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Grover Reed v. State of Florida

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING AGAIN, AND WE APPRECIATE COUNSEL BEING READY. WITHOUT ANY FURTHER ADO, IT IS REED VERSUS STATE. COUNSEL.

YOUR HONOR, MAY IT PLEASE THE COURT. I AM CHRIS-ANDERSON, COUNSEL FOR APPELLANT GROVER REED.

CHIEF JUSTICE: MR. ANDERSON, YOU HAVE A SOFT VOICE AND ALSO THAT MICROPHONE SOMETIMES DOESN'T MATCH, BUT I THINK THAT WILL HELP, BECAUSE JUST DID, SO YOU PROCEED. CAN YOU TELL US WHICH ISSUES YOU ARE GOING TO ADDRESS, REALIZING WE HAVE A LIMITED AMOUNT OF TIME, AND --

YOUR HONOR, PRIMARILY INEFFECTIVE ASSISTANCE OF COUNSEL. THERE IS ALSO A RING ARGUMENT IN THIS CASE.

OKAY. ON THE INEFFECTIVENESS, WHICH PORTION OF THAT IS IT YOUR INTENT TO ADDRESS?

WELL, OF COURSE, I WISH I COULD ADDRESS ALL OF THEM, BECAUSE I THINK THEY ARE ALL IMPORTANT, YOUR HONOR. HOWEVER, I THINK THE FOCUS SHOULD BE ON THE ALIBI ISSUE AND, ALSO, COURT APPOINTED TRIAL COUNSEL'S DECISION NOT TO PRESENT ANY DEFENSE WITNESSES WHATSOEVER.

AND YOU ARE TALKING ABOUT DEFENSE WITNESSES AT THE GUILT STAGE OR AT THE MITIGATION STAGE?

BOTH, YOUR HONOR.

ALL RIGHT. WELL, WOULD YOU, FOR MY BENEFIT, AT LEAST, ADDRESS THE ISSUE OF YOUR CLAIM OF INEFFECTIVENESS, AS TO THE FAILURE TO PRESENT MITIGATION AT THE PENALTY PHASE.

YES, SIR.

ARE YOU PREPARED TO DO THAT?

YES, SIR.

WOULD YOU SET THE STAGE FOR US, AS FAR AS WHAT DID HAPPEN AND THEN WHAT EVIDENCE WAS BROUGHT OUT AT THIS EVIDENTIARY HEARING AND WHAT THE CONCLUSION OF THE TRIAL COURT WAS.

YOUR HONOR, THE DEFENSE COUNSEL THAT THE DEFENDANT HAD AT THE TRIAL COURT LEVEL, WAS MR. RICHARD NICKELS, AND HE TESTIFIED AT THE EVIDENTIARY HEARING ON THE SUBJECT POSTCONVICTION MOTION, THAT HE DID NOT REALLY PRESENT ANY MITIGATION EVIDENCE. WHAT HE INDICATED WAS THAT THE DEFENDANT HAD INSTRUCTED AM NOT TO REALLY PRESENT ANY MITIGATION EVIDENCE, AND HE ALSO INDICATED IN THE EVIDENTIARY HEARING ON THE SUBJECT POSTCONVICTION MOTION, THAT HE FELT THAT PUTTING ON MITIGATION WOULD BE

CONTRARY TO THE DEFENDANT'S INSIST TANS THAT HE WAS INNOCENT -- INSISTENCE THAT HE WAS INNOCENT, AND SO HE REALLY DID NOTHING, AT LEAST IN THE FRONT OF THE JURY. NOW, THERE WAS SOME MITIGATION EVIDENCE PRESENTED TO THE JUDGE LATER ON. I BELIEVE SOME HEALTH REPORTS, SOME PRIOR MEDICAL RECORDS, AS I RECALL, ABOUT ORGANIC BRAIN DAMAGE, BUT THE JUDGE HEARD THAT. THE JURY DIDN'T.

WAS THERE ANY TESTIMONY AT THE EVIDENTIARY HEARING HERE, THAT COUNSEL INVESTIGATED MITIGATION, THAT IS THAT HE INVESTIGATED THE BACKGROUND OR OTHER CIRCUMSTANCES OF THE DEFENDANT?

I, YOUR HONOR, MY RECOLLECTION IS THAT HE DID HAVE A MENTAL HEALTH EXPERT EARLY ON, BUT THAT MENTAL HEALTH EXPERT WAS RETAINED PRIMARILY TO ADDRESS SANITY AND COMPETENCE TYPE ISSUES, AND SO THE EVIDENCE THAT WE HAVE THAT IS AVAILABLE, IS THAT HE REALLY DID NOT GO OUT AND INTERVIEW WITNESSES, DID NOT SPEAK TO FAMILY MEMBERS, DID NOT DEVELOP THE SCHOOL HISTORY DID NOT REALLY GO FURTHER WITH A PSYCHOLOGIST OR PSYCHIATRIST, IN PRESENTING ANY KIND OF CASE OF ORGANIC BRAIN DAMAGE, LEAD POISONING OR SOME OF THE OTHER THINGS THAT I HAVE ALLUDED TO IN MY BRIEF.

IN READING THE TRIAL COURT'S DECISION HERE, AS I UNDERSTAND THE HE SEND THE TESTIMONY THAT THE DEFENDANT INSTRUCTED THE LAWYER NOT TO INVESTIGATOR PRESENT MITIGATING EVIDENCE, AND HE CONCLUDED FURTHER, THAT EVEN IF HE HAD, THAT THE EVIDENCE THAT WAS AVAILABLE WOULD NOT HAVE MADE A DIFFERENCE. IN OTHER WORDS THAT THERE WAS NO PLEDGE DISIN THIS CASE -- NO PREJUDICE IN THIS CASE. NOW, AM I CORRECT IN CHARACTERIZING THE CONCLUSIONS OF THE TRIAL COURT JUDGE?

WITH REGARD TO THE PREJUDICIAL, PREJUDICE ISSUE, YES.

WHAT ABOUT THE PART WHERE THE TRIAL JUDGE CONCLUDED THAT THE DEFENDANT HAD INSTRUCTED THE LAWYER NOT TO INVESTIGATOR PRESENT MITIGATION?

AM I INCORRECT ABOUT THAT -- MITIGATION? AM I INCORRECT ABOUT THAT, IN MY READING OF THE JUDGE'S ORDER? EYE BELIEVE YOU ARE READING THE JUDGE'S ORDER CORRECTLY. I BELIEVE THE JUDGE IS INCORRECT.

OBVIOUSLY THAT WAS MY NEXT QUESTION, IS ISN'T THERE EVIDENCE TO SUPPORT THOSE TWO CONCLUSIONS BY THE TRIAL COURT JUDGE? WHY WAS HE WRONG ABOUT THAT?

THE EVIDENCE THAT THE DEFENDANT INSTRUCTED HIS TRIAL COUNSEL NOT TO PRESENT MITIGATION, IS VERY WEAK, AND REALLY, CONTRADICTIONARY TO DEFENSE COUNSEL'S PRESENTATION OF MITIGATION EVIDENCE TO THE JUDGE.

