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Donald W. Dufour v. State of Florida

CHIEF JUSTICE: ALL RIGHT. THE NEXT CASE ON THE CALENDAR, IS DONALD DUFOUR VERSUS STATE OF FLORIDA. PARTIES READY? ALL RIGHT. YOU MAY PROCEED.

THANK YOU. MADAM CHIEF JUSTICE, MAY IT PLEASE THE COURT, MY NAME IS MARIE-LOUISE PARMER, AND I REPRESENT THE APPELLANT PETITIONER MR. DONALD DUFOUR. THIS IS AN APPEAL OF DENIAL OF A MOTION FOR POST-CONVICTION RELIEF AND PETITION FOR STATE HABEAS RELIEF. I WOULD LIKE TO FOCUS MY ARGUMENTS TODAY ON ARGUMENTS TWO AND THREE IN THE BRIEF, WHICH DEAL WITH INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, AND WOULD REST ON THE MERITS OF THE BRIEF AS TO THE OTHER ARGUMENTS. YOUR HONOR, YOUR HONORS, THIS CASE INVOLVED A SITUATION WHERE THE TRIAL COUNSEL FAILED TO PROPERLY INVESTIGATE AND PRESENT MITIGATION EVIDENCE.

WHEN DR. GUTMAN WAS SELECTED, IT WAS PRIMARILY FOR COMPETENCY?

YES. THAT IS EXACTLY RIGHT.

NOW, WAS THERE EVIDENCE THAT NOT ONLY THAT THEY WOULD ADDRESS COMPETENCY, BUT WHAT WAS THE EVIDENCE WITH REGARD TO WANTING EVERYTHING ABOUT THIS PERSON, WITH REGARD TO BACKGROUND OR ANYTHING ELSE AT ALL THAT YOU CAN COME UP WITH, IS THAT A CORRECT ASSESSMENT OR IS THAT AN INCORRECT ASSESSMENT?

IT IS PARTIALLY CORRECT AND PARTIALLY INCORRECT.

PLEASE ENLIGHTEN US ON THOSE ISSUES.

TRIAL COUNSEL TESTIFIED THAT HE RETAINED DR. GUTMAN FOR COMPETENCY AND INSANITY, AT THE TIME OF THE OFFENSE. HE ALSO ASKED HIM TO LOOK AT THE EVIDENCE, AND AS BEST, THAT HE WANTED EVERYTHING IN THE BACKGROUND. HOWEVER, IF YOU LOOK AT THE RECORD, THE MOTION THAT HE FILED ON APPEAL, IT ASKED SIMPLY THAT A DOCTOR BE APPOINTED FOR COMPETENCY AND INSANITY AT THE TIME OF THE EVALUATION. IN ADDITION THE COURT'S ORDER AT THE TIME OF THE TRIAL APPOINTING DR. GUTMAN, DOESN'T CLARIFY ANYTHING OTHER THAN THAT HE WILL BE A CONFIDENTIAL EXPERT WHO WILL ASSIST A DEFENSE. IF YOU THEN LOOK AT DR. GUTMAN'S ACTUAL REPORT, IT IS CLEAR THAT DR. GUTMAN, BY LOOKING AND READING THAT REPORT, THAT ALL HE WAS LOOKING AT WAS DOING SORT OF A GENERAL PSYCHIATRIC OVERVIEW, AND ADDRESSES THE ISSUES OF COMPETENCY AND INSANITY. THAT REPORT FAILS TO ADDRESS SIGNIFICANT AREA OF THE BACKGROUND MITIGATION. SPECIFICALLY THE CHILDHOOD SEXUAL ABUSE, THE BRAIN DAMAGE, THE DRUG, THE MOST DRASTIC DRUG AND ALCOHOL ABUSE THAT ONE OF THE EXPERTS HAD EVER SEEN, SO TO ANSWER YOUR QUESTION, I DON'T BELIEVE THAT THAT REALLY WAS WHAT THEY ASKED DR. GUTMAN TO DO, AND IT IS AKIN TO THE SITUATION IN WIGGINS, WHERE IT SOUNDS MORE LIKE A POST HOC RATIONALIZATION.

WHAT DID THE TRIAL COURT FIND AS TO THAT? IN OTHER WORDS, IS THIS AN ISSUE OF CREDIBILITY, AS TO WHAT THE SCOPE OF THE RETENTION WAS VERSUS TRYING TO, NOW, LOOK BACK IN HINDSIGHT?

YOUR HONOR, IN HIS ORDER, THE TRIAL COURT DID NOT SPECIFICALLY ADDRESS THAT. AS FAR AS

I RECALL, THAT HE SAID THAT, OR ACTUALLY WHAT HE FOUND WAS THAT EXPERTS OFTEN BRING IN DAMAGING BACKGROUND INFORMATION, AND THEREFORE COUNSEL'S DECISION TO NOT PRESENT A MENTAL HEALTH EXPERT, WAS REASONABLE.

WELL, NOW, DR. GUTMAN, THE DEFENDANT ADMITTED TO THE MURDER, TO DR. GUTMAN, IT THAT CORRECT?

YES. THAT'S CORRECT.

THAT IS PRETTY SIGNIFICANT. YOU WOULD CERTAINLY, ONCE THAT WAS THERE, YOU WOULD BE THINKING I AM NOT GOING THIS DIRECTION, BECAUSE I CAN'T, IN GOOD FAITH, YOU KNOW, WHAT AM I GOING TO DO NOW.

NOT NECESSARILY, BECAUSE IT WASN'T INCONSISTENT WITH THE THEORY OF DEFENSE AT THE GUILT PHASE. THE THEORY OF DEFENSE AT THE GUILT PHASE, WAS THAT HE WAS PRESENT. MR. DUFOUR WAS PRESENT BUT THAT ROBERT TAYLOR, WHO TESTIFIED, WHO OF HIS, WHO TESTIFIED AGAINST -- WHO WAS, WHO TESTIFIED AGAINST MR. DEFOUR AND WAS A CODEFENDANT OF MR. DUFOUR IN ANOTHER CASE, THAT HE WAS ACTUALLY THE LEADER, THE MANIPULATOR, AND ROBERT DUFOUR WAS ACTUALLY FOUND WITH SOME OF THE JEWELRY, SO ALTHOUGH IT WAS CLAIMED THAT MR. DUFOUR WAS NOT PRESENT NECESSARILY, IT WOULD HAVE BEEN INCONSISTENT, AND JUST TO CLARIFY THE LAST QUESTION ABOUT WHAT THE TRIAL COURT FOUND ABOUT THE EIGHTH CLAIM, IF YOU WILL, HE ALSO FOUND THAT DR. GUTMAN'S EXAMINATION WAS ADEQUATE AND SO THEREFORE NO RELIEF, THAT MR. DUFOUR IS NOT ENTITLED TO RELIEF, AND I BELIEVE THAT FINDING IS AN ERRONEOUS FINDING.

DOESN'T THAT REALLY RELATE TO WHAT THE SCOPE OF HIS ENGAGEMENT WAS? IN OTHER WORDS, IF HE WAS ENGAGED TO DO COMPETENCY AND INSANITY, THEN IT WOULD BE CERTAINLY A COMPETENT EXAMINATION.

YES, IF THAT IS ALL THAT HE WAS RETAINED FOR, WHICH GOES INTO OUR CLAIM, WHICH IS THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK MENTAL HEALTH MITIGATION OR MENTAL HEALTH TESTIMONY IN THE PENALTY PHASE THAT, THEY ACTUALLY DIDN'T RETAIN AN EXPERT FOR THAT.

WAS DR. GUTMAN RETAINED AND EVALUATED THE DEFENDANT BEFORE THE TRIAL, THE GUILT-PHASE TRIAL?

THAT'S CORRECT, YES.

