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Darius Mark Kimbrough v. State of Florida

NEXT CASE ON THE COURT'S DOCKET IS KIMBROUGH VERSUS STATE.

REGARDING THE 3.850 CLAIM IN THE ACHE CASE, ENDED WITH A -- IN THE AKE CASE, ENDED WITH THE CONCLUSION THAT THE DEFENSE'S ANALYSIS OF THE MORAL INFLUENCE CULPABILITY MIGHT WE WILL HAVE BEEN INFLUENCED BY THE MITIGATION THAT WAS AVAILABLE AT THE TIME OF TRIAL AND AS SHOWN POSTCONVICTION.

ON THAT QUESTION, LET ME ASK YOU WHY DID YOU NOT, COUNSEL BELOW, CALL DR. BERLIN TO TESTIFY, BERLAND, TO TESTIFY AT THE EVIDENTIARY HEARING?

THE PRIMARY REASON, JUSTICE BELL, WAS THAT THE, AS THE COURT'S SENTENCING ORDER MADE REFERENCE TO, IS THAT THE COURT HAD ALREADY CONSIDERED, IN DETAIL, DR. BERLAND'S AFFIDAVIT THAT HE HAD SUBMITTED AT THE TIME THE PET SCAN VANSMENTS WERE BEING SOUGHT, AND THE -- VANSMENTS WERE BEING SOUGHT, AND THE DETAIL WORK OF HIS RECOLLECTION AND POST TRIAL RECOLLECTION, WHAT HAVE YOU, GATHERING OF RECORDS AND ALL OF THAT, HAD ALREADY BEEN CONSIDERED BY THE COURT, AND SO THE CONCLUSION IF YOU WILL, WAS THAT IT WOULD HAVE BEEN CUMULATIVE TO THAT, THAT THAT WAS PRESENTED.

HERE YOU HAVE DR. MAINS, WHO WAS FIRST HIRED, AND TRIAL COUNSEL WASN'T CONVINCED THAT HE WOULD HELP YOUR CLIENT, SO THEY HIRED DR. BERLAND, AND THEY APPARENTLY CAME TO THE SAME CONCLUSION, AND I DIDN'T SEE, FROM THE RECORD AT THE EVIDENTIARY HEARING, YOU BROUGHT IN A THIRD EXPERT WITNESS THAT DID NOT EXAMINE MR. KIMBROUGH AND GAVE TESTIMONY, AND THE STATE RESPONDED WITH A COMPLETELY DIFFERENT WITNESS. I WAS JUST CURIOUS AS TO WHY BERLAND WAS NOT BROUGHT TO TESTIFY WHAT HE WOULD HAVE TESTIFIED TO, WHAT HE SAID, ET CETERA.

THERE WAS EXTENSIVE TESTIMONY, IF YOU WILL, AS FAR AS THE COULD, AS FAR AS THE TRIAL COUNSEL'S RECOLLECTIONS ABOUT DR. BERLAND. NUMBER TWO, DR. BERLAND'S FILE RORZ, ALL HIS SCORING DATA ON VARIOUS MMPI TESTS AND WHAT HAVE YOU, AND SOME CORRESPONDENCE, WAS ADMITTED IN EVIDENCE, WAS CONSIDERED BY DR. MOSSMAN, WHO WAS THE CCRC EXPERT, AND ALSO CONSIDERED BY DR. MARIN, WHO THE STATE HAD RETAINED AT POSTCONVICTION, SO BY THE TIME OF POSTCONVICTION, ALL OF DR. BERLAND'S WORK AT TRIAL HAD BEEN CONSIDERED BY THE COURT.

HOW DO YOU OVERCOME THE FACT THAT YOU HAVE, IN THIS CASE, APPARENTLY TWO VERY EXPERIENCED DEFENSE LAWYERS AND WHO, BOTH OF THEM TESTIFIED IN THESE POSTCONVICTION PROCEEDINGS, IS THAT CORRECT?

YES, SIR.

WAS THE ESSENCE OF THEIR TESTIMONY ON THIS ISSUE, THAT, YES, INDEED THEY HAD THE DEFENDANT EVALUATED, BUT THAT REALLY THE GIST OF THAT WOULD END UP BEING MORE DAMAGING THAN IT WOULD BE POSITIVE FOR THE, AND THEREFORE IT WAS THEIR DETERMINATION NOT TO CALL EITHER OF THE TWO MENTAL HEALTH EXPERTS THAT THEY HAD HAD EXAMINE THE DEFENDANT. WASN'T THAT THE GIST OF THEIR?

YOU ARE CORRECT, JUSTICE ANSTEAD, AND, AGAIN, THAT GOES TO THE KEY, AND GIVE ME A

MOMENT TO GO THROUGH THIS TIME LINE, IF YOU WILL. MUCH LIKE THE DUNCAN CASE FOR WHICH THIS COURT HEARD ORAL ARGUMENT LAST WEEK, SOME OF THE SAME PLAYERS, SOME OF THE SAME ATTORNEYS AND EXPERTS WERE MENTIONED. HERE WE HAD TWO TRIAL COUNSEL, EXPERIENCED TRIAL COUNSEL, WHO, BY THE TIME OF THE EVIDENTIARY HEARING OR BY THE TIME OF POSTCONVICTION, INDICATED THAT THEY COULD NOT RECALL THE BASIS FOR THEIR STRATEGY AND NOT CALLING BOTH OR EITHER DR. MINGS OR DR. BERLAND, AND AS MY BRIEF TRIED TO SHOW AND AS WIGGINS NOW SAYS, WHEN THE EVIDENTIARY COURT WHO WAS ALSO THE TRIAL COURT, FOUND THAT PATRICIA CASSMAN'S PHONE CALL UNDERSTANDING, WHICH THE EVIDENTIARY COURT FOUND WAS A TECHNICAL MISUNDERSTANDING ABOUT WHETHER PSYCHOPATH I CAN DEVIANT WAS A DIAG-- PSYCOPATHIC DEVIANT WAS A DIAGNOSIS.

