Patrick C. Hannon v. State of Florida

MARSHAL: PLEASE RISE. HEAR YE.HEAR YE.HEAR YE.THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA , DRAW NEAR AND GIVE ATTENTION . GOD SAVE T HESE UNITED STATES , THE GREAT STATE OF FLORIDAAND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING. WELCOME TO THE FLORIDASUPREME COURT.THE FIRST CASE ON TODAY'S DOCKET IS HANNON VE RSUS THESTATE OF FLORIDA AND JUSTICE QUINCE IS RECUSED ON THAT CASE. PARTI ES READ Y? ALL RIGHT. MS. KEFFER. PROCEED.

GOOD MORN ING. MAY IT PLEASE THE COURT . SUZANNE KEFFER ON BEHALF THE APPELANT. THIS IS AFTER A FI NAL HEARING REGARDING A 3.850 MOTION. INCLUDING THE IS SUES IN WHICH EVIDENTIARY H EARING WAS GLAPT ED WAS GR ANTED , WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTYSTAGE AND COUNSEL'S FAILURE TO DEPOSE CODEFENDANT RON RICHARDSON AND COUNSHE W ILL 'S FAILURE TO COUNSEL'S FAILURE TO PREPARE AND DEPOSE EXPERT S U SAN BUNKER. AND COUNSEL'S INEFFECTIVE ASSISTANCE AT THE PENALTYPHASE AND HOW HE R E FUSE ED TO INVESTIGATE AND PREPARE THE TESTIMONY OF JU DITH BU NKER AND D URING THE PENALTY PHASE.

WITH REGARD TO THE PENALTY P HASE INEFFECTIVE ASSISTANCE, WOULD YOU ADDRESS THE ST ATUS OF THESE CASES THAT WE SEE FROM TIMETO TIME , WHERE THE PR IMARY DEFENSE THROUGHOUT THE TRIAL WAS, I WAS NOT THERE. THIS IS NOT ME. THEN WE COME TO A PENALTY PHASE, AND WE HAVE , ARE ABLE TO FIND EVIDENCE SUCH AS DR . CROWN IN THIS CASE, WHERE THERE IS SOMETHI NG THAT MAY BE DISCUSSED IN THE BACKGROUND, AND IT SEEMS AS THOUGH OUR CASE LAW PLACES US IN A POSTURE O F SA YING THAT WE SHOULD NOT, THAT THAT IS NOT AN IMPROPER OR INEFFECTIVE ASSISTANCE OF C OUNSEL IN NOT GOING THAT ROUTE IN A PENALTY PH ASE, AFTER YOU HAVE DEFEND THE WHOLE TRIA L ON THE BASISTHAT THIS PERSON, YOU HAVE GOT THE W RONG GUY AND HE IS NOT HERE. IT SEEMS A S THOUGH OUR CASE L AW IS GOING THERE , SO COULDYOU ADDRESS THAT, AND, A LSO , THE QUALIT ATIVE IM PACT OF DR . CROWN AND SOME OF THE O THERS.HE SEEMS TO BE , PROBABLY , THE MOST IMPOR TANT, WOULDN'T YOU THINK, OF YOUR WITNESSES?

I THINK THAT DR . CROWN CERTAINLY WAS IMPORTANT. I THINK , HOWEVER , THOUGH, THAT DR . SILTSON'S TESTIMONY WAS Q UITE IMPORTANT HERE ASWELL. SHE ESTABLIS HED A N ABUNDANCE OF MITIGATION AND WAS A B LETO TALK ABOUT THAT A T THE EVIDENTIARY HEAR ING.

WOULD YOU AD DRESS THOSE.

ABSOLUTELY. L ET ME START WITH YOUR QUESTIONS REGA RDING WHAT WOULD BE CONSIDERED A LINGERING DOUBT DE FENSE , THROUGHOUT THE PENALTY PHASE , AND ESSENTIALLY LINGERINGDOUBT IS NOT A V ALID MITIGATOR IN THE STATE OF FLORIDA.THAT HAS BEEN R E PEATED OVER AND OVER A GAIN , AND IN FA CTIN THIS CASE, THE TR IAL COURT IN ITS SENTEN CING O RDER, REJECTED THAT AS A VALID MITIGATION .

I THINK WE CERTAINLY, ALL , UNDERSTAND THAT, LEGALLY I T I S NOT , BUT THE QUESTION IS

SHIFTING HOW YOU TRY A CASE IN THE MIDDLE OF THE CASE.THAT IS WHERE I T HINK WE R EALLY NEED TO GO ON THIS ISSUE.

CERTAINLY AND THERE WAS EXTENSIVE TESTIMONY ABOUT THAT AT THE EVIDENTIARY HEARING FROM RO BERT NORGARD , WHO TALKED ABOUT THE COMMUNITY STANDARDS AT THE TIME OF MR. HA NNON 'S TRIAL IN 1991. MR. NOR GARD M ADE IT V ERY C LEAR THAT , SI MPLY BECAUSEYOU HAVE AN INNOCENCE DEFENSE DOES NOT MEAN THAT YOU DO N' T BE GIN INVESTIGATING A PENALTY PHASE, EVEN BEFORE TRIAL BEGINS. IT IS ESSENTIAL THAT YOU DO THAT INVEST IGATION , REGARDLESS OF WHAT YOUR DEFENSE IS AT THE GUILT PHASE . THE ATTORNEY DID NOT DO THAT HERE. SECONDLY, ROBERT NORGARD T ALKED ABOUT THE IMPORT ANCE OF INTEGRATING DEFENSES BETWEEN THE GUILT PHASE AND THE INNOCENCE PHASE , AND , I AM SO RRY , THE GUILT PHASE AND THE PENALTY PHASE. WHEN YOU HAVE AN INNO CENCE DEFENSE AT THE GUILT PHASE, YOU NEED TO APPROACH THE JURY IN THE PENALTY PHASE , TELL THEM THAT YOU RESPECT THEIR DECISION OF CONVICTION , AND THAT YOU NEED TO MOVE ON FROM THE RE AND THIS IS ADDRESS ING DIFFERENT ISSUES. IT IS JUST NOT ACCEPTABLE TO NOT PRESENT ANYTHING IN MITIGATION.

THAT IS ONE THE ORY THAT YOU ARE ASSERTING THAT THAT IS WHAT YOU NEED TO DO . ISN'T THERE AN E QUALLY VA LID THE ORY THAT YOU SH OULDN'T PRESENT INCONSISTENT DEFENSES THAT , ONCE YOU ASSERT AN INNOCENCE DEFE NSE IN THE GUILT PHASE , THAT YOU SHOULDN'T MAKE AN INCONSISTENT DEFENSE IN THE PENALTY PHASE? ALTHOUGH YOU ASSE RTED A PERFECTLY VALID THEORY, IT IS NOT THE ONLY THEORY OF REPRESENTATION IN A D E ATH PENALTY CASE.

CERTAINL Y IT IS NOT THE ONLY THEORY. HOWEVER, HERE , AS I SAID , MR . EPISCIPO DID NOT EXPLORE ANY OTHER PO SSIBLE THERE ICHT IT IS VERY CLEAR THE ABA GUIDELINES AND COMMUNITYITY STANDARDS AT THE TIME AND THE CASE LAW THAT WE NOW H AVE BEFORE US, THAT INVESTIGATION NEEDS TO BE DONE, BEFORE YOU CH OOSE WHICH AVENUE YOU ARE GOINGTO P URSUE . I THINK, ALSO , I T IS , YOU ARE ABLE TO MAINTAIN THE INNOCENCE DEFENS E IN THE PENALTY PHASE AND STILL PRESENT MIT IGATION . THAT IS EXACTLY WHAT WAS DONE AT THIS EVIDENTIARY HEARING.

WAS THERE NO MITI GATION PRESENTED IN THE PENALTYPHASE?

THE PENALTY PHASE TESTIMONY CON SISTED OF TH REE P AGES IN THIS CASE ,, WHICH ALONE , IS OBVIOUS OF MR . EPISCOPO'S DEFICIENCIES. THERE WERE THREE WITNESSES THAT GOT U P THERE AND STATED HE HAS NEVER HARMED ANYONE BEFORE, HE IS NOT A VIOLENT PERSON AND HE DID NOT DO THIS.

