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Floyd Damren v. State of Florida

NEXT CASE ON THE DOCKET IS DAMREN VERSUS STATE AND DAMREN VERSUS MOORE. ALL RIGHT. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

YES, SIR. THANK YOU, YOUR HONOR. JEFF MORROW FOR PETITIONER FLOYD DAMREN. THIS CASE COMES BEFORE US AS A DENIAL OF 3.851 EVIDENTIARY HEARING. VERY NARROW ISSUE, REALLY, BEFORE YOU. THIS WAS A CASE WHERE FLOYD DAMREN WAS FOUND GUILTY BY A JURY IN CLAY COUNTY. THERE WAS A 12-0 VOTE FOR DEATH. HE WAS SENTENCED TO DEATH. AT THE HEARING, WE PRESENTED EVIDENCE FROM DR. MILLER, AND WE BROUGHT DR. MILLER IN, BECAUSE HE WAS THE SAME WITNESS THAT WAS AT THE TRIAL LEVEL, SO WE ARE NOT TALKING ABOUT, LIKE, A BARRY CROWN ISSUE, WHERE SOMEONE LIKE BARRY CROWN IS HIRED TEN YEARS LATER AND SAYS WELL, GEE, I THINK THERE WAS BRAIN DAMAGE AND IT SHOULD HAVE BEEN BROUGHT UP. THIS WAS THE SAME WITNESS THAT TESTIFIED AT TRIAL THAT COULD HAVE TESTIFIED THAT THERE WAS BRAIN DAMAGE.

HOW DO YOU GET AROUND THE TWO EXPERTS WERE RETAINED BY COUNSEL, CORRECT SNACK.

YES, SIR.

BOTH OF THEM INDICATED NO BRAIN DAMAGE, AND THAT EXPERT, REALLY, CAN'T QUANTIFY THE EXTENT OF ANY. WHAT IS THE IMPACT ON THIS CASE?

WELL, THE FIRST EXPERT WAS PHILLIPS, AND THE DECISION WAS A STRATEGIC DECISION NOT TO USE HIM, BECAUSE THEY DIDN'T WANT TO GET INTO HIS CRIMINAL HISTORY, BECAUSE IT WAS MORE AFTER SOCIOLOGICAL SORT OF APPROACH. THE SECOND ONE WAS DR. RISK, WHO DID NOT HAVE TIME-HONORED TRADITIONS OF HALL STEAD READER LURE YEAH AND NEBRASKA STREET NEUROLOGICAL SCREENING, AND THE TESTIMONY WAS THAT ANY NEURO LOGICAL PSYCH WOULD HAVE DONE THAT AND HAD THE SAME RESULT, BUT THAT IS TRUE THAT THAT IS AN ISSUE IN THE CASE, YOUR HONOR, BUT THE REASON WHY I BRING THIS UP IS BECAUSE DR. MILLER WAS THERE AT THE TRIAL. HE HAD THE MEDICAL RECORDS BEFORE HIM, AND THE MEDICAL RECORDS, HE BASED HIS OPINION ON SEVERAL THINGS. NUMBER ONE, THERE WAS A SAYS YOUR THAT OCCURRED AFTER COCAINE OVERDOSE. NUMBER TWO, THAT THERE WAS STATUS ELIPTICUS, WHICH MEANS THAT THERE WAS AN ONGOING, CONTINUES SEIZURE AS A SEPARATE PART OF HIS OPINION, MEANING THAT, IN FACT IN THE MEDICAL RECORDS, THEY HAD TO PUT A VALIUM IV IN MR. DAMREN TO GET HIM OUT OF THAT STATE, WHICH MEANS THE BRAIN DAMAGE IS ONGOING, AND THEN THIRDLY, THE BLOOD DRAW WAS ACIDOTIC, WHICH IS AN INDICATION OF BRAIN DAMAGE, SO THOSE ARE THE THREE AREAS OF THE BASIS OF HIS OPINION, AND IT WAS DONE WITHIN A REASONABLE DEGREE OF MEDICAL PROBABILITY.

WHAT DOES THAT TRANSLATE INTO THE BEHAVIOR OF THIS PARTICULAR PERSON?

THAT IS NOT CLEAR FROM THE RECORD. ALL I CAN ARGUE, YOUR HONOR, IS THAT AT PENALTY PHASE THAT, I THINK THAT WOULD HAVE MADE A DIFFERENCE, AND THE JURY SHOULD HAVE HEARD THAT, AND I WILL ADMIT THAT THE COUNSEL PUT ON 14 WITNESSES AT PENALTY PHASE, WENT THROUGH A LOT OF STUFF ABOUT HIS CHILDHOOD AND THAT SORT OF THING, BUT HE DID ADMIT, HE SAID I COULD NOT CONCEIVE OF A REASON WHY I WOULD NOT PUT THAT ON, MEANING THE EVIDENCE OF THE BRAIN DAMAGE.

DEFENSE COUNSEL, WASN'T IT THE EXPERT'S OPINION THAT ANY TIME THERE IS A SEIZURE, YOU ARE GOING TO HAVE SOME DEATH OF SOME BRAIN CELLS?

