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## 02-2314\_03-1044

THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. PLEASE BE SEATED. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.

CHIEF JUSTICE: WE APPRECIATE EVERYONE BEING READY ON THE FIRST CASE. IF COUNSEL IS READY, YOU MAY PROCEED.

THANK YOU, CHIEF JUSTICE ANSTEAD AND THANK YOU MEMBERS OF THE COURT. GOOD MORNING. I AM WILLIAM HENES, REPRESENTING WILLIAM HENNIS, REPRESENTING MR. PIETRI AS CAPITAL COLLATERAL COUNSEL. I HOPE BEFORE YOU REVIEW TODAY'S CASE YOU WILL KEEP IN MIND THE STORY OF THE CASE, THE STORY A BIT COMPLICATED. I WANT TO GIVE YOU A VERY QUICK REVIEW OF THE STORY OF THE CASE. THIS IS A CASE THAT STARTED OUT AS SOMEBODY ELSE DID IT DEFENSE AT THE GUILT PHASE. THEN AN EXPERT WAS SENT IN IN EARLY DECEMBER, BEFORE IT WENT TO TRIAL IN JANUARY, TO DO A PENALTY PHASE EVALUATION. SHORTLY AFTER THAT, THE CLIENT HAD A CONVERSION EXPERIENCE IN JAIL, TOLD HIS ATTORNEY "I DID IT, AND I WANT TO CONFESS TO THE CRIME ON THE STAND." THEN THE EXPERT PROVIDED A REPORT TO THE ATTORNEY, MR. BIRCH, OUTLINING EXACTLY WHAT NEEDED TO BE DONE, BOTH FOR A GUILT PHASE INTOXICATION DEFENSE, AS WELL AS FOR PENALTY PHASE MIGHT DIVISION. THE EX MITIGATION. THE EXPERT WAS NEVER CONTACTED THAT THAT PHASE, EXCEPT FOR THE ATTORNEY. THE ATTORNEY INFILTRATES BY A POLICE AGENT AND REALLY DROPPED THE BALL. HE ALSO THOUGHT THAT THIS CASE WAS GOING TO PLEAD OUT. IN FACT, UNTIL THE DAY BEFORE THE TRIAL BEGAN, THERE WAS ASSIGNED PLEA AGREEMENT BETWEEN MR. PIETRI AND THE STATE PITRY AND THE STATE, THAT WAS PIETRI AND THE STATE, THAT DETAILED THE MURDER OF THE VICTIM.

IT SOUNDS A LOT LIKE YOU ARE GETTING INTO YOUR ISSUES NOW. COULD YOU TELL US WHICH ISSUES YOU ARE GOING TO ADDRESS, IN THE LIMITED AMOUNT OF TIME THAT WE HAVE, SO THAT WE CAN SEE THE CONTEXT OF THOSE CIRCUMSTANCES.

ABSOLUTELY, YOUR HONOR. WHAT HAPPENED WITH THE PENALTY PHASE IN THIS CASE, WAS THAT THERE WAS ESSENTIALLY NO INVESTIGATION

ARE YOU GOING TO ADDRESS THE INEFFECTIVENESS CLAIM?

I AM GOING TO TALK ABOUT THE INEFFECTIVE ASSISTANCE OF COUNSEL IN PENALTY PHASE UP FRONT, AND THE KEY TO LOOKING AT THIS CLAIM, I BELIEVE, IS TO LOOK AT WHAT DR. CROPP, THE PSYCHOLOGIST RETAINED BY MR. BIRCH IN EARLY DECEMBER, DID. HE WENT IN, ACCORDING TO HIS TESTIMONY AT THE EVIDENTIARY HEARING, AND THE DOCUMENTS THAT WERE INTRODUCED, HE WENT IN AND TALKED TO MR. PIETRI ON THE 12th OF DECEMBER AND THEN PROVIDED A ONE-PAGE LETTER OR REPORT ON THE 26th OF DECEMBER, TO MR. BIRCH.

WHEN WAS THE TRIAL?

THE TRIAL BEGAN INITIALLY, IN LATE JANUARY. THERE WAS A MISTRIAL. IT BEGAN, I THINK, ON THE 23d OF JANUARY. MR. PIETRI WAS FOUND GUILTY ON FEBRUARY 27 OF 1990 AND THE GUILT PHASE ON THE 18th, I BELIEVE, OF FEBRUARY. AS FAR AS THE PENALTY PHASE WAS

CONCERNED , WHAT HAPPENED IN THIS CASE AND WHAT THE TESTIMONY AT THE EVIDENTIARY HEARING INDICATED WAS THAT , BECAUSE DEFENSE COUNSEL BELIEVED THERE WAS GOING TO BE A PLEA , THEY DROPPED THE BALL COMPLETELY AFTER DR . CROPP'S LETTER CAME TO THEM. THERE ARE A VARIETY OF REASONS FOR THAT BUT THE BIGGEST REASON THOUGHT IT WASN'T GOING TO EVER GO TO A PENALTY PHASE. THEY THREW TOGETHER A GUILT PHASE, BECAUSE AS I SAID BEFORE , THEY THOUGHT THE PLEA WAS GOING TO HAPPEN, AND THEN ONCE MR . PIETRI WAS FOUND GUILTY, THEY FOUND THEMSELVES WITH NO EXPERT BECAUSE THEY HAD NEVER GOTTEN BACK IN TOUCH WITH DR . CROPP. THEY DIDN'T HAVE A INVESTIGATOR WHO HAD DONE ANYWORK WHATSOEVER ON THE PENALTY PHASE FORM THE GUILT PHASE INVESTIGATOR THEY HIRED WAS STRICTLY FOR THE GUILT PHASE , AND BECAUSE OF THE INFILTRATION OF LITIGATION IN HER OFFICE , SHE

WHAT WAS YOUR CLIENT GUILTY OF IN THE PENALTY PHASE COMPARED WITH YOUR VIEW OF WHAT COUNSEL SHOULD HAVE DONE? IN OTHER WORDS TELL US WHAT COUNSEL DID AND THEN TELL U S WHAT YOUR COMPLAINT IS ABOUT THAT , COMPARED TO WHAT YOU BELIEVE A REASONABLE, COMPETENT COUNSEL WOULD HAVE DONE.

I THINK I WILL QUICKLY LIST FOR YOU WHAT COUNSEL DIDN'T DO , AND THEN I WILL EXPLAIN WHAT WE PRESENTED AT THE EVIDENTIARY HEARING THAT SUPPORTS THAT , IF THAT WILL ANSWER YOUR QUESTION, YOUR HONOR.

IF YOU CAN ALSO TELL US WHAT COUNSEL DID DO , BECAUSE WE HAVE TO GAGE SURE.