WAS THERE ALSO TESTIMONYIN THE GUILT PHASE THAT WOULD BE RELEVANT TO THEPENALTY PHASE?

THERE WAS TESTIMONY IN THE GUILT PHASE. AS I MENTIONED, THE TESTIMONY OF JUDITH BUNKER , WENT DIRECTLY TO THE HE INOUS , ATROCIOUS AND C R UEL AGGRAVATOR.

COUNSEL TESTIFIED THAT HE THOUGHT IT WOULD BE REPETITIVE TO PUT ON THE S AME TESTIMONY IN THEPENALTY PHASE THAT WAS PRESENTED BEFORE THE SAME JURY IN THE GUILTY PHASE, BUT THAT THAT CERTAINLY IN THE GUILT PHASE , B UT THAT THAT CERTAINLY COULD BE CONSIDERED AS MITIGATION, SOME OF THAT TESTIMONY THAT WAS IN THE GUILT PHASE.

YOU ARE REFERRING TO WHAT COUNSEL PRESENTE D IN THEGUILT PHASE.

YES.

IN TE RM S OF THERE WERE AFEW WITN ESSES THAT SAID THIS IS A TE DD Y BEAR K IN D OF GUY AND THAT HE COULDN'T HAVE COMMITTED THIS.

AND WE HAVE TO CONS IDERTHAT, A S REALLY , A LSO , PENALTY PHASE TESTIMONY , DON'T WE?

LIKEWISE THAT WOULD ASSERT THE B RIEF TESTIMONY PHASE FROM THE EVID ENTIARY HEARING.AT THE EVIDENTIARY HEA RINGTHERE WAS ABUNDANCE OF TESTIMONY TESTIFIED T O , INCLUDING THE TESTIMONY OF DR. CR OWN, WHICH HE FOUNDBRAIN IMPAIRMENT WHICH AFFECTED HIS ABILITY TO REASON AND PR OCESS MIT IGATION.ALL OF THE MITIGATION THAT WAS TESTIFIED TO AT THE EVIDENTIARY HEARING , WENT TO MR. HANNON 'S FUNCTIONING ON A DAY-TO-DAY B ASIS THROUGHOUT HIS LIFE , L E ADING UP TO THIS CRIME , SO YOU STILL CAN PRESENT INFORMATION , REGARDING THE DEFENDANT 'S LIFE , HIS CHARACTER, AND WIT HOUT APPROACH ING SPECIFICALLY SAYING , O KAY , NOW WE ARE G OING TO

GIVE US A CONCISESTATEMENT. THE DEFENSE LAWYER TESTIFIED EXTENSIVELY AT THIS POSTCONVICTION HEARING, ISTHAT CORRECT?

YES.

NOW, T ELL US WHAT HIS TESTIMONY WAS, WITH REFERENCE TO HIS OB LIGATION TO INVESTIGATE MITIGATION AND WH ETHER HE DID INVESTIGATE THE BACKGROUND OF THE DEFENDANT , POTENTIAL MITIGATION, SO THAT HE WAS , AS YOU SAID BEFORE , IN THE POSITION TO DETERMINE WHAT THE STRATEGY WOULD BE OR TO ADVISE THE DEFENDANT. WHAT WAS HIS TESTIMONY AS TO THE INVESTIGATION THAT HE DID INTO THIS DEFEND ANT'S BACKGROUND FOR MITIGATI ON?

THE TESTIMONY WAS HE DID ABSOLUTELY NOTHING. BECAUSE HE DIDN'T SEE IT AS RELEVANT. HE DIDN 'T, HE WAS GOING WITH AN INNOCENCE DEFENSE. THAT IS THE WAY IT WAS GOINGTO BE AND NOBODY WAS GOING TO DE RAIL HIM FROM THAT.

TELL US WHETHER OR NOT O UR CASE LAW WAS IN EXISTENCE AT THE TIME OF THIS TRIAL OR BEFORE HAND , THAT TAL KED ABOUT THE FACT THAT THE INNOCENCE DEFENSE OR REMAINING DOUBT WOULD NOT BE MITIGATION , COULD NOT BE USED AS MITIGATION . WAS THERE CASE LAW FROM THIS COURT AT THAT TIME , THAT COUNSEL SHOULD HAVE BEEN A WARE OF , THAT ANNOUNCEDTHAT RULE? THAT LINGERING DO UBT WOULD NOT BE A PROPER CASE FOR MITIGATION?

ABSOLUTELY. I DID CITE TO SOME CASES IN MY BRIE F. I DON'T HAVE THEM OFF THE TOP OF MY HEAD BUT THEY ARE CITED TO IN MY BRIEF , THAT TALK ABOUT THE LINGERING DOUBT IS NOT VALI D.

THOSE EX ISTED AT THE TIME OF THIS TRIAL.

I BE LIEVE SO , AND MR . NORGARD TESTIFIED , TO, THAT , YOU KNOW , THAT WAS COMMON KNOWLEDGE AT THE TIME. THAT WAS THE COMM UNITY CENTER THAT LINGERING DOUBT WAS NOT ACCEPTABLE.

DID THE DEFENSE LAWYER STATED HE KN EW THAT?

NO , HE DID NOT.

HE SAID HE DIDN'T KNOW THAT LINGERING DOUBT WAS NOT PROPER MITIGATION?

WHEN HE WAS ASKED THAT QUESTION, HE SAID, SURE, IT IS MITIGATION. IT IS PART OF THE CATCHALL .

WHAT WAS HIS EXPERIENCE , AS FAR AS HAVING TRIED DE ATH C ASES AND HIS INVOLVEMENT WITH PRIOR PENALTY PHASE?

M R . EPISCOPO , HIS TESTIMONY WAS THAT HE HAD, IN THE PENALTY PHASE, TESTIFIED THAT HE HAD DONE SOME WORK AS A PROSECUTOR , WHICH IN MISSOURI ME AN S GIVES AN ATTOR NEY ANY MEA NSTO DEFEND A CAPITAL DEFENDANT.THIS WAS HIS FIRST CAPITAL CASE WHERE HE WAS DEFENDINGIT.

WAS THERE CO-COUNSEL?

HE HAD CO- COUNSEL. HE TESTIFIED THAT IT WAS SOMEBODY WHO WAS RIGHT OUTOF LAW SCHOOL, THAT IN FACT IN THE BEGINNING OF THE CASE , THAT GENTLEMAN HAD NOT EVEN PASSED THE BAR YET. HE WAS WAITING FOR HISRESULTS , SO AT LEAST FOR THEBEGINNING OF THE CASE, AND HE DID , I BEL IEVE , PASS AND THEN CONTINUED ON WITH THE CASE, BUT HE LIKEWISE HAD NO EXPERIENCE DEFENDING A CAPITAL CASE.

NOW, HAD HE H I RED AN INVESTIGATOR L OOK INTO , AGAIN , THE CHARACTER EVIDENCE ABOUT HIM BE ING A TEDDY BEAR, SOMETHING , ANYTHING IN HIS BACKGROUND THAT WOULD HAVE CONFIRMED THE NATURE OF HIS CHARACTERAS BEING ESSENTIALLY A NONVIOLENT PE RSON .

HE DID NOT.

WAS THERE AN INVESTIGATOR ?

NO. THERE WAS NO INVEST IGATOR F OR PENALTY PHASE ISSUES FOR THE DEFENDANT'S CHARACTER. THE ONLY INVESTIGATION THAT WAS DONE WAS BY HIS CO-COUNSEL AND HIMSELF , REGARDING JAIL HOUSE SNITCHES. THEY WENT AND INTERVIEWED THE JAIL HOUSE S NITCH ES AT THE JAIL. THERE IS SOME RE FERENCE THAT HE U S ED. THE CODEFENDANT 'S ATTORNEYS INVESTIGATOR. THERE WAS A BILL FOR 6.3HOURS , AND , A GAIN , THAT WENT DIRECTLY TO GUILT /INNOCENCE PHASE ISSUES. THERE WAS ABSOLUTELY NO INVESTIGATION.HE DIDN'T QUES TION THEFAMILY. HE NEVER DID A SO CIAL H ISTORY OF MR . HANNON , ANDTHERE WAS CERT AINLY INFORMATION BEFORE HIM , WHICH WOULD HAVE LED A REASONABLE ATTO RNEY TO AT LEAST ASK THE QUESTIONS THAT NEEDED TO BE ASKED OF MR . HANNON THAT NEE DED TO BE ASKED OF HIS FAMILY. HE, ALTH OUGH HE WASN'T REVIEWING HIS , MR . HANNON' S PREVIOUS CONVICTIONS U NTIL THE DAY OF T RIAL , THAT IS IN THE RECORD, THERE WERE PREVIOUS CONVIC TIONS REGARDING DRUG POSSESSIONS , SEVERAL OF THEM. THERE WAS INFORMATION IN NEW ATTORNEY RECORDS WHICH HE IN MILITARY RECORDS WHICH HE FAILED TO OBTAIN .