OKAY, WELL, WHAT WAS IT? WAS IT, DID THE DEFENSE LAWYER TESTIFY THAT I MET WITH THE DEFENDANT, AND I SAID, YOU KNOW, ORDINARILY WHAT I DO NOW, IS I GO OUT AND I INVESTIGATOR I QUESTION BUT MITIGATION, AND THAT THAT IS SEPARATE FROM THE GUILT ASPECT, AND THEN I PRESENT TO THE JURY AND THE JUDGE, THE BEST CASE I CAN, TO TRY TO SAVE YOUR LIFE. AND THEN THE DEFENDANT SAYS I UNDERSTAND THAT, BUT I DON'T WANT YOU TO PRESENT ANY OF THAT. I INSTRUCT YOU NOT TO DO IT. I AM TRYING TO SET UP, IS THAT WHAT THE DEFENSE LAWYER TESTIFIED TO OR WHAT DID HE TESTIFY TO?

THE DEFENSE LAWYER TESTIFIED, IN EFFECT, THAT THE DEFENDANT DID NOT WANT TO DRAG HIS FAMILY MEMBERS INTO THIS, INTO THE TRIAL, AND FRANKLY THE FAMILY MEMBERS ARE A BIG PART OF MITIGATION. BUT THE REAL PROBLEM IS THAT THERE IS NO INDICATION THAT THAT WAS AN INFORMED DECISION BY THE DEFENDANT. IN OTHER WORDS, THERE IS NOTHING THAT INDICATES THAT DEFENDANT'S TRIAL COUNSEL EVER TOOK THE TIME TO INTERVIEW THE FAMILY MEMBERS, TO DEVELOP THE MENTAL HEALTH BACKGROUND, TO DEVELOP THE LEAD POISONING,

THE ORGANIC BRAIN DAMAGE EVIDENCE, THE HORRIBLE CHILDHOOD BEATING AND ALCOHOLISM, THE CHILDHOOD INCIDENT OF HIS MOTHER SHOOTING AND KILLING HIS FATHER. THERE IS NO INDICATION THAT DEFENSE COUNSEL WENT OUT AND DISCOVERED THESE FACTS, DEVELOPED THESE FACTS AND TALKED AND ADVISED THE DEFENDANT, SO THAT THE DEFENDANT --

BUT IT WOULD HAVE TO BE ON THE BASIS THAT HE DID THAT, CONTRARY TO WHAT MR. REED HAD TOLD HIM THAT, HOW HE WANTED TO PROCEED. ISN'T THAT RIGHT? ISN'T THAT WHAT THE TESTIMONY WAS, BEFORE, AT THE EVIDENTIARY HEARING HERE, BY MR. ARNOLD? THAT REED DIDN'T WANT HIM TO CONTACT THE FAMILY MEMBERS. DIDN'T WANT HIM TO INVOLVE THE FAMILY.

YES, SIR.

SO IN ORDER FOR HIM TO HAVE DONE THAT, HE WOULD HAVE HAD TO HAVE ACTED CONTRARY TO WHAT REED HAD TOLD HIM.

WELL, YOUR HONOR, I DON'T REALLY THINK SO, BECAUSE NUMBER ONE, WE HAVE A DEFENDANT CHARGED WITH DEATH. WE, THE CASE AND THE SEMINARS THAT DEATH PENALTY ATTORNEYS ATTEND, INSTRUCT US NOT TO JUST STOP WHEN A DEFENDANT HAS LOST HOPE AND IS DESPONDENT AND TELLS US TO DO SOMETHING. OUR JOB IS TO GO FURTHER.

WE ARE DEALING IN 1986, RIGHT?

YES, SIR.

AND THIS WAS AN EXPERIENCED DEFENSE LAWYER, CORRECT?

YES, SIR.

AND IN FACT, THE JUDGE, REALLY, RELIED HEAVILY ON THE FACT THAT HE HAD HAD NUMEROUS CAPITAL CASES. RIGHT?

I DON'T KNOW THAT. I DO KNOW THAT JUDGE WEATHERBEE, THE TRIAL COURT JUDGE AT THE EVIDENTIARY HEARING, MENTIONED THE FACT THAT RICHARD NICKELS IS AN EXPERIENCED TRIAL LAWYER WITH YEARS OF EXPERIENCE.

WELL, AGAIN, WOULD YOU POINT OUT TO US WHERE DID THE TRIAL COURT GO WRONG IN MAKING THESE TWO CONCLUSIONS, FIRST IN ESSENCE, THAT YOUR CLIENT YOU KNOW, WAIVED OR DIRECTED HIS LAWYER NOT TO PRESENT MITIGATION, AND THEN IN CONCLUDING THAT THERE WAS NO DEMONSTRATION OF PREJUDICE BY NOT DOING. THAT WHERE DID THE JUDGE GO WRONG.

WELL, FOR ONE THING, YOUR HONOR, THERE IS MORE TO MITIGATION THAN JUST FAMILY MEMBERS. AND I AM THINKING OF THE CASE OF WIGGINS VERSUS SMITH RIGHT NOW. THERE IS PSYCHOLOGICAL EVIDENCE THERE, SECTION PERTH WITNESS EVIDENCE, THERE IS EVIDENCE OF SCHOOL TEACHERS AND COACHES, AND --

BUT IN WIGGINS, THE DEFENDANT HADN'T INSTRUCTED HIS ATTORNEY NOT TO PRESENT MITIGATION, HAD HE? NOT TO INVOLVE HIS FAMILY, NOT TO INVOLVE HIS FRIENDS, NOT TO INVOLVE PSYCHIATRIC TESTIMONY, NOT PRESENT ANY EVIDENCE THAT WOULD CONTRADICT HIS CLAIM OF INNOCENCE. THAT WASN'T THE CASE IN WIGGINS, RIGHT?

I DON'T RECALL OFFHAND. AND I APOLOGIZE TO THE COURT FOR THAT. WIGGINS IS, AS MOST OF THESE DECISIONS IS EXTREMELY LENGTHY, BUT WHAT I DO RECALL ABOUT WIGGINS WAS THAT YOU DON'T EVEN GET TO THE POINT WHERE THE DEFENDANT MAKES A DECISION AND THE TRIAL COUNSEL ACCEPTS THAT DECISION ABOUT MITIGATION, UNTIL YOU FIRST, UNTIL TRIAL COUNSEL

FIRST INVESTIGATES THE BACKGROUND FULLY, AND CAN THAT.

WHAT ABOUT IN A CASE SUCH AS THAT AND WHAT OCCURRED HERE, WHERE THE DEFENDANT, BEFORE THE ATTORNEY CAN CONDUCT AN INVESTIGATION, THE DEFENDANT TELLS THE ATTORNEY I DON'T WANT YOU TO CONDUCT AN INVESTIGATION. I DON'T WANT YOU TO TALK TO MY FAMILY OR MY FRIENDS, I DON'T WANT TO YOU PRESENT ANY PSYCHIATRIC EVALUATION. WHAT IS THE ATTORNEY SUPPOSED TO DO AT THAT POINT?

THE ATTORNEY IS SUPPOSED TO SAY I UNDERSTAND YOUR HONOR'S SENTENCE OF DEATH AND -- I UNDERSTAND YOUR HONOR'S SENTENCE OF DEATH AND YOU ARE DESPONDENT. HOWEVER, BEFORE YOU MAKE THAT DECISION, LET ME INVESTIGATE YOUR BACKGROUND AND YOUR FAMILY AND TELL YOU WHAT EVIDENCE IS OUT THERE, BEFORE YOU MAKE THAT DECISION.

