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Dennis Sochor v. State of Florida

NOW TURN TO THE LAST CASE, COURT'S DOCKET THIS MORNING AND THAT'S SOCHOR VERSUS STATE.

ALL RIGHT, IF COUNSEL'S READY TO PROCEED, YOU MAY PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT, MY NAME IS RACHEL DAY AND I AM HERE ON BEHALF OF DENNIS SOCHOR, WHO APPEALS AFTER EVIDENTIARY HEARING OF A CAPITAL CASE. THIS IS A CASE OF CLASSIC INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO INVESTIGATE MITIGATION AT THE PENALTY PHASE. THE CIRCUMSTANCES SURROUNDING THE PENALTY PHASE ARE LAID OUT IN BOTH PENALTY PHASE ITSELF AND THE TESTIMONY AT THE EVIDENTIARY HEARING. WHAT HAPPENED WITH THIS. TRIAL COUNSEL DID NOT APPARENTLY DO ANY INVESTIGATION AT ALL PRIOR TO THE COMMENCEMENT OR PRIOR TO THE GUILTY VERDICT IN THIS CASE. WHAT WAS THE --.

WHAT WAS THE GAP BETWEEN THE GUILT PHASE AND THE PENALTY PHASE?

I THINK IT WAS JUST ONE DAY. VERY, VERY LITTLE TIME. MAYBE A WEEKEND. WHAT HAPPENED WAS THAT, -- AT THE CONCLUSION OF THE GUILT PHASE TRIAL, COUNSEL TELEPHONED THE PARENTS OF MR. SOCHOR, CHARLES AND ROSE SOCHOR AT THEIR HOME IN MICHIGAN. ASKED THEM TO COME DOWN TO FLORIDA TO TESTIFY AT THE PENALTY PHASE. THEY CAME DOWN TO FLORIDA, HE MET, WIFE MET HAD THEM AT THE AIRPORT. I DON'T WANT TO BE NITPICKING BUT SINCE YOU SAY NOTHING WAS DONE. HE OBVIOUSLY MUST HAVE HAD THEIR PHONE NUMBERS AND KNEW HOW TO CONTACT THEM.

BUT IN TERMS OF INVESTIGATION AS TO SUBSTANCE, NOTHING WAS DONE. HE DIDN'T TALK TO THEM UNTIL THEY GOT TO THE HOTEL THAT NIGHT. AS ROSE SOCHOR TESTIFIED AT THE EVIDENTIARY HEARING, HE SPENT HALF AN HOUR MAYBE. THEN ASKED THEM TO PREPARE A STATEMENT WHAT THEY WOULD LIKE TO PRESENT TO THE JURY. NEXT MORNING THEY WENT INTO THE COURT AND CHARLES AND ROSE SOCHOR TESTIFIED, TWO OTHER PEOPLE TESTIFIED ADMITTEDLY AT THE PENALTY PHASE. ONE WAS KATHY COOPER, MR. SOCHOR'S OLDER SYSTEM. -- SISTER. SHE ONLY TESTIFIED HER OWN INSISTENCE. SHE WASN'T ASKED BY TRIAL COUNSEL, SHE WAS NEVER CON TAKTD BY TRIAL COUNSEL.

MR. RICH WAS DECEASED AT THE TIME OF THE EVIDENTIARY HEARING?

YES, YOUR HONOR, MR. RICH WAS DECEASED AT THE COMMENCEMENT OF THE CONVICTION PROCEEDINGS.

DID YOU GATHER -- DID HIS RECORDS EXIST AS TO TIME SPENT IN THE PENALTY PHASE?

WE HAVE NO RECORDS YOUR HONOR BECAUSE WE NEVER WERE ABLE TO OBTAIN A FILE FROM MR. RICH.

SO THE TESTIMONY AS TO WHAT HE DIDN'T DO IS BASED ON WHAT THESE WITNESSES SAY NOW AND THE VERY FACT OF THE, WHAT OCCURRED DURING THE PENALTY PHASE?

THAT'S CORRECT, YOUR HONOR. I DO HAVE -- BEFORE YOU CONTINUE, JUST A QUESTION. I KNOW NO MENTAL HEALTH EXPERTS TESTIFIED IN THE PENALTY PHASE. THESE TWO EXPERTS WHO WERE I GUESS HAD BEEN EMPLOYED BEFORE MR. RICHARD -- RICH'S INVOLVEMENT AS TO COMPETENCY AND SANITY WERE PUT ON BY THE DEFENDANT IN THE GUILT PHASE.

THAT'S CORRECT, YOUR HONOR.

ONE OF THEM TALKS ABOUT THINGS THAT WERE FUTURE DANGEROUSNESS. I'M TRYING TO FIND OUT, FROM YOUR READ OF THAT WHOLE TRANSCRIPT, WHAT WAS THE REASON THAT HE PUT ON THOSE TWO EXPERTS IN THE GUILT PHASE?

AGAIN, FROM MY READ OF THE TRANSCRIPT YOUR HONOR, BECAUSE I WASN'T ABLE TO TALK TO MR. RICH, IT LOOKED LIKE HE WAS TRYING TO ESTABLISH SOME KIND OF VOLUNTARY INTOXICATION DEFENSE. THE CIRCUMSTANCES SURROUNDING THE MENTAL HEALTH ARE THESE. DOCTOR ZAGER WAS A PSYCHIATRIST HIRSD BY THE PUBLIC DEFENDER WHO HAD PRECEDED MR. RICH REPRESENTING MR. SOCHOR.

SO HE WASN'T TRYING TO SAY HE WAS INSANE AT THE TIME OF THIS CRIME IN.

NO HE SPECIFICALLY SAID HE WASN'T INSANE AT THE TIME. HE SAID HE WAS INTOXICATED.

WHAT DID HE END UP ARGUING TO THE JURY DURING THE GUILT PHASE?

DURING THE GUILT PHASE, HE TALKED ABOUT THE INTOXICATION.

WELL THE BROTHER HAD TESTIFIED, CORRECT?

THE BROTHER HAD TESTIFIED AT GUILT PHASE, THAT'S CORRECT.

HAD TESTIFIED THAT THEY HAD BEEN AT THE BAR.

AND DRINKING AND SO FORTH.

SO DID THE MENTAL HEALTH EXPERT THEN PROVIDE THAT TO THE DEFENSE LAWYER, THAT IS, DID THEY SAY BASED ON HIS HISTORY, HE WAS INTOXICATED? DIDN'T KNOW WHAT HE WAS DOING?

DOCTOR ZAGER SAID HE WAS INTOXICATED AT THE TIME OF THE CRIME. HOWEVER, DOCTOR ZAGER DID NOT DO ANY INVESTIGATION INTO THE UNDERLYING MENTAL HEALTH CONDITION. DOCTOR ZAGER WAS HIRED PURELY TO LOOK AT COMPETENCE AND SANITY. HE WASN'T GIVEN ANY BACKGROUND MATERIALS. HE WASN'T GIVEN ACCESS TO ANY FAMILY MEMBERS. IN FACT, THIS CAME OUT VERY DETRIMENTALLY ON CROSS-EXAMINATION BECAUSE IT MADE MR. SOCHOR LOOK AS THOUGH HE WAS SERVING, EVERYTHING CAME FROM MR. SOCHOR BETTER VIEW WITH HIM. DOCTOR LIVING STONE WAS A PSYCHOLOGIST HIRED BY THE COURT TO CONDUCT COMPETENCY EVALUATION. AGAIN THE SCOPE OF HER EVALUATION WAS PURELY COMPETENCY. IT WASN'T ANYTHING TO DO WITH THE PRESENCE OR ABSENCE OF MITIGATING FACTORS.

