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## **Esig Perlow v. Sharon H. Berg-Perlow**

PLEASE RISE.

PLEEBS SEATED.

GOOD MORNING AGAIN. WE WANT TO WELCOME THE APPELLATE ADVOCACY CLASS WITH PROFESSOR KOOIS BROUGHT HERE. WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE YOU ALL BEING READY WITHOUT THE -- WITH THE NEXT CASE. STATE VERSUS DUNCAN AND DUNCAN VERSUS CROSBY. YOU ALL HAVE ARRANGED YOUR ORDER OF ARGUE ULTS. YOU MAY PROCEED.

MAY IT PLEASE THE COURT, MY NAME IS DOUGLAS SQUIRE, I REPRESENT THE APPELLATE, THE STATE. WE HAVE ONE ISSUE ON APPEAL. AND I GUESS I WOULD START WITH POINTING OUT THREE SPECIFIC SENTENCES FROM THE TRIAL COURT'S ORDER. BEFORE I ATTEMPT TO EXPLAIN THEM. AN EVIDENTIARY HEARING IS HELD SO THAT THE COURT MAY HEAR WHAT THE ACTUAL REASON WAS AND MAY THEN DETERMINE WHETHER THAT REASON IS CONSISTENT WITH PROFESSIONAL STANDARDS. IN THE ABSENCE OF A SPECIFIC REASON, THE COURT IS CONSTRAINED TO FIND THAT MR. DUNCAN'S ALLEGATION HAS SATISFIED THE PERFORMANCE PRONG OF STRICKLAND. CLEARLY THE COURT WAS APPLYING A SUBJECT OF A STANDARD.

COULD WE TALK JUST A LITTLE BIT ABOUT THIS, BECAUSE I DON'T WANT US TO GET INTO A SEMANTIC DIFFERENCE AND PLAY ON WORDS IF THERE IS SUBSTANCE IN THIS. AND I MEAN BY THAT, IS THAT, IS THIS REALLY A CASE THAT'S DECIDED PROCEDURALLY ON A BURDEN SHIFTING OR IS THIS JUST A LINE THAT'S USED IN THE FINAL JUDGMENT WHERE THE JUDGE HAS FOUND THERE IS JUST SO MANY MITIGATORS HERE THAT NO REASONABLE LAWYER WOULD HAVE NOT UTILIZED THIS EVIDENCE AND IN THE ABSENCE OF EXPLANATION, THAT IS A INADEQUATE PERFORMANCE, AS OPPOSED TO SAYING IN EVERY CASE, THE DEFENSE LAWYER MUST COME UP WITH AN EXPLANATION OR WE'RE GOING TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL. AM I EXPLAINING MY QUESTION CLEARLY? YOU UNDERSTAND ME?

I WAS ABLE TO REALIZE THE WEAKNESS IN MY OWN BRIEFS. AND IT COMES DOWN TO WHAT WAS I TRYING TO SHOW? AND IT'S THINGS THAT AREN'T ENUNCIATED BY THE COURT. AND I THINK IT IS PRECISELY BECAUSE THE COURT USES SUBJECTIVE STANDARD INSTEAD OF THE OBJECTIVE STANDARD. WE HAVE THE ORDER THAT WE HAVE. AND MY POINT IS THAT THERE ARE TWO FINDINGS IN THIS ORDER THAT ARE INHERENTLY CONFLICTING. IN THE ORDER THE TRIAL COURT FINDS THAT -- I MEAN HE RELIES ON BERLIN'S MITIGATION.

GOING BACK TO THE TRIAL COURT, GOING BACK TO JUSTICE LEWIS'S QUESTION? HIS TIME IS UP? THAT WAS QUICK. (LAUGHTER).

GOING BACK TO JUSTICE LEWIS'S QUESTION BECAUSE THAT IS MY CONCERN. THIS IS A SINGLE AGO GREATER CASE. THERE IS THE OTHER CONTEMPORANEOUS AGGRAVATOR, 1959 AGGRAVATOR. I UNDERSTAND THERE WERE TWO MENTAL HEALTH EXPERTS. NEITHER WERE CALLED. AND DR. BERLIN TESTIFIED IN THE EVIDENTIARY HEARING THAT DUNCAN SUFFERED FROM MENTAL ILLNESS A LONGSTANDING PSYCHOTIC DISTURBANCE. EVIDENCE OF PARANOID THINKING. AND THAT HE HAD ALREADY CONTACTED LAY WITNESSES THAT COULD HAVE VERIFIED IT SPECIFICALLY HIS EX-WIFE, I GUESS IS ALICE PORTER WHO TESTIFIED PRETTY

COMPELLINGLY IN THE EVIDENTIARY HEARING. SO, I GUESS THE QUESTION IS, IS WHEN YOU HAVE GOT THAT TYPE OF MENTAL HEALTH TESTIMONY AND THERE IS NO EVIDENCE IN THE RECORD OF WHERE THE DOWNSIDE IS, TO IT, AND NO EVIDENCE OF STRATEGIC THING.

THAT IS PRECISELY MY POINT. THAT IS WHAT I WAS TRYING TO LAY THE GROUNDWORK HERE, IS THAT THE ONLY WAY THESE TWO FINDINGS IN, THE NEXT PART THAT I WAS GOING TO READ THAT I DIDN'T GET TO READ WAS, WHILE -- NOT -- WHILE THE COURT CAN CONCEIVE OF SOUND STRATEGIC AND TACTICAL REASONS FOR DECIDING NOT TO CALL DR. BERLIN TO TESTIFY, SUCH SPECULATION WOULD NOT BE A VALID BASIS TO DENY THIS CLAIM. NO, THERE IS SEVERAL POINTS THAT WILL EXPLAIN THIS. AND THAT HE -- HE COULD CONCEIVE OF SOUND STRATEGIC REASONS. CLEARLY THAT SATISFIES THE OBJECTIVE PRONG.

WHAT ARE THEY? I CAN'T CONCEIVE OF ANY.

THAT WAS NOT IN THE ORDER WHICH IS WHY I DIDN'T GO INTO WHAT THEY WERE BECAUSE I DON'T KNOW. THERE ARE SOME CLEAR FROM THE RECORD. FUNDAMENTALLY IT SAID, IT IS BECAUSE HE DIDN'T HAVE THE SPECIFIC QUOTE AND ACTUAL REASONS OF COUNSEL, I DON'T THINK HE LOOKED AT ANY OF THE OTHER EVIDENCE.

WE HAVE INDEPENDENT REVIEW. TELL US WHAT WERE OBJECTIVELY SOUND STRATEGIC REASONS ON THIS RECORD FOR NOT CALLING DR. BERLIN? I MIGHT, ON THE OTHER ONE THEY SAID SOMETHING ABOUT IT WAS A MEMO TO THE FILE ABOUT THE OTHER EXPERTS. WHAT WAS THE OBJECTIVE SOUND STRATEGIC REASON FOR NOT CALLING DR. BERLIN OR ANY MENTAL HEALTH EXPERT?

WELL, THAT'S THE LIMITATION OF THE ORDER IS HE SIMPLY -- I AM ADDRESSING YOUR QUESTION, PLEASE. HE TYPES IN SIMPLY BERLIN'S TESTIMONY ON DIRECT. AND FOR SOME REASON COMPLETELY IGNORES IN MY EXPLANATION THAT REASON IS, HE DIDN'T GO TO ANY OTHER REBUTTAL TESTIMONY. BUT THE RECORD IS FULL OF REBUTTAL TESTIMONY THAT THE STATE HAD CROSS-EXAMINED BERLIN AND SHOWED THE WEAKNESSES IN HIS TESTIMONY. NONE OF THAT IS ADDRESSED BY THE TRIAL COURT.

STOP AS WE GO THROUGH THESE. THE ONE WEAKNESS WAS THE MMPI. SAID COULD EASILY BE DISTINGUISHED.

WHAT HE CONCEDED, THAT HIS INTERPRETATION OF THE PARANOID DELUSIONAL WOULD BE EASILY REBUTTED BY OTHER EXPERTS BECAUSE HE USED A NON-STANDARD INTERPRETATION. AND THEN THE STATE ALSO --.