AFTER THAT, MR. STEPS SAID, HE DIDN'T DEMONSTRATE ANY MISUNDERSTANDING OR FEAR, HAD THE SAME RESPONSE AS MS. CASH MAN, AND HE TESTIFIED THAT HE WOULD HAVE DEPOSED HIM AND USED ANY DATA TO DIAGNOSE ANY OPINION. I DON'T AGREE WITH YOU, WHERE ITS LIKE TALKING ABOUT THE CASE LAST MONTH WHERE NO ONE COULD COME UP WITH A POSSIBLE REASON WHERE NOBODY WOULD HAVE CALLED THESE. IN THIS CASE, YOU HAVE GOT DEFENSE LAWYERS THAT HAD AN EXPERIENCED INVESTIGATOR THAT TRACKED DOWN 22 WITNESSES, GOT THE SCHOOL RECORDS, GOT THE MEDICAL RECORDS, PUT IN ALL OF THIS, THAT EVIDENCE IN MITIGATION, BUT MADE A STRATEGIC DECISION THAT THE MENTAL HEALTH PART OF IT WOULD NOT HAVE BEEN PARTICULARLY HELPFUL.

WELL, AGAIN, JUSTICE PARIENTE, UNDERSTANDING THAT IT WAS IMPOSSIBLE, AND ALL THE EXPERTS AGREED AT THE EVIDENTIARY, IT WAS IMPOSSIBLE FOR DARRIUS KIMBROUGH TO HAVE AN ANTISOCIAL PERSONALITY DISORDER DIAGNOSIS, BECAUSE THERE WAS NO ONSET OF ANY CONDUCT DISORDER BEFORE MR. KIMBROUGH WAS AGE 15. SO YOU GO --

THIS IS NOT A FAILURE TO INVESTIGATE CASE. WOULD YOU AGREE WITH THAT?

IT GOES, EXCUSE ME, JUSTICE QUINCE, IT GOES TO WHAT WIGGINS SAYS IS WHAT WAS, WAS THE DECISION NOT TO USE DR. MINKS AND THEN DOCTOR --

ONCE YOU HAVE DR. MINGS'S REPORT AND THE DEFENSE ATTORNEY, THEN THEY HAVE DR. BERLAND, CORRECT?

THERE WAS NO REPORT --

WHAT IS IN THOSE REPORTS OR THE SUBSTANCE OF THEIR CONVERSATIONS WITH THESE TWO MENTAL HEALTH EXPERTS THAT WOULD HAVE LET THEM SAY TO GET A NIRNDION? WAS THERE -- -- TO GET A THIRD OPINION? WAS THERE, IT SEEMS TO ME THAT THERE WAS SOMETHING HERE THAT WOULD HAVE LED THESE DEFENSE ATTORNEYS TO DO MORE OR TO, I AM JUST NOT GETTING WHAT IT IS THAT THEY DID WRONG.

THE, WHEN, AGAIN, YOU WILL RECALL FROM THE BRIEFING AND FROM THE RECORD OF THE EVIDENTIARY, THAT NEITHER DR. BERLAND NOR DR. MINGS FILED A WRITTEN REPORT TO THE PUBLIC DEFENDER, BECAUSE PRIMARILY THAT WAS AGAINST PUBLIC DEFENDER POLICY AT THE TIME.

THEY TALKED TO THEM.

SO, AND THERE WERE FILE NOTES FROM THE PUBLIC DEFENDERS RECORDS OF TELEPHONE CONVERSATION THAT IS PATRICIA CASH MAN HAD MADE, FIRST WITH DR. MINGS, WHERE SHE MADE WHAT I ARGUE IS THE MONUMENTAL MISTAKE, NOT A TECHNICAL MISUNDERSTANDING, THAT THERE WAS A PSYCOPATHIC DEVIANT DIAGNOSIS, WHEN WILL IS NO SUCH THING. -- WHEN THERE IS NO SUCH THING.

IF IT WAS SUCH A BIG DEAL, WHICH IS WHAT MR. ASHLEY SAID, HE LOVES THAT ONE, BECAUSE HE IS ABLE TO USE IT BEFORE A JURY TO ARGUE THAT THIS IS NOTHING MORE THAN A PSYCHOPATH, AND IT IS WHAT THE JURY IS GOING TO CONSIDER, NOT TECHNICALLY WHETHER IT IS OR IT ISN'T.

EXCUSE ME, MA'AM. JUSTICE PARIENTE, THERE WAS NO DIAGNOSIS OF A PSYCOPATHIC DEVIANT OR ANTI-PERSONALITY DISORDER AND THERE COULD NOT HAVE BEEN, AND THAT FACT WAS MADE CLEAR AT THE EVIDENTIARY.

BUT THE ISSUES, THE ELEVATED SCALE THOUGH, IS DO YOU DISPUTE THAT THERE WAS AN ELEVATED SCALE THAT IS RELATED OR TERMED DEVIANCY? EVEN THOUGH THERE MAY NOT HAVE BEEN THE DISORDER.

THE NAME OF THE SCALE FOR IT IS PSYCOPATHIC DEVEATE. DR. MING'S MMPI, DOCTOR BERLAND'S AND DOCTOR MARINE'S, ALL SHOWED US A SPIKE ON SCALE FOUR, BUT THE TEST ON EVIDENTIARY SHOW THAT THOSE SAME SPIKES APPLY TO THE GENERAL POPULATION AND ALSO OFTEN APPLY TO ATTORNEYS.

THE PROSECUTOR SAID THAT HE LOVES TO SEE THAT SCALE. NOW, OBVIOUSLY ANY PROSECUTOR WOULD WANT THE FULL SCALE DIAGNOSIS, BUT THAT THE PROSECUTOR, DID HE NOT TESTIFY THAT HE WOULD HAVE, AND THE DEFENSE COUNSEL WOULD HAVE KNOWN, HE WOULD HAVE MADE A BIG POINT OF THAT SCALE, AND THOUGH THERE ARE NORMAL PEOPLE IN THE POPULATION THAT HAVE THAT SAME SCALE, IN THIS CASE, WHEN YOU HAVE A DEFENDANT WHO HAS BEEN FOUND GUILTY OF THIS CRIME AND THE OTHER RAPE THAT HAPPENED AFTERWARDS, IS IT NOT REASONABLE FOR TRIAL COUNSEL TO BE SOMEWHAT CONCERNED ABOUT THAT?

