State of Florida v. Henry A. Davis

CHIEF JUSTICE: GOOD MORNING.

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

CHIEF JUSTICE: GOOD MORNING EVERYONE. APPRECIATE YOUR BEING READY TO GO. WE ARE READY AT 8:30.

GOOD MORNING, YOUR HONOR.

CHIEF JUSTICE: GOOD MORNING. STATE VERSUS DAVIS AND DAVIS VERSUS CROSBY. YOU MAY PROCEED.

SCOTT BROWNE REPRESENTING THE STATE OF FLORIDA. HENRY DAVIS WAS TRIED AND CONVICTED IN 1990, OF MURDERING 73-YEAR-OLD JOYCE EZELL BY STABBING HER 21 TIMES IN HER OWN HOME AND WAS ALSO CONVICTED OF ROBBERY. HE WAS SENTENCED TO DEATH. IN 2001, THE HONORABLE CHARLES LEE BROWN IN POLK COUNTY REVERSED THE SENTENCE AND ORDERED A NEW SENTENCING PHASE. THE STATE HAS APPEALED THAT ORDER. THE PROBLEM WITH THE TRIAL COURT'S ORDER, IN THIS CASE SRCKTS TRIAL COURT, THE CIRCUIT COURT DID A VERY GOOD JOB OF LISTENING TO THE FACTS DEVELOPED DURING THE EVIDENTIARY HEARING. HE CONDUCTED ALMOST NO ANALYSIS OF THE ORIGINAL PENALTY PHASE FACTS AND THE TWO STATE EXPERTS THAT TESTIFIED DURING THE PENALTY PHASE, AND WE DON'T HAVE A LISTING OF WHAT ADDITIONAL OR NEW MIDGATION THE TRIAL COURT THOUGHT -- OR MITIGATION THE TRIAL COURT THOUGHT WOULD HAVE BEEN FOUND DURING THE ORIGINAL PENALTY PHASE.

IT WAS REMANNEDED TO THIS COURT AFTER RECONSIDERING -- REMANDED TO THIS COURT AFTER RECONSIDERING TWO AGGRAVATORS THAT HAD BEEN STRUCK.

YES, YOUR HONOR.

AND IT WAS AT THAT TIME THAT ANOTHER ATTORNEY CAME IN AND WANTED TO PUT IN ADDITIONAL EVIDENCE.

YES, YOUR HONOR. ANOTHER JUDGE SAID, NO, THE REMAND WAS JUST FOR HIM TO REWEIGH. IN THAT ORIGINAL SENTENCING, THERE WAS NO STATUTE, THERE WAS NO STATUTORY MITIGATION, MENTAL HEALTH MITIGATION FOUND, CORRECT?

NONE FOUND.

AND THERE WASN'T ANY, AS FAR AS THE NONSTATUTORY MITIGATION, WHAT WAS THE NONSTATUTORY MITIGATION THAT WAS FOUND?

THAT, YOUR HONOR, WAS PREEXAMPLE. THIS WAS TRIED -- THAT WAS PRECAMPBELL. THIS WAS TRIED IN JANUARY 19 -- AGE, DEFENDANT'S EDUCATION, JUST SORT OF A BACKGROUND.

BUT THERE WAS REALLY NO MENTAL HEALTH MITIGATION FOUND?

NO.

I AM TRYING TO GET IT CLEAR, THE STATUS THAT WE ARE LOOKING AT IT ON. AND YOU SAID WHAT WAS PRESENTED AT THE ORIGINAL PENALTY PHASE, AND I AM WANT TO MAKE SURE I AM CLEAR ON THE FACTS THAT WERE FOUND AND NOT NONPRESENTED EVIDENCE. THERE WAS NO MENTAL HEALTH MITIGATION OR STATUTORY MITIGATION FOUND?

NO, YOUR HONOR. BUT --

I AM TRYING TO ESTABLISH THE FACTS, YOUR HONOR.

IF I CAN MOVE ON, NOW, TRIAL COUNSEL DAN BRAWLE I WAS A -- BRAWLEY WAS A DEFENSE COUNSEL TO PRESENTED TWO MENTAL HEALTH EXPERTS WHO TESTIFIED THAT THE STATUTORY MENTAL MITIGATORS BOTH APPLIED IN THIS CASE, BACK IN 1990, SO THE TRIAL COUNSEL PRESENTED THE SAME TWO EXPERTS THAT THE CCRC PRESENTED IN 2001, AND THOSE EXPERTS HAD THE SAME FAVORABLE OPINIONS ESSENTIALLY, THAT THEY HAD BACK IN 1990, THE ONLY ADDITIONAL OR STRENGTHENING OF THEIR OPINION, IF YOU WILL, WAS THAT COUNSEL FAILED TO USE AN EEG, WHICH WAS BROUGHT OUT IN FRONT OF THE JURY ANYWAY, BUT THIS IS WHAT THE TRIAL COURT FOUND, THE CIRCUIT COURT, THAT THERE WAS AN EEG THAT WAS NOT ESSENTIALLY PRESENTED TO THE JURY. THAT IS WRONG. THAT EEG WAS KNOWN TO BOTH THE STATE EXPERTS, THE ABNORMAL EEG AND THE DEFENSE EXPERTS.

AND ISN'T THAT THE PROBLEM, THOUGH, THAT DR. WESBY SAID SHE DIDN'T REALLY KNOW HOW TO INTERPRET THE EEG, AS DID THE OTHER EXPERT, AND IT WAS REALLY JUST KIND OF SORT OF SWEPT AWAY, AND IT ALLOWED THE STATE TO ARGUE VERY STRENUOUSLY, IN CLOSING, THAT THERE WAS JUST NO OBJECTIVE EVIDENCE OF BRAIN DAMAGE. AND I GUESS, SO I WOULD LIKE YOU TO FOCUS ON THE FACT THAT, AND THEN IN THE EVIDENTIARY HEARING AND SUBSEQUENT TESTIMONY, HAVE DR. PANER-, WHO DID THE -- PANERO WHO DID THE EEG, HAVE SOME CONFLICTING EVIDENCE ABOUT THE TEMPORAL LOBE EPILEPSY, AND THEN ON TOP OF SCHOOL RECORDS AND WHAT DR. ESPY SAID ABOUT HIM GRADUATING NORMALLY AND THAT HE WAS IN THE SLOW, LEARNING-DISABLED CLASSES, SO IT IS THE WHOLE PICTURE THAT I WOULD LIKE TO YOU FOCUS ON.

YOUR HONOR, IF I CAN GET TO THAT. FIRST OF YOU WILL -- FIRST OF ALL, THE JURY WAS WELL AWARE OF THE ABNORMAL EEG CLAIM. THE DOCTOR WAS WELL AWARE OF THE ABNORMAL A.M. EEG AND HE MENTIONED THAT TO THE -- THE ABNORMAL EEG, AND HE MENTIONED THAT TO THE JURY. HE COUNSELED BOTH EXPERTS ABOUT THE ABNORMAL EEG AND PRESENTED THAT THERE WERE ABNORMAL BRAIN WAVES AND SUPPORTED THE CLAIM OR ASSERTION OF BRAIN DAMAGE AND ALSO USED THE ABNORMAL EEG IN CLOSING ARGUMENT, SO WHAT WE ARE TALKING ABOUT HERE IS COUNSEL'S FAILURE, BASED UPON NO RECOMMENDATION OR ADVICE FROM HIS EXPERTS, TO GET A MORE SENSITIVE EEG, AND THAT WAS DONE IN 1992.