YES, SIR, AND THAT IS WHY I WENT INTO THE SECOND --

SO YOU WOULD HAVE ORGANIC BRAEN DAMAGE, NO MATTER HOW -- BRAIN DAMAGE, NO MATTER HOW SHORT THE SEIZURE IS OR HOW SERIOUS THE SEIZURE IS, THE FACT THAT YOU HAD A SEIZURE, ERGO THERE IS ORGANIC BRAIN DAMAGE. WAS THAT IT?

YES, SIR AND WE QUANTIFIED THAT WITH JUST DIFFERENCE BETWEEN A MAN OR WOMAN OR A CHILD HAVING A GEEZ YOUR AND THAT WAS IT, AND THE --?; A SEIZURE AND THAT WAS IT, AND THE SECOND PART THAT THE ELIPTICUS WAS ONGOING AND THERE WAS MORE THAN BRAIN CELLS WERE DEAD. THERE WAS A SCIENTIFIC BASIS THAT HE PUT ON THE OPINION AND FELT IT WAS A 90-TO-95 PERCENT PROBABILITY, WITHOUT EXAMINING THE MAN HE KNEW THAT, AND IN THOSE CASES IF WE PROVE MORE THAN 51 PERCENT, WE ARE ALLOWED TO PUT INTO EVIDENCE, WITHOUT A REASONABLE GREL OF MEDICAL PROBABILITY, THAT THIS PERSON HAD BRAIN DAMAGE.

A THE 5 PERCENT PROBABILITY OF -- A 95 PERCENT PROBABILITY OF WHAT? WHAT ARE THE CONSEQUENCES OF THIS? HAVE WE GOT SOMEBODY THAT IS NOW TOTALLY SDRBLD AS A RESULT OF THAT?

NO, SIR -- TOTALLY DISABLED AS A RESULT OF THAT OR SOMEBODY WHOSE IY IS REDUCED -- WHOSE IQ IS REDUCED OR WHATEVER?

NO, SIR.

I AM FAILING TO SEE ANYTHING THAT SAYS THIS IS CRITICALLY IMPORTANT BECAUSE THIS PERSON WAS A VEGETABLE OR SOMETHING LIKE THAT. WHAT IS THE EVIDENCE HERE THAT THIS MAKES ANY QUALITATIVE DIFFERENCE?

I HAVE TO AGREE WITH YOU IN THE RECORD THERE ISN'T, BUT THE PURE ISSUE OF BRAIN DAMAGE, EVEN IF IT IS MINIMAL BEFORE THE JURY, AND I AM TALKING ABOUT JURY IMPACT, AND I HAVE ARGUED IN FRONT OF A LOT OF JURIES, AND I KNOW THAT JURY IMPACT ON BRAIN DAMAGE COULD MAKE A DIFFERENCE, IF SOMEONE IS GIVEN LIFE OR DEATH.

BUT THE DEFENDANT'S OWN EXPERT TESTIFIED THAT THE BRAIN DAMAGE WAS SO MILD, IT COULDN'T BE MEASURED. DIDN'T HE?

HE DID SAY THAT THERE WAS NO WAY TO QUANTIFY IT. THAT IS CORRECT. BUT HE DID SAY THAT THERE IS THE BASIS OF HIS THREE OPINIONS AND THAT STATUS ELIPTICUS IS REALLY THE BASIS OF OUR ARGUMENT.

AND THE ONLY REASON HE SAID THERE IS BRAIN DAMAGE IS BECAUSE HE SAID WHENEVER YOU KILL BRAIN CELLS, THERE IS DAMAGE TO THE BRAIN SO THEREFORE THERE IS BRAIN DAMAGE, SO WHEN YOU USE ALCOHOL YOU LOSE BRAIN CELLS, SO THEREFORE THERE IS BRAIN DAMAGE WHEN YOU DRINK ALCOHOL?

YES AND I THERE FOR AGREE WITH YOU, AND ALSO WHEN YOU GET HIT IN THE HEAD AND THIS PERSON WAS HIT IN THE HEAD PRIOR TO THIS MURDER CASE. THAT COULD BE EVIDENCE OF THE MINOR BRAIN DAMAGE.

DOESN'T THAT, REALLY, THOUGH, UNDERMINE, IT IS LIKE SAYING THAT THE DEFENDANT PLAYED HIGH SCHOOL FOOTBALL AND HE WAS KNOCKED OUT ONCE OR HAD A CONCUSSION.

YES, SIR.

YOU INDICATE THAT THERE IS SOME BRAIN DAMAGE THEN.

YES, SIR.

AND SO LEFT IN THE STATE THAT IT IS IN, I AM HAVING DIFFICULTY HAVING ANY DEMONSTRATION THAT THERE REALLY IS PREJUDICE HERE, OTHER THAN WHAT YOU SAY ABOUT THIS SORT OF EMOTIONAL APPEAL, THAT IS THAT IF SOMEBODY JUST USES.

YES, SIR.

