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Timothy Lee Hurst v. State of Florida

SC07-1798

>> THE NEXT CASE ON THE COURT'S
AGENDA IS TIMOTHY HURST VERSUS
STATE OF FLORIDA.

MR.^HAZEN, ARE YOU READY TO
PROCEED?

>> GOOD MORNING, MAY IT PLEASE
THE COURT.

CHIEF JUSTICE QUINCE, OTHER
MEMBERS OF THE COURT, I'M JEFF
HAZEN,
HERE ON BEHALF OF THE APPELLANT
IN THIS CASE, TIM HURST.

WE'RE HERE ON DENIAL OF
MR.^HURST'S POST-CONVICTION
MOTION FROM ESCAMBIA COUNTY
AFTER AN EVIDENTIARY HEARING ON
SOME CLAIMS AND AFTER SIMPLY
DENIAL ON OTHER CLAIMS.

>> WOULD YOU GO DIRECTLY TO THE
ISSUE WITH REGARD TO THE
PENALTY PHASE. AMOUNT FOF
INVESTIGATION THAT WAS OR WAS
NOT PERFORMED, OUTLINE WHAT
DOCUMENTATION THAT THE TRIAL
ATTORNEY, MADE?

IT APPEARS HE TALKED TO THE
FAMILY.

MADE THESE DECISIONS NOT GET
SOMEONE INVOLVED.

SO WHAT I'M CONCERNED WITH WE
DON'T START DEVELOPING A RULE,
IF YOU DON'T GET A MENTAL
HEALTH EXPERT IT IS PER SE
REVERSEABLE.

DID HE HAVE SCHOOL RECORDS?

GO THROUGH THAT PRECISELY.

WHAT DID THIS LAWYER DO OR
OBTAIN THAT WOULD SHED LIGHT ON
THAT OTHER THAN JUST A VERBAL
DISCUSSION, IF ANYTHING.

>> IN TERMS OF A DOCUMENTATION
AS TO WHY A MENTAL HEALTH
EXPERT WAS NOT RETAINED IN THIS
CASE, YOUR HONOR, I DON'T
BELIEVE THERE IS ANY
DOCUMENTATION AT ALL ALL.

>> DOCUMENTATION AS TO THIS
MAN'S BACKGROUND.

DID GET SCHOOL RECORDS?

>> I DON'T BELIEVE THERE WERE
ANY SCHOOL RECORDS.

THERE WERE SCHOOL RECORDS
OBTAINED AT POST-CONVICTION BUT

THERE WAS NO TESTIMONY FROM
WITNESSES AT THE PENALTY PHASE
ABOUT HIS SCHOOL RECORDS.

>> OKAY.

>> THERE WAS TESTIMONY FROM THE
FAMILY ABOUT HIS INTELLIGENCE.

>> OH I UNDERSTAND AND ABOUT
THE GRADES.

I SEE ALL THAT BUT, BUT THE
KINDS OF THINGS THAT ONE WOULD
THINK YOU WOULD LOOK FOR, NOT
JUST WHAT SOMEBODY SAYS.

BUT WHAT DOES THIS CHILD'S
BACKGROUND LOOK LIKE?

>> NO, YOUR HONOR.

THERE WAS NO DOCUMENTATION.

>> NOTHING AT ALL?

WAS IT AVAILABLE?

>> THERE WAS, YES, THERE WERE
SCHOOL RECORDS AVAILABLE, BOTH
THE, MY EXPERT, MR. HURST'S
EXPERT IN POST-CONVICTION AND
THE STATE'S EXPERT, DR. LARSON
BOTH TESTIFIED.

>> WHAT ELSE WAS AVAILABLE IN
ADDITION TO SCHOOL RECORDS?

>> THERE WAS TESTIMONY --
TALKING ABOUT IN TERMS OF
DOCUMENTATION?

>> WE CERTAINLY KNOW THE EXPERT'S
TESTIMONY WASN'T AVAILABLE
BECAUSE YOU DIDN'T CONSULT HIM.
I'M LOOKING FOR WHAT EVIDENCE
WAS THERE AND AVAILABLE FOR
THIS PERSON TO FIND THAT
ADDRESSED THIS ISSUE?

>> SURE.

THERE WAS EVIDENCE THAT
MR. HURST'S MOTHER, WAS UNWED
MOTHER AT 15 YEARS OLD WHEN SHE HAD
HIM.

THERE WAS EVIDENCE --

>> THAT ALLOWS ITSELF TO
SUBJECTIVE OPINION.

I'M TALKING ABOUT HARD
DOCUMENTS THAT WERE THERE THAT
WOULD HAVE --

>> THERE WERE THE SCHOOL
RECORDS.

>> THAT'S IT?

>> THAT'S IT.

IN TERMS OF WHAT WAS TESTIFIED
TO BY THE MENTAL HEALTH
EXPERTS.

>> WAS THERE ANY INVESTIGATOR
ON THIS CASE?

>> YES, YOUR HONOR.

>> AND FOR WHAT, IF ANYTHING,
DID THE INVESTIGATOR DO?

>> THE INVESTIGATOR --

>> I ASSUME THE INVESTIGATOR
WAS THE ONE WHO FOUND THE
MOTHER AND FATHER AND SISTER
WHO TESTIFIED IN THIS CASE BUT
WHAT ELSE DID THE INVESTIGATOR
DO?

>> I BELIEVE THE TESTIMONY FROM
LARRY SMITH, WHO WAS THE
INVESTIGATOR, HE WAS NOT, HE
WAS NOT ASSIGNED TO DO ANY
MITIGATION INVESTIGATION AT
ALL.

HE WAS PRIMARILY CONCERNED WITH
THE GUILT PHASE.

HE DIDN'T --

>> HE DID NOT INVESTIGATE THE
PENALTY PHASE?

>> NO, MA'AM.

HE DID NOT.

>> IN THE BEGINNING OF THE
CASE, THE PUBLIC DEFENDER'S
OFFICE REPRESENTED DEFENDANTS
IS THAT CORRECT?

>> THAT'S CORRECT, YOUR HONOR.

>> AND THE PUBLIC DEFENDER HAS
FILED A MOTION TO HAVE THE

DEFENDANT EVALUATED MENTALLY,
IS THAT CORRECT?

>> THAT'S CORRECT, YOUR HONOR.

JUDGE, MR.^LOVELL FILED THAT
WITH JUDGE TARBUCK.

>> THAT'S CORRECT.

IT WAS SCHEDULED TO HEARING,
AND BY THE TIME HE CAME TO
HEARING NEW COUNSEL CAME TO THE
CASE CORRECT, MR.^ARNOLD?

>> CORRECT, MR.^ARNOLD.

>> MR.^ARNOLD WITHDREW THAT
MOTION.

>> HE DID, YOUR HONOR.

>> WHY WAS THAT?

WHAT WOULD HAVE BEEN THE
DOWNSIDE OF HAVING HIM
EVALUATED?

>> THAT IS PART OF MY
CONTENTION THAT CLAIM THERE
WOULD BE NO DOWNSIDE WHATSOEVER
TO THAT.

IF YOU LOOK AT THE RECORD, IN
THE RECORD, MR.^ARNOLD SAYS, I
HAVE SEEN MR.^HURST.

MY INVESTIGATOR HAS SEEN HIM.
WE DON'T SEE ANYTHING WRONG
WITH HIM.

THERE WAS NOTHING ON THE RECORD
IN THAT EXCHANGE ABOUT
MR.^HURST NOT WANTING A MENTAL
HEALTH EXPERT OR HIS MOTHER NOT
WANTING.