FROM THE MMPI?

CORRECT. THAT HE HAD SCORED HIGH ON SCALE FOUR. WELL, IN 1969 WHICH COUNSEL TESTIFIED TO, THE MENTAL HEALTH MITIGATION FROM THE PRIOR MURDER, HE HAD BEEN SENT FOR EVALUATION. AND HE HAD SCORED I BELIEVE, I DON'T REMEMBER EXACTLY HOW HIGH. BUT ALSO HIGH ON THAT SCALE. AND HAD BEEN DETERMINED BY THAT MENTAL HEALTH EXPERT TO BE A SOCIOPAT. WHICH WAS ONE OF THE SPECIFIC REASONS HE DIDN'T USE DOCTOR LIP MAN, WHICH IS MEMORIALIZED. WHICH IS WHY HE IS NOT AN ISSUE. HE DIDN'T MEMORIALIZE DR. BERLIN. DOCTOR UPSOM THE STATE'S EXPERT CAME IN AND SAID NOT ONLY DID HE DISAGREE WITH BERLIN'S TESTIMONY THERE WAS NO EVIDENCE OF ORGANIC BRAIN DAMAGE. HE ALSO HAD ELEVATED SCALE FOUR WHICH BERLIN M AND THE DOCTOR FROM 1969 AND THOSE TWO DOCTORS DETERMINED HE WAS A SOCIOPATH. ON UPSON'S SCALE HE WAS TWO STANDARD DEVIATIONS ABOVE THE NORM. NONE OF THIS WAS ADDRESSED BY THE TRIAL COURT. MY EXPLANATION IS HE BELIEVES THAT IT WAS -- HE HAD TO WEIGH AGAINST THE POSITIVE MITIGATION ALLEGED BY THE DEFENSE. AND THAT'S ALL THAT'S IN HIS, THE TESTIMONY HE TYPED IN, WAS THE EVIDENCE PRESENTED BY THE DEFENSE ON DIRECT.

WHAT BOTHERS ME --.

BUT HE ONLY REBUT THAT WITH THE ACTUAL OR SPECIFIC REASON OF COUNSEL. HE REFUSED TO ADDRESS ANY OF THE SUBSTANTIAL EVIDENCE THAT CAME IN LIKE WITH DOCTOR LIPMAN.

LODGELY THE PLACE THAT COMES FROM IN THESE HEARINGS IS FROM THE LAWYER, THAT IS THERE IS A PRESENTATION OF THE AVAILABILITY OF THIS PARTICULAR FAVORABLE MITIGATION EVIDENCE. AND THEN THE LAWYER HAS A CHANCE TO SAY WELL MY GOSH, THERE IS ALL THAT GOOD MITIGATION EVIDENCE FOR YOUR CLIENT, WHY DIDN'T YOU, AND THE LAWYER THEN SAYS WELL IF YOU READ THE SECOND PARAGRAPH OF THE REPORT, IT LISTS THE 35 PREVIOUS CRIMINAL OFFENSES, YOU KNOW, THAT THE DEFENDANT WAS GUILTY OF. OR THIS TERRIBLE RECORD OF ABUSE. IN OTHER WORDS, THINGS THAT MAY BE NEGATIVE. AND IF I CALL THE DOCTOR, I WOULD HAVE OPENED IT UP TO SHOW THAT HE ESCAPED FROM PRISON IN LOUISIANA OR WHATEVER. BUT THE LAWYER HERE DIDN'T DO THAT. HE DIDN'T PROVIDE THAT TO THE COURT.

I HAVE CITED EXTENSIVE CASE LAW THAT THIS IS AN OBJECTIVE STANDARD PRECISELY FOR THE REASONS IN THIS CASE. 10 YEARS LATER, WHAT IF HE HAD DIED? YOU WOULDN'T HAVE A LAWYER TO PUT ON THE STANDARD.

MR. SQUIRE, IF THE REASON THE LAWYER WOULD HAVE OBJECTIVELY, FOR NOT CALLING AN EXPERT IN A DEATH CASE IS THEY COULD BE CROSS-EXAMINED ABOUT THE WEAKNESS OF THEIR TEST, WE WOULD NEVER HAVE A MENTAL HEALTH EXPERT BECAUSE TO THE STATE'S CREDIT I HAVE NEVER SEEN A CASE, WHETHER DR. BERLIN OR DOCTOR D OR WHOEVER ELSE IS OUT THERE, ISN'T CROSS-EXAMINED ABOUT THE TEST. AND THIS MMPI HE SAID THIS IS A CASE WHERE THIS GUY WASN'T MALINGERING, IN FACT HE WAS HIDING HIS MENTAL ILLNESS. SO ARE YOU SAYING THAT WE SHOULD LOOK AND SAY THAT THE ABILITY TO CROSS-EXAMINE AN EXPERT BY THE STATE IS A REASON THAT, LOGICAL AND OBJECTIVE REASON THAT A DEFENSE LAWYER WOULDN'T CALL MEANT TAKE HEALTH EXPERT?

THAT'S A SINGLE ASPECT. I HE KEPT THE DOOR CLOSED TO MENTAL HEALTH SPERD. HE USED THE SISTER AND FORMER GIRLFRIEND WHO HAD KNOWN HIM 25 YEARS TO BRING IN THE DEATH OF HIS FIANCE AND DEALT OF HIS SON AND THE OTHER THING. YOU CAN LOOK TO THE MEMORIALIZATION OF WHY HE DIDN'T USE DOCTOR LIPMAN, IT WASN'T RESTRICTED TO THE WEAKNESS OF LIPMAN'S RESULTS.

I WANT TO GET THIS OUT. IN THIS SITUATION, WE HAVE A DEFENSE ATTORNEY WHO PRESENTED TO THE COURT SEVERAL MITIGATING CIRCUMSTANCES. INCLUDING THE MENTAL HEALTH MITIGATING CIRCUMSTANCES THAT ARE PROVIDED FOR IN THE STATUTE. ISN'T THAT CORRECT? AND ON DIRECT APPEAL OF THIS CASE, THIS COURT REVERSED THE TRIAL COURT'S FINDING OF THOSE MENTAL MITIGATING SAYING THERE WAS NO EVIDENCE TO SUPPORT THEM. CORRECT?

CORRECT.

AND SO WHAT BOTHERS ME IS THAT WE HAVE AND WE KNOW THAT THERE WERE TWO MENTAL HEALTH EXPERTS THAT THE DEFENSE HIRED. WHETHER MR. BERLIN, DR. BERLIN WAS GOING TO BE CROSS-EXAMINED OR NOT BY THE STATE, AND THEY ALWAYS ARE, IF YOU'RE GOING TO ARGUE THAT THESE MENTAL MITIGATORS APPLY, HOW CAN YOU DEMONSTRATE THAT TO THE COURT WITHOUT PRESENTING ANY EVIDENCE? SO, WHY ARGUE THOSE MITIGATORS IF YOU'RE NOT GOING TO PUT ON SOME EVIDENCE TO SUPPORT IT?

HE ARGUED THE MITIGATORS HOPING THE JURY WOULD FIND IT AND IT WOULD AFFECT THEIR RECOMMENDATION. IT IS CLEAR FROM THE CLOSING ARGUMENTS.

HOW CAN THE JURY FIND IT IF THERE IS NO EVIDENCE?

YOU'RE PRESUMING THE STATE WOULD NOT HAVE HIRED THEIR OWN EXPERT AND BROUGHT IN THE 1969 MENTAL HEALTH EVALUATION. HE WANTED TO KEEP MENTAL HEALTH OUT COMPLETELY. BY NOT DOING --.

THAT'S WEIGH SAYS HE DID NOT WANT THE TRIAL LAWYER SAYS ON THE RECORD, THAT HE DID NOT WANT THE 1969 MENTAL HEALTH INFORMATION BEFORE THE COURT?

IN HIS MEMORIALIZATION OF HIS REASON FOR NOT CALLING DOCTOR LIPMAN. AGAIN, HE'S CONCEDED UP FRONT, HE DOES NOT REMEMBER WHY HE DIDN'T CALL.

