EVIDENCE THAT YOU WANT TO HAVE IN FRONT OF THE JURY. NOW, DESPITE HIS BEST EFFORTS EVEN IN FRONT OF THE JUDGE, THE FACT THAT WINDOM WAS A DRUG DEALER CAME OUT DURING THOSE FIVE MITIGATION WITNESSES. IN FACT, THE RUMOR CAME OUT THAT MARY JACKSON TESTIFIED THAT WINDOM, HIMSELF, AND THIS IS A ADMISSION THAT WINDOM MADE. HE HAD HEARD A RUMOR THAT VALERIE DAVIS WAS ABOUT TO OR WAS GOING TO INFORM ON HIM, SO IT DIDN'T COME OUT DURING THE SPENCER HEARING, AND THAT SHOWS, AGAIN, HOW TRIAL COUNSEL STRATEGY WAS REASONABLE IN THIS CASE AND IT WAS A STRATEGY TAKEN WITH THE FULL KNOWLEDGE OF THE DEFENDANT, BECAUSE HE AGREED TO IT, AND EVEN THOUGH THIS CASE WAS TRIED BEFORE THIS COURT'S DECISION IN COON, THE TRIAL COUNSEL OFFERED UP ORALLY, PRIOR TO THE WAIVER, WHAT HE WAS PREPARED TO PRESENT IN MITIGATION, AND PERHAPS IT WASN'T A DETAILED PRESENTATION OF THAT TIME, BUT WE DO HAVE A COLLOQUY ON THE RECORD WHERE THE DEFENDANT IS CLEARLY MAKING AN INFORMED DECISION.

COULD YOU COMMENT ABOUT THERE APPARENTLY WERE TWO LAWYERS HERE. IS THAT CORRECT? AND THERE WERE TWO LAWYERS.

YES, YOUR HONOR.

IS THAT RIGHT? REPRESENTING THE DEFENDANT?

YES. LIENSTER AND KIRK BARCH, I BELIEVE.

AND LIENSTER HAD A SEVERE ALCOHOL PROBLEM, THAT CORRECT?

THAT'S CORRECT.

WAS IT A DRUG PROBLEM, TOO, OR JUST ALCOHOL?

I DIDN'T, SOMEONE MENTIONED THERE WAS A DRUG PROBLEM. I DIDN'T SEE ANYTHING DEVELOP DURING THE EVIDENTIARY HEARING ABOUT DRUGS.

OKAY. WHAT WAS THE EVIDENCE HERE WITH REFERENCE, NUMBER ONE, TO WHAT THE DIVISION OF RESPONSIBILITIES WERE BETWEEN THE TWO LAWYERS, AND THEN NUMBER TWO, WHAT WAS THE EVIDENCE AS TO MR. LIENSTER'S PARTICIPATION IN THE CASE AND AT TRIAL, AS FAR AS THE EFFECT OF THE ALCOHOLISM, KEEPING HIM HOME AND AWAY FROM THE TRIAL OR AFFECTING THE CASE? COULD YOU COMMENT ON THOSE TWO THINGS. THE DIVISION OF RESPONSIBILITIES AND THEN THE EFFECT OF HIS ALCOHOLISM.

YES, YOUR HONOR. WELL, FIRST OF ALL, MR. LIENSTER WAS LEAD COUNSEL, AND PRIMARILY RESPONSIBLE FOR ALL GUILT PHASE ISSUES, BUT HE HAD THE ASSISTANCE OF KIRK BARCH, WHO HE DIRECTED TO GATHER EVIDENCE FOR HIM, PREPARE FOR THE PENALTY PHASE. SO HE HAD TWO ATTORNEYS, ONE WAS PRIMARILY --

SO DID LIENSTER TESTIFY OR WAS THERE EVIDENCE THAT HE WAS COMPLETELY IN CHARGE AND CALLING THE SHOTS, AS TO BOTH THE GUILT AND THE PENALTY PHASE? OR WAS IT DIVIDED UP INTO TWO OF THEM OR TELL ME.