THERE WAS NOTHING WHATSOEVER IN
THAT EXCHANGE ON THE RECORD
WITH JUDGE TARBUCK WHEN THE
MOTION TO WITHDRAW ABOUT
MR.^HURST NOT WANTING A MENTAL
HEALTH EXPERT.

>> SEEMS TO ME THAT YOU HAVE A
PRETTY GOOD ARGUMENT ABOUT
DEFICIENCY HERE.

I MEAN I THINK IT COULD BE
DEBATED BUT I THINK YOU MADE A
GOOD ARGUMENT.

MANY OF THESE CASES WE FOCUS ON
WHAT IS THE PREJUDICE.

AND WE HAVE HERE A CRIME AND A
ROBBERY AND HAC.

AND WHAT I'M INTERESTED IN IS
THE SPECIFICS OF WHAT YOUR
EXPERTS -- I KNOW THEY SAID
THAT THEY WOULD SUPPORT THE
MENTAL HEALTH STATUTORY
MITIGATORS.

EXACTLY WHAT HE SAID 18 OR 19
AT TIME?

>> HE WAS 18 YEARS OLD, YOUR HONOR.

>> HE WAS 18 AT THE TIME.

FIRST OF ALL WOULD SUPPORT A STATUTORY AGE MITIGATOR OF LESS THAN 18 OR HE WAS UNDER EXTREME EMOTIONAL DURESS OR WHAT THOSE OTHER MENTAL MITIGATORS ARE.

WHAT IS THE QUALITATIVE TESTIMONY ON THOSE ISSUES THAT WOULD CHANGE THE BALANCE OF AGGRAVATORS AND MITIGATORS IN THIS CASE?

>> RIGHT.

YOUR HONOR, DR. ^McCLAIN TESTIFIED ABOUT MR. ^HURST, IN TERMS OF THE AGE MITIGATOR THAT HE HAD THE MENTAL CAPACITY OF A I BELIEVE A FOURTH OR FIFTH GRADER IN TERMS OF HIS ABILITY TO REASON AND THINK.

>> DOES THAT REALLY BEAR OUT? AND AGAIN, I PROBABLY, HELPING MR. ^WHITE JUST WITH SOME OF THESE AND I'M NOT SURE, HERE IS A GUY, LIVING ON HIS OWN. HE HAD HIS OWN CAR.

HE HAD ENOUGH SENSE AFTER THIS
CRIME TO GO AND YOU KNOW, GET
RID OF HIS SNEAKERS AND BUY A
NEW PAIR AT WAL-MART.

>> I DON'T THINK THAT THAT IS,
THAT'S BEEN CONTESTED YOUR
HONOR.

I WOULDN'T AGREE THAT THOSE
THINGS HAVE BEEN PROVEN BUT.

>> SO YOU CONTEST THAT HE, THAT
THIS WASN'T A PLANNED CRIME?

>> I DON'T BELIEVE -- PROVEN
THOSE SNEAKERS WERE MR. ^HURST,
NO, I DON'T.

THEY WERE FOUND AT LEE-LEE
SMITH'S HOUSE.

>> THERE WAS CERTAIN EVIDENCE
TO SUPPORT THE CONCLUSION THEY
WERE?

>> SURE, YOUR HONOR.

>> WHAT IS THE REAL LIFE, IN
OTHER WORDS, WHAT WAS THIS ON A
DAY-TO-DAY BASIS, AT THE TIME
OF THE CRIME, WHAT WAS HIS,
WHAT WAS HE DOING?
WASN'T HE WORKING?

>> WAS AN 18-YEAR-OLD KID
LIVING AT HOME WITH HIS MOM AND
DAD.

HE HAD A JOB WORKING AT POPEYE'S
AS A COOK.

HE HAD A LITTLE BIT OF MONEY IN
BANK ACCOUNT.

HE HAD A CAR HE JUST BOUGHT.

THIS IS ONLY JOB HE EVER HAD.

FIRST AND ONLY JOB HE EVER HAD.

HE WAS LIVING AT HOME WITH HIS
MOM AND DAD.

>> WHAT WAS HISTORY OF HIS
HAVING ANY OTHER MENTAL HEALTH
DIFFICULTIES?

ANYTHING THAT CONCERNED HIS
PARENTS?

BECAUSE THIS IS PRETTY, THE
SERIOUS ISSUE HERE.

AND YOU THINK IT IS
SUBSTANTIAL.

HE WAS BORN TO A 15-YEAR-OLD
MOTHER WITH REAL POSSIBILITY OF
FETAL SYNDROME AND PERHAPS
ORGAN YOU CAN BRAIN DAMAGE.

I'M JUST TRYING TO SEE HOW THAT
TRANSLATES INTO THE REAL LIFE
OF MR.^HURST.

WHERE IT WOULD BE GIVEN AND
WEIGHED BY A JURY?

>> WELL, I THINK IN TERMS OF

WHERE IT WOULD MANIFEST ITSELF
IN TERMS OF HIS EVERYDAY LIFE,
PARTICULARLY IN THE HIS SCHOOL
PERFORMANCE WAS DEEFFICIENT.

HE NEVER GRADUATED.

MADE IT TO THE 10th GRADE.

WENT TO 10th GRADE TWICE.

NEVER GRADUATED.

MANIFESTED BEST WITH DIFFICULTY
IN SCHOOL.

THE FACT THAT HE HAD TO SERVE
MENIAL JOB.

>> WHAT DID THE SCHOOL RECORDS
SAY ABOUT -- HE REPEATED 10th
GRADE TWICE.

HE WAS IN SOME SPECIAL

EDUCATION CLASSES, ABOUT, WAS

HE, WAS THERE ANY OTHER TESTING
DONE OF HIM IN SCHOOL?

SOMETIMES THAT IS THE KIND OF

THING, WE THINK, WOW, IF A

DEFENSE ATTORNEY HAD GOTTEN

THESE SCHOOL RECORDS THERE

WOULD HAVE BEEN A WEALTH OF

MITIGATION THAT THEY WOULD HAVE

UNCOVERED, AND REALLY PUT THEM

ON THE PATH TO UNDERSTAND THIS

WAS THE A WHOLE DIFFERENT

PICTURE ABOUT THIS PERSON?

>> THERE WAS EVIDENCE THAT HE,
THAT HE ATTENDED SPECIAL
EDUCATION COURSES THAT HE WAS
IN SPECIAL EDUCATION COURSES IN
SCHOOL.

HE WAS NEVER IN THE ACTUAL
FUNCTIONING NORMAL CLASS.
IN SPECIAL EDUCATION CLASSES IS
A --

>> FROM THE ENTIRE TIME HE WAS
IN SCHOOL?

>> IN HIGH SCHOOL, YOUR HONOR.

>> HE WAS ONLY IN SPECIAL
EDUCATION?

>> YES.

HE WAS IN SPECIAL EDUCATION
CLASSES.

HE NEVER GRADUATED.

OBVIOUSLY, AT THE, AT THE TRIAL
LEVEL, MOTHER AND SISTER
TESTIFIED ABOUT HIS
DIFFICULTIES IN SCHOOL.

HIS INTELLECTUAL DEFICITS.

>> WHAT DOES HIS ELEMENTARY AND
MIDDLE SCHOOL RECORDS SHOW?

>> THERE, I DON'T RECALL, YOUR
HONOR.

I DON'T BELIEVE THE ELEMENTARY

AND MIDDLE SCHOOL RECORDS WERE
INTRODUCED.

IT WAS JUST THE HIGH SCHOOL
RECORDS.

>> AREN'T THESE THINGS
CRITICAL?