WHAT WAS IN THE MILITARY RECORDS?

DR . SU LTAN TESTIFIED THAT IN THE MILITARY RECORDS , THERE WAS INFORMATION THAT HE DID HAVE A DRUG ADDICTION OR SOME INFO RMATION ABOUT ADDICTION.THERE WERE INDICATIONS THAT HE WAS A.W.O.L. FROM THE MILITARY.

SEE, THAT IS WHER E, NOW , MAYBE THIS IS GETTING INTO THE SE COND PART OF THE STRICKLAND TEST AS TO WHETHER OR NOT IT WOULD UNDERMINE OUR CONFIDENCE INTHE OUTCOME. L ET'S ASSU ME FOR THE SAKE O F ARGUMENT, THAT AT LEAST HE HAD A DUTY TO LOOK INTO THIS OTHER , WHETHER MITIGATION EXISTED AND THEN D E CIDE WHETHER IT WOULD BE CONSISTENT OR INCONSISTENT AND HE DIDN'T DO. THAT YOU HAVE GOT SOME, THREE SUBSTANTIAL AGGRAVATORS . YOU HAVE GOT , YOU ARE TALKING ABOUT A HISTORY OF DRUG AD DICTION , WHERE YOU ARE NOT GOING TO SAY THAT SOMEONE IS GOING TO TESTIFY AS TO THE EXTREME EMOTIONAL DISTRESS AGGRAVATORS, BECAUSE THAT WOULD HAVE TO RELATE THEM TO BEIN G AT THESCENE OF THE CRIME. HOW IS THE DRUG ADDICTION G OING TO, I MEAN , WHERE , HOWWOULD THAT HAVE , RE ALLY , INFLUENCED A JURY OR THE T RIAL COURT , OR THIS

COUR T, IN TE RMS OF THE ULTIMATE DEATH PENALTY THAT WAS IMPOSED?

THERE WAS TESTIMONY AT THE EVIDENTIARY HEARING , THAT THE SUBSTANCE AB USE NOT ONLY DR UGS BUT ALCOHOL BEGAN AT A V ER Y E ARLY AGE , ACTUALLY AT THE AGE O F 11, THAT IMPACTED ON HISDEVELOPMENT. IT IMPA CTED ON HIS DEVELOPMENT WITH PERSONALITY , CERTAINLY HOW HE WAS FUNCTIONING AT THE TIME OF THE CR IME, A MAN THAT WENT FROM JOB TO JOB. HE WAS DESCRIBED AS AN EXTREME FOLLOWER, WHICH IS EXACTLY WHY H E GOT INVOLVED WITH DRUGS TO BEGIN WITH. HE WAS VERY CLOSE WITH HIS S ISTER MAUREEN. SHE BECAME VERY INVOLVED WITH DRUGS AND ABUSE OF DRUGS AND HE FOLLOWED RIGHTALONG WITH HER. HE WAS ALWAYS LOOKING FOR ACCEPTANCE, ALWAYS LOOKING TO BE FRIENDS WITH PEOPLE AND LOOKING UP TO PEO PLE, AND THAT IS HOW IT , HE CARRIED THROUGH LIFE.

THAT SOUND LIKE PRETT Y MILD ST UFF , COMPARED TO THE AGGRAVATION THAT EXIST INS THIS CASE. AND SO WHAT, I HOPE THAT THAT IS NOT YOUR STRONGEST POINT , AS FAR AS WHAT YOU PRESENTED IN MITIGATION. BUT LET ME ASK YOU A DIFFERENT QUESTION , BECAUSEI REALIZ E YOU HAVE COVEREDTHAT, A LSO , IN YOUR BRIEF AND YOU MI GHT WANT TO RESPOND AGAIN. M ANY OF THE CASE S THAT WE SEE ARE CASES WHERE THE DEFENSE LAWYER OR LAWY ERS TESTIFY THAT THE DEFENDANT HERSELF OR HIMSELF , REALLY , INSISTS THAT LI MITED MITIGATION BE PRESENTED AND THAT THEY ABSOLUTELY CONTROL THE DEFENSE, DE SPITE THE LAWYER'S PROTESTATION S THAT MITIGATION MUST BE PRESENTED AND FA MILY MEMBERS MUST BE INTERVIEWED AND THIS KIND OF THING.IS THIS ON E OF THOSE CASES. DO YOU UNDERSTAND WHAT I AM ASKING?

WHERE THE DEFENDANT DIDN'T WANT MITIGATION ?

WHERE THE DEFENDANT SAYS,NO, I DON'T WANT YOU TALKING TO MY MOTHER.I DON'T WANT YOU TA LKING TO MY OLD FRIENDS AT SCHOOL. I DON'T WANT YOU INVESTIGATING MY MILITARY BACKGROUND . I DON'T WANT ANY OF THAT DONE. HERE IS WHAT I WANT DONE. I AM INNOCENT. THAT IS ALL I WANT YOU TO DO IS TO CONTINUE TO A R GUE THAT I DIDN'T DO THIS AND THAT IS IT, AND THE LAWYER SAYS I WAS FRUSTRATED BECAUSE ICOULDN'T GET HIM TO COOPERATE WITH ME . IS THIS ONE OF THOSE CASES?

NO. IT IS NOT EX ACTLY HOW THAT HAPPENED IN THIS CASE . MR. HANNON CONTINUED TO MAINTAIN HIS INNOCENCE, BUT IN THE RECORD WE SEE AT THEEND OF THE GUILT PHASE, THAT THE COURT SAYS TO MR . EPISCIPO, A REN'T YOU GOING TO PRESENT A MITIGATION CASE, AND HE SAYS , NO , WE ARE NOT GOING TO PRESENT ANYTHING.THE COURT INSTRUCTS MR. EPISCIPO TO SPEAK TO MR . HANNON, JUST TO SEE IF THERE IS ANYTHING.WHEN THEY COME BACK THE NEXT DAY , MR. HANNON HAS AG RE ED , SURE, I WILL PRESENT MY MOM AND MY DA D AND LET THEM GETUP THERE, S O WHE N MR. HANNON ACTUALLY HAD SOME INFORMATION OF WHAT POSSIBLY COULD BE PRESENTED, HE CERTAINLY WASN'T RESISTENTTO THE FACT, AND I DON'T THINK THAT WE CAN SAY THAT MR. HANNON WOULDN'T HAVE BEEN OPEN TO PRESENTING MITIGATION, HAD HE KN OWN WHAT THERE WAS THAT HE WAS ABLE TO PRESENT. I DO SEE MY YELLOW LIGHT ON, BUT JUSTICE P A RIENTE AND JUSTICE AN STEAD , YOU TALKED ABOUT THE AGGRAVATING FACTORS , AND I DO WANT TO POINT OUT THAT MR . EPISCIPO DID NOTHING TO CHALLENGE THESE AGGRAVATING FACTORS. THERE WAS EVIDEN CE AND TESTIMONY IN THE RECORD , HAD HE CHALLE NGED JU DITH BUNKER AND RONALD RICHARDSON ON CROSS-EXAMINATION, HE COULD HAVE REFUTED SOME OF THOSE AGGRAVATORS. IN ADDITION , HE GOT UP THEREAT THE CLOSING OF THE PENALTY PHASE AND TOLD THEJURY WE DON'T AGREE WITH YOUR VERDICT . WE MAINTAIN THAT HE IS NOT GUILTY, AND WE ARE NOT GOING TO AGREE WITH YOUR VERD ICT. HE AL SO GOT U P THERE , AND WITH REGARDS TO EACH AGGRAVATOR, THE EXTENT OF HIS ARGUMENT WAS THAT W E DON'T AGREE. THAT IS ALL HE SAID T O THEM REGARDING THREE AGGRAVATORS FOR ONE V ICTIM AND F O UR FOR THE OTHER , S O THERE THE DEFINITELY

WH AT WAS THE JU RY'S PENALTY PHASE VERDSIGNIFICANT.