SO, AGAIN, IT IS YOUR POSITION THAT, REALLY, THE ONLY LOGICAL CONCLUSION IS, AND GIVEN HIS REPORT, IS THAT IT WAS PURELY A COMPETENCY INSANITY EXPERT, I MEAN, SOMEBODY TO LOOK AT WHETHER HE IS COMPETENT TO STAND TRIAL OR WHETHER HE WAS INSANE, AS OPPOSED TO LOOKING FOR MITIGATION.

I BELIEVE THAT WAS --

IS THAT CORRECT?

YES.

HOW WOULD YOU EXPLAIN THE PART WHERE JUSTICE LEWIS ASKED YOU IF PART WAS TRUE AND PART IS NOT TRUE, THAT HE WAS, ALSO, ASKED TO DO OTHER THINGS, AND THAT IS WHAT, THE FOCUS WAS ON.

THAT WAS THE TESTIMONY OF MR. DVORAK, THE TRIAL COUNSEL, WAS ASKED, AND HE WANTED

HIM TO LOOK AT EVERYTHING, BUT IF YOU LOOK AT DR. GUTMAN'S REPORT, HE DOES GIVE YOU SOME BACKGROUND ABOUT MR. DUFOUR. HE TALKS ABOUT THE FACT THAT HIS FATHER WAS AN ALCOHOLIC. HE TOUCHES, JUST TOUCHES ON THE FACT THAT MR. DUFOUR HAD A DRUG AND ALCOHOL PROBLEM. HE TALKS ABOUT HOW HE WENT TO, DIDN'T DO WELL IN SCHOOL, AND HE TOUCHES ON THE FACT THAT HE HAS A BROTHER WHO IS HOMOSEXUAL.

WHAT RECORDS WERE PROVIDED AND WHO DID DR. GUTMAN TALK TO?

HE DID NOT TALK TO, AS BEST AS I CAN REMEMBER, HE DID NOT TALK TO ANYONE, OTHER THAN THE DEFENDANT. I AM NOT 100 PERCENT POSITIVE ABOUT THAT, BUT I AM PRETTY SURE THAT IS THE ONLY PERSON HE SPOKE TO. HE ALSO DIDN'T DO ANY TESTING, YOUR HONOR.

WHAT ABOUT THE RECORDS?

HE LOOKED AT THE ONLY --

SCHOOL RECORDS.

THERE WERE PARTIAL SCHOOL RECORDS, AND IN FACT HIS SUMMARY OF THAT, THE PARTIAL SCHOOL RECORDS SHOWED THAT MR. DUFOUR HAD AN IQ AROUND 80, IN THE RANGE OF 75-TO-80, AND HE DOESN'T ADDRESS THAT, AND HE SAYS MR. DUFOUR IS OF AVERAGE INTELLIGENCE, SO EVEN THOUGH THERE WERE SOME SCHOOL RECORDS, DR. GUTMAN EITHER DIDN'T LOOK AT THEM OR LOOKED AT THEM AND MISREAD THEM AND FAILED TO RECOGNIZE A SIGNIFICANT MITIGATING FACTOR, WHICH IS LOW IQ.

WASN'T THE MOTION OF THE MITIGATION, IT APPEARS HERE, WAS THE ABUSE AS A CHILD, AND I DON'T RECALL THE OTHER EXPERTS, YOUR EXPERTS, REALLY, GETTING INTO SCHOOL PROBLEMS OR IQ PROBLEMS, AS MUCH AS THE ABUSIVE PROBLEMS, WITH REGARD TO THE SEXUAL ABUSE AND WITH REGARD TO DRUG AND ALCOHOL USE. THAT SEEMED TO BE, WAS THAT NOT THE THRUST OF WHERE YOU WERE GOING WITH THIS?

YES, IN PART THE THRUST WAS SEXUAL ABUSING AND SODOMIZED AT AGE 7 AND ALSO THE HORRIFIC DRUG ABUSE, STARTING WITH INHALING SOLVENTS AT THE AGE OF TEN, BUT THERE WAS TESTIMONY, AND I BELIEVE IT WAS FROM DR. BERLAND, AND I CAN CHECK ON THAT FOR SURE, BUT THERE WAS TESTIMONY ABOUT THE IQ, THE SCHOOL RECORDS EVIDENCING A LOW IQ, AND THERE IS ALSO BRAIN DAMAGE. ALL THE EXPERTS, DR. MARIN, THE STATE EXPERT, DR. BERLAND, AND DR. LIPPMAN, THE NEUROTOXICOLOGIST, ALL FOUND THAT MR. DUFOUR HAD BRAIN DAMAGE, WHICH WAS ANOTHER THING THAT DR. GUTMAN FAILED TO FIND IN HIS EXAMINATION.

NOW, IN OUR ANALYSIS, CERTAINLY THE STATE PUT ON DR. MARIN, AND HOW SHOULD WE OR WHAT ASPECTS OF HIS TESTIMONY SHOULD WE CONSIDER, AS WE ARE LOOKING TO THE INEFFECTIVENESS OF COUNSEL, BECAUSE IT APPEARS THAT DR. MARIN, IN SOME REGARD, I HATE TO USE THE WORD PARROTED, BUT IN SOME REGARD HE SEEMED, ALMOST SANCTIONED IF YOU WILL, THE EXAM AND HOW DR. GUTMAN, WHATEVER THE PRONUNCIATION, APPROACHED THIS, SO HOW SHOULD WE EVALUATE IT? WHAT ABOUT DR. MARIN?

DR. MARIN FOUND A LOT OF MITIGATION THAT DR. GUTMAN NEVER FOUND. SPECIFICALLY DR. GUTMAN, WHO SPENT 90 MINUTES WITH MR. DUFOUR AND DIDN'T DO ANY TESTING, AS OPPOSED TO DR. MARIN, WHO SPENT FIVE HOURS WITH MR. DUFOUR AND CONDUCTED TESTING, GAVE MR. DUFOUR THE WAVE AND ALSO THE MILLAN EXEMPT. DR. MARIN FOUND THAT MR. DUFOUR HAD A VERBAL IQ OF 85 AND A PERFORMANCE IQ OF 65, WHICH IS WITHIN A 20-POINT SPLIT, INDICATING BRAIN DAMAGE. DR. MARIN THE STATE EXPERT, FOUND THAT MR. DUFOUR HAD SUFFERED FROM DEPRESSIVE, DEPENDENT, SCHIZO-TYPE OF ANTISOCIAL PERSONALITY DISORDER AND ALSO MILD-TO-MEDIUM COGNITIVE DISORDERS, SO DR. MARIN FOUND SIGNIFICANT MITIGATION THAT DR.

GUTMAN FAILED TO FIND.

DOCTORS LOOK ALL THE TIME FOR THE ANTISOCIAL PERSONALITY DISORDER, SO IF THAT WOULD HAVE BEEN BROUGHT IN ON THE PREJUDICE PRONG, THE ANTISOCIAL PERSONALITY DISORDER, AS WELL AS THE DEVIL WORSHIPING AND PULLING THE KNIFE AND THOSE THINGS, HOW DO WE WEIGH THAT, WITH RESPECT TO THIS CASE?