THE GUILT PHASE WAS CLEARLY ALL MR. LIENSTER. PENALTY PHASE, AS FAR AS THE INVESTIGATION, WAS CLEARLY KIRK BARCH. HOWEVER, THE OVERRIDING DECISION, THEY BOTH AGREED, AND THEY TALKED ABOUT THE STRATEGY PRIOR TO THE PENALTY PHASE, THEY BOTH AGREED AT THAT TIME, WHEN THE STATE PRESENTED, I BELIEVE, ONE WITNESS, THEY WENT BACK TO THE OFFICE AND THEY TALKED ABOUT THEIR STRATEGY, AND BOTH AGREED THAT THEY WOULD NOT PRESENT MITIGATION EVIDENCE ON, IN FRONT OF THE JURY. NOW, THIS DOESN'T MEAN THAT THERE WAS NO EVIDENCE PRESENTED, BUT I WILL GET BACK TO THAT IN A MOMENT. WITH REGARD TO THE ALCOHOL CONSUMPTION THERE, IS NO CREDIBLE EVIDENCE BASED ON THIS RECORD THAT MR. LIENSTER'S PERFORMANCE WAS IN ANY WAY IMPAIRED BY ALCOHOL OR DRUGS.

WAS THERE TESTIMONY THAT HE WASN'T ABLE TO COME TO COURT AND THAT HE WAS AT HOME DURING THE COURSE OF THE TRIAL?

NO, YOUR HONOR. HE DIDN'T MISS A DAY OF THE TRIAL. THERE WERE A FEW MOTION HEARINGS, I GUESS, EARLY ON, WHERE MR. BARCH MAY HAVE COVERED FOR HIM, BUT HE HAD THE FLU AT THE BEGINNING OF THE TRIAL, BUT MR. LIENSTER TESTIFIED THAT HE NEVER APPEARED IN COURT NOT ONCE, DRUNK.

I AM NOT TALKING ABOUT HIS APPEARANCES IN COURT. I AM TALKING ABOUT WHETHER OR NOT HE WAS DISABLED.

NO. HE WAS NOT DISABLED.

BARCH DID NOT TESTIFY THAT PLIN SISTER HAD TO STAY AWAY BECAUSE OF HIS ALCOHOLISM PROBLEM?

NO, YOUR HONOR, NOT ON THIS CASE, BUT HE DID SAY ON OCCASION HE WOULD HAVE TO COVER FOR HIM, BUT I DON'T BELIEVE ON THIS CASE THERE WAS ANY EVIDENCE THAT HE WAS IMPAIRED WHATSOEVER. IN FACT, THE TRIAL COURT CAME IN AND TESTIFIED THAT SHE OBSERVED MR. LIENSTER, WAS FAMILIAR WITH HIS PAST PROBLEMS WITH ALCOHOL, LOOKED FOR SIGNS OF IMPAIRMENT, OBSERVED NONE, THAT HE WAS ATTENTIVE IN COURT. ALWAYS APPROPRIATE IN HIS DEMEANOR. NO INDICATIONS THAT HE WAS DRUNK. BOTH PROSECUTORS TESTIFIED THAT THEY SAW NO EVIDENCE OF INTOXICATION DURING THIS TRIAL. ALSO MR. LIENSTER AND MR. BARCH TESTIFIED THAT HE WAS NOT INTOXICATED DURING THE TRIAL.

I WOULD LIKE TO ADDRESS, SO THE ONLY THING AS FAR AS LIENSTER DID IN THE PENALTY PHASE BEFORE THE JURY WAS MAKE A CLOSING ARGUMENT. CORRECT?

THAT'S CORRECT.

AND JUST LENGTHWISE, HOW LONG WAS THAT CLOSING ARGUMENT?

I DON'T KNOW, YOUR HONOR. IT WAS A FEW BANKS IN THE RECORD, BUT -- A FEW PAGES IN THE RECORD.

I AM CONCERNED ABOUT IT, ALTHOUGH IS INDIRECTLY OR DIRECTLY HERE, AS FAR AS THIS PERFORMANCE, HE SAYS, HE DOESN'T DESERVE PITY. HE DOESN'T DESERVE ANYTHING FOR WHAT HE DID. I AGREE WITH YOU. IT WAS, I AGREE WITH JEFF IT WAS COLD. ANYBODY COULD COMMIT, IT WAS PREMEDITATED. IT IS AGGRAVATED. IT SEEMS TO ME THAT HE CONCEDES THE CCP AGGRAVATOR BEFORE THE JURY, THE SAME, IS THAT NOT CORRECT?