IN TERMS OF THIS, BECAUSE WE ARE HERE ON A STATE APPEAL.

YES, YOUR HONOR.

NORMALLY THE KINDS OF THINGS WHERE IT IS SAID THAT HE DID IT ENOUGH AND SO THERE IS NO INEFFECTIVE ASSISTANCE, BUT ARE YOU TELLING ME THAT WE SHOULD DISREGARD THE JUDGE'S FINDING, WHERE HE SAID WHAT HE DIDN'T OBTAIN, THAT HE COULD HAVE OBTAINED THIS ADDITIONAL THING AND THAT HE NOTED A FAVORED A LESS IS MORE APPROACH, AND THAT IN THIS CASE, WHERE THERE WAS A NUMBER OF AGGRAVATORS, EVERY BIT OF MITIGATION WOULD HAVE HAD A SUBSTANTIAL EFFECT. DO WE JUST IGNORE ALL OF THAT?

YOUR HONOR, HIS CONCLUSION THAT COUNSEL WAS DEFICIENT, IS SUBJECT TO DE NOVO REVIEW, AND THIS COURT SHOULD IGNORE IT, BECAUSE NOT ONLY ARE WE USING 20/20 HINDSIGHT, WE ARE USING TELESCOPIC HINDSIGHT, BECAUSE HIS EXPERTS WERE AWARE OF THIS ABNORMAL

EEG, YET THERE IS NO TESTIMONY BELOW THAT THEY REQUESTED AN ADDITIONAL MORE SENSITIVE NASOPHEREAL EEG.

YOU SAY THE DOCTOR CLAIMED IT?

HE MENTIONED THE REPORTS FROM THE STATE HOSPITAL THAT MENTIONED THE ABNORMAL EEG.

DID HE EXPLAIN WHY, IF HE HAD THIS COMPELLING EVIDENCE, HE DIDN'T ADVISE THE DEFENSE ATTORNEY THAT SOMETHING ELSE SHOULD BE DONE?

YES,. IN FACT, HE SAID, HE THOUGHT ON THE RECORD THAT IF HE WOULD HAVE KNOWN ABOUT IT, HE WOULD HAVE REQUESTED A MORE SENSITIVE EEG BE DONE, BUT THE RECORD IS CLEAR. THE RECORD DOESN'T LIE. IF YOU GO BACK TO THE PENALTY PHASE, AND THAT IS WHAT THIS CIRCUIT COURT WAS TO DO, NOT THE ORIGINAL TRIAL JUDGE. HE WAS EX-CLUEDED. SO THE ORIGINAL JUDGE WHO -- EXCLUDED, SO THE ORIGINAL JUDGE WHO HAD THE TRIAL TESTIMONY AND KNEW IT WAS PART OF THE PENALTY PHASE OF THE CASE, KNEW THAT IT WAS NOT A PROBLEM HERE.

LET ME ASK ABOUT THIS INVESTIGATION. I AM CONCERNED ABOUT THESE STATEMENTS THAT WERE MADE BY COUNSEL, CONCERNING HIS FEELINGS ABOUT RACE. AND I AM CONCERNED ABOUT HIM IN THIS WAY, THAT THERE DOESN'T APPEAR THAT COUNSEL WENT OUT INTO THE NEIGHBORHOOD AND TALKED TO THE PEOPLE IN THE NEIGHBORHOOD ABOUT THIS DEFENDANT, AND WHAT IS THE EXPLANATION THAT COUNSEL DIDN'T DO THAT AND DIDN'T TALK TO MORE OF THE FAMILY AND TRY TO DEVELOP THAT? I AM CONCERNED ABOUT THE RACIAL --

YES, YOUR HONOR, FIRST OF ALL THE STATEMENTS OF VOIR DIRE AND CLEARLY WHAT WAS FOUND, COUNSEL OPENED UP THE STRATEGIC ISSUE AND NOT TAKE THE SAFE APPROACH. HE WANTED TO EVENT RR ON THE SIDE OF GETTING PEOPLE TO OPEN UP AND TALK ABOUT RACE AND MAKE SURE THAT RACE PLAYED NO PART --

BUT HE MADE STATEMENTS THAT WERE VERY MUCH OF CONCERN, WHERE HE SAID I DON'T LIKE BLACK PEOPLE, AND HOW DOES THAT FIGURE INTO THE INVESTIGATION THAT HE ACTUALLY DID? OBVIOUSLY DAVIS LIVED IN A BLACK NEIGHBORHOOD, CORRECT?

DAVIS? YES, YOUR HONOR. I BELIEVE SO. BUT FIRST OF ALL, THAT STATEMENT IS TAKEN OUT OF CONTEXT. WHAT HE WAS TALKING ABOUT IS SOMETIMES SOUTHERNERS DON'T HAVE A CROWD OR A GOOD HISTORY ON RACE RELATIONS, AND HE WANTED THEM TO FEEL SAFE TO OPEN IT UP.

I THINK, BUT HE DID, IT IS ONE THING, BUT HE ACTUALLY SAID I DON'T LIKE BLACK PEOPLE. IT IS NOT --

SOMETIMES I JUST DON'T LIKE BLACK PEOPLE, BUT YOU KNOW WHAT? THAT WAS A RISKY STRATEGY THAT HE TOOK, AND THE CIRCUIT COURT FOUND NO EVIDENCE IN THE RECORD THAT BRAWLEY IS A RACIST.

THE INQUIRY NOW IS THAT THE TRIAL COURT FOUND, AND I HAVE A PROBLEM WITH YOU SAYING THAT WE ARE REVIEWING ALL OF THIS DE NOVO. THE TRIAL COURT'S FACTUAL FINDINGS WE DEFER TO, UNLESS YOU CAN DEMONSTRATE THAT THERE IS NO EVIDENTIARY BASIS FOR THAT, RIGHT?

ABSOLUTELY RIGHT. ANOTHER TRIAL COURT FOUND THAT BRAWLEY TESTIFIED THAT HE DID NOT OBTAIN DAVIS'S SCHOOL RECORDS, THAT HE NEVER VISITED DAVIS'S FAMILY.

THAT'S CORRECT.

OR NEIGHBORHOOD. DID NOT TALK TO HIS FAMILY MEMBERS, COACHES OR FRIENDS. WELL, NOW, I AM READING OBVIOUSLY WHAT THE, NOW, THIS APPEARS TO BE A FACTUAL FINDING. JUST ON ITS FACE, IT APPEARS TO BE A FUNDAMENTAL DEFICIENCY, IN THE OBLIGATION OF DEFENSE BE COUNSEL, AND -- OF DEFENSE COUNSEL, AND I THINK THAT JUSTICE WELLS IS ASKING YOU THAT, WHEN YOU COUPLE THAT WITH THESE RATHER BLATANT STATEMENTS ON THE RACE ISSUE, DOESN'T THAT GIVE THE STATE SOME DIFFICULTY HERE? AREN'T YOU TROUBLED BY THE COMBINATION OF THIS APPARENTLY FUNDAMENTAL LACK OF DELIVERING UP TO THIS FUNDAMENTAL OBLIGATION, THAT A LAWYER RIGHT OUT OF LAW SCHOOL, YOU WOULD THINK, WOULD KNOW THAT HE WOULD HAVE AN OBLIGATION TO DO THESE THINGS, YET THESE WEREN'T DONE, AND THEN WE COMBINE IT WITH A POTENTIAL AT LEAST, EXPLANATION, THAT IS NOT A VERY HAPPY EXPLANATION, SO HOW DOES THE STATE FEEL ABOUT THAT?

