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Lynford Blackwood v. State of Florida

WE WILL CALL THE LAST CASE ON THIS MORNING'S DOCKET WHICH IS BLACKWOOD VERSUS STATE OF FLORIDA.

CHIEF JUSTICE: PARTIES READY. MR. ^SCHER?

TODD SCHER ON BEHALF OF THE APPELLANT.

I WANT TO MAKE SURE YOU HAVE INDICATED YOU ONLY WANT FIVE MINUTES?

WHAT I INTENDED TO DO, YOUR HONOR. I AM AN APPELLANT AND A CROSS APPEALEE AND MY INTENTION WAS TO REALLY REST ON THE BRIEFS AS TO THE CLAIMS REGARDING THE GUILT PHASE AND RESERVE MY TIME TO RESPOND.

CHIEF JUSTICE: ALL RIGHT. THAT'S FINE.

SO WITH THAT BEING SAID UNLESS THE COURT HAS ANY QUESTIONS ABOUT THE GUILT PHASE ISSUES I WILL RESERVE MOST OF MY TIME TO RESPOND TO THE STATE'S ARGUMENT. THANK YOU.

CHIEF JUSTICE: ALL RIGHT. YOU ARE UP.

MAY IT PLEASE THE COURT, I AM WITH THE ATTORNEY GENERAL'S OFFICE.

YOU ARE IN A UNIQUE POSITION IN THIS CASE.

YES.

NOW, THE STATE ALWAYS GETS THE BENEFIT OF THE PRESUMPTION OF CORRECTNESS OF THE TRIAL COURT'S FINDINGS ON APPEAL. IN THIS CASE, OF COURSE, YOU ARE GOING TO SUFFER FROM THE PRESUMPTION OF CORRECTNESS. SO WE HAVE TO TAKE THE FACTS, AT LEAST THE FACTS IN THE LIGHT MOST FAVORABLE TO THE JUDGE'S RULING, CORRECT, SO YOU ARE GOING TO STICK TO THAT WHEN YOU TELL US WHAT THE FACTS ARE AS FOUND BY THE TRIAL COURT.

RIGHT. REGARDING MY CROSS APPEAL, YOUR HONOR?

YES. I WOULD LIKE TO SAY THAT GIVEN COUNSEL'S RESTING ON HIS BRIEF I ALSO WILL FORM OUR RESPONSES TO THE GUILT PHASE.

CHIEF JUSTICE: I THOUGHT YOU WERE GOING TO REST ON YOUR TIME AS WELL. REGARDING YOUR ORAL ARGUMENT.

NO, THE TRIAL COURT'S ORDER HERE GRANTED A NEW PENALTY PHASE AND IN GRANTING A NEW PENALTY PHASE HE FOUND THAT COUNSEL WAS DEFICIENT FOR NOT PRE-- PRESENTING AND SECURING THE MENTAL HEALTH EXPERT FOR THE PENALTY PHASE AND THEN HE WENT ON AND HE FOUND THAT THERE WAS PREJUDICE HERE BECAUSE THE JURY THEN, THE JURY DIDN'T HEAR FROM THAT EXPERT AND WHAT HAPPENED WAS THAT THERE WAS AN EXPERT THAT TESTIFIED AT THE SPENCER HEARING AND THE TRIAL COURT RELIED HEAVILY UPON HER FINDINGS IN ENTERING THE DEATH ORDER.

IS IT YOUR CLAIM UNDER STRICKLAND, WHETHER THE -- THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT DOESN'T INCLUDE THE JURY'S SENTENCING RECOMMENDATION, ONLY THE ULTIMATE DETERMINATION OF SENTENCING BY THE TRIAL JUDGE?

NO, THE STATE'S POSITION HERE IS THAT THE TRIAL COURT ERRED IN FINDING PREJUDICE HERE, BECAUSE IN THE TRIAL COURT'S ORDER WHAT THE TRIAL COURT DIDN'T CONSIDER WAS THAT WHAT DR.^BLOCK-GARFIELD TESTIFIED TO AT THE SPENCER HEARING WAS ESSENTIALLY CUMULATIVE TO WHAT THE JURY HEARD DURING THE PENALTY PHASE. DURING PENALTY PHASE, THERE WERE TEN FAMILY AND FRIEND WITNESSES THAT TESTIFIED, AND --

WAS THERE ANY EXPERT THAT TESTIFIED DURING THE PENALTY PHASE?

NO, THERE WAS NOT AN EXPERT THAT TESTIFIED DURING THE PENALTY PHASE BUT DR.^BLOCK-GARFIELD WHO TESTIFIED AT THE SPENCER HEARING BASICALLY SHE SAID THAT BLACKWOOD WAS DEPRESSED, SHE SAID THAT HE HAD AN IQ OF 70 BUT THEN SHE TOOK THE NUMBER BACK BECAUSE SHE SAID BECAUSE OF THE DEPRESSION SHE COULDN'T REALLY, IT WASN'T REALLY A VALID INDICATOR OF HIS IQ, BECAUSE HE WAS SO DEPRESSED AT THE TIME HE TOOK THE TEST. SHE ALSO FOUND THAT HE WAS A GOOD PARENT AND THAT HE WAS A GOOD EMPLOYEE. NOW, IF YOU LOOK AT THE FAMILY MEMBERS AND THE FRIENDS WHO TESTIFIED AT THE PENALTY PHASE, WHAT YOU FIND IS THAT WHAT DR.^GARFIELD TESTIFIED TO AT SPENCER WAS ESSENTIALLY CUMULATIVE. TO WHAT THE FAMILY MEMBERS SAID.

CHIEF JUSTICE: ARE YOU SAYING THERE WAS NO PREJUDICE?

YES, THAT THE TRIAL COURT ERRED ON THE PREJUDICE PRONG. WE ARE CENTERED ON THAT ARGUMENT BECAUSE, FOR EXAMPLE --.

BEFORE YOU GO FURTHER, THIS IS A CASE WHERE THERE WAS ONLY ONE AGGRAVATOR FOUND, HAP, CORRECT?

RIGHT.

AND WHAT MITIGATORS WERE FOUND?

THE STATUTORY MITIGATOR OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY AND THEN AS A NONSTATUTORY MITIGATOR, MENTAL AND EMOTIONAL DISTURBANCE AS WELL AS APPROXIMATELY SEVEN OTHERS, GOOD PARENT, GOOD FATHER, THE FACT THAT THE MURDER RESULTED FROM A LOVER'S QUARREL THAT HE HAD THE CAPACITY FOR REHABILITATION, AND HE HAD GOOD CONDUCT IN JAIL AND HAD COOPERATED WITH THE POLICE. DEPRIVED CHILDHOOD.