A 12 -0 RECOMMENDATION FOR B OTH VICTIM S. HOWEVER, YOU HAVE TO LOOK AT THE T O TALITY OF THE CIRCUMSTANCES HERE AND NOT JUST WHAT THE AGGRAVATORS WERE OR THE RECOMMEND ATION.I THINK IT IS CL EAR THAT HE FAILED TO CHALLENGE THE CASE AT ALL IN THE PENALTY PHASE , BY NOT PRESENTING MITIGATION , AND NOT CHALLE NGING THOSE AGGRAVATORS.

CHIEF JUSTICE: THANK YOUVERY.

MAY IT PLEASE THIS HONORABLE COURT. YOUR HO NORS , MY NAME IS KATHERINE BLA NCO WITH THE STATE ATTORNEYS OFFICE INTAMPA , REPRESENTING THE STATE OF FLORIDA IN THIS POSTCONVICTION PROCEEDING.I WOULD LIKE, AS WELL, TO ADDRESS THE ISSUES THAT HAVE BEEN ADDRESSED BY OPPOSING COUNSEL THIS MO RNING , SPECIFICALLY THE INEFFECTIVE ASSISTANCE DURING THE PEN ALTY PHASE. HOWEVER, IT MUST BE REMEMBERED TWO THINGS ARE CRITICAL. F IRST AND FOREMOST THAT THE DEFENSE'S BEST WIT NESS THIS THIS CASE AND PR IMARY WITNESS WAS PATRICK HANNON WHO TO OK THE S TAND DU RING THE GUILT PHASE, AND ALL OF THE GUILT PHASE TESTIMONYTHAT THE DEFENSE RELIED UP ON, IN FACT , WAS BUILDING TO THE PENALTY PHASE. AT THE COMMENCEMENT OF THE PENALTY PHASE , THE TRIALCOURT ASKED , AND THIS IS AT P AGE 1594 OF THE ORIGINAL T RIAL RECORD, DOES THE STATEHAVE ANY EVIDENCE TO PRESENT AT THIS TIME . MR. LE WIS WAS ONE OF THE PROSECUTORS. YOUR HONOR, IN THIS PROCEEDING THE STATE WILL RELY ON THE EVIDENCE AND TESTIMONY IN THE PRIOR GUILTPROCEEDING AND REST. THAT IS THE SUM TOTAL OF THE STATE'S PRESENTATION DURING THE COMMENCEMENT OF THE PENALTY PHASE. AT THAT POINT IN TIME, THEN , MR. EPISCIPO , DEFENSE COUNSEL , IS GIVEN THE OPPORTUNITY TO ADDRESS THECOURT AND THE JUR Y, AND HE NOT ONLY SAYS IN ADDITION TO THE EVIDENCE THAT WE HAVE PRESENTED IN THE TRIAL D URING THE CASE-IN-CHIEF , WEWOULD LIKE T O PRESENT SOME ADDITIONAL MITIGATING EVIDENCE AT THIS TIME.

LET ME ASK THE FUNDAMENTAL QU ESTION, AND THAT IS WITH REGARD TO THIS APPARENT SFRIX S HUN BETWEEN PRESENT APPARENT F R ICTION BETWEEN PRESENTING THE INNOCENCE, I WASN'T THERE,AND THE PENALTY PHASE, WHEREIT DOES APPEAR THAT THE DEFENSE ATTORNEY DID NOT DO A FULLBACK GROUND INVESTIGATION , WHETHER HE WAS GOING TO USE THAT INFORMATION OR NOT BUT TO MAKE THAT INFO RMED DECISION, CERTAINLY, HIS PARENTS, HE K NEW ABOUT THE DRINKING . HE TALKED WITH SOME FA MILY MEMBERS IS WHAT IT APPEARS T O ME. BUT DID NOT GO INTO , AS WE ARE ACCUSTOMED T O SEEING , SOME T YPE O F BACKGROUND THAT C CRC HAS NOW DONE. COULD YOU COMMENT ON THAT AND THIS APPROACH , BECAUSE IT IS A TROUBLESOME KIND OF ARE A TO TO UCH UPO N.

CERTAINLY, Y OUR HONO R, THROUGH THE YEARS, MORE AND MORE HAS DEVELOPED WITH MOREAND MORE FOCUS , CERTAINLY, ON THE ISSUES OF M E NTAL HEALTH MITIGATION IN PARTICULAR, AND WHEN YOU SEE MORE ALLE GATIONS OF DRUG ABUSE AND ISSUES THAT OCCURRED IN A DEFENDANT'S CHILDHOOD.THIS CASE WAS TRIED IN 1991. AT THE TIME OF THIS PARTICULAR TRIAL, YOU HAVE A DEFENSE ATTORNEY WHO IS A FORMER PROSECUTOR. HE HAND LE D TWO CASES IN HILLSBOROUGH AND FOUR IN PASCO COUN TY. S IX AS A PROSECUTOR . HE HAD BEEN OUT OF PRACTICE FOR THREE YEARS AS A DEFENSE ATTORNEY BY THE TIME OF THIS FIRST CAPITAL CASE. HE WAS FAMILIAR WITH GUILT AND PENALTY PHASE , BIFURCATED PROCEEDINGS, ANDHE TESTIFIED THAT ATTORNEYS WHO CHANGED THEIR TACTICS , IT WAS NOT AVENUE HE CA N'T I HAVE TECHNI QUE AND HE DID NOT BE LIEVE TAKE IT WAS IN FACT, A GOOD IDEA. WHAT WAS

IF I COULD INTERRUPT YOU , I WOULD LIKE I F YOU COULD CONTINUE THE ANSWERS TO JUSTICE LEWIS'S QUE STION, BUT I THINK WE NEED TO PUT THIS ANSWER IN THE CONT EXT OF THE U.S. SUPREME COURT'S WIGGINS CASE, BECAUSE IT SEEMS TO ME THAT WI GGINS WAS A 19 90 VINTAGE MURDER AND TRIAL.

SURE.

AND WHAT WAS AND WHAT THEUNITED STATES SUPREME COURT NOW SAID, THE RESPONSIBILITY OF COUNSEL TO DO AN INVESTIGATION INTO THESE MATTERS , REGARDLESS OF WHAT IS GOIN G TO BE PRESENTED AS THE DEFENSE .

YOUR HONOR , WE CERTAINLY DO NOT DISPUTE , WIGGINS I S STRICKLAND. WIGGINS IS AN APPLICATION OF STRICKLAND. IT IS A VERY CL EAN APPLICATION, AND WHAT WE HAVE STRICKLAND DECIDED IN 1984, THE WIGGINS TRIAL , OF COURSE, IN THE E ARLY 90s , AND ESS ENTIALLY WHAT HAPPENED IN WIGGINS WAS YOU HAVE DEFENSE COUNSEL WHO REPRESENTS TO THE COURT , THAT THEY ARE GOING TO INTRODUCE EVIDENCE OF THIS DEFENDANT'S DEPR IVED UPBRINGING. UNNORTH NATIONAL CIRCUMSTANCES, AND ABSOLUTELY FA ILS TO DO SO , DESPITE HAVING , UNDER THE MARYLAND PROCEDUR ES, A SOCIAL HISTORY SERVICES REPORT AVAILABLE TO THE M.

I THINK WE KNOW WHAT WIGGINS SAYS.

CERTAINLY.

