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Marvin Jones v. State of Florida

THE MARSHAL: PLEASE RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING. ONCE AGAIN, THE THIRD CASE ON THIS MORNING'S DOCKET IS MARVIN JONES VERSUS THE STATE OF FLORIDA. WELCOME, MR. NORGUARD.

THANK YOU. GOOD TO BE BACK AGAIN. I DIDN'T EVEN HAVE TO GO HOME BETWEEN ARGUMENTS THIS TIME. BOB NORGUARD ON BEHALF OF MARVIN JONES AND APPEARING ON BEHALF OF MR. JONES AS THE REGISTRY ATTORNEY IN THIS PARTICULAR CASE. ESSENTIALLY WHAT WE ARE DEALING WITH HERE ON THE DENIAL OF THE POST-CONVICTION MOTION THAT I SEE AS BEING THE MAIN ISSUE IN THE CASE IS ISSUE 1 IS RAISED IN MY BRIEF. WHAT ISSUE 1 HAS TO DO WITH WAS THE FAILURE TO PRESENT MENTAL HEALTH MITIGATION IN THIS CASE. I THINK AS THE STARTING POINT THAT WHEN YOU LOOK AT THE ISSUE OF PREJUDICE WHEN YOU LOOK AT THE FAILURE TO PRESENT THE MENTAL HEALTH MITIGATION IN THIS CASE, WE ARE TALKING ABOUT MENTAL HEALTH MITIGATION THAT IS STANDING ALONE WOULD CERTAINLY HAVE BEEN VALUABLE INFORMATION FOR THE JURY IN MAKING A DETERMINATION.

CHIEF JUSTICE: CAN WE JUST GO BACK A LITTLE BIT?

SURE.

CHIEF JUSTICE: WHICH MENTAL HEALTH MITIGATION ARE YOU TALKING ABOUT?

YES, MA'AM.

CHIEF JUSTICE: DR. MILLER OR IS THAT WHO YOU ARE TALKING ABOUT?

YES, BASICALLY WE HAVE.

CHIEF JUSTICE: BUT, AGAIN, THIS IS NOT A CASE WHERE THEY JUST DIDN'T LOOK AT MENTAL HEALTH MITIGATION. THEY PURSUED MENTAL HEALTH MITIGATION AND MADE A DECISION WHETHER IT WAS A GOOD DECISION OR NOT, IT WAS AN INFORMED DECISION NOT TO PUT DR. MILLER ON; IS THAT CORRECT OR NOT CORRECT?

I WOULD DISAGREE WITH THAT.

CHIEF JUSTICE: SO TELL ME HOW.

AND ESSENTIALLY WHAT, AND THIS IS SOMETHING THAT I CERTAINLY HAVE TO REVIEW THE RECORD ON VERY CAREFULLY, PARTICULARLY AFTER HAVING BEEN HERE YESTERDAY AND THAT BEING VIRTUALLY THE FOCUS OF THE ENTIRE ARGUMENT. THIS GUYS IS IN A MUCH DIFFERENT POSTURE IN TERMS OF ANY TACTICAL OR STRATEGIC DECISIONS MADE BY THE DEFENSE ATTORNEY AND I THINK WHEN YOU LOOK AT THIS CASE AND YOU LOOK AT THE TESTIMONY OF THE WITNESSES, WHAT WE HAVE IS ESSENTIALLY A FAILURE TO PROPERLY INVESTIGATE AS A THRESHOLD BEFORE WE GET TO ANY TACTICAL DECISION.

THE MILLER THAT TESTIFIED AT THE EVIDENTIARY HEARING, DR. MILLER?

YES, MA'AM.

THIS IS THE SAME DR.^MILLER THAT HAD BEEN HIRED PRIOR TO THE PENALTY PHASE?

THAT IS CORRECT.

OKAY.

WHAT HAPPENED IN THIS CASE IS MR.^TASSONE CONTACTED DR.^MILLER. WHEN YOU REVIEW DR.^MILLER'S REPORT AND HIS TESTIMONY AND WHEN YOU REVIEW MR.^TASSONE'S TESTIMONY, ESSENTIALLY THE ONLY THING THAT WE HAVE WITH ANY DEGREE OF CERTAINTY IS THAT THE EVALUATION THAT WAS REQUESTED WAS ON THE ISSUE OF COMPETENCE TO PROCEED AT TRIAL AND INSANITY AT THE TIME OF THE OFFENSE, AND WHAT IS SIGNIFICANT ABOUT THIS, ABOUT THAT IN THIS PARTICULAR CASE IS THAT I DON'T BELIEVE THE EVIDENCE SHOWS AND THE RECORD SHOWS THAT THERE WAS ANY REAL CONCERN ABOUT MR.^JONES' COMPETENCE TO PROCEED. THAT THERE WAS ANY REAL CONCERN ABOUT MR.^JONES' INSANITY AT THE TIME. THE DEFENSE PRESENTED BY MR.^JONES WAS THAT HE HAD ACTED IN SELF DEFENSE SO THE REPORT THAT WAS GENERATED BY DR.^MILLER, WHICH WAS THE SOLE REPORT THAT WAS GENERATED IN THIS CASE ADDRESSED THE ISSUE OF COMPETENCE, ADDRESSED THE ISSUE OF INSANITY AT THE TIME OF THE DEFENSE, OF THE OFFENSE AND HAD A CLINICAL INTERVIEW.

LET'S LOOK AT WHAT DR.^MILLER IS SAYING NOW. THIS REALLY DOESN'T SEEM TO BE ONE OF THOSE CASES WHERE WE'VE GOT MAJOR PSYCHOSIS OR MAJOR MENTAL ILLNESS THAT WE SEE IN A LOT OF THESE CASES. WHAT IS IT THAT DR.^MILLER IS REALLY ADDING TO THE PICTURE OF MITIGATION THAT WE DIDN'T GET FROM THE WITNESSES WHO DID, IN FACT, TESTIFY AT THE PENALTY PHASE? I BELIEVE THE PARENTS AND BEST FRIEND AND SISTER MAYBE?