BUT WHAT ABOUT DR.^JACOBSON TESTIFIED THAT HE WAS EXPERIENCING AN EXTREME EMOTIONAL DISTURBANCE AT THE TIME OF THIS INCIDENT AND THIS INCIDENT WAS, AGAIN, AS JUSTICE CANTERO POINTED OUT THE SINGLE AGGRAVATOR CASE CRYING OUT FOR SOME EXPLANATION OF HOW A MAN WHO HAD NO PRIOR SIGNIFICANT CRIMINAL HISTORY PERPETRATED THIS HORRIBLE ACT ON SOMEONE THAT HE HAD CARED FOR. SO, AGAIN, THE TRIAL COURT FOUND THAT NOT ONLY WAS THIS INFORMATION THAT SHOULD HAVE BEEN PRESENTED TO THE JURY, BUT I DON'T SEE THAT IT IS CUMULATIVE. THAT'S DIFFERENT AND QUALITATIVELY THAN WHAT THE TRIAL JUDGE FOUND.

YOUR HONOR, THE TRIAL COURT'S ORDER FOCUSED HEAVILY ON THE FACT AND HE SAID THE REASON I'M GOING TO FIND THAT THERE IS A REASONABLE PROBABILITY THAT THE JURY'S RECOMMENDATION MIGHT HAVE BEEN DIFFERENT IS BECAUSE THEY DIDN'T HEAR FROM THE EXPERT, DR.^TRUDY BLOCK-GARFIELD. OKAY, TAKING ASIDE FOR THE MOMENT THERE WERE

TWO ADDITIONAL EXPERTS THAT CAME INTO THE EVIDENTIARY HEARING. DR. JACOBSON AND EISENSTEIN AND BOTH OF THEM DID SAY THAT THEY OPINED THAT THEY WOULD GIVE THE STATUTORY MITIGATOR OF EXTREME MENTAL AND EMOTIONAL DISTURBANCE. BUT IT IS IMPORTANT TO REMEMBER THAT DR. BLOCK-GARFIELD ALSO TESTIFIED AT THE EVIDENTIARY HEARING AND SHE ADHERED TO HER POSITION THAT SHE WOULD NOT GIVE THE STATUTORY MITIGATOR, THAT SHE WOULD STILL EVEN AFTER EVALUATING THEIR OPINIONS THAT SHE WOULD STILL ONLY GIVE IT AS A NONSTATUTORY MITIGATOR.

NOW, IT SEEMS AT THE EVIDENTIARY HEARING, THAT THE DEFENSE ATTORNEY ACTUALLY TESTIFIED THAT THE MENTAL HEALTH PRESENTATION WAS PART OF HIS STRATEGY IN THIS CASE. AND IN THIS CASE, AS OTHER JUSTICES HAVE POINTED OUT, YOU HAVE THIS ONE STATUTORY AGGRAVATOR. IF IT IS A PART OF YOUR STRATEGY TO GET THIS MENTAL HEALTH MITIGATION INFORMATION, WHY NOT PRESENT IT TO THE JURY?

WELL, WHAT HAPPENS IN THIS CASE WAS HE WAS RELYING UPON --

I MEAN, YOU KNOW, OFTEN WE SAY IN CASES THAT THERE MIGHT BE A STRATEGY NOT TO PRESENT IT TO THE JURY, BECAUSE THERE ARE THINGS IN THE REPORT THAT ARE NOT FAVORABLE, ET CETERA.

CORRECT.

WAS THERE A STRATEGY HERE OF NOT PRESENTING IT TO THE JURY AND IF THERE WAS, WHY?

NO, IT WASN'T A STRATEGY HERE NOT PRESENTED TO THE JURY. WHAT ACTUALLY HAPPENED IN THIS CASE WHAT MR. ULLMAN TESTIFIED TO WAS THAT HE WAS RELYING UPON AN EXPERT, DR. MACALOOSA WHO WAS ONE OF THREE EXPERTS WHO HAD EVALUATED MR. BLACKWOOD FOR COMPETENCY. HE WAS THE ONLY ONE WHO FOUND HIM NOT COMPETENT TO PROCEED TO TRIAL TO MR. ULLMAN FELT THAT WOULD BE HIS BEST EXPERT FOR MITIGATION PURPOSES. PRIOR TO THE GUILT PHASE OF THIS TRIAL, HIS TIME RECORDS WERE INTRODUCED AT THE EVIDENTIARY HEARING AND THEY INDICATE THAT HE DID SEND A MEDICATION PACKAGE TO MR. MACALOOSA AND DID A FOLLOW-UP LETTER TO HIM.

WHAT DID THAT PACKAGE INCLUDE? BECAUSE THERE ARE OTHER INDICATIONS IN THE RECORD THAT HE DID NOT SEND HIM A LOT OF INFORMATION THAT YOU WOULD NORMALLY SEND TO AN EXPERT.

WHAT WAS INCLUDED IN THE PACKET WAS NOT WRITTEN DOWN ON THE TIME RECORDS AND MR. ULLMAN DID NOT HAVE A RECOLLECTION OF EXACTLY WHAT WAS INCLUDED. SO THAT NEVER, YOU KNOW, WAS TESTIFIED TO AT THE HEARING. BUT WHAT HAPPENED WAS THEN THEY HAD THE GUILT PHASE AND AFTER HE HAD A VERDICT OF GUILTY, HE SENT DR. MACALOOSA ANOTHER LETTER SAYING NOW I WOULD LIKE YOU TO EXAMINE MY CLIENT FOR THE STATUTORY MITIGATION. THERE WAS A SECOND LETTER SENT BY HIM AND THEN BASICALLY PRIOR TO THE PENALTY PHASE HE RECEIVED A LETTER BACK FROM DR. MACALOOSA WHICH WAS THE FIRST INDICATION HE RECEIVED THAT DR. MACALOOSA WOULD NOT BE ABLE TO BE HIS EXPERT.

CHIEF JUSTICE: THERE WAS SOME ANSWER THAT THE DEFENSE LAWYER SAID WAS A CYA TYPE OF THING. HE SAID I NEED ANOTHER \$150 OR SOMETHING?

WELL, THERE WAS SOME DISPUTE AS TO WHETHER DR. MACALOOSA DID NOT WANT TO TESTIFY BECAUSE OF THE FEE. THE FEE WAS NOT HIGH ENOUGH FOR HIM. SO MR. ULLMAN WAS INVESTIGATING AND WAS INVESTIGATING USING A MENTAL HEALTH EXPERT. SO IT WASN'T THAT HE DIDN'T WANT TO. IT WAS THAT UNFORTUNATELY FOR HIM THE EXPERT THAT HE HAD RELIED UPON ALL ALONG AT THE LAST MINUTE BACKED OUT.