I THINK, GOING BACK TO WHAT JUSTICE WELLS AND THEN JUSTICE LEWIS IS TALKING TO YOU ABOUT , IS THE ISSUE IN THIS CASE , IS THAT , H OW DOES SOMEBODY M AKE AN INFORMED DECISION ABOUT POTENTIAL DEFENSES AND A STRATEGY , IF THERE HAS BEEN A TOTAL FAILURE OF INVESTIGATION INTO THE MITIGATION AT ANY TIME, AND THAT IS THE DEFICIENCY PART. N OW, THE QUESTION O F WHETHERYOU, THEN , MAKE AN INFORMED DECISION, AF TER YOU L OOK AT SOMETHING , LIKE YOU TAKE HALLE BUR TON, WHIC H HAS BEEN CITED , WELL , THERE HE SAID THAT HE WAS A WARE THAT HALL BURTON HAD SUFFERED PHYSICAL AND SEX UAL ABUSE BUT CHOSE AND THOUGHT IT WOULD BE MORE HARMFUL , SA ME THING ON CASE AFTER CASEY HIM A W ARE OF THIS BUT I THINK IT WILL BE HARMFUL . SO WHERE, GOING BACK TO ASITUATION WHERE SOMEONE IS SAYING I AM GOING TO PU RSUE AN INNOCENCE DEFENSE, WHICH IS MANY OF THESE CASES , HOW DOES THAT SQUARE, AS JUSTICE LEWIS IS ASKING , WITH THEDUTY TO INVESTIGATE AND LO OKAT THE POT ENTIAL MITIGATION, BEFORE YOU MAKE A DECISION NOT TO PRESENT ANY REAL MITIGATION?

JUSTICE PARIENTE , WE CERTAINLY DON'T DIS PUTE THAT, IN FACT , COUNSEL HAS THE RESPONSIBILITY TO INVESTIGATE THE CASE. WHAT I DO DISPUTE IS THE CONCLUSION, I BELIEVE, THAT IS SUBMITTED BY CCR THAT THERE WAS NO INVESTIGATION IN THIS CASE , AND I WOULD BRIEFLY LIKE TO DIRECT THIS COURT'S ATTENTION TO THE TRIAL COURT'S ORDER WITH RESPECT TO THE PENALTY PHASE INEFFECTIVE CL AIM. MR . EPISCIPO , TRIAL COUNSELIN THIS CASE, TESTIFIED THAT THE STRA TEGY IN THE PENALTY PHASE WAS TO NOT PUT ON ANYTHING IN MITIGATION THAT W OULD RE TRACT OR DETRACTFROM THE DEFENDANT'SSTATEMENT THAT HE WAS NOTTHERE AND DID NOT DO IT , WHICH WAS DISCUSSED WITH THE DEFENDANT AND THE DEFENDANT'S FAMILY MEMBE RS. IN ADDITION , MR . EPISCIPO TESTI FIED AND AGREED T O PRESENT THE INNOCE NCE DEFENSE AT THE PENALTY PHASEAND THE DEFENDANT N EVER C HANGED HIS POSITION. MR . EPIS CIPO TESTIFIED THAT HIS ROLE IN THE PENALTY INVESTIGATION WAS TO TRY TO ESTABLISH IN HIS CASE-IN-CHIEF THAT THEDEFENDANT DID NOT HAVE THETYPE OF CHARACTERTORY COMMIT MURDER AND MR. EPISCIPO KN EWOF THE DEFENDANT'S PRIOR BACKGROUND, NA MELY HIS PRIOR CRIMINAL RECORD, AND HE WAS NOT GOING TO B RING IT TO THE JURY'S ATTE NTION BECAUSE THE STATE CONSIDERED IT A VICTORY BECAUSE IT NEVER CAME OUT I N THE PENALTY PHASE. IN ADDITION HE KNEW OF THE DEFENDANT'S DRUG USE. NOW , HE SAYS THE DEFENDANTNEVER TOLD HIM HE HAD A DRINKING PROBLEM ALTH OUGH MR . EPISCIPO TESTIFIED THAT HE K NEW THAT HE WAS DRINKING BUT HE DIDN'T US E IT AS A DEFENSE. MR . EPIS PICO ACTUALLY CAME BACK AND DID THE INVESTIGATI ON.

LET ME COME BACK AND SEEWHAT YOU ARE SAYING HE RE, BECAUSE WE HAVE , AS YOU HAVE

ACKNOWLEDGED, THIS R ATHER SPECIFIC MANDATE F ROM THE U.S. SUPREME COURT THAT SAYS WE ARE GOING TO GIVE COUNSEL LEEWAY IN STRATEGY , BUT BEFORE WE GIVE THIS LE EWAY , WE REQU IRE COUNSEL TO DO INVESTIGATION INTO THE POTENTIAL MITIGATION. HERE I AM NOT SURE I UNDERSTAND THE STATE'S POSITION. ARE YOU SAYING THAT WE IN THIS CASE , BELIEVE THAT COUNSEL DID WHAT WIGGINS MANDATES? THAT IS AS A STARTING POINT , ARE YOU SAYING THAT?

I A M SAYING, YOUR HONOR , THE STAT E IS SAYING THAT MR . EPISCIPO'S INFORMATION WAS BASED ON THE INVESTIGATION WAS BASED ON THE INFORMATION H E OBTAINED FROM THE CLIENT AND HIS CLIENT'S FAM ILY .

BASED ON THAT MANDATE , A RE YOU SAYING THAT IN THIS CASE YOU HAVE NO PROBLEMDEFENDING THIS LAWYER, THATHE DID THE INVESTIGATION THAT WIGGINS MANDATES ?

HE DID THE INVESTIGATIONTHAT THE REASONABLE LEADS LED HIM TO INVESTIGATE , YOURHONOR. HE SO YOU ARE TAKING THE POSITION THAT THIS REC ORD WILL DEMONSTRATE THAT HE DID THE KIND OF INVESTIGATION THAT THE U.S. SUPREME COURT MANDATED IN WIGGINS?

YOUR HONOR , WITH ALL DUE RESPECT, I AM SAYING THATTHE U.S. SUPREME COURT MANDATED IT IN STRICKLAND, AND WHAT STRICKLAND REQUIRES , IS THE ANALYSIS IN WIGGINS.

I FEEL LIKE YOU ARE NOT GIVING ME AN ANSWER . WIG INTS .

I APOLOGIZE.

WIGGINS HAS A RATHER WIGGINS .

I APOLOGIZE.

WIGGINS HAS A RATHER CLEAR ANA LYSIS AS FAR AS INVESTIGATION, SO YOU HAVEGOT THE STATE HER E AND THESTATE CAN TELL ME WHAT YOUR VIEW OF THE RECORD IS. IS IT YOUR VIEW OF THE RECORD THAT THE RECORD WILL DEMONSTRATE THAT THE DEFENSELAWYER DID THE JOB THAT THESUPREME COURT MANDATED IN WIGGINS? JUST YES OR NO!

YES , YOUR HONOR. I WOULD LIKE TO EXPLAIN WHY.

WELL , I WOULD WANT YOU TO DO THAT. GO AHEAD.

I WOULD LIKE TO EXPLAINWHY. WIGGINS DOES NOT RETREAT FROM STRICKLAND IN ANY WAY , SHAPE OR FORM , NOR DOES IT A DD ADDITIONAL REQUIREMENTS THAT STRICKLAND DID NOT IMPOSE. WITH RESPECT TO THE NOTION THAT THERE MUST BE A CHECKLIST OR YOU ARE INEFFECTIVE UNLESS YOU G ET A PSYCHIATRIC EXPERT IN EV ERY CASE OR SOMEHOW TRIAL COUNSEL CAN BE DE EMED IPSA FACT-INEFFECTIVE, I F HE I PSO FACTO INEFFECTIVE, IF HE DOESN'T GET IT , INEFFECTIVE , AND THAT IS NOT WHAT WIGGINS O R STRICKLAND HOLDS. THESE ARE GUIDELINES AND RECOGNIZED IN STRICKLAND AS GUIDES. NO MORE , NO LESS. VERY HELP FUL, TO BE SU RE. THE ERROR IN WIGGINS WAS SIMPLY THE FA ILURE TO FOLLOW STRICKLAND, AND THE FAILURE TO FO LLOW THROUGH WHERE THERE WAS CLEAR INDICATION THAT THERE WAS AN INVESTIGATION THAT WAS TO BE DONE AND NEEDED.

