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Maurice Lamar Floyd v. State of Florida

SC07-330 | SC07-1894

THE LAST CASE ON THE COURT'S
DOCKET FOR TODAY IS FLOYD V.
STATE.

>> MR. GEMMER, ARE YOU READY TO
PROCEED?

>> YES, YOUR HONOR.

MAY IT PLEASE THE COURT, I'M
DAVID GEMMER, I REPRESENT
MAURICE FLOYD ON BEHALF OF THE
CCRC TAMPA OFFICE.

AND I'M BLESSED WITH THE
PLETHORA --

I FOCUS ON THE MITIGATION ISSUE
WHICH IS PROBABLY OUR STRONGEST
PROBLEM WITH THE TRIAL.

>> WHAT -- WHICH ISSUE?

>> THE MITIGATION ISSUE.

>> THE INEFFECTIVENESS OF
COUNSEL?

>> CORRECT.

>> IS THAT THE SOLE ISSUE YOU'RE
GOING TO ADDRESS?

>> NO, I'LL BE GLAD TO GET -- I
HAVE A HIERARCHY, AND I GO UNTIL
I STOP.

UNTIL YOU STOP ME.

>> ALL RIGHT.

WE'LL START WITH THAT.

>> -- AT THE MITIGATION.

CERTAINLY WHEN A CASE COMES
THROUGH HERE, IT'S CLEAR WE LOOK
AT IT.

IF THERE'S NO MITIGATION, WE
SAY, WELL, WE'RE GOING TO SEE
THIS ONE LATER ON FOR SOME
REASON, AND HERE WE HAVE.

AND THE THING THAT IS TROUBLING
TO ME, YOUR ARGUMENT HERE SEEMS
TO BE BASED ON THE DR. KROP,
INNATE BLAME OR WHATEVER YOU
WANT TO STYLE IT WITH, THAT HE
DIDN'T DO WHAT HE WAS SUPPOSED
TO DO, AND THEN THE LAWYER
SHOULD HAVE DONE SOMETHING

DIFFERENT WITH REGARD TO
DR. KROP.

AND HERE'S -- I'M TROUBLED BY
THIS BECAUSE I LOOK THROUGH THIS
RECORD, AND IT'S WHAT
TRADITIONAL MENTAL HEALTH
EXPERTS DO IN CONNECTION WITH
EVERY DEFENDANT THAT COMES
THROUGH THIS COURT.

AND I LOOK TO SEE IS THERE
SOMETHING UNFAMILIAR ABOUT IT,
AND I CAN'T TELL YOU THE NUMBER
OF CASES THAT DR. KROP IS ON ON
ONE SIDE OR THE OTHER.

AND HONEST, I MEAN, I'M LOOKING
AT THIS.

SO HELP ME WITH THAT BECAUSE HE
DID ADMINISTER TESTING, HE SEEMS
TO HAVE BECOME FRUSTRATED
BECAUSE HE GOT FALSE INFORMATION
OR CONFLICTING INFORMATION FROM
DIFFERENT PEOPLE, AND HE
COMMUNICATED AS BEST I CAN
DETERMINE FROM THE RECORD WITH
THE LAWYER.

AND THE LAWYER SAID, THIS GUY'S
GOING TO HURT ME IN THIS CASE.

AND DR. KROP SAID AS MUCH, IT
SEEMS TO ME.

SO HELP ME WITH THOSE CONCERNS.
YOU KNOW, RATHER THAN JUST
TALKING, YOU KNOW, WE HAVE
CONCERNS ABOUT THINGS --

>> YEAH.

THANKS FOR FOCUSING.

THE PROBLEM IS DR. KROP LOST ALL
OF HIS RECORDS, AND SO WE HAVE
ABSOLUTELY NO IDEA WHAT THE
MITIGATION WAS THAT HE FOUND OR
WHAT NEGATIVE FACTORS HE MAY
HAVE DISCOVERED WHICH CAUSED HIM
ULTIMATELY TO SAY, LOOK, THE
COST BENEFIT RATIO HERE IS ON
THE DOWNSIDE, DON'T CALL ME.

>> I THOUGHT THAT THERE WAS
TESTIMONY ON THAT FROM THE
LAWYER AND FROM DR. KROP.

MAYBE NOT AS TO I DON'T HAVE MY
FILE, BUT IN THIS CASE,
PARTICULARLY THE LAWYER.

THE LAWYER SAID, YOU KNOW, HE
TOLD ME THIS, AND I MADE A
DECISION NOT TO USE HIM.

>> HE SAID THERE WAS NEGATIVE

MATERIAL, I THINK THERE WERE SOME PROBLEMS.

IF YOU LOOK AT THE NELSON HEARING, HE CONVEYED TO THE COURT THERE WERE PROBLEMS WITH THE PARENTS.

BUT EXPERTS ARE EMINENTLY ABLE TO DEVELOP OPINIONS WITHOUT PARENTS WHO ARE DECEASED OR UNAVAILABLE.

WITH DR. KROP, AGAIN, IT'S A CONUNDRUM.

WE DON'T KNOW WHY HE DIDN'T, WHY HE SAID DON'T CALL ME.

HE --

>> WELL, I THOUGHT WHY, I THOUGHT HE SAID -- AT LEAST, THERE'S TESTIMONY IN THIS RECORD THAT HE HAD TOLD THE LAWYER THAT I CAN'T HELP YOU, THAT I'M GOING TO HURT MORE THAN HELP, AND HE GAVE SUCH THINGS AS THE VIOLENCE WITH THE DEATH OR THE KILLING OF HIS YOUNGER BROTHER, THE MANSLAUGHTER.

WAS THAT NOT PART OF IT?

AND SO I'M TRYING TO UNDERSTAND, ARE YOU SAYING BECAUSE HE LOST HIS RECORDS WE CANNOT VERIFY WHY HE DID SO, THEREFORE, IT OUGHT TO BE REVERSED?

I'M TRYING TO MAKE SURE WHERE WE STAND HERE.

>> I DON'T RECALL THAT DR. KROP SPECIFICALLY SAID ANYTHING ABOUT THE --

>> THE LAWYER?

DIDN'T SOMEONE SPEAK IN TERMS OF THAT?

>> THERE ARE FACTS, IT WAS IN THE AGGRAVATORS THAT WERE PRESENTED IN THE PENALTY PHASE. THAT'S CLEARLY SOMETHING HE WOULD HAVE BEEN AWARE OF, BUT HE WOULD HAVE BEEN AWARE OF THAT WHEN HE WROTE THE FIRST LETTER TO DEFENSE COUNSEL AND SAID I'VE GOT SOME MITIGATION.

AND, IN FACT, DEFENSE COUNSEL SAID WE'RE STILL WORKING IT UP.

AND DR. KROP AT THE HEARING SPECIFICALLY SAID -- AT THE EVIDENTIARY HEARING SPECIFICALLY SAID THAT HE HAD MITIGATING

EVIDENCE BASED ON WHAT HE SAW IN HIS LETTERS, HE HAD MITIGATING EVIDENCE, COULDN'T REMEMBER WHAT IT WAS, EQUALLY [INAUDIBLE] NOW, THE STATE -- I WON'T ADDRESS THAT RIGHT NOW.

THE, YOU KNOW, WE HAVE THE EVIDENCE THAT WE PRESENTED AT THE HEARING, AND THE SAME MATERIALS THAT DR. KROP HAD, ALL THE BACKGROUND MATERIALS, THE SCHOOL RECORDS, PRIOR PSYCHOLOGICAL EVALUATIONS AND TESTS.