WELL, DID HE MOVE THROUGH A CONTINUANCE THEN?

NO, AS THE TRIAL COURT FOUND HE DID NOT MOVE FOR A CONTINUANCE.

CHIEF JUSTICE: YOU'VE GOT A SITUATION, BASED WITH HE KNOWS THERE IS ONLY ONE AGGRAVATOR FROM THIS TERRIBLE, TERRIBLE CRIME. HE ABANDONED. THAT'S BASICALLY WHAT THE TRIAL COURT FOUND. ANY DECISION TO PRESENT MENTAL HEALTH MITIGATION SIMPLY BECAUSE THIS EXPERT STARTS TO GIVE THEM A RUN-AROUND AND DOESN'T DO EVERYTHING IN HIS POWER AT THAT POINT TO EITHER GET ADDITIONAL EXPERTS OR TO TELL THE COURT THAT HE NEEDS MORE TIME.

RIGHT. AND IDEALLY THERE ARE CERTAIN THINGS THAT DEFENSE COUNSEL SHOULD HAVE DONE IN THIS CASE. BUT THE STATE'S FOCUS HERE IS THAT UNDER STRICKLAND, YOU HAVE TO MEET BOTH PRONGS. BOTH PRONGS HAVE TO BE SHOWN. DEFICIENCY AND PREJUDICE.

CHIEF JUSTICE: AND WHICH ONE ARE WE NOT SEEING HERE?

OUR FOCUS IS ON THE PREJUDICE PART.

CHIEF JUSTICE: JUDGE KAHN FOUND AND WE AFFIRMED THAT THERE WAS NOT A FINDING OF ANY EXTREME, EMOTIONAL DISTURBANCE BECAUSE OF WHAT THIS KIND OF WEAK TESTIMONY WAS AS IN -- FROM THE EXPERT, AND THAT THESE EXPERTS NOW, THE TWO ADDITIONAL ONES, HAVE SOME VERY SUBSTANTIAL REASONS, NOT JUST CONCLUSION REASONS, WHAT HE WAS SUFFERING FROM, AND THE SIGNIFICANT DEPRESSION AND HOW WHAT HAPPENED, YOU KNOW, SORT OF TRIGGERS, YOU KNOW, THIS VERY VIOLENT AND EMOTIONAL ACT.

ACTUALLY THE TWO NEW EXPERTS, I MEAN THEIR FINDINGS ARE NOT THAT SIGNIFICANTLY DIFFERENT. I MEAN, DR. ^BLOCK-GARFIELD FOUND HIM TO BE SUFFERING FROM MAJOR DEPRESSION. THAT WAS ALSO TESTIFIED TO BY HIS FAMILY MEMBERS, HIS LONG-TIME FRIEND OF 15 YEARS TESTIFIED THAT HE WENT TO HIS HOUSE AND HE WAS BASICALLY CURLED UP IN THE FETAL POSITION.

CHIEF JUSTICE: THIS WAS A 4-3 AFFIRMING, ISN'T IT A FACT OF WHETHER OUR CONFIDENCE IN THE OUTCOME MIGHT BE UNDERMINED FROM LOOKING AT WHAT WE CLEARLY SAW AS VERY WEAK EXPERT TESTIMONY THAT WAS AUTHORED ONLY IN THE -- AT THE SPENCER HEARING AND WHY NOW WE FIND OUT THAT IT WAS ABANDONED AND NOT PRESENTED TO THE JURY, THAT WE LOOK AT NOT ONLY WHAT THE JURY DIDN'T HEAR BUT WHAT THIS TRIAL COURT, WHAT THIS COURT IS DEPRIVED OF EVALUATING?

WELL, WITH THE FOCUS OF THE COURT'S ATTENTION IS HERE IS ON THE TRIAL COURT WHO CITED THE PENALTY PHASE AND OF COURSE THIS COURT HAS A REVIEW OF THAT.

CHIEF JUSTICE: BUT THEY SAY THAT I FIND THAT MY CONFIDENCE IN WHAT THE JURY RECOMMENDED IS UNDERMINED. AND ALSO THE DEATH SENTENCE THAT I RENDERED, MY CONFIDENCE IN THAT IS ALSO UNDERMINED.

RIGHT. BUT IN CONCLUDING THAT HIS CONFIDENCE WAS UNDERMINED, THE TRIAL COURT POINTED ONLY TO THE FACT THAT, GEE, THE JURY DIDN'T HEAR FROM DR. ^BLOCK-GARFIELD. AND WHAT THE STATE'S POSITION IS THAT YOU LOOK AT WHAT WAS PRESENTED AT PENALTY PHASE YOU WILL SEE THAT THE JURY HEARD EVERYTHING ESSENTIALLY THAT DR. ^BLOCK-GARFIELD CAME IN AND TESTIFIED. THEY DIDN'T HEAR IT FROM A DOCTOR. I MEAN, FOR EXAMPLE --

SO DOES THAT IN OUR ANALYSIS DESERVE SOME SEPARATE CONSIDERATION.

SHOULD THAT DESERVE ANY CONSIDERATION?

I SUPPOSE IT IS GOING TO DEPEND UPON THE QUALITY OF THE TESTIMONY THAT WAS PRESENTED, AND I HAVE ACTUALLY LOOKED THROUGH, I MEAN AND COMPARED IN THIS CASE THE TESTIMONY THAT WAS PRESENTED BY THE LAY WITNESSES WAS VERY SIGNIFICANT, BECAUSE YOU ACTUALLY HAD SOME OF THE NONSTATUTORY MITIGATORS THAT YOU HAVE HERE, WERE ACTUALLY BETTER PRESENTED BY THE LAY WITNESSES, BECAUSE FOR EXAMPLE YOU HAVE GOOD PARENT AS ONE OF HIS NONSTATUTORY MITIGATORS. WELL, AT PENALTY PHASE THAT WAS TESTIFIED TO BY HIS SON, AND THE MOTHER OF HIS CHILD WHO CAME IN. SO THAT WAS CERTAINLY BETTER PRESENTED BY THE LAY WITNESSES THAN JUST HIS SELF REPORTING TO THE DOCTOR ON THAT.

HOW ABOUT STATUTORY?

RIGHT.