I MEAN I'M, I'M SHOCKED THAT, I
MEAN WE'RE HERE TALKING ABOUT A
PENALTY PHASE, REPRESENTING
SOMEONE SAYING THEY'RE IN
SPECIAL ED CLASSES, THAT IS THE
HEART OF WHO THIS PERSON IS.
WE NEED TO KNOW THAT.

>> THERE WAS TESTIMONY TO THAT,
YOUR HONOR.

>> WHAT WAS IT ABOUT HIS THEN,
HIS ELEMENTARY AND MIDDLE
SCHOOL RECORD?
JUST NORMAL KID?

>> I DON'T BELIEVE, THOSE
WEREN'T AVAILABLE.

WE HAVE THE ELEMENTARY AND
MIDDLE SCHOOL RECORDS.
CAN.

>> CAN I JUST ASK, FOLLOWING UP
ON THESE QUESTIONS, HOW DOES
ANY OF THIS GO TO SHOWING THAT
THERE WAS A SUBSTANTIAL
IMPAIRMENT OF THE CAPACITY TO

APPRECIATE THE CRIMINALTY OF
HIS ACT OR TO SHOW EXTREME
DURESS OR DOMINATION BY
ANOTHER?

I'M TRYING TO -- I UNDERSTAND
THAT THE EXPERT MADE THE
CONCLUSION THAT THOSE WERE
SHOWN BUT I'M TRYING TO
UNDERSTAND, KIND OF THE FACTUAL
PREDICATE.

I THINK THESE QUESTIONS HAVE
GONE BEFORE, TRYING TO
UNDERSTAND WHAT THE FACTUAL
BASIS, HIS EXPERIENCE, WOULD BE
TO, TO, SUPPORT THAT?
OTHER THAN JUST THE CONCLUSION,
WHAT'S THE SUPPORT FOR THOSE
CONCLUSIONS?

>> I THINK IT GOES BACK AND
DR.^McCLAIN AND MR.^HURST THE
ORGANIC BRAIN DAMAGE HE HAD.

>> HOW WAS THAT MANIFESTED?

>> IT WAS MANIFESTED BY HIS
INABILITY, SUBSTANTIAL
IMPAIRMENT HE HASN'T LESS WALL
DEFICITS THAT PROHIBITED HIM,
STOPPED HIM FROM BEING ABLE TO
THINK CLEARLY.

>> SO THEN, EVERYBODY WHO,
ESSENTIALLY, IT IS CONCEDED IS
NOT RETARDED? HE IS
INTELLECTUALLY, HAS SOME
INTELLECTUAL --

>> 70. BORDERLINE.

HE IS NOT RETARDED, NO.

>> I MEAN YOU CONCEDE THAT?
I MEAN THE EXPERT CONCEDED HE
IS NOT RETARDED UNDER THE
APPLICABLE DEFINITION?

CORRECT?

>> CORRECT.

>> OKAY. BUT IT SEEMS
LIKE THE REST OF
IT JUST AMOUNTS TO A CONCLUSION
THAT HE IS ESSENTIALLY, HE IS
SLOW.

HE, HE HAS INTELLECTUAL
CHALLENGES.

HE DID NOT DO WELL IN SCHOOL.
ASIDE FROM THAT IN TERMS OF ANY
OTHER BEHAVIOR THAT WOULD
INDICATE THAT A PERSON, THAT,
WOULD SHOW THAT HIS CAPACITY TO
UNDERSTAND THE CRIMINALTY OF
HIS ACT HAS BEEN IMPAIRED, I
HAVEN'T, IF IT IS THERE, TELL
ME WHAT IT IS.

>> I THINK I SAID WHAT I KNOW.

>> JUST THAT HE IS SLOW,

ESSENTIALLY?

HE HAD BAD GRADES AND WAS SLOW?

>> I MEAN, I THINK IT IS MORE

THAN HE IS JUST SLOW.

>> LET ME ASK YOU, ANOTHER WAY

FROM WHAT JUSTICE CANADY IS

ASKING THE SAME THING.

HERE YOU HAVE, AN 18-YEAR-OLD

WHO IS GOING TO WORK, AND HE

EITHER, WE DON'T KNOW IF HE

MADE THE DECISION BEFORE HE

WENT INTO WORK OR WHEN HE GOT

IN THERE, THAT HE IS GOING TO,

GET MONEY IN.

HE IS GOING TO ROB THIS STORE.

BUT HE THEN COMMITS THIS CRAZY

VICIOUS ASSAULT ON THIS

80-POUND, FOUR-FOOT-11-INCH

WOMAN.

I REMEMBER WE HAD A CASE OF A

KID WHERE THERE WAS AN ASSAULT

IN A BAR AND HE HAD JUST, SORT

OF LOST.

IS THERE ANY TESTIMONY THAT

WOULD EXPLAIN THAT BASED ON, --

THIS IS WHAT I WOULD BE LOOKING

FOR, BASED ON HIS ORGANIC BRAIN
DAMAGE, WHICH WAS BASED ON
FETAL ALCOHOL SYNDROME, THAT
SOMEONE CONFRONTED WITH A
SITUATION LIKE HE WAS
CONFRONTED WITH, MIGHT JUST
LOSE IT AND, NOT, AND, THAT
WOULD EXPLAIN THE SUDDEN
VICIOUSNESS OF THIS ACT THAT IS
INCONSISTENT WITH THE ENTIRE
THEN PERHAPS A PSYCHOLOGIST
WOULD HAVE COME UP WITH ALL
THESE THINGS, SO I WANT TO GO
WAY BACK AND IF THERE ARE ANY
DEFICIENCIES IN TRIAL COUNSEL'S
PART, INITIALLY BY NOT ASKING OR
AN EVALUATION BECAUSE THERE WERE
SIGNS THERE.

THE MERE FACT THAT HE SUPPOSEDLY
STABBED SOMEBODY 62 TIMES, THAT
IN ITSELF WOULD WARRANT, I WOULD
THINK, ASKING FOR SOME TYPE OF
EVALUATION.

>> I AGREE YOUR HONOR AND
MR. ARNOLD, HIS TESTIMONY HAS
SAID HIMSELF THAT HE DID NOT
BELIEVE THERE WAS ANYTHING WRONG
WITH THE BOY.

>> HERE'S WHAT HE SAID.

I PERSONALLY HAVE NOT DONE ANYTHING THAT WOULD REQUIRE AN EXAMINATION BY AN EXPERT. I HAVE TALKED DEFENSIVELY WITH MY INVESTIGATOR, WHO HAS SPENT CONSIDERABLE TIME WITH THE DEFENDANT AND HE HAS DONE NOTHING THAT HE THINKS NEEDS TO BE DEALT WITH BY AN EXPERT. NOW, THE POST-CONVICTION JUDGE, JUDGE NOBLES I THINK IT WAS? SHE FOUND BASICALLY THAT THE DEFENDANT HAS NOW BEEN EXAMINED BY A MENTAL HEALTH EXPERT IN BOTH STATUTORY AND NON-STATUTORY MITIGATING CONSIDERATION, SO IT SEEMS TO ME THAT SOMEWHERE ALONG THE LINE, THESE TWO MITIGATORS WERE AVAILABLE. >> CLEARLY THEY WERE YOUR HONOR, AND IT WOULD HAVE DONE NOTHING, IT WOULD NEVER HURT TO HAVE HIM EXAMINED BY A MENTAL HEALTH EXPERT, AND I DON'T THINK THEY GIVE A CREDIBLE REASON WHY. I SEE THE CLAIM REGARDING DAVID KLADITIS WAS WHAT I WANTED TO FOCUS ON.