WHAT PERFORMANCE THERE WAS THERE AND THEN GAUGE WHETHER THAT WAS DEFICIENT , BUT , OF COURSE , THAT IS OBVIOUSLY PART OF THE ANALYSIS . IT IS WHAT YOU CLAIM THAT HE SHOULD HAVE DONE THAT HE DIDN'T DO THAT SHOULD HAVE BEEN DONE BY COMPETENT COUNSEL.

THERE WAS NO WORK BY THE APPOINTED INVESTIGATOR VIRGINIA SNYDER , AT ALL. THE ONLY WORK DONE BY ANY INVESTIGATOR ON THE CASE WAS A VOLUNTEER INVESTIGATOR FROM THE PUBLIC DEFENDER'S OFFICE , WHO CONFLICTED OFF THE CASE , WHO , BASED ON THE EVIDENTIARY HEARING TESTIMONY WAS ASSIGNED TO WORK THE CASE VERY BRIEFLY BECAUSE OF CONCERN BY THE MEMBERS OF THE WEST PALM PUBLIC DEFENDER S OFFICE ABOUT THE CASE NOT BEING PREPARED PROPERLY. THERE WAS TESTIMONY THAT , A WEEK BEFORE THE PENALTY PHASE, THE TRIAL ATTORNEYS CAME TO THE WEST PALM PUBLIC DEFENDERS OFFICE ATTORNEYS AND SAID WE ARE UNPREPARED. WE DON'T KNOW WHAT TO DO. CAN YOU HELP US . THERE WAS NO PSYCHOLOGICAL TESTING OF ANY KIND DONE BY THE EXPERT , DR . CADDY, WHO SAW MR. PIETRI THE NIGHT BEFORE MR . CADDY TESTIFIED THE NEXT MORNING AT THE PENALTY PHASE. ALL HE DID WAS MEET WITH HIM FOR THREE AND-A-HALF HOURS , WITH NO FAMILY BACKGROUND MATERIAL AND MET WITH THEM I N THE MORNING BEFORE THEY WENT TO COURT.

THE TESTING THAT WAS DONE , WAS IT ONLY DR . GOLDBERG THAT DID THE TESTING? DID ANY OF THE OTHER DOCTORS DO TEST SOMETHING.

DR . GOLDBERG DID NEUROPSYCHOLOGICAL TESTING AND BASED ON THE DEPOSITION TESTIMONY OF DR . SPENCER, WHO WAS APPOINTED OR THE STATE HAD INTERVIEWED MR . PIETRI. I HAD A NEUROLOGIST , DR . THOMAS HYDE , EXAMINE MR . PIETRI AND HIS REPORT WAS INTRODUCED IN AN ANALYSIS AT THE EVIDENTIARY HEARING AND HE LATER PROVIDED AN AFFIDAVIT , AND BOTH DR . HYDE AND

IS HE NOT A PHARMACOLOGIST OR AN ADDICTION OLOGIST ? I AM TALKING ABOUT THE TESTING. YOU ARE STARTING TO MIX

I AM SORRY . THE TESTING WAS DONE BY A NEUROPSYCHOLOGIST , DR . TERRY GOLDBERG, AND THERE WAS ALSO NEUROLOGICAL TESTING BY A MEDICAL DOCTOR, DR . T HOMAS HYDE, WHO BOTH PRESENTED THEIR REPORTS AND ONLY DR . GOLDBERG TESTIFIED.DR . LIPPMAN WAS A NEUROPHARMACOLOGIST , WHO INTERVIEWED IN GREAT DETAIL, A NUMBER OF FAMILY MEMBERS , ANDHIS REPORT AND THE INTERVIEWS ARE , BOTH , PART OF THE RECORD,AND HE, ALSO, TESTIFIED ABOUTTHEM. HE, ALSO , TALKED TO TWO OF THEOTHER EXPERTS , AND HIS OPINIONWAS THAT BOTH MENTAL HEALTH MITIGATORS WERE PRESENT AND H E ALSO BE PLEEVED THAT MR. PIETRI WAS HE ALSO BELIEVED THAT. MR. PIETRI WAS INTOX INDICATEDAT THE TIME OF THE OFFENSE .

THERE ARE OTHER INDICATORS AS FAR AS MR . PIETRI BEING INTOXICATED AT THE TIME OF THEOFFENSE. YOU ARE GETTING AT THE FACT THAT THE LONG LASTING SUBSTANCE ABUSE CREATED THIS MENTAL PROBLEM THAT , THE TOXICITY LASTED AND EXTENDED AND YOU HAVE A GREAT DEAL OF TESTIMONY ON THAT. WE REALLY DIDN'T HAVE ANY FACTUAL TESTIMONY OF ACTUAL CONSUMPTION , WITHIN A PERIOD THAT WOULD HAVE PRODUCED LEVELS OF SUBSTANCE THAT WOULD HAVE BEEN INTOXICATING AT THE TIME OF THE EVENT, CORRECT?

I WOULD DISAGREE WITH THAT, YOUR HONOR. IN FACT , I THINK DR . LIPPMAN 'S TESTIMONY WAS PRECISELY ON THAT POINT, AND I TRIED TO OUTLINE THAT AS WELL , IN MY REPLY BRIEF THAT , HIS TESTIMONY WAS THAT THE ABSENCE OF COCAINE AT THE TIME OF THE OFFENSE IN THE BLOODSTREAM , AND OF COURSE WE DIDN'T HAVE ANY MEDICAL TEST TO BEGIN WITH , DOESN'T NECESSARILY MEAN THAT THERE WAS NOT INTOXICATION .

BUT HE IS BEING EVIDENT IN TERMS OF LONG LASTING. DR . LIPPMAN I S IN A NUMBER OF CASES THAT HAVE COME TO THIS COURT, WITH THE SAME KIND OF CONCEPT, THAT THE SUPER ABUSE LEAVES THE TOXICITY , CREATES THE CHANGES , NOT THAT THERE WAS CONSUMPTION , THOUGH, AT THE TIME OF THE EVENT , WAS THERE?

I THINK ALSO

I NEED TO BE CLEAR ON THAT.

WELL , I DON'T THINK THAT IS QUITE RIGHT, YOUR HONOR. FOR ONE THING, THE REPORT, THE STATE TAKES THE POSITION THAT IT WAS SOME FOUR HOURS BETWEEN THE TIME OF LAST CONSUMES CON SUGES AND THE TIME OF THE OFFENSE CONSUMPTION AND THE TIME OF THE OFFENSE , WHEREAS I POINT OUT IN TRIAL THAT THERE WAS THREE HOURS BETWEEN THE TIME O F CONSUMPTION AND THE TIME OF THE ACTUAL EVENT, SO THERE IS IN FACT A DISPUTE BETWEEN WHAT THE STATE PROVIDES IN THEIR POST HEARING MEMORANDUM AND WHAT I BELIEVE THE TESTIMONY AT THE TRIAL PRESENTS, BUT NOT TO GET TOO FAR AWAY FROM THE INTOXICATION ISSUE, THAT IS CERTAINLY APART OF WHAT WAS NOT PRESENTEDAT THE PENALTY PHASE AS WELL , BECAUSE THE ONLY TESTIMONY HAVING TO DO WITH DRUG USE WASBASED ON SELF REPORT THROUGHDR . CADDY, AT THE ORIGINAL TRIAL, AND THAT WAS , OF COURSE , BASED ON HIS THREE AND-A-HALF HOUR INTERVIEW WITH MR . PIETRI , NIGHT BEFORE HE TES TIFIED.