LET ME ASK YOU THIS QUESTION, THEN, RE LATED TO THAT, AND THAT IS , GOING TO THIS LI NGERING DO UBT , LET'S ASSUME THAT A YEAR BEF ORE THIS CASE WAS TRIED , THAT THIS COURT HAD ISSU ED AN OPINION IN WHICH IT SAID ABSOLUTELY , YOU CANNOT PRESENT A LINGERING DOUBT MITIGATION EVIDENCE, AND THE TRIAL COURT DID NOT ERR IN THE CASE THAT WE

ISSUED THE OPINION ON IN PRECLUES CHROOUDING THE DEFENSE FROM IN PRECLUDING THE DEFENSE FROM ADVA NCING THAT AS THE CASE FOR MITIGATION , DURING THE COURSE OF THE PENALTY PHASE . AND THAT THAT O PINION WAS WIDELY CIRCULATED AND THAT THAT WAS THE STATE OF THE LAW , AT THE TIME THIS CASE WAS TRIE D. HELP ME WITH DEFENDING COUNSEL'S STRATEGY HERE, ESPECIALLY WHAT APPE ARS TO BE SORT OF AN IN-YOUR-FACE TO THE JURY , THAT IS NOW THE JURY HAS DECI DED , AND IT IS ALL OVER WITH , AS FAR AS WHETHER OR NOT THIS DEFENDANT WAS GUI LTY , AND SO HELP ME WITH THE REASONABLENESS UNDER THESE CIRCUMSTANCES , OF DEFENSE COUNSEL GETTING U P TO THIS JURY AND SAYING , W ELL , YOU MAY HAVE FOUND HIM GUILTY OF THESE THINGS, BUT WE ST ILL DISAGREE WITH THAT AND THAT IS OUR CASE IN MITIGATION. THIS IS NOT THE KIND OF PERSON THAT COULD EVER DO THESE HORRENDOUS THIN GS THAT HAPPENED IN THIS CASE . NOW , IN VIEW OF THE CASE LAW , A ND I AM HIM GETTING , REA LLY SETTING UP A ND I AM G ETTING, REALLY SETTING THAT UP AS HYPOTHETICAL. WOULD IT BE REAS ONABLE FO R A DEFENSE LAWYER TO ADV ANCE THAT STRATEGY IN THE PENALTY PHASE, IN THE FACE OF THEDECISION OUT OF THIS COURT THAT IN E SSENCE SAYS A TRIAL COURT CAN PRECLUDE YOU, ACTUALLY, FROM OFFERING THAT KIND OF EVIDENCE? WOULD THAT BE REASONABLE STRATEGY FOR A DEFENSE LAWYER?

IT WOULD FOR THE FOLLOWING REASONS , YOURHONOR.FIRST OF ALL , WITH RES PECT TO THE FACT THAT IT WAS NOTA LE GALLY RECOGNIZED OR ACCEPTED MITIGATING CIRCUMSTANCE , THE NOTION OF RES IDUAL OR LINGERING DOUBT. CERTAINLY REASON ABLE MI NDS CAN DIFFER AS TO, AND IN FACT THE ELEVENTH CIRCUIT HAS GO NE ON AT LENGTH WITH RESPECT TO THE VALIDITY OF ALLOW ING DEFENSE COUNSEL TO PRESENT THAT TYPE OF ARGUMENT. WHAT HAPPENED IN THIS PARTICULAR CASE , YOUR HONOR , IS THAT ALTHOUGH IT WAS NOT A LEGALLY -ESTABLISHED MITIGATING CIRCUMSTANCE , IN FACT , TRIAL COUNSEL , MR. EPISCIPO , CORRECTLY PRE DICTED THAT HE WOULD BE ALL OWED TO PRESENT ANYTHING AND WAS, IN FACT , ALLOWED TO PRESENT A CIRCUMSTANCE , WHICH , ALT HOUGH NOT FOUND BY THE STATE OF FLORIDA, TO BE A LEGALLY RECOGNIZED MITIGATING CIRCUMSTANCE , NEVERTHELESS WAS PRESENTEDTO THE JU RY. AND INTERESTING LY ENOUGH , MR . NORGARD , DU RING HIS TESTIMONY , AND HE IS THE DEFENSE EXPERT WITNESS , DEFENSE ATTORNEY HAS BEEN ACCUSED, OF COURSE, OF BEING INEFFECTIVE IN A COUPL E OF DEATH PENALTY CASES, HIMSELF , BUT IN ANY EVENT, MR . NOR GARD ADMITTED THAT , LINGERING DOUBT IS NOT A LEGALLY RECOGN IZED MITIGATING CIRCUMSTANCE , IT NEVERTHELESS MAY HAVE SOME BENEFICIAL IMPACT FOR THE JURY.

BUT , IN TE RMS OF , MOM AND D AD GET UP AND SAY IN THE PENALTY PHASE , HE SAYS HE IS INNOCENT. I BELIEVE HE IS INNOCENT. I THINK HE OU GHT TO BE GIVEN A CHANCE TO PROVE HE IS INNOCENT. MOM SAYS GIVE US A CHANCE, PLEASE, TO PROVE HE NEVER DID ANYTHING LIKE THIS. THAT IS A LITTLE BIT DIFFERENT THAN SAYING I AM NOW GOING TO GO THROUGH MY CHILD'S LI FE, TO TELL YOU WHAT THE KINDS O F GOOD THING THAT IS HE DID , HIS GOOD CHARACTER , AND THAT IS I N TERMS OF LINGERING DOUBT , THAT IS NOT EVEN LINGERING DOUBT. THAT I S LIKE THROWING INTO THE JURY THAT JUST MADE A DECISION, THAT HE IS GUILTY , AND THEY HAVE HA D A WH OLE G UILT PHASE TO GO , GIVE HIM A CHANCE TO PROVE HE IS INNOCENT. WELL, THAT JUST HAPPENED. S O I DON'T EVEN SEE QUALITATIVELY , EVEN THOUGH YOU MIGHT WANT TO CONTINUE TO AR GUE WHY , WELL , M AYBE THEY WEREN'T POSITIVE , YOU KNOW, I T HAS GOT TO BE BEYOND A REASONABLE DOUBT. DON'T YOU HAVE, MAYBE , AQUESTION ABOUT IT , HOW THIS, REALLY, EVEN I S MITIGATING , EVEN IF LINGERING DOUBT WAS A DEFENSE, TO HAVE A P ARENT GET UP AND SAY , LE T'S GET ANOTHER CHAN CE TO PROVE THAT HE IS INNOCENT! WHERE DOES THAT EVEN GETYOU?

YOUR HONOR , THE LINGERING DOUBT RE FERENCE WAS EXPLAINED B Y MR . EPIS CIPO , AS A CHARACTER AT ANY RATE,THAT IT WAS IMPOSSIBLE IF THIS MAN WHO HAVE THIS MAN TO HAVE COMMITTED SUCH HEINOUS ACTS. THE MOTHER IMPLORES THE JURY, PLEASE GIVE HIM TIME. THE FATHER SAYS HE HAS NEVERBEEN A V I OLENT PERSON. HE IS A TEDDY BE AR . IN FACT ONE OF THE OTHER WITNESSES TESTIFIED AND DESCRIBED HIM AN AS A TEDDY BEAR. IT IS A THEME FOR

THE DEFENSE. THEY TESTIFIED AND ADDED IT IN THE GUILT PHASE. MR . EPISCIPO DIDN'T THROW IN THE TO WEL AND I UNDERSTAND , JUSTICE ANSTEAD , THE REFERENCE TO IN-YOUR-FACE . IT WAS CERTAINLY NOT WITH DEFINES.HE WAS MOST - - IN DEFY ANSWER. HE WAS MOST IN DEFIANCE. HE WAS CERT AINLY MOST RESPECTFUL. HE MAINTAINED YOUR HONOR.

I UNDERSTAND THE STATE'S ARGUMENT IN THAT RESPECT , BUT LET'S SWITCH TO DR . C ROWN AND DR . SU LTAN .

CERTAINLY.

I KNOW THE STATE'S POS ITION IS THAT, THE TESTIMONY OF THOSE PHYSICIANS, O F THOSE INDIVIDUALS , WOULD HAVE BEEN MIXED BAG . GIVE ME THE STATE'S BEST SHOT ON WHY THEY WOULD NOT HAVE BEEN HE AVEN HE LPFUL.