BUT ONCE THEY KNOW THAT, WELL, IF THEY WERE KNOCKED OUT IN A HIGH SCHOOL FOOTBALL GAME OR SOMETHING, THEY, TOO, HAD BRAIN DAMAGE, SO DOESN'T THERE HAVE TO BE SOME QUALITATIVE MEASURE PUT ON THIS HERE, TO DEMONSTRATE PREJUDICE?

WELL, WE WOULD ARGUE THAT JUST BASIS OF THAT WOULD BE HIGHER THAN, LIKE, A CONCUSSION INCIDENTS OR ALCOHOL INCIDENTS, BECAUSE OF THE ONGOING SEIZURE. YOU KNOW, I WOULD MAKE THE ARGUMENT THAT THE ARGUMENT COULD HAVE BEEN MADE THAT THIS IS MORE THAN JUST A HEAD INJURY, MORE THAN JUST A DRINKING INCIDENT OR MORE THAN JUST A DRUG ABUSE INCIDENT.

BUT YOU ARE CHALLENGING THE FACT THAT DEFENSE COUNSEL DIDN'T PUT ON DR. RICH, AND THAT DR. RICH DIDN'T DO THESE OTHER, DIDN'T YOU SAY THAT YOUR EXPERT SAID THAT HE SHOULD HAVE DONE THESE OTHER TESTS, IN ORDER TO REALLY DETERMINE WHETHER OR NOT THERE WAS BRAIN DAMAGE?

YES, YOUR HONOR.

WELL, AND YET YOU HAVE AN EXPERT, AND WE ARE SUPPOSED TO ACCEPT THAT EXPERT WHO NEVER EVEN EXAMINED THE DEFENDANT, DID HE?

NO, BUT NEITHER DID THE EXPERT YOU ARE TALKING ABOUT.

BUT HE NEVER PERFORMED THESE SAME TESTS THAT YOU ARE SAYING THAT ANY GOOD DOCTOR WOULD HAVE DONE, IN ORDER TO DETERMINE THIS BRAIN DAMAGE. HE SAYS YOU SHOULD HAVE DONE IT. YET HE DIDN'T DO IT, AND NOW WE ARE TO ACCEPT JUST HIS STATEMENT THAT THIS MAN HAD A SEIZURE AT SOME POINT AND SO THERE IS BRAIN DAMAGE.

I KNOW WHAT YOU ARE SAYING, BUT WHAT HE SAID WAS AS TO A NEUROLOGICAL SCREENING TEST, THAT THERE WERE THREE TYPE-HONORED PARTS OF THE TEST NOT USED BY THE NEUROLOGICAL SCREENING. ON THE OTHER HAND, HE SAYS FORGETTING --

WHY DIDN'T THIS EXPERT DO THOSE THINGS? OR WAS THIS OUTSIDE HIS FIELD OF EXPERTISE?

HE IS NOT A NEUROPSYCH. IS HE A PSYCHIATRIST AND A MEDICAL DOCTOR, AND HE HAS A LARGE PRACTICE, OVER THE YEARS, REGARDING SEIZURE DISORDER AND ALCOHOLISM, WHETHER IT AFFECTS LAWYERS, DOCTORS, OR WHOEVER, AND SO ON THAT BASIS, THAT IS WHY I THOUGHT THAT WOULD BE RELEVANT EVIDENCE TO BRING OUT.

BUT WAS THERE ANY ATTEMPT HERE, TO HAVE THIS EXPERT CONDUCT ALL THESE OTHER TESTS THAT IT IS BEING CLAIMED, YOU KNOW, SHOULD HAVE BEEN DONE, AND THEREFORE YOU WOULD KNOW A LOT MORE ABOUT THIS? IN OTHER WORDS ISN'T THAT, ALSO, AVOID HERE, THAT IS --

YES, SIR.

THAT THIS DOCTOR IS, YOU KNOW, SAYING, BECAUSE I SEE IN THE RECORDS THAT THIS HAPPENED, THAT I AM SAYING SOME BRAIN DAMAGE HAD TO OCCUR, BUT I HAVEN'T DONE ANY TESTS, AND SO AGAIN, IN TERMS OF REALLY KNOWING WHAT THE CURRENT SITUATION IS, WE DON'T KNOW. WE ARE LEFT WITH A RECORD THAT DOESN'T TELL US, ARE WE NOT?

THAT'S CORRECT.

BUT ISN'T THAT, AND, AGAIN, I JUST WANT TO MAKE SURE I UNDERSTAND THIS, BECAUSE FOR OUR CONFIDENCE IN THE RESULT TO BE UNDERMINED, IT WOULD, YOU KNOW, FIRST OF ALL, IT ALREADY WAS AN EVIDENTIARY HEARING. THE TRIAL COURT MADE DECISIONS.

YES.

THAT WHAT IS COMPELLING ABOUT THE QUALITY OF THE MENTAL HEALTH MITIGATION THAT YOU ARE NOW PRESENTING TO US, TO SAY, WELL, IF THE JURY HAD HEARD THIS, MY GOODNESS, AND IF THE COURT HAD HEARD THIS, THERE IS NO QUESTION, BUT THAT WE WOULD GET A RESULT.