THE COURT IS REQUIRED TO LOOK AT THE EVIDENCE ACTUALLY PRESENTED AT TRIAL AND THE EVIDENCE PRESENTED AT POSTCONVICTION HEARING. THERE WAS A LOT OF TESTIMONY BROUGHT OUT BY THE DEFENSE ATTORNEY AT TRIAL, THAT WAS NEGATIVE. IT JUST WASN'T EXPLAINED. THE DEFENSE ATTORNEY ACTUALLY ASKED STACEY SIEGLER, WAS MR. DUFOUR DEALING IN THE USE OF DRUGS, INCLUDING COCAINE, AT AROUND THE TIME OF THE CRIME, SO THE DEFENSE COUNSEL BROUGHT OUT THESE VERY NEGATIVE FACTOR. DEFENSE COUNSEL BROUGHT OUT THE FACT THAT, AND IT CAME INTO EVIDENCE THAT MR. DUFOUR HAD BEEN CONVICTED OF PRIOR CRIMES, INCLUDING ANOTHER MURDER IN MISSISSIPPI. ALL, A LOT OF THAT TESTIMONY CAME OUT ANYWAY, BUT IT CAME OUT WITHOUT ANY WAY TO EXPLAIN IT, WITHOUT ANY WAY TO LINK THE SEVERE DRUG AND ALCOHOL ABUSE, WITHOUT ANY WAY TO LINK THIS HORRIFIC CHILDHOOD SEXUAL ABUSE OF BEING SODOMIZED ORALLY AND ANALLY AT THE AGE OF SEVEN, AND THAT IS SIGNIFICANT BECAUSE HE IS SAID TO HAVE PREYED ON HOMOSEXUALS, AND THE DOCTOR TESTIFIED THAT THERE WAS A LINK TO THE HOMOSEXUAL ABUSE THAT HE SUFFERED AS A CHILD, TO THE CRIMES THAT HE COMMITTED AS AN ADULT, AND SO ALL THAT CAME OUT AS FAR AS THE SEXUAL ABUSE, WAS AT THE TRIAL, WAS THAT HE CRUISED GAY BARS, HE PREYED ON GAY MEN AND THAT HE HAD PIMPED OUT HIS GIRLFRIEND, AND THAT WAS ACTUALLY BROUGHT OUT BY THE WITNESS, THE GIRLFRIEND, WHO WAS A WITNESS OF THE STATE.

WAS THERE TESTIMONY AT THE TRIAL PRESENTED ABOUT THE SEXUAL ABUSE, PRESENTED BY THE BROTHER?

IT WAS PRESENTED, BUT IT WAS A MERE HOLLOW SHELL.

DID COUNSEL TRY TO GET THE ASSISTANCE OF THE BROTHER WHO ACTUALLY COMMITTED THE OFFENSE?

YES. THERE WERE TWO BROTHERS, ONE WHO TESTIFIED AT TRIAL, YOU ARE CORRECT, YOUR HONOR, AND THEN GEORGE DUFOUR, WHO WAS THE HOMOSEXUAL BROTHER, WHO HAD ACTUALLY PIMPED OUT HIS OWN BROTHER AT THE AGE OF 16. THE TESTIMONY IS MIXED. GEORGE DUFOUR FILED AN AFFIDAVIT SAYING THAT HE WOULD HAVE COME IN. HE NEVER SAID THAT HE DIDN'T WANT TO BE INVOLVED, AND HE CONTRADICTED THE TESTIMONY OF, I BELIEVE, DETECTIVE VOSE, WHO SAID THAT GEORGE DUFOUR SAID THAT HE DIDN'T WANT TO BE INVOLVED. IN ADDITION --

TRIAL COUNSEL TESTIFIED THAT HE CONTACTED GEORGE, BUT HE ADAMANTLY REFUSED TO GET INVOLVED.

THAT, I BELIEVE, IS A MISREADING OF THE TRIAL RECORD. THAT IS WHAT THE TRIAL COURT ORDERED. I BELIEVE THAT THE TRIAL COURT HAS MISREAD THE TESTIMONY, IN THAT MR. DUFOUR ASKED THE TRIAL LAWYER, DID NOT SAY SPECIFICALLY, I DON'T BELIEVE, DID NOT SPECIFICALLY SAY HE DIDN'T WANT TO GET INVOLVED. WHAT HE SAID WAS I TALKED TO HIM, AND ONCE I STARTED TALKING TO HIM ABOUT THE PIMPING OUT, IF YOU WILL, OF MR. DUFOUR, GEORGE DUFOUR BECAME ANGRY, AND HE HUNG UP THE PHONE OR ENDED THE CONVERSATION. HE SAID THAT HE THOUGHT MR. COHEN, HIS CO-COUNSEL, MAY HAVE TRIED TO CALL HIM AGAIN, BUT HE WASN'T SURE, AND HE, ALSO, SAID THAT HE BELIEVED THAT HE MAY HAVE TRIED AGAIN, BUT HE WASN'T, DIDN'T HAVE A CLEAR MEMORY OF THAT. SO THERE WASN'T, REALLY, ANY TESTIMONY THAT REALLY SAID, FROM GEORGE DUFOUR, I DIDN'T WANT TO PARTICIPATE, I

REFUSED TO PARTICIPATE IN THIS. THAT, REALLY, WASN'T THE TESTIMONY THAT WAS PRESENTED.

AS WE LOOK AT THIS, THE PROBLEM WITH WHICH WE ARE DEALING TODAY AND VIRTUALLY EVERY ONE OF THESE COLLATERAL ATTACKS WHERE IT IS THE PENALTY PHASE, COLLATERAL COUNSEL IS ABLE TO FIND MORE SOPHISTICATED EXPERTS OR EMBELLISHED TESTIMONY THAT KIND OF THING. WOULD YOU HELP US AND DIRECT YOUR ANALYSIS, TO THE DECISION-MAKING PROCESS THAT THIS IS NOT JUST SECOND-GUESSING. THIS IS NOT JUST A SECOND OPINION, BECAUSE A LOT OF YOUR BRIEF ARGUMENT WAS THEY NEED A SECOND OPINION, AND I AM NOT SURE THAT CASE LAW NECESSARILY SUPPORTS YOU HAVE GOT TO DO A SECOND OPINION. HOW WAS, THIS AND EXPLAIN TO THE COURT, HOW THIS IS NOT LIKE AN ASAY, OR WE HAVE NOW GONE OUT AND FOUND THESE EXPERTS. WHERE ARE THOSE CRITICAL DIFFERENCES THAT YOU ARE SEEING?

FIRST, THE TRIAL ATTORNEYS' TESTIMONY WAS, THE REASON THEY DIDN'T GET A SECOND OPINION WAS BASED ON A MISUNDERSTANDING OF THE LAW. THEY THOUGHT THAT, IF THEY WENT AND GOT A SECOND OPINION, THAT DR. GUTMAN'S TESTIMONY WOULD BE DISCLOSED TO THE STATE, AND THAT WAS AN INACCURATE READING OF THE LAW. SECONDLY, TRIAL COUNSEL KNEW A LOT OF THINGS ABOUT HIS CLIENT THAT DR. GUTMAN FAILED TO ADDRESS, AND SPECIFICALLY TRIAL COUNSEL KNEW ABOUT THE CHILDHOOD SEXUAL ABUSE AT THE AGE OF SEVEN. TRIAL COUNSEL KNEW ABOUT THE OVERWHELMING, UNBELIEVABLE DRUG USE, STARTING WITH THE SNIFFING GLUE AND THE INJECTING IV DRUGS AT AGE 13, THE HEROIN, \$250-A-DAY HEROIN HABIT AT THE AGE OF 18, AND HE, ALSO, KNEW THAT HIS CLIENT WAS MENTALLY ILL. MR. DUFOUR AT ONE POINT, REFUSED TO EAT, BECAUSE HE BELIEVED THE ORANGE COUNTY JAIL DEPUTIES WERE POISONING HIS FOOD, AND SO TRIAL COUNSEL KNEW THAT HIS CLIENT WAS MENTALLY ILL. HE KNEW THAT HE HAD A LOW IQ. HE KNEW HE SUFFERED HORRIFIC SEXUAL ABUSE, AND HE KNEW THAT HIS DRUG ABUSE WAS OVERWHELMING, AND YET HE FAILED TO RECOGNIZE THAT DR. GUTMAN'S EVALUATION WAS DEFICIENT. I SEE THAT I AM, HAVE GONE INTO MY REBUTTAL TIME, AND IF THAT ANSWERED THE QUICK QUESTION, I WOULD LIKE TO RESERVE THE REMAINING MOMENTS. THANK YOU.