YOUR HONOR, FIRST OF ALL, MR. BRAWLEY TESTIFIED THAT HE DID, IN FACT, TALK TO THE MOTHER, AND HE KNEW FOR SURE HE TALKED TO THE OLDEST SISTER. THE TWO FAMILY MEMBERS --

THERE IS NO EVIDENCE TO SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS.

I DID NOT SAY. THAT SOME OF THE FAMILY MEMBERS, YOUR HONOR, DID TESTIFY THAT HE NEVER TALKED TO THEM. WHERE THE TRIAL COURT'S ORDER IS NOT BASED IN FACT, AS HE SAID, BRAWLEY ADMITTED HE NEVER TALKED TO THE FAMILY MEMBERS. THAT IS NOT TRUE. THAT IS AN ERRONEOUS FACTUAL FINDING. HE TALKED TO THE MOTHER AND THE OLDEST DAUGHTER, AND IN FACT IF YOU EVEN TAKE A CURSORY GLIMPSE OF THEIR TESTIMONY DURING THE PENALTY PHASE, HE FOCUSED THEM IN TO EXACTLY WHERE HE WANTED TO GO.

SO HE DID VISIT THE NEIGHBORHOOD AND LOOK AT THE SCHOOL RECORDS AND TALK TO THE COACHES.

NO, YOUR HONOR, HE DID NOT. IF YOU ARE TALKING ABOUT THE PRACTICE TEN YEARS AGO THAT YOU HAVE TO GO AND TALK TO SCHOOL TEACHERS, WHAT DO THE SCHOOL TEACHERS ADD TO THAT? WELL, HE WAS A NICE KID IN TRACK.

YOU ARE SAYING IT IS NOT A STANDARD PRACTICE IN MITIGATION, TO GET THE SCHOOL RECORDS? THAT ISN'T ACCEPTED STANDARD PRACTICE NOW?

YOUR HONOR, THE SCHOOL QUESTION --

I AM ASKING YOU A QUESTION, IS IT STANDARD PRACTICE OR ISN'T IT?

I BELIEVE IT IS. IN FACT IN MY BRIEF I BELIEVE DAVIS MIGHT HAVE IDENTIFIED A DEFICIENCY IN NOT GETTING THE SCHOOL RECORDS. THE SCHOOL RECORDS SHOW THAT HE HAD THE CAN'T OF TAKING REGULAR CLASSES. HE WAS IN SOME SPECIAL LEARNING DISABILITY CLASSES, BUT THERE IS NO PREJUDICE WITH THAT, BECAUSE THE PROBLEM WITH THE TRIAL COURT'S ORDER IS --

THE FACT, WE ARE SKIPPING OVER AGAIN, YOU SEE, JUSTICE WELLS ASKED YOU INITIALLY, THAT, IS THERE A CONCERN HERE ABOUT THE CONNECTION BETWEEN BRAWLEY'S STATEMENT ABOUT RACE AND THE, YOU KNOW, REALIZING YOU DISPUTE SOME OF THESE FACTUAL FINDINGS BY THE TRIAL COURT JUDGE IN HIS FAILURE TO GO TO THE NEIGHBORHOOD. IS IT, IN OTHER WORDS, IS THAT FACTUAL FINDING IN ERROR?

THE FACT THAT HE DIDN'T GO INTO THE NEIGHBORHOOD? NO. THE STATE DOES NOT DISPUTE THAT. THE STATE DISPUTES THE FACT THAT COUNSEL HAS TO GO TO THE NEIGHBORHOOD.

YOU DON'T SEE ANY CONCERN, THOUGH, IN THIS RECORD --

NOT BASED ON BRAWLEY'S -- YOU MAY CALL THEM DEFECTIVE --

-- STATEMENTS AND THESE FINDINGS.

NEW YORK CITY YOUR HONOR. IF YOU GO BACK AND LOOK AT THESE STATEMENTS, BRAWLEY DIDN'T GO TO THE NEIGHBORHOOD BECAUSE HE WAS AFRAID OR IT WAS A RACIST MOTIVE ON HIS PART. WE CAN'T DEFER EVERY DEFICIENCY --

HELP ME HERE. THIS APPEARS TO BE A VERY DISCREET AND THOUGHTFUL ORDER. THAT IS THE JUDGE REJECTS MOST OF THE CLAIMS AND DOES IT IN A VERY THOROUGH AND ANALYTICAL WAIT.

YES, YOUR HONOR.

HOW IS IT THAT YOU FEEL THAT THE JUDGE, WHERE DID THE JUDGE GO WRONG, WHEN HE GOT TO THIS ISSUE, WHEN HE ANALYZES SEEMINGLY IN THE SAME THOUGHTFUL AND ANALYTICAL WAY, IN BACKING UP HIS CONCLUSIONS?

WELL, THE JUDGE NEVER FOUND THAT BRAWLEY WAS A RACIST. IN FACT THE CONCLUSION IS THE OPPOSITE.

I AM TALKING ABOUT THE DEFICIENCY OF COUNSEL IN PENALTY PHASE. YOU KNOW, HE REJECTED THIS CLAIM IN THE GUILT PHASE.

YES, YOUR HONOR.

HE REJECTED THE RACIST CLAIM. HE REJECTED A NUMBER OF OTHER --

YOUR HONOR, THE FUNDAMENTAL PROBLEM IS THE CIRCUIT JUDGE DIDN'T GO BACK TO THE PENALTY PHASE AND LOOK AT EXACTLY WHAT WAS PRESENTED PARTICULARLY ABOUT THE MENTAL HEALTH TESTIMONY.

HE SAYS HERE IN THE OPENING PART, THAT HE HAS GONE BACK AND READ EVERYTHING AVAILABLE IN THIS RECORD. DOES HE NOT IN THE ORDER?

HE DOES STATE THAT.

ARE YOU DISPUTING THAT HE DID THAT?

NO, YOUR HONOR. I AM SAYING WHAT HE DIDN'T DO IS ANALYZE THOSE FACTS FROM THE ORIGINAL PENALTY PHASE.

DIDN'T PUT THAT IN HIS ORDER.

DIDN'T PUT THAT IN HIS PREJUDICE PRONG. HE DID A DETAILED ORDER. THE STATE AGREES WITH THAT. VERY METICULOUS, BUT THE PROBLEM WITH THE OVERALL, HE SAID THAT COULD HAVE BEEN DONE BUT HE DIDN'T GO TO THE PENALTY PHASE.

I REALIZE WE HAVE BEEN ASKING YOU THESE QUESTIONS AND YOU ARE IN YOUR REBUTTAL TIME.

I AM IN MY REBUTTAL TIME. THANK YOU.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM LESLIE SCALLEY FOR MR. DAVIS.

WHAT ABOUT, IS THERE A FLAW IN THE JUDGE'S ANALYSIS HERE? HAS HE OVERLOOKED THE EVIDENCE THAT ACTUALLY WAS PRESENTED?