WHAT CASE FROM THE SUPREME COURT OR THE US SUPREME COURT REQUIRES AN ATTORNEY TO DO THAT?

I BELIEVE IT IF IT IS NOT EXPLICIT, IT IS CERTAINLY IMPLICIT, IN WIGGINS VERSUS SMITH.

WHAT, YOU SAID THAT THE RECORD, REALLY, REFUTES THE TRIAL COURT'S, THE EVIDENTIARY TRIAL COURT'S FINDINGS, BECAUSE THIS REALLY WOULDN'T HAVE BEEN A CASE, SAY, IF COON VERSUS DUGGAR EXISTED AT THE TIME, WHICH IT DIDN'T, OR MOHAMMED, WHERE THOSE CASES WOULD HAVE COME INTO PLAY, BUT YOU SAID THAT THE FACT THAT HE ALLOWED HIS ATTORNEY TO PRESENT EVIDENCE AT THE SPENCER HEARING BELIES THE FACT THAT HE REALLY WAS PREVENTING HIM FROM PRESENTING MITIGATION. WHAT WAS PRESENTED TO THE TRIAL COURT AT THE SPENCER HEARING OR THE, YOU KNOW, BEFORE THE TRIAL COURT?

YOUR HONOR, THE EVIDENCE IN THIS CASE IS SO VOLUMINOUS, I AM TRYING TO RECALL AT ALL, BUT I DO RECALL THAT THERE WAS SOME EVIDENCE HE WAS HOSPITALIZED ONCE FOR MENTAL, FOR LEAD POISONING, CONNECTED TO HIS GASOLINE HUFFING.

THE HOSPITAL RECORDS FROM THE HENDERSON --

YES, SIR.

-- HOSPITAL.

SO THE ATTORNEY HAD OBTAINED HOSPITAL RECORDS.

YES, SIR.

WHAT ELSE DID THE ATTORNEY TESTIFY THAT HE HAD OBTAINED IN THE PENALTY PHASE? HAD HE DONE ANYTHING, YOU KNOW, AGAIN, HE HADN'T CONTACTED THE FAMILY MEMBERS, CORRECT?

I BELIEVE THERE WAS TESTIMONY THAT HE HAD CONTACTED SOME FAMILY MEMBERS OR AN INVESTIGATOR CONTACTED SOME FAMILY MEMBERS ON BEHALF OF THE TRIAL ATTORNEY, BUT IT NEVER WENT ANYWHERE BEYOND THAT, BEYOND THE INITIAL BRIEF CONTACT.

IT IS HELPFUL IN TRYING TO UNDERSTAND WHETHER THIS ATTORNEY FAILED TO DO WHAT A REASONABLY PRUDENT ATTORNEY WOULD DO. I AGREE WE MAYBE CAN'T JUST SIMPLY ACCEPT THAT THE DEFENDANT SAYS, WELL, I WOULD RATHER YOU DIDN'T CONTACT THE FAMILY AND THAT MIGHT NOT BE ENOUGH, SO TO KNOW THAT, IF THE ATTORNEY ACTUALLY WAS INVESTIGATING THINGS, THAT MIGHT LEND MORE CREDIBILITY TO ONE SIDE OR THE OTHER, SO IT IS HELPFUL IF YOU COULD --

YES, YOUR HONOR. I RECALL THAT KRISTIN NISNICK, THE DEFENDANT'S LIVE-IN QUOTE/UNQUOTE COMMON LAW WIFE, WAS CONTACTED. AS I RECALL, I BELIEVE ONE, EITHER HIS BROTHER OR SISTER WAS CONTACTED AS WELL, BUT THAT WAS THE EXTENT OF IT, AND THEY, THERE WERE NO STATEMENTS, NO POINTS OF VIEW OBTAINED. IT NEVER REALLY WENT BEYOND THAT.

WHAT WAS YOUR, IF I UNDERSTAND PART OF YOUR CLAIM HERE, IS THAT THE MITIGATION WAS SO OVERWHELMING --

YES, SIR.

-- THAT THE TRIAL JUDGE WAS WRONG IN SAYING THAT THERE WAS NO PREJUDICE.

YES, SIR.

-- TO THE DEFENDANT. SO WHAT, WOULD YOU ELABORATE ON. THAT YOU KNOW, WHAT WAS SO OVERWHELMING ABOUT THE MITIGATION IN THIS CASE?

THE TRIAL JUDGE FOCUSED, YOUR HONOR, ON THE DEFENDANT'S ANTISOCIAL PERSONALITY DISORDER AND HIS NARCISSISTIC TENDENCY, AND THE PSYCHOLOGIST THAT WE CALLED TO TESTIFY AT THE EVIDENTIARY HEARING TO INDICATE WHAT A HEALTH PROFESSIONAL COULD HAVE CONTRIBUTED TO MITIGATION, DID INDICATE THAT THIS DEFENDANT DID, IN DEED, HAVE SUCH AN ANTISOCIAL PERSONALITY DISORDER, AND THAT, AND MY RECOLLECTION OF THE TRIAL COURT'S LENGTHY ORDER IS THAT, FOR EXAMPLE, WITH REGARD TO MENTAL HEALTH IN PARTICULAR, THAT IT WAS A PRUDENT DECISION NOT TO CALL A MENTAL HEALTH EXPERT.

WELL, HOW WAS HE WRONG ABOUT THAT? THAT IS THAT WE DO SEE, IN CASES WHERE LAWYERS HAVE ACTUALLY TESTIFIED, IN EVIDENTIARY HEARINGS, THAT THEY DON'T WANT DIAGNOSIS LIKE THAT DISCLOSED TO JURIES, BECAUSE THOSE DIAGNOSIS BASICALLY ARE SAYING THIS IS JUST A VERY BAD PERSON.

YES, YOUR HONOR, BUT IN THIS CASE, THE MENTAL HEALTH PROFESSIONAL, I BELIEVE DR. LARSEN WAS HIS NAME, TESTIFIED THAT THE REASON THAT THIS DEFENDANT IS A BAD PERSON, THE REASON THAT HE HAS THE ANTISOCIAL PERSONALITY DISORDERS AND THESE PROBLEMS IS BECAUSE OF THE TERRIBLE CHILDHOOD THAT HE HAD, THE HORRIBLE UPBRINGING, THE ORGANIC BRAIN DAMAGE FROM GASOLINE HUFFING, LIVE HAD GONE IN A SEXUALLY ABUSIVE HOME, BEING BEATEN REGULARLY TO THE POINT OF BED WETTING, WITNESSING HIS FATHER SHOOT HIS MOTHER. BEING --

SO YOUR CLAIM IS THAT ALL OF THAT WOULD HAVE OUTWEIGHED OR THE NEGATIVE SIDE OF IT, OF ENDING UP WITH THE DIAGNOSIS.