SO WE DO KNOW HE HAD ACCORDING TO DR. BERLIN'S RECORD THAT THERE WAS A TOTAL OF LESS THAN AN HOUR IN SEVERAL MINUTE PHONE CONVERSATION THAT HE HAD WITH DR. BERLIN, OBJECTIVELY WE AS LAWYERS AND AS JUDGES KNOW THAT, TO WORK WITH AND TO UNDERSTAND WHAT THE PRO'S AND CONS ARE OF A MENTAL HEALTH EXPERT'S TESTIMONY WHO HASN'T SAID ON THIS RECORD THAT I TOLD HIM I WASN'T GOING TO BE HELPFUL, BECAUSE THAT CERTAINLY IS, WE HAVE -- WE HAVE SEEN THAT. JUST LOOKING OBJECTIVELY AT THE TIME HE SPENT WITH DR. BERLIN, DOESN'T THAT FURTHER SUPPORT THE CONCLUSION THE FACTUAL CONCLUSION OF THE TRIAL JUDGE?

IT'S NOT TIED TO THE OTHER ISSUE BUT I'M BACK TO LOGIC. AND THAT'S, IN DR. BERLIN TESTIFIED THAT THESE WERE CALLS BY HIM TO COUNSEL. COUNSEL TESTIFIED THAT HE HAD USED DR. BERLIN A DOZEN TIMES BEFORE AND DID NOT TREAT HIM AS HE DID OTHER EXPERTS HE WASN'T EXPERIENCED WITH. IT IS NOT CLEAR TO ME -- THERE IS NO TESTIMONY THAT COUNSEL EVER LIMITED BERLIN'S CALLS. BERLIN TESTIFIED THAT HE CALLED COUNSEL EVERY TIME HE DID AN INTERVIEW OR A TEST. AND THERE IS NO TESTIMONY THAT COUNSEL LIMITED HIS ABILITY TO CALL HIM. COUNSEL STATED BERLIN CALLED HIM WITH INFORMATION. I DON'T KNOW HOW IT'S COUNSEL'S FAULT THAT BERLIN DIDN'T CALL HIM MORE. BERLIN CALLED HIM WHEN HE THOUGHT HE HAD SOMETHING TO IMPART. CLEARLY.

DID COUNSEL TESTIFY THAT HE HAD A REGULAR CONFERENCE WITH DR. BERLIN IN WHICH THEY DISCUSSED THE PRO'S AND CON'S?

HE DIDN'T REMEMBER ANY OF THE CONVERSATIONS. THE, AS FAR AS THE PHONE CALLS THAT'S IN THE RECORD, HE DID TESTIFY THAT HE DOESN'T REMEMBER BERLIN EVER ASKING HIM FOR MORE TIME OR ANY ADDITIONAL INFORMATION. AND.

BUT IT'S LIMITED TO -- TELEPHONE CONVERSATIONS? NO INPERSON CONFERENCE?

I KNOW NO EVIDENCE OF IN-PERSON CONFERENCE.

YOU'RE IN YOUR REBUTTAL IF YOU WANT TO PAUSE.

GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. I'M LESLIE SCALLEY FOR MR. DUNCAN. FIRST I'D LIKE TO ADDRESS THE STATE'S APPEAL AND THEN WITH ANY REMAINING TIME, A COUPLE OF THE ISSUES RAISED.

HOW LONG HAD MR. LAWRENCE BEEN A DEFENSE LAWYER?

MR. LAWRENCE HAD BEEN A DEFENSE LAWYER FOR SOMETIME. AND IN FACT I BELIEVE AT THE TIME HE HANDLED MR. DUNCAN'S CASE, HE WAS ONE OF THE CHIEF ASSISTANTS IN THE PUBLIC DEFENDER'S OFFICE.

AND THIS TRIAL TOOK PLACE IN 9?

1991.

91. THE RECORD REFLECT WHEN LOU LAWRENCE CAME TO WORK FOR THE PUBLIC DEFENDER'S OFFICE?

I CAN'T RECALL OFF THE TOP OF MY HEAD BUT I BELIEVE IT WAS IN THE 70s OR 8 OTHER. IT HAD BEEN A SUBSTANTIAL LENGTH OF TIME.

AND THIS WASN'T HIS FIRST CAPITAL?

NO, HE TESTIFIED THAT HE HAD DONE -- HE REFERENCED ONE BY NAME, MAGGARD, BEFORE HE TOOK MR. DUNCAN'S CASE.

COULD YOU GIVE US A SORT OF A COMPARISON, IF YOU COULD, ABOUT WHAT DID THE JURY HEAR IN THE ORIGINAL CASE? THERE WERE JUST TWO, TWO LAY WITNESSES ON THE PENALTY PHASE?

CORRECT.

AND THEN JUST LET'S STICK WITH THE LAY WITNESS TESTIMONY BECAUSE MOST OF THESE CASES WHEN WE LOOK AT LAY WITNESS TESTIMONY, WE ARE SORT OF SAYING THAT WELL, IT IS JUST DUPLICATES. COULD YOU CLARIFY WHETHER THERE IS QUALITATIVE DIFFERENCE BETWEEN THAT AND WHAT, AS FAR AS THAT WHOLE PREPARATION OF THE PENALTY PHASE, WHAT MR. LAWRENCE SAID ABOUT WHY HE DIDN'T PROCEED TO TRY TO FIND OR TALK TO THE EX-WIFE ALICE PORTER?

YES, YOUR HONOR. AT THE PENALTY PHASE, COUNSEL PRESENTED TWO WITNESSES IN MITIGATION. THEIR ENTIRE TESTIMONY CONSISTS OF ONLY 33 PAGES IN THE RECORD. ONE WITNESS WAS MR. DUNCAN'S SISTER, UNA LEVY WHO TESTIFIED TO CIRCUMSTANCES SURROUNDING THEIR CHILDHOOD. SHE FOCUSED A LOT ON HER CHILDHOOD. AND SHE FURTHER TESTIFIED THAT SHE LIVED WITH MR. DUNCAN FOR ONLY A FEW YEARS BEFORE SHE LEFT THE HOUSE AT THE AGE OF 16. AND FROM THAT POINT ON THEY MORE OR LESS LED SEPARATE LIVES. ALTHOUGH THEY DID KEEP IN TOUCH. SHE TESTIFIED THAT MR. LUNG CAN'S FATHER LEFT WHEN MR. DUNCAN WAS TWO AND THAT HER MOTHER RAISED THEM FOR A WHILE, REMARRIED AND THAT THE STEPFATHER RAISED THEM IN THE SITUATION THAT SHE FELT WAS MENTALLY ABUSIVE OR THAT THE CHILDREN DID NOT FEEL WELCOME IN THE HOME. SHE FURTHER TESTIFIED THAT MR. DUNCAN LOST A CHILD, THAT HE MARRIED AND HE HAD A CHILD AND THE BABY DIED. AND THAT ONE OF MR. DUNCAN'S CLOSE GIRLFRIENDS, A WOMAN TO WHOM HE WAS ENGAGED, ALSO DIED. SHE FURTHER TESTIFIED THAT HE HAD A HISTORY, BRIEFLY SHE MENTIONED THAT HE HAD USED A CRACK AND ALCOHOL IN THE PAST AND THAT HE IS NOT A NICE DRUNK. UNA -- OR SARAH MARTIN TESTIFIED THAT SHE HAD KNOWN MR. DUNCAN FOR ABOUT 25 YEARS. SHE DESCRIBED HER INTERACTION WITH M DUNCAN AS SPORADIC AND TESTIFIED THAT HE WAS FRIENDS WITH HER BROTHER, HER BROTHER TOLD HER HE WAS A GOOD AND STEADY WORKER. HE WAS NICE TO HER.

HAD THIS, WERE THESE THE -- HAD THE DEFENSE ATTORNEY TALKED TO SEVERAL WITNESSES AND THEN HE SELECTED THESE TWO WITNESSES?