EVEN THOUGH THEY WEREN'T HIRED FOR THOSE PURPOSES, WHAT DID THE DEFENSE -- DID THE DEFENSE ATTORNEY USE IT AT ALL IN THE PENALTY PHASE? WHAT WAS THE ESSENCE OF THE DEFENSE ATTORNEY'S ARGUMENT IN THE PENALTY PHASE? BECAUSE IT SEEMS TO ME THE STATE IS ARGUING THAT THIS INFORMATION WAS BEFORE THE JURY AND SO, IT COULD BE USED BY THEM IN A PENALTY PHASE, ALTHOUGH IT WAS THE GUILT PHASE THAT IT CAME OUT. DID THE DEFENSE ATTORNEY ARGUE THAT INFORMATION IN THE PENALTY PHASE?

TO SOME EXTENT HE ARGUED IT AND HE DID PUT THE REPORTS OF THE THREE EXPERTS IN INTO

EVIDENCE.

DURING HIS ARGUMENT, WHAT DID HE SAY ABOUT THEM? DID HE TIE THEM INTO?

HE TRIED TO. BUT BECAUSE OF EVALUATIONS THEMSELVES WAS FUNDAMENTALLY FLAWED. BECAUSE THEY WERE BASICALLY COMPETENCY EVALUATIONS, RATHER THAN PROPER MITIGATION EVALUATIONS, THE EFFECT WAS OBVIOUSLY EXTREMELY LIMITED. IN FACT THE TRIAL COURT FOUND NO MITIGATION WHATSOEVER IN THIS CASE.

THIS TRIAL TOOK PLACE UNTIL 1986?

1987, YOUR HONOR.

DID, IN THE TRIAL COURT'S ORDER IN THE POST CONVICTION, YOU SAID YET DEFENSE COUNSEL DID PRESENT AS A MITIGATOR THAT THE DEFENDANT WAS DIAGNOSED AS EXTREMELY DANGEROUS AND VIOLENT. WAS THAT -- DID THE DEFENSE COUNSEL DO THAT? DID THEY PRESENT EVIDENCE THAT HE WAS EXTREMELY DANGEROUS AND VIOLENT?

THEY PRESENTED EVIDENCE IN THE GUILT PHASE BY I WOULD SAY DOCTOR ZAGER AND DOCTOR LINK STONE. DOCTOR ZAGER DID SAY HE WAS EXTREMELY DANGEROUS WHEN INTOXICATED, YES. HOWEVER, BECAUSE IT WAS ONLY A COMPETENCY EVALUATION, RATHER THAN A MITIGATION EVALUATION, WHICH THE 11TH CIRCUIT RECENTLY AFFIRMED ARE NOT THE SAME THING. IN THE HARD WICK CASE. AND IT AFFIRMED THE BLANKNER DECISION, THAT COMPETENCE -- SOMETHING CAN BE PERFECTLY COMPETENT AND STILL HAVE AWFUL LOT OF MENTAL HEALTH MITIGATION.

WHAT DOES THE RECORD SHOW AS TO THE DEFENDANT'S YOUTH OF LITHIUM PRIOR -- THAT DEFENSE COUNSEL WOULD HAVE BEEN AWARE OF IN THE ORIGINAL TRIAL?

HE WOULD OR SHOULD HAVE BEEN AWARE OF MR. SOCHOR'S USE OF LITHIUM. BECAUSE SOMEBODY AT THE JAIL WAS MEDICATING HIM. AND IF HE GATHERED THE JAIL RECORDS, THEN HE WOULD HAVE BEEN SEEN MR. SOCHOR WAS BEING MEDICATED WITH LITHIUM. THAT WOULD HAVE ACTED AS SPRING BOARD FOR MORE INVESTIGATION INTO BIPOLAR DISORDER. WHICH AS DOCTOR GREER TESTIFIED AT THE EVIDENTIARY HEARING, SPECIFICALLY WHAT LITHIUM IS USED FOR. BY POLAR, VERY SPECIFICALLY LINKED BY POLAR DISORDER.

WHAT DOES THE POST CONVICTION RECORD SHOW US INSOFAR AS WHAT THE LAWYER DID IN TERMS OF INVESTIGATING FOR MITIGATION?

WHAT IT SHOWS IS THAT HE BROUGHT THESE PEOPLE DOWN, THE PARENTS DOWN TO FLORIDA, TALKED TO THEM FOR HALF AN HOUR IN THE HOTEL ROOM. ASKED THEM TO PREPARE A STATEMENT OF WHAT THEY WANTED TO TELL THE JURY AND THEN PUT THEM ON THE STAND WITHOUT HAVING READ THE PREPARED STATEMENTS. AS FAR AS THE SISTER KATHY COOPER, SHE DECIDED ON HER OWN VOLITION TO COME DOWN FROM MICHIGAN. SHE TALKED THE LAWYER INTO LETTING HER TESTIFY. HE PUT HER ON THE STAND SHE PREPARED A STATEMENT BECAUSE HER MOTHER HAD DONE THE SAME THING. AND SHE TALKED TO THE JURY. HE HAD NO IDEA WHAT SHE WAS GOING TO SAY.

SO THIS IS A CASE WE HEAR SO MANY CASES THE DEFENDANT SAYS DON'T CONTACT MY FAMILY, FAMILY IS UNCOOPERATIVE. THERE IS NO INDICATION THAT EVER HAPPENED.

NO.

THAT THESE WANTED TO DO EVERYTHING THEY COULD TO HELP THIS DEFENDANT?

ABSOLUTELY.

WHAT SUBSTANTIAL DIFFERENCE IS THERE IN THE TESTIMONY OF THESE THREE PEOPLE AT THE PENALTY PHASE THAT TOOK PLACE IN THIS TRIAL AND THEN AT THE EVIDENTIARY HEARING?

A GREAT DEAL, YOUR HONOR. FIRST OF ALL, THE TESTIMONY OF THE MOTHER -- AT THE EVIDENTIARY HEARING, SHE TESTIFIED ABOUT THE CIRCUMSTANCES SURROUNDING MR. SOCHOR'S BIRTH. SHE TESTIFIED IT WAS A LONG AND DIFFICULT LABOR. INVOLVING A FORCEPS DELIVERY. APPARENTLY THE BABY ARRIVED WITH MARKS ON ITS HEAD FROM THE FORCEPS DELIVERY. HE WAS BLUE ALL OVER AND HEAD WAS FUNNY POINTED SHAPE. SO MUCH SO THAT THEY CALLED HIM DENNY DIM WIT AFTER A CHARACTER THAT HAD PINTD HEAD. THAT IN ITSELF IS VALUABLE MITIGATION BUT ALSO AN INDICATOR THAT SHOULD AND COULD IF IT HAD BEEN FOUND OUT EARLIER, BEEN GIVEN TO MENTAL HEALTH EXPERTS. IT MIGHT HAVE BEEN A SIGNIFICANT INDICATOR THAT HE MIGHT BE SUFFERING FROM BRAIN DAMAGE. EVIDENCE IS PUT ON AT THE EVIDENTIARY HEARING THAT HE IN FACT IS SUFFERING FROM BRAIN DAMAGE BY DOCTOR FROMING, NEUROPSYCHOLOGIST WHO WAS CONSULTED DURING POST CONVICTION. SO THAT IS ONE INSTANCE. THERE ARE MANY, MANY OTHER INSTANCES OF HEAD TRAUMA, WHICH SHOULD HAVE BEEN BROUGHT OUT, HAD TRIAL COUNSEL FOUND OUT ABOUT THEM. THERE WAS ADMITTEDLY AT THE PENALTY PHASE MR. SOCHOR HAD SUFFERED SOME BEATINGS AS A CHILD. BUT THE TRUE NATURE AND EXTENT OF THOSE PHYSICAL ABUSIVE TORTIOUS BEATINGS WAS NEVER PRESENTED TO THE JURY. THE FACT HE WAS RENDERED UNCONSCIOUS ON A REGULAR BASIS BY THE PUNCHING AND KICKING OF HIS FATHER WAS NEVER BROUGHT OUT FULLY AT THE PENALTY FACE.