ALL I CAN ARGUE IS THAT THE JURY HAD THE CHILDHOOD BACKGROUND BEFORE THEM. IN ADDITION TO THAT, IF THEY WOULD HAVE HAD THE BRAIN DAMAGE, THEN I THINK IT WOULD HAVE MADE A DIFFERENCE.

WHAT BRAIN DAMAGE? I THINK THAT IS WHAT WE ARE ALL STRUGGLING WITH.

I AM, TOO.

IS THERE SOME OBJECTIVE, THERE IS NOT OBJECTIVE TESTING, THE NEUROPSYCHOLOGICAL TESTING THAT MAY COULD SHOW IT OR A CT SCAN OR SOMETHING IS STILL MISSING FROM THE RECORD.

YES.

AND I THOUGHT THAT, ALSO, THAT THE LAWYER WHO REPRESENTED THE DEFENDANT HAD SAID THERE WERE BALANCING ACTS, ESPECIALLY ABOUT THIS ADDICTION, YOU KNOW, THE USE OF DRUGS AND ALCOHOL. THERE WERE SOME DECISIONS MADE ABOUT NOT WANTING TO HAVE THAT COME BEFORE THE JURY. HOW DO YOU --

RIGHT. HE DID SAY THAT, BUT HE, ALSO, BACK TRACKED, WHEN I QUOTED HIM, SAYING I COULD NOT CONCEIVE OF A REASON WHY I WOULD NOT PUT THAT ON, MEANING THE MINIMAL BRAIN DAMAGE ELICITED FROM DR. MILLER, AND IT ALL GOES BACK TO THE SAME QUESTION OF WHAT IS THE QUANTITATIVE AND WHAT IS THE AMOUNT, AND I AM NOT CLAIMING THAT IT IS A STATUTORY MITIGATOR. IT IS A NONSTATUTORY MITIGATOR THAT I THINK WOULD HAVE MADE A DIFFERENCE. OKAY. YES.

BUT I GUESS I AM STILL STRUGGLING WITH, HERE, ONCE THE JURY HAD HEARD AND THE JUDGE HAD HEARD THAT THERE WAS SOME POSSIBLE MINIMAL BRAIN DAMAGE, THEN WHAT? WHERE DO YOU TAKE THAT? HOW DID IT IMPACT THE DEFENDANT'S ACTIONS OR IN ACTIONS ON THE NIGHT OF THE MURDER?

IT DIDN'T, BECAUSE IT IS NOT A STATUTORY. IT WOULD, IF IT WAS A STATUTORY MITIGATOR, THEN, YES, IT WOULD IMPACT ON WHAT HAPPENED WITH THE MURDER.

SO THE IMPACT OF HAVING IT IS WHAT YOU ARE SAYING IS ENOUGH TO JUST PRESENT TO THE COURT, AND IT IS MITIGATING, EVEN THOUGH IT HAD NO EFFECT ON WHAT HE DID ON THE NIGHT OF THE MURDER.

YES, AND THE REASON YOU USE THAT IS BECAUSE IT IS IN COMBINATION WITH HIS CHILDHOOD. IT IS EVIDENCE OF BOTH THE MITIGATION OF HIS CHILDHOOD AND THE SORT OF STUFF THAT WAS PUT ON THROUGH, LIKE, 14 WITNESSES, IN ADDITION TO THAT, WOULD HAVE MADE A DIFFERENCE.

DIDN'T TRIAL COUNSEL, THEN, MAKE THE STRATEGIC DECISION THAT ANY BENEFIT TO THAT KIND OF EVIDENCE, EVEN COMBINED WITH CHILDHOOD, WAS OUTWEIGHED BY THE FACT THAT, THEN, THE FACT THAT YOU HAD A SEIZURE BECAUSE HE WAS USING COCAINE WOULD HAVE COME OUT IN EVIDENCE AND KIND OF OBLITERATED ANY SYMPATHY THAT THE SEIZURE WOULD HAVE ENGENDERED IN THE JURY?

YES. THE RECORD ISN'T COMPLETELY CLEAR ON THAT, BUT HE WENT KIND OF BACK AND FORTH ON THAT AND THAT IS WHY I KEEP COMING BACK TO WHAT HE SAID, AND THAT IS THAT HE COULD NOT CONCEIVE OF ANY REASON WHY HE WOULDN'T PUT IT ON. WHETHER OR NOT IT BROUGHT OUT THE EVIDENCE OF THE COCAINE ABUSE OR NOT, I DON'T THINK THAT WOULD MAKE A DIFFERENCE. HIS RECORD CLEARLY WOULD NOT HAVE BEEN AT ISSUE BUT THE ISSUE OF THE COCAINE WOULD BE.

AND WHAT DIFFERENCE DO YOU THINK, EVEN IF WE AGREE IT SHOULD HAVE BEEN BROUGHT BEFORE THE JUDGE AND THE JURY, HOW MANY AGGRAVATING CIRCUMSTANCES WERE FOUND IN THIS CASE?