AND BASED ON THOSE RECORDS PLUS TESTING, WHICH APPARENTLY DUPLICATED DR. KROP'S BY ANOTHER NEUROPSYCHOLOGIST, SHOWED WE HAD THE TWO STATUTORY --

>> DO WE KNOW FROM THE RECORD THAT DR. KROP DID OR DID NOT CONFIRM IF HE HAD BEEN CALLED THE STATUTORY MITIGATORS?

>> HE DIDN'T MENTION THEM IN THE LETTER.

>> THAT'S NOT WHAT I ASKED. DO WE KNOW FROM THIS RECORD WHETHER FROM THE LAWYER OR FROM DR. KROP WHETHER HE FOUND STATUTORY MITIGATORS?

>> NO.

>> WE DON'T KNOW ONE WAY OR THE OTHER?

>> NO, BUT I THINK THOSE ARE SOME SO PROFOUND, THOSE CERTAINLY WOULD HAVE BEEN MENTIONED IN THAT FIRST LETTER.

>> I SORT OF ASSUME FROM READING THE JUDGE'S ORDER AND FROM LOOKING AT WHAT PARTS OF THE TRANSCRIPT THAT IT WAS THAT DR. KROP, THAT HE WOULD NOT FIND THE STATUTORY MITIGATORS. THAT'S NOT IN THIS RECORD ANYWHERE?

>> I DON'T THINK DR. KROP HAD ANYTHING NEW TO LOOK AT. I DON'T THINK WE PROVIDED -- I'M PRETTY SURE WE DIDN'T PROVIDE HIM WITH THE MATERIALS WE PROVIDED TO DR. DEE AND THE OTHER EXPERT OR THAT WE PROVIDED TO THE STATE EXPERT. I APOLOGIZE IF MY RECOLLECTION'S

INCORRECT, BUT I DON'T THINK DR. KROP HAD ANY BASIS TO MAKE ANY KIND OF FINDING AT THE EVIDENTIARY HEARING. HE HAD NOTHING TO PLOW THE FIELD AGAIN, SO TO SPEAK. HE CERTAINLY DIDN'T INTERVIEW OUR CLIENT, AND HE CERTAINLY DIDN'T ADMINISTER ANY NEW TESTS, AND I DON'T THINK HE ASSESSED DR. DEE'S TESTS.

>> WHEN DR. KROP ORIGINALLY LOOKED AT THIS CASE, YOU JUST SAID HE WAS GIVEN THOSE SAME BACKGROUND INFORMATION THAT YOUR EXPERTS WERE GIVEN, AND AT THE TIME OF THE ACTUAL PENALTY PHASE WE HAVE NO INDICATION THAT DR. KROP SAID THAT THOSE MENTAL MITIGATORS WOULD APPLY, CORRECT? I MEAN --

>> NO, WE DON'T HAVE ANY INDICATION --

>> I WOULD ASSUME THAT IF HE HAD SAID THAT, THERE MIGHT HAVE BEEN A DIFFERENT WEIGHING OF WHETHER OR NOT HIS TESTIMONY WOULD HAVE BEEN OF VALUE.

>> THERE'S NO EVIDENCE OF THE RECOLLECTION OF ANY OF THE PRINCIPALS WHO WOULD HAVE KNOWN THAT THOSE TWO MITIGATORS WERE FOUND BY DR. KROP AT ANY POINT IN HISTORY.

>> WELL, HELP US THEN BECAUSE WE'RE GOING TO HAVE TO GO THROUGH THIS WITH A FINE-TOOTHED COMB.

THERE'S NO EVIDENCE -- IN YOUR VIEW, THERE'S NO EVIDENCE THAT DR. KROP WAS OF THE VIEW THAT THIS DEFENDANT HAD ACADEMIC PROBLEMS, THAT HE HAD LEARNING DISABILITY PROBLEMS, BUT THAT HE DID NOT HAVE MENTAL HEALTH ISSUES, THAT HIS IQ, THERE WAS A DIFFERENCE BETWEEN VERBAL AND PERFORMANCE AND HE CONSIDERED THAT SIGNIFICANT, BUT NOT IN THE MENTAL HEALTH ARENA. HE FOUND NO PSYCHOSIS, NO NEUROCOGNITIVE PROBLEMS, AND THE CONCLUSION WAS THAT THE DEFENDANT THAT HE WAS DEALING

WITH WAS -- THE DIAGNOSIS WAS AN ANTISOCIAL.

SO IS THAT, ARE THOSE NOT IN THIS RECORD?

>> THE ANTISOCIAL DIAGNOSIS WAS NEVER IN THE RECORD.

>> SO, AGAIN, THOSE THINGS ARE NOT IN THIS RECORD?

>> THAT'S MY RECOLLECTION, YES.

>> HELP US WITH THE TESTIMONY OF THE DEFENSE --

>> I'M SORRY.

SOME OF THAT MAY BE IN THE RECORD, YOU KNOW, I MEAN, THERE WERE THREE LETTERS.

THAT'S ALL WE HAVE THAT'S DEFINITIVE OF WHAT WAS IN THE RECORD OF WHAT DR. KROP FOUND.

>> WELL, NO, YOU HAD TESTIMONY, YOU HAD --

>> NO PRESENT RECOLLECTION AT THE HEARING, SO ANYTHING HE SAID WOULD BE PURE SPECULATION.

>> WHAT ABOUT THE LAWYER? WE DISREGARD WHAT THE LAWYER SAID?

>> THAT'S WHAT I'M ASKING YOU.

TELL US WHAT -- IS IT

MR. WITHEE?

>> WITHEE.

>> WHAT WAS HIS TESTIMONY WITH REFERENCE TO HIS COMMUNICATIONS WITH DR. KROP?

>> I'M A LITTLE, LITTLE WEAK ON THAT RECOLLECTION.

I KNOW -- MY RECOLLECTION IN GENERAL AND THE REASON I DIDN'T GO BACK AND RE-EXAMINE IT WAS HE WASN'T VERY SPECIFIC ABOUT HIS DISCUSSIONS WITH DR. KROP --

>> HIS TESTIMONY HAS TO BE EVEN MORE IMPORTANT IN THE CONTEXT OF IF IT'S CORRECT THAT DR. KROP COULDN'T REMEMBER THIS DEFENDANT

DIDN'T HAVE ANY RECORDS.

SO HE TESTIFIED IN A GENERAL WAY BASED ON THE LETTERS, REPORTS THAT HE GAVE AS FAR AS WHAT THOSE THINGS MEANT.

AS WHAT THEY WOULD MEAN.

BUT, IT'S IMPORTANT THAT WE KNOW WHAT THE DEFENSE LAWYER,

BECAUSE IF THE DEFENSE LAWYER FILLED IN THE BLANKS, AND, IF THE DEFENSE LAWYER SAID, WELL, THE BEST THAT THE DR.^KROP COULD DO IS ANTISOCIAL PERSONALITY DISORDER OR SOMETHING AGREES -- CONSIDER AND DR.^KROP PRETTY EXPLICITLY LAID OUT FOR ME THAT THE INFORMATION HE WAS GETTING FROM THE FAMILY WAS VERY QUESTIONABLE AS FAR AS THE CREDIBILITY OR BACKGROUND INFORMATION.

IN OTHER WORDS, IF THE DEFENSE LAWYER FILLED IN THE BLANKS OF SAYING, WHY HE DIDN'T CALL DR.^KROP? AND IT WAS CREDIBLE, IT WOULD MAKE AN IMPORTANT DIFFERENCE.

SO WE NEED YOU TO HELP US WITH THAT.