I MEAN ISN'T THAT WHAT WE ARE TALKING ABOUT? STATUTORY HERE WAS NO SIGNIFICANT PRIOR CRIMINAL HISTORY. SO THAT WAS SOMETHING --

NOW, REGARDING THE EMOTIONAL, THE MENTAL OR EMOTIONAL DISTURBANCE, YOU HAVE HIS FRIEND, HIS LONG-TIME FRIEND OF 15 YEARS DESCRIBED HIM AS VERY DEPRESSED IN THE SUMMER, HIS BROTHER, MICHAEL, WHO SAW HIM EVERY DAY, BASICALLY THE WHOLE YEAR PRIOR TO THIS MURDER HAPPENING, HE SAID THAT HE GOT SO DEPRESSED THAT ABOUT A MONTH BEFORE CHRISTMAS, HE WASN'T EVEN TAKING CARE OF HIS HOUSE. HE HAD GONE OVER THERE TO PICK HIM UP TO GO PLAY SOCCER AND HE FOUND HIM IN THE FETAL POSITION. THE SHEETS WERE OFF THE BED AND THAT THAT'S HOW DEPRESSED HE WAS. SO I THINK GIVEN THE QUALITATIVE NATURE OF THAT, A JURY IS GOING TO BE MORE SIGNIFICANT AND THE JURY IS GOING TO UNDERSTAND THAT HE HAD A MENTAL OR EMOTIONAL DISTURBANCE.

HOW WAS THE DEPRESSION RELATED TO EMOTIONAL DISTURBANCE AND A VERBAL IQ SCORE OF 70 PLACING HIM IN A BORDERLINE RESTARDED -- RETARDED RANGE OF INTELLIGENCE? HOW WAS THE JURY ABLE TO WEIGH THAT WE HAVE A LOW LEVEL FUNCTIONING INDIVIDUAL WHO IS SEVERELY DEPRESSED AND EMOTIONALLY DISTURBED? WAS IT DIFFERENT THAN BEING DEPRESSED? I THINK. SOMEWHAT DIFFERENT. HOW WERE THEY ABLE TO WEIGH THAT WITH A VERY LOW FUNCTIONING IQ PERSON? HOW WAS THAT EXPLAINED TO THEM BY THE LAY WITNESSES?

ACTUALLY WHAT DR. ^BLOCK-GARFIELD TESTIFIED TO AT THE EVIDENTIARY HEARING WAS THAT EVEN THOUGH SHE FOUND AN IQ OF 70 SHE WOULD NOT CLASSIFY HIM AS BORDERLINE RETARDED BECAUSE OF HIS HIGH FUNCTIONING. THIS WAS A MAN WHO HAD WORKED 15 YEARS AS A CABINET MAKER. HE SUPPORTED HIMSELF AND HE SUPPORTED HIS SON AND HE SUPPORTED THE VICTIM. THERE IS TESTIMONY HE SUPPORTED HER ON AND OFF FOR THE TEN YEARS THEY HAD DATED. SO DR. ^BLOCK-GARFIELD DID NOT WANT TO CLASSIFY HIM AS BORDERLINE RETARDED SO THE LAY TESTIMONY THAT CAME OUT AT THE PENALTY PHASE WAS TO THE SAME EXTENT, ABOUT WHAT A HARD WORKER HE WAS. THAT HE HAD WORKED FOR THE 15 YEARS. THAT HE SUPPORTED HIS SON. AND THEN REGARDING HIS INTELLIGENCE, THERE WAS SUFFICIENT TESTIMONY THAT CAME OUT REGARDING HIS LOW INTELLIGENCE WHICH ISN'T A NUMBER, BUT HIS FRIEND, AGAIN, HIS LONG-TIME FRIEND OF 15 YEARS, WILLIAM PAUL BENNETT DESCRIBED HIM AS SLOW, LIKE A CHILD, SOMEONE YOU COULD LEAD. HE DESCRIBED HIS INTELLIGENCE LEVEL AS A GRADE 4 OR 5. A PERSON WHO WAS NOT VERY DEEP.

BUT YOU DON'T SEE WHEN YOU HAVE THAT KIND OF LAY TESTIMONY PRESENTED THAT A FOLLOW-UP OF THAT WITH A MEDICAL EXPERT WHO THEN CAN TAKE ALL OF THOSE THINGS THAT HAVE BEEN TESTIFIED TO THAT PEOPLE HAVE OBSERVED OVER THE YEARS AND PUT THEM INTO SOME KIND OF CONTEXT AND YOU DON'T BELIEVE THAT THAT WOULD MAKE A DIFFERENCE TO A JURY? I MEAN, OBVIOUSLY THE TRIAL JUDGE HERE FELT THAT IT WOULD.

RIGHT. I DON'T BELIEVE IN THIS CASE, GIVEN THE QUALITY OF THE PENALTY PHASE TESTIMONY THAT WE HAVE THROUGH THE EXPERTS, I DON'T THINK IT WOULD HAVE MADE A DIFFERENCE.

CHIEF JUSTICE: AGAIN --

AND BECAUSE OF WHAT THE EXPERT ACTUALLY ULTIMATELY CAME OUT AND SAID.

CHIEF JUSTICE: YOU HAD SAID THAT IN GRANTING A NEW PENALTY PHASE ON THE PREJUDICE PRONG, THAT THE JUDGE ONLY RELIED ON THE FACT THAT BLOCK-GARFIELD DIDN'T TESTIFY TO THE JURY, BUT IT APPEARS THAT THE JUDGE GOES ON, PAGE 7, PAGE 8 AND PART OF PAGE 9 TALKING ABOUT THE OTHER MENTAL HEALTH EXPERTS AND THEIR TESTIMONY.

HE DOES TALK ABOUT THAT.

CHIEF JUSTICE: AND THE JURY BEING DEPRIVED OF ALL OF THAT SO IT AS LITTLE BIT HARD SO HAD THE JURY BEEN PRESENTED WITH EXPERT HEALTH MITIGATION, BUT YOU'VE GOT TO RELATE IT TO THE FACT THAT HE IS TALKING ABOUT THESE OTHER EXPERTS AS WELL.

RIGHT.

CHIEF JUSTICE: HE MIGHT --

THE OTHER EXPERTS WERE EXPERTS THEY WERE ABLE TO COME UP WITH LATER TO SAY MORE FAVORABLE, TO GIVE THEM MORE FAVORABLE TESTIMONY. I MEAN WHO THE COURTS SEEM TO FOCUS ON IN THE PRIOR PAGES OF THAT ORDER WAS DR. ^BLOCK-GARFIELD WHO HE HAD RELIED UPON.