I BELIEVE FOUR OR FIVE.

FOUR OR FIVE.

AND HOW DO YOU THINK THAT THIS WOULD HAVE IMPACTED, WHAT IS THE PREJUDICE PRONG OF STRICKLAND HERE, WOULD IT HAVE --

IT IS MORE --.

-- CHANGED THE OUTCOME? UNDERMINED OUR CONFIDENCE IN THE RECOMMENDATION OF DEATH?

ALL I CAN TELL YOU IS THAT WE DON'T LIVE IN A PERFECT WORLD, AND A JURY IS NOT A PERFECT WORLD, AND THE JURY SYSTEM, THE WAY IT WORKS THEY ARE IMPACTED BY DIFFERENT THINGS, AND ONE OF THEM IS THE ISSUE OF BRAIN DAMAGE. THEY ARE IMPACTED IN THE WAY THEY THINK ABOUT A PERSON AND WHETHER THAT PERSON SHOULD GET THE DEATH PENALTY OR GET A LIFE SENTENCE, AND THAT IS, REALLY, ALL I CAN SAY ABOUT. THAT I MEAN, I KNOW WHAT YOU ARE TALKING ABOUT. YOU ARE GETTING BACK TO THE SAME QUESTION THAT I CAN'T ANSWER THAT.

HOW OLD WAS THIS, BY THE WAY? HOW LONG AGO HAD THIS HAPPENED, THIS RECORD OF HAVING THE SAYS YOUR?

IT IS IN -- OF HAVING THE SAYS YOUR?

IT IS IN THE -- OF HAVING THE SEIZURE?

IT IS IN THE RECORD OF THE COURT FILE, AND I DON'T KNOW.

THANK YOU VERY MUCH.

MAY IT PLEASE THE COURT. I AM CURTIS FRENCH, REPRESENTING THE STATE OF FLORIDA IN THIS CASE. THE HOSPITALIZATION AND THE COCAINE OVERDOSE WAS 1989. THE CRIME OCCURRED 1994,

AND THE TRIAL WAS 1995.

SO ABOUT FIVE YEARS.

FIVE YEARS BEFORE THE TRIAL, YES, SIR, AND THE EVALUATION BY DR. RICH WAS MAY 17, 1995. HER EVALUATION IS IN THE RECORD AS PART OF DEFENSE EXHIBIT 1.

WHAT KIND OF TEST DID SHE PERFORM ON THE DEFENDANT, TO DETERMINE THAT HE HAD NO BRAIN DAMAGE?

SHE NOTES, ON PAGE FOUR OF HER REPORT, THAT MR. DAMREN WAS UNABLE TO COMPLETE THE STROUP NEUROPSYCHOLOGICAL SCREENING TEST. HE HAD DIFFICULTIES WITH CHLORIDE FIX. GOING BY THE REPORT, BECAUSE DR. RICH DID NOT TESTIFY IN THIS HEARING. HOWEVER, SHE DID ADMINISTER THE DIJ I SPAN TEST, BENDER JESSTALT TEST, HOOPER ORGANIZATIONAL TEST, CATEGORY TASK, WISCONSIN CARD SORTING TEST AND MMPI. HE HAD NO MEMORY DEFICITS. HIS DELAYED RECALL WAS EXCELLENT. HE HAD EXCELLENT ENCODING ABILITY FOR, BOTH, VISUAL AND VERBAL INFORMATION, ET CETERA, ET CETERA.

WAS THERE ANY REQUEST FOR ANYTHING LIKE A CT SCAN OR ANOTHER ONE IS SEP SCAN OR PC< SOMETHING LIKE THAT?

NONE THAT I AM AWARE OF. I AM NOT SURE PT SCANS WERE AVAILABLE AT THIS TIME. I THINK THEY ARE MORE RECENT AND I AM NOT SURE THAT THEY SHOW ANYTHING, ANYWAY, BUT NO REQUEST THAT I AM AWARE OF, NO. AT ANY RATE DR. RICH, HER CONCLUSIONS WERE THAT THE TESTING PROFILE SHOWED THAT DAMREN'S FUNCTIONING WAS VOID OF ORGANIC IMPLICATIONS. THERE WAS SIMPLY NO MEASURABLE BRAIN DAMAGE OR BRAIN DYSFUNCTION. I DON'T RECALL TESTIMONY BY DR. MILLER AT THIS HEARING, THAT WAS CRITICAL OF HER TESTING. IN FACT, WHEN HE TESTIFIED, HE DIDN'T SEE HER REPORT UNTIL IT WAS SHOWN TO HIM DURING HIS TESTIMONY AT THIS HEARING. DR. MILLER, OF COURSE, DID NOT CONDUCT ANY TESTING, HIMSELF. I AM NOT SURE HE IS QUALIFIED TO DO SO. IS HE A DESCRIBE TRIS AND NOT A NEUROPSYCHOLOGIST. -- HE IS A DESCRIBE TRIS AND NOT -- HE IS A PSYCHIATRIST AND NOT A NEUROPSYCHOLOGIST. AT ANY RATE HE ADMITTED ON THE STAND THAT HE COULD NOT QUANTIFY THE AMOUNT OF BRAIN DAMAGE, AND IF HE HAD TO GUESS, IT WOULD BE MINIMAL TO MILD, AND AS HE POINTED OUT, WE HAVE MILLIONS OF BRAIN CELLS AND WE CAN LOSE 10,000 OF THEM AND STILL FUNCTION WELL IN ALL APPEARANCES, AND IN FACT --

DID HE MAKE ANY ATTEMPT TO LINK THIS MINIMAL BRAIN DAMAGE TO ANY OF THE DEFENDANT'S ACTIONS?