NO, AT THE PROCEEDINGS BELOW, THE DEFENSE COUNSEL TESTIFIED THAT HE ONLY SPOKE TO THE PEOPLE WHO HE PRESENTED AT TRIAL. THAT WOULD BE LIMITED TO THOSE TWO WITNESSES. THERE IS AN ISSUE, HE SUBPOENAED ONE MAN BUT HE DIDN'T TESTIFY. SO HE MIGHT HAVE SPOKEN TO A THIRD WITNESS WHO WAS JUST A MANAGER AT A LABOR POOL.

WELL DID HE USE AN INVESTIGATOR, DID HE NOT, TO FIND THESE PEOPLE, AND THE ATTORNEY WAS COMMUNICATING PRETTY MUCH WITH HIS INVESTIGATOR RATHER THAN THE WITNESSES? WOULD THAT BE A FAIR CHARACTERIZATION?

THAT IS WHAT COUNSEL TESTIFIED TO. BUT COUNSEL TESTIFIED -- AGAIN HE JUST SAID, DOUG SPOKE TO THE PEOPLE, DOUG TOLD ME WHAT HE FOUND AND I DECIDED IF THAT WAS RELEVANT. SPECIFIC TESTIFY WAS -- TESTIMONY WAS PRESENTED BELOW THAT NEITHER THE INVESTIGATOR NOR COUNSEL CONTACTED TWO OF DUNCAN'S EX-WIVES, WOMEN WHO LIVED WITH HIM FOR A LONG TIME AND IN FACT HAD CHILDREN WITH HIM.

I KNOW THERE IS EVIDENCE THAT MR. DUNCAN WOULD NOT COOPERATE WITH DR. BERLIN INITIALLY. IS THERE ANY SIMILAR INFORMATION THAT HE WOULD NOT COOPERATE WITH INVESTIGATORS OR HIS TRIAL ATTORNEY? WAS THAT TALKED ABOUT?

NO, YOUR HONOR. AND THE LACK OF COOPERATION ISN'T THE TYPE OF LACK OF COOPERATION THIS COURT IS CHARACTERIZED AS THAT THAT WOULD JUSTIFY NO FURTHER INVESTIGATION. DR. BERLIN TESTIFIED THAT THE FIRST TIME HE MET WITH MR. DUNCAN, HE WAS HYPER VIGILANT AND PARANOID. DR. BERLIN FURTHER TESTIFIED THAT HE WAS TRYING TO PROVOKE A PARANOID RESPONSE WITH HIS QUESTIONS. AND THAT THEY CONCLUDED THE FIRST MEETING. DR. BERLIN CALLED COUNSEL, COUNSEL SPOKE TO MR. DUNCAN. DR. BERLIN CAME BACK AND THAT HE COMPLETED THE EVALUATION HE INTENDED TO COMPLETE. THAT MR. DUNCAN TRIED VERY HARD ON THE TEST. AND THAT MR. DUNCAN IN FACT PROVIDED DR. BERLIN WITH THE NAME OF HIS EX-WIFE, DIFFICULT ANN GOOD MAN. AND -- DIANN GOOD MAN. AND AT LEAST TWO OTHER MEN'S. DR. BERLIN IN FACT TESTIFIED IT WAS A PARANOID HYPER VIGILANT RESPONSE THAT WAS CHARACTERISTIC WITH THE MENTAL ILLNESS HE SAW ON MMPI AND THE MENTAL ILLNESS HE CORROBORATED THROUGH THE WITNESS HE, THE WITNESSES.

YOU HAVE TESTIFIED ABOUT -- I MEAN YOU HAVE GIVEN US SOME INFORMATION ABOUT THE TWO LAY WITNESSES THAT TESTIFIED AT TRIAL. THE DEFENSE ATTORNEY ACTUALLY ARGUED MORE THAN JUST THE INFORMATION THAT CAME FROM THOSE TWO WITNESSES. WHAT INFORMATION DID THE DEFENSE ATTORNEY ARGUE TO SUPPORT THE MENTAL MITIGATORS THAT HE ASKED THE TRIAL COURT AND THE TRIAL COURT DID IN FACT FIND? WHAT EVIDENCE WAS IN THE RECORD THAT WOULD HAVE SUPPORTED THOSE MENTAL MITIGATORS?

THE ONLY EVIDENCE THAT COULD HAVE SUPPORTED THE MENTAL HEALTH MITIGATORS, FIRST THE TWO PENALTY PHASE WITNESSES HE DID CALL HAD NO CONTACT WITH MR. DUNCAN AROUND THE TIME OF THE CRIME OR AT THE TIME OF THE CRIME. SO THEY WERE PATENTLY COULD NOT TESTIFY TO MENTAL HEALTH MITIGATING CIRCUMSTANCES IN EACH CASE. COUNSEL ARGUED THAT THE FACT THAT MR. DUNCAN HAD BEEN DRINKING THE NIGHT BEFORE, EVEN THOUGH THE RECORD REVEALED THAT HE STOPPED DRINKING AT 8:30 THAT NIGHT, SOMEHOW MIGHT SUPPORT THE AGGRAVATING -- MITIGATING CIRCUMSTANCE. AND THE FACT THAT IN HIS CONFESSION TO THE POLICE SHORTLY AFTER, WHEN HE WAS ARRESTED, AFTER THE CRIME, HE SAID HE THOUGHT HE STABBED THE VICTIM TWO TIMES. AND HE GUESSED HE WENT NUTS. THAT'S ALL THE EVIDENCE FROM WHICH ANYBODY COULD HAVE FOUND THE MENTAL HEALTH MITIGATING CIRCUMSTANCES.

BUT HE RELIED ON GUILT PHASE EVIDENCE TO ARGUE THOSE THINGS?

HE REFERENCED IT.

WELL HELP US NOW SUCCINCTLY AS YOU CAN TO POINT OUT IN THE RECORD EVIDENCE THAT WILL SUPPORT THE TRIAL COURT'S CONCLUSION. THAT BOTH PRONGS OF STRIKELAND WEREMENT IN THIS CASE. DEFICIENT PERFORMANCE AND PREJUDICE TO THE DEFENDANT.

THE COURT'S ORDER IS WRITTEN AFTER THREE DAYS OF TRIAL TESTIMONY AND FROM HIS

SPEAKER YAR VANTAGE POINT IN ACCESSING THE CREDIBILITY OF THE WITNESSES AND MAKING FINDINGS OF FACT. AT COUNSEL'S DECISION NOT TO PRESENT THE AVAILABLE MENTAL HEALTH MITIGATING EVIDENCE WAS NOT REASONABLE. THE COURT DESCRIBED, CHARACTERIZED COUNSEL'S COUNSEL CONSULTATION WITH DR. BERLIN AS MINIMAL. THIS IS SUPPORTED BY DR. BERLIN'S BILLING RECORDS, THOUGH NEAR DR. BERLIN NOR COUNSEL COULD REMEMBER THE SUBSTANCE OF ANY OF THEIR CONVERSATIONS. DR. BERLIN RECORDS REVEALED HE DID NOT SPEAK WITH COUNSEL FOR A TIME LONG ENOUGH FROM WHICH HE COULD HAVE EXPLAINED THE STATUTORY, OR THE MENTAL HEALTH MITIGATION THAT HE HAD DETERMINED.

DID THE TRIAL JUDGE FOCUS HIS CONCLUSION ON THE FACT THAT THE TRIAL COUNSEL COULD NOT RECALL WHY HE DECIDED NOT TO CALL DR. BERLIN?

AFTER -- YOUR HONOR, AFTER MAKING THE FINDING OF FACT THAT COUNSEL HAD MINIMAL CONSULTATION WITH MR. -- WITH DR. BERLIN, THE COURT FOUND AGAIN BASED ON THE COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD BELOW, THAT THIS WAS A CASE IN WHICH SUBSTANTIAL MENTAL HEALTH WAS THEN AVAILABLE. THE COURT THEN TURNED TO THE NEXT PRONG OF THE DEFICIENT PERFORMANCE TEST UNDER STRICKLAND IS WHETHER COUNSEL HAD ANY REASON PROFESSIONAL JUDGMENT FOR ABANDONING HIS INVESTIGATION OR FAILING TO INVESTIGATE. AND THEN --.