THAT IS NOT CORRECT. IN FACT, IF YOU LOOK AT THE ENTIRE ARGUMENT, FIRST OF ALL, HE UNDERSTOOD, WITH REGARD TO THE FIRST VICTIM, JOHNNY LEE, I MEAN, YOU HAVE HIS STATEMENT EARLIER IN THE DAY THAT I AM GOING TO KILL JOHNNY LEE, THAT YOU ARE GOING TO READ ABOUT ME. I AM GOING TO MAKE THE HEADLINES, AND THEN HE GOES OUT. HE OBTAINS THE GUN. HE OBTAINS THE AMMUNITION, THEN HE PULLS UP TO HIM IN BROAD DAYLIGHT AND POINTS THE GUN OUT WHEN THE VICTIM'S BACK IS TURNED TO HIM AND SHOOTS HIM TWICE IN THE BACK AND THEN GETS OUT OF THE CAR AND AS THE VICTIM IS LAYING PRONE ON THE GROUND, HE SHOOTS HIM TWO MORE TIMES AND BEFORE THAT, HE SAID SOMETHING ABOUT EX-PLEAT I HAVE, EX-PLEAT I HAVE, MY -- EXPLETIVE, EXPLETIVE, MY MONEY.

HE SAYS THAT IN THE ARGUMENT?

HE BROUGHT OUT IN THE TESTIMONY THAT MR. WINDOM LOOKED STRANGE THAT DAY. HE APPEARED, HE LOOKED WILD, HIS EYES WERE BUGGED OUT, SO HE WAS USING THE WITNESSES PRESENTED DURING THE GUILT PHASE TO ARGUE THE STATUTORY MENTAL MITIGATORS, SO IT IS NOT TRUE TO SAY HE TOTALLY LAID DOWN AND DID NOT MAKE AN ARGUMENT. HE DID. HE USED HIS GUILT PHASE EVIDENCE, WITHOUT BRINGING UP THE FACT THAT MR. WINDOM WAS A HIGHLY SUGGESTIONFUL DRUG DEAL -- HIGHLY SUCCESSFUL DRUG DEALNER THE WINTER GARDEN AREA. I WANT TO COMMENT ON COLLATERAL COUNSEL HAS FOUND TWO EXPERTS, DR. CROWDER FROM BOYS', IDAHO, AND DR. JONATHAN PINKUS, AND THEY DO BOTH HAVE FAVORABLE OPINIONS ABOUT MR. WINDOM. BUT THEY NEVER WOULD HAVE FOUND THOSE TWO WITNESSES. HE HAD DR. KIRKLAND, A PSYCHIATRIST FROM THE LOCAL AREA AND DR. KIRKLAND INDICATED AFTER HIS INITIAL EXAMINATION HE FOUND NO EVIDENCE OF BRAIN DAMAGE, NO EVIDENCE OF A PSYCHOTIC THOUGHT DISORDER, BASICALLY NO REASON, NO EVIDENCE OF BRAIN DAMAGE, THERE WAS NO REASON --

WASN'T THERE SOME PROBLEM, THOUGH, WITH THE MENTAL HEALTH EXPERT THAT HE DID HAVE, THAT HE COULD, THAT DIDN'T GIVE HIM THE KIND OF INFORMATION THAT WOULD HAVE BEEN NECESSARY, IN ORDER FOR THIS DOCTOR TO HAVE MADE A REASONABLE STATEMENT CONCERNING WHETHER OR NOT MR. WINDOM HAD OR DID NOT HAVE ANY KIND OF MENTAL HEALTH PROBLEMS?