WELL, YOUR QUESTION IS TIED IN WITH JUSTICE PARIENTE, AND THIS IS WHY I SAY THIS CASE IS VERY SIMILAR IN PART WITH DUNCAN. BECAUSE OUTSIDE OF THE FACT, AND RECALL THAT THE TIME LINE SHOWS THAT DR. MINGS HAD ALREADY BEEN HIRED A FEW MONTHS AFTER RAINMENT, WAS APPROVED AND USED UP HIS FIRST 15 HOURS AND THEN USED FIVE ADDITIONAL HOURS. BY MARCH OF 1993. IN JULY OF 1993, HE WAS FIRST LISTED AS A DEFENSE EXPERT WITNESS, AND IN DECEMBER, TWO WEEKS BEFORE KELLY SIMS, THE SOLE COUNSEL, LEAD COUNSEL IN THE CASE UNTIL HE RESIGNED TWO MONTHS LATER, HAD LISTED HIM AS SECOND TIME, AND IT WAS ONLY AFTER KELLY SIMS LEFT THE OFFICE, PATRICIA CASH MAN, WHO, ACCORDING TO HER OWN EXPERIENCED INVESTIGATOR, SAID SHE WAS BURIED WITH WORK ON THE DNA ISSUE, TAKES THIS CALL FROM DR. MINGS. NOW, YOU, I THINK IT WAS YOU, JUSTICE QUINCE, WHO ASKED WHAT OTHER INFORMATION SHOWED UP ON THESE TELEPHONE NOTES FROM BOTH DR. MINGS'S CALLS AND DOCTOR BERLAND. THE BRIEFS IN BOTH RECORDS SHOW THAT DR. MINGS, DR. CASH MAN CALLED TWO DAYS BEFORE SHE STRUCK HIM AS WITNESS. THAT KIMBROUGH WAS AFFECTED BY A COUSIN WHO WAS KILLED AT AGE 18. THAT HE HAD AN IQ OF 76, WHICH IS AT THE BORDERLINE MENTAL RETARDED RANGE, THE FIFTH PERCENTILE, THAT THE MMPI WAS VALID BUT DEFENSIVE IN, AND THAT HE WAS ENDORSING ITEMS CONSISTENT WITH FAMILY DISCORD.

ARE YOU SAYING THAT THAT WOULD HAVE BEEN STATUTORY MITIGATION? DID YOU INTRODUCE ANYTHING TO SHOW THAT THIS TYPE OF TESTIMONY WOULD HAVE GONE TO A STATUTORY MITIGATOR?

WHEN YOU COMBINE IT WITH WHAT DR. BERLAND DID WHEN DR. MINGS, IF YOU WILL, WAS RELEASED, BECAUSE DR. BERLAND, RECALL, HIS, THE NOTES THAT THE PUBLIC DEFENDER USED, INDICATED THAT THERE WAS MENTAL ILLNESS, BUT IT WOULD BE DIFFICULT TO PROVE.

RIGHT. AND DR., WHEN YOU SAY THAT CASH MAN DIDN'T -- AND DOCKET OR, WHEN YOU SAY THAT CASH MAN DIDN'T REMEMBER WHY SHE DIDN'T CALL DR. BERLAND, RIGHT IN THE RECORD, AT LEAST IN THE RECORD EVIDENCE THAT I HAVE GOT, WHICH WERE THAT ALTHOUGH THERE WERE MENTAL HEALTH ISSUES THAT COULD HAVE BEEN PRESENTED BUT THAT HE THOUGHT WOULD BE DIFFICULT TO PRESENT TO THE JURY, AND SHE THOSE CHOSE NOT TO PUT BERLAND

ON THE STAND, BECAUSE SHE THOUGHT HE WOULD TESTIFY THAT KIMBROUGH HAD HIDDEN CRAZINESS. AGAIN, WE ARE TALKING ABOUT SOMEBODY WHO HAS INVESTIGATED, THERE IS SUBSTANTIAL INVESTIGATION, THERE IS NOT A, I DON'T REMEMBER WHERE I -- WHY I DIDN'T PUT THIS PERSON ON, AND EVEN WITH THAT, I AM NOT SURE HOW YOU SHOW PREJUDICE.

THE PREJUDICE COMES FROM WHAT WIGGINS TELLS US ABOUT POST HOC RAGSIZATIONS. -- RAGSIZATIONS OF TRIAL COUNSEL'S ACTIONS, RATHER THAN A DESCRIPTION OF WHAT LED THEM TO THEIR DECISION. THE ORDER, IF YOU WILL --

I AM NOT SURE I UNDERSTAND EXACTLY WHAT THAT MEANS. TRIAL COUNSEL GOT ON THE STAND AND TALKED ABOUT WHAT SHE RECALLED OF THESE CONVERSATIONS AND WHY SHE MADE THE DECISIONS THAT SHE MADE, SO HOW WAS THAT --

JUSTICE QUINCE, AGAIN, WHEN YOU ANALYZE THE RECORD OF THE EVIDENTIARY IN THE STATE'S BRIEFS, NEITHER MISS CASH MAN NOR MR. SIMS, COULD EXPLAIN WHAT WERE THE HORRIBLE NEGATIVES OUTSIDE OF THE ONE THING THAT JUSTICE BELL TALKED ABOUT, ABOUT HOW THESE DIFFERENT SPIKES HAVE NAMES THAT THEY COULD HAVE SAID OH, WELL, THIS IS BAD, THIS IS BAD AND THIS IS BAD.

LET ME ASK YOU TO APPROACH IT FROM A DIFFERENT STANDPOINT HERE. IT SEEMS TO ME THE LARGEST PART OF THIS CLAIM IS THE DEFENSE LAWYERS DID HAVE THE DEFENDANT EXAMINED BY THESE TWO MENTAL HEALTH EXPERTS, AND THAT THESE TWO MENTAL HEALTH EXPERTS WOULD HAVE BEEN ENORMOUSLY HELPFUL TO THE DEFENDANT IN HIS CASE FOR MITIGATION, AND YET THE DEFENSE LAWYERS DIDN'T CALL THEM. NOW, HELP ME WITH YOU PRESENTED DR. MINGS'S TESTIMONY, IS THAT CORRECT?