DID HE, DID HE DO THAT?

>> IN THE BRIEFS THE STATE MENTIONS A COUPLE OF THINGS THAT MR.^WITHEE MENTIONED IN THE TESTIMONY AND NELSON HEARING.

>> WHERE DID MR.^WITHEE SAY HE NEGLECTED TO CALL DR.^KROP?

I HAVE NEGATIVE INFORMATION.

EVEN THOUGH THERE IS MITIGATORS AND I HAVE NEGATIVE MITIGATION.

>> IF I TESTIFY I WILL HURT YOUR CASE?

>> IT WILL BE NEGATIVE --

>> WHY ISN'T THAT REASONABLE JUDGEMENT IF THAT, IF THAT, IF THAT ENDS UP BEING THE CONCLUSION?

IF THE MENTAL HEALTH EXPERT THAT THE DEFENDANT'S LAWYER HAS CONSULTED WITH HAS SEEN THE DEFENDANT OVER A LONG PERIOD OF TIME AND THEN ENDS UP WITH A CONCLUSION, DON'T CALL ME, BECAUSE I'M GOING TO HURT YOUR CASE FOR MITIGATION.

IF HE HAD CALLED HIM, SEEMS LIKE WE WOULD BE HERE, YOU KNOW, FROM A DIFFERENT VIEWPOINT NOW IN SAYING, WELL,

THAT DEFENSE LAWYER WAS EXPLICITLY TOLD AND WARNED NOT TO CALL THE MENTAL HEALTH EXPERT.

BUT HE DID ANYWAY.

AND LOOK WHAT HAPPENS.

>> WELL, THERE IS --

>> NOT ENOUGH INFORMATION --

>> WHY WAS THAT ENOUGH TO SUSTAIN THE TRIAL JUDGE'S FINDING THAT HE WAS NOT INEFFECTIVE?

>> THE TRIAL JUDGE WENT AND BACK AND WENT OVER ALL THE SPECULATION THAT DR.^KROP WAS PROVIDED AND THE SLIGHT INFORMATION OR INPUT WE HAD FROM MR.^WITHEE.

I DON'T NECESSARILY DISAGREE THAT NOT CALLING DR.^KROP WAS A SOUND OR UNSOUND -- I DON'T THINK IT'S AN UNSOUND DECISION NECESSARILY BUT WE DON'T HAVE ENOUGH INFORMATION FROM DR.^KROP TO BE ABLE TO GO BACK AND LOOK.

AT WHAT INFORMATION HE TOLD TO MR.^WITHEE WHICH WOULD HAVE, WOULD HAVE WEIGHED IN MR.^WITHEE'S DECISION.

>> HOW DO YOU PROVE A CASE OF INEFFECTIVENESS THEN?

>> YOU PROVE A CASE OF INEFFECTIVENESS WHEN, SOLE WITNESS, HE TESTIFIED AT EVIDENTIARY HEARING THAT HE RELIED ON MR.^, DR.^KROP FOR EVERYTHING, EVERYTHING IN THE MITIGATION CASE.

HE GAVE HIM EVERYTHING, SAID, GIVE ME WHAT YOU GOT.

YOU'RE MY ONLY HOPE.

HE USED THOSE WORDS.

>> IN OTHER WORDS, HE DOESN'T PRESENT ANY MITIGATION.

>> ZERO.

HE RESTED.

STATE PRESENTED A BUNCH OF AGGRAVATING EVIDENCE.

HE STOOD UP AND SAID WE REST.

>> NOW IT APPEARS YOU'RE GETTING TO THE HEART OF YOUR ARGUMENT.

IN OTHER WORDS, THIS IS A CASE

WHICH NO MITIGATION WAS PUT ON?

>> NO EVIDENCE OF MITIGATION.

YOU KNOW, THE ROUTINE ONES, HE WAS WELL-BEHAVED AND HE TOOK NOTES. AND AT THE SPENCER HEARING

DRAGGED OUT AT LEAST HE WAS DOING OKAY ON HIS PROBATION UNTIL HE KILLED THE LADY AND, MR.^WITHEE THREW IN AN ADDITIONAL -- SPENCER WHICH WAS NEVER IN FRONT OF THE JURY.

>> YOUR MITIGATION CLAIM AS I UNDERSTAND IT, THE MITIGATION CLAIM AS I UNDERSTAND IT IS DIRECTED TO DR.^KROP, ISN'T IT, OR IS IT BROADER THAN THAT?

>> DR.^KROP BLEW UP.

HIS RELIANCE ON KROP WENT AWAY. IN THE ORIGINAL ORDER SETTING THE TRIAL DATE FOR APRIL 5th IN '99, WHICH WENT OFF, THEY ALSO SAID IF THERE IS SECOND PHASE, WE'LL DO THAT ON APRIL 19th.

THERE WAS TWO WEEKS MR.^WITHEE WOULD HAVE HAD TO TRY TO DEVELOP ADDITIONAL EVIDENCE.

>> THAT'S, THAT'S WHAT JUSTICE ANSTEAD SPENT THE LAST FIVE MINUTES TRYING TO DRAW FROM YOU, WHAT IS IT IN THE BRIEF AND IN THIS RECORD THAT'S BEEN DEMONSTRATED AND THAT'S, WAS INTENDED IN THE FIRST QUESTION?

YOU SEEM TO LIMIT YOUR MITIGATION ARGUMENT IN THE FAILURES TO THIS CASE TO DR.^KROP.

WHAT ARE THE OTHER ONES?

>> ALL THE OTHER MITIGATION EVIDENCE THAT WE PRESENTED AT HEARING.

DR.^DEE, DR.^BERLAND'S FINDINGS.

BRAIN DAMAGE, EVEN THE STATE'S EXPERT SAYS THE BRAIN OF MR.^FLOYD FUNCTIONS IN A VERY DIFFERENT WAY, ALL OF THEM FOUND THE SLEEP DISORDER TO BE IMPORTANT, INDICATIVE OF EARLY CHILDHOOD PROBLEMS AND LEARNING DISABILITY.

DR.^RIEBSAME, SAID CHAOTIC CHILDHOOD HE SUFFERED

THROUGH PREVENTED LEARNING
DISABILITY OR ANY OTHER
PROBLEMS HE MIGHT HAVE HAD ALL
WERE MITIGATING EVIDENCE IF HE
WERE THE DEFENSE EXPERT HE
WOULD HAVE BEEN GLAD TO TESTIFY
TO AT THE TRIAL.

WE PRESENTED THREE EXPERTS WITH
SPECIFIC EXPRESS MITIGATING
EVIDENCE READILY AVAILABLE AT
THE TIME OF TRIAL BASED ON --
>> THIS IS NOT AN UNFRIENDLY
QUESTION.

I'M TRYING TO DIRECT YOU, ARE
THERE OTHER THINGS OTHER THAN
MENTAL HEALTH THAT THE JUSTICE
ANSTEAD IS GOING TO THAT WERE
PRESENTED AT THE EVIDENTIARY
HEARING THAT THIS LAWYER SHOULD
HAVE PRESENTED?

YOU'VE COVERED THE MENTAL
HEALTH.

I THINK OTHER THINGS I THINK
WHERE HE IS GOING, WE
UNDERSTAND THE KROP AND
BERLAND AND RIEBSAME AND ALL
THOSE.

>> RIEBSAME.

>> MY PRONUNCIATION.

MY COUNTRY BACKGROUND.

WE KNOW THE IQ, OTHER
MITIGATION.

WHAT OTHER MITIGATION ARE YOU
REFERRING TO?