NO. HE DID NOT. THAT I AM AWARE OF. BASICALLY HIS TESTIMONY, AS I EVALUATE IT, WAS SIMPLY THAT HE HAD THIS SEIZURE. WHEN YOU HAVE A SEIZURE, YOU LOSE BRAIN CELLS. AS A CONSEQUENCE, YOU ARE BRAIN DAMAGED. OF COURSE THERE ARE OTHER THINGS THAT MAKE YOU LOSE BRAIN CELLS. I UNDERSTAND THAT JUST DRINKING, EVERY TIME YOU DRINK, YOU LOSE SOME BRAIN CELLS. I HAVE, ALSO, HEARD THAT AS WE AGE WE LOSE BRAIN CELLS, AND OBVIOUSLY WE AREN'T BRAIN-DAMAGED OR IMPAIRED, SIMPLY BECAUSE THAT OCCURS, AND NO MORE THAN THAT HAS BEEN SHOWN HERE, IN THIS PARTICULAR CASE, TRIAL COUNSEL WAS ALLEN CHIPPERFIELD, PROBABLY ONE OF THE BEST CRIMINAL DEFENSE ATTORNEYS IN DUVAL COUNTY. HE INVESTIGATED THIS CASE. HE HAD THIS DEFENDANT EVALUATED BY TWO DIFFERENT EXPERTS, AND IT IS INTERESTING HOW HE DID IT, BECAUSE DR. RICH TOLD HIM THAT, IF YOU WANT AN EVALUATION, I WILL NEED A HISTORY. IF YOU WANT JUST TESTING, THEN I CAN DO THAT WITHOUT KNOWING HIS HISTORY. SO HE CHOSE THE SECOND ROUTE, THINKING THAT IF DR. RICH UNCOVERED SOME BRAIN DAMAGE THAT, HE WOULD BE ABLE TO PUT HER ON THE STAND, AND SHE COULD NOT BE CROSS-EXAMINED ABOUT HIS CRIMINAL HISTORY AND THE FACT THAT HE HAS EIGHT PRIOR FELONY CONVICTIONS WOULD NOT BE DISCLOSED TO THE JURY. THE PSYCHIATRIST FROM WASHINGTON, D.C., WHO HE, ALSO, CONSULTED, WHO FLEW DOWN TO

INTERVIEW DAMREN AND TO EVALUATE HIM, HE DID GIVE THAT PSYCHIATRIST A HISTORY, THINKING THAT IF HE HAD SOMETHING THAT WAS SUFFICIENTLY MITIGATING, THAT WOULD OUTWEIGH THE NEGATIVE IMPACT OF, YOU KNOW, SHOWING THAT HE HAS BEEN ABUSING COCAINE AND HAS ALL THESE FELONY CONVICTIONS FOR BURGLARY, THAT HE WOULD DO SO. HOWEVER, THIS PSYCHIATRIST, ALSO, IS NOT HELPFUL, SO HE CHOSE TO KEEP FROM THE JURY THE FACT THAT HE HAD THIS CRIMINAL HISTORY OR THAT HE HAD BEEN ABUSING COCAINE, BECAUSE THERE WAS ABSOLUTELY NO EVIDENCE OR ANY INDICATION THAT DAMREN WAS UNDER THE INFLUENCE OF COCAINE WHEN HE COMMITTED THIS CRIME OR EVEN THAT HE HAD BEEN USING IT AT THIS TIME. SO THE COCAINE IS BASICALLY HISTORY. THERE IS NO BODY THAT MR. CHIPPERFIELD UNCOVERED AND NOBODY TO DATE HAS RELATED THAT CRIMINAL HISTORY OR THAT ABUSE OF COCAINE TO ANYTHING THAT COULD BE MIGHT BAITING IN THIS CASE.

SO HE KNEW, I MEAN THERE WAS NO -- THAT COULD BE MITIGATING IN THIS CASE.

SO HE KNEW, I MEAN THERE WAS NO QUESTION THAT HE KNEW ABOUT THE HISTORY OF COCAINE USE IN THIS CASE.

YES.

DID HE KNOW ABOUT THE SEIZURE IN?