CHIEF JUSTICE: AGAIN, YOUR ARGUMENT WOULD BE SO GOOD IF YOU WERE HERE AND THIS GOES BACK TO WHAT JUSTICE CANTERO SAID WITH THE TRIAL COURT HAVING DENIED RELIEF ON THE PENALTY PHASE. YOU KNOW, ESPECIALLY BECAUSE IN THESE CASES WE ASK WHERE POSSIBLE THE TRIAL JUDGE WAS THE SAME JUDGE THAT SENTENCED THIS MAN TO DEATH, LOOKING AT THIS, AND SAYING, MY GOODNESS, THIS IS A VERY DIFFERENT PICTURE. THE JURY SAW NONE OF IT, AND I OBVIOUSLY DIDN'T SEE THE WHOLE PICTURE, EITHER. AND SO HOW DID, YOU KNOW, SECONDGUESS THAT, IT SEEMS WE WOULD BE BACK TO SECONDGUESSING ALL OF THESE TRIAL COURT DECISIONS. I MEAN, HOW DO WE DISTINGUISH IF IT WERE JUDGE KAHN FINDING THAT THERE WAS NO PREJUDICE? WOULD YOU BE -- I MEAN THAT'S THE ARGUMENT YOU WOULD BE MAKING BUT HERE WE'VE GOT A TRIAL COURT WHO SAYS THIS IS STRONG, MENTAL HEALTH MITIGATION THAT WOULD HAVE UNDERMINED THE CONFIDENCE, THAT UNDERMINES MY CONFIDENCE IN WHAT THE JURY DID.

RIGHT. BUT THE STATE'S POSITION IS THAT GIVEN WHAT HE HEARD AND GIVEN THE FACT THAT DR. ^GARFIELD'S TESTIMONY DIDN'T CHANGE BETWEEN THE SPENCER AND THE EVIDENTIARY HEARING THAT HE REALLY DIDN'T HEAR ANYTHING ELSE, AND REGARDING WHAT THE JURY HEARD THAT THEY HEARD SUBSTANTIALLY THE SAME THING, THAT WHICH HE SAID IN SPENCER WAS CUMULATIVE. IT WOULD BE ANYTHING CORRECT FOR THE COURT TO HAVE DRAWN THAT CONCLUSION BECAUSE HE DIDN'T HEAR ANYTHING DIFFERENT FROM HER BETWEEN SPENCER AND THE EVIDENTIARY HEARING. SHE CAME IN WITH THE EVIDENTIARY OPINIONS AND GIVEN THE TESTIMONY THAT SHE PRESENTED AND THE NONSTATUTORY THAT THAT WAS CUMULATIVE TO WHAT THE LAY WITNESSES HAD TESTIFIED.

BUT YOU WOULD HAVE TO IGNORE, IN ESSENCE, THE ADDITIONAL INFORMATION THAT WAS PRESENTED?

WELL, NO, THAT ADDITIONAL INFORMATION IS JUST AN EXAMPLE OF THEM COMING IN LATER AND THEY HAVE MORE FAVORABLE OPINIONS BUT WE'RE NOT SAYING THAT HAS TO BE IGNORED.

WHAT DOES THE TRIAL JUDGE DO WITH IT? THE TRIAL JUDGE IS NOW PRESENTED WITH EXPERTS THAT SAY THERE WAS EXTREME MENTAL AND EMOTIONAL PROBLEMS IN THIS CASE.

WHICH CONFLICTS WITH DR. BLOCK-GARFIELD.

WHAT YOU ARE SAYING, THOUGH, IS IF HE IS ONLY GOING TO FOCUS ON WHAT DR. BLOCK-GARFIELD SAID THEN HE JUST IGNORES ALL OF THAT.

NO, I'M NOT SAYING THAT. I'M SAYING IN HIS ORDER HE FOCUSES VERY MUCH ON DR. BLOCK-GARFIELD AND HER NOT TESTIFYING IN FRONT OF THE JURY. AND GIVEN THE OTHER EXPERTS WHO TESTIFIED, YOU HAVE TO BALANCE THAT AGAINST DR. BLOCK-GARFIELD ALSO TESTIFIED AT THE EVIDENTIARY HEARING AND SHE SAID SHE WOULDN'T CHANGE ANY OF HER OPINIONS. SHE ADHERED TO ALL OF HER OPINIONS EVEN GIVEN WHAT THEY SAID, SO THAT CUMULATIVELY. THERE WAS NOT SUFFICIENT PREJUDICE BECAUSE THE IMPORTANT PART TO THE JUDGE WAS THE JURY HEARD, WE SAY, BASICALLY DR. BLOCK-GARFIELD WAS CUMULATIVE TO THAT. IF THERE ARE NO FURTHER QUESTIONS, THEN THE STATE ASKS THAT THIS COURT AFFIRM THE DENIAL OF THE 3.850 ON THE GUILT PHASE AND REVERSE ON THE PENALTY PHASE. THANK YOU.

CHIEF JUSTICE: MR. SCHER?

LET ME FIRST SAY THIS THIS IS A CASE WHERE I THINK SHOWS HOW IMPORTANT IT IS TO HAVE A HEARING ON BOTH DEFICIENT PERFORMANCE AND PREJUDICE PRONGS BECAUSE THIS IS A CASE WHERE THEY BOTH INTERSECT. THE STATE IS FOCUSING PRIMARILY ON PREJUDICE. I'M NOT SURE IF THAT CAN BE TAKEN AS A CONCESSION OF DEFICIENT PERFORMANCE BUT I THINK CERTAINLY GIVEN MY POSTURE AND THIS COURT'S CASE LAW, OF COURSE THE SPECIFIC FINDINGS OF FACTS THE COURT PROPERLY APPLIED THE LAW AND I THINK THE DEFICIENT PERFORMANCE PRONG UNQUESTIONABLY SHOULD BE AFFIRMED.

CHIEF JUSTICE: IT WILL HELP US WITH CONTEXT, DID THE TRIAL COURT FIND THAT THERE WAS REALLY NO REASON FOR THE DEFENSE LAWYER TO FAIL TO PRESENT MITIGATION, MENTAL HEALTH MITIGATION TO THE JURY?

CORRECT. IN FACT, THE COURT'S ORDER SPECIFICALLY MAKES A FINDING REJECTING ANY STRATEGIC REASON, AND EVEN IF HE COULD COME UP WITH ONE, THE COURT FOUND THAT IT WOULD HAVE BEEN UNREASONABLE UNDER WIGGINS AND SO THIS IS NOT A SITUATION WHERE YOU DO SEE IN CASES AND THIS IS A POINT THE STATE MADE WHERE COLLATERAL COUNSEL IS COMING IN WITH NEW EXPERTS THAT HAVE BETTER OPINIONS. THERE WERE NO EXPERT OPINIONS AT THE PENALTY PHASE SO IT IS NOT LIKE WE HAVE EXPERTS THAT TESTIFIED AT THE PENALTY PHASE THEY DIDN'T FIND BRAIN DAMAGE AND NOW WE COME IN AND SAY THERE WAS BRAIN DAMAGE. HERE THERE WERE NO EXPERT OPINIONS PRESENTED AT ALL IN THE PENALTY PHASE. NOW, WITH RESPECT TO THE STATE'S REAL ARGUMENT WHICH IS THAT BECAUSE THE TRIAL COURT, BECAUSE DR. BLOCK-GARFIELD DIDN'T ADD ANYTHING NEW SUPPOSEDLY AT THE EVIDENTIARY HEARING THAN WHAT SHE TESTIFIED TO AT THE PENALTY PHASE THE COURT WASN'T IN THE POSITION.