I THIN K DR . WOUL D NOT HAVE BEEN HEL PFUL.

I THINK DR . C ROWN, WE HAVE FIR ST AND FOREMOST IN THE POSTCONVICTION RECORD , 2419 , THE PROSECUTOR ASKEDDR. CROWN , YOU ARE SAYING BRAIN DAMAGE BUT THE BRAINDAMAGE DID NOT A FFECT HIS BEHAVIOR ON THE DAY OF THE CRIME, TO WH ICH DR . CR OW N TESTIFIED THAT'S CORRECT. WE HAVE JUST TAKE POSED WITH DR . CRO WN JUST TAKE POSED WITH JUXTAPOSED WITH DR . SULTAN, WHO SAYS THAT HE BELIEVES HE RECEIVED PREFERENTIAL TREATMENT, PERHAPS BECAUSE HE IS THE B ABY O R THE ONLY BOY. DR. SULTAN CONCLUDES HE HAS POOR SKILLS IN LI VING , PERHAPS BECA USE OF THE TWO. THE FA MILY, THE PARENTS WERE UNAWARE THAT HE BE GAN EXTENSIVE DRUG USE IN HIS E ARLY TE ENS. MAUREEN THE SISTER , CRITICIZES THIS BY SAYING THE PARE NT S ARE SO CLUELESS THIS. IS THE PARENTS WHO THE FATHER IS WORKING THREE JOBS TO PROVIDE FOR HIS FAMILY AND THE MOTHER IS A STAY AT HOME MOTHER UN TIL PATRICK STA RTS KINDERGARTEN. ANY TESTIMONY OF THE MOTHER'S DRINKING AND THROWING SHOES , SHE WOULD THROW SHOES AT THE DAUGHTERS , WHEN SHE, APPARENTLY SHE ADMITTED THAT SHE PROBABLY COULD HAVE THROWN SHOES AT THEM OR THREW A GLASS OF ORANGE JUICE AT ONE OF THE DAUGHTERS , NONE OF IT EVER DIRECTED AT PATRICK HA NNON , SO CERTAINLY IT IS THEWEALTH OF MITIGATION THAT THEY NOW ALLEGE TO HAVE I S C ERTAINLY IN SUBSTANTIAL AND INSIGNIFICANT. IN ADDITION , PATRICK HANNON , NOT ONLY AT THE T IME OF T RIAL BUT AFTER TRIAL, FOR FIVE YE ARS AFTER TRIAL , HE CORRESPONDED WITH MR. EPISCOPO, AND HE CONSISTENT LY AND ADAMANTLY MAINTAINED HIS INNOCENCE, THAT HE WAS NOT GUILTY . YES , YOUR HONOR.

LET ME ASK A QUESTION. IT SEEMS TO ME THAT WHAT THEATTORNEY WAS SAYING AND THEFAMILY WAS SAYING THAT DIDN'T WANT TO DO ANYTHINGTHAT, IF YOU ACCEPT THAT HE HAD NOT COM MITTED THIS CRIME THAT WOULD LATER INCRIMINATE H IM, TO LATER GET ON THE STAND AND IN THE PENALTY PHASE TO GET ON THE STAND AND PLEAD FOR ME RCY , BUT CANAN ATTOR NEY NOT APPROACH THESE KIND S OF MA TTERS AND STILL PRESERVE THE NONADMISSION, I F YOU WI LL, OF GUILT , BUT , STILL , PRESENT THE LIFE OF A DEFENDANT IN A CASE UNDER THESE CIRCUMSTANCES, AND NOT COMPROMISE THAT OPPORTUNITYIN THE FUTURE , IF YOU ACCEPT WHAT THE DEFENDANT SA ID , I WASN'T THERE, TO PROVE IN THE FUTU RE, HE WASN'T THERE?

CERTAINLY, JUSTICE LE WIS , THERE ARE AS MANY WA Y TO SAYDEFEND A CLIENT AS THERE ARE C LIENTS , AND SO AR GUABLY , COULD I T HAVE BEEN DONE A DIFFERENT WAY? CERTAINLY, BUT THAT IS WHAT STRICKLAND SAYS

SHOULD IT HAVE BEEN?

THE ISSUE IS SHOULD IT HAVE BEEN DONE DIFFERENTLY, IT REQUIRES YOU, THE N, TO EVALUATE WHAT COUNSEL KNEW AT THE TI ME AND THE ASSESSMENT HE MADE AT THE TIME, AND MR . EPISCOPO'S STRATEGY WAS , AFTER CONFERRING WITH THEDEFENDANT, HIS PARENTS , HIS SISTER

THAT , NUMBER ONE THEDEFENDANT AND HIS FAMILY ADAMANTLY MAINTAIN THE DEFENDANT WAS NOT THERE , DIDN'T DO, IT WAS NOT CAPABLE OF DOING T NUMBER T WO THAT HE WAS FAMILIA R WITH CASES H E PROSECUTED WHERE ATTORNEYS HAD CHAN GED TACTICS AND HE VIEWED THAT WITHOUT FAVOR, AND MORE IMPORTANTLY AND REAL STRATEGIC AND ONE OF THE MOST IMPORTANT FAC TORS WAS HE WAS NOT GOING TO PUTANYTHING ON IN MITIGATION THAT WOULD DETRACT FROM THE DEFENDANT'S OWN STATEMENTS THAT HE WAS NOT THERE AND HAD NOTHING TO DO WITH IT .

IF C CRC HAD COM E IN AND PRESENTED DEFINITIVE EVIDENCE THAT THIS PE RSON WAS MENTALLY RETARDED , SEVERELY MENTALLY RET ARDED , WOULD THIS HAVE BEEN A VALIDAPPROACH?

I THINK SE VERE MENTAL RETARDATION, THAT YOU WOULD HAVE MR . EPISCOPO TESTIF YING THAT , IN HIS FREQUENT CONTACTS WITH HIS CLIENT THAT, THAT WOULD HAVE BEEN AMATTER THAT WOULD HAVE B EEN A PPARENT TO THEM , YOU HAD THIS DEFENDANT WHO TESTED OUT AT 112 ON AN IQ

I UNDERSTAND THIS IS A HYPOTHETICAL BUT IF Y OU HAVE TO DO THAT.

IF YOU HAVE A DEFENSE COUNSEL WHO IS UNAWARE THAT HIS CLIENT IS SO MENTALLY DEFICIENT, IQ IN THE 50s , LET'S SAY , THEN I DON'T THINK THAT WE WOULD HAVE A LEG TO STAND ON , IF MENTAL RETARDATION HAD NOT BEEN EXPLORED.

SO COU LD YOU THEN GO BACK TO JUSTICE WE LLS'S QUESTIONSABOUT THE QUALITATIVE ANALYSIS OF THOSE EXPERTS. I WANT TO MAKE SURE THAT YOU FINISH THAT.

WITH RESPECT TO THEDEFENSE EXPE RTS?

YES.

THE, I SEE MY RED LI GHT IS ON. MAY I?

CHIEF JUSTICE: YOU MAYRESPOND TO JUSTICE LEWIS 'S QUESTION.

JUSTICE ADVERTISE LEWIS AND JUSTICE WELLS JUSTICE L EWIS AND JUSTICE WELLS , WITH RE GARD TO THE DEFENSE EXPERTS THEY CALLED, DR . CROWN CANNOT MAKE ANY STATEMENT WITH RESPECT TO THE DEFENDANT'S ALLEGED BRAIN IMPAIRMENT AND HIS BEHAVIOR AT THE TIME OF THE CRIME.DR. SULTAN BELIEVES HE HAD POOR SKILLS IN LIVING. HE HAD BEEN , A GAIN , RE LIED ON OTHER PE OPLE , PERHAPS , IN HIS HOME LIFE. FINALLY , YOU HAVE DR . LIPPMAN, WHO SAYS BY THE WAY , THE DEFENDANT HAS ADMITTED TO ME THAT HE WAS THERE, ANDDR. LI PPMAN IN HIS RE PORTS CHRONICLED FOR YEARS HIS A.W.O.L. FROM THE NAVY , V ER Y FACT-SPECIFIC , VE RY METICULOUS LY DET AILS HIS HISTORY AND JUXTAPOSED TO THAT YOU HAVE THE STATE'S WITNESS DR. MARIN , WHO IS VERY CAUTIOUS A BOUT ANSWERING ANY QUESTIONS THAT WILL INCRIMINATE HIM ANDSAID IF YOU KNOW THEY TAKE THIS DEATH PENALTY OFF THETABLE , I WOULD BE HAPPY TO TALK WITH YOU, S O CERTAI NLY REFUTING THE , THEIR BEST EXPERT, IF YOU CONSIDER THAT TO BE DR. CROWN . THANK YOU VERY MUCH. I APPRECIATE THE ADDITI ONAL TIME, YOUR HONORS. THANK YOU.