SO POST CONVICTION TRIAL JUDGE HELD AN EVIDENTIARY HEARING IN WHICH ALL OF THESE VARIOUS WITNESSES TESTIFIED? CORRECT?

YES, YOUR HONOR.

AND THEN CAME TO A CONCLUSION THAT, THAT DEFENSE COUNSEL WAS AS SUCH, DEFENSE COUNCIL WAS NOT INEFFECTIVE. WHAT IS YOUR -- DISCUSS WITH US THE BASIS UPON WHICH YOU SAY THAT THIS COURT SHOULD REVERSE THE TRIAL JUDGE'S DETERMINATION FOLLOWING THE EVIDENTIARY HEARING.

WELL FIRST OF ALL, DEFICIENT PERFORMANCE. I THINK THE CASE LAW WELL ESTABLISHES THAT YOU NEED TO DO IS CONSTITUTION SIGNALLY REASONABLE INVESTIGATION OF THE SOCIAL HISTORY LATELY WIGGINS VERSUS SMITH FROM THE UNITED STATES SUPREME COURT CAME DOWN THAT EMPHASIZED THE ABSOLUTE NEED TO DO A SOCIAL HISTORY INVESTIGATION BEFORE YOU DECIDE WHAT YOU'RE GOING TO PUT ON AND NOT PUT ON AT THE PENALTY PHASE, CLEARLY COUNSEL DID NOT DO. THE COURT SIMPLY IGNORED THAT LANGUAGE.

I THINK, IF YOU'RE GOING TO SAY THAT, THAT THE JUDGE'S FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE OR THAT THE, WHAT THE DEFENSE LAWYER DID IS EVEN BELOW A LEGALLY ACCEPTED THING. WHAT I'D LIKE TO KNOW AND MAYBE IT IS A FOLLOW-UP, NOT JUST WHAT THE DIFFERENCE BETWEEN THE FAMILY MEMBERS, WHAT THEY SAY NOW AND WHAT THEY SAID THEN, BUT YOU MAKE IT A BIG POINT OF SAYING THAT HE GOT NO RECORDS AND THAT THERE ARE PSYCHIATRIC RECORDS, PRISON RECORDS, MILITARY RECORDS, SCHOOL RECORDS. WHAT DID THOSE RECORDS SHOW THAT ENABLED THE MENTAL HEALTH EXPERTS TO RENDER A DIAGNOSIS? BECAUSE THAT IS VERY IMPORTANT. IN OTHER WORDS, TALK ABOUT HIM BEING BRAIN DAMAGED. WHAT DID THE SCHOOL RECORDS SHOW ABOUT BRAIN DAMAGE?

SCHOOL RECORDS I DON'T THINK SHOWED VERY MUCH ABOUT BRAIN DAMAGE APART FROM THE FACT THAT THERE WAS SOME PROBLEMS AT SCHOOL. AND THAT WAS CORROBORATED BY THE TESTIMONY OF TWO SCHOOL TEACHERS PUT ON AT THE EVIDENTIARY HEARING, LIEU LA SKARLER --.

HE WASN'T LEARNING DISABLED?

NO. THIS IS SOMEBODY WHO IS MENTALLY ILL.

WHAT RECORDS SHOW THAT HE WAS MENTALLY ILL? ARE THERE RECORDS THAT DOCUMENT THAT? YOU SAY THAT THERE ARE MILITARY RECORDS. WHAT DO THE MILITARY RECORDS.

MILITARY RECORDS, THE PURPOSE OF GATHERING RECORDS IS TWOFOLD. ONE FOR THE INFORMATION THAT THEY CONTAIN WITHIN THEM. I MENTIONED EARLIER THE JAIL RECORDS SHOWED THAT HE WAS USING LITHIUM AND BEING MEDICATED FOR BIPOLAR DISORDER. AS FAR AS THE MILITARY RECORDS, IT IS A STARTING OFF POINT FOR OTHER INVESTIGATION. HERE IS WHAT HE COULD HAVE GOT FROM THE MILITARY RECORD. WHEN MR. SOCHOR ENTERED THE MILITARY, HE HAD TO PROVIDE REFERENCES FOR CHARACTER. NOW, THE MOST RECORDS SHOWED THE NAMES OF TWO PEOPLE WHO WERE REFERENCED AS THE CHARACTER. THOSE HAPPENED TO BE BILL MITCHELL AND MARVIN DROSY, TWO FRIENDS OF HIS AT THE TIME HE ENTERED THE MILITARY. THOSE TWO PEOPLE COULD HAVE BEEN TRACKED DOWN AND ASKED ABOUT THEIR KNOWLEDGE OF MR. SOCHOR. THEY IN FACT TESTIFIED AT THE EVIDENTIARY HEARING AND GAVE USEFUL TESTIMONY. MR. MITCHELL TO THE EXTENSIVE DRUG USE THAT HE AND MR. SOCHOR HAD DONE TOGETHER.

ARE ANY RECORDS THAT SHOW A DOCUMENTED PSYCHIATRIC HISTORY PRIOR TO THE CURRENT JAIL RECORDS? DO THE MILITARY RECORDS SHOW THAT, THAT THERE WAS CONCERN-

THERE WAS CONCERN IN THE MILITARY RECORDS BUT IT IS A LITTLE VAGUE, I HAVE TO SAY NOTHING REALLY --.

NOTHING REALLY COMPELLING IN THE RECORDS?

THE RECORDS ARE STARTING POINT, A JUMP OFF POINT. THE RECORDS HAVE TO BE TAKEN IN CONJUNCTION WITH EVERYTHING ELSE. THEY ARE PART OF THE INVESTIGATION. I WOULDN'T SUGGEST THEY WERE THE WHOLE OF THE INVESTIGATION.

I WANT TO COME BACK TO MY QUESTION FOR JUST A MINUTE. IS IT YOUR POSITION THAT THIS COURT SHOULD FIND THAT THE TRIAL JUDGE IN POST CONVICTIONS ORDER IS NOT FOUND UPON COMPETENT SUBSTANTIAL EVIDENCE, OR IS IT YOUR POSITION THAT THE TRIAL JUDGE USED THE WRONG RULE OF LAW? I MEAN THOSE ARE THE TWO THINGS THAT THIS COURT SEEMS TO REPEAT OFTEN.

I THINK THE TRIAL COURT IGNORED THE APPLICABLE LAW AS TO WHAT CONSTITUTES A REASONABLE INVESTIGATION FIRST OF ALL, AS FAR AS SUFFICIENT PERFORMANCE FOLLOWING STRICKLAND IS CONCERNED. CLEARLY CALLING PEOPLE THE NIGHT BEFORE THEY TESTIFY AND NOT DOING ANYTHING BEFORE THAT DOES NOT AMOUNT TO A CONSTITUTIONAL AND REASONABLE INVESTIGATION. AS FAR AS THE PREJUDICE PROBLEMS OF STRICKLAND IS CONCERNED, THE TRIAL COURT SIMPLY IGNORED THE QUALITY TAIVE AND QUANTITATIVE DIFFERENCES IN THE TESTIMONY PRESENTED AT THE PENALTY PHASE AS AGAINST THE TESTIMONY PRESENTED AT TESTIFIED SHEAR HEARING, LIKE THE BIRTH RECORDS. LIKE THE FACT THAT MR. SOCHOR WAS A TROUBLED CHILD. HE SLEEP WALKED, HAD NIGHTMARES. HE HAS PROBLEMS FOR A VERY LONG TIME INDEED. AND THAT IS NOT SOMETHING THAT CAME OUT AT THE --.

DID THE ORIGINAL TRIAL COURT IN ITS SENTENCING ORDER FIND ANY STATUTORY OR NON-STATUTORY MITIGATORS?

FOUND NO MITIGATION WHATSOEVER YOUR HONOR, NONE. MY TIME IS UP. I'D LIKE TO RESERVE

REMAINDER FOR REBUTTAL IF I MAY.

GOOD MORNING.