DAVID KLADITIS WAS A TRIAL
WITNESS AND THE VEHICLE HE
DESCRIBED AS MR. HURST'S
FOLLOWING IT.

THE DEFENSE THEORY AT TRIAL WAS
THAT THERE WERE FOUR TO FIVE
OTHER YOUNG BLACK MALES WHO
COMMITTED THIS CRIME THAT WERE,
SOME OF THEM, ASSOCIATES OF
MR. HURST.

IN THE OPENING ARGUMENT, THE
EVIDENCE, THAT DEFENSE THEORY
WAS THROUGHOUT THE CASE AT THE
EVIDENTIARY HEARING.

DAVID KLADITIS TESTIFIED BEFORE
HE WENT TO THE STORE THAT
MORNING HE WAS OVER BY THE
POPEYE'S RESTAURANT AND HE
OBSERVED FOUR TO FIVE YOUNG
BLACK MALES, 16 TO 20 YEARS OLD,
IN THE POPEYE'S PARKING LOT.

>> BUT HE SAW THEM THERE AT
7:00

HE SAYS HE SAW THEM BETWEEN 7:00
AND 7:30.

WE HAVE A POINT IN TIME WHEN THE
VICTIM WAS KILLED, BECAUSE HE
WAS ON THE PHONE BETWEEN 7:55
AND 8:00 WHEN A CO-WORKER AT A

DIFFERENT STORE, A DIFFERENT
RESTAURANT, SO WE KNOW IT HAD TO
HAVE HAPPENED BETWEEN 8:00 AND
8:05

>> I THINK YOUR HONOR, IF YOU
LOOK AT THE NOTES, DAVID
KLADITIS WAS NOT SURE, BUT HE
TESTIFIED IT WAS SOMEWHERE
AROUND 7:00.

IF YOU LOOK AT THE NOTES WHICH
WERE SUBJECT TO BE SUMMARILY
DENIED BY THE CLAIM, HE SAW THEM
AT 7:30.

THE NOTES CLEARLY SAY HE SAW
THEM AT 7:30 AND THEY WERE THERE
WHEN MR. KLADITIS LEFT SO IT IS
MERE MINUTES BEFORE THE MURDER
HAPPENED.

>> I DON'T THINK THEY HAD TO BE
COMMITTING THE CRIME FOR IT TO
BE AN EXCRETORY.

WE DID NOT GET A CHANCE TO
DEVELOP THAT.

>> I THOUGHT THE EVIDENCE
SUBMITTED AT OR ABOUT THE TIME
OF THE CRIME WAS THAT THERE WAS
A PERSON THAT FIT THE
DESCRIPTION, WEARING A POPEYE'S

UNIFORM, THAT WAS AT THE DOOR AT
A TIME THAT WOULD HAVE BEEN
ABOUT THE TIME HE WAS ON THE
PHONE.

>> THERE IS TESTIMONY FROM CARL
HESS.

HE WAS THE ONLY PERSON THAT
PLACED MR. HURST AT THE SCENE.

HE ADMITTED THAT HE PERJURED
HIMSELF OF THE TRIAL.

HE LIED TO THE JURY.

HE PERJURED HIMSELF.

HE CLAIMED THERE WAS AN
INTERVIEW OF MR. HURST WHEN
THERE NEVER WAS.

>> HE WAS ALSO IMPEACHED ON A
LOT OF OTHER POINTS AS WELL.

>> HE TOOK HIS APPLICATION.

CARL HESS WORKED AT WENDY'S AND
SUPPOSEDLY THE DEFENDANT APPLIED
FOR A JOB AT WENDY'S.

>> THAT WAS NOT TRUE.

>> HE DID NOT TAKE THIS
APPLICATION.

>> IF YOU LOOK AT THE NOTES,
THAT IS NOT TRUE EITHER.

THE NOTES SAY HE SAW HIM APPLY
FOR A JOB.

THERE MAY BE SOME OTHER POINT

WHERE HE SAID I SAW IT ALL BUT
THE NOTES SAID-- HE DID NOT EVEN
HAND HIM AN APPLICATION SO HE
LIED AGAIN AT THE EVIDENTIARY.

>> ALL HE BACKED OFF OF WAS THAT
HE DID NOT REALLY INTERVIEW HIM.
HE SAID HE LIED ABOUT THAT.

>> I THINK THAT IS A FLAW IN THE
STATE'S ARGUMENT AND THE LOWER
COURT'S RULING, THEY EXTRACTED
THE INTERVIEW FROM THE TESTIMONY
AND SAID EVERYTHING IS FINE.

>> YOU TALK ABOUT IMPEACHMENT
REALLY HERE.

PART OF HIS STATEMENT.

>> IN ADDITION THAT HE LIED.

IN ADDITION TO PERJURY.

THE JURY IS AWARE THAT HE LIED
TO THEM ABOUT A MATERIAL FACT.

>> BUT CAN WE REASONABLY
CONCLUDE THAT THEY KNEW THAT
BECAUSE HE WAS IMPEACHED AS MUCH
AS HE COULD BE IMPEACHED, EXCEPT
FOR HIS OWN CONFESSION THAT HE
LIED?

>> ADMITTEDLY--

>> I DON'T KNOW YOUR HONOR, BUT
THE TESTIMONY IN A TRIAL CLEARLY

IMPEACHED HIM.

IT WAS CLEAR THE FELLOW WAS TRYING TO MAKE HIMSELF MORE THAN HE WAS.

BUT THAT IS KIND OF A SIDE ISSUE TO THIS IDENTIFICATION AND HIS KNOWLEDGE ABOUT THIS PERSON AND WHO IT WAS FROM THE PROXIMITY OF THE TWO PLACES WHERE THEY WERE.

THAT IS NEVER BEEN CALLED INTO QUESTION.

YOUR HONOR, IF THAT IS TRUE THEN I QUESTION WHY MR. HURST'S TESTIMONY IS THE FIRST THING CITED BY THIS COURT.

IF HE IS SO IMPEACHED, HE IS SO INVALUABLE AS A WITNESS--

>> THE FACT THAT SOMEBODY IS IMPEACHED FOR TELLING ONE LIE DOES NOT MEAN EVERYTHING IS A LIE.

>> I THINK IN TERMS OF THE JURY, I CAN SPEAK FROM HAVING SERVED ON A JURY, IF HE LIED ABOUT A MATERIAL FACT, THEY ARE NOT GOING TO BELIEVE A WORD HE SAYS.

>> THE QUESTION IS WHETHER IT IS MATERIAL.

THAT HE INTERVIEWED-- YES YOUR

HONOR, HE INTERVIEWED MR. HURST
FOR A JOB AND PART OF HIS BASIS
FOR IDENTIFYING HIM, THAT IS A
MATERIAL FACT.

I CANNOT SEE HOW THAT IS NOT A
MATERIAL FACT.

>> YOU HAVE RUN WELL OVER YOUR
TIME HERE TODAY.

WE THANK YOU VERY MUCH.

>> STEPHEN WHITE REPRESENTING
THE STATE OF FLORIDA APPELLEE.
THE THREE FINGERPRINTS OF
MR. HURST IN THE BAG, WHAT DID
NOT LIE WAS THE BOX CUTTERS SEEN
A FEW DAYS BEFORE THE MURDER
WHEN THE VICTIM WAS KILLED BY A
BOX CUTTER.

WHAT DID NOT LIE WERE THE BLOODY
SHOES THAT WERE THROWN AWAY, THE
WERE SIZE 14.

THE DEFENDANT BOUGHT A SIZE 14
SHOE AT WALMART THE MORNING OF
THE MURDER.