GOOD MORNING. SCOTT BROWNE FOR THE STATE OF FLORIDA. YOUR HONORS, TRIAL COUNSEL DID NOT IGNORE AN INVESTIGATION INTO POTENTIAL MENTAL HEALTH ISSUES. FAIRLY EARLY ON INTO THIS CASE, HE RETAINED DR. MICHAEL GUTMAN, WHO HE EXPLAINED HE HAD WORKED WITH BEFORE AND HE WAS KNOWN IN THE ORLANDO DEFENSE COMMUNITY, AS A DEFENSE LAWYER GOOD, SO HE HAD -- DEFENSE LAWYER DOCTOR, SO HE HAD FAITH IN THE DOCTOR.

WHAT WAS THE PURPOSE FOR HIS RETENTION? ANOTHER ORDER SAID FOR COMPETENCY, BUT TRIAL COUNSEL MADE IT CLEAR HE WAS LOOKING FOR ANY PSYCHOLOGICAL ISSUES SURROUNDING THE OFFENSES, ANYTHING THAT COULD REALLY HELP MR. DUFOUR, SO I THINK COUNSEL DID NOT OPERATE UNDER A MISUNDERSTANDING AND NEITHER DID DR. GUTMAN. IT WAS DR. GUTMAN --

DID HE ADDRESS, FOR EXAMPLE, HIS IQ? DID HE ADDRESS CHILDHOOD SEXUAL ABUSE? DID HE ADDRESS ANYTHING ABOUT THAT IN HIS REPORT?

HE DID ADDRESS IQ. HE THOUGHT HE WAS OF AVERAGE INTELLIGENCE, AND THERE WERE RECORDS SUPPORTING THAT HE HAD AN 80. THERE WAS ANOTHER ONE MENTIONED DURING THE EVIDENCE, OF 106.

80 IS AN AVERAGE. DID HE TEST HIM?

FOR PRISONERS, I DON'T KNOW IF HE ACTUALLY TESTED HIM OR NOT. HE IS A PSYCHIATRIST AND THEY OPERATE A LITTLE DIFFERENTLY FROM PSYCHOLOGIST, BUT WHAT WE DO KNOW FROM DR.

GUTMAN'S REPORT IS YOU WOULDN'T WANT TO CALL HIM AT ALL. HE WAS LOOKING FOR ANY PSYCHOLOGICAL ISSUE SURROUNDING THESE DEFENSES. HE FOUND THAT HE WAS A PSYCHOPATH, ANTISOCIAL, HIGH ON THE ANTISOCIAL SCALE, AND THE DEFENSE DOCTORS EVEN CONFIRMED THIS, THAT HE HAD THE 4-9 COMBINATION. THE FOUR IS THE PSYCHOPATHIC DEVIANT SCALE AND THE NINE MEASURES ENERGY. AND THAT YOU HAVE GOT.

I DON'T RECALL DR. GUTMAN BEING ADRIFT HERE. DR. GUTMAN EITHER DID WHAT HE WAS SUPPOSED TO DO IN HIS REPORT, OR COUNSEL WAS DEFICIENT FOR NOT SUPPLYING THE TYPE OF INFORMATION THAT DR. GUTMAN WOULD NEED TO DO A PROPER MENTAL EVALUATION, SO ANSWER THOSE.

YOUR HONOR, THERE WAS NO TESTIMONY BELOW THAT DR. GUTMAN'S EXAMINATION LACKED ANY MATERIAL WHATSOEVER. IN FACT, RAY DVORAK TESTIFIED THAT IT WAS HIS NORMAL PRACTICE TO PROVIDE DOCTORS ANYTHING, AND HE CERTAINLY MADE SURE THAT HE HAD DEPOSITIONS, SCHOOL RECORDS, SO THERE HAS NOT BEEN ONE SCINTILLA OF EVIDENCE INTRODUCED HERE THAT DR. GUTMAN DIDN'T HAVE ALL OF THE INFORMATION THAT HE NEEDED ABOUT THIS PATIENT, TO RENDER A PSYCHOLOGICAL OPINION.

DID HE HAVE THE SCHOOL RECORDS?

YES, AND I BELIEVE THAT --

WHAT YEAR WAS THIS?

1984.

DID COUNSEL TESTIFY THAT HE SPOKE WITH GUTMAN AND TOLD HIM WHAT HE WANTED GUTMAN TO DO, IN TERMS OF EXPANDING BEYOND JUST COMPETENCY OR SANITY ISSUE? WAS THERE SOME TESTIMONY?

YES, YOUR HONOR, THERE WAS. IT WAS SOMEWHAT VAGUE --

TELL ME ABOUT IT.

-- BECAUSE YOU ARE GOING BACK TO 1984. WE ARE HAVING THIS EVIDENTIARY HEARING IN 2001, BUT HE WAS SAYING, LOOK, I WAS LOOKING FOR ANYTHING IN MY CONVERSATIONS WITH HIM THAT WOULD HELP DONALD DUFOUR, AND WHAT HE GOT FROM DR. GUTMAN WAS NOT A REPORT BUT A RECOMMENDATION FROM DR. GUTMAN, WHO WAS KNOWN IN THE DEFENSE AREA, THAT YOU DO NOT CALL ME. I AM NOT GOING TO HELP YOU.

IS IT ON THIS RECORD THAT HE DID EXPAND DR. GUTMAN'S RULE.

BEYOND COMPETENCY.

BEYOND COMPETENCY AND INSANITY.

YES, YOUR HONOR.

THAT YOU ARE MORE FAMILIAR WITH THAT THAN I AM, BUT THAT WE CAN BE COMPETENT THAT THE LAWYER, IN THE WAY HE TESTIFIED, EXPLANATION.

THAT DR. GUTMAN SAID IN HIS REPORT, IF YOU LOOK AT THAT, THAT THERE ARE NO PSYCHOLOGICAL REASONS THAT HE COULD FIND, BEHIND THESE OFFENSES, AND THAT WAS THE GIST OF THE WHAT HE GOT. DR. GUTMAN MADE IT CLEAR THAT YOU ARE NOT GOING TO CALL ME, BECAUSE HE IS A PSYCHOPATH. AND WE HAVE AN INCREDIBLE BACKGROUND HERE THAT WAS

KEPT FROM THE JURY. DEFENSE COUNSEL ASSERTS THAT THIS MISSISSIPPI MURDER WAS BROUGHT OUT BY DEFENSE COUNSEL. THAT WAS COMING OUT ANYWAY, BECAUSE HAD HE A PRIOR CONVICTION, BUT WHAT THE JURY DID NOT HEAR, DUE TO COUNSEL'S TACTICAL DECISION, WAS THAT AROUND THE SAME TIME, DONALD DUFOUR TIED UP TWO INDIVIDUALS, HOMOSEXUALS, AND SLIT THEIR THROATS. TWO ADDITIONAL MURDERS WOULD HAVE BEEN REVEALED TO THE JURY, HAD HE PRESENTED DR. GUTMAN OR HAD HE PRESENTED DR. BERLAND OR THE MORE FAVORABLE EXPERTS HE NOW CONTENDS SHOULD HAVE BEEN FOUND SOMEHOW. YOU HAVE SATANIC WORSHIPPING. YOU HAVE GRAVE-ROBBING. YOU HAVE THE FACT THAT HE SUPPORTED HIMSELF BY COMMITTING SEVERAL ROBBERIES, INCLUDING A PONDEROSA RESTAURANT, AND THERE WERE MANY PATRONS INVOLVED.