HE TESTIFIED AT THE EVIDENTIARY, THAT'S RIGHT.

THAT IS WHAT I, NOW, TELL US WHAT YOUR POSITION IS WITH REFERENCE TO WHAT HIS TESTIMONY WAS THAT WOULD HAVE BEEN SO ENORMOUSLY HELPFUL, AND THAT YOU ALSO WOULD HAVE EITHER ELIMINATED OR WOULD HAVE BEEN CONSIDER TO THIS INDICATION THAT MAYBE THERE WERE GOOD REASONS FOR NOT CALLING HIM, SO SUM UP, WHAT WAS HIS TESTIMONY AT THE POSTCONVICTION HEARING, NOW, THAT HE SAID YOU KNOW, BASED ON EVERYTHING THAT I DID, HERE IS ALL THIS VERY HELPFUL MITIGATION THAT I WOULD HAVE BEEN ABLE TO TESTIFY TO, AND THERE WOULD HAVE BEEN NO DOWN SIDES. AND THEN I WOULD LIKE YOU TO DO THE SAME THING WITH DR. BERLAND, BECAUSE THESE ARE THE TWO WITNESSES.

THAT'S RIGHT, JUSTICE ANSTEAD, AND REMEMBER DR. MINGS WAS TWICE. THE FIRST TIME A FULL YEAR BEFORE TRIAL AND THE SECOND TIME, SIX MONTHS BEFORE TRIAL, LISTED AS A DEFENSE EXPERT WITNESS. YOU MAY RECALL THAT DR. MINGS IS THE ONE DOCTOR WHO COULD NOT FIND HIS FILE ON MR. KIMBROUGH FROM THE TIME OF HIS WORK AT THE TRIAL, SO HIS TESTIMONY AT THE EVIDENTIARY WAS BASED LARGELY ON REFRESHMENT OF RECOLLECTION BY LOOKING AT THE PUBLIC DEFENDERS MATERIALS, AND THE BILLING RECORDS THAT SHOWED UP IN THE COUNTY FILES. SO AGAIN, HE CONFIRMED ALL THE WAY DOWN THE LIST WHAT PATRICIA CASH MAN WROTE ON THE NOTES. NUMBER ONE, THERE WAS NO NOT AND COULD NOT HAVE -- THERE WAS NOT AND COULD NOT HAVE BEEN AN ANTISOCIAL PERSONALITY DISORDER DIAGNOSIS, THAT THERE WAS --

YOU ARE SORT OF BACKWARDS HERE FROM MY STANDPOINT, BECAUSE WHAT I AM LOOKING FOR AS I SAY, IS THAT, YOU KNOW, AND I REALIZE WHAT, YOU ARE IN YOUR REBUTTAL TIME, BUT THIS IS VERY IMPORTANT THAT YOU MAKE THIS POSITION CLEAR, IS THAT, IN THE EXTREME CASE, FOR INSTANCE, WE HAVE THE ARGUMENT MADE, WELL, THERE WAS A MENTAL HEALTH EXPERT THAT EXAMINED THE DEFENDANT. MENTAL HEALTH EXPERT FOUND BRAIN DAMAGE, FOUND CHILD ABUSE, FOUND THAT THIS WAS THE MOST MITIGATED CASE HE HAD EVER SEEN IN HIS LIFE AND

WAS PREPARED TO TESTIFY TO ALL OF THAT, BUT THE LAWYER NEVER CALLED HIM, AND NOW, FILL IN THE BLANKS FOR ME, AS COMPARED TO THAT HYPOTHETICAL. WHAT WAS IT THAT DR. MINGS WAS GOING TO SAY THAT WAS SO FAVORABLE, WITH REFERENCE TO MITIGATION HERE?

AGAIN, IT WASN'T DR. MINGS, BECAUSE HIS MEMORY WAS FALTERED BY THE LACK OF THE FILE.

WHAT WAS IT THAT DR. BERLAND, THAT HE WAS GOING TO SAY THAT WAS GOING TO BE MITIGATION?

DR. BERLAND'S SERVICES WERE TERMINATED, EVEN BEFORE THE PUBLIC INVESTIGATOR --

BUT YOU UNDERSTAND SORT OF THE MODEL I AM SETTING UP HERE IS THAT IT SEEMS TO ME THAT IT IS DEFENSE COUNSEL'S DEFICIENCY TO SAY THAT THEY HAD ALL OF THE EVIDENCE BUT DIDN'T LOOK AT IT.

DR. MOSSMAN'S TESTIMONY. WOULD BE THE ANSWER.

DR. MOSSMAN DIDN'T SEE THE DEFENDANT.

HE DIDN'T HAVE TO. THERE IS NO REQUIREMENT THAT -- HE HAD ACCESS TO DR. BERLAND'S FULL MMPI AND HE HAD ACCESS TO DR. MARIN'S FULL MMPI.

I THOUGHT YOU SAID WE WEREN'T WNT GOING TO ACCEPT AFTER THE FACT EXAMINATION. IT THAT WERE TRUE, WHY WOULDN'T IT BE DR. MINGS?

SHE DID NOT DISMISS DR. MOSSMAN'S TESTIMONY, SAY, VERSUS DR. MARIN'S. SHE WAS CRITICAL TO DR. MOSSMAN APARTMENTS REFERENCE TO NONSTATUTORY -- MOSSMAN'S REFERENCE TO NONSTATUTORY MITIGATION, BECAUSE --

YOU ARE SAYING THAT WHAT WENT WRONG IS THAT, HAD THE DEFENSE LAWYERS COME TO THE CONCLUSION THAT THESE TWO MENTAL HEALTH EXPERT'S TESTIMONY WOULD BE HARMFUL TO THEIR CLIENT. THAT IS THE ERROR OF THE TRIAL JUDGE.

THAT'S RIGHT THERE. IS A COMPLETE ABSENCE OF ANY HARMFUL INFORMATION FROM TIME OF TRIAL OR AFTER THE EVIDENTIARY.

I REALIZE THAT I ASKED YOU THAT DURING YOUR REBUTTAL TIME, SO YOU MAY WANT TO PAUSE NOW TO SAVE SOME OF THAT.