CAN YOU JUST GO BACK , I WANT TO MAKE SURE I UNDERSTAND SOMETHING. WE UNDERSTAND DR. CADDY TESTIFIED AND HE HAD ONLY EXAMINED HIM THE DAY BEFORE.

YES, YOUR HONOR.

I THOUGHT , WAS THERE, BEFORE DR . CADDY DID HIS EXAMINATION THE DAY BEFORE HE TESTIFIED IN THE PENALTY PHASE , WASN'T THERE A SERIES OF OTHER MENTAL MELT EXPERTS THAT HAD BEEN CONTACTED BY THE DEFENSE COUNSEL , T O ATTEMPT TO GET FAVORABLE MITIGATION TESTIMONY? COULD YOU JUST ANSWER , IS THAT YES OR NO ?

I WOULD SAY YES , BUT WITH THE QUALIFIER THAT THE ONLY PERSON'S NAME WHO CAME UP

AT THE EVIDENTIARY HEARING, WAS DR . KEITH HAINES , AND MR . MORELL HAD NO RECOLLECTION WHATSOEVER OF EVER BEING INVOLVED WITH DR . HAINES.

WAS THERE ANY OTHER TESTING OF DOCTOR , OF THE DEFENDANT , OTHER THAN THE DAY BEFORE THE ACTUAL PENALTY PHASE TESTIMONY?

YOUR HONOR , THE ONLY OTHER MEDICAL PROFESSIONAL OR PSYCHOLOGICAL EXPERT WHO ACTUALLY SAW MR. PIETRI, WAS DR . CROPP, BACK IN DECEMBER. THERE WAS NO TESTIMONY BY ANYONE THAT , ANY OF THE OTHER EXPERTS THAT MAY HAVE BEEN CONTACTED, ACTUALLY SAW MR . PIETRI OR TESTED HIM IN ANY WAY.

DR . CROPP DID NOT TESTIFY?

DR . CROPP DID NOT TESTIFY. DR . CROPP DID NOT HAVE ANY FURTHER CONTACT WITH COUNSEL , AFTER WE WENT HIM A LETTER.

THIS WAS NOT A CASE WITH AN ABSENCE OF MITIGATION OR AN ABSENCE OF MITIGATION WITNESSES. WHAT IS COUNSEL'S EXPLANATION AND HOW, WHAT, WHAT IS THE SIGNIFICANCE OF WAITING UNTIL THE DAY BEFORE , TO TEST , AND WHY DID HE WAIT UNTIL THE DAY BEFORE AND WHAT IS HIS EXPLANATION AS TO WHY , WHAT, WHY THIS HAPPENED AT THE LAST MINUTE AND WHAT EFFECT WOULD YOU SAY THAT HAD ON THE CASE? HE STILL TESTIFIED AS TO THE MENTAL MITIGATORS.

WELL, NO , HE DIDN'T , YOUR HONOR.

HE DID NOT .

HE DID NOT. THAT WAS NOT SOLICITED FROM THE EXAMINATION AT THE TRIAL.

WHAT DID DR . CADDY TESTIFY TO?

DR . CADDY TESTIFIED IN VERY GENERAL TERMS, ABOUT SUBSTANCE ABUSE , ABOUT POVERTY . I BELIEVE HE MENTIONED SEXUAL ABUSE, AND HE WAS RIPPED TO SHREDS ON CROSS-EXAMINATION, BECAUSE EVERYTHING WAS BASED SOLELY ON SELF REPORT FROM MR . PIETRI.

COULD WE CLARIFY ONE THING. YOU JUST MADE THE STATEMENT THAT THEY DIDN'T SOLICIT THE QUESTIONS ON STATUTORY MITIGATORS. IT IS PRETTY CLEAR FROM THE RECORD WHY THEY DID NOT , BECAUSE DR. CADDY DID NOT BELIEVE THEY EXISTED , DID HE? HE TESTIFIED TO THAT DURING THE EVIDENTIARY HEARING BELOW , DIDN'T HE?

NO , YOUR HONOR , I DON'T THINK SO. I THINK MY ARE REPLY BRIEFPOINTS OUT VERY SPECIFICALLY HOW DR. CADDY DID TESTIFY IN SUPPORT OF THE MITIGATING FACTORS AND TO POINT OUT ONE OTHER THING, HE DID, AT THE ORIGINAL TRIAL ON PROPER , TESTIFY THAT HE BELIEVED THAT MR. PIETRI DIDN'T HAVE THE SPECIFIC INTENT TO KILL AT THE TIME OF THE OFFENSE , ALTHOUGH THAT NEVER CAME BEFORE THE JURY. SO DR . CADDY BASICALLY , AT THE EVIDENTIARY HEARING , SAID BASICALLY , AT THE EVIDENTIARY HEARING, SAID MY OPINION BASICALLY DIDN'T CHANGE BUT NOW I HAVE THE INFORMATION WITH THE BACKGROUND PACKS AND OTHER REPORTS FROM EXPERTS, THAT I WOULD BE ABLE TO HANG MY HAT ON THAT AND I WOULD NOT BE RIPPED APART UNDER CROSS-EXAMINATION .

YOU WERE ASKED ABOUT CROSS-EXAMINATION AND WHY THIS WAS NOT DONE THE DAY BEFORE.

THERE WAS SOME DIFFERENCE BETWEEN MR. MORELL AND MR . BIRCH AS TO WHY THEY DID NOT TAKE PLACE. MR. BURRELL SAID I WAS AS MR . MORELL SAID I DID THE PENALTY PHASE. IT WAS MY FIRST TIME AS PENALTY PHASE. I USED JODY DEISCH , WHO WAS A SOCIAL WORKER , WHO DID

NOT DO THE PENALTY PHASE. CADDY , WE GOT AT THE 11th HOUR IN 30 MINUTES, BECAUSE WE WEREN'T PREPARED . WE WERE TOO BUSY INVOLVED WITH OTHER ISSUES AND TOO BUSY AROUND ALL OF THE OTHER MESS WITH THE GUILT PHASE AND PLEA AGREEMENT, AND WE HAD A HARD TIME FINDING ANYBODY THAT WOULD WORK ON THE CASE, AND HE ALSO SAYS I NEVER EVEN KNEW ABOUT DR . CROPP.