DID HE KNOW ABOUT THAT?

YES, IN FACT YOU HAVE FRANK HEYMAN WHO SAID I WOULD HAVE LOVED TO GET INTO THIS NEGATIVE BACKGROUND MATERIAL BUT I COULDN'T, BECAUSE HE DIDN'T PRESENT AN EXPERT. WHAT COUNSEL --

THE EXPERTS NOW THAT TESTIFIED AT THE EVIDENTIARY HEARING, DO THEY TIE IN ALL OF THIS NEGATIVE INFORMATION, THE WORSHIPPING, THE INCIDENTS WITH OTHER HOMOSEXUALS? DO THEY TIE THIS INTO HIS NOW REVEALED MENTAL ILLNESS?

NO, YOUR HONOR. YOU MEAN HIS MILD NEUROCOGNITIVE DISORDER? THAT DIDN'T PRECLUDE HIM FROM PLANNING ANY OF HIS DEFENSES. IN FACT, HIS OWN EXPERTS TESTIFIED THAT, WITH THE EXCEPTION OF DR. CARTER THAT, STATUTORY MENTAL MITIGATORS APPLIED, BUT EVEN DR. LIPPMAN ADMITTED THAT HE HAD THE INTENT TO ROB THIS VICTIM, AND DR. CARTER WAS THE ONE THAT DEFENSE COUNSEL ASSERTED COULD TIE THIS ALL IN TOGETHER BECAUSE SHE WAS AN EXPERT ON CHILD SEXUAL ABUSE. SHE DID NOT TESTIFY THAT ANY OF THESE OFFENSES WERE THE RESULT OF HIS CHILDHOOD SEXUAL TRAUMA IN FACT, SHE REJECTED A DIAGNOSIS OF POST-TRAUMATIC STRESS SYNDROME FOR THE APPELLANT. WHAT SHE DID FIND, AND HER ONLY MITIGATING FACTOR WAS EXTREME EMOTIONAL DISTURBANCE, AND THAT WAS BASED ON A CHRONIC SUBSTANCE ABUSE DISORDER. THE JURY KNEW THAT THIS DEFENDANT HAD A DRUG AND ALCOHOL PROBLEM.

WHAT WAS THE STATE'S EXPERT'S DIAGNOSEI?

I DON'T KNOW THAT DR. CARTER HAD AN ORIGINAL ROLE THAT BROUGHT IN SOME SORT OF TRAUMA. DR. BERLAND HAD SOME DISORDER, BUT HE WAS NOT SPECIFIC IN WHAT IT WAS, AND DR. MARIN, THE MORE CREDIBLE EXPERT, THE ONE THAT BASICALLY CAME TO THE SAME CONCLUSION AS DR. GUTMAN, TESTIFIED THAT HE HAD A SUBSTANCE ABUSE DISORDER, A MILD COGNITIVE DISORDER, AND THAT NONE OF THE MENTAL MITIGATORS WOULD HAVE APPLIED IN THIS CASE, BUT, AGAIN, TO GET THAT MINIMAL MITIGATION, YOU HAVE A WEALTH OF NEGATIVE INFORMATION. I MEAN, TWO ADDITIONAL MURDERS. THAT ALONE, IS REASON ENOUGH NOT TO CALL ANY OF THESE MENTAL HEALTH EXPERTS.

THE DEFENSE LAWYER TESTIFIED, I BELIEVE, THAT HE WAS AWARE OF, AND I AM NOT SURE WHAT ADJECTIVES HE USED, BUT HORRENDOUS ALCOHOL AND DRUG ABUSE BACKGROUND.

THAT'S CORRECT, YOUR HONOR.

OF THE DEFENDANT, DID HE ELABORATE, IN TERMS OF WHERE HE GOT THAT INFORMATION, IN TERMS OF GAUGES HIS INVESTIGATION INTO THE DEFENDANT'S BACKGROUND?

HE CERTAINLY WAS AWARE OF THAT AND HE PRESENTED IT THROUGH STACEY SIEGLER AND HIS BROTHER.

DID HE GETS THAT FROM STACEY SEIGLER AND HIS BROTHER?

I THINK HE WAS AWARE OF IT. THIS IS NOT A DEFENSE COUNSEL WHO DID NOT DO ANY INVESTIGATIVE WORK. HE WAS AWARE OF THAT, BUT HE WAS AWARE THAT, TO BRING THIS INFORMATION THROUGH AN EXPERT, IS GOING TO OPEN THE FLOODGATES TO NEGATIVE INFORMATION, SO WHAT HE DID DO IS TAKE THE LAY WITNESSES THAT HE HAD AVAILABLE TO HIM, AND HIS OLDER BROTHER TESTIFIED THAT HE HAD A DRINKING PROBLEM AND A DRUG PROBLEM FROM AN EARLY AGE, SO MUCH OF THIS INFORMATION WAS PRESENTED TO THE JURY, WITHOUT THE DAMAGING NEGATIVE OR COLLATERAL INFORMATION.

WAS THERE AN INVESTIGATOR THAT INVESTIGATED WHAT MIGHT BE AVAILABLE FROM MISSISSIPPI, FROM THE LITIGATION OVER THERE, COUNSEL OVER THERE, OR ANY PRESENTENCE INVESTIGATIONS? IN MISSISSIPPI.

NO, YOUR HONOR. I THINK THAT, ALTHOUGH THERE WAS MINIMAL MITIGATION PRESENTED FOR THE MISSISSIPPI MURDERS, SO I DON'T THINK THAT WOULD HAVE BEEN HELPFUL TO THIS COUNSNECESSARILY 1984. IN FACT, HIS PENALTY PHASE MITIGATION WAS, I THINK YOU COULD SAY, AND I DON'T HAVE THE ENTIRE MISSISSIPPI RECORD HERE, BUT IT WAS, IS MUCH BETTER. I DON'T THINK YOU CAN LEARN ANYTHING FROM WHAT TRIAL COUNSEL PRESENTED.

I AM TRYING TO FIGURE OUT, DID TRIAL COUNSEL HERE, DISCUSS THE CASE WITH TRIAL COUNSEL IN MISSISSIPPI OR HAVE AN INVESTIGATOR GO AND TALK WITH THE INVESTIGATOR IN MISSISSIPPI OR GO AND TALK TO FAMILY MEMBERS OR DO ANYTHING TO DEVELOP?

HE CERTAINLY DID TALK TO FAMILY MEMBERS, AND I AM NOT SURE WHAT THE EXTENT IF ANY, THAT HE HAD. I AM TRYING TO RECALL THE RECORD. I DON'T RECALL HIM SAYING THAT HE WENT TO MISSISSIPPI TO LOOK FOR INFORMATION, BUT WHAT WE DO KNOW IS HE DID CALL JUDGE DUFOUR, IT THE APPELLANT'S OLDER BROTHER, AND HE DIDN'T WANT ANYTHING TO DO WITH THE APPELLANT, AND HE SAID SOME EVIDENTIARY REASONS DURING THE HEARING DOWN BELOW. THE LAST TIME HE SAW HIS BROTHER, HE THREATENED HE AND HIS ROOMMATE WITH A GUN, SO HE WASN'T FEELING TOO KINDLY, AND THAT WAS HIS OWN ADMISSION TOWARDS HIS BROTHER, AT THE TIME OF THE OFFENSES. MOREOVER, DEFENSE COUNSEL --

WHAT WITNESS TESTIFIED TO THE STATEMENTS, BY GEORGE DUFOUR? BECAUSE I UNDERSTOOD THAT THE DEFENSE COUNSEL WAS THE ONE WHO SAID THAT GEORGE DUFOUR DIDN'T WANT TO HAVE ANYTHING TO DO WITH IT.