NO, YOUR HONOR, HE DIDN'T. IF YOU LOOK, CAREFUL READING OF THE COURT ORDER, AGAIN AFTER THREE DAYS AND OVER 30 WITNESSES, THE COURTITYFIED -- IDENTIFIED -- THE COURT IDENTIFIED SPECIFIC INSTANCES IN WHICH COUNSEL'S FAILURE TO INVESTIGATE FELL BELOW THE PREVAILING STANDARDS, AND IN EACH OF THOSE INSTANCES, THERE WAS A DISCERNABLE EFFECT ON WHAT COUNSEL'S FAILURE ON EFFECTIVELY ADVOCATING THE DEATH PENALTY FOR MR. DAVIS. FOR EXAMPLE, EVEN THOUGH IT WAS MENTIONED IN A REPORT, COUNSEL KNEW THAT THERE WAS AN ABNORMAL EEG. HAD COUNSEL OBTAINED THE REPORT AND PERHAPS HAD HIRED SOMEONE TO INTERPRET THAT, COUNSEL COULD HAVE PRESENTED OBJECTIVE EVIDENCE THAT HENRY DAVIS HAS BRAIN DAMAGE AND EPILEPSY, AND IT WAS THE VERY TYPE OF EVIDENCE THAT THE SENTENCING COURT FOUND LACKING, AND FOR THAT REASON DID NOT FIND THE STATUTORY MENTAL HEALTH MITIGATORS.

IS DOCTOR PENERO, HE WAS PROFFERED DURING THE EVIDENTIARY HEARING. HE IS A NEUROLOGIST?

YES.

IS THAT PART OF THE RECORD, HIS DEPOSITION?

YES, YOUR HONOR. IT WASN'T INCLUDED IN THE ORIGINAL RECORD ON APPEAL, BUT THE STATE STIPULATED TO ITS ADMISSION AS TO WHAT COUNSEL COULD HAVE DONE AT THE TIME OF MR. DAVIS'S PENALTY PHASE.

QUESTION THAT I HAVE, AS YOU SAID THE EEG WAS IN THE REPORT -- IN THE RECORD, SO IT DOESN'T LOOK LIKE ONE DOCTOR HAD IT BUT DR. McCLAIN HAD IT, BECAUSE HE REFERS TO IT IN HIS TESTIMONY. WHAT WOULD YOU SAY IS THE OBLIGATION OF THE ATTORNEY, IF HIS MENTAL HEALTH EXPERT HAS IT AND DOESN'T POINT OUT THAT IT HAS SIGNIFICANCE, TO KNOW THAT IT HAS SIGNIFICANCE?

WELL, THE EEG, IT WAS JUST MENTIONED IN THE STATE DOCTOR'S REPORT. COUNSEL TESTIFIED BELOW THAT HE DID NOT HAVE THE ACTUAL REPORTS, THEMSELVES. MR. DEMICK, WHO ALSO TESTIFIED --

DID MR. DEMI CAN WAS A -- MR. DEMICK WAS AN ORIGINAL ATTORNEY AND THEN HE CAME BACK FOR THE RESENTENCING?

CORRECT.

WHAT WAS IT, WHAT DID HE SAY THAT LED HIM TO SAY THE EEG HAD SIGNIFICANCE?

HE SAID IT IS ESSENTIAL AT THE TIME OF THE INVESTIGATION, TO OBTAIN ALL REPORTS ON A PERSON'S RECORDS AND FOLLOW-UP ON THE EEG.

ARE YOU SAYING THAT COUNSEL DID NOT HAVE A RECORD OF THE EEG?

NO.

DR. WESLEY HAD ACCESS TO IT?

THE ORIGINAL WAS DONE AUGUST 25, I BELIEVE, WHILE IN MR. DAVIS WAS AT CHATTAHOOCHEE, AND DR. ESPY MENTIONED IT IN ONE OF HER REPORTS.

SO THE REPORT ITSELF, WAS NEVER OBTAINED AND WAS NEVER PROVIDED TO THE EXPERTS.

CORRECT. ALTHOUGH HE HAD AN ABNORMAL EEG MENTIONED DURING PENALTY PHASE, COUNSEL, NEITHER COUNSEL CROSS-EXAMINED DR. WEST BIABOUT IT AND THE STATE'S DOCTOR, BUT NEITHER DOCTOR COULD EXPLAIN WHAT IT WAS OR WHAT IT MEANT. IN FACT THE STATE OBJECTED TO COUNSEL'S CROSS-EXAMINATION, FOR TRYING TO GET THAT INFORMATION TO COME OUT.

WHAT CONNECTION IN THE EVIDENTIARY HEARING, I REALIZE THAT DR. DEE AND DR. McCLAIN SAID THIS IS VERY, THIS WOULD BE OBJECTIVE EVIDENCE, AND IT WOULD REALLY STRENGTHEN AND BOLSTER WHAT I HAD TO SAY, BUT DID THEY RELATE THE FACT THAT HE HAD THIS ABNORMAL EEG, WITH A SEIZURE DISORDER, TO THE STATUTORY MENTAL HEALTH MITIGATOR, OF BEING EITHER DIMINISHED CAPACITY OR UNDER EXTREME MENTAL DISTRESS? WHAT DID THEY SAY ABOUT THAT?

THEY ONLY SAID THAT IT REALLY CONFIRMS THEIR TESTIMONY AT THE PENALTY PHASE, BUT IT WAS DR. PENERO, HE WAS THE NEUROLOGIST WHO WAS QUALIFIED.

WHAT DID HE SAY ABOUT THE CONNECTION?

HE SAID THAT, BECAUSE OF THE TEMPORAL LOBE EPILEPSY, MR. DAVIS REACTS, LIKELY TO REACT TO TRIVIAL PROVOCATION IN A MORE VIOLENT AND DESTRUCTIVE MANNER, AND FOR THAT REASON, HIS IMPULSES, HIS ABILITY TO CONTROL HIS IMPULSES, ARE IMPAIRED. DR. PENERO TESTIFIED THAT THE EPILEPSY AND ESPECIALLY COMBINED WITH MR. DAVIS'S BORDERLINE INTELLECT AND HIS OTHER ORGANIC PROBLEMS, THEY REALLY AFFECTED HIS ABILITY TO CONTROL BEHAVIORS.

HOW WAS THAT, OTHER THAN THAT GENERAL TESTIMONY, WITH SPECIFICITY FROM FAMILY MEMBERS, COACHES, TEACHERS OR ANYONE ELSE, WHAT SUPPORT DID THEY HAVE THAT THAT WAS HOW THE DEFENDANT ACTUALLY ACTED?

WELL, ACTUALLY THERE WAS NO SUPPORT FROM THE FAMILY MEMBERS TO THE FACT THAT THAT WAS HOW MR. DAVIS ACTUALLY ACTED, REACTING TO TRIVIAL PROVOCATION, BUT THE FAMILY MEMBERS DID CONFIRM THAT MR. DAVIS HAD BLANK STARES AND PAUSES, WHICH WAS WHAT DR. PENERO DESCRIBED AS HOW MR. DAVIS WOULD LOOK WHEN HE HAD A SEIZURE. THE FAMILY CONFIRMED THAT HENRY DAVIS SEEMED TO FORGET THINGS AND CAN FABRICATE, WHICH IS CONSISTENT WITH THIS SEIZURE.

HOW DOES THAT COMPORT WITH WHAT JUSTICE PARIENTE WAS ASKING YOU ABOUT. HOW DID THEY CONNECT THAT DAMAGE WITH THE MENTAL DISTURBANCE OR THE ABILITY TO CONFIRM THE BEHAVIOR, THE MENTAL HEALTH MITIGATORS THAT ARE AT ISSUE? THE FAILURE TO CONTROL HIS IMPULSES. I MEAN, WHERE DID THEY SHOW THE REALITY IN HIS DAY-TO-DAY LIFE, TO WHAT THE DOCTOR TESTIFIED TO?