>> HEARING EXPERTS WENT THROUGH
THE RECORDS AND TALKED ABOUT --

>> MENTAL EXPERTS?

>> IT'S IN THE RECORD.

THE CONCLUSIONS THEY REACHED
BUT TO GET TO THOSE CONCLUSIONS
THEY DISCUSSED IN MORE DETAIL
THAN I'M TELLING YOU HERE AND I
THINK IT'S COVERED PRETTY WELL
IN THE BRIEF IN AT LEAST THE
FACT SECTION, ALL THE
MITIGATION EXISTED IN THOSE
RECORDS, EVEN IF DR.^KROP
WASN'T AVAILABLE, HE COULD HAVE
PROBABLY PRESENTED IN SOME
OTHER MANNER.

>> THAT'S WHAT HE IS ASKING
YOU, WHAT IS IT?

AND YOU KEEP REFERING TO WHAT,
HE JUST WANTS YOU TO

SPECIFICALLY SAY WHAT OTHER,
OTHER THAN MENTAL HEALTH
MITIGATION, WHAT OTHER
MITIGATION?

WAS HE ABUSED AS A CHILD?
WAS HE, YOU KNOW, PARENTS
NEGLECTFUL?

>> IT WAS CHAOTIC CHILDHOOD.
THEY MOVED ALL OVER THE PLACE
FROM STATE TO STATE DURING HIS
CHILDHOOD.

HE HAD A STILLBORN TWIN
BROTHER.

>> I JUST WANT TO MAKE SURE,
BECAUSE THERE IS MITIGATION AND
THERE AS MITIGATION.

AND I THINK WHAT WE'VE ALWAYS
RECOGNIZED ABOUT NOW THAT YOU
GET THE SECOND CHANCE, TO SAY
THIS IS HOW, I WOULD HAVE DONE
IT, OR, REASONABLY COMPETENT
LAWYER WOULD HAVE DONE IT, IS
THAT, YOU KNOW, AGAIN, MOVING
AROUND IS CERTAINLY, JUST A
FACT.

WAS THERE, IN ANSWER TO JUSTICE
QUINCE'S QUESTION, WAS THERE
EVIDENCE OF AN ABUSIVE, I MEAN
PHYSICALLY OR SEXUALLY ABUSIVE
CHILDHOOD?

WERE THERE EVIDENCE OF SCHOOL
RECORDS SHOWING A CHILD THAT
WAS BARELY HANGING ON?
I MEAN THIS IS THE KIND OF
THING WHEN WE LOOK AGAIN,
BECAUSE WE'RE IN
POSTCONVICTION,
THAT WE GO, WOW!, THIS WOULD
NOT ONLY HAVE BEEN SOMETHING
THAT A REASONABLE LAWYER WOULD
PUT ON BUT FAILING TO PUT IT
ON REALLY UNDERMINES OUR
CONFIDENCE IN THE OUTCOME OF
THIS PENALTY PHASE.

AND I THINK, FROM JUDGING FROM
THE QUESTIONS, YOU'RE IN
REBUTTAL, YOU HAVEN'T TOLD US
WHAT THAT WOULD BE.

>> THE DETAILED TESTIMONY WENT
THROUGH THOSE RECORDS BOTH
DR.^BERLAND AND DR.^DEE.
BERLAND WAS LENGTHIER ON
EXPLAINING --

>> -- EXPERTS, CORRECT?

LET ME ASK THE QUESTION IN A DIFFERENT WAY.

>> YES.

OBVIOUSLY I'M NOT UNDERSTANDING.

>> THAT ASSUMING, AND REALIZING WE HAVEN'T RESOLVED THAT, ASSUMING A REASONABLE DEFENSE LAWYER, AFTER DR. ^KROP SAYS, SORT OF PULLS THE RUG OUT FROM UNDERNEATH, SAYS, AFTER ALL THIS, I'M NOT GOING TO BE ABLE TO HELP YOU AND DON'T DARE. NOW WE SAY, WHAT WOULD A REASONABLE DEFENSE LAWYER HAVE DONE IN TERMS OF PRESENTING MITIGATION?

LET'S ASSUME, AT LEAST FOR THIS, ALTHOUGH WE HAVE NOT DECIDED, PART OF WHAT HE WOULDN'T HAVE DONE TO ANOTHER MENTAL HEALTH EXPERT.

WOULDN'T HAVE FOUND THESE OTHERS THAT CAME, BUT HE, WHAT ELSE DID HE HAVE OUT THERE IN TERMS OF SCHOOL RECORDS, OR MEDICAL RECORDS, OR FAMILY, OR FRIENDS, OR WHOEVER, THAT WAS AVAILABLE TO HIM TO PUT ON A STRONG CASE FOR MITIGATION?

>> ASSUMING HE COULD GET THE RECORDS IN -- ASSUMING GETS FACTS AND RECORDS, WE HAVE RECORDS IN THE RECORD AND DISCUSSED BY THESE EXPERTS, THAT HE, THE STILLBORN TWIN, THE PROBLEMS IN EARLY CHILDHOOD.

LEARNING DISABILITY I BELIEVE DIAGNOSED IN SCHOOL AND MOVED VERY SHORTLY THEREAFTER UP TO NORTH CAROLINA I BELIEVE.

THE EVALUATIONS AND PRESCRIPTIONS, YOU KNOW, HE HAD A JUVENILE PROBLEMS AND, HE WAS PRESCRIBED MEDICINE FOR THE SLEEP DISORDER AND SO, THAT, BUT YOU NEED EXPERTS --

>> THOSE THINGS ARE DETAILED IN YOUR BRIEF?

>> IN THE FACT SECTION I BELIEVE.

IF NOT THEY'RE CERTAINLY IN THE TESTIMONY AND EVIDENCE

PRESENTED.

THEY'RE IN THE EVIDENTIARY
EXHIBITS PRESENTED AT THE
COURT.

>> YOUR ENTIRE DEFENSE --

>> ENTIRE DEFENSE FILE.

>> AT VERY LEAST THE DEFENSE
LAWYER SHOULD HAVE PUT ON ALL
OF THIS IN ORDER TO MAKE A CASE
FOR MITIGATION?

>> OF COURSE.

IT'S SO SELF-EVIDENT TO ME I
THINK THAT'S WHERE THE PROBLEM
IS.

AND THE EASIEST OR BEST WAY TO
PUT THAT ON USE AN EXPERT TO
EXPLAIN HOW ALL THOSE THINGS
DRAW TOGETHER.

>> YOU'RE IN YOUR REBUTTAL,
WHAT DID THE DEFENSE LAWYER SAY
WHEN YOU REQUESTED HIM ABOUT
THAT?

EVEN THOUGH THE DOCTORS PULLED
OUT ON YOU WHY DIDN'T YOU
PRESENT ALL THIS OTHER STUFF?
WHAT DID HE SAY?

>> HE DIDN'T PUT IT ON.

HE JUST, HE WAS RELYING ON
DR.^KROP, WHEN DR.^KROP BLEW
UP, HE GAVE UP.

AND I DON'T RECALL HIM EVER
SAYING ANYTHING ABOUT
CONSIDERING ANYTHING ELSE.

AND IT'S CLEAR BECAUSE INSTEAD
OF TAKING THE TWO WEEKS WHERE
HE COULD HAVE DEVELOPED THAT
STUFF PERHAPS, HE JUST WENT
AHEAD AND RESTED, CAME UP WITH
CAPITAL, YOU KNOW, THE VERY
SMALL, HE WAS WELL-BEHAVED.