IS THIS REALLY ABANDONMENT OF AN INVESTIGATION OR FAILURE TO INVESTIGATE? BECAUSE HE DID HIRE MR. BERLIN. THEY DID COMMUNICATE. DR. BERLIN INDICATES THAT HIS FILES INCOMPLETE BUT WE KNOW THE ATTORNEY WAS SENDING HIM MATERIALS THAT ARE SOMEHOW HIS FILE WAS PURGED OR CLEANSED IN SOME FASHION BECAUSE THINGS ARE MISSING FROM HIS FILE CORRECT, TODAY THAT WERE GIVEN BEFORE. SO ARE WE IN THE CLASSIC FAILURE TO INVESTIGATE OR INADVERTENTLY VIOLATE INVESTIGATION? OR ARE WE IN A DIFFERENT CATEGORY?

YOUR HONOR, IT'S THE CLASSIC FAILURE TO INVESTIGATE AN ADEQUATE INVESTIGATION. COUNSEL COULD NOT INVESTIGATE OR MAKE INFORMED STRATEGIC REASON PROFESSIONAL JUDGMENT BECAUSE HE DID NOT KNOW WHAT MENTAL HEALTH DR. BERLIN COULD HAVE TESTIFIED TO. THOUGH THE FACT STRICKLAND HAS NEVER STOOD FOR THE PROPOSITION THAT THE FACT THAT AN ATTORNEY CONDUCTS A CURSORY INVESTIGATION OR HIRES AN EXPERT SUPPORTS A DECISION NOT TO PRESENT MENTAL HEALTH TESTIMONY.

BUT THE MOST THAT THE TESTIMONY IN THE RECORD IS, IS THIS LAWYER SAYS THAT I DON'T -- I KNOW I HAD A COMMUNICATION WITH DR. BERLIN. I DIDN'T GET A WRITTEN REPORT. I DO NOT REMEMBER THE SUBSTANCE OF THE DISCUSSIONS AFTER THIS TEN YEAR PERIOD. I MEAN THAT IS WHAT THE LAWYER SAYS, RIGHT?

CORRECT.

AND ALSO THE LAWYER SAYS, THAT WAS MR. DEROTIONIER. AND, WHO WAS THE PUBLIC DEFENDER. AND I BELIEVE I MET WITH, BUT HIS MEMORY IS HAZY. WAY I TAKE THAT,, IS HE IS TESTIFYING AS TO WHAT THE USUAL PROCEDURE IN THAT OFFICE WAS. AND HAD A DISCUSSION. AND IT WOULD HAVE BEEN A DECISION MADE IN THAT WAY, NOT TO CALL DR. BERLIN. ISN'T THAT THE SUBSTANCE OF THE TESTIMONY?

THAT COUNSEL DIDN'T CHARACTERIZE HIS DISCUSSION WITH MR. DE ROSIER AS A DISCUSSION REGARDING MR. DUNCAN'S CASE OR DR. BERLIN'S TESTIMONY. FIRST I'D LIKE TO POINT OUT ACCORDING TO THE COURT'S FINDING, COUNSEL OF MINIMAL CONSULTATION WITH DR. BERLIN, COUNSEL COULD NOT KNOW TO WHAT DR. BERLIN WOULD HAVE TESTIFIED. SO ANY MEETING HE WOULD HAVE HAD WITH THE PUBLIC DEFENDER, HE COULD NOT EXPRESS THE RESULTS OF THE INVESTIGATION.

WHATEVER MR. LAWRENCE SAID ABOUT THAT IS REFLECTED IN THE TRIAL COURT'S ORDER,

RIGHT?

YES. I BELIEVE THE STATE IN FACT CITED THE PORTION THAT HE DOESN'T RECALL ANY CONVERSATIONS WITH MR. DEROSIER WHETHER TO HIRE DR. BERLIN. BUT THEY HAD A GENERAL MONTHLY MEETING AMONG THE CAPITAL DEFENSE UNIT WHERE THEY DISCUSSED THE NEEDS FOR HIRING EXPERTS AND FINANCIAL THINGS. AND THOUGH HE HAD ABSOLUTELY NO MEMORY OF THAT, HE WAS SURE THAT DR. BERLIN WOULD HAVE COME UP DURING THAT MEETING.

WELL I GUESS, YOU KNOW, THE FLIP SIDE IS THIS. AND AGAIN WE DON'T WANT TO BE ENGAGED IN SPECULATION. BUT, SINCE DR. BERLIN, AT LEAST ON THIS RECORD, GAVE MOSTLY FAVORABLE TESTIMONY, YET HERE IS A LAWYER THAT HAS HIRED HIM, WHAT WOULD BE THE REASON, I MEAN, GEE I JUST FORGOT DR. BERLIN WAS THERE, NOT TO CALL HIM? AND YOU'RE SAYING WELL -- HE WASN'T -- SINCE HE'D ALREADY HIRED HIM, IT WOULD BE, YOU KNOW ALMOST, TO SAY WELL I'M JUST NOT GOING TO CALL HIM BECAUSE I WANT TO GET OVER WITH THE PENALTY PHASE? I MEAN I GUESS THAT'S WHERE THE JUDGE'S IDEA, SAY I COULD CONCEIVE OF REASONABLE STRATEGIC REASONS FOR NOT GETTING INTO THIS. AND CAN YOU HELP US AS FAR AS THE FLIP SIDE? ARE THERE, YOU KNOW, WHAT ARE THE REASONS THAT A LAWYER MIGHT NOT CALL DR. BERLIN? DO YOU AGREE WITH ANYTHING THAT THE STATE SAID AS FAR AS THE REASONS WHY DR. BERLIN OR FOR THAT MATTER THE OTHER DOCTOR MIGHT BE A LIABILITY TO MR. DUNCAN?

NO, YOUR HONOR. I DO NOT AGREE WITH THE STATE AT ALL. IN THIS CASE COUNSEL SUBMITTED A LIST OF WHAT HE THOUGHT WERE 15 MITIGATING CIRCUMSTANCES TO THE COURT. DR. BERLIN'S TESTIMONY WAS ENTIRELY CONSISTENT WITH EACH OF THOSE 15 MITIGATING CIRCUMSTANCES. AND IT WAS INCONSISTENT WITH NOTHING. COUNSEL OBVIOUSLY WANTED THE COURT TO FIND THE STATUTORY MENTAL HEALTH MIT GAYER -- MITIGATORS. DR. BERLIN'S TESTIMONY BELOW CONCLUSIVELY ESTABLISHED THAT HE COULD HAVE TESTIFIED THAT MR. DUNCAN SUFFERED FROM BIOLOGICALLY DETERMINED PSYCHOSIS WITH SYMPTOMS OF DELUSIONAL PARANOID THINKING, HE HAD POST TRAUMATIC STRESS DISORDER.

HE WOULD BE ABLE TO RELATE THIS, THIS SHOOTING OR THE KILLING WAS DONE AT LEAST FROM MR. DUNCAN'S CONFESSION BECAUSE HE, HIS FIANCE, BELIEVED HIS FIANCE WAS CHEATING ON HIM. DID DR. BERLIN SAY HOW HE WOULD LINK UP THIS MENTAL ILLNESS WITH THE FACTS OF THIS CRIME?

YES IN FACT DR. BERLIN TESTIFIED THAT HAD HE BEEN ALLOWED TO COMPLETE HIS EVALUATION, HE WOULD HAVE BEEN ABLE TO TESTIFY THAT THIS MURDER RESULTED FROM ONE OF MR. DUNCAN'S LIFE LONG PARANOID DELUSIONS THAT WAS CAUSED BY BOTH THE BRAIN INJURY AND THE MENTAL ILLNESS.

WHEN YOU SAY DR. BERLIN IF HE HAD BEEN ALLOWED TO COMPLETE IT, IS THERE EVIDENCE IN THE RECORD THAT HE WAS TOLD NOT TO PROCEED ANY FURTHER?