THERE ARE A NUMBER OF INMATES, A
NUMBER OF OTHER WITNESSES.

FOR EXAMPLE MICHAEL WILLIAMS.

>> COULD YOU ADDRESS ON THE
GUILT PHASE, BECAUSE I KNOW YOU

ARE GOING TO WANT TO SPEND TIME
ON THE PENALTY PHASE ISSUE, THAT
THE STATE-- AND MAYBE IT IS JUST
THAT THE STRATEGY WHICH IS-- BUT
THE CO-DEFENDANT WAS 15TH AND
THAT SOUNDED LIKE IT WAS REALLY
YOUNG UNTIL I REALIZED THIS
PARTICULAR DEFENDANT IS 18 AND
HE WAS MENTALLY SLOW.

>> I'M NOT SURE ABOUT THAT YOUR
HONOR.

I KNOW THERE WAS SOME TESTIMONY,
SO HE MAY HAVE BEEN 19 AND
CHANGE.

HE WAS 18 OR 19.

>> THAT IS WHY I ASKED.

I THOUGHT HE ENDED UP BEING
CHARGED AS A JUVENILE.

IN ANY EVENT WHEN THE JURY HEARD
HIM GIVE DAMAGING TESTIMONY,
THEY DID NOT KNOW THAT HE WAS
GOING TO BE CHARGED, AND WHILE
WE CAN DEBATE IT BACK AND FORTH,
I THINK THAT A JURY WHO IS
HEARING THAT SOMEBODY IS THERE,
GIVING HIS TESTIMONY AND DOES
NOT HAVE ANYTHING TO LOSE ONE
WAY OR ANOTHER FOR IT, MAY BE
MORE CREDIBLE, SO THE QUESTION I

HAVE ON IT IS THAT, IS THERE SUFFICIENT EVIDENCE THAT REALLY THE STATE DID NOT MAKE ANY DEAL TO HOLD OFF CHARGING HIM OR THAT THE ISSUE OF WHETHER HE WAS GOING TO BE CHARGED JUST DID NOT COME UP UNTIL WHERE JUDGE TARBUCK, IN VIOLATION OF EX PARTE COMMUNICATIONS, ASKED THE STATE WHY WAS HE NOT CHARGED? COULD YOU JUST CLARIFY THAT ISSUE ABOUT THE CO-DEFENDANT, MR. SMITH AND HIS ROLE IN THIS AND WHAT THE STATE HAD AS FAR AS NOT HAD AS A DEAL FOR HIM.

>> I DON'T BELIEVE IT WAS A FACTOR DURING LEE-LEE SMITH'S TESTIMONY BUT IN ANY EVENT WHAT HE WAS CHARGED WITH IN THE GUILT PHASE OF THE TRIAL, AND THAT IS WHEN THIS ALLEGED COMMUNICATION OCCURRED IS MY UNDERSTANDING.

>> DID HIS MOTHER, EUNICE SMITH, LEE-LEE'S MOTHER, TESTIFY AT THE POST-EVIDENTIARY HEARING THAT THE PROSECUTOR DID SPEAK WITH HER AND LEE-LEE SMITH, AND TOLD THEM BOTH HE WAS PLANNING ON

CHARGING THEM?

>> YOUR HONOR HIS DENIAL WAS
CREDITED BY THE TRIAL COURT.

[INAUDIBLE]

>> YES YOUR HONOR.

LEE-LEE SMITH ALSO TESTIFIED,
AND HE REALLY WAS NOT SURE WHEN
HE BECAME AWARE HE WAS GOING TO
BE CHARGED BUT THE BOTTOM LINE
ON THE CHARGE WAS THAT LEE-LEE
SMITH WAS CHARGED WITH EXACTLY
WHAT THE TRIAL SUPPORTED.

THE JURY WAS TOLD BY LEE-LEE
SMITH THAT-- I, LEE-LEE SMITH,
HELPED MR. HURST DISPOSE OF THIS
EVIDENCE AND THAT IS WHAT IN
FACT LEE-LEE SMITH WAS CHARGED
WITH.

HE CHARGED-- THE CHARGE EXACTLY
FIT THE TESTIMONY, ACCESSORY
AFTER THE FACT.

BUT, JUST FOR A SECOND AND THEN
GET TO THE MENTAL HEALTH.

I KNOW THE COURT WANTS TO TALK
ABOUT MENTAL HEALTH.

>> ON MR. KLADITIS, COULD YOU
ADDRESS WHY AT LEAST THAT
EVIDENCE SHOULD NOT HAVE BEEN
TURNED OVER TO THE DEFENDANT AS

SOMETHING THAT THE DEFENDANT,
AGAIN, YEAH THERE IS THIS OTHER
EXPLANATION BUT IT CERTAINLY
SEEMS THAT A DEFENDANT MIGHT
WANT TO DEVELOP THEM AS THEY ARE
BEING SUFFICIENT PEOPLE.

>> HE PROBABLY WOULD HAVE DONE
EXACTLY THE SAME THING BUT THERE
WERE OTHER PEOPLE OUT THERE THAT
MORNING.

THE BOTTOM LINE IS--

>> BUT HE DID NOT KNOW THAT
MR. HESS HAD OBSERVED, IN FACT,
A GROUP OF PEOPLE IN THE AREA
THAT MORNING.

AND MR. KLADITIS, THE ONE THAT
LIED ABOUT THE APPLICATION--

>> WELL, HE RECANTED IN TERMS OF
THE INTERVIEW BUT HE SAID, I GOT
THE APPLICATION, AND IT SEEMED
HE HAD BEEN WORKING THERE.

MR. HESS BEEN WORKING AT WENDY'S
FOR SEVERAL MONTHS AND HAD AN
OPPORTUNITY--

>> WHY ISN'T THAT-- WHY
SHOULDN'T THAT BEEN TURNED OVER
TO THE DEFENSE FOR THEM TO
DEVELOP AS A BASIS FOR CREATING

A REASONABLE DOUBT?

>> THERE IS ABSOLUTELY NO EVIDENCE WHATSOEVER THAT THESE YOUNG FOLKS WHO WERE IN THE PARKING LOT BETWEEN 6:40 AND 7:00 A.M., BELIEVE THAT IS THE TESTIMONY.

THERE ARE NO FINGERPRINTS.

>> THAT IS WHAT THE STATE DETERMINED BUT I GUESS WHEN I THINK OF BRADY, IT IS NOT WHETHER THIS IS GOING TO LEAD TO SOMETHING THAT MIGHT BE, YOU KNOW, HELPFUL TO-- AND TO ME THE FACT THAT THERE ARE YOUNG PEOPLE AROUND THE VICINITY IN THE MORNING, IT MAY END UP THAT I WOULD AGREE WITH YOU THAT IT IS NOT GOING TO-- BUT AS FAR AS JUST FOR THE FUTURE, ESPECIALLY WHEN WE HAVE HAD ALL THIS-- ALL THESE CASES AROUND THE COUNTRY WHERE PROSECUTORS ARE WITHHOLDING INFORMATION, NOT THE STATE COURT BUT FEDERAL COURT, THAT WE OUGHT TO BE EMPHASIZING THAT, IF IN DOUBT, TURN IT OVER.

>> YOUR HONOR WE HAVE NO EVIDENCE THAT THESE YOUNG FOLKS

WERE IN THE PARKING LOT AT THE
TIME OF THE MURDER.

THEY WERE THERE BY A-- ABOUT AN
HOUR EARLIER.

THERE IS NO EVIDENCE THAT PUTS
THEM THERE AT 7:55 OR
AFTERWARDS.