YES, MA'AM.

TESTIFIED ABOUT THIS BACKGROUND INFORMATION. SO WHAT IS IT THAT DR.^MILLER IS REALLY GOING TO ADD TO ALL OF THIS?

WELL, FIRST OF ALL THE START WILLING POINT OBVIOUSLY I MEAN I RECOGNIZE AND THIS COURT RECOGNIZES, I THINK EVERYBODY RECOGNIZES IF YOU HAVE A STATUTORY MENTAL MITIGATOR THOSE ARE OBVIOUSLY VERY, VERY STRONG MENTAL MITIGATORS, PARTICULARLY GIVEN THE MANY QUALIFYING TERMS THAT YOU HAVE TO JUMP THROUGH AND THE HOOPS YOU HAVE TO JUMP THROUGH TO REACH THAT LEVEL OF PROOF. NONETHELESS, NONSTATUTORY MENTAL HEALTH MITIGATION CAN BE VERY SIGNIFICANT IN A PARTICULAR CASE, AND OBVIOUSLY THIS IS SOMETHING THE COURT AND THE JUDGES HAVE TO LOOK AT. AND IN THIS PARTICULAR CASE, NOT ONLY DO WE HAVE MENTAL HEALTH MITIGATION BEING MR.^JONES' DEPRESSION, MR.^JONES' ANXIETY, MR.^JONES' OBSESSIVE PERSONALITY, OBSESSIVE COMPULSIVE PERSONALITY TRAIT AND OR DISORDER, THOSE FACTORS IN HIS LIFE, INCLUDING THE STRESSORS GOING ON IN HIS LIFE. WE'RE TYPICALLY DEALING WITH AXIS 1 AND 2 DIAGNOSES. WE FORGET THAT MENTAL HEALTH EXPERTS ALSO EVALUATE OTHER AXES GOING ON IN A PARTICULAR PERSON'S POINT IN TIME.

I GUESS I LOOKED AT THIS AND HE WAS LOOKING FOR A JOB AND HE TURNED DOWN CERTAIN JOBS BECAUSE HE DIDN'T WANT TO GO OUT OF STATE. OTHER JOBS BECAUSE HE WANTED SOMETHING BETTER, AND THE KINDS OF THINGS THAT WERE GOING ON IT SEEMS TO ME IN HIS LIFE WERE THE KINDS OF THINGS THAT GO ON IN A LOT OF PEOPLE'S LIVES AND SO CONNECT THESE STRESSORS WITH WHY THEY WERE SO DEVASTATING TO MR.^JONES?

CERTAINLY. FIRST OF ALL, I THINK THAT MOST PEOPLE, CERTAINLY MOST PEOPLE AT SOME POINT HAVE SOME STRESSORS GOING ON IN THEIR LIFE. THEY MAY HAVE SOME UPHEAVAL IN THEIR

JOB, UPHEAVAL IN OTHER COMPONENT OF THEIR LIFE BUT WHEN YOU LOOKED AT MR.^JONES' SITUATION AT THIS POINT IN TIME NOT ONLY WAS HE HAVING UPHEAVAL IN HIS JOB, AND UPHEAVAL WITH HIS FINANCIAL SITUATION HE WAS HAVING UPHEAVAL WITH HIS FAMILY SITUATION. HIS WIFE HAD MOVED TO A DIFFERENT AREA AND WAS LIVING WITH HER PARENTS. HE HAD JUST RECENTLY SEPARATED FROM THE MILITARY THAT HE HAD BEEN IN FOR EIGHT YEARS WHICH WOULD HAVE BEEN A VERY STRUCTURED ENVIRONMENT.

CHIEF JUSTICE: THE JURY KNEW ALL OF THAT.

THEY KNEW THAT THOSE WERE PRESENTED AS GOOD GUY MITIGATION. THINGS THAT THE JURY SHOULD CONSIDER IN TERMS OF, YOU KNOW, THE FACT HE WAS IN A MILITARY WAS A GOOD GUY THING.

CHIEF JUSTICE: I'M TRYING TO FIND OUT HOW AND I GUESS WE'RE GOING INTO THE PREJUDICE PART ALTHOUGH I STILL HAVE QUESTIONS ABOUT THE FIRST PRONG IS HOW DOES THAT -- WHAT KIND OF MITIGATION IS THAT? IN OTHER WORDS, BY DR.^MILLER SAYING IT AS OPPOSED TO JUST THAT, YES, OKAY, SO HE DIDN'T HAVE A JOB AND HE WAS, YOU KNOW, HE STILL KILLED THIS PERSON.

CORRECT. BUT WHAT WE ARE DEALING WITH HERE IS A SITUATION WHERE THE MENTAL HEALTH MITIGATION I'M REFERRING TO SPECIFICALLY TIES INTO NOT JUST, YOU KNOW, MITIGATION IN GENERAL, BUT TIES INTO THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMED INDICATE -- PREMEDITATED MURDER.

CHIEF JUSTICE: DID DR.^MILLER SAY HE WAS NOT CAPABLE OF HEIGHTENED PLANNING OF A MURDER?

DR.^MILLER, IN ADDITION TO BEING A PHYSICIAN, TESTIFIES THAT THE STRESSORS AND IN MR.^JONES' LIFE, ALSO TALKED ABOUT HIS DIAGNOSES THAT MR.^MILLER HAD OBSESSIVE/COMPULSIVE PERSONALITY DISORDER OR A TRAIT, AND THAT THIS WAS SOMETHING WHERE ABOVE AND BEYOND YOUR AVERAGE INDIVIDUAL WHO HAS SOME UPHEAVAL OR PROBLEM IN THEIR LIFE TEND TO REACT VERY STRONGLY TO IT. IT IS A SITUATION WHERE DR.^MILLER TESTIFIED THAT THIS CERTAINTY DISORDER IS AGGRAVATED BY STRESS AND HERE WE HAVE TREMENDOUS STRESS IN THIS PERSON'S LIFE.

WAS IT A DISORDER HE CHARACTERIZED OR A TRAIT?