GOOD MORNING. WOULD YOU PICK UP.

YES, SIR. SCOTT BROWNE, REPRESENTING THE STATE OF FLORIDA. YOUR HONOR, AS THIS COURT HAS RECOGNIZED, THE TRIAL DEFENSE ATTORNEYS IN THIS CASE DID NOT IGNORE POTENTIAL MENTAL HEALTH ISSUES. WITHIN ONE MONTH OF APPELLANT'S ARREST, THEY RETAINED DR. MINGS, AN EXPERT THAT THE DEFENDANT WAS -- THAT THEY WERE FAMILIAR WITH, HE HAD A RELATIONSHIP WITH HIM IN THE PAST AND HE HAD A CORDIAL RELATIONSHIP. HOWEVER, DR. MINGS WAS NOT BENEFICIAL. AFTER HE WORKED 15 HOURS AND THEN REQUESTED ANOTHER 20 HOURS, HIS REPORT BACK TO THE ATTORNEYS WAS NOT FAVORABLE.

IS YOUR EVIDENCE THAT THEY DID NOT OBTAIN ALL THESE RECORDS AND IN MANY CASES WE SAY WHY DIDN'T THEY RETAIN THEM?

YES, YOUR HONOR.

WAS THERE EVIDENCE AS TO WHY THEY WERE SUPPLIED TO -- AS TO WHETHER THEY WERE SUPPLIED TO THE MENTAL HEALTH EXPERTS, NUMBER ONE, AND NUMBER FOR TWO, IS THERE

ANYTHING HELPFUL IN THOSE RECORDS, VIS-A-VIS MENTAL HEALTH MITIGATION?

YOUR HONOR, I KNOW THAT THE SCHOOL RECORDS WERE OBTAINED. I ALSO KNOW THAT THERE WAS TESTIMONY THAT THE INVESTIGATOR IN THIS CASE ACTUALLY WENT AND TALKED TO SCHOOL TEACHERS IN MEMPHIS, AND THAT THE INVESTIGATOR FREQUENTLY CONTACTED MENTAL HEALTH EXPERTS. I AM NOT SURE THAT THE EXPERTS HAD THOSE SCHOOL RECORDS. THEY WERE FAMILIAR WITH THEM CERTAINLY, AND --

WERE THEY INTRODUCED INTO EVIDENCE IN THE TRIAL?

I DO NOT BELIEVE SO, YOUR HONOR.

SO THE JURY DIDN'T KNOW ABOUT THE IQ.

NO, YOUR HONOR.

AND WAS THERE SOME TESTIMONY THAT THERE WAS ACTUALLY, IN TERMS OF THE IQ, WHICH IS ON THE PART OF LOW NORMAL, THAT THERE WAS CONCERN BY AT LEAST, I GUESS, MS. CASHMAN, THAT TO EMPHASIZE LOW IQ MIGHT NOT BE A GOOD IDEA?

FIRST OF ALL, MS. CASHMAN IS HE, LOOK, I HAVE HAD A LOT -- SAID, LOOK, I HAVE HAD A LOT OF PEOPLE WITH LOW IQ. SHE WAS NOT SURE THAT THAT WAS FAVORABLE IN THE JURY'S MITIGATION. WHAT THE DEFENSE WAS CONCERNED ABOUT REGARDING IQ IS YOU DON'T JUST PRESENT THE IQ YOU HAVE TO REALLY BRING THAT IN THROUGH AN EXPERT, SO REALLY YOU ARE OPENING THE DOOR TO UNFAVORABLE INFORMATION BY PRESENTING THE IQ EVIDENCE IN THIS CASE.

WHAT WAS THE UNFAVORABLE, IF YOU COULD SUMMARIZE FOR US --

YOUR HONOR, IT WAS THE PSYCOPATHIC DEVIANT SCALE ON THE MMPI AND MOREOVER YOU HAVE EVIDENCE THAT THE APPELLANT WAS SELLING DRUGS. IN FACT THERE WAS AN ARREST IN HIS HISTORY. THAT OPENS THE DOOR TO HIS ARREST ON DRUG USE. HE HAD BEEN IN A GANG FIGHT, SO THERE WERE CERTAIN AREAS OF CROSS-EXAMINATION AVAILABLE TO THE PROSECUTOR. MOREOVER, THESE DEFENSE ATTORNEYS WERE VERY FAMILIAR WITH THIS PROSECUTOR, JEFF ASHTON. THIS WAS A CLOSE KNIT COMMUNITY OF LITIGATORS, WHO TRY CAPITAL CASES IN ORANGE COUNTY. SO THEY KNEW EXACTLY WHAT MR. ASHTON DOES. AND MS. CASHMAN TESTIFIED THAT SHE HAD SEEN IN THE PAST, A MENTAL HEALTH EXPERT ACTUALLY TURNED INTO AN AGGRAVATION WITNESS BY THIS VERY PROSECUTOR, BECAUSE --

WHAT CONCERNS ME ABOUT THIS CASE IS, WHEN YOU LOOK AT IT, THERE IS REALLY, YOU WOULD HAVE TO ADMIT THAT THERE IS VERY LITTLE MITIGATION THAT THE TRIAL COURT FOUND, ISN'T THAT CORRECT?

WELL, YOUR HONOR, BUT THAT IS WHAT WAS AVAILABLE.

THEY DISCUSSED SOME MENTAL, NOT MENTAL, BUT SOME MITIGATION, BUT FOR THE MOST PART, THE TRIAL JUDGE EITHER FOUND THAT IT DIDN'T EXIST OR GAVE LITTLE WEIGHT TO A COUPLE OF THEM. THAT IS WHAT THE RECORD INDICATES.

YES, YOUR HONOR. IN FACT --

SO UNDER THOSE CIRCUMSTANCES, IF YOU HAVE SOME MENTAL HEALTH INFORMATION, WHY WOULD NOT A DEFENSE ATTORNEY PUT THAT ON, SINCE YOU HAVE VERY LITTLE ELSE TO GO ON?