YOUR HONOR, HE DID HAVE FOR -- HE DID ASK FOR DR. KIRKLAND SOME ADDITIONAL MATERIALS FROM COUNSEL WHICH COUNSEL NOT PROVIDE. NOW, COUNSEL INDICATED, TESTIFIED BELOW THAT THAT KIND OF BACKGROUND INFORMATION WOULD MAKE DR. KIRKLAND USELESS TO HIM. ONCE HE KNEW WINDOM WAS A DRUG DEALER AND HE HAD TO, TO INVESTIGATE HIS BACKGROUND, HE COULD NEVER USE HIM, SO HE MADE THAT CHOICE. NOW, IF YOU WANT TO CALL THAT CHOICE DEFICIENT BECAUSE HE DIDN'T GIVE HIM ADDITIONAL BACKGROUND MATERIALS, DR. KIRKLAND, LET'S LOOK AT THE TESTIMONY AT THE EVIDENTIARY HEARING, DR. KIRKLAND DID NOT HAVE ANYTHING TO SAY FAVORABLE TO MR. WINDOM. HE WAS PROVIDED THREE BOXES OF MATERIAL TO COLLATERAL -- PROVIDED BY COLLATERAL COUNSEL D HE HAVE A CHANGE OF OPINION ABOUT MR. WINDOM? NO. HIS OPINION WAS UNCHANGED. THERE IS NO EVIDENCE IN THE RECORD ANYWHERE THAT, IT WOULD HAVE MADE DR. KIRKLAND A FAVORABLE WITNESS.

THESE TWO COLLATERAL COUNSEL WITNESSES, DIDN'T THEY BOTH INDICATE THAT MR. WINDOM HAD SOME KIND OF DEFECTOR DISEASE AND WOULD HAVE MET THE STANDARD FOR NOT ONLY THE STATUTORY MENTAL MITIGATORS BUT FOR AN INSANITY DEFENSE?

WELL, I WOULD AGREE WITH YOU ON DR. PINKUS DID CLEARLY TESTIFIED THAT MR. WINDOM WAS INSANE AT THE TIME OF THE OFFENSES. DR. BEAVER, ALTHOUGH, THE TRIAL COURT, SEEMED TO REACH THAT OPINION ALTHOUGH HE DIDN'T. HE READ THE TESTIMONY A COUPLE OF TIMES. DR. BEAVER NEVER SAID THAT MR. WINDOM WAS INSANE AT THE TIME OF THE OFFENSES. THEY

DO THINK HE WAS PSYCHOTIC, DISTURBED, PARANOID, POTENTIALLY, BUT THAT TESTIMONY WAS REBUTTED BY THE MORE CREDIBLE TRIAL EXPERT, DR. MARIN, AND MOREOVER THE TRIAL COURT EXPERT, AND IF YOU READ THEIR OPINIONS, THE OPINIONS THEY ARRIVED AT TOTALLY DID NOT TAKE INTO ACCOUNT THE FACTS OF THIS CASE OR THE VIOLENT SOCIAL SETTING IN WHICH MR. WINDOM LIVED. IF YOU LOOK AT THE LIFE OF A DRUG DEALNER WINTER GARDEN, YOU SHOULD BE PARANOID. THERE ARE PEOPLE AFTER YOU. MR. WINDOM HAD BEEN SHOT IN THE LEG. MR. WINDOM'S APARTMENT HAD BEEN RANSACKED. HE HAD BEEN ROBBED. \$10,000 HAD BEEN TAKEN FROM HIM. HE LED A STRESSFUL LIFE AT THE TIME OF THE SHOOTINGS, BUT HE MADE THE CONSCIOUS DECISION --

WHAT WAS THIS THING ABOUT A STATE OF FEUGE OR WHATEVER? YOUR OPPONENT HERE, IN HIS DIRECT PRESENTATION, SAID THAT DR. KIRKLAND WAS CALLED JUST TO TESTIFY ABOUT THIS STATE OF FEUGE. I MEAN, YOU ARE GOING TO HAVE TO EXPLAIN, DID HE EXPLAIN WHAT THAT WAS, BUT THEN THAT HE, IN ESSENCE, TESTIFIED OR DESCRIBED THAT, BUT THEN IN ESSENCE SAID BUT THE DEFENDANT WASN'T IN A STATE OF FUGUE, AND SO HELP ME WITH WHY WAS HE PUT ON AND THEN WHAT POSITIVE TESTIMONY DID HE GIVE ON BEHALF OF THE DEFENDANT, AFTER BEING PUT ON?