THIS IS PALM BEACH COUNTANY THE 90s . BE SPECIFIC.WHEN HE SAYS HE HAD A HARD TIME FINDING ANYONE TO WORK ON THE CASE, IS HE SAYING THAT YOU KNOW, YOU HAVE A CASE , THEY TRIED TO FIND EXPERTS AND THEY DIDN'T FIND EXPERTS THAT WOULD BE FAVORABLE TO THEM ON MITIGATION . I MEAN, THAT IS NOT THE SAME THING AS SORT OF SAYING, WELL , GEE, I DIDN'T KNOW WHAT TO DO, SO I JUST WAS LIKE WANDERING AROUND , JUST YOU KNOW, DOING NOTHING FOR ALL THESE DAYS.

JUSTICE PARIENTE, IF THEY HAD FOLLOWED DR . CROPP'S ADVICE IN HIS LETTER TO THEM ABOUT WHAT TO DO TO PREPAREFOR MITIGATION AND HAD CONTACTED EXPERTS IN THAT CONTEXT, IF THEY HAD EVEN GOTTEN BACK IN TOUCH WITH DR . CROPP AND DONE SOME OF THAT,THERE MIGHT BE A LEG TO STAND ON.

WHY DID THEY SAY THEY DIDN'T GET BACK IN TOUCH WITH DR . CROPP?

IF YOU ARE GOING TO DR . CROPP? IF YOU ARE GOING TO SAY IF WE LOOK AT DR . CROPP'S LETTER WE WILL SEE A ROAD MAP FOR A COMPELLING CASE IN MITIGATION AND INSTEAD THEY WANDERED OFFON OTHER THINGS.WHAT IS YOUR EXPLANATION FOR WHY THEY DIDN'T GET BACK IN TOUCH WITH DR .

PETER BIRCH SAID HE AND DR . CROPP DIDN'T CLICK , AND IDON'T BELIEVE THAT NOT DRINK CLIQUING WITH AN EXPERT IS THAT NOT CLICKING WITH AN EXPERT IS AN EXCUSE FOR NOT PROVIDING MITIGATION IN YOUR CASE .

THIS OTHER EXPERT , DR . CROPP , FOUND THAT HE WAS COMPETENT AND SANE AND HE HAD NO PSYCHOLOGICAL HISTORY, BECAUSE AS I RECALL THE ATTORNEY'S TESTIMONY WAS THAT HE DID NOT WANT TO USE DR. CROPP, BECAUSE DR . CROPP WAS NOT GIVING HIM FAVORABLE INFORMATION ABOUT MR . PIETRI.

WELL , THE IRONY IS , JUSTICE QUINCE, THAT MR . BIRCH NEVER HAD ANY COMMUNICATION WHATSOEVER WITH DR . CROPP AFTER DR . CROPP SENT HISLETTER , HIS REPORT TO MR . BIRCH. THERE WASN'T ANY COMMUNICATION.

I WANT YOU TO CONTINUE, BUT THE MARSHAL HAS REMINDED YOU THAT YOU ARE IN THE TIME YOUASKED FOR REBUTTAL.

I THINK THAT I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL , YOUR HONOR. THANK YOU. TRI.

GOOD MORNING . CELIA TERENCE O N BEHALF OF THE STATE OF FLORIDA.

WOULD YOU FOCUS O N THE PENALTY PHASE.

MY QUESTION IS WHY COUNSEL DID OR DIDN'T DO SOMETHING AND THEREFORE WE ARE GOING T O GET INTO THE CREDIBILITY OF WHAT THEY WERE SAYING, WHETHER THEY DROPPED THE BALL ON SOMETHING ELSE AND THOUGHT CASE WOULD PLEA OUT AND THEY WERE RUNNING AROUND, THE IMPRESSION WE ARE GETTING HIS , LIKE A CHICKEN WITH THEIR HEADS CUT OFF , OR THEY WERE TRYING TO FIND MITIGATION AND THE CASE WAS SUCH THAT THERE WERE SO MANY OVERWHELMING AGO DRAT VAITORS AGGRAVATORS , THAT IT WOULD BE TOUGH. THE JUDGE DEFINED THE FACTS ON CREDIBILITY.THE JUDGE, IN HIS ORDER , REFERS COMPLETELY TO THE

STATE'S MEMORANDUM AND INCORPORATES THAT. NOW, ALTHOUGH NORMALLY WE HAVE NEVER SAID THAT THAT IS A REASON FOR REVERSAL , WHAT DOES CONCERN ME IS, WHEN WE ARE LOOKING AT ISSUES ABOUT CREDIBILITY, BECAUSE IF THE JUDGE HAD FOUND THAT THE DEFENSE ATTORNEY'S EXPLANATION WERE NOT CREDIBLE , WE WOULD HAVE DEFERRED TO THAT. HOW DO WE DEAL WITH THAT ISSUE, THAT IS THAT THE JUDGE DOESN'T MAKE HIS OWN FINDINGS OF FACT ON CREDIBILITY AND YET WE ARE NOW GOING TO DEFER TO THOSE STATE 'S CHARACTERIZATION OF EVERYTHING A S T O THESE TACTICAL DECISIONS.

WELL , THE ANSWER TO THAT IS , NUMBER ONE , I THINK JUDGE MOUNTS AT LEAST IMPLICITLY MADE CREDIBILITY FINDINGS. HOWEVER , YOU DON'T EVEN HAVE TO GO TO COMPARE THE TESTIMONY OF PETER BIRCH AND DONNY MORELL. ALL YOU HAVE TO DO IS LOOK AT THE COLD RECORD AND WHAT WAS PRESENTED PENALTY PHASE. THERE WERE TWO EXPERTS AND SIX FAMILY MEMBERS. THAT IS NUMBER ONE. NUMBER TWO, IF YOU LOOK

LET ME STOP YOU THERE, AND I UNDERSTAND THAT PROBABLY, BASED ON THIS COURT'S CASE LAW , WHEN THAT , WHEN THERE IS ACTUALLY STUFF PRESENTED, WE GO, WELL , SOMETHING WAS PRESENTED , SO WE KNOW THEY DIDN'T, THEY DID NOTHING, BUT IF THEORETICALLY , EVERYTHING WAS DONE THE DAY BEFORE, EVEN THOUGH SOMEBODY HAD A YEAR, YOU KNOW, YOU HAVE GOT ONE CASE WHERE SOMEBODY HAS WORKED. THEY HAVE BEEN APPOINTED A YEAR BEFORE, AND SOMEONE IS WORKING DILIGENTLY FOR THE WHOLE YEAR IN CULLING OUT WITNESSES, AND THEN YOU HAVE ANOTHER CASE WHERE SOMEONE GOES O MY GOD , I THOUGHT THE CASE WAS GOING T O PLEAD OUT. I HAVE NEVER TRIED A PRESENT PHASE. WHAT AM I GOING TO DO AND THEY GET WITH PEOPLE THE DAY BEFORE AND PUTS ON WHOEVER HAPPENS TO BE THERE , ARE THOSE BOTH REASONABLY COMPETENT COUNSEL AND IS THAT , EVEN THOUGH THERE IS TOTALLY IN EQUALITY IN HOW THAT PREPARATION IS , DO WE SAY THERE IS PEOPLE PRESENTED , SO THAT IS THE END OF THE STORY?