THAT IS TRUE. HE SAID THAT. DEFENSE COUNSEL, AFTER CALLING HIM, BUT, ALSO, THE SHERIFF'S COUNSEL, BILL VOSE, WHO WENT TO LAW SCHOOL WITH GEORGE DUFOUR, CALLED HIM UP AND SAID, YOUR BROTHER IS ON A HUNGER STRIKE HERE, AND GEORGE DUFOUR, AND THIS IS TESTIMONY ON THE STAND, TOLD HIM HE CAN DIE, FOR ALL WE CARE. NEITHER MYSELF OR ANY OF OUR FAMILY MEMBERS WANT ANYTHING TO DO WITH HIM. THE ONLY LAY WITNESS THAT WAS NOT PRESENTED BY THE TRIAL DEFENSE ATTORNEY AT TRIAL THAT COLLATERAL COUNSEL PARADED THROUGH IN THE POSTCONVICTION HEARING, WAS GEORGE DUFOUR. ONE ADDITIONAL WITNESS, AND THAT WITNESS IS PROVEN BY THIS RECORD AND IT IS A FACTUAL FINDING BY THE TRIAL COURT, THAT GEORGE DUFOUR WAS NOT AVAILABLE TO THE TRIAL COUNSEL, AT THE TIME OF TRIAL.

MEANING THAT HE DIDN'T WANT TO COOPERATE.

HE DID NOT AND HE WOULD NOT, AND THAT IS CLEAR FROM THIS RECORD, AND THAT IS A FACTUAL FINDING THAT IS WELL SUPPORTED BY THE RECORD. I WANT TO GET TO THE CHILD SEXUAL ABUSE, BECAUSE COUNSEL INDICATED HE WAS AWARE SOME TRAUMATIC SEXUAL INCIDENT BUT HE HAD NO WITNESSES THAT WOULD TALK ABOUT IT, AND DR. CARTER TESTIFIED THAT SHE HAD A HARD TIME BRINGING THAT OUT FROM THE APPELLANT, SO YOU ONLY HAVE

APPELLANT'S SELF-SERVING STATEMENTS ABOUT HIS CHILDHOOD SEXUAL ABUSE.

WHERE DID DEFENSE COUNSEL GET HIS INFORMATION ABOUT IT, WHEN HE SAID HE WAS AWARE OF IT?

WELL, HE SAID HE WAS AWARE OF A TRAUMATIC SEXUAL INCIDENT. I BELIEVE THAT HE WAS TALKING ABOUT VISITING HIS BROTHER AND BEING EXPOSED TO THE HOMOSEXUAL LIFESTYLE IN GAINESVILLE AND POSSIBLY BEING FLIPPED OUT.

DID HIS BROTHER TELL HIM SOMETHING THAT HIS CLIENT TOLD HIM OR SOMETHING THAT A MENTAL HEALTH EXPERT TOLD HIM? IN OTHER WORDS WHERE DID THE DEFENSE LAWYER, WHEN HE MADE THAT RATHER BROAD OR SOMEWHAT VAGUE STATEMENT THAT HE WAS AWARE OF, DID HE ATTRIBUTE A SOURCE TO THAT?

NO, YOUR HONOR.

DID HE HAVE MEAT ON THE BONE AS TO WHAT HE HAD?

NO, YOUR HONOR, HE WAS AWARE OF IT BUT HAD NO WITNESSES TO PRESENT IT. I DON'T THINK HE WAS EVER AWARE OF THE CHILDHOOD ABUSE AT THE AGE OF SEVEN, BUT HE KNEW THAT THERE WAS A TRAUMATIC CHILDHOOD INCIDENT, AND WE ARE TALKING IN 1984. HE DIDN'T UNDERSTAND, AND THAT IS MY UNDERSTANDING OF THE RECORD, HE DIDN'T UNDERSTAND WHERE HE GOT THAT INFORMATION FROM.

DO WE KNOW IF HE ATTEMPTED TO ASK THE FAMILY MEMBERS OR FRIENDS ABOUT THIS TRAUMATIC SEXUAL INCIDENT?

WELL, WE KNOW HE TALKED TO THE ONLY FAMILY MEMBER THAT HE SAID WAS WILLING TO HELP HIM, AND THAT WAS GARY DUFOUR, AND HE TESTIFIED ABOUT WHAT HE KNEW ABOUT YOU KNOW, HIS BROTHER, EXPOSING HIM, GEORGE DUFOUR EXPOSING AND, PERHAPS, EVEN PIMPING OUT HIS BROTHER AT THE AGE OF 15 OR 16, SO THE JURY WAS AWARE THAT THERE WAS SOME KIND OF EXPOSURE TO A NEGATIVE, A DIFFERENT LIFESTYLE IN GAINESVILLE, AND THAT HIS BROTHER WAS INVOLVED IN IT, SO THE EARLIER CHILDHOOD SEXUAL ABUSE, THAT WAS SIMPLY NOT AVAILABLE TO COUNSEL, AND THERE WAS NO EVIDENCE PRESENTED BELOW, TO SHOW THAT THIS EVIDENCE, COUNSEL HAD THIS OR HE SHOULD HAVE KNOWN OF IT. HE TALKED TO THE ONLY FAMILY MEMBER THAT WAS WILLING, ABLE AND AVAILABLE TO TALK TO HIM.

YOU ARE SAYING THAT THE ONLY THING IN THIS RECORD DEMONSTRATES THIS SEXUAL ABUSE AT THE AGE OF SEVEN, IS THE DEFENDANT'S OWN STATEMENT. NO ONE ELSE, THERE IS NO OTHER KIND OF --

THAT IS IT.

-- CORROBORATION OF THIS KIND, I HAVE NOT FOUND ANY, AND I BELIEVE IT WAS SPECIFICALLY A STATEMENT TO DR. CARTER, AND SHE INDICATED HE WAS RELUCTANT TO EVEN TALK ABOUT IT, SO I DON'T THINK YOU CAN, EVEN IF YOU BELIEVE THAT THIS ABUSE WAS TRUE, I DON'T THINK YOU CAN ATTRIBUTE THE FAILURE, IF ANY, TO PRESENT SUCH INFORMATION, ON THE PART OF COUNSEL, BECAUSE THEN AGAIN, IF YOU WANTED TO PRESENT SEXUAL ABUSE THROUGH AN EXPERT, YOU HAVE GOT A WEALTH OF NEGATIVE INFORMATION THAT YOU OPEN THE DOORS TO, AGAIN, TWO MURDERS ALONE, IS ENOUGH TO THWART ANY MENTAL HEALTH INVESTIGATION.

TWO MURDERS?

HE PLED GUILTY TO TWO MURDERS.

DID THEY TALK ABOUT IT IN THE PENALTY PHASE?

NO. THEY KNEW ABOUT THE MISSISSIPPI MURDERS, BUT HE PLED TO TWO ADDITIONAL MURDERS, AND THEN YOU HAVE GOT DUFOUR RAPED A WIFE'S FRIEND. YOU HAVE SUCH NEGATIVE INFORMATION HERE, THAT SATANIC WORSHIPING, THAT ALL OF THAT MENTAL MITIGATION WOULD HAVE MADE A DIFFERENCE IN THE WORLD AND WOULD HAVE OUTWEIGHED --

HOW OLD WAS HE AT THE TIME OF THIS?

I THINK HE WAS IN HIS LATE TWENTIES.

WHAT WAS THE EXPLANATION FOR, YOU SAID THIS WAS AN '81 MURDER. IT WAS AFFIRMED ON DIRECT APPEAL IN '86. IT WAS NOT AN EVIDENTIARY HEARING UNTIL 2001. WHAT HAPPENED BETWEEN, WAS THERE SOMETHING ELSE THAT I AM MISSING IN THE RECORD, OF WHAT HAPPENED BETWEEN, I AM JUST, WANT TO UNDERSTAND HOW 15 YEARS WENT BY.