WELL, YOUR ASS YOU MEANING, YOUR HONOR, THAT THERE WAS SOME -- A YOU -- WELL, YOU

ARE ASSUMING, YOUR HONOR, THAT THERE WAS SOME MENTAL HEALTH RECORD THAT WAS CLEAR THAT AND THERE WAS NOT. DR. MINGS TESTIFIED THAT THERE WAS A NORMAL MMPI, THAT HE DENIED THAT HE CONTRIBUTED ANYTHING TO HIS CURRENT LEGAL SITUATION, THAT HE SCORED HIGH ON THE PSYCOPATHIC DEVIANT SCALE. THE ONLY THING THEY POSSIBLY HAD WAS A LOW IQ, AND I WANT TO GO ADDRESS DR. BERLAND AT THIS POINT, BECAUSE JUSTICE BELL, YOU NOTICED THAT DR. BERLAND DIDN'T TESTIFY AT THE EVIDENTIARY HEARING. COLLATERAL COUNSEL SAID THAT IT WAS SUFFICIENT TO PROVE ALL OF HIS POINTS ON EFFECTIVENESS. IN IT WAS NOT. -- -- IT WAS NOT. IN FACT, THE ONLY REASON IT WAS INTRODUCED WAS IN ORDER TO OBTAIN A PT SCAN, AND THAT WAS OBSTAINED, AND IT WAS FOUND THAT THE APPELLANT HAS A NORMAL FUNCTIONING BRAIN, AND I OBTO ANY MATERIAL OR FAVORABLE INFORMATION FROM THE AFFIDAVIT, AND I KNOW THE TRIAL COURT MENTIONED IT IN HER ORDER, BUT DR. BERLAND WAS NOT CALLED AND THE STATE HAD NO OPPORTUNITY TO CROSS-EXAMINATION HIM, AND WE CAN DRAW NO CONCLUSIONS OF INEFFECTIVENESS, BASED ON DR. BERLAND.

DID ANY DEFENSE LAWYERS SAY WHAT DR. BERLAND'S EVALUATION WAS, AFTER THEY HIRED HIM?

YES, YOUR HONOR. HE HAD A HIDDEN CRAZINESS, THAT HE HAD A NORMAL IQ, AND THAT IF HE MIGHT HAVE SOME BRAIN DIFFICULTY OR INJURY, BUT IT WOULD BE DIFFICULT TO PRESENT. SO IN DR. BERLAND'S OWN OPINION, THAT HE INDICATED THAT ANY MENTAL HEALTH MITIGATION THAT HE HAD TO PRESENT WOULD BE DIFFICULT, AND, AGAIN, YOU HAVE THE SAME PROBLEM WITH DR. BERLAND. I MEAN, YOU DON'T PRESENT MENTAL HEALTH EXPERTS TO GET IN MINOR NONSTATUTORY MITIGATION, BECAUSE YOU ARE OPENING THE DOOR TO A VERY EXPERIENCED PROSECUTOR. PSYCHOPATH I CAN DEVIANT -- PSYCOPATHIC DEVIANT SCALE. PROSECUTORS WILL TELL THAT YOU IS THE THE FAVORITE SCALE. DR. MARIN WILL ALSO TELL YOU THAT THE APPELLANT HAS A SPIKE ON SCALE 9, WHICH HYPER MANIA, WHICH MEANS THAT NOT ONLY DOES HE HAVE ANTISOCIAL TENDENCIES BUT THAT HE HAS A LOT OF ENERGY TO ACT ON THEM.

WHY WASN'T DR. MOSSMAN ANOTHER EXPERT THAT WAS PRESENTED AT THE EVIDENTIARY HEARING, I BELIEVE, THE DEFENSE PRESENTED IT, AND NOW DR. MOSSMAN INDICATED THAT THERE WERE SEVERAL MENTAL HEALTH MITIGATORS THAT WERE POSSIBLE IN THIS CASE. ISN'T THAT SOMETHING THAT THE DEFENSE WOULD HAVE WANTED TO PRESENT?

YES. POSSIBLE. FIRST OF ALL, YOUR HONOR, THE ORLANDO-BASED DEFENSE ATTORNEYS HAD NO DUTY TO HIRE A THIRD OR FOURTH EXPERT, UNTIL THEY HAPPENED UPON DR. MOSS HAS NOT -- DR. MOSSMAN IN MIAMI. REMEMBER THAT, ONCE DR. MINGS WAS NOT SUFFICIENTLY FAVORABLE, THEY DIDN'T STOP THERE. THEY SOUGHT APPROVAL FOR FUNDS TO HIRE A SECOND EXPERT. THE TESTIMONY BELOW WAS THAT IT WOULD BE VERY DIFFICULT TO GET APPROVAL TO HIRE A THIRD EXPERT. ONCE YOU HIRE TWO EXPERTS, YOU DON'T HAVE UNLIMITED FUNDS TO GO AROUND THE STATE TO HIRE EXPERTS, UNTIL YOU FIND A SUFFICIENTLY FAVORABLE EXPERT.

I WAS GOING TO ASK YOU SOMETHING ABOUT THE DECISION NOT TO USE DR. MINGS. THERE IS IN IMPLICATION THAT THE PRIOR DEFENSE ATTORNEY WOULD HAVE, HAD LISTED DR. MINGS, AND THAT THAT WAS REALLY THE REASONABLE COURSE WAS, DID THAT PRIOR DEFENSE ATTORNEY TESTIFY AS TO THE REASON THAT HE OR SHE WOULD HAVE CALLED DR. MINGS OR ANYTHING LIKE THAT?

YOUR HONOR, I BELIEVE COLLATERAL COUNSEL WAS REFERRING TO MR. SIMS, AND HE AGREED TO TESTIFY AT THE I HAVE HAD YEAR HEARING THAT -- AT THE EVIDENTIARY HEARING THAT, WHEN HE WAS PUT BACK ON THE TRIAL OF THAT CASE, THERE WAS NO DISAGREEMENT. MS. CASHMAN, THERE WAS NO DISAGREEMENT HERE. THEY BOTH AGREED AND THESE ARE BOTH VERY EXPERIENCED CAPITAL LITIGATORS.

ARE YOU ON THE DUNCAN ONE?

NO, YOUR HONOR.

BUT STILL UNDER CONSIDERATION.