SHE DIDN'T TESTIFY AT THE PENALTY PHASE.

THE SPENCER HEARING. CORRECT.

AND WAS THERE TESTIMONY AT THE SPENCER HEARING, I MEAN THEIR ARGUMENT REALLY IS THAT SHE DIDN'T NEED TO GO BEFORE THE JURY, BECAUSE THE JURY HEARD FROM THE LAY WITNESSES, THE SAME THINGS THAT SHE HAD TESTIFIED TO?

WELL, THAT'S NOT REALLY CORRECT AS JUDGE KAHN POINTS OUT AND AS I ARGUED IN MY BRIEF.

FIRST OF ALL ONE OF THE AREAS THAT WAS NEVER TOUCHED UPON WAS DURING THE, OF COURSE, LET ME BACKTRACK. THERE WAS SIGNIFICANT DIFFERENCE BETWEEN PRESENTING A LAY FAMILY TESTIMONY AND THE FAMILY MEMBERS WERE CROSS-EXAMINED BY THE STATE. THE STATE WASN'T CONCEDED ALL OF THE FAMILY MEMBERS, I KNOW THE MITIGATION EXISTED BUT THERE IS SIGNIFICANT DIFFERENCE BETWEEN PUTTING ON FAMILY MEMBERS TESTIFYING ABOUT A DEFENDANT'S BACKGROUND AND HAVING ESPECIALLY IN THIS CASE, A MENTAL HEALTH EXPERT PUTTING ALL OF THAT TOGETHER AND GIVING THIS JURY UNDERSTANDING OF WHAT BROUGHT THIS PERSON WITH NO CRIMINAL BACKGROUND TO DO SUCH A TERRIBLE THING TO A WOMAN WHO HE WAS IN A RELATIONSHIP WITH FOR 12 YEARS. IF ANY CASE CRIES OUT FOR A MENTAL HEALTH EVALUATION, NUMBER ONE, MENTAL HEALTH EXPLANATION FROM EXPERTS TO EXPLAIN ALL OF THAT, BUT --

AND WHAT WAS THE EXPLANATION?

WELL, I THINK ONE OF THE EXPERTS THAT I BELIEVE IT WAS DR. JACOBSON, I THOUGHT PRESENTED A VERY COMPELLING PICTURE AS TO HAVING GLEANED ALL OF MR. BLACKWOOD'S BACKGROUND FROM GROWING UP IN JAMAICA, THE NEGLECT, AND THE DIS ASSOCIATION THAT HE HAD WITH HIS MOTHER WHEN HIS MOTHER ABANDONED HIM AS A CHILD. ALL OF THAT LED TO OVER THE YEARS, GIVEN CERTAINLY SIGNIFICANT DEPRESSION, ISSUES, THAT WHEN HE WAS CONFRONTED WITH A SITUATION WITH THE VICTIM IN THIS CASE, SHE HAD TOLD HIM HE HAD ABORTED SIX OF HIS CHILDREN, JUST SNAPPED. IT WAS ONE OF THE SITUATIONS WHERE HE SNAPPED. IT WAS NOT A SITUATION WHERE ANYONE IS BLAMING ANY DRUG USE OR ANYTHING ELSE. JUST AS DR. JACOBSON PUT IT, ALL OF THE PIECES FIT TOGETHER IN THIS PARTICULAR CASE. IF WE HAVE A SITUATION WHERE WE HAVE SOMEONE WITH EXTENSIVE PRIOR CRIMES THAT'S A DIFFERENT STORY, BUT HERE I THINK GIVEN THE RATHER UNIQUE SITUATION WHERE SOMEONE CHARGED WITH CAPITAL MURDER HAS ZERO IN TERMS OF CRIMINAL BACKGROUND, AND A TYPE OF CRIME THAT THIS WAS. A VERY VIOLENT, EMOTIONALLY TYPE OF INCIDENT, SPUR OF THE MOMENT, THAT MENTAL HEALTH TESTIMONY NEEDS TO BE PROVIDED. GETTING BACK TO DR. BLOCK-GARFIELD, ONE OF THE THINGS SHE HAD DONE IN HER LAST EVALUATION OF MR. BLACKWOOD WHICH WAS AFTER THE PENALTY PHASE, WAS A NEUROPSYCHOLOGICAL SCREENING TEST. WE HEARD SOME ARGUMENT ABOUT THIS IN THE PREVIOUS CASE. IN THIS CASE SHE ACTUALLY DID DETERMINE THAT HE MET THE -- THE TEST CAME UP WITH IMPAIRMENTS. SHE RECOMMENDED TO TRIAL COUNSEL THAT FURTHER NEUROPSYCHOLOGICAL TESTING WAS DONE AND THAT SIMPLY WASN'T DONE.

CHIEF JUSTICE: BUT WHAT WAS FOUND BASED ON WHAT'S NOW IN THE EVIDENTIARY HEARING, WAS THERE INDICATIONS OF BRAIN DAMAGE?

MORE THAN INDICATIONS. DR. EISENSTEIN TESTIFIED EXTENSIVELY TO THE NEUROPSYCHOLOGICAL BATTERY THAT HE PERFORMED AND TO THE RESULTS WHICH DID COME UP WITH I THINK HIS TERMS WERE SIGNIFICANT IMPAIRMENT, PARTICULARLY IN MR. BLACKWOOD'S EXECUTIVE FUNCTIONING WHICH, OF COURSE, GOVERNED THE TYPES OF AREAS THAT ARE PARTICULARLY VULNERABLE UNDER A STRESSFUL SITUATION ON TOP OF THE FACT THAT WE ARE DEALING WITH SOMEONE WHO HAS A LONG HISTORY OF SIGNIFICANT DEPRESSION.

CHIEF JUSTICE: LET ME MAKE SURE ON THIS THEREFORE IT IS NOT JUST THE ISSUE THAT BLOCK-GARFIELD TESTIFIED OR, YOU KNOW, THAT THE QUESTION IS WHAT SHE TESTIFIED TO, AT THE SPENCER HEARING AND TESTIFIED TO THE JURY THAT WOULD HAVE JUST BEEN THIS TESTIMONY. BUT YOU ARE SAYING THAT THE DEFICIENT PERFORMANCE WHICH WAS ALSO NOT ONLY NOT CALLING THE MENTAL HEALTH EXPERT BUT NOT PURSUING MISS BLOCK-GARFIELD THE NEUROPSYCHOLOGICAL TESTING IS ADDITIONAL QUALITATIVE DIFFERENCE EVEN WITH WHAT BLOCK-GARFIELD COULD HAVE TESTIFIED TO?