NOT AT ALL. IN THIS CASE , MR . BIRCH DID TESTIFY THAT HE HAD AN INVESTIGATOR LOOK AT SCHOOL RECORDS , INTERVIEW FAMILY MEMBERS , AND TEACHERS .

WAS THAT INVESTIGATOR , WAS THAT VIRGINIA SNYDER ?

I THINK VIRGINIA SNYDER WAS MORE INVOLVED WITH DEALING DIRECTLY WITH THE DEFENDANT, AND GAIL MARTIN FROM THE PD'S OFFICE , OFFERED HER ASSISTANCE.

WELL , THAT IS WHAT MR . HENNIS IS SAY ING WAS KIND OF DONE AT THE LAST MINUTE. WHEN WAS THAT DONE?

MR . BIRCH SAID THAT HE STARTED THE INVESTIGATION EARLY ON. BUT WHAT HAPPENED WAS THAT , NUMBER ONE, THE DEFENSE CHANGED, BECAUSE OF THE ALPS OWN STATEMENTS, AND M R . BIRCH TESTIFIED THAT HE CONTACTED FIVE EXPERTS. THERE IS A BILL IN THE RECORD FROM ONE OF THE DOCTORS , KEITH HAINES , WHO PRESENTED A BILL FOR KEITH HAINES, WHO HAD NOTHING GOOD TO SAY. IT IS IN THE RECORD. DR . CROPP HAD NOTHING GOOD TO SAY AND IT WAS MORE THAN JUST THAT HE AND MR. BIRCH DIDN'T CLICK. DR . CROPP SAID

WHAT ABOUT THE DEFENSE STATEMENT THAT DR. CROPP LAID OUT IN HIS REPORT , I ASSUME , THAT , HOW THIS CASE COULD HAVE BEEN TRIED AND WHAT THE DEFENSE ATTORNEYS COULD HAVE DONE?

WELL , BECAUSE MR . BIRCH SAID I DID NOT HAVE ANY EVIDENCE OF VOLUNTARY INTOXICATION . THERE WAS JUST NO WAY THAT THAT WAS GOING TO FLY. AND THAT IS BASED ON TWO THINGS. THE OBJECTIVE FACTS OF THE CASE, AND NUMBER TWO , HIS CLIENT'S OWN STATEMENTS TO HIM , SO THERE WAS NO WAY THAT, HE REJECTED CROPP 'S PROPOSED STRATEGY, AND IF YOU LOOK AT DR . CROPP'S NOTES , FROM WHEN HE DID TALK TO THE DEFENDANT , THEY

WAS THAT STRATEGY JUST FOR THE GUILT PHASE? DID HE ALSO LAY OUT A STRATEGY FOR THE PENALTY PHASE ?

BUT THAT STRATEGY ULTIMATELY WAS EXACTLY THE SAME INFORMATION THAT WAS ELICITED FROM DR . CADDY. IF YOU PUT THE TWO TEST MOANSFROM THE EVIDENTIARY HEARING AND THE THE TWO TESTIMONYFROM THE EVIDENTIARY HEARINGAND THE PENALTY PHASE , THEY WERE ALMOST IDENTICAL EXCEPT FOR A FEW BUZZWORDS . METABOLIC INTOXICATION , BUT WHEN IT COMES RIGHT DOWN TO IT THEY ARE SAYING THAT THE DEFENDANT PATH LOGICALLY CRAVED COCAINE AND HIS MIND-SET WAS , I AM GOING TO DO WHATEVER I HAVE TO DO TO GET COCAINE. THAT IS WHAT DR . CADDY TESTIFIED TO, AND ACTUALLY DR . CADDY'S TESTIMONY AT THEPENALTY PHASE , WAS EVEN MORE COGENT AND COHERENT , BECAUSE HE BROUGHT IN THE DEFENDANT'S SEX ABUSE, THE VIOLENCE IN THE HOME, THE POVERTY, AND SHOWED HOW THAT UPBRINGING MADE THIS DEFENDANT AN ACCIDENT WAITING TO HAPPEN, IN TERMS OF THE VULNERABILITY OF GETTING LOOKED ON COCAINE .

WHY , IT WAS TROUBLING , BECAUSE THAT CERTAINLY WOULD SEEM TO BE A COMPETENT DEFENSE. THERE IS SOMETHING, WHAT IS THE EXPLANATION FOR WHY DR . CADDY DIDN'T MEET WITH THE DEFENDANT , UNTIL THE DAY BEFORE? SOMEHOW THAT CONVEYS TO ME , A CONCEPT OF A LAST-MINUTE , I AM NOT SURE WHAT I AM GOING TO DO YET BUT I HAD BETTER GO HAVE MY MY EXPERT SEE MY CLIENT ORHE IS GOING TO B E DECIMATED ON CROSS-EXAMINATION.

HE HAD SIX WEEKS TO COME UP WITH SOMEONE, BASED ON THE DEFENDANT'S NEW STATEMENT. OKAY.

MR . MORELL OR MR . BIRCH?

MR . BIRCH. MR . BIRCH WAS LE AD COUNSEL . HE GOT D R . CROPP

YOU ARE SAYING THAT THE DEFENDANT ACTUALLY CHANGED HIS STORY.

STORY , TWO WEEKS BEFORE THE TRIAL?

IN MIDDECEMBER AND THE TRIAL WAS AT THE END OF JANUARY , SO I GUESS YOU WOULD SAY THAT IS SIX -TO-EIGHT WEEKS.

AND WHEN WAS THE PENALTY PHASE?

THE PENALTY PHASE WAS TWO WEEKS AFTER THE GUILT PHASE ENDED , ALMOST TWO WEEKS. LATE FEBRUARY.

YES, SIR.

SO THEY ASKED FOR A CONTINUANCE.

YES AND IT WAS DENIED.

SO THAT IS NOT AN ISSUE HERE.

NO.

SO THERE IS EVIDENCE THAT THEY WOULD HAVE LIKED TO HAVE BEEN MORE PREPARED BUT THE JUDGE JUST DIDN'T GIVE THEM A CONTINUANCE, THAT CORRECT?