WOULD HAVE EXPLAINED THE DIAGNOSIS. IN OTHER WORDS, THE ANTISOCIAL PERSONALITY DISORDER DIAGNOSIS, THE REASON HE HAD THAT DISORDER IS BECAUSE OF THE TERRIBLE UPBRINGING HE HAD. AND IN LIGHT, IN LIGHT OF THAT, AND I THINK THAT THIS PARTICULAR DEFENDANT'S UPBRINGING WAS PARTICULARLY HORRIBLE, THE FACTS ABOUT THE BEATING, BEING CONSTANTLY BEATEN TO THE POINT OF HIS STEPFATHER SOAKING ON ROPE IN WATER AND LETTING IT DRY SO IT WOULD BE BRINGSLY AND HARD AND PAINFUL, THE FACT -- BRISTLY AND HARD AND PAINFUL, THE HALF THAT GROVER REED, ONE OF HIS SIBLINGS THAT WAS HALF INDIAN, WERE CALLED DOGS AND MONGRELS BY THE STEPFATHER.

PRESUMABLY HE KNEW ABOUT THESE THINGS, THEY HAPPENED TO HIM, BUT NEVERTHELESS HE INSTRUCTED HIS COUNSEL THAT HE DIDN'T WANT THAT KIND OF TESTIMONY OUT ABOUT HIS FAMILY AND HIS FRIENDS. DEFENDANTS HAVE MANY REASONS FOR NOT WANTING THAT OUT. MAYBE THEY ARE EMBARRASSED TO GET THAT INFORMATION OUT. THEY DON'T WANT TO BE HUMILIATED, WHATEVER THE REASON, ONCE A DEFENDANT INSTRUCTS AN ATTORNEY IN HAVING

THAT KNOWLEDGE, BECAUSE IT IS ABOUT HIS BACKGROUND, WHY IS AN ATTORNEY INEFFECTIVE FOR FOLLOWING HIS CLIENT'S INSTRUCTIONS?

BECAUSE, AND I HAVE CITED THE ETHICAL RULE IN MY BELIEF AND I APOLOGIZE -- IN MY BRIEF, AND I APOLOGIZE I CAN'T THINK OF THE RULE RIGHT NOW, BUTS, YOUR HONOR, THE COURT IS ABSOLUTE -- BUT, YOUR HONOR, THE COURT IS ABSOLUTELY ON FIRM GROUND WHEN IT SAYS IT HAS AN ETHICAL OBLIGATION TO OBEY THE INSTRUCTION OF OUR CLIENTS. WE CAN'T TELL OUR CLIENTS WHAT TO DO. HOWEVER, THE ETHICAL RULE ALSO STATES THAT AN ATTORNEY HAS THE OBLIGATION TO INFORM THE CLIENT, SO THAT A CLIENT CAN MAKE THAT DECISION INTELLIGENTLY AND THAT DID NOT HAPPEN IN THIS CASE.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED US THAT YOU ARE IN USER REBUTTAL TIME. IF YOU WANT TO SAVE A FEW MINUTES FOR REBUTTAL OR CONTINUE THAT, IS YOUR CHOICE ABOUT HOW YOU USE YOUR TIME.

I WOULD SAVE.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING, CHIEF JUSTICE ANSTEAD.

WOULD YOU PICK UP ON THIS ISSUE OF INEFFECTIVENESS OF COUNSEL AT THE PENALTY PHASE AND GO AHEAD AND INTRODUCE YOURSELF.

MAY IT PLEASE THE COURT. CHARMAINE MILLSAPS, REPRESENTING THE STATE. THE PENALTY PHASE, FIRST OF ALL LET ME HOP RIGHT TO THE MEAT OF WHAT WAS PRESENTED, BUT HE DID WAIVE, AND I WILL GO BACK TO HIS WAIVER. BUT WHILE THE DEFENDANT, THIS IS NOT THE TYPICAL CASE OF THIS HORRIBLE CHILD ABUSE. WHAT HAPPENED IS THE DEFENDANT WENT TO LIVE WITH HIS GRANDMOTHER. EVERYBODY TESTIFIED THAT WAS A VERY STABLE, LOVING ENVIRONMENT. WHEN THE MOTHER GOT REMARRIED, WHEN THE DEFENDANT WAS ABOUT SIX, AND I AM GETTING THIS FROM DR. LARSEN'S REPORT, SO NOT ALL OF THIS CAME OUT AT THE EVIDENTIARY HEARING VIA TESTIMONY, BUT THAT IS IN HIS REPORT. WHEN THE DEFENDANT WAS SIX, THE MOTHER REMARRIED, AND THEY WENT TO LIVE WITH THE STEPFATHER, WHO WAS ABUSIVE, THE TESTIMONY WAS HE WAS ABUSIVE. THEY WERE THERE FOR ONLY A VERY SHORT MONTHS, SEVEN TO EIGHT MONTHS, AND THEN THEY WENT BACK TO LIVE WITH THE GRANDMOTHER. UNDERSTAND THE MAJORITY OF THIS DEFENDANT'S CHILDHOOD WAS HAD, IN FACT, IN A LOVING, WHAT WAS CLASSIFIED AND CHARACTERIZED AS LOVING, STABLE ENVIRONMENT. OKAY. THEN THAT IS, LET'S ALSO TALK ABOUT WHAT THE BROTHER, THERE WERE THREE PEOPLE WHO TESTIFIED IN MITIGATION. I AM TALKING ABOUT FAMILY MITIGATION. THEN DR. LARSEN TESTIFIED IN PSYCHOLOGICAL, AND I WILL GO THROUGH ALL FOUR OF THEM. THE COACH ADDED ALMOST NOTHING. AS A MATTER OF FACT, WHAT HE SAID WAS THE DEFENDANT FELL BEHIND IN SCHOOL. NOT BECAUSE OF AN IN ABILITY TO PERFORM BUT BECAUSE HE WAS NOT DOING HIS HOMEWORK. THAT IS NOT HELPFUL. THE SISTER TESTIFIED. THE BROTHER TESTIFIED. NOW, THE BROTHER'S TESTIMONY, WE COULD ALMOST USE. IT WAS ALMOST ALMOST --

AGGRAVATE SOMETHING.

IT WAS ALMOST AGGRAVATING. OBVIOUSLY WE ARE NOT GOING TO USE IT AS AGGRAVATING BUT IT REBUTS ITSELF, YOUR HONOR, AND HERE IS WHAT HE TESTIFIES TO. THE LOVING GRANDMOTHER, WHEN THE DEFENDANT WAS USING DRUGS, HE PUNCHED HIS LOVING GRANDMOTHER IN THE NOSE AND BROKE HER NOSE, WHICH IS WHAT CAUSED THEM TO SEND HIM TO THE MENTAL HEALTH, FOR A MENTAL HEALTH DRUG TREATMENT PROGRAM. HE, THEN, CAME, WHEN HE CAME OUT OF THE PROGRAM, HE WENT TO LIVE WITH THE BROTHER. ON THE CONDITION THAT HE NOT USE DRUGS. THE BROTHER'S WIFE FOUND A NEEDLE IN THE COUCH, AND CONFRONTED HIM WITH, IT AND HE THREATENED THE BROTHER'S LIFE. I WILL TELL YOU

EXACTLY HOW THE STATE WOULD USE THIS. OH, THE BROTHER ALSO DEFINED, SAID HE WAS A CON MAN, THAT GROVER REED WAS A CON MAN. SO THE STATE WOULD USE THIS AS PART OF A PATTERN THAT WHAT HAPPENS IS THIS LOVING, GIVING, HELPFUL WOMEN HELP THIS DEFENDANT AND HE LASHES OUT. BREAKS THE GRANDMOTHER'S NOSE, THREATENS THE BROTHER'S WIFE, AND ENDS UP KILLING THIS, THE REVEREND'S WIFE. THAT IS THE VICTIM HERE, AND THAT IS THE EXACT PATTERN OF THIS CRIME. THE REVEREND AND HIS WIFE HELPED THEM, WHEN THEY CAME TO JACKSONVILLE, AS PART OF TRAVELERS AID, GOT THEM SET UP, GAVE THEM RIDES RBLTHS GAVE THEM MONEY, AND -- RIDES, GAVE THEM MONEY, AND THEN WHEN SHE STOPPED, HE RAPED AND STRANGLED AND STABBED HER.