AND PLETHORA OF EVIDENCE HE HAD
IN HIS HANDS HE NEVER PRESENTED
AND NEVER TOOK THE STEPS TO GET
ANYBODY ELSE TO PRESENT IT IN A
MENTAL HEALTH CONTEXT OR IN
SIMPLY FACTUAL CONTEXT.

IT WAS ALL THERE.

IT'S IN THE FILE.

THEY MADE THE DEFENSE FILE A
PART OF THIS RECORD BEFORE THIS
COURT AND IT'S ALL IN THERE.

>> WITH THAT, MR.^GEMMER, YOU
HAVE ACTUALLY EXCEEDED YOUR
TIME.

THANK YOU VERY MUCH.

>> THANK YOU.

>> MISS DAVIS.

>> MAY IT PLEASE THE COURT.

MY NAME IS BARBARA DAVIS.

I REPRESENT THE STATE OF

FLORIDA.

>> COULD YOU START WITH THE PROPOSITION THAT, ONE OF THE POSSIBILITIES IS IF I ACCEPT THE TRIAL COURT'S FINDING THAT DR.^KROP TOLD DEFENSE COUNSEL, DON'T CALL ME, I'M, I CAN ONLY HURT YOUR CASE, WHATEVER, WHAT ABOUT THIS ALTERNATIVE HERE, THAT IS, THAT DEFENSE LAWYER STILL HAD AN OBLIGATION TO PUT ON A CASE FOR MITIGATION?

ACCORDING TO YOUR OPPONENT HE JUST COMPLETELY ABANDONED HIS CLIENT AT THAT POINT AND, IF DR.^KROP WAS IT.

DR.^KROP WENT AWAY, WHATEVER, THERE WERE, IT WAS LOADS OF EVIDENCE OF MITIGATION.

APPARENTLY AS EVIDENCED BY THE FILE OF THE DEFENSE LAWYER THAT IS IN THE RECORDS.

SO, WHY SHOULDN'T WE FIND THAT SUFFICIENT CONTEXT?

>> FIRST OF ALL, THERE IS NOT A LOT OF OTHER MITIGATION.

SECONDLY THIS COURT HAS NEVER HELD THAT THE DEFENSE ATTORNEY HAS TO GO SHOPPING FOR AN EXPERT.

WHEN AN EXPERT --

>> NOT TALKING ABOUT SHOPPING FOR ANOTHER EXPERT.

NOW I'M TALKING ABOUT ALL OF THIS BACKGROUND INFORMATION THAT YOUR OPPONENT IS REFERRING TO, THAT APPARENTLY WOULD BE MITIGATING IN NATURE AND, HE IS CORRECT, IS HE CORRECT THAT THE DEFENSE LAWYER PUT ON NO CASE FOR MITIGATION?

>> DEFENSE ATTORNEY, INVESTIGATED THOROUGHLY EVERYTHING.

THERE WAS NO CASE IN MITIGATION TO PUT ON.

>> SO IT IS CORRECT THAT HE PUT ON NOTHING?

>> HE OFFERED, THERE WERE FOUR NON-STATUTORY MITIGATORS THAT WERE FOUND.

>> I MEAN THOSE, THINGS LIKE EXEMPLARY COURTROOM BEHAVIOR. HE ASSISTED HIS DEFENSE ATTORNEY.

HE WAS SUCCESSFULLY COMPLETED PROBATION.

HE EXPRESSED CONCERN ABOUT HIS WIFE USING ALCOHOL AND WANTING HER TO BE A PETER PERSON THAN SHE EVIDENTLY WAS.

BUT THAT DOESN'T TELL US ANYTHING ABOUT THE DEFENDANT, REALLY.

IF THERE IS FAMILY INFORMATION ABOUT SOME KIND OF NEGLECTFUL CHILDHOOD OR ABUSE IN CHILDHOOD, ISN'T THAT THE KIND OF THINGS WE SEE IN THESE CASES AND THE THINGS THAT JUDGES FIND AS MITIGATION?

>> THERE'S NOT.

THERE IS NO EVIDENCE THAT HE COULD PRESENT.

AND I WOULD DIRECT THE COURTS TO THE JUDGE'S FINDINGS ON PAGE 12 TO 13 OF THE RECORD.

I WOULD DIRECT THE COURT TO THE NELSON HEARING ON THE RECORD OF DIRECT APPEAL.

STARTS ON PAGE 1433.

DR.^KROFT, THE DEFENDENT TO THIS DAY MAINTAINS INNOCENCE.

DR.^KROFT TESTIFIES WHEN HE MAINTAINS INNOCENCE IT IS VERY DIFFICULT TO FIND STATUTORY CIRCUMSTANCES.

MR.^WITHEE SENT DR.^KROP ALL THE RECORDS.

WHAT DID THE RECORDS THE SAY? HE HAS ANTISOCIAL PERSONALITY DISORDER.

DR.^DEE, SUPPLEMENTAL.

DR.^RIEBSAME TESTIFIES AT PAGE 358 TO 361.

THERE ARE NO STATUTORY MITIGATING CIRCUMSTANCES.

>> BEYOND THAT, WE'RE TALKING ABOUT, BASICALLY NON-STATUTORY MITIGATION.

THE FAMILY BACKGROUND.

ARE YOU TELLING US THIS RECORD,

DOES NOT SUPPORT ANY KIND OF
BACKGROUND INFORMATION THAT
COULD AT ALL BE MITIGATION?

>> I'M TELLING YOU DEFENSE
COUNSEL WAS UP AGAINST A WALL
BECAUSE, THE PARENTS WERE THERE
TRYING TO GIVE AN ALIBI TO THE
DEFENDANT.

THEY WERE GIVING CONTRADICTORY
INFORMATION TO DR.^KROP AND TO
DR.^WITHEE.

HE COULD NOT CALL THE PARENTS.

>> YOUR ANSWER IS NO, THERE IS
NO --

>> THERE IS NOTHING.

IF YOU LOOK AT DR.^REIBSAME'S,
OKAY, DR.^KROP HAD THE RECORD
FROM DR.^DAVID.

WHAT DID DR.^DAVID SAY?

NORMAL CHILDBIRTH.

NORMAL CHILDHOOD.

HE MAY HAVE HAD SOME LEARNING
DEFICIENCIES WHICH THE PARENTS
DIDN'T INTERVENE IN.

REMEMBER, FLOYD KILLED HIS
BROTHER WHEN HE WAS 16.

THE FACTS OF THAT WERE
EXCRUCIATING AND MR.^WITHEE
INVESTIGATED ALL THAT AND FOUND
THAT THERE'S A LOT MORE TO THIS
THAN INVOLUNTARY MANSLAUGHTER.

>> I THINK WE'RE PASSING IN THE
NIGHT BECAUSE I THINK WE PASSED
BEYOND THE DR.^KROP AND THE
EXPERTS.

I THINK JUSTICE QUINCE AND OUR
QUESTIONS HAVE BEEN, AT LEAST
THE SUGGESTION BY YOUR
OPPOSITION THAT THERE ARE
THINGS IN HIS SCHOOL RECORDS.

LET'S FORGET ABOUT EXPERTS.

THINGS IN HIS SCHOOL RECORDS,
THINGS, JUST THAT HAPPENED TO
HIM DURING HIS LIFE.

ARE THERE SOME OF THESE THINGS
IN THE RECORD?

JUST I MEAN, IN ALL CANDOR,
TELL US WHAT THE RECORD, WHAT
DO THE SCHOOL RECORDS SHOW?
BECAUSE THOSE WERE IN --

>> DR.^KROP HAD THE SCHOOL
RECORDS.