IT IS AN UNACCEPTABLE PERIOD OF TIME. THERE WAS SOME DELAY OCCASIONED BY THE NORMAL COURSE OF LITIGATION, GETTING A MOTION, AN AMENDED MOTION, A RESPONSE.

THE CASE WAS ASSIGNED TO A JUDGE THAT HAD ENDED UP HAVING, RESIGNED FROM THE BENCH, CORRECT?

YOUR HONOR, I AM NOT FAMILIAR WITH THAT. I WOULD NOT DISPUTE THIS COURT'S RECOLLECTION, BUT I ALSO NOTE THAT THERE WAS SOME DELAY, OCCASION, AND I AM NOT EXCUSING IT, BY THE FACT THAT HE WAS INCARCERATED IN MISSISSIPPI, AND THEY HAD THE FIRST SHOT AT THE POSTCONVICTION LITIGATION APPLE, AND THEN HE WAS BROUGHT BACK DOWN HERE, BUT I AGREE. I MEAN, I DON'T THINK THERE IS A GOOD EXPLANATION FOR IT ON THIS RECORD, BUT IF I CAN CONCLUDE WITH MENTAL HEALTH MITIGATION, THERE HAS NOT BEEN SHOWN ANY DEFICIENCY. THE ONLY THING THAT COLLATERAL COUNSEL HAS SHOWN, THAT WITH THE BENEFIT OF TIME AND UNLIMITED RESOURCES, YOU CAN FIND MORE FAVORABLE EXPERTS.

WHAT YOU ARE REALLY SAYING, ON TOP OF IT, IS THAT, REALLY, IT WOULDN'T UNDERMINE OUR CONFIDENCE, BECAUSE TO OFFSET WHAT MIGHT BE SOMEWHAT COMPELLING MITIGATION, WOULD BE SUCH TERRIBLE NEGATIVE INFORMATION, THAT IT REALLY HAVE HARMED THE DEFENDANT.

YES AND WE HAVE MUCH MORE THAN THAT, WHAT THE DEFENSE EXPERTS ARE BATTLING AND TESTIFYING ABOUT, SO YOU HAVE GOT THE BATTLE OF THE EXPERTS, WHERE I THINK THE STATE EXPERT WAS A LITTLE MORE CREDIBLE. HIS OPINION WAS CONSISTENT WITH DR. GUTMAN'S.

DID ANY OF THE WITNESSES ATTEMPT TALKING ABOUT THE HOMOSEXUAL THEME AND THIS IS THAT HE MURDERED A HOMOSEXUAL, BUT IT WASN'T A HEAT OF PASSION MURDER. IT WAS I AM GOING TO GO OUT AND ROB AND MURDER A HOMOSEXUAL, SO WAS THERE ANY ATTEMPT BY THE DEFENSE EXPERTS, TO LINK UP AND SAY THIS WAS, THAT HE WAS UNDER EXTREME EMOTIONAL DISTURBANCE OR, AT THE TIME, AS OPPOSED TO SAYING, WELL, SOMETHING HAPPENED IN THE PAST THAT MIGHT MAKE YOU SYMPATHETIC TOWARDS HIM, BUT WHAT DID IT HAVE TO DO WITH THE MURDER.

DR. BERLAND DID NOT, NEITHER DID DR. LIPPMAN, THE NEUROPHARMACOLOGIST, WHO TESTIFIED ABOUT PSYCHOLOGICAL ISSUES, BUT DR. CARTER WAS BROUGHT IN SPECIFICALLY TO DO THAT, AND SHE COULD NOT SAY THIS WAS A RESULT OF POST-TRAUMATIC STRESS. SHE TOUCHED UPON IT AND NOTED, WELL, IT IS INTERESTING THAT THESE ARE HOMOSEXUAL VICTIMS, BUT IT WAS CLEAR THROUGHOUT THAT THE MOTIVE WAS THAT HE WAS FAMILIAR WITH THE HOMOSEXUAL LIFESTYLE AND FOUND EASY TARGETS IN VICTIMS, AND THAT WAS WHY HE DID IT WAS FOR MONEY. HE SOUGHT OUT THE VICTIM AND IT WAS CLEAR THAT THERE WAS DELIBERATE

BEHAVIOR ON EACH OF THE MURDERS.

WAS THERE ANY TESTIMONY ON THE PSYCHOLOGICAL OR PSYCHIATRIC PROFILE THAT HE WAS HOMOSEXUAL OR BY SEXUAL? I AM TRYING TO PIECE THIS TOGETHER.

HE WAS CALLED, I GUESS, BISEXUAL, OR DR. GUTMAN USED THE TERM, HE HAD INTERESTING SEXUAL PROCLIVITIES. POLYMORPH.

HE WAS IN A RELATIONSHIP WITH A WOMAN, AND YET THERE WAS TESTIMONY EXTENSIVE, THAT HE WAS ALSO A PRACTICING HOMOSEXUAL, TOO?

YES. RHINE TESTIFIED TO THAT AND I DON'T KNOW IF STACEY SIEGLER DID AS WELL.

THERE WAS TESTIMONY THAT HE WAS INTRODUCED TO HOMOSEXUALITY BY ONE OF HIS BROTHERS?

THAT DID COME OUT, YES, AND IT WAS BROUGHT OUT IN THE PENALTY PHASE.

WAS THAT GEORGE, THE BROTHER WHO WOULD NOT TESTIFY?

HE DID TESTIFY.

AND HE DID TESTIFY AT THE EVIDENTIARY HEARING.

YES, YOUR HONOR, HE DID.

DID HE CONFIRM THAT, THAT HE HAD HAD HIS BROTHER PIMP FOR HIM?

NO. HE ADMITTED IT WAS A WILD TIME AND THEY WERE ALL USING DRUGS WHILE HE WAS IN LAW SCHOOL, AND THAT HIS BROTHER DID GO OUT WITH OLDER HOMOSEXUAL MEN, SO HE CONFIRMED THAT HE WAS EXPOSED TO THE HOMOSEXUAL LIFESTYLE. HE NEVER ADMITTED THAT HE PIMPED HIS 16-YEAR-OLD BROTHER OUT AT THE TIME. IF I COULD MAKE ONE LAST POINT HERE, DEFENSE COUNSEL MADE A POINT OF SAYING, WELL, COUNSEL OPENED THE DOOR TO SOME NEGATIVE INFORMATION BY CALLING STACEY SIEGLER, BUT REALLY THAT IS THE KIND OF TACTICAL DECISION THAT DEFENSE COUNSEL MUST MAKE DURING TRIAL, AND SHE WAS CLEARLY, HAD BENEFICIAL POINTS TO BRING OUT, THAT COUNSEL WANTED TO EXPOSE THE JURY TO, BUT, AGAIN, COUNSEL IS CRITICIZED AND EXPOSED BY OPENING THE DOOR TO THIS NEGATIVE INFORMATION, AND COUNSEL IS IGNORING THE WEALTH OF NEGATIVE INFORMATION.

SO YOU ARE SAYING THERE WAS TWO ADDITIONAL MURDERS THAT WERE NOT PRESENTED TO THE JURY OR FOUND AS AGGRAVATORS, THAT WOULD BE AVAILABLE?

YES, HE PLED GUILTY.

WHY DOES THAT HAVE ANYTHING TO DO WITH THE MITIGATION THAT WAS PRESENTED? WHY DID HE PLEAD GUILTY IN THE FIRST PLACE?