THE LAY WITNESSES DID NOT CONNECT THAT, THE REALITY TO WHAT HAPPENED AND TO MR. DAVIS'S YOU KNOW, DAY-TO-DAY ACTIVITY. IN FACT, THE WITNESSES DECIDED -- THE WITNESSES TESTIFIED, ASIDE FROM THE FABULATION AND NEVER MENTIONED IT. IN FACT, THE TEACHERS, TRACK COACHES, FAMILY MEMBERS, EVERYONE --

THE QUESTION HAS TO DO WITH WHETHER HE HAD LESS CULPABILITY AS TO THESE OTHER TWO POTENTIAL PEOPLE, BUT HERE IS A VIOLENT CRIME, AND YOU ARE SAYING IT WASN'T LIKE ANYTHING EVER DID IN HIS WHOLE LIFE, SO HOW DOES THE STATUTORY, IS THE THEORY THAT HE WAS HAVING FOR THE FIRST TIME IN HIS LIFE, A SAYS YOUR, THAT CAUSED TOM BE VIOLENT AT THE TIME OF THE CRIME?

THAT IS -- THAT CAUSED HIM TO BE VIOLENT AT THE TIME OF THE CRIME?

THAT IS ALL THE EVIDENCE WE HAVE. THERE IS ALSO EVIDENCE THAT MR. DAVIS HAD A HEAD INJURY FOUR MONTHS BEFORE THE CRIME OCCURRED, SO PERHAPS THE HEAD INJURY COULD HAVE PRO VOCKD THE -- PROVOKED THE EPILEPSY AND COULD HAVE MADE IT MORE EXTREME.

THE HEAD INJURY WAS THAT CLOSE TO WHEN THE CRIME OCCURRED?

I BELIEVE IT WAS FOUR MONTHS BEFORE.

WHAT WAS TESTIFIED AT THE ORIGINAL TRIAL, ABOUT HIS BORDERLINE IQ AND HIS PERFORMANCE IN SCHOOL? WAS THERE ANYTHING ABOUT THAT?

THE TEST THAT THE COMPETENCY OF THE DOCTORS WHO EXAMINED HIM FOR COMPETENCY, ALL REVEALED THAT HE HAD A BORDERLINE INTEL SECRETARY. HOWEVER, NOTHING FURTHER WAS DEVELOPED, AND IN FACT BECAUSE NOTHING FURTHER WAS DEVELOPED, THE PROSECUTION ARGUED IN CLOSING ARGUMENT, THAT MR. DAVIS'S BORDERLINE, SOME DOCTORS EVEN CALLED IT BORDERLINE MENTALLY RETARDED IQ, WAS NOT MITIGATING BECAUSE HE GRADUATED FROM HIGH SCHOOL WITH A NORMAL DIPLOMA, BUT HAD COUNSEL GONE BACK AND LOOKED AT THOSE SCHOOL RECORDS, COUNSEL WOULD HAVE FOUND EVIDENCE THAT SCHOOL OFFICIALS DIAGNOSED HENRY'S MENTAL AGE AT 14 WHEN HE WAS 18, THAT HE HAD BEEN IN CLASSES FOR PEOPLE WITH SPECIFIC LEARNING DISABILITIES FOR TEN YEARS, THAT HE REPEATED A GRADE. ALL OF THIS COULD HAVE BEEN USED TO EFFECTIVELY CHALLENGE THE STATE'S CASE. AGGRAVATION. BUT IT DID NOT OCCUR.

CAN YOU, AT SOME POINT IN YOUR ARGUMENT, CAN YOU ADDRESS YOUR FIRST ISSUE ON CROSS APPEAL, AS TO INEFFECTIVENESS DURING THE GUILT PHASE AND NOT PRESENTING TESTIMONY THAT THERE MAY HAVE BEEN OTHERS EITHER SOLELY OR JOINTLY INVOLVED IN THE MURDER?

YES. AT THE TIME OF MR. DAVIS'S TRIAL, THERE WERE INDICATIONS THAT MR. DAVIS MAY NOT HAVE BEEN ALONE AT THE SCENE OF THE CRIME, AND IN FACT, ONCE HE WAS FOUND COMPETENT, HE TOLD THREE OF THE FOUR EXAMINING DOCTORS THAT HE WAS AT THE VICTIM'S HOUSE, THAT HE WAS WORKING IN THE BACKYARD, I BELIEVE. HE CAME AROUND THE FRONT DOOR AND FOUND REGINALD SHEPARD AND JOHN JOHNSON IN THE HOUSE AND THE VICTIM WAS DEAD. THE EVIDENCE BELOW REVEALED THAT THE VICTIM'S CAR INDICATED THAT IT CARRIED AT LEAST THREE PEOPLE. A MAN NAMED LINDVINDT JONES, WHO COUNSEL WOULD HAVE DEPOSED, WOULD HAVE TESTIFIED, THAT HE SAW THE DEFENDANT AT HIS -- THAT HE SAW THE DEFENDANT AT THE VICTIM'S HOUSE AND WITH JEGE NALED JOHNSON AND THE OTHER MAN. THEY FOUND 15 ITEMS AND DIDN'T FIND HENRY DAVIS'S FINGERPRINTS ON THE KNIFE THAT WAS FOUND AT THE HOUSE AND WHICH THE STATE PRESENTED AS THE MURDER WEAPON, AND THEY FOUND NO EVIDENCE OF BLOOD ON HIS CLOTHES.

WAS THIS TESTIMONY NOT PRESENTED AT THE ORIGINAL TRIAL?

MR. JONES'S TESTIMONY, ABOUT SEEING MR. JOHNSON AND SHEPARD AT THE HOUSE.

DID ANYBODY TESTIFY ABOUT SEEING JOHNSON AND SHEPARD AT THE HOUSE?

NO, THEY DIDN'T.

WHAT ABOUT GOING TO THE PENALTY PHASE, WHICH HAS LESS INVOLVEMENT, JONES AND WHO WAS THE OTHER ONE?

LAVONSKY REILLY.

AND WAS HE BLACK?

YES, YOUR HONOR, THEY ARE.

WHAT DID BRAWLEY SAY ABOUT WHY HE CHOSE NOT TO PRESENT THESE WITNESSES AT THE GUILT PHASE?

MR. BRAWLEY TESTIFIED THAT HE BELIEVED THAT MR. BROWN, MS. EZELL'S WHITE NEIGHBOR, WAS A VERY CREDIBLE WITNESS, AND HE BELIEVED THAT MR. BROWN IDENTIFIED HENRY DAVIS VERY ACCURATELY. WE DISPUTE THAT.

THERE WAS NO QUESTION BUT THAT MR. DAVIS WAS AT THE SCENE. THERE IS NO QUESTION TO THAT. I MEAN, HIS FINGERPRINTS ARE THERE AND THEY ARE ON, SO WE HAVE HIM, AND I GUESS I SEE THAT AS MAYBE HELPING IN THE PENALTY PHASE, BUT I HAVE A PROBLEM AS TO HOW THAT TESTIMONY WOULD HAVE MADE A DIFFERENCE IN THE GUILT PHASE, SEEING THAT, AT THE VERY LEAST, HE IS THERE AND CULPABLE, AS A PRINCIPLE, SO COULD YOU HELP ME ON ASSUMING THAT HE SHOULD HAVE PRESENTED THESE WITNESSES THAT WOULD HAVE BUTTRESSED THE STORY, HOW THAT WOULD HAVE MADE A DIFFERENCE OR HOW THAT SHOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME OF THIS CASE WITH MR. DAVIS BEING STILL A MAJOR PARTICIPANT IN THIS CASE?