HE CHARACTERIZED IT AS HE NEVER REALLY MADE A FINAL AXIS 1 DIAGNOSIS BECAUSE AS I INDICATED AT THE BEGINNING OF MY ARGUMENT ALL HE WAS ASKED TO DO WAS EVALUATE COMPETENCY AND INSANITY AT THE TIME OF THE OFFENSE. DR.^MCMAHON WAS BROUGHT ON BOARD BY THE DEFENSE IN THIS CASE TO OFFER A MORE DETAILED PSYCHOLOGICAL ANALYSIS OF MITIGATION IN THIS CASE AND MR.^JONES' MENTAL STATE AT THE TIME OF THE OFFENSE. HER OPINIONS ARE ESSENTIALLY CONSISTENT WITH --

DID SHE SAY IT WAS A DISORDER OR TRAIT?

SHE DID NOT IDENTIFY THAT.

SO NOT EVEN SHE SAYS IT IS A DISORDER SO GETTING BACK TO THE FIRST PRONG WHICH IS INEFFECTIVE ASSISTANCE AND COMING FULL CIRCLE TO THE CHIEF JUSTICE'S ORIGINAL QUESTION WHICH IS WHY WASN'T THIS A STRATEGIC DECISION WHERE COUNSEL FINDS A DOCTOR THAT SAYS THIS GUY HAS WHAT EVERYBODY WOULD CONSIDER NORMAL PROBLEMS IN LIFE AND EVEN IF IT IS JUST, WELL, EVEN MORE THAN NORMAL PROBLEMS BUT NOT TO THE EXTENT THAT IT WOULD CONSTITUTE A STATUTORY MITIGATOR OF EXTREME EMOTIONAL DISTRESS WHY IS IT NOT A REASONABLE STRATEGIC DECISION TO SAY INSTEAD OF PAINTING HIM AS THIS GUY WITH

MENTAL PROBLEMS WHICH I'M NOT GOING TO BE ABLE TO PROVE ALL OF THE WAY I'M GOING TO PAINT HIM AS A GOOD GUY? WHY ISN'T THAT A REASONABLE STRATEGIC DECISION?

FIRST OF ALL, OBVIOUSLY UNDER WIGGINS THERE HAS TO BE PROPER INVESTIGATION FOR A STRATEGIC DECISION WITH BE MADE.

HE LOOKED AT EDUCATION, FAMILY HISTORY SO HE DID THAT.

HE DID NOT CONDUCT A FULL-BLOWN MENTAL HEALTH EVALUATION IN TERMS OF EVALUATING THE MITIGATION IN THIS CASE.

DOES EVERY COUNSEL HAVE TO ORDER A FULL-BLOWN MENTAL HEALTH EVALUATION WHEN THERE IS NO INDICATION ANYWHERE IN THE DEFENDANT'S BACKGROUND OR IN THE EVALUATION OF THE EXPERT FOR COMPETENCY PURPOSES THAT THERE IS ANY MENTAL HEALTH ISSUE INVOLVED? DOES EVERYBODY COUNSEL NOW HAVE TO UNDERGO AN EXTENSIVE MENTAL HEALTH EVALUATION WITHOUT ANY EVIDENCE THAT ONE IS NEEDED?

WELL, IN THIS PARTICULAR INSTANCE, WHAT WE HAVE IS A SITUATION WHERE FIRST OF ALL COUNSEL CHOSE TO LIMIT THE INQUIRY OF THE MENTAL HEALTH PROFESSIONAL TO COMPETENCY AND INSANITY. HE DID NOT ASK DR. MILLER TO FULLY INVESTIGATE MENTAL HEALTH MITIGATION.

CAN YOU ANSWER MY QUESTION? WHAT WAS THERE IN WHAT HE DID FIND OUT ABOUT THE DEFENDANT'S BACKGROUND AND SPEAKING TO THE DEFENDANT AND THE CIRCUMSTANCES OF THE CRIME, ANYTHING SURROUNDING THIS CASE THAT WOULD LEAD COUNSEL TO AT LEAST SUSPECT THAT THERE WAS SOME SUBSTANTIAL MENTAL HEALTH MITIGATION HERE, SOME MENTAL HEALTH PROBLEM THAT NEEDS TO BE INVESTIGATED FURTHER UNLESS WE ARE GOING TO SAY THAT EVERY DEFENDANT NEEDS TO UNDERGO A MENTAL HEALTH EVALUATION?

WELL, FIRST OF ALL I HAVE A PROBLEM WITH THE COURT SAYING UNLESS THERE IS SUBSTANTIAL EVIDENCE OF SOME SUBSTANTIAL MENTAL HEALTH CONDITION THAT YOU DON'T HAVE TO INVESTIGATE IT, BECAUSE, YOU KNOW, EVEN A MINOR MENTAL HEALTH ISSUE WOULD CERTAINLY STILL BE MITIGATION. IT MAY NOT CARRY AS MUCH WEIGHT.

DON'T 99.9% OF US HAVE MENTAL HEALTH ISSUES?

CHIEF JUSTICE: HE'S INCLUDING HIMSELF IN THAT.

I THINK THAT CERTAINLY MOST OF US WOULD NOT HAVE SOMETHING WHERE DSM IV R WOULD BE A DIAGNOSIS. WE MAY HAVE LIMITED DEPRESSION OR LIMITED ANXIETY.

CHIEF JUSTICE: BUT MR. NORGARD, WE ARE TALKING GOOD AND I AM A BIG BELIEVER THAT IF THERE ARE MENTAL HEALTH ISSUES THEY HAVE TO BE EXPLORED, BUT IN THIS CASE ONCE YOU GET THE RECORD AND TO ME THAT'S THE CRITICAL PART OF WHAT COUNSEL IN MANY CASES DOES NOT DO, YOU HAVE ALL OF THE RECORDS, WHAT RED FLAGS ARE THERE IN THE RECORDS THAT WOULD PUT A, YOU KNOW, AGAIN WE'RE TALKING ABOUT JUST WHAT THE STANDARD IS FOR PROFESSIONAL COMPETENCE FOR SOMEONE REPRESENTING A DEATH PENALTY DEFENDANT THAT IN THIS CASE CALLS OUT TO SAY UNLESS AGAIN WE SAY THAT IN EVERY CASE YOU'VE GOT TO HIRE SOMEBODY TO ADVISE YOU ON MENTAL HEALTH MITIGATION THAT WOULD SAY THAT COUNSEL WAS NOT FUNCTIONING AS REQUIRED BY THE SIXTH AMENDMENT. IS THERE ANYTHING IN THOSE RECORDS?