CORRECT. ONE THING I WANT TO POINT OUT IS THE STATE RELIAISON WHAT THEY NOW CLAIM TO BE THE TYPE QUALITY OF MITIGATION AT THE PENALTY PHASE FROM LAY WITNESSES BUT, IN FACT, JUDGE KAHN AS NOTED IN FOOTNOTE 3, REJECTED DEPRIVED CHILDHOOD BASED UPON LACK OF SUFFICIENT EVIDENCE TO SUPPORT THE CLAIM SO CERTAINLY THE STATE'S ARGUMENT THAT, WELL, THIS WILL ALL BE CUMULATIVE TO WHAT WAS ACTUALLY PRESENTED AT THE PENALTY PHASE REALLY IS NOT CORRECT EVEN IF THE TRIAL COURT ITSELF REJECTED SOME OF THAT TESTIMONY AND SO IT DOESN'T TAKE A WHOLE LOT TO ESTABLISH DEPRIVED CHILDHOOD UNDER THE STANDARDS THAT ARE SET OUT BY THIS COURT AND THE STATE REALLY I THINK MISS CONSTRUED WHAT THE CLAIM IS. THIS ISN'T A CLAIM WHERE THEY SAID DR.^BLOCK-GARFIELD TESTIFIED AT THE PENALTY HEARING, SHE SHOULD HAVE TESTIFIED AT THE SPENCER HEARING AND THAT IS NOT THE CLAIM. THE MEAT OF THE CLAIM IS THAT THE JURY DIDN'T HEAR NOT ONLY FROM DR.^BLOCK-GARFIELD BUT BECAUSE OF TRIAL COUNSEL'S FAILURES DID NOT HEAR OF SIGNIFICANT MITIGATION, INCLUDING AN ADDITIONAL STATUTORY MITIGATOR WHICH IS THE MENTAL HEALTH MITIGATING FACTOR.

CHIEF JUSTICE: THE ORIGINAL JURY, DID THE DEFENSE, DID THE STATE ARGUE TO THE JURY THAT ANYTHING LIKE THERE IS NO EVIDENCE THAT THIS IS MENTAL HEALTH PROBLEMS, I MEAN WAS THERE ANYTHING LIKE THAT OR DID THEY DENEGRATE THE LAY TESTIMONY THAT WAS PRESENTED? I MEAN, HOW DID IT COME OUT?

I HONESTLY DON'T RECALL. I REALLY DON'T RECALL BECAUSE THERE WAS NO MENTAL HEALTH TESTIMONY PRESENTED I CAN ONLY IMAGINE WHETHER THEY ARGUED THE LACK OF THAT.

CHIEF JUSTICE: A LOT OF TIMES THEY WILL ARGUE THAT THIS SORT OF SELF-SERVING AND HAVING THE FRIENDS TESTIFY, YOU KNOW.

I DON'T REMEMBER THE CLOSING ARGUMENTS WEREN'T IN ISSUE, SO I UNFORTUNATELY DIDN'T HAVE A CHANCE TO REVIEW THEM BEFORE TODAY SO I WOULD RELY ON WHATEVER THE ARGUMENTS WERE BUT BE THAT AS IT MAY, JUDGE KAHN WAS THERE AT THE TIME AND HEARD THE EVIDENCE AT THE EVIDENTIARY HEARING AND WAS THE ONE WHO, OF COURSE, GRANTED RELIEF.

ON THAT ISSUE OF JUDGE KAHN BEING BOTH THE JUDGE WHO HEARD THE PENALTY AND DID SENTENCING PHASE AND THEN HEARS THIS EVIDENTIARY HEARING, HOW ARE WE TO TREAT HIS FINDING THAT THIS DOES, IN FACT, UNDERMINE CONFIDENCE IN THE OUTCOME OF THE PROCEEDING?

JUST LIKE YOU WOULD IN ANY OTHER SITUATION. WE DON'T HAVE CURIOUSLY IN ONE OF THE OTHER CLAIMS THAT THAT JUDGE KAHN DIDN'T ADDRESS IS WHETHER ANY OF THIS INFORMATION PRESENTED TO HIM IN THE SPENCER HEARING WOULD HAVE CHANGED HIS VIEW IN THE SPENCER HEARING SO WE DON'T HAVE A SITUATION WHERE JUDGE KAHN IS IMPOSING HIS OWN SUBJECTIVE VIEWS ON THE CASE. WHAT WE HAVE HERE IS JUST A STRAIGHTFORWARD APPLICATION OF STRICKLAND WHICH IS THAT HE FINDS THAT THE JURY DENIED THE THREE RECOMMENDATION, WAND UNDERMINED IN LIGHT OF THE DEFICIENT PERFORMANCE AND MENTAL HEALTH MITIGATION THAT WAS PRESENTED AT THE EVIDENTIARY HEARING.

HE WAS REQUIRED TO DO THAT UNDER THE STRICKLAND TEST ON AN OBJECTIVE BASIS.

CORRECT. AND THERE IS CERTAINLY NOTHING AND THE STATE HAS NOT SUGGESTED THAT HE DID ANYTHING OTHER THAN THEY DON'T AGREE WITH IT, BUT THEY DON'T MAKE THE SUGGESTION THAT HE USE IT IN A SUBJECTIVE MANNER AND ONE THING ADDITIONALLY I WANTED TO POINT OUT WHILE IT IS POPPED INTO MY HEAD --

AS TO YOUR CLAIM THAT COUNSEL NEGLECTED TO PROVIDE EVIDENCE, EVEN AT THE SPENCER HEARING, PENALTY PHASE OR SPENCER HEARING, YOU LATER DISCOVERED WHAT'S THE

DIFFERENCE BETWEEN THE TESTIMONY THAT WAS PRESENTED AT THE EVIDENTIARY HEARING AS TO THE-

CERTAINLY ONE OF THEM, AREA THAT THE STATE FOCUSED ON AT THE SPENCER HEARING WAS ATTACKING DR.^BLOCK-GARFIELD FOR NOT HAVING ANY COOPERATION FOR ANY OF HER OPINIONS, ASIDE FROM MR.^BLACKWOOD'S SELF REPORT. OF COURSE, BOTH MENTAL HEALTH EXPERTS PRESENTED AT THE EVIDENTIARY HEARING HAD CONTACT WITH MR.^BLACKWOOD'S FAMILY MEMBERS, SISTER, I THINK ONE OF THEM SPENT TIME SPEAKING WITH THEM ON THE PHONE. SO THERE WAS A QUALITATIVE DIFFERENCE IN THE TYPE OF EVIDENCE THAT WAS PRESENTED.