SO THE ALLEGED MITIGATION IS NOT THAT MITIGATING, WHEN YOU EXAMINE IT CLOSELY.

IT IS NOT, WE WOULD USE THE BROTHER'S TESTIMONY. WE WOULD USE THAT.

WHAT ABOUT THE PSYCHOLOGICAL TESTIMONY?

DR. LARSEN TESTIFIED HIS DIAGNOSIS WAS ANTISOCIAL PERSONALITY, WITH NARCISSISTIC TENDENCIES. ANY PROSECUTOR WOULD MAKE, REMAKE, WE HAVE THEM EAT THAT DIAGNOSIS. THAT. ALL WE HAVE TO DO IS HAVE THE EXPERT EXPLAIN WHAT SUCH A DIAGNOSIS MEANS. WE GET OUT THE DSM-4 AND HAVE THEM READ WHAT THAT MEANS. ONE COURT DESCRIBED THAT AS FANCY LANGUAGE FOR BEING A MURDERER.

THE TRIAL COURT EXPRESSLY RELIED ON THAT DOWN SIDE TO THE MENTAL HEALTH EVIDENCE.

ABSOLUTELY. HE RELIED ON TWO THINGS. YOUR HONOR, THIS IS A 36-PAGE ORDER. IT IS ONE OF THE BEST ORDERS ON A POSTCONVICTION THAT I HAVE EVER SEEN. HE SAID IT WAS WAIVED. WE CANNOT GET OVER THAT. THE DEFENDANT SAID, THE TESTIMONY WAS HE INSTRUCTED HIM TWICE, INCLUDING AT THE END OF, AND HE QUOTES A WAIVER FORM, SO YOUR HONOR, THIS ISN'T JUST AT THE BEGINNING THAT HE SAYS, NO, DON'T PRESENT MY FAMILY. THIS IS HIS CONSISTENT -

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WHEN YOU SAY AT THE END, WHAT TIME PERIOD ARE YOU TALKING ABOUT?

THE WAIVER IS IN NOVEMBER, WHICH IS WHEN THIS TRIAL WAS. SO RIGHT AROUND THE TIME OF THE TRIAL, AND THE DATE IS IN THE ORDER. RIGHT AROUND THE TIME OF THE TRIAL, HE REASSERTS "DO NOT CONTACT MY FAMILY." DR. LARSEN'S TESTIMONY, NOT ONLY DID DR. LARSEN, HIMSELF, ADMITTED THAT THAT WAS THE DIAGNOSIS, ANTISOCIAL, THAT IT WAS VERY RARE FOR HIM TO BE CALLED AS A -- TO BE CALLED AS AN EXPERT. ALLEN CHIPPERFIELD, THE PUBLIC DEFENDER HAD ORIGINALLY BEEN ASSIGNED TO REPRESENT THIS DEFENDANT, AND THEN MR. NICKLES COMES IN AND ACTUALLY REPRESENTS HIM AS TRIAL. ALLEN CHIPPERFIELD ALSO TESTIFIED, WITH HIS VAST EXPERIENCE IN CAPITAL CASES, THAT IT IS HARD TO PRESENT A PENALTY PHASE, WHEN YOUR ONLY DIAGNOSIS IS ANTISOCIAL PERSONALITY. TRIAL COUNSEL, HIMSELF, MR. NICKLES, TESTIFIED I WOULD NOT PRESENT SUCH A DIAGNOSIS. MOREOVER, LET ME TELL YOU WHAT WAS PRESENTED AT THE SPENCER HEARING TO THE JUDGE. DR. MILLER WAS THE LOCAL PSYCHIATRIST THAT COUNSEL HAD RETAINED, AND THAT REPORT WAS PUT IN FRONT OF HIM. A PSI WAS ORDER. -- WAS ORDERED. WE ARE IN COMPLIANCE, I KNOW MORE HAMMED HAD NOT COME OUT BUT WE ARE IN COMPLIANCE WITH MOHAMMED -- WITH MOHAMMED ANYWAY. THE JUDGE READ THE PSI.

WAS THERE MITIGATING EVIDENCE IN THE PSI?

I CAN'T ACTUALLY, I DON'T REMEMBER WHAT WAS SPECIFICALLY IN THE PSI.

THERE WAS AN OBJECTION BY REED TO THE USE OF PART OF THE PSI, WAUT WAS THERE NOT?

THAT HAD A CONVICTION IN IT, YES. THE PART OF THE PSI HAD THAT HAD A CONVICTION IN -- PSI THAT HAD A CONVICTION IN IT. THERE WAS AN OBJECTION TO. THAT.

BUT WAS HIS FAMILY BACKGROUND IN THE PSI?

I ASSUME SO, BECAUSE THEY ALWAYS ARE, YOUR HONOR. MOREOVER --

YOU ASSUME SO. WE ARE TRYING TO FIND OUT IF THE DEFENDANT WOULDN'T COOPERATE, HOW WOULD THEY GET HIS FAMILY BACKGROUND, IF HIS OWN TRIAL COUNSEL DIDN'T HAVE HIS FAMILY BACKGROUND?

WELL, NOW, I KNOW HE TALKED WITH, DR. MILLER EXAMINED HIM, SO I AM NOT SURE HE WAS COMPLETELY UNCOOPERATIVE, IN TERMS OF TALKING ABOUT HIS BACKGROUND. I DID NOT REREAD THE PSI, YOUR HONOR. I PROBABLY READ IT BEFORE THE EVIDENTIARY HEARING. AND THEN ALSO --

WHAT, WELL, GO AHEAD.

OKAY. LET ME JUST FINISH WITH WHAT WAS PRESENTED AT THE SPENCER HEARING. THE DEPARTMENT OF MENTAL HEALTH, THE MENTAL, THE MIDDLE TENNESSEE MIDDLE HEALTH INSTITUTE AND HOSPITAL RECORDS FROM HENDERSONVILLE HOSPITAL. HERE IS THE DIAGNOSIS. CHRONIC LEAD POISONING, ENCEPHALOPY WITH A SEIZURE DISORDER. THAT WAS IN THE PSI AND PRESENTED TO THE TRIAL COURT, AS PART OF THE SPENCER HEARING.

DID THE TRIAL LAWYER EXPLAIN WHY, IF HE HAD THOSE RECORDS, HE DIDN'T PUT THOSE RECORDS INTO EVIDENCE IN THE, BEFORE THE JURY?