I THINK THE LATEST IS 7:00 A.M.

>> BUT WHEN HE GAVE HIS
DEPOSITION.

THE STATE KNEW THERE WAS THIS
OTHER EVIDENCE THAT HE HAD
TESTIFIED TO AND DIDN'T TELL THE
DEFENSE ABOUT IT.

>> ACTUALLY, MR. KLADITIS SAID,
I WAS READY TO TALK ABOUT THE
DEPOSITION BUT NOBODY WAS
INTERESTED IN WHAT I SAW BEFORE.

>> BUT, THE DEFENDANT DID NOT
KNOW ABOUT IT AND THE STATE
CHOSE NOT TO ASK ABOUT IT.

>> NOBODY ASKED THEM ABOUT IT.

>> ISN'T THAT THE WHOLE POINT,
THE DEFENDANT DID NOT ASK ABOUT
IT BECAUSE THEY DIDN'T KNOW
THERE WAS THIS OTHER ASPECT.

>> IT IS SO PERIPHERAL THOUGH
YOUR HONOR.

THERE IS NO INDICATION-- THE
DOOR WAS LOCKED, NONE OF THESE
FOLKS WERE AROUND THE DOOR.

THEY ARE IN THE PARKING LOT.

IT IS AN HOUR BEFORE.

THERE IS ABSOLUTELY NO EVIDENCE
OTHER THAN THEM BEING PRESENT AN
HOUR BEFORE THE MURDER ROUGHLY,
THAT THERE IS ANY ASSOCIATION
WITH THEM AND THE MURDER AT ALL,
BUT--

>> SHOULDN'T THE DEFENSE HAVE AN
OPPORTUNITY TO--

[INAUDIBLE]

YOU SEE THE POINT I'M TRYING TO
MAKE?

>> THE SHORT ANSWER IS, GOING
BACK TO THE MATERIALITY, THERE
IS ABSOLUTELY NO WAY THIS COULD
HAVE AFFECTED THE VERDICT.

THE FINGERPRINTS, THE BOX
CUTTER, THE TAPE, THE BLOODY
SHOES, AND THE FOUR CONFESSIONS,
ONE OR TWO OF WHICH HAVE BEEN
RECANDED BUT THE JUDGE DOES NOT
BELIEVE IN RECANTATION.

THE EVIDENCE WAS OVERWHELMING
AGAINST MR. HURST.

>> LET'S TALK ABOUT THE PENALTY

PHASE.

I'M QUITE CONCERNED WITH WHAT THE DEFENSE COUNSEL TESTIFIED TO AT THE EVIDENTIARY HEARING, AND HE SAID AT THE END OF THE GUILT PHASE HE BELIEVED HE HAD THE CASE IN THE BAG, AND HE THOUGHT THERE WOULDN'T BE A PENALTY PHASE AND HE SAID THAT-- YEAH HE THOUGHT THERE WAS NOT LIKELY TO BE A PENALTY PHASE.

HE HAD DONE SOME WORK AS FAR AS MITIGATION.

IT WAS NOT A HECK OF A LOT BUT WE HAD DONE SOME AND HE BELIEVED HE HAD ONE.

THEN HE GOES AND TALKS ABOUT THAT HE DIDN'T KNOW FOR SURE, HE MIGHT NOT HAVE KNOWN, BUT HE DOES NOT REMEMBER WHETHER HURST WAS WITH A 15-YEAR-OLD WOMAN.

HE MIGHT HAVE KNOWN.

SHE WAS A HEAVY DRINKER DURING HER PREGNANCY.

THEN HE SAID HE WISHED HE HAD RETAINED A MENTAL HEALTH EXPERT.

I FIND THAT TO BE ABSOLUTELY, BESIDES JUST THE HEIGHT OF,

FIRST OF ALL ARROGANCE THAT
SOMEBODY IN A DEATH PENALTY CASE
IS SAYING I'M GOING TO THROW ALL
OF MY EGGS IN THE GUILT PHASE
BASKET, BUT BEYOND THAT TAKE
THIS 18-YEAR-OLD THAT HAS NO
PRIOR CRIMINAL HISTORY, NONE.
SO THERE IS NOTHING-- A LOT OF
THESE CASES THEY SAY, WE DON'T
WANT TO GO INTO A MENTAL
LITIGATION AND BECAUSE WE ARE
GOING TO COME UP WITH THAT HE IS
AN ANTI-SOCIAL PERSON AND HE HAS
DONE ALL OF THESE THINGS IN
SCHOOL.

IT TURNS OUT THAT HERE IS
SOMEBODY THAT HAS BEEN IN
SPECIAL-EDUCATION CLASSES IN
HIGH SCHOOL, THAT HE WAS-- YOU
ARE NOT DISAPPEARING ON ME ARE
YOU?

>> WE LOST ANOTHER ONE.

>> AND THAT HE HAD-- THE EIGHTH
MITIGATOR.

HE DOES NOTHING TO ESTABLISH THE
AGE MITIGATOR.

IN DIRECT APPEALS WE SAID THAT
THERE WAS-- THE ONLY TESTIMONY
CAME FROM HIS FAMILY, SO WITH

THIS IN MIND, ISN'T THERE
EVERYTHING TO BE GAINED BY
STARTING WITH THE SCHOOL RECORDS
AND DEVELOPING AND, AGAIN, TO ME
A 15-YEAR-OLD MOTHER WHO HAS
BEEN DRINKING HEAVILY ALREADY
AND HAS ORGANIC BRAIN DAMAGE,
WHERE IS THE DOWNSIDE IN THIS?
LOOKING AT FIRST, SO ON THE
DEFICIENCY PART, HOW CAN WE NOT
HOLD THAT THIS DEFENSE ATTORNEY
WAS DEFICIENT IN THE WAY THAT HE
APPROACHED THE PENALTY PHASE OF
THIS TRIAL?

>> TWO MAJOR POINTS ON
DEFICIENCY YOUR HONOR.

I BELIEVE THERE IS A RECENT U.S.
SUPREME COURT CASE THAT SAYS
TO-- WE GO BACK TO THE
REASONABLE TEST, BUT GETTING TO
THE STRICKLAND TEST.

>> AREN'T ALL THE SUPREME COURT
CASES THOUGH FOCUSED ON, YOU
MUST INVESTIGATE BEFORE YOU KNOW
WHETHER OR NOT YOU CAN REJECT OR
ACCEPT A PARTICULAR MITIGATION
PHILOSOPHY OR APPROACH?

>> IN THIS CASE YOUR HONOR,

DEFENSE COUNSEL, MR. ARNOLD WAS TOLD EXPLICITLY BY THE DEFENDANT AND HIS MOTHER NOT TO PROCEED WITH MITIGATION AND WE TALKED ABOUT SOME OF THE CASES, NEWLAND AND SIMMS.

THAT IS NOT SUFFICIENT PERFORMANCE WHEN YOU HAVE A COMPETENT DEFENDANT AND FROM ALL INDICATIONS THERE IS NOTHING SUGGESTING MR. HURST WAS INCOMPETENT.

A COMPETENT DEFENDANT TELLING ME NOT TO PURSUE THIS.

>> LET'S APPROACH IT THIS WAY. YOU ARE VERY EXPERIENCED AT THIS.

YOU KNOW WHAT YOU ARE DOING IN THIS.

HAVE WE REALLY AT LEAST REACHED THE STAGE IN THE LITIGATION AND DEVELOPMENT IN THE CAPITAL CASES THAT DEFENSE ATTORNEYS SHOULD HAVE THE SCHOOL RECORDS OF THE PERSON THEY ARE REPRESENTING?