WELL, FIRST OF ALL, IN A CAPITAL CASE WHERE STATUTORY MENTAL MITIGATORS ARE A POTENTIAL FACTOR.

CHIEF JUSTICE: IN EVERY CASE YOU ALWAYS, THOSE ARE THE ONES YOU WOULD LIKE TO GET. SO THE QUESTION SHOULD BE DO YOU ALWAYS NEED TO HIRE A MENTAL HEALTH EXPERT TO -- IF THERE IS, YOU KNOW, IF THERE IS SOME NEED TO EXPLAIN WHY THE DEFENDANT ACTED AS HE OR SHE DID?

WELL, IN THIS CASE MR.^TASSONE INDICATED THAT HE ALWAYS DID HIRE A MENTAL HEALTH PROFESSIONAL IN CAPITAL CASES SO LOOKING AT THIS PARTICULAR CASE THAT WAS HIS PRACTICE.

CHIEF JUSTICE: WHY DID HE SAY HE LIMITED DR.^MILLER THEN?

HE LIMITED AND SAID INCOMPETENCE AND INSANITY WHICH MAKES NO SENSE AS TO WHY HE WOULD HAVE LIMITED THAT.

CHIEF JUSTICE: DID YOU ASK THE QUESTION WHY DID HE LIMIT HIM IN HIS INQUIRY?

AND THE AS THAT WERE PRESENTED REGARDING THAT WHEN MR.^TASSONE WAS QUESTIONED ABOUT WHETHER HE EVER TALKED TO DR.^MILLER ABOUT MITIGATION OR MITIGATION OF CCP THROUGH MENTAL HEALTH EVIDENCE COULD NOT RECALL WHETHER HE HAD TALKED TO HIM ABOUT THAT.

CHIEF JUSTICE: HOW IS THIS CASE DIFFERENT FROM THE RUTHERFORD CASE? ARE YOU FAMILIAR WITH THE RUTHERFORD CASE?

NO, MA'AM.

CHIEF JUSTICE: OKAY. IT SEEMS, AS I RECALL, THAT THE FACTS THERE WAS THE SAME THING AS IT WAS A COMPETENCY EVALUATION. THERE WAS NOTHING IN THE COMPETENCY EVALUATION THAT SENT UP ANY RED FLAGS AS TO, YOU KNOW, THAT THERE SHOULD BE FURTHER INVESTIGATION AND THE TACTIC OF THE DEFENSE WAS TO HUMAN ANIZE THIS PERSON. THIS IS A VERY UNUSUAL CASE. THIS IS SOMETHING THAT HAD A WONDERFUL BACKGROUND UNTIL A CERTAIN POINT IN TIME. THIS IS A MODEL CITIZEN, AND SO THAT WAS THE TACTIC TO TRY TO DO EVERYTHING TO MAKE HIM SEEM AS A -- THAT THIS WAS AN ABBORHENT ACT IN HIS LIFE. NOT THAT HE HAD SOME OBSESSIVE/COMPULSIVE DISORDER THAT MADE HIM RIGID IN THE WAY HE FUNCTIONED IN LIFE.

WELL, THE REPORT THAT WAS GENERATED, DESPITE ITS LIMITATIONS ON SCOPE DID INDICATE OBSESSIVE/COMPULSIVE PERSONALITY TRAIT AND/OR DISORDER AND CERTAINLY THAT SHOULD HAVE TRIGGERED AN INQUIRY INTO THAT AS POTENTIAL MITIGATION, AND WHEN YOU LOOK AT DR.^MILLER'S TESTIMONY AT THE EVIDENTIARY HEARING IN TERMS OF THE IMPORTANCE OF THAT AS IT RELATES TO THIS PARTICULAR CASE, IT GOES TO THE VERY HEART OF MR.^JONES' MENTAL STATE AT THE TIME OF THE OFFENSE AND I THINK ANY TIME WE DEAL WITH A SITUATION WHERE A PERSON WHO ON THEIR SPACE APPEARS TO BE A MODEL CITIZEN, A GOOD CITIZEN YOU'VE GOT TO ASK.

WHAT DO YOU CONSIDER TO BE THE MOST STRIKING THING THAT DR.^MILLER TESTIFIED TO THAT WOULD HAVE BEEN HELPFUL IN THE MITIGATION?

THE MOST STRIKING THING I SEE IS THAT WE HAVE THIS PERSON WHO HAS THIS OBSESSIVE/COMPULSIVE TRAIT OR DISORDER WHO WAS UNDERGOING SIGNIFICANT STRESSORS IN THEIR LIFE, AND AS DR.^MILLER TESTIFIED IS IN A SITUATION LIKE THIS HE WAS IN A STATE OF DISCONTROL CHARACTERIZED BY DESTRUCTIVE BEHAVIORAL RESPONSES AND MORE PRIMITIVE REACTIONS. DR.^MILLER TESTIFIED HE FOUND NO EVIDENCE TO SUPPORT THE CONCLUSION THAT THE INCIDENT OR OFFENSES OR LOGICALLY PLANNED OR THOUGHT OUT OR THE PRODUCT OF ANY REASON OR SUBSTANCE BUT WERE AN EMOTIONAL RESPONSE TO A HIGHLY CHARGED

EMOTIONAL EVENT UNDER CIRCUMSTANCES WHERE MR.^JONES WAS UNDER TREMENDOUS STRESS AND PRESSURES IN HIS LIFE.

BUT EVEN CONSIDERING THAT, I MEAN, THIS IS A SITUATION MR.^JONES WAS CALLED BY MR.^STOW, IS THAT HIS NAME?