NO. THERE WAS NO -- THERE WASN'T SPECIFICALLY TESTIMONY AS TO. THAT I AM ASSUMING IT HAD TO DO WITH, THAT THEY HAD AGREED, REMEMBER NEITHER SIDE PRESENTED ADDITIONAL TESTIMONY AT THIS PENALTY PHASE.

ISN'T THAT SORT OF, AGAIN, GOING BACK TO WHETHER, ANDION WHETHER THOSE RECORDS CONTAIN SOMETHING THAT A JURY WOULD CONSIDER MITIGATING, YOU KNOW -- AND I DON'T KNOW IF THOSE RECORDS WOULD CONTAIN SOMETHING MIGHT -- COBB OBTAIN SOMETHING THAT A JURY WOULD CONSIDER MITIGATING. AN ENCEPALOPATHY IS SOMETHING, A SEIZURE DISORDER. I AM TRYING TO DETERMINE WHETHER THIS COUNSEL DID INVESTIGATE CERTAIN THINGS, SUCH AS THE MENTAL HEALTH PART, AND ALL THAT THE DEFENDANT TOLD HIM TO DO WAS I DON'T WANT YOU TALKING TO MY FAMILY, BUT YET, COULD YOU HELP ME WITH THAT, AS TO WHAT DID TRIAL COUNSEL DO IN THE ORIGINAL TRIAL? HE GOT RECORDS. HE GOT A MENTAL HEALTH EXPERT, DR. MILLER?

DR. MILLER. HE GOT DR. MILLTORY EXAMINE HIM.

SO WHY DID HE EXPLAIN -- DR. MILLER TO EXAMINE HIM.

SO WHY DIDN'T HE EXPLAIN THAT HE DIDN'T PUT THAT ON BEFORE THE JURY?

HE DIDN'T PARTICULARLY EXPLAIN, BUT A LOT OF THIS CONTAINS DRUG USE, AND IT IS BETTER TO PRESENT THAT KIND OF THING TO A JUDGE, BUT HE DIDN'T, WE DIDN'T SPECIFICALLY, WE DIDN'T SPECIFICALLY HAVE HIM, WHAT HE SAID WAS WAIVER, THE WAIVER, HE SAID, DON'T TALK TO MY FAMILY, AND THEN THE --

THAT IS ALL THAT THE WAIVER SAID IS HE DIDN'T WANT THEM TALKING TO, ORION IF THE WAIVER EVEN SAID THAT. IT IS A HANDWRITTEN WAIVER. HE SAID HE DIDN'T WANT HIM TALKING TO, HE DIDN'T WANT THE FAMILY INVOLVED.

BUT THAT WAS ALSO TRIAL COUNSEL'S TESTIMONY, THAT HE TOLD HIM TWICE NOT TO --

I HIM ASKING YOU ABOUT THE MENTAL, THE ACTUAL HARD RECORDS, YOU KNOW, OF THE MENTAL HEALTH ISSUES.

OKAY. NOW, THE ONE, REMEMBER RIGHT AFTER HE PUNCHES HIS GRANDMOTHER, THEY PUT HIM IN THE DRUG TREATMENT, SO ONE OF THESE IS FROM THE DRUG TREATMENT.

THIS ISN'T A CASE WHERE WE ARE SAYING THAT COUNSEL INVESTIGATED AND THEN WAS MAKING A STRATEGIC DECISION THAT HE WOULD RATHER PUT NO MITIGATION ON THAN RISK THE FACT OF HAVING SOME BAD INCIDENTS COME OUT. IF WE WERE DEALING WITH THAT KIND OF CASE --

YES, WE ARE, BECAUSE THE END DIAGNOSIS PSYCHOLOGICALLY WAS ANTISOCIAL PERSONALITY WITH NARCISSISTIC, AND HE SAID I WOULD NOT PRESENT THAT, THEN OR NOW.

WHAT DID DR. MILLER TESTIFY TO?

DR. MILLER WAS NOT CALLED. DR. LARSEN WAS CALLED.

AT THE SPENCER HEARING?

NO. NO. NO.

IN OTHER WORDS, I REALIZE IT IS CONFUSING IN A WAY, BUT IF I UNDERSTAND IT, DR. MILLER WAS PRESENTED AT THE SPENCER HEARING BEFORE THE JUDGE.

HIS REPORT.

JUST HIS REPORT.

HIS REPORT.

HIS REPORT IS NOT IN THE RECORD, IS IT?

NO BUT EVERYBODY SAYS THAT WAS PRESENTED.

YEAH, BUT THAT IS UNFORTUNATE THAT I CAN'T FIND IT IN THE RECORD NOR IS THE PSI IN OUR RECORD. WAS THE PSI?

I THINK WE HAVE A PSI. I WILL SEE IF I CAN SUPPLEMENT WITH THE PSI.

I WOULD ASK BOTH OF YOU TO PLEASE EXAMINE THE RECORD FOR THOSE TWO DOCUMENTS, THE SP. -- THE PSI AND THE REPORT OF DR. MILLER. CAN YOU SUMMARIZE FOR US, WHAT THE REPORT OF DR. MILLER SHOWED AT THE SPENCER HEARING. DO YOU KNOW?

NO, YOUR HONOR, I CANNOT.

SO, EITHER IF WE AGREE WITH THE STATE THAT WE SHOULD AFFIRM THE TRIAL COURT'S ORDER, THERE IS TWO-WAYS THAT AN OPINION LIKE THIS COULD GET WRITTEN. ONE IS TO SAY THAT THERE WAS MITIGATION OUT THERE IN THE FORM OF SOME HOSPITAL RECORDS AND MENTAL HEALTH ISSUES THAT, THROUGH DR. MILLER, AND THAT THE LAWYER DID, ALSO, CONTACT FAMILY MEMBERS, BUT DIDN'T GET ANY EXTENSIVE STATEMENTS, BUT MADE THE DECISION THAT THAT MENTAL HEALTH INFORMATION WOULD BE MORE HARMFUL THAN HELPFUL, AND THEREFORE JUST PUT ON NOTHING IN THE PENALTY PHASE. OR WE COULD SAY THAT THIS WAS A CASE WHERE THE TRIAL COUNSEL STARTED TO DO CERTAIN THINGS AND WAS DEFINITELY

INSTRUCTED BY HIS CLIENT AGAINST HIS RECOMMENDATION. I DON'T WANT ANYTHING PRESENTED. AND THAT IS WHY HE DIDN'T DO IT, AND AS JUSTICE CANTERO WAS SAYING, THEN YOU HAVE GOT A SITUATION WHERE HE IS FOLLOWING HIS CLIENT'S WISHES, AND I AM CONFUSED, BECAUSE THIS DOESN'T SEEM TO FALL INTO EITHER ONE, BECAUSE OBVIOUSLY HE DIDN'T EVEN, UNDER MOHAMMED, HE DIDN'T WAIVE MITIGATION, BECAUSE THINGS WERE PRESENTED TO THE TRIAL JUDGE. UNDER COON, YOU WOULD BE PROFFERING WHAT MITIGATION EXISTED, IN SAYING I RECOMMENDED HE PUT THIS ON BUT HE DIDN'T WANT ME TO, BUT HERE YOU ARE SAYING, WELL, NO, THIS WAS STUFF THAT NOBODY WOULD WANT TO PUT ON ANYWAY, SO WHERE IS IT? WHICH WAY IS IT? NO INSTRUCTED BY THE CLIENT AND THEREFORE THAT IS WHY, OR BECAUSE IT WASN'T GOING TO BE HELPFUL? OR PICK OR BOTH. IF THAT IS WHAT YOU WANT.