WELL, I THINK NUMBER ONE, HE GOT IN FRONT OF THE JURY, AND I DON'T THINK HE SHOULD HAVE, I THINK IT IS AMAZING THAT MR. LIENSTER GOT HIM TO TESTIFY, BECAUSE YOU KNOW, BASICALLY HE WAS TRYING TO REACH A DIMINISHED CAPACITY DEFENSE, AND IT WASN'T RECOGNIZED, BUT ANYHOW, SO DR. DIRK LAND TESTIFIES THAT THERE IS SUCH A THING AS A FEUGE STATE, AND ON CROSS-EXAMINATION HE SAID IT WAS UNLIKELY IN THIS CASE, BUT I THINK DR. KIRKLAND DID HAVE SOMETHING FAVORABLE TO SAY BECAUSE IT GOT IN FRONT OF THE JURY THAT MR. WINDOM, AGAIN, HAD NO MEMORY OF SHOOTING VALERIE DAVIS, SO HE JUST WANTED TO THROW SOMETHING OUT THERE TO THE JURY THAT WE DON'T KNOW HOW HIS BRAIN REACTS, WE DON'T KNOW HOW HIS CONDUCT --

WHAT DID LIENS SISTER TEST -- WHAT DID MR. LIENSTER TESTIFY AS TO HIS PURPOSE FOR PUTTING DR. KIRKLAND ON? JUST TO GIVE THE JURY --

JUST TO GIVE THE JURY SOMETHING THEY CAN LOOK AT, AND WHETHER YOU WANT TO CALL THAT DEFICIENT OR NOT, I THINK THERE WAS NO MORE FAVORABLE MENTAL HEALTH TESTIMONY THAT COULD HAVE BEEN AVAILABLE TO COLLATERAL COUNSEL.

DID KIRKLAND TESTIFY THAT HE WAS ASKED TO DO A MITIGATION EVALUATION OF THE DEFENDANT?

NO, YOUR HONOR. HE WAS NOT. IN FACT, WHAT HE TESTIFIED TO IS THAT HE WAS EXAMINING HIM FOR COMPETENCY AND SANITY, BUT AS THE RECORDER -- AS THE ORDER IS WORDED, HE WAS CLEARLY LOOKING INTO HIS MENTAL FUNCTIONING AND HIS PROCESSES, SO EVEN THOUGH YOU DON'T CALL IT MENTAL HEALTH MITIGATION, HE FOUND IT WAS BASED ON HIS EXAMINATION, NO EVIDENCE OF PSYCHOTIC OR THOUGHT DISORDER.

HE DID A THOROUGH WORKUP?

I WOULDN'T SAY THOROUGH. HE ADMITTED THAT HE DIDN'T HAVE ALL OF THE MATERIAL HE WANTED, BUT HIS CONCLUSIONS WERE REASONABLE AND BASICALLY DR. MARIN, WHO WAS GIVEN MORE MATERIAL THAN ANY OTHER EXPERT IN THIS CASE, BASICLY ARRIVED AT THE SAME CONCLUSION THAT MR. WINDOM WAS NOT INSANE, NOT PSYCHOTIC, AND NOT BRAIN DAMAGED, AND AGAIN, ONCE YOU PRESENT MENTAL HEALTH TESTIMONY, YOU ARE OPENING UP A PANDORA'S BOX OF MISCONDUCT. WINDOM WAS ABLE TO OPERATE --

ARE YOU SAYING THAT KIRKLAND'S TESTIMONY AT THE GUILT PHASE WAS ESSENTIALLY A WASH, THAT IS IT HAD NOTHING DO WITH THE GUILT PHASE ISSUES?

I WOULDN'T SAY NOTHING TO DO WITH IT. I CAN SEE WHY HE PUT THEM ON THERE, BUT IT WASN'T TERRIBLY --

WHY DID HE PUT ON IN THE GUILT PHASE ISSUES?

FEUGE STATE. I THOUGHT HE TESTIFIED THAT IT WASN'T A FEUGE STATE?