WELL, ACCORDING TO MR. DAVIS'S STORY, HE WAS OUT BACK. HE CAME AROUND, AND WHEN HE WENT INTO THE HOUSE, HE SAW REGINALD SHEPARD AND JOHN JOHNSON THERE, AND THE VICTIM WAS ALREADYTED DID. THAT WAS MAKE -- WAS ALREADY DEAD. THAT WOULD MAKE AM NOT A PRINCIPLE PAL TO THE MURDER -- A PRINCIPAL TO THE MURDER. SURELY HE WOULD BE CULPABLE TO THE ROBBERY AFTER THE MURDER, BUT TO THE MURDER ITSELF, IT WOULD BRING INQUEST REGARDING HIS GUILT, AND IN FACT I BELIEVE THE JURY DID ASK THE COURT A QUESTION ABOUT WHETHER MR. DAVIS COULD BE FOUND GUILTY OF FIRST-DEGREE MURDER IF HE WAS THERE, BUT HE WAS NOT A MAJOR PARTICIPANT.

WAS THIS, DO YOU KNOW FROM THE RECORD, WERE THERE ANY AFRICAN-AMERICANS ON THIS JURY?

NO. THERE WERE NO AFRICAN-AMERICANS ON THE JURY. IT WAS AN ALL-WHITE JURY.

IT WASN'T EVEN, THE WHOLE PANEL APPARENTLY, WAS, THE JURY PANEL WAS ALL WHITE, AND THERE HAS NEVER BEEN, THERE WAS NEVER A CHALLENGE TO, ON THE LACK OF RACIAL DIVERSITY IN THE PANEL HAS EVER BEEN MADE IN THIS CASE?

I CAN'T RECALL IF THERE WAS A CHALLENGE. I JUST KNOW THAT THE JURY THAT ULTIMATELY CONVICTED MR. DAVIS AND SENTENCED HIM TO DEATH WAS ALL WHITE.

APPARENTLY THEY WERE ALL WHITE, BECAUSE WHEN HE WAS ASKING IN HIS VOIR DIRE, HE SAID WE ARE ALL WHITE AND I AM A SOUTHERNER AND SO HE WAS DIRECTED, SO THERE WERE NO BLACKS ON THAT WHOLE PANEL.

I WOULD HAVE TO ASSUME SO.

WHERE DID THE TRIAL COURT GO WRONG IN HIS ANALYSIS OF THIS GUILT PHASE ISSUE?

THE TRIAL COURT ERRED IN THE FACT, HE SAID IT WASN'T BRAWLEY'S THEORY TO NEGATE MR. DAVIS'S, THE FACT THAT MR. DAVIS WAS AT THE SCENE, BUT IT WAS HIS THEORY TO TRY AND LEAD THE JURY TO BELIEVE THAT SOMEBODY ELSE MAY HAVE COMMITTED THE MURDER. HAD HE PRESENTED LAVONSKY REILLY'S TESTIMONY AND MR. JONES'S TESTIMONY, HE COULD HAVE PRESENTED EVIDENCE THAT WOULD HAVE BEEN CONSISTENT WITH THAT THEORY. ALSO --

WHAT WAS THE RELATIONSHIP BETWEEN THOSE WITNESSES AND THE PARTIES HERE, AND WHAT WAS THEIR PRIOR CRIMINAL RECORDS FOR IMPEACHMENT PURPOSES, IS WHAT I AM ASKING TO GET A PICTURE OF?

MR. --

HOW CREDIBLE WOULD THESE WITNESSES HAVE BEEN?

MR. REILLY WAS MR. DAVIS'S UNCLE. MR. JONES, HE DOES HAVE A CRIMINAL RECORD. OFF THE TOP OF MY HEAD, I AM NOT SURE HOW MANY CONVICTIONS HE HAS NOW OR HAD AT THE TIME. BUT I KNOW HE DOES CURRENTLY HAVE A CRIMINAL RECORD.

I SEE THAT. I JUST DIDN'T KNOW AT THE TIME WHAT IT WOULD HAVE BEEN.

I AM SORRY. I DON'T KNOW THE ANSWER TO THAT QUESTION.

THE TRIAL COURT DID MAKE COMMENT IN HIS ORDER, ABOUT THE CREDIBILITY OF THESE POTENTIAL WITNESSES. IS THAT CORRECT?

I DON'T BELIEVE THAT THE TRIAL COURT MADE COMMENTS ABOUT THE CREDIBILITY OF MR. JONES AND MR. REILLY IN HIS ORDER. HOWEVER, HE DID MAKE COMMENTS ABOUT THE CREDIBILITY OF OTHER WITNESSES IN THE NEWLY EVIDENCE ISSUE.

HOW OLD WERE THEY? MR. DAVIS WAS 22 AT THE TIME OF THIS.

CORRECT.

I GUESS HE MUST HAVE SOME CRIMINAL RECORD, BECAUSE HE DIDN'T ASK FOR THE MITIGATOR OF NO CRIMINAL HISTORY. HOW OLD WAS SHEPARD, THE ONE THAT ALL OF THESE OTHER JAILHOUSE SNITCHES TOLD HIM ABOUT THAT HE WAS REALLY THE MURDERER?

I AM NOT SURE THE RECORD STATES HIS AGE, BUT I DO KNOW HE WAS OLDER THAN MR. DAVIS.

AND HOW ABOUT THE OTHER, MR. SHP ARRESTED, IS IT?

-- MR. SHEPARD, IS IT?

MR. JOHNSON?

MR. JOHNSON.

I AM NOT SURE IF IT WAS TESTIFIED TO BELOW. HE TESTIFIED AT TRIAL, BUT THEY WERE ALL FRIENDS OF MR. DAVIS.

WAS THERE TESTIMONY AT TRIAL ABOUT THAT?

ALAN SHEPARD TESTIFIED THAT HENRY DAVIS STARTED HANGING AROUND WITH MR. SHEPARD AT SOME POINT, BUT SHE DIDN'T LIKE IT BECAUSE SHE FELT IN HER WORDS, A MASTER CRIMINAL, BUT THAT WAS REALLY THE EXTENT. THERE WAS NO TESTIMONY THAT THEY WERE FRIENDS OR ANYTHING.

CAN YOU RESPOND TO THE STATE'S ARGUMENT THAT THE TRIAL JUDGE FAILED TO COMPARE PENALTY PHASE TESTIMONY WITH WHAT WAS PRESENTED AT THE EVIDENTIARY?

YOUR HONOR, I BELIEVE THE TRIAL COURT MADE THE CORRECT PREJUDICE ANALYSIS. THE

COURT LOOKED AT THE AGGRAVATING CIRCUMSTANCES THAT WERE VALID AND EXISTED IN THIS CASE. HE DETERMINED THAT COUNSEL'S PERFORMANCE FELL BELOW THE PREVAILING PROFESSIONAL STANDARDS, AND THEN MADE THE DETERMINATION THAT, HAD THE JURY HEARD THE COMPELLING EVIDENCE THAT WAS OFFERED AT THE PENALTY PHASE, THAT WITH WHAT COUNSEL COULD HAVE PRESENTED, THAT WITH WHAT WAS PRESENTED AT TRIAL, THERE WAS A REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT. AS HE SAID, CONFIDENCE IS, IN THE OUTCOME IS UNDERMINED, THAN IS THE STRICKLAND ANALYSIS.

BUT DO YOU AGREE OR DISAGREE WITH THE STATE'S POSITION THAT I TAKE IT WHAT THE STATE IS SAYING IS THE JUDGE TOOK THE EVIDENCE THAT WAS CLEAR FROM THE EVIDENTIARY HEARING, WHAT WAS NOT PRESENTED, AND MADE HIS ANALYSIS, BASED UPON THAT, IN RELATION TO THE AGGRAVATORS AND MITIGATORS, BUT DID NOT SAY AND COMPARE WHAT WAS NOT GIVEN AND WEIGH IT AGAINST WHAT WAS, IN FACT, PRESENTED?