HE HAD DR.^DAVID'S EVALUATION.

HE HAD THE MENTAL HEALTH

RECORDS.

BECAUSE REMEMBER WHEN MR.^FLOYD
CAME DOWN HERE, JUDGE MATHIS
HAD HIM ON PAROLE.

HE ORDERED ANOTHER EVALUATION
SO, WE HAVE DORTHEA DIX
RECORDS WHICH ARE IN THE
RECORDS. THAT IS THE DEFENSE
EXHIBIT 2.

WE HAVE DR.^DAVID'S REPORT IN
THE RECORD.

YOU GO THROUGH THIS, WHAT IT
SHOWS ANTISOCIAL PERSONALITY
DISORDER WHICH IS WHAT DR.^KROP
SAID --

>> YOU'RE GOING BACK TO MENTAL
HEALTH.

PLEASE SEPARATE.

FORGET ABOUT EXPERT MENTAL
HEALTH.

IF YOUR OPPOSING COUNSEL
WALKING INTO A COURTROOM TO
TELL A JURY WHO THIS PERSON IS,
DR.^KROP'S NOT THERE.

LET'S DON'T TALK ABOUT THESE
EXPERTS.

I THINK THAT'S WHERE THE
QUESTIONS ARE GOING.

DID ANYTHING EXIST AND IF SO,
WHAT IS IT.

IT MAY NOT BE ENOUGH OR MAY BE.
BUT YOU NEED TO TELL THIS COURT
IS THERE ANYTHING IN HIS SCHOOL
RECORDS, THAT HE DIDN'T
PERFORM, THAT HE DROPPED OUT OF
SCHOOL THEY EXPELLED?

THOSE THINGS.

WHETHER KROP THINKS IT'S
A BIG DEAL OR NOT WHAT THE
THINGS IN THE RECORD THAT GO TO
THAT ISSUE BECAUSE NOTHING WAS
PRESENTED?

>> HERE IS WHAT MR.^WITHEE
TESTIFIED TO AND HERE IS WHAT
THE TRIAL JUDGE FOUND.
HE INVESTIGATED ALL THAT.
HE HAD ALL THE SCHOOL RECORDS.
HE HAD ALL THE PSYCHOLOGICAL
RECORDS.

ALL IT SHOWED WAS NEGATIVE
THINGS.

HE PROVIDED ALL THAT TO
DR.^KROP.

HE MADE A STRATEGIC DECISION.

I AM NOT PRESENTING THESE THINGS.

>> YOUR ANSWER IS THERE IS NOTHING.

THAT'S AN ANSWER.

WE'RE TRYING TO EXPLORE THAT AREA.

I THINK YOU UNDERSTAND THAT.

>> YOU CAN SAY THIS IS POTENTIALLY MITIGATING.

ON BALANCE IT'S NEGATIVE TO THE DEFENDANT.

THAT'S WHAT A DEFENSE ATTORNEY DOES.

IF YOU SEE ,OH, HE KILLED HIS BROTHER IN THIS VIOLENT THING.

OH, HE HAD A NORMAL BIRTH.

HE HAD, HE THREATENED HIS PRINCIPAL WHEN HE WAS IN SCHOOL.

HE KILLED HIS BROTHER WHEN HE WAS 16.

ANYTHING IS POTENTIALLY MITIGATING.

AND THEN YOU LOOK AT THE PATTERN WHICH IS WHAT DR.^KROP TOLD MR.^WITHEE.

THIS IS ANTISOCIAL PERSONALITY DISORDER.

AND MR.^WITHEE HAD CONSULTATIONS WITH DR.^KROP AND THE JUDGE FOUND, AND MR.^WITHEE TESTIFIED, I'M NOT GOING TO PRESENT ANTISOCIAL PERSONALITY.

NOW WHETHER HE GOES SHOPPING FOR ANOTHER EXPERT TO SAY HE IS NOT, IS THAT WHAT DEFENSE ATTORNEYS HAVE TO DO?

IF THE PATTERN OF THE RECORD AND AN EXPERT SAYS HE IS ANTISOCIAL, THE PARENTS ARE NOT COOPERATING, HE'S NOT COOPERATING, I CAN'T HELP YOU, ANYTHING I TESTIFY TO WOULD DO MORE HARM THAN GOOD, IT COULD ONLY BE VIEWED IN A NEGATIVE WAY.

AM I SUPPOSED TO GO FIND ANOTHER EXPERT?

HIDE THE RECORDS?

AND GET HIM TO TESTIFY HE IS NOT ANTISOCIAL?

I JUST DON'T THINK THAT, I MEAN, MR.^WITHEE WENT TO

DR.^KROP'S OFFICE WITH MAURICE FLOYD.

DR.^KROP SAW HIM FOUR TIMES. HE SPENT 12 HOURS WITH HIM. HE DID ALL THE PSYCHOLOGICAL TESTING.

AND THEY MADE A STRATEGIC DECISION AND THIS IS A STRATEGIC DECISION.

THE PARENTS ARE LYING TO DEFENSE COUNSEL.

IF YOU LOOK AT THE NELSON HEARING, THE JUDGE EXPLORED ALL THIS BECAUSE FLOYD WAS COMPLAINING THAT MR.^WITHEE WOULDN'T PRESENT THE ALIBI DEFENSE.

THAT HE HATED THE DEFENSE EXPERT AND HE WASN'T GOING TO COOPERATE WITH HIM.

IT'S ALL IN THE NELSON HEARING.

AND, IT'S IN OUR RECORDS.

DR.^KROP'S TESTIMONY, THAT, YOU CANNOT FIND STATUTORY MITIGATORS.

WHEN HE'S, MAINTAINING INNOCENCE.

DR.^REIBSAME'S TESTIMONY, HE GOES THROUGH --

>> COULD I TRY TO HELP YOU A LITTLE BIT?

COULD I MAYBE JUST ASK SOME QUESTIONS?

>> SURE.

>> DID HE COMPLETE ELEMENTARY SCHOOL?

>> HE KILLED HIS BROTHER OH, HE COMPLETED ELEMENTARY SCHOOL.

>> ELEMENTARY SCHOOL.

YES?

>> ANY INDICATION IN THOSE RECORDS HE WAS BEATEN AS A CHILD OR DIDN'T HAVE FOOD OR ANYTHING LIKE THAT.

>> NO, SIR, NO, SIR.

>> DID HE GO TO A MIDDLE SCHOOL?

THAT'S THE KIND OF THINGS WE'RE ASKING ABOUT.

>> AIMED JUST DIRECT TO YOU DR.^DAVID'S REPORT AND DOCTOR, AND THE DORTHEA DIX REPORTS.

THEY ARE BOTH IN THE RECORD.

I MEAN, YOU COME --

>> EVERYTHING IN THE RECORD IS
IN --
>> OKAY.
>> SO EVERYTHING THAT HE IS IN
THIS RECORD WITH REGARD TO THIS
MAN'S LIFE, IS IN THOSE TWO
REPORTS?
IS THAT WHAT YOU'RE TELLING THE
COURT?