YES, MA'AM.

TO COME AND MAKE GOOD ON A BAD CHECK THAT HE HAD WRITTEN.

THIS IS THE SITUATION WHERE THERE HAD BEEN ONGOING PROBLEMS BETWEEN THESE TWO INDIVIDUALS FOR QUITE SOME TIME.

ON THIS PARTICULAR DAY HE WENT SUPPOSEDLY TO MAKE GOOD ON A CHECK AND HE ENCOUNTERED THE DAUGHTER OF MR.^STOW. HE GOES BACK OUT AND GETS A WEAPON. COMES BACK IN AND SHOOTS HER. GOES INTO ANOTHER OFFICE AND SHOOTS MR.^STOW AND COMES AROUND AND SHOOTS HIM A SECOND TIME AND SO I'M TRYING TO UNDERSTAND HOW GIVEN THE FACTS OF THE CASE THIS IS AN IMPULSIVE REACTION BY MR.^JONES HERE.

WELL, I THINK CERTAINLY, YOU KNOW, IF IT WAS AN IMPULSIVE -- WELL, THE SITUATION --

YOU CONSIDER IT IMPULSIVE?

PSYCHOLOGICALLY WHAT WE ARE LOOKING AT IS WHAT DR.^MILLER DESCRIBED IS SOMEBODY WHO WAS IN A STATE OF DISCONTROL, YOU KNOW, WHEN WE DEAL WITH PREMEDITATION OBVIOUSLY YOU ARE DEALING WITH SOMETHING THAT IS VERY CIRCUMSTANTIAL AND DIFFERENT CONCLUSIONS CAN BE DRAWN FROM THE CIRCUMSTANTIAL EVIDENCE AND IN THIS CASE WHAT WE HAVE IS OBJECTIVE FACTS WHICH CAN BE APPLIED AND USED TO ANALYZE WHAT MR.^JONES' ACTUAL MENTAL STATE WAS. NOT JUST ONE INTERPRETATION.

LET ME ASK, IN REACHING HER DECISION, DID SHE RELY ON THE FACTS AS PRESENTED TO HER BY MR.^JONES OR AS FOUND BEYOND A REASONABLE DOUBT BY THE JURY?

YOU ARE REFERRING TO DR.^MILLER; IS THAT CORRECT?

OR MCMAHON, EITHER ONE OF THEM. TYPICALLY THEY JUST TAKE THE FACT PATTERN AS PRESENTED BY THE DEFENDANT AND THEN KIND OF GO FROM THERE BUT YOU MENTIONED OBJECTIVE FACTS.

WELL, THE STRESSORS THAT WERE GOING ON IN HIS LIFE, IN FACT, WERE PART OF THE STATE'S THEORY OF THE CASE OF THE FINANCIAL PROBLEMS.

BUT AS FAR AS THE EVENT THAT JUSTICE QUINCE WAS TALKING ABOUT AROUND THE MURDER OF -- ITSELF, WAS IN MAKING THIS ANALYSIS WERE THE EXPERTS RELYING ON THE PORTRAYAL OF THE EVENTS IN THE BUSINESS AS JONES PRESENTED THEM OR AS THE JURY FOUND THEM?

WHAT THEY BASED IT ON WAS THEIR EVALUATION OF MR.^JONES AND WHAT'S IMPORTANT IS THAT NEITHER ONE OF THESE DOCTORS BOUGHT INTO OR RELIED ON HIS VERSION OF SELF-DEFENSE. WHAT THEY WERE LOOKING AT --.

CHIEF JUSTICE: I WANT TO REMIND YOU YOU ARE IN YOUR REBUTTAL.

I WOULD RATHER USE MY TIME TO ADDRESS THAT. WHAT THEY RELIED ON WAS THEIR EVALUATION OF MR.^JONES BASED ON NOT JUST HIS OWN PERSONAL SELF-PURPORTING INFORMATION WHICH WAS SELF-DEFENSE BUT THEY HAD THEIR OWN DOUBTS ABOUT THE

VALIDITY OF SELF-DEFENSE CLAIM AND, IN FACT, DR. ^MCMAHON TALKED ABOUT THE MENTAL STATE HE WAS IN LED TO MISPERCEPTIONS OF REALITY ON MR. ^JONES' PART IN TERMS OF HOW HE REACTED TO THINGS IN HIS ENVIRONMENT BECAUSE OF THIS DIS CONTROL DESCRIBED BY DR. ^MILLER. SO THESE DOCTORS BY NO MEANS SOLELY JUST BOUGHT INTO WHAT MR. ^JONES TOLD THEM BECAUSE HIS VERSION WAS THAT IT WAS JUST A CLEAR-CUT CASE OF SELF DEFENSE. WHAT THEY WERE LOOKING AT IS THE EVENTS IN HIS LIFE AS PROVIDED BY MULTIPLE WITNESSES, THEIR ASSESSMENT OF HIM AFTER A VERY CAREFUL MENTAL HEALTH EVALUATION WHERE WHAT THEY ARE REVEALING IS THINGS ABOUT HIM THAT I DON'T EVEN BELIEVE MR. ^JONES KNEW ABOUT HIMSELF IN TERMS OF WHAT WAS GOING ON HERE. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH.

GOOD MORNING, CHIEF JUSTICE PARIENTE. MAY IT PLEASE THE COURT, CHARMAINE MILLSAPS REPRESENTING THE STATE . THERE IS NO DEFICIENT PERFORMANCE AND THERE IS NO PREJUDICE. FIRST OF ALL, THIS IS NOT A CASE OF FAILURE TO INVESTIGATE, AND I MEAN THIS WAS NOT REPRESENTED MERELY TO INSANITY AND COMPETENECY TO STAND TRIAL. THE REPORT WAS NOT EVEN LIMITED TO THAT, BUT MORE OVER NOT ONLY DID --.

CHIEF JUSTICE: SINCE MR. ^NORGARD SAID SPECIFICALLY MILLER WAS ENTITLED -- HIRED ONLY FOR COMPETENECY AND INSANITY YOU DISPUTE THAT?

YES.

CHIEF JUSTICE: WHAT DID MR. ^TASSONE SAY OR HOW IS THAT CONTRADICTED IN THE RECORD?

OKAY. NOW, THE REPORT THAT DR. ^MILLER GENERATED SEVERAL MONTHS PRIOR TO THE TRIAL IS IN THE RECORD ON THE -- IN THE SUPPLEMENTAL RECORD. IT IS THE FIRST THREE PAGES OF THE SUPPLEMENTAL RECORD. IT IS A THREE-PAGE REPORT. YES, IT DOES TALK ABOUT COMPETENECY AND THAT HE WAS NOT INSANE AT THE TIME OF THE TRIAL BUT IT ALSO GIVES FOR INSTANCE THE DIAGNOSIS OF COMPULSIVE PERSONALITY TYPE. SO IT TALKS ABOUT HIS BACKGROUND, IT TALKS ABOUT THE NAVY. BUT MORE IMPORTANTLY THAN THAT, WHAT MR. ^TASSONE TESTIFIED TO WAS HERE'S MY STANDARD PRACTICE. MR. ^TASSONE'S NOTES WERE DESTROYED IN AN ARSON, SO HE CANNOT TELL US EXACTLY WHAT HE DID IN THIS CASE BUT FOR INSTANCE IT IS ALWAYS -- HE TESTIFIED IT WAS ALWAYS HIS PRACTICE TO HIRE AN EXPERT FOR BOTH COMPETENECY AND FOR MENTAL MITIGATION. SO WHAT SEEMS TO HAVE HAPPENED HERE WITH MR. ^TASSONE THINKS HAPPENED HERE WAS HE GOT THE REPORT FROM THAT AND THEN THEY HAD A CONVERSATION ABOUT A TELEPHONE CONVERSATION ABOUT BOTH STATUTORY AND NONSTATUTORY MENTAL MITIGATION. YOUR HONOR, THEY INVESTIGATED MORE. DR. ^MILLER'S REPORT WAS NOT EVEN LIMITED JUST TO COMPETENECY. IT CONTAINED A DIAGNOSIS BUT THEN THEY TALKED ABOUT THAT REPORT AND MR. ^TASSONE SAID THAT CONVERSATION INVOLVED IT IS MY STANDARD PRACTICE. IT WOULD HAVE INVOLVED MITIGATION BOTH STATUTORY AND NONSTATUTORY.

WHEN YOU TALK ABOUT THE REPORT GOING BEYOND COMPETENECY, DOES THE REPORT SAY SPECIFICALLY I FIND NO STATUTORY MENTAL HEALTH MITIGATORS? THERE MAY BE NONSTATUTORY BUT NOT REALLY? DOES IT TALK IN THOSE TERMS?

IT DOES REFER TO -- NO, IT DOESN'T REALLY SAY STATUTORY AND NONSTATUTORY. IT DOES GIVE A DIAGNOSIS. THAT SEEMS TO HAVE HAPPENED IN THE TELEPHONE CONVERSATION THAT MR. ^TASSONE TALKED ABOUT. IT DID GIVE A DIAGNOSIS AND IT ALSO REFERRED TO HIS DEPRESSION IN IT, OKAY? IT IS A THREE-PAGE REPORT.

ANY QUESTIONS ABOUT THE RECORDS GIVEN TO THE EXPERTS TO HELP HIM PREPARE THIS EVALUATION?

NO, THERE WAS NO ALLEGATION. WE DID NOT EXPLORE THAT. THAT SEEMS -- EVERYBODY SEEMS TO HAVE AGREED THAT EVERYBODY GOT EVERYTHING.

CHIEF JUSTICE: MISS MILLSAPS, WHAT WAS THE JURY VOTE IN THIS CASE?

9-3, YOUR HONOR.

CHIEF JUSTICE: AND WHAT WERE THE AGGRAVATORS? ONE WAS CCP?

YES, PECUNIARY GAIN AND THEN THE PRIOR VIOLENT FELONY BUT THE PRIOR VIOLENT FELONY WAS THE CONTEMPORANEOUS ATTEMPTED MURDER.

CHIEF JUSTICE: LET'S TALK ABOUT CCP A SECOND. I GUESS WHAT I'M CONCERNED ABOUT IS THAT IN MOST OF THE CASES WHERE YOU SAY, WELL, YOU DON'T PUT ON A MENTAL HEALTH EXPERT AND YOU SAY THAT'S GOING TO OPEN THE DOOR TO ALL OF THIS DAMAGING INFORMATION, WELL, HERE IS A GUY THAT HAD NO PRIOR HISTORY OF VIOLENCE IN HIS LIFE, AND WAS PRETTY MUCH A GREAT GUY, MODEL CITIZEN, BUT HE COMMITS THESE MURDERS WHICH TO, YOU KNOW, IF YOU LOOK AT HIS PRIOR LIFE YOU SAY HOW COULD THIS HAPPEN, AND YET NOT ONLY DID HE COMMIT THEM BUT HE COMMITTED THEM IN A HEIGHTENED WAY. WHAT IS THE STRATEGIC REASON FOR NOT AT LEAST OFFERING SOME EXPLANATION FOR WHY THIS MAN, WHOSE LIFE HAD BEEN GOING ALONG SO WELL AND THE UNRAVELING, HOW HIS ISSUES ABOUT HIS OWN PERSONALITY MAKE-UP CONTRADICTED TO NOT SOMETHING THAT IS JUSTIFIED BUT TO AN UNRAVELING THAT MIGHT AT LEAST TAKE AWAY THE CCP AGGRAVATOR?

WELL, I'M NOT SURE YOU CAN TAKE AWAY THE CCP AGGRAVATOR. THAT WOULD BE WONDERFUL IF COUNSEL COULD DO IT. I DON'T THINK -- WE STILL DON'T -- HE STILL DOESN'T HAVE THE AMMUNITION TO DO THAT EVEN AFTER THE EVIDENTIARY HEARING AND REMEMBER THIS FUNDAMENTALLY WORKED. LET ME TELL YOU WHAT WAS PRESENTED AT THE PENALTY HEARING REGARDING THE LAY EXPERTS AND WHAT THEY ACHIEVED. BOTH THE FACT THAT HE HAD NO SIGNIFICANT CRIMINAL HISTORY WAS ONE OF THE MITIGATORS, AND THEN HIS MILITARY HISTORY NINE YEARS, EIGHT YEARS IN THE NAVY.

CHIEF JUSTICE: BUT THE SHORT QUESTION IS WHAT'S THE DOWNSIDE INPUTTING ON THE MENTAL HEALTH MITIGATION IN THIS CASE?

BECAUSE IT IS A LITTLE INCONSISTENT. I DON'T WANT TO SAY IT IS DIRECTLY INCONSISTENT. IT IS INCONSISTENT. YOU MAKE HIM TO MAKE HIM A NORMAL, NICE GUY.

CHIEF JUSTICE: A NORMAL NICE GUY DOESN'T GO AND GET A GUN AND KILL TWO PEOPLE OR ATTEMPT TO KILL TWO PEOPLE IN COLD BLOOD OVER A CAR DISPUTE. BY ITS VERY NATURE I WOULD BE SAYING THIS IS NO NICE GUY. THIS IS REALLY ON THOSE DAYS WAS A COLD-BLOODED KILLER EVEN IF FOR THE LAST HOW MANY YEARS HE WAS THE GREATEST GUY IN THE WORLD THAT WOULDN'T IMPRESS ME ON THAT DAY IN QUESTION HE IS A COLD-HEARTED, COLD-BLOODED KILLER.

BUT WE DID THIS AT THE EVIDENTIARY HEARING. FINAL DIAGNOSIS IS VERY -- THE STATE ISN'T MAKING AN ARGUMENT THAT JUST BECAUSE THIS IS NOT STATUTORY MITIGATION THAT IT IS TRIVIAL.

CHIEF JUSTICE: I'M ASKING YOU JUST ON THE PERFORMANCE PRONG, YOU KNOW, JUST BECAUSE SOMEONE SAYS IT IS STRATEGY IT HAS TO BE REASONABLE STRATEGY. I'M ASKING YOU WHERE IS THE DOWNSIDE INPUTTING ON -- WHY IS IT REASONABLE OR FROM TRYING TO EXPLAIN SOMETHING THAT IS SO OUT OF CHARACTER FOR THIS PERSON? IT IS NOT LIKE YESTERDAY NORGARD TALKED ABOUT THE ELEPHANT IN THE ROOM AND WE KNOW HE KILLED THE PERSON IN COLD BLOOD.

NOW, ONE OF THE DOWNSIDES WITH THIS PARTICULAR EXPERT, DR. MILLER, AND IT IS IN HIS REPORT, HE DID ASK FIRST ALSO RESPONDING TO JUSTICE BELL'S QUESTION, HE DID AT FIRST IN THE REPORT TAKE THE DEFENDANT'S VERSION OF WHAT HAPPENED AND SAID IN HIS REPORT HE FOUND IT CREDIBLE. BY THE TIME OF THE EVIDENTIARY HEARING PROBABLY WHEN HE IS GETTING ALL OF THE POLICE REPORTS AND STUFF LIKE THAT, BY THE TIME OF THE EVIDENTIARY HEARING, WELL, ACTUALLY BY THE TIME OF THE TELEPHONE CONVERSATION AND AT THE EVIDENTIARY HEARING HE SAYS HE -- THAT HE DOUBTS THE DEFENDANT'S VERSION OF EVENTS. SO, NUMBER ONE, WE'VE GOT AN EXPERT WHO AT FIRST SAID HE FOUND THE DEFENDANT'S VERSION CREDIBLE AND THEN AS HE FINDS OUT MORE AND MORE ABOUT THE CRIME HE ENDS UP FINDING THE DEFENDANT NOT CREDIBLE. I WOULD BE WARY IF I WERE COUNSEL TALKING ON THE PHONE TO MY MENTAL EXPERT ABOUT HIS OWN CHANGE OF VIEW ABOUT THE DEFENDANT'S CREDIBILITY. NOW, HOW THE STATE COULD GET OUT OF THAT WOULD BE A LITTLE HARD TO SEE, BUT THE STATE PROBABLY COULD GET AT SOME THINGS, FOR INSTANCE DID YOU KNOW HE BROUGHT A GUN TO THE SAN PABLO MOTORS WITH HIM. YOU COULD IMPEACH HIM WITH SOME OF THE FACTS IF YOU GOT A COPY OF HIS REPORT AND WE WERE LIKELY TO DEPOSE THIS WITNESS. SO, YOUR HONOR, I'M NOT SURE GIVEN ALMOST EVERYTHING HAS DOWNSIDES AND GIVEN THAT THIS WAS VERY, VERY MINOR MENTAL MITIGATION TO THE EXTENT IT WAS, YOU ENDED UP WITH COMPULSIVE PERSONALITY TYPE BECAUSE DR. MILLER'S DATA, HIS NOTES AND HIS RAW DATA HAD BEEN THIS WAS TOO LATE. HE COULDN'T GO BACK AND REVIEW HIS FILES. HE SAID HE COULDN'T DECIDE WHETHER IT WAS A DISORDER DUE TO HIS NOTES. IT MIGHT HAVE BEEN TRAITS OF THAT AND THAT SUCH PEOPLE CAN FUNCTION QUITE WELL IN THE WORLD.

GETTING TO THE ISSUE OF WHETHER THE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT, TO GET A BETTER REPORT, I GUESS, WHAT WAS DR. MCMAHON'S TESTIMONY AT THE EVIDENTIARY HEARING THAT WENT BEYOND WHAT DR. MILLER HAD SAID IN HIS REPORT? THAT SHE WOULD PUT ON -- SHE WOULD HAVE SAID?

NOTHING. THAT'S THE PROBLEM. SHE ENDS UP WITH THE BASIC SAME DIAGNOSIS. SHE DOESN'T REFER TO IT AS COMPULSIVE PERSONALITY TYPE. HER FINAL DIAGNOSIS IS ANXIETY AND THEY ARE BOTH -- THEY BOTH AGREE ON ANXIETY. SHE HASN'T GOT -- THIS ISN'T EVEN THE CASE WHERE THEY GET A BETTER EXPERT AND IN THE EVIDENTIARY HEARING AND REMEMBER I'M NOT ENSURE DR. MCMAHON IS PROPERLY PART OF THE ANALYSIS, BECAUSE WHAT WE REALLY HAVE HERE IS NOT A FAILURE TO INVESTIGATE. WE REALLY HAVE A FAILURE TO PRESENT AND ONLY A FAILURE TO PRESENT.

I THINK HE IS PRESENTING IT BOTH WAYS HERE.

I DON'T THINK HE GETS TO AND HERE'S WHY: REALLY, DR. MCMAHON WAS NOT THE EXPERT THAT TASSONE WAS GOING TO USE AND I THINK HE IS LIMITED TO SAYING, LOOK, COUNSEL MADE A DECISION NOT TO PRESENT DR. MILLER, AND HE CAN ATTACK THAT AND ONLY ATTACK THAT BUT THIS IS NOT A FAILURE TO INVESTIGATE AND THE EXPERT THAT HE WAS OR WAS NOT GOING TO USE WAS DR. MILLER AND DR. MILLER ONLY, BUT JUST FOR YOUR HONOR'S KNOWLEDGE SHE DID NOT GO BEYOND. SHE DID NOT -- SHE DID ADD ONE THING. SHE SAID VERY SOFT SIGNS IN HER REPORT, VERY SOFT SIGNS, QUOTE-UNQUOTE, OF A RIGHT HEMISPHERE AND SHE ENDED UP SAYING IT WOULDN'T EVEN BE NOTICEABLE IN THE REPORT.

DID SHE SAY THAT SHE WOULD FIND ANY STATUTORY OR NONSTATUTORY MENTAL HEALTH MITIGATORS?

WELL, THE NONSTATUTORY WOULD BE HER ANXIETY, BUT SHE DOESN'T -- NEITHER ONE OF THEM WERE --

DID SHE RELATE THAT ANXIETY TO THE CIRCUMSTANCES OF THE CRIME ITSELF?

YES, AND, YES, SHE DOES RELATE IT TO THE CIRCUMSTANCES OF THE CRIME ITSELF. SHE DOES SAY THINGS LIKE HIS PERCEPTION WHEN HE GETS THIS STATE OF DISORDER, HIS PERCEPTIONS OF WHETHER HE IS ACTUALLY UNDER ATTACK ARE WRONG. SHE TRIES TO, AND THAT'S WHY I DON'T

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DOES SHE RELATE IT TO THE CCP AGGRAVATOR?

NO, SHE RELATES IT MORE TO HIS SELF DEFENSE, AND REMEMBER AT PENALTY WE WERE GOING TO BE WAY BEYOND THAT AND THE JURY WILL HAVE ALREADY REJECTED THAT, OKAY, SO SHE IS MORE SAYING, WELL, YOU AND I WOULD KNOW WE WERE NOT UNDER ATTACK. HE DIDN'T KNOW THAT. THAT'S MORE PROPPING UP HIS SELF DEFENSE. SHE DOES NOT, I'M NOT ENSURE SHE DOES NOT REBUTT THE CCP. SHE DOES NOT SAY HERE'S WHAT YOU WOULD REALLY HAVE TO HAVE. HE IS INCAPABLE. HE HAS A MENTAL DISORDER TO THE POINT THAT HE IS INCAPABLE OF PLANNING OR PREMEDITATION. SHE CERTAINLY NEVER GETS ANYWHERE HERE THAT. SHE DOESN'T REBUTT^CCP. SHE SAYS YOU AND I KNOW WE ARE NOT UNDER ATTACK BUT HE IS SO DISCONTROLLED, THAT HE THOUGHT THAT. THAT DOESN'T HELP YOU MUCH. A JURY HAS ALREADY REJECTED SELF DEFENSE BY THE TIME WE ARE IN PENALTY. YOU ARE NOT GOING TO BE ABLE TO USE IT TO REBUTT^CCP. IT JUST DOESN'T GO THERE. YOU HAVE TO HAVE A DISORDER OF THE NATURE, TYPE AND MAGNITUDE TO NEGATE A MENTAL ABILITY TO PLAN OR A MENTAL ABILITY TO PREMEDIATE AND, YOUR HONOR, SUCH A DISORDER WOULD BE ALMOST CLOSE TO INSANITY AND THAT'S EXACTLY WHAT THEY DIDN'T FIND. SO I DON'T THINK THERE IS ANY DEFICIENT PERFORMANCE. HE DID HAVE A MENTAL HEALTH EXPERT. NOT ONLY TO INVESTIGATE MITIGATION AND THEN HE DECIDED NOT TO PRESENT HIM BECAUSE HE WASN'T HELPFUL. THAT'S A REASONABLE STRATEGIC DECISION, AND THERE IS NO PREJUDICE AND THIS COURT FOUND AT LEAST ON THE CCP FOUND THAT HARMLESS ON THE DIRECT APPEAL BUT THERE IS NO PREJUDICE HERE BECAUSE THAT JUST -- THIS IS JUST NOT A SIGNIFICANT DIAGNOSIS. VERY SOFT SIGNS THAT ARE NOT ONLY -- ARE NOT NOTICEABLE TO THE DEFENDANT HIMSELF AND A COMPULSIVE PERSONALITY TYPE THAT YOU END UP DOING QUITE WELL IN THE WORLD WITH, QUOTE- UNQUOTE, IS JUST NOT MITIGATING. IT IS TOO TRIVIAL. I MEAN, IT IS JUST TOO LOW A LEVEL FOR THERE TO BE ANY PREJUDICE IN THIS CASE. I ASK YOU TO AFFIRM THE TRIAL COURT'S DENIAL OF POST-CONVICTION RELIEF. THANK YOU.

CHIEF JUSTICE: THANKS TO BOTH SIDES.