GOOD MORNING A MAY IT PLEASE THE CORD, CELIA TERENCE ON BEHALF OF THE STATE OF FLORIDA. IN ORDER FOR THIS COURT TO REVERSE THE TRIAL COURT'S ORDER FINDING THAT CHARLIE RICH WAS NOT DEFICIENT, THEY WOULD HAVE TO IGNORE THE RECORD OF THE GUILT PHASE AND THE PENALTY PHASE AND ACTUALLY WHAT MR. RICH DID IN FACT PUT ON. THEY'RE TRYING TO RELY ON DEATON. AND IN THAT CASE, TRIAL COUNSEL DIDN'T PUT ANYTHING ON. BUT IN THIS CASE, THE PENALTY PHASE INVESTIGATION OCCURRED WHEN HE WAS PREPARING FOR THE GUILT PHASE. AND THE DOCTORS WHO TESTIFIED --.

IN HIS ARGUMENT THE PENALTY PHASE, DID HE IN FACT GO THROUGH WHAT WAS PRESENTED BY THOSE MENTAL HEALTH EXPERTS IN THE GUILT PHASE AND TRANSLATED INTO HOW IT WOULD BE MITIGATING IN THE PENALTY PHASE?

WELL HE INTRODUCED THE REPORTS, ASKED THE COURT FOR THE JURY INSTRUCTIONS ON THE STATUTORY MENTAL --.

I AM TALKING ABOUT HIS ACTUAL ARGUMENT TO THE JURY. HOW DID HE TIE IT INTO THE JURY IN HIS ARGUMENT?

HE DISCUSSED WITH THE JURY ALL THE BAD BREAKS AND ALL THE THINGS THAT HAD HAPPENED TO THIS YOUNG MAN IN TERMS OF THE PHYSICAL ABUSE, THE -- HIS DRUG ADDICTION, THAT HE WAS IN A PSYCHIATRIC HOSPITAL, THAT HE HAD SUICIDE TENDENCIES. AND THE SYSTEM FAILED DENNIS SOCHOR RATHER THAN THE OTHER WAY AROUND.

BUT IS IT TRUE THAT THE ONLY PEOPLE WHO TESTIFIED AT PENALTY PHASE WERE HIS FAMILY MEMBERS?

YES, SIR.

AND AS FAR AS THE EXPERTS' REPORTS, THE ONLY THING THEY RELIED ON OTHER THAN THEIR INDEPENDENT TESTING, WAS THE SELF-REPORTING OF THE DEFENDANT?

YES, SIR. BUT THE STATE -- AS A MATTER OF FACT, THE STATE'S REBUTTAL DOCTOR ALSO FOUND IN TERMS OF DIAGNOSIS THAT THIS MAN HAD A LONGSTANDING ALCOHOL AND DRUG ABUSE PROBLEM. THE STATE HAS NEVER -- THE ONLY FACTUAL ISSUE THAT THE STATE EVER TRIED TO REBUT WAS THE FACT WHETHER OR NOT HE WAS ACTUALLY INTOXICATED ON THE NIGHT OF THE CRIME.

I'M TALKING ABOUT AS TO THE MENTAL HEALTH --.

I UNDERSTAND.

WHAT ASSISTANCE, OTHER THAN THE DEFENSE COUNSEL'S ABILITY TO ARGUE, WHICH THE JURY'S INSTRUCTED OVER AND OVER AGAIN, IT IS SIMPLY ARGUMENT AND NOT EVIDENCE IN THE CASE, WHAT EVIDENCE IN THE CASE PRESENTED BY EXPERT OPINION OR OTHERWISE, WAS THERE GIVEN IN THE PENALTY PHASE TO ASSIST THE JURY TO UNDERSTAND QUALITATIVELY THE MITIGATION EVIDENCE PRESENTED?

WELL FIRST OF ALL, AT THE GUILT PHASE, OKAY, THE DOCTORS TESTIFIED TO HIS LONG HISTORY OF DRUG ABUSE, BEHAVIORAL DISORDERS, SUICIDE, INTERPERSONAL RELATIONSHIPS AND

HETEROSEXUAL RELATIONSHIPS. HIS, ALL THE PAST CONCUSSIONS HE'S HAD. FELL OFF A HORSE, THEY GO THROUGH ALL THAT. THEY GO THROUGH THE, HIS TREATMENT WITH LITHIUM AND SIN ANY KWAN AND ACTUALLY TOLD THE JURY THAT HE HAD BEEN DIAGNOSED AS A MANIC DEPRESSIVE. BUT IN ALL THREE -- NONE OF THESE DOCTORS FELT THAT HE WAS MANIC DEPRESSIVE. BUT THEY GAVE THE JURY THAT INFORMATION. AND THEY DIAGNOSED HIM AS ANTISOCIAL PERSONALITY BEHAVIOR. AND THE ONLY --.

AND IN THE GUILT PHASE, WHICH THE JURY'S DETERMINING THE DEGREE OF CULPABILITY, OR GUILT, DID NOT THOSE WITNESSES CALLED BY THE DEFENDANT BASICALLY SAY THIS GUY WAS A LOOSE CANNON? AND HE WAS AS DANGEROUS AS HE COULD BE? IF YOU COMBINE HIS INABILITY TO CONTROL HIS IMPULSES, WITH ABSTAINING FROM ALCOHOL AND THEN OF DRINKING THE ALCOHOL, THAT HE WAS UNABLE TO CONTROL HIMSELF?

ABSOLUTELY. AND THAT WENT TO THE VOLUNTARY INTOXICATION DEFENSE AND HIS BLACKOUTS ON THE NIGHT OF THE CRIME. THAT IS WHAT THOSE DOCTORS WERE THERE TO TESTIFY TO.

WASN'T THAT TESTIMONY VERY DAMAGING? NO, SIR.

TO THE DEFENDANT? AS CHARACTERIZED?

IT IS NO DIFFERENT THAN WHAT THEY PUT ON AT THE EVIDENTIARY HEARING. AS A MATTER OF FACT, IF YOU LOOK AT --.

IN OTHER WORDS, THERE IS NO DAMAGING TESTIMONY TO THE DEFENDANT IN THOSE REPORTS?

WHAT I'M SAYING, SIR, THERE IS NO DIFFERENCE BETWEEN THOSE REPORTS AND THE REPORTS THAT THEY GENERATED IN 1999. IT'S EXACTLY THE SAME INFORMATION. THEY HAVE COME UP WITH NOTHING NEW. THEY LABEL IT SOMETHING DIFFERENT. THEY CALL IT MANIC DEPRESSIVE OR BIPOLAR. BUT THE THREE DOCTORS BEFORE RELYING ON THE SAME EXACT INFORMATION SAYS HE HAS AN ANTISOCIAL PERSONALITY DISORDER. AND AS A MATTER OF FACT, IF YOU LOOK AT DOCTOR AFRICAN-AMERICANNINGS TESTIMONY AT THE EVIDENTIARY HEARINGS SHE TALKS ABOUT HIS INABILITY TO SELF-REGULATE AND MISINTERPRET INFORMATION. THIS DISORDER COULD LEAD TO IMPAIRED INTERPERSONAL SKILLS AND AN BORE RENT RESPONSE TOSS STIMULUS. INABILITY TO CONTROL EMPAULSS IS SEVERE AND HE SOLVES HIS PROBLEMS IN AGGRESSIVE MANNER.

SO THE TESTIMONY THAT WAS PRESENTED IN THE POST CONVICTION HEARING BY THE MENTAL HEALTH EXPERTS WAS REALLY IDENTICAL TO WHAT HAD BEEN PRESENTED.

YES, SIR.

IN COMPETENCY EXAMINATION?

YES, SIR. ALTHOUGH THE TWO DOCTORS AT THE GUILT PHASE WERE ASKED TO DO A COMPETENCY AND SANITY HE VALUES, THEY DID A MENTAL HEALTH STATUS. THEY DID MEDICAL FINDINGS AS TO WHAT THEY FOUND IN THIS DEFENDANT. NOT SIMPLY WHETHER OR NOT HE WAS SANE OR COMPETENT AT THE TIME OF TRIAL.