>> IT'S IN THE REPORTS.
DR.^REIBSAME DID A COMPLETE
BACKGROUND CHECK ON HIM.
READ EVERYTHING.
IF YOU LOOK AT DR.^REIBSAME'S
TESTIMONY, AND HOW HE KIND OF
SYNTHESIZED THE REPORTS, THE
INFORMATION, TESTIFIED ABOUT
ALL THIS, SEE FLOYD WAS 15 WHEN
HE SHOT HIS BROTHER.
AND DR.^REIBSAME TOLD THE
JUDGE, YEAH, I MEAN HE PROBABLY
HAD A LEARNING DISABILITY.
THERE WAS NO INTERVENTION BY
THE PARENTS.
THERE WAS SOME MITIGATION HERE.
MR.^WITHEE KNEW ALL THAT.
ON BALANCE, WHAT'S HE GOING TO
DO?
EXPOSE AN EXPERT TO COME UP AND
TESTIFY ABOUT A LEARNING
DISABILITY AND HAVE HIS CLIENT
BE LABELED AN ANTISOCIAL
PERSONALITY DISORDER?
SO, YEAH, DR.^REIBSAME WAS VERY
HONEST.
HE SAID YES, THE DORTHEA DIX
AND DR.^DAVID SHOWED HE HAD A
SLEEP DISORDER.
PARENTS WOULDN'T DO ANYTHING
ABOUT IT.
HE WOULD REFUSE TO TAKE HIS
MEDICATION.
THE BROTHER THAT HE SHOT, THEY
WOULD SNEAK OUT THE WINDOW AND
DO BURGLARIES IN THE MIDDLE OF
THE NIGHT.
YOU LOOK AT THIS, ON BALANCE DO
I PUT IN THIS FAMILY NOT
EXACTLY THE YOU KNOW, THE
SOCCER MOM AND DAD.
AND BUT ON THE OTHER HAND,
YOU'VE GOT, AND HE IS SO
TOTALLY ANTISOCIAL.
THAT'S THE STRATEGIC DECISION.

MR. ^WITHEE INVESTIGATED THIS THOROUGHLY. HAD THE ADVICE OF A REKNOWNED MENTAL HEALTH EXPERT. IT'S ALL IN THE RECORD. I MEAN DR. ^REIBSAME'S TESTIMONY, THE JUDGE'S ORDER AT PAGES, PAGES 12 AND 13, THE JUDGE FINDS MR. ^WITHEE TESTIFY, THE DEFENDANT HAD AN ANTISOCIAL PERSONALITY DISORDER. SOMETHING HE DIDN'T WANT TO PRESENT.

>> MISS DAVIS, WHETHER YOUR ANSWERS ARE RESPONSIVE ON THE FIRST PRONG, I THINK YOU'VE HIT ON SOME OF THE MAJOR AREAS. WHAT I WOULD LIKE YOU TO JUST ADDRESS IS THE PREJUDICE ISSUE. LET'S ASSUME THAT WE FIND HE SHOULDN'T HAVE GIVEN UP. THAT HE NEEDED TO, AND EVIDENCE OF A, BRAIN DAMAGE IN TERMS OF THE, IN TERMS OF THE TESTING. LET'S TWO TO THE SECOND PRONG, SO I CAN HEAR YOUR TAKE ON THAT.

OR IS IT ALL OR NOTHING? IF WE FIND DEFICIENCY THERE IS DEFINITELY PREJUDICE IN THIS CASE?

>> OH, NO. THE PREJUDICE PRONG WOULD BE WHAT CCR HAS NOW GIVEN TO THE TRIAL JUDGE TO SAY, WELL, HERE'S WHAT HE SHOULD HAVE PRESENTED. TRIAL COUNSEL KNEW ALL THAT AND MADE A STRATEGIC DECISION NOT TO PRESENT IT BECAUSE IT WOULD EXPOSE TO -- OKAY, ONE OF THE EXPERTS SAYS HE IS PSYCHOTIC. DR. ^DAVID, DORTHEA DIX NO PSYCHOTIC SYMPTOMS WHEN HE IS 15, 16, AND 17 WHEN THEY DO THOSE.

THAT IS TOTALLY IMPEACHABLE BY RECORDS WE HAVE IN THE HAND.

>> WHAT YOU'RE SAYING WE HAVE TO LOOK AT QUALITY WHAT IS PRESENTED? BECAUSE THERE IS THIS LABELING BEING BROUGHT OUT, THAT DOESN'T MEAN THAT IT WAS,

TRIAL COURT, LOOKING BACK AT ORDER.

TRIAL COURT EVALUATE THE PREJUDICE PRONG OR JUST THE DEFICIENCY?

I MEAN WHAT DID THE TRIAL COURT SAY ABOUT THE QUALITY OF THE MITIGATION?

>> IT'S PAGES 13 AND 14.

HE DIDN'T SAY, HE DIDN'T, SLICE IT OUT INTO DEFICIENCY AND PREJUDICE.

HE DID A THOROUGH EVALUATION OF THE SINGLE-SPACES OR TWO PAGES AND SAID THERE'S NO VIABLE CHALLENGE TO THE EQUALITY OF THE EXPERTISE OF DR. ^KROP AND THE DOCTOR'S ANALYSIS.

MR. ^FLOYD HAS FAILED TO MEET HIS BURDEN OF PROOF ON THIS ISSUE.

>> THAT'S ON THE FIRST ISSUE.

>> AND THIS, HE MADE A BONAFIDE SOLID STRATEGY DECISION.

>> THAT'S THE FIRST ISSUE.

SO I DON'T KNOW THAT THE JUDGE D LET'S GO BACK OVER, WHAT YOU'RE SAYING IS THAT ALTHOUGH HE PUT ON ALL THESE EXPERTS, TALKED ABOUT EVIDENCE THAT DEFENSE LAWYER HAD THAT WAS AVAILABLE, NONE OF THAT EITHER INDIVIDUALLY, COLLECTIVELY WOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME OF THE PENALTY PHASE?

>> NO.

>> AND THAT WOULD BE BECAUSE THERE WOULD BE, AGAIN WE CAN'T ALWAYS SAY SOMETHING BAD MIGHT COME OUT.

AGAIN, SOMEONE WHO HAS HAD A CHILDHOOD AND IS SORT OF COMMITTING CRIMES, THERE IS ALWAYS, THERE IS A WEIGHING ON IT, BUT HERE YOU'RE SAYING THE NATURE OF THE DIAGNOSIS WAS REALLY KIND OF A WEAK ONE OR THAT THERE WOULD BE REAL PROBLEMS IN TRYING TO USE THIS TO ESTABLISH THE TWO STATUTORY MITIGATORS SINCE HE WAS DENYING EVEN BEING AT, CRIME SCENE FOR THE STATUTORY MITIGATOR?