HE SAID IT WAS UNLIKELY BUT HE ALSO GOT ON THAT MR. WINDOM HAD NO RECOLLECTION OF SHOOTING AT LEAST ONE OF THE VICTIMS, SO THERE WAS SOME PURPOSE IN MIND THAT WAS NOT CLEARLY UNREASONABLE, BUT EVEN IF YOU CALL THAT DEFICIENT, THERE IS ABSOLUTELY NO PREJUDICE BASED UPON THIS RECORD. WE HAVE AN ABUNDANT EVIDENCE OF DELIBERATE CONDUCT, IN OBTAINING THE GUN, OBTAINING THE AMMUNITION, SAYING THAT HE WAS GOING TO KILL HIS FIRST VICTIM AND HE DID, HE FOLLOWED THROUGH ON IT.

WHAT WAS LIENSTER'S POSITION AT THE TIME OF THIS HEARING? IS HE A LAWYER? HE WAS INCARCERATED AT THE TIME AND HE IS NO LONGER A MEMBER OF THE BAR, BUT AS HE TESTIFIED OF -- AS HE TESTIFIED BELOW, HIS PROBLEMS WITH THE FLORIDA BAR HAD NOTHING TO DO WITH THIS CASE.

CHIEF JUSTICE: I SEE YOU ARE OUT OF TIME.

THANK YOU VERY MUCH.

CHIEF JUSTICE: COUNSEL, COULD YOU ADDRESS THE ISSUE AS TO WHETHER THERE WAS ANY TESTIMONY THAT LIENSTER'S ALCOHOLIC PROBLEM HAD ANYTHING TO DO NEGATIVELY WITH HIS REPRESENTATION HERE?

SURE, YOUR HONOR. THE TESTIMONY AT THE EVIDENTIARY HEARING WAS CONFLICTING. THERE WERE SOME WITNESSES THAT TESTIFIED ON BEHALF OF MR. WINDOM THAT THEY SMELLED ALCOHOL ON MR. LIENSTER IN THE, IN BETWEEN BREAKS AT TRIAL. JUDGE RUSSELL AND MR. ASHTON TESTIFIED THAT THEY COULD NOT OBSERVE ANY SIGNS OF ALCOHOL. MR. BARCH, WHO PROBABLY IS THE BEST WITNESS AS TO MR. LIENSTER'S ALCOHOLISM DURING THIS PERIOD, TESTIFIED THAT AT THE TRIAL, HE COULDN'T SAY FOR SURE WHETHER OR NOT HE WAS DRINKING OR NOT. HE TESTIFIED THAT HE HAD ALCOHOL-RELATED SHAKES AT THE TRIAL. HE ALSO TESTIFIED THAT, IN THE TIME LEADING UP TO THE TRIAL, THAT ESSENTIALLY MR. LIENSTER'S FUNCTION WAS NOT TO PROVIDE ANY LEGAL REPRESENTATION AT ALL BUT ESSENTIALLY TO COLLECT BILLS. HE TESTIFIED THAT HE WAS AT HOME MOST OF THE TIME AND THAT MR. BARCH HAD TO COVER IN COURT FOR HIM QUITE OFTEN, OFTEN IN FRONT OF JUDGE RUSSELL. IN TERMS --

BUT FOR THE ON THIS CASE.

MA'AM?

BUT HE WASN'T COVERING FOR HIM ON THIS CASE.

NO. MR. LIENSTER WAS AT THE GUILT AND PENALTY PHASE OF TRIAL.

I DON'T UNDERSTAND EXACTLY, AND IF YOU COULD HELP US WITH THIS DIVISION OF RESPONSIBILITIES. IF MR. BARCH WAS PUT IN CHARGE OF THE PENALTY PHASE ASPECT OF THE TRIAL, I THINK YOU INDICATED BEFORE IN YOUR DIRECT PRESENTATION, THAT MR. BARCH THOUGHT THAT THERE SHOULD BE AN INVESTIGATOR, AND THAT THERE SHOULD BE A MENTAL HEALTH EXAMINATION FOR MITIGATION, AND THAT KIND OF THING, HOW DOES THAT SQUARE WITH MR. BARCH BEING IN CHARGE OF THE PENALTY PHASE OF THE TRIAL? I AM NOT --

I THINK MR. BARCH'S RESPONSIBILITY WAS TO INVESTIGATE. HE WAS ESSENTIALLY ACTING TO LOOK, AND HE, IN TERMS OF HIRE AGO INVESTIGATOR, I THINK THAT DECISION WAS UP TO MR. LIENSTER, AND THAT HE TESTIFIED THAT HE COMMUNICATED THAT AN INVESTIGATOR SHOULD BE HIRED AND THAT A MENTAL, COMPLETE MENTAL HEALTH EVALUATION SHOULD BE CONDUCTED AND HE COMMUNICATED THAT. I THINK MR. LIENSTER WAS MAKING THOSE ULTIMATE DECISIONS.