I DON'T BELIEVE THAT WAS CITED BY MY OPPONENT AND I AM NOT FAMILIAR WITH IT, AND I DON'T BELIEVE THAT THAT IS PROPER FOR HIM TO RAISE AT THIS TIME AT ORAL ARGUMENT, BUT NONETHELESS, LET'S LOOK AT DR. MOSSMAN'S TESTIMONY. A REASONABLE INVESTIGATION INTO MENTAL HEALTH EXPERTS IS NOT RENDERED INEFFECTIVE, SIMPLY BECAUSE THE DEFENSE IS ABLE, IN POSTCONVICTION, TO FIND A MORE EXPERT, AND IN THIS CASE THE -- A MORE FAVORABLE EXPERT, AND IN THIS CASE THE TRIAL COURT HAD CONCERN ABOUT DR. MOSSMAN, AND IN THIS CASE SHE INDICATED THAT THE EVIDENCE TO SUPPORT THE MITIGATORS EXIST, IF THEY DO, ANY OF THESE MITIGATORS, BUT THERE WAS INSUFFICIENT EVIDENCE TO PRESENT THEM, SO BASICALLY THE TRIAL COURT IS SAYING, LOOK, THERE IS INSUFFICIENT EVIDENCE FOR ME TO EVEN FIND MITIGATORS MENTIONED BY DR. MOSSMAN, AND IN FACT OF THE FOUR EXPERTS WHO TESTIFIED THIS THIS CASE, ONLY DR. MOSSMAN WOULD HAVE FOUND THE STATUTORY MENTAL MITIGATORS BUT ONLY DR. MOSSMAN WAS THE EXPERT TO NOT PERSONALLY INTERVIEW THE APPELLANT NOR TEST HIM.

IS THIS CASE SIMILAR TO RUTHERFORD?

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I AM NOT FAMILIAR WITH THE FACTS OFFHAND, YOUR HONOR, WITH RUTHERFORD. BUT THERE ARE CASES LIKE WIGGINS, THIS CASE HAS, IS NOT ANYWHERE --

LET ME SEE IF I CAN SUM UP YOUR POSITION, THOUGH, IN TERMS OF THIS ISSUE. IF I UNDERSTAND IT CORRECTLY, YOU UNDERSTAND THE DEFENDANT'S CLAIM TO BE THAT THE DEFENSE LAWYERS HIRED MENTAL HEALTH EXPERTS, AND THAT THEY SHOULD HAVE PUT THESE MENTAL HEALTH EXPERTS ON TO TESTIFY, BECAUSE THEY WOULD HAVE BEEN VERY HELPFUL IN ESTABLISHING MITIGATION, BUT THAT, AT THE EVIDENTIARY HEARING HERE, IT WAS ESTABLISHED THAT, IN THE COMMUNICATIONS THE DEFENSE LAWYERS HAD WITH THESE TWO EXPERTS, THAT THEY CONCLUDED THAT THE TESTIMONY WOULD NOT HAVE BEEN HELPFUL, AND IN FACT IT WOULD HAVE BEEN DAMAGING, AND THAT THERE IS EVIDENCE TO SUPPORT THE TRIAL COURT'S CONCLUSION TO THAT EFFECT. IS THAT --

YES, YOUR HONOR. IT WAS A REASONABLE TACTICAL DECISION MADE BY THE ATTORNEYS, AND, AGAIN, NOTHING WAS DEVELOPED DURING THE EVIDENTIARY HEARING TO SUGGEST THAT THAT TACTICAL DECISION WAS UNREASONABLE.

POINT OUT TO US, IF YOU CAN, PERHAPS, THE MOST EXPLICIT STATEMENTS MADE BY, IS IT CASHMAN AND SIMS?

YES, YOUR HONOR.

ARE THOSE THE NAME OF THE TWO? WHAT WERE THE MOST EXPLICIT STATEMENTS MADE BY THEM, WITH REFERENCE TO THIS DECISION, HAVING EVALUATED WHAT THE EXPERTS WERE GOING TO SAY, NOT TO CALL THEM? HOW EXPLICIT WERE THEY, REALIZING THERE WAS A TIME GAP.

VERY EXPLICIT.

HOW EXPLICIT WERE THEY?

VERY EXPLICIT. IN FACT, MS. CASHMAN INDICATED AND STATED ON THE RECORD THAT SHE WAS WORRIED THAT THE PROSECUTOR WAS GOING TO PAINT HER CLIENT AS DANGEROUS INDIVIDUAL

AND MAKE THE JURY WANT TO KILL HIM, SO HER RECOLLECTION, REGARDLESS OF WHAT YOU CALL THE SCALE FOR, SHE HAD EXPERIENCE WITH THIS PROSECUTOR. SHE KNEW HOW HE WAS GOING TO PAINT MR. KIMBROUGH AS A DANGEROUS INDIVIDUAL IN THIS CASE, AND REMEMBER YOU HAVE TWO SIGNIFICANT CRIMES OF VIOLENCE AGAINST YOUNG WOMEN AND THOSE FIT WITHIN ANTISOCIAL PERSONALITY DISORDER, SO REGARDLESS, MY OPPONENT SEEMS TO PLACE GREAT EMPHASIS ON THE FACT THAT NO DOCTOR CAME IN AND SAID THAT'S THE DIAGNOSIS IN THIS CASE, BUT THE DOCTORS DID ADMIT, EVEN DR. MINGS, THAT HE HAD ANTISOCIAL CHARACTERISTICS AND TRAIT, MOREOVER, DR. MINGS -- AND TRAITS. MOREOVER, DR. MINGS INDICATED THAT IT WAS POSSIBLE AT THE TIME OF TRIAL THAT HE WAS LEANING TOWARDS AN ANTISOCIAL PERSONALITY DISORDER DIAGNOSIS, SO THE EVIDENCE IN THIS MATTER IS PRETTY CLEAR THAT DR. MINGS HAD VERY LITTLE FAVORABLE INFORMATION. DR. BERLAND, TOO, HAD LITTLE FAVORABLE INFORMATION. HE WAS NOT CALLED BY COLLATERAL COUNSEL TO TESTIFY DURING THE EVIDENTIARY HEARING.