BECAUSE THERE WAS NO MEANT AT HEALTH EXPERT AVAILABLE, SO YOU COULDN'T BRING THIS OUT THROUGH LAY WITNESSES. THE REASON YOU COULDN'T BRING IT OUT THROUGH LAY WITNESSES IS THEY HAD TO KNOW ABOUT HIS BACKGROUND IN DETAIL. YOU NEEDED TO KNOW ABOUT HIS CRIMINAL HISTORY AND THEN APPLY IT TO ANY PSYCHOLOGICAL CONDITION THAT HE MAY OR MAY NOT HAVE, SO HIS TACTICAL DECISION WAS PREVENTING THE JURY, JUST A PLETHORA OF INFORMATION, IF YOU READ THROUGH IT, THIS GUY'S BACKGROUND, THERE IS NO WAY YOU WILL CHANGE A JUROR'S VOTE. AT THE TIME OF TRIAL -- I SEE THAT MY TIME IS UP AND AGAIN I ASK YOU TO AFFIRM THE DECISION OF THE TRIAL COURT.

REBUTTAL.

I JUST WANTED TO CONFIRM A NUMBER OF QUESTIONS THAT WERE ANSWERED, THAT I BELIEVE -- I JUST WANT TO CORRECT A NUMBER OF QUESTIONS THAT WERE ANSWERED, THAT I BELIEVE ANSWERS WERE GIVEN, THAT HOW DID THE DEFENSE ATTORNEY KNOW ABOUT THE SEXUAL ABUSE?

FROM THE DEFENDANT, FROM HIS FAMILY, HIS BROTHER, AND HE KNEW THAT HE HAD HAD SEXULE ABUSE.

HOW DID HE KNOW ABOUT THE SEXUAL ABUSE?

HE TESTIFIED THAT HE INTERVIEWED MR. DUFOUR TO FIND OUT IF HE WAS MALINGERING ABOUT THE SEXUAL ABUSE, AND THAT WAS AN UNREFUTED CLAIM THAT HE WAS NOT MALINGERING. SHE DID NOT FIND POST-TRAUMATIC STRESS DISORDER BUT SHE DID FIND THAT THERE WAS A CONNECTION.

HOW WAS THAT CONNECTED IF AT ALL, TO THIS OFFENSE?

THE STATUTORY MITIGATORS THAT DR. CARTER FOUND, THAT, OPINED THAT HE WAS UNDER EXTREME MENTAL AND EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME, BECAUSE OF A CHRONIC SUBSTANCE ABUSE DISORDER. SHE ALSO LINKED IT AND SAID THAT HIS REACTION TO HOMOSEXUAL MEN, WAS IN PART A REACTION TO THE ABUSE THAT HE HAD. HE WAS BISEXUAL, BY THE WAY, AND VERY OPENLY BISEXUAL.

IN RESPONSE TO ASK YOU TO FOLLOW UP ON THE LOGIC OF THAT, WHICH IS THAT THIS IS NOT A CRIME WHERE HE WAS IN A, SOME TYPE OF A RELATIONSHIP AND THEN SNAPPED AND KILLED THE PERSON, BUT THE EVIDENCE AND THE TESTIMONY IS THAT HE SOUGHT OUT A VICTIM. THE VICTIM HAPPENED TO BE HOMOSEXUAL. I HAVE A HARD TIME, IN THAT CIRCUMSTANCE, SEEING HOW THERE IS THE KIND OF CONNECTION WHICH WOULD BE, PERHAPS, COMPELLING TO A JURY, WITHOUT THAT TYPE OF LINK, TO SAY, WELL, BECAUSE HE HAD BEEN ABUSED AT EIGHT YEARS OLD, THEN HE WAS ON A KILLING SPREE OF HOMOSEXUALS. I MEAN, THAT, HELP ME OUT ON THAT.

MR. DUFOUR TOLD DR. GUTMAN THAT HE WENT OUT WITH THIS VICTIM AND THAT THE VICTIM STARTED COMING ON TO HIM, AND THAT IS WHY HE REACTED VIOLENTLY, SO THAT WAS MR. DUFOUR'S CLAIM TO THE EXPERT. OF COURSE THE JURY NEVER GOT TO HEAR.

BUT DIDN'T SOMEONE ELSE TESTIFY THAT HE ACTUALLY HAD A PLAN TO FIND HOMOSEXUALS AND ROB THEM?

STACEY SIEGLER DID CLAIM THAT. IT WAS NOT WHAT SHE HAD SAID INITIALLY, WHEN SHE GAVE A STATEMENT TO THE DEFENSE. SHE THEN WORKED A DEAL WITH THE STATE, AND THAT WAS HER TESTIMONY AT TRIAL.

WHAT IS THE DEAL WITH THE TWO OTHER MURDERS THAT, ARE THERE TWO OTHER MURDERS BESIDES THE, THREE OTHER MURDERS BESIDES THIS MURDER?

THERE WERE MURDERS IN MISSISSIPPI, AND THE REASON THIS CASE WAS DELAYED, WAS AS COUNSEL SAID, HE WAS IN MISSISSIPPI THERE.

MURDERS? MORE THAN ONE?

ACTUALLY I AM NOT SURE. I THINK IT WAS ONE, BUT THE ONES HERE, AND THOSE WERE ALL PRESENTED AT TRIAL, JUSTICE QUINCE, THE MISSISSIPPI MURDER.

THE MISSISSIPPI MURDER.

THE JUDGE HEARD -- THE JURY HEARD ALL ABOUT THE MISSISSIPPI MURDER.

AS PART OF WILLIAMS RULE EVIDENCE?

AND IN FACT THAT GOES TO ANOTHER CLAIM THAT WE RAISED IN OUR BRIEF, WHERE THE PHOTOS OF THOSE MURDERS WERE INTRODUCED AND THEY WERE HORRIFIC, AND THE DEFENSE, STATE ATTORNEY AT TRIAL, HELD UP THE PICTURES OF THOSE OTHER MURDERS.

WILLIAMS RULE EVIDENCE OR AGGRAVATION?

AS AGGRAVATION.

I THOUGHT YOU SAID IT CAME IN IN THE GUILT PHASE.

I MAY HAVE MISSPOKE. I AM SORRY.

I HAVE A PROBLEM WITH YOUR CLAIM ON THE PHOTOGRAPHS. ONLY TWO WERE ADMITTED. ONE WAS A JEANS-CLAD INDIVIDUAL ON THE FLOOR, AND THE OTHER SHOWS JUST A COUPLE OF NOT VERY GRUESOME BUT A COUPLE OF, DEATH IS GRUESOME, BUT IT SHOWS A COUPLE OF SPOTS IS ALL. WHAT IS SO GRUESOME ABOUT THOSE? WHEN YOU ARE EXPLAINING A MURDER. HEADS CUT OFF. IT IS NOTHING LIKE THAT.

IN THE MANNER IN WHICH IT WAS ARGUED BY THE PROSECUTOR AND THE TESTIMONY, THE HEARSAY TESTIMONY, THEY BROUGHT IN A DETECTIVE WHO TESTIFIED WHAT THE MEDICAL EXAMINER HAD TESTIFIED TO IN MISSISSIPPI, OVER DEFENSE OBJECTION, AND I THINK THOSE WERE THE BIGGEST PROBLEMS WITH THAT, AND IT WAS HIS DESCRIPTION OF THESE BRUTAL MURDERS. I SEE THAT MY TIME IS ABOUT TO RUN OUT.

CHIEF JUSTICE: IT RAN OUT.

THANK YOU VERY MUCH.

MAY WE COMMEND YOU FOR THOSE POINTS THAT YOU ARE PRESERVING AND NOT ARGUING FOR MAKING SURE THAT WE ARE AWARE OF THAT AND NOT BE LABORING THE POINT. WE DO HAVE A LOT OF MATERIAL TO COVER, AND YOU PRESERVED THEM, AND WE ARE CERTAINLY, APPRECIATE THE PROFESSIONISM.

THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK TO YOU BOTH OF YOU.