OKAY. BUT LET'S SEPARATE IT OUT. WHAT MR. NICKLES, THE TRIAL COUNSEL, TESTIFIED, IS I WOULD NOT PRESENT THE ANTISOCIAL DIAGNOSIS.

IN ALL DUE DIFFERENCE TO. MR. ANDERSON, MAYBE DR. LARSEN WASN'T REALLY GOING TO BE A GOOD MENTAL HEALTH EXPERT. THE QUESTION IS DID ANYONE ASK HIM WHY THEY DIDN'T PRESENT DR. MILLER, WHOSE REPORT WE DON'T HAVE INTO EVIDENCE?

NO. THAT WAS NOT SPECIFICALLY ASKED AT THE EVIDENTIARY HEARING.

HOW WAS DR. MILLER RETAINED? THAT IS WAS HE RETAINED SPECIFICALLY TO ADVISE DEFENSE COUNSEL ABOUT MITIGATION?

NO. IT WAS, HE SEEMS TO HAVE BEEN MORE COMPETENCY, YOUR HONOR.

SO --

BUT REMEMBER, WITH MOST EXPERTS, COMPETENCY, UNDERLYING EITHER A COMPETENCY OR A MITIGATION IS THE MENTAL HEALTH OF THE DEFORMITY YOU CAN OFTEN, OFTEN WHEN YOU EXAMINE SOMEBODY FOR KPA COMPETENCY, YOU ALSO -- FOR COMPETENCY, YOU ALSO GET THE DIAGNOSIS THAT WOULD TLEED MITIGATION.

THAT IS WHY IT IS SO IMPORTANT THAT THAT BE IN THE RECORD.

JUDGE, I WILL CHECK AND SEE IF WE CAN --

BUT THAT WAS PRETRIAL MENTAL EXAMINATION ON THE ISSUE OF COMPETENCY, SO THAT COUNSEL COULD KNOW WHETHER OR NOT TO ASK THE COURT TO DECLARE HIS COUNSEL OR HIS CLIENT INCOMPETENT TO PROCEED TO TRIAL.

YES, AND THE TESTIMONY THAT I REMEMBER ABOUT THE REPORT, IT DID NOT HAVE, IT TALKED ABOUT DRUG USE AND, BUT THIS, I HAVE NOT READ THE REPORT, ITSELF. IT TALKED ABOUT DRUG USE AND IMBALANCES, PSYCHOLOGICAL IMBALANCES, SO THERE WASN'T, FROM THAT DESCRIPTION, I GATHER THERE IS NOT MUCH MEAT THERE, BUT I WILL FIND, I WILL TRY TO TRACK DOWN DR. MILLER'S REPORT.

WAS THERE OTHER EVIDENCE PRESENTED AT THE SPENCER HEARING, BESIDES DR. MILLER'S REPORT?

YES. DR. MILLER'S REPORT, THE PSI, THE HOSPITAL RECORDS FROM HENDERSONVILLE HOSPITAL WITH THE DIAGNOSIS THAT I READ OUT EARLIER, AND THEN THE REPORT FROM THE DEPARTMENT OF MENTAL HEALTH, THE MIDDLE TENNESSEE MENTAL HEALTH INSTITUTE REPORT.

AND ALL OF THOSE THINGS ARE IN THE RECORD.

YES.

WELL, MINUS DR. MILLER'S REPORT.

THEY WERE PRESENTED DURING THE SPENCER HEARING. WAS THERE ANY ARGUMENT MADE? I MEAN THERE, IS A DIFFERENCE IN PRESENTING DOCUMENTS AND MAKING SOME ARGUMENT ABOUT HOW THESE DOCUMENTS ARE RELEVANT AND WHAT KIND OF MITIGATION YOU COULD ACTUALLY GET OUT OF THEM. WE HAVE A SITUATION WHERE YOU PRESENTED NO WITNESSES WERE PRESENTED, CORRECT? AT THE PENALTY PHASE.

CORRECT, YOUR HONOR.

SO WHAT WAS ARGUED, EITHER AT THE PENALTY PHASE ABOUT MITIGATION OR WHAT WAS ARGUED AT THE SPENCER HEARING, ABOUT HOW THESE DOCUMENTS SHOWED MITIGATION? I MEAN, JUST GIVING THE TRIAL JUDGE SOME DOCUMENTS, WHAT GOOD DOES THAT REALLY DO?

WELL, THE TRIAL JUDGE CAN READ THE DOCUMENTS.

BUT ISN'T A TRIAL COUNSEL'S OBLIGATION TO TRY TO AT LEAST LEAD THE TRIAL JUDGE INTO SOME DIRECTION ABOUT HOW THESE ARE HELPFUL?

OKAY, BUT, YOUR HONOR, THAT IS NOT THEIR CLAIM OF INEFFECTIVENESS. THEIR CLAIM OF INEFFECTIVENESS IS NOT PRESENTING THE ANTISOCIAL.

INCLUDED IN THE WHOLE INEFFECTIVENESS IS WHETHER HE DID ANYTHING TO ACTUALLY TRY TO HELP HIS CLIENT DEMONSTRATE SOME MITIGATION, AND YOU ARE SAYING HE DID SOMETHING BY GIVING THESE DOCUMENTS, BUT WHAT GOOD, WHAT DID HE SAY ABOUT THESE DOCUMENTS?

WELL, OKAY, FIRST, AT THE PENALTY PHASE, WHEN HE WAS ARGUING, THAT WAS MORE RESIDUAL DOUBT AND THE TRIAL JUDGE LET HIM DO SOMETHING THAT IS VERY CLOSE TO A RESIDUAL DOUBT ARGUMENT, SO THE REAL ARGUMENT MADE IN FRONT OF THE JURY AND, REMEMBER, THE JURY DIDN'T HAVE THESE DOCUMENTS, WAS A RESIDUAL DOUBT TYPE OF ARGUMENT.

I GUESS, AND MY QUESTION IS, I CAN'T REMEMBER, AT LEAST, AND I AM SURE THERE IS SOMEWHERE, A CASE WHERE THERE WAS A TOTAL ABSENCE OF MITIGATION PRESENTED BEFORE, TO THE JURY, WHERE IT HAS BEEN OTHER THAN WHEN THE DEFENDANT SAYS, "I JUST" -- IN MOHAMMED OR COON, I WANT TO WAIVE ALL MITIGATION FOR ALL PURPOSES, AND THIS DOESN'T SEEM TO BE THAT CASE. IT MAY BE THAT HE SAID TO HIS LAWYER OR SOMETHING LIKE THAT, I DON'T WANT TO GET MY FAMILY INVOLVED, BUT THAT IS NOT WHAT WE ARE TALKING ABOUT HERE.

THAT IS HALF OF THEIR CLAIM OF INEFFECTIVENESS.