THERE IS NO EVIDENCE IN THE RECORD THAT HE WAS TOLD NOT TO PROCEED ANY FURTHER. BUT DR. BERLIN DID TESTIFY THAT HE NEEDED RESOURCES FROM COUNSEL TO COMPLETE HIS EVALUATION, SPECIFICALLY THE DEPOSITIONS OF THE PEOPLE WHO SAW MR. DUNCAN AT THE TIME HE WAS ARRESTED. ALSO, AS DR. BERLIN TESTIFIED BELOW, HE WAS NOT EVEN INFORMED THAT HE WOULD NOT TESTIFY AT MR. DUNCAN'S PENALTY PHASE UNTIL AFTER IT WAS OVER. AND MR. DUNCAN HAD BEEN SENTENCED TO DEATH.

IS IT YOUR POSITION THAT AFTER A TRIAL 10 YEARS LATER, ON POST CONVICTION, IF AN ATTORNEY DID NOT CALL AN EXPERT TO TESTIFY AND HE CANNOT RECALL WHY, THAT'S THE END OF THE INQUIRY, THAT'S PER SE INEFFECTIVE ASSISTANCE AND THE DEFENDANT'S ENTITLED TO A NEW TRIAL?

NO YOUR HONOR RESPECTFULLY, THAT IS NOT OUR ARGUMENT. OUR ARGUMENT IS THAT IN THIS CASE, AFTER THREE DAYS OF TESTIMONY, VERY SAME TRIAL COURT USING HIS SUPERIOR POSITION IN DETERMINING THE CREDIBILITY OF THE WITNESSES, AND MAKING FINDINGS OF FACT, HE DETERMINED -- AND YOU KNOW THAT IS THE PURPOSE OF AN EVIDENTIARY HEARING, TO DETERMINE IF AN ATTORNEY SAYS I DON'T REMEMBER, TO FIND OUT IF HE'S COVERING UP FOR SOME NEGLECT. TO DETERMINE WHETHER HE DID IN FACT NOT REMEMBER. OR IF HE FEELS BAD FOR HIS CLIENT AND IS SWAY TRYING TO FALL ON A SWORD.

BUT ASSUMING HE DID IN FACT NOT REMEMBER AND THE TRIAL COURT SAYS HE DOESN'T REMEMBER, AND THAT'S WHAT HE TESTIFIED TO, IS THE TRIAL COURT THEN TO GO BACK INTO THE RECORD, DETERMINE WHETHER THERE WOULD HAVE BEEN A LEGITIMATE BASIS FOR NOT CALLING THE EXPERT OR DOES THE TRIAL COURT SIMPLY STOP AND SAY, IF THE STATE CANNOT SHOW THAT THERE WAS A REASON THAT THE COUNSEL HAD FOR NOT CALLING, THEN THAT'S INEFFECTIVE ASSISTANCE? WE GO TO THE PREJUDICE PRONG?

I BELIEVE THAT'S CORRECT. AND THAT IS CONSISTENT WITH THE ANALYSIS THAT THE UNITED STATES SUPREME COURT HAS MANDATED IN STRICKLAND.

IF THAT'S YOUR POSITION THEN, WHAT ABOUT THE STATE'S ARGUMENT THAT, THAT THE COUNSEL DIES AFTER THE TRIAL AND BEFORE THE POST CONVICTION HEARING AND POST CONVICTION COUNSEL RAISES THE SAME ISSUE AND SAYS HE HAD AN EXPERT HE DIDN'T CALL HIM? AND THE STATE CAN'T PRESENT EVIDENCE OF WHY HE DIDN'T CALL HIM BECAUSE THE DEFENSE COUNSEL HAS NOW DIED. NOW DO WE, ARE WE REQUIRED THEN TO HOLD A NEW TRIAL IN THAT CASE?

THAT WOULD, YOU'D HAVE TO LOOK AT THE SPECIFIC CIRCUMSTANCES OF EACH CASE. STRICKLAND HAS HELD SPECULATION IT IS NOT -- YOU DON'T SPECULATE IN THESE CASES.

ONE OF THE THINGS THAT WE USUALLY SEE IS WHETHER, WHEN THE JUDGE IS LISTENING TO THE EXPERT, WHETHER THE JUDGE FINDS THE EXPERT TO BE CREDIBLE. AND I THINK YOU SAID EARLIER THAT THE JUDGE ACCEPTED THAT DR. BERLIN HAD VALUABLE MENTAL HEALTH TESTIMONY. SO THAT WOULD BE -- I MEAN IN TERMS OF THE FINDINGS HERE, IF THE JUDGE HAD DECIDED THAT THIS WITNESS WOULD HAVE DONE MORE HARM THAN GOOD, THAT WOULD HAVE BEEN A FINDING THIS JUDGE WOULD HAVE BEEN ABLE TO MAKE.

CORRECT. AND -- I'M SORRY. THERE ARE CASES IN WHICH THE POST CONVICTION, IN POST CONVICTION PROCEEDINGS THE LAWYER HAS DIED. AND IN THAT CASE, THE COURT MAKES THE DETERMINATION BOTH FROM WHAT IS IN THE RECORD AND THE ABSENCE OF THINGS IN THE RECORD. AND SPECIFICALLY THEY USUALLY HAVE COUNSEL TRIAL FILE. SO THE FINDINGS COUNSEL'S FAILURE TO REMEMBER IN THIS CASE DID NOT JUSTIFY REASON, -- DID NOT EXPLAIN A REASON FOR PROFESSIONAL JUDGMENT.

I'M TRYING TO UNDERSTAND YOUR POSITIONS. I THINK YOU JUST CHANGED POSITIONS. IT IS YOUR POSITION THEN THAT THE TRIAL COURT CAN GO BEHIND IF THE ATTORNEY DOESN'T REMEMBER OR HAS DIED, THE ATTORNEY CAN GO TO THE RECORD ITSELF AND DETERMINE WHETHER THERE WERE LEGITIMATE REASONS FOR NOT CALLING THE EXPERT?

IN THAT CASE, YOU CAN'T DETERMINE WHAT COUNSEL'S REASONS PROFESSIONAL JUDGMENT WAS. THAT'S AN ENTIRELY DIFFERENT SITUATION. IN THIS CASE, THE LOWER COURT DID CONCLUDE THAT COUNSEL HAD NO REASON, COULD NOT ARTICULATE A REASON.

BUT I AM NOT SURE -- YOU SHOULDN'T BE PENALIZED AND THE STATE SHOULDN'T BE PENALIZED. IF A DEFENSE ATTORNEY CAN'T REMEMBER, THEN YOU'RE GOING TO HAVING FAILURE OF PROVE BECAUSE IF THE DEFENSE ATTORNEY SAID I DIDN'T HAVE A REASON, YOU'D SAY WELL I'D RATHER HAVE THAT. DON'T WE WANT TO LOOK AT THE FACTS OF EACH SKAS, SEE IF THIS WAS A CREDIBLE EXPERT, SEE WHAT THE OBJECTIVE EVIDENCE IS OF ANY DOWNSIDE OF CALLING THIS WITNESS,

SUCH AS THAT, AS JUSTICE ANSTEAD SAID EARLIER, THERE WOULD BE IN THE REPORT THAT HE WOULD HAVE COME OUT WITH OTHER PRIOR VALT ACTS AND LOOK AT IT OBJECTIVELY TO SEE IF IN THE RECORD THERE IS A GOOD TACTICAL REASON FOR NOT CALLING THAT EXPERT?

YES. IF THIS ATTORNEY IS NOT PRESENT TO TESTIFY.

EVEN IF THE DEFENSE ATTORNEY IS. BUT HE SAID I CAN'T RECALL WHAT IT IS. WHY SHOULD THE STATE BE PENALIZED? I DON'T THINK YOU SHOULD BE PENALIZED EITHER. BUT YOUR BEST ARGUMENT HERE IS TO SAY LOOK, WE ARE LOOKING AT THIS WHOLE RECORD. THERE IS NO LEGITIMATE REASON FOR NOT CALLING THIS EXPERT.