YOUR CONCERN , JUSTICE PARIENTE, ABOUT THE LAST MINUTE FOR DR . CADDY , AND THE REASON WAS THEY WERE SHOPPING AROUND FOR A DOCTOR.THERE IS EVIDENCE OF A BILL FROM DR . HAYES. DR. CROPP SAW HIM. HE HAD NOTHING GOOD TO SAY , AND IF YOU WOULD LOOK AT DR . CROPP'S NOTES THAT HE TOOK FROM HIS INTERVIEW , THERE IS SOME VERY DAMAGING TESTIMONY , AND DR. CROPP 'S WRITTEN NOTES, HE IS ASKING THE DEFENDANTWHAT HAPPENED, AND HE SAID "PULLED OVER FOR A TRAFFIC STOP." DEFENDANT KNEW HE WOULD FIND OUT , MEANING THE POLICE OFFICER , THAT THE TRUCK WAS HOT. WHEN THAT THE TRUCK WASHOT. WHEN PULLED OVER, HE KNEW HEWOULD BE BUSTED AND THEN THERE WAS THE QUESTION WHY SHOOT QUESTION MARK. DEFENDANT THOUGHT ABOUT ALL OF THE STOLEN MERCHANDISE IN THE CAR, THEN ALL OF A SUDDEN T HE DEFENDANT DIDN'T WANT TO TALK ABOUT THE DETAILS ANYMORE , TO DR . CROPP.

WOULD YOU GIVE WAS THUMBNAIL SKETCH , NOT T O OVERSIMPLIFY IT , BUT OF WHAT ACTUALLY WAS PRESENTED AT THE PENALTY PHASE , THE SUBSTANCE OF IT. AND THEN COMPARE THAT WITH THE EVIDENCE THAT WAS PRESENTED AT THE EVIDENTIARY HEARING OPPOSE THE CONVICTION, AND GIVE US YOUR ANALYSIS OF WHETHER THERE WAS ANYTHING SUBSTANTIAL LY DIFFERENT PRESENTED , AT THE POSTCONVICTION HEARING , IN TERMS OF ACCLAIMED DEFICIENCY . EYE WILL START BACK.

WOULD YOU DO THAT FOR US?

SURELY.I WILL START BACKWARDS. IT IS CLEAR THAT THE TEST MINE MOAN IT IS CLEAR THAT THE TESTIMONY , SIDE-BY-SIDE , WAS IDENTICAL . THEY PUT ON SIX FAMILY MEMBERSTO TALK ABOUT THE POVERTY, THE PHYSICAL ABUSE, THE SEXUAL ABUSE , THE ALCOHOLISM. THE CHILDREN WITNESSED THE BEATING OF THEIR MOTHER. THE ABANDONMENT BY THE FATHER.

THIS WAS ALL PRESENTED AT THE PENALTY PHASE. IS THAT CORRECT?

YES, SIR. THE SAME WITNESSES , THEDEFENDANT CAME FROM A VERY LARGE FAMILY, NINE CHILDREN. SIX OF THOSE FAMILY MEMBERS TESTIFIED AT THE PENALTY PHASE. AT THE EVIDENTIARY HEARING, SOME OF THE SAME FAMILY MEMBERS TESTIFIED AND THEN OTHERS TESTIFIED, AND THEY TALKED ABOUT THE EXACT SAME THING. THE ABJECT POVERTY, THE ABUSE , SEXUAL ABUSE , THE ALCOHOLISM , ABANDONMENT.SO THOSE WERE VIRTUALLY IDENTICAL.IN TERMS OF THE MENTAL HEALTH , DR . CADDY TALKED ABOUT THE FACT THAT THE DEFENDANT , WAS IN A STATE OF WITHDRAWAL , AND ALL HE COULD THINK ABOUT WAS GETTING MORE COCAINE .

THAT TESTIMONY WAS AT GUILTPHASE?

NO, SIR.

THAT WAS AT THE PENALTYPHASE?

THAT WAS PENALTY PHASE, AND HE TALKED ABOUT, HE SAID THAT THE DEFENDANT WAS AN EMOTIONAL ACCIDENT WAITING TO HAPPEN. HE WAS, THE COCAINE WITHDRAWAL CAUSED HYPER AROUSEAL . AND HYPER KINETIC , WHEN HE SAW A SILKS , HE WOULD REACT A SITUATION, HE WOULD REACT MORE SO THAN THE AVERAGE PERSON, AND ALL HE HAD ON HIS MIND WAS NOT TO GET CAUGHT , BECAUSE HE HAD TO GET HIS NEXT FIX .

CAN YOU CONNECT THAT T O A DID HE CONNECT THAT TO A SPECIFIC STATUTORY OR NONSTATUTORY MENTAL HEALTH MITIGATOR?

DR . CADDY , AT THE PENALTY PHASE AND AT THE EVIDENTIARY HEARING , SAID THAT HE COULDN'T SAY THAT THIS DEFENDANT SATISFIED EITHER STATUTORY MIX , AND IRONICALLY DR . GOLDBERG SAID THE VERY SAME THING, SO AT THE EVIDENTIARY HEARING, YOU STILL HAVE

TWO DOCTORS SAYING NO STATUTORY MIX , TWO SAYING YES, AND A FIFTH ONE IRONICALLY, WAS NEVER ASKED .

THIS IS , WAS HE ON CRACK COCAINE?

YES .

SO THIS IS BASICALLY A CRACK COCAINE ADDICT THAT IS THINKING CLEARLY BUT IS CRAVING COCAINE. THAT IS THE PICTURE THAT YOU ARE SAYING IS PRESENTED , BOTH AT THE PENALTY PHASE AND THE EVIDENTIARY HEARING. THE ACTUAL VOTE, EVEN THOUGH WITH ALL OF THESE AGGRAVATORS

8-TO-4.

SO , ONE MIGHT SAY THAT COUNSEL DID

A GOOD JOB.

GOOD JOB .

AND ALSO AT THE PENALTY PHASE , STICK WITH A VERY SMART MOVE, IS THEY PUT ON JODY APPLE DIES , AND SHE PURPOSELY DIDN'T SEE THE DEFENDANT BECAUSE SHE WAS COMING FROM A MORE OBJECTIVE VIEW. SHE WAS A COCAINE ADDICT HERSELF , AND THE PURPOSE OF HER TESTIMONY WAS TO SHOW THAT , YOU KNOW WHAT , EVEN WHEN YOU ARE COMING DOWN FROM COCAINE , YOU CAN STILL ARTICULATE AND STILL REMEMBER THING THAT IS 457D , AND THAT WAS THE THING THAT IS HAPPENED , AND THAT WAS THE BIGGEST OBSTACLE FACING PETER BIRCH , BECAUSE THE RECORD SHOWS THAT THIS DEFENDANT , 50 MINUTES BEFORE HE KILLED OFFICER CHEAP HE WILL , BURGLARIZED THE HOME OFFICER CHAPEL , BURGLARIZED THE HOME BUT HE HAD THE SMARTS AND WAS CASING THE AREA AND WENT TO ONE RESIDENT AND SAID CAN YOU TELL ME WHERE THE MANAGER'S OFFICE IS. SHE WAS COOL AND CALM . HE WAS COOL AND CALM. HE FOUND THE HOUSE AND LIFTED THE WINDOW TO AVOID THE ALARM SYSTEM AND WIPED DOWN ALL HIS FINGERPRINTS AND PUT HIS CAR OUT IN FRONT OF THE HOUSE AND BLARED THE MUSIC, AND THE NEIGHBOR SAID THERE MUST NOT BE ANYTHING WRONG, BECAUSE THIS MAN IS SO CONSPICUOUSLY OUT THERE AND HE JUST LOADED THE BOTTOM OF HIS TRUCK

SO THERE IS NOT ANYTHING SPECIFICALLY OUT THERE THAT WAS ACTUALLY PRESENTED IN THE PENALTY PHASE ON BEHALF OF THIS DEFENDANT .