LET ME ASK YOU A QUESTION HERE. SO I WANT TO MAKE SURE I HAVE THE PROCEDURE RIGHT. THE DEFENSE COUNSEL HAD THE DEFENDANT EXAMINED BY TWO DEFENSE EXPERTS FOR MENTAL HEALTH MITIGATION PURPOSES. IS THAT CORRECT SOME.

YES, YOUR HONOR.

BUT THEY NEVER, THOUGH THEY WERE LISTED AS WITNESSES, THEY NEVER LISTED BERLAND AS A WITNESS.

NO, THEY DID NOT.

SO THE STATE NEVER HAD THE RIGHT OR THE OPPORTUNITY TO HAVE MR. KIMBROUGH EVALUATED BY THEIR EXPERT, CORRECT?

THAT IS CORRECT, YOUR HONOR.

SO THERE WAS NO MENTAL HEALTH MITIGATION PRESENTED BY EITHER THE DEFENSE NOR THE STATE IN THIS CASE.

NEW YORK CITY YOUR HONOR, THERE WAS NOT, AND THE STATE, THERE WAS NO RECORD EVIDENCE THAT THE STATE HAD HIRED AN EXPERT AT THE TIME OF TRIAL, BUT THE STATE CERTAINLY, THAT WAS AN AREA THAT THE STATE, ONCE THEY DEPOSED THE DEFENSE EXPERT, WOULD HAVE LOOKED INTO, AND THAT IS ACCORDING TO MR. ASHTON. AND, AGAIN, YOUR HONORS, I HAVE TO POINT OUT HERE, THAT THE DEFENSE ATTORNEYS IN THIS CASE PRESENTED SIX FAMILY MEMBERS DURING THE PENALTY PHASE, AND THEY TESTIFIED ABOUT APPELLANTS MOVING AROUND, HIS UPBRINGING. THERE WAS NO CHILDHOOD ABUSE IN THIS CASE. THERE IS NOTHING TO COMPARE THIS CASE TO WIGGINS, WHERE YOU HAD A SEVERE HISTORY OF SEXUAL ABUSE, WHERE YOU HAD SERIOUS PSYCHOLOGICAL PROBLEMS. THIS CASE IS NOT WIGGINS. THIS CASE IS MORE LIKE GASKIN VERSUS STATE, WHERE THE DEFENSE ATTORNEYS MADE A REASONABLE TACTICAL DECISION NOT TO PRESENT MENTAL HEALTH TESTIMONY DURING THE PENALTY PHASE. THE STATE HAS NOTHING FURTHER. THANK.

CHIEF JUSTICE: THANK YOU. MR. MARSHAL, HOW MUCH TIME LEFT? OKAY.

WITH DUE RESPECT TO OPPOSING COUNSEL, JUSTICE BELL, THE STATE COULD HAVE DEPOSED MR., OR DR. MINGS FOR A PERIOD OF EIGHT MONTHS, THAT HE WAS ON THE WITNESS LIST AS THEIR EXPERT AND COULD HAVE REQUESTED THEIR OWN DOCTOR TO EVALUATE MR. KIMBROUGH. AND THAT GOES TO THE WHOLE --

LET ME ASK YOU A QUESTION, DID, THE DEFENSE LISTED HIM AS A WITNESS, BUT HAD THEY NOTIFIED THE STATE THAT THEY WERE GOING TO PRESENT A MENTAL HEALTH DEFENSE?

I DON'T BELIEVE THEY DID AND I DON'T BELIEVE THE LAW AT THAT TIME REQUIRED TO SPECIALIZE NOTICE THAT THE RULES PRESENTLY REQUIRE, JUSTICE BELL. BUT THE KICKER IS, AND THE KEY THING IS, IS THAT DR. MINGS HAD CONCLUDED HIS FULL 20 HOURS OF EVALUATIONS BY MARCH OF '93 AND WASN'T LISTED AS A WITNESS UNTIL JULY. HE WAS RELISTED TWO WEEKS BEFORE THE END OF DECEMBER, IN '93, THE SAME WEEK THAT KELLY SIMS WENT AND PLED MR. KIMBROUGH NO CONTEST TO THE OTHER PENDING RAPE CASE THAT CREATED THE AUTOMATIC, IF YOU WILL, OR CONCEDED AGGRAVATOR ON THE CLAY POOL RAPE CASE. REMEMBER, ALSO, THAT ALL OF THE RECORDS THAT THE DOCTORS TESTIFIED AND EVALUATED AND TESTIFIED TO AT THE HEARING, WERE THOSE RECORDS THAT WERE AVAILABLE AT THE TIME OF TRIAL. THE SCHOOL RECORDS, THE PUBLIC DEFENDER INTERVIEWS AND THE INVESTIGATORS. THAT INVESTIGATOR DID NOT START WORK ON THE CASE BECAUSE THEY WERE BURIED UNDER THE DNA AND KELLY SIMS LEAVING THE OFFICE, YOU BELIEVE UNTIL MARCH OR APRIL OF '93, AFTER BOTH DOCTORS HAD BEEN DISMISSED, SO EVEN THIS VERY EXPERIENCED INVESTIGATOR WAS OUT, TRAVELING AROUND, AND WORKING ON A CASE THAT ENDED UP WITH WHAT YOU CALLED WEAK, NONSTATUTORY MITIGATION, AND CAN IN WHICH THE EVIDENTIARY HEARING -- AND IN WHICH THE EVIDENTIARY HEARING SHOWED HAD A COMPLETE AND ABYSMAL LACK OF DEFENSE THEORY, EX-PLAINING HOW THIS 19-YEAR-OLD, WHEN AGE HAD NO BACK UP FACTORS TO FIND A LEGITIMATE STATUTORY MITIGATOR, BECAUSE OF THE FACT THAT THE TRIAL COUNSEL DID NOT USE THE TWO DOCTORS THEY HIRED. THEY REQUEST RELIEF.

CHIEF JUSTICE: THANK YOU BOTH. THE COURT IS GOING TO TAKE A 15-MINUTE RECESS BEFORE WE HEAR THE LAST CASE ON THIS MORNING'S DOCKET. WE STAND IN RECESS NOW, FOR 15 MINUTES.

MARSHAL: PLEASE RISE.