HE KNEW ABOUT THAT, TOO, BECAUSE HE HAD THE HOSPITAL RECORDS FROM 1989 THAT INDICATED HE HAD A SEIZURE, AND I LOOKED AT THOSE EXHIBITS RECORDS IN EXHIBIT 1 YESTERDAY, AND HE GOT ARRESTED AND HIS SOURCE OF COCAINE WAS CUT OFF AND HE WENT INTO WITHDRAWAL AND THAT IS WHY HE WAS HOSPITALIZED AND THAT BEING THE CASE, ANOTHER CONSEQUENCE OF PRESENTING THIS 1989 HOSPITALIZATION IS THAT YOU ALSO INTRODUCE THE FACT THAT HE WAS ARRESTED.

SO WHAT WE HAVE IS THIS IS NOT A SITUATION, AS MANY WE SEE, WHERE THERE IS A FAILURE TO INVESTIGATE MITIGATION. IN FACT, THIS DEFENSE LAWYER PUT ON 14 WITNESSES AND, AS YOU SAID, AND HAD HIRED AND --

TWO DIFFERENT EXPERTS.

-- EXPERTS, SO WHAT WE HAVE IS JUST A LAWYER THAT THOUGHT THIS WOULD NOT REALLY BE HELPFUL TO THE CASE, AND WE REALLY DON'T HAVE ANYTHING TO SHOW IT WOULD HAVE BEEN PARTICULARLY HELPFUL.

THAT IS THE JUDGMENT HE MADE, AND AS FAR AS HIS EFFORT INVESTIGATING THE CASE, I WOULD ALSO POINT OUT THAT TWO OF THE WITNESSES, DAMREN HAD SERVED IN THE ARMY IN VIETNAM AROUND 1970 OR SO, I THINK. HE ACTUALLY FOUND TWO WITNESSES FROM THAT ERA WHO HAD SERVED WITH DEMDAMREN, ONE OF WHOM TESTIFIED THAT HE WAS A MODEL SOLDIER AND ANOTHER OF WHOM TESTIFIED THAT HE HAD BEEN A GOOD FRIEND AND A GOOD SOLDIER AND HE PUT -- SOLDIER AND HE PUT IN FAMILY BACKGROUND, A MOTHER AND FATHER AND AUNT, I BELIEVE, AND IT WAS TESTIFIED THAT HE HAD AN ABSENT FATHER AND HE BASICALLY GREW UP BY HIMSELF AND BASICALLY TRIED TO HUMANIZE THIS FELLOW, SO THAT HE AT LEAST WAS NOT A REPREHENSIBLE PERSON DESPITE WHAT HE DID IN THIS CASE AND THAT HE HAD MITIGATING PROBABILITIES AND THAT WAS WHY HE SHOULD NOT BE PUT TO DEATH.

DID THE STATE PUT ON VIOLENT FELLS IS?

THEY WEREN'T VIOLENT, SO THE STATE DIDN'T USE THE STATUTORY CONVICTION. THE FOUR HAD AGGRAVATORS WERE THE BURGLARY AND HAD, AND THE PRIOR VIOLENT FELONY, AND THAT WAS SOMEONE WHO HAPPENED UPON HIM WHILE HE WAS IN THE COMMISSION OF THIS BURGLARY AND HE ASSAULTED HIM AND THE GUY FLED, SO THAT WAS THE PRIOR VIOLENT

FELONY. THE BURGLARIES DIDN'T COME IN. IN THIS CASE THE JURY DIDN'T LEARN OF HIS EIGHT PRIOR FELONIES OR HIS COCAINE ABUSE. THE ONLY OTHER WITNESS WHO TESTIFIED AT PENALTY PHASE WAS ARLENE DELONG. THE DEFENSE PROFFERS HER NOW AS SOMEONE WHO COULD HAVE HELPED HIM, BUT THE PROBLEM WAS THAT NUMBER ONE, SHE MET HIM IN PRISON, SO IF YOU INTRODUCE HER, AGAIN, YOU INTRODUCE THE FACT THAT HE HAS THIS PRIOR CONVICTION, AT LEAST ONE. HE WAS ABUSING COCAINE WHILE SHE WAS INVOLVED WITH HIM, WHICH IS ANOTHER THING COUNSEL WANTED TO AVOID. HE ABANDONED HER WHEN SHE GOT PREGNANT. HE GAVE HER MONEY FOR AN ABORTION AND THEN HE JUST LEFT AND SHE HAD A NERVOUS BREAKDOWN, AND AGAIN, THAT, IN OUR VIEW, WOULD BE INCONSISTENT WITH BASICALLY HIS DEFENSE THEORY IN THIS CASE. FINALLY, IT SEEMS TO ME THE EVIDENCE IS PRETTY CLEAR THAT SHE WAS NOT AVAILABLE AT THE TIME, BECAUSE AFTER HE DISAPPEARED FROM HER LIFE, SHE MOVED. SHE DIDN'T HAVE A TELEPHONE. SHE HAD A NEW CIRCLE OF FRIENDS. HE HAD NO WAY OF CONTACTING HER. THE COURT HAS NO OTHER QUESTIONS, I --

WE HAVE A COPY OF AN ORDER DENYING THE MOTION, AND IT IS JUST A CONCLUSORY ORDER. DID THE TRIAL COURT DO DETAILED FINDINGS OF FACT OR IS THERE --

THE TRIAL JUDGE'S ORDER, AND I HAVE A COPY OF IT HERE AND I GUESS WE ARE LOOKING AT THE SAME ORDER, BASICALLY SAYS THAT THERE WAS NO SHOWING THAT PERFORMANCE OF DEFENDANT'S TRIAL COUNSEL WAS DEFICIENT OR THAT DEFENDANT WAS PREJUDICED BY COUNSEL'S PERFORMANCE.