I DISAGREE WITH THE STATE'S ASSERTION THAT THAT WAS THE INCORRECT ANALYSIS. UNDER STRICKLAND, AGAIN, YOU WEIGH WHAT COULD HAVE BEEN DONE WITH EVERYTHING. THE CUMULATIVE EFFECT OF ALL OF THE MITIGATION THAT COULD HAVE BEEN PRESENTED. THERE IS NO REQUIREMENT THAT HE ANALYZE WHAT WAS PRESENTED AND WHAT WASN'T, BECAUSE HE CLEARLY STATED IN HIS ORDER, ALL OF COUNSEL'S DEFICIENCIES, EVERYTHING THAT HE FAILED TO DO, AND THEN AFTER HEARING THE TESTIMONY AND WEIGHING IT FROM, HE WAS THE ONE WHO HEARD THE TESTIMONY, JUDGED THE CREDIBILITY OF THE PENALTY PHASE WITNESSES. HE DETERMINED THAT THERE WAS A REASONABLE LIKELIHOOD THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT, AND THAT IS THE ONLY PREJUDICE ANALYSIS THAT STRICKLAND HAS REALLY OUTLINED, FROM THE BEGINNING IN STRICKLAND THROUGH WILLIAMS VERSUS TAILOR AND WIGGINS. THAT WAS REALLY THE MOST DISCRETION THAT THE UNITED STATES SUPREME COURT HAS GIVEN, HAS OUTLINED FOR THE TEST, AND THE OTHER COURT DID THAT.

. YOU HAVE A CROSS-APPEAL AND HAVE RESERVED TIME, TOO, FOR REBUTTAL ON THAT. IF YOU WANT TO PAUSE NOW AND LET THE STATE HAVE ITS REBUTTAL.

THANK YOU.

THERE ARE TWO THING INS THE STATE'S CLOSING ARGUMENT IN THE ORIGINAL TRIAL, THAT REALLY BOTHER ME IN TERMS OF WHAT, GOING BACK TO THE PREJUDICE PRONG. IT SAYS DAVIS HAD ALL OF THOSE CAT SCANS AND EEG'S AND THIS SORT OF STUFF, AND THEY SAID, WELL, WE CAN'T FIND INDANY BRAIN DAMAGE, AND THE OTHER COMMENT IS BRAIN DAMAGE DIDN'T KEEP DAVIS FROM GRADUATING FROM HIGH SCHOOL GOING TO REGULAR CLASSES AND GRADUATING WITH A REGULAR DIPLOMA. CAN YOU STRESS THE FACT THAT THAT IS NOT TRUE IN THE CASE?

YOUR HONOR, EVEN DR. WENDELL, THE STATE EXPERT, ADMITTED TO THE ORDER AND MADE IT ON CROSS-EXAMINATION BY DAN BRAWLLY, SO THEY HAD THAT AND KNEW ABOUT THE UNDERLYING CONVULSIVE DISORDER. SO THE PROSECUTOR'S CLOSING ARGUMENT BASED IT ON DAVIS'S IQ, AND THAT IS PRETTY SIMILAR TO WHAT YOU WOULD FIND IN PRISON, SO THAT IS NOT ANY INDICATION OF BRAIN DAMAGE, SO IT IS NOT THE FACT THAT HE GRADUATED FROM HIGH SCHOOL. THAT WAS MENTIONED IN CLOSING ARGUMENT, BUT THE FACT, ACCORDING TO DR., THAT HE WAS THE SAME PERSON AS YOU WOULD FIND IN PRISON.

WHAT ABOUT THE 20-POINT DISPARITY BETWEEN PERFORMANCE AND VERBAL IQ, AS EARLY AS BEFORE HE GRADUATED. THAT IS WHY I GUESS THE SCHOOL RECORDS, AND YOU DID SAY THAT YOU CONCEDED THERE MIGHT HAVE BEEN A DEFICIENCY IN NOT OBTAB IT.

YES -- OBTAINING IT.

YES, YOUR HONOR.

BUT THERE IS PRETTY COMPELLING EVIDENCE IN THE RECORD ABOUT A BRAGE DAMAGED INDIVIDUAL. THEY DON'T CATEGORIZE IT AND HE IS IN SPECIAL CLASSES, AND IT IS UNCLEAR WHETHER HE GRADUATED WITH A DIPLOMA BUT WITH SLD HELP, THAT THEY GOT HIM TO GET OUT. SO ISN'T THAT AT LEAST AGAIN, GO BACK TO THE OBJECTIVE ABOUT THE JURY COULD HAVE SEEN ABOUT WHAT THIS PERSON WAS LIKE, UP UNTIL TWO OR THREE YEARS BEFORE THE CRIME CRIME.

YOUR HONOR, THE STATE EXPERT WAS A SENIOR SUPERVISING PSYCHOLOGIST, THE ONE WHO SAID THAT DAVIS WAS A MALINGERER, NOT ONLY THAT BUT A VERY GOOD ONE, AND EVEN THE DEFENSE EXPERTS REALIZED FIRST OF ALL, THAT DAVIS WAS A MALINGERER, WITH REGARD TO HIS PSYCHIATRIC CONDITION. WITH THE SCHOOL RECORDS, DAVIS SAID HE HAD NO MEMORY FROM FIVE, ON, AND THAT IS NOT WHAT THE RECORDS SHOW, THAT HE COULD BE IN SOME SPECIAL LEARNING DISABILITY CLASSES AND SOME REGULAR CLASSES.

BUT WOULD YOU ADDRESS THIS GUILT PHASE CLAIM, INADEQUACY OF COUNSEL. YOUR OPPONENT SAYS THAT THE PRESENTATION OF THIS IMPORTANT ADDITIONAL EVIDENCE, THAT DAVIS, REALLY, SORT OF SHOWS UP IN THE HOUSE AFTER THE MURDER IS COMPLETED, WOULD HAVE BEEN COMPLETELY CONSISTENT WITH DEFENSE COUNSEL'S APPROACH TO THE CASE AND WOULD HAVE VALIDATED AND SUPPORTED IT. HOW DID THE TRIAL COURT AVOID A FINDING THAT THIS WAS NOT DEFICIENT CONDUCT ON THE PART OF THE LAWYER? HE HAS GOT VIRTUALLY EYEWITNESS TESTIMONY TO SUPPORT THE DEFENSE OF HIS CLIENT, AND HE HAS GOT THIS TESTIMONY YOU KNOW, ABOUT THE FINGERPRINTS ONLY ON A PORTION OF THE OBJECTS TAKEN AND WHY WASN'T THAT DEFICIENT PERFORMANCE ON THE PART OF COUNSEL?

YOUR HONOR, THE CIRCUIT COURT ANALYZED THAT AND SAID NONE OF THIS WAS COMPELLING WHATSOEVER, WITH REGARD TO THE FACTS ACTUALLY IMPLICATING DAVIS IN THE CRIME.

HOW IS IT NOT COMPELLING? IT SOUNDS AWFULLY COMPELLING TO ME FOR A JURY TO HEAR.

YOUR HONOR, IF YOU LOOK AT WHAT DAVIS'S STORY IS, HE GAVE FOUR OR FIVE DIFFERENT STORIES, THEN FINALLY 8 MONTHS LATER, HE COMES UP WITH NOW I HAVE GOT AN EXPLANATION FOR MY FINGERPRINTS FINALLY.