DID MR. BARCH TESTIFY THAT HE CONCURRED WITH THOSE DECISIONS?

THE DECISIONS?

NOT TO HIRE INVESTIGATORS, NOT TO --

NO, NO YOUR HONOR. HE TESTIFIED THAT HE COMMUNICATED TO MR. LIENSTER THAT THOSE THINGS SHOULD BE DONE AND THAT THEY WERE NOT, BUT I THINK MR. LIENSTER IS THE ONE WHO WAS MAKING THE FINAL DECISIONS WHETHER OR NOT TO DO THOSE THINGS. ON THE, ALSO AS TO THE DRUG TESTIMONY AND MR. ASHTON, I THINK THAT IT WAS ALSO PART OF THE TESTIMONY THAT HE HAD COCAINE DEALERSHIP AS WELL.

WHAT WAS THE HARD EVIDENCE ABOUT YOUR CLIENT'S BACKGROUND AS A MAJOR DRUG DEALER? WHAT WAS THE STRONGEST EVIDENCE OF THAT?

THE STRONGEST EVIDENCE IS THE ARREST REPORTS. I THINK THAT IS THE STRONGEST EVIDENCE INTRODUCED BY THE STATE AT THE EVIDENTIARY HEARING BELOW.

WHAT DO THE ARREST REPORTS SAY?

THEY SAID THAT HE WAS CHARGED WITH SALE AND POSSESSION OF COCAINE.

WAS THERE A CONVICTION RECORD PUT IN?

NO, YOUR HONOR. THOSE CASES WERE NOLLE PROSSED, AS FAR AS I KNOW. THOSE CASES WERE NOLLE PROSSED. I BELIEVE THAT IS THE TESTIMONY.

THOSE WERE NOLLE PROSSED BECAUSE OF THE MURDER CASES?

POSSIBLY. I MEAN, THAT WOULD MAKE SENSE, BUT I DON'T KNOW THAT FOR A FACT.

OKAY. WAS THERE ACTUAL TESTIMONY BY PERSONS AT THE EVIDENTIARY HEARING, DESCRIBING HIM BEING THIS MAJOR DRUG DEALER?

NOT ONE, YOUR HONOR.

OR CONVICTIONS OF OTHER OFFENSES?

NO, YOUR HONOR. MR. ASHTON WAS THE ONLY WITNESS WHO TESTIFIED ABOUT THIS, AND HE TESTIFIED GENERALLY, ABOUT WANTING TO PUT ON MOTIVE, AND I WOULD POINT OUT IT IS CURIOUS, IF THE STATE HAD EVIDENCE THAT THESE MURDERS WERE MOTIVATED BY ONE OF THE VICTIMS BEING AN INFORMANT, THERE IS NOTHING THAT WOULD HAVE PRECLUDED THEM FROM PUTTING THAT EVIDENCE ON AT THE GUILT PHASE. THAT WOULD HAVE BEEN ADMISSIBLE EVIDENCE IF THEY HAD ANYTHING SOLID AND THE ONLY THING THAT THEY HAD WAS THE TESTIMONY OF MARY JACKSON, WHO TESTIFIED THAT MR. ASHTON TOLD THAT HE HEARD A RUMOR THAT --

MR. ASHTON TESTIFIED AT THE EVIDENTIARY HEARING, IS THAT RIGHT?

YES.

DID HE TEST MY THAT HE EVIDENCE THAT MR. WINDOM WAS A DRUG DEALER?

IF THEY HAD IT, THEY DIDN'T PRESENT ANY EVIDENCE OF THESE FELONY --

THERE WAS A MOTION IN LIMINE, IS THAT CORRECT, TO PREVENT MR. ASHTON --

THERE WAS NO MOTION.