WHAT WAS THE BASIS OF THE TRIAL COURT THEN ENDING UP FINDING NO MITIGATION?

WELL, AS A MATTER OF FACT ON DIRECT APPEAL THE ISSUE WAS THAT THE TRIAL JUDGE DID NOT FIND MITIGATION AND THIS COURT FOUND THAT IT WAS A CASE OF SITUATE MAN TICKS. IT IS NOT THAT HE DIDN'T FIND MITIGATION. HE DID NOT FIND THAT THE MITIGATION OUTWEIGHED THE AGGRAVATION IN THIS CASE.

SO HE DID FIND MITIGATION?

YES, SIR. AS A MATTER OF FACT THIS COURT IN DISCUSSING THE PENALTY PHASE TESTIMONY, THIS COURT SAID THE DEFENDANT'S FAMILY WHO TIERFULLY AND GRIEVOUSLY TESTIFIED, HOWEVER, THE COURT FINDS NO STATUTORY MITIGATION. AND THEN THE COURT GOES ON TO SAY BUT WHAT HE DID FIND WAS THAT IT WAS INSIGNIFICANT IN RELATION TO THE AGGRAVATION.

WHAT MITIGATION DID THE TRIAL COURT FIND? IN OTHER WORDS, DO YOU HAVE THE TRIAL COURT ORDER?

THE ACTUAL SENTENCING ORDER? NO, I HAVE THE POST CONVICTION.

READ THE SENTENCING ORDER?

YES, SIR.

WHAT MITIGATION IS SET OUT IN THE SENTENCING ORDER?

PHYSICAL ABUSE BY THE FATHER, FINANCIAL SUPPORT OF THE FAMILY BY THE DEFENDANT. WHEN THE FATHER WASN'T ABLE TO WORK. DEFENDANT'S ALCOHOL PROBLEMS AND HIS VIOLENT TEMPER AND MENTAL INSTABILITY. WHICH IS ACTUALLY WHAT I'M READING FROM THIS COURT'S OPINION, WHICH WAS PARAPHRASING THE TRIAL COURT'S SENTENCING ORDER. NOW, THE ONLY DIFFERENCE, AS I SAID BEFORE, BETWEEN THE TWO SETS OF DOCTORS IS WHETHER YOU LABEL HIM ANTISOCIAL PERSONALITY, OR BIPOLAR.

WHAT ABOUT THE POST TRAUMATIC STRESS DISORDER?

DOCTOR FUNDING FINDS HE'S GOT POST-TRAUMATIC STRESS DISORDER BASED ON THE FACT HE WAS SEVERELY ABUSED AS A CHILD. BUT AGAIN, THAT IS THE SECOND DOCTOR DIDN'T FIND THAT, DOCTOR GREER DIDN'T FIND THAT AND NONE OF THE OTHER THREE DOCTORS FOUND THAT. THE STANDARD ISN'T, JUST BECAUSE YOU CAN GET A NEW DOCTOR TO SAY SOMETHING DIFFERENT. WHAT I THOUGHT THIS COURT LOOKED AT WAS THE THOROUGHNESS OF THE INVESTIGATION AND WHAT FACTS WENT INTO ANY DOCTOR'S PARTICULAR CONCLUSION.

AND ON THIS FILE, WHAT EVIDENCE IS THERE THAT TRIAL COUNSEL INVESTIGATED, PREPARED OR PLANNED A MITIGATION DIFFERENTLY THAN THE?

THE FACT THAT THESE TWO DOCTORS THAT TESTIFIED AT THE GUILT PHASE AND THEIR REPORTS THAT WERE IN EVIDENCE. IF YOU LOOK AT THEM, EVERYTHING THEY TALK ABOUT ARE THE SAME FACTS THAT ARE RELIED UPON BY THE NEW DOCTORS. VERBATIM. THE LITHIUM AND THE SIN THAT QON. THE PSYCHIATRIC POPTTATION FOR FIVE DAYS. REPEATED HEAD INJURIES. ALCOHOL ABUSE. THE PHYSICAL ABUSE BY THE FATHER.

HE USED TWO EXPERTS THAT WERE, ONE, CORRECT, ONE WAS APPOINTED BY THE COURT? AND ONE HAD BEEN HIRED BEFORE MR. RICH WAS INVOLVED IN THE CASE, CORRECT?

CORRECT.

BOTH FOR COMPETENCY?

COMPETENCY SANITY.

HE PUT THEM ON IN THE GUILT PHASE TO ESTABLISH A VOLUNTARY INTOXICATION DEFENSE?

SLASH BLACKOUT, RIGHT.

DID HE GET A VOLUNTARY INTOXICATION INSTRUCTION?

YES.

NO. I'M SORRY. YOU'RE SAYING THAT THERE WAS A VOLUNTARY INTOXICATION JURY INSTRUCTION?

YES, SIR, THERE WAS.

AND THEN IS THE RECORD SILENT, THE QUESTION SOMETIMES IS THAT IF IT IS THE SAME EVIDENCE, THEN, AND YOUR EGOING TO GO NOW AND TIE THAT IN IN THE PENALTY PHASE.

CORRECT.

SO WHAT YOU'RE SAYING IN THE PENALTY PHASE, DID THEY, DID HE THEN -- DID THE REPORTS COME IN IN THE GUILT PHASE?

THE REPORTS CAME IN IN THE PENALTY PHASE.

FOR THE JURY?

YES.

SO THE JURY SAW THE REPORT?

CORRECT.

THEN GOING BACK, HOW LONG, -- SINCE IT WAS A REPORT, HOW LONG WAS THE DEFENSE LAWYER'S CLOSING ARGUMENT AS TO PENALTY PHASE? AND WHAT WAS IT HE SPECIFICALLY SAID THAT WAS ABOUT MENTAL HEALTH MITIGATION AND THIS DEFENDANT'S MENTAL STATUS THAT WOULD BE A STATUTORY OR NON-STATUTORY MITIGATOR?

WELL I DON'T HAVE THE EXACT PAGES, BUT I DO KNOW THAT HE REFERENCED THE DOCTORS, HE TALKED ABOUT HIS PAST. HE ASKED FOR THE INSTRUCTION ON MENTAL, THE STATUTORY MENTAL MYTHS AND DISCUSSED WITH THE JURY THE BAD BREAKS GOT AND THE FACT THAT THE SYSTEM HAS NEVER HELPED HIM WITH ALL HIS PROBLEMS.

AND MY PROBLEM IS THAT WE HAVE, AND I AGREE WITH YOU, THE ADETHERE IS A BETTER EXPERT NOW IS DIFFERENT. THIS DOESN'T SEEM TO ME TO BE THAT CASE. AND MY CONCERN IS THAT YOU SAY WELL IT DOESN'T MATTER WHETHER SOMEONE'S DIAGNOSED AS AN ANTISOCIAL PERSONALITY DISORDER OR IF HE IS DIAGNOSED AS A MANIC DEPRESSIVE MENTAL ILLNESS. AND SINCE DAY AFTER DAY WE HEAR THAT THE WORSE -- MOST DEFENSE LAWYERS DO NOT WANT, IF THEY HAVE GOT A REAL, YOU KNOW, SORT OF SOMETHING, MENTAL ILLNESS WHERE YOU'RE PRESCRIBED LITHIUM, AND YOU HAVE GOT A HISTORY OF PSYCHIATRIC PROBLEMS, TO PUT ON AND SAY WHAT THE PERSON HAS IS A ANTISOCIAL PERSONALITY DISORDER, WHICH MOST PEOPLE INTERPRET AS THAT'S A BAD GUY. I THINK, YOU KNOW, EXPLAIN TO ME WHY THAT ISN'T QUALITATIVELY DIFFERENT?