ABSOLUTELY. NOT ONLY WAS THERE NOTHING THAT WAS NOT ALREADY PRESENTED. HE HAD , GIVEN THE FACTS OF THE CASE , HE DID AS WELL AS COULD BE EXPECTED . THIS WAS NOT A VOLUNTARY INTOXICATION DEFENSE , AND I WOULD LIKE TO ADD IN TERMS OF THE INVESTIGATION AND WHAT WAS UNCOVERED, IF YOU LOOK AT THE CONTENTS OF THE TWO VOLUME UNCOVERED , IF YOU LOOK AT THE CONTENTS OF THE TWO-VOLUME PACKET, IF YOU LOOK AT THERE IS , THERE WASN'T ONE OUT OF THE 15 THAT WASN'T PRESENTED AND THOSE ARE D.O.C. RECORDS THAT SHOW FIVE REPORTS OF THE DEFENDANT AS TO HOW HE WOULD BRING COCAINE BACK INTO THE PRISON, AND MR . BIRCH SAID "I DIDN'T NEED THAT." THE STATE NEVER REBUTTED OUR DEFENSE OF HIS CHRONIC HISTORY OF COCAINE. PLUS THAT WOULD HAVE BEEN NEGATIVE HISTORY. WE HEAR THAT THIS GUY STILL BREAKS THE LAW WHEN HE IS IN PRISON. SO IT WOULD BE TWOFOLD. THEY PRESENTED PRETTY MUCH THE SAME , AND GIVEN WHAT HE WAS UP AGAINST , HE COULD NOT HAVE DONE MUCH BETTER. THEY DIDN'T DO ANY BETTER AT THE EVIDENTIARY HEARING.

WHAT WAS DR. CROPP 'S WHAT WAS DR. CROPP 'S REPORT TO COUNSEL , THE RECORD , IN THE PENALTY PHASE , PRIOR , ABOUT MITIGATION?

THAT HE WOULD LIKE FURTHER, HE SAID , WELL , BEGIN THAT , ACCORDING TO MR . BIRCH, HE WASN'T GIVING HIM MUCH , CROPP DID SAY THAT, WELL , YOU KNOW, MAYBE , MAYBE WE SHOULD HAVE HIM NEWER LODGE CALLY NEUROLOGICALLY TESTED , AND PETER BIRCH SAID, AFTER WHAT HE SAID TO ME AND GIVEN THE NOTES THAT I HAD JUST REFERRED TO, THERE WAS NO WAY HE WAS GOING TO PUT HIM ON , AND EVEN WHEN THERE WAS NEUROLOGICAL TESTING , THEIR DOCTORS AT THE EVIDENTIARY HEARING , STILL COULD ONLY SAY MAYBE THERE IS ORGANIC BRAIN DAMAGE. NOBODY COULD COME UP WITH A DIAGNOSIS. HE IS A LITTLE BIT OF THIS AND A LITTLE BIT OF THAT .

DR. DID CROPP SAY ANYTHING ABOUT DID CROPP SAY ANYTHING ABOUT ANY STATUTORY OR NONSTATUTORY MITIGATORS AVAILABLE? I AM TALKING ABOUT TO COUNSEL, WITH WHEN COUNSEL DECIDED NOT TO CALL HIM OR USE HIM. YOU GAVE A BRIEF STATEMENT. I JUST HAVEN'T READ WHAT ALL HIS REPORT TO COUNSEL , WHAT I AM TRYING TO FIGURE OUT IS, WHEN COUNSEL DECIDED NOT TO USE CROPP, WHAT EVIDENCE DID HE HAVE OF WHAT DR. CROPP WOULD TESTIFY TO, AS RELATED TO THE PENALTY PHASE?

WHAT I REMEMBER FROM THE LETTER , FROM DR. CROPP TO MR . BIRCH , WAS THAT I WOULD NEED FURTHER NEUROLOGICAL TESTING , TO SEE IF WE CAN GET ANY FARTHER. THAT IS, IN TERMS OF AN OBJECTIVE PIECE OF PAPER , BUT ACCORDING TO MR . BIRCH, HE SAID HE HAD NOTHING FOR HIM , AND I THINK THOSE NOTES , THE HANDWRITTEN NOTES OF DR. CROPP , CERTAINLY BEAR THAT OUT. TAKE IT A STEP FURTHER. EVEN IF HE HAD PUT DR. CROPP ON THE STAND AT THE PENALTY PHASE , TO TALK ABOUT STATUTORY MITS , HE WOULD HAVE TO EXPLAIN THIS VERY DAMAGING STATEMENT ABOUT HOW , YEAH, WHEN THE OFFICER IS COMING UP, HE KNEW HE WAS BUSTED. HE HAD STOLEN MARYLAND. HE WAS A CONVICTED HE HAD STOLEN MERCHANDISE. HE WAS A CONVICTED FELON WITH WEAPONS. THE DEFENDANT IS COGNIZANT OF THAT AND THEN ALL OF A SUDDEN HE TURNS AND HE SHOOTS THE OFFICER. THOSE ARE VERY DAMAGING FACTS, AND IT WOULD HAVE TO COME OUT THAT DR. CROPP KNEW THAT INFORMATION.

THIS TRIAL WAS IN FEBRUARY 1990?

YES, SIR. CORRECT. CORRECT. IF THERE ARE NO FURTHER QUESTIONS, WE ASK THAT YOU AFFIRM THE ORDER OF THE TRIAL COURT .

CHIEF JUSTICE: THANK. MR . MARSHAL, HOW MUCH TIME LEFT ? COUNSEL, COULD YOU INITIALLY , ORDINARILY , IF YOU SEE OUR OPINIONS , WHEN WE DO BRING UP RELIEF ON A CLAIM OF INEFFECTIVENESS AFTER REVIEWING WHAT THE TRIAL COURT HAS DONE , IT IS USUALLY WHERE THERE IS REALLY A DRAMATIC DIFFERENCE OF SOMETHING THAT WAS OUT THERE , REALLY , UNDERMINES OUR CONFIDENCE , AND THE WAY COUNSEL PERFORMS , SOMETHING DRAMATICALLY DIFFERENT. COULD YOU , TAKING THE RECORD THAT WE HAVE HERE , TELL US WHAT WAS DRAMATICALLY DIFFERENT , IN TERMS OF WHAT WAS AVAILABLE FOR MITIGATION , FOR THIS DEFENDANT , THAT WASN'T PRESENTED AT HIS PENT PHASE .