CHIEF JUSTICE: REBUTTAL.

LET ME ASK YOU TWO QUESTIONS.ONE, DO YOU AG REE OR DISAGREE THAT THERE WAS NO STATUTORY MITIGATION IN THISCASE PROVEN ?

AT THE PENALTY PHASE, WE DID NOT ASSERT THAT THERE WAS STAT UTORY MITIGATION . IMPAIRMENT ON HIS FUNCTIONING

WE ARE ONLY TALKING ABOUT NONSTATUTORY MITIGATING FACTORS HERE, CORRECT?

YES , BUT I DON'T THINKTHAT LESSE NS IT A T ALLBECAUSE THERE IS CERTAINLY AN ABUN DANCE , AND HIS FUNCTIONING M UCH

GIVEN THE STATUTORY MITIGATION, BECA USE WE A RELIMITED IN TIME AND I AM T RYING TO NA RROW IT , AT THE NONSTATUTORY MITIGATION THAT IS AVAILABLE HERE THAT SHOULD HAVE BEEN PRESENTED , WHAT DO YOU ASSERT SHOULD HAVE BEEN PRESEN TED THAT WASNOT , THAT WOULD NOT HAVE BEEN INCONSISTENT OR DAMAGING TO THE ATTEMPT TO PRESENT THE DEFENDANT AS ONE NOT BE ING THERE , AND, TW O, BEING A HARD WORKER, NICE TEDDY BEAR T YPE OF PER SON, THAT WOULD NOT , COULD NOTHAVE BEEN INVOLVED IN THIS OFFENSE?

I DON'T THINK THAT ANYTHING THAT WAS PRESENTEDAT THE EVIDENTIARY HEARINGWOULD HAVE BEEN INCONSISTENT WITH EVEN HO PING FOR , THAT THE JURY MIGHT SEE LINGERINGDOUBT , WITHOUT THAT BEING Y OUR SOLE DEFENSE . THERE WAS THE DOMINATION OF MR. HANNON BY CODEFENDANT RON RICHARDSON , THAT HE HAD A PATTERN OF BEING AN EXTREME FOLL OWER AND THAT P ATTERN FOLLOWED WITH MR . RICHARDSON. I AM TRYING TO BE VERY QUICK HERE BUT IT IS ALL LAID O UTIN THE BRIEF. HE HAD AN EXTENSIVE HISTORY OF DR UG AND ALCOHOL ABUSE STARTING AT AN E ARLY AGE, WHICH AFFE CTED HIS DEVELOPMENT. HIS FUNCTIONING, RIGHT UP UNTIL THE TIME OF THE CRIME , ABILITY TO REASON . THERE WAS PARENTAL NEGLECT, A LACK OF STRUCTURE, LACK OF DISCIPLINE, LACK OF GUIDANCE IN HIS EA RLY ENVIRONMENT , A DYSFUNCTIONAL FAMIL Y. IT GOES ON.

IF THAT IS ALL PRESENTED , DOES THAT NOT PRESENT THE DEFENDANT NOT AS THE HARD W ORKER , NICE , T EDDY BEAR GUYWHO WOULDN'T H URT A SEOUL , INTO A SEOUL , I NTO THE DRUG - - WHO WOULDN'T HURT A SOUL , INTO THE DR INKING , DRUG USING

NOT THE J OB . MR . EPISCOPO DIDN'T DO AN INVESTIGATION TO LEAR N THIS , HE DIDN'T KNOW

HERE IS MY PO INT N GUILT PHASE PENALTY THE DEFENDANT , AS I JUST SAID EAR LIER , THE TRIAL JUDGE FOUND AND THAT IS WHAT H E TESTIFIED TO. ARGUE TO ME, H O W, I F THAT OTHER EVIDENCE I S PRESENTED , HOW IT DOES NOT JUST TO TALLY NEGATE THE AR GUMENT THAT HE IS A GOOD GUY , HARD WORKER,TEDDY BEAR ?

THE PRO BLEM IS THAT THAT IS NOT ALL THERE WAS TO MR . HANNON'S HIST ORY. AND HAD MR . EPISCOPO DONE ANY INVESTIGATION BES IDES SPEAK ING BRIEFLY TO THE PARENTS IN THE HALLWAY AT TRIAL, REGARDING HIS INNOCENCE , HE WOULD HAVE HAD ALL OF THE OPTIONS AVAILABLE, AND IF HE HAD THEN CHOSEN TO GO WITH THE FACT THAT MR . HANNON WAS NONVIOLENT AND A GOOD GUY, THEN SO BE IT , BUT HE DIDN'T HAVE, H E WASN'T INFORMED AS TO WHAT THOSECHOICES WERE, SO I DON'T K NOW THAT I CAN EVEN GIVE , A NSWER THAT ONE IS

AGAIN, L ET'S ASSUME THAT WE AGR EE WITH YOU THAT THE PERFORMANCE WAS DEFICIENT. I AM STILL CONCERNED THAT, ALTHOUGH YOU CERTAINL Y HAVE PUT ON ADDITIONAL EVIDENCE AND DID A GOOD JOB OF DOING THAT, THAT THIS I S , REALLY , COMPELLING MITIGATION THAT WOULD UNDERMINE CONFIDENCE IN THE OUT COME OF THIS PENALTY PHASE VERDICT , SO , AGAIN, IF YOU COULD , I F , AS YOU WERE LOOKING AT IT , YOU KNOW, HE DIDN'T GET , SCHOOL RECORDS , WAS THERE ANY THING COMPELING IN THE SCHOOL RECORDS? JUST GIVE ME , SINCE I SEE YOUR TIME IS U P , A FEW SENTENCES ON JUST WHAT YOU VIEW AS THE MOST COM PELLING MITIGATION THAT , IF A JURY HEARD THAT , I T COULD HAVE MADE A DI FFERENCE IN THEOUTCOME OF THIS CASE.

I THINK THAT I LI STED SOME OF THE THIN GS BUTCERTAINLY THE TESTIMONY OF DR. C ROWN AND OF DR . SULTAN AS TO WHAT HIS LIFE WAS LIKE, WHAT BROUGHT HIM TO THAT POINT IN HIS LIFE , IS THEMOST COMP ELLING, AND IF YOU LOOK AT THEIR TESTIM ONY, THEY, REALLY, PUT

OUT THERE HIS FUNCTIONING , HOW HE WAS LIVING AT THE TIME , AND JUST TO, SINCE YOU ARE CONCERNED , HOW WE WOULD O VERCOME , I GUESS YOUR CONCERN IS THE PREJUDICE ARGUMENT , H ERE , THE AGGRAVATORS DID G O COMPLETELY UNCHALLENGED. AN ATTORNEY CANNOT GET UP THERE AND SAY WE DON'T AGREE , AND THAT BE THE EXTENT O F HIS ARGUMENT, WHEN THERE IS INFORMATION IN THE RE CORD WHERE HE COULD HAVE MADE ARGUMENT AS TO THE AGGRAVATORS , REFUTED WHAT THE STATE WAS ARGUING, ANDIT WOULD HAVE MADE A DIFFERENCE IN THE JURY 'S WEIGHING. THIS JURY DELIBERATING DELIBERATING FOR 40 MINUTES BECAUSE THEY HAD NOTHING T O DELIBERATE. THERE WAS A COMP LETE AB SENCE AT THE PENALTY PHASE .

THANK YOU VERY M UCH FOR BOTH BEING RESPONSIVE TO OURQUESTIONS AND WE WILL TAKE THE CASE UNDER ADVISEMENT