WELL IN TERMS OF THE CASE LAY THINK YOU NOTICE TOO THOUGH, IN THE OLD DAYS, YOU SAW MORE OF THE LABELS ANTISOCIAL PERSONALITY DISORDER. AND NOW THEY'RE TRYING TO GET AWAY FROM THAT. BUT IN THIS CASE, YOU HAVE THREE DOCTORS, TWO FOR THE DEFENSE AND ONE FOR THE STATE, THAT BASED ON THE SAME INFORMATION, FROM 87 TO 2000, USED THE SAME EXACT INFORMATION WHICH THE STATE NEVER DISPUTED AND THEY CALL IT SOMETHING

DIFFERENT. BECAUSE YOU CAN CALL IT MANIC DEPRESSIVE, I MEAN, SHE DESCRIBED THAT AS BEING, OKAY, YOU HAVE THE HEAD INJURIES, YOU HAVE HIS, THE ALCOHOL ABUSE. SO THIS MAN CANNOT CONTROL HIS BEHAVIOR.

ARE YOU SAYING THAT IN THE 1980'S, THAT SOMEBODY WAS PRESCRIBED LITHIUM FOR AN ANTISOCIAL PERSONALITY DISORDER?

THE DOCTOR CASTILLO, THE STATE'S REBUTTAL DOCTOR TESTIFIED THAT IN THOSE DAYS, LITHIUM WAS ALSO PRESCRIBED FOR VIOLENT PEOPLE. LET'S FACE IT, THIS WAS AND IS A VIOLENT MAN. HIS DOCTORS TODAY DO NOT DISPUTE THAT. THEY SAY THAT THIS MAN HAS NO ABILITY TO SELF-REGULATE OR TO, OR ANY ABILITY TO INHIBIT HIS IMPULSES. HE IS A HYPER SEXUAL, HYPER MOTOR INCOMPETENT PERSON, WHICH IS THE SAME THING AS I CAN WHEN HE IS ON DRUGS OR ALCOHOL, HE CANNOT CONTROL HIS SEXUAL URGES. THERE IS NOTHING, THERE IS NO QUALITY TAIVE DIFFERENCE BETWEEN THOSE TWO DIAGNOSES. AND I KAENLT FA SIZE ENOUGH BASED ON THIS COURT'S OPINIONS IN OTHER CASES WHERE THE INFORMATION UTILIZED IS EXACTLY THE SAME. THEY HAVE NOT COME UP WITH ANY NEW INFORMATION AND AS A MATTER OF FACT, DOCTOR LIVINGSTON, WHO TESTIFIED FOR THE DEFENSE AT THE PENALTY PHASE, AND FOR THE STATE AT THE POST CONVICTION, SAID THERE IS NOTHING IN HERE THAT CHANGES MY MAENED. SO HOW CAN YOU HOLD A DEFENSE ATTORNEY INEFFECTIVE WHEN THE DOCTORS, WHO WERE QUALIFIED DOCTORS AND WHO RELIED ON THE SAME INFORMATION -- I GUESS I DON'T KNOW HOW TO CONVINCEN YOU THAT IT IS THE KIND OF CASE WHERE YOU COME UP WITH A DIFFERENT LABEL BASED ON THE SAME INFORMATION. I MEAN,.

WELL IF IT IS SO ABSOLUTELY CLEAR AND UNDISPUTED AS TO WHAT EVERY EXPERT HAS SAID, BOTH IN EVIDENTIARY AND TRIAL PHASE IN THIS CASE, THEN HOW CAN WE REASONABLY FIND THAT THERE WAS NO -- NEITHER OF THE TWO MENTAL HEALTH STATUTORY MITIGATION, MUCH LESS NON-STATUTORY MITIGATION IN THIS CASE? IF IT IS UNDISPUTED THAT THE MAN IS ABSOLUTELY VIOLENT AND OUT OF CONTROL? MENTALLY.

THE JURY HEARD THE SAME INFORMATION THAT IS NOW --.

NOT TALKING ABOUT THE JURY. TALKING ABOUT THE JUDGE.

I CAN'T ANSWER THAT EXCEPT TO TELL YOU THAT WHAT THE JUDGE FOUND WAS IT DID NOT OVERCOME THE SEVERE AGGRAVATION IN THIS CASE. AND EVEN IF HE LABELED IT STATUTORY MYTHS, I WOULD STILL TODAY SAY THAT WOULD NOT OVERCOME THE FACT THIS MAN WAS AN ADMITTED RAPIST. HE WAS ON PROBATION WHEN HE COMMITTED THIS MURDER. IT WAS -- IT WAS HEINOUS, ATROCIOUS AND CRUEL. AND HIS EX-WIFE TESTIFIED FOR THE STATE AT THE PENALTY PHASE THAT THIS WAS JUST ONE MEAN GUY.

LET ME ASK YOU THIS. HAVEN'T WE SAID IN OTHER CASES, HAVE WE NOT EXPRESSED OUR DISCOMFORT AND MAYBE EVEN SAID IT IS DEFICIENT PERFORMANCE, LEAVING ASIDE PREJUDICE FOR THE MOMENT, WHERE COUNSEL RETAINED MENTAL HEALTH EXPERTS BUT DOES NOT EXPLAIN TO THE EXPERT WHAT THE STATUTORY MITIGATORS ARE SO THAT THE EXPERTS MAY CONDUCT THEIR EXAMINATION OF THE DEFENDANT WITH THOSE MITIGATORS IN MIND?

IN THIS CASE, YOU'RE ABSOLUTELY RIGHT. AND DOCTOR LIVINGSTON TESTIFIED AT THE EVIDENTIARY HEARING THAT SHE WAS CALLED UPON TO DO A COMPETENCY AND A SANITY EVALUATION. HOWEVER, IT DOES ENCOMPASS THE SAME INFORMATION. I MEAN THEY DON'T PUT BLINDERS ON AND IF THEY FIND, I FIND HIM SANE BUT I'M GOING TO IGNORE THE DRUG ABUSE AND THE PHYSICAL ABUSE, THEY ALL DOCUMENTED THAT INFORMATION. AND WHEN THEY GOT TO THE PENALTY PHASE, I MEAN EVEN IN BELLE VERSUS COHN OUT OF THE UNITED STATES SUPREME COURT, COUNSEL IS NOT DEFICIENT FOR PUTTING ON INFORMATION AT THE GUILT PHASE AND THEN JUST ASKING THE JURY TO CONSIDER IT FOR THE PENALTY PHASE. THEY ARE -- HE MADE AN ARGUMENT. THEY WERE GIVEN THE JURY INSTRUCTION. NOW ADMITTEDLY COULD

THERE HAVE BEEN MORE DETAIL? SURE. BUT DOES THAT MEAN THAT THERE WAS DEFICIENT PERFORMANCE BACK THEN? NO.

IN THE PENALTY PHASE, WAS THE JURY INSTRUCTED ON ANY STATUTORY MITIGATORS?

YES, SIR, THEY WERE. ON BOTH MEDICAL MYTHS AND ON THE CATCH OUT, THE NON-STATUTORY. MITIGATORS. SO I MEAN, IF YOU WANT TO PICK APART THE CLOSING ARGUMENT AND SAY HE COULD HAVE BEEN DONE A BETTER JOB. SURE. SURE I'M SURE YOU COULD DO THAT IN ANY CASE. BUT THAT IS NOT THE STANDARD. AND WHAT WAS PRESENTED AT THE EVIDENTIARY HEARING WAS NO DIFFERENT THAN WHAT THE DEFENDANTS DEFENSE ATTORNEY ALREADY HAD.

I THINK, HE WAS A SINGLE CHAIR.

YES. RIGHT.

OBVIOUSLY IN THE 8 OTHER, WE ARE NOT GOING TO LOOK AT THAT. I THINK WHAT CONCERNS ME AT LEAST, YOU KNOW, AS TO THE WITNESSES, IS THAT THE, AND THEN IT SORT OF SPILLS OVER INTO THE MENTAL HEALTH AREA. THIS IS, YOU KNOW, HERE IS A PERSON'S LIFE AT STAKE. JUST SEEMS REAL SLOPPY, YOU KNOW, THAT YOU WOULD END THE GUILT PHASE, IS IT A SHORT, LIKE A WEEKEND, IS THERE A SHORT TIME IN BETWEEN GUILT AND PENALTY?