CERTAINLY . I THINK THAT THE OBJECTIVE NEUROPSYCHOLOGICAL TESTING BY DR . GOLDBERG AND THE NEUROLOGICAL TESTING BY DR . HYDE , DEFINITELY SHOWED THAT THERE WAS SUBSTANTIAL FRONTAL LOBE DAMAGE IN MR . PITRY THAT HAD NOT BEEN IN MR . PIETRI THAT HAD NOT BEEN EXPLAINED OR DIAGNOSED OUT , AND NOT INVESTIGATED, BECAUSE DR. CROPP 'S NEUROPSYCHOLOGICAL TESTING WAS NEVER TAKEN UP.

HOW WAS THAT CONNECTED TO THE ACTIONS OF THE DEFENDANT THAT WAS NOT OTHERWISE TESTIFIED TO?

IT CONNECTS DIRECTLY TO WHAT DR . LIPPMAN TALKED ABOUT, IN HIS TESTIMONY, ABOUT THE IMPACT OF DRUGS ON SOMEONE THAT HAS BRAIN DAMAGE, A CHRONIC COCAINE ADDICT WHO HAS BRAIN DAMAGE, YOU KNOW, IS SOMEONE WHO IS ACTING DIFFERENTLY THAN SOMEONE WHO DOESN'T HAVE THAT BRAIN DAMAGE . LOOK AT DR . LIPPMAN'S TESTIMONY, AND THAT WILL,

I THINK , EXPLAIN IN SOME DETAIL,WHAT HE BELIEVED THE DIFFERENCE WAS.

SO HE TESTIFIED TO THE STATUTORY MENTAL MITIGATORS AT THE CONVICTION HEARING.

YES, YES, HE DID AND AS I MENTIONED BEFORE , DR . HYDE DIDN'T TESTIFY AND DR . GOLDBERG WAS ESSENTIALLY HIRED AT THE EVIDENTIARY HEARING, FOR PURPOSES OF DOING PSYCHOLOGICAL TESTING.

I WAS UNDER THE IMPRESSION AND YOU CORRECT ME IF I AM WRONG , THAT ONLY DR . GOLDBERG TESTIFIED THAT THE CATCHALL WOULD BE SATISFY AND DIDN'T TESTIFY TO ANY STATUTORY MENTAL MITIGATORS , DID HE?

YES , JUSTICE LEWIS , BUT WHAT HE SAID WAS I WASN'T RETAINED TO OPINE ABOUT STATUTORY MITIGATION , AND BASICALLY WHAT I WAS HIRED TO DO WAS TO DO NEUROPSYCHOLOGICAL TESTING ON THIS CLIENT, SO THAT THAT INFORMATION COULD BE PROVIDED TO THE OTHER EXPERTS , WHO WOULD THEN OPINE.

DR . LIPPMAN TESTIFIED TO THE STATUTORY

YES, HE DID, AND HE HAD TALKED TO DR . GOLDBERG AS WELL AS DR . SULTAN , AS PART OF FORMING HIS OPINION. NOW, ALONG WITH THIS AND BACK TO YOUR QUESTION , THOUGH , THE NOTION THAT THE TESTIMONY BY THE FAMILY MEMBERS WAS CUMULATIVE AT THE EVIDENTIARY HEARING , AND THE TRIAL , JUST IS NOT TRUE. THE MOST IMPORTANT REASON IT IS NOT TRUE, IS BECAUSE OF HOW THE TESTIMONY WAS USED AT THE EVIDENTIARY HEARING. ALL THOSE FAMILY MEMBERS , MOST OF WHOM HAD NEVER TALKED TO ANYBODY BEFORE , TALKED TO THE EXPERTS, AND IT WAS PRESENTED IN THE CONTEXT OF SUPPORTING THE EXPERT TESTIMONY. THAT IS WHAT DIDN'T HAPPEN AT TRIAL.THERE WAS NO CONNECT BETWEEN DR . CADDY'S TESTIMONY AND THE FAMILY MEMBERS' TESTIMONY OR YORI SANTANA 'S TESTIMONY , BECAUSE HE HAD NEVER TALKED TO THEM. HE DIDN'T KNOW WHAT WAS GOING ON. HE TALKED TO ONE SISTER, A FEW MINUTES BEFORE THE TRIAL.

HOW CAN YOU SAY THERE WAS NO CONNECTION? DID NOT THE FAMILY TESTIFY WHAT A GREAT PERSON THIS INDIVIDUAL WAS , UNTIL HE GOT MIXED UP WITH COCAINE AND HOW COCAINE HAD RUINED HIS LIFE AND HOW HE BEHAVED ? EVERYTHING THAT THESE DOCTORS WERE TESTIFYING TO , THE FAMILY TESTIFIED TO ALL OF THAT , DID THEY NOT?

BASICALLY AT TRIAL THE ONLY PERSON WHO REALLY TALKED ABOUT MR . PIETRI 'S DRUG HISTORY WAS HIS SISTER ADA. EVERYBODY ELSE TALKED ABOUT SOMETHING COMPLETELY DIFFERENT , MOSTLY POVERTY.

DID THE SISTER TESTIFY TO IT?

SHE TALKED VERY BRIEFLY ABOUT IT , BUT INTERESTING LY ENOUGH , UNLIKE THE TWO BROTHERS WHO WERE ALREADY IN PRISON, SHE TESTIFIED AT THE EVIDENTIARY HEARING THAT SHE HAD NO PERSONAL INFORMATION ABOUT HIM DOING DRUGS. THEY TAUGHT HIM HOW TO DO DRUGS AND THEY KNEW WHAT HIS DRUG HISTORY WAS BECAUSE THEY WERE DEALING AND SELLING AND WORKED TOGETHER AND PROVIDED THE CONTEXT FOR EXPLAINING WHY MR . PIETRI WAS WHO HE WAS.

WHEN YOU TALK TO SOMEONE , EVEN THOUGH WE UNDERSTAND THAT ADDICTION CAN BE CHEMICAL, BUT WHEN YOU EMPHASIZE THAT , INSTEAD OF THIS PERSON BEING A GREAT PERSON, YOU GO INTO THAT HE WAS A LIFELONG DRUG ADDICT THAT NEVER GOT HELP , DOESN'T THAT HAVE THE POTENTIAL FOR CHANGING THE JURY'S FEELINGS ABOUT THE DEFENDANT , AND I GUESS YOUR TIME IS UP, SO IF YOU CAN

I WOULD JUST SAY LOOK TO HIS TESTIMONY AT THE GUILTPHASE. SEE WHAT HE SAID ABOUT HIMSELF AND COMPARE THAT TO WHAT OTHER PEOPLE SAID ABOUT HIM. HE WAS HIS OWN WORST CRITIC .

CHIEF JUSTICE: ALL RIGHT. THANK YOU VERY MUCH. THANK YOU , BOTH , VERY MUCH.