>> OH ABSOLUTELY.
EVEN IF, IF THE DEFENSE COUNSEL
HAD A RESPONSIBILITY TO GO FIND
ANOTHER EXPERT, AND HE HAD
FOUND DR.^BERLAND AND DR.^DEE,
DR.^BERLAND NOW HAS HIM BEING
PSYCHOTIC WHERE THE PRIOR
EXPERTS, DR.^DAVID AND DIX
EVALUATIONS THERE IS NO
PSYCHOTIC SYMPTOMS.
THERE IS NO PSYCHOTIC BEHAVIOR.
THERE IS NO HALLUCINATIONS.
PARENTS SAY THERE IS NO
HALLUCINATIONS.
DR.^DEE, HE HAS BRAIN DAMAGE.
DR.^KROP SPECIFICALLY RULED OUT
BRAIN DAMAGE.
SO DID DR.^REIBSAME.
DR.^DEE WAS SEVERELY IMPEACHED
HOW CAN YOU COME UP WITH
DIAGNOSIS OF BRAIN DAMAGE?
IT WAS JUST BECAUSE OF THE
DISPARITY BETWEEN THE VERBAL
AND PERFORMANCE IQ WHICH
DR.^KROP ADDRESSED IN HIS
TESTING.
HE HAD LIKE A 27-POINT
DISPARITY HE SAID, THIS, IS,
I'VE DONE A NEUROPSYCH EVAL.
IT DOESN'T APPEAR TO BE
NEUROPSYCH.
IT CAN VERY EASILY BE A
LEARNING DISABILITY OR
SOMETHING.
THEY KNEW ABOUT THIS DISPARITY.
DR.^KROP SAYS, THAT DOESN'T
MEAN BRAIN DAMAGE.
DR.^REIBSAME, SAID, THAT
DOESN'T MEAN BRAIN DAMAGE.
SO EVEN IF, LET'S SAY, LET'S
SAY THEY DID FIND DR.^BERLAND
AND DR.^DEE AND THEY COME IN?
THE SAME THING IS GOING TO
HAPPEN.
STATE WILL HAVE ALL THESE PRIOR
REPORTS TO IMPEACH THESE
REPORTS.
WE'LL HAVE DR.^REIBSAME.
SO IF YOU CAN REWIND THE CLOCK
AND THIS WAS THEIR
PRESENTATION, WE GET TO THE
SAME PLACE.
HE IS ANTISOCIAL.
THERE ARE THESE FACTS

SURROUNDING THE KILLING OF HIS BROTHER THAT ARE JUST AWFUL. THE PARENTS COULD NOT BE CALLED, THEY DIDN'T CALL THE PARENTS TO TESTIFY?

>> I NOTICE, THAT'S AN INTERESTING POINT.

I NOTICE THERE WERE 13 OR 14 WITNESSES CALLED AT EVIDENTIARY HEARING, NONE OF THEM SEEMED TO BE FAMILY MEMBERS.

DO WE HAVE ANYTHING IN THIS RECORD ABOUT WHY, EVEN POSTCONVICTION NORMALLY SAY HERE ARE ALL THE WITNESSES WHO COULD HAVE TESTIFIED ABOUT HIS BACKGROUND, WE DON'T HAVE THAT? IS THERE ANYTHING IN THE RECORD THAT INDICATES WHY NO FAMILY MEMBERS WERE CALLED?

>> THEY WERE LISTED AS WITNESSES.

THEY WERE NOT CALLED. THE MOTHER AND FATHER. AND, MR.^WITHEE --

>> NO SIBLINGS?

DOES HE HAVE ANY SIBLINGS?

>> HE HAS SIBLINGS.

TWO BROTHERS LEFT.

HE KILLED ONE OF THEM.

SO YES.

>> WHAT IS ISSUE ON STILLBORN BROTHER?

I MEAN --

>> THERE WAS EVIDENCE THAT, ONE OF, THERE WAS A TWIN THAT WAS STILLBORN.

BUT THEN DR.^DAVID TALKED TO THE MOM AND SHE SAID, AND LOOKED AT THE RECORDS, IT WAS A NORMAL CHILDBIRTH.

MAURICE WAS NOT AFFECTED AT ALL BY THE TWIN BEING STILLBORN BY WHATEVER.

MAURICE HAD A NORMAL CHILDHOOD, MR.^FLOYD.

THE PSYCHOLOGICAL RECORDS ARE VERY DAMNING THAT THEY WOULD PUT IN.

MR.^WITHEE, I MEAN, IF YOU LOOK AT THE NELSON HEARING, BENT OVER BACKWARDS INVESTIGATING THIS CASE.

AND, I THINK THAT'S IT.

I'D ASK THIS COURT TO AFFIRM
THE TRIAL JUDGE'S ORDER.

>> THANK YOU.

MR.^GEMMER, I WILL GIVE YOU A
MINUTE.

YOU'VE RUN OUT OF TIME BUT --

>> THANK YOU.

>> GIVE US YOUR POSITION
SUCCINCTLY ABOUT THIS
MITIGATING --

>> DR.^REIBSAME WOULD PROBABLY
HAVE BEEN AN EXCELLENT DEFENSE
WITNESS AT TRIAL IF HE HAD BEEN
CALLED.

HE FOUND, DR.^DEE JUST DIDN'T
FIND DISPARITY IN THE IQ. HE
ALSO FOUND OTHER MATTERS IN HIS
NEUROPSYCHOLOGICAL TESTING HE
WHICH HE TESTIFIED.

DR.^REIBSAME TESTIFIED,
FUNCTIONING SCORING IN 16
PERCENTILE.

LOW SCORE INDICATING
IMPAIRMENT.

DR.^REIBSAME SAID THE SLEEP
DISORDER IS MITIGATING.

HE SAYS HE IS LEARNING
DISABLED.

DR.^REIBSAME SAY CHAOTIC
CHILDHOOD INATTENTIVE.
THAT'S WHERE THAT CAME IN.
BRAIN FUNCTIONS IN VERY
DIFFERENT WAY.

>> CHAOTIC CHILDHOOD COULD MEAN
MANY THINGS.

WHAT WAS CHAOTIC OTHER THAN THE
FACT HE MOVED FROM PLACE TO
PLACE?

THAT HAPPENS QUITE FREQUENTLY
IN OUR MOBILE SOCIETY.

WHAT WAS SO --

>> I THINK HE MOVED, LIKE EVERY
YEAR OR LESS THAN EVERY YEAR.
INTERRUPTED HIS SCHOOLING.
AND HE MOVED EVEN AROUND IN
TOWN SO HE WOULDN'T BE ABLE TO
DEVELOP A, YOU KNOW, NEIGHBORLY
FRIENDS AND THAT SORT OF THING.

>> JUSTICE QUINCE ASKED EARLIER
WHETHER THERE WAS SOME
EXPLANATION FOR FAMILY MEMBERS
NOT TESTIFYING AT THE
POSTCONVICTION HEARING.

>> WE FELT THAT THE EXPERT

TESTIMONY DRAWING ON THE RECORDS OF CHILDHOOD RECORDS, BECAUSE THEY WERE ABLE TO CONNECT THOSE THINGS TO THE MENTAL HEALTH MITIGATION, THAT THEY WERE FAR MORE EFFECTIVE IN PRESENTING THE PROBLEMS THAT HE HAD AS A CHILD THAN THE PARENTS WHO DIDN'T HAVE THE GREATEST RECOLLECTION OF ALL THOSE MATTERS BECAUSE THEY'RE NOT PSYCHOLOGISTS.

THEY DON'T UNDERSTAND WHAT IS IMPORTANT AND WHAT'S NOT.

FINALLY ULTIMATELY PREJUDICE --
>> YOU MADE AT THIS POINT A STRATEGIC DECISION ABOUT WHAT TO PRESENT?

OR NOT PRESENT?

THAT'S WHAT YOU JUST SAID.

>> ON THAT DAY, YES.

AND, ULTIMATE PREJUDICE IS, EVEN WITHOUT ANY MITIGATION, THERE WAS ONE JUROR SAID, VOTED AGAINST DEATH WHICH MEANS ONE JUROR FOUND THAT THE AGGRAVATORS ALONE WERE NOT SUFFICIENT TO JUSTIFY THE DEATH PENALTY.

IF ANYTHING HAD BEEN PRESENTED IN MITIGATION, THEY COULD HAVE BROUGHT IN MORE JURORS, POSSIBLY UP TO THE SIX THAT WOULD BE REQUIRED TO DENY A DEATH PENALTY.

>> THANK YOU VERY MUCH FOR YOUR ARGUMENTS.

>> THANK YOU.

>> BOTH OF YOU.

THE COURT IS NOW IN RECESS.

>> PLEASE RISE.