YES, THERE WAS.

MUST HAVE GIVEN A CALL TO SOME PEOPLE, YOU KNOW, THE PARENTS IN MICHIGAN, WHO HADN'T TALKED TO BEFORE. SO HE WOULDN'T KNOW WHAT THEY WERE GOING TO SAY, AND SAY COME ON DOWN. AND THEN THEY CALL THEIR DAUGHTER AND SAY HEY, YOU WANT TO COME DOWN TOO? AND THEN HE GIVES, YOU KNOW, THEY ALL PREPARE A STATEMENT. SHE HAS A THREE PAGE STATEMENT AND HE GOES, JUST GO ON THE STAND. YOU KNOW, I MEAN WE ALL PRACTICED LAW IN THE 1980S. AND YOU WOULDN'T TRY A WHIPLASH CASE LIKE THAT. IF THAT'S WHAT'S SO STARTLING TO ME. AND SO THEREFORE, WHEN YOU GET TO THE QUALITY OF THE MENTAL HEALTH MITIGATION, AND REALLY TRYING TO TAILOR THIS TO THIS CASE, BECAUSE YOU HAD THIS THING WITH GARY AND THEY WERE, HE WAS KISSING AND THEN ALL OF A SUDDEN THIS GUY SNAPPED. THAT IT'S ONE THING TO JUST THROW OUT, YOU KNOW, AND SAY HERE IS A GUY THAT JUST HAD A TOUGH LIFE. BUT TO ACTUALLY TAILOR WHAT WENT ON AT THE TIME OF THAT MURDER TO THIS DEFENDANT TO SHOW THAT HE REALLY WAS UNDER -- YOU KNOW, THAT HE HAD VERY LITTLE CONTROL, NOT JUST BECAUSE HE WAS DRINKING, BUT BECAUSE HIS, HE WAS MENTALLY ILL. SO THAT'S -- I GUESS, IF YOU CAN ADDRESS THAT. IT IS JUST -- I JUST DON'T KNOW THAT WE HAVE -- I HAVE SEEN A CASE IN, WE HAD A CASE TODAY THAT WAS A FOUR DAY PENALTY PHASE. OBVIOUSLY WE CAN'T COMPARE EACH CASE. BUT, IT WAS IN THE DARK AGES WHEN THIS CASE WAS TRIED. THIS IS DOWN IN BROWARD COUNTIES. WE HAVE SOME VERY GOOD ATTORNEYS THERE. WHAT'S YOUR ANSWER TO THAT?

OKAY. FIRST OF ALL, IN TERMS OF THE NEW DOCTORS AND WHAT THEY WERE RELYING ON, THE BASIC PREMISE OF THEIR DIAGNOSIS HINGES ON WHETHER OR NOT THERE WAS VOLUNTARY INTOXICATION THE NIGHT OF THE CRIME. AND TO THIS DAY, THE ONLY EVIDENCE THAT THEY HAVE OF THAT ARE THE DEFENDANT'S SELF-SERVING STATEMENTS. AT THE TRIAL, THE STATE PUT ON THE BARTENDER WHO SERVED HIM, THE GIRLFRIEND OF THE VICTIM, AND THE DEFENDANT'S TWO ROOMMATES, WHOM HE SAW LESS THAN AN HOUR AFTER THE CRIME. AND NOT ONE OF THEM -- AND GARY HIMSELF, DENNIS DROVE THE CAR THAT NIGHT. SO ALL OF THOSE WITNESSES SAID THAT THERE WAS NO VOLUNTARY INTOXICATION. YES, HE GOT THE INSTRUCTION ON IT BECAUSE OF HIS SELF-SERVING STATEMENTS. IS SO THE PREMISE OF THESE DOCTORS THEN AND NOW HINGES ON WHETHER OR NOT HE REALLY WAS INTOXICATED THAT NIGHT. AND THERE IS NO EVIDENCE EVEN TODAY TO SUGGEST THAT OTHER THAN HIS STATEMENTS.

YOU'RE HINGEING NOW, YOU'RE GOING INTO THE PREJUDICE?

NO, ACTUALLY WHAT I'M TRYING TO SAY, IS THAT YOU'RE TALKING ABOUT HOW IT'S A GIVEN THAT THIS MAN IS MENTALLY ILL AENSD EMANIC DEPRESSIVE VERSUS ANTISOCIAL. AND WHAT I'M TRYING TO SAY, THE STATE IS NOT CONCEDED THAT.

I DIDN'T SAY THAT. I SAID WHAT EXCUSE DO WE HAVE FOR SOMEONE NOT TALKING TO WITNESSES?

WELL IN TERMS OF THAT, THE DEFENSE ATTORNEY TOLD THE JURY, OKAY, RIGHT BEFORE THE FAMILY WAS TESTIFYING THAT HE DELIBERATELY DID NOT WANT TO COACH THEM AND REHEARSE WITH THEM. HE WANTED THEM TO SPEAK FROM THE HEART. HE WANTED THE JURY TO HEAR WHAT THEY HAD TO SAY.

IS THAT REALLY WHAT A CAPABLE ATTORNEY SHOULD DO? THAT IS, AN ATTORNEY DOESN'T EVEN KNOW WHAT A WITNESS THAT HE PUTS ON THE WITNESS STAND -- AND I'M CONCERNED ABOUT YOUR CHARACTERIZATION OF THE TRIAL COURT FINDING MITIGATING EVIDENCE IN THIS CASE. I'M QUOTING FROM OUR COURT'S OPINION. IT SAYS THAT THE TRIAL COURT IN ITS SENTENCING ORDER STATED, WE QUOTE, THERE WERE SEVERAL MEMBERS OF THE DEFENDANT'S FAMILY WHO TEARFULLY AND GRIEVOUSLY TESTIFIED. HOWEVER, AFTER CONSIDERING THEIR TESTIMONY, THIS COURT FINDS NO NON-STATUTORY MITIGATING CIRCUMSTANCES. IN OTHER WORDS, A FAIR CHARACTERIZATION OF THE TRIAL COURT'S SENTENCING ORDER IS THAT HE DID NOT FIND ANY MITIGATING CIRCUMSTANCES.

WELL HE FOUND IT INSIGNIFICANT BECAUSE YOUR NEXT SENTENCE SAYS --.

I JUST READ THE WORDS.

YES, SIR.

ARE THOSE THE WORDS THAT WERE IN THE SENTENCING ORDER? DID WE MISQUOTE?

NO, SIR, BUT YOU ALSO, BUT IN YOUR OPINION IT SAYS THE TRIAL JUDGE CONSIDERED THE EVIDENCE OF FAMILY AND PERSONAL HISTORY, BUT DETERMINED IT WAS SO INSIGNIFICANT. AND THEN WHAT I'M TRYING TO SAY IS, IT WAS THERE BUT HE DIDN'T GIVE IT MUCH WEIGHT.

WELL WE SAY THAT WE FIND NO ERROR IN HIM FINDING NO MITIGATING CIRCUMSTANCES.

BECAUSE IT WAS SO INSIGNIFICANT. BUT HE CONSIDERED IT BUT HE DIDN'T FIND IT TO BE SIGNIFICANT.

OKAY. THANK YOU VERY MUCH. MR. MARSHAL, HOW MUCH TIME IS LEFT ON REBUTTAL?

OKAY.

REGARDING THE LAST TALK ABOUT THE TRIAL COURT'S FINDING THAT HE WANTED, THAT TRIAL COUNSEL WAS REASONABLE BECAUSE HE WANTED DEFENSE WITNESSES TO SPEAK FROM THE HEART. SPEAKING FROM THE HEART AND NOT WANTING TO COACH WITNESSES IS NO SUBSTITUTE FOR NOT INVESTIGATING THE CASE.