>> CAN I TALK ABOUT THE SCHOOL RECORDS YOUR HONOR?

>> LET'S JUST WALK THROUGH IT.

DO YOU DISAGREE WITH THAT, THAT

THAT IS NOT SOMETHING THAT JUST
IS A MATTER OF COURSE, BUT IT IS
A BROAD LANGUAGE THAT WE HAVE
SEEN IN ALL THE CASE LAW, THAT
ANYTHING THAT IS MITIGATING IN
THE BACKGROUND OF THE
INDIVIDUAL, THAT IS PRETTY
FUNDAMENTAL ISN'T IT?

TO HAVE A SCHOOL RECORD?
IF ANYTHING IS GOING TO BE
SHOWN, THAT IS WHERE IT IS.

>> TO BE HONEST WITH YOU, AS TO
WHAT MR. ARNOLD TESTIFIED, I
KNOW THE SCHOOL RECORD CAME IN--

>> LET'S GO BACK TO THE BASIC
FUNDAMENTAL QUESTION.

YOU CANNOT AGREE THAT SCHOOL
RECORDS OUGHT TO BE OBTAINED?
THAT IS PART OF THE PROCESS OF
DEFENDING A CAPITAL DEFENDANT.

>> I DON'T WANT TO GO SO FAR AS
SAYING THE PER SE RULE CANNOT
BE--

>> THEN YOU GO LOOK TO SEE WHAT
THOSE RECORDS WOULD SHOW.
CERTAINLY I UNDERSTAND THAT.

>> THAT WOULD BE OPTIMAL
PERFORMANCE.

>> I HAVE GOT A PROBLEM WITH OUR CAPITAL SYSTEM IN THAT WE DON'T REQUIRE OUR LAWYERS TO AT LEAST ACQUIRE THE SCHOOL RECORDS.

>> IN TERMS OF MR. ARNOLD'S PREPARATION, HE WAS READY TO GO. THERE WERE SOME INDICATIONS FROM JUSTICE PARIENTE THAT HE WAS UNPREPARED BUT THE JURY CAME IN WITH A GUILTY VERDICT AND I BELIEVE IT WAS THE SAME DAY THAT THE EVIDENCE STARTED FOR THE PENALTY PHASE.

>> HE MAY HAVE SAID HE WAS READY TO GO, BUT HOW WAS HE READY TO GO?

>> HE CALLED THE MOTHER.

>> HE CALLED THREE RELATIVES.

HOLD ON JUST A SECOND.

HE CALLED THREE RELATIVES, THE MOTHER, THE SISTER AND THE FATHER.

HE SAID HIMSELF THAT HIS THEORY IN THE PENALTY PHASE WAS, THIS WAS A GOOD BOY BUT SLOW.

HOW DO YOU DEMONSTRATE HE WAS SLOW IF YOU HAVE NO IDEA OF WHAT HIS MENTAL CAPACITY WAS?

HOW DO YOU DEVELOP THAT HE WAS A

GOOD BOY BUT SLOW?

THAT WAS HIS THEORY IN THIS.

>> AND PRODUCE EVIDENCE OF THAT
YOUR HONOR IN TERMS OF THE
RELEVANCE, SO IT WAS SOMEWHAT OF
A MIXED BAG BECAUSE THE SISTER
TESTIFIED THAT THE DEFENDANT
WOULD TAKE CARE OF THE SIBLINGS
WHILE THE PARENTS WERE AT WORK.

>> YOU KNOW AS WELL AS THE REST
OF US THAT IN THESE CAPITAL
CASES, IT IS NICE TO HAVE THE
RELATIVES COME AND GIVE
TESTIMONY, BUT MORE OFTEN THAN
NOT, WE ALWAYS LOOK TO SOME
CORROBORATING EVIDENCE ABOUT
WHAT THE FAMILY IS GOING TO SAY,
SO IF HE THINKS THIS GUY IS
SLOW, I AM JUST REALLY-- I DON'T
UNDERSTAND WHY HE DOESN'T DO
SOMETHING TO DEVELOP, BEYOND HIS
MOTHER SAYING THAT, THAT HE WAS
SLOW.

>> IN TERMS OF A MENTAL HEALTH
EXPERT, HE WAS TOLD NOT TO.

>> LET'S GO OVER WHETHER HE WAS
TOLD NOT TO.

FIRST OF ALL, WE HAVE AN

18-YEAR-OLD THAT HAS GOT, NOW WE
KNOW, A 70 IQ THAT COULD NOT
GRADUATE-- LET'S SAY IN THE
'70S.

>> DR. LARSEN FOUND 78.

>> WELL, THEY WERE A BORDERLINE
INTELLECTUALLY FUNCTIONING
PERSON.

NEVER FIT IN THE CRIMINAL
JUSTICE SYSTEM.

HE SAYS I TALKED TO TIMOTHY
ABOUT WHETHER OR NOT WE SHOULD
HAVE HIM EXAMINED BY A
PSYCHOLOGIST OR PSYCHIATRIST.

I DID NOT SEE ANYTHING AT THE
TIME THAT WOULD INDICATE THAT TO
ME.

I TALKED TO HIM ABOUT IT,
NEVERTHELESS, AND AS TO WHETHER
WE SHOULD DO SOMETHING.

BASED ON WHAT TIMOTHY TOLD ME
ABOUT NOT WANTING TO BE-- I JUST
TOLD THE JUDGES I DID NOT SEE
ANYTHING.

THAT IS NOT EXACTLY THE WAY WE
HAVE IN THE CASES, WHERE WE HAVE
SAID THE DEFENDANT CONTROLS HIS
OR HER DESTINY, OR THEY SAY I
DON'T WANT YOU TALKING TO MY

FAMILY, I DON'T WANT YOU DOING
ANYTHING.

I EITHER WANT TO DIE OR DON'T
WANT TO GO THERE.

THAT IS NOT THIS CASE AND I
THINK IT WOULD BE--

SO LET'S JUST SAY, AND I THINK,
THAT IS THE ONLY REASON HE DID
NOT PURSUE MENTAL MITIGATION
BECAUSE HE WAS INSTRUCTED NOT TO
BY HIS 18-YEAR-OLD CLIENT.

>> AND HIS MOTHER.

>> WELL, THE MOTHER IS SAYING--
AND WHAT WAS THE CONVERSATION
WITH THE MOTHER?

>> I BELIEVE MR. ARNOLD
TESTIFIED AT POST-CONVICTION
HEARING THAT, MY MOTHER TOLD ME
NOT TO PURSUE MENTAL HEALTH.

>> I GUESS WE WILL LOOK
EXACTLY-- I HAVE NEVER BEEN
EXPOSED WHERE THE DEATH PENALTY
IS A--

[INAUDIBLE]

AND MAYBE YOU TOLD ME THAT YOU
ARE GOING TO GET MY BOY OFF.

WHAT IS THE COLLOQUY THAT YOU
HAVE WITH THE MOTHER OR SON, WHO

ARE NOT EXPERIENCED IN THE
SYSTEM ABOUT THE IMPORTANCE OF
TRYING TO SAVE THIS DEFENDANT'S
LIFE IF THE JURY COMES BACK WITH
A VERDICT OF GUILT ABOUT THE
IMPORTANCE OF LOOKING-- LET'S
JUST START WITH THE SCHOOL
RECORDS AND LET'S SEE IF THERE
IS ANYTHING THERE.

>> WELL, CAN I TALK ABOUT
PREJUDICE?

>> ABSOLUTELY.

>> SCHOOL RECORDS-- SCHOOL
RECORDS WERE DISCUSSED,
ESPECIALLY IN CROSS-EXAMINATION
BY DR. MCCLAIN.