IT SEEMS SOMEWHAT UNUSUAL. WE USUALLY HAVE SOME, YOU KNOW, BECAUSE WE ARE NEEDING TO EVALUATE CREDIBILITY OR DEFERRED TO THAT, THAT THIS IS A CONCLUSORY, HAVING SEEN THIS TYPE OF CONCLUSORY ORDER.

THAT IS TRUE, ALTHOUGH IN THIS CASE THERE IS NO ISSUE OF CREDIBILITY. THE STATE DIDN'T PRESENT ANY WITNESSES OF ITS OWN AND, YOU KNOW, WE ARE NOT CONTENDING THAT DR. MILLER IS NOT CREDIBLE OR THAT MR. CHIPPERFIELD IS NOT CREDIBLE OR EVEN THAT ARLENE DELONG IS NOT CREDIBLE, EXCEPT THEIR TESTIMONY AND WE HAVE THAT IT FAILS TO SHOW DEFICIENT ATTORNEY PERFORMANCE OR PREJUDICE.

CHIEF JUSTICE: THANK YOU. COUNSEL, YOU HAVE SEVERAL MINUTES LEFT.

JUST IN REBUTTAL, THE ONE THING STATED BY MY OPPOSING COUNSEL IS THAT THERE WAS, HE HAD ONGOING COCAINE ABUSE. I THINK WHAT HAPPENED IS IN THE HOSPITAL, IF YOU LOOK IN THE RECORDS, ACTUALLY DURING AN ARREST, I HATE TO SAY THIS, HE SWALLOWED THE EVIDENCE, AND THAT IS WHAT CAUSED THAT PARTICULAR SEIZURE DISORDER NOT FROM ONGOING, AS FAR AS I KNOW. THE EIGHT PRIOR FELONY CONVICTIONS WERE NOT IN THE EVIDENCE AND THEY WOULD NOT HAVE BEEN INTO EVIDENCE, HAD DR. MILLER TESTIFIED ABOUT THE BRAIN DAMAGE. ADDITIONALLY, IF DR. MILLER WERE TO BE ALLOWED TO TESTIFY TO THAT, THE ARGUMENT THAT THE INTOXICATION WHICH OCCURRED ON THE NIGHT OF THE MURDER, COMBINED WITH THE MINIMAL BRAIN DAMAGE, COULD MAKE A MORE POWERFUL ARGUMENT TO THE JURY.

BUT, AGAIN, YOU JUST SAID THAT THE REASON HE HAD THE SEIZURE BACK THEN WAS NOT JUST BECAUSE HE HAD SOME ONGOING COCAINE ADDICTION BUT HE ACTUALLY INTENTIONALLY SWALLOWED THE COCAINE.

THAT'S CORRECT.

YOU DON'T THINK THAT WOULD HAVE AN ADVERSE IMPACT ON A JURY TO HEAR THAT?

THERE IS SOME OF. THAT I MEAN, IT CUTS BOTH WAYS, BUT I THINK THE STRONGEST PART OF SHOWING THE BRAIN DAMAGE, YOU ARE GOING TO HAVE TO GET INTO THAT FACT. THE FACT IS

INESCAPABLE. BUT THE FACT OF BRAIN DAMAGE ARISING FROM THAT AND THE SCIENTIFIC BASIS OF IT SHOWING THAT IT IS ONGOING, I THINK, IS INESCAPABLE.

BUT DIDN'T THE DEFENSE ATTORNEY SPECIFICALLY TESTIFY ABOUT JURIES AND THEIR REACTIONS WHEN THEY HEAR ABOUT PEOPLE WHO USE COCAINE OR ADDICTED TO DRUGS, THAT HE FELT THAT THAT IMPACT ON THE JURY WOULD HAVE BEEN GREATER THAN ANYTHING, ANY BENEFIT YOU WOULD GET FROM THIS OTHER TESTIMONY?

HE DIDN'T SAY IT THAT WAY, THAT IT WOULD BE BETTER. JUST SAID THAT HE WOULD IMPACT A JURY, AND I THINK WE CAN ALL AGREE TO THAT. IT WOULD IMPACT.

NEGATIVELY IMPACT.

YES. BUT HE GOES BACK TO THE SAME THING, THAT HE WOULD HAVE PUT IT ON IF HE WOULD HAVE KNOWN ABOUT IT OR COULD HAVE FIGURED IT OUT, I GUESS.

CHIEF JUSTICE: ALL RIGHT. THANK YOU BOTH VERY MUCH. THE COURT WILL TAKE A 15-MINUTE RECESS BEFORE HEARING THE LAST CASE THIS MORNING. WE WILL NOW STAND IN RECESS.