YES, AND THAT IS THE ANALYSIS OUTLINED IN STRICKLAND AND WIG BEGINS AND WILLIAMS VERSUS TAYLOR THAT ANY DECISION COUNSEL MAKES MUST BE OBJECTIVELY REASONABLE GIVEN THE FACTS OF THIS CASE.

LET ME ASK THIS QUESTION. WE HAD TWO MENTAL HEALTH EXPERTS. IS THERE AN INDICATION WE KNOW THAT THE DR. BERLIN, HIS FILE HAD BEEN, HAD ITEMS REMOVED BECAUSE THEY SUBMITTED INTO EVIDENCE CERTAIN THINGS, CORRECT? THAT WERE LETTERS DIRECTED TO HIM WITH ATTACHMENTS THAT WERE NOT IN HIS FILE AT THE TIME OF THIS EVIDENTIARY HEARING. THAT PARTLY HE HAD IN 91. CORRECT?

RIGHT.

NOW IS THERE ANY INDICATION THAT DR. BERLIN RECEIVED THE SAME THINGS THAT DOCTOR LIPMAN DID AND THAT THAT WOULD BE A REASON THAT HE WOULD ALSO HAVE ANY MENTAL EVALUATIONS GOING BACK TO 1969 BECAUSE I NOTICE THE ONE EXHIBIT WAS SOME KIND OF REPORT FOLLOWING THE 1969, THERE WAS AN EVALUATION OF SOME TYPE. DID DR. BERLIN -- IS THERE ANY INDICATION THAT DOCTOR LIPMAN, THE SAME INFORMATION WAS GIVEN DO DR. BERLIN AND THAT MAY BE A REASON FOR NOT USING? NOTHING LIKE THAT.

THERE IS NO INDICATION IN THE RECORD, I BELIEVE DR. BERLIN DIDN'T EVEN REMEMBER, HAVE ANY RECOLLECTION.

WE ARE GOING TO HAVE TO CLOSE ON THAT NOTE. THANK YOU VERY MUCH. MR. MARCH IS SHAL, HOW MUCH TIME IS LEFT?

COUNSEL, CAN YOU START BY LETTING ME ASK YOU THE CONVERSE. IS IT THE STATE'S POSITION THAT IF COUNSEL CANNOT REMEMBER WHY HE DID NOT CALL AN EXPERT, THAT THE TRIAL COURT OR THE STATE CAN GO AND FIND JUSTIFICATION IN ANY PART OF THE RECORD FOR WHY HE MAY HAVE NOT CALLED THE EXPERT?

YES. AND THE CASE I CITE CHANDLER SPECIFICALLY SAYS.

SO WHAT ABOUT THE POSITION, WHAT ABOUT THE SITUATION WHERE LET'S SAY TRIAL COUNSEL SAYS I DIDN'T CALL THE EXPERT FOR REASON A, AND THE TRIAL COURT SAYS WELL I DON'T BELIEVE REASON A IS A LEGITIMATE REASON BUT I FIND THERE IS A REASON B THAT WOULD BE A VERY LEGITIMATE REASON FOR NOT CALLING THE EXPERT SO I FIND NO INEFFECTIVE ASSISTANCE. COULD WE DO THAT?

YES AND THE CASE LAW CITES TWO CASE HE IS IN THE PAREN THETTY CALS FOR THE SAME REASON WE DON'T ALLOW TRIAL COUNSEL TO COME IN LATER AND CLAIM HE WAS INEFFECTIVE. WE LOOK OBJECTIVELY AT WHETHER OR NOT HE WAS INEFFECTIVE.

SEEMS LIKE YOU BOTH AGREE, BECAUSE THE DECISION NOT TO CALL MUST BE OBJECTIVELY REASONABLE. CORRECT. AND WHAT WE WANT TO COME OUT HERE IS A RULE OR A PRINCIPLE

THAT ISN'T GOING TO PENALIZE EITHER SIDE IF EITHER COUNSEL IS DECEASED OR LEGITIMATELY HAS A LACK.

IN THIS CASE THE TRIAL COURT DID FIND REASONS NOT TO CALL HIM. HE JUST DIDN'T ENUNCIATE THEM.

THERE IS NO FINDING FAILURE TO INVESTIGATE. THERE IS QUITE THE CONTRARY.

THAT IS HARDLY THE STATEMENT OF THE TRIAL JUDGE, IS IT? YOU'RE RELYING ON THAT STATEMENT THAT THE COURT SAID, WELL I COULD SPECULATE AS.

SAID I COULD CONCEIVE OF SOUND STRATEGIC AND TACTICAL REASONS FOR DECIDING NOT TO CALL DR. BERLIN.

AND WHAT ARE THOSE REASONS?

HE DIDN'T ENUNCIATE THEM.

WELL THAT'S WHAT I MEAN. THAT'S THE SPECULATIVE PART OF THAT. DON'T YOU HAVE TO FILL IN THAT BLANK SUCH AS WITH THE HYPOTHETICAL THAT I GAVE YOU, AND CAN YOU DO IT IN THIS CASE?

I BELIEVE BELOW THE STATE DID PRESENT PLENTY OF TESTIMONY.

AND TELL US AGAIN WHAT THAT TESTIMONY IS THAT WOULD HAVE GIVEN COUNSEL VERY GOOD REASON NOT TO CALL THIS MENTAL HEALTH EXPERT.

I BELIEVE THE TWO I POINT OUT ON THE BRIEF ARE THAT THE STATE WOULD HAVE CALLED THEIR OWN MENTAL HEALTH EXPERT AND THEY DID AT THE EVIDENTIARY HEARING WHICH IS WHY WE DO THESE. DOCTOR UPSOM FOUND HE DID NOT HAVE ORGANIC BRAIN DAMAGE. THAT HE WAS A SOCIOPATH. ALSO WOULD HAVE INTRODUCED THE WHOLE MENTAL HEALTH ISSUE WHICH WOULD HAVE BROUGHT IN THE 1968 EVALUATION HE WAS A SOTION YO PATH.

WHEN YOU SAY IT WOULD BRING IN THE WHOLE MENTAL HEALTH ISSUE, IF THE GUY WAS A LIFE LONG PSYCHOTIC PERSON AND A LIFE LONG MENTAL ILLNESS AND THE ONLY WAY YOU CAN SAVE THIS PERSON IS BY GETTING SOME SUBSTANTIAL STATUTORY OR NON-STATUTORY MITIGATION, THEN I'M TRYING TO FIGURE OUT WHAT, YOU KNOW, AND AGAIN TRYING TO LOOK AT THIS, NOT IN THE HINDSIGHT, BUT IN, -- WHY YOU DON'T CALL SOMEBODY WHEN YOU KNOW THAT THE 1969 PRIOR VIOLENT FELONY IS GOING TO COME OUT WITH ALL ITS GORY DETAILS, TO HELP TO EXPLAIN TO THE JURY NOT TO EXCUSE IT, BUT TO SAY THIS IS A PERSON THAT'S BEEN SICK HIS WHOLE LIFE. THE TWO TIMES THAT HE KILLED, ALTHOUGH IT IS NOT MOTIVATION THAT EXCUSE HIS ACTIONS, ONE, HE WAS BEING BULLIED AND THE PERSON WAS THIS AND THAT, WOULD HAVE CALLED INTO QUESTION HIS PARANOID PERSONALITY. AND THE OTHER WAS ALSO WHERE HE THOUGHT HIS FIANCE WAS CHEATING ON HIM. AND ALTHOUGH THIS IS NOT ACTIONS WE CONDONE, THIS IS A PRODUCT OF A VERY MENTALLY ILL PERSON. AND ONE MORE THING ABOUT THIS IS THAT, THERE IS NOTHING IN THE JUDGE'S ORDER THAT SHOWS THAT HE CONSIDERS AND HE GOES ON FOR SEVERAL PAGES, WITH DR. BERLIN SAYS ABOUT THE MENTAL ILLNESS TO BE NOT RELIABLE OR TO BE NOT CREDIBLE.

WHICH IS I BELIEVE INCONSISTENT WITH HIS FINDING THAT THERE ARE STRATEGIC REASONS NOT NOT TO CALL HIM.