SO ONE OF THE ISSUES IS THAT COUNSEL NEVER HAD ANY DOCTOR ACTUALLY MEET WITH THE DEFENDANT?

FOR PURPOSES OF MITIGATION, NO. THAT'S ABSOLUTELY CORRECT. THE STATE RELIAISON DR.^MACALOOSA WHO FOUND MR.^BLACKWOOD TO BE INCOMPETENT A YEAR AND A HALF OR SO BEFORE TRIAL AND MENTIONED THIS MITIGATION PACKET. ONE THING I DID WANT TO POINT OUT THAT WAS IN THAT MITIGATION PACKET, JUDGE KAHN SAID ON PAGE 10 OF THAT. I CAN'T FIND IT. IT IS IN THE ORDER AND IT IS BASICALLY THE AUTOPSY REPORT. I THINK THE PRIOR COMPETENCEY REPORT JUST THINGS GENERALLY OF THE CASE, NOTHING SPECIFIC, NOTHING ABOUT THE FAMILY OR BACKGROUND. DR.^MACALOOSA NEVER SAW MR.^BLACKWOOD AFTER THE 1995 COMPETENCEY EVALUATION AND WAS NEVER ASKED TO CONDUCT ANOTHER EVALUATION OF MR.^BLACKWOOD AT ANY TIME AND DR.^GARFIELD WAS ASKED TO GET INVOLVED IN THIS CASE AFTER THE PENALTY PHASE.

DID YOU SAY HE WAS NOT ASKED TO DO MITIGATION? I THOUGHT HE WAS REQUESTED TO DETERMINE MITIGATION AND SAID HE COULD NOT FIND THAT HE WAS THE STATUTORY MENTAL MITIGATOR.

HE WAS NEVER ASKED TO GO DO AN EVALUATION OF MR.^BLACKWOOD TO ACTUALLY SEE MR.^BLACKWOOD. WHAT HAPPENED IS THAT ALL WE HAVE ARE THE LETTERS THAT TRIAL COUNSEL SENT DR.^MACALOOSA A LETTER AND THEY ASSUMED HE HAD ASKED DR.^MACALOOSA TO BE AN EXPERT WITNESS. HE DIDN'T REALLY REMEMBER ONE WAY OR THE OTHER AND THEN FOLLOWED UP WITH A LETTER AND THEN IT WAS NOT UNTIL MONTHS LATER, NEVER TALKED TO HIM ON THE PHONE, I DON'T THINK AT THAT POINT. HE MAY HAVE BUT I'M NOT SURE. I DON'T THINK HE COULD RECALL EITHER AND AT THAT POINT WE ARE AT SEVERAL WEEKS BEFORE THE PENALTY PHASE WHERE DR.^MACALOOSA SAYS I CAN'T HELP YOU AND FURTHERMORE I'M NOT GOING TO TESTIFY BECAUSE OF THIS. FURTHERMORE THAT ALSO CUTS AGAINST ANY STRATEGIC REASON THAT COUNSEL COULD HAVE HAD FOR NOT WANTING TO PRESENT MENTAL HEALTH MITIGATION BECAUSE, IN FACT, HE WAS ATTEMPTING TO PURSUE IT ALTHOUGH IN A PRETTY ANEMIC AND INEFFECTIVE FASHION.

WHAT WAS THE TIME PERIOD BETWEEN THE JURY FINDING AFTER THE PENALTY PHASE AND THE SPENCER HEARING?

BETWEEN THE PENALTY PHASE AND THE SPENCER HEARING? THE PENALTY PHASE WAS JANUARY 23, '97. THE SPENCER HEARING WAS APRIL 11TH.

AND WHEN WAS THE EXAMINATION BY BLOCK-GARFIELD?

THE EXAMINATION BY DR.^BLOCK-GARFIELD WAS NOT UNTIL MARCH 12TH. IT WASN'T UNTIL FEBRUARY 25TH, ABOUT FOUR WEEKS AFTER THE PENALTY PHASE, THAT TRIAL COUNSEL ASKED DR.^BLOCK-GARFIELD TO LOOK INTO THE MATTER FOR MITIGATION OF THE SPENCER HEARING AND THEN SHE WENT TO CONDUCT AN EVALUATION ON MARCH 12, 1997. OF COURSE, NOW WEAVER TALK -- WE'RE TALKING TWO YEARS OR SO AFTER HER COMPETENCEY EVALUATION.

THE COUNSEL WAS, OR WAS HE ASKED WHY HE DID NOT SEEK A CONTINUANCE AFTER RECEIVING THE SITUATION FROM DR. ^MACALOOSA?

YOU KNOW, I DON'T KNOW IF HE WAS ASKED OR NOT. I JUST DON'T RECALL WHAT THE RECORD SAYS. WHAT I DO KNOW IS THAT, FOR EXAMPLE, HE WAS ASKED WHY HE NEVER FOLLOWED UP ON DR. ^BLOCK-GARFIELD'S SUGGESTION TO GET A NEUROPSYCHOLOGIST INVOLVED IN THE CASE. OF COURSE, THAT SUGGESTION CAME AFTER THE PENALTY PHASE ANYWAY BUT BE IT AS IT MAY THEN HE SAID HE NEVER HAD A PSYCHOLOGIST TELL HIM THAT FURTHER TESTING WASN'T REQUIRED AND PLUS THERE WAS COSTS AND OTHER MATTERS THAT WERE OF IMPORTANCE TO HIM, AND SO THAT WAS HIS EXPLANATION.

CHIEF JUSTICE: WAS HE PRIVATELY RETAINED?

NOT TO MY RECOLLECTION. I HON -- HONESTLY DON'T KNOW.

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CHIEF JUSTICE: WELL, COST MATTERS ARE AN ISSUE.

I DON'T BELIEVE HE WAS. THERE WAS A PRIOR ATTORNEY WHO WITHDREW AND I WANT TO SAY HE WAS CONFLICT COUNSEL BUT EVEN IF HE WASN'T CERTAINLY YOU COULD MOVE THE COURT FOR COSTS, YOU KNOW, IN A CAPITAL CASE WHETHER THEY ARE RETAINED OR NOT. SO I CERTAINLY THINK GIVEN THE RECORD IN THIS CASE, GIVEN THIS COURT'S DIRECT APPEAL OPINION, IT IS A ONE AGGRAVATOR CASE, NO PRIOR CRIMINAL HISTORY AND GIVEN THE FACT THAT WE WERE BEFORE THE COURT HAVING RECEIVED THE BENEFIT OF THE RULING IN OUR FAVOR, I DO THINK THAT THE LOWER COURT'S ORDER SHOULD BE APPROVED.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL BE IN RECESS UNTIL 9:00 A.M. TOMORROW MORNING.

THE MARSHAL: PLEASE RISE.