WELL HOW ABOUT ADDRESSING THOUGH THE MAIN THRUST OF THE STATE'S ARGUMENT, AND THAT IS THAT REALLY THIS ISN'T A CASE WHERE, AT THE TRIAL THERE WAS, YOU KNOW VIRTUALLY NOTHING PUT ON ABOUT MITIGATION POST CONVICTION NOW, IT'S DISCOVERED THAT THERE WAS AN ENORMOUS AMOUNT OF MITIGATION TO BE PUT ON IF THE LAWYER HAD JUST LOOKED? AND THE POSITION THAT REALLY THERE ISN'T ANYTHING NEW PRODUCED AT THE POST

CONVICTION HEARING. WOULD YOU ADDRESS THAT?

YES, YOUR HONOR, I THINK WE HAVE TO GO BACK TO THE LINES OF CASES THAT EMPHASIZE THAT MITIGATION IS NOT ONLY JUST CIRCUMSTANCES SURROUNDING THE OFFENSE. IT IS ALSO ANYTHING IN THE DEFENDANT'S CHARACTER AND BACKGROUND THAT MAY BE HELPFUL IN ALLOWING THE JURY TO MAKE A DETERMINATION.

YOUR OPPONENT SAYS THAT WAS ALL BROUGHT OUT DURING THE COURSE OF THE TESTIMONY AT THE GUILT PHASE BY THE TWO EXPERTS THAT WERE PUT ON.

WELL IT CAN'T HAVE BEEN YOUR HONOR BECAUSE THEY DID NOT LOOK INTO THE CHARACTER AND BACKGROUND.

BUT WHAT THE JUDGE SAYS THAT AFTER 12 YEARS, THAT POST CONVICTION COUNSEL COLLATERAL COUNSEL DIDN'T PUT ON ANY DIFFERENT FACTS THAN CAME THROUGH THE FIRST TIME. HOW WOULD YOU ADDRESS THAT SENTENCE THAT IS IN THIS ORDER?

YES, YOUR HONOR. FIRST CONVICTION PUT PUT ON EVIDENCE OF BRAIN DAMAGE. PUT ON EVIDENCE PRESENT ILLNESS AND POSE DRAMATIC EXPRESS DISORDER. THOSE EXPLAIN WHY HE ACTS THE WAY HE DOES UNDER ALCOHOL. THOSE ARE, THOSE HELP THE JURY UNDERSTAND WHY HE ACTS THE WAY HE DOES. GIVING THEM SOMETHING TO HANG THEIR HAT ON IF YOU LIKE. IF HE DONE SOME MORE INVESTIGATION INTO THE SOCIAL HISTORY, HE WOULD HAVE DISCOVERED WHY MR. SOCHOR HAD GOT THE BRAIN DAMAGE. ALL THE MULTIPLE PERSONALITIES, THE DIFFICULT BIRTHS, HEAD INJURIES, FALLING ON HIS HEAD AND PUNK TOURING SOME OF THE PALETTE.

IN TERMS OF WHAT THE DEFENSE LAWYER DID DO, HOW MUCH DOES THE POST CONVICTION RECORD SHOW US? FOR INSTANCE, DOES THE RECORD SHOW US THAT HE INTERVIEWED HIS CLIENT AND GOT A DETAILED FAMILY HISTORY FROM HIS CLIENT? DOES THE RECORD SHOW US THAT HE WENT TO THE DOCTORS, THE TWO MENTAL HEALTH PEOPLE AND SAT DOWN WITH THEM AND EITHER PROVIDED THEM INFORMATION OR DISCUSSED WITH THEM IN DETAIL WHAT THEIR EVALUATIONS WERE? WHAT DOES THE RECORD TELL US AS FAR AS WHAT THIS LAWYER DIDN'T DO? WE KNOW YOUR ARGUMENT ABOUT THAT JUST BEFORE THE PENALTY PHASE, THAT HE CALLED THE PEOPLE IN MICHIGAN AND THEY CAME DOWN AND THAT CIRCUMSTANCE.

THE RECORD IS SILENT AS TO WHAT HE DID VIS-A-VIS HIS CLIENT BECAUSE MR. RICH WAS NOT AROUND TO TESTIFY. AS FAR AS THE TWO MENTAL HEALTH EXPERTS ARE CONCERNED, HE MADE A POINT WHEN HE PUT THEM ON IN THE GUILT PHASE OF SAYING WE HAVEN'T TALKED BEFORE, HAVE WE? THIS IS THE FIRST TIME I'M TALKING TO YOU, ISN'T IT?

IS THAT IN THE RECORD?

THAT'S IN THE RECORD OF THE GUILT PHASE. HE MAKES THAT POINT, DURING HIS DIRECT EXAMINATION OF THOSE TWO EXPERTS. HE IS READ THEIR REPORTS. HE HASN'T TALKED TO THEM.

YOUR OPPOSING COUNSEL STATES THAT ALTHOUGH WE ARE GIVING THIS A DIFFERENT LABEL, THE UNDERLYING DISORDER, WHETHER IT IS CALLED MANIC DEPRESSIVE OR ANTISOCIAL PERSONALITY DISORDER, WOULD BE IDENTICAL. IN OTHER WORDS, IF WE READ THE GUILT PHASE EXPERTS AND WE LOOK SIDE BY SIDE, COULD YOU -- IN THE VERY FEW MINUTES OR A MINUTE, CAN YOU TELL ME? BECAUSE THAT'S IMPORTANT TO ME, IS IT JUST A DIFFERENT LABEL THAT WE NOW IN 2000 VERSUS?

NO YOUR HONOR. THE DIAGNOSIS OF ANTI -- SORRY, BIPOLAR DISORDER AND BRAIN DAMAGE WERE CERTAINLY AVAILABLE HAD THE PROPER TESTING BEEN DONE, A COMPREHENSIVE INVESTIGATION INTO HIS CHARACTER AND BACKGROUND. THE REASONS HE GOT IN HIS SOCIAL

HISTORY TO WHERE HE IS, THEY WOULD HAVE COME UP WITH EXACTLY THE SAME RESULTS AS THE DOCTORS WHO CAME OUT AT PENALTY PHASE. THEY EXPLAINED WHY HE WAS THE WAY HE IS, THE DIAGNOSES THAT SUPPORT HIS IMPULSIVITY AND THE THINGS IN HIS SOCIAL HISTORY THAT CAUSED HIM TO HAVE THE BRAIN DAMAGE. THERE IS EVIDENCE SEVERAL PEOPLE TALKED ABOUT AT THE EVIDENTIARY HEARING, THAT HE WAS DEPRESSED. THAT HE HAD MOOD SWINGS EVEN FAR BACK AS TEENAGE YEARS. THIS IS ALL SOMETHING THAT CAME OUT IN THE EVIDENCE SHEARING HEARING AND DID NOT COME OUT AT THE EITHER GUILT PHASE OR PENALTY PHASE. IT IS QUALITY TATETIVELY DIFFERENT EVALUATION. AND TRIAL COUNSEL SIMPLY DID NOT INVESTIGATE IT. THERE WAS REASONABLE PROBABILITY GIVEN THE EXPLANATION AND THE HISTORY AND THE ETIOLOGIES THAT THE JURY WOULD HAVE FOUND WITH HAD A DIFFERENT RESULT. MR. SOCHOR ASK THIS COURT GRANT A RELIEF IN THE FORM OF PENALTY PHASE.

MAY I ASK A QUESTION? IS THERE ANY EVIDENCE THAT A INVESTIGATED FROM THE PUBLIC DEFENDERS OFFICER TASK WITH INVESTIGATION.

THERE WAS NO EVIDENCE OF THAT.

THANK YOU VERY MUCH. THANK YOU BOTH VERY MUCH. COURT WILL NOW STAND IN RECESS UNTIL 1Y08 30 IN THE MORNING.