TELL US, ABOUT THE STATE'S WITNESS. DID THE STATE HAVE A MENTAL HEALTH EXPERT AVAILABLE AT THE PREVIOUS TRIAL?

I DON'T KNOW THAT THAT WAS, THAT THE STATE ATTORNEY WAS ASKED THAT QUESTION. I MEAN IF THEY HAD PUT IN DISCOVERY --.

DOCTOR UPSON TESTIFY AT THE EVIDENTIARY HEARING?

CORRECT.

HAD HE BEEN HIRED BY THE STATE BEFORE? IN OTHER WORDS, WAS THE STATE POISED AND THE DEFENSE LAWYER WOULD HAVE KNOWN AT THE PREVIOUS TRIAL, THAT IF HE CALLED DR. BERLIN, THE STATE HAD A WITNESS IN THE WINGS THAT WOULD COME AND TESTIFY TO THE OPPOSITE OF WHAT DR. BERLIN IS SAY? WHAT DOES THE RECORD SHOW ABOUT THAT?

I DON'T KNOW THAT IT SHOWS ANYTHING. THIS ATTORNEY --.

YOU DON'T KNOW IF THE STATE HAD ASKED FOR AN EXAMINATION AND AN EXPERT AT THE PREVIOUS TRIAL?

I DON'T RECALL READING THAT BEING BROUGHT UP. THERE WERE NO REASONS.

DID THE DEFENDANT EVER FILE A MOTION OR NOTICE THAT THEY WERE GOING TO RELY ON MENTAL HEALTH?

NO, THAT'S WHY THERE WERE NO WRITTEN REPORTS. HE WANTED TO HOLD THAT BACK. BEFORE I FORGET TO MAKE THE POINT, AS FAR AS THE FAILURE TO INVESTIGATE, THERE IS NO EVIDENCE FROM THE SUBSEQUENT WITNESSES AND THERE IS 11 CITES TO HOW UNCOOPERATIVE HE WAS IN THE BRIEF. THE TRIAL COURT ACTUALLY FOUND QUITE THE OPPOSITE. HE SAYS REGARDLESS OF WHAT THIS COULD HAVE BEEN, HE FOUND SUFFICIENT EVIDENCE THAT EXISTED IN 1991 THAT KOUB COULD HAVE PRESENTED. THAT'S WHY HE FOUND FOR THEM. IT, HE DIDN'T ADDRESS ANY OF THE EVIDENCE THAT CAME OUT SUBSEQUENTLY. HE FOUND THAT REGARDLESS, AND IT IS IN THE SAME PARAGRAPH, REGARDLESS OF THE MINIMAL CONTACT DR. BERLIN TESTIFIED HE WAS READY TO GO FORWARD. BECAUSE COUNSEL CAN'T REMEMBER THE ACTUAL REASON HE DIDN'T USE HIM, I'M COMPELLED TO FIND OR CONSTRAINED TO FIND THAT DOESN'T SATISFY STRICKLAND. THERE IS NO ALLEGATION OF THAT IN LIPPMAN. LIPPMAN, PART OF THE 196969 PRIOR INCIDENT, LIPPMAN SAID ON THE OUTSIDE IT WAS DRUGS AND ALCOHOL THAT ERODED HIS CONTROL AND THAT IS WHY HE KILLED. IN PRISON HE HAD NO DRUGS AND ALCOHOL WHICH REALLY IT WAS BECAUSE HE HATED BLACKS. THAT DOESN'T PLAY WELL TO THE JURY.

BUT THE UNDERLYING THEME OF BOTH OF THE KRIMENTS IS THERE IS SOME PARANOIA ABOUT WHAT HAS HAPPENED, WHICH IS THAT IN, I MEAN.

AND THAT WAS REFUTED AT THE EVIDENTIARY HEARING.

BUT THAT'S FOR A JURY TO DETERMINE. NOT FOR US TO LOOK AND SAY WITHOUT, CERTAINLY THEY WEREN'T ABLE TO DETERMINE IT WITHOUT MENTAL HEALTH TESTIMONY. THEY DIDN'T KNOW ANYTHING ABOUT MR. DUNCAN'S LIFE LONG HISTORY OF THIS. AND YOU KNOW, WE HAVEN'T REALLY TALKED AGAIN ABOUT WHY THERE WAS NO ATTEMPT TO CONTACT THE EX-WIVES. AND THE TESTIMONY THAT THEY BROUGHT.

COUNSEL TESTIFIED THEY CONTACT WITH THE WITNESSES THE WERE DISCLOSED BY DEFENDANT. AND BERLIN ADMIT THAD THE WITNESS HE GAINED SUBSEQUENTLY, HE GOT THOSE NAMES FROM THE DEFENDANT AND THOSE NAMES WERE NOT GIVEN TO HIM BY THE DEFENDANT BEFORE 1998 OR 99.

WOULD YOU BEFORE YOU SIT DOWN, PLEASE TELL US WHAT ARE THE THINGS THAT YOU SEE IN THIS RECORD THAT A LAWYER WOULD WANT TO KEEP FROM A JURY AND NOT PRESENT BEFORE A

JURY THAT WOULD BE ASSOCIATED WITH DR. BERLIN, IF HE HAD BEEN CALLED? HOW ABOUT THAT FOR JUST A SUMMARY, WAS THE 1969 RECORD THAT WAS PLACED INTO EVIDENCE? OR WHAT EXACTLY WAS IT THAT THE REASON THAT THE JUDGE COULD RELY ON FOR SAYING THAT THERE IS GOOD REASONS? COULD YOU OUTLINE THOSE FOR US?

I THINK THERE ARE SEVERAL. AND I WILL TRY. ONE, HE CONCEDED THAT HIS INTERPRETATION WAS NON-STANDARD. AND IT COULD EASILY BE REBULLETED. AND HE CONCEDED THAT. SO I AM SURE HE RELAYED THAT TO COUNSEL. AND WHEN THEY WOULD HAVE FILED NOTICE OF RELYING ON MENTAL HEALTH I AM SURE THE STATE WOULD HAVE RETAINED AN EXPERT. THIS MAN HAD DONE FIVE OR SIX CAPITAL TRIALS AT LEAST ONE THAT HAD GONE TO A JURY. HE HAD DONE 250 FELONY TRIALS. HE WAS ACTUALLY THE SUPERVISING PUBLIC DEFENDER. HE KNEW WHAT HE WAS DOING. AND NOBODY CHALLENGES HIS REASONS NOT TO CALL DOCTOR LIPMAN. WE ARE SIMPLY STANDING HERE BECAUSE WE DON'T KNOW. YOU'RE ASKING ME TO GUESS.

NO, WHAT THINGS ARE THERE?

SHIFTED TO THE STATE.

PLEASE DON'T GUESS. WHAT THINGS ARE THERE? IS THERE SOMETHING ABOUT THE EXHIBIT THAT WAS PLACED IN EVIDENCE CONCERNING THE 69 MURDER THAT WOULD HAVE BEEN DEATH PRIMENT TAKE?

HE WAS DIAGNOSED A AS A SOCIOPALATE. WAS NOT A ORGANIC BRAIN INJURY. DIRECTLY CONTRARY TO DR. BERLIN'S TESTIMONY.

ANYTHING ELSE?

WELL THE PRISON RECORD. ALTHOUGH HE SAID HE HAD GLOWING WORK REPORTS. EVERY TIME HE WAS PUT ON WORK RELEASE, HE REEVALUATED AND GOT PUT BACK IN. SO THAT CONTRADICTS ITSELF. AND THE ATTORNEY TESTIFIED HE GAVE HIM THE PRISON RECORDS. AND THEN THE PRISON RECORDS SHOWS HE WAS TRANSFERRED BECAUSE HE THREATENED ANOTHER INMATE. HE HAD ALREADY KILLED ONE.

ALL RIGHT WE ARE GOING TO HAVE TO CLOSE ON THAT NOTE. YOU HAVE EXAMINE EXHAUSTED THE TIME OF BOTH OF YOU. THANK YOU BOTH VERY MUCH.