BUT WE HAVE GOT TO LOOK AT WHETHER OUR CONFIDENCE IN THE RESULT IS UNDERMINED, WHEN WE HAVE A SITUATION WHERE IT IS SURE TO GET THE DEATH PENALTY, IF YOU JUST LOOK AT THE AGGRAVATORS IN THIS CASE, AND MAYBE IT IS SURE, ANYWAY, EVEN WITH THE MITIGATORS, BUT THE THOUGHT THAT THERE WOULD BE, EVERY DEFENDANT THAT IS BEFORE US HAS SOMETHING IN THEIR PAST THAT THEY WOULD RATHER NOT COME OUT, WHETHER IT IS DRUG USE OR WHATEVER, BUT THAT DOESN'T STOP ATTORNEYS FROM FINDING WHAT IS AT LEAST SOMETHING YOU KNOW, IN THE WAY OF MITIGATION, JUST TO AT LEAST PRESENT IT TO THE JURY.

WELL, BUT, IT DOES STOP THEM WHEN THE CLIENT SAYS DON'T. THEY ARE OBLIGATED TO HONOR INSTRUCTIONS FROM THEIR CLIENT NOT TO PRESENT THIS, AND IN WIGGINS V SMITH, NO,

THERE WAS NOT. THERE WAS NOT --

YOU ARE SAYING THIS WAS A CASE THAT THE REASON THAT NO PENALTY PHASE MITIGATION WAS PUT ON, BECAUSE THERE IS, IT IS CLEAR, THAT REED INSTRUCTED HIM THAT HE DIDN'T WANT A MITIGATION BEFORE THE JURY MADE.

I WOULD SAY IT IS MORE PROFFERED THAT HE SAID THE FAMILY, AND THEN THE DIAGNOSIS THAT THEY PRESENTED AT THE EVIDENTIARY HEARING, WHAT HIS TESTIMONY WAS, IS I WOULD NOT PRESENT NICKELS TESTIFIED, I WOULD NOT PRESENT AN ANTISOCIAL, AND THAT IS REALLY WHAT THEIR FOCUS WAS. INEFFECTIVENESS FOR NOT PRESENTING ANTISOCIAL AND INEFFECTIVENESS FOR NOT PRESENTING THE BROTHER, THE SISTER AND THE COACH, AND I AM SAYING THE MEAT OF BOTH OF THOSE IS JUST NOT THERE!

SO YOU WOULD SAY, REALLY, WE COULD RESOLVE THIS ON A SECOND PRONG, ON PREJUDICE, NOT WORRY ABOUT WHETHER THERE IS DEFICIENT PERFORMANCE.

YES, YOUR HONOR, YOU CERTAINLY COULD DO THAT.

DID COUNSEL MAKE AN ARGUMENT AT THE SPENCER HEARING?

YOUR HONOR, I DO NOT REMEMBER HIM MAKING A DETAILED, YOU KNOW, THROUGH THE DOCUMENTS ARGUMENT.

IS THERE A TRANSCRIPT OF THE SPENCER HEARING?

YES, YOUR HONOR.

BUT YOU DON'T BELIEVE THE DEFENSE LAWYER --

I KNOW THAT BECAUSE THAT IS WHERE I WOULD HAVE GOTTEN THESE THINGS.

BUT THE DEFENSE LAWYER MADE NO ARGUMENT TO THE JUDGE?

HE DID NOT SEEM TO GO DOCUMENT BY DOCUMENT AND SAY THAT --

I AM NOT TALKING ABOUT DOCUMENT. DID HE MAKE AN ARGUMENT TO THE JUDGE TO NOT IMPOSE THE DEATH PENALTY AT THE SPENCER HEARING?

YES, YOUR HONOR. YES, YOUR HONOR.

CHIEF JUSTICE: ALL RIGHT. THANK YOU VERY MUCH.

THANK YOU.

CHIEF JUSTICE: MR. MARCH HALL, HOW MUCH TIME? -- MR. MARSHAL, HOW MUCH TIME? OKAY. YOU HAVE A COUPLE OF BRIEF MINUTES.

YES, YOUR HONOR. I AM NOT SURE, BUT AT THE SPENCER HEARING, COUNSEL MAY HAVE JUST SUBMITTED THE DOCUMENTS TO THE COURT. I WOULD ASK THE COURT'S PERMISSION. --

WE HAVE A TRANSCRIPT OF THAT.

HAVE YOU SEEN DR. MILLER'S REPORT? IS THAT SOMETHING THAT EXISTS?

YES, I HAVE, AND I CAN REMEMBER SEEING IT. I DON'T REMEMBER WHAT THE DETAIL WAS, OTHER THAN COMPETENCY.

SO YOU DON'T REMEMBER HIM PRESENTING DR. MILLER AT THE EVIDENTIARY HEARING?

NO, YOUR HONOR, BECAUSE THE FOCUS REALLY WASN'T ON THE COMPETENCY AND SANITY. I WOULD JUST LIKE TO ADD --

WHAT INFORMATION, YOU PRESENTED THE EVIDENTIARY, WAS OR WAS NOT REFLECTED IN DR. MILLER'S COMPETENCY EVALUATION AND THE FAMILY HISTORY, MENTAL HEALTH HISTORY, THOSE OTHER THINGS, TESTING.

WELL, FOR ONE THING HIS SISTER AND I BELIEVE HIS MOTHER, TESTIFIED THAT THEY WERE GIVEN NERVE MEDICATION, THEY CALLED IT, TO DEAL WITH THE TREMENDOUS STRESS AT HOME, AND GROVER REED STARTED HUFFING GASOLINE, SELF MEDICATING IN EFFECT, WHEREAS HIS BROTHERS AND SISTERS WERE RECEIVING PRESCRIPTION ANXIETY MEDICATION. AND AS A RESULT OF THE SELF MEDICATION, HE WOULD BECOME VIOLENT. THE GASOLINE HUFFING IS WHAT MADE HIM SLIL HE -- VIOLENT -- IS WHAT MADE HIM VIOLENT. AND SO IT IS HIS ANTISOCIAL PERSONALITY DISORDER AND --

THE STATE SAYS THAT YOUR CLAIM ABOUT THIS EXTENSIVE MITIGATION, ABOUT A DEPRAVED OR DEPRIVED CHILDHOOD, SIMPLY ISN'T BORNE OUT BY THE RECORD. THAT IS THAT, IN FACT, THAT HE LIVED HIS CHILDHOOD WITH A LOVING GRANDMOTHER.

WELL, I DISAGREE WITH THE STATE ON THAT. THE RECORD INDICATES THAT HE WAS OKAY, UNTIL HE STARTED SELF MEDICATING, AND THEN HE BECAME VIOLENT, SO IT IS NOT SIMPLY A MATTER OF THIS INDIVIDUAL BEATING HIS GRANDMOTHER OR ABUSING PEOPLE OR PUTTING DRUGS IN THEIR HOUSES JUST BECAUSE HE WAS A BAD INDIVIDUAL. SHE WAS A -- THAT WAS A RESPONSE TO THE WHO ARE SITUATION THAT HE WAS RAISED -- TO THE HORRIBLE SITUATION THAT HE WAS RAISED IN.

CHIEF JUSTICE: LET ME TELL YOU BOTH THE TIME IS UP, TO MAKE SURE THAT THE PSI AND DR. MILLER'S REPORT IS BOTH SUPPLEMENTED INTO THIS RECORD OF THE COURT AND THAT YOU BOTH, JOINTLY, DO THAT. THANK YOU BOTH VERY MUCH. WE WILL TAKE IT FROM HERE.