O.

THERE WAS NOT. MR. LIENSTER TESTIFIED AT THE EVIDENTIARY HEARING, AND I THINK HE TESTIFIED THAT IN RETROSPECT THERE PROBABLY SHOULD HAVE BEEN ONE AND THE LOWER COURT, THE POSTCONVICTION COURT ACTUALLY WROTE THAT HE BELIEVED A MOTION IN LIMINE SHOULD HAVE BEEN FILED, ALTHOUGH HE, ULTIMATELY DIDN'T FEEL THAT IT WOULD HAVE BEEN SUCCESSFUL, HE FELT LIKE IT SHOULD HAVE BEEN FILED, BUT THERE WAS NO MOTION IN LIMINE FILED IN THIS CASE, TO PREVENT THAT EVIDENCE.

WAS THERE ANYTHING IN THE RECORD REGARDING NEGOTIATIONS, FOR LACK OF A BETTER WORD, BETWEEN THE PROSECUTOR AND THE DEFENSE COUNSEL, BASICALLY AN UNDERSTANDING IS I AM NOT GOING TO PRESENT THIS EVIDENCE OF THE DRUG DEALING, UNLESS YOU PRESENT THE EVIDENCE OF THE MENTAL MITIGATION, AND IF YOU DO, THEN I AM GOING TO PULL OUT THAT EVIDENCE?

YES, YOUR HONOR. I THINK THERE WAS TESTIMONY FROM BOTH MR. LIENSTER AND MR. ASHTON THAT MR. ASHTON HAD COMMUNICATED TO MR. LIENSTER I HAVE GOT THIS EVIDENCE. I WANT TO PRESENT IT. BUT --

BUT I AM NOT GOING TO PRESENT IT, UNLESS YOU TRY TO PRESENT THE MENTAL MITIGATION?

I THINK THAT HE MAY HAVE TESTIFIED TO THAT. I AM NOT EXACTLY SURE IF HE WENT THAT FAR BUT HE MAY HAVE. BUT I WOULD POINT OUT THAT MR. LIENSTER, HE ESSENTIALLY, HE DID, HE WASN'T AWARE OF WHAT THE FULL, WHAT THE EVIDENCE WAS THERE. HE DIDN'T DO ANY DISCOVERY ON THIS.

HAVE YOU, SINCE YOU HAVE PUBLIC RECORDS ABILITIES, HAVE YOU TRIED TO OBTAIN WHATEVER THIS EVIDENCE WAS? I MEAN, YOU ARE NOT SAYING MR. LIENSTER WAS, YOU KNOW, MAYBE HE WAS SHOWN THAT EVIDENCE OR?

I HAVE NOT, YOUR HONOR. I WASN'T AT THE, I DIDN'T HAVE THIS CASE EARLY ON, BUT I HAVEN'T DONE ANYTHING TO OBTAIN ANY EVIDENCE LIKE THAT, AND I AM NOT, THERE IS NO EVIDENCE THAT MR. LIENSTER HAD IT.

BUT WE DO KNOW THAT MR. LIENSTER WAS PAID AS A PRIVATELY RETAINED ATTORNEY, A SUBSTANTIAL SUM OF MONEY TO DEFEND THIS CASE.

HE WAS PRIVATELY RETAINED, THAT'S CORRECT. I AM NOT SURE HOW MUCH.

WAS THE DEFENDANT'S RECORD PUT IN EVIDENCE AT THE EVIDENTIARY HEARING?

YES. WELL, THERE WAS NO PRIOR, THERE WAS NO PRIOR RECORD. THE TWO ARRESTS. THOSE WERE THE ARREST AFFIDAVITS WERE PUT INTO EVIDENCE AT THE EVIDENTIARY HEARING, BUT IN TERMS OF A PRIOR CONVICTIONS, I DON'T BELIEVE THERE WERE ANY PRIOR CONVICTIONS.

CHIEF JUSTICE: WE HAVE USED YOUR TIME AND GONE OVER T WE HAVE TO TAKE THE REST OF IT

ON THE BRIEFS. THANK YOU BOTH, VERY MUCH, FOR YOUR PRESENTATION.

THANK YOU VERY MUCH.