BUT TALKING ABOUT OTHER WITNESSES NOT TALKING ABOUT DAVIS. WHO WERE THE OTHER WITNESSES THAT THEY CLAIMED IN THE POSTCONVICTION HEARING, WOULD HAVE BEEN AVAILABLE TO TESTIFY BUT WEREN'T CALLED BY THE DEFENSE LAWYER?

THE UNCLE, EVONSKY REILLY, WHO HAD NO IDEA WHEN HE SAW SHEPARD WITH A BLOODY SHOE, NO RELATION BACK TO THIS WHATEVER, AND THE ONLY INDIVIDUAL WHO DID ADMIT IT WAS LINDVINDT JONES. HE WAS NOT OF CREDIBLE. MR. DAVIS TESTIFIED THAT -- MR. BROWN TESTIFIED THAT AT 7:15, WHEN HE WAS WALKING HIS DOG, AND HE IS VERY CERTAIN ABOUT THAT, HE MADE A GREETING, LIKE A GOOD MORNING GESTURE TO THEM. WHEN HE CAME BACK AT 7:30, HE LOOKED OVER AT MRS. EZELL'S HOUSE. THERE WAS NO CAR AT THE FRONT DOOR AND NO ONE THERE. WE KNOW THAT SHE WAS MURDERED IMMEDIATELY UPON SOMEONE GAINING ENTRANCE. HER PAPER WAS AT THE DOOR AND SHE WAS IN HER NIGHTCLOTHES. DAVIS MURDERED HER WHEN MR. BROWN CAME BACK OUT AT 7:30, MRS. EZELL WAS BLEEDING TO DEATH. THAT IS THE STORY. IF HE HAD PRESENTED LINDVINDT JONES, IT WOULD BE A WILD HAIR AND NOT CREDIBLE. MR. JONES WAS JUST DRIVING THROUGH TOWN AT THAT TIME AND MR. BROWN SAW THEM.

DID HE MAKE A FINDING -- DID THE TRIAL COURT MAKE A FINDING ABOUT LINDVINDT JONES? ABOUT THEIR CREDIBILITY?

I THINK HE DID ON LINDVINDT JONES. I THINK HE DID INDICATE THAT LAVONSKI REILLY INDICATED THAT HE DIDN'T KNOW WHEN IT HAPPENED AND THAT IS CLEAR. SHEPARD OR DAVIS

HAD NOTHING TO ADD WHATSOEVER, BUT AGAIN LOOK AT THE TIME LINE IN THIS CASE AND LOOK AT THE COMPELLING PHYSICSAL EVIDENCE. WHERE THE BLOODY KNIFE WAS FOUND THERE, IS MR. DAVIS'S FINGERPRINT ON A CHEESE THE -- ON A CHEST IN THE BEDROOM, AND THAT IS WHERE IT WAS STOLEN THERE. WE KNOW HIS BLOODY FINGERPRINTS ARE THERE AND NOT SHEPARD'S OR JOHNSON'S. WE KNOW THEY WERE FOUND IN THE STOLEN ITEMS IN THE CAR AND DAVIS DROVE THE VICTIM'S CAR AWAY. I SEE I AM OUT OF TIME.

LET ME ASK YOU, JUSTICE PARIENTE RAID THE -- READ THE STATEMENTS ABOUT FROM THE CLOSING ARGUMENT ABOUT THE SCHOOL AND IT IS NOT CLEAR THAT STATE HAD THE SCHOOL RECORDS OR ACTUALLY KNEW THE CIRCUMSTANCES OF THE DEFENDANT IN SCHOOL, AT THE TIME THOSE STATEMENTS WERE MADE, IS THERE?

NO, YOUR HONOR, BUT THE DEFENSE DIDN'T -- BUT THE STATE DIDN'T THINK THE SCHOOL RECORDS WERE IMPORTANT. THERE IS NO TESTIMONY ON THAT.

THANK YOU.

THANK YOU. WE WOULD ASK THAT THE MR. CHIEF JUSTICE

TWO MINUTES. COUNSEL.

MAY IT PLEASE THE COURT. BRIEFLY, I WOULD LIKE TO ADDRESS THE NEWLY-DISCOVERED EVIDENCE ISSUE. SEVERAL WITNESSES TESTIFIED AT THE HEARING BELOW --

DO YOU DISPUTE THAT ABOUT THE STATE'S WITNESSES DID NOT HAVE THE SCHOOL RECORDS?

THE STATE'S WITNESS DR. WESTBY TESTIFIED THAT SHE DID OBTAIN SCHOOL RECORDS, AND I BELIEVE SHE ACTUALLY STATED THAT THE SCHOOL RECORDS REFUTED BRAIN DAMAGE.

THAT IS IN THE ORIGINAL?

THAT IS DR. WEST BI'S ORIGINAL PENALTY PHASE -- THAT IS DR. WESTBY'S PENALTY PHASE TESTIMONY. I THINK IT WAS CITED REGARDING BRAIN DAMAGE AND SHE TESTIFIED HOW HE WAS A MALINGERER, THAT THEY GOT THE SCHOOL RECORDS AND FOUND OUT THAT THAT WAS NOT THE CASE, FROM AGE 5, I THINK THAT WAS THE SPECIFIC CONTEXT OF HER STATEMENT. REGARDING THE NEWLY-DISCOVERED EVIDENCE, SEVERAL WITNESSES TESTIFIED AT THE HEARING BELOW THAT REGINALD SHEPARD TOLD THEM THAT HE COMMITED THIS MURDER AND NOT MR. DAVIS.

THIS IS THE HEARSAY TESTIMONY OF ALL THIS, THE PARADE OF FELONS.

YES. THE DECLARATIONS AGAINST PENAL INTEREST.

I HAVE TO SAY, YOU KNOW, READING THOSE, AND ESPECIALLY THE ONE THAT SAYS THAT HE GOT FIVE PAGES OF A CONFESSION BUT JUST SORT OF FORGOT TO GIVE IT TO DAVIS, I MEAN, YOU KNOW, THE JUDGE DID MAKE FINDINGS ABOUT THE CREDIBILITY OF THESE WITNESSES, BUT MORE IMPORTANTLY, THAT THERE IS REALLY NO DETAIL FROM THE WITNESSES THAT, REALLY, WOULD CORROBORATE ANY OF THE FACTS OF THIS CRIME, WOULD YOU AGREE WITH THAT? IN OTHER WORDS, I AM SAYING EITHER BY BRAGGING OR WHEN HE WAS, HAD A RELIGIOUS REVELATION, THAT HE IS THE ONE THAT KILLED THE VICTIM, THAT THEY REALLY, SHEPARD NEVER GAVE ANY DETAILS OF THE CRIME THAT WOULD SHOW THAT THESE WERE TRUSTWORTHY STATEMENTS.

SHEPARD NEVER GAVE ANY DETAILS OF THE CRIME, EXCEPT, I BELIEVE, CEDRICK VICE CHRISTIANE TESTIFIED THAT SHEPARD TOLD THEM HE STABBED THE VICTIM, BUT THE COURT ERRED IN DETERMINING THE CREDIBILITY OF THE WITNESSES, IN DETERMINING THAT THE

CORROBORATING CIRCUMSTANCES DIDN'T EXIST, AND THIS CASE, I SEE I AM OUT OF TIME, BUT THE CONFESSIONS IN THIS CASE ARE VERY SIMILAR TO THOSE IN CARPENTER VERSUS STATE.

CHIEF JUSTICE: THANK YOU. THANK YOU BOTH.