GRADE SIX, B AND C STUDENT, C-
IN MATH, C- IN READING.

>> WAS THAT SPECIAL EDUCATION?

>> IT IS INTERESTING ABOUT
SPECIAL EDUCATION.

THAT TERM WAS USED.

DR. LARSEN TESTIFIED THAT THE
DEFENDANT TOLD HIM THAT HE WAS--
THE DEFENDANT WAS THROWN OUT OF
SCHOOL FOR FIGHTING AND DRUGS
WHICH WOULD HAVE BEEN INTRODUCED
IN REBUTTAL TO DR. MCCLAIN
DURING THAT TRIAL.

>> IS THAT IN THE SCHOOL RECORD?

>> I DON'T THINK THE REASON WHY
HE WAS IN SPECIAL ED IS IN THE
RECORD.

I WOULD NOT SWEAR TO THAT THOUGH
YOUR HONOR.

>> AGAIN, YOU SEE THE PROBLEM
HERE IS THAT WHEN THERE IS AN
INDIVIDUAL, A CHILD IN THE
EDUCATIONAL SYSTEM THAT HAS MORE
CONTACT WITH OUR CHILDREN THAN
EVEN MANY PARENTS, AND IT SAYS
THIS CHILD IS IN SPECIAL
EDUCATION.

THAT SINGLES HIM OUT AND
TRANSFERS HIM OUT OF MAINSTREAM
INTO A DIFFERENT CATEGORY OF
PROGRESS.

HERE WE HAVE A STELLAR PERSON,
STRAIGHT A'S, A PRESIDENT OF
THIS, THAT AND EVERYTHING, AND
ON THE OTHER HAND YOU HAVE
SOMEBODY WHO CAN'T EVEN GET INTO
THOSE CLASSES.

WOULDN'T THAT NOT BE A RED FLAG?

>> ALTHOUGH THE BURDEN IS ON THE
DEFENSE AND UNDER STRICKLAND TO
IMPROVE THE EFFICIENCY--

>> WE ALWAYS FALL BACK ON THAT.
PREJUDICE IS THE NEXT QUESTION,
BUT I HAVE A VERY DIFFICULT TIME
WITH THE STATE TAKING THE
POSITION OF THE SCHOOL RECORDS
ARE NOT IMPORTANT AND WHETHER
SPECIAL ED OR REGULAR ED, THAT
IS NOT IMPORTANT.

>> I WOULD NOT SAY THAT YOUR
HONOR.

>> WE HAVE TO HAVE A COMMON
GROUND TO DISCUSS THESE CASES.
PREJUDICE MIGHT BE A DIFFERENT
STORY, AND I THINK IT IS.
IF WE CAN'T GET PAST THOSE TWO
ELEMENTS I DON'T KNOW WHAT WE
ARE TALKING ABOUT IN THESE
CASES.

>> WELL, I MEAN IF I MAY
CONTINUE ON PREJUDICE.

>> ABSOLUTELY.

>> I COULD GO ON WITH
CROSS-EXAMINATION.

A B IN MATH.

DR. LARSEN AND DR. MCCLAIN, AND
DR. LARSEN'S TESTIMONY WOULD
HAVE BEEN PROPER REBUTTAL IN A
PENALTY STAGE .

DR. MCCLAIN'S SCORING WITHOUT

FOLLOW-UP QUESTIONS.

>> THE PROBLEM I SEE WITH THIS, THAT SOUNDS ALL WELL AND GOOD RIGHT NOW, BUT IF WE COULD GO BACK TO THE EFFICIENCY PRONG OF THAT FOR JUST A MOMENT, IT SEEMS TO ME THAT WHAT WE HAVE IS A TRIAL ATTORNEY, WHO, WITH A CERTAIN DISSENT IN MIND FOR THE PENALTY PHASE, DID NOTHING REALLY TO DEVELOP IT.

JUSTICE LEWIS, AT A MINIMUM, HE COULD HAVE GOTTEN THE SCHOOL RECORDS TO BOOST, BOLSTER THE MOTHER'S CLAIM THAT THIS GUY WAS SLOW BECAUSE THAT WAS HIS PERCEPTION OF IT ALSO, WAS THAT THIS GUY WAS SLOW, SO NOT EVEN GETTING ANY KIND OF RECORD TO DEMONSTRATE THAT HE WAS SLOW? ARE YOU CONCEDING THAT THAT IS A SUFFICIENT PERFORMANCE BY GOING ON TO THE PREJUDICE PRONG?

>> NO MAAM, I HAVE BEEN ARGUING--

>> ARGUMENTS ARE FUTILE, BUT WE NEED TO HAVE SOME BASIS ON WHICH TO DISCUSS THIS.

>> BUT THERE IS NO PER SE TEST.

YOU DON'T HAVE TO HAVE THE
MENTAL HEALTH EXPERT IN ANY
EVERY CASE.

>> LET ME ASK YOU ONE LAST
QUESTION IF I COULD.

KNOWING WHAT WE KNOW TODAY ABOUT
DR. MCCLAIN'S TESTIMONY, AND SHE
FOUND-- WOULD YOU AGREE THAT HER
TESTIMONY WOULD HAVE QUALIFIED
AS THE MITIGATOR IF THEY HAD
KNOWN ABOUT IT?

THE JURY WOULD HAVE HEARD THAT.

>> IT WOULD HAVE BEEN
SUBSTANTIAL EVIDENCE ON WHICH TO
MAKE THAT FINDING, BUT
DR. LARSEN, I THINK IT'S A VERY
COMPETENT JOB OF SHREDDING HER
TESTIMONY, SO IT WOULD HAVE BEEN
SUBSTANTIAL EVIDENCE TO REJECT
THOSE MITIGATORS.

>> PREJUDICE IS A MATTER OF LAW
AND DR. LARSEN'S TESTIMONY
WEIGHED HEAVILY.

>> I THINK THAT IS WHY I AM SO
CONCERNED IN THIS CASE, BECAUSE
HAVING LOOKED BACK AT THE
ORIGINAL DIRECT APPEAL, WE SEEM
TO, IN LOOKING AT

PROPORTIONALITY, IN LOOKING AT THE EFFECT OF THE HARMLESSNESS OR NOT IN THE JUDGE IN FINDING A DIRECT AGGRAVATOR, WE REALLY FOCUSED ON THE LACK OF ANY INDICATION THAT AGE WOULD BE A MITIGATOR OR THE ABSENCE OF ANY MENTAL HEALTH TESTIMONY.

I THINK SINCE UNDERMINING CONFIDENCE HAS TO DO WITH NOT ONLY THE TRIAL COURT IN THE JURY BUT THIS COURT, THAT IS IN A DIFFICULT CATEGORY FROM SOME OF THE OTHER CASES WHERE WE SAY IT IS OVERWHELMING AND NO JURY WOULD HAVE EVER VOTED FOR LIFE IF THEY HAD HEARD--

[INAUDIBLE]

I UNDERSTAND THE COURT'S CONCERN BUT THE STATE'S POSITION IS THAT, GIVEN THE ORDERS FROM THE DEFENDANT AND HIS MOTHER, TRIAL COUNSEL DID A REASONABLE JOB IN HUMANIZING AND BEING READY WITH-- AND UNDER RUTHERFORD, BELL AND OTHER CASES THERE IS NO PREJUDICE.

>> THANK YOU VERY MUCH MR. WHITE

AND THANK YOU, BOTH OF YOU FOR
YOUR ARGUMENTS HERE TODAY.
THE COURT WILL BE IN RECESS